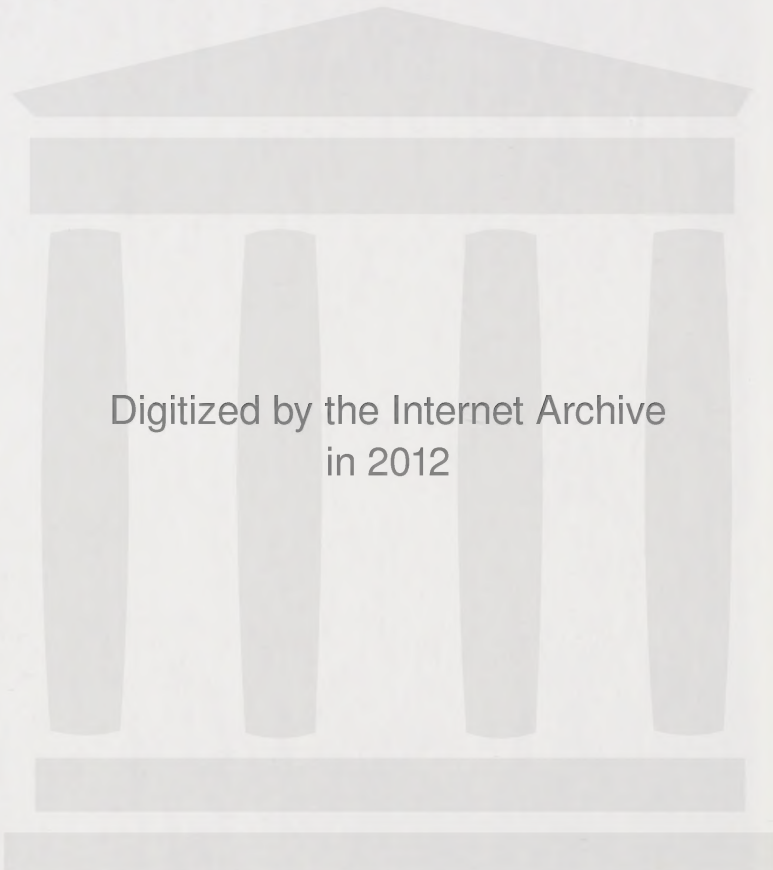

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AMERICAN FEDERAL TAX REPORTS

Second Series

THIS VOLUME CONTAINS UNABRIDGED FEDERAL AND STATE COURT DECISIONS ARISING UNDER THE FEDERAL TAX LAWS

Vol. 90

RESEARCH INSTITUTE OF AMERICA

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FOREWORD

American Federal Tax Reports is the oldest exclusively Federal tax case reporter. It reports unabridged texts of federal court decisions that settle problems arising under the federal tax law. Paragraph numbers assigned to cases in the advance sheets are retained in the bound volumes.

American Federal Tax Reports (First Series), cited "AFTR", covers cases decided from the beginning of federal tax litigation through most of 1957. There are 52 volumes with cumulative case tables in Volumes 31, 46 and 52.

American Federal Tax Reports (Second Series), cited "AFTR 2d", covers cases decided from late 1957 to the present. Two volumes are issued each year: one covers cases published as AFTR 2d Advance Sheets for the first half of the year, and the other does the same for the second half of the year.

AFTR 2d uses a numbered headnote system. Decisions are introduced with short headnotes that concisely summarize each issue in the court's opinion. Headnotes are numbered, and corresponding numbers in the text of the opinion facilitate issue-spotting. Headnote numbers are also tied in with our Federal Citator, cutting research time to a minimum. And references to explanations and annotations in our code-order tax service are included at the end of each headnote.

Cumulative parallel citation and case tables, in the front of each AFTR 2d volume, give official Government reporter and West national reporter citations that are available when the volume is published. If the Government or West publishes a case later, the citation will be included in the cumulative table of the next AFTR 2d volume. Cumulative tables run for 10 volumes before starting over. So, for example, cumulative parallel citation and case tables for Volumes 81-90 appear on pages 11-26 and 51-215 of this volume. Volume 91 will begin a new cumulative table.

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AMERICAN FEDERAL TAX REPORTS
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¶2002-5001

Ruth WAPNICK, ET AL., PLAINTIFFS v. UNITED STATES, ET AL., DEFENDANTS. U.S. District Court, Eastern Dist. of New York, (DC NY) Docket No. CV 95-2025 (CBA), May 22, 2002. Earlier proceedings at (2001, DC NY) 89 AFTR 2d 2002-1077; (2000, DC NY) 86 AFTR 2d 2000-6582; and (2000, DC NY) 86 AFTR 2d 2000-5917. Decision against Taxpayers.

1. District court procedure—additional discovery. Magistrate judge denied taxpayer's request for additional discovery in response to govt.'s summary judgment motion: claim that taxpayer didn't receive magistrate's prior report until almost 4 months after its issuance was rejected. Although sent to wrong address, record showed package was actually delivered to correct address where taxpayer had authorized deliveries nearly 3 months before report was adopted, and signature was obtained upon receipt. Also, to extent taxpayer sought extension to respond to motion, request was denied where taxpay-ers' prior discovery failures had already caused extensive delays. *Reference:* United States Tax Reporter ¶74,025.01(3). IRC §7402.

United States District Court, Eastern District of New York.

Order

GO, Magistrate Judge:

[1] In a letter dated May 21, 2002, plaintiff Ruth Wapnick advised that she has appealed to the Second Circuit from this Court's order and report and recommendation dated December 20, 2002 (the "Report") which was adopted by the Honorable Carol Bagley Amon on March 27, 2002. Plaintiff claims that she did not receive the Report until April 10, 2002 and argues that she should be permitted to conduct discovery before responding to the defendant United States' motion for summary judgment.

This Court is constrained to voice strong disagreement with Ms. Wapnick's claim that she did not receive the Report until April 4, 2002.[1] This Court sent the Report by Federal Express to Ruth and Meri Wapnick at 2025 East 18th Street, Brooklyn, New York on December 20, 2001. The mailing label had the wrong street number, since the docket sheet indicates that the Wapnicks reside at 2024 E. 18th Street, not 2025. However, upon inquiry from my chambers, Federal Express confirmed that the package was delivered on December 24, 2001 to 2024 East 18th Street, and a signature obtained upon receipt. According to Federal Express, the delivery was made to 2024 East 18th Street since it is the address the company had on record where Ruth Wapnick had authorized deliveries. This Court's Federal Express receipt as well as the tracking records received from Federal Express are attached.

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[1] This is not the first time that the Court has rejected Ruth Wapnick's claim that she failed to receive an order. See, e.g. endorsed order dated September 17, 1998 attached to the Report in which this Court noted that plaintiff's claim that she had just received a September 3, 1998 conference calendar "is simply untrue."

Insofar as Ms. Wapnick's letter is seeking an extension of time for responding to the government's motion for summary judgment, this request is denied. As previously discussed in the Report, there have been extensive delays in this case caused primarily by plaintiffs' failure to comply with discovery. There is simply no reason to delay adjudication of the government's motion. Plaintiffs' opposition to the motion is due June 14, 2002.

Plaintiffs' request for additional discovery is denied, for the reasons stated in the Report.

SO ORDERED.

Dated: Brooklyn, New York

May 22, 2002

MARILYN DOLAN GO

UNITED STATES MAGISTRATE JUDGE

¶2002-5002

James E. BROWN, APPELLANT v. COMMISSIONER of Internal Revenue Service, APPELLEE. U.S. Court of Appeals, District of Columbia Circuit, (CA Dist Col) Docket No. 02-1012, May 13, 2002. Decision for Govt.

1. Appeals to Courts of Appeals—venue—motion to transfer appeal. Govt.'s motion to transfer appeal of Tax Court's dismissal of taxpayer's IRC §6330 petition from District of Columbia Cir. to 6th Cir. was granted: undisputed evidence showed taxpayer's legal residence at time he filed petition was located within 6th Cir.; and prior decision establishing residence 30 years before had no effect on determination of his current residence. *Reference:* United States Tax Reporter ¶74,825.02(37). IRC §6330; 7482.

United States Court of Appeals, District of Columbia Circuit.

Before: ROGERS and GARLAND, Circuit Judges.

Order

PER CURIAM:

[1] Upon consideration of the motion to transfer the appeal to the Sixth Circuit, or, in the alternative, for summary affirmance, the opposition thereto, and the reply; and the motion for leave to file a motion for summary reversal out of time, and the opposition thereto, it is

ORDERED that the motion to transfer be granted. Appellant does not contest that the proper venue for appellate review of the United States Tax Court's dismissal of his I.R.C. § 6330 petition is the United States Court of Appeals for the circuit encompassing appellant's legal residence at the time his Tax Court petition was filed, or, if his legal residence is not located in any circuit, this court. See I.R.C. § 7482(b)(1)(A); Estate of Israel v. Commissioner of IRS, 159 F.3d 593, 595 [82 AFTR 2d 98-6937] (D.C.Cir.1998). Appellant offers no evidence to dispute the fact that on May 30, 2001, when he filed the I.R.C. § 6330 petition at issue, his legal residence was in Tennessee, which is located within the Sixth Circuit. See 28 U.S.C. § 41. Regardless of any res judicata effect of Brown v. United States, 5 Cl.Ct. 1, 12, aff'd, 741 F.2d 1374 (Fed.Cir.1984), in establishing Brown's legal residence as of August 1971, that decision has no effect on the determination of Brown's legal residence as of May 2001. Therefore, this appeal, along with the remaining pending motions, will be transferred to the Sixth Circuit. See Alexander v. Commissioner, 825 F.2d 499 [60 AFTR 2d 87-5445] (D.C.Cir.1987) (per curiam).

Pursuant to D.C.Cir. Rule 36, this disposition will not be published. The Clerk is directed to transmit the original file and a certified copy of this order to the United States Court of Appeals for the Sixth Circuit.

¶2002-5003

James G. and Barbara L. ROBINSON, PLAINTIFFS v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) Docket No. 01-102T, June 24, 2002. Year 1995. Decision for Govt.

1. Stock transferred in compensation for services—employer's deduction—employee's inclusion in income. Film production S corp. stockholders' IRC §83(h)-based refund suit for deduction for value of restricted stock transferred in compensation for services to CEO/employee was dismissed as unripe: final determination as to whether amount was *included* in employee's income under IRC §83(h) hadn't yet been made. Fact that employee should or could have included amount in income for subject year didn't in itself trigger employer's deduction; and by statute's and reg preamble's plain meaning, ''included'' meant actually included, which in turn contemplated final determination of employee's tax liability and not merely putting IRS on notice via returns or otherwise of compensation's nature and amount. Also, facts that case involved restricted stock and IRC §83(b) election, and that notice did satisfy IRC §83(h)'s general equitable considerations, weren't relevant to deduction issue; safe-harbor rule wasn't met; and taxpayers' attempt to read ''reasonable cause'' exception into regs was rejected. *Reference:* United States Tax Reporter ¶835.04(25). IRC §83.

Samuel M. Maruca, Washington, DC, for plaintiff. Robert L. Moore, II, Miller & Chevalier, Chtd., of counsel.
G. Robson Stewart, Washington, DC, with whom was Assistant Attorney General Eileen J. O'Connor, for defendant.

In the United States Court of Federal Claims.

Order

MILLER, Judge:

Taxes; tax refund; employer's deduction of value of property transferred to employee under 26 U.S.C. § 83(h) (2000); ripeness; statutory construction.

This case is before the court after argument on defendant's motion to dismiss and the parties' cross-motions for summary judgment. Whether a taxpayer-employer's claim under 26 U.S.C. § 83(h) (2000), to deduct the value of property transferred to an employee is limited to the amount, if any, determined by the Internal Revenue Service (the ''IRS'') to have been included in the employee's gross income presents the ultimate legal issue. However, the ripeness of the taxpayer's claim is the antecedent inquiry, and defendant takes the position that plaintiff's claim cannot be addressed until the IRS makes the determination of the amount to have been included.

FACTS

The following facts are undisputed. James G. and Barbara L. Robinson (''plaintiffs'') own all of the issued and outstanding stock in a group of related S-corporations in the commercial film production business, collectively known as ''Morgan Creek.'' From 1989 through 1997, Gary Barber was the Chief Operating Officer of Morgan Creek and, as such, was responsible for all of Morgan Creek's legal, financial, administrative, and other business. Pursuant to an employment agreement dated January 1, 1995, and a common stock subscription agreement entered into as of January 30, 1995 (the ''Stock Agreement''), Morgan Creek renewed Mr. Barber's contract and trans-ferred to him a restricted10% ownership interest in Morgan Creek (the ''stock'').[1]

[1] The Stock Agreement provided for various vesting schedules that represented a risk of forfeiture to Mr. Barber in the event of an early termination of his employment.

26 U.S.C. (I.R.C.) § 83 (2000), governs the taxation of property transferred to an employee in connection with services provided by the employee. In general, such property is not taxable until it is has become ''substantially vested'' in the employee. I.R.C. § 83(a); Treas. Reg. § 1.83-1(a) (1978); Treas. Reg. § 1.83-3(a) & (b) (as amended in 1985). Once the property substantially vests, the employee must include in gross income in that year the excess of the current fair market value of the property over any consideration paid by the employee for the property (the ''bargain element''). I.R.C. § 83(a). Accordingly, any appreciation in the property between the year of transfer and the year the property substantially vests is reported as ordinary income. Under section 83(b) the employee may elect to include the bargain element in gross income for the year in which the property is transferred (determined without regard to any restrictions on ownership). See Treas. Reg. § 1.83-2(a) (1978). If the employee so elects, any subsequent appreciation of the property is not considered ordinary compensation, but will be recognized as capital gain. See generally Alves v. Comm'r, 734 F.2d 478, 480–81 [54 AFTR 2d 84-5281] (9th Cir. 1984) (discussing history, purpose, and operation of I.R.C. § 83); Venture Funding, Ltd. v. Comm'r, 110 T.C. 236, 239–40 (1998) (same), aff'd, 198 F.3d 248 [84 AFTR 2d 99-6929] (6th Cir. 1999) (unpublished table decision).

In February 1995 Mr. Barber filed with the IRS an election under I.R.C. § 83(b) to include in income the bargain element of the stock. Mr. Barber indicated that the bargain element was zero, thereby positioning himself to recognize no income from the transfer and to claim capital gains treatment on any gain from the subsequent sale of the stock.[2]

By regulation, an employee who makes an election under I.R.C. § 83(b) must file a written statement with the IRS and submit a copy of that statement to the employer. Treas. Reg. § 1.83-3(c) & (d). The parties dispute when Morgan Creek was given notice of the election. Shortly after Mr. Barber filed his election, his attorneys pro-vided Mr. Barber, in his capacity as Chief Operating Officer of Morgan Creek, with a copy of the election document. Defendant thus argues that, because Mr. Barber himself was an officer of Morgan Creek, an agent of Morgan Creek properly was advised of the election when it was made. Plaintiffs maintain that Morgan Creek first learned of Mr. Barber's I.R.C. § 83(b) election at the closing of a settlement agreement and mutual general release executed in June 1998 (the ''Settlement Agreement''), in which Morgan Creek repurchased the then-vested portion of the stock (80% of the total shares) from Mr. Barber.[3] Plaintiffs insist that the first time an agent of Morgan Creek other than Mr. Barber learned of Mr. Barber's election was at the closing of the Settlement Agreement.

Morgan Creek subsequently issued amended 1995 Forms W-2 increasing Mr. Barber's wage income by $20,716,400.00 and paid the employer's share of employment taxes. The IRS audited Mr. Barber's 1995 tax return and, on or about December 14, 2001, issued an audit report proposing to increase Mr. Barber's gross income from wages by $26,759,800.00. The IRS has not finally determined Mr. Barber's 1995 tax liability.

On or about August 17, 1999, plaintiffs filed with the IRS an administrative claim

[2] The parties disagree with respect to the fair-market value of the stock at the time of the transfer without regard to the restrictions, and therefore disagree on the value of the bargain element of the stock. In consideration for the stock, Mr. Barber paid $2 million in cash and notes to Morgan Creek. Under the Stock Agreement, the stock's value was to be determined as a strict percentage of the value of Morgan Creek and without regard to any discount for lack of marketability or minority status of the holder. Plaintiff estimates that the value of Morgan Creek at the time of the transfer was $288,000,000.00, which would translate to an ownership interest worth $28,800,000.00 to Mr. Barber and a bargain element of $26,800,000.00.

[3] The purchase price of the Settlement Agreement was $13,200,000.00, based on an agreed value of $165,000,000.00 million for Morgan Creek.

for refund of 1995 income taxes, seeking deductions for additional compensation paid to Mr. Barber in 1995 and a tax refund of $7,626,575.00. On or about November 28, 2000, plaintiffs filed an amended administrative claim seeking and additional tax refund of $1,227,706.00 based on the same transaction. On February 27, 2001, plaintiffs filed a complaint in the Court of Federal Claims seeking recovery of overpaid income taxes in the amount of $8,854,281.00, plus interest. Defendant argues that plaintiffs are not entitled to a decision on their claim for a refund until a final determination has been made of the amount, if any, to be included in Mr. Barber's 1995 income.

DISCUSSION

1. Statutory framework and ripeness

[1] The question presented in this case is one of ripeness and, therefore, jurisdiction.[4] The "basic rationale" of the ripeness doctrine, according to the Supreme Court in Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967),

> is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Accord Disabled Am. Veterans v. Gober, 234 F.3d 682, 690–91 (Fed. Cir. 2000). Not untypically, however, whether this case actually presents a live controversy depends on an interpretation of the underlying statute.

I.R.C. § 83(h) provides:

> [T]here shall be allowed as a deduction under section 162 [to the employer] an amount equal to the amount included under subsection (a), (b), or (d)(2) in the gross income of the person who performed such services. Such deduction shall be allowed for the taxable year of such person in which or with which ends the taxable year in which such amount is included in the gross income of the person who performed such services.

The critical word in this subsection is "included," and the critical question in this case is whether any amount has been included in Mr. Barber's gross income. See Venture Funding, 110 T.C. at 242 ("The statutory prerequisite to petitioner's deduction under section 83(h) is that the corresponding amount must be 'included' in its employees' income . . . ."). If the amount included in the employee's gross income remains to be decided by another tribunal, it remains possible that the parties' dispute will resolve itself, for plaintiffs' complaint is predicated on their fear that the IRS will determine, in the process of reviewing Mr. Barber's return, that Mr. Barber should have included less than the amount that plaintiffs claim as a deduction.

2. Statutory meaning of "included"

Because income tax deductions are a matter of "legislative grace," "they are strictly construed and allowed only 'as there is a clear provision therefor.'" INDOPCO, Inc. v. Comm'r, 503 U.S. 79, 84 [69 AFTR 2d 92-694] (1992) (quoting New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 [13 AFTR 1180] (1934)). "[T]he burden of clearly showing the right to the claimed deduction is on the taxpayer." INDOPCO, 503 U.S. at 84.

The first step in construing a statute "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the

[4] The ripeness doctrine is drawn both from Article III limitations on the judicial power and from prudential reasons for refusing to exercise jurisdiction. See, e.g., Buckley v. Valeo, 424 U.S. 1, 114 (1976) (per curiam); Socialist Labor Party v. Gilligan, 406 U.S. 583, 588 (1972). Although not an Article III court, the Court of Federal Claims is vested with a "judicial power," Freytag v. Comm'r, 501 U.S. 868, 889–90 [68 AFTR 2d 91-5025] (1991), and has adjudicated cases on the basis that, except as Congress provides otherwise, its jurisdiction is similarly limited to "cases" or "controversies" and is subject to well-known prudential limitations, e.g., Mass. Bay Transp. Auth. v. United States, 21 Cl. Ct. 252, 257–58 (1990), rev'd on other grounds, 129 F.3d 1226 (Fed. Cir. 1997).

case.'' Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). The term ''included'' has just such a plain and unambiguous meaning in the tax code, one that distinguishes it from the term ''includible.'' E.g., Grant Oil Tool Co. v. United States, 180 Ct. Cl. 620, 632 [20 AFTR 2d 5176], 381 F.2d 389, 397 [20 AFTR 2d 5176] (1967); Venture Funding, 110 T.C. 240–41 & n.3; id. at 249–51 (Colvin, J., concurring); see also Day v. Heckler, 735 F.2d 779, 784 (4th Cir. 1984) (distinguishing between ''allowed'' and ''allowable''). I.R.C. § 83 requires that the employer's deduction equal the amount included in the employee's gross income and that it be taken in the year that ends the taxable year in which the employee included the amount in gross income. That the employee should have, or could have, included a particular amount in gross income in a particular year does not, on its own, trigger the allowance of a deduction.[5]

Both the Tax Court and the IRS recognize that, by the plain meaning of the term, an amount is ''included'' in a taxpayer's income when that amount is actually ''taken into account in determining the tax liability of the employee for that year.'' Venture Funding, 110 T.C. at 240. Recognizing that I.R.C. § 83(h) requires an employer to ''demonstrat[e] that an amount has actually been included,'' T.D. 8599, 1995-2 C.B. 12, 12, the IRS created a limited safe-harbor provision under which an employee is ''deemed'' to have included a particular amount in gross income, Treas. Reg. § 1.83-6(a)(2) (as amended in 2000).[6]

Aside from the safe harbor, however, ''the employer generally is required to demonstrate that the employee actually included the amount in income in order to support its deduction of the amount.'' T.D. 8599, 1995-2 C.B. at 13; see also Sutherland Lumber-Southwest, Inc. v. Comm'r, 114 T.C. 197, 205 (2000).

Plaintiffs concede that a final determination regarding Mr. Barber's 1995 income tax liability has not been made. They argue instead that the term ''included'' does not contemplate a final determination of the employee's tax liability. Plaintiffs rely primarily on language in the preamble of a 1995 amendment to the regulations implementing I.R.C. § 83:

> Under these regulations, the former general rule and special rule are replaced by a revised general rule that more closely follows the statutory language of section 83(h). The service recipient is allowed a deduction for the amount ''included'' in the service provider's gross income. For this purpose, the amount included means the amount reported on an original or amended return or included in gross income as a result of an IRS audit of the service provider.

Plaintiffs erroneously argue that, because the IRS has issued an audit report concerning Mr. Barber's income for 1995, the preamble's definition of ''included'' is satisfied. To the contrary, the preamble refers to an amount ''included in gross income as a result of an IRS audit.'' The audit itself does not satisfy the preamble's definition of ''included'': The audit must result in an amount-certain included in the employee's gross income. Plaintiffs concede that this has not yet occurred.

Plaintiffs argue more generally that the essence of I.R.C. § 83's operation is not the actual inclusion of compensation in the employee's income, but notice to the IRS of the nature and amount of compensation. Plaintiffs reason that the purpose of the

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[5] Section 83(h) was added to the Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 588, by a Senate amendment. The report of the Senate Finance Committee states: ''The allowable deduction is the amount which the employee *is required to recognize* as income. The deduction is to be allowed in the employer's accounting period which includes the close of the taxable year in which the employee *recognizes* the income.'' S. Rep. No. 91-552 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2027, 2155 (emphasis added). The Conference Report adopts the Senate amendment, indicating only that ''[t]he amendment provides rules for deductions for the employer with respect to restricted property.'' H.R. Conf. Rep. No. 91-782 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2392, 2418. Although the language used by the Senate Finance Committee supports plaintiffs' claim, see Venture Funding, 110 T.C. at 258, 261 (Ruwe, J., dissenting), the court nevertheless must apply the plain, unambiguous meaning of the statute. E.g., Garcia v. United States, 469 U.S. 70, 75 (1984).

[6] As discussed below, plaintiffs did not avail themselves of the safe harbor.

statute is satisfied when the IRS is made aware that property has been transferred as income and is put in a position to make any necessary adjustments to the tax liabilities of those involved. Plaintiffs again rely on the 1995 amendment to the implementing regulations, arguing that the events discussed in the preamble—submission of an original or amended return or an IRS audit—are not final determinations of an employee's tax liability, but, rather, are events that put the IRS in a position to discover and correct any discrepancy between the employer's and the employee's returns.

Again, plaintiffs overlook the fact that the preamble refers to inclusion "as a result" of an audit—not an audit itself. As such, the preamble informally describes the means by which a final amount to be included in gross income is determined. Unless the IRS determines that an audit is necessary, the taxpayer's return is essentially a "self-assessment," e.g., Laing v. United States, 423 U.S. 161, 191 [37 AFTR 2d 76-530] (1976), and any amount included as gross income on that return is the amount ultimately taken into account in determining the employee's tax assessment for that year, 26 U.S.C. § 6201 (authorizing summary assessment of taxes shown on return); Venture Funding, 110 T.C. at 258 n.3 (Ruwe, J., dissenting) ("The alternative to reporting as gross income on the employee's ... return would be an adjustment to gross income in a deficiency determination."); Michael I. Saltzman, IRS Practice & Procedure ¶s 8.01, 10.01–10.03 (2d ed. 1991) (discussing examination and assessment process). The preamble thus is consistent with the plain meaning of "included" applied in Venture Funding: "taken into account in determining the tax liability of the employee for that year." Venture Funding, 110 T.C. at 240.

The fact that this case involves restricted stock and an election under I.R.C. § 83(b) does not affect application of the plain meaning of "included." Subsection (b) contains no language that would qualify or avoid the requirement in subsection (h) that the deduction equal the amount included in the employee's gross income. The plain meaning of I.R.C. § 83(h), confirmed by the IRS's implementing regulations and applied by the Tax Court in Venture Funding, is that an employer is allowed a deduction only to the extent that an equal amount actually is included in the employee's gross income.

3. The role of notice

Plaintiffs may be correct that notice to the IRS adequately serves the purpose of I.R.C. § 83(h), which is to ensure consistent treatment of employers and employees. T.D. 8599, 1995-2 C.B. at 13. Nevertheless, "[t]he propriety of a deduction does not turn upon general equitable considerations, such as a demonstration of effective economic and practical equivalence." Comm'r v. Nat'l Alfalfa Dehydrating & Milling Co., 417 U.S. 134, 148–49 [33 AFTR 2d 74-1347] (1974). More fundamentally, this court is in no po-sition to fashion alternate methods of ac-complishing Congress's will. Whatever merit plaintiffs' arguments may have as a policy matter, they would circumvent—and therefore contradict—the scheme Con-gress has chosen.

Similarly, although the court appreciates the vulnerability of plaintiffs to the outcome of Mr. Barber's administrative appeals, the court cannot avoid the unambiguous language of I.R.C. § 83(h) on this basis. Under that statute an employer's deduction rests on "its employee's inclusion in income of a corresponding amount." Venture Funding, 110 T.C. at 240. Although several courts applying I.R.C. § 83 according to its terms have recognized the inequities created in particular circumstances, e.g., Sakol v. Comm'r, 574 F.2d 694, 700 [41 AFTR 2d 78-1095] (2d Cir. 1978); Venture Funding, 110 T.C. at 242; Alves v. Comm'r, 79 T.C. 864, 878 (1982), aff'd, 734 F.2d 478 [54 AFTR 2d 84-5281] (9th Cir. 1984), these courts consistently have refused "to create excep-

tions to the statute's coverage.'' Alves, 734 F.2d at 483. The result in this case is coherent, consistent with the Code's distinction between ''included'' and ''includible,'' and, while unaccommodating of plaintiffs' reasonable concerns, is far from absurd.[7] Consequently, because the statute's language is plain, the court must enforce it according to its terms. See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000); Robinson, 519 U.S. at 340.

4. Safe-harbor regulation

As noted above, IRS regulations recognize that it is often difficult for an employer to ascertain whether its employees actually included an amount in income. T.D. 8599, 1995-2 C.B. at 12; see also Venture Funding, 110 T.C. at 242. Treas. Reg. § 1.83-6(a)(2) accordingly provides a safe harbor to employers through which they can claim a deduction regardless of whether the employee actually includes the amount in income. Under the safe harbor, if the employer timely satisfies I.R.C. §§ 6041 or 6041A, *i.e.*, files the appropriate form (usually a W-2) with the IRS reporting the compensation to the employee and furnishes a statement to the employee, the employee is ''deemed'' to have included the amount reported by the employer as income for purposes of I.R.C. § 83(h). See also Treas. Reg. §§ 1.6041-1, -2 (as amended in 2000) (describing mechanics of compliance).

Plaintiffs concede that they did not report the bargain element of the Stock Agreement as compensation in accordance with the safe-harbor rule. Plaintiffs instead request that the court read into the regulation a ''reasonable cause'' exception. The court finds no basis in the statute or the regulation for such an exception. As discussed above, the statute requires that the employer's deduction equal the amount included in the employee's gross income. The statute itself admits of no exception, whether for reasonable cause or otherwise. Cf., e.g., I.R.C. § 6651(a) (imposing penalties for failure to file a return or pay tax ''unless it is shown that such failure is due to reasonable cause''). In the safe-harbor provision, the IRS has provided one, and only one, qualification to the statute's general operation. The rule provides detailed instructions to employers on how to avail themselves of that safe harbor. This court is in no position to broaden that exception or to create additional exceptions.

CONCLUSION

Because plaintiffs' entitlement to a deduction for 1995 depends upon a final determination of the amount included in Mr. Barber's income, plaintiffs' claim is unripe.

Accordingly, based on the foregoing, defendant's motion to dismiss pursuant to RCFC 12(b)(1) is granted, and the Clerk of the Court shall dismiss the complaint without prejudice as unripe.

IT IS SO ORDERED.

No costs.

Christine Odell Cook Miller

Judge

¶2002-5004

In Re: Rudolf RUECKER, Debtor. U.S. Bankruptcy Court, Northern Dist. of California, (Bktcy Ct CA) Docket No. 00-53522-JRG, May 29, 2002. Decision against Applicant.

1. Bankruptcy court procedure—application for fees—plan confirmation. Attorney's application for additional fees incurred in connection with Chap. 13 plan confirmation was denied: fees were already overpaid by prior order, and billings relating to relatively simple confirmation objection and proceedings were unreasonable.

[7] The court notes that an earlier version of the safe-harbor rule was available to plaintiffs when they negotiated Mr. Barber's employment contract. Moreover, plaintiffs were free to incorporate into the Stock Agreement their understanding of what Mr. Barber would report to the IRS and thereby fix any risk associated with his conduct.

Reference: United States Tax Reporter ¶68,726.52(3).

United States Bankruptcy Court, Northern District of California.

Order on Fee Application of Ronald Wilcox

GRUBE, Bankruptcy Judge:

Chapter 13

I. INTRODUCTION

The petition in this case was filed on July 10, 2000. The fee originally quoted by applicant was $2,500. On November 7, 2000, an order was entered approving this fee. A few days later, on November 13, 2000, another order was entered approving fees in the amount $3,811.75 which included the $2,500 contained in the November 7th order. On March 13, 2002, applicant filed the application now before the Court seeking another $774.25.

For the reasons hereafter stated the application is denied.

II. FACTUAL BACKGROUND

A review of the debtor's statement of affairs and schedules indicates: there is a single debtor. He has no real property and personal property valued at $19,747.37. This is a tax case. The debtor owes approximately $26,817 in federal taxes and another $4,220 in state taxes.

III. DISCUSSION

[1] There was only one objection to confirmation and it was by the Trustee:

The debtor has elected to make his payments through a voluntary wage deduction however, the debtor failed to make payments until such wage deduction began. Therefore, the Trustee questions the feasibility of this plan. The debtor failed to make the payment due in August of $680.00, prior to the wage deduction.

The Trustee's objection seems simple enough. To reach confirmation took three and a half months. During that time Applicant logged 108 time entries representing 30.22 hours at a cost of $3,966.25.

As the Court has gone back and reviewed this case from the start, it has become clear that Applicant was over paid in a prior award of fees. The billings in connection with confirmation are unreasonable as are many thereafter. A sampling of entries the Court finds inappropriate are set forth on Exhibit A. The Court may decline to award attorneys' fees where the time expended cannot be justified on a cost-benefit analysis. In re Riverside-Linden Inv. Co., 925 F.2d 320, 322–23 (9th Cir. 1991). Hours that are excessive, redundant, or unnecessary should be excluded from fee applications. Hensley v. Eckerhart, 461 U.S. 424 (1983).

III. CONCLUSION

The Court will not address whether fees previously received should be disgorged but no additional fees will be awarded.

DATED: ___

JAMES R. GRUBE

UNITED STATES BANKRUPTCY JUDGE

¶2002-5005

Alfred J. MARTIN, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Fourth Circuit, (CA4) Docket No. 01-2436, June 28, 2002. Tax Court affirmed. Ear-lier proceeding at (2000) TC Memo 2000-187, RIA TC Memo ¶2000-187, 79 CCH TCM 2153. Years 1980, 1981, 1982. Deci-sion for Govt.

1. Review of Tax Court decision—deficiency redetermination—jurisdiction—application of payments. Tax Court properly upheld IRS's crediting of taxpayer-partner's voluntary payment on partnership-related deficiency to his joint liability for '80 rather than to his subsequent year's separate liability: Court properly ex-

ercised its overpayment jurisdiction to review issue, which only involved what instructions taxpayer gave with payment and didn't implicate IRS's discretion to credit any excess overpayment; and record showed that taxpayer clearly directed his attorneys to remit payment against his joint liability. Also, earlier decision that taxpayer hadn't authorized petition filing for '80 wasn't inconsistent with finding that he had directed payment to be applied to that year. *Reference:* United States Tax Reporter ¶74,425.02(45); 64,025.28(15); 74,425.01(100). IRC §6402; 7442.

Argued: Patricia Tucker, Laflin, Lieuwen, Tucker, Pick & Heer, P.A., Albuquerque, New Mexico, for Appellant. Patricia McDonald Bowman, Tax Division, United States Department of Justice, Washington, D.C., for Appellee.
On Brief: Eileen J. O'Connor, Assistant Attorney General, Gilbert S. Rothenberg, Tax Division, United States Department of Justice, Washington, D.C., for Appellee.

Appeal from the United States Tax Court. (Tax Ct. No. 86-32146). United States Court of Appeals for the Fourth Circuit.

Before WIDENER, WILLIAMS, and TRAXLER, Circuit Judges.

Opinion

PER CURIAM:

UNPUBLISHED

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

Alfred J. Martin appeals from the tax court's determination that a $50,000 tax payment that he made in 1996 was credited properly by the Internal Revenue Service (IRS) to his tax liability for 1980 rather than for 1981 and 1982. Finding no error, we affirm.

I.

Martin was married to Amilu Rothhammer during 1980; they were divorced in 1981. Martin and Rothhammer are both physicians. Prior to 1980, they bought a limited partnership interest in Winchester Oil & Gas, one of the "Manhattan group" of approximately 20 partnerships. (A. at 16.)[1] The Manhattan partnerships were involved in a group of tax court cases, the "Elektra-Hemisphere" cases. See Krause v. Commissioner, 99 T.C. 132 (1992), aff'd sub nom. Hildebrand v. Commissioner, 28 F.3d 1024 [74 AFTR 2d 94-5189] (10th Cir. 1994) (the "test case"). The general partners of the Manhattan partnerships hired a law firm, Mathias & Berg, to litigate the test case regarding the permissibility of certain loss deductions claimed by the limited partners and also to file petitions challenging tax determinations at the request of any of the limited partners.

The IRS determined a joint deficiency against Martin and Rothhammer for the tax year 1980 in the amount of $56,771, as well as a penalty in the amount of $16,085 for a valuation overstatement. For 1981 and 1982, Martin filed as a single taxpayer; the IRS determined a deficiency against Martin alone for 1981 and 1982 in the amounts of $14,827 and $298, respectively. For 1981 and 1982, the IRS also determined that Martin was liable for negligence and failure-to-file penalties totaling approximately $1,100. On August 4, 1986, Mathias & Berg filed a tax court petition on behalf of Martin and Rothhammer, disputing the IRS's determinations for 1981 and 1982.[2] On September 6, 1988, Mathias & Berg filed a petition on behalf of both Martin and Rothhammer challenging the IRS's 1980 deficiency determination.

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[1] References to the appendix provided by Martin will be denoted by the abbreviation "A." References to the IRS's supplemental appendix will be denoted by "S.A."

[2] The petition erroneously included Rothhammer, who was not a party to Martin's 1981 and 1982 returns; Rothhammer filed a motion to dismiss and was removed as a party to the 1981 and 1982 litigation.

Resolution of each of these petitions was delayed by the need to await the ruling in the test case. Hildebrand, 28 F.3d at 1026.

On August 9, 1996, Martin sent Mathias & Berg a check in the amount of $50,000, payable to the IRS (the $50,000 payment), with a cover letter referencing the docket number for the 1980 tax court case and indicating that the payment was towards a "good faith settlement" of Martin's "half of the obligation." (A. at 33.) Martin also enclosed a check in the amount of $500, payable to Mathias & Berg, for their review of the IRS's interest calculations, and stated in his cover letter that Rothhammer should reimburse half of this review fee. On August 14, 1996, Mathias & Berg wrote Martin and Rothhammer, stating that Martin's $50,000 check had been sent to the IRS for credit against the joint liability of Martin and Rothhammer for the 1980 tax year. On the same date, Mathias & Berg sent the check to the IRS with express instructions to credit it against potential liability for 1980. On November 18, 1996, Martin wrote Mathias & Berg, stating that he would not send any funds beyond the $50,000 he had paid "until such time as my former wife has matched that amount." (S.A. at 46.)

On Martin's motion, the tax court dismissed the 1980 petition as to him for lack of jurisdiction after it determined that he had never authorized or ratified the filing of a petition on his behalf for the 1980 tax year.[3] On June 20, 2001, the tax court entered its final decision with respect to Martin's returns for 1981 and 1982, finding Martin liable for a deficiency of $974 for 1981 and $135 for 1982, and rejecting his argument that the $50,000 payment should be applied to his deficiencies for 1981 rather than to his and Rothhammer's joint deficiency for 1980. Martin timely appealed to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit granted an unopposed motion to transfer the case to this circuit on November 26, 2001.[4] On appeal, Martin does not challenge the tax court's deficiency determinations for 1981 and 1982; instead, he contends only that the tax court should have applied the $50,000 payment to his 1981 liability, resulting in a determination that he had made a substantial overpayment for that year.

II.

[1] The IRS contends for the first time on appeal that because the petition for the 1980 tax year was dismissed as to Martin based upon his insistence that he never authorized or ratified its filing, the tax court lacked jurisdiction to "redetermine" Martin's liability for the 1980 tax year. It is our duty at the outset to examine de novo the question of whether the tax court had jurisdiction to order the $50,000 payment applied to Martin's 1981 liability. Correia v. Commissioner, 58 F.3d 468, 469 [76 AFTR 2d 95-5126] (9th Cir. 1995).

The tax court is a court of limited jurisdiction, and it may exercise jurisdiction only as expressly provided by statute. Commissioner v. McCoy, 484 U.S. 3, 7 [60 AFTR 2d 87-6150] (1987). When the IRS has issued a notice of deficiency for a given year and the taxpayer files a timely petition for that year, the tax court obtains jurisdiction to determine whether there is a deficiency for that year. Estate of Baumgardner v. Commissioner, 85 T.C. 445, 448 (1985). Once the tax court has jurisdiction to determine whether there is a deficiency for a given year, Congress has authorized the tax court to determine whether a taxpayer has made an overpayment of tax for that year. 26 U.S.C.A. § 6512(b) (West 1989); Winn-Dixie Stores v. Commissioner, 110 T.C. 291, 294–95 (1998). An overpayment is the excess of a taxpayer's payments for the period at issue over his liability for that period. Jones v. Liberty Glass Co., 332 U.S. 524, 531 [36

[3] In 1998, Rothhammer settled all issues related to her 1980 liability with the IRS.

[4] Because Martin lived in Virginia at the time his tax court petition was filed, venue for appeal lies in this court. 26 U.S.C.A. § 7482 (West 1989) (stating that appellate venue is based on a taxpayer's residence at the time a petition was filed).

AFTR 377] (1947) (''overpayment'' is ''any payment in excess of that which is properly due''). A determination of an overpay ment for the period at issue thus logically requires a determination of two facts: the taxpayer's liability for that period and the amount of the taxpayer's payments applicable to that period. Accordingly, the tax court's overpayment jurisdiction includes the power to determine whether a payment is applicable to the particular period for which the tax court has jurisdiction to make a deficiency determination. Malachinski v. Commissioner, 268 F.3d 497, 508 [88 AFTR 2d 2001-6169] (7th Cir. 2001) (stating that the tax court has jurisdiction to determine ''whether a deposit payment is applicable to a particular deficiency'');[5] Estate of Wilson v. Commissioner, 78 T.C.M. (CCH) 35 [1999 RIA TC Memo ¶99,221] (1999) (excercising the tax court's overpayment jurisdiction to review improper IRS application of a portion of a payment specifically designated for the year under review to other years); Hays v. Commissioner, 71 T.C.M. (CCH) 1754, 1757–58 [1996 RIA TC Memo ¶96,018](1996).[6] Thus, the overpayment jurisdiction facially provided the tax court with the authority to determine whether Martin's $50,000 payment was properly attributable to 1981.

On appeal, the IRS points to several statutory provisions that, it argues, strip the tax court of jurisdiction to determine whether a payment is applicable to a period at issue before the tax court, when the IRS has credited the payment to another period that is not at issue before the tax court. First, the IRS notes that the tax court has no jurisdiction to determine whether the tax for any period not at issue before it has been overpaid or underpaid. 26 U.S.C.A. § 6214(b) (West 1989); Gooding v. Commissioner, 310 F.2d 501, 502 [10 AFTR 2d 5994] (4th Cir. 1962). Determinations of overpayment or un-derpayment for years not before the tax court are impermissible because they nec-essarily involve a resolution of a tax-payer's liability for those years. See Roth-ensies v. Electric Storage Battery Co., 329 U.S. 296, 302 [35 AFTR 297] (1946) (holding that a theory of recoupment of a prior overpayment may not serve as a means to bring a time-barred refund claim due to finality concerns regarding determi-nations of tax liability). In this case, how-ever, Martin does not seek a redetermina-tion as to whether his tax liability for 1980 has been overpaid or underpaid. He con-tends instead that his $50,000 payment, in its entirety, was properly applicable to 1981 rather than 1980, and thus, that with-out regard to the relationship between the $50,000 payment and his 1980 liability (i.e. any overpayment or underpayment for 1980), the payment should be applied to 1981. If the tax court granted him the re-lief that he seeks, it would not be deter-mining any deficiency or liability for 1980.

Second, the IRS notes that it is authorized to credit the amount of any overpayment against any tax liability of the taxpayer. 26 U.S.C.A. § 6402 (West 1989). In turn, the tax court may not ''restrain or review any credit or reduction made by'' the IRS under the authority of § 6402. 26 U.S.C.A. § 6512 (West Supp. 2001); Savage v. Commissioner, 112 T.C. 46, 51 (1999) (noting the tax court's lack of jurisdiction to review the IRS's credit of an overpayment). The IRS suggests that the relief Martin seeks in this case would involve forbidden tax court interference with the IRS's decision to credit an overpayment against another year's tax liability pursuant to § 6402. As we have noted above, however, Martin does not contend that he has overpaid his 1980 tax liability

[5] Malachinski ultimately concluded that the tax court could not order a payment credited to a year at issue before the tax court where the IRS had credited the payment to a year not at issue before the tax court, but as the IRS notes, in Malachinski the payment at issue was made before the initiation of tax court proceedings, while here, the $50,000 payment was made during the pendency of proceedings in the tax court.

[6] The tax court's rules implicitly contemplate that factual disputes regarding the timing and amount of payments will be resolved as part of the tax court's determination of the amount of ''deficiency, liability or overpayment.'' See Tax Court R. 155(b) (providing for the Tax Court to resolve disputes regarding the computation of overpayments).

and that the excess of the $50,000 payment over his 1980 liability should be credited to his 1981 liability, as opposed to some other liability of the IRS's choosing. Instead, he contends that the entire $50,000 payment is properly attributable to 1981.[7] Consequently, Martin does not seek to "restrain or review" the IRS's credit of an overpayment to another year's liability.[8]

Accordingly, we conclude that the tax court's overpayment jurisdiction allowed it to determine whether the $50,000 payment properly was attributable to 1981. We now turn to an examination of the merits of the tax court's determination that the payment was not attributable to 1981.

III.

The tax court determined that Martin in fact authorized Mathias & Berg to remit the $50,000 payment relative to his 1980 liability. We review this factual finding for clear error. Eren v. Commissioner, 180 F.3d 594, 596 [83 AFTR 2d 99-2799] (4th Cir. 1999). We resolve questions of law de novo. Estate of Godley v. Commissioner, 286 F.3d 210, 213 [89 AFTR 2d 2002-2001] (4th Cir. 2002).

At the outset, Martin concedes that Mathias & Berg had apparent authority to direct the application of the $50,000 payment.[9] It is elemental that objective manifestations, and not subjective inten-tions, govern the proper application of funds, for tax debts as for other debts. See Cindy's Inc. v. United States, 740 F.2d 851, 852 [54 AFTR 2d 84-5852] (11th Cir. 1984) (holding that the taxpayer's mani-fest, not subjective, intent controls). In-deed, unless a taxpayer provides specific written instructions for the application of a voluntary payment, the IRS may apply the payment as it wishes. See, e.g., Rev. Proc. 2002-26, 2002-15 I.R.B. 746 (providing that the IRS may apply a payment to any tax year unless the taxpayer provides ex-press written instructions directing its ap-plication to a particular year); Muntwyler v. United States, 703 F.2d 1030, 1032 [51 AFTR 2d 83-997] (7th Cir. 1983) (approv-ing of this principle); see also In re DuCharmes, 852 F.2d 194, 195 [62 AFTR 2d 88-5300] (6th Cir. 1988) (noting that an exception arises to the IRS's ability to credit a payment as it deems appropriate when a taxpayer expressly designates a voluntary payment as applicable to a par-ticular liability); In re Technical Knockout Graphics, 833 F.2d 797, 800 [60 AFTR 2d 87-6084] (9th Cir. 1987) (same); O'Dell v. United States, 326 F.2d 451, 456 [13 AFTR 2d 567] (10th Cir. 1964) (same). Here, Martin's attorneys explicitly directed the IRS to apply the $50,000 payment to Martin's 1980 liability. In order to estab-lish that the payment should have been credited to his 1981 and 1982 liability, Martin would have to show that he pro-vided the IRS with contemporaneous ex-press instructions to that effect; he does not contend that he could make such a showing. The IRS cannot reasonably be expected to look behind the express in-structions of a taxpayer's actually or appar-ently authorized representatives in crediting a payment.

Despite Martin's assertions that he was confused and intended to remit the $50,000 payment relative to his 1981 liability, the tax court did not clearly err in finding that he actually authorized Mathias & Berg to remit the payment against his 1980 liabili-

[7] Section 6512's limitation on the tax court's jurisdiction could have become relevant in this case had Martin prevailed on the merits of his claim that the $50,000 payment was applicable to 1981. In that circumstance, the resulting overpayment of approximately $49,000 for 1981 could have been credited to Martin's 1980 liabilities by the IRS, and the tax court would lack jurisdiction to restrain or review the IRS's decision to so credit the overpayment. 26 U.S.C.A. §§ 6402, 6512; Belloff v. Commissioner, 996 F.2d 607, 612 [72 AFTR 2d 93-5334] (2d Cir. 1993) (noting the IRS's power to apply an overpayment determined by the tax court to a taxpayer's liability for another tax year, thus defeating a refund claim).

[8] The IRS also suggests that Martin's claim is a de facto refund action and is barred by the two-year statute of limitations provided by 26 U.S.C.A. § 6511(b)(2)(B) (West 1989). As we have noted above, however, a determination of overpayment would not necessarily result in a refund; the IRS could apply any overpayment against another year's liability pursuant to 26 U.S.C.A. § 6402. Savage v. Commissioner, 112 T.C. 46, 51 (1999).

[9] The IRS treats this concession as relevant to the jurisdictional issue discussed in Part II above; we believe it is more appropriately considered relative to the merits of Martin's claim.

ties. Ample evidence supports the tax court's finding to this effect. For example, Martin's August 9, 1996 letter accompanying the $50,000 payment stated that it was a partial payment of a joint liability. Martin and Rothhammer were divorced during the 1981 and 1982 tax years and had no joint liability for those years. Further, on August 14, 1996, shortly after Martin sent the $50,000 payment to Mathias & Berg, Mathias & Berg wrote both Martin and Rothhammer, noting that the $50,000 payment had been sent to the IRS for credit against Martin and Rothhammer's joint 1980 liability. No record evidence indicates that Martin timely communicated to Mathias & Berg that such application of the payment was improper. Several months after the August 14 letter was sent, Martin wrote to Mathias & Berg, stating that he would not be making payments additional to the $50,000 payment until Rothhammer had "matched that amount." (S.A. at 46.)

Finally, Martin claims that the law of the case doctrine precluded the tax court from finding that he authorized Mathias & Berg to forward the $50,000 payment relative to 1980, because the tax court earlier found that he did not authorize the filing of a tax court petition for that year. This argument fails because there is no inconsistency between a finding that Martin did not authorize the filing of the 1980 petition and a finding that he did authorize the forwarding of the $50,000 payment relative to 1980. Martin need not have challenged his 1980 liability to have made a payment towards that liability.

The IRS properly credited Martin's $50,000 payment to his 1980 liability based upon his attorney's express instructions. While the tax court had jurisdiction to entertain Martin's claim that the payment was properly applicable to his 1981 liability, the governing law squarely precludes Martin's contentions on the merits. The judgment of the tax court is therefore

AFFIRMED.

¶2002-5006

PRINCIPAL MUTUAL LIFE INSURANCE COMPANY AND SUBSIDIARIES (now known as Principal Life Insurance Company and Subsidiaries), PLAINTIFF-APPELLANT v. UNITED STATES, DEFENDANT-APPELLEE. U.S. Court of Appeals, Federal Circuit, (CA Fed Cir) Docket No. 01-5036, July 1, 2002. Court of Federal Claims, (2000) 86 AFTR 2d 2000-6593, 48 Fed Cl 52, 2000-2 USTC ¶50814, affirmed. Years 1984, 1985, 1986. Decision for Govt.

1. Mutual life insurance cos.—policyholder dividend deductions; adjustments—statutory reserve requirements—excess interest reserves. Fed. Cir. affirmed order that, for policyholder dividend deduction computation purposes, mutual life ins. co improperly excluded reserves for excess interest guaranteed beyond tax years' ends (EIRs) from IRC §809(b)(4) statutory reserves: IRC §811(d)'s computation provisions required EIRs' exclusion only from tax reserves, not both tax and statutory reserves. IRC §811(d)'s non-application to statutory reserves was reflected in facts that statute's "computing" language paralleled tax reserves definitional language and implicitly referred only to tax reserves; and was further supported by IRC §809(g)(6)'s transitional rule, IRC §809(b)(4)'s statutory reserves definitional provision's lack of reference to IRC §811(d), and IRC §809(b)(6)'s 50% rule. Also, fact that IRC §811(d) applied to all parts of Part 1 of Subchapter L wasn't dispositive of or even relevant to issue. *Reference:* United States Tax Reporter ¶8095.01(20); 8115.01(40). IRC §809; 811.

Bruce Graves, Brown, Winick, Graves, Gross, Baskerville and Schoenebaum, PLC, of Des Moines, Iowa, argued for plaintiff-appellant.

Edward T. Perelmuter, Attorney, Tax Division, Department of Justice, of Washinton, DC, argued for defendant-appellee. With him on the brief was Claire Fallon, Acting Assistant Attorney General; and David I. Pincus, Attorney.

Appealed from: United States Court of Federal Claims. United States Court of Appeals for the Federal Circuit.

SMITH, Senior Judge:

Before MICHEL, BRYSON, and LINN, Circuit Judges.

BRYSON, Circuit Judge.

In this complex federal tax case, the taxpayer, Principal Mutual Life Insurance Company and Subsidiaries (''Principal''), seeks a refund of income taxes that it paid for taxable years 1984, 1985, and 1986. The United States Court of Federal Claims rejected Principal's claim in a thorough and lucid opinion. We have carefully reviewed Principal's detailed critique of the trial court's opinion and are not persuaded that the trial court erred in construing the pertinent provisions of the Internal Revenue Code. Although the statutory framework is intricate and the language of a key provision ambiguous, we find that related statutory provisions give reasonably clear guidance as to the proper interpretation of the provisions at issue here, and we sustain the trial court's interpretation of the statutory language.

I

Principal is an Iowa-based mutual life insurance corporation. Mutual life insurance companies are owned by their policyholders, from whom they receive equity capital in the form of premiums. Stock life insurance companies, by contrast, are owned by their shareholders, who provide equity capital; the policyholders are simply customers who pay premiums to purchase policies.

Stock life insurance companies frequently rebate to their policyholders part of the premiums paid. Those premium rebates are tax deductible by the company. Stock life insurance companies also pay their shareholders a portion of their profits as dividends. Those dividend payments, however, are not tax deductible. Mutual life insurance companies give premium rebates to their policyholders, but because the policyholders are also the company's owners, payments to policyholders are in part price rebates, in part policyholder benefits, and in part returns on equity. See CUNA Mut. Life Ins. Co. v. United States, 169 F.3d 737, 738 [83 AFTR 2d 99-799] (Fed. Cir. 1999). If payments to policyholders were fully deductible from the income of mutual life insurance companies, those companies would have an inherent tax advantage over stock life insurance companies, because the mutual companies would be deducting payments that were, in part, returns on equity, while the dividend payments made by stock companies to their shareholders would not be deductible.

On several occasions, Congress has adopted legislative mechanisms designed to provide parity of tax treatment for stock and mutual insurance companies. In 1984, as part of the Deficit Reduction Act of 1984, Pub. L. 98-369, 98 Stat. 494 (''1984 Act''), Congress substantially revised the provisions of the Internal Revenue Code governing the deductions that life insurance companies could take. Under the 1984 Act, stock companies and mutual companies were both permitted to deduct payments to policyholders, but the amount of the deduction for mutual companies was reduced to prohibit mutual companies from deducting the portion of the payments that the statute treated as a return on equity to owners rather than a price rebate to customers.

The method Congress devised to achieve that end is complex. The statutory scheme begins with a provision permitting an insurance company to deduct ''policyholder dividends,'' which are defined as ''any dividend or similar distribution to policyholders in their capacity as such.'' 26

U.S.C. § 808(a). Section 808(c) provides that policyholder dividends may be deducted in the year paid or accrued, but are subject to certain reductions for mutual insurance companies.

The reductions for mutual insurance companies are set forth in section 809, which provides the means for determining which portion of the policyholder dividend is deductible and which is not. In essence, section 809 establishes a formula for comparing the pre-tax earnings rate in the stock life insurance company industry with the pre-tax earnings rate in the mutual life insurance industry for the taxable year in question. The statute attributes the difference to a distribution by mutual companies of earnings to their policyholder owners. Using that industry-wide rate, the statute provides that each mutual company's deduction for payments to policyholders will be reduced by the product of that rate and the particular company's ''average equity base,'' which is also calculated according to a statutory formula. See 26 U.S.C. § 809(b)(1). The result is that the deductions for payments to policyholders are limited for mutual companies to payments that can reasonably be considered premium rebates and not returns on equity.

An individual company's average equity base is the average of its equity base at the end of the preceding taxable year and its equity base at the end of the current taxable year. 26 U.S.C. § 809(b)(1). The larger the company's average equity base, the greater the reduction in the company's policyholder dividend deduction, and thus the greater the company's tax liability. The equity base consists of the company's surplus and capital, adjusted pursuant to sections 809(b)(3), (4), (5), and (6). 26 U.S.C. § 809(b)(2). For present purposes, the most important of those adjustments is the one in section 809(b)(4), which provides that the company's equity base will be increased by the amount that the aggregate amount of its ''statutory reserves'' exceeds the aggregate amount of its ''tax reserves.'' 26 U.S.C. § 809(b)(4)(A). ''Statutory reserves'' are defined as ''the aggregate amount set forth in the annual statement with respect to items described in section 807(c),'' while ''tax reserves'' are defined as ''the aggregate of the items described in section 807(c) as determined for purposes of section 807.'' 26 U.S.C. § 809(b)(4)(B).

Congress created the distinction between ''statutory reserves'' and ''tax reserves'' to address the following problem: States impose reserve requirements on life insurance companies, including mutual companies such as Principal, to ensure that the companies have sufficient assets to make payments on their policies. The reserves required by state law are recorded as liabilities on an insurance company's bal-ance sheet and represent contractual claims against the company's assets by its policyholders. Because of state-law emphasis on ensuring the solvency of life insurance companies, the methods and assumptions that the states require insurance companies to use in calculating reserves are fiscally conservative. At the time of the 1984 legislation, Congress was concerned that the state-law methods of calculating reserves resulted in ''a significant overstatement of liabilities in comparison to those measured under realistic economic assumptions.'' S. Prt. No. 98-169, vol. 1, at 521 (1984). Accordingly, Congress required that federal standards be used to calculate reserves for purposes of determining the size of the equity base of mutual companies and thus the size of their allowable policyholder dividend deductions. By requiring that the difference between a company's statutory reserves and its tax reserves be added to the company's capital and surplus, Congress sought to ensure that only those reserves that it deemed to reflect true liabilities of the company were excluded from the calculation of the company's equity base.

This case involves the proper treatment within this scheme of reserves for an item

known as ''excess interest.'' Excess interest is the interest guaranteed on an annuity or investment contract that exceeds the prevailing state assumed interest rate. During the taxable years in question in this case, Principal maintained several classes of accounts in which the guaranteed interest rates exceeded the prevailing state assumed rate. The guarantee period for those accounts ranged from two to eight years. The interest reserves for those accounts consisted of the present value of the excess interest guaranteed on the accounts for the rest of the guarantee periods. The issue in this case is how to classify reserves for excess interest guaranteed beyond the end of the taxable year for purposes of calculating statutory and tax reserves under section 809(b)(4).

With respect to the application of section 809(b)(4) to its returns for taxable years 1984, 1985, and 1986, Principal took the position that it was not required to include its reserves for excess interest guaranteed beyond the end of the taxable year in either its statutory reserves or its tax reserves. Principal argued that the then-applicable version of section 811(d) of the Code, 26 U.S.C. § 811(d) (Supp. V 1987), required it to exclude excess interest reserves from both sets of reserves when calculating the company's average equity base under section 809(b)(4), which would result in the excess interest reserves not being added to its equity base.

The Internal Revenue Service (''IRS'') disagreed. It took the position that Principal should have included its reserves for excess interest guaranteed beyond the end of the current taxable year in its statutory reserves but not in its tax reserves, and that it should have increased its equity base accordingly. Principal paid the full amount that was due under the IRS's construction of the statute and then filed refund claims with the IRS. When the IRS denied the refunds, Principal sued in the Court of Federal Claims. On cross-motions for summary judgment, the court agreed with the IRS's interpretation of the statutes at issue and granted summary judgment for the government.

The trial court focused on section 811(d), which Principal contended required that excess interest reserves be omitted from both statutory and tax reserves. Section 811(d), which is entitled ''Method of computing reserves on contract where interest is guaranteed beyond end of taxable year,'' provides as follows:

> For purposes of this part (other than section 816), amounts in the nature of interest to be paid or credited under any contract for any period which is computed at a rate which—
>
> (1) exceeds the prevailing State assumed interest rate for the contract for such period, and
>
> (2) is guaranteed beyond the end of the taxable year on which the reserves are being computed, shall be taken into account in computing the reserves with respect to such contract as if such interest were guaranteed only up to the end of the taxable year.

26 U.S.C. § 811(d) (Supp. V 1987).

Principal argued that the reference to ''computing the reserves with respect to such contract'' referred to both statutory and tax reserves, and thus required that the excess interest reserves be excluded from both categories. The government responded that the reference to ''computing the reserves with respect to such contract'' referred only to the tax reserves. The effect of omitting the excess interest reserves from only the tax reserves, and not from the statutory reserves, would be to increase Principal's equity base, since the statute provides that the company's equity base is to be increased by the difference between the statutory reserves and the tax reserves. An increase in the company's equity base would in turn lead to a decrease in its policyholder dividend deduction.

The trial court reasoned that the term "computing" in section 811(d) most naturally referred only to tax reserves, since statutory reserves were not "computed" as such, but were simply taken directly from the reserves set forth in the insurance companies' annual statements, while tax reserves were computed according to the formula set out in the Tax Code. The court further concluded that its statutory construction was consistent with other provisions of the statute as well as with its legislative history.

II

[1] The dispute in this case turns on whether section 811(d) requires reserves for excess interest guaranteed beyond the end of the current year to be excluded from both tax reserves and statutory reserves, as Principal contends, or only from tax reserves, as the government contends.

A

Section 811(d) provides that excess interest to be paid or credited under a contract in which the interest is "guaranteed beyond the end of the taxable year on which the reserves are being computed, shall be taken into account in computing the reserves with respect to such contract as if such interest were guaranteed only up to the end of the taxable year." At first blush, that language would appear to apply to both tax reserves and statutory reserves. The government argues, however, that the use of the words "computing" and "computed" indicates that section 811(d) applies only to tax reserves, because statutory reserves are not "computed," but are simply imported directly from the insurance company's annual statement. Principal responds that while the components of the statutory reserves may be taken without modification from the company's annual statement, the various components of the statutory reserves must be aggregated to produce a single amount of statutory reserves, which involves "computing" of a sort and thus makes section 811(d) applicable by its terms to statutory reserves as well as to tax reserves.

We conclude that the language of the statute is ambiguous on this point. The term "computed" could be read broadly enough to include aggregation, but the context does not compel such a broad reading. Section 809(b)(4)(B) defines statutory reserves as "the aggregate amount set forth in the annual statement with respect to items described in section 807(c)," which includes various specific reserves and other obligated funds; tax reserves, on the other hand, are defined as "the aggregate of the items described in section 807(c) as determined for purposes of section 807." 26 U.S.C. § 809(b)(4)(B) (emphases added). The use of the term "determined" in the definition of tax reserves suggests computation, while the reference to the "amount set forth in the annual statement" in the definition of statutory reserves does not. The method of obtaining the two numbers underscores this difference: the numbers for the items making up the statutory reserves are taken from the company's annual report without adjustment, while the numbers for the items making up the tax reserves must be calculated afresh in light of the rules set forth in section 807. Moreover, the subsection of section 807 referred to in the emphasized portion of the definition of tax reserves (subsection 807(d)) is entitled "Method of computing reserves for purposes of determining income," which parallels the language used in the definition of tax reserves. The phrase "computing the reserves" in section 811(d) therefore appears most naturally to refer to the reserves computed by the formulas in section 807(d), which are tax reserves, not statutory reserves.

For those reasons, it is reasonable to conclude that the reference in section 811(d) to the reserves that are "computed" applies to tax reserves only, not to both tax reserves and statutory reserves. More telling than the language of section

811(d), however, is the statutory context in which it appears, which provides substantial support for the government's position.

B

1

In examining the statutory context in which section 811(d) appears, we look first at the second sentence of section 809(b)(4)(B)(i), which provides that statutory reserves "shall not include any reserve attributable to a deferred and uncollected premium if the establishment of such reserve is not permitted under section 811(c)." Section 811(c) forbids establishment of a reserve for items not included in a mutual company's income. The definition of statutory reserves does not, however, include any similar proviso excluding the reserves for excess interest guaranteed beyond the end of the year, which is the subject of section 811(d). Because Congress expressly included a reference to section 811(c) in the definition of statutory reserves, it seems likely that if Congress had intended for section 811(d) to apply to statutory reserves, it would have stated so directly.

2

Another provision of the statute, the so-called "transitional rule" set forth in 809(g)(6), also supports the government's construction of section 811(d). The transitional rule exempts mutual life insurance company subsidiaries from section 811(d) for purposes of section 809(b)(4) for life insurance policies issued before January 1, 1985.

The transitional rule is understandable if the normal rule is that reserves for excess interest guaranteed beyond the end of the taxable year are included in statutory reserves but excluded from tax reserves by operation of section 811(d). In normal operation, section 811(d) would create a larger excess of statutory reserves over tax reserves, which would increase the mutual company's average equity base, thus decreasing the company's policyholder dividends deduction. By exempting certain contracts from the normal operation of section 811(d), the transitional rule allows a mutual company to add reserves related to excess interest guaranteed after the end of the current taxable year to its tax reserves, thus ensuring that no excess of statutory reserves over tax reserves is created, and thereby preserving the mutual company's policyholder dividend deduction.

The legislative history of the 1984 Act provides support for this construction of the transition rule. In reports prepared contemporaneously with the consideration and enactment of the 1984 statute, both the Joint Committee on Taxation and the Senate Committee on Finance described the special transition rule and its effect on the calculation of the average equity base for mutual companies as follows:

> For purposes of determining the excess of statutory policy reserves over tax reserves, the [subsidiary's] tax reserves may be computed without regard to the accounting rule [section 811(d)] that prohibits a company from taking into account amounts in the nature of interest that are in excess of the prevailing State assumed interest rate and guaranteed beyond the end of the taxable year ....

Joint Comm. on Taxation, 98th Cong., General Explanation of the Revenue Provisions for the Deficit Reduction Act of 1984, at 615 n.31 (Jt. Comm. Print 1984) ("General Explanation"); S. Prt. No. 98-169, vol. 1 at 551 n.17 (1984). That characterization of the operation of the transition rule clearly reflects an understanding that the normal operation of section 811(d) would require companies to subtract reserves for excess interest guaranteed beyond the end of the taxable year from tax reserves, but not from statutory reserves.

By contrast, Principal's construction of section 811(d) would render section 809(g)(6) mere surplusage. According to Principal, reserves for excess interest are never taken into account in determining either tax reserves or statutory reserves. If

that were true, however, there would be no need for a transitional rule that, in certain circumstances, gives the taxpayer the benefit of precluding the operation of section 811(d) with respect to reserves for excess interest guaranteed beyond the end of the taxable year. Accordingly, the interpretation of section 809(g)(6) that gives effect to the provision and is consistent with Congress's intentions supports the government's construction of section 811(d).

3

Another subsection of section 809, section 809(b)(6), provides further support for the government's construction of section 811(d). Section 809(b)(6) provides that in calculating a mutual insurance company's equity base, "[t]he amount of surplus and capital shall be increased by 50 percent of the amount of any provision for policyholder dividends (or other similar liability) payable in the following taxable year." The legislative history of section 808(b) explains that if, for example, a mutual company sets up a provision on its annual statement for excess interest to be distributed in the year following the taxable year, and it does not adjust for that provision in restating annual statement reserves to tax reserves, 50 percent of the amount set aside will be included in the company's equity base. General Explanation at 617; S. Prt. No. 98-169, vol. 1 at 551; H.R. Rep. No. 98-432, at 1424 (1984).

Principal acknowledges that 50 percent of such amounts set aside for paying excess interest in the following year would have to be added to the company's equity base, but contends that amounts set aside for paying excess interest in any subsequent years would not be includible in the company's equity base at all. That contention, however, is inconsistent with the legislative history of section 809(b)(6), which makes clear that 100 percent of such funds for subsequent years must be included in the company's equity base. See General Explanation at 616–17. Moreover, as the trial court pointed out, it is difficult to imagine why Congress would have wanted to treat as company equity 50 percent of the funds set aside for payment of obligations in the year following the taxable year, but not to treat as company equity any portion of the funds set aside for payment of such obligations in subsequent years.

The premise of Principal's argument that section 811(d) excludes all reserves for excess interest from both statutory reserves and tax reserves is that excess interest reserves are a fixed liability and should not be treated as part of the company's equity. That premise, however, is at odds with the operation of section 809(b)(6), as described above. As explained by the Joint Committee on Taxation, Congress chose to include 50 percent of the payments covered by section 809(b)(6) (including excess interest reserves in certain circumstances) in the company's equity base because it regarded only 50 percent of the section 809(b)(6) funds as "fairly allocable as a liability in the current year." General Explanation at 617. It follows that Congress required all of the funds set aside for payments in subsequent years to be included in company equity because it regarded those funds as not fairly allocable as a liability. Thus, from the operation of section 809(b)(6), it appears that Congress did not share Principal's view that excess interest reserves must be regarded as fixed liabilities that should not be included in the company's equity base, and therefore should not be reflected in the difference between statutory reserves and tax reserves.

Principal argues that the government's construction of section 809(b)(6) would result in double counting of excess interest added to the company's equity base, first through the addition of 50 percent of the following year's policyholder dividends (which would include excess interest) and then through the addition of the difference between statutory and tax reserves (which would also include excess interest). The statute, however, contains an express prohibition against double counting in calcu-

lating the equity base. 26 U.S.C. § 809(b)(2) (''No item shall be taken into account more than once in determining equity base.''). The government disclaims any intention of requiring double counting of the same excess interest reserves, and as is suggested in the legislative history, the double counting problem can be avoided if the taxpayer adjusts for its excess interest reserves ''in restating annual statement reserves to tax reserves.'' S. Prt. No. 98-169, vol. 1 at 551 (1984); H.R. Rep. No. 98-432 at 1424; General Explanation at 617. What is important for present purposes, however, is that section 809(b)(6) indicates that the 1984 Act did not treat funds set aside for the payment of excess interest as fixed liabilities that should be wholly excluded from the company's equity base. That subsection therefore supports the construction of section 811(d) adopted by the trial court.

C

Relying on the decision of our predecessor court in United American Insurance Co. v. United States, 475 F.2d 612 [31 AFTR 2d 73-1037] (Ct. Cl. 1973), Principal contends that the answer to the statutory construction issue in this case is dictated by the language of section 811(d) that states that it applies ''[f]or purposes of this part,'' i.e., for purposes of Part I of Subchapter L of the Internal Revenue Code, which consists of sections 801 through 818 of the Code. We do not find Principal's reliance on this point at all persuasive. There is no doubt that section 811(d) applies to all of Part I of Sub-chapter L of the Code, but that does not advance Principal's argument. The dispositive question remains whether the reference in section 811(d) to ''reserves'' that are ''computed'' was meant to include statutory reserves as well as tax reserves, as Principal contends, or to be limited to tax reserves, as the trial court found. On that issue, Principal's contention that section 811(d) applies to all of Part I of Sub-chapter L, although indisputably correct, does not in any way advance its argument.

The United American Insurance Co. case is of no help to Principal. The issue in that case was whether a deduction applicable to certain contracts issued or renewed for periods of five years or more under section 809(d)(5) of the Internal Revenue Code was applicable to guaranteed renewable health and accident policies. In ruling in favor of the taxpayer, the court relied in part on section 801(e) of the Internal Revenue Code, which at that time provided that ''[f]or purposes of this part, guaranteed renewable life, health, and accident insurance shall be treated in the same manner as noncancelable life, health, and accident insurance.'' Because that statutory provision contained no exception for section 809(d)(5), the court held that the company's guaranteed renewable policies were entitled to the same favorable treatment under that section as noncancelable policies.

This case has almost nothing in common with United American Insurance Co. While there is no question that the accounting rule of section 811(d) is to be applied to all portions of Part I of Subchapter L (except for section 816, for which there is an explicit statutory exception), the conclusion that section 811(d) applies across the entire range of sections 801 through 818 does not answer, or even address, the question how section 811(d) should be construed. Because the evidence available to us indicates that the term ''reserves'' in section 811(d) must be construed to refer only to tax reserves and not to statutory reserves, the fact that section 811(d), as so construed, applies throughout Part I of Subchapter L does not provide any support for Principal's argument.

III

For the reasons set forth above, we conclude that Principal has not shown that the trial court's construction of section 811(d) is incorrect. We therefore sustain the trial

court's ruling denying Principal's refund claims.

AFFIRMED.

¶2002-5007

Leland D. PETERSON, PLAINTIFF v. Charles O. ROSSOTTI, Commissioner, Internal Revenue Service, Department of Treasury, DEFENDANT. U.S. District Court, Eastern Dist. of Virginia, (DC VA) No. Civ.2:02CV54, April 19, 2002. Decision for Govt.

1. Actions against IRS—Declaratory Judgment and Anti-Injunction Acts. Pro se taxpayer's complaint to order IRS to "void requirement that tax-exempt interest be included in Social Security Worksheet items of gross income" was dismissed for lack of jurisdiction: complaint, which was actually request for declaration on how to interpret IRC §86 and restrain assessment, was barred by DJA and AIA. *Reference:* United States Tax Reporter ¶74,217.502(5); 74,215.05(5). IRC §7421.

United States District Court, Eastern Dist. of Virginia.

Order to Dismiss Action

MORGAN, District Judge:

This matter comes before the Court on the Defendant's Motion to Dismiss. On January 30, 2002, the Plaintiff, proceeding pro se, filed a complaint, titled "The Law on Tax-Exempt Interest and IRS Contradictions" against the Defendant. In this matter, the Plaintiff is seeking an order from the Court declaring that tax exempt interest should not be included for purposes of determining whether a portion of taxpayer's social security benefits are included in gross income. The Plaintiff asks the Court "to order the IRS to void the requirement that line 8b of Form 1040 be included in line 3 of the Social Security Work-sheet items of gross income." Complaint at "CONCLUSION." On April 1, 2002, the Defendant filed the present motion, claiming that under 28 U.S.C. § 2201 ("the Declaratory Judgment Act"), the Court lacks Subject Matter Jurisdiction over this matter, that the Plaintiff's complaint is barred by 26 U.S.C. § 7421 ("the Anti-Injunction Act"), and that the government has not waived its sovereign immunity in this matter. For the reasons explained below, the Court GRANTS Defendant's Motion to Dismiss.

Analysis

[1] The Declaratory Judgment Act provides that a federal district court may grant declaratory relief "[i]n a case or actual controversy within its jurisdiction, except with respect to Federal taxes." 28 U.S.C. § 2201 (emphasis added). Congress enacted this tax exception to prevent the use of the Act as a means of avoiding the established principle that a taxpayer must pay the assessment before he may challenge it. Flora v. United States, 362 U.S. 145, 163–64 [5 AFTR 2d 1046] (1960). A controversy is "with respect to" federal taxes if it calls into "question a specific provision of the Internal Revenue Code, or . . . a ruling or regulation issued under the Code." McCarthy v. Marshall, 723 F.2d 1034, 1037 (1st Cir.1983).

The Anti-Injunction Act operates in conjunction with the Declaratory Judgment Act to limit actions by taxpayer contesting assessments in federal district court to actions seeking refunds. See Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 [9 AFTR 2d 1594] (1962). The Anti-Injunction Act provides that, with certain exceptions not relevant here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421. The Anti-Injunction Act is "equally applicable to activities which are intended or may culminate in the assessment or collection of taxes." Dickens v. United States, 671 F.2d 969, 971 [49 AFTR 2d 82-1238] (6th Cir.1982). This Act is designed to allow the administrative process

by which taxes are determined, assessed, and collected to proceed "without judicial intervention, ... the legal right to dispute sums [is to] be determined in a suit for refund." Williams Packing, 370 U.S. at 7. The object of the Anti-Injunction Act is to "withdraw jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes." Id. at 5.[1]

In the case at bar, the Plaintiff requests the Court "to order the IRS to void the requirement that the line 8b of Form 1040 be included in line 3 of the Social Security Worksheet of gross income." Complaint at "CONCLUSION." This is a request for declaratory judgment on how Section 86 of the Internal Revenue Code should be interpreted, relief that is barred by the tax exemption to the Declaratory Judgment Act. The relief requested by the Plaintiff would also have the practical effect of an injunction, as it would restrain the IRS from computing tax liabilities and assessing them as it currently does. Thus, the Plaintiff's complaint is barred by the Anti-Injunction Act.

Therefore, the Court FINDS that the Court currently lacks subject matter jurisdiction over the filed claims. Accordingly, the Defendant's Motion to Dismiss is GRANTED.

Plaintiff is ADVISED that he may appeal from this final order by forwarding a written notice of appeal to the Clerk of the United States District Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510. Said written notice of appeal must be received by the Clerk within thirty (30) days from the date of this order.

The Clerk is REQUESTED to send a copy of this order to the Plaintiff and to all counsel of record.

It is so ORDERED.

2002 WL 1277951 (E.D.Va.), 2002-1 USTC P 50,407

¶2002-5008

Sharocco CLARK, PLAINTIFF v. UNITED STATES of America, DEFENDANT. U.S. District Court, Northern Dist. of Indiana, (DC IN) No. 3:01cv0723AS, June 5, 2002. Year 1998. Decision for Govt. in part.

1. Actions against U.S.—damages—unauthorized collection—replacement refunds—Federal Tort Claims Act. Govt.'s motion for jurisdictional dismissal of pro se taxpayer's complaint for replacement refund check and damages was granted in part: replacement claim was premature where Financial Management Service hadn't investigated taxpayer's qualification under 31 USC §3343; and, although entitled to amend his tort claim, such still failed under FTCA's jurisdictional bar against tax-related tort claims. Also, IRC §7433's damages provision didn't apply to complaint grounded in Title 31; but, because damages claim wasn't jurisdictionally barred, it remained, subject to dismissal under F.R.Civ.P.12(b)(6), 12(c), or 56 motion. *Reference:* United States Tax Reporter ¶76,557.53(12); 74,335.01(7); 74,025.01(3). IRC §7402; 7433.

United States District Court, Northern District of Indiana, South Bend Division.

[1] The Supreme Court has created a narrow exception to these statutory bars. To qualify for the exception, the aggrieved party must show that (1) the government could under no circumstances prevail, and (2) equity jurisdiction otherwise exists, due to a threat of irreparable injury for which plaintiff has no adequate legal remedy. California v. Regan, 641 F.2d 721, 723 [47 AFTR 2d 81-1363] (9th Cir.1981), citing Williams Packing, 370 U.S. at 6–7 and Bob Jones University v. Simon, 416 U.S. 725, 745 [33 AFTR 2d 74-1279] (1974). A showing of irreparable harm is not enough to grant an injunction; the focus should be on whether the government's actions have any chance of success on the merits. Williams Packing, 370 U.S. at 6–7; See also Martin v. Andrews, 238 F.2d 552, 556 [50 AFTR 736] (9th Cir.1956) (stating that, "an allegation that collection of a tax ... threatens destruction of the taxpayer's business or estate fails to state extraordinary and exceptional circumstances sufficient to permit maintenance of such a suit.") The Plaintiff does not meet either prong of the Williams Packing exception, Section 86 of the Internal Revenue Code requires that tax exempt interest be included in determining the taxable amount of an individual's social security benefit, 26 U.S.C. § 86, despite the Plaintiff's claim that this is done "contrary to law." Complaint at p. 3. Thus, the Plaintiff has not shown that there are no circumstances under which the United States can prevail. Further, the Plaintiff has not claimed that he will suffer an irreparable injury if his complaint is dismissed. Moreover, the Plaintiff has an adequate remedy by paying the tax and filing a claim for a refund. In fact, the Plaintiff, in his complaint, alleges that he has recently filed a claim for refund and the IRS is currently reviewing his claim. Complaint at Note A.

Memorandum and Order

SHARP, District Judge:

This matter is before the court on the Defendant United States' motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Alternatively, the Plaintiff Sharocco Clark has moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The above motions have been fully briefed by the parties. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331; 1346.

I. BACKGROUND

The claims filed by Mr. Clark arise out of the issuance of his 1998 tax refund check by the United States, which according to Clark was cashed by another family member. (Plaintiff's Compl. at p 9). Subsequently, Mr. Clark sought to have that refund check re-issued by the United States based upon his assertion that it was forged by the family member. (Id.). Mr. Clark has alleged that the United States engaged in certain wrongful acts and has sought relief for those actions pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq and certain other federal statutes as discussed below. A close examination of the original complaint reveals that Clark seeks relief in several forms: 1) the issuance of a refund pursuant to 26 U.S.C. § 7422; 2) a claim for civil damages resulting from the unauthorized collection actions pursuant to 26 U.S.C. § 7433; and 3) a general claim for the wrongful acts alleged to have been committed by the United States under 28 U.S.C. § 2674.

On April 25, 2002, Clark filed his petition to amend his notice of tort claim. (See Plaintiff's Petition to Amend Notice of Tort Claim). That particular pleading sought to further clarify his claim for relief. That particular petition, which the court will treat as a motion to amend the complaint pursuant to Federal Rule 15, is now GRANTED. In his amended notice of tort claim Clark seeks to further bolster his claim pursuant to Section 7433 of Title 26 by demonstrating that the Internal Revenue Service intentionally disregarded certain statutory provisions. (See P's Amend. Tort Claim at pp 3–4). The amended petition also sought to increase his claim for damages by $10,000. (Id.)

The United States in responding to Clark's motion for summary judgment and in further support of its motion to dismiss has characterized Clark's claims as a claim for refund and for "tortious injury caused by the wrongful acts of the Internal Revenue Service." (See Defendant's Combined Reply Memorandum at p. 3). It is the position of the United States that this court lacks jurisdiction to entertain those claims and in the alternative that those claims are claims upon which relief could not be granted.[1]

Finally, it should be noted that in Clark's petition to amend his tort notice an exhibit was attached that indicated that an investigation was under way to determine whether a replacement check should be issued pursuant to 31 U.S.C. § 3343. (See P's Amend Tort Claim, Ex. H).

III. DISCUSSION

[1] The Plaintiff's characterization of his claims against the United States have varied somewhat throughout this proceeding. The court commends the Assistant United States Attorney on his briefs in the matter to help clarify the issues and for his efforts in attempting to determine whether a new refund check should be issued. The thrust of this case centers around whether or not the United States should have issued a refund check to Clark based upon his claim that a family member had forged his named and cashed the check. In construing this particular claim, as well as his remaining claims, the court must take into account Clark's status as a pro se litigant. Haines v. Kerner, 404 U.S. 519, 520, 92

[1] The United States has not filed a motion to dismiss pursuant to Rule 12(b)(6) nor has it filed a motion pursuant to Rule 56. Therefore, the court cannot properly rule at this time upon the argument that the Plaintiff has failed to state a claim upon which relief can be granted.

S.Ct. 594, 30 L.Ed.2d 652 (1972) (per curiam).

Congress has established a clear plan of recovery for those individuals whose United States Treasury check has been either stolen or lost without any fault by the claimant. See 31 U.S.C. § 3343. In order to recover Clark must demonstrate that: (1) the check was lost or stolen without fault of the payee; (2) the check was negotiated and paid on a forged endorsement of the payee's name; (3) the payee did not participate in any part of the proceeds of the negotiation; and (4) recovery from the forger on the check after the forgery has been or may be delayed or unsuccessful. 31 U.S.C. sec. 3343(b); See also Strann v. United States, 2 Cl.Ct. 782 (1983). It appears that Clark also attempts to make a claim for a tax refund in his complaint. However, the court finds based upon the record at this point that Clark's claim is not a claim for refund but rather a claim for a replacement check.[2] The procedural posture of this case dictates that this particular claim for the re-issuance of the refund check be dismissed without prejudice to allow the Financial Management Service the opportunity to determine whether a replacement check should be issued before any claim can proceed against the United States based upon the failure to issue a replacement check.

Next, Clark contends that the United States, in particular the Internal Revenue Service, has engaged in various tortious acts in refusing to replace his refund check. His theory for recovery is based upon the FTCA and Section 7433 of Title 26.

The FTCA provides the basis to bring a tort claim against the United States. See 28 U.S.C. §§ 1346(b); 2671 et seq. 28 U.S.C. § 2680(c) provides that claims "arising in respect of the assessment or collection of.. tax[es]" are not subject to the FTCA's waiver of sovereign immunity. Aetna Cas. & Sur. Co. v. U.S., 71 F.3d 475, 477 [76 AFTR 2d 95-7853] (2nd Cir.1995). In Aetna, the court rejected the argument that the payment of a refund did not fall within the definition of a claim for the assessment or collection of taxes. Aetna Cas. & Sur. Co., 71 F.3d at 478 (citing numerous cases). Therefore, the court finds that any claim based upon the FTCA with respect to the payment of refunds is barred under Section 2680(c) and as such those claims are dismissed pursuant to the United States' motion to dismiss pursuant to Rule 12(b)(1).

Next, Clark asserts, attempting to bypass the sovereign immunity pitfall, that the United States is liable for damages under 26 U.S.C. § 7433 (West 2001). Section 7433 provides for civil damages "[i]f, in connection with any collection of Federal tax ... the Internal Revenue Service recklessly or intentionally, or by reason of negligence disregards any provision of this title or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States." 26 U.S.C. § 7433

In light of the exception to the United States immunity from suit created under section 7433, this court must construe claims based upon an alleged unauthorized collection action narrowly. See Shaw v. United States, 20 F.3d 182 [73 AFTR 2d 94-1998] (5th Cir.), cert. denied, 513 U.S. 1041, 115 S.Ct. 635, 130 L.Ed.2d 540 (1994)(claim for damages based upon an

[2] The Fifth Circuit in Your Ins. Needs Agency Inc. v. U.S., 274 F.3d 1001 [88 AFTR 2d 2001-7108] (5th Cir.2001) discussed the above procedures in seeking such a replacement check and whether such a claim was a claim for a refund or merely claim for a replacement check. The court noted that because the one year period prescribed by 31 U.S.C. § 3702(c)(1) had passed the only issue that remained was whether the claim could be couched as a claim for a refund under 26 U.S.C. § 7422(a). 274 F.3d at 1005. The Fifth Circuit determined that when the Government issues a timely refund check and mailed the check to the address on the return it has fulfilled its obligations under the Internal Revenue Service regulations. Id. at 1006. Thus, no refund for any tax overpayment remained owing despite the fact that the checks were stolen and forged. Id. Here Clark has not asserted in his complaint that the Government did not issue a refund check to the address listed on his tax return. Exhibit F attached to his tort claim notice lists a Lafayette, Indiana address as the mailing address for the refund check in question. Clark does not refute in any of his submissions that this in fact was not the mailing address on his 1998 tax return. Rather, much like Your Ins. Needs Agency Inc., his claim is that the check was negotiated by a family member without his permission. (P's Notice of Tort Claim at p 9).

erroneous assessment did not fall within the concept of improper collection practices); see also Allied/Royal Parking v. United States, 166 F.3d 1000, 1003 [83 AFTR 2d 99-806] (9th Cir.1999) (waiver of sovereign immunity in § 7433 must be construed narrowly). As stated previously, Clark's claim is for a replacement check under 31 U.S.C. § 3343 and therefore his claim does not arise under Title 26 or the accompanying regulations of the Internal Revenue Code. On this basis alone any claim under section 7433 must be denied upon the submissions thus far under the clear statutory language which provides that damages must be based upon "any provision of this title, or any regulation promulgated under this title." See 26 U.S.C. § 7433. A close examination of Clark's tort claim notice and his amended notice affirms this conclusion. Paragraphs 11,12,13 and 14 deal directly with his inability to receive a replacement check under Title 31 Section 3343. (See P's Tort Claim Notice). Moreover, his amended tort claim notice reconfirms this position "plaintiff's complaint is grounded in 31 U.S.C. 3343, 31 U.S.C. 3712, 31 U.S.C. 3331, and the IRS intentionally disregarded these statutory provisions." (Amend Tort Claim Notice at p 3(c). Simply put, Clark has failed to point to a single provision of Title 26 or any of its accompanying regulations that the Internal Revenue Service disregarded.

Notwithstanding the above discussion, the court cannot dismiss the claim under Section 7433 based upon the present motion to dismiss. That motion is based upon this court's lack of subject matter jurisdiction. Under section 7433, the statutory language clearly provides that this court does have jurisdiction over such a claim. See 26 U.S.C. § 7433(a). Therefore, a claim under Section 7433 must be disposed under either a Rule 12(b)(6), Rule 12(c) or Rule 56 motion.

The Seventh Circuit has repeatedly cautioned the district courts to tread carefully in dismissing claims sua sponte. Frey v. Environmental Protection Agency, 270 F.3d 1129, 1132 (7th Cir.2001); Joyce v. Joyce, 975 F.2d 379, 386 (7th Cir.1992); see also Shockley v. Jones, 823 F.2d 1068 (7th Cir.1987). Therefore, the court will afford the United States the opportunity to file a dispositive motion consistent with this opinion and with the appropriate pro se notifications under Timms v. Frank, 953 F.2d 281, 286 (7th Cir.1992).

IV. CONCLUSION

For the foregoing reasons the Plaintiff's claim pursuant to 31 U.S.C. § 3343 is DISMISSED for failure to exhaust his administrative remedy, Plaintiff's claim pursuant to the Federal Tort Claims Act; 28 U.S.C. §§ 1346(b); 2671 et seq is DISMISSED for lack of subject matter jurisdiction. Therefore, the Plaintiff's claim pursuant to 26 U.S.C. § 7433 remains. IT IS SO ORDERED.

¶2002-5009

UNITED STATES OF AMERICA, PLAINTIFF v. BANK OF HAWAII, DEFENDANT. U.S. District Court, Dist. of Hawaii, (DC HI) No. Civ.01-00460HGBMK, April 2, 2002. Decision against Govt.

1. Payment of trust fund taxes—lien priority—summary judgment. 3d-party bank was granted summary judgment on its right to retain bankrupt taxpayer's suspense and deposit account funds over govt.'s objection: govt.'s claims that funds were impressed with tax trust or designated as trust fund assets, or that payroll taxes were placed in subject accounts, weren't supported; and bank's conditional and unaccepted agreement to pay taxpayer's withholding tax debts wasn't dispositive. Also, suspense account, by virtue of its subjection to bank's perfected security interest and non-control by taxpayer, couldn't be used to create res for tax trust fund; and under traditional priority rules, bank's previously perfected security interest and set-

off right took priority over govt.'s later tax lien. *Reference:* United States Tax Reporter ¶75,015.01(5); 63,215.04(135). IRC §6321; 7501.

United States District Court, District of Hawaii.

Order Granting Summary Judgment in Favor of Defendant Bank of Hawaii

GILLMOR, District Judge:

Plaintiff United States of America brings this action to recover funds held by Defendant Bank of Hawaii. The United States claims the funds are subject to a statutory trust in its favor for unpaid withholding tax liability.

Bank of Hawaii claims a superior interest in the funds, which it asserts were never designated to pay withholding tax liability.

Through the instant motion to dismiss or for summary judgment, Bank of Hawaii claims the United States will be unable to prove its claim at trial.

Because the United States has failed to demonstrate there is a genuine issue of material fact, Bank of Hawaii is entitled to summary judgment.

FACTUAL BACKGROUND

Oahu Construction Company, Inc. (''Oahu Construction'') was obligated to Bank of Hawaii under a revolving credit line agreement and a term Joan agreement. (Affidavit of Heather Piper (''Piper Affidavit'') at par. 5 to 9, attached to Motion filed August 30, 2001.)

The amounts owed under the agreements and related promissory notes were secured by collateral, including contract rights, owned by Oahu Construction. (See security agreement, attached as Exhibit 6 to Piper Affidavit; see also Piper Affidavit at par. 15)

In December 1998, Oahu Construction was experiencing financial difficulties. (See Transcript of November 29, 2001, Deposition of Heather Piper at 9, attached as Exhibit B to Declaration of Keith S. Blair, attached to Opposition filed January 15, 2002.)

In February 1999, Bank of Hawaii sent notices to entities having contracts with Oahu Construction, advising them that Bank of Hawaii had a security interest in the payments owed (Piper Affidavit at par. 16 and 17.)

In the notices, Bank of Hawaii asked that checks payable to Oahu Construction be sent directly to Bank of Hawaii. (Piper Affidavit at par. 17 and 18.)

In response to these letters, Bank of Hawaii received a check in the amount of $64,000 and another in the amount of $126,649.52 on August 30, 1999. (Piper Affidavit at 20.)

Bank of Hawaii deposited these checks into a suspense account, which was not under the control of Oahu Construction. (Id).

Oahu Construction also had a general checking account at Bank of Hawaii. As of September 1, 1999, Oahu Construction held $55,194.34 in the general checking account. (Piper Affidavit at par. 21.)

In September 1999, Bank of Hawaii and Oahu Construction attempted to reach an agreement whereby Oahu Construction's assets would be liquidated by a receiver in an orderly fashion. (Affidavit of Katherine G. Leonard (''Leonard Affidavit dtd. 8/30/01'') at par. 3–8, attached to Motion filed August 30, 2001.)

The parties were unable to reach an agreement. (Id.) As a result, Bank of Hawaii, on September 9, 1999, applied the monies that had been in the deposit account and in the suspense account to pay debts owed to it by Oahu Construction. (Piper Affidavit at par. 23.)

Oahu Construction filed for bankruptcy protection later that same day. (See Bankruptcy Petition, attached as Exhibit 17 to Leonard Affidavit dtd. 8/30/01.)

During the bankruptcy, the United States claimed that Oahu Construction owed $243,125.82 for unpaid FICA and withholding taxes. (See Internal Revenue Service Proof of Claim, attached as Exhibit 20 to Leonard Affidavit dtd. 8/30/01.)

PROCEDURAL HISTORY

On December 21, 2000, the Bankruptcy Court issued its Order Granting [the United States'] Motion for Relief from the Automatic Stay to Proceed Against Bank of Hawaii. (See Order, attached as Exhibit 19 to Leonard Affidavit dtd. 8/30/01.)

The United States filed its Complaint against Bank of Hawaii on July 10, 2001.

In response, Bank of Hawaii filed its Motion to Dismiss Complaint or in the Alternative, for Summary Judgment (the "Motion"), and separate Concise Statement on August 30, 2001.

The United States filed its Opposition to the Motion and "Statement of Material Facts In Opposition to Bank of Hawaii's Motion" on January 15, 2002.[1]

Bank of Hawaii filed a reply and a Supplemental Concise Statement on January 31, 2002.

LEGAL STANDARD

A. Motion to Dismiss

A motion to dismiss will be granted where the plaintiff fails to state a claim upon which relief may be granted. See Fed.R.Civ.P. 12(b)(6). A complaint should not be dismissed unless it appears to a certainty that plaintiff can prove no set of facts which would entitle the plaintiff to relief. See Neitzke v. Williams, 490 U.S. 319, 326–27 (1989); Fidelity Fin. Corp. v. Federal Home Loan Bank, 792 F.2d 1432, 1435 (9th Cir.1986), cert. denied, 479 U.S. 1064 (1987).

B. Summary Judgment

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party has the initial burden of "identifying for the court the portions of the materials on file [in the case] that it believes demonstrate the absence of any genuine issue of material fact." T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)).

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment without significant probative evidence tending to support its legal theory. Commodity Futures Trading Comm'n v. Savage, 611 F.2d 270, 282 (9th Cir.1979). The court must view the facts in the light most favorable to the non-moving party (State Farm Fire & Casualty Co. v. Martin, 872 F.2d 319, 320 (9th Cir.1989)). The opposing party cannot stand on its pleadings, nor can it simply assert that it will be able to discredit the movant's evidence at trial. See T.W. Elec. Serv., 809 F.2d at 630; Fed.R.Civ.P. 56(e).

ANALYSIS

I. THE COURT WILL TREAT THE MOTION AS ONE FOR SUMMARY JUDGMENT.

Bank of Hawaii filed its motion under both Fed.R.Civ.P. 12(b)(6) and Fed.R.Civ.P. 56. "Whenever a district court looks beyond the pleadings in evaluating a Rule 12(b)(6) motion to dismiss, the motion must be treated as one for summary judgment under Rule 56." Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1532 (9th Cir.1985).

Because the Court found it necessary to consider the affidavits and exhibits submitted by the parties, the Court treats Bank of

[1] The United States failed to comply with Local Rule 56.1, which requires the opposing party to address each statement of undisputed material fact contained in the moving party's Concise Statement. Under Local Rule 56.1(g), material facts set forth in the movant's concise statement are deemed admitted unless controverted by an opposing concise statement. During the hearing, the United States was allowed to clarify its position with respect to the facts.

Hawaii's Motion as a motion for summary judgment. See Grove, 753 F.2d at 1532.

At the hearing, the parties were informed that the Court would treat Bank of Hawaii's Motion as a motion for summary judgment. There was no objection.

II. BANK OF HAWAII IS ENTITLED TO SUMMARY JUDGMENT

A. Legal principles.

[1] The concept of a "tax trust" being placed on certain funds was discussed in the seminal case of Begier v. I.R.S., 496 U.S. 53 [65 AFTR 2d 90-1095] (1990). Begier involved interpretation of 26 U.S.C. § 7501, which creates a "tax trust fund" in favor of the US:

> Whenever any person is required to collect or withhold any internal revenue tax from any other person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States.

26 U.S.C. 7501(a). In Begier, a taxpayer paid withholding taxes to the IRS from funds contained in both an account established for withholding taxes and a general account. The taxpayer later filed for bankruptcy protection, and the trustee sought to recover the payments made to the IRS as a preferential payment of "property of the estate." Begier 496 U.S. at 57.

As property of the estate does not include a trust beneficiary's interest in trust assets, the payment would not be a preferential transfer if it had been made from "trust assets." Although Section 7501 creates a trust when wages are paid, "that section provides no rule by which we can decide whether the assets ... belong[ ] to that trust." Id. at 62. The issue is not whether a tax trust fund was created when an employee was paid, but whether the funds at issue were the "res" of that trust. Id.

The Supreme Court held that the IRS is only required to show "some connection" between the amount held in trust under Section 7501 and the assets at issue. Id. at 65–66 (emphasis in original). In determining the sufficiency of the nexus, the courts should use "reasonable assumptions." Id. at 67.

The Supreme Court held that one such reasonable assumption is that "any voluntary prepetition payment of trust-fund taxes out of the debtor's assets is not a transfer of the debtor's property" (because the assets, at that point, have been sufficiently identified as trust fund assets). Id. at 67. Payment provides a sufficient nexus between the tax trust and the funds.

Payment, however, is merely one method of identifying the trust fund "res." See In re Megafoods Stores, Inc., 163 F.3d 1063, 1069 (9th Cir.1998) ("voluntary one method of identifying tax trust funds.") The determinative factor is whether the taxpayer has sufficiently identified particular assets as belonging to the tax trust:

> It is clear from the statutory scheme that the taxpayer has the power to identify which portion of its assets constitutes the trust fund; indeed, 26 U.S.C. § 7512 permits the Government to compel such identification where it has not been made.

Begier 496 U.S. at 71 (Scalia, J., concurring). See also In re Edison Bros., Inc., 268 B.R. 409, 414 (Bankr.D.Del.2001). ("Unlike the Begier case, the Debtors did not voluntarily pay ... the funds it had available ... nor did the Debtors otherwise designate them or identify them in any way as funds subject to [the] constructive trust claim.")

In In re Megafoods Stores, Inc., 210 B.R. 351 (B.A.P. 9th Cir.1997), aff'd. in part, vacated in part, 163 F.3d 1063 (9th Cir.1998), the Ninth Circuit held that tracing could be used to identify tax trust funds. Although Megafoods involved a state sales tax, the state statute at issue created a "tax trust" in favor of the government for collected but unpaid taxes. Megafoods, 163 F.3d at 1067.

The sales taxes in Megafoods were actually collected at the point of sale and commingled into general accounts. Id. at 1065. The taxpayers failed to pay these funds to the IRS, and later filed for bankruptcy protection. Id.

The State sought to recover the sales taxes from the bankruptcy estate. Id. The Ninth Circuit, relying on Begier, held that the government must show a connection between the tax trust and the particular funds at issue. Id. at 1068. To establish a nexus in a case where actual trust funds were commingled with other funds, the government could trace the trust funds by using the presumptions under the lowest intermediate balance test. Id. at 1067 and 1069; see also R & T Roofing Structures & Commercial Framing, Inc., v. Daniel 887 F.2d 981, 987 [64 AFTR 2d 89-5835] (9th Cir.1989) (where wrongdoer commingles funds, beneficiary is entitled to the lowest intermediate balance between the date of commingling and the date of payment).

In Megafoods, there was no dispute that the sales tax proceeds had been placed into the accounts. The lowest intermediate balance test could therefore be used to identify the trust fund assets from the other assets in the account.

B. The United States has not furnished any evidence that the suspense or deposit accounts were identified as the res for a tax trust.

The determinative issue in this case is whether funds in the suspense or deposit accounts were ever identified as the res for a tax trust under 26 U.S.C. § 7501. Because the United States has failed to present evidence with respect to this essential element of its claim, Bank of Hawaii is entitled to summary judgment.

During the hearing, the United States asserted that the funds in the accounts were impressed with a tax trust merely because Oahu Construction had a withholding tax liability when the funds were held by Bank of Hawaii.

This is not the law. Under Begier, the "res" of the tax trust must be identified by the taxpayer. Begier 496 U.S. at 66–67. Identification may be shown by payment or other reasonable assumption. Id. In cases where tax trust funds have already been identified but commingled with other funds, common law tracing doctrines may be used to isolate the trust funds. Megafoods, 163 F.3d at 1067 and 1069.

The United States has not provided affidavits or other evidence showing that the funds in the accounts were ever designated as tax trust fund assets. When asked when the funds in the suspense accounts were designated as tax trust fund assets, counsel for the United States was unable to identify any evidence in the record.

With respect to the deposit account, the United States similarly failed to present any evidence that a designation was made.

Without proof of a designation, the United States cannot establish the necessary nexus between the tax trust and the accounts. Begier 496 U.S. at 66–67.

Similarly, the United States cannot use the lowest intermediate balance test to trace the funds, Without proof that withheld payroll taxes were actually placed in the deposit or suspense account, there are no commingled trust funds to trace. Megafoods, 163 F.3d at 1067 and 1069.

C. The alleged agreement by Bank of Hawaii to pay Oahu Construction's withholding taxes does not defeat summary judgment.

Although the United States did not provide evidence that the funds in the suspense or deposit accounts were designated to pay Oahu Construction's withholding tax liability, the United States did offer evidence it claimed supported an agreement by Bank of Hawaii to pay the withholding tax liability.

In its Concise Statement, the United States includes a letter dated September 9, 1999 from Oahu Construction's attorney, Mr. Ted Pettit, to counsel for Bank of Hawaii. (See letter dated September 9, 1999, attached as Exhibit C to Declaration of Keith S. Blair.)

The letter was sent after Oahu Construction was notified of the set-off made by Bank of Hawaii. (See Supplemental Affidavit of Katherine G. Leonard ("Leonard Affidavit dtd. 1/31/02") at par. 5 and 6, attached to Reply dated January 31, 2002.)

In the letter, Mr. Pettit states that Bank of Hawaii confirmed on September 2, 1999, that it was holding $245,000 to pay withholding taxes.

The letter does not create a genuine issue of material fact.

As a threshold matter, Mr. Pettit's statements are hearsay, not subject to any exception. See United States v. Harrison-Philpot, 978 F.2d 1520, 1527 n. 5 (9th Cir.1992). The United States has not provided sworn testimony from Mr. Pettit or any other witness having personal knowledge of the letter or the alleged agreement.

Even if the letter were competent evidence to oppose a motion for summary judgment, the letter does not create a genuine issue of material fact.

The alleged agreement by Bank of Hawaii to pay withholding taxes was contingent on the parties agreeing to a stipulated receivership over Oahu Construction's assets. (Leonard Affidavit dtd. 8/30/01 at par. 7.)

Bank of Hawaii had proposed to pay the withholding taxes to ensure that the receiver would not face personal liability for the taxes. (Leonard Affidavit dtd. 8/30/01 at par. 7.)

In response to Bank of Hawaii's request, Oahu Construction's treasurer sent Bank of Hawaii a letter dated September 7, 1999, identifying the amount of $245,071.12 in unpaid federal and state withholding taxes. (Leonard Affidavit dtd. 8/30/01 at par. 4; see letter dated September 7, 1999, as Exhibit B to Complaint.)

By letter also dated September 7, 1999, Bank of Hawaii responded by requesting sworn statements from persons responsible for payroll at Oahu Construction. (Leonard Affidavit dtd. 8/30/01 at par. 5; see letter dated September 7, 1999, as Exhibit 14 to Leonard Affidavit dtd. 8/30/01.)

Bank of Hawaii also attached to its letter dated September 7, 1999, a draft stipulation to appoint a receiver. (See draft stipulation, attached as Exhibit 14 to Leonard Affidavit dtd. 8/30/01.)

In the same letter, Bank of Hawaii admonishes that "unless the Bank and Oahu [Construction] can reach a written agreement in principal by 3:00 p.m. [September 8, 1999], the bank reserves the right to proceed with its otherwise available rights and remedies . . . ." (See Exhibit 14 to Leonard Affidavit dtd. 8/30/01.)

The parties were unable to reach an agreement. (Leonard Affidavit dtd. 8/30/01 at par. 8; Piper Affidavit at par. 23).

Because the parties never agreed to a stipulated receivership. Bank of Hawaii never became obligated to pay the withholding taxes. Malani v. Clapp & Furuya, 542 P.2d 1265, 1267 (Haw.1975) (there must be mutual assent as to all essential terms to create a binding agreement.)

The United States has not provided any evidence to dispute the contingent nature of the agreement to pay the withholding taxes. The Pettit letter does not create a genuine issue of material fact.

D. The suspense account was subject to Bank of Hawaii's superior security interest.

Without respect to the suspense account, there is another basis for summary judgment: the suspense account could not have been impressed with a tax trust because it was subject to Bank of Hawaii's security interest.

It is undisputed that Bank of Hawaii had a perfected security interest in Oahu Construction's contract rights, accounts receivable, and proceeds. (Piper Affidavit at par. 16).

As part of its rights as a secured party, Bank of Hawaii reserved the right to have payments owed to Oahu Construction sent directly to Bank of Hawaii. (See security agreement dated October 31, 1991, at 11, attached as Exhibit 6 to Piper Affidavit.)

Bank of Hawaii sent notice to Oahu Construction's obligors, instructing them to send payments directly to Bank of Hawaii. (Piper Affidavit at par. 17.)

The checks received by Bank of Hawaii were deposited in an account controlled only by Bank of Hawaii. (Piper Affidavit at par. 20.)

Funds encumbered by a security interest are not available to pay withholding tax liability if the creditor has prevented the funds from being used for that purpose. Honey v. United States 963 F.2d 1083, 1090 [69 AFTR 2d 92-1333] (8th Cir.1992); see also Purcell v. United States 1 F.3d 932, 939 [72 AFTR 2d 93-5821] (9th Cir.1993) (noting that some courts have found funds unavailable for payment of tax trust fund liability even if subject to non-binding restrictions).

In this case, Bank of Hawaii had put the suspense account completely out of Oahu Construction's control. (Piper Affidavit at par. 20) Although check writing restrictions had not been placed on the deposit account, the suspense account was separate from the deposit account. (Id. at par. 20–21.) Oahu Construction had no possession or control over the suspense account. (Id. at par. 20.)

Because Oahu Construction did not have control over the suspense account, the funds could not have been used to create the res for a tax trust fund. See Honey 963 F.2d at 1090; Purcell 1 F.3d at 939.

E. Bank of Hawaii is entitled to judgment as a matter of law.

The United States sought relief based on an alleged tax trust under 26 U.S.C. § 7501. The United States did not assert that it had a paramount claim due to a tax lien or levy, or that Bank of Hawaii's actions were improper for reasons other than the impact on the alleged trust funds.

Bank of Hawaii has produced evidence that the United States will be unable to establish a tax trust over the deposit or suspense account. To avoid entry of summary judgment, the United States was required to produce evidence showing a genuine issue of material fact. See Celotex Corp., 477 U.S. at 324 (non-moving party must designate "specific facts showing that there is a genuine issue for trial.") Because the United States has failed to show that there are genuine issues of material fact, Bank of Hawaii is entitled to summary judgment as a matter of law.

The United States did not have a tax lien when Bank of Hawaii set-off the funds in the deposit and suspense accounts. In its proof of claim filed with the bankruptcy court, the United States represented that the withholding tax liability had not yet been assessed. (See Proof of Claim, attached as Exhibit A to Complaint.) Without an assessment, a tax lien cannot arise, 26 U.S.C. § 6322.

A perfected security interest is superior to a later arising tax lien. Slodov v. United States 436 U.S. 238, 256–57 [42 AFTR 2d 78-5011] (1978). Hawaii law also provides banks with a common law right of setoff. See American Sec. Bank v. Kaneshiro, 688 P.2d 254, 255 (Haw.1984). A bank exercising a right of setoff before a federal tax lien or levy arises is entitled to priority over the United States. See Peoples Nat. Bank of Washington v. United States 608 F.Supp. 672, 676–77 [55 AFTR 2d 85-589] (W.D.Wash.1984), aff'd. 777 F.2d 459 [57 AFTR 2d 86-344] (9th Cir.1985).

Under traditional rules of priority, Bank of Hawaii, as a secured party and bank exercising a right of set-off, has priority over the United States.

CONCLUSION

Based on the foregoing, summary judgment is HEREBY entered in favor of Bank of Hawaii on all claims.

IT IS SO ORDERED. 2002 WL 1277955 (D.Hawai'i), 2002-1 USTC P 50,405

¶2002-5010

William H. MURPHY, JR., PLAINTIFF v. COMPTROLLER OF THE TREASURY, ET AL., DEFENDANTS. U.S. District Court, Dist. of Maryland, (DC MD) Civil Action No. S-01-2032, June 6, 2002. Decision for Govt.

1. Lien priority—property subject to lien—lawsuit settlement—estate taxes. Magistrate judge granted govt. summary judgment on priority of its estate tax lien against *entire* proceeds of malpractice lawsuit settlement between estate's co-representative and estate's attorneys: co-representative's argument that portion of proceeds were attributable to his individual claims as primary beneficiary and thus his separate property and not subject to estate tax lien was rejected. Under Maryland law, co-representative didn't have standing to sue attorneys for malpractice in his primary beneficiary capacity where he failed to show he was intended 3d-party beneficiary of attorneys' services to estate, or that he had direct employment relationship with attorneys. *Reference:* United States Tax Reporter ¶63,215.02(17). USTR Estate & Gift Taxes ¶63,245.01(5). IRC §6321; 6324.

In the United States District Court for the District of Maryland.

Memorandum

GESNER, Magistrate Judge:

Plaintiff, William H. Murphy, Jr., brings this interpleader action against the United States and the State of Maryland to determine entitlement to funds resulting from the settlement of two lawsuits. (Paper No. 2). The case was referred to the undersigned for all proceedings with the consent of the parties. 28 U.S.C. § 636(c); Local Rule 301.4. Pending before the court are defendant United States' Motion for Summary Judgment, plaintiff;s Opposition, and defendant;s reply. (Paper Nos. 12, 16, 17). A hearing on the motion was held before this court on June 4, 2002. For the reasons set forth below, the court grants defendant United States' Motion for Summary Judgment.

I. Background

Plaintiff William Murphy (''Murphy'') filed this interpleader action to determine the superiority of claims to $130,460.20. This amount represents the settlement proceeds from two lawsuits brought by Murphy regarding legal services William A. Hackney. (''Hackney'') provided to the Estate of Virginia S. Murphy (''the Estate''), mother of Murphy. (Paper No. 2 at ¶ 8). Murphy sued Hackney, attorney for the Estate and its co-personal representative, and Fidelity National Insurance Company alleging that Hackney committed professional negligence by, inter alia, negligently valuing the Estate's assets and computing the Estate's tax liability, con-duct that resulted in a substantial assess-ment of taxes, penalties and interest against the Estate. (Paper No. 12; Exh. A

¶ 22).[1] Murphy and the United States each argue they have a superior claim to some or all of the settlement proceeds.

Murphy argues that he has a superior claim to a portion of the settlement proceeds because of the dual capacity in which he brought both underlying suits. Murphy was both primary beneficiary and co-personal representative of the Estate and brought each suit in this dual capacity: (1) on behalf of the Estate as its co-personal representative; and (2) in his individual capacity.[2] At the time of settlement, both claims were still pending. Murphy contends, therefore, that a portion of the money received in settlement of these suits resolved his individual claims. Therefore, according to Murphy, that portion of the proceeds is his property and because the federal tax lien applies only to Estate property, Murphy argues he has a superior claim to that portion of the settlement proceeds attributable to his individual claims.[3]

The United States argues that it has a superior claim to all of the settlement proceeds because of the federal tax lien against the Estate. The United States argues that, under Maryland law, the primary beneficiary of an estate (Murphy) does not have standing to sue the attorney for the estate (Hackney) in an individual capacity. Because, as the United States argues, Murphy did not have standing to sue Hackney in an individual capacity, all the money recovered in settlement is attributable to Murphy's claims on behalf of the Estate as co-personal representative (rather than as a beneficiary of the Estate). Therefore, the United States argues that the settlement proceeds are entirely Estate property and subject to the federal tax lien.

II. Summary Judgment Standard

Summary judgment is appropriate when there is no genuine issue of material fact and a decision may be rendered as a matter of law. Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). The party moving for summary judgment has the burden to demonstrate the absence of any genuine issue of material fact. Fed. R. Civ. P. 56(c); Pulliam Inv. Co. v. Cameo Props., 810 F.2d 1282, 1286 (4th Cir. 1987).

If there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. Anderson, 477 U.S. at 250. The only facts that are properly considered "material" are those that might affect the outcome of the case under the governing law. Id. at 248. If the evidence favoring the non-moving party is "merely colorable, or is not significantly probative, summary judgment may be granted." Id. at 249–50. Thus, the existence of only a "scintilla of evidence," is not enough to defeat a motion for summary judgment. Id. at 252.

To determine whether a genuine issue of material fact exists, all facts and all reasonable inferences drawn therefrom are construed in favor of the non-moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The non-moving party, however, may not rest on its pleadings, but must show that specific, material facts exist to create a genuine, triable issue. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

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[1] On September 9, 1993, the Internal Revenue Service ("IRS") assessed taxes totaling $292,199.00 against the Estate. (Paper No. 12; Decl. of Lawrence Miles). As of January 14, 2002, the Estate owed the IRS $1,271,800.98 in estate taxes, penalties and interest. (Id.).

On April 28, 1994, the Comptroller of the State of Maryland assessed taxes against the Estate totaling $33,377.41. The State has also placed a tax lien against the Estate. The State of Maryland did not file an opposition to the United States' motion, but instead filed a reply, which stated that "[d]efendant Comptroller concedes that in the current posture of the case its interest in the proceeds is inferior to the United States. This is because priority between two competing tax liens is decided by the date of assessment." (Paper No. 19). The court, therefore, will resolve the pending motion for summary judgment on the issue of priority of entitlement to the funds as between the United States and Plaintiff Murphy.

[2] Murphy claimed that Hackney's negligence resulted in pecuniary damage to the Estate from the penalties and interest on the outstanding taxes and pecuniary damage to himself in the form of a diminished distributive share of the Estate. (Id. ¶s 31, 32).

[3] Murphy does not state how much of the settlement proceeds are attributable to his individual claims, instead arguing that the amount is a factual issue that makes summary judgment inappropriate. (Paper No. 16 at 4).

On those issues for which the non-moving party will have the burden of proof, it is his or her responsibility to oppose the motion for summary judgment with affidavits or other evidence specified in the rule. Id.; Fed. R. Civ. P. 56(e); Mitchell v. Data Gen. Corp., 12 F.3d 1310, 1316 (4th Cir. 1993) (''The summary judgment inquiry thus scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, in the form of admissible evidence, that could carry the burden of proof in her claim at trial.''). If a party fails to make a showing sufficient to establish the existence of an essential element on which that party will bear the burden of proof at trial, summary judgment is proper. Celotex, 477 U.S. at 322.

III. Discussion

[1] The issue before the court is whether plaintiff has presented sufficient evidence to establish there is a factual dispute as to the superiority of the United States' claim to all of the settlement proceeds that would preclude summary judgment. The parties do not dispute that, because of its tax lien, the United States has a superior claim to the settlement proceeds recovered as a result of Murphy's claims on behalf of the Estate in his capacity as co-personal representative. The dispute revolves around whether any part of the settlement proceeds were recovered as a result of claims brought by Murphy in his individual capacity as primary beneficiary under the will.[4]

The settlement proceeds could be the result of claims raised by Murphy as primary beneficiary under the will only if, under Maryland law, Murphy had standing to sue Hackney as an individual, i.e., in a capacity other than on behalf of the Estate as its co-personal representative.[5] Maryland follows a strict privity rule in causes of action for malpractice against an attorney, which requires a plaintiff to prove an employment relationship with the attorney before an action can be maintained. Noble v. Bruce, 709 A.2d 1264, 1268–69 (Md. 1998) (beneficiaries had no standing to sue attorney hired by decedent to draft a will); Ferguson v. Cramer, 709 A.2d 1279, 1287 (Md. 1998) (beneficiaries had no standing to sue attorney hired by personal representative to help administer the estate). In the case of a nonclient plaintiff, (i.e., where there is no employment relationship), the so-called ''third party beneficiary theory'' is a narrow exception to the strict privity requirement. Flaherty v. Weinberg, 492 A.2d 618, 625 (Md. 1985). To fit within this exception, the nonclient ''must allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship.'' Id. The central question before this court, therefore, is whether, as an individual, Murphy had standing to sue Hackney either because of an employment relationship with Hackney or because, as primary beneficiary under Mrs. Murphy's will, he was the intended third party beneficiary of Hackney's legal services to the Estate.

The United States argues that Murphy did not have standing to sue Hackney as an individual because, under Maryland law, the primary beneficiary of an estate does not have standing to sue the estate's attorney for malpractice. (Paper No. 12 at 5). The United States relies on Ferguson v. Cramer, 709 A.2d 1279 (Md. 1998), in which the Maryland Court of Appeals applied the strict privity rule where beneficiaries of an estate sued the attorney hired by the estate's personal representative. In

[4] Murphy conceded at the hearing that any amount recovered as a result of his claims as co-personal representative inure to the benefit of the Estate. In this regard, he limited any ''individual'' claims to those made in his capacity as primary beneficiary and not as co-personal representative of the Estate.

[5] Murphy seems to argue that by virtue of the fact that he alleged his claims in his dual capacity and both types of claims were pending at the time of settlement, the settlement proceeds were recovered as a result of both. The parties, however, are not free to characterize settlement proceeds in a manner not supported by the underlying law. See Hemelt v. United States, 122 F.3d 204, 207–08 [80 AFTR 2d 97-5937] (4th Cir. 1997). In Hemelt, the parties in an ERISA action sought to characterize settlement proceeds as personal injury damages in order to avoid taxes. The Fourth Circuit held that the proceeds could not be characterized in this manner because the statute itself did not provide for personal injury damages. Id. Similarly, in this case, the settlement proceeds cannot be characterized as compensation for Murphy's individual claims if, under Maryland law, Murphy could not bring the suits in an individual capacity.

Ferguson, the court determined that the beneficiaries did not have standing because they did not have an employment relationship with the attorney and, in the alternative, they had not established that they were the intended third party beneficiaries of the personal representative's contract with the attorney. Id. at 1286. Although Murphy sought to distinguish Ferguson in his opposition, at the hearing, he admitted that Ferguson controlled in this case. Therefore, in order to maintain an individual claim against Hackney, Murphy must show either an employment relationship with Hackney or that he was the intended third party beneficiary of Hackney's legal services.

Murphy claims that he had standing to sue Hackney because, as primary beneficiary under the will, he was the intended third party beneficiary of Hackney's legal services to the Estate. Murphy contends that by virtue of the fact that he is primary beneficiary, Mrs. Murphy's purpose in engaging Hackney's legal services for the Estate must have been to benefit Murphy. Merely being the primary beneficiary of an Estate, however, is insufficient to establish the requisite intent on the part of Mrs. Murphy that Murphy benefit from her contract for legal services with Hackney. Noble, 709 A.2d at 1276 (''[T]here is a critical difference between being the intended beneficiary of an estate and being the intended beneficiary of a contract between a lawyer and his client.''); Ferguson, 709 A.2d at 1284 (''[W]here a personal representative hires an attorney to assist him or her in handling the estate ... the direct purpose in hiring the attorney is not to benefit the beneficiaries.''). Murphy's burden, therefore, is to prove that Mrs. Murphy's direct purpose in engaging Hackney was to benefit Murphy as primary beneficiary of the Estate. See Ferguson, 709 A.2d at 1283 (incidental benefit to beneficiaries from legal services by personal representative's attorney insufficient to impose duty of care on attorney); Flaherty, 492 A.2d at 625 (nonclient must ''allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship'').

The only evidence Murphy offers to support his assertion that he was the intended third party beneficiary is Hackney's deposition testimony which was taken in connection with the underlying lawsuit.[6] Murphy contends that Hackney admitted that he had a duty to Murphy individually and that he provided legal services to Murphy in his individual capacity. (Paper No. 16 at 4). A review of the deposition testimony reveals that, contrary to Murphy's assertion, Hackney did not admit a duty to Murphy individually or that he performed legal services for Murphy in an individual capacity. The pertinent testimony from Hackney's deposition is as follows:

> Q: When Mrs. Murphy died, you and Mr. Murphy were appointed as co-personal representatives of the estate?
>
> A: That's correct.
>
> Q: And that was by virtue of Mrs. Murphy's will?
>
> A: That's correct.
>
> Q: Did you then provide legal services to the estate?
>
> A: Yes.
>
> Q: And that was in the form of administering the estate?
>
> A: Yes.
>
> Q: Did you at some point complete a document which appointed you as the resident agent for the estate?
>
> A: Yes.
>
> Q: In the course of administering the estate, did you provide legal services for Mr. Murphy also individually?

[6] He alleges in his complaint against Hackney and argued at the hearing that Murphy, Hackney and Virginia Murphy specifically intended that Murphy would be the third party beneficiary of Hackney's legal services to the Estate. (Paper No. 12; Exh. A ¶ 28). These allegations, however, are not evidence sufficient to create a genuine issue of fact as to Mrs. Murphy's intent. See Celotex, 477 U.S. at 324.

A: Yes. To the extent that they were connected with the estate.

Q: In other words, you were serving as his legal advisor in administering the estate, in his role as co-personal representative?

A: Yes.

Q: And the compensation which you were to receive once the estate was closed was intended to compensate you for both roles, providing legal services to the estate, and providing legal services to Mr. Murphy?

A: That's correct.

(Paper No. 16; Exh. A at 19–20).

At most, the deposition testimony suggests that Hackney's legal services to the Estate may have benefitted Murphy in his role as co-personal representative on behalf of the Estate. The testimony, however, does not reflect that Mrs. Murphy's purpose in engaging Hackney for legal services was to benefit Murphy as primary beneficiary.

At the hearing, Murphy did not offer any other evidence of Mrs. Murphy's purpose in engaging Hackney for legal services. He conceded that there was no retainer agreement between Mrs. Murphy and Hackney which might reflect her intent in engaging Hackney. Further, the fact that Mrs. Murphy introduced Hackney to Murphy as the attorney for the Estate belies the notion that Hackney's services were intended to benefit Murphy individually. In sum, Murphy has not directed the court to any evidence that he was the intended third party beneficiary of Hackney's legal services.[7]

At the hearing, for the first time, Murphy raised the argument that in addition to being an intended third party beneficiary, he also had a direct employment relationship with Hackney. Murphy claims that between 1991 and 1994, he had several conversations with Hackney during which Hackney gave him legal advice regarding assets he had already received from the Estate, specifically grounds rents. He conceded that he did not have an employment contract with Hackney, either written or oral.

Murphy argues that, as a matter of law, an attorney-client relationship is established when a client consults an attorney with the expectation of receiving legal services. Accordingly, Murphy contends that he formed an attorney-client relationship with Hackney because he consulted Hackney with the expectation that he would receive legal advice about handling the ground rents he received as beneficiary under the will.

Murphy's argument that he had a direct employment relationship with Hackney fails in two respects. First, Murphy's argument that his expectation that the legal advice created an attorney-client relationship fails substantively. At the hearing, when asked by the court, Murphy could not point to any law to support his contention that under such circumstances, his expectation regarding Hackney's legal advice was sufficient to create a direct employment relationship. Furthermore, Murphy. acknowledged that there was no factual connection between Hackney's legal advice regarding ground rents and the alleged negligent conduct in the underlying complaints, which revolved around Hackney's handling of the Estate taxes. Murphy explained the issue of Hackney's negligent legal advice arose during discovery in the underlying malpractice suits,[8] but acknowledged that he did not amend his complaints in the underlying suits to include allegations regarding negligent legal advice from Hackney.

Second, even if Murphy's intent to create an attorney-client relationship controls, his claim in this case fails for lack of proof. Although an express employment agreement is not required, "the circumstances must clearly indicate an employment relationship." Flaherty, 492 A.2d at

[7] In his complaint against Hackney, Murphy did allege that while acting as a lawyer for the Estate, Hackney formed an attorney-client relationship with Murphy because Murphy, Hackney and Mrs. Murphy specifically intended that Murphy would be the third party beneficiary of Hackney's legal services to the Estate. (Paper No. 12; Exh. A ¶ 28).

[8] Murphy speculated at the hearing that any loss resulting from Hackney's legal advice regarding the ground rents would be a very small amount, under $5,000.00.

627. As the nonmoving party, Murphy would be required to present affidavits or other evidence to show a genuine factual issue as to Murphy's intent at the time he consulted Hackney. See Celotex, 477 U.S. at 324; Fed. R. Civ. P. 56(e). Here, Murphy relied on counsel's proffer at the hearing, which is insufficient to meet his burden, and did not present any evidence at the hearing to support the assertion that he intended for Hackney's legal advice regarding grounds rents to create an attorney-client relationship.[9]

In sum, the court finds that Murphy has failed to produce sufficient evidence that he had standing to sue Hackney as primary beneficiary of the Estate either because of a direct employment relationship with Hackney or because he was the intended third party beneficiary of Hackney's legal services. Therefore, as a matter of law, the settlement proceeds could have resulted only from Murphy's claims on behalf of the Estate in his capacity as co-personal representative. As a result, the settlement proceeds constitute Estate property to which the United States has a superior claim because of its tax lien.[10] Accordingly, summary judgment for the United States is appropriate.

IV. Conclusion

For the foregoing reasons, defendant United States' Motion for Summary Judgment is granted. A separate order shall issue.

Date: ___

Beth P. Gesner

United States Magistrate Judge

¶2002-5011

Domingo MONTIJO, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) Case No. CV-S-01-1227-LRH (LRL), May 14, 2002. Year 1998. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties—summary judgment. IRS's administrative determination to proceed with collection of IRC §6702 penalty against taxpayers who filed "zero" return was upheld on summary judgment: penalty was valid based on taxpayers' frivolous return position that their substantial wages and other compensation as shown on Forms W-2 wasn't income, and that no IRC section subjected them to income taxation. Also, IRS Appeals Officer could rely on transcript of taxpayer's account for IRC §6330(c)(1) verification; evidence showed taxpayer received notice and demand for payment; and other arguments were frivolous or irrelevant. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(10). IRC §6330; 6702.

United States District Court, District of Nevada.

Order

HICKS, District Judge:

Before the Court are Defendant's Motion for Summary Judgment (#3), Plaintiff's Reply to Defendant's Motion to Dismiss (#7), and Plaintiff's Corrections and Addition to Plaintiff's Reply to Defen-

[9] At the hearing, Murphy did not point to Hackney's deposition testimony as evidence that Murphy intended to create an attorney-client relationship with Hackney by seeking legal advice. Because this deposition remains the only evidence in the record, the court has considered whether that testimony, read in the light most favorable to Murphy, is evidence of Murphy's intent at the time he consulted Hackney. Hackney's testimony makes clear that any legal services provided to Murphy "individually" were provided in connection with Murphy's responsibilities in administering the Estate as co-personal representative, not as primary beneficiary, and in no way reflects Murphy's intent when he consulted Hackney. (Paper No. 16; Exh. A at 19–20).

[10] In his opposition, Murphy argued that the settlement proceeds are not Estate property because the Estate closed prior to the assessment. He offered no law to support this position and at the hearing abandoned the argument.

dant's Motion to Dismiss (#8). The Court finds that there are no genuine issues of material fact and grants Defendant's Motion (#3).

In considering a motion for summary judgment, the court performs "the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved by a finder of fact because they may be reasonably resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). To succeed on a motion for summary judgment, the moving party must show (1) the lack of a genuine issue of any material fact, and (2) that the court may grant judgment as a matter of law. Fed. R. Civ. P. 56(c). Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

A material fact is one required to prove a basic element of a claim. Anderson, 477 U.S. at 248. The failure to show a fact essential to one element "necessarily renders all other facts immaterial." Celotex, 477 U.S. at 323.

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. "Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Id. at 323. As such, when the non-moving party bears the initial burden of proving, at trial, the claim of defense that the motion for summary judgment places in issue, the moving party can meet its initial burden on summary judgment merely "by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party meets its initial burden on summary judgment, the nonmoving party must submit facts showing a genuine issue of material fact. Fed. R. Civ. P. 56(e). As summary judgment allows a court "to isolate and dispose of factually unsupported claims or defenses," Celotex, 477 U.S. at 323–24, the court construes the evidence before it "in the light most favorable to the opposing party." Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). The allegations or denials of a pleading, however, will not defeat a well-founded motion. Fed. R. Civ. P. 56(e); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986).

On August 14, 1999, Plaintiff and his wife signed and filed with the Internal Revenue Service on Form 1040 an income tax return for the year 1998. He stated that he had no income from wages, salaries, tips, interest, capital gain, or other sources, filling the income section of the return with zeros. Compl. (#1), Exhibit B. He attached two Forms W-2, one for Plaintiff and one for his wife, showing a total of $64408.24 in wages, tips, or other compensation. Id. He also attached a two page explanation of how they have no income tax liability because their wages were not income. Id. The Internal Revenue Service assessed against Plaintiff a frivolous return penalty. When Plaintiff received a notice of intent to levy, he requested a collection hearing pursuant to 26 U.S.C. § 6330. After the hearing, the Appeals Office of the Internal Revenue Service found that the Director of the Service Center was correct when he determined that a levy should be served. Compl. (#1), Exhibit A.

[1] Plaintiff then commenced this action pursuant to 26 U.S.C. § 6330(d). The Tax Court does not have jurisdiction to consider frivolous return penalties. Van Es

v. Commissioner, 115 T.C. 324 (2000). Therefore, this Court has jurisdiction. 26 U.S.C. § 6330(d)(1)(B).

A person who files a frivolous tax return is liable for a penalty of five hundred dollars ($500.00). 26 U.S.C. § 6702. The Secretary of the Treasury or his delegate, such as the Internal Revenue Service,[1] assesses this penalty in the same manner as a tax, and any reference to a "tax" in Title 26 also includes this penalty. 26 U.S.C. § 6671. Section 6201 of the Code authorizes the Secretary to make any necessary tax assessments. In the case of a frivolous return penalty, the deficiency procedures of Title 26, Chapter 63, Subchapter B, do not apply. 26 U.S.C. § 6703(b). If the Secretary wishes to levy the property of the person, he must first send the person a notice of intent to levy no less than thirty (30) days before the levy. 26 U.S.C. § 6331(d)(2). The Secretary must also inform the person of his right to a hearing at the same time. 26 U.S.C. § 6330(a). If the person requests a hearing, the hearing officer must "obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." 26 U.S.C. § 6330(c)(1). At the hearing, the person may raise any relevant issue, including spousal defenses, the appropriateness of the collection action, and any collection alternatives. 26 U.S.C. § 6330(c)(2)(A). The person "may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. § 6330(c)(2)(B).

The "underlying tax liability" in this case is the frivolous return penalty. See 26 U.S.C. § 6671; see also 26 C.F.R. 301.6331-1(a)(1). Plaintiff properly challenged the validity of the frivolous return penalty at the collection due process hearing because the statutory deficiency procedures to not apply to a frivolous return penalty, 26 U.S.C. § 6703(b), and thus Plaintiff had no prior opportunity to dispute the penalty. The validity of the income tax that Plaintiff owes for 1998 is not at issue in this action. On the other hand, the tax return that Plaintiff filed for 1998 is relevant because it determines whether assessment of the frivolous return penalty was proper.

Section 6330(d) is silent on the standard that the Court should use to review the determination of the collection hearing. However, the legislative history indicates that if the validity of the underlying tax liability was properly at issue, then review is de novo. H. Conf. Rep. 105-599 (1998); see also Dogwood Forest Rest Home, Inc. v. United States, 181 F. Supp. 2d 554, 559 [89 AFTR 2d 2002-728] (M.D.N.C. 2001); MRCA Info. Servs. v. United States, 145 F. Supp. 2d 194, 198–99 [89 AFTR 2d 2002-694] (D. Conn. 2000); Sego v. Commissioner, 114 T.C. 604, 610 (2000). The Court will use that standard of review.

There is no doubt about the validity of the penalty. Plaintiff submitted a Form 1040 tax return for 1998 with zeros in the income section and Forms W-2 showing income considerably more than zero. Compl. (#1), Exhibit B. He also attached an explanation of how no provisions of the Internal Revenue Code make him liable for the income tax, how his wages are not income, and other matters. Id. Wages are income, 26 U.S.C. § 61, upon which Plaintiff owes a tax, 26 U.S.C. § 1, and courts—including this one—have found arguments to the contrary to be frivolous long before Plaintiff filed his 1998 tax return. See, e.g., Sisemore v. United States, 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir. 1986); Coleman v. Commissioner, 791 F.2d 68, 70 [57 AFTR 2d 86-1420] (7th Cir. 1986); Sullivan v. United States, 788 F.2d 813, 815 [57 AFTR 2d 86-1226]

[1] The Court will use the collective term "Secretary" to refer to the Secretary of the Treasury and any delegates. See 26 U.S.C. § 7701(a)(11)(B). The Secretary of the Treasury may delegate much of his authority and responsibilities to others by prescribing rules and regulations, among other methods. 26 U.S.C. § 7805(a); see also 26 C.F.R. §§ 301.7701-9, 301.7701-10.

(1st Cir. 1986); Olson v. United States, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985); In re Hopkins, 192 B.R. 760, 762–63 [76 AFTR 2d 95-7748] (D. Nev. 1995); and other cases too numerous to cite. On its face, Plaintiff's tax return was substantially incorrect, and it was due to a frivolous position; thus making Plaintiff liable for the frivolous return penalty. 26 U.S.C. § 6702. The assessment of the frivolous return penalty is valid.

No genuine issue of material fact exists over the verification of all legal and administrative requirements. The Chief of the Automated Collection Branch sent Plaintiff Letter 1058, "Final Notice—Notice of Intent to Levy and Notice of Your Right to a Hearing," which is the notice that §§ 6330 and 6331 require. Compl. (#1), Exhibit C. This official had the authority to send such a notice. See D.O. No. 191, 1982-1 C.B. 352 (1982). The Secretary of the Treasury delegated to the local Internal Revenue Service office collecting the penalty the responsibility of providing the verification to the hearing officer. 26 C.F.R. § 301.6330-1(e)(1).[2] The local IRS office provided the hearing officer with a transcript of Plaintiff's account. Compl. (#1), Exhibit E. The hearing officer could rely on such a transcript for § 6330(c)(1) verification. See Huff v. United States, 10 F.3d 1440, 1446–47 [72 AFTR 2d 93-6682] (9th Cir. 1993), cert. denied, 512 U.S. 1219 (1994); Hughes v. United States, 953 F.2d 531, 538–40 [69 AFTR 2d 92-472] (9th Cir. 1992); see also Davis v. Commissioner, 115 T.C. 35, 41 (2000). The transcript shows that the frivolous return penalty had been assessed and that Plaintiff had requested a collection due process hearing. As noted above, the 1998 tax return is clearly frivolous. The hearing officer did not err in his verification that the requirements of any applicable law and administrative procedures had been met.

According to Plaintiff, he "never received the statutory Notice and Demand for payment for any of the penalty at issue." Compl. (#1), at ¶ 30. Plaintiff verified his Complaint (#1), and thus it serves as an affidavit. Schroeder v. McDonald, 55 F.3d 454, 460 (9th Cir. 1995). His argument is defective for two reasons. First, it is untrue. Plaintiff obviously received Letter 1058 because he attached it to his verified Complaint (#1) as Exhibit C. Second, Plaintiff might be arguing that he did not receive a notice and demand pursuant to 26 U.S.C. § 6303. However, § 6303 only requires the Internal Revenue Service to mail a notice and demand to Plaintiff's last known address, and, as noted above, the hearing officer could rely on the account transcript to verify that the notice was sent. The failure to receive such notice and demand, and Plaintiff's affidavit to that effect, are immaterial. Hansen v. United States, 7 F.3d 137, 138 [72 AFTR 2d 93-5922] (9th Cir. 1993).

Plaintiff's other arguments are also frivolous and irrelevant to 26 U.S.C. § 6330(c)(2)(A). The hearing officer's decision on this point is correct.

Because there are no genuine issues of material fact, Defendants are entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment (#3) is GRANTED. The Clerk of the Court shall enter judgment accordingly.

DATED this 14th day of May, 2002.

LARRY R. HICKS

United States District Judge

Judgment in a Civil Case

_ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came to be considered by the Court. The issues

[2] Plaintiff's repeated insistence that he see documents signed by the Secretary of the Treasury or by a person with a delegation order signed by the Secretary of the Treasury, Corrections and Addition (#8), at pp. 3–6, is frivolous.

have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (#3) is granted.

May 15, 2002

LANCE S. WILSON

Clerk, U.S. District Court

By: M. Zadina

Deputy Clerk

¶2002-5012

SUCCESSION OF BETTY FELIX HELIS, by Esther Helis Henry and David A. Kerstein, Testamentary Co-Executors, PLAINTIFF v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 97-190T, June 25, 2002. Earlier proceeding at (2001, Ct Fed Cl) 88 AFTR 2d 2001-5199. Date of death 4-12-80. Decision for Taxpayer.

1. Estate tax deductions—administrative expenses—interest; executor and attorney's fees; "overhead". Estate was entitled to administrative expense deductions for excess interest, executor and attorney's fees, and overhead expenses: subsequently refunded interest paid on IRC §6166 installments was deductible as expense actually incurred in estate's administration; executor fees allowed by Louisiana probate court were reasonable based on succession's complexity; probate court's approval of attorney's fees was presumptive evidence that fees were reasonable and actually incurred, govt. didn't provide evidence to refute specific charges, and executor testified he wouldn't receive both attorney's *and* executor fees; and accounting and appraisal fees and overhead expenses were reasonable. Also, court accepted parties' agreements as to dates interest on overpayments began to run. *Reference:* USTR Estate & Gift Taxes ¶20,535.02(5); 20,535.06(10); 20,535.05(5); 20,535.02(10). IRC §2053; 7502.

Jasper G. Taylor III, Fulbright & Jaworski L.L.P., Houston, Texas for plaintiff.

Jennifer Dover Spriggs, U.S. Department of Justice, Tax Section, Washington, D.C., with whom on briefs were Eileen J. O'Connor, Assistant Attorney General, Mildred L. Seidman, Chief, Court of Federal Claims Section, and David Gustofson, Assistant Chief.

In the United States Court of Federal Claims.

Opinion

BRUGGINK, Judge:

Estate tax refund; Administrative expenses.

This is an action for refund of estate taxes. The primary issue is one of valuation of an oil and gas partnership owned in part by the estate. That question was addressed by trial in June 2001, in Houston, Texas, after which the court ruled that the plaintiff had the better of the argument-the government had overstated the value of the partnership and hence, the estate. *See Succession of Betty Felix Helis v. United States,* No. 97-190T (July 3, 2001). The parties were directed to attempt to resolve remaining issues, which primarily involved the deductibility of items of estate administration expense. Unable to do so, the matter is now pending on the parties' cross-motions for summary judgment. Oral argument was held June 14, 2002. At oral argument the court, without objection, took testimony from two witnesses pursuant to RCFC 43(e).

BACKGROUND

Plaintiff is a Louisiana succession for Betty Felix Helis, deceased. When the decedent died on April 12, 1980, she was a resident of New Orleans, Louisiana. The case is brought by Esther Helis Henry and David A. Kerstein, Testamentary Co-Executors.

Betty Felix Helis was the wife of William G. Helis, Sr. Mr. Helis predeceased Mrs. Helis, leaving her a fifty-percent interest in his estate. Her succession is still pending in Civil District Court, Parish of Orleans, Louisiana. William G. Helis, Jr. was the original duly appointed and acting Testamentary Executor of the succession, but he died on August 5, 1988 and was replaced by Ms. Henry and Mr. Kerstein. Plaintiff timely filed the estate tax return on July 10, 1981.

The decedent owned, among other things, a fifty-percent interest in a partnership named "Estate of William G. Helis," which qualified as a closely held business under 26 U.S.C. (hereafter, "I.R.C.") § 6166 (1994). On July 10, 1981, plaintiff filed its Form 4768 "U.S. Estate Tax Return" which reported that the average appraised value of the partnership interest was $35,900,000 at date of death. After an Internal Revenue Service ("IRS") audit, it determined that the value of the partnership interest was $44,500,000.[1] The assessed taxes were increased, accordingly. In July 2001,we determined that the fair market value of the partnership interest as of the date of death was $35,900,000.

Plaintiff paid the disputed estate tax in the amount of $19,430,645.88 and interest in the amount of $16,690,452.11. Plaintiff chose to defer payment on the estate tax over the period allowed by I.R.C. § 6166 to in closely held businesses, thereby incurring an interest obligation. *See* I.R.C. § 6166.

Although the ultimate issues here are ones requiring the application of federal tax law, Louisiana law controls much of the outcome. This is the case because the I.R.C. provides the following:

> (a) General Rule.-For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate such amounts-
>
> (1) for funeral expenses,
>
> (2) for administration expenses,
>
> (3) for claims against the estate, and
>
> (4) for unpaid mortgages on, or any indebtedness in respect of, property where the value of the decedent's interest therein, undiminished by such mortgage or indebtedness, is included in the value of the gross estate,
>
> as are allowable by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered.

I.R.C. § 2053. Accordingly, certain key components of Louisiana law are set out below.

> A succession representative may pay an estate debt only with the authorization of the court, except as provided by Articles 3224 and 3302.

La. Code Civ. Proc. Ann. art. 3301 (West Supp. 2002).

> A. When a succession representative desires to pay estate debts, he shall file a petition for authority and shall include in or annex to the petition a tableau of distribution[2] listing those estate debts to be paid. A court order shall not be required for the publication of the notice of filing of a tableau of distribution.

La. Code Civ. Proc. Ann. art. 3303 (West Supp. 2002).

> A. An opposition may be filed at any time before homologation,[3] and shall be tried as a summary proceeding. If no opposition has been filed, the succession representative may have the tableau of distribution homologated and the court may grant the authority requested at any time after the expiration of seven days from the date of publication or from the

[1] The IRS concluded that the value of the taxable estate was $46,927,582.93 and the gross estate $58,171,762.01.

[2] A list of payments to or charges by creditors.

[3] Approval given by the probate court.

date the notice required by Article 3306 is mailed, whichever is later.

La. Code Civ. Proc. Ann. art. 3307 (West Supp. 2002).

Decedent's will states that the executor or executors "shall be entitled to such compensation as may be fixed by law . . . "The executor fees claimed and previously approved by the probate court total $1,764,117.56.

As of March 29, 2002, the succession incurred legal fees and expenses in the amount of $2,781,081.47 and accounting fees and expenses in the amount of $742,379.81. Appraisal and other fees and expenses in the amount of $544,328.35 were also incurred in preserving and distributing the estate. All of these fees and expenses were initially paid by the Estate of William G. Helis, A Partnership. The probate court approved each tableau related to these fees and allowed the succession to reimburse the partnership. David Kerstein, co-executor, and Michael Schott, Chief Financial Officer of Estate of William G. Helis, A Partnership, testified at oral argument that these fees and expenses paid by the partnership later were reimbursed in full by plaintiff.[4]

DISCUSSION

[1] The government agrees that, assuming the correctness of the court's ruling with respect to valuation of the partnership interest, the plaintiff is entitled to some refund of the overpayments made to the IRS, the underpayment interest with regard to these overpayments, and overpayment interest. The decedent's taxable estate must be determined, however, before the refund can be calculated.

Deductions from the gross estate for administration expenses are proper if allowable under the laws of Louisiana. *See* I.R.C. § 2503. The relevant regulation states:

> (a) *In general.* The amounts deductible from a decedent's gross estate as "administration expenses" . . . are limited to such expenses as are actually and necessarily, incurred in the administration of the decedent's estate.
>
> . . . .
>
> (d) *Miscellaneous administration expenses.* (1) Miscellaneous administration expenses include such expenses as court costs, surrogates' fees, accountants' fees, appraisers' fees, clerk hire, etc. Expenses necessarily incurred in preserving and distributing the estate are deductible,
>
> . . . .

Treas. Reg. § 20.2053-3 (1979). Plaintiff seeks to deduct from the taxable estate excess interest, attorneys' fees, executor fees, and overhead expenses of the succession.

Interest

The estate claimed as an expense the amounts paid to the IRS as interest. Defendant argues that the overpayment of interest may not properly be deducted from the estate because improperly paid interest will be returned to the estate upon payment of final judgment. It contends that the amount ultimately passing to the heirs will thus not be reduced. The interest will therefore not have been actually and necessarily incurred in the administration of the decedent's estate.

Defendant relies primarily on *Estate of O'Daniel v. United States*, 6 F.3d 321 [72 AFTR 2d 93-6762] (5th Cir. 1993), in which a taxpayer was assessed an additional estate tax and deficiency interest by the IRS. The estate later received a refund of a portion of the additional tax as well as the corresponding deficiency interest. *O'Daniel*, 6 F.3d at 329. The court held that the deficiency interest was not an expense "actually" incurred and thus the estate could not deduct the refunded deficiency interest. *Id.* It is not clear from

[4] We reject defendant's argument that this process of, payment by the partnership, reimbursement by the succession, is in any way improper. It was approved in principle by the probate court and Messrs. Kerstein and Schott confirm that the expenses were actually absorbed by the succession.

O'Daniel whether the refund had already been reimbursed fully to the plaintiff, but it is clear that the court had already awarded a specific amount in estate tax refund, deficiency interest refund, and statutory interest. It is also clear that, unlike the present case, the question involved the deductibility of "deficiency interest" pursuant to I.R.C. § 6601 instead of statutory interest under the I.R.C. § 6166 election.

To the extent that *O'Daniel* stands for the proposition that any future recovery of statutory interest must be taken into account in calculating deductions from the estate, which is not at all clear, we respectfully decline to follow it.

Plaintiff's interest in Estate of William G. Helis, A Partnership, qualified as a closely held business under I.R.C. § 6166. This enabled plaintiff to pay the estate tax due on the partnership interest in installments for fifteen years. Each installment included tax and interest. Plaintiff had the choice of either taking an estate tax deduction or an income tax deduction for the interest payments. *See*Rev. Rul. 79-252, 1979-2 C.B. 333 (1979) (allowing post-death interest on an income deficiency to be deducted from an estate as an administration expense). Plaintiff chose to take the deduction on its estate tax return.[5]

The estate tax assessed will be calculated as of the date of ultimate judgment, because at that time all administrative deduction issues will be resolved. But defendant proposes that after the estate's net value is determined, the amount of interest refunded to the estate should then be folded back into the estate, increasing net value. Once the estate is increased, the tax on it would also be increased, thus decreasing the amount of overpayment and associated interest overpayment, thus triggering a recalculation of the size of the estate, thus .... The process would theoretically never end. It would be comparable to closing a door half the distance repeatedly. The door never closes. Similarly here, there would be no way to determine the exact size of the estate or refund. In any event, the court orders the refund as of the day of judgment. As of that date, the interest is still outstanding. By law, plaintiff can claim the interest as an estate tax deduction. Plaintiff's methodology-which would require it to recognize the refunded interest as income in a later year-is both legally correct and not encumbered by imprecision.

Executor Fees

The decedent's will[6] left the compensation of the executor to be set by

> Louisiana law which states: An executor shall be allowed as compensation for his services such reasonable amount as is provided in the testament in which he is appointed.
>
> ....
>
> In the absence of a provision in the testament or an agreement between the parties, the administrator or executor shall be allowed a sum equal to two and one-half percent of the amount of the inventory as compensation for his services in administering the succession. The court may increase the compensation upon a proper showing that the usual commission is inadequate.
>
> ....
>
> The compensation of a succession representative shall be due upon the homologation of his final account. The court may allow an administrator or executor an advance upon his compensation at any time during administration.

La. Code Civ. Proc. Ann. art. 3351 (West Supp. 2002). Executor fees totaled $1,764,117.56. Defendant points out that this is in excess of the two and one-half percent of the new value of the estate. In-

[5] Under 26 U.S.C. § 642(g), this had the effect of precluding the estate from deducting any item for income tax purposes.

[6] Mrs. Helis's will does not establish a maximum fee to be paid to the executors, but provides that the executors "shall be entitled to such compensation as may be fixed by law ...."

deed, it is in excess of two and one-half percent of the IRS-calculated value. Defendant objects to the deduction of the executor fees because the fees paid exceed the amount presumptively allowed by Louisiana law.

Plaintiff relies on the fact that the executor fees were approved by the probate court. The additional fees were allowed because of the complexity and magnitude of the succession. The fees were also audited by the IRS and not objected to in the year they were proposed or in the closing letter issued in 1997. In any event, this court has no basis for disturbing the probate court's decision regarding executor fees. The probate court is in a superior position to determine the reasonableness and necessity of an increase in fees in this succession, particularly as it has overseen the succession for more than twenty years, during which time there has been an audit, an I.R.C. § 6166 payment election for fifteen years, and a trial.

Attorneys' fees

Defendant objects to the amount claimed as attorneys' fees. Although these fees have been homologated by the Louisiana probate court, defendant questions whether they were all "necessarily incurred." Defendant also challenges the reasonableness of the fees and argues that the burden of proving the correctness of challenged items on a tax return leading to a refund is on the taxpayer. *See United States v. Janis*, 428 U.S. 433, 440 [38 AFTR 2d 76-5378] (1976). It points out that not all of the billings contain hourly rates and descriptions of the work.

Plaintiff agrees that ultimately the burden is on the taxpayer to prove reasonableness but that the approval of the fees by the Louisiana probate court constitutes prima facie proof. We agree. The Court of Claims in *Missouri Pacific Railroad Co. v. United States*, 338 F.2d 668, 670 [14 AFTR 2d 5948] (1964), held that the government must show a reasonable basis for challenging the items before the taxpayer can be required to proceed with the burden of proving the correctness of each item. The court stated:

> the government has to demonstrate that it has some concrete and positive evidence, as opposed to a mere theoretical argument, that there is some substance to its claim and is not a mere fishing expedition or a method of discouraging taxpayers from seeking refunds on meritorious claims because of the costs that would result in proving each and every item involved in the tax return.

Id.

The probate court's allowance of payment of the attorneys' fees is presumptive evidence that the attorneys' fees were reasonable and actually incurred. What we have, moreover, in addition to the probate court's rulings, are the invoices submitted to the succession by the attorneys. The court has been shown no Louisiana prohibition on lump-sum billing.

In any event, because of defendant's questions about the support for undifferentiated fees, the court heard the testimony of Mr. Kerstein, primary attorney for the succession's affairs. He explained that the succession's attorneys' fees initially were estimated to be approximately $600,000. In light of the extended period of time it has taken to probate the estate, attorneys' fees were increased.

Defendant has offered no evidence to support its challenges, nor has it stated that any would be offered in the event of trial. In the absence of any specific challenge to the reasonableness of specific charges, we are satisfied that the charges meet the statutory requirements. Ruling to the contrary would mean that this court, for no clear reason, would duplicate the work of the Louisiana probate court. The court is satisfied that amounts billed were reasonable and necessary.

Defendant also objects to the deduction of some of the amounts paid Mr. Kerstein as attorney fees because he served both as

executor and as the succession's attorney. The Louisiana code provides that "if the succession representative serves as an attorney for the succession . . . , the succession representative shall not receive compensation both as a succession representative and as an attorney for the succession . . ." *Id.* at art. 3351.1. In *Suc-cession of Abdalla*, 764 So.2d 362 (2000), the Louisiana Third Circuit Court of Ap-peal held that this article "only applies when the executor claims *both* attorney fees *and*an executor fee." *Id.* at 366. It does not prohibit "a named succession representative from acting as the attorney for the succession. It simply prohibits the representative/attorney from collecting a fee in both capacities." *Id.* Mr. Kerstein testified at oral argument that he has not and will not receive any compensation as executor. Defendant has offered no evi-dence to the contrary. His compensation as the succession's attorney is thus fully de-ductible.

Miscellaneous Expenses

Defendant also asserts that plaintiff is not entitled to deduct certain miscellaneous expenditures for the estate. These expenditures are accounting fees, appraisal fees, and "overhead" that were homologated by the Louisiana probate court. The accounting fees and appraisal fees are contemplated by the Treasury Regulations as the type of expenditures that fall into the "miscellaneous administration expenses" category. Treas. Reg. § 20.2053-3. Defendant's complaint, once again, is that the invoices do not include the number of hours worked, the hourly rate charged, or by whom the work was done. Plaintiff argues that they are proper under the laws of Louisiana and under I.R.C. § 2053. As stated above, detail as to time spent and amount charged are not necessary and the lack of this information on the invoices does not make the expenditures unreasonable.

The "overhead" deductions sought by plaintiff are charges against the Estate of William Helis, A Partnership for the staff and administrative services that it provided for over twenty years. Defendant complains that the government did not have enough information to determine how the partners allocated overhead. The affidavits of David Kerstein and Michael Schott explain that the partnership does not normally allocate overhead to each partner, although the special circumstances created by the death of Mrs. Helis required that the partnership provide extraordinary services for the estate of the decedent partner. As Mr. Kerstein explained during the hearing, the partnership incurred substantial costs that were necessary solely to provide accounting, tax, and managerial supervision for the administration of the substantial and complex succession. This overhead was allowed by the Louisiana probate court, and we have no basis for questioning it.

The Mailbox Rule

The final unresolved issue between the two parties concerns the date that should be used to determine when payments were made to the IRS, thus setting the date from which interest on the overpayment begins to run. Plaintiff contends that I.R.C. § 7502 fixes the date of mailing as the date of payment. The statute reads:

> (a) General Rule-
>
> (1) Date of Delivery.-If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue law is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of

delivery or the date of payment, as the case may be.

26 U.S.C. § 7502 (1994). During oral argument the parties expressed their prior agreement that January 12 of each year should be used to determine the date of payment with two exceptions: January 8, 1987 and January 13, 1992. Plaintiff later conceded, however, that interest should begin on January 12, 1987 instead of the January 8, 1987 mailing date. Defendant agreed that because January 12, 1992 was a Sunday, the payment was due on January 13, 1992. We accept these dates.

CONCLUSION

We grant plaintiff's motion for summary judgment and deny defendant's motion as set out above. The parties are directed to confer to attempt to reach agreement on the correct tax refund calculation. A status conference will be held on July 22, 2002 to assess progress toward an agreed calculation.

ERIC G. BRUGGINK

Judge

¶2002-5013

Clarence FULLER, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Western Dist. of Tennessee, (DC TN) No. 01-1048, June 5, 2002. Earlier proceedings at (2002, DC TN) 89 AFTR 2d 2002-2162, vacating (2001, DC TN) 89 AFTR 2d 2002-2161. Decision for Govt.

1. 100% penalty for failure to pay over trust fund taxes—counterclaims; reduction of assessments to judgment—summary judgment. Govt. was granted summary judgment on its counterclaim to reduce taxpayer's IRC §6672 penalty assessment to judgment: despite dismissal of his original claim for failure to comply with court's show cause order, taxpayer was entitled but failed to refute penalty's validity or show why assessment shouldn't have been reduced to judgment. *Reference:* United States Tax Reporter ¶66,725.02(30). IRC §6672.

In the United States District Court for the Western District of Tennessee, Eastern Division.

Order Granting Defendant's Motion for Summary Judgment

TODD, District Judge:

Plaintiff has filed this action against the United States of America disputing the determination by the Internal Revenue Service that Plaintiff is liable for a trust fund recovery penalty assessed upon Frankie's Piccooo Cuclna, Inc. Defendant filed an answer and counter-claim seeking to reduce to judgment the penalty assessed against Plaintiff. On October 3, 2001, Olie H. Phillips Jr. moved to withdraw as counsel for Plaintiff due to health complications. The court granted said motion on October 10, 2001, and required Plaintiff to inform the court of Plaintiff's new counsel within thirty (30) days. On October 30, 2001, this court entered an order giving Plaintiff fifteen (15) days to show cause why his action should not be dismissed for failure to advise the court of Plaintiff's current address. Plaintiff did not respond to either of the court's October orders and the court dismissed Plaintiff's cause of action for failure to advise the court of Plaintiff's current address, failure to comply with the court's order to show cause, and failure to comply with the court's order to inform the court of Plaintiff's new counsel.

On April 19, 2002, Defendant moved for summary judgment on its counter-claim against Plaintiff. Plaintiff has not responded to this motion. For the following reasons, Defendant's motion for summary judgment is GRANTED.

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. To prevail on a motion for summary judgment, the moving party has the burden of showing the "absence of a genuine issue of material fact as to an

essential element of the nonmovant's case." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). The moving party may support the motion with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

"If the defendant ... moves for summary judgment ... based on the lack of proof of a material fact, ... [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter. Anderson, 477 U.S. at 249. Rather, "[t]he inquiry on a summary judgment motion ... is ... 'whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street, 886 F.2d at 1479 (quoting Anderson, 477 U.S. at 251–52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158–59 (1970).

If a party does not respond to a motion for summary judgment, the Federal Rules of Civil Procedure provide that "summary judgment, if appropriate, shall be entered against him." Fed.R.Civ.P.56(e). The fact that Plaintiff did not respond does not require granting Defendant's motion. However, if the allegations of the counter-claim are proven by Defendant's affidavits and Defendant is entitled to judgment as a matter of law on those facts, then summary judgment is appropriate.

[1] In support of its motion for summary judgment, Defendant presented evidence that the Internal Revenue Service found Plaintiff liable pursuant to 26 U.S.C. § 6672 in the amount of $ 75,484.07 for withholding employment taxes. See Defendant's Motion for Summary Judgment, at Exhibit 1. As of February 4, 2002, the total penalty against Plaintiff, including interest until that date, was $ 108,452.89 See id. Even though Plaintiff's claim has been dismissed, Plaintiff was entitled to present evidence demonstrating why this penalty was inappropriate or why the penalty should not be reduced to judgment. Plaintiff failed to do so; thus, summary judgment is appropriate.

Defendant has presented the court with a factual basis for summary judgment to which Plaintiff has not responded. Accordingly, Defendant's motion for summary judgment is GRANTED.

The Clerk is directed to enter judgment for the Defendant in the amount of $108,452.89, plus statutory interest accruing from February 4, 2002 until paid.

IT IS SO ORDERED.

JAMES D. TODD

UNITED STATES DISTRICT JUDGE

5 June 2002

DATE

Judgment in a Civil Case

TODD, District Judge:

Jury verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in compliance with the order entered in the above-styled matter on 06/05/02,

Defendant's motion for summary judgment is GRANTED. Judgment is hereby entered for the defendant in the amount of $108,452.89, plus statutory interest accruing from February 4, 2002 until paid.

APPROVED:

JAMES D. TODD

UNITED STATES DISTRICT JUDGE

ROBERT R. Di TROLIO

CLERK

6-6-02

DATE

BY: /s/

DEPUTY CLERK

¶2002-5014

James Clay BOYD, ET AL., PETITIONERS v. UNITED STATES OF AMERICA, RESPONDENT. U.S. District Court, Eastern Dist. of Kentucky, (DC KY) Civil Action No. 01-472-JMH, June 13, 2002. Years 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999. Decision for Govt.

1. Third-party summons enforcement—criminal investigations—procedure—notice. Magistrate judge recommended denying taxpayers' petition to quash and enforcing summonses IRS criminal agent issued on taxpayers' accountant: agent's pre-summons interview of accountant and review of 1 year's return didn't violate IRC §7602 since statute's advance notice requirements didn't apply to criminal investigations; informal interviews and reviews of voluntarily disclosed records weren't prohibited by statute and were in line with IRS's criminal investigatory procedures; IRS refrained from examination for requisite period following summonses' issuance; and no Justice Dept. referral was in effect. Also, technical discrepancies between 1 summons and taxpayers' notice copy didn't otherwise warrant quashing; and belatedly raised challenge to untimeliness of govt.'s response was rejected. *Reference:* United States Tax Reporter ¶76,025.03(5); 76,095.01(30). IRC §7602; 7609.

United States District Court, Eastern District of Kentucky, Lexington.

Proposed Findings of Fact and Recommendation

TODD, Magistrate Judge:

I. INTRODUCTION

On November 20, 2001, Petitioners James Clay Boyd and Debra E. Boyd, by counsel, filed a petition to quash summonses served on their accountant, R. Douglas Anderson, C.P.A., by Internal Revenue Service Special Agent J. Trent Tyson on or about November 1, 2001, and November 2, 2001, respectively, requesting the production of records from R. Douglas Anderson on November 26, 2001. [DE #1].

By Order of November 26, 2001, the district court referred this matter to the Magistrate Judge, pursuant to 28 U.S.C. § 636(b), for initial consideration, development of the record, and a report and recommendation. [DE #2].

On March 14, 2002, the Magistrate Judge conducted an evidentiary hearing on petitioners' petition to quash the foregoing summonses. The court heard testimony from petitioners' accountant, Richard Douglas Anderson, C.P.A., Internal Revenue Service Supervisory Special Agent Timothy Skeens, and Internal Revenue Service Special Agent Joseph Trent Tyson. This matter having been fully briefed, it is ripe for review.

II. FACTUAL BACKGROUND

This matter concerns two administrative summonses served by the Internal Revenue Service (''IRS'') on a third-party recordkeeper requesting the production of documents and records concerning the petitioners. On November 1, 2001, IRS Special Agent J. Trent Tyson contacted R. Douglas

Anderson[1] , a certified public accountant, at his place of business at 3470 Blazer Way, Suite 120, Lexington, Kentucky, and informed him that he was conducting an investigation as to whether any criminal violations of the Internal Revenue laws had been committed by petitioner James Clay Boyd and that James Clay Boyd was then under criminal investigation.[2] Declaration of J. Trent Tyson, p. 2, ¶s 3, 4 - DE #8. Agent Tyson, who was accompanied by IRS Special Agent Tony Hantke, interviewed Mr. Anderson in his office for approximately one and one-half hours. (Evidentiary Hearing Transcript, p. 41).

The purpose of the contact with Mr. Anderson was to determine his role in the preparation of income tax returns for the petitioners and to serve a third-party record-keeper summons on Mr. Anderson. Id. During the meeting with Mr. Anderson, Agent Tyson viewed a copy of petitioners' federal income tax return for 1995 that had been prepared by Mr. Anderson. Id. At the conclusion of the interview, in accordance with 26 U.S.C. § 7602, Agent Tyson issued an administrative summons to Mr. Anderson, requesting the production of books, records, papers, and other data relating to petitioners' tax liability for the years 1996, 1997, 1998, and 1999.[3] Exhibit 1 to Declaration of J. Trent Tyson - DE #8. As originally prepared, this summons also requested Mr. Anderson to appear before Agent Tyson on November 26, 2001, to give testimony. However, at the time Agent Tyson served this summons on Mr. Anderson, he crossed out the words in the summons ''to give testimony and.'' See Exhibit ''A'' to Petition to Quash Summons - DE #1. Agent Tyson explained that since he had already interviewed Mr. Anderson for about one and one-half hours, he saw no need for additional testimony from Mr. Anderson on those years. (Evidentiary Hearing Transcript, p. 47).

The following day, November 2, 2001, Agent Tyson returned to Mr. Anderson's office and served another administrative summons on him, requesting the production of books, records, papers, and other data relating to petitioners' tax liability for the years 1992, 1993, 1994, and 1995.[4] Exhibit 2 to Declaration of J. Trent Tyson - DE #8.

Pursuant to 26 U.S.C. § 7609(a), Agent Tyson served notice to the petitioners of the foregoing two third party record-keeper summonses that he had served on Mr. Anderson on November 1 and November 2, 2001, and provided to petitioners a copy of the two summonses and attachments thereto that he had served on Mr. Anderson on November 1 and November 2, 2001. However, the copy of the summons that was issued to Mr. Anderson on November 1, 2001, that was provided to the petitioners was not identical to the summons that was actually served to Mr. Anderson on November 1, 2001, in the respect that the copy thereof provided to petitioners did not also contain the deletion of the words ''to provide testimony and'' which were crossed out by Agent Tyson at the time he served the original summons to Mr. Anderson.

III. PETITION TO QUASH SUMMONS

[1] Pursuant to 26 U.S.C. § 7609(b)(2)(A), petitioners timely filed a petition to quash the foregoing summonses on the grounds that the IRS did not comply with the statutory requirements of 26 U.S.C. §§ 7602 and 7609. Specifically, petitioners contend that Agent Tyson's interview of R. Douglas Anderson on Novem-

[1] Based on prior income tax returns filed by the petitioners, the IRS knew that R. Douglas Anderson had prepared those income tax returns and was petitioners' third party record-keeper.

[2] Petitioner James Clay Boyd has not filed a federal income tax return for the years 1996, 1997, 1998, and 1999. Declaration of J. Trent Tyson, p. 1 ¶ 2 - DE #8.

[3] This summons requested production of said documents on November 26, 2001, at the Internal Revenue Service, 1500 Leestown Road, Room 200, Lexington, KY.

[4] The summons itself refers to the tax years 1996, 1997, 1998, 1999; however, the Summons Attachment which describes the types of records requested to be produced, refers to the periods 1992, 1993, 1994, and 1995. Additionally, the summons requested production of said documents on November 26, 2001, at the Internal Revenue Service, 1500 Leestown Road, Room 200, Lexington, KY.

ber 1, 2001, violated the advance notice requirement established by 26 U.S.C. § 7602(c), and that the third party record-keeper summons issued to R. Douglas Anderson on November 1, 2001, should be quashed because it does not comply with the notice requirement established by 26 U.S.C. § 7609(a)(1), in that the copy of the summons provided to them was not a copy of the same summons that was served on R. Douglas Anderson. Petitioners also contend that the third-party record-keeper summons served on R. Douglas Anderson on November 2, 2001, should be quashed because it resulted from information Agent Tyson illegally obtained from Anderson during the course of the one and one-half hour interview with him on November 1, 2001.

In addition to requesting that both of the foregoing third-party record-keeper summonses be quashed, petitioners also request the court to order the respondent to turn over to them all notes, memoranda or any other document or thing, and all copies of the same, that were obtained as a result of the interrogation of R. Douglas Anderson on November 1, 2001, and that respondent be directed not to make or prepare any replacement document.

On March 13, 2002, the day prior to the evidentiary hearing, the respondent moved for summary denial of said petition and for summary enforcement of the two foregoing summonses, asserting that through the declaration of Agent Tyson, the United States had made a *prima facie* showing that the subject investigation to which the summonses relate: (a) is being carried out for a proper purpose; (b) that the summonsed information may be relevant to that purpose; (c) that the summonsed information, except for certain documents described in the Tyson Declaration, is not within the possession of the IRS; and (d) that the administrative steps required by the Internal Revenue Code of 1986 have been per-formed.

On April 8, 2002, petitioners moved for judgment and moved to amend their petition to quash summons. [DE #15]. On April 26, 2002, respondent filed a response in opposition to petitioners' motion for judgment and motion to amend the petition to quash summons. [DE #17].

A. Fed.R.Civ.P. 12(a)(3)(A) violation

Before considering the merits of the petition to quash summons, the Magistrate Judge must first address petitioners' argument that they are entitled to judgment because the respondent failed to respond to the petition to quash summons in compliance with Fed.R.Civ.P. 12(a)(3)(A), which provides as follows: Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on Pleadings(a) When Presented.

. . .

(3)(A) The United States, agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim--or a reply to a counterclaim--within 60 days after the date the United States Attorney is served with the pleading asserting the claim.

Fed.R.Civ.P. 12(a)(3)(A).

The record reflects that petitioners' petition to quash summons was served on the United States Attorney for the Eastern District of Kentucky on November 26, 2001. See Exhibit "A" to petitioners' Motion for Judgment and Motion to Amend Petition - DE #15. The record also reflects that on February 15, 2002, respondent filed its response to the petition to quash summons [DE #3], and that prior to the filing of said response, respondent filed no motion for an extension of time to file same.

Since the petition to quash summons was served on the United States Attorney on November 26, 2001, under Fed.R.Civ.P. 12(a)(13)(A), respondent's answer or response thereto was due to be filed no later than January 25, 2002, 60 days after the

United States Attorney was served with said petition to quash summons. Thus, since the respondent's response to the petition to quash summons was not filed until February 15, 2002, said response was untimely.

However, the mere fact that the respondent's response was untimely under Fed.R.Civ.P. 12(a)(3)(A) does not necessarily mean that petitioners are entitled to default judgment against the respondent under Fed.R.Civ.P. 55. First of all, petitioners have not moved for default judgment, and the Clerk of the Court has not entered default against the respondent. Secondly, the Magistrate Judge concludes that petitioners are not entitled to default judgment under Fed.R.Civ.P. 55(e), which provides as follows:

> (e) Judgment Against the United States. No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court.

Based on the fact that petitioners did not move for default judgment and that the Clerk of the Court had not entered default against the United States, the Magistrate Judge concludes that petitioners have not established that they are entitled to default judgment against the United States in this matter.

B. Petition on the merits

The statutes relevant to this action are 26 U.S.C. §§ 7602 and 7609, both of which petitioners allege the IRS violated in respect to Agent Tyson's interview of petitioners' third-party record-keeper, R. Douglas Anderson, on November 1, 2001, and in respect to the fact that the copy of the summons issued to Mr. Anderson that was provided to them was not an exact copy of the summons that was served on Mr. Anderson.

1. 26 U.S.C. § 7602

26 U.S.C. § 7602 provides in relevant part, as follows: § 7602 Examination of books and witnesses.

> . . .
>
> (c) Notice of contact of third parties. (1) General notice. An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.
>
> . . .
>
> (3) Exceptions. This subsection shall not apply--
>
> . . .
>
> (C) with respect to any pending criminal investigation.
>
> (d) No administrative summons when there is Justice Departmental referral. (1) Limitation of authority. No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.

IRS Special Agent J. Trent Tyson testified that he was employed in the Criminal Investigation Division of the IRS, that petitioner James C. Boyd was under criminal investigation due to his failure to file a federal income tax return for the years 1996, 1997, 1998, and 1999, and that his visit to petitioners' third party record-keeper, R. Douglas Anderson, concerned that pending criminal investigation. (Evidentiary Hearing Transcript, pp. 39–41). Consequently, the Magistrate Judge concludes that since there was a pending criminal investigation of petitioner James C. Boyd, the IRS was no required to give the petitioners advance notice that it would be contacting petitioners' third-party record-keeper, R. Douglas Anderson. 26 U.S.C.

§ 7602(c)(3)(C) expressly states that subsection (c) does not apply "with respect to any pending criminal investigation." Therefore, there was no violation of 26 U.S.C. § 7602(c).

The Magistrate Judge also heard testimony from IRS Supervisory Special Agent Timothy Skeens, a supervisory special agent with the criminal division of the IRS who has been employed by the IRS for more than ten (10) years. (Evidentiary Hearing Transcript, p. 35). In explaining the criminal investigation process, Agent Skeens testified that the second step in the investigative process is "to contact the return preparer or accountant for the taxpayer and conduct an interview of the return preparer." Id. In explaining when a summons is issued, Agent Skeens testified as follows:

> A. A summons is issued to compel the testimony or to acquire documents from the third party, in this case, would be the accountant. It's part of our investigative process. We make a lot of contacts to ask questions and do interviews, and we treat the contacts of and the accountant the same way. We generally approach the accountant and explain why we're there and ask if they are willing to answer questions. We are not required to give notice to the taxpayer or subject of the investigation that we're going to do that interview. At that time, the accountant or return preparer or any third-party witness certainly has the opportunity to talk to us. In that instance, we issue a summons to compel the production of books and records or the production of testimony and in the case of a third-party record keeper, we're bound by the requirements of giving notice within three days and then allowing the petition to quash to be filed. If the third-party record keeper decides that they will talk to us, we certainly sit down and talk with them and go over their testimony, and we certainly can look at books and records pertaining to the investigation.
>
> If we issued a summons in the very beginning, we could not do that without filing notice and giving them the chance to quash, but if we sit down voluntarily and talk, there is no requirement for us to issue a summons for those books and records. Our general practice is at the end of the interview, we ask, Would you please provide us the records? And in most instances, the accountant will request a summons, basically. And you referred to professional courtesy earlier. I think that's why the summons is issued so the return preparer will be able to tell the client that I'm going to turn over these records and I'm compelled to do so, and that's when the client has the opportunity to petition to quash.
>
> Q. So is it your testimony that if a third party voluntarily turns over documents to a special agent, that special agent is not required to issue a summons?
>
> A. Correct. We can receive and take information from third-party and non third-party witnesses without letting or serving a third-party notice. That only comes into play when we actually serve the summons.
>
> Q. Is it also your testimony that a summons would only be issued if a third party refuses to turn over documents and records?
>
> A. No, not really. They certainly can turn over records and documents voluntarily. But when we do issue that summons, from that point on, we cannot look at the records until the 23 days expire for the petition to quash. It's the general practice that we serve the summons at the end to be able to cover the third-party record keepers in any liability that they think they may have by producing the records to the Internal Revenue Service.

Id. at 35–37.

Based on a review of 26 U.S.C. § 7602, relevant case law, and the testimony of Agent Skeens, the Magistrate Judge con-

cludes that since the IRS was conducting a criminal investigation of petitioner James C. Boyd, the IRS was authorized, prior to the issuance of a summons, to make contact with petitioners' third-party record-keeper, R. Douglas Anderson, to explain that James C. Boyd was being investigated for possible criminal liability for not filing an income tax return for the years 1996, 1997, 1998 and 1999, and to require as to whether the third-party record-keeper would be willing to be interviewed informally and to permit the examination of records the third-party record-keeper might have concerning James C. Boyd. If the third-party record-keeper were willing to be interviewed informally, then such an interview, including the examination of the third-party record-keeper's records could take place, all within the framework of 26 U.S.C. §§ 7602 and 7609. If the third-party record-keeper were not willing to be interviewed informally, then the IRS would issue an administrative summons to the third-party record-keeper, requesting him to appear and give testimony and to produce books and records relevant to the inquiry.

In this case, the third-party record-keeper voluntarily agreed to an informal interview with Agent Tyson on November 1, 2001. During the course of this interview, Agent Tyson viewed, without copying, a 1995 income tax return that Mr. Anderson had prepared for the petitioners. At the conclusion of that interview, Agent Tyson served the summons in question on Mr. Anderson, and Agent Tyson has not viewed or examined any books or records subsequent to the issuance of the summons on November 1, 2001.

In United States v. McLaughlin, 126 F.3d 130 [80 AFTR 2d 97-6436] (3rd Cir. 1997), the Third Circuit recognized that the IRS has broad discretion in how it conducts its investigations, explaining as follows:

> The IRS has broad discretion on how it conducts its investigation. *See* 26 U.S.C. § 7602. As the Ninth Circuit has said:
>
> > Section 7602 provides three separate means of ... inquiry. Section 7602(a)(1) provides for an informal, noncompulsory means of inquiry. If an informal inquiry proves inadequate, Sections 7602(a)(2) and 7602(a)(3) provide mechanisms for the formal compulsion of the production of documents and testimony.
>
> *Speck v. United States*, 59 F.3d 106, 108 [76 AFTR 2d 95-5226] (9th Cir.1995). "Nothing ... in the text of Section 7602 suggests that subsection (a)(2) should be read to exclude informal or noncoercive attempts to obtain information about possible failures to report income." *Id.*Section 7602(a) permits the government to conduct a formal investigation and issue summonses or to proceed informally. In this case, the government chose to proceed informally, and BIU's former accountant cooperated with the investigation. It was entitled to do so without notifying Mark.

United States v. McLaughlin, supra, 126 F.3d at 137.

Consequently, the Magistrate Judge concludes that there has been no violation of 26 U.S.C. § 7602. Therefore, neither the summons issued to R. Douglas Anderson on November 1, 2001, nor the summons issued to R. Douglas Anderson on November 2, 2001, should be quashed.

Concerning 26 U.S.C. § 7602(d)(2)(A), Agent Tyson stated in his declaration that:

> 14. As of the date of this declaration, no "Justice Department referral" is in effect with respect to James Clay Boyd. More specifically, the Internal Revenue Service has not made a recommendation to the Department of Justice for a grand jury investigation or criminal prosecution of James Clay Boyd for the tax years under investigation. The Internal Revenue Service also is not delaying a

recommendation to the Department of Justice in order to collect additional information. Moreover, the Department of Justice has not made any request under 26 U.S.C. § 6103(h)(3)(B) for the disclosure of any return or return information (as those terms are defined in 26 U.S.C. § 6103(b)) relating to taxpayers.

Declaration of J. Trent Tyson, p. 5, ¶ 14 - DE #8.

Thus, the IRS was authorized to issue an administrative summons in respect to the petitioners.

2. 26 U.S.C. § 7609

26 U.S.C. § 7609 provides in relevant part, as follows: § 7609. Special procedures for third-party summonses.

(a) Notice. (1) In general. If any summons to which this section applies requires the giving of testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code (as defined in 7612(d)(2)) with respect to, any person (other than the person summoned) who is identified in the summons, then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the right under subsection (b)(2) to bring a proceeding to quash the summons.

. . .

(b) Right to intervene; right to proceeding to quash. (1) Intervention. Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604. (2) Proceeding to quash. (A) In general. Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given in the manner provided in subsection (a)(2). In any such proceeding, the Secretary may seek to compel compliance with the summons.

. . .

(d) Restriction on examination of records. No examination of any records required to be produced under a summons as to which notice is required under subsection (a) may be made--

(1) before the close of the 23rd day after the day notice with respect to the summons is given in the manner provided in subsection (a)(2), or

(2) where a proceeding under subsection (b)(2)(A) was begun within the 20-day period referred to in such subsection and the requirements of subsection (b)(2)(B) have been met, except in accordance with an order of the court having jurisdiction of such proceeding or with the consent of the person beginning the proceeding to quash.

. . .

(j) Use of summons not required. Nothing in this section shall be construed to limit the Secretary's ability to obtain information, other than by summons, through formal or informal procedures authorized by section 7601 and 7602.

To reiterate, petitioners contend that the third-party record-keeper summons issued to R. Douglas Anderson on November 1, 2001, should be quashed because it does not comply with the notice requirement established by 26 U.S.C. § 7609(a)(1), in that the copy of the summons provided to them did not contain the deleted words ''to give testimony and'' that were deleted

from the summons that had been issued to R. Douglas Anderson.[5]

The Magistrate Judge concludes that the discrepancy between the summons served on R. Douglas Anderson on November 1, 2001, and the copy thereof that was pro-vided to the petitioners is an insignificant, hypertechnical violation resulting in no prejudice to the petitioners, similar to the violation in Cook v. United States, 104 F.3d 886 [79 AFTR 2d 97-577] (6th Cir. 1997), which the Sixth Circuit concluded did not warrant disqualification of the summons.

Consequently, for all of the foregoing reasons, the Magistrate Judge concludes that the petition to quash summons should be denied and that the respondent is entitled to summary enforcement of the two summonses at issue.

Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion for summary denial of the petition to quash summons [DE #6] be GRANTED; that respondent's motion for summary enforcement of the administrative summonses served by IRS Special Agent J. Trent Tyson on R. Douglas Anderson on November 1, 2002, and November 2, 2002, [DE #6] be GRANTED; that petitioners' motion for judgment and motion to amend petition [DE #15] be DENIED; that the petition to quash summons filed herein on November 20, 2001 be DENIED; and that this action be DISMISSED and STRICKEN from the docket.

The Clerk of the Court shall forward a copy of this Proposed Findings of Fact and Recommendation to the respective parties who shall, within ten (10) days of receipt thereof, serve and file timely written objections to the Magistrate Judge's Proposed Findings of Fact and Recommendation with the District Court or else waive the right to raise the objections in the Court of Appeals. 28 U.S.C. section 636(b)(1)(B); Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), affirmed, 474 U.S. 140 (1985); Wright v. Holbrook, 794 F.2d 1152, 1154–55 (6th Cir. 1986); Fed.R Civ.P. 6(e).

This 13th day of June, 2002.

JAMES B. TODD,

UNITED STATES MAGISTRATE JUDGE

¶2002-5015

Hugh S. HUNT v. UNITED STATES OF AMERICA. U.S. District Court, Dist. of Maryland, (DC MD) Civil No. JFM-94-3533, June 11, 2002. Earlier proceedings at (2002, DC MD) 89 AFTR 2d 2002-539, 178 F Supp 2d 537, 2002-1 USTC ¶50181 [89 AFTR 2d 2002-539]; and (2000, DC MD) 85 AFTR 2d 2000-1976, 94 F Supp 2d 665, 2001-1 USTC ¶50444 [87 AFTR 2d 2001-2389]. Year 1992. Decision for Govt.

1. Actions against U.S.—damages—wrongful collection; failure to release improper liens—limitations periods—exhaustion of administrative remedies. Taxpayer's motions to alter prior order and for summary judgment on his wrongful collection complaint were denied: taxpayer's argument that limitations period on IRC §7432 and IRC §7433 claims was tolled while his Tax Court proceeding was pending was meritless. Although assessment was ultimately found to be erroneous, IRS believed assessments to be correct when it instituted collection. *Reference:* United States Tax Reporter ¶74,335.01(30); 74,325.01. IRC §7432; 7433.

In the United States District Court for the District of Maryland.

Memorandum

MOTZ, District Judge:

[1] Plaintiff has filed a motion to partially alter or amend this court's order en-

[5] The parties have stipulated that the copy of the summons provided to the petitioners did not contain the deleted words "to give testimony and" that were deleted from the summons that was served on R. Douglas Anderson on November 1, 2001.

tered on January 7, 2002, and a motion for summary judgment of his claim for an alleged wrongful collection of $30,541.59 from the refund on TY 1982 taxes. Both motions will be denied.

The premise of plaintiff's position is that limitations on his causes of action under §§7432 and 7433 of the Internal Revenue Code were tolled while the Tax Court proceeding he had instituted was pending. In effect, he argues that because the Tax Court ultimately found that the assessment upon which the collection was based was erroneous, the collection itself was actionable. This position is without merit. The collection actions were taken upon the basis of an assessment that the IRS then believed to be correct. The subsequent finding by the Tax Court that the assessment was erroneous does not render the Internal Revenue Service liable under §§7432 or 7433 for a wrongful collection.

A separate order denying plaintiff's motion is being entered herewith.

Date: June 11, 2002

J. Frederick Motz

United States District Judge

Order

MOTZ, District Judge:

For the reasons stated in the accompanying memorandum, it is, this 11th day of June 2002

ORDERED

1. Plaintiff's Rule 59(e) motion is denied; and

2. Plaintiff's motion for summary judgment filed on January 15, 2002 is denied.

J. Frederick Motz

United States District Judge

¶2002-5016

UNITED STATES OF AMERICA, PLAINTIFF v. M. Robert ULLMAN, DEFENDANT. U.S. District Court, Eastern Dist. of Pennsylvania, (DC PA) Civil Action No. 01-0272, June 13, 2002. Earlier proceedings at (2002, DC PA) 89 AFTR 2d 2002-2492, 2002-1 USTC ¶50428; and (2002, DC PA) 89 AFTR 2d 2002-1090, 2002-1 USTC ¶50271, reconsidering and vacating in part (2001, DC PA) 88 AFTR 2d 2001-6773, 2001-2 USTC ¶50749. Decision for Govt.

1. Actions against IRS—damages—unauthorized collection—installment agreements—offers in compromise—reconsideration—motions to compel—sanctions. Taxpayer's motion for reconsideration of prior order, motions to compel disclosure, and motion for sanctions against govt. were denied, and case was closed: taxpayer's allegations and arguments were already raised and addressed in prior rulings on govt.'s 2 summary judgment motions. *Reference:* United States Tax Reporter ¶74,335.01(10); 74,025.01(3). IRC §7402; 7433.

In the United States District Court for the Eastern District of Pennsylvania.

Order

[1] AND NOW, this 13 day of June, 2002, upon consideration of Defendant's Motion for Reconsideration of Order Dated May 8, 2001 (Docket No. 47), the United States' Opposition to Defendant's Motion to Reconsider (Docket No. 51), along with other matters of record, it is hereby ORDERED that Defendant's Motion is DENIED.

Upon consideration of Defendant's Motion to Compel (Docket No. 48), the United States' opposition thereto (Docket No. 58), along with other matters of record, it is hereby ORDERED that Defendant's motion is DENIED.

Upon consideration of Defendant's Motion for Sanctions for Refusing to Comply (Docket No. 48), the United States' opposition thereto (Docket No. 58), along with other matters of record, it is hereby OR-

DERED that defendant's motion is DENIED.

Upon consideration of Defendant's Motion to Compel the United States of America to Provide or Disclose Written Documents Issued by the National Office of Chief Counsel to its Field Components and Field Agents of the IRS (Docket No. 54), it is hereby ORDERED that Defendant's motion is DENIED.

The allegations and arguments in Defendant's numerous filings associated with the above motions duplicate those facts and arguments raised by Defendant and addressed by the Court in its Memoranda and Orders dated October 30, 2001, ruling on the United States' motion for Summary Judgment and May 8, 2002, ruling on the United States' second Motion for Summary Judgment. Accordingly, Defendant's motions are denied.

Judgment is entered in favor of Plaintiff and against Defendant. This case is marked CLOSED.

BY THE COURT:

Ronald L. Buckwalter, J.

¶2002-5017

UNITED STATES OF AMERICA v. Charles W. SINGER, APPELLANT. U.S. Court of Appeals, Third Circuit, (CA3) Docket No. 01-3607, June 12, 2002. District Court, (2001, DC PA) 88 AFTR 2d 2001-5712, 2001-2 USTC ¶50611, affirmed per curiam. Years 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989. Decision for Govt.

1. Actions to reduce assessments to judgment—fraud penalties—summary judgment. District court properly reduced taxpayer's tax, interest and penalty assessments, including fraud penalties, to judgment on summary judgment: unrefuted assessment certificates sufficiently proved existence, amount and date of assessments and that notice and demands were made; and taxpayer didn't allege error regarding fraud penalties' imposition. Also, govt. properly relied on Forms 4340 and wasn't required to produce Forms 23C; taxpayer's protestor-type arguments were meritless; and arguments regarding guilt findings and double jeopardy didn't apply. And, govt. was granted motion to file supplemental appendix, but, motion to dismiss appeal due to taxpayer's failure to pay past sanctions was denied as untimely; and taxpayer's motions to dismiss appeal and reverse court's decision were denied. *Reference:* United States Tax Reporter ¶74,035.01(25); 66,535.14(10). IRC §7403. Former IRC §6653.

On Appeal From the United States District Court For the Eastern District of Pennsylvania (D.C. Civ. No. 00-cv-04840). United States Court of Appeals for the Third Circuit.

Before: SCIRICA, BARRY, and COWEN, Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Penn-sylvania. On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered on August 21, 2001, be, and the same is, hereby affirmed.

Costs taxes against Appellant. All of the above in accordance with the Opinion of the Court.

ATTEST:

/s/

Clerk

DATED: June 12, 2002

Opinion

Per Curiam:

UNREPORTED - NOT PRECEDENTIAL

Charles W. Singer appeals from the order of the District Court of the Eastern District of Pennsylvania granting the government's motion for summary judgment in an action to reduce to judgment his tax liabilities for 1979 through 1989. The District Court had jurisdiction pursuant to 26 U.S.C. § 7402(a) and 28 U.S.C. §§ 1340 and 1345. We exercise plenary review over a District Court's grant of summary judgment. Pacitti v. Macy's, 193 F.3d 766, 772 (3d Cir. 1999.) The government submitted with its motion for summary judgment certified copies of IRS Form 4340, "Certificate of Assessments and Payments," showing timely tax assessments for Singer's income tax liability for tax years 1979–1989. The government also submitted a declaration by Carlo Gonnella, Advisor in the Special Procedures Branch of the collection division of the Internal Revenue Service (IRS) in Philadelphia, Penn-sylvania, showing that, as of December 31, 2000, Singer owed $4,063,120.89 in unpaid taxes, interest, and penalties, including $600,766 in fraud penalties. The District Court granted summary judgment in an order entered on August 21, 2001 and judgment was entered in favor of the United States and against Singer in the amount of $4,063,120.89 plus statutory additions from December 31, 2000.

[1] We will affirm. We agree with the District Court's conclusion that the Certificates of Assessments and Payments were sufficient to demonstrate the existence, amount, and date of each assessment, see Freck v. Internal Revenue Service, 37 F.3d 986, 991–92 n.8 [74 AFTR 2d 94-6544] (3d Cir. 1994) (assessments are presumed valid and establish a *prima facie* case of tax liability); and to show that notice and demands for payments were made, see United States v. Chila, 871 F.2d 1015, 1019 [63 AFTR 2d 89-1278] (11th Cir. 1989) (absent contrary proof, signed certificate of assessment that indicates date on which notice was sent is presumptive proof that notice was sent). We also agree that Singer presented no persuasive evidence or argument that he is not liable for the assessments made against him. Indeed, he does not challenge the correctness of the amounts due. See United States v. Vespe, 868 F.2d 1329, 1331 [89 AFTR 2d 89-837](3d Cir. 1989) (once the government establishes its case, the taxpayer then bears the burden of proving that he is not liable for the assessments). In particular, Singer alleges no error regarding the imposition of fraud penalties, and we thus have no basis for disturbing the District Court's conclusion that evidence of fraud exists in the record.

In his brief on appeal, Singer contends that the District Court unfairly denied him discovery. The District Court found that the government was entitled to rely on Forms 4340 and was not required to produce the Forms 23C summary records of assessment that Singer sought to discover. We find no abuse of discretion here. Cf. St. Surin v. Virgin Islands Daily News. Inc., 21 F.3d 1309, 1313 (3d Cir. 1994) (denial of motion under Federal Rule of Civil Procedure 56(f) seeking further discovery is reviewed for abuse of discretion). Singer also contends that the District Court lacked jurisdiction because the federal government does not have jurisdiction over any activity in the Commonwealth of Pennsylvania; that compensation earned in a state and not in interstate commerce is not taxable by the federal government; and that the government has failed to comply with the requirements of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692g(b). We find these contentions to be without merit. Singer also makes assertions concerning findings of guilt and double jeopardy violations. These arguments are inapplicable in this civil action to recover unpaid income taxes.

Accordingly, we will affirm the District Court's order granting summary judgment in favor of Appellee, United States of America. The government's motion to dismiss the appeal for Singer's failure to pay previously-imposed sanctions to this Court

is denied as untimely filed after briefing was completed. The government's motion to file a supplemental appendix is granted as stated (we do not construe the motion to request that we strike portions of Singer's appendix). Singer's motions to dismiss the appeal and to reverse the District Court's decision are denied.

¶2002-5018

In re: Dennis A. & Donna M. GRANNAN, Debtors. UNITED STATES OF AMERICA, PLAINTIFF v. David R. RUBY, Trustee, DEFENDANT. U.S. Bankruptcy Court, Eastern Dist. of Virginia, (Bktcy Ct VA) Case No. 01-51154-S; No. APN 01-5043-S, June 20, 2002. Earlier proceeding at (2002, Bktcy Ct VA) 89 AFTR 2d 2002-1825, 277 BR 673. Years 1998, 2000. Decision against Govt.

1. Tax claims in bankruptcy—IRS right to setoff—mutuality of debt—joint returns and refunds; separate liabilities. IRS's adversary complaint to recover married debtors' refund checks from 13Chap. 7 trustee and set them off against husband's outstanding IRC §6672 penalty debt was rejected: IRS lacked setoff right where there was no mutuality between refunds that arose from taxpayers' joint returns and husband's separate tax liability; and IRS failed to offer any documentary evidence to support allocation of portion of refund to husband separately. *Reference:* United States Tax Reporter ¶68,726.52(20); 64,025.06(60). IRC §6402; 6672.

United States Bankruptcy Court Eastern District of Virginia Newport News Division,

Memorandum Opinion and Order

ST. JOHN, Bankruptcy Judge:

Chapter 7

On April 25, 2001, Dennis A. & Donna M. Grannan (''Debtors'') filed for bankruptcy protection under Chapter 7 of Title 11 of the United States Code, and David R. Ruby was appointed Trustee. This Court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(b) and 1334(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

FINDINGS OF FACT

The instant dispute arises from the United States of America's, through the Internal Revenue Service (''IRS''), complaint to recover funds held by the Trustee. Allegedly, the IRS erroneously issued two tax refunds to the Debtors and it now seeks to recover them.

Prior to filing for bankruptcy, on April 9, 2001, Dennis Grannan asked for a ''quick assessment'' of unemployment tax liabilities for his business, Sunray Cleaning Services, for the tax period ending on June 30, 2000. Ex. 101. On April 18, 2001, the United States through the Internal Revenue Service (''IRS'') assessed a trust fund liability of $50,902.66 against Dennis Grannan individually. Ex. 102. The IRS completed the quick assessment by completing the 2751 form and assigning Dennis Grannan's tax liability a DLN number, document location number. Tr. 10–11, 27. Subsequent to this assessment, the Debtors, through joint tax returns, became entitled to two refunds for the 1998 and 2000 tax years, which total $43,925.00 and $8411.00, respectively. Compl. 6; Answer 6; Tr. 19; Ex. 103.[1] The IRS manually processed the refunds and issued them to the debtors, the IRS issued the 2000 refund in the middle of May 2001. Tr. 19. The Debtors then sent these tax refund checks to the Trustee on June 18, 2001, which the Trustee deposited into an escrow account. Compl. 10, 12; Answer 10, 12. On July 27, 2001 Gregory Stefan, Assistant United States Attorney and Jason Zarin, Trial Attorney, Tax Division, United States Depart-

[1] There is some ambiguous testimony that such refunds arose from the debtor's business; but even with such testimony, it is not clear how much of the refund is attributable to Dennis or Donna Grannan. Tr. 32

ment of Justice, for the IRS, filed this adversary proceeding to Recover Money held by the Trustee.

At the pretrial conference held on October 12, 2001, both parties expressed an intention to file motions for Summary Judgment, which both Clara Swanson, counsel for David Ruby, Chapter 7 Trustee (''Trustee'') and the IRS, filed on January 10, 2001. Pursuant to these motions, this Court held a Summary Judgment hearing on March 19, 2002, where it addressed whether or not the Internal Revenue Service can waive its right to offset a certain tax refund with certain outstanding tax liabilities. This Court denied the cross motions for Summary Judgment on March 21, 2002, and held a trial on May 15, 2002, to further address the factual issues in this matter. This opinion constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Banckruptcy Procedure 7052.

CONCLUSIONS OF LAW

[1] The IRS asserts it is entitled to setoff the refunds distributed to the debtors against the tax liability of Dennis Grannan. The Trustee asserts the IRS has waived its right to setoff or in the alternative setoff is not appropriate since there is no mutuality. The Court will first address the latter argument.

26 U.S.C. 6402(a)(2002) grants the IRS the right to setoff, ''[i]n the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, . . . , against any liability in respect of an internal revenue tax on the part of the person who made the overpayment.''[2] ''The right of setoff (also called 'offset') allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding 'the absurdity of making A pay B when B owes A.''' *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 18 (1995)(quoting *Studley v. Bolyston Nat. Bank*, 229 U.S. 523, 528 (1913)). No federal right of setoff is created by the Bankruptcy Code, 11 U.S.C. § 553(a)(2001), merely preserves the right of setoff as it is allowed under nonbankruptcy law with certain limitations. *Id; Durham v. SMI Indus. Corp.*, 882 F.2d 881, 883 (4th Cir. 1989); *Hal, Inc. v. United States (In re Hal, Inc.)*, 122 F.3d 851, 853 [80 AFTR 2d 97-6537] (9th Cir. 1997);. 11 U.S.C. § 553(a)(2001) states

> [e]xcept as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case.

Inherent within such language are several limitations; thus, a creditor must establish by a preponderance of the evidence: (1) a debt owed by the creditor to the debtor, which arose prior to the commencement of the bankruptcy case; (2) a claim of the creditor against the debtor, which arose prior to the commencement of the bankruptcy case; (3) the debt and claim are mutual obligations; and (4) the debts are subject to setoff under nonbankruptcy law; in order to assert the right of setoff under § 553. *Internal Revenue Serv. v. Luongo (In re Luongo)*, 259 F.3d 323, 334 [88 AFTR 2d 2001-5752] (5th Cir. 2001) (citing *Braniff Airway, Inc. v. Exxon Co.*, 814 F.2d 1030, 1035 (5th Cir. 1987)); *Public Serv. Co. of New Hampshire v. New Hampshire Elec. Coop. Inc. (In re Public*

[2] At the trial, the IRS apparently asserted it need to follow the requirements of § 553 in order to effectuate a setoff of Dennis Grannan's tax liability. Tr. 41 (stating ''Mr. Whitaker [IRS agent] testified as to the IRS standard practice which is that setoffs are handled automatically.'') This Court finds the case law is contrary to such assertion. In *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 209 [52 AFTR 2d 83-5121] (1983), the Supreme Court required the IRS to return property the IRS seized prepetition to satisfy a tax lien, and it further asserted ''[n]othing in the Bankruptcy Code or its legislative history indicates that Congress intended a special exception for the tax collector.'' In *Belloff v. Commissioner*, 996 F.2d 607, 613 [72 AFTR 2d 93-5334] (2d Cir. 1993), the Second Circuit Court of Appeals rejected the IRS's claims § 6402(a) procedures allow it to avoid the tax court's jurisdiction over setoff. With such prior opinions, it becomes clear the IRS's assertion is contrary to the law and this Court must continue to analyze this case under § 553 of the Bankruptcy Code.

Serv. Co. of New Hampshire), 884 F.2d. 11, 14 (1st Cir. 1989); *King v. Fulbright & Jaworski, LLP (In re Koch)*, 224 B.R. 572, 576 (Bankr. E.D. Va. 1998); *In re Holder*, 182 B.R. 770, 774–75 (Bankr. M.D. Tenn. 1995); *Bavely v. Cinoco Terminal, Inc. (In re Triple A Coal Co.)*, 41 B.R. 641, 646 (Bankr. S.D. Ohio 1984)(holding the defendant established by a preponderance the right of setoff); *See Eckles v. Petco, Inc., Interstate (In re Balducci Oil Co., Inc.)*, 33 B.R. 847, 850–51 (Bankr. D. Colo. 1983)(explaining § 553 limits the assertion of setoff but nonbankruptcy law determines the right of setoff). After establishing the prerequisites for asserting setoff, the Court generally must examine the equities to determine whether or not to allow its assertion. *Cumberland Glass Mfg. Co. v. DeWitt*, 237 U.S. 447, 455 (1915)(holding setoff is permissive and not mandatory, and thus its assertion is guided by principles of equity); *Gordon Sel-Way, Inc. v. United States (In re Sel-Way, Inc.)*, 270 F.3d 280, 292 [88 AFTR 2d 2001-6688] (6th Cir. 2001); *Blanton v. Prudential-Bache Securities (In re Blanton)*, 105 B.R. 321, 336–37 (Bankr. E.D. Va. 1989).

In the present case, the debtors' refunds arose from overpayments for federal income taxes in 1998 and 2000 pursuant to joint income tax return filings on or before April 15, 2001. Compl. 6, Answer 6. The Debtors asserted a claim for a 1998 refund at that time due to a loss carryback. Tr. 19. Thus, both the tax years where the refunds arose and the tax filings, occurred prepetition, *Segal v. Rochelle*, 382 U.S. 375 [17 AFTR 2d 163] (1966)(holding under the Bankruptcy Act, refunds based on prepetition overpayments arise at that time, rather than at the postpetition assertion of the loss carryback refunds); *Still v. United States (In re W.L. Jackson Mfg. Co.)*, 50 B.R. 506, 508 [56 AFTR 2d 85-5878] (Bankr. E.D. Tenn. 1985)(holding *Segal* also applies under the Bankruptcy Code); *In re Conti*, 50 B.R. 147, 149 (Bankr. E.D. Va. 1985)(holding the tax refund arises at the end of the tax year where overpayment occurred and not at the claiming of the tax refund).

The tax liability also arose prepetition since such taxes arose from Dennis Grannan's failure to pay employment taxes for his business, Sunray Cleaning Service, Inc, for the period ending June 30, 2000. Ex. 101; *Rozel Indus., Inc. v. Internal Revenue Serv. (In re Rozel Indus., Inc.)*, 120 B.R. 944, 949 (Bankr. N.D. Ill. 1990)(holding tax liability arises in the year it is due whether or not the debtor filed a tax return). Such taxes were assessed against Dennis Grannan prior to the bankruptcy filing on April 18, 2001. Ex. 102. However, whether such liability arose upon completion of the tax assessment or upon the end of the tax period, is not at issue in this case since it is uncontested both actions occurred prepetition.

The IRS must next prove there was mutuality, which simply means "the debts are between the same parties, standing in the same capacities." *In re Blanton*, 105 B.R. at 334; *Lubman v. Sovran Bank, N.A. (In re A & B Homes, Ltd.)*, 98 B.R. 243, 248 (Bankr E.D. Va. 1989). As Chief Judge For explained, same parties refers to the identify of the parties while capacity refers to the parties' relationship such as a fiduciary, trustee, or agent. *In re Nuclear Imaging Systems, Inc.*, 260 B.R. 724 (Bankr. E.D. Pa. 2000)(quoting L. King, *5 Collier on Bankruptcy*¶ 553.03[3][c] (15th ed. rev. 1999)); *In re Carlyle*, 242 B.R. 881, 888 n. 4 (Bankr. E.D. Va. 1999)(quoting *First Nat'l. Bank v. Johnson*, 183 Va. 227, 31 S.E.2d 581, 585 (1944))(stating a fiduciary may not setoff a trust res against a debt owed to the trustee personally since the res is held in a separate capacity).

Generally, courts strictly construe the mutuality requirement. *Gray v. Rollo*, 85 U.S. (18 Wall.) 629, 633 (1873)(holding mutuality is construed strictly unless justice requires a particular result); *In re Koch*, 224 B.R. at 576 (holding courts strictly construe mutuality); *Virginia Block Co. v. Bushong (In re Virginia Block Co.)*,

16 B.R. 560, 562 (Bankr. E.D. Va. 1981)(holding courts strictly construe mutuality). In the present case, it is undisputed the tax liability is a personal liability of Dennis Grannan while the tax refunds arose through the debtors' joint tax returns. To properly setoff the tax liability and refund, this Court must determine what amount of the refunds are due Dennis Grannan.

The language of 26 U.S.C. 6402 (2002), as previously quoted, appears clear, the IRS may setoff one person's tax liability against that same person's overpayment. *Gens. v. United State*, 673 F.2d 366, 367–68 [49 AFTR 2d 82-734] (Ct. Cl. 1982)(holding the language of the § 6402 limits setoff to the person who actually made the overpayment). It is undisputed the tax refunds in the present case arose from joint tax returns.

> Spouses filing a joint return have separate interests in any overpayment, the interest of each depending on his or her income, i.e., an overpayment is apportionable to a spouse to the extent he or she contributed to the overpaid tax.

Rosen v. United States, 397 F.Supp. 342, 343–44 [36 AFTR 2d 75-5835] (E.D. Pa. 1975)(citing *Maragon v. United States*, 153 F. Supp. 365 [52 AFTR 196] (Ct. Cl. 1975)); *Jahn v. Regan*, 584 F. Supp. 399 [53 AFTR 2d 84-1221] (E.D. Mich. 1984); Rev. Rul. 74-611, 1974-2 C.B. 399 (holding an overpayment on a joint return filed by a husband and wife, each individual has a separate interest in the overpayment). The IRS specifically conceded at trial that with regard to the 1998 and 2000 tax refunds, the amount of overpayment attributable to each spouse is "not a matter of the record . . . But the IRS is willing to concede that for the 2000 returns that $452.62 would not be, in fact, a fee [sic] a joint liability, and $452.62 would incur to Donna Grannan, bu the remainder could be applied under *Glaubke* to Mr. Grannan's individual liability." Tr. 41. The IRS further asserted the entire 1998 overpayment is attributable to Dennis Grannan's income. However, the Court in *Glaubke v. United States*, Civ. No. 77-94-N, 1978 WL 1150, at 5 [41 AFTR 2d 78-759] (E.D. Va. Jan. 3, 1978)(unpublished opinion), held the IRS with regard to a joint tax return, may only setoff an individual's personal tax liability against the amount of overpayment attributable to that individual's income. *See McClelland v. Massinga*, 786 F.2d 1205 [57 AFTR 2d 86-1077] (4th Cir. 1986)(stating with regard to interception of tax refunds, "if the [nonobligated] spouse has made some contribution, he or she does have an interest in the refund and must be given notice.")[3]

Since the IRS declined to present the Debtors' income tax return or any other information about their respective incomes, the only other information on the amount of income contributed by each of the debtors respectively is the following statement offered by the IRS's counsel during argument, "[f]or 2000, based on the information attached to the Grannans' income tax [not in evidence], Dennis Grannan earned wages of $66,825.20, of which $6457.10 was withheld." Tr. 41. While this Court may agree part of the refund is likely attributable only to Dennis Grannan, the plaintiff has failed to introduce any evidence providing how much or if any. Thus, the evidence fails to provide the Court a proper basis to calculate the amount of re-

[3] The IRS may argue the Trustee has the burden to establish both Mr. and Mrs. Grannan contributed to the overpayment. *St. John v. Bookwalter*, 58-1 U.S. Tax Cas. (CCH) P 9216 [1 AFTR 2d 697] (W.D. Mo. 1957). While such an assertion is perhaps correct in the context of a suit for a tax refund, as discussed previously, the IRS bears the burden to prove mutuality, and as such it must demonstrate the tax liability and tax refunds are attributable to the same party. Such conclusion is further supported in that when the United States seeks to recover an allegedly erroneous refund, it bears the burden of proof. *United States v. Commercial Nat. Bank*, 874 F.2d 1165, 1169 [63 AFTR 2d 89-1428] (7th Cir. 1989); *United States v. Russell Mfg. Co.*, 349 F.2d 13, 16 [16 AFTR 2d 5156] (2d Cir. 1965); *United States v. CSX Corp.*, Civ. No. 3-94CV773, 1995 WL 381537, at 3 [75 AFTR 2d 95-2434] (E.D. Va. 1995)

fund attributable to Dennis Grannan.[4] Therefore, the plaintiff has failed to establish mutuality, and thereby failed to establish setoff is proper in this matter.[5]

CONCLUSION

26 U.S.C. § 553 (2002) preserves right of setoff as it exists under nonbankruptcy law; therefore, those asserting such must right prove the debts and credits arose prepetition, the right of setoff exists pursuant to nonbankruptcy law, and there is mutuality between the debtor and creditor. There is no dispute the debts and credits arose prepetition, thus the plaintiff need only prove mutuality and that such right of setoff exists under nonbankruptcy law. The plaintiff in this matter has failed to prove the debts and credits exist between the same parties and in the same capacities, and thereby failed to prove mutuality.[6]

ACCORDINGLY, the relief sought in the United States' Complaint to Recover Money from the Trustee is DENIED.

IT IS SO ORDERED.

The Clerk shall send copies of this opinion to Gregory D. Stefan, Assistant United States Attorney, 800 World Trade Center, 101 West Main Street, Norfolk, VA 23510; Jason S. Zarin, Trial Attorney, P.O. Box 224, Washington D.C. 20044; Clara P. Swanson, Counsel for David R. Ruby, Chapter 7 Trustee, 707 Mobjack Place, Newport News, Virginia 23607; David R.Ruby, McSweeney, Burtch, & Crump, P.C., 11 South 12th Street, P.O. Box 1463, Richmond, VA 23218; and W. Greer McCreedy, II, counsel for Dennis and Donna Grannan, Kellam, Pickrell, Cox, and Tayloe, 403 Boush Street, Suite 300, Norfolk, VA 23510.

ENTERED: This 20th day of June 2002 at Norfolk in the Eastern District of Virginia.

STEPHEN C. ST. JOHN

United States Bankruptcy Judge

¶2002-5019

ESTATE OF Robert SANSONE, deceased, Robert B. Sansone, personal representative, PLAINTIFF-APPELLANT, v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-55439; No. CV-00-05551-RSWL, June 11, 2002. District Court, (2001, DC CA) 87 AFTR 2d 2001-1361, affirmed. Date of death 7-15-91. Decision for Govt.

1. Estate taxes—marital deduction—qualified terminable interest property (QTIP)—annuity trusts—deductible interests. District court properly limited estate's marital deduction: possible cost-of-living adjustments to surviving spouse's annual payments from trust/QTIP weren't deductible under Reg. §20.2056(b)-7(e)(2). Also, trust wasn't IRC §2056(b)(8) qualified charitable remainder trust where annual payments could fluctuate with inflation and weren't based on fixed percentage of corpus. *Reference:* USTR Estate & Gift Taxes ¶20,565.08(5). IRC §2056.

Appeal from the United States District Court for the Central District of California. United States Court of Appeals for the Ninth Circuit.

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[4] Even if the stipulations from the Summary Judgment hearing continue in effect for the trial, this Court still does not have enough evidence to determine how much of the overpayments are attributable to each spouse. The only additional information offered in the IRS's demonstration of how to proportionately calculate the amount of refund attributable to Dennis and Donna Grannan respectively, offered in its Opposition to the Trustee's motion for Summary Judgment. Opp. to Summary Judgment P. 2–4. However, the IRS declined to attach an affidavit demonstrating the basis for its figures and furthermore, the Trustee never stipulated to these figures at the Summary Judgment hearing nor at the trial. Thus, this Court is without sufficient evidence to determine the amount of refund attributable to Dennis Grannan, if any.

[5] This Court is unable to determine the equities of whether or not to grant setoff since the IRS failed to prove the prerequisites for asserting it. *In re Gordon Sel-Way, Inc.*, 270 F.3d at 292 (citing *DuVoisin v. Foster (In re Southern Indus. Banking Corp.)*, 809 F.2d 329, 332 (6th Cir. 1987) (holding "once the prerequisites for establishing a setoff claim are established, the court generally looks to the equities in order to determine if the setoff should be allowed.")

[6] As a practical matter, this Court's opinion may have little effect on the administration of the Debtors' bankruptcy since the IRS possesses a first priority creditor status and will thereby receive the funds retained by the Trustee upon distribution of the estate.

Before: KOZINSKI and GOULD, Circuit Judges, and CEBULL, District Judge.*

MEMORANDUM**

LEW, District Judge:

Not for Publication

[1] Mrs. Sansone's right to $100,000 every year for life is a ''qualifying income interest for life'' that is treated as ''qualified terminable interest property,'' 26 U.S.C. § 2056(b)(7), but the potential cost-of-living increases are not. 26 C.F.R. § 20.2056(b)-7(e)(2) (although ''the annual payment may increase, the increased amount is not taken into account in valuing the deductible interest'').[1] Under this regulation, the estate may deduct only that amount of the corpus that, using the applicable federal interest rate, would produce the $100,000 yearly payments for life: $1,041,719. The estate may not deduct any more of the corpus than this amount.

''We defer to ... regulatory interpretations of the [Internal Revenue] Code so long as they are reasonable.'' Sessler v. United States, 7 F.3d 1449, 1451 n.2 [72 AFTR 2d 93-6548] (9th Cir. 1993). The regulation challenged here is reasonable and consistent with the Code. See 26 U.S.C. § 2056(b)(7)(B)(ii) (''The surviving spouse has a qualifying income interest for life if ... the surviving spouse is entitled to all the income from the property .... '') (emphasis added). Mrs. Sansone is entitled to all the income from $1,041,719 of the corpus; therefore, she has a qualifying income interest for life only in that specific portion of the corpus.

The Sansone trust is not a ''qualified charitable remainder trust'' under 26 U.S.C. § 2056(b)(8); therefore, the challenged regulation applies. To be a ''qualified charitable remainder trust,'' the trust must be either ''a charitable remainder annuity trust or [a] charitable remainder unitrust.'' 26 U.S.C. § 2056(b)(8)(B)(ii). The Sansone trust is not the former because the annual payments are not of a ''sum certain,'' but instead could fluctuate with inflation. 26 U.S.C. § 664(d)(1)(a) (a charitable remainder annuity trust is a trust ''from which a sum certain ... is to be paid''); 26 C.F.R. § 1.664-2(a)(1)(ii) (''A sum certain is a stated dollar amount which is the same ... for each year of such period.''). Nor is it the latter, because the annual payments are not based on a fixed percentage of the corpus. See 26 U.S.C. § 664(d)(2)(A) (a charitable remainder unitrust is a trust ''from which a fixed percentage [of the corpus] is to be paid'').

AFFIRMED.

¶2002-5020

UNITED STATES OF AMERICA, PLAINTIFF v. Ralph R. CUDY, JR.; Dixie Lee Ball, Trustee; Delcorp Limited; Saxon Investment Company, a/k/a Saxon Investments; Saxon Investment Land Trust; Charles J. Dougherty; Verna H. Dougherty; and City of Cape Coral, DEFENDANTS. U.S. District Court, Middle Dist. of Florida, (DC FL) Case No. 2:98-CV-535-FTM-29DNF, May 22, 2002. Year 1986. Decision for Govt.

1. Collection actions—sale of lien property. Private sale of taxpayer's lien property was confirmed, with sale proceeds to be distributed 1st to local govt. and private lienholders and then to govt. in partial satisfaction of its tax lien. *Reference:* United States Tax Reporter ¶74,035.03(100). IRC §7403.

Michael F. Neves 5341 S.W. 11 Place Cape Coral, Florida 33914.

* The Honorable Richard F. Cebull, United States District Judge for the District of Montana, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[1] This rule ''applies with respect to estates of decedents dying on or before October 24, 1992.'' 26 C.F.R. § 20.2056(b)-7(e)(5). It applies here because decedent died in 1991.

United States Marshall Suite 1-116 Fort Myers Federal Building & Federal Courthouse 2110 First Street Fort Myers, Florida 33901.
Thomas E. Shipp, Jr., Esquire Thomas E. Shipp, Jr. & Associates, P.A. 4223 Del Prado Boulevard Cape Coral, Florida 33904.
Delores D. Menendez City Attorney City of Cape Coral, Florida Post Office Box 150027 Cape Coral, Florida 33915-0027 Attn: Brian R. Bartos, Esquire Assistant City Attorney.

In the United States District Court for the Middle District of Florida, Ft. Myers Division.

Order Confirming Private Sale of Realty

STEELE, District Judge:

[1] This matter having come before the Court on the unopposed motion by Plaintiff United States of America for confirmation of a private sale of the parcel of real property subject of the above-captioned federal tax lien foreclosure proceeding, and the Court, being fully apprised in the premises and finding the motion to be well taken, it is hereby

ORDERED, that the unopposed motion by Plaintiff United States of America for Confirmation of Private Sale of Realty be, and the same hereby is, GRANTED, and it is hereby further

ORDERED, that the private sale of the following described parcel of real property to Michael F. Neves (hereinafter, ''the purchaser'') and/or his assignee or assignees, for $363,000, payable in cash at closing, on further terms stated below, be, and the same hereby is, confirmed:

> Lots 7 and 8, Block 560, of that certain subdivision known as CAPE CORAL, UNITE 11, according to the map or plat thereof on file and recorded in the office of the Clerk of the Circuit Court, Lee County, Florida, in Plat Book 13, Pages 42 through 48, inclusive.

and it is hereby further

ORDERED, 1) that the purchaser shall reimburse Plaintiff United States of America for the costs and fees of appraisals by three disinterested persons, in the total amount of $900, in addition to the purchase price; 2) that the purchase price to be received for the property shall not be reduced realtor or broker fees; 3) that the purchaser shall pay for owner's title insurance and all related closing charges, documentary tax stamps and recording of deed; 4) that property taxes and storm water water assessment shall be prorated to the date of closing and 5) that closing of the sale shall take place within sixty (60) days of the date of entry of this Order, and it is hereby further

ORDERED, that the subject real property is sold free and clear of all liens or other claims of any party to this proceeding, with any unpaid ad valorem real property taxes owing to Lee County, Florida, to be paid as an expense of sale from the proceeds of sale, prorated to the actual date of sale, and it is hereby further

ORDERED, that upon confirmation and receipt of the full purchase price of such sale, the United States Marshall shall execute and deliver his Deed, conveying the property sold to the successful purchaser, and it is hereby further

ORDERED, the expenses of the sale shall be ascertained, including amounts due for ad valorem taxes to be ascertained from the Lee County, Florida, Tax Collector, and those amounts shall be paid out of the sale proceeds, except for the charges and expenses specifically allocated to the purchaser, above. The balance of the sale proceeds to the Clerk of this Court with a statement of the amount of the net proceeds received from the sale, and it is hereby further

ORDERED, that upon the sale of the subject real property, the respective liens and claims of the parties shall attach to the proceeds of sale to the same extent and in the same order of priority as such liens and

claims attached to the subject real property, and it is hereby further

ORDERED, ADJUDGED and DECREED that within thirty (30) days after the Clerk gives notice to the parties that she has received the net proceeds, each party claiming an interest in said proceeds shall certify to the Court and to every other party the amount of its claim, and it is hereby further

ORDERED, that the proceeds of the sale will thereafter be distributed from the Registry of the Court in the following order of priority and in accordance with a separate order of the Court:

First, to the City of Cape Coral, in satisfaction of its lien claim arising from a special public works assessment for the costs of an irrigation project, together with penalties and interest accruing to the date of payment;

Second, to Charles J. Dougherty and Verna H. Dougherty, in satisfaction of their first mortgage on the subject property, and all costs, charges and expenses, including lawyer's fees and title searches, reasonably incurred or paid by Charles J. Dougherty and/or Verna H. Dougherty because of the failure of Ralph R. Cudy, Jr., to promptly and fully comply with the terms of the subject mortgage; and

Third, to the United States of America, in partial satisfaction of the federal income tax liabilities of Ralph R. Cudy, Jr., for 1986, including penalties and interest related thereto;

and it is hereby further

ORDERED, this Court reserves jurisdiction to enter writs of assistance or any further order for the taxation of all costs of this proceeding and for such other and further relief as may be appropriate.

DONE AND ORDERED, at Fort Myers, Florida, this 22nd day of May, 2002.

JOHN E. STEELE

UNITED STATES DISTRICT JUDGE

Copies:

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United States Marshall

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Delores D. Menendez

City Attorney

City of Cape Coral, Florida

Post Office Box 150027

Cape Coral, Florida 33915-0027

Attn: Brian R. Bartos, Esquire

Assistant City Attorney

¶2002-5021

Charles Dale HARMAN, JR. and Katherine R. HARMAN, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Georgia, (DC GA) Civil Action File No. 1:00-cv-1534-CAP, June 4, 2002. Earlier proceedings at (2002, DC GA) 89 AFTR 2d 2002-2541, denying reconsideration of (2002, DC GA) 89 AFTR 2d 2002-1819, 2002-1 USTC ¶50359. Decision for Taxpayers.

1. Attorney's costs and fees—net worth requirements; substantial justification for govt.'s position; reasonable costs—amount—refund actions—accounting fees. Judgment was entered for taxpayer-spouse awarding her accounting fees equalling 50% of accountants' documented fees for relevant time period, plus attorney's

fees already awarded. *Reference:* United States Tax Reporter ¶74,305.01(50); 74,305.01(25); 74,305.01(10). IRC §7430.

United States District Court Northern District of Georgia, Atlanta Division.

Judgment

This action having come before the court, Charles A. Pannell, Jr., United States District Judge, for consideration of motion for attorney fees, and the court having granted said motion, it is

Ordered and adjudged that plaintiff recover accounting expert fees in the amount of $1,021.00 in addition to the $11,823.66 previously awarded as reasonable attorney's fees.

Dated at Atlanta, Georgia this 4th day of June, 2002.

LUTHER D. THOMAS

CLERK OF COURT

By: /s/

Deputy Clerk

Prepared, filed, and entered in the Clerk's Office June 4, 2002

Luther D. Thomas

Clerk of Court

By: /s/

Deputy Clerk

Order

PANNELL, JR., District Judge:

[1] In its order dated January 14, 2002, the court awarded Ms. Harman $11,539.50 in attorney fees. The court, however, did not enter a final judgment at that time but, rather, it directed that the plaintiff's accounting expert, William C. Lankford, Jr., submit to the court an affidavit indicating the hours billed by his firm from June 2000 through July 2001. Mr. Lankford's affidavit has been submitted and the total bill for the relevant period is $2,042.00. Ms. Harman is entitled to half of the amount of fees attributable to that time period, or $1,021.00.

Ms. Harman is now awarded accounting expert fees in the amount of $1,021.00 in addition to the $11,823.66 previously awarded. The Clerk of Court is DIRECTED to enter a final judgment consistent with this order.

SO ORDERED, this 30 day of May, 2002.

CHARLES A. PANNELL, JR.

United States District Judge

¶2002-5022

Christopher H. LYON, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT and THIRD-PARTY PLAINTIFF v. Henry LYON, THIRD-PARTY DEFENDANT. U.S. District Court, Western Dist. of Virginia, (DC VA) Civil Action No.: 1:00CV178, June 4, 2002. Earlier proceeding at (2001, DC VA) 88 AFTR 2d 2001-5183. Years 1994, 1995, 1996, 1997. Decision for Taxpayer.

1. 100% penalty for failure to pay over withholding taxes—responsible person—no actual authority. Coal co.'s sole shareholder/pres. was granted summary judgment on his non-liability for co.'s unpaid withholding taxes: evidence overwhelmingly showed taxpayer wasn't IRC §6672 responsible person. Taxpayer was merely ''pseudo-pres.'' and nominal titleholder, fronting for actual managers and controllers who, for union reasons, couldn't hold official officer or shareholder positions; and held no managerial role himself or any actual authority to make financial or other decisions on co.'s behalf. *Reference:* United States Tax Reporter ¶66,725.03(90); 66,725.05(10). IRC §6672.

In the United States District Court for the Western District of Virginia, Abingdon Division.

Order

WILLIAMS, Senior District Judge:

For the reasons stated in the foregoing opinion, it is hereby ORDERED that the motion for summary judgement made by the plaintiff be GRANTED and the motion for summary judgment made by the defendant is hereby DENIED.

The clerk is directed to enter this order and to strike it from the docket, given by my hand this the 4th day of June, 2002.

Glen M. Williams

Senior U.S. District Judge

Memorandum Opinion

WILLIAMS, Senior District Judge:

For the reasons stated in this opinion, it is hereby ORDERED that the motion for summary judgment made by the plaintiff be GRANTED and the motion for summary judgment made by the defendant is hereby DENIED.

FACTS

This case involves a Virginia corporation called the North Branch Coal Company, Inc. (Lyon Depo. at 12). This controversy arose from North Branch's failure to pay income tax from December of 1994 to January of 1997. (Hunter Aff. at ¶ 9). The total amount of delinquency was $338,451.46. (Hunter Aff. at ¶ 20). The President and sole shareholder of North Branch, at the time of delinquency, is the plaintiff in this case; Christopher Lyon. (C. Lyon Depo. at 12–14). The Government has assessed Chris Lyon with the entire amount of the debt and Lyon has, in response, brought this suit claiming that he was not the party responsible for the unpaid tax liability.

The history of this corporation becomes important to the question of who is personally liable for the corporation's tax debt. First, there is no dispute that North Branch Coal Company was managed by three persons whose names could not be given officer status nor shareholder positions because of union rules. Those individuals are Jerry Tackett, Danny Blankenship and the plaintiff's father, Henry Lyon. Each of these individuals owned and operated a mine equipment leasing company called Black Gold Leasing. (H. Lyon Depo. at 16, 17). Black Gold Leasing was not UMWA affiliated. However, North Branch was UMWA affiliated, therefore, according to union rules, North Branch could not keep its affiliation, nor its mining contract with Consolidated Coal Company, if any of the three above named individuals were named owners, shareholders or officers of North Branch. (H. Lyon Depo. at 16, 17).

As a result, North Branch went through a lengthy list of pseudo-presidents who were each gifted all of the shares of the company but whom had no substantial control over or say in the actual management of the company. (Kretzer at 22). Christopher Lyon appears to be one of these pseudo-presidents. At the time has was president and sole shareholder of North Branch, the plaintiff's father, was the significant figure in the management of the company. (H. Lyon Depo. at 6; J. Kretzer Depo. at 28, 29) Chris Lyon did have the capacity to authorize checks and run the financial aspects of the company. (C. Lyon Depo. at 135). In fact, he executed several agreements between North Branch and several different banking establishments. (C. Lyon Depo. at 135). However, the overwhelming weight of evidence shows that everything that Chris Lyon did, as president of North Branch, was at the direction of his father, Henry Lyon. (H. Lyon Depo. at 24–30). In fact, Henry Lyon admits that the presidents of North Branch were merely "title holder[s]". (H. Lyon Depo. at 14–18). Henry Lyon further testified that the people who ran the corporation were "Danny, Jerry and myself." (H. Lyon Depo. at 14–18).

The deposition testimony reveals that Chris Lyon was less qualified than any of the other title presidents, that he had no authority to make any decisions on behalf

of the company and had no role in the management of North Branch while he was president of the company. (H. Lyon Depo. at 14–18). Henry Lyon testified that Chris did not even have an office and that he had no authority to pay the income taxes of the company. (H. Lyon Depo. at 14–18).

Furthermore, the deposition testimony of Joyce Kretzer, the "title president" before Chris Lyon, shows that her role was the same as Chris'; that is, having no authority within the office of president. (Kretzer Depo. at 21–23). In fact, she stated that "[s]ee, I worked for Henry and I was very loyal to Henry and I trusted Henry. And Chris was put in the same position because Chris was his son." (Kretzer Depo. at 22). Kretzer went on to explain that while she was president, she paid nothing for the stock given to her, she stated that she knew nothing about mining coal and that Blankenship, Henry Lyon and Tackett were running the company, not her and that the only explanation that she was given for why she needed to be president was that it was due to "personal reasons". (Kretzer Depo. at 20–23). Finally, Kretzer explained that while Chris Lyon was president, she still did the payroll for North Branch and that she wrote Chris pay checks but that he was never at the office. (Kretzer Depo. at 28).

Also, Jerry Tackett testified that he never dealt with Chris Lyon concerning the business affairs of North Branch. (Tackett Depo. at 13). Tackett further testified that Chris Lyon did not have an office and that Henry Lyon was the person who dealt with making payments to Tackett, not Chris. (Tackett Depo. at 13–17). Furthermore, Blankenship testified that he was at the nine site of North Branch at least two times a week and that he never saw Chris Lyon. (Blankenship Depo. at 33). Blankenship further testified that he only dealt with Henry Lyon and that the employees of North Star never directed him to talk to Chris. (Blankenship Depo. at 39). Finally, Blankenship testified that he never observed Chris doing anything on behalf of North Star. (Blankenship Depo. at 44).

Finally, Henry Lyon has accepted sole responsibility for the unpaid tax debt and a default judgment has been entered against him for the delinquent balance. The Government has explained to the court that it has not pursued Danny Blankenship nor Jerry Tackett because the statute of limitations has run on any action for recovery.

STANDARD OF REVIEW

Summary judgment is appropriate when there is "no genuine issue of material fact," given the parties' burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Rule 56 "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not "a disfavored shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." *Id.* at 327.

In opposing summary judgment, the nonmoving party must "set forth such facts as would be admissible in evidence." Fed. R. Civ. P. 56(e). Inadmissible hearsay cannot be used to oppose summary judgment. *See Greensboro Prof. Fire Fighters Ass'n. v. City of Greensboro*, 64 F.3d 962, 967 (4thCir. 1995).

OPINION

[1] The Government alleges that Chris Lyon is liable for North Star's unpaid tax liability under 26 U.S.C.A. §6672. The Fourth Circuit stated that in order for a person to be liable under §6672, the Government must show that (1) the party assessed is the ''responsible person'' to pay the tax and that (2) that person has willfully failed to pay the tax. *O'Connor v. United States*, 956 F.2d 48, 50 [69 AFTR 2d 92-659] (4th Cir. 1992). The Fourth Circuit further stated that in determining whether the person is the ''responsible person'', a fact based inquiry must be held. *Id.*at 51–52. That court went on to explain that this inquiry should be held to determine the person's actual authority within the business. *Id.* The court rejected the conclusion that a title holder of an office within the enterprise or mere check signing authority makes a person ''responsible'' under the statute. *Id.* The court decided that the inquiry must be geared toward finding whether the person was authorized in the financial affairs and the general decision making within the company. *Id.*

This court finds that Chris Lyon was not authorized to make financial decisions on behalf of North Star nor did he make any decisions within the company. The overwhelming weight of evidence, in this case, suggests that everything that Chris Lyon did, as president of North Branch, was at the direction of his father, Henry Lyon. In fact, Henry Lyon admits that the presidents of North Branch were merely ''title holder[s]''. Henry Lyon further testified that the people who ran the corporation were ''Danny, Jerry and myself.''

Furthermore, the deposition testimony reveals that Chris Lyon was less qualified than any of the other title presidents, that he had no authority to make any decisions on behalf of the company and had no role in the management of North Branch while he was president of the company. Henry Lyon testified that Chris did not even have an office and that he had no authority to pay the income taxes of the company. It is clear that under the Fourth Circuit's test, Chris Lyon was not the party responsible for the payment of North Star's tax liability. Therefore, this court does hereby enter summary judgment in favor of the plaintiff.

The clerk is directed to enter this order and to strike if from the docket, given by my hand this the 4th day of June, 2002.

Glen M. Williams

Senior U.S. District Judge

¶2002-5023

UNITED STATES OF AMERICA, PLAINTIFF v. J. Michael MAGINNIS and Janet Y. MAGINNIS, DEFENDANTS. U.S. District Court, Dist. of Oregon, (DC OR) Civil No. CV01-368 KI, June 4, 2002. Earlier proceeding at (2002, DC OR) 89 AFTR 2d 2002-3028. Year 1996. Decision for Govt.

1. Gross income—ordinary vs. capital gain income—assigned income—lottery winnings—erroneous refunds. Judgment was entered for govt. on its erroneous refund complaint. *Reference:* United States Tax Reporter ¶615.183; 615.187(35); 74,055.01(10). IRC §61; 7405.

Michael W. Mosman United States Attorney OSB# 87111 1000 S.W. Third Avenue Suite 600 Portland, Oregon 97204-2902.

Henry C. Darmstadter, Jeremy N. Hendon, Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 683 Ben Franklin Station Washington, D.C. 20044-0683 Telephone: (202) 307-6481.

In the United States District Court for the District of Oregon.

Judgment in a Civil Action

KING, District Judge:

[1] The Motion for Summary Judgment of plaintiff United States of America

on its Complaint for Erroneous Refund under Internal Revenue Code (IRC) Section 7405 having been granted by the Court, and the Motion for Summary Judgment of defendants J. Michael Maginnis and Janet Y. Maginnis having been denied by the Court, by Order dated May 28, 2002,

IT IS HEREBY ORDERED AND ADJUDGED that the United States of America on its Complaint for Erroneous Refund shall recover from defendants J. Michael Maginnis and Janet Y. Maginnis the sum of $352,517.16 with statutory interest accruing from March 29, 1999 in accordance IRC § 6602 at the rate prescribed by IRC § 6621 and compounded daily in accordance with IRC § 6622.

DATED this 4th day of June, 2002.

GARR M. KING

United States District Court Judge

¶2002-5024

Dennis W. BROWN, PETITIONER v. DISTRICT DIRECTOR, Security, Colorado, Internal Revenue Service, in His Individual Capacity, and Does I-XX, RESPONDENTS. U.S. District Court, Dist. of Colorado, (DC CO) Docket Civil Action No. 01-D-1625 (CBS), June 6, 2002. Decision for Govt.

1. Actions against IRS officers—damages—jurisdiction—Anti-Injunction, Declaratory Judgment, and Federal Tort Claims Acts. Magistrate judge recommended dismissing pro se taxpayer's collection-related action against IRS District Director and anonymous Does for declaratory and injunctive relief and damages: district court lacked jurisdiction where action was dismissed in state court in which it was originally filed before it was removed to federal court. Also, individual officers weren't proper defendants to suit con-testing actions taken in their official capacities; meritless claims about IRS's taxing authority didn't establish equity jurisdiction or otherwise bring suit within AIA exceptions; DJA wasn't independent jurisdictional basis for suit; taxpayer showed no sovereign immunity waiver for constitutional violation claims; FTCA barred tax-related tort claims; and action was patently frivolous. *Reference:* United States Tax Reporter ¶74,336.508(60); 74,215.05(5); 74,217.502(5); 76,557.53(12); 74,335.01(7). IRC §7421; 7433.

In the United States District Court for the District of Colorado.

Recommendation of United States Magistrate Judge

SHAFFER, Magistrate Judge:

THIS MATTER comes before the court on the United States' Motion to Dismiss (filed September 24, 2001). Pursuant to the August 24, 2001 Order of Reference, this civil action was referred to the Magistrate Judge to, *inter alia*, "submit proposed findings of fact and recommendations for rulings on dispositive motions." The court has reviewed the Motion to Dismiss, Petitioner Brown's "Affidavit of Points and Authorities . . ." (filed October 29, 2001), the pleadings, the entire case file, and the applicable law and is sufficiently advised in the premises. For the reasons discussed below, it is recommended that the Motion to Dismiss be granted and that Brown's "Verified Petition for Writ of Mandamus" ("the Petition") be dismissed with prejudice.

I. Background

Brown, *pro se*, alleges that he "is domiciled" and "engaged in a private, non-governmental occupation" in El Paso County, Colorado. (Declaration attached to Petition ¶s 3, 4). Brown alleges that a Notice of Federal Tax Lien containing unspecified errors was received by a credit reporting agency in 1993. (Declaration ¶ 6). Brown appears to allege that he is not subject to federal tax laws. (Declaration ¶ 8). Brown seeks a writ compelling the Internal Revenue Service ("IRS") to (1) re-

lease levies and liens relating to 1993; (2) return unspecified property to Brown; and (3) cease and desist future tax collections against him. (Petition p. 5).

The United States moves to dismiss the Petition pursuant to Fed. R. Civ. P. 12(b) for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted based on several reasons: (1) this court does not have jurisdiction over this case because it was dismissed by the state court prior to removal to federal court; (2) the United States is the sole proper Defendant; (3) the Petition is barred by the Anti-Injunction Act, 26 U.S.C. 7421(a); (4) the Petition is barred by the Declaratory Judgment Act, 28 U.S.C. § 2201; (5) the court lacks subject matter jurisdiction over this action due to Brown's failure to establish a waiver of sovereign immunity; and (6) to the extent Brown asserts any claim under the Federal Tort Claims Act (FTCA), he is prohibited from suing the government or its employees under the FTCA for tax collection matters and he has not complied with the jurisdictional administrative prerequisites for filing a claim under the FTCA.

II. Standard of Review

First, *pro se* pleadings are to be construed liberally. Haines v. Kerner, 404 U.S. 519, 520–21 (1972). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

Rule 12(b)(1):

> empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." As courts of limited jurisdiction, federal courts may only adjudicate cases that the Constitution and Congress have granted them authority to hear. *See* U.S. CONST. art. III, § 2; *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994). Statutes conferring jurisdiction on federal courts are to be strictly construed. *F & S Construction Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). If a Rule 12(b)(1) motion to dismiss merely challenges the sufficiency of the allegations in the complaint, the court must accept those allegations as true, *see Holt v. United States*, 46 F.3d 1000, 1002–1003 (10th Cir. 1995), but "without regard to mere conclusionary allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). A party may attack the factual assertions regarding subject matter jurisdiction through affidavits and other documents. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Although the district court may consider evidence outside the pleadings, generally the motion is not converted to one for summary judgment pursuant to Rule 56. *Id.* The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction. *Basso v. Utah Power and Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

American Fair Credit Ass'n v. United Credit Nat. Bank, 132 F. Supp.2d 1304, 1308–09 (D. Colo. 2001).

For purposes of a motion to dismiss under Rule 12(b)(6),

> the pleading is construed in the light most favorable to the non-moving party, and its allegations are taken as true. *See, e.g.*, Daigle v. Shell Oil Co., 972 F.2d 1527, 1533 (10th Cir. 1992). The court considers whether the allegations set forth in the pleading constitute a statement of a claim under Rule 8(a) of the Federal Rules of Civil Procedure. *See* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1363, at 460 (2d ed. 1990). Rule 8(a) provides that the pleading need only set out a generalized statement of facts from which the opposing party will be able to frame a responsive pleading. Fed. R. Civ. P. 8(a). Thus, in appraising the sufficiency of the allegations, "the [pleading] should not be dismissed for failure

to state a claim unless it appears beyond doubt that [plaintiff] can prove no set of facts in support of his claim that would entitle him to relief.'' Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *see* Daigle, 972 F.2d at 1533. Additionally, the court must determine if plaintiff's allegations provide any basis for relief on any possible theory, as the court should not dismiss a complaint merely because plaintiff's allegations do not support the particular legal theory on which the plaintiff intends to proceed. *See* 5A Charles A. Wright & Arthur R. Miller, § 1357, at 336–37.

Pierce v. Delta County Department of Social Services, 119 F. Supp. 2d 1139, 1146 (D. Colo. 2000).

III. Analysis

A. Lack of Subject Matter Jurisdiction Based on Dismissal of Case in State Court

[1] Brown commenced this civil action by filing the Petition in the District Court, County of El Paso, Colorado on June 8, 2001. A copy of the Petition was delivered to the IRS on July 13, 2001. The United States Department of Justice Tax Division received a copy of the Petition on July 23, 2001. On August 17, 2001, the United States filed its Notice of Removal.

Unknown to the United States, on June 12, 2001, prior to the filing of the Notice of Removal, the state court dismissed the Petition. (*See* Exhibit A to United States' Motion). On July 31, 2001, the state court denied Brown's ''Motion to Reopen'' the case. (*See* Exhibit B to United States' Motion).

''Fundamental to the right of removal is the requirement that there be a case to remove.'' MHM Sponsors Co. v. Permanent Mission of Pakistan to United Nations, 672 F. Supp. 752, 753 (S.D.N.Y. 1987). ''There is generally no jurisdiction to remove closed cases, because if a case is closed, no case or controversy exists.'' Zilinger v. Allied American Insurance Co., 957 F. Supp. 148, 149 (N.D. Ill. 1997) (internal quotation marks and citation omitted). Because the state court dismissed this action on June 12, 2001 and has not restored it to the calendar, there was no action pending in state court on August 17, 2001 that was removable. *See* Bradigan v. Office and Professional Employees International Union, Local 153, AFL-CIO, 879 F. Supp. 7, 9 (N.D.N.Y. 1995). At the time of filing of the Notice of Removal, there was no case or controversy for the federal court to decide. Therefore, this court lacks subject matter jurisdiction over this civil action.[1]

B. Suit against Respondents in their Individual or Official Capacities

Brown seeks injunctive relief and monetary damages from Respondents. The Petition states that Brown is suing the District Director solely in his individual capacity. (Petition p. 1). The Petition does not state whether Brown is suing ''Does I-XX'' in their official capacities, their individual capacities, or both. The Petition seeks release of IRS liens and cessation of IRS collection activity and clearly is based on actions taken by IRS employees in the scope of their official duties. *See* Houston v. Reich, 932 F.2d 883, 885 (10th Cir. 1991) (the court should review the ''course of the proceedings'' to determine in what capacity a public official defendant is being sued) (quoting Kentucky v. Graham, 473 U.S. 159, 167 (1985)) (internal quotation omitted). Brown's Petition against Defendants in their official capacities as agents or employees of the Internal Revenue Service (''IRS'') is properly construed as a claim against the United States. Atkinson v. O'Neill, 867 F.2d 589, 590 (10th Cir. 1989). Therefore, the District Director and

[1] Should the District Judge determine that this court lacks subject matter jurisdiction over this civil action because the case had been dismissed by the state court prior to removal to federal court, it is unnecessary to consider the remaining grounds for dismissal set forth in this Recommendation.

"Does I-XX" are properly dismissed from this civil action.[2]

C. Availability of Declaratory or Injunctive Relief

To the extent that Brown seeks either declaratory relief finding that he is not subject to the federal tax laws or injunctive relief restraining the IRS from assessing and collecting tax deficiencies and penalties, the court lacks jurisdiction over the subject matter of the claims. Brown's claim for injunctive and declaratory relief is barred by the Anti-Injunction Act, 26 U.S.C. §7421, and the Declaratory Judgment Act, 28 U.S.C. §2201. The prohibitions of the Acts are co-extensive. Bob Jones University v. Simon, 416 U.S. 725, 732, n.7 [33 AFTR 2d 74-1279] (1974).

1. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The purpose of the Anti-Injunction Act is to allow the government to conduct its business expeditiously in the assessment and collection of taxes without judicial intervention and to require that a taxpayer challenging the assessment and collection of taxes against him must first file a claim for a refund with the IRS. Wyoming Trucking Association, Inc. v. Bentsen, 82 F.3d 930, 933 [77 AFTR 2d 96-2098] (10th Cir. 1996) (citing Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 [9 AFTR 2d 1594] (1962)). If the taxpayer does not prevail in the administrative proceeding, he may then file a suit for a refund in federal district court. *See* 26 U.S.C. §7422; 28 U.S.C. §1346(a)(1).

In addition to certain statutory exceptions neither pled nor applicable here,[3] the Supreme Court has created a "judicial exception" to the Anti-Injunction Act which allows a taxpayer to seek injunctive relief "if the taxpayer demonstrates that: under no circumstances could the government establish its claim to the asserted tax; and ... equity jurisdiction otherwise exists." Williams Packing, 370 U.S. at 7. Equity jurisdiction exists if the taxpayer shows that he would suffer irreparable injury without the injunction. Commissioner of Internal Revenue v. Shapiro, 424 U.S. 614, 627 [37 AFTR 2d 76-959] (1976) (citing Williams Packing, 370 U.S. at 7).

First, Brown does not allege that his claim falls within the judicial exception to the Anti-Injunction Act found in Williams Packing, 370 U.S. at 7. Second, Brown fails to satisfy either prong of the Williams Packing exception to the Anti-Injunction Act. Brown cannot demonstrate that under no circumstances could the government establish its claim to the asserted tax. Brown's allegations state a common theme that the IRS has no authority or jurisdiction over him and thus cannot impose, assess, or collect income taxes from him. The United States Court of Appeals for the Tenth Circuit has found this contention to be "completely lacking in legal merit and patently frivolous." Lonsdale, 919 F.2d 1440, 1448 [67 AFTR 2d 91-1049] (10th Cir. 1990). Brown has not indicated that he has filed a claim for refund with the IRS, nor, because he has the remedy of a refund suit available, has he shown that such a remedy is inadequate to redress any asserted injuries. Accordingly, this court may not exercise its equity jurisdiction over Brown's claim. *See* Wyoming Trucking Assn., Inc., 82 F.3d at 935 (citing Bob

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[2] In addition, there is no provision in the Federal Rules of Civil Procedure for the naming of fictitious or anonymous parties in a lawsuit. Watson v. Unipress, Inc., 733 F.2d 1386, 1388 (10th Cir. 1984); Coe v. U.S. Dist. Court for Dist. of Colorado, 676 F.2d 411, 415 (10th Cir. 1982). To the contrary, the Federal Rules provide:

"[e]very pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint, the title of the action shall include the names of all the parties ...."

Fed. R. Civ. P. 10(a). Because anonymous parties are not permitted by the Federal Rules and Brown has not identified the anonymous Doe Defendants, "Does I-XX" are properly dismissed from this action.

[3] See 26 U.S.C. §§ 6212(a) & (c); 6213(a); 6672(b); 6694(c); 7426(a) & (b)(1); and 7429(b) (providing for actions related to redeterminations, stays, levies, and refunds in specified circumstances).

Jones University, 416 U.S. at 746); Shapiro, 424 U.S. at 629 (noting that taxpayer seeking injunction must plead and prove facts establishing that his remedy in a refund suit is inadequate to repair any injury that might be caused by an erroneous assessment or collection of taxes).

2. The Declaratory Judgment Act prohibits a court from declaring the rights of litigating parties with regard to federal taxes. Wyoming Trucking Association, Inc., 82 F.3d at 932–933. The Declaratory Judgment Act is remedial only and is not an independent basis for subject matter jurisdiction for this or any other court. *See* Fry Bros. Corp. v. Department of HUD, 614 F. 2d 732, 733 (10th Cir. 1980) (citations omitted). Even if the statute con-ferred jurisdiction, it expressly excepts tax cases from its operation and does not give the court jurisdiction to render declaratory relief determining federal tax liabilities. *See* Hutchinson v. United States, 677 F. 2d 1322, 1326 [50 AFTR 2d 82-5117] (9th Cir. 1982). The court is precluded by 28 U.S.C. § 2201 from entertaining requests for declaratory relief in matters relating to federal taxes. 28 U.S.C. § 2201(a); Wyoming Trucking Association, Inc., 82 F.3d at 932–933; Flora v. United States, 362 U.S. 145, 164 [5 AFTR 2d 1046] (1960); Fostvedt v. United States, 978 F.2d 1201, 1203 [70 AFTR 2d 92-6115] (10th Cir. 1992), *cert. denied,* 507 U.S. 988 (1993); Voss v. United States, 573 F. Supp. 957, 959 [53 AFTR 2d 84-310] (D. Colo. 1983).

In sum, because the court finds that the Petition challenges the authority of the government to tax, seeks a declaration as to the rights of the litigating parties, and seeks permanent injunctive relief, jurisdiction is barred by both the Anti-Injunction Act and the Declaratory Judgment Act.

D. The United States is a sovereign and, as such, is immune from suit without its prior consent. United States v. Shaw, 309 U.S. 495, 500–01 (1940); Amoco Oil Co. v. United States Environmental Protection Agency, 959 F. Supp. 1318, 1320 (D. Colo. 1997). The United States is not subject to suit absent an express statutory waiver of its sovereign immunity. Atkinson, 867 F.2d at 590 (citing Kentucky v. Graham, 473 U.S. at 165–67); United States v. Mitchell, 463 U.S. 206, 212 (1983). When the United States is a defendant in an action by a taxpayer, the taxpayer has the burden of showing an explicit waiver of sovereign immunity as a prerequisite to federal court jurisdiction. Lonsdale, 919 F.2d at 1444; *see also*National Commodity and Barter Assn. v. Gibbs, 886 F.2d 1240, 1246 [64 AFTR 2d 89-5783] (10th Cir. 1989).

The United States has not waived its sovereign immunity for claims based on alleged constitutional violations by its officers. *See* Clemente v. United States, 766 F.2d 1358, 1363 (9th Cir. 1985) (United States cannot be held liable for constitutional torts of its officers), *cert denied,* 474 U.S. 1101 (1986); *see also* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) (''However desirable a direct remedy against the Government might be as a substitute for individual officer liability, the sovereign still remains immune to suit [for constitutional violations of its officers]''); Dahn v. United States, 127 F.3d 1249, 1254 [80 AFTR 2d 97-7631] (10th Cir. 1997) (''The United States and its agencies are not subject to suit under Bivens'') (citations omitted).

Brown has not met his burden of showing an explicit waiver of sovereign immunity as a prerequisite to federal court jurisdiction. While Brown broadly allege that he has ''adhered to all administrative remedies and requirements as imposed in 26 U.S.C. § 6343, he fails to plead with the specificity required for jurisdiction.[4] Brown does not allege that he paid the tax

[4] Section 6343 merely prescribes the circumstances under which the IRS may release a levy on personal property. It does not waive sovereign immunity or provide a cause of action against the United States or its employees.

liability at issue or filed a refund claim with the IRS. *See* 28 U.S.C. § 1346(a) (providing district courts with jurisdiction over civil actions against the United States for recovery of taxes erroneously or illegally assessed or collected, with certain jurisdictional prerequisites). Brown does not request a refund of overpaid tax for a given tax year. *See Id.* Brown does not allege nor does the court find any other appropriate basis for a waiver of sovereign immunity. Lacking a waiver of sovereign immunity, the Petition cannot be maintained against the United States.

E. No Waiver of Sovereign Immunity for Common Law Torts

To the extent that Brown's claim for damages may be construed as alleging tortious conduct on the part of the United States or its employees, the FTCA, 28 U.S.C. §2671 *et seq.*, provides for a limited waiver of sovereign immunity for claims falling within its ambit. However, while the FTCA waives the United States' sovereign immunity in limited actions, claims arising out of the assessment or collection of taxes are excluded from coverage. 28 U.S.C. §2680(c); Gibbs, 886 F.2d at 1246 and n.5. The court also notes that it would lack subject matter jurisdiction because Brown has not alleged facts to show that he filed an administrative claim for a refund with the IRS or has otherwise exhausted available administrative remedies. *See* 26 U.S.C. §7422; 28 U.S.C. §1346(a)(1); Bruno v. United States, 547 F.2d 71, 73 [39 AFTR 2d 77-573] (8th Cir. 1976); Lewis v. Sandler, 498 F.2d 395, 399–400 [34 AFTR 2d 74-5167] (4th Cir. 1974). To the extent Brown's Petition could be interpreted as making a claim under the FTCA, it must be dismissed.

F. Petition May Be Dismissed as Frivolous

Not only is the Petition jurisdictionally deficient, it is also substantively frivolous. Brown asserts, *inter alia*, that he is not a resident of the District of Columbia or any United States territory and does not engage in an occupation that generates taxable income. (Declaration pp. 15–17). Such claims have been dismissed as frivolous. *See, e.g.*, Lonsdale, 919 F.2d at 1448 (contentions that plaintiff is not a "person" subject to taxation and that the authority of the United States is confined to the District of Columbia are patently frivolous); United States v. Cheek, 882 F.2d 1263, 1268 n. 2 [65 AFTR 2d 90-564] (7th Cir. 1989) (argument that defendant was not a "fourteenth amendment citizen" and, hence, not subject to federal income tax laws characterized as "absurd"), *vacated on other grounds*, 498 U.S. 192 [67 AFTR 2d 91-344] (1991); United States v. Ward, 833 F.2d 1538, 1539 [61 AFTR 2d 88-357] (11th Cir. 1987) (finding similar contentions "to be utterly without merit"), *cert. denied*, 485 U.S. 1022 (1988); United States v. Studley, 783 F.2d 934, 937 [57 AFTR 2d 86-888] (9th Cir. 1986) (assertion that defendant was not a "taxpayer" because she was an "absolute, freeborn and natural individual" held to be "frivolous"); Charczuk v. Commissioner of Internal Revenue, 771 F.2d 471, 473 [56 AFTR 2d 85-5740] (10th Cir. 1985) (arguments advanced on behalf of taxpayer were "preposterous"); United States v. Romero, 640 F.2d 1014, 1016 [48 AFTR 2d 81-5150] (9th Cir. 1981) (defendant's allegation that he was not a "person," within the meaning of the federal income tax laws found to be "fatuous"); United States v. Bell, 27 F. Supp. 2d 1191, 1198 n. 7 and 8 [82 AFTR 2d 98-6624] (E.D. Cal. 1998) (finding similar theories "neither correct nor persuasive"). This court concurs with these decisions. Brown's position that he is not subject to federal income tax laws is specious and legally frivolous.

For the reasons set forth, IT IS RECOMMENDED that the United States' Motion to Dismiss (filed September 24, 2001) be GRANTED and that this civil action be DISMISSED with prejudice.

Advisement to the Parties

Within ten days after service of a copy of the Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1). Objections to a magistrate judge's recommendation must be made within ten days of service of the Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); In re Griego, 64 F.3d 580, 583 (10th Cir. 1995).

The district judge shall make a de novo determination of those specific portions of the proposed findings or recommendations to which specific objection is made. 28 U.S.C. § 636(b)(1). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for de novo review by the district court. *See* In re Griego, 64 F.3d at 583; United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Oklahoma, 73 F.3d 1057, 1060 (10th Cir.), *cert. denied*, 519 U.S. 909 (1996). The district judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1). The district judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1).

"[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." One Parcel of Real Property Known As 2121 East 30th Street, 73 F.3d at 1060. Failure to make timely objections to the magistrate judge's proposed findings and recommendations will bar de novo review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. In re Key Energy Resources, Inc., 230 F.3d 1197, 1199–1201 (10thCir. 2000); Theede v. United States Department of Labor, 172 F.3d 1262, 1267–68 (10th Cir. 1999); One Parcel of Real Property Known As 2121 East 30th Street, 73 F.3d at 1059–60.

DATED at Denver, Colorado, this 4th day of June, 2002.

BY THE COURT:

Craig B. Shaffer

United States Magistrate Judge

¶2002-5025

UNITED STATES OF AMERICA, PLAINTIFF v. Gilbert GOO, Individually and as Sole Trustee of the Brandar Management Trust; Creative Signs &Graphics, LTD., a Hawaii corporation, DEFENDANTS. U.S. District Court, Dist. of Hawaii, (DC HI) CV. No. 00-00540, June 3, 2002. Earlier proceedings at (2002, DC HI) 89 AFTR 2d 2002-3034; (2002, DC HI) 89 AFTR 2d 2002-2646; (2001, DC HI) 88 AFTR 2d 2001-6413; (2001, DC HI) 88 AFTR 2d 2001-5784; and (2001, DC HI) 88 AFTR 2d 2001-5466. Years 1989, 1990, 1991, 1992, 1993. Decision for Govt.

1. Collection actions—sale of lien property—motions to vacate judgment and for reconsideration. Taxpayer's motions to vacate collection judgment and for reconsideration of amended sale order were denied: taxpayer's meritless, already rejected challenges to govt.'s right to tax him provided no legal grounds for vacatur; and taxpayer showed no error in prior decision or any new facts or law warranting reconsideration. *Reference:* United States Tax Reporter ¶74,035.03(100); 74,025.01(3). IRC §7402; 7403.

In the United States District Court for the District of Hawaii.

Order Denying Defendant's Motion to Vacate Judgment and Denying Defendant's Motion for Reconsideration of Order of Confirmation of Sale and Writ of Possession

EZRA, Chief District Judge:

Pursuant to Local Rule 7.2(d), the court finds this matter suitable for disposition without a hearing. After reviewing Defendant's Motions and the supporting and opposing memoranda, the court DENIES Defendant's Motion To Vacate Judgment and DENIES Defendant's Motion for Reconsideration.

BACKGROUND

On or about August 2, 2000, the United States filed the instant action seeking to: (i) reduce to judgment the outstanding federal income tax liabilities assessed against taxpayer Gilbert Goo (''Defendant''); and (ii) foreclose its tax liens against two parcels of real property, including the property at issue in the present action. On July 3, 2001, the Court entered an order granting the United States' motion for summary judgment. Judgment was entered against Defendant on July 16, 2001. On April 29, 2002, Defendant filed a motion seeking to vacate that judgment pursuant to Fed. R. Civ. P. 60(b). The United States filed its opposition to the motion on May 13, 2002.

On February 1, 2002, the Internal Revenue Service sold the property located at 2024 Homerule St., Honolulu, Hawaii, to Dana Shelton for $440,000, and the property located at 2002 Homerule St., Honolulu, Hawaii, to Jianjie Ji for $225,000. The court filed its Order Confirming the Sale and Granting Writ of Possession for these two properties on April 29, 2002 and an Amended Order Confirming Sale and Granting Writ of Possession on May 30, 2002. Defendant filed a Motion for Reconsideration of the April 29, 2002 order on May 6, 2002. The United States filed their opposition on May 14, 2002.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 60(b), a district court may relieve a party from a final judgment or order for the following reasons: 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly discovered evidence by which due diligence could not have been discovered in time to move for a new trial; 3) fraud, misrepresentation or other misconduct of an adverse party; 4) the judgment is void; or 5) the judgment has been satisfied, released or discharged. See Fed. R. Civ. P. 60(b) Although there is a split of authority in the circuits as to whether 60(b)(1) permits a court to reconsider errors of law, the Ninth Circuit has concluded that ''errors of law are cognizable under Rule 60(b).'' Liberty Mutual Ins. Co. v. E.E.O.C., 691 F.2d 438, 441 (1982) (citing Gila River Ranch, Inc. v. United States, 368 F.2d 354, 356 (9th Cir. 1966)). ''Accordingly, a district court's erroneous reading of the law is a 'mistake' sufficient to require reconsideration of an order.'' Ynigues v. Cabral, 985 F.2d 1031, 1034 (9th Cir. 1993); see also Faile v. Upjohn, 988 F.2d 985, 987 (9th Cir. 1993). However, where the motion for reconsideration raises no new arguments, but instead relies on the same arguments made in the party's original opposition, the motion for reconsideration should be denied. See generally Fuller v. Jewelry, 950 F.2d 1437, 1442 (9th Cir. 1991) (holding that district court properly denied a Rule 59(e) motion for reconsideration where the motion only raised arguments previously addressed by the court); Taylor v. Knapp, 871 F.2d 803, 805 (9th Cir. 1988) (same); Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985) (same); see also CNF Constructors, Inc. v. Donohoe Constr. Co., 57 F.3d 395, 400 (4th Cir. 1995) (''To the extent that the post-judgment motion sought to have the district court reconsider its ruling with respect to the issues addressed in the district court's original order, it is clearly improper, because Rule 60(b) does not authorize a motion for reconsideration of a

legal issue.'') (citation and internal quotation marks omitted); Glavor v. Shearson Lehman Hutton, Inc., 879 F. Supp. 1028, 1032 (N.D. Cal. 1994) (''In order for a party to demonstrate clear error, the moving party's arguments cannot be the same as those made earlier.'').

The disposition of a motion for reconsideration is within the discretion of the district court and will not be reversed absent an abuse of discretion. See Plotkin v. Pacific Telephone & Telegraph Co., 688 F.2d 1291, 1292 (9th Cir. 1982). There is a ''compelling interest in the finality of judgments which should not be lightly disregarded.'' Rogers v. Watt, 722 F.2d 456, 459 (9th Cir. 1983).

The Ninth Circuit has articulated two goals that must be accomplished in order for a motion for reconsideration to succeed: ''First, a motion for reconsideration must demonstrate some reason why the court should reconsider its prior decision. Second, a motion for reconsideration must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.'' Stein v. State Farm Mutual Automobile Insurance Company, 934 F. Supp. 1171, 1173 (D. Haw. 1996). To justify reconsideration, three grounds have been established: 1) an intervening change in controlling law; 2) the availability of new evidence; and, 3) the need to correct clear error or to prevent manifest injustice. See Great Hawaiian Financial Corp. v. Aiu, 116 F.R.D. 612, 616 (D. Haw, 1987), rev'd on other grounds, 863 F.2d 617 (9th Cir. 1988).

DISCUSSION

I. Motion to Vacate Judgment

[1] Defendant has made no showing of any of the grounds upon which a court may relieve a party from final judgment pursuant to Rule 60(b). Defendant contends that the court lacks jurisdiction because the federal government does not possess the right to tax him. This argument is the same one Defendant made in the underlying motion and is without merit. Defendant presents no evidence of mistakes, inadvertence, surprise or excusable neglect, nor is there any proof of any misconduct on the part of the Government. There is no basis for vacating the July 16, 2001 judgment.

II. Motion for Reconsideration

Defendant makes no new arguments in his motion and does not identify any error in law or fact. Accordingly, the instant motion does not meet the standard for granting a motion to reconsider a previous order of the court. Defendant has not demonstrated any reason why the court should reconsider its prior decision and the motion does not set forth any facts or law of a ''strongly convincing nature to induce the court to reverse its prior decision.'' Stein v. State Farm Mutual Automobile Insurance Company, 934 F. Supp. 1171, 1173 (D. Haw. 1996). To justify reconsideration, three grounds have been established: 1) an intervening change in controlling law; 2) the availability of new evidence; and, 3) the need to correct clear error or to prevent manifest injustice. See Great Hawaiian Financial Corp. v. Aiu, 116 F.R.D. 612, 616 (D. Haw. 1987), rev'd on other grounds, 863 F.2d 617 (9th Cir. 1988). Defendant has not produced any evidence of the aforementioned grounds upon which a motion to reconsider may be granted.

CONCLUSION

For the reasons stated above, the court DENIES Defendant's Motion to Vacate Judgment and DENIES Defendant's Motion for Reconsideration of its Order Confirming Sale and Granting Writ of Possession.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii June 03, 2002.

DAVID ALAN EZRA

CHIEF UNITED STATES DISTRICT JUDGE

¶2002-5026

Jerry A. HOLT; Patricia L. HOLT, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Arizona, (DC AZ) Docket No. CV 01-1346-PHX-ROS, June 4, 2002. Year 1987. Decision against Govt.

1. Business deductions—legal expenses—paid or incurred by taxpayer—libel suit—refunds. Govt.'s motion to dismiss for failure to state claim pro se taxpayers' refund complaint, which sought business deduction for legal expenses incurred in libel suit, was denied: govt. didn't address tax implications of taxpayers' purported agent relationship with wholly owned corp. that nominally paid subject expenses, didn't show that legal expenses of libel suit were never deductible, and didn't otherwise establish taxpayers' inability to state claim. Also, motion for time extension was denied as moot. *Reference:* United States Tax Reporter ¶1625.051(5); 1625.041(15); 74,225.01(3). IRC §162; 7422.

In the United States District Court for the District of Arizona.

Order

SILVER, District Judge:

Pending before the Court is Defendant's Motion to Dismiss (Doc. #5) filed September 18,2001. Defendant also filed a Motion for Extension of Time (Doc. #7) to respond to Plaintiff's Complaint. Plaintiffs filed their Response (Doc. #9) on November 9, 2001, and Defendant filed no reply. For the reasons set forth below, the Court will deny Defendant's Motions.[1]

Background

On July 19, 2001, Plaintiffs filed pro se a Complaint against Defendant alleging that Plaintiffs "are entitled to recover from Defendant in the amount of $2,737.00 in overpaid income taxes plus applicable penalties and interest." (Compl. at 3). Plaintiffs contend that Defendant improperly disallowed a deduction claimed by Plaintiffs under 28 U.S.C. § 162 in a Claim for Refund submitted October 26, 2000. The basis for Plaintiffs' claimed refund was a deduction for legal expenses incurred during the 1987 tax year. In 1984, Plaintiffs had filed a libel suit against Andy LaLande in Mohave County Superior Court (CV84-22374). LaLande was Plaintiff Jerry Holt's opponent in the Republican primary for the office of Supervisor of Mohave County. (See Libel Compl. at 2). Plaintiffs alleged that LaLande was responsible for campaign advertisements that were libelous and slanderous and "were such as to bring Jerry A. Holt into disrepute, contempt, ridicule and to constitute impeachment of his honesty, integrity, virtue or reputation." (Id at 3).

On January 21, 1999, Plaintiffs' accountant provided the Internal Revenue Service ("IRS") with information pertaining to Plaintiffs' claimed expenses, including legal and documentary support for Plaintiffs' position. (Compl. at 2). On July 21, 1999, the IRS mailed to Plaintiffs a letter disallowing Plaintiffs' claim, stating the following "[r]easons for disallowance":

> Failure to provide itemized billing statements or receipts reflecting business purpose of expenditures claimed on the amended return and additional expenses presented during examination. Failure to provide documentation the expenses were personally paid by Jerry or Patricia Holt and were not a transaction of the corporation, Yankee Enterprises.[2]

(Compl. at 3, Exh. G). On July 19, 2001, Plaintiffs timely filed the present Complaint. On September 18, 2001, Defendant filed its Motion to Dismiss.

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[1] The Court will deny as moot Defendant's Motion for Extension of time. Pursuant to Rule 12 of the Federal Rules of Civil Procedure, a Rule 12(b) motion extends the time for Defendant to file a responsive pleading until ten days after notice of the Court's decision denying the motion. See Fed. R. Civ. P. 12(a)(4)(A).

[2] According to Plaintiffs, Yankee Enterprises, Inc. is Plaintiffs' "wholly-owned corporation." (Resp. at 1).

Discussion

I. Legal Standard

In resolving a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, ''[a]ll allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.'' Smith v. Jackson, 84 F.3d 1213, 1217 (9thCir. 1996). ''A complaint should not be dismissed unless a plaintiff could prove no set of facts in support of his claim that would entitle him to relief.'' Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). ''The federal rules require only a 'short and plain statement of the claim showing that the pleader is entitled to relief.''' Gilligan v. Jamco Dev. Corp., 108 F.3d 246248 (9th Cir. 1997)(quoting Fed. R. Civ. P. 8(a)). ''The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.'' Id. at 249 (quotation marks omitted). Indeed, though ''it may appear on the face of the pleadings that a recovery is very remote and unlikely[,] ... that is not the test.'' Id. (quoting Scheur v. Rhodes, 416 U.S. 232, 236 (1974)). ''The issue is not whether the plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'' (Id.) (quoting Scheur, 416 U.S. at 236). Finally, it is well established that pro se complaints, ''however inartfully pleaded[,] are held to less stringent standards than formal pleadings drafted by lawyers[.]'' Hughes v. Rowe, 449 U.S. 5, 9 (1980) (quotation marks omitted). ''Such a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'' Id. at 10.

II. Analysis

[1] Defendant's Motion to Dismiss reiterates the two grounds for denying relief articulated by the IRS in its July 19, 1999 Notice of Disallowance. According to Defendant, Plaintiffs are: (1) attempting to claim a deduction for legal expenses actually incurred by another taxpayer—Yankee Enterprises; and (2) attempting to claim a nondeductible personal expense as a deductible business expense. For their part, Plaintiffs contend that the accounting procedures that structure the relationship between Plaintiffs and Yankee Enterprises, together with the ''general rules of principal-agent common law,'' establish that ''payments by Yankee for the benefit of the plaintiffs are deductible in the year paid.'' (Resp. at 2). In addition, Plaintiffs maintain that because their claimed damages in the libel suit against LaLande consisted of the loss of income to Jerry Holt's real estate appraisal business, the legal fees are properly regarded as a business expense. (Resp. at 3–4).

A. Plaintiffs' Deduction for Expenses Paid by Yankee Enterprises

Pursuant to 28 U.S.C. § U.S.C. 162, ''deductions for expenses can be taken only by the party who actually 'paid or incurred' them.'' United States v. Cocke, 399 F.2d 433, 447 [22 AFTR 2d 5267] (5th Cir. 1968) (quoting 28 U.S.C. § 162(a)). ''Three are no provisions in the tax laws whereby one taxpayer can deduct from his gross income expenses incurred and defrayed by another.'' H.W. Nelson Co. v. United States, 308 F.2d 950, 954 [10 AFTR 2d 5668] (Ct. Cl. 1962).

Defendant contends that the checks submitted by Plaintiffs to substantiate their litigation expenses were drawn on the account of Yankee Enterprises, thereby establishing that Yankee Enterprises, not Jerry and/or Patricia Holt, ''paid'' the litigation expenses. Accordingly, to the extent that such expenses were deductible, Yankee Enterprises, *not*Plaintiffs, was entitled to deduct them.

Plaintiffs contend that their ''earnings were deposited into this [Yankee Enterprises bank] account, and the plaintiff's [sic] personal expenses were paid out of this acount in 1987.'' (Resp. at 1–2).

Plaintiffs also attached to their Complaint documents purporting to show how the account was established and maintained.[3] (See Compl., Exh. E). According to Plaintiffs, "[u]nder the general rules of principal-agent common law, it would appear that plaintiffs have met their burden that payments by Yankee for the benefit of the plaintiffs are deductible in the year paid." (Id. at 2).

Although Plaintiffs cite no authority for the principal-agent doctrine as it applies in the context of taxation, the Court cannot say that the doctrine does not apply to the facts of this case.[4] Indeed, "courts, although maintaining the legal fiction of a distinction between stockholder and corporation, may, in considering both income and deductions, reach the conclusion that a corporate entity was the agent of the principal in receiving income." Factor v. Comm'r of Internal Revenue, 281 F.2d 100, 110 [6 AFTR 2d 5028] (9th Cir. 1960). Plaintiffs are thus entitled to offer evidence to support their claim that the principal-agent doctrine justifies their deduction for legal expenses nominally incurred by Yankee Enterprises. In light of the "powerful presumption against re-jecting pleadings for failure to state a claim," Gilligan, 108 F.3d at 249, Defen-dant has not established "beyond doubt that the [Plaintiffs] can prove no set of facts in support of [their] claim which would entitle [them] to relief." Hughes, 449 U.S. at 10.

B. Plaintiffs' Deduction for Legal Fees Incurred in the Libel Suit

Pursuant to 28 U.S.C. § 162, a taxpayer may claim "as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." 28 U.S.C. § 162(a). Legal fees incurred by a taxpayer are deductible as a business expense where "directly connected with, or . . . proximately result[ing] from, his business." Kornhauser v. United States, 276 U.S. 145, 153 [6 AFTR 7358] (1928); see also Butler v. Comm'r of Internal Revenue, 17 T.C. 675, 679 (1951) ("[P]ayment in settlement of a suit for breach of trust or mismanagement of funds by a fiduciary, where the threatened litigation is bona fide, is deductible in those instances where the threatened litigation arises either out of the business of the taxpayer or some transaction he has entered into for profit."). Because "an income tax deduction is a matter of legislative grace," however, "the burden of clearly showing the right to the claimed deduction is on the taxpayer." INDOPCO, Inc. v. Comm'r of Internal Revenue, 503 U.S. 79, 83 [69 AFTR 2d 92-694] (1992). Moreover, the taxpayer bears the burden of substantiating the amount of a claimed deduction. See Hradesky v. Comm'r of Internal Revenue, 65 T.C. 87, 89 (1975). "If the trier of fact finds that the litigation is not directly connected with the business of the taxpayer, then the expense is a nondeductible personal item." Comm'r of Internal Revenue v. Shapiro, 278 F.2d 556, 558 [5 AFTR 2d 1574] (7th Cir. 1960).

Here, Defendant observes that Plaintiffs' "libel complaint made no mention of lost income or other business consequences flowing from the alleged libel." (Mot. at 4). According to Defendant, "[t]his strongly indicates that the expenses were not incurred for business purposes." (Id.).

Plaintiffs contend that they "sued [La-Lande] in this state court action due to loss of earnings from the plaintiff-husband's long-term position in Mohave County, Arizona, as a professional real estate appraiser and real estate broker." (Resp. at 2–3). Plaintiffs note that the damage evidence as

[3] The Court recognizes that "[g]enerally, a district court may not consider any material beyond the pleadings in ruling on a 12(b)(6) motion." Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). "However, material which is properly submitted as part of the complaint may be considered." Id.; see also Parks Sch. of Bus., Inc., 51 F.3d at 1484 ("When a plaintiff has attached various exhibits to the complaint, those exhibits may be considered in determining whether dismissal was proper without converting the motion to one for summary judgment."). Because the relevant exhibits are attached to, and incorporated into, Plaintiffs' Complaint, the Court has considered them in resolving Defendant's Motion to Dismiss.

[4] Here, as elsewhere, Defendant's failure to file a reply rebutting Plaintiffs' arguments substantially weakens its case for dismissal.

the state court trial focused on Jerry Holt's diminished income as an appraiser in to the wake of the alleged libel. Attached to Plaintiffs Complaint in the present action is an ''Income Analysis'' adduced by Plaintiff in the state court action to substantiate his damages in terms of lost business revenue. The Income Analysis, and its role in the state court proceedings, supports Plaintiffs' allegation that the legal expenses incurred in the state court action arose out of, or in connection with, his business activities.[5]

Although the parties cite no authority that addresses whether litigation expenses incurred in connection with a libel suit are deductible as business expenses under 28 U.S.C. § 162, several courts have addressed the issue. ''The courts have generally denied a deduction for the costs of prosecuting an action for libel or slander, even though the statements could be detrimental to the taxpayer's business.'' 39 A.L.R. Fed. 221 (1978); see, e.g., Lloyd v. Comm'r of Internal Revenue, 55 F.2d 842, 844 [10 AFTR 1195] (1932) (''In practically every case where slanderous reports are circulated about an individual and damage his character or reputation, such reports affect indirectly . . . the business in which he is engaged. Any expense, however, incurred by him in defending his good name under such circumstances, cannot be said to be ordinary and necessary expenses incurred in carrying on his business,''); Kleinschmidt v. Comm'r of Internal Revenue, 12 T.C. 921, 924 (1949) (holding that legal expenses incurred in connection with ''libel suits . . . filed as the result of published statements made in the course of a political campaign'' and ''not made as an incident to earning income in the practice of law'' were not deductible as business expenses).

Other courts, however, have determined that legal expenses incurred in prosecuting a libel suit are deductible business expenses if the taxpayer undertakes the suit to protect his professional reputation. See e.g., Dyer v. Comm'r of Internal Revenue, 36 T.C. 456, 465 (1961) (holding that, because the petitioner testified that the purpose of his libel suit was to protect his reputation as a lawyer, ''the $134.60 which petitioner incurred and paid in the libel suit was a business expense and is deductible under section 162''). More generally, ''[e]xpenditures incurred by a taxpayer to protect his business reputation or avoid unfavorable business or commercial publicity have been regard[ed] as deductible.'' Marks v. Comm'r of Internal Revenue, 27 T.C. 464, 467, (1956) (distinguishing between a taxpayer's personal and professional reputation); Butler v. Comm'r of Internal Revenue, 17 T.C. 675, 681 (1951) (allowing deduction for legal expenses incurred by taxpayer motivated to enter settlement agreement ''because of his fear of damage to his reputation as a public utility consultant or manager from unfavorable publicity which might result from continued litigation''); Helvering v. Cmty. Bond & Mortgage Corp., 74 F.2d 727, 178 [14 AFTR 908] (2d Cir. 1935) (''In the instant case, the taxpayer's reputation was being injured by the conduct of its agent, and its primary motive in seeking cancellation of the contract was to prevent the loss of earnings . . . . This we think was an expenditure ordinary and necessary in carrying on the business, and deductible from the respondent's gross income.''). But cf. Welch v. Helvering, 290 U.S. 111, 115 [12 AFTR 1456] (1933) (upholding disallowance of deduction for taxpayer's payment of debts of a bankrupt corporation because the expenses were incurred only to enhance the taxpayer's ''own standing and credit'').

The Court express no opinion regarding whether Plaintiffs' purported expenditures are deductible legal expenses under § 162. However, in light of the presumption against rejecting pleadings for failure to

[5] As noted above, because the Income Analysis and other exhibits are attached to, and incorporated into, Plaintiffs' Complaint, the Court has considered them in resolving Defendant's Motion. See Hal Roach Studios, Inc., 896 F.2d at 1555 n.19.

state a claim and the Court's liberal construction of Plaintiffs' pro se Complaint, Defendant has failed to establish that Plaintiff can prove no set of facts that would entitle them to relief. Specifically, because Defendant has failed to address the tax implications of the alleged principal-agent relationship between Plaintiffs and Yankee Enterprises and the alleged damage to Plaintiffs' business reputation as a result of the alleged libel, the Court cannot say that Plaintiffs' allegations, and supporting documentation, fail as a matter of law.

Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss (Doc. #5) is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion for Extension of Time (Doc. #7) is DENIED as moot.

DATED this 31 day of May, 2002.

Roslyn O. Silver

United States District Judge

¶2002-5027

Jerry D. BRASFIELD, PLAINTIFF v. THE INTERNAL REVENUE SERVICE, Commissioner of Theirs, District Director, and all other delegated, DEFENDANTS. U.S. District Court, Dist. of Colorado, (DC CO) Civil Action No. 01-Z-2409 (CBS), June 6, 2002. Decision against Taxpayer.

1. Actions against IRS and IRS employees—Anti-Injunction Act—temporary restraining order (TRO). Magistrate judge recommended that pro se taxpayer's action against IRS and its employees for injunctive relief, return of property and cessation of collection efforts be dismissed for lack of jurisdiction, and dismissed individual defendants from action: U.S. was sole proper defendant to claims based on actions taken by IRS employees in their official capacity; AIA barred injunctive relief, and neither statutory nor judicial exceptions applied; and unfounded TRO request was barred by AIA. *Reference:* United States Tax Reporter ¶74,215.05(5). IRC §7421.

In the United States District Court for the District of Colorado.

Recommendation and Order of United States Magistrate Judge

SHAFFER, Magistrate Judge:

THIS MATTER comes before the court on: (1) Brasfield's Motion for Temporary Restraining Order (filed April 17, 2002); and (2) the United States' Motion to Dismiss (filed March 21, 2002). Pursuant to the March 26, 2002 Order of Reference, this civil action was referred to the Magistrate Judge to, *inter alia*, ''[h]ear and determine pretrial matters'' and to ''submit proposed findings of fact and recommendations for rulings on dispositive motions.'' The court has reviewed the pending matters, Brasfield's ''Answer to United States Motion to Dismiss'' (filed April 7, 2002), the pleadings, the entire case file, and the applicable law and is suf-ficiently advised in the premises.

I. Background

Brasfield, *pro se*, initiated this civil action on December 12, 2001 seeking a court order to prevent the levy on his wages by the Internal Revenue Service (''IRS''). (*See* December 12, 2001 Notice and Request for Temporary Restraining Order). Brasfield has alleged that the ''United States government, by its agency, the Internal Revenue Service and its delegates, has stolen $1,698.78 from the Plaintiff . . . by illegal garnishment of Plaintiff's wages . . . .'' (February 19, 2002 Amended Notice and Request for Temporary Re-straining Order ¶ 4). Brasfield asks the court to, *inter alia*, ''grant an injunction and command the return of the property taken.'' (February 19, 2002 Amended No-tice and Request for Temporary Re-straining Order p. 6).

II. The United States' Motion to Dismiss

The United States moves to dismiss this civil action pursuant to Fed. R. Civ. P. 12(b) for lack of subject matter jurisdiction because (1) the United States is the sole proper Defendant; and (2) the action is barred by the Anti-Injunction Act, 26 U.S.C. § 7421(a).

A. Standard of Review

First, *pro se* pleadings are to be construed liberally. Haines v. Kerner, 404 U.S. 519, 520–21 (1972). However, a *pro se* litigant's "conclusory allegations without supporting factual averments are insufficient to state a claim upon which relief can be based." Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

Rule 12(b)(1):

> empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." As courts of limited jurisdiction, federal courts may only adjudicate cases that the Constitution and Congress have granted them authority to hear. *See* U.S. CONST. art. III, § 2; *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994). Statutes conferring jurisdiction on federal courts are to be strictly construed. *F & S Construction Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). If a Rule 12(b)(1) motion to dismiss merely challenges the sufficiency of the allegations in the complaint, the court must accept those allegations as true, *see Holt v. United States*, 46 F.3d 1000, 1002–1003 (10th Cir. 1995), but "without regard to mere conclusionary allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971). A party may attack the factual assertions regarding subject matter jurisdiction through affidavits and other documents. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Although the district court may consider evidence outside the pleadings, generally the motion is not converted to one for summary judgment pursuant to Rule 56. *Id.* The burden of establishing subject-matter jurisdiction is on the party asserting jurisdiction.

Basso v. Utah Power and Light Co., 495 F.2d 906, 909 (10th Cir. 1974). American Fair Credit Ass'n v. United Credit Nat. Bank, 132 F. Supp.2d 1304, 1308–09 (D. Colo. 2001).

B. The United States is the Proper Defendant

[1] Brasfield does not state whether he is suing the Defendants in their official capacities, their individual capacities, or both. Brasfield concedes that the United States "should be added as proper party with the existing Defendants." (Brasfield's Answer to Motion to Dismiss p. 2). Brasfield also states that IRS employees "may have been directed by the United States. . . . " (Brasfield's Answer to Motion to Dismiss p. 3).

First, the IRS is not an entity against which suit may be brought. Lopez v. United States, 129 F. Supp.2d 1284, 1292 [86 AFTR 2d 2000-6960] (D. N.M. 2000)(citations omitted). Second, Brasfield seeks injunctive relief, the return of property, and the cessation of collection efforts. His allegations clearly are based on actions taken by IRS employees in the scope of their official duties. *See* Houston v. Reich, 932 F.2d 883, 885 (10th Cir. 1991)(the court should review the "course of the proceedings" to determine in what capacity a public official defendant is being sued) (quoting Kentucky v. Graham, 473 U.S. 159, 167 (1985)) (internal quotation omitted). Brasfield's allegations against the named Defendants are properly construed as allegations against the United States. Atkinson v. O'Neill, 867 F.2d 589, 590 (10th Cir. 1989). Therefore, Defendants the "Internal Revenue Service, Commissioner of Theirs, District Director, and all Other Delegated" are properly dismissed from this civil action.

C. Availability of Injunctive Relief

To the extent that Brasfield seeks injunctive relief restraining the IRS from levying his wages to collect tax deficiencies, Brasfield's claim is barred by the Anti-Injunction Act, 26 U.S.C. §7421. The Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The purpose of the Anti-Injunction Act is to allow the government to conduct its business expeditiously in the assessment and collection of taxes without judicial intervention and to require that a taxpayer challenging the assessment and collection of taxes against him must first file a claim for a refund with the IRS. Wyoming Trucking Association, Inc. v. Bentsen, 82 F.3d 930, 933 [77 AFTR 2d 96-2098] (10th Cir. 1996) (citing Enochs v. Williams Packing & Navigation Co., 730 U.S. 1, 7 [9 AFTR 2d 1594] (1962)). If the taxpayer does not prevail in the administrative proceeding, he may then file a suit for a refund in federal district court. *See* 26 U.S.C. §7422; 28 U.S.C. §1346(a)(1).

Brasfield "does not believe that the Anti-Injunction Act applies" to this case. (Brasfield's Answer to Motion to Dismiss p. 6). However, the relief he seeks is an injunction prohibiting the government from collecting its tax, and the purpose of his suit is to restrain the collection of taxes. Therefore, the Anti-Injunction Act applies, and this action is properly dismissed for lack of subject matter jurisdiction. *See* Bob Jones Univ. v. Simon, 416 U.S. 725, 738–39 [33 AFTR 2d 74-1279] (1974); Williams Packing, 370 U.S. at 5; Overton v. United States, 925 F.2d 1282, 1284–85 [67 AFTR 2d 91-614] (10th Cir. 1991); Lonsdale v. United States, 919 F.2d 1440, 1442–43 [67 AFTR 2d 91-1049] (10th Cir. 1990).

In addition to certain statutory exceptions neither pled nor applicable here,[1] the Supreme Court has created a "judicial exception" to the Anti-Injunction Act which allows a taxpayer to seek injunction relief "if the taxpayer demonstrates that: (1) under no circumstances could the government establish its claim to the asserted tax; and (2) irreparable injury would otherwise occur.'" Lonsdale, 919 F.2d at 1442 (quoting Souther v. Mihlbachler, 701 F.2d 131, 132 [51 AFTR 2d 83-915] (10th Cir. 1983) (citations omitted).

Brasfield attempts to avoid the Anti-Injunction Act by alleging "constitutional claims." (*See* Amended Complaint for Temporary Restraining Order p. 1 ¶ 3). However, to have subject matter jurisdiction to order such relief, the court must find that Brasfield's claim falls within an exception to the Anti-Injunction Act. James v. United States, 970 F.2d 750, 756–57 [70 AFTR 2d 92-5440] (10th Cir. 1992). In addition, Brasfield's allegations of financial difficulties stemming from the levy on his wages are not a basis for equity jurisdiction when the levy was created to collect a tax deficiency. *See* Lucia v. United States, 474 F.2d 565, 577 [31 AFTR 2d 73-733] (5th Cir. 1973) (en banc) ("hardship alone is insufficient to justify injunctive relief against the collection of taxes").

Brasfield does not allege that his claim falls within the judicial exception to the Anti-Injunction Act found in Williams Packing, 370 U.S. at 7. Nor does Brasfield satisfy either prong of the Williams Packing exception to the Anti-Injunction Act. Brasfield cannot demonstrate that under no circumstances could the government establish its claim to the asserted tax. Brasfield has not indicated that he has filed a claim for refund with the IRS, nor has he shown that such a remedy is inadequate to redress any asserted injuries. Accordingly, this court may not exercise its equity jurisdic-

[1] See 26 U.S.C. §§6212(a) & (c); 6213(a); 6672(b); 6694(c); 7426(a) & (b)(1); and 7429(b) (providing for actions related to redeterminations, stays, levies, and refunds in specified circumstances.)

tion over Brasfield's claim. *See*Wyoming Trucking Assn., Inc., 82 F.3d at 935 (citing Bob Jones Univ., 416 U.S. at 746); C.I.R. v. Shapiro, 424 U.S. 614, 629 [37 AFTR 2d 76-959] (1976) (noting that taxpayer seeking injunction must plead and prove facts establishing that his remedy in a refund suit is inadequate to repair any injury that might be caused by an erroneous assessment or collection of taxes).

Thus, Brasfield fails to show that his case falls within any exception to the Anti-Injunction Act, and, consequently, pursuant to the Act, the court does not have jurisdiction to rule on his request for injunctive relief.

III. Brasfield's Motion for Temporary Restraining Order

Also before the court is Brasfield's seventh request for a temporary restraining order against the IRS. (*See*December 12, 2001 Notice and Request for Temporary Restraining Order (denied December 17, 2001); December 19, 2001 Amended Complaint for Temporary Restraining Order . . . (denied December 21, 2001); December 24, 2001 Notice and Request for Temporary Restraining Order (denied March 26, 2002); February 19, 2002 Notice and Request for Temporary Restraining Order (denied March 26, 2002); February 19, 2002 Amended Notice and Request for Temporary Restraining Order (denied March 26, 2002); and February 26, 2002 Motion to Amend Complaint and tendered Amended Complaint for Temporary Restraining Order (denied March 26, 2002)). Brasfield seeks "a permanent injunction," "a Temporary Restraining order," "requests the Court to stop the garnishment. . . ." (Brasfield's Motion p. 2).

A temporary restraining order may be granted only if "it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant." Fed. R. Civ. P. 65(b). Furthermore, to be entitled to temporary or preliminary injunctive relief, a moving party must establish: (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant unless injunctive relief is provided; (3) the threatened injury to the movant outweighs the injury that the proposed injunction may cause the opposing party; and (4) the injunction, if issued, would not be adverse to the public interest. Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001) (citation omitted).

As the District Judge has ruled several times (*see* Orders dated December 17, 2001, December 21, 2001, and March 26, 2002), Brasfield's request for a temporary restraining order is barred by the Anti-Injunction Act. Further, Brasfield has failed to make the requisite showing for a temporary restraining order.

Accordingly, IT IS ORDERED that Plaintiff's Motion for Temporary Re-straining Order (filed April 17, 2002) is DENIED.

Further, IT IS RECOMMENDED that the United States' Motion to Dismiss (filed March 21, 2002) be GRANTED and that this civil action be DISMISSED with prejudice.

Advisement to the Parties

Within ten days after service of a copy of the Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1). Objections to a magistrate judge's recommendation must be made within ten days of service of the Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); In re Griego, 64 F.3d 580, 583 (10th Cir. 1995).

The district judge shall make a de novo determination of those specific portions of the proposed findings or recommendations to which specific objection is made. 28 U.S.C. § 636(b)(1). A general objection that does not put the district court on notice of the basis for the objection will not

preserve the objection for de novo review by the district court. *See* In re Griego, 64 F.3d at 583; United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Oklahoma, 73 F.3d 1057, 1060 (10th Cir.), *cert. denied*, 519 U.S. 909 (1996). The district judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1). The district judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1).

"[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." One Parcel of Real Property Known As 2121 East 30th Street, 73 F.3d at 1060. Failure to make timely objections to the magistrate judge's proposed findings and recommendations will bar de novo review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. In re Key Energy Resources, Inc., 230 F.3d 1197, 1199–1201 (10th Cir. 2000); Theede v. United States Department of Labor, 172 F.3d 1262, 1267–68 (10th Cir. 1999); One Parcel of Real Property Known As 2121 East 30th Street, 73 F.3d at 1059–60.

DATED at Denver, Colorado, this 9th day of June, 2002.

BY THE COURT:

Craig B. Shaffer

United States Magistrate Judge

¶2002-5028

Floyd E. RILEY, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Eastern Dist. of Missouri, (DC MO) Docket No. 2:94-CV-124 CEJ, June 4, 2002. On remand from (1997, CA8) 80 AFTR 2d 97-5126, 118 F3d 1220, 97-2 USTC ¶50522, reversing and remanding (1995, DC MO) 76 AFTR 2d 95-7996, 192 BR 727, 96-1 USTC ¶50090. Year 1990. Decision for Govt.

1. Tax claims in bankruptcy—effect of automatic stay on 100% withholding penalty—responsible person—summary judgment—void assessments—attorney's fees. On remand, govt. was granted summary judgment on CEO/Chairman of Board/ majority shareholder's IRC §6672 penalty liability: taxpayer was responsible person where he had authority over day-to-day managerial decisions, had hiring/firing and check signing authority, and controlled co.'s finances; and fact that finance vice pres. and Controller also signed co. checks wasn't dispositive where taxpayer retained ultimate authority as to funds' disbursement and creditor payments. Also, taxpayer acted willfully where he paid other creditors, including employee wages, with knowledge that employment taxes were unpaid. *Reference:* United States Tax Reporter ¶66,725.01(35); 68,726.52(10); 68,726.52(15); 74,305.01(40). IRC §6672; 7430.

United States District Court, Eastern District of Missouri, Northern Division.

Memorandum and Order

JACKSON, District Judge:

This matter is before the Court upon the motion of the United States for summary judgment. Fed.R.Civ.P. 56(c). Plaintiff Floyd Riley has not responded to defendant's motion, and the time allowed for doing so has expired.

Plaintiff brings this civil action to recover $2,000.00 which he paid to the Internal Revenue Service ("IRS") in accordance with a Trust Fund Recovery Penalty assessed against him under 26 U.S.C. § 6672. The penalty assessment was equal to the total amount of the federal income and

social security taxes withheld from the wages of employees of FERCO Fabricators, Inc. for the first, second and third quarters of 1990 which were never paid over to the United States. The Government has counterclaimed against Riley for the unpaid balance of the assessment in the amount of $681,675.24, plus statutory interest.

I. Background

Through 1990, Riley was associated, in various capacities, with FERCO Fabricators, Inc. ("FERCO"), a company in Moberly, Missouri. During this time, Riley was majority shareholder and at one point served as chairman of the board of directors. The government alleges that in 1990, while Riley was still involved with FERCO, the company failed to remit to the government more than $680,000 it had withheld from employees for social security and income taxes.

Riley filed for Chapter 7 bankruptcy in September of 1991, and received his discharge in June of 1992. During this time, the Bankruptcy Code's automatic stay was in effect, entitling Riley to protection from all actions to recover claims against him that arose before he filed his bankruptcy petition. See 11 U.S.C. § 362(a) (6).

On May 18, 1992, during the period of the automatic stay, the IRS issued to Riley a notice of proposed assessment of a penalty for FERCO's unpaid taxes, pursuant to I.R.C. § 6672. The notice informed Riley that he could either agree to pay the proposed assessment or that he could file an appeal with the agency within thirty days. Riley protested the proposed assessment, claiming that it violated the automatic stay and that, in any event, he was not responsible. In August of 1993, more than a year after the stay expired, the IRS issued the assessment. Riley paid $2,000, representing a portion of the assessment, and made a claim for a refund. After the IRS denied his claim, Riley initiated this refund action.

On October 25, 1995, the Honorable George F. Gunn Jr. granted Riley's motion for summary judgment and found that the notice of proposed assessment violated the automatic stay. Thus, the Court concluded that violation of the bankruptcy stay rendered the assessment void and granted Riley's request for a refund. Thereafter, the Court denied Riley's request for attorney's fees, concluding that the IRS's position, although erroneous, was substantially justified. Defendant appealed Judge Gunn's grant of summary judgment, and Riley appealed the denial of his motion for fees. The Eighth Circuit Court of Appeals reversed Judge Gunn's grant of summary judgment, finding that the issuance of the notice of proposed assessment did not violate the bankruptcy stay. Thus, the case was remanded to this Court for further proceedings. Consequently, defendant argues that the only issues before the Court are: (1) whether the plaintiff was a person responsible for withholding, collecting and paying over to the IRS the withholding taxes of FERCO for the first, second and third quarters of 1990; (2) whether the plaintiff's failure to collect and pay over the withheld taxes, which were impressed with a special trust in favor of the United States under 26 U.S.C. § 7501, was willful.

II. Discussion

[1] Sections 3102 and 3402 of the Internal Revenue Code require employers to withhold federal social security and income taxes from the wages of their employees. "Once taxes are collected they become a trust fund in the hands of the employer." 26 U.S.C. § 7501. To protect against revenue losses, § 6672(a) of the U.S.C. pro-vides that when a person responsible for collecting, accounting for and paying over withholding taxes willfully fails to do so, he is liable for a 100 percent penalty equal to the total amount of the taxes held in trust. Olsen v. United States, 952 F.2d 236, 239 [69 AFTR 2d 92-395] (8th Cir. 1991). A § 6672 assessment against a responsible

person is equivalent to a tax. Once the tax is assessed, a rebuttable presumption arises that the assessment is correct. Helvering v. Taylor, 293 U.S. 507 [14 AFTR 1194] (1935); Anderson v. United States, 561 F.2d 162, 165 [40 AFTR 2d 77-5642] (8th Cir. 1977). Thus, the taxpayer has the burden of proving lack of responsibility or lack of willfulness. Olsen, 952 F.2d at 239; Honey v. United States, 963 F.2d 1083, 1087 [69 AFTR 2d 92-1333] (8th Cir.), cert. denied, 113 S.Ct. 676 (1992). That is so with respect to both the taxpayer's claim for refund and the United States' counterclaim. McDermitt v. United States, 954 F.2d 1245, 1251 [69 AFTR 2d 92-665] (6th Cir. 1992). Section 6672 imposes liability on an individual if two requirements are met: (1) the person must be a "responsible person" and (2) the person must act "willfully" in not paying over the taxes. See also Olsen, 952 F.2d at 239.

Responsible persons are those who have the status, duty and authority to avoid the corporation's default in collection or payment of the taxes. Kenagy v. United States, 942 F.2d 459, 464 [68 AFTR 2d 91-5342] (8th Cir. 1991). The determination of whether or not an individual is a responsible person requires a close examination of the facts of each case. See Bauer v. United States, 543 F.2d 142, 148 [38 AFTR 2d 76-5975] (Ct. Cl. 1976). "Certain facts will almost invariably prove dispositive of a finding of responsibility." Barnett v. Internal Revenue Service, 988 F.2d 1449, 1454 [71 AFTR 2d 93-1614] (5th Cir. 1993). No single fact is dispositive as to whether an individual is a responsible person, but such facts include whether a person: (1) is an officer, director or member of the board of directors; (2) owns substantial stock in the company; (3) manages the day-to-day operations of the business; (4) has the authority to hire or fire employees; (5) makes decisions as to the disbursement of funds and payment of creditors; (6) possesses the authority to sign company checks; and (7) signs the employer's tax returns. Id. at 1455; Kinnie v. United States, 994 F.2d 279, 283 [71 AFTR 2d 93-1979] (6th Cir. 1993); Brounstein v. United States, 979 F.2d 952, 954-953 [71 AFTR 2d 93-1714] (3rd Cir. 1992). The responsible person need only have significant control over disbursement of the employer's funds, not necessarily sole or final authority. Donelan Phelps & Co., Inc. v. United States, 876 F.2d 1373, 1376 [64 AFTR 2d 89-5049] (8th Cir. 1989).

The evidence is clear that Floyd Riley is a responsible person under § 6672. During the period at issue, Riley was FERCO's Chief Executive Officer and Chairman of the Board of Directors, as well as owner of 90% of the company's stock. Riley retained ultimate authority to review and approve all day-to-day managerial decisions, and had the authority to hire and fire employees. Riley's authority was of such magnitude that it enabled him to fire FERCO's President, Don Schlueter, on May 4, 1990. One year earlier, Riley, himself, had hired Schlueter as President and Chief Operating Officer of FERCO. Riley had signature authority on FERCO's bank accounts, and he exercised the authority frequently by signing company checks. His control over the company's finances is evidenced by his signature on at least two loan agreements, various promissory notes, a security agreement with Landmark Bank in his capacity as an officer of the corporation, and the letter agreement with Landmark Bank, as well as his signature on the business plan. Riley guaranteed FERCO's debt with Landmark Bank, and he pledged his residence and life insurance policy as collateral. Finally, although Gary Dengel, Vice-President of Finance and controller, also signed FERCO's checks, Riley possessed ultimate authority as to the disbursement of company funds and the payment of its creditors. In fact, Riley personally determined which FERCO bills were to be paid and when. Thus, there can be no doubt that Riley is a responsible person within the meaning of the statute.

A responsible person acts willfully within the meaning of § 6672 whenever he "acts or fails to act consciously and voluntarily and with knowledge or intent that as a result of his action or inaction trust funds belonging to the government will not be paid over but will be used for other purposes," Hartman v. United States, 538 F.2d 1336, 1341 [38 AFTR 2d 76-5510] (8th Cir. 1976), or "by proceeding with reckless disregard of a known or obvious risk that trust funds may not be remitted to the government." Honey, 963 F.2d at 1087. "The term 'willfully' does not connote a bad or evil motive, but rather means a voluntary, conscious, and intentional act, such as the payment of other creditors in preference to the United States." Id. quoting Elmore v. United States, 843 F.2d 1128, 1132 [61 AFTR 2d 88-975] (8th Cir. 1988). Although willfulness is usually a question of fact, "evidence that the responsible person had knowledge of payment to other creditors, including employees, after he was aware of the failure to pay over withholding taxes is proof of willfulness as a matter of law." Id.; Olsen, 952 F.2d at 240.

The evidence is undisputed that plaintiff paid other creditors of FERCO's, including employee wages, with knowledge that the company's employment taxes were going unpaid. Riley was kept abreast of the financial workings of FERCO by Gary Dengel, Vice-President of Finance and controller. Not only did Dengel discuss FERCO's financial situation with Riley on more than one occasion, but Dengel also distributed financial statements to Riley, which included lists of the outstanding tax liabilities of the company. Furthermore, Riley, himself, spoke to Stan Taylor of the IRS about the unpaid tax liability on July 18, 1990, and Riley admitted in his claim for a refund that he found out as early as June 1990 about FERCO's trust fund taxes "due for two or three quarters." Notwithstanding his information regarding the tax liabilities, Riley permitted and directed that funds of the corporation be paid to creditors other than the IRS. Just one example of such occurred in August of 1990, after Riley admittedly was aware of the federal tax delinquencies, when Riley allowed FERCO to pay wages to its employees. In addition, there is evidence in the record that Riley, on a regular basis, reviewed a list of FERCO's accounts payable and decided from the list which creditors to pay. Furthermore, FERCO's bank statements for the period January 1990 through September 1990 show that more than $8 million was deposited into just one of FERCO's three accounts at the Bank of Cairo and Moberly. Thus, during January and September 1990, FERCO received revenues that were sufficient to pay the outstanding employment taxes. As such, Riley's decision to pay other creditors after learning of the company's failure to pay prior withholding taxes was conscious and intentional, and therefore, willful.

The Court finds that plaintiff was a responsible person at FERCO who willfully chose to prefer other creditors rather than pay FERCO's employment taxes. As a result, plaintiff will be held liable to the United States in the amount of $681,675.24, plus statutory interest from the date of the original assessment.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment is granted. A judgment in accordance with this Memorandum and Order will be entered this same date.

CAROL E. JACKSON

UNITED STATES DISTRICT JUDGE

Dated this 4th day of June, 2002.

Judgment

JACKSON, District Judge:

In accordance with the Memorandum and Order entered this same date,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of the defendant United

States of America and against plaintiff Floyd E. Riley on the plaintiff's complaint.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of defendant United States of America and against plaintiff Floyd E. Riley on the defendant's counterclaim in the amount of $681,675.24, plus statutory interest from the date of the original assessment. The plaintiff shall bear the costs.

CAROL E. JACKSON

UNITED STATES DISTRICT JUDGE

Dated this 4th day of June, 2002.

¶2002-5029

In Re: Martha G. RODRIGUEZ, Debtor. U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) Docket No. 01-11164-8W3, May 29, 2002. Decision for Govt. in part.

1. Tax claims in bankruptcy—objection to IRS proof of claim. Debtor's objection to IRS's proof of claim was overruled as moot, but she was allowed 30 days to file objection to IRS's amended proof of claim. *Reference:* United States Tax Reporter ¶68,726.51(10).

United States Bankruptcy Court, Middle District of Florida, Tampa Division.

Order Overruling as Moot Debtor's Objection to Claim No. 13 of the Internal Revenue Service

WILLIAMSON, Bankruptcy Judge:

[1] This matter came on for hearing on May 17, 2002, upon the Debtor's Objection to Claim No. 13 of the Internal Revenue Service. For the reasons stated orally and recorded in open court, which shall constitute the decision of this Court, it is hereby

ORDERED, ADJUDGED, and DECREED:

1. That Debtor's Objection to Claim No. 13 of the Internal Revenue Service is OVERRULED as MOOT; and

2. That the debtor shall have thirty (30) days within which to object to the amended proof of claim filed by the Internal Revenue Service.

DONE and ORDERED this May 29, 2002, at Tampa, Florida.

MICHAEL G. WILLIAMSON

United States Bankruptcy Judge

¶2002-5030

UNITED STATES OF AMERICA, PLAINTIFF v. Douglas P. ROSILE, SR., DEFENDANT. U.S. District Court, Middle Dist. of Florida, (DC FL) Docket No. 8:02-CV-466-T-17MSS, June 10, 2002. Decision for Govt.

1. Abusive tax shelter promotion—injunctions—false statements—impeding tax law enforcement. Govt. was granted preliminary injunction preventing return preparer from further promoting bogus refund scheme, preparing or making false and frivolous IRC §861-based statements, and engaging in punishable IRC §6700 or IRC §6701 conduct or related conduct substantially interfering with tax law administration and enforcement: govt. was likely to prevail on merits where facially absurd IRC §861 argument had been universally rejected by courts for years; and would be irreparably harmed if it were denied access to preparer's client lists and had to keep wasting resources on abusive returns. Also, public interest in being protected from taxpayer's worthless advice and bogus scheme outweighed any prejudice to him. *Reference:* United States Tax Reporter ¶74,025.01(11); 67,005.01(15); 74,085.01(50). IRC §6700; 6701; 7402; 7408.

United States District Court, Middle District of Florida, Tampa Division.

Order

KOVACHEVICH, District Judge:

This cause is before the Court on the following:

Dkt. 12 Motion for Preliminary Injunction And Expedited Hearing

Dkt. 19 Motion to Assert Fifth Amendment Protections

Dkt. 21 Motion to Take Judicial Notice

[1] Plaintiff seeks a preliminary injunction preventing Defendant Douglas P. Rosile, Sr. from:

1. Preparing federal tax returns or other documents to be filed with the IRS that understate taxpayers' liabilities using the Sec. 861 argument or other frivolous positions;

2. Failing to retain and produce to the Internal Revenue Service upon request, a list of all clients for whom her performed return-preparation services;

3. Engaging in activity subject to penalty under IRC Sec. 6700, including organizing a plan or arrangement and making a statement regarding the excludibility of income that he knows or has reason to know is false or fraudulent as to an material matter.

4. Engaging in activity subject to penalty under IRC Sec. 6701, including preparing and/or assisting in the preparation of a document related to a matter material to the internal revenue laws that includes a position that he knows will result in the understatement of tax liability;

5. Engaging in any other activity subject to penalty under IRC Secs. 6694, 6695, 6700, or 6701; and

6. Engaging in other similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

I. Standards for Preliminary Injunction

In order to obtain a preliminary injunction under 26 U.S.C. Sec. 7402, Plaintiff must show that the following four factors weigh in favor of granting a preliminary injunction against Defendant Douglas P. Rosile, Sr.:

1) there is a likelihood of irreparable injury to the United States as a result of the conduct complained of;

2) there is a likelihood of little or no harm to the counterclaim defendant if the temporary injunctive relief is granted;

3) there is a likelihood that the United States will prevail on the merits;

4) an injunction will serve the public interest.

In order to obtain a preliminary injunction to 26 U.S.C. Secs. 7407 and 7408, Plaintiff must show that Defendant Rosile either: 1) engaged in conduct subject to penalty under IRC Secs. 6694 or 6695, or engaged in any other fraudulent or deceptive conduct that substantially interferes with the proper administration of the internal revenue laws; or 2) Rosile engaged in conduct subject to penalty under Sec. 6700 or 6701; and 3) injunctive relief is appropriate to prevent the recurrence of such conduct.

II. Plaintiff's Argument

A. Irreparable Injury

Plaintiff argues that Defendant continues to prepare frivolous Sec. 861 returns, and refuses to turn over his client list or copies of clients' returns. Plaintiff argues that, as a result, it is impossible for the IRS to detect all improper Rosile-prepared returns and bogus refunds. Plaintiff argues that Defendant has prepared frivolous returns for at lease 174 taxpayers in 34 states. The processing of the frivolous returns consumes substantial resources of Plaintiff. Plaintiff argues that Defendant is harming his clients, the Government and all law-abiding taxpayers.

B. Likelihood of Prevailing on the Merits

Plaintiff argues that the Sec. 861 argument is completely without merit.

C. Threatened Injuries to Plaintiff Outweigh Injuries to Defendant

Plaintiff argues that the requested injunction will prevent Rosile from causing further irreparable injury to the Government and to future customers who will be liable for penalties if they file frivolous returns. Plaintiff requests an injunction to prevent Defendant from continuing to violate the law, not to prevent Defendant from preparing tax returns.

D. Public Interest

Plaintiff argues that the issuance of the injunction will stem the spread of the frivolous Sec. 861 argument, and taxpayers paying for worthless tax advice will be protected from the fraudulent scheme and associated tax penalties.

III. Defendant's response

Defendant denies that the Sec. 861 argument is frivolous (Dkt. 21). Defendant also asserts the Fifth Amendment as a defense (Dkt. 19). This is a civil proceeding, and the effect of the Defendant's assertion of the Fifth Amendment is that Defendant has brought forth nothing to weigh against Plaintiff's arguments.

IV. Discussion

Plaintiff has filed Exhibits and Affidavits in support of Plaintiff's request for preliminary injunction. The Court makes the following findings, based on the pleadings and supporting documents:

1. Defendant Rosile promoted and continues to promote the IRC Sec. 861 argument, a frivolous position that domestic income is not subject to the federal income tax.

2. Rosile knew or should have known that the Sec. 861 argument is frivolous because 1) the argument is absurd on its face; 2) judicial decisions dating back to 1993 have universally rejected the argument; and 3) the IRS issued numerous public documents describing the invalidity of the argument. Also, Rosile continued to advance the argument even after the IRS informed him that he was being investigated for promoting an abusive tax plan.

3. Rosile prepared tax returns on behalf of client that advocated the Sec. 861 argument. He charged fees for this service.

4. Rosile was asked by the IRS to provide a list of his clients or copies of returns he prepared, but he refused to comply with this request, in violation of IRC Sec. 6107.

5. Rosile admitted to preparing tax returns based on the Sec. 861 argument.

6. The Sec. 861 argument, if used, results in an understatement of liability for tax and requires the user to list fraudulent and false information concerning the amount of income earned.

7. Absent this injunction, Rosile will continue to promote the Sec. 861 argument.

8. If this injunction is not granted, the United States will suffer irreparable harm because Rosile, by refusing to turn over his client lists or copies of his clients' returns, makes it virtually impossible for the IRS ro catch all of the incoming, improperly prepared Rosile returns. Further, considerable government resources are spent reviewing and dealing with returns and correspondence advocating the frivolous Sec. 861 argument. This injunction will prevent the expenditure of some of those resources.

9. The Sec. 861 argument is frivolous and without merit. The Government, therefore, will likely prevail on the merit.

10. The injury to the United States caused by Rosile's conduct outweighs any injury an injunction might cause.

11. The public is served by granting this injunction. If a preliminary injunction is granted, it will help to stem the spread of the frivolous Sec. 861 argument. Rosile's clients will be protected from Rosile's fraudulent scheme and from the tax penalties resulting from participation in the frivolous scheme.

V. Conclusion

The Court finds that the United States has presented sufficient evidence to obtain a preliminary injunction, based on the factual findings listed above. Accordingly, it is

ORDERED that the Motion for Preliminary Injunction (Dkt. 12) is granted. Defendant Douglas P. Rosile, Sr. is enjoined from:

1. Preparing or helping to prepare federal tax returns (or other documents to be filed with the IRS) for others;

2. Failing to produce to the Internal Revenue Service either: 1) a list of all clients for whom he has performed return-preparation services, or 2) copies of all federal income tax returns he has prepared for other from September 17, 1998 to the entry date of this Order.

The Court also ORDERS Defendant Douglas P. Rosile, Sr. and his agents, servants, employees, attorneys and those persons in active concert or participation with him who receive actual notice of this Order are enjoined from:

Engaging in activity subject to penalty under IRC Sec. 6700, including organizing the Sec. 861 argument or any other plan or arrangement and making a statement regarding the excludibility of income that he knows or has reason to know is false or fraudulent as to any material matter;

Engaging in activity subject to penalty under IRC Sec. 6701, including preparing and/or assisting in preparing a document related to a matter material to the internal revenue laws that includes a position, including the Sec. 861 argument, that he knows will result in the understatement of tax liability;

Engaging in any other activity subject to penalty under IRC Secs. 6694, 6695, 6700, or 6701; and

Engaging in other similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

Further, the Court ORDERS that Defendant Rosile, within ten days of the date of this Order, mail to counsel for the United States, at the address listed on the Complaint, either: 1) a complete list, including names, addresses, phone numbers and social security numbers or employer identification numbers) of all persons and entities for whom he has prepared, or assisted in preparing, federal tax returns or amended tax returns from September 17, 1998 to the entry date of this Order, or 2) complete copies of all federal tax returns or amended tax returns that he has prepared, or assisted in preparing, on behalf of any other person or entity from September 17, 1998 to the entry date of this Order.

As to Defendant's Motions (Dkts. 19, 21), the Court has noted the contents of the Motions in considering the Motion for Preliminary Injunction. To that limited extent, the Motions are granted.

DONE and ORDERED in Chambers, in Tampa, Florida on this 10th day of June, 2002 at 9:00 A.M.

ELIZABETH A. KOVACHEVICH

United States District Judge

Copies to:

All parties and counsel of record

¶2002-5031

Melissa V. COUTANT, PLAINTIFF v. UNITED STATES OF AMERICA, Department of the Treasury, Internal Revenue Service, DEFENDANT. U.S. District Court, Southern Dist. of Florida, (DC FL) Docket No. 00-14163-CIV-MOORE, June 6, 2002. District Court, (2002, DC FL) 89 AFTR 2d 2002-2817, adopted. Earlier proceeding at (2002, DC FL) 89 AFTR 2d 2002-1358. Decision for Taxpayer.

1. Actions by third parties—damages; refund—discharge of lien—marital property—negligent processing of re-

fund request—lien priority—entry of judgment. Magistrate judge's recommendation to grant taxpayer's motion for entry of judgment was adopted, and taxpayer was awarded damages, interest, filing fee and service costs in amounts stated. *Reference:* United States Tax Reporter ¶74,265.01(25); 74,225.06(60); 63,255.01(70); 63,215.04(200). IRC §6321; 6325; 7422; 7426.

Melissa V. Coutant, *Pro se*PO Box 2686 Stuart, FL 34995.
Mark Stier, Esq. Trial Attorney, Tax Division U.S. Department of Justice PO Box 14198 Ben Franklin Station Washington, DC 20044.

In the United States District Court for the Southern District of Florida. Ft. Pierce Division.

Order

MOORE, District Judge:

[1] THIS CAUSE is before the Court upon Plaintiff's Motion for Entry of Judgment (DE#24).

THE MATTER was referred to the Honorable Frank J. Lynch, United States Magistrate Judge. A Report and Recommendation dated May 14, 2002 has been filed, recommending that Plaintiff's Motion be GRANTED.

A review of the record indicates that no objections to the Magistrate's Report and Recommendation have been filed.

Accordingly, after a *de novo* review of the record herein, and being otherwise fully advised in the premises, it is ORDERED AND ADJUDGED that United States Magistrate Judge Lynch's Report and Recommendation of May 14, 2002 (DE#27) be, and the same is, hereby ADOPTED in its entirety. It is further ORDERED, and based thereon, that Plaintiff be awarded the sum of $1,678.00 as compensatory damages, $857.95 as interest through March 31, 2002, a filing fee in the amount of $150.00, and costs of service in the amount of $25.48, for a total amount of $2,711.43.

DONE AND ORDERED in Chambers at Miami, Florida, this 6th day of June, 2002.

K. MICHAEL MOORE

UNITED STATES DISTRICT JUDGE

copies provided:

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United States Magistrate Judge Frank J. Lynch

¶2002-5032

UNITED STATES OF AMERICA, PLAINTIFF v. Kenneth T. ADAMS, ET AL., DEFENDANTS. U.S. District Court, Dist. of Utah, (DC UT) Docket No. 2:00-CV-953K, June 10, 2002. Years 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991. Decision for Govt.

1. Actions to reduce assessments to judgment—summary judgment. Taxpayer's unpaid tax, penalty and interest assessments were reduced to judgment on summary judgment: taxpayer didn't respond to govt.'s motion; and deemed admissions established his liability for balance accrued on assessments. Also, taxpayer's motion to amend scheduling or-der was denied as moot. *Reference:* United States Tax Reporter ¶74,035.01(25). IRC §7403.

In the United States District Court for the District of Utah, Central Division.

Order

KIMBALL, District Judge:

[1] On January 18, 2002, Plaintiff United States of America filed a Motion for Summary Judgment against Defendant Kenneth T. Adams to reduce to judgment income tax and related assessments made against Adams for the tax years 1982 through 1991. Defendant's response to Plaintiff's Motion for Summary Judgment was due February 19, 2002. However, as of the date of this Order, Adams has not responded to Plaintiff's motion. This court grants Plaintiff's Motion for Summary Judgment based upon Adam's failure to respond.

Moreover, Plaintiff's motion should be granted because Adams failed to respond or request an extension to respond to Plaintiff's requests for admissions served September 24, 2001. Those requests are deemed admitted under Rule 36(a) of the Federal Rules of Civil Procedure. Therefore, Adams has admitted the facts upon which Plaintiff based its assessments against him and the undisputed facts demonstrate that Adams owes the United States the balance accrued on those assessments.

Accordingly, Plaintiff's summary judgment is GRANTED in favor of the United States and against Adams. Because of the court's ruling, Plaintiff's Motion to Amend Scheduling Order, filed June 5, 2002, is MOOT.

The Clerk of the Court is directed to enter judgment in favor of the United States and against Adams for unpaid federal taxes, penalties, and interest for the tax periods ending December 31, 1982 through December 31, 1991, in the amount of $2,236,093.28, plus additional interest accruing from January 14, 2002, pursuant to 26 U.S.C. §§ 6601, 6621, 6622 and 28 U.S.C. § 1961(c).

DATED this 10th day of June, 2002.

BY THE COURT:

DALE A. KIMBALL

United States District Judge

Judgment in a Civil Case

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment be entered in favor of the plaintiff and against defendant Kenneth T. Adams for unpaid federal taxes, penalties, and interest for the tax periods ending December 31, 1982 through December 31, 1991, in the amount of $2,236,093.28, plus additional interest accruing from January 14, 2002, pursuant to 26 U.S.C. §§ 6601, 6621, 6622 and 28 U.S.C. § 1961(c).

June 10, 2002

Date

Markus B. Zimmer

Clerk

/s/

(By) Deputy Clerk

¶2002-5033

In Re: SEARCH WARRANT EXECUTED FEBRUARY 28, 2001, Does I and II v. UNITED STATES OF AMERICA, ET AL. U.S. District Court, Central Dist. of California, (DC CA) Docket No: CV 02-1150 AHM (MCx), June 17, 2002. Decision for Govt.

1. Actions against U.S. and IRS agents—damages—constitutional claims—jurisdiction—sovereign immunity—Anti-Injunction Act. Attorneys' action against govt. and IRS agents for constitutional violations incident to search of their law offices and seizure of client-taxpayer records was dismissed for lack of jurisdiction: IRC §6103 and IRC §7431 didn't implicitly waive govt.'s sovereign immunity to damages claim where attorneys weren't taxpayers and return information wasn't disclosed; and AIA barred in-

junction request as suit was really just attempt to protect clients from criminal tax investigation and any resulting assessment/collection. Also, mere act of issuing warrants for law offices search didn't in itself establish any constitutional violation or otherwise support conspiracy claim against agents. But, attorneys were granted 10 days to conduct discovery on qualified immunity issue. *Reference:* United States Tax Reporter ¶74,336.506(25); 61,035.03(3); 74,315.01; 74,215.05(5). IRC §6103; 7421; 7431.

United States District Court, Central District of California.

HUPP, District Judge:CIVIL MINUTES — GENERAL

PRESENT

Arlene Chavez

Deputy Clerk

Cynthia L. Mizell

Court Recorder

ATTORNEY PRESENT FOR PLAINTIFFS:

Willam A. Cohan

ATTORNEY PRESENT FOR DEFENDANTS:

Sandra Brown

Thomas Coker

PROCEEDINGS: MOTION TO DISMISS AND IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

ORDER (also, if applicable, findings and memorandum opinion):

The motion of the defendant United States to dismiss for lack of jurisdiction is granted without leave to amend and the United States is dismissed by judgment signed and filed this date. The motion of defendants Keith Boden and Andrew Lee to dismiss for failure to state a claim is granted with 10 days leave to amend. The motion of defendants Boden and Lee for summary judgment on the ground of qualified immunity is placed off calendar pursuant to FRCP 56(f) on the motion of plaintiffs Doe I and Doe II and may be re-noticed for hearing after 90 days.

This matter has been transferred to this court for the determination on these motions only. All further matters will be before Judge Matz.

This action relates to a search warrant of the law offices of plaintiffs Doe I and Doe II (who have been authorized to sue under fictitious names) which was issued on Feb. 21, 2001, based on the affidavit of defendant Boden and was executed by defendant Lee on Feb. 28, 2001. Numerous documents relating to the affairs of clients of Does I and II were seized during the search of the lawyers' offices. The warrant was issued during a criminal tax investigation. Does I and II bring a Bivens action and an action based on the First, Fourth, Fifth, and Sixth Amendments to the Constitution against the United States and IRS employees Boden and Lee requesting damages and an injunction against the United States.

[1] The United States claims that there has been no waiver of sovereign immunity. Plaintiffs Doe I and II respond that the combination of 26 USC § 6103 and § 7431 waive sovereign immunity. § 6103 states the substantive rule that no government employee shall reveal return information and § 7131 allows a taxpayer to bring a civil action for damages against the United States when there has be a disclosure of return information. These sections are not applicable in this case. In the first place, there has been no disclosure of information provided to the IRS in a return, which is what is protected against by the rule stated in § 6103. (Stokwitz 9Cir'87 831 F2d 893 [60 AFTR 2d 87-5952].) In the second place, Does I and II are not taxpayers and there has been no showing that the taxpayers cannot act for themselves even if there was a disclosure of return information. Plaintiffs suggest that no

other basis for jurisdiction against the United States; a Bivens actions may only be brought against federal officers responsible for a constitutional action but not against the government itself. There must be an explicit waiver of sovereign immunity for the United States to be sued for a constitutional violation. (Pereira 9Cir'92 964 F2d 873.) Accordingly, the United States must be dismissed from the 1st and 2d claims. Plaintiffs also purport to request an injunction against the United States. However, the court lacks jurisdiction to do so by reason of the Anti-Injunction Act (26 USC § 7421(a)). This statute is interpreted broadly to cover "activities which are intended to or may culminate in the assessment or collection of taxes" (Linn 5Cir'83 714 F2d 1278, 1282 [52 AFTR 2d 83-6052]), which is a possible by-product of a criminal tax investigation. An injunction is not available even if the plaintiff's claim is couched in constitutional terms if the purpose of the action is to stymie an IRS investigation (Lowrie 6Cir'87 824 F2d 827 [60 AFTR 2d 87-5399]). Plaintiffs, who are not the taxpayers, concede that the purpose of the action is to protect their clients from IRS investigations. The court concludes that the Anti-Injunction Act applies. (See Keese SDTX'85 632 FSupp 85 [57 AFTR 2d 86-848].)

The individual defendants Boden and Lee between them are alleged to have procured the warrant (Boden) and executed it (Lee) without probable cause. However, the affidavit for the warrant is not attached to the complaint, nor is any other information attached to the complaint from which it might be determined that probable cause was so lacking that any federal officer would know that probable cause was insufficient to obtain a warrant or execute it if issued. Plaintiff claims that Boden and Lee conspired to violated the constitutional right of plaintiffs Doe I and II (and their clients), but there are no facts supporting a conspiracy, which is fatal to the conspiracy allegation. (Burns 9Cir'89 883 F2d 819.) Because there are no facts shown as to probable cause, the complaint fails to state a claim based on lack of such. Plaintiffs appear to suggest that the mere act of issuing a search warrant for a lawyer's office violates the Constitution, but there is no support for such a claim. It is true that the attorney-client privilege must be protected, subject to the crime-fraud exception, but there are procedures for that, not attacked in this complaint. Plaintiffs also claim that most of the items seized are beyond the probable cause alleged in the affidavit for the warrant. However, at this point the allegation, apparently against Lee, is merely a conclusion, without any allegation of factual matter which would support a Bivens action against Lee. Accordingly, the complaint against the individual officers is insufficient. The motion to dismiss as to defendants Boden and Lee is granted with 10 days leave to amend.

The motion to dismiss for insufficiency of service as to Lee is denied as moot.

Plaintiffs have requested time to do discovery to meet the qualified immunity summary judgment motion as to Boden and Lee. The request is reasonable. The summary judgment motion is placed off calendar and may be reset for hearing after 90 days.

cc: Hon. A. Howard Matz

A:021150AHM.617

¶2002-5034

Michael John IAMAIO, PLAINTIFF v. UNITED STATES OF AMERICA, Internal Revenue Service, DEFENDANT. U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) Docket No. 01-09288-6J7; Adv. Proc. No. 01-267, May 29, 2002. Years 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996. Decision for Taxpayers.

1. Tax claims in bankruptcy—dischargeability. Pursuant to consent judgment, Chap. 7 debtor's tax liabilities were dischargeable; but, properly noticed tax

liens remained in effect as to taxpayer's prepetition property. *Reference:* United States Tax Reporter ¶68,726.52(27); 68,726.53(2).

United States Bankruptcy Court, Middle District of Florida, Orlando Division.

Consent Final Judgment

JENNEMANN, Bankruptcy Judge

CHAPTER 7

The plaintiff, Michael John Iamaio, and the defendant, United States of America, having agreed to the entry of final judgment resolving the issues raised by the "Adversary Complaint to Determine Dischargeability of Debt Pursuant to 11 U.S.C. Section 523," it is hereby ORDERED and ADJUDGED that:

[1] 1. The Internal Revenue Service is not a proper party to this proceeding and is dismissed from this adversary proceeding. The real party in interest to this proceeding is the United States of America;

2. The plaintiff's assessed unpaid federal income tax liabilities for the years 1989, 1990, 1991, 1992, 1993, 1994, 1995, and 1996 are dischargeable as such liabilities are not excepted under 11 U.S.C. Section 523 from any discharge granted the debtor by this Court pursuant to 11 U.S.C. Section 727;

3. Any federal tax liens with respect to the assessed tax liabilities for the years 1989, 1990, 1991, 1992, 1993, 1994, 1995, and 1996, notices of which were properly filed prior to the filing of the petition herein, shall remain in full force and effect as to any property owned by the plaintiff as of the filing of the petition in bankruptcy.

DONE and ORDERED this 29th day of May, 2002, in Orlando, Florida.

KAREN S. JENNEMANN

United States Bankruptcy Judge

For the Plaintiff/Debtor:

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By:

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¶2002-5035

Jeff WALBY, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Eastern Dist. of Michigan, (DC MI) Docket No. 02-70689, June 6, 2002. Years 1995, 1996. Decision for Govt.

1. Actions against U.S.—sovereign immunity. Pro se taxpayer's action against govt. for abatement of interest on employment taxes was dismissed for lack of jurisdiction: taxpayer didn't provide more definite statement of generalized claim or show any applicable sovereign immunity waiver. *Reference:* United States Tax Reporter ¶74,336.506(25).

United States District Court, Eastern District of Michigan, Southern Division.

Order Dismissing Case

COHN, District Judge:

I.

[1] This is a tax case. Plaintiff Jeff Walby (Walby) filed a complaint against the government requesting "abatement of all interest on 1995 and 1996 employment taxes subsequent to April 3, 1998." The government filed a motion for more definite statement arguing that Walby's pleading was deficient because it: 1) fails to allege a jurisdictional basis for the case; 2) "does not indicate how sovereign immunity has been waived;" 3) fails to state a claim; 4) contains a vague demand; 5) fails to allege that the prerequisites to filing a refund action have been met; 6) fails to state whether it is a timely action for a collection due process review; and 7) does not contain attachments of any of the documents to which it refers. On May 13, 2002, Walby filed a pro se response to the government's motion. However, Walby failed to provide a more definite statement of the majority of the items requested by the government. Specifically, Walby failed to show that the government has consented to suit.

"The doctrine of sovereign immunity removes subject matter jurisdiction in lawsuits against the United States unless the government has consented to suit." Beamon v. Brown, 125 F.3d 965, 967 (6th Cir. 1997). This means, the government and its agencies are immune from suit, unless immunity has been expressly waived. See Department of the Army v. Blue Fox, Inc., 525 U.S. 255, 260 (1999); United States v. Shaw, 309 U.S. 495, 500–501 (1940). Accordingly, because Walby has failed to show that the government or any of its agencies have consented to suit, the complaint is DISMISSED for lack of subject matter jurisdiction.

SO ORDERED.

AVERN COHN

UNITED STATES DISTRICT JUDGE

Date: June 06 2002

Detroit, Michigan

Judgment in a Civil Case

Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the above case is DISMISSED for reasons stated in the Court's Order of Dismissal entered and filed this date.

I hereby certify that the foregoing is a true copy of the original on file in this Office.

CLERK, U.S. DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

By /s/

Deputy Clerk

Date June 06 2002

David Weaver, Clerk of Court

JUDY CASSADY Deputy Clerk

¶2002-5036

Walter H. WILSON and Geraldine WILSON, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Colorado, (DC CO) Docket No. 98-WY-1920-WD (PAC), April 28, 2002. District Court, (2000, DC CO) 85 AFTR 2d 2000-555, adopted. Years 1988, 1989, 1990, 1991. Decision for Govt.

1. Refund actions—administrative refund claims; informal claims—res judicata. Magistrate judge's recommendation to dismiss taxpayers' NOL-based refund complaint was adopted: taxpayers didn't timely file formal administrative refund claim; and Tax Court petition covering subject years wasn't adequate informal refund claim where petition merely contested deficiency calculations and asserted only general NOL claim without identifying refund issue or taxpayers' specific theories. Also, res judicata applied since issue could have been raised in Tax Court. *Reference:* United States Tax Reporter ¶74,225.01(20); 65,115.04(2); 65,115.04(70); 74,337.503(40).

IRC §6511; 7422.

2. Refund actions—responsible officer penalties—limitations periods—interest abatements—innocent spouse relief—lack of proof. Magistrate judge's recommendation to dismiss taxpayers' refund complaint for "responsible officer" penalties was adopted: taxpayers made no overpayment; and offered no support for position that IRS was required to apply all monies they were awarded in interpleader action to past due employment taxes and assessed penalties, and that such application would give rise to refundable overpayment. Also, belatedly raised argument that penalties shouldn't have been assessed in 1st place wasn't considered. *Reference:* United States Tax Reporter ¶65,115.04(65); 74,225.01(3); 64,045.01(3); 60,155.01(7). IRC §6015; 6404; 6511; 7422.

In the United States District Court for the District of Colorado.

Order on Recommendation of Magistrate Judge

This matter comes before the Court on the Defendant's Motion to Dismiss[1] and the Recommendation of United States Magistrate Judge. The Court, having reviewed the Recommendation and Plaintiff's objections thereto, and being otherwise fully advised in the premises, FINDS and ORDERS as follows:

Background

Plaintiffs' complaint asserts two separate claims for tax refunds. Plaintiffs' first claim involves alleged refunds for tax years 1988, 1989 and 1990, which arose as a result of a reported net operating loss ("NOL") from plaintiffs' businesses in tax year 1991.[2] The NOL allegedly created a tax credit that Plaintiffs claim should have been carried back and credited against their tax liability for the prior three years. (Recommendation at 1.) Plaintiffs' second claim requests a refund of approximately $60,000 that the IRS allegedly unlawfully assessed from plaintiff Walter Wilson's ("Wilson") personal individual retirement account ("IRA") to recover "responsible officer" ("RO") penalties. RO penalties are brought against an individual, such as a corporate officer, who is responsible for the collection, accounting, and payment of other taxes, and who wilfully fails to perform his or her duties with respect to the taxes. *Id.* at 3.

With respect to Plaintiffs' first claim for refund, Magistrate Judge Coan found that Plaintiffs failed to file a formal administrative claim for refund within the three-year limitations period under 26 U.S.C. § 6511(d)(2)(A). The Magistrate Judge further found that Plaintiffs' June 27, 1994 petition to the tax court, requesting a redetermination of the alleged deficiencies in their 1988, 1989 and 1990 Form 1040 tax returns, did not meet the requirements of 26 U.S.C. § 7422(a) as an informal claim because it did not fairly advise the IRS that Plaintiffs are claiming a refund. Finally, the Magistrate Judge found that the IRS had not waived the statute of limitations for the refund claim, and that, even assuming Plaintiffs had filed a timely refund request, the Plaintiffs' claims would be barred by the principles of *res judicata* due to the Tax Court's previous findings that there were deficiencies in Plaintiffs' returns for 1988, 1989, and 1990.

As to Plaintiffs' second claim for refund of the RO penalties assessed against Wilson's IRA, the Magistrate Judge found that no overpayment had been made and there-

[1] The Magistrate Judge converted the IRS' Motion to Dismiss to one for summary judgment because the IRS submitted evidentiary materials in support of its motion. Plaintiffs also submitted Walter Wilson's affidavit and exhibits in support of their response to the motion to dismiss.

[2] Plaintiffs also sought a determination that Plaintiff Geraldine Wilson is an "innocent spouse" and not jointly liable for the deficiencies on the 1988, 1989, and 1990 tax returns. Magistrate Judge Coan found that Plaintiffs have not alleged facts that would support any of the required elements under the "innocent spouse" statute. (Recommendation at 14–15.) In their Objections to the Recommendation of U.S. Magistrate Judge Coan, Plaintiffs withdraw the innocent spouse claim.

fore Plaintiffs were not entitled to seek a refund. Furthermore, Magistrate Coan found that since the only payments made to satisfy Wilson's RO penalties occurred on January 4, 1994, Plaintiffs claim for refund of those payments on May 15, 1998 was untimely.[3] Finally, Magistrate Coan found that even if Plaintiffs had filed a timely refund request, this Court does not have the authority to grant the declaratory relief sought by Plaintiffs.

Plaintiffs timely filed objections to the Magistrate Judge's Recommendation, attaching the affidavit of Michael J. Shidler for the Court's consideration. Plaintiffs assert that the Magistrate Judge erred in finding against them on their first claim, maintaining that the 1994 Tax Court Petition was sufficient notice of a future NOL for 1991. Plaintiffs also argue that the Magistrate Judge erred in finding that the Tax Court decision regarding their 1988, 1989, and 1990 returns bars this action under principles of *res judicata*. As to their second claim, Plaintiffs' concede that no overpayment occurred, making § 6511(a) inapplicable. Although not set forth clearly, Plaintiffs argue that Defendant had a duty to apply the monies received from the interpleader action to the RO penalties assessed, even to those already satisfied by the levy on Wilson's IRA. Had the IRS done so, Plaintiffs argue, there would have been an overpayment of $60,000—equal to the amount of RO penalties already satisfied—and Plaintiffs would have been entitled to a refund. Finally, Plaintiffs argue that there should not have been any RO penalties assessed in the first instance.

Standard of Review

In considering a recommendation from a magistrate judge regarding a dispositive motion,

> [a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

28 U.S.C. § 636(b)(1).

The Magistrate Judge appropriately converted Defendant's Motion to Dismiss to one for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "When applying this standard, we view the evidence and draw reasonable infer-ences therefrom in the light most favorable to the nonmoving party." *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999).

A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The moving party bears the initial burden of showing that there is an absence of any issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets this burden, the non-moving party then has the burden to come forward with specific facts showing that there is a genuine issue for trial as to elements essential to the non-moving party's case. *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th

[3] Generally, a taxpayer must file a claim for refund of an overpayment of any tax "within 3 years from the time the return was filed or 2 years from the time the tax was paid, . . . or if no return was filed by the taxpayer, within 2 years from the time the tax is paid." 26 U.S.C. § 6511(a). "A taxpayer seeking a refund of RO penalties must file a claim for refund within two years of payment of the penalties, since no return is filed with respect to those penalties." (Recommendation at 11) (citing *Braithwaite v. United States*, 873 F. Supp. 452, 454 n.2 [74 AFTR 2d 94-6886] (D. Colo. 1994); *Kuznitsky v. United States*, 17 F.3d 1029, 1032–33 [73 AFTR 2d 94-1303] (7th Cir. 1994); and *USLife Title Ins. Co. of Dallas v. Harbison*, 784 F.2d 1238, 1243 [57 AFTR 2d 86-1017] (5th Cir. 1986)).

Cir. 1993). Conclusory allegations will not create a genuine issue of material fact. *White v. York Int'l Corp.*, 45 F.3d 357, 363 (10th Cir. 1995).

Discussion

Refund Claim for Tax Years 1988, 1989, 1990

[1] Plaintiffs maintain that their 1994 Tax Court Petition was sufficient informal notice of a future NOL claim for 1991, from which it could be inferred that such losses would offset any gains in 1988, 1989, and 1990. An informal claim is valid if it contains the following components: (1) the claim must provide the IRS with notice that the taxpayer is asserting a right to a refund; (2) the claim must describe the legal and factual basis for the refund; and (3) an informal claim must have some written component. *New England Elec. Sys. v. U.S.*, 32 Fed. Cl. 636, 641 [75 AFTR 2d 95-786] (Fed. Cl. 1995). "[T]he proper analysis is whether or not in the context of a particular case, a writing can be construed as a claim of a right to a refund or is simply part of the administrative process to determine the taxpayer's tax liability." *Id.* at 643. This Court agrees with Magistrate Coan that Plaintiff's Petition to the Tax Court does not adequately advise the IRS that Plaintiffs are claiming a refund, but instead argues that the claimed deficiencies were miscalculated. Furthermore, the 1994 Petition lacks any description of the legal and factual basis for any refund; rather, the Petition very generally asserts entitlement to "NOL carryback deductions from 1991, 1992 and 1993."[4] As pointed out by the Magistrate Judge, the burden is on the claimant to set forth the grounds upon which a refund is claimed, and neither the Commissioner nor his agents are required to "ferret out possible grounds for relief which a taxpayer might assert." *True v. U.S.*, 190 F.3d 1165, 1171 [84 AFTR 2d 99-5950] (10th Cir. 1999) (quoting *Herrington v. United States*, 416 F.2d 1029, 1032 [24 AFTR 2d 69-5694] (10th Cir. 1969)).

The Court recognizes that a taxpayer's informal claim can be comprised of more than the written component—a Court should examine the facts and circumstances presented in each case to determine whether the IRS knew or should have known that the taxpayer was asserting a right to a refund. *New England Elec. Sys.*, 32 Fed. Cl. at 645. Attaching the Affidavit of Michael Shidler, Plaintiffs contend that the IRS became fully informed of the existence of the future NOL claim during the course of the Tax Court proceedings. Mr. Shidler's affidavit states that he was involved in extensive negotiations with the attorney for the IRS relating to Plaintiffs' Tax Court cases. Mr. Shidler generally refers to discussions regarding NOL deductions; however, he is unspecific about the content of such discussions and whether such discussions included the specifics of a NOL in 1991. Furthermore, Mr. Shidler admits that at the time of these negotiations, the necessary returns had not been prepared or filed so the NOL issue was not a factor in the settlement amount. Plaintiffs have submitted no evidence showing that the IRS knew or should have known that Plaintiffs were asserting a right to a refund resulting from a NOL in tax year 1991. The Court finds that Plaintiffs' 1994 Petition in the Tax Court and the proceedings relating thereto were not sufficient to constitute an informal claim for a refund.

Plaintiffs also object to the Magistrate Judge's finding that, assuming Plaintiffs had filed a timely refund request, Plaintiffs' claim would be barred by the principles of *res judicata*. Plaintiffs assert that the NOL of 1991 was intentionally not part of the Tax Court proceedings for a variety of reasons. Plaintiffs then argue that "a bar cannot be maintained unless a degree

[4] A taxpayer seeking a refund for a NOL carryback must file a request for a refund within three years of the deadline for filing the original return which reports the NOL. *See* 26 U.S.C. § 6511(d)(2)(A). Plaintiffs' three year statue of limitations for filing their refund requests began on August 15, 1992, which was the extended deadline for filing their 1991 return. At the time their Petition was filed in the Tax Court in June of 1994, Plaintiffs still had not filed their 1991 return.

of notice exists within the judgement adequate to advise the world of the prior conflicting determination.'' Plaintiffs do not cite any authority in support of their argument. Plaintiffs' argument ignores the legal principles of *res judicata* which operate to bar subsequent litigation relating not only to issues actually raised by the parties in a previous action, but also those issues which *could have been* raised. *See United States v. Annis*, 634 F.2d 1270, 1272 [46 AFTR 2d 80-6088] (10th Cir. 1980) (citing *Commissioner v. Sunnen*, 333 U.S. 591, 598 [36 AFTR 611] (1948) (*res judicata* provides that ''when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose'')). Plaintiffs could have raised their refund claims in the Tax Court proceedings, but failed to do so. The Court agrees with Magistrate Coan that the Tax Court's decision regarding Plaintiffs' tax liabilities for 1988, 1989 and 1990 is a final determination, foreclosing a subsequent challenge to those determinations in this Court.

Refund Claim for RO Penalties

[2] Plaintiffs contend that the Magistrate Judge erred in finding that Plaintiffs did not file a timely refund request under 26 U.S.C. § 6511(a) because no overpayment was made. Rather, Plaintiffs argue that the IRS was required to take the entire amount awarded in the interpleader action and apply the monies to all of the past due employment taxes, as well as all of the previously assessed RO penalties, thereby creating an overpayment in the amount of those RO penalties already paid by Plaintiffs. Plaintiffs cite to no authority which imposes such a requirement on the IRS or permits this Court to grant the relief requested.

Alternatively, Plaintiffs argue that no RO penalties should have been assessed in the first instance. Plaintiffs did not raise this allegation in their Complaint and, accordingly, the facts and circumstances leading to the assessment of RO penalties is not properly before this Court.

Conclusion

The Court finds no merit in Plaintiffs' Objections to the Recommendation of U.S. Magistrate Judge Coan. The Court accepts the findings and recommendations of the Magistrate Judge in whole. THEREFORE, it is hereby

ORDERED that the Defendant United States' Motion to Dismiss is GRANTED, and this case is DISMISSED with prejudice.

DATED this 28th day of April, 2001.

/s/

United States District Judge

¶2002-5037

IOWA 80 GROUP, INC. & SUBSIDIARIES (Formerly Iowa 80 Truckstop, Inc. & Subsidiaries), PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of Iowa, (DC IA) Docket No. 3-00-CV-90217, June 3, 2002. Earlier proceeding at (2002, DC IA) 89 AFTR 2d 2002-2939, 203 F Supp 1058, 2002-2 USTC ¶50474 [89 AFTR 2d 2002-2939]. Year 1997. Decision for Govt.

1. Refund actions—depreciation—retail motor fuels outlets—gross revenue; floor space—summary judgment. Pursuant to stipulation, trucking co.'s claim that 1 of its installations qualified as retail motor fuels outlet under IRC §168(e)(3)(E)(iii)'s 50% gross revenue test was dismissed. *Reference:* United States Tax Reporter ¶1685.05; 74,225.05(40). IRC §168; 7422.

Gene H. Snapp 4500 Brady Street, Suite 205 Davenport, Iowa 52806 (563) 445-1710 Attorney for Plaintiff.
John S. Gosma Gosma Gallagher & Goebel 4301 East 53rd Street, Suite 300 Davenport, Iowa 52807 (563) 388-8417 Attorney for Plaintiff.
Joan Stentiford Ulmer Trial Attorney U.S. Department of Justice P.O. Box 7238 Ben Franklin Station Washington, D.C. 20044 (202) 514-4679 Attorney for Defendant.

In the United States District Court for the Southern District of Iowa, Davenport Division.

Stipulation of Dismissal

[1] It is hereby stipulated and agreed that all claims not disposed of in the Memorandum Opinion and Order on Summary Judgment filed in this case on May 23, 2002, be dismissed with prejudice. Specifically, plaintiff dismisses with prejudice its claim that plaintiff's Joplin, Missouri installation meets the 50 percent gross revenue test such that it is a ''retail motor fuels outlet'' under 26 U.S.C. § 168(e)(3)(E)(iii). The parties will bear their respective costs, including any possible attorneys' fees or other expenses of this litigation.

THIS 3d day of June, 2002.

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(563) 445-1710

Attorney for Plaintiff

Date: 6/3/02

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Date: 6/03/02

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Attorney for Defendant

Date: May 31, 2002

SO ORDERED THIS 4th day of June, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5038

Marvel JONES, PLAINTIFF v. INTERNAL REVENUE SERVICE, Rodney J. Strickland, Chief, Customer Service Branch, Dennis Parizek, Chief, Customer Service Center, Mr. Corbridge, unknown position at IRS, Richard M. Creamer, Commissioner, and Known and Unknown Defendants, DEFENDANTS. U.S. District Court, Dist. of Nebraska, (DC NE) Docket No. 4:01CV3067, June 4, 2002. Year 1999. Decision for Govt.

1. Actions against IRS—damages—refunds—earned income credits (EIC)—Federal Tort Claims, Declaratory Judgment, and Anti-Injunction Acts. Incarcerated taxpayer's action against IRS for damages relating to its interception and recapture of his EIC-based refund check was dismissed: taxpayer wasn't entitled to EIC for compensation earned while incarcerated; and sovereign immunity otherwise barred suit since FTCA's, AIA's and DJA's limited sovereign immunity waivers didn't extend to tax-related claims and taxpayer didn't exhaust his administrative remedies under FTCA, IRC §7433 or IRC §7422. Also, *Bivens* relief wasn't

available; action was mooted by IRS's subsequent issuance of readjusted refund; IRS's noncompliance with its own procedures didn't give rise to compensable damages, and even if it did, Prison Litigation Reform Act barred inmates from suing govt. for emotional damages; and circumstances didn't support taxpayer's requests for appointment of counsel and to consolidate action with companion case. *Reference:* United States Tax Reporter ¶325.02(35); 76,557.53(12); 74,335.01(5); 74,225.01(5); 74,215.05(5). IRC §32; 7421; 7422; 7433.

In the United States District Court for the District of Nebraska.

Memorandum and Order

This matter is before me on the following motions: (1) filing no. 20, the Motion for Appointment of Counsel filed by the plaintiff, Marvel Jones; (2) filing no. 21, the Motion to Consolidate Both Cases, in which Mr. Jones seeks to consolidate the above-captioned litigation with a companion case, Jones v. Nebraska Department of Correctional Services, et al., Case No. 4:01CV3068, presently pending in this district; and (2) filing no. 27, the Federal Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, filed by the defendants, Internal Revenue Service ("IRS") and individual employees and officials of the IRS. Mr. Jones has filed the Plaintiff's Response to Federal Defendant[s'] Motion to Dismiss or for Summary Judgment (filing no. 33).

BACKGROUND

The plaintiff, an inmate in the custody of the Nebraska Department of Correctional Services ("DCS"), is proceeding pro se and in forma pauperis. In his complaint, the plaintiff seeks compensatory, punitive, and treble damages as well as return of his tax refund check in the amount of $617.15 for the 1999 tax year.

Employed by a private company during 1998 and 1999, the plaintiff filed a federal income tax return for the year 1999, requesting a refund in the amount of $617.15. The refund derived in part from the plaintiff's claim to an earned income credit ("EIC") in the amount of $308. See 26 U.S.C. § 32 (establishing EIC tax credit for eligible taxpayers).

Initially, the IRS issued a refund check for $617.15, and the plaintiff received notice from prison officials regarding receipt of the check. However, before he could access the funds, the plaintiff received a message from the prison Finance Manager that the IRS had sought return of the refund check, and that the prison accounting office had returned the check. During his prison grievance proceedings, the plaintiff learned that the prison has an agreement with the IRS to allow time for the IRS to review tax refunds received by inmates. The plaintiff contends that the IRS's interception of his check, without affording him prior notice and a hearing, deprived him of due process, and subsequent delays in processing his refund violated internal regulations of the IRS.

ELIGIBILITY FOR EIC

[1] By prior Order (filing no. 13 at 2), I upheld the IRS's view that 26 U.S.C. § 32(c)(2)(B)(iv) rendered the plaintiff ineligible for the EIC in 1999. Section 32(c)(2)(B)(iv) states:

> 32(c) Definitions and special rules.— For purposes of this section— . . .
>
> (2) Earned income.—
>
> (A) The term "earned income" means— . . .
>
> (B) For purposes of subparagraph (A)— . . .
>
> (iv) no amount received for services provided by an individual while the individual is an inmate at a penal institution shall be taken into account . . . .

The statutory language clearly states that compensation received by an inmate as payment for services is not considered

"earned income" for purposes of the EIC. The plaintiff was an inmate at a penal institution during the 1998 and 1999 tax years.

APPOINTMENT OF COUNSEL

In Davis v. Scott, 94 F.3d 444, 447 (8th Cir. 1996), the Eighth Circuit Court of Appeals discussed appointment of counsel in civil cases:

> "Indigent civil litigants do not have a constitutional or statutory right to appointed counsel." .... The trial court has broad discretion to decide whether both the plaintiff and the court will benefit from the appointment of counsel, taking into account the factual and legal complexity of the case, the presence or absence of conflicting testimony, and the plaintiff's ability to investigate the facts and present his claim.

(Citations omitted.) Accord Stevens v. Redwing, 146 F.3d 538, 546 (8th Cir.1998):

> A pro se litigant has no statutory or constitutional right to have counsel appointed in a civil case .... When determining whether to appoint counsel for an indigent civil litigant, the district court considers relevant factors such as the complexity of the case, the ability of the indigent litigant to investigate the facts, the existence of conflicting testimony, and the ability of the indigent to present his claim.

Other federal courts consider the same factors. See, e.g., Castro Romero v. Becken, 256 F.3d 349, 353–54 (5th Cir. 2001): "Pursuant to 28 U.S.C. § 1915(e)(1), the court may appoint an attorney to represent a litigant in federal court, but there is no automatic right to appointment of counsel in a civil rights case .... In evaluating whether the appointment of counsel is proper, the district court considers the type and complexity of the case, the litigant's ability to investigate and present the case, and the level of skill required to present the evidence." In light of those considerations and the disposition of this case, I will deny filing no. 20, the plaintiff's motion for appointment of counsel.

CONSOLIDATION

I agree with the Order entered by Magistrate Judge Kathleen A. Jaudzemis in the companion Case No. 4:01CV3068, Jones v. Nebraska Department of Correctional Services, et al., denying the plaintiff's motion to consolidate Case Nos. 4:01CV3067 and 4:01CV3068. In my view, the two cases present distinct issues of law and fact, so that consolidation pursuant to Fed. R. Civ. P. 42(a) would not serve the interests of convenience and economy or avoid unnecessary cost or delay. Therefore, I will deny filing no. 21.

MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

The defendants moved for dismissal or summary judgment on the basis of Fed. R. Civ. P. 12(b)(1) and (6) (lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted). Upon review of the record and the parties' arguments, I believe that this case should be dismissed for lack of subject matter jurisdiction. In making that determination, I have considered all of the evidentiary material attached by the plaintiff to his complaint as well as the pleadings and the applicable law.

SOVEREIGN IMMUNITY

Suit Against the IRS

A suit against the IRS is "one against the United States." Coolman v. U.S. I.R.S., 117 F. Supp.2d 943, 945–46 [85 AFTR 2d 2000-1915] (D. Neb. 2000), aff'd, 242 F.3d 374 (8thCir. Nov 09, 2000) (unpublished). See also Carelli v. IRS, 668 F.2d 902, 904 [49 AFTR 2d 82-529] (6th Cir.1982) ("Although the appellant named the IRS as defendant in his complaint, we treat this action as a suit against the United States.").

"Under the doctrine of sovereign immunity, the United States is immune from suit unless it consents to be sued .... This consent must be unequivocally expressed in statutory text ... and the scope of a sovereign immunity waiver is strictly construed in favor of the sovereign." Miller v. Tony and Susan Alamo Foundation, 134 F.3d 910, 915 [81 AFTR 2d 98-482] (8th Cir. 1998).

Federal Defendants in Their Official Capacity

A suit against an official of the federal government in the officer's official capacity is considered a suit against the United States. Searcy v. Donelson, 204 F.3d 797, 798 [85 AFTR 2d 2000-1055] (8th Cir. 2000), cert. denied, 531 U.S. 898 (2000); Buford v. Runyon, 160 F.3d 1199, 1203 (8th Cir. 1998). See also Kentucky v. Graham, 473 U.S. 159, 165 (1985), *quoting* Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690 n. 55 (1978): "Official capacity suits ... 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'"

It is well established that, absent an express waiver, the doctrine of sovereign immunity bars a plaintiff's claim for money damages against the United States, its agencies, and its officers in their official capacities. See, e.g., FDIC v. Meyer, 510 U.S. 471, 475 (1994); United States v. Sherwood, 312 U.S. 584, 586 (1941). "Sovereign immunity is jurisdictional in nature." FDIC v. Meyer, 510 U.S. at 475, *citing* United States v. Mitchell, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction").

The jurisdictional bar of sovereign immunity operates when a suit threatens to impose liability on the United States for money or property or to engender some form of coercive injunctive relief. See, e.g., Dugan v. Rank, 372 U.S. 609, 620 (1963): "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' Land v. Dollar, 330 U.S. 731, 738 ... (1947), or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' Larson v. Domestic & Foreign Corp., *supra*, 337 U.S. at 704 ... ; Ex parte New York, 256 U.S. 490, 502 ... (1921)."

Federal Tort Claims Act

Although the United States has consented to suit under the Federal Tort Claims Act ("FTCA"), the FTCA does not apply to this case. Under the FTCA, the United States waives its sovereign immunity for damages claims regarding "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

However, 28 U.S.C. § 2680(c) precludes suit under the FTCA for "[a]ny claim arising in respect of the assessment or collection of any tax." Even if this action could somehow be construed to involve an injury or loss not relating to the assessment or collection of a tax, the plaintiff has not alleged compliance with the administrative claim requirement which is a prerequisite to filing a claim under the FTCA. See 28 U.S.C. § 2675(a):

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate

> Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section . . . .

(Emphasis added.)

26 U.S.C. § 7433

Title26, U.S.C. § 7433 permits the recovery of damages from an officer or employee of the IRS who "recklessly or intentionally, or by reason of negligence disregards" the tax laws or regulations. Such damages are limited to "actual, di-rect economic damages sustained by the plaintiff as a proximate result of the reck-less or intentional or negligent actions of the officer or employee" of the IRS. How-ever, 26 U.S.C. § 7433(d)(1) states: "Re-quirement that administrative remedies be exhausted.—A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service." The plaintiff has not exhausted such administrative remedies.

26 U.S.C. § 7422

Title 26, U.S.C. § 7422(a) also precludes any action to obtain a tax refund unless administrative procedures are first exhausted. See generally Sigmon v. Southwest Airlines Co., 110 F.3d 1200, 1203 [79 AFTR 2d 97-2286] (5th Cir.), cert. denied, 522 U.S. 950 (1997): "The Internal Revenue Code governs tax refund suits. Under Section 7422(a) of the Code, a taxpayer who seeks a refund of federal taxes must first make an administrative refund claim with the Secretary of the Treasury. 'No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary . . . .' 26 U.S.C. § 7422(a). Failing an administrative resolution, the taxpayer's remedy is to file suit against the government. 26 U.S.C. § 7422(f)(1) ('A suit [for erroneously or illegally assessed or collected taxes] may be maintained only against the United States . . . .'). The plaintiff does not contend that he exhausted any remedies within the IRS, only that he exhausted the grievance procedures in his prison institution.[1]

Declaratory Judgment

Pursuant to 28 U.S.C. § 2201(a), a federal district court has no power to enter a declaratory judgment "with respect to federal taxes," with a limited exception for declaratory relief under 26 U.S.C. § 7428 regarding certain charitable organizations. Similarly, the Anti-Injunction Act, 26 U.S.C. § 7421, prohibits lawsuits "for the purpose of restraining the assessment or collection of any tax . . . ."

"Bivens" Action

Finally, a "Bivens action" may be maintained against federal officials in their individual capacity for their constitutional torts. See Bivens v. Six Unknown Named Agents, 403 U.S. 388, 395–97 (1971), in which the Supreme Court recognized that damages may be obtained for constitutional injuries inflicted by individual federal officials. However, a Bivens action cannot be implied directly against the United States, its agencies, and, by extension, against federal agents and employees in their official capacity. FDIC v. Meyer, 510 U.S. 471, 473, 484–86 (1994).

The plaintiff did not sue or serve the defendant-officers and employees of the IRS in their personal capacity. Even if the plaintiff had sued those defendants in their

[1] Title 26, U.S.C. § 7429, which does not apply to this case, permits a taxpayer to challenge a jeopardy assessment administratively and judicially. Similarly, 26 U.S.C. § 7432, which provides civil damages under certain circumstances for failure to release a lien, also has no application to the plaintiff.

individual (as opposed to official) capacity, the Eighth Circuit has not allowed a Bivens action for alleged violation of due process in the context of tax assessment and collection. See Vennes v. An Unknown Number of Unidentified Agents, 26 F.3d 1448, 1453–54 [74 AFTR 2d 94-5144] (8th Cir. 1994), cert. denied, 513 U.S. 1076 (1995):

> The district court dismissed these claims on the ground that a taxpayer's remedies under the Internal Revenue Code preclude such a Bivens action. Vennes cites us to no contrary authority, and we have found none. Though the Supreme Court has not addressed this precise question, it has strongly suggested that the district court correctly applied Bivens: When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies, Schweiker v. Chilicky, 487 U.S. 412, 423 ... (1988) ....
>
> Since Chilicky, at least three circuits have upheld the dismissal of Bivens actions against IRS agents for tax assessment and collection activities .... We agree with those decisions.

Accord Shreiber v. Mastrogiovanni, 214 F.3d 148, 149 [85 AFTR 2d 2000-1958], 149 n. 1 (3d Cir. 2000); Fishburn v. Brown, 125 F.3d 979, 982–83 [80 AFTR 2d 97-6722] (6th Cir. 1997).

None of the foregoing limited waivers of sovereign immunity enables this court to exercise jurisdiction over the plaintiff's claims, and sovereign immunity therefore bars the plaintiff's claims against the IRS, i.e., the United States, and the individual federal defendants in their official capacity. I will grant filing no. 27, the Federal Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment.

ALTERNATE GROUNDS FOR DISMISSAL

Mootness

The defendants assert, as an alternate ground for dismissal of this action, that the plaintiff's claim has become moot, and that the complaint accordingly fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). Fed. R. Civ. P. 12(b) provides in part: "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

I find that this litigation has become moot. The matter outside the pleading which leads me to that conclusion is the defendants' evidence that a check for the plaintiff's readjusted refund was sent to him on June 18, 2001 (filing no. 28, Declaration of Dennis L. Parizek at 3 and Ex. A). While that payment occurred after the filing of the complaint, the plaintiff does not dispute his receipt of a tax refund for the $309.15 balance of his refund claim (after deduction of EIC), together with statutory interest of $32.71.

On two additional bases, I conclude that the plaintiff has failed to state a claim for which relief can be granted.

Damages

First, the plaintiff seeks damages which are not available to him by virtue of the Prison Litigation Reform Act ("PLRA"). 42 U.S.C. § 1997e(e) of the PLRA states: "No person convicted of a felony who is incarcerated ... while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury." The plaintiff alleges only emotional distress as the injury or loss giving rise to his claim for $250,000, and he does not assert any underlying physical injury.

Violation of IRS Regulations

Second, the plaintiff has identified no regulations which the IRS violated by re-

calling his refund check. In actions taken after review of the plaintiff's refund claim, the IRS did fail to abide by the deadlines set forth in various IRS communications to the plaintiff. However, the approximately six-month delay in processing the plaintiff's final refund did not amount to a violation of due process, and, as stated, the plaintiff's refund has since been paid. See generally Vallone v. Commissioner of Internal Revenue, 88 T.C. 794, 807 (Tax Court 1987). In Vallone, taxpayers challenged certain penalties on the ground of the IRS's failure to comply with its own procedures in the Internal Revenue Manual (''IRM'') for contacting delinquent taxpayers before seizure of their property. The Tax Court declined to abate the penalties and rejected the argument that the IRS's failure to follow its own procedures constituted a per se violation of the United States Constitution. The Tax Court held that IRM requirements are merely directory and not mandatory, and that noncompliance with the Manual does not render an action by the IRS invalid. The purpose of IRM procedures is to govern the internal affairs of the IRS, and such IRS procedures do not have the force and effect of law. Id. at 808. Courts have generally said that the Manual is not for the protection of taxpayers. Id.

Thus, I dismiss this litigation on the basis of Fed. R. Civ. P. 12(b)(1), although I conclude that Fed. R. Civ. P. 12(b)(6) provides an alternate basis for dismissal.

IT IS THEREFORE ORDERED:

1. That filing no. 27, the Federal Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, is granted;

2. That this action and the plaintiff's complaint are dismissed with prejudice; and

3. That a separate judgment will be entered in accordance with this Memorandum and Order.

DATED this 4th day of June, 2002.

BY THE COURT:

WARREN K. URBOM

United States Senior District Judge

Judgment

URBOM, Senior District Judge:

Pursuant to the Memorandum and Order entered on this date,

IT IS ORDERED, ADJUDGED and DECREED:

1. That judgment is hereby entered for all named defendants and against the plaintiff, Marvel Jones, on the plaintiff's complaint; and

2. That this action and the plaintiff's complaint are dismissed with prejudice.

DATED this 4th day of June, 2002.

BY THE COURT:

WARREN K. URBOM

United States Senior District Judge

¶2002-5039

UNITED STATES OF AMERICA, PLAINTIFF v. James E. BEESON, JR., DEFENDANT. U.S. District Court, Dist. of Delaware, (DC DE) Docket No. 01-46-SLR, June 17, 2002. Decision for Govt.

1. Tax crimes—tax evasion—jury instructions—acquittal; new trial. Convicted tax evader's motion for acquittal or new trial was denied: district court's refusal to instruct jury on Supreme Court standard for determining income/non-income nature of taxpayer's unreported ''pre-need'' funeral funds was appropriate where Supreme Court case, involving corp. funds retained for corp. use, didn't apply to funds diverted for taxpayer's personal use; and other case law involving vacatur for convictions resulting from erroneous jury instructions didn't apply. *Reference:* United States Tax Reporter ¶74,025.01(133); 72,015.06(80). IRC §7201; 7402.

In the United States District Court for the District of Delaware.

Memorandum Order

ROBINSON, District Judge

I. INTRODUCTION

Defendant James E. Beeson, Jr. (''Beeson''), who was convicted on five counts of income tax evasion following a jury trial on March 25, 2002 (D.I. 31), moves for judgment of acquittal or a new trial. (D.I. 37) Defendant United States of America (''government'') has filed its opposition (D.I. 39) and Beeson has filed a reply. (D.I. 41) For the reasons that follow, the motion is denied.

II. ARGUMENT

Beeson contends the court's refusal to instruct the jury on the standards set by the United States Supreme Court in C.I.R. v. Indianapolis Power & Light Co., 493 U.S. 203 [65 AFTR 2d 90-394] (1990), constitutes error. (D.I. 37) In Indianapolis Power & Light, the Supreme Court held that an express or implied consensual obligation to repay renders a receipt of funds non-income. (D.I. 41) Beeson argues the court should have instructed the jury to apply the test stated in Indianapolis Power & Light to determine whether Beeson received income regarding the pre-need funeral funds. As a consequence, the jury considered the pre-paid funeral expenses as income to Beeson which the jury in turn found he failed to report on his federal income tax forms. Beeson further asserts that there was sufficient evidence presented from which a properly instructed jury could have found that there was a ''consensual recognition, express or implied, or an obligation to re-pay'' which would refute any finding of income as to the other pre-need dollars. See id. at 209. He argues the amounts involved totaled $346,000, representing over half of all the unreported income as charged by the government. Finally, Beeson contends, under the Third Circuit Court of Appeals recent holding in United States v. Syme, 276 F.3d 131, 144 (3d Cir. 2002), a conviction resulting from a jury instruction based on an erroneous interpretation of the law must be vacated. (D.I. 41)

The government asserts that the court did not abuse its discretion in not applying the standards of Indianapolis Power & Light, since after extensive argument, the court concluded the case was factually distinguishable. (D.I. 39) Further, the government submits that the court is not required to instruct the jury in the precise language requested by the defendant. United States v. Turley, 891 F.2d 57, 62 (3d Cir. 1990).

III. STANDARD OF REVIEW

The standard of review applicable for a motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, is that all evidence must be viewed in the light most favorable to the government and all reasonable inferences must be drawn in favor of the prosecution. See United States v. Hart, 273 F.3d 363, 371 (3d Cir. 2001). The trial court must uphold the verdict of the jury unless, viewing the evidence in this fashion, no rational jury could have found the defendant guilty beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979); United States v. Coleman, 811 F.2d 804, 807 (3d Cir. 1987).

The standard is different for a motion for new trial under Rule 33 of the Federal Rules of Criminal Procedure. Under Rule 33, the court may grant a defendant's motion for new trial if mandated in the interest of justice. ''Whether to grant a [Rule] 33 motion lies within the district court's sound discretion.'' United States v. Mastro, 570 F.Supp. 1388, 1390 (E.D. Pa 1983). A court may grant a new trial if one of two reasons exist: if after weighing the evidence, the court determines that there has been a miscarriage of justice or if a trial error had a substantial influence on the verdict. Government of Virgin Islands v. Commissioner, 706 F.Supp. 1172, 1184 (D.Vi.1989); Government of the Virgin Islands v. Bedford, 671 F.2d 758, 762 (3d Cir. 1982).

IV. ANALYSIS

[1] After reviewing the arguments presented (D.I. 13, 23), as well as conducting a hearing on the same, the court concluded that a careful analysis of Indianapolis Power & Light rendered the holding inapposite to the evidence presented at trial. Specifically, the court found that, unlike Indianapolis Power & Light, this was

not a case where the funds remained with the corporate corpus and used for corporate needs. Instead, the funds went out of the corporate corpus and to Beeson's personal use. Nothing persuasive has been presented in this motion to cause the court to revisit that decision. Further, The Third Circuit's decision in Syme does not compel this court to vacate the verdict since the decision made on the jury instruction at bar was legally valid.

V. CONCLUSION

For the reasons stated, at Wilmington this 17th day of June, 2002;

IT IS ORDERED that defendant's motion for new trial and/or motion for judgment of acquittal is denied. (D.I. 37)

Sue L. Robinson

United States District Judge

¶2002-5040

Michael J. MORONEY, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. In re: MICHAEL J. MORONEY, Debtor. U.S. Bankruptcy Court, Eastern Dist. of Virginia, (Bktcy Ct VA) Docket No. 00-11276-SSM; Adversary Proceeding No. 01-1194, June 5, 2002. Years 1990, 1992. Decision for Govt.

1. Tax claims in bankruptcy—dischargeability—summary judgment. Govt. was granted summary judgment that Chap. 7 debtor's tax liabilities were nondischargeable under 11 USC §523(a)(1)(B)(i); and, whether 11 USC §523(a)(1)(B)(ii)'s exception from discharge applied wasn't determined. *Reference:* United States Tax Reporter ¶68,726.52(27).

Thomas F. DeCaro, Jr., Esquire DeCaro & Howell, P.C. 14406 Old Mill Road, Suite 201 Upper Marlboro, MD 20772 Counsel for the plaintiff.
D. Brian Simpson, Esquire Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 227 Ben Franklin Station Washington, DC 20044 Counsel for the defendant.

United States Bankruptcy Court, Eastern District of Virginia, Alexandria Division.

Order Granting Summary Judgment

MITCHELL, Bankruptcy Judge:

Chapter 7

[1] A hearing was held in open court on June 4, 2002, on the defendant's motion for summary judgment. The plaintiff and the defendant were each present by counsel.

Upon consideration of the motion, exhibits, briefs, and oral argument of the parties, and for the reasons stated orally on the record, it is

ORDERED:

1. The motion for summary judgment is granted. The court determines that the plaintiff's Federal income tax liability for 1990 and 1992 is nondischargeable under 11 U.S.C. § 523(a)(1)(B)(i) and has not been discharged as a result of the discharge granted the debtor under 11 U.S.C. § 727 on June 28, 2000. No determination is made by the court as to whether the exception from discharge under 11 U.S.C. § 523(a)(1)(B)(ii) applies.
2. The clerk will mail a copy of this order to counsel for the parties.

Date: 6-5-2002

Alexandria, Virginia

Stephen S. Mitchell

United States Bankruptcy Judge

Copies to:

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D. Brian Simpson, Esquire

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P.O. Box 227

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Counsel for the defendant

NOTICE OF JUDGMENT OR ORDER

Entered On Docket 6-6-02

¶2002-5041

Clay RICHARDSON, PLAINTIFF v. INTERNAL REVENUE SERVICE, RESPONDENT. U.S. District Court, Dist. of Arizona, (DC AZ) Docket No. CV 02-125 TUC DCB, June 10, 2002. Decision for Govt.

1. District court procedure—failure to respond to dismissal motion. Taxpayer's action against IRS was dismissed: despite district court's warning, taxpayer failed to show cause why IRS's dismissal motion shouldn't have been granted. *Reference:* United States Tax Reporter ¶74,025.01(85). IRC §7402.

United States District Court, District of Arizona.

Order

BURY, District Judge:

[1] On April 12, 2002, Defendant IRS filed its Motion to Dismiss. Pursuant to Local Rule 1.10(c), Plaintiff had until April 25, 2002 to respond to Defendant's Motion. Plaintiff failed to do so. In its Order dated May 23, 2002, this Court ordered Plaintiff to show cause why Defendant's Motion to Dismiss should not be granted. Plaintiff had until June 6, 2002 to do so. The Order further advised Plaintiff that his failure to show cause would result in the dismissal of Plaintiff's cause of action. Nonetheless, despite the warning by this Court, Plaintiff has yet to respond to Defendant's Motion to Dismiss. Plaintiff, therefore, consents to the dismissal of his lawsuit pursuant to Local Rule 1.10(i).

Accordingly,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (document 4) is GRANTED.

IT IS FURTHER ORDERED that this case is DISMISSED, with prejudice.

DATED this 10th day of June, 2002.

David C. Bury

United States District Judge

¶2002-5042

THE PEOPLE OF MONTANA ex rel Wallace Umland, Citizen in Party, PLAINTIFF v. DISTRICT DIRECTOR, Montana Internal Revenue Service, in His Individual Capacity, and DOES I-XX, DEFENDANTS. U.S. District Court, Dist. of Montana, (DC MT) Docket No. CV 01-175-M-DWM, May 28, 2002. Decision for Govt.

1. Actions against IRS employees—failure to release lien. Taxpayer's action against IRS District Director and other unnamed employees for failure to release alleged erroneous liens and return of improperly seized property was dismissed without prejudice: U.S., not District Director, was proper defendant where actions complained of fell within IRC §7432's provisions. *Reference:* United States Tax Reporter ¶74,325.01. IRC §7432.

In the United States District Court for the District of Montana, Missoula Division.

Order

MOLLOY, Chief District Judge:

[1] Defendants move to dismiss Plaintiff's Complaint for insufficient service of process and for failing to name the correct party as a defendant. Because the United States is the proper defendant in this matter, Plaintiff's Complaint is dismissed without prejudice.

Plaintiff filed suit in the Montana Third Judicial District Court alleging that Defendants acted improperly and in bad faith in refusing to release erroneous liens and return improperly seized property. Defendants timely removed the action to this Court. Plaintiff argues the District Director in his individual capacity is the proper defendant because the actions complained of

were taken outside the course of employment.

26 U.S.C. § 7432 allows a person to bring an action against the United States if "any officer or employee of the Internal Revenue Service knowingly, or by reason of negligence, fails to release a lien" on the person's property. Despite Plaintiff's argument to the contrary, the actions Plaintiff complains of fall squarely within the provisions of § 7432. Therefore, the United States is the proper defendant in this matter, not the District Director of the IRS. Because the United States is not named as a defendant, Plaintiff's action is properly dismissed. See Kersting v. United States, 818 F. Supp. 297, 302 [71 AFTR 2d 93-851] (D. Hawaii 1992).

Accordingly, IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (dkt #10) is GRANTED. This action is dismissed without prejudice.

DATED this 28th day of May, 2002.

DONALD W. MOLLOY, CHIEF JUDGE

UNITED STATES DISTRICT COURT

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This matter came before the Court for consideration. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendants and against Plaintiff. Plaintiff's complaint is dismissed without prejudice.

Date: May 29, 2002

PATRICK E. DUFFY, CLERK

/s/

(By) Deputy Clerk

FILED, ENTERED, and NOTED IN CIVIL JUDGMENT BOOK VOLUME 83 PAGE 4855

¶2002-5043

Robert Churchill MacELVAIN, PLAINTIFF v. UNITED STATES OF AMERICA, ET AL., DEFENDANTS. U.S. District Court, Middle Dist. of Alabama, (DC AL) Docket No. 01-A-1240-N, May 21, 2002. District Court adopted. Decision for Govt.

1. Actions against U.S. and IRS agent—damages—Federal Tort Claims Act—refunds—limitations periods—untimely claims—account stated—contract with govt. Magistrate judge's recommendation to dismiss as untimely pro se taxpayer's refund action was adopted: taxpayer didn't file refund claim within IRC §6511(a)'s 2-year limitations period; account stated claim was meritless where parties disagreed as to amount of taxpayer's tax liability and whether taxes assessed were properly collected; and amendment of complaint to assert such claim would be futile. *Reference:* United States Tax Reporter ¶76,557.53(12); 65,115.04(70); 74,225.01(30); 76,557.53(30). IRC §6511; 7422.

In the United States District Court for the Middle District of Alabama, Northern Division.

Order

ALBRITTON, Chief District Judge:

[1] This case is before the court on the Recommendation of the Magistrate Judge entered on April 22, 2002, and Plaintiff's Reply (treated as an objection) to the Recommendation of the Magistrate Judge, and in the Alternative to Amend Complaint, filed on May 14, 2002. The court will first address the alternative motion to amend.

MacElvain averred in the *pro se* complaint that "the Defendant, United States of America, through its agency the Internal Revenue Service, caused unjust assessments to be made and proceeded with unjust collection actions and did collect from the Plaintiff the same." (Complaint at ¶ 7). The complaint also contained repeated references to Defendants' refusal to "refund ... unlawfully seized and collected funds." (Complaint, at p. 3). Relying on

prevailing Supreme Court precedent and statutory law, the Magistrate Judge determined, *inter alia,* that to the extent the complaint sought a refund of alleged unlawfully collected taxes, MacElvain's failure to timely file a claim for refund barred his claims against the United States.[1] Thus, the Magistrate Judge recommended dismissal of such claims. In the objection, MacElvain argues that his action challenging the collection of taxes is not time-barred if it is construed as an ''account stated'' or ''implied contract,'' as opposed to a refund claim. Presumably, he seeks to amend the complaint to state such a claim. For the reasons which follow, that amendment would be futile and, therefore, should not be allowed.

The only significant exception to the general rule that a suit against the United States for the recovery of a tax overpayment must be based on a timely filed refund claim and brought within the two-year period of limitations is an action for an account stated. Because it is a cause of action based on a contract rather than an action for the recovery of taxes, there is no requirement that the taxpayer file a refund claim as a jurisdictional prerequisite, and the action will be timely if filed within the general six-year period of limitations for contractually premised actions against the United States. *Daube v. United States* 289 U.S. 367, 372–73 [12 AFTR 51] (1933).

In general, an account stated is based on the common law concept that an implied contract arises when the debtor (the Service) submits to the creditor (the taxpayer) a statement of the final balance due on an account and the creditor agrees to accept the proposed balance to close the account. *See Bonwit Teller & Co. v. United States,* 283 U.S. 258 [9 AFTR 1421] (1931). The elements of a suit for an account stated are: (1) that the Service and the taxpayer agree that there is a tax overpayment of a specified amount; (2) that the Service has communicated to the taxpayer that it intends to refund the overpaid amount to the taxpayer in satisfaction of the taxpayer's account for the taxable period; and (3) that the taxpayer agrees to accept the refund of the stated amount in satisfaction of the account. *See West Publishing Co. Employee's Preferred Stock Ass'n v. United States,* 198 Ct.Cl. 668, 675 [30 AFTR 2d 72-5007] (1972).(Recovery on an ''account stated'' theory is based on the common law concept that an implied contract arises when a debtor, such as the IRS, submits to a creditor, such as a taxpayer, a statement of the final balance due on an account and the creditor agrees to accept the proposed balance to close the account.) To prove an account stated, the taxpayer must show ''beyond peradventure'' that the Government has in fact agreed to pay a stated sum and communicated this intention to the taxpayer. *Id.* If the purported account stated is ''provisional and tentative,'' or otherwise lacking in finality, there is no agreement. *See R.H. Stearns Co. v. United States,* 291 U.S. 54, 66 [13 AFTR 842] (1934). Moreover, the Supreme Court has cautioned against expanding the concept of an account stated beyond the established narrow confines. *Daube,* 289 U.S. at 372–73.

Absolutely no element for account stated is satisfied by the undisputed facts of this case. Indeed, the parties evince a fundamental disagreement regarding the amount of taxes owed for the tax years at issue and even whether taxes assessed have been properly collected. Consequently, no merit attends MacElvain's arguments regarding the efficacy of an account stated claim. Inasmuch as applicable a two year statute of limitations precludes the refund claim ''whether the tax is alleged to have been erroneously, illegally, or wrongfully collected,'' *Dalm,* 494 U.S. at 602, his ancillary arguments about whether the IRS properly extended the limitations period to collect taxes or whether it prematurely destroyed material from its claim files, are irrelevant.[2]

---

[1] *United States v. Dalm,* 494 U.S. 596, 601–602 [65 AFTR 2d 90-1210] (1990)(noting that the import of 28 U.S.C. § 1346(a)(1) and 29 U.S.C. § 6511(a) is that unless a prospective plaintiff timely files a claim for refund of a tax, ''a suit for refund, regardless of whether the tax is alleged to have been erroneously, illegally, or wrongfully collected, may not be maintained in any court.'')

[2] Even if these claims are differently characterized as sounding in tort, they are still subject to dismissal on sovereign immunity grounds and due to MacElvain's failure to satisfy various jurisdictional prerequisites, as noted on p. 3–6 of the Magistrate Judge's recommendation.

MacElvain's objection also seeks amendment of the complaint because "plaintiff is pro se and without the resources to hire an attorney to assist in preparing complaint or responses to motions" and because "the plaintiff believes that [the] motion to dismiss is based on procedural defects that Plaintiff may have made . . . ." The Magistrate Judge recognizes that, "[w]here it appears a more carefully drafted complaint might state a claim upon which relief can be granted, . . . a district court should give a plaintiff an opportunity to amend his complaint instead of dismissing it." *Bank v. Pitt,* 928 F.2d 1108, 1112 (11th Cir. 1991). "A district court need not, however, allow an amendment (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." *Bryant v. Dupree,* 252 F.3d 1161, 1163 (11th Cir. 2001), *citing Foman v. Davis,*371 U.S. 178, 182 (1962). It appears that amendment in the instant case would be futile because the proposed new theory of the case disclosed in the objection is patently without merit.[3] Therefore, it is hereby

ORDERED that the alterative Motion to Amend Complaint is DENIED.

And now, upon an independent evaluation of this matter, the court finds the objection of the Plaintiff to be without merit, and it is hereby overruled. The court adopts the Recommendation of the Magistrate Judge, and it is hereby

ORDERED that Defendants' Amended Motion to Dismiss is GRANTED, and this case is DISMISSED with prejudice.

DONE this 21st day of May, 2002.

W. HAROLD ALBRITTON

CHIEF UNITED STATES DISTRICT JUDGE

¶2002-5044

FINANCIAL SERVICES BUREAU LIMITED, PLAINTIFF v. Douglas G. McDONALD, DEFENDANT. U.S. District Court, Eastern Dist. of California, (DC CA) Docket No. MISC S-02-0035 WBS GGH PS, June 12, 2002. District Court, (2002, DC CA) 89 AFTR 2d 2002-2896, adopted. Decision against Taxpayer.

1. District court procedure—motion to dismiss—local rules—standing. Magistrate judge's recommendation to grant defendant's dismissal motion was adopted, and action was dismissed. *Reference:* United States Tax Reporter ¶74,336.504(65); 74,336.505(25).

In the United States District Court for the Eastern District of California.

Order

[1] On May 10, 2002, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice that any objections to the findings and recommendations were to be filed within ten days. No objections to findings and recommendations have been filed.

This court reviews de novo those portions of the proposed findings of fact to which objection has been made. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). As to any portion of the proposed findings of fact to which no objection has been made, the court assumes its correctness and decides the motions on the applicable law. See Orand v. United States, 602 F.2d 207, 208 (9th Cir. 1979). The magistrate judge's conclusions of law are reviewed de novo. See Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983).

[3] *See Wyatt v. BellSouth, Inc.* 176 F.R.D. 627, 631-631 (M.D.Ala.1998)("An amendment adding a cause of action is considered futile if the new cause of action does not state a claim upon which relief can be granted, *Rudolph v. Arthur Andersen & Co.,* 800 F.2d 1040, 1042 (11th Cir. 1986), or if the claim would not survive an affirmative defense."); *See Moore v. Baker,* 989 F.2d 1129, 1131 (11th Cir.1993) (amendment would have been futile since limitations period for claim had expired); *St. Charles Foods, Inc. v. America's Favorite Chicken Co.,* 198 F.3d 815, 822 (11th Cir.1999)("When a district court denies the plaintiff leave to amend a complaint due to futility, the court is making the legal conclusion that the complaint, as amended, would necessarily fail."); *Galindo v. ARI Mut. Ins. Co.,* 203 F.3d 771, 777 n. 10 (11th Cir.2000) ("'A proposed amendment is futile if the complaint, as amended, would be subject to dismissal.'")

The court has reviewed the applicable legal standards and, good cause appearing, concludes that it is appropriate to adopt the Proposed Findings and Recommendations in full. Accordingly, IT IS ORDERED that:

1. The Proposed Findings and Recommendations filed May 10, 2002, are ADOPTED;
2. Respondents motion to dismiss is granted; and
3. This action is dismissed.

DATED: 6/11/2002

/s/

UNITED STATES DISTRICT JUDGE

Judgment in a Miscellaneous Case

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JUNE 12, 2002.

ENTERED: June 12, 2002

Jack L. Wagner,

Clerk of the Court

by:

D. Waggoner, Deputy Clerk

¶2002-5045

UNITED STATES OF AMERICA, PLAINTIFF v. Lee D. WIGHT, ET AL., DEFENDANTS. U.S. District Court, Eastern Dist. of California, (DC CA) Docket No. CIV. S-98-442 FCD DAD, May 31, 2002. Earlier proceedings at (2002, DC CA) 89 AFTR 2d 2002-2993; (2002, DC CA) 89 AFTR 2d 2002-1787; (2002, DC CA) 89 AFTR 2d 2002-853, 2002-1 USTC ¶50287; (2000, DC CA) 85 AFTR 2d 2000-1384; and (1999, DC CA) 83 AFTR 2d 99-2175, 99-1 USTC ¶50368. Years 1983, 1984, 1985, 1986. Decision against Taxpayers.

1. Actions to reduce assessments to judgment—foreclosure—property held in name of third parties—nominees—default judgment. Taxpayers' "motion to produce findings of fact and conclusions of law" was denied: final disposition had already been rendered in instant action. *Reference:* United States Tax Reporter ¶74,025.01(95); 74,035.01(50); 63,215.02(18); 74,035.03(80). IRC §6321; 7402; 7403.

United States District Court, Eastern District of California.

Order

[1] On May 22, 2002, defendants Lee D. Wight and Marjorie A. Wight filed a "Motion to Produce Findings of Fact and Conclusions of Law." As the court made clear in its order filed May 8, 2002, the court has previously rendered final disposition in this case. Defendants' "Motion" is DENIED.

IT IS SO ORDERED.

DATED: May 29, 2002.

FRANK C. DAMRELL, Jr.

UNITED STATES DISTRICT JUDGE

¶2002-5046

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. John SANDALIS; Michelle SANDALIS, DEFENDANTS-APPELLANTS. UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. John SANDALIS; Michelle SANDALIS, DEFENDANTS-APPELLANTS. U.S. Court of Appeals, Fourth Circuit, (CA4) Docket No. 00-4748; No. 02-4073, Aug. 1, 2001. District Court, (2002, DC WV) 89 AFTR 2d 2002-552, 2002 USTC ¶50220, on remand from (2001, CA4) 88 AFTR 2d 2001-5324, 14 Fed Appx 287, affirmed per curiam. Decision for Govt.

1. Tax crimes—tax evasion; assisting in preparation of false returns—motion for new trial—juror bias—evidence. Painting contractors/married taxpayers' convictions for attempted tax evasion, pre-

paring false returns, and assisting preparation of false returns (''assisting'') were affirmed: taxpayers' juror bias claim was refuted by subject juror's credible testi-mony that she didn't recall allegedly nega-tive prior contacts with or complaining about taxpayers or their business and was still able to render fair and impartial ver-dict. Also, any error in admitting govt. witness's opinion testimony about husband's character was harmless; questioning taxpayer's former lawyer about specific instance of alleged criminal activity was appropriate; and wife's assisting conviction was supported by substantial evidence of her significant involvement as bookkeeper in co. finances, her knowledge of proper accounting procedures and her inconsistent stories about co. records. *Reference:* United States Tax Reporter ¶73,446.515(50); 72,015.04(5); 72,065.01(5); 72,065.01(10); 73,447.508(5). IRC §7201; 7206.

Argued: Peter Hugh White, Hunton & Williams, McLean, Virginia, for Appellants.
Gregory Victor Davis, Tax Division, United States Department of Justice, Washington, D.C., for Appellee. On Brief: Charles P. Rosenberg, Robert C. Stacy, II, Hunton & Williams, McLean, Virginia, for Appellants. Paula M. Junghans, Acting Assistant Attorney General, Robert P. Crouch, Jr., United States Attorney, Robert E. Lindsay, Alan Hechtkopf, Meghan S. Skelton, Tax Division, United States Department of Justice, Washington, D.C., for Appellee.

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville.Norman K. Moon, District Judge. (CR-98-82). United States Court of Appeals for the Fourth Circuit.

Before WILKINS and WILLIAMS, Circuit Judges, and Andre M. DAVIS, United States District Judge for the District of Maryland, sitting by designation.

Opinion

PER CURIAM:

UNPUBLISHED

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

John and Michelle Sandalis (collectively, the Sandalises) appeal their convictions and sentences for tax fraud and tax evasion following our remand for the district court to conduct an evidentiary hearing regarding the potential bias of the jury foreperson. See United States v. Sandalis, No. 00-4748, 2001 WL 867389 (4th Cir. Aug. 1, 2001). Finding no reversible error, we affirm.

I.

The Sandalises operated Dalis Painting, Inc., one of the principal painting contractors for the University of Virginia. John owned the company and managed the operations and painting contracts, and Michelle was the bookkeeper. The Sandalises were prosecuted for their failure to report revenues from Dalis Painting as income on their corporate and individual income tax returns in 1994 and 1995.

Dalis Painting maintained a corporate account at Central Fidelity Bank, and corporate earnings also were deposited into several accounts held in John's name, which were maintained at Jefferson National Bank (JNB accounts)[1] and NationsBank. Dalis Painting's general ledger accounted for the transactions in the NationsBank accounts, but it made no mention of any transactions involving the JNB accounts. Similarly, the 1994 and 1995 corporate tax returns for Dalis Paint-ing reported the income deposited into the NationsBank account, but they did not report the income deposited into the JNB accounts. The omission of the income deposited into the JNB accounts resulted in Dalis Painting underreporting its income by $267,584 for 1994 and $125,056 for 1995.

[1] Two separate accounts were maintained at JNB. One was interest bearing, and the other was non-interest bearing. (J.A. at 535.)

On the Sandalises' individual income tax returns for 1994 and 1995, they did not report any dividend income from Dalis Painting, but in both years, the Sandalises used corporate income from the NationsBank and JNB accounts for personal expenditures. By failing to report these expenditures as income, the Sandalises underreported their joint individual income by $209,962 in 1994 and by $56,079 in 1995.

The Sandalises were charged with two counts of attempted tax evasion, in violation of 26 U.S.C.A. § 7201 (West 1989) (Counts One and Two). Additionally, John was charged with two counts of preparing false tax returns, in violation of 26 U.S.C.A. § 7206(1) (Counts Five and Six), and Michelle was charged with two counts of aiding in the preparation and presentation of false tax returns, in violation of 26 U.S.C.A. § 7206(2) (West 1989) (Counts Three and Four). At trial, the Sandalises conceded that the 1994 and 1995 corporate and individual income tax returns were materially false and resulted in a substantial tax debt. They contended, however, that they did not intend to violate the tax laws and that their accountant, Arthur Gisser, solely was to blame for the inaccuracies in their tax returns.

The jury found the Sandalises guilty of all counts. John was sentenced to 26 months imprisonment, and Michelle was sentenced to 12 months imprisonment. The Sandalises filed a notice of appeal to this court, arguing, inter alia, that the district court erred in failing to hold a post-trial evidentiary hearing to determine whether the jury foreperson, Elizabeth Braswell, was biased against them. We remanded for the district court to conduct the requisite hearing in accordance with Remmer v. United States, 347 U.S. 227, 229–30 [46 AFTR 936] (1954). At the evidentiary hearing, several witnesses testified, including Braswell and eight of the other eleven jurors who had served during the Sandalises' trial. Based upon this testimony, supplemental briefing, and oral argument, the district court found that Braswell was an impartial juror and denied the Sandalises' motion for a new trial.

On appeal, the Sandalises challenge the district court's findings and denial of their motion for a new trial, contending that the evidence demonstrated that Braswell was biased against them, depriving them of their Sixth Amendment right to trial by an impartial jury. Additionally, the Sandalises renew arguments from their previous appeal, claiming that the district court erred by failing to strike prejudicial evidence regarding John's character and by denying Michelle's motion for judgment of acquittal.[2] We have consolidated the Sandalises' current appeal with their previous appeal and now undertake to resolve each claim of error in turn.

II.

[1] In United States v. Cheek, 94 F.3d 136 (4th Cir. 1996), we developed a specialized standard of review for the denial of a motion for a new trial based upon juror bias, providing as follows:

> The standard of review of the district court's opinion involves three inquiries. We review historical facts for clear error. Questions of law are reviewed de novo . . . . Ordinarily, the grant of a new trial is committed to the sound discretion of the district court. However, because the ultimate factual determination regarding the impartiality of the jury necessarily depends on legal conclusions, it is reviewed in light of all the evidence under a somewhat narrowed, modified abuse of discretion standard giving the appellate court more latitude to review the trial court's conclusion in this context than in other situations.

Id. at 140 (internal citations and quotation marks omitted).

As we stated more fully in our prior opinion, Braswell had contact with employees of Dalis Painting in 1998 and 1999, during which time the company performed painting and lead abatement work in and around Braswell's office, which was located in the Faulkner House at the Uni-

[2] We reserved judgment on these issues pending completion of the district court's proceedings following the remand.

versity of Virginia.[3] Sandalis, 2001 WL 867389. At the evidentiary hearing on the Sandalises' claim of juror bias, present and former Dalis Painting employees and a contract manager for the University of Virginia testified that there were quite a few complaints about the painting project and that Braswell complained more than other people about the painters. The Sandalises also submitted the affidavits of three individuals who did not testify at the hearing but who averred that Braswell made numerous complaints about Dalis Painting during its work at the Faulkner House. Finally, the Sandalises presented evidence that Braswell spoke directly to John on the telephone on at least two occasions to discuss her various complaints and that Braswell spoke with Michelle on the telephone on at least one occasion.

Braswell testified, on the other hand, that while her office building had been undergoing a substantial amount of construction and renovation over the past two years, she could not recall complaining about Dalis Painting or its painters. According to Braswell, she did not know and had not heard of the Sandalises prior to her jury service. She testified that between the first and second day of the trial, she recognized the connection between Dalis Painting and the renovation of her office building, but that she did not bring it to the district court's attention because she thought the trial and the renovation work were ''disconnected'' matters. (J.A. at 970.) Braswell specifically denied telephoning Dalis Painting at any point. Ultimately, Braswell stated that she had been ''faithful to [her] oath as a juror,'' (J.A. at 983), that she ''was totally neu-tral,'' and that she had no opinions or feel-ings about Dalis Painting or the Sandalises that affected her ability to render an impar-tial verdict, (J.A. at 978). Several of the other jurors testified that Braswell had seemed objective, had not been particularly vocal, never mentioned that Dalis Painting had performed services at Braswell's of-fice,[4] and was randomly selected to serve as the jury foreperson.

In analyzing the Sandalises' claims of actual and implied bias, the district court carefully reviewed all of the competing evidence, explicitly found Braswell's testimony to have been credible, and concluded that the Sandalises had not met their burden of proving that Braswell's prior business dealings with the Sandalises compromised her ability to render a fair and impartial verdict. See United States v. Malloy, 758 F.2d 979, 982 (4th Cir. 1985) (holding that the defendant bears the burden of proving bias). The Sandalises contend that Braswell's testimony was incredible and that the district court improperly weighed the evidence, but the district court is uniquely situated to weigh the evidence and make credibility determinations. See, e.g., United States v. Lancaster, 96 F.3d 734, 739 (4th Cir. 1996) (en banc) (stating, in the context of a challenge to voir dire, that ''an appellate court [cannot] easily second-guess the conclusions of the decision-maker who heard and observed the witnesses'' (internal quotation marks omitted)). On this record, we cannot say that the district court abused its discretion in concluding that Braswell was neither actu-

[3] Dalis Painting employees all wear uniforms with ''large Dalis Painting logo[s]'' printed on them and Dalis Painting's vehicles and equipment are similarly marked. (J.A. at 103–04.)

[4] One juror, Charles Fix, testified that Braswell had told him that ''she had seen the [Dalis Painting] sign on the doors of vehicles or something or another, and she had recognized the name.'' (J.A. at 986–87.)

ally nor impliedly biased.[5] See Smith v. Phillips, 455 U.S. 209, 218–19 (1982) (setting forth standard for finding actual bias); id. at 222 (O'Connor, J., concurring) (providing examples "that would justify a finding of implied bias"). Accordingly, the district court properly denied the Sandalises' motion for a new trial on the basis of juror bias.

III.

John next argues that he is entitled to a new trial because the district court, on two separate occasions, erroneously admitted prejudicial evidence regarding his character. During the Government's case-in-chief, the prosecutor asked Lee Koliopolous, an acquaintance of the Sandalises, whether Koliopolous had formed an opinion regarding John's character for truthfulness. Koliopolous responded, "I don't think he's a very truthful person." (J.A. at 584.) John argues that this opinion testimony was forbidden by Federal Rule of Evidence 404(a), which provides:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same ....

Fed. R. Evid. 404(a) (emphasis added).

Because John failed to object to the admission of this evidence at trial, we review for plain error. See United States v. Ellis, 121 F.3d 908, 918–19 (4th Cir. 1997) (applying plain error review to evidentiary challenge). To establish our authority to notice an error not preserved by timely objection, John must demonstrate that an error occurred, that the error was plain, and that the error affected his substantial rights. See United States v. Olano, 507 U.S. 725, 732 (1993). Even if John can satisfy these requirements, correction of the error remains within our discretion, which we "should not exercise ... unless the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" Id. (second alteration in original and internal quotation marks omitted).

Assuming the admission of Koliopolous's opinion testimony violated Rule 404, John has not met his burden of establishing that his substantial rights were affected. Subsequent to Koliopolous's testimony, John presented evidence of his character for truthfulness through six sepa-rate witnesses. Rule 404(a) would have permitted the Government to introduce Koliopolous's opinion testimony to rebut these character witnesses. Significantly, John does not contend that he would not have introduced this positive character evi-dence had the Government not first intro-duced Koliopolous's opinion testimony. Thus, the error was one only of timing, be-cause, irrespective of this error, the jury would have had the benefit of Koliopo-lous's opinion testimony. In fact, the fail-ure to object to the admission of Koliopo-lous's testimony, coupled with the subsequent admission of positive character evidence, may have been a strategic deci-sion designed to secure the final word on John's character prior to the commence-ment of jury deliberations. Thus, John has not met his burden of demonstrating that the jury's verdict was "substantially

[5] We note that there is some question as to whether implied bias remains a viable doctrine following the Supreme Court's majority opinion in Smith v. Phillips, 455 U.S. 209, 218–19 (1982). Id. at 221 (O'Connor, J., concurring) (writing separately to express her "view that the [majority] opinion does not foreclose the use of 'implied bias' in appropriate circumstances"); cf. Fitzgerald v. Greene, 150 F.3d 357, 365 (4th Cir. 1998) (noting that the majority opinion in Smith appeared to undermine the legitimacy of the implied bias doctrine). Assuming the doctrine's continued viability, however, we agree with the district court that the facts alleged by the Sandalises do not support a finding of implied bias.

Additionally, to the extent that McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984), is applicable in this criminal proceeding, see id. at 556 (holding in a civil case that a new trial is warranted when a "juror failed to answer honestly a material question on voir dire" and "the correct response would have provided a valid basis for a challenge for cause"); Fitzgerald v. Greene, 150 F.3d 357, 362 (4th Cir. 1998) (applying the McDonough test in the context of a criminal habeas corpus proceeding), the Sandalises have not demonstrated that the district court erred by denying a new trial on the basis of McDonough. The Sandalises claim that Braswell was dishonest for failing to inform the district court of her past interactions with Dalis Painting. Noting that Braswell was never asked whether she recognized the name "Dalis Painting," and that she had not recognized the Sandalises, by name or appearance, the district court found that Braswell honestly responded to all of the voir dire questions, and, in any event, that Braswell was not motivated to conceal her connection to Dalis Painting for reasons affecting her partiality. See McDonough, 464 U.S. at 556 ("[O]nly those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."). These factual findings were not clearly erroneous.

swayed by the error.'' United States v. Brooks, 111 F.3d 365, 371 (4th Cir. 1997); United States v. Vonn, ___ U.S. ___, 122 S. Ct. 1043, 1048 (2002) (explaining that under plain error review, the defendant ''has the burden to show that his substantial rights were affected'' (internal quotation marks omitted)).

John also claims that the district court erred by failing to strike a question that the Government posed to Michael Mulkey, John's former attorney. On direct examination, Mulkey testified that he had known John for several years and that he had a high opinion of John's character. On cross examination, the prosecutor asked Mulkey: ''Did you know that Mr. Sandalis within the last few years attempted to persuade Mr. Koliopolous to testify falsely in a judicial proceeding?'' (J.A. at 770.) The district court overruled defense counsel's objection and permitted Mulkey to answer the question. Mulkey responded that he did not have any knowledge of the suggested incident.

John concedes that the question complied with Federal Rule of Evidence 405(a), which allows the Government to inquire into specific instances of conduct on cross examination of a character witness for the defendant. See Fed. R. Evid. 405(a). Nevertheless, he contends that the question violated Federal Rule of Evidence 404(b) because it amounted to evidence of a prior criminal act, and the Government failed to provide defense counsel with the requisite advance notice of its intent to offer such evidence. Fed. R. Evid. 404(b). This argument is misplaced because Rule 404(b) limits the admission of ''evidence of other crimes, wrongs, or acts,'' Fed. R. Evid. 404(b) (emphasis added), and no such evidence was admitted. Mulkey responded to the question by saying that he had no knowledge of the alleged criminal activity, and the Government did not attempt to establish the occurrence of the criminal activity in any other manner. Indeed, the jury explicitly was instructed: ''If a lawyer asks a witness a question which contains an assertion of fact, you may not consider the assertion as evidence of that fact.'' (J.A. at 298.) Therefore, Rule 404(b)'s advance notice requirement was not violated.[6]

IV.

Finally, Michelle contends that the Government failed to introduce sufficient evidence to support her convictions. A jury verdict ''must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.'' United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996) (en banc) (internal quotation marks and emphasis omitted). In determining whether the evidence is substantial, we examine whether there is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt. Id. We must consider circumstantial as well as direct evidence and allow the government the benefit of all reasonable inferences from the facts proven to those sought to be es-tablished. Id. at 857–58.

Michelle was charged with attempted tax evasion and aiding and assisting in the preparation of false tax returns. She concedes that she filed and assisted in preparing materially false tax returns but claims that the Government failed to introduce substantial evidence that her violations of the tax laws were willful.[7] See 26 U.S.C.A. § 7201, 7206(2). Willfulness means the voluntary and intentional violation of a known legal duty. Cheek v. United States, 498 U.S. 192, 201 [67 AFTR 2d 91-344] (1991).

The evidence demonstrated that Michelle was involved significantly in managing the finances for Dalis Painting. She served as the company's bookkeeper and was the primary contact for Gisser. Although she

[6] We also reject John's suggestion that the question constituted prosecutorial misconduct.

[7] To obtain a conviction under § 7206(2), the government must prove the following elements beyond a reasonable doubt: ''(1) the defendant aided, assisted, or otherwise caused the preparation and presentation of a return; (2) that the return was fraudulent or false as to a material matter; and (3) the act of the defendant was willful.'' United States v. Aramony, 88 F.3d 1369, 1382 [78 AFTR 2d 96-5738] (4th Cir. 1996) (internal citation omitted). The elements of the section 7201 offense are: (1) willfulness; (2) a substantial tax deficiency; and (3) some affirmative act constituting an attempted evasion of the tax. United States v. Wilkins, 385 F.2d 465, 472 [20 AFTR 2d 5769] (4th Cir. 1967).

now contends that she knew almost nothing about the activity or amount of corporate income in the JNB accounts, John Peirce, an Internal Revenue Service case agent, testified that Michelle told him that she borrowed money from Dalis Painting and deposited those loans into the JNB accounts. She further informed Peirce that she did not keep records of the loans and did not tell Gisser about the loans. Peirce also testified that there were "several large cash withdrawals" from the JNB accounts, some of which were in the form of checks made payable to Michelle. (J.A. at 529.) Moreover, Peirce testified that when he first asked about the company's records for 1994 and 1995, Michelle stated that the Sandalises had not maintained records related to the company's income in 1994 or 1995, but she later told Peirce that such records had been maintained in the form of a "pink book," which included information regarding invoices and checks that had been deposited into the JNB accounts, and that the records had been provided to Gisser for preparation of the tax returns. (J.A. at 527, 552, 821.) Gisser testified that he provided "guidance to the Sandalises about the use of the corporate credit card" and "told them their personal expenses shouldn't be there." (J.A. at 445.) He further testified that he advised the Sandalises not to take loans from the corporation.[8] (J.A. at 445.) Based upon the evidence of Michelle's individual connection to, and knowledge of, the company's finances, including her status as the bookkeeper, evidence of her knowledge of proper accounting practices, such as Gisser's advice to her, and her lack of candor regarding the maintenance of records relating to the company's income for 1994 and 1995, a reasonable juror could infer that Michelle willfully assisted in the preparation of false tax returns and attempted to evade taxes. See United States v. Diamond, 788 F.2d 1025, 1030 [57 AFTR 2d 86-1310] (4th Cir. 1987) (affirming conviction for filing false returns and concluding that defendant's knowledge and experience with tax matters was circumstantial evidence of willfulness); United States v. Wilkins, 385 F.2d 465, 472 [20 AFTR 2d 5769] (4th Cir. 1967) ("Subsequent acts of a defendant, such as the fabrication of evidence or false explanations which will aid his defense, are clearly admissible to prove his guilty state of mind."). Because there was substantial evidence to support the jury's verdict, we affirm Michelle's convictions.

V.

For the foregoing reasons, we affirm the Sandalises' convictions and sentences.

AFFIRMED

¶2002-5047

DYNADECK ROTARY SYSTEMS, LTD.; Martin Lettunich, Tax Matters Partner, PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-71469, June 27, 2002. Tax Court, (2000) TC Memo 2000-382, RIA TC Memo ¶2000-382, 80 CCH TCM 893, supplemented (2001) TC Memo 2001-113, RIA TC Memo ¶2001-113, 81 CCH TCM 1611 (opinions by Laro, *J.*), affirmed. Years 1991, 1992. Decision against Taxpayers.

1. Partnership liabilities—effect on partners' bases in partnership interests—proof of debt—Tax Court procedure—motion to reconsider—substantial error; new evidence. Tax Court properly held that loan undertaken by corp./partner individually wasn't partnership liability: evidence showed that loan was intentionally made to corp., not partnership, and didn't indicate that corp. acted as partnership's agent when signing prom-

[8] Michelle challenges testimony, such as Gisser's, which was worded in the form of the Sandalises' joint wrongdoing, complaining that she was prejudiced because she was "not tried as an individual, but rather as a part of 'the Sandalises,' as a unit." (Appellant's Br. at 37.) The fact that Gisser's testimony implicates both of the Sandalises, absent some other objection, is not a ground for reversal of Michelle's convictions. Moreover, the district court advised the Sandalises that "it's generally not a very good idea to have the same lawyer representing both defendants," but the Sandalises rejected this advice and agreed to joint representation, and their attorney did not object to the joint nature of the evidence. (J.A. at 491.) Accordingly, to the extent that some of the evidence of their joint wrongdoing may have been problematic, the admission of the evidence does not require reversal of Michelle's convictions. Cf. United States v. Olano, 507 U.S. 725, 732 (1993) (providing that errors for which no objection was raised are reviewed for plain error); United States v. Herrera, 23 F.3d 74, 75 (4th Cir. 1994) (holding that invited errors do not provide a basis for reversal).

issory note; note and all related correspondence referred only to corp.; parties awaited corp.'s incorporation before entering into loan agreement; and all parties understood that lender intended to lend to corp., not partnership. Also, Court didn't abuse its discretion in refusing to consider partner's declaration as evidence. *Reference:* United States Tax Reporter ¶7525.01(5); 74,536.16151(5). IRC §752.

Appeals from the United States District Court for the Western District of Virginia, at Charlottesville.Norman K. Moon, District Judge. (CR-98-82). United States Court of Appeals, Ninth Circuit.

Before SCHROEDER, Chief Judge, D.W. NELSON and REINHARDT, Circuit Judges.

Memorandum*

NOTICE: THIS IS AN UNPUBLISHED OPINION. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Tax Ct. No. 1199-99.

[1] Appellants Martin Lettunich and Dynadeck Rotary Systems, Ltd. (''the partnership'') appeal a decision of the Tax Court affirming adjustments to partnership tax items for the 1991 and 1992 tax years. At issue is whether a $400,000 loan undertaken by one of the partners, Dynadeck Inc., should be considered a liability of the partnership.

In the Tax Court, the parties entered into a stipulation of settled issues. They agreed that the sole issue to be adjudicated was whether there was an outstanding partnership debt during 1991 and 1992 that would allow the partners to increase their bases in the partnership. The case was submitted without trial on the basis of a fully stipulated record, and the Tax Court affirmed the Commissioner's determination that the partnership was not liable for any part of the $400,000 debt.

Evidence in the record indicates only that the loan was intentionally made to the corporation, not to the partnership, and does not indicate that the corporation was acting as an agent of the partnership when it signed the promissory note. The note and all surrounding correspondence reference only the corporation; the parties awaited the incorporation of the corporation before entering into the loan agreement; and all parties understood that the lender intended to lend to the corporation, not the partnership. We therefore affirm the Tax Court's decision.[1]

AFFIRMED.

2002 WL 1401906 (9th Cir.), Unpublished Disposition

¶2002-5048

John T. HOREJS, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 02-35288, June 13, 2002. District Court, (2001, DC ID) 87 AFTR 2d 2001-1218 [87 AFTR 2d 2001-1218], adopting (2001, DC ID) 87 AFTR 2d 2001-1028 [87 AFTR 2d 2001-1028], affirmed. Decision for Govt.

1. Actions against IRS agents—jurisdiction—removal and remand—Federal Tort Claims Act. 9th Cir. summarily affirmed district court's judgment: insubstantial issues taxpayer raised on appeal didn't require further argument. *Reference:* United States Tax Reporter ¶76,557.53(12); 74,336.508(60).

United States Court of Appeals for the Ninth Circuit.

Before: O'SCANNLAIN, BERZON and RAWLINSON, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[1] We also hold that the Tax Court did not abuse its discretion in refusing to consider the declaration of Martin Lettunich as evidence.

Order

[1] The Clerk is directed to file appellant's opposition to appellee's motion for summary affirmance, received May 20, 2002. Appellee's motion for summary affirmance is granted because the questions raised in this appeal are so insubstantial as not to require further argument. *See United States v. Hooton*, 693 F.2d 857, 858 (9th Cir. 1982) (per curiam).

Accordingly, we summarily affirm the district court's judgment.

AFFIRMED.

¶2002-5049

In Re: Pamela J. DEMARS, Debtor. U.S. Bankruptcy Court, Western Dist. of Missouri, (Bktcy Ct MO) Docket No. 98-44141, June 19, 2002. Year 2001. Decision against Taxpayer.

1. Tax claims in bankruptcy—exemptions—earned income credits (EIC)—local public assistance. Chap. 7 trustee's objection to debtor's claimed exemption of portion of her refund attributable to EIC as form of local public assistance was sustained: although included in bankruptcy estate, case precedent showed that EIC was federally created credit, not local public assistance benefit; and case law taxpayer cited holding that EIC was exempt under specific state statutes that exempt public assistance didn't apply where Missouri law limited exemption to local public assistance benefits. *Reference:* United States Tax Reporter ¶68,726.52(32).

Ronald G. Byers, Independence, MO, for debtor.
Gary D. Barnes, Husch & Eppenberger, Kansas City, MO, for Chapter 7 Trustee.

United States Bankruptcy Court, Western District of Missouri.

Memorandum Opinion

FEDERMAN, Chief Judge:

Chapter 7 trustee objected to exemption claimed by debtor in refund payable to debtor as result of earned income tax credit (EIC) to which she was entitled on federal income tax return. The Bankruptcy Court, Arthur B. Federman, Chief Judge, held that: (1) refund was included in property of the estate; and (2) refund was not "local public assistance benefit," within meaning of Missouri exemption statute.

Objection sustained.

Chapter 7 trustee Gary Barnes objected to debtor Pamela J. Demars' claims of exemption. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B) over which the Court has jurisdiction pursuant to 28 U.S.C. § 1334(b), 157(a), and 157(b)(1). The following constitutes my Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure as made applicable to this proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure.

ISSUE PRESENTED

The State of Missouri exempts from execution payments that have been designated as local public assistance. Debtor received a 2001 federal income tax refund as a result of the earned income tax credit. While the 2001 federal income tax refund is an asset of her bankruptcy estate, she claimed the refund as exempt on the grounds that the earned income tax credit is a form of local public assistance. Is the earned income tax credit a form of local public assistance in Missouri?

DECISION

[1] The earned income tax credit is a program to assist low income wage earners, especially those with small children, by allowing them to claim a percentage of their income as a credit against tax they would otherwise owe for a taxable year. It is a federal program and the Internal Revenue Code classifies the refund as a tax overpayment. As such it is property of the bankruptcy estate. Section 513.430.1(10)(a) of Missouri's Revised Statutes permits debtors to exempt payments classified as a form of local public assistance. A federal tax refund is not a form of local public assistance as defined by the State of Missouri. The refund is, therefore, not exempt pursuant to section 513.430.1(10)(a).

FACTUAL BACKGROUND

On September 30, 1998, Ms. Demars and her husband filed a joint Chapter 13 bankruptcy petition. Thereafter, her husband asked to have the Chapter 13 petition dismissed as to him, and the court granted that request. On February 5, 2002, Ms. Demars' case was converted to Chapter 7. In her amended Schedule B Ms. Demars scheduled as property of her estate her 2001 state and federal income tax refund in the total amount of $3,792.00. On her amended Schedule C Ms. Demars claimed those refunds as exempt pursuant to section 513.440 and section 513.430(3) and 513.430.1(10)(a) of Missouri's Revised Statutes. The trustee objected to the claim of exemption pursuant to section 513.430.1(10)(a). He does not object to Ms. Demars' claim of exemption as head of household, pursuant to section 513.440, in the amount of $1,350.00, or to her claim of exemption as to $72.00 remaining of her $400.00 wild card exemption, pursuant to section 513.430(3). Thus, the issue before this Court is whether section 513.430.1(10)(a) allows Ms. Demars to claim as exempt the remaining balance of her 2001 income tax refund, in the amount of $2,370.00. Ms. Demars argues that a portion of her income tax refund is attributable to the earned income tax credit (the EIC), therefore, it is exempt as a form of local public assistance.

DISCUSSION

A discussion of exempt property properly begins with an analysis of what constitutes property of the estate. Section 541 of the Bankruptcy Code provides that the filing of a bankruptcy petition creates an estate that contains all property in which the debtor holds any legal or equitable interest:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.[1]

The Eighth Circuit has specifically held that a debtor's interest in a tax refund is property of the debtor's bankruptcy estate and is not exempt as "earnings" under Missouri's garnishment statute.[2] In In re Goertz this Court relied on the plain language of section 541 to hold that a tax refund, in the form of an EIC, is property of the estate.[3] Other Courts that have addressed this issue have reached a similar conclusion. In Johnston v. Hazlett (In re Johnston),[4] the Sixth Circuit stated that the overwhelming majority of courts that have addressed the issue have found that an EIC is property of the estate.[5] The United States Supreme Court shed light on this area of the law when it stated, "[t]he refundability of the earned-income credit is .... inseparable from its classification as an overpayment of tax."[6] In Sorenson, the Supreme Court found that since an EIC is a tax refund, it could be intercepted by the state for the payment of past due child

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1 11 U.S.C. § 541(a)(1).

2 Davis v. Robinson (In re Robinson), 152 B.R. 956, 958 (Bankr.E.D.Mo.1993) (citing In re Wallerstedt, 930 F.2d 630 (8th Cir.1991)). See also Kokoszka v. Belford, 417 U.S. 642, 648 [34 AFTR 2d 74-5196], 94 S.Ct. 2431 [34 AFTR 2d 74-5196], 2435, 41 L.Ed.2d 374 [34 AFTR 2d 74-5196] (1974) (where the Court held that an income tax refund is sufficiently rooted in the prepetition past to be defined as property under the bankruptcy act).

3 202 B.R. 614, 616 [81 AFTR 2d 98-1873] (Bankr.W.D.Mo.1996). See also Williamson v. Montgomery (In re Montgomery), 219 B.R. 913, 917 [81 AFTR 2d 98-1649] (10th Cir. BAP 1998), affirmed, 224 F.3d 1193 [86 AFTR 2d 2000-6007] (10th Cir.2000) (holding that EIC's are classified as a tax overpayment and are, therefore, property of the estate); Johnston v. Hazlett (In re Johnston), 209 F.3d 611, 613 [85 AFTR 2d 2000-1284] (6th Cir.1999) (holding that an EIC available to a debtor at the end of the tax year in which she filed her Chapter 7 bankruptcy petition is included in property of the estate, even though she filed her petition prior to the end of the year).

4 209 F.3d 611 [85 AFTR 2d 2000-1284] (6th Cir.1999) (citing Baer v. Montgomery (In re Montgomery), 219 B.R. 913 [81 AFTR 2d 98-1649] (10th Cir. BAP 1998); In re Fraire, Case No. 96-1241, 1997 WL 45465 [81 AFTR 2d 98-1868] (D.Kan. Jan.2, 1997); In re McCourt, 217 B.R. 998 (Bankr.S.D.Ohio 1997); In re Barnett, 214 B.R. 632 (Bankr.W.D.Okla.1997); In re Beagle, 200 B.R. 595 (Bankr.N.D.Ohio 1996); In re Kurilich, 199 B.R. 161 (Bankr.N.D.Ohio 1996); In re Goertz, 202 B.R. 614 [81 AFTR 2d 98-1873] (Bankr.W.D.Mo.1996); In re George, 199 B.R. 60 [81 AFTR 2d 98-1871] (Bankr.N.D.Okla.1996); In re Brown, 186 B.R. 224 [81 AFTR 2d 98-1978] (Bankr.W.D.Ky.1995); In re Goldsberry, 142 B.R. 158 [81 AFTR 2d 98-1985] (Bankr.E.D.Ky.1992); In re Buchanan, 139 B.R. 721 [81 AFTR 2d 98-1983] (Bankr.D.Idaho 1992); In re Davis, 136 B.R. 203 [71A AFTR 2d 93-4791] (Bankr.S.D.Iowa 1991); In re Richardson, 216 B.R. 206 [83 AFTR 2d 99-1413] (Bankr.S.D.Ohio)).

5 Id. at 612.

6 Sorenson v. Secretary of the Treasury of the United States, 475 U.S. 851, 859 [57 AFTR 2d 86-1189], 106 S.Ct. 1600 [57 AFTR 2d 86-1189], 1606, 89 L.Ed.2d 855 [57 AFTR 2d 86-1189] (1986).

support.[7] The Court's analysis is relevant, because, as stated, in the Eighth Circuit, tax refunds are an asset of the bankruptcy estate. Thus, I find that an EIC is included in the bankruptcy estate. The issue then becomes whether a debtor can claim an exemption in the EIC. A brief description of the EIC is relevant here.

The EIC permits qualifying taxpayers to claim a percentage of their income as a credit against tax they would otherwise owe for a taxable year.[8] Congress made this program available to low income earners for the following three reasons: (1) to reduce the disincentive to work caused by the imposition of Social Security taxes on earned income; (2) to stimulate the economy by placing funds in the hands of consumers who would spend them immediately; and (3) to provide relief for families impacted by rising food and energy prices.[9] If the EIC is greater than the taxes owed by the wage earner, the excess is considered an overpayment of taxes, and the taxpayer is entitled to a refund as if she overpaid her taxes in that amount.[10] In other words, a predicate to receiving an EIC is to have earned income. This Court previously found that the EIC is not a form of local public assistance.[11] In In re Goertz, the court analyzed the language in section 513.430.1(10)(a) of Missouri's Revised Statutes. Section 513.430.1(10)(a) permits a debtor to exempt a payment received in the form of a "local public assistance benefit:"

> 1. The following property shall be exempt from attachment and execution to the extent of any person's interest therein:
>
> * * *
>
> (10) Such person's right to receive:
>
> (a) A Social Security benefit, unemployment compensation or a local public assistance benefit.[12]

The Court stated that a local public benefit was more limited in scope than the EIC, therefore, the EIC was not exempt under either bankruptcy law or Missouri law.[13] The Court went on to state that an EIC is not a creation of local or state government. It is, instead, a credit created by the federal government, not a local public assistance benefit.[14]

Debtor cites several cases that hold either that the EIC is not a tax refund,[15] or that the EIC is exempt under specific state statutes that exempt public assistance.[16] In re Hurles, which stated that the EIC was not a tax refund, was decided before the United States Supreme Court's decision in Sorenson, and is, therefore, not applicable. In In re Jones, the court found the EIC exempt based upon an Idaho exemption statute that allows debtors to exempt benefits received under "federal, state, or local public assistance legislation."[17] The trustee points out that the EIC could be classified as a federal public assistance program given the purpose behind its enactment, but there is no such provision for exemption of that benefit in Missouri. Finally, debtor relies on In re Davis.[18] In Davis the bankruptcy court did allow debtor to exempt her EIC, and the Iowa exemption statute at issue limited the exemption to

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7 Id.

8 Williamson v. Montgomery (In re Montgomery), 224 F.3d at 1194.

9 Id.

10 Id.

11 In re Goertz, 202 B.R. 614, 617 [81 AFTR 2d 98-1873] (Bankr.W.D.Mo.1996).

12 Mo. Stat. Ann. § 513.430.1(10)(a) (Supp.2002).

13 202 B.R. at 617–18.

14 Id. at 618.

15 In re Hurles, 31 B.R. 179, 180 (Bankr.S.D.Ohio 1983) (where the court held that the EIC is not an income tax refund because it does not represent a return of funds withheld from the debtor's wages).

16 See, e.g. In re Jones, 107 B.R. 751 (Bankr.D.Idaho 1989); In re Davis, 136 B.R. 203 [71A AFTR 2d 93-4791] (Bankr.S.D.Iowa 1991).

17 Jones, 107 B.R. at 751, n. 1 (quoting Idaho Code § 11-603(4) (Michie 2001)), which provides:

11-603 Property exempt without limitation.

An individual is entitled to exemption of the following property:

* * *

(4) benefits the individual is entitled to receive under federal, state, or local public assistance legislation.

18 136 B.R. 203 [71A AFTR 2d 93-4791] (Bankr.S.D.Iowa 1991).

"local public assistance." The court held, however, that the trustee failed to object to the exemption on the basis that it was not a "local public assistance."[19] In addition, in two later opinions the Iowa court has sustained the trustee's objection to an exemption of an EIC when the trustee argued that the EIC was not a "local public assistance."[20] More telling, in In re Longstreet,[21] the bankruptcy court recognized Iowa residents' right to exempt from execution their EIC's on the grounds that they were a "public assistance benefit."[22] In reaching this decision, the court addressed the fact that the Iowa Legislature had amended the exemption statute after the bankruptcy court's holdings in In re Peckham and In re Crouch.[23] The Iowa statute prior to the amendment was identical to Missouri Revised Statute § 513.430.1(10)(a), in that it limited the exemption to a local public assistance benefit.[24] In 1999 the Iowa Legislature amended section 627.6(8)(a) by substituting the modifier "local" with the more general adjective "any,"[25] such that the Iowa statute now exempts "any public assistance benefit." Based upon that amendment, the court in Longstreet allowed the debtors to exempt their EIC. The Missouri Legislature, however, has not amended section 513.430.1(10)(a). I am bound by the language in that statute, which limits the exemption to a local public assistance benefit. The federal program known as EIC is not a local public assistance benefit. I will, therefore, sustain the Chapter 7 trustee's objection to Ms. Demars' claim of exemption in the amount of $2,370.00.

An Order in accordance with this Memorandum Opinion will be entered this date.

¶2002-5050

MADISON RECYCLING ASSOCIATES, David A. Beldon, Robert T. Boyd, Douglas C. Brandon, Stewart Pierce Brown, Lloyd E. Busch, David J. D'Antoni, John H. Delaney, Jr., Daniel C. Greer, Gerald O. Henderson, Charles D. Hoertz, Estate of Joseph Kessel, Thomas P. Korehle, Josiah O. Low, III, Robert J. Ripston, Howard S. Siever, Lavonne F. Siever, James W. Simpson, Jr., R. Barry Uber, Lillian D. Williams, Partners Other Than the Tax Matters Partner, PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Second Circuit, (CA2) Docket No. 01-4141, July 9, 2002. Tax Court, (2001) TC Memo 2001-85, RIA TC Memo ¶2001-085, 81 CCH TCM 1496 (opinion by Carluzzo, *Sp. Tr. J.*), affirmed. Earlier proceeding at (1992) TC Memo 1992-605 [1992 RIA TC Memo ¶92,605], RIA TC Memo ¶92605, 64 CCH TCM 1063 [1992 RIA TC Memo ¶92,605]. Year 1982. Decision for Govt.

1. Partnership items—limitations period on assessments—extensions—authority of tax matters partner (TMP). Tax Court properly determined that limitations period on partnership-related assessments was validly extended by extensions TMP's attorneys-in-fact executed while TMP was subject of criminal investigation: TMP clearly had authority if not in his TMP capacity then as general partner to delegate to attorneys-in-fact his authority to bind partnership. And, such delegation via Form 2848 was effective despite nonliteral compliance with Reg. §301.6229(b)-1T where documents were signed before reg took effect; mere fact of criminal investigation didn't in itself automatically disqualify TMP or his representatives; and prior imposition of IRC §6700 penalties and injunction didn't otherwise create disqualifying conflict of interest.

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19 Id at 207.

20 In re Peckham, Case No 97-01117 (Bankr.S.D.Iowa January 26, 1998); In re Crouch, Case No. 96-23085 (Bankr.N.D.Iowa May 13, 1997), as cited in In re Longstreet, 246 B.R. 611, 615 (Bankr.S.D.Iowa 2000).

21 246 B.R. 611 (Bankr.S.D.Iowa 2000).

22 Id. at 617.

23 Id. at 615.

24 See Iowa Code § 627.6(8)(a) (Supp.1998).

25 Longstreet, 246 B.R. at 615 (citing comments to Iowa Code § 627.6(8)(a) (Supp.1999)).

Reference: United States Tax Reporter ¶62,295.01(20); 62,315.01(5); 62,215. IRC §6221; 6229; 6231.

Gillard B. Johnson, III, Bowling & Johnson, P.S.C. (Patrick Nash, Lexington, KY, on the brief), for Petitioners-Appellants. Annette M. Wietecha (Bruce R. Ellisen, on the brief), for Eileen J. O'Connor, Assistant Attorney General, Tax Division, Department of Justice, Washington, D.C., for Respondent-Appellee.

United States Court of Appeals for the Second Circuit.

Before: CALABRESI, SACK, and B.D. PARKER, JR., Circuit Judges.

CALABRESI, Circuit Judge:

AFFIRMED.

Appeal from judgments of the Tax Court (Joel Gerber and Howard A. Dawson, Judges) holding that a Notice of Final Partnership Administrative Adjustment issued by the Commissioner of the Internal Revenue Service was timely, and sustaining adjustments sought by the Commissioner to partnership's tax return.

Petitioners-Appellants, who are limited partners of Madison Recycling Associates ("Madison"), a limited partnership organized under the laws of the State of New York, appeal from judgments of the Tax Court sustaining adjustments sought by the Commissioner of the Internal Revenue Service (the "Commissioner" or the "IRS") to Madison's 1982 partnership return and holding them liable for taxes. The principal issue on appeal is whether the Notice of Final Partnership Administrative Adjustment (the "FPAA") was issued by the IRS within the period of limitations for assessing any income tax, for Madison's 1982 taxable year, attributable to any partnership item (or affected item).

BACKGROUND

Madison is a partnership subject to the provisions of the Tax Equity and Fiscal 1 Responsibility Act of 1982 ("TEFRA"), Pub. L. No. 97-248, § 402(a), 96 Stat. 324, 26 U.S.C. § 6221 *et seq.*.[1] Accordingly, the treatment of Madison's partnership items is determined at the partnership level. The parties are in agreement with respect to the adjustments made in the FPAA,[2] but disagree as to whether the FPAA was timely.

A. The Partnership Agreement

Madison's Agreement of Limited Partnership, executed on September 20, 1982, named Richard Roberts ("Roberts") as the general partner and tax matters partner (the "TMP").[3] Roberts was Madison's sole general partner and its TMP in 1982 and at all other relevant times. Under the partnership agreement, Roberts, as general partner, had exclusive management power over the partnership. The agreement provides, in relevant part, that the general partner has the power and authority on behalf of the partnership:

> (a) to execute, acknowledge and deliver any and all instruments necessary, convenient or advisable to effectuate any and all of the foregoing, including, without limitation, equipment purchase agreements, leases, licenses, security agreements, management consulting agreements and other agreements between the Partnership and one or more third parties;

---

[1] Until the enactment of TEFRA, administrative and judicial proceedings related to the partnership income were conducted at the level of the individual partner. If the IRS took issue with the partnership's books or returns, it addressed the matter with each partner individually. *See, e.g., Chimblo v. Comm'r*, 177 F.3d 119, 121 [83 AFTR 2d 99-2610] (2d Cir. 1999). Under TEFRA, a single proceeding determines how partnership items will be reported on all of the partners' individual returns. The partners, moreover, are required to treat partnership items consistently with the items' treatment on the partnership return. Individual taxpayers still pay the relevant taxes, but the determination as to the amount of tax attributable to partnership items is made at the partnership level. *Monti v. United States*, 223 F.3d 76, 82 [86 AFTR 2d 2000-5713] (2d Cir. 2000).

[2] The adjustments in the instant case (which is part of the Plastics Recycling cases, involving the leasing of plastics recycling equipment) arise from transactions similar to those addressed in *Provizer v. Comm'r*, 63 T.C.M. (CCH) 2531 [1992 RIA TC Memo ¶92,177] (1992), *aff'd*, 996 F.2d 1216 (6th Cir. 1993) (unpublished decision). In *Provizer*, the transactions were found to be shams lacking economic substance. The substance and merits of the transactions, however, are not at issue in the case before us.

[3] The TMP is "the partner designated to act as a liaison between the partnership and the Internal Revenue Service in administrative proceedings, and as a representative of the partnership in judicial proceedings." *Addington v. Comm'r*, 205 F.3d 54, 60 [85 AFTR 2d 2000-1048] (2d Cir. 2000); *see* I.R.C. § 6224(c)(3)(A), 26 U.S.C. § 6224(c)(3)(A) (References to the Internal Revenue Code, 26 U.S.C. § 401 *et seq.*, are designated "I.R.C."). The TMP is the general partner designated by the partnership or, if no general partner is so designated, the general partner having the largest profit stake in the partnership at the close of the taxable year. *See* I.R.C. § 6231(a)(7).

. . . .

(e) to employ on behalf of the Partnership agents and independent contractors[,] including, without limitation, employees, accountants, lawyers and appraisers[,] and to obtain such other assistance and services and to pay such remuneration therefor as the General Partner deems proper;

. . . .

(j) to file all necessary income and other tax returns and reports required to be filed by the Partnership;

. . . ; [and]

(n) to perform any other acts specifically authorized to the General Partner by any other provision of this Partnership Agreement. In addition, in furtherance of the foregoing, the General Partner shall possess all of the power and authority of a general partner in a partnership without limited partners as is provided under the laws of the State of New York . . . .

Under the partnership agreement, the limited partners have no right or authority to bind or act for the partnership. Rather, upon admission to the partnership, each limited partner granted an irrevocable power of attorney to the general partner, giving Roberts the authority to make, execute, and file, *inter alia*, "[a]ny and all . . . documents as may be deemed necessary or desirable by the General Partner to carry out fully the provisions of [the partnership agreement]."

B. Madison's 1982 Partnership Tax Return and Related Tax Proceedings

Madison filed its 1982 Form 1065, U.S. Partnership Return of Income, with the Brookhaven Service Center in Holtsville, New York, on March 14, 1983. The return was prepared by H.W. Freedman & Co., Madison's accountants, and signed by Roberts as Madison's TMP and general partner. At that time, Harris W. Freedman ("Freedman") and Shaye Jacobson ("Jacobson") were partners in H.W. Freedman & Co.

In 1983, the IRS determined that Roberts had violated I.R.C. § 6700 by promoting and selling limited partnership interests in various plastics recycling partnerships, including Madison. On August 8, 1983, the United States, pursuant to I.R.C. § 7408, filed a civil complaint in the United States District Court for the District of Massachusetts, seeking an injunction against Roberts and other promoters of the partnerships. That same day, in accordance with a consent agreement signed by Roberts on August 4, 1983, the court issued a permanent injunction against Roberts and other promoters to prevent them from further organizing, promoting, or selling abusive tax shelters. Roberts moved to Paris, France, in 1984, and apparently has continued to reside there ever since. In January 1985, pursuant to I.R.C. § 6700, the IRS assessed $205,000 in civil penalties against Roberts for his role in the promotion of the plastics recycling partnerships.

The IRS began its examination of Madison's 1982 tax filings in 1984. On April 2, 1984, Roberts executed a Form 2848, Power of Attorney and Declaration of Representative, appointing Freedman and Jacobson as attorneys-in-fact to represent Madison before the IRS. Form 2848 stated that the tax matters of Madison for which the attorneys-in-fact were appointed were as follows:

Type of tax: Partnership

Federal tax form number: 1065 and all related IRC matters

Year(s) or period(s): 1982–1984[4]

Form 2848 also stated: "The attorney(s)-in-fact (or either of them) are authorized, subject to revocation,[5] to receive confidential information and to perform any and all acts that the principal(s) can perform

[4] The notation "-1984" was handwritten next to the typewritten "1982" for the year(s) or period(s) covered by the power of attorney. This notation was not initialed. The IRS has conceded that the handwritten and uninitialed notation "-1984" is ineffective to appoint Freedman or Jacobson for years subsequent to 1982.

In addition, handwritten changes to the address of H.W. Freedman & Co., and of the attorneys-in-fact were made on the form and initialed by "S.J."

[5] Roberts revoked the power of attorney in a letter dated December 28, 1986.

with respect to the above specified tax matters (excluding the power to receive refund checks, and the power to sign the return ... unless specifically granted ...).''

Subsequently, Jacobson, as attorney-in-fact for Roberts, on two separate occasions signed a Form 872-P, Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership. The first consent, dated November 5, 1985,[6] extended the period of limitations for assessments relating to Madison's 1982 tax year to June 30, 1987. The second, signed on August 6, 1986,[7] extended the period to December 31, 1987.

Sometime between August and October 1985, while the examination of Madison's 1982 tax filings was ongoing, the IRS initiated a criminal tax investigation of Roberts. The special agent assigned to conduct the criminal investigation did not contact Roberts, who was in France, during the investigation. On December 9, 1986, the investigation was discontinued without a recommendation that Roberts be prosecuted for any tax-related offenses.

On December 24, 1987, the IRS mailed the FPAA with respect to Madison's 1982 tax year to Roberts, as TMP. The FPAA increased the partnership's ordinary income by $704,111, and disallowed a business energy investment credit and an investment tax credit, each in the amount of $7 million. Roberts did not file a petition in the Tax Court for readjustment of the items set forth in the FPAA.[8] But, partners other than the TMP (including the petitioners in the instant suit) filed a timely petition for readjustment in 1988.[9]

Petitioners subsequently sought summary judgment on the ground that the statute of limitations for the assessments had expired prior to the issuance of the FPAA. Petitioners claimed that the consent forms signed by Jacobson did not extend the period of limitations for the individual limited partners because Jacobson was not specifically authorized to extend the period of limitations for them. This is so, they claimed, because the general partner did not file a written statement that met the requirements of Treas. Reg. § 301.6229(b)-1T. The limited partners also contended that the power of attorney executed by Roberts was not sufficient to authorize a representative to extend the period of limitations for the limited partners and, moreover, that Form 2848 was ineffective because it had been altered by handwritten changes.

The Tax Court denied petitioners' motion for summary judgment. The court held that the TMP had, under the terms of the partnership agreement, broad and exclusive powers over the business of the partnership, including the authority to enter into an agreement with the Commissioner to extend the period of limitations under § 6229(b)(1)(B) with respect to all the limited partners. The court reasoned that Roberts therefore also had the authority to delegate this power to his attorney-in-fact to execute consents to extend the period of limitation with respect to all of Madison's partners. The court stated, moreover, that, even if Roberts, *as the TMP*, had not delegated his authority to enter into the agreements with the IRS, Roberts, *as the general partner*, could and did delegate this authority to Jacobson.

The Tax Court rejected petitioners' argument that the consents were invalid because the specific procedures of Treas. Reg. § 301.6229(b)-IT had not been met. The court explained that the language of the regulation is permissive and not mandatory, and that, in any event, ''noncompliance with th[e] regulation 'cannot invalidate authority to extend the period of assessment granted by a partnership prior

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6 The consent was countersigned on behalf of the Commissioner of Internal Revenue on November 18, 1985.

7 This form was countersigned on behalf of the Commissioner on August 19, 1986.

8 A TMP has ninety days from the date that the FPAA is issued to contest the adjustments by filing a petition for readjustment of the partnership items with the Tax Court, the United States Claims Court, or the federal district court for the district in which the partnership's principal place of business is located. *See* I.R.C. § 6226(a).

9 If the TMP has not filed a petition by the ninetieth day from the date that the FPAA was mailed, any other ''notice'' partner, as defined under I.R.C. § 6223, or any group of partners who collectively have an interest of five percent or more in the profits of the partnership, may petition the Tax Court, the Claims Court, or the appropriate district court. Such a petition must be filed on or before 150 days from the mailing of the FPAA. *Id.* § 6226(b)(1).

to [the] promulgation of the regulation.''' *Madison Recycling Assocs. v. Comm'r*, 64 T.C.M. (CCH) 1063 [1992 RIA TC Memo ¶92,605] (1992) (quoting *Cambridge Research & Dev. Group v. Comm'r*, 97 T.C. 287, 295 (1991)). The court, moreover, rejected petitioners' claim that the consents were invalidated due to the alterations to Form 2848.[10]

Summary judgment having been denied, the case was scheduled for trial on February 7, 2000. On December 28, 1999, petitioners moved for a continuance, seeking to secure evidence relating to the IRS's criminal and civil investigations of Roberts. Petitioners claimed that the information was necessary to support their claim that the criminal investigation and the civil penalties imposed on Roberts created a conflict of interest that had legally removed Roberts's authority to act, personally or through a representative, on behalf of the partnership. The Commissioner filed an opposition, and the Tax Court denied petitioners' motion.[11]

Following the trial, petitioners filed a motion to reopen the proceedings in order to allow them the opportunity to secure the complete administrative file on Roberts, including materials relating to the IRS's criminal investigation. The Commissioner again opposed petitioners' motion, stating (1) that petitioners could have obtained the information through a formal discovery request, but had failed to do so during the ten years since the filing of the partners' 1988 petition for readjustment, and (2) that all relevant materials subject to disclosure, including portions of the criminal investigation file, had been provided to petitioners.[12] The Tax Court denied petitioners' motion.

The Tax Court subsequently issued an opinion, in which it held that the FPAA was timely because Roberts was not operating under any conflict of interest that would have rendered ineffective the consents that he authorized. The court stated that there was nothing to suggest that Roberts ''had a powerful incentive to ingratiate himself with the Government.'' *Madison Recycling Assocs. v. Comm'r*, 81 T.C.M. (CCH) 1496 [TC Memo 2001-85] (2001). This was the case, the court reasoned, particularly since ''there [was] no evidence that Roberts (or his attorney-in-fact) was aware of the criminal tax investigation at the time the consents were signed.'' *Id.* The Tax Court also disagreed with petitioners' claim that the § 6700 proceedings resulted in a conflict of interest. The court noted that those proceedings had been completed, and the penalties imposed, prior to Jacobson's execution of the consents. *See id.* This appeal followed.

DISCUSSION

We review the Tax Court's legal conclusions *de novo* and its factual findings for clear error. *See* I.R.C. § 7482(a)(1) (''The United States Courts of Appeals ... shall ... review the decisions of the Tax Court ... in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.''); *see also Callaway v. Comm'r*, 231 F.3d 106, 115 [86 AFTR 2d 2000-6148] (2d Cir. 2000). In doing so, '''[w]e owe no deference to the Tax Court's statutory interpretations, its relationship to us being that of a district court to a court of appeals, not that of an administrative agency to a court of appeals.''' *Callaway*, 231 F.3d at 115 (quoting *Exacto Spring Corp. v. Comm'r*, 196 F.3d 833, 838 [84 AFTR 2d 99-6977] (7th Cir.1999) (Posner, *C.J.*)); *cf. Baizer v. Comm'r*, 204 F.3d 1231, 1233 [85 AFTR 2d 2000-1067] (9th Cir.2000) (''Although a presumption exists that the tax court correctly applied the law, no special deference is given to the tax court's decisions.'').

[1] The period for assessing income tax attributable to any partnership item (or

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[10] Petitioners have not, on appeal, renewed the objection raised in their motion for summary judgment that Form 2848 was invalid as a result of the handwritten alterations to the form. The argument is deemed waived on appeal. *See LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995) (citing Fed. R. App. P. 28(a)).

[11] Thereafter, the partnership filed for bankruptcy. *See Madison Recycling Assocs. v. I.R.S. (In re Madison Recycling Assocs.)*, No. Civ. 00-65, 2001 WL 429805, at 1 [87 AFTR 2d 2001-1583] (E.D. Ky. Mar. 1, 2001). The Tax Court determined that the bankruptcy automatic stay provisions did not apply to the Tax Court proceeding, and the case proceeded to trial.

[12] The IRS claimed that, pursuant to I.R.C. § 6103, portions of the administrative file and certain documents relating to the criminal investigation of Roberts were not subject to disclosure.

affected item) for a partnership taxable year does not expire until the date that is three years after the later of (a) the date on which the partnership actually files its information return for the taxable year in question, or (b) the last date for filing such return for such year (without extensions). I.R.C. § 6229(a). In this case, absent extensions, any FPAA for Madison's 1982 taxable year should have been issued by April 15, 1986. Under TEFRA, however, the Commissioner may receive an extension if, before the assessment period expires (including any periods covered by a prior extension), he secures the consent of (a) each and every limited partner or (b) the partnership's TMP or "any other person authorized by the partnership in writing to enter into such an agreement." *Id.* § 6229(b)(1).

"The expiration of the period of limitation on assessment is an affirmative defense, and the party raising it must specifically plead it and carry the burden of proving its applicability." *Amesbury Apartments, Ltd. v. Comm'r*, 95 T.C. 227, 240 (1990); *see Chimblo v. Comm'r*, 177 F.3d 119, 125 [83 AFTR 2d 99-2610] (2d Cir. 1999). The taxpayer must, first, "make a *prima facie* case establishing the filing of the partnership return, the expira-tion of the statutory period, and receipt or mailing of the notice after the running of the period." *Amesbury Apartments*, 95 T.C. at 240–41. Second, if this showing is made, the burden of production then shifts to the Commissioner to show that the bar of the limitations period is not applicable. *Id.* at 241; *see Transpac Drilling Venture 1982-12 v. Comm'r*, 147 F.3d 221, 224 n.5 [82 AFTR 2d 98-5078] (2d Cir. 1998). Third and finally, if the Commissioner suc-ceeds, the burden shifts back to the tax-payer to show that the alleged exception to the expiration of the limitations period is ineffective or otherwise inapplicable. *Amesbury Apartments*, 95 T.C. at 241. The burden of persuasion, however, remains al-ways with the taxpayer. *Id.*

Only the third step of the inquiry is implicated here.[13] As the Tax Court rightly determined, petitioners have not met their burden of showing that the consents executed by Jacobson on behalf of Roberts were invalid. As an initial matter, there is no question that Roberts had the authority, both in his capacity as general partner and as the TMP, to enter into binding agreements with the IRS on behalf of the partnership. And, through Form 2848, Roberts, as the general partner for Madison, appointed Jacobson and Freedman as attorneys-in-fact for the partnership for purposes of filing the partnership returns and all related tax matters. As the Tax Court further noted, even if Roberts, *in his capacity as TMP*, did not delegate his authority to enter into agreements with the IRS, Roberts could, under the terms of the partnership agreement and under New York law,[14] delegate his authority, as *general partner*, to bind the partnership and its partners to an extended limitations period.

Since Roberts could delegate his authority to consent to an extension of the limitations period, the only question that remains is whether he made an effective delegation in this case. Section 6229(b) of the Internal Revenue Code provides, in relevant part, that the limitations period may be extended with respect to all partners by an agreement between the IRS and the TMP or "any other person authorized by the partnership in writing to enter into such an agreement." I.R.C. § 6229(b)(1)(B). The regulations promulgated thereunder (appli-

[13] The parties stipulated that the partnership timely filed its partnership return and that any FPAA, to be timely absent any extensions, was required to have been mailed on or before April 15, 1986. Petitioners have put forth a *prima facie* case, and the Commissioner has met his burden by introducing two facially valid consents that purport to extend the limitations period beyond the date on which the FPAA was mailed. *See Lefebvre v. Comm'r*, 47 T.C.M. (CCH) 1572, 1574 [¶84,202 PH Memo TC] (1984) (holding that a consent to extend the statute of limitations is valid on its face if it was signed prior to the expiration of the limitations period and includes the name of the taxpayer, the signature of the taxpayer or a person authorized to sign on the taxpayer's behalf, and the taxable year to which the agreement relates), *aff'd*, 758 F.2d 1340 [55 AFTR 2d 85-1422] (9th Cir. 1985) (per curiam).

[14] Except as provided in the partnership agreement, the grounds for, and extent of, Roberts's authority as a general partner are determined under New York law. New York has adopted the Revised Uniform Limited Partnership Act. *See* N.Y. Partnership Law §§ 90 to 119 (McKinney 1988). Both the partnership agreement and New York law afford to Roberts, as general partner, the same rights and powers given to a partner in a partnership without limited partners. *See id.* § 98.

cable to the 1982 tax year[15]) state that a partnership *may* authorize any person to extend the limitations period by filing a statement to that effect with the IRS. The statement must meet four requirements: (1) it must provide that it is an authorization for a person other than the TMP to extend the assessment period with respect to all partners; (2) it must identify the partnership and the person being authorized by name, address, and taxpayer identification number; (3) it must specify the partnership year(s) for which the authorization is effective; and (4) it must be signed by all persons who are general partners at any time during the year(s) for which the authorization is effective. *See* Treas. Regs. § 301.6229(b)-1T.

The Tax Court, in denying petitioners' motion for summary judgment, conceded that the specific procedures of the regulation were not met in this case. Even if the power-of-attorney Form 2848 were to be deemed to be a "statement" under the regulation, there is no question that the form signed did not specifically provide that it was an authorization for a person other than the TMP to extend the assessment period with respect to all partners. Rather, it gave Freedman and Jacobson broad powers relating generally to tax matters affecting the partnership.

Even though the requirements of § 301.6229(b)-1T are not met, we find that the consents to extend the limitations period are valid. For, § 301.6229(b)-1T was not promulgated until 1987, *see* sec. 301.6229(b)-1T, Temporary Proced. & Admin. Regs., 52 Fed. Reg. 6789 (Mar. 5, 1987); T.D. 8128, 1987-1 C.B. 325, well after the consents were executed. As the Tax Court has held, § 301.6229(b)-1T "cannot invalidate authority to extend the period of assessment granted by a partnership prior to [the] promulgation of the regulation." *Cambridge Research & Dev. Group*, 97 T.C. at 295; *see also* I.R.C. § 7805 (stating that treasury regulations do not generally apply retroactively).[16]

Petitioners, relying on our decision in *Transpac Drilling Venture 1982-12 v. Commissioner*, 147 F.3d 221 [82 AFTR 2d 98-5078] (2d Cir. 1998), argue, however, that the consents are invalid because Roberts (and, thus, Jacobson) was laboring under a conflict of interest that legally removed his (and his representative's) authority to act on behalf of the partnership or its partners. In *Transpac*, while the IRS was pursuing a civil audit of the Transpac partnerships, the IRS began a criminal investigation of both Transpac's promoter and its tax matters partners. *See id.* at 223–24. During the course of the criminal investigation, the tax matters partners became government witnesses in the investigation of the promoter. *See id.* at 223. In exchange for their cooperation, the tax matters partners either were granted immunity from prosecution or were offered suspended sentences. *See id.* Because the statute of limitations applicable to the civil examination was about to expire, the IRS solicited consents to extend the limitations period from Transpac's limited partners, who refused to consent. *See id.* at 224. The IRS then approached the tax matters partners-who at the time were targets of the ongoing criminal investigation and were cooperating with the IRS-and received consents from them on behalf of all of the Transpac partners. *See id.*

In *Transpac*, we held that a TMP, although an entity created by statute, owes a fiduciary duty to his partners. Since the TMP's acts bind his partners, the partners secure their due process protection only as a result of the TMP's faithful discharge of

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15 The regulations, which were promulgated in 1987, *see sec.* 301.6229(b)-1T, Temporary Proced. & Admin. Regs., 52 Fed. Reg. 6789 (Mar. 5, 1987); T.D. 8128, 1987-1 C.B. 325, apply with respect to any partnership taxable year beginning after September 3, 1982, and with respect to any taxable year beginning on or before and ending after September 3, 1982, if with respect to that taxable year there is an agreement entered into pursuant to section 407(a)(3) of the TEFRA. *See* 52 Fed. Reg. 6779 (1987); T.D. 8128, 1987-1 C.B. 325. Madison's partnership return filed for the 1982 tax year is for the period between October 1, 1982 and December 31, 1982.

16 At first glance, it is unclear whether, as has been held by the Tax Court, the language in Treas. Reg. § 301.6229(b)-1T is permissive rather than mandatory. *See Cambridge Research & Dev. Group*, 97 T.C. at 300–01 ("Nothing in section 6229(b) ... suggests a requirement that the necessary writing authorizing a person other than the tax matters partner to extend the period for assessment is limited to one specifically referring to a consent agreement under section 6229(b)(1)(B)."); *Amesbury Apartments*, 95 T.C. at 242–43 ("There is no mandatory requirement that a partnership give authority to a person to execute a consent utilizing specific procedures, such as those outlined in the temporary regulation."); *see also id.* at 243 (stating that "authority to 'perform any and all acts * * * with respect to the above specified tax matters'" in a power of attorney was sufficient). Since no resolution of the issue is needed to decide this case, we express no opinion on the matter.

his fiduciary obligations. *Id.* at 225. Therefore, ''where serious conflicts exist, a TMP may be barred from acting on behalf of the partnership.'' *Id.* at 227. Because Transpac's TMPs were seeking favorable treatment with respect to their own criminal exposure by cooperating with federal criminal prosecutors, we found that they had ''a powerful incentive to ingratiate themselves to the government.'' *Id.* We observed, moreover, that ''the criminal in-vestigation created an overwhelming pres-sure on the TMPs to ignore their fiduciary duties to the limited partners.'' *Id.* Accord-ingly, we held that the consents signed by the TMPs did not bind Transpac's limited partners.

Our decision in *Transpac* was based on the presence of an actual conflict. We did not hold that the existence of a criminal investigation by the IRS automatically disqualifies a TMP or his representative from negotiating or entering into agreements with the IRS. *Cf. Phillips v. Comm'r*, 114 T.C. 115, 132 (2000) (''[T]he mere existence of an investigation [targeting the tax matters partner does not, in and of itself,] subvert a tax matters partner's judgment and bend him to the government's will in dereliction of his fiduciary duties to his partners.'' (internal quotation marks omitted)), *aff'd*, 272 F.3d 1172 [88 AFTR 2d 2001-7092] (9th Cir. 2002). We acknowledged that this is a fact-dependent inquiry, and that, in *Transpac*, ''[t]he facts of the matter [spoke] for themselves.'' *Transpac*, 147 F.3d at 227.

The case before us is readily distinguishable from *Transpac*. There is no evidence in this case that suggests that Roberts had any incentive to ingratiate himself to the government. There is also no suggestion that Roberts was a prospective government witness or that the consents were given to the IRS in exchange for a grant of immunity or other inducements relevant to the IRS's investigations. Any *quid pro quo* is unlikely here, where there is no evidence that either Roberts or his representative was aware of the IRS's criminal investigation.[17] As the Tax Court rightly acknowledged, ''[u]nless [Roberts] was aware of the existence [or the prospect] of the criminal investigation against him, we fail to see how Roberts, acting personally or through his attorney-in-fact, could have been influenced by personal concerns in such a way that he could not properly discharge his fiduciary duties to the limited partners of Madison.'' *Madison Recycling*, 81 T.C.M. (CCH) at 1496 [TC Memo 2001-85].

We also agree with the Tax Court's position that the § 6700 proceedings and the civil penalties imposed thereunder did not result in a conflict of interest. The injunction against Roberts was issued in August 1983 and civil penalties assessed in January 1985; the consents were executed in November 1985 and August 1986, after the § 6700 proceedings were closed. And, there is no suggestion that Roberts anticipated a criminal investigation or that the subsequent consents were part of a scheme to curry favor with the IRS in exchange for a decreased civil penalty.

Based on the record before us, we are unwilling to infer an abandonment of fiduciary duties by Roberts. For the same reasons, we agree with the Tax Court's finding that Jacobson was not himself operating under a conflict of interest sim-ply because he was Roberts's personal representative in Roberts's dealings with the IRS.

CONCLUSION

In sum, we conclude that petitioners have not met their burden of showing that the consents executed by Jacobson on behalf of Roberts were invalid or otherwise ineffective.[18] The FPAA was therefore timely, and the judgment of the Tax Court is hereby AFFIRMED.

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[17] The IRS agent in charge of the criminal investigation testified that, to the best of his knowledge, neither Roberts nor Jacobson was aware of the investigation. Petitioners had an opportunity to ascertain the extent of Roberts's and Jacobson's awareness of the IRS investigation at trial, but failed to call either to testify as witnesses. Based on the record before it, the Tax Court made a factual finding that Roberts and Jacobson were unaware of the criminal investigation. This finding is not clearly erroneous.

[18] Petitioners make a series of other arguments, all of which we have considered and summarily reject as meritless.

¶2002-5051

Edward DUKE, PLAINTIFF v. DEPARTMENT OF TREASURY, DEFENDANT. U.S. District Court, Eastern Dist. of New York, (DC NY) Docket No. 02-CV-0591(ERK)(LB), April 29, 2002. Year 1998. Decision for Govt.

1. Collection due process (CDP)—equivalent hearings. Pursuant to stipulation, taxpayer's action seeking discontinuation of IRS levy on his wages, CDP hearing and information on his underlying tax liability was dismissed without prejudice: taxpayer wasn't entitled to CDP hearing where he failed to make timely request for such, but could seek "equivalent hearing" under Reg. §301.6330-1(i) and directly contact IRS regarding payment of his remaining debt. *Reference:* United States Tax Reporter ¶63,305.01(30). IRC §6330.

Edward Duke 1019 Hancock Street Brooklyn, NY 11221.
Jennifer Gazaille Cohen Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 55, Ben Franklin Station Washington, DC 20044 Telephone: (202) 307-6403.

In the United States District Court for the Eastern District of New York.

Joint Stipulation of Facts and Order of Dismissal

1. **[1]** On January 20, 2002, Edward Duke (Plaintiff) filed the above-captioned case in the United States District Court for the Eastern District of New York seeking the discontinuation of an Internal Revenue Service levy on his wages, a hearing regarding the levy, and information on the underlying tax liability.

2. In 1998, the plaintiff took a loan from his pension plan and failed to report the distribution as income on his 1998 tax returns. As a result of the plaintiff's failure to report the income on his 1998 return and, following an audit, the IRS, on October 23, 2000, assessed a deficiency with respect to plaintiff's federal income tax liability for 1998 in the amount of $12,650.00, plus $4,554.35 in interest and penalties.

3. The plaintiff failed to pay the assessed liability. On September 7, 2001, a final demand letter, including a Collection Due Process notice (CDP notice), was sent to the plaintiff notifying him of the IRS' intent to levy upon his wages and his rights under the Internal Revenue Code, specifically a taxpayer's right to request a hearing within 30 days from the issuance of the final demand letter, as provided by 26 U.S.C. §6330.

4. On November 29, 2001, more than thirty (30) days after the issuance of the final demand, the plaintiff sent a letter to the IRS requesting a hearing. That letter was not honored as a request for a hearing as it was not signed by the taxpayer, as required under, 26 C.F.R. § 301.6330-1(c)(2), and because the letter was untimely.

5. A taxpayer who fails to make a timely request for a CDP hearing is not entitled to a CDP hearing. Such a taxpayer may nevertheless, as provided by 26 C.F.R. § 301.6330-1(i), request an administrative hearing with the IRS. Such an administrative hearing is referred to as an "equivalent hearing."

6. In order to receive such an "equivalent hearing", the plaintiff may complete and sign Form 12153 and submit it to the IRS.

7. From January 22, 2002 to March 18, 2002, the United States collected $7,315.78, through the levy imposed on the plaintiff's wages.

8. On April 5, 2002, the United States released the levy on the plaintiffs wages.

9. The plaintiff remains indebted to the United States in the amount of $7,792.76, as of April 17, 2002, plus statutory additions that may continue to accrue as provided by law until the liability is fully paid.

10. The plaintiff may directly contact the Internal Revenue Service at (800) 829-3903 regarding payment of the remaining liability.

WHEREFORE, the United States of America, and the plaintiff, Edward Duke, by and through the undersigned, hereby stipulate to the above-stated facts and the dismissal, without prejudice, of the above-titled action, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure.

APPROVED this 29th day of April, 2002.

EDWARD DUKE

EDWARD DUKE

1019 Hancock Street

Brooklyn, NY 11221

UNITED STATES OF AMERICA

JENNIFER GAZAILLE COHEN

Trial Attorney, Tax Division

U.S. Department of Justice

P.O. Box 55, Ben Franklin Station

Washington, DC 20044

Telephone: (202) 307-6403

SO ORDERED:

Dated 4/29/02

Judge, U.S. District Court

Eastern District of New York

¶2002-5052

Robin J. McDANIEL, PLAINTIFF v. INTERNAL REVENUE SERVICE, and Illinois Department of Revenue, DEFENDANTS. Robin J. MCDANIEL, Debtor. U.S. Bankruptcy Court, Northern Dist. of Illinois, (Bktcy Ct IL) Docket No. 00-B-11637; Adversary No. 01-A-00140, June 20, 2002. Years 1982, 1988, 1989, 1990, 1991, 1993, 1994. Decision for Taxpayer.

1. Tax claims in bankruptcy—dischargeability—willful attempt to evade or defeat tax. Pursuant to stipulation, Chap. 7 debtor's tax debt for 1 of 7 years was dischargeable under 11 USC §507(a)(7); and remaining years' debts were also dischargeable under §507(a)(7) where taxpayer didn't willfully attempt to evade or defeat tax under §523(a)(1)(C).

Reference: United States Tax Reporter ¶68,726.52(27).

Mark A. Locascio, Ltd. Attorney for Debtor 450 Skokie Blvd., Suite 502 Northbrook, IL 60062 (847) 480-3000.

In the United States Bankruptcy Court for the Northern District of Illinois, Eastern Division.

Order

BARBOSA, District Judge:

Chapter 7

[1] This cause coming to be heard for trial upon the Debtor's Adversary Complaint to Determine whether certain tax debts are dischargeable under Section 507 (a) (7) as to Defendant, Internal Revenue Service only, the court having heard evidence in this matter and the arguments of counsel with the court having jurisdiction herein and with the court fully advised in the premises;

IT IS HEREBY ORDERED by stipulation of the parties the Debtor's alleged 1040 tax due the Department of the Treasury/Internal Revenue Service for tax year 1982 is dischargeable under Section 507 (a) (7).

IT IS FURTHER ORDERED AND ADJUDGED that the Debtor's alleged 1040 tax debt due the Department of the Treasury/Internal Revenue Service for tax years 1988, 1989, 1990, 1991, 1993, and 1994 are dischargeable under Section 507 (a) (7) as the court finds the Debtor did not willfully attempt in any matter to evade or defeat such tax under Section 523 (a) (1) (C).

Dated: June ___, 2002

ENTERED: ___

Judge

MARK A. LOCASCIO, LTD.

Attorney for Debtor

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¶2002-5053

UNITED STATES OF AMERICA, PLAINTIFF v. Lawrence A. MITCHELL, DEFENDANT. U.S. District Court, Dist. of New Jersey, (DC NJ) Docket No. 00-45 (JBS), June 28, 2002. Earlier proceeding at (2002, DC NJ) 89 AFTR 2d 2002-2422. Years 1986, 1987. Decision for Govt.

1. 100% penalty for failure to pay over trust fund taxes—responsible person; willfulness—collection. IRC §6672 penalty assessments against construction co.'s founder/pres. were reduced to judgment: taxpayer was responsible person for co.'s unpaid trust fund taxes where he had signatory authority over co. accounts, hired employees, signed co.'s payroll tax returns for relevant periods, helped control co.'s finances, was fully responsible for co.'s large contract, pursued collection for co., had entrepreneurial status in co., and stayed actively involved in co. management after his alleged resignation; and his uncorroborated testimony that others were forging his name on co. checks wasn't credible, particularly in face of multitude of admittedly authentic checks signed by him and his attempt to submit materially altered tax documents into evidence. Also, tracing argument was frivolous; and taxpayer's willfulness was shown by his decision to pay other creditors while knowing and in disregard of outstanding tax debt. *Reference:* United States Tax Reporter ¶66,725.03(5); 66,725.04(35); 74,035.01(30). IRC §6672; 7403.

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In the United States District Court for the District of New Jersey.

Findings of Fact and Conclusions of Law

SIMANDLE, District Judge:

Not for Publication

The Court, sitting without a jury, tried this case on April 16 & 23, 2002. The principal issue is whether the United States has proved that defendant Lawrence A. Mitchell (''Mitchell'') is a responsible person under the Internal Revenue Code, 26 U.S.C. & 6672, against whom a tax assessment against Mitchell Construction Co. may be reduced to judgment.

For the following reasons, the Court finds that defendant Mitchell is a responsible person with respect to his corporation, Mitchell Construction Co., for the periods at issue from 1986 and 1987, with liability to pay the assessment of unpaid taxes in the amount of $196,428.08, plus interest and penalties, amounting to a total of $463,168.83 as of December 13, 1999.

The following constitute the Court's findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

FINDINGS OF FACT

1. This is an action to reduce federal tax assessments made against defendant/taxpayer Lawrence A. Mitchell (''Mitchell'') to judgment. The assessments are for withholding taxes not paid over to the IRS from Mitchell Construction Co., Inc. Jurisdiction is based on 26 U.S.C. § 7402(a) and 28 U.S.C. §§ 1340 and 1345.

2. Mitchell Construction Co. failed to pay over income taxes and social security taxes withheld from the wages of employees for the fourth quarter of 1986 through the third quarter of 1987, inclusive.

3. On January 9, 1990, a delegate of the Secretary of the Treasury made an assessment against defendant for a trust fund recovery penalty in the amount of $196,428.08, pursuant to Section 6672 of the Internal Revenue Code. This amount represented the sum total of the amounts the corporation withheld from the wages of the employees and failed to pay over to the

Internal Revenue Service.[1] By December 13, 1999, according to the IRS Certificate of Official Record (Ex. G-3), the amount due, including accrued interest, has grown to $463,168.83.

4. In 1986, Mitchell helped to found Mitchell Construction Co., which was to be an electrical contractor on a condominium project in Brigantine, New Jersey. He was also employed in electrical and mechanical contracting from 1972 to 1998, doing business under the name of Mitchell Mechanical and Electrical Contractors, which he operated out of his home. (Tr. 181–183, 193–194.) Mitchell was a licensed mechanical and electrical contractor, and in 1986, he was asked by Thomas Pauley if he "would be interested in furnishing my licenses for that particular job for a fee." (Tr. 183.) Mitchell also lent his name to the new corporation -- Mitchell Construction Co. -- because he was a known contractor in the Atlantic County area.

5. The corporation was formed by attorney James Aaron, Esquire. Mitchell was President, Pauley was supposedly Chairman of the Board of Directors, and Richard McConagly was Vice President. (Tr. 186.) Mitchell denied he had a stockholder interest in Mitchell Construction Co. (Tr. 187).

6. Defendant was the highest ranking officer (president) of the Corporation, and he was a member of the Board of Directors. He had substantial authority directing the construction work at the project.

7. Defendant signed payroll tax returns on behalf of the Corporation during the relevant periods, namely for the Fourth Quarter of 1986, the First Quarter of 1987, and the Third Quarter of 1987. (Ex. G-10).[2] His testimony that his signature is forged on these returns is not credible, for reasons discussed momentarily. He also knew about the requirements for paying over trust fund taxes to the IRS, since his other business, Mitchell Mechanical & Electrical Contractors, had also previously experienced IRS enforcement due to unpaid withholding tax liability. (Tr. 245.)

8. Defendant had signature authority on significant Mitchell Construction Co. corporate accounts and while the Corporation failed to pay over the trust fund amounts during the periods in question in 1986 and 1987, the defendant signed corporate checks payable to entities other than the IRS with the knowledge that the trust fund taxes were not paid over to the IRS. He also authorized transfer of substantial funds among the corporation's accounts. Checks signed by defendant amounted to hundreds of thousands of dollars.

9. Mitchell had signature authority as President of Mitchell Construction Co. on the corporate accounts at First Jersey Bank, including Account Nos. 0300-67053 (Ex. G-12) and 0300-69102 (id.), which he acknowledged in his testimony. (Tr. 204 & 211). The first account (0300-67053) was the general account for Mitchell Construction and it required two signatures, with the authorized signatories being Tom Pauley, Richard McConagly and Mitchell. (Tr. 204; Ex. G-12.) Large sums of money passed through these general account, such as a deposit for $306,000 on October 17, 1986 (Tr. 211; Ex. G-13C.) Deposits in November, 1986 to this general account included $99,000 on November 3, 1986, $70,000 on November 19, 1986, and $12,000 on November 24, 1986, and a total of $217,935.94 in deposits for the month ending November 28, 1986. (Id.) This account received deposits and other credits of $112,185.61 for the month ending December 31, 1986; deposits and other credits of $94,982.96 for the month ending

[1] On January 9, 1990 (Exs. J-3 & 4), the IRS Service Center assessed a 100-percent penalty against Mitchell for Mitchell Construction Company's trust fund liability arising from Form 941 Withholding as follows:

Fourth Quarter 1986	--	$ 81,825.07
First Quarter 1987	--	35,559.05
Second Quarter 1987	--	51,456.55
Third Quarter 1987	--	27,585.41.

[2] Certain exhibits introduced by the Government at trial bore G-series numbers, while others bore J-series numbers. For the sake of simplicity, all will be referred to in these findings as G-series exhibits.

January 30, 1987; $155,588.26 for the month ending February 27, 1987; $93,036.93 for the month ending March 31, 1987; $133,917.23 for the month ending April 30, 1987; $70,821.50 for the month ending May 29, 1987; $146,130.27 for the month ending June 30, 1987; $23,324.71 for the month ending July 31, 1987; $27,854.00 for the month ending August 31, 1987; and finally, $7,154.42 in deposits and other credits for the month ending September 30, 1987. (Id.) This demonstrates that Mitchell Construction Company's general account during the four quarters at issue here itself had significantly more than enough cash to have paid the Internal Revenue Service for these quarterly trust funds.

10. The second account above, upon which Mitchell acknowledged his signature authority, namely Account No. 0300-69102, was described as the petty cash account (Tr. 204), upon which Mr. Mitchell was also a signator. (Ex. G-12.) The account statements for this account are not in evidence.

11. A third large account, Account No. 0300-67746, was used extensively by Mitchell Construction Co. during this period, and the relevant account statements are in evidence. (Ex. G-13G.) The bank's signature card for this account (Ex. G-22) is not filled in with the names, titles, or signatures of the authorized signators (id.), and Mr. Mitchell testified he does not know whether he was an authorized signator. (Tr. 205.) Mr. Mitchell thought this account may have been Mitchell Construction Co.'s payroll account. (Tr. 206.) This payroll account (0300-67746) likewise had substantial activity during the relevant periods, since the following monthly deposits and other credits are reflected in the bank's monthly statements (Ex. G-13B):

Period Ending	Deposits
10/31/86	$119,106.00
11/28/86	38,000.00
12/31/86	75,200.00
01/30/87	82,042.44
02/27/87	71,858.83
03/31/87	67,413.73
04/30/87	58,774.58
05/29/87	51,737.63
06/30/87	54,684.62
07/31/87	25,197.23
08/31/87	(Missing)
09/30/87	20,215.00

This account (0300-67746) itself had substantially more funds than would have been needed to satisfy Mitchell Construction Co.'s trust fund obligations for the four relevant quarters. As shown below, Mr. Mitchell has signature authority for this account.

12. Mitchell Construction Co. also had a fourth significant bank account at a relevant time, principally the Fourth Quarter of 1986, namely Account No. 3010-810-8 at National Community Bank of New Jersey, for which the bank statements are also in evidence. (Ex. G-13A.) Mr. Mitchell did not recall whether he was an authorized signator on this account (Tr. 207), and there is no signature card in evidence. (Tr. 258.) This account (3010-810-8) received deposits and other credits of $165,247.82 for the month ending October 31, 1986; $261,090.53 for the month ending November 28, 1986; and $16,032.89 for the month ending December 31, 1986. (Ex. G-13A.) In 1987, the account had minimal declining balances starting with only $746.00 on January 1, 1987 to $3.48 as of May 29, 1987. (Id.) No copies of checks drawn upon this account are in evidence.

13. Mr. Mitchell has taken the position that he resigned from Mitchell Construction Co. on December 16, 1986, and that "Defendant has no knowledge concerning the actions of Mitchell Construction Co. after defendant's date of resignation." (Def. proposed Findings of Fact ¶ 2.) If so, he argues that he cannot be a responsible party for this 100 percent penalty, nor could his failure to have paid these taxes be willful. Contrary to Mr. Mitchell's allegations, the Court finds that he remained substantially involved in Mitchell Construction Co., that he continued to enjoy check writing authority, and that he continued to exercise major management responsibilities even after his purported "resignation," for the reasons now discussed.

14. Mr. Mitchell claims that on December 16, 1989, there was a meeting called by him to tender his resignation as a corporate officer. (Tr. 188.) He was concerned that the capitalization for the project allegedly promised by Pauley, McConagly, and John Wademan had not fully materialized (id.), and he testified that he personally saw and witnessed forgeries on checks, corporate resolutions, and borrowing documents. (Id. at 189.) He claims that he delivered a resignation letter on December 16, 1986 bearing his signature (Ex. G-6), and that he also wrote a letter to First Jersey National Bank on December 16, 1986. (Id.; Tr. 190.) His resignation letter stated that "I hereby tender my resignation as President of Mitchell Construction Inc. and as a member of the Board of Directos," while his letter to the bank directed the bank "to remove my name from all signature cards at your bank for any and all checking accounts for Mitchell Construction Inc., effective this date." (Ex. G-6.)[3]

15. There is no confirmatory evidence that the bank ever received Mitchell's December 16, 1986 letter or that the bank ever took action to remove Mitchell's name from these checking accounts. To the contrary, at about that point in time, First Jersey Bank began sending the monthly account statements to Mr. Mitchell's home address at 100 Van Sant Avenue in Linwood, instead of the previous address at the Mitchell Construction Co. construction trailer at Sand Dune Drive in Brigantine. (See Ex. G-13B (Account No. 0300-67746 as of 11/28/86 through 10/30/87, all indicating 100 Vansant Avenue address)). The same address change occurred in December, 1986 with respect to the National Community Bank Account No. 3010-810-8 (See Ex. G-13A, indicating new address of 100 Van Sant Avenue on all statements from 12/31/86 to 10/30/97.) Mitchell's testimony that he did not receive these monthly statements (Tr. 254–255) is not credible. His story that mail addressed to his home at 100 Van Sant Avenue was diverted by the post office to a post office box to which he lacked access or control (Tr. 254–55) is also not credible, and is unsupported by any indication in the record. Although he recalls that he did not live at his home at 100 Van Sant Avenue for three months due to a marital separation (Tr. 260), he is unable to recall the dates when he was not in his home (Tr. 319) (and supposedly would have been unaware of mail sent there). His story is also undermined by the fact that he has acknowledged that his own company -- Mitchell Mechanical & Electrical Contractors -- operated continuously from his home at 100 Van Sant with a secretary from 1972 to 1998 (Tr. 194), apparently without having any of its mail mysteriously diverted. Accordingly, the Court finds that Mr. Mitchell received the monthly bank statements for Mitchell Construction Co. from First Jersey National Bank and from National Community Bank at his home beginning in November, 1986 through October 31, 1987, and he was personally aware of the Mitchell Construction Co. accounts and activity throughout this period.

16. Mitchell's assertion that he withdrew from the management of Mitchell Construction Co. after December 16, 1986 is also untrue. He continued to supervise the construction project, designing and inspecting the mechanical and electrical work, and his professional licenses were in place on the project. (Tr. 237; 295; 320.) He stayed involved, as he testified, notwithstanding his concern with forgeries, in order to make a profit. (Tr. 305, 320) His percentage of the profit, if the project went to a successful completion under his guidance, would be $80,000. (Tr. 305.) The mechanical and electrical component alone was $4 million (Tr. 320–321) and required a substantial amount of Mitchell's hands-on time and effort. (Tr. 322) He examined

[3] The Court has not overlooked the fact that Mitchell's December 16, 1986 letters (Ex. G-6) were in existence by 1991 and furnished by Mitchell to Revenue Officer John D'Augustine, who suggested in a memorandum dated February 1, 1991 (Ex. D-4) that Mr. Mitchell not be held liable after December 16, 1986. (Tr. 140–142.) D'Augustine's recommendation was overturned by an IRS appeals officer, who interviewed Mitchell and reviewed other documents in possession of the IRS including the 100 percent penalty file, the checks, copies of the loan applications, and letters. (Tr. 143–144.) The Court has reviewed all evidence de novo, and concludes, for reasons stated in the accompanying Findings of Fact, that Mitchell did not resign in fact, nor did he effectuate the withdrawal of his corporate bank account signature authority, whether or not these letters were actually tendered by him in 1986.

a bank account of Mitchell Construction Co. in February, 1987, which was supposedly closed in September, 1986, for which he believed two employees (Chris Johnson and Marie Kuntz) made unauthorized phone transfers. (Tr. 278–280.) He corresponded with attorney Aaron over a period of time from April 6, 1987 to February 22, 1988 about his suspicions about the Kuntz/Johnson embezzlements. (Ex. G-7, 8, & 9.) He knew that the accountant prepared the tax returns that he denied signing, again showing familiarity with the business post-December 1986. (Tr. 287.)

17. Thomas Pauley also testified that Mr. Mitchell remained involved in the management of this company after his alleged resignation. Pauley did not recall seeing any letter of resignation from Mitchell, nor did he recall any all day meeting with arguments about the corporation at about that time. (Tr. 90.) There was never a time when Mitchell Construction was run by Pauley or McConagly without Mitchell (Tr. 90), since Mitchell was always involved, running the construction project. (Tr. 90–91.) Pauley never signed Mitchell's name to a check, and Mitchell never accused him of doing so. (Tr. 93.) Pauley's association with Mitchell Construction ended when the company owed Pauley money that he sought to collect until Mitchell himself stopped returning his phone calls. (Tr. 91, 100.)

18. Mitchell's testimony that he was concerned that McConagly and Pauley were forging his name on checks was not corroborated by any action or accusation he made at that time. He never accused Pauley, so far as Pauley is aware. (Tr. 93.) He never accused anyone of forging or embezzlement other than Johnson and Kuntz, involving no more than $30,000 of transactions, in allegations he made to attorney Aaron in 1987–88, supra, that did not pan out. He never told Aaron that he suspected McConagly or Pauley or anyone else in management of forging his name to checks. It would be quite telling that he continued to work with these alleged forgers and thieves if his concerns for their forgeries had been real. His concerns were not real, and I find that they now appear to be pretextual, to blame someone other than himself for his signatures on numerous substantial checks before and after December 16, 1986, and for his decisions to use corporate funds to pay creditors other than the IRS.

19. Mr. Mitchell's signature appears on hundreds of thousands of dollars of corporate account checks, drawn on the checking accounts identified above, both before and after December 16, 1986. He has testified that he signed no check after December 16th, and that any such document is a forgery. He also claims that his signatures on the three tax returns (Fourth Quarter 1986, First Quarter 1987, and Third Quarter 1987, see Ex. G-10) are forgeries. The Court must determine whether the genuineness of his signatures has been established.

20. There are many documents in evidence in which Mr. Mitchell admits the authenticity of his signature, including a $50,000 promissory note dated April 4, 1986 (Ex. G-15 & D-17; Tr. 225); a rider to the promissory note (Ex. D-10; Tr. 226); bank signature cards for Account Nos. 300-67053, and 300-69102 (Ex. G-12; Tr. 203, 205, 258); the December 16, 1986 letter of resignation and letter to the bank (Ex. G-6; Tr. 190); check #2191 for $10,000 to Pippi (Ex. D-20; Tr. 198, 277 & 332); check #2071 to the Union for $13,300 (Tr. 331); check #2129 for payment of unemployment taxes (Tr. 334); check #2023 for $150,000 (Ex. G-14; Tr. 330); and letters to attorney James Aaron (Ex. G-7 & G-8, dated Feb. 22, 1988 and Nov. 16, 1987, respectively. Tr. 278, 282). His signature is usually in the form of stylized cursive "LM" with the initials overlapping and entwined. There is, however, a substantial degree of variability among his authentic signatures, such as among the bank signature cards (Ex. G-12), the promissory note enlargement (Ex. D-17), and the rider to the promissory note (Ex. D-19), even though all these specimens were made in the short period of time from April – June 1976. Sometimes the "M" aspect of the signature is pronounced with three distinct vertical strokes (Exs. D-17 &

D-19) while other times, the "M" is indistinct and seems to have two or fewer strokes (Ex. G-12). Mr. Mitchell agreed in testimony that his signature styles showed such variance. (Tr. 314–315.)

21. Mr. Mitchell admits that his signature appears on many of the pre-December 16, 1986 checks, such as Check Nos. 2191, 2089, 2071, 2191, 2129, and 2023, about which he was questioned. Those signatures are essentially indistinguishable from the other pre-December 16, 1986 checks which he denies writing and endorsing, such as five checks payable to him on Account No. 300-67746, namely Exs. D-6 through D-10, for dates from 10/1/86 to 11/12/86, in amounts from $1,078.35 to $1,524.34. (Tr. 213–217.) While these signatures may vary from one to another, each of them resembles a style represented in the known authentic signature styles noted above. Similarly, his signature appears on bank documents Exs. D-15, 16, & 18, which he denies, even though these are the same signature style as the bank signature cards (Ex. G-12.)

22. With respect to post-December 16, 1986 checks, Mitchell acknowledged writing three "transfer checks," moving money from one Mitchell Construction account to another, namely, #2332 for $14,482 on January 12, 1987, #2353 for $12,010.83 on January 27, 1987, and #2422 for $11,713.63 on February 17, 1987 (Ex. D-21; Tr. 241–242.) His admitted signing of these checks is of course inconsistent with his earlier purported instruction to First Jersey Bank to remove his signature authority from the accounts on December 16, 1986, again making it implausible that he ever gave such an instruction to the bank.

23. Other post-December 16, 1986 checks signed by Mitchell include #1123 on March 11, 1987 in the amount of $2,253.69 payable to "Cash" and endorsed by "Sharon Mitchell" who was his daughter. (Ex. G-14; Tr. 274.) Similarly, #03105 on March 11, 1987 in the amount of $1,549.77 was signed by Mitchell, payable to Mitchell, and endorsed by Mitchell and his daughter Sharon Mitchell. (Ex. G-14; Tr. 275–276.) On March 10, 1987, Mitchell wrote check #1122 for $5,000 on Account No. 300-67746 to "Cash," which was endorsed by Victoria Whitecross (Ex. G-14; Tr. 326–238); this was no forgery, since Whitecross, according to Mitchell, was a trusted employee who was a payroll expert. (Tr. 290, 326). Similarly, although he denies it (Tr. 316), Mitchell wrote a $10,000 check (#2508) on March 3, 1987 to a supplier, Uhr Electric Supply Co. from Account No. 300-67053 (Ex. G-14; Tr. 316); seeing that Pauley countersigned the check with his initials "TAP," Mitchell testified, incredibly, that he left black checks for Pauley's use. (Tr. 317.) The signed blank check were meant to avoid the inconvenience of bothering Mitchell at his home 17 miles away in Linwood (Tr. 319), or when he was out of town on jobs in Baltimore (Tr. 337); even if Mitchell's story is true, he authorized the use of his signature on corporate checks after his supposed departure from such financial responsibilities, and he is therefore responsible. Also, Mitchell has suggested no motive why someone would forge his name on a Mitchell Construction check to a bona fide supplier such as Uhr Electric. (Tr. 319.)

24. Other post-December 16, 1986 checks on which Mitchell's signature appears, and which the Court finds he did sign, in the order listed in Ex. G-14, include:

Date	Account	Check	Amount	Payee
06-01-87	300-67053	2743	$ 6.511.24	Local Union 322
02-12-87	300-67053	2392	20.000.00	Kiker Sheet Metal
06-21-87	300-67053	2800	13.000.00	Siracusa & Son
04-01-87	300-67053	2610	12,500.00	Opec Leasing
04-07-87	300-67053	2626	10,000.00	Devlin Consult.
04-17-87	300-67746	1159	2,000.00	Southern Mech.
01-24-87	300-67746	2154	1,828.98	R. McConagly
01-14-87	300-67746	2099	1,103.42	L. Mitchell
02-04-87	300-67746	2180	1.294.59	L. Mitchell
03-29-87	300-67746	3160	1,057.65	R. McConagly
05-20-87	300-67746	3349	1,088.57	R. Volpe
03-31-87	300-67746	1127	1,047.66	R. McConagly
04-30-87	300-67053	2683	5,000.00	Lam Electrical
02-25-87	300-67088	1136	35.00	J. Roche
10-28-87	300-67746	3704	1,306.49	R. Volpe

25. Mr. Mitchell clearly had continued check-writing authority for Mitchell Construction through the year 1987, as demonstrated above.

26. Defendant Mitchell's submission of an altered tax document to this Court also reflects negatively on his credibility. In assessing the credibility of Mr. Mitchell, the Court takes into account the usual factors such as his demeanor on the witness stand, the extent to which his testimony is contradicted by other evidence in the case, the plausibility of his testimony, and the like. One factor of particular note in Mr. Mitchell's case is that he submitted to the Court evidence on the first day of trial, in support of dismissal on statute of limitations grounds, a document which had been materially altered in his favor to make it appear that the government's complaint against him was time-barred. On April 16, 2002, defendant Mitchell (through his attorney, Gary Levin) submitted Ex. D-1, which was his copy of the government's "Request for 100-Percent Penalty Assessment," also called Form 2749.[4] The handwritten "assessment date" on Ex. D-1 was "01-04-90," and defendant argued that the Complaint was therefore barred by the 10-year statute of limitations of 26 U.S.C § 6502(a)(1), since the Complaint was not filed until January 5, 2000, or 10 years and one day after the assessment gave rise to this § 6672 cause of action against Mitchell. The date "01-04-90" had been altered by or on behalf of defendant Mitchell, for reasons I found in the Oral Opinion of April 16, 2002 (Tr. 4/16/02 at 66–70), because the true date was "01-09-90" as indicated in Ex. G-3 (the IRS "Certificate of Official Record"), as well as in Ex. D-2 (the "Request for 100-Percent Penalty Assessment," supra), as well as Ex. P-19 (same, copy from U.S. Department of Justice Litigation File).

The Court's findings regarding the fabricated transformation of "01-09-90" to "01-04-90" were also memorialized in the Memorandum Order (filed April 17, 2002) at page 5, n.3. The Court's findings re-ferred to Ex. D-1 as "a discrepant copy of [Exs. D-2 and P-19]," id., which was clearly revealed when comparing enlarged copies of the assessment dates of Exs. D-1, D-2, and P-19 (See Exs. D-1A, D-2A, and G-19A). The "9" was altered to a "4" on defendant's Ex. D-1.

27. The Court finds that Mr. Mitchell, or someone on his behalf, altered the true copy of the "Request for 100-Percent Penalty Assessment" and submitted it to the Court at the last minute, as trial was scheduled to begin on April 16, 2002, to the surprise of Mr. Hrebiniak, in an attempt to get this case dismissed. There is no other reasonable explanation for how

[4] Defendant's counsel attached Ex. D-1 to his "Objection to Proposed Findings of Fact and Conclusions of Law" and submitted same to the Court on April 16, 2002, as the trial was about to begin. The assessment date portion of Ex. D-1 was enlarged in Ex. D-1A, which was also entered into the record because it more clearly shows "01-04-90."

the January 9, 1990 assessment date could have been changed to January 4, 1990 on Mitchell's copy alone, nor why Mitchell didn't "discover" this until the trial's first day, and Mitchell has tendered no other explanation.

28. A litigant who manufactures an important piece of evidence -- here, an alteration that would bar this entire case as untimely -- attempts to work a fraud on the Court and against the adverse party, here the United States. At a minimum, this causes the Court to carefully weigh Mitchell's other proofs and to question his overall veracity in this case.

29. The government has proved that Mitchell was properly assessed as a responsible person for the four quarters at issue. The facts show the following indicia of his responsibility:

(a) The ability to sign checks from corporate accounts, demonstrated by his signature card authority on several accounts and his de facto authority on others, at all relevant times.

(b) He signed the company's Form 941 tax returns for three of the four quarters, and all four returns each listed his home address at 100 Van Sant Avenue in Linwood, while Richard McConagly signed the remaining Form 941 return.

(c) He was among the individuals in control of the company's financial affairs, together with McConagly and Pauley, during the relevant times; he had full responsibility for the $4 million contract the company was performing; he was pursuing collection for the company's work; and he was investigating alleged embezzlement by two clerical employees.

(d) He hired certain employees from his own business to work for the company, and he selected subcontractors to work on the large construction project and in that sense, selected their personnel to do the construction work; there is, however, no evidence that he fired employees.

(e) He was President and a member of the Board of Directors, and his claimed "resignation" and revocation of bank account signature authority on December 16, 1986 are uncorroborated by any other documents or testimony, and are contradicted by his conduct and the bank's conduct after December 16, 1986.

(f) He had an entrepreneurial status in the company to the extent he was promised a substantial share of the profits ($80,000) from the project which was the company's sole mission, and he lent his name and professional licenses for the Company's use on this project, although he was not a shareholder.

30. His duties included payments for employees' taxes and benefits, as shown by his signatures on company checks including the following in Ex. G-14:

Local Union 322 Disbursement Acc't	#2743	06-01-87	$ 6,511.24
IBEW Local 211 Distribution Fund	#2273	12-15-86	$13,024.17
NJ Employment & Security Agency	#2129	10-15-86	$18,242.00
Local Union 322 Disbursement	#2179	11-14-86	$16,477.23
Local Union 322 Disbursement Acc't	#2071	10-15-86	$13,360.24

31. It is also telling that no witness backs his allegations of his diminished duties, forgery of his signature, or other points in dispute. Vickie Whitecross is apparently in Brigantine and not unavailable, yet her testimony was not sought by defendant. (Tr. 313.) Diane Starr failed to appear as a witness as defendant allegedly requested, claiming an emergency at work according to defendant's counsel, but promising to arrive by noon on the trial date, which she failed to do. (Tr. 313, 339.) Attorney James Aaron's whereabouts were allegedly unknown to defendant Mitchell (Tr. 314),[5] and investor John Wademan was said to have been a member

[5] James G. Aaron, Esquire, practiced in Shrewsbury, NJ 07701 in 1987, according to Aaron's letterhead in Ex. G-9. James G. Aaron, Esquire now practices in Ocean, NJ 07712, according to the official public listing in the New Jersey Lawyers Diary (2002) at p. 863. The Court takes judicial notice of this current official roster under Rule 201(b), Fed. R. Evid. It would not have been difficult for defendant to locate attorney Aaron if Mr. Mitchell wanted him to testify at trial.

of organized crime who spent time in prison for matters unrelated to this project. (Tr. 311, 323.) Richard McConagly was said to have three addresses in New Jersey to which defendant Mitchell sent certified mail in February, 2002 and which mail was not returned (Tr. 312), but Mr. Mitchell's testimony that he attempted to subpoena McConagly for trial (Tr. 252) was untrue; instead, Mitchell produced a copy of a subpoena that the government attempted to serve on him. (Tr. 253.) In other words, Mr. Mitchell failed to call any available witness to support his case.

32. Defendant Mitchell's conduct, in failing to make payments of the trust funds required by Form 941 liability, was willful. He knew of the company's obligations to account for and pay over these withholding taxes. He had previous personal experience with such tax problems with IRS in his own company. He signed three of the form returns at issue. He disbursed hundreds of thousands of dollars of corporate funds, or moved such funds among corporate accounts, without directing that a single dime was sent to the Internal Revenue Service, all while paying other creditors, suppliers, and even the company's shareholders Open Leasing and Devlin Consultants, Inc. (check #2610 and #2626, supra.) He had access to the company's bank statements which were sent to his home after November, 1986, and he well knew that these taxes were due (he signed three returns) and that no check had been written to pay the taxes.

33. The defendant has failed to pay the assessment made against him and the government is entitled to the entry of judgment against defendant in the mount of the assessment of the taxes, plus interest as allowed by law.

CONCLUSIONS OF LAW

[1] 1. The taxpayer, here defendant Lawrence Mitchell (''Mitchell''), has the burden of proof in litigation with the IRS with respect to determinations made prior to June 22, 1998, and the assessments of tax carry with them a presumption of correctness which must be rebutted. Braunstein v. United States, 979 F.2d 952, 954 [71 AFTR 2d 93-1714] (3d Cir. 1992); United States v. Pomponio, 635 F.2d 293 [47 AFTR 2d 81-324] (4th Cir. 1980). See also, Anastasato v. Commissioner, 794 F.2d 884, 886–887 [58 AFTR 2d 86-5349] (3d Cir. 1986); Christensen v. United States, 733 F. Supp. 844, 851–852 [65 AFTR 2d 90-1143] (D. N.J. 1990), aff'd, 925 F2d 416 (3d Cir. 1991). Even if present law were applicable here, the Government has met its burden of proving Mr. Mitchell's responsible person status and his liability for the 100 percent penalty assessment.

2. Employers such as Mitchell Construction Co. are required to withhold, from the wages of their employees, income and social security taxes, and to hold such taxes in trust for the United States. 26 U.S.C. §§ 3102, 3402, 7501. Turpin v. United States, 970 F.2d 1344, 1347 [70 AFTR 2d 92-5361] (4th Cir. 1992); Thomsen v. United States, 887 F.2d 12, 14 [64 AFTR 2d 89-5752] (1st Cir. 1989); Morgan v. United States, 937 F.2d 281, 284 [68 AFTR 2d 91-5491] (5th Cir. 1991); Gephart v. United States, 818 F.2d 469, 472–73 [59 AFTR 2d 87-1099] (6th Cir. 1987). Because the United States is required to credit employees for the withheld taxes (''trust fund taxes'') ''regardless of whether they are paid by the employer,'' In re RIBS-R-US, Inc., 828 F.2d 199, 200 [60 AFTR 2d 87-5601] (3d Cir. 1987) (citing Slodov v. United States, 436 U.S. 238, 243 [42 AFTR 2d 78-5011] (1978)), Congress provided that officers and employees of such employers can be held personally liable for such taxes under 26 U.S.C. § 6672 when the trust fund taxes are not paid over when due. Emshwiller v. United States, 565 F.2d 1042, 1044 [40 AFTR 2d 77-6094] (8th Cir. 1977); Gephart v. United States, supra; Morgan v. United States, supra; Thomsen v. United States, supra.

3. Despite its denomination as a ''penalty'' assessment, the statutory liability imposed by section 6672 is essentially civil in nature. Gephart v. United States, supra;

Monday v. United States, 421 F.2d 1210, 1216 [25 AFTR 2d 70-548] (7th Cir.), cert. denied, 400 U.S. 821 (1973).

4. The liability under § 6672(a) is imposed on a responsible person who has willfully failed to perform a duty to collect, account, and pay over the taxes. Plett v. United States, 185 F.3d 216 [84 AFTR 2d 99-5403] (4th Cir. 1999); Morgan v. United States, 937 F.2d at 284 (citations and footnote omitted). The responsible person's willful failure to perform any one of the three enumerated functions [collect, account for, or pay over] results in § 6672(a) liability Id. at 284 n.3 (citing Slodov v. United States, 436 U.S. 238, 250 [42 AFTR 2d 78-5011] (1978)).

5. Even though the employer, Mitchell Construction Co., Inc., was liable to pay the employment and trust fund taxes to the IRS, a responsible person for the company, here Lawrence A. Mitchell, is also held liable under Section 6672 when the company has failed to pay due to the fault of Mitchell. The Section 6672 liability is a separate and distinct liability, from and in addition to the employer's liability for the employment or trust fund taxes. Datloff v. United States, 370 F.2d 655, 656 [19 AFTR 2d 335] (3d Cir. 1966), aff'q 272 F. Supp 11 (E.D. Pa.), cert. denied, 387 U.S. 906 (1967). See also In re RIBS-R-US, Inc., 828 F.2d at 204; United States v. Huckabee Auto Co., 783 F.2d 1546, 1548–49 [57 AFTR 2d 86-987] (11th Cir. 1986).

6. Mr. Mitchell is a responsible person for Mitchell Construction Co. even if he is not necessarily the sole responsible person. There can be more than one responsible person for a given employer, and there usually is more than one responsible officer. Plett v. United States, supra, at 217; Quattrone Accountants, Inc. v. Internal Revenue Service, 895 F.2d 921, 926 [65 AFTR 2d 90-580] (3d Cir. 1990); United States v. Vespe, 868 F.2d 1328, 1332 [63 AFTR 2d 89-837] (3d Cir. 1989) That another person also may be liable under Section 6672 does not affect the liability of the person presently subject to suit. Quattrone, 895 F.2d at 926 (citations omitted). Accordingly, the liability under section 6672 is joint and several among responsible persons, and "each responsible person can be held for the total amount of withholding not paid." id. (quoting Sinder v. United States, 655 F.2d 729, 732 [48 AFTR 2d 81-5706] (6th Cir. 1981)). In the present case, the Court therefore need not determine whether others besides Mitchell are responsible persons; the issue is whether the facts demonstrate that he is liable under Section 6672.

7. In order for a person to be liable under section 6672, two elements must be satisfied:

(1) he must have been a person required to collect, truthfully account for, or pay over the employment or trust fund taxes; and

(2) he must have willfully failed to collect, account for, or pay over the trust fund taxes.

O'Connor v. United States, 956 F.2d 48, 49 [69 AFTR 2d 92-659] (4th Cir. 1992); Plett v. United States, 185 F.3d at 219; Quattrone, 895 F.2d at 927; Morgan v. United States, 937 F.2d at 284; Hochstein v. United States, 900 F.2d 543, 546 [65 AFTR 2d 90-937] (2nd Cir. 1990).

8. The defendant has argued that the Government must actually trace the funds withheld by Mitchell Construction Company, and that Section 7501 of the Internal Revenue Code, 26 U.S.C. § 7501, requires the Government to prove a nexus between corporate receipts and trust funds. The defense argues that this requirement arises from both Section 7501 and the Supreme Court's decision in Slodov v. United States, 436 U.S. 238 [42 AFTR 2d 78-5011] (1978). Thus, the defense argues, if the government cannot show that the company set up segregated trust fund accounts, or that it did not have the funds to pay the Form 941 tax liabilities, the defendant cannot be found liable. This position is incorrect as a matter of law and fact in this case. Section 7501(a) states:

(a) General rule. -- Whenever any person is required to collect or withhold any internal revenue tax from any other

person and to pay over such tax to the United States, the amount of tax so collected or withheld shall be held to be a special fund in trust for the United States. The amount of such fund shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including penalties) as are applicable with respect to the taxes from which such fund arose.

Defendant's position -- that if the company disregarded Section 7501(a) and failed to hold the withheld taxes in a special fund it cannot thereafter serve as a basis for liability upon a Section 6672 penalty assessment -- is frivolous, illogical, and finds no support in case law. It violated the tax code when such funds are not held in trust, and it aggravates the violation of law when the taxes are not properly accounted for the paid over to the IRS.

9. The Slodov case is clearly inapposite to defendant's argument. In Slodov, the Supreme Court held that an individual hired by a corporation after the corporation was liable for old taxes, who had nothing to do with the prior financial administration of the company, does not become responsible for the prior obligation. Slodov, 436 U.S. at 243. Here, the IRS does not seek to impose liability upon Mitchell for any period when he was not a substantial figure in the financial management of the company. Moreover, the lack of a segregated trust account for these corporate tax liabilities is immaterial to Mitchell's individual liability, because the amounts withheld from wages paid to employees are deemed to be held in trust for the United States, and they are not to be used in the operation of the business. United States v. Vespe, 868 F.2d 1328, 1331 [63 AFTR 2d 89-837] (3d Cir. 1989).

10. Defendant's argument factually also lacks merit. Mitchell Construction Company did not lack funds to pay over these trust liabilities to the IRS. As documented above, the corporate accounts contained hundreds of thousands of dollars in deposits during the four quarters at issue, substantially more than enough to have paid the quarterly IRS liabilities in question. This is simply not a case where imposition of responsible party liability would be unfair due to some failure of the company to realize income, since in fact there was substantial and continuing income and other funds passing through the corporate accounts when Mr. Mitchell was a person in charge, throughout 1986 and 1987.

11. Responsibility under section 6672 is a "matter of status, duty or authority, not knowledge." Quattrone Accountants, Inc. v. Internal Revenue Service, 895 F.2d 921, 927 [65 AFTR 2d 90-580] (3d Cir. 1990); accord Morgan v. United States, 937 F.2d at 284 (5th Cir. 1991) (citations omitted).

12. Section 6672 does not confine liability for the unpaid taxes only to the single officer with the greatest or the closest control or authority over corporate affairs. Denbo v. United States, 988 F.2d 1029, 1033 [71 AFTR 2d 93-1317] (10th Cir. 1993) (citing Gephart v. United States, 818 F.2d 469, 476 [59 AFTR 2d 87-1099] (6th Cir. 1987); Barnett, supra, ("the statute [26 U.S.C. § 6672] expressly applies to 'any' responsible persons, not just to the person most responsible for the payment of the taxes"). The responsible person need not even be a corporate officer. Quattrone, 895 F.2d at 927.

13. It likewise does not matter that Mitchell exercised joint financial responsibilities with others in the company who had joint check-writing authority. A person is responsible if the person has significant, though not necessarily exclusive control, over the employer's finances. Brounstein v. United States, 979 F.2d 952, 955 [71 AFTR 2d 93-1714] (3d Cir. 1992); Greenberg v. United States, 46 F.3d 239, 243 [74 AFTR 2d 94-7343] (3d Cir. 1994); United States v. Vespe, 868 F.2d at 1332. A person has significant control if he has the final or significant word over which bills or creditors get paid. Quattrone Accountants, 895 F.2d at 927; Greenberg v. United States, supra. Accord, Hochstein v. United States, supra, 900 F.2d at 547 ("[t]he central question . . . is whether the individual has significant control over the enterprise's finances."); Gephart v. United States, 818 F.2d at 473 ("the test for the

responsibility of a person under § 6672 is essentially a functional one, focusing on the degree of influence and control which the person exercised over the financial affairs of the corporation, and specifically, disbursements of funds and the priority to creditors.'')

14. Specifically, responsibility is found in high corporate officials who participate in decisions concerning payment of creditors. O'Connor v. United States, 956 F.2d at 51; Plett v. United States, 185 F.3d t 218. Mitchell was such an official in Mitchell Construction Co.

15. The indicia of ''responsibility,'' within the meaning of Section 6672, is to be found by using one or more of the following criteria:

(1) the ability to sign checks;
(2) the identity of the individuals who signed the Company's tax returns;
(3) the identity of the individuals who were in control of the Company's financial affairs;
(4) the identity of the individuals who hired and fired employees;
(5) the identity of the officers, directors, and shareholders;
(6) the individual's entrepreneurial stake in the company.

Brounstein v. United States, 979 F.2d at 954–55; Datloff v. United States, 252 F. Supp. at 32–33 (E.D. Pa.), aff'd, 370 F.2d 655 [19 AFTR 2d 335] (3d Cir.); Quattrone Accountants, 100 B.R. 235, 239 [63 AFTR 2d 89-1364] (W.D. Pa. 1989), aff'd, 895 F.2d 921 [65 AFTR 2d 90-580] (3d Cir. 1990). Accord Thomsen v. United States, 887 F.2d at 16 (''Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees.''); Gephart v. United States, 818 F.2d at 473. Mitchell had all of these attributes -- some to a greater degree than other -- throughout the relevant periods of 1986 and 1987, as found above.

16. Given the benefit of the above legal theories, and given the above facts, it is clear that defendant was responsible. He was the highest ranking corporate officer, he never resigned in fact, he directed the company's performance of its sole construction project, he was largely in charge of corporate financial matters, and he made decisions to pay other creditors.

17. Even if defendant did submit a paper resignation to attempt to shield himself from liability, it is the defendant's actions during the periods in question that control whether he was responsible or willful. Both before and after his purported resignation, he exercised substantial control in all the relevant areas.

18. The Courts of Appeals for the Third and Fourth Circuits have stated that ''willfulness,'' under section 6672, simply means a voluntary, conscious, and intentional decision to prefer other creditors over the Government, as opposed to an accidental choice. Quattrone Accountants, 895 F. 2d at 928; Turpin v. United States, 970 F. 2d 1344, 1347 [70 AFTR 2d 92-5361] (4th Cir. 1992).

19. A responsible person acts willfully if he pays other creditors in preference to the IRS knowing that taxes are due. Brounstein v. United States, 979 F.2d at 956; United States v. Vespe, 868 F. 2d at 1334; Quattrone, supra. Mr. Mitchell did so throughout the relevant periods.

20. Neither bad purpose nor evil motive, in failing to collect and pay the taxes properly, play a part in the civil definition of willfulness. Hochstein, 900 F. 2d at 948 (citing Monday v. United States, 421 F. 2d 1210, 1216 [25 AFTR 2d 70-548] (7th Cir.), cert. denied, 400 U.S. 821 (1970)). See also Datloff v. United States, 252 F. Supp. at 33, aff'd, 370 F.2d 655 [19 AFTR 2d 335] (3d Cir. 1966), cert. denied, 387 U.S. 906 (1967). Since proof of evil motive is not required, it is unnecessary to determine whether Mr. Mitchell's untrue testimony and alteration of evidence rise to the level of proof of his evil intent.

21. A responsible person also can act willfully if he pays other creditors with

reckless disregard for whether the taxes have been paid. Quattrone Accountants, 895 F.2d at 928. In this context, reckless disregard includes the failure to investigate or correct mismanagement after being notified that withholding taxes have not been paid. Morgan v. United States, 937 F.2d at 286 (citing Mazo v. United States, 591 F.2d 1151, 1154–55 [43 AFTR 2d 79-853] (5th Cir.), cert. denied, 444 U.S. 842 (1979)). See also Vespe, 868 F.2d at 1335. Mr. Mitchell knew that these liabilities were unpaid, he failed to take (or even direct others to take) corrective action, and he paid other creditors instead.

22. Willfulness, for purposes of section 6672, merely means a voluntary, conscious, and intentional act, and any payment to other creditors, including the payment of net wages to the corporation's employees, with knowledge that the em-ployment taxes are due and owing to the Government, constitutes a willful failure to pay taxes. Datloff v. United States, supra; Hochstein v. United States, 900 F.2d at 548; Morgan v. United States, 937 F.2d at 285–86; Gephart v. United States, 818 F.2d at 475; Emshwiller v. United States, 565 F.2d at 1045; Davis v. United States, 961 F.2d 867, 869 [69 AFTR 2d 92-1136] (9th Cir. 1992). Mr. Mitchell's conduct easily satisfies these standards of willfulness.

23. It is irrelevant that the funds available were disbursed in order to keep the corporation in business. "It is no defense that the corporation was in financial distress and that the funds were spent to keep the corporation in business with the expectation that sufficient revenue would later become available to pay the United States." Emshwiller v. United States, 565 F.2d at 1045; accord Hochstein v. United States, 900 F.2d at 548, 549.

24. In addition, the assurances of others that the taxes will be taken care of is no defense, Denbo v. United States, 988 F.2d 1029, 1033–34 [71 AFTR 2d 93-1317] (10th Cir. 1993), although in this case, no such assurances were ever given to Mr. Mitchell.

25. As is clear from the facts of this case, defendant was willful as a matter of law, having carried out the corporate policy of paying other creditors with full knowledge of the unpaid withholding taxes in an attempt to keep the business operating.

26. Defendant is liable pursuant to Section 6672 of the Internal Revenue Code and a judgment of $463,168.83 as of December 13, 1999, shall be entered against him.

27. The accompanying Judgment is entered.

June 28, 2002

Date

Jerome B. Simandle

United States District Judge

JUDGMENT

JEROME B. SIMANDLE U.S. District Judge

This case having been tried to the Court without a jury; and For reasons stated in the Court's Findings of Fact and Conclusions of Law filed today pursuant to Rule 52(a), Fed. R. Civ. P.;

IT IS, this 28th day of June, 2002, hereby

ORDERED that JUDGMENT be entered in favor of the plaintiff, United States of America, and against the defendant, Lawrence A. Mitchell, in the amount of Four Hundred Sixty-Three Thousand, One Hundred Sixty-Eight Dollars and Eighty-Three Cents ($463,168.83), together with applicable interest and penalties since December 13, 1999.

Costs for plaintiff.

JEROME B. SIMANDLE

U.S. District Judge

¶2002-5054

In Re: Johnnie L. BROWN, Debtor. U.S. Bankruptcy Court, Eastern Dist. of Wisconsin, (Bktcy Ct WI) Docket No. 1998-31716, July 2, 2002. Years 1992, 1994, 1995. Decision for Govt.

1. Tax claims in bankruptcy—tax liens and levies—IRS's right to unclaimed funds. Bankruptcy court clerk was ordered to pay unclaimed funds of Chap. 13 debtor over to IRS: IRS's valid prepetition lien on taxpayer's funds, which were initially held in trustee's possession, followed funds when they were transferred to clerk after case's dismissal and superceded taxpayer's 11 USC §1362(a)(2) right to turnover. Also, IRS's assertion of its right to funds served as functional equivalent to levy, which clerk was required to honor; and case law involving state law liens was inapposite. *Reference:* United States Tax Reporter ¶68,726.52(3); 63,215.02(246). IRC §6321.

United States Bankruptcy Court, Eastern District of Wisconsin.,

Order Directing Payment of Unclaimed Funds

McGARITY, Bankruptcy Judge:

For the reasons stated in the court's memorandum decision entered on this date, the Clerk of Bankruptcy Court for the Eastern District of Wisconsin is ordered to pay the unclaimed funds due the debtor in the above referenced case to the Internal Revenue Service.

MEMORANDUM DECISION ON PETITION FOR PAYMENT OF UNCLAIMED FUNDS

This proceeding involves a dispute over unclaimed funds held by the Clerk of Bankruptcy Court after the debtor's chapter 13 case was dismissed without confirmation of a plan, and the trustee was unable to return the funds to the debtor. This court has jurisdiction under 28 U.S.C. § 1334. Because the issues in this matter involve the administration of a case filed under Title 11 of the United States Code, and also a claim against the debtor, it is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (B).

The debtor filed a chapter 13 petition on November 20, 1998, and after failing to file a feasible plan, his case was dismissed on June 23, 1999. After the case was dismissed, the trustee attempted to return the undistributed payments made to him by the debtor. The check to the debtor in the amount of $916.42 was returned to the trustee by the postal service as unclaimed. The trustee then paid the unclaimed funds to the Clerk of Bankruptcy Court. 11 U.S.C. § 347(a); Fed.R.Bankr.P. 3011.

On December 4, 2001, The Financial Resources Group filed a petition for payment of unclaimed monies on behalf of the debtor. Notice of such request was given to the United States Attorney. 28 U.S.C. § 2042. At the hearing on the Internal Revenue Service's request for additional time to review the request for unclaimed funds, the IRS asserted its position that it was entitled to receive the unclaimed funds from the estate because the debtor had outstanding tax liabilities, which were well in excess of the amount to be returned to the debtor. The court provided the parties with an opportunity to file briefs on their positions, and the court received a brief from the IRS only.

According to the IRS, the debtor owes federal income taxes for the years 1992, 1994 and 1995 in the amounts of $6,863.38, $1,559.67 and $3,956.20, respectively. Liens attached to all property of the debtor, pursuant to 28 U.S.C. § 6321, when he did not pay those amounts after notice and demand. The liens arose on September 18, 1995, for the 1992 federal income tax liability, on September 25, 1995, for the 1994 federal income tax liability, and on February 23, 1998, for the 1995 federal income tax liability. Notices of Federal Tax Lien, giving the IRS priority as to third parties, were filed for those periods on August 17, 2000.

[1] Resolution of this matter depends upon the interplay between two federal statutes, 11 U.S.C. § 1326(a)(2) and 26 U.S.C. § 6321. Section 1326(a)(2) of the Bankruptcy Code provides that

A payment made under this subsection shall be retained by the trustee until confirmation or denial of confirmation of a plan . . . .

If a plan is not confirmed, the trustee shall return any such payment to the debtor, after deducting any unpaid claim allowed under section 503(b) of this title.

11 U.S.C. § 1326(a)(2). Section 6321 of the Tax Code provides:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any cost that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6321.

Thus, the court must determine whether the funds can only be turned over to the debtor pursuant to 11 U.S.C. § 1326(a)(2), or whether the monies may be turned over to the IRS under 26 U.S.C. § 6321 because of the federal tax liens that have attached to all property of the debtor. No notice of levy has been served on the Clerk because, as the IRS stated in its brief, levy was considered unnecessary for funds held by the court. See also Treas.Reg. § 301.6331-1(a)(3) (taxes cannot be collected by levy upon assets in custody of court); Gulf Coast Galvanizing, Inc. v. Steel Sales Co., 826 F.Supp. 197, 205 [71 AFTR 2d 93-2126] (S.D.Miss.1993) (noting that levy is administrative).

The IRS cites In re Beam, 192 F.3d 941 [84 AFTR 2d 99-6555] (9th Cir.1999), in support of its position that the funds do not have to be returned to the debtor. In Beam, the Ninth Circuit held the IRS could levy on funds paid to the trustee under the debtor's proposed chapter 13 plan and held by the trustee following dismissal of the case. The Beam court held that provisions of the Internal Revenue Code superseded § 1326(a)(2) of the Bankruptcy Code.

The court noted that § 6334(a)[1] of the Internal Revenue Code provided 13 categories of property exempt from levy under a federal tax lien, and those categories did not include funds held by the chapter 13 trustee after dismissal of a bankruptcy case. Beam, 192 F.3d at 944. Because § 6334(c) further specified that no other property or rights were exempt from IRS levy except as specifically set forth in § 6334(a), and § 1326(a)(2) of the Bankruptcy Code was not listed among the 13 items exempt from levy, the Ninth Circuit concluded that the Internal Revenue Code modified the operation of § 1326(a)(2). Id.

Other cases have allowed a creditor to assert state law liens against funds in the possession of the chapter 13 trustee upon dismissal of the case; however, the majority of those cases require the creditor to pursue their rights against the property in state court. See, e.g., In re Oliver, 222 B.R. 272 (Bankr.E.D.Va.1998); In re Walter, 199 B.R. 390 (Bankr.C.D.Ill.1996); In re Clifford, 182 B.R. 229 (Bankr.N.D.Ill.1995). In effect, the trustee does not make distributions to creditors when a plan has not been confirmed, notwithstanding the creditors' state law rights in the funds held by the trustee. As the IRS points out, these cases are distinguishable in that none of them involved the reach of a federal tax lien.

This view is not unanimous, however. One court determined that judicial economy favored resolving the disposition of the creditor's lien in bankruptcy court, even though no plan was confirmed. In re Doherty, 229 B.R. 461 (Bankr.E.D.Washington 1999). The court concluded that the chapter 13 trustee's costs primed both the debtors' claim to the funds as well as any state tax lien interest. Nevertheless, the state department of revenue had a lien on the funds that were not necessary to pay the administrative costs, i.e., the debtor's funds, and the trustee was required to comply with the levy. The Doherty court noted that leaving the lien creditor with the obligation to complete its pursuit of the funds in state court was not an

[1] The specific exemptions include wearing apparel and school books, fuel, necessary personal expenses, books and tool, unemployment benefits, undelivered mail, certain annuity and pension payments, workers' compensation, judgments in support of minor children, minimum exemptions for wages and salary, certain service-connected disability payments, certain public assistance payments, assistance under the Job Training Partnership Act, residences exempt in small deficiency cases and principal residences and certain business assets exempt in absence of certain approval or jeopardy. 26 U.S.C. § 6334(a)(1)-(13).

attractive solution. Id. at 466. Requiring the IRS to chase its liened funds in the debtor's possession is similarly unattractive.

One treatise, Mertens Law of Federal Income Taxation, takes the position that the funds should be turned over to the IRS:

When a taxpayer files for bankruptcy, that action will operate as an automatic stay to prevent collection efforts until there is a court hearing. Although a bankrupt taxpayer may possess property not subject to a levy because of the automatic stay provision, a tax lien will extend to such property. When a bankruptcy petition is filed, the Service will also maintain whatever tax liens that it has against the bankrupt's non-exempt property. If a bankruptcy case is dismissed, the bankrupt [sic] trustee is then obligated to either honor a notice of levy related to the non-exempt property or be subject to a penalty.

14 Mertens Law of Fed. Income Tax'n § 54A:10 (citing In re Beam, 192 F.3d 941 [84 AFTR 2d 99-6555] (9th Cir.1999)).

This court is satisfied that the IRS' position is correct with respect to both substance and procedure. Cases dealing with state law created liens, which required return of assets to the debtor, seem to require state court procedure for enforcement of those liens, a result that is not necessary in the instant case involving a federal tax lien. The IRS had a valid prepetition lien on all nonexempt property of the debtor, including the debtor's funds in possession of the trustee, and the lien followed those funds when they were transferred to the Clerk of Bankruptcy Court. As the Beam court found, the IRS' lien and levy superceded the debtor's right to return of the funds under 11 U.S.C. § 1326(a)(2). While the IRS has not served the Clerk with a notice of levy, an administrative act preliminary to seizing a particular asset or fund subject to a tax lien, the IRS has issued the functional equivalent of a levy by challenging the debtor's right to the funds held by the Clerk. The debtor has had the opportunity to challenge that claim and thus is in no way denied due process. Just as the trustee in Beam was required to honor the IRS levy, the Clerk of Bankruptcy Court is likewise required to honor the IRS' claim to the funds on which it has a lien.

This decision stands as the court's findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. A separate order consistent with this decision will be entered.

¶2002-5055

Darlene R. ESPOSITO, PLAINTIFF v. COMMISSIONER of Internal Revenue, DEFENDANT. U.S. District Court, Dist. of Columbia, (DC Dist Col) Docket Nos. 01-1912, 7, 2, 6, July 9, 2002. Years 1996, 1997, 1998. Decision for Govt.

1. District court jurisdiction—review of Tax Court decision—motions for declaratory and injunctive relief. District court lacked jurisdiction over pro se taxpayer's action for "appeal" of Tax Court decision upholding deficiencies against her, and motions for declaratory and injunctive relief were dismissed without prejudice: appellate review authority was solely vested in appeals courts. Also, court declined to transfer action to 3d Cir. under 28 USC §1631 where case would only be duplicative of taxpayer's previously filed appeal. *Reference:* United States Tax Reporter ¶74,825.02(5); 74,025.01(18). IRC §7402; 7482.

United States District Court, District of Columbia.

Memorandum Order

Ricardo M. URBINA, District Judge.

GRANTING THE DEFENDANT'S MOTION TO DISMISS; DISMISSING THE PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER; DISMISSING THE PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT

I. INTRODUCTION AND BACKGROUND

This matter comes before the court on the pro se plaintiff's motions for a declara-

tory judgment and a protective order and the defendant's motion to dismiss for lack of subject-matter jurisdiction. The plaintiff's petition for declaratory and injunctive relief arises out of an adverse decision of the United States Tax Court in which that court determined that the plaintiff, Darlene R. Esposito, owed tax deficiencies for years 1996, 1997, and 1998. Def.'s Mot. to Dismiss at 1–2; Esposito v. Comm'r of Internal Revenue, No. 4542-00 (T.C. June 18, 2001). Following that decision and an unsuccessful request for reconsideration, the plaintiff filed an action with this court on September 10, 2001. Esposito v. Comm'r of Internal Revenue, No. 4542-00 (T.C. July 18, 2001); Compl. The plaintiff also filed an appeal in the U.S. Court of Appeals for the Third Circuit in September 2001. Docket, Esposito v. Comm'r of Internal Revenue, No. 01-3617 (3d Cir.) (showing that the appeal was filed on September 25, 2001). The defendant moves to dismiss the plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction, arguing that only the United States Courts of Appeals may review a decision of the Tax Court.

II. DISCUSSION

A. Legal Standard for a Motion to Dismiss

On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. District of Columbia Retirement Bd. v. United States, 657 F.Supp. 428, 431 (D.D.C.1987). In evaluating whether subject-matter jurisdiction exists, the court must accept all the complaint's well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overturned on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982). The court need not, however, accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations. E.g., Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir.1990).

Moreover, the court need not limit itself to the allegations of the complaint. Hohri v. United States, 782 F.2d 227, 241 (D.C.Cir.1986), vacated on other grounds by 482 U.S. 64 (1987). Rather, the court may consider such materials outside the pleadings as it deems appropriate to determine whether it has jurisdiction in the case. Herbert v. Nat'l Acad. of Sciences, 974 F.2d 192, 197 (D.C.Cir.1992).

B. This Court Dismisses the Complaint for Lack of Subject Matter Jurisdiction

[1] In reviewing jurisdictional issues, a court cannot ignore statutory restrictions on its jurisdiction. The Internal Revenue Code explicitly addresses judicial review of the decisions of the Tax Court: "The United States Courts of Appeals ... shall have exclusive jurisdiction to review the decisions of the Tax Court...." 26 U.S.C. § 7482(a)(1); Hayward v. United States Tax Court, 762 F.2d 706, 707 [56 AFTR 2d 85-5134] (8th Cir.1985) (per curiam) (recognizing that exclusive jurisdiction to review Tax Court decisions rests with the Court of Appeals). Applying this standard to the instant case, the court holds that it lacks subject-matter jurisdiction over this matter. See Fed.R.Civ.P. 12(b)(1).

The plaintiff describes her complaint as an "appeal ... filed with respect to the decision rendered in the Tax Court." Pl.'s Compl. at 2. In her motion, the plaintiff also refers to this action as an appeal. Pl.'s Mot. for Declaratory J. at 1–2. Considering the plaintiff's complaint and litigation in the United States Tax Court, the court concludes that the plaintiff seeks review of the June 18, 2001 Tax Court decision. Because the plain language of 26 U.S.C. § 7482 prohibits such a review, the court lacks subject-matter jurisdiction to decide the merits of this case. See Hayward, 762 F.2d at 707.

After determining that it lacks jurisdiction, the court may dismiss a party's claims under Rule 12(b)(1) or transfer the dispute to a court with jurisdiction. 28 U.S.C. § 1631. Under this statute, transfer to cure a want of jurisdiction is required "if it is in the interest of justice" to do so. Id. The legislative history of Section 1631

indicates that Congress contemplated that the section would provide assistance to those parties who were "confused about the proper forum for review." American Beef Packers, Inc. v. Interstate Commerce Comm'n, 711 F.2d 388, 390 (D.C.Cir.1983).

Confusion about the proper forum is certainly understandable when the litigants are pro se, as is this plaintiff. Because the plaintiff has already properly filed an appeal with the Third Circuit, however, the interest of justice does not warrant transferring this case to the Third Circuit, thereby adding a duplicative case to that court's docket. Docket, Esposito v. Comm'r of Internal Revenue, No. 01-3617 (3d Cir.). Consequently, the court dismisses the plaintiff's case for lack of subject-matter jurisdiction. Because the court lacks jurisdiction over this case, the court also dismisses without prejudice the plaintiff's other motions.

Accordingly, it is this __ day of July 2002,

ORDERED that the defendant's motion to dismiss is GRANTED; and it is

FURTHER ORDERED that the plaintiff's motion for declaratory judgment is DISMISSED without prejudice; and it is

ORDERED that the plaintiff's motion for a protective order is DISMISSED without prejudice.

SO ORDERED.

¶2002-5056

UNITED STATES OF AMERICA, APPELLANT v. Ronald D. NUTT, APPELLEE. In Re: RONALD D. NUTT, Debtor. U.S. District Court, Middle Dist. of Florida, (DC FL) Docket No. 6:01-Cv-1223-06-JGG, June 5, 2002. Bankruptcy Court, (2001, Bktcy Ct FL) 88 AFTR 2d 2001-5613, 271 BR 896, 2001-2 USTC ¶50613, remanded. Year 1995. Decision for Govt.

1. Tax claims in bankruptcy—100% penalty for failure to pay over trust fund taxes—objection to proof of claim—willfulness. Bankruptcy court's decision sustaining Chap. 11 debtor/business owner's objection to IRS's proof of claim for IRC §6672 penalty assessments was remanded: although finding that debtor had no actual knowledge of corp.'s nonpayment of employment taxes until 4th quarter of year at issue wasn't erroneous, court never referred to former corp. employee's letter asserting that taxpayer knew of tax nonpayment in prior years; and, if such assertions had any fact basis, taxpayer would be responsible for unpaid taxes because he acted with reckless disregard of known or obvious risk of nonpayment. *Reference:* United States Tax Reporter ¶68,726.52(15); 66,725.04(60); 68,726.51(10). IRC §6672.

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Bankruptcy Clerk U.S. Bankruptcy Court Middle District of Florida First Bankers

Bldg. 135 W. Central Blvd. Orlando, FL 32801.

United States District Court, Middle District of Florida, Orlando Division.

Order

YOUNG, Senior District Judge:

This case came before the Court on April 9, 2002 and May 28, 2002 for oral argument on appeal from the August 2, 2001 Findings of Fact, Conclusions of Law and Order of the Bankruptcy Court sustaining Debtor's Objection to Claim No. 3 of the Internal Revenue Service. This Court has jurisdiction pursuant to 28 U.S.C. § 158(a).

After reviewing the record on appeal and following argument of counsel, it is the opinion of this Court that the case should be remanded for further findings.

Background:

On August 24, 2002, Debtor, Ronald D. Nutt, filed a voluntary personal bankruptcy petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C.)[1] . On November 15, 2000 the Internal Revenue Service (IRS) filed a proof of claim for Debtor's unpaid trust fund recovery penalty liabilities assessed pursuant to § 6672 of the Internal Revenue Code (26 U.S.C.) for unpaid employment taxes for Hallmark Builders, Inc., for the second, third and fourth quarters of 1995 in the amount of $248,862,03.[2] The IRS contends that the Debtor was liable for payment of the trust fund taxes for all three quarters in issue because he was both responsible for ensuring that trust fund taxes were withheld from the wages of his former employees at Hallmark Builders and then timely paid over to the United States but that Ronald Nutt had willfully failed to do so.

On January 24, 2001 Debtor filed an objection to the IRS claim alleging (1) that the IRS breached a 1996 settlement agreement and as a result Debtor has suffered damages in excess of the amount of the IRS claim; and (2) that Debtor is not "responsible party" as defined under 26 USC § 6672, and has no liability to IRS for the claim[3] .

The bankruptcy court in sustaining the Debtor's objection and disallowing the IRS claim, found that Debtor did not *willfully* fail to pay over funds. The IRS appeals that decision.

Hallmark Builders, Inc. (Hallmark) was formed as a Florida corporation in 1975, for the purpose of building and selling homes in Central Florida. Ronald Nutt (Debtor) was the sole shareholder of Hallmark and had exclusive and direct management of Hallmark until he retired from day-to-day management in December 1993 at which time he appointed John Conner President. Thereafter John Conner served as President until May 1995. Conner replaced Hallmark's controller with an accountant, a Mr. Leyco, who handled all financial matters for Hallmark, including payroll. Although Ronald Nutt gave up the position of President, he nevertheless obviously continued to have final authority over the corporation. It was he who fired John Conner in May 1995. Apparently he continued as the sole stockholder without any board of directors disclosed by the record.

Hallmark failed to pay employment taxes for the second, third and fourth quarters of 1995. Debtor alleges he did not have knowledge that the taxes were not paid until October 1995. The bankruptcy judge in his Findings of Fact and Conclusions of Law, at pg. 3, #12, found that "Nutt did not have actual knowledge of any payroll tax delinquency until October 31, 1995."

After Hallmark Builders filed for Chapter 11 bankruptcy in February, 1996 Hallmark Builders, Ronald Nutt and the IRS entered into a written settlement agreement dated July 18, 1996 which agreement provided for the payment of $270,000 to the United States in full satisfaction of Hall-

[1] Ronald D. Nutt was President of Hallmark Builders, Inc. Hallmark Builders had previously filed a Chapter 11 bankruptcy on February 13, 1996. Hallmark Builder's Chapter 11 was converted to a Chapter 7 on February 21, 1997.

[2] $75,591.00 was a secured claim, $173,259.03 was an unsecured priority claim, and $12.00 was an unsecured general claim.

[3] The record reflects Debtor stipulated during the Mary 2, 2001 Final Evidentiary hearing that during the second, third and fourth quarters of 1995, the period in issue, he qualified as a "responsible person" as defined by statute.

mark's employment tax liability. The Settlement agreement contemplated repayment would be from sales of lots owned by Hallmark and Ronald Nutt. Thereafter, the IRS was paid some money from the sale of lots but there was an alleged breach of the agreement, which is the subject of the pending lawsuit assigned to another judge of this Court.

As previously states, the Bankruptcy court found that Debtor had not *willfully* failed to turn over the funds and that a totality of the circumstances indicated that Debtor acted in good faith.

Discussion

[1] Internal Revenue Code § 26 U.S.C. 6672(a) provides that when a person required to collect and pay over withheld taxes *willfully* fails to do so, he is liable for a penalty equal to the amount of the unpaid taxes. §6672 further provides that personal liability under §6672 is properly imposed upon the person or persons who: (1) were responsible for ensuring that the trust fund taxes were collected and accounted for or paid over to the United States; and (2) willfully failed to discharge that duty.

Although Debtor admits that for the second, third and fourth quarters of 1995 he qualifies as a ''responsible person'' under §6672 of the Internal Revenue Code, he states that he did not *willfully* fail to carry out his responsibilities for paying over the taxes. § 6672 does not impose upon the responsible person an absolute duty to pay over amounts that should have been collected and withheld. The failure to collect and remit trust fund taxes must be willful. Liability is not imposed without personal fault. See *Siodov v. United States*, 436 U.S. 238 [42 AFTR 2d 78-5011] (1978).

The term ''willfully'' is defined as meaning, in general, a voluntary, conscious, and intentional act. See *Mazo v. United States*, 591 F.2d 1151 [43 AFTR 2d 79-853] (5th Cir. 1979).

Absence of willfulness can be proved by an affirmative showing that the responsible person did not disregard his duties, and that he undertook all reasonable efforts to see that such taxes would be paid in circumstances where the employer had the means of payment and could reasonably be expected to make the payment. See *Feist v. United States*, 607 F.2d 954 [44 AFTR 2d 79-5843] (Ct. Cl. 1979).

The IRS contends that the Debtor acted willfully and with reckless disregard for a known or obvious risk by failing to determine whether withholding taxes were remitted to the IRS after learning that the company was experiencing cash flow difficulties.

While there is evidence in the record that Debtor had knowledge that Hallmark was experiencing cash flow problems, and had infused over $650,000 of his personal funds to help cure that problem, that evidence relates to a time period prior to Debtor's alleged knowledge of the IRS deficiency.

Decision:

The Eleventh Circuit Court of Appeals held in *Malloy v. United States*, 17 F.3d 329, 332 [73 AFTR 2d 94-1569] (11th Cir. 1994) ''. . . we hold that a responsible person is liable under §6672 if he or she either had actual knowledge that the taxes were not being paid or acted with a reckless disregard of a known or obvious risk of nonpayment.'' (emphasis added).

The Bankruptcy Judge found as a matter of fact that the Debtor did not have actual knowledge that the taxes were not being paid until October 1995. That finding is binding on this Court in the absence of a finding that it was erroneous. Although a different finding might have been made from the same facts, this Court is unable to say that the Bankruptcy Judge erred in this respect.

The Bankruptcy Judge also found that the Debtor's failure to know that the taxes were not being paid was not because of acting with reckless disregard of a known or obvious risk of non-payment. While the Bankruptcy Judge stated facts from the record that support that finding, there was no reference to that portion of John Conner's March 21, 2000 deposition (at page 98) referring to a communication from another

former Hallmark employee. Michael A. Storey (which is attached as Exhibit #5 to the Conner deposition). In that letter, Michael Storey states:

> "It seems the acid test is to view the situation historically as we now understand. Hallmark, previous to your tenure as President, filed bankruptcy, was delinquent in paying employment taxes on at least one occasion in 1988 or 1989, and had misappropriated funds. Roger concealed the tax delinquency and stole money from the company leading to his dismissal by Ron Nutt . . . ."

If there is a factual basis for the contents of Michael Story's letter, there could conceivably be a different view as to whether the Debtor acted with reckless disregard of a known or obvious risk of non-payment.

In *Malloy*, *supra*, the Eleventh Circuit also held:

> "At the time Malloy invested in the condominium management business, he was aware that the predecessor corporation, SPMC, had financial difficulties, and he saw that the business was restructured so he would not be responsible for SPMC's unknown liabilities. At least by February 1983, Malloy knew that SPMC had failed to pay withholding taxes and that SPMII (Malloy's current corporation), like SPMC before it, was having financial difficulties. Malloy also knew that the same employees who had been responsible for paying SPMC's bills were responsible for paying SPMII's bills. Malloy never made any inquiries to determine whether SPMII was paying the withholding taxes; . . . ."

If Michael Storey's assertions contained in his letter have any basis in fact, it could be found that the Debtor was in much the same position as *Malloy* and that he therefore would be responsible for the unpaid taxes because of acting with a reckless disregard for a known or obvious risk of non-payment. Based on the record as it now stands, this Court cannot make such a finding but will remand this case to the Bankruptcy Judge to make such further determination as he finds appropriate in light of the holding herein.

In accordance with the foregoing, it is

ORDERED that this case is REMANDED to the Bankruptcy Court for further proceedings consistent with this decision.

SO ORDERED in Chambers at Orlando, Florida, this 5th day of June, 2002.

GEORGE C. YOUNG

SENIOR UNITED STATES DISTRICT JUDGE

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¶2002-5057

Robert FEINSCHREIBER and Margaret Kent, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of Florida, (DC FL) Docket No. 01-3628-CIV-HUCK/TURNOFF, June 24, 2002. Earlier proceeding at (2002, DC FL) 89 AFTR 2d 2002-2874, 2002-2 USTC ¶50482. Years 1988, 1989, 1990, 1991, 1992. Decision against Taxpayers.

1. Actions against U.S.—damages—sovereign immunity—Federal Tort Claims Act—constitutional violations—unauthorized disclosure of return information—disclosure—summary judgment. Final judgment was entered denying taxpayers any recovery against govt. *Reference:* United States Tax Reporter ¶74,336.506(25); 76,557.53(12); 74,335.01(7); 74,315.01; 61,035.03(3). IRC §6103; 7431; 7433.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA,

FINAL JUDGMENT

Paul C. Huck United States District Judge

[1] Pursuant to the findings of fact and conclusions of law entered this date in open court, it is hereby ORDERED that Plaintiff Robert Feinschreiber and Margaret Kent take nothing by this action and that Defendant United States of America go hence without day. The Court reserves jurisdiction over appropriate motions for attorney fees and costs.

DONE in Chambers, Miami, Florida, this 24th day of June, 2002.

Paul C. Huck

United States District Judge

Copies furnished to:

Counsel of Record

¶2002-5058

MEDCHEM (P.R.), INC., PETITIONER-APPELLANT v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT-APPELLEE. U.S. Court of Appeals, First Circuit, (CA1) Docket No. 01-2251, July 10, 2002. Tax Court, (2001) 116 TC 308 (opinion by Laro, *J.*), affirmed. Year 1992. Decision for Govt.

1. Possession tax credits—Puerto Rico—active conduct of trade or business—regular and extensive participation; investment in economy. Tax Court properly determined that Puerto Rican ("PR") sub. of U.S. drug corp. wasn't entitled to possession tax credit for year it primarily derived income from PR sales of drug manufactured by unrelated 3d-party PR co.: taxpayer didn't itself actively con-

duct trade or business in PR under IRC §936(a)(2)(B). "Active conduct" of business under statute's plain language and legislative history required more than simple non-passive activity, just buying and reselling 3d-party manufactured products, or helping to avoid PR job losses; and clearly wasn't satisfied by taxpayer's employment of only 1 employee in 1-room office in PR for less than 1 year of requisite 3-year period. Also, taxpayer's argument that statute could be satisfied through attribution to itself of 3d party's manufacturing activities contradicted statute's implicit *by the taxpayer* requirement; case law decided under repealed Western Hemisphere Trade Corp. provisions, which had widely divergent policy goals from those of IRC §936, didn't apply; Court's analogies to IRC §179's and other Sections' regulatory definitions weren't arbitrary; and taxpayer's reliance on IRC §936(h)(5) was misplaced. *Reference:* United States Tax Reporter ¶9365.01(25). IRC §936.

David A. Hickerson with whom Lisa R. Fine and Weil, Gotshal & Manges, LLP were on brief for appellant.
A. Duane Webber and Baker & McKenzie on brief for Electronic Arts Puerto Rico, Inc., amicus curiae.
David English Carmack, Attorney, Tax Division, Department of Justice, with whom Eileen J. O'Connor, Assistant Attorney General, and Kenneth W. Rosenberg, Attorney, Tax Division, Department of Justice, were on brief for appellee.

United States Court of Appeals For the First Circuit,

APPEAL FROM THE UNITED STATES TAX COURT [Hon. David Laro, U.S. Tax Court Judge]

Before Selya, Circuit Judge, Stahl, Senior Circuit Judge, and Lynch, Circuit Judge.

LYNCH, Circuit Judge.

This tax case requires interpretation of the Internal Revenue Code's Puerto Rico and Possession Tax Credit provision, 26 U.S.C. § 936 (2000), which permits a domestic corporation to elect a possession tax credit if it meets certain conditions, id. § 936(a). The condition on which this case turns is that 75% or more of the gross income of the corporation for the three preceding years must be "derived from the active conduct of a trade or business within a possession of the United States." Id. § 936(a)(2)(B).[1]

The taxpayer, MedChem (P.R.), Inc. ("M-PR"), contends that it meets this "active conduct of a trade or business" requirement; the Tax Court and the Commissioner of Internal Revenue disagree. This issue appears to be one of first impression at the circuit level.

The particular tax credit codified at § 936 was added by the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified in scattered sections of 26 U.S.C.), although it has its roots in legislation from the 1920s, see Revenue Act of 1921, Pub. L. No. 67-98, § 262, 42 Stat. 227, 271 (1921). The government tells us that the tax credit is in the process of being phased out. See 26 U.S.C. § 936(j). This case has, in the interim, consequences for domestic corporations involved in business activity in Puerto Rico[2] and certain other possessions. Unfortunately, there are no promulgated regulations under § 936(a) and domestic corporations have been forced to make business arrangements in U.S. possessions without the prior guidance such regulations might provide.

Based primarily on § 936's text, understood in the context of the legislative history, we conclude that M-PR has failed to meet the "active conduct of a trade or business" requirement and, accordingly, we affirm the Tax Court's judgment. We do so without adopting the Tax Court's proposed test for what constitutes the active

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[1] Section 936(a)(2)'s other condition is that at least 80% of the corporation's gross income for the three-year period immediately preceding the close of the tax year must be "derived from sources within a possession of the United States." 26 U.S.C. § 936(a)(2)(A). The parties agree that MedChem (P.R.) meets this requirement.

[2] Puerto Rico is a Commonwealth; it is explicitly within the term "possession" for purposes of § 936. 26 U.S.C. § 936(d)(1) ("The term 'possession of the United States' includes the Commonwealth of Puerto Rico ....").

conduct of a trade or business in a U.S. possession for purposes of § 936(a).

I.

The facts in this case are not in dispute, MedChem (P.R.), Inc. v. Comm'r, 116 T.C. 308, 310 (2001); see generally Tax Ct. R. 122, although M-PR contests the inferences the Tax Court drew from the stipulated record. M-PR is the taxpayer claiming to qualify for the possessions tax credit.

M-PR's identity has gone through several transformations. M-PR was incorporated in Delaware on December 8, 1987, as MedChem Puerto Rico, Inc. A couple of weeks later, on December 22, MedChem Puerto Rico, Inc. changed its name to BioChem Products, Inc. Then, on March 1, 1992, BioChem Products, Inc. changed its state of incorporation to Massachusetts and, on November 25, 1992, changed its name to MedChem P.R., Inc. M-PR and all of its predecessors -- all of which we will refer to as M-PR -- were at all times wholly owned subsidiaries of MedChem Products, Inc. (''M-USA''). M-USA is a Massachusetts corporation with its principal place of business in Woburn, Massachusetts. Following the tax years at issue in this case,[3] M-USA succeeded M-PR through a merger of M-PR into M-USA.

The IRS found a deficiency of $815,196[4] in M-PR's federal income tax paid for the tax year ending August 31, 1992, and a deficiency of $1,705,019 in M-USA's tax payments for the same period. In consolidated cases in the Tax Court, M-USA, as successor by merger to M-PR, contested both of these claims of deficiency. MedChem, 116 T.C. at 309. It is the $815,196 liability that is at issue here.

During the relevant three-year period -- that is, during each of M-PR's taxable years ending on August 31, 1990–92 -- all of M-PR's reported income was ''intangible property income,'' see 26 U.S.C. § 936(h)(3), attributable to the sale of Avitene, a blood-clotting drug manufactured by Alcon Puerto Rico, Inc. (''A-PR''), an unrelated company.

On December 18, 1987, ten days after M-PR was incorporated, A-PR along with Alcon Pharmaceuticals, Ltd. and Alcon Laboratories, Inc. (collectively ''Alcon entities'') sold the Avitene portion of their business to M-PR and M-USA. The Alcon entities sold the equipment, raw materials, technology, and other assets associated with Avitene's manufacturing. M-USA acquired the receivables, non-competition agreements, goodwill, contract rights, records, patents and related know-how, trademarks, and Food and Drug Administration approvals. M-PR acquired receivables, inventory, and title to the machinery and equipment located within A-PR's manufacturing facility in Humacao, Puerto Rico. Those assets did not include A-PR's Avitene manufacturing facility in Humacao.

Before the acquisition, A-PR had been the manufacturer of Avitene. M-USA had nothing to do with the drug. Until ten days prior to the acquisition, M-PR did not exist. As part of the sale, A-PR agreed to continue manufacturing Avitene for M-PR using A-PR's own facility and labor and M-PR's recently-acquired raw materials and equipment. A-PR also used the technology acquired by M-USA. M-PR held title to the in-process and finished Avitene. A-PR shipped finished Avitene from its facility to M-USA, and title passed to M-USA, the purchaser. A-PR was solely responsible for any issues that arose until the finished product was delivered to a carrier for shipment to M-USA. In return, A-PR sent its invoices for its manufacturing services directly to M-USA, which paid, from M-PR's account, a price equal to the manufacturing cost plus 10%. The primary change effected by the 1987 sale was that certain assets were held in the name of either M-PR or its parent, M-USA.

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[3] When we refer to the ''tax years at issue'' or the ''subject years of this case,'' we mean the three-year period made relevant by § 936(a)(2). That is, the three-year period ''immediately preceding the close of the taxable year.'' Here, because the alleged deficiency occurred for the tax year ending August 31, 1992, the three-year period runs from September 1, 1989, through August 31, 1992.

[4] The Tax Court states that the deficiency was $815,196. MedChem, 116 T.C. at 309. In contrast, both parties, at various points in their briefs, state that the sum is $815,916. The Notice of Deficiency uses both figures. We assume that $815,196 is the correct figure.

The reason M-PR entered into the processing agreement with A-PR, in which A-PR manufactured Avitene for M-PR using M-PR's raw materials and equipment, was that M-PR needed to ensure a steady supply of Avitene until it built its own manufacturing facility in Puerto Rico. As it turns out, M-PR later abandoned its plan to construct its own Avitene facility in Puerto Rico.

During much of the relevant three-year period, M-PR had no employees. Its one employee, Mr. Perez, was a former A-PR employee. He worked for M-PR from March 1988 to June 1990 out of a one-room office that M-PR maintained. Mr. Perez spent much of his time planning M-PR's transition to its own Avitene manufacturing facility. M-PR also paid three independent contractors to assist Mr. Perez. M-PR treated the independent contractors as nonemployees for payroll and tax purposes. M-USA and A-PR employed the individuals, other than Mr. Perez and the independent contractors, associated with the Avitene manufacturing and sales business.

At the time of the 1987 processing agreement, M-PR and M-USA had hoped to establish their own manufacturing facility in Puerto Rico. M-PR purchased land in Puerto Rico, on which it planned to build its own Avitene manufacturing facility. In early 1990 M-USA suffered financial reverses causing it to lay off a third of its workforce and to default on $10 million in debt. As a result, M-PR suspended its plans to construct a manufacturing facility in Puerto Rico. M-PR then wrote off its capital expenditures that had been made on the new facility and closed its Puerto Rico office. When the office closed, Perez transferred M-PR's business records to A-PR and M-USA. As of July 1, 1990, all M-PR checks were issued by M-USA from M-USA's Woburn, Massachusetts office.

In early 1990 M-USA decided to move the manufacturing equipment and processes from A-PR's Humacao facility to M-USA's facility in Woburn. Significant elements of the equipment were moved from Humacao to Woburn by June 1990 and, by January 1991, all of the manufacturing equipment necessary to perform the first phase of the manufacturing process had been moved to Woburn. In October 1992, first-phase Avitene production commenced in Woburn. By April 1994, M-USA had substantially completed the construction, in Woburn, of its Avitene finished goods manufacturing facility.

II.

For its tax year ending August 31, 1992, M-PR claimed a tax credit under § 936. The Commissioner determined that M-PR's Avitene income was not "derived from the active conduct of a trade or business" within a possession as § 936(a)(2)(B) requires. Accordingly, the Commissioner issued a notice of deficiency in the amount of $815,196.

M-USA, as successor by merger to M-PR, contested the asserted deficiency. On June 27, 2001, the Tax Court entered its final decision, finding that M-PR was deficient, in the sum of $815,196, in its federal income tax payments. The Tax Court concluded that M-PR did not meet § 936(a)(2)(B)'s "active conduct of a trade or business within a possession" requirement. MedChem, 116 T.C. at 309, 328–29. The Tax Court held that

> for purposes of section 936(a), a taxpayer actively conducts a trade or business in a U.S. possession only if it participates regularly, continually, extensively, and actively in the manage-ment and operation of its profit-moti-vated activity in that possession .... [F]or the purpose of this participation re-quirement, the services underlying a manufacturing contract may be imputed to a taxpayer only to the extent that the performance of those services is adequately supervised by the taxpayers's own employees.

Id. at 336–37.

The Tax Court concluded that M-PR did not meet this test. Id. at 337. It concluded that A-PR and M-USA (located in a mainland U.S. facility) performed, directed, and controlled all of the business activities related to the manufacture of Avitene. Id. at 339. The Tax Court found that, under the

processing agreement, A-PR used its own personnel to manufacture, test, and package the Avitene at its Humacao facility. Id. at 317. A-PR employees performed all of the tasks required in the manufacturing process, including the supervision of that manufacturing. Id. at 317, 339. It was M-USA which distributed, marketed, and sold the drug in the United States. Id. at 339. Indeed, the processing agreement prohibited M-PR from taking a managerial role in the manufacturing process. Id. at 346. Any risks associated with M-PR's activities appear to be minimal, as M-USA had guaranteed payment of any debt, and performance of any of M-PR's obligations, arising from the asset purchase agreements. Id. at 316. M-USA consistently reported, including to the FDA and to the SEC, that the unrelated entity, A-PR, was the drug's manufacturer. Id. This information was also contained on the labels of the drugs. Id. at 315–16.

M-PR appeals the Tax Court's decision.

III.

A. Standard of Review

This court reviews the Tax Court's decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." 26 U.S.C. § 7482(a)(1) (2000); see also Silverman v. Comm'r, 86 F.3d 260, 261 [78 AFTR 2d 96-5031] (1st Cir. 1996). Our standard of review is two-fold. We review de novo the Tax Court's statutory and other legal interpretations. Alexander v. IRS, 72 F.3d 938, 941 [77 AFTR 2d 96-301] (1st Cir. 1995). We review its factual findings, including those based on inferences from stipulated facts, for clear error. Manzoli v. Comm'r, 904 F.2d 101, 103 [66 AFTR 2d 90-5030] (1st Cir. 1990). To the extent that M-PR is making a clear error argument with respect to the Tax Court's factual findings, we reject the argument.

There are no Treasury Department regulations interpreting § 936(a),[5] nor is the term "active conduct of a trade or business" defined for purposes of § 936. There are, however, some guides to statutory interpretation, which assist us. "It is well established in the tax law that an [IRS determination that a taxpayer owes the Federal Government a certain amount of unpaid taxes] is entitled to a legal presumption of correctness -- a presumption that can help the Government prove its case against a taxpayer in court." United States v. Fior D'Italia, Inc., No. 01-463, 2002 U.S. LEXIS 4418, at 9–10 [89 AFTR 2d 2002-2883] (U.S. June 17, 2002). Furthermore, income tax deductions and credits are matters of legislative grace; the taxpayer bears the burden of proving entitlement to any deduction or credit claimed. Indopco, Inc. v. Comm'r, 503 U.S. 79, 84 [69 AFTR 2d 92-694] (1992); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 [13 AFTR 1180] (1934); Norfolk S. Corp. v. Comm'r, 104 T.C. 13, 36 (investment tax credit), supplemented by 104 T.C. 417 (1995), aff'd, 140 F.3d 240 [81 AFTR 2d 98-1198] (4th Cir. 1998). Moreover, a deduction or credit should be allowed only where there is "clear provision therefor." New Colonial Ice Co., 292 U.S. at 440; see also Helvering v. Inter-Mountain Life Ins. Co., 294 U.S. 686, 689 [15 AFTR 280] (1935) (stating that "[d]eductions are allowed only when plainly authorized").[6]

B. Positions of the Parties

[1] The parties have presented the court with different interpretations of the meaning of § 936(a). The Tax Court has, in its ruling, left each side dissatisfied. Both sides' interpretations diverge from the Tax Court's, although the government's

[5] Had the Treasury Department promulgated a regulation interpreting § 936(a), we would have been required, absent contradictory statutory language, to defer to a reasonable interpretation. Kikalos v. Comm'r, 190 F.3d 791, 795–96 [84 AFTR 2d 99-5933] (7th Cir. 1999); Snowa v. Comm'r, 123 F.3d 190, 195–96 [80 AFTR 2d 97-6127] (4th Cir. 1997).

[6] We are not persuaded by M-PR's contention that, if § 936 is ambiguous, then this court should strictly construe it against the government. Here, we are interpreting a provision permitting a tax credit, not a provision levying a tax. The Supreme Court has stated that in the context of a tax deduction, it is "not impressed by the argument that . . . all doubts should be resolved in favor of the taxpayer." White v. United States, 305 U.S. 281, 292 [21 AFTR 1000] (1938); see also United States v. Stewart, 311 U.S. 60, 71 [24 AFTR 1042] (1940) (stating that "those who seek an exemption from a tax must rest it on more than a doubt or ambiguity"); Inter-Mountain Life Ins. Co., 294 U.S. at 689–90 (holding that deductions must be plainly authorized, not derived from ambiguities). Rather, it is the duty of a court to determine "what [the] construction [of a statute] fairly should be." White, 305 U.S. at 292. M-PR's argument would be more appropriate were this a case involving a statute imposing a tax, rather than a statute permitting a tax credit.

position is much closer to the Tax Court's conclusion.

The Tax Court rejected M-PR's statutory plain meaning argument. MedChem, 116 T.C. at 328–29. Instead, it crafted a test that, in the absence of a statutory or regulatory definition of "active conduct of a trade or business" for purposes of § 936(a), looks to regulations defining the phrase as it is used elsewhere in the code, bearing in mind the section's legislative intent, id. at 330–33. Applying this test, the Tax Court rejected interpretations more helpful to the taxpayer, provided in other regulations, see, e.g., 26 C.F.R. § 1.936-5(c) (2001). The applicable test, the Tax Court held, was whether the taxpayer "participates regularly, continually, extensively, and actively in the management and operation of its profit-motivated activity in that possession." MedChem, 116 T.C. at 336. It held that to impute a contractor's activities to the taxpayer, the taxpayer had to "adequately supervise[]" the provision of these services with its own employees. Id. at 337. The Tax Court found the facts about M-PR's relationship with the contract manufacturer inadequate under its newly crafted test, and thus found that M-PR is not entitled to the credit. Id. at 337-43.

The Commissioner rejects M-PR's "plain meaning" reading of the statute and generally rejects the proposition that use of contract manufacturers in possessions is ever sufficient to qualify for the § 936(a) tax credit, but allows for rare exceptions where the taxpayer corporation is very heavily involved in the operation and management of the contract manufacturer. The Commissioner seeks affirmance of the Tax Court's result, but at oral argument protested the Tax Court's test, which is more beneficial to taxpayers than the IRS's proposed test for what constitutes the active conduct of a trade of business. The IRS proposes that outsourced manufacturing may never (well, hardly ever) qualify for the tax credit. Only in rare instances, when the taxpayer is heavily involved in the management and control of operations of a contract manufacturer, says the IRS, might it qualify.

The taxpayer, M-PR, on the other hand, argues that the statute's plain meaning does not preclude tax credits to taxpayers who use contract manufacturers located in the possessions and that, if more were required, it has, on the facts, provided the requisite more. M-PR says the Tax Court is wrong in its statutory interpretation and in its choice of test. M-PR asserts that the Tax Court's test is inconsistent with regulations applicable to other parts of § 936.

We affirm the denial of the credit and the finding of deficiency. In doing so, we assess and reject the taxpayer's plain meaning arguments, look to the Act's legislative history for further guidance regarding congressional intent in enacting § 936, and compare the section at issue with the now-repealed Western Hemisphere Trade Corporation provisions of the Internal Revenue Code of 1954. We conclude that, on the facts presented, M-PR does not fall within the language of the statute or Congress's intent. We do so without adopting the Tax Court's proposed test.

C. The Statute and Plain Meaning

Before analyzing the statute, we think it helpful to understand the context in which the statutory interpretation question arises. "Possessions corporations ... are U.S.-chartered companies that are effectively exempt under section 936 of the Internal Revenue Code from Federal tax on business income and qualified passive investment income from Puerto Rico and certain other U.S. possessions." Dep't of the Treasury, The Operation and Effect of the Possessions Corporation System of Taxation, Sixth Report 1 (1989) (footnotes omitted).

The Treasury Department has described the general operation of the possessions corporation tax system:

> The possessions corporation system of taxation is a set of rules under which a U.S. corporation deriving qualifying income from possessions and Puerto Rico pays no income tax to the United States. As a U.S. corporation, a possessions

corporation is subject to federal tax on its worldwide income. However, a special credit available under section 936 fully offsets the federal tax on income from a trade or business in Puerto Rico and from qualified possession source investment income (QPSII). A U.S. parent corporation can, in turn, offset dividends received from a wholly owned 936 subsidiary with a 100 percent dividends-received deduction, which frees the dividend income from federal tax.

Id. at 5.

With this context, we turn to the statutory language. The code section at issue provides, in relevant part:

§ 936. Puerto Rico and possession tax credit

(a) Allowance of credit

(1) In general

Except as otherwise provided in this section, if a domestic corporation elects the application of this section and if the conditions of both subparagraph (A) and subparagraph (B) of paragraph (2) are satisfied, there shall be allowed as a credit against the tax imposed by this chapter an amount equal to the portion of the tax which is attributable to the sum of --

(A) the taxable income, from sources without the United States, from --

(i) the active conduct of a trade or business within a possession of the United States, or

(ii) the sale or exchange of substantially all of the assets used by the taxpayer in the active conduct of such trade or business, and

(B) the qualified possession source investment income.

(2) Conditions which must be satisfied

The conditions referred to in paragraph (1) are:

(A) 3-year period

If 80 percent or more of the gross income of such domestic corporation for the 3-year period immediately preceding the close of the taxable year (or for such part of such period immediately preceding the close of such taxable year as may be applicable) was derived from sources within a possession of the United States (determined without regard to section 904(f)); and

(B) Trade or business

If 75 percent or more of the gross income of such domestic corporation for such period or such part thereof was derived from the active conduct of a trade or business within a possession of the United States.

26 U.S.C. § 936(a)(1)-(2). A separate subsection of § 936 governs the tax treatment of possessions corporations' intangible property income. 26 U.S.C. § 936(h). The Treasury Department has issued regulations under § 936(h), see 26 C.F.R. §§ 1.936-4 to -7 (2001), although not under § 936(a). It is the § 936(a) ''derived from the active conduct of a trade or business'' language that is at issue here. 26 U.S.C. § 936(a)(2)(B).

M-PR argues that § 936(a) ''requires only that the taxpayer derive its income from an active business rather than a passive investment.'' Its argument is really two-fold: first, that ''active conduct'' means all non-passive conduct; second, that the taxpayer corporation need only derive its income from some non-passive source, meaning that the taxpayer can qualify by deriving its income from the active conduct of a third party rather than from the taxpayer's own active conduct. This interpretation, if accepted, would mean that a domestic corporation that gets its income from the sale of a pharmaceutical product manufactured by a contract manufacturer in Puerto Rico, as here, would qualify for the tax credit. We deal with each argument in turn, rejecting both parts as contrary to the text of the statute.

First, M-PR's interpretation, construing income ''derived from the active conduct of a trade or business'' to mean income ''derived from an active, rather than passive, business,'' renders the statutory term ''active'' surplusage. The phrase ''active

conduct of a trade or business'' does not mean that all income derived from anything that is not a passive investment qualifies for the credit.[7] We accept the Commissioner's view that the phrase ''conduct of a trade or business'' alone, without the term ''active,'' distinguishes section 936(a) income from passive investment income. M-PR's construction renders the term ''active'' redundant. That is not a permissible form of interpretation. E.g., New England Power & Marine, Inc. v. Town of Tyngsborough (In re Middlesex Power Equip. & Marine, Inc.), No. 01-2314, 2002 WL 1248226, at 4 (1st Cir. June 11, 2002) (stating that ''[w]e assume each term was meant to have separate content in order to avoid redundancy'').

Given that the statutory term ''active'' is not surplusage, we must determine what independent meaning it adds to the statutory phrase ''active conduct.'' Because ''active'' modifies ''conduct,'' we conclude that ''active conduct'' means something more than simply a minimal level of involvement in the process of conducting a trade or business. Not all conduct of a trade or business qualifies under § 936(a)(2)(B); only ''active conduct'' qualifies. Because the ''conduct of a trade or business'' itself requires some level of activity, the adjective ''active'' must, in context, signify something more than a nonzero level of activity.

The Oxford English Dictionary's first definition of the noun ''conduct'' is ''[t]he action of conducting or leading,'' and, as the term relates to a business, it is defined as ''[t]he action or manner of conducting, directing, managing, or carrying on (any business ... etc.).'' Oxford English Dictionary (2d ed. 1989), http://dictionary.oed.com. Similarly, Webster's defines the noun ''conduct'' as ''the act, manner, or process of carrying out ... or carrying forward (as a business, government, or war).'' Webster's Third New International Dictionary of the English Language Unabridged 473 (P.B. Gove et al. eds. 1993). ''Active,'' in turn, is generally defined as ''[c]haracterized by action'' and is defined in terms such as ''[o]riginating or communicating action,'' ''practical,'' ''working, effective, having practical operation or results.'' Oxford English Dictionary, supra; see also Webster's Third New International Dictionary of the English Language Unabridged, supra, at 22 (defining ''active'' as ''characterized by action rather than by contemplation or speculation'').

The mere act, without more, of purchasing products that another unrelated entity has taken the action to manufacture, and reselling the products to others outside the possession, does not fit within the meaning of ''active conduct of a trade or business.'' In such a case, it is the unrelated entity controlling and directing the manufacturing that is actively conducting the trade or business.

Here, the Tax Court was ''not even able to find that M-P.R. had any meaningful business activity in Puerto Rico.'' MedChem, 116 T.C. at 337. It found that M-PR's ''involvement in Puerto Rico during the 3-year period failed even to qualify as a trade or business in Puerto Rico,'' id. at 338, never mind as an actively conducted trade or business. It concluded that A-PR and M-USA, but not M-PR, directed and controlled ''[a]ll of the business activities connected to Avitene,'' id., and that A-PR ''performed every task required in the manufacturing process,'' without the ability of M-PR ''to manage, direct, or control any part of the manufacturing process,'' id. at 339. These findings were not clearly erroneous. On these facts, we are confident in the conclusion that M-PR did not itself actively conduct a trade or business.

The remaining question is whether A-PR's manufacturing activities may be attributed to M-PR for the purposes of § 936(a). The answer to this question hinges on M-PR's second claim, that the statutory phrase requires only that the income ''de-

[7] M-PR notes that the Commissioner has previously taken the position that the ''active conduct'' requirement is meant to distinguish between investment income and business income. That proposition is different from the proposition M-PR urges here, which is that the ''active conduct'' requirement is met so long as the taxpayer derives income from any source not wholly passive. To say that the ''active conduct'' requirement distinguishes investment income from business income is not to say that all income other than investment income meets the requirement.

rived'' by the taxpayer be from some third party engaged in the active conduct of a trade or business. We reject this claim as well. Both the Tax Court and the Commissioner interpret § 936(a) as requiring that the taxpayer, not someone else, be the entity engaged in the active conduct of a trade or business. We agree.

First, this reading is the most natural reading of the statutory requirement that at least 75% of the taxpayer's gross income during the relevant period be ''derived from the active conduct of a trade or business within a possession of the United States.'' 26 U.S.C. § 936(a)(2)(B). M-PR correctly notes that Congress could have more explicitly said, ''the active conduct by the taxpayer of a trade or business'' and it did not. But Congress might have concluded that the addition of the phrase would be redundant, given the preceding discussion and especially given that the taxpayer corporation is the only actor referenced in § 936(a)(1)-(2). Congress could also have said ''the active conduct by the taxpayer or any contract manufacturer of a trade or business,'' which is M-PR's reading, and it did not. Viewed myopically, the statutory phrase is silent on whose ''active conduct of a trade or business'' it refers to, but, viewed in context, the best reading is that it means the taxpayer's own active conduct. Ambiguity in this instance does not assist M-PR because a deduction or credit should be allowed only where there is ''clear provision therefor.'' New Colonial Ice Co., 292 U.S. at 440. M-PR has simply not met its burden of proving entitlement to the § 936 credit claimed.

To read the statute as requiring only that the income be derived from a third party's active conduct would eliminate the distinction between active conduct income and all other income, including passive investment income. Virtually all passive investment income, for example, is derived, somewhere down the chain, by some entity's active conduct of a trade or business.

Finally, as discussed below, the legislative history confirms Congress's intent to require the taxpayer claiming the credit to itself be engaged in the active conduct of a trade or business. If M-PR's interpretation were correct, then upon the 1976 enactment of § 936, see Tax Reform Act of 1976, Pub. L. No. 94-455, § 1051, 90 Stat. 1520, 1643–47 (1976) (current version at 26 U.S.C. § 936 (2000)), all domestic corporations that had contract manufacturers in Puerto Rico (and otherwise met the numerical requirements) would automatically have become eligible for the tax credit. This is, in our view, highly improbable on its face. It is particularly improbable given the legislative history discussed below.

D. Legislative History and Western Hemisphere Trading Corporations

1. Legislative history.

As stated above, at issue in this case is the proper interpretation of § 936's ''active conduct of a trade or business'' language. Section 936 in general, and the ''active conduct of a trade or business'' language in particular, have their roots in much older legislation. Before analyzing the legislative history as it pertains to the meaning of the relevant statutory phrase, we describe § 936's predecessors.

Both § 936 and the basic structure of today's possessions corporation tax system have their genesis in a provision of the Revenue Act of 1921. See Revenue Act of 1921, Pub. L. No. 67-98, § 262, 42 Stat. 227, 271 (1921). The phrase we interpret -- ''derived from the active conduct of a trade or business'' -- first appeared in the Revenue Act of 1921, though in a slightly different context. Compare id. with 26 U.S.C. § 936(a)(2)(B). The 1921 Act exempted a domestic corporation from federal taxes on foreign-source income if, for the three years preceding the close of the taxable year, it derived at least 80% of its gross income from sources within a possession and 50% or more of its gross income ''from the active conduct of a trade or business'' within the possessions. § 262, 42 Stat. at 271. Congress enacted this section of the 1921 Act to eliminate the competitive disadvantage that U.S. corporations were suffering as a result of double taxation of income earned outside the U.S. and to encourage U.S. business investments in

U.S. possessions. See S. Rep. No. 67-275 (1921), reprinted in 1939-1 C.B. (pt. 2) 181, 187; see generally Coca-Cola Co. v. Comm'r, 106 T.C. 1, 21 (1996) (describing the 1921 Act and its progeny); N.H. Kaufman, Comment, Puerto Rico's Possessions Corporations: Do the TEFRA Amendments Go Too Far?, 1984 Wis. L. Rev. 531, 533–37 (same).

Congress carried forward, without material change, the 1921 Act's possessions corporation exemption into section 931 of the Internal Revenue Code of 1954. See Internal Revenue Code of 1954, Pub. L. No. 83-591, § 931, 68A Stat. 3, 291 (1954). Section 931 used the same language as the 1921 Act's section 262, requiring, among other things, that 50% or more of the corporation's gross income be "derived from the active conduct of a trade or business." § 931(a)(2), 68A Stat. at 291.[8] Section 931 remained in effect without material change until the mid-1970s, when Congress enacted legislation approximating the current version of 26 U.S.C. § 936. See G.D. Searle & Co. v. Comm'r, 88 T.C. 252, 350–52 (1987) (describing the genesis of § 936).

Section 1051 of the 1976 Tax Reform Act added a new U.S. Code section, 26 U.S.C. § 936. See Tax Reform Act of 1976, Pub. L. No. 94-455, § 1051, 90 Stat. 1520, 1643–47 (1976) (current version at 26 U.S.C. § 936 (2000)). Section 936 partially replaced section 931, as it relates to Puerto Rico.[9] See id. The 1976 legislation effected a number of revisions in prior law. To focus on the revision central to this case, the new § 936 transformed the old section 931 exemption mechanism into a tax credit. The credit permits domestic corporations to offset U.S. taxes on income "derived from the active conduct of a trade or business" in Puerto Rico, if certain prerequisites are met. § 1051(b), 90 Stat. at 1644.[10] We rely on the Treasury Department's 1989 Report, which described the transition from the 1921 Act to the 1976 Act:

> The possessions corporation exemption remained unchanged until the Tax Reform Act of 1976. Many U.S. firms established plants in Puerto Rico after 1948, when Puerto Rico enacted a program of tax exemption for manufacturing firms. Before the 1976 Act was implemented, proponents of continued U.S. tax exemption argued that the possessions corporation system of taxation was needed to offset the U.S. minimum wage requirement, the requirement to use U.S. flag vessels in transporting goods to the United States, and other Federally imposed requirements that tended to reduce Puerto Rico's ability to compete with neighboring countries for U.S. investment.
>
> By enacting the Tax Reform Act of 1976, Congress wanted to leave undisturbed the tax exemption of earnings

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[8] The 1954 Internal Revenue Code provided, in relevant part:

Sec. 931. Income From Sources Within Possessions of the United States.

(a) General Rule. -- In the case of citizens of the United States or domestic corporations, gross income means only gross income from sources within the United States if the conditions of both paragraph (1) and paragraph (2) are satisfied:

(1) Three-year period. -- If 80 percent or more of the gross income of such citizen or domestic corporation (computed without the benefit of this section) for the 3-year period immediately preceding the close of the taxable year ... was derived from sources within a possession of the United States; and

(2) Trade or business. -- If --

(A) in the case of such corporation, 50 percent or more of its gross income (computed without the benefit of this section) for such period ... was derived from the active conduct of a trade or business within a possession of the United States ....

§ 931, 68A Stat. at 291.

[9] Section 936 did not entirely replace section 931. The then-existing provision -- 26 U.S.C. § 931 -- was retained, but only for qualifying "individual citizens," as opposed to corporations. In addition, it was made inapplicable to Puerto Rico by defining "possession," for purposes of section 931, not to include Puerto Rico. § 1051(c), 90 Stat. at 1645. In the case of domestic corporations deriving the requisite income from Puerto Rico and deriving the requisite income from active conduct of a trade or business in Puerto Rico, the § 936 credit is available. See 26 U.S.C. § 936. In the case of qualifying U.S. individual citizens, the Puerto Rican source income exclusion is now contained in 26 U.S.C. § 933.

[10] Since 1976, there have been many amendments to the possessions corporations taxation system in general and to § 936 in particular, including those imposed by the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982), and by the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986). We do not analyze these changes. The text of the provision we construe, 26 U.S.C. § 936(a)(2)(B), has remained unchanged since 1976, except that its 50% "trade or business" requirement is now a 75% requirement.

> from a trade or business in Puerto Rico or from investments made with those earnings for Puerto Rican use. At the same time, Congress wished to end the exemption for passive income from funds invested in foreign capital markets and to hasten their repatriation if not used in the possession . . . .
>
> To continue promoting Puerto Rico's industrial development, the Tax Reform Act of 1976 therefore left intact the exemption for income derived by U.S. corporations from operations in a possession. It also exempted from tax the dividends remitted by a possessions corporation to its U.S. parent. To prevent the avoidance of tax on income invested in foreign countries by possessions corporations, however, the Tax Reform Act eliminated the exemption for income derived outside the possessions. The changes in the tax treatment of possessions corporations were effected by removing possessions corporations from section 931 of the Internal Revenue Code and placing them into a newly created Code section 936.

The Operation and Effect of the Possessions Corporation System of Taxation, supra, at 6.

As to the problem before us, the Treasury Report described the effect of the change:

> Change in the scope of and method of effecting the tax exemption. Before 1976, a possessions corporation was exempt from U.S. tax on all income derived from sources outside the United States. Under the Tax Reform Act of 1976, the exemption was limited to two kinds of income:
>
> Income from the active conduct of a trade or business in a possession, or from the sale or exchange of substantially all of the assets used by the corporation in the active conduct of such trade or business; and
>
> QPSII, which is non-business income derived from the possession in which the corporation has its trade or business and which is attributable to the investment of funds derived from such trade or business for use within the possession.
>
> Rather than exempting the income from U.S. taxation, section 936 provides a credit equal to (and, therefore, fully offsetting) the U.S. tax on the income. The section 936 credit is not available for other income earned by a possessions corporation. However, a regular foreign tax credit may be claimed for foreign (including possession) taxes paid or accrued with respect to income that does not qualify for the 936 credit.

Id. at 7 (footnote omitted).

The House and Senate Reports are virtually identical on the pertinent provision. See H.R. Rep. No. 94-658, at 253–60 (1975), reprinted in 1976 U.S.C.C.A.N. 2897, 3149–56; S. Rep. No. 94-938, at 277–84 (1976), reprinted in 1976 U.S.C.C.A.N. 3438, 3707–13. The Reports discuss the tax treatment of corporations conducting trade or business in possessions of the U.S. as well as issues arising under the now-repealed Western Hemisphere Trade Corporation provisions of the Internal Revenue Code of 1954, §§ 921-922, 68A Stat. at 290–91 (repealed in 1976 for taxable years after 1979). See H.R. Rep. No. 94-658 at 253–60; S. Rep. No. 94-938 at 277–84.

Describing the law as it existed prior to the enactment of the Tax Reform Act of 1976, the House and Senate Reports recite that

> [u]nder present law, corporations operating a trade or business in a possession of the United States are entitled to exclude from gross income all income from sources without the United States, including foreign source income earned outside of the possession in which they conduct business operations, if they meet two conditions.

H.R. Rep. No. 94-658 at 253–54 (emphasis added); see also S. Rep. No. 94-938 at 277. With this in mind, a new provision, 26 U.S.C. § 936, was added "for the tax treatment of U.S. corporations operating in Puerto Rico." H.R. Rep. No. 94-658 at

256 (emphasis added); see also S. Rep. No. 94-938 at 279. We think this language supports the Commissioner's view that the taxpayer must be the one actively conducting the trade or business.

As to the changes in the possessions tax credit legislation, Congress stated that it sought to "assist the U.S. possessions in obtaining employment-producing investments by U.S. corporations, while at the same time encouraging those corporations to bring back to the United States the earnings from these investments to the extent they cannot be reinvested productively in the possession." H.R. Rep. No. 94-658 at 255; see also S. Rep. No. 94-938 at 279 (using the same language). The congressional history reflects a dual intention to stimulate investment, both active and passive, in Puerto Rico and to encourage the growth of new jobs in Puerto Rico. H.R. Rep. No. 94-658 at 255; S. Rep. No. 94-938 at 279 (same). Those are related but not identical objectives. Congress's emphasis on the creation of new jobs by operating companies is also reflected by the fact that Congress mandated that the Department of the Treasury report to it periodically on the progress in meeting that goal. See H.R. Rep. No. 94-658 at 259 (stating that the Department of the Treasury's reports are to include, among other things, "an analysis of ... the [provision's] effects on investment and employment in the possessions"); S. Rep. No. 94-938 at 282 (same).

Although the Department of the Treasury has not promulgated regulations under § 936(a), its reports provide data both on how Treasury has interpreted that section and on the context of the legislation. We look, in particular, to Treasury's 1989 Report. See The Operation and Effect of the Possessions Corporation System of Taxation, supra. The 1989 Report provides insight into Treasury's interpretation of § 936. For example, the 1989 Report says "[b]y enacting section 936, Congress sought to assist Puerto Rico in obtaining employment-producing investments." Id. at 3; see also id. at 46 (same). Accordingly, Treasury matched "possessions corporations' U.S. income tax returns with payroll and employment data from the companies' federal unemployment insurance tax returns" to determine "whether this objective has been attained." Id. at 46. In particular, Treasury sought to measure the "direct employment associated with section 936 companies." Id.

For example, as of 1989, Puerto Rican business expansion had "been concentrated in four high-technology industries: chemicals (including pharmaceuticals), scientific instruments, electrical and electronic equipment, and machinery." Id. at 27. From 1970 to 1988, the chemical industry's earned income grew from 11% to 44% of total income originating in Puerto Rican manufacturing. Id. Nearly all of the investments in those industries were made by possessions corporations. Id. at 27–29. Indeed, in 1983, about 62% of the employees in the Puerto Rican manufacturing sector were employed by possessions corporations; this represents about 12% of Puerto Rico's total employment. Id. at 3. As the 1989 Treasury Department Report makes clear, most of the corporations that qualified to receive the possessions tax credit were manufacturing corporations. Id. at 31.

On the whole, the views on eligibility for the tax credit expressed both in the legislative history and in the Treasury Department's Report are more consistent with those of the Commissioner and the Tax Court than those of M-PR. Those views are not binding on us, but they have some weight. Both sources tend to support the Commissioner's view that § 936(a) requires that the taxpayer itself actively conduct a trade or business, with the expectation being that this active conduct by the taxpayer would increase employment and investment in Puerto Rico. Both sources contemplate that the taxpayer be the party employing workers in the Puerto Rican economy.

Here, the Tax Court's conclusion, which was not clearly erroneous, was that M-PR's investment in Puerto Rico's economy was virtually nonexistent. MedChem, 116 T.C. at 337. M-PR's activities in Puerto Rico "failed even to qualify as a trade or

business in Puerto Rico," id. at 338, much less as an actively conducted one. A-PR and M-USA directed and controlled "[a]ll of the business activities connected to Avitene." Id. Furthermore, during the relevant three-year period, M-PR placed only one employee in Puerto Rico. That employee, Mr. Perez, worked for M-PR out of a one-room office for less than one year of the requisite three-year period.

2. Western Hemisphere Trade Corporations

M-PR urges that we follow the construction that some courts have given to the phrase "active conduct of a trade or business" under the Western Hemisphere Trade Corporation ("WHTC") provisions of the Internal Revenue Code of 1954, § 921, 68A Stat. at 290, that were repealed in 1976. Section 921 defined "Western Hemisphere trade corporation" to mean "a domestic corporation all of whose business ... is done in any ... countries in North, Central, or South America, or in the West Indies, and which satisfies" two requirements. Id. One requirement was that at least 95% of the corporation's gross income for the three preceding years be derived from sources outside of the United States. Id. The other was that at least 90% of the corporation's gross income for the three preceding years be "derived from the active conduct of a trade or business." Id.

Although at first cut the WHTC provision appears to be an apt point of comparison, ultimately this analogy does not assist M-PR. This is primarily because of the important differences between the purposes of the WHTC provision and § 936.

Congress may, particularly in the internal revenue code, use the same phrase, such as "active conduct of a trade or business," in attempts to reach different ends. The Supreme Court made this point in Commissioner v. Groetzinger, 480 U.S. 23 [59 AFTR 2d 87-532] (1987). After noting that the phrase "trade or business" appeared in over fifty sections of the Code, the Court stated: "[I]n this opinion our interpretation of the phrase 'trade or business' is confined to the specific sections of the Code at issue here. We do not purport to construe the phrase where it appears in other places." Id. at 27 & n.8. Other circuits construing the phrase "trade or business" have also concluded that the phrase has different meanings in different sections of the Internal Revenue Code. In Hughes v. Commissioner, 38 F.2d 755 [8 AFTR 10385] (10th Cir. 1930), for example, the Tenth Circuit, construing the statutory phrase "trade or business" in section 204(a) of the Revenue Act of 1921, Pub. L. No. 67-98, § 204(a), 42 Stat. 227, 231 (1921), stated that "[w]e are here concerned only with the meaning of this phrase as used in this section. The same phrase, in other statutes, or in other sections, in a different context, and for a different purpose, may or may not be helpful." Hughes, 38 F.2d at 757. This is not to say that the WHTC provision is necessarily inapposite, but rather simply to emphasize, as we have emphasized in other contexts, that "the same words may play different roles in different contexts." Walker v. Exeter, 284 F.3d 42, 45 n.4 (1st Cir. 2002). The relevance of the WHTC provision, then, turns on its similarity to the provision at issue here.

The Tax Court has described the legislative history of the WHTC provision as disclosing a congressional "desire to offset through a tax preference the competitive disadvantage suffered by certain American corporations abroad on account of the less onerous taxes to which their non-American competitors were subject." Kewanee Oil Co. v. Comm'r, 62 T.C. 728, 737 (1974). Accordingly,

> [i]t follows that when the "active conduct" requirement is read in the context from which it arose, namely the threat of foreign competition, one might well conclude that in passing the Western Hemisphere provisions Congress intended to grant relief to United States business activity in the Americas only to the extent that the beneficiary corporation conducted active business operations abroad vulnerable to the competitive threat posed by the tax-advantaged corporations of other countries.

Id. at 737–38.

Like the WHTC provision, the possessions tax credit was meant to offset the competitive disadvantage suffered by American companies. The possessions tax credit, however, was meant not only to offset certain impediments for U.S. corporations investing in Puerto Rico, but also to increase investment and employment-producing opportunities in Puerto Rico. This is a difference that makes a difference. To the extent that the WHTC provision was meant to increase the foreign competitiveness of domestic corporations, the geographic location of those corporations' operations was relevant only to a limited extent -- that is, it was important only to ensure that the domestic corporation actu-ally engaged in some foreign commerce. In contrast, the possessions tax credit was meant, in addition to advancing the competitiveness of domestic corporations, to stimulate investment in particular places, including Puerto Rico. On this account, unlike the WHTC provision, the location of the corporation's trade or business was critical to advancing this goal. After all, the goal is promoting investment in the possessions -- a goal the attainment of which is intrinsically tied to the location of the investments made.

M-PR relies on Frank v. International Canadian Corp., 308 F.2d 520 [10 AFTR 2d 5609] (9th Cir. 1962), a Ninth Circuit decision applying the WHTC provision of section 109 of the Internal Revenue Code of 1939. It is far from clear that this court would have viewed Frank's facts the same way and reached the same outcome as did the Ninth Circuit, even under the WHTC.

In Frank, the Pennsylvania Salt Manufacturing Corporation of Washington, a domestic corporation that regularly conducted business activities in British Columbia, decided to assume new shipping responsibilities. Id. at 522–23. For legitimate business reasons having to do with the most favored nation clauses in its contracts and the Robinson-Patman Act's prohibitions, Washington decided to form a new corporation, named International Canadian Corporation, as a WHTC, in order to perform the shipping. Id. International, in turn, had one full-time employee and assumed the parent's sales functions. Id. International did utilize services of Washington's employees and paid for those services. Id. at 523. The Ninth Circuit held, on review of a district court decision, that International, which came into existence for legitimate business reasons unrelated to the WHTC provision, was not disqualified from the WHTC credit although it had assumed former business of Washington, utilized and paid for help from Washington's employees, and did not have a source of supply or customers independent of Washington's. Id. at 526–27. The court found that International clearly was active, earning its income by performing a variety of services relating to the sale of chemical products. Id. at 525–27.

The Ninth Circuit's opinion is of limited utility because of the factual distinctions between it and the case here. For example, Frank found that International's existence was justified by a legitimate business purpose. Id. at 526. At least from early 1990, when M-USA had decided not to build a manufacturing plant in Puerto Rico, it is difficult to view M-PR as anything other than a corporate shell with little business reason to exist other than to attempt to secure the § 936 credit. Furthermore, as already discussed, the divergent policy goals of the possessions tax credit and the WHTC provision mean that the analogy is strained from the start. Nothing in the history of the WHTC leads us to the taxpayer's interpretation.

E. Analogy to Other Regulatory Definitions

The Tax Court found twenty-two uses of the phrase "active conduct of a trade or business" in the Internal Revenue Code. MedChem, 116 T.C. at 330 & n.13. M-PR argues that the Tax Court erred in looking by analogy to regulations interpreting "active conduct of a trade or business" as used in 26 U.S.C. §§ 179, 355, and 367, for purposes of interpreting the phrase as

used in § 936.[11] The argument is that the purposes of those sections are so different from the purpose of § 936 that their selection was arbitrary.

We do not think the selection was arbitrary. We analyze one example to demonstrate our point. M-PR says the regulation under § 179 is not analogous because that regulation is explicit: it refers to a trade or business "actively conducted by the taxpayer." 26 C.F.R. § 1.179-2(c)(6) (2001) (emphasis added). It states, in part, that "a taxpayer generally is considered to actively conduct a trade or business if the taxpayer meaningfully participates in the management or operations of the trade or business. A mere passive investor in a trade or business does not actively conduct the trade or business." Id. As stated earlier, our view is that the "by the taxpayer" requirement is implicit in § 936, and so the analogy to 26 C.F.R. § 1.179-2(c)(6) is not strained.

M-PR argues that the more appropriate analogy is to 26 U.S.C. § 936(h)(5), and guidance provided thereunder, which, M-PR says, contemplates the use of contract manufacturers. That section states, in relevant part, that

> an electing corporation shall not be treated as having a significant business presence in a possession with respect to a product produced in whole or in part by the electing corporation in the possession ... unless such product is manufactured or produced in the possession by the electing corporation within the meaning of subsection (d)(1)(A) of section 954.

26 U.S.C. § 936(h)(5). Section 954(d)(1)(A) states that

> the term "foreign base company sales income" means income ... derived in connection with the purchase of personal property from a related person and its sale to any person, the sale of personal property to any person on behalf of a related person, the purchase of personal property from any person and its sale to a related person, or the purchase of personal property from any person on behalf of a related person where -- (A) the property which is purchased (or in the case of property sold on behalf of a related person, the property which is sold) is manufactured, produced, grown, or extracted outside the country under the laws of which the controlled foreign corporation is created or organized.

26 U.S.C. § 954(d)(1) (2000). M-PR says that it relied on a Revenue Ruling concluding that, under § 954, when a "controlled foreign corporation" contracts out a manufacturing process to another manufacturer, the contract manufacturer's performance is considered to be performance by the controlled foreign corporation. See Rev. Rul. 75-7, 1975-1 C.B. 244. M-PR says § 936(a)(2) must be read, in light of Revenue Ruling 75-7, not to require the taxpayer actually to supervise the contract manufacturer's activities.

The two sections, however, measure different things. As the Commissioner points out, the Revenue Ruling allows contract manufacturing to be taken into account in narrow situations, not present here. Section

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[11] The sections selected by the Tax Court concern the following matters:

(1) 26 U.S.C. § 179 (2000). Section 179 deals with the election to expense certain depreciable business assets. It states, in part, that "[a] taxpayer may elect to treat the cost of any section 179 property as an expense which is not chargeable to capital account." Id. § 179(a). It defines "Section 179 property," for purposes of § 179, as "any tangible property (to which section 168 applies) which is section 1245 property (as defined in section 1245(a)(3)) and which is acquired by purchase for use in the active conduct of a trade or business." Id. § 179(d)(1) (emphasis added).

(2) 26 U.S.C. § 355 (2000). Section 355 deals with the distribution of stock and securities of a controlled corporation. Section 355(a)'s provisions apply

> only if either -- (A) the distributing corporation, and the controlled corporation ... is engaged immediately after the distribution in the active conduct of a trade or business, or (B) immediately before the distribution, the distributing corporation had no assets other than stock or securities in the controlled corporations and each of the controlled corporations is engaged immediately after the distribution in the active conduct of a trade or business.

Id. § 355(b)(1) (emphases added).

(3) 26 U.S.C. § 367 (2000). Section 367 deals with foreign corporations. It provides that, if in connection with certain defined exchanges, United States persons transfer property to foreign corporations, "such foreign corporation shall not, for purposes of determining the extent to which gain shall be recognized on such transfer, be considered to be a corporation." Id. § 367(a)(1). But, in general, § 367(a)(1) does "not apply to any property transferred to a foreign corporation for use by such foreign corporation in the active conduct of a trade or business outside of the United States."

Id. § 367(a)(3)(A) (emphasis added).

936(h)(1) taxes "intangible property income" to the U.S. shareholder of the § 936 corporation unless the § 936 corporation elects either the cost sharing or profit split method. See 26 U.S.C. § 936(h)(5)(C). To make that election, the § 936 corporation must have a "significant business presence" ("SBP") in the possession as to that product or service. In order to show a "significant business presence" certain numerical tests must be met and, in addition, the product must be manufactured or produced in the possession within the meaning of § 954(d)(1)(A). For these stated purposes, contract manufacturing costs may be attributed to the taxpayer as allowed by the regulations. Those regulations, for purposes of the SBP requirement, permit a possessions corporation to treat the cost of contract manufacturing as a cost of direct labor. See 26 C.F.R. § 1.936-5(c). The purpose appears to be to permit a taxpayer who has already satisfied the 75% "active conduct of a trade or business" requirement then to obtain § 936 credit for the contract manufactured product. We reject the argument that the section 936(h)(5) provisions govern by analogy the initial question of what is meant by the active conduct of a trade or business.[12]

F. Application of Section 936(a) to the Facts

Under our understanding of the statutory term, the requisite gross income of M-PR, over the relevant three-year time period, was not "derived from the active conduct of a trade or business within a possession of the United States." 26 U.S.C. § 936(a)(2)(B). This is because M-PR was not engaged in the active conduct of a trade or business in Puerto Rico for the three preceding years. The Tax Court was "not even able to find that MedChem P.R. had any meaningful business activity in Puerto Rico." MedChem, 116 T.C. at 337. We agree that, whatever M-PR's presence in Puerto Rico, over the relevant time-period, it did not actively conduct a trade or business there. A-PR and M-USA, but not M-PR, directed and controlled all of the Avitene business activities. A-PR performed the tasks required in the manufacturing process, without the ability of M-PR to control any part of that process.

During much of the relevant three-year period, M-PR had no employees. Its one employee, Mr. Perez, was a former A-PR employee who worked out of a one-room office maintained by M-PR. He worked for M-PR from March 1988 to June 1990, though only about ten months of his employment occurred during the relevant three-year period. M-PR argues that, for other reasons, A-PR activities must be attributed to M-PR, and that A-PR employees are M-PR's employees. The Tax Court adopted as its definition of an employee of M-PR the definition used by the IRS to determine if an individual is an employee for payroll tax and withholding purposes. See MedChem, 116 T.C. at 341–43 (citing 26 C.F.R. § 31.3401(c)-1(b) (stating, among other things, that "if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee")). Under that approach, neither A-PR nor the contract employees meet the test. Nor do those M-USA employees who served as M-PR officers but received no compensation from M-PR. We think the Tax Court's approach was correct because we agree that none of the purported M-PR employees were subject to M-PR's control as to the means and methods of carrying out the production and sale of Avitene. Even were this not the case, we also think it significant that, until this litigation, M-PR consistently treated these individuals as nonemployees for tax purposes.

Finally, M-PR makes a policy argument that it should be within the scope of the tax credit because it created jobs in the sense that it could have chosen earlier to move the Avitene production process out

[12] The taxpayer relies on cases arising under other provisions of the Internal Revenue Code, which hold that a taxpayer need not manufacture its own product but may be a manufacturer by use of a contract manufacturer. See Suzy's Zoo v. Comm'r, 273 F.3d 875, 879 [88 AFTR 2d 2001-6916] (9th Cir. 2001); Polaroid Corp. v. United States, 235 F.2d 276, 278 [49 AFTR 1731] (1st Cir. 1956). Those cases address different problems. One size does not fit all.

of Puerto Rico. Had it done so, there would have been a net job loss. But avoiding the destruction of jobs is not the same as creating new job opportunities, which was part of Congress's concern. It would seem contrary to congressional intent to create incentives for American companies to threaten the loss of contract manufacturing jobs in Puerto Rico unless the American companies were given the possessions tax credit. More significantly, M-PR's argument is too broad. All investment, of whatever nature, in Puerto Rico may be thought to contribute to job producing opportunities. But Congress did not intend the credit to apply whatever the nature of the investment. Congress limited the credit to those involved in the "active conduct of a trade or business." And that does not describe what the taxpayer here did.

G. Conclusion

We have no basis, in the statute or on the facts, to upset the Tax Court's reasonable conclusion that the taxpayers owe the deficiency assessed. This case has not required us to evaluate the Tax Court's proposed rule; each case will bring factual variations, which bring with them legal consequences.

We affirm the judgment of the Tax Court.

¶2002-5059

Sam SALMON, dba Salmon Construction, PLAINTIFF-APPELLANT v. NDC, a Nevada Corporation; United States of America, DEFENDANTS-APPELLEES. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 00-17186, June 24, 2002. District Court, (2000, DC NV) 86 AFTR 2d 2000-6542, affirmed. Earlier proceedings at (1999, DC NV) 84 AFTR 2d 99-6113, 99-2 USTC ¶50839, affirming in part and vacating in part on reconsideration (1998, DC NV) 82 AFTR 2d 98-6561, 99-1 USTC ¶50203. Decision for Govt.

1. Review of district court decision—motion for reconsideration—validity of lien—reasonable attorney's fees; proof. District court properly granted govt. summary judgment on priority of its tax lien over attorney's fees lien and properly determined that it was entitled to full payment of disputed funds: record showed that payment notice and demand and lien and levy notices were properly mailed and filed; court lacked jurisdiction to consider underlying merits of assessment; and inadequately documented fee request wasn't reasonable under IRC §6323(b)(8). Also, taxpayer's state law arguments were meritless; case's removal from state to federal court was proper; and burden of proof challenge was rejected. *Reference:* United States Tax Reporter ¶74,025.01(3); 63,235.16(40). IRC §6321; 6323; 7402.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the District of Nevada David Hagen, District Judge, Presiding.

Before D.W. NELSON and HAWKINS, Circuit Judges and FITZGERALD, District Judge.**

MEMORANDUM*

Unpublished Disposition

[1] Taxpayer Sam Salmon, dba Salmon Construction (Salmon), appeals from the district court's summary judgment holding that: (1) the Internal Revenue Service had a tax lien with priority over attorney fees earned by Salmon's attorney, Kevin Mirch; and (2) the IRS was entitled to the full amount of the tax lien. We have jurisdiction under 28 U.S.C. § 1291.

Salmon argues that the district court erred in finding that only one of the lodestar elements under Kerr v. Screen Extras Guild, 526 F.2d 67, 69–70 (9th Cir.1975) had been satisfied. The district court correctly determined, however, that the docu-

** The Honorable James M. Fitzgerald, Senior District Judge for the District of Alaska, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

mentation in support of attorney's fees satisfied only one of the 12 Kerr factors.

Salmon challenges the validity of the tax lien and levy. A federal tax lien arose on March 28, 1994, when the IRS assessed penalties against Salmon. The lien attached to Salmon's property, including his interest in the settlement proceeds. The Certificate of Assessment and Payments shows that Salmon was sent a notice and demand for payment, that payment was not made in full, and that a notice of federal tax lien was filed on May 20, 1994. The IRS sent a notice and demand for payment and a notice of intent to levy before levying on the property, as required by 26 U.S.C. §§ 6303 and 6331. The facts establish that the assessment, lien, and levy were valid.

Salmon argues that he was not liable for the IRS taxes upon which the government's lien was based because he did not have control over the company funds. Salmon failed to challenge the lien, and the district court lacked jurisdiction to consider the underlying merits of the assessment. 26 U.S.C. § 7422.

Salmon argues that Nevada Revised Statute § 18.015(4) required the district court to adjudicate the attorney fees lien within five days. The statute, however, requires the court to adjudicate the lien after five days notice to all interested parties.

Salmon argues that Nevada Revised Statute § 18.015(1) required the district court to determine the reasonableness of fees only where there is no agreement between the attorney and client from which a fee could be calculated. The record contained no such agreement and the argument was not raised below.

Salmon argues that the district court erred in allowing removal of the matter to federal court. Salmon did not raise the matter below and removal was proper under 28 U.S.C. §§ 1444 and 2410.

Salmon argues that the attorney lien enjoyed a priority over the tax lien. The district court correctly found, however, that the attorney fee request was not reasonable under 26 U.S.C. § 6323(b)(8). Therefore, the attorney lien did not enjoy priority over the tax lien.

Salmon argues that the district court erred by inconsistently instructing the parties as to the burden of proof standard it was going to apply. Nothing in the record supports Salmon's argument.

AFFIRMED

¶2002-5060

Stuart E. GLASS, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Texas, Dallas Division, (DC TX) Docket No. CIV.A. 3:00CV1543L, July 2, 2002. Years 1994, 1995, 1996. Decision for Taxpayer in part and for Govt. in part.

1. Actions against IRS—damages—unauthorized collection—jurisdiction—limitations periods—failure to exhaust administrative remedies. Attorney-taxpayer's damages complaint for IRS's allegedly unauthorized collection from him of deceased client's defunct co.'s employment and unemployment tax liability was dismissed on summary judgment: limitations periods barred claim to extent based on cause of action accruing more than 2 years before taxpayer filed suit; and fact that govt. didn't timely raise issue was irrelevant since limitations period was nonwaivable jurisdictional defense. Also, taxpayer didn't exhaust his administrative remedies with respect to remaining/timely claims; or, even if he did, no IRC violations resulted from IRS's clerical error on notice of tax due or by virtue of its withholding of his overpayment. *Reference:* United States Tax Reporter ¶74,335.01(30); 74,335.01(5). IRC §7433.

2. Refund actions—jurisdiction—failure to exhaust administrative remedies. Attorney's refund complaint was dismissed in part for lack of jurisdiction: taxpayer didn't exhaust his administrative remedies with respect to overpayment claim that wasn't included in his administrative refund claim, which covered only initial $100 payment he had earlier made to IRS. So, overpayment portion of complaint was

barred; but portion relating to $100 payment was allowed to proceed. *Reference:* United States Tax Reporter ¶74,225.01(20). IRC §7422.

3. 100% penalty for failure to pay over trust fund taxes—responsible person—summary judgment—proof. Attorney was denied summary judgment on question of his liability for deceased client's defunct co.'s employment and unemployment tax debts: whether attorney was IRC §6672 responsible person was remaining material fact issue. Evidence attorney offered that he was never officer, representative, interest owner, board member, day-to-day manager, authorized decision maker, or co. account signatory conflicted with govt.'s evidence that he did have authority to determine co.'s financial policy, attended meetings to discuss unpaid taxes, had access to books and records, and paid expenses on behalf of estate that held co.'s stock. *Reference:* United States Tax Reporter ¶66,725.02(30). IRC §6672.

United States District Court, N.D. Texas, Dallas Division,

MEMORANDUM OPINION AND ORDER

LINDSAY, District J.

Before the court are Plaintiff's Motion for Partial Summary Judgment, filed August 30, 2001; Defendant's Motion for Partial Summary Judgment, filed September 4, 2001; and Defendant's Motion to Strike Jury Demand, filed November 9, 2001. For the reasons stated herein, Plaintiff's Motion for Partial Summary Judgment is denied, Defendant's Motion for Partial Summary Judgment is granted, and Defendant's Motion to Strike Jury Demand is denied as moot.

I. Facts and Procedural Background[1]

From 1994 to 1996, Plaintiff Stuart E. Glass (''Glass'' or ''Plaintiff'') was the attorney for Mrs. Belen Stolar. Belen Stolar was the administratrix of her deceased husband's estate, Mr. Isaac Stolar (''Stolar''). Stolar died in May 1990, but before he died, he was the principal owner of Stolar Clinics, Inc. (''Stolar, Inc.'' or ''the company''). Stolar, Inc. ceased to operate sometime after Stolar's death, and its stock became part of his estate. Also after Stolar's death, Plaintiff Glass obtained possession of assets that belonged to Stolar, Inc., and the assets were held in his law firm's trust account. It is not entirely clear why Plaintiff Glass possessed the assets, but Defendant[2] contends that it knows how he obtained the assets: he allegedly was collecting the company's accounts receivables. Stolar, Inc. allegedly owed Defendant unpaid federal employment and unemployment taxes. On August 22, 1996, Defendant attempted to collect these taxes by serving a Summons and a Notice of Levy on Plaintiff Glass, which required him to turn over Stolar, Inc. assets that were in his possession. On September 9, 1996, he disbursed a $31,503.36 check to Defendant. This allegedly represented the full amount of Stolar, Inc. assets in his possession, but it did not cover the full balance of the company's tax liability. De-fendant therefore continued its attempt to collect Stolar, Inc.'s assets by serving Plaintiff Glass with Notices of Levy on September 16, 1996 and March 4, 1997. Defendant also served him with a Final Demand on September 16, 1996. He appar-ently believed that these continued collec-tion activities were improper, and on ap-proximately April 28, 1997 filed an administrative claim with Defendant wherein he complained that the activities were unauthorized collection activities in violation of 26 U.S.C. § 7433. The admin-

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[1] Even after reviewing the purported facts set forth in the summary judgment motions and Plaintiff's Complaint, it was difficult for the court to develop a coherent understanding of the facts that underlie this cause of action. Accordingly, in drafting this section, the court has pieced together details taken from the parties' respective submissions. The court notes that Plaintiff objects to a number of purported facts set forth in Defendant's summary judgment motion. To the extent those purported facts are in dispute and material, Plaintiff (as the nonmovant) is entitled to have the facts viewed in a light most favorable to him. Accordingly, any disputed facts set forth in the fact section are included only to allow for comprehensive presentation of background information. The court will give appropriate consideration to the disputed facts when it evaluates whether there are genuine issues of material fact that preclude summary judgment.

[2] The actions of the Internal Revenue Service, discussed herein, give rise to Plaintiff Glass's cause of action. Since the IRS is an agency of the United States, the United States is named as the defendant. Accordingly, the United States will hereafter be referred to as ''Defendant.''

istrative claim was denied by a letter from Defendant dated September 26, 1997.

Up to this point, Defendant had requested only that Plaintiff Glass turn over Stolar, Inc. assets in his possession to pay the company's outstanding tax liability. This changed, however, in 1999 because Defendant began to believe that Plaintiff Glass had sufficient control over Stolar, Inc.'s finances to make him personally responsible for the company's tax liability. Defendant contends that evidence of this control is that he had authority to determine Stolar, Inc.'s financial policy, attended meetings where the company's unpaid taxes were discussed, had access to or maintained the company's books and records, and was paying expenses on behalf of the estate that held the company's stock.

Plaintiff Glass contends that he did not have control over Stolar, Inc.'s finances because he never was: (1) an officer or employee of Stolar, Inc.; (2) hired to represent Stolar, Inc.; (3) an interest owner in Stolar, Inc.; (4) a member of the board of Stolar, Inc.; (5) a manager of Stolar, Inc.'s day-to-day operations; (6) authorized to make decisions on behalf of Stolar, Inc.; (7) authorized to act as a signatory on Stolar, Inc.'s bank accounts; or (8) required to collect, account for, or pay taxes imposed on Solar, Inc. In any event, on April 5, 1999, Defendant served Plaintiff Glass with a Notice of Tax Due on Federal Tax Return,[3] which indicated that he personally was liable for $17,052.68. This sum allegedly corresponded with the outstanding taxes owed by Stolar, Inc. Plaintiff Glass did not comply with the notice. Apparently, he did not believe he was personally liable for any taxes owed by the company. On August 2, 1999, Defendant therefore sent a notice that it intended to levy Plaintiff Glass's assets. The notice in-dicated that Plaintiff owed $17,503.25.[4]

Plaintiff Glass questioned the propriety of his personal liability for the taxes in a letter to Defendant dated September 3, 1999. He also paid $100 towards the tax liability on this date. Defendant maintained its position that Plaintiff was responsible for the overdue taxes. On September 13, 1999, Defendant therefore applied $1,249 that Plaintiff Glass was owed as a refund for overpayment on his 1998 tax return to offset the taxes he allegedly owed on behalf of Stolar, Inc.

Plaintiff Glass filed this suit on July 18, 2000. He apparently claims that Defendant engaged in the unauthorized collection of taxes in violation of 26 U.S.C. § 7433 when it: (1) undertook the collection activities that gave rise to his 1997 administrative claim and proceedings,[5] (2) sought to collect the outstanding taxes with the April 5, 1999 Notice of Tax Due on Fed-eral Tax Return and August 2, 1999 notice of intent to levy, and (3) withheld his $1,249 refund. He also asserts refund claims to recover the $1,249 withheld by Defendant, and the $100 he paid to Defen-dant. Defendant counterclaims under 26 U.S.C. § 6672 to recover the outstanding taxes that Plaintiff Glass allegedly owes.[6]

Both parties move for partial summary judgment. Defendant's motion sets forth its request to dismiss Plaintiff Glass's § 7433 claim on the grounds that the court lacks jurisdiction to hear the claim, Plaintiff lacks standing to bring the claim, and Defendant's actions did not violate § 7433. Plaintiff Glass's motion sets forth his request for judgment as a matter of law on his claim that Defendant's collection activities violated § 7433. The motion also sets forth his request to dismiss Defendant's § 6672 counterclaim on the ground that he

[3] Plaintiff Glass refers to this notice in his Complaint as being issued on April 15, 1999, as opposed to April 5, 1999. See Complaint at 2. The notice is attached to his Complaint as a portion of Exhibit A, and is dated April 5, 1999.

[4] The April 5, 1999 Notice of Tax Due on Federal Tax Return indicated that Plaintiff owed $17,052.68. The August 2, 1999 notice, however, indicated that Plaintiff owed $17,503.25. The increase partially can be explained because $345.61 of interest apparently accrued from the time of the initial notice to the time of the second notice. Even considering the accrued interest, however, there is an additional $104.96 increase that is not explained in the record.

[5] The court is not entirely clear whether Plaintiff Glass's Complaint should be read to set forth a § 7433 claim based on the 1997 collection activities, because the Complaint does not appear to make any specific reference to these collection activities as a basis for the claim. Out of an abundance of caution, the court nevertheless addresses these collection activities, because the parties have treated the collection activities as if they are a basis for Plaintiff Glass's § 7433 claim. See generally Defendant's Motion for Partial Summary Judgment at 5; Brief in Support of Plaintiff's Response for Partial Summary Judgment ("Brief in Support") at 4.

[6] As of September 22, 2000, Defendant contended that Plaintiff owed $15,808.64. See Defendant's Answer and Counterclaim at 3.

was not a person responsible for Stolar, Inc.'s taxes. The court begins its evaluation of the parties' motions by setting forth the summary judgment standard.

II. Summary Judgment Standard

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323–25 (1986); Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir.1998). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986); Ragas, 136 F.3d at 458.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. Matsushita, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. Eason v. Thaler, 73 F.3d 1322, 1325 (5th Cir.1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. See Forsyth v. Barr, 19 F.3d 1527, 1533 (5th Cir.), cert. denied, 513 U.S. 871 (1994). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. Ragas, 136 F.3d at 458. Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. Id.; see also Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915–16 & n. 7 (5th Cir.), cert. denied, 506 U.S. 832 (1992). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. Disputed fact issues which are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. Id. If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. Celotex, 477 U.S. at 322–23. In light of the summary judgment standard, the court first evaluates Defendant's Motion for Partial Summary Judgment.

III. Analysis

A. Defendant's Motion for Partial Summary Judgment

1. Plaintiff's § 7433 Claim

As previously stated, Defendant contends that Plaintiff's § 7433 claim should be dismissed because the court lacks subject matter jurisdiction over the claim, Plaintiff lacks standing to bring the claim, and Defendant's actions did not violate s 7433. Defendant's Brief in Support of its Motion for Partial Summary Judgment ("Defendant's Brief") at 1. Glass appears to assert four bases for his § 7433 claim: (1) Defendant's collection activities that gave rise to the 1997 administrative claim and proceedings, (2) the April 5, 1999 Notice of Tax Due on Federal Tax Return, (3) the August 2, 1999 notice of intent to levy, and (4) Defendant's withholding of Plaintiff Glass's $1,249 refund. The court addresses each basis for the § 7433 claim in turn.

a. The 1997 Collection Activities and Administrative Claim

The collection activities that lead to Plaintiff Glass's 1997 administrative claim were Notices of Levy sent by Defendant

on September 16, 1996 and March 4, 1997, and a Final Demand sent by Defendant on September 16, 1996. The court does not have jurisdiction over Plaintiff Glass's § 7433 claim related to these collection activities.

The "United States, as sovereign, is immune from suits save as it consents to be sued . . . ." Broussard v. United States, 989 F.2d 171, 174 (5th Cir.1993)(internal quotations omitted). Accordingly, "the United States is immune to suit unless [its] immunity is expressly waived by Congress." Austral Oil Co. v. National Park Serv., 982 F.Supp. 1238, 1242 (N.D.Tex.1997). "If a waiver of sovereign immunity contains a limitations period, a plaintiff's failure to timely file suit deprives the court of jurisdiction." Gandy v. United States, 234 F.3d 281, 283 [86 AFTR 2d 2000-7212] (5th Cir.2000); see also Dunn-McCampbell Royalty Interest, Inc. v. National Park Serv., 112 F.3d 1283, 1287 (5th Cir.1997)(holding that "failure to sue the United States within the limitations period is not merely a waivable defense . . . [i]t operates to deprive federal courts of jurisdiction.").

Congress has waived the immunity of the United States with regard to this action by the following language:

> If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States . . . .

26 U.S.C. § 7433(a)(emphasis added). This provision is subject to a limitations provision that provides, "Notwithstanding any other provision of law, an action to enforce liability created under this section . . . may be brought only within 2 years after the date the right of action accrues." 26 U.S.C. § 7433(d)(3)(emphasis added). Accordingly, any suit not brought within the limitations period set forth in § 7433(d)(3) is jurisdictionally barred.

Defendant contends that Plaintiff Glass's § 7433 cause of action accrued on or before April 29, 1997. Defendant's Brief at 5. The record reflects that April 29, 1997 was the day that Defendant received Plaintiff Glass's administrative claim for the alleged unauthorized collection activities that led to the 1997 administrative proceedings. See United States' Appendix in Support of its Motion for Partial Summary Judgment ("Defendant's App.") at 8. Accordingly, Defendant contends that "[a]s a matter of law, [Plaintiff] had at most two years from that date, or April 29, 1999 (April 29, 1997 + 2 years) to file a suit seeking damages under [s] 7433." Defendant's Brief at 5. Plaintiff filed this action on July 18, 2000. Id. Defendant therefore contends that "[d]ue to the untimeliness of this suit, [the] Court lacks subject matter jurisdiction over [this] portion of the Complaint . . . . " Id.

Plaintiff does not challenge Defendant's contention that the limitations period set forth in § 7433(d)(3) is a jurisdictional limitation. Plaintiff also does not challenge Defendant's contention that this action was filed after the limitations period expired. Plaintiff merely responds by asserting that "Rule 8(c) of the Federal Rules of Civil Procedure require [sic] affirmative defenses and special matters such as the statute of limitations to be specially pleaded and included in a party's first responsive pleading or the defenses or special matters are waived." Brief in Support at 4. Plaintiff continues by asserting that Defendant did not raise the statute of limitations defense in its responsive pleading, and therefore waived the defense. Id.

[1] Plaintiff is mistaken that Defendant waived the limitations defense. The defense speaks to whether the court has jurisdiction over this action, and "[d]efects of subject[ ]matter jurisdiction cannot be waived." Freeman v. Northwest Acceptance Corp., 754 F.2d 553, 560 (5th Cir.1985). Moreover, "an alleged want of subject matter jurisdiction may be raised at

any time ....'' Sea-Land Serv., Inc. v. International Longshoremen's Assoc., 625 F.2d 38, 41 (5th Cir.1980); see also Fed.R.Civ.P. 12(h)(3). Accordingly, to the extent Plaintiff Glass's § 7433 claim is based on the collection activities that gave rise to the 1997 administrative proceedings, it is untimely and the court lacks jurisdiction over this portion of the claim.[7]

This determination does not extend to Plaintiff Glass's § 7433 claim insofar as it relates to the April 5, 1999 Notice of Tax Due on Federal Tax Return; the August 2, 1999 notice of intent to levy; or Defendant's withholding of his $1,249 refund. The April 5, 1999 Notice of Tax Due on Federal Tax Return and August 2, 1999 notice of intent to levy obviously were sent to Plaintiff Glass in 1999. Additionally, the record reflects that his $1,249 refund was withheld on approximately September 13, 1999. See Appendix to Brief in Support of Plaintiff's Response to Defendant's Motion for Partial Summary Judgment (''Plaintiff's App.'') at 37. Plaintiff Glass therefore had two years from those respective dates in 1999 to file a § 7433 claim. See 26 U.S.C. § 7433(d)(3). He filed this action on July 18, 2000, which was within the two-year period. As a result, Defendant's contention that the limitations period has run on the § 7433 claim does not extend to the portions of the claim based on the April 5, 1999 Notice of Tax Due on Federal Tax Return; the August 2, 1999 notice of intent to levy; or the withheld $1,249 refund. The court therefore addresses whether Defendant otherwise is entitled to summary judgment on the portions of the § 7433 claim that arise from these collection activities.

b. The April 5, 1999 Notice of Tax Due on Federal Tax Return

The court does not have jurisdiction over the portion of Plaintiff Glass's § 7433 claim based on the April 5, 1999 Notice of Tax Due on Federal Tax Return, because he did not exhaust his administrative remedies. As previously stated, Defendant asserts that Plaintiff Glass lacks standing to bring his § 7433 claim. Under this argument, Defendant in part asserts that Plaintiff ''never filed an administrative claim with [Defendant] alleging improper collection activities[ ]'' after the 1997 administrative claim. Defendant's Brief at 7.

In an action for unauthorized collection of taxes, ''[a] judgment for damages shall not be awarded ... unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.'' 26 U.S.C. § 7433(d)(1); see also 26 C.F.R. § 301.7433-1(a)(addressing a cause of action for the unauthorized collection of taxes and stating that ''[a]n action for damages filed in federal district court may not be maintained unless the taxpayer has filed an administrative claim [in accordance with this section].'').

The record reflects that the only administrative claim for unauthorized collection of taxes was the 1997 claim. See Defendant's App. at 8. The April 5, 1999 Notice of Tax Due on Federal Tax Return postdates this administrative claim, is independent of the collection activities that gave rise to the claim, and there is not evidence that Plaintiff Glass filed any subsequent administrative claim that the April 5, 1999 Notice of Tax Due on Federal Tax Return violated § 7433.

The record does reflect that in a letter to Defendant dated June 3, 1999, Plaintiff Glass claimed that the personal assessment on him of $17,052.68 in taxes was erroneous and that on September 3, 1999 he sent a letter to Defendant inquiring about the reason he had been assessed with the taxes. See Plaintiff's App. at 24, 28. Nothing, however, in the June 3, 1999 letter or September 3, 1999 letter indicates that he requested an administrative hearing to determine whether the April 5, 1999 Notice of Tax Due on Federal Tax Return violated § 7433. Moreover, nothing in the record otherwise indicates that an administrative

[7] Even if the court had jurisdiction over this portion of the claim, it would fail as a matter of law. Plaintiff Glass appears to complain that he was improperly assessed with Stolar, Inc.'s taxes, and Defendant therefore should not have attempted to collect the taxes from him. He does not contend that the actual collection procedures used by Defendant were contrary to law. These facts do not support a § 7433 claim, because in Shaw v. United States, 20 F.3d 182, 184 [73 AFTR 2d 94-1998] (5th Cir.1994), the Fifth Circuit held that no cause of action arises under § 7433 when the IRS uses proper collection procedures to collect an improperly assessed tax.

hearing was ever requested or conducted with respect to the April 5, 1999 Notice of Tax Due on Federal Tax Return.

The court therefore does not have jurisdiction over this portion of Plaintiff Glass's § 7433 claim, because the record does not reflect that he exhausted his administrative remedies. Accordingly, there is no genuine issue of material fact regarding the April 5, 1999 Notice of Tax Due on Federal Tax Return, and Defendant is entitled to judgment as a matter of law on this basis for Plaintiff's § 7433 claim.[8]

c. The August 2, 1999 Notice of Intent to Levy

Plaintiff Glass's claim that the August 2, 1999 notice of intent to levy violated § 7433 also fails, because he did not exhaust his administrative remedies. As previously stated, the record reflects that he filed his only administrative claim for unauthorized collection of taxes in 1997. He did not file an administrative claim with respect to the August 2, 1999 notice of intent to levy. Accordingly, the court does not have subject matter jurisdiction over this portion of his § 7433 claim. Moreover, even if Plaintiff Glass had exhausted his administrative remedies, the court cannot identify any statutory provision or regulation that makes the August 2, 1999 notice of intent to levy improper. Accordingly, the notice did not violate § 7433. Defendant therefore is entitled to judgment as a matter of law on this basis for Plaintiff Glass's § 7433 claim.

d. Defendant's Withholding of Plaintiff's $1,249 Refund

Plaintiff Glass finally contends that the IRS violated § 7433 when it withheld a $1,249 refund that he was owed as an overpayment on his 1998 tax return. The record does not reflect that he filed an administrative claim with respect to this basis for his § 7433 claim. Accordingly, he did not exhaust his administrative remedies, and the court lacks jurisdiction over this portion of his § 7433 claim. Additionally, the court cannot identify any statutory or regulatory provision that prevents Defendant from withholding a taxpayer's refund to offset his purported tax liabilities. As a result, Defendant did not violate § 7433 when it withheld Plaintiff Glass's $1,249 refund. Defendant therefore is entitled to judgment as a matter of law on Plaintiff Glass's § 7433 claim based on the withheld $1,249 refund.

For the foregoing reasons, Plaintiff Glass fails to create a genuine issue of material fact regarding any of the bases for his § 7433 claim. Accordingly Defendant is entitled to summary judgment on Plaintiff's § 7433 claim.

2. Plaintiff Glass's Refund Claims

As previously stated, Plaintiff Glass filed refund claims to recover the $1,249 that Defendant withheld and applied to his tax liability, and the $100 he paid to Defendant. These claims are distinct from his claim that Defendant's withholding of the $1,249 violated § 7433. Although Defendant moved for summary judgment on the § 7433 claim related to the withheld $1,249, it did not move for summary judgment on either of the refund claims. The court nevertheless addresses the refund claims in this summary judgment analysis, because it does not have subject matter jurisdiction over the claim for $1,249, and a "federal trial court[ ][has] the duty to examine the basis for ... subject matter jurisdiction, doing so on its own motion if necessary." Torres v. Southern Peru Copper Corp., 113 F.3d 540, 542 (5th Cir.1997)(emphasis added).

[8] Even if Plaintiff Glass had exhausted his administrative remedies, the claim would fail. The April 5, 1999 Notice of Tax Due on Federal Tax Return refers to tax due on tax return form 8278. There is no IRS tax form 8278. See Brief in Support of Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Brief") at 2. As a result, Plaintiff apparently is contending that the April 5, 1999 Notice of Tax Due on Federal Tax Return somehow violated the provisions of the Internal Revenue Code or Internal Revenue Code regulations. Plaintiff Glass does not refer the court to a code provision or regulation that is violated when the IRS makes, what appears to be, a clerical error and lists an incorrect tax form number. Likewise, the court cannot identify any such provision. There must, however, be a code section or regulation that speaks to this issue if Plaintiff is to make the requisite § 7433 showing that an "officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence disregard[ed][a] provision of [the Internal Revenue Code], or any regulation promulgated under [the code] ...." See 26 U.S.C. § 7433(a). Since there does not appear to be any provision that prohibits Defendant's apparent clerical mistake, Plaintiff Glass cannot demonstrate that the April 5, 1999 Notice of Tax Due of Federal Tax Return violated § 7433.

Plaintiff Glass's refund claims are subject to an administrative remedy requirement that reads as follows:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

[2] 26 U.S.C. § 7422(a). The record reflects that on August 28, 1999 Plaintiff Glass filed an administrative claim for refund of the $100 he paid to Defendant. Defendant did not withhold the $1,249 until after Plaintiff Glass filed this administrative refund claim, and there is no evidence that he filed any subsequent administrative claim with respect to the $1,249. The court therefore determines, sua sponte, that it does not have subject matter jurisdiction over Plaintiff Glass's refund claim for $1,249, because he did not ex-haust his administrative remedies. The court does, however, have jurisdiction to hear Plaintiff's refund claim for $100, and he may proceed with this claim.

B. Plaintiff's Motion for Partial Summary Judgment

Plaintiff Glass contends that he is entitled to judgment as a matter of law on his § 7433 claim, and that Defendant's counterclaim under § 6672 should be dismissed as a matter of law. See Plaintiff's Brief at 5, 7. For the reasons previously stated, Plaintiff's § 7433 claim fails as a matter of law. As a result, he necessarily is not entitled to summary judgment on the § 7433 claim.

Regarding Defendant's § 6672 counterclaim, the section in relevant part states:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over . . . .

26 U.S.C. § 6672(a). "To be held liable under [s] 6672, a person must be deemed 'responsible' within the meaning of the statute, and must 'willfully' fail to remit the amounts due to the government." Bugge v. United States, 99 F.3d 740, 744 [78 AFTR 2d 96-7115] (5th Cir.1996).

[1] Plaintiff requests summary judgment dismissal of Defendant's § 6672 counterclaim on the ground that he was not a responsible person within § 6672's meaning. He has not raised arguments to challenge the willfulness element of Defendant's § 6672 counterclaim. Accordingly, the court limits its analysis to the responsibility element.

Plaintiff sets forth evidence that could indicate he was not responsible for Stolar, Inc.'s taxes. The evidence indicates that he never was: (1) an officer or employee of Stolar, Inc.; (2) hired to represent Stolar, Inc.; (3) an interest owner in Stolar, Inc.; (4) a member of the board of Stolar, Inc.; (5) a manager of Stolar, Inc.'s day-to-day operations; (6) authorized to make decisions on behalf of Stolar, Inc.; or (7) authorized to act as a signatory on Stolar, Inc.'s bank accounts. Appendix to Brief in Support of Plaintiff's Motion for Partial Summary Judgment at 2. Defendant counters this evidence by bringing forth evidence that Plaintiff had authority to determine Stolar, Inc.'s financial policy, attended meetings where the company's unpaid taxes were discussed, had access to or maintained the company's books and records, and was paying expenses on behalf of the estate that held the company's stock. United States' Appendix in Support of Response and Brief in Opposition to Plaintiff's Motion for Partial Summary Judgment at 4, 5, 10. The parties' conflicting evidence creates a genuine issue of

material fact for trial. Accordingly, Plaintiff's Motion for Partial Summary Judgment is denied.

IV. Motion to Strike Jury Demand

Plaintiff Glass's Complaint contains a request for jury trial. See Complaint at 1. Defendant's Motion to Strike Jury Demand ("Motion to Strike") sets forth its request that the court strike the jury demand with respect to Plaintiff Glass's § 7433 claim, because he allegedly has no right to a jury trial for a § 7433 claim. See Motion to Strike at 1. The court has found that Plaintiff Glass's § 7433 claim fails as a matter of law. Accordingly, the claim will be dismissed. Defendant's request to strike the jury demand therefore is moot. As a result, Defendant's Motion to Strike Jury Demand is denied as moot.

V. Conclusion

For the reasons stated herein, Defendant's Motion for Partial Summary Judgment is granted, and Plaintiff Glass's claim for unauthorized collection of taxes under 26 U.S.C. § 7433 is dismissed without prejudice. Plaintiff's refund claim for $1,249 is dismissed without prejudice for lack of subject matter jurisdiction. Plaintiff's Motion for Partial Summary Judgment is denied, and Defendant's Motion to Strike Jury Demand is denied as moot. The remaining claims are Plaintiff Glass's refund claim for $100 and Defendant's counterclaim under 26 U.S.C. § 6672. By separate order, the court will set the remaining claims for trial.

¶2002-5061

James R. RAMETTE, TRUSTEE PLAINTIFF-APPELLEE v. UNITED STATES OF AMERICA and Minnesota Department of Revenue, DEFENDANTS-APPELLANTS. In Re: Fred H. BAME, a/s/f Al & Alma's Inc., a/s/f Excelsior Park Tavern Two, Inc., a/s/f Excelsior Financial Properties, a/s/f Gopher Oil Company, DEBTOR. U.S. Bankruptcy Appellate Panel, Eighth Circuit, (BAP8) Docket No. 02-6002 MN; Docket No. 02-6003MN, July 2, 2002. Bankruptcy Court, (2001, Bktcy Ct MN) 89 AFTR 2d 2002-476, 271 BR 374, affirmed. Decision against Govt.

1. Tax claims in bankruptcy—equitable distribution of assets—marshaling and foreclosure. Bankruptcy court properly applied marshaling doctrine to require govt. and state tax agency to pursue collection 1st against home titled to Chap. 7 debtor's non-debtor spouse before participating in bankruptcy estate distribution: per se rule against subjecting govt. agencies to marshaling was rejected in favor of case by case analysis. And, marshaling was equitable in instant case where tax liens had validly attached to home before it was transferred to spouse; home's value was sufficient to fully satisfy liens; spouse agreed to liens' payment from home's sale proceeds; govt.'s potential costs of foreclosure or redemption weren't overly burdensome; and allowing govt. to participate in estate distribution before pursuing its non-bankruptcy collection rights would give both it and taxpayers windfall and harm unsecured creditors. *Reference:* United States Tax Reporter ¶68,726.52(3); 63,215.02(127). IRC §6321.

United States Bankruptcy Appellate Panel FOR THE EIGHTH CIRCUIT,

Appeals from the United States Bankruptcy Court for the District of Minnesota

Before KOGER, Chief Judge, SCHERMER and FEDERMAN, Bankruptcy Judges

SCHERMER, Bankruptcy Judge.

The United States of America and the Minnesota Department of Revenue (collectively referred to herein as the "Taxing Authorities") appeal from the bankruptcy court[1] order and judgment requiring, *inter alia*, marshaling by the Taxing Authorities. We have jurisdiction over this appeal from the final order and judgment of the bankruptcy court. *See* 28 U.S.C. § 158(b). For the reasons set forth below, we affirm.

[1] The Honorable Nancy C. Dreher, United States Bankruptcy Judge for the District of Minnesota.

ISSUE

The issue on appeal is whether the bankruptcy court can require the Taxing Authorities, the holders of tax claims against the debtor which are secured by liens on certain real property presently owned by the debtor's non-debtor spouse, to proceed first against such property to satisfy their tax claims prior to participating in any distribution from the bankruptcy estate. We conclude that the bankruptcy court properly applied the marshaling doctrine to require the Taxing Authorities to proceed first against the real property to satisfy their claims before participating in any distribution from the bankruptcy estate.

BACKGROUND

In 1992, JoAnna Bame conveyed by quitclaim deed her interest in a certain luxury log home on Lake Minnetonka (the "Homestead") to herself and her husband, Fred Bame, as joint owners. On March 16, 1998, Joanna and Fred Bame reconveyed the Homestead to JoAnna Bame. During the period that the Homestead was jointly owned by Fred and JoAnna Bame, the United States of America and the Minnesota Department of Revenue filed tax liens against the Homestead on account of unpaid tax liabilities of Fred Bame.

On February 10, 1999, an involuntary Chapter 7 petition was filed against Fred Bame ("Debtor"). The case was converted to Chapter 11 and later reconverted to Chapter 7 on May 19, 1999. James E. Ramette ("Trustee") was appointed trustee of the Debtor's bankruptcy estate.

On June 7, 1999, the Trustee filed an adversary proceeding against the Debtor and his wife, JoAnna Bame, seeking to avoid certain transfers of property from the Debtor to his wife, including the March 16, 1998, conveyance of the Homestead from the Debtor and JoAnna Bame to JoAnna Bame. The adversary proceeding was resolved by a settlement agreement which was approved by the bankruptcy court. Pursuant to the settlement agreement, JoAnna Bame agreed, *inter alia*, to place the Homestead on the market, to use all commercially reasonable efforts to close a sale of the Homestead before September 1, 2000, and to apply the proceeds of sale, to the extent available, to pay the claims of the Taxing Authorities secured by the liens on the Homestead. For marketing purposes, the property has been tentatively divided into two lakefront parcels, one undeveloped lot and one lot improved with the residence. Despite marketing efforts, the Homestead has not yet sold.

The Homestead is encumbered by the following liens: a mortgage in favor of Bank of America recorded August 4, 1995, in the original amount of $1,207,120.00; a federal tax lien filed October 8, 1997, in the amount of $121,699.43; tax liens recorded by the Minnesota Department of Revenue in the following amounts on the following dates: $10,099.75 on June 26, 1997, $10,006.40 on August 8, 1997, $20,414.06 on October 15, 1997, $51,755.19 on January 16, 1998, and $8,585.02 on February 6, 1998; and a mortgage in favor of Republic Leasing recorded November 6, 2000, in the amount of $85,000. Additionally, JoAnna Bame has a $200,000 homestead exemption in the Homestead under Minnesota law.

The balances due on the encumbrances in favor of Bank of America and the Taxing Authorities are as follows: Bank of America asserts a balance due of $1,309,079.64 as of October 30, 2001; the Minnesota Department of Revenue asserts a tax lien in the amount of $152,439 as of October 30, 2001; and the United States of America asserts a tax lien in the amount of $136,720.68 as of August 11, 1999.

The Taxing Authorities filed proofs of claim against the Debtor's bankruptcy estate. On February 28, 2000, the Minnesota Department of Revenue filed a priority proof of claim in the amount of $172,048.92. Of this amount, $152,439 was owed as of October 30, 2001, on account of taxes which accrued during the period the Debtor had a recorded interest in the Homestead, plus interest thereon. On August 11, 1999, the Internal Revenue Service filed a proof of claim in the amount of $136,720.68. The Internal Revenue Service's claim arises out of a civil trust fund

recovery penalty against the Debtor and is secured by the federal tax lien filed October 8, 1997. As of the petition date the Debtor owned no property to which the Taxing Authorities' liens attached. Consequently, their claims are allowed as un-secured claims against the Debtor's bankruptcy estate.

The Trustee holds approximately $1 million for distribution to creditors. Total claims exceed $4.5 million. The Taxing Authorities would like to be paid from the estate funds. If the Taxing Authorities participate in the distribution of estate funds, the available funds for other creditors will be reduced from $1 million to approximately $700,000.

On February 12, 2001, the Trustee filed an adversary proceeding against the Taxing Authorities seeking an order requiring the Taxing Authorities to look first to the Homestead to satisfy their liens prior to receiving any distribution from the estate.

At trial, an appraiser testified that the value of the Homestead is $2.8 million, $1 million attributable to the undeveloped lot and $1.8 million attributable to the improved lot. The listing agent testified that he would expect the property to sell for $2.5 million if it had no house on it and that the tear down costs would approximate $100,000.

The United States asserted that it would incur costs of up to $10,041 to foreclose on the Homestead and costs of $1,790 in connection with a redemption and sale of the Homestead.[2] The costs of maintaining the Homestead until it is sold approximate $800 per month.

The Minnesota Department of Revenue asserted that it would incur costs of up to $100,900 to foreclose on the Homestead and estimated its costs to redeem in a foreclosure situation at $1,559,000, with estimated carrying costs of $15,600 per month. An additional $4,000 would be incurred evicting the Bames if necessary.

The bankruptcy court concluded that marshaling was appropriate under the circumstances. The Taxing Authorities appeal the order and judgment requiring them to look first to the Homestead before receiving any distribution from the Debtor's bankruptcy estate.

STANDARD OF REVIEW

We review the bankruptcy court's findings of fact for clear error, its conclusions of law *de novo*, and its application of the equitable doctrine of marshaling for abuse of discretion. *C.T. Development Corp. v. Barnes (In re Oxford Development, Ltd.)*, 67 F.3d 683, 685 (8thCir. 1995).

DISCUSSION

[1] Pursuant to the federal doctrine of marshaling, if a senior lien holder has a lien that extends to two funds or two potential funds, and a junior lien holder has recourse to only one of those funds, the senior lien holder may be required to exhaust the fund to which only it has access before proceeding against the fund that is also available to the junior lien holder. *Meyer v. United States*, 375 U.S. 233, 236 [12 AFTR 2d 6141], 84 S.Ct. 318, 321 [12 AFTR 2d 6141], 11 L.Ed.2d 293 [12 AFTR 2d 6141] (1963); *C.T. Dev. Corp. v. Barnes (In re Oxford Dev., Ltd.)*, 67 F.3d 683, 687 (8th Cir. 1995); *Berman v. Green (In re Jack Green's Fashions for Men Big and Tall, Inc.)*, 597 F.2d 130, 132–33 (8th Cir. 1979). The doctrine of marshaling is designed to promote fair dealing and justice and is applied when it can be equitably fashioned as to all parties. *Meyer*, 375 U.S. at 237; *Oxford Dev., Ltd.*, 67 F.3d at 686–87.

Bankruptcy courts may apply the doctrine in proper cases where it is equitable to do so. *Oxford Dev., Ltd.*, 67 F.3d at 687; *Jack Green's Fashions for Men Big and Tall, Inc.*, 597 F.2d at 133. The court must balance the equities to determine whether marshaling is equitable in any given situation. *Oxford Dev., Ltd.*, 67 F.3d at 687. Marshaling is not appropriate

[2] Additionally, the United States would be required to satisfy the foreclosed mortgage in order to redeem. Therefore, its redemption costs would include the Bank of America mortgage balance in excess of $1.3 million.

where it will cause prejudice. *Whitaker Corp., Juster Steel Div. v. St. Cloud Nat'l Bank & Trust (In re St. Cloud Tool & Die Co.)*, 533 F.2d 387, 391 (8th Cir. 1976).

The Taxing Authorities challenge the marshaling order on two bases: (1) governmental taxing authorities should not be subject to marshaling and (2) requiring the Taxing Authorities to look first to the Homestead will severely prejudice the Taxing Authorities. We address these arguments in turn.

Applicability of Marshaling to Taxing Authorities

The Taxing Authorities argue that the doctrine of marshaling should not be applied to governmental agencies engaged in the collection of revenue. We reject such a *per se* rule.

The Taxing Authorities cite case law from other jurisdictions for the proposition that governmental taxing authorities should be immune from marshaling. *See, e.g., Ackerman v. United States*, 424 F.2d 1148 [25 AFTR 2d 70-1039] (9th Cir. 1970); *United States v. Herman*, 310 F.2d 846 [11 AFTR 2d 301] (2nd Cir. 1962); *United States v. Valley Nat'l Bank (In re Decker)*, 199 B.R. 684 (B.A.P. 9th Cir. 1996). We do not read the *Ackerman* and *Herman* cases as imposing a *per se* rule prohibiting marshaling against taxing authorities. Rather, each case specifically states that based upon the facts of the case the imposition of marshaling on the government would create a burden on the collection of revenue. *Ackerman*, 424 F.2d at 1150 (''substantial burden'') and *Herman*, 310 F.2d at 848 (''extreme burden''). Each case can be interpreted as applying a balancing test to determine that the imposition of marshaling was not appropriate under the circumstances of the case, rather than imposing a *per se* rule. To the extent the *Decker* court interpreted the *Ackerman* decision as an express rejection of the application of marshaling to the enforcement of federal tax liens, we are neither bound by decisions from the Ninth Circuit Bankruptcy Appellate Panel nor by the Ninth Circuit Court of Appeals' decision on which the BAP relied.

Accordingly, we decline to hold that the application of marshaling to governmental taxing authorities is *per se* prohibited. Rather, we conclude that marshaling must be evaluated on a case by case basis, regardless of whether a taxing authority is involved.

Equitable Application of Marshaling to the Taxing Authorities

The Taxing Authorities argue that even if marshaling against taxing authorities is not prohibited *per se*, they will be severely prejudiced if they are required to look first to the Homestead to satisfy the tax obligations. The bankruptcy court weighed the relevant factors and concluded that the Taxing Authorities would not be unduly burdened if required to look first to the Homestead to satisfy the tax claims. The bankruptcy court noted that the Taxing Authorities have valid liens on the Homestead which they are free to pursue. The value of the property is sufficient to satisfy all liens on the property as well as JoAnna Bame's homestead exemption therein. Normally a creditor of one spouse cannot proceed against the property of the other spouse to satisfy its claim. In this instance, however, the Taxing Authorities obtained valid liens on the Homestead while Fred Bame had an interest therein. Fred Bame's subsequent transfer of his interest therein to his wife was subject to the existing tax liens. Furthermore, JoAnna Bame agreed to the payment of the liens of the Taxing Authorities from the proceeds of sale of the Homestead in the settlement agreement with the Trustee. She has thus consented to the satisfaction of the valid tax liens from the property. Consequently, no legal impediment exists which would prevent the Taxing Authorities from proceeding against the Homestead to satisfy their liens.

The Taxing Authorities claim they would be prejudiced by having to proceed against the Homestead because to do so would require them to undertake lengthy and costly foreclosure proceedings or to redeem the property if foreclosed by the mortgage holder. The bankruptcy court determined the costs which the Taxing Authorities would incur if forced to proceed

against the Homestead and determined that such costs were not sufficient to render marshaling inequitable. Furthermore, the Taxing Authorities are not required to initiate foreclosure proceedings or to redeem the property. Rather, their liens could be satisfied or extinguished by a voluntary sale of the property, which is currently being actively marketed, or by a foreclosure of the consensual mortgage. In the event the property does not fully satisfy the liens of the Taxing Authorities for any reason, the Taxing Authorities will be able to participate in distributions from the bankruptcy estate to satisfy any remaining allowed claims. The bankruptcy court weighed the costs and burdens on the Taxing Authorities against the facts that claims against the bankruptcy estate exceed $4.5 million; neither the Trustee nor other creditors have the option of proceeding against the Homestead; and the amount available for distribution to other creditors would be reduced from approximately $1 million to $700,000 if the Taxing Authorities were paid with estate funds.

The marshaling order does not require the Taxing Authorities to forego their lien rights; rather it asks them to exercise the rights available to them under non-bankruptcy law prior to sharing in the distribution of bankruptcy estate assets. These are the same rights the Taxing Authorities would have in the event no bankruptcy proceeding had been initiated. In contrast, if the Taxing Authorities participate in the estate distribution, they will, in essence, receive a windfall as a result of the Trustee's efforts because they will receive payment in full without incurring their normal collection costs. Additionally, JoAnna and Fred Bame will receive a windfall by keeping the Homestead free of the valid tax liens. The Debtor's unsecured creditors, on the other hand, do not have the option of proceeding against the Homestead and will receive substantially less if estate funds are used to pay the Taxing Authorities.

The bankruptcy court carefully weighed the relevant factors and determined that requiring the Taxing Authorities to look first to the Homestead for satisfaction of their liens prior to receiving a distribution from the bankruptcy estate was equitable under the circumstances. We conclude, therefore, that the bankruptcy court did not abuse its discretion in applying the doctrine of marshaling. Consequently, the marshaling order shall not be reversed.

CONCLUSION

Marshaling is an equitable doctrine applicable to all creditors, including taxing authorities, under appropriate circumstances. In this case, the bankruptcy court weighed the relevant factors and determined that marshaling was appropriate. The bankruptcy court did not abuse its discretion in so determining. Consequently, the order of the bankruptcy court is AFFIRMED.

A true copy.

Attest:

CLERK, U.S. BANKRUPTCY APPELLATE PANEL FOR THE EIGHTH CIRCUIT

¶2002-5062

Charles Craig PEARSON, PLAINTIFF, v. UNITED STATES OF AMERICA (Internal Revenue Service), DEFENDANT. In Re: Charles Craig PEARSON, DEBTOR. U.S. Bankruptcy Court, Northern Dist. of Iowa, (Bktcy Ct IA) Bankruptcy No. 99-03150S; Adversary No. 00-9042S, April 25, 2000. Year 1995. Decision for Taxpayer.

1. Tax claims in bankruptcy—dischargeability. Pursuant to joint stipulation, Chap. 7 debtor's tax liabilities, interest, and penalties were subject to discharge and adversary action was dismissed with prejudice. *Reference:* United States Tax Reporter ¶68,726.52(27).

UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF IOWA,

JUDGMENT

Chapter 7

The issues of this proceeding having been duly considered by the Honorable William L. Edmonds, United States Bankruptcy Judge, and a decision having been reached without trial or hearing, upon the joint stipulation of the parties,

IT IS ORDERED, ADJUDGED AND DECREED that stipulation between plaintiff and defendant is approved.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the complaint of plaintiff against defendant is dismissed with prejudice as to the plaintiff and the United States of America, each party to bear its own litigation expenses, including costs and attorney's fees.

[Seal of the U.S. Bankruptcy Court]

Date of Issuance: April 25, 2000

George D. Prentice, II

Clerk of Bankruptcy Court

By: /s/

Deputy Clerk

ORDER

[1] THIS MATTER comes before the Court upon the joint stipulation between the plaintiff, Charles C. Pearson, and the defendant, United States of America, determining the dischargeability of federal income taxes for the 1995 tax year.

IT APPEARING TO THE COURT that the plaintiff and the United States of America are in agreement as to the disposition of the above-captioned adversary proceeding pursuant to the joint stipulation filed herewith, it is

ORDER that the stipulation between the plaintiff and the United States of America is hereby APPROVED and ADOPTED by the Court, and it is

FURTHER ORDERED that this adversary action is hereby dismissed with prejudice as to the plaintiffs and the United States of America, each party to bear its own litigation expenses, including costs and attorneys' fees.

IT IS SO ORDERED this 25th day of April, 2000

UNITED STATES BANKRUPTCY JUDGE

Submitted by:

STEPHEN JOHN RAPP

United States Attorney

ROBERT D. METCALFE 65422

Trial Attorney, Tax Division

U.S. Department of Justice

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Attorneys for the Defendant

United States of America

Seen and approved:

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505 6th Street, Suite 308

Sioux City, IA 51101

(712) 255-8036

Attorney for Plaintiff

copies of order and judgment to Don Molstad, 505 - 6th St., # 308, Sioux City, IA 51101; Robert Metcalf, PO Box 7238, Ben Franklin Station, Washington, D.C. 20044; US Trustee, 400 Law Bldg., 225 - 2nd St. SE, Cedar Rapids, IA 52401

JOINT STIPULATION AND JUDGMENT DETERMINING DISCHARGEABILITY OF DEBT

The plaintiff, Charles Craig Pearson, and the United States of America, hereby agree and stipulate to the following facts as to the dischargeability of federal taxes in the above-referenced adversary action.

1. The plaintiff filed a Chapter 7 petition in bankruptcy on December 1, 1999.

2. On March 2, 2000, the plaintiff filed the above-captioned adversary action seeking a determination of the dischargeability of federal taxes owed to the United States for the 1995 tax year.

3. The federal tax liabilities, interest and penalties owed by the plaintiff for the 1995 tax year are properly subject to discharge, if and when a discharge is entered in this case.

4. This stipulation constitutes a final order in this adversary action between the plaintiff and the United States of America, each party to bear its own litigation expenses, including costs and attorneys' fees.

Dated: 4 19 00

Donald H. Molstad (3755)

Molstad Law Firm

505 6th Street, Suite 308

Sioux City, Iowa 51101

(712) 255-8036

Attorney for Plaintiff

STEPHEN JOHN RAPP

United States Attorney

Dated: 4-5-00

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Attorneys for the Defendant

United States of America

¶2002-5063

UNITED STATES OF AMERICA, PLAINTIFF v. Donald E. HUNT, individually and d/b/a Hunt's Income Tax and Accounting Services DEFENDANT. U.S. District Court, Southern Dist. of Iowa, (DC IA) Civil No. 1-94-CV-80006, June 3, 2002. Decision for Govt.

1. Abusive tax shelters—return preparers—injunctions—contempt. Pursuant to stipulation, return preparer was held in contempt of and ordered to comply with 8-year old judgment enjoining him from further preparing or assisting in preparing income tax returns other than his own and from tax-related bookkeeping services. Also, preparer was ordered to provide govt. with names and addresses of all entities for which/whom he had provided such services since judgment's entry date; and was warned that any violation of instant order could result in criminal contempt sanctions. *Reference:* United States Tax Reporter ¶67,015(5); 74,336.504(80). IRC §6701.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA WESTERN DIVISION,

ORDER

The Honorable Charles R. Wolle Judge of District Court

At the contempt hearing dated May 10, 2002, defendant stipulated that the United States had met its burden of proving that he had violated the terms of the injunction previously imposed by this Court.

Based on the foregoing, the Court orders as follows:

[1]

1. Defendant is in civil contempt for violating the Court's judgment enjoining him from preparing or assisting in preparing income tax returns and from providing bookkeeping services for federal income tax purposes.

2. Defendant shall disclose to the Government by June 10, 2002, the names and addresses of all persons and businesses that he has assisted in the preparation of federal income tax returns, or to whom he has provided bookkeeping services, since the entry of the judgment dated December 22, 1994.

3. Defendant is hereby given notice that if he violates any of the terms of this Order or of the underlying injunction, this Court will consider imposing criminal contempt sanctions, including at least 15 days incarceration per violation. Any punishment imposed will be in accordance with the due process guarantees set forth in Federal Rule of Criminal Procedure 42, including the right to notice of the violation

and a hearing to contest the same, and upon a finding by this Court.

4. Defendant agrees and acknowledges that the judgment dated December 22, 1994 enjoins him from preparing or assisting in the preparing of federal income tax returns (other than his own), and from providing bookkeeping services for federal income tax purposes (other than his own), whether or not he receives remuneration for these services.

5. The Government may propound full discovery to ensure compliance with the underlying injunction and this Order.

Date: June 3, 2002

The Honorable Charles R. Wolle

Judge of District Court

¶2002-5064

Ron KINTZLER, PLAINTIFF v. INTERNAL REVENUE SERVICE, ET AL., DEFENDANTS. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-0148-PMP-(PAL), Oct. 22, 2001. Reconsideration of (2001, DC NV) 88 AFTR 2d 2001-5823, 2001-2 USTC ¶50696, denied. Years 1994, 1995, 1996, 1997. Decision against Taxpayer.

1. Collection due process—procedure—civil rights complaints. Taxpayer's motion for reconsideration was denied without discussion. *Reference:* United States Tax Reporter ¶63,305.01(5); 74,336.505(15). IRC §6330.

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA,

ORDER

PHILIP M. PRO United States District Judge

[1] The Court having read and considered Plaintiff's Motion for Reconsideration of Order Dated August 14, 2001 (#15), filed September 14, 2001,

IT IS ORDERED that Plaintiff's Motion for Reconsideration of Order Dated August 14, 2001 (#15) is denied.

DATED: October 19, 2001

PHILIP M. PRO

United States District Judge

¶2002-5065

Harvey L. MORTON, Trustee, PLAINTIFF v. THE INTERNAL REVENUE SERVICE of the United States of America, DEFENDANT. IN RE: John Wayne METCALF, Debtor. U.S. Bankruptcy Court, Northern Dist. of Texas, (Bktcy Ct TX) CASE NO. 00-10278-7; ADVERSARY NO. 00-1029, Aug. 17, 2001. Year 1999. Decision for Govt.

1. Tax claims in bankruptcy—turnover—bankruptcy estate property—overpayments; application of payments. Chap. 7 trustee wasn't entitled to turnover of overpayment that debtor had elected prepetition to have applied to subsequent year's tax liability: election irrevocably transferred taxpayer's interest in overpayment to IRS, leaving him with no interest that could have become bankruptcy estate property subject to turnover. *Reference:* United States Tax Reporter ¶68,726.52(24); 64,025.24(30). IRC §6402.

In the United States Bankruptcy Court for the Northern District of Texas, Abilene Division.

Memorandum Opinion

JONES, Bankruptcy Judge:

Harvey Morton, the Trustee and Plaintiff, and the Defendant, the Internal Revenue Service, have filed cross-motions for summary judgment seeking a determination of whether the debtor's pre-petition overpayment of taxes to the Internal Revenue Service is property of the bankruptcy estate. The Internal Revenue Service argues that the debtor made an irrevocable election, pre-petition, to have the overpayment credited to his subsequent year's tax liability and, therefore, the overpayment cannot be property of the estate. The Trustee con-

tends he is entitled to rescind the election and thus receive the overpayment as a refund.

This court has jurisdiction of this matter under 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b). This memorandum opinion contains the court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052 and Fed. R. Bankr. P. 9014.

Facts

John Wayne Metcalf, the debtor, filed his individual federal income tax return for the 1999 tax year on February 28, 2000. Because of withholdings and quarterly tax payments, Metcalf overpaid the IRS in the amount of $3,995.00. Metcalf elected to have the overpayment applied to his estimated tax liability for the succeeding tax year 2000. On April 4, 2000, Metcalf filed this Chapter 7 bankruptcy proceeding. The Trustee filed an amended tax return with the IRS seeking to rescind the election made by the debtor and receive the 1999 refund on behalf of the bankruptcy estate.[1]

Discussion

The facts are stipulated to by the parties and they agree there is no genuine issue of material fact. *See*Stipulated Facts set forth in Trustee's and IRS's briefs. Rule 56 of the Federal Rules, as incorporated by Rule 7056 of the Rules of Bankruptcy Procedure, provides that a party may obtain summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Stults v. Conoco, Inc.*, 76 F.3d 651, 654 (5th Cir. 1996).

[1] Section 542(a) of the Bankruptcy Code (11 U.S.C.) requires that an entity in possession of property of the estate must turn that property over to the trustee. The term "property of the estate" is defined by the Code as "including all legal or equitable interests of the debtor in property as of the commencement of the case." *See* 11 U.S.C. § 541(a)(1). The thrust of the argument made by the IRS is that since the debtor elected, pre-petition, to have the overpayment applied to his subsequent year's tax liability, that election is irrevocable and, therefore, the overpayment is no longer property of the estate as the debtor no longer has any legal or equitable interest in the property. The Trustee disagrees, contending that the overpayment is property of the estate and the IRS is required under § 542(a) to deliver that property to the Trustee.[2]

Several courts, including the District Court for the Northern District of Texas, have held that once a taxpayer makes an election under 26 U.S.C. §§ 6402(b) and 6513(d), which allows a taxpayer to have an overpayment credited to the succeeding year's tax liability, that election "is irrevocable and binding upon the taxpayer and the Internal Revenue Service." *See In re Block*, 141 B.R. 609, 610–611 (N.D. Tex. 1992); *Georges v. United States Internal Revenue Service*, 916 F.2d 1520 [66 AFTR 2d 90-5882] (11th Cir. 1990); *Martin Marietta Corp. v. United States*, 572 F.2d 839, 841 [41 AFTR 2d 78-986], 216 Ct. Cl. 47 [41 AFTR 2d 78-986] (1978). Accordingly, once the overpayment is properly transferred to the IRS pre-petition, it cannot become property of the estate, and is not recoverable under § 542 of the Bankruptcy Code. *See In re Block*, 141 B.R. at 611.

The debtor made a pre-petition election to have the overpayment credited to his succeeding year's tax liability. Once the election is made by the taxpayer, there is no refund to request and the overpayment becomes an advance payment on the subsequent year's tax bill. *See In re Block*, 141 B.R. at 611. Consequently, the debtor's "pre-petition estimated tax payment cannot be considered a legal or equitable interest of the debtor in property as of the commencement of the case, and such payment is not subject to turnover."

[1] The Trustee stands in the place of the debtor.

[2] The Trustee does not contend that the election was a fraudulent transfer.

See In re Block, 141 B.R. at 611; *In re Simmons*, 124 B.R. 606 (Bankr. M.D. Fla. 1991).

The Trustee relies on another case in the Northern District of Texas, *In re Cannon*, 130 B.R. 748 (Bankr. N.D. Tex. 1991). The *Cannon* case was decided by the bankruptcy court prior to the district court's decision in *In re Block*. This court, therefore, declines to follow *In re Canon*.

Conclusion

The tax refund was not property of the estate when the bankruptcy was commenced and, therefore, the Trustee is not entitled to the overpayment pursuant to 11 U.S.C. § 542(a). Summary Judgment is granted in favor of the Internal Revenue Service.

Signed August 17, 2001.

ROBERT L. JONES

UNITED STATES BANKRUPTCY JUDGE

¶2002-5066

RIGGS NATIONAL CORPORATION AND SUBSIDIARIES, APPELLANT v. COMMISSIONER of Internal Revenue, APPELLEE. U.S. Court of Appeals, Dist. of Columbia Circuit, (CA Dist Col) Docket No. 01-1121, July 12, 2002. Tax Court, (2001) TC Memo 2001-12, RIA TC Memo ¶2001-012, 81 CCH TCM 1023 (opinion by Jacobs, *J.*), on remand from (1999, CA Dist Col) 83 AFTR 2d 99-438, 163 F3d 1363, 99-1 USTC ¶50185, reversing and remanding (1996) 107 TC 301 (opinion by Jacobs, *J.*), reversed and remanded. Years 1984, 1985, 1986. Decision for Taxpayer in part.

1. Foreign tax credits (FTC)—Brazilian withholding tax—net loans—proof of payment—indirect subsidies. Tax Court's remand determination that taxpayer/U.S. lender wasn't entitled to FTCs for Brazilian Central Bank's (Bank) payments on its behalf of taxes on its interest income from "net loans" to Bank was again incorrect: taxpayer presumptively proved payments were in fact made with official Brazilian governmental tax receipts/"DARFs." Although not conclusive, DARFs were entitled to presumption of regularity, which IRS was then required to disprove with clear and specific evidence, of which IRS failed to offer. Also, Bank's erroneous pecuniary benefit reporting in documents *accompanying* DARFs didn't show DARFs themselves were erroneous, particularly considering that pecuniary benefit transaction was separate from tax payment transactions. But, question of whether or to what extent taxpayer's FTCs were subject to subsidy/other offsets was further remanded. *Reference:* United States Tax Reporter ¶9015.01(5); 9015.03(25); 9055.02(5); 9015.03(30); 9015.02(15); 9015.02(40); 9015.04(50). IRC §901; 905.

Thomas C. Durham argued the cause for appellant. With him on the briefs were Joel V. Williamson, Russell R. Young, Kim Marie Boylan, Charles W. Hall and Stephen M. Feldhaus.
Stephen D. Gardner was on the brief for amicus curiae National Foreign Trade Council, Inc. in support of appellant.
Charles Bricken, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief was David English Carmack, Attorney.

United States Court of Appeals FOR THE DISTRICT OF COLUMBIA CIRCUIT,

Appeal from the United States Tax Court (No. 24368-89)

Before: Sentelle, Henderson and Tatel, Circuit Judges.

Sentelle, Circuit Judge:

Opinion for the Court filed by Circuit Judge Sentelle.

This case returns to us after decision on remand by the United States Tax Court. Riggs Bank, asserting that the Central Bank of Brazil paid taxes to the Brazilian government on its behalf with respect to interest income on loans it had made to the Central Bank, claimed foreign tax credits under section 901 of the Internal Revenue Code. The Commissioner disallowed the

credits and the Tax Court denied Riggs's petition for relief. Upon review, we conclude that official tax receipts that the Central Bank submitted on behalf of Riggs Bank are entitled to the presumption of regularity. Holding that the Commissioner failed to rebut this presumption through clear and specific evidence that the taxes had not, in fact, been paid, we reverse the decision of the Tax Court and hold that Riggs is entitled to the tax credits. We remand to the Tax Court for determination of whether the tax credits owed to Riggs should be reduced by offsetting subsidies reportedly paid to the Central Bank.

I. Background and Prior Proceedings

The origins of this case are set out more fully in our prior opinion Riggs National Corporation & Subsidiaries v. Commissioner, 163 F.3d 1363 [83 AFTR 2d 99-438] (D.C. Cir. 1999) (Riggs II), and will not be repeated at length here. We instead provide an overview of this case's prior history with a recitation of the facts giving rise to the issues now before us.

Riggs National Corporation's subsidiary, Riggs Bank (''Riggs''), made loans to the Central Bank of Brazil during the early to mid-1980's. These loans were of the ''net loan'' variety. In a net loan, the borrower contractually agrees to pay both the interest on the loan to the lender and any local (in this case, Brazilian) tax that the lender incurs as a result of the interest income. The attractiveness of such a loan is obvious: the lender receives the agreed upon interest income while the borrower is obligated to pay any tax that the lender owes on that interest. Making these types of loans even more appealing is an added benefit resulting from the United States's Internal Revenue Code (''IRC''). Under section 901 of the IRC, a United States taxpayer is able to take a credit against his U.S. tax liability on income earned in a foreign country equal to the amount of foreign tax paid on that income. 26 U.S.C. § 901. Thus, by providing ordinary net loans (i.e., net loans to individual foreign borrowers), Riggs could take a credit equal to the amount of taxes that Brazilian borrowers paid to Brazil on Riggs's behalf without running afoul of the IRC. See Riggs II, 163 F.3d at 1365; Continental Illinois Corp. v. Commissioner, 998 F.2d 513, 516–17 [72 AFTR 2d 93-5308] (7th Cir. 1993).

At issue in Riggs II was the fact that the borrower was the Central Bank of Brazil, a government entity that is ordinarily immune from tax on its own income under the Federal Constitution of Brazil. Despite its tax immune status, and possibly because of pressure from foreign lenders who favored the tax credits under section 901, Brazil's Minister of Finance--the highest ranking Brazilian tax authority--ruled that the Central Bank was required under Brazilian law to pay the tax obligation it assumed from foreign lenders. The Minister of Finance justified his ruling under the rationale that the funds were available for ''re-lending'' by the Central Bank to private Brazilian borrowers. See Riggs Nat'l Corp. v. Commissioner, 107 T.C. 301, 331 (1996) (Riggs I). The Minister concluded that the Central Bank must, ''as a substitute for such borrowers [to-be,] pay the income tax incident on the interest from January 1, 1984 to the end of the period of availability for such funds to be relent.'' Riggs II, 163 F.3d at 1366 (quoting Riggs I, 107 T.C. at 331). In response, the Central Bank issued official tax receipts, called ''DARFs,''[1] to the foreign lenders which purportedly indicated the amount of tax paid on the lender's behalf. This comported with the standard practice in Brazil: taxpayers submit DARFs and the accompanying tax payment to commercial banks, which then transfer the payments to the Banco do Brasil, a quasi-public, quasi-private bank that collects taxes on behalf of Brazil's National Treasury.

Despite the Minister's ruling that the Central Bank was required to pay the taxes, and despite the receipt of DARFs indicating that the taxes had been paid, the Commissioner rejected the DARFs as sufficient proof that the taxes were paid, rea-

[1] Documento de Arrecadacao de Receitas Federais. DARFs are official forms authorized by the Brazilian government as the only form to pay taxes and prove payment of those taxes within Brazil.

soning instead that because the Central Bank was a tax immune entity, any tax payments made by the Central Bank were voluntary and not "taxes paid or accrued . . . to any foreign country." 26 U.S.C. § 901(b)(1). The Commissioner consequently assessed a deficiency against Riggs. Before the Tax Court, Riggs submitted its DARFs as proof that the Central Bank paid the foreign taxes on Riggs's behalf. Riggs also provided the Tax Court with entries from the Banco do Brasil which purportedly showed that the Central Bank paid to the National Treasury the taxes withheld from its payments of interest to Riggs. The Tax Court, however, agreed with the Commissioner that the Central Bank was not obligated to pay the taxes and therefore disallowed the tax credits. Riggs I, 107 T.C. at 360. Riggs appealed.

On appeal, we held that the Minister of Finance's ruling that the Central Bank was obligated to pay the taxes was an act of state, which precluded the Commissioner from inquiring into its validity. We remanded "so that the Tax Court may determine in the first instance . . . whether the taxes were in fact paid by the Central Bank" on Riggs's behalf, and whether any of the potential tax credits must be reduced by pecuniary benefits, or subsidies, paid to the Central Bank. Riggs II, 163 F.3d at 1369. Pecuniary benefits were originally instituted in 1975 and allowed Brazilian borrowers who paid interest to foreign lenders to receive a benefit, or subsidy, equal to a percentage of the amount of the tax paid with respect to the interest. The amount of the pecuniary benefit was originally 85 percent of the amount of the tax paid. It was reduced to 50 percent of the tax in July 1979, increased to 95 percent of the tax in December 1979, reduced to 40 percent of the tax in May 1980, and reduced to zero in June 1985. See Riggs I, 107 T.C. at 308.

On remand, the Tax Court ruled that Riggs failed to establish that the Central Bank had, in fact, paid the taxes at issue on Riggs's behalf. Riggs Nat'l Corp. & Subs. v. Commissioner, T.C. Memo. 2001-12 [TC Memo 2001-12], 81 T.C.M. 1023, 2001 Tax Ct. Memo LEXIS 20, 66 (Jan. 22, 2001) (Riggs III). Specifically, the Tax Court noted that letters and spreadsheets the Central Bank submitted with the DARFs reported that, for some of the payments, a pecuniary benefit had been reported as received after June 28, 1985. That is, the Central Bank continued to report pecuniary benefit information in documents submitted to Morgan Bank, the Central Bank's agent to foreign lenders such as Riggs, after Brazil stopped providing the pecuniary benefits. Reasoning that errors of this sort would not have been made if payment of the taxes had actually occurred (in other words, had the Central Bank actually paid the taxes, it would know that it did not receive a pecuniary benefit for those tax payments after June 28, 1985 and would therefore not report the receipt of such), the Tax Court found that the DARFs issued by the Central Bank were not reliable proof that the withholding taxes in issue had actually been paid by the Central Bank. Id. The Tax Court also disagreed with secondary accounting evidence relied on by Riggs to indicate that the taxes had been paid. Id. Consequently, the Tax Court ruled that Riggs was not entitled to the foreign tax credits at issue. Id. After ruling that Riggs was ineligible for the tax credits, the Tax Court had no occasion to reach the issue of whether Riggs's tax credits should be reduced by the value of any pecuniary benefits paid to the Central Bank. Id.

In this appeal, Riggs asserts that the Commissioner acted contrary to Treasury Regulations by refusing to accept the DARFs as definitive proof that the foreign taxes were paid. Riggs also contends that the DARFs are entitled to the presumption of administrative regularity and must be deemed reliable. Finally, Riggs argues that its foreign tax credits should not be reduced by the offsetting pecuniary benefits paid to the Central Bank. The Commissioner, however, contends that Riggs has the burden of proving its entitlement to the foreign tax credits. The Commissioner relies on the language of IRC § 905(b), which allows foreign tax credits only to the extent "the taxpayer establishes to the

satisfaction of the Secretary'' the amount of foreign tax paid. 26 U.S.C. § 905(b). The Commissioner argues that this section authorizes him to require more satisfactory proof that foreign taxes were, in fact, paid. The Commissioner also contends that Riggs waived its ''presumption of regularity'' argument by not raising it before the Tax Court, but that even if a presumption of regularity exists with respect to the DARFs, irregularities accompanying the issuance and submission of the DARFs rebut that presumption. The Commissioner further contends that Riggs's secondary accounting evidence is unpersuasive to show that the taxes were actually paid to the National Treasury by the Central Bank.

II. Analysis

A. Availability of Foreign Tax Credits

[1] When we remanded this case to the Tax Court for it to determine ''whether the taxes were in fact paid by the Central Bank,'' Riggs II, 163 F.3d at 1369, the Tax Court was required to determine whether the taxes were paid within the meaning of section 901 of the Internal Revenue Code. Determining whether taxes for which a credit is sought under section 901 have been paid is governed by section 905 of the IRC. Section 905 reads in applicable part that the foreign tax credit ''shall be allowed only if the taxpayer establishes to the satisfaction of the Secretary ... the tax paid....'' I.R.C. § 905(b)(2). The amount the taxpayer claims as having been paid, and thus the amount of the credit sought, shall ''be determined under regulations prescribed by the Secretary.'' Id. For the type of credit at issue in this case, Treasury Regulation § 1.905-2 requires that if a taxpayer corporation, like Riggs, seeks to claim a foreign tax credit, the taxpayer must submit a Form 1118, Computation of Foreign Tax Credit--Corporations. See Treas. Reg. § 1.905-2(a)(1). This form ''must be carefully filled in with all the information called for and with the calculations of credits indicated. Except where it is established to the satisfaction of the district director that it is impossible for the taxpayer to furnish such evidence, the taxpayer must provide upon request the receipt for each such tax payment if credit is sought for taxes already paid.... This receipt ... must be either the original, a duplicate original, a duly certified or authenticated copy, or a sworn copy.'' Treas. Reg. § 1.905-2(a)(2). In this case, while Riggs must in the first instance submit direct evidence of foreign tax withholding and payment where possible (i.e., ''the receipt for each ... tax payment''), the district director has the discretion to accept secondary evidence. See id. § 1.905-2(b). Regardless of the evidence upon which the Commissioner ultimately relies, the taxpayer ''must plainly establish his right [to the foreign tax credit] by showing that he has fulfilled all the conditions upon which the allowance of the credit is made to depend.'' Irving Air Chute Co. v. Commissioner, 143 F.2d 256, 259 [32 AFTR 952] (2d Cir. 1944).

Riggs contends that it provided the Commissioner with both direct and secondary evidence that the taxes were paid on its behalf. It is undisputed that Riggs provided the Commissioner with a DARF, or tax receipt, for each tax payment credit that it sought, and that it recorded the amount of taxes paid on an accompanying Form 1118.[2] Riggs thus insists before this Court that the Commissioner failed to comply with Treas. Reg. § 1.905-2(a)(2) by not accepting the submission of the DARFs as definitive proof that the Central Bank paid the foreign taxes on Riggs's behalf. We disagree, although our disagreement is not fatal to Riggs's position. The regulations do not require the Commissioner to accept foreign tax receipts at face value. It follows that the regulations do not require the Commissioner to allow foreign tax credits without scrutinizing the tax receipts on which the claim for credits is premised. In fact, the regulations do not require the Commissioner to take any action at all. Rather, the regulations only set forth the necessary evidence a taxpayer must provide, upon request, to the Commissioner if that taxpayer intends to claim a

[2] Indeed, the Tax Court accepted Riggs's DARFs into evidence as authenticated copies of the original tax receipts and agreed the receipts were official records of the Brazilian government.

foreign tax credit. This evidentiary requirement does not require the Commissioner to accept the tax receipts as sufficient proof that the taxes were paid. Indeed, if, as here, the Commissioner questions the legitimacy of the accompanying receipts, section 1.905-2 in no way compels the Commissioner to ignore a perceived inconsistency and accept the receipts as unquestionable proof of payment. We con-clude, therefore, that mere submission of a DARF is not absolute proof that the taxes reported therein were paid.

Although we hold that the submission of DARFs, as required under section 1.905-2, is not conclusive proof of a foreign tax payment, we nonetheless conclude that the DARFs are entitled to a presumption of regularity. Common law has long recognized a presumption of regularity for actions and records of public officials. See United States v. Chemical Foundation, 272 U.S. 1, 14–15 (1926); American Federation of Government Employees v. Reagan, 870 F.2d 723, 727–28 & n.33 (D.C. Cir. 1989). The presumption also applies to the actions of tax officials and in applying United States tax law. See R.H. Stearns Co. v. United States, 291 U.S. 54, 62–63 [13 AFTR 842] (1934); cf. Utah Power & Light Co. v. Pfost, 286 U.S. 165, 190 (1932). Most pertinently, it applies to the actions and records of foreign public officials. See United States v. King, 44 U.S. (3 How.) 773, 785–86 (1845); Murarka v. Bachrack Bros., Inc., 215 F.2d 547, 552–53 (2d Cir. 1954). We therefore conclude that a DARF, as an official tax receipt of the Brazilian government, is entitled to a presumption of regularity. While not ir-rebuttable, this presumption may only be rebutted through clear or specific evidence. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." Chemical Foundation, 272 U.S. at 14–15; see also United States v. Studevent, 116 F.3d 1559, 1563 (D.C. Cir. 1997). Thus the Commissioner must provide clear and specific evidence that the DARFs submitted on behalf of Riggs were inaccurate representations of the amount of tax paid by the Central Bank in order to justify its denial of Riggs's claimed tax credit.

The Commissioner argues that Riggs waived its "presumption of regularity" argument by not raising it before the Tax Court. We disagree. Riggs clearly argued before the Tax Court that the Commissioner had the burden of proving that the DARFs were inaccurate accountings of the amount of foreign tax paid on Riggs's behalf. Riggs's argument before this Court--that the DARFs must be given a presumption of regularity--is merely an improved articulation of that previously raised argument. Riggs is not raising a novel issue or argument before us that it failed to first bring before the Tax Court. Riggs is instead reasserting and restating its earlier position--that the Commissioner has the burden of disproving the accuracy of the DARFs, and the Commissioner failed to meet that burden.

The Commissioner argues next that inconsistencies in documents accompanying the submission of the DARFs "call into question" the accuracy and validity of the DARFs. Specifically, the Commissioner relies on the finding of the Tax Court that schedules, or spreadsheets, that accompanied letters from the Central Bank and that were submitted along with the DARFs indicated that the Central Bank had received a 40 percent pecuniary benefit with respect to the tax payments, even though the pecuniary benefit had by then been repealed. The Tax Court reasoned that:

> If, as [taxpayer] asserts, the Central Bank actually had paid withholding taxes on [taxpayer's] ... behalf ..., we then find inexplicable the Central Bank's erroneous actions well after June 28, 1985, in continuing to report its having received a nonexistent "pecuniary benefit."

Riggs III, 2001 Tax Ct. Memo LEXIS 20, at 65. Thus when making its finding that the foreign tax had not been paid, the Tax Court relied on the reported receipt of a pecuniary benefit after the benefits were reduced to zero. In the first instance, we note that an inconsistency that merely

"call[s] into question" the validity of an official document is not "clear evidence" of that document's invalidity, or "clear evidence" of anything, for that matter. That being so, we are not convinced that the erroneous reporting of a pecuniary benefit in a document that accompanied the submission of an official government record entitled to a presumption of regularity, is clear and specific evidence that the official government record is itself erroneous. The spreadsheets and transmittal letters indicated the receipt of a nonexistent pecuniary benefit. The obvious irregularities in the accompanying documents do not, however, indicate clear and specific evidence that taxes reported as paid in the DARFs were not paid. At best, the accompanying documents reflect clerical errors; at worst, they reflect the erroneous receipt of a disallowed pecuniary benefit. Neither scenario, however, is clear evidence that the Central Bank failed to remit foreign tax payments on behalf of Riggs, as indicated by the DARFs. Therefore, we conclude that the Commissioner did not rely on clear and specific evidence necessary to rebut the presumption of regularity that attaches to the DARFs.

We understand that the payment of foreign taxes and the receipt of a pecuniary benefit are necessarily related: while the pecuniary benefits were in effect, the pecuniary benefit was dependent on the payment of foreign taxes. As we understand the Brazilian tax system, a borrower paid the entire amount of interest owed on a foreign debt and then later received a credit equal to the amount of the pecuniary benefit. Such a system necessitates two separate and independent transactions. Perhaps if the payment of taxes and the receipt of the pecuniary benefits had taken place through one transaction (e.g., the borrower made interest payments that were already reduced by the amount of the pecuniary benefit), evidence of one (payment of the tax or receipt of the pecuniary benefit) might bear strongly upon the other. But given that the receipt of a pecuniary benefit was the result of a separate transaction, we are altogether unconvinced that the impossibility of one establishes the impossibility of the other. Thus the Central Bank's reported receipt of a nonexistent pecuniary benefit is not clear and specific evidence that the DARF, an official government document otherwise entitled to a presumption of regularity, is erroneous.

Inconsistencies or inaccuracies in documents accompanying official government records do not inherently rebut the presumption of regularity attaching to those official records, especially when the accompanying documents do not directly address the matter sought to be proved by the official records. Because the DARFs are entitled to a presumption of regularity, and because the Tax Court based its decision on inconsistencies in accompanying documents rather than the DARFs themselves, and because the accompanying documents did not in fact address the issue of whether the foreign taxes had, in fact, been paid, we conclude that the Commissioner did not have clear and specific evidence that the DARFs were themselves erroneous representations of Riggs's claimed tax credits.

As the Tax Court erroneously based its decision to reject the DARFs on the wrongly reported pecuniary benefit, we need not consider the other arguments, such as inconsistencies in Riggs's secondary accounting evidence, now offered by the Commissioner to explain the Tax Court's decision. We therefore reverse the decision of the Tax Court and hold that the foreign tax credits should have been allowed.

B. Offsetting Subsidies

In our initial remand of this case to the Tax Court, we directed it to determine whether any of Riggs's potential tax credits should be reduced by the pecuniary benefits, or subsidies, reportedly paid to the Central Bank. Riggs II, 163 F.3d at 1369. Given the Tax Court's decision in favor of the Commissioner, the Tax Court never reached this issue. As we now hold that the foreign tax credits should have been allowed, this issue is ripe for consideration. However, rather than decide this issue for the first time on appeal, we remand this case to the Tax Court solely to determine whether any of the tax credits

owed to Riggs must be reduced by the subsidies reportedly paid to the Central Bank.

III. Conclusion

The official actions of foreign governments are entitled to a presumption of regularity. While this presumption is not absolute, it may be rebutted only through clear and specific evidence. The DARFs submitted by the Central Bank indicating that it had paid taxes on Riggs's behalf are entitled to the presumption of regularity unless rebutted by the Commissioner. We conclude that irregularities in documents accompanying the DARFs that do not specifically pertain to whether the taxes had, in fact, been paid do not rise to the level of clear and specific evidence showing that the taxes were never remitted. We therefore reverse the decision of the Tax Court disallowing Riggs's tax credits for the taxes paid by the Central Bank on Riggs's behalf with respect to interest income on loans Riggs made to the Central Bank. We remand the case solely for the Tax Court to determine whether the tax credits should be reduced by any subsidies that may have been paid to the Central Bank.

¶2002-5067

Martin H. TONN; Lorraine A. TONN, APPELLANTS v. COMMISSIONER of Internal Revenue, APPELLEE. U.S. Court of Appeals, Eighth Circuit, (CA8) Docket No. 01-3515, July 15, 2002. Tax Court, (2001) TC Memo 2001-123, RIA TC Memo ¶2001-123, 81 CCH TCM 1670 (opinion by Ruwe, *J.*), affirmed per curiam. Years 1995, 1996, 1997. Decision for Govt.

1. Review of Tax Court decision—deemed admissions—gross income—deductions—business expenses; loss; bad debt—basis in value of taxpayer's labor. 8th Cir. affirmed per curiam decision upholding deficiencies and penalties against taxpayers, based on Tax Court's reasoning. *Reference:* United States Tax Reporter ¶74,536.09051(50); 1625.019(25); 1655.0921(80); 1665.160(5); 1665.210(20). IRC §162; 165; 166.

Appeal from the United States Tax Court. United States Court of Appeals for the Eighth Circuit.

Before WOLLMAN, FAGG, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

PER CURIAM:

[UNPUBLISHED]

[1] Martin H. Tonn and his wife, Lorraine A. Tonn, appeal from a decision of the tax court finding they owed deficiencies and additions to tax. After carefully reviewing the record, we affirm for the reasons stated by the tax court. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

¶2002-5068

UNITED STATES OF AMERICA, PETITIONER v. Joseph CIANCIULLI, RESPONDENT. U.S. District Court, S.D. New York, (DC NY) Docket No. M18304 (RMBTHK), July 10, 2002. Earlier proceeding at (2001, DC NY) 88 AFTR 2d 2001-6227, 2001-2 USTC ¶50682. Years 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999. Decision for Taxpayer.

1. Summons procedure—5th Amendment privilege against self-incrimination—in camera review. Magistrate judge denied govt.'s request to enforce IRS summons for documents taxpayer/non-filer had turned over to court for in-camera review: taxpayer was justified in invoking his 5th Amendment privilege against self-incrimination where govt. had no reason to know that subject documents existed or were in taxpayer's possession; and producing them could communicate incriminating facts. Also, 5th Amendment's "required

records exception'' didn't apply where subject documents weren't Forms W-2, returns, or other type of document required to be maintained by law for regulatory purposes. *Reference:* United States Tax Reporter ¶76,025.08(15). IRC §7602.

United States District Court, S.D. New York,

OPINION AND ORDER

KATZ, Magistrate J.

BACKGROUND

This proceeding arises out of an application by the United States (''Petitioner'') for an order directing Respondent Joseph Cianciulli (''Respondent'') to comply with an Internal Revenue Service (''IRS'') summons, issued pursuant to section 7602 of the Internal Revenue Code, 26 U.S.C. § 7602. The summons was issued as part of an investigation for the purpose of ascertaining the correct income tax liability of Respondent for the calendar years 1990 through 1999. Respondent failed to file any tax returns for those years. The summons directed Respondent to appear before a designated Revenue Officer to testify, and to produce for examination, inter alia, all books, records, and other documents that reflected the receipt of taxable income, records of deposits to bank accounts, and receipts regarding wages, salaries, and income. (Petition to Enforce Internal Revenue Service Summons, May 4, 2001, Exhibit (''Ex.'') B.)

Respondent failed to comply with the summons and Petitioner secured an Order to Show Cause as to why Respondent should not be compelled to testify and produce the books and records demanded in the summons. (Order to Show Cause, May 8, 2001 (Wood, J.).) In response, Respondent submitted a Memorandum of Law and two sworn declarations of his attorney, James R. DeVita; Petitioner submitted a Reply Memorandum of Law (''Pet.Mem.''); and Respondent submitted a Sur-Reply Memorandum of Law (''Sur-Reply''). In his submissions, Respondent invoked his Fifth Amendment privilege against self-incrimination, arguing that responses to the IRS's questions might be used to incriminate him for such offenses as willful failure to file a tax return or to pay a tax, in violation of 26 U.S.C. § 7203. Respondent further argued that the act of producing the requested documents could also incriminate him, by ''indicating his belief that they are the documents described in the summons, their authenticity, and admitting his possession and control of them.'' (Sur-Reply at 4–5.)

Petitioner argued that Respondent's application was inadequate because he failed to meet his burden of establishing facts that demonstrate a substantial and real hazard of incrimination; his attorney's declaration consisted of hearsay and was an insufficient basis on which to invoke the Fifth Amendment privilege; Respondent's reliance on the act of production privilege was misplaced; and even if Respondent reasonably feared incrimination, his blanket assertion of his Fifth Amendment privilege was improper.

United States District Judge Richard M. Berman concluded, in a Decision and Order dated September 17, 2001 (''Sept. 17 Decision''), that compliance with the summons could potentially incriminate Respondent, but that Respondent had failed to satisfy his burden of establishing a blanket Fifth Amendment privilege with respect either to all of the deposition questions which might be posed to him or to all of the documents requested. The Court therefore ordered Respondent to appear for deposition and either respond or invoke his Fifth Amendment privilege on a question-by-question basis. Disputes regarding the invocation of the privilege were to be resolved by the undersigned. Respondent was further ordered to produce to the undersigned, for in camera review, all documents responsive to the summons as to which he asserted a Fifth Amendment privilege.

There followed a series of conferences with the parties regarding the procedure to be used to resolve privilege issues at Re-

spondent's deposition.[1] The parties finally agreed that any privilege issue that arose would likely be the same as to most questions, and it was agreed that rather than conducting the deposition in court, where the invocation of the privilege would be addressed on a question-by-question basis, the deposition would be held out of the Court's presence, and the propriety of Respondent's invocation of the privilege would subsequently be argued to the Court. Respondent's deposition was held on June 3, 2002. As it turns out, the parties have not sought a Court ruling on Respondent's invocation of the privilege with respect to any deposition question.

However, there remains the issue of the document production. Respondent has submitted to the Court, for in camera review, a small quantity of documents that he asserts are the only documents that he still possesses that arguably can be construed as being responsive to the summons. Respondent seeks a protective order with respect to their production, arguing that to produce them could incriminate him because they could "'furnish a link in the chain of evidence needed to prosecute' Mr. Cianciulli for such crimes as willful failure to file income tax returns and income tax evasion." (Letter of James R. DeVita, Oct. 4, 2001, submitted in camera, at 2 (quoting Hoffman v. United States, 341 U.S. 645, 649, 71 S.Ct. 814, 818 (1951)).) Petitioner continues to seek enforcement of the IRS summons, relying on its previous submissions.

DISCUSSION

[1] The District Court (Berman, J.) has already determined that the Fifth Amendment to the United States Constitution, which protects an individual from being compelled to be a witness against himself, is applicable to the instant case. See Sept. 17 Decision. The Fifth Amendment may be asserted in any civil, criminal, or administrative proceeding, when a "witness reasonably believes that his testimony could 'furnish a link in the chain of evidence needed to prosecute' him for a crime." Estate of Fisher v. Comm'r of Internal Revenue, 905 F.2d 645, 648 [66 AFTR 2d 90-5099] (2d Cir.1990) (quoting Hoffman, 341 U.S. at 486, 71 S.Ct. at 818). Although the Fifth Amendment does not protect the contents of voluntarily prepared documents, see United States v. Hubbell, 530 U.S. 27, 35–36, 120 S.Ct. 2037, 2043 (2000); United States v. Doe, 465 U.S. 605, 612 n. 10 [57 AFTR 2d 86-1270], 104, 1242 n. 10 S.Ct. 1237 [57 AFTR 2d 86-1270] (1984), the "act of production" doctrine has been recognized as protecting individuals from incriminating themselves by being compelled to produce documents where the production could implicitly communicate incriminating facts, such as the admission that "papers existed, were in [the producing party's] possession or control, and were authentic." Hubbell, 530 U.S. at 36–37, 120 S.Ct. at 2044; see also Fisher v. United States, 425 U.S. 391, 410–11 [37 AFTR 2d 76-1244], 96 S.Ct. 1569, 1581 [37 AFTR 2d 76-1244] (1976); In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992, 1 F.3d 87, 93 (2d Cir.1993), cert. denied sub nom. Doe v. United States, 510 U.S. 109, 114 S.Ct. 920 (1994). Thus, the act of production may result in self-incriminating evidence primarily in two situations: "(1) if the existence and location of the subpoenaed papers are unknown to the government; and (2) where production would implicitly authenticate the documents." AAOT Foreign Econ. Ass'n (VO) Technostroy export, v. Int'l Dev. & Trade Servs., Inc., No. 96 Civ. 9056(JGK) (AGP), 1999 WL 970402, at 6 (S.D.N.Y. Oct. 25, 1999) (quoting United States v. Doe (In re Grand Jury Subpoena), 1 F.3d at 93).

For example, in a case where the government sought production of working papers prepared by taxpayers' accountants, which were the type of documents that are usually prepared by an accountant working on a client's tax returns, and the government knew the documents were in the possession of the taxpayers, the Supreme Court held that the Fifth Amendment was not violated by requiring the taxpayer to

[1] There was also a substantial delay in scheduling the deposition because of the unavailability of counsel and the possibility that Mr. Cianciulli would retain new counsel.

produce the documents. "The existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." Fisher, 425 U.S. at 411, 96 S.Ct. at 1581. Compare Hubbell, 530 U.S. at 44–45, 120 S.Ct. at 2047–48 (production in response to broad subpoena for business and tax records had a testimonial aspect where the government did not show that it had prior knowledge of either the existence or whereabouts of the documents, and merely argued that business executives always possessed such documents).

Based upon the record before the Court, including the transcript of Respondent's deposition, there is no reason to believe that the documents produced to the Court for in camera review are known by the government either to exist or to be in Respondent's possession. Moreover, their existence, and Respondent's possession and production of the documents, could well communicate incriminating facts. Accordingly, Respondent is justified in invoking his Fifth Amendment privilege.

Petitioner also relies on the "required records exception" to the Fifth Amendment, arguing that the records sought from Respondent, such as wage statements, employee earnings statements, and bank records, are required to be maintained by law. (Pet. Mem. at 11–13.) "To qualify as a required record, a document must satisfy a three-part test: (1) it must be legally required for a regulatory purpose, (2) it must be of a kind that the regulated party customarily keeps, and (3) it must have assumed 'public aspects' which render it analogous to public documents." AAOT Foreign Econ. Ass'n, 1999 WL 970402, at 7 (citing Grosso v. United States, [21 AFTR 2d 554] 390 U.S. 62, 67–68 (1968); Doe v. United States, 711 F.2d 1187, 1191 (2d Cir.1983)). In the context of tax investigations, it is commonly recognized that W-2 forms and tax returns are required records. Id.

Here, although Petitioner sought, inter alia, employee wage statements, such as W-2 forms, the few documents produced for the Court's in camera review are neither W-2 forms nor tax returns, and do not otherwise fall within the required records exception to the Fifth Amendment.

In short, the Court concludes that production of the documents provided to the Court by Respondent for in camera review could "furnish a link in the chain of evidence needed to prosecute" Respondent, and thus to require him to produce them to Petitioner would violate his Fifth Amendment rights. Accordingly, Petitioner's request to enforce the summons is denied. The original documents will be returned to Respondent, and copies of the documents along with Mr. DeVita's October 4, 2001 letter, will be filed under seal.

So ordered.

¶2002-5069

UNITED STATES, PLAINTIFF v. Duane E. FOSTER, DEFENDANT. U.S. District Court, Eastern Dist. of Michigan, (DC MI) Docket No. 01-80264, July 1, 2002. Years 1994, 1995. Decision for Govt.

1. Tax crimes—filing false returns—evidence—motion to suppress. CPA indicted for filing false returns was denied motion to suppress evidence allegedly illegally obtained by audit agent: taxpayer's argument that agent developed criminal case under guise of civil examination was rejected. Agent's failure to explicitly acknowledge that examination began with informant information didn't prove she affirmatively attempted to mislead or deceive taxpayer or his attorneys, with whom she consulted and from whom she ultimately obtained potentially incriminating information; and agent properly suspended investigation as soon as she had "firm indication" of fraud. Also, her earlier *suspicions* of fraud didn't rise to level of firm indication. *Reference:* United States Tax Reporter ¶72,015.04(5); 73,447.503(15). IRC §7201.

United States District Court, E.D. Michigan, Southern Division,

DECISION AND ORDER DENYING MOTION TO SUPPRESS EVIDENCE

COHN, J.

I. Introduction

This is a criminal case. Defendant, a certified public accountant, is charged in a two count indictment with filing a false 1994 individual income tax return, (Count One) and a false 1995 individual income tax return (Count Two). Particularly defendant is charged with grossly understating his gross receipts, Schedule C on Form 1040, for each of the two years. Before the Court is defendant's motion to suppress[1] certain evidence in the hands of the government, essentially on the grounds that the revenue agent, Kathy McHugh (McHugh), who audited his returns, continued her examination after she had a firm indication of fraud in violation of Internal Revenue Manual § 4565.21 and defendant's constitutional right not to incriminate himself, and that McHugh's materially misrepresented the nature of the audit after she came to the subjective belief that a firm indication of fraud was present. The Government denies that McHugh made any material misrepresentation and denies that defendant suffered the loss of any constitutional right in the course of the audit. The government further says that McHugh did not violate the manual provisions since she suspended the audit only after the point in time at which there was a firm indication of fraud present. The Court conducted a two-day evidentiary hearing on the motion at which McHugh and one of the two lawyers who represented defendant during the course of the audit testified. Numerous exhibits, including McHugh's complete file, were received in evidence. For the reasons which follow the motion is DENIED.

Defendant was not misled by McHugh and McHugh did not have a firm indication of the presence of fraud until the point in time she suspended the audit. Importantly, defendant was represented by two knowledgeable lawyers beginning early in the audit who, as do most lawyers representing a client in similar circumstances, knew considerably more about defendant's tax situation than did McHugh. It was only after the two lawyers thought full disclosure might dissuade McHugh from suspending the audit and referring the matter to the Criminal Investigation Division of the Internal Revenue Service, did McHugh have a firm indication of fraud. Additionally, nothing in McHugh's statements to the lawyers constituted an affirmative misrepresentation designed to deceive. In every audit by a revenue agent the possibility of a criminal referral exists if the facts as they unfold call for such a reference.

II. Factual Background

Based on the testimony at the eviden-tiary hearing and the exhibits received in evidence, and after weighing the evidence and assessing the credibility of the witnesses, the facts, briefly stated, are as follows:[2]

1. On or about May 8, 1996, the Internal Revenue Service (IRS) received a hand written letter from an informant describing understatements of income in the range of $150,000 to $200,000 a year by defendant. A ledger sheet allegedly prepared by defendant was included with the letter. The informant asked for a reward.

2. The letter was sent by the Criminal Investigation Division of the IRS to the Examination Division on July 2, 1996. The Examination Division initially rejected the claim for a reward. On December 4, 1996, the Examination Division reopened the case selecting defendant's 1995 income tax return for audit.

3. Nothing significant happened until July 21, 1998 when McHugh was assigned

[1] The motion is styled Motion To Dismiss The Indictment, To Suppress Evidence And/Or For An Evidentiary Hearing. In reality it is a motion to suppress.

[2] Appendix B, Chronology of Investigation, to the GOVERNMENT'S RESPONSE AND SUPPLEMENTAL BRIEF IN SUPPORT THEREOF TO DEFENDANT'S POST EVIDENTIARY HEARING BRIEF ON HIS MOTION TO DISMISS INDICTMENT, SUPPRESS EVIDENCE AND/OR FOR AN EVIDENTIARY HEARING, is a detailed narrative of the facts relating to the McHugh audit beginning with the handwritten informant's letter to the Internal Revenue Service and ending with the last contact McHugh had with the lawyers representing defendant. It is a credible account of the facts.

the task of auditing defendant's 1995 income tax return. McHugh was instructed to defer the audit until she requested of defendant that he file his delinquent 1996 and 1997 income tax returns. The statute of limitations had run on a civil audit of defendant's 1994 income tax return.

4. McHugh sent defendant a letter on August 5, 1998 requesting that he file his 1996 income tax return. Defendant called McHugh on August 10, 1998 acknowledging he had not as yet filed his 1996 and 1997 income tax returns and explaining why. Defendant estimated that he would be filing these income tax returns shortly. He did not do so.

5. On September 10, 1998, McHugh wrote defendant notifying him that his 1995 income tax return had been assigned to her for audit and requested an appointment. IRS publications relating to a taxpayer's rights were enclosed with the letter.

6. The initial appointment between McHugh and defendant, scheduled for October 13, 1998, was rescheduled to October 27, 1998. The letter confirming the appointment included an Information Document Request. Prior to October 21, 1998, McHugh obtained information concerning defendant's income and assets from IRS data bases and public records. McHugh also contacted the informant and received information as to defendant's business operations and vacations and real estate holdings. The informant also sent McHugh additional information. McHugh's gathering of information in advance of the appointment with defendant, including meeting with the informant, was customary IRS practice.

7. On October 27, 1998, McHugh interviewed defendant primarily about his business background, income, banking practices and assets. Defendant told McHugh:

- how he financed the $287,000 down payment on his new house
- that he personally deposited all his business receipts and that he reported all his income
- that the gross receipts for his accounting business were based on bank deposits into a single bank account at Michigan National Bank
- that his rental receipts were deposited into a single bank account at National Bank of Detroit
- that he maintained a personal account at Wayne County Teacher's Credit Union and that he had no other personal or business accounts
- that he was not sure if he still had copies of his billing invoices and that he did not maintain a computerized billing system

8. On October 27, 1998, defendant gave McHugh copies of various of his records including

- a hand written list of his 1995 cash receipts
- a computer print-out of his 1995 general ledger and a computer print-out of the "Transactions Edit List" for 1995 which included a list of his accounts and the check register. The listing of cash receipts reflected bank deposits into an account at Michigan National Bank and was consistent with Line 1 of Schedule C of the 1995 income tax return.

9. After reviewing the records provided by defendant, McHugh gave him a second request for documents to be produced at the next conference scheduled for November 5, 1998.

10. On November 4, 1998, defendant retained the service of an experienced tax lawyer.[3] One of defendant's lawyer's called McHugh to advise her of the representation (voice mail message) and that he would call her for an appointment after he talked to defendant.

11. On November 12, 1998, McHugh called the lawyer since he had not called her. She was advised defendant had retained the services of an accounting firm who would be preparing the delinquent 1996 and 1997 income tax returns. The lawyer then asked McHugh for a copy of

[3] The retained lawyer and his partner jointly represented defendant. The partner, for a short period of time, worked as a revenue agent.

her interview notes of her October 27, 1998 meeting with defendant. Rather than giving the lawyer a copy of her notes, McHugh said that he could record her recitation of summaries that she would read to him from her notes. Later that day, McHugh called the lawyer and read over the phone an almost verbatim account of her notes which the lawyer recorded. The tape of what McHugh told the lawyer was not introduced in evidence.

12. In the November 12, 1998 phone conversation, the second lawyer testified that McHugh was asked whether the audit was random or part of a program or that there was some other basis for it. The lawyer said that McHugh replied that she was not sure and thought it was because of a failure to file tax returns. The lawyer did not say that McHugh was specifically asked whether an informant was involved. McHugh testified that she had no recollection of such a conversation. It is not clear whether the conversation was taped. No weight is given to the phone conversation, whatever its contents.

13. On November 24, 1998, the lawyers scheduled an appointment with McHugh for December 10, 1998. On December 10, 1998, McHugh and the second lawyer met at defendant's office. The lawyer deferred answering questions until he knew what direction the audit was going. McHugh responded that the audit had not really begun inasmuch as she had not yet seen detailed source documents. The lawyer told McHugh an accounting firm was completing defendant's 1996 and 1997 income tax returns and that she would be furnished copies within two weeks. McHugh was told by the lawyer that defendant's earlier statement that he did not have a computerized billing system was a mistake.[4]

14. The 1996 and 1997 income tax returns were filed directly with the IRS on December 24, 1998. Copies were not sent to McHugh at the time they were filed.

15. On January 14, 1999, McHugh met with both tax lawyers at their office. They first went through McHugh's initial document request. McHugh was told there were additional papers responsive to it. The lawyers then gave McHugh a copy of a proposed 1995 amended tax return prepared by the accounting firm and told her it was a draft to be used as a guide by her. McHugh was then taken to another room where there was a large box of records, including what she was told were additional bank statements from four different bank accounts of which she was previously unaware. It was at this moment McHugh felt she had a firm indication of fraud. McHugh prepared various lists and noted that other records were present. McHugh gave the lawyers a new document request and scheduled a follow-up appointment. It was against IRS procedure for McHugh to advise the lawyers that she was contemplating a recommendation for a criminal investigation. McHugh suspended any further activity on the audit that day.

16. McHugh had no further contact with defendant or his lawyers except for a telephone call to the lawyers to cancel the previously scheduled appointment and to advise a referral had been made.

III. The Law

As explained in United States v. McKee, 192 F.3d 535, 537–538 [84 AFTR 2d 99-6229] (6th Cir.1999), The IRS splits the responsibility for enforcing the nation's tax laws between its two investigative divisions. The Criminal Investigative Division (''CID'') is charged with investigating criminal violations of the tax code and related federal statutes. CID investigators are called ''special agents.'' Like many other criminal law enforcement agents, they carry firearms and badges. In addition, special agents must recite an administrative warning prior to soliciting information from taxpayers. See Beckwith v. United States, 425 U.S. 341, 343 [37 AFTR 2d 76-1232], 96 S.Ct. 1612 [37 AFTR 2d 76-1232], 48 L.Ed.2d 1 (1976) (quoting warning provided by special agents).

[4] In an earlier filed affidavit the lawyer stated in part that McHugh said that ''She just wanted to get the 1995 audit of Mr. Foster closed.'' In a file memo written by McHugh following the meeting there is no reference to such a statement. It is highly unlikely McHugh would have made such a statement.

On the other hand, the Examination Division of the IRS is responsible for conducting civil tax audits. Examination Division investigators are known as "revenue agents." In contrast to special agents, revenue agents do not carry firearms; nor are they required to provide taxpayers with an administrative warning. Although an Examination Division audit typically concludes with some sort of civil settlement between the IRS and the taxpayer, such an audit may uncover evidence that causes the revenue agent to refer the case to the CID for criminal investigation. Under IRS regulations, a revenue agent who uncovers a "firm indication of fraud on the part of the taxpayer" must immediately suspend her audit and refer the case to the CID. See Internal Revenue Manual § 4565.21(1). At that point, the CID enters the case and the IRS' efforts become focused on the possibility of criminal [prosecution]. See generally, Michael I. Saltzman, IRS Practice and Procedure pp 12.01 & 12.03[1][a]. Peters, 153 f.3d at 447.

[1] The issue is when McHugh had a "firm indication of fraud on the part of defendant." As pointed out in McKee, 192 F.3d at 541, "IRS regulations explicitly prohibit a revenue agent from developing a criminal case against a taxpayer under the guise of a civil investigation." This is no more than saying that to continue a civil investigation which is designed to develop a criminal case would be a violation of a taxpayer's Fourth and Fifth Amendment rights. Effectively what is involved in such a situation is, as described in United States v. Peters, 153 F.3d 445, 451 [82 AFTR 2d 98-5719] (7th Cir.1998), an unreasonable consensual search under the Fourth Amendment and a denial of due process under the Fifth Amendment because "the consent was induced by fraud, deceit, trickery, or misrepresentation by the revenue agent."

As pointed out in Peters, 153 F.3d at 452–453, Nonetheless, as the district court noted, the "firm indications of fraud" standard is a difficult standard for federal courts to apply because it is inherently vague and depends, in large part, on the good faith and professional judgment of the revenue agents conducting the investigation at issue.

"[T]he 'firm indications of fraud' rule cannot be expressed in a set of absolute criteria and ... the facts and circumstances of each case must be assessed in their own light." 153 F.3d at 453.

Also, The case law suggests that a revenue agent has developed a firm indication of fraud when she has established that the taxpayer has engaged in a consistent patter of substantial underreporting of income and/or overstatement of deductions such that an intent to evade taxes can be in-ferred.

Id. at 455. Further, "a firm indication of fraud should be distinguished from a first indication of fraud." Id. at 455.

Finally, ... evidence will be suppressed only upon a clear showing that the taxpayer was tricked or deceived. In the absence of a clear showing that the taxpayer has been tricked or deceived by the government agents into providing incriminating information, the documents and statements obtained by the Internal Revenue agents are admissible.

McKee, supra, 192 F.3d at 541 (internal citations and quotation marks omitted).

IV. Analysis

A.

Defendant argues that McHugh, on November 12, 1998, misrepresented the nature of her examination in her response to the lawyers' question as to how the examination began when she stated she was not sure. Assuming for the sake of argument McHugh did not explicitly state that the audit began with an informant seeking a reward, there is nothing in her response to suggest she was endeavoring to affirmatively mislead the lawyers as to the true nature of her investigation or that she tried to trick or deceive the defendant. As stated in Peters, supra, 153 F.3d at 457, n. 16:

> We note at the outset that the IRS did not have an affirmative duty to warn [the taxpayer] or her representatives that the audit could lead to criminal conse-

quences or that it was prompted by an informant's tip. Further, as explained in United States v. Kontny, 238 F.3d 815, 819 [87 AFTR 2d 2001-390] (7th Cir.2001), Proof of deceit must be linked up to the constitutional standard of threat or promise. Deceit by itself is neither . . .

Nothing in anything McHugh said in the November 10, 1998 conversation suggests either a threat or a promise. She said she was doing an audit and that is what she was doing.

B.

As to when McHugh first became aware of a "firm indication of fraud," this did not occur until the January 14, 1999 meeting. Up to that point McHugh did not have available to her what has been described as detailed source documents. At the October 27, 1998 meeting with the defendant, McHugh was given very little in the way of information or documents. On her own, McHugh had gathered from internal IRS data bases as well as public records and documents furnished by the informant, additional information--information sufficient to suggest that the 1995 income tax form, and particularly Schedule C, was not accurate. However, what she did have certainly was not sufficient to firmly indicate the presence of fraud.

There can be no doubt that the lawyers, once they saw the accounting firm's draft of an amended 1995 income tax form, knew that the filed Schedule C grossly understated taxpayer's 1995 gross receipts and that once McHugh saw it she would know that also. What happened here was that they hoped that by voluntarily disclosing this fact they could dissuade McHugh from a referral. This did not happen. When McHugh saw the draft 1995 amended income tax return for the first time and was made aware of the additional bank accounts, McHugh knew there was a firm indication of fraud present. McHugh quickly concluded her meeting with the lawyer as she was instructed to do by IRS procedures and then went back to her office and put together the necessary forms for a referral to the Criminal Investigation Division. McHugh is an experienced revenue agent. McHugh was well aware of how to conduct a civil audit and what indications must be present to cause her to suspend it. There is a vast difference between a suspicion that something is not right and a firm indication of fraud. McHugh knew the difference and when her suspicions ripened to firm indications she stopped the audit. There is nothing in McHugh's actions during the course of the audit to warrant suppression of any information given to her during the course of the audit or to warrant suppression of any documents given to her.[5]

SO ORDERED.

¶2002-5070

Charles I. McBRIDE, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, Department of Treasury Internal Revenue Service, DEFENDANTS-APPELLEES. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-16612; July 12, 2002 District Court, (2001, DC CA) 88 AFTR 2d 2001-5258, 146 F Supp 2d 1105, 2001-2 USTC ¶50552 [88 AFTR 2d 2001-5258], affirmed. Years 1979, 1981. Decision for Govt.

1. Limitations periods on refunds—untimely claims—partnership items. District court properly dismissed for lack of jurisdiction taxpayer's partnership-related refund action, based on court's reasoning that taxpayer didn't timely file suit within IRC §7422(h)'s 6-month limitations period and that investment tax credit carryback wasn't affected item requiring partner-level determination or otherwise affecting limitations period. *Reference:* United States Tax Reporter ¶74,225.01(50); 65,115.04(70); 74,225.01(20); 62,215. IRC §6221; 6229; 6230; 6511; 7422.

[5] The information and documents which defendant has moved to suppress are described in Exhibit A, Listing of Evidence to be Suppressed, to Defendant's SUPPLEMENTAL MATERIALS FOR ORAL ARGUMENT.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the Northern District of California Thelton E. Henderson, District Judge, Presiding.

Before SCHROEDER, Chief Judge, D.W. NELSON, and REINHARDT, Circuit Judges.

MEMORANDUM*

NOTICE: THIS IS AN UNPUBLISHED OPINION. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

[1] Charles McBride brought this refund suit for federal income taxes assessed in 1996 and arising out of a partnership governed by the Tax Equity and Fiscal Responsibility Act of 1982 (''TEFRA''), 26 U.S.C. § 6211 et seq. The district court dismissed the action for lack of subject matter jurisdiction pursuant to 26 U.S.C. § 7422, and plaintiff appeals.

The district court ruled that McBride's suit was untimely, as it fell outside the six month statute of limitations for refunds attributable to ''partnership items.'' 26 U.S.C. § 7422(h); 26 U.S.C. 6230(c)(2). The district court also held that the disallowance by the I.R.S. of an investment tax credit carryback was not an ''affected item'' requiring a partner level determination and thus did not require a separate notice of deficiency to McBride. Thus, the six month statute of limitations remains applicable in all respects.

We adopt the reasoning of the district court, set forth in its Order of June 13, 2001, in which it properly dismissed McBride's claim for lack of subject matter jurisdiction.

AFFIRMED.

¶2002-5071

FIOR D'ITALIA, INC., PLAINTIFF-COUNTER-DEFENDANT-APPELLEE, v. UNITED STATES OF AMERICA, DEFENDANT-COUNTER-CLAIMANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 99-16021, July 26, 2002. District Court, (1998, DC CA) 82 AFTR 2d 98-6888, 21 F Supp 2d 1097, 98-2 USTC ¶50840 [82 AFTR 2d 98-6888], affirmed (2001, CA9) 87 AFTR 2d 2001-1118, 242 F3d 844, 2001-1 USTC ¶50261, reversed (2002, S Ct) 89 AFTR 2d 2002-2883, 2002-2 USTC ¶50459, remanded. Years 1991, 1992. Decision for Govt.

1. FICA tax assessments—IRS method—aggregate estimate of employee tip income. 9th Cir. remanded case to district court for further proceedings consistent with Supreme Court decision. *Reference:* United States Tax Reporter ¶31,115.01. IRC §446; 3111; 3121; 6201; 6205.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Before: Alex Kozinski, Andrew J. Kleinfeld and M. Margaret McKeown, Circuit Judges.

ORDER

FOR PUBLICATION

ORDER

[1] We remand to the district court for further proceedings consistent with the Supreme Court's decision in *United States* v. *Fior D'Italia, Inc.*, No. 01-463, 536 U.S. ___ (U.S. June 17, 2002).

¶2002-5072

UNITED STATES OF AMERICA v. Charles H. RINGWALT III. U.S. District Court, Eastern Dist. of Pennsylvania, (DC PA) Docket No. Crim.A. 01-192,

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

June 28, 2002. Years 1994, 1995. Decision for Taxpayer.

1. Tax crimes—tax evasion; willfully subscribing, and aiding and assisting in preparing false returns—procedure—attorney's retainer liens. Convicted tax evader's former attorneys were required to allow his new counsel copy certain case-related files that would help in preparing for post-trial motions and sentencing: former attorneys' lien interest in files was outweighed by potential for serious prejudice to taxpayer were he denied access to documents, his urgent need for documents and public's interest in preserving integrity of criminal justice system; and taxpayer demonstrated his inability to pay former attorney's outstanding fees. *Reference:* United States Tax Reporter ¶72,015.11(5). IRC §7201; 7206.

United States District Court, Eastern District of Pennsylvania.

Memorandum

ROBRENO, District Judge:

In April 1997, Charles Ringwalt, III (''defendant'') retained the law firm of Carroll & Carroll, through John Rogers Carroll, Esquire, to represent defendant in a variety of criminal and quasi-criminal investigations relating to certain tax obligations defendant owed to the City of Philadelphia and to the Internal Revenue Service. On April 10, 2001, a federal grand jury returned an indictment against defendant, charging him with two counts of income tax evasion under 26 U.S.C. § 7201, three counts of willfully subscribing to false tax returns under 26 U.S.C. § 7206(1), and one count of aiding and assisting the preparation of false tax returns under 26 U.S.C. § 7206(2). The charges in-volved allegations of false and fraudulent personal and corporate income tax returns relating to the defendant's taxable income in 1994 and 1995 from Stelwagon Manu-facturing Corporation (''Stelwagon''), in which defendant Ringwalt was the presi-dent and sole shareholder. On January 17, 2002, following a two-week jury trial, de-fendant was convicted on all counts.[1]

According to Carroll & Carroll, defendant discharged the law firm on April 16, 2002, advising them that defendant had retained Jeffrey M. Kolansky, Esquire, of the law firm of Kolansky, Tuttle & Rocco, P.C., to represent him in the instant criminal prosecution. Mr. Kolansky, however, did not immediately enter an appearance or request the court's permission to substitute counsel. In light of these circumstances, Carroll & Carroll prepared and filed defendant's brief in support of post-trial motions on April 19, 2002, as required by the court's scheduling order. On April 30, 2002, after a hearing on defendant's motion for permission to withdraw as counsel, the court granted the motion permitting Carroll & Carroll to withdraw from the case. Immediately following the conclusion of the hearing, and at the direction of the court, Mr. Kolansky filed a Notice of Appearance in the instant case.[2]

On May 22, 2002, Mr. Kolansky wrote Carroll & Carroll requesting production of defendant's entire file by 4:00 p.m. the following day. Carroll & Carroll responded that they would not turn over the file because the defendant had not paid his outstanding balance.[3] However, Carroll & Carroll informed Mr. Kolansky that it was willing to respond to specific requests for documents. It is undisputed that Mr. Kolansky did not make any further requests to Carroll & Carroll for documents between

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[1] On January 18, 2002, bail was set at $250,000, requiring 10% or $25,000 to be posted within 21 days. After a bond hearing held on February 22, 2002, the court found that defendant failed to show cause why he could not post bail as directed and ordered the defendant taken into custody. The following day, defendant posted $25,000 in cash as bail. Defendant represented to the court that the bond money was secured through a third party surety.

[2] At that hearing, Mr. Kolansky told the court that he was adopting the brief in support of defendant's post-trial motion filed by Carroll and Carroll and would not be requesting additional time to prepare for the post-trial motion and sentencing hearing scheduled for June 20, 2002.

[3] Although no specific amount has been offered to the court, it is generally acknowledged that Carroll & Carroll have received substantial compensation for representing defendant over the course of these proceedings

May 22, 2002 and the post-trial motion and sentencing hearing on June 20, 2002.[4]

At the June 20, 2002 hearing, Mr. Kolansky represented to the court that he did not have the file held by Carroll & Carroll and made an oral motion to permit defendant to inspect and copy defendant's file. The court issued a rule to show cause why the court should not order Carroll & Carroll to turn over defendant's file to Mr. Kolansky.[5] Carroll & Carroll submitted a response to the rule to show cause asserting a valid attorney retaining lien over defendant's file.

Between June 24, 2002 and June 27, 2002, the court held two in-person hearings and two telephone hearings, at which former counsel, present counsel, the government and the defendant himself, addressed the court on these issues. Pursuant to a court order of June 24, 2002, and without objection from Carroll & Carroll, Mr. Kolansky inspected the thirteen banker's boxes comprising defendant's file to determine what documents are needed to prepare for a supplementation of defendant's post-trial motions and sentencing. Thereafter, Mr. Kolansky represented to the court that the equivalent of one and a half boxes of materials held by Carroll & Carroll are necessary to defendant's representation through the post-trial and sentencing stages. At a hearing on June 26, 2002, Mr. Kolansky provided the court with a list of specific categories of documents (i.e. ''government discovery,'' ''notes from interviews by investigators,'' and ''letters from defendant and third parties to the lawyers'') comprising the equivalent of one and a half boxes of materials defendant now seeks. Mr. Kolansky, on behalf of defendant, and Mr. Carroll, at the direction of the court, met on several occasions but were unable to work out a mutually acceptable method of providing for the payment of Carroll & Carroll's outstanding bill.

II. ANALYSIS

[1] The issue before the court is whether Carroll & Carroll should be required to make available for copying certain case-related files collected by Carroll & Carroll during the course of the legal representation of defendant in the instant criminal prosecution as to which Carroll & Carroll asserts a lien, as a result of defendant's failure to pay an outstanding bill for legal services rendered, and which may be helpful to new counsel in preparing for defendant's post-trial motions and sentencing.

Attorney retaining liens have long been recognized under Pennsylvania law. See United States v. Fidelity Philadelphia Trust Co., 459 F.2d 771 [29 AFTR 2d 72-1046] (3d Cir.1972) (quoting Laplacca v. Philadelphia Rapid Transit Co., 108 A. 612, 265 Pa. 304 (1919)). Lawyers can claim a lien on outstanding unpaid fees and disbursements on a client's papers in the attorney's possession as a result of representation of the client. See Novinger v. E.I. DuPont de Nemours & Co., Inc., 809 F.2d 212, 218 (3d Cir.1987). Specifically, Pennsylvania Rule of Professional Conduct 1.16(d) provides that ''[u]pon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as, ... surrender-ing papers and property to which the client is entitled .... The lawyer may retain papers relating to the client to the extent permitted by other law.'' Rules of Professional Conduct 1.16(d), 42 Pa.C.S.A.

Although courts have not expressly carved out any formal distinction between retaining liens asserted by lawyers against clients for failure to pay a fee in a civil as opposed to a criminal case, courts have recognized that the nature of the interests implicated in a civil case differ in some important respects from those in a criminal prosecution. See, e.g., Pomerantz v. Schandler, 704 F.2d 681 (2d Cir.1983). In a civil

[4] The court was copied on the May 22, 2002 letter. In response, the court informed counsel that copies of correspondence between parties were not to be directed to chambers. At the sentencing hearing, Mr. Kolansky informed the court that he mistakenly understood the response by the court, regarding the practice of sending copies of communications between parties to the court, to mean that he was not to pursue gaining access to the documents in possession of Carroll & Carroll.

[5] Mr. Kolansky stated that because he did not have access to defendant's file, he was uncertain whether there were any additional grounds to assert in support of post-trial relief. In light of this development, the court issued a short scheduling order for defendant to submit and the government to respond to supplemental post-trial motions. A hearing on any supplemental post-trial motions was scheduled for July 19, 2002 and the sentencing was continued to August 5, 2002.

case, the interests are private involving largely the litigant and counsel. Resolution of these disputes is left primarily to the law of debtor-creditor relations. By contrast, a criminal case involves not only the debtor-creditor relationship between the lawyer and his client, but it also implicates the defendant's liberty interest and the interests of the public in maintaining the integrity of the criminal justice system and in a just outcome. Moreover, the court must protect the public's interest in finality by guarding against the prospect of collateral litigation, in the event that the defendant later claims that lack of access to his former lawyers's file deprived him of a fair trial or the effective assistance of counsel.[6]

The Second Circuit in Pomerantz v. Schandler, 704 F.2d 681 (2d Cir.1983) stated a test to guide courts in balancing these competing interests.[7] "An exception to the foregoing [recognition of the attorney retaining lien] may be made when the client has an urgent need for the papers to defend a criminal prosecution and will be seriously prejudiced by withholding of but lacks the means to pay the lawyer's fee and disbursements." Id. at 683 (emphasis added). Thus, under Pomerantz, a court may, after balancing the conflicting interests of the parties, counsel and the public, require former counsel to release papers maintained in the attorneys' file and as to which the attorney has asserted a retaining lien. See id.

Applying Pomerantz to this case, under the first prong, the court finds that the defendant has shown an urgent need for the papers. At a hearing held on June 26, 2002, Mr. Kolansky identified particular types of documents in the possession of Carroll & Carroll, by category, which are necessary and may be helpful to the preparation of defendant's upcoming post-trial motions and sentencing. Defendant's brief on these motions are due July 3, 2002. A hearing is scheduled for July 19, 2002. Moreover, the documents which have been identified were obtained by Carroll & Carroll from third parties, the defendant and the government during the course of this criminal investigation and prosecution. It is submitted by the defendant and counsel that none of the requested documents contain legal research and work product of Carroll & Carroll. The first Pomerantz prong is thus satisfied in this case.

The second prong of Pomerantz addresses whether denying access to papers under an attorney lien would cause serious prejudice to the defendant. The court finds that the defendant has shown that, since Mr. Kolansky does not have access to documents which have been identified as necessary and helpful to his defense during the post-trial motion and sentencing stages of these proceedings, serious prejudice would result to the defendant if counsel is unable to adequately prepare for the hearings. The second Pomerantz prong is thus satisfied.

As to the third prong of Pomerantz, the lack of ability to pay the fees owed and due to Carroll & Carroll, the court finds that defendant lacks an immediate ability to pay. At this time, the defendant does not have the cash or cash equivalent necessary to satisfy Carroll & Carroll's bill in full in or in part. In addition, Mr. Kolansky has represented to the court that, although he has obtained security for future payments, defendant has only paid him $7,000.00 as a retainer and that while the retainer has been exhausted, future payments will come only from the liquidation of defendant's real estate assets and not from any current funds. Furthermore, defendant's company is currently in bankruptcy. Under these circumstances, the court finds that, under Pomerantz's third prong, defendant lacks

[6] It is undisputed that defendant owes Carroll & Carroll a significant amount of unpaid fees. While Carroll & Carroll claim the outstanding balance owed is $79,000, the defendant only acknowledges owing $50,000 with the possibility that additional unpaid fees may equal up to $29,000.

[7] While the attorneys in Pomerantz asserting the retaining lien were corporate counsel to the defendant on corporate securities matters, they withheld documents which the client was seeking to defending himself in a criminal grand jury investigation. Id. at 682.

an ability to pay the owed fee at this time.[8]

Nor is Carroll & Carroll's interest in collecting the fee eviscerated by the release of copies of certain documents. Carroll & Carroll may, of course, attempt to collect the outstanding fee by, for example, suing for payment (which defendant acknowledges he largely owes to Carroll & Carroll) and, if appropriate under local law, seeking a lis pendens on properties owned by defendant. Under these circumstances, the court finds that the interest of the defendant in having access to Carroll & Carroll's file in pursuit post-trial motions and at sentencing, and the interest of the public in preserving the integrity of the criminal justice system, in finality and in a just result outweigh Carroll & Carroll's interest in enforcing its lien in the case file to the ullest extent.[9]

One final point is worthy of note. As one court has stated, and as this case exemplifies, "[o]rdinarily, the right to ... [a] retaining lien ... arises in civil cases. A lawyer who engages in criminal trials usually receives his fee or the bulk of it prior to actually coming into court .... Once a defendant is convicted there is small likelihood that he will ever be paid for his services. Such is a fact of life for the criminal practitioner." People v. Altvater, 355 N.Y.S.2d 736, 737 (N.Y.Sup.Ct.1974). To put it differently, criminal defense counsel who fails to collect a fee or to adequately secure its payment prior to the commencement of the representation does so at his or her own financial peril.

III. CONCLUSION

For the reasons stated above, Carroll & Carroll shall allow defendant's counsel to copy, at defendant's counsel's expense, the documents identified by counsel as being necessary and helpful to the defendant's case. The order is stayed for 24 hours to permit an opportunity for appeal.

¶2002-5073

In Re: Dee Linda WALKER, Debtor. U.S. Bankruptcy Court, Western Dist. of Missouri, (Bktcy Ct MO) No. 02-60094, June 6, 2002. Year 2001. Decision against Taxpayer.

1. Tax claims in bankruptcy—exemptions—earned income credits (EIC)—joint returns. Chap. 7 trustee's motion to compel turnover of debtor-wife and husband's tax refund resulting from EIC claimed on their joint return was granted: refund was bankruptcy estate property where taxpayer was family's sole income earner; and refund wasn't exempt as tenancy-by-entireties property based on 8th Cir. precedent and taxpayer's individual return containing no language conveying her interest in refund to husband. *Reference:* United States Tax Reporter ¶68,726.52(32).

Jon M. Gold, Reynolds & Gold, Springfield, MO, for debtor.
J. Kevin Checkett, Carthage, MO, for Chapter 7 Trustee.

United States Bankruptcy Court, Western District of Missouri.

Memorandum Opinion

FEDERMAN, Chief Judge:

Chapter 7 trustee moved to compel turnover of federal income tax refund payable to debtor-wife and her nondebtor-husband, as result of earned income tax credit (EIC) which they had claimed on their joint return. The Bankruptcy Court, Arthur B.

[8] This does not mean that the defendant does not have the ability to pay the debt in the future. It does appear that subject to the future sales of certain properties, the defendant can pay these debts and/or provide some security for future payment of the obligation to Carroll & Carroll. Although the defendant offered some security to Carroll & Carroll, it only allowed Carroll & Carroll security behind the interest of his current attorney. After discussions between defendant, Carroll & Carroll, and present counsel, the parties were unable to agree on adequate security.

[9] Although the coercive agency of the lien is obviously affected by this order in that it removes the obvious incentive for immediate payment, Carroll & Carroll's lien over the file is not completely vitiated by the court's directive; rather, the court has allowed defendant to copy one and a half boxes of documents in a file totally thirteen boxes—less than 10% of the overall file. See New World Marketing Corp. v. Garcia, 76 B.R. 68, 69–70 (E.D.Pa.Bankr.1987) ("since the law firm would still be permitted to retain possession of the documents, allowing [the client] to gain access to the documents and learn their contents would not deprive the law firm of any benefit its lien confers vis-a-vis the client."); Altvater, 355 N.Y.S.2d at 738 ("While the right to permit defense counsel copy the papers may appear to negate the characteristics of a retaining lien, such is not the intention of the court nor the law. Where the surrender of papers, documents, etc., are pursuant to a court order, it is an involuntary surrender and the right to a lien is not extinguished.") (citations omitted).

Federman, Chief Judge, held that: (1) refund was included in property of debtor-wife's estate; and (2) refund was not owned in tenancy by the entirety and was not, as entireties property, exempt from claims of debtor-wife's creditors.

Motion granted.

The Chapter 7 trustee filed a motion to compel turnover of debtor Dee Linda Walker's 2001 income tax refund. Ms. Walker refused, claiming that she held the income tax refund with her non-debtor husband as tenants by the entirety. This is a core proceeding under 28 U.S.C. § 157(b)(2)(B) over which the Court has jurisdiction pursuant to 28 U.S.C. § 1334(b), 157(a), and 157(b)(1). The following constitutes my Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure as made applicable to this proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure. For the following reasons I will grant the trustee's motion.

FACTUAL BACKGROUND

Ms. Walker and her non-debtor husband married in June of 2001. He has two children from a previous marriage, and Ms. Walker has one child from a previous marriage. Ms. Walker testified that all three children live with them. She is employed at Bass Pro Shop and has been for 8 years. She earned $19,400 in 2001. On January 11, 2002, Ms. Walker filed a Chapter 7 bankruptcy petition. Mr. Walker is disabled and contributes no income to the household, however, on or about February 17, 2002, Mr. and Ms. Walker filed a joint tax return. Thus, the Walkers received an income tax refund postpetition for income earned in 2001. The amount of the refund is $4,721.00. The refund was due them because of the earned income tax credit (the EIC).

The Chapter 7 trustee demanded turnover of the income tax refund as an asset of the bankruptcy estate. Ms. Walker claims that she and Mr. Walker have no joint debts, and that they hold the income tax refund as tenants-by-the- entirety property. On May 16, 2002, this Court held a hearing. There are two issues before the Court. The first issue is whether the tax refund is property of the bankruptcy estate. The second issue is whether an income tax refund is exempt as tenants-by-*546 the-entirety property if a couple files a joint tax return, only one spouse earns income, they have no joint debts, and the spouse earning the income files a bankruptcy petition.

DISCUSSION

[1] Section 541 of the Bankruptcy Code provides that the filing of a bankruptcy petition creates an estate that contains all property in which the debtor holds any legal or equitable interest:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.[1]

The Eighth Circuit has specifically held that a debtor's interest in a tax refund is property of the debtor's bankruptcy estate and is not exempt as ''earnings'' under Missouri's garnishment statute.[2] In In re Goertz this Court relied on the plain language of section 541 to hold that a tax refund is property of the estate.[3] And Ms. Walker testified that she earned all of the income for her family in 2001. Accordingly, the tax refund at issue here is property in which Ms. Walker holds a legal interest, it is property of her bankruptcy

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1 11 U.S.C. § 541(a)(1).

2 Davis v. Robinson (In re Robinson), 152 B.R. 956, 958 (Bankr.E.D.Mo.1993) (citing In re Wallerstedt, 930 F.2d 630 (8th Cir.1991)). See also Kokoszka v. Belford, 417 U.S. 642, 648 [34 AFTR 2d 74-5196], 94 S.Ct. 2431, 2435 [34 AFTR 2d 74-5196], 41 L.Ed.2d 374 [34 AFTR 2d 74-5196] (1974) (where the Court held that an income tax refund is sufficiently rooted in the prepetition past to be defined as property under the bankruptcy act).

3 202 B.R. 614, 616 [81 AFTR 2d 98-1873] (Bankr.W.D.Mo.1996). See also Williamson v. Montgomery (In re Montgomery), 219 B.R. 913, 917 [81 AFTR 2d 98-1649] (10th Cir. BAP 1998), affirmed, 224 F.3d 1193 [86 AFTR 2d 2000-6007] (10th Cir.2000) (holding that EIC's are classified as a tax overpayment and are, therefore, property of the estate); Johnston v. Hazlett (In re Johnston), 209 F.3d 611, 613 [85 AFTR 2d 2000-1284] (6th Cir.1999) (holding that an EIC available to a debtor at the end of the tax year in which she filed her Chapter 7 bankruptcy petition is included in property of the estate, even though she filed her petition prior to the end of the year).

estate, and she may assert any appropriate exemptions to remove any or all of the tax refund from the estate.[4]

Ms. Walker testified that she and Mr. Walker received an income tax refund because of the EIC. And, she felt the amount of the refund was increased because Mr. Walker's two minor children live with them. The EIC permits qualifying taxpayers to claim a percentage of their income as a credit against tax they would otherwise owe for a taxable year.[5] Congress made this program available to low income earners for the following three reasons: (1) to reduce the disincentive to work caused by the imposition of Social Security taxes on earned income; (2) to stimulate the economy by placing funds in the hands of consumers who would spend them immediately; and (3) to provide relief for families impacted by rising food and energy prices.[6] If the EIC is greater than the taxes owed by the wage earner, the excess is considered an overpayment of taxes, and the taxpayer is entitled to a refund as if she overpaid her taxes in that amount.[7] In other words, a predicate to receiving an EIC is to have earned income.[8] And Ms. Walker is the only member of her family with earned income. I find, therefore, that the tax refund is property of the estate. Ms. Walker, however, claims that the tax refund is exempt because she holds it with her husband as tenants by the entirety, and they have no joint creditors.

Missouri cases define tenancy by the entirety as "a form of ownership in property created by marriage in which each spouse owns the entire property rather than a share or divisible part, and thus at the death of one spouse, the surviving spouse continues to hold title to the property."[9] Thus, the husband and wife have unity of interest, unity of entirety, unity of time, and unity of possession, and both are seized of the entirety.[10] In Missouri there is a presumption that both personal property and real estate owned by a husband and wife are held as tenants by the entirety.[11] This form of title derives from ancient common law, and serves the purpose of making it difficult, if not impossible, for a creditor of one spouse to reach that spouse's interest in property held by both spouses as tenants by the entirety.[12] As such, the State of Missouri recognizes that property held as tenants by the entirety is exempt from the claims of creditors of either spouse individually. Moreover, the Bankruptcy Code permits a debtor to exempt property from the bankruptcy estate that she holds as a tenant by the entirety:

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection .... Such property is--

....

(2)(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.[13]

So, if Ms. Walker holds the income tax refund as a tenant by the entirety, she may exempt the entire refund from her bankruptcy estate.

The Eighth Circuit addressed this issue in In re Wetteroff.[14] In Wetteroff, the Eighth Circuit held that a tax refund issued on behalf of debtors who filed a joint tax return is not per se owned by the debtors

4 202 B.R. at 616.

5 Williamson v. Montgomery (In re Montgomery), 224 F.3d at 1194.

6 Id.

7 Id.

8 See In re Goertz, 202 B.R. 614, 616 [81 AFTR 2d 98-1873] (Bankr.W.D.Mo.1996) (where the court found that a person cannot collect the EIC unless she first files an income tax return).

9 Rinehart v. Anderson, 985 S.W.2d 363, 367 (Mo.Ct.App.1998).

10 Murawski v. Murawski, 240 Mo.App. 533, 209 S.W.2d 262, 264 (1948).

11 See, e.g., Scott v. Flynn, 946 S.W.2d 248, 250 (Mo.Ct.App.1997).

12 Harris v. Crowder, 174 W.Va. 83, 322 S.E.2d 854, 858 (1984).

13 11 U.S.C. § 522(b)(2)(B).

14 453 F.2d 544 [29 AFTR 2d 72-392] (8th Cir.1972).

as tenants-by-the-entirety property.[15] The Court stated that Congress passed legislation allowing taxpayers to file joint tax returns in order to equalize the tax burden for married persons in noncommunity property states, not to effect a change of ownership of property rights as between the spouses.[16] As the Court further stated, "[i]t is an elementary principal of conveyancing law that an instrument claimed to have conveyed a property interest must contain proper words of conveyance showing an intent upon the part of the grantor to transfer his interest."[17] Ms. Walker offered as an exhibit her individual income tax return for 2001, which indicates she and Mr. Walker did file a joint return.[18] That document, however, does not contain any language of conveyance. Based upon the precedence in the Eighth Circuit and the evidence before me, I cannot, therefore, find that Mr. and Ms. Walker hold their 2001 income tax refund as tenants by the entirety. Accordingly, the tax refund at issue here is property of Ms. Walker's bankruptcy estate, and it is not exempt as tenants-by-the-entirety property.

An Order in accordance with this Memorandum Opinion will be entered this date. 279 B.R. 544

¶2002-5074

Garth R. and Karma R. EDINGTON, PETITIONERS v. UNITED STATES, RESPONDENT. U.S. District Court, Dist. of Oregon, (DC OR) Civil No. 02-676HA, July 9, 2002. Decision for Govt.

1. Summons procedure—motion to quash. Taxpayer's motion to quash IRS summons was withdrawn. *Reference:* United States Tax Reporter ¶76,025.04(25). IRC §7602.

In the United States District Court for the District of Oregon.

Order of Withdrawal

HAGGERTY, District Judge:

[1] IT IS HEREBY ORDERED that the petitioner's motion to quash summons by the Internal Revenue Service is withdrawn.

Dated this 9 day of July, 2002.

/s/ Ancer L.Haggerty

ANCER L. HAGGERTY

U.S. District Judge

¶2002-5075

Bruce GORDON, PLAINTIFF v. MIDWEST MUSICAL INSTRUMENT RENTAL INC., a dissolved Illinois Corporation, Joan Gordon, and United States of America, DEFENDANTS. UNITED STATES OF AMERICA, COUNTER-PLAINTIFF/CROSS-CLAIMANT v. Midwest Musical Instrument Rental Inc., a dissolved Illinois Corporation, Joan Gordon, and United States of America, COUNTER-DEFENDANT/CROSS-RESPONDENT. U.S. District Court, Northern Dist. of Illinois, (DC IL) Docket No. 01 C 4916, July 15, 2002. Decision for Govt.

1. Tax liens—priority of competing claims—summary judgment. Govt. was granted summary judgment that its tax liens attached to dissolved corp.'s assets before taxpayer sold assets to 3d-party, and balance of case was remanded to state court for lack of jurisdiction. *Reference:* United States Tax Reporter ¶63,215.04(200). IRC §6321.

In the United States District Court for the Northern District of Illinois, Eastern Division.

Memorandum Opinion

GRADY, District Judge:

[1] The court has read the materials filed by the United States and Joan Gordon

15 453 F.2d at 547.
16 Id. at 547.
17 Id.
18 Debtor's Ex. # 1.

regarding the motion of the United States for summary judgment on its crossclaim and counterclaim. The court agrees with the United States that there are no genuine issues of material fact and that the United States is entitled to judgment as a matter of law. In short, the tax liens of the United States attached to the assets of MMIR prior to the time Joan Gordon sold those assets to Bruce Gordon. It was not possible for Joan Gordon to sell the assets to Bruce Gordon free of the liens.

The motion of the United States for summary judgment is allowed. Counsel for the United States may prepare a draft judgment order, submit it to all other counsel in the case for any objections as to form, and then submit the approved order for entry.[1]

DATED: July 15, 2002

ENTER:

John F. Grady, United States District Judge

¶2002-5076

Barton S. MANN, JR. and Sandra K. MANN, PLAINTIFFS v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Western Dist. of Missouri, (DC MO) Case No. 01-0668-CV-W-3, July 9, 2002. Year 1994. Decision for Govt.

1. Actions against IRS—refund—limitations periods; disallowance of refund claim. Taxpayers' refund action against IRS was dismissed for lack of jurisdiction: IRS wasn't suable entity; and even if taxpayers had filed suit against U.S., which was proper defendant, claim was untimely filed more than 2 years after disallowance notice was mailed. *Reference:* United States Tax Reporter ¶74,225.03(3); 65,325.01(10). IRC §6532; 7422.

In the United States District Court for the Western District of Missouri, Western Division.

Order Granting Defendant's Motion to Dismiss

SMITH, District Judge:

Pending is Defendants Motion to Dismiss (Doc. #11). For the reasons discussed below, Defendants motion is hereby GRANTED.

I. BACKGROUND

Plaintiffs' have filed suit against the Internal Revenue Service ("IRS") claiming that they are entitled to receive a refund from their 1994 tax return. The IRS disallowed Plaintiffs' claim for a refund on October 7, 1998.[1] In the written disallowance notice, Plaintiffs were informed that they may appeal the decision disallowing their claim by filing a lawsuit with the United States District Court or the United States Court of Federal Claims within two years from the mailing date of the letter. Additionally, the IRS Appeal Officer who reviewed the denied claim included in her letter a reminder that Plaintiffs could contest the decision by filing suit within two years from the date of the disallowance letter previously mailed to them on October 7, 1998.

Plaintiffs subsequently filed a motion to proceed in forma pauperis and a motion for appointment of counsel in the United States District Court of the Western District of Missouri on June 22, 2001.[2] This Court denied both of Plaintiffs motions. Plaintiffs complaint was filed on January 25, 2002. On May 15, 2002, Defendant filed its Motion to Dismiss for Lack of Subject Matter Jurisdiction.

II. STANDARD

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, dismissal for lack of subject matter jurisdiction is appro-

[1] As the court has previously indicated, the balance of the case will then be remanded to the Circuit Court of Cook County because of a lack of subject matter jurisdiction.

[1] The IRS denied Plaintiffs' claim for a refund because the claim was filed late. Plaintiffs argue (1) the IRS should have applied the common law mailbox rule, and (2) the IRS should not have denied the claim based on lack of timeliness because Plaintiffs met the required deadline for filing such a claim. Nonetheless, in order for this Court to have jurisdiction to review such an argument, the suit had to be brought by Plaintiffs within two years from the date of the disallowment notice. Plaintiffs waited more than two years to file such claims; therefore, this Court cannot decide or address such arguments.

[2] Because the claim was barred by the statute of limitations as of the filing date of the motion to proceed in forma pauperis, this Court will not decide whether filing a motion to proceed in forma pauperis tolls the statute of limitations.

priate if the issue before the court is whether the plaintiff has failed to satisfy a threshold jurisdictional requirement. Trimble v. Asarco, Inc., 232 F.3d 946, 955 n.9 (8th Cir. 2000). In order to properly dismiss a case for lack of subject matter jurisdiction, the complaint must be successfully challenged on the factual truthfulness of its averments or on its face. Titus v. Sullivan, 4 F.3d 590, 593 (8th Cir. 1993). In a factual 12(b)(1) motion, the trial court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Osborn v. U.S., 918 F.2d 724, 730 (8th Cir. 1990).

III. DISCUSSION

A. The IRS Is Not the Proper Defendant

The IRS is an agency that cannot be subject to suit. Krouse v. United States Gov't Treasury Dep't IRS, 380 F. Supp. 219, 221 [35 AFTR 2d 75-999] (C.D. Cal. 1974) (citing Blackmar v. Guerre, 342 U.S. 512 (1952)). "When Congress authorizes one of its agencies to be sued eo nomine, it does so in explicit language, or impliedly because the agency is the offspring of such a suable entity." Blackmar, 342 U.S. at 515. Absent express statutory authority from Congress, dismissal is required because the "[d]istrict courts lack subject matter jurisdiction over claims against the Government to which the Congress has not consented." Miller v. Tony & Susan Alamo Foundation, 134 F.3d 910, 915–16 [81 AFTR 2d 98-482] (8th Cir. 1998). Because the IRS cannot be subject to suit, the case must be dismissed because this Court does not have jurisdiction over the claims.

B. Plaintiffs Failed to Bring Suit Within Two-Year Statute of Limitations

Even if Plaintiffs had filed suit against the proper defendant, the United States, Plaintiffs' claim is time barred because they failed to file their claim within two years after the date of the IRS letter disallowing their claim. "The applicable statute of limitations is a term of [Congresss] consent." Loudner v. U.S., 108 F.3d 896, 900 (8th Cir. 1997). If a plaintiff fails to sue within the statute of limitations, the district court is deprived of jurisdiction and cannot entertain the claim. Id.

> No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

26 U.S.C. § 6532(a)(1) (1989). In the present case, the IRS sent Plaintiff a notice of disallowance on October 7, 1998. This notice also included that Plaintiffs must file suit to contest the decision within two years from the date of the notice. Plaintiffs filed a motion to proceed in forma pauperis and a motion for appointment of counsel on June 22, 2001. The two-year statute of limitation to file a claim with this Court expired on October 7, 2000. Because Plaintiffs failed to file suit within the statute of limitations, this Court does not have jurisdiction of their claims.

IV. CONCLUSION

For the above-stated reasons, Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction is hereby GRANTED. Plaintiffs' claims are dismissed with prejudice.

IT IS SO ORDERED.

Date: July 9, 2002

/s/ Ortrie D. Smith

ORTRIE D. SMITH, JUDGE

UNITED STATES DISTRICT COURT

¶2002-5077

EAST CASCADE WOMEN'S GROUP, P.C., an Oregon professional corporation, PLAINTIFF v. Alison F. TUTTHILL; Roxanne L. Farra, P.C.; Milly Whatley, P.C.; State of Oregon, Oregon Department of Revenue; and United States of America, DEFEND-

ANTS. U.S. District Court, Dist. of Oregon, (DC OR) CV-02-67-ST, May 1, 2002. Year 2001. Decision for Govt.

1. District court jurisdiction—interpleader actions—sovereign immunity—attorney sanctions. Magistrate judge's recommendation to grant employee's attorney's and employer/interpleader's motions for voluntary dismissal of action originally filed in Oregon state court regarding potential federal and state taxability of employee's lawsuit judgment was adopted: jurisdiction was lacking in 1st instance over Oregon Dept. of Revenue; and interpleader had no viable claim for relief against IRS or other defendants that had not yet made any claim to judgment funds. But, employee's attorney's request to sanction interpleader's attorney was denied where filing of instant action, although misguided, wasn't in bad faith and caused only single additional proceeding at minimal cost. *Reference:* United States Tax Reporter ¶74,025.01(89); 74,336.511(80). IRC §7402.

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U.S. District Court, Dist. of Oregon,

Findings and Recommendations

STEWART, Magistrate Judge:

INTRODUCTION

On October 9, 2001, a jury awarded a verdict in favor of Alison F. Tutthill ("Tutthill") against her former employer, East Cascade Women's Group, P.C. ("ECWG"), in *Tutthill v. East Cascade Women's Group, et al*, Circuit Court for the State of Oregon for the County of Deschutes, Case No. 99CV-0376, in the sum of $18,022 on her claim for three month's severance pay. The jury was unable to reach a verdict on plaintiff's wrongful discharge claim and, after the parties stipulated to having that claim decided by the trial judge, the trial judge ruled in favor of ECWG. On December 20, 2001, a Partial Judgment was then entered against ECWG for $18,022 plus pre-judgment and post-judgment interest. Tutthill's attorneys, Roxanne L. Farra, P.C. ("Farra") and Milly Whatley, P.C. ("Whatley"), filed an attorney lien against that Partial Judgment.

Because ECWG contended that the Partial Judgment constitutes wages from which it must withhold state and federal taxes, as well as pay the employer's share of the taxes, it proposed to satisfy this Partial Judgment by deducting employment taxes of $7,956.71. This would result in a net principal to Tutthill of $10,065.29. Farra, on behalf of Tutthill, objected and took the position that no taxes should be withheld from the Partial Judgment.

On January 4, 2002, to provide an opportunity for the potentially competing claimants to the Partial Judgment to state their positions, ECWG filed this interpleader action in the Circuit Court for the State of Oregon for the County of Deschutes, Case No. 02CV-0007-MA, against defendants Tutthill, Farra, Whatley, the State of Oregon, Oregon Department of Revenue ("ODR"), and the United States of America ("IRS").

On January 15, 2002, the IRS removed this action to this court pursuant to 28 USC §§ 1141 and 1142(a)(1). The ODR filed an Answer, and Farra moved to dismiss this case for lack of jurisdiction

(docket #5). When EWCG opposed Farra's motion, Farra responded with a motion for an award of $2,303.50 in monetary sanctions against EWCG's attorney (docket #11). After the IRS refused to waive its sovereign immunity and the ODR raised both immunity and jurisdictional issues, EWCG filed a motion to voluntarily dismiss this action with prejudice and without fees or costs to any party (docket #16). No defendant has objected to dismissal with prejudice, but Farra seeks to condition dismissal upon an award of its attorney fees and costs incurred in defending this lawsuit.

For the reasons set forth below, Farra's motion to dismiss should be granted as against the ODR and any claims premised upon the payment of taxes pursuant to Oregon law; EWCG's motion to dismiss should be granted; and Farra's motion for sanctions should be denied.

ANALYSIS

I. Farra's Motion to Dismiss

"Federal courts are always 'under an independent obligation to examine their own jurisdiction.' . . . and a federal court may not entertain an action over which it has no jurisdiction." *Hernandez v. Campbell*, 204 F3d 861, 865 (9th Cir 2000) (citations omitted). Moreover, if the state court lacks jurisdiction over the subject matter, then this court acquires none through removal: "Basic to the procedure of removal is the notion of derivative jurisdiction. As explained in *Lambert* . . . 'If the state court lacks jurisdiction of the subject matter or of the parties, the [f]ederal court acquires none, although it might in a like suit, originally brought there, have had jurisdiction.'" *Schroeder v. Trans World Airlines, Inc.*, 702 F2d 189, 192 (9th Cir 1983), quoting *Lambert Run Coal Co. v. Baltimore & Ohio R.R. Co.*, 258 US 377, 382 (1922).

[1] Farra argues that this court lacks jurisdiction over this action because the state court lacked jurisdiction over the ODR and the IRS. Specifically, she contends that the ODR has not waived immunity as to suits in circuit court which concern the assessment, levy or collection of taxes, and that the exclusive jurisdiction over matters concerning the assessment or collection of taxes rests with the Oregon Tax Court. Second, Farra contends that the IRS is immune from suit in state court.

The ODR contends that the IRS properly removed this matter to this court, but that such removal does not confer jurisdiction of this court over the ODR. Therefore, the ODR joins Farra's motion and requests dismissal of this action as to the ODR. The IRS disagrees with Farra that it is immune from every suit in state court, but notes that it may well be immune from the claims asserted in this action. Therefore, it takes no position with respect to Farra's motion.

The IRS timely removed this case to this court pursuant to 28 USC § 1442 which allows removal of actions to federal court of actions filed in state court against the United States or any of its agencies or officers. Accordingly, this court has subject matter jurisdiction over this case under 28 USC § 1441(a)(1), provided that the state court also had jurisdiction.

With respect to the ODR, the state court did not have subject matter jurisdiction. The ODR and its employees and agents are immune from liability for any claim in connection with the assessment and collection of taxes. ORS 30.265(3)(b). Moreover, the Oregon Tax Court has "sole, exclusive and final judicial authority for the hearing and determination of questions of law and fact arising under the tax laws of [Oregon]," and Oregon law expressly prohibits contesting "any action, suit or proceeding in the circuit court or any other court, any matter within the jurisdiction of the tax court." ORS 305.410(1) & (3).

Here, ECWG requests this court to determine its potential tax liability to the ODR as to any claims concerning ECWG's liability to pay taxes due under Oregon law. Therefore, this case should be dismissed as to the ODR. But that does not mean that it should be dismissed for lack of subject matter jurisdiction as to the other defendants, as Farra contends.

The state court clearly has jurisdiction to entertain interpleader claims. Thus, at least with respect to the defendants other than the ODR, the issue is not one of subject matter jurisdiction in state court, but rather whether the Complaint states an interpleader claim. It is clear from the allegations of the Complaint that ECWG may be able to seek declaratory relief in state court against Tutthill to determine whether the Partial Judgment constitutes payment of wages to Tutthill and therefore is subject to various tax liabilities. However, at this point, ECWG has no viable interpleader claim.

Interpleader allows a party who is or may be exposed to double or multiple liability to joins as defendants "[p]ersons having claims against the plaintiff." ORCP 31. A fundamental requirement of an interpleader action is that the defendants actually have claims against the ECWG. That fundamental requirement is not met in this case. No claim has been made by the ODR or the IRS or anyone else to all, or any portion of, the Partial Judgment. Neither the ODR nor the IRS has filed a tax lien or even a notice of deficiency. To the contrary, the ODR notified the parties that "[t]he obligation of the parties to the original case between ... Tutthill and [ECWG] is to satisfy the judgment rendered according to its terms [and that the State would not] involve it or its agencies in a minor dispute among counsel for private parties over the form of a Judgment." Farra's Memorandum in Support of Motion to Dismiss, Exhibit A. The IRS later advised the parties that ECWG's claim was essentially a declaratory judgment action with respect to federal taxes for which it has not waived its sovereign immunity. Affidavit of John A. Berge in Support of Plaintiff's Memorandum in Opposition to Request for Sanctions, Exhibit 5.

ECWG may have a legitimate concern that either the ODR or the IRS may later determine that ECWG should have paid employer-based taxes on the Partial Judgment to Tutthill. However, that concern cannot be addressed through an interpleader action where neither the ODR nor the IRS has yet made such a claim. A theoretical concern is an insufficient basis for the use of interpleader. *See e.g. New York Life Ins. Co. v. Lee*, 232 F2d 811, 813-814 (9th Cir 1956).

Furthermore, an interpleader generally requires a plaintiff to deposit a fund into court for distribution to competing claimants. In this case, ECWG and Tutthill dispute whether a portion of the Partial Judgment is subject to any taxes at all. Farra claims that ECWG must report as income only the net amount of the Partial Judgment received after payment of the attorney lien. Complaint, Exhibit 3, ECWG also seeks to determine what additional amount it will owe in taxes as an employer. Thus, unlike the standard interpleader case, this case involves the issue of what additional amount ECWG may owe as the employer's share of the taxes.

Although this court has jurisdiction over claims against the IRS, ECWG cannot state a claim for interpleader against the IRS or anyone else at this point. Instead, to resolve this issue, ECWG should file an action against Tutthill in state court to seek a declaratory judgment as to whether the Partial Judgment constitutes payment of wages to Tutthill and therefore is subject to various tax liabilities. Thus, this court concludes that this action should be dismissed over the ODR for lack of jurisdiction and should be dismissed as to all other defendants for failure to state a claim upon which relief can be granted.

II. Farra's Motion for Sanctions

Pursuant to 28 USC § 1927 and the court's inherent powers, Farra seeks imposition of $2,303.50 in monetary sanctions against ECWG's attorney, John Berge ("Berge"), and the law firm of Bryant, Lovlien & Jarvis, P.C. The amount requested is for the time and expense in-curred by Farra in filing the motion to dismiss (5.55 hours) and the motion for sanctions (8 hours) at the hourly rate of $170.00.

A. Standards

Pursuant to 28 USC § 1927, "[a]ny attorney ... who so multiplies the proceed-

ings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, ex-penses, and attorneys' fees reasonably in-curred because of such conduct.'' An attor-ney's delay and failure to act warrant § 1927 sanctions only if it is so egregious as to ''multiply'' the proceedings. *See West Coast Theater Corp. v. City of Portland*, 897 F2d 1519, 1528 (9th Cir 1990) (affirming § 1927 sanctions where counsel failed to provide any evidence of discriminatory intent, failed to answer interrogatories, failed to respond to a document demand, and failed to drop the case after improperly serving a defendant).

Sanctions under § 1927 must be supported by a finding of subjective bad faith, which ''is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim for the purpose of harassing an opponent.'' *In re Keegan Mgmt. Co., Sec. Litig.*, 78 F3d 431, 436 (9th Cir 1996) (internal quotations omitted). Thus, ''[f]or sanctions to apply, if a filing is submitted recklessly, it must be frivolous, while if it is not frivolous, it must be intended to harass .... [R]eckless nonfrivolous filings, without more, may not be sanctioned.'' *Id.*

To fill in the gaps between the other rules, courts are invested with inherent powers to sanction a party or counsel who '''wilfully abuse[s] the judicial process.''' *Oregon RSA No. 6, Inc. v. Castle Rock Cellular of Or., Ltd. P'ship*, 76 F3d 1003, 1007 (9th Cir 1996), quoting *Roadway Express, Inc. v. Piper*, 447 US 752, 766 (1980). These sanctions are designed not only to provide a substantive remedy to an aggrieved party, but also to ''vindicate judicial authority.'' *Mark Indus., Ltd. v. Sea Captain's Choice, Inc.*, 50 F3d 730, 733 (9thCir 1995).

> For purposes of imposing sanctions under the inherent power of the court, a finding of bad faith does not require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or malafides, the assertion of a colorable claim will not bar the assessment of attorney's fees.

Fink v. Gomez, 239 F3d 989, 992 (9thCir 2001), quoting *In re Itel Sec. Litig.*, 791 F2d 672, 675 (9th Cir 1986), *cert denied*, 479 US 1033 (1987).

However, ''[s]uch sanctions require a court to make a finding of subjective bad faith,'' and due process concerns ''may require 'fair notice and an opportunity for a hearing on the record.''' *Oregon RSA No. 6*, 76 F3d at 1007 (citations omitted).

B. Analysis

Farra complains that Berge was aware of the alleged ''tax'' issue before the Partial Judgment was entered, but made no effort to approach the trial court with that issue or to ask Farra to alter or amend the draft Partial Judgment forwarded to him for his review and approval. After Farra objected to ECWG deducting any amount from the Partial Judgment and filed its attorney lien, Berge stated his intent to interplead the amount awarded in the Partial Judgment. Farra advised him that he had no basis for an interpleader and that he should have raised the issue before entry of the Partial Judgment. Yet Berge filed the interpleader without first seeking amendment of the Partial Judgment under ORCP 71 or consulting the ODR. Faced with a conflict created by being named as a co-defendant with its client, Farra was forced to withdraw as Tutthill's counsel in the underlying state court case. Farra then filed a motion to dismiss and advised Berge that it would seek to recover its attorney fees and costs if he failed to voluntarily dismiss this action. Instead, ECWG opposed Farra's motion to dismiss.

Berge explains that his motivation in filing this action was an attempt to avoid potential multiple liability to ECWG. He consulted certified public accountants and learned of a split of authority at the federal level as to whether an attorney lien could be paid prior to a judgment for severance pay being taxed. However, it appeared that the taxes needed to be withheld from the judgment for severance pay. He raised with Farra the issue of whether taxes

should be withheld prior to paying the Partial Judgment, but was unable to reach agreement. He advised Farra that by filing the interpleader action, all competing claimants could be included in one action and state their position as to whether taxes should be withheld. It was not his intent to necessarily resolve the ultimate taxation question, but instead to allow the taxing authorities to state a position if they chose to do so.

After filing the action in state court, the IRS removed it to federal court. The ODR immediately responded by indicating that based on jurisdictional and procedural issues, it was not required to participate and demanded dismissal. Berge advised all parties that he was waiting for the IRS to state its position and that if the IRS chose not to participate, he intended to dismiss the action. To keep all parties' costs and time at a minimum, he did not request or demand that any party file responsive pleadings. Subsequently, the IRS indicated that it had not waived sovereign immunity and therefore did not wish to participate. As soon as both taxing authorities stated their positions, Berge requested the position of all parties on a voluntary dismissal.

As discussed above, this case is not a proper interpleader action. However, by filing this action, Berge hoped to force the taxing authorities to indicate their position on the taxation issue. In fact, the IRS could have deemed the action to be a declaratory judgment action and waived its sovereign immunity. Although ECWG could have filed a motion under ORCP 71 to modify the Partial Judgment to allow the deduction, only the taxing authorities can ultimately resolve the taxability issue. Tp that end, Berge's tactic proved unsuccessful. However, Farra need not have incurred any extra, unnecessary work had it waited a few weeks and not prematurely filed a motion to dismiss. Moreover, as indicated above, Farra's motion to dismiss is well-taken only with respect to the ODR.

Berge's conduct in this case caused only a single additional proceeding, which was terminated quickly with minimal cost. The record does not support a finding that Berge's conduct rose to the level of bad faith or its equivalent under a recklessness standard. Nothing occurred in this case other than Berge's misguided attempt to provide an opportunity for the taxing authorities to take a position on the taxation issue. This is not a case where plaintiff continued to pursue a claim for oppressive reasons, in bad faith, or in violation of an order of the court. In fact, had Farra waited for the IRS to state its position, as Berge suggested, it would not have needed to file any motion to dismiss since the IRS' position caused ECWG to agree to voluntarily dismiss this case. *Compare Gomez v. Vernon*, 255 F3d 1118 (9th Cir), *cert denied*, 122 SCt 667 (2001) (affirming sanctions award where attorneys willfully and repeatedly examined prisoners' attorney-client privileged materials), and *Pacific Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F3d 1112, 1115–18 (9th Cir 2000) (affirming sanctions award where attorney advised client to violate TRO), with *Barber v. Miller*, 146 F3d 707, 711 (9thCir 1998) (stating that "ignorance or negligence" does not support § 1927 sanctions), *Zambrano v. City of Tustin*, 885 F2d 1473, 1484 (9th Cir 1989) (reversing sanctions award where attorneys, in violation of clear rule, failed to seek admittance to district court before appearing there), and *United States v. Stoneberger*, 805 F2d 1391, 1393 (9th Cir 1986) (reversing sanctions award for repeated tardiness).

Therefore, Farra's motion for sanctions against Berge should be denied.

III. ECWG's Motion to Dismiss

As indicated above, ECWG seeks a voluntary dismissal to which no party objects. Farra, however, seeks as a condition of dismissal that this court award its attorney fees and costs incurred in defending this action. For the reasons stated above with respect to Farra's request for sanctions, such a conditioned dismissal is not appropriate under the circumstances of this case.

RECOMMENDATIONS

For the reasons set forth above, the Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and (2) by Defendant Roxanne L.

Farra, P.C. (docket #5) should be GRANTED; Defendant Roxanne L. Farra, P.C.'s Motion Seeking Award of Costs and Attorney Fees Pursuant to 28 USC § 1927 and Court's Inherent Power (docket #11) should be DENIED; and Plaintiff's Motion to Dismiss (docket # 16) should be GRANTED.

SCHEDULING ORDER

Objections to these Findings and Recommendations, if any, are due May 20, 2002. If no objections are filed, then the Findings and Recommendations will be referred to a district court judge and go under advisement on that date.

If objections are filed, the response is due no later than June 7, 2002. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will be referred to a district court judge and go under advisement.

DATED this 1st day of May, 2002.

/s/ Janice M. Stewart

Janice M. Stewart

Order

BROWN, District Judge:

Magistrate Judge Janice M. Stewart issued Findings and Recommendation (#24) on May 1, 2002, in which she recommended this Court grant Defendant Roxanne L. Farra, P.C.'s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and (2)(#5), grant Plaintiff East Cascade Women's Group, P.C.'s Motion to Dismiss (#16), and deny Defendant Roxanne L. Farra, P.C.'s Motion Seeking Award of Costs and Attorney Fees Pursuant to 28 U.S.C. § 1927 and Court's Inherent Power (#11). The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b).

Because no objections to the Magistrate Judge's Findings and Recommendation were timely filed, this Court is relieved of its obligation to review the record *de novo*. *Britt v. Simi Valley Unified School Dist.*, 708 F.2d 452, 454 (9thCir. 1983). *See also Lorin Corp. v. Goto & Co.*, 700 F.2d 1202, 1206 (8th Cir. 1983). Having reviewed the legal principles *de novo*, the Court finds no error.

Accordingly, the Court ADOPTS Magistrate Judge Stewart's Findings and Recommendation (#24). The Court GRANTS Defendant Roxanne L. Farra, P.C.'s Motion to Dismiss (#5), GRANTS Plaintiff's Motion to Dismiss (#16), and DENIES Defendant Roxanne L. Farra, P.C.'s Motion Seeking Award of Costs and Attorney Fees Pursuant to 28 U.S.C. § 1927 and Court's Inherent Power (#11).

IT IS SO ORDERED.

Dated this 17th day of June, 2002.

ANNA J. BROWN

United States District Judge

Judgment

BROWN, District Judge:

Based on the record, IT IS ORDERED AND ADJUDGED that Plaintiff take nothing and this action is dismissed with prejudice.

Dated this 1st day of July, 2002.

/s/ Anna J. Brown

ANNA J. BROWN

United States District Judge

¶2002-5078

IN RE: Alice Sharon ROBERTS, DEBTOR. U.S. Bankruptcy Court, Southern Dist. of Alabama, (Bktcy Ct AL) CASE NO. 01-14849-13, June 18, 2002. Decision for Govt.

1. Tax claims in bankruptcy—post-dismissal levy on funds in Chap. 13 trustee's possession—motion for instruction. Bankruptcy court instructed Chap. 13 trustee to hand over all funds remaining after his administrative expenses to govt.'s counsel pursuant to post-dismissal levy: IRC §6331 and binding precedent required trustee to honor levy even in face of 11 USC §1326(a)'s language requiring return of funds to debtor. *Reference:* United States Tax Reporter ¶68,726.52(3); 63,315.03(155). IRC §6331.

United States Bankruptcy Court, Southern District of Alabama, Southern Division.

Order on Trustee's to Motion for Instruction

MAHONEY, Bankruptcy Judge:

The standing Chapter 13 trustee has filed Motion For Instruction in regard to a United States Internal Revenue Service levy served on him after this case was dismissed.

FACTS

Debtor filed this case on September 24, 2001. The United States Internal Revenue Service filed a proof of claim showing a secured claim $227,961.05. In March 7, 2002, the Court entered its Order on Dismissal of Chapter 13 Case. On March 28, 2002, the Court denied Debtor's motion to alter or amend. The Standing Chapter 13 Trustee states that he is holding $13,271.25. The Chapter 13 Trustee was served with a 26 U.S.C. § 6331 Notice of Levy after this case was dismissed.

LAW

[1] "The Internal Revenue Service is empowered to levy on the property of a tax delinquent in the hands of a third party by 26 U.S.C. §6331 . . . . Upon receipt of a notice of levy, such third parties are required to surrender that property to the I.R.S." United States v. Ruff, 99 F.3d 1559, 1563 [78 AFTR 2d 96-7274] (1996). Ruff held that a Chapter 7 Trustee who had failed to honor a levy, instead paying the funds to an administrative claimant, was personally liable to the Government for the property not surrendered. Ruff, 99 F.3d at 1567. Ruff went on to hold a contrary case from this District, In re Ceafco, No. 28,700, 1977 WL 1273 (S.D. Ala. Sept. 21, 1977), to have been wrongly decided.

Ruff has been applied to require a Chapter 13 Trustee to honor a Title 26 Notice of Levy. In re Mishler, 223 B.R. 17, 19–20 [82 AFTR 2d 98-5499] (Bankr. M.D. Fla. 1996). This requirement applies notwithstanding language in 11 U.S.C. § 1326(a) calling for return of funds to the debtor. Mishler, 223 B.R. at 20; In re Schlapper, 195 B.R. 805, 806 [82 AFTR 2d 98-5913] (Bankr. M.D. Fla. 1996). This Court has followed the logic of Schlapper in a case affirmed by the District Court and Court of Appeals. In re Kiper, Case No. 98-14655-WSS-13 (April 26, 2000) at 5, aff'd, In re Kiper, Case No. 00-670-BJ-L (September 26, 2000), aff'd Kiper v. McAleer, No. 00-15595 (July 5, 2001).

The Court of Appeals decision in Ruff, 99 F.3d 1559 [78 AFTR 2d 96-7274], and the decisions of the District Court and Court of Appeals in Kiper, are binding precedent. United States v. Chila, 871 F.2d 1015,1018 [63 AFTR 2d 89-1278] (11th Cir. 1989), cert. denied, 493 U.S. 498. The Trustee is instructed to follow the command of 26 U.S.C. § 6331 and hand over all funds remaining after his administrative expenses to the counsel for the United States.

Dated: June 18, 2002

MARGARET A. MAHONEY

CHIEF BANKRUPTCY JUDGE

¶2002-5079

UNITED STATES OF AMERICA, PLAINTIFF v. William M. ARNOLD, Dorothy N. ARNOLD, Robert B. Arnold, DBA Marketing, Inc., as successor in interest to Carnegie Multi International Corporation, DBA Marketing, Inc., as successor in interest to Carnegie Mortgage Securities, Inc., DBA Marketing,Inc., as successor in interest to Murtaugh Corporation, DBA Marketing, Inc., as successor in interest to Thoroughbred Sales, Inc., Nahama Limited Company, The Arnold Group, Inc., Multi-Housing of Florida, Inc., R.B. and Associates, Inc., The Chestertown Bank of Maryland, Barnett Bank of Marion County, N.A., and Colonial Bank, as successor to First Family Federal Savings & Loan Association, Regency Savings Bank, FSB, successor by assignment to Barnett Bank of Marion County, N.A., DEFENDANTS. U.S. District Court, Middle Dist. of Florida, (DC FL) CIVIL

ACTION NO. 5:99-CV-161-OC-21GRJ, June 13, 2002. Earlier proceedings at (2002, DC FL) 89 AFTR 2d 2002-2823; (2002, DC FL) 89 AFTR 2d 2002-2500; (2001, DC FL) 89 AFTR 2d 2002-1167, 2002-1 USTC ¶50300, amending (2001, DC FL) 88 AFTR 2d 2001-5867, 2001-2 USTC ¶50605; and (2001, DC FL) 88 AFTR 2d 2001-5284, 2001-2 USTC ¶50553. Decision for Govt. in part.

1. Collection actions—sale of receivership estate property—"alternative amount" withholding rule. Receiver was granted motion for confirmation of sale of receivership estate property, free of any federal tax liens. Also, receiver was authorized to satisfy any liens that were to be paid as sale conditions, pay all closing costs, and distribute balance of proceeds to govt.; and under Reg. §1.1445-2(d)(3)'s special "alternative amount" withholding rule, foreign taxpayers wouldn't realize any sale proceeds where tax lien judgments exceeded portions of purchase price allocable to each, so neither receiver nor 3d-party purchaser was required to withhold any sale proceeds to pay federal taxes on sales. *Reference:* United States Tax Reporter ¶74,035.03(100); 14,455.01(10). IRC §1445; 7403.

In the United States District Court of the Middle District of Florida, Ocala Division.

Order on Motion for Confirmation of Sale of Property of the Receivership Estate (Twenty (20) Apartment Projects) to Fortune Capital Partners, Inc.

NIMMONS, JR., District Judge:

Filed herein are the Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Twenty (20) Apartment Projects) to Fortune Capital Partners, Inc. (Dkt. 300). A hearing to consider the Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Twenty (20) Apartment Projects) to Fortune Capital Partners, Inc. (Dkt. 300) was held on June 13, 2002.

The Receiver previously entered into an Agreement of Purchase and Sale to sell twenty apartment projects of the Receivership Estate (Subject Properties) to Fortune Capital Partners, Inc., (Fortune Capital), on January 21, 2002. In accordance with 18 U.S.C.§2001 and the Court's Order (Dkt. 269) establishing private sales procedures, the Receiver published notice of its agreement with Fortune Capital. On February 11, 2001, the tenth day after publication, H.L.H. Properties, Inc. (H.L.H.), made an offer for the Subject Properties that was 110% of Fortune Capitals' Offer. On February 21, 2001, H.L.H. withdrew its offer. Subsequently, James Riesenberg made an offer on February 22, 2001, that was more than 110% of Fortune Capital's offer and LCA Land Acquisitions, Inc. (LCA), made an offer that was more than 110% of Fortune Capital's offer on February 26, 2001.

The Court ruled in favor of the offer by LCA and rejected the Receiver's Contract with Fortune Capital and the offer of James Riesenberg in its Order on Motion for Confirmation of Sale of Property of the Receivership Estate (Twenty (20) Apartment Projects) (Dkt. 293).

The Receiver subsequently entered into an agreement of Sale and Purchase with LCA. The LCA Contract reserved to LCA a due diligence period after the Contract was approved to allow LCA to confirm certain matters relating to the feasibility of the purchase. LCA has advised the Receiver that it was not able to assure itself that it would be able to obtain the financing it sought in order purchase the Subject Properties. As a result, LCA elected to terminate its Contract with the Receiver.

Fortune Capital has advised the Receiver that it desires to purchase the Subject Properties under the terms of the Fortune Capital Agreement, with a minor amendment to extend the time of the termination date of the due diligence period to thirty days after entry of an order of the Court confirming the sale.

Counsel for the Receiver has advised the Court that counsel for Riesenberg has stated that Risenberg has no interest in pursuing the purchase of the Subject Properties. Neither Risenberg nor his counsel attended the hearing.

[1] The Receiver's submissions reflect that DBA and Nahama are foreign entities, subject to withholding tax upon the foreclosure sale of properties owned by them under I.R.S. Reg. §1.1445-2(d)(3). Under the special "alternative amount" withholding rules provided in I.R.S. Reg. §1.1445-2(d)(3), if this Court determines that neither defendant will realize any portion of the proceeds from the sale of the property, because the amount of the tax lien/judgment held by Plaintiff which is being foreclosed exceeds the amount of the proceeds to be realized from the sale otherwise due to the lien holder, then the "alternative amount" to be withheld is zero and no withholding of the sales proceeds is required. This Court entered judgments against (a) DBA for $18,222,567.77, plus interest (Dkt. 253); (b) Nahama for $55,086,200.02, plus interest (Dkt. 269); and (c) Multi-Housing for $25,872,520.84, plus interest (Dkt. 256). The Receiver's submissions reflect that the gross purchase price offered by Fortune Capital when allocated to the individual properties comprising the Subject Properties, based upon their individual highest appraisal values, reflect the portion of the purchase price allocable to each would be (a) DBA $6,213,613.00, (c) Nahama $9,047,525.00, and (c) Multi-Housing, $1,170,862.00. As the tax lien judgments against DBA, Nahama and Multi-Housing exceed the portions of the purchase price allocable to each, it is clear that none of the defendants would realize any of the proceeds from the sale of the Subject Properties.

Of the bona fide offers received, both the Receiver and Plaintiff assert that Fortune Capital's offer is in the best interest of the Receivership Estate. In the light of the argument at the hearing and the submissions of counsel, the Court agrees that LCA's offer is in the best interest of the Receivership Estate and the parties in this action.

Upon consideration thereof, it is hereby ORDERED:

1. The Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Twenty (20) Apartment Projects to Fortune Capital (Dkt. 300) is GRANTED.

2. The Agreement of Purchase and Sale executed by the Receiver and Fortune Capital Partners, Inc., on or about January 21, 2002, is CONFIRMED and the Receiver is authorized to amend the Agreement to extend the Buyer's due diligence period and may proceed with the sale of the Subject Properties described on the composite legal description attached hereto.

3. The offer to purchase submitted by James Riesenberg is not approved and is deemed REJECTED.

4. The private sale of the Subject Properties to Fortune Capital, Inc. shall be free and clear of any federal tax liens held by the United States of America.

5. The Receiver is authorized to satisfy any liens or encumbrances that are to be paid as a conditions of the sale, to pay all closing costs associated with the sale, including the Receiver's attorneys' fees and costs, and to pay the Receiver's commission pursuant to the provisions of the Order on Motion of Receiver for Approval of Receiver's Compensation Arrangements and for Authority to Pay the Receiver's Compensation and Expenses of the Receivership on a Monthly Basis (Dkt. 54). The Receiver shall disburse the balance of the sale proceeds to Plaintiff.

6. The Court finds that under the special "alternative amount" withholding rule in I.R.S. Reg. §1.1445-2(d)(3), the Defendants will not realize any proceeds from the sale of the Subject Properties and therefore neither the Receiver nor Fortune Capital, Inc. is required to withhold any of the sale proceeds for the purpose of paying federal taxes on the sales.

DONE AND ORDERED at Jacksonville, Florida this 13th day of June, 2002.

RALPH W. NIMMONS, JR.

UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

Pro se party, if any

Courtroom Deputy Clerk

Judicial Assistant

Law Clerk

¶2002-5080

Christopher L. ARNS, PLAINTIFF - APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT - APPELLEE. U.S. Court of Appeals, Seventh Circuit, (CA7) Docket No. 01-2681, June 28, 2002. District Court, (2001, DC IL) 87 AFTR 2d 2001-2096, 2001-1 USTC ¶50418, affirmed. Years 1994, 1995. Decision against Taxpayer.

1. Third-party summons enforcement—summary judgment—motion to strike. District court properly granted govt. summary judgment enforcing 3d-party summons IRS issued on pro se taxpayer's bank: failure to strike IRS agent's affidavit sufficiently based on personal knowledge and submitted in good faith wasn't abuse of discretion; taxpayer wasn't entitled to advance summons notice before IRS contacted bank under version of IRC §7602(c) in effect at time of such contact; taxpayer's irrelevant FOIA argument was rejected; and other arguments about insufficiency of govt.'s statement of material facts and court's grant of summary judgment were meritless. *Reference:* United States Tax Reporter ¶76,095.01(10). IRC §7609.

United States Court of Appeals For the Seventh Circuit.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 00 C 3878, William J. Hibbler, Judge.

Before: Honorable Richard A. Posner, Circuit Judge Honorable Michael S. Kanne, Circuit Judge Honorable Terence T. EVANS, Circuit Judge.

Judgment-Without Oral Argument

Chicago, Illinois 60604

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

Order

Christopher Arns appeals an unfavorable grant of summary judgment on his petition to quash a third-party summons issued to his bank by the Internal Revenue Service. Because the district court properly granted summary judgment in favor of the government, we affirm.

Arns failed to file income tax returns for 1994 and 1995, and in 1997 the IRS launched an audit to determine his possible tax liability for those years. The IRS immediately contacted Arns and requested his assistance as it tried to determine if he was responsible for any unpaid taxes. Almost three years into its investigation, the IRS issued a summons to U.S. Bank, requesting documentation for all "mortgages, notes, lines of credit, or other security agreements entered into with Mr. Arns" and any paperwork concerning settlements Arns had paid in two civil lawsuits. The IRS also mailed notice of the summons to Arns on the same day it was issued.

Within twenty days Arns, through counsel, filed a petition in district court to quash the summons. The government responded by filing a motion to dismiss that was alternatively labeled as a motion for summary judgment. With its motion the government filed a statement of material facts as required by Local Rule 56.1 and included the affidavit of IRS revenue agent Frank Kessler. Arns responded to the government's motion and submitted his own affidavit but did not file a separate statement of material facts.

After a hearing the district court concluded that because Arns failed to file a separate statement under Rule 56.1 the facts contained in the government's statement were deemed admitted. The district court then determined that the IRS summons was enforceable because it sought documents relevant to the investigation not already in the IRS' possession and because Arns had failed to show that the IRS acted in bad faith in issuing the summons. See United States v. Powell, 379 U.S. 48, 57-58 [14 AFTR 2d 5942] (1964). The district court also rejected Arns' argument that the IRS violated the applicable statutory notice

requirements, see id., and granted summary judgment in favor of the government. The district court also denied Arns' request to strike Agent Kessler's affidavit. Arns moved for reconsideration under Federal Rule of Civil Procedure 59(e), but the district court denied his motion.

[1] Arns, now proceeding pro se, timely filed an appeal in which he continues to challenge issuance of the summons. But he does not contest the general enforceability of the summons and instead attacks the sufficiency of Agent Kessler's affidavit, claiming that the affidavit has a multitude of deficiencies that should have prevented the district court from relying on it. A district court, however, may accept an affidavit so long as it is based on personal knowledge and facts that would be admissible. See Fed.R.Civ.P. 56(e); Fed. Deposit Ins. Corp. v. Meyer, 781 F.2d 1260, 1267 (7th Cir.1986). Here, the district court reasonably determined that Kessler, the IRS agent assigned to investigate Arns' tax liability, had sufficient personal knowledge to describe the events surrounding the summons' issuance, see Miller v. United States, 150 F.3d 770, 772 [82 AFTR 2d 98-5414] (7th Cir.1998) (per curiam) (noting that submission of the IRS agent's affidavit is the "usual" method to support a summons), and we see no support in the record for Arns' speculations that the government was not acting in good faith when it submitted Kessler's affidavit. Therefore, the district court's decision not to strike Kessler's affidavit was not an abuse of its discretion. See Aboiye v. Sunstrand Corp., 164 F.3d 364, 368 (7th Cir.1998).

Next, Arns argues that the IRS violated 26 U.S.C. § 7602(c) because it did not notify him before contacting the bank about the information it needed. To address this argument, we must be specific about the timing of the events at issue here. Agent Kessler initially contacted U.S. Bank by phone in October 1997, and at that time, § 7602(c) did not require advance notice to taxpayers before a third party was contacted. *See* Internal Restructuring and Reform Act of 1998, Pub. L. 105-206, sec. 3417(a) (1998) (providing that the amendments made to §7602 that require advance notice to taxpayers "shall apply to contacts made after the 180th day after the date of the enactment of this Act [July 22, 1998]"). Therefore, we disagree with Arns' contention that any prior notice was necessary.

Arns also argues that the district court failed to consider the impact of the IRS' responses to the Freedom of Information Act requests (FOIA), *see* 5 U.S.C. § 552, that Arns allegedly submitted during the course of the ongoing tax investigation. But Arns' FOIA argument is irrelevant. The record does not contain any FOIA requests submitted by Arns, although it does contain two partially redacted letters from the IRS to Arns' attorney that Arns refers to as "FOIA responses." Moreover, he attempts to improperly fold his FOIA claim into his petition to quash the summons instead of filing a separate complaint as dictated by the FOIA to enjoin the IRS to turn over the requested information. *See* 5 U.S.C. § 552(a)(4)(B). Thus, we reject Arns' argument that the IRS somehow violated the FOIA.

Arns also raises a host of other arguments about the insufficiency of the government's statement of material facts and the district court's grant of summary judgment, but none of his arguments merit discussion. Therefore, the judgment of the district court is AFFIRMED.

¶2002-5081

IN RE: Brian J. CALLERY, Debtor. U.S. Bankruptcy Court, Dist. of Massachusetts, (Bktcy Ct MA) Bk. No. 97-48586-JBR, June 27, 2002. Earlier proceeding at (2002, Bktcy Ct MA) 89 AFTR 2d 2002-1304, 274 BR 51, 2002-1 USTC ¶50299. Years 1987, 1991, 1992, 1993, 1994, 1995, 1996, 1997. Decision for Govt.

1. Tax claims in bankruptcy—judgments—dischargeability. Judgments were entered against Chap. 11 debtor in stated amounts, plus penalties and interest from 1st judgment date regarding 4 of 8 years at issue, and from 2d judgment date as to remaining years. Also, taxpayer's tax

liabilities for 7 of 8 years weren't dischargeable under 11 USC §523(a)(1)(B). *Reference:* United States Tax Reporter ¶68,726.52(3); 68,726.52(27).

In the United States Bankruptcy Court for the District of Massachusetts.

Judgment

Chapter 11

The Court having previously made Findings of Fact and Conclusions of Law it is now hereby:

[1] ORDERED, ADJUDGED, and DECREED that judgment is entered in favor of the United States of America against Brian J. Callery in the amount of $70,840, plus statutory additions and interest from December 10, 1997, pursuant to 28 U.S.C. § 1961(c)(1), incorporating the rate provided under 26 U.S.C. § 6621, for taxes, penalties, and interest in regard to Mr. Callery's 1987, 1991, 1992, and 1993 federal income tax years.

It is further ORDERED, ADJUDGED, and DECREED that, in addition to the amount set forth above, judgment is entered in favor of the United States of America against Brian J. Callery in the amount of $2,857,823, plus statutory additions and interest from May 31, 2002, pursuant to 28 U.S.C. § 1961(c)(1), incorporating the rate provided under 26 U.S.C. § 6621, for taxes, penalties, and interest in regard to Mr. Callery's 1994, 1995, 1996, and 1997 federal income tax years.

It is further ORDERED, ADJUDGED, and DECREED that Brian J. Callery's incomes tax liabilities for 1991, 1992, 1993, 1994, 1995, 1996 and 1997 were not discharged pursuant to 11 U.S.C. §523(a)(1)(B).

IT IS SO ORDERED, ADJUDGED AND DECREED.

Dated at Worcester, Massachusetts, this 27th day of June, 2002.

/s/

Motion to Amend Motion for Entry of Final Decree

Now comes the Debtor, Brian J. Callery, by his counsel, and moves to amend his Motion for Entry of Final decree by substituting an amended Exhibit C, attached hereto, for the original Exhibit C to said motion.

This motion is filed in conjunction with the United States' Amended Motion for Entry of Judgment.

Respectfully submitted,

Brian J. Callery, by counsel

Richard A. Savrann

BBO# 443200

Gargill, Sassoon & Rudolph LLP

92 State St.

Boston, MA 02109

617-523-7700

¶2002-5082

IN RE: Seshadri N. PRATIVADI and Mallika Seshadri, Debtors. U.S. Bankruptcy Court, Western Dist. of New York, (Bktcy Ct NY) CASE NO. 00-23357, Feb. 11, 2002. Year 2000. Decision against Taxpayers.

1. Tax claims in bankruptcy—bankruptcy estate—postpetition tax debts—short tax year elections. Chap. 7 debtors' attempt to file proof of claim against bankruptcy estate on behalf of IRS and state tax authority for their year 2000 taxes was rejected: taxes were postpetition claim not collectible from bankruptcy estate where taxpayers filed bankruptcy in middle of 2000 and never made IRC §1398 short tax year election. Also, case law involving corp. debtors was inapposite. *Reference:* United States Tax Reporter ¶13,985.01(5); 13,985.05(5); 68,726.52(3). IRC §1398.

United States Bankruptcy Court, Western District of New York.

Decision & Order

NINFO, II Chief Bankruptcy Judge:

BACKGROUND

On November 13, 2000, Seshadri N. Prativadi and Mallika Seshadri (the ''Debtors'') filed a petition initiating a Chapter 7 case. On the Schedules and Statements required to be filed by Section 521 and Rule 1007, the Debtors indicated that the Internal Revenue Service (the ''IRS'') and the New York State Department of Taxation and Finance (''New York State'') held priority claims for unpaid calendar year 2000 income taxes in an undetermined amount.

On May 7, 2001, the Debtors filed a proof of claim on behalf of New York State in the amount of $2,821.32 (the ''New York Tax Claim''), which represented a pro rata portion (from January 1, 2000 to November 13, 2000) of the Debtors' calendar year 2000 income tax liability of $3,248.52, as set forth on their tax return.

On May 7, 2001, the Debtors also filed a proof of claim on behalf of the IRS in the amount of $16,057.60 (the ''IRS Tax Claim''), which represented the same pro rata portion of the Debtors' calendar year 2000 income tax liability of $18,489.03, as set forth on their tax return.

On June 11, 2001, New York State filed its own priority claim in the amount of $3,896.46 (the ''Superseding New York State Tax Claim'').

On September 26, 2001, the Debtors' trustee (the ''Trustee'') filed objections to all three of the tax claims which asserted that, since the Debtors had failed to elect and file split year tax returns for their calendar year 2000 income taxes, any taxes due for that calendar year were debts that were deemed to have arisen after the filing of their petition that could not be charged against or paid by a distribution from the estate.

On November 27, 2001, the Trustee filed a letter that he received from the New York State Tax Compliance Division - Bankruptcy Section, which indicated that it did not oppose his objection to the Superseding New York Tax Claim.

The IRS did not interpose a Response to the Trustee's objection to the IRS Tax Claim.

The Debtors interposed a response to the Trustee's objections to the tax claims. In their written submissions and arguments the Debtors asserted that: (1) Section 507(a)(8)(A)(iii)[1] : (a) permitted the taxing authorities to file claims for the pre-petition portion of the income taxes due from the Debtors for the calendar year 2000, since calendar year 2000 taxes could be assessed after the filing of their petition; and (b) provided that such claims, when filed, would be entitled to priority treatment; (2)

[1] Section 507 provides in relevant part that:
(a) The following expenses and claims have priority in the following order:
(8) Eighth, allowed unsecured claims of governmental units, only to the extent that such claims are for -
(A) a tax on or measured by income or gross receipts -
(iii) other than a tax of a kind specified in section 523(a)(1)(B) or 523(a)(1)(C) of this title, not assessed before, but assessable, under applicable law or by agreement, after, the commencement of the case[.]
11 U.S.C. § 507 (2002).

although 26 U.S.C.A. § 1398[2] (''Section 1398'') provided that an individual Chapter 7 or 11 debtor whose bankruptcy case was being administered as an asset case could file a split year election, nothing in Section 1398 specifically required that election to be made in order for the provisions of that Section to supersede the claim treatment afforded by the provisions of Section 507(a)(8)(A)(iii); (3) the Court should analyze and decide the issue presented as the Court did in its decision in *Missouri Dep't. of Revenue v. L.J. O'Neill Shoe Co.* (In re L.J. O'Neill Shoe Co.) 64 F.3d 1146 (8 th Cir. 1995); and (4) to be consistent, the Court, which has held that a pro rata portion of a debtor's anticipated income tax refunds for the calendar year ending after the filing of a petition are property of the estate, should decide that a pro rata portion of any income taxes due for the calendar year ending after the filing of a petition should be a liability of the estate in a Chapter 7 asset case.

The Trustee asserted in his written submissions and arguments that: (1) Section 1398, which was enacted subsequent to the enactment of the Bankruptcy Code as part of the Bankruptcy Tax Act of 1980, primed Section 507(a)(8)(A)(iii) in individual Chapter 7 and 11 asset cases; (2) a failure to make the required election provided for in Section 1398 results in the pre-petition portion of the income taxes due for the calendar year ending after the filing of the petition not being assessable against the bankruptcy estate; (3) the Court should adopt the analysis of this issue as set forth by the Bankruptcy Court for the Southern District of New York in its decision in *In re Haedo*, 211 B.R. 149 [79 AFTR 2d 97-2340] (Bankr. S.D.N.Y. 1997), even though it was dicta in that case; and (4) individual Chapter 7 and 11 debtors, whose cases are asset cases, do have the ability, if they make the Section 1398 election, to afford the taxing authorities the right to file a priority claim for the pre-petition portion of the income taxes due for the calendar year ending after the filing of their petition, so that there is consistency in the Court's treatment of pre-petition income tax refunds and liabilities.

DISCUSSION

[1] It is clear from the uniform decisions of the Courts which have decided the issue presented, as well as the legislative

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[2] Section 1398 provides in relevant part that:

(a) Cases to which section applies. — Except as provided in subsection (b), this section shall apply to any case under chapter 7 (relating to liquidations) or chapter 11 (relating to reorganizations) of title 11 of the United States Code in which the debtor is an individual.

General rule.-Except as provided in paragraph (2), the taxable year of the debtor shall be determined without regard to the case under title 11 of the United States Code to which this section applies.

Election to terminate debtor's year when case commences. —

In general.-Notwithstanding section 442, the debtor may (without the approval of the Secretary) elect to treat the debtor's taxable year which includes the commencement date as 2 taxable years-

(d)(2)(A)(i) the first of which ends on the day before the commencement date, and

(d)(2)(A)(ii) the second of which begins on the commencement date.

(d)(2)(C) No election where debtor has no assets.-No election may be made under subparagraph (A) by a debtor who has no assets other than property which the debtor may treat as exempt property under section 522 of title 11 of the United States Code.

(d)(2)(D) Time for making election.-An election under subparagraph (A) or (B) may be made only on or before the due date for filing the return for the taxable year referred to in subparagraph (A)(i). Any such election, once made, shall be irrevocable.

(d)(2)(E) Returns.-A return shall be made for each of the taxable years specified in subparagraph (A).

(d)(2)(F)(3) Commencement date defined.-For purposes of this subsection, the term ''commencement date'' means the day on which the case under title 11 of the United States Code to which this section applies commences.

(e)(1) Estate's share of debtor's income.-The gross income of the estate for each taxable year shall include the gross income of the debtor to which the estate is entitled under title 11 of the United States Code. The preceding sentence shall not apply to any amount received or accrued by the debtor before the commencement date (as defined in subsection (d)(3)).

(e)(2) Debtor's share of debtor's income.-The gross income of the debtor for any taxable year shall not include any item to the extent that such item is included in the gross income of the estate by reason of paragraph (1).

26 U.S.C.A. § 1398 (2002).

history accompanying Section 1398,[3] that it was the intention of Congress that if an individual Chapter 7 or 11 debtor does not timely make the split year election under Section 1398, no portion of the debtor's pre-petition income tax liability for the year ending after the filing of the petition can be assessed or claimed against that debtor's asset bankruptcy estate; it can only be assessed against the debtor.

I agree with the analysis set forth in *In re Haedo*, 211 B.R. 149 [79 AFTR 2d 97-2340] (Bankr. S.D.N.Y. 1997) as well as the decisions of the Bankruptcy Courts in *In re Wurst*, 204 B.R. 902 [78 AFTR 2d 96-7599] (Bankr. E.D.N.C. 1996) and *In re Turboff*, 93 B.R. 523 (Bankr. S.D. Tex. 1988) which specifically addressed and rejected the Section 507 arguments raised in this case.

All of the cases cited by the Debtors are Chapter 11 cases involving corporations. Section 1398(a) provides that the Section is only applicable to Chapter 7 and Chapter 11 cases in which the debtor is an individual.

CONCLUSION

The Trustee's objections to the IRS Tax Claim and the New York Tax Claim are sustained, and the claims are disallowed in their entirety.

IT IS SO ORDERED.

HON. JOHN C. NINFO, II

CHIEF U.S. BANKRUPTCY JUDGE

Dated: February 11, 2002

¶2002-5083

David HEMPEL, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Western Dist. of Washington, (DC WA) Docket No. C01-1334P, April 15, 2002. Decision against Taxpayer.

1. Actions against U.S.—Declaratory Judgment Act—injunctive relief—ex parte petitions. Taxpayer's ex parte "emergency petition for declaratory judgment" in his collection-related action was denied: ex parte emergency injunctive relief wasn't appropriate where taxpayer didn't specifically show possibility of immediate and irreparable injury before govt.'s response. Also, taxpayer didn't establish merits of claim that he wasn't subject to U.S. laws or existence of hardship entitling him to emergency relief; and DJA barred relief in tax-related disputes. *Reference:* United States Tax Reporter ¶74,336.504(61); 74,217.502(5).

United States District Court, Western District of Washington at Seattle.

Order Denying "Emergency Petition for Declaratory Judgment"

PECHMAN, District Judge:

Pending before the Court is plaintiff's "emergency petition for declaratory judgment." This motion has been brought on an *ex parte* basis and in it plaintiff seeks immediate relief from the Court. Having reviewed the petition and all supporting materials submitted by plaintiff, plaintiff's motion is DENIED.

ANALYSIS

[1] Plaintiff filed a complaint in this Court in August of 2001, alleging that the Internal Revenue Service ("IRS") had previously collected taxes from plaintiff in violation of federal law. See, generally, Complaint. On April 8, 2002, defendant

[3] The Legislative History sets out that:

2. Debtor's election to close taxable year. — *In general.* — The bill gives an individual debtor an election to close his or her taxable year as of the day before the date on which the bankruptcy case commences (the "commencement date"). If the election were made, the debtor's taxable year which otherwise would include the commencement date is divided into two "short" taxable years of less than 12 months. The first such year ends on the day before the commencement date; the second such year begins on the commencement date (new Code sec. 1398(d)(3)(A)). If the election were not made, the commencement of the bankruptcy case does not affect the taxable year of an individual debtor (new Code sec. 1398(d)(2)).

As a result of the debtor's making the election, his or her Federal income tax liability for the first short taxable year becomes (under bankruptcy law) an allowable claim against the bankruptcy estate as a claim arising before bankruptcy. Accordingly, any tax liability for that year is collectible from the estate, depending on the availability of estate assets to pay debts of that priority. Inasmuch as any such tax liability for an electing debtor's first short taxable year is not dischargeable, the individual debtor remains liable for any amount not collected out of the bankruptcy estate (new 11 U.S. Code sec.523(a)(1)). If the debtor does not make the election, no part of the debtor's tax liability from the year in which the bankruptcy case commences is collectible from the estate, but is collectible from the individual debtor.
Committee Report on P.L. 96-589 (Bankruptcy Tax Act of 1980).

filed a motion to dismiss or, in the alternative, a motion for summary judgment. Dkt. No. 25. On April 12, 2002, plaintiff filed the pending motion for emergency declaratory relief. It is not clear if this motion was filed in response to defendant's motion to dismiss.

It appears that plaintiff seeks an immediate determination by the Court that he is not subject to the laws of the United States. Plaintiff has not made any showing that he is likely to prevail on this argument on the merits.

Denial of this motion is appropriate on several grounds. First, plaintiff has failed to make a showing that this motion is properly brought before the Court on an *ex parte*basis. See Fed. R. Civ. P. 65(b) (Emergency injunctive relief appropriate on an *ex parte* basis only if the moving party demonstrates, by way of "specific facts," "that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition.").

Second, even when the adverse party is allowed an opportunity to respond, the moving party is entitled to a preliminary injunction only if he establishes the following elements: (1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury to plaintiff if injunctive relief is not granted; (3) a balance of hardships favoring plaintiff; and (4) advancement of the public interest. Textile Unlimited, Inc. v. A..BMH and Co., Inc., 240 F.3d 781,786 (9th Cir. 2001). Plaintiff may meet this burden "by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in [her] favor." Id. (quoting Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1201 (9th Cir. 1980)). Plaintiff has failed to demonstrate the merits of his claims, and has further failed to demonstrate the existence of any looming crisis or hardship which would entitle him to emergent relief.

Finally, litigation to resolve disputes related to Federal taxes are not generally subject to declaratory relief. See 28 U.S.C. § 2201. Plaintiff has made no showing that the Court is authorized to grant the relief requested.

CONCLUSION

Plaintiff's "emergency petition for declaratory judgment" is DENIED. The Court will not accept *ex parte* pleadings. The clerk is therefore directed to distribute a copy of this Order, as well as a copy of plaintiff's motion and supporting documents, to opposing counsel.

Dated this 15 day of April, 2002.

Marsha J. Pechman

United States District Judge

¶2002-5084

KENTFIELD MEDICAL HOSPITAL CORP., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of California, (DC CA) Docket No. C-01-2989-VRW, June 20, 2002. Years 1991, 1992, 1993, 1994, 1995. Decision against Taxpayer.

1. Employment taxes—independent contractors vs. employees—psychologists—safe harbor relief—summary judgment. Rehabilitation hospital was denied summary judgment on its independent contractor treatment of its salaried and other psychologists: taxpayer didn't qualify for '78 Revenue Act §530 safe harbor relief where its employee treatment of 1 psychologist/supervisor in prior years violated statute's requirement that it have consistent reporting for *all periods*; and taxpayer's attempt to read "de minimis" exception into requirement or limit it to subject periods wasn't supported by statute or otherwise. Similarly, statute didn't allow for de minimis exception from substantive consistency requirement, which taxpayer also failed due to similarities between supervisor's and other staff psychologists' duties. And, fact that taxpayer controlled psychologists' means and methods of work, through hiring, billing, training and supervisory practices, rebutted alternative claim that they were in fact independent contrac-

tors. *Reference:* United States Tax Reporter ¶34,015.38(12); 31,115.01. IRC §3111; 3401.

In the United States District Court for the Northern Distirct of California.

Order

WALKER, District Judge:

Kentfield Medical Hospital Corp (Kentfield) initiated this action to recover taxes paid under protest. At issue is whether Kentfield properly treated its psychologists as independent contractors rather than employees. An IRS audit concluded that Kentfield's psychologists were employees rather than independent contractors and assessed employee taxes (FICA and FUTA) on Kentfield. Kentfield moves for summary judgment on its claim for reimbursement of taxes paid. See Doc # 6.

I

The following factual summary is undisputed except as specifically noted below.

In 1988, Continental Medical Systems, Inc (CMS) acquired Kentfield Medical Hospital Corp, a rehabilitation hospital in Marin County. After acquisition, Kentfield remained a separate, wholly-owned subsidiary of CMS. The IRS audited Kentfield and several other hospital subsidiaries of CMS. At issue in Kentfield's audit was whether Kentfield properly treated its psychologists as independent contractors during tax years 1991 through 1995. A description of the relationship between Kentfield and its psychologists informs this determination.

Kentfield's contracts with the individual psychologists were substantially similar, although the particular details differed. Each stated that the individual was an independent contractor and responsible for the payment of his or her taxes on that basis. Kentfield did not provide health or life insurance. For one psychologist, James Wilson, Kentfield provided malpractice insurance, but also required Wilson to obtain additional malpractice insurance. Each psychologist received office space and clerical support. Kentfield paid for some continuing education, including attending conferences and purchasing educational materials. Kentfield also provided the psychologists with books, videos and other supplies necessary for their work. Most billing was done by Kentfield; psycholo-gists were not allowed to patients directly with the exception of certain Medicare bill-ings.

The psychologists' primary responsibility was providing patient care, including ''psychological and neurophysiological services, cognitive remediation, behavioral services, counseling, psychotherapy, [i e] the whole range of psychological services that a psychologist would provide to a medical population.'' Wilson Depo (Doc # 8, Exh 14a) at 24:2–7. Each psychologist signed an agreement outlining his or her goals and responsibilities. Wilson and later Dawn Osterweil also had supervisory responsibilities. As supervisors, they split their time between administrative duties and patient care. All the psychologists were required to provide services under supervision; their direct supervisors varied depending on the type of work performed for Kentfield. The psychologists were also required to provide daily records and progress notes and comply with all hospital policies and regulations. All the psychologists were required to attend inservice training and assist in marketing efforts, including attending conferences, writing articles and making speeches. Finally, the psychologists were required to sit on committees as necessary.

Several psychologists were paid an hourly rate for up to a certain number of hours a week; this number was typically 20–25 hours per week. Other psychologists were paid a yearly salary and expected to work 35 to 40 hours per week. The psychologists were required to work 48 weeks per year. Several psychologists were also allowed to maintain private practices so long as those practices did not interfere with their work at Kentfield.

While Kentfield treated all of its psychologists as independent contractors during the audit period, for ten months in 1987 through 1988, Kentfield treated one

psychologist as an employee. In August or September 1987, prior to CMS's acquisition of the hospital, James Wilson, a psychologist, was hired as an employee. Wilson was issued a W-2 for 1987 and Kentfield paid employment taxes for him as if he were an employee. Kentfield also provided employee benefits such as health insurance and vacation and sick leave. After CMS acquired Kentfield, it determined that Wilson was more properly treated as an independent contractor than an employee. On July 1, 1988, Kentfield officially changed Wilson's status as an employee to an independent contractor. When Wilson first arrived at Kentfield, he was the only psychologist; as Kentfield hired more psychologists, Wilson's role became more administrative. The parties dispute whether Wilson always had a significant administrative role or whether that evolved over time as Kentfield's psychological services department grew.

II

In reviewing a summary judgment motion, the court must determine whether genuine issues of material fact exist, resolving any doubt in favor of the party opposing the motion. The burden of establishing that there is no genuine issue of material fact lies with the moving party. Celotex Corp v Catrett, 477 US 317, 322–23 (1986). If the nonmoving party would bear the burden of proof at trial, the moving party may meet its burden by pointing out - not by a conclusory statement but by demonstration - the absence of evidence to support the nonmoving party's case. Id at 325–26. Summary judgment is granted only if the moving party is entitled to judgment as a matter of law. FRCP 56(c).

[1] Kentfield bases its summary judgment motion on § 530, a "safety valve" provision of the tax code which allows good faith employers who mistakenly treat employees as independent contractors relief from paying past due employment taxes. As an alternative basis for summary judgment, Kentfield asserts that the psychologists were, in fact, properly treated as independent contractors. The court considers these arguments in turn.

A

Kentfield first argues that it is entitled to § 530 relief. Section 530 allows employers to rely upon their good faith treatment of individuals as independent contractors by allowing such employers to avoid prior employment tax liability if they had a reasonable basis for treating their workers as independent contractors, even if their workers were, in fact, properly treated as employees. Section 530 provides, in pertinent part:

> (a) Termination of certain employment tax liability:
>
> (1) In general. -If-
>
> (A) for purposes of employment taxes, the taxpayer did not treat an individual as an employee for any period, and
>
> (B) in the case of periods after December 31, 1978, all Federal tax returns (including information returns) required to be filed by the taxpayer with respect to such individual for such period are filed on a basis consistent with the taxpayer's treatment of such individual as not being an employee, then for purposes of applying such taxes for such periods with respect to the taxpayer, the individual shall be deemed not to be an employee unless the taxpayer had no reasonable basis for not treating such individual as an employee.
>
> * * *
>
> (3) Consistency required in the case of prior tax treatment -
>
> Paragraph (1) shall not apply with respect to the treatment of any individual for employment tax purposes for any period ending after December 31, 1978, if the taxpayer (or a predecessor) has treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for any period beginning after December 31, 1977.

Pub L 95-600 § 530, as subsequently amended by Pub L 96-167 § 9(d); Pub L 96-541 § 1; Pub L 97-248 Title II, § 269(c) (1)–(2); Pub L 99-514 § 2, Title XVII § 1706(a) (uncodified note to 26

USC § 3401). Thus, in order to qualify for § 530 relief, Kentfield must demonstrate: (1) that Kentfield treated its workers as independent contractors and filed all appropriate tax forms for its workers as if they were independent contractors (the reporting consistency test) (2) that Kentfield did not treat any other worker holding a substantially similar position as an employee (the substantive consistency test) and (3) that Kentfield had a reasonable basis to treat its workers as independent contractors.

The United States asserts that Kentfield does not meet the reporting consistency test with respect to James Wilson and does not meet the substantive consistency test with respect to all of the psychologists because of Wilson's brief treatment as an employee. First, the United States asserts that because Wilson was treated as an employee from September 1987 to July 1988, Kentfield does not satisfy § 530(a) (1) (A), which requires that each individual cannot be treated as an employee for "any period." Kentfield counters that, read in its entirety, § 530(a) (1) is limited to the taxable periods at issue. Kentfield relies upon the final phrase in § 530(a) (1), which refers to "apply[ing] such taxes such periods", i e, the taxable periods at issue. This phrase, however, does not negate the expansive plain language of § 530(a) (1) (A), which states unambiguously that "the taxpayer [must] not treat an individual as an employee for any period." The court finds that in order to satisfy the reporting consistency test with respect to each psychologist, Kentfield must demonstrate that it did not treat the psychologist as an employee at any time during the psychologist's tenure at Kentfield. Accord Halfhill v IRS, 927 F Supp 171, 176 n4 [77 AFTR 2d 96-1553] (ED Pa 1996) (stating in dictu, that plaintiff did not meet reporting consistency test because he treated one individual as an employee in 1978, when the audit year in question was 1990).

Kentfield also argues that a de minimus exception should apply to the reporting consistency test. It asserts that treating Wilson as an employee for a brief period of time before CMS acquired Kentfield is merely a de minimus inconsistency with § 530 and should be ignored. Initially, the court notes that whether CMS owned Kentfield is irrelevant to this determination; the court looks solely to the taxpayer at issue, in this case, Kentfield Medical Hospital. The tax status of that entity did not change when CMS acquired Kentfield.

In support of its de minimus exception argument, Kentfield cites legislative history which suggests that § 530 should be read liberally to favor the taxpayer. This legislative history, however, concerned only the reasonable basis test. See HR Rep 95-1748, 95th Cong 2d See at 5 ("The committee intends that this reasonable basis requirement be construed liberally in favor of taxpayers."). As compliance with both the reporting consistency and the substantive consistency tests is a prerequisite to the reasonable basis test, this legislative history is not relevant to whether a de minimus exception applies. In addition, the case law does not support Kentfield's position. While the Ninth Circuit in at least one case stated that § 530 should be liberally construed, in that case the IRS had stipulated that plaintiff met the substantive and reporting consistency tests. See Springfield v United States, 88 F3d 750, 753 [78 AFTR 2d 96-5185] (9th Cir 1996). Indeed, in support of its statement, the Ninth Circuit cited the legislative history discussed above which mentions only the reasonable basis test. See id. In addition, in Halfhill, plaintiff treated his son, at the time his only worker, as an employee for 1978 and part of 1979; plaintiff later expanded his trucking business and hired several truck drivers as independent contractors. 927 F Supp at 176. The court did not find a de minimus exception treating one individual as an employee over ten years before the taxable year in question. See id. Finally, the plain language of the statute requires that Kentfield cannot have treated an individual as an employee for any period. This expansive language is not consistent with a de minimus exception.

With respect to the substantive consistency test, Kentfield must demonstrate that treated all "substantially similar" employ-

ees as independent contractors for any period after December 31, 1978. Again, Kentfield argues that a de minimus exception should apply. The court finds no support in the plain language of the statute or case law for such a de minimus exception. Having treated Wilson as an employee for 10 months in 1987 and 1988, Kentfield must show that the other psychologists did have substantially similar positions to Wilson in order to meet the substantive consistency test with respect to all psychologists.

Kentfield argues that Wilson had significant administrative duties that other psychologists did not have. During the audit years, Wilson was the director of psychological services. He spent approximately 40% of his time on administrative matters. Sixty percent of his time was spent on direct patient care. It is not clear what the exact proportion was in 1987 and 1988 when he was treated as an employee; Wilson testified that his administrative duties grew over time. Even as the director, Wilson's primary responsibility was patient care. The other psychologists had administrative responsibilities, although not as time-consuming as Wilson's. It is not clear, however, that the psychologists' positions were not substantially similar to Wilson's role when he first began at Kentfield. Both parties rely upon Wilson's testimony; this testimony is ambiguous regarding his duties at that time. Specifically, Wilson states:

> As the department grew, as I developed the program and services, more people were hired.
>
> * * *
>
> [Director of Psychological Services] was sort of a role that I fell into because I was - I was soft of given the designation of developing the program, the head injury program, psychological side and behavioral side in terms of treatments and services.
>
> So at that point, given that I was the only employee initially, I was the only employee and the director of the department. But as the department grew, that role developed a little bit more and I had supervisory responsibilities and so forth.

Wilson Decl (Doc # 8, Exh 14a) at 22:23–23:18.

Kentfield asserts that Wilson was always the de facto director of psychological services and that this position, by definition, was different from the other psychologists. This is not clear; from Wilson's own testimony, it appears that his administrative responsibilities were significantly less when he first began work at Kentfield. Kentfield also relies upon Northern Louisiana Rehabilitation Center v United States, in which the court determined that medical directors, essentially consultants at the hospital, did not perform substantially similar work to a staff physician who was required to work full time for the hospital and spent approximately 25% of her time to administrative duties. 179 F Supp 2d 658, 666 (WD La 2001). The primary difference between these groups, however, was that the medical directors were simply consultants to the hospital with private practices; in addition, the hospital did not "dictate the means or manner of their work." Id. The difference was not solely the amount of administrative work performed. Kentfield has not demonstrated that it has met the substantive consistency requirement and is not, therefore, eligible for § 530 relief.

B

As an alternative ground for summary judgment, Kentfield argues that the psychologists were, on the merits, independent contractors. With respect to the psychologists' terms and conditions of employment, the parties do not have disputes of facts; they simply dispute how the facts should be applied in this case. The issue may fairly be stated, therefore, as a matter of law. Kentfield must therefore demonstrate that the psychologists were independent contractors.

The Internal Revenue Service uses a 20-factor test in determining whether a worker was an employee or an independent contractor. See Rev Rul 87-41. In Nationwide Mutual Ins Co v Darden, the Supreme Court stated that the fundamental question

was whether "the hiring party[] [had a] right to control the manner and means by which the product [was] accomplished." 503 US 318, 323 (1992). The Supreme Court found the following factors relevant to this inquiry:

> the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id at 323–24. The threshold amount of control necessary to demonstrate an employer-employee relationship is lessened when the hired party is a professional. See James v Commissioner, 25 TC 1296, 1301 (Tax Ct 1956).

Here, taking into account the lesser amount of control Kentfield necessarily has over the psychologists as professionals, Kentfield had sufficient control over the means and methods by which the psychologists worked to demonstrate that the psychologists were employees. Kentfield hired each psychologist at an hourly or yearly rate; with the exception of some Medicare biling, the psychologists did not bill their clients separately for their services. While Kentfield did not provide significant employee benefits such as vacation or health or life insurance, this factor weighed against the others is insufficient to demonstrate an independent contractor relationship.

Kentfield provided significant support services, including staff, office space and all tools and materials necessary for the psychologists work. All the work was performed at Kentfield. With the exception of the director of psychological services, the psychologists did not have any role over the process of hiring or firing support staff. The psychologists had control over the specific times they worked, although they were required to respond promptly to referrals; some were required to work full time while others had the flexibility to determine the number of hours they worked. The psychologists were required to work 48 weeks per year and had ongoing relationships with Kentfield. The psychologists were supervised by other psychologists and had to submit daily reports of their work.

In addition, while the psychologists already had significant training and skill, Kentfield required the psychologists to continue to enhance their skills through further training and conferences. Kentfield paid for this additional training and attendance at conferences. Taking all these factors into account, the court finds that Kentfield has not demonstrated that it did not have the right to control the means and methods by which the psychologists performed their work. Thus, the court finds that Kentfield has not met its summary judgment burden with respect to the psychologists.

III

In summary, the court DENIES Kentfield's motion for summary judgment (Doc # 6) with respect to the claims regarding the psychologists.

IT IS SO ORDERED.

VAUGHN R WALKER

United States District Judge

¶2002-5085

Robert A. LUND; Colleen L. LUND; Zero Gee Enterprises Trust; Sun Federal, Inc., Trustee, PETITIONERS - APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT - APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-71220, June 27, 2002. Tax Court, (2000) TC Memo 2000-334, RIA TC Memo ¶2000-334, 80 CCH TCM 599 (opinion by Swift, *J.*), affirmed. Years 1994, 1995, 1996. Decision against Taxpayers.

1. Sham trusts—economic substance—proof. Tax Court properly held that sham trust to which taxpayer transferred his computer consulting business for 100% trust beneficial interest, which he purportedly transferred to foreign corp. for no consideration, lacked economic substance. After trust's establishment, trustees performed no meaningful work for trust and received little salary despite trust's substantial income, and taxpayer continued to operate and control business; named beneficiaries received only taken payments despite trust's $1 million net income and reported distributions equal to its entire income; and taxpayer obtained bank loans and credit using taxpayers' realty as collateral, without trustees' approval, and had unrestricted use of trust property. *Reference:* United States Tax Reporter ¶79,007.01(23).

2. Accuracy-related negligence penalties—reliance on tax professional. Accuracy-related negligence penalty was properly upheld against taxpayers who operated sham trust: taxpayer-husband didn't reasonably attempt to comply with IRC or show good faith reliance on professional's advice; and claim that Tax Court's questioning of witnesses was "hostile and argumentative" was rejected. *Reference:* United States Tax Reporter ¶66,625.01(10). IRC §6662.

Appeal from a Decision of the United States Tax Court. United States Court of Appeals for the Ninth Circuit.

Before: SCHROEDER, Chief Judge, D.W. NELSON and REINHARDT, Circuit Judges.

MEMORANDUM*

Stephen J. Swift, Tax Court Judge, Presiding

NOT FOR PUBLICATION

Appellants ("Lunds") appeal the decision of the Tax Court sustaining the Commissioner Of Internal Revenue's ("Commissioner") determination that Robert Lund ("Lund") was operating a sham trust ("The Zero Gee Trust") and that the Lunds were personally liable for tax on the income purportedly earned by the trust in 1994, 1995, and 1996, and were personally liable for negligence penalties for failure to pay the tax when due. We have jurisdiction pursuant to 26 U.S.C. § 7482. We affirm the decision of the Tax Court in all respects.

[1] Trusts lacking in economic substance are considered shams and are properly disregarded for federal income tax purposes. Zmuda v. C.I.R, 731 F.2d 1417, 1421 [53 AFTR 2d 84-1269] (9th Cir. 1984). Here, the Tax Court applied a four factor test to determine that the Zero Gee Trust lacked economic substance: (1) Lund's relationship to the trust property (his computer consulting business) did not differ materially before and after he formed the trust and granted the business to the trust; (2) the trust did not have independent trustees; (3) no economic interest passed to the named beneficiaries of the trust; (4) Lund did not honor restrictions imposed by the trust or by the law of trusts.

Telltale indicators that Zero Gee lacked economic substance include the following: (1) After forming the trust, placing his computer consulting business in the trust, and making himself sole beneficiary of the trust, Lund purportedly transferred his entire beneficial interest, which he valued at between $1 and $2 million, to a foreign corporation without any consideration whatsoever; (2) the trustees of Zero Gee performed no meaningful work, received only $3600 per year for managing the trust (despite gross income for the trust of over $5 million total over three years), and Lund continued to operate and control the business; (3) the named beneficiaries of Zero Gee received only token payments ($41,000) despite a net trust income of over $1.2 million and despite the fact that Zero Gee reported distributions equal to its entire income; (4) Lund obtained bank loans and credit for the consulting business

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

using as collateral real property owned by the Lunds, without approval of the trustees, and Lund had essentially unrestricted use of trust property.

[2] On this record, the Tax Court's determination that Zero Gee is a sham trust is more than well supported and by no stretch of the imagination clearly erroneous. Further, the Tax court correctly upheld the negligence penalty assessed against the Lunds because Lund failed to make a reasonable attempt to comply with the provisions of the tax code and presented no evidence to show that he relied in good faith on professional advice.

Lund's allegation that the Tax Court abandoned its role as a neutral finder of fact because, Lund argues, the Tax Court's questioning of Lund's witnesses was "hostile and argumentative" is also without merit. There is nothing remarkable about Judge Swift's pointed questioning of Zero Gee's trustee when he testified that he knew virtually nothing about Zero Gee's foreign corporate beneficiary and then went on to testify that he had no particular reason for replacing that foreign corporate beneficiary with a different foreign corporate beneficiary about which he also knew nothing.

AFFIRMED

¶2002-5086

UNITED STATES OF AMERICA, PLAINTIFF v. Patricia LABATO, Denise LABATO a/k/a Denise Labato Hunt, and Brevard County, Florida, DEFENDANTS. Gennaro Labato, INTERVENOR. U.S. District Court, Middle Dist. of Florida, (DC FL) Case No. 6:97-cv-900-Orl-28JGG, June 18, 2002. Year 1992. Decision for Govt.

1. Actions to reduce assessments to judgment—deficiency notice—foreclosure—fraudulent conveyances—summary judgment. Taxpayer's jeopardy assessments were reduced to judgment on summary judgment, conveyance of lien property to daughter was set aside as fraudulent, and liens were foreclosed: taxpayer's challenge to her non-receipt of deficiency notice, which was properly mailed to her last known address, was meritless since notice's validity depended only on its proper mailing, not taxpayer's receipt; taxpayer didn't otherwise refute assessment's presumptive correctness; and didn't rebut conveyance's fraudulent nature, which was shown by facts it was made to "insider" for no consideration at time taxpayer was insolvent and shortly after tax lien arose. Also, taxpayer's argument that it was really husband who purchased and conveyed subject property was rejected. *Reference:* United States Tax Reporter ¶74,035.01(25); 62,125.03(12); 63,215.02(17); 74,035.03(80). IRC §6212; 6321; 7403.

United States District Court Middle District of Florida Orlando Division.

Order

ANTOON II, District Judge:

This is an action by the United States of America ("United States" or "the Government") against Defendant Patricia Labato ("Ms. Labato"), her daughter, Denise Labato a/k/a Denise Labato Hunt ("Ms. Hunt"), and Brevard County, Florida arising from Ms. Labato's alleged failure to pay income tax for the year ended December 31, 1992. The Government seeks to reduce to judgment the balance of Ms. Labato's unpaid income tax liability, to set aside as fraudulent a 1993 conveyance of real property from Ms. Labato to Ms. Hunt, and to foreclose the federal tax lien against that property. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1340 and 1345.

This case is currently before the Court on the Motion for Summary Judgment (Doc. 101, filed January 30, 2002) filed by Defendant Ms. Labato, and the Opposition of Plaintiff United States of America to Motion for Summary Judgment by Defendant Patricia Labato and Plaintiff's Cross-Motion for Summary Judgment (Doc. 104, filed February 12, 2002). The United States has also filed a Memorandum of Law in Support of Opposition of Plaintiff

United States of America to Motion for Summary Judgment by Defendant Patricia Labato and Plaintiff's Cross-Motion for Summary Judgment (Doc. 105, filed February 12, 2002). Defendant Ms. Labato has filed Defendant's Amended Memorandum in Opposition to the Government's Counter-Motion for Summary Judgment (Doc. 113, filed March 13, 2002).[1] Upon consideration of the record in this matter, and as more specifically set forth below, the Court concludes that the Government's motion shall be granted wand that Defendant's motion shall be denied.

I. Factual Background

On July 10, 1992, Ms. Labato and her husband, Gennaro Labato, sold approximately one hundred sixty acres of land and improvements thereon in Woodstown, New Jersey for $3,140,022. (Ex. 6 to Doc. 18). The Labatos had purchased the land in the early 1970s for approximately $70.000, and consequently, upon the sale a substantial capital gain was realized. Despite this significant capital gain, however, the Labatos failed to pay income tax on that gain and failed to file an income tax return for the year 1992.

The proceeds from the sale of the New Jersey property were used, inter alia, to purchase some real property, including a $450,000–500,000 house in St. Cloud, Florida, and the subject property, a house in Cocoa, Florida. The Cocoa house, located at 3034 Winchester Drive, was purchased for $62,145.24 on June 29, 1993. Ms. Labato signed the settlement statement for that property (Ex. 8 to Doc. 105), and a warranty deed dated June 29, 1993 was recorded reflecting the sale from the sellers, Timothy and Diedre Decker, to Ms. Labato (Ex. 10 to Doc. 105). A ''corrective'' warranty deed from Ms. Labato to Ms. Hunt was recorded on July 23, 1993 (Ex. 11 to Doc. 105).

On February 1, 1995, the IRS made a jeopardy assessment of Ms. Labato's income tax liability for 1992. The jeopardy assessment totalled $947,289.12, representing the tax liability plus penalties and interest. As noted by the Government, on that same date a jeopardy assessment was also made against Ms. Labato's husband, Gennaro Labato; as explained by the Government, ''[s]eparate assessments were made because Mr. and Mrs. Labato had not filed a tax return for 1992, and thus, had not elected the filing status 'married filing joint.''' (Government's Memorandum of Law, Doc. 105 at 4 n.6). Mr. Labato's tax liability has since been satisfied.

On March 29, 1995, the IRS sent notices of deficiency by certified mail to Ms. Labato at four different addresses: (1) 4540 Albritton Road, St. Cloud, Florida 34772, certified mail number 058869; (2) Rural Delivery 1, Box 540, Woodstown, New Jersey 08098, certified mail number 058870; (3) 204 South Main Street, Woodstown, New Jersey 08098, certified mail number 058871; and (4) Rural Delivery 4, Box 254, Woodstown, New Jersey 08098, certified mail number 058872. Copies of all four letters (Exs. 2–5 to Doc. 105) as well as a certified mail list reflecting delivery of those letters to the Postal Service on March 29, 1995 (Ex. 6 to Doc. 105) are contained in the record. Ms. Labato claims that she did not receive a notice of deficiency, and she has submitted an ''Affidavit of Truth'' that she ''never received an original, Notice of Deficiency, (either direct or forwarded from another address), at my current address, 4540 Albritton Rd. St. Cloud Florida. I have lived at this St. Cloud address since 1992.'' (Attach. to Doc. 101). However, only the notice mailed to the South Main Street address (certified mail number 058871) was returned to the IRS unclaimed. (Ex. A-2 to Doc. 101). According to the Government's memorandum and a supporting affidavit (Doc. 107), some payments have been made since 1995, but as of January 31, 2002, Ms. Labato's federal income tax liability totalled $1,377,706.93.

II. Procedural Background

This case has a long and somewhat complicated procedural history. The Gov-

[1] Defendant's Amended Memorandum in Opposition to the Government's Counter-Motion for Summary Judgment (Doc. 113) supersedes the initial Defendant's Memorandum in Opposition to the Government's Counter-Motion for Summary Judgment (Doc. 111).

ernment filed its Complaint (Doc. 1) on July 18, 1997, against Ms. Labato, Ms. Hunt, and Brevard County, Florida. The Complaint notes that Ms. Hunt is named as a Defendant because she may claim an interest in the subject real property, and Brevard County is named as a Defendant because it is owed ad valorem real property taxes and may claim a lien or other interest in the subject real property. (Doc. 1 at 3).[2]

After Answers (Docs. 7 & 9) were filed, on May 6, 1998, the Government filed its Motion for Summary Judgment against Defendants Labato and Hunt (Doc. 18) and supporting Memorandum of Law (Doc. 19). On May 29, 1998, United States District Judge G. Kendall Sharp granted the motion, finding that Ms. Labato was indebted to the United State for unpaid federal income taxes for 1992, setting aside as fraudulent the transfer of the Cocoa house from Ms. Labato to Ms. Hunt, declaring that the United States has a valid tax lien on all of Ms, Labato's property, and foreclosing that tax lien (Doc. 24).

Ms. Labato and Ms. Hunt attempted to appeal the order granting summary judgment (Doc. 25), but the Court of Appeals for the Eleventh Circuit dismissed the appeal for lack of jurisdiction, finding that the order (Doc. 24) was not final or otherwise appealable. (Doc. 27). A Decree of Foreclosure and Order of Forfeiture was entered on June 19, 1998 (Doc. 26), and on August 12, 1998, the property was sold to Charles Campbell for the highest bid of $42,000. (Doc. 29).

Ms. Labato and Ms. Hunt filed an Emergency Motion to stay the transfer of the property (Doc. 30, filed August 28, 1998). A hearing on the motion was held on September 24, 1998, after which the court took the matter under advisement. (Docs. 34 & 40). Meanwhile, the United States filed a Motion for Confirmation of Sale (Doc. 35, filed October 1, 1998), and that motion was heard on November 17, 1998 (Docs. 38 & 41). At that hearing, the Court found that a factual dispute existed regarding the conveyance of the property and an alleged scrivener's error in the property initially being placed in Ms. Labato's name rather than Ms. Hunt's name; the Court apparently was reconsidering its order granting the Government's motion for summary judgment. (Doc. 41 at 7). The hearing was continued pending completion of an IRS audit regarding Mr. Gennaro Labato, and the Court ordered that Ms. Hunt would be permitted to temporarily occupy the house. (Doc. 41 at 9). On July 13, 1999, the Court ordered the U.S. Marshal to assist Defendants in gaining access to the house. (Doc. 47).

On June 13, 2000, the Government filed its Notice of Withdrawal of Plaintiff's Motion fro Confirmation of Sale (Doc. 55), advising that confirmation of the sale was no longer desirable. The Government also filed Plaintiff's Motion for an Order Permitting the United States Marshal to Return Funds to Successful Bidders (Doc. 56, filed June 16, 2000). On June 20, 2000, Ms. Labato and Ms. Hunt filed a "Motion for Clarification of Issues" (Doc. 57).

The case was reassigned to the undersigned United States District Judge on June 29, 2000 (Doc. 59). A status hearing was held on September 22, 2000 (Doc. 62), during which the court granted the Government's withdrawal of motion to confirm sale, granted the motion for return of funds to successful bidders, and announced that Mr. Gennaro Labato would be permitted to intervene if he moved to do so within ten days thereof. (Doc. 62). On October 4, 2000, the Court entered an Order (Doc. 66) declining to confirm the sale of the property, directing the return of the purchase price to Mr. Campbell, denying Defendants' Motion for Clarification of Issues (Doc. 57) as moot, and denying Defendants' motion for an order removing all tax liens from the property (Doc. 57). On October 25, 2000, the Court granted (Doc. 67) Mr. Gennaro Labato's Motion to Intervene (Doc. 64).

On January 8, 2001, Ms. Labato advised the Court that she had filed a Chapter 7 Bankruptcy petition (Doc. 71), and this

[2] The Government concedes that any lien that Brevard County may claim for unpaid ad valorem property taxes is superior to the federal tax lien. (Doc. 105 at 2 n.2).

matter was stayed (Docs. 72 & 76) until April 9, 2001 (Doc. 79). A Case Management and Scheduling Order was entered on September 4, 2001 (Doc. 90) setting this matter for trial in July 2002. The summary judgment motions filed by the parties (Docs. 101 & 104) are now ripe for consideration by the Court.

III. Discussion

A. Summary Judgment Standards

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing that no genuine issues of material fact remain. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

In ruling on a motion for summary judgment, the Court construes the facts and all reasonable inferences therefrom in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). However, summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. At the summary judgment stage, "[t]he function of the court is not to 'weigh the evidence and determine the truth of the matter but to determine whether there is an issue for trial.'" Lockett v. Wal-Mart Stores, Inc., No. Civ. A. 99-0247-CB-C, 2000 WL 284295, at 2 (S.D. Ala. Mar. 8, 2000) (quoting Anderson, 477 U.S. at 249).

When faced with a "properly supported motion for summary judgment, [the nonmoving party] must come forward with specific factual evidence, presenting more than mere allegations." Gargiulo v. G.M. Sales, Inc., 131 F.3d 995, 999 (11th Cir. 1997). "The evidence presented cannot consist of conclusory allegations or legal conclusions." Avirgan v. Hull, 932 F.2d 1572, 1577 (11th Cir. 1991); see also Fed. R. Civ. P. 56(e) (providing that nonmovant's response "must set forth specific facts showing that there is a genuine issue for trial.").

B. The Merits of the Parties' Summary Judgment Motions

i. Ms. Labato's Motion for Summary Judgment (Doc. 101)

[1] In her motion (Doc. 101), Ms. Labato makes only one argument: that the IRS did not serve her with a Notice of Deficiency and that therefore she was denied an opportunity to petition the tax court for redress. Ms. Labato contends that she never received a Notice of Deficiency, but she does not contest that the Government delivered the notices to the Post Office for mailing. The Government responds that Ms. Labato's alleged failure to receive the deficiency notice does not invalidate the tax assessment where the Government has presented unrebutted evidence of mailing the deficiency notice to Ms. Labato.

Section 6212 of Title 26 provides in part, "If the Secretary determines that there is a deficiency in respect of any tax imposed . . . , he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail." 26 U.S.C. § 6212(a). "The notice is valid even if not received by the taxpayer, if it is mailed to the taxpayer's last known address." United States v. Zolla, 724 F.2d 808, 810 [53 AFTR 2d 84-652] (9th Cir. 1984); accord Wiley v. United States, 20 F.3d 222 [73 AFTR 2d 94-1603] (6th Cir. 1994) ("The only requirement is that the IRS send the notice of deficiency by certified or registered mail to the taxpayer's last known address; actual receipt of the notice is not necessary."); United States v. Dixon, 672 F. Supp. 503, 506 [60 AFTR 2d 87-5672] (M.D. Ala. 1987) ("[A]ctual receipt of the Notice is not necessary."), aff'd, 849 F.2d 1478 (11th Cir. 1988).

In the instant case, both parties have submitted with their motions a copy of an IRS certified mail list stamped "March 29, 1995" and listing four certified mail items — one for each of the four addresses to

which the IRS sent the notice to Ms. Labato. (Ex. A to Doc. 101; Ex. 6 to Doc. 105). The Government has also submitted certification that this list is a true copy of an official record of the IRS. (Ex. 6 to Doc. 105). Ms. Labato does not dispute that only one of these notices was returned unclaimed or that notice was sent to her "last known address," but she has submitted an affidavit stating that she never received a deficiency notice at her St. Cloud address. (Attach. to Doc. 101).

Ms. Labato cites several cases where the sufficiency of a notice of deficiency was allegedly determined based on whether it was actually received by the taxpayer. See. e.g., Berger v. Comm'r of Internal Rev., 404 F.2d 668 [22 AFTR 2d 5889] (3d Cir. 1968); see also Sicker v. Comm'r of Internal Revenue, 815 F.2d 1400, 1401 [59 AFTR 2d 87-1055] (11th Cir. 1987) (finding notice of deficiency which was improperly addressed by the IRS was not effective when mailed where notice was not "actually received by the taxpayer within ample time to file a petition for redetermination") (citing Pugsley v. Comm'r of Internal Rev., 749 F.2d 691 [55 AFTR 2d 85-606] (11th Cir. 1985) (holding notice sufficient even though not sent to "last known address" of taxpayer where taxpayer was not prejudiced because he actually received the notice)). Ms. Labato reads these cases as requiring actual receipt of the notice of deficiency.

However, these cases do not hold that receipt of the notice by the taxpayer is required. Berger, for example, dealt with the situation where the IRS does not send the notice to the last known address but the taxpayer nevertheless receives it. In such a situation, actual receipt can, depending on the circumstances, overcome the IRS's failure to send the notice to the taxpayer's last known address. This does not mean that a notice sent to the last known address is not effective even if not received; indeed, the Berger court noted that when notice is sent to the last known address, "the notice is adequate and effective even though it may later be shown in fact it was never delivered to the taxpayer," 404 F.2d at 673. Hence, these cases do not support Ms. Labato's position that the notice must be received to be effective, nor does her affidavit which states she never received a notice at her St. Cloud address. See Dixon, 672 F. Supp. at 506 ("[D]efendant's affidavit that he did not receive the statutory notice is not evidence that it was not mailed."). Despite Ms. Labato's arguments to the contrary, it is the *mailing* of the notice rather than the *receipt* of the notice that determines its sufficiency. See e.g., Zolla.

In her memorandum (Doc. 113) in opposition to the Government's summary judgment motion, Ms. Labato argues, citing three cases, that the absence of signed return receipts shows that she did not receive the deficiency notice. However, all three of those cases — McPartlin v. Commissioner of the IRS, 653 F.2d 1185 [48 AFTR 2d 81-5897] (7th Cir. 1981), Mulder v. Commissioner of Internal Revenue, 855 F.2d 208 [62 AFTR 2d 88-5651] (5th Cir. 1988),[3] and Powell v. Commissioner of Internal Revenue, 958 F.2d 53 [69 AFTR 2d 92-800] (4th Cir. 1992) — dealt with the issue of whether notice had been sent to the taxpayer's last known address and whether the IRS had acted with due diligence in determining that address. In each of those cases, the court viewed the IRS's actions under the circumstances as not amounting to due diligence, considering in part the presence or absence of a return receipt as it bore on the IRS's actions in determining the taxpayer's last known address.

None of these cases relied upon by Ms. Labato addressed the issue before this Court — whether a notice properly sent to the taxpayer's last known address is sufficient—and they are not instructive on this point. Indeed, the language of McPartlin regarding error of the post office has been rejected as dicta. See Keado v. United States, 853 F.2d 1209, 1212 n.9 [62 AFTR 2d 88-5666] (5th Cir. 1988) (affirming

[3] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down as of September 30, 1981.

summary judgment for Government where Government had presented proof of delivery by IRS to the postal service and rejecting taxpayer's argument, based on McPartlin, that receipt of notice is required, noting that "[i]n *McPartlin*, however, the Seventh Circuit found that the IRS did not mail the notice of deficiency to the taxpayers' last known address. This finding was sufficient to support the court's holding. The court's comments regarding the effect of the post office's error were dicta.").[4]

Hence, although Ms. Labato attempts to create an issue by arguing that there is no return receipt to show that she received the notice of deficiency, the Court finds her arguments insufficient to create an issue of fact to defeat summary judgment for the Government. Again, the cases on which she relies relate to the IRS's diligence in ascertaining the taxpayer's "last known address" rather then to the sufficiency of a notice properly sent to the "last known address" as in the case at bar. Ms. Labato does not contend that the notice was not sent to her last known address. Indeed, the Government has presented evidence that in March 1995 it sent notices to four different addresses including Ms. Labato's address on Albritton Road in St. Cloud — the address at which Ms. Labato admittedly has resided since 1992. The record includes copies of the four letters dated March 29, 1995, as well as a certified mail list reflecting delivery of those four letters to the Postal Service. The evidence is unrebutted that only one of the four letters was returned "unclaimed." Although the record is silent as to whether the letters in the instant case were sent certified with a requested return receipt or certified without a return receipt, this silence does not create a material issue of fact on the issue of whether the IRS properly mailed the notice of deficiency to Ms. Labato.

The evidence is unrebutted that the IRS mailed a notice of deficiency to four addresses, including Ms. Labato's correct "last known address," and that only one letter was returned unclaimed. This evidence is sufficient to establish as a matter of law that the IRS properly mailed the deficiency notice to Ms. Labato. Hence, Ms. Labato's motion for summary judgment based on her alleged failure to receive a deficiency notice will be denied, and the Government's motion on this issue will be granted.

ii. The Government's Cross-Motion for Summary Judgment (Doc. 104)

In its motion (Doc. 104) and supporting memorandum (Doc. 105), the Government contends that there are no genuine issues of material fact and that it is entitled to summary judgment on the issues of Ms. Labato's outstanding tax debt and the transfer of property from Ms. Labato to her daughter, Ms. Hunt. In her amended opposition memorandum (Doc. 113), Ms. Labato argues only the issue of the notice of deficiency discussed above in part III.B.i. of this Order and does not respond to the Government's other arguments, each of which will now be addressed in turn.

a. Ms. Labato's Tax Liability

The Government first argues that it is entitled as a matter of law to reduce to judgment the unpaid balance of Ms. Labato's 1992 federal income tax liability. The Government avers that Ms. Labato's tax debt has been duly assessed, that notice of deficiency was properly sent to Ms. Labato, and that Ms. Labato did not file a complaint challenging the jeopardy assessment within the allowable time period. Therefore, the Government argues, there are no remaining issues as to Ms. Labato's tax liability.

The Government correctly notes that the assessment of Ms. Labato's tax debt is pre-

[4] Moreover, Keado preceded the Fifth Circuit's Mulder decision by a few weeks, and the Fifth Circuit has reiterated its Keado holding since Mulder. See, e.g., Jones v. United States, 889 F.2d 1448, 1450 [65 AFTR 2d 90-387] (5th Cir. 1989) ("Section 6212 does not require actual receipt by the taxpayer of the notice of deficiency. Rather, it provides that the notice 'shall be sufficient' if mailed to the taxpayer at his 'last known address.' . . . The statutory scheme, therefore, provides a method of notification which insures that the vast majority of taxpayers will be informed that a tax deficiency has been determined against them without imposing on the Commissioner the virtually impossible task of proving that the notice actually has been received by the taxpayer.") (citing Keado); Pomeroy v. United States, 864 F.2d 1191, 1195 [63 AFTR 2d 89-626] (5th Cir. 1989) ("The relevant statutes simply require that the deficiency notice be *mailed* to the taxpayer's last known address, not that it be received.") (citing Keado) (emphasis in original).

sumed correct. Welch v. Helvering, 290 U.S. 111, 115 [12 AFTR 1456] (1933); accord United States v. Pomponio, 635 F.2d 293 [47 AFTR 2d 81-324] (4th Cir. 1980). Thus, upon a showing like the Government has made here of certified copies of the certificate of assessment (Ex. 1 to Doc. 105), the Government establishes a prima facie case. Pomponio, 635 F.2d at 296; see also United States v. Chila, 871 F.2d 1015, 1017 [63 AFTR 2d 89-1278] (11th Cir. 1989) (''[A] Certificate and Assessments and Payments is presumptive proof of a valid assessment.'') (quoting appellant's brief therein) (citing United States v. Dixon, 672 F. Supp. 503 [60 AFTR 2d 87-5672] (M.D. Ala. 1987), aff'd, 849 F.2d 1478 (11th Cir. 1988)).

The Government having presented its proof, the burden shifts to Ms. Labato to contest the tax assessment as arbitrary or incorrect. Bar L Ranch, Inc. v. Phinney, 426 F.2d 995, 998 [25 AFTR 2d 70-1234] (5th Cir. 1970) (''Of course we agree with the District Court that the Commissioner's determination of a deficiency is prima facie Correct and that the burden is on the taxpayer to prove to the contrary.''). Ms. Labato has not presented any evidence or argument regarding the propriety of the tax assessment other than her contention, discussed earlier, that she did not receive the notice of deficiency. Accordingly, the Government is entitled to summary judgment on the issue of Ms. Labato's 1992 federal income tax liability.

b. Transfer of the Subject Real Property to Ms. Hunt

The Government next seeks to foreclose its tax lien on the subject real property in Cocoa, Florida. The Government contends that the property is subject to foreclosure on the tax lien because Ms. Labato fraudulently transferred the property to Ms. Hunt and the transfer should be set aside.

Upon Ms. Labato's refusal to pay or neglect in not paying her tax liability after demand for payment, the amount of her tax liability became ''a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to [her].'' 26 U.S.C. § 6321. As set forth in the Internal Revenue Code, ''the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.'' 26 U.S.C. § 6322. Section 7403 of the Code provides for enforcement of liens and subjection of property to payment of tax. 26 U.S.C. § 7403.

In the instant case, the IRS assessed Ms. Labato's tax liability in 1995 — more than a year and a half after Ms. Labato acquired and then transferred the subject Cocoa real property. Therefore, as noted by the Government, a federal tax lien did not attach to the property before Ms. Labato conveyed it to Ms. Hunt. Nevertheless, the Government may still seek to enforce its lien against the property pursuant to state fraudulent conveyance law. See, e.g., Ressler v. United States, 433 F. Supp. 459, 463 [40 AFTR 2d 77-5119] (S.D. Fla. 1977) (''[W]here a taxpayer disposes of property prior to the existence of federal tax liens, the United States may seek relief under the applicable fraudulent conveyance laws of the particular state in which the property and taxpayer are located.''), aff'd, 576 F.2d 650 [42 AFTR 2d 78-5388] (5th Cir. 1978), cert. denied, 440 U.S. 929 (1979).

Florida's fraudulent conveyance law is codified in Florida's Uniform Fraudulent Transfer Act, Sections 726.101 et seq., Florida Statutes. The Government contends that the transfer of the Cocoa property from Ms. Labato to Ms. Hunt was fraudulent under section 726.106(1), Florida Statutes, which deems fraudulent ''as to a creditor whose claim arose before the transfer was made'' a transfer of property made ''without receiving a reasonably equivalent value in exchange'' where the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer.

Even though the IRS did not assess Ms. Labato's 1992 tax liability until 1995, the Government's ''claim arose'' before the July 1993 transfer of the subject property from Ms. Labato to Ms. Hunt as required

by section 726.106(1). As noted by the Ressler court, ''[r]egardless of when federal taxes are actually assessed, taxes are considered as due and owing, and constitute a liability, as of [the] date the tax return for the particular period is required to be filed.'' 433 F. Supp. at 463. Accordingly, Ms. Labato's 1992 federal income tax liability arose on April 15, 1993, when her tax return was due. See 26 U.S.C. §§ 6072, 6151 (prescribing, respectively, that tax returns are to be filed by April fifteenth of the following year and that tax owed is to be paid at time return is due). At the time of the July 1993 transfer of the property to Ms. Hunt, therefore, the Government's claim had already arisen.

Turning to the remaining elements of section 726.106(1), the Government correctly notes that it is undisputed that Ms. Labato did not receive any consideration for the transfer of the Cocoa property. (Dep. of Patricia Labato, Ex. 4 to Doc. 18, at 44). Additionally, the Government points out that Ms. Labato admitted in her 1998 deposition that she was insolvent and had been for several years as a result of the IRS's attempts to collect the tax debt. (Dep. of Patricia Labato, Ex. 4 to Doc. 18, at 57–61). The Court agrees that the unrebutted evidence establishes that the conveyance of the Cocoa property to Ms. Hunt was fraudulent under section 726.106, Florida Statutes.

The Government also argues that the transfer to Ms. Hunt was fraudulent and should be set aside under section 726.105(1)(a), Florida Statutes, which provides that a transfer of property made ''[w]ith actual intent to hinder, delay, or defraud any creditor of the debtor'' is fraudulent as to that creditor ''whether the creditor's claim arose before or after the transfer was made.'' The statute provides a nonexclusive list of factors which may be considered in determining the transferor's intent. § 726. 105(2).[5] Applying those factors to the instant facts, the transfer was to an insider,[6] § 726.105(2)(a); Ms. Hunt did not take possession of the property until 1995 — two years after the sale — implying that Ms. Labato ''retained possession or control of the property transferred after the transfer,'' § 726.105(2)(b); the transfer was not for reasonably equivalent value, § 726.105(2)(h); as discussed above Ms. Labato ''was insolvent or became insolvent shortly after the transfer was made,'' § 726.105(2)(i); and the 1993 transfer occurred shortly after Ms. Labato's tax liability arose, § 726.105(2)(j).

Considering these factors, the Court finds that the transfer of the Cocoa property from Ms. Labato to her daughter, Ms. Hunt, was fraudulent under Florida law and should be set aside. The Government — anticipating in its supporting memorandum that Ms. Labato would argue in response that her husband, Gennaro Labato, and not she, purchased the property and gave it to Ms. Hunt — aptly notes that the undisputed record evidence reflects that it is Ms. Labato's name and signature on the closing documents and warranty deed. A ''corrective'' deed was entered a month later conveying the property from Ms. Labato to Ms. Hunt, and the Court finds that taking into account all of the circumstances the property was purchased by Ms.

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5 Section 726.105(2) provides:

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

(a) The transfer or obligation was to an insider.
(b) The debtor retained possession or control of the property transferred after the transfer.
(c) The transfer or obligation was disclosed or concealed.
(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
(e) The transfer was of substantially all the debtor's assets.
(f) The debtor absconded.
(g) The debtor removed or concealed assets.
(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

6 ''Insider'' is defined in subsection 726.102(7), Florida Statutes, to include ''[a] relative of the debtor.'' Ms. Hunt is Ms. Labato's daughter.

Labato and then was conveyed by Ms. Labato to Ms. Hunt for no consideration.[7] Thus, the transfer was fraudulent under section 726.105(1)(a) as well as under section 726.106(1).

Ms. Labato has not presented any evidence to rebut the Government's evidence of actual and constructive fraud. Accordingly, the transfer of the property shall be set aside and the Government shall be permitted to foreclose its tax lien against the Cocoa property.

IV. Conclusion

In accordance with the foregoing, it is ORDERED and ADJUDGED as follows:

1. The Motion for Summary Judgment (Doc. 101, filed January 30, 2002) filed by Defendant Patricia Labato is DENIED.

2. Defendant's Motion for a Hearing on Defendant's Motion for Summary Judgment (Doc. 115) is DENIED.

3. Plaintiff's Cross-Motion for Summary Judgment (Doc. 104, filed February 12, 2002) is GRANTED in all respects.

4. Patricia Labato is indebted to the United States for unpaid federal income taxes for 1992 in the total amount of $1,377,706.93, plus interest accruing between January 31, 2002, and the date of judgment.

5. The purported transfer on July 23, 1993, of the subject real property at 3034 Winchester Drive in Cocoa, Florida, from Patricia Labato to Denise Labato a/k/a Denise Labato Hunt is hereby set aside as a fraudulent conveyance.

6. The United States, as a result of Defendant Patricia Labato's failure to pay her assessed federal income tax liability for 1992, has a valid federal tax lien upon and against all property, and all rights to property, belonging to Defendant Patricia Labato, including the subject real property at 3034 Winchester Drive in Cocoa, Florida.

7. The federal tax lien is hereby FORECLOSED, and the United States may sell the subject real property and apply the sale proceeds to the payment or partial payment of Defendant Patricia Labato's outstanding federal income tax liability for 1992.

8. A judgment and order of foreclosure will be entered separately. The Government shall file a proposed judgment and order of foreclosure within five (5) days of the date of this Order.

9. The Motion by Plaintiff United States of America to Strike Defendant's Demand for Trial by Jury (Doc. 114) is DENIED as moot.

DONE and ORDERED in Chambers, Orlando, Florida this 17 day of June, 2002.

JOHN ANTOON II

United States District Judge

¶2002-5087

Michael FLEMING, PLAINTIFF v. FOUR RECORDS OF LIEN, DEFENDANT. U.S. District Court, Middle Dist. of Florida, (DC FL) Case No. 8:02-cv-1085-T-26MAP, June 21, 2002. Decision for Govt.

1. Actions against U.S.—sovereign immunity—discharge of liens. Taxpayer's frivolous action seeking discharge of federal tax liens was dismissed for lack of jurisdiction: even if state statute on which lawsuit was based could apply to tax liens, U.S. didn't expressly waive its sovereign immunity as to suits instituted pursuant to such statute. *Reference:* United States Tax Reporter ¶74,336.506(25).

United States District Court, Middle District of Florida, Tampa Division.

Judgment in a Civil Case

Decision by Court. This action came to trial or hearing before the Court The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered for the defendant.

[7] Although earlier in the case Ms. Labato contended that the initial titling of the property in her name was a mistake, she has not made that or any other argument in opposition to this portion of the Government's current motion. In any event, the Court finds that any such mistake would not create an issue of material fact sufficient to defeat the Government's motion for summary judgment.

Date: June 21, 2002

SHERYL L. LOESCH, CLERK

By:

R. Moglia, Deputy Clerk

Order

LAZZARA, District Judge:

Before the Court is the Government's Motion to Dismiss (Dkt. 4). As noted in the Notice of Pendency of Other Actions (Dkt. 3), this case is identical to a series of lawsuits filed in state court and later removed to federal court, following which the lawsuits were dismissed in due course.

[1] In this case, the Plaintiff seeks to discharge liens imposed by the Internal Revenue Service and recorded in the official records of Pinellas County, Florida. The basis of the Plaintiff's lawsuit is section 731.21, Florida Statutes, which relates to the discharge of construction liens. Even if this statute could conceivable be construed to apply to a federal tax lien, the United States has not expressly waived its sovereign immunity with regard to suits instituted pursuant to this state statute. See Rosado v. Curtis, 885 F. Supp. 1538, 1542 [75 AFTR 2d 95-1564] (M.D. Fla. 1995) (''The United States is immune from suit unless it has expressly waived its immunity and has consented to suit.''), *aff'd* 84 F.3d 437 (11th Cir. 1996); accord Dorsett v. Frankel, [89 AFTR 2d 2002-1060] 2001 WL 1338420 (M.D. Fla. 2001). Thus, this Court lacks subject matter jurisdiction over this action and dismissal is appropriate pursuant to Federal Rule of Civil Procedure 12(b)(1).[1]

Accordingly, it is ordered and adjudged as follows:

1) The Motion to Dismiss (Dkt. 4) is granted.

2) The Plaintiff's complaint is dismissed with prejudice.

3) The Clerk is directed to enter judgment for the Defendant and to close this case.

DONE AND ORDERED at Tampa, Florida, on June 20, 2002.

RICHARD A. LAZZARA

UNITED STATES DISTRICT JUDGE

¶2002-5088

Estate of Llewellyn BURCHELL, the Chase Manhattan Bank, formerly Chemical Bank, Executor, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of New York, (DC NY) Docket No. 96 CIV. 6757(JSR), May 29, 2001. Date of death 1-1-91. Decision for Govt.

1. Estate taxes—charitable deduction—valuation of remainder interests—actuarial tables. For purpose of pre-12-13-95 valuation of charitable remainder interest in unitrust, estate was required to measure life expectancy of life beneficiary who had undiagnosed terminal cancer at time of decedent's death by actuarial tables, not his actual date of death: taxpayer's tortured interpretation of *Rev. Rul. 80-80*, 1980-1 CB 194 to allow departure from tables at any post-death time when imminency of life tenant's death was certain wasn't supported by Rul.'s plain language or case law, and violated *Rev. Rul. 66-307*, 1966-2 CB 429's clear dictates to contrary. *Reference:* USTR Estate & Gift Taxes ¶20,315.31(15); 20,555.16(45). IRC §2031; 2055.

Michael Frankel, Carter, Ledyard & Milburn, New York City, for Plaintiff.

Maya Wiley, Kathy Marks, Assistant United States Attorney, United States Attorney's Office, New York City, for Defendant.

United States District Court, Southern District of New York.

Order

RAKOFF, District Judge:.

Government moved for summary judgment in suit seeking refund of federal es-

[1] Because the Court is in complete agreement with the United States' contention that this is a frivolous action, and because other judges in this district have recognized the lack of merit of identical lawsuits, the Court needs no response from the Plaintiff before ruling on the Motion to Dismiss.

tate taxes. The District Court, Rakoff, J., held that Life interest was to be valued, for purposes of charitable deduction on federal estate tax return for donation of remainder interest, by applying actuarial tables to the facts known by the life tenant and his doctor at the time the tenancy came into effect on testatrix's death.

Motion granted.

Life interest was to be valued, for purposes of charitable deduction on federal estate tax return for donation of remainder interest, by applying actuarial tables to the facts known by the life tenant and his doctor at the time the tenancy came into effect on testatrix's death; departure from the use of actuarial tables was not warranted when, at some time after the testatrix's death, it became certain that, at the time of testatrix's death, the life tenant suffered from a terminal disease making the life tenant's death imminent.

On this motion for summary judgment, the pertinent facts, either undisputed or, where disputed, taken most favorably to the plaintiff, are as follows. At her death on January 1, 1991, Llewellyn Burchell ("Llewellyn") left a testamentary charitable remainder unitrust, granting a life tenancy to her 67-year-old stepson Samuel Burchell III ("Samuel") and the remainder to the Columbia University College of Physicians and Surgeons. Llewellyn's estate filed a federal estate tax return, claiming a charitable deduction of $4,051,884.35, i.e., the value of the remainder interest after subtracting from the value of the trust the value of Samuel's life tenancy determined as of January 1, 1991 in accordance with Internal Revenue Service valuation and mortality tables. The tax return was accepted by the IRS and the estate paid an estate tax of $1,431,635.

In May 1991, Samuel was diagnosed for the first time with cancer, from which he subsequently died in April 1992, fifteen months after Llewellyn's death. Llewellyn's estate then filed an amended federal estate tax return, claiming that Samuel's life interest in the unitrust should be valued according to what was now known to have been his actual remaining lifetime of fifteen months, rather than his predicted life expectancy as of January 1, 1991 as indicated by IRS mortality tables. Under this theory, the charitable deduction would increase to $7,472,918.20, the estate tax owed would decrease to $25,813.91, and the estate would be entitled to a refund of more than $1.4 million. The IRS declined to grant the refund, the estate brought the instant lawsuit, and the Government brought the instant motion for summary judgment. For the following reasons, the motion must be granted.

[1] *Revenue Ruling*, 1966 WL 15345, 66-307, in effect at the time of Llewellyn's death, provided that "the value of life and remainder interests must be determined from facts available at the time of the death of the decedent." *Rev. Rul.*, 1966 WL 15345, 66-307, 1966-2 C.B. 429. The meaning and practical effect of *Revenue Ruling*, 1966 WL 15345, 66-307 were further elaborated in *Revenue Ruling*, 1980 WL 129641, 80-80, also in effect at the time of Llewellyn's death, which provided as follows:

> the current actuarial tables in the regulations shall be applied if valuation of an individual's life interest is required for purposes of the federal estate or gift taxes unless the individual is *known to have been afflicted, at the time of transfer*, with an incurable physical condition that is in such an advanced stage that death is clearly imminent.

Rev. Rul., 1980 WL 129641, 80-80, 1980–1 C.B. 194 (emphasis added).[1]

Plaintiff no longer contends, as it once did, that Samuel's cancer was known to his doctors or himself at the time of Llew-

[1] Both *Revenue Ruling*, 1966 WL 15345, 66-307 and Revenue Ruling 80-80 were subsequently rendered obsolete by *Revenue Ruling*, 1995 WL 738146, 96-3, 1996-1 C.B. 348.

ellyn's death.[2] Plaintiff contends, however, that "at the time of transfer" modifies "afflicted" instead of "known"; that the present tense "is known" refers to knowledge of the disease at some (unknown) time after the transfer; and that "known" is used to mean certainty rather than conscious awareness. Thus plaintiff reads the quoted sentence in *Revenue Ruling*, 1980 WL 129641, 80-80 to mean that a departure from the use of actuarial tables is warranted when at some time after the decedent's death it becomes certain that at the time of decedent's death the life tenant suffered from a terminal disease making the life tenant's death imminent.

This is a reading that only a lawyer could love. It would replace the relative certainty of measuring a life interval by what is known to the life tenant and his doctors at the time his life tenancy comes into being with what is discovered to a "certainty" by some revelation at some unspecified time in the future. It would render practically meaningless the words of *Revenue Ruling*, 1966 WL 15345, 66-307, which Revenue Ruling, 1980 WL 129641, 80-80 clarified but did not displace,[3] that "the value of life and remainder interests must be determined from facts available at the time of the death of the decedent." In short, it is nonsense.

By contrast, the practice of valuing a life interest by applying actuarial tables to the facts known by the life tenant and his doctor at the time the tenancy comes into effect on the decedent's death makes complete, practical sense, and has been repeatedly approved by the courts, including the Supreme Court, even when the life tenant survives the decedent by only a short period. *See, e.g., United States v. Provident Trust Co.*, 291 U.S. 272 [13 AFTR 861], 54 S.Ct. 389, 78 L.Ed. 793 (1934); *Ithaca Trust Co. v. United States*, 279 U.S. 151 [7 AFTR 8856], 49 S.Ct. 291, 73 L.Ed. 647 (1929); *Bank of Cal. v. United States*, 672 F.2d 758 [49 AFTR 2d 82-1512] (9th Cir.1982). Plaintiff's arguments concerning valuation principles applicable in other areas are inapposite as they fly in the face not only of these direct precedents but also of the plain meaning of the applicable regulations.

Accordingly, defendant's motion for summary judgment is hereby granted, and the complaint is hereby dismissed in its entirety. Clerk to enter judgment.

SO ORDERED.

¶2002-5089

Robert C. MACELVAIN, PLAINTIFF v. UNITED STATES OF AMERICA and Revenue Officers of the United States of America, Personally, Jane Doe, Personally, Fran Keith, Personally, DEFENDANTS. U.S. District Court, Middle Dist. of Alabama, Northern Division, (DC AL) CIVIL ACTION NO. 02-A-102-N, June 21, 2002. Years 1980, 1981, 1982, 1983, 1984, 1985, 1986. Decision against Taxpayer.

1. Actions against U.S.—Anti-Injunction Act—exceptions—collateral estoppel. Magistrate judge recommended denying pro se taxpayer's motion to preliminarily enjoin IRS and its agent from seizing his retirement benefits on grounds that IRS didn't follow proper assessment procedures: AIA barred injunctive relief in tax-related matters, and no statutory or judicial exceptions applied. Prior Tax Court and district court judgments determining that taxpayer received deficiency notices for each year sufficient to sustain IRS's collection notice determinations, and rejecting his arguments regarding deficiency notices' timeliness, precluded taxpayer from relitigating assessments' procedural validity and applying IRC §6213 excep-

[2] Earlier in this litigation, plaintiff attempted to raise a factual issue that Samuel's illness was known at the time of Llewellyn's death based on the affidavit of one Dr. William Skinner, who was one of Samuel's physicians. Dr. Skinner's affidavit and the purported medical records he produced in support thereof led to his indictment for the making of false and fraudulent statements, and the instant case was then put on hold while the criminal case proceeded. Although Dr. Skinner was ultimately acquitted of the criminal charges, plaintiff's brief on the instant motion does not argue or in any way contend that anyone knew of Samuel's illness at the time of Llewellyn's death. *See* Mem. Law in Opp'n to U.S.'s Mot. Summ. J.

[3] There is no support, either in the words of the revenue rulings themselves or in their legislative history, for plaintiff's fallback contention that *Revenue Ruling*, 1980 WL 129641, 80-80 replaced Revenue Ruling, 1966 WL 15345, 66-307, rather than simply elaborating its meaning and operation.

tion to AIA; and taxpayer didn't show that govt. couldn't establish its tax claim. *Reference:* United States Tax Reporter ¶74,215.05(5); 74,337.504(5). IRC §6213; 7421.

In the United States District Court for the Middle District of Alabama, Northern Division.

Recommendation of the Magistrate Judge

BOYD, Magistrate Judge:

I. BACKGROUND

The Internal Revenue Service (''IRS'') has determined that *pro se* plaintiff Robert C. MacElvain (''MacElvain'') is liable for unpaid federal income taxes, interest, and statutory additions in excess of four million dollars for the years 1980 to 1986. MacElvain has vigorously and consistently resisted all collection attempts. In this action for the recovery of collections allegedly assessed unlawfully, MacElvain moves to enjoin preliminarily the IRS and Fran Keith (''Keith''), a revenue agent, from seizing his retirement benefits or, alternatively, any portion in excess of 15 percent, on the grounds that the IRS did not properly follow assessment procedures and did not timely impose the deficiency assessments. Defendants assert that the requested relief would violate the Anti-Injunction Act, 26 U.S.C. § 7421(a). For reasons which follow, the Magistrate Judge recommends that the motion for preliminary injunction be DENIED.

II. DISCUSSION

[1] The Anti-Injunction Act, 26 U.S.C. § 7421(a), provides in pertinent part:

> *Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.*

''The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund.'' *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 [9 AFTR 2d 1594], 5 (1962). Thus, The Anti-Injunction Act ''withdraw[s] jurisdiction from the state and federal courts to entertain suits seeking injunctions prohibiting the collection of federal taxes,'' *Id.* at 6, unless a litigant demonstrates one of several statutory exceptions to the Anti-Injunction Act and also satisfies ''traditional standards for equitable relief'' under the judicially-created exception set forth in *Enochs. Lovell v. U.S.*, 795 F.2d 976, 977 [58 AFTR 2d 86-5607] (11th Cir. 1986)(''[F]or a tax injunction to issue despite the general prohibition of the Anti-Injunction Act, the movant must not only qualify under an exception to that Act, but must also satisfy traditional standards for equitable relief''); *Davis v. C.I.R.*, 661 F.Supp. 733, 736 [59 AFTR 2d 87-1034] (M.D.Ala. 1987)(''Congress, in enacting Section 6213(a), did not repudiate the principle that injunctive relief is an extraordinary remedy which is unavailable absent a showing of irreparable injury and no adequate remedy at law .... [A]bsent a clear Congressional statement, [a court] should not infer that Congress intended to alter equity practices.'')

MacElvain alleges that his requested injunction falls within both a statutory exception and the judicially-created exception to the Anti-Injunction Act. Accordingly, the dispositive issue is whether either exception sustains this Court's jurisdiction.

A. Statutory Exception

Contending that 26 U.S.C. §6213(a) permits the injunctive relief requested, MacElvain alleges that the IRS assessments for 1980–1986 taxes are time-barred and fraudulent because the IRS either did not timely mail statutory notices of deficiency for the specified years or made assessments after expiration of the applicable statute of limitations. (*See Plaintiff's Reply*

to Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, at 3[1]).

"The Internal Revenue Code authorizes the Commissioner to notify a taxpayer by certified or registered mail of a deficiency in income tax owed, 26 U.S.C. § 6212(a) . . . [and] mailing of a valid notice of deficiency is generally a prerequisite to formal assessment and collection of the deficiency by the IRS." *Tavano v. C.I.R.*, 986 F.2d 1389, 1390 [71 AFTR 2d 93-1271] (11th Cir. 1993). An injunction may issue when the IRS has not mailed a notice of deficiency or has otherwise failed to comply with procedural requisites; "no assessment of a deficiency . . . and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice [of deficiency] has been mailed to the taxpayer." *See* 26 U.S.C. § 6213(a).[2] As interpreted by the Eleventh Circuit, this exception provides for injunctive relief "when the IRS fails to send the taxpayer a statutorily required notice deficiency." *Hempel v. United States*, 14 F.3d 572, 573 [73 AFTR 2d 94-1372] (11th Cir. 1994).

Highlighting MacElvain's several, prior unsuccessful lawsuits in the Tax Court and the District Court regarding the legality of assessments, including the validity of deficiency procedures for specified tax years, Defendants argue that issue preclusion bars application of the Section 6213 exception. Ample documentation establishes, defendants contend, that MacElvain duly availed himself of the opportunity to contest these deficiency notices in Tax Court. In each instance, the Tax Court resolved the dispute either by issuing a decision pursuant to the parties' stipulations or by issuing final judgments against MacElvain. The District Court has also ruled against MacElvain in previous assessments challenges. Thus, the Court reviews the substance, the reasoning, and the record in the prior decisions, to determine if issue preclusion bars re-litigation of this matter.

1. Issue Preclusion: Guiding Principles

Issue preclusion "recognizes that suits addressed to particular claims may present issues relevant to suits on other claim, and requires that the identical issue in question was actually litigated and necessary to the judgment of an earlier suit." *Manning v. City of Auburn*, 953 F.2d 1355, 1358 (11th Cir. 1992), *citing Kaspar Wire Works, Inc. v. Leco Engineering and Mach., Inc.*, 575 F.2d 530, 535 (5th Cir. 1978) *and Hart v. Yamaha-Parts Distrib., Inc.*, 787 F.2d 1468, 1473 (11th Cir. 1986). Federal law requires the following four elements to invoke issue preclusion:

(1) the issue at stake is identical to the one involved in the prior proceeding;

(2) the issue was actually litigated in the prior proceeding;

(3) the determination of the issue in the prior litigation must have been "a critical and necessary part" of the judgment in the first action; and

(4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Christo v. Padgett, 223 F.3d 1324, 1339 (11th Cir.2000), *citing Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1359 (11th Cir. 1998). Issue preclusion, "like the related doctrine of *res judicata*, serves to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'" *U.S. v. Mendoza*, 464 U.S. 154, 158 (1984), *quoting Allen v. McCurry*, 449 U.S. 90, 94 (1980). In furtherance of that goal, prevailing authority dictates that "once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case." *Yamaha Corp. of America v. U.S.*, 961 F.2d 245, 254

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[1] Hereinafter referred to as *Plaintiff's Reply*.

[2] Section 6213(a) provides that no assessment of a tax shall be made and no proceeding for collection shall begin until 90 days after the mailing of a notice of deficiency pursuant to section 6212 or, if an individual seasonably petitions the Tax Court for a redetermination of the deficiency, until a final determination. Section 6213(a) further provides:

> [n]otwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection.

(D.C. Cir. 1992)(emphasis in original).[3] Accordingly, ''[p]reclusion cannot be avoided simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first.'' *Id.*[4]

After reviewing the parties' arguments and evidentiary submissions, the Magistrate Judge is satisfied that each element of issue preclusion has been met so as to bar judicial reconsideration of both the validity and procedural underpinnings of assessments from 1980 to 1986.

2. Issue Preclusion - Analysis

In 1984, MacElvain contested in Tax Court the June 15, 1984 deficiency notices assessed for his 1980 tax liability.[5] Prior to the scheduled trial in 1986, MacElvain entered into a stipulated decision with the IRS for a deficiency assessment. The decision of the Tax Court became final when MacElvain elected not to appeal. *See* I.R.C. §§ 7481(a)(1), 7483. MacElvain also timely challenged the 1981 deficiency notice issued on August 19, 1988 (*See* Ex. 1), and the Tax Court's Order of Dismissal and Decision sustained the IRS determinations because MacElvain failed to prosecute his case in compliance with court orders. MacElvain did not appeal. The Tax Court dismissed on procedural grounds MacElvain's timely contest of the June 15, 1990 deficiency notice for 1983 taxes. Specifically responding to MacElvain's disavowals, the Tax Court determined that he received deficiency notice for that year. (Defs. Ex. 1). MacElvain did not appeal that dismissal.[6]

In 1993, MacElvain challenged in federal court the validity of the 1980–1986 tax assessments. Contending, *inter alia*, ''that the IRS did not properly follow the procedures for making assessments and failed to impose the deficiencies within the time allowed by the statute of limitations,'' he demanded an injunction requiring the IRS to withdraw all liens filed against his property and to refrain from filing future liens. *MacElvain v. U.S.*, 867 F.Supp. 996, 998 [74 AFTR 2d 94-6241] (M.D.Ala. 1994)(J. Thompson). In denying injunctive relief, the Court found *first*, that MacElvain offered no evidence or specific argument to rebut the presumption of procedural correctness which attends IRS certificates of assessment, and *second*, ''MacElvain's contention that his tax liabilities were not assessed within the time period allowed by the statute of limitations ... without merit.'' *Id.* at 999.

In March 1996, the United States sued MacElvain in the same court to secure a final judgment on the government's tax claims from 1980 to 1982. (*See* Defs. Ex. 1 at 6, ¶ 2). Rejecting MacElvain's challenge that the statute of limitations precluded the assessments because the government fraudulently altered his master file, the Court entered judgment in favor of the United States ''for unpaid taxes, interest,

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[3] *See also Montana v. U. S.*, 440 U.S. 147, 155 (1979)(''To determine the appropriate application of collateral estoppel ... necessitates [an inquiry] 'whether the issues presented by this litigation *are in substance the same* as those resolved [in prior litigation]'')(emphasis added); *Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364 (D.C.Cir. 1990); *Rambacher v. C.I.R.*, [87 AFTR2d 2002-812] 248 F.3d 1151, 2001 WL 133123, at 2 (6th Cir. Feb.5, 2001); *Kamilche Co. v. U.S.*, 53 F.3d 1059, 1063 [75 AFTR 2d 95-2076] (9th Cir. 1995); 1B Moore's Federal Practice ¶ 0.443[2] (''Any contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue ... is subsumed in that issue and precluded by the effect of the prior judgment as collateral estoppel.''); *See also* Restatement (Second) of Judgments § 27 (''[I]f the party against whom preclusion is sought did in fact litigate an issue ... and suffered an adverse determination, ... new arguments may not be presented to obtain a different determination of that issue.'')

[4] This authority renders unavailing MacElvain's assertion that ''the allegation that the Defendants made time-barred and fraudulent assessment'' has not been actually litigated because he has new affidavit evidence from forensic accountant Victoria Osbourne to substantiate that ''the Government willfully and intentionally made time-barred assessments by backdating the assessment date'' in his Master File. (*See* Plaintiff's Reply at 4). As will be discussed *infra*, that argument relies on evidence previously presented and is an obvious reiteration of the statute of limitations issues decided adversely to MacElvain in prior litigation.

[5] (*See MacElvain v. Commissioner*, T.C. Memo 2000-230 [TC Memo 2000-230], Defs. Ex. 1) Defendants argue that issue preclusion bars this Court from reviewing the validity of this deficiency notice; alternatively, they assert that § 6313 exceptions are inapplicable because MacElvain admits receiving a notice for that year.

[6] To the extent that the Tax Court decisions arising from the 1980 and 1983 contests do not affirmatively show that any substantive issue was ''actually and necessarily determined,'' *Montana v. U. S.*, 440 U.S. 147, 153 (1979), those final judgments do not form an adequate basis for issue preclusion. Such summary and stipulated decisions, however, are wholly sufficient to establish *res judicata*inasmuch as the issue contested in both proceedings are identical; the parties to the subsequent proceeding are the same as, or are in privity with, the parties to the earlier proceeding; and the earlier proceeding resulted in a final judgment on the merits. *Nevada v. United States*, 463 U.S. 110, 129–130 (1983); *See Baptiste v. C.I.R.* 29 F.3d 1533, 1539–1540 [74 AFTR 2d 94-7477] (11th Cir. 1994)(noting ''a final decision of the tax court determining the tax liability of a taxpayer is a judgment on the merits for the purposes of *res judicata*, 'whether or not the basis of the agreements on which [it] rest[s] reached the merits.'')

penalties and lien fees for the years 1980, 1981 and 1982 . . .''[7]

On January 29, 1999, the IRS sent MacElvain a final ''notice of intent to levy'' which indicated his tax liability for tax years 1980 through 1986. MacElvain reasserted his contention that ''the time for making an assessment for all periods listed on [the] 'NOTICE OF LEVY' was negated on May 8, 1987.'' When the Appeals Office declined to hear MacElvain's petition, noting his earlier opportunities to litigate that matter in the Tax Court and the District Court, MacElvain filed a fourth petition for review in the Tax Court. He alleged in that petition — as he does before this Court — that he was not liable ''for the underlying taxes because of the expiration of the period of limitations on assessment for the years in issue and government fraud.'' The IRS asserted issue preclusion on any contest of the 1980–1983 deficiency notices, and, accordingly moved for partial summary judgment. Granting the motion, the Tax Court reasoned as follows:

> The record in the instant case shows that petitioner received notice of deficiency for the taxable years 1980, 1981, 1982, and 1983. Moreover, petitioner filed petitions with the Court contesting those notices. As previously discussed, those petitions were disposed of either by stipulated decision, order of dismissal and decision, or order of dismissal for lack of jurisdiction . . . . Petitioner has failed to state a justiciable claim for relief in this Lien and Levy proceeding with respect [sic] the taxable years 1980, 1981, 1982, and 1983. Petitioner's claim that the period of limitations for assessment expired on May 9, 1987, for these years constitutes a challenge to the existence of the underlying tax liabilities. Section 6330(c)(2)(B) precludes review of those tax liabilities in this proceeding.[8]

In a decision filed September 19, 2001, the Tax Court found that ''the determinations set forth in the *Notice of Determination Concerning Collection Action* for the taxable years 1980, 1981, 1982, 1983, 1984, 1985 and 1986 upon which this case is based are sustained in full,'' based on a stipulation entered into between MacElvain and the IRS. (*See*Defs. Ex. 3).

Based on the foregoing factual record, the Magistrate Judge finds that MacElvain's tax liability for the years in question and the adequacy of deficiency notices were exhaustively litigated issues before the Tax Court, and the Tax Court issued its final judgments before the commencement of proceedings in this Court. *See* I.R.C. §§ 7483, 7481(a). The Tax Court specifically determined that MacElvain received the notices of deficiency for each year and that such notices were adequate to sustain a Notice of Determination Concerning Collection Action for each year. The District Court also considered and rejected MacElvain's arguments regarding the timeliness of the notices of deficiency.[9] Issue preclusion thus not only bars this Court from revisiting MacElvain's arguments regarding the validity of procedures attendant to imposing the 1980–1986 assessments but also counsels against applying the Section 6213(a) exception to the Anti-Injunction Act.

B. Judicial Exception

MacElvain also fails to demonstrate entitlement to injunctive relief under the judicially-created exception to the Anti-Injunction Act. This exception permits federal courts to enjoin the collection of taxes only if the plaintiff establishes *first*, that under no circumstances could the government ul-

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[7] The Magistrate Judge takes judicial notice of *United States v. MacElvain*, Civil Action No. 96-D-501-N (M.D.Ala. Mar. 21, 1996), the case referenced by Defs. Ex. 1, wherein MacElvain filed a voluminous exhibit purporting to prove that the IRS not only failed to provide deficiency notices for the tax years at issue but also falsified his master file to issue assessments beyond the statute of limitations. *See U.S. v. Jones*, 29 F.3d 1549, 1553 (11thCir.1994)(citation omitted) (noting a ''court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'''')

[8] Moreover, the Tax court determined, based on its prior decisions, that the doctrine of *res judicata* preclude[d] [MacElvain] from relitigating his liabilities' for taxable years 1980 through 1982. *See U.S. v. Shanbaum*, 10 F.3d 305, 314 [73 AFTR 2d 94-571] (5th Cir. 1994), *citing Commissioner v. Sunnen*, 333 U.S. 591, 598 [36 AFTR 611], (1948)(noting 'if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year.')

[9] *See Christo v. Padgett*, 223 F.3d at 1339 (''When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated.'')

timately prevail on its tax claim and *second*, that equity jurisdiction otherwise exists, *i. e.*, irreparable harm to the plaintiff and no adequate legal remedy. *Williams Packing & Navigation Co.*, [9 AFTR 2d 1594] 370 U.S. I (1962). "The burden is on the plaintiff to show that his case falls within this exception to the Anti-Injunction Act." *Hatley v. Department of Treasury*, I.R.S. 876 F.Supp. 1262, 1269 [74 AFTR 2d 94-7237] (S.D.Ala. 1995), *citing Bowers v. United States*, 423 F.2d 1207 [26 AFTR 2d 70-5106] (5th Cir. 1970). "Unless both conditions are met, a suit for preventive injunctive relief must be dismissed." *U. S. v. American Friends Service Committee*, 419 U.S. 7, 10 [34 AFTR 2d 74-6053] (1974); *Mathes v. United States*, 901 F.2d 1031, 1033 [66 AFTR 2d 90-5035] (11th Cir. 1990)(ob-serving "the general rule is that, except in very rare and compelling circumstances, federal courts will not entertain actions to enjoin the collection of taxes").

In light of previous judgments rendered by the Tax Court and the District Court, MacElvain has not shown that "under the most liberal view of the law and facts. the United States cannot establish its claim, '*Bob Jones University v. Simon*, 416 U.S. 725 [33 AFTR 2d 74-1279] (1974), or that the Government's "claim of liability ... [is] ... without foundation." *Enochs v. Williams Packing & Nav. Co.*, 370 U.S. at 8. Thus, the Magistrate Judge need not consider whether equity jurisdiction otherwise exists. *American Friends Service Committee*, 419 U.S. at 10.

III. CONCLUSION

For the foregoing reasons, the Magistrate Judge hereby Recommends that the Plaintiff's Motion for Preliminary Injunction (Doc. 6.), be DENIED.

Done this 21st day of June, 2002.

DELORES R. BOYD

UNITED STATES MAGISTRATES JUDGE

ORDER

DELORES R. BOYD UNITED STATES MAGISTRATE JUDGE

The Clerk of the Court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from a de novo determination by the District Court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the District Court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Done this 21st day of June, 2002.

DELORES R. BOYD

UNITED STATES MAGISTRATE JUDGE

¶2002-5090

Dennis NEEDHAM, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-0752-LRH (PAL), June 4, 2002. Earlier proceeding at (2002, DC NV) 89 AFTR 2d 2002-2342. Years 1998, 1999. Decision for Govt.

1. Collection due process (CDP)—review of administrative determination—abuse of discretion—summary judgment. Govt. was granted summary judgment in damages action seeking to set aside allegedly invalid determination to proceed with collection of frivolous return

penalty against taxpayer who filed "zero returns": appeals officer properly relied on computer records in determining that IRC §6330(c)(1)'s administrative procedures were followed; taxpayer didn't raise any statutory spousal defenses, challenge appropriateness of collection, or offer alternate collection means; challenges to CDP's hearing's constitutionality, appeals officer's authority, and income tax's legitimacy were previously rejected by other courts; and IRC §6331 authorized collection by levy. *Reference:* United States Tax Reporter ¶63,305.01(5). IRC §6330; 6331; 6702.

United States District Court, District of Nevada.

Order

On December 21, 2001, the United States filed a Motion for Summary Judgment. (Docket #8). Plaintiff filed a timely Opposition on February 1, 2002, (#13) and for the reasons that follow, the Court grants Defendant's motion.

I. Background

Plaintiff Dennis Needham filed a Complaint seeking damages and requesting that the Court set aside an invalid collection determination pursuant to 26 U.S.C. § 6330.

Plaintiff's individual income tax returns for 1998 and 1999 contained zeros down the left hand margin to reflect zero income and zero taxes due to the government. As a result, the Internal Revenue Service ("IRS") assessed a frivolous return penalty for each year and sent to Plaintiff a Notice of Intent to Levy. The Notice informed Plaintiff of his right to request a collection due process hearing, which Plaintiff requested and which was held on May 24, 2001. On May 31, 2001, the IRS sent Plaintiff a Notice of Determination Under Section 6320 and/or 6330 essentially rejecting the issues raised by Plaintiff at the hearing as frivolous. The present case is an appeal of the Notice of Determination.

II. Analysis

A. Standard of Review

A motion for summary judgment terminates, without a trial, actions in which "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate "'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)). Thus, in order to preclude a grant of summary judgment, the non-moving party must set forth "'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The substantive law defines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). All justifiable inferences must be viewed in the light most favorable to the non-moving party. County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001) (citing Zenith Radio Corp., 475 U.S. at 587).

Section 6330(d) does not specify the standard of review a district court should apply to an appeal of a Notice of Determination. However, the legislative history indicates that the court should conduct a de novo review only "where the validity of the tax liability was properly at issue at the administrative hearing." H. Conf. Rept. 105–599, 105th Cong.2d Sess. 266 (1998). Where the amount of the underlying tax liability is not properly part of the appeal, the court reviews a Notice of Determination for abuse of discretion. See Sego v. Comm'r of Internal Revenue, 114 T.C. 604, 609–10 (2000).

B. Plaintiff's Section 6330 Appeal

[1] Plaintiff raises the same issues before this Court that he raised at the May 24, 2001 hearing. Plaintiff challenges the Constitutionality of the May 24 hearing, the sufficiency of the Notice, the appeals officer's reliance on computer generated

records, the authority of the appeals officer and the legitimacy of individual income tax generally.

Here the IRS hearing officer did not abuse his discretion when he determined that the requirements of applicable law had been met and that Plaintiff had been afforded statutorily-required administrative procedures. 26 U.S.C. § 6330(c)(1). Additionally, Plaintiff did not address any of the statutorily-specified issues that may be raised at a collection due process hearing, such as spousal defenses, the appropriateness of an intended collection action, and possible alternative means of collection. 26 U.S.C. § 6330(c). Finally, each of these arguments that Plaintiff now raises in the district court have been considered and rejected by other courts.

For example, in G.M. Leasing Corp. v. United States, 429 U.S. 338 [39 AFTR 2d 77-475] (1977), the United States Supreme Court held that 26 U.S.C. § 6331 authorizes the collection of federal taxes by levy on the property of any person who refuses or neglects to pay any tax. Consequently, and contrary to Plaintiff's assertion, it requires no court order for the IRS to place a levy on an individual's property for failure to pay tax.

Nor is it improper for an appeals officer to rely on computer records in determining that the proper administrative procedures were followed to provide notice and for computing an assessment against a taxpayer. Davis v. Commissioner, 115 T.C. 35, 40 (2000). The ''wages are not income'' argument has been repeatedly rejected. See Olson v. United States, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985). Also rejected is the claim that an IRS employee is not a ''delegate'' of the Secretary of the Treasury. Browder v. Commissioner, T.C. Memo 1990-408 [¶90,408 PH Memo TC], 1990 WL 108316.

III. Conclusion

Plaintiff has not, and cannot, present a material fact that would allow him to defeat Defendant's Motion for Summary Judgment. Defendant's Motion for Summary Judgment (#8) is, therefore, GRANTED. The clerk is directed to close the file.

IT IS SO ORDERED.

DATED: June 4, 2002

LARRY R. HICKS

United States District Judge

¶2002-5091

QUALITY HOMES, INC. v. UNITED STATES OF AMERICA. U.S. District Court, Western Dist. of Louisiana, (DC LA) Docket No. 99-1059, June 25, 2002. District Court, (2002, DC LA) 89 AFTR 2d 2002-1370, 2002-1 USTC ¶50301, amended. Years 1990, 1991. Decision for Govt.

1. Failure to timely file returns penalties—reasonable cause—reliance on accountant. Magistrate judge granted govt.'s motion to amend judgment on corp.'s penalties refund claim, clarifying that taxpayer wasn't entitled to interest on IRC §6651 penalties for which it was ultimately found liable. Also, taxpayer's request to reinstate initial jury verdict of non-liability or for new trial, on grounds of erroneous jury instructions and corp. disability theory, was rejected where taxpayer didn't object to instructions at trial and didn't timely raise disability theory. *Reference:* United States Tax Reporter ¶66,515.11(15); 74,305.01(25). IRC §6651; 7430.

United States District Court, Western District of Louisiana, Lake Charles Division.

TRIMBLE, District Judge, WILSON, Magistrate Judge.

Memorandum Ruling

Presently before the Court are the following two motions filed in response to the judgment signed on February 25, 2002 (doc. 58), which granted the renewed motion of the United States for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50: (1) the Motion of the

United States to Modify Judgment (doc. 60), filed pursuant to Rule 59(e) and alternatively Rule 60(a); (2) a Motion to Amend the Judgment and, in the alternative, Motion for New Trial and Motion for Summary Judgment (doc. 63), filed by Plaintiff Quality Homes, Inc. (''Quality Homes''). For the reasons stated below, the motion of the United States to modify the judgment will be GRANTED; the motion by Quality Homes to amend the judgment will be DENIED; the motion for a new trial will be DENIED; and the motion for summary judgment will be DENIED AS MOOT.

I. BACKGROUND

Quality Homes brought this action to recover penalties assessed by the Internal Revenue Service (''IRS'') for late filing, pursuant to 26 U.S.C. § 6651(a)(1), and substantial understatement, pursuant to 26 U.S.C. § 6662(a), (b) and (d), of corporate income taxes for its 1990, 1991 and 1992 tax years. The 1992 penalties were abated and were not at issue during the trial of this matter. During the two-day trial, the United States moved for judgment as a matter of law at both the close of the Plaintiffs case, and at the close of all the evidence. These motions were denied, and the jury returned a verdict in favor of Quality Homes on its claims for a refund of both the delinquency and substantial understatement penalties. On November 6, 2001, a judgment was entered in accordance with the jury's verdict. After trial, the United States renewed its motion for judgment as a matter of law only on the issue of the delinquency penalties. The Memorandum Ruling and Judgment granting the motion for judgment as a matter of law were signed on February 25, 2002, and the Judgment was entered by the court clerk on January 26, 2002.

On February 25, 2002, this Court held that Quality Homes was not entitled to a refund of the delinquency penalties because its reliance on an agent to file its tax returns could not constitute ''reasonable cause'' for a failure to file in a timely manner. *See United States v. Boyle*, 469 U.S. 241, 252 [55 AFTR 2d 85-1535], 105 S. Ct. 687, 693 [55 AFTR 2d 85-1535], 83 L. Ed. 2d 622 [55 AFTR 2d 85-1535] (1985). This ruling was based on the conclusion that no reasonable juror could find that Larry Bruce, the certified public accountant employed by Quality Homes, provided substantive legal advice, such as advice that no return was necessary. Mr. Bruce merely assured Teddy Dowden, the President and sole shareholder of Quality Homes, that he would file the returns for Quality Homes. In addition to not filing the returns, Mr. Bruce defrauded Quality Homes by leading Mr. Dowden to believe that Quality Homes needed to reimburse Mr. Bruce for taxes that had already been paid.

In this case, the jury was instructed that it must find ''[t]hat the accountant advised Quality Homes, Inc. that it did not need to file a federal corporate income tax return.'' This instruction was proposed by the United States, and Quality Homes did not object to the instruction at the charge conference or indicate in any way that this instruction was erroneous until it filed the present motion to amend the judgment on March 11, 2002. In the Memorandum Ruling of February 25, 2002, this Court took note of an alternative basis to find ''reasonable cause,'' namely disability of the taxpayer, which was not advanced by Quality Homes. Quality Homes now argues that the reading disability of Mr. Dowden, caused by dyslexia and mild organic brain dysfunction, rendered Quality Homes disabled and that it was necessary to delegate the responsibility of filing the returns to an agent because the corporation was not able to meet the filing requirements. While substantial evidence regarding Mr. Dowden's reading disability and his wife's limited education was adduced at trial, the theory of corporate disability was not disclosed to opposing counsel during discovery in responses to written interrogatories. Also, the theory was not presented as an issue of fact or law in the pretrial statement submitted to the Court by Quality Homes. Additionally, it was not requested as a jury instruction. Moreover, it is not clear whether the disability of Mr. Dowden can be imputed to Quality Homes.

The United States argues that Quality Homes has waived the issue, that no manifest error or injustice will occur by disregarding the corporate disability theory of recovery and that the corporate disability theory does not apply to the facts of this case.

I. LAW AND ANALYSIS

A. Motion of the United States to Modify Judgment (doc. 60)

[1] The United States submits that the amount of the judgment entered on February 25, 2001 was calculated in error. Federal Rule of Civil Procedure 59(e) permits a district court to alter or amend its judgment upon a motion filed within 10 days from entry of judgment. Rule 60(a) pro-vides that "[c]lerical mistakes in judg-ments . . . arising from oversight or omis-sion may be corrected by the court at anytime . . . ." Fed. R. Civ, P. 60(a). "[T]he relevant test for the applicability of Rule 60(a) is whether the change affects substantive rights of the parties and is therefore beyond the scope of Rule 60(a) or is instead a clerical error, a copying or computational mistake, which is correcta-ble under the Rule." *See United States v. Kellogg (In re West Texas Marketing Corp.)*, 12 F.3d 497, 504 [73 AFTR 2d 94-889] (5th Cir. 1994); *see also Hale Container Line, Inc. v. Houston Sea Pack-ing Co. Inc.*, 137 F.3d 1455, 1474 (11th Cir. 1998) ("A damages award that is in-correct because it is based on an erroneous mathematical computation that does not in-volve the substantive rights of the parties may be corrected under Rule 60(a)."). However, "a postjudgment motion will be considered a Rule 59(e) motion where it involves 'reconsideration of matters prop-erly encompassed in a decision on the mer-its.'" *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 174, 109 S. Ct. 987, 990, 103 L. Ed. 2d 146 (1989) *(quoting White v. New Hampshire Dep't of Employment Security*, 455 U.S. 445, 451, 102 S. Ct. 1162, 1166, 71 L. Ed. 2d 325 (1982)). The present motion to modify does not require a reexamination of the issues addressed in this Court's Memorandum Ruling of February 25, 2002. Although it was timely filed pursuant to Rule 59(e), the motion was properly filed pursuant to Rule 60(a). *See Kellogg*, 12 F.3d at 504–505 ("[a]s long as . . . all the court need to do is employ the judicial eraser to obliterate a . . . mathematical mistake, the modification will be allowed").

After the trial of this matter, the parties were instructed to prepare a judgment that reflected the jury's determination that Quality Homes was entitled to a refund of the substantial understatement penalties and delinquency penalties for the 1990 and 1991 tax years. On November 6, 2001, this Court entered a judgment in the amount of $113,325.12. Although not specified in the judgment, this amount included a refund of the delinquency penalties for the 1990 and 1991 tax years, a refund of the substantial understatement penalties for the 1990 and 1991 tax years and interest accrued on both penalties through October 31, 2001. (Def.'s Mem. in Supp. at 1–2). On February 25, 2002, this Court granted the motion of the United States for judgment as a matter of law and ruled that Quality Homes was not entitled to a refund of the delinquency penalties for the 1990 and 1991 tax years. On February 25, 2002, the amount of the judgment against the United States was reduced by the amounts assessed for the 1990 and 1991 delinquency penalties, as specified in the memorandum of the United States in support of its renewed motion for judgment as a matter of law (doc. 41). However, due to an oversight, the amount of the judgment entered on February 25, 2002, still included a refund of interest accrued on the delinquency penalties. Since Quality Homes is not entitled to a refund of the delinquency penalties for the 1990 and 1991 tax years, it is not entitled to the interest that has accrued on the money paid in satisfaction of those penalties. Quality Homes has not submitted any papers in opposition to this motion, and the motion is considered unopposed. Therefore, the Motion of the United States to Modify Judgment (doc. 63) will be GRANTED.

The United States has calculated that the amount of the judgment, including interest

accrued through March 1, 2002, should total $50,099.92. This would refund the substantial understatement penalties and the interest associated with that amount, but not the delinquency penalties or any interest accrued on that amount.

B. Motion of Quality Homes to Amend the Judgment and, alternatively, for a New Trial and Summary Judgment (doc. 63)

Quality Homes seeks to amend this Court's judgment signed on February 25, 2002, and reinstate the jury verdict. In the alternative, Quality Homes moves for a new trial. If the motion for new trial is granted, Quality Homes argues that summary judgment is appropriate because there are no issues of material fact left to be tried and that this matter may be decided as a matter of law.

A party against whom judgment as a matter of law is rendered may file a motion for a new trial pursuant to Federal Rule of Civil Procedure 59. *See* Fed. R. Civ. P. 50(c)(2). Rule 59(e) permits a party to file a motion to amend a judgment. *See* Fed. R. Civ. P. 59(e). A motion pursuant to Rule 59(e) is proper to reconsider manifest errors of law, manifest errors of fact or to present newly discovered evidence. *See Waltman v. International Paper Co.*, 875 F.2d 468, 473–474 (5th Cir. 1989). A motion pursuant to Rule 59(e) "'cannot be used to raise arguments which could, and should, have been made before the judgment issued,'" and it "'cannot be used to argue a case under a new legal theory.'" *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (*quoting Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986)).

In this case, Quality Homes does not present newly discovered evidence. Therefore, the motion of Quality Homes to amend the judgment may only be granted if it can establish that the ruling of February 25, 2002 contained a manifest error of law or fact. Quality Homes argues that the jury instructions were erroneous because they did not adequately inform the jury of the law applicable to this case. Quality Homes now argues that jury instructions should have presented the corporate disability theory as an alternative basis of recovery. However, "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51; *see also MacArthur v. University of Texas Health Ctr.*, 45 F.3d 890, 895 (5th Cir. 1995) (plaintiff's failure to object to omission of jury charges and interrogatory on a claim indicated her intent to abandon it). "A party has the burden to request the submission of its issues to the jury and to request instructions on each such issue." *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 306 (5th Cir. 1993).

In this case, Quality Homes concedes that it did not object to the jury instruction regarding the delinquency penalty. (Quality Homes' Mem. in Supp. at 2.) Additionally, Quality Homes did not raise the issue of corporate disability during discovery in response to written interrogatories or in its pretrial statement, in which it was required to inform the Court of all issues of law and fact that remained for trial. Instead, Quality Homes, in its pretrial statement, presented the facts regarding Mr. Dowden's reading disability to support its argument that it was reasonable to rely on the "erroneous advice" of Mr. Bruce. (Pl.'s Pretrial Statement at 2.) Quality Homes did not argue that it was "incapable by objective standards of meeting the criteria of 'Lordinary business care and prudence.'" *Boyle*, 469 U.S. at 249 n.6, 105 S.Ct. at 692; *see, e.g., Brown v. United States*, 630 F. Supp. 57, 60 [57 AFTR 2d 86-1483] (M.D. Tenn. 1985) (refunding delinquency penalty when executor relied on attorney to file return because executor was not physically and mentally capable of complying with the filing deadline due to age, health and lack of experience).

While Quality Homes might have been entitled to an instruction on the issue of corporate disability if it had raised the issue before the jury retired to consider its verdict, the focus of the trial was on the purported "erroneous advice" of Larry Bruce. Quality Homes failed to raise the

issue in a manner that would inform opposing counsel and the Court of its intention to pursue this theory of recovery. Furthermore, it was not clear at the close of the evidence that Mr. Dowden's reading disability should be imputed to his corporation, Quality Homes. During cross-examination, Mr. Dowden admitted that Quality Homes had other officers and that there were other employees capable of reviewing tax returns. On redirect, Mr. Dowden specified that he was referring to his wife, who also worked at Quality Homes, when he responded affirmatively to the question asking whether other people at Quality Homes were capable of reviewing the returns. Even though Mrs. Dowden did not complete high school, the evidence did not clearly establish that the corporation was unable to determine the deadline for filing income tax returns. Presently, without citation to authority or analysis of the conflicting evidence adduced at trial, Quality Homes equates Mr. Dowden's reading disability with disability of the corporate taxpayer.

In light of the position taken in its pretrial statement, which set forth the argument that reliance on Mr. Bruce's "erroneous advice" constituted reasonable cause for failure to file a return, and the conflicting evidence regarding corporate disability, it was not erroneous to only instruct the jury regarding the requirements of substantive legal advice, which under the facts of this case required advice that a return was not necessary. Since Quality Homes failed to object to the jury instructions in a timely manner and this Court was not otherwise informed of the Plaintiff's intention to pursue recovery under the theory of corporate disability, Quality Homes waived its right to an instruction on the issue. *See* Fed R. Civ. P. 51; *McDaniel*, 987 F.2d at 306; *MacArthur*, 45 F.3d at 895. Therefore, the motion to amend the judgment will be DENIED.

Although Quality Homes moves in the alternative for a new trial on the issue of the delinquency penalty if its motion to amend the judgment is denied, Quality Homes offers no independent basis for granting the motion for new trial on the issue of the delinquency penalty. Since Quality Homes merely reasserts the viability of the corporate disability theory of recovery, the motion for a new trial on this issue of the delinquency penalty will be DENIED. Accordingly, the motion for summary judgment will be DENIED AS MOOT.

III. CONCLUSION

For the reasons stated above, the motion of the United States to modify the judgment will be GRANTED. The motion of Quality Homes to amend the judgment will be DENIED. The motion of Quality Homes for a new trial will be DENIED, and the motion of Quality Homes for summary judgment will be DENIED AS MOOT.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 25th day of June, 2002.

JAMES T. TRIMBLE, JR.

UNITED STATES DISTRICT JUDGE

AMENDED JUDGMENT

Pursuant to the Memorandum Ruling of this date,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion of the United States to Modify Judgment (doc. 60) is GRANTED; and

IT IS FURTHER ORDERED that the fourth paragraph of this Court's Judgment signed on February 25, 2002 (doc. 58), is AMENDED and shall read as follows:

IT IS FURTHER ORDERED that the judgment of November 6, 2001 (doc. 38), for $113,325.12, is set aside, and that the Plaintiff, Quality Homes, Inc., recover from the Defendant, United States of America, $50,099.92, including interest accrued through March 1, 2002, plus interest thereafter as provided by 28 U.S.C. § 2411 until paid in full.

IT IS FURTHER ORDERED that the remaining portions of the Judgment signed on February 25, 2002 shall remain unchanged; and

IT IS FURTHER ORDERED that the Motion to Amend the Judgment (doc. 63), filed by the Plaintiff, Quality Homes, Inc., is DENIED; and,

IT IS FURTHER ORDERED that the Motion for New Trial (doc. 63), filed by the Plaintiff, Quality Homes, Inc., is DENIED; and

IT IS FURTHER ORDERED that the Motion for Summary Judgment (doc. 63), filed by the Plaintiff, Quality Homes, Inc., is DENIED AS MOOT.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 25th day of June, 2002.

JAMES T. TRIMBLE, JR.

UNITED STATES DISTRICT JUDGE

¶2002-5092

PARCC HEALTH CARE, INC. v. UNITED STATES OF AMERICA. U.S. District Court, Dist. of Connecticut, (DC CT) Docket No. 3:01cv379 (JBA), June 27, 2002. Years 1994, 1995, 1996, 1997. Decision for Taxpayer in part and for Govt. in part.

1. Penalties—failure to timely file returns; returned checks—reasonable cause—willful neglect—summary judgment. Penalties for returned checks and for failure to timely file employment tax returns were upheld on summary judgment against solely owned health care corp.: taxpayer didn't establish reasonable cause for failing its statutory duties where, even if it reasonably relied on CPA/employee, it didn't explain why she failed to make requisite filings. But, govt.'s alternate willful neglect argument, that taxpayer's reliance solely on CPA and failure to institute compliance safeguards was willful neglect per se, was rejected. *Reference:* United States Tax Reporter ¶66,515.11(15); 66,575.01(5). IRC §6651; 6657.

2. Penalties—failure to pay taxes and make payroll deposits—reasonable cause—financial hardship—summary judgment. Solely owned health care corp.'s penalties liability for failure to pay taxes and make payroll tax deposits wasn't determinable on summary judgment: whether taxpayer's financial difficulties, which were caused at least in part by unexpected state rate-cuts and taxpayer's potential incurrence of more detrimental "take backs" had it paid IRS over other essential creditors, was reasonable cause for its failures was remaining material fact question. *Reference:* United States Tax Reporter ¶66,515.14(15); 66,565.01(15). IRC §6651; 6656.

United States District Court, District of Connecticut.

Memorandum of Decision on Cross Motions for Summary Judgment [## 16, 21]

ARTERTON, District Judge:

Plaintiff PARCC Health Care, Inc. ("PARCC") seeks a refund of penalties assessed by the Internal Revenue Service against it for returned checks, failure to timely file quarterly federal employment tax returns and failure to deposit and pay employment taxes withheld from its employees. PARCC and the United States have now cross-moved for summary judgment. While PARCC does not dispute that it committed the violations, the parties disagree as to whether PARCC is liable for the penalties.

I. Factual Background

PARCC operates Astoria Park, a skilled nursing home facility in Bridgeport, Connecticut. PARCC has been owned by Donald Franco since April 1985. Franco is the president, chief executive officer and sole shareholder of PARCC, and he and his wife are the sole members of PARCC's board of directors. During the relevant time period, Michael Fiore was the administrator of PARCC, and Franco was the assistant administrator.

PARCC's data processing for receivables, payables and cost reports is handled by Paragon Group, a management services corporation. Franco is the president and CEO of Paragon Group. In 1985, Paragon Group hired Colleen Hartigan, a licensed

CPA, as a controller. She was later promoted to chief financial officer of Paragon Group. Her duties included preparing payroll tax returns, corporate income tax returns, payroll checks, Medicare and Medicaid cost reports and the company's monthly financial statements. Hartigan also took care of the company's financial books and records. She was authorized to use Franco's signature stamp to prepare checks, including payroll checks, on behalf of PARCC. Hartigan resigned from Paragon in August 1998.

Franco claims that Fiore, PARCC's administrator, and he were responsible for determining which of PARCC's creditors were paid each month, and that Hartigan also participated in that decision-making. Franco Aff. ¶ 53. According to Franco,

> Ms. Hartigan, Mr. Fiore and I would get an accounts payable journal every month and would look at those vendors that had to be paid and would look at the dollars that they received for that period or that month and they would choose vendors and what they would pay them and would send that down to Paragon to cut checks. Due to our obligations to our patients to feed, house and care for them, and our obligations under Connecticut law, to maintain staffing to care for patients in our facility[,] [a]t times, essential services were paid before the IRS.

Franco Aff. ¶ 53; see also id. at ¶ 54 ("PARCC paid vendors providing essential services to patients, before obligations to the IRS."). Hartigan maintains that she "had limited input with respect to the company's finances." Hartigan Aff. ¶ 7. It is undisputed that the payroll tax information was not included on the vendor lists of creditors to be paid. Franco dep. at 104–05.

Franco claims that "[a]t no time did Ms. Hartigan tell me that federal taxes were not being paid." Franco Aff. at ¶ 55; see also id. at ¶ 58 ("During the periods at issue in this lawsuit, Ms. Hartigan never informed me of the insufficient funds to pay the payroll and the payroll taxes to the IRS."). In his deposition, Franco similarly stated that Hartigan "never told me that those payroll taxes weren't being paid," and that he never asked her about it because he assumed they were being paid. Franco dep. at 75. The Government, however, has submitted an affidavit from Hartigan, in which she states:

> During the periods at issue in this lawsuit, there were insufficient funds to pay all of the credisors of PARCC, including the withholding taxes to the IRS. During the periods at issue in this lawsuit, I informed Mr. Franco of the insufficient funds to pay the payroll which included payroll taxes to the IRS, however, Mr. Franco was not interested in discussing this matter with me. Instead, Mr. Franco told me which creditors to pay, to make sure employees were paid, and to make payment arrangements with the IRS, which I did on at least three separate occasions. The payments were made out of Paragon's office as authorized by Paragon. The reason why the payroll taxes were not being paid for PARCC to the IRS was because PARCC was not taking in enough money at that time. Before I left Paragon Group, I gave Mr. Franco a pile of uncashed checks, which were not given to creditors because there was not enough money in the bank account of PARCC to cover these checks.

Hartigan Aff. ¶ 9.

According to Franco, Hartigan "had complete control over payroll and corporate taxes. She did not need permission to pay the taxes, to file the returns or to deposit the payroll taxes. I generally do not nor was I offered the opportunity to review Ms. Hartigan's books." Id. Franco explained that because Ms. Hartigan was a CPA, he relied on her expertise and did not retain outside accountants to review the returns. Id. at ¶s 55–56. Hartigan signed PARCC's quarterly tax returns for the quarterly periods ending September 30, 1994 through December 31, 1997 (the periods at issue in this litigation). Franco and Hartigan signed the annual federal unemployment returns. Id. Hartigan maintains that she left employment with Paragon because of "the lack of input . . . from Mr.

Franco with respect to the company's finances. Although I was supposed to have weekly meetings with Mr. Franco, these meetings were frequently canceled by Mr. Franco.'' Hartigan Aff. ¶. 3.

After Hartigan ceased working at PARCC, Franco claims that he ''ultimately [found] evidence of mismanagement by her with respect to the payroll taxes at issue in this lawsuit. In fact, I found checks drawn to the IRS which appeared on statements created by Ms. Hartigan which were not sent to the IRS.'' Id. at ¶ 59.

The penalties at issue here began to be assessed in October 1995, and continued to be assessed through September 1998. The IRS Certificates of Assessments and Payments detail a series of partial and late payments by PARCC throughout this time period and the imposition of various penalties for the late payments, some of which were paid by PARCC. In March 1999, the IRS received requests for abatement of penalties from PARCC. In the request for refund and abatement, PARCC cited Hartigan rather than the its financial condition as the cause of the late or missing payments. The claims for refund were denied by the IRS on March 11, 1999.

PARCC now claims that its financial condition was the reason taxes were unpaid. PARCC receives reimbursement from the state of Connecticut under Medicaid based upon cost reports filed with the state Department of Social Services the previous year. Hartigan prepared the costs reports for the periods at issue in this litigation, and Franco states that he signed them but did not review the reports. Franco Aff. ¶ 60.

For the year October 1, 1994 through September 30, 1995, PARCC's cost report indicate that it spent $13,177 for holiday parties and/or gifts to staff, $2,138 for employee travel, $8,510 for education expenses related to seminars and conventions, $4,386 for automobile expenses and $9,674 for entertainment. According to Franco, these were reimbursable expenses paid by the Medicaid system, and ''[i]f these funds had not been expended as set forth in the cost reports, we would not have received reimbursement for them. They would not have been available to pay taxes. Our rates would simply have fallen lower.'' Id. at ¶ 61. During the 1994 cost year, PARCC paid $1,386,766 in rental payments to Franco, who claims to have used those payments to pay the mortgage owed on the facility.[1] Franco states that he made no profit on the rental of the property to PARCC. Franco also states that he paid over $11,386,766 in mortgage payments, taxes and escrow funds.[2] Total wages and salaries paid by PARCC for the 1995 cost year were $3,942,149. PARCC paid the total amount of $458,991 for worker's compensation, health and life insurance for the 1995 cost year.

During the 1995 to 1996 cost year, PARCC reported spending $7,879 for holiday parties and/or gifts to staff, $2,976 for employee travel, $6,078 for education expenses related to seminars and conventions, $7,110 for automobile expenses and $6,663 for entertainment. These expenses were reimbursed by Medicaid. The total wages and salaries paid in the 1996 cost year was $3,827,088, and PARCC paid an additional $473,267 for workers' compensation, health and life insurance for employees. PARCC also paid $1,029,343 in rental payments to Franco. The rental payments were reduced in 1995 after Franco refinanced the mortgage to reduce the rate from fourteen percent to eight percent. Again, Franco asserts that all rental payments were applied to the mortgage payments. Franco Aff. ¶ 62.

For the 1996 to 1997 cost year, PARCC reported spending $3,049 for holiday parties and/or gifts to staff, $2,384 for employee travel, $10,854 for education expenses related to seminars and conventions, $2,940 for automobile ex-penses and $7,718 for entertainment. PARCC's rental payments to Franco for the 1997 cost year were $1,071,592. PARCC paid $3,696,703 in wages and sal-

[1] PARCC does not own the land and buildings on which it is located. Franco refinanced the mortgage with a HUD-issued loan of approximately $9,300,000 to obtain a lower interest rate.

[2] This is presumably a typographical error, as the rental payments from PARCC to Franco were $1, 386,766.

aries, and an additional $388,035 for workers' compensation, health and life insurance for employees. These expenses were reimbursed by Medicaid.

Franco asserts that during 1994 to 1995, PARCC sustained unexpected losses of $1,240,490.[3] These losses were caused by a loss of over $600,000 in revenue as a result of certain Medicare take-backs, which are funds withheld by Medicare because of claimed prior year over-payments, as well as major rate reductions by Medicaid. Franco claims PARCC sustained losses exceeding $1,000,000 in 1996 and 1997. According to Franco, from 1993 to 1998, "Medicaid cut PARCC's rates substantially due to the rate setting procedure in Connecticut." Franco Aff. ¶. 71. Although PARCC appealed each reduction, "because the rate setting was based upon prior year figures, the rate caused a massive reduction in revenues." Id. Franco also asserts that "during the periods at issue, my salary was decreased. PARCC did not give raises to its employees for over eighteen months. No employees were laid off because of minimum staffing requirements of Connecticut law. Benefits to PARCC's employees were not decreased nor were they increased." Franco Aff. at ¶ 65. It is undisputed that PARCC's operations and programs were not scaled back during this time period, and PARCC did not consider that an option because cutting-back operations would have led to a reduction in revenue. Franco dep. at 118–19.

II. Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). It may be granted "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). An issue of fact is "material" for these purposes if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. In assessing the record, the Court draws all reasonable inferences and resolves all ambiguities in favor of the non-moving party. Ametex Fabrics, Inc. v. Just In Materials, Inc., 140 F.3d 101, 107 (2d Cir. 1998) (citations omitted).

On cross-motions for summary judgment "neither side is barred from asserting that there are issues of fact, sufficient to prevent the entry of judgment, as a matter of law, against it. When faced with cross-motions for summary judgment, a district court is not required to grant judgment as a matter of law for one side or the other." Heublein, Inc. v. United States, 966 F.2d 1455, 1461 (2d Cir. 1993) (citing Schwabenbauer v. Board of Educ. of Olean, 667 F.2d 305, 313 (2d Cir. 1981)). "Rather, the court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." Schwabembauer, 667 F.2d at 314.

III. Discussion

[1] The Internal Revenue Code requires employers to deduct and withhold an employee's contributions to Social Security and Medicare ("FICA") and income taxes from the employee's wages. See 26 U.S.C. §§ 3102(a), 3401. Withheld income taxes are held by the employer in trust for the United States, and must be deposited in an approved bank at specified intervals, depending on the amount withheld. See 26 U.S.C. §§ 7501(a), 6302. In addition, employers must file quarterly payroll tax returns indicating the amounts withheld from employees and the taxes to be paid. See 26 U.S.C. § 6011(a). When the quarterly returns are filed, the employer must also make full payment of the FICA taxes for that quarter, if they have not already been deposited with an approved financial institution. See 26 U.S.C. § 6151. Employers are also subject to unemployment tax with

[3] The previous year (1993–94), PARCC had losses of only $30,802. Franco asserts that "[t]his was a normal year for PARCC." Franco Aff. ¶ 68.

respect to each employee, and must file annual unemployment tax returns. See 26 U.S.C. §§ 3301, 6071.

If any employer does not timely comply with these requirements, the tax code imposes various penalties. See 26 U.S.C. §§ 6651 (penalties for failure to timely file return and pay required taxes), 6656 (penalties for failure to timely make required payroll tax deposits), 6657 (penalties for returned checks). Sections 6651 and 6656 provide that penalties imposed pursuant to those sections shall not be imposed where the failure to comply was due to ''reasonable cause'' and not ''willful neglect.'' Section 6657 provides that penalties for returned checks ''shall not apply if the person tendered such check in good faith and with reasonable cause to believe it would be duly paid.'' 26 U.S.C. § 6657; 26 C.F.R. § 301.6557-1(b).

A. ''Reasonable cause''

Treasury Department regulations interpreting the term ''reasonable care'' provide that:

> If the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time, then the delay is due to a reasonable cause. A failure to pay will be considered to be due to reasonable cause to the extent that the taxpayer has made a satisfactory showing that he exercised ordinary business care and prudence in providing for payment of his tax liability and was nevertheless either unable to pay the tax or would suffer an undue hardship (as described in § 1.6161-1(b) of this chapter) if he paid on the due date. In determining whether the taxpayer was unable to pay the tax in spite of the exercise of ordinary business care and prudence in providing for payment of his tax liability, consideration will be given to all the facts and circumstances of the taxpayer's financial situation, including the amount and nature of the taxpayer's expenditures in light of the income (or other amounts) he could, at the time of such expenditures, reasonably expect to receive prior to the date prescribed for the payment of the tax . . . . A taxpayer will be considered to have exercised ordinary business care and prudence if he made reasonable efforts to conserve sufficient assets in marketable form to satisfy his tax liability and nevertheless was unable to pay all or a portion of the tax when it became due.
>
> In determining if the taxpayer exercised ordinary business care and prudence in providing for the payment of his tax liability, consideration will be given to the nature of the tax which the taxpayer has failed to pay. Thus, for example, facts and circumstances which, because of the taxpayer's efforts to conserve assets in marketable form, may constitute reasonable cause for nonpayment of income taxes may not constitute reasonable cause for failure to pay over taxes described in section 7501 that are collected or withheld from any other person.

26 C.F.R. § 301.6651-1(c)(1) & (2).

Finally, 26 C.F.R. § 1.6161-1(b) defines undue hardship as follows:

> The term ''undue hardship'' means more than an inconvenience to the taxpayer. It must appear that substantial financial loss, for example, loss due to the sale of property at a sacrifice price, will result to the taxpayer for making payment on the due date of the amount with respect to which the extension is desired. If a market exists, the sale of property at the current market price is not ordinarily considered as resulting in an undue hardship.

The Second Circuit has recently held that financial difficulties may, under some circumstances, establish reasonable cause for a failure to pay taxes, including employee withholding, or ''trust fund'' taxes, relying in part on these Treasury regulations, which ''clearly require a factual assessment of the taxpayer's financial situation to determine whether it has exercised ordinary business care and prudence in responding to competing financial obligations.'' Fran Corp. v. United States, 164 F.3d 814, 819 [83 AFTR 2d 99-621] (2d Cir. 1999). In Fran Corp., the Second Cir-

cuit affirmed the district court's holding that the corporation had failed to demonstrate reasonable cause for failure to file and pay its taxes, and therefore did not reach the issue of whether the failure to pay was due to willful neglect. Id. The corporation in that case argued that it had not paid its taxes because the funds were needed to complete two construction projects to avoid default; however, the Second Circuit noted that it: had paid rent to its president during the period of delinquency, despite the fact that the president owed the corporation over $150,000; had continued to fund automobile leases and repairs that were admittedly not essential for the business; and had over $15,000 in entertainment expenses, characterized by the corporation as business development expenses, that were clearly not necessary to the completion of the two projects. Id. at 819–20. The court also found that "[p]erhaps most important is Fran's failure to provide any evidence to show that it placed its obligations to the IRS before those to any and all creditors not directly related to the two projects that defaulted. Absent such a showing, Fran cannot demonstrate that it acted prudently in disregarding its legal obligations to pay and deposit the employment taxes." Id. at 820.

[2] Here, PARCC argues that it had reasonable cause for the failure to pay its taxes because of its financial difficulties, noting that Franco re-financed his mortgage in 1994 to reduce the rental payments owed by PARCC by over $400,000 per year, and that PARCC "cut costs wherever possible" and appealed the rate decreases. PARCC Br. at 13. PARCC therefore claims to have acted prudently in the face of an unexpected $1.2 million loss in 1994. Because of the nature of PARCC's business, it maintains that it could not have scaled back operations under law without jeopardizing the care and well-being of patients, and that any "reduction in staff, ordering business expenses, rent or other factors will simply reduce the reimbursement." Id. at 14–15. Citing the state reimbursement policy, PARCC argues that its travel, education and gift expendi-tures cannot be deemed imprudent because cutting back these projected expenditures would have resulted in a "take back" by the state. PARCC contends that "[a]ll of the arguments raised by the United States would have caused the closing of the facility and harm to all the patients." PARCC Br. at 13. PARCC further argues that its failure to file the tax returns was attributable to Hartigan's conduct, and should be excused because she failed to inform Franco that the returns were not being filed.[4]

The Government, in turn, argues that neither mismanagement by Hartigan nor the financial difficulties described by Franco are sufficient to establish reasonable cause. First, the Government argues that because PARCC failed to implement any internal controls to ensure that its tax responsibilities were met, the exclusive reliance on Hartigan demonstrates a lack of ordinary business care and prudence. In Boyle v. United States, the Supreme Court held that the taxpayer's reliance on an attorney to file a tax return was not reasonable cause for failure to meet a deadline, where the claim was not that the attorney's erroneous legal advice led the taxpayer to file late but simply that the attorney failed to file any tax return at all. 469 U.S. 241, 250–52 [55 AFTR 2d 85-1535] (1985). The Supreme Court observed that:

> To say that it was "reasonable" for the [taxpayer] to assume that the attorney would comply with the statute may resolve the matter as between them, but not with respect to the [taxpayer's] obligations under the statute . . . . It requires no special training or effort to ascertain a deadline and make sure that it is met. The failure to make a timely filing of a tax return is not excused by the taxpayer's reliance on an agent, and such reliance is not "reasonable cause" for a late filing under § 6651(a)(1).

Id. at 250, 252 (emphasis in original).

In support of its contention that Hartigan's failure to file returns is not reasona-

[4] At oral argument, PARCC conceded that the penalties for bounced checks were properly assessed.

ble cause, the Government relies on Universal Concrete Products Corp. v. United States, [71A AFTR 2d 93-3852] 90-2 U.S.T.C. §50,440, 1990 WL 106584 (E.D. Pa. July 24, 1990) (''a corporation's failure to implement internal checks and controls over the employee responsible for tax obligations demonstrates a lack of ordinary business care and prudence, and as such, negates a claim that late filings, deposits, and payments are due to reasonable cause''), aff'd 941 F.2d 1204 (3d Cir. 1991); Thom v. United States, [47 AFTR 2d 81-430] 80-2 U.S.T.C. § 9814, 1980 WL 1690 (D. Or. Oct. 23, 1980) (failure of unsupervised bookkeeper to file tax returns not reasonable cause); Obstetrical & Gynecological Group, P.A. v. United States, [44 AFTR 2d 79-5438] 79-2 U.S.T.C. § 9511, 1979 WL 1419 (D. Colo. July 6, 1979) (lack of supervision of employee who knew of duty to file tax returns was evidence that failure to file had no reasonable cause).

The Court agrees with the Government that PARCC has not offered any evidence from which a reasonable fact-finder could conclude that the failure to file tax returns was attributable to reasonable cause and not willful neglect. Even if PARCC acted reasonably in trusting Hartigan, a trained CPA, to file the returns, no explanation has been offered for her failure to do so. Accordingly, the Government is entitled to summary judgment as to the claims for refund of penalties based on late filed returns.

The Government argues that because PARCC met its other financial obligations during the relevant time period, did not reduce salaries (other than Franco's), made its rental payments to Franco, and paid entertainment, travel, automobile and education expenses, it has failed to demonstrate that its financial difficulties were so great as to excuse payment of its taxes. The Government also notes that although PARCC froze salaries in 1995, the freeze was in place only for eighteen months, and then PARCC offered raises again.[5] Finally, the Government argues that PARCC has offered no evidence that it made any effort to comply with federal tax laws, as required by Fran Corp.

PARCC relies on East Wind Industries, Inc. v. United States, 196 F.3d 499 [84 AFTR 2d 99-6949] (3d. Cir. 1999), in which the Third Circuit found both reasonable cause based on financial hardship and a lack of willful neglect where the taxpayers had initially acceded to bribery demands of corrupt defense agency employees who were the sole purchasers of the goods manufactured by the taxpayers, and then, after the taxpayers refused to pay the bribes, refused to honor existing contracts or consider the taxpayers for new contracts. The taxpayers eventually sued the defense agencies, and recovered $2.1 million in settlement, but not before they failed to pay withholding taxes for six years. The Third Circuit noted that although the taxpayers had chosen to pay other creditors and employees before the IRS, the taxpayers had proven that they exercised ordinary business care and prudence and that undue hardship would have resulted if they had paid the taxes when due. Id. at 509–10. As evidence of undue hardship, the court considered that the owners of the corporation ''incurred substantial personal debts by obtaining loans and a mortgage on their residence in order to provide additional cash for the taxpayers to stay in business,'' rent was not paid, suppliers were not paid the personal funds were used to pay only essential creditors and a small number of employees retained to re-work the inventory, had those employees not been retained, the taxpayers would have been unable to function as a going concern, and finally, that only market for the taxpayers' inventory was the corrupt defense agencies. The court also found that the taxpayers had exercised ordinary business care and prudence in providing for the payment of their taxes:

> Any income received by the Taxpayers on government contracts was used to pay either taxes owed to the IRS or employees' wages. Consequently, the Taxpayers did not pay suppliers, rent, health

[5] Franco contends that this was done to avoid losing critical staff and avoid unionization.

> and welfare premiums, employees' union dues, and workers' compensation insurance premiums. Utility companies were only paid from [the vice-president's] personal funds at the eleventh hour after the companies threatened to shut off service .... [The vice-president] secured a mortgage on his personal residence and sold several personal assets to obtain cash to pay creditors after [his] personal funds were depleted .... Finally, the evidence shows ... that if the Defense Agencies had paid the Taxpayers what was owed under the contracts, the Taxpayers would have had sufficient funds to pay their employment taxes and other debts when due. Thus, it appears that the Taxpayers made reasonable efforts to conserve sufficient assets in marketable form, by maintaining $750,000 of inventory for the Defense Agencies, to satisfy their tax liability, and despite such efforts, were unable to pay their employment taxes when they became due.

Id. at 510–11.

This case clearly falls somewhere between Fran Corp. and East Wind. PARCC's financial troubles appear to have been caused by unexpected rate-cutting in 1994 by the state of Connecticut, rather than its own expenditures. Further, the nature of PARCC's business is claimed to have been such that essential vendors had to be paid to ensure adequate care of its patients and compliance with state and federal law. As the Second Circuit noted in Fran Corp., to prevail on a claim of undue financial hardship, PARCC must provide evidence to show that "it placed its obligations to the IRS before those to any and all creditors not directly" necessary to its survival as a going concern. Id. at 820. Although the Government notes that PARCC has not offered any evidence other than Franco's affidavit that all the payments to creditors were necessary to avoid incurring penalties from the state, the Government has not offered any evidence suggesting that Franco's affidavit testimony is inaccurate in this respect.[6]

In Fran Corp., the Second Circuit noted that "it will be the rare case where the government is made the 'unwilling partner in a floundering business,' without the employer incurring the duty to pay a penalty for having made such a choice, but it nonetheless remains for the court in each case to weight all of the factors identified in the Regulations." 164 F.3d at 819 (quoting Brewery, Inc. v. United States, 33 F.3d 589, 593 [74 AFTR 2d 94-5878] (6th Cir. 1994)). PARCC argues that the nursing home industry is so highly regulated that the Government - although admittedly not the IRS - is more akin to a voluntary partner in a struggling industry. According to PARCC, it would have been subject to federal civil and/or criminal penalties if it used the Medicare funding to pay taxes rather than for patient care and state Department of Health standards impose minimum staffing and other requirements. Thus, PARCC maintains that the unexpected reduction in rates in 1994 and the "take backs" created financial difficulties that it struggled to overcome for several years. The Government has not rebutted this claim of financial hardship with evidence that PARCC's expenditures were not necessary, or would not have resulted in even more detrimental "take backs."

Whether reasonable cause exists is a question of fact, and on this record, neither the Government nor PARCC has shown that, drawing all inferences in the favor of the other party, a reasonable fact-finder would be compelled to conclude either that PARCC would have had such an undue burden if it had timely complied with its tax requirements that it had reasonable cause, or that PARCC's conduct was so lacking in diligence that it lacked reasonable cause as a matter of law. Thus, the Court concludes that whether or not PARCC's financial difficulties establish

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[6] More troubling, however, is the Government's observation that some of the losses claimed by Franco are not corroborated by the supporting documentation. Thus, the corporate tax returns reflect a loss for the 1995 to 1996 years of approximately $450,000 and a 1996 to 1997 year loss of approximately $25,000, less than half the $1,000,000 loss for those two years that Franco claimed was sustained. While the Government also alleges that PARCC has failed to offer evidence (other than the tax returns) that its financial losses were as great as reflected in the tax returns, the Government has not offered anything to suggest that the losses reflected in PARCC's corporate tax returns are inaccurate.

reasonable cause and not willful neglect for the failure to pay corporate taxes and to deposit withholding taxes remains a disputed issue for trial.

B. "Willful neglect"

The Supreme Court has held the term "willful neglect" means "a conscious, intentional failure or reckless indifference." Boyle, 469 U.S. at 245 (citations omitted). "In other words, 'a taxpayer seeking a refund must therefore prove that his failure ... was the result neither of carelessness, reckless indifference, nor intentional failure.'" Fran Corp., 164 F.3d at 816 (quoting Boyle, 469 U.S. at 246 n.4).

The Government also argues that PARCC's failure to meet its tax obligations was willful neglect, in light of Franco admissions that he failed to confirm that the returns were timely filed and simply assumed the payroll tax deposits were being made. According to the Government, because it is undisputed that PARCC failed to institute any safeguards to ensure compliance, this apathy demonstrates reckless indifference, and therefore willful neglect. The Government maintains that reposing all payment responsibility in one individual is willful neglect as a matter of law. The Court, finding no authority for such a proposition, declines to adopt such a per se rule.

In East Wind, the Third Circuit rejected the government's position that any intentional failure to pay employment taxes amounts to willful neglect, noting that:

> The IRS has consistently taken the position that if a taxpayer cannot afford to pay trust fund taxes, no matter what the cause, it should close up shop. Both the economy and the federal fisc are negatively impacted by such an approach - the amount of money flowing into the economy and the fisc is reduced as a result of increased unemployment, idle buildings and plants, and decreased sales of goods and services. Under this approach, no one benefits. Where, however, a taxpayer keeps its business operating at a minimal level in order to collect moneys contractually due so that it can pay trust fund taxes and other debts, and does in fact collect the funds owed and pays its back taxes and other debts, the economy and federal fisc, in-cluding the IRS, benefits.

196 F.3d at 509. A critical fact in East Wind, however, was the role the government itself, as the defense agencies, played in causing the financial hardship suffered by the taxpayers. The court emphasized that this suggested that "the Government was not an unwilling partner in a floundering business, but an active participant." Id. Further, the court noted that the taxpayers' vice president had stated in his deposition that he paid "only those creditors whose services were essential to maintaining and reworking the inventory ... [and] that maintaining minimal business operations was required to institute adversary proceedings against the Defense Agencies and collect the $2.1 million settlement .... [He] further testified that he felt he had no choice but to pay employees from the funds received under government contracts because Delaware law makes it a criminal violation not to pay employees for time worked." Id. The court held that under these circumstances, the decision "to pay those creditors, whose services were essential to maintaining and reworking the inventory, over the trust fund taxes" was not "a conscious, intentional failure or reckless indifference" and therefore not willful neglect. Id.

From a review of the certificates of assessments, it is evident that PARCC made partial payments during this period, and that it was assessed and paid multiple penalties for the late filings. Hartigan's affidavit further makes clear that these payments were late because of the company's financial difficulties. Under these circumstances, PARCC's reliance on a single employee has not been shown to be unreasonable, and the evidence in the record does not compel the conclusion that the failure to file taxes was either a conscious, intentional failure or reckless indifference. Accordingly, summary judgment on the grounds of willful neglect is inappropriate.

IV. Conclusion

For the reasons set forth above, PARCC's motion for summary judgment [# 21] is DENIED. The Government's motion for summary judgment [# 16] is GRANTED IN PART as to the claims for refunds of penalties based on the failure to file tax returns and bounced checks, and is DENIED IN PART as to the claims for refunds of penalties based on the failure to timely pay taxes.

IT IS SO ORDERED.

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 27th day of June, 2002.

¶2002-5093

JUDICIAL WATCH, INC., PLAINTIFF v. Charles O. ROSSOTTI, ET AL., DEFENDANTS. U.S. District Court, Dist. of Maryland, (DC MD) Civil Action No. WMN-01-2672, June 19, 2002. Earlier proceeding at (2002, DC MD) 89 AFTR 2d 2002-2795. Decision against Taxpayer.

1. District court procedure—motion to seal records. District court record was ordered unsealed upon dismissal of org.'s appeal of decision denying its motion to seal. *Reference:* United States Tax Reporter ¶74,025.01(3). IRC §7402.

In the United States District Court for the District of Maryland.

Order

NICKERSON, District Judge:

[1] On January 23, 2002, this Court issued an Order denying Plaintiff's Motion to Seal the record of this case. Plaintiff appealed the order to the Fourth Circuit Court of Appeals, and this Court maintained this action under seal pending a resolution of that appeal. On June 4, 2002, the Court of Appeals dismissed Plaintiff's appeal as to the sealing issue.

Accordingly, IT IS this 18th day of June, 2002, by the United States District Court for the District of Maryland, ORDERED:

1. That the record and all proceedings in the above-captioned matter are hereby UNSEALED; and

3. That the Clerk of the Court shall mail or transmit copies of this Order to all counsel of record.

William M. Nickerson

United States District Judge

¶2002-5094

Stephen E. ROBERTS and Madeleine M. ROBERTS, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) Case No.: CV-S-01-1230-RLH (LRL), June 13, 2002. Years 1997, 1998. Decision for Govt.

1. Collection due process—review of administrative determination—motion to dismiss. Taxpayers' district court IRC §6330 petition was dismissed without prejudice for failure to comply with local rules: taxpayers' non-response to govt.'s dismissal motion was deemed consent thereto; and court's interest in resolving case and managing its docket outweighed risk of prejudice to taxpayers. *Reference:* United States Tax Reporter ¶63,305.01(5). IRC §6330.

United States District Court, District of Nevada.

Before the Court is Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment (#4), filed February 7, 2002. No opposition was filed with the court.

Order

HUNT, District Judge:

(Motion to Dismiss, or in the Alternative, for Summary Judgment—#4)

BACKGROUND

On October 12, 2000, the Internal Revenue Service (''IRS'') sent Plaintiffs a notice of intent to levy to collect outstanding civil penalties assessed against them for tax years 1997 and 1998. In addition to the

notice, the IRS informed Plaintiffs of their right to request a "Due Process Appeals Hearing" pursuant to Title 25 U.S.C. § 6330(a). On June 26, 2001, a Collection Due Process Hearing was held. On September 21, 2001, the IRS sent Plaintiffs a Notice of Determination Concerning Collection Action pursuant to Section 6330(a). The Notice of Determination informed Plaintiffs of the issues addressed at the Collection Due Process Hearing and notified Plaintiffs of their right to judicial review of the determination.

On October 19, 2001, Plaintiffs filed a complaint for damages and appeal of the collection due process determination. On December 26, 2001, this Court granted the Defendant an extension of 45 days to respond to the complaint. On February 7, 2002, Defendant filed for a motion to dismiss Plaintiffs' income tax-related claims under Fed. R. Civ. P. 12(b)(6), or in the alternate for summary judgment pursuant to Fed. R. Civ. P. 56.

DISCUSSION

[1] Pursuant to Local Rule 7-2(d), "[t]he failure of an opposing party to file points and authorities in response to any motion shall constitute a consent to the granting of the motion." When an opposing party receives notice pursuant to Fed. R. Civ. Proc. 5(b) and is given sufficient time to respond to a motion to dismiss, a district judge does not abuse his discretion in granting the motion based on failure to comply with a local rule. *See Ghazali v. Moran*, 46 F.3d 52, 54 (9th Cir. 1995). *But cf. Evans v. Indep. Order of Foresters*, 141 F.3d 931, 932 (9th Cir. 1998) (failure to comply with local rule may not be employed as a sanction against a party on summary judgment motion). Before dismissing a case for failing to follow local rules, the district court must weigh five factors: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits and (5) the availability of less drastic sanctions." *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986).

Here the Plaintiff was given the appropriate notice of Defendant IRS's motion to dismiss or, in the alternative for summary judgment when it was filed February 7, 2002. On February 8, 2002, the Court issued an order that clearly informed Plaintiffs about the consequences of a failure to comply with LR 7-2. The court has weighed the *Henderson* factors and finds that the Court's interest in resolving this case and managing its docket outweighs any risk of prejudice to Plaintiffs. Defendant's motion to dismiss will therefore be granted.

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (#4) is GRANTED.

Dated: June 12, 2002.

ROGER L. HUNT

United States District Judge

JUDGMENT IN A CIVIL CASE

_ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed without prejudice. Judgment is entered in favor of defendant United States of America and against plaintiffs Stephen E. and Madeline M. Roberts.

June 14, 2002

Date

LANCE S. WILSON

Clerk

/s/

(By) Deputy Clerk,

¶2002-5095

In Re: Stephen B. SCALLEN, Debtor. U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) Docket No. 01-00245-6B7, June 12, 2002. Decision against Taxpayer.

1. Tax claims in bankruptcy—motion for enforcement of settlement; declaratory and injunctive relief—seizure; pending appeals. Chap. 7 debtor's motion for enforcement of court approved settlement and declaratory and injunctive relief was denied without prejudice, so debtor and parties seeking joinder could file adversary proceeding to obtain relief. Also, pursuant to parties' stipulation and due to debtor's and spouse's pending collection due process appeals, govt. was barred from seizing rents and/or assets related to tax and alter ego liens at issue, until further court order or dismissal of bankruptcy proceeding. *Reference:* United States Tax Reporter ¶68,726.52(3).

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United States Bankruptcy Court, Middle District of Florida, Orlando Division.

Order on Debtor's Motion for Enforcement of Court Approved Settlement, Declaratory, and Injunctive Relief

BRISKMAN, Bankruptcy Judge:

Chapter 7

This matter came before this Court on June 5, 2002, upon the Debtor Stephen B. Scallen's (''Debtor'') Motion for Enforcement of Court Approved Settlement, Declaratory, and Injunctive Relief (''Motion for Relief'') (Docket no. 19A) the Juno Entities' Notice of Joinder[1] (Docket no. 20) therein and the Opposition by Creditor United States of America thereto (Docket no. 26). The Court, having reviewed the Motion for Relief, the United States of America's Opposition thereto, and the Juno Entities and Debtor's joint reply to the response (Docket no. 27), having heard the argument of counsel, and being otherwise duly advised of the premises does hereby,

ORDER and ADJUDGE:

[1] 1. That the Motion for Relief is denied without prejudice. The Debtor and Juno Entities may attempt to seek the relief requested by the Motion for Relief by the filing of an Adversary Proceeding before this Court.

2. Pursuant to the parties stipulation and due to the pendency of the collection due process appeals of the Debtor and his spouse, Chacke' Y. Scallen, pursuant to 26 U.S.C. § 6330, the United States of America (Internal Revenue Service) shall not attempt to collect or seize rents and/or assets in connection with the tax liens and alter ego liens that are the subject of the Motion for Relief pending further order of this Court or the dismissal or closing of this bankruptcy proceeding.

DONE AND ORDERED in Orlando, Florida, in the U.S. Bankruptcy Court for the Middle District of Florida on this 12th day of June, 2002.

ARTHUR B. BRISKMAN

United States Bankruptcy Judge

cc: Carol Koehler Ide, Esq., Tax Division, U.S. Dept. of Justice, P.O. Box 14198, Washington, D.C. 20044 Phil A. D'Aniello, Esq. (Attorney D'Aniello shall file a Certificate of Service of this order upon all parties).

CERTIFICATE OF SERVICE OF ORDER ON DEBTOR'S MOTION FOR ENFORCEMENT OF COURT APPROVED SETTLEMENT, DECLARATORY, AND INJUNCTIVE RELIEF

Debtor and interested parties, Juno Investment Corporation, Juno Investment Co. LLC, Juno Investments LLC, Finlandia LLC, Julie Scallen, Nora Rottier, and

[1] The ''Juno Entities'' are comprised of interested parties, Juno Investment Corporation, Juno Investment Co. LLC, Juno Investments LLC, Finlandia LLC, Julie Scallen, Nora Rottier, and Chacke' Y. Scallen.

Chacke' Y. Scallen (collectively ''Juno Entities''), hereby file this Certificate of Service of the attached Order Upon Debtor's Motion for Enforcement of Court Approved Settlement, Declaratory, and Injunctive Relief upon the individuals on the service list attached hereto on June 17, 2002.

Attorneys for Debtor:

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- and -

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Fla. Bar No. 0115525

¶2002-5096

TCS AUTO WHOLESALE, INC., and Terry C. Smith, PLAINTIFFS v. Paul BEENE, Bette Kronbauer, and the United States of America, DEFENDANTS. U.S. District Court, Eastern Dist. of Washington, (DC WA) Docket No. CS-98-196-JLQ, June 20, 2002. Decision for Taxpayer in part and for Govt. in part.

1. Actions against U.S. and IRS employees—refunds—damages—employment tax assessments; notice of employee classification—jurisdiction—attorney's fees and costs. Govt. was granted summary judgment in part on used car dealer-corp.'s and sole owner's complaint for damages, refund and other relief relating to IRS's erroneous employment tax assessments on owner's wages: district court lacked jurisdiction to provide taxpayers accounting of amount due or to consider refund claim for taxes that hadn't been paid; taxpayers' admitted failure to exhaust their administrative remedies under IRC §7432 precluded damages claims thereunder; and complaint concerning improper tax *determination* failed to state claim under IRC §7433, which in any event provided for relief against govt. only and not individual IRS employees. Also, govt.'s failure to issue worker classification notice for owner and related employment tax issues were mooted by govt.'s concessions; but, taxpayers were entitled as prevailing parties on those issues to seek attorney's fees and costs in post-judgment proceeding. *Reference:* United States Tax Reporter ¶74,225.01(5); 74,325.03(10); 74,335.01(7). IRC §7422; 7432; 7433; 7436.

United States District Court, Eastern District of Washington.

Order Granting in Part Defendants' Motion for Summary Judgment and Dis-missing Remaining Claims as Moot

QUACKENBUSH, Senior District Judge:

Before the Court is Defendants' Motion for Summary Judgment, heard without oral argument on June 18, 2002. Robert E. Kovacevich represents Plaintiffs. W. Carl Hankla represents Defendants. Having reviewed the record, and being fully advised in this matter, It Is Hereby Ordered that Defendants' Motion for Summary Judgment is Granted in Part. It Is Further Ordered that the remainder of Plaintiffs' claims are Hereby Dismissed As Moot for the following reasons.

1. Background

Plaintiffs TCS Auto Wholesale (TCS) and Terry Smith were engaged in the business of selling used cars. Mr. Smith was the owner and control person of TCS. As such, he received dividends from TCS rather than paychecks. TCS's salesmen and cleaning person were treated as independent contractors. TCS did not report or pay federal employment taxes with respect to

any of the funds it paid to Mr. Smith or the TCS workers,

The Internal Revenue Service (IRS) audited TCS and reclassified its independent contractors as employees. The IRS did not reclassify Mr. Smith as an employee because TCS had treated him as a shareholder rather than an independent contractor. However, the IRS recharacterized the dividends Smith had received as wages. In 1998, the IRS issued TCS a Notice of Determination Concerning Worker Classification as to the workers other than Mr. Smith, and issued Mr. Smith a Notice of Deficiency for additional self-employment taxes. The IRS then took steps to assess TCS with the employment taxes attributable to Mr. Smith's wages and sent TCS demands for payment and notices of intention to levy.

TCS and Mr. Smith separately filed petitions with the United States Tax Court. TCS challenged the IRS reclassification of the workers from independent contractors to employees and Mr. Smith challenged the characterization of Mr. Smith's dividend income from TCS as wages and the amount of the assessed employment tax deficiencies. While these petitions were pending, TCS and Mr. Smith commenced this action on May 12, 1998 against the United States and two named IRS officials.

On September 17, 1998, this court entered a stay to allow the resolution of the cases pending in United States Tax Court. On February 5, 1999, the case of *TCS Auto Wholesale Inc. v. Commissioner of Internal Revenue* was partially dismissed by the Tax Court for lack of jurisdiction to determine the amount of employment tax deficiencies, and the remainder of the case was settled. On December 21, 2000, Congress amended the Tax Court Jurisdictional Statute and retroactively granted jurisdiction to the Tax Court to determine the amount of employment tax deficiencies.

On January 14, 2002, the Defendants filed their Motion for Summary Judgment claiming that this court lacks subject matter jurisdiction over Plaintiffs challenge to the amount of employment taxes assessed because the Plaintiffs have neither paid the disputed taxes nor filed a refund claim in United States Tax Court, that the court lacks subject matter jurisdiction over Plaintiffs' damage claims, and that TCS was not entitled to a Notice of Determination Concerning Worker Classification from the Tax Court relative to Mr. Smith. Plaintiffs responded claiming that due to the change in law concerning the jurisdiction of the Tax Court to determine the amount of employment tax deficiencies, the Tax Court can determine the amounts, if any, TCS owes on employment taxes on the work Mr. Smith did for TCS.

Defendants filed a reply brief conceding that under I.R.C. section 7436(a), TCS was entitled to a Notice of Determination Concerning Worker Classification relative to Terry C. Smith, which would have given TCS a pre-assessment opportunity to petition the U.S. Tax Court regarding its liability for employment taxes relative to Mr. Smith, and Defendants also agreed to abate its assessments for employment taxes relative to Mr. Smith. Defendants, therefore for the first time in their reply, claim this case is moot.

Plaintiffs filed a Response to Defendant's Reply claiming that the case is not moot because Plaintiffs are also entitled to an accounting of taxes due, and are seeking damages for constitutional and statutory violations pursuant to 26 U.S.C. § 7432 and 26 U.S.C. § 7433. Plaintiffs also seek attorney fees under 28 U.S.C. 2412(b),(c)(1), and 26 U.S.C. § 7430. Defendants have filed a Rebuttal of Plaintiffs' Response. The Rebuttal claims that Plaintiffs had no right to file a Response to their Reply. However, Plaintiffs Response was due to an inquiry from the court as to whether Plaintiffs agreed that the case was now moot. The Rebuttal also reiterates the argument that due to Defendants' concessions, this case is now moot.

2. Defendants' Motion for Summary Judgment

[1] As to Plaintiff's claims for an accounting of taxes due; and claims for damages, Defendant's Motion for Summary Judgment has merit and is Granted. However, as to Plaintiff's claim that TCS was

entitled to a Notice of Determination Concerning Worker Classification relative to Mr. Smith and the Plaintiffs challenge to the amount of taxes for employment taxes assessed relative to Mr. Smith, Defendant's Motion for Summary Judgment is Denied, the Defendants now conceding that TCS is entitled to a Notice of Determination Concerning Worker's Classification relative to Mr. Smith and have abated all tax assessments for employee taxes previously assessed relative to Mr. Smith.

A. Accounting of Amounts due

Plaintiffs seek an accounting and a hearing to determine what amount of taxes remain to be paid, without citing any authority. *See Latch v. United States*, 842 F.2d 1031 [61 AFTR 2d 88-900], (9th Cir. 1988). A federal district court has subject matter jurisdiction to consider a challenge to an IRS tax assessment only when the aggrieved taxpayer pays the full amount of tax assessed and then seeks a refund. 28 U.S.C. § 1346(a)(1). ''The requirement that the taxpayer pay the entire amount assessed is strictly enforced.'' *Id.* at 1032 (citing *Flora v. United States*, 362 U.S. 145, 177 [5 AFTR 2d 1046] (1960). ''Thus, a federal district court may not entertain a declaratory judgment action 'with respect to federal taxes.''' *Id.*(citing 28 U.S.C. § 2201(a) and *Hutchinson v. United States*, 677 F.2d 1322, 1326–27 [50 AFTR 2d 82-5117] (9th Cir. 1982). Nor may the court consider a suit that seeks to enjoin the collection or assessment of federal taxes. 26 U.S.C. § 7421(a). *Id.* ''There is ... no statute that gives federal district courts jurisdiction over suits for tax accounting.'' *Latch, supra* at 1032.

Plaintiffs do not claim that they have paid the full amount of the taxes assessed, which have now been abated and sought a refund, rather they seek an accounting of taxes due. Clearly, this court has no subject matter jurisdiction to order an accounting of the amounts Plaintiffs owe for taxes.

B. Claim for Damages

Plaintiffs seek damages under 26 U.S.C. sections 7432 for failure to release lien. However, Defendants are correct that, prior to bringing a damage action under section 7432, a Plaintiff must first exhaust his available administrative remedies by requesting a certificate of release of lien pursuant to IRS and Treasury regulations. Plaintiffs do not dispute that they have not requested a certificate of release with respect to any lien for taxes assessed pursuant to IRS and Treasury regulations. *See Declaration of Louis A. Panelli* in support of Defendants' Motion for Summary Judgment, which states that Mr. Panelli checked the official records of the IRS to determine whether any request for a certificate of release of lien had been made under Treas. Reg. § 401.6325-1(f) with respect to taxes assessed against TCS and found no such request.

Additionally, Plaintiffs seek damages under 26 U.S.C. section 7433 for an unauthorized collection action. 26 U.S.C. 7433 provides that

> If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

To begin, section 7433 only provides for an action against the United States. Therefore, Plaintiffs have no section 7433 claim against Defendants Paul Beene and Bette Kronbauer, who Plaintiffs sued only in their official capacities. Plaintiffs allegations of wrongful assessment, and wrongful levy are governed by 26 U.S.C. 7422 (civil action for refund) and 26 U.S.C. 7426 (for wrongful levy), both of which bar suit against individually-named IRS officers and/or employees. *See Chapin v. Hutton*, 84 A.F..T.R.2d 99-5133, 1999 WL 550237 (D. Idaho 1999).

Secondly, in order to succeed on a claim against the United States under I.R.C. section 7433, a taxpayer must prove that an IRS official or employee intentionally or recklessly violated a specific section of the Code or its regulations in an act of collect-

ing taxes from the taxpayer. I.R.C. section 7433(a). Here, Plaintiffs do not challenge an act of collection, rather an unlawful act in the improper determination of tax, which is not actionable under Section 7433. *See Miller v. United States*, 66 F.3d 220, 222 [76 AFTR 2d 95-6584] (9th Cir. 1995). Therefore the Plaintiffs have stated no basis to recover for damages from the Defendants in this court. Summary Judgment in favor of the Defendants is Granted as to Plaintiffs' claim for an accounting and claims for damages.

3. Claim for Notice of Determination Concerning Worker Classification for Mr. Smith and Challenge to Amount of Employment Taxes Assessed Relative to Mr. Smith

Defendants have Conceded that TCS was entitled to a Notice of Determination Concerning Worker Classification as to Terry C. Smith, which would have given TCS a pre-assessment opportunity to petition the U.S. Tax Court regarding its liability for employment taxes relative to Mr. Smith and have abated all assessments for employment taxes relative to Mr. Smith. Therefore, with summary judgment being granted as to Plaintiff's other claims, there is nothing left to try as to the merits of this case. The court agrees with Defendants that this case is now moot. Therefore, the remaining claims of Plaintiffs are Dismissed With Prejudice as Being Moot.

4. Attorney Fees

Defendants concede that Plaintiffs may seek attorney fees and costs in a post-judgment proceeding under 28 U.S.C. § 2412 and U.S.C. § 7430. *See Mair, Camiel & Kovach, P.S. v. United States*, 98-2 T.C. 601 [82 AFTR 2d 98-5946] (W.D. Wash. 1998). 28 U.S.C. § 2412 provides that fees and expenses of attorneys may be awarded to the prevailing party in a civil action brought against the United States or any agency or official thereof, acting in his or her official capacity. 26 U.S.C. § 7430 authorizes an award of reasonable administrative and litigation costs, including attorney fees, to a prevailing party where the Government's position is not ''substantially justified''.

5. Conclusion

This court concludes that Plaintiffs are the prevailing party in that Defendants have agreed with Plaintiffs that TCS was entitled to a Notice of Determination Concerning Worker Classification as to Terry C. Smith, which would have given TCS a pre-assessment opportunity to petition the U.S. Tax court regarding its liability for employment taxes relative to Mr. Smith and Defendants have abated all assessments at issue in this case, although Plaintiffs are not the prevailing party concerning their claims for an accounting and damages. I further conclude that Defendants are correct that this case is now moot, in view of Defendants' concessions.

Accordingly, It Is Hereby Ordered that the Clerk shall enter a Judgment in favor of the Defendants as to Plaintiffs' claims for an accounting and claims for damages and in favor of Plaintiffs as to their claim that TCS was entitled to a Notice of Determination Concerning Worker Classification and challenge to the amount of employment taxes assessed relative to Mr. Smith, The Clerk is directed to dismiss Plaintiff's Complaint and the claims therein with prejudice. However, Plaintiffs may subsequently seek the costs of litigation as a prevailing party in this action under 28 U.S.C. § 2412 and U.S.C. § 7430 by filing an appropriate Application for Attorney Fees and Costs. 28 U.S.C. § 2412(B) provides:

> A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney . . . appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified.

Whether or not the position of the United States was substantially justified is to be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

It Is So Ordered. The Clerk is directed to enter this Order and furnish copies to counsel.

Dated this 20th day of June, 2002.

JUSTIN L. QUACKENBUSH

SENIOR UNITED STATES DISTRICT JUDGE

¶2002-5097

UNITED WE STAND AMERICA and Russell J. Verney, PLAINTIFFS v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Dist. of Columbia, (DC Dist Col) Docket No. 01-0735 (ESH), June 26, 2002. Decision for Govt.

1. FOIA—exemptions—"congressional records" vs. "agency records." IRS was granted summary judgment in tax-exempt org. and individual plaintiff's FOIA action to compel disclosure of documents related to org.: documents were properly withheld as "congressional records" where created pursuant to congressional inquiry, not "agency records" subject to disclosure. IRS intended at all times to relinquish control over records to Congress, and kept copies for administrative purposes only; IRS personnel didn't use documents other than to respond to Congress's request; records weren't integrated into IRS's record system or files; and Congress prohibited IRS from using or disposing of records as it saw fit. Also, case law plaintiffs cited in which Congress returned to agency records generated in response to congressional inquiry was distinguishable; and policy concerns of maintaining secrecy as part of congressional oversight weighed in favor of IRS. *Reference:* United States Tax Reporter ¶76,556.502(35).

United States District Court for the District of Columbia.

Order

HUVELLE, District Judge:

Upon consideration of Defendant's Motion for Summary Judgment [23-1], plaintiffs' opposition thereto, defendant's reply, and the record herein, it is this 26th day of June 2002, hereby

ORDERED that defendant's motion for summary judgment is GRANTED; and it is

FURTHER ORDERED that plaintiffs' complaint is DISMISSED with prejudice.

ELLEN SEGAL HUVELLE

United States District Judge

MEMORANDUM OPINION

ELLEN SEGAL HUVELLE United States District Judge

Plaintiffs United We Stand America, Inc. ("UWSA") and Russell J. Verney seek to compel disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, of thirty-four pages of documents that defendant Internal Revenue Service ("IRS") has refused to disclose. Initially, plaintiffs requested from the IRS "any and all documents, including but not limited to files, that refer or relate in any way to United We Stand America, Inc." (Complaint Ex. 1, Judicial Watch Letter of February 13, 2001.) The IRS provided plaintiffs with most of the requested documents, but refused to release the thirty-four pages now at issue. The parties have thus narrowed their dispute to a single question: whether the thirty-four pages withheld constitute "agency records," which must be produced under the FOIA, or "congressional records," which are exempt from disclosure. Plaintiffs argue that the documents are "agency records" because the IRS created them and retains a copy of them. In response, defendant asserts that since the documents were created pursuant to a congressional inquiry, they are "congressional records" not subject to disclo-

sure under the FOIA. Based on the record before it, the Court holds that the documents in question are "congressional records" not subject to disclosure under the FOIA.

BACKGROUND

On March 24, 1997, the Joint Committee on Taxation ("JCT"), a congressional committee that undertakes certain investigations with respect to the federal tax system, directed the JCT's Staff Director Kenneth Kies to investigate whether the IRS's selection of tax-exempt organizations for audit had been politically motivated. (Declaration of Lindy L. Paull ("Paull Decl.") Ex. B., Letter Directing Joint Committee Staff Investigation.) Kies then asked the IRS, by letter dated April 28, 1997, to provide the JCT with access to certain documents and information that the Joint Committee believed to be relevant to its investigation. (Paull Decl. ¶ 8.) Kies con-cluded his letter to the IRS by indicating: "This document is a Congressional record and is entrusted to the Internal Revenue Service for your use only. This document may not be disclosed without the prior ap-proval of the Joint Committee." (Paull Decl. ¶ 8.)

In response to this inquiry, the IRS sent the JCT a seventeen-page letter dated June 13, 1997, with an additional seventeen pages of attachments.[1] (Miller Decl. ¶ 3.) The IRS retained a copy of both the letter and the attachments in its correspondence file dedicated to the JCT, which it kept separate and apart from ordinary IRS files. (Miller Decl. ¶ 8.) These documents were not used for any purpose other than to respond to the congressional inquiry. (Miller Decl. ¶ 7.)

On February 13, 2001, UWSA submitted a FOIA request to the IRS requesting "any and all documents, including but not limited to files, that refer or relate in any way to [UWSA]." (Complaint Ex. 1, Judicial Watch Letter of February 13, 2001.) After receiving no substantive response, plaintiffs filed their complaint on April 5, 2001. Since filing the complaint, plaintiffs twice refined their request in cooperation with the IRS to resolve outstanding procedural issues. (Declaration of R. Scott Clarke ("Clarke Decl.") ¶s 4, 6.) In January 2002, the IRS produced over five hundred pages of documents to plaintiffs, redacting some information under claims of exemption. (Joint Status Report of January 31, 2002 ¶s 1–2.) Defendant declined to produce an additional thirty-four pages of documents, claiming that these documents are not "agency records." (Joint Status Report of January 31, 2002 ¶ 3.) Defendant moved for summary judgment as to these thirty-four pages on April 26, 2002, and plaintiffs filed their opposition on May 10, 2002.

LEGAL ANALYSIS

Summary judgment should be granted to the movant if it has shown, when the facts are viewed in the light most favorable to the nonmovant, that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Here, there are no genuine issues of material fact. (*See* Joint Status Report of March 12, 2002.)

[1] In order for a document to be subject to FOIA disclosure, it must be an "agency record." 5 U.S.C. § 552(a)(4)(B). The FOIA does not define this term either in the statute's text or in its legislative history. *See, e.g., United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 [63 AFTR 2d 89-1492] (1989) [hereinafter *Tax Analysts I*]; *Goland v. CIA*, 607 F.2d 339, 345 (D.C. Cir. 1978); *Tax Analysts v. United States Dep't of Justice*, 913 F. Supp. 599, 602 [77 AFTR 2d 96-464] (D.D.C. 1996) [hereinafter *Tax Analysts II*]. However, the Supreme Court has held that a document is an "agency record" if (1) "an agency [] 'either create[s] or obtain[s]' the requested materials," and (2) "the agency [is] in control of the requested

[1] The three attachments consist of (1) a twelve-page list of organizations and the names of IRS employees who were involved in cases concerning those organizations, (2) a four-page narrative listing of cases containing allegations of inappropriate behavior by IRS employees involving tax-exempt organizations, and (3) a one-page list of National Office cases and the estimated volume of documents in each case. (Declaration of Steven T. Miller ("Miller Decl.") ¶ 5.) Like the letter to which they were appended, these attachments were created solely in response to the JCT's inquiry. (Miller Decl. ¶ 3.)

materials at the time the FOIA request is made.'' *Tax Analysts I*, 492 U.S. at 144–45 (quoting *Forsham v. Harris*, 445 U.S. 169, 182 (1980)). The burden rests with the agency to demonstrate that the materials sought are not ''agency records.'' *Tax Analysts I*, 492 U.S. at 142 n.3.

The parties do not dispute that the IRS ''created'' the documents in question, but they disagree as to whether Congress or the IRS has ''control'' over the records. To determine control, the Court must undertake a fact-based inquiry to discern, based upon the totality of the circumstances, who intended to control the records in question. The central question is ''whether, considering all of the circumstances of the case including, of course, physical possession, the records at issue are 'subject to the free disposition of the agency.''' *Tax Analysts II*, 913 F. Supp. at 603 (quoting *Goland*, 607 F.2d at 347)). Courts in this district have addressed this issue on numerous occasions.

The Court of Appeals applied the ''control'' prong in the context of a congressional inquiry in *Goland*, where plaintiffs sought the CIA's copy of a congressional hearing transcript that had been marked ''secret.'' The Court held that the transcript copy located at the CIA was a ''congressional record,'' and not an ''agency record,'' because the CIA maintained a copy only for the limited purpose of internal reference, and Congress' intent to retain control of the document was clear. 607 F.2d at 347–48. It further noted that if the confidential information at issue were publicly divulged, ''Congress would be forced either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role. We decline to confront Congress with this dilemma absent a more convincing showing of self-abnegating congressional intent.'' *Id.* at 346. *See also Tax Analysts I*, 492 U.S. at 145–47 (finding agency control over records that agency possessed, integrated into records system, and relied upon in agency memoranda); *Paisley v. CIA*, 712 F.2d 686, 692–96 (D.C. Cir. 1983), *vacated in part on other grounds*, 724 F.2d 201 (1984) (finding no congressional ''control'' over records because Congress neither created nor possessed the records); *Holy Spirit Ass'n v. CIA*, 636 F.2d 838, 841–43 (D.C. Cir. 1980), *vacated in part on other grounds*, 455 U.S. 997 (1982) (no intent to control when Congress returned records to CIA); *Tax Analysts II*, 913 F. Supp. at 602–07 (agency did not control data when right to use, transfer, and dispose of it was restricted); *Ctr. for Nat'l Sec. Studies v. CIA*, 577 F.Supp. 584, 589–90 (D.D.C. 1983) (congressional intent to control document's confidentiality extended to duplicate copy of document possessed by agency for record-keeping purposes).

Relying upon *Goland* and its progeny, in *Tax Analysts II*, the Court identified four factors that are to be considered when determining ''control'': ''(1) the intent of the document's creator to retain or relinquish control over the records; (2) the ability of the agency to use and dispose of the record as it sees fit; (3) the extent to which agency personnel have read or relied upon the document; and (4) the degree to which the document was integrated into the agency's record system or files.'' 913 F. Supp. at 603 (citing *Dow Jones & Co. v. Gen. Servs. Admin.*, 714 F. Supp. 35, 39 (D.D.C. 1989) (formulating test based on decision in *Tax Analysts v. U.S. Dep't of Justice*, 845 F.2d 1060, 1069 [61 AFTR 2d 88-1044] (D.C. Cir. 1988), *aff'd*, 492 U.S. 136 [63 AFTR 2d 89-1492] (1989))).

Applying the above standards to the instant case, this Court concludes that the documents at issue are ''congressional records,'' and are not ''agency records'' subject to disclosure under the FOIA. While the IRS created the documents, it intended at all times to relinquish control over them, and the IRS is not free to use or dispose of them as it sees fit because the JCT maintains control over them. Additionally, IRS personnel did not use the records for any of its regular agency functions, and the IRS kept the documents for internal reference purposes only.

Indeed, each factor listed in *Tax Analysts II*weighs in favor of concluding that

Congress intended to control the records. *See* 913 F. Supp. at 603. First, as Steven T. Miller, Exempt Organizations Director of the IRS, avers in his declaration, the IRS created the letter and its attachments for the sole purpose of responding to the JCT. (*See* Miller Deck ¶s 6–9.) Thus, the IRS's intent at creation was to relinquish control over the records. Accordingly, the original records were transmitted directly to the party who requested that they be created, the JCT, while the IRS kept copies for internal reference purposes only and did not use them for any functional purpose. (*See* Miller Decl. ¶s 6–9.) Second, IRS personnel have not read or relied upon the documents beyond the extent required to create the documents, for as Miller avers, "the IRS has not used these records for any purpose other than that for which they were originally created—to respond to the Joint Committee's April 28, 1997 request." (Miller Decl. ¶ 7.) Third, the documents in question have not been integrated into the IRS's record system or files. The Exempt Organizations Division of the IRS maintains a copy of the documents in its files pertaining to correspondence between the IRS and the JCT, but this file is kept in a location separate from the office's ordinary files. (Miller Decl. ¶ 8.)

Lastly, if not most importantly, Congress prohibited the IRS from using or disposing of the records as it sees fit. Indeed, Congress expressed its clear intent to "control" such records. *See Paisley*, 712 F.2d at 692–93 (D.C. Cir. 1983) (if Congress "has manifested its own intent to retain control, then the agency—by definition—cannot lawfully 'control' the documents . . . , and hence they are not 'agency records'"); *Goland*, 607 F.2d at 348 n.48 (in ascertaining whether a record is a "congressional document," a court must consider "(1) Congress' clear intent to exempt congressional documents from disclosure under FOIA; (2) Congress' clear prerogative to prevent disclosure of its own confidential materials; and (3) the danger of inhibiting the legislative and judicial branches from making their records available to the executive branch"); *see also Holy Spirit Ass'n*, 636 F.2d at 842; *Ctr. for Nat'l Sec. Studies*, 577 F. Supp. at 587.

In the initial inquiry letter, the JCT explicitly asserts that the letter is confidential: "This document is a Congressional record and is entrusted to the Internal Revenue Service for your use only. This document may not be disclosed without the prior approval of the Joint Committee." (Paull Decl. ¶ 8.) According to the JCT's current Chief of Staff, "[t]his language is used by the JCT to reflect its intent that the document in question [the IRS's response] remain under the control of the JCT and not be subject to the 'free disposition' of the IRS, and it thereby retain its character as a congressional record for purposes of the Freedom of Information Act." (Paull Decl. ¶ 8 (citing *Goland*, 607 F.2d at 346–47).)[2]

Plaintiffs attempt to distinguish *Goland* by relying on the fact that Congress created the transcript in *Goland* of agency testimony by employing the stenographer and typist, whereas here, the IRS created the documents in question only in response to a Congressional inquiry. This distinction is insufficient, for the IRS created these documents in direct response to a congressional inquiry that was marked confidential. The records cannot be said to be the IRS's property, as the IRS is not free to dispose of them. Rather, like *Goland*, the IRS "holds the document, as it were, as a 'trustee' for Congress." 607 F.2d at 347. Although the IRS created the documents in question, the facts of this case are similar to the facts of *Goland* because Congress maintained control of the documents and the IRS kept a copy only for internal reference purposes.[3]

[2] Plaintiffs argue that this language "clearly relates only to the letter itself." (Pl. Opp. at 6.) However, such a position is unpersuasive, for the IRS cannot release its response without revealing the contents of the JCT's inquiry letter. (Paull Decl. ¶ 11.) In fact, disclosure of these documents would defeat the entire purpose of the initial letter's demand for confidentiality, for it would necessarily reveal the contents of the initial letter.

[3] In this regard, it is noteworthy that several courts in this district have held that agency-created documents may be considered congressional records when Congress expresses a clear intent that the documents remain confidential. *See, e.g., Holy Spirit Ass'n*, 636 F.2d at 843; *Judicial Watch v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995); *Ctr. For Nat'l Sec. Studies*, 577 F. Supp. at 588; *see also Navasky v. CIA*, 499 F. Supp. 269, 278 (S.D.N.Y. 1980).

Plaintiff's reliance on the Court of Appeals' decision in *Holy Spirit Ass'n* is also misplaced. (Pl. Opp. at 5.) There, this Circuit ruled that documents were agency records only when Congress had returned them to the CIA after the agency had created them in response to a congressional investigation. *See* 636 F.2d at 843. Congress "failed to retain control over them" by sending the records back to the CIA. *Id.* The Court clearly indicated that the significant factor was returning the records to the CIA, for "even if these CIA-created records were once congressional documents because generated in response to congressional inquiries and transferred to Congress, they subsequently lost their exemption as congressional records when Congress failed to retain control over them." *Id.*

Here, the JCT retained control of the original records, leaving the IRS with only a copy for administrative purposes. Furthermore, the JCT has consistently maintained its intent to control these records. When UWSA made a prior FOIA request for the very same documents, the JCT specifically told the IRS not to release them because they were congressional records. (Paull Decl. ¶ 13.) Moreover, the JCT has indicated that its "longstanding practice and course of dealing with the IRS" is to keep such communications confidential. (Paull Decl. ¶ 9.) According to Paull, "it is critical that JCT communications with the IRS be protected from compelled public disclosure" for several reasons. (Paull Decl. ¶ 9.) For example, unauthorized release of JCT materials could allow the tax bar and the public to structure business transactions in anticipation of possible changes in the tax law. Moreover, the JCT must be able to retain control over its investigations for effective oversight and consideration of legislation, which would be undermined if materials were likely to become public. (Paull Decl. ¶s 6, 9.)

Lastly, the policy concerns raised in *Goland* are equally pertinent here, for as recognized by the Court, "Congress exercises oversight authority over the various federal agencies, and thus has an undoubted interest in exchanging documents with those agencies to facilitate their proper functioning in accordance with Congress' originating intent." *Goland*, 607 F.2d at 346. Were the Court to accept plaintiffs' argument, Congress would be faced with the same dilemma the Court in *Goland* sought to avoid: "Congress would be forced either to surrender its constitutional prerogative of maintaining secrecy, or to suffer an impairment of its oversight role." *Id.*

CONCLUSION

Accordingly, following the rationale of *Goland*, the Court will not hinder Congress' constitutional prerogative by ordering release of documents intended only for the JCT merely because the IRS maintained a copy of these documents. Therefore, defendant is not required to produce the records in question, and its motion for summary judgment is granted.

ELLEN SEGAL HUVELLE

United States District Judge

Dated: 6/26/02

¶2002-5098

Donald Charles FLEMING, and Joyce Lana FLEMING, PLAINTIFFS v. UNITED STATES, DEFENDANT. U.S. District Court, Middle Dist. of Florida, (DC FL) Docket No. 3: 01-170-CIV-J-21-TEM, June 12, 2002. Decision for Taxpayers.

1. Actions against U.S.—frivolous filings—sanctions. District court discharged its show cause sanctions order against taxpayers, declining to impose F.R.Civ.P. 11 sanctions against them: although instant case was taxpayers' 3d attempt to make "civil end-run" on their criminal case and arguments were fallacious, sanctions' non-imposition was warranted based on taxpayers' apparent misapprehension of criminal-civil distinction and possible ignorance of law. But, taxpayers were explicitly warned against making further similar filings. *Reference:* United States Tax Reporter ¶74,336.511(35).

United States District Court, Middle District of Florida, Jacksonville Division.

Order

NIMMONS, JR., District Judge:

This cause comes before the Court on Plaintiffs' and Defendant's Responses (Dkts. 12 & 13, resp.) to the Court's February 15, 2002, Order (Dkt. 10) directing the Plaintiffs to show cause why sanctions should not be imposed against them under Rule 11, Federal Rules of Civil Procedure.

[1] To be sure, one can easily refer to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and determine that declaratory relief cannot be sought in this Court "with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code." See 28 U.S.C. § 2201.[1] Likewise, as Defendant has illustrated, a search of the internet reveals that Plaintiffs' claims would not ultimately succeed. See Dkt. 13 at p.7, n.1 (listing multiple websites warning of the fallaciouness of claims and arguments like those made by Plaintiffs herein). Yet, having reviewed the pleadings, motions, responses, and notices filed herein, it appears that Plaintiffs have misapprehended—or, rather, failed to apprehend—that there is a distinction between civil and criminal proceedings. (This is highlighted, for example, by Plaintiff Donald Fleming's attempt to use the Defendant United States' authority for dismissal herein to argue for dismissal of the criminal charges in United States v. Donald C. Fleming, Joyce L. Fleming, etc., Case No. 3: 00cr262-20-J-HTS. (See Dkt. 920 therein)).

Additionally, contrary to Defendant's correct citation of the Advistory Committe Notes for Rule 11, see Dkt. 13 at 8, n.2, the Eleventh Circuit has determined that the obligation imposed by Rule 11 is not seen as continuing, as long as the complaint was reasonably interposed in the first instance. See, e.g., Glatter v. Mroz, (In re Mroz), 65 F.3d 1567, 1572 (11th Cir. 1995). The Rule 11 analysis thus being limited to Plaintiffs' actions and motives at the time of filing, based on the conclusions stated in the preceding paragraph, it cannot be said with sufficient certainty that Rule 11's strictures were exceeded. Accordingly, the Order to show cause will be discharged and no sanctions will be imposed in this case.

However, having said that, the Court will remind Plaintiffs that while one time may be an anomaly, and the second a coincidence, the third time is definitely a trend. This case marks the Plaintiffs' third attempt to make a civil end-run on their criminal case. Any future civil filings by these Plaintiffs directed at or involving their criminal case, the issues implicated therein, or any of the actors (attorneys, agents, officers, staff, etc.) involved therein, will be viewed with circumspection. Plaintiffs are hereby put on express notice of Rule 11 of the Federal Rules of Civil Procedure, their obligations thereunder, and the fact that they, as pro se parties, are not exempt from the Federal Rules or the Local Rules of this Court. See Moon v. Newsome, 863 F.2d 835, 837 (11th Cir. 1989).

Upon consideration of the foregoing, it is hereby ORDERED that the Court's Court's February 15, 2002, Order (Dkt. 10) directing the Plaintiffs to show cause why sanctions should not be imposed is DISCHARGED.

DONE AND ORDERED, at Jacksonville, Florida, this 12th day of June, 2002.

RALPH W. NIMMONS, JR.

UNITED STATES DISTRICT JUDGE

Copies to: Counsel of record

Pro Se Party (if any)

Denise Seymour, Deputy Courtroom Clerk

Margaret Costa, Judicial Assistant

¶2002-5099

William F. KAETZ, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Middle Dist. of Pennsylvania, (DC PA) Docket

[1] It is of significance to the Court's conclusion herein that Plaintiffs' Complaint sought declaratory relief but did not cite the Declaratory Judgment Act. See Dkt. 1. Thus, on the record before it, the Court cannot determine, objectively, that Plaintiffs were aware of the Act.

No.3:02cv512, June 28, 2002. Decision for Govt.

1. Actions against the U.S.—defective tax lien notices—amendment of complaint—sanctions. Taxpayer's motion to supplement or amend complaint against govt. challenging lien notices' validity was denied, and complaint was dismissed: proposed amendment couldn't survive govt.'s sovereign immunity and other jurisdictional defenses; and taxpayer's argument that IRS's failure to sign lien notices under penalties of perjury violated IRC §6065's returns verification provisions was meritless. Also, taxpayer's request to impose F.R.Civ.P. 11 sanctions against IRS attorney was groundless. *Reference:* United States Tax Reporter ¶60,655.01(10); 74,025.01(108). IRC §6065; 7402.

In the United States District Court for the Middle District of Pennsylvania.

Memorandum and Order

MUNLEY, District Judge:

Before the Court for disposition is defendant's motion to dismiss plaintiff's complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Also before the Court are plaintiff's motions to (1) file a supplemental pleading pursuant to Rule 15(d) of the Federal Rules of Civil Procedure; (2) sanction Beatriz T. Saiz, Esq. of the Tax Division of the United States Department of Justice under Rule 11 of the Federal Rules of Civil Procedure; (3) submit interrogatories to defendant; and (4)conduct discovery. Plaintiff is William F. Kaetz, (''Kaetz''). Defendant is the Internal Revenue Service, (''IRS'').

This case concerns the filing of a Notice of Federal Tax Lien, (''Notice''), against Kaetz's property. Kaetz argues that the Notice is not in compliance with the requirements of 26 U.S.C. § 6065 and therefore is unlawful. For the reasons that follow, we will grant the IRS's motion to dismiss pursuant to Rule 12(b)(6) and deny Kaetz's motions.[1]

Discussion

A. Kaetz's Motions Pursuant to Rule 15(d) and Rule 11

[1] Kaetz moves to supplement his complaint pursuant to Rule 15(d) of the Federal Rules of Civil Procedure. Under Rule 15 a party may, with court approval, supplement a pleading to address matters ''which have happened since the date of the pleading sought to be supplemented.'' Fed. R. Civ. P. 15(D). Kaetz's proposed supplemental pleading (Docket No. 9) does not address any matters that have occurred since the filing of his original complaint. In fact, in his motion to file a supplemental pleading, plaintiff states that he seeks to file the supplemental pleading so as to ''conform to the Federal Rules of Civil Procedure.'' That is not the purpose of a supplemental pleading. See 6A Charles Allan Wright ET AL., Federal Practice and Procedure: Civil 2D ¶ 1504 (2d ed. 1990) (discussing purpose of Rule 15(d)).

Even if we were to read Kaetz's motion to file a supplemental pleading as a motion to file an amended complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, we still would not grant it. Although motions to amend complaints are to be liberally granted, a district court may deny ''leave to amend where the motion would not withstand a motion to dismiss.'' Massarsky v. General Motors Corp., 706 F.2d 111, 125 (3d Cir. 1983). In its pending motion to dismiss, the IRS raises arguments regarding the sovereign immunity of the United States, our jurisdiction under the Anti-Injunction Act, and the Internal Revenue Code, 26 U.S.C. § 6065, that Kaetz's proposed amended complaint will not withstand. Therefore, we will deny Kaetz's motion to serve supplemental pleadings.

Kaetz also moves, pursuant to Rule 11 of the Federal Rules of Civil Procedure, for sanctions against Beatriz T. Saiz, Esq., of the tax division of the United States Department of Justice. Kaetz alleges that Saiz does not have the authority to appear before this Court and that we should sanc-

[1] Kaetz originally filed the instant complaint in the Court of Common Pleas of Monroe County, Pennsylvania. The IRS removed the complaint to this Court pursuant to 28 U.S.C. § 1444.

tion her for so doing. Rule 11 is designed to deter meritless filings in federal courts. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990). Kaetz's allegation itself is meritless and no basis exists for Rule 11 sanctions against Saiz.

B. IRS's Motion to Dismiss Pursuant to Rule 12(b)(6)

The IRS moves to dismiss Kaetz's complaint, pursuant to Rule 12(b)(6), for failure to state a claim for which relief can be granted. We will grant the IRS's motion to dismiss pursuant to Rule 12(b)(6).

When a 12(b)(6) motion is filed, the sufficiency of a complaint's allegations are tested. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d Cir. 1993). The issue is whether the facts alleged in the complaint, if true, support a claim upon which relief can be granted. Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). In deciding a 12(b)(6) motion, the Court must accept as true all factual allegations in the complaint and give the pleader the benefit of "all reasonable inferences that can fairly be drawn therefrom, and view them in the light most favorable to the plaintiff." Id. The Court should not credit, however, "bald assertions" and "legal conclusions" within a complaint. Id. "A 12(b)(6) motion should be granted 'if it appears to a certainty that no relief could be granted under any set of facts which could be proved.'" Id. (quoting D.P. Enter. Inc. v. Bucks County Cmty. College, 725 F.2d 943, 944 (3d Cir. 1984)).

The IRS filed a Notice of Federal Tax Lien, ("Notice"), against Kaetz's property in the Court of Common Pleas of Monroe County, Pennsylvania. Kaetz contends in his complaint that the Notice does not conform with the requirements of 26 U.S.C. § 6065, ("Section 6065"), and therefore is invalid. Section 6065, entitled Verification of Returns, reads, in relevant part: "any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury." 26 U.S.C. § 6065 (West 1989).

Kaetz argues that the IRS's Notice does not conform with section 6065 because it was not signed under penalty of perjury: Section 6065 requires taxpayers filing tax returns or other documents with the IRS to do so under penalty of perjury. Vaira v. Commissioner of Internal Revenue, 444 F.2d 770, 777 [28 AFTR 2d 71-5033] (3d Cir. 1971); Olpin v. Commissioner of Internal Revenue, 270 F.3d 1297, 1301 [88 AFTR 2d 2001-6697] (10th Cir. 2001); Morelli v. Alexander, 920 F. Supp. 556, 558 [77 AFTR 2d 96-2195] (S.D.N.Y. 1996). It does not apply to notices issued by the IRS. Thompson v. Internal Revenue Service, 23 F. Supp 2d. 923, 925 [82 AFTR 2d 98-5311] (N.D. In. 1998); Morelli, 920 F. Supp at 558. Consequently, Kaetz's claim is without merit and we will grant the IRS's motion to dismiss.

AND NOW, to wit, this 28th day of June 2002, it is hereby ORDERED that:

1. Plaintiff's motion to serve a supplemental pleading [8-1] is DENIED;
2. Plaintiff's motion for the imposition of Rule 11 sanctions [11-1] against Beatriz T. Saiz, Esq. is DENIED;
3. Defendant's motion to dismiss [3-1] pursuant to Rule 12(b)(6) is GRANTED;
4. Plaintiff's motions to submit interrogatories [5-1] and conduct discovery [6-1] are DENIED as moot; and
5. The Clerk of Court is directed to close this case.

BY THE COURT:

JUDGE JAMES M. MUNLEY

United States District Court

¶2002-5100

Louis S. JORGL v. UNITED STATES OF AMERICA. U.S. District Court, Middle Dist. of Florida, (DC FL) Docket No. 8:01CV438-T-17-TBM, June 17, 2002. Years 1994, 1995, 1996. Decision for Govt.

1. 100% penalty for failure to pay over withholding taxes—refunds—responsible person; willfulness—reducing assess-

ments to judgment. Pres./majority shareholder's IRC §6672 penalty refund claim was denied, and outstanding assessments were reduced to judgment: taxpayer's responsible person status was shown by his position and control over corp.'s managerial and financial decisions, and wasn't avoided or excused by his assignment of daily duties including tax management to untrained manager; and willfulness of his tax payment failures was reflected in facts he continued to draw salary and pay himself, employees and other creditors while knowing corp. was undercapitalized and that taxes were due and owing. *Reference:* United States Tax Reporter ¶66,725.04(5); 66,725.01(62); 74,035.01(30). IRC §6672; 7403.

In the United States District Court for the Middle District of Florida, Tampa Division.

Order

Judgment on the merits is ENTERED in favor of the United States of America and against plaintiff Louis S. Jorgl on plaintiff's complaint.

Judgment on the merits is ENTERED in favor of the United States of America and against counterclaim defendant Louis S. Jorgl on the counterclaim of the United States of America in the amount of $183,084.23, plus statutory interest.

IT IS SO ORDERED.

Charles R. Weiner

WEINER, J.[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[1] 1. Louis Jorgl brought this action to recover $77.12 of trust fund penalties regarding allegedly unpaid employment taxes of his closely held corporation, Abbard Nurses Registry, Inc.

2. The United States has brought a counterclaim to reduce to judgment Jorgl's outstanding federal tax liabilities.

3. Abbard's business was to provide nurses and other health care workers on a temporary or per diem basis to hospitals that had nursing shortages.

4. Sometime prior to 1994, Abbard changed from an agency format to being the actual employer of the nurses it provided to these hospitals. As the employer, it had the legal responsibility to collect trust fund taxes and remit those taxes to the United States.

5. During the second, third and fourth quarters of 1994, the first, second, third and fourth quarters of 1995, and the first and second quarters of 1996, Abbard failed to collect, truthfully account for, and pay over federal employment taxes.

6. Jorgl was the president and majority shareholder of Abbard during these periods. Together with his wife, they owned all outstanding shares.

7. Jorgl had signature authority on Abbard's bank accounts.

8. Jorgl inherited the company from his parents. He did not, however, wish to run the company on a full time basis. He hired Anne Miller to be the office manager of Abbard in its office in Chicago, while Jorgl lived in Florida.

9. Jorgl visited Chicago only once or twice a year, usually to make contact with and give Christmas presents to the managers of local hospitals that utilized Abbard's services.

10. Abbard's day to day business was handled by Miller. Miller was not trained as a bookkeeper or accountant, nor did she have management training. Her initial salary was $9.00/hour. Miller replaced the former manager of Abbard when that manager left the company. She had no equitable interest in the company.

11. Miller would take orders from hospitals and find nurses to fill the slots. She also handled all of the office's bookkeeping responsibilities.

12. Miller routinely signed Jorgl's name to various documents including checks and tax returns.

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[1] United States District Judge for the Eastern District of Pennsylvania, sitting by designation

13. Miller would routinely communicate with Jorgl by telephone to receive his input and permission to make Abbard's business decisions.

14. Abbard was chronically undercapitalized. It had problems meeting payrolls and paying its trust fund taxes on time.

15. Jorgl drew a salary from the company, averaging over $60,000/year during the relevant time frame. Jorgl's wife also received a small salary from the company.

16. Abbard's policy was to pay its employees, including Jorgl, and its creditors before paying its payroll taxes. It rationalized this policy by concluding that if it did not pay the nurses, there would be no receivables to pay any of the other expenses.

17. In August 1995, IRS Revenue Officer Silva came to Abbard's office and met with Miller to discuss Abbard's delinquent employment taxes. Miller testified that Silva told her to stop paying the monthly remittances until Miller heard back from Silva. What Silva told Miller remains a disputed issue of fact. Nevertheless, from that point forward, Miller accumulated the trust fund taxes but did not remit them to the IRS.

18. Miller prepared all the payroll tax forms in question, signing Jorgl's name to them.

19. Miller filed a Chapter 11 petition for Abbard on October 22, 1996. The petition was dismissed on August 19, 1997

20. Miller filed a second Chapter 11 petition for Abbard on February 4, 1998. This petition was dismissed on May 4, 1998. Abbard soon thereafter ceased operations.

21. On June 8, 1998, pursuant to 26 U.S.C. § 6671 and § 6672, the IRS made an assessment against Jorgl for the trust fund portion of the unpaid federal employment taxes of Abbard in the amount of $197,623.31 for the second, third, and fourth quarters of 1994, all quarters of 1995 and the first and second quarters of 1996.

22. The amount referred to above was reduced by $14,539.08 when the IRS applied this portion of a subsequent corporate payment to the trust fund portion of Abbard's liability.

23. The net remaining liability is thus $183,084.23.

24. Jorgl has received notice and a demand for payment of this assessment; the remaining liability, plus statutory interest, remains unpaid.

25. On June 19, 1998, Jorgl filed a claim for refund, Form 843, seeking refund of $77.12, asserting he was not a responsible party for the trust fund taxes.

26. As the president and majority shareholder of Abbard, Jorgl is a responsible party under the statute to collect, account for and pay over Abbard's trust fund taxes.

27. Jorgl, as Abbard's president, assigned the management of the company, including payroll, tax payment, hiring and firing, to Miller, who was untrained in managing these responsibilities.

28. Jorgl knew the company was undercapitalized, yet continued to draw a substantial salary from the company.

29. Jorgl's failure to see to the payment of the trust fund taxes was willful since he knew the company was short of funds and permitted it to pay employees, including himself, and other creditors with trust fund money.

30. As the principle owner of the corporation, Jorgl was not a passive investor. He knew or should have known of the company's cash flow problems and the obvious risk of paying employees and creditors with trust fund money, and ignoring the indebtedness due to the United States.

31. As Jorgl was a responsible party for payment of the trust fund taxes, and those taxes were not paid timely or at all, his claim for refund is unsupported by the evidence.

32. The United States' counterclaim, seeking to reduce to judgment the unpaid tax liability of $183,084.23 is supported by the preponderance of the evidence.

33. Having reviewed all the testimony and exhibits and heard argument by all

counsel, the court finds in favor of the United States and against Louis S. Jorgl on the counterclaim and enters judgment accordingly.

¶2002-5101

UNITED STATES OF AMERICA, PLAINTIFF v. Melville TURNER, ET AL., DEFENDANTS. U.S. District Court, Dist. of Hawaii, (DC HI) Docket No. 99-00817 SOM, June 14, 2002. District Court amended. Earlier proceedings at (2002, DC HI) 89 AFTR 2d 2002-3074; (2000, DC HI) 86 AFTR 2d 2000-6731, 2000-2 USTC ¶50815; (2000, DC HI) 86 AFTR 2d 2000-6464; (2000, DC HI) 86 AFTR 2d 2000-6049, 2000-1 USTC ¶50336; and (2000, DC HI) 85 AFTR 2d 2000-2163. Decision for Govt.

1. Collection actions—jurisdiction—reconsideration. District court amended its amended orders that had denied taxpayers' requests for relief from or reconsideration of deficiency judgments and motion to vacate: court clarified that, although it did have jurisdiction to consider relief/reconsideration requests, those requests nonetheless failed to allege viable claim. *Reference:* United States Tax Reporter ¶74,025.01(90). IRC §7402.

In the United States District Court for the District of Hawaii.

Amendments to (1) Amended Order Denying Motion for Relief from Order Granting Deficiency Judgments Against Defendants Melville K. Turner and Letitia Y. Turner, Filed June 4, 2002, and (2) Order Denying Motion for Relief from Order Denying Motion to Vacate Deficiency Judgments, Filed June 10, 2002

MOLLWAY, District Judge:

[1] On June 4, 2002, this court filed its Amended Order Denying Motion for Relief from Order Granting Deficiency Judgments Against Defendants Melville K. Turner and Letitia Y. Turner. A few days later, on June 10, 2002, this court filed its Order Denying Motion for Relief from Order Denying Motion to Vacate Deficiency Judgments. Both orders recited that, given the pendency of the appeal in this case, the court was without jurisdiction to rule on the merits of the motions in issue. Upon further consideration, the court concludes that, under Rule 4(a)(4) of the Federal Rules of Appellate Procedure, it may consider the merits of the motions. Accordingly, the court withdraws the portions of the orders stating that it lacks jurisdiction over the motions. That is, the court withdraws the second sentence of the second paragraph and the entire third paragraph of its June 4 order, and further withdraws the second sentence of its June 10 order.

In place of the withdrawn sentences, the court inserts the following language into both orders, in the space left by the above withdrawals:

> Because the Turners raise no cognizable basis for relief, the court denies their motion. Reconsideration of the deficiency judgments is sought under either Rule 59(e) or Rule 60 of the Federal Rules of Civil Procedure. Neither rule supports the granting of the relief requested.
>
> A Rule 59(e) "motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." 389 Orange St. Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999). 9th Cir. 1999). There are four basic grounds upon which a Rule 59(e) motion may be granted:
>
> First, the movant may demonstrate that the motion is necessary to correct manifest errors of law or fact upon which the judgment is based. Second, the motion may be granted so that the moving party may present newly discovered or previously unavailable evidence. Third, the motion will be granted if necessary to prevent manifest injustice . . . . Fourth, a Rule 59(e) motion may be justified by an intervening change in controlling law.

McDowell v. Calderon, 197 F.3d 1253, 1255 n.1 (9thCir. 1999) (quotation omitted).

The Turners satisfy none of these circumstances.

A motion for reconsideration may be brought under Fed. R. Civ. P. 60(b) if the moving party can show: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud or other misconduct; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) any other reason justifying relief from operation of judgment. See Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985). The Turners fail to satisfy this rule.

DATED: Honolulu, Hawaii; June 14, 2002.

Susan Oki Mollway

United States District Judge

¶2002-5102

Charles REYNOLDS and Beatrice REYNOLDS, PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Seventh Circuit, (CA7) Docket No. 00-2966, July 18, 2002. Tax Court, (2000) TC Memo 2000-20, RIA TC Memo ¶2000-020, 79 CCH TCM 1376 (opinion by Dean, *Sp.Tr.J.*), affirmed. Years 1993, 1994. Decision against Taxpayers.

1. Review of Tax Court decision—estoppel—admissibility of evidence. Tax Court properly determined that IRS "no liability" letters to taxpayer-IRS agent/attorney and wife weren't binding admissions of no deficiency: letters were at most evidentiary extrajudicial admissions, not judicial admissions settling issue or valid closing or compromise agreement. *Reference:* United States Tax Reporter ¶74,338.534(10); 74,536.1437(10).

2. Deductions—legal expenses—time for claiming deductions—proof—medical expenses—office, supplies and repair and maintenance expenses. Tax Court properly determined that taxpayers-IRS agent/attorney and wife were entitled only to miscellaneous itemized deduction, not business deduction, for costs related to IRS's investigation of husband's allegedly improper practicing of law during his official IRS employment hours: origin of claim was to protect husband's IRS employment, not his business as self-employed attorney; and whether investigation could have effects on that business was irrelevant. *Reference:* United States Tax Reporter ¶675.01(10); 4615.02(5); 2135.16(5); 4615.06(5); 1625.018(5); 74,536.1429(10). IRC §67; 162; 213; 461.

3. Business deductions—auto, travel, meal and entertainment expenses—expensing depreciable farm equipment—substantiation. Tax Court properly denied taxpayers-IRS agent/attorney and wife deductions for auto and travel expenses allegedly related to their rental properties, farming activities and husband's law practice: taxpayers failed IRC §274(d)'s strict substantiation requirements where they didn't keep vehicle logs; general receipts and insufficiently detailed summary charts weren't probative; and husband's vague, contradictory and generally incredible testimony didn't adequately explain trips' business purposes. Also, mere fact that taxpayers owned out-of-state rental properties and farm didn't in itself prove that their travel thereto was for business rather than personal purposes; and, to extent relating to his law practice, trips were otherwise nondeductible commuting expenses. *Reference:* United States Tax Reporter ¶1795.04(5); 2745.14(40). IRC §179; 274.

4. Accuracy-related negligence penalties—reasonable cause. Tax Court properly upheld accuracy-related negligence penalties against taxpayers-IRS agent/attorney and wife who claimed improper deductions: taxpayers' reasonable cause and good faith claims were rejected where they identified no specific supporting section of tax guide on which they allegedly relied and didn't explain how computerized return preparation program caused their substantive reporting errors; and husband, by virtue of his experience, education and sophistication, should have known and been able to understand and comply with basic substantiation requirements.

Reference: United States Tax Reporter ¶66,625.01(10). IRC §6662.

Appeal from the United States Tax Court No. 12112-97—John F. Dean, Special Trial Judge. In the United States Court of Appeals For the Seventh Circuit.

Before FLAUM, Chief Judge, CUDAHY, and MANION, Circuit Judges.

CUDAHY, Circuit Judge:.

This dispute arises from certain tax deductions claimed by Charles and Beatrice Reynolds on their 1993 and 1994 tax returns. The Internal Revenue Service (IRS) challenged the deductibility of certain expenses related to a family farm business, rental properties and to Charles Reynolds' private law practice, which is, for better or worse, a sideline from his full-time employment as an IRS supervisor.[1] During the pendency of this dispute, the Reynolds received two brief letters from the IRS stating that they had no outstanding liability for the 1993 and 1994 tax years. The Reynolds asserted that these letters were binding admissions by the IRS, thus estopping the agency from pursuing any further action against them. The U.S. Tax Court rejected this argument and ruled on the merits, allowing some of the deductions and disallowing others. In addition, pursuant to 29 U.S.C. § 6662(a), the Tax Court upheld a 20% accuracy-related penalty because it found that some of the remaining errors were the result of negligence.

The Reynolds appeal the following: (1) the evidentiary weight given to the no-liability letters, (2) the classification of certain legal defense costs as personal costs rather than as business expenses related to Charles Reynolds' private law practice, (3) the denial of various automobile and travel expenses related to the private law practice, farming activity and the rental properties, and (4) the imposition of the accuracy-related penalties. We affirm the judgment of the Tax Court.

I.

Charles Reynolds joined the IRS in 1976, where he worked as a revenue officer in the Chicago office. Several years later, Reynolds graduated from law school and was promoted to a supervisory position, which involved a case-load of taxpayer audits. In 1987 and 1988, Reynolds received permission from the IRS to practice law in addition to his primary employment with the IRS. However, in 1992, the IRS commenced an investigation of Reynolds springing from concerns that he may have been conducting his private law practice during his workday at the IRS. To defend himself, Reynolds hired a major Chicago law firm and incurred legal expenses. The investigation was officially terminated in 1995.

During 1993 and 1994, which is the time period relevant to this dispute, Charles Reynolds operated a small part-time law practice. These efforts were limited to a few real estate closings and related activities. In 1993, Reynold's Schedule C for this law practice reported gross receipts of only $700.[2] However, he claimed a net loss of $6,271. His deductions included $2,380 for legal fees related to the IRS investigation of certain questionable on-the-job activities. Similarly, in 1994, Reynold's Schedule C reported gross receipts of $450 with a net loss of $10,255. This amount included $5,615 in legal fees related to the ongoing investigation. In a subsequent audit, the IRS disallowed the business deduction of the legal expenses, ruling that they should instead be categorized as itemized personal expenses on Schedule A and thus deductible to the extent they exceeded the 2% "floor" limitation of 26 U.S.C. § 67(a).

In addition to the reclassification of the legal expense, IRS auditors also denied various other deductions, including automobile and travel expenses allegedly related to the law practice, to a family farm and to rental properties. Only the auto and travel

[1] Reynolds recently retired from the IRS.

[2] This case involves a discussion of various tax forms, or "Schedules," used in the preparation of a federal tax return. Schedule C is used to calculate a profit or loss from a sole proprietorship—e.g., a law practice. Schedule A is used to itemize various personal expenses that are deductible under federal law. Schedule E is used to state supplemental income or loss from various other activities—e.g., rental income from real property. Schedule F is used to state a profit or loss from farming activity.

expenses, however, are currently before us on appeal. From our own inspection of the record, we estimate the total amount of the deductions now in dispute to be approximately $3,359.[3] Included in this amount are travel and automobile expenses allegedly incurred by Charles Reynolds in the course of his law practice, including depreciation of a 1988 Toyota Camry. Similarly, the IRS denied travel and automobile expenses related to rental property owned by the Reynolds in Indiana, Kentucky and Virginia, and travel to Florida to evaluate a real estate development project that never materialized. Finally, the IRS denied travel and automobile expenses incurred in a trip to a family-owned farm in Kentucky, including the depreciation of a 1994 Ford van, which was supposedly used "to haul tillers, plows and farm tools from Virginia to Kentucky and for use in the operation of the farm."[4] Although the Reynolds did not keep a log of specific trips and the mileage that corresponded with each money-making activity, Charles Reynolds retained various receipts for gas, maintenance and repairs, and during the subsequent audit, he attempted to categorize each expense and to apportion it to the appropriate activities.

Nonetheless, the IRS denied the automobile and travel deductions on various grounds, including failure to comply with the substantiation requirements of 26 U.S.C. § 274(d). After the IRS had made several other adverse rulings that are not pertinent to this appeal, the agency calculated deficiencies of $4,732 and $3,092 for the 1993 and 1994 tax years, respectively, together with corresponding accuracy-related penalties of $946 and $618, respectively.

In August of 1997, the Reynolds petitioned the U.S. Tax Court for a redetermination of their 1993 and 1994 tax liability. In March of 1998, while this matter was still pending before the Tax Court, the Reynolds apparently sent a letter of inquiry to the IRS problem resolution office in Kansas City, Missouri, with respect to their 1993 and 1994 tax liabilities. It is important to note that this inquiry was not directed to the district counsel for the IRS, who was representing the respondent in the ongoing dispute before the Tax Court. A month later, the Reynolds received two short letters from the IRS, one pertaining to 1993 and the other to 1994, that were identically worded with the exception of the specific tax amounts peculiar to each. After listing credit adjustments for each year, both letters listed "the amount you now owe" as "none."

In April 1999, the case went to trial, and the Reynolds asserted that the IRS correspondence was tantamount to a binding admission by the government that estopped it from litigating the present case. The Tax Court rejected this argument as contrary to well-established law. The court went on to consider various testimony and exhibits, issuing a decision in part for the Reynolds and in part for the IRS. The restated liability was $2,422 and $1,937 for the 1993 and 1994 tax years, respectively, together with corresponding accuracy-related penalties of $484.40 and $387.40, respectively. Although the amount in controversy in the case is relatively small, the Reynolds assert that this appeal is being brought "to purge the taint on [Charles Reynolds'] reputation arising from the negligence penalty assessed against him." We agree that money is not the measure of all things worth

[3] Neither party in this case provides an intelligible summary of precisely which automobile and travel deductions are now on appeal nor do they give us the total amount of the claimed deductions. Moreover, during the proceedings below, the Tax Court discovered that the disputed travel, meals and automobile expenses, including depreciation of various cars owned by the Reynolds, had been consolidated on either Schedules C or E rather than spread across Schedules C, E and F to reflect the costs incurred in each activity (i.e., law practice, rental properties or farming). The Reynolds attempted to cure this problem by submitting additional documents that reflected a more precise breakdown. Although the Reynolds correctly point out that all expenses listed on Schedules C, E and F are "above-the-line" deductions, and thus their assignment to a particular Schedule has no effect on their *total* tax liability, Appellant's Br. at 27, they seem to forget that "the taxpayer[ ] bears the burden of showing a right to the business deduction." *A.E. Staley Mfg. Co. v. Commissioner*, 119 F.3d 482, 486 [80 AFTR 2d 97-5060] (7th Cir. 1997) (citing *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 [69 AFTR 2d 92-694] (1992)). It is astonishing that the Reynolds fail to make a clear statement on the *amount* of the automobile and travel deductions they are entitled to, especially since these deductions were disallowed by the Tax Court because of inadequate substantiation under 26 U.S.C. § 274(d). The Reynolds apparently believe that, if their argument carries the day, the U.S. Court of Appeals will do the math for them.

[4] According to tax returns filed by the Reynolds, the family farm generated $50 in revenues in 1993 and $1,745 in 1994. In both years, the farm operated at a net loss.

fighting for, and the issues raised here are, for the most part, serious.

II.

Pursuant to 28 U.S.C. § 2072, decisions of U.S. Tax Court are reviewable by this court. *See* 28 U.S.C. § 2072. The Reynolds present four issues for review: (1) Did the Tax Court err when it refused to consider the written notices sent to the Reynolds in relation to their 1993 and 1994 tax liability? (2) Did the Tax Court err in classifying Charles Reynolds' legal defense expenditures as § 67(a) itemized personal deductions rather than as § 162(a) business expenses? (3) Did the Tax Court err in ruling that the Reynolds had failed to adequately substantiate their automobile and travel-related expenses on Schedule C (law practice), Schedule E (rental properties) and Schedule F (farming business), as required by § 274(d)? (4) Did the Tax Court err in sustaining a § 6662(a) accuracy penalty against the Reynolds for negligent underpayments of their 1993 and 1994 taxes?

Before considering each issue in turn, we note that a decision of the Tax Court is subject to the same standards of review "that we apply to district court determinations in a civil bench trial: We review factual determinations, as well as applications of legal principles to those factual determinations, only for clear error." *Cline v. Commissioner*, 34 F.3d 480, 484 [74 AFTR 2d 94-6144] (7th Cir. 1994); *accord Toushin v. Commissioner*, 223 F.3d 642, 645–46 [86 AFTR 2d 2000-5505] (7th Cir. 2000); *Fruit of the Loom, Inc. v. Commissioner*, 72 F.3d 1338, 1343 [77 AFTR 2d 96-372] (7th Cir. 1996). However, deficiencies determined by the Commissioner are presumed to be correct and the taxpayer bears the burden of proving otherwise. *Pittman v. Commissioner*, 100 F.3d 1308, 1313 [78 AFTR 2d 96-7262] (7th Cir. 1997).

A.

[1] The first issue we address is whether the Tax Court erred when it refused to treat the two no-liability letters from the IRS (pertaining to the 1993 and 1994 tax years, respectively) as binding admissions. The Reynolds claim that these two documents are "uncontroverted binding admissions of no deficiency," thus mandating a judgment in their favor. However, the cases relied upon by the Reynolds in this regard all deal with "judicial admissions," which enter the litigation either through the pleadings or under Rule 36 of the Federal Rules of Civil Procedure. *See, e.g., Kohler v. Leslie Hindman, Inc.*, 80 F.3d 1181, 1185 (7th Cir. 1996) ("When a party in a lawsuit makes an admission in its pleadings or in its answer to a request for admissions, it makes a judicial admission that can determine the outcome of that lawsuit." (citing Fed. R. Civ. P. 36(b))); *Keller v. United States*, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995) ("Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. They may not be controverted at trial or on appeal . . . . [They] have the effect of withdrawing a fact from contention." (quotations omitted)).

Although a judicial admission has the effect of settling an issue of fact for the purposes of the current litigation, nothing of that exalted significance is present here. The alleged admissions in this case were not furnished by the IRS as part of the record before the Tax Court. In fact, the weight to be accorded these letters appears to be less than leaden.

The story unfolds as follows. The Tax Court scheduled the matter before us now for a trial to commence on March 2, 1998. On the day of trial, the district counsel for the IRS learned that the Reynolds had been subject to a premature deficiency assessment for the 1993 and 1994 tax years and motioned the Tax Court to return the case to its general trial docket. According to the court transcript for that date, the parties appeared to be close to settlement. The Reynolds offered no objection to the government's motion, and a continuance was granted. Shortly thereafter, the Reynolds apparently sent an inquiry to the IRS problem resolution office in Kansas City, Missouri. On April 13, 1998, that office generated the two no-liability letters, which

respectively credited the Reynolds' 1993 and 1994 tax years in the exact amount at issue before the Tax Court. Both of these very short letters contained the following sentence: ''This [action] is the result of your correspondence of March 18, 1998.'' However, a copy of the March 18, 1998 letter is not part of the record, presumably because it was sent to the IRS problem resolution office in Kansas City. If the Reynolds wanted the IRS to stipulate or to admit that the couple owed no taxes for 1993 and 1994, they should have directed their correspondence to the district counsel for the IRS, who was based in Chicago and apparently was well known to the Reynolds through previous settlement negotiations and court appearances. The Reynolds cannot obtain a judicial admission on the cheap.

At most, the two no-liability letters are extrajudicial admissions, which are admissible as evidence and may be weighed by the factfinder according to their probative value. *See Murrey v. United States*, 73 F.3d 1448, 1455 (7th Cir. 1996) (distinguishing between a ''judicial admission'' and an ''extrajudicial admission''); *Keller*, 58 F.3d at 1199 n.8 (distinguishing between ''judicial admission'' and other admissions which are treated as evidence). In the case before us, the letters have virtually no probative value. The letters appear to have been computer generated and do not reference in any way the litigation that has been pending before the Tax Court. The letters state that the Reynolds' ''account'' was ''adjusted.'' Because the Reynolds could not be lawfully assessed with a tax deficiency until the Tax Court issued a decision favorable to the IRS, *see* 26 U.S.C. § 6213(a), these letters most likely reflect an adjustment for a premature deficiency assessment. Unfortunately, we don't know what information the IRS office in Kansas City was acting upon because the correspondence which prompted the IRS reply is not part of the record.

Further, the settlement or closure of a civil tax dispute with the IRS is a matter controlled by statute. *See*26 U.S.C. §§ 7121 (closing agreements), 7122 (compromises). These provisions provide the exclusive method for settling civil tax disputes with finality. *See Brooks v. United States*, 833 F.2d 1136, 1145 [60 AFTR 2d 87-6063] (4th Cir. 1987) (holding that ''[s]ection 7122 is the exclusive method by which tax cases may be compromised''); *Whitney v. United States*, 826 F.2d 896, 897–98 [60 AFTR 2d 87-5547] (9th Cir. 1987) (holding that ''section 7121 of the Internal Revenue Code is the exclusive means whereby tax disputes can be settled''); *Hagadone v. Commissioner*, 98 T.C.M. (RIA) 352 [1998 RIA TC Memo ¶98,352] (''It is well established that as a general rule the Commissioner is finally and conclusively bound by an agreement with a taxpayer only if the parties enter into a closing agreement under the provisions of section 7121.''). The Tax Court correctly observed that the record ''is devoid of any evidence that petitioners and respondent entered into a valid closing or compromise agreement.'' On the evidentiary weight to be given to the no-liability letters, we are in agreement with the Tax Court. The letters get the petitioners no closer to their goal.

B.

[2] The next issue before us is whether the Tax Court erred when it ruled that legal defense costs incurred by Charles Reynolds during the 1993 and 1994 tax years were miscellaneous itemized deductions, which are subject to the 2% floor contained in 26 U.S.C. § 67(a), rather than business expenses related to the private law practice, which are fully deductible under 26 U.S.C. § 162(a). The legal costs at issue here are related to the IRS investigation of Charles Reynolds' alleged on-the-job misconduct—i.e., that he may have been conducting his private law practice during his official hours of employment at the IRS.

The Reynolds' primary argument is that Charles Reynolds' ability to practice law on a part-time basis had to be approved through appropriate IRS channels. Thus, an adverse ruling could have led to the withdrawal of this approval and thus terminated his practice of law. The Reynolds also

claim that an adverse ruling would have negatively affected Charles Reynolds' legal reputation, which would have caused him to lose law-related business. Following this logic, the Reynolds maintain that all of the legal defense costs for 1993 and 1994 ($5,615 and $2,380, respectively) were properly listed as Schedule C business expenses.

In response, the government correctly argues that this issue is governed by the ''origin of the claim'' doctrine, which was first articulated by the Supreme Court in *United States v. Gilmore*, 372 U.S. 39 [11 AFTR 2d 758] (1963). In Gilmore, the taxpayer attempted to deduct substantial legal expenses incurred in protracted divorce litigation with his estranged wife as a ''business'' expense related to income-producing property rather than as a ''personal'' expense. The taxpayer justified his position by arguing that the divorce litigation involved the disposition of three car dealerships owned by the taxpayer. He contended that the conservation of these income-producing assets depended upon his ability to retain a controlling stock in-terest in them.[5] Moreover, if certain scan-dalous allegations were proven to be true, the taxpayer's franchisor might have grounds to cancel his dealerships. The Court rejected the taxpayer's position, holding:

> [T]he characterization, as ''business'' or ''personal,'' of the litigation costs of resisting a claim depends on whether or not the claim *arises in connection with* the taxpayer's profit-seeking activities. It does not depend on the *consequences* that might result to a taxpayer's income-producing property from a failure to defeat the claim, for ... ''that would carry us too far'' and would not be compatible with the basic lines of expense deductibility drawn by Congress.

372 U.S. at 48 (emphasis in original) (footnote omitted) (quoting *Lykes v. United States*, 343 U.S. 118, 125 [41 AFTR 606] (1952)).

In the case before us, the origin of the claim lies in Charles Reynold's conduct as an IRS employee, not in his trade or business as a self-employed attorney. Charles Reynolds incurred these legal costs because an IRS investigation had been commenced to determine whether he was practicing law during his prescribed hours of employment at the IRS. Under *Gilmore*, the business-related consequences that may flow from the IRS's inquiry—that it may result in withdrawal of IRS approval for the part-time law practice or damage to Charles Reynolds' professional reputation—do not control the question whether the fees are deductible as a business expense. Since the taxpayer bears the burden of showing that he has a right to a business deduction, *A.E. Staley Mfg. Co.*, 119 F.3d at 486, and no additional arguments have been advanced on this issue, the Reynolds cannot prevail. The disputed legal fees are properly classified as miscellaneous itemized deductions, which are subject to the 2% floor contained in § 67(a).

C.

[3] The Reynolds next assert that the Tax Court erred when it denied deductions for various automobile and travel expenses that were purportedly made in connection with the law practice, the rental properties or farming activity. The Tax Court ruled that none of the expenses at issue were deductible because the Reynolds had failed to satisfy the substantiation requirements of 26 U.S.C. § 274(d). At the outset, we note that a determination that a taxpayer has failed to come forward with sufficient evidence to support a deduction, including a failure to comply with the § 274(d) substantiation requirements, is generally viewed as a finding of fact that is reviewed for clear error. *See, e.g., Yoon v. Commissioner*, 135 F.3d 1007, 1012, 1016 [81 AFTR 2d 98-938] (5th Cir. 1998) (review-

[5] *Gilmore* addressed the deductibility of legal expenses related to the conservation of income-producing property under §§ 23(a), 24(a) of the 1939 Code, and its successor statutes, 26 U.S.C. §§ 212, 262, of the 1954 Code. *See* 372 U.S. at 40 & n.3. However, it is well settled in that the holding of *Gilmore* also applies to the deductibility of legal expenses under § 162(a). *See Anchor Coupling Co., Inc. v. United States*, 427 F.2d 429, 433 [25 AFTR 2d 70-1282] (7th Cir. 1970) (applying *Gilmore* to determine deductibility of legal expenses under § 162(a)); *see also Dana Corp. v. United States*, 174 F.3d 1344, 1350–51 [83 AFTR 2d 99-1699] (Fed. Cir. 1999) (same); *Kopp's Co. v. United States*, 636 F.2d 59, 60–61 [46 AFTR 2d 80-6018] (4th Cir. 1980) (same); *Nadiak v. Commissioner*, 356 F.2d 911, 912 [17 AFTR 2d 396] (2d Cir. 1966) (same); *Berry Petroleum Co. v. Commissioner*, 104 T.C. 584, 618–22 (1995) (same).

ing § 274(d) ruling for clear error); *Buelow v. Commissioner*, 970 F.2d 412, 415 [70 AFTR 2d 92-5521] (7th Cir. 1992) (''The tax court determination that a taxpayer has failed to come forward with sufficient evidence to support a deduction is a factual finding subject to reversal only if found to be clearly erroneous.''). The tax code precludes a deduction for various enumerated items, including auto and travel expenses, unless a taxpayer substantiates ''by [1] adequate records or [2] by sufficient evidence corroborating the taxpayer's own statement'' the following five elements: the amount, date, time, place and business purpose of the expense. 26 U.S.C. § 274(d); *see also Dowell v. United States*, 522 F.2d 708, 714 [36 AFTR 2d 75-6314] (5th Cir. 1975).

Here, the Reynolds fall far short of the necessary showing. Based on the regulations under § 274(d), the Reynolds cannot avail themselves of the ''adequate records'' language of § 274(d) because they did not maintain logs for each vehicle in their household to reflect their use in the law practice, rental property management or farming activities. *See* 26 C.F.R. § 1.274(d)(2) (1993) (stating that substantiation by adequate records requires a taxpayer ''to maintain an account book, diary, log, statement of expense, trip sheets, or similar record'' that is made ''at or near the time of the expenditure or use''). Although Treasury regulations implementing § 274(d) clearly state that ''adequate records'' are not the *only* method of establishing eligibility, alternative methods are disfavored—and for good reason. At the risk of the reader's eyes glazing over, we will quote at length the ''rules of substantiation'' as they appeared in the 1993 Code of Federal Regulations,[6] especially since they bear on the accuracy-related penalties that the Reynolds also appeal:

> [A] taxpayer must substantiate each element of an expenditure or use ... by [1] adequate records or [2] by sufficient evidence corroborating his own statement .... A contemporaneous log is not required, but a record of the elements of an expenditure or of a business use of listed property made at or near the time of the expenditure or use, supported by sufficient documentary evidence, has a high degree of credibility not present with respect to a statement prepared subsequent thereto when generally there is a lack of accurate recall. Thus, the corroborative evidence required to support a statement not made at or near the time of the expenditure or use *must have a high degree of probative value* to elevate such statement or evidence to the level of credibility reflected by a record made at or near the time of the expenditure or use supported by sufficient documentary evidence. The substantiation requirements of section 274(d) are designed to encourage taxpayers to maintain the records, together with documentary evidence, as provided in paragraph (c)(2) of this section [entitled ''Substantiation by *adequate records*'']. 26 C.F.R. § 1.274-5T(c)(1) (1993) (emphasis added).

The implications of this passage are unmistakable. Complete, contemporaneous records are the preferred method of substantiation. Taxpayers who pursue alternative methods will have to present evidence that is equally credible and probative, which will be difficult.

When a taxpayer cannot substantiate his deduction with ''adequate records,'' the Treasury Regulations specifically lay out the method for substantiation ''by other sufficient evidence.'' A taxpayer must establish each element of a § 274(d) business expense ''(A) By his own statement, whether written or oral, containing specific information in detail as to such element; and (B) By other corroborative evidence sufficient to establish such element.'' § 1.274-5T(c)(3)(i) (1993).

This alternate method was utilized by the Reynolds at trial. Specifically, Charles Reynolds testified as to the business purpose of each deduction and attempted to

[6] The 1993 version governs the 1993 tax year and could have provided guidance to the Reynolds in their recordkeeping efforts. Based on our own brief review, however, the 2002 version of this regulation is substantially the same as the one in effect in 1993.

substantiate his account by presenting various documents that purported to reconstruct the date, amount and proper categorization of the claimed expenses. To prepare these exhibits, Reynolds relied on voluminous receipts and cancelled checks from the 1993 and 1994 tax years; a "representative" sample of these receipts was made available for inspection and then submitted into the record.

The Tax Court ultimately found this testimony and evidence unconvincing. For example, Charles Reynolds created a two-page chart entitled "Reconstruction of Mileages Driven," which categorizes his 1993 auto expenses by month and profit-making activity (i.e., law practice, farm or rental properties). At the bottom of the chart, 3,715 miles were attributed to the "farm" for trips on April 22, June 13, July 28 and October 11. However, the only elaboration of the business purpose of the trips was the term "crops," which appears next to the dates. Charles Reynolds' testimony on his farming activities also undermined his case, since the Tax Court found it "vague, confusing, and evasive." But perhaps the most damaging detail was an admission by Reynolds that no crops were grown on his farm during the 1993 tax year.

Expenses attributed to the rental properties suffered similar problems. For the 1993 tax year, the Reynolds attributed 3,646 miles and $995.30 in hotel bills to two trips to Virginia, where they own rental property. Yet, the only business explanation for this substantial deduction is the elliptical phrase "cleaning, leasing." The corroborating evidence, in combination with Charles Reynolds' testimony on the nature of these trips, simply does not have the "high degree of probative value" necessary to put it on a par with "adequate records" documentation. § 1.274-5T(c)(1); *see also Masat v. Commissioner*, 784 F.2d 573, 575 [57 AFTR 2d 86-1029] (5th Cir. 1986) (ruling that mere fact that taxpayer owns out-of-state property does not satisfy his or her burden of proving that the travel expenses were motivated by business rather personal reasons).

Of the four corroborating summaries presented at trial, the 1993 chart is the most comprehensive breakdown. Unfortunately, it does not contain the type of specific detail mandated by the Treasury Regulations; all of the travel and car maintenance expenses are listed by month rather than by specific trip. *See* § 1.274-5T(c)(3)(i) (in the absence of contemporaneous written evidence, requiring "specific information in detail" as to each element of a § 274(d) deduction). The listed figures are presumably the sum of adding together the voluminous receipts, though only "representative" receipts were included in the record.[7] But as the Tax Court correctly observed, many of these receipts are for automobile repairs having no apparent relationship to any particular trip or business. Section § 274(d) requires the taxpayer to prove the amount, date, time, place and business purpose of each claimed expense. The existence of these elements simply cannot be discerned in any of the Reynolds' reconstructed summaries.

The automobile and travel expenses for the Reynolds' farming activities (Schedule F) and rental properties (Schedule E) clearly fail because of inadequate substantiation. *See* 26 C.F.R. § 1.274-5T(c)(1) (stating that non-contemporaneous evidence "must have a high degree of probative value" to establish eligibility for deduction). Although we believe that the auto and travel expenses attributed to the law practice (Schedule C) share similar defects, they also suffer the more fundamental problem of being nondeductible commuting expenses.

According to Reynolds, the mileage attributed to his law practice resulted from travel between his home and a title company, where he handled several real estate closings for his clients. In general, commuting expenses between home and work are personal and therefore nondeductible.

[7] The government emphasizes the fact that the Reynolds' "representative" sample is both incomplete and arbitrary in what is does and does not support, but additional receipts would not have helped the Reynolds' case. Rather, the testimony and corroborating summaries, which were presented at trial, were insufficient to establish the required elements of § 274(d). *See Dowell*, 522 F.2d at 714 (holding that a "virtual blizzard of bills, chits and other papers" does not satisfy the "expenditure by expenditure determination" required by § 274(d)).

See Commissioner v. Flowers, 326 U.S. 465, 473–74 [34 AFTR 301] (1946); *accord H B & R, Inc. v. United States*, 229 F.3d 688, 690 [86 AFTR 2d 2000-6426] (8th Cir. 2000) (''*Flowers* established the general rule that an employee's expenses in commuting from home to work are personal, not deductible business expenses.''); 26 C.F.R. § 1.262-1(b)(5) (''The taxpayer's costs of commuting to his place of business or employment are personal expenses and do not qualify as deductible expenses.''). However, if a taxpayer maintains a home office as a principal place of business, and periodically travels to other sites to meet with clients or otherwise conduct their business, then these traveling costs are deductible as a business expense. That said, the taxpayer bears the burden of producing sufficient evidence to show that his ''principal place of business'' is, in fact, a home office. *Browning v. Commissioner*, 890 F.2d 1084, 1087 [65 AFTR 2d 90-385] (9th Cir. 1989). Here, the Tax Court noted that during the 1993 and 1994 tax years, Charles Reynolds failed to claim a home office deduction. While failure to claim the deduction alone does not settle the issue of the traveling costs, the court also stated that Charles Reynolds ''offered no evidence and made no argument that his 'principal place of business' was at his home.'' Notwithstanding conclusory assertions contained in the Reynolds' brief, the record, as we read it, wholly supports this assessment. Therefore, we conclude that none of the Schedule C auto and travel expenses are deductible.

D.

[4] The final issue on appeal is whether the Tax Court erred in upholding an accuracy-related penalty under 26 U.S.C. § 6662 for the negligent underpayment of income taxes. The term ''negligence'' is defined by statute to include ''any failure to make a reasonable attempt to comply with the provisions of this title.'' § 6662(c). The 1993 implementing regulation states:

> The term negligence includes any failure to make a reasonable attempt to comply with the provisions of the internal revenue laws or to exercise ordinary and reasonable care in the preparation of a tax return. ''Negligence'' also includes any failure by the taxpayer to keep adequate books and records or to substantiate items properly.

26 C.F.R. § 1.662-3(b)(1) (1993). At the outset, we note that a finding of negligence under § 6662 is a finding of fact that we review for clear error. *See Hayden v. Commissioner*, 204 F.3d 772, 775 [85 AFTR 2d 2000-825] (7th Cir. 2000). In addition, determinations of negligence by the Commissioner ''are presumed to be correct, and the taxpayer has the burden of proving that the penalties are erroneous.'' *Id.* (citing *Welch v. Helvering*, 290 U.S. 111, 115 [12 AFTR 1456] (1933); *Forseth v. Commissioner*, 845 F.2d 746, 749 [61 AFTR 2d 88-1197] (7th Cir. 1988)).

The Reynolds attempt to rebut the presumption of correctness by claiming that they have satisfied the ''good faith'' affirmative defense, which is also provided by statute. The relevant provision states that no penalty shall be imposed for underpayment of taxes if the taxpayer can demonstrate ''that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion.'' 26 U.S.C. § 6664(c). The Treasury Regulation that implements this statute further elaborates:

> The determination of whether a taxpayer acted with reasonable cause and in good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances. The most important factor is the extent of the taxpayer's effort to assess the taxpayer's proper tax liability. Circumstances that may indicate reasonable cause and good faith include an honest misunderstanding of fact or law that is reasonable in light of the *experience, knowledge and education of the taxpayer.*

26 C.F.R. § 1.6664-4(b)(1) (1993) (emphasis added). Here, the ''experience, knowledge and education'' proviso is fatal for Charles Reynolds, who is a licensed attor-

ney, certified public accountant and IRS audit supervisor.[8]

As evidence of good faith, the Reynolds argue that they classified their 1993 and 1994 using the CCH Master Tax Guide, which is a treatise containing annotations to relevant statutes, regulations and case law. Assuming *arguendo* that reliance on an established secondary source can be the basis of a § 6664(c) good-faith defense, the Reynolds fail to direct us to the specific passages of the CCH Master Tax Guide upon which they reasonably relied.

The Reynolds next assert that their 1994 tax return was prepared using a commercial software program called Turbo Tax, which they claim is a ''tax preparer'' and is subject to IRS penalties. *See* Rev. Rul. 85-187, 1985-2 C.B. 338 (stating that a firm ''that furnishes a computerized tax return preparation service to tax practitioners is an income tax preparer when the program used goes beyond mere mechanical assistance''). This argument, however, goes nowhere. In order to demonstrate an ''honest misunderstanding of fact or law'' under § 1.6664-4(b)(1), the Reynolds must at least make the threshold showing that reliance on Turbo Tax caused them to make substantive errors in their tax preparation. Even then, the mere fact of reliance may not be enough. *See* § 1.6664-4(b)(1) (1993) (''Reliance on an information return or on the advice of a professional (such as an appraiser, attorney or accountant) does not necessarily demonstrate reasonable cause and good faith.'').

Finally, the Reynolds defend their failure to allocate their automobile expenses to Schedules C, E and F as the ''considered judgment of a tax professional who recognized that absolutely NO tax impact flowed from the allocation itself.'' The gist of the Reynolds' argument is that no tax consequences flow from the apportionment of expenses between the Schedules since they all constitute ''above-the line'' deductions used to calculate adjusted gross income. Yet, the fact that all the claimed deductions were above-the-line obscures the more fundamental problem that a more precise allocation was not made because the Reynolds' business records were not adequately organized and thorough. At trial, Charles Reynolds stated that ''[a] more rigorous application of the allocation guidelines or the application of the mileage guidelines between Schedules C, Schedules E and Schedule F would have required a substantial amount of work, okay, in terms of ... tying the receipts back to support the mileage in each of these items.'' But without making these allocations, the required elements of substantiation under § 274(d) cannot be met. Because of his substantial education and experience in tax law and administration, we must impute basic knowledge of the elements of substantiation to Charles Reynolds. We therefore uphold the § 6662(a) accuracy-related penalties in their entirety.[9]

III.

For the forgoing reasoning, the judgment of the Tax Court is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of

Appeals for the Seventh Circuit

¶2002-5103

Deborah LAMPKINS, PLAINTIFF-APPELLEE v. Robert H. GOLDEN, Trustee, Robert H. Golden P.C. Profit Sharing Trust, DEFENDANT, Robert H. GOLDEN, DEFENDANT-APPELLANT. U.S. Court of Appeals, Sixth Circuit, (CA6) Docket No. 00-1443, Jan. 17, 2002. District Court affirmed. Decision for Plaintiff.

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[8] During cross-examination at trial, Charles Reynolds stated that he is a licensed CPA in the state of South Carolina. In addition, Reynolds is now retired from the IRS.

[9] The accuracy-related penalties are calculated in relation to specific underpayments. However, with the exception of an unfocused argument on auto and travel expenses, the Reynolds's brief did not make good-faith defense arguments directed at any specific underpayment penalty. The fact that the Reynolds failed to substantiate various travel expenses has no bearing on accuracy-related penalties for an underpayment resulting from other tax errors. For example, the Reynolds failed to make any argument that a good-faith defense applied to Charles Reynolds' legal defense fees, which were erroneously deducted during the 1993 and 1994 tax years. Without a reasoned analysis, we cannot disturb the Commissioner's negligence determination, which is presumptively correct. *See Hayden*, 204 F.3d at 775.

1. Employee retirement plans—simplified employee pension (SEP)—qualification. District court properly determined that pro se attorney/employer's SEP was excepted from ERISA's anti-alienation provision as IRC §408(k) qualified plan and thus subject to garnishment: attorney's argument that SEP's qualification depended 1st on its qualification under IRC §408(a) as IRA, or satisfaction of IRC §408(k)(2) participation requirements, was belied by statute's plain language; his argument regarding IRC §408(k)(5), written allocation requirements of which were met by plan's explicit provisions, was meritless; and ERISA preempted Michigan law's exemption from levy for IRC §408 plans. Also, record supported decision that SEP assets included attorney's and wife's outstanding debt. *Reference:* United States Tax Reporter ¶4085.04; 4085.02. IRC §408; 415.

On Appeal from the United States District Court for the Eastern District of Michigan. United States Court of Appeals. Sixth Circuit.

Before SILER and CLAY, Circuit Judges; and GRAHAM, District Judge.*

CLAY, Circuit Judge.

Defendant, Robert H. Golden, an attorney proceeding pro se, appeals from the district court's order entered on March 23, 2000, adopting the magistrate's report and recommendation and entering summary judgment in favor of Plaintiff, Deborah Lampkins, against garnishee Defendant "RHG Law Offices SEP." For the reasons set forth below, we AFFIRM.

STATEMENT OF FACTS

Plaintiff filed suit against Defendant-Appellant on March 23, 1993, against Defendant, Trustee of the Robert H. Golden P.C. Profit Sharing Trust ("Profit Sharing Plan"), and the Robert H. Golden P.C. Pension Trust ("Pension Plan"), averring several violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., including a breach of Defendant's fiduciary responsibilities. Plaintiff also claimed that her accrued benefits in her Pension Plan and Profit Sharing Plan were misstated. Defendant filed a counter-claim seeking attorney's fees and costs for defending the action.

Plaintiff was employed as a secretary to Defendant from sometime in 1980 through March 27, 1992. During the period of her employment with the law firm, Plaintiff participated in both the Profit Sharing Plan and the Pension Plan. Defendant, who is the sole shareholder and president of the law firm, serves as the trustee of both plans and is the only other participant in the plans.

On August 8, 1995, the district court granted summary judgment to Plaintiff and ordered Defendant to pay Plaintiff accrued benefits in the amount of $1,371.33 from the Profit Sharing Plan and $10,817.50 from the Pension Plan. In addition, the district court assessed a penalty against Defendant for his delay in producing the documents requested by Plaintiff. The district court dismissed Defendant's counter-claim. Defendant appealed the district court's decision, challenging only the court's imposition of a fine against him--i.e., Defendant did not challenge the amount owed to Plaintiff regarding the retirement plan. This Court thereafter affirmed the district court. See Lampkins v. Golden, 1996 WL 729136, at *1 [79 AFTR 2d 97-817] (6th Cir. Dec.17, 1996) (unpublished).

On June 6, 1997, the district court ordered Defendant to pay Plaintiff attorney's fees and costs in the amount of $5,213.58. (J.A. at 271.) Defendant refused to pay the 1995 and 1997 judgments entered against him claiming that he had no assets or income, despite his continued law practice. Plaintiff subsequently discovered that Defendant had placed assets in an individual retirement account, that being the RHG Law Offices, P.C. Simplified Employee Pension ("RHG SEP"). Specifically, Plaintiff alleged that the RHG SEP had approximately $90,000 in assets comprised of $30,000 in a Merrill Lynch Account, and $60,000 in outstanding loans made by De-

* Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

fendant to himself, his wife, and various other entities that he owns and operates, including a $5,600 promissory note owed to RHG SEP by Defendant and his wife. Based upon this information, Plaintiff garnished the RHG SEP in an effort to collect her judgments, and sought summary judgment in the district court. Plaintiff obtained an ex parte restraining order as well as an order enjoining Defendant from removing any funds from the RHG SEP.

The matter was referred to Magistrate Judge Thomas A. Carlson for a report and recommendation and, after hearing oral argument on the matter, the magistrate recommended that "Plaintiff's Motion for Summary Judgment on her Writs of Garnishment should be granted, and she should be allowed to garnish the RHG SEP Plan, including the Merrill Lynch account and the $5,600 loan owed by Defendant and his wife to the fund." (J.A. at 222.) Defendant filed objections to the magistrate's report and recommendation, and on March 23, 2000, the district court, having considered Defendant's objections, accepted the magistrate's report and entered summary judgment against garnishee Defendant RHG law offices SEP. The district court ordered that

> B) Within ten (10) days of the date of this Order, all amounts held in the Merrill Lynch, Pierce, Fenner, and Smith, Inc. brokerage account # 64283T55 of the RHG Law Offices P.C. SEP shall be liquidated and transferred by check payable to the Michael F. Saggau Trust Account--IOLTA. Provided, however that the amount transferred shall not exceed the outstanding judgment amount of $36,851.46 plus post-judgment interest owed at the rate set forth in 28 U.S.C. Section 1961 in the amount of $10,699.00. C) Ownership of the debt obligation owed by Robert Golden and his spouse Judith Golden to the RHG Law Offices P.C. SEP, which this Court finds to be in the amount of $5,600 (five thousand, six-hundred dollars) plus interest in the amount of 11% (eleven percent) per annum from December 1, 1993 (as set forth in the Assignment of Mortgage attached as Exhibit C to Plaintiff's Motion for Summary Judgment on Writs of Garnishment), is hereby transferred to Plaintiff Deborah Lampkins. Provided, however, that the amount of this debt obligation to be transferred shall not exceed the outstanding judgment amount of $36,851.46 plus post-judgment interest owed at the rate set forth in 28 U.S.C. Section 1961 in the amount of $10,699.00, minus the amount trans-ferred pursuant to paragraph A) [sic] of this Order.

(J.A. at 249–50.) Defendant did not file a bond to stay enforcement of the March 23, 2000 judgment, but instead filed a motion to waive the bond requirement; the motion was subsequently denied. According to Plaintiff, Merrill Lynch complied with the district court's order and sent Plaintiff, through counsel, a check in the amount of $47,550.46 to satisfy the 1995 and 1997 judgments. Defendant now appeals the district court's judgment granting summary judgment to Plaintiff on her claim of garnishment.

DISCUSSION

[1] This Court reviews a district court's order granting summary judgment de novo. Logan v. Denny's, Inc., 259 F.3d 558, 565 (6th Cir.2001). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56.

Defendant makes four arguments in support of his contention that the district court erred in granting Plaintiff's motion for summary judgment. First, Defendant claims that the RHG SEP is exempt from garnishment under federal law; second, Defendant claims that the RHG SEP is exempt from garnishment under state law; third, Defendant claims that the exemption under state law is not preempted by federal law; and finally, the district court ignored evidence that Defendant had repaid the RHG SEP in full. We disagree with Defen-

dant's arguments and will address each in turn.

A. Whether the RHG SEP is Exempt from Garnishment Under Federal Law

Defendant first argues that under ERISA's anti-alienation provision, Plaintiff is precluded from garnishing the RHG SEP.

29 U.S.C. § 1056(d)(1), the anti-alienation provision in question, states that "benefits provided under the plan may not be assigned or alienated." This provision is qualified, however, by § 1051(6) which provides the following exception:

> This part shall apply to any employee benefit plan described in section 1003(a) of this title ... other than--
>
> * * *
>
> (6) an individual retirement account or annuity described in section 408 of Title 26, or a retirement bond described in section 409 of Title 26 ....

29 U.S.C. § 1051(6). Section 408 of Title 26, the Internal Revenue Code, entitled Individual Retirement Accounts, encompasses Defendant's retirement plan. Specifically, § 408(k) defines and lists the requirements of a "simplified employee pension" or SEP. See 26 U.S.C. § 408(k). Therefore, because Defendant's RHG SEP is one described in section 408 of Title 26, it follows that Defendant's SEP is not exempted by ERISA's anti-alienation provision. See 29 § U.S.C 1051(6).

Defendant attempts to avoid § 1051(6) by arguing that the RHG SEP does not fall under the guise of a § 408 account. Defendant maintains that the RHG SEP does not meet the definition of an individual retirement account as set forth in § 408(a), and therefore contends that this subsection of § 408 does not apply. Defendant notes that the district court found that the RHG SEP qualified under subsection (k) of § 408, and not subsection (a). Defendant contends, however, that its SEP does not qualify under subsection (k) because to do so would require first and foremost that the retirement plan be an individual retirement account. Therefore, according to Defendant, a plan must qualify as an individual retirement account as defined in subsection (a) before it can be considered a simplified employee pension under subsection (k)(1); and because the RHG SEP does not qualify under subsection (a), the district court therefore erred in finding that it qualified under subsection (k). Finally, Defendant argues that even if one is to assume that the RHG SEP is an individual retirement account for purposes of satisfying subsection (k)(1), because the RHG SEP cannot be found to meet the requirements of subsection (k)(2), (3), (4) and (5), it cannot qualify under § 408(k).

Discussion of subsection (a) under § 408 is unnecessary inasmuch as the district court did not find that Defendant's RHG SEP fell under this subsection. Rather, as noted by Defendant himself, the district court found that Defendant's RHG SEP fell under the auspices of subsection (k) of § 408. Therefore, the next step is to examine each of Defendant's arguments as to why its RHG SEP does not qualify as a § 408(k) plan.

1. In Order to Qualify Under Subsection (k), the Plan Must Meet the Definition of an Individual Retirement Account Under Subsection (a)

Defendant argues that to qualify as an individual retirement account under subsection (a), the contributions thereto cannot exceed $2,000 per taxable year, and the RHG SEP exceeded that amount, thereby making it ineligible under subsection (a). Defendant's argument fails in this regard inasmuch as subsection (j) of § 408 specifically states that "[i]n the case of any simplified employee pension, subsections (a)(1) and (b)(2) of this section shall be applied by increasing the $2,000 amounts contained therein by the amount of the limitation in effect under section 415(c)(1)(A)." See 26 U.S.C. § 408(j). Section 415(c)(1)(A), in turn, provides that contributions to the plan cannot exceed $30,000 per year of 25% of the participant's compensation annually, whichever amount is greater. See 26 415(c)(1)(A). Defendant does not claim that the contributions to the RHG SEP exceed those stated

in § 415(c)(1)(A); thus, his claim that subsection (k) does not apply because the contributions exceed the limit of $2,000 as set forth in subsection (a) is without merit.

2. In Order to Qualify Under Subsection (k), the Plan Must Meet the Participation Requirements of § 408(k)(2)

Defendant contends that under subsection (k)(2)'s participation requirement, Defendant, as the employer, was required to make annual contributions to the plan for each employee who earned more than $300 annually. Because he earned more than $300 annually, but did not make contributions to the RHG SEP on his own behalf some years, Defendant argues that the RHG SEP cannot qualify under § 408(k). We disagree. As found by the district court, the participation requirement for subsection (k) expressly uses the term ''if'' in reference to contributions made by the employer for a given year, thereby leaving it to the discretion of the employer to make contributions for that year if the employer wishes to meet the definition. In other words, the participation requirement is discretionary and not mandatory, such that Defendant's claim in this regard fails.

3. In Order to Qualify Under Subsection (k), the Plan Must Meet the Requirements of § 408(k)(5) that Contributions be Made Pursuant to a Written Formula

Defendant argues that because the RHG SEP does not meet the requirements of subsection (k)(5), ''contributions must be made under a written allocation formula,'' it cannot qualify under § 408 of the Internal Revenue Code. Subsection (k)(5) provides that requirements of this paragraph are met with respect to a simplified employee pension only if employer contributions to such pension are determined under a definite written allocation formula which specifies--

(A) the requirements which an employee must satisfy to share in an allocation, and

(B) the manner in which the amount allocated is computed.

26 U.S.C. § 408(k)(5). Defendant's claim is without merit where the provisions of the RHG SEP expressly meet the written allocation formula requirements. Specifically, the RHG SEP provides that ''[t]he allocation will be based on the same percentage of each Participant's Compensation, provided that the contribution for any Employee shall not exceed the lesser of 15% of the Participant's Compensation for the Plan Year involved or $30,000.'' (J.A. at 99–100.) Therefore, Defendant's claim in this regard is baseless.

In summary, the district court did not err in finding that Defendant's RHG SEP was exempt from ERISA's anti-alienation provision inasmuch as the RHG SEP qualifies as an individual retirement account under Internal Revenue Code § 408(k). See 29 U.S.C. § 1051(6) (providing that ERISA's anti-alienation provision does not apply to an individual retirement account or annuity described in section 408 of Title 26, or a retirement bond described in section 409 of Title 26).

B. Whether the RHG SEP is Exempt from Garnishment Under State Law

Defendant argues that if the RHG SEP qualifies under 26 U.S.C. § 408, then it is exempt from garnishment under Michigan law. Specifically, Defendant claims that the RHG SEP is exempt from garnishment under Mich. Comp. Laws Ann. § 600.6023(k), which provides that ''[a]n individual retirement account or individual retirement annuity as defined in section 408 or 408(a) of the internal revenue code'' is exempt from levy and sale under any execution.

Plaintiff argues that the state exemption is preempted under ERISA, and that even if the state exemption was not preempted, it would only apply to the contributions made by Defendant which exceeded a certain amount. Because we agree with Defendant and the district court that the state exemption is preempted under ERISA, we will focus on that argument.

C. Whether Mich. Comp. Laws Ann. 600.6023(1) is Preempted by ERISA

Based on the magistrate's report and recommendation, the district court found that under ERISA's section 1144(a), the Michigan statute was preempted. Section 1144(a) provides that Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a). In finding that this provision applied, the court relied upon Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825, 829, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), wherein the Supreme Court explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." The district then opined that because Mich. Comp. Laws Ann. § 600.6023(1) exempts all § 408 individual retirement pension plans from garnishment, while ERISA would allow garnishment of those funds, the Michigan statute clearly "relates to" or has a "connection with" the subject ERISA plan. The district court concluded that, as a result, the Michigan statute was preempted.

On appeal, Defendant attempts to distinguish Mackey by claiming that the Georgia statute in question in that case expressly used the term "ERISA" in describing plans to which the state law purported to apply, while the Michigan statute in question does not expressly use the term "ERISA." Defendant's argument is clearly without merit, where the Supreme Court has expressly rejected this contention. See Dist. of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 130–31, 113 S.Ct. 580, 121 L.Ed.2d 513 (1992) (holding a state law preempted because it "impos[ed] requirements by reference to [ERISA]"); see also Kentucky Ass'n of Health Plans, Inc. v. Nichols, 227 F.3d 352, 358 (6th Cir.2000) (recognizing the holding and force of Greater Washington Bd. of Trade in this regard). In other words, the state statute need only impose requirements on ERISA plans to be preempted. See Greater Washington Bd. of Trade, 506 U.S. at 130–31, 113 S.Ct. 580.

Defendant also seeks to interject an argument on appeal that he did not raise in the district court. Of course, we do not entertain such belated arguments on appeal. See White v. Anchor Motor Freight, Inc., 899 F.2d 555, 559 (6th Cir.1990). However, we note that Defendant now seems to argue, based upon his misrepresentation that the district quote misquoted § 1144, that § 1051(6) excepts Internal Revenue Code § 408 from ERISA's preemption because ERISA's § 1003(a) states that this title applies to benefit plans except as provided in § 1051. As with his other allegations of error, Defendant's claim must fail based upon a plain reading of the ERISA statute.

It is true that § 1051 states that "this part" shall not apply to certain plans, including § 408 plans as we saw with ERISA's anti-alienation provision; however, the "this part" to which the statute refers is part two which encompasses participation and vesting, not preemption. ERISA's preemption is set forth in part five, which does not exclude plans under § 408 of the Internal Revenue Code.

Therefore, in summary, the Michigan statute upon which Defendant relies is preempted under federal law, such that the RHG SEP is subject to garnishment.

D. Whether the District Court Properly Assigned the Outstanding Debt Owed by Defendant and his Wife to the RHG SEP

Defendant and his wife transferred $7,500 from the Robert H. Golden, P.C. Employees' Pension Plan and Trust to himself and his wife in 1991, and designated this as a "loan." A portion of the debt, $5,600, was assigned to the RHG SEP on April 29, 1995. This entire debt, plus interest at the rate of 11% per year from December 1, 1993, remains outstanding.

The district court found that this debt owed by Defendant and his wife was an asset of the garnished RHG plans and assigned that debt to Plaintiff pursuant to her writ of garnishment. Plaintiff did not attempt collection of the debt inasmuch as the monies provided by Merrill Lynch satisfied the outstanding judgment amounts. However, Plaintiff claims that she will seek collection of this debt to satisfy costs and attorney's fees associated with this appeal.

Defendant argues, as he did in the district court, that the $5,600 debt to the RHG SEP was deemed paid because he scrawled ''paid in full'' upon the earlier $7,500 note. However, the records produced by Defendant do not support a finding that this note was satisfied. Defendant failed to produce a cancelled check, bank statement, or any other document evidencing the repayment of the $5,600. Instead, Defendant relies upon records showing a 1997 payment of $9,000 to the RHG SEP from Defendant's law firm, but these records indicate that the monies were employer contributions to the RHG SEP Merrill Lynch account. Defendant claims that the $9,000 employer contribution was actually not an employer contribution at all, but in-stead was a repayment by him and his wife of the $5,600 debt they owed. However, Defendant offered nothing but his conten-tion in this regard, whereas the record from Merrill Lynch clearly lists the funds as ''employer contributions.'' Therefore, we agree with the district court that the record does not support a finding that the loan amount was paid by Defendant and his wife.

CONCLUSION

For the reasons set forth above, the district court's judgment granting summary judgment to Plaintiff is AFFIRMED.

¶2002-5104

Robert D. MUELLER, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals For the Seventh Circuit, (CA7) Docket No. 02-1189, June 27, 2002. Tax Court, (2001) TC Memo 2001-274, RIA TC Memo ¶2001-274, 82 CCH TCM 764 (opinion by Pajak, *J.*), affirmed. Year 1996. Decision against Taxpayer.

1. Filing status—distinction between married taxpayers and unmarried economic partners—constitutionality—frivolous appeals sanctions. Tax Court properly upheld deficiency against homosexual taxpayer who attempted to file joint return with domestic partner: taxpayer's claim that Defense of Marriage Act unconstitutionally taxed homosexuals in violation of Equal Protection Clause was properly rejected where he never sought recognition of same-sex relationship under state law, so Act was never implicated; he admitted he wasn't legally married under state law thus precluding joint filing; and he didn't offer evidence discrediting IRS's deficiency determination. Also, taxpayer was warned about possible future sanctions if he files further frivolous appeals. *Reference:* United States Tax Reporter ¶15.01(5). IRC §1; 6673.

Appeal from an order of the United States Tax Court No. 4743-00. United States Court of Appeals For the Seventh Circuit.

Before: Honorable William J. Bauer, Circuit Judge, Honorable Kenneth F. Ripple, Circuit Judge, Honorable Daniel A. Manion, Circuit Judge.

Judgment - Without Oral Argument

The judgment of the United States Tax Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

Order

PAJAK, Special Trial Judge:

Submitted June 26, 2002*

Upon learning that Robert Mueller had underpaid his income taxes for 1996, the

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

IRS issued a deficiency notice that required him to pay the $8,712 due the government. Mr. Mueller petitioned the Tax Court for a redetermination of the unpaid tax, and after a one-day trial the court upheld the calculations in the deficiency notice. Mr. Mueller appeals, and we affirm.

In preparing his tax return for 1996, Mr. Mueller attempted to file jointly with his partner, Mr. Todd Bates. Involved in an intimate relationship with Mr. Bates since 1989, Mr. Mueller believes that he and Mr. Bates should be allowed to file a joint return like married couples. Therefore, on his 1996 tax return Mr. Mueller listed Mr. Bates' information in the blank designated for his spouse's name and social security number but struck the word "Spouse" from the label. He also marked the box that indicated his filing status as "Married filing joint return," although he struck the word "Married" from that label as well. Mr. Mueller completed the rest of the form, listing his income and applying the "married filing jointly" deduction, which was much larger than the standardized deduction for a single person. Both men signed and dated the form, which Mr. Mueller then filed with the IRS.

During his brief trial in the Tax Court, Mr. Mueller testified on his own behalf and tried to persuade the court that homosexuals are being taxed in violation of the Equal Protection Clause. He argued that because of this inequity the Tax Court should declare the Defense of Marriage Act, Pub L. 104–199, 110 Stat. 2419 (1996), unconstitutional. The court rejected Mr. Mueller's arguments and entered judgment in favor of the IRS.

This is not the first time we have encountered Mr. Mueller and his equal protection arguments. Just last year, Mr. Mueller appealed a similar Tax Court decision pertaining to tax years 1986–1995, and in that appeal he raised an identical challenge to the Defense of Marriage act. *See Mueller v. Comm'r*, No. 00-3587, 2001 WL 522388 [87 AFTR 2d 2001-2052] (7th Cir. April 6, 2001) (unpublished order). We rejected his argument because the Defense of Marriage Act was not in effect during the tax years at issue there.

[1] Although Mr. Mueller is correct that the Act was effective during 1996, the tax year at issue in this appeal, the statute had absolutely no bearing on his filing status. The Defense of Marriage Act presumptively denies federal recognition of same-sex marriages should any state choose to recognize such unions. *See* 28 U.S.C. § 1738C. But as the Commissioner argues, Mr. Mueller did not try to have his same-sex relationship recognized as a marriage under Illinois law, and thus the Defense of Marriage Act was not implicated. Instead Mr. Mueller's filing status depended only on whether he was legally married under Illinois law at the close of tax year 1996, *see* 26 U.S.C. § 7703; 26 CFR § 1.7703-1 *see also Estate of Steffke v. Commissioner*, 538 F.2d 730, 733 [38 AFTR 2d 76-6248] (7th Cir. 1976), which he admitted he was not. Therefore, the constitutionality of the Defense of Marriage Act is irrelevant.

Furthermore, Mr. Mueller presented no evidence to discredit the Commissioner's calculation of the deficiency, which enjoys a presumption of correctness. *See Welch v. Helvering*, 290 U.S. 111, 115 [12 AFTR 1456] (1993); *Pittman v. Commissioner*, 100 F.3d 1308, 1313 [78 AFTR 2d 96-7262] (7th Cir. 1996). We remind Mr. Mueller once again that despite his personal dissatisfaction with the current tax laws, he does not have licence to ignore them. We also warn Mr. Mueller that if he continues to file frivolous tax appeals, he faces the possibility of sanctions. *See* Fed. R. App. P. 38; Cir. R. 38; *see also Cohn v. Comm'r*, 101 F.3d 486 [78 AFTR 2d 96-7281] (7th Cir. 1996) (per curiam).

AFFIRMED.

¶2002-5105

UNITED STATES OF AMERICA, APPELLEE v. Daniel M. FIRMENT, DEFENDANT-APPELLANT. U.S. Court of Appeals, Second Circuit, (CA2) Docket No. 01-1243, July 18, 2002. District Court

affirmed. Years 1994, 1995, 1996, 1997. Decision against Taxpayer.

1. Tax crimes—conspiracy to defraud IRS—U.S. Sentencing Guidelines—restitution. District court properly calculated taxpayer's sentence for conspiring to defraud IRS of tax on fraudulent telemarketing scheme income: application of U.S.S.G. §3A1.1(b)(1)'s vulnerable victim adjustment was appropriate based on elderly telemarketing scheme's victims' vulnerability, and wasn't circumscribed by fact that IRS rather than vulnerable individuals was direct victim of conviction offense/tax offense. Also, inclusion in tax loss calculation of amount of taxes co-conspirator failed to pay on income he received on account of taxpayer's conduct was proper; evidence that taxpayer helped develop scheme and recruited others supported managerial/supervisory role adjustment; and taxpayer's argument that, because telemarketing victims weren't direct victims of conviction offense/tax offense, he couldn't be ordered to pay them restitution agreed to in his plea agreement, was meritless. *Reference:* United States Tax Reporter ¶73,446.516(55); 73,447.515(21).

Karen L. Peck, Assistant United States, Attorney, New Haven, Connecticut (John A. Danaher III, United States Attorney for the District of Connecticut, New Haven, Connecticut, on the brief), for Appellee. David W. Windley, Brooklyn, New York, submitted a brief for Defendant-Appellant.

United States Court of Appeals for the Second Circuit.

Before: VAN GRAAFEILAND, KEARSE, and B.D. PARKER, JR., Circuit Judges.

KEARSE, Circuit Judge:

Appeal from a judgment of the United States District Court for the District of Connecticut, Janet C. Hall, Judge, convicting defendant of conspiracy to impede and impair the lawful government functions of the Internal Revenue Service and sentencing him to serve 21 months in prison and to pay $46,465 in restitution to victims of fraudulent telemarketing schemes. Affirmed.

Defendant Daniel M. Firment appeals from a judgment of the United States District Court for the District of Connecticut convicting him, following his plea of guilty before Janet C. Hall, Judge, of conspiracy to impede and impair the lawful functions of the Internal Revenue Service ("IRS"), in violation of 18 U.S.C. § 371. Firment was sentenced principally to 21 months' imprisonment, to be followed by a three-year term of supervised release, and was ordered to pay $46,465 in restitution to a victims' restitution fund. On appeal, he contends principally that the court erred in its determination of the amount of loss attributable to him under § 2T4.1 of the Sentencing Guidelines (2000) ("Guidelines"), in adjusting his offense level upward pursuant to Guidelines § 3B1.1(c) and § 3A1.1 for his role in the offense and the vulnerability of his victims, respectively, and in ordering restitution. Finding no merit in his contentions, we affirm.

I. BACKGROUND

The present appeal arises out of the prosecution of Firment and others in connection with their operation of fraudulent telemarketing schemes headed by Louis J. D'Amato. In one such scheme, Firment and other members of the conspiracy telephoned persons who had been victimized by other telemarketing scams and persuaded them to send the coconspirators money to help fund lawsuits or investigations to recover the money the victims had lost in the earlier scams. Many of these victims were elderly persons with fixed incomes. The lawsuits and investigations were fictitious. In another telemarketing scam, the coconspirators offered, for a fee, to help people who had found it difficult to obtain credit cards to obtain such cards. In fact, no such help was provided.

Together, the coconspirators took in approximately $700,000, and they agreed not to report or pay taxes on the sums they received. During the years 1994–1997, Firment received at least $46,465 in payments from the various operations. Firment did not report any part of this amount on his

personal income tax returns for those years.

In connection with this conduct, Firment, D'Amato, and others were indicted in 1999 on charges of, inter alia, conspiracy to commit mail fraud. Thereafter, to the extent relevant here, a two-count superseding indictment charged Firment with conspiracy to commit mail fraud (count one) and conspiracy to impede and impair the lawful functions of the IRS (count two) (the "tax conspiracy count"). Pursuant to a written plea agreement dated September 27, 2000 ("Plea Agreement"), Firment agreed to plead guilty to the tax conspiracy count, and the government agreed that if Firment's plea were accepted, the government would move for dismissal of the mail fraud conspiracy count. In the agreement, the parties stipulated that Firment had failed to report and/or to identify correctly the source of a total of $46,465 he had received from D'Amato-controlled entities. (Plea Agreement at 3–4.) They also "agree[d] that the Court may impose restitution in this case in an amount up to $46,465.00" and "that the order of restitution should state that amounts paid in this criminal case will go to the victims of the telemarketing operations in which the defendant participated." (Id. at 2.)

In sentencing Firment, the district court began with $46,465 as the amount he himself had received as a result of his illegal conduct and on which he had not paid taxes. Assuming a 28% bracket, the court calculated that the government's lost tax revenue on that amount was $13,010.20. The court also calculated that D'Amato had received some $18,807.31 as a result of Firment's participation in the conspiracy; because D'Amato did not pay tax on that amount, the court calculated, again using the 28% bracket, that the government had lost an additional $5,266.05 in taxes as a result of Firment's conduct. The total loss in taxes was thus $18,276.25. Under the version of the Guidelines applicable to Firment, that loss total gave him a base offense level of 11. See Guidelines § 2T4.1 (2000).

The court found that Firment's base offense level should 19 be enhanced by two steps pursuant to § 2T1.1(b)(1) because Firment had failed to report more than $10,000 a year from his criminal activity. In addition, it adjusted Firment's offense level upward by two steps pursuant to § 3A1.1(b)(1) because he knew or should have known of the vulnerability of his telemarketing victims; upward by two steps pursuant to § 3B1.1(c) because he played a managerial or supervisory role in the offense; and downward by three steps pursuant to § 3E1.1 because of his acceptance of responsibility.

As a result, Firment's total offense level was 14; as his criminal history category was I, the recommended Guidelines imprisonment range was 15 to 21 months. The court sentenced Firment principally to serve 21 months in prison, to be followed by a three-year period of supervised release, and ordered him to pay $46,465 in restitution to a victims' restitution fund. This appeal followed.

II. DISCUSSION

[1] On appeal, Firment makes several challenges to his sentence. Most are squarely foreclosed by statutory or Guidelines provisions or by this Court's established precedents. We write to address his contention that the court erred in adjusting his offense level upward by two steps because of the vulnerability of his victims.

A. The Vulnerable Victim Enhancement

Firment contends that the district court erred in adjusting his offense level upward under Guidelines § 3A1.1(b)(1) because of the vulnerability of the victims of the telemarketing scheme. At his sentencing hearing, Firment conceded to the district court that "the conduct concerning the telemarketing scheme was relevant conduct" within the meaning of Guidelines § 1B1.3 and that the victims of that scheme were vulnerable. However, he contends that the vulnerable victim adjustment is applicable only if the vulnerable persons were victims of the offense of conviction; and he argues that because he pleaded guilty only to the tax conspiracy count, the

only victim of his offense of conviction was the United States, which cannot be said to be vulnerable. We reject Firment's contention that, for the vulnerable victim adjustment to be applicable, the vulnerable victim must be a victim of the offense of conviction.

The Guidelines provide that "[i]f the defendant knew or should have known that a victim of the offense was a vulnerable victim, [the sentencing court shall] increase [the offense level] by 2 levels." Guidelines § 3A1.1(b)(1). Since November 1, 1997, the commentary to this section has stated that "[f]or purposes of subsection (b), 'vulnerable victim' means a person ... who is a victim of the offense of conviction and any conduct for which the defendant is accountable under §1B1.3 ...." Guidelines § 3A1.1, Application Note 2 (emphasis added). Although this version of the commentary did not take effect until after the present telemarketing activities had ended, it became effective during the course of the tax-fraud conspiracy as the coconspirators failed to report their 1997 income to the IRS in 1998, and hence there was no ex post facto impediment to its application here, see generally United States v. Minicone, 960 F.2d 1099, 1111 (2d Cir.) (when a conspiracy continues after a Guidelines change that would be applicable to prior conspiratorial conduct, "fair warning of the penalty exist[s] notwithstanding that the penalty itself is mechanically a function of a crime committed prior to passage of the sentencing law"), cert. denied, 503 U.S. 950 (1992).

Further, even prior to the 1997 amendment to the § 3A1.1(b)(1) commentary, this Court had held that application of the vulnerable victim adjustment was authorized where the offense conduct victimized a vulnerable person even though the entity directly targeted by the offense of conviction was a different person. See, e.g., United States v. Borst, 62 F.3d 43 (2d Cir. 1995); United States v. Echevarria, 33 F.3d 175, 180–81 (2d Cir. 1994). In Borst, a defendant who sold mobile homes was convicted of bank fraud, to wit, making false statements to a bank in furtherance of loan applications submitted on behalf of his apparently innocent customers, who were vulnerable because their credit ratings were poor and they needed help to secure financing for their purchases. The bank was the target of Borst's fraud; but a by-product of that fraud, when it was discovered, was the further impairment of the purchasers' credit. We held that the district court was "required to consider 'all harm that resulted from the [defendant's] acts and omissions,'" 62 F.3d at 47–48 (quoting Guidelines § 1B1.3(a)(3) (relevant conduct)), and that the district court thus had correctly applied the vulnerable victim enhancement to Borst even though injury to the loan recipients was not an element of the offense of bank fraud, see 62 F.3d at 48. In Echevarria, the defendant posed as a physician and submitted fraudulent "medical evidence" to support his "patients'" claims for social security disability and insurance benefits. We held that the "enhancement for vulnerable victims [wa]s appropriate where the exploitation of patients [wa]s part of" the social security disability scheme, 33 F.3d at 181 (internal quotation marks omitted), "even if the government felt the primary economic impact of the defendant's activities," United States v. Borst, 62 F.3d at 47 (describing Echevarria).

Accordingly, we see no error in the district court's application of the vulnerable victim enhancement to Firment on the basis of the vulnerability of the victims of the telemarketing scheme that generated the taxable revenues, despite the fact that his offense of conviction was a tax offense.

B. Other Challenges

Firment also contends that the district court erred in (a) calculating the amount of loss that determined his base offense level, (b) adjusting his offense level upward on the ground that he had a managerial role in the conspiracy, and (c) ordering restitution to anyone other than the United States. These contentions are meritless and do not warrant extended discussion.

Firment contends that the district court miscalculated the amount of tax loss attrib-

utable to him pursuant to Guidelines § 2T4.1, by including the amount of taxes D'Amato had failed to pay on income the latter received on account of Firment's efforts. We disagree. ''[I]n the case of a jointly undertaken criminal activity ... all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense'', shall be taken into account in determining the base offense level. Guidelines § 1B1.3(a). When a defendant has pleaded guilty to conspiring with others to evade taxes, conspiracy-related tax loss is attributable to him unless he proves that the loss was not foreseeable by him. See United States v. Martinez-Rios, 143 F.3d 662, 677 [81 AFTR 2d 98-2083] (2d Cir. 1998).

Firment's effort to distinguish Martinez-Rios on the ground that the conspiracy in that case was more sophisticated than that at issue here is unpersuasive. The touchstone of responsibility for the conduct of a coconspirator is foreseeability. Firment has not argued that D'Amato's failure to report and pay taxes on the income to D'Amato generated by Firment's participation in the conspiracy was unforeseeable to Firment, and we see no error in the district court's calculation of the tax loss caused by Firment's conduct.

Nor are we persuaded by Firment's contention that the district court erred in adjusting his offense level upward by two steps pursuant to Guidelines § 3B1.1(c) on the ground that he played a managerial or supervisory role in the offense. The court's findings as to a defendant's role may not be overturned unless they are clearly erroneous, see, e.g., United States v. Brinkworth, 68 F.3d 633, 641 (2d Cir. 1995); and we are to ''give due deference to the district court's application of the guidelines to the facts,'' 18 U.S.C. § 3742(e). We see no error here. The court found that ''Firment ... worked with Mr. D'Amato to develop the next telemarketing scheme,'' and there was undisputed evidence that Firment had recruited another worker for the telemarketing scheme and received commissions on that recruit's earnings. The upward adjustment for the role played by Firment was not erroneous.

Finally, we reject Firment's contention that because the victims of the telemarketing scheme were not victims of the offense of conviction, i.e., conspiracy to commit tax fraud, the district court exceeded its authority by ordering him to make restitution to those persons. Such an order of restitution is expressly authorized by statute when the defendant's plea bargain includes an agreement for such restitution. See 18 U.S.C. § 3663(a)(1)(A) (''The court, when sentencing a defendant convicted of an offense under this title ... may order, in addition to ... any other penalty authorized by law, that the defendant make restitution to any victim of such offense .... The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.'' (emphasis added)).

Here, Firment's Plea Agreement stated that the court could order restitution in an amount up to $46,465, and that ''[t]he parties also agree[d] that the order of restitution should state that amounts paid in this criminal case will go to the victims of the telemarketing operations in which the defendant participated.'' (Plea Agreement at 2.) The court did not err in ordering restitution to the victims of the telemarketing scheme.

CONCLUSION

We have considered all of Firment's arguments on appeal and have found them to be without merit. The judgment of conviction is affirmed.

¶2002-5106

Patrick A. PAISELY and Marilyn A. PAISLEY, PLAINTIFFS v. INTERNAL REVENUE SERVICE, DEBTORS. In Re: Patrick A. Paisely and Marilyn A. Paisley, Debtors. U.S. Bankruptcy Court, Southern Dist. of New York, (Bktcy Ct NY) Docket No. 01 B 10175(ASH); Adv.

Proc. No. 01-05326, Feb. 1, 2002. Decision for Taxpayer in part and for Govt. in part.

1. Tax claims in bankruptcy—settlement—release of tax liens. Pursuant to stipulation, converted Chap. 7 debtors' adversary complaint to reduce or void and extinguish part of IRS's liens on 1 piece of mortgaged property was dismissed, with IRS agreeing to discharge liens upon property's sale at amount stated and with provision that liens remained in effect as to taxpayers' remaining property. *Reference:* United States Tax Reporter ¶68,726.52(3); 68,726.53(2).

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United States Bankruptcy Court, Southern District of New York.

Stipulation and Order

HARDIN, JR., Bankruptcy Judge:

Chapter 7

[1] WHEREAS, on February 13, 2001 (the "Petition Date") Patrick A. Paisely and Marilyn A. Paisely (the "Debtors") filed a voluntary petition for relief (the "Petition") under Chapter 13, Title 11 of the United States Code (the "Bankruptcy Code"); and

WHEREAS, on October 1, 2001 (the "Conversion Date"), the Petition was converted to a petition for relief under Chapter 7, Title 11 of the Bankruptcy Code;

WHEREAS, on July 8, 1998 and October 28, 1999, prior to the Petition Date, the United States of America (the "Government"), through its Department of the Treasury,. Internal Revenue Service (the ("IRS"), filed Notices of Federal Tax Liens (the "IRS Liens") with the Office of the Clerk of the County of Rockland; and

WHEREAS, the Trustee and the Government agree that the IRS Liens have attached to, among other property of the Debtor, the Debtor's real property located at 19 Brookview Boulevard, Chestnut Ridge, New York (the "Real Property"); and

WHEREAS, on or about May 25, 2001, the Government, through the IRS, filed a Proof of Claim on account of the Debtor's due and owing, but unpaid, pre-petition federal income taxes, interest, and penalties in the total amount of $42,589.14 (the "IRS Claim"); and

WHEREAS, $35,167.81 of the IRS Claim is classified as a secured claim under Section 506(a) of the Bankruptcy Code and is secured by the IRS Liens, and $7,312.06 of the IRS Claim is classified as a priority claim under Section 507(a)(8) of the Bankruptcy Code; and

WHEREAS debtor has represented that it has entered into a contract for the purchase of the Real Property at a purchase price of $245,000 (the "Sale"); and

WHEREAS debtor has represented to the Government and to the Court that the Real Property is encumbered by: (i) a first mortgage held by Aurora Loan Service, Inc. in the. principle amount of $145,095.90, plus an additional $62,571.03, for items such as interest, late charges and attorneys' fees; and (ii) a second mortgage held by Wells Fargo Home Mortgage, Inc. in the principle amount of $16,529.89 plus an additional $3,662.15, for items such as interest and attorneys' fees; and

WHEREAS debtor filed the instant adversary proceeding seeking to reduce and/or void and extinguish part of the IRS Liens on the ground that debtors lack equity in the Real Property; and

WHEREAS, the Debtor and the Government agree that the Government has a perfected security interest in all of the Debtor's remaining property and rights to property to the extent of the value of said property and rights to property; and

WHEREAS, the debtors and the Government have agreed to settle the adversary proceeding on the terms set forth below;

IT IS HEREBY STIPULATED AND ORDERED that:

1. The instant adversary proceeding is dismissed with prejudice, and without costs to either party.

2. The IRS shall issue to the Debtor or his representative a certificate of discharge of the Real Property. from the IRS Liens upon the sale of the Real Property for $245,000 or less.

3. Pursuant to Section 6321 and 6325 of the Internal Revenue Code, the IRS Liens shall remain in effect against the Debtor's remaining property and rights to property to the extent of the value of said property and rights to property until the IRS Claim is paid in full.

Dated: New York, New York

January 28, 2002

JAMES B. COMEY

United States Attorney

By: ROSS E. MORRISON (RM-7271)

Assistant United States Attorney

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SO ORDERED:

Adlai S. Hardin, Jr.

UNITED STATES BANKRUPTCY JUDGE

February 1, 2002

DATE

¶2002-5107

Mary BURGESS, PLAINTIFF v. UNITED STATES OF AMERICA, Department of the Treasury Internal Revenue Service, DEFENDANT. In Re: Mary Burgess, Debtor. U.S. Bankruptcy Court, Southern Dist. of New York, (Bktcy Ct NY) Docket No. 01-43135 (RLB); Adv. Pro. No. 02/8014A, Feb. 22, 2002. Years 1994, 1995, 1996, 1998. Decision for Taxpayer in part and for Govt. in part.

1. Tax claims in bankruptcy—dismissal of adversary proceeding—dischargeability. Pursuant to stipulation, Chap. 7 debtor's adversary proceeding was dismissed without prejudice subject to bankruptcy court's approval, and her tax debts for 2 of 4 years were dischargeable; but, IRS had allowed claim in stated amount for remaining years' debts. *Reference:* United States Tax Reporter ¶68,726.52(40); 68,726.52(27).

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James B. Comey United States Attorney for the Southern District of New York Attorney for the United States Of America Marianne T. O'Toole (MOT-7714) Assistant United States Attorney 100 Church Street, 19th Floor New York, New York 10007 Telephone: (718) 422-5614

United States Bankruptcy Court, Southern District of New York.

Stipulation and Order of Dismissal

BOHANON, Bankruptcy Judge:

CHAPTER 7

[1] WHEREAS, on December 14, 2001, Mary Burgess (the ''Debtor'') filed for bankruptcy under Chapter 7 Title 11 of the United States Code; and

WHEREAS, on January 30, 2002, Debtor filed her complaint in this adversary proceeding, Adv. Proc. No. 02/8014A, in the United States Bankruptcy for the Southern District of New York, seeking a discharge of Debtor's federal income tax

liabilities for the years 1994, 1995, and 1996;

WHEREAS, the Debtor and the United States of America (''the Government'') have agreed that litigation with regard to the issues raised in the complaints would be unnecessarily burdensome and wasteful to each of them.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the Debtor and the Government:

1. This adversary proceeding is dismissed without prejudice and without costs or attorneys' fees to either of the parties.

2. The Debtor's federal income tax liabilities for the taxable years 1995 and 1996 are dischargeable pursuant to Sections 523 and 727 of the Bankruptcy Code, 11 U.S.C. §§ 523, 727. The IRS shall have an allowed claim in the aggregate amount of $12,040.01, including a tax liability of $3,245.81 for federal income tax liabilities for 1994 and $8,794.20 for federal income tax liabilities for 1998.

3. This Stipulation is subject to the approval of the Court. In the event that the Court declines to enter it, the Stipulation shall be null and void, with no force or effect.

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JAMES B. COMEY

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Assistant United States Attorney

100 Church Street, 19th Floor

New York, New York 10007

Telephone: (718) 422-5614

Dated: New York, New York

February 22, 2002

So Ordered this 8th day of March, 2002

Richard L. Bohanon

UNITED STATES BANKRUPTCY JUDGE

¶2002-5108

SECURITIES AND EXCHANGE COMMISSION, PLAINTIFF-APPELLEE UNITED STATES OF AMERICA, INTERVENOR-APPELLANT, Gene W. Ray, Dr., Centigram Comm. Corp., Stephen J. Cole-Hatchard, Nicko Feinberg, Leonard Zera, Trustee for Lathrop Investment Trust and Harrington Irrevocable Trust, Cole-Hatchard Family Limited Partnership, Michael OLBERMAN & John Dillon, INTERVENORS-PLAINTIFFS, Stephenson Equity, Co., Thomas Stappas, Vincent J. Bagli, Andrew Calcagno, Regina Calcagno, Richard J. DuPont, Barbara DeYoung, Ronald DeYoung, Concetta G. Frato, George G. Luce & James F. Luce, Ttees FBO Luce Schwab & Case, Inc. Profit Sharing Plan, Frank Mignogna, TTE of Head & Neck Surgical Associates Retirement Trust, Robert Praegitzer, Stephen Robbins, Kurt G. Richter & Steven Allen, & Lorraine Jankowski, INTERVENORS-PLAINTIFFS-APPELLEES v. CREDIT BANCORP, LTD., Credit Bancorp, Inc., & Richard Jonathan Blech, DEFENDANTS-INTERVENORS-DEFENDANTS, Carl H. LOEWENSON, JR., RECEIVER-APPELLEE, Douglas C. BRANDON & Thomas Michael Rittweger, DEFENDANTS-INTERVENORS-DEFENDANTS-CROSS-DEFENDANTS, CREDIT SUISSE, Swiss American Securities, Inc., ING Baring Private

Bank (Switzerland), Ltd., Brown Brothers Harriman & Co., Federal Insurance Company, THIRD-PARTY DEFENDANTS. U.S. Court of Appeals, Second Circuit, (CA2) Docket No. 01-6158, July 18, 2002. District Court, (2001) 87 AFTR 2d 2001-1815, 138 F Supp 2d 512, reversed in part, and vacated and remanded in part. Decision for Govt. in part.

1. Lien property—receiverships—quiet title; jurisdiction—Declaratory Judgment and Anti-Injunction Acts—lien priority—constructive trusts—assignment of interests—first-in-time—fiduciary duties; personal liability. District court's decision to allow receiver's request for priority determination between bank customers' interests and govt.'s potential tax lien interest in receivership estate assets was reversed in part, and vacated and remanded: sovereign immunity (''immunity'') barred court from hearing action in 1st place. Action, by virtue of its overt federal tax implications and underlying collection-restraining nature, was clearly barred by both DJA and AIA; 28 USC §2410's limited immunity waiver for quiet title actions in which govt. *has or claims* lien didn't apply since govt. had in fact made no assessment or taken any other action to establish or claim lien; and govt.'s potential for asserting lien/claims wasn't in itself sufficient to bring action within statute's parameters. Also, court's reliance on AIA's ''no alternative''/necessity exception was misplaced since receiver did have alternatives for obtaining determination of his federal tax exposure without incurring personal liability; AIA's irreparable injury exception and Administrative Procedures Act were similarly unavailing; and govt.'s limited intervention in suit to seek narrow discovery stay and subsequent negotiations with receiver didn't in themselves constitute affirmative immunity waiver. *Reference:* United States Tax Reporter ¶74,336.506(25); 74,336.507(10); 63,215.02(245); 74,215.05(7); 74,336.504(25); 63,215.02(205); 63,215.04(200); 63,235.17(5); 68,736.51(10). IRC §6321; 6323; 7421.

Edward Chang, Assistant United States Attorney, New York, New York (Mary Jo White, United States Attorney for the Southern District of New York, Jeffrey Oesteric her, Assistant United States Attorney, New York, New York, on the brief), for Intervenor - Appellant.
Carl H. Loewenson, Jr., New York, New York (Charles L. Kerr, Oliver Metzger, Andrew J. Fields, Nancy R. Thomas, Eleonore Dailly, Morrison & Foerster, New York, New York, on the brief), for Receiver -Appellee.

U.S. Court of Appeals, Second Circuit.

Before: WALKER, Chief Judge, NEWMAN and KEARSE, Circuit Judges.

KEARSE, Circuit Judge:

Appeal from an order of the United States District Court for the Southern District of New York, Robert W. Sweet, Judge, granting motion of receiver for a declaration that debts of defendant Credit Bancorp, Ltd., et al., to its customers have priority over its tax liabilities to the United States, and that the receiver may use and distribute receivership assets without paying, providing for, or being held personally liable for under the Federal Debt Priority statute, 31 U.S.C. § 3713, federal tax obligations of defendants or the receivership. See 138 F.Supp.2d 512 (2001).

Vacated and remanded for dismissal of receiver's motion for lack of jurisdiction, on the ground of sovereign immunity.

The United States of America (the ''Government''), an intervenor in this enforcement action brought by the Securities and Exchange Commission (''SEC'') against defendants Credit Bancorp, Ltd., and its affiliated entities (collectively ''Credit Bancorp'' ''Bancorp'' or ''CBL''), appeals from so much of a May 16, 2001 order (''May 2001 Order'') of the United States District Court for the Southern District of New York, Robert W. Sweet, Judge, as granted the motion of Carl H. Loewenson, Jr., CBL's receiver (the ''Receiver''), for a declaration (1) that, from the assets deposited with Bancorp by its customers, along with the proceeds derived therefrom and the re-

ceipts of the receivership, debts to CBL customers have priority over tax debts to the Government; and (2) that the Receiver, in making distributions in accordance with a plan of partial distribution conditionally approved by the court, will incur no personal liability under the Federal Debt Priority statute, 31 U.S.C. § 3713(b), for tax debts of Bancorp or the receivership. The district court rejected the Government's contention that sovereign immunity had not been waived and that the court thus lacked subject matter jurisdiction to make such declarations, ruling that jurisdiction existed under 28 U.S.C. § 2410(a)(1) and as a matter of necessity. See 138 F.Supp.2d 512, 526–28 (2001). On appeal, the Government principally pursues its jurisdictional contentions. For the reasons that follow, we conclude that sovereign immunity has not been waived; we thus vacate the May 2001 Order for lack of jurisdiction and remand for dismissal of the Receiver's motion.

I. BACKGROUND

The present action was brought by the SEC against Credit Bancorp in November 1999, alleging, inter alia, that CBL had engaged in a Ponzi scheme that defrauded its customers in violation of § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a), § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. As discussed in this Court's recent decision in SEC v. Credit Bancorp, Ltd., 290 F.3d 80 (2d Cir. 2002), Bancorp had persuaded investors (referred to by the parties and the district court as "customers") to transfer cash and securities to it in order to enable it to engage in what it described as "riskless arbitrage" trading, and it promised to pay customers dividends based on the value of the unencumbered assets trans-ferred by the customer. See id. at 83. Bancorp thereafter did pay some customers dividends, but only out of deposits it received from other customers. By the time the SEC commenced this suit and obtained a freeze of Bancorp's assets, Bancorp had victimized more than 200 customers and lost tens of millions of dollars of their assets.

Shortly after freezing Credit Bancorp's assets, the district court appointed Loewenson as Bancorp's fiscal agent; on January 21, 2000, the court appointed him Receiver. Bancorp was ordered to turn over all funds, property, documents, and records to the Receiver, who was granted broad powers to, inter alia, issue subpoenas, marshal CBL assets, liquidate those assets, and reinvest the proceeds in Treasury instruments. The freeze order directed the Receiver not to return any securities or other assets to Credit Bancorp's customers without further order of the court. In April 2000, the United States, by the United States Attorney for the Southern District of New York, sought and obtained permission to intervene in the action for the limited purpose of seeking a stay of discovery pending completion of related criminal proceedings with regard to Bancorp, its chief executive officer Richard Blech, and others.

A. The Receiver's Distribution Plan and Motion for Priority

In May and June 2000, the SEC and groups of intervening customers submitted to the district court three competing plans for interim distributions of Bancorp assets marshaled by the Receiver. In October 2000, the Receiver, after unsuccessfully attempting to negotiate a consensus plan, submitted to the court his own interim distribution plan. Under the Receiver's plan, customers who had transferred to CBL identifiable securities that were in the possession of the Receiver would be given an opportunity to retrieve them by depositing with the Receiver "Undertakings"--i.e., cash or United-States-government-backed securities in amounts equaling a specified percentage of the current market value of the securities; the cash Undertakings would be used by the Receiver to make pro rata distributions to customers whose deposits with CBL had been lost. Oral argument on the Receiver's plan was heard in mid-October, and decision was reserved.

Thereafter, the Receiver served a motion dated November 8, 2000, on the Office of

the United States Attorney for the Southern District of New York in order to bring "[t]he Government ... into this action in its capacity as the Internal Revenue Service," 138 F.Supp.2d at 515. The motion asked the district court for an order

> declaring that Credit Bancorp Ltd.'s customers have priority over the United States ... for payment from the customer-deposited assets, as well as the proceeds therefrom and cash receipts of the receivership [and] declaring that in notifying the Court and the potentially affected governments of the potential for tax liability, the Receiver has discharged his obligations pursuant to [the Federal Debt Priority statute,] 31 U.S.C. § 3713(b) ....

(Receiver's Notice of Motion dated November 8, 2000 ("Priority Declaration Motion" or "Motion").) The Federal Debt Priority statute provides the federal government, in certain circumstances, with priority over other claimants as to the payment of debts, including tax debts, owed by an insolvent debtor, see 31 U.S.C. § 3713(a)(1), and states that a "representative of a person or an estate ... paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government," id. § 3713(b).

The Receiver and the Government began negotiations with respect to Credit Bancorp's tax liability. Eventually, as discussed in Part I.B. below, the Receiver and the Government entered into a stipulation in February 2001 dealing with CBL's tax liability for the period prior to, but not after, the Receiver's appointment.

In the meantime, in an opinion dated November 29, 2000, the district court largely approved the Receiver's plan, finding it more equitable and more feasible than the other plans. Thereafter, in response to the court's expression of concern with respect to certain customers, the Receiver submitted a revised interim distribution plan, which the court approved in an opinion dated January 19, 2001. The court entered a detailed order, also dated January 19, 2001 ("January 2001 Order" or "Order"), setting out the terms of the plan, which provided essentially that the Receiver would, in exchange for the Undertakings, return identifiable securities under his control to the Bancorp customers who had deposited them with Bancorp, and that the Receiver would use the Undertakings principally to (a) facilitate a general pro rata distribution for those CBL customers whose securities and other assets had been transferred or lost, (b) provide collateral for claims by broker- dealers, and (c) fund the administration of the receivership. The January 2001 Order provided, however, that the Order was not to become effective prior to approval of the Receiver's request for priority treatment of customer debts:

> This Order shall become effective upon further order of this Court, either by the entry of a stipulation and order between the Receiver and the United States permitting the distribution set forth herein to proceed, or by a separate order of this Court declaring that Credit Bancorp's customers have priority over the United States and the States for payment from the customer-deposited assets, as well as the proceeds therefrom, and that the distribution set forth herein may proceed without payment by CBL or the Receiver to the IRS.

January 2001 Order ¶ U.

B. The Stipulation Between the Receiver and the Government

The Government did not formally respond to the Receiver's November 2000 Priority Declaration Motion. After ob-taining extensions of time to respond and negotiating with the Receiver toward a settlement of the issues raised by the Motion, the Government informed the district court in February 2001 that the United States had not waived its sovereign immunity and took the position that the district court thus did not have jurisdiction to grant the declaratory relief requested in the Motion. On February 28, 2001, the Receiver and the Government entered into a stipulation (the "Stipulation" or "Stipulation and Order") resolving some of the issues raised in the Priority Declaration Motion. In the

Stipulation, the Government agreed not to assert a federal tax lien on certain specified present and future receivership assets and agreed that it would not assert that the Receiver had any liability under § 3713(b) for Credit Bancorp's tax liability resulting from income generated prior to his January 21, 2000 appointment. The Government reserved the right to assert a tax lien or priority against any other assets or future assets of Credit Bancorp or the receivership, and it did not agree not to assert that the Receiver had tax liability resulting from income generated after his appointment. The pertinent provisions read as follows:

> The relative priorities among the United States, Credit Bancorp and its customers with respect to assets not listed in paragraph 2 are not determined by this Stipulation and Order, and the receiver reserves the right to continue to assert the positions set forth in support of his Motion and Renewed Motion as to those assets.
>
> 4. The United States reserves the right to assert a tax lien or to assert priority against any asset listed in paragraph 2 remaining in the receivership estate after payment of the administrative expenses of the receivership and a determination by the Court that each customer has been compensated for the value of the securities and other assets deposited with Credit Bancorp, less any custodial dividends paid by Credit Bancorp and any outstanding loan balance owed to Credit Bancorp.
>
> . . . .
>
> 6. Notwithstanding any other provision of this Stipulation and Order, nothing herein shall be taken to determine for tax purposes the characterization of or liability with respect to the proceeds of any sale of customer securities pursuant to ¶ G of the Distribution Plan, or any other amounts earned, accrued or added to the receivership estate subsequent to January 21, 2000.
>
> 7. Notwithstanding any other provision of this Stipulation and Order, the United States shall not be deemed to have waived its rights, if any, to assess or collect federal income taxes of Credit Bancorp's customers arising from the Stipulated Distribution.
>
> . . . .
>
> 9. Nothing herein shall waive any of the Government's defenses, including but not limited to sovereign immunity and lack of subject matter jurisdiction, with respect to any additional relief that the receiver may seek.

(Stipulation ¶s 3–4, 6–7, 9.)

C. The District Court's Declaration of Priority Over IRS Claims

The Receiver promptly renewed his motion for a declaration that payment of CBL's debts to its customers took priority over its tax liabilities and that the Receiver would incur no personal liability in making the distributions called for by his plan. The Receiver argued that virtually all of the assets already in the receivership estate and much of the property he anticipated the estate would receive, either through his own efforts or through the Undertakings delivered pursuant to the partial distribution plan, should be considered subject to a constructive trust in favor of CBL customers; if the assets were subject to such a constructive trust, CBL would have had no property interest in the assets, and the assets could not be applied to satisfy Bancorp's tax liabilities.

The Government opposed the motion, contending that the United States had not waived its sovereign immunity and that the district court thus lacked subject matter jurisdiction to grant the relief requested by the Receiver. The Government argued that the Receiver's motion sought relief with respect to federal taxes, and pointed out that the Declaratory Judgment Act allows the court to declare the parties' rights and obligations "except with respect to Federal taxes," 28 U.S.C. § 2201(a), and that the Anti-Injunction Act states in pertinent part that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the

person against whom such tax was assessed,'' 26 U.S.C. § 7421(a).

The Receiver argued that a waiver of sovereign immunity was to be found in, inter alia, the Judicial Code provision that permits certain actions ''to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien,'' 28 U.S.C. § 2410(a). The Government pointed out that in all of the § 2410(a) cases relied on by the Receiver, a federal tax lien had been asserted, and it argued, inter alia, that the section was inapplicable here because the Government possessed no lien, had asserted no lien, and had not determined Credit Bancorp's tax liability, if any.

The Receiver also argued that jurisdiction could be premised on the exceptions to the Anti-Injunction Act recognized in South Carolina v. Regan, 465 U.S. 367, 381 (1984) (''Regan'') (Anti-Injunction Act does not apply when Congress has not ''provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf''), or Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 6–7 [9 AFTR 2d 1594] (1962) (''Williams Packing'') (Anti-Injunction Act does not apply where ''it is clear that under no circumstances could the Government ultimately prevail'' and that ''irreparable injury'' would occur without the requested relief).

In an opinion dated April 6, 2001, reported at 138 F.Supp.2d 512, the district court rejected the Government's jurisdictional arguments, finding the requisite waiver of sovereign immunity in § 2410(a). The court stated that

> [s]ection 2410(a)(1) does not constitute a waiver of sovereign immunity with respect to challenges to the merits of the federal government's tax assessment or lien . . . .
>
> However, § 2410(a)(1) does serve as a waiver of the United States' sovereign immunity with respect to disputes concerning the priority of competing liens. See, e.g., Progressive Consumers [Federal Credit Union v. United States, 79 F.3d 1228, 1232–33 [77 AFTR 2d 96-1419] (1st Cir. 1996)] (''[S]ection 2410(a)(1) controversies encompass disputes concerning both the 'validity and priority of liens' as distinguished from actions seeking 'their extinguishment' . . . .'') . . . .
>
> Suits to determine lien priority under the quiet title provision of § 2410 are not barred by the Declaratory Judgment or Anti-Injunction Acts. See Progressive Consumers, 79 F.3d at 1234 (Declaratory Judgment Act does not bar quiet title action seeking determination of lien priority) . . . .
>
> The reduction of the pool of possible assets available for collection by the government, however, is precisely the result in the cases that have found lien priority challenges to fall within § 2410(a)(1), since a finding that the moving party's lien is superior to the government's lien necessarily means that the assets available to the government to satisfy any tax assessment or collection are decreased. See, e.g., Progressive Consumers, 79 F.3d at 1232 . . . . ''Admittedly, any challenge to the validity of a federal tax lien and sale indirectly interferes with the tax collection process which [the Declaratory Judgment Act and the Anti-Injunction Act] are designed to protect from undue litigation outside the Tax Court.'' Aqua Bar [& Lounge, Inc. v. IRS, 539 F.2d 935, 940 [38 AFTR 2d 76-5466] (3rd Cir. 1976)]. Nonetheless, § 2410(a)(1) permits litigants to seek declaratory relief against the government regarding the priority of competing liens. See id.
>
> . . . .
>
> The Receiver does not dispute that Credit Bancorp may owe substantial federal tax liability. What the Receiver seeks, however, is a determination regarding who holds property interests in the Protected Property. Thus, the Receiver has not challenged an underlying tax assessment or collection effort but, rather, seeks a determination regarding the priority of competing liens and, under the authorities just discussed,

there is subject matter jurisdiction over this motion.

The Government also objects, however, that the Receiver cannot rely on § 2410(a)(1) because the Government has not actually made an assessment and does not presently have a lien on the receivership estate. Therefore, according to the Government, the United States neither ''has nor claims a lien,'' 28 U.S.C. § 2410(a)(1), on the Protected Property.

. . . .

Although no tax liability has yet been assessed against Credit Bancorp, there is a potential that a substantial assessment will be made in the future. This potential is far from speculative. After negotiations between the Receiver and the Government, and the entry of the Stipulation, the Government specifically reserved its rights to assert a tax lien or to assert priority as to certain receivership assets, including but not limited to the Post-Receivership Income. While the Government avers that the Receiver's predictions of the potential Credit Bancorp tax liability are exaggerated, it is apparent that the Government contemplates that some tax liability will result from the assets not included in the Stipulation. Moreover, the practical effect of the Government's position is much the same as would be the effect of an actual lien in that the Receiver cannot implement the partial distribution plan until the issue of the Government's right to these assets is resolved.

138 F.Supp.2d at 522–525.

The district court also found that § 2410(a) essentially gave it jurisdiction to declare that in executing the partial distribution plan, the Receiver would not be liable under the Debt Priority statute, reasoning that ''the issue of whether [the Receiver] has satisfied his obligations under § 3713(b) is inseparable from the is-sue of lien priority under § 2410(a)(1),'' and that ''the effect of finding jurisdiction under § 2410(a)(1) would be to protect the executor from the dangers he would other-wise face under § 3713(b)--assuming, of course, that he complied with the judicially determined priorities.'' 138 F.Supp.2d at 527.

The court also concluded that if § 2410(a) did not provide jurisdiction, it had jurisdiction under the exception announced in Regan on the basis that ''there is no alternative means for resolving the potential conflict between implementing the partial distribution plan and the incurrence of extraordinary personal liability,'' 138 F.Supp.2d at 528. Although the court noted that prerequisites for application of the Regan exception to the Anti-Injunction Act are difficult to meet, and that the Receiver could, in theory, like any other taxpayer, pay first and litigate later, it found the Regan exception applicable here because

> [t]his is a special type of case. It is the court that imposed the receivership, and the court that appointed the Receiver. If the Receiver cannot obtain review of his motion regarding personal liability then he has two choices. He can implement the partial distribution plan as presently structured, but at the risk of extraordinary personal liability. Or he can set aside reserves from the receivership funds to provide for the eventuality that this personal liability will come to pass, and to cover that liability. Neither of these courses of action is tenable. Thus, the effect of not affording the Receiver a way to have the personal liability issue determined at this stage would be to bring the receivership and any partial distribution under the receivership to a halt. The available alternatives are thus not merely inadequate as a practical matter but defeat the very purpose of the receivership. Therefore, applying Regan to the facts of this case leads to the conclusion that there is subject matter jurisdiction under the Regan exception.

138 F.Supp.2d at 528. Having found jurisdiction under § 2410(a) and Regan, the district court found it unnecessary to consider whether it also had jurisdiction under the Williams Packing exception.

The court largely, to the extent pertinent to this appeal, granted the Receiver's Pri-

ority Declaration Motion. An order was entered on May 16, 2001 ("May 2001 Order"), so- ordering the Stipulation between the Receiver and the Government and providing that

> [t]he Receiver shall implement the Plan of Partial Distribution pursuant to this Court's opinion dated November 29, 2000, SEC v. Credit Bancorp, Ltd., 2000 WL 1752979 (S.D.N.Y. Nov. 2000); its opinion dated January 19, 2001, SEC v. Credit Bancorp, Ltd., 129 F. Supp. 2d 259 (S.D.N.Y. 2001); its order dated January 19, 2001; and all subsequent orders;
>
> C. The property described in this paragraph C may not be applied to satisfy liabilities for Taxes, if any, of CBL, Richard Blech, any other defendant, the Receiver, or any entity, fund, or account created or deemed to be created by the Receiver or pursuant to Order of this Court . . . .
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> . . . .
>
> I. After due consideration by this Court of the arguments of the Receiver and of the United States and in light of this Court's April 6 Opinion, the Receiver has discharged his obligations under 31 U.S.C. § 3713, and neither the Receiver nor his counsel, accountants, consultants or agents may be held liable for Taxes for effectuating the Plan of Partial Distribution.

May 2001 Order ¶s B, C, I (emphasis added). This appeal followed.

II. DISCUSSION

[1] On appeal, the Government contends principally that the district court erred in finding a waiver of sovereign immunity in 28 U.S.C. § 2410 or under the Regan exception to the Anti-Injunction Act and in refusing to apply the plain language of that statute and of the express exception stated in the Declaratory Judgment Act. In opposition, the Receiver argues, inter alia, that the Declaratory Judgment Act and the Anti-Injunction Act are inapplicable because he "does not challenge any underlying assessment or collection effort." (Receiver's brief on appeal at 27.) Alternatively, the Receiver argues that the court's reliance on Regan was correct or that the court could properly have pre-mised jurisdiction on Williams Packing, or on the Administrative Procedure Act, 5 U.S.C. § 702, or on the Government's prior intervention in the case seeking a stay of discovery.

Preliminarily, we note our jurisdiction to entertain this appeal. First, since the district court's May 2001 Order effects a modification of the original order freezing Bancorp's assets, see SEC v. Credit Bancorp, Ltd., 290 F.3d at 82, which was initially entered as a temporary restraining order and continued as a preliminary injunction, the order is immediately appealable pursuant to 28 U.S.C. § 1292(a)(1) ("Interlocutory orders of the district courts . . . modifying . . . injunctions" are appealable.). Second, the Order is immediately appealable under the "practical finality doctrine," or Forgay-Conrad doctrine, under which "a judgment requiring immediate delivery . . . of property while further proceedings in the action continue is final for purposes of appellate review" where the appealing party would be irreparably injured if appellate review were delayed pending conclusion of the entire action. 19 Moore's Federal Practice § 202.08, at 202–32 (3d ed. 1999); see, e.g., Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 126 (1945); Forgay v. Conrad, 47 U.S. (6 How.) 201, 204 (1848).

As to the merits of the appeal, we conclude for the reasons that follow that the United States has not waived its sovereign immunity so as to permit a declaration as to the tax liabilities of Bancorp or the Receiver.

A. General Principles of Sovereign Immunity

"It is well established that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . . [T]he terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.' . . . . Any waiver of the government's sovereign immunity is to be strictly construed in favor of the government."

Long Island Radio Co. v. NLRB, 841 F.2d 474, 477 (2d Cir. 1988) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). Thus, the court is given jurisdiction to entertain a claim against the United States only to the extent of the waiver; the court has no power to broaden a limited waiver of immunity. See, e.g., Long Island Radio Co. v. NLRB, 841 F.2d at 477 (''Since jurisdiction to entertain a claim against the United States exists only as Congress has granted it, neither an agency nor a court has the power to entertain claims that do not meet the conditions limiting the waiver of immunity.'').

Section 1340 of 28 U.S.C. gives the federal district courts ''original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue,'' 28 U.S.C. § 1340; but as a general jurisdictional statute, it does not of itself constitute a waiver of sovereign immunity. See, e.g., Kulawy v. United States, 917 F.2d 729, 733 [66 AFTR 2d 90-5839] (2d Cir. 1990); Falik v. United States, 343 F.2d 38, 40 [15 AFTR 2d 566] (2d Cir. 1965) (''Falik''). The Declaratory Judgment Act, with certain exclusions not relevant here, allows a federal court to declare the rights and obligations of the parties properly before it in any ''case of actual controversy within its jurisdiction, except with respect to Federal taxes.'' 28 U.S.C. § 2201(a) (emphasis added). Thus, although that Act waives the sovereign immunity of the United States with respect to other types of actions, it explicitly excludes from that waiver the power to declare rights or obligations with respect to federal taxes.

We disagree with the Receiver's contention that this provision is inapplicable to the present matter, for, insofar as the Government is concerned, the precise focus of the Receiver's Priority Declaration Motion was federal taxes. The Receiver sought to bring the United States into this action in its capacity as the IRS. He sought a declaration that customer debts have priority over Bancorp's federal tax debts, and he sought a declaration as to his own liability for Bancorp's federal taxes if he proceeds with the partial distribution plan. We conclude that, in the absence of some other waiver of sovereign immunity, the Declaratory Judgment Act deprived the district court of the power to grant the declarations sought by the Receiver.

That absence of power is further reflected in the Anti-Injunction Act. That statute provides, with exceptions not relevant here, that ''no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.'' 26 U.S.C. § 7421(a). Although the district court's order in the present case is not in the form of an injunction, there can be no doubt that the purpose of the Receiver's Priority Declaration Motion was to preclude any possibility of the Government's collection of taxes out of specified Bancorp property or from the Receiver. Indeed, in a supplemental brief to this Court addressing the matter of appellate jurisdiction, the Receiver states that ''[a]lthough not formally denominated an 'injunction,' the May [2001] Order is injunctive in nature in ordering specified parties to undertake or not to undertake particular actions.'' (Receiver's supplemental brief on appeal dated October 22, 2001, at 3.). That effect brings the Receiver's motion squarely within the Anti-Injunction Act and the federal-tax-exception to the Declaratory Judgment Act. As we noted in Falik,

> [p]laintiff argues that an action to quiet title is not a suit for an injunction and, more particularly, not a suit ''for the purpose of restraining the assessment or collection of any tax,'' which § 7421(a) alone forbids. Literally that is so .... But the action is quite similar to that contemplated by the Declaratory Judgment Act, 28 U.S.C. § 2201, to which Congress was quick to attach an exception ''with respect to Federal taxes''--explaining that application of a declaratory judgment procedure in federal tax matters ''would constitute a radical departure from the long-continued policy of Congress ....'' S.Rep. No. 1240, 74th Cong., 1st Sess. 11 (1935).

Falik, 343 F.2d at 42.

We reject the Receiver's contention that a "declaration by a court that the assets are held in constructive trust for CBL's customers does not 'restrain' the IRS's ability to collect taxes, because the IRS never had the right to collect from those assets in the first place." (Receiver's supplemental brief on appeal dated October 22, 2001, at 12.) Were this correct, it would apply to any determination by a court that the IRS had no right to collect taxes from certain assets, essentially eviscerating the Anti-Injunction Act.

We conclude that the Anti-Injunction Act and the Declaratory Judgment Act are applicable here.

B. Section 2410(a)

Section 2410, the quiet-title provision on which the district court relied, constitutes a limited waiver of sovereign immunity. It provides in part that "the United States may be named a party in any civil action or suit in any district court ... to quiet title to ... real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a)(1). The Government argues that this provision is inapplicable here because the Government neither has nor claims a mortgage or other lien. The district court rejected this argument, ruling essentially that the Government's "contemplat[ion]" of some federal tax liability on the part of Bancorp, together with its reservation of "its rights to assert a tax lien," 138 F.Supp.2d at 525, and its position that any such debt on the part of Bancorp will have priority over the debts to Bancorp customers, constitutes a claim of a lien. We disagree with the district court's view.

A lien is a security interest in property. See, e.g., Restatement of Security Ch. 2, Scope Note (1941) ("The term 'lien' is frequently used in the broad sense of a tie or hold which one person has for the purpose of security upon land, chattels or intangibles in which another has an interest .... Thus broadly understood 'lien' may be considered as a general term embracing all sorts of security devices, legal or equitable."). It may be perfected or it may merely be claimed. A party may claim a lien and ultimately have its claim rejected on the ground that its lien was not perfected or was otherwise invalid. In the federal taxation context, a tax assessment would automatically result in a lien on the taxpayer's property, see 26 U.S.C. § 6321, 6322; but there has been no assessment here. Indeed, the Government points out that, the Receiver having filed no federal tax returns, it is unknown whether Bancorp even has any tax liability. Thus, the Government has no automatic lien, and it has not asserted a lien. It has merely stated that it may be entitled to a lien when the existence and extent, if any, of Bancorp's federal tax liability is clarified; and it has opposed a declaration that Bancorp's federal tax liabilities are subordinate to Bancorp's debts to customers. We cannot conclude that Congress intended that either a refusal by the United States to disavow any possibility that it may have a lien in the future after tax liability is determined, or a refusal to forgo the priority for debts to the United States that is established in the Federal Debt Priority statute, 31 U.S.C. § 3713, would constitute a "claim[]" of a lien such as to waive the government's sovereign immunity.

Further, in the absence of a lien, an action to foreclose the Government's right to assert a lien imperils the government's tax revenues in precisely the way the Anti-Injunction Act is meant to foreclose:

> an action ... where the lien remains of record until and unless a court determines the underlying assessment to be invalid, is less dangerous to the revenue than one in which a taxpayer obtains an injunction against assessment or collection and is free to dispose of his property while the suit goes on.

Falik, 343 F.2d at 42. The more dangerous type of action is at issue here: The Receiver has obtained an order that would allow him to dispose of the estate's property prior to the Government's assessment or collection of the taxes due from the estate, perhaps making the eventual collection of whatever tax is due impossible.

We conclude that in the circumstances of this case, § 2410(a)(1) does not consti-

tute a waiver of sovereign immunity that would avoid application of the Anti-Injunction Act and the Declaratory Judgment Act.

C. Jurisdiction Under South Carolina v. Regan

The district court alternatively premised its power to grant the Receiver's Priority Declaration Motion on the exception to the Anti-Injunction Act announced in South Carolina v. Regan. The Regan Court held that the Anti-Injunction Act does not apply when Congress has not "provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf." 465 U.S. at 381. The district court stated that the Receiver has two choices, to wit, "implement[ing] the partial distribution plan as presently structured, but at the risk of extraordinary personal liability," or "set[ting] aside reserves from the receivership funds to provide for the eventuality that this personal liability will come to pass, and to cover that liability." 138 F.Supp.2d at 528. The court found that these alternatives were untenable because "the effect of not affording the Receiver a way to have the personal liability issue determined at this stage would be to bring the receivership and any partial distribution under the receivership to a halt," which would "defeat the very purpose of the receivership." Id. We cannot conclude that these considerations meet the Regan standard, for the Receiver has alternative routes for obtaining a determination of his federal tax exposure without incurring personal liability for violating the Federal Debt Priority statute.

First, the Receiver, like any other taxpayer has the option of paying taxes immediately and seeking a refund thereafter. The "pay first, litigate later" procedure is not unusual. See Bull v. United States, 295 U.S. 247, 260 [15 AFTR 1069] (1935); Phillips v. Commissioner, 283 U.S. 589, 595–99 [9 AFTR 1467] (1931). In addition, the Government also points out that even without paying taxes, the Receiver has the means, prior to making a distribution, to obtain a determination of tax liability either through administrative procedures or through a judicial proceeding. For example, the Receiver could request an administrative determination of Bancorp's tax liability or of the tax consequences of the Plan by applying for a private letter ruling. See, e.g., 26 C.F.R. § 601.201. Or, upon filing the appropriate tax returns, the Receiver could request a prompt assessment of any corporate tax liability of Credit Bancorp. See 26 U.S.C. § 6501(d). As the Government concedes (see Government's reply brief at 10–11), if the Receiver were to obtain such an assessment, with its concomitant automatic lien, a suit would then lie under § 2410 to determine whether the receivership assets can be used to satisfy the tax liability. See, e.g., Hensley v. Harbin, 196 F.3d 613, 614 [84 AFTR 2d 99-6888] (6th Cir. 1999); Litton Industrial Automation Systems, Inc. v. Nationwide Power Corp., 106 F.3d 366, 368 [79 AFTR 2d 97-1356] (11th Cir. 1997), cert. denied, 523 U.S. 1003 (1998); Progressive Consumers Federal Credit Union v. United States, 79 F.3d 1228, 1230–34 [77 AFTR 2d 96-1419] (1st Cir. 1996); Estate of Johnson, 836 F.2d 940, 943–45 [61 AFTR 2d 88-579] (5th Cir. 1994). Or, because the Receiver is a fiduciary, he could obtain judicial review because he would be entitled to a notice of deficiency before any assessment is made, and to challenge any such notice in the Tax Court, see 26 U.S.C. §§ 6212(a), 6213(a).

Finally, as the district court noted, the Receiver could set up a reserve for taxes--a common step--and delay distribution of the reserved portion of the estate until Bancorp's tax liabilities are determined. Such reserves and delays are hardly novel. See generally 1 A. Dewing, Financial Policy of Corporations 622 (5th ed. 1953) ("Probably the most frequent of [contingency reserves] is that required for taxes."). Such a reserve by the Receiver would doubtless be approved by the court. See generally King v. United States, 379 U.S. 329, 338–39 (1964) (holding that bankruptcy estate's distributing agent had personal liability for distributing estate's assets without making adequate provision for payment of government's priority claim, and stating: "[I]f King had objected

at the confirmation hearing to paying out the deposited funds to nonpriority creditors before the Government's claim was surely provided for, there can be little doubt that he would have obtained satisfaction. Even after confirmation it is most unlikely that such an objection would have been ignored. Had it been, responsibility for the frustration of the Government's claim would have devolved completely upon the court . . . . '' (footnote omitted)).

In light of the procedures available to him, the Receiver has not shown that he has no means of securing a timely determination of whether and to what extent Bancorp has federal tax liability and whether the fraud victims' claims take priority over any tax liabilities, or of avoiding massive personal liability under the Federal Debt Priority statute, other than by ob-taining a declaration against the Govern-ment pursuant to his Priority Declaration Motion. The district court's view that pur-suit of any of these courses of action would defeat the purpose of the receiver-ship is unpersuasive. The purpose will not be defeated by the delay endured by many individuals and entities during the interval in which potential tax issues are resolved. And to hold that there is a necessity- based exception to the Anti-Injunction Act here would be to allow the district court itself to effect a waiver of the United States' sovereign immunity simply by having created the receivership and having ordered immediate distribution.

In sum, we conclude that the Regan exception to the Anti-Injunction Act did not authorize the district court to grant the Receiver's Priority Declaration Motion.

D. Alternative Waivers Suggested by the Receiver

The Receiver urges that if we reject the grounds relied on by the district court for its ruling that sovereign immunity has been waived, we should apply the exception to the Anti-Injunction Act established in Williams Packing, or conclude that there was a waiver of such immunity in the Administrative Procedure Act or in the Government's acts of intervening in this action in the spring of 2000 or negotiating thereafter. We find none of these contentions persuasive.

The Williams Packing exception applies when the requested relief is required in order to avoid irreparable injury and ''it is clear that under no circumstances could the Government ultimately prevail.'' 370 U.S. at 6–7; see also Bob Jones University v. Simon, 416 U.S. 725, 737 [33 AFTR 2d 74-1279] (1974). We cannot see that either prong of this test is met.

The Receiver has the burden of ''plead[ing] and prov[ing] facts'' that establish irreparable injury, see Commissioner v. Shapiro, 424 U.S. 614, 629 [37 AFTR 2d 76-959] (1976), and his simple assertions on this appeal that postponing the distribution plan would result ''in irreparable injury to the customers because they are deprived of the right to vote or dispose of their shares . . . [and they] are left exposed to injury due to market risk'' (Receiver's brief at 37), does not carry that burden. The district court has already shown its willingness to make accommodations designed to alleviate injury that might arise from CBL customers' inability to control their own shares, see SEC v. Credit Bancorp, Ltd., 124 F.Supp.2d 824, 826 (S.D.N.Y. 2000), and the Receiver has offered no proof of irreparable injury.

More importantly, it cannot be said that the Government clearly could not ultimately prevail. The Receiver has not even filed any tax returns from which one could determine whether the Government will be owed taxes, and the Receiver himself postulates massive tax liability. The Williams Packing exception to the jurisdictional bar simply has no application here.

Nor are we persuaded that the necessary waiver can be found in the Administrative Procedure Act, 5 U.S.C. § 702. That section applies only when there has been an ''agency action'' within the meaning of 5 U.S.C. § 551(13), see Lujan v. National Wildlife Federation, 497 U.S. 871, 882 (1990). Here, the Receiver does not complain of any action or inaction on the part of any governmental agency. Accordingly, his Priority Declaration Motion does not

trigger the § 702 waiver of sovereign immunity.

Finally, we cannot agree that the Government's conduct with regard to the present action constituted a waiver of sovereign immunity. Its intervention in pursuit of a stay of discovery solely in order to protect an ongoing criminal investigation was a narrowly focused request and not a waiver with respect to the civil tax liability of Bancorp or the Receiver. As discussed above, the United States is amenable to suit only to the extent it has consented to be sued, and waivers of sovereign immunity are to be narrowly construed. Indeed, our cases generally note that a Congressional enactment is required for a waiver of sovereign immunity and that

> "no contracting officer or other official is empowered to consent to suit against the United States." . . . Therefore, to the extent that [a] [s]ettlement [a]greement purports to waive sovereign immunity, whoever acceded to the [s]ettlement [a]greement on behalf of the Government . . . was acting beyond the scope of his or her authority.

Presidential Gardens Associates v. U.S. ex rel. Secretary of Housing and Urban Development, 175 F.3d 132, 140 (2d Cir. 1999) (quoting United States v. Mitchell, 463 U.S. 206, 215–16 (1983)). The Government's Stipulation with the Receiver in this case with respect to the proposed partial interim distribution cannot be viewed as constituting a waiver. In the Stipulation, in which the Government agreed not to assert a lien on certain receivership assets and not to assert § 3713(b) liability against the Receiver with respect to the period preceding his appointment, the parties agreed that "[n]othing" in the Stipulation was to "waive any of the Government's defenses, including but not limited to sovereign immunity." (Stipulation ¶ 9.)

CONCLUSION

We have considered all of the Receiver's arguments on this appeal and have found them to be without merit. The May 2001 Order of the district court is reversed to the extent that it found a waiver of sovereign immunity with respect to the tax liabilities of Bancorp and the Receiver, declared that Bancorp's debts to its customers take priority over its debts to the United States, and ruled that the Receiver will have no personal liability under 31 U.S.C. § 3713 if he distributes assets of the estate as contemplated by the Plan.

We note that, in the absence of consent by the Government, the Receiver was not ordered to implement the Plan unless the district court entered an order granting his Priority Declaration Motion. See January 2001 Order ¶ U. The order granting that Motion is now being vacated, and the Receiver is thus under no obligation to proceed with a distribution in a way that exposes him to personal liability for Bancorp's taxes. The matter is remanded for dismissal of the Receiver's Priority Declaration Motion, without prejudice to renewal at such time as the Government has made an assessment or otherwise asserted or claimed a lien on the assets of Bancorp or the receivership.

¶2002-5109

Steven J. RENNIE, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Eastern Dist. of California, (DC CA) Docket No. CV-F-02-5055 REC, June 13, 2002. Year 1998. Decision for Govt.

1. Collection due process (CDP)—review of administrative determination—frivolous return penalties. Govt. was granted dismissal of damages complaint and request to set aside allegedly invalid determination to proceed with collection of frivolous return penalty against pro per tax protester who filed "zero" return: alleged failure to send to taxpayer "verification from IRS office collecting tax" before issuing determination notice didn't violate IRC §6330; and transcript attached to complaint showed taxpayer received transcript of his account at CDP hearing. Also, Appeals Officer wasn't required to produce documents regarding Secy.'s delegation of authority to IRS employees to impose IRC §6702 penalty; penalty was valid based on

taxpayer's frivolous return positions that income was derived only from corp. activity, that he wasn't required to file returns, and that IRS had no legal basis to collect withheld taxes; and taxpayer's proposed condition to paying underlying liability wasn't alternative collection method. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(10). IRC §6330; 6702.

In the United States District Court for the Eastern District of California.

Order Granting Defendant's Motion to Dismiss or for Summary Judgment and Directing Entry of Judgment for Defendant

COYLE, District Judge:

On May 8, 2002, the court heard defendant's Motion to Dismiss or For Summary Judgment.

Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants this motion and directs entry of judgment for defendant.

On January 11, 2002, plaintiff Steven J. Rennie, proceeding in pro per, filed a ''Complaint for Damages and Request That This Court Set Aside an Invalid Collection Due Process 'Determination' Lawlessly Issued Pursuant to 26 USC 6330''. The Complaint alleges that the ''Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330'' issued on December 28, 2001, a copy of which is attached to the Complaint as Exhibit A, was issued in violation of law.[1]

In the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998), Pub.L. 105-206, sec. 3401, 112 Stat. 685, 746, Congress enacted new sections 6320 (pertaining to liens) and 6330 (pertaining to levies) to provide due process protections for taxpayers in tax collection matters. Section 6330 generally provides that the Commissioner cannot proceed with the collection of taxes by way of a levy on a taxpayer's property un-til the taxpayer has been given notice of and the opportunity for an administrative review of the matter (in the form of an Appeals Office due process hearing) and, if dissatisfied, with judicial review of the administrative determination. Section 6330(c) pertains to matters considered at such a hearing and provides in pertinent part:

> (c) Matters considered at hearing. - In the case of any hearing conducted under this section -
>
> (1) Requirement of investigation. -The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

Section 6330(c) (2) (A) provides that the person may raise any relevant issue to the unpaid tax or the unpaid levy, including appropriate spousal defenses, challenges to the appropriateness of collection actions, and ''offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.'' Section 6330(c) (2) (B) provides that ''[t]he person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.'' Section 6330(c) (3) provides in pertinent part:

> The determination by any appeals officer under this subsection shall take into consideration -
>
> (A) the verification presented under paragraph (1);
>
> (B) the issues raised under paragraph (2); and
>
> (C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate

[1] Also attached to the Complaint is what purports to be a transcript of the Collection Due Process Hearing. The hearing was tape recorded by plaintiff and he has prepared the transcript of it. The transcript is not certified. Moreover, from the court's research, the Collection Due Process hearings are supposed to be informal and there is not requirement that the hearings be recorded.

concern of the person that any collection action be no more intrusive than necessary.

Section 6330(d) (1) provides that the person may appeal the determination to either the Untied States Tax Court or to the United States District Court, depending upon jurisdiction of the underlying tax liability. Here, there is no dispute that the appeal is to this court. Although Section 6330(d) does not specify the standard of review a district court should apply to an appeal of a Notice of Determination by the IRS Appeals Office, the legislative history indicates that the court should conduct a de novo review only "where the validity of the tax liability was properly at issue at the administrative hearing." H. Conf. Rept. 105-599, 105th Cong. 2nd Sess. 266 (1998). Where the amount of the underlying tax liability is not properly part of the appeal, the court reviews a Notice of Determination for abuse of discretion. Id.; Sego v. Commissioner, 114 T.C. 604, 609–610 (2000). Here, because deficiency procedures do not apply to the assessment or collection of a penalty pursuant to 26 U.S.C. § 6702, defendant asserts that the court's review is de novo.

The United States moves to dismiss the Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b) (6), Federal Rules of Civil Procedure. Alternatively, defendant moves the court for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure.

[1] The Complaint alleges that the appeals officer "[d]id not produce and present to Plaintiff the 'verification from the Secretary' as required by Section 6330(c)" and that the appeals officer "[d]id not 'Prior to issuance of' the 'determination' at issue, send Plaintiff the 'verification' from the IRS office collecting the tax that the requirement of any applicable [sic] have been met," as "required" by Treasury Regulation 301.6330-1(e).'

These allegations state a claim upon which relief can be granted. Section 6330(c) (1) only requires that the appeals officer "obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." Section 301.6330-1(e) provides that the appeals officer is required to "obtain verification from the IRS office collecting the tax that the requirements of any applicable law or administrative procedure have been met." Nothing in either the statute or the regulation requires that the verification be sent to or provided to the taxpayer. See Nestor v. Commissioner, 2002 WL 236682 [118 TC 162] (Tax Ct. 2002). Furthermore, according to the transcript attached to plaintiff's complaint, the Appeals officer reviewed

> the case file and all of the information that you submitted to me separately; which was a copy of the transcript [of an earlier Collection Due Process Hearing] and some information on the frivolous return penalty. I reviewed the Las Vegas penalty file which includes the stipulation of the parties to return the matter to us. ... I've also reviewed the transcripts of the court and the internal records regarding the application of the penalty and everything that happened there. I've done the same thing with the income tax liability, reviewing the return itself and the audit procedures, the audit report, the documents that passed back and forth between you and the service, and all of the procedural aspects of that. I've also reviewed your protest and the documents that you attached to your protest ... I also looked at transcripts for each year ....
>
> ...
>
> This is the kind of evidence that the court looks to, along with us, as to the records that are on the master file, on our computer systems, regarding your liabilities. Now there's two pages there, the first is for your individual income tax, and the second is on the civil penalty. And what these two documents do is they put in a plain language format so you can see what those codes mean over there on the left and all of the actions that have occurred on the account, and the balances due are summarized at the top of that as of a specific date. These

are both as of September 24, 2001, and they show the account balance on the individual income tax return to be $20,196.64, and the balance on the proposed penalty, well the penalty that has been asserted and assessed $555.26, those include interest and penalties up through that 9-24-2001. The literal transcript, there's two pages of transcripts that the court will accept, has evidence that the procedures have been and that there's [sic] been an assertive tax liability properly assessed; one is the (Metra X?) [sic] which I have provided you, the other is a certified transcript, which I did not obtain in this case, because the, at least at this point, because the courts have told us that this is as far as we need to go in appeals to determine that the taxes have been [sic]

In Yacksyzn v. Commissioner, 2002 WL 531150 [RIA TC Memo 2002-099] (Tax Ct. 2002), the United States Tax Court held:

> Federal tax assessments are formally recorded on a record of assessment. Sec. 6203. ''The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment.'' Sec. 301.6203-1. Proced. & Admin. Regs.
>
> Section 6330(c)(1) does not require the Commissioner to rely on a particular document to satisfy the verification requirement imposed therein ... In this regard, we observe that the transcripts of account on which the Appeals officer relied, and which he furnished to petitioner before the hearing, contained all the information prescribed in section 301.6203-1 ....
>
> Petitioner has not alleged any irregularity in the assessment procedure that would raise a question about the validity of the assessments or the information contained in the transcripts of account ... Accordingly, we hold that the Appeals officer satisfied the verification requirement of section 6330(c)(1) ....

Therefore, the alleged failure to send to plaintiff ''verification from the IRS office collecting the tax'' prior to the issuance of the ''determination'' is not a violation of the statute and cannot state a claim upon which relief can be granted. Furthermore, the transcript attached to the Complaint indicates that a transcript of plaintiff's account was provided to plaintiff at the Collection Due Process hearing.

The Complaint further alleges that the hearing pursuant to Section 6330 was unlawful because the appeals officer did not ''produce any document signed by any Defendant employee that would have supported the imposition of the 'frivolous penalty' at issue''; did not ''produce any Delegation of Authority from the Secretary that authorized any Defendant employee to impose the 'frivolous penalty' at issue''; did not ''identify or produce a Treasury Department regulation that authorized any Defendant employee to impose the 'frivolous penalty' at issue or required Plaintiff to pay such a 'frivolous penalty'''; and did not ''produce any statute that established the 'existence ... of the underlying liability' of the tax for which the 'frivolous penalty' had been imposed.''

Defendant moves to dismiss these allegations on the ground that there is no requirement in the law that the IRS produce any of these documents or information prior to the imposition of a levy or in connection with a Collection Due Process hearing.

The court agrees. In Hughes v. United States, 953 F.2d 531, 536 [69 AFTR 2d 92-472] (9th Cir. 1993), an action brought by the taxpayers to enjoin the collection of income taxes, the Ninth Circuit rejected the argument that the IRS could not prevail because there was no evidence of any delegated authority from the Secretary of the Treasury to the various agents involved:

> Relevant statutes and regulations demonstrate ... that the Secretary does have the power to collect taxes, and that such power can be delegated to local IRS agents. 26 U.S.C. § 6301 provides that ''[t]he Secretary shall collect the taxes imposed by the internal revenue laws.''

The actual task of collecting taxes, however, has been delegated to local IRS directors. ''The taxes imposed by the internal revenue laws shall be collected by district directors of internal revenue.'' 26 C.F.R. § 301.6301-1. District directors in turn are authorized to redelegate the levy power to lower level officials such as collection officers. See IRS Delegation Order 191. The delegation of authority down the chain of command, from the Secretary, to the Commissioner of Internal Revenue, to local IRS employees constitutes a valid delegation by the Secretary to the Commissioner, and a redelegation by the Commissioner to the delegated officers and employees. See 36 C.F.R. § 301.7701-9.

Furthermore, there is no requirement of publication of internal delegations of administrative authority to enforce the Internal Revenue laws. Id. at 539; Lonsdale v. United States, 919 F.2d 1440, 1446 [67 AFTR 2d 91-1049] (10th Cir. 1990). With respect to the allegation that the Appeal Officer did not ''produce any document signed by any Defendant employee that would have supported the imposition of the 'frivolous penalty' at issue''; 26 U.S.C. § 6702 provides for a $500 civil penalty for a frivolous income tax return if

(1) any individual files what purports to be a return of the tax imposed by subtitle A but which -

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to -

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws.

Here, the record before the court establishes that plaintiff's 1998 income tax return, with attachment, reported ''zero'' in the portions of the return pertaining to income and sought a refund of federal income tax withheld from Forms W-2 and 1099 in the amount of $7,086.90.[2] In addition, as stated in the Notice of Determination, also attached to the 1998 income tax return was a Form W-2 from Caesar's Palace in Las Vegas reporting wages in the amount of $65,674.74 and withholding in the amount of $7,086.90. There is no question that the return filed by plaintiff is a ''purported return'' within the meaning of Section 6702. See Fuller v. United States, 786 F.2d 1437, 1438–1439 [57 AFTR 2d 86-1224] (9th Cir. 1986); see also Hudson v. United States, 766 F.2d 1288 [56 AFTR 2d 85-5582] (9th Cir. 1985).[3] Furthermore, there can be no question that the positions espoused by plaintiff in the attachment to the 1998 income tax return are frivolous within the meaning of Section 6702. Thus, plaintiff's assertion that the Internal Revenue Code does not define ''income'' and that income can only be derived from corporate activity are without merit. 26 U.S.C. § 61(a) defines gross income as ''all income from whatever source derived . . . .'' The case cited by plaintiff in the attachment, United States v. Ballard, 535 F.2d 400 [37 AFTR 2d 76-1340] (8th Cir.), cert. denied, 429 U.S. 918 (1976), stated in dicta that the ''general term 'income' is not defined in the Internal Revenue Code in the context of addressing the Government's contention that all 'gross receipts' received by Ballard represented income that must be reported. Furthermore, cases have consistently found the identical arguments being made by plaintiff to be frivolous. See, e.g., Tornichio v. United States, 1998 WL 381304 [81 AFTR 2d 98-1377] (N.D.Ohio 1998), aff'd, 1999 WL 191340 [83 AFTR 2d 99-1516] (6th Cir. 1999); Gavigan v. United States, 2000 WL 33187163 [87 AFTR 2d 2001-808] (D. Conn. 2000);

[2] The court notes that this virtually identically worded attachment has been filed to many ''tax protestor'' returns and the positions espoused therein have been found frivolous by all courts that the court has seen in its research.

[3] To the extent that the attachment to the 1998 income tax return asserts to the contrary, the assertion is without legal merit. The cases which are cited in the attachment to the 1998 income tax return, United States v. Kimball, 896 F.2d 1218 [65 AFTR 2d 90-619] (9th Cir. 1990) and United States v. Long, 618 F.2d 74 [46 AFTR 2d 80-5004] (9th Cir. 1980), do not involve a ''purported return'' within the meaning of Section 6702.

Townsend v. United States, 2000 WL 1616081 [86 AFTR 2d 2000-6611](W.D.Mich. 2000); Perl v. United States, 1999 WL 1022186 [84 AFTR 2d 99-6751] (D.Mass. 1999); Dose v. United States, 1986 WL 147 [58 AFTR 2d 86-6291] (N.D.Iowa 1986); In re Bertelt, 184 B.R. 603 (M.D.Fla. 1995); Ghalardi Tax Education Foundation v. Commissioner, 1998 WL 906755 [1998 RIA TC Memo ¶98,460] (Tax Ct. 1998); Zyglis v. Commissioner, 1993 WL 289265 [1993 RIA TC Memo ¶93,341](Tax Ct. 1993). Plaintiff's assertions in the attachment to the 1998 return that he is not required to file an income tax return because the Privacy Act Notice in a Form 1040 booklet so advises is also meritless. See Ghalardi Income Tax Education Foundation, id.; Billman v. Commissioner; 1984 WL 14920 [83 TC 534](Tax Ct. 1984). Plaintiff's assertion in the attachment that, because no assessment for the 1998 income taxes was made, the IRS has no legal basis to hold the monies withheld for income taxes by plaintiff's employer is also is without merit. See Roth v. United States, 1999 WL 1090819 [84 AFTR 2d 99-6974] (W.D.Wis. 1999); see also Sarnelli v. United States, 78 F.Supp.2d 1131 [84 AFTR 2d 99-5353] (D.Nev. 1999); Louden v. United States, 2001 WL 260080 [87 AFTR 2d 2001-987] (E.D.Mich. 2001); Morris v. United States, 2002 WL 471826 [89 AFTR 2d 2002-1406] (D.Idaho 2002). The allegation in the Complaint that the Appeals Officer erred because he 'did not identify or produce a Treasury Department regulation that authorized Defendant employees to impose the ''frivolous penalty'' at issue or required Plaintiff to pay such a ''frivolous penalty'''is also without merit. See Hudson v. United States, 766 F.2d 1288, 1291 [56 AFTR 2d 85-5582] (9th Cir. 1985); Gass v. United States, 2000 WL 1204575 [86 AFTR 2d 2000-5968] (D.Colo. 2000).

The Complaint alleges that the Appeals Officer erred because the Appeals Officer

> g) Refused to accept the ''collection alternative'' proposed by Plaintiff which was that (they) would immediately pay the ''frivolous penalty'' if the appeals officer would merely cite and produce the statute that established the ''underlying liability'' for the tax ....
>
> h) To make it easy for the appeals officer to comply ..., Plaintiff's placed an Internal Revenue Code on the table in front of the appeals officer.
>
> i) Despite having an Internal Revenue Code in front of him, the appeals officer refused to point out in the Code where an income tax ''liability'' was established by law.

These allegations do not state a claim. The purpose of the provision for the consideration of collection alternatives described in Sections 6330(c)(2)(A) and 6330(c)(3)(C) clearly is intended to allow the taxpayer to propose a method of payment that will of the underlying tax liability instead of satisfaction of a tax lien by a levy. Plaintiff's allegations do not propose an ''alternative'' to collection by levy but rather proposes a condition to payment of the underlying liability. Furthermore, as discussed supra, the basis of the underlying liability is clear as a matter of law and, as indicated in the attachment to the 1998 purported income tax return, known to plaintiff. Therefore, these allegations do not state a claim upon which relief can be granted.

The court further concludes that leave to amend will be futile because the record before the court establishes that plaintiff cannot state a claim upon which relief can be granted pursuant to 26 U.S.C. § 6330.

ACCORDINGLY, IT IS ORDERED that defendant's Motion to Dismiss or For Summary Judgment is granted and that this action is dismissed without leave to amend.

THE CLERK OF THE COURT IS DIRECTED TO ENTER JUDGMENT FOR DEFENDANT.

Dated: June 11, 2002

ROBERT E. COYLE

UNITED STATES DISTRICT JUDGE

Judgment in a Civil Action

DECISION BY COURT: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's motion to dismiss is granted. JUDGMENT IS ENTERED for Defendant and against Plaintiff.

DATED: 6-13-02

JACK L. WAGNER, Clerk

By:/s/

Deputy Clerk

¶2002-5110

Cynthia STOUDEMIRE, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. In Re: Cynthia Stoudemire, Debtor. U.S. Bankruptcy Court, Northern Dist. of Georgia, Docket No. 01-67128B, Oct. 15, 2001. Years 1994, 1995, 1996. Decision for Taxpayer in part and for Govt. in part.

1. Tax claims in bankruptcy—dischargeability—tax liens. Pursuant to consent order, Chap. 7 debtor's tax liabilities were dischargeable, properly noticed prepetition liens remained in effect as to all her prepetition property interests, and adversary proceeding was closed. *Reference:* United States Tax Reporter ¶68,726.52(27); 68,726.53(2).

Travis T. Vance, III Special Assistant United States Attorney Georgia Bar No. 724380 Post Office Box 901, Stop 1000-D Atlanta, Georgia 30370
Joseph Chad Brannen (signed with the express permission of Mr. Brannen) Attorney for debtor Georgia Bar No. 077120 5025 North Henry Blvd. Stockbridge, Georgia 30281

In the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division.

Consent Order

BIHARY, Bankruptcy Judge:

Chapter 7

[1] Based upon the consent of the parties, and the Court being otherwise fully advised in the premises thereof, it is hereby:

ORDERED that plaintiff's assessed federal income tax liabilities for the years 1994, 1995 and 1996 are not excepted from discharge pursuant to 11 U.S.C. § 507 and § 523, and are, therefore, dischargeable;

ORDERED that any federal tax liens, notices of which were properly filed prior to the petition date, with respect to the tax and penalty liabilities for the years 1994, 1995 and 1996, remain in full force and effect as to any property or rights to property owned by the plaintiff as of the date of the petition in bankruptcy;

ORDERED that the Clerk of the Court close the instant adversary proceeding; and it is further

ORDERED that the parties shall bear their respective costs.

SO ORDERED this 10th day of October, 2001, in Atlanta, Georgia.

JOYCE BIHARY

United States Bankruptcy Judge

Consented to and Presented by:

TRAVIS T. VANCE, III

Special Assistant

United States Attorney

Georgia Bar No. 724380

Post Office Box 901, Stop 1000-D

Atlanta, Georgia 30370

Consented to:

JOSEPH CHAD BRANNEN (signed with the express

permission of Mr. Brannen)

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I certify that I served the foregoing document(s) on the attached list of parties at the addressses shown, through the United States Mail, or (as applicable) by placing a copy in the respective attorney's mailbox provided by the Clerk's Office on the 13th Floor of the United States Courthouse, Atlanta, Georgia.

Date: October 15, 2001

W. Yvonne Evans, Clerk of Court

By: /s/

¶2002-5111

Cynthia Sue WASHBURN and Matthew Lawrence WASHBURN, PLAINTIFFS v. UNITED STATES OF AMERICA (Internal Revenue Service), DEFENDANT. In Re: Cynthia Sue Washburn and Matthew Lawrence Washburn, Debtors. U.S. Bankruptcy Court, Northern Dist. of Iowa, (Bktcy Ct IA) Docket No.01-01299-c, Aug. 3, 2001. Years 1996, 1997. Decision for Govt.

1. Tax claims in bankruptcy—dismissal of adversary proceeding. Pursuant to joint stipulation, Chap. 7 debtors' adversary proceeding to determine dischargeability of their tax liabilities was dismissed with prejudice. *Reference:* United States Tax Reporter ¶68,726.52(40).

Stephen Jon Rapp, United States Attorney. Robert D. Metcalfe Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 7238 Washington, D.C. 20044 Telephone (202) 307-6525 Attorney for the Defendant United States of America.
Linda E. Merritt 408 Edgewood Road, Suite 107 P.O Box 8085 Cedar Rapids, Iowa 52408-8085 Telephone (319)396-3535.

U.S. Bankruptcy Court, Northern Dist. of Iowa,

Order

Chapter 7

[1] THIS MATTER comes before the Court upon the joint stipulation between the plaintiff, Cynthia Sue and Matthew Lawrence Washburn, and the defendant, the United States of America, determining

the dischargeability of federal income taxes for the 1996 and 1997.

IT APPEARING TO THE COURT that plaintiffs and the United States of America are in agreement as to the disposition of the above-captioned adversary proceeding pursuant to the joint stipulation filed herewith, it is

ORDERED that the stipulation between the plaintiffs and the United States of America is hereby APPROVED AND ADOPTED by the Court, and it is

FURTHER ORDERED that this adversary action is hereby dismissed with prejudice as to the plaintiffs and the United States of America, each party to bear its own litigation expenses, including cost and attorney's fees.

IT IS SO ORDERED this 3 day of Aug, 2001.

/s/

UNITED STATES BANKRUPTCY JUDGE

Submitted by:

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United States Attorney

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United States Trustee

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Cedar Rapids, IA 52401

¶2002-5112

Mary M. LITZENBERGER, PLAINTIFF v. UNITED STATES OF AMERICA Ex Rel. Internal Revenue Service, DEFENDANT. In Re: Mary M. Litzenberger, Debtor. U.S. Bankruptcy Court, Northern Dist. of Iowa, Docket No. 00-02554-S, Dec. 15, 2000. Later proceeding at (2000, DC IA) 87 AFTR 2d 2001-524. Year 1995. Decision for Govt.

1. Tax claims in bankruptcy—dischargeability. Pursuant to joint stipulation, Chap. 7 debtor's tax liability was excepted from discharge under 11 USC §523(a)(1)(B) where she filed late return more than 2 years before filing bankruptcy petition. *Reference:* United States Tax Reporter ¶68,726.52(27).

Wil L. Forker 505 6th Street, Suite 530 Sioux City, Iowa 51101 (712) 252-1395 Robert D. Metcalfe Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 7238 Ben Franklin Station Washington, D.C. 20044 Telephone: (202) 307-6525 Fascimile (202) 514-6770

In the United States Bankruptcy Court for the Northern District of Iowa.

Joint Stipulation for Order and Judgment Determining Dischargeability of Debt

Chapter 7 Case

[1] The plaintiff, May M. Litzenberger, and the defendant, United States of America, hereby agree and stipulate to the following facts as to the dis-

chargeability of federal income taxes in the above-referenced adversary action.

1. The plaintiff filed a Chapter 7 petition on October 4, 2000.

2. On October 19, 2000, the plaintiff filed the above-captioned adversary action seeking a determination of the dischargeability of federal income taxes owed to the United States for the 1995 tax year.

3. The federal income taxes assessed against plaintiff for the 1995 tax year are excepted from discharge under section 523(a)(1)(B) of the Bankruptcy Code (11 U.S.C.) because plaintiff filed her 1995 federal income tax return after the date on which such return was last due under any applicable laws or extensions, and after two years before the filing of the bankruptcy petition.

4. This stipulation constitutes a final order in this adversary action between the plaintiff and the United States of America, each party to bear its own litigation expenses including costs and attorneys' fees.

Dated: 12/15/00

Dated: November 29, 2000

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(712) 252-1395

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¶2002-5113

In Re: Shane' Latrell JACKSON a/k/a Shane' Latrell Rambo SSN:422-06-4872, Debtor. U.S. Bankruptcy Court, Middle Dist. of Georgia, (Bktcy Ct GA) Docket No. 01-40268, July 1, 2001. Decision for Taxpayer.

1. Tax claims in bankruptcy—exemptions—earned income credits (EIC)—refunds. Trustee's objections to Chap. 7 debtor's amended claims of exemption for income tax refunds were overruled: EIC portion of federal tax refund fell squarely within Alabama law's "public assistance" exemption; non-EIC portion was also clearly exempted by statute; and taxpayer's failure to schedule refunds' correct amounts in her original petition evidenced no bad faith or prejudice to creditors, so didn't disqualify her claims. *Reference:* United States Tax Reporter ¶68,726.52(32).

United States Bankruptcy Court, Middle District of Georgia, Columbus Division.

Memorandum Opinion

LANEY, III, U.S. Bankruptcy Judge:

CHAPTER 7

On June 1, 2001, the court held a hearing on Trustee's objection to Debtor's amended claim of exemptions. At the conclusion of the hearing, the court took the matter under advisement and gave the parties an opportunity to submit letter briefs. Debtor filed a letter brief and also filed another amended claim of exemptions. Trustee filed a letter brief in response. After considering the parties' briefs and the applicable statutory and case law, the court will overrule Trustee's objection.

FACTS

On January 30, 2001, Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code (''Code''). In Debtor's Schedule C, she claimed a $1500.00 exemption in her federal income tax refund. Debtor valued this tax refund at $1500.00. She also claimed a $400.00 exemption in her state income tax refund which she valued at $400.00. In Debtor's Schedule B, she attested that each refund was in the possession of the government.

On March 7, 2001, Trustee conducted a Meeting of Creditors pursuant to § 341(a) of the Code. While Trustee was questioning Debtor, it was revealed that Debtor had received a federal income tax refund of $3801.00 instead of $1500.00 as her schedules indicated. On March 28, 2001, Debtor amended her claim of exemptions reflecting a $3000.00 claim of exemption in the $3801.00 refund. Debtor relied on section 6-10-6 of the Alabama Code as authority for the $3000.00 claim of exemption.

On March 26, 2001, Trustee filed his objection to Debtor's amended claim of exemptions. Specifically, Trustee alleges ''[t]he debtor failed to disclose an asset until questioned by the Trustee. The asset is a tax return, which is property of the estate.'' (Trustee's Objection, Doc. #6).[1]

At the June 1, 2001 hearing on Trustee's objection, Debtor testified that her father prepared her federal and state tax returns. At the end of February 2001, Debtor filed these returns. Debtor further testified that she received her refund before the March 7, 2001 Meeting of Creditors. When questioned about the whereabouts of the refunds, Debtor explained that she used them to bring automobile and mortgage payments current. However, on re-cross by Trustee, Debtor indicated that she did not receive the refund until late March. Instead of receiving the refund Debtor stated that she actually wrote post-dated checks. Lastly, Debtor testified that a portion of her tax refund was an Earned Income Credit (''EIC''). As to Debtor's state income tax refund, she indicated that she received only $300.00 instead of $400.00 as indicated in her schedules.

The parties agree that under Alabama law, the amount and nature of Debtor's amended claim of exemptions could be allowed. However, the parties disagree as to whether Debtor's claim should be allowed given that she did not list the accurate amount of her refund in her original schedules and did not come forward with the correct information until the Meeting of Creditors. Trustee asserts that the EIC and tax refunds must be disclosed in the schedules filed with the original petition or they become property of the estate. Trustee further argues that it is inconsequential the information was disclosed at the Meeting of Creditors when the Debtor failed to disclose such information in her original schedules.

Debtor argues, however, that she did schedule an anticipated tax refund in her original schedules. Debtor explains that she scheduled an amount which she anticipated that she would receive. Once the refund was received, Debtor revealed it at the Meeting of Creditors. Therefore, Debtor asserts that there was no intent to deceive or conceal the refund. Debtor concedes that her testimony may have been inconsistent when she indicated that she had received the refund when she actually had been writing post-dated checks. However, Debtor contends that this is immaterial because there was no intent to conceal the refund.

Before ruling on this issue, Trustee requested that the court consider the case of Brasher v. McGregor (In re Brasher), 253 B.R. 484 (M.D. Ala. 2000). The parties were given an opportunity to respond. On June 15, 2001, Debtor responded by filing another amended claim of exemptions claiming $1748.00, the EIC portion of the $3801.00 refund, as exempt pursuant to Brasher and Ala. Code § 38-4-8. The amendment further claimed $1180.00 of the $3801.00 refund as exempt pursuant to section 6-10-6 of the Alabama Code. Furthermore, although Debtor testified she re-

[1] Although Trustee's objection reads ''asset is a tax return . . . .'' the court will assume that Trustee intended to allege that the asset is a tax *refund*.

ceived a $300.00 income tax refund from the state, the amendment contained a $400.00 claim of exemptions as in her prior schedules.

On June 29, 2001, Trustee filed his response maintaining that Debtor's failure to disclose the full amount of the tax refund should result in his objection being sustained. Because Debtor knew she would receive a $400.00 state tax refund, Trustee asserts that Debtor likewise knew that her federal income tax refund would be $3801.00 Relying on Sixth and Tenth Circuit authority, Trustee furthers argues that EIC's are, in fact, property of the estate.

DISCUSSION

[1] The primary issue before the court is whether Debtor's failure to schedule the correct amount of a tax refund in her original schedules precludes her from obtaining an exemption in that refund. Also before the court is the substantive issue of whether Debtor can claim the EIC portion of her refund as exempt under Alabama law. The court will address this latter issue first.

Under section 38-4-8 of the Alabama Code, "[a]ll amounts paid or payable as public assistance to needy persons shall be exempt from any tax levied ... and in the case of bankruptcy, shall not pass to the trustee or other person acting on behalf of the creditors of the recipient of public assistance." As Trustee has pointed out to the court, the Middle District of Alabama has recently held that "public assistance" includes federal EICs. See Brasher, 253 B.R. at 489.

In Brasher, the debtor filed her Chapter 7 petition in January 1999. She did not list the EIC on her original schedules. On August 3, 1999, the debtor amended her petition to claim the EIC portion of her refund as exempt under Ala. Code § 38-4-8. The debtor claimed as exempt the remainder of her refund pursuant to Ala. Code § 6-10-6. The trustee objected to the debtor's claim of exemptions. The bankruptcy court sustained the trustee's objection. See In re Brasher, No. 99-405-WRS (Bankr. M.D. Ala. Filed Sept. 28, 1999). However, the district court reversed and remanded holding that the debtor was allowed to claim the EIC as exempt pursuant to section 38-4-8. See Brasher, 253 B.R. at 489.

The court finds the Brasher decision to be directly on point. An Alabama district court having determined that the EIC falls within the exemption in section 38-4-8, the court finds that Debtor's claim of exemption in her EIC should be allowed.

The court notes that the Sixth Circuit and Tenth Circuit cases cited by Trustee are inapplicable to the facts of this case because neither case dealt with the issue of exemptions. See Baer v. Jones, 224 F.3d 1193 [86 AFTR 2d 2000-6007] (10th Cir. 2000); Johnston v. Hazlett, 209 F.3d 611 [85 AFTR 2d 2000-1284] (6th Cir. 2000). In Baer, the Tenth Circuit affirmed the Bankruptcy Appellate Panel ("BAP") and held that a debtor's EIC is property of the estate, as pro-rated to the date that the bankruptcy petition was filed. See Baer at 1194. However, as the Tenth Circuit BAP noted, the exemption issue was not before the court. See Baer v. Montgomery (In re Montgomery), 291 B.R. 913, 915 n.4 [81 AFTR 2d 98-1649] (B.A.P. 10th Cir. 1998).

In Johnston, the Sixth Circuit similarly held that the debtor's EIC was property of the estate even though the debtor filed bankruptcy prior to the end of year in which the EIC was earned. See Johnston at 612. Likewise, the Sixth Circuit never got to the issue of exemptions. Although the debtor claimed an exemption pursuant to Ohio Revised Code § 2329.66(A)(9)(e), the bankruptcy court held and the Sixth Circuit BAP affirmed that the exemption was not available because that statute was repealed on July 15, 1995, two years after the debtor filed her petition. See Johnston v. Hazlett (In re Johnston), 222 B.R. 552, 553 [82 AFTR 2d 98-5580] (B.A.P. 6th Cir. 1998).

The court now turns to the issue of whether Debtor's claim of exemption in her tax refund should be disallowed because she did not schedule the correct amount in her original petition. Pursuant to Fed. R. Bankr. P. 1009(a), "[a] voluntary petition, list, schedule, or statement may be

amended by the debtor as a matter of course at any time before the case is closed." This rule denies the court discretion to deny leave to amend unless there is a showing of a debtor's bad faith or prejudice to creditors. See Doan v. Hudgins, 672 F.2d 831, 833 (11th Cir. 1982); Arnold v. Gill, 252 B.R. 778, 784 (B.A.P. 9th Cir. 2000).

Under the bad faith ground, a showing that the debtor has attempted to hide assets is usually required. See Arnold, 252 B.R. at 785. In the case of an alleged concealment of a tax refund, sufficient evidence must exist that the debtor intentionally or fraudulently attempted to conceal the tax refund. Doan at 833.

In Doan, the debtors indicated in their original petition that they expected a tax refund but did not schedule or claim the refund as exempt. The debtors again mentioned the expected refund at the meeting of creditors. When the debtors received the tax refund, they spent the money. The debtors subsequently moved to amend their schedules and claim the refund as exempt. The bankruptcy court allowed the debtors to schedule the asset but denied the motion to amend to claim the exemption. The district court affirmed the bankruptcy court, however, the Eleventh Circuit reversed and remanded with instructions granting the debtors' motion to amend to claim the tax refund as exempt. Id. at 834.

The second ground for denying leave to amend schedules is prejudice to creditors. Several courts have held that a simple delay in filing an amendment where the case has not been closed does not alone prejudice creditors. See Doan at 833; Arnold at 787 (citing Andermahr v. Barrus (In re Andermahr), 30 B.R. 532, 534 (B.A.P. 9th Cir. 1983). Creditors must "suffer an actual economic loss" as a result of the debtor's delay in claiming an exemption. Arnold at 787. Plainly stated, evidence of prejudice exists if the creditor would have acted differently had the creditor known of the full extent of the claimed exemptions. Id. (citing Grzesnikowski v. Shaffer (In re Shaffer), 92 B.R. 632, 635 (Bankr. E.D. Pa. 1988) which held that it would be prejudicial to creditors to allow a debtor to amend its exemptions if a distribution of assets had already been made based on the exemptions previously claimed). Furthermore, as the court in Arnold explained, no creditor in that case filed an objection to the amended claim of exemptions alleging any prejudice. Id.

In the case before the court, the court finds that there is no evidence of bad faith, i.e., no attempt by Debtor to intentionally or fraudulently conceal her tax refund. Debtor scheduled an anticipated tax refund in her original schedules and claimed that amount exempt. The fact that Debtor scheduled an amount less than she actually received does not demonstrate an intent to conceal the entire refund. Debtor explained that she scheduled only $1500.00 because that was the amount she had received in the past. The court is satisfied with this explanation.

The court also finds that Debtor's inconsistent testimony is immaterial to the bad faith issue. The fact that she wrote post-dated checks in anticipation of receiving the refund instead of having actually received the refund as she initially testified does not exhibit an intent to fraudulently conceal this asset.

The court likewise finds no evidence of prejudice to creditors. Although Trustee did not raise this issue in his objection, he argued that Debtor delayed in disclosing the full amount of the refund until the meeting of creditors which should result in Debtor's claim of exemptions being denied. However, as the courts in Doan and Arnold held, simple delay alone does not demonstrate prejudice. Doan at 833; Arnold at 787. No creditors suffered any actual economic loss as a result of Debtor's delay. In fact, as Debtor's claim of exemptions currently exist, $873.00 should be available to the estate for administration that was not available before Debtor's amendment.[2] Furthermore, no creditor objected indicating that it would have acted differently had the creditor known of the full extent of the claimed exemption.

[2] This is because of the $3801.00 refund, Debtor claimed a total of only $2928.00 leaving $873.00 available for the estate.

Accordingly, the court finds that Debtor's amended claim of exemption in her tax refund does not prejudice any creditors.

As to Trustee's argument in his June 29, 2001 response that Debtor should have known the correct amount she would receive, the court finds this argument without merit. See Andermahr, 30 B.R. at 533 (rejecting the trial court reasoning that "debtor should have anticipated a possible refund and claimed it as exempt.") Debtor testified that her father prepared her returns for the year in question and she based the $1500.00 amount on what she received in prior years.

In conclusion, the court finds that Debtor's $1748.00 claim of exemption in the EIC portion of her tax refund is allowed pursuant to Ala. Code § 38-4-8. The court also finds that Debtor's $1180.00 claim of exemption in the non-EIC portion of her refund is allowed pursuant to Ala. Code § 6-10-6. Therefore, Trustee's objection is overruled. Because section 6-10-6 allows an aggregate exemption of $3000.00 and Debtor testified that she received a state income tax refund of $300.00, not $400.00 as indicated in her schedules, the court will allow Debtor to exempt $300.00 in her state income tax refund.

An order in accordance with this Memorandum Opinion will be entered.

DATED this _ _ _ day of July, 2001.

JOHN T. LANEY, III

UNITED STATES BANKRUPTCY JUDGE

¶2002-5114

UNITED STATES OF AMERICA, PLAINTIFF v. Thomas C. COON, ET AL., DEFENDANTS. U.S. District Court, Western Dist. of Michigan, (DC MI) Docket No. 1:01-cv-700, July 1, 2002. Decision for Govt.

1. Actions to reduce assessments to judgment—foreclosure—default judgment. Magistrate judge recommended reducing taxpayer's assessments to judgment and foreclosing tax liens against his property on default judgment: taxpayer's nonsensical "Verified Actual and Constructive Notice" in response to complaint contained only incomprehensible statements typical of pro se, tax protester litigants; and facts that he didn't appear at court-ordered scheduling conference and cited tax-protester jargon in response to court personnel's questions concerning his identity evidenced willful failure to participate in such conference. *Reference:* United States Tax Reporter ¶74,035.03(135); 74,025.01(143). IRC §7402; 7403.

United States of America, United States District Court for the Western District of Michigan, Southern Division.

HILLMAN, District Judge:

Report and Recommendation

SCOVILLE, Magistrate Judge:

[1] This is a civil action brought by the United States of America to reduce to judgment its federal tax assessments against defendant Thomas C. Coon and to foreclose federal tax liens on real property located in Howard City, Michigan. The claim against defendant Thomas C. Coon is therefore *in personam*; the remaining defendants are parties to an *in rem*action involving the subject real estate.

By order entered May 29, 2002, United States District Judge Douglas W. Hillman established a Rule 16 scheduling conference for June 27, 2002, and required the parties to participate in the preparation of a joint status report. The joint status report was filed on June 25, 2002, and reflects that defendant Thomas C. Coon failed to participate in its preparation, in violation of Judge Hillman's order. I conducted the Rule 16 scheduling conference at the appointed time, 9:30 a.m. on June 27, 2002. Counsel for plaintiff appeared, but Mr. Coon did not. A man who could have been Mr. Coon was present in the lobby outside the courtroom, but refused to identify himself to court personnel. The man's only response to questions concerning his identity and reason for being in the courthouse was

typical tax-protester jargon, such as, "Do you have a claim against me?"

Rule 16(f) provides that "If a party or a party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference ... the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others, any of the orders provided in Rule 37(b)(2)(B),(C),(D)." Fed.R.Civ. P. 16(f). In my opinion, Mr. Coon has no intention of participating in any meaningful way in the proceedings in this court. His only response to the complaint is a nonsensical document titled "Verified Actual and Constructive Notice" (docket # 21), which fails to meet the substance of the complaint and instead is replete with incomprehensible statements typical of *pro se*, tax protester litigants. Mr. Coon apparently wishes to make a mockery of the court and its processes and has no intention of litigating this case on its merits. His wilful failure to participate in the scheduling conference subjects him to sanctions under Rule 16(f) and the most appropriate sanction is the entry of a default against him. If Mr. Coon has any excuse or justification for his conduct, he may raise it with the district judge within the ten days allowed for objections to this report and recommendation.

Recommended Disposition

For the foregoing reasons, I recommend that a default be entered against defendant Thomas C. Coon as a sanction under Rule 16(f).

Dated: July 1, 2002

/s/ Joseph G. Scoville

United States Magistrate Judge

¶2002-5115

Fred Raymond WALLACE and Marilyn Joyce WALLACE, ET AL., PLAINTIFFS v. Paul H. O'NEILL, ET AL., DEFENDANT. U.S. District Court, Dist. of Wyoming, (DC WY) Docket No. 01-CV-180-J, March 8, 2002. Earlier proceeding at (2001, DC WY) 89 AFTR 2d 2002-347, 2002-1 USTC ¶20163. Decision for Govt.

1. Actions against IRS employees—dismissal—jurisdiction; waiver of sovereign immunity; exhaustion of administrative remedies; Anti-Injunction Act—motion to remand—reconsideration. Taxpayers' motions to vacate judgment and remand case against IRS employees to state court, reconsider dismissal order, and strike misidentifying documents were denied: motions merely reiterated previously rejected arguments or espoused meritless challenges that showed no error in court's decisions. *Reference:* United States Tax Reporter ¶74,025.01(83); 74,336.506(25); 74,215.05(5); 74,335.01(5). IRC §7402; 7421; 7433.

In the United States District Court for the District of Wyoming.

Order Denying:

(1) PLAINTIFF'S "PETITION TO VACATE A VOID JUDGMENT AND TO REMAND CASE BACK TO STATE JURISDICTION,"

(2) "JUDICIAL NOTICE OF: TRESPASS UPON STATE ACTION, USURPATION OF STATE COURT JURISDICTION, ATTEMPT TO EVADE AND/OR DEFEAT THE LIABILITIES STATE CRIMINAL LAWS, ATTEMPTED COVER-UP OF FRAUDULENT AND FELONIOUS ACTS, ATTEMPT TO DENY PLAINTIFF A STATE REMEDY AGAINST FRAUD AND UNLAWFUL TAKING, ATTEMPT TO COLLECT AN UNLAWFUL DEBT, OBSTRUCTION OF JUSTICE, AND NOTICE OF INTENT TO PURSUE A CRIMINAL COMPLAINT BEFORE STATE AND/OR COUNTY GRAND JURY," and

(3) "MOTION TO STRIKE CERTAIN DOCUMENTS, PLEADINGS AND/OR MOTIONS MISIDENTIFYING THE PETITIONER/PLAINTIFF"

[1] Various motions and written submissions by plaintiffs/petitioners have

come before the Court for consideration, including (1) Plaintiff's "Petition to Vacate a Void Judgment and to Remand Case Back to State Jurisdiction," (2) "Judicial Notice Of: Trespass upon State Action, Usurpation of State Court Jurisdiction, Attempt to Evade And/or Defeat the Liabilities State Criminal Laws, Attempted Cover-up of Fraudulent and Felonious Acts, Attempt to Deny Plaintiff a State Remedy Against Fraud and Unlawful Taking, Attempt to Collect an Unlawful Debt, Obstruction of Justice, and Notice of Intent to Pursue a Criminal Complaint Before State And/or County Grand Jury," which the Court has deemed for purposes of this Order as a motion to reconsider its November 28, 2001 Order Granting United States' Motion to Dismiss, and (3) "Motion to Strike Certain Documents, Pleadings And/or Motions Misidentifying the Petitioner/plaintiff." The Court has considered the plaintiffs/petitioners' motions and submissions, has reviewed the file and the pleadings, particularly the prior November 28, 2001 Order Granting Motion to Dismiss, the applicable law, and is fully advised in the premises.

The Court finds that all of the plaintiff/petitioners' Motions should be DENIED, as they merely attempt to reiterate arguments that have already been considered by the Court in the earlier proceedings and seek to convince this Court that its application and interpretation of the law is erroneous and should be reversed. The Court declines the request to reconsider its earlier rulings and persists in its earlier findings and rulings in all respects.

To the extent that other arguments, many of which are specious and unmeritorious, are not specifically addressed in this Order, the Court finds that this ruling is dispositive of all issues that have been raised by plaintiffs/petitioners' in their submissions to this Court since November, 28, 2001 and all motions will be DENIED. It is therefore

ORDERED that Plaintiff's "Petition to Vacate a Void Judgment and to Remand Case Back to State Jurisdiction" shall be, and is, DENIED. It is further

ORDERED that the "Judicial Notice Of: Trespass upon State Action, Usurpation of State Court Jurisdiction, Attempt to Evade And/or Defeat the Liabilities State Criminal Laws, Attempted Cover-up of Fraudulent and Felonious Acts, Attempt to Deny Plaintiff a State Remedy Against Fraud and Unlawful Taking, Attempt to Collect an Unlawful Debt, Obstruction of Justice, and Notice of Intent to Pursue a Criminal Complaint Before State And/or County Grand Jury," which the Court has deemed for purposes of this Order as a motion to reconsider its November 28, 2001 Order Granting United States' Motion to Dismiss, shall be, and is, DENIED. It is further

ORDERED that the "Motion to Strike Certain Documents, Pleadings And/or Motions Misidentifying the Petitioner/Plaintiff" shall be, and is, DENIED.

Dated this 8th day of March 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5116

James D. & Julie M. FARMER, PLAINTIFFS v. INTERNAL REVENUE SERVICE, ET AL., DEFENDANTS. UNITED STATES OF AMERICA, COUNTERCLAIM PLAINTIFF v. James D. FARMER, Julie M. FARMER, and 1ST Nationwide Mortgage, COUNTERCLAIM DEFENDANTS. U.S. District Court, Southern Dist. of Texas, (DC TX) Docket No. H-98-1383, Feb. 14, 2001. Earlier proceeding at (1999, DC TX) 83 AFTR 2d 99-1999. Years 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996. Decision for Govt.

1. Collection actions—foreclosure—sale of lien property. Govt. was granted amended order foreclosing tax liens against and ordering sale of taxpayers' real property, and establishing that were taxpayers to file any bankruptcy before sale, automatic bankruptcy stay would be lifted so as to allow sale to go forward. *Reference:* United States Tax Reporter ¶74,035.03(100). IRC §7403.

In the United States District Court for the Southern District of Texas, Houston Division.

Amended Order of Foreclosure and Sale

For good cause shown, this Court grants the motion of the United States of America for an Amended Order of Foreclosure and Sale. Accordingly, it is ORDERED that:

[1] 1. The United States' federal tax liens against James D. Farmer for federal income taxes, penalties and interest arising out of tax years 1986 through 1996, inclusive, shall be foreclosed against the real property (the "Property") at issue located at 7330 Torquay Lane, Houston, Texas 77074 (which is Lot 15, Block 20 of Sharpstown, Section 2, an addition in Harris County).

2. The United States Marshal or his representative (hereafter "the Marshal") is authorized and directed to seize and sell the Property, together with any improvements, buildings, and appurtenances thereon, at public auction, in accordance with 28 U.S.C. Sections 2001 and 2002, subject to a minimum bid of $67,080.00 as shown on the attached worksheet prepared by the Internal Revenue Service, and the terms set forth in this Order.

3. The sale by public auction shall be held at the Family Law Center, Harris County Courthouse, 1115 Congress, Houston, TX 77002, at a date and time, to be determined by the Marshal in accordance with the provisions of 28 U.S.C. §§ 2001(a) and 2002. After the Marshal has determined the date and time for the sale, the Marshal shall insert the same in the Notice of Sale attached hereto, and shall promptly mail a copy of said Notice of Sale to each of the following:

Andrew Sobotka

Attorney, Tax Division

U.S. Department of Justice

717 N. Harwood, Suite 400

Dallas, Texas 75201

James D. Farmer

Julie M. Farmer

6610 Harwin, Suite 150

Houston, TX 77036

James D. Farmer

Julie M. Farmer

7330 Torquay Lane

Houston, Texas 77074

4. The Notice of the sale shall be published once a week for at least four weeks prior to the sale in the Daily Court Review, which is a newspaper of general circulation in Harris County, Texas.

5. No person receiving notice of the entry of the Order shall take any steps to demean, impair, or destroy the value of this Property, including the improvements thereon, and no actions shall be taken to impede the Marshal in the execution of his duties, except pursuant to order of this Court.

6. Upon the entry of this Order, the Marshal shall have free access to the Property for the purpose of showing it to prospective bidders. Furthermore, in accordance with the terms of the March 8, 1999, Amended Final Judgment:

a. Mr. Farmer and anyone living in the Property with his permission shall vacate the Property at least 10 days prior to date of the sale which is scheduled by the Marshal;

b. The Marshal shall take possession of the Property at the time it is vacated by Mr. Farmer; and shall take all actions appropriate to preserve said Property until the deed thereof is delivered to the successful purchaser; and

c. In the event that Mr. Farmer should file for bankruptcy under any chapter prior to the sale of the Property, the automatic stay imposed by 11 U.S.C. § 362 shall be automatically lifted so that the sale may go forward, and this Court shall retain jurisdiction to enforce its Judgment.

7. The Property shall be sold free and clear of all liens or other claims of any party to this proceeding.

8. The successful bidder shall be required to deposit with the Marshal a minimum of twenty percent (20%) of the

amount bid on the date of the sale, either by certified check or by cash deposit.

9. The balance of the purchase price shall be tendered to the Marshal by the successful bidder within three (3) business days following the date of the sale, payment being by certified check payable to the United States Marshal Service. In the event the purchaser fails to fulfill this requirement, the deposit made by him shall be forfeited and applied first to the expenses of sale, and the Property shall be re-offered for sale in the same manner as provided for the initial sale with the cost of such additional advertising and sale to be deducted from the forfeited deposit. Any remaining excess of the forfeited deposit shall then be deposited with the Court and distributed by further order of the Court in accordance with paragraph 12 below. The United States may bid on any sale as a credit against the taxes, penalties and interest referenced in the March 8, 1999, Amended Final Judgment, and in such case, the United States shall not be required to tender any cash.

10. The sale shall be confirmed without hearing or notice unless a written objection is filed with the Court and notice delivered to the Marshal and the parties no later 5:00 p.m. on the fifth (5th) business day following the sale by the Marshal. If an objection to the sale is properly filed, the Court will determine whether or not to confirm the sale.

11. Upon confirmation without objection or by the Court, the United States Marshal shall execute and deliver his deed, conveying the property sold to the successful purchaser, and shall deposit the balance of the sales proceeds with the Clerk of the Court along with the Marshal's report of sale, which will list the total amount received, amounts deducted for his expenses and the net amount deposited with the Clerk. Also, upon confirmation, the respective liens and claims of the parties shall attach to the net proceeds of sale to the same extent and in the same order of priority as such liens and claims attached to the Property sold.

12. In the event that any sale proceeds or forfeited funds are deposited with the Court either because the sale has been confirmed, or because a successful bidder has defaulted and forfeited a deposit, then, within ten (10) business days after such confirmation or deposit of forfeited funds, all parties claiming an interest in the sale proceeds or forfeited funds shall move the Court for an Order directing the Clerk to disburse the funds in accordance with March 8, 1999, Amended Final Judgment. The United States, as the foreclosing party, shall provide the Court with any local property tax and mortgage payoff information that is applicable to the Property or its proceeds. Such information shall be supplied by the United States when it files its motion for distribution of the proceeds deposited with the Clerk, or as soon as such information can thereafter be obtained.

13. The Clerk of Court shall immediately mail a copy of this order to counsel of record identified in paragraph 3 above, and shall deliver a copy to the Marshal.

SIGNED on the 14th day of February, 2001.

/s/

UNITED STATES DISTRICT JUDGE

Notice of Sale

Notice is given that pursuant to an Amended Judgment entered on March 8, 1999, and a subsequent Amended Order for Foreclosure and Sale signed by the Honorable Nancy F. Atlas, United States District Judge for the Southern District of Texas, the United States Marshal of the Southern District of Texas has been directed under 28 U.S.C. Sections 2001 and 2002 to sell at public sale, the real property (the "Property") located at 7330 Torquay Lane, Houston, Texas 77074 (which is Lot 15, Block 20 of Sharpstown, Section 2, an addition in Harris County).

Pursuant to these orders, the United States Marshal or his representative (hereafter the "Marshal") will offer the Property for sale and, subject to confirmation, sell to the highest bidder the above Property, SUBJECT to the minimum bid price of $67,080.00. The public auction will be held on _, 2001, at _.m., at the Family

Law Center in the Harris County Courthouse, 1115 Congress, Houston, TX 77002.

The conditions of the sale are that the purchaser shall be required to deposit with the Marshal a minimum of twenty percent (20%) of the amount of his bid by certified check, payable to the United Stated Marshal Service, or cash deposit at the time of sale. The balance of the purchase price shall be tendered to the Marshal by the successful bidder no later than 5 p.m. local time, within three (3) business days following the date of sale in the form of a certified check, payable to the United States Marshal Service. In the event the purchaser fails to fulfill this requirement, the deposit made by him shall be forfeited and applied first to the expenses of sale, and the Property shall be re-offered for sale in the same manner as provided for the initial sale with the cost of such additional advertising and sale to be deducted from the forfeited deposit. Any remaining excess of the forfeited deposit shall then be deposited with the Court and distributed in accordance with the Amended Order of Foreclosure and the March 8, 1999, Amended Judgment. The United States may bid on any sale as a credit against the taxes, penalties and interest referenced in the March 8, 1999, Amended Final Judgment, and in such case shall not be required to tender cash.

The sale shall be confirmed without hearing or notice unless a written objection is filed with the Court and notice delivered to the Marshal and the parties no later than 5:00 p.m. on the fifth business day following the sale. Upon confirmation without objection or by the Court, the Marshal will execute and deliver his deed, conveying the property to the successful purchaser. For further information contact Brett Thomas, U.S. Marshals Office, at (713) 718-4800 or Ken McNeill, IRS Revenue Officer at (713)-209-3857.

DATED this _ day of _, 2001.

/s/

UNITED STATES MARSHAL

SOUTHERN DISTRICT OF TEXAS

¶2002-5117

UNITED STATES OF AMERICA, PLAINTIFF v. Timothy Lee NIPPER, ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of Oklahoma, (DC OK) Docket No. 98-CV-526 EA(J), July 11, 2002. Earlier proceedings at (2001, DC OK) 88 AFTR 2d 2001-6504; and (2001, CA10) 87 AFTR 2d 2001-1455, dismissing appeal from District Court, on remand from (2001, CA10) 87 AFTR 2d 2001-828, 2001-1 USTC ¶50229. Years 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988. Decision against Govt.

1. Collection actions—discovery—privilege against self-incrimination—willful tax evasion—limitations periods. Govt.'s motion to compel discovery in its collection action of pro se taxpayer's returns, sources of income, bank accounts and statements, and payments and gifts to others over his 5th Amendment objections was denied: taxpayer demonstrated reasonable fear of prosecution for willful evasion of taxes owed more than 6 years prior. Although IRC §7201's limitations period for underlying liability had run, govt. had already alleged in its complaint that taxpayer engaged in fraudulent conveyances of property to conceal his income, and could attempt to argue in evasion prosecution that any such similar conveyance in last 6 years constituted continuing evasion act; govt.'s claim that taxpayer had to show that he took specific evasive acts in last 6 years before validly asserting privilege against self-incrimination wasn't supported; and non-continuing offense cases were distinguishable. Also, privilege wasn't waived even though 1st asserted on sur-reply brief; and taxpayer didn't make blanket assertion of privilege. *Reference:* United States Tax Reporter ¶74,035.01(10); 73,447.513(10). IRC §7201; 7403.

Evan J Davis, U.S. Department of Justice, Tax Division, Washington, DC, for United States of America, plaintiff.
Timothy Lee Nipper, Tulsa, Pro se.

Thomas Eugene Nipper, Tulsa, Pro se.

United States District Court, N.D. Oklahoma,

Order

JOYNER, Magistrate Judge:

Now before the Court is the United States' motion to compel. [Doc. No. 30]. The Court heard oral argument on the motion on June 10, 2002, and received supplemental briefs thereafter. The Court has considered the following briefs in connection with the United States' motion: the United States' brief in support of the motion to compel (# 30), Mr. Nipper's response in opposition to the United States' Rule 56(f) motion (# 94), the United States' reply (# 97), and Mr. Nipper's surreply (# 99). For the reasons discussed below, the United States' motion to compel is DENIED.

I. DISCUSSION

[1] This is a civil action in which the United States seeks to reduce to judgment certain outstanding tax assessments against Timothy Lee Nipper for tax years 1981–1988, to set aside allegedly fraudulent conveyances of real property, and to foreclose federal tax liens against certain real property. [Doc. No. 1]. To obtain evidence to support its claims, the United States served discovery requests (i.e., interrogatories, requests for admission, and requests for production) on Mr. Nipper personally. These requests sought information about Mr. Nipper's tax returns, sources of income, bank accounts and statements, and payments and gifts made to others.

In response to the United States' discovery requests, Mr. Nipper asserted a Fifth Amendment privilege and refused to provide any information. The United States has moved to compel Mr. Nipper's responses over his Fifth Amendment objections, arguing that Mr. Nipper cannot assert a Fifth Amendment privilege because he has no reasonable fear of prosecution given that the statute of limitations for tax years 1981–1988 has run. The Court does not agree, and finds that Mr. Nipper has demonstrated a reasonable fear of prosecution for wilful tax evasion.

To validly assert a Fifth Amendment privilege against self-incrimination, Mr. Nipper must demonstrate that he is confronted with a substantial and real, and not merely a trifling, remote or imaginary risk of incrimination.[1] Mr. Nipper argues that he has a substantial and real fear that he could be prosecuted today for wilfully evading paying taxes for tax years 1981–1988. The Supreme Court has defined the crime of income tax evasion under 26 U.S.C. § 7201 as: (1) failure to pay the tax, (2) an affirmative act of evasion, and (3) willfulness.[2]

The statute of limitations for tax evasion under § 7201 is six years. See 26 U.S.C. § 6531. The Supreme Court has held that this statute of limitations does not begin to run until the underlying crime has been committed. United States v. Habig, 390 U.S. 222, 225 [21 AFTR 2d 803] (1968). Thus, one can be guilty of evading taxes due more than six years prior as long as one or more affirmative acts of evasion is committed within the past six years. "[I]t is the date of the latest act of evasion, not the due date of the taxes, that triggers the statute of limitations." United States v. Ferris, 807 F.2d 269, 271 [59 AFTR 2d 87-367] (1st Cir.1986).[3] Mr. Nipper argues that he has a substantial and real fear that he could still be prosecuted for evading to pay his taxes for tax years 1981–1988 given that the government need only demonstrate that at some point in the last six years he took some affirmative act of evasion in connection with his 1981–1988 income or tax liability.

The United States does not directly dispute Mr. Nipper's reading of the relevant law regarding the running of the statute of limitations for tax evasion. Rather, the

[1] See United States v. Apfelbaum, 445 U.S. 115, 128 (1980); California v. Byers, 402 U.S. 424, 429 (1971); Zicarelly v. New Jersey, 406 U.S. 472, 478 (1972); and United States v. Schmidt, 816 F.2d 1477, 1481 [59 AFTR 2d 87-1029] (10th Cir.1987).

[2] Sansone v. United States, 380 U.S. 343 [15 AFTR 2d 611], 351 (1965); Spies v. United States, 317 U.S. 492 [30 AFTR 378] (1943).

[3] See also United States v. Shorter, 608 F.Supp. 871, 874–75 [56 AFTR 2d 85-5300] (D.D.C.1985); United States v. Mousley, 194 F.Supp. 119, 119–120 [7 AFTR 2d 1511] (E.D.Pa.1961); United States v. DiPetto, 936 F.2d 96, 98 [68 AFTR 2d 91-5064] (2nd Cir.1991); and United States v. Hunerlach, 197 F.3d 1059, 1064–65 [84 AFTR 2d 99-7182] (11th Cir.1999).

United States argues that in order to show a substantial and real fear of prosecution for evasion, Mr. Nipper must show that he "took specific evasive actions during the prior six years." Doc. No. 97, p. 4. In other words, the United States argues that Mr. Nipper must disclose that he actually committed the crime for which he fears prosecution before he can validly assert his rights under the Fifth Amendment. The United States cites no authority which stands directly for such a proposition, and it does not, as the United States argues, follow from the cases cited by Mr. Nipper.

The Court recognizes the United States' concern that Mr. Nipper's argument could make the statute of limitations for wilful tax evasion never-ending, and that he could always have a reasonable fear of prosecution for evasion. This result is due in part, however, to the United States' efforts to make the statute of limitations for evasion offenses open-ended and dependant on the last act of evasion. It is the United States that wants to be able to prosecute evaders well after the underlying tax liability was due and owing. The United States also has control over Mr. Nipper's fear of prosecution for evasion. If the United States has not found sufficient evidence in the last 20 years to prosecute Mr. Nipper for evasion, it can offer him immunity and proceed to obtain his information in connection with this civil action. To assert his Fifth Amendment right, Mr. Nipper is not "required to prove the hazard [of incrimination] in the sense in which a claim is usually required to be established in court . . . ." Hoffman v.. United States, 341 U.S. 479, 486 (1951). Exercise of the privilege against self-incrimination also does not depend upon a judge's prediction of the likelihood of prosecution. Resnover v. Pearson, 965 F.2d 1453, 1462 (7th Cir.1992). "[C]ourts should not engage in raw speculation as to whether the government will actually prosecute." United States v. Sharp, 920 F.2d 1167, 1171 [66 AFTR 2d 90-5974] (4th Cir.1990). That prosecution is possible is enough absent clear evidence of an absolute bar to prosecution. Id. "[I]t is only when there is but a fanciful possibility of prosecution that a claim of Fifth Amendment privilege is not well taken." In re Folding Carton Antitrust Litigation, 609 F.2d 867, 871 (7th Cir.1979). Mr. Nipper has shown more than just a fanciful possibility of prosecution in this case, especially given the fact that the United States has already alleged in its complaint against Mr. Nipper that Mr. Nipper engages in fraudulent conveyances of property to conceal his income and assets. The government could certainly attempt to argue in an evasion prosecution that any such similar conveyance in the last six years constituted a continuing act of evasion.

The cases cited by the United States are distinguishable. The United States cites: an unpublished Ninth Circuit case, United States v. Garrett, No. 99-56226, 2001 WL 206000 [87 AFTR 2d 2001-1132] (9th Cir. Feb. 28, 2001); and United States v. Aeilts, 855 F.Supp. 1114, 1119 (C.D.Cal.1994). In these cases, however, the courts only discussed whether the defendants had a reasonable fear of prosecution for wilful failure to file a tax return more than six years after the return was due. The courts held that the defendants did not. The courts did not discuss whether the defendants could have had a reasonable fear of prosecution for wilful evasion (an offense different than wilful failure to file). The statute of limitations is much more definite for a wilful failure to file than it is for wilful evasion. The failure to file occurs on the April 15th following the tax year in question. A wilful evasion offense can, as discussed above, be a continuing offense which subjects a defendant to liability well after the statue of limitations runs for the underlying tax liability.

In his original discovery responses, Mr. Nipper did not raise a Fifth Amendment objection in connection with discovery requests which asked him to identify persons who assisted him in drafting his discovery responses. While not asserting a Fifth Amendment objection with regard to these questions, he did assert a relevancy objection. In his sur-reply brief, however, Mr. Nipper now asserts the Fifth Amendment in connection with these questions as well.

Even though not asserted until the sur-reply brief, the Court finds no basis for finding that Mr. Nipper has waived his Fifth Amendment right in connection with questions about those who have helped him with this litigation.

The privilege against self-incrimination protects the person claiming it from being compelled to give ''answers that would in themselves support a conviction'' or that ''would furnish a link in the chain of evidence needed to prosecute the claimant'' for a crime. Hoffman, 341 U.S. at 486. As the United States points out in its brief, the relevance of information about those helping Mr. Nipper with this case is that the information could lead it to those other than Mr. Nipper who have first hand knowledge about his income and taxes, and to those to whom Mr. Nipper may have made admissions concerning his income and taxes. Thus, the requested information could easily provide a link in the chain of evidence needed to prosecute Mr. Nipper for wilful evasion, or even for wilful failure to file in the last six years. The information could, therefore, be incriminating and Mr. Nipper cannot be compelled by the government to disclose it.

The United States objected in its original motion to compel to the fact that Mr. Nipper was making a blanket invocation of his Fifth Amendment privilege. Blanket assertions of the privilege are inappropriate. The privilege should be made in response to individual questions based upon a reasonable belief that a response would pose a substantial and real hazard of criminal liability. United States v. Clark, 847 F.2d 1467, 1474 [61 AFTR 2d 88-1313] (10th Cir.1988). In this case, however, Mr. Nipper has not made a blanket assertion of the privilege. Rather, in response to individual questions posed in discovery requests, he has asserted his Fifth Amendment privilege. In fact, in response to the United States' first set of interrogatories, Mr. Nipper did answer some questions, and interposed his Fifth Amendment privilege as to others.

CONCLUSION

The United States' motion to compel is DENIED. [Doc. No. 30]. Mr. Nipper has validly asserted his Fifth Amendment right in connection with the discovery served on him by the United States. Absent immunity, the United States will have to obtain evidence to establish its claims against Mr. Nipper from sources other than Mr. Nipper himself.

¶2002-5118

Hexin E. McPHEE, PLAINTIFF v. INTERNAL REVENUE SERVICE, ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of Texas, (DC TX) Docket No. Civ.A.3:00CV2028-D, July 5, 2002. Decision for Govt.

1. Actions by third parties—wrongful levy—community property—state law. Husband's IRC §7426 complaint against govt.'s attachment of his home's sale proceeds to satisfy ex-wife's separate tax debts was rejected: home was properly subject to lien as community property under Texas law. Although husband purchased home after couple's initial separation, their temporary reconciliation at time of purchase effectively annulled separation agreement and rendered funds he used to make earnest money deposit community property, which in turn rendered home community property as well; and redesignation of home as husband's separate property by nunc pro tunc final divorce decree to which govt. wasn't party wasn't controlling. *Reference:* United States Tax Reporter ¶74,265.01(25); 63,215.02(160). IRC §6321; 7426.

United States District Court, Northern District of Texas, Dallas Division.

Memorandum Opinion and Order

FITZWATER, District Judge:

Plaintiff Hexin E. McPhee (''McPhee'') brought this action under 26 U.S.C. § 7426 to recover proceeds in the amount of $45,864.24 that he maintains the Internal Revenue Service (''IRS'') wrongfully ob-

tained from the sale of his residence at 321 Crooked Tree Court, Coppell, Texas (''Residence'') to satisfy a tax lien that secured the recovery of unpaid income taxes owed by his former wife, Debra McPhee (''Debra''). The threshold question the court must decide is whether the Residence was the couple's community property or McPhee's separate property. Following a bench trial, the court holds, for the reasons that follow,[1] that McPhee failed to prove by clear and convincing evidence that the Residence was his separate property. The court directs the parties to stipulate to the extent of the IRS' lien rights in the Residence, or (absent agreement) to brief the remaining issues concerning the extent of the IRS' rights.

I

McPhee sues the IRS and the United States Attorney (collectively, the ''United States'') to recover the sum of $45,864.24 that he paid the IRS from the proceeds of the sale of the Residence to obtain the release of an IRS tax lien. While McPhee and Debra were still married, but were living apart under the terms of a California separation agreement (''Separation Agreement'') (PX 1), Debra failed over a period of several years to file federal income tax returns and pay income taxes. The IRS assessed her unpaid taxes in 1995 and on April 2, 1996 perfected a tax lien by filing a notice of federal tax lien in Dallas County, Texas. McPhee maintains that he is entitled to recover what he paid to obtain release of the lien because the Residence was his separate property. The United States does not contend that McPhee is liable for Debra's tax debts. It maintains that the Residence is community property and therefore liable for Debra's indebtedness.

McPhee and Debra married on April 23, 1977 and took up residence in California. Two daughters were born of the marriage. Ultimately, the couple decided to separate and live apart. Effective November 6, 1987 they entered into the Separation Agreement, which is permitted under California law. They never divorced while they lived in California. The couple did not share income or expenses, but McPhee made child support payments to Debra. Each spouse was responsible for filing his or her own separate federal income tax returns and paying his or her respective federal income tax liabilities. Debra worked in jobs that did not require withholding of such taxes from her income. During the period they were separated, McPhee purchased a home with his separate property. McPhee and Debra had a cordial, amicable relationship that centered around their children; they were not intimate. For a time, another woman and her children lived with McPhee in his home.

In 1993 McPhee's employer transferred him to the Dallas, Texas area. He did not want to leave his daughters, so he asked Debra if she would consider permitting them to relocate with him, provided he continued to make child support payments. He did not intend that Debra move to Texas with their children. McPhee brought her to Texas, however, so that she could see that the move would not be detrimental to their children.

McPhee located a home-the Residence at issue-and on November 19, 1993 he made an earnest money payment of $2,500 from his separate property personal checking account. He intended to pay the balance of the purchase price from the proceeds of the sale of his separate property California home. The total purchase price of $194,295.00 was paid using the $2,500 earnest money payment, an additional $14,000 from a bank loan that his employer guarantied, and a mortgage loan that the relocation company insisted be in McPhee's and Debra's names.

McPhee moved to Texas in February 1994 as part of the employer's advance team, and he lived in corporate housing until May 20, 1994, while awaiting the move to the Residence. His intention that Debra not move to Texas changed, how-

[1] As permitted by Fed.R.Civ.P. 52(a), the court sets out its findings of fact and conclusions of law in this memorandum opinion and order. The court's findings do not address all matters in dispute. They are primarily confined to those factual matters that affect the legal basis for the court's decision.

ever, when she appeared to renege on her agreement that their daughters could move with him. Heartbroken by this turn of events, but not wanting to forfeit his job in Texas, McPhee suggested that Debra move with their daughters and that the two attempt a reconciliation of their marriage.

Although the mortgage documents (e.g., deed of trust, see DX 5) were executed by both McPhee and Debra and the deed to the Residence was prepared in both their names as "husband and wife," see DX 4, McPhee testified credibly at trial that this was required by the relocation company that was involved in the sale of his California home and the acquisition of the Residence, and it did not reflect his intentions. McPhee signed the closing documents in Texas and Debra did so in California.

In July 1994 Debra moved to Texas and she and McPhee began their reconciliation. The two opened a joint checking account. They cohabited until the spring of 1995 and slept in the same bedroom. The couple and their daughters lived together as a family in the Residence.

In February 1995 McPhee learned of Debra's unpaid taxes. This started a series of disagreements that resulted in their separation (sleeping in separate bedrooms) and the eventual return of Debra and their daughters to California.

McPhee filed for divorce in September 1995. The state district court granted the divorce on April 19, 1996. In the final decree of divorce, the court found that McPhee and Debra jointly owned the Residence, and it awarded the Residence to McPhee as his separate property. See DX 8 at 21. On June 15, 2000, however, the court filed a nunc pro tunc final decree of divorce in which it found that McPhee owned the Residence as his separate property. See PX 21 at 2.[2] The United States was not made a party to, or notified of, this proceeding.

In 2000 McPhee attempted to sell the Residence and found that the IRS lien was in effect. He paid the IRS the sum of $45,864.24 to obtain release of the lien and permit the sale to close.

II

[1] This court looks to state law to decide whether Debra had a property interest in the Residence. See Aquilino v. United States, 363 U.S. 509, 512–13 [5 AFTR 2d 1698] (1960). Under Texas law,

> [c]ommunity property consists of the property, other than separate property, acquired by either spouse during marriage.
>
> Separate property is that property owned by a spouse before marriage, acquired during the marriage by gift, devise, or descent, or as a recovery for personal injuries sustained during the marriage. The characterization of property as either "community" or "separate" is determined by the inception of title to the property. The major consideration in determining the characterization of property as community or separate is the intention of spouses as shown by the circumstances surrounding the inception of title.

Winkle v. Winkle, 951 S.W.2d 80, 88 (Tex.App.1997, writ denied) (citations omitted). "The inception of title occurs when a party has the right of claim to the property by virtue of which title is finally vested." In re Marriage of Parker, 997 S.W.2d 833, 837 (Tex.App.1999, pet.denied). In the case of a real estate purchase, inception of title generally occurs when the purchase contract is signed rather than when the deed is dated. See id. (holding that date that party purchased property under contract for deed determined character of property).

"Any property acquired during marriage is presumed to be community property in the absence of clear and convincing evidence to the contrary." Dutton v. Dutton, 18 S.W.3d 849, 852 (Tex.App.2000, pet.denied) (citing Tex. Fam.Code Ann. §

[2] The nunc pro tunc final decree of divorce did not recite why it was entered or why any particular change was made. The state judge who signed both decrees testified at trial that, according to her notes of the original ruling, she found that the Residence was McPhee's separate property based on the inception of title rule, because he purchased it with his separate property funds, as determined under California law, and he acquired it before Debra came to Texas.

3.003 (Vernon 1998)).[3] "In order to rebut the community property presumption, the party claiming separate property must trace and identify the property claimed as separate property by clear and convincing evidence." Celso v. Celso, 864 S.W.2d 652, 654 (Tex.App.1993, no writ). "Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property. Separate property will retain its character through a series of exchanges so long as the party asserting separate ownership can overcome the presumption of community property by tracing the assets on hand during the marriage back to property that, because of its time and manner of acquisition, is separate in character." Id. (citations omitted). Texas law generally, and the Texas Family Code in particular, provide that "'[c]lear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Fam.Code Ann. § 101.007 (Vernon 1996); see State v. Addington, 588 S.W.2d 569, 570 (Tex.1979) (per curiam). "This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard of criminal proceedings." Addington, 588 S.W.2d at 570.

Debts contracted during marriage are also presumed to be community. In re Marriage of Gill, 41 S.W.3d 255, 258 (Tex.App.2001, no pet.) ("[I]t is well established that debts contracted during marriage are presumed to be community obligations, unless it is shown by clear and convincing evidence that the creditor agreed to look solely to the separate estate of the contracting spouse.").

Under the "quasi-community property" statute, Tex. Fam.Code Ann. § 7.002 (Vernon Supp.2002), "property that would be classified as community property if the spouses had resided in Texas at the time of its acquisition is classified as community property on divorce in Texas regardless of the characterization of the property in the state of its acquisition." Dawson-Austin v. Austin, 920 S.W.2d 776, 789 (Tex.App.1996) (addressing precursor s 3.63(b)), rev'd on other grounds, 968 S.W.2d 319 (Tex.1998).[4]

Texas law recognizes the validity of post-nuptial agreements that partition community property. See Miller v. Miller, 700 S.W.2d 941, 951 (Tex.App.1985, writ ref'd n.r.e.). But Texas law also generally provides that reconciliation, in which the parties subsequently live together, annuls such agreements.[5] See, e.g., Hornsby v. Hornsby, 127 Tex. 474, 476, 93 S.W.2d 379, 380 (Tex.1936); Rose v. Rogers, 264 S.W. 954, 956 (Tex.Civ.App.1924, no writ); Cox v. Mailander, 178 S.W. 1012, 1015 (Tex.Civ.App.1915, writ ref'd). "The general rule in this jurisdiction is that a separation agreement between husband and wife regarding their property rights is 'annulled by a subsequent reconciliation, followed by a resumption of marital relations.'" Standard v. Standard, 199 S.W.2d 180, 181 (Tex.Civ.App.1947, no writ) (quoting Hornsby, 127 Tex. 474, 93 S.W.2d at 380).

There are recognized exceptions to this general rule. It does not apply where the parties provide to the contrary in the partition agreement or agree, while they were living apart, that their reconciliation will not annul the agreement. Id.; Cox, 178 S.W. at 1015; see Speckels v. Kneip, 170 S.W.2d 255, 260–61 (Tex.Civ.App.1942, writ ref'd) ("We think the testimony warrants no other conclusion than that at the time Mrs. Speckels returned she and her husband had a mutual understanding that the division of community property made by the agreement of May 5, 1924, was to

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[3] Dutton cites a provision of the Texas Family Code that has been recently recodified but does not materially change the one extant during the period at issue.

[4] This statute has been amended several times since the McPhees' divorce. The court is relying on the version that appears to have been in effect during the period in question.

[5] The United States raised this issue in support of its summary judgment motion, but it did not do so until its reply brief. See D. Mar. 22, 2002 Rep. Br. at 1–2. Although McPhee's counsel asserted inter alia during her opening statement at trial that Cox v. Mailander, 178 S.W. 1012 (Tex.Civ.App.1915, writ ref'd), has been distinguished by subsequent decisions and should not be viewed in isolation, McPhee has not directly addressed this principle in his proposed findings of fact and conclusions of law.

remain unimpaired by the resumption of marital relations, and that such understanding was recognized and lived up to by both parties until the time of Mr. Speckels' death . . . . Here, there was an agreement when the marital relations were resumed that the prior agreement as to division of the community estate should remain effective, and this mutual understanding was carried out by both parties until Mr. Speckels' death.''). Another recognized exception provides that the general rule cannot ''have the effect to reinvest title already vested through instruments of conveyance executed in a manner required by law . . . when applied to separation agreements which have been fully exe-cuted.'' Id. at 261. This exception has been construed to mean ''that where there has been a final and irrevocable conveyance of property from one spouse to another, upon sufficient consideration it would require a reconveyance, executed under legal formalities, to divest such title and reinvest it in the other spouse.'' Standard, 199 S.W.2d at 182. The court in Standard stated that it did ''not think it should be given the interpretation that in so far as a conveyance of realty is involved in a separation agreement, it can not be annulled by subsequent reconciliation and living together of the spouses without the formality of a reconveyance.'' Id.

III

McPhee failed to prove by clear and convincing evidence that the Residence was his separate property.[6] Both parties agree that McPhee and Debra reconciled in July 1994 and cohabited as husband and wife until the spring of 1995. To avoid the Texas rule that the Separation Agreement was thereby annulled, McPhee was required to prove that the Separation Agreement provides to the contrary; while they were living apart, they agreed that their reconciliation would not annul the Separation Agreement; or some other exception to the general rule applied. The court finds that he did not. The Separation Agreement does not address the subject of reconciliation. See PX 1. McPhee did not prove at trial that he and Debra agreed that their reconciliation would not annul the Separation Agreement. And he did not establish any other factual or legal basis for avoiding the general rule.

McPhee and Debra were still married when McPhee arranged for the purchase of the Residence. Their reconciliation in 1994 and 1995 annulled the Separation Agreement. Consequently, the $2,500 that McPhee used to make the earnest money deposit on the Residence was community property. McPhee acknowledges that, under his own construction of the Texas inception of title rule, the character of the funds he used to purchase the Residence determines its classification. See P. Prop. Concl. Law No. 30(i) (arguing that inception of title for real property is determined by signing of purchase contract, not date of deed, and that McPhee ''paid the escrow funds from separate property.''). McPhee thus failed to prove by clear and convincing evidence that the Residence was his separate property. Cf. Winkle, 951 S.W.2d at 88 (''In the instant case, the property at 904 Waterview was purchased during the marriage and intended as a home for the community. The down payment on the lot was paid, by appellant's own testimony, with community funds. The property at 904 Waterview therefore is community property.'').

McPhee relies on a nunc pro tunc final decree of divorce to contend that the Residence was his separate property. It is undisputed, however, that the United States was not made a party to the nunc pro tunc proceeding, despite the obvious potential impact on its tax lien against the Residence.[7] Because the United States was not a party to the nunc pro tunc proceeding, the nunc pro tunc final decree of divorce is

[6] McPhee did not attempt to offer clear and convincing evidence tracing any proceeds he used to purchase the Residence from property he owned before marriage or acquired during the marriage by gift, devise, or descent, or as a recovery for personal injuries sustained during the marriage.

[7] McPhee made the payment that he seeks to recoup on May 19, 2000, he obtained the nunc pro tunc final decree of divorce on June 15, 2000, and he filed the instant suit on September 15, 2000.

not binding on this court. See Comm'r v. Bosch, 387 U.S. 456, 457 [19 AFTR 2d 1891], 87 S.Ct. 1776 [19 AFTR 2d 1891], 18 L.Ed.2d 886 (1967) (holding that federal court or agency is not bound by state court's characterization of property interests in federal estate tax controversy where United States is not party to proceeding).

* * *

For the reasons set forth, the court holds that McPhee failed to prove by clear and convincing evidence that the Residence was his separate property. The court directs the parties to stipulate to the extent of the IRS' lien rights in the Residence, or (absent agreement) to submit briefs to the court on the following schedule: McPhee's initial brief must be filed no later than July 22, 2002; the United States' responsive brief must be filed no later than August 5, 2002; and McPhee may file reply brief no later than August 12, 2002.

2002 WL 1477433 (N.D.Tex.)

¶2002-5119

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Steve L. NEWELL, DEFENDANT-APPELLANT. U.S. Court of Appeals, Sixth Circuit, (CA6) Docket No. 00-5522, July 6, 2001. District Court affirmed per curiam. Decision against Govt.

1. Tax crimes—making materially false statements to IRS Special Agent—partial dismissal of indictment. District court properly dismissed Count 7 of superseding indictment charging taxpayer with making materially false statements to IRS Special Agent: govt. didn't show that taxpayer's statement that he had never held himself out as CPA was material under 18 USC §1001(a)(2). *Reference:* United States Tax Reporter ¶73,446.503(115).

On Appeal from the United States District Court for the Western District of Tennessee. United States Court of Appeals, Sixth Circuit.

Before JONES, DAUGHTREY, and COLE, Circuit Judges.

Opinion

PER CURIAM:

This case was not selected for publication in the Federal Reporter

United States appealed the dismissal by the United States District Court for the Western District of Tennessee of count of a superseding indictment charging defendant with making a materially false statement to Internal Revenue Service (IRS) Special Agent. The Court of Appeals held that whether defendant falsely stated to Special Agent that he never told anyone he was a certified public accountant (CPA) and had never held himself out to be a CPA was not material within the meaning of statute prohibiting the knowing and willful making of any materially false, fictitious, or fraudulent statement or representation concerning any matter within the jurisdiction of the Government of the United States.

Affirmed.

[1] The United States appeals the dismissal of Count 7 of a superseding indictment against Defendant-Appellee Steve L. Newell. Count 7 charged Newell with making a materially false statement to Internal Revenue Service (''IRS'') Special Agent Blanche Wilson in violation of 18 U.S.C. § 1001(a)(2), which prohibits the making of ''any materially false, fictitious, or fraudulent statement or representation'' concerning ''any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully.'' The government alleged that Newell falsely stated to Wilson that he never told anyone he was a certified public accountant (''CPA''), nor had he ever held himself out to be a CPA.

On January 31, 2000, the district court held a hearing on Newell's motion to dismiss Counts 6 and 7, granting Newell's motion with respect to Count 7 on the ground that whether or not Newell ever held himself out to be a CPA was not material within the meaning of § 1001. The

government filed a motion for reconsideration, which the district court denied by order dated March 17, 2000. The district court held that the government failed 457 to show that Newell's false statement to Wilson was material within the meaning of s 1001.

After careful review of the record in this case, the applicable law, counsels' briefs and arguments, and the opinion of the district court, we conclude that the district court did not err in dismissing Count 7 of the superseding indictment. We also believe that the issuance of a full written opinion in this case would be duplicative and serve no useful purpose. Accordingly, based upon the reasoning set forth in the district court's March 17, 2000, order, we affirm the judgment of the district court.

14 Fed.Appx. 456, 2001 WL 777416 (6th Cir.(Tenn.))

¶2002-5120

Edwin H. ATKINS, JR., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. In Re: Edwin H. ATKINS, Jr., Debtor. U.S. Bankruptcy Court, Northern Dist. of New York, (Bktcy Ct NY) Docket No. 86-10604; Adversary No. 00-90144, June 18, 2002. Year 1986. Decision for Taxpayer in part.

1. Tax claims in bankruptcy—govt.'s willful violation of permanent discharge injunction—damages. Former Chap. 7 debtor was awarded limited damages against govt. for its admitted continual, willful violations over 14-year period of 11 USC §524 permanent discharge injunction: overwhelming evidence of govt.'s repeated and self-described "tortur[ous]" violations, including illegally intercepting taxpayer's tax refunds and threatening collection, seizure, foreclosure or reporting him to credit agencies, plus taxpayer's consequent mental anguish sufficiently established his right to compensatory damages; but, absent statutory provision for punitive damages, amount of award was limited. Also, govt. was ordered to return admittedly wrongfully seized 14-year old refund. *Reference:* United States Tax Reporter ¶68,726.52(10).

2. Actions against U.S.—interest—authority to release levy—sovereign immunity. Former Chap. 7 debtor's IRC §6343(c) request to recover interest from govt. as compensation for its wrongful retention of his various tax refunds was denied: sovereign immunity barred claim where statute's provision for return of wrongfully levied property contained no express immunity waiver to interest award; and taxpayer offered no other statutory basis for his request. *Reference:* United States Tax Reporter ¶66,115.01(5). IRC §6343; 6611.

3. Attorney's fees—bankruptcy cases—govt.'s willful violation of permanent discharge injunction—bad faith. Former Chap. 7 debtor was awarded attorney's fees against govt. under 11 USC §106 and 28 USC §2412(d)(2)(A) for its continual, willful and bad faith violations over 14-year period of 11 USC §524 permanent discharge injunction: govt.'s admitted violations were inexcusable; and its bad faith was shown by its wrongful seizures of taxpayer's various tax refunds, repeat post-discharge collection attempts and foreclosure threats and telling taxpayer that his debt hadn't been discharged after it had. Also, amount of fees listed was reasonable; and cost-of-living allowance was approved. But, finding of special factor exceeding statutory cap and expenses of retrieving and reopening case weren't allowed. *Reference:* United States Tax Reporter ¶68,726.52(100); 74,336.511(55).

Selbach & Viencek, L.L.P., Syracuse, New York, for plaintiff, Mark F. Viencek, of counsel.
U.S. Attorney General, Albany, New York, for defendant, Diane Cagino, Assistant U.S. Attorney.

United States Bankruptcy Court, N.D. New York.

Memorandum-Decision and Order

LITTLEFIELD, Jr., Bankruptcy Judge.

Former Chapter 7 debtor brought adversary proceeding against federal government to recover for its violations of discharge injunction. The Bankruptcy Court, Robert E. Littlefield, Jr., J., held that: (1) debtor was entitled, as compensatory damages for his mental anguish and sleeplessness due to federal government's repeated violations of discharge injunction in attempting, over period of 14 years, to collect loan obligation discharged in bankruptcy, to award in amount of $30,000; (2) provision of the Internal Revenue Code authorizing government to release lien and to return property levied upon, together with interest, if it determines that levy was wrongful, was not express waiver of federal government's sovereign immunity with respect to interest awards; and (3) government's bad faith and willful violation of discharge injunction was such as to warrant attorney fee award against it.

So ordered.

The current matter before the court is the request of Edwin H. Atkins (''Plaintiff'' or ''Debtor'') for damages against the United States of America (''Defendant'' or ''Government'') based on the Defendant's alleged violation of the permanent injunction provided by 11 U.S.C. § 524. The court has jurisdiction via 28 U.S.C. §§ 157(b)(2)(A) and (G) and 1334(b).

FACTS

The court finds the following facts taken directly from the stipulation of the parties:[1]

1. On or about May 24, 1979, the United States of America, acting through the Farmers Home Administration, United States Department of Agriculture entered into a transaction with the Plaintiff whereby money was loaned to Plaintiff in exchange for a mortgage on Plaintiff's real property located at R.D. # 2, Johnston, New York.

2. The Plaintiff is the Debtor in Chapter 7 Bankruptcy Case No. 86-10604 which was filed on April 25, 1986.

3. Plaintiff listed the Government as a creditor in said Bankruptcy case in connection with the debt secured by said mortgage.

4. The Government received notice of the commencement of said Bankruptcy case.

5. On a number of occasions, the Plaintiff communicated his intention to surrender the property to the Government.

6. On January 30, 1987, the Bankruptcy Court issued Plaintiff a Chapter 7 Discharge wherein the debt owed by Plaintiff to Government in connection with said mortgage was discharged. On January 30, 1987, the Bankruptcy Court mailed the Government a copy of said Discharge, which was received by the Government.

7. In an effort to assist the Government in minimizing its losses concerning the property, the Plaintiff cooperated with the Government in attempting to transfer his interest in the property to it.

8. In or about March of 1987, the Government intercepted and seized the Plaintiff's 1986 Federal Income Tax Refund in the amount of $677.00 in an attempt to offset the debt Plaintiff discharged in his Bankruptcy case. Plaintiff was due said amount from the Internal Revenue Service as the result of a $677.00 overpayment he had made in connection with his 1986 income taxes.

9. The Government never returned to the Plaintiff said 1986 tax refund in the amount of $677.00.

10. On or about November 17, 1987, the Government sent a letter to the Bankruptcy Court requesting a copy of the Plaintiff's Bankruptcy Petition.

11. On or about May 31, 1988, the Government sent Plaintiff a letter which Plaintiff received demanding payment from Plaintiff of $6,005.50 past due in connection with the discharged debt, and advising Plaintiff that ''[f]uture contact regarding

[1] The court has redacted mention of exhibits attached and made minor, nonsubstantive revisions. Although lengthy, the totality of the stipulated facts is necessary to understand the breath of the problem.

this matter will require you to come into the office.'' The May 31, 1988 letters bears the notation ''SECOND NOTICE'' and was the second notice sent by the Government and received by the Plaintiff demanding payment from Plaintiff of the discharged debt.

12. On or about June 23, 1988, the Government sent Plaintiff a letter which Plaintiff received demanding payment from Plaintiff of ''6,471.40 past due'' in an attempt to collect the discharged debt. Despite the fact that the Plaintiff had made clear to the Government his intention of surrendering the property to same, and, in fact, was in the process of assisting the Government in connection with said voluntary transfer, said letter dated June 23, 1988, stated as follows: ''If you are willing to cooperate and want to keep your home, you must contact this office within 10 days from the date of this letter ... IMPORTANT—If we do not hear from you within 10 days, your account will be referred to the District Office.'' Said letter bears the notation ''FOURTH NOTICE'' and was the fourth such notice sent to Plaintiff in an attempt to collect the discharge debt.

13. On or about July 6, 1988, the Government sent Plaintiff a letter which Plaintiff received demanding payment and threatening foreclosure. Said letter bears the notation ''FIFTH NOTICE.''

14. On or about October 11, 1988, the Government sent Plaintiff a letter which Plaintiff received in which it threatened to intercept further income tax refunds from Plaintiff in an attempt to offset the discharge debt, then threatened to report his ''account'' to ''consumer credit reporting agencies.'' One side of said letter indicated that the Plaintiff was ''more than 3 months delinquent on a debt owed to the [Government].'' The other side of said letter indicated that Plaintiff was 16 payments delinquent and that the amount of said delinquency was $7,403.50.

15. On or about December 2, 1988, the Government sent Plaintiff a letter by certified mail, return receipt requested which Plaintiff received wherein Plaintiff was advised that he was required to complete and return a budget and financial statement to the Government within 10 days of the date of said letter.

16. The Plaintiff alleges that in 1988, an employee of the Government called the Plaintiff in an attempt to collect the discharged debt; that when the Plaintiff indicated that the debt had been discharged in his Bankruptcy case, said employee said ''that's not true''; and that because of this and because of all other actions taken by the Government, the Plaintiff became fearful that even though he had filed bankruptcy and lost his home, he still owed the discharged debt. The Government denies these allegations based on lack of knowledge sufficient to form a belief.

17. On or about February of 1989, Plaintiff was denied an income tax refund anticipation loan at Mellon Bank. Said Mellon Bank stated in a letter dated 02/15/89 concerning said denial that the reason for the denial is that ''the Internal Revenue Service informed [Mellon Bank] that they will not direct deposit [Plaintiff's] tax refund to [Plaintiff's] account at Mellon Bank ...''

18. On or about February 17, 1989, the Government sent Plaintiff a letter by certified mail return receipt requested which was received by Plaintiff wherein the Government demanded full payment of the discharged debt consisting of ''$36,566.80 unpaid principal and $7,327.84 unpaid interest as of February 17, 1989, plus additional interest accruing at the rate of $9.0165 per day thereafter ...'' The Government demanded in said letter full payment of said amount by March 17, 1989.

19. On or about March 6, 1989, Plaintiff sent the Government a letter and again advised the Government that he had filed a Bankruptcy Petition. Plaintiff also notified the Government of the name and address of his attorney and advised the Government that he had already transferred his interest in the property and turned the keys to the property over to the Government.

20. In February or March of 1989, as threatened, the Government intercepted and

seized the Plaintiffs 1988 income tax refund in the amount of $1386.00.

21. On or about March 19, 1990, the Government sent Plaintiff a letter which Plaintiff received wherein the Government demanded payment of the discharge debt indicating that said debt was ''$20.317 past due'' and advising the Plaintiff that he was required to complete a household budget and to bring the same with his ''payment coupon'' to the Government's office on March 28, 1990, at 9:00 a.m.

22. The Government was contacted by Attorney Hallenbeck who demanded a return of the 1988 income tax refund the Government had seized. In its letter to Mr. Hallenbeck dated March 26, 1990, and in the memorandum enclosed therewith and referenced therein, the Government acknowledged that it should not have intercepted the 1988 tax refund and stated that the refund would be returned to the Plaintiff.

23. The Government did not return the Plaintiff's 1988 refund in the amount of $1,386.00 until late April of 1990 when it mailed the refund to the Plaintiff on April 23, 1990.

24. On or about May 4, 1990, the Government sent the Plaintiff a letter which the Plaintiff received demanding payment on the discharged debt and indicating that said debt ''is past due $22,757.''

25. On or about September 19, 1990, the Government sent Plaintiff a letter which the Plaintiff received wherein the Government threatened to intercept his tax refund and report his account ''to credit reporting agencies.''

26. On or about September 20, 1990, the Government sent Plaintiff a letter by certified mail return receipt requested which Plaintiff received. Said letter demanded full payment of the discharged debt consisting of $45,924.42 unpaid principal and $13,540.98 unpaid interest, as of September 20, 1990, plus additional interest accruing at the rate of $10.8307 per day thereafter.

27. On or about March 26, 1991, the Government sent Plaintiff a letter which the Plaintiff received informing the Plaintiff that his ''loan file'' would be forwarded to the Government's ''attorney and then on to the United States Attorney.'' Said letter also advised the Plaintiff to consider bringing the discharged debt current.

28. On or about January 22, 1993, the Government sent Plaintiff a letter which the Plaintiff received wherein the Government stated: ''The principal debt owed as of January 19, 1993 is $45,418.88, with subsidy recapture of $4,128.00 and interest in the amount of $22,879.53, for a total of $72,426.41. Interest continues to accrue at $11.1992 per day.''

29. In or about February of 1993, the Government commenced a foreclosure action against the Plaintiff in the United States District Court for the Northern District of New York. The Government demanded that the Plaintiff acknowledge receipt of the Summons and Complaint by signing and returning an acknowledgment form. The Government threatened to collect costs against the Plaintiff if he did not return the acknowledgment. It was alleged that the Plaintiff must complete the acknowledgment and return it to the Government.

30. In Paragraph 13 of said Foreclosure Complaint, the Government claimed that the sum of $68,298.41 ''[t]ogether with interest at the rate of 9% on principal and all advances from January 19, 1993, or at the daily rate of $11.1992 from that date'' was ''justly due'' from the Plaintiff. This again led the Plaintiff to believe that he was still responsible for the discharged debt.

31. In Paragraph 9 of said Foreclosure Complaint the Government alleged that the Plaintiff had abandoned the property even though he had voluntarily given the keys to the property to the Government.

32. In the Foreclosure Complaint the Government sought recovery as against the Plaintiff for payments of taxes, hazard insurance, water and sewage charges and other municipal assessments and maintenance with respect to the property.

33. On or about October 19, 1998, the Government sent Plaintiff a letter which the Plaintiff received wherein the Govern-

ment stated in reference to the discharged debt, "You have not paid the past due amount you owe the [Government] . . ." In said letter, the Government threatened to take the Plaintiff's tax refund(s) to offset the discharged debt.

34. In February or March of 1999, the Government intercepted and seized the Plaintiff's 1998 income tax refund in the amount of $587.99 to offset the discharged debt. This was the third income tax refund intercepted and seized by the Government to offset the discharged debt.

35. On or about March 12, 1999, the Government sent Plaintiff a letter which the Plaintiff received wherein the Government advised the Plaintiff that it had seized the Plaintiff's 1998 refund for $587.99 "to satisfy in whole or in part [Plaintiff's] delinquent debt owed to the United States [i.e. the discharged debt]."

36. On or about July 31, 1999, the Government sent Plaintiff a letter which the Plaintiff received wherein the Government informed the Plaintiff that it was reporting the outstanding delinquency in connection with the discharged debt to credit reporting agencies.

37. The Government did not return the Plaintiff's 1998 refund in the amount of $587.99 until June 29, 2000, when it mailed said refund to the Plaintiff. The Plaintiff received said refund on July 5, 2000.

38. On or about August 12, 2000, the Government sent Plaintiff a letter which Plaintiff received wherein the Government informed Plaintiff of the following: "After careful consideration, cancellation of the balance remaining on your debt [i.e., the discharged debt] has been approved."

39. At all times relevant to this case, the Government took the position that it had a right to collect the discharged debt based on the reaffirmation agreement that was signed by the Debtor before the filing of the petition and issuance of the discharge, but was never filed with the bankruptcy court.

ARGUMENTS

The Plaintiff argues that the Defendant's conduct is cause for the following damages:

1) Compensatory damages of $150,000[2] pursuant to 11 U.S.C. § 105(a)[3] and/or 11 U.S.C. § 524(a);[4]

2) A return of the Plaintiff's 1986 income tax refund with interest;

3) Payment of interest on Plaintiff's 1988 and 1998 income tax refund; and

4) Attorneys' fees and costs.

The Defendant counters in its post-trial brief by arguing that:

1) If the court finds it appropriate to award compensatory damages, the award should not exceed $5,000;

2) Attorneys' fees should not be recoverable but if the court is so inclined to "review, as it does with any fee application, not only what is reasonable but what could have been avoided by the plaintiff." (Defendant's post-trial brief on damages p. 9.)

3) Interest should not be awarded "in as much as it relies on inapplicable sections [sic] of the Internal Revenue Code."

(Defendant's post-trial brief on damages p. 9.)

DISCUSSION

[1] This case paints a portrait of a large bureaucracy running amuck. Reduced to its essence, we have a Plaintiff who realized he could not afford to keep his home and endeavored to surrender it to the secured lender, i.e., Farmer's Home Administration. The underlying note was discharged in the Debtor's Chapter 7. The Government received a copy of that discharge and then, for whatever reason, ig-

[2] In the conclusion to his reply brief, Plaintiff's request for damages increased to $200,000.

[3] 11 U.S.C. § 105 is entitled "Power of court" and states, in part: (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title . . .

[4] 11 U.S.C. § 524 is entitled "Effect of discharge" and states, in part: (a) A discharge in a case under this title — (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor whether or not discharge of such debt is waived . . .

nored it and engaged in fourteen years of ongoing "torture"[5] of this Plaintiff.

There is no rationalizing, explaining, excusing or defending the Government's actions. Government counsel stated during the evidentiary heating, "I'm not going to defend what happened. I can't defend it . . . . [t]here was no question that the Government was wrong." (Tr. p. 9, lines 16–17, 19–20.) The problem with this case is how to quantify the damages. Government counsel at trial conceded, "the interest of the client right now is just to have the court award an amount." (Tr. p. 8, lines 14–15.) As strongly as this court feels that the Government should be punished for its behavior, both parties agree that punitive damages are not available due to express statutory prohibition.[6]

A. COMPENSATORY DAMAGES

This court discussed damages in In re Alberto, Case No. 98-14005 (Bankr.N.D.N.Y. Oct. 2000), rev'd on other grounds, 271 B.R. 223 (N.D.N.Y.2001), stating:

Whether under §§ 105, 362(h), or 524(a)(2), the standard is basically the same. Once a party has proven that he has been damaged, he needs to show the amount of damages with reasonable certainty. (citation omitted). However, courts have recognized that damages from mental anguish can be difficult to prove. (citation omitted).

While some courts have refused to award damages under section 362(h) because the debtor failed to introduce any medical evidence, other courts have imposed a less stringent standard when it is clear that the debtor suffered some appreciable emotional harm as a result of the stay violation. (citations omitted). This court agrees with the rational of the above cases and finds that emotional distress damages can be awarded against creditors for violation of the automatic stay. In addition, this court concurs with District Judge Nagle, in affirming the Bankruptcy Court, that in the appropriate case, this may be done without the necessity of medical testimony. (citation omitted). See also In re Ghostlaw, Case No. 96-15146 (Bankr.N.D.N.Y. August 14, 1998).

In the instant case, the Debtor testified credibly to the stream of harassment as is reflected in the stipulated facts and the effect on him mentally and physically. The Debtor stated he was "paralyzed with fear." (Tr. p. 31, line 20; p. 32 lines 17–18; p. 56 lines 16–17.) He had difficulty sleeping. (Tr. p. 39, lines 1–25; p. 40 line 1; p. 56, lines 4–6; p. 63, line 10.) This aspect was corroborated by his wife. (Tr. p. 67, lines 4–6.)

The Government's misfeasance malfeasance began prepetition with a bizarre attempt to concoct a reaffirmation agreement. Such an agreement must involve a debtor[7] and be filed with the court. There was no bankruptcy case and therefore no debtor when the agreement was allegedly executed and it was never filed with the court. This improper agreement is the basis that the Government looks to as the justification for their many actions. (Defendant's post-trial brief p. 9.) The Government seized three tax refunds totaling $2,650.99; $677.00 of that has been held by the Government for fifteen years. Like some reverse Robin Hood, taking from the poor and giving to the rich, the Government still has not returned the balance of the seized refund.

From the stipulated facts, there are at least fourteen[8] written communications with the Debtor post-discharge. Some are standard collection letters, demanding from $6005.50 to $72,426.41; others threaten seizure of tax refunds, reporting the discharged debt to consumer credit report agencies, referral to the United States Attorney, foreclosure and/or a demand that Debtor report to the Government's office.

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5 As described by the Government's counsel at trial (Tr. p. 8, line 18.)

6 11 U.S.C. § 106 is entitled "Waiver of sovereign immunity" and states, in part: (a)(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages . . .

7 11 U.S.C. § 101(13) defines a debtor as a "person . . . concerning which a case under this title has been commenced."

8 Exhibit 2 to the Plaintiff's post trial brief analyzes the Government's relationship with the Debtor and posits more than three times as many violations of 11 U.S.C. § 524.

The Debtor also testified credibly to a telephone call with the Government wherein the Government's agent told the Debtor his obligation had not been discharged. The effect on the Debtor, a non-lawyer, was a growing belief that he still owed the Government money on the discharged debt. The Debtor testified "that whatever amount that was incurred on this home, that I was responsible for" (Tr. p. 53 line 7–10.) and "that I was responsible for that debt." (Tr. p. 54, line 13.1.) Further, the Debtor testified that the Government's seizure of tax refunds delayed the construction of his family's new home. (Tr. p. 20, lines 4–19, p. 23, lines 16–25; p. 24, lines 1–3, p. 40; lines 23–25, p. 41; lines 1–3, p. 40; lines 13–21, p. 47; lines 11–13; p. 58, lines 8–23.)

Other courts have also struggled with the issue of damages. The court in In re Taylor, 252 B.R. 201 (Bankr.N.D.Ala.2000) awarded $1,200 against the government for a violation of 11 U.S.C. § 525(c)(1).[9] In that case the court found that the plaintiff suffered headaches, loss of sleep and lack of concentration. Plaintiff withdrew and often cried. Her performance as a high school math teacher suffered. Id. at 204.

In Matthews v. United States, 184 B.R. 594, 600 [75 AFTR 2d 95-2445] (Bankr.S.D.Ala.1995), the debtors filed a chapter 7 on May 4, 1992; an IRS obligation was subsequently discharged on October 2, 1992. Post-filing, the IRS sent two notices of intent to levy. Post-discharge, the IRS seized two tax funds totaling $1,793 which the IRS held for less than a year. Attendant with the seizure were notices of "final seizure," intent to levy and assignment of tax liability for collection. The court stated:

The Matthews were without $1,800 for one year; Mrs. Matthews quit a job due to her stress; the debtors vomited and cried; and their children were upset. Although not quantified in exact dollars, the proof showed damage was done and it should be compensated. The Court finds that $3,000 is reasonable compensatory damage for the loss of use of funds and stress suffered by the Matthews ... Id. at 601.

In In re Davis, 201 B.R. 835 [77 AFTR 2d 96-2439] (Bankr.S.D.Ala.1996), the debtors filed a chapter 7 on September 8, 1995 and properly scheduled the IRS. Post-filing the IRS sent three collection letters and then four notices of intent to levy. Subsequently, the IRS levied on the debtors' bank account resulting in $467.61 being sent to the government. When contacted by one of the debtors, the IRS restored the levied funds within one day, however the levy resulted in bounced checks to local merchants with whom they had done business for a long time. The debtor's alleged damages of $200 for NSF check charges and $2,000 for "trauma and embarrassment and the ordeal of worrying in straightening the problem out." The court ruled:

In this case, it is clear the Debtors suffered some embarrassment due to the local nature of many of the returned checks. The Court does not believe damages to be as substantial as $2,000. The creditors already knew the Davises were in bankruptcy.

Therefore, the Debtors precarious finances were known. However, inconvenience and some embarrassment did occur which the court will quantify at $300, 150% of the out of pocket costs. Id. at 837.

In Matter of Flynn, 169 B.R. 1007 [73 AFTR 2d 94-2208] (Bankr.S.D.Ga.1994), the debtor filed a chapter 13 on April 17, 1992 which properly scheduled the IRS. Post-filing, the IRS levied on the debtor's bank account which lead to the following consequences for the debtor:

First, because the Debtor learned that she could not access her bank account and because she had very limited cash on hand, she was forced to cancel a birthday party that she had planned for the eleven-year-old son on January 16, 1993. This fact

[9] Section 525 is entitled "Protection against discriminatory treatment" and section (c)(1) states, in relevant part: A governmental unit that operates a student loan grant or loan program ... may not deny a grant, loan, loan guarantee, ... to a person that is or has been a debtor under this title ... because the debtor or bankrupt is or has been a debtor under this title ... has been insolvent before the commencement of a case under this title ... or has not paid a debt that is dischargeable in the case under this title ...

added to the distress that she originally experienced upon receipt of the letter from NationsBank informing her of the levy. She spent the entire three day weekend in a state of agitation, what she described as being ''in a wreck,'' worried specifically that her rent and other checks would be dishonored by the bank. She subsequently received notice that several checks issued prior to January 15th, at a time when her account held adequate funds to cover the checks, were dishonored because the checks were presented for payment during the period of time that her account was frozen . . . In each case, the bank returned the item to the payee of the check and charged $20.00 directly to the Debtor for the dishonor. Additionally, Debtor was required, in making good on the dishonored checks, to pay an additional $20.00 insufficient fund charge to each of the payees. All told, Debtor incurred $120.00 in ''NSF'' charges. Id. at 1010–11.

As a result of the above, the debtor requested, among other things, actual damages of $588.55 and compensatory damages of $25,000 for ''mental embarrassment, humiliation, and anxiety.'' Id. at 1011. The court found:

Although Debtor apparently did not suffer any out-of-pocket medical expenses or long-term physical or emotional harm as a result of the IRS' wrongful levy, the evidence was uncontradicted that she was forced to endure the stress of knowing that a number of her checks would bounce and dealing with those payees, the emotional trauma of having to cancel a planned birthday party for her child, and the humiliation of being unable, without considerable difficulty and commotion, to negotiate a check for groceries at her neighborhood supermarket. These natural and powerful emotional reactions cannot be dismissed as ''fleeting'' or ''inconsequential.'' The overpowering sense of humiliation, embarrassment and shame occasioned by the levy and its consequences was only exacerbated by the Debtor's knowledge that she should have been spared these indignities because of the dictates of federal law which her attorney had guaranteed would protect her during her Chapter 13 case. Accordingly, I find it appropriate to award Debtor $5,000.00 in actual, compensatory damages due to her emotional distress. (Citations omitted.) Id. at 1023.

Finally, in Fleet v. Kaneb, 196 F.3d 265 (1st Cir.1999), the creditor filed a foreclosure action under the mistaken belief that a lift stay order had been granted. After the error was pointed out, the bank put the foreclosure ''on hold'' for six weeks before dismissing the suit. During the life of the suit, a foreclosure notice was published in the local paper and as a result the debtor, an eighty-five year old widower, became persona non grata; he was avoided and not invited to social outings. The Bankruptcy Court awarded $25,000[10] for the mental anguish which was affirmed by the BAP.

The First Circuit affirmed, stating that the debtor: [t]estified about the emotional distress he experienced because of these changes in his life. ''[I]ts very irritating. I don't sleep well. My eating habits have changed. I—I don't feel that ambitious about getting out and doing things and meeting people.

It's—it's not a pleasant situation to be in . . . . I'm worried concerning where am I going to live.' An honest accounting of actual damages under § 362(h) must include the psychological suffering of this eighty-five year old retired widower. We affirm the bankruptcy court's award of damages for mental anguish. Id. at 270.

In trying to quantify the damages with the above case law in mind, the court must be vigilant to not allow the punitive to creep into the compensatory. Additionally, a damages award must not be based on mere speculation, guess or conjecture, Flynn, supra at 1021 (citations omitted). However, as in the Matthews case, the proof demonstrated damage was done and should be compensated. Mr. Atkins did not have the physical manifestations of other cases, e.g., vomiting, crying, etc. and his

[10] On appeal, the bank raised, for the first time, whether mental anguish requires corroborating medical testimony. Both the BAP and the First Circuit declined to rule upon this issue because it was not raised at the trial level.

wife testified that the Government's actions had no effect on their marriage. (Tr. p. 67, lines 18, 20.) However, the time line involved in this case dwarfs the other factual scenarios. Still, within that long time period, there are extended phases when no Government collection activity is apparent.

Upon detailed examination, the Government's action may be grouped into five subgroups:

1) March 1987: seizure of the 1986 tax refund;
2) May 1988 - March 1989: primarily written collection efforts leading to seizure of the 1988 tax refund;
3) March 1990 - March 1991: primarily written collection efforts;
4) January and February 1993: written collection activity leading to a foreclosure suit; and
5) October 1998 - July 1999: written collection activity and seizure of the 1998 tax refund.

The Plaintiff's wife put this case into perspective by summing up the physical manifestations on her husband by testifying:

He seemed very stressed out. He would wake up a couple times through the night. He'd be off into a world of his own really. I could tell he was upset .... He was very worried, very upset that they keep bothering us. (Tr. p. 67, lines 12–2, 24–25.)

While the Plaintiff's request of $150,000 would be reasonable under a punitive heading to discourage future government transgressions of this sort, it is far too large to compensate for the emotional stress testified to within the compressed time periods as noted above. The court finds that $30,000 is appropriate and balances the wrong committed versus the harm caused.

B. RETURN OF SEIZED REFUND.

In a stunning display of apathy, ignorance or arrogance, the Government's wrongful seizure of Plaintiff's 1986 tax refund of $677 has never been addressed, much less rectified. Defendant's post-trial brief on damages makes no mention of Plaintiff's demand for return of the refund. In its answer to the complaint, the Government asserted affirmative defenses regarding the 1988 and 1998 tax refunds but not the 1986 tax refund. As such, with no affirmative defense and no statutory or case law offered post-trial, the Government has consented to the relief requested. The Government is directed to refund the 1986 tax refund of $677 to the Debtor.

C. INTEREST ON REFUNDS.

[2] The Plaintiff has requested interest to compensate him for the wrongful retention of the tax refunds. He points to 26 U.S.C. § 6343(c) as authority for the award. That section is entitled "Authority to release levy[11] and return property" and states, in relevant part:

(b) Return of property. If the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return— ...

(2) an amount of money equal to the amount of money levied upon, ...

(c) Interest. Interest shall be allowed and paid at the overpayment rate established under section 6621—

(1) in a case described in subsection (b)(2), from the date the Secretary receives the money to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days, or ...,

Plaintiff suggests that the judgment of the court will suffice as a substitute for the determination of the Secretary. The Government in its post-trial brief states interest should not be allowed because the Debtor's statutory authority is "inapplicable."

Pursuant to Library of Congress v. Shaw, 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986), the Government is immune from an award of interest unless there is an express waiver of sovereign immunity. This court does not interpret § 6343(c) as such an express waiver. Rather,

[11] 26 U.S.C. § 7701 defines levy as including the power of distraint and seizure by any means.

§ 6343 requires the Secretary to release a lien if certain conditions are met and confers discretion upon the Secretary to return property wrongfully levied upon.[12] If property is returned, then interest would be paid. As Plaintiff offers no other statutory or case law authority for an award of interest, his request is denied.

D. ATTORNEYS FEES.

[3] Plaintiff requests attorneys' fees via 11 U.S.C. § 106(a)(3)[13] and 28 U.S.C. § 2412(d)(2)(A).[14] In addition, based upon the spurious reaffirmation agreement, Plaintiff argues that Defendant committed a fraud upon the Plaintiff and the court and this justifies the finding of a special factor within the ambit of § 2412(d)(2)(A). As-suming fees are appropriate, such a finding would allow this court to exceed the $125 cap in the statute. Plaintiff also requests a cost of living allowance on any fee award.

Defendant counters by arguing that fees should not be allowed because there is no statutory authority for such an award. Alternatively, the Defendant states that any fee awarded should reflect that if Debtor's counsel had become involved earlier, the problem would not have been as complicated and fees would have been less.

This court is given specific authority to award attorneys' fees in certain actions brought under the Code, e.g., 11 U.S.C. § 362(h), 11 U.S.C. § 523(d), and F.R.B.P. 9011. Also, virtually any action involving the Internal Revenue Service has the possibility of attorneys' fees via 28 U.S.C. §§ 7430-33. However, there is no specific statutory power to confer attorneys' fees in either section 105 or 524.

11 U.S.C. § 106 provides an explicit waiver of sovereign immunity to 11 U.S.C. §§ 105 and 524 and provides further that the court may determine any issue arising under those sections including applicable costs or fees. Thus, if attorneys' fees are appropriate under either section, they would be properly chargeable to the Farmer's Home Administration. However, the Title 28 reference in § 106 merely provides clarity to certain expenses if they are awarded. Nowhere in § 2412(d)(2)(A) is this court given authority to actually award fees; that authority must emanate from the Bankruptcy Code itself. Thus, the question remains, are attorney fees permissible under either section 105 or 524?

Generally, a prevailing party may not collect attorneys' fees from the loser of the litigation, the so-called "American Rule." However, a court may assess attorneys' fees for the willful disobedience of a court order or if the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons. Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Thus, if either of these judicially created exceptions apply, 28 U.S.C. § 2412(d)(2)(A) via 11 U.S.C. § 106 would permit the assessment of fees against the Government.

1) Willful violation of a court order.

The discharge injunction put in place pursuant to 11 U.S.C. § 524(a) is an order of the bankruptcy court whose violation is

---

12 Section 6343(b) makes it lawful to return wrongfully levied property, but does not mandate it.

13 13. 11 U.S.C. § 106 states in relevant part:

(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following:

(1) Sections 105, ... 524 ...

(2) The court may hear and determine, any issue arising with respect to the application of such sections to governmental units.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections ... including an order or judgment awarding a money recovery ... Such order or judgment for costs or fees under this title ... against any governmental unit shall be consistent with the provisions and limitation of section 2412(d)(2)(A) of title 28.

14 Title 28 of the United States Code relates to the Judiciary and Judicial Process. Chapter 161 is entitled "United States as Party Generally" and section 2412 pertains to costs and fees. Subsection (d)(2)(A) states: fees and other expenses includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees.

The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States: and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

punishable by the imposition of civil sanctions. In re Cherry, 247 B.R. 176, 187 (Bankr.E.D.Va.2000). (collecting cases). There is no disagreement that the Government violated the 11 U.S.C. § 524 discharge injunction. As discussed above, there was no excuse for the Government's actions, then or now. They were served with the discharge and then reminded of that fact along the way. For whatever reason, the Government chose to ignore it. The willful violation of the injunction opens the door to attorneys' fees.

2) Bad faith.

The record is replete with evidence sufficient to support a bad faith finding, including:

the events surrounding the preparation and execution of the document erroneously referred to as a reaffirmation.
the Government's seizure of the a tax refund in 1987, applying it to the discharged debt and never returning it.
the Government's numerous post-discharge attempts to collect to the Debtor over many years.
an agent of the Government telling the Debtor his debt had not been discharged.

Therefore, attorneys' fees are appropriate under the bad faith exception as well.

Debtor's Counsel has submitted time records as follows:

a) Attorney Selbach's Time Records for the period 9/30/99 thru 5/29/01 totaling 5.7 hours. (Exhibit 3 of Plaintiff's brief.)

b) Attorney Viencek's Time Records for the period 8/4/00 thru 5/29/01 totaling 73.9 hours. (Exhibit 3 of Plaintiff's brief.)

c) Attorney Viencek's Time Records for the period 6/4/01 thru 7/17/01 totaling 10.4 hours. (Exhibit A of Plaintiff's brief.)

d) Attorney Selbach's Supplemental Time Records totaling 2.4 hours. (annexed to Attorney Selbach's Declaration dated July 25, 2001.)

e) Attorney Viencek's Time Records for the period 7/18/01 thru 7/25/01 totaling 2 hours. (annexed to the July 25, 2001 Declaration in support of application for attorneys' fees and expenses.)

Total hours are 94.4.[15] In examining these time records of Debtor's counsel, the services rendered were reasonable under the totality of circumstances in this case and are thus allowed.

The court declines to find that any special factors exist allowing an augmentation of the $125 fee allowed by statute, agreeing with the Fifth Circuit's analysis in Cervin v. Commissioner of Internal Revenue, 200 F.3d 351 [85 AFTR 2d 2000-567] (5th Cir.2000) (citing Cassuto v. Commissioner, 936 F.2d 736, 744 [68 AFTR 2d 91-5096] (2d Cir.1991)). The finding of a special factor based on the alleged fraud and bad faith of the defendant would be, in essence, the imposition of punitive damages which is forbidden by the statute. However, a cost of living allowance is appropriate and thus is approved. The Second Circuit has held that the phrase ''cost of living'' should be given its ordinary meaning and should be measured by the Consumer Price Index (CPI) and changes therein. Harris v. Sullivan, 968 F.2d 263, 265 (2nd Cir.1992).

The attorney time records break down as follows: .5 hours in 1999, 15.2 hours in 2000, and 78.7 hours in 2001. The attorney fee provided by statute should only be increased by the corresponding CPI for each year in which the legal work was performed. Kerin v. United States Postal Service, 218 F.3d 185, 194 (2nd Cir., 2000). Applying the CPI formula as espoused by the Debtor's counsel[16] and not contradicted by the Government, results in allowed fees of:

[15] If there are additional hours not included, Plaintiff's attorney has thirty days from the date of this decision to submit them to this court for review.

[16] The 2001 cost of living was calculated only through April 2001. If Plaintiff's counsel requests any additional hours, he is directed to submit the year end CPI increase for 2001.

1999 $135.11 per hour x .5 hours	=	$ 67.56
2000 $139.69 per hour x 15.2 hours	=	$ 2,123.29
2001 $142.03 per hour x 78.7 hours	=	$11,177.76
Total fees		$13,368.61

Finally, in the Declarations in Support of Application for Attorney's Fees and Expenses, Plaintiff's counsel requests expenses of $155 involving the retrieval and reopening of the underlying chapter 7 citing to 28 U.S.C. § 2412(d)(1)(A). However, 11 U.S.C. § 106 only refers to § 2412(d)(2)(A), not (d)(1)(A). Section 2412(d)(2)(A) does not provide for the type of expenses Plaintiff seeks and thus the request for the $155 is denied.

In summary, the court awards as against the Defendant the following amounts:

1) $30,000 in compensatory damages;
2) $677 for the 1987 tax refund; and
3) $13,368.61 in attorneys' fees.

The Plaintiff's requests for interest on the tax refunds, a finding of special factors to increase the attorneys' fees and for expenses of $155 are denied.

It is so ORDERED.

¶2002-5121

Jim D. BURROW, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. UNITED STATES OF AMERICA, COUNTERCLAIMANT, Roland R. Lohmann, COUNTERCLAIM DEFENDANT. U.S. District Court, Western Dist. of Oklahoma, (DC OK) Docket No. CIV-01-1131 L, July 3, 2002. Years 1995, 1996. Decision for Govt.

1. 100% penalty for failure to pay over trust fund taxes—default judgment. Govt. was granted default judgment on its counterclaim to reduce IRC §6672 penalty assessment to judgment against taxpayer/responsible person for his willful failure to pay over trust fund taxes. *Reference:* United States Tax Reporter ¶66,725.02(40). IRC §6672.

In the United States District Court for the Western District of Oklahoma.

Judgment

LEONARD, District Judge:

[1] Default having been entered against counterclaim defendant Roland R. Lohmann on June 5, 2002, JUDGMENT is hereby entered in favor of the counterclaimant United States of America against counterclaim defendant Roland R. Lohmann in the amount of $262,734.81, plus statutory interest on that amount accruing pursuant to law after June 12, 2002, for the balance of the trust fund recovery penalty assessments against him pursuant to 26 U.S.C. 6672 as a responsible person who wilfully failed to truthfully account for, collect and/or pay over trust fund taxes due from Lohmann, Burrow & Associates Inc. for the quarters ending March 31, 1995, June 30, 1995, September 30, 1995, December 31, 1995, June 30, 1996, and September 30, 1996.

ORDERED AND ADJUDGED this 3 day of July, 2002.

TIM LEONARD

UNITED STATES DISTRICT JUDGE

Prepared and submitted by:

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¶2002-5122

UNITED STATES OF AMERICA, PETITIONER v. Timothy S. CHARLTON, as Trustee of the Titan International Trust, RESPONDENT. U.S. District Court, Eastern Dist. of Missouri, (DC MO) Docket No. 4:02 MC 001 69 RWS, June 27, 2002. Decision for Govt.

1. Summons enforcement—legitimate purpose. Pursuant to stipulation, taxpayer/trust's trustee was required to appear before IRS agent to provide testimony, books, records and other summonsed data: summons was issued for legitimate purpose, information was relevant and not already in govt.'s possession, and all administrative steps were taken; and trustee didn't show that summons was issued in bad faith, or that its enforcement would constitute abuse of process. *Reference:* United States Tax Reporter ¶76,025.02(20). IRC §7602.

In the United States District Court for the Eastern District of Missouri, Eastern Division.

Order

SIPPEL, District Judge:

[1] In accordance with the stipulation of the petitioner, the United States of America, and the respondent, Timothy S. Charlton, as Trustee of the Titan International Trust, it is

ORDERED, ADJUDGED AND DECREED that the IRS administrative summons issued to the respondent on April 5, 2002 which directed him to appear before Revenue Agent Christine M. Presson on April 17, 2002 to provide the testimony and the books, papers, records, and other data demanded in said summons meets the good faith requirements for enforcement as set forth in United States v. Powell, 379 U.S. 48, 57–58 [14 AFTR 2d 5942] (1964), in that (1) the IRS examination is being conducted for legitimate purposes; (2) the information sought is relevant to those purposes; (3) the information is not already in the Government's possession; and (4) all administrative steps necessary for the issuance and service of the IRS summons have been taken; and it is further

ORDERED, ADJUDGED AND DECREED that the respondent has not shown that the IRS is pursuing the examination in bad faith, or that the judicial enforcement of the summons would constitute an abuse of the Court's process; and it is further

ORDERED, ADJUDGED AND DECREED that the respondent, Timothy S. Charlton, as trustee of the Titan International Trust, will appear before Revenue Agent Presson (or her designee) on or before July 18, 2002, to comply with this order by providing the testimony and the books, papers, records and other data described in the IRS summons issued to the respondent on April 5, 2002 as described above. The time and place for the respondent's appearance will be set by Revenue Agent Presson.

SO ORDERED this 27th day of June, 2002.

BY THE COURT:

RODNEY W. SIPPEL

UNITED STATES DISTRICT JUDGE

¶2002-5123

UNITED STATES OF AMERICA, PLAINTIFF v. William E. DOWNING, JR., Billie Jane Downing and Community First National Bank, DEFENDANTS. U.S. District Court, Northern Dist. of Iowa, (DC IA) Docket No. C01-2019, June 24, 2002. Years 1992, 1993, 1994, 1995. Decision for Govt.

1. Actions to reduce assessments to judgment—foreclosure and sale of lien property—summary judgment. Pro se tax protester-husband's assessments were reduced to judgment on summary judgment for years he failed or refused to file returns: taxpayer's meritless challenges to tax laws' constitutionality and applicability raised no genuine issue of material fact to rebut assessments' presumptive correctness. Also, record supported foreclosure and sale of both taxpayer's and wife's real

property interest, subject to bank's deed of trust. *Reference:* United States Tax Reporter ¶74,035.01(25); 74,035.03(100). IRC §7403.

In the United States District Court, Northern District of Iowa, Cedar Rapids Division.

Order

The Internal Revenue Service (IRS) has filed a Complaint for federal taxes and to foreclose federal tax liens. Currently pending before the Court is the Government's Motion for Summary Judgment. The Defendants, William Downing, Jr. and Billie Jane Downing, have filed a response. For good cause shown, said motion will be granted.

THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

For its motion, the Government request that (1) summary judgment be granted in its favor, that the assessments against Mr. Downing be reduced to judgment, and that the Court order that the interests of both Mr. and Mrs. Downing in certain real property be sold at a public sale pursuant to 28 U.S.C. §§ 2001, 2002. The record reveals both an absence of genuine issues as to any material fact and good cause under the law for all of the relief requested. Therefore, the Government's motion will be GRANTED in its entirety.[1] For purpose of thoroughness, the Court will note the following undisputed facts as revealed by the record.

The Downings, a married couple, are the taxpayers in this action. Mr. Downing failed or refused to file tax returns for the following tax years: 1992, 1993, 1994 and 1995. As a result, substitutes for returns were filed on behalf of Mr. Downing in accordance with 26 U.S.C. § 6020(b), which provides as follows:

> (b) Execution of return by Secretary.
>
> (1) Authority of Secretary to execute return. If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.
>
> (2) Status of returns. Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

Copies of said substitutes for returns are attached to the Declaration of Joan S. Ulmer, which was submitted with the instant motion. As noted, the statute provides that the substitutions are "prima facie good and sufficient for all legal purposes."

In preparing the substitutes for returns on Mr. Downing's behalf, the IRS used actual reported income for Mr. Downing and credited him with the standard deduction, as well as a deduction for self-employment tax to which he would have been entitled. *See* Declaration of Revenue Agent Arnie Stevensons, ¶ 3.[2] The IRS then sent Mr. Downing a letter informing him of the proposed tax assessments for the years at issue and allowed him 90 days to dispute the proposed tax.[3] *See* Declaration of Revenue Agent Arnie Stevenson, §4. The IRS contends that Mr. Downing responded to the letter by returning it to the IRS. *Id.* In any event, the income and tax amounts determined on the substitutes for returns were duly filed as reflected on the Certificates of Assessment and Payment attached to the Declaration of Joan S. Ulmer. The Government's assessments reflect that, as of the date of the instant motion, Mr. Downing owed $144,599.47 in delinquent taxes and penalties.[4] Despite notice and demand

---

[1] Pursuant to Fed. R. Civ. P. 56, the Court may grant summary judgment only when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

[2] The tax was calculated using the standard tax tables for married individuals filing separately. *See* Declaration of Revenue Agent Arnie Stevenson, ¶ 3.

[3] It is well recognized that when a taxpayer fails to file a return, the IRS may use a substitute return to assess the person's tax liability. *United States v. Silkman*, 220 F.3d 935, 936 [86 AFTR 2d 2000-5330] (8th Cir. 2000).

[4] Of course, interest continues to accrue until the taxes and penalties are paid.

from the Government, Mr. Downing has failed to pay any of the assessments.

[1] Pursuant to 26 U.S.C. §6321, tax liens arose on the date of the assessments noted above in favor of the United States against all property and rights to property of Mr. Downing.[5] The IRS filed a notice of federal tax liens with the Recorder of Deeds for Winnesheik County, Iowa, the location of certain real property owned by Mr. Downing. *See* Ulmer Declaration, ¶s 8–15, and corresponding exhibits.[6] The Government notes that said property is subject to a deed of trust held by Decorah State Bank (now known as First Community Bank) and that this deed of trust has *priority over the federal tax lien.*

Mr. Downing has repeatedly argued throughout this litigation that the federal tax laws are unconstitutional or do not apply to him. By Orders of May 11, 2001 and June 29, 2001, the Honorable Michael J. Judge Melloy denied such challenges. Furthermore, Mr. Downing has not presented any evidence to rebut the Government's substitutes for returns and Certificates of Assessment and Payment. Indeed, as is often the unfortunate case with "tax protestor" proceedings, the Defendants' insistence on proceeding pro se has left them facing serious consequences without the benefit of any legal assistance. Thus, despite his numerous challenges to the tax laws and his general assertions that the Government's assessments are inaccurate, Mr. Downing has failed to submit any specific evidence to show that the assessments are arbitrary or erroneous.[7]

In sum, the Court agrees with the Government that, on the basis of the summary judgment record, there are no genuine issues of material fact and that the Government is entitled to the relief requested as a matter of law. The Court directs the attorneys for the Government to prepare a precedent judgment in accordance herewith and submit same to the Defendants and to the Court for its consideration. Upon receipt of a copy of the precedent judgment, the Defendants will be given 10 days within which to object thereto. The Court will thereafter enter the judgment it concludes to be appropriate under the circumstances.

IT IS THEREFORE ORDERED that the Government's Motion for Summary Judgment, be and it is hereby, GRANTED. It is the conclusion of the Court that the United States is entitled to the relief as requested, including the public sale of the interests of both Mr. and Mrs. Downing in the real property described in the Government's motion, subject of course to the deed of trust held by the Defendant Bank.[8]

Dated this 21st day of June 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5124

Bruce MEYER and Deborah MEYER, PLAINTIFFS v. UNITED STATES OF AMERICA and Charles O. Rossotti, Commissioner of Internal Revenue Service, DEFENDANTS. U.S. District Court, Eastern Dist. of New York, (DC NY) Docket No. CV 00-2084 (DRH), June 28, 2002. Year 1993. Decision for Taxpayers in part.

1. Actions against U.S.—overpayments—interest. Judgment was entered for taxpayers for overpayment in amount representing 10% of their insurance premi-

5 This statute provides as follows:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6321.

6 The subject property was originally purchased by the Downings in 1990. They transferred a portion of said property in 1996.

7 Indeed, the Defendants' latest arguments are inconsistent. At one point he "denies that he was involved in a revenue taxable activity" for the years in question. However, he also has submitted copies of numerous receipts and checks which he contends reflect "business" expense deductions to which he is entitled. Of course, taxpayers are not entitled to deduct "business expenses" if they have no business income. He also contends that he is entitled to six dependent exemptions and other deductions that are not reflected in the Government's assessments. As the Government notes, if Mr. Downing believed that the amounts of the assessments were incorrect, he had the obligation to file accurate tax returns for the years in question.

8 As noted by the Government, the Court has some discretion to prevent a sale of Mrs. Downing's interest in the subject property because there are no delinquent assessments outstanding against her. However, for the reasons cited by Government in the instant motion, the Court concludes that Mrs. Downing is not entitled to the benefit of this discretion.

ums paid with respect to year at issue, plus statutory interest and penalties from judgment date; but, taxpayers' remaining claim was dismissed with prejudice. *Reference:* United States Tax Reporter ¶66,215.01(8). IRC §6621; 6622.

United States District Court, Eastern District of New York.

Judgment

[1] An Order of Honorable Denis R. Hurley, United States District Judge, having been filed on June 26, 2002, directing the entry of judgment pursuant to 26 U.S.C. § 6621 and 6622, and 28 U.S.C. §1961(c), in favor of the plaintiffs Bruce Meyer and Deborah Meyer, and against the defendant, United States of America, for an overpayment in the amount of $408.00, which represents ten percent of the amount of insurance premiums paid by the plaintiffs, Bruce Meyer and Deborah Meyer, with respect to the taxable year ending December 31, 1993, plus statutory interest and additions from August 15, 1996; and dismissing with prejudice, the remaining claim of the plaintiffs, Bruce Meyer and Deborah Meyer, in the amount of $20,372.53, plus statutory interest and additions from August 15, 1996, with each party bearing its own fees and costs, it is

ORDERED AND ADJUDGED that judgment is hereby entered pursuant to 26 U.S.C. § 6621 and 6622, and 28 U.S.C. §1961(c), in favor of the plaintiffs Bruce Meyer and Deborah Meyer, and against the defendant, United States of America, for an overpayment in the amount of $408.00, which represents ten percent of the amount of insurance premiums paid by the plaintiffs, Bruce Meyer and Deborah Meyer, with respect to the taxable year ending December 31, 1993, plus statutory interest and additions from August 15, 1996; and that the remaining claim of the plaintiff's, Bruce Meyer and Deborah Meyer, in the amount of $20,372.53, plus statutory interest and additions from August 15, 1996, is dismissed with prejudice, with each party to bear its own fees and costs.

Dated: Central Islip, New York

June 28, 2002

ROBERT C. HEINEMANN

Clerk of the Court

By: /s/

Deputy Clerk

¶2002-5125

Zariq SIDDIQUI, ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Arizona, (DC AZ) Docket No. CV 99-1596-PHX-ROS, July 10, 2002. Decision for Govt.

1. Unauthorized disclosure of return information—damages—punitive damages—summary judgment. Taxpayers' claims for additional statutory and punitive damages from IRS agent's admittedly unauthorized disclosure at retirement party of their pending tax investigation were denied on summary judgment: taxpayers' argument that agent's disclosure was for statutory damages purposes really multiple, separate disclosures equal to number of people present at party was foreclosed by case law and established principle that disclosure meant agent's "act," not number of people to whom disclosure is made. And, based on traditional tort principles and narrow construction of sovereign immunity waiver, punitive damages against govt. weren't available absent showing of actual damages, which taxpayers admittedly could not make. *Reference:* United States Tax Reporter ¶74,315.01. IRC §6103; 7431.

In the United States District Court for the District of Arizona.

Order

SILVER, District Judge:

Pending before the Court is Plaintiffs' Motion for Partial Summary Judgment Re: Statutory Damages (Doc. #46) filed December 21, 2001. Defendant filed its Opposition (Doc. #48) on January 18, 2002, and Plaintiffs filed a Reply (Doc. #52) on January 31, 2002. Also pending is Defendant's Motion for Partial Summary Judg-

ment Re: Punitive Damages (Doc. #56) filed February 12, 2002. Plaintiffs filed a Response (Doc. #58) on March 15, 2002, and Defendant filed a Reply (Doc. #61) on April 1, 2002. For the reasons set forth below, Plaintiffs' Motion will be denied, and Defendant's Motion will be granted.

Background

Plaintiffs are various taxpayers, including five individuals and a corporation, who filed a Complaint on September 2, 1999[1] alleging that the Internal Revenue Service (''IRS'') made unauthorized disclosures of Plaintiffs' tax information in violation of 26 U.S.C. § 6103. Plaintiffs also allege that the IRS acted willfully and with gross negligence, entitling Plaintiffs to punitive damages pursuant to 26 U.S.C. § 7431. In its Answer, Defendant admits that Special Agent Greg Heck made an unauthorized disclosure of Plaintiffs' tax information at a retirement party held in Heck's honor on October 24, 1998. It is undisputed that approximately 100 people attended the party, which included a ''roast'' of Heck. In connection with the roast, Heck made reference to the then-ongoing investigation by the IRS of Plaintiffs' tax practices.[2]

Discussion

In their Motion for Partial Summary Judgment, ''[e]ach Plaintiff contends that he or she is entitled to $1,000 for the disclosures made to each of the 100 persons at the retirement party.'' (Mot. at 7). Defendant, however, contends that ''each Plaintiff may recover a total of $1,000, as [Heck] committed only one 'act.''' (Opp'n at 7). In short, Plaintiffs argue that they are entitled to a total of $600,000 in statutory damages pursuant to § 7431; Defendant argues that Plaintiffs are only entitled to $6,000 as a result of the unauthorized disclosure.

In its Motion for Partial Summary Judgment, Defendant contends that Plaintiffs cannot recover punitive damages pursuant to § 7431 (c) because Plaintiffs have neither sustained nor alleged actual damages. Plaintiffs admit they that have not sustained actual damages as a result of Defendant's unlawful disclosure, but contend that they may nevertheless recover punitive damages under § 7431.

I. LEGAL STANDARD

This Court may grant summary judgment if it finds there is ''no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'' Fed. R. Civ. P. 56(c). Where, as here, the parties are in essential agreement about the facts giving rise to their dispute, ''a motion for summary judgment is appropriate because [the parties] raise[] questions of law, the resolution of which does not involve disputed 'material' facts.'' Delbon Radiology v. Turlock Diagnostic Ctr., 839 F. Supp. 1388, 1391 (E.D. Cal. 1993); see also Edwards v. Aguillard, 482 U.S. 591, 594 (1987) (stating that interpretation of a statute is appropriate for summary judgment based on the text of the statute and/or its legislative history).

II. ANALYSIS

A. Statutory Damages

[1] Section 6103 provides that, with limited exceptions, ''no officer or employee of the United States ... shall disclose any [tax] return or return information.'' 26 U.S.C. § 6103(a)(1). ''Return information'' includes ''whether the taxpayer's return was, is being, or will be examined or subject to other investigation.'' § 6103(b)(2)(A). In the absence of actual damages § 7431 provides statutory damages for unauthorized disclosure of tax return information in the amount of ''$1,000 for each act of unauthorized disclosure of a return information with respect to which [a] defendant is found liable.'' 26 U.S.C. § 7431(c)(1)(A). ''The term 'disclosure' means the making known to any person in any manner whatever a return or return information.'' § 6103(b)(8).

Here, Plaintiffs contend that because Heck disclosed the fact that Plaintiffs were

[1] Plaintiffs filed an Amended Complaint on July 26, 2000.

[2] Plaintiffs Zariq Siddiqui, Joseph Vullo, and Richard Vullo were indicted for tax evasion on August 6, 2001. After entering plea agreements, each was sentenced on October 22, 2001 to approximately sixteen months in prison and fined $5000. The present action was stayed pending resolution of these criminal proceedings. The stay was lifted on November 9, 2001.

under investigation to a room full of 100 people, Defendant is liable for 100 separate acts of disclosure as to each Plaintiff. Plaintiffs rely on Mallas v. United States, 993 F.2d 1111 [71 AFTR 2d 93-2036] (4th Cir. 1993), in support of their position.

In Mallas, a confidential IRS report (''RAR'') was mailed to thirty-three couples at thirty-three addresses and to seven other individuals in violation of § 6103. Rejecting the defendant's argument that the mailings constituted only forty acts of disclosure (i.e., one for each RAR mailed), the Fourth Circuit calculated seventy-three separate acts of disclosure:

> [T]he act to be counted for computing damages is the ''making known to any person in any manner whatever'' the return information. Each time the Government ''makes known'' return information to a person in violation of section 6103, it has committed an ''act of unauthorized disclosure.'' ... If the IRS addresses and mails a single RAR to two people, it makes the information known to each of them no differently than if it had decided to use two copies of the RAR, two envelopes, and two stamps. Nothing in the language of the statute suggests that Congress means to reward the IRS, having been found liable for violating section 6103, for the fortuity of having multiple investors living under one roof.

Id. at 1125. Similarly here, according to Plaintiffs, ''the IRS should not be rewarded because special agent Heck fortuitously made the wrongful disclosure to 100 persons in the same room instead of making the disclosures to 100 persons in separate rooms.'' (Reply at 4).

For its part, Defendant primarily relies on Miller v. United States, 66 F.3d 220 [76 AFTR 2d 95-6584] (9th Cir. 1995), and Ward v. United States, 973 F. Supp. 996 [79 AFTR 2d 97-2831] (D. Colo. 1997). In Miller, the Ninth Circuit determined that an unauthorized disclosure by an IRS agent to a newspaper reporter, who subsequently published the information, constituted a single ''act'' of disclosure warranting only $1,000 in statutory damages. The Ninth Circuit rejected the taxpayer's argument that she was entitled to $1,000 in damages for each subscriber of the newspaper. The court noted ''the public policy reason for not allowing this form of second party dissemination to be actionable,'' observing that ''one statement on the worldwide computer network or to a television reported could result in disseminations that could break our nation's treasury.'' Id. 224–25.

Although factually distinguishable, Miller establishes the principles that govern in the present case. First, Miller emphasizes that public policy considerations, especially the potential drain on ''our nation's treasury,'' militate against the award of high statutory damages. Miller, 66 F.3d at 223–24. Noting that the taxpayer's original claim sought ''$1.1 billion in damages representing the paper's total circulation multiplied by $1,000,'' the court observed that ''[i]n a case involving no actual damages, such a prayer gives new meaning to 'overreaching.'''[3] Miller, 66 F.3d at 224. Second, in rejecting liability for second-party dissemination, the Ninth Circuit implicitly rejected the Fourth Circuit's expansive construction of § 6103, which counts as a discrete ''act'' of disclosure every instance in which another person learns of a taxpayer's return information. See Mallas, 993 F.2d at 1125 (''Each time the government 'makes known' return information ... it has committed an 'act of unauthorized disclosure.'''). The Mallas court's interpretation is thus inconsistent with the Ninth Circuit's rejection of liability for second-party dissemination. Indeed, though the unauthorized disclosure of tax information ''to a person who is likely to publish that information'' represents a particularly effective means of ''making known'' confidential tax information, the Ninth Circuit determined that not every instance of disclosure constitutes a discrete ''act'' for the

[3] Although the taxpayer's original request for relief was based on the newspaper's total circulation, she amended her request when she learned that the unauthorized disclosure was only included in the payer's ''Valley Edition'' with a circulation of 181,734. Notably, the Ninth Circuit articulated its public policy rationale, in terms of the threat to the nation's treasury, in the context of a claim for only $181,734.

computation of damages. Miller, 66 F.3d at 223–224. Rather, ''the disclosure of information to a person who is likely to publish that information is relevant in determining the degree of negligence or recklessness involved, *not the number of disclosures.*'' Id. at 225 (emphasis added).

In Ward, the court similarly rejected an award of damages based on the number of people to whom the tax information was made known, concluding that unauthorized disclosures by two IRS agents during a radio program constituted two acts of disclosure regardless of the size of the listening audience. The court rejected ''the position that there was as act of disclosure for each listener,'' finding that such an argument ''improperly focuses on the audience that heard or received the unauthorized disclosure.'' Ward 973 F. Supp. at 1003. According to the court, under § 7431, ''[i]t is the act of disclosure that triggers and defines liability, not the extent or scope of the disclosure.'' Id. ''To accept Plaintiff's argument would require this Court to give no effect to the word 'act' as used in § 7431(c)(1)(A), thus violating a cardinal rule of statutory interpretation.'' Id. Although the taxpayer attempted to distinguish Miller on the grounds that a radio broadcast does not involve second-party dissemination, the court found ''that the medium or manner by which the information is disseminated is immaterial for purposes of determining the 'acts' of disclosure pursuant to § 7431.'' Id.[4]

In the present case, the Miller principles defeat Plaintiffs' claim for $600,000 in statutory damages. First, like the taxpayer in Miller, Plaintiffs sustained no actual damages. Accordingly, their prayer for $600,000 in statutory damages is similarly ''overreaching.'' Miller, 66 F.3d at 224. Moreover, awarding such extensive damages under the present circumstances would not only strain ''our nation's treasury,'' id. at 225, it would grant Plaintiffs an unjustified windfall.[5] Cf. Frank Music Corp. v. Metro-Goldwyn-Mayer Inc., 886 F.2d 1545, 1554–55 (9th Cir. 1989) (declining to award statutory damages under the Copyright Act because to do so ''effectively would grant plaintiffs a windfall''). Although the extent of the disclosure may be relevant in determining Plaintiffs' actual damages, or ''the degree of negligence or recklessness involved,'' it is not relevant in determining ''the number of disclosures.'' Miller, 66 F.3d at 225.

Second, though Heck's unauthorized disclosure ''made known'' Plaintiffs tax information to 100 people, ''[i]t is the act of disclosure that triggers and defines liability, not the extent or scope of the disclosure.'' Ward, 973 F. Supp, at 1003; see also Miller, 66 F.3d at 224 (''The district court correctly limited the IRS's damages for unauthorized disclosure to $1,000 for [the agent's] *single statement* to the Los Angeles Times, Valley Edition.'') (emphasis added). Thus, limiting Plaintiffs to statutory damages for Heck's single statement is consistent with the Ninth Circuit's determination that ''disclosure'' is construed with reference to the defendant's ''act,'' not the number of persons to whom the information is made known.

B. Punitive Damages

As discussed above, § 7431 provides actual and/or statutory damages for unauthorized disclosure of tax information. In addition, § 7431 provides for punitive damages under the appropriate circum-stances:

> [U]pon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of —

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[4] The Ward court distinguished Mallas on the grounds that in Mallas, ''Defendant committed 73 different 'acts' by addressing and placing in the mail envelopes that were addressed and directed to seventy-three individuals. Thus, Defendant committed seventy-three separate 'acts' of disclosure.'' Ward, 973 F. Supp. at 1003. The court also stated that ''to the extent that Mallas could be interpreted as holding that an act of disclosure is committed for every person who learned about Plaintiff's return information, as a consequence of [the agents'] act of appearing on the radio, this Court disagrees with such as analysis.'' Id. at 1003–04.

[5] Plaintiffs contend that ''the IRS should not be rewarded because special agent Heck fortuitously made the wrongful disclosure to 100 persons in the same room instead of making the disclosures to 100 persons in separate rooms.'' (Reply at 4). In this case, Plaintiffs provide no basis for concluding that Heck's single disclosure was fortuitous in this sense, or that he would have made 100 separate wrongful disclosures if the partygoers had not been assembled in a single room. In Mallas, by contrast, the IRS specifically intended to reach all seventy-three addresses regardless of whether some of them ''fortuitously'' lived at the same address. Moreover, Miller makes clear that the number of persons who ultimately receive the information does not determine ''the number of disclosures.'' Miller, 66 F.3d at 224.

(1) the greater of —

(A) $1,000 for each act of unauthorized disclosure of a return or return information with which respect to which the defendant is found liable, or

(B) the sum of —

(i) the actual damages sustained by the plaintiff as a result of such unauthorized disclosure, plus

(ii) in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action.

26 U.S.C. § 7431(c). Where, as here, the United States waives its sovereign immunity from suit, "the government's consent to be sued 'must be construed strictly in favor of the sovereign, and not enlarg[ed] ... beyond what the language requires.'" United States v. Nordic Village, Inc., 503 U.S. 30, 33–34 [69 AFTR 2d 92-687] (1992) (quoting McMahon v. United States, 342 U.S. 25, 27 (1951)); see also United States Dep't of Energy v. Ohio, 503 U.S. 607, 627 (declining to extend waiver of sovereign immunity to punitive fines where statutory waiver was ambiguous).

Here, Defendant contends that because Plaintiffs have not sustained any actual damages, they cannot recover punitive damages under § 7431(c). According to Defendant, "[w]hen a plaintiff has not sustained any actual damages, Congress has limited that plaintiff's recovery to statutory damages under § 7431(c)(1)(A)." (Mot. at 7). "Had Congress intended to waive immunity to permit taxpayers who had not sustained actual damages to recover punitive damages, it would have said so, clearly and unambiguously." (Id.).

Plaintiffs concede that they have not sustained any actual damages as a result of the unauthorized disclosure of their tax information. (See Resp. at 2). However, Plaintiffs contend that the statutory language supports an award of punitive damages even in the absence of actual damages. (Resp. at 2). Because subsection (B)(1) provides for "the sum of" actual damages "plus" punitive damages, Plaintiffs argue that even if "actual damages are zero and there are punitive damages, 'the sum of' means the zero plus 'X', the amount of punitive damages." (Id. at 4). Plaintiffs also rely on Mallas and various cases in which courts have awarded punitive damages despite the absence of actual damages.

The Ninth Circuit has not addressed "whethr § 7431 punitive damages can apply where there are no actual damages." Miller, 66 F.3d at 224. However, the structure of § 7431(c), together with this Court's clear mandate to construe narrowly waivers of sovereign immunity, establish that punitive damages are not available under § 7431(c) absent a showing of actual damages. Accord Barrett v. United States, 917 F.Supp. 493, 504 [77 AFTR 2d 96-449] (S.D. Tex. 1995) ("The very language and structure of the statute ... mean that punitive damages are recoverable only when actual damages have been proved."); Smith v. United States, 730 F. Supp. 948, 955 [65 AFTR 2d 90-951] (C.D. Ill. 1990), rev'd on other grounds, 964 F.2d 630 [69 AFTR 2d 92-1306] (7th Cir. 1992) ("[T]he clear language of the statute provides that when a taxpayer only recovers statutory damages, punitive damages are unavailable to him."); William E. Schrambling Accountancy Corp. v. United States, 689 F. Supp. 1001, 1008 [61 AFTR 2d 88-1055] (N.D. Cal. 1988), rev'd on other grounds, 973 F.2d 1485 (9th Cir. 1991) (holding that a plaintiff that has not proved actual damages is not entitled to punitive damages).

Section 7431(c) provides that a taxpayer may recover either $1,000 for an unauthorized disclosure, or, the sum of actual damages "plus," where appropriate, punitive damages. In Mallas, the Fourth Circuit determined that "a taxpayer may recover punitive damages, even where actual damages are zero." Mallas, 993 F.2d at 1126. Similarly, Plaintiffs argue that "[t]he word 'plus' is critical in the statutory interpretation," because "the sum of" actual and punitive damages allows for the possibility

that actual damages may be zero. (Resp. at 4). In Plaintiffs' formulation, where X = punitive damages: 0 + X = X.

In reaching this conclusion, neither Plaintiffs nor the Fourth Circuit address the fact that their interpretation of § 7431 achieves, at best, an ambiguous waiver of sovereign immunity with respect to the availability of punitive damages in the absence of actual damages. Traditional tort principles, however, link an award of punitive damages to a showing of actual damages. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996) (''The principles that exemplary damages must bear a 'reasonable relationship' to actual damages has a long pedigree.'') (citing cases).[6] Against this common law backdrop, Plain-tiffs' interpretation of § 7431 enlarges the waiver of sovereign immunity ''beyond what the [statutory] language requiers.'' Nordic Village, Inc., 506 U.S. at 33–34. Under these circumstances, because § 7431 lacks an unequivocal waiver for punitive damages in the absence of actual damages, the expansive waiver urged by Plaintiffs cannot be justified. See United States Dep't of Energy, 503 U.S. at 627.

Accordingly,

IT IS ORDERED that Plaintiffs' Motion for Partial Summary Judgment Re: Statutory Damages (Doc. #46) is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion for Partial Summary Judgment Re: Punitive Damages (Doc. #56) is GRANTED.

IT IS FURTHER ORDERED that a Final Pretrial Conference is set for October 18, 2002 at 1:30 p.m. The parties shall file a Joint Proposed Pretrial Order by September 18, 2002. All motions in Limine are to be filed at the time of filing the Joint Proposed Pretrial Order. Responses to the Motions in Limine are due within ten days from the receipt of the Motions. No replies will be filed.

Dated this 9 day of July, 2002.

Roslyn O. Silver

United States District Judge

¶2002-5126

UNITED STATES SHOE CORPORATION, PLAINTIFF-APPELLEE v. UNITED STATES, DEFENDANT-APPELLANT. U.S. Court of Appeals, Federal Circuit, (CA Fed Cir) Docket No. 98-1574, July 23, 2002. Court of International Trade reversed. Earlier proceedings at (1998, S Ct) 81 AFTR 2d 98-1256, 118 S Ct 1290, affirming (1997, CA Fed Cir) 79 AFTR 2d 97-2813, 114 F3d 1564, 97-1 USTC ¶70078. Decision for Govt.

1. Harbor Maintenance Tax—exports—refunds—interest—sovereign immunity. Fed. Cir. reversed decision granting taxpayer-exporter interest on refund of HMT that had been unconstitutionally applied to taxpayer's exports: no express sovereign immunity waiver to HMT interest award applied. IRC §4462 expressly prohibited 28 USC §2411's application in HMT context; §2644 interest award was jurisdictionally barred; and 19 USC §1505(c) by its plain language applied only to imports, not exports. Also, interest wasn't required by Export Clause; and equitable principles weren't otherwise sufficient to waive govt.'s immunity. *Reference:* United States Tax Reporter ¶66,115.01(3). USTR Excise Taxes ¶44,615.01(10). IRC §4461; 4462; 6611.

James S. O'Kelly, Barnes, Richardson & Colburn, of New York, New York, argued

[6] Plaintiffs are correct in observing that state law does not determine the availability of punitive damages under § 7431. (See Resp. at 9). However, the principle that punitive damages cannot be awarded in the absence of actual damages is a matter of common law generally, not unique to Arizona. See, e.g., Martini v. Fed. Nat'l Mortgage Ass'n, 178 F.3d 1336, 1350 (D.C. Cir. 1999); Belleville v. Davis, 498 P.2d 744, 752 (Or. 1972); 1488, Inc. v. Philsec Inv. Corp., 939 F.2d 1281 (5th Cir. 1991) (Texas law); Guar. Serv. Corp. v. American Employers' Ins. Co., 893 F.2d 725 (5th Cir. 1990) (Miss. law); Richard v. Hunter, 85 N.E.2d 109, 110 (Ohio 1999). Although Congress is free to reject the common law in enacting a statute, in the context of sovereign immunity, it must do so unambiguously. As discussed above, § 7431 does not unambiguously waive sovereign immunity with respect to punitive damages in the absence of actual damages. Moreover, the limited waiver of sovereign immunity in § 7431 distinguishes the cases cited by Plaintiffs in which punitive damages were awarded despite the absence of actual damages. See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970); Basista v. Weir, 640 F.2d 74 (3d Cir. 1965). In these cases, because plaintiffs brought causes of action against state officials pursuant to 42 U.S.C. § 1983, sovereign immunity was not in issue. Finally, Plaintiffs' reliance on Basista is misplaced. In Basista, the court noted that a plaintiff need not allege even nominal damages for the violation of a federal right because the damage is evidenced by the violation itself. Here, by contrast, Congress has expressly made provision for nominal damages in § 7431 and, at the same time, expressly coupled punitive damages with actual damages.

for plaintiff-appellee. With him on the brief were Harvey A. Isaacs and Robert T. Stack, Tompkins & Davidson, LLP, of New York, New York. Of counsel on the brief were Alan Goggins and Kevin J. Sullivan, Barnes, Richardson & Colburn.

Jeffrey A. Belkin, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Robert D. McCallum, Jr., Assistant Attorney General; David M. Cohen, Director; Jeanne E. Davidson, Deputy Director; and Todd M. Hughes, Assistant Director. Of counsel on the brief was Richard McManus, Office of the Chief Counsel, United States Customs Service, of Washington, DC. Of counsel was Lara Levinson, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC.

John J. Galvin, Galvin & Mlawski, of New York, New York, for amicus curiae Arbon Steel & Service Co.

John M. Peterson, Neville Peterson LLP, of New York, New York, for amici curiae Totes-Isotoner, Inc. et al. With him on the brief were George W. Thompson, Michael K. Tomenga, and Maria E. Celis.

Barry E. Cohen, Crowell & Moring LLP, of Washington, DC, for amicus curiae E.I. Du Pont de Nemours & Co.

Appealed from: United States Court of International Trade, Judge Jane A. Restani. United States Court of Appeals for the Federal Circuit.

Before MAYER, Chief Judge, RADER and BRYSON, Circuit Judges.

MAYER, Chief Judge:

The United States appeals the judgment of the Court of International Trade granting United States Shoe Corporation's motion for payment of interest on its refund of the Harbor Maintenance Tax. United States Shoe Corp. v. United States, 20 I.T.R.D. (BNA) 1703 (Ct. Int'l Trade 1998). Because the payment of interest is not mandated by statute or the Constitution, we reverse.

Background

The Harbor Maintenance Tax was en-acted by Congress as part of the Water Resources Development Act of 1986. 26 U.S.C. §§ 4461–4462 (2000). It levied a 0.125 percent ad valorem tax on commercial cargo for any port use. Id. § 4461(b). In 1995, the Court of International Trade decided that the tax imposed on exports was unconstitutional because it violated the Export Clause's mandate that "[n]o Tax or Duty shall be laid on Articles exported from any State," U.S. Const. art. I, § 9, cl. 5. See United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995). The court then decided that in addition to a refund of the tax payment, interest was due pursuant to 28 U.S.C. § 2411. United States Shoe Corp. v. United States, 20 C.I.T. 206 (Ct. Int'l Trade 1996). The award of interest was stayed until appellate proceedings on the constitutionality of the tax were complete.

On appeal, this court agreed that the tax was unconstitutional, United States Shoe Corp. v. United States, 114 F.3d 1564 [79 AFTR 2d 97-2813] (Fed. Cir. 1997), and the Supreme Court affirmed, stating that the tax "is not a fair approximation of services, facilities, or benefits furnished to exports, and therefore does not qualify as a permissible user free," United States v. United States Shoe Corp., 523 U.S. 360, 363 [81 AFTR 2d 98-1256] (1998). The stay on the payment of interest dissolved, and pursuant to its 1996 judgment, the Court of International Trade awarded U.S. Shoe interest. The United States asks that we reverse the judgment. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

Discussion

We review statutory interpretation by the Court of International Trade without deference. Saarstahl AG v. United States, 78 F.3d 1539, 1542 (Fed. Cir. 1996). Constitutional interpretation is also a question of law, which we review de novo. Florida Sugar Mktg. & Terminal Ass'n, Inc. v. United States, 220 F.3d 1331, 1333 [86 AFTR 2d 2000-5467] (Fed. Cir. 2000). A court may fashion equitable remedies, but it may not abuse its discretion in doing so.

Massie v. United States, 226 F.3d 1318, 1321 (Fed. Cir. 2000). An equitable remedy here must not be (1) clearly unreasonable, arbitrary or fanciful or (2) based on an erroneous conclusion of law. Institut Pasteur & Genetic Sys. Corp. v. Cambridge Biotech Corp., 186 F.3d 1356, 1369 (Fed. Cir. 1999).

Interest may only be recovered in a suit against the government if there has been a clear and express waiver of sovereign immunity by contract or statute, or if interest is part of compensation required by the Constitution. Library of Congress v. Shaw, 478 U.S. 310, 311 (1986); Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 47 (1928). U.S. Shoe argues that interest is due on its payment of the Harbor Maintenance Tax under (1) statutory provisions providing for the payment of interest, (2) the Takings and Export Clauses of the Constitution, and (3) the discretionary power of a court to fashion equitable remedies.

I.

[1] The government argues that the Court of International Trade erred in awarding U.S. Shoe interest because the United States has not expressly consented to such an award, relying on International Business Machines Corp. v. United States, 201 F.3d 1367, 1374 [85 AFTR 2d 2000-518] (Fed. Cir. 2000). We agree. IBM looked to the statutes which waived immunity to pay interest and concluded that neither a tax related statute, 28 U.S.C. § 2411, nor customs related statutes, 28 U.S.C. § 2644 and 19 U.S.C. § 1505, permitted the award. Id.

First, 28 U.S.C. § 2411 provides: ''In any judgment of any court rendered ... for any overpayment in respect of any internal-revenue tax, interest shall be allowed ... from the date of the payment ....'' IBM held that the Harbor Maintenance Tax statute, 26 U.S.C. § 4462, expressly prohibited the application of section 2411 because it is a tax law, and not a customs law. 201 F.3d at 1372. Section 4462(f)(1) states that ''all administrative and enforcement provisions of customs laws and regulations shall apply ... as if such tax were a customs duty.'' ''[A]dministration and enforcement'' encompass the ''assessment and collection of tax payments and issuance of refunds and interest on those refunds.'' 201 F.3d at 1372. Because section 2411 does not apply to refunds of the tax, id. at 1373, the Court of International Trade improperly awarded U.S. Shoe interest under it.

Second, 28 U.S.C. § 2644 provides for post-summons interest for claims that invoke the Court of International Trade's jurisdiction under 28 U.S.C. § 1581(a). For review under this subsection, a party must have filed a protest under section 515 of the Tariff Act of 1930. 28 U.S.C. § 1581(a) (2000). In IBM, section 1581(a) jurisdiction was not invoked because IBM did not file a customs protest; therefore section 2644 interest could not be awarded. 201 F.3d at 1374. Instead, jurisdiction in IBM arose under section 1581(i), the residual jurisdiction provision. Id. Likewise in this case, the Supreme Court held that jurisdiction was proper under section 1581(i), U.S. Shoe, 523 U.S. at 365, thereby prohibiting an award of section 2644 interest.

Third, 19 U.S.C. § 1505 provides for prejudgment interest, and states in relevant part that ''[i]nterest on excess moneys deposited shall accrue ..., from the date the importer ... deposits estimated duties, fees, and interest ... to the date of liquidation or reliquidation of the applicable entry or reconciliation [of the imports].'' 19 U.S.C. § 1505(c) (emphases added). IBM held that section 1505(c) does not apply to exports because it speaks only to imports and declined to rewrite the ''Congressional enactment to make it fit a case for which it was clearly not intended.'' 201 F.3d at 1374.

U.S. Shoe and amicus argue that IBM's interpretation is too restrictive, and that section 1505(c) should apply to exports as well as imports. They rely by analogy on the Supreme Court's holding that review of the Harbor Maintenance Tax on exports could be heard under the Court of International Trade's jurisdictional statute, section 1581(i), referring only to imports: ''True, §

1581(i) does not use the word 'exports.' But that is hardly surprising in view of the Export Clause, which confines customs duties to imports.'' U.S. Shoe, 523 U.S. at 366. U.S. Shoe urges that ''exports'' be read into section 1505(c) also. The Court, however, was reviewing the entire statute, and the tax on imports provided a sufficient basis for jurisdiction because the ''HMT statute, although applied to exports here, does apply equally to imports.'' Id. We believe the Court's reasoning is sound for the purpose of establishing jurisdiction, but an insufficient basis upon which sovereign immunity may be waived in light of the ''Supreme Court's mandate that Congress must expressly consent to an award of interest.'' IBM, 201 F.3d at 1374.

II.

The government also argues that the Constitution does not mandate the payment of prejudgment interest. We agree. The Harbor Maintenance Tax was not a taking, but a violation of the Export Clause, for which no prejudgment interest is due. If not granted by statute, the Supreme Court has held only the Fifth Amendment of the Constitution to mandate the payment of interest. Shaw, 478 U.S. at 317 n.5; Smyth v. United States, 302 U.S. 329, 353–54 (1937); Boston Sand & Gravel, 278 U.S. at 47. The Fifth Amendment states that private property shall not be ''taken for public use, without just compensation.'' U.S. Const. amend. V. The principle that the ''just compensation'' language includes the payment of interest from the time of the taking is long standing. Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 306 (1923) (''The requirement that 'just compensation' shall be paid is comprehensive . . . and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.'').

U.S. Shoe argues that the Harbor Maintenance Tax was a taking in violation of the Fifth Amendment because it was an unlawful confiscation of its property. We do not agree. The government's act of taxation here was not a per se taking of private property. United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989) (considering and rejecting the view that money is private property that can be physically occupied by the government: ''Unlike real or personal property, money is fungible.''). Nor is the tax a regulatory taking: ''[R]egulatory actions requiring the payment of money are not takings.'' Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (en banc) (relying on the reasoning of five justices in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998)); Atlas Corp. v. United States, 895 F.2d 745, 756 (Fed. Cir. 1990) (''Requiring money to be spent is not a taking of property.'').

A ''reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services.'' Sperry, 493 U.S. at 63. The Harbor Maintenance Tax was imposed to ''defray the cost of harbor development and maintenance.'' U.S. Shoe, 523 U.S. at 370. In Pace v. Burgess, 92 U.S. 372, 375 (1875), a stamp fee placed on packages of tobacco for export was upheld because it ''bore no proportion whatever to the quantity or value of the package on which it was affixed'' and was not excessive. Here, the fee was declared unconstitutional because it was proportional to the value of the exported goods and not the actual use of the harbors. U.S. Shoe, 523 U.S. at 369 (''[T]he connection between a service the Government renders and the compensation it receives for that service must be closer than is present here . . . the extent and manner of port use depend on factors such as the size and tonnage of a vessel, the length of time it spends in port, and the services it requires.''). But it was not excessive. Under Sperry, a user fee of 1.5 percent ''does not qualify as a 'taking' by any standard of excessiveness.'' 493 U.S. at 62. Similarly, purely by its amount, 0.125 percent, 26 U.S.C. § 4461(b) (2000), the Harbor Maintenance Tax must be considered reasonable. Because ''the Takings Clause is less restrictive than the Export Clause,'' U.S. Shoe, 523 U.S. at 369, and the tax would be sustained if it ''fairly match[ed] the exporters' use of port services and facili-

ties,'' id. at 370, we conclude that the tax did not rise to the level of a taking.

U.S. Shoe also contends that the government's retention of the interest income earned on the tax revenue is a continuing taking. But U.S. Shoe has not established a private property right in the interest generated by the payment of the tax. See Eastern Enterprises, 524 U.S. at 543 (Kennedy, J., concurring). The Harbor Maintenance Tax did not ''appropriate, transfer, or encumber an estate in land . . . , a valuable interest in an intangible . . . , or even a bank account or [its associated] accrued interest.'' Id. at 540. For the accrued interest to rise to the level of private property, the principal must be held in an identified private account. See Phillips v. Washington Legal Found., 524 U.S. 156, 164 (1998) (stating that client fees held in trust accounts constituted ''private property''). And then any interest accrued belongs to the owner of the principal. Id. at 172 (holding that the ''interest income generated by funds held in IOLTA accounts [client accounts] is the 'private property' of the owner of the principal''). The tax revenue here was not held by the government as property of U.S. Shoe. It became the property of the Treasury upon payment, and was appropriated to the Harbor Maintenance Trust Fund along with user fees on imports, passenger cruise ships, and domestic shipments, and other statutory fees. 26 U.S.C. § 9505(b) (2000). Accordingly, the interest earned on the tax payments is also the property of the government. And its use for harbor maintenance expenditures, id. § 9505(c), cannot be a taking.

U.S. Shoe also argues that the Harbor Maintenance Tax was so arbitrary that it was an egregious violation of due process, and therefore a taking. See Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24–25 [3 AFTR 2926] (1916) (''[A]lthough there was a seeming exercise of the taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking . . . .''). We do not agree. The tax was not arbitrary because it served the rational purpose of maintaining the ports. See U.S. Shoe, 114 F.3d at 1579 (Mayer, C.J., dissenting) (''Congress mandated that fees collected from the HMT be used only for commercial navigation projects.''); see also Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 547 (1977) (White, J., dissenting on other grounds) (statutes restrictive of liberty must have ''an ascertainable purpose and represent a rational means to achieve that purpose . . . .''). The Court struck down the tax because it was improperly calculated, not because its purpose was unascertainable or nefarious. U.S. Shoe, 523 U.S. at 363, 370 (The tax was not ''a fair approximation of services, facilities, or benefits furnished to the exporters,'' but ''[t]his does not mean that exporters are exempt from any and all user fees designed to defray the cost of harbor development and maintenance.''). Moreover, the tax cannot be a taking because the Supreme Court determined that the tax violated the Export Clause, not the Takings Clause. Id. at 368 (''Those decisions [discussing user fees] [including Sperry, a takings case] involved constitutional provisions other than the Export Clause, however, and thus do not govern here.'').

In the alternative, U.S. Shoe argues that the Export Clause mandates the payment of interest. It cites Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 [85 AFTR 2d 2000-1151] (Fed. Cir. 2000), that a claim against the government for a violation of the Export Clause is money mandating, and requires ''a return of money unlawfully exacted.'' Cyprus Amax, however, was premised on the award of money damages to U.S. Shoe ''equaling the amount exacted under the HMT'' only, id. at 1374; U.S. Shoe, 114 F.3d at 1577, and does not discuss, nor stand for the proposition that interest must be awarded.

U.S. Shoe also relies on Hatter v. United States, 38 Fed. Cl. 166 [80 AFTR 2d 97-5646] (1997), to assert that violations of constitutional clauses other than the Takings Clause require the payment of interest. In Hatter, the Court of Federal Claims decided that judges were due interest on

money owed because of an Article III Compensation Clause violation. Id. at 183. See also Hatter v. United States, 64 F.3d 647, 653 [76 AFTR 2d 95-6111] (Fed. Cir. 1995), aff'd in part, rev'd in part, Hatter v. United States, 532 U.S. 557 [87 AFTR 2d 2001-2227] (2001) (affirming that discriminatory taxes imposed on sitting judges violated the Compensation Clause). The interest issue, however, was not appealed by the government, and the final judgment of the Court of Federal Claims is not binding upon us. Aleman Food Servs., Inc. v. United States, 994 F.2d 819, 822 (Fed. Cir. 1993). Even if interest is mandated under the Compensation Clause, the reasoning upon which this conclusion is based does not extend to the Export Clause.

Under the Compensation Clause, "Judges . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1. The construction of the Export Clause differs from the Compensation Clause. The Export Clause is prohibitive, "No Tax or Duty shall be laid on Articles exported from any State," U.S. Const. art. I, § 9, cl. 5, while the Compensation Clause requires that judges shall receive "Compensation." Such "Compensation" must be paid at "stated Times," indicating that if it is not paid when due, interest should be paid to compensate for the delay. Hatter, 38 Fed. Cl. at 183. And the rationale, that the government should pay interest if it unlawfully withholds judges' pay to maintain the separation of powers, does not apply to the Export Clause. Id.

Like the Export Clause, the Takings Clause is also prohibitive, "nor shall private property be taken for public use," but it is coupled with the restorative clause, "without just compensation." U.S. Const. amend. V. The Export Clause's prohibition lacks similar remedial language. U.S. Shoe asserts, nevertheless, that the Supreme Court's reasoning in Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893), reading "compensation" to require the "full and perfect equivalent for the property taken," and its subsequent interpretation that such compensation requires the payment of interest, Seaboard Air Line, 261 U.S. at 305–06, applies to the Export Clause. And because a violation of the Export Clause requires a return of the money excised, its perfect equivalent entails both principal and interest. We are unwilling to import the Court's interpretation of "Compensation" into the Export Clause where the word "compensation" does not appear. Instead, we prefer to "follow the express textual command of the Export Clause." United States v. Int'l Bus. Machs., 517 U.S 843, 862 [77 AFTR 2d 96-2412] (1996); see also id. at 857 ("We have good reason to hesitate before adopting the analysis of our recent Import-Export Clause cases into our Export Clause jurisprudence . . . . [M]eaningful textual differences exist and should not be overlooked.").

III.

Finally, the government argues that principles of equity are insufficient to waive the government's sovereign immunity. We agree. The equitable doctrine of restitution and unjust enrichment are powerful remedies of fairness. But true to the "no-interest rule," under which a waiver of sovereign immunity for an award of interest must be affirmative and unequivocal, Shaw, 478 U.S. at 311, the foregoing analysis demonstrates that a judge-fashioned remedy here would be an abuse of discretion. See IBM, 201 F.3d at 1374; Kalan, Inc. v. United States, 944 F.2d 847, 850 (Fed. Cir. 1991) ("Neither we nor the Court of International Trade can supply by creative interpretation the necessary clear direction [to award interest] that Congress omitted.").

Conclusion

Accordingly, the judgment of the Court of International Trade is reversed.

REVERSED

¶2002-5127

Dan R. WISE, PLAINTIFF v. Kelly J. HARVEY, DEFENDANT v. William S. MONTGOMERY, Ann B. MONTGOM-

ERY, United States Internal Revenue Service, and Samuel Spritzer Furs, Inc., DEFENDANTS ON INTERPLEADER. U.S. District Court, Southern Dist. of Texas, (DC TX) Docket No. H-02-1242, July 8, 2002. Earlier proceeding at (2002, DC TX) 89 AFTR 2d 2002-2809. Decision for Govt.

1. Interpleader—motion to reopen case. IRS/interpleader's unopposed motion to lift stay and reopen district court case was granted upon dismissal of taxpayer's bankruptcy petition. *Reference:* United States Tax Reporter ¶74,025.01(3); 63,215.04(147). IRC §6321; 7402.

United States Distirct Court, Southern District of Texas, Houston Division.

Order

RAINEY, District Judge:

[1] Pending before the Court is Interpleader Defendant Internal Revenue Service's (''IRS'') Motion to Reopen Case (Dkt. #7). On May 15, 2002 the Court granted the IRS's motion to stay this case pending the resolution of Defendants William and Ann Montgomery's bankruptcy petition. On May 29, 2002 the Honorable Manuel Leal dismissed the Montgomery's bankruptcy petition with prejudice for 180 days. The IRS has now requested that the Court lift the stay it imposed on May 15, 2002 and allow this case to proceed. The IRS's motion was filed on June 6, 2002. Under Local Rule 7.3, ''Opposed motions will be submitted to the judge twenty days from filing without notice from the clerk and without appearance by counsel.''[1] Thus, the other parties to this lawsuit had until July 1, 2002 to respond to the pending motion. As of the date of this order no response has been received by the Court. Local Rule 7.4 provides that, ''Failure to respond will be taken as a representation of no opposition.'' Thus, the IRS's motion will be treated as unopposed.

Therefore, the IRS's motion to Reopen Case is GRANTED. The initial pretrial and scheduling conference in this case will be held before the Honorable Nancy K. Johnson on July 25, 2002 as per the Court's order of April 5, 2002. The parties shall have fifteen days from the date of entry of this order to file their disclosures of interested parties and answer the petition in interpleader.

It is so ORDERED.

Signed this 8th day of July, 2002.

JOHN D. RAINEY

UNITED STATES DISTRICT JUDGE

¶2002-5128

Natalie M. WILLIAMS, DEBTOR v. INTERNAL REVENUE SERVICE, CLAIMANT. In Re: Natalie M. Williams, Debtor. U.S. Bankruptcy Court, Southern Dist. of New York, (Bktcy Ct NY) Docket No. 01 B 40029 (CB), Feb. 6, 2002. Decision for Govt.

1. Tax claims in bankruptcy—objection to proof of claim. Chap. 13 debtor's objection to IRS's amended proof of claim was overruled and IRS's claim was allowed on summary judgment. *Reference:* United States Tax Reporter ¶68,726.51(10).

United States Bankruptcy Court, Southern District of New York.

Order

BLACKSHEAR, Bankruptcy Judge:

(Chapter 13)

[1] This action having come on for a hearing before the Honorable Cornelius Blackshear, United States Bankruptcy Judge for the Southern District of New York on the motion of the United States of America (sued herein as the Internal Revenue Service) (the ''Government'') to overrule debtor's objection, or in the alternative, for summary judgment, and the issues having been duly considered, and the Court having rendered its decision from the bench on January 24, 2002, it hereby is:

[1] Federal Rule of Civil Procedure 6(e) gives a party who is served with a motion by mail or fax an additional three days to respond.

ORDERED, ADJUDGED and DECREED, that: (1) the Government's motion for summary judgment pursuant to 7056(b) of the Federal Rules of Bankruptcy Procedure, is granted; (2) the Debtor's objection to the amended proof of claim filed by the Internal Revenue Service on October 29, 2001 (''IRS' Amended Proof of Claim'') is overruled; and (3) the IRS' Amended Proof of Claim shall be allowed in the full amount of $7,825.95: (a) $6,102.95 representing an unsecured priority claim under Section 507(a)(8) of the Bankruptcy Code; and (b) $1,723.00 representing a general unsecured claim pursuant to Section 502 of the Bankruptcy Code.

Dated: New York, New York

February 6, 2002

CORNELIUS BLACKSHEAR

UNITED STATES BANKRUPTCY JUDGE

¶2002-5129

In Re: Saul S. RUBIN, Debtor. U.S. Bankruptcy Court, Southern Dist. of New York, (Bktcy Ct NY) Docket No. 01 B 12252 (ALG), Dec. 26, 2001. Decision for Taxpayer.

1. Tax claims in bankruptcy—objection to proof of claim. Pursuant to stipulation, Chap. 11 debtor's objection to IRS's proof of claim was dismissed, claim was withdrawn and case was closed. *Reference:* United States Tax Reporter ¶68,726.51(10).

MARK FRANKEL (MAF-8417) Attorney for Debtor 885 Third Avenue New York, New York 10022 Telephone: (212) 593-1100
NICOLE L. GUERON (NG-7682) Assistant United States Attorney 100 Church Street, 19th Floor New York, New York 10007 Temp. Telephone: (718) 422-5644

United States Bankruptcy Court, Southern District of New York.

Stipulation and Order

GROPPER, Bankruptcy Judge:

Chapter 11

WHEREAS, on or about April 15, 2001 (the ''Petition Date''), Saul S. Rubin (the ''Debtor'') filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code; and

WHEREAS, on or about July 2, 2001, the United States of America (the ''Government''), through its Department of the Treasury -- Internal Revenue Service (the ''IRS''), filed a Proof of Claim on account of the Debtor's due and owing, but unpaid, pre-petition liabilities in the total amount of $147, 745.15 (the ''IRS Claim''); and

WHEREAS, on or about November 30, 2001, the Debtor filed a Motion for an Order Expunging the IRS Claim (the ''Objection''); and

WHEREAS, on or about December 13, 2001, the Government, through the IRS, filed a Withdrawal of Claim, dated December 13, 2001, withdrawing the IRS Claim; and

WHEREAS, the Debtor and the Government agree to resolve the issues raised in the Objection under the following terms and conditions;

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and between the Debtor and the Government, by their respective counsel, as follows:

[1] 1. The Objection is hereby dismissed with prejudice and without costs or attorney's fees to either the Debtor or the Government.

2. The IRS Claim is hereby withdrawn with prejudice.

3. This Stipulation is subject to the approval of the Bankruptcy Court. In the event that the Court declines to enter it, the Stipulation shall be null and void, with no force or effect.

Dated: New York, New York

December 20, 2001

MARY JO WHITE

United States Attorney for the Southern District of New York

BACKENROTH FRANKEL & KRINSKY LLP

By:

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Attorney for Debtor

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By:

NICOLE L. GUERON (NG-7682)

Assistant United States Attorney

100 Church Street, 19th Floor

New York, New York 10007

Temp. Telephone: (718) 422-5644

So Ordered this 26th day of December, 2001

/s/ Allan L. Gropper

UNITED STATES BANKRUPTCY JUDGE

Final Decree

GROPPER, Bankruptcy Judge:

Upon the annexed application of Saul S. Rubin, the debtor herein (the "Debtor") for the entry of a final decree in this chapter 11 case, and after due deliberation and sufficient cause having been found therefor, it is

ORDERED, that the Debtor's chapter 11 case be, and it hereby is, closed.

Dated: New York, New York

March 14, 2002

/s/ Allan L. Gropper

UNITED STATES BANKRUPTCY JUDGE

¶2002-5130

Rose CLEVELAND, Individually and in Her Capacity as Executrix of the Estate of Robert Cleveland, Esquire, Deceased, PLAINTIFF-APPELLANT v. Michael ROTMAN, DEFENDANT-APPELLEE. U.S. Court of Appeals, Seventh Circuit, (CA7) Docket Nos. 01-2488 & 01-2958; No. 00C 424, July 17, 2002. District Court, (2000, DC IL) 88 AFTR 2d 2001-7001, affirmed. Decision for Govt.

1. Actions against IRS—tort claims—harassing audits—legal malpractice. District court properly dismissed for failure to state claim estate's malpractice and tort claims against decedent's attorney/tax adviser, whose bad tax advice allegedly led to harassing IRS audit and decedent's consequent suicide: under Illinois law, suicide, which generally wasn't result of bad tax advice, was independent intervening act that attorney had no duty to foresee and wasn't directly or proximately caused by attorney's advice. Also, estate failed to properly state claim for negligent infliction of emotional distress, failed to allege adequate factual basis for financial damages claim, and failed to properly request leave to amend. *Reference:* United States Tax Reporter ¶76,557.53(10).

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. John Grady, Judge. In the United States Court of Appeals For the Seventh Circuit.

Before COFFEY, MANION, and EVANS, Circuit Judges.

EVANS, Circuit Judge:

Rose Cleveland is executrix of the estate of her late husband, Robert Cleveland, who committed suicide in 1998. Cleveland alleges that events surrounding 15 years of tax collection proceedings caused her husband severe depression and led to his suicide. She filed a four-count suit on the estate's behalf against the Internal Revenue Service, an IRS officer, and her husband's tax attorney, Michael Rotman. We address only the claims against Rotman, which are for legal malpractice sounding in contract and tort. Cleveland's estate appeals from the district court's dismissal for failure to state a claim for which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).

We review *de novo* the district court's grant of a motion to dismiss under Rule 12(b)(6). *See Help At Home, Inc. v. Medical Capital, L.L.C.*, 260 F.3d 748, 752 (7th Cir. 2001). In doing so, we accept all well-pleaded factual allegations in the plaintiff's complaint as true and draw all reasonable inferences in the plaintiff's favor. We will affirm the dismissal if it appears beyond doubt that the plaintiff cannot prove any set of facts entitling it to relief.

In the late 1960's, Robert Cleveland, who was an attorney, became involved in a dispute with the IRS over a tax issue. The tax proceedings stretched over 15 years, involving multiple trials and appeals. Cleveland's estate alleges that the IRS engaged in a campaign of unauthorized activities that stripped Cleveland of all assets and income. Unable to pay his legal bills and the interest and penalties that the IRS assessed (which totaled $250,000), Cleveland went into debt. Starting in 1991, the IRS confiscated Cleveland's social security income. The estate also alleges that the IRS levied on money that Cleveland obtained in a settlement for one of his law clients, causing the client to wait for years to receive his settlement money. The estate alleges that this is "one example of how . . . the IRS caused Mr. Cleveland to get disbarred from practicing law in Illinois." The tax dispute caused Cleveland to suffer severe depression. As a result, Cleveland's therapist informed the IRS in writing that Cleveland was suicidal.

In 1996 Cleveland retained Rotman for advice in resolving the tax dispute. At the time, Cleveland's therapist informed Rotman of Cleveland's poor financial status, his severe depression, and his suicidal tendencies. Rotman advised Cleveland that he needed to file tax returns for a 10-year period, but Cleveland claimed that he was unable to calculate his income and expenses for this period because his financial records had been lost during office moves and discarded by others during divorce proceedings (involving a different wife, not Rose). As a result, it is alleged that Rotman told Cleveland to estimate his income and expenses for the relevant years.

Apparently, Cleveland's estimates did not agree with IRS figures, and although the IRS had previously declared Cleveland's account uncollectible, it decided to audit him again. It notified Cleveland of the impending audit in February 1997. Because she was concerned over Cleveland's suicidal depression, Cleveland's therapist intervened and succeeded in postponing the audit until January 1998. On January 26, 1998, shortly before the audit was scheduled to take place, Cleveland shot himself in the head at home in his wife's presence. He was 74 years old.

[1] Cleveland's estate alleges that Rotman committed malpractice, which triggered the IRS's proposed 1998 audit, which in turn triggered Cleveland's suicide. The estate argues that the district court erred in ruling that, as a matter of law, a plaintiff's allegations were insufficient under Rule 12(b)(6).

A plaintiff may style a claim for legal malpractice as either a tort or contract claim. *See Collins v. Reynard*, 154 Ill. 2d 48, 50 (1992). Under either a tort or contract theory, the elements of a legal malpractice claim are (1) an attorney-client relationship establishing a duty on the attorney's part, (2) breach of that duty, (3) proximate cause establishing that but for the breach the plaintiff would not have been injured, and (4) resulting damages. *See Radtke v. Murphy*, 312 Ill. App. 3d 657, 662 (2000); *Serafin v. Seith*, 284 Ill. App. 3d 577, 586–87 (1996); *Coughlin v. SeRine*, 154 Ill. App. 3d 510, 514 (1987).

It is well-established under Illinois law that a plaintiff may not recover for a decedent's suicide following a tortious act because suicide is an independent intervening event that the tortfeasor cannot be expected to foresee. *See Kleen v. Homak Mfg. Co.*, 321 Ill. App. 3d 639, 640 (2001); *Moss by Moss v. Meyer*, 117 Ill. App. 3d 862, 864 (1983); *Jarvis v. Stone*, 517 F. Supp. 1173, 1175 (N.D. Ill. 1981); *Little v. Chicago Hoist & Body Co.*, 32 Ill. 2d 156, 158–59 (1965); *Stasiof v. Chicago Hoist & Body Co.*, 50 Ill. App. 2d 115, 122 (1964). The district court found this rationale equally applicable in the contract context and

therefore dismissed the estate's claims arising from Cleveland's suicide.[1]

We agree with the district court that Cleveland's suicide was an independent intervening event that broke the chain of causation from Rotman's alleged malpractice to Cleveland's death. Cleveland was an adult, and the estate has not alleged that he was mentally unstable. *See Kleen*, 321 Ill. App. 3d at 643; *Jarvis*, 517 F. Supp. at 1175 (recognizing exception to suicide rule where, as proximate result of a head injury caused by tortfeasor's negligence, victim becomes "insane and bereft of reason" and commits suicide as a result). Therefore, we assume that Cleveland was a competent adult who clearly understood what he was doing and intentionally took his own life. Moreover, Cleveland's estate fails to establish that Rotman breached a duty to Cleveland, or that Rotman's alleged negligence proximately caused Cleveland's suicide.

Essentially, Cleveland's estate seeks to impose on Rotman a duty to foresee and avoid a client's suicide. Although an Illinois court imposed such a duty on a psychiatrist who knew of his patient's history of suicidal depression and yet failed to protect the patient from self-harm, *see Winger v. Franciscan Med. Ctr.*, 299 Ill. App. 3d 364, 371–72, 375 (1998), the estate here points to no case law extending such a duty to the attorney-client context. Because of the differences between the psychiatrist-patient relationship and the attorney-client relationship, we see no justification for extending such a duty to attorneys. Psychiatrists are health care professionals trained to care for their pa-tients' mental and emotional health. By contrast, attorneys are medical laypeople who cannot be reasonably expected to an-ticipate the mental health consequences of their legal advice.

Whether Rotman had a duty to prevent Cleveland's suicide depends on the suicide's foreseeability, its likelihood, the magnitude of the burden of guarding against it, and the potential consequences of placing that burden on Rotman. *See Collins*, 154 Ill. 2d at 51. As we just noted, because Rotman was not a medical professional, he could not have reasonably been expected to foresee that his allegedly erroneous advice would drive Cleveland to suicide. Cleveland's estate urges, however, that Rotman should have foreseen that bad tax advice could drive Cleveland to suicide because he knew that Cleveland was suffering from severe depression triggered by his tax woes. Nonetheless, based on his lack of psychological training, Rotman cannot have reasonably been expected to foresee Cleveland's suicide.

Additionally, suicide is generally not a likely result of bad tax advice, especially when that advice concerns the relatively routine matter of filing tax returns. By the time Cleveland retained Rotman, the tax dispute had been going on for 15 years, and Cleveland was already suffering from severe depression. In the context of the entire series of events arising from Cleveland's IRS dispute, Rotman's allegedly erroneous advice was not more likely than any of the other events to cause Cleveland's suicide.

Moreover, the magnitude of placing the burden on an attorney to foresee and prevent a client's suicide is very great. Attorneys cannot reasonably be expected to screen potential clients for suicidal tendencies. Imposing such a burden would expose attorneys to an unreasonable risk of liability, which would ultimately deprive visibly depressed people of competent legal advice. Therefore, Cleveland's estate fails to establish that Rotman had a duty to foresee and avoid Cleveland's suicide.

Even assuming that Rotman had such a duty, the estate fails to show that Rotman's allegedly erroneous advice proximately caused Cleveland's suicide. A proximate cause is one that produces an injury through a natural and continuous sequence

[1] Cleveland's estate argues, however, that foreseeability is a question of fact, not of law, and therefore that the district court erred in not allowing the question to go to a jury. The estate cites to *City of Streator v. Industrial Commission*, 92 Ill. 2d 353, 363 (1982), and *Harper v. Industrial Commission*, 24 Ill. 2d 103, 110 (1962). These cases are inapplicable because they dealt with worker's compensation claims. Because the worker's compensation statutory scheme was designed to replace common law, legal causation is irrelevant, and only factual causation need be established. *See In re Estate of Dierkes*, 191 Ill. 2d 326, 331 (2000). Therefore, the estate's reliance on these cases is misplaced because they were not decided under the common law of tort or contract.

of events unbroken by any effective intervening cause. *See Kleen*, 321 Ill. App. 3d at 641. Proximate cause is composed of two elements: legal cause and cause in fact. Legal cause exists where the injury was of a type that a reasonable person would foresee as a likely result of his or her conduct. *See id.* at 642.

As we've noted, it was not reasonably foreseeable that Cleveland's suicide was a likely result of Rotman's advice. Additionally, the timing of events weakens the proximate cause argument. Rotman advised Cleveland to file estimated tax returns in 1996. The IRS notified Cleveland of its intended audit in February 1997. Cleveland did not commit suicide until almost a year later, in January 1998. Even assuming that Rotman's allegedly erroneous advice precipitated the audit, Cleveland was aware of the impending audit for almost a year before taking his life. Given the significant time lapse between the alleged triggering event and Cleveland's suicide, as well as Cleveland's history of depression, which had its origins in events that preceded his relationship with Rotman—including the loss of his legal practice, his disbarment, the confiscation of his assets and income, and his mounting debt—Cleveland's suicide did not follow Rotman's advice through a natural and continuous sequence of events unbroken by any effective intervening cause. Therefore, Rotman's allegedly erroneous advice did not proximately cause Cleveland's suicide. Thus, the district court correctly held that the estate cannot recover for Cleveland's suicide.

The estate also argues that the district court erred in holding that a claim for Cleveland's emotional distress arising from Rotman's malpractice did not survive Cleveland's death. The Illinois Survival Act provides that actions to recover damages for injury to the person, except actions for slander and libel, survive death. *See* ILCS 5/27-6. Early interpretations of the act held that only actions for physical damages, not emotional damages, survived death. Courts now view the act as a remedial statute that is to be construed liberally to avoid abatement. *See Owens v. Archer-Daniels-Midland Co.*, 30 F. Supp. 2d 1082, 1084 (C.D. Ill. 1999); *Walter v. Board of Educ. of Quincy Sch. Dist. No. 172*, 93 Ill. 2d 101, 108 (1982).

Given that Illinois courts liberally construe the survival act, it's possible that an action for negligent infliction of emotional distress survives death. We express no opinion on this subject, however, because we find that Cleveland's estate failed to state such a claim. This is so because Illinois follows the "impact rule," which allows a plaintiff to recover for negligent infliction of emotional distress only if the distress is directly and causally related to a physical injury. *See In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 948 F. Supp. 747, 750 (N. D. Ill. 1996); *Allen v. Otis Elevator Co.*, 206 Ill. App. 3d 173, 178 (1990); *Braun v. Craven*, 175 Ill. 401, 420 (1898).[2] Here, the estate did not allege that Rotman's negligence caused Cleveland a physical injury that directly caused his emotional distress. Therefore, regardless of whether an action for negligent infliction of emotional distress could survive Cleveland's death, his estate fails to state such a claim.

The estate's next argument is that the district court erred in dismissing its claim for financial damages because the estate failed to plead damages with specificity. Cleveland's estate alleges that, by triggering the IRS audit, Rotman's allegedly erroneous tax advice caused Cleveland to lose his social security income. Yet, the estate's complaint also alleged that the IRS began confiscating Cleveland's social security income in 1991, 5 years before Rotman was retained to give tax advice. Additionally, Cleveland's estate failed to allege how the impending IRS audit resulted in other financial damages. Therefore, because the estate failed to allege an adequate factual basis for its damages claim, the district court properly dismissed it.

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[2] Although the Illinois Supreme Court partially replaced the impact rule with a "zone-of-danger" rule for plaintiffs who were by-standers to negligent acts that subjected them to a high risk of physical impact, *see Rickey v. Chicago Transit Auth.*, 98 Ill. 2d 546 (1983), later cases hold that *Rickey* did not completely replace the impact rule. *See Corgan v. Muehling*, 143 Ill. 2d 296, 305–06 (1991) (holding that *Rickey* did not alter impact rule for negligence plaintiffs who were not bystanders); *Pasquale v. Speed Prod. Eng'g*, 166 Ill. 2d 337, 350 (1995) (holding that *Rickey* did not alter impact rule for bystander plaintiffs in strict liability cases).

In a related claim, Cleveland's estate argues that the district court should have allowed it to amend the complaint to include more facts concerning the financial damages claim. The estate does not allege that it actually filed a motion to amend the complaint in this regard, nor does the record reflect that the estate filed such a motion. Where a plaintiff does not move to amend, the district court is under no obligation to amend the complaint *sua sponte*. *See Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1192 (7th Cir. 1990). Therefore, the district court did not err in dismissing the estate's complaint without allowing the estate to amend its factual allegations regarding economic damages.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

¶2002-5131

Michael R. OLSEN, ET AL., PLAINTIFFS-APPELLANTS v. COMMISSIONER of Internal Revenue Service, ET AL., DEFENDANTS-APPELLEES. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-16404, April 16, 2002. District Courts, (2001, DC CA) 87 AFTR 2d 2001-2473, adopted (2001, DC CA) 88 AFTR 2d 2001-5142 [87 AFTR 2d 2001-2473], affirmed; and appeal from (2001, DC CA) 87 AFTR 2d 2001-2067, denying reconsideration of (2001, DC CA) 87 AFTR 2d 2001-1094 [87 AFTR 2d 2001-763], adopting (2000, DC CA) 87 AFTR 2d 2001-763, dismissed. Earlier proceeding at (2000, DC CA) 86 AFTR 2d 2000-6698. Decision for Govt.

1. Actions against IRS and IRS employees—immunity—vexatious litigants—district court procedure—prefiling review order. 9th Cir. dismissed for lack of jurisdiction pro se taxpayers' appeal from district court orders dismissing their 42 USC §1983 action for failure to state claim and denying their reconsideration motion: appeal notice was untimely. And, vexatious litigant order was affirmed where taxpayers had notice and opportunity to oppose order, made numerous frivolous filings, and order was narrowly tailored to protect their right of access to courts. *Reference:* United States Tax Reporter ¶74,336.511(39); 74,336.506(30).

Appeal from the United States District Court for the Eastern District of California, Frank C. Damrell, District Judge, Presiding. United States Court of Appeals, Ninth Circuit.

Before BROWNING, KLEINFELD, and GOULD, Circuit Judges.

Memorandum*

Submitted April 8, 2002.**

[1] Michael and Sheila Olsen appeal pro se the district court's orders dismissing their 42 U.S.C. § 1983 action for failure to state a claim, denying their motion for reconsideration, and entering a vexatious litigant order against them. We lack jurisdiction to review the orders dismissing the action and denying reconsideration, be-cause the notice of appeal was untimely. We have jurisdiction to review the vexa-tious litigant order pursuant to 28 U. S.C. § 1291. See Moy v. United States, 906 F.2d 467, 469–70 (9th Cir.1990). We affirm.

The district court dismissed the Olsens' complaint with prejudice on January 26, 2001, and denied the Olsens' motion for reconsideration on April 4, 2001. Thus, the Olsens' notice of appeal filed on June 29, 2001 was untimely as to these two orders. See Fed. R.App. P. 4(a)(4). The Olsens' notice of appeal was timely as to the vexatious litigant order entered June 12, 2001.

We review the entry of a vexatious litigant order for abuse of discretion. De Long v. Hennessey, 912 F.2d 1144, 1146 (9th Cir.1990). The district court did not

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

abuse its discretion in entering the vexatious litigant order because the Olsens had notice that the district court was considering entering such an order and had an opportunity to oppose it. Cf. id. In addition, the district court specifically identified numerous filings by the Olsens that the district court found to be frivolous. Cf. id. at 1148. Finally, the district court's order is narrowly tailored to "prevent infringement on the [Olsens'] right of access to the courts." Id. (citation omitted).

DISMISSED in part, AFFIRMED in part. 32 Fed.Appx. 961, 2002 WL 570416 (9th Cir.(Cal.))

¶2002-5132

Robert Churchill MACELVAIN, PLAINTIFF v. UNITED STATES OF AMERICA, ET AL., DEFENDANTS. U.S. District Court, Middle Dist. of Alabama, (DC AL) Docket No. 01-A-1240-N, April 22, 2002. Adopted at (2002, DC AL) 90 AFTR 2d 2002-5118. Year 1976. Decision for Govt.

1. Actions against U.S. and IRS agent—damages—Federal Tort Claims Act—refunds—limitations periods—untimely claims—account stated—contract with govt. Magistrate judge recommended dismissing pro se taxpayer's action against govt. and IRS agent for damages and refund relating to allegedly "unjust" assessments and collection: FTCA foreclosed any tax-related tort claims against govt., and otherwise barred suit as untimely filed more than 2 years after collection date, when cause of action accrued; and refund claim was similarly untimely under IRC §6511(a)'s 2-year limitations period. Also, taxpayer didn't properly serve agent; or, even if he did, any claims relating to actions taken in agent's official capacity failed as they were really against govt.; and *Bivens* relief for constitutional tort claims against agent individually wasn't available, based on "special factors" nature of complaint and existence of alternative remedies under IRC §7432 and IRC §7433. *Reference:* United States Tax Reporter ¶76,557.53(12); 65,115.04(70); 74,225.01(30); 76,557.53(30). IRC §6511; 7422; 7432; 7433.

In the United States District Court for the Middle District of Alabama, Northern Division.

Recommendation of the Magistrate Judge

BOYD, Magistrate Judge:

In this lawsuit alleging unlawful assessment and collection of federal income taxes, Robert Churchill MacElvain ("MacElvain") sues the United States and Roger Forehand ("Forehand"), an Internal Revenue Service ("IRS") official,[1] for compensatory and punitive damages as well as costs. This matter is now before the court on the Defendants' *Amended Motion to Dismiss* pursuant to Federal Rules of Civil Procedure 12(b)(1), (2) and (6). After careful consideration of the parties' submissions and the relevant law, the Magistrate Judge recommends that the Amended Motion to Dismiss be GRANTED.

I. JURISDICTION

Although MacElvain properly identifies 28 U.S.C. §1346(a)(1)[2] as the jurisdictional basis for this action, he also claims jurisdictional support from several other statutes.[3] Defendants deny the sufficiency

[1] For ease of reference, the Magistrate Judge will refer to the United States and Forehand collectively as "Defendants," except where the discussion warrants differentiation. Because there is no provision for fictitious party practice under the Federal Rules of Civil Procedure, the defendants designated as John Doe and Jane Doe are due to be dismissed. *See New v. Sports and Recreation, Inc.*, 114 F.3d 1092, 1094 n.1 (11th Cir.1997) ("[F]ictitious party practice is not permitted in federal court."); *Edwards v. Alabama Dept. of Corrections*, 81 F.Supp.2d 1242, 1257 (M.D. Ala.2000).

[2] Title 28 U.S.C. §1346(a)(1) provides, in pertinent part:

..The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

..Any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . .

[3] MacElvain neglects to explain his reliance on, or even refer to, any of the provisions of Title 18, Title 26, and Title 28 cited at ¶ 3 of his complaint. None is remedial or forms an alternative basis for civil liability, and all are irrelevant to the disposition of this motion. Similarly, though 42 U.S.C. § 1983 is a remedial statute, it authorizes specified actions against officials acting under color of *state* law, and has no application to MacElvain's factual claims.

of MacElvain's claims to invoke either subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 or personal jurisdiction over Defendant Forehand. The parties do not contest venue.

II. FACTUAL BACKGROUND

For purposes of the pending motion, the factual allegations are not challenged and may be simply summarized. On January 13, 1993, the IRS collected from MacElvain $5,688.56 for federal income taxes due for the 1976 tax year. MacElvain retained a forensic accountant who discovered in 1999 that the collection action proceeded pursuant to an extension of the statute of limitations for that tax year, which had been secured with the involvement of revenue officer Forehand. MacElvain then challenged the lawfulness of the extension and resulting collection by pursuing an IRS administrative claim on April 6, 1999. He was advised, initially on June 7, 2000 and again on October 12, 2000, that IRS records documented his signature on a consent form extending the statute of limitations and that the extension was properly undertaken pursuant to IRS regulations. MacElvain filed the present civil action on October 29, 2001.

III. DISCUSSION

Defendants' Rule 12(b)(1) motion attacks the viability of all claims asserted against the United States based on sovereign immunity and jurisdictional grounds. For Defendant Forehand, Defendants seek Rule 12(b)(2) dismissal for lack of personal jurisdiction and a Rule 12(b)(6) dismissal for MacElvain's failure to state a valid claim against Forehand for alleged violations of federal statutory and constitutional rights. As explained herein, dismissal is appropriate on all three grounds.

A. RULE 12(b)(1)-LACK OF SUBJECT MATTER JURISDICTION

[1] The court must first address whether it has subject matter jurisdiction because that question implicates the court's "very power to hear the case." *Whitson v. Staff Acquisition, Inc.*, 41 F.Supp.2d 1294, 1296 (M.D.Ala.1999) *quoting Bell v. Hood*, 327 U.S. 678, 682–683 (1946). Rule 12(b)(1) motions "challenge the existence of subject matter jurisdiction in fact, irrespective of the pleading, and matters outside the pleadings, such as testimony and affidavits, are considered." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir.1990).

1. Sovereign Immunity

In the sole count of the complaint, MacElvain avers that "the Defendant, United States of America, through its agency the Internal Revenue Service, caused unjust assessments to be made and proceeded with unjust collection actions and did collect from the Plaintiff the same." (Compl.at ¶ 7). In reliance on well-established principles, Defendants correctly respond that this Court lacks subject matter jurisdiction over MacElvain's complaints of tortious acts by the United States because the government has not waived its sovereign immunity for such claims.

"As sovereign, the United States, in the absence of its consent, is immune from suit," *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986), "and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Waivers of sovereign immunity must be both unequivocally expressed and strictly construed in favor of the United States. *United States v. Nordic Village*, 503 U.S. 30, 33 [69 AFTR 2d 92-687] (1992); *See also McMahon v. United States*, 342 U.S. 25, 27 (1951).

Although sovereign immunity has been generally waived for tort claims presented pursuant to the Federal Tort Claims Act, 28 U.S.C. §2674, the Act incorporates at 28 U.S.C. § 2680(c) an exception for "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty," and the exception expressly governs claims filed under 28 U.S.C.§1346(a)(1). The broad judicial interpretation accorded to 28 U.S.C.§2680(c) effectively forecloses MacElvain's action for tort liability against the United States

arising from tax collection activity, and dictates Rule 12(b)(1) dismissal.[4]

2. Untimely Administrative Claim

Citing the prerequisites of 28 U.S.C.§2675, Defendants contend that MacElvain's tort action is also barred by the untimeliness of his administrative claim filed April 6, 1999, "even assuming that [it] contained sufficient allegations of tortuous conduct." (*Mem.of Law in Supp. of Mot. to Dismiss at 2*). Failure to file an administrative claim within two years of the date that the cause of action accrues "forever bars a tort claim against the United States,"[5] and the administrative filing requirement is jurisdictional. *See United States v. Kubrick*, 444 U.S. 111, 117 (1979).

MacElvain's cause of action accrued in 1993 when the IRS allegedly collected from him unlawfully income taxes for 1976. His contention that the "right of action accrues only after the citizen has had a reasonable opportunity to discover all the essential elements of a possible cause of action," is simply disingenuous (*Resp. to Dismissal Mot.* at 3). By his own admission, MacElvain knew the essential facts underlying both his injury and its cause as early as January 13, 1993 and immediately began his vigorous protest of the IRS collection action.[6] *See Kubrick*, 444 U.S. at 117 (statute of limitations began to run when plaintiff "became aware of his injury"); *Price v. U.S.*, 775 F.2d 1491, 1493 (11th Cir.1985). Accordingly, absent any facts which warrant tolling the statute of limitations, MacElvain's present action against the United States is time-barred. *See Price, Id.* at 1494 (tolling not warranted unless "plaintiff has no reason to know that his injury was connected to some act of the defendant, or where the plaintiff is prevented from filing a timely cause of action because of some action of the defendant").

3. Claim for Wrongful Assessment and Collection

Repeated references in the Complaint to Defendants' refusal to "refund . . . unlawfully seized and collected funds" *(Complt. at 3)* are properly analyzed not as a tort claim barred by sovereign immunity but rather a refund action authorized by 28 U.S.C. § 1346(a)(1). *See U.S. v. Williams*, 514 U.S. 527, 536 [75 AFTR 2d 95-1805] (1995). Such a refund action is precluded, nevertheless, because MacElvain failed to satisfy the jurisdictional pre-condition of a timely filing as prescribed by 26 U.S.C. § 6511(a):

> *. . . Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.*

See United States v. Dalm, 494 U.S. 596, 601–602 [65 AFTR 2d 90-1210] (1990).

Section 6511(h) does permit suspension of the statute of limitations under circumstances not applicable here, but it does not, as suggested by MacElvain, permit equita-

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[4] As explained in *Capozzoli v. Tracey*, 663 F.2d 654, 657 [49 AFTR 2d 82-412] (5th Cir. 1981): "Congress retained the United States' sovereign immunity for any claim in respect of the assessment or collection of taxes," [and 28 U.S.C. § 2680(c)]"insulate[s] the IRS from tort liability stemming from any of its revenue-raising activities." Finding the language of §2680(c) "broad enough to encompass any activities of an IRS agent even remotely related to his or her official duties," the Court dismissed the plaintiff's tort claims for lack of subject matter jurisdiction. *See also Anding v. Gray*, 2001 WL 260060, at 3 [87 AFTR 2d 2001-1063](N.D.Ga.2001)("Section 2680(c) has been interpreted broadly by the courts to preclude suits for damages arising out of the allegedly tortious activities of IRS agents when those activities were in any way related to the agents' official duties.")

[5] The pertinent statute, 28 U.S.C. § 2401(b), provides:

A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action in begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

[6] As Defendants note, MacElvain is a serial tax protester. *See e.g, United States v. MacElvain*, 858 F.Supp. 1096 [73 AFTR 2d 94-2050] (M.D.Ala. 1994) *aff'd*, 68 F.3d 486 [76 AFTR 2d 95-6816] (11th Cir. 1995) (injunction barring action "to molest, interrupt, hinder, impede or retaliate against" IRS officials in the performance of enforcement duties); *MacElvain v. United States*, 867 F.Supp. 996 [74 AFTR 2d 94-6241] (M.D.Ala. 1994)(unsuccessful action to set aside property sale and enjoin IRS collection for unpaid income taxes); *MacElvain v. United States*, Civil Action No. 93-T-542-N [71 AFTR 2d 93-2069] (M.D.Ala. Nov. 17, 1993) (unsuccessful motion to enjoin sale of property); *United States v. MacElvain*, Civil Action No. 92-T-1407-N (M.D. Ala. Jan. 6, 1993) (IRS petition to compel testimony regarding tax liability for 1976 and 1980–1986); *MacElvain v. United States*, Civil Action No. 92-T-866-N (M.D. Ala. July 20, 1992)(unsuccessful attempt to quash IRS summons for information about wife's bank accounts for calendar years including 1976); *United States v. MacElvain*, Civil Action No. 96-D-501-N (M.D.Ala. Mar. 21, 1996) (action for unpaid income taxes for 1980–1982).

ble tolling "until discovery of the fraud."(*Resp. to Dismissal Mot. at 3, 4–5*). Rather, as explained by the Supreme Court in *U.S. v. Brockamp*, 519 U.S. 347, 352-352 [79 AFTR 2d 97-986] (1997):

> *Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, "equitable" exceptions into the statute that it wrote. There are no counterindications . . .*
>
> *For these reasons, we conclude that Congress did not intend the "equitable tolling" doctrine to apply to § 6511's time limitations.*

Because he filed a refund claim in April 1999, more than six years after the IRS collected taxes subject to the purported refund claim, the Court must dismiss MacElvain's § 1346(a)(1) claim to the extent it seeks a refund.

B. RULE 12(b)(2) - LACK OF PERSONAL JURISDICTION

Although the complaint indicates plainly that MacElvain purports to assert claims against Forehand "personally," Defendants note that MacElvain served him with process only by certified mail as an official of the United States rather than by personal service in his individual capacity. Pursuant to Fed.R.Civ.P.4(i)(2)(B), service of a lawsuit against a federal official sued in his personal capacity must be "effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g)." Absent proper service, this Court cannot exercise personal jurisdiction over Forehand. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999); *Pardazi v. Cullman Medical Center*, 896 F.2d 1313, 1317 (11th Cir.1990)

In response to Defendants' facially valid challenge to personal jurisdiction, MacElvain "must bear the burden of establishing its validity." *Aetna Business Credit, Inc. v. Universal Decor & Interior Design, Inc.*, 635 F.2d 434, 435 (5th Cir.1981). If the court does not conduct an evidentiary hearing on a Rule 12(b)(2) motion, and instead relies solely on affidavits and pleadings, the plaintiff need only establish a *prima facie* case of jurisdiction.[7]

Substantiating Defendants' challenge is the notice, which is attached to the Complaint, for certified-mail service to Forehand, and MacElvain has provided no contrary proof of proper service. Generally, "a court can acquire personal jurisdiction over a federal officer only by personal service made on that officer within the territorial limits of the state in which the court sits." *Blum v. Morgan Guaranty Trust Co. of New York*, 539 F.2d 1388, 1391 (5th Cir. 1976); *see also Praytor v. Manning*, 2001 WL 350211, at 3 [87 AFTR 2d 2001-1300] (S.D.Ala.2001)(noting that "defendants in *Bivens*actions must be served as individuals, pursuant to Rule 4(e)" and dismissing under Rule 12(b)(2) because defendants were served only in official capacities). Therefore, MacElvain has not established a *prima facie* case of jurisdiction and Defendants' Rule 12(b)(2) motion is due to be granted.

C. RULE 12(b)(6) - FAILURE TO STATE A CLAIM

Independent of their jurisdictional challenge to the claims against Forehand, Defendants move for Rule 12(b)(6) dismissal based on MacElvain's claim that "Defendants made numerous unlawful collections against Plaintiff . . . as a result of the unlawful extension of the collection statute." (*Complt.* at 6).

A dismissal motion pursuant to Fed.R.Civ.P. 12(b)(6) is generally due to be granted only when the movant demon-

[7] *See e.g., Francosteel Corporation, Unimetal-Normandy v. M/V Charm, Tiki, Mortensen & Lange*, 19 F.3d 624, 626 (11th Cir.1994)("A prima facie case . . . consists of sufficient evidence . . . to get plaintiff past a motion for directed verdict in a jury case or motion to dismiss in a nonjury case. It is the evidence necessary to require the defendant to proceed with his case."); *Bracewell v. Nicholson Air Services, Inc.*, 748 F.2d 1499, 1504, n.2 (11thCir.1984)*(citation omitted)*; *Consolidated Development Corp. v. Sherritt*, Inc. 216 F.3d 1286, 1291 (11th Cir.2000)("The court, in considering the motion, must take all allegations of the complaint that the defendant does not contest as true, and, where the parties' affidavits conflict, the court must construe all reasonable inferences in favor of the plaintiff.") *See also Huey v. American Truetzschler Corp.*, 47 F.Supp.2d 1342, 1344 (M.D.Ala. 1999).

strates "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). In assessing a motion to dismiss, the Court must accept as true any allegations in the Complaint. *See Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 706 (11thCir. 1998). Because MacElvain proceeds without counsel, the Court must hold his pleadings to a less stringent standard than would otherwise be the case. *See Haines v. Kerner*, 404 U.S. 519 (1971). Applying this standard of review, the Court concludes that MacElvain has failed to state any valid claims against Forehand in his official or personal capacity.

1. "Official Capacity" Claim

Assuming that MacElvain sues for "injuries arising from any negligent or wrongful act or omission of a government employee," Defendants correctly contend that the United States is the only proper defendant and thus deny the validity of any claim against Forehand in his official capacity.[8] The pertinent statute, 28 U.S.C. § 2679(b)(1), unequivocally permits a recovery, subject to specified exceptions, only against the United States for common law torts committed by a federal employee acting within the scope of his employment. *See Matsushita Elec. Co. v. Zeigler*, 158 F.3d 1167, 1169 (11th Cir.1998).[9] MacElvain does not dispute that Forehand's tax collection efforts were committed in the line and scope of his employment as an IRS agent, and it is evident that the factual allegations are plainly related to Forehand's official duties and responsibilities as an IRS agent.

Moreover, notwithstanding a plaintiff's designations, an action is generally deemed against the United States "if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (*citations and quotations omitted*). Since any judgment recovered against Forehand in his official capacity would be paid by the United States, the action is, in practical effect, a lawsuit against the United States. *See also Stafford v. Briggs*, 444 U.S. 527, 542 n. 10 (1980); *Johnson v. U.S.*, 816 F.Supp. 1519, 1522 (N.D. Ala. 1993). Therefore, the claims against Forehand in his official capacity are due to be dismissed.

2. "Personal Capacity" Claim

Construing the *pro se* complaint liberally, the Court acknowledges MacElvain's attempt, as follows, to state a constitutional tort against Forehand, individually:

> The Defendant Roger Forehand, as an individual and personally is properly named as he (1) deprived Plaintiff of his Constitutional Right to Due Process and (2) acted under the color of Federal Statues (3) acted in bad faith (4) knowingly made and delivered false notices of levy and other writings he knew to be false (5) made materially false and fictitious statements (6) knowingly and willingly violated federal tax laws to the detriment of the Plaintiff. (*Complt. at ¶ 7*)

Defendants dispute that 28 U.S.C. §2679(b)(2) *and Bivens v. Six UnKnown Federal Narcotics Agency*, 403 U.S. 388 (1970), each permitting damages against a federal official, individually, for alleged violations of constitutional or statutory rights, authorize this action against Forehand, *an IRS official*. They argue *first* that Congress has provided an alternative remedy for recovery and *second* that MacElvain's action "involves ... special factors counseling hesitation in the absence

[8] Although MacElvain specifically denies that he has sued Forehand in his official capacity, the language used in the complaint and course of proceedings indicate otherwise. *See Adams v. Franklin*, 111 F.Supp.2d 1255, 1262 (M.D.Ala.2000)(citation omitted)(holding that if complaint does not adequately identify capacity in which the defendants are sued,' the court must look to 'the course of proceedings for the nature of the liability sought to be imposed.')

[9] The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred. 28 U.S.C. § 2679(b)(1)(emphasis added)

of affirmative action by Congress." *Bivens*, 402 U.S. at 396–397. The Court finds merit in each argument.

(a) Alternative remedy for recovery

Defendants point to 28 U.S.C. §1346(a)(1), and 26 U.S.C. §§ 7432 and 7433 for adequate and available alternative remedies. MacElvain's failure to comply with jurisdictional prerequisites undermines, however, the availability of §1346(a)(1) as an alternative to a *Bivens*claim; thus, the court focuses on the adequacy of remedies pursuant to §§ 7432 and 7433.

A taxpayer suing under §7432 may pursue damages against an IRS officer or employee who "... knowingly, or by reason of negligence, fails to release a lien under section 6325 on property of the taxpayer." Similarly, §7433 permits damages against an IRS officer or employee who recklessly, intentionally, or negligently undertakes a tax collection action. Both section thus permit an aggrieved taxpayer to address "the validity of the Government's demand," *Rutherford v. U.S.* 702 F.2d 580, 584 [51 AFTR 2d 83-1084] (5th Cir. 1983), and both provide meaningful and adequate remedies.[10]

(b) Special Factors

Since taxpayer actions against IRS officials potentially implicate each of the "special factors counseling hesitation in the absence of affirmative action by Congress," it is well-established that "constitutional tort remedies are not available against IRS agents because such claims would interfere with the effective functioning of the specific statutory remedies provided for actions against the agency." *See Christensen v. Ward*, 916 F.2d 1462, 1476 (10th Cir. 1990) *citing Bush v. Lucas*, 462 U.S. at 388–90 and *Cameron v. I.R.S.*, 773 F.2d 126, 128 [56 AFTR 2d 85-5851] (7th Cir. 1985).[11]

Relying principally on *Schweiker v. Chilicky*, 487 U.S. at 427, Defendants have demonstrated that the unique remedial scheme of the IRS is itself a "special factor" warranting dismissal of MacElvain's *Bivens* claims against Forehand. In *Chilicky* the Supreme Court refused to create a *Bivens* remedy for respondents whose disability benefits terminated during a continuing disability review. Rejecting their damage claims against federal employees in their individual capacities for "emotional distress and for loss of food, shelter and other necessities proximately caused by petitioner's denial of benefits without due process," the Court acknowledged that Congress failed to provide "complete relief." *Id.* at 419. Commenting on the complex remedial structure fashioned by Congress to address the needs of disability claimants, the Court declined to allow imposition of a new substantive legal liability under *Bivens* because it was "convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it." *Id.* at 426.[12]

The *Chilicky* rationale dictates an identical outcome in this case. Because MacElvain can state no *Bivens* claim

[10] Though the remedy must be adequate, it need not provide *complete* relief for the plaintiff. See *Schweiker v. Chilicky*, 487 U.S. 412, 427–428 (1988); *Bush v. Lucas*, 462 U.S.367, 388(1983).

[11] Although the Eleventh Circuit apparently has not determined whether *Bivens* claims can be pursued against IRS officials, in other contexts, it has consistently applied the "special factor" analysis to limit *Bivens* claims against federal officials. *See McCollum v. Bolger*, 794 F.2d 602, 607 (11th Cir.1986); *Wells v. F.A.A.*, 755 F.2d 804, 810 (11th Cir.1985); *Hallock v. Moses*, 731 F.2d 754, 757 (11th Cir.1984).

[12] Numerous courts have expressly followed the *Chilicky* holding to preclude *Bivens*claims against IRS employees. *See, e.g. National Commodity and Barter Ass'n, National Commodity Exchange v. Gibbs*, 886 F.2d 1240, 1248–1248 [64 AFTR 2d 89-5783] (10thCir.1989); *Hollett v. Browning*, 711 F.Supp. 1009, 1012 [63 AFTR 2d 89-482] (E.D.Cal.1988) Even prior to the decision in *Chilicky*, courts routinely expressed a similar rationale for deciding that a *Bivens* remedy should not lie for damages against IRS agents. *See, e.g., Baddour, Inc. v. United States*, 802 F.2d 801, 807–809 [58 AFTR 2d 86-6035] (5th Cir.1986)("To open up an entirely new avenue of relief resulting in the personal liability of Internal Revenue Service employees would serve to hamper the ability of such employees to perform a function that is a difficult one and one that is vital to our nation."); *Cameron v. I.R.S.*, 773 F.2d at 129 ("Congress has given taxpayers all sorts of rights against an overzealous officialdom, including, most fundamentally, the right to sue the government for a refund if forced to overpay taxes, and it would make the collection of taxes chaotic if a taxpayer could bypass the remedies provided by Congress simply by bringing a damage action against Treasury employees.")

against Forehand, an IRS employee, Rule 12(b)(6) dismissal is appropriate[13]

IV. CONCLUSION

For the reasons indicated, the Magistrate Judge hereby Recommends that Defendants' Amended Motion to Dismiss, filed January 3, 2002 (Doc. #11), be GRANTED with prejudice.[14]

Done this 22nd day of April, 2002.

DELORES R. BOYD

UNITED STATES MAGISTRATE JUDGE

ORDER

DELORES R. BOYD UNITED STATES MAGISTRATE JUDGE

The clerk of the court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive, or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from *de novo* determination by the district court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the district court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (11th Cir. Unit B. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

DONE this 22nd day of April, 2002.

DELORES R. BOYD

UNITED STATES MAGISTRATE JUDGE

¶2002-5133

Stephen R. BOLDEN, PLAINTIFF v. UNITED STATES OF AMERICA, ET AL. DEFENDANTS. U.S. District Court, Eastern Dist. of Arkansas, (DC AR) Docket No. 4:01CV00806 GH, April 25, 2002. Decision for Govt.

1. Actions against IRS employees and other federal officials—constitutional claims—sovereign immunity; qualified immunity. Pro se criminally indicted taxpayer's conspiracy complaint against IRS and FBI agents, various judges, court officials and govt. attorneys was dismissed: agents and other defendants were absolutely immune from claims against actions taken in their official capacities; and, although agents' qualified immunity from taxpayer's racial discrimination claims against them individually was remaining material fact issue, any decision thereon would be premature in face of pending criminal case. *Reference:* United States Tax Reporter ¶74,336.506(25); 74,336.506(30).

In the United States District Court, Eastern District of Arnansas, Western Division.

Order

HOWARD, JR., District Judge:

On May 18, 2000, the pro se plaintiff filed suit in the District of Columbia against numerous defendants alleging a civil conspiracy in the illegal indictment against him in United States v. Bolden,

[13] The determination that MacElvain fails to state a *Bivens* claim makes unnecessary any extensive analysis of Defendants' final contention that this action is barred by the applicable, two-year statute of limitations. *See Owens v. Okure*, 488 U.S. 235, 236 (1989); Ala. Code § 6-2-38(5). Because the tax collection activity in dispute occurred in 1993, a *Bivens* claim against Forehand is clearly time-barred. Similarly pretermitted is any discussion of Forehand's asserted entitlement to qualified immunity under well-established principles. *See Saucier v. Katz, 533 U.S. 194 (2001); Siegert v. Gilly*, 500 U.S. 226 (1991); *Marsh v. Butler County, Alabama*, 268 F.3d 1014 (11th Cir.2001).

[14] *See Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir 1991)("if a more carefully drafted complaint could not state a claim under the standard of *Conley*, 355 U.S. at 45–46, dismissal with prejudice is proper").

4:00CR00022 WRW. He seeks declaratory and injunctive relief as well as damages.[1]

By order filed on June 29, 2001, the D.C. district court, in addressing plaintiff's motion for summary judgment and the defendants' motion to dismiss, dismissed the claims against the former Attorney General and Secretary of the Treasury since respondeat superior is inapplicable in a Bivens action. The remaining claims against U.S. District Judge William R. Wilson, Jr., United States Magistrate Judge Henry L. Jones, Jr., former United States Attorney Paula Casey, Assistant United States Attorney Robert J. Govar, Assistant United States Attorney Todd L. Newton, FBI Special Agent Dixon Land, IRS Agent John Fettes, Chief Probation Officer Claretha G. Nelson, and Probation Officer Rodney Seals were transferred to this district as the proper venue. The case was filed in this Court on November 23rd.

Plaintiff filed a motion for summary judgment on September 5, 2000, based on his unrebutted Administrative Notice of facts and on the "United States" only having jurisdiction in Washington, D.C.

Defendants filed a combined response/cross-motion to dismiss on September 15, 2000. They assert that the claims against them in their official capacity are barred by sovereign immunity, the defendants performing their duties in connection with plaintiff's criminal trial enjoy absolute immunity, and the individual defendants are entitled to qualified immunity on any claim asserted against them in an individual capacity.

Plaintiff responded on October 19, 2000, that defendants are continuing to fraudulent identify themselves for "the fictitious entity known as 'UNITED STATES OF AMERICA,' a name found nowhere in statutory law spelled in ALL CAPS." He continues to argue that there is no jurisdiction for the criminal charges to be brought against him.

Plaintiff filed a motion for temporary restraining order to enjoin the defendants from contacting him in relation to the criminal proceedings in light of this civil suit which was denied by the D.C. court. On October 19, 2000, plaintiff filed a motion to reconsider. As the motion to reconsider has no merit, the motion is denied.

[1] The Court first notes that a similar argument about fictitious names was rejected in United States v. Washington, 947 F.Supp. 87, 92 [80 AFTR 2d 97-7857] (S.D.N.Y. 1996):

> Finally, the defendant contends that the Indictment must be dismissed because "KURT WASHINGTON," spelled out in capital letters, is a fictitious name used by the Government to tax him improperly as a business, and that the correct spelling and presentation of his name is "Kurt Washington." This contention is baseless.

The Court finds the following excerpts from the case of Namey v. Reilly, 926 F.Supp. 5, 7–9 (D. Mass. 1996) provide an excellent summary of immunity:

> The common law doctrine of judicial immunity grants judges absolute immunity for damages resulting from actions undertaken in their official judicial capacity. Stump v. Sparkman, 435 U.S. 349, 355–56, 98 S.Ct. 1099, 1104–05, 55 L.Ed.2d 331 (1978). As the Supreme Court has explained, providing judges with immunity preserves the integrity of the legal process by allowing them to "be free to act upon [their] own convictions, without apprehension of personal consequence to [themselves]." Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646 (1871). Immunity also "protects judges from vexatious actions prosecuted by disgruntled litigants." Forrester v. White, 484 U.S. 219, 225, 108 S.Ct. 538, 543, 98 L.Ed.2d 555 (1988).
>
> Federal courts have extended absolute immunity to certain other officials "closely associated with the judicial process." Cleavinger v. Saxner, 474 U.S. 193, 200, 106 S.Ct. 496, 500, 88 L.Ed.2d 507 (1985). In determining whether immunity reaches the actions of

[1] On April 4, 2000, the Eighth Circuit Court of Appeals denied plaintiff's petition for writ of prohibition in the criminal case.

an official, courts examine the function performed by the official, not his rank or status. Buckley v. Fitzsimmons, 509 U.S. 259, 268, 113 S.Ct. 2606, 2613, 125 L.Ed.2d 209 (1993); Cleavinger, 474 U.S. at 200–01, 106 S.Ct. at 500–01. Under this functional view, immunity has been extended to officials performing discretionary tasks that assist judges in the decision-making process, compare Briscoe v. LaHue, 460 U.S. 325, 335–36, 103 S.Ct. 1108, 1115–16, 75 L.Ed.2d 96 (1983) (witnesses, including police officers, are immune for their testimony in judicial proceedings) and Imbler v. Pachtman, 424 U.S. 409, 424–27, 96 S.Ct. 984, 992–93, 47 L.Ed.2d 128 (1976) (granting prosecutors absolute immunity with respect to initiating and pursuing a criminal prosection), with Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 436, 113 S.Ct. 2167, 2172, 124 L.Ed.2d 391 (1993) (court reporters are not absolutely immune for failure to produce a transcript of a federal criminal trial), as well as to officials engaging in tasks closely analagous to those of a judge. See, e.g., Butz v. Economou, 438 U.S. 478, 513, 98 S.Ct. 2894, 2914, 57 L.Ed.2d 895 (1978) (federal hearing examiner immune from suit). The issue posed by this case is whether the defendants' acts are "closely associated with the judicial process" such that they are entitled to absolute immunity.

The Eighth Circuit recently addressed a similar issue in Anton v. Getty, 78 F.3d 393 (8th Cir. 1996). In Anton, a federal parolee brought a Bivens action against probation officers, contending that they violated his constitutional rights by "concluding that his release plan was unacceptable and recommending that his parole be delayed." Id. at 396. The Eighth Circuit found that the information and recommendations provided by probation officers to the parole hearing examiners play a significant part in the decision-making process. Id. The court, thus, concluded that in preparing materials for the Parole Commission, probation officers are entitled to immunity. Id. See also, Duffy v. Wolle, 123 F.3d 1026, 1037 (8thCir. 1997) (recognizing §1983 body of law applies to Bivens actions), cert. denied, 523 U.S. 1137, 118 S.Ct. 1839, 140 L.Ed.2d 1090 (1998).

Therefore, the claims against U.S. District Judge William R. Wilson, Jr., United States Magistrate Judge Henry L. Jones, Jr., former United States Attorney Paula Casey, Assistant United States Attorney Robert J. Govar, Assistant United States Attorney Todd L. Newton, Chief Probation Officer Claretha G. Nelson, and Probation Officer Rodney Seals must be dismissed with prejudice. Likewise, the claims against Land and Fettes in their official capacity are barred by sovereign immunity.

Turning to the individual claims against Land and Fettes, the Court cannot find at this stage of the proceedings and utilizing the standards governing a motion to dismiss that they are entitled to qualified immunity since plaintiff has alleged that the investigation and pursuit of charges against him was for racist motives. "To withstand the application of qualified immunity, a plaintiff must assert a violation of a constitutional or statutory right; that right must be clearly established at the time of the violation; and, given the facts most favorable to the plaintiff, there must be no genuine issues of material fact as to whether a reasonable official would have known that the alleged action indeed violated that right." Liebe v. Norton, 157 F.3d 574, 577 (8th Cir. 1998). When that standard is applied here, the Court concludes that the constitutional right to be free from investigation motivated by race was clearly established and that there are material factual disputes presented by plaintiff's allegations in the complaint as to whether a reasonable official would have known that the actions of Land and Fettes indeed violated that right.

However, the Court finds that any possible claim plaintiff would have against Land and Fettes as to the validity of the investigation and charges against him involves the outcome of the criminal case. Hence, the Court is persuaded that this ac-

tion against Land and Fettes cannot proceed at this time in light of Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (in order to recover damages under §1983 for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render conviction or sentence invalid, a plaintiff must prove that his conviction or sentence has been overturned). Until the criminal case is resolved, the claims against Land and Fettes must be stayed and the case dismissed without prejudice.

Accordingly, plaintiff's November 23rd motion (#0–1) for summary judgment and his November 23rdmotion (#0–1) for reconsideration of petition for temporary restraining order are denied. The defendants' November 23rd motion (#0–1) to dismiss is granted. The dismissal is with prejudice as U.S. District Judge William R. Wilson, Jr., United States Magistrate Judge Henry L. Jones, Jr., former United States Attorney Paula Casey, Assistant United States Attorney Robert J. Govar, Assistant United States Attorney Todd L. Newton, Chief Probation Officer Claretha G. Nelson, and Probation Officer Rodney Seals and is denied without prejudice as to FBI Special Agent Dixon Land and IRS Agent John Fettes.

IT IS SO ORDERED this 25 day of April, 2002.

George Howard, Jr.

UNITED STATES DISTRICT JUDGE

JUDGMENT

George Howard, Jr. UNITED STATES DISTRICT JUDGE

In accordance with the separate order filed this date, the complaint against U.S. District Judge William R. Wilson, Jr., United States Magistrate Judge Henry L. Jones, Jr., former United States Attorney Paula Casey, Assistant United States Attorney Robert J. Govar, Assistant United States Attorney Todd L. Newton, Chief Probation Officer Claretha G. Nelson, and Probation Officer Rodney Seals is dismissed with prejudice and is denied without prejudice as to FBI Special Agent Dixon Land and IRS Agent John Fettes.

DATED this 25 day of April, 2002.

George Howard, Jr.

UNITED STATES DISTRICT JUDGE

¶2002-5134

Daniel K. SCHEINGOLD, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT, COUNTERCLAIM PLAINTIFF and THIRD-PARTY PLAINTIFF v. John W. OREM and Edward L. Trueblood, THIRD-PARTY DEFENDANTS. U.S. District Court, Dist. of New Jersey, (DC NJ) Docket No. 00-2150 (JBS), June 7, 2002. Years 1995, 1996, 1997. Decision against Taxpayer.

1. 100% penalty for failure to pay over trust fund taxes—assessments—notice—summary judgment. Attorney-corp. counsel was denied summary judgment on his claim that IRC §6672 penalty assessment against him was void for failure to provide proper notice: whether notice IRS sent by regular mail complied with IRC §6672(b)'s 60-day time limit was genuine material fact issue. IRS records and taxpayer's own attorney's letter raised reasonable inference that he did in fact receive timely notice; and reliance on IRC §6212(a) was misplaced since statute only permitted but didn't require IRS to send notice by certified mail. *Reference:* United States Tax Reporter ¶66,725.01(50). IRC §6212; 6672.

2. 100% penalty for failure to pay over trust fund taxes—responsible person—corporate counsel—summary judgment. Attorney-corp. counsel was denied summary judgment on his status as responsible person for corp.'s unpaid trust fund taxes: extent of attorney's control over corp. finances was remaining material fact issue. Testimony and other evidence that taxpayer was responsible for payroll tax returns' preparation and filing, directed creditor payments, had hiring/firing authority and took on CFO or CEO role countered his assertions that he was merely outside counsel with no control; but testimony also countered govt.'s assertion that taxpayer had signatory authority on corp. accounts.

Reference: United States Tax Reporter ¶66,725.02(30); 66,725.05(10). IRC §6672.

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Mr. Edward L. Trueblood, Esquire 9 Chippenham Drive Voorhees, NJ 08043 Third-party Defendant pro se

In the United States District Court for the District of New Jersey.

SIMANDLE, District Judge:

Opinion

SIMANDLE, District Judge:

NOT FOR PUBLICATION

This matter comes before the Court upon motion by third-party defendant Edward L. Trueblood, who appears pro se, for summary judgment against third-party plaintiff, the United States. In its third party complaint, the United States asserts that Mr. Trueblood failed to collect, account for, and pay over income and employment taxes of IE, Inc., rendering him liable for a penalty equal to the total amount of the tax not collected, or a Trust Fund Recovery Penalty (''TFRP''). Mr. Trueblood argues that the IRS failed to provide the 60-day preliminary notice as required under 26 U.S.C. § 6672 (b) (1) & (2), thus prohibiting the IRS's assessment of the TFRP to Mr. Trueblood, and, further, that he is not a ''responsible person'' as defined in the Internal Revenue Code, 26 U.S.C. § 6672, and should therefore not be held liable for IE, Inc.'s nonpayment of taxes. For the reasons discussed below, third-party defendant's motion for summary judgment will be denied.

BACKGROUND

The underlying action arises out of plaintiff Daniel K. Scheingold's complaint against the United States, filed on May 4, 2000, for abatement of a penalty of $1,852,312 assessed against him for failure to collect, account for, and remit the employment taxes of IE, Inc. for the last three quarters of 1995, all four quarters of 1996, and the second and third quarters of 1997. (Scheingold Compl.) Plaintiff Scheingold also seeks judgment in the amount of $100, and attorney's fees and costs. (Id.) On October 6, 2000, the United States filed a counterclaim against Mr. Scheingold seeking outstanding tax liability in the amount of $1,883,307.95, plus statutory interest. (USA Answer & Compl., at 5–6.)

On October 20, 2000, the United States filed a third-party complaint against Mr. Trueblood,[1] asserting that he is liable for a penalty equal to the amount of tax not collected, accounted for, and paid over from IE, Inc., to the IRS. (USA Third Party Compl.) The United States seeks $100 in the event it is found liable to Mr. Scheingold, as well as $1,190,676.78, representing the amount ''legal to the income and employment taxes which were required to be withheld from the wages of the employees of IE, Inc[.] for all four quarters of 1996 and the second quarter of 1997 that were not collected, accounted for or paid over when due.'' (Id. ¶ 8.) The United States also seek $17,479.92 in interest on the liability, assessed on March 29, 1999, for a total judgment of $1,208,156.70. (Id. ¶s 10, 18.) On November 26, 2001, Mr. Trueblood filed the instant motion for summary judgment against third-party plaintiff United States. On March 8, 2002, this Court heard oral argument.

DISCUSSION

I. Summary Judgment Standard

A court may grant summary judgment only when the materials of record ''show that there is no genuine issue as to any

[1] The United States also filed a third-party complaint against third-party defendant IE, Inc., President John Orem on October 20, 2000.

material fact and that the moving party is entitled to judgment as a matter of law.'' Fed. R. Civ. P. 56(c). In deciding whether there is a disputed issue of material fact the court must view the evidence in favor of the non-moving party by extending any reasonable favorable inference to that party. See Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1080–81 (3d Cir. 1996); Meyer v. Riegel Prods. Corp., 720 F.2d 303, 307 n. 2 (3d Cir. 1983), cert. denied, 465 U.S. 1091 (1984). The threshold inquiry is whether there are ''any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

Supreme Court decisions mandate that ''the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial.'' Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 329–30 (3d Cir. 1995) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1987)). However, ''the nonmoving party creates a genuine issue of material fact if it provides sufficient evidence to allow a reasonable jury to find for him at trial.'' Brewer, 72 F.3d at 330 (citing Liberty Lobby, 477 U.S. at 248). Once the moving party has carried its burden of establishing the absence of a genuine issue of material fact, ''its opponent must do more than simply show that there is some metaphysical doubt as to material facts.'' Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Thus, if the non-movant's evidence is merely ''colorable'' or is ''not significantly probative,'' the court may grant summary judgment. Liberty Lobby, 477 U.S. at 249–50.

II. Analysis

[1] Third-party defendant Mr. Trueblood in his moving brief argues that the TFRP cannot be assessed against him because the United States failed to give him the 60-day preliminary notice as required under § 6672.[2] Mr. Trueblood additionally argues that he is not a ''responsible person'' under § 6672 and therefore the TFRP cannot be assessed against him.

A. 60-Day Notice under § 6672

In the instant matter, Mr. Trueblood argues that summary judgment should be granted because he ''did not receive the 60-day preliminary notice before the assessment of the Trust Fund Recovery Penalty.''[3] Trueblood Br. at d; Trueblood Aff. ¶ 2. The government argues that it complied with the Internal Revenue Code procedures for sending out a 60-day notice and sent notice to Mr. Trueblood via certified mail. See Frank Decl.

The Preliminary Notice Requirement under 26 U.S.C. § 6672(b) requires that ''[n]o penalty shall be imposed under subsection (a)[4] unless the Secretary notifies the taxpayer in writing by mail ... or in person that the taxpayer shall be subject to an assessment of such penalty.' 26 U.S.C. § 6672(b)(1). It further provides that '[t]he mailing of the notice described in paragraph (1) ... shall precede any notice and demand of any penalty under subsection (a) by at least 60 days.' 26 U.S.C. § 6672(b)(2).

Mr. Trueblood asserts that the notice of deficiency was not sent by certified or registered mailing to the taxpayer's last known address as required under Delman v. Comm'r of Internal Revenue, 384 F.2d 929 [20 AFTR 2d 5543] (3d Cir. 1967), cert. denied, 390 U.S. 952 (1968), and

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[2] Mr. Trueblood further argues that because he was given no notice, no tax may be assessed against him because such action is out of the three-year statute of limitations provided under 26 U.S.C. § 6501(a). The statute of limitations in 26 U.S.C. § 6501(a), provides that ''the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed ... and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.'' 26 U.S.C. § 6501(a). Because this Court precludes granting of summary judgment due to the existence of a genuine issue of material fact whether Mr. Trueblood received the notice, this argument need not be addressed.

[3] Mr. Trueblood does allege that he received a preliminary notice regarding a pending assessment for a related company, Street Holding Company. Street Holding Co. Notive, Trueblood Br. Ex. 1.

[4] 26 U.S.C. § 6672(a) provides that

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a).

D'Andrea v. Comm'r of Internal Revenue, 263 F.2d 904 [3 AFTR 2d 694] (D.C. Cir. 1959). The Third Circuit in Delman expanded on the "last known address" requirement of 26 U.S.C. § 6212(b), not the provision regarding certified or registered mail.[5] Subsection (b) of § 6212 provides that "notice of a deficiency in respect of a tax imposed . . . , if mailed to the taxpayer at his last known address, shall be sufficient . . . ." 26 U.S.C. § 6212(b)(1). The Delman court affirmed the tax court's dismissal of taxpayers' petition for redetermination of income taxes as untimely, holding that subsection (b) of § 6212 is inapplicable because notice was sent by or-dinary mail to taxpayers at the address of their attorney and by certified mail to their accountants, the addresses being those which taxpayers had used before and could reasonably be reached.[6]

The principle of Delman is inapplicable here, where the accuracy of Mr. Trueblood's address was never in question. Mr. Trueblood's argument instead implicates subsection (a) of § 6212, which refers to the certified mailing method by which the Secretary "is authorized to send notice of [] deficiency." 26 U.S.C. § 6212(a). The Third Circuit in Berger v. Commissioner of Internal Revenue specifically considered whether notice by regular mail satisfied § 6212. Berger v. Comm'r of Internal Revenue, 404 F.2d 668, 675 [22 AFTR 2d 5889] (3d Cir. 1968) (holding that notices of deficiency sent by regular mail were "adequate and effective," and affirming the tax court's dismissal of taxpayers' petitions as untimely filed), cert. denied, 395 U.S. 905 (1969). The Third Circuit, noting that subsection (a) of § 6212 was changed from mandatory form to its present form in which the Commissioner "is authorized" to use registered or certified mail, specifically stated that

> Subsection (a) authorizes a notice of deficiency to be sent by registered or certified mail. In authorizing such method of notice it does not forbid any other method. If a revenue agent personally delivers by hand a notice of deficiency to the taxpayer it could not rationally be suggested that the notice was invalid because it violated a requirement of subsection (a).

Id. at 673. Here, Mr. Trueblood's argument that the IRS violated the IRC because it did not send notice to him via certified or registered mail fails. Under the Internal Revenue Code, the IRS was "authorized" to do so, not required, as specified by the Third Circuit in Berger.[7]

Viewing the evidence in the light most favorable to the nonmoving party, here the United States, and extending any reasonable favorable inference to it, the United States has proffered sufficient evidence that would allow a reasonable jury to find that Mr. Trueblood and Mr. Sapinski, Mr. Trueblood's attorney of record, received the notice of deficiency directed to Mr. Trueblood regarding IE, Inc. The United States proffers a letter addressed to the Internal Revenue Service in which Mr. Sapinski states, "Mr. Trueblood has forwarded to me a copy of your June 16, 1998 letter addressed to him proposing to assert the 'Trust Fund Recovery Penalty' (IRC §§ 6671–6672) against him with respect to employment taxes owed by IE, Inc. for the periods ended 3/31/96 through 6/30/97." Sapinski Letter, 7/15/98, USA Sur-Reply Br. Ex. 3. Subsequently, Mr. Sapinski sent a letter to the Internal Revenue Service in which he states, "Enclosed please find a Protest submitted on behalf

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[5] Section 6212 of the IRS Code provides that "[i]f the Secretary determines that there is a deficiency in respect of any tax imposed . . . , he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail." 26 U.S.C. § 6212(a) (emphasis added).

[6] Furthermore, the court expounded on the purpose of the notice of deficiency:

> Its purpose is to notify the taxpayer that a deficiency has been determined against him. The mailing of a notice, unlike the filing of a complaint, does not commence an action in any court. It does not subject the taxpayer to the jurisdiction of the Tax Court. It merely allows the taxpayer, if he so desires, to commence an action in the Tax Court within the statutory period . . . . Where, however, the notice is mailed to a correct, albeit not the last known address, and is received in a timely fashion by the taxpayer or his authorized agent, no statutory scheme or purpose would thereby be violated. The purpose of the notice has been served when it is actually received.

Delman, 384 F.2d at 933–34 (citations omitted).

[7] Mr. Trueblood alleges that Revenue Officer Frank D. Clark III's declaration "falsely alleges that the requisite notice was sent to [Mr. Trueblood] by certified mail." See Trueblood Sur-Reply Br. at 3. Under Berger, which does not require certified mailing, this allegation thus has no consequence.

of Mr. Trueblood disputing your proposed assertion of the Trust Fund Recovery Penalty against him with respect to I.E., [I]nc.'' Sapinski Letter, 8/20/98, USA Sur-Reply Br. Ex. 4. These letters strongly suggest that Mr. Trueblood received the notice of deficiency, and that he responded to it in the form of a protest. The IRS nevertheless did not accept the protest because it was received 2–3 days beyond the time in which to file a protest. See Trueblood Sur-Reply Br. at 3 & Ex. 1.2 at ¶ 2; Clark Decl. ¶ 3. Mr. Trueblood's further efforts to appeal the denial of his protest demonstrates that Mr. Trueblood was indeed made aware of the notice of deficiency, but acknowledged that he was late in his response. Mr. Trueblood states that ''[i]n spite [of Mr. Trueblood's] repeated request to IRS personnel for an Appeals conference ... it was never granted.'' Trueblood Br. at d.

The reasonable inference from Mr. Sapinski's letter of July 15, 1998, is that his client, Mr. Trueblood, received timely notice of the IRS' deficiency claim, as required by 26 U.S.C. § 6672(b), on or about June 16, 1998. Indeed, given the IRS' records and Mr. Sapinski's written confirmation of such receipt of the IRS' letter from Mr. Trueblood, it is just about impossible to infer otherwise.

Accordingly, because the nonmoving party here has created a genuine issue of material fact, third-party defendant's motion for summary judgment will be denied on this ground.[8]

B. Responsible Person under 26 U.S.C. § 6672

[2] Mr. Trueblood chiefly argues that he is not a ''responsible person'' as defined under the Internal Revenue Code and therefore a Trust Fund Recovery Penalty (''TFRP'') cannot be assessed against him. A responsible person, for purposes of § 6672, is one who is ''required to collect, truthfully account for or pay over any tax due to the United States.'' United States v. Carrigan, 31 F.3d 130, 133 [74 AFTR 2d 94-5425] (3d Cir. 1994) (quoting Brounstein v. United States, 979 F.2d 952, 954 [71 AFTR 2d 93-1714] (3d Cir. 1992)). Responsibility is a matter of status, duty, or authority, not knowledge. Carrigan, 31 F.3d at 133 (quoting Quattrone Accountants, Inc. v. IRS, 895 F.2d 921, 927 [65 AFTR 2d 90-580] (3d Cir. 1990)). ''While a responsible person must have significant control over the corporation's finances, exclusive control is not necessary.'' Greenberg v. United States, 46 F.3d 239, 243 [74 AFTR 2d 94-7343] (3d Cir. 1994) (quoting Brounstein, 979 F.2d at 954). ''A person has significant control if he has the final or significant word over which bills or creditors get paid.'' Carrigan, 31 F.3d at 133 (quoting Quattrone, 895 F.2d at 927). In determining whether an individual is a person responsible for paying over withholding taxes, courts consider the following factors:

> (1) duties of the officer as outlined in the corporate by-laws; (2) ability to sign checks on the company's bank account; (3) signature on the employer's federal quarterly and other tax returns; (4) payment of other creditors in lieu of the United States; (5) identity of the officers, directors, and principal stockholders in the firm; (6) identity of individuals in charge of hiring and discharging employees; and (7) identity of individuals in charge of the firm's financial affairs.

Greenberg, 46 F.3d at 243–44 (citing Brounstein, 979 F.2d at 954–55).

Applying the foregoing principles to the instant case, the Court finds that there is a genuine issue of material fact concerning whether third-party defendant Mr. Trueblood had significant control over IE, Inc.'s financial affairs. Mr. Trueblood claims that he contracted with IE, Inc., to perform legal services in IE's ongoing relations with the IRS, see Trueblood Br. Ex. 6, was remunerated on a monthly basis pursuant to the legal services agreement

[8] Mr. Trueblood asserts in passing in his reply brief that the assessment notice did not sufficiently indicate the correct period for the assessment, nor the amount. The Court, noting the inconsistency of this contention in light of the argument that such notice was never received, will not address this argument due to the Court's conclusion that a genuine issue of material fact exists to preclude summary judgment on the notice issue.

with IE, Inc., and reported the same as such on his personal tax return.[9] Mr. Trueblood was brought on to help with payroll tax issues of IE, as well as other financial aspects and accounting issues of the corporation, due to company president John Orem's stroke in July 1995. See Orem Depo. 5/23/01, at 15, 18, 29, USA Br. Attach.; Orem Depo. 8/2/01, at 8, USA Br. Attach.; Scheingold Depo. 4/26/01, at 48–49, USA Br. Attach.

Although Mr. Trueblood asserts that he was neither an employee, officer, nor shareholder of IE, Inc., and had no duty that would result in the imposition of the TFRP, the evidence proffered suggests that Mr. Trueblood originally was corporate counsel, then became the Chief Financial Officer of IE, Inc. Deposition testimony by Chief Operating Officer Daniel Scheingold indicated that "[a]t first, [Mr. Trueblood] was the attorney with IE, Inc., and then eventually he became the CFO, Chief Finance Officer." Scheingold Depo. 4/26/01, at 15:17–19, USA Br. Attach. Sche-ingold's deposition testimony indicates that Mr. Trueblood was made the Chief Financial Officer of IE, Inc., in 1996.[10] See id. at 42:25–43:11. Mr Scheingold testified further that when IE President John Orem informed him of Mr. Trueblood's new position, Mr. Orem told him that "[Mr. Trueblood] would be taking over the financial stuff of the corporation .... He would be in charge of taking care of the general ledger and making sure everything was in balance." Id. at 48:24–49:7. In addition, the United States provides a letter dated February 27, 1997, written by Mr. Trueblood, in which he states "I am the Chief Executive Officer for IE, Inc. and it has recently come to my attention that the program that was offered to and accepted by our company will not become effective as March 1, 1997 as was agreed upon."[11] See Trueblood Letter, 2/28/97, USA Br. Ex. FF.

Under the second factor, it is unclear whether Mr. Trueblood had the ability to write company checks, although Mr. Trueblood, in dealing with the IRS, "had arranged for certain payment structures with the IRS agent." See Foti Depo. 8/8/01, at 15:14–15, USA Br. Attach. Deposition testimony of Caesar Foti, Controller of IE, Inc., indicates that he and Dan Scheingold had access to the company's checkbooks, and that Dan signed all of the checks. See id. at 17:18–19. In addition, IE President John Orem testified that Mr. Trueblood was not a signatory on any of the company's bank accounts, see Orem Depo. 8/2/01, at 52:3–5, USA Br. Attach., and Mr. Scheingold testified that Mr. Trueblood did not have authorization to call the bank to inquire about the company bank accounts. See Scheingold Depo. 4/26/01, at 89:13–24, USA Br. Attach. Although Mr. Trueblood argues that he was never involved with the payment processes or decisions regarding payment to creditors, the United States asserts that Mr. Trueblood directed Mr. Scheingold to make payments to various creditors, including tax payments to the IRS beginning in 1996. See USA Br. at 11; Scheingold Depo. at 71–72, USA Br. Attach. Specifically, the deposition testimony indicates that Mr. Trueblood directed Mr. Sche-ingold to make $100,000 payments to the IRS in 1996. See Scheingold Depo. at 71–72, USA Br. Attach.

As for the third factor, Mr. Trueblood was involved in the preparation and filing of the company's payroll tax returns and was responsible for ensuring that the payroll tax deposits were made. See id. at 15–16, 18, 21. Although Mr. Trueblood asserts that he did not sign any tax returns, IE's tax returns were signed by John Orem and

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[9] Further, Mr. Trueblood states that he was never issued a W-2, which would have indicated that he was an employee of IE, Inc.

[10] John Orem, President of IE, Inc., testified that Mr. Trueblood became CFO of IE in 1995. Orem Depo. 8/2/01, at 7. Caesar Foti, Controller of IE, Inc., although not aware of Mr. Trueblood actually becoming CFO or CEO, was aware of discussions regarding Mr. Trueblood assuming the title of CFO. Foti Depo. 8/8/01, at 52.

[11] The Court notes that the time periods mentioned here, 1996 to at least March 1997, are compatible with the period of time for which the IRS seeks assessment, or "the quarters ended March 31, 1996 through June 30, [1997]," as indicated in the alleged Protest submitted on Mr. Trueblood's behalf in August 1998. See USA Br. Ex. D. See, e.g., Vinick v. United States, 205 F.3d 1, 7 [85 AFTR 2d 2000-1177] (2d Cir. 2000) ("Because the trial court made its findings of fact based on a misunderstanding of the legal standard for what constitutes a responsible person under § 6672 in that it considered Vinick's conduct over the entire period he was involved with Jefferson Bronze rather than his activities during the quarters in question, ..., we do not defer to its conclusion that Vinick was a responsible party within the meaning of the statute.").

bore the identification and signature of Mr. Trueblood as the preparer. See IE Tax Return, Trueblood Br. Exs. 5 & 5b.

Mr. Trueblood also maintains that he did not have the ability to hire or fire, and that he merely participated in the preliminary interview of one employee, but had no authority to extend an offer of employment. Mr. Scheingold testified that Mr. Trueblood hired Mr. Foti as Controller of the company, as well as the other accountant of the company. See Scheingold Depo. 4/26/01, at 103–04, USA Br. Attach. In addition, Mr. Scheingold testified that Mr. Trueblood fired another accountant named "Eves." Id. at 104.

Viewing the evidence in the light most favorable to the non-moving party, here the United States, and extending any reasonable favorable inference to that party, this Court finds that reasonable finders of fact could find Mr. Trueblood to have maintained significant control over the financial affairs of IE such that he would be deemed a responsible person under $ 6672 for the relevant quarters. Considering the factors for determining the "person responsible" under $ 6672, Mr. Trueblood was brought on to help IE institute a payment structure to the IRS, and directed others in the company to make payments to the IRS. He may also have held the title of Chief Financial Officer, and he referred to himself as "Chief Executive Officer." There is no indication, however, that Mr. Trueblood wrote checks to pay other creditors while knowing that tax liabilities to the United States remained unpaid. On the other hand, while Mr. Trueblood did not appear to have check-signing capability, as Chief Financial Officer of IE, he was in charge of the financial affairs and accounting issues of the company. Cf. Greenberg, 46 F.3d at 243–44 (holding that taxpayer who was in charge of the accounting department, an authorized signatory on all corporate checking accounts, and determined which creditors should be paid, is a responsible person); Quattrone, 895 F.2d at 927 (concluding that debtor who had significant control over finances, had authority to pay monthly bills without prior approval, and provided daily financial advice to company is a responsible person). In such a capacity and having such a knowledge of the company's finances, it is possible that Mr. Trueblood could have directed or advised Mr. Foti or Mr. Orem to write checks to other creditors, keeping in mind the payment structure he had instituted with the IRS. In addition, a previous IE tax return did bear Mr. Trueblood's signature and information as the preparer of the form. Cf. Carrigan, 31 F.3d at 133 (holding that district court erred in granting summary judgment to government when officer was not responsible for financial affairs of company, did not have access to corporate books, and did not prepare or sign any company tax returns). Furthermore, as for Mr. Trueblood's capability to hire and fire employees, he fired an employee and participated in an employee hire interview, which he asserts was taken under the direction of Mr. Orem, who had been physically weakened by a stroke. Such action indicates that he had some meaningful degree of control within the company.

Accordingly, because there is a genuine issue of material fact regarding whether Mr. Trueblood was a responsible person under $ 6672, this Court will deny summary judgment on this ground.

CONCLUSION

For the reasons discussed above, the Court will deny third-party defendant Edward Trueblood's motion for summary judgment against the United States. The accompanying Order is entered.

June 7, 2002

DATE

JEROME B. SIMANDLE

United States District Judge

ORDER

THIS MATTER having come before the Court upon third-party defendant Edward L. Trueblood's motion for summary judgment against third-party plaintiff United States; and the Court having considered the parties' submissions; and the Court having heard oral argument on March 8, 2002;

and for the reasons stated in the Opinion of today's date; and for good cause shown;

IT IS on this 7th day of June, 2002, hereby

ORDERED that third-party defendant Edward L. Trueblood's motion for summary judgment [Docket Items 18 & 19] be, and hereby is, DENIED.

JEROME B. SIMANDLE

United States District Judge

¶2002-5135

Michael FLEMING, PLAINTIFF v. SEVEN RECORDS OF LIEN, DEFENDANT. U.S. District Court, Middle Dist. of Florida, (DC FL) Docket No. 8:02-CV-781-T-17TGW, July 3, 2002. Decision for Govt.

1. District court proceedings—motions to dismiss and vacate—release of liens—sanctions. Govt.'s motion to dismiss and vacate state court order of cancellation of federal tax liens was granted where order was void ab initio. And, taxpayer was ordered to show cause why sanctions shouldn't be imposed for repeat frivolous filings. Also, taxpayer's motions to strike, to withdraw amended complaint, for evidentiary hearing, to vacate stay of state proceedings and for injunction were denied. *Reference:* United States Tax Reporter ¶74,025.01(133); 74,025.01(3). IRC §7402.

United States District Court, Middle District of Florida, Tampa Division.

Order

KOVACHEVICH, District Judge:

This cause is before the Court on all pending motions, as follows:

Dkt. 9 Motion to Dismiss and Vacate Order of Cancellation

Defendant filed a Motion to Dismiss and to Vacate State Order of Cancellation (Dkt. 9). The Court notified Plaintiff to respond (Dkt. 10), and Plaintiff filed a Motion to Strike (Dkt. 15).

[1] After consideration of the Motion to Dismiss and to Vacate State Order of Cancellation, and in accordance with Rules 55(c) and 60(b) of the Federal Rules of Civil Procedure, the Court determines that the "Order of Cancellation" entered on June 13, 2001, purporting to cancel the federal tax liens against the Plaintiff, Michael Fleming, in the case of Michael Fleming v. Seven Records of Lien, Case No. 10-2544-CI-008, Circuit Court for the Sixth Judicial Circuit in and for Pinellas County, Florida, is void ab initio and should be vacated. Based on the foregoing, it is ordered as follows:

1. The Government's Motion to Dismiss and to Vacate State Court Order of Cancellation (Dkt. 9) is granted. This case is dismissed with prejudice, and the Clerk of Court shall close the case. The Court reserves jurisdiction to award sanctions, and this case is a repeat of a case previously filed. Plaintiff's Motion to Strike (Dkt. 15) is denied. Plaintiff shall show cause within ten days why sanctions should not be imposed on Plaintiff for filing a frivolous case.

2. The June 13, 2001 "Order of Cancellation" entered in the state action is void ab initio and is hereby vacated.

3. The Court denies the following Motions:

Dkt. 11 Motion to Withdraw Amended Complaint
Dkt. 14 Amended Motion to Withdraw Amended Complaint
Dkt. 16 Motion for Evidentiary Hearing, to Vacate Stay of State Proceedings, and for Injunction

3. The Clerk of Court is directed to mail a certified copy of this Order to counsel for the United States and to the Clerk for the Sixth Judicial Circuit in and for Pinellas County, Florida.

DONE and ORDERED in Chambers, in Tampa, Florida on this 3rd day of July, 2002.

ELIZABETH A. KOVACHEVICH

United States District Judge

Copies to:

All parties and counsel of record

¶2002-5136

UNITED STATES OF AMERICA, PLAINTIFF v. Patricia LABATO, Denise Labato a/k/a Denise Labato Hunt, and Brevard County, Florida, DEFENDANTS, Gennaro Labato, INTER-VENOR. U.S. District Court, Middle Dist. of Florida, (DC FL) Docket No. 6:97-cv-900-Orl-28JGG, June 27, 2002. Earlier proceeding at (2002, DC FL) 90 AFTR 2d 2002-5244. Year 1992. Decision for Govt.

1. Actions to enforce tax liens—fraudulent conveyances; foreclosure and sale—summary judgment. Foreclosure and sale of lien property fraudulently conveyed to taxpayer's daughter was ordered pursuant to 28 USC §2001 and §2002, free and clear of all liens and claims; and, upon sale's confirmation, proceeds were to be distributed 1st to county tax collector and then to govt. Also, taxpayer's husband/intervenor failed to establish any right, title or interest in subject property. *Reference:* United States Tax Reporter ¶74,035.03(100). IRC §7403.

United States District Court, Middle District of Florida, Orlando Division.

Judgment

ANTOON II, District Judge:

[1] This action came before this Court, Honorable John Antoon II, District Judge, on cross-motions for summary judgment, and a decision having been rendered by Order entered June 18, 2002, that the subject real property, located at 3034 Winchester Drive, Cocoa, Brevard County, Florida 32926, and described as follows:

LOT 79, PHASE III, A REPLAT OF COVENTRY OF COCOA, ACCORDING TO THE PLAT THEREOF, AS RECORDED IN PLAT BOOK 32, PAGE 76 AND 77, OF THE PUBLIC RECORDS OF BREVARD COUNTY, FLORIDA

(hereinafter, the ''subject property'') was fraudulently conveyed by Defendant Patricia Labato to her daughter, Defendant Denise Labato a/k/a Denise Labato Hunt, and that said fraudulent conveyance is set aside and the federal tax lien against all property and rights to property of Defendant Patricia Labato, including the subject property, shall be foreclosed, it is hereby

ORDERED AND ADJUDGED that the Intervenor Gennaro Labato has failed to establish any right, title or interest in the subject property and therefore shall take nothing by his motion in intervention.

Dated at Orlando, Florida, this 27 day of June, 2002.

JOHN ANTOON II

UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of record

Unrepresented parties

Judgment of Foreclosure and Order of Sale

ANTOON II, District Judge:

In accordance with this Court's Order granting Plaintiff's Cross-Motion for Summary Judgment and denying defendant's motion for summary judgment, entered in the above-captioned civil action on June 18, 2002, and holding that (1) Defendant Patricia Labato is indebted to Plaintiff United States of America for unpaid federal income tax liabilities for the year 1992 in the total amount of $1,377,706.93, plus interest accruing between January 31, 2002, and the date of judgment; (2) the purported transfer on July 23, 1993, of the subject real property at 3034 Winchester Drive in Cocoa, Florida (hereinafter the ''subject property''), from Defendant Patricia Labato to Denise Labato a/k/a Denise Labato Hunt, is set aside as fraudulent; (3) the United States has a valid federal tax lien upon and against all property, and all rights to property, belonging to Defendant Patricia Labato, including that subject real property; and (4) the federal tax lien is foreclosed, it is hereby further ORDERED, ADJUDGED AND DECREED:

1. That the United States Marshal for the Middle District of Florida, or such representative as he may appoint or employ, is authorized and directed under 28 U.S.C. Sections 2001 and 2002 to offer for public sale and to sell the subject property to the highest and best bidder for cash, subject to certain other rights as set forth in this Order. No further orders or process from this Court shall be required to effectuate the sale of the subject property.

2. That Defendants Patricia Labato, Denise Labato a/k/a Denise Labato Hunt, their successors, lessees and assigns and any person acting under their direction or authority shall, within thirty (30) days of the date of this Order, in good order with all fixtures, appliances and appurtenances thereto, deliver up to the United States Marshal, the subject property, including all keys to the premises, suitably labeled. No person receiving notice of the entry of this Order shall take any steps to demean, impair or destroy the value of these premises, including the improvements thereon, and no actions shall be taken to impede the United States Marshal in the execution of his duties, except pursuant to order of this Court. Should the Defendants Labato and Hunt, or their successors, lessees, assigns, or any person acting under their direction or authority, fail, within thirty (30) days of the date of this Order, to deliver possession of the subject property to the United States Marshal, the United States Marshal shall be authorized to take any and all steps necessary to secure possession of the subject property including, if necessary, retaining a locksmith or other person to enter the subject property and to change the locks thereto.

3. That pending the sale of the subject property, the United States Marshal or his representative is authorized to have free access to the premises and shall take all actions appropriate to preserve the subject property, including without limitation obtaining insurance coverage for the subject property and/or retaining a locksmith or other person to change or install locks or other security devices on any part of the subject property, until the deed to the subject property is delivered to the ultimate purchaser.

4. That the sale by public auction shall be held at the front door of the Brevard County Courthouse or at such other place within Brevard County, Florida, as the United States Marshal shall determine, in accordance with the provisions of 28 U.S.C. Sections 2001 and 2002. After the Marshal has determined the date, time and place for the sale, the Marshal shall insert the same in the Notice of Marshal's Sale attached hereto, and shall promptly mail a copy of such Notice of Marshal's Sale to each of the following:

Patricia Labato

4540 Albritton Road

St. Cloud, Florida 34772

Denise Labato

3034 Winchester Drive

Cocoa, Florida 32926

Michael A. Paasch

MATEER & HARBERT, P.A.

225 East Robinson Street, Suite 600

P.O. Box 2854

Orlando, Florida 32802-2854

Gennaro Labato

4540 Albritton Road

St. Cloud, Florida 34772

5. That the date, time and place for the sale of the subject property shall also be announced by the United States Marshal by advertising the attached Notice of Sale once each week for four consecutive weeks preceding the date fixed for the sale in a newspaper of general circulation in Brevard County, Florida, and by any other notice that the United States Marshal or his representative may in his discretion deem appropriate.

6. That the subject property shall be sold free and clear of all liens and claims of any part to this proceeding, with such liens and claims to attach to the proceeds of sale in the same order of priority as they attached to the property sold.

7. That the successful bidder shall be required to deposit with the United States Marshal a minimum of ten percent (10%)

of the amount bid on the date of the sale, either by certified check or by cash deposit.

8. That the balance of the purchase price shall be tendered to the United States Marshal by the successful bidder within ten (10) days following the date of the sale. Payment shall be made by certified check payable to the United States Marshal for the Middle District of Florida. In the event that the purchaser fails to fulfill this requirement, the deposit shall be forfeited and applied to the expenses of sale, and the subject property shall be re-offered for sale in the same manner as provided for in the initial sale.

9. That after receipt of the full purchase price the United States Marshal shall ascertain the expenses of the sale and the expenses of his preservation and conservation of the property, and shall pay those amounts out of the sale proceeds. The United States Marshal shall remit the balance of the sale proceeds to the Clerk of the Court with a statement of such expenses and the amount of the net proceeds received from the sale.

10. That within ten (10) days after receipt of the net proceeds of sale from the Marshal, the Clerk shall give notice to the parties that she has received the funds from the Marshal. Within thirty (30) days thereafter, the Brevard County tax collector shall file with the Court a verified statement of the amount of its claim to the date of sale, with a per diem rate of interest.

11. That the United States Marshal's sale of the subject property shall be subject to confirmation by this Court, and upon confirmation the United States Marshal shall execute and deliver his deed, conveying the subject property to the successful purchaser.

12. That after confirmation of the sale of the subject property, this Court shall enter an appropriate Order of Distribution directing the Clerk of the Court to dis-tribute the balance of the sale proceeds first to Brevard County, and second to the United States of America.

13. That this Court shall retain jurisdiction over this action for the purpose of making any and all further orders, writs and decrees as may be just and equitable, including orders confirming sale, when and if such confirmation shall appear proper, orders of distribution, and entry of deficiency judgment against Defendant Patricia Labato should the proceeds of the sale of the subject property be insufficient to satisfy the judgment in favor of the United States of America and against Defendant Patricia Labato set forth above.

IT IS FURTHER ORDERED that the Clerk shall immediately mail a copy of this order to all parties of record herein and shall deliver a copy to the United States Marshal.

Done and ordered, this 27 day of June 2002, in Orlando, Florida.

JOHN ANTOON II

UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of record

Unrepresented parties

United States Marshal

¶2002-5137

Gary D. STARKS, PLAINTIFF v. Dennis PARIZEK, Chief Examination Branch, ET AL., DEFENDANT. U.S. District Court, Western Dist. of Kentucky, (DC KY) Docket No. 3:02-CV-47-H, July 1, 2002. Year 2000. Decision for Govt.

1. Refund actions—administrative refund claims—informal claims. Taxpayer's action for refund of withheld taxes was dismissed for lack of jurisdiction: taxpayer didn't file formal administrative refund claim; and his return didn't qualify as informal claim where it didn't contain any income or liability information and attached letter asserted only frivolous protester-type arguments. *Reference:* United States Tax Reporter ¶74,225.01(20). IRC §7422.

United States District Court, Western District of Kentucky at Louisville.

Memorandum and Order

HEYBURN II, Chief District Judge:

[1] Plaintiff is a taxpayer who has filed suit to recover $5,260.53 withheld from his wages during tax year 2000. He contends that the wages that he earn during that year did not constitute income and should not have been withheld from his wages and paid to the Internal Revenue Service. Defendant has no moved to dismiss on the grounds that the court lacked subject matter jurisdiction because Plaintiff failed to file an administrative claim for a refund and has not otherwise filed an informal claim for refund.

Having reviewed the memoranda of both parties, the Court concludes that the case should be dismissed. First, Plaintiff has not filed an administrative claim for refund which is a prerequisite to filing a lawsuit such as this one. Plaintiff does assert that he has submitted a tax return which constitutes an informal claim for refund. However, Plaintiff's tax return does not qualify as an informal claim for refund. The tax return which Plaintiff submitted contains no information regarding adjusted gross income, taxable income or tax liability. Instead, Plaintiff attached a letter claiming that he was entitled to a refund because no statute or regulation of the tax code makes him liable for income tax, he is not required to file a tax return and his wages do not qualify as taxable wages under the income tax statutes. Each of these arguments is frivolous and, therefore, Plaintiff has not submitted a valid income tax return which actually constitutes a reasonable claim for refund.

Being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the motion of the United States to dismiss is SUSTAINED and Plaintiff's complaint is DISMISSED WITH PREJUDICE.

This is a final and appealable order.

This 1st day of July, 2002

JOHN G. HEYBURN II

CHIEF JUDGE, U.S. DISTRICT COURT

cc. Gary D. Starks, Pro Se

William F. Campbell, AUSA

Aneida P. Winston

¶2002-5138

INTERNAL REVENUE SERVICE, APPELLANT v. Curtis WINGFIELD, APPELLEE/CROSS-APPELLANT. In Re: Curtis Wingfield. U.S. District Court, Eastern Dist. of Virginia, (DC VA) Docket No. 2:02cv78, July 12, 2002. Bankruptcy Court, (2001, Bktcy Ct VA) 89 AFTR 2d 2002-1344, affirmed. Years 1995, 1996, 1997, 1998, 1999, 2000. Decision for Taxpayer in part and for Govt. in part.

1. Tax claims in bankruptcy—objection to proof of claim—secured claims—ERISA plans—priority claims—lookback period; tolling. Bankruptcy court properly rejected IRS's argument that, for limited purpose of establishing secured federal tax claim for 1 of 6 years, Chap. 13 debtor's interest in ERISA-qualified deferred compensation plan was bankruptcy estate property: case law clearly excluded all ERISA-qualified pension plans from bankruptcy estate, regardless of plan's subjection to federal tax lien, and foreclosed govt.'s "split personality" characterization. But, taxpayer's limitations period objection to priority status of 2 other years' taxes was properly overruled, based on Supreme Court precedent that his prior, serial bankruptcy filings tolled 11 USC §507(a)(8)(A)(i)'s 3-year lookback period. *Reference:* United States Tax Reporter ¶68,726.51(10); 68,726.52(28); 68,726.54.

United States District Court, Eastern District of Virginia, Norfolk Division.

Judgment in a Civil Case

[] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came for determination before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Bankruptcy Court's decision in this case is AFFIRMED.

Date: July 12, 2002

ELIZABETH H. PARET, CLERK

By: Lori M. Baxter, Deputy Clerk

ORDER

This matter is before the court on the Internal Revenue Service's appeal from a decision rendered by Judge Stephen C. St. John of the United Stated Bankruptcy Court for the Eastern District of Virginia. The Internal Revenue Service (''IRS'') appeals this decision, arguing that the Bankruptcy Court erred in holding that Mr. Wingfield's ERISA-governed 401(k) plan was not property of the bankruptcy estate for the purposes of securing the IRSs' claim. Mr. Wingfield filed a cross-appeal, arguing the claim for his 1996 and 1997 income taxes should not have tolled during the debtor's prior bankruptcies. After examination of the briefs and record, this court determines oral argument is unnecessary because the facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. *See generally, Richard Emerson Snow v. Countrywide Home Loans, Inc.*, 270 B.R. 38, 39 (D. Md. 2001); *Grundy Nat. Bank v. Shortt*, 80 B.R. 802, 803 (W.D. Va. 1987). For the reasons set forth herein, the Bankruptcy Court's decision is AFFIRMED.

I. Factual and Procedural Background

The facts of this case are undisputed. Curtis Wingfield (''the debtor''), filed a Chapter 13 petition on May 2, 2001. As part of his petition, the debtor scheduled personal property valued at $275.00. He additionally possessed a 401(k) plan with a value of approximately $23,000.00.

The IRS subsequently filed a Proof of Claim on May 18, 2001, with a secured claim of $23,275 for unpaid 1995 income taxes, an unsecured priority claim of $116,978.83 for unpaid 1995 through 2000 income taxes, and a general unsecured claim of $41,874.95 for penalties on the unpaid income taxes. On June 6, 2001, the IRS objected to the debtor's plan and the debtor objected to the IRS's Proof of Claim shortly thereafter. The parties both moved for summary judgment before the Bankruptcy Court for their respective claims. The Bankruptcy Court held that the debtor's 401(k) plan could not be used to secure the IRS's claim. The IRS appealed the Bankruptcy Court's ruling to this court.

In the same proceeding, the parties disputed the treatment of the 1996 and 1997 tax claims. The debtor previously filed a petition for Chapter 13 relief on October 22, 1997, which was voluntarily dismissed on July 30, 1998 and a Chapter 7 petition on August 24, 1999, which was dismissed for failure to file schedules on September 14, 1999. On November 29, 1999, the debtor refiled his Chapter 7 bankruptcy and obtained a discharge on March 9, 2000. The parties disagreed whether the priority status associated with tax claims that become due within three years of the bankruptcy petition automatically tolled during the pendency of the prior bankruptcies. The Bankruptcy Court found that an automatic tolling does occur, and the debtor now appeals this ruling.

II. Discussion

A. Standard of Review

The bankruptcy court's final judgments, orders, and decrees are reviewable by the district court. *See* 28 U.S.C. § 158(a). Factual findings are subject to the clearly erroneous standard, and questions of law, including statutory construction, are reviewed *de novo*. *In re Southeast Hotel Prop. Ltd. Partnership*, 99 F.3d 151, 153 (4th Cir. 1996) (citing *In re Johnson*, 960 F.2d 396, 399 (4th Cir. 1992)). When a decision rests in the discretion of the bankruptcy court, it should be set aside only when the reviewing court determines (1) that the decision was based on an erroneous conclusion of law, (2) that the record of the proceedings contain no evidentiary basis for the decision, or (3) that the factual findings of the court are ''clearly erroneous.'' *In re Jackson*, 121 F.3d 698 (4th Cir. 1997) (citations omitted) (unpublished).

B. Analysis

[1] There are two main issues that the court must address in this appeal. First, whether the Bankruptcy Court erred in holding that the IRS's claim is secured by the debtor's interest in his 401(k) plan, and second, whether the Bankruptcy Court erred in tolling the priority status of the debtor's 1996 and 1997 taxes.

1. Whether a 401(k) Plan Can Secure a Federal Tax Claim

The IRS appeals the Bankruptcy Court's ruling that a debtor's interest in an ERISA-governed deferred-compensation plan is not property of the bankruptcy estate for the purposes of establishing the IRS's secured claim. For the following reasons, the court AFFIRMS the ruling of the Bankruptcy Court.

Qualified pension benefits may be excluded from a bankruptcy estate, thereby placing them beyond the reach of creditors. *See Patterson v. Shumate*, 504 U.S. 753, 760, 112 S. Ct. 2242, 2248 (1992). This result is brought about by § 541(c)(2) of the Bankruptcy Code, which excludes from the bankruptcy estate any interest in a trust that is subject to transfer restrictions under applicable non-bankruptcy law. *Shumate*, 504 U.S. at 757–58. This necessarily excludes from the bankruptcy estate all interests in pension plans that are qualified under the Employee Retirement Income Security Act of 1974 (ERISA), which requires that all pension plans include a prohibition on assignment and alienation. *See* 29 U.S.C. § 1056(d)(1). Both parties agree that the debtor's 401(k) plan is normally excluded from the bankruptcy estate. There is also no dispute that the debtor's 401(k) plan is subject to the lien of the IRS for unpaid taxes. The issue, therefore, is whether the IRS can secure its claim in the debtor's Chapter 13 bankruptcy against property that is not property of the bankruptcy estate.

According to the IRS, while the 401(k) plan is not generally property of the bankruptcy estate under *Patterson v. Shumate*, it should be considered part of the estate for the sole purpose of securing a federal tax claim. In support of its argument, the IRS notes that in a non-bankruptcy setting, its tax lien does not violate the non-alienation provision of a 401(k) retirement plan. The IRS asserts that Congress did no intend for the intervention of bankruptcy to alter the IRS's power as a tax creditor. *See In re Lyons*, 148 B.R. 88, 93 (Bankr. D.D.C. 1992). The IRS concludes that while the debtor's 401(k) plan is not reachable by private creditors (and presumably state tax creditors) and therefore the plan is not considered ''part of the estate'' under 11 U.S.C. § 541, it suddenly becomes ''part of the estate'' when the IRS becomes involved. This conclusion results in a so-called ''split personality'' of the 401(k) asset because it can secure the claims of some parties but not others.

The Bankruptcy Court rejected the ''split personality'' characterization and held that the debtor's 401(k) plan cannot secure the claims of the IRS. In its ruling, the Bankruptcy Court primarily relied upon the decision of Judge Adams in a similar case. *In re Keyes*, 255 B.R. 819 [87 AFTR 2d 2001-448] (Bankr. E.D. Va. 2000). In the *Keyes* case, the court noted that the ERISA qualified plan was excluded from the bankruptcy estate under *Patterson*. The court held that ''[w]hile it is clear that an asset of the debtor is subject to the IRS lien as provided for by statute, there is simply no statutory authority for granting it a 'split personality' to include it in the bankruptcy estate simply for purposes of securing the IRS's lien.'' *Id.* at 822. The court then concluded that ''the Supreme Court's ruling in *Patterson* is clear that ERISA qualified plans do not become part of the bankruptcy estate. Therefore, the IRS's claim cannot be treated as secured because it does not have a 'lien on property in which the estate has an interest,' as required by 506(a).'' *Id.* This court agrees with the Bankruptcy Court and Judge Adams in the *Keyes* decision. The debtor's interest in his 401(k) plan is not property of the estate for the purposes of establishing the IRS's secured claim. *See also, In re McIver*, 262 B.R. 362, 365 [87 AFTR 2d 2001-1498] (Bankr. D. Md. 2001); *In re Persky*, 1998 WL 695311, at 5 [82 AFTR

2d 98-6664] (E.D. Pa. 1998); *In re Wilson*, 206 B.R. 808, 810 [79 AFTR 2d 97-820] (Bankr. W.D.N.C. 1996). Accordingly, the decision of the Bankruptcy Court is AFFIRMED.

2. Whether the 1996 and 1997 Taxes Are Entitled to Priority Treatment

In his cross-appeal, the debtor objects to the Bankruptcy Court's ruling that the IRS's claims for his 1996 and 1997 taxes are entitled to priority status. Normally, the IRS only enjoys priority status for its claim for taxes within three years prior to the filing of the bankruptcy petition, otherwise known as the ''three-year lookback period.'' *See* 11 U.S.C. § 507(a)(8)(A)(i). As a result of their priority status, these taxes are nondischargeable in bankruptcy. *See* 11 U.S.C. § 523(a)(1)(A). Because the debtor filed his petition in 2001, he argues that his older taxes - those outside the ''three-year lookback period'' - lose their priority status. This argument is without merit. The Supreme Court recently addressed this exact issue and decided in favor of the IRS. *See Young v. United States*, 535 U.S. ___, 122 S. Ct. 1036 [89 AFTR 2d 2002-1258] (2002). In *Young*, the Court held that the three year lookback period of 11 U.S.C. § 507(a)(8)(A)(i) is tolled during the pendency of a prior bankruptcy petition. *Id.* In the instant case, the debtor filled a series of bankruptcy petitions prior to the Chapter 13 petition in question. Under the holding of *Young*, the prior petitions tolled the limitations period under 11 U.S.C. § 507(a)(8)(A)(i), and the IRS's tax claims maintained their priority status. The court finds the Bankruptcy Court's decision in accordance with *Young* and therefore AFFIRMS the decision of the Bankruptcy Court.

III. Conclusion

For the reasons stated herein, the Bankruptcy Court's decision in this case is AFFIRMED.

It is so ORDERED.

The Clerk is DIRECTED to send a copy of this Opinion and Order to counsel for the parties.

/s/

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

July 12, 2002

¶2002-5139

UNITED STATES OF AMERICA, PLAINTIFF v. Sterling W. WYATT and J.A. ''Andy'' Harwell, McLennan County Clerk, DEFENDANTS. U.S. District Court, Western Dist. of Texas, (DC TX) Docket No. W-02-CA-58, June 25, 2002. Decision for Govt.

1. Injunctions against taxpayers—frivolous common-law liens—summary judgment—tax protester. Tax pro-tester's motion to dismiss govt.'s lien expungement complaint was denied: complaint stated viable claim for relief with allegations that common-law liens taxpayer filed against IRS employees were frivolous and harassing, interfered with employees' property rights and hurt their credit ratings. And, govt. was entitled to summary judgment where IRC §7402(a) clearly authorized expungement of protester liens and taxpayer's filings were unquestionably frivolous and without basis in fact or law. So, filings were expunged, and taxpayer was permanently enjoined from making any further frivolous filings and was given sanctions warning. *Reference:* United States Tax Reporter ¶74,025.01(138). IRC §7402.

In the United States District Court for the Western District of Texas, Waco Division.

Order

SMITH, JR., District Judge:

This is a ''tax-protestor'' case. According to Plaintiff's Amended Complaint, Defendant, Sterling Wyatt, filed two documents in the public records of McLennan County, Texas. The documents purport to be ''public notices of default.'' Plaintiff's complaint is that these documents act as a cloud on the title of Government employees' real and personal property. Plaintiff contends that these documents were filed

in the public records naming Government employees in retaliation for their part in an Internal Revenue Service investigation of Wyatt. Plaintiff also complains that these filings were made in an attempt to intimidate the employees named in the filings. Plaintiff seeks, pursuant to 26 U.S.C. §§ 7401 and 7402(a): (1) an order expunging the documents from the public records and declaring the filings to be null and void and of no effect; (2) an order enjoining Wyatt from filing similar documents against Government employees in the future; and (3) an order directing Wyatt to disclose any similar documents he has filed against Government employees in the public records of McLennan County.

Before the Court are two motions: Defendant's Rule 12(b)(6) Motion to Dismiss Plaintiff's Amended Complaint and Plaintiff's Cross-Motion for Summary Judgment.

[1] With regard to Defendant's motion to dismiss for failure to state a claim, the Court notes the following. Numerous federal courts have determined that 26 U.S.C. § 7402(a) permits the courts to expunge common law liens filed by tax protestors. *See United States v. Scott*, 191 F.3d (7th Cir. 1999); *United States v. McKinley*, 53 F.3d 1170, 1172 (10th Cir. 1995); *Ryan v. Bilby*, 764 F.2d 1325, 1327 [56 AFTR 2d 85-5458] (9th Cir. 1985); *United States v. Trowbridge*, 1993 WL 764338, at *5 (D. Idaho 1993); *United States v. Van Dyke*, 568 F. Supp. 820, 821 [52 AFTR 2d 83-5201] (D. Or. 1983); *United States v. Hart*, 545 F.Supp. 470, 473–75 (D.N.D. 1982). As noted by the *Trowbridge* court, liens filed by tax protestors such as that alleged by Plaintiff, are "frivolous tax protestor devices used to harass government employees." 1993 WL 764338, at *5. And according to the *Van Dyke*court, tax protestors "use this weapon to harass private individuals in their private lives . . . ." 528 F.Supp. at 821. Title 26, United States Code, section 7402(a) empowers federal courts to void common-law liens imposed by taxpayers on the property of government officials assigned to collect delinquent taxes. *See United States v. Elkbad*, 732 F.2d 562, 563 (7th Cir. 1984).

Accepting all of Plaintiff's allegations as true, which is the appropriate standard of review for a Rule 12(b)(6) motion to dismiss,[1] the Court finds that Plaintiff's complaint does state a claim for relief under 26 U.S.C. § 7402(a). Plaintiff alleges that the liens are frivolous in nature designed solely to intimidate and harass Government employees assigned to investigate Defendant's tax liability. Plaintiff further alleges that the liens have interfered or are interfering with the Government employees' right to use and enjoy their property, have damaged or will damage the Government employees' credit rating, and have caused or will cause the Government employees' to experience distress and anxiety. If true, Plaintiff is clearly entitled to relief. Defendant's motion to dismiss should be DENIED.

With regard to Plaintiff's cross-motion for summary judgment,[2] the Court, after a review of Defendant's "response," finds that there are no genuine issues of material fact and Plaintiff's cross-motion for summary judgment should be GRANTED. The documents filed in the McLennan County public records regarding Government employees have no basis in law or fact. Title 26, United States Code, section 7402(a) allows the Court to expunge such "tax

[1] Dismissal of a complaint is proper under Rule 12(b)(6) if it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Conely v. Gibson*, 355 U.S. 41, 45–46 (1957). When ruling on a motion to dismiss, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the Plaintiff. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). While all well pleaded facts are taken as true for the purposes of a 12(b)(6) motion to dismiss, a court cannot accept as true "conclusory allegations or unwarranted deductions of fact." *Tuchman v. DSC Commun. Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994). The court cannot assume that the plaintiff can prove facts that have not been alleged. *Cline v. Rogers*, 87 F.3d 176, 184 (6th Cir. 1996). The court's task is simply to determine whether the plaintiff's complaint is legally sufficient to state a claim for relief.

[2] Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 322 (1986). A dispute is genuine if the issue could be resolved in favor of either party. *Matsushita*, 475 U.S. at 586; *Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 131 (5th Cir.), *cert. denied*, 506 U.S. 845 (1992). A fact is material if it might reasonably affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matter of Gleasman*, 933 F.2d 1277, 1281 (5th Cir. 1991). The party seeking summary judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case." *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982).

protestor liens'' from country records. *See Ryan v. Bilby*, 764 F.2d 1325 (9th Cir. 1985). Accordingly,

IT IS ORDERED that Defendant's motion to dismiss is DENIED.

IT IS FURTHER ORDERED that Plaintiff's cross-motion for summary judgment is GRANTED.

As a result of the Court granting Plaintiff's motion for summary judgment, the Court additionally finds that the following Order should be entered.

IT IS FURTHER ORDERED that:

1. Any document or instrument which purports to create a ''lien,'' ''common law lien,'' ''writ of attachment,'' ''garnishment,'' ''commercial lien,'' ''public notice of default,'' ''public notice of default declared,'' or any other non-consensual lien or encumbrance filed by Defendant Sterling W. Wyatt against the person or property of any government employee or others who are authorized and/or performed any act in connection with the assessment or collection of Defendant Sterling W. Wyatt's income tax liabilities are declared null and void *ab initio*and declared to have no force and effect.

2. This Order may be filed and recorded by the United States in the Clerk's Office of McLennan County, Texas or any other county clerk's office in the state of Texas where such liens have been or will be filed by Defendant Sterling W. Wyatt.

IT IS FURTHER ORDERED that regardless of the nomenclature, caption, title, or terms used to describe the document, Sterling W. Wyatt is permanently enjoined from filing or attempting to file any document or instrument which purports to create a ''lien,'' ''common law lien,'' ''writ of attachment,'' ''garnishment,'' ''commercial lien,'' ''public notice of default,'' ''public notice of default declared,'' or any other non-consensual lien or encumbrance filed by Defendant Sterling W. Wyatt against the person or property of any government employee or others who are authorized and/or performed any act in connection with the assessment or collection of Defendant Sterling W. Wyatt's income tax liabilities. This injunction, however, shall not prevent Defendant Sterling W. Wyatt from applying to any state or federal court of competent jurisdiction in order to obtain relief for any non-frivolous legal claim, and this injunction shall not apply to or prohibit liens created by any court of competent jurisdiction.

IT IS FURTHER ORDERED that any willful violation of this Order by Defendant Sterling W. Wyatt shall result in the imposition of sanctions.

IT IS FURTHER ORDERED that the document styled ''PUBLIC NOTICE OF DEFAULT DECLARED'' filed in the McLennan County, Texas Public Records as instrument number 9730154 by Sterling W. Wyatt against Donald R. Kubiak and Pam Bigelow and that the document styled ''PUBLIC NOTICE OF DEFAULT'' filed in the McLennan County, Texas Public Records as instrument number 2002014176 by Sterling W. Wyatt against Charles O. Rossetti, K. Steven Burgess, J.D. Herrera, Donald Kubiak, and Nelda Wheeler are null and void and of no legal effect.

IT IS FURTHE ORDERED that Defendant Sterling W. Wyatt advise the Court in writing within eleven (11) days of the date of this Order of any additional filings of documents similar to those enumerated above against any government employees, the name of the individual or individuals listed in the document, the date and place of filing and other pertinent information relating to said filings in order for the Court to declare that those documents are likewise null and void and of no legal effect. Defendant is admonished that he will be ordered to appear in person in open court if he fails to comply with this Order.

IT IS FURTHER ORDERED that Defendant J.A. ''Andy'' Harwell, McLennan County Clerk, expunge from the public records of McLennan County, Texas, any document or instrument which purports to create a ''lien,'' ''common law lien,'' ''writ of attachment,'' ''garnishment,'' ''commercial lien,'' ''public notice of default,'' ''public notice of default declared,'' or any other non-consensual lien

or encumbrance filed by Defendant Sterling W. Wyatt against the person or property of any government employee or others who are authorized and/or performed any act in connection with the assessment or collection of Defendant Sterling W. Wyatt's income tax liabilities.

IT IS FURTHER ORDERED that Defendant J.A. "Andy" Harwell, McLennan County Clerk, expunge from the public records of McLennan County, Texas, the document styled "PUBLIC NOTICE OF DEFAULT DECLARED" filed in the McLennan County, Texas Public Records as instrument number 9730154 by Sterling W. Wyatt against Donald R. Kubiak and Pam Bigelow and the document styled "PUBLIC NOTICE OF DEFAULT" filed in the McLennan County, Texas Public Records as instrument number 2002014176 by Sterling W. Wyatt against Charles O. Rossetti, K. Steven Burgess, J.D. Herrera, Donald Kubiak, and Nelda Wheeler.

SIGNED this 25 day of June 2002.

WALTER S. SMITH, JR.

UNITED STATES DISTRICT JUDGE

¶2002-5140

ST. DAVID'S HEALTH CARE SYSTEM, INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Western Dist. of Texas, (DC TX) Docket No. A 01CA046 JN, July 9, 2002. District Court, (2002, DC TX) 89 AFTR 2d 2002-2998, 2002-1 USTC ¶50452, accepting in part and rejecting in part (2002, DC TX) 89 AFTR 2d 2002-2909, amended. Years 1996, 1997, 1998, 1999, 2000. Decision against Govt. in part.

1. Exempt orgs.—charitable purposes; community benefit—summary judgment. Amended final judgment was entered against govt. with respect to its erroneous revocation of taxpayer's IRC §501(c)(3) exemption, ordering it to refund amounts taxpayer paid toward revocation-year assessments and to reinstate/adjust taxpayer's accounts to correct for improper offsets. Also, govt. was allowed to file more than 10-page response to taxpayer's litigation costs request. *Reference:* United States Tax Reporter ¶5015.07(135); 5015.09(10). IRC §501.

United States District Court, Western District of Texas, Austin Division.

Amended Final Judgment

NOWLIN, Chief District Judge:

[1] This Amended Final Judgment modifies and supersedes the Court's Final Judgment dated June 14, 2002. This action came on for consideration on the motions for summary judgment filed by each of Plaintiff St. David's Health Care System, Inc. and Defendant United States of America. The motions for summary judgment having been duly considered and a decision having been rendered thereon on June 7, 2002, granting Plaintiff's motion and denying Defendant's motion,

IT IS ORDERED, ADJUDGED and DECREED that the Clerk enter judgment in favor of Plaintiff St. David's Health Care System, Inc. and against Defendant United States of America; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff St. David's Health Care System, Inc., having proved its entitlement to exemption from taxation for the year 1996 pursuant to Section 501(c)(3) of the Internal Revenue Code, shall have and recover of and from the Defendant United States of America the sum of (i) $818,452.00, plus statutory interest pursuant to IRC §§ 6621 and 6622 from August 23, 2000, until paid, and (ii) $43,327.00, plus statutory interest pursuant to IRC §§ 6621 and 6622 from December 21, 2000, until paid, and (iii) $326,546.71, plus statutory interest pursuant to IRC §§ 6621 and 6622 from January 5, 2001, until paid; all such amounts corresponding to the amounts previously paid under protest by Plaintiff to the United States with respect to alleged 1996 Federal income taxes; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the United States adjust its tax payment records to re-

instate each of the following amounts to the indicated St. David's tax account maintained in the records of the Internal Revenue Service, and that each such adjustment shall be reflected as being effective as of the date set forth below:

Amounts of adjustment	Type and period of tax record adjusted	Effective date of adjustment
$30,000.00	1999 Form 990-T	May 15, 2000
$23,000.00	2000 Form 990-T	May 15, 2001
$50,000.00	2000 Form 990-T	May 15, 2001

These amounts reflect payments made by St. David's for other purposes, but applied by the Government towards 1996 federal income tax liability. These amounts should not be paid as a refund to plaintiff but should instead be reapplied to the accounts from which they were offset.

All costs of Court are hereby rendered against Defendant United States of America. All writs and processes necessary for the enforcement and collection of this Judgment or the costs of Court may issue as necessary. Award of attorneys' fees, if any, will be by subsequent order pursuant to Local Rule CV-7(i). All other relief not expressly granted herein is hereby denied. This is a final Judgment.

SIGNED this 9th day of July, 2002.

THE HONORABLE JAMES R. NOWLIN

CHIEF UNITED STATES DISTRICT JUDGE

Order Granting United States' Unopposed Motion for Leave to File Response in Excess of Ten Pages to Plaintiff's Application for Litigation Costs

The Court, having considered the United States' unopposed motion for leave to file a response that exceeds ten pages to St. David's Health Care System, Inc.'s (''Plaintiff'') Application for Litigation Costs (''Application''), in the above referenced case, has determined that the motion shall be granted. Accordingly, it is hereby

ORDERED that the motion is granted and that the United States may file a response to Plaintiff's Application that exceeds ten pages.

SIGNED this 8th day of July, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5141

UNITED STATES OF AMERICA v. Rosemary DEPAOLI. UNITED STATES OF AMERICA v. Frank KRESOCK. UNITED STATES OF AMERICA v. Frank KRESOCK. UNITED STATES OF AMERICA v. Rosemary DEPAOLI. U.S. Court of Appeals, Third Circuit, (CA3) Docket Nos. 00-2212, 00-2238, 00-2422, and 00-2427; Appellant in No. 00-2212; Appellant in No. 00-2238; Appellant in No. 00-2422; Appellant in No. 00-2427, July 22, 2002. District Court affirmed. Years 1992, 1993, 1994. Decision against Taxpayers and against Govt.

1. Tax crimes—tax evasion; filing false returns—motion for bill of particulars—jury instructions—evidence. Married doctors' convictions and sentences for tax evasion, filing false corp. tax returns and aiding in filing of false corp. returns as 50% shareholders of medical corp. were affirmed: bill of particulars wasn't warranted where govt. provided sufficiently specific and detailed indictment that allowed adequate defense and avoided prejudicial surprise at trial, and provided taxpayers with considerable pretrial discovery and explanation of its case. And, willfulness and good faith defense instructions didn't mislead jury since they clearly indicated burden of proving willfulness was on govt. and didn't require taxpayers to have objectively reasonable belief. Taxpayers' claim that jury should have been instructed that corp. expenditures for shareholders' benefit shouldn't be treated as personal income until they exceeded outstanding shareholder loans to their corp. was rejected where applicable case law required govt. to prove taxpayers' control over di-

verted funds, not character of funds. Also, fact that trial judge and taxpayers' CPA belonged to same church didn't warrant judge's recusal, and error in admitting IRS agent's expert opinion testimony regarding taxpayers' intent to avoid taxes was harmless. *Reference:* United States Tax Reporter ¶72,015.04(5); 72,065.01(5); 73,446.506(15); 73,446.514(25); 73,447.505(10). IRC §7201; 7206.

Martin C. Carlson United States Attorney. William S. Houser (argued) Assistant U.S. Attorney U.S. Attorney's Office Suite 309, Federal Building Scranton, PA 18501 Attorneys for Appellee-Cross-Appellant United States of America
Peter Goldberger (argued) Pamela A. Wilk 50 Rittenhouse Place Ardmore, PA 19003-2276 Attorneys for Appellant-Cross-Appellee Rosemary DePaoli
Peter T. Campana Campana & Lovecchio, LLP 602 Pine Street Williamsport, PA 17701 Attorneys for Appellant-Cross-Appellee Frank Kresock

On Appeal from the United States District Court for the Middle District of Pennsylvania D.C. Crim. Nos. 99-cr-00026-1 and 99-cr-00026-2 Honorable James F. McClure, Jr., District Judge. United States Court of Appeals for the Third Circuit.

Before: SCIRICA and GREENBERG, Circuit Judges, and FULLAM, District Judge*

OPINION OF THE COURT

GREENBERG, Circuit Judge.

NOT PRECEDENTIAL

I. BACKGROUND & PROCEDURAL HISTORY

This criminal case is before the court on appeal and cross-appeal from judgments of conviction and sentence. A grand jury returned a nine-count indictment charging husband and wife defendants Frank Kresock and Rosemary DePaoli with income tax evasion and related charges. In particular, the indictment charged each defendant with three counts of income tax evasion, in violation of 26 U.S.C. § 7201, relating to their joint personal income tax returns for years 1992, 1993 and 1994, DePaoli with filing false corporate income tax returns for the same three years, in violation of 26 U.S.C. § 7206(1), and Kresock with aiding and abetting the filing of the false corporate returns, in violation of 26 U.S.C. § 7206(2).

Appellants are medical doctors: Kresock is a cardiologist and DePaoli is a dermatologist. In 1988, they formed Columbia Medical Group, Inc. "CMG," a medical corporation. Each appellant owned one-half of the shares in CMG and both acted as the corporation's employees, lessors and creditors. William J. Roll, CPA, acted as their accountant and designed CMG's accounting procedures. The system provided for appellants to use checks and check stubs, adding expense codes, to record CMG's income and expenses. Appellants' practice was to send their accountant copies of the corporate check stubs, bank statements, and payroll information monthly.

In 1995, a routine IRS audit of CMG's 1993 corporate tax return led to a criminal investigation and ultimately the indictments and convictions involved here. The evidence at trial showed, inter alia, that appellants used CMG funds to purchase thousands of dollars worth of guns and jewelry, which were coded as "office supplies." Appellants also purchased numerous vehicles, including a Ferrari Testarossa and Harley Davidson motorcycles, with corporate funds. Additionally they used CMG funds to renovate their vacation home, purchase jewelry, gold coins and many other personal items and services, including child care, home furnishings, groceries, diapers, children's toys, tampons and mustache wax. Many of Kresock's receipts were altered. Appellants did not declare the personal expenses they paid for with CMG funds as income on their personal tax returns. Instead the expenses frequently were treated as business-related items on CMG's corporate returns.

* Honorable John P. Fullam, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

Evidence showed that appellants took steps to conceal the personal nature of the corporation's expenditures by falsely coding the check stubs to make the expenses appear business related. As an example, the purchase of a Harley Davidson motorcycle was coded as "equipment rental" for a cardiac echo machine. Defendants also omitted income on their personal tax returns from other sources, including fees from speaking engagements and for work performed at Bloomsburg Hospital. Overall the evidence of the appellants' guilt was overwhelming and, indeed, they understandably do not contend that the verdicts were against the weight of the evidence.

At the trial in the district court, the jury returned a verdict of guilty as to both appellants on all charges. The court sentenced Kresock to serve 20-month concurrent custodial terms to be followed by three-year concurrent terms of supervised release and DePaoli to serve 16-month current custodial terms to be followed by three-year concurrent terms of supervised release. DePaoli was to commence her custodial term when Kresock was released from imprisonment. The appellants have appealed and the United States has cross-appealed from the judgments insofar as they imposed sentences.

II. DISCUSSION

[1] Appellants first contend that the district court erred in denying their pretrial motions for bills of particulars. We consider this point on an abuse of discretion basis. See United States v. Eufrasio, 935 F.2d 553, 575 (3d Cir. 1991).

The purpose of a bill of particulars is to inform the defendant of the nature of the charges against him. See United States v. Addonizio, 451 F.2d 49, 63 (3d Cir. 1971). It is not intended to be a discovery device. See United States v. Smith, 776 F.2d 1104, 1111 (3d Cir. 1985). Thus, its purpose is to give the defendant only the information necessary to permit him to conduct his own investigation. See id. A trial judge has broad discretion in considering a motion for a bill of particulars, but the court should grant a motion seeking a bill of particulars when an indictment's failure to provide factual or legal information "significantly impairs the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial." United States v. Rosa, 891 F.2d 1063, 1066 (3d Cir. 1989).

In this case, the indictment sufficiently informed the appellants of the nature of the charges against them, and provided them with sufficient information to prepare an adequate defense and avoid prejudicial surprise at trial. For example, broken down by the years 1992, 1993, and 1994, the indictment charged appellants with income tax evasion, subscribing to a false tax return, and aiding and assisting the preparation of a false tax return. Furthermore, the government provided appellants with considerable pretrial discovery and explained its theories of the case in writing in advance. In the circumstances, we are satisfied that appellants understood the nature of and, indeed, had considerable details of the charges against them. Accordingly, we cannot say that the court erred in denying the motions for a bill of particulars.

Appellants argue that the jury instruction on the elements of income tax evasion was unclear and permitted personal income tax evasion convictions for acts not charged in the indictment. Inasmuch as appellants did not object to the instructions during the charging conference or when the instruction was given, we consider this contention on a plain error basis. See Fed. R. Crim. P. 52(b); United States v. Dalfonso, 707 F.2d 757, 760 (3d Cir. 1983).

The appellants' particular objection is that the instructions failed to specify that the jury to convict was required to find that they knowingly filed personal tax returns each year which understated their joint taxable income. They argue that the jury instructions broadened the possible bases of conviction beyond that charged in the indictment. In support of their argument, appellants quote a small portion of the charge in which the court stated that the appellants' tax evasion was attempted:

> by filing and causing to be filed ... a false and fraudulent joint U.S. individual income tax return ... wherein it was

> stated that their joint taxable income for [1992] was the sum of $519,357 ... whereas ... [they knew the correct figure] was substantially in excess of that ... and that upon said additional joint taxable income a substantial additional tax was due.

App. at 290–91. Appellants complain that this instruction was ambiguous and that the jury may not have known that it was to "focus exclusively on the omission of income from the personal returns as the 'act of evasion.'" Appellants' Jt. Reply Br. at 4. Appellants point out that the record was "replete" with testimony about their conduct that the jury could have viewed as affirmative acts undertaken with the intent of tax evasion. They complain that nothing in the jury charge told the jury that it could convict on the personal evasion counts only if it found that they had attempted to evade income taxes by filing what they knew to be a false personal return which omitted income. This omitted income includes the imputed income appellants derived from the value of CMG's funds that were incurred for their personal benefit. See Appellants' Br. at 40.

We reject this contention as we are satisfied that the ambiguity of which appellants complain is not real and we see no reason to believe that the jury failed to understand that to convict it had to find beyond a reasonable doubt that appellants knowingly filed personal tax returns that understated their joint taxable income. We cannot believe that the jury, when it considered the charge, did not understand the elements of the offenses involved here.

Appellants claim that the court's charge to the jury on "willfulness" and "good faith" confused the jury into applying the "objective reasonableness" approach prohibited by Cheek v. United States, 498 U.S. 192 [67 AFTR 2d 91-344], 111 S.Ct. 604 (1991). We review the instructions on this point on a plenary basis for legal correctness but on an abuse of discretion basis on matters of phrasing. See United States v. Zehrbach, 47 F.3d 1252, 1260 (3d Cir. 1995). Here we are satisfied that viewed in its entirety the court's charge on "willfulness" and "good faith" left no doubt that the defense of "good faith" need not be objectively reasonable. Moreover, the instructions clearly set forth that the burden of proving willfulness rested with the government.

> With regard to willfulness, the district court stated in part: [T]he government must prove beyond a reasonable doubt that each defendant acted willfully. To act willfully means to act voluntarily and deliberately and intending to violate a known legal duty .... The word willfully as used in these instructions means a voluntary intentional violation of a known legal duty, in other words, the defendant must have acted voluntarily and intentionally with the specific intent to do something he or she knew the law prohibited, that is to say with intent either to disobey or to disregard the law.

App. at 298–300.

With regard to the "good faith" defense, appellants argue that the district court led the jury to believe that it was their burden to show good faith and that their belief must have been objectively reasonable. Appellants contend that the court's statement that "[i]f a person acts without reasonable grounds for belief that his or her conduct is lawful, it is for the jury to decide whether that person has acted in good faith ..." violated United States v. Powell, 955 F.2d 1206 [69 AFTR 2d 92-726] (9th Cir. 1991).

The district court stated:

> Now, the good faith of a defendant is a complete defense to the tax charges in the indictment because good faith is simply inconsistent with willfully attempting to evade or defeat any tax, subscribing to a false return or aiding and assisting the preparation of a false tax return.
>
> While the term good faith has no precise definition, it means, among other things, an honest belief, a lack of malice, and the intent to perform all lawful obligations. A person who acts on a belief or on an opinion honestly held is not punishable under this statute merely be-

> cause that honest belief is unreasonable or turns out to be incorrect or wrong . . . . If a person acts without reasonable grounds for belief that his or her conduct is lawful, it is for the jury to decide whether that person has acted in good faith in order to comply with the law or whether that person has willfully attempted to evade or defeat the tax, subscribed to a false return, or aid and assist the preparation of a false tax return.
>
> A person who believes that his or her tax return truthfully reports the taxable income and allowable deductions under the tax law acts in good faith and cannot be found guilty of willfully committing the offenses charged in the indictment . . . . The burden of proving good faith does not rest with the defendants because the defendants have no obligation to prove anything to you. The government has the burden of proving to you beyond a reasonable doubt that each defendant acted willfully.

App. at 301–04. In context, the court's instructions on willfulness and good faith did not mislead the jury as to the burden of proof and did not lead the jury into believing that the "good faith" defense required appellants to have an objectively reasonable belief in the propriety of their actions. Thus, the court's charge captures both the spirit and the letter of the law as set forth in Cheek and is not contrary to Powell.

Appellants unsuccessfully sought jury instructions to the effect that corporate expenditures for the benefit of shareholders are not treated as personal income until they exceed in amount all outstanding shareholder loans to the corporation and that a corporation cannot generate dividend income in the absence of earnings and profits. See United States v. D'Agostino, 145 F.3d 69 [81 AFTR 2d 98-1923] (2d Cir. 1989). Appellants assert that their receipt of benefits from CMG would not be taxable if those benefits served to reduce the principal amount of a loan balance outstanding. See Appellants' Jt. Reply Br. at 6. They add that their intent, no matter how subjectively fraudulent, cannot create liability if they did not receive income but instead were repaid for their loans. See id. Appellants contend that the D'Agostino instruction was necessary to show that there was no deficiency in tax and that the instruction they request would not have been contrary to our opinion in United States v. Goldberg, 330 F.2d 30, 38 [13 AFTR 2d 938] (3d Cir. 1964). We review a refusal to give a requested instruction on an abuse of discretion basis, evaluating "whether the proffered instruction was legally correct, whether or not it was substantially covered by other instructions, and whether its omission prejudiced the defendant." United States v. Pitt, 193 F.3d 751, 755–56 (3d Cir. 1999).

In Goldberg, we noted that the government need not fix a precise label on diverted funds since "substance controls over form, and taxation is concerned with the actual command over the property taxed." Id. at 38. A number of other courts have agreed that the government need not prove the character of diverted funds, rejecting the D'Agostino rationale. See United States v. Williams, 875 F.2d 846, 849–52 [64 AFTR 2d 89-5061] (11th Cir. 1989); United States v. Miller, 545 F.2d 1204, 1213–14 [39 AFTR 2d 77-364] (9th Cir. 1976); Davis v. United States, 226 F.2d 331, 335–36 [47 AFTR 2016] (6th Cir. 1955). These courts have stressed the distinction between a civil collection action and a criminal tax proceeding by noting that:

> In civil tax cases the purpose is tax collection and the key issue is the establishment of the amount of tax owed by the taxpayer. In a criminal tax proceeding the concern is not over the type or the specific amount of tax which the defendant has evaded, but whether he has wilfully attempted to evade the payment or assessment of tax.
>
> The difficulty in automatically applying the constructive distribution rules in this case is that it completely ignores one essential element of the crime charged: the willful attempt to evade taxes, and concentrates solely on the nature of the funds diverted. That latter aspect is not the important element. Where

the taxpayer has sought to conceal income by filing a false return, he has violated the tax evasion statutes.

Miller, 545 F.2d at 1214; see also Williams, 875 F.2d at 850. Indeed, the Court of Appeals for the Second Circuit has acknowledged that its view in D'Agostino does not state the prevailing rule. See United States v. Bok, 156 F.3d 157, 162 [82 AFTR 2d 98-6383] (2d Cir. 1998).

We also point out that in D'Agostino, unlike in this case, the government conceded that the defendant's corporation had no earnings or profits. Here, there was evidence supporting a conclusion that, when adjustments were made for personal items falsely labeled as business expenses, CMG showed a profit for each year charged in the indictment. Additionally, even though appellants complain that the diverted funds could have been accounted for lawfully as return of capital or repayment of a loan and that there would have been no or very little taxable income if corporate income diverted by appellants had been accounted for by issuance of 1099 forms, there was no evidence from which it could be in-ferred that the diverted income was accounted for in this way. Accordingly, we will not stray from Goldberg, which requires the government to prove the taxpayer's "actual command" over the property taxed rather than fix a precise label or prove the character of the diverted funds.

Appellant Kresock filed a motion to recuse the district judge, who, during the pretrial conference, revealed to counsel that he and William Roll, appellants' CPA, belonged to the same church and were involved in church activities. We consider the appeal from the court's denial of the motion on an abuse of discretion basis. See Securacomm Consulting, Inc. v. Securacom, Inc., 224 F.3d 273, 278 (3d Cir. 2000).

Under 28 U.S.C. § 455:

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) [The judge] shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

In considering this issue we determine whether an objective observer reasonably might question the judge's impartiality. See Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n, 107 F.3d 1026, 1042 (3d Cir. 1997). In its opinion declining to recuse the court noted, quoting Hadler v. Union Bank and Trust Co., 765 F. Supp. 976, 977 (S.D. Ind. 1991) (internal quotation marks omitted) that "it is beyond the bounds of reasonable supposition to infer that a judge would abandon his obligation of impartiality merely because a friend is a witness in a case in which that judge is presiding. That is why practically every federal court faced with arguments for recusal based on friendship has found recusal unnecessary." App. at 22. In this case, the judge and the witness did not have a close personal relationship. Instead, the judge merely was acquainted with the witness through church involvement. Moreover, we see no reason to believe that the judge's acquaintance with the witness affected the outcome of sentencing. Indeed, we note that neither appellant has appealed from his or her sentence, which, considering the situation in which they were in, were favorable to them. In fact, it is the government which is appealing from the sentences. Overall, we are satisfied that the district court properly denied the motion to recuse.

Appellants argue that the court committed plain error in allowing testimony from IRS agent Christopher Roginsky who was a summary witness who observed the trial and testified as to the amount of criminal tax due and owing from the defendants based on the evidence. See Fed. R. Crim. P. 52(b). Appellants argue that they received inadequate pretrial notice of Roginsky's testimony and that his testimony violated Fed. R. Evid. 704(b).

Before trial, appellants filed an unsuccessful motion under Rule 16(d)(2) to exclude Roginsky's testimony to the extent that he proposed to testify as an expert on tax preparation. The government, however, identified Roginsky as a summary witness who would offer a summary of tax calculations at the end of the government's case, based on the evidence presented at trial. Appellants complain that Roginsky's testimony went beyond his role as a summary witness when he offered expert opinion on their intent to avoid taxes.

On cross-examination appellants tried to create the impression that there would have been no corporate tax due and owing if their accountant simply had issued form 1099s to appellants on behalf of the corporation. Thus, the line of questioning suggested that corporate profit, and appellants' resulting liability, were consequences of the accountant's error. On redirect examination, the government asked the following questions to rebut the suggestion that the accountant was responsible for creating corporate profit:

> Q: Now, Mr. Borden asked you a couple of questions about if there had been 1099's issued and if things had been done a certain way what the effect would have been on the corporate tax; is that correct?
>
> A: Yes, I remember those questions.
>
> Q: Why is it that you calculated a corporate tax due and owing in this case?
>
> A: The items which comprised the corporate adjustments represent expenses that are not business expenses. They were expenses personal expenses related to the shareholder, nonbusiness items. Had the shareholders had the intention of deducting them as business expenses, they would have been wait, let me step back. Had they been legitimate business expenses they would have been allowed. Had the shareholders' intention been otherwise, that was additional compensation, they would have followed that route when they were coding the checks, placing them in the general ledger, et cetera.
>
> Q: Okay, and that wasn't done here, correct.
>
> A: No, it was not.

Supp. app. at 492–93.

Although they did not object at the time, appellants now contend that Roginsky's answer was highly prejudicial and that he improperly expressed an opinion as to their intent. See Appellants' Br. at 74 (citing United States v. Watson, 260 F.3d 301, 308 (3d Cir. 2001) for proposition that reversal is required when expert offers opinion about defendant's intention). The government responds that in the disputed testimony, Roginsky merely stated that ap-pellants' treatment of the funds from CMG was inconsistent with an intention to consider those payments to be compensation as appellants had suggested, and that the opinion was not tantamount to an opinion regarding appellants' willfulness to evade income taxes. In any event, it points out that Roginsky's testimony covers 75 transcript pages and that the challenged testimony was not repeated.

In fact, from the start of Roginsky's testimony, the government made clear that he had been asked to assume that expenses paid by CMG to appellants were personal rather than business expenses. The fact that he began with this assumption and that his testimony was not intended to prove the intent of appellants was repeated throughout his testimony. See Br. of Appellant/Cross-Appellee at 71–73 (citing pages of transcript). Thus, even if a single, isolated portion of the agent's testimony was improper, it would not require reversal.

To reverse a conviction under Rule 52(b), plain error must affect substantial rights. See United States v. Olano, 507 U.S. 725, 735, 113 S.Ct. 1770, 1778 (1993). The appellant bears the burden of persuasion, and "[i]n most cases," the substantial rights requirement "means that the error must have been prejudicial: [i]t must have affected the outcome of the district court proceedings." Id. at 734, 113 S.Ct. at 1778. Here, the testimony was a brief statement in the midst of lengthy testimony and the agent's statements did not

directly address appellants' intention to evade the payment of income taxes. In the circumstances, it is difficult to characterize the error as plain.

Moreover, even if the error was plain, there has been no specific showing of prejudice. We cannot believe that in the face of the overwhelming evidence supporting the convictions that the statement affected the outcome of the trial. Thus, appellants are not entitled to a new trial: the alleged error was not of constitutional dimension, and there is a ''high probability'' that the error did not contribute to the conviction. See United States v. Molina-Guevara, 96 F.3d 698, 703 (3d Cir. 1996). The error was harmless.

III. CONCLUSION

We have reviewed all the other points raised by the parties, including those the government has advanced on the cross-appeal, and we are satisfied that we have no basis to reverse by reason of any of them. Consequently, we will affirm the judgments of conviction and sentence entered July 20, 2000.

TO THE CLERK:

Please file the foregoing opinion.

Morton I. Greenberg

Circuit Judge

DATED: July 22, 2002

¶2002-5142

Kevin and Deborah MACLEOD, PLAINTIFFS v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Southern Dist. of California, (DC CA) Docket No. 01-CV-2320 H (JAH), June 7, 2002. Decision for Govt.

1. Actions against IRS—Privacy Act; FOIA; Federal Tort Claims Act—unauthorized collection. Pro se taxpayers' action to compel IRS to amend tax records under FOIA or Privacy Act was dismissed with prejudice: taxpayers didn't allege that IRS improperly withheld records from them or otherwise state claim under FOIA, which provided only for production, not amendment of records; and Privacy Act didn't cover claim since it involved records relating to actual or possible tax liability. Also, FTCA barred tax-related tort claims against govt. or its employees; and ambiguous reference to IRC §7433, unaccompanied by any cite to specific statute allegedly violated by IRS employees, didn't state viable claim for relief or show exhaustion of administrative remedies thereunder. *Reference:* United States Tax Reporter ¶76,556.502(75); 76,556.504; 76,557.53(12); 74,335.01(7). IRC §7433.

Kevin and Debbie Macleod 7023 Coleshill Drive San Diego, CA 92119-1340
Jennifer L. Best US Department of Justice Tax Division Post Office Box 227 Ben Franklin Station Washington, DC 20044
US Attorney's Office Southern District of California Civil Division 880 Front Street Suite 6253 San Diego, CA 92101

United States District Court, Southern District of California.

Order Granting Defendant's Motion to Dismiss

HUFF, Chief District Judge:

Plaintiffs Kevin and Deborah Macleod, proceeding *pro se*, filed the above-captioned action against Defendant Internal Revenue Service (''IRS'') on December 18, 2001. Defendant filed a Motion to Dismiss on February 20, 2002. Plaintiffs filed an Opposition to the Motion to Dismiss on March 11, 2002. No reply was filed, and the motion is submitted on the papers without oral argument, pursuant to Local Rule 7.1.

BACKGROUND

This case arises from an on-going dispute over Plaintiff's tax liability. Prior to the filing of this case, Plaintiffs filed two other actions against the IRS in federal district court, both of which have been dismissed and terminated.[1]

In this latest Complaint, Plaintiffs fail to state a claim for relief. According to the IRS, Plaintiffs submitted a request for ac-

[1] See Macleod v. Internal Revenue Service, Case No. 99-CV-1088; Macleod v. Internal Revenue Service, Case No. 01-CV-0125.

cess to information and a request to amend their tax records, ostensibly pursuant to the FOIA and the Privacy Act. Plaintiffs sent the request to the IRS's Laguna Niguel Disclosure Office by fax on July 24, 2001. The Laguna Niguel Disclosure Office released 307 pages of responsive documents by letter dated October 2, 2001. The letter also informed Plaintiffs that records pertaining to the determination, collection, or payment of federal taxes are not subject to amendment under the Privacy Act. The Laguna Niguel Disclosure Office sent a follow-up letter, dated October 11, 2001, to restate that I.R.C. Section 7852(e) precluded the amendment of Plaintiff's tax records.

Plaintiff Kevin Macleod replied by letter dated October 24, 2001, indicating that he disagreed with the determination that his tax records were exempt from amendment and requesting an administrative review. The Laguna Niguel office responded by letter dated December 19, 2001, informing Plaintiff Kevin Macleod that he should write to the national office in order to pursue an administrative review. Nothing in the Complaint alleges that Plaintiffs have pursued an administrative claim alleging unauthorized collection action.

DISCUSSION

I. Standards on a Motion to Dismiss

Defendant moves for dismissal of all of Plaintiffs' claims under both Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim) and Federal Rule of Civil Procedure 12(b)(1) (lack of federal jurisdiction).

A. 12(b)(6)

Generally, the issue to be decided on a motion to dismiss is not whether a plaintiff's claims have merit but whether the moving defendant has shown beyond doubt that the plaintiff can prove no set of facts entitling it to relief. See Conley v. Gibson, 355 U.S. 41 (1957); Church of Scientology v. Flynn, 744 F.2d 694, 696 (9th Cir. 1984). Courts grant 12(b)(6) relief only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).

In deciding a motion to dismiss, the complaint must be construed in the light most favorable to plaintiff. See Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980). Dismissal is proper if the complaint is vague, conclusory, and fails to set forth any material facts in support of the allegation. See North Star Intern v. Arizona Corp. Comm'n, 720 F.2d 578, 583 (9th Cir. 1983). However, courts must assume that all general allegations "embrace whatever specific facts might be necessary to support them." Peloza v. Capistrano Unified School District, 37 F.3d 517 (9th Cir. 1994). Additionally, the allegations of the complaint must be taken as true for purposes of a decision on the pleadings. Hughes v. Rowe, 449 U.S. 5, 10 (1980) (per curiam). To dismiss with prejudice, it must appear to a certainty that the plaintiff would not be entitled to relief under any set of facts that could be proven. See Reddy v. Litton Indus., 912 F.2d 291, 293 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991).

B. 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) allows litigants to seek the dismissal of an action from federal court for lack of subject matter jurisdiction. When subject matter jurisdiction is challenged under Federal Rule of Procedure 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion. See Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th cir. 1989). "A plaintiff suing in a federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment." Smith v. McCullough, 270 U.S. 456, 459 (1926).

II. Analysis

Although Plaintiffs' Complaint only ambiguously refers to certain statutory and legal bases for suit against the IRS, the

Court will liberally construe the Complaint to encompass a number of possible claims. See Garaux v. Pulley, 739 F.2d 437, 439 (9th Cir. 1984) (''This circuit has long had a rule of liberal construction of pleadings presented by pro se litigants, particularly when a motion to dismiss under Rule 12(b)(6) is being considered.'').

A. Plaintiffs Have Not Stated an FOIA or Privacy Act Claim

[1] The Court First addresses Plaintiffs' attempt to use the FOIA or the Privacy Act to force the IRS to amend Plaintiffs' tax records.[2] Nothing in Plaintiffs' pleading papers would permit the Court to provide the relief Plaintiffs have requested under either of these statutes.

The FOIA confers jurisdiction on the district courts ''to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld.'' § 552(a)(4)(B). Under this provision, ''federal jurisdiction is dependent on a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.''' U.S. Dept. of Justice v. Tax Analysts, 109 S.Ct. 2841, 2846 [63 AFTR 2d 89-1492] (1989) (quoting Kissinger v. Reporters Committee for Freedom of Press, 445 U.s. 136, 150 (1980)). Unless each of these criteria is met, a district court lacks jurisdiction to devise remedies to force an agency to comply with the FOIA's disclosure requirements. Id.

Plaintiffs have not shown that this Court has jurisdiction over an FOIA claim. Plaintiffs attempt to use the FOIA as a basis for their request that the Court order the IRS to amend Plaintiffs' tax records to expunge all records pertaining to the assault charges. However, the FOIA only allows federal courts to order an agency to provide documents; it does not provide federal courts with the power to require agencies to amend or change their records. See id. Plaintiffs' Complaint does not allege that the IRS has withheld any agency records. Additionally, nothing in the Complaint alleges the Plaintiffs have requested certain documents under the FOIA or that the IRS has withheld any documents from them. Without this showing, Plaintiffs have failed to meet the jurisdictional requirement for bringing an FOIA claim. The Court must dismiss any such claim.

Plaintiffs also have not shown that this Court has jurisdiction over a Privacy Act claim. The Privacy Act permits an individual to review agency records that contain information pertaining to that individual. 5 U.S.C. § 552a(d)(1). In addition, the individual is permitted to request amendment of a record that pertains to him, 5 U.S.C. § 552a(d)(2), and the agency is required promptly either to ''make any correction of any portion thereof which the individual believes is not accurate, relevant, timely or complete,'' 5 U.S.C. § 552a(d)(2)(B)(i), or to inform the individual of its refusal to amend the record and the reason for the refusal, 5 U.S.C. § 552a(d)(2)(B)(ii). The individual who disagrees with the refusal of the agency to amend its records is permitted to seek review of that decision. 5 U.S.C. § 552a(d)(3). If the reviewing official refuses to amend the record, the individual may file with the agency a statement setting forth the reasons for his disagreement with the agency's decision, 5 U.S.C. § 552a(d)(3), and he may bring a civil action in the United States district court against the agency, 5 U.S.C. § 552a(g)(1)(A).

Congress has, however, limited the applicability of the Privacy Act's remedial provisions with regard to records maintained by the IRS. Section 7852 of the Internal Revenue Code provides: ''[t]he provides of subsection (d) (2), (3), and (4) and (g) of section 552a of title 5, Unite States Code, shall not be applied, directly or indirectly, to the determination of the existence or possible existence of liability (or amount thereof) of any person for any tax, penalty, interest, fine, forfeiture, or other imposition or offense to which the provisions of this title apply.'' 26 U.S.C. § 7852(e). Consequently, the district court is without jurisdiction over a civil action by

[2] The Complaint states: ''We have made Privacy Act, FOIA and (Title 5 §552a) requests to the I.R.S. Disclosure office and to the T.I.G.T.A. Disclosure office to amend our file after receiving prior Privacy Act and F.O.I.A. requests. Both Disclosure offices have refused to amend.''

an individual who seeks to amend a record relating to the determination of actual or possible tax liability. England v. C.I.R., 798 F.2d 350, 352 [58 AFTR 2d 86-5618] (9th Cir. 1986).

Plaintiffs want to amend their IRS records to eliminate from them any documents related to Mr. Macleod's alleged complaints against IRS agents who were working to assess the Macleod's tax liability for previous tax years. These records, though, are related to the IRS's ability to determine the Macleod's past and future tax liability. Cf. England, 798 F.2d at 352 (finding a "direct relationship" between documents flagging an individual's record as a tax protestor and the determination of his tax liability). Consequently, these records are excluded from amendment under the Privacy Act and the Court has no jurisdiction to hear this claim. See England, 798 F.2d at 351–52. There is no set of facts that would allow Plaintiffs to receive the relief they have requested under these two statutes, and therefore the Court must dismiss the claims under the Privacy Act and the FOIA with prejudice.

IV. Plaintiffs Cannot Maintain a Tort Claim Under the Tort Claims Act

Plaintiffs' tort claim against the United States and its employees fails under the theory of sovereign immunity. The Complaint names the IRS and the Treasury Department as defendants, and it appears to seek damages from five IRS employees and three TIGTA employees for "incompetence, life endangerment, collusion, conspiracy, and giving false testimony" pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*.

It is well settled that the United States is a sovereign, and, as such, is immune from suit unless it has expressly waived such immunity and consented to be sued. United States v. Shaw, 309 U.S. 495, 500–01 (1940); Hutchinson v. United States, 677 F.2d 1322, 1327 [50 AFTR 2d 82-5117] (9th Cir. 1982). "It is axiomatic that the United States may not be sued without its consent and that the existence of such consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206 (1983). Therefore, absent a waiver of sovereign immunity an action must be dismissed for lack of subject matter jurisdiction. Gilber [sic, Gilbert] v. DaGrossa, 756 F.2d 1455, 1458 [56 AFTR 2d 85-5567] (9th Cir. 1985).

Plaintiffs attempt to pursue a damage award against government employees under the Federal Tort Claims Act ("FTCA"). The Federal Tort Claims Act is a general waive of sovereign immunity that allows a private litigant to bring causes of action for state law torts against the United States and its employees acting in the scope of their employment. See 28 U.S.C. § 1346(b). However, the Federal Tort Claims Act does not apply to "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty . . ." 28 U.S.C. § 2680(c); see also Hutchinson v. United States [82-1 USTC ¶ 9405 [50 AFTR 2d 82-5117]], 677 F.2d 1322, 1327 [50 AFTR 2d 82-5117] (9th Cir. 1982). Because the conduct about which Plaintiffs complain is not covered by the FTCA's waiver of sovereign immunity, the FTCA does not give this Court jurisdiction over Plaintiffs' tort claims. Plaintiff has failed to show that the United States has waived its immunity under the FTCA or another statutory source, and therefore the Court must also dismiss Plaintiffs' tort claims. Because sovereign immunity bars Plaintiffs' tort claims completely, the Court dismisses such claims with prejudice.

III. Plaintiffs Have Not Alleged an Unauthorized Collection Action

The Court is also willing to construe its ambiguous reference to "Title 26 § 7433" as representing a claim for unauthorized collection action pursuant to 26 U.S.C. § 7433. However, Plaintiffs fail to allege any facts to support such claim.

Section 7433 of the Internal Revenue Code provides a means to recover damages against the United States "[i]f in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under

this title . . . . '' 26 U.S.C. § 7433(a). In order to make out a claim under Section 7433(a), a claimant must demonstrate that an employee of the IRS violated a specific section of the Internal Revenue Code or Treasury Regulations in collecting taxes from the claimant. See id.; see also Miller v. United States, 66 F.3d 220, 222 [76 AFTR 2d 95-6584] (9th Cir. 1995).

First, Plaintiffs' Complaint fails to identify a specific section of the Internal Revenue Code that the IRS employees allegedly violated. Instead, Plaintiffs make vague allegations charging government employees with ''incompetence, life endangerment, collusion, conspiracy, and giving false testimony.'' These vague and conclusory allegations are not enough to overcome a motion to dismiss.

Moreover, Plaintiffs have not shown that they have exhausted their administrative remedies. Under 26 C.F.R. § 301.7422-1(e), a claimant seeking damages under Section 7433 must, inter alia, send a claim in writing to the District Director of the district in which the taxpayer resides. The claim must include the grounds for the claim, a description of the injuries in-curred, and the dollar amount of the claim. Id. Plaintiffs have not presented evidence of their compliance with 26 C.F.R. § 301.7433-1(e), nor do they allege that they have complied. Consequently, the Court must dismiss any Section 7433 claim.

CONCLUSION

For the reasons provided above, the Court GRANTS Defendant's Motion to Dismiss Plaintiffs' Complaint with prejudice, as Plaintiffs have not alleged facts to support a possibility of relief under the law.

IT IS SO ORDERED.

Date: 6/7/02

MARILYN L. HUFF, Chief Judge

UNITED STATES DISTRICT COURT

Copies to:

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Southern District of California

Civil Division

880 Front Street

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San Diego, CA 92101

¶2002-5143

UNITED STATES OF AMERICA, PLAINTIFF v. Billie TARNOVE, DEFENDANT and Billie Tarnove Morrison, P.A., GARNISHEE. U.S. District Court, Southern Dist. of Florida, (DC FL) Docket No. 97-7444-CIV-ZLOCH, June 11, 2002. Decision for Govt.

1. Surrender of property subject to levy—garnishment. Govt. was granted writ of continuing garnishment against taxpayer-attorney who failed to surrender property subject to levy under IRC §6332(a)(d). *Reference:* IRC §63,325.01. IRC §6332.

United States District Court, Southern District of Florida.

Writ of Garnishment

ZLOCH, Chief District Judge:

[1] THIS MATTER is before the Court upon Plaintiff, United States of America's, Application For Writ of Continuing Garnishment (DE 28). The Court has carefully reviewed the merits of said Application and the entire record in this matter.

The Court notes that Final Summary Judgment (DE 21) was entered herein in favor of the Plaintiff, the United States of America, and against the Defendant, Billie Tarnove, whose last known address is 507

S.E. 11th Court, Fort Lauderdale, Florida 33316, for failure and refusal to surrender property subject to a levy under Title 26, U.S.C. § 6332(a)(d). Pursuant to said Judgment, the Defendant remains indebted to the Plaintiff in the amount of $43,501.12.

The Court further notes that the Plaintiff, in its motion for a writ of continuing garnishment, has properly complied with the requirements of 28 U.S.C. § 3205.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff, United States of America's, Application For Writ Of Continuing Garnishment (DE 28) be and the same is hereby GRANTED;

2. The Garnishee, Billie Tarnove Morrison, P.A., whose address is 507 S.E. 11th Court, Fort Lauderdale, Florida 33316 shall answer this writ within ten (10) days of service of this writ. Furthermore, the Garnishee shall withhold and retain any property in which the debtor has a substantial nonexempt interest and for which the Garnishee is or may become indebted to the judgment debtor pending further order of the Court; and

3. The United States, through its counsel, Mark Stier, Esquire, United States Department of Justice, P. O. Box 14198, Ben Franklin Station, Washington, D.C. 20044, shall serve the Garnishee and the judgment debtor with a copy of this writ of garnishment in accordance with 28 U.S.C. § 3205(c)(3), and shall certify to the Court that service was made. Plaintiff shall serve this writ on Garnishee with accompanying instructions explaining the requirement that the Garnishee submit a written answer to the writ, and that id answer shall comply with 28 U.S.C. § 3205(c)(4). Further, Plaintiff shall serve this writ on the judgment debtor with accompanying instructions for objecting to the answer of the Garnishee and for obtaining a hearing on the objections.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 11th day of June, 2002.

WILLIAM J. ZLOCH

Chief United States District Judge

Copies furnished:

Mark Stier, Esq.

Grisel Alonso, Esq., AUSA

For Plaintiff

Billie Tarnove, Esq.

For Defendant

¶2002-5144

UNITED STATES OF AMERICA v. Anthony FUSCALDO. U.S. District Court, Eastern Dist. of Pennsylvania, (DC PA) Docket No. 99-5540, May 15, 2002. Earlier proceeding at (2001, DC PA) 89 AFTR 2d 2002-1664, 2002-1 USTC ¶50141. Years 1992, 1993. Decision for Govt.

1. 100% penalty for failure to pay over trust fund taxes—responsible person; willfulness—summary judgment—res judicata. Govt. was awarded judgment against taxpayer in stated amount, plus interest until paid. *Reference:* United States Tax Reporter ¶66,725.02(30); 66,725.03(25); 74,337.501(40). IRC §6672.

In the United States District Court for the Eastern District of Pennsylvania.

Before the Honorable Herbert J. HUTTON.

Civil Judgment

AND NOW, this 9th day of April 2002, in accordance with Court's Order Dated April 9, 2002 (PAPER #30),

[1] IT IS ORDERED that Judgment be and the same is hereby entered in favor of the Plaintiff United States of America and against the Defendant Anthony Fuscaldo in the sum of $174,197.99 plus interest accruing on such amount according to

26 U.S.C. 6621 from November 23, 2001 until paid..

BY THE COURT

ATTEST:

Stephen J. Iannacone

Deputy Clerk

¶2002-5145

UNITED STATES OF AMERICA v. Kathryn E. FUSCALDO. U.S. District Court, Eastern Dist. of Pennsylvania, (DC PA) Docket No. 00-4723, May 8, 2002. Earlier proceeding at (2001, DC PA) 89 AFTR 2d 2002-1664, 2002-1 USTC ¶50141. Years 1992, 1993. Decision for Govt.

1. 100% penalty for failure to pay over trust fund taxes—responsible person; willfulness—summary judgment—res judicata. Govt. was awarded judgment against taxpayer in stated amount, plus interest until paid. *Reference:* United States Tax Reporter ¶66,725.02(30); 66,725.03(25); 74,337.501(40). IRC §6672.

In the United States District Court for the Eastern District of Pennsylvania.

Before the Honorable Herbert J. HUTTON

Civil Judgment

[1] AND NOW, this 9th day of April, in accordance with Court's Order Dated April 9, 2002 (PAPER # 30),

IT IS ORDERED that Judgment be and the same is hereby entered in favor of Plaintiff United States of America and against Defendant Kathryn E. Fuscaldo in the sum of $56,836.30 plus interest accruing on such amount according to 26 U.S.C. 6621 form November 23, 2001 until paid..

BY THE COURT

ATTEST:

Stephen J. Iannacone

Deputy Clerk

¶2002-5146

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Wilbur H. SMITH; Dorothy W. Smith, DEFENDANTS-APPELLANTS and Franchise Tax Board; ET AL., DEFENDANTS. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-15670, March 20, 2002. District Court affirmed. Decision against Taxpayers.

1. Collection actions—proof of assessments. District court properly entered judgment against taxpayers for balance of their tax liabilities: assessment and payment certificates established underlying assessments' validity and amount; and other record evidence established that proceeds from real property's court-ordered sale weren't sufficient to extinguish taxpayers' liability. Also, taxpayers' motion to compel was properly denied; and limitations period and procedural arguments were meritless. *Reference:* United States Tax Reporter ¶74,035.01(10). IRC §7403.

Appeal from the United States District Court for the Northern District of California, Maxine M. Chesney, District Judge, Presiding. United States Court of Appeals, Ninth Circuit.

Before CANBY, BEEZER, and PAEZ, Circuit Judges.

Memorandum*

Submitted March 11, 2002.**

[1] Wilbur and Dorothy Smith, husband and wife, appeal pro se the district court's entry of a deficiency judgment for the balance of the Smiths' tax liabilities, and from the magistrate judge's order denying the Smiths' motion to compel production of documents.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2). Accordingly, the Smiths' request for oral argument is denied.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, see Hansen v. United States, 7 F.3d 137, 138 [72 AFTR 2d 93-5922] (9th Cir.1993) (per curiam), and we affirm.

The district court properly relied upon the updated Certificates of Assessments and Payments to determine the amount and the validity of the underlying tax deficiency. See id. The record evidence established that the proceeds from the court-ordered sale of real property did not extinguish the Smiths' tax liability. See id. Consideration of this issue did not require additional discovery. See Qualls v. Blue Cross of Cal., Inc., 22 F.3d 839, 844 (9th Cir.1994).

We have reviewed the Smiths' statute of limitations contention and the contentions of violations of the Federal Rules of Civil Procedure, and we conclude that there is no ground for reversal of the deficiency judgment.

AFFIRMED.

32 Fed.Appx. 385, 2002 WL 463365 (9th Cir.(Cal.))

¶2002-5147

STANDARD BRANDS LIQUIDATING CREDITOR TRUST, ET AL., PLAINTIFFS v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) Docket No. 00-188T, July 19, 2002. Year 1987. Decision for Govt.

1. Specified liability losses (SLLs)—bankruptcy expenses; professional fees—expenses arising out of federal or state law. Govt. was granted summary judgment that corp.'s capitalized bankruptcy expenses didn't qualify as SLLs for IRC §172(b)(1)(C)'s 10-year carryback: expenses weren't attributable to liability *arising out of* federal or state law. Expenses' connection with Bankruptcy Code in general, or even with specific provisions requiring appointment of creditor committees that gave rise to subject expenses, was too tenuous to meet statute's arising out of requirement where such required more than that expenses just be ''connected to'' statute, and events fixing liability still lay in future when bankruptcy was initially filed and cited provisions came into play. Also, taxpayer's alternative reliance on date of committee's appointment was misplaced since no additional certainty had accrued at that time either. *Reference:* United States Tax Reporter ¶1725.04(80). IRC §172.

Thomas F. Joyce, Chicago, Illinois, for the plaintiff Standard Brands Liquidating Creditor Trust. With him on briefs were Michael Yentikoff, David F. Heroy, of counsel.

Rozella A. Oliver, Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, for the United States. With her on briefs were Eileen J. O'Connor, Assistant Attorney General, Mildred L. Seidman, Chief, Court of Federal Claims Section, Stuart J. Bassin, Senior Trial Attorney, of counsel.

United States Court of Federal Claims.

Opinion

BRUGGINK, Judge:

Pending in this income refund claim are plaintiffs' motion for summary judgment and defendant's cross-motion for summary judgment. Oral argument was held on July 16, 2002. The issue presented is the deductibility of certain bankruptcy expenses as ''specified liability losses'' under 26 U.S.C. (''I.R.C.'') § 172(b)(1)(C) (1994). For the reasons set out below, the government's cross-motion is granted.

BACKGROUND

Standard Brands Paint Company and its subsidiaries (collectively referred to as ''Standard Brands'') manufactured, distributed, and sold paint and related products in retail stores. Standard Brands petitioned the United States Bankruptcy Court for the Central District of California for relief under Chapter 11 of Title 11 of the United States Code on February 11, 1992. On February 27, 1992, the Assistant United States Trustee responsible for the first bankruptcy appointed an ''Official Committee of Creditors Holding Unsecured Claims'' (''creditors' committee''). This

appointment was made pursuant to 11 U.S.C. § 1102(a)(1). On March 3, 1993, Standard Brands filed with the bankruptcy court a plan of reorganization which would allow Standard Brands and its subsidiaries to continue to operate as going concerns.

During the first bankruptcy, under the supervision of the bankruptcy court, both Standard Brands and the creditors' committee employed various legal, accounting, and other professionals who incurred fees and expenses. The committee was authorized by law to make such engagements. Id. s 1103(a). The bankruptcy court entered awards of final compensation to the various professionals in September 1993. In its federal income tax returns for the taxable years ending January 1993 and January 1994, Standard Brands deducted some of the professional fees and expenses resulting from the first bankruptcy and capitalized the remaining $5,429,186 (''capitalized bankruptcy costs'').[1]

In December 1995, Standard Brands filed for bankruptcy for a second time; this time as a liquidation. A going out of business sale was approved by the bankruptcy court on June 14, 1996. Most of Standard Brands' inventory was liquidated by the time it ceased retail operations in August 1996. Under the second bankruptcy plan, all of Standard Brands' property, proceeds, claims, and actions were assigned to the Standard Brands Liquidating Creditor Trust (''Liquidating Creditor Trust'').

On August 10, 1998, Standard Brands filed a Form 1120X (''Claim'') for the taxable year ending January 1987. The claim applied a net operating loss deduction of $5,429,186 for the capitalized bankruptcy costs as a ''specified liability loss'' for the taxable year ending January 26, 1997, carried back to the taxable year ending January 25, 1987, pursuant to 26 U.S.C.§ 172(f). The claim sought a refund of $2,497,426 for that taxable year. After reviewing Standard Brands' claim, the Internal Revenue Service (''IRS'') issued a technical advice memorandum (''TAM'') on June 17, 1999, denying a loss deduction.[2] In a September 1, 1999, letter, the IRS proposed disallowance of the claim. On April 5, 2000, Standard Brands and the Liquidating Trust filed this complaint seeking refund of taxes plus interest.

DISCUSSION

[1] Section 172 allows a deduction for the aggregate of net operating loss carrybacks and carryovers to the taxable year. s 172(a) (unless indicated, all subsequent references are to the I.R.C.). ''Net operating loss'' is defined as the excess of deductions allowed over gross income. s 172(c). Generally, a net operating loss can be carried back for up to three years and carried forward for up to fifteen years. s 172(b)(1)(A). A special category of net operating losses called ''specified liability losses,'' however, can be carried back 10 years. § 172(b)(1)(C).

There is no question that Standard Brands' capitalized bankruptcy costs are deductible and subject to a carryback of up to three years. The issue is whether they qualify for the ten year carryback created by section 172(b)(1)(C).

For the relevant period of time,[3] Section 172(f) defined ''specified liability losses,'' insofar as relevant here, as follows:

> (1) In general.—The term ''specified liability loss'' means the sum of the following amounts to the extent taken into account in computing the net operating loss for the taxable year:
>
> . . . .

[1] Standard Brands has substantiated $5,346,478.11 of the $5,429,186 capitalized bankruptcy costs. The parties continue to dispute the substantiation of the remaining $82,707 of the capitalized bankruptcy costs.

[2] In the TAM, the IRS explored the legislative history of the 1984 tax law changes that created the ten year rollback provision in Section 172. The TAM asserted that this legislative history shows that the phrase ''deduction . . . with respect to a liability'' was tantamount to a deduction for a liability. This distinction provides support for the central claim of the TAM: the deduction was not for a liability, but for ''the worthlessness of an asset.'' In other words, the capitalized bankruptcy costs were a loss, not a liability. Defendant does not rely on the analysis in the TAM. TAMs have no precedential weight, and the government is certainly not bound to follow the reasoning used in the particular TAM that arose from this dispute.

[3] In 1998, Congress amended I.R.C. § 172(f)(1)(B) to narrow its reach. This provision now includes only liabilities attributable to the reclamation of land, the decommissioning of a nuclear power plant, the dismantling of a drilling platform, the remediation of environmental contamination, or a payment under any workmen's compensation act.

(B) Any amount (not described in subparagraph (A)) allowable as a deduction under this chapter with respect to a liability which arises under a Federal or State law or out of any tort of the taxpayer if—

(i) in the case of a liability arising out of a Federal of State law, the act (or failure to act) giving rise to such liability occurs at least 3 years before the beginning of the taxable year, or

. . . .

A liability shall not be taken into account under subparagraph (B) unless the taxpayer used an accrual method of accounting throughout the period or periods during which the acts or failures to act giving rise to such liability occurred.

26 U.S.C.§ 172(f). There must be an act, in short, which gives rise to liability under state or federal law and that act must have occurred more than three years prior to the tax year in question.

The government concedes that most elements of section 172(f) are met. It contends, however, that these costs are not attributable to a liability which arose under federal or state law. Alternatively, it argues that, if there was such an act, it had not occurred by January 26, 1993, 3 years before the beginning of the taxable year.

With respect to the first issue, whether these costs are attributable to a liability which arises out of federal or state law, plaintiffs argue that the law giving rise to the deduction in this case is, in general, Title 11 of the bankruptcy code. More specifically, it is those provisions requiring the appointment of a creditors' committee and allowing that committee to incur expense for professional services, 11 U.S.C. ss 1102, 1103. Those deductible expenses capitalized during the first bankruptcy, according to plaintiffs, are directly traceable to these code provisions.

With respect to the second issue, when the act occurred, plaintiffs' preferred event is the filing of the first bankruptcy. At that point, according to plaintiffs, the entire weight of the bankruptcy laws came to bear on the Standard Brands estate, making it subject to the all the requirements of the code, including bearing costs associated with professionals hired by the creditors committee.

The government contends that the connection between the capitalized expenses and the bankruptcy code is insufficient; that there are too many uncertainties intervening between the filing of the bankruptcy petition and the final order of the bankruptcy court ordering the estate to pay the fees. With respect to the timing question, the government contends that the relevant "act" is the order confirming fees; that everything up to that point is simply too contingent to sustain the necessary connection.

Consideration of section 172(f) is novel in this circuit, and its application in this case raises difficult questions. Nevertheless, for the reasons set out below, we believe that the government's position is correct. The connection between the deduction claimed and the bankruptcy code is simply too attenuated to sustain the deduction.

This is ultimately a matter of statutory construction. Unfortunately the agency did not issue interpretive regulations and, indeed, still has not adopted regulations construing the current law. Both parties consequently draw heavily on the only three cases dealing with the previous law. Two arose from the Tax Court. One arose in federal district court. Sealy Corp. v. Comm'r of Internal Revenue, 171 F.3d 655 [83 AFTR 2d 99-1377] (9th Cir.1999) (affirming Sealy Corp. v. Comm'r of Internal Revenue, 107 T.C. 177 (1996)); Host Marriott Corp. v. United States, 113 F.Supp.2d 790 [86 AFTR 2d 2000-5721] (D.Md.2000); Intermet Corp. v. Comm'r of Internal Revenue, 117 T.C. 133 (2001).

Sealy involved a claim that fees and expenses paid for accounting and legal services in connection with compliance with the Securities and Exchange Act could be carried back for ten years under section 172(f). The corporate plaintiffs relied on the fact that the Act required them to file quarterly and annual financial reports with the SEC. See 15 U.S.C. § 78(m). In addition, they claimed expenses incurred in

connection with auditing and examination of the companies' employee retirement plans, pursuant to 29 U.S.C. § 1023(a)(1). The Tax Court rejected the argument:

> [T]hose provisions do not establish petitioners' liability to pay the amounts at issue. Petitioners' liability to pay those amounts did not arise until petitioners contracted for and received the services. Petitioners' choice of the means of compliance, and not the regulatory provisions, determined the nature and amount of their costs.

107 T.C. at 184.

The Tax Court went on to supplement its analysis, drawing on the doctrine of ejusdem generis and an examination of the legislative history to conclude that section 172(f) was meant to apply to a "relatively narrow class of liabilities." Id. at 186. The Ninth Circuit affirmed, although not on the latter grounds. Instead it began with the observation that the phrase "arising out of a Federal or State law" had to mean something more than simply, "with respect to." 171 F.3d at 657. It agreed with the principal ground of the Tax Court decision:

> The act giving rise to each of the liabilities in question was the contractual act by which Sealy engaged lawyers or accountants%Y4)27 Sealy's argument essentially is that the act giving rise to the liability is the first event in a chain of causes which gives rise to the liability. The argument leads to a reductio ad absurdum. The organization of the company gave rise to an obligation to comply with all pertinent state and federal laws and thereby gave rise to the liabilities incurred in complying with these laws. According to this logic, every corporation would have a specified liability carryback for all costs the corporation incurred to comply with relevant laws. Congress did not create such a windfall.

Id. at 657–58.

Host Marriott involved two different types of deductions. One was for payments of workmen's compensation claims. The other was for federal income tax deficiency interest. The district court sustained the deductions, holding that the liabilities were mandated by federal law, in the case of deficiency interest, §§ 6601(a), 6621, and state law, in the case of workmen's compensation liability.

The district court differentiated Sealy:

> Unlike in Sealy, the deductions in this case qualify as specified liability losses because Plaintiff's liability for workers compensation claims and tax deficiency interest, and the amounts at issue, are set by federal or state law, and not by Plaintiff's choice.

113 F.Supp.2d at 794.

The Tax Court revisited the issue in 2001 in Intermet, a case that, like Host Marriott, involved a claim that federal income tax deficiency interest constituted a "specified liability loss" under section 172(f). Like the district court, the Tax Court in Intermet distinguished expenses for accounting and legal professionals found ineligible in Sealy from federal income tax deficiency interest. 117 T.C. at 138–39. With respect to the former, the plaintiff's choice, not the regulatory provisions, determined the nature and amount of the liability. Id. at 138. The latter, by contrast, were "expressly impose[d]" by federal law. Id. at 140.

Two principles can be derived from these three cases. The first is that "arising out of a state or federal law" means more than just that the liability was incurred "with respect to" a law. The test is not one of free association, in other words. The second principle is that liabilities "arising out of" law must be traceable to a specific law and cannot be the result of choices made by the taxpayer or others. We adopt these principles.

These holdings are only guidance in the particular facts here, however. The holdings are not directly on point. Nevertheless, we find that the predominant similarities of the present facts are to Sealy, whereas the predominant distinctions lie between those facts and Host Marriott and Intermet.

There is no question, as plaintiffs point out, that several provisions of the bank-

ruptcy code imposed requirements on the bankrupt estate. For example, a committee had to be appointed; that committee could hire professionals; and those professionals had to be paid out of the estate. 11 U.S.C. §§ 327, 328, 330, 331, 1102, 1103. The code also required the bankruptcy court to review applications to retain those professionals, to authorize their hiring, and to approve the terms of and administer payment. Id. Standard Brands also cites local Rule 2.9.1 of the bankruptcy court, which required Standard Brands to retain counsel.

The professional services in Sealy, similarly, could be traced to the need to comply with statutory auditing and reporting requirements, not unlike the requirement in a Chapter 11 bankruptcy to appoint a creditors' committee. Like Sealy, the committee had to make choices about who to engage as professionals and how much to pay them. Unlike Sealy, however, in this instance, those expenses had to be approved by a court. As defendant correctly suggests, this adds another level of uncertainty, at least until the court's order of approval. The court has the right to disapprove as well as approve.

The filing of a bankruptcy petition in this case, according to plaintiffs, is analogous to the filing of the tax return in Intermet. Both events triggered the applicability of certain statutory provisions, which, in turn, lead to an obligation to pay money. Unlike Intermet, however, the events fixing liability had not fully taken place. Nor were amounts calculable until services were incurred and fees approved.

The same comparisons can be made to Host Marriott and Intermet. There is a superficial similarity, in that the filing of the bankruptcy petition, like the filing of a tax return or an accident underlying workmen's compensation liability, "triggered" the applicability of a federal statutory scheme. Unlike the present case, however, the events upon which liability would be determined were fixed in those cases upon the occurrence of the event.

Income tax deficiency interest is an obligation arising directly from sections 6601 and 6621. Although the facts still have to be determined at the time of filing the return, once they are determined, then, assuming there is liability for tax, the liability to pay interest is fixed, nunc pro tunc, back to the time of filing. The post-filing intervening events do not alter the facts as of the date of filing, as subsequently determined. Section 6601 then establishes that interest will be assessed to a deficient taxpayer in a particular amount set by section 6621. These two statutes work in tandem to establish a specific type of liability and expressly impose it upon certain parties. They also establish a clear and exact means of calculating the amount of the liability.

Similarly, the act triggering liability in the case of workmen's compensation claim occurs once in time. Although at that moment there is uncertainty as to whether a claim will be filed and whether payment will be made, the determination that the worker is entitled to payment is based on the facts surrounding the accident. Much like a tort action, there is a single event in the past that creates the possibility of liability. Subsequent events do not alter the implications of the initial event. From the corporation's perspective, it is an ongoing liability from the day of the accident.

On balance, we conclude that the connection between these capitalized expenses and the bankruptcy code is too attenuated to meet the requirements of section 172(f)(1)(B). Like Sealy, the events fixing liability still lay ahead at the time of the initial bankruptcy filing. The only certainty lay in the powers granted to the court and to the creditors' committee. Liability at that point was still uncertain in every other respect and dependent upon the discretion of the committee and the court. To the extent plaintiffs rely in the alternative on the date of the appointment of the creditors' committee, February 27, 1992, we find that no additional certainty accrued at that point. What the committee would do and what the court would do were still unclear. The finality engendered by the orders of the bankruptcy court approving payment of the fees does not help plaintiffs here. If those orders constitute the "act" triggering

liability, they are too recent in time to meet the three year requirement. See § 172(f)(1)(B)(ii).

Ruling for the plaintiffs here would require giving the law an expansive reading—akin to the "in connection with" construction rejected elsewhere—that is inconsistent with the principle that deductions are considered matters of legislative grace and thus narrowly construed. See Host Marriott, 113 F.Supp.2d at 792.

CONCLUSION

For the reasons stated above, the plaintiffs' motion for summary judgment is denied and the government's cross-motion for summary judgment is granted. Judgment accordingly. No costs.

¶2002-5148

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Ernest Glenn AMBORT, William J. Lewis, and John W. Benson, DEFENDANTS-APPELLANTS. U.S. Court of Appeals, Tenth Circuit, (CA10) Docket Nos. 01-4077; 01-4078; 01-4079, July 24, 2002. Appeal from District Court dismissed. Decision against Taxpayers.

1. Tax crimes—"right not to be tried"—appeals—mandamus. Taxpayers' 2d interlocutory appeal attempt to avoid tax crimes prosecution was dismissed for lack of jurisdiction: newly-discovered prospectus of IRS's crime prevention program didn't prove taxpayers' 1st Amendment rights had been chilled or otherwise establish "right not to be tried." Also, taxpayers' alternative mandamus request to order district court to allow further discovery of IRS's program was denied where taxpayers offered no evidence that program was intended to generally suppress lawful anti-IRS viewpoints or impetus for specific investigation of taxpayers' alleged crimes. *Reference:* United States Tax Reporter ¶73,446.503(115); 73,446.517(30).

United States Court of Appeals Tenth Circuit.

Before MURPHY, ANDERSON, and O'BRIEN, Circuit Judges.

Order and Judgment[1]

Stephen H. Anderson Circuit Judge

This matter is before us on interlocutory appeal for the second time in an attempt by Defendants-Appellants ("Defendants") to avoid trial on various charges alleging violation of federal tax laws.[1] Relying principally on United States v. P.H.E., Inc., 965 F.2d 848 (10th Cir. 1992), Defendants assert that they have a First Amendment "right not to be tried." Specifically, they contend that the government is waging a vindictive prosecution against them, motivated by a desire to chill their First Amendment rights.

We rejected the identical argument the first time this case was before us, and dismissed the appeal for lack of jurisdiction. United States v. Ambort, 193 F.3d 1169 [84 AFTR 2d 99-6618] (10th Cir. 1999) ("Ambort I"). We concluded that nothing in the record placed the case in the category of P.H.E.,[2] and that the "collateral order doctrine" therefore did not apply.[3] In reasserting their arguments now, Defendants contend that a newly discovered piece of information, to wit: a document entitled "Operation Phoenix Prospectus,"

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[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] We originally combined Defendants' individual appeals for purposes of oral argument. Because all three appeals raise essentially identical issues and suffer the same jurisdictional defects, we now consolidate them for disposition.

[2] In P.H.E. we held that a defendant has a First Amendment "right not to be tried" in the "unusual" and "unique" case where there is "substantial evidence" that the prosecution is pre-textual and based on "an extensive government campaign . . . designed to use the burden of repeated criminal prosecutions to chill the exercise of First Amendment rights." 965 F.2d at 855. Concluding that the "right not to be tried" would be "lost, probably irreparably, if review had to await final judgment," we allowed the defendant's interlocutory appeal. Id. at 855 (quotation omitted).

[3] The "collateral order doctrine" is a judicially created exception to 28 U.S.C. 1291, which grants appellate courts jurisdiction over "final decisions of the district courts of the United States . . . ." Under this doctrine, courts of appeal may review only those interlocutory orders which "'conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and [are] effectively unreviewable on appeal from a final judgment.'" Ambort I, 193 F.3d at 1171 (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

App. to Jurisdictional Briefs of all Appellants at 44–63 (''Prospectus''), provides the evidence of pre-textual prosecution lacking in Ambort I.

[1] The relevant background information for this case is set forth in Ambort I, 193 F.3d at 1170–71, and need not be repeated here. Our central task is to determine whether the Prospectus, together with inferences the Defendants contend should be drawn therefrom, places this case in a posture sufficiently different from Ambort I to support a conclusion that Defendants have proved the existence of a ''right not to be tried'' under P.H.E. Having carefully reviewed the document in question, Defendants' arguments relating thereto, and the posture of the case at the present time, we adhere to the conclusions reached in Ambort I, and continue to hold that this is not a proper case for interlocutory appeal. The differences between this case and P.H.E. remain obvious and significant, and Defendants have wholly failed to demonstrate the existence of a ''right not to be tried.''(4) This case is now in a posture to proceed to trial where Defendants will be free to make their arguments on the merits, subject, of course, to the rules governing trials, including the Rules of Evidence. In the eventuality of a conviction, the Defendants will likewise be entitled to pursue their claims on appeal. Accordingly, Defendants' interlocutory appeal is DISMISSED.

Defendants alternatively petition for a writ of mandamus ordering the district court to allow further discovery relevant to Operation Phoenix. Mandamus is an extraordinary remedy, see Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 34 (1980); Weston v. Mann (In re Weston), 18 F.3d 860, 864 (10th Cir. 1994), one that we will not ordinarily use prior to trial to scrutinize or interfere with a district court's discretionary discovery decisions. See Paramount Film Dist. Corp. v. Civic Ctr. Theatre, Inc., 333 F.2d 358, 361 (10th Cir. 1694)

Contrary to Defendants' assertions, there is no evidence that Operation Phoenix was intended to prevent the lawful expression of anti-IRS viewpoints simply for the sake of suppression. Indeed, any potential impact on First Amendment rights was incidental, at best, to Operation Phoenix's otherwise lawful purpose of preventing crime. We are also convinced that Operation Phoenix was not the impetus for the specific investigation into Defendants' alleged criminal activity, and that it did not actually influence or direct that investigation. See June 5, 2000, Tr. of Proceedings on Motions to Suppress at 15–16, R. Vol. XXIII (Testimony of IRS Special Agent Jerry R. Wright) (indicating that the investigation of Defendants spawned entirely from the tip of a local informant); June 15, 2000, Tr. of Proceedings on Motions to Suppress at 194, R. Vol. XXIV (Testimony of Agent Wright) (''Did Operation Phoenix direct me to do the things that I did, no.'').

(''A writ of mandamus to a trial court in matters relating to discovery should only issue under exceptional circumstances which amount to a clear abuse of discretion, an abdication of the judicial function, or the usurpation of judicial power.'').(5) On the record before us, we hold that the district court did not clearly abuse its discretion, and that Defendants are not entitled to the extraordinary relief sought. Accordingly, Defendants' petition for a writ of mandamus is DENIED.

ENTERED FOR THE COURT

Stephen H. Anderson

Circuit Judge

(4) The Prospectus reveals that Operation Phoenix is a program created by the Internal Review Service (''IRS'') to track and prevent the clearly criminal activities of a nationwide, California-based tax protestor organization known as The Pilot Connection Society (''TPCS''). The IRS targeted TPCS out of a belief that it was acting criminally, with the ''avowed goal'' of destroying the IRS. See Prospectus at 1. Believing that TPCS perpetuated ''self-serving theories, half truths, [and] misrepresentation[s],'' id. at 2, to actively encourage otherwise law abiding citizens to violate the federal tax laws, the IRS developed Operation Phoenix as a coordinated effort to prevent its ongoing criminal efforts. The Prospectus is relevant in this case only because it tangentially identifiesAssociates de Libertas (the organization in which Defendants were involved) as a splinter group of TPCS subject to investigation.

(5) See also United States v. Carrigan, 804 F.2d 599, 604 (10th Cir. 1986) (concluding that when a district court acts within its discretion in granting discovery motions ''the threshold showing necessary to secure a writ of mandamus is higher than mere error, even error that might lead to reversal on a direct appeal,'' and that ''[t]he trial court's action must be so clearly without proper basis as to amount to a usurpation of [judicial] power'').

¶2002-5149

Dale/Deborah CRUMP, PLAINTIFF(S) v. UNITED STATES OF AMERICA, ET AL., DEFENDANT(S). In Re: Dale/Deborah Crump, Debtor(s). U.S. Bankruptcy Court, Northern Dist. of Ohio, (Bktcy Ct OH) Docket No. 01-3159 (Related Case: 01-31973), July 17, 2002. Year 1996. Decision for Govt.

1. Tax claims in bankruptcy—dischargeability—failure to file returns—proof of filing—physical delivery rule. Chap. 7 debtors' tax debts were nondischargeable under 11 USC §523(a)(1)(B)'s non-filing exception: taxpayers offered no proof to rebut IRS's evidence that they never filed return for year at issue; and under 6th Cir. precedent, taxpayers weren't entitled to IRC §7502 protection absent at least proof of postmark. *Reference:* United States Tax Reporter ¶68,726.52(27); 75,025.01(3). IRC §7502.

United States Bankruptcy Court for the Northern District of Ohio.

Decision and Order

SPEER, Bankruptcy Judge:

This cause comes before the Court upon the Defendant's Motion for Summary Judgment, Memorandum in Support, and the Plaintiff/Debtors' Response thereto. The sole issue raised by these materials concerns whether the Plaintiff/Debtors' federal tax obligation for the year 1996 is dischargeable. As it pertains to this issue, the gravamen of the Parties' dispute centers around whether the Debtors actually filed their 1996 tax return. The following facts, which are not in dispute, are relevant to this issue:

The Debtors had taxable income for the 1996 tax year.

The IRS prepared, without any assistance, a Substitute for Return for the Debtors for the 1996 tax year.

The IRS sent notice to the Debtors that they had a tax deficiency of $17,234.00 for the 1996 tax year; at not time did the Debtors petition the United States Tax Court to challenge this deficiency.

On November 9, 1998, the Debtors were assessed for their 1996 tax year deficiency; included in this assessment were statutory penalties and interest.

On April 4, 2001, the Debtors filed a petition in this Court for relief under Chapter 7 of the United States Bankcruptcy Code. Thereafter, on August 13, 2001, the Debtors filed a Complaint to determine the dischargeability of their tax obligations for the years 1996 and 1997. After discussing the matter, the Parties agreed that the Debtors' tax liability for the year 1997 was nondischargeable as the due date of this tax return fell within the three-year provision contained in 11 U.S.C. § 507(a)(1)(A).

In support of its position that it never received a tax return from the Debtors for the 1996 tax year, the Defendant submitted an affidavit to the Court wherein it was stated that no record of any such tax return exists. In response, the Debtors, although ostensibly maintaining that they did file a federal tax return for 1996, acknowledged that they "cannot [actually] prove that they file their 1996 [tax] return." (Plaintiff's Response to Defendant's Motion for Summary Judgment, at pg. 1).

LEGAL DISCUSSION

[1] Under 28 U.S.C. § 157(b)(2)(I), a determination as to the dischargeability of a particular debt is a core proceeding. Thus, this matter is a core proceeding.

This cause comes before the Court upon the Defendant's Motion for Summary Judgment. The standard for summary judgment is set forth in Fed.R.Civ.P. 56, which is made applicable to this proceeding by Bankruptcy Rule 7056, and provides for in pertinent part: A movant will prevail on a motion for summary judgment if, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

judgment as a matter of law.'' *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In order to prevail, the movant must demonstrate all the elements of the cause of action. *R.E. Cruise, Inc. v. Bruggeman*, 508 F.2d 415, 416 (6th Cir.1975). Thereafter, upon the movant meeting this burden, the opposing party may not merely rest upon their pleading, but must instead set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 586–88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

There exists a general presumption that an honest debtor who seeks bankruptcy relief is entitled to receive a discharge of all his or her debts. *See, e.g., Farrington v. Lincoln (In re Farrington)*, 118 B.R. 871, 873–74 (Bankr. M.D.Fla. 1990); *Nelson v. Peters (In re Peters)*, 106 B.R. 1, 3 (Bankr.D.Mass.1989). Exceptions to this rule, however, exist for certain kinds of tax debts. Specifically, relevant to this case is § 523(a)(1)(B)(i), which provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-
>
> (1) for a tax or a customs duty-
>
> *(i) was not filed[.]*

(emphasis added). The underlying purpose of this exception to discharge is self-evident: A taxing authority should not be preclude from recovering unpaid taxes by the convenient method of a debtor simply failing to file a return.

As it pertains to the applicability of § 523(a)(1)(B)(i), the Debtors rely upon the case of *Crawley v. United States (In re Crawley)*, 244 B.R. 121 [85 AFTR 2d 2000-1538] (Bankr. N.D.Ill. 2000), which held that a tax return need not be filed prior to an assessment by the IRS in order to quality as a return for purposes § 523(a)(1)(B)(i). In coming to this decision, the court in *In re Crawley* rejected the Sixth Circuit's approach, laid out in *United States v. Hindenlang (In re Hindenland)*,[1] that after assessment the filing of a tax return can serve no tax purposes, and thus cannot qualify as the filing of a tax return within the meaning of the Bankruptcy Code. The difficulty, however, the Court has with the Debtor's position is that even if the facts of this case could be distinguished from the Sixth Circuit's decision in *In re Hindenlang*, the circumstances present in *In re Crawley* are clearly inapposite to the circumstances present in this case. In particular, in the instant case, unlike the situation in *In re Crawley*, there exists a clear dispute as to whether the Debtors even filed a tax return. Thus, resolution of the issue at hand necessarily requires the Court to determine whether there exists sufficient evidence, for purposes of § 523(a)(1)(B)(i), to find that the Debtors ''filed'' a tax return.

The term ''filed,'' as it is used in § 523(a)(1)(B)(i), is not defined in the Bankruptcy Code. In the absence of such a definition, the Sixth Circuit has held that it is appropriate to look to applicable tax law to determine the proper definition of such a word. *United States v. Hindenlang (In re Hindenlang)*, 164 F.3d 1029, 1032–33 [83 AFTR 2d 99-509] (6th Cir.1999), *cert. denied*, 528 U.S. 810, 120 S.Ct. 41, 145 L.Ed.2d 37 (1999). As it applies to tax law, it has been held that, in line with the Supreme Court's decision in *United States v. Lombardo*,[2] a tax return will be deemed to be filed on the date the return is actually delivered to and received by the IRS. *Young v. Internal Revenue Service (In re Young)*, 230 B.R. 895, 897 [83 AFTR 2d 99-1093] (Bankr.S.D.Ga.1999); *Woodworth v. United States (In re Woodworth)*, 202 B.R. 641, 644 [78 AFTR 2d 96-7488] (Bankr.S.D.Fla.1996). This rule is known as the physical delivery rule.

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[1] 164 F.3d 1029, 1032–33 [83 AFTR 2d 99-509] (6th Cir.1999), *cert. denied*, 528 U.S. 810, 120 S.Ct. 41, 145 L.Ed.2d 37 (1999)

[2] 241 U.S. 73, 36 S.Ct. 508, 60 L.Ed. 897 (1916).

For purposes of documents sent to the IRS, however, two statutory exceptions exists to the physical delivery rule. These exceptions are codified in paragraphs (a)(1) and (c) of § 7502 of the Internal Revenue Code which provide, in relevant part, that:

(a) General rule.-

(1) If any ... document required to be filed, or any payment required to be made, within a prescribed period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by the United States mail to the agency, officer, or office with which such ... document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such ... document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

(c) Registered and certified mailing; electronic filing.-

(1) Registered mail.-For purposes of this section, if any such return, claim, statement, or other document, or payment, is sent by United States registered mail-

(A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed, and

(B) the date of registration shall be deemed the postmark date.

Stated in simpler terms, under the first exception to the physical delivery rule set forth in paragraph (a)(1) of § 7502, when a document is received by the IRS after the filing deadline, the postmark stamped on the document is deemed to be the date of delivery. By comparison, under paragraph (c) of § 7502, a certified or registered mail receipt operates as prima facie evidence that a document mailed to the IRS was actually delivered, and the date of certification or registration is then deemed to be the postmark date.

It is self-evident, however, that the above statutory exceptions to the physical delivery rule only apply when there exists proof of a postmark; that is, when some proof of the actual mailing of the document to the IRS exists. On the other hand, in a situation such as this, where a taxpayer seeks to establish, in the absence of a postmark, that they actually mailed a tax document to the IRS, the protections of § 7502 are not applicable. *See Miller v. United States*, 784 F.2d 728, 730 [57 AFTR 2d 86-928] (6th Cir.1986) (§ 7502 does not apply when the IRS does not receive the document and the document is not sent by registered mail). To ameliorate the potential harshness which could arise if the exceptions to the physical delivery rule were entirely limited to those provisions contained in § 7502, some courts have held that § 7502 is merely a nonexclusive ''safe harbor'' provision, and therefore a taxpayer is permitted to present circumstantial proof of timely mailing, such as by affidavits or oral testimony.[3] In the context of documents mailed to the IRS, however, such an approach was squarely rejected by the Sixth Circuit Court of Appeals in *Miller v. United States*, wherein the Court stated that ''the only exceptions to the physical delivery rule available to taxpayers are the two set out in section 7502.'' 784 F.2d 728, 730–31 [57 AFTR 2d 86-928] (6thCir.1986). As a result, in the Sixth Circuit, § 7502 provides the exclusive means by which a taxpayer may prove that a tax return is filed. *Id.* This rule, although it has been criticized on the grounds that it allows sloppiness by the IRS, has on several occasions been reiterated by the Sixth Circuit Court of Appeals. *Surowka v. United States*, 909 F.2d 148 [66 AFTR 2d 90-5359] (6th Cir.1990); *Carroll v. Commissioner of Internal Revenue*, 71 F.3d 1228 [76 AFTR 2d 95-8115] (6thCir.1995); *Thomas v. United States*, 166 F.3d 825, 831 fn.9 [83 AFTR 2d 99-569] (6th Cir.1999).

[3] *See, e.g., Estate of Wood v. Commissioner*, 909 F.2d 1155 [66 AFTR 2d 90-5987] (8th Cir.1990).

Therefore, in this case, since the Defendant has offered evidence that it did not receive the Debtors' 1996 tax return and the Debtors have not been able to produce a registered mail receipt to the contrary, the Court must find that, as a matter of law, the Debtors did not file their 1996 tax return. Accordingly, in accordance with § 523(a)(1)(B)(i), it is the holding of this Court that the Debtors are forbidden by law from receiving a discharge on any tax liability that was due for the 1996 tax year. In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

Accordingly, it is

ORDERED that the 1996 federal tax obligation of the Debtors, Dale Crump and Deborah Crump, be, and is hereby, determined to be a NONDISCHARGEABLE DEBT.

Dated: 7/17/02

Richard L. Speer

United States Bankruptcy Judge

¶2002-5150

Diane G. REED, Trustee, PLAINTIFF v. Lucky W. LUMMUS and Teresa M. LUMMUS, DEFENDANTS. In Re: Lucky W. Lummus, Debtor. U.S. Bankruptcy Court, Northern Dist. of Texas, (Bktcy Ct TX) Docket No. 99-41676-BJH-7; Adversary No. 99-4198, Nov. 21, 2000. Year 1998. Decision for Taxpayers in part.

1. Tax claims in bankruptcy—bankruptcy estate property—joint tax refunds; non-debtor spouse. Chap. 7 trustee was entitled to turnover as bankruptcy estate property of portion of debtor-husband's and non-debtor-wife's refund, in amount equal to that which husband contributed to overpayment; but wife was entitled to remaining portion. *Reference:* United States Tax Reporter ¶68,726.52(3).

In the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division.

Findings of Fact and Conclusions of Law

HOUSER, Bankruptcy Judge:

Findings of Fact

1. Before the Court are Plaintiff's Motion for Summary Judgment and Brief in Support (''Plaintiff's Motion'') and Defendants' Response to Plaintiff's Motion for Summary Judgment and Brief in Support and Cross-Motion and Brief in Support of Summary Judgment (''Defendants' Motion'').

2. The Court adopts the parties' Stipulation of Uncontested Facts (the ''Stipulation'') as if such factual findings were set forth herein. The Court makes the additional findings set forth herein.

3. Lucky W. Lummus (the ''Debtor'') filed for relief under chapter 7 of the Bankruptcy Code on March 31, 1999. *See* Stipulation, ¶ 2. On April 10, 1999, the Debtor and his non-debtor spouse (''Mrs. Lummus'') filed a joint 1998 Form 1040 U.S. Individual Tax Return (the ''Joint Return''). *See* Stipulation, ¶ 4. The Joint Return shows, *inter alia*:

a. Joint total 1998 earnings of $58,059.00, consisting of (1) Mrs. Lummus' wages of $49,164.00, (2) the Debtor's business income $7,839.00, and (3) other income (e.g., other interest income) of $1,056.00. *See* Stipulation, ¶s 5–8.

b. Joint total withholding and estimated tax payments of $20,712.00, consisting of (1) Mrs. Lummus' withholding of $9,792.00, and (2) the Debtor's estimated tax payments of $10,920.00. *See* Stipulation, ¶s 5–6.

c. Joint total 1998 income taxes owed of $5,534.00, resulting in a joint total overpayment of 1998 income taxes of $15,178.00. See Stipulation, ¶s 4, 9.

4. The Debtor and Mrs. Lummus sought to apply $2,040.00 of the overpayment to their estimated 1999 tax liability, and requested the remaining $13,138.00 of over-

payment as a tax refund (the "Refund"). The Internal Revenue Service issued a refund check for $13,138.00 payable to the Debtor and Mrs. Lummus. Counsel for the Debtor and Mrs. Lummas has possession of the Refund. *See* Stipulation, ¶s 4–10.

5. Because Mrs. Lummus did not file for relief under the Bankruptcy Code, there is a question as to the portion of the Refund to which she and the Debtor's estate, respectively, is entitled.

6. Any Finding of Fact may also be deemed a Conclusion of Law.

Conclusions of Law

1. The Court has jurisdiction over this dispute pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding over which the Court may enter a final judgment. 28 U.S.C. § 157.

2. The parties agree that this Court should enter a summary judgment where, as here, it appears from the record that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 533 (5th Cir. 1996).

[1] 3. A debtor's bankruptcy estate includes "[a]ll interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is [under] the sole, equal, or joint management and control of the debtor." *See* 11 U.S.C § 541(a)(2). In *Ragan v. Commissioner of the Internal Revenue Service*, 135 F.3d 329 [81 AFTR 2d 98-911] (5th Cir. 1998), *cert denied*, 525 U.S. 875 (1998), the court explained that while personal earnings are community property, they are subject to the sole management and control of the spouse that earned them. *See Ragan*, 135 F.3d at 333 (citing TEX. FAM. CODE § 3.102(a) (West Supp. 1998).) The *Ragan* court further concluded that "to the extent that the income is attributable to one spouse's sole management community property, the refund from the excess tax on that income is the sole management community property of that spouse." *See id.* ("[T]he case law overwhelmingly establishes that overpayments by married couples are apportionable to each spouse to the extent that he or she contributed to the overpaid amount.") (citation omitted)); *see also In re Bathrick*, 1 B.R. 428, 430 (Bankr. S.D. Tex 1979) ("The source of an overpayment of income tax determines the character of the refund, with a refund of excess withholding tax merely being a repayment of earnings from employment") (superseded by statute on other grounds as stated in *Thomas v. Burke (In re Burke)*, 150 B.R. 660, 662–63 (Bankr. E.D. Tex.1993)). Because the tax overpayment, and therefore the refund, derived solely from the debtor's earnings (*see Ragan*, 135 F.3d at 331), the Ragan court found that the debtor's spouse was not entitled to any portion of the refund. *See id.* Thus, in Texas, a debtor's bankruptcy estate includes the debtor's interest in a tax refund resulting from a jointly filed tax return. *See id.*; 11 U.S.C § 541(a)(2).

4. Here, while Mrs. Lummus contributed the majority of the joint earnings, she did not contribute the majority of the tax overpayment. The Court concludes that the Debtor's estate is entitled to that portion of the Refund as calculated below:

a. The Lummas' joint total earnings in 1998 were $58,059.00. Mrs. Lummus contributed $49,164.00, or 84.68%, of those earnings, while the Debtor contributed $8,895.00,[1] or 15.32%, of those earnings.

b. The Lummas' tax liability for 1998 was $5,534.00. As Mrs. Lummus' earnings accounted for 84.68% of the total earnings, she was responsible for 84.68% of the total taxes owed for 1998, or approximately $4,686.00, while the Debtor was responsible for the remaining 15.32% of the taxes owed, or approximately $848.00.

c. As a result, Mrs. Lummus contributed $5,106.00 to the tax overpayment (*i.e.*, $9,792.00 in withholding minus her 84.68% share of taxes owed of $4,686.00) and the Debtor contributed $10,072.00 to

[1] The Debtor earned $7,839.00 of income from his self-employment. The Tax Return shows $1,056.00 of miscellaneous income which the parties attribute to the Debtor for purposes of the summary judgment motions. *See* Plaintiff's Motion p. 6, n.2; Defendants' Motion p. 5.

the tax overpayment (*i.e.*, $10,920.00 in estimated tax payments minus his 15.32% share of taxes owed of $848.00).

5. Accordingly, and in accordance with 11 U.S.C. § 541(a) and the Fifth Circuit's decision in *Ragan*, the Debtor's estate is entitled to $10,072.00 of the Refund, or the amount the Debtor contributed to the tax overpayment, and Mrs. Lummus is entitled to the remaining $3,066.00.

6. The Trustee is entitled to a summary judgment directing the turnover of $10,072.00 of the Refund to her. A separate judgment will be entered consistent with these findings and conclusions.

7. Any Conclusion of Law may also be deemed a Finding of Fact. Signed this ___ day of November, 2000.

Barbara J. Houser

United States Bankruptcy Judge

¶2002-5151

UNITED STATES OF AMERICA, PLAINTIFF v. Jacob EVSEROFF, N.Y. State Dept. of Taxation, Paul Lawrence Evseroff, Kenneth James Evseroff, Lynn R. Terrelonge, and Barry A. Schneider, DEFENDANTS. U.S. District Court, Eastern Dist. of New York, (DC NY) Docket No. 00 Civ. 6029, July 9, 2002. Earlier proceeding at (2001, DC NY) 88 AFTR 2d 2001-6926, 2001-2 USTC ¶50783. Years 1978, 1979, 1980, 1981, 1982, 1991, 1992, 1996. Decision for Govt.

1. Actions to reduce assessments to judgment—motion for entry of final judgment—summary judgment—limitations periods—estoppel. Amended judgment was entered reducing taxpayer's Tax Court judgment and assessments to judgment in amounts stated plus interest. *Reference:* United States Tax Reporter ¶74,035.01(30); 74,025.01(3); 74,035.01(25); 65,015.03(5); 65,025.03(3); 65,015.03(12); 74,338.531. IRC §6501; 6502; 7402; 7403.

United States District Court for the Eastern District of New York.

Amended Judgment

POHORELSKY, District Judge:

[1] Pursuant to a Memorandum and Order of the Honorable Judge David G. Trager, United States District Judge, having been filed on November 15, 2001, granting the United States' motion to reduce to judgement the United States Tax Court judgment and the federal tax assessments against Jacob Evseroff, and directing the Clerk of the Court to enter final judgment pursuant to Fed. r. Civ. P. 54(b); and Memorandum and Order of the Honorable Judge David G. Trager, having been filed on November 15, 2001, denying the taxpayer's motion for reconsideration, it is

ORDERED and ADJUDGED that final judgment is hereby entered pursuant to Fed. R. Civ. P. 54(b); and that judgment against Jacob Evseroff and in favor of the United States is hereby entered in the amount of $1,546,682.08, plus additional statutory interest computed from May 31, 2000 for tax years 1978, 1979, 1980, 1981, 1982, 1991, 1992, and 1996.

Dated: Brooklyn, New York

July 9, 2002

ROBERT C. HEINEMANN

Clerk of Court

¶2002-5152

NEONATOLOGY ASSOCIATES, P.A. v. COMMISSIONER of Internal Revenue (Tax Court No. 97-1201). John J. and Ophelia J. MALL v. COMMISSIONER of Internal Revenue (Tax Court No. 97-1208). ESTATE OF STEVEN SOBO, Deceased and Bonnie Sobo, Executrix, and Bonnie Sobo, Surviving Wife v. COMMISSIONER of Internal Revenue (Tax Court No. 97-2795). Akhilesh S. and Dipti A. DESAI v. COMMISSIONER of Internal Revenue (Tax Court No. 97-2981). Kevin T. and Cheryl McMANUS v. COMMISSIONER of Internal Revenue (Tax Court No. 97-

2985). Arthur and Lois M. HIRSHKOWITZ v. COMMISSIONER of Internal Revenue (Tax Court No. 97-2994). LAKEWOOD RADIOLOGY, P.A. v. COMMISSIONER of Internal Revenue (Tax Court No. 97-2995) Neonatology Associates, P.A., John J. and Ophelia Mall, Estate of Steven Sobo, Deceased, and Bonnie Sobo, Executrix, and Bonnie Sobo, Surviving Wife, Akhilesh S. and Dipti A. Desai, Kevin T. and Cheryl McManus, Arthur and Lois M. Hirshkowitz and Lakewood Radiology, P.A., APPELLANTS. U.S. Court of Appeals, Third Circuit, (CA3) Docket No. 01-2862, July 29, 2002. Tax Court, (2000) 115 TC 43 (opinion by Laro, *J.*), affirmed. Earlier proceeding at (2002, CA3) 89 AFTR 2d 2002-2585, 293 F3d 128. Years 1991, 1992, 1993, 1994. Decision against Taxpayers.

1. Business deductions—voluntary employees' beneficiary association (VEBA) plan contributions—constructive distributions—deductions for amounts paid in connection with insurance—indirect beneficiary. Tax Court properly determined that closely held professional medical corps.' excess VEBA plan contributions for group term life ins. that widely exceeded conventional ins. costs were disguised surplus cash distributions and not deductible IRC §162 ordinary and necessary business expenses: record showed transactions were really just bookkeeping artifice using inflated premiums as means for achieving bogus tax benefits. Notably, payments exceeded conventional ins. by almost 500% and merely paid for ''conversion credits'' rather than actual current year ins. payments; and taxpayers' education and training belied any claim that they bought admittedly overpriced ins. with no expectation of tax benefit in return. Also, taxpayers' reliance on ERISA case law for proposition that Court should not have looked to documents outside plan and ins. contracts was misplaced; and argument that ins. law otherwise mandated Court's limited document review was rejected. *Reference:* United States Tax Reporter ¶1625.033(10); 74,536.1436(5); 2645.05(10). IRC §162; 264.

2. Gross income—constructive dividends—excess VEBA plan contributions—business deductions—ordinary and necessary—covered employees—time for reporting income—forfeiture. Tax Court properly determined that employee-owners received constructive dividends, not deductible compensation, from closely held professional medical corps.' excess VEBA plan contributions for group term life ins. that widely exceeded conventional ins. costs: dividend finding was supported by transactions' very design, lack of any compensatory intent and failure to offer plans to non-equity employees; and taxpayers' reliance on ERISA case law for proposition that plan payments were compensation per se was misplaced. *Reference:* United States Tax Reporter ¶3015.14(15); 1625.033(5); 835.01(40); 3015.12(10); 4515.008(5). IRC §83; 162; 301; 451.

3. Penalties—accuracy-related negligence; failure to timely file returns—reasonable cause—reliance—test case—frivolous claim penalties—litigating positions—actions of trial attorneys—VEBA plans. Tax Court properly upheld accuracy-related negligence penalties against owners of closely held medical corps. that mischaracterized excess VEBA plan contributions for nonconventional life ins. as deductible business expenses: taxpayers' reliance on insiders wasn't reasonable; and, although 1 taxpayer consulted his own accountant, he didn't show what information or advice was exchanged with accountant or identify accountant's qualifications. Also, as highly educated professionals, taxpayers should have recognized too-good-to-be-true nature of scheme that promised both large corp. deductions and tax-free income to them individually; and ''test case'' argument was rejected. *Reference:* United States Tax Reporter ¶66,625.01(10); 66,515.14(5); 66,735.01(5). IRC §6651; 6662; 6673.

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On Appeal from the United States Tax Court (T.C. Nos. 97-1201/1208/2795/2981/2985/2994/2995) Tax Court Judge: Honorable David Laro. United States Court of Appeals for the Third Circuit.

Before: SCIRICA and GREENBERG, Circuit Judges, and FULLAM, District Judge*

Opinion of the Court

GREENBERG, Circuit Judge:

PRECEDENTIAL

I. INTRODUCTION

This matter comes on before this court on appeal from decisions of the United States Tax Court entered April 9, 2001, in accordance with its opinion filed July 31, 2000, upholding the determination of the Commissioner of Internal Revenue that contributions made by appellants, two professional medical corporations, Neonatology Associates, P.A. and Lakewood Radiology, P.A., into Voluntary Employees Beneficiary Program (VEBA) plans in excess of the cost of term life insurance were taxable constructive dividends to the physicians owning the corporations and their spouses rather than employer deductible expenses. See Neonatology Assoc., P.A. v. Comm'r, 115 T.C. 43 (2000). We refer to the corporations and individuals collectively as "taxpayers." The consequences of the decisions were substantial for the taxpayers inasmuch as the professional medical corporations were denied deductions they had taken for the contributions and the individuals were charged with significant additional taxable dividend income. The court held further that the individual taxpayers were liable for accuracy-related negligence penalties under I.R.C. § 6662(a).

Our examination of the record convinces us that the contributions at the heart of this dispute were so far in excess of the cost of annual life insurance protection that they could not plausibly qualify as ordinary and necessary business expenses in accordance with I.R.C. § 162. In essence, the physicians adopted a specially crafted framework to circumvent the intent and provisions of the Internal Revenue Code by having their corporations pay inflated life insurance premiums so that the excess contributions would be available for redistribution to the individual shareholders free of income taxes. As correctly recognized by the Tax Court, these contributions were taxable disguised dividends and not deductible expenses. Moreover, as the individual taxpayers could not in good faith avail themselves of the reliance-on-professional defense, the Tax Court duly held them liable for the accuracy-related negligence penalties. Accordingly, for the reasons we elaborate in more detail below, we will affirm the decisions of the Tax Court.

II. BACKGROUND

The evidence at the trial disclosed the following facts. Neonatology is a New Jersey professional corporation owned by Dr. Ophelia J. Mall. Lakewood is a New Jersey professional corporation owned equally at the times material here by Drs. Arthur Hirshkowitz, Akhilesh Desai, Kevin McManus, and Steven Sobo until his death on September 23, 1993. Subsequently Dr. Vijay Sankhla, who is not a party to this action, purchased Sobo's interest. The

* Honorable John P. Fullam, Senior Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

spouses of the doctors, John Mall, Lois Hirshkowitz, Dipti Desai, Cheryl Mac-Manus, and Bonnie Sobo, are parties to this action as the doctors and their spouses filed joint income tax returns. In addition, Bonnie Sobo is a party as executrix of her husband's estate.

Following the enactment of the Tax Reform Act of 1986 (TRA), Pub.L. 99-514, 100 Stat. 2085, insurance salesmen Stephen Ross and Donald Murphy formed Pacific Executive Services (PES), a California partnership designed to provides services to retirement plan administrators and employee benefit advisors unfamiliar with the impact of the TRA. See App. at 377. Specifically, Ross and Murphy de-vised a program to allow closely held cor-porations to "create a tax deduction for [] contributions to [an] employee welfare benefit plan going in and a permanent tax deferral coming out." App. at 2672.

To achieve this end, PES created two voluntary employees' beneficiary associations, the Southern California Medical Profession Association VEBA (SC VEBA) and the New Jersey Medical Profession Association VEBA (NJ VEBA).[1] A VEBA, as defined in I.R.C. § 501(c)(9), is a tax-exempt program providing members, their dependents, or designated beneficiaries with life, sick, accident, or other benefits "if no part of the net earnings of such association inures (other than through such payments) to the benefit of any private shareholder or individual."

Under the PES VEBA programs, each participating employer adopts its own plan, maintaining a trust account and designating a trust administrator with exclusive control over all assets. The plan adoption agreement obligates employers to make, whether in the form of group insurance policies or group annuities, contributions towards the life insurance benefits of employees and their beneficiaries, based on a multiple of each employee's annual compensation. Benefits payable under any plan are paid solely from that plan's allocable share of the trust fund, and the participating employer, administrator, and trustee are not liable for any shortfall in the funds required to be paid. Upon termination of a plan, all its remaining assets are distributed to the employer's covered employees in proportion to their compensation. PES enlisted the services of Barry Cohen, a longtime insurance salesman with the Kirwan companies, to market the VEBA programs to medical professionals.

The SC VEBA plans at issue in this case, the Neonatology Employee Welfare Plan and the Lakewood Employee Welfare Plan, shared a common feature: both purchased continuous group (C-group) term policy certificates from the Inter-American Insurance Co. of Illinois, Commonwealth Life Insurance Co., and Peoples Security Life Insurance Co. The C-group product provided routine group term life insurance with an added component, a "special" conversion policy through which a covered employee, under certain circumstances,[2] could opt to convert his or her policy to an individual policy, the C-group conversion universalife (UL) policy. By converting from a C-group to an individual UL policy, the employee could access funds paid by the employer to the group policy that exceeded the applicable mortality charge, i.e. the cost of insurance. The excess funds, depending on the year in which the conversion takes place,[3] are paid out with interest as so-called "conversion credits."

In addition to being able to access surplus amounts, a policyholder upon conversion to the UL policy may borrow any amounts against his or her policies not re-

[1] Notwithstanding what might be regarded as a geographical anamoly, only the SC VEBA is involved here. There was, however, an additional petitioner in the Tax Court, not a party on this appeal, Wan B. Lo, d/b/a Marlton Pain Control and Acupuncture Center, who established a plan under the NJ VEBA.

[2] Under the policies, conversion was allowed when group coverage ceased because (1) the employee ceased employment, (2) the employee left the class eligible for coverage, (3) the underlying contract terminated, (4) the underlying contract was amended to terminate or reduce the insurance of a class of insured employees, or (5) the underlying contract terminated as to an individual employer or plan. See App. at 1836, 1846.

[3] Under the applicable schedule, none of the conversion credit balance is transferred to the C-group conversion UL policy if conversion occurs in the C-group term policy's first year. However, if conversion takes place in the C-group term policy's fourth year or beyond, 95% of the conversion credit balance is transferred to the C-group conversion UL policy. Policyholders could not receive more than 95% of their conversion credit balance because a five percent commission was paid automatically to the insurance agent upon conversion. See App. at 2161–62, 4710, 4713.

quired to keep the policies in force.[4] When the policyholder dies, the loans are to be repaid from the policy death benefits, which ordinarily are not subject to income tax. See I.R.C. § 101. Of course, by borrowing the money the taxpayer effectively would be withdrawing money the medical corporations paid for the conversion privilege on a tax free basis. Thus, as if by magic, cash derived from the corporations would be withdrawn without tax. Each of the physician taxpayers, other than Dr. Sobo, in fact converted at least one C-group term certificate to a special policy providing conversion credits. See App. at 426–29, 439–41.

Neonatology, on the basis of conversations between its principal, Dr. Mall, and Cohen, established the Neonatology Plan under the SC VEBA on January 31, 1991, effective January 1, 1991. Under the plan, each covered employee was to receive a life insurance benefit equal to 6.5 times the employee's compensation of the prior year. See App. at 434, 1807. John Mall, Dr. Mall's husband, was not a paid employee of Neonatology and thus was not eligible to join the plan. Nevertheless, Dr. Mall and PES, the plan administrator, allowed Mr. Mall to join the plan, making him eligible to receive a death amount commensurate to that payable under life insurance that he had owned outside the plan ($500,000). See Supp. App. at 108–09. The Neonatology Plan purchased three C-group life insurance policies, two on Dr. Mall's life and one on Mr. Mall's life. See App. at 434–39. Neonatology contributed to the Neonatology Plan during each year from 1991 through 1993 and, for each subject year, claimed a tax deduction for those contributions and other related amounts.

Lakewood, on the basis of conversations between its principals and Cohen, established the Lakewood Plan under the SC VEBA on December 28, 1990, effective January 1, 1990. Under the plan, each covered employee was to receive a life insurance benefit equal to 2.5 times his or her prior-year compensation. See App. at 387. Lakewood amended its plan as of January 1, 1993, to increase the compensation multiple to 8.15. The Lakewood Plan purchased 12 C-group life insurance policies on the lives of Drs. Hirshkowitz, Desai, Sobo, McManus, and Sankhla and three group annuities toward future premiums on the policies. See App. at 400–26. Lakewood also purchased three C-group policies outside of the Lakewood Plan. The individual owners on their own behalf determined the amounts contributed by Lakewood to the SC VEBA. See App. at 1015–16, 3674–87. For each subject year, Lakewood claimed a tax deduction for those contributions and other related amounts.

The IRS audited Neonatology's tax returns for calendar years 1992 and 1993 and Lakewood's tax returns for fiscal year 1991 (ending October 31, 1991) and calendar years 1992 and 1993. As a consequence of the audits, the Commissioner made the following determinations. First, with respect to the deductions claimed by Neonatology for amounts paid to the SC VEBA and by Lakewood for amounts paid to the SC VEBA and to the three non-plan C-group policies, he allowed only the cost of annual term life insurance protection and disallowed the excess amounts of $43,615 and $986,826 for Neonatology and Lakewood respectively. See App. at 2265–66, 2283–85. The Commissioner based his disallowance on alternative bases: (1) the excess contributions were not ordinary and necessary business expenses under I.R.C. § 162(a); (2) even if the amounts constituted ordinary and necessary business expenses, they nevertheless were not deductible under I.R.C. §§ 404(a) and 419(a), which limit the deductibility of contributions paid to deferred compensation plans and welfare benefit plans. See App. at 2266, 2285.[5]

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[4] Notably, the interest due on any loan policy was equal to the interest credited on the asset accumulation. In other words, there were no out-of-pocket costs to the debtor-policyholder. See App. at 2164. To hedge the attendant C-group product risks, Inter-American and Commonwealth reinsured with a third party.

[5] Specifically, the Commissioner ruled that as deferred compensation plans, the Neonatology and Lakewood Plans did not satisfy the I.R.C. § 404(a)(5) "separate account" requirement for the contributions to be deductible. If the plans were characterized as welfare benefit funds, I.R.C. § 419(b) limited the deductions as the plans could not qualify for the "10-or-more-employer plans" exception to section 419(b) in I.R.C. § 419A(f)(6).

Second, the Commissioner determined with respect to the individual owners that amounts paid to the SC VEBA program increased personal incomes by $39,343 for Dr. Mall and her husband, $219,806 for Dr. Desai, $56,107 for Dr. McManus, $601,849 for Dr. Hirshkowitz, and $101,314 for Dr. Sobo (his estate). See App. at 2271, 2311, 2297, 2320. The Commissioner included the excess contributions as income to the individual taxpayers on alternative bases: (1) the amounts were deposited in the plans for the economic benefit of the individual taxpayers and as such constituted constructive dividends under I.R.C. §§ 61(a)(7) and 301; (2) assuming that the Neonatology and Lakewood Plans constituted deferred compensation plans, the excess contributions were includible under section 402(b). See App. at 2271, 2297, 2311, 2320. Lastly, the Commissioner determined that by reason of the underpayment of taxes the individual taxpayers were subject to penalties under I.R.C. § 6662(a).

Neonatology, Lakewood, and the individual owners petitioned the Tax Court challenging the IRS's determinations. After a bench trial, the court sustained the Commissioner on the ground that:

> The Neonatology Plan and the Lakewood Plan are primarily vehicles which were designed and serve in operation to distribute surplus cash surreptitiously (in the form of excess contributions) from the corporations for the employee/owners' ultimate use and benefit .... The premiums paid for the C-group term policy exceeded by a wide margin the cost of term life insurance .... What is critical to our conclusion is that the excess contributions made by Neonatology and Lakewood conferred an economic benefit on their employee/owners for the primary (if not sole) benefit of those employee/owners, that the excess contributions constituted a distribution of cash rather than a payment of an ordinary and necessary business expense, and that neither Neonatology nor Lakewood expected any repayment of the cash underlying the conferred benefit.

Neonatology, 115 T.C. at 89–91.

Without addressing the alternative grounds for the Commissioner's conclusions, the court rejected taxpayers' arguments that the possibility of forfeiture in certain situations like policy lapse or death rendered all excess payments into de facto contributions to life insurance protection. Id. at 89–90 (''The mere fact that a C-group term policyholder may forfeit the conversion credit balance does not mean, as petitioners would have it, that the balance was charged or paid as the cost of term life insurance.''). The court also rejected the idea that contributions which in fact did not fund term life insurance were paid as compensation for services, rather than dividends, because as a factual matter neither Neonatology nor Lakewood had the requisite compensatory intent when the contributions were made. Id. at 93. Lastly, the court agreed with the Commissioner that the individual taxpayers were in fact negligent and could not circumvent the accuracy-related penalties by asserting a good faith, reliance-on-professional defense nor could they do so by claiming that the case involved tax matters of first impression.

The Tax Court entered its decisions on April 9, 2001. Taxpayers timely appealed on July 6, 2001. We have jurisdiction over this appeal pursuant to I.R.C. § 7482, and the Tax Court had jurisdiction over the petitions pursuant to I.R.C. §§ 6213(a) and 7442.

III. DISCUSSION

There are three principal issues before us on appeal: (1) whether the Tax Court correctly determined that the amounts contributed in excess of the cost of per annum term life insurance were not ordinary and necessary business expenses and therefore not deductible; if yes, (2) whether those amounts constituted dividends, includible as taxable individual income, or compensation to the individual taxpayers; and, (3) whether the individual taxpayers were negligent. Our review of the Tax Court's legal conclusions is plenary and is based on the ''clearly erroneous'' standard for its findings of fact. See ACM P'ship v. Comm'r,

157 F.3d 231, 245 [82 AFTR 2d 98-6682] (3d Cir. 1998); Pleasant Summit Land Corp. v. Comm'r, 863 F.2d 263, 268 [63 AFTR 2d 89-344] (3d Cir. 1988). Moreover, taxpayers bear the burden of refuting the IRS's determinations. See Welch v. Helvering, 290 U.S. 111, 115 [12 AFTR 1456], 54 S.Ct. 8, 9 [12 AFTR 1456] (1933).[6]

A. The Deficiencies

[1] Section 162(a) of the Internal Revenue Code[7] allows for the deduction of all ordinary and necessary expenses incurred in carrying on a trade or business providing five requirements are met: the item claimed as deductible (1) was paid or incurred during the taxable year; (2) was for carrying on a trade or business; (3) was an expense; (4) was a necessary expense; and (5) was an ordinary expense. See Comm'r v. Lincoln Sav. & Loan Ass'n, 403 U.S. 345, 352 [27 AFTR 2d 71-1542], 91 S.Ct. 1893, 1898 [27 AFTR 2d 71-1542] (1971). Beyond peradventure, employee benefits like life insurance are a form of compensation deductible by the employer.[8] See Treas. Reg. § 1.162-10(a); see also Joel A. Schneider, M.D., S.C. v. Comm'r, 1992 T.C. Memo. 992–24, [sic, 1992-24] 63 T.C.M. (C.C.H.) 1787. To the extent, however, that Neonatology's and Lakewood's expenditures did not fund term life insurance, the Tax Court found that they did not meet the five requirements delineated above and therefore were not deductible. This factual finding was not clearly erroneous. See Comm'r v. Heininger, 320 U.S. 467, 475 [31 AFTR 783], 64 S.Ct. 249, 254 [31 AFTR 783] (1943).

The record amply supports the conclusion that taxpayers paid artificially inflated premiums in a creative bookkeeping ploy conceived by their insurance specialists to exploit what they thought were loopholes in the tax laws. Indeed, we do not see how a court examining this case could conclude otherwise. Charles DeWeese, the Commissioner's expert, testified that amounts paid into the C-group policies exceeded conventional life insurance premiums by nearly 500%. See App. at 804–08, 2156.[9] Evidence at trial demonstrated that Dr. Mall knew that term life insurance was substantially more expensive to buy through the SC VEBA than through other plans offered to her under the auspices of the American Medical Association and the American Academy of Pediatrics. She nevertheless opted to form the Neonatology Plan because she believed that it offered her the best tax benefits. See App. at 1025. Dr. Hirshkowitz testified that Lakewood intentionally paid more expensive premiums on the C-group policies than it would have for conventional life insurance protection. See App. at 998. Dr. Desai, another Lakewood owner, testified that his independent personal life insurance cost him substantially less than the policies issued pursuant to the SC VEBA. See App. at 1047. Like Dr. Mall, the Lakewood owners nevertheless invested in the SC VEBA program because of Cohen's representation of tax benefits and cash returns that they could anticipate receiving. See App. at 1014–15.

The record also reveals that excess premium amounts did not pay for actual current year life insurance protection but rather paid for conversion credits. The compliance manager of the Providian Cor-

[6] The burden of proof may be shifted to the Commissioner in certain circumstances for audits conducted after July 22, 1998. See I.R.C. § 7491. These modifications to the Internal Revenue Code have no bearing on this case.

[7] The Internal Revenue Code, I.R.C. § 162(a), provides that "[t]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

[8] Of course, the mere fact that the benefit is a form of deductible compensation does not necessarily mean that it is taxable to the employee. See I.R.C. § 79. We note that the parties do not treat section 79 as significant here.

[9] It should be noted that the Tax Court made certain credibility determinations, finding DeWeese, an independent consulting actuary, to be a "reliable, relevant, and helpful" witness whose testimony was bolstered by a voluminous record with stipulations to more than 2,000 facts and with more than 1,500 exhibits. See Neonatology, 115 T.C. at 86–87. By the same token, the court found that the opinions expressed by taxpayers' sole expert, Jay Jaffe, were of minimal help, considering his close relationship to one of the insurance companies that provided the C-group product at issue in the case. See id. (experts who act as advocates, "can be viewed only as hired guns of the side that retained them, and this not only disparages their professional status but precludes their assistance to the court in reaching a proper and reasonably accurate conclusion") (quoting Jacobson v. Comm'r, T.C. Memo. 1989-606 [¶89,606 PH Memo TC], 58 T.C.M. (C.C.H.) 645)). The court also found that some of taxpayers' fact witnesses "testified incredibly with regard to material aspects of this case" and that their testimony, for the most part, was "self-serving, vague, elusive, uncorroborated, and/or inconsistent with documentary or other reliable evidence." Id. These types of credibility determinations are ensconced firmly within the province of a trial court, afforded broad deference on appeal. See Dardovitch v. Haltzman, 190 F.3d 125, 140 (3d Cir. 1999).

poration, the parent of the Commonwealth Life Insurance Company which issued policies involved here, stated in a letter to the IRS that the "premiums paid for the term policy are higher than the traditional term policy because of the conversion privilege and the costs of conversion credits." App. at 3690. DeWeese, belying taxpayers' claim that C-group premiums were higher than those under ordinary term life policies because they were calibrated to the higher risks of longer term employees in small markets,[10] testified that the bulk of the gross premiums went to accumulate assets for distribution to the individual participants upon conversion. See App. at 2173. In addition, the record supports the conclusion that payments made to the Lakewood Plan for annuities were made not to fund current life insurance protection for employees but rather were made as an investment for the trustee to pay premiums on future C-group premiums. See App. at 976, 993–94, 1041–42.

In sum, the evidence fully supports, indeed compels, the finding that the contributions in excess of the amounts necessary to pay for annual term life insurance protection were distributions of surplus cash and not ordinary and necessary business expenses. Considering the sound reasoning of the Tax Court and our own intensive review of the facts here, we conclude that it is implausible that the owners of Neonatology and Lakewood, educated and highly trained medical professionals, knowingly would have overpaid substantially for term life insurance unless they contemplated receiving an added boon such as a tax-free return of the excess contributions.

Taxpayers advance two arguments to the effect that the court erred by not limiting its consideration to the written plan documents and life insurance contracts rather than relying on extraneous evidence like the plan marketing materials which discuss the availability of conversion credits. First, they maintain that the Neonatology and Lakewood SC VEBA programs were employee benefit plans under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq., (ERISA). Thus, they contend that representations made outside of the plan documents cannot be used to consider rights and obligations arising out of the plans. See Br. of Appellants at 35. Second, they argue that under governing state insurance law, the tax implications of a group term life insurance policy are determined only on the basis of the policy language itself. As the literal provisions of the plans discuss only insurance benefits -- that is, a death benefit and an option to convert to an individual policy upon termination of employment -- but say nothing about excess contributions returning as conversion credits, taxpayers claim that the Tax Court was compelled to conclude from the strict form of their plans that all contributions in fact went to providing insurance benefits.

Inasmuch as taxpayers did not raise the ERISA issue before the Tax Court, we need not consider it on this appeal. See Visco v. Comm'r, 281 F.3d 101, 104 [89 AFTR 2d 2002-974] (3d Cir. 2001). While we recognize that in some exceptional circumstances an appellate court may review a defaulted argument, in this case there are compelling reasons militating against our overlooking procedural norms to consider whether ERISA governed the SC VEBA programs as our determination may prejudice persons not parties to this case.[11]

In any event, even assuming for purposes of argument that the plans were employee benefit plans under ERISA, the fact remains that under well-established tax principles a court is not limited to plan documents in determining the tax consequences of a transaction. See, e.g., Comm'r v. Court Holding Co., 324 U.S. 331, 334 [33 AFTR 593], 65 S.Ct. 707,

[10] See Br. of Appellants at 44 and n.30.

[11] An amicus brief has been filed in this case on behalf of five physician-participants in the VEBA program who have filed a civil complaint against the insurance companies that wrote the C-group policies, Sankhla v. Commonwealth Life Ins. Co. et al., No. 01-CV-4761 (U.S.D.C. N.J.). Amici have an interest in the outcome of this case because the extent to which we address whether the plans are governed by ERISA could affect resolution of the issue of whether their state law claims against the insurance companies are preempted. See Amicus Br. at 1–2. Rather than needlessly prejudice the rights of litigants in separate proceedings, we do not discuss the applicability of ERISA to the VEBA plans.

708 [33 AFTR 593] (1945) (''The incidence of taxation depends upon the substance of a transaction.''); ACM P'ship, 157 F.3d at 247 (''we must look beyond the form of the transaction to determine whether it has the economic substance that its form represents'') (citations omitted); Lerman v. Comm'r, 939 F.2d 44, 54 [68 AFTR 2d 91-5223] (3d Cir. 1991) (Commissioner and courts have ''the power and duty ... to look beyond the mere forms of transactions to their economic substance and to apply the tax laws accordingly.'').[12]

The cases cited by taxpayers,[13] on the other hand, involve only disputes over ERISA benefits between private parties, not disputes over tax liabilities between private parties and the Commissioner. While the cases lay out certain principles for determining rights and obligations under an ERISA plan, including the standard contract theory that the literal terms of a plan document must guide all analysis, the cases say nothing about the proper evidentiary protocol for evaluating the tax ramifications of an employer benefit plan. In sum, we have no intention of importing ERISA principles into this tax dispute.

Moreover, we reject taxpayers' contention that the Tax Court erred by not limiting its evaluation to the plan documents in light of state insurance law. The court did not construe or interpret the terms of the individual taxpayers' life insurance policies, but rather characterized the contributions made towards those policies for purposes of determining tax liabilities. While the former endeavor indeed would implicate state law,[14] the latter is singularly a question of federal law. See, e.g., Thomas Flexible Coupling Co. v. Comm'r, 158 F.3d 828, 830 [35 AFTR 606] (3d Cir. 1946).

[2] In view of our conclusion that the contributions in dispute were not ordinary and necessary business expenses under I.R.C. § 162(a), we next consider whether the district court erred in determining that the contributions constituted dividends rather than compensation to the individual taxpayers and thus deductible to the corporations on that basis.[15] Under I.R.C. § 316(a), a dividend is a distribution of property made by a corporation to its shareholders out of its earnings and profits. See Comm'r v. Makransky, 321 F.2d 598, 601–03 [12 AFTR 2d 5097] (3d Cir. 1963).

Dividends are taxed as a component of gross income. See I.R.C. § 61(a)(7). A shareholder, even if the corporation has dispensed with the formalities of declaration, may be charged with a disguised or constructive dividend if the corporation confers a direct benefit on him from available earnings and profits without expectation of repayment. See, e.g., Crosby v. United States, 496 F.2d 1388–89 [34 AFTR 2d 74-5371] (5th Cir. 1974); Noble

[12] Taxpayers, conflating the so-called ''substance-over-form'' doctrine with the ''economic substance'' or ''sham transaction'' doctrine, mistakenly argue as well that a court may not disregard the form of an arrangement until it determines that the arrangement lacks any economic substance other than obtaining tax deductions. See Br. of Appellants at 41 (''If ... there is any economic substance to the arrangement apart from the alteration of tax liabilities, then the form of the arrangement must be respected, even if the arrangement was motivated by tax avoidance or minimization.''). In actuality, the two doctrines are distinct. The substance-over-form doctrine is applicable to instances where the ''substance'' of a particular transaction produces tax results inconsistent with the ''form'' embodied in the underlying documentation, permitting a court to recharacterize the transaction in accordance with its substance. The economic substance doctrine, in contrast, applies where the economic or business purpose of a transaction is relatively insignificant in relation to the comparatively large tax benefits that accrue (that is, a transaction ''which actually occurred but which exploit[s] a feature of the tax code without any attendant economic risk,'' Horn v. Comm'r, 968 F.2d 1229, 1236 n.8 [70 AFTR 2d 92-5196] (D.C.Cir. 1992)); in that situation, where the transaction was an attempted tax shelter devoid of legitimate economic substance, the doctrine governs to deny those benefits. See generally Rogers v. United States, 281 F.3d 1108, 1113–18 (10th Cir. 2002). The Tax Court in this case, however, based its decision solely on the substance-over-form doctrine, finding that the form of the VEBA was not reflective of its genuine substance. In addition to the evidence we have set forth, the Tax Court's determination further is reinforced, inter alia, by the fact that taxpayers were allowed to convert the C-group term policies to individual C-group conversion UL policies even though none of the five required conditions for conversion were present, see Supp. App. at 106, 111–12, and by the fact that the amount of life insurance taken on the Lakewood principals did not correspond to the amount of benefits for which they were eligible under the plan documents. See, e.g., App. at 389, 400–03 (Dr. Hirshkowitz had C-group certificates on his life for over a million dollars even though he was eligible for life benefits of less than $500,000 -- 2.5 times his 1991 compensation of $181,199.09). Moreover, even under the economic substance doctrine taxpayers would be hard-pressed to argue that the transactions involving the excess term life insurance payments had sufficient economic substance to be respected for tax purposes.

[13] See Br. of Appellants at 29–36 (citing Gruber v. Hubbard Bert Karle Weber, Inc., 159 F.3d 780 (3d Cir. 1998); Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan, 24 F.3d 1491 (3d Cir. 1994); Schoonejongen v. Curtiss-Wright Corp., 18 F.3d 1034 (3d Cir. 1994); Henglein v. Informal Plan for Plant Shutdown Benefits, 974 F.2d 391 (3d Cir. 1992)).

[14] Curiously, taxpayers fail to specify which state's insurance law applies: New Jersey, where all of the physicians reside, or Penn-sylvania, where the insurance agents who promoted the VEBA were located.

[15] In their brief, taxpayers indicate that the Tax Court erred in characterizing the ''disallowed contributions as constructive dividends rather than deductible compensation.'' Br. at 46 (emphasis added). See King's Ct. Mobile Home Park, Inc. v. Comm'r, 98 T.C. 511, 512 (1992) (''The first question is whether the diversion of $58,365 of petitioner's income by its controlling shareholder for personal use constitutes the payment of deductible wages or the distribution of a dividend.'') (footnote omitted).

v. Comm'r, 368 F.2d 439, 443 [18 AFTR 2d 5982] (9th Cir. 1966); see also Magnon v. Comm'r, 73 T.C. 980, 993–94 (1980) (''Where a corporation confers an economic benefit on a shareholder without the expectation of repayment, that benefit becomes a constructive dividend, taxable to the shareholder, even though neither the corporation nor the shareholder intended a dividend.'').

In this case, the record fully supports the conclusion of the Tax Court that the individual taxpayers were chargeable with constructive dividends. Indeed, Neonatology and Lakewood, by design surrendering any expectation of remuneration, purchased products that generated a considerable economic bounty for their shareholders in the form of conversion credits. Furthermore, nothing in the record illustrates that taxpayers diverted these corporate assets with the requisite ''compensatory intent.'' See King's Ct. Mobile Home Park, Inc. v. Comm'r, 98 T.C. 511, 514–15 (1992) (business expense may be deducted as compensation only if the payor intends at the time that the payment is made to compensate the recipient for services performed).[16] Moreover, support for a conclusion, though certainly not dispositive, that the excess contributions were not paid as compensation for services rendered is supplied by the fact that the Neonatology and Lakewood plans were made available only to those individuals who owned the corporations and not to their non-equity employees. Furthermore, Dr. Mall directed Neonatology to purchase the C-group product on her husband, a non-employee third-party who did not perform any services for the corporation.[17]

In the circumstances, it is therefore not surprising that Dr. Desai at trial made the matter-of-fact statement that the money contributed by Lakewood to fund insurance premiums and conversion credits is ''our money. It's not Lakewood['s].'' App. at 1055.

Taxpayers again rely on non-tax ERISA jurisprudence for the exaggerated proposition that payments made pursuant to an employee benefit plan are necessarily compensatory.[18] However, the plain language of I.R.C. § 419(a)(2) explicitly contemplates situations where contributions paid or accrued by an employer to a welfare benefit fund are not deductible (deductions allowed only if ''they would otherwise be deductible''); see also Treas. Reg. § 1.162-10(a) (contributions to employee benefit plans deductible only if ''they are ordinary and necessary business expenses.''). To read otherwise inexplicably creates a shelter loophole by allowing taxpayers to transform disbursements into deductible business expenses merely by funneling them through an ERISA plan.

We recognize that it is axiomatic that taxpayers lawfully may arrange their affairs to keep taxes as low as possible.[19] Nevertheless, at the same time the law imposes certain threshold duties which a taxpayer may not shirk simply by manipulating figures or maneuvering assets to conceal their real character. See Court Holding Co., 324 U.S. at 334, 65 S.Ct. at 708 (''[t]o permit the true nature of a transaction to be disguised by mere formal-isms . . . would seriously impair the effec-tive administration of the tax policies of Congress.''); see also Saviano v. Comm'r, 765 F.2d 643, 654 [56 AFTR 2d 85-5337] (7th Cir. 1985) (''The freedom to arrange one's affairs to minimize taxes does not in-clude the right to engage in financial fanta-sies with the expectation that the Internal Revenue Service will play along.''). Thus, we conclude that the Tax Court correctly held that the inflated premiums were not allowable corporate business expenses but

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16 To qualify as deductible compensation, a payment also need be reasonable. See Treas. Reg. § 1.162-7(a). We do not need to address this point, as the Tax Court correctly determined as a matter of fact that taxpayers did not demonstrate compensatory intent.

17 We are satisfied that the mere fact that Dr. Mall partially diverted the benefits to her husband should not change our result.

18 Taxpayers misread Pediatric Surgical Assoc., P.C. v. Comm'r, 81 T.C.M. (CCH) 1474, 1479 [TC Memo 2001-81] (2001), for the proposition that anything paid by a corporation for an employee's benefit is presumed legally to be compensation. Rather, Pediatric Surgical clearly iterates that intent to pay compensation ''is a factual question to be decided on the basis of the particular facts and circumstances of the case.'' Id. at 1480.

19 See Gregory v. Helvering, 293 U.S. 465, 469 [14 AFTR 1191], 55 S.Ct. 266, 267 [14 AFTR 1191] (1935) (''The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.').

rather allocations in the nature of dividends and thusly taxable.

B. The Penalties

[3] Finally, we must consider the aptness of the penalties assessed by the Commissioner and upheld by the Tax Court. The Internal Revenue Code imposes a 20% tax on the portion of an underpayment attributable, among other things, to negligence or the disregard of rules and regulations. I.R.C. §§ 6662(a) and (b)(1). ''Negligence'' can include any failure to make a reasonable attempt to comply with the provisions of the Code, to exercise or-dinary and reasonable care in the prepara-tion of a tax return, to keep adequate books and records, or to substantiate items properly. I.R.C. § 6662(c); Treas. Reg. § 1.6662-3(b)(1). Generally speaking, the negligence standard as in the tort context is objective, requiring a finding of a lack of due care or a failure to do what a reasona-ble and prudent person would do under analogous circumstances. See, e.g., Schrum v. Comm'r, 33 F.3d 426, 437 [74 AFTR 2d 94-6174] (4th Cir. 1994).

On the basis of the record, the Tax Court was justified in concluding as a matter of fact that the individual taxpayers were liable for the section 6662 accuracy-related penalties because they did not meet their burden of proving due care. See Hayden v. Comm'r, 204 F.3d 772, 775 [85 AFTR 2d 2000-825] (7th Cir. 2000) (the Commissioner's determination of negligence is presumed to be correct, and the taxpayer has the burden of proving that the penalties are erroneous); accord Pahl v. Comm'r, 150 F.3d 1124, 1131 [82 AFTR 2d 98-5418] (9th Cir. 1998) (burden of disproving negligence on taxpayer); Goldman v. Comm'r, 39 F.3d 402, 407 [74 AFTR 2d 94-6923] (2d Cir. 1994) (once the Commissioner determines that a negligence penalty is appropriate, the taxpayer bears the burden of establishing the absence of negligence). The physician-owners caused their corporations to overpay considerably for term life insurance knowing that the money could be rerouted circuitously to their personal coffers with a net tax savings. Yet, notwithstanding the extraordinary financial implications of the SC VEBA arrangement, the individual taxpayers did not make a proper investigation or exercise due diligence to verify the program's tax legitimacy. See David v. Comm'r, 43 F.3d 788, 789–90 [75 AFTR 2d 95-480] (2d Cir. 1995); see also Pasternak v. Comm'r, 990 F.2d 893, 903 [71 AFTR 2d 93-1469] (6th Cir. 1993) (holding that a reasonably prudent person should investigate claims when they are likely ''too good to be true'') (quoting McCrary v. Comm'r, 92 T.C. 827, 850 (1989)).

Taxpayers argue that their negligence should have been excused because they relied on the advice of professionals. While it is true that actual reliance on the tax advice of an independent, competent professional may negate a finding of negligence, see, e.g., United States v. Boyle, 469 U.S. 241, 250 [55 AFTR 2d 85-1535], 105 S.Ct. 687, 692 [55 AFTR 2d 85-1535] (1985), the reliance itself must be objectively reasonable in the sense that the taxpayer supplied the professional with all the necessary information to assess the tax matter and that the professional himself does not suffer from a conflict of interest or lack of expertise that the taxpayer knew of or should have known about. See Treas. Reg. § 1.6664-4(c); Ellwest Stereo Thea-tres, Inc. v. Comm'r, T.C. Memo. 1995-610 [1995 RIA TC Memo ¶95,610], 70 T.C.M. (C.C.H.) 1655; see also Zfass v. Comm'r, 118 F.3d 184, 189 [79 AFTR 2d 97-3188] (4th Cir. 1997).

The Tax Court concluded that taxpayers could not prevail on a reliance-on-professional defense because they received advice only from Cohen, an insurance agent who stood to profit considerably from the participation of Neonatology and Lakewood in the VEBA program, rather than from a competent, independent tax professional with sufficient expertise to warrant reliance. The circumstances here, including the facts that certified public accountants prepared taxpayers' returns, the New Jersey Medical Society -- a group with dubious tax code proficiency which in fact received royalties to endorse the SC

VEBA[20] --purportedly endorsed the program, and the engagement agreement between PES and the employers stated that PES would submit the trust to the IRS for qualification,[21] do not suffice for us to disturb the Tax Court's negligence finding on a clear error basis. See Merino v. Comm'r, 196 F.3d 147, 154 [84 AFTR 2d 99-6790] (3d Cir. 1999).

In reaching our result, we acknowledge that Dr. Hirshkowitz deviated from the thoroughly head-in-the-sand posture of his fellow taxpayers by soliciting his accountant's opinion of the SC VEBA. See App. at 6666–67. Nevertheless, the record supports the court's finding with respect to Dr. Hirshkowitz, considering that he did not introduce into evidence precisely what information he showed to his accountant, precisely what advice his accountant gave him, and, more generally, the qualifications of his accountant.

We also add the following. When, as here, a taxpayer is presented with what would appear to be a fabulous opportunity to avoid tax obligations, he should recognize that he proceeds at his own peril. In this case, PES devised a program which it marketed as "creat[ing] a tax deduction for the contributions to the employee welfare benefit plan going in and a permanent tax deferral coming out." As highly educated professionals, the individual taxpayers should have recognized that it was not likely that by complex manipulation they could obtain large deductions for their corporations and tax free income for themselves.[22]

In a final attempt to skirt the additional penalties, taxpayers argue that a finding of negligence could not in fairness arise out of a case resolving tax issues of first impression. In this regard, we point out that the parties have indicated that this case is indeed without direct precedent and that other cases are awaiting our disposition.[23]

This argument, however, does not sway us for this case does not involve novel questions of law but rather is concerned with the application of well-settled principles of taxation to determine whether certain expenditures made by close corporations are deductible as ordinary and necessary business expenses or taxable as constructive dividends. While the setting in which these principles have come to bear is no doubt unusual with its VEBAs, C-group policies, and conversion credits, the law was nevertheless pellucid that taxpayers should have endeavored to verify the validity of their deductions before claiming them.[24] Moreover, they should have been apprehensive when they examined the scheme, for experience shows that when something seems too good to be true that probably is the case. Overall, we are satisfied that taxpayers now must abide the consequences of the Commissioner's audit as sustained by the Tax Court, including the finding of liability for accuracy-related penalties under section 6662.

IV. CONCLUSION

For the foregoing reasons, we will affirm the decisions of the Tax Court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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20 See App. at 570–71.

21 Notably, the agreement does not say that the IRS did qualify the plan. In fact, as the government points out, the IRS expressly disavowed any opinion as to whether contributions to the plan were deductible. See App. at 1410.

22 It well may be that reliance on the advice of a professional should only be a defense when the professional's fees are not dependent on his opinion. For example, it is not immediately evident why a taxpayer should be able to take comfort in the advice of a professional promoting a tax shelter for a fee. After all, that professional would have an interest in his opinion. Consideration of this point, however, will have to wait for another day.

23 The Tax Court observed that this case is a test case with the result resolving other cases involving SC VEBA and NJ VEBA plans and that the parties in 19 other cases pending before the Tax Court have agreed to be bound by the decision here. See Neonatology, 115 T.C. at 44.

24 We recognize that courts have overlooked negligence penalties in cases of first impression that involve unclear statutory language. See, e.g., Mitchell v. Comm'r, T.C. Memo. 2000-145 [TC Memo 2000-145], 79 T.C.M. (C.C.H.) 1954 (recognizing exception in a case of first impression involving the unclear application of an amendment to the Internal Revenue Code); Hitchins v. Comm'r, 103 T.C. 711, 720 (1994) (first impression exception applies to issue not previously considered by the court where the statutory language is not entirely clear). But nothing in this case hinges on the interpretation of vague statutory text.

¶2002-5153

Daniel ANDERSEN and Lorenzo J. Lamantia, individually and on behalf of the members of the Institute for Global Prosperity, PLAINTIFFS-APPELLANTS v. UNITED STATES OF AMERICA, Named and Unnamed Agents of the Internal Revenue Service Criminal Division, IRS Special Agent Thomas Wourgiotis, IRS Special Agent Tom Oenbrink, IRS Special Agent Paula Lurvey, IRS Special Agent Jeffrey Holm, IRS Special Agent Julie Lau, IRS Special Agent Charles Phillips, IRS Special Agent Judy O'Briant and Shoshanna Szuch, DEFENDANTS-APPELLEES. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-56900, July 30, 2002. Appeal from District Court dismissed. Decision against Taxpayers.

1. Actions against U.S. and IRS agents—Court of Appeals jurisdiction—interlocutory appeals—motion for return of seized property—pending criminal investigation. Taxpayers' appeal of order denying their motion for preliminary injunction to enjoin govt. from further seizing their tax protest org.'s property and for return of org. membership lists and literature that IRS seized from their homes and org.'s offices was dismissed for lack of jurisdiction: motion was really F.R.Crim.P. 41(e) motion for return of seized property unreviewable on appeal where it sought more than property's return and where taxpayers were subjects of pending criminal investigation. Also, taxpayers' argument that 1st Amendment nature of their underlying complaint excepted them from such finality/no appeal rule was rejected where broad rule was necessary to maintaining integrity of criminal justice process regardless of nature of underlying complaint; and bar against interlocutory appeal meant only that review of merits was postponed until final action of district court. *Reference:* United States Tax Reporter ¶73,447.504(60); 73,447.516(30).

William A. Cohan, William A. Cohan, P.C., San Diego, CA, for the plaintiffs-appellants.
Gretchen M. Wolfinger, Tax Division, U.S. Department of Justice, Washington, D.C., for the defendants-appellees.

Appeal from the United States District Court for the Central District of California, Christina A. Snyder, District Judge, Presiding, D.C. No. CV-01- 08427-CAS. United States Court of Appeals, Ninth Circuit.

Before STEPHEN REINHARDT and SUSAN P. GRABER, Circuit Judges, and ROGER L. HUNT,* District Judge.

Opinion

GRABER, Circuit Judge:

Plaintiffs Andersen and LaMantia, on behalf of themselves and the members of the Institute for Global Prosperity (IGP), sued the United States and its agents. Plaintiffs alleged that the government conspired to violate their constitutional rights and those of IGP's members when the government executed eight search warrants and seized, among other things, IGP's membership lists and literature. Plaintiffs moved for an injunction (1) to prevent the government from conducting further searches or seeking further information, (2) to prevent the government from using the information obtained from search warrants already executed, and (3) to require the government to return the seized property. The district court denied the motion. We dismiss Plaintiffs' appeal for lack of jurisdiction.

FACTS AND PROCEDURAL HISTORY

Plaintiffs are leaders of IGP, an organization that distributes "educational, political, religious and philosophical materials in the form of books and CDs, much of which is critical of the United States' financial and taxing policies." Plaintiffs and

* The Honorable Roger L. Hunt, United States District Court for the District of Nevada, sitting by designation.

other IGP leaders are currently under investigation[1] for tax-related crimes.

Between February 28, 2001, and September 25, 2001, the government executed eight search warrants on Plaintiffs' residences and on IGP offices across the country. The warrants sought a broad range of financial records. The warrants also sought material under the heading "[IGP] related records/evidence," including applications for membership, membership cards, membership agreements, confidentiality agreements, promotional literature (letters, flyers, brochures, videotapes and audiotapes), scripts used during telephone solicitations, newspaper advertisements, lists of names or addresses or telephone numbers (or other identifying data) of members, prospective members or Qualified Retailers, records reflecting attendance at [IGP] seminars, videotapes/audiotapes of [IGP] leaders/members at [IGP] seminars, and audiotapes of [IGP programs].

On September 28, 2001, Plaintiffs filed this action in federal district court, alleging claims of (1) conspiracy to violate Plaintiffs' First and Fourth Amendment rights and the First Amendment rights of members and associates of IGP and (2) "willful, wanton and malicious violations" of Plaintiffs' individual Fourth Amendment rights.

At the same time, Plaintiffs filed a motion for a temporary restraining order and a preliminary injunction. They sought to prohibit the United States from (a) conducting any further searches and seizures or otherwise seeking or acquiring indicia of association with plaintiffs and/or IGP's members and/or associates; and (b) any use or dissemination to any person, entity or agency whatsoever of any membership and/or associates' identities or information already obtained during the searches and seizures at issue ....

Plaintiffs also sought a permanent injunction ordering the return of all IGP- related property that had been seized pursuant to the warrants.

The district court denied the request for a temporary restraining order and, later, denied Plaintiffs' motion for a preliminary injunction. Plaintiffs timely filed a notice of appeal.

DISCUSSION

As a threshold matter, we must decide whether we have jurisdiction to review the district court's denial of the preliminary injunction.[2] Generally, we may review only final orders of the district court. 28 U.S.C. § 1291. [1] The denial of a preliminary injunction is one of the few kinds of appealable interlocutory orders. 28 U.S.C. § 1292(a)(1). However, here, Plaintiffs' motion sought relief typically provided by Federal Rule of Criminal Procedure 41(e). Although styled as an action for an "injunction," perhaps because of the general rule noted above, the motion in substance sought the return of property that had been seized pursuant to a warrant. Rule 41(e) controls the procedure for obtaining that form of relief. The distinction between injunction proceedings in general and Rule 41(e) motions in particular is important, because the denial of a motion under Rule 41(e) usually is not appealable. DiBella v. United States, 369 U.S. 121, 131-32 (1962)

The substance of the motion, not its form, controls its disposition. See Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc., 204 F.3d 867, 880 (9th Cir.2000) ("[T]he label attached to a motion does not control its substance." (citation and internal quotation marks omitted)); Hasbrouck v. Texaco, Inc., 879 F.2d 632, 635 (9th Cir.1989) ("The nomenclature the movant uses is not controlling. This court must decide whether a motion, however styled, is appropriate for the relief requested." (citations omitted)). In accordance with that principle favoring substance over form, we have construed a motion that sought injunctive relief of the

[1] At oral argument, the parties agreed that we should assume for the purpose of decision that there is a grand jury investigation in progress. Although the government makes no factual representations on this issue, we so assume. See Fed.R.Crim.P. 6(e) (providing for secrecy of grand jury proceedings).

[2] For jurisdictional purposes, we are obliged to determine the finality of a decision on appeal. Regula v. Delta Family-Care Disability Survivorship Plan, 266 F.3d 1130, 1136-37 (9th Cir.2001). We review de novo questions of our jurisdiction. Didrickson v. United States Dep't of Interior, 982 F.2d 1332, 1337 (9th Cir.1992).

kind provided by Rule 41(e) as a Rule 41(e) motion, notwithstanding the motion's label. See, e.g., DeMassa v. Nunez, 747 F.2d 1283, 1291 (9th Cir.1984) (Ferguson, J., dissenting), reh'g granted on other grounds, 770 F.2d 1505 (9th Cir.1985) (per curiam) (DeMassa I and DeMassa II, respectively). Because Plaintiffs sought the relief provided by Rule 41(e), we construe their motion as one properly brought under that rule.

The Supreme Court has held that the courts of appeal have jurisdiction to review decisions on Rule 41(e) motions "[o]nly if the motion is solely for return of property and is in no way tied to a criminal prosecution in esse against the movant." DiBella, 369 U.S. at 131-32.[3] As we recently recognized:

> This rule reflects the careful balancing between two competing interests: On the one hand, appellate courts should act to prevent the deprivation of seized property that is sorely needed when those deprived have no other avenues for relief. On the other hand, the appeal of a lower court's decision denying a return of property can add uncertainty and delay to an ongoing parallel criminal proceeding, especially if the legality of the search is the critical issue in the criminal trial.

Bridges v. United States (In re 3021 6th Ave. N.), 237 F.3d 1039, 1041 [87 AFTR 2d 2001-578] (9th Cir.2001).

In this case, Plaintiffs' motion seeks the return of the seized property but also asks for significant additional relief. And, there is an ongoing criminal investigation that targets Plaintiffs. In the circumstances, Plaintiffs fail both parts of DiBella's test, and they therefore cannot establish the exception to the general rule that motions like theirs are unappealable.

As for the first criterion, in addition to demanding the return of their property, Plaintiffs seek to enjoin the IRS from conducting any future searches or seizures. Further, they seek to enjoin the IRS from using the material that already was seized. By asking for exclusion of evidence and by seeking to prevent any further searches, the complaint seeks relief beyond "solely" the return of property.

[5] As for the second criterion, an ongoing grand jury investigation constitutes a " 'criminal prosecution in esse' " under DiBella. DeMassa I, 747 F.2d at 1291 (Ferguson, J., dissenting) (quoting DiBella, 389 U.S. at 132). In this circuit, rulings on motions for return of property are unappealable when there is an ongoing grand jury investigation. Id.

Indeed, DeMassa I directly controls this case.[4] In DeMassa I, we construed a motion for a preliminary injunction as a Rule 41(e) motion. Because one of the plaintiffs was the target of an ongoing grand jury investigation, we held that we lacked jurisdiction to review the order denying injunctive relief. See id. at 1287 (stating that "[t]his circuit has joined those courts adopting a liberal definition of when a proceeding is in esse and has also concluded that an order denying the return of seized property is not appealable when a grand jury proceeding against the movant is underway").

DeMassa I clearly contemplates that grand jury proceedings constitute criminal proceedings for the purpose of determining appealability. This interpretation is consistent with DiBella, which held that "the mere circumstance of a pre-indictment mo-

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[3] The dissent relies on two brief passages in DiBella, 369 U.S. at 124-26, to argue that it "do[es] not set forth an absolute rule prohibiting all interlocutory appeals in cases involving criminal proceedings." Dissent at 10607. In the cited passages, however, the DiBella Court was merely describing, as background, extant exceptions to the finality rule, none of which applies here. The Court went on to state the applicable and clear two-part test that we summarize in the text above. 369 U.S. at 131-32.

[4] In DeMassa I, we held that we lacked jurisdiction to review the Fourth Amendment claims of a lawyer whose offices had been searched and whose files had been seized. Because that lawyer was the target of an ongoing grand jury investigation, we concluded that DiBella controlled, and we had no jurisdiction. 747 F.2d at 1287. However, in DeMassa II, we held that we did have jurisdiction to review the Fourth Amendment claims of the clients who were also individually named plaintiffs. 770 F.2d at 1506. We reasoned that those clients were "strangers to any potential indictments" and, thus, their claims were reviewable under DiBella because there was no criminal proceeding in esse. Id.

The clients in DeMassa II were named plaintiffs in the action. By contrast, the IGP is not a plaintiff, nor are any individual members named as plaintiffs except Andersen and LaMantia. Andersen and LaMantia purportedly assert rights on the membership's behalf. Without jurisdiction over any of Andersen's or LaMantia's claims, however, we cannot assert jurisdiction over the membership's potential derivative claims, even if Andersen and LaMantia otherwise would be entitled to bring such claims in a representative capacity.

tion does not transmute the ensuing evidentiary ruling into an independent proceeding begetting finality even for purposes of appealability. Presentations before a ... grand jury are parts of the federal prosecutorial system leading to a criminal trial.'' DiBella, 369 U.S. at 131 (citations omitted) (emphasis added).

Plaintiffs ask for an exception to the rule of nonappealability on the ground that their First Amendment rights allegedly have been infringed. Although DiBella and DeMassa dealt with Fourth Amendment rights, the broad proscription against interlocutory review that those cases establish applies with equal force to First Amendment claims.

We recognize that First Amendment rights may be chilled when the government seizes information about the members of an organization. NAACP v. Alabama, 357 U.S. 449, 462-63 (1958). Nonetheless, for three reasons, we conclude that the Supreme Court would apply the DiBella rule even to a First Amendment claim.

First, the Court's logic in DiBella retains its efficacy in this context. The Court gave two reasons for refusing to create an exception to the general finality rule: The Court was concerned with impeding the criminal justice process, including the Sixth Amendment right to a speedy trial, 369 U.S. at 124, 126, and it concluded that Rule 41(e) motions are not independent of the associated criminal investigation and thus not severable from the ''larger litigious process,'' id. at 127 (citation and internal quotation marks omitted). In other words, permitting an appeal from the district court's decision on a Rule 41(e) motion is likely to affect the integrity of the investigation and potential criminal trial. Id. These concerns are equally valid whatever the specific nature of the constitutional right that the potential criminal defendant seeks to vindicate.

Second, the bar against an interlocutory appeal means only that review on the merits is postponed, not foreclosed. Plaintiffs can obtain appellate review on the merits of their claims when the district court has taken final action, either in the context of a criminal conviction or otherwise.

Third, we note by way of analogy the Supreme Court's application of a procedural bar even in the face of substantial First Amendment claims. In United States v. American Friends Service Committee, 419 U.S. 7 [34 AFTR 2d 74-6053] (1974) (per curiam), the Supreme Court reversed an injunction that had been granted on First Amendment grounds. Employees of the American Friends Service Committee, who were Quakers, obtained an injunction that prevented the government from enforcing mandatory tax-withholding requirements. Id. at 9. Because of their religious objection to the war in Vietnam, the employees contended that the Free Exercise Clause protected their right to express those beliefs by refusing to pay a portion of their taxes. Id. at 7-8. Despite the strong First Amendment interests at stake, the Court imposed a statutory bar against equitable relief. Construing the Anti-Injunction Act, 26 U.S.C. § 7421(a),[5] the Court reaffirmed the principle that ''the constitutional nature of a taxpayer's claim'' under the First Amendment was irrelevant to its analysis. Am. Friends, 419 U.S. at 11 (citation and internal quotation marks omitted).

We express no opinion on whether the Anti-Injunction Act would bar Plaintiffs' suit on the merits; it is not clear whether it would or would not. See Church of Scientology v. United States, 920 F.2d 1481, 1486 [67 AFTR 2d 91-303] (9th Cir.1990) (noting that the Act extends to suits that target any activity that is '' 'intended to or may culminate in the assessment or collection of taxes' '' (quoting Blech v. United States, 595 F.2d 462, 466 [44 AFTR 2d 79-5065] (9th Cir.1979))). However, analogizing from American Friends, we conclude that no exception to the procedural bar may be made here on the ground that Plaintiffs assert First

[5] Subject to certain statutory exceptions not applicable here, the Anti- Injunction Act provides that ''no suit for the purpose of re-straining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.'' 26 U.S.C. § 7421(a).

Amendment as well as Fourth Amendment interests.

Although the dissent emphasizes the compelling nature of First Amendment claims, our jurisdiction is bounded by the clear rule in DiBella, as interpreted by this court in DeMassa. We are not free to ignore those precedents defining our jurisdiction simply because the subject matter of the underlying complaint tempts us to do so. That is true even in the Younger abstention context, on which the dissent relies by analogy. See Younger v. Harris, 401 U.S. 37 (1971) (limiting Dombroski v. Pfister, 380 U.S. 479 (1965), to its facts and abstaining despite an underlying First Amendment claim).

CONCLUSION

Plaintiffs' motion for a preliminary injunction was, in substance, a motion for return of property under Federal Rule of Criminal Procedure 41(e), but it sought additional relief and was tied to an ongoing grand jury investigation. Therefore, the district court's order denying the injunction is not a final, appealable order, and we lack jurisdiction to review it.

APPEAL DISMISSED.

Dissenting Opinion

REINHARDT, Circuit Judge, dissenting:

The majority asserts that it merely applies the clear rule of DiBella and DeMassa to the case at hand. The rule is hardly clear and in my view is not applicable to claims of serious, imminent, and irreparable violations of First Amendment rights. Accordingly, I dissent.

The majority treats the appellants' motion as simply a ''functional'' 41(e) motion that, under the law of our circuit, is tied to an ongoing criminal proceeding and thus is unappealable. In so doing, the majority fails to consider adequately the nature and importance of the subject matter of the appellants' motion. The appellants seek to enjoin the government from seizing and making use of their membership lists—lists of the names and other identifying information regarding all current and prospective members of the Institute for Global Prosperity (IGP).

Membership lists have a long and unique history in our constitutional jurisprudence, and the seizure of such items implicates the rights of freedom of association and freedom of speech under the First Amendment. In NAACP v. Alabama, 357 U.S. 449 (1958), the government action at issue, as in this case, was the compelled disclosure of the organization's membership lists. Id. at 460. The Court stated that ''[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute[an] effective ... restraint on freedom of association.'' Id. Thus, the Court recognized that the destruction of members' anonymity may hamper their individual rights to associate freely. See Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 544 (1963) (stating that right of association includes protection of privacy of association); NAACP, 357 U.S. at 462 (''This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.'').

The concern for the protection of the right of free association, and the ability to maintain one's privacy in that association, is especially present in political, economic, and religious organizations, NAACP, 357 U.S. at 460, including tax protester groups. First Nat'l Bank v. United States, 701 F.2d 115, 118 (10th Cir.1983) (''The chilling effect of a summons served by an IRS agent to obtain membership records of a tax protester group ... [is] readily apparent.'') (internal quotation marks omitted). It is especially important that we be vigilant in our protection ''when a group espouses dissident beliefs.'' NAACP, 357 U.S. at 462. Accordingly, a government action that directly, or indirectly, limits the freedom to associate ''is subject to the closest scrutiny.'' Id. at 461; see also Bates v. Little Rock, 361 U.S. 516, 523 (1960) (stating that associational rights are protected ''from being stifled by more subtle governmental interference'').

Here, the appellants, who head a tax protester organization, assert their rights to as-

sociation and freedom of speech—rights that we must be particularly vigilant to protect against unwarranted governmental intrusion. They allege that those rights are currently being violated, that there will be additional violations in the near future, and that the government's actions, if unreviewed by this court, will have an immediate and serious chilling effect upon the organization and its members. The only question addressed in the majority opinion, and in this dissent, is whether we have the ability to consider appellants' constitutional claims now, or whether they must await appellate review for an indefinite period of time, perhaps for a significant number of years, by which time the irreparable damage that is attendant on the alleged First Amendment violation will likely have been done. The majority concludes that "later"—no matter how much later—is good enough. I disagree.

As stated by the majority, DiBella and DeMassa together stand for the proposition that a motion for the return of property is generally not appealable on an interlocutory basis if it is tied to a "criminal prosecution in esse against the movant." DiBella v. United States, 369 U.S. 121, 132 (1962); see also DeMassa v. Nunez, 747 F.2d 1283, 1287 (9th Cir.1984). The stated purpose behind this rule is to avoid interference with ongoing criminal cases, as well as to discourage piecemeal litigation and delays in the administration of justice. DiBella, 369 U.S. at 124.

The majority asserts that its decision is compelled by DiBella, as interpreted by DiMassa. I disagree. Neither DiBella nor DeMassa addressed the First Amendment, and neither case involved membership lists. Nor did the petitioner in either case seek an injunction to prevent the further seizure of First Amendment materials, as do the appellants here. To the contrary, both DiBella and DeMassa involved petitioners who instituted collateral civil proceedings to assert violations of their Fourth Amendment rights resulting from searches and seizures of drugs and related materials and stolen property, as well as a gun and devices used in a robbery. See DiBella, 369 U.S. at 122 and 290 F.2d 166, 167 n. 1 (5th Cir.1961); DeMassa, 747 F.2d at 1285 (also asserting Fifth and Sixth Amendment). The Supreme Court and this court have said that because Fourth Amendment questions arise regularly in criminal trials and because their resolution may determine the outcome of the criminal matter, they represent "but a step in the criminal case" and should ordinarily be resolved in the course of the criminal proceedings. DiBella, 369 U.S. at 131-32; DeMassa, 747 F.2d at 1288. While I agree that this general principle ordinarily holds true for claims of Fourth Amendment violations, I do not agree that it is applicable to bona fide First Amendment claims, including claims involving past and future seizures of membership lists and similar constitutionally protected materials.

DiBella and DeMassa do not set forth an absolute rule prohibiting all interlocutory appeals in cases involving criminal proceedings. In DiBella, the Court stated that Congress intended such appeals should be permitted where the harm of "error unreviewed before the judgment is definitive and complete [is] greater than the disruption caused by immediate appeal." Id. (internal citation omitted). The Court also stated that "immediate appeal has been allowed from an order recognized as collateral to the principal litigation . . . when the practical effect of the order will be irreparable by any subsequent appeal." Id. at 126 (internal citation omitted). These exceptions fit within a general public policy permitting interlocutory appeals in criminal cases where rights of exceptional importance are at stake, and where resolution of those rights cannot wait until the close of criminal proceedings. See, e.g., Helstoski v. Meanor, 442 U.S. 500 (1979) (permitting immediate appeal of criminal defendant's motion to dismiss under the Speech or Debate Clause); Abney v. United States, 431 U.S. 651 (1977) (permitting immediate appeal of criminal defendant's motion to dismiss on double jeopardy grounds); Stack v. Boyle, 342 U.S. 1 (1951) (permitting immediate appeal of criminal defendant's motion to reduce bail); see also 18 U.S.C. § 3731 (per-

mitting prosecution to appeal immediately order dismissing indictment, granting motion to suppress, or granting motion for return of property). In my view, the First Amendment right to association is one of those questions of exceptional importance that must be resolved as soon as possible, without waiting for the end of what may be interminable criminal proceedings. See Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 55 (1992) (''Adjudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule.''); United States v. P.H.E., Inc., 965 F.2d 848, 857 (10th Cir.1992) (''[F]ederal courts have asserted jurisdiction in a number of contexts involving non-final orders, in which the proceedings complained of infringed upon First Amendment rights'').

In this case, the ''criminal proceeding'' is the beginning of a grand jury investigation.[1] At that stage of the proceedings, there is no certainty that a criminal indictment will ever issue, and even if probability weighs in favor of an indictment issuing eventually, there is no telling how long that might take. The target of a grand jury investigation may have to wait a fair number of years before he will have the chance to raise his First Amendment claims and, under the majority's holding, he will be unable during that entire time to take any legal action to prevent the continuing violation of his rights. In my view, an immediate appeal is necessary to afford the appellants a forum in which to assert their First Amendment rights before irreparable injury results.

The Supreme Court has held that when the government seizes material that is protected by the First Amendment, courts must provide increased oversight to ensure that First Amendment rights are not harmed. See New York v. P.J. Video, 475 U.S. 868, 873 (1986). For example, a seizure of obscene materials cannot stand absent a warrant and a prompt postseizure judicial determination of its legality. Id., citing Lee Art Theatre, Inc. v. Virginia, 392 U.S. 636 (1968). In keeping with this idea, circuit courts have held that federal courts may exercise their equitable jurisdiction in favor of a potential defendant, who has not yet been indicted and who alleges First Amendment violations, because ''[t]he promise of review of a prior restraint at some indefinite, future time does not meet constitutional requirements.'' Kitty's East v. United States, 905 F.2d 1367, 1372 (10th Cir.1990).

In the related Younger abstention context, the Supreme Court has held that the exercise of federal jurisdiction may be appropriate if a violation of First Amendment rights is alleged, even though under normal circumstances it would not be. See Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965) (stating that abstention is inappropriate in cases where the threat of criminal prosecution itself chills freedom of expression). This is because sometimes First Amendment rights cannot adequately be addressed in the state criminal proceeding. Id. at 490-91; see also Kaylor v. Fields, 661 F.2d 1177, 1182 (8th Cir.1981) (finding Younger abstention inappropriate as there was ''no assurance that [plaintiff] could assert this free-speech claim as a defense to the crime ... with which she is charged''); Gold v. State of Connecticut, 531 F.2d 91 (2d Cir.1976) (per curiam) (stating in Younger abstention context that ''federal review may be available where such orders affect First Amendment rights not capable of vindication through direct appeal from conviction''), citing Gerstein v. Pugh, 420 U.S. 103, 108 n. 9 (1975).[2]

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[1] As the majority states, under Ninth Circuit law, a criminal proceeding is in esse once a grand jury investigation has begun. DeMassa, 747 F.2d at 1287. The Sixth, Seventh, Eighth, and Tenth Circuits take a different position, although the Second, Third, and Fourth Circuits share our view. The circuits that disagree with us require charges to be filed before a criminal proceeding is deemed ''pending.'' See Blinder, Robinson & Co. v. United States, 897 F.2d 1549, 1554 (10th Cir.1990); In re Grand Jury Proceedings, 716 F.2d 493, 496 (8th Cir.1983); Sovereign News Co. v. United States, 690 F.2d 569, 571 (6th Cir.1982); Mr. Lucky Messenger Serv., Inc. v. United States, 587 F.2d 15, 16 (7th Cir.1978). But see United States v. Regional Consulting Serv., 766 F.2d 870 (4th Cir.1984); United States v. Furina, 707 F.2d 82 (3d Cir.1983); Standard Drywall, Inc. v. United States, 668 F.2d 156 (2d Cir.1982).

[2] In World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079, 1082 (9th Cir.1987), this circuit held that the petitioner's First Amendment challenge under § 1983 was barred by Younger. However, in that case the plaintiffs were also defendants in state court criminal and civil enforcement proceedings, so they had ample opportunity to raise their First Amendment challenge in the ongoing state court proceedings. Here, by contrast, no indictment has issued against Appellants.

Here, the exercise of appellate jurisdiction is justified for similar reasons.

United States v. American Friends Service Committee, 419 U.S. 7 [34 AFTR 2d 74-6053] (1974), the only First Amendment case on which the majority relies, does not alter the analysis in our case. Nowhere does American Friends discuss the First Amendment. Nor does it address an appellate court's jurisdiction to hear an interlocutory appeal. American Friends simply stands for the proposition that constitutional claims do not constitute exceptions to the Anti-Injunction Act. Id. at 15. The question before us, of course, is not whether the Anti- Injunction Act bars appellants' First Amendment claims (and I think it likely does not), but whether we have jurisdiction to decide on this appeal whether it does, or whether Appellants' claims should be rejected on other grounds. On that jurisdictional question, I believe that First Amendment principles are controlling.

Appellants have alleged that their First Amendment associational rights, and those of IGP's members, have been and are currently being chilled by the government's continuing possession of IGP's membership lists. In my view, the importance of this claim—and the need to resolve it expeditiously—outweighs any theoretical disruption to the grand jury pro ceedings that may be occasioned by an immediate appeal. I would hold that this is the kind of claim contemplated by DiBella's exceptions, and therefore that we have jurisdiction to review it. I respectfully dissent from the majority's decision to dismiss the appeal.

¶2002-5154

John RICHARDS, Assignee of Topco, Inc., a Montana corporation, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, Internal Revenue Service, DEFENDANT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-35445, March 21, 2002. District Court, (2001, DC MT) 87 AFTR 2d 2001-1372, 2001-1 USTC ¶50314, reconsideration denied at (2001, DC MT) 87 AFTR 2d 2001-2395, affirmed. Earlier proceedings at (2001, DC MT) 88 AFTR 2d 2001-6756; and (1998, DC MT) 82 AFTR 2d 98-6550, 98-2 USTC ¶50747. Decision for Govt.

1. Litigation costs—substantial justification for IRS position. District court properly denied pro se taxpayer's attorney's fees request: court was within its discretion in determining that IRS was substantially justified in its position in underlying proceeding. *Reference:* United States Tax Reporter ¶74,305.01(25). IRC §7430.

Appeal from the United States District Court for the Southern District of California, Donald W. Molloy, District Judge, Presiding. United States Court of Appeals, Ninth Circuit.

Before CANBY, BEEZER, and PAEZ, Circuit Judges.

Memorandum*

Submitted March 11, 2002.**

[1] John Richards appeals pro se the district court's order denying his motion for attorneys' fees. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review for abuse of discretion a denial of attorneys' fees, see United States v. Yochum (In re Yochum), 89 F.3d 661, 670 [78 AFTR 2d 96-5539] (9th Cir.1996), and we affirm.

The district court acted within its discretion in concluding that the Internal Revenue Service's litigation position was substantially justified. See Id. at 670-71. Accordingly, we affirm the denial of fees. See 26 U.S.C. § 7430(c)(4)(B).

AFFIRMED.

32 Fed.Appx. 444, 2002 WL 464981 (9th Cir.(Cal.)), 2002-1 USTC P 50,334

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

¶2002-5155

Henry GUY, M.D., P.C., PLAINTIFF v. UNITED STATES OF AMERICA and the Commissioner of the Internal Revenue Service, DEFENDANTS. U.S. District Court, Eastern Dist. of New York, (DC NY) Docket No. 01-CV-73(NG), July 24, 2002. Year 1997. Decision for Govt.

1. Collection due process—review of administrative determination—jurisdiction. Taxpayer's untimely complaint seeking review of IRS's administrative determination regarding late-filing penalty was dismissed for lack of jurisdiction: taxpayer didn't file complaint within IRC §6330(d)(1)'s 30-day filing period; even if taxpayer executed power of attorney authorizing his attorney to act in instant matter, claim that statutory deadline could be tolled because IRS improperly sent determination notice to taxpayer himself wasn't supported; and taxpayer didn't show he acted with reasonable diligence to timely file complaint. Also, lack of face-to-face hearing with IRS was irrelevant for jurisdictional purposes; taxpayer didn't invoke mandamus jurisdiction, or challenge IRS's failure to hold hearing, in his complaint; and IRS wasn't required to hold face-to-face hearing. *Reference:* United States Tax Reporter ¶63,305.01(10). IRC §6330.

James Guy, Albany, NY, for plaintiff.
Bonni Perlin, for defendant.

United States District Court, Eastern District of New York.

Before Judge NINA GERSHON.

Order

GERSHON, District Judge:

[1] Plaintiff Henry Guy, by complaint filed January 8, 2001, brings this action against the United States of America and the Commissioner of the Internal Revenue Service ("IRS") seeking judicial review of a determination by an IRS appeals officer regarding a penalty imposed on plaintiff for the late filing of a Form 550-EZ, Annual Return of One-Participant (Owners and Their Spouses) Retirement Plan for the 1997 tax year. Defendants move for an order dismissing the complaint pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6) on the ground that the action is untimely.

The IRS is required to give notice to a taxpayer in writing at least 30 days prior to a proposed levy. 26 U.S.C. § 6330(a). The notice shall inform the taxpayer of his right to a collection due process ("CDP") hearing. 26 U.S.C. § 6330(a)(3). The taxpayer has the right to a fair CDP hearing before an impartial appeals officer who has no prior involvement with respect to the unpaid taxes. 26 U.S.C. § 6330(b). The Internal Revenue Code also provides for judicial review of the appeals officer's determination following the CDP hearing. It states as follows:

(1) Judicial review of determination.—The person may, within 30 days of a determination under this section, appeal such determination -

(A) to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matters); or

(B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

26 U.S.C. § 6330(d). This 30 day time-limit is 30 calendar days, not 30 business days. See Guerrier v. Commissioner of Internal Revenue, 2002 WL 15567 [2002 RIA TC Memo 2002-3] (U.S. Tax Ct.2002).

In this case, plaintiff did not file his complaint until Monday, January 8, 2001, which is 33 days after the IRS issued and mailed a Notice of Determination on December 6, 2000. Plaintiff argues that the determination was made on December 8, 2000, and that, since the date stamp on the Notice of Determination is unclear, it should be construed against the defendants. However, the date stamp on both the Notice of Determination and the IRS Form 3877, which reflects the date the Notice of Determination was mailed, clearly indicate that the determination was made on December 6, 2000.

Plaintiff also argues that he had executed a power of attorney empowering his lawyer to take actions in this matter, but the notice of determination was improperly sent to plaintiff instead of his lawyer. As an initial matter, there is no evidence that a power of attorney was ever sent to the IRS. Plaintiff relies on an unsigned cover-letter from his lawyer to the appeals officer dated June 28, 2000, which claims it is enclosing an executed power of attorney, but plaintiff does not submit proof that this letter was mailed or any document addressed to the IRS with his signature giving his lawyer power of attorney. Moreover, even if plaintiff had executed a power of attorney, he does not claim, let alone cite any authority for the proposition that, the deadline under 26 U.S.C. § 6330(d)(1) may be tolled, equitably or otherwise, under these circumstances. Even if such authority exists, plaintiff has not shown that he acted with reasonable diligence to file the complaint on time.

Next, plaintiff argues that this court has jurisdiction, despite his late filing, because the INS never held a face-to-face hearing. However, ''in determining the validity of a notice of determination for jurisdictional purposes, we shall not look behind such a notice in order to ascertain whether the taxpayer was afforded an appropriate hearing with respondent's Appeals Office.'' Id. (citing Lunsford v. Commissioner, 117 T.C. 159, 164 (2001)). Finally, plaintiff argues in opposition to defendants' motion that this court has jurisdiction pursuant to 28 U.S.C. § 1361 to issue a writ of mandamus to order the INS to hold a face-to-face hearing, which, according to plaintiff, is ''a duty owed to the plaintiff.'' 28 U.S.C. § 1361. However, plaintiff never invoked mandamus jurisdiction, or challenged the failure of the agency to hold a hearing, in the complaint. Moreover, defendants did not owe plaintiff a duty to hold a face-to-face hearing. CDP Hearings are:

> informal in nature and do not require the Appeals officer or employee and the taxpayer, or the taxpayer's representative, to hold a face-to-face meeting. A CDP hearing may, but is not required to, consist of a face-to-face meeting, one or more written or oral communications between an Appeals officer or employee and the taxpayer or the taxpayer's representative, or some combination thereof.

26 C.F.R. § 301.6330-1, A-D6.

In sum, the action is untimely under 26 U.S.C. § 6330(d), and thus this court lacks jurisdiction. 26 U.S.C. § 6330(d)(1). Defendants' motion to dismiss is granted.

The clerk of court is directed to close this case.

SO ORDERED.

2002 WL 1732850 (E.D.N.Y.)

¶2002-5156

In Re: Jeffrey B. RICE, Debtor. U.S. Bankruptcy Court, Eastern Dist. of Virginia, (Bktcy Ct VA) Docket No. 01-10552, July 12, 2002. Decision for Govt.

1. Bankruptcy court procedure—amended proof of claim. Pursuant to consent order, IRS's amended proof of claim was allowed against pro se Chap. 11 debtor in stated amounts. *Reference:* United States Tax Reporter ¶68,726.51(5).

Richard G. Jacobus VSB No. 41579 Trial Attorney, Tax Division U.S. Department of Justice P.O. BOX 227 Washington, D.C. 20044 Telephone: (202) 616-0553 Counsel for the United States Appearing Pursuant to 28 U.S.C. § 517

In the United States Bankruptcy Court for the Eastern District of Virginia Alexandria Division.

Consent Order and Judgment Establishing Allowed Claims of the Internal Revenue Service

MAYER, Bankruptcy Judge:

Chapter 11

Pursuant to the trial in this matter on March 14, April 10–11, and April 15, 2002, with respect to the debtor's objection to the claims of the Internal Revenue Service (IRS), IT IS HEREBY ORDERED, ADJUDGED, AND DECREED as follows:

[1] 1. Pursuant to Fed. R. Civ. P. 58 and Fed. R. Bankr. P. 9021, judgment is hereby rendered in favor of the United States of America and against the debtor, Jeffrey B. Rice, in the amount of $243,094.79, consisting of the taxes, civil penalties, and interest due for each of the tax periods set forth on the amended IRS proof of claim dated May 24, 2002, a photocopy of which is annexed hereto as Exhibit A; and

2. As set forth on Exhibit A hereto, the claims of the IRS against the debtor are hereby ALLOWED; and

3. The IRS shall forthwith file the signed original of its amended proof of claim with the Court; and

4. This Consent Order and Judgment is entered without prejudice to the parties' rights of appeal pursuant to 28 U.S.C. § 158(a) and Fed. R. Bankr. P. 8001; and

5. The Clerk shall forward copies of this Consent Order and Judgment to the debtor, counsel for the United States, and the United States Trustee.

DONE this ___ day of July, 2002, at Alexandria, Virginia.

HONORABLE ROBERT G. MAYER

UNITED STATES BANKRUPTCY JUDGE

WE ASK FOR THIS:

JEFFREY B. RICE

VSB No. 6211

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Debtor, pro se

PAUL J. McNULTY

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Counsel for the United States

¶2002-5157

UNITED STATES OF AMERICA, APPELLEE v. Steven FISHER, DEFENDANT-APPELLANT. U.S. Court of Appeals, Second Circuit, (CA2) Docket No. 01-1415, March 20, 2002. District Court affirmed. Decision against Taxpayer.

1. Tax crimes—tax evasion—U.S. Sentencing Guidelines—downward departure; diminished capacity—acceptance of responsibility. Taxpayer's sentence for tax evasion and mail fraud was affirmed: district court's discretionary denial of downward departure for diminished capacity was unreviewable where court understood full scope of its authority and didn't equate diminished capacity with insanity, interpret USSG to allow departure only where diminished capacity was sole "but-for" cause of offense, or improperly fail to consider volitional aspects of diminished capacity departure guideline. Also, court had adequate foundation to deny 3-level reduction for acceptance of responsibility where it considered expert testimony about taxpayer's mental state but ultimately relied on its own assessment of his demeanor and candor in evaluating his capacity and willingness to accept responsibility. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §7201.

Eric L. Lewis, Baach Robinson & Lewis, Washington, DC, for Appellee.
Stanley J. Okula, Jr.; Cathy Seibel, on the brief, Assistant United States Attorneys, for Mary Jo White, United States Attorney for the Southern District of New York, New York, NY, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York, Barrington D. Parker, Judge. United States Court of Appeals, Second Circuit.

Present CALABRESI, and JOSE A. CABRANES, Circuit Judges, and CAROL BAGLEY AMON,* District Judge.

Summary Order

Unpublished Disposition

Defendant was convicted, in the United States District Court for the Southern District of New York, Barrington D. Parker, Jr., J., of mail fraud and tax evasion, and he appealed sentence. The Court of Appeals, Circuit Judge, held that: (1) denial of downward departure for diminished mental capacity was not reviewable, and (2) evidence supported denial of offense-level reduction for acceptance of responsibility.

Affirmed.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the sentence imposed by the District Court be and it hereby is AFFIRMED.

Defendant-Appellant Steven Fisher ("Fisher") appeals from a judgment of conviction entered on July 30, 2001 in the United States District Court for the Southern District of New York (Parker, J.), following a guilty plea. Fisher was charged, in a thirteen-count indictment, with (1) four counts of mail fraud, in violation of 18 U.S.C. § 1341, (2) making a perjuriously false declaration in connection with a bankruptcy filing, in violation of 18 U.S.C. § 152(3), (3) two counts of personal income tax evasion, in violation of 26 U.S.C. § 7201, (4) two counts alleging the failure to file personal income tax returns, in violation of 26 U.S.C. § 7203, and (5) four counts alleging the failure to file corporate income tax returns for Bellerose Corporation and Winston Barrett Associates (companies controlled by Fisher), in violation of 26 U.S.C. § 7203. Pursuant to a written plea agreement, Fisher pled guilty to one count of mail fraud and one count of personal income tax evasion, for which he was sentenced to 30 months' imprisonment and three years of supervised release. Fisher was also ordered to pay restitution in the amount of $457,520 and a $200 special assessment.

Fisher appeals only his sentence and not the underlying conviction. He contends that the district court erred (a) in refusing to grant a downward departure pursuant to U.S.S.G. § 5K2.13 on the basis of his diminished mental capacity and (b) in denying a three-point reduction in his offense level under U.S.S.G. § 3E1.1 for acceptance of responsibility. We reject both of Fisher's contentions.

I. Downward Departure for Diminished Capacity

[1] Following the court's acceptance of the plea agreement, the amount of the loss caused by Fisher's conduct and the timing of the fraud remained in dispute. Accordingly, the district court held a hearing pursuant to United States v. Fatico, 579 F.2d 707 (2d Cir.1978), to resolve these issues. During the sentencing hearing, the court allowed Fisher to submit evidence of his mental health. This included (1) a written report from Dr. Alexander Bardey, a courtappointed forensic psychiatrist, which stated that "Fisher was suffering from a major depressive disorder at the time of the commission of the ... offenses and that [Fisher's] judgment and abilities were significantly impaired as a result of the symptoms of the illness," and (2) evidence that Fisher had been hospitalized four times since January 1997, twice involuntarily. Fisher argued that such findings warranted a downward departure for diminished capacity. The pertinent Guideline policy statement provides that "[a] sentence below the applicable guidelines range may be warranted if the defendant committed the offense while suffering from a significantly reduced mental capacity." U.S.S.G. § 5K2.13, p.s. (2001); see also id., cmt. n. 1 ("'Significantly reduced mental capacity' means "a significantly impaired ability to (A) understand the wrongfulness of the behavior comprising the offense or to exercise the power of reason; or (B) control behavior that the defendant knows is wrongful.").

* The Honorable Carol Bagley Amon, United States District Judge for the Eastern District of New York, sitting by designation.

Ultimately, the court declined to depart, stating:

> I realize and accept the proposition that a constellation of factors and psychological problems can take cases outside of the heartland and provide a basis for departure. However, in this case, recognizing my legal authority to do so, I am not inclined to depart from the guidelines. So the application is denied . . . .

A district court's exercise of its discretion not to grant a downward departure is unreviewable on appeal unless the sentencing court committed an error of law or misapprehended its power to depart. United States v. McCarthy,271 F.3d 387, 401 (2d Cir.2001); United States v. Acevedo, 229 F.3d 350, 356 (2d Cir.), cert. denied, 531 U.S. 1027, 121 S.Ct. 602, 148 L.Ed.2d 514 (2000). Fisher argues on appeal that the district court erred because (1) it ''equated diminished capacity with insanity,'' (2) it interpreted the Sentencing Guidelines to allow a departure only in cases where the diminished capacity was the sole ''but-for'' cause of the offense, and (3) it improperly failed to consider the volitional aspects of the diminished capacity departure guideline.

We do not agree. The record demonstrates that the district court understood the full scope of its authority, that it made none of the legal errors suggested by Fisher, and that its refusal to depart resulted from the exercise of its discretion. Accordingly, we dismiss Fisher's appeal from the court's refusal downwardly to depart.

II. Acceptance of Responsibility

After giving the defense counsel and Fisher (who personally addressed the court) the opportunity to explain why Fisher was entitled to a three-point reduction for acceptance of responsibility, during which time the defense focused on Fisher's mental condition and the disputed claims regarding the amount of the loss and timing of the fraud, the district court stated:

> Having . . . given it some careful consideration, I conclude that an adjustment for acceptance of responsibility under [s] 3E1.1 is not warranted. I will not give one. I do not believe that Mr. Fisher has clearly demonstrated responsibility for his offense. I find that what acceptance of responsibility there was not only was not clear, but I found it guarded, I found it unequivocal [sic][1] , and ultimately I found it disingenuous.
>
> I simply didn't believe your testimony, your representations, Mr. Fisher, about why you were doing what you did and what happened to the money. And as I said, I credit Dr. Hyman's testimony.

Fisher contends on appeal that ''[t]he court gave no indication that it considered whether . . . Fisher's mental condition contributed to his inability to express in coherent and articulate terms his acceptance of responsibility to the court's satisfaction.'' ''This disregard for the defendant's impaired condition,'' Fisher claims, ''constitutes reversible error, requiring remand for resentencing pursuant to explicit instructions that the court must consider the medical evidence as it bears upon . . . Fisher's acceptance of responsibility.''

Section 3E1.1 of the Guidelines provides for a reduction in the defendant's offense level if the defendant ''clearly demonstrates acceptance of responsibility for his offense.'' U.S.S.G. § 3E1.1. Although a defendant who pleads guilty is routinely afforded a sentence reduction for acceptance of responsibility, see United States v. Rogers, 972 F.2d 489, 493 (2d Cir.1992), we have emphasized that ''[a] guilty plea does not, by itself, entitle a defendant to a reduced sentence under § 3E1.1.'' United States v. Irabor, 894 F.2d 554, 557 (2d Cir.1990).

Fisher points out that the Government had stipulated in the plea agreement that an adjustment for acceptance of responsibility would be appropriate and that the Probation Office recommended that Fisher receive a three-level reduction. But, the plea agreement specifically provided that

[1] Although the transcript reads ''unequivocal,'' both the Government and the defense agree that it appears to be a typographical error.

the adjustment was dependent upon ''an allocution acceptable to the Court'' and noted that the sentencing recommendations were not binding upon the sentencing court.

Whether or not a defendant has accepted responsibility for the offense of conviction is a factual question as to which the district court's determination should not be disturbed unless it is ''without foundation.'' Id.; United States v. Reyes, 9 F.3d 275, 280 (2d Cir.1993). The district court may deny a reduction under § 3E1.1 based on a credibility determination, and it is manifest that, with the defendant before him, ''[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility'' and to assess contrition and candor. U.S.S.G. § 3E1.1, cmt. n. 5; see Reyes, 9 F.3d at 280. Hence, the determination of the sentencing judge on acceptance of responsibility is entitled to the highest level of deference. United States v. Sewell, 252 F.3d 647, 652 (2d Cir.2001); Reyes, 9 F.3d at 280.

Fisher, however, contends that the district court failed to consider the impact of his mental capacity on his ability to express his acceptance of responsibility. The district court had an adequate opportunity to gauge Fisher's demeanor at the sentencing hearing and to assess Fisher's candor. Unlike the district court in United States v. Altman, 901 F.2d 1161 (2d Cir.1990), moreover, the court below considered expert testimony about Fisher's mental state. In the end, it relied on its own assessment of Fisher's capacity and his willingness to accept responsibility. We cannot say that its determination that Fisher had failed sufficiently to accept responsibility for his offense is without foundation.

CONCLUSION

Because the record reflects that the district court understood the full scope of its authority to depart and declined, in its discretion, to do so, and because there is an adequate foundation in the record for the court's holding that Fisher failed to accept responsibility for the offenses of conviction, the sentence imposed by the district court is AFFIRMED.

¶2002-5158

UNITED STATES OF AMERICA v. John FASSNACHT and Vincent Malanga. U.S. District Court, Northern Dist. of Illinois, (DC IL) Docket No. 01 CR 0063, July 24, 2002. Earlier proceeding at (2002, DC IL) 89 AFTR 2d 2002-586. Year 1994. Decision for Govt.

1. Tax crimes—obstruction of justice—motion for acquittal—bill of particulars. Investment firm partner and accountant were denied acquittal on 18 USC §1503(a) conviction for obstruction of justice in connection with conspiracy to conceal $1.35 million incentive fee from IRS: evidence showed that partner had knowledge of grand jury's investigation of firm's use of offshore accounts to hide income from IRS; that taxpayers corruptly intended to obstruct justice by making false statements to IRS about purpose of payment to firm with knowledge of agent's connection to grand jury investigation, and conspired to ensure that 3d party would ''back-up'' their story and provide corroborating documentation; that accountant concealed subpoenaed documents, created false documents and offered money to 3d party in exchange for his false statements to IRS; and taxpayers' motive to obstruct grand jury was avoidance of criminal liability for evasion. Also, bill of particulars was unwarranted in face of sufficiently detailed indictment, tapes and transcripts from govt.'s witness. *Reference:* United States Tax Reporter ¶72,125.01(15); 73,446.506(15). IRC §7212.

United States District Court, Northern Dist. of Illinois, Eastern Division.

Memorandum and Order

MANNING, District Judge:

Defendants John Fassnacht and Vincent Malanga, pursuant to Federal Rule of Criminal Procedure 29, have moved this Court for a judgement of acquittal as to Count 4, the sole count on which they were found guilty by a jury. For the rea-

sons set forth below, this Court DENIES Defendants' motions.

BACKGROUND[1]

The Indictment charged Defendants with: (1) conspiring to commit tax evasion, in violation of 18 U.S.C. § 371 (Count 1); (2) tax evasion, in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2 (Counts 2 and 3); and (3) obstruction of justice, in violation of 18 U.S.C. § 1503(a) (Count 4). The Indictment also separately charged Fassnacht with making false statements to an Internal Revenue Service ("IRS") agent, in violation of 18 U.S.C. § 1001 (Count 5).

Malanga, along with Donald Newell, were partners in an investment firm named LaSalle Portfolio Management, Inc. ("LPM"). Fassnacht is an accountant who rendered advice to LPM during the relevant time period. LPM provided clients with investment advice based, in part, on its "proprietary discretionary trading program, which invested customers' money in futures and option contracts in interest rate sensitive investments."

One of LPM's clients was Abu Dhabi Investment Authority ("ADIA"), which invested $85 million with LPM. In 1994, LPM was due to receive an incentive fee of $1.35 million from ADIA. In anticipation of receiving this fee, LPM, with the assistance of Fassnacht, formed and registered a company named LaSalle Portfolio Management Ltd. ("LPM Ltd.") in Bermuda and opened several bank accounts in Bermuda for LPM Ltd. Malanga and Newell owned LPM Ltd. as 50/50 partners. LPM Ltd. conducted no legitimate business of its own, but was allegedly formed to avoid reporting the ADIA fee as income on LPM's federal income tax return for 1994.

In March 1994, LPM directed ADIA to deposit the $1.35 million incentive fee in an LPM Ltd. bank account in Bermuda. Fassnacht prepared the tax returns for LPM, Newell and Malanga, which did not include the $1.35 million which was deposited in LPM Ltd.'s Bermuda account.

Two years later, Angela Dancisak, a former employee of LPM, informed the IRS of Defendants' alleged illegal conduct. Subsequently, a grand jury was convened and the IRS began conducting an investigation. The IRS executed a search warrant at LPM's Chicago offices on March 26, 1996, and conducted interviews with Malanga, Fassnacht, and Newell.

After the commencement of the investigation, Newell, on the advice of his attorney, began secretly tape recording his conversations with Defendants regarding the LPM Ltd. transactions and the Government's investigation. After recording conversations on his own, Newell agreed to cooperate with the Government and began recording conversations at the behest of the Government.

Newell later stopped cooperating with the Government, and was convicted in a separate proceeding and sentenced on charges of filing false 1994 federal income tax returns for LPM and himself. At Defendants' trial, the Government immunized Newell and presented him as its main witness against Defendants. Newell testified that after learning of the IRS and grand jury investigation, Defendants proceeded to concoct a plan to end the investigation. The plan called for an individual named Ed Burke, a citizen of Switzerland, to come forward and falsely state that the $1.35 million in the LPM Inc. account in Bermuda was a finders fee which he carned for introducing LPM to ADIA. In exchange for this story, Burke was to be paid 10 to 20 percent of the $1.35 million. To corroborate Burke's story, Defendants conspired to prepare false documents including invoices, corporate records, and phone and travel records.

At the conclusion of the Government's case in chief, this Court granted Defendants' Motions for Judgment of Acquittal as to Counts 2 and 3 and denied the motions as to Counts 1, 4, and 5. At the conclusion of the trial, the jury found Defendants not guilty as to Counts 1 and 5 and guilty as to Count 4. Subsequently, Defendants have

[1] A complete summary of the indictment and the facts of this case are contained in this Court's January 11, 2002 Memorandum and Order, and thus, the Court will only review the facts as they relate to the instant motions.

moved this Court for a judgement of acquittal as to Count 4.

STANDARD OF REVIEW

Under Federal Rule of Criminal Procedure 29, a court may acquit a defendant on "one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." When reviewing a motion for judgment of acquittal pursuant to Rule 29, the Seventh Circuit mandates that the district court determine:

whether at the time of the motion there was relevant evidence from which the jury could reasonably find [the defendants] guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the government ... bearing in mind that it is the exclusive function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences.

United States v. Reed, 875 F.2d 107, 111 (7th Cir.1989). In short, the court views all the evidence in the Government's favor and is absolutely barred from second-guessing the jury's credibility determinations or findings of fact. Id. Instead, the court merely assesses the record to determine if all the admissible evidence supports the defendants' adjudication of guilt beyond a reasonable doubt. Id.

ANALYSIS

[1] Defendants have moved this Court for a judgement of acquittal on Count 4 on the grounds that: (I) the conduct proven at trial did not violate section 1503, and therefore, the evidence was insufficient to support the jury's verdict; and (II) Count 4 failed to adequately apprise them of the charge of obstruction of justice. The Court will address each of these contentions in turn.

I. Conduct Constituting Obstruction of Justice Under Section 1503

Section 1503 contains a "catch-all provision," United States v. Cueto, 151 F.3d 620, 630 (7th 1998), which states that a defendant is guilty of obstruction of justice by "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes or endeavors to influence obstruct or impede, the due administration of law." 18 U.S.C. § 1503(a). Congress enacted the "catch-all provision" to ensure that criminal defendants could not "circumvent the statute's purpose by devising novel and creative schemes that would interfere with the administration of justice but would nevertheless fall outside the scope of § 1503's specific prohibitions." Cucto, 151 F.3d at 630. In accordance with Congress' intent, courts interpret this provision to "cover a broad spectrum of conduct" so as "to promote the administration of justice and to prevent the miscarriage of justice." Id. at 631. Consequently, courts hold that the defendant does not need to successfully obstruct the administration of justice to fall within the scope of section 1503. Id. at 633. See also United States v. Bucey, 876 F.2d 1297, 1314 (7th Cir.1989)("the impossibility of accomplishing the goal of an obstruction of justice does not prevent a prosecution for the endeavor to accomplish the goal").

To convict a defendant under the "catch-all provision," the Government must prove: (1) that the defendant (a) knew of a "pending judicial proceeding"; and (b) acted corruptly with the intent to influence, obstruct, or impede or endeavor to influence, obstruct or impede the due administration of justice; and (2) a "nexus between the defendant's efforts and the judicial proceeding." Cueto, 151 F.3d at 633.

Here, Defendants contend that the Government failed to present sufficient evidence that: (A) Malanga had knowledge of a pending judicial proceeding; (B) Defendants corruptly intended to obstruct justice; (C) Defendants actually obstructed, interfered with, or impeded a judicial proceeding; and (D) Fassnacht had a motive to obstruct justice. The Court will discuss each of these contentions in turn.

A. Knowledge of a Pending Judicial Proceedings

A judicial proceeding is pending when an investigation is undertaken to secure presentation of evidence before the grand jury. See United States v. McComb, 744 F.2d 555, 559 (7th Cir.1984). See also United States v. Maloney, 71 F.3d 645, (7th Cir.1996) (''[i]t is well established that investigations undertaken with the intention of presenting evidence before a grand jury are sufficient to constitute the due administration of justice under § 1503''). To satisfy section 1503(a)'s knowledge requirement, the Government is required to show that the defendant had knowledge that a grand jury was con-ducting an investigation. Maloney, 71 F.3d at 656; United States v. Guzzino, 810 F.2d 687, 696 (7th Cir.1987).

Here, the Government presented both circumstantial and direct evidence that Malanga had knowledge that the grand jury was investigating LPM's use of off-shore accounts to hide income from the IRS. On March 26, 1996, a search warrant was executed on LPM's offices in Chicago as part of the grand jury's investigation. The next week, on April 1, 1996, the grand jury issued a subpoena to Fassnacht requiring him to provide documents related to LPM and ADIA. The same day on which the subpoena was issued, Fassnacht was interviewed by Agent Tice. Over the next couple of days, April 23, 1996, Malanga discussed the grand jury investigation with Fassnacht and Newell, in particular, the proposed testimony which Ed Burke and Fassnacht would present to the grand jury. In a conversation recorded by Newell on April 3, and played at the trial, Malanga specifically stated that Fassnacht's grand jury testimony was postponed. Moreover, Newell testified that during a meeting between himself and Defendants, regarding the planning of the Burke story, the grand jury investigation was specifically discussed. Consequently, interpreting the evidence in the light most favorable to the Government, this Court finds that the jury could reasonably have found beyond a reasonable doubt that Malanga had knowledge of the grand jury investigation of LPM.

B. Corruptly Intending to Obstruct Justice

Section 1503 also requires the Government to prove that Defendant corruptly endeavored to obstruct the due administration of justice. The term ''corruptly,'' as used in section 1503, has been defined as an act done ''with the purpose of obstructing justice.'' United States v. Machi, 811 F.2d 991, 996 (7 th Cir.1987). See also Cueto, 151 F.3d at 630–31 (affirming a jury instruction that defined ''corruptly'' as ''to act with the purpose of obstructing justice''); United States v. Rasheed, 663 F.2d 843, 852 (9th Cir.1981) (purposeful concealment of documents from a grand jury ''can fall within the prohibitions of the statute''). ''Endeavor'' has been defined as ''any effort or assay to obstruct justice.'' United States v. Barfield, 999 F.2d 1520, 1523 (11th Cir.1993). Courts generally hold that ''endeavor'' denotes a lesser threshold of purposeful activity than ''attempt.'' See United States v. Thomas, 916 F.2d 647, (11th Cir.1990); ''Obstruction of Justice,'' American Criminal Law Review (Summer 2001) (citing cases). To prove a ''corrupt endeavor'' to obstruct justice, the Government must prove that ''the defendant knowingly and intentionally undertook an action from which obstruction of justice was a reasonably foreseeable result.'' Barfield, 999 F.2d at 1523, 1524. The endeavor need not be successful as long as the Government shows that the defendant had ''knowledge or notice that his actions [were] likely to affect the just administration of the subject proceedings.'' Cueto, 151 F.3d at 633. See also United States v. Aguliar, 515 U.S. 593, 599 (1995); United States v. Buckley, 192 F.3d 708, 710 (7th Cir.1999). Moreover, the Government need not present direct proof of the defendant's corrupt intent; the jury may ''infer'' the defendant's intent ''from all the surrounding facts and circumstances.'' McComb, 744 F.2d at 561. See also Cueto, 151 F.3d at 630–31, 633; Furkin, 119 F.3d at 1283.

Moreover, a defendant may be convicted of corruptly endeavoring to obstruct justice even when the object of the endeavor was

an undercover government agent or informant. See United States v. Bucey, 876 F.2d 1297, 1314 (7th Cir.1989). The false statement need not actually be presented to the grand jury or relied upon or delivered; the mere existence of such a statement makes it far more likely that the statement would be produced in court, with the natural and probable consequence of ob-structing the due administration of justice. See United States v. Barber, 881 F.2d 345, 351 (7th Cir.1989).

Here, the Government presented both circumstantial and direct evidence that Defendants intended to corruptly endeavor to interfere, obstruct, or impede the grand jury's investigation into LPM. On March 26, 1996, the day the search warrant was served on LPM, Malanga falsely told the IRS that the payment from ADIA was deposited in Bermuda to pay Ed Burke a finder's fee for introducing ADIA to LPM. Likewise, after receiving the grand jury subpoena, Fassnacht told the IRS the same story about Burke and the money in Bermuda.

Defendants contend that this conduct does not fall within the scope of section 1503 because the story about Burke was told to IRS agents and not to the grand jury. While it is true that simply lying to a government agent without knowledge of a grand jury proceeding does not violate section 1503, see Unied States v. Aguilar, 515 U.S. 593, 599 (1995), a defendant violates section 1503 where the defendant lies to a government agent and the defendant is "aware that the [agent] was integrally involved in the grand jury investigation." United States v. Furkin, 119 F.3d 1276, 1282 [80 AFTR 2d 97-5352] (7th Cir.1997). In Furkin, the Seventh Circuit rejected Defendants' exact argument and held that "[t]he IRS investigation was not some 'ancillary proceeding' unrelated to the grand jury proceeding. Indeed, the IRS investigation and the grand jury investigation were one and the same, and the evidence established that [the defendant] understood this fact." 119 F.3d at 1283. Here, as explained above, the Government presented evidence that Defendants knew that the IRS investigation was being conducted to present evidence to the grand jury.

Moreover, the fact that Defendants lied to the IRS was not the sole basis of the Government's evidence that Defendants corruptly intended to endeavor to obstruct the grand jury. The Government presented evidence showing that Malanga and Fassnacht conspired to ensure that Burke would "back-up" Defendants' story to the IRS. In exchange for providing the finders fee story, Burke was to receive ten to twenty percent of the funds from the Bermuda account.

To corroborate Burke's story, Fassnacht stressed to Newell the importance of having Burke provide an invoice or "any other documentation" for the work he allegedly did for LPM in 1994. Likewise, Malanga told Newell that they would have to put together documents to support Burke's story. Subsequently, at Defendants' direction, Newell received a false invoice from Burke in Switzerland for $1.35 million for a finders fee he allegedly earned in 1993–94 for introducing ADIA and LPM. Additionally, Newell, at the direction of Defendants, created a false "itinerary" setting forth the chronology of the false finders fee story.[2]

Consequently, interpreting the evidence in the light most favorable to the Government, this Court finds that the jury could reasonably have found beyond a reasonable doubt that Defendants knew or reasonably should have known that their actions were likely to affect the just administration of justice, and therefore, reasonably found that Defendants intended to corruptly endeavor to interfere, obstruct, or impede the grand jury's investigation into LPM.

C. Acts Which Constitute Obstruction of Justice

Defendants further contend that they are entitled to a judgment of acquittal because the Government failed to show that they

[2] As long as the jury found that Defendants "corruptly endeavored to obstruct the administration of justice," whether Defendants used legal or illegal means to attempt to bring about this result is irrelevant under section 1503. See Cueto, 151 F.3d at 630–31.

actually obstructed, interfered with, or impeded a judicial proceeding. Defendants, however, have misinterpreted the catch-all provision. Defendants did not need to actually succeed, but as noted by the Seventh Circuit in Cueto, "[i]t is not the means employed by the defendant that are specifically prohibited by the omnibus provision ... but ... instead, the defendant's corrupt endeavor which motivated the action." 151 F.3d at 631, 633. As noted above, the Government need not show that Defendants' endeavors successfully interfered with the grand jury, only that Defendants' actions had the natural and probable consequence of obstructing the due administration of justice.

The Government contends that the evidence at trial was sufficient for the jury to reasonably find beyond a reasonable doubt that Defendants corruptly endeavored to: (1) conceal documents from the grand jury and/or produce false documents for introduction to the grand jury; and (2) en-courage false testimony before the grand jury. The Court will examine each of these issues in turn.

1. Concealment, Alteration or Destruction of Documents

The concealment, alteration, and destruction of subpoenaed documents to a grand jury constitute a violation of section 1503. See Barber, 881 F.2d at 351; McComb, 744 F.2d at 559. The government need not prove that the documents are material, only that the documents could have altered or affected the grand jury's determination. See, e.g., Barber, 881 F.2d at 351. Where a defendant receives a grand jury subpoena for documents and intentionally conceals documents the defendant believes are covered under the subpoena, the defendant is guilty of obstruction of justice under section 1503. United States v. Lench, 806 F.2d 1443, 1444–45 (9th Cir.1986).

Here, Fassnacht admitted, in a conversation taped by Newell, that he had not turned over all the documents requested in the grand jury subpoena. Additionally, as explained above, Defendants created, or caused to be created, false documents which they planed to use to bolster the credibility of Burke's story. Consequently, interpreting the evidence in the light most favorable to the Government, this Court finds that the jury could reasonably have found beyond a reasonable doubt that Defendants concealed, altered, or destroyed documents that could have foreseeably affected the due administration of justice.

2. Encouraging False Testimony

A defendant also violates section 1503 by fabricating a "story for a potential witness to tell the grand jury, even though the witness has not been subpoenaed." McComb, 744 F.2d at 755. See also United States v. Arnold, 773 F.2d 823, 831–32 (7th Cir.1985). To fall within section 1503's prohibitions, the false statement need not actually be presented to a grand jury and the defendant does not need to have actually caused the witness to have testified falsely. Id. at 834. Rather, to prove obstruction of justice based on false testimony, the Government need only show that the defendant's acts had "a reasonable tendency to impede the witness in the discharge of her duties." Id. The Government need only show that the defendant intended to obstruct the due administration of justice by encouraging a prospective witness to render false testimony or tampering with the witness' prospective testimony. Id.; Maloney, 71 F.3d at 658–59. Because section 1503 encompasses "elliptical suggestions as much as it does direct commands," simply proposing to a potential witness that he lie in a judicial proceeding constitutes obstruction of justice. United States v. Trankos, 911 F.2d 1422, 1432 (10th Cir.1990).

Here, as explained above, the Government showed that in exchange for ten to twenty percent of the money in the Bermuda account, Defendants attempted to ensure that Burke would "back-up" their story to the IRS by having him falsely state that the money put in Bermuda was to pay a finders fee to Burke, not to hide income from the IRS. Consequently, interpreting the evidence in the light most favorable to the Government, this Court finds that the jury could reasonably have found beyond a reasonable doubt that De-

fendants took action which could have reasonably resulted in a witness giving false testimony which could have affected the grand jury's determination.

D. Motive Under Section 1503

Fassnacht further contends that the Court should enter a judgment of acquittal because the Government failed to present sufficient evidence that he had a motive to obstruct justice. In response, the Government contends that motive is not an element of the offense of obstruction of justice under section 1503, and even if it is, Fassnacht has waived the issue because he did not object that motive was not included as an element of obstruction of justice in the jury instructions. The Government further contends that even if motive is an element, sufficient evidence was presented to show that Fassnacht had a motive to obstruct the grand jury--the avoidance of criminal liability for tax evasion.

Although the Seventh Circuit has not specifically ruled on the issue, a number of other circuits have held that section 1503 requires that the defendant must have had an ''improper motive or purpose of obstructing justice.'' United States v. Brady, 168 F.3d 574, 579 n. 3 (1st Cir.1999). See also United States v. Barfield, 999 F.2d 1520, 1534 (11th Cir.1993) (''[a]lthough the government is not required to prove that the defendant had the specific purpose of obstructing justice, it must establish that the conduct was prompted, at least in part, by a corrupt motive''); United States v. Lench, 806 F.2d 1443, 1446 (9th Cir.1986) (noting that the defendant had a motive to obstruct justice); ''Obstruction of Justice,'' American Criminal Law Review (Summer 2001) (citing cases).

Notwithstanding that the Seventh Circuit has yet to rule on the issue of motive, this Court finds that the Government presented sufficient evidence for the jury to reasonably find beyond a reasonable doubt that Defendants' desire to avoid criminal liability for tax evasion was their motive to obstruct justice. For example, Newell testified that one of the reasons for creating the Burke story was that Fassnacht wanted the investigation ''to stop as soon and as quickly as possible,'' so that it would not lead the Government into investigating other entities which he had set up in Bermuda for other clients. (Newell Tr. at 169.) Consequently, the Court finds that the Government presented sufficient evidence to allow the jury to reasonably conclude beyond a reasonable doubt that Fassnacht had a motive to obstruct the grand jury.

In conclusion, the Court finds that the conduct proven at trial violated section 1503, and that the evidence was sufficient to support the jury's verdict.

II. Sufficiency of Count 4

Defendants further contend that the Court should enter a judgment of acquittal because Count 4 failed to adequately apprise them of the charge of obstruction of justice and that the Court should have granted their pretrial motions for a bill of particulars.

Federal Rule of Criminal Procedure 7(c)(1) states that an indictment ''shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.'' The test to determine whether an indictment sufficiently states a criminal charge is whether the indictment sets forth the elements of the offense charged, sufficiently apprises the defendant of the charges to enable him to prepare for trial, and enables the defendant to plead double jeopardy to a subsequent indictment for the same offense. McComb, 744 F.2d at 562; United States v. Garcia-Geronimo, 663 F.2d 738, 743 (7th Cir.1981); United States v. Roya, 574 F.2d 386, 391 (7th Cir.1978). Sufficiency should not be determined by whether the indictment could have been drafted more definite and certain. Garcia-Geronimo, 663 F.2d at 743.

Here, according to Defendants, because Count 4 incorporated by reference paragraphs 1–26 of Count 1, it was ''patently unfair to hold Defendants responsible for defending every paragraph of Count One when a number of those acts or events plainly preceded the time frame charged.'' (Joint Mot. for Acquittal at 8.) Defendants contend that Count 4 is impermissibly vague because only one of the 26

paragraphs reference the grand jury investigations, while the rest focus on Defendants' alleged obstruction of the IRS investigation. Therefore, Defendants assert that this conduct cannot not fall within the scope of section 1503 because the story about Burke was told to IRS agents and not to the grand jury. As explained above, however, while it is true that simply lying to a government agent without knowledge of a grand jury proceeding does not violate section 1503, see Aguilar, 515 U.S. at 599, a defendant violates section 1503 where the defendant lies to a government agent and the defendant is ''aware that the [agent] was integrally involved in the grand jury investigation.'' Furkin, 119 F.3d at 1282.

Count 4 tracks the language of section 1503 in alleging that from ''approximately March 26, 1996 and continuing thereafter until in or about May 1996'' Defendants ''did corruptly endeavor to influence, obstruct and impede the due administration of justice namely, Federal Grand Jury investigation number 96 GJ 258 in the Northern District of Illinois.'' Count 4 also incorporates by reference paragraphs 1–26, which further detail the obstruction of justice allegations against Defendants. Paragraphs 10–26 detail Defendants' scheme to concoct a plan to end the grand jury investigation. The plan called for Ed Burke to come forward and falsely state that the $1.35 million in the LPM Inc. account in Bermuda was a finders fee which he earned for introducing LPM to ADIA. In exchange for this story, Burke was to be paid 10 to 20 percent of the $1.35 million. To corroborate Burke's story, Defendants conspired to prepare false documents including invoices, corporate records, and phone and travel records. In addition to the Indictment itself, the Government provided Defendants with the tapes and transcripts from Newell, which further detailed the obstruction of justice allegations. Consequently, this Court finds that Count 4 sufficiently apprised Defendants of the charges against them to enable them to adequately prepare for trial.

Furthermore, Defendants contend that this Court should enter a judgment of acquittal because the Court should have granted their pretrial motions for a bill of particulars. As discussed in detail in the Court's January 11, 2002 Memorandum and Order, Defendants were not entitled to a bill of particulars because the indictment was sufficient to inform Defendants of the charges against them and to allow them to prepare for trial.

CONCLUSION

For the forgoing reasons, this Court DENIES Defendants John Fassnacht and Vincent Malanga's Motions for Judgment of Acquittal [73-1, 74-1, and 75-1]. It is so ordered. 2002 WL 1727388 (N.D.Ill.)

¶2002-5159

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Bradford Lee BUTLER, DEFENDANT-APPELLANT. U.S. Court of Appeals, Sixth Circuit, (CA6) Docket No. 99-3867, July 30, 2002. District Court affirmed in part, and vacated and remanded in part. Year 1991. Decision for Taxpayer in part and for Govt. in part.

1. Tax crimes—tax evasion—indictments—limitations periods. District court properly rejected taxpayer's limitations periods defense to his prosecution for and guilty plea to employment tax evasion: taxpayer's last affirmative evasion act was at earliest within 6 years of original indictment; and superseding indictment, which mirrored charging language of original and made only minor, non-substantive change, related back to timely original. Also, motion to dismiss superseding indictment due to govt.'s informal agreement not to prosecute was properly denied for lack of proof. *Reference:* United States Tax Reporter ¶73,446.503(50).

2. Tax crimes—tax evasion—guilty plea—sentencing—enhancements and reductions—restitution. District court properly denied corp. pres./convicted tax evader's motion to withdraw guilty plea: govt. didn't breach plea agreement by ar-

guing for sentencing enhancements or failing to request downward departure where it already possessed facts necessary to enhancements before taxpayer provided relevant information in post-plea meetings, and its decision on downward departure was explicitly discretionary. Also, sophisticated means enhancement was supported by intricate nature of scheme involving shell cos. and multiple accounts that taxpayer either helped establish or used on daily basis, plus his use of alias and attempts to mislead IRS; and court had discretion not to grant him ''split'' term of imprisonment and community confinement. But, restitution order leaving determination of restitution amount to Tax Court or IRS was impermissible delegation of court's authority. *Reference:* United States Tax Reporter ¶73,446.505(10); 72,015.13(5); 73,446.516(55). IRC §7201.

Argued: James R. Alsup, Chula Vista, CA, for Appellant. Daniel Allen Brown, Assistant United States Attorney, Columbus, OH, for Appellee.
On Brief: William Yesowitch, Barber, Banaszynski & Associates, Louisville, KY, for Appellant. Daniel Allen Brown, Assistant United States Attorney, Columbus, OH, for Appellee.

Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 98-00025. Algenon L. Marbley, District Judge. United States Court of Appeals, Sixth Circuit.

Before MOORE and COLE, Circuit Judges; O'MEARA, District Judge.*

Opinion

MOORE, Circuit Judge:

Defendant-Appellant Bradford Lee Butler pleaded guilty to one count of tax evasion in violation of 26 U.S.C. § 7201. On appeal, Butler claims that the district court erred by accepting his guilty plea to a count in the indictment that fell outside of the statute of limitations, denying his motion to dismiss the superseding indictment on the basis of the government's alleged breach of an agreement not to prosecute him, and denying his motion to withdraw his guilty plea on the basis of the government's alleged breach of the plea agreement. In addition, Butler challenges the district court's enhancement of his sentence for the use of sophisticated means, the court's failure to consider a split sentence, and the court's imposition of restitution in an amount to be determined by the Tax Court or the IRS. For the following reasons, we AFFIRM the district court's judgment in all respects, except that we VACATE the district court's order regarding the amount of restitution and we REMAND for further proceedings consistent with this opinion.

I. BACKGROUND

The undisputed facts of this case are set forth in an attachment to Butler's plea agreement. Butler established and operated two businesses, National Consumer Research (''NCR''), of which he was president, and Fulfillment Services Corp. (''FSC''). Butler represented to the Internal Revenue Service (''IRS'') that NCR leased its employees from FSC. Butler used payroll services companies to pay the NCR/FSC employees, and the employees' checks showed the deduction of federal taxes. Instead of paying the deducted amounts to the federal government, however, Butler retained the money, and he also failed to file the employer tax return form as required by federal law. On January 29, 1998, a federal grand jury in the Southern District of Ohio returned an indictment against Butler for one count of conspiracy to impede or obstruct the IRS in ascertaining and collecting employment taxes in violation of 18 U.S.C. § 371 and five counts of employment tax evasion in violation of 26 U.S.C. § 7201.[1] On February 26, 1998, the same grand jury returned a superseding indictment, adding information about FSC to some of the counts.

* The Honorable John Corbett O'Meara, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] Butler was indicted with his business partner, Kriston Kent Manning. Manning was charged with one count of conspiracy to impede or obstruct the IRS in ascertaining and collecting employment taxes in violation of 18 U.S.C. § 371 and twelve counts of employment tax evasion in violation of 26 U.S.C. § 7201. Manning has fled the United States and remains a fugitive.

On March 6, 1998, Butler was arraigned, and, initially, he entered pleas of not guilty to the six counts charged against him in the superseding indictment. A number of pre-trial motions were filed, including a motion by Butler to dismiss the superseding indictment on the ground that the government had breached an agreement not to prosecute him. On September 15, 1998, the district court held a hearing on the motion to dismiss. At the hearing, Butler's former attorney and the attorney's paralegal testified that at a meeting in Washington, D.C. on October 18, 1995, the government agreed not to prosecute Butler in exchange for his cooperation in locating and convicting Manning and the payment of his personal income taxes. According to Butler's attorney and the paralegal, this agreement was confirmed in subsequent telephone conversations, although both conceded that there is no documentary evidence of such an agreement. Government witnesses testified that the meeting occurred, but they denied that the government attorney with whom Butler's attorney and the paralegal met ever agreed not to prosecute Butler; in fact, the government attorney testified that she did not have the authority to make such an agreement. The district court found that there was no agreement, specifically noting that "the oral testimony coming from defense witnesses as to an agreement are patently unbelievable," and it denied Butler's motion to dismiss. Joint Appendix ("J.A.") at 415–19 (Mot. to Dismiss Indictment Hearing Tr.).

Following the denial of his motion to dismiss the superseding indictment, Butler signed an agreement with the government to plead guilty to the second count of the superseding indictment charging him with tax evasion in violation of 26 U.S.C. §7201.[2] Pursuant to the 1991 Sentencing Guidelines,[3] and based on a tax loss amount of $179,454.97 (the total tax loss to the IRS from both Butler and Manning), the presentence investigation report recommended that Butler be sentenced to twelve months of imprisonment, a fine of $3,000, restitution to be determined by the Tax Court, and a special assessment of $50. The report also recommended a two-level enhancement for the use of sophisticated means and a two-level reduction for acceptance of responsibility. In February 1999, the district court held a hearing on objections to the report. Based on the government's arguments at the hearing and in its post-hearing memorandum, Butler moved on May 5, 1999, to withdraw his guilty plea on the ground that the government had breached the plea agreement.

On May 7, 1999, the district court held a sentencing hearing, at which it also heard Butler's motion to withdraw his guilty plea. Finding that the government had not breached the plea agreement, the district court denied Butler's motion to withdraw his guilty plea. The court also approved the presentence report's enhancement and reduction recommendations. However, the court agreed—with both Butler and the government—that the appropriate amount of tax loss was $69,558 as opposed to $179,454.97. Based the lower tax loss amount, the court then sentenced Butler to twelve months of imprisonment, three years of supervised release following the imprisonment, a fine of $3,000, restitution to be determined by the Tax Court or the IRS, and a special assessment of $50.[4] Butler timely appeals.[5]

II. ANALYSIS

A. Statute of Limitations to Count 2 of the Superseding Indictment

Butler pleaded guilty to tax evasion in violation of 26 U.S.C. § 7201. The statute

[2] Pursuant to Federal Rule of Criminal Procedure 11(a)(2), Butler entered the plea on the condition that he could appeal the denial of his motion to dismiss the superseding indictment.

[3] All references to the United States Sentencing Guidelines and the Commentary to the Guidelines in this opinion are to the 1991 version, because the district court relied on that version in sentencing Butler.

[4] Pursuant to U.S.S.G. § 2T4.1(F), a tax loss amount of more than $40,000 warrants a base offense level of 11; the recommended two-level enhancement and reduction to Butler's base offense level cancel one another out. As Butler's Criminal History Category was I, he was sentenced within an eight-to-fourteen-month range.

[5] On January 18, 2000, Butler filed a petition for a writ of habeas corpus or in the alternative a motion to set aside the conviction and sentence under 28 U.S.C. § 2255 in the district court, suspending his direct appeal pending the outcome of the petition. Butler alleged ineffective assistance of counsel and failure of the United States to exhaust its administrative remedies. The district court denied both the petition and a certificate of appealability; this court also denied a certificate of appealability.

of limitations period for prosecuting violations of 26 U.S.C. § 7201 is six years. 26 U.S.C. § 6531. Butler claims that the "operative date of violation" of Count 2 was December 31, 1991; therefore, as the superseding indictment was returned on February 26, 1998, he argues that the district court should not have been able to accept his guilty plea to Count 2 because the statute of limitations for prosecuting the offense in Count 2 had run.

[1] We conclude that the district court properly accepted Butler's guilty plea to Count 2 of the superseding indictment because the statute of limitations had not yet run on the offense described in that Count. Count 2 of the superseding indictment states that:

> On or about the 31st day of January 1992, in the Southern District of Ohio, KRISTON KENT MANNING and BRADFORD LEE BUTLER, JR., defendants, who conducted businesses known as National Consumer Research (hereinafter, "NCR") and Fulfillment Services Corp. that were established in Columbus, Ohio, and with business operations then in Columbus, Ohio, did willfully attempt to evade and defeat federal income taxes withheld from wages and Federal Insurance Contributions Act taxes due and owing to the United States of America for the quarter ending December 31, 1991, by failing to file with the Internal Revenue Service an Employer's Quarterly Federal Tax Return, Form 941, and by failing to pay the amount of federal income tax withheld and social security taxes due and owing . . .

J.A. at 32 (Superseding Indictment). We have held that the statute of limitations begins to run for tax evasion under 26 U.S.C. § 7201 on the date of "the last affirmative act of evasion." United States v. Dandy, 998 F.2d 1344, 1356 [72 AFTR 2d 93-5236] (6th Cir.1993), cert. denied, 510 U.S. 1163 (1994). The date Butler cites as the operative date of violation—December 31, 1991—is not the date of the last affirmative act of evasion. December 31, 1991, was the day the winter quarter of 1991 ended; the taxes for that quarter were not even due until January 31, 1992. Therefore, at the very earliest, January 31, 1992, is the date of the last affirmative act of evasion.[6]

Moreover, Butler calculates the date of prosecution as the date the superseding indictment was entered—February 26, 1998. However, this court has held that a superseding indictment relates back to the date of the original indictment if it "does not broaden the charges set forth" in the original indictment. United States v. Garcia, 268 F.3d 407, 411 (6th Cir.2001), cert. denied, No. 01-9762, 2002 WL 754021 (U.S. May 20, 2002). In Garcia, this court concluded that the addition of drug quantities in a superseding indictment did not "materially broaden the charges already pending against the defendants," because the defendants had sufficient notice of the drug quantities. Id. at 416. Similarly, in a fraud conspiracy case, United States v. Lash, we held that a superseding indictment was not materially broadening because:

> The dates of the conspiracy remain the same, as do the names of the conspirators and the nature and offices of the operations alleged. The allegation of additional underlying details in a superseding indictment does not compel a conclusion that the charge had been broadened. The original indictment clearly put the defendants on notice of the charges against which they were to defend themselves at trial.

United States v. Lash, 937 F.2d 1077, 1081–82 (6th Cir.1991) (quotation omitted), cert. denied, 502 U.S. 949 (1991) and 502 U.S. 1061 (1992). In this case, the only change to Count 2 between the original indictment and the superseding indictment was the substitution of FSC for another company, Data Central. This substitution simply constitutes "underlying detail"—both companies were alleged to

[6] In Dandy, we held that the filing of the defendant's tax returns did not necessarily constitute the last affirmative act of evasion. We explained that because "defendant's evasive acts in 1985 prevented the IRS from learning about defendant's income tax fraud occurring in 1982 and 1983," such acts constituted affirmative acts of evasion for the 1982 and 1983 tax years. Dandy, 998 F.2d at 1355.

have performed the same role in the tax evasion. Thus, Butler clearly had notice of the charges against him in the first indictment. As the superseding indictment relates back to the original indictment, the date of prosecution is January 29, 1998. This date is within—albeit by three days—the six-year statute of limitations period beginning January 31, 1992.

B. Motion to Dismiss the Superseding Indictment

Butler moved to dismiss the superseding indictment on the ground that the government breached an informal agreement not to prosecute him. The district court denied the motion, finding that no such agreement existed, and Butler properly preserved the issue for appeal. "To secure a defendant's cooperation in a criminal investigation, the government may informally grant him immunity in exchange for his testimony. An agreement not to prosecute is contractual in nature, and subject to contract law standards." United States v. Fitch, 964 F.2d 571, 574 (6th Cir.1992) (citation omitted). As with plea agreements, therefore, we review for clear error the district court's factual determination regarding the content of an agreement not to prosecute, and we review de novo the district court's legal determination whether certain conduct violated the agreement. United States v. Wells, 211 F.3d 988, 995 (6th Cir.2000). Because the district court denied Butler's motion to dismiss the superseding indictment on the basis of its finding that an agreement not to prosecute Butler did not exist-a factual determination, we review the district court's denial of Butler's motion to dismiss the superseding indictment for clear error. See United States v. Suarez, 263 F.3d 468, 476 (6th Cir.2001), cert. denied, 122 S.Ct. 1547 (2002) (applying the same standard of review to a district court's denial of a motion to dismiss an indictment for prosecutorial vindictiveness as applies in prosecutorial misconduct cases).[7]

The district court found that there was no agreement between the government and Butler not to prosecute Butler; therefore, the district court concluded that the government could not have violated any such agreement. Butler was unable to produce any documentary evidence of the alleged agreement, and the district court found the only witnesses who attested to the existence of the agreement not to be credible. Unless it has no foundation, we defer to a district court's finding of credibility. United States v. Owusu, 199 F.3d 329, 339 (6th Cir.2000). We thus conclude that it was not clear error for the district court to find that there was no agreement by the government not to prosecute Butler, and we agree with the district court that if no agreement existed, the government could not have breached it. Butler's motion to dismiss the superseding indictment was properly denied.

C. Motion to Withdraw Guilty Plea

Butler claims on appeal that the district court erred in denying his motion to withdraw his guilty plea, because the government breached the plea agreement in a number of ways. According to Butler, the government: (1) used incriminating information provided by Butler to argue for two two-level enhancements of Butler's base offense level in violation of Paragraph 4 of the plea agreement; (2) contested a two-level reduction of Butler's base offense level for acceptance of responsibility in violation of Paragraph 9 of the plea agreement; and (3) failed to move for a downward departure from the guidelines range in Butler's sentence, even though Butler substantially assisted in the government's investigation and prosecution of Manning

[7] We have stated that we generally review a district court's refusal to dismiss an indictment for abuse of discretion. See, e.g., United States v. Middleton, 246 F.3d 825, 841 [87 AFTR 2d 2001-1783] (6th Cir.2001) (citing United States v. Powell, 823 F.2d 996, 1001 (6th Cir.), cert. denied, 484 U.S. 969 (1987)). However, where a district court's refusal to dismiss an indictment is determined by its conclusion regarding another claim as in Suarez, we have applied the same standard of review to the district court's refusal to dismiss the indictment as we apply to the claim alleged as the basis for dismissal. See, e.g., United States v. Wright, 260 F.3d 568, 570 (6th Cir.2001) (applying de novo review to a district court's denial of a motion to dismiss an indictment for destruction of potentially exculpatory evidence) (citing United States v. Jobson, 102 F.3d 214, 217 (6th Cir.1996)); see also United States v. Plummer, 941 F.2d 799, 802–03 (9th Cir.1991) (discussing the relationship between the standard of review applied to motions to dismiss indictments and that applied to the claim on which the motion to dismiss the indictment is based). Because in this case the district court's denial of Butler's motion to dismiss the indictment was determined by its finding that an agreement not to prosecute Butler did not exist, we apply the same standard of review to the court's denial of the motion as we apply to the court's factual determination regarding an agreement not to prosecute.

in violation of Paragraph 14 of the plea agreement.[8]

The district court, after reviewing all the above claims at Butler's sentencing hearing, found that the government had not breached the plea agreement and therefore denied Butler's motion to withdraw his guilty plea. We review the district court's decision to deny Butler's motion to withdraw his guilty plea for abuse of discretion. United States v. Pluta, 144 F.3d 968, 973 (6th Cir.), cert. denied, 525 U.S. 916 (1998). Federal Rule of Criminal Procedure 32(e) provides that "[i]f a motion to withdraw a plea of guilty ... is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason." Had the government breached the plea agreement, we have held that "the proper remedy may be either specific performance or permitting the defendant to withdraw his plea." Peavy v. United States, 31 F.3d 1341, 1346 (6th Cir.1994). As noted above, we review for clear error the district court's determinations regarding the content of the plea agreement, and we review de novo the district court's determination that the government's conduct did not breach the plea agreement. Wells, 211 F.3d at 995.

Butler claims that he met with law enforcement authorities on December 17, 1998, pursuant to Paragraph 4 of the plea agreement, and provided them with information that the government then used in arguing for two two-level enhancements of his base offense level in violation of that paragraph. Paragraph 4 of the plea agreement stated that:

> Pursuant to § 1B1.8 of the Federal Sentencing Guidelines, the government agrees that any self-incriminating information so provided will not be used against the defendant in determining the applicable guideline range for sentencing, or as a basis for upward departure from the guideline range.

J.A. at 128 (Plea Agreement).[9] At the sentencing hearing, however, the government claimed that "every single piece of evidence that was used relative to sentencing was in the file of the United States Attorney and the IRS prior to [the meeting]. In fact, it was in the file prior to the return of the Superseding Indictment in this case." J.A. at 704 (Sentencing Hearing Tr.).

[2] First, the government argued that Butler's base offense level should be enhanced by two levels for use of "sophisticated means" pursuant to U.S.S.G. § 2T1.1(b)(2), as recommended in the presentence investigation report. The government claimed that "Butler kept the money concealed from the IRS behind another business entity name, used post office 'drop' boxes and aliases, and successfully put off agents through incomplete referrals and presentation of tax protestor defenses." J.A. at 158 (Pl.'s Post Hearing Mem. re Sentencing Issues). The fact that Butler concealed money from the IRS was clearly available to the government prior to the post-plea meeting. In addition, Fred Richardson, Butler's business partner's bookkeeper and the government's informant in this case, testified to all of the other facts at the sentencing objections hearing on February 25, 1999, and he referenced

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[8] Butler also contends that it was his understanding that the plea agreement was for a tax loss amount of $17,652 — not $69,558. However, Paragraph 8 of the plea agreement explicitly states that: "The parties further agree that the amount of loss suffered by the victim, the United States of America, for criminal tax purposes is calculated to be $69,558.00 ...." J.A. at 130 (Plea Agreement). We have held that "[a]n integration clause normally prevents a criminal defendant, who has entered into a plea agreement, from asserting that the government made oral promises to him not contained in the plea agreement itself." United States v. Hunt, 205 F.3d 931, 935 (6th Cir.2000). The plea agreement in this case contained such an integration clause. J.A. at 133 (p 16).

Moreover, although Count 2 in the original indictment did state $17,652 as the amount of tax loss for that count, Butler could have been held accountable for sentencing purposes for the amount of tax loss incurred as "part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(2); U.S.S.G. § 2T1.1 commentary, applic. note 3 ("In determining the total tax loss attributable to the offense (see § 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated."). The combined tax loss of all the counts charged against Butler in the superseding indictment totals $69,558, and thus even if Butler had not agreed to this amount in the plea agreement, it would have been an appropriate amount of tax loss from which to determine Butler's sentencing range if found by a preponderance of the evidence by the district court. See also United States v. Daniel, 956 F.2d 540, 544 [69 AFTR 2d 92-663] (6th Cir.1992).

[9] U.S.S.G. § 1B1.8(a) provides that:

Where a defendant agrees to cooperate with the government by providing information concerning unlawful activities of others, and as part of that cooperation agreement the government agrees that self-incriminating information provided pursuant to the agreement will not be used against the defendant, then such information shall not be used in determining the applicable guideline range, except to the extent provided in the agreement. See also United States v. Miller, 910 F.2d 1321, 1325 (6th Cir.1990), cert. denied, 498 U.S. 1094 (1991).

particular pieces of evidence likely to be in his knowledge or possession prior to Butler's post-plea meeting with the government. Second, the government argued that Butler's base offense level should be enhanced by two levels for willful obstruction pursuant U.S.S.G. § 3C1.1 because Butler "repeatedly lied and cast blame upon others." J.A. at 158–59. As in its argument for the sophisticated means enhancement, the government in making its willful obstruction argument relied on three sources of facts: the facts to which Butler stipulated in pleading guilty to Count 2, Richardson's testimony, and the experience of IRS agents. Such facts were likely in the possession of the government prior to Butler's post-plea meeting with law enforcement authorities. We therefore agree with the district court that the government did not breach the plea agreement by arguing for the sophisticated means and obstruction of justice enhancements.

Butler also claims that the government violated the plea agreement by contesting a two-level reduction of his base offense level for acceptance of responsibility and by failing to move for a downward departure from his guidelines range for substantial assistance. In regard to the reduction, the plea agreement explicitly conditioned the government's support of the reduction on the defendant's continued acceptance of responsibility.[10] The district court did eventually apply the reduction, but it was at least reasonable for the government to argue that Butler failed to accept responsibility for his 1991–92 act of tax evasion when he testified that he had no knowledge of the failure of NCR to pay its employment taxes until 1992 and that he cooperated with the IRS as soon as he learned of the problem. In regard to the downward departure, the plea agreement stipulated that the government "may" move the court for a downward departure for substantial assistance, but that such motion lay within the discretion of the government.[11] Thus the government in not moving for a downward departure for substantial assistance was acting within its discretion under the plea agreement. We therefore also agree with the district court that the government did not breach the plea agreement by contesting the two-level reduction for acceptance of responsibility or failing to move for downward departure for substantial assistance.

Because we agree with the district court that the government did not breach the plea agreement, we further conclude that the district court did not abuse its discretion in denying Butler's motion to withdraw his guilty plea.

D. Sentencing

Butler challenges the district court's determination of his sentence in three respects: (1) the district court's application of a two-level enhancement for use of sophisticated means to Butler's base offense level; (2) the district court's failure to consider a split sentence; and (3) the district court's imposition of restitution in an amount to be determined by the Tax Court or the IRS. We review de novo the district court's interpretation of the Sentencing Guidelines, and we review the district court's findings of fact at sentencing for clear error. United States v. Canestraro, 282 F.3d 427, 431 (6th Cir.2002). In addition, we review de novo the district court's application of the facts to the Sentencing Guidelines, because such application involves a mixed question of law and fact. United States v. Middleton, 246 F.3d 825, 844 [87 AFTR 2d 2001-1783] (6th Cir.2001). Therefore, "[t]he determination

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[10] Paragraph 9 of the plea agreement provided that: The parties further agree that pursuant to U.S.S.G. § 3E1.1, at the time of his plea, the Defendant BRADFORD LEE BUTLER, JR., has accepted responsibility for his offense, and therefore is entitled to an appropriate reduction, being 2 points, in the applicable base offense level under the sentencing guidelines. At the time of sentencing, the United States will not object to this same determination provided defendant's conduct has continued to demonstrate compliance with the terms of U.S.S.G. § 3E1.1..... J.A. at 130.

[11] Paragraph 14 of the plea agreement provided that:

> The United States Attorney for the Southern District of Ohio agrees that if Defendant BRADFORD LEE BUTLER, JR., provides substantial assistance in the investigation or prosecution of others who have committed criminal offenses, the United States Attorney may move the Court pursuant to U.S.S.G. § 3553(e) and/or § 5K1.1 of the United States Sentencing Guidelines for an appropriate departure from the otherwise applicable guideline range for Defendant's sentence and will in connection therewith make known to the Court the nature and extent of Defendant's assistance. Defendant understands that whether such motion should be made lies within the discretion of the United States Attorney and that whether and to what extent such motion should be granted are solely matters for determination by the Court.

J.A. at 132.

that a tax evasion scheme used sophisticated means generally enjoys the protection of the clearly erroneous standard, except that we review the application of the guideline to a particular set of facts de novo.'' United States v. Pierce, 17 F.3d 146, 151 [73 AFTR 2d 94-1191] (6th Cir.1994). And ''[w]e review de novo whether a restitution order is permitted under the law. If it is, we then review the amount ordered under the abuse of discretion standard.'' United States v.. Comer, 93 F.3d 1271, 1278 (6th Cir.), cert. denied, 519 U.S. 1033 (1996).

1. Sophisticated Means Enhancement

The district court applied a two-level enhancement to Butler's base offense level for use of sophisticated means in impeding ''discovery of the nature or extent'' of a tax evasion offense, pursuant to U.S.S.G. § 2T1.1(b)(2). The Commentary to the Guidelines explains that: '''Sophisticated means,' as used in § 2T1.1(b)(2), includes conduct that is more complex or demonstrates greater intricacy or planning than a routine tax-evasion case. An enhancement would be applied, for example, where the defendant used offshore bank accounts, or transactions through corporate shells.'' U.S.S.G. § 2T1.1(b)(2) commentary, applic. note 6. In overruling Butler's objection to the enhancement, the district court stated that ''[i]t appears to the Court that there was a fairly elaborate scheme employed here and that Mr. Butler took part of [sic] that scheme. He used post office drop boxes, aliases, put out some of the incomplete referrals.'' J.A. at 711 (Sentencing Hearing Tr.). We have held that the sophisticated means enhancement requires the sentencing court to look at the actions taken by the individual. United States v. Kraig, 99 F.3d 1361, 1371 [78 AFTR 2d 96-7063] (6th Cir.1996). In particular, ''[a] defendant involved in a complex or repetitive tax conspiracy is not automatically given a sophisticated means enhancement if his or her own personal involvement did not constitute sophisticated means.'' Id.

On appeal, Butler argues that he was simply involved in a complex scheme of tax evasion set up by his business partner, Manning. However, the evidence presented by the government at the sentencing objections hearing demonstrated that Butler's personal involvement in the scheme constituted sophisticated means. First, as opposed to the defendant in Kraig, Butler himself helped set up the shell companies Data Central and FSC, and he was president of NCR. Second, although Butler may not have set up the various different bank accounts or post office boxes, he used them in his day-to-day business at NCR—he was not just occasionally involved in the scheme. Third, according to Richardson, Butler did use an alias. And, finally, Richardson and IRS agents provided evidence that Butler tried to mislead the IRS. In other words, ''[t]his was not a case of an individual who simply lied on a 1040 form.'' Pierce, 17 F.3d at 151. We therefore conclude that the district court properly applied the two-level sophisticated means enhancement to Butler's base offense level.

2. Split Sentence

Butler argues that the district court overlooked the possibility that Butler's sentence could be ''split'' under U.S.S.G. § 5C1.1(d). U.S.S.G. § 5C1.1(d) provides that:

> If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than six months but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e), provided that at least one-half of the minimum term is satisfied by imprisonment.

Because his base offense level was set at 11 and his Criminal History Category was I, Butler's sentencing guideline range was eight to fourteen months, and thus he could have received a ''split sentence'' under § 5C1.1(d). U.S.S.G. § 5C1.1(d) commentary, applic. note 4; see also United States v. Cseplo, 42 F.3d 360, 361–62 [74 AFTR 2d 94-7389] (6th Cir.1994).

Butler did not raise any objection to the district court's failure to apply the split-sentence guideline at the sentencing hearing; therefore, this court may only review the district court's failure to apply the guideline for plain error. United States v. Koeberlein, 161 F.3d 946, 949 (6th Cir.1998), cert. denied, 526 U.S. 1030 (1999); United States v. Barajas Nunez, 91 F.3d 826, 830 (6th Cir.1996).

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed.R.Crim.P. 52(b). For a challenge to be successful under plain error review, "there must be (1) error, (2) that is plain, (3) and that affects[s] substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." United States v. Roper, 266 F.3d 526, 531 (6th Cir.2001) (quoting Johnson v. United States, 520 U.S. 461, 467 (1997)). As U.S.S.G. § 5C1.1(d) gives the district court the discretion to sentence certain defendants either to a term of imprisonment or to a "split" term of imprisonment and community confinement or home detention, the district court's failure to sentence Butler to a "split" term cannot constitute error much less plain error.

3. Restitution

The district court sentenced Butler to make restitution to the IRS in an amount "To be determined thru tax court or IRS." J.A. at 43 (Judgment). Butler argues on appeal that the district court erred by failing to specify the amount of restitution, and, furthermore, that the district court did not have the authority to order restitution under the Victim and Witness Protection Act (VWPA), as codified at 18 U.S.C. § 3663, § 3664 (1994).[12] Because Butler did not object to the imposition of restitution at the sentencing hearing, this court must review such imposition for plain error. United States v. Hall, 71 F.3d 569, 573 (6th Cir.1995).

Butler correctly points out that the VWPA does not apply to Title 26 offenses such as tax evasion. 18 U.S.C. § 3663(a)(1). However, the district court did not order Butler to make restitution under the VWPA; the district court ordered Butler to make restitution as a condition of supervised release under 18 U.S.C. §§ 3563(b)(3), 3583(d) (1994). The presentence investigation report recommended that restitution to the IRS be ordered as a condition of probation or supervised release under 18 U.S.C. §§ 3563(b)(3), 3583(d), and the district court adopted this recommendation. 18 U.S.C. §§ 3563(b)(3) states that district courts may provide that a defendant "make restitution to a victim of the offense" as a condition of probation. 18 U.S.C. § 3583(d) extends the possibility of such provision to supervised release. Therefore, we conclude that the district court had authority to order Butler to make restitution to the IRS.

More problematic, however, is the district court's order of restitution in an amount "To be determined thru tax court or IRS." J.A. at 43. Although the district court had authority to order Butler to make restitution pursuant to 18 U.S.C. § 3563(b)(3), § 3583(d), not pursuant to the VWPA, such restitution was required nonetheless to conform to the provisions of the VWPA. See Gall v. United States, 21 F.3d 107, 111 (6th Cir.1994) ("We have already concluded that the restitution provision, 18 U.S.C. § 3583(d), via its reference to 18 U.S.C. § 3563(b)(3), requires restitution to conform with provisions of the VWPA, notwithstanding the limitations set forth in § 3663(a)."),[13] Under the

[12] This court has held that "restitution imposed under the VWPA is punishment for the purpose of the Ex Post Facto Clause." United States v. Schulte, 264 F.3d 656, 662 (6th Cir.2001) (citing United States v. Streebing, 987 F.2d 368, 376 (6th Cir.), cert. denied, 508 U.S. 961 (1993)). Therefore, we apply the version of the VWPA in effect at the time Butler committed the offenses for which he is required to make restitution. See 18 U.S.C. §§ 3663, 3664 (1994). We also note that the 1996 amendment to the VWPA — the Mandatory Victims Restitution Act ("MVRA"), codified at 18 U.S.C. § 3663A (Supp.V), — does not apply. See Schulte, 264 F.3d at 662.

[13] 18 U.S.C. § 3563(b)(3) (1994) states that: "[The court may provide that the defendant] make restitution to a victim of the offense under sections 3663 and 3664 (but not subject to the limitations of section 3663(a)) . . . ." As noted above, the VWPA is codified at 18 U.S.C. §§ 3663, 3664. Therefore, although the district court had authority to order restitution under 18 U.S.C. § 3563(b)(3) in a case in which the defendant pleaded guilty to an offense other than those offenses listed in 18 U.S.C. § 3663(a)(1), the rest of the VWPA as codified in 18 U.S.C. §§ 3663, 3664 still applies. See Gall, 21 F.3d at 109 – 110.

VWPA, a district court may not delegate the determination of the amount of restitution. At issue is the district court's abrogation of its judicial authority; as the Fourth Circuit has held, ''making decisions about the amount of restitution, the amount of installments, and their timing is a judicial function and therefore is non-delegable.'' United States v. Johnson, 48 F.3d 806, 809 (4th Cir.1995). Although in Weinberger v. United States this court held that a district court does not abrogate its judicial authority under the VWPA ''when it delegates the setting of a restitution-payment schedule to the defendant's probation officer,'' we also held that such delegation was only permissible ''provided that the court first establishes the amount of restitution.'' Weinberger v. United States, 268 F.3d 346, 360 [88 AFTR 2d 2001-7226] (6th Cir.2001), cert. denied, 122 S.Ct. 1433 (2002) (emphasis added) (quotation omitted).[14]

The district court in this case delegated the determination of the amount of Butler's restitution to the Tax Court or the IRS. Such delegation was impermissible as an abrogation of the court's judicial authority, and we conclude that it affected the fairness, integrity, and public reputation of judicial proceedings. See United States v. Pandiello, 184 F.3d 682, 688 (7th Cir.1999). Therefore, the district court plainly erred in failing to determine the amount of Butler's restitution, and we vacate the restitution portion of Butler's sentence. In addition, we note that on remand, the district court must consider the following matters in determining the amount of restitution Butler should be required to make to the IRS. First, the district court did not explain its order of restitution in this case, but 18 U.S.C. § 3664 delineates a number of factors district courts ''shall consider'' in ordering restitution.[15] Thus, on remand, the district court must consider the factors and explain why they are or are not relevant. See United States v. Meacham, 27 F.3d 214, 219 (6th Cir.1994) (remanding order of restitution for failure to consider factors set out in 18 U.S.C. § 3664). Second, in Weinberger, we held that ''absent a specific provision in the plea agreement to pay full restitution pursuant to 18 U.S.C. § 3663(a)(3), the district court could only order restitution for the tax loss related to Count 12 [the count Weinberger pleaded guilty to].'' Wein-berger, 268 F.3d at 35758[16] ; see also Comer, 93 F.3d at 1278–79; Gall, 21 F.3d at 110. In this case, Butler's plea agree-ment does not contain any provision spe-cifically discussing restitution. Therefore, the district court may only order Butler to make restitution to the IRS in an amount that does not exceed the tax loss related to Count 2 of the superseding indictment—$17,652.

III. CONCLUSION

For the above reasons, we AFFIRM the judgment of the district court, except we VACATE the district court's imposition of restitution and we REMAND for proceedings consistent with this opinion.

R. GUY COLE, JR., Circuit Judge, concurring.

CONCURRENCE

I concur in the majority's opinion. I write separately to note that the record does not reveal why the district court chose to delegate the restitution amount to the IRS or tax court. Certainly, parties to a plea agreement may specify that the final restitution amount will be negotiated be-

[14] No circuit has held that determination of the amount of restitution is delegable. In accordance with the Fourth Circuit, the substantial majority of circuits has held that neither the amount of restitution nor the restitution-payment schedule may be delegated. See United States v. Pandiello, 184 F.3d 682, 688 (7th Cir.1999); United States v. Graham, 72 F.3d 352, 356 (3d Cir.1995), cert. denied, 516 U.S. 1183 (1996); United States v.. Porter, 41 F.3d 68, 71 (2d Cir.1994); United States v. Albro, 32 F.3d 173, 174 (5th Cir.1994). Neither of the two other circuits to have held that a district court may delegate a defendant's restitution-payment schedule to the defendant's probation officer have held that a district court may delegate the amount of restitution. See United States v. Fuentes, 107 F.3d 1515, 1529 n. 25 (11th Cir.1997) (district court may delegate restitution-payment schedule to defendant's probation officer); United States v. Barany, 884 F.2d 1255, 1261 (9th Cir.1989), cert. denied, 493 U.S. 1034 (1990) (district court may delegate timing and manner of restitution payments to defendant's probation officer, but court's failure to establish amount of restitution required remand).

[15] 18 U.S.C. § 3664(a) (1994) provides that: ''The court, in determining whether to order restitution under section 3663 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.''

[16] 18 U.S.C. § 3663(a)(3) (1994) states that: ''The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.''

tween the IRS and the defendant. See United States v. Gottesman, 122 F.3d 150, 151–52 [80 AFTR 2d 97-6458] (2d Cir.1997); United States v. Stout, 32 F.3d 901, 904 [74 AFTR 2d 94-6367] (5th Cir.1994). However, there is no clear indication that delegation was contemplated as part of the plea agreement in this case. Alternatively, the district court could simply have been unaware that delegation was impermissible. The parties registered no objection to delegation, and only after Butler had been sentenced did this Circuit suggest in binding precedent that delegation of the restitution amount could be plain error. See Weinberger v. United States, 268 F.3d 346, 359 [88 AFTR 2d 2001-7226] (6th Cir.2001).

If there were evidence that the parties had agreed to delegate restitution, or evidence that the defendant had affirmatively waived his right to have the restitution amount set by the court, I would be more hesitant to vacate the sentence. However, as this record does not present such evidence, I join the majority.

¶2002-5160

Billy Joe BROWN, PLAINTIFF v. UNITED STATES OF AMERICA, on behalf of Internal Revenue Service, DEFENDANT. In re Billy Joe BROWN, Debtor. U.S. Bankruptcy Court, Middle Dist. of Georgia, (Bktcy Ct GA) Docket No. 01-11429-JDW, May 14, 2002. Years 1987, 1988, 1989, 1990. Decision for Govt.

1. Tax claims in bankruptcy—dischargeability—"returns"—substitute returns; installment agreements. Chap. 7 debtor's tax liabilities for years he didn't file returns were nondischargeable on summary judgment: 9th Cir. precedent showed that neither substitute returns nor installment agreement he entered into with IRS qualified as "returns"; and, taxpayer didn't sign substitute returns, respond to deficiency notices, or allege that installment agreement contained information necessary for computing tax liability. *Reference:* United States Tax Reporter ¶68,726.52(27).

T. Lee Bishop, Jr., Albany, GA, for Debtor.
Lillian H. Lockary, Assistant U.S. Attorney, Macon, GA, for Defendant.

United States Bankruptcy Court, Middle District of Georgia, Albany Division.

Before JAMES D. WALKER, JR., United States Bankruptcy Judge.

Memorandum Opinion

WALKER, JR., Bankruptcy Judge:

This matter comes before the Court on Debtor's Complaint to determine dischargeability of income taxes. This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(I). After considering the pleadings, the evidence, and the applicable authorities, the Court enters the following decision in accordance with Federal Rule of Bankruptcy Procedure 7052.[1]

Undisputed Facts

The Internal Revenue Service filed a statement of material facts, uncontested by Debtor, which recites the following: Debtor failed to file timely federal income tax returns for the years 1987, 1988, 1989, and 1990. As a result, the IRS filed substitute returns on behalf of Debtor for those years and sent Debtor statutory notices of deficiency for each year. Debtor never signed the substitute returns. In the absence of a timely response by Debtor, the IRS assessed the income taxes due for those years without Debtor's written consent. In addition, the IRS does not dispute Debtor's assertion that he entered into an installment payment agreement with the IRS, although neither party has provided the date the agreement was executed.

On August 7, 2001, Debtor filed a Chapter 7 petition. On November 6, 2001, he filed a Complaint to Determine Dischargeability of Taxes. The IRS filed a

[1] The Court is not required to announce findings of fact on a summary judgment motion. Fed.R.Civ.P. 52(a), applicable to bankruptcy through Fed. R. Bankr.P. 7052. On a summary judgment motion, the Court does not make findings of fact, but rather determines whether any material facts are in dispute. Gray v. Manklow (In re Optical Tech., Inc.), 246 F.3d 1332, 1335 (11th Cir.2001).

motion for summary judgment on April 9, 2002. Debtor has not responded to the motion.

Conclusions of Law

[1] Summary judgment is governed by Federal Rule of Civil Procedure 56, made applicable to bankruptcy through Bankruptcy Rule of Procedure 7056. Under Rule 56, a party is entitled to summary judgment when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). Evidence and reasonable factual inferences are viewed in the light most favorable to the nonmoving party. Burton v. Tampa Housing Auth., 271 F.3d 1274, 1277 (11th Cir.2001).

Debtor seeks a determination that his federal income tax liability for the years 1987, 1988, and 1989 are dischargeable. The IRS has asserted that Debtor's tax liability for 1990 also is in issue. Section 727(b) provides a Chapter 7 debtor with a discharge of all prepetition debt, except as provided in Section 523.[2] Section 523(a)(1)(B) states that "[a] discharge under section 727 ... of this title does not discharge an individual debtor from any debt ... (1) for a tax ... (B) with respect to which a return, if required(i) was not filed." 11 U.S.C.A. § 523(a)(1)(B) (West 1993).

In an action to determine discharge under Section 523, the plaintiff must prove his case by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 287 [70 AFTR 2d 92-5639], 111 S.Ct. 654, 659 [70 AFTR 2d 92-5639] (1991). Aside from his admissions in the complaint and answers to interrogatories, Debtor has submitted no evidence in this case.

The only "returns" held by the IRS are the substitute returns prepared by the IRS. The term "return" has not been defined by the Bankruptcy Code, and bankruptcy courts have adopted varying definitions, generally derived from tax law. The most stringent definition requires the following of a return: "'(1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.'" United States v. Hatton (In re Hatton), 220 F.3d 1057, 1060–61 [86 AFTR 2d 2000-5572] (9th Cir.2000) (quoting United States v. Hindenlang (In re Hindenlang), 164 F.3d 1029, 1033 [83 AFTR 2d 99-509] (6th Cir.1999); see also United States v. Ralph, 266 B.R. 217, 219 [88 AFTR 2d 2001-5639] (M.D.Fla.2001) (quoting Germantown Trust Co. v. Commissioner of Internal Revenue, 309 U.S. 304, 308 [23 AFTR 1084], 60 S.Ct. 566, 568 [23 AFTR 1084] (1940)). In Hatton, the court concluded that neither an installment agreement nor a substitute return qualified as a return for two reasons. 220 F.3d at 1061. First, neither was signed by the debtor under penalty of perjury. Id. Second, neither represented "an honest and reasonable attempt to satisfy the requirements of the tax law" because the debtor did not begin to cooperate with the IRS until after they took action to levy his wages and seize his property. Id.

Most courts do not require that the return be signed under penalty of perjury so long as it is signed by the debtor and provides the necessary information for computing tax liability. See Bergstrom v. United States (In re Bergstrom), 949 F.2d 341, 343 [68 AFTR 2d 91-5886] (10th Cir.1991); Mathis v. United States (In re Mathis), 249 B.R. 324, 328 [87 AFTR 2d 2001-793] (S.D.Fla.2000); Berard v. United States (In the Matter of Berard), 181 B.R. 653, 657 [75 AFTR 2d 95-2526] (Bankr.M.D.Fla.1995). In addition, courts give considerable weight to the debtor's cooperation when deciding whether or not a return has been filed. Gentry v. United States, 223 B.R. 127, 131–32 [81 AFTR 2d 98-1037] (M.D.Tenn.1998); Gless v.

[2] "Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter...." 11 U.S.C.A. § 727(b) (West 1993).

United States (In the Matter of Gless), 181 B.R. 414, 417 (Bankr.D.Neb.1993).

Even using the most liberal definition for filing a return and viewing the facts in the light most favorable to Debtor, the IRS prevails. It is uncontroverted that Debtor did not sign the substitute return. There are no facts to show that Debtor cooperated with the IRS in determining his tax liability. To the contrary, he failed to respond to the notices sent to him by the IRS. Although Debtor signed an installment agreement, such an agreement to pay a tax debt is not equivalent to filing a return. Debtor has not alleged that the agreement contains the information necessary for computing tax liability, and, thus, has not provided any facts from which the Court could determine that the agreement constitutes a filed return. Neither the substitute returns completed by the IRS nor the installment agreement satisfy the requirements for a filing a return. As a result, the IRS is entitled to judgment as a matter of law. Debtor's tax debt for the years 1987, 1988, 1989, and 1990 are nondischargeable.

An Order in accordance with this Opinion will be entered on this date.

ORDER

In accordance with the Memorandum Opinion entered on this date, Debtor Billy Joe Brown's federal income tax liability for the years 1987, 1988, 1989, and 1990 is nondischargeable under 11 U.S.C. § 523(a)(1)(B). The Court hereby GRANTS the United States' Motion for Summary Judgment.

So ORDERED, this 14th day of May, 2002.

¶2002-5161

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Maria Lilia ARAUJO, aka Lily Araujo, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 00-10473, July 24, 2002. District Court affirmed. Years 1995, 1996. Decision against Taxpayer.

1. Tax crimes—tax evasion—evidence—indictments. Bankrupt return preparer's conviction and sentence for tax evasion were affirmed: evidence reflecting preparer's dire financial situation and failure to obtain extensions for clients sufficiently showed that she took clients' tax payments for herself with intent to evade paying taxes indefinitely, not merely to postpone payment. Also, preparer's argument that govt. improperly charged her with evasion before taxes were due was rejected since indictment was properly based on dates she cashed or deposited clients' checks in her personal account; and convicting her of multiple evasion counts for each year was proper where each count was based on different evasion act. *Reference:* United States Tax Reporter ¶72,015.02(5); 73,446.503(21). IRC §7201.

Appeal from the United States District Court for the Eastern District of California Oliver W. Wanger, District Judge, Presiding. United States Court of Appeals, Ninth Circuit.

Before RONEY,* HUG and THOMAS, Circuit Judges.

Memorandum**

Unpublished Disposition

Maria Lilia Araujo (''Araujo'') appeals her jury conviction and sentence on five counts of federal tax evasion under 26 U.S.C. § 7201. The district court had jurisdiction pursuant to 18 U.S.C. § 3231, and we have jurisdiction over Araujo's timely appeal under 28 U.S.C. § 1291. We affirm. Because the parties are familiar with the factual and procedural history of this case, we do not recount it here.

The essential elements of federal tax evasion under 26 U.S.C. § 7201 are: ''(1) the existence of a tax deficiency; (2) willfulness; and (3) an affirmative act consti-

* Honorable Paul H. Roney, Senior United States Circuit Judge for the Eleventh Circuit, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

tuting an evasion or attempted evasion of the tax.'' United States v. Marashi, 913 F.2d 724, 735 [71A AFTR 2d 93-3898] (9th Cir.1990) (internal quotation marks and citation omitted). On appeal, Araujo presents two arguments, challenging the sufficiency of the government's evidence of her willfulness and the existence of a tax deficiency.[1] Sufficient evidence exists to support a conviction if, ''viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'' United States v. Wright, 215 F.3d 1020, 1025 (9th Cir.), cert. denied, 531 U.S. 969 (2000). We find that the government's evidence was sufficient to sustain her conviction on the five counts.

[1] Citing Edwards v. United States, 375 F.2d 862 [20 AFTR 2d 5055] (9th Cir.1967), Araujo first argues that the government's evidence was inadequate to show that she intended permanently to evade, rather than merely to postpone, payment of the federal taxes of her clients, Jess and Oralia Ortega (''the Ortegas''). In Edwards, we held that the willfulness requirement of 26 U.S.C. § 7201 calls for ''a specific intent to evade or defeat the tax or its payment,'' which ''contemplate [s] an escape from tax and not merely a postponement of disclosure or payment.'' Edwards, 375 F.2d at 867. We concluded that the Edwards defendant, a tax attorney, did not intend the permanent evasion of his clients' taxes, but only ''to take advantage of the time lag in Government investigation of delinquent returns to tide him over during a period of personal financial hardship.'' Id. Accordingly, we reversed the defendant's conviction under 26 U.S.C. § 7201 for insufficient proof of willfulness. See id.

Araujo's argument fails because the government's evidence was enough for a rational trier of fact to find that Araujo intended permanently to evade, rather than merely to postpone, payment of the Ortegas' federal taxes. The government's evidence shows that Araujo took for herself payments from the Ortegas that they intended for the tax authorities. The record is devoid of any evidence indicating that Araujo planned ultimately to send the Ortegas' payments to the Internal Revenue Service (''IRS''). In contrast with Edwards, there is no evidence that Araujo obtained extensions for the Ortegas' federal tax payments and thereby disclosed to the government that a return for the Ortegas was due. See id.

Moreover, Araujo's own evidence does not support her contention that she intended only to delay payment of the Ortegas' federal taxes. At trial, Araujo stated that the Ortegas gave her the checks at issue in the five appealed counts as loans, not as payments of their federal taxes. Araujo declared that whenever she repaid the loans, the Ortegas, rather than she, would be responsible for making their tax payments. Thus, Araujo's own trial testimony fails to substantiate her theory on appeal that she sought merely to postpone payment of the Ortegas' taxes.

Finally, evidence of Araujo's dire financial situation suggests that she could not reasonably have believed that she would see herself through her difficult times by filing tardy tax returns for the Ortegas. In Edwards, we cautioned: ''One pursuing a path such as that of [the defendant] might eventually fall so far behind that no reasonable man could believe that he would ever catch up.'' Id. We found, however, that the Edwards defendant's ''straits had [not] become that serious.'' Id. The record in this case indicates that the same was not true for Araujo. Araujo filed for bankruptcy after paying the Ortegas a mere fraction of the total loss that they incurred as a result of Araujo's tax evasion scheme. Given this evidence of Araujo's difficult financial predicament, it is reasonable to infer that Araujo intended permanently to evade, rather than merely to postpone, payment of the Ortegas' federal taxes. Thus,

[1] Because Araujo does not raise the separate legal question discussed by the dissent, namely whether a tax preparer's theft of client monies intended for the Internal Revenue Service properly constitutes tax evasion under 26 U.S.C. § 7201, we do not address the issue. See Paracor Finance, Inc. v. General Elec. Capital Corp., 96 F.3d 1151, 1168 (9th Cir.1996) (''It is well established in this Circuit that claims which are not addressed in the appellant's brief are deemed abandoned.'') (quoting Collins v. City of San Diego, 841 F.2d 337, 339 (9th Cir.1988)).

we reject Araujo's argument that the government's evidence was insufficient under Edwards.

Araujo next argues that the government's evidence on the five counts that she challenges was insufficient to show the existence of a tax deficiency. To prove a violation of 26 U.S.C. § 7201, the government must show the existence of a tax deficiency on the date that the taxpayer should have filed a return. United States v. Voorhies, 658 F.2d 710, 714 [48 AFTR 2d 81-6012] (9th Cir.1981). However, the willful and affirmative conduct constituting the tax evasion may occur prior to the failure to file a return when taxes are due. See United States v. Mal, 942 F.2d 682, 685 [68 AFTR 2d 91-5452] (9th Cir.1991) (the defendant's filing of a false and fraudulent tax withholding certificate constituted a sufficient willful and affirmative act for purposes of 26 U.S.C. § 7201).

The government's indictment set forth the five counts at issue in a table that contains columns indicating the count, the taxpayer (the Ortegas), the year for which the tax was due, the amount of tax due, the Ortegas' check date, and the date on which Araujo either cashed the Ortegas' check or deposited it into her personal bank account. Pointing to the last column, which indicates when she cashed or deposited the Ortegas' checks, and omitting any reference to the column that shows the tax years, Araujo argues that the government charged her with committing tax evasion at a time when the taxes were not yet due, and so no tax deficiencies then existed. Araujo contends that, accordingly, the government's evidence, showing that the Ortegas still owed federal taxes for the years of 1995 and 1996 after the April 15, 1996 and April 15, 1997 dates when the Ortegas should have filed their returns, was insufficient to prove the crimes charged because, Araujo asserts, the indictment charged crimes occurring at an earlier date.

We reject Araujo's argument because it misconstrues the indictment. The final column that Araujo cites does not allege the dates on which the tax deficiencies arose. Rather, this column shows the dates on which she performed the willful and affirmative acts constituting tax evasion by cashing or depositing into her personal bank account monies that the Ortegas intended for the IRS. As already noted, the required willful and affirmative conduct may occur prior to the existence of the tax deficiency. See id. The indictment indicates the April 15 date on which each tax deficiency arose by reference to the year for which the taxes were due and owing. The indictment charged her with evading the tax "due and owing by the individuals named below to the United States of America, for the tax years listed below . . . ." Because the case law defines the date of the tax deficiency as the date on which the tax became due and owing for the particular tax year, see Voorhies, 658 F.2d at 714, the indictment's specification of the 1995 and 1996 tax years alleged tax deficiencies on April 15, 1996 and April 15, 1997, respectively. Consequently, the government's evidence of tax deficiencies after April 15, 1996 and April 15, 1997 was adequate to prove the tax deficiencies that the government charged in its indictment.

Further, it is acceptable that Araujo was convicted of multiple counts of evasion for each of the tax years in question. See Cohen v. United States, 297 F.2d 760, 769–71 [9 AFTR 2d 715] (9th Cir.1962) (affirming a conviction for tax evasion for tax years 1945 through 1950 when the defendant had previously been convicted of tax evasion for three of those years based on different acts); Norwitt v. United States, 195 F.2d 127, 133 [41 AFTR 883] (9th Cir.1952) (disagreeing with the defendant's argument that "several such separate [tax evasion] offenses may not be committed for the same year"). In this case, each of the three counts relating to the 1995 tax year and the two counts relating to the 1996 tax year is based on a different affirmative act of evasion. These distinctions differentiate the counts.

Because we reject Araujo's challenges to the sufficiency of the government's evidence on the five counts of tax evasion,

we find no error in the district court's sentencing determination.

AFFIRMED.

Dissenting Opinion

RONEY, Senior Circuit Judge, Dissenting:

I respectfully dissent. The portion of the indictment containing counts 13–17 challenged on this appeal is set forth in full as follows:

The Grand Jury further charges THAT MARIA LILIA ARAUJO, aka Lily Araujo, defendant herein, on or about the dates listed below, in the County of Tulare, State and Eastern District of California, did wilfully attempt to evade and defeat a large part of the tax due and owing by the individuals named below to the United States of America, for the tax years listed below, by diverting the payments of said federal taxes, in the appropriate amounts listed below, to the United States of America by depositing the taxpayers' personal checks intended to be applied for the payment of federal taxes into her business bank account or converting them to cash:

COUNT	TAXPAYER	TAX YEAR	TAX DUE	CHECK DATE	DATE NEGOTIATED
TWELVE	Jess Ortega	1994	$7,665.00	17/15/95	7/17/95
THIRTEEN	Jess Ortega	1995	$3,000.00	8/18/95	8/21/95
FOURTEEN	Jess Ortega	1995	$3,000.00	10/5/96	10/6/95
FIFTEEN	Jess Ortega	1995	$3,000.00	1/8/96	1/8/96
SIXTEEN	Jess Ortega	1996	$3,000.00	4/2/96	4/4/96
SEVENTEEN	Jess Ortega	1996	$3,000.00	7/4/96	7/5/96
EIGHTEEN	Salvador Mendoza	1994	$ 883.00	3/25/95	4/3/95

All in violation of Title 26, United States Code, Section 7201. A TRUE BILL. Counts 13 through 17 involved estimated tax payments in the amount of $3,000 each, not final payment of taxes due. The evidence showed that for each of these counts, Jesse Ortega gave defendant Araujo one lump sum check, made out to either Araujo or her company, Servimex, to cover an estimated tax of $3,000, EDD contributions, and her own services. She deposited some of those checks into her bank account and cashed the others. This is what Araujo was supposed to do with those checks because they were made payable to her, and thus she did not "divert" the checks to her account. The checks themselves were not "intended to be applied for the payment of federal tax" as alleged in the indictment because they were not made payable to the United States of America, but rather to Araujo. Nor were they made payable to Araujo in the amount of a tax payment with the intent that Araujo would endorse them over to the United States of America.

Araujo had promised Ortega, however, that she would then write her own check to the government on his behalf to pay his estimated taxes. She broke that promise. She kept his money. She thus may well have been guilty of breach of fiduciary duty and theft vis-a-vis Ortega, but committed no act vis-a-vis the IRS that could be considered § 7201 tax evasion. The government did not charge Araujo with non-payment of estimated taxes under 26 U.S.C. § 7203.

Therefore, there was insufficient evidence to support Araujo's conviction for tax evasion under 26 U.S.C. § 7201 for the challenged counts because:

(1) No case has held that the intentional non-payment of estimated tax is a crime under 26 U.S.C. § 7201, the statute under which Araujo was charged. 26 U.S.C. § 7203 is the section that specifically covers willful failure to pay estimated tax or tax.

(2) Non-payment of tax is not a felony under 26 U.S.C. § 7201

(3) 26 U.S.C. § 7201 does not cover stealing from a taxpayer but covers tax evasion from the government only. While the district court correctly stated that a § 7201 conviction requires affirmative conduct constituting an evasion or attempted

evasion of tax in accordance with Sansone v. United States, 380 U.S. 343, 351 [15 AFTR 2d 611] (1965), it improperly interpreted Araujo's misappropriation of her clients' money as ''tax evasion'' for the purposes of § 7201 failing to recognize that ''tax evasion'' is not just stealing money from a taxpayer as Araujo did here. Rather, ''tax evasion'' is lying to or concealing the truth from the IRS, or, ''[t]he willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability.'' BLACK'S LAW DICTIONARY 1474 (7th ed.1999).

Courts have uniformly held that affirmative acts associated with tax evasion involve its traditional notions, such as filing a false return, concealing the taxpayer's ability to pay taxes, or removing assets from the IRS' reach or knowledge (e.g. moving money offshore to conceal its existence). See, e.g., Spies v. United States, 317 U.S. 492, 499 [30 AFTR 378] (1943) (listing examples of what constitutes a willful attempt to evade tax); United States v. McGill, 964 F.2d 222, 233 [70 AFTR 2d 92-5043] (3d Cir.1992) (hiding money from IRS by depositing money in spouse's account and office expense account are affirmative acts of tax evasion); United States v. Robinson, 974 F.2d 575, 578 [70 AFTR 2d 92-5868] (5th Cir.1992) (filing unsigned tax returns constitutes an affirmative act); United States v. Daniel, 956 F.2d 540, 542–543 [69 AFTR 2d 92-663] (6th Cir.1992) (failing to file tax returns while dealing almost exclusively in cash were affirmative acts of tax evasion); United States v. DiPetto, 936 F.2d 96, 97 [68 AFTR 2d 91-5064] (2d Cir.1991) (falsifying W4 forms to conceal accurate amount of their taxable income are affirmative acts); United States v. Connor, 898 F.2d 942, 945 [66 AFTR 2d 90-5713] (3d Cir.1990) (filing false W-4 information is an affirmative act of § 7201 evasion); United States v. Conley, 826 F.2d 551, 55657 [60 AFTR 2d 87-5409] (7th Cir.1987)(placing assets in son's name and manipulating accounts to shield them from IRS are affirmative acts); United States v. Shorter, 809 F.2d 54, 57 [59 AFTR 2d 87-449] (D.C.Cir.1987) (affirming conviction where defendant carried on ''cash lifestyle''), abrogated on other grounds, Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993); United States v. Hook, 781 F.2d 1166, 1169 [57 AFTR 2d 86-630] (6th Cir.1986) (concealing assets from the IRS, even though return was timely and accurately filed, was § 7201 tax evasion).

Thus, the courts have defined ''evade'' and ''evasion'' in the tax context as concealing from or misrepresenting information to the IRS, not a willful failure to pay tax or stealing a taxpayer's money. The Third Circuit, citing this Court, stated that ''[a]n affirmative act is anything done to mislead the government or conceal funds to avoid payment of an admitted and accurate deficiency.'' McGill, 964 F.2d at 230 (citing Cohen v. United States, 297 F.2d 760, 762, 770 [9 AFTR 2d 715] (9th Cir.1962)). The McGill court stated that ''[g]enerally, affirmative acts associated with § 7201 evasion of payment involve some type of concealment of the taxpayer's ability to pay his or her taxes or the removal of assets from the reach of the Internal Revenue Service. '' Id. (emphasis added). The McGill court went on to list examples of evasion of payment (as opposed to evasion of assessment) such as ''placing assets in the name of others; dealing in currency; causing receipts to be paid through and in the name of others; and causing debts to be paid through and in the name of others.'' Id. The McGill court then went on to state that ''[m]erely failing to pay assessed taxes, without more, however, does not constitute evasion of payment, though it may satisfy the requirements for the willful failure to pay taxes under § 7203 .... [o]nly affirmatively evasive acts—acts intending to conceal—are punishable under § 7201'' Id. at 231 (citing United States v. Sansone, 380 U.S. at 351; United States v. Romano, 938 F.2d 1569 1573 [68 AFTR 2d 91-5234], (2d Cir.1991)).

Finally, the McGill court noted that ''[t]he government advises its attorneys that '[o]bstinately refusing to pay taxes due, possession of the funds needed to pay

the taxes, or even the open assignment of the income, without more, merely constitute a willful failure to pay taxes . . . . They do not meet the requirement of the affirmative act necessary for an evasion charge.' Id. (citing U.S. Dept. of Justice, Criminal Tax Manual, § 8.04 at 8-7, 8-8 (6th ed.1985); Joint App. at A-229-30).

Where tax preparers are charged under § 7201, the case law again shows that evasion consists of fraud, concealment, or misrepresentation vis-a-vis the government, and not theft, embezzlement, or misappropriation vis-a-vis the taxpayer. A third-party tax preparer who steals from his client cannot be convicted of 26 U.S.C. § 7201 without also committing one of the affirmative evasive acts previously discussed. Leathers v. United States, 250 F.2d 159 [1 AFTR 2d 385] (9th Cir.1957) (upholding defendant—accountant's § 7201 conviction where he both (1) prepared and filed a false return for his client and (2) defrauded his client by collecting an excess amount of money supposedly for payment to the IRS).

In the instant case, with respect to the counts Araujo challenges, the record indicates that Araujo did not file a false return nor attempt to conceal assets from the IRS, nor was she charged in the indictment with filing a false return or failure to file a return.

In United States v. Mesheski, 286 F.2d 345, 346 [7 AFTR 2d 533] (7th Cir.1961), a case factually similar to this one, the issue was whether a "a person who converts money entrusted to him by another for the payment of such other's income tax by failing to turn it over to the Internal Revenue Service [is] guilty of a felony within the meaning of [26 U.S.C.] Section 7201 . . . ." The court said no, holding that the defendant's conduct (prepared tax returns for others, failed to file those returns, and diverted to his own use his taxpayer-clients' money which was to go to the IRS) did not constitute such affirmative conduct inferring the motive to evade or defeat tax as to make him guilty of a felony under 26 U.S.C. § 7201.

Further support for this decision is gleaned from the IRS itself, which defines violations of § 7201 in terms of some kind of fraud against the government, not theft from individuals.

For example, in the INTERNAL REVENUE MANUAL, which is the internal instruction manual for the agents, I.R.M. s 9.1.3.3.2.3—WILLFULNESS (in the context of § 7201) specifically cites the examples the Supreme Court set forth in Spies.

In INTERNAL REVENUE MANUAL § 9.1.3.3.2.2.2—ATTEMPT TO EVADE OR DEFEAT ANY TAX § 7201, the IRS again cites the examples from Spies, 317 U.S. at 499, which stated that the "affirmative act" language should be construed broadly to include, inter alia: (1) filing false returns, (2) keeping a double set of books, (3) making false entries or alterations, (4) making false invoices or documents, (5) destroying books or records, (6) concealing assets or covering up sources of income, or (7) avoiding making records usually kept for transaction or conduct where the likely effect would be to mislead or to conceal.

All of these examples involve some kind of concealment from or misrepresentation to the IRS, not individuals. The INTERNAL REVENUE MANUAL specifically states that "[i]n an attempt to evade or defeat the payment of any tax, the mere failure or willful failure to pay any tax does not constitute an attempt to evade or defeat the payment of any tax . . . . Examples of such action or conduct relating to the attempted evasion of the payment of the tax are found in [United States v. Giglio, 232 F.2d 589 [49 AFTR 950] (2d Cir.1950)]. These are as follows: (a) concealing assets; (b) reporting income through others; (c) misappropriating, converting, and directing corporate assets; (d) filing late returns; (e) failing to withhold taxes as required by law; (f) filing false declarations of estimated taxes; (g) filing false tentative corporate returns." I.R.M. § 9.1.3.3.2.2.2 (emphasis added).

Thus, on the challenged counts, while Araujo defrauded and stole from her clients and violated their trust, she did not

evade or attempt to evade tax within the meaning of 26 U.S.C. § 7201.

I would reverse Araujo's convictions on Counts 13—17 and remand for resentencing accordingly.

2002 WL 1727404 (9th Cir.(Cal.)), Unpublished Disposition

¶2002-5162

Charles BEATTY and Peggy BEATTY, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. In Re: Charles Beatty and Peggy Beatty, Debtors. U.S. District Court, Southern Dist. of Indiana, (DC IN) Docket No. 01-069, July 9, 2002. Earlier proceeding at (2002, DC IN) 89 AFTR 2d 2002-1619 Decision for Taxpayers and for Govt.

1. Appeals from bankruptcy court—interlocutory appeals. Pursuant to agreed order, appeal was remanded for consideration of parties' intended submission of agreed dismissal order. *Reference:* United States Tax Reporter ¶68,726.527(30).

Agreed Order Remanding Case to Consider Agreed Dismissal

TINDER, District Judge:

[1] The parties to this action, the appellant, the United States of America, by its undersigned counsel, Douglas W. Snoeyenbos, the appellees, Charles Beatty and Peggy S. Beatty, in their own persons, and Rex M. Joseph, Jr., in his capacity as Chapter 7 Trustee, agree that this appeal should be remanded to the bankruptcy court for consideration of the parties' intended submission of an Agreed Order of Dismissal.

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IT IS SO ORDERED.

Done at Indianapolis, Indiana, this 9th day of July, 2002.

John Daniel Tinder, Judge

United States District Court

¶2002-5163

UNITED STATES OF AMERICA, PETITIONER v. Darrell D. & Joan BILLHEIMER, ET AL., RESPONDENTS. U.S. District Court, Southern Dist. of Ohio, (DC OH) Docket No. C-3-99-402, July 12, 2002. Earlier proceedings at (2002, DC OH) 89 AFTR 2d 2002-2241, 197 F Supp 2d 1051, 2002-1 USTC ¶50424 [89 AFTR 2d 2002-2241]; and (2000, DC OH) 86 AFTR 2d 2000-6328, 169 F Supp 2d 763, 2000-1 USTC ¶50138. Years 1992, 1993, 1994. Decision against Taxpayers.

1. Actions to reduce assessments to judgment—summary judgment—fraudulent conveyances—alter egos; nominees—foreclosure—discovery. Taxpayers' objections to district court judge's decision and entry sustaining in part and overruling in part govt.'s summary judgment motion were overruled: no provision existed for objections to such. Also, defendant's motion to quash/objection to discovery was denied as not well-founded, and defendant was required to answer govt.'s requests for production, admissions and in-

terrogatories. *Reference:* United States Tax Reporter ¶74,035.01(25); 74,035.02(80); 63,215.04(9). IRC §6321; 7403.

United States District Court Southern District of Ohio, Western Division at Dayton.

Order Overruling Objections (Doc. #31) Addendum and Supplement to Objections (Doc. #32) and Second Addendum to Objections (Doc. #33)

ROSE, District Judge:

[1] This matter comes before the Court pursuant to Objections by Darrell D. Billheimer and Joan B. Billheimer (Doc. #31), Addendum/Supplement by Darrell D. Billheimer and Joan Billheimer re: Objections (Doc. #33).

These Objections and Addendum to Objections are directed at the Decision and Entry by Judge Walter H. Rice sustaining in part and overruling in part Plaintiff's Motion for Summary Judgment (Doc. #23) filed March 21, 2002.

There being no provision for Objections to a Decision and Entry by a District Judge, the Court finds said objections not well-founded and OVERRULES same.

IT SO ORDERED.

THOMAS M. ROSE

DISTRICT COURT JUDGE

Copies furnished to:

Counsel of Record

Unrepresented Parties

Order Overruling Objections and Motion to Quash Discovery (Doc. #34); Order Compelling Response to Government's Request (DOC. #35)

ROSE, District Judge:

This matter comes before the Court pursuant to a Motion by Defendant, John Huber to Quash Discovery/Objection to Discovery (Doc. #34) and the Motion by Plaintiff N.S.A. to Strike Motion to Quash Discovery/Objection to Discovery or, in the alterative for an Order Overruling The Objections On The Merits and Compel A Response To The Government's Request (Doc. #35).

After comprehensive review of the file, including but not limited to the pleadings pertinent to the Motion before the Court, the Court finds the Motion to Quash Discovery/Objection to Discovery not well-founded and DENIES same. Defendant, Huber, shall respond to the Plaintiff's Request for Production, Requests for Admissions and Interrogatories no later than August 12, 2002.

IT IS SO ORDERED.

THOMAS M. ROSE

DISTRICT COURT JUDGE

Copies furnished to:

Counsel of Record

Unrepresented Parties

¶2002-5164

HOWARD H. CALLAWAY FOUNDATION, INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Middle Dist. of Georgia, (DC GA) Docket No. 4:00-CV-219-2 (CDL), July 10, 2002. Year 1996. Decision for Taxpayer.

1. Attorney's fees and costs—substantial justification for govt. position—erroneous refunds. Taxpayer-foundation was entitled to attorney's fees and costs in reopened refund action: govt.'s position that taxpayer was liable for disputed amount wasn't substantially justified. Although taxpayer received refund checks before filing instant action, checks were sent without explanation that govt. had reversed its recent disallowance of refunds; govt. confirmed that it unlawfully assessed taxes and that taxpayer was entitled to refund 3 months *after* suit was filed; and taxpayer was justified in filing action to preserve its rights to refunds instead of "trusting" govt. not to later seek reim-bursement of erroneously issued refund checks based on its prior confusing and contradictory dealings with IRS.

Reference: United States Tax Reporter ¶74,305.01(25). IRC §7430.

In the United States District Court, Middle District of Georgia, Columbus Division.

Order

LAND, District Judge:

Introduction

This case arises from Defendant's unlawful assessment of federal income taxes allegedly owed by Plaintiff. Plaintiff successfully asserted a claim for a refund of those income taxes and now seeks to recover its attorneys' fees and costs pursuant to section 7430 of the Internal Revenue Code, 26 U.S.C. §7430.

Defendant opposes Plaintiff's motion for attorneys' fees and costs, claiming that Plaintiff is not a prevailing party and therefore is not entitled to recover its attorneys' fees and costs. Finding that Plaintiff is a ''prevailing party'' in the underlying action, the Court grants Plaintiff's motion and awards Plaintiff its attorneys' fees and costs in the amount of $31,484.62.

Facts

Based upon the following facts, the Court finds that Plaintiff has substantially prevailed with respect to the amount in controversy and that the Defendant was not substantially justified in its position. Accordingly, Plaintiff is a ''prevailing party'' under section 7430(c)(4) of the Internal Revenue Code, 26 U.S.C. §7430(c)(4).

On June 28, 2000, Defendant issued Plaintiff a notice for deficiency for income tax due in the amount of $180,053.00 for the year ended December 31, 1996. Plaintiff paid the sum on August 1, 2000, as directed by the IRS. On September 7, 2000, Plaintiff filed a refund claim for the amount in controversy.

Defendant subsequently disallowed Plaintiff's refund claim through correspondence dated November 7, 2000. Confusingly, the IRS, on November 21, 2000, without explanation, sent Plaintiff checks for the income tax refund amount plus interest. Based upon Plaintiff's previous dealings with the IRS and the disallowance dated November 7, 2000, Plaintiff reasonably concluded that the refund checks were issued in error. Having properly exhausted its administrative remedies, Plaintiff filed the above captioned action on December 12, 2000, for a refund of federal income taxes.

During the pendency of this lawsuit, Defendant, by correspondence dated March 12, 2001, advised Plaintiff:

> [T]hrough a clerical error, we failed to properly assess the tax. This failure now requires us to refund to the foundation its tax payments. I appreciate your sense of frustration with our handling of this matter, and I pledge to do what I can to bring it to a prompt and appropriate conclusion.

This communication from Defendant clearly confirmed that Plaintiff was entitled to the refund that it sought.

On April 4, 2001, Plaintiff sought to dismiss the present action upon receiving Defendant's written confirmation of the legitimacy of the refund. Prior to filing its dismissal motion, Plaintiff had filed a re-quest for attorneys' fees and costs. The Court dismissed this action on May 15, 2001, allowing the parties the right to reo-pen the case, upon good cause shown, if settlement was not consummated within 90 days. The Court subsequently, on August 14, 2001, granted the parties' joint motion to extend the time within which to reopen the case, allowing for additional time to settle the issue of attorneys' fees.

The parties have been unable to settle the issue of attorneys' fees. Defendant takes the position that Plaintiff is not entitled to recover its attorneys' fees and costs. Since Defendant issued the refund checks prior to Plaintiff's filing of the present action, Defendant argues that Plaintiff is not a prevailing party and therefore has no right to recover its attorneys' fees and costs.

Discussion

Nowhere is the federal government's mighty hand felt more directly than when

the Internal Revenue Service comes calling with a demand for unpaid taxes. Taxation, admittedly a necessary element of any form of civilized government, places unparalleled power in the hand of the sovereign. When that power is unleashed in an inconsistent, threatening, and arrogant manner, the powerless taxpayer, who for all practical purposes is at the mercy of the government, has little recourse to remedy such abuses.[1] Recognizing the need for a remedy to soften the blow of the federal government's abuse of its tax-collecting power, Congress enacted section 7430 of the Internal Revenue Code, which allows the taxpayer who prevails against the IRS to recover the costs and expenses it in-curred to establish vindication.

[1] Section 7430 provides that in a proceeding brought against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty to a prevailing party, the prevailing party shall be entitled to recover its attorneys' fees. ''Prevailing party'' has been defined as one who has substantially prevailed with respect to the amount in controversy. To recover its attorneys' fees, the prevailing party must also demonstrate that the Defendant was not substantially justified in its position.

It is undisputed that Plaintiff was entitled to, and has now received, the amount it sought to be refunded in taxes that were unlawfully assessed by Defendant. Therefore, Plaintiff has clearly prevailed in this matter.

Defendant argues that since it refunded the amounts due prior to Plaintiff filing the instant action, Plaintiff did not prevail in this action. In effect, Defendant argues that Plaintiff had already prevailed prior to filing the present case. Consequently, it did not need to file this action to recover the refunds due.

The Court finds Defendant's argument unpersuasive. Although Plaintiff did receive refund checks prior to filing this action, those refund checks were not sent to Plaintiff in isolation; nor were they accompanied by an explanation stating that Defendant had reversed its recent disallowance of the refunds. Instead, Plaintiff reasonably concluded that the checks re-sulted from one of Defendant's hands (the refund) not knowing what the other hand (the refund disallowance) was doing. It was not until after Plaintiff filed the above captioned action that Defendant finally confirmed in writing that it had unlawfully assessed the income taxes in question and that Plaintiff was entitled to a refund of those taxes.

Defendant now suggests that when Plaintiff received the refund checks, it should have declared victory and ''trusted'' Defendant not to come back later and seek reimbursement of erroneously issued refund checks. Defendant's ''trust us, we're from the IRS'' argument ignores both common sense and Plaintiff's own personal unpleasant experiences with Defendant's error-prone bureaucracy. The Court finds that Plaintiff was entirely justified in filing the above captioned lawsuit to preserve its rights in light of the conflicting information that it had received from Defendant.

The Court further finds that the impetus for obtaining the ultimate and legally binding confirmation of Plaintiff's entitlement to the refunds was the present litigation. Defendant's argument that Plaintiff did not substantially prevail with respect to the collection of the refunds rivals Defendant's initial refund disallowance decision for its ''frivolousness.''

It is likewise clear that Defendant was not substantially justified in its position regarding the assessment of the taxes or the disallowance of Plaintiff's refund claim. In

[1] Taxation has long been the subject of judicial analysis. *See M'Culloch v. Maryland*, 17 U.S. 316, 431 [4 AFTR 4491] (1819) (''. . . the power to tax involves the power to destroy . . . ''); *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) (''The power to tax is not the power to destroy while this court sits.''); *International Harvester Co. v. Wisconsin Department of Taxation*, 322 U.S. 435, 450 (1944) (''The physical power to get the money does not seem to me a test of the right to tax. Might does not make right even in taxation.''); *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (''Taxes are what we pay for civilized society . . . . ''). Judges are not alone in their tax commentary. *See* Margaret Mitchell, *Gone with the Wind* (1936) (''Death and taxes and childbirth! There's never any convenient time for any of them.''); Ethel Jacobson, *Reader's Digest*, April 1973 (''Behind every man who achieves success, stand a mother, a wife and the IRS.'')

fact, Defendant now concedes that it had no legal right to assess the taxes in question or to disallow the refund demand by Plaintiff. Consequently, the Court finds that Plaintiff has carried its burden of showing that the IRS's position was not "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (interpreting similar provision for attorneys' fees and costs under the Equal Access to Justice Act).

Defendant admits that it erred by failing to properly assess the tax. Although Defendant issued refund checks to Plaintiff at the end of November, shortly before Plaintiff filed its complaint, Defendant had taken the position throughout the administrative proceedings that Plaintiff was liable for the sum in controversy. Furthermore, Defendant had issued a written letter to Plaintiff prior to the filing of the complaint that Plaintiff's refund request was disallowed and that Plaintiff could challenge the disallowance in court. It was not until March 2001 that Defendant acknowledged its mistake and confirmed that Plaintiff was due the refund. Plaintiff was forced to file this lawsuit to preserve its rights to the refunds in question. Defendant had no reasonable basis for disallowing the refunds initially and for failing to promptly correct its erroneous disallowance.

Under these circumstances, the Court finds that the Plaintiff was a prevailing party and that the Defendant's position lacked justification. Accordingly, Plaintiff is entitled to recover its costs and attorneys' fees.

Conclusion

Based on the foregoing, Plaintiff's motion is granted. Plaintiff is awarded its costs and attorneys' fees in the amount of $31,484.62, which amount this Court finds reasonable, necessary, and supported by the evidence in the record.

IT IS SO ORDERED, this 10th day of July, 2002.

CLAY D. LAND

UNITED STATES DISTRICT JUDGE

¶2002-5165

In Re: PROMEDCO OF LAS CRUCES, INC., ET AL., Debtors. U.S. Bankruptcy Court, Northern Dist. of Texas, (Bktcy Ct TX) Docket No. 00-46863-BJH-11, July 10, 2002. Earlier proceeding at (2002, Bktcy Ct TX) 89 AFTR 2d 2002-1990, 275 BR 499, 2002-2 USTC ¶50464. Years 1997, 1998, 1999. Decision for Taxpayers in part and for Govt. in part.

1. Tax claims in bankruptcy—objection to proof of claim—priority claims—amendments. Chap. 11 debtor-corps.' objection to IRS's proof of claim was dismissed pursuant to agreed order, wherein IRS agreed to file amended claim reflecting taxpayers' income and amortization adjustments and taxpayers agreed to assessment of stated liabilities. Order also set out IRS's right to post-confirmation interest until its priority claim was fully paid and taxpayers' rights to make claims for refund, interest deductions and net operating loss carrybacks; and IRS was precluded except in case of taxpayers' fraud from asserting additional claims, interest or penalties for subject years. *Reference:* United States Tax Reporter ¶68,726.51(10); 68,726.51(20); 68,726.54.

Robin Russell State Bar No. 17424001 Jason Brookner State Bar. 24033684 Andrews & Kurth L.L.P. 600 Travis, Suite 4200 Houston, Texas 77002 (713) 220-4200 (713) 220-4285 (fax) Attorneys for Debtor
Herbert W. Linder Ohio Bar No. 0065446 Attorney, Tax Division U.S. Department of Justice 717 N. Harwood, Suite 400 Dallas, Texas 75201 (214) 880-9754 or 880-9721 (214) 880-9741 (fax) Attorney for the United States

In the United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division.

Agreed Order

The Court, having considered the agreement of the parties -ProMedCo and its subsidiaries (collectively referred to herein as

''Debtor''), and the United States, which resolves the Objection of ProMedCo Management Company and Subsidiary Debtors to Claim No. 115 of the Internal Revenue Service (Debtors' Objection), finds that an Order should be entered consistent with the parties' agreement. References to Issues A through K in this Order incorporate the meanings given such terms in the Revenue Agent's report previously provided to this Court. Accordingly, it is hereby

ORDERED and DECREED that:

1. In regard to Issue A, Debtor shall have an increase in income in the amount of $37,571 for the 1997 tax year. The $37,571 adjustment shall be amortized over a 15 year period with the balance fully deductible in the 2001 tax year.

2. In regard to Issue B, Debtor shall have an increase in income in the amount of $48,000 for the 1997 tax year. The $48,000 adjustment shall be amortized over a 15 year period with the balance fully deductible in the 2001 tax year.

3. In regard to Issue C, Debtor shall have a decrease in income in the amount of $5,705.00 for the 1997 tax year. This $5,705.00 income adjustment reflects the amortization of adjustments for Issues A and B as described in paragraphs 1 and 2, above, for the 1997 tax year.

4. In regard to Issue D, Debtor shall have an increase in income in the amount of $92,168 for the 1997 tax year.

5. In regard to Issue E, Debtor shall have an increase in income in the amount of $42,215 for the 1997 tax year.

6. In regards to Issues F, G and H, there shall be no increase in Debtor's income due to these issues for the 1997 tax year.

7. In regard to Issue I, Debtor shall have an increase in income in the amount of $215,892 for the 1997 tax year.

8. In regard to Issue J, Debtor shall have an increase in income in the amount of $87,820 for the 1997 tax year.

9. In regard to Issue K, this issue has been adjudicated, and, there shall be no increase in Debtor's income relating to this issue for the 1997 tax year.

10. The Internal Revenue Service will calculate the tax due for the 1997 tax year based upon the above listed adjustments in paragraphs 1 through 9. Accordingly, the Internal Revenue Service will file an amended proof of claim solely to reflect this new calculation.

11. Debtor has a $26,279.00 increase in the amount of tax for the 1998 tax year.

12. Debtor has a $233,819.00 increase in the amount of tax for the 1999 tax year.

13. Penalties and Interest as applicable under the Internal Revenue Code will apply to Debtor's 1997, 1998 and 1999 tax liabilities. Penalties shall be classified as general unsecured claims.

14. Debtor may deduct any statutory interest, when paid, as allowed pursuant to the Internal Revenue Code.

15. Debtor may carry back any Net Operating Loss from 2001 forward as allowed by the Internal Revenue Code, including any newly enacted tax laws.

16. Debtor is permitted to seek any refund of taxes paid as permitted by law.

17. Debtor agrees to the assessment of the 1997, 1998 and 1999 tax liabilities as set forth in this agreed order. The IRS agrees to amend its proof of claim accordingly.

18. IRS will be precluded from asserting additional claims, interest or penalties against Debtor for corporate income taxes for the 1997, 1998 and 1999 tax years, absent Debtor engaged in fraud against the IRS.

19. Debtors' Objection and this contested matter are dismissed with prejudice.

20. Post confirmation interest at the statutory rate under 26 U.S.C. § 6621 shall be payable from the effective date of the Debtor's chapter 11 plan until the date of entry of this order by the Bankruptcy Court. Post confirmation interest shall commence accruing again on the 6th business day after notice of filing of the amended proof of claim (the ''Notice'') is tendered to counsel for the Debtor, if the Debtor fails to pay the IRS priority claim in full within 5 business days after the Notice is tendered to counsel for the Debtor.

Post confirmation interest will no longer accrue after the IRS priority claim is paid in full.

21. Debtor has the right to file a motion to have the IRS' amended proof of claim approved by Order of the Court, said motion and approval will have no effect on the terms as outlined in the preceding paragraphs.

Signed July 10, 2002.

/s/

UNITED STATES BANKRUPTCY JUDGE

AGREED:

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ATTORNEY FOR THE UNITED STATES

¶2002-5166

Jo Anne FONZONE, PLAINTIFF v. DEPARTMENT OF THE TREASURY, Internal Revenue Service, DEFENDANTS. U.S. District Court, Eastern Dist. of Pennsylvania, (DC PA) Docket No. 02-CV-173, July 9, 2002. Decision against Taxpayer.

1. FOIA—confidential third-party return information. Informant's FOIA complaint against IRS for turnover of file relating to complaint she filed against 3d-party entertainment companies alleging illegal tax activities was dismissed: regardless of informant's alleged position as pres. of 2 cos., requested file was confidential 3d-party return information not subject to FOIA. Also, informant was warned that misrepresenting herself as co. pres. or otherwise could result in criminal and civil penalties; and that any future frivolous filings would be dismissed with costs against her. *Reference:* United States Tax Reporter ¶61,035.03(3); 76,556.502(10). IRC §6103.

In the United States District Court for the Eastern District of Pennsylvania.

Memorandum

VAN ANTWERPEN, District Judge:

[1] In 1997, pro se Plaintiff Jo Ann Fonzone submitted a letter to the Internal Revenue Service requesting "an investigation [of] illegal and fraudulent tax and business activities at" more than 15 giant entertainment companies, among them MTV Networks and Viacom. Plaintiff claimed to be "an employee (independent contractor) as a [sic] writer and officer, partner, attorney at [sic] these companies" who wanted the IRS to "investigate the misuse of my fictious [sic] names and social security numbers and to punish the officers, directors, CEOs, partners, agents and anyone else involved who, knowingly [sic] assisted in the unfair, unjust, egregious, malevolent, fraudulent criminal activities." Plaintiff signed her letter "Jo Ann Fonzone, aka Judy McGrath (President, MT Networks, Viacom)." Plaintiff has maintained throughout this litigation that she is also known as Judy McGrath, who Fortune Magazine lists as one of the Most Powerful Women in Business, Chairman and CEO of the MTV Group of Viacom.

On many occasions after she submitted her original letter, Plaintiff contacted the IRS to demand information as to the progress of its investigation. The IRS docu-

mented one such encounter, on August 3, 1999, when Plaintiff visited the IRS office in Bethlehem, Pennsylvania. On this occasion, according to the IRS officials present, Plaintiff became frustrated and irritated about the progress on her "complaint," contending that she "was being harassed and could possibly be killed if anyone found out that she made the complaint." Defendant's Summary Judgment Motion ("Def. SJ"), Memorandum of Conversation (August 3, 1999), Ex. K.

On May 11, 2001 and thereafter, Plaintiff made several requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552, for "a copy of [her] file" in connection with the complaint she filed in 1997. Def. SJ at Exs. A, E. The IRS responded asking Plaintiff for 1) a description of the records desired which included adequate detail to enable the agency to locate them; 2) proof of Plaintiff's identity and entitlement to such records; 3) agreement to pay appropriate fees for search and duplication; and 4) the category of requester into which she fell (commercial use, media, etc.). Id at Ex. F. When Plaintiff did not adequately respond, the IRS denied Plaintiff's requests, citing §6103 of the Internal Revenue Code, which "prevents the [IRS] from disclosing the requested information without the consent of the taxpayer(s) involved." Id. at Ex. D. Plaintiff's subsequent administrative appeal was denied and she filed this lawsuit to enjoin the IRS from withholding documents. After Plaintiff filed suit, the Defendant conducted an additional search of its file concerning Plaintiff's 1997 letter and divulged to Plaintiff the only document responding to her FOIA request - the Memorandum of Conversation concerning her visit to the agency on August 3, 1999. Id., Def. SJ at app. 4–8.

We note first that Plaintiff has presented no evidence that she is, in fact, the same Judy McGrath who runs MTV. Notwithstanding that, even if Plaintiff Fonzone were the same Ms. McGrath, Plaintiff would not be entitled to the documents she requests under §6103 of the Internal Revenue Code, which provides that tax returns and return information of third parties (i.e., not the requesting party) are confidential and not subject to the FOIA. See e.g., U.S. v. Humedco Enterprises, Inc., 512 F.Supp. 1302, 1307 [48 AFTR 2d 81-5432] (E.D.Pa 1981), citing inter alia Mason v. Callaway, 554 F.2d 129 [40 AFTR 2d 77-5750] (4th Cir. 1977), cert. denied 437 U.S. 877, 98 S.Ct. 424, 54 L.Ed.2d 295 (1977) ("The IRS properly declined to reveal to the Masons documents pertinent to an investigation of third parties' tax returns, although we take as true Masons' allegation that they had informed on the alleged delinquent taxpayers."). Generally, courts have accorded great weight to the safeguards instituted by the government to prevent unwarranted disclosure of private information, like tax returns (the latter are defined broadly). Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 458, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); Whalen v. Roe, 429 U.S. 589, 593–595, 97 S.Ct. 869, 51 L.Ed.2d 864 (1977); see also Bruce W. Clark, "The Constitutional Right to Confidentiality," George Washington Law Review, November 1982, pp. 134–135, FN9–12. Thus, we will grant Defendant's motion.

Additionally, we caution Plaintiff about representing herself as an attorney, if she is not licensed to practice, or as a top media executive, if she is not in fact that person. Civil and criminal penalties may attach if Plaintiff abuses the trust of this court.

Furthermore, our court records suggest that Jo Ann Fonzone had several prior actions dismissed by the Eastern District, including one which former Chief Judge Edward Cahn called "frivolous on its face." Fonzone v. Bell Atlantic Comm. et al. (98-CV-1955). We will not assess fees and costs against Plaintiff in this instance, though we consider the present action borderline frivolous. However, we will recommend on the record that any frivolous lawsuit brought by Plaintiff in the future be dismissed with both sides' fees and costs assessed against her.

An order consistent with this Memorandum follows.

Order

VanANTWERPEH, District Judge:

AND NOW, this 8th of July, 2002, for the reasons stated in the foregoing Memorandum, Defendant's Motion for Summary Judgment, filed June 18, 2002, is GRANTED.

We RECOMMEND ON THE RECORD that Plaintiff be assessed both sides' fees and costs if she files any future frivolous complaints.

This case is DISMISSED and this file is CLOSED.

BY THE COURT:

Franklin S. VanAntwerpen, U.S.D.J.

¶2002-5167

GREATWOOD FAMILY FIRST ORDER OF CONSECRATION and True Charity Church and Larry-Lee: Greatwood, Creditor, Sovereign, PLAINTIFF v. THE UNITED STATES OF AMERICA, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) Docket No. 01-671T, July 16, 2002. Decision for Taxpayer.

1. Court of Federal Claims—motion to withdraw—declaratory relief. Pro se religious org.'s motion to withdraw action for declaratory judgment overturning IRS's determination that it wasn't IRC §501(c)(3) tax-exempt org. was granted, and action was dismissed without prejudice, based on taxpayer's claimed belief that complaint was filed in wrong forum. *Reference:* United States Tax Reporter ¶74,336.510(60). IRC §501.

In the United States Court of Federal Claims.

Order

BASKIR, Judge:

[1] The Plaintiff, proceeding *pro se*, filed this action on November 29, 2001, seeking to invoke the declaratory judgment jurisdiction of this Court, pursuant to 28 U.S.C. § 1507, to overturn a determination by the Commissioner of the Internal Revenue Service (IRS) that the Plaintiff is not an Internal Revenue Code § 501(c)(3) organization exempt from federal tax.

On January 28, 2002, the Defendant filed a Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction. The Defendant asserts that in order to invoke this Court's declaratory judgment jurisdiction, the Plaintiff was required to file a complaint within ninety-one (91) days after receiving the IRS notification that its application for recognition of tax-exempt status was denied. 26 U.S.C. § 7428(b)(3).

Both parties agree that the IRS notice was sent by certified mail to the Plaintiff on June 21, 2001. Accordingly, the Plaintiff was required to file the instant case no later than September 19, 2001. As the Plaintiff's complaint was filed on November 29, 2001, the Government argues it is untimely and requests that the Court dismiss the Plaintiff's complaint without prejudice.

In response to the Defendant's Motion to Dismiss, the Plaintiff filed, on March 22, 2002, a document entitled "Commercial Notice of Withdrawal of the Petition for Relief and Judgment." The Plaintiff's Notice of Withdrawal states: "Petitioners move in good faith and respectfully withdraw it's [sic] Petition for Relief with the belief it is submitted to the wrong Court and Jurisdiction."

While the Plaintiff's response does not address the Defendant's statute of limitations argument, the Plaintiff apparently now believes that this complaint was filed in the wrong forum and therefore seeks the Court's permission to withdraw it.

Accordingly, the Court GRANTS Plaintiff's Motion to Withdraw and hereby DISMISSES the Plaintiff's complaint without prejudice.

The Clerk of Court is directed to enter judgment for the Defendant. Each party to bear its own costs.

IT IS SO ORDERED.

LAWRENCE M. BASKIR

Judge

¶2002-5168

Lorenzo WILSON, PLAINTIFF v. Jo-Renee Hunter WILSON, DEFENDANT. David FINDLING, State court appointed receiver, THIRD-PARTY PLAINTIFF v. Coranza WILSON and Rosie Wilson, Ann Marie Wilson, United States of America, Department of the Treasury, Internal Revenue Service, State of Michigan, Department of Treasury, THIRD-PARTY DEFENDANTS. U.S. District Court, Eastern Dist. of Michigan, (DC MI) Docket No. 02-70833, July 16, 2002. Decision for Govt.

1. Actions against U.S.—quiet title—jurisdiction—removal and remand. Receiver's motion to remand 3d-party quiet title action against U.S. to state court was denied: although instant action arose out of underlying divorce action, removal was proper under 28 USC §1444 where instant action merely involved dispute over title to property subject to tax lien. Also, unsupported alternate request to settle action was denied. *Reference:* United States Tax Reporter ¶74,336.508(60).

United States District Court, Eastern District of Michigan, Southern Division.

Order

ZATKOFF, District Judge:

This matter is before the Court on "Third Party Plaintiff and State Court Appointed Receiver, David Findling's Motion for Entry of Order Setting Aside Removal by the United States Attorney to the [United States District Court for the Eastern District of Michigan Southern Division,] or, In the Alternative, for Authority to Settle Priority Claim of the Third Party Defendants." The United States responded. The Court reviewed the materials submitted.

On December 14, 2001, the Wayne County Circuit Court entered a judgment of divorce between Lorenzo Wilson and Jo-Renee Hunter Wilson.[1] On January 25, 2002, the Wayne County Circuit Court appointed David Findling as Receiver for the purpose of enforcing the judgment of divorce. On February 8, 2002, Receiver Findling served the United States with a third-party complaint to quiet title to a piece of property owned by Mr. Wilson. The United States holds a tax lien against Mr. Wilson's property. On March 6, 2002, the United States removed the action to this Court.

[1] Receiver Findling filed a motion to remand the matter to the Wayne County Circuit Court, arguing that the removal was improper because this Court lacks jurisdiction over family law actions. Receiver Findling argues that the third party action is simply a supplemental proceeding to the underlying divorce proceeding, and therefore, this Court lacks jurisdiction. Finally, Receiver Findling argues that third party defendants, such as the United States in this action, cannot properly remove an action to federal court under 28 U.S.C. § 1441.

While the Court generally agrees that federal courts lack the "power to issue divorce, alimony, and child custody decrees," the Court may still hear related matters that arise out of divorce actions, such as actions to enforce alimony decress. *Ankenbrandt v. Richards*, 504 U.S. 689, 701–03 (1992). In the present action, the Court is not being asked to issue a divorce or alimony decree; rather, it is being asked to resolve a question regarding the title to a piece of property on which the United States possesses a tax lien.

Because the United States is a sovereign entity, it is generally immune for suit. *See United States v. Dalm*, 494 U.S. 596, 608 [65 AFTR 2d 90-1210] (1990). It must consent to being sued, and the terms of its consent define the Court's jurisdiction. *See id.* The United States has consented to actions to quiet title on pieces of property on which it holds mortgages or other liens, however, it has done so only on the condi-

[1] It is unclear whether the divorce was between Mr. Wilson and Jo-Renee Hunter Wilson, as the United States mentions in its brief, or between Mr. Wilson and Ms. Ann Marie Wilson, as Receiver Findling states in the complaint. Either way, it is irrelevant for present purposes.

tion that it be allowed to remove such actions to federal court pursuant to 28 U.S.C. § 1444. *See* 29 U.S.C. 2410. Section 1444 provides that any state court action to quiet title on a piece of property that the United States holds a tax lien against ''may be removed by the United States to the district court of the United States for the district and division in which the action is pending.'' 28 U.S.C. § 1444. Therefore, this Court shall retain jurisdiction over this action to quiet title.

As for Receiver Findling's request for alternative relief, authority to settle the dispute, the Court notes that Receiver Findling's brief provides the Court with no reasons for granting the motion. The United States, however, notes that Ms. Jo-Renee Hunter Wilson has not consented to Receiver Findling's proposed settlement. Because Receiver Findling fails to give any reason why this Court should grant him authority to settle the dispute, the Court shall deny this request also. Therefore, ''Third Party Plaintiff State Court Appointed Receiver, David Findling's Motion for Entry of Order Setting Aside Removal by the United States Attorney to the [United States District Court for the Eastern District of Michigan Southern Division,] or, In the Alternative, for Authority to Settle Priority Claim of the Third Party Defendants'' is DENIED.

IT IS SO ORDERED.

Date: 16 JUL 2002

LAWRENCE P. ZATKOFF

CHIEF UNITED STATES DISTRICT JUDGE

¶2002-5169

Michael FLEMING, PLAINTIFF v. FOUR RECORDS OF LIEN, ETC., DEFENDANT. U.S. District Court, Middle Dist. of Florida, (DC FL) Docket No. 8:02-cv-1085-T-26MAP, July 9, 2002. Reconsideration of (2002, DC FL) 90 AFTR 2d 2002-5252, denied. Decision against Taxpayer.

1. Actions against U.S.—sovereign immunity—discharge of liens—reconsideration; recusal. Taxpayer's petition for reconsideration of dismissal order and recusal were denied. *Reference:* United States Tax Reporter ¶74,336.506(25); 74,025.01(3). IRC §7402.

United States District Court, Middle District of Florida, Tampa Division.

Order

LAZZARA, District Judge:

[1] UPON DUE CONSIDERATION, it is ORDERED AND ADJUDGED that the Plaintiff's Petition and Demand for Disqualification of Honorable Lazzara in Affidavit Form (Dkt. 9) and Plaintiff's petition for Reconsideration of Order Granting Government's Motion to Dismiss and a Request for Recusal of Presiding Judge in Affidavit Form (Dkt. 10) are hereby denied.

DONE AND ORDERED at Tampa, Florida, on July 9, 2002.

RICHARD A. LAZZARA

UNITED STATES DISTRICT JUDGE

COPIES FURNISHED TO:

Counsel of Record

¶2002-5170

Patricia M. POLAND, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. In Re: Patricia M. Poland, Debtor. U.S. Bankruptcy Court, Central Dist. of Illinois, (Bktcy Ct IL) Docket No. 02-82139; ADV. NO. 02-8102, July 1, 2002. Years 1998, 2001. Decision for Taxpayer in part and for Govt. in part.

1. Tax claims in bankruptcy—dischargeability. Pursuant to agreed order, Chap. 7 debtor's tax liability for 1 of 2 years was dischargeable under 11 USC §523(a)(1), but remaining year's tax liability was nondischargeable. *Reference:* United States Tax Reporter ¶68,726.52(27).

Sumner A. Bourne Attorney for Debtor-Plaintiff 411 Hamilton, Suite 1600 Peoria, IL 61602 Tel: (309) 673-5535.
Gerard A. Brost Asst. U.S. Attorney 211 Fulton, Suite 200 Peoria, IL 61602 Tel: (309) 671-7050.

United States Bankruptcy Court, Central District of Illinois.

Agreed Order of Dischargeability

CHAPTER 7

[1] THIS CAUSE coming on to be heard on Debtor's Complaint to Determine Dischargeability of a Debt against Defendant the INTERNAL REVENUE SERVICE, upon agreement of the parties and the Court being fully advised in the premises;

IT IS HEREBY ORDERED:

1. That as to the Debtor's liabilities to Defendant for federal income taxes for the tax year 1998, the elements of 11 U.S.C. Section 523(a)(1) have been satisfied.

1. That as to the Debtor's liabilities to Defendant for federal income taxes for the tax year 1998, said obligations are DISCHARGEABLE in the above Chapter 7 proceeding.

1. The parties agree that any federal income tax liability owed to Defendant for the tax year 2001 is NOT dischargeable in the above Chapter 7 proceeding.

Dated: JUL 01 2002

/s/

UNITED STATES BANKRUPTCY JUDGE

AGREED AND APPROVED AS TO FORM:

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¶2002-5171

In Re: SETH CO., INC., Debtor. U.S. Bankruptcy Court, Dist. of Connecticut, (Bktcy Ct CT) No. 01-22241, July 10, 2002. Decision for Govt.

1. Tax claims in bankruptcy—authorization to incur debt—prepetition liens—IRS objection. Chap. 11 debtor-real estate developer was denied authorization to incur debt secured by senior mortgage to complete construction of houses on 2 residential lots that were subject to IRS's prepetition tax liens: taxpayer didn't prove that sufficient equity would exist on houses' completion to adequately protect IRS as lienholder. *Reference:* United States Tax Reporter ¶68,726.52(30).

John A. Wall, Wall, McCormack & Robinson, Windsor, CT, for debtor-movant.
John Aletta, Special Assistant, United States Attorney, East Hartford, CT, for United States of America, Internal Revenue Service, Creditor.

United States Bankruptcy Court, District of Connecticut.

Ruling on Debtor's Motion to Incur Debt Secured by a Senior Lien on Property Subject to Liens

KRECHEVSKY, Bankruptcy Judge:

I.

Seth Co., Inc., (''the debtor'') filed a Chapter 11 petition on July 9, 2001. The debtor, whose vice-president and sole stockholder is Derek S. Pierce, listed its business as that of real estate development and house construction. Gary L. Pierce, the debtor's president, is Derek S. Pierce's father.

In a revised motion filed on May 2, 2002, the debtor, as debtor in possession, seeks authorization, pursuant to Bank-

ruptcy Code § 364(d),[1] to incur debt of $450,000 secured by a senior mortgage to Enfield Lumber Company, Inc. (''Enfield Lumber''), on two residential lots owned by the debtor--one located on Ridge Boulevard, East Granby, Connecticut (''the East Granby Lot''), and the other on Neipsic Road, Glastonbury, Connecticut (''the Glastonbury Lot''), (together, ''the Lots'') on which partially constructed homes presently exist.

The United States of America, Internal Revenue Service (''the Government or the IRS''), which holds two pre-petition federal income tax liens on all of the debtor's assets, filed an objection to the granting of the motion.[2] The Government principally contends that the debtor does not provide adequate protection[3] for the IRS liens covering the Lots when they are primed by the proposed first mortgage. A hearing on the debtor's motion concluded on May 10, 2002.

II.

A.

At the hearing, the debtor submitted the testimony of an appraiser on the present fair market value of the East Granby Lot and the value when construction is fully completed, the building on the lot being 40 percent completed. The appraiser set present fair market value at $100,000 to $110,000, and upon completed construction, a value of $380,000. The house on the Glastonbury Lot is 20 percent completed. The appraiser valued that lot in its present condition at between $70,000 to $80,000 and, upon completion, at $499,000 (assuming the completion of a road in the subdivision where the lot is located). There presently are no buyers for the Lots.

The motion asserts that the debtor requires the loan to complete construction of the houses on the Lots; to ''fund the Debtor's ongoing working capital and general corporate needs''(''operating expenses''); to fund the purchase of four additional lots in Glastonbury on which the debtor holds options; and to ''pay the fees, costs, expenses and disbursements of professionals retained by the Debtor . . . . ''(Motion p 9.) Gary L. Pierce testified that the partially-constructed houses would rapidly deteriorate over time if not completed, and that he believed the debtor would receive, when the Lots were sold, monies in excess of the Government's present interest in the Lots.

The debtor has contested the validity of the IRS liens, and litigation is presently pending in the District Court for the District of Connecticut to resolve the validity of these liens and the claims which the debtor has asserted against the Government. Through the testimony of a loan officer from a local savings bank, the debtor established that while the litigation with the Government exists, and the debtor remains a petitioner in the bankruptcy court, the debtor cannot secure loans from local lending institutions, but that the interest and other terms of the proposed Enfield Lumber loan were those that an institutional lender, otherwise, would likely im-

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[1] Section 364(d) provides:

(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if--

(A) the trustee is unable to obtain such credit otherwise; and

(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.

(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

[2] There are other existing liens filed against the lots, but they are of no relevance in this proceeding.

[3] Section 361 provides:

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by--

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

pose. These terms are a $450,000 loan for one year at 7.25 percent interest and a one percent closing fee, with the Lots and additional lots purchased to be collateral for the loan.

The tax liens filed against the debtor named the debtor as the "nominee/alter ego/transferee of Gary Pierce,'according to the Government proof of claim, and total $4,300,515.33. In addition, the Government proof of claim asserts unsecured priority corporate taxes due from the debtor in the amount of $311,319.00. The IRS tax liens apparently cover the debtor's 21-lot subdivision in Manchester, Connecticut, and a bank account containing approximately $600,000. The debtor does not contend that the IRS liens, if valid, are oversecured.

B.

The Government argues that the record made in this proceeding does not support a finding that a sufficient equity will undoubtedly exist upon completion of the houses to protect the IRS liens. It also contends its undercollateralized liens should not be displaced to fund the purchase of additional lots, or for the payment of the debtor's operating expenses as well as fees due the debtor's attorneys. The Government further asserts that the debtor's motion contains some of the factors that should be contained in a plan of reorganization, and the debtor concedes that no plan is in prospect. Cf. Resolution Trust Corp. v. Official Unsecured Creditors Committee (In re First South Sav. Ass'n.), 820 F.2d 700, 714 (5th Cir.1987) (declaring that a motion for authority to grant priming lien, where profit assumptions were involved in providing adequate protection, should be filed, if possible, in the context of a plan of reorganization); In re Defender Drug Stores, Inc., 145 B.R. 312, 317 (B.A.P. 9th Cir.1992) (''The bankruptcy court cannot, under the guise of section 364, approve financing arrangements that amount to a plan of reorganization but evade confirmation requirements.'').

III.

[1] The ability to prime an existing lien is extraordinary, and in addition to the requirement that the trustee be unable to otherwise obtain the credit, the trustee must provide adequate protection for the interest of the holder of the existing lien .... In most cases, adequate protection is provided by conditioning or limiting the borrowing in order to maintain a sufficient equity in the subject property to protect the existing lienholder.

3 Collier on Bankruptcy p 364.05 (15th Ed. Revised 2002); see also Resolution Trust Corp. v. Swedeland Development Group, Inc. (In re Swedeland Development Group, Inc.), 16 F.3d 552, 564 (3rd Cir.1994) (''In other words, the proposal should provide the pre-petition secured creditor with the same level of protection it would have had if there had not been post-petition superpriority financing.'').

It is readily apparent that the debtor is not relying upon subsections (1) or (2) of s 361. See supra note 3. The debtor, for adequate protection, neither proposes cash payments to the IRS nor additional or replacement liens. It is also apparent that in relying upon subsection (3) of § 361, the debtor is not providing the Government with the ''indubitable equivalent'' of the Government's interest in the Lots when an unspecified portion of the proposed loan is to fund the debtor's operating non-construction expenses and payment of professional fees. Cf. In re Mosello, 195 B.R. 277, 292 (Bankr.S.D.N.Y.1996) (denying motion to permit Chapter 11 debtor to borrow $350,000 by granting lender a lien which would prime that of undersecured creditor because speculative benefit to undersecured creditor did not constitute adequate protection).

The court concludes that § 364(d)(1) does not authorize it to prime the Government's liens with the proposed Enfield Lumber mortgage to the extent that the loan proceeds are intended to be used to fund the debtor's operating expenses and to pay professional fees. The court would be prepared to consider approving financing to complete the partially-constructed

homes on the Lots to prevent unnecessary economic waste. As for the motion's request concerning funding the purchase of additional lots, the court concludes such request may be better addressed by a separate motion not involving the debtor's presently- owned Lots.

IV.

For the reasons stated, the debtor's motion to incur debt secured by a senior lien must be denied. It is

SO ORDERED.

¶2002-5172

Craig F. REINHART v. INTERNAL REVENUE SERVICE. U.S. District Court, Eastern Dist. of California, (DC CA) Docket No. CIV S-01-1286 FCD GGH PS, May 24, 2002. District Court, (2002, DC CA) 89 AFTR 2d 2002-2517, adopted. Year 1999. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties. Magistrate judge's recommendations were adopted in pro se taxpayer's action, and IRS was granted summary judgment. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(2). IRC §6330; 6702.

United States District Court, Eastern District of California.

Judgment in a Civil Case

XX — Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF MAY 24, 2002.

Jack L. Wagner,

Clerk of the Court

ENTERED: May 24, 2002

by: D. Waggoner, Deputy Clerk

Order

[1] Plaintiff, proceeding pro se, filed the above-entitled action. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 72-302(c)(21).

On April 18, 2002, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice to the parties that any objections to the findings and recommendations were to be filed within ten days. No objections to the findings and recommendations have been filed.

The court has reviewed the file and finds the findings and recommendations to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed April 18, 2002, are adopted in full; and

2. Defendant's January 14, 2002 summary judgment motion is granted.

DATED: May 23, 2002

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5173

NEW HOPE SERVICES, INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of Indiana, (DC IN) Docket No. NA 96-116/C H/G, July 16, 2002. On remand from (2002, CA7) 89 AFTR 2d 2002-1736, 285 F3d 568, 2002-1 USTC ¶50322, reversing and remanding District Court. Decision for Taxpayer.

1. Attorney's fees and costs—exhaustion of administrative remedies—failure to request administrative appeals conference. On remand, taxpayer was awarded reduced attorney's fees and costs in amounts stated. *Reference:* United States Tax Reporter ¶74,305.01(5). IRC §7430.

Ray McCabe Cohen Swados Wright Hanifin Bradford & Brett 1100 M&T Center 3 Fountain Plaza Buffalo, New York 14203
J. Anthony Goebel Wyatt Tarrant & Combs 500 West Jefferson Street Suite 2800 Louisville, Kentucky 40202
Jeffrey L. Hunter Office of the United States Attorney 10 West Market Street, Suite 2100 Indianapolis, Indiana 46204-3048
Christine G. Michaelis Trial Attorney, Tax Division United States Department of Justice Post Office Box 55 Washington, D.C. 20044

United States District Court, Southern District of Indiana, New Albany Division.

Entry Upon Remand

HAMILTON, District Judge:

[1] The United States Court of Appeals for the Seventh Circuit remanded this action to this court for entry of judgment awarding attorney fees to plaintiff New Hope Services, Inc. After considering the parties' submissions on the subject, and relying upon the United States' statement that New Hope agreed to reduce its request for costs, the court will enter judgment in favor of New Hope and against the United States for $83,541.78, which is the sum of $56,657.54 in attorneys' fees and costs in this court, $22,155.00 in appellate attorney fees, $2,846.24 in appellate costs, and $1,883.00 in fees for preparing the fee petition.

So ordered.

Date: July 16, 2002

DAVID F. HAMILTON, JUDGE

United States District Judge

Southern District of Indiana

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Judgment Awarding Attorney Fees and Costs

HAMILTON, District Judge:

The court having this day issued its Entry Upon Remand, it is hereby ORDERED, ADJUDGED AND DECREED that plaintiff New Hope Services, Inc. recover from defendant United States of America the sum of Eighty-Three Thousand Five Hundred Forty-one Dollars and 78 Cents ($83,541.78).

Date: July 16, 2002

DAVID F. HAMILTON, JUDGE

United States District Court

Southern District of Indiana

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¶2002-5174

UNITED STATES OF AMERICA, APPELLEE v. Lawrence LaSPINA, DEFENDANT, Robert St. Germain, DEFENDANT-APPELLANT. U.S. Court of Appeals, Second Circuit, (CA2) Docket No. 01-1219, July 30, 2002. District Court affirmed. Years 1992, 1993. Decision for Govt.

1. Tax crimes—willfully subscribing false returns—indictments—limitations periods—evidence. Taxpayer's convictions for willfully subscribing false returns and conspiracy relating to his concealment of illegal kickback income were affirmed: taxpayer's limitations period defense to tax counts was rejected where, although untimely, IRC §7206(1) superseding indictment mirrored charging language of and related back to original, timely indictment; and fact that superseding indictment alleged additional sources for taxpayer's unreported income was irrelevant since income source wasn't element of IRC §7206(1) offense. Also, evidence sufficiently supported finding that taxpayer received and didn't report kickback income and that he actively furthered kickback scheme/conspiracy; and his remaining challenges to conspiracy count were rejected. *Reference:* United States Tax Reporter ¶72,065.01(5); 73,446.503(50). IRC §7206.

John M. Thompson, Springfield, MA (Peter L. Maroulis, Poughkeepsie, NY, of counsel), for Defendant-Appellant.

Diane Gujarati, Assistant United States Attorney for the Southern District of New York, New York, N.Y. (Mary Jo White, United States Attorney, Barbara Guss and Celeste L. Koeleveld, Assistant United States Attorneys, of counsel), for Appellee.

United States Court of Appeals, Second Circuit.

Before OAKES and SACK, Circuit Judges, and BRIGHT,* Circuit Judge.

OAKES, Senior Circuit Judge:

The defendant was convicted in the United States District Court for the Southern District of New York, Colleen McMahon, Judge, of conspiracy to engage in monetary transactions with money derived from a kickback scheme and of filing false federal income tax returns. Affirmed.

On December 13, 2000, after a two-week bench trial, Robert St. Germain was convicted in the United States District Court for the Southern District of New York, Colleen McMahon, Judge, of conspiring to engage in monetary transactions in criminally derived property in violation of 18 U.S.C. § 1957(a) and filing false federal income tax returns for the calendar years 1992 and 1993 in violation of 26 U.S.C. § 7206(l). St. Germain now appeals on several grounds: (1) that the conspiracy count was insufficient to give the district court subject matter jurisdiction; (2) that the conspiracy count was time-barred; (3) that the tax counts are time-barred; (4) that the evidence against him was constitutionally insufficient to support the conspiracy conviction; (5) that the evidence at trial constructively amended the conspiracy count and created prejudicial variances between the facts alleged and those proved; and (6) that the government presented false and misleading evidence and arguments in violation of his right to due process.

We affirm the judgment of conviction. We write primarily to address St. Germain's second argument: that the conspiracy charge was barred by the statute of limitations.

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* The Honorable Myron H. Bright, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

BACKGROUND

The conspiracy charge in this case arose from a scheme to launder money made in kickbacks from business that St. Germain steered to Cerplex, Inc. (''Cerplex'').[1] From mid-1990 until July 1993, St. Germain managed the Reutilization Department for International Business Machines Corporation (''IBM'') in Poughkeepsie, New York. The Reutilization Department was responsible for the sale, recycling, dismantling, and repair of surplus computers and computer parts. During the time St. Germain managed the Reutilization Department, IBM relied on external plants of manufacture (''EPOM'') to store, repair, and refurbish old surplus products economically. As manager of the Reutilization Department, St. Germain influenced the award of EPOM contracts.

In September 1990, IBM entered into an EPOM contract with the Jennifer-Ashley Company, Inc. (''JACO''), a company formed in the summer of 1990. The founder of JACO, Linda Schultz, was a former IBM employee whom St. Germain first met in 1985 when Schultz was working as a secretary for IBM in Tucson, Arizona. Schultz testified that, although she was married, their relationship became intimate in early 1991.

JACO secured a permanent EPOM contract with the IBM Reutilization Department to sell surplus computer equipment. The contract provided that proceeds of the sales would be split between JACO and IBM. JACO did not have to submit a competitive bid for the contract, and IBM was JACO's only supplier.

In early 1991, St. Germain asked Schultz to introduce him to her brother, Darrell Elkins, an attorney in Arizona. A few months later, St. Germain, Schultz, and Elkins met in Tucson, Arizona. During the meeting, St. Germain proposed the Cerplex kickback scheme. He suggested that Schultz secure a position as a sales representative at Cerplex, a company that IBM had previously contracted with for the repair of an eight-inch disk drive product. As a Cerplex sales representative, Schultz would collect commissions that resulted from her sales of Cerplex proposals to IBM. St. Germain would sign the future Cerplex contracts at IBM, ensuring that Schultz's proposals would result in contracts and thus in commissions. Elkins would provide legal services to Cerplex on the IBM contracts. Any commissions that Schultz collected from the Cerplex contracts with IBM would then be split between Schultz, Elkins, and St. Germain. Any money that Elkins received from Cerplex for his legal work would be split between Elkins and St. Germain.

In late 1991, St. Germain instructed Schultz to contact Richard Davis, the chief executive officer at Cerplex, and William Klein, an investor in Cerplex who had previously worked for IBM. Schultz met with Davis and, with no resume or sales pitch, was offered a position as a Cerplex sales representative. Schultz testified that she had the impression the job was handed to her.

Once Schultz was working at Cerplex, the amount of IBM business awarded to Cerplex from the Reutilization Department increased significantly and included risky and costly arrangements for IBM. David Akers, a contract administrator in the Reutilization Department at the time, testified that St. Germain had a significant amount of control over the Cerplex contracts, and that the contracts were awarded even when Akers and the IBM legal department objected to them.

Evidence at trial indicated that, in addition to steering IBM business to Cerplex, St. Germain helped ensure that Cerplex paid the kickbacks in the form of commissions to Schultz and Elkins on time. In late February 1992, St. Germain sent an electronic message to Davis at Cerplex asking, ''Rick, where's the bacon?'' On March 3, 1992, Davis responded in an electronic message saying, ''The bacon's at the store

[1] The superseding indictment charged St. Germain with, inter alia, conspiracy in violation of 18 U.S.C. § 371 and 18 U.S.C. § 1956(h) based on his involvement in the Cerplex kickback scheme as well as in a bribery scheme involving Recycler's Consulting Group, Inc. (''RCG''). The district court found St. Germain guilty based only on his conduct in the Cerplex kickback scheme. We therefore limit our discussion of the facts to those relevant to the Cerplex scheme.

but the money is in your bank account[.] Have a good day[.]'' On the date Davis sent his response, the money was in Elkins's bank account.

Schultz testified that, despite her title of sales representative, she did very little work for Cerplex. Still, between 1992 and 1993, Schultz received over $650,000 in commissions from Cerplex. She transferred a substantial portion of this money to Elkins and deposited some of it into a bank account in the name of Ajack Enterprises, an acronym derived from the first letters of her children's names and the names of St. Germain's children.

During the same time period, Elkins received approximately $1 million from Cerplex. The money was deposited directly into a bank account in the name of Elkins Enterprises, Inc. Half of this amount went to St. Germain, some in cash and some, in order to be inconspicuous, through a real estate investment in Papago Place, a commercial property in Phoenix, Arizona.

Elkins arranged for the $1.1 million purchase of Papago Place in May 1992, with a $450,000 down payment and a $650,000 mortgage from Citibank. Elkins used part of his share and part of St. Germain's share of the Cerplex kickbacks to make the purchase and converted future Cerplex payments into mortgage payments. Although St. Germain's money was used to purchase Papago Place, he was not identified as an owner of the property at the time of purchase.

In July 1992, Schultz began sending Elkins money to purchase an interest in Papago Place. In December 1992, Schultz advised her accountant that the division in ownership of the property would be 45% for Schultz and her husband, 10% for Elkins, and 45% for a ''partner of her brother.'' After St. Germain left IBM in July 1993, Schultz identified St. Germain as her brother's ''partner.''

On July 6, 1994, Elkins sold his share of Papago Place to St. Germain. St. Germain took legal title to half of Papago Place and Schultz and her husband took legal title to the other half through a limited liability company known as Papago Place L.L.C. The money St. Germain paid for his share of the property was significantly less than its value, indicating that Elkins had previously used part of St. Germain's portion of the Cerplex money to purchase the property and make mortgage payments, and that Elkins's ''share'' of the property was in name only.

In the fall of 1998, St. Germain, Schultz, and Schultz's husband sold Papago Place. At the time of the sale, St. Germain and Schultz and her husband held the same interests in the property through Papago Place L.L.C. Approximately $1.7 million in proceeds from the 1998 sale was wired to a Papago Place L.L.C. operating account in New York.

In addition to the Papago Place purchase, St. Germain arranged to receive part of his share of the kickback scheme by purporting to be Schultz's ''agent'' for the purpose of collecting commissions due to her from Cerplex. Using several shell companies and a sham collection agreement between himself and Schultz, St. Germain collected approximately $2.8 million in commissions due to Schultz and kept approximately $1.6 million of that for himself.

Schultz testified that St. Germain instructed her to lie if she was asked about how St. Germain became a partner in Papago Place. In addition, St. Germain asked Schultz to help him manufacture evidence to support his supposed purchase of Papago Place and to distance himself from record ownership of the property. Finally, St. Germain directed Schultz to create back-dated documents that would make the collection agreement seem legitimate.

During the course of the Cerplex scheme, large amounts of money were deposited into St. Germain's bank accounts that he did not report on his income tax returns. St. Germain did not report as income his share of the Cerplex kickbacks that Elkins paid him as cash or that was invested in Papago Place on St. Germain's behalf. In addition, St. Germain failed to report his share of the down payment and mortgage payments on Papago Place paid with his

share of the Cerplex proceeds in 1992 and 1993.

On April 7, 1999, St. Germain was indicted for his involvement in a bribery scheme unrelated to the Cerplex scheme. On July 26, 2000, the government filed a superseding indictment charging St. Germain in four counts. Count One was dismissed on the government's request. Count Two charged St. Germain with conspiracy under 18 U.S.C. § 1956(h) to engage in monetary transactions with criminally derived property in violation of 18 U.S.C. § 1957(a). Specifically, Count Two charged St. Germain with conspiring to launder the proceeds of the bribery scheme described in the initial indictment as well as the proceeds of the Cerplex scheme. Counts Three and Four charged St. Germain with filing false federal income tax returns for the calendar years 1992 and 1993, in violation of 26 U.S.C. § 7206(l). Finally, pursuant to 18 U.S.C. § 982, the superseding indictment contained a money laundering forfeiture allegation, which pertained to the charges in Count Two.

St. Germain made a motion to dismiss Count Two as time-barred. The district court denied the motion before trial and when it was renewed at the close of the government's evidence.

St. Germain requested, and the government consented to, a bench trial on the superseding indictment. The trial court convicted St. Germain on all counts as they related to the Cerplex scheme. He was sentenced to concurrent terms of imprisonment of 63 months on the conspiracy count, 36 months on the 1992 tax count, and 36 months on the 1993 tax count, to be followed by a term of two years' supervised release. In addition, St. Germain was ordered to pay a $15,000 fine and a $300 special assessment and, based on a forfeiture allegation pertaining to the conspiracy charge, to forfeit $1,227,000.

Following his conviction, St. Germain moved to set aside the verdict pursuant to Fed.R.Crim.P. 29 or for an arrest of judgment pursuant to Fed.R.Crim.P. 34. St. Germain argued: 1) the district court lacked jurisdiction over Count Two because the Grand Jury was not presented with evidence that St. Germain steered business to Cerplex in exchange for payment; 2) Count Two was insufficient because it failed to set forth the specified unlawful activity that gave rise to the money laundering transactions; 3) the government impermissibly shifted the burden of proof; 4) Counts Three and Four varied impermissibly from the original indictment and were thus time-barred; and 5) the evidence as to all counts was insufficient to support a conviction. The district court denied the motion on all grounds. This appeal followed.

DISCUSSION

We discuss separately each of St. Germain's claims of error, turning first to the claim that the conspiracy charge was barred by the statute of limitations.

I. Statute of Limitations Over Conspiracy Count

Count Two charged St. Germain with conspiring to engage in monetary transactions of criminally derived property in violation of 18 U.S.C. § 1956(h)(2001). The statute of limitations for actions brought under § 1956(h) is five years. 18 U.S.C. § 3282 (2000).

In order for the conspiracy charge alleged in Count Two to fall within the statute of limitations, (1) the "conspiracy must still have been ongoing within the five year period preceding the indictment, and (2) 'at least one overt act in furtherance of the conspiratorial agreement [must have been] performed within that period.'" United States v. Ben Zvi, 242 F.3d 89, 97 (2d Cir.2001) (quoting Grunewald v. United States, 353 U.S. 391 [51 AFTR 20], 396–97 (1957)) (alteration in origi-

nal).[2] In this case, the superseding indictment was returned on July 26, 2000. Therefore, for the conspiracy charge in Count Two to have fallen within the statute of limitations, the conspiracy must have continued until at least July 26, 1995.

"[T]he crucial question in determining whether the statute of limitations has run is the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." Grunewald, 353 U.S. at 397. St. Germain argues that the scope of the conspiracy was limited to putting St. Germain's share of the Cerplex proceeds into his control. Therefore, according to St. Germain, the conspiracy was complete and the last possible overt act committed on July 6, 1994, when Elkins sold his last share of Papago Place to Papago Place L.L.C., a company controlled by St. Germain.

The government argues that the conspiracy continued into 1998 when St. Germain sold Papago Place. According to the government, the scope of the conspiracy included any monetary transactions made by the conspirators with the Cerplex money. Thus, the government argues that two acts alleged in the indictment—St. Germain's withdrawal of approximately $118,000 from a certificate of deposit in March 1996 and the sale of Papago Place in 1998—as well as several additional acts proven at trial bring Count Two within the statute of limitations.

We reject St. Germain's characterization of the scope of the conspiracy because it is unduly narrow, but we do not fully embrace the government's position. The government's reading of the scope of the conspiracy to include any monetary transactions made by the conspirators with the Cerplex money is overbroad. We do agree with the government's conclusion that the 1996 and 1998 transactions fell within the scope of the conspiracy because the conspirators did not receive their antic-ipated economic benefits from the conspir-acy until the 1998 sale of Papago Place. The conspiracy continued at least until then, well within the limitations period.

"A conspiracy involves an agreement by at least two parties to achieve a particular illegal end." United States v. Stavroulakis, 952 F.2d 686, 690 (2d Cir.1992). In order for a defendant to be convicted of conspiracy, "there must be proof beyond a reasonable doubt that [the conspirators] agreed on the 'essential nature of the plan.'" Id. (quoting Blumenthal v. United States, 332 U.S. 539, 557 (1947)). We therefore "focus on the essence of the underlying illegal objective to determine" the scope of the conspiracy. Id.

St. Germain was convicted under 18 U.S.C. § 1956(h) of conspiring to engage in monetary transactions in violation of 18 U.S.C. § 1957(a). Section 1957 makes it a crime to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 [that] is derived from specified unlawful activity." 18 U.S.C. § 1957(a) (2001). The illegal objective of a conspiracy to engage in monetary transactions in violation of § 1957(a) is the monetary transaction involving unlawfully obtained property, not the underlying act of unlawfully obtaining it. See Stavroulakis 952 F.2d at 691; United States v. Holmes, 44 F.3d 1150, 1154 (2d Cir.1995). Therefore, because the monetary transaction is the illegal objective, a conspiracy to engage in such transactions continues as long as one or more conspirators engages in monetary transactions as contemplated by the conspiratorial agreement.

St. Germain argues persuasively that construing the conspiracy to continue as

[2] Two circuits have recently held that a § 1956(h) conspiracy does not require proof of an overt act. United States v. Tam, 240 F.3d 797, 802 (9th Cir.2001) (reasoning that "[t]he language of 18 U.S.C. § 1956(h) is nearly identical to the language of 21 U.S.C. § 846 [(criminalizing conspiracy to commit drug offenses)], which the Supreme Court held in United States v. Shabani, 513 U.S. 10, 15 (1994), does not require proof of an overt act"); accord United States v. Godwin, 272 F.3d 659, 669 n. 9 (4th Cir.2001), cert. denied, 122 S.Ct. 1942 (2002). We have not specified the essential elements of § 1956(h), as distinct from those of the general federal conspiracy statute, 18 U.S.C. § 371, see United States v. Vargas, 986 F.2d 35, 39–40 (2d Cir.1993) (discussing the defendant's liability for conspiracy to launder the proceeds of drug trafficking, where the government charged that conspiracy under 18 U.S.C. § 371 rather than § 1956(h)) and have therefore not considered whether proof of an overt act is a necessary element of § 1956(h). Because there is sufficient proof of an overt act in this case, we need not and do not decide this question.

long as one conspirator engages in any monetary transactions involving the criminally derived property, irrespective of whether the transactions are intended to further the initial aims of the conspiracy, results in an indeterminate extension of the statute of limitations. The Supreme Court has warned that it "view[s] with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." Grunewald, 353 U.S. at 404. The Court has further instructed that in determining "whether the statute of limitations has run," we should analyze "the scope of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." Id. at 397. Accordingly, the conspirators' purpose or intent informs the scope of the conspiracy. Otherwise, a conspiracy knowingly to engage in monetary transactions in criminally derived property, 18 U.S.C. § 1957(a), would be "an indefinitely continuing offense" with an "indeterminate" statute of limitations, Krulewitch v. United States 336 U.S. 440, 456 (1949) (Jackson, J., concurring).

The government argues that our holding in United States v. Monaco, 194 F.3d 381 (2d Cir.1999), supports the proposition that the scope of a conspiracy includes any transaction involving the criminally derived property. We disagree. In Monaco, we noted that a conspiracy to launder proceeds from drug trafficking and piracy was within the statute of limitations even though the monetary transactions in furtherance of the laundering conspiracy were made as many as twelve years after the drug trafficking and piracy ended. Id., 194 F.3d at 387 n. 2. The Monaco defendants continued until then to commit acts in furtherance of their conspiracy "to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity," id. at 386 (quoting 18 U.S.C. § 1956(a)(1)(B)(I)), viz., drug trafficking and piracy. Contrary to the government's reading of Monaco, the monetary transactions were not deemed to be within the scope of the conspiracy simply because they involved the drug trafficking and piracy proceeds. The transactions were deemed part of the conspiracy because they furthered the original aims of the conspiracy, to "conceal" and "disguise" the "nature, source, the ownership or control" of the proceeds. Monaco, therefore, like Krulewitch and Grunewald, analyzed the aims of the conspiracy to determine whether a specific act fell within its scope.

But we disagree with St. Germain's alternative and unduly narrow characterization of the scope of the conspiracy as limited to putting St. Germain's share of the Cerplex proceeds into his control. Where the object of a conspiracy is economic, the conspiracy generally "continues until the conspirators receive their anticipated economic benefits." United States v. Mennuti, 679 F.2d 1032, 1035 (2d Cir.1982); accord id. at 1035–36 (collecting cases for the same proposition). If the conspirators received their anticipated economic benefits after placing St. Germain's share of the proceeds within his control, then that placement did not end the conspiracy.

We need not speculate about the outer limits of the conspiratorial agreement to conclude that both the 1996 withdrawal from the certificate of deposit and the 1998 sale of Papago Place were within the scope of the conspiracy.

The trial court found proof beyond a reasonable doubt that St. Germain conspired with Schultz and Elkins to engage in a series of monetary transactions with the money derived from the Cerplex scheme. The scheme began with Schultz and Elkins receiving money from business that St. Germain steered to Cerplex. Schultz and Elkins then kicked portions of their commissions back to St. Germain. In an effort to hide the kickback scheme, St. Germain, Schultz, and Elkins used the Cerplex money in several monetary transactions between 1992 and 1998. In 1992, Elkins, acting as a strawman for St. Germain, used part of St. Germain's proceeds from the Cerplex scheme to purchase Papago Place. In 1993 and 1994, St. Germain used several shell companies to engage in mon-

etary transactions with proceeds from the Cerplex scheme. In 1994, Elkins used Cerplex money to pay off the mortgage on Papago Place and subsequently transferred complete title to St. Germain through Papago Place L.L.C. In March 1996, St. Germain withdrew approximately $118,000 from a certificate of deposit he had established with Cerplex proceeds in 1994. Finally, in August 1998, St. Germain caused Papago Place L.L.C. to sell Papago Place, resulting in a wire transfer of approximately $1.7 million into the account of Papago Place L.L.C. Thus, St. Germain and Schultz did not ''receive their anticipated economic benefits'' as contemplated by the conspiratorial agreement until the sale of Papago Place. The conspiracy was therefore ongoing until at least 1998 when Papago Place was sold.

St. Germain argues that the withdrawal from the certificate of deposit and the wire transfer from the sale of Papago Place were not transactions contemplated by the conspiratorial agreement because he acted alone in making these transactions. However, while conspirators must agree on the ''‘essential nature'’' of the conspiracy, they ''need not agree on every detail of their venture.'' Stavroulakis, 952 F.2d at 690 (noting that ''[t]he policies underlying conspiratorial liability could easily be thwarted by the careful compartmentalization of information, and 'conspirators would go free by their very ingenuity,' if it were required that they agree on all details of the scheme'' (quoting Blumenthal, 332 U.S. at 557)). The conspirators had agreed to launder the proceeds of the scheme. They did not have to agree further on the details of each transaction in furtherance of that objective.

Moreover, the 1996 and 1998 transactions were part of a series of transactions made throughout the life of the conspiracy and thus part of a single ongoing agreement. First, the money withdrawn in 1996 was Cerplex commission money that St. Germain placed in a certificate of deposit in 1994 under the name of a shell company created to carry out the sham commission agreement with Schultz. Second, Papago Place had originally been bought to disguise St. Germain's involvement in the Cerplex scheme. Several monetary transactions resulted from the purchase, ending with the sale of the property in 1998. At the time Papago Place was sold, St. Germain and Schultz were still co-owners of the property, thus demonstrating the conspirators' continued involvement with the Cerplex money and with each other. Therefore, the 1996 and 1998 transactions were contemplated by the conspiratorial agreement and demonstrate that the conspiracy was ongoing as late as 1998.

In addition to establishing the continued existence of the conspiracy, the 1996 and 1998 transactions qualify as overt acts in furtherance of the conspiracy, assuming such overt acts are required. See footnote 2, supra. ''To constitute an overt act for purposes of the statute of limitations the act must involve some affirmative conduct or deliberate omission on the part of [a conspirator].'' Ben Zvi, 242 F.3d at 97. An ''overt act[] . . . [is] meaningful only if [it is] within the scope of the conspiratorial agreement,'' Grunewald, 353 U.S. at 414, but an overt act may be made by ''only a single one of the conspirators and need not be itself a crime.'' Braverman v. United States, 317 U.S. 49, 53 [29 AFTR 1195] (1942).

As discussed above, the withdrawal of Cerplex money in 1996 and the wire transfer from the sale of Papago Place in 1998 fell within the scope of the conspiracy. The transactions were part of a single continuing agreement and were made by St. Germain, a conspirator who had not withdrawn from the conspiracy. Therefore, the transactions were overt acts in furtherance of the conspiracy.[3]

In summary, the conspiracy in this case continued at least until the conspirators received their anticipated economic benefits from the Cerplex scheme. Because the conspirators did not receive their antici-

[3] We note that the government proved additional acts at trial that would likely qualify as overt acts in furtherance of the conspiracy. Because we find the 1996 and 1998 transactions constitute overt acts in furtherance of the conspiracy, we do not specifically address these additional acts.

pated economic benefits until the sale of Papago Place in 1998 and the government proved that the conspiracy continued at least until that date, Count Two was not barred by the statute of limitations.

II. Sufficiency of the Indictment

St. Germain argues that Count Two failed to allege the object of the conspiracy charged and the specified unlawful activity with respect to Cerplex. As a result, St. Germain argues, the district court lacked subject matter jurisdiction over Count Two.

''A criminal defendant is entitled to an indictment that states the essential elements of the charge against him.'' United States v. Pirro, 212 F.3d 86, 91 [85 AFTR 2d 2000-1774] (2d Cir.2000) (citing Jones v. United States, 526 U.S. 227, 232 (1999); Hamling v. United States, 418 U.S. 87, 117 (1974)). Accordingly, Fed.R.Crim.P. 7 provides that ''[t]he indictment ... shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.'' Fed.R.Crim.P. 7(c)(1).

To satisfy the pleading requirements of Fed.R.Crim.P. 7(c)(1), '''an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime.''' Stavroulakis, 952 F.2d at 693 (quoting United States v. Tramunti, 513 F.2d 1087, 1113 (2d Cir.1975)). An indictment '''must be read to include facts which are necessarily implied by the specific allegations made.''' Id. (quoting United States v. Silverman, 430 F.2d 106, 111 (2d Cir.1970)). In short, ''an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'' Hamling, 418 U.S. at 117.

Because St. Germain first raised the issue in a post-trial motion, we read the superseding indictment liberally. United States v. Sabbeth, 262 F.3d 207, 218 (2d Cir.2001); United States v. Wydermyer, 51 F.3d 319, 324 (2d Cir.1995). Further, ''in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy.'' Wydermyer, 51 F.3d at 325 (quoting Wong Tai v. United States, 273 U.S. 77, 81 (1927)). Thus, to prevail on his claim that the conspiracy count was insufficient, St. Germain ''must show that the indictment, liberally construed, was not 'sufficient to identify the offense which [he] conspired to commit.''' Id. at 326 (quoting Wong Tai, 273 U.S. at 81).

Under this standard, Count Two easily satisfies the pleading requirement. It put St. Germain on notice that he was being charged with conspiracy under 18 U.S.C. § 1956(h) to engage in monetary transactions with criminally derived property in violation of 18 U.S.C. § 1957(a). Paragraph 13 of the superseding indictment tracked the statutory language of § 1957(a) by identify-ing the object of the conspiracy as ''en-gag[ing] and attempt[ing] to engage in monetary transactions in criminally derived property that was of a value greater than $10,000 and that was derived from specified unlawful activity[.]'' The same paragraph identified the ''specified unlawful activity'' from which the property was derived as ''interstate transportation of property obtained by fraud and wire fraud.''

Count Two went on to specifically allege facts with respect to the Cerplex scheme. Paragraph 14(b) alleged that: (1) St. Germain, an IBM employee, steered IBM business to Cerplex; (2) Schultz, acting as a Cerplex sales representative, received commissions for the IBM business; and (3) Schultz kicked a portion of the commissions back to St. Germain. Count Two thus adequately put St. Germain on notice that he was charged with a conspiracy to commit the underlying substantive

offense of money laundering based on the Cerplex scheme.[4]

III. Statute of Limitations for Counts Three and Four

St. Germain argues that the tax counts alleged in Counts Three and Four are time-barred. Although the tax counts in the original indictment fell within the applicable statute of limitations, St. Germain argues that the tax counts in the superseding indictment are substantially broader than those in the original indictment and therefore do not relate back to the original indictment.

"Once an indictment is brought, the statute of limitations is tolled as to the charges contained in that indictment." United States v. Grady, 544 F.2d 598, 601 (2d Cir.1976).

When a superseding indictment supplants a pending timely-filed indictment, any charges in the superseding indictment that are neither materially broadened nor substantially amended from the earlier indictment relate back to the date of the filing of the earlier indictment. The superseding indictment continues its predecessor's tolling of the statute of limitations and inherits its predecessor's timeliness.

Ben Zvi, 242 F.3d at 98 (citing United States v. O'Bryant, 998 F.2d 21, 23 (1st Cir.1993); Grady, 544 F.2d at 601).

The original indictment in this case was filed on April 7, 1999. Counts Four and Five of the original indictment charged St. Germain with subscribing to materially false income tax returns for the calendar years 1992 and 1993. The statute of limitations for tax offenses under Title 26 is six years. 26 U.S.C. § 6531 (2001). St. Germain filed his 1992 tax returns on April 15, 1993, and his 1993 tax return on April 14, 1994. Therefore, the statute of limitations for the 1992 false tax return count ran on April 15, 1999, and the statute of limitations for the 1993 false tax return count ran on April 15, 2000. See United States v. Silverman, 449 F.2d 1341, 1346 [28 AFTR 2d 71-5899] (2d Cir.1971). Both counts of the original indictment thus fell within the statute of limitations.

The superseding indictment was returned on July 26, 2000. Counts Four and Five of the original indictment were renumbered as Counts Three and Four but were otherwise identical to the original counts. Despite this, St. Germain argues that Counts Three and Four of the superseding indictment impermissibly broadened the tax counts beyond the allegations in the original indictment because Count Two of the superseding indictment added allegations that he had received income in 1992 and 1993 from the Cerplex kickback scheme. Because the original indictment did not make any allegations regarding the Cerplex scheme, St. Germain argues that the superseding indictment impermissibly broadened the basis for the tax evasion charges.

The central policy underlying statutes of limitation is timely notice to the defendant "that [he] will be called to account for [his] activities and should prepare a defense." Grady, 544 F.2d at 601; see also United States v. Gengo, 808 F.2d 1, 3 (2d Cir.1986) ("notice to defendants is at the core of the limitations doctrine"). "Similarly, notice is the touchstone in deciding whether a superseding indictment substantially changes the original charges." Gengo, 808 F.2d at 3.

The original indictment in this case informed St. Germain that he was being charged with subscribing to materially false income tax returns for tax years 1992 and 1993, in violation of 26 U.S.C. § 7206(1). Using identical language, the superseding indictment charged St. Germain with the same offense for the same years. St. Germain argues that, despite the identical language, the superseding indictment substantially changed the original charges because it alleged a new source of unreported income, namely, the proceeds from the Cerplex scheme. However, the source of unreported income is not an essential el-

[4] Although we need not address it in this case, we note that the Supreme Court recently rejected St. Germain's argument that indictment omissions are jurisdictional defects, holding that, because "defects in an indictment do not deprive a court of its power to adjudicate a case," such defects are not jurisdictional errors. United State v. Cotton, 535 U.S. ----, 122 S.Ct. 1781, 1784–85 (2002).

ement of an offense under 26 U.S.C. § 7206(1). United States v. Rodriguez, 545 F.2d 829, 831–32 [39 AFTR 2d 77-377] (2d Cir.1976). The elements of an offense under 26 U.S.C. § 7206(1) are: ''(1) that the defendant made or caused to be made, a federal income tax return for the year in question which he verified to be true; (2) that the tax return was false as to a material matter; (3) that the defendant signed the return willfully and knowing it was false; and (4) that the return contained a written declaration that it was made under the penalty of perjury.'' Pirro, 212 F.3d at 89. Therefore, the source of unreported income is ''not essential to the proof of the violation charged.'' Rodriguez, 545 F.2d at 832.

Neither the original nor the superseding indictment alleged the source or the amount of income that St. Germain failed to declare. In addition, such information was neither requested nor provided in a bill of particulars. Any change in the proof regarding the source or amount therefore did not alter the charges made in the original indictment, and the government was permitted to present its proof of the crime charged, regardless of when such proof was uncovered.

Because the charging language and the elements of the offense in this case remained unchanged in the superseding indictment, the charges in Counts Three and Four were not impermissibly broadened by the superseding indictment, and St. Germain had adequate notice of the offense with which he was being charged. The tax counts in the superseding indictment therefore relate back to the original indictment and are not barred by the statute of limitations.

IV. Sufficiency of Evidence

St. Germain challenges the sufficiency of the evidence for each count for which he was convicted. ''A defendant challenging a conviction based on a claim of insufficiency of the evidence bears a heavy burden.'' United States v. Dhinsa, 243 F.3d 635, 648 (2d Cir.) (citing United States v. Walsh, 194 F.3d 37, 51 (2d Cir.1999)), cert. denied, 122 S.Ct. 219 (2001). Trial evidence is viewed ''in its totality'' and is considered ''in the light most favorable to the government, crediting every inference that the [fact finder] might have drawn in favor of the government.'' Id. (internal citations omitted). If the evidence ''suffices to convince any rational trier of fact of the defendant's guilt beyond a reasonable doubt, then [the] conviction must stand.'' United States v. Martinez, 54 F.3d 1040, 1042 (2d Cir.1995); see Jackson v. Virginia, 443 U.S. 307, 319 (1979) (jury's verdict must be sustained if ''any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'') (emphasis in original).

In our analysis, ''[w]e defer to the [fact finder]'s determination of the weight of the evidence and the credibility of the witnesses, and to the [fact finder]'s choice of the competing inferences that can be drawn from the evidence.'' United States v. Morrison, 153 F.3d 34, 49 (2d Cir.1998). In addition, ''[p]roof of the elements of the crimes charged may be entirely by circumstantial evidence.'' Id. (citing United States v. Sureff, 15 F.3d 225, 228 (2d Cir.1994)).

Viewed in the light most favorable to the government, the evidence presented at trial fully supported the district court's finding of guilt on Counts Two, Three, and Four of the superseding indictment. With regard to Count Two, conspiracy to engage in monetary transactions with criminally derived property, St. Germain argues that there is no proof that he either agreed to steer business to Cerplex, that he in fact succeeded in steering business to Cerplex, or that there was a connection between the contracts IBM awarded to Cerplex and the commissions paid to Schultz. However, the testimony of Akers, a former IBM contract administrator, and Schultz established that: (1) St. Germain had significant influence over the award of IBM contracts to EPOM like Cerplex; (2) St. Germain arranged for Schultz to be a ''sales representative'' at Cerplex; and (3) Cerplex received significant business from IBM in 1992 and 1993 when the kickback scheme was in place. From this evidence, a rational fact finder could conclude that St. Germain agreed to

and did steer business to Cerplex in furtherance of the kickback scheme.

In addition, a rational fact finder could infer a connection between the IBM contracts and Schultz's commissions based on timing in the case. Schultz testified that after St. Germain set up the kickback scheme and arranged for Schultz to work at Cerplex, Cerplex entered into several contracts with IBM that generated substantial income for Cerplex but often put IBM at unnecessary risk. Moreover, Schultz received commissions as a sales representative for the IBM business despite the fact that IBM had never worked with a sales representative in its previous dealings with Cerplex. The email exchange between St. Germain and Davis, Cerplex's CEO, in February 1992 further supports a connection between the IBM contracts and Schultz's commissions. In response to St. Germain's message asking "where's the bacon," Davis replied, "the bacon's at the store, but the money is in your bank account." While St. Germain argues that there is an alternative explanation for the email exchange, the district court could have reasonably concluded that the email refers to commission payments due to Schultz for business St. Germain steered to Cerplex.

The trial court summarized its findings with regard to Count Two as follows:

There is no question that the evidence adduced at trial—from Linda Schultz and from numerous other witnesses and records—supported the Government's contention that St. Germain used Schultz (his paramour) and her brother to receive money from Cerplex; that the payment of those monies could not be attributed to any work actually done by Linda Schultz or her brother; that St. Germain received a "cut" of these so-called "sales commissions" and that he invested a significant portion of those proceeds in the building known as Papago Place. The trial evidence supported the charge made in the indictment.

(March 13, 2001, Order at 3). All of the court's findings were supported by the evidence, which was sufficient to establish a connection between St. Germain's actions and Schultz's commissions.

With regard to Counts Three and Four, the tax counts, St. Germain argues that the evidence was insufficient to establish that he received income from the Cerplex scheme and, therefore, that he willfully failed to report the income. Schultz's testimony and documentary evidence of various transactions established that St. Germain received one-third of the Cerplex commissions paid to Schultz and Elkins in 1992 and 1993, that Elkins funneled most of that income into Papago Place, and that St. Germain was involved in the ownership of Papago Place as early as 1992. The district court could have rationally concluded that St. Germain received income from the Cerplex scheme and, regardless of what he did with the income at the time, failed to report it for income tax purposes. The evidence was thus sufficient to support the district court's finding of guilt on the tax counts.

V. Constructive Amendment and Prejudicial Variance

St. Germain argues that the government's trial presentation constructively amended the conspiracy charge in Count Two of the superseding indictment and prejudicially varied from the facts alleged in the indictment. We disagree.

A constructive amendment of an indictment "'occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them.'" United States v. Zingaro, 858 F.2d 94, 98 (2d Cir.1988) (quoting Gaither v. United States, 413 F.2d 1061, 1071 (D.C.Cir.1969)). As such, a constructive amendment is a per se violation of the Fifth Amendment. United States v. Delano, 55 F.3d 720, 729 (2d Cir.1995). "To prevail on a constructive amendment claim, a defendant must demonstrate that either the proof at trial or the trial court's jury instructions so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." United States v. Frank,

156 F.3d 332, 337 (2d Cir.1998) (per curiam) (citing Zingaro, 858 F.2d at 98). "In determining whether an 'essential element' of the offense has been modified, moreover, we have 'consistently permitted significant flexibility in proof, provided that the defendant was given notice of the core of criminality to be proven at trial.'" Delano, 55 F.3d at 729 (quoting United States v. Patino, 962 F.2d 263, 266 (2d Cir.1992) (internal quotations omitted)).

Moreover, in the context of a conspiracy charge, "[t]he Government need not ... set out with precision each and every act committed ... in furtherance of the conspiracy," particularly where the acts proven at trial were part of the "core of the overall scheme and in furtherance of that scheme." United States v. Cohen, 518 F.2d 727, 733 (2d Cir.1975). "It is clear the Government may offer proof of acts not included within the indictment, as long as they are within the scope of the conspiracy." United States v. Bagaric, 706 F.2d 42, 64 (2d Cir.1983), abrogated on other grounds by Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 259–60 (1994).

St. Germain argues that the superseding indictment was constructively amended because the government's proof expanded the conspiracy to include proceeds from the collection agreement and expanded Elkins's role in the conspiracy. However, both the collection agreement and Elkins's role in the conspiracy were well within the scope of the conspiracy alleged in the superseding indictment.

The superseding indictment charged St. Germain with conspiracy, "together with others known and unknown ..., [to] unlawfully, wilfully, and knowingly, ... engage and attempt to engage in monetary transactions in criminally derived property ... that was derived from specified unlawful activity, to wit, the interstate transportation of property obtained by fraud and wire fraud, in violation of Title 18, United States Code, Section 1957(a)." The essential elements of a conspiracy to engage in monetary transactions with criminally derived property are that the defendant conspired with one or more persons to: (1) engage or attempt to engage; (2) in a monetary transaction; (3) in criminally de-rived property that is of a value greater than $10,000; (4) knowing that the prop-erty is derived from unlawful activity; and (5) that the property is, in fact, derived from specified unlawful activity.

The superseding indictment specifically alleged that the money used in the transactions at issue was derived from a fraudulent scheme involving commissions that Cerplex paid to Schultz and that St. Germain received a portion of the commissions. The purpose of the collection agreement between Schultz and St. Germain was to provide a vehicle for St. Germain to recover part of his share of the proceeds. The agreement was thus evidence of St. Germain's receipt of the criminally derived property. As such, it fell squarely within the scope of the conspiracy as charged in the indictment and did not alter an essential element of the offense.

In addition, as stated above, the superseding indictment referred to conspirators "known and unknown." It also specifically identified Elkins as one of the coconspirators. While the indictment referred to Elkins as a strawman in the purchase of Papago Place, such reference did not limit Elkins's involvement to this act because "the Government may offer proof of acts not included within the indictment, as long as they are within the scope of the conspiracy." Bagaric, 706 F.2d at 64. The government's evidence of Elkins's involvement in the conspiracy was within the scope of the conspiracy and therefore did not alter an essential element of the crime for which St. Germain was charged. The superseding indictment was not constructively amended by the government's proof.

Similarly, the government's proof at trial did not prejudicially vary from the facts alleged in the indictment. "A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment." Dunn v. United States, 442 U.S. 100, 105 (1979). Unlike a constructive amendment, a variance "does not broaden the possible basis for conviction beyond that contained in the indictment."

Patino, 962 F.2d at 266. Accordingly, a defendant must show that the variance resulted in "substantial prejudice" in order to obtain relief from his conviction. United States v. McDermott, 918 F.2d 319, 326 (2d Cir.1990).

St. Germain argues that several pieces of evidence at trial varied from the facts in the indictment and thus constituted prejudicial variances. Such evidence includes: (1) Schultz's testimony suggesting that her sales representative contract with Cerplex was a sham; (2) Akers's testimony that Cerplex did not employ third party sales representatives; (3) evidence that Klein and Davis were co-conspirators at Cerplex; and (4) evidence that Schultz paid some of the mortgage on Papago Place. Assuming arguendo that any of this evidence varied from the facts alleged, St. Germain has not established that such a variance was prejudicial. The challenged evidence was within the scope of the Cerplex conspiracy as alleged and, as such, was not of a character that could prejudice St. Germain. "A variance is immaterial—and hence not prejudicial—'where the allegation and proof substantially correspond, where the variance is not of a character that could have misled the defendant at the trial, and where the variance is not such as to deprive the accused of his right to be protected against another prosecution for the same offense.'" United States v. Mucciante, 21 F.3d 1228, 1236 (2d Cir.1994) (quoting United States v. Heimann, 705 F.2d 662, 669 (2d Cir.1983)). Because any possible variance identified by St. Germain was immaterial, there was no prejudicial variance between the alleged conspiracy and the proof at trial.

VI. False and Misleading Evidence and Arguments

St. Germain argues that the government presented false and misleading testimony through agent George Franischelli and made false and misleading arguments in summation in violation of St. Germain's right to due process. Having carefully considered this argument, raised by St. Germain for the first time on appeal, we find it to be without merit.

CONCLUSION

For the foregoing reasons, the judgment of conviction is affirmed.

¶2002-5175

UNITED STATES OF AMERICA, APPELLANT/DEFENDANT v. Stanley M. SPIWAK, a/k/a Stanley M. Spiwak, Trustee, APPELLEE/PLAINTIFF. In Re: Stanley M. Spiwak, a/k/a Stanley M. Spiwak, Trustee, Debtor. U.S. District Court, Southern Dist. of Florida, (DC FL) Docket No. 97-7101-CIV-MOORE, June 10, 2002. Bankruptcy Court reversed and remanded. Years 1977, 1978, 1979, 1981, 1982, 1983, 1986. Decision for Govt.

1. Review of bankruptcy court decision—dischargeability—willful attempt to evade or defeat taxes. Bankruptcy court's order denying govt.'s motion for judgment on pleadings and discharging debtor/taxpayer's tax liability was reversed and remanded for further fact findings as to whether taxpayer wilfully attempted to evade or defeat taxes: prior district court court order declaring taxpayer's trust as sham may have rested on premise that he necessarily committed fraud on govt.; but, since that order didn't rule on discharge issue, factual findings were still required. Also, bankruptcy court's finding that taxpayer couldn't pay his tax liabilities was clearly erroneous in light of evidence showing he earned income 3 years after he claimed that earnings stopped. *Reference:* United States Tax Reporter ¶68,726.527(15); 68,726.52(27).

In the United States District Court for the Southern District of Florida, Miami Division.

Order

MOORE, District Judge:

THIS CAUSE is before the Court upon Appellant's Notice of Bankruptcy Appeal (DE#1).

UPON CONSIDERATION of the Appeal, the Responses, and the pertinent por-

tions of the record, and being otherwise fully advised in the premises, the Court enters the following Order.

BACKGROUND

Appellant, The United States of America (the ''United States'' or ''Appellant'') commenced an action in the United States District Court for the Southern District of Florida against Appellee Stanley M. Spiwak (''Appellee'' or ''Spiwak'' or ''Debtor''), his wife Grethe Aarnes Spiwak, the Grethe Aarnes Trust, and Shaw Realty, Inc. entitled *United States of America v. Stanley M. Spiwak, et al.*, Case no. 93-7001-CIV-GONZALEZ. Following trial, on July 24, 1995, the District Court entered judgment against the Spiwaks in the amount of $456,344.50, for the Spiwaks' unpaid income tax liabilities for the years 1977–79, 1981–83, and 1986. The District Court also entered an Order of Foreclosure, finding that the federal tax liens against the Spiwaks applied to their home at 3100 N.E. 47th Court, #302, Fort Lauderdale, Florida (the ''condominium'') and authorizing the United States to foreclose its liens. The condominium was nominally owned by the Grethe Aarnes Trust and encumbered by a Shaw Realty mortgage held to be null and void.

On June 14, 1996, three days before the scheduled foreclosure sale of the condominium, Spiwak filed his bankruptcy petition. Spiwak commenced an adversary proceeding seeking a judgment that his income tax liabilities were dischargeable. The United States filed a motion to dismiss on the grounds that the income tax liabilities were nondischargeable under 11 U.S.C. §523(a)(1)(C). The Bankruptcy Court treated the motion to dismiss as a motion for judgment on the pleadings, and subsequently denied the motion.

On July 7, 1997, the issue of whether the income tax liabilities were dischargeable under 11 U.S.C. §523(a)(1)(C) was tried before the Bankruptcy Court. Stating its findings of fact and conclusions of law on the record, the Bankruptcy Court entered judgment in Spiwaks' favor. That same day, the Bankruptcy Court entered its Final Judgment Discharging Income Tax Liability, discharging Spiwaks' income tax liabilities for the years 1977–1979, 1981–1983, and 1986.

The United States now appeals the Final Judgment Discharging Income Tax Liability dated July 10, 1997 and the Memorandum Decision Denying Motion to Dismiss by United States of America and Denying *Ore Tenus* Motion to Render a Judgment on the Pleadings as to Count I dated March 26, 1997. The United States presents the following issues on appeal:

1. Whether the Bankruptcy Court erred in denying the United States' Motion for Judgment on the Pleadings.
2. Whether the Bankruptcy Court erred in concluding that the debtor did not have the wherewithal to pay his tax liabilities.
3. Whether the Bankruptcy Court erred in concluding that the United States had not met its burden of proving that the debtor had willfully attempted in any manner to evade or defeat his tax liabilities.

DISCUSSION

A. Standard of Review

[1] A district court reviewing a bankruptcy appeal is not authorized to make independent factual findings; that is the function of the bankruptcy court. *In re Sublett*, 895 F.2d 1381, 1383–84 (11th Cir. 1990). Factual findings made by the bankruptcy court are subject to a clearly erroneous standard. *Toledo v. Sanchez*, 170 F.3d 1340, 1344 (11th Cir. 1999). Conclusions of law are subject to *de novo* review. *In re Calvert*, 907 F.2d 1069, 1070 (11th Cir. 1990). Equitable determinations are reviewed for abuse of discretion. *In re Red Carpet Corp. of Panama City Beach*, 902 F.2d 883 (11th Cir. 1990).

B. The Bankruptcy Court's Denial of the United States' Motion for Judgment on the Pleadings

The United States asserts that it was error for the Bankruptcy Court to deny its Motion for Judgment on the Pleadings as (1) the District Court's finding that Spiwak had established a sham corporation necessarily rested on the premise that Spiwak

acted a fraud upon the government, (2) Debtor's recording of his transactions does not validate them, and (3) fraudulent intent should be presumed.

Appellee asserts that the District Court's Order subjecting the Spiwak trust property to foreclosure by the Internal Revenue Service was based on two distinct theories, both of which did not concern fraudulent transactions. First, Ms. Spiwak had a present beneficial interest in the trust and Spiwak had a future interest in the trust. Therefore, the tax liens would attach to their beneficial interest as a matter of federal law. Second, the District Court noted that the trust was a sham, and that the trust held the property at issue as a "nominee" of the Spiwaks. The District Court found that the trust was properly classified as a sham, as it granted "almost total control to the beneficiaries, the Spiwaks. The trust's only asset serves as the personal residence of the defendants Stanley and Grethe A. Spiwak . . . The taxpayers have exercised complete control over the trust's sole asset since its acquisition, even to the extent of having a controlled corporation ostensibly hold a mortgage on the property and institute a foreclosure proceeding against the property."[1]

Appellee argues that the application of the nominee doctrine does not involve an inquiry into the existence of a fraudulent conveyance or the Debtor's intentions to evade or defeat the tax at issue. Appellant asserts that had the Court not found fraud to exist, then the federal tax liens would have attached only to whatever limited interest the Spiwaks retained under the trust terms, and that the mortgage held by Shaw Realty would have held priority over the tax lien of the United States. In support of its argument, the United States refers to *Dallas Nat'l Bank v. United States*, 167 F.2d 468 [36 AFTR 954] (5th Cir. 1948). In *Dallas Nat'l Bank*, the Fifth Circuit found that a federal lien for income taxes would attach to the taxpayer's equitable interest in the corpus of the trust estate, although provisions existed preventing its sale or alienation. *Id.* at 469. Appellant avers that this case stands for the proposition that had the Spiwak transaction not been fraudulent, then the federal tax lien would only have attached to the interest the Spiwaks retained in the condominium. The Court does not find that this case clarifies the issue at hand. Rather, *Dallas Nat'l Bank* simply holds that a federal tax lien may be enforced against a taxpayer's income from trust property. The Court did not discuss how the lien would otherwise be enforced in the absence of fraud, nor did it discuss this differentiation.

Similarly, Appellant cites *United States v. McCombs*, 928 F. Supp. 261, 267–72 [77 AFTR 2d 96-2341] (W.D.N.Y. 1995) for the proposition that absent a fraudulent transaction, the mortgage held by Shaw Realty would have held priority over the tax lien asserted by the United States. The undersigned finds this case to be instructive, as the Court did not allow the government to enforce a 1984 tax lien against a property because the government did not carry its burden of demonstrating that the conveyance was fraudulent. *Id.* at 277–278.

The District Court allowed the lien against the mortgage held by Shaw Realty, and therefore necessarily found that fraud tainted the transaction. Appellee argues that fraudulent conveyance issues are separate causes of action from inquiries into the application of the nominee doctrine. Appellee's authority, the case *Libutti v. United States*, 894 F. Supp. 589, 598 [76 AFTR 2d 95-6381] (N.D.N.Y. 1995), does not hold that nominee inquiries cannot and do not involve determinations of the existence of fraud in transactions. In addition, the fact that typical nominee inquiries do not involve liability determinations of civil tax fraud or criminal tax fraud does not preclude the District Court's finding that fraud necessarily permeated the trust transaction.

The Court finds it instructive that the Disctrict Court, rather than simply stating that the trust property was held as a nominee of the Spiwaks, called the trust a "sham." Nominee inquiries generally ad-

[1] July 26, 1995 District Court Order, at 8–9.

dress the manner in which a taxpayer treats a property, while fraudulent conveyance questions concern the validity of a trust upon its creation. The District Court's identification of the trust property as a sham indicates that the Court considered the validity of the trust in conjunction with the manner in which Spiwak treated the instrument of his creation *See In re Richards*, 231 B.R. 579 [83 AFTR 2d 99-1138] (E.D. Pa. 1999).

Appellant asserts that under the doctrine of collateral estoppel, the issue of Spiwak's fraudulent transaction has been established and cannot be relitigated. Collateral estoppel is appropriate when the following three elements are present: (1) the issue at stake must be identical to the one involved in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that litigation. *In re Halpern*, 810 F.2d 1061, 1064 (11th Cir. 1987) (citing *In re Held*, 734 F.2d 628, 629 (11th Cir. 1984)).

The undersigned finds that the Bankruptcy Court, while relying on the status of the trust as a sham in its ruling, did not specifically rule on the dischargeability of the Debtor's debt. Bankruptcy Judge Raymond B. Ray stated in his Memorandum Order that the Bankruptcy Court did not find that the issue of the dischargeability of Debtor's debt had been litigated before the District Court for the purposes of application of the collateral estoppel doctrine.

The Court agrees with Appellant that the District Court's allowance of the federal tax lien to take priority over the Shaw Realty mortgage may imply a finding of fraud. However, the Bankruptcy Court is to make a factual determination as to whether evidence of a willful attempt to evade taxes exists upon an examination of the totality of the circumstances.

C. Debtor's Ability to Pay His Tax Liabilities

The Bankruptcy Court's factual determination that Debtor was unable to pay his tax liabilities is reviewable by this Court under a clearly erroneous standard. *Toledo*, 170 F.3d at 1344. Appellant states that the finding that the Debtor did not have the means to pay his liabilities is contrary to the evidence.

Appellee asserts that there is no evidence of income on behalf of Spiwak after 1983. The Honorable Francis G. Conrad, a visiting Judge of the United States Bankruptcy Court, stated at trial on July 7, 1997 that the Internal Revenue Service and the United States failed to provide any evidence concerning Debtor's ability to pay.[2] However, the Debtor's 1986 tax return reported a $40,523.75 tax liability. This is in direct conflict to the Bankruptcy Court's and Appellee's assertion that Debtor did not earn income after 1983.

The United States asserts that Debtor did have the ability to pay, as evidenced by his use of the sham trust, his participation in tax shelters, and his receipt of money from friends. Spiwak asserts that the tax shelters did not provide him with income and that he used the money given to him for personal expenses. Under the holding of *In re Haas*, 48 F.3d 1153, 1156 [75 AFTR 2d 95-1585] (11th Cir. 1995) this does not preclude a debtor's access to discharge of his liabilities.

The undersigned holds that the Bankruptcy Court's finding that Debtor did not have the wherewithal to pay his tax liabilities is clearly erroneous in light of Debtor's reported liability in 1986.

D. Dischargeability of Spiwak's Income Tax Liabilities

The United States asserts that Spiwak's income tax liabilities were not dischargeable pursuant to 11 U.S.C. §523(a)(1)(C). This section of the Bankruptcy Code provides, in relevant part:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title

[2] July 7, 1997 Trial Transcript, at 88–89.

does not discharge an individual debtor from any debt—

(1) for a tax or a customs duty ...

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

11 U.S.C. §523(a)(1)(C).

The Eleventh Circuit, in *In re Haas*, 48 F.3d 1153 [75 AFTR 2d 95-1585] (11th Cir. 1995) found that a knowing failure to discharge one's tax obligations does not qualify as a willful attempt "in any manner to evade or defeat such tax" pursuant to 11 U.S.C. §523(a)(1)(C). Therefore, a failure to pay a tax liability does not preclude the dischargeability of such debt upon a declaration of bankruptcy.

However, in *In re Griffiths*, 206 F.3d 1389 [85 AFTR 2d 2000-1249] (11th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 826 (2000), the Eleventh Circuit abrogated in part the *Haas* decision. In *Griffiths*, the Eleventh Circuit reaffirmed that the mere nonpayment of taxes, without more, does not constitute a willful attempt to evade or defeat taxes. *Id.* at 1395. However, the Eleventh Circuit held that a tax liability is nondischargeable under 11 U.S.C. §523(a)(1)(C) when a debtor engages in affirmative acts seeking to evade or defeat collections of taxes. *Id.* at 1395.

The creditor bears the burden of demonstrating, by a preponderance of the evidence, that a particular claim is nondischargeable under 11 U.S.C. §523(a)(1)(C). *Id.* at 1396 (*citing Grogan v. Garner*, 498 U.S. 279, 287–88 [70 AFTR 2d 92-5639] (1991)). There is both a conduct and mental state requirement under 11 U.S.C. §523(a)(1)(C). *Id.* at 1396 (citing *In re Birkenstock*, 87 F.3d 947, 951 [78 AFTR 2d 96-5229] (7th Cir. 1996). For the conduct requirement, the creditor must demonstrate that the debtor sought to evade or defeat his tax liability in any manner. *Id.* at 1396. For the mental state requirement, the creditor must demonstrate that the debtor acted willfully. *Id.* at 1396. A three-prong test may be used to determine whether a debtor's failure to pay taxes was willful: (1) whether the debtor had a duty under the law; (2) whether the debtor knew he had that duty; and (3) whether the debtor voluntarily and intentionally violated that duty. *Id.* at 1396 (citing *In re Bruner*, 55 F.3d 195, 197 [76 AFTR 2d 95-5024] (5th Cir. 1995)).

The determination whether the Debtor willfully attempted to evade payment of taxes is a question of fact for the Bankruptcy Judge to determine from the totality of the record. *United States v. Uria*, 180 B.R. 688, 691 [75 AFTR 2d 95-2258] (Bankr. S.D. Fla. 1995) (citing *In re Berzon*, 145 B.R. 247, 250 (Bankr. N.D.Ill. 1995)). The Bankruptcy Court's factual findings are subject to review under a clearly erroneous standard by the District Court. Legal conclusions resulting from the Bankruptcy Court's findings are subject to *de novo* review.

Appellant argues that the Bankruptcy Court erred in determining that Appellant had not met its burden of showing that the Debtor willfully attempted to evade or defeat his tax liabilities. In support of its argument Appellant states that Spiwak controlled the mortgage on his home, abandoned the foreclosure suit when he discovered that the United States did not have a lien on the condominium, failed to maintain bank accounts, accepted money as gifts from friends, and placed money into tax shelters.

Appellant states that badges of fraud existed throughout Debtor's transactions, as Debtor did not have personal bank accounts, yet paid personal expenses from the accounts of businesses he owned. *See* Exhibit KK ¶ 18. *See In re Spirito*, 198 B.R. 624, 629 [77 AFTR 2d 96-2262] (Bankr. M.D. Fla. 1996) (finding an exception to discharge where debtor converting joint bank account to a nominee account). Debtor also enabled a corporation owned by a trust funded by his father to acquire the mortgage on his condominium. Debtor also admits that he initiated a foreclosure proceeding, which he later abandoned upon the discovery that the United States did not have a lien against the property.

Court have relied on well-defined badges of fraud in order to presume fraudulent intent to transfer, as direct proof of fraudulent intent is rarely present. *In re Landen*, [79 AFTR 2d 97-2613] 1997 WL 416437, 5–6 (Bankr. M.D. Fla. 1997). The Eleventh Circuit has indentified certain types of conduct as badges of fraud which will serve as circumstantial evidence of the existence of willful intent to evade taxes. These types of conduct include: (1) the recurrence of the understatement of income for more than one tax year, (2) the understatement of income, (3) implausible or inconsistent explanations of behavior, (4) inadequate records, (5) transfer of assets to a family member, (6) transfer for inadequate consideration, (7) transfer that greatly reduced assets subject to IRS execution, and (8) transfers made in the face of serious financial difficulties. *Id.* No one factor is determinative; the analysis proceeds on the totality of the circumstances. *In re Greene*, 207 B.R. 21, 24–25 [79 AFTR 2d 97-1657] (Bankr. M.D. Fla. 1997).

The existence of several badges of fraud will justify a finding of fraud, but the inference established is a rebuttable one. *Advest, Inc. v. Rader*, 743 F. Supp. 851, 854 (S.D. Fla. 1990). While badges of fraud appeal to have existed in Debtor's case, the Bankruptcy Court accordingly found that under the totality of the circumstances, there was no affirmative act by Debtor to evade his tax obligations. The Bankruptcy Judge stated on the record that (1) there was no evidence to show that the trust established provided a source of income, (2) the condominium appeared to be registered under the trust so that the Debtor's child could cohabitate with Debtor, (3) Debtor tried to settle his obligations with the United States, and (4) Debtor did not conceal any of his transactions.

As Appellant has provided information demonstrating that Debtor reported tax liability in 1986, three years after he allegedly ceased earning an income, the Court REVERSES and REMANDS the Bankruptcy Court's finding that Debtor did not willfully evade his tax obligations.

The Bankruptcy Court is instructed to examine Debtor's 1986 tax liability in light of the existing facts of the above-styled matter, and to make a determination, based on the totality of the circumstances, as to the existence of a willful evasion on behalf of Debtor.

CONCLUSION

Based on the foregoing, it is hereby ORDERED and ADJUDGED as follows:

(1) The Bankruptcy Court's Final Judgment Discharging Income Tax Liability dated July 1997 is REVERSED and REMANDED.

(2) The Bankruptcy Court's Memorandum Decision Denying Motion to Dismiss by United States of America and Denying *Ore Tenus* Motion to Render a Judgment on the Pleadings as to Court I dated March 26, 1997 is REVERSED and REMANDED.

The Clerk of the Court is directed to mark this case as CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of June, 2002.

K. MICHAEL MOORE

UNITED STATES DISTRICT JUDGE

copies provided:

Paul G. Gill, Esq.

Susan D. Lasky, Esq.

¶2002-5176

David Henry LAWRENCE, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. In Re: David Henry Lawrence, Debtor. U.S. Bankruptcy Court, Southern Dist. of New York, (Bktcy Ct NY) Docket No. 99-11364 (AJG); 00 B 02189 (AJG), Jan. 30, 2001. Years 1990, 1991, 1992. Decision for Govt.

1. Tax claims in bankruptcy—dischargeability—dismissal of adversary proceeding. Pursuant to stipulation, debtor's tax liabilities were nondischargeable under 11 USC §523(a)(1)(C), and adversary proceeding was dismissed without

prejudice. *Reference:* United States Tax Reporter ¶68,726.52(27); 68,726.52(40).

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Mary Jo White United States Attorney for the Southern District of New York By: ROBERT W. SADOWSKI (RS-4473) Assistant United States Attorney 100 Church Street — 19thFloor New York, NY 10007 Tel. No.: (212) 637-2715 Fax No.: (212) 637-2825

United States Bankruptcy Court, Southern District of New York.

Stipulation and Order of Dismissal

GONZALEZ, Bankruptcy Judge:

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the parties as follows:

[1] 1. Plaintiff's federal income tax liabilities for the taxable years 1990, 1991 and 1992 are nondischargeable pursuant to 11 U.S.C. § 523(a)(1)(C);

2. Plaintiff reserves any and all rights he may have to contest the amount of debtor's federal income tax liabilities for the taxable years 1990, 1991, and 1992, and the Government reserves any and all rights it may have with respect to the debtor's federal income tax liabilities for the taxable years 1990, 1991, and 1992; and

3. This adversary proceeding is hereby dismissed with prejudice and without costs or fees.

Dated: New York, New York

January 29, 2001

MARY JO WHITE

United States Attorney for the Southern District of New York

Attorney for the United States of America

By: s/Robert W. Sadowski

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Dated: New York, New York

January 29, 2001

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David Henry Lawrence

By: s/Leo Fox

LEO FOX (LF-1947)

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New York, New York 10017

Tel. No.: (212) 867-9595

David Henry Lawrence

Debtor

s/ David Henry Lawrence

David Henry Lawrence

SO ORDERED:

s/Arthur J. Gonzalez 1/30/2001

United States Bankruptcy Judge

¶2002-5177

Charles BEATTY and Peggy BEATTY, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. In Re: Charles BEATTY and Peggy BEATTY, Debtors. U.S. Bankruptcy Court, Southern Dist. of Indiana, (Bktcy Ct IN) Docket No. 95-07372-FJO-7, July 9, 2002. On remand from (2002, DC IN) 89 AFTR 2d 2002-5493. Earlier proceeding at (2002, DC IN) 89 AFTR 2d 2002-1619. Decision for Taxpayers and for Govt.

1. Tax claims in bankruptcy—dismissal of adversary proceeding. Pursuant to agreed order, Chap 7 debtors' adversary proceeding was dismissed with prejudice. *Reference:* United States Tax Reporter ¶68,726.52(40).

United States Bankruptcy Court, Southern District of Indiana.

Agreed Order of Dismissal

OTTE, Bankruptcy Judge:

Bankr. No. 95-07372-FJO-7 (Adv. Pro. No. 01-069)

[1] The parties to this adversary proceeding, the plaintiffs, Charles Beatty and Peggy S. Beatty, in their own persons, the defendant, the United States of America, by its undersigned counsel, Douglas W. Snoeyenbos, and the Chapter 7 Trustee, Rex M. Joseph, Jr., agree that this adversary proceeding should be dismissed with prejudice, with the parties to bear their own costs, including attorney's fees.

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Telephone: (317) 859-0000

IT IS SO ORDERED.

Done at Indianapolis, Indiana, this 9 day of July, 2002.

HON. FRANK J. OTTE

U.S. Bankruptcy Judge

Southern District of Indiana

¶2002-5178

Beatrice Ellen Jones DUNN, Deceased, ESTATE OF, Jesse L. Dunn III, Independent Executor, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Fifth Circuit, (CA5) Docket No. 00-60614, Aug. 1, 2002. Tax Court, (2000) TC Memo 2000-12, RIA TC Memo ¶2000-12, 79 CCH TCM 1337 [TC Memo 2000-12] (opinion by Gale, *J.*), reversed and re-manded. Date of death 6-8-91. Decision for Taxpayer.

1. Estate taxes—valuation of stock—basis of valuation of stock of close corporations. Tax Court's "dual approach" valuation of decedent's stock in family-owned equipment corp. was reversed and remanded: Court should have applied full 34% reduction for built-in gains tax liability when calculating asset-based value factor, rather than mere 5% for potential tax costs, since hypothetical willing buyer would clearly demand full reduction when buying operational-control majority block of stock for purposes of getting corp.'s assets. And, Court should have factored no-liquidation assumption only into its relative weighting determination; and should have used 85:15/earnings-based to asset-based weighting ratio, rather than its illogical and unsupported 35:65 weighting ratio, considering corp.'s zero dividend-paying capacity and fact that it was going concern that would be purchased for continued operation, not liquidation or other asset disposition. Also, IRS's appeals arguments were rejected where they were abrupt change and completely inconsistent with its trial position, which in itself was extreme and wholly unsupportable and opened IRS up to potential IRC §7430 costs. *Reference:* USTR Estate & Gift Taxes ¶20,315.03; 20,315.12(5). IRC §2031; 7430.

Appeal from the Decision of the United States Tax Court. In the United States Court of Appeals for the Fifth Circuit.

Before SMITH, DUHE, and WIENER, Circuit Judges.

WIENER, Circuit Judge:

The sole issue presented by this appeal from the United States Tax Court (the "Tax Court") is the fair market value of a block of common stock in Dunn Equipment, Inc. ("Dunn Equipment" or the

"Corporation") owned by the late Beatrice Ellen Jones Dunn (the "Decedent") on the date of her death (the "valuation date") for purposes of calculating the estate tax owed by Petitioner-Appellant Estate of Beatrice Ellen Jones Dunn, Deceased (the "Estate"). The Tax Court valued the Decedent's shares higher than had the Estate on the Form 706 (the "estate tax return" or the "return") filed by Jesse L. Dunn III, the Decedent's Independent Executor (the "Executor") but lower than had Respondent-Appellee Commissioner of Internal Revenue (the "Commissioner"). We conclude that the Tax Court erred as a matter of law in the valuation methodology that it selected and applied to facts that are now largely uncontested by virtue of stipulations, concessions, and non-erroneous findings of that court. This legal error produced an incorrect valuation and thus an erroneous final Tax Court judgment as to the Estate's tax deficiency, requiring remand to that court. We hold that the correct methodology for determining the value of Dunn Equipment as of the valuation date requires application of an 85:15 ratio, assigning a weight of 85% to the value of the Corporation that the Tax Court determined to be $1,321,740[1] when using its "earnings-based approach" and a weight of 15% to the value that the court determines on remand using its "asset-based approach" but only after recomputing the Corporation's value under this latter approach by reducing the market value of the assets[2] by 34% of their built-in taxable gain — not by the 5% as previously applied by that court — of the built-in gain (excess of net sales value before taxes over book value) of the assets, to account for the inherent gains tax liability of the assets. We therefore remand this case to the Tax Court for it to (1) redetermine the asset-based value using a 34% reduction for built-in tax liability; (2) recalculate the fair market value of the Corporation based on that 85:15 weighting ratio; (3) calculate the value of the Estate's ratable portion of the total value of the Corporation as thus redetermined; (4) discount the value of that ratable portion by 22.5% for lack of market and lack of super-majority; (5) based on that result, redetermine the estate tax liability of the Estate as well as any resulting overpayment of such taxes by the Estate; and (6) render a final judgment consistent with this opinion and our judgment.

I. Facts and Proceedings

A. Proceedings

In November, 1994, approximately three and one-half years after the Decedent's death and two and one-half years after her estate tax return was filed, the Commissioner issued a notice of deficiency, assessing additional estate taxes of $238,515.05. This litigation ensued. In an amended answer filed in the Tax Court, the Commissioner increased the asserted estate tax deficiency to approximately $1,100,000. This deficiency was predicated on the Commissioner's contention that the Decedent's 492,610 shares of common stock in Dunn Equipment, a closely-held, family-operated corporation, was undervalued in the estate tax return. The Commissioner argued that such stock should be valued solely on the basis of the fair market value of its assets, discounted only for lack of a market and lack of a super-majority, and with no reduction for built-in tax liability of those assets and no consideration whatsoever of an earnings or cash flow-based approach to valuation.

In June, 1996, trial was held in the Tax Court to determine the fair market value of Decedent's block of stock in Dunn Equipment. Approximately three and one-half years after trial, the Tax Court issued its Memorandum Findings of Fact and Opinion ("the Tax Court opinion"). The court concluded that the subject block of stock, which constituted 62.96% of the issued and the outstanding shares of Dunn Equipment's capital stock, was worth $2,738,558 on the valuation date. After the Tax Court entered its final judgment some six months later, the Estate timely filed a notice of appeal.

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[1] If need be, this figure can be fine tuned on remand to reconcile the slight discrepancy between the Tax Court's figure and that of the Estate.

[2] $8,278,342 according to the Tax Court; $8,268,345 according to the Commissioner's appellate brief.

B. Facts

Based in principal part on stipulations, uncontested evidence,[3] and concessions, the Tax Court found the following facts. Decedent, a longtime resident of Texas, died there on June 8, 1991 at the age of 81. The Executor, Decedent's son, is also a Texas resident, and the Estate was administered there.

Dunn Equipment was incorporated in Texas in 1949. It had been family owned and operated throughout its entire existence. The Corporation actively operated its business from four locations in Texas and, on the valuation date, employed 134 persons, three of whom were executives and eight of whom were salesmen.

Dunn Equipment owned and rented out heavy equipment, and provided related services, primarily in the petroleum refinery and petrochemical industries. The personal property rented from the Corporation by its customers consisted principally of large cranes, air compressors, backhoes, manlifts, and sanders and grinders. The Corporation frequently furnished operators for the equipment that it rented to its customers, charging for both equipment and operators on an hourly basis. For example, the Corporation's revenues resulted in significant part from the renting of large cranes, with and without operators. For the four fiscal years preceding the valuation date, equipment rented with operators furnished by the Corporation produced between 26.3% and 32.7% of the Corporation's revenues. On the valuation date, Dunn Equipment's assets comprised the aforedescribed heavy equipment, plus industrial real estate valued at $1,442,580 and a townhouse valued at $35,000, prepaid expenses of $52,643, and prepaid interest of $671,260.

In addition to the shares owned by the Decedent, shares in Dunn Equipment constituting 31.12% of the issued and outstanding common stock were owned individually by Jesse L. Dunn III (the Decedent's son and executor), who also held title to an additional 2.61% as a trus-tee. Shares representing the remaining 3.31% of the Corporation's issued and out-standing stock were owned in combination by other family members and employees of the Corporation.

The Corporation's Board of Directors consisted of the Decedent; her son and executor, Jesse; and her grandson, Peter Dunn (Jesse's son). Jesse was President, Peter was Vice President, and the Decedent was Secretary-Treasurer. The Tax Court found that compensation paid to the officers of Dunn Equipment was lower than that paid to officers of similarly situated companies.

Over the course of its 42 years of operation preceding the valuation date, Dunn Equipment had emerged as the largest heavy equipment rental business in its part of Texas, holding a substantial share of that market. By virtue of its market dominance and reputation for dependable service, the Corporation was historically able to command rates above the market average. From 1987 through the valuation date, a decline in the worldwide price of feed stock for the oil refining and petrochemical industries created a favorable business climate for the Corporation's principal customers, and Dunn Equipment's gross revenues increased during that period. During the same period, however, the heavy equipment rental market became increasingly competitive, as equipment such as cranes became more readily available and additional rental companies entered the field. This in turn caused hourly rental rates to decline and flatten. In fact, increased competition prevented Dunn Equipment from raising its rental rates at any time during the period of more than ten years preceding the valuation date. These rates remained essentially flat for that 10-year period. The same competitive factors forced the Corporation to replace its equipment with increasing frequency, reaching an average new equipment expen-

[3] We do not refer here to the testimony and documents submitted by the opposing parties' dueling experts as being uncontested. The Commissioner contested the methodology of the Estate's expert appraisers, and the Estate took issue with the assertions of the Commissioner's accounting (not appraisal) expert; but the Tax Court was not required to credit such testimony and in fact disregarded or disagreed with much of it from both camps. Like the Tax Court, we are not bound to rely on expert testimony proffered by the Estate or the Commissioner.

diture of $2 million per annum in the years immediately preceding the valuation date.

In addition to the increased annual cost and frequency of replacing equipment during the years of flat rental rates that preceded the Decedent's death, the Corporation's operating expenses increased significantly, beginning in 1988, and con-tinued to do so thereafter: The ratios of di-rect operating expenses to revenue esca-lated from 42% in 1988 to 52% in the 12-month period that ended a week before the Decedent's death. The effect of the in-crease in direct operating expenses on the Corporation's cash flow and profitability was exacerbated by a practice that Dunn Equipment was forced to implement in 1988: meeting its customers' demands by leasing equipment from third parties and renting it out to the Corporation's custom-ers whenever all of its own equipment was rented out to other customers. Although this practice, which continued through the valuation date, helped Dunn Equipment keep its customers happy and retain its customer base, the Corporation was only able to break even on these re-rentals, fur-ther depressing its profit margin.

Based on the foregoing factors, the Tax Court concluded that the Corporation had no capacity to pay dividends during the five years preceding the death of the Decedent. In fact, it had paid none.

As of the valuation date, no public market in the stock of Dunn Equipment existed, and no recent private transactions in its stock had occurred. There was no current or pending litigation that could have had a material effect on the value of the stock, but large annual capital expenditures for equipment replacement coupled with shrinking profit margins resulting from the combination of increased operating expenses and flat or reduced rental rates, essentially eliminated net cash flow available for debt reduction or dividend payment. On the valuation date, the Corporation had outstanding debt of $7,343,161, producing a debt-to-equity ratio in excess of 6.5 to 1. The Corporation's average net annual cash flow for the 4-year period ending with the valuation date was only $286,421. Given the Tax Court's finding regarding the underpayment of compensation to its officers, the Corporation's cash flow — and thus its income-based valuation — is actually overstated.

On the basis of these extensive factual findings and reasonable inferences from them, the Tax Court concluded that, as of the valuation date, Dunn Equipment was "a viable operating company . . . and earned a significant part of its revenues from selling services as well as renting equipment"; that between one-fourth and one-third of the Corporation's gross operating revenue was produced by charges for labor, parts, and equipment rentals with operators supplied; and that there were "significant active operational aspects to the company as of the valuation date."[4]

The Tax Court also found that, even though the Decedent's 62.96% of stock ownership in the Corporation gave her operational control, under Texas law she lacked the power to compel a liquidation, a sale of all or substantially all of its assets, or a merger or consolidation, for each of which a "super-majority" equal to or greater than 66.67% of the outstanding shares is required.[5] The Court further concluded that, in addition to lacking a super-majority herself, the Decedent would not have been likely to garner the votes of additional shareholders sufficient to constitute the super-majority required to instigate liquidation or sale of all assets because the other shareholders were determined to continue the Corporation's independent existence and its operations indefinitely. The court based these findings on evidence of the Corporation's history, community ties, and relationship with its 134 employees, whose livelihoods depended on Dunn Equipment's continuing as an operating business.[6]

We perceive no clear error in any of the foregoing findings or in the inferences and

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[4] Dunn v. Comm'r, 79 T.C.M. (CCH) 1337, 1339 [TC Memo 2000-12] (2000).

[5] Id. at 1340 (citing Tex. Bus. Corp. Act Ann. art 6.03 (West 1991)).

[6] Although not mentioned by the court, we speculate that the specter of incurring a 34% tax on the multimillion dollar amount by which the selling price of the assets in liquidation would have exceeded the Corporation's basis for tax purposes was also a deterrent to liquidation.

conclusions that the Tax Court derived from them.

The Tax Court found further that, for Dunn Equipment, the process of liquidation would be expensive and time-consuming, involving sales costs, transportation costs, reduced equipment sales prices because of the increased short-term supply of such equipment that would result from a liquidation's flooding of the market, and the risk of loss of customers during the course of a lengthy liquidating process if that were to be attempted. These findings too are free of clear error. (Again, the Court did not list among Dunn Equipment's costs of liquidation, however, the adverse tax results that would be incurred, particularly the 34% federal income tax on gains to be realized by the Corporation on the sale of its equipment, whether ultimately deemed ordinary income or capital gains.[7])

Having painted this clear and detailed valuation-date portrait of Dunn Equipment, the Tax Court proceeded to confect its valuation methodology. The court selected two different approaches to value, one being an income-based approach driven by net cash flow[8] and the other being an asset-based approach driven by the net fair market value of the Corporation's assets.[9] The court calculated the Corporation's "earnings-based value" at $1,321,740 and its net "asset-based value" at $7,922,892, as of the valuation date. The latter value was calculated using a 5% factor for built-in gains tax liability, not the actual rate of 34% that the Corporation would have incurred on sale to a willing buyer.

As the next step in its methodology, the Tax Court assigned dissimilar weights to the two valuations, expressly rejecting (1) the Estate's expert's method, which assigned equal weight to each, and (2) the Commissioner's contention that no weight whatsoever should be given to earnings or cash flow and that the Corporation be valued entirely on asset value undiminished by any built-in tax liability. Despite having concluded that "the hypothetical investor would give earnings value substantial weight" and acknowledging "that, as a general rule, earnings are a better criterion of value for operating companies [which Dunn Equipment is] and net assets a better criterion of value for holding or investment companies [which Dunn Equipment is not],"[10] the Tax Court confected the weighting factor of its valuation method by assigning a weight of 35% to earnings-based value and 65% to asset-based value (which the court calculated by, inter alia, reducing the value of assets by 5% for built-in gains tax liability).[11] After applying its weighted average to the results of its two valuation approaches to reach the fair market value of the entire Corporation, the Tax Court calculated the Decedent's percentage of ownership (62.96%) to ascertain the pro rata value of her block of stock. The final step in the Tax Court's methodology involved the determination and application of discounts. In the discount step, the court concluded that the gross pro rata value of Decedent's block of stock should be reduced 15% for lack of marketability and 7.5% for lack of supermajority control, producing a total discount of 22.5%. This is not contested on appeal.

The Executor had returned the Decedent's block of stock at $1,635,465. The Estate's expert appraiser's 50:50 weighting approach produced a minimally lower value of $1,582,185. The Commissioner originally contended that the value was $2,229,043 but ultimately claimed the

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7 The taxable gain on any sale of used heavy equipment presumably would result from reduction in basis produced by substantial depreciation deductions previously taken, not from appreciation in value of these assets, as age, use, and obsolescence generally produce sales prices for such used equipment substantially below its original cost.

8 The Estate's expert proffered the use of a capitalization-of-earnings rather than a capitalization-of-net-cash-flow approach to an earnings-based valuation, but the results of these two methods produced similar results, and the Estate does not press the issue on appeal.

9 We note in passing that the court did not include dividend-paying capacity as a factor despite its customary inclusion in multifaceted valuation methodology for closely held corporations. See, e.g., Rev. Rul. 59–60, 1959-1 C.B. 237, § 4.01(e) (1959). Although factoring in a "zero" dividend-paying capacity would have further reduced the value of Dunn Equipment, the Estate has not complained to us of that omission so we do not examine it as a possible error in the valuation methodology employed by the Tax Court.

10 Dunn, 79 T.C.M. (CCH) at 1340.

11 For over 40 years, Rev. Rul. 59–60 has counseled against assigning finite percentages to relative weights of the various valuation methods employed by appraisers of stock in closely held businesses; yet that admonition is largely honored in its breach — as exemplified by both the Tax Court and the Estate's appraiser in this case.

value to be $4,430,238. And the Tax Court found the value to be $2,738,558.

On appeal, the Estate has stipulated that it is not contesting the Tax Court's determination of the value of Dunn Equipment "under the earnings based approach, or [the Tax Court's] application of a 15% discount for lack of marketability and a 7.5% discount for lack of super-majority control" to the Decedent's pro rata ownership of the issued and outstanding stock of the Corporation.[12] This reduces our chore to one of reviewing only the aspects of the Tax Court's methodology that the Estate does continue to challenge, i.e., the method employed to determine (1) the appropriate discount to apply to the value of the Corporation's assets to account for built-in tax liability in determining its asset-based value and (2) the relative weights to assign to the two disparate values, income-based and asset-based.

II. Analysis

A. Standard of Review

We review opinions and judgments of the Tax Court under the same standards that we apply when reviewing those of other trial courts: Factual determinations are reviewed for clear error, and conclusions of law are reviewed de novo.[13] We have held that determination of fair market value is a mixed question of fact and law for which "the factual premises [are] subject to review on a clearly erroneous standard, and the legal conclusion[s are] subject to de novo review."[14] The mathematical computation of fair market value is an issue of fact, but determination of the appropriate valuation method is an issue of law that we review de novo.[15]

B. Burden of Proof

On the estate tax return, the Decedent's block of stock in Dunn Equipment was valued at $1,635,465. The Commissioner's deficiency notice stated a value of $2,229,043. Subsequently, the Commissioner's amended answer upped the value to $4,430,238, roughly doubling the deficiency notice value and increasing the asserted estate tax deficiency by $861,485 for a total of $1,100,000. The Tax Court correctly observed that the Estate has the burden of refuting the value asserted in the Commissioner's original notice of deficiency, but that the Commissioner has the burden of proving any value in excess of that initial amount.[16]

C. The Commissioner's Disparate Positions: Trial Vis-à-Vis Appeal

1. **[1]** Position On Appeal As appellee, the Commissioner supports the Tax Court's treatment of each aspect of the case and asks us to affirm the court's judgment. Specifically, the Commissioner urges us to accept, inter alia, the Tax Court's dual approach to value; the court's treatment of built-in tax liability; the relative weights assigned by the court to the results of each approach; and the court's discounts for lack of market and lack of supermajority control.

2. Pre-Trial and Trial Position The Commissioner's posture on appeal is a stark departure from his pre-trial and trial position: amending his answer to quadruple the Estate's tax deficiency as originally assessed, urging the Tax Court to disregard totally the built-in tax liability of the Corporation's assets, insisting that the Corporation be valued solely on asset values, and urging that no consideration whatsoever be given the earnings or cash-flow based approach to valuation. Indeed, at trial, the Commissioner did not favor the Tax Court with testimony of an expert appraiser, even though the Commissioner had affirmatively proposed his own, geometrically higher value for the Decedent's block of stock — values that started out higher than the ones reported on the estate tax return and that were then multiplied, by virtue of the

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12 Neither has the Estate contested the Tax Court's finding of the market value of the Corporation's assets, before discount for built-in tax liability, of $8,278,342.

13 See, e.g., McIngvale v. Comm'r, 936 F.2d 833, 836 [68 AFTR 2d 91-5267] (5th Cir. 1991).

14 In re T-H New Orleans, Ltd. P'ship, 116 F.3d 790, 799 (5th Cir. 1997).

15 Estate of Palmer v. Comm'r, 839 F.2d 420, 423 [61 AFTR 2d 88-607] (8th Cir. 1988)(citing Powers v. Comm'r, 312 U.S. 259, 260 [25 AFTR 1168] (1941))("The ultimate determination of fair market value is a finding of fact . . . . The question of what criteria should be used to determine value is a question of law subject to de novo review.").

16 See Dunn, 79 T.C.M. (CCH) at 1338.

Commissioner's amended answer, to almost four times the Estate's figures. Yet, instead of supporting his own higher values (for which he had the burden of proof) by proffering professional expert valuation testimony during the trial, the Commissioner merely engaged in guerilla warfare, presenting only an accounting expert to snipe at the methodology of the Estate's valuation expert. The use of such trial tactics might be legitimate when merely contesting values proposed by the party opposite, but they can never suffice as support for a higher value affirmatively asserted by the party employing such a trial strategy. This is particularly true when, as here, that party is the Commissioner, who has the burden of proving the expanded value asserted in his amended answer.

Using such tactics remains the prerogative of the Commissioner and his trial counsel, at least up to a point. But when his choice of tactics is viewed in the framework of the substantive valuation methodology urged by the Commissioner in the Tax Court, his posture at trial is seen to be so extreme and so far removed from reality as to be totally lacking in probative value.

To keep this in perspective, it must be remembered that this case had been under the scrutiny of the Commissioner for many years before trial, during which time he had to have learned essentially all of the discrete attributes of Dunn Equipment that were eventually stipulated by the parties or found by the Tax Court: its operating history, its sources of income, the nature of its assets and their use in its operations, the status of the industry, and so on ad infinitum. Thus, as of the commencement of trial, the Commissioner must be held to the knowledge that Dunn Equipment was and had always been, as the Tax Court concluded, "a viable operating company" which "earned a significant part of its revenues from selling services as well as renting equipment" and that there were "significant active operational aspects to the company as of the valuation date."[17] When the nature of the Corporation's assets — primarily heavy equipment held not for investment or production of passive income, like interest and dividends, but for active hourly rental (frequently with operators furnished by the Corporation), in the heavy construction and maintenance of chemical plants and petroleum refineries, rapidly depreciating with use and requiring constant maintenance, repair, and replacement — are viewed in pari materia with the myriad specific attributes of the Corporation, the untenability of the Commissioner's trial position in the Tax Court is plain.

Consequently, the Commissioner's insistence at trial that the value of the subject stock in Dunn Equipment be determined exclusively on the basis of the market value of its assets, undiminished by their inherent tax liability — coupled with his failure to adduce affirmative testimony of a valuation expert — was so incongruous as to call his motivation into question. It can only be seen as one aimed at achieving maximum revenue at any cost, here seeking to gain leverage against the taxpayer in the hope of garnering a split-the-difference settlement — or, failing that, then a compromise judgment — somewhere between the value returned by the taxpayer (which, by virtue of the Commissioner's eleventh-hour deficiency notice, could not effectively be revised downward) and the unsupportedly excessive value eventually proposed by the Commissioner. And, that is precisely the result that the Commissioner obtained in the Tax Court.

Any remaining doubt that the Commissioner's pretrial and trial tactics in this case could conceivably evidence a bona fide disagreement over the value of Dunn Equipment is dispelled by the element of timing. In an estate tax situation, the statute of limitations for assessment and collection by the IRS is generally three years, as specified in Internal Revenue Code ("I.R.C.") § 6501. When the IRS presents a deficiency notice in close proximity to the expiration of I.R.C. § 6501's 3-year time bar, it creates a tactical advantage for

[17] Dunn, 79 T.C.M. (CCH) at 1339.

itself: Once the statute of limitation expires, the taxpayer can no longer claim a refund even if he then concludes that he was too conservative in his original valuation. This is so because the ability of the taxpayer to claim a refund is controlled by I.R.C. § 6511, which provides that the taxpayer has until the later of three years from the time the return was filed or two years from the time the tax was paid to assert such a claim. The tax due is normally paid with the tax return, by or before the due date. As a result, the only amount that the taxpayer could recover would be for taxes paid in response to the deficiency notice. Consequently, by holding off the filing of a notice of deficiency until more than two years following payment of tax or three years following the filing of the return, the IRS is able to manufacture an advantage with no downside risk: The taxpayer is precluded from claiming a refund except for any taxes paid with the deficiency notice, and the Commissioner is able to assert an excessive value and then use it for leverage in negotiations or at trial.

The Commissioner's abrupt change of position on appeal is so inconsistent and unreconcilable with his pretrial and trial positions that all of his urgings to us are rendered highly suspect. We keep this duplicity in mind as we proceed to examine the Tax Court's valuation methodology.

D. Determination of Fair Market Value

The definition of fair market value is as universally recognized as its determination is elusive: Fair market value is "'the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.'"[18] As a broad generality, appraising corporations or blocks of corporate stock involves consideration of three approaches: income, market, and assets-based.[19] When, as here, the corporation being appraised is closely held, is not regularly traded on an exchange, has not been traded at arm's length in close proximity of the valuation date, and is not comparable to other corporations engaged in the same or similar businesses of which there is evidence of recent sales of stock, the market approach is inapposite, leaving only the income and assets-based approaches as candidates for analysis. Thus, in cases like this, such features as net worth, prospective earning power and dividend-paying capacity, good will, position in the industry, management, economic outlook of the industry, and the degree of control represented by the block of stock in question must be looked to in the appraisal process.[20]

As is apparent from the essentially uncontested operative facts and inferences of this case, most of the heavy lifting required to reach the ultimate conclusion of fair market value of Decedent's block of stock had been accomplished by the time the question reached us. In addition, most of the penultimate conclusions regarding valuation methodology are conceded or uncontested on appeal: the pre-discount value of the Corporation under the earnings-based approach ($1,321,740); its debts ($7,343,161); the market value of its assets before adjustment for built-in tax liability ($8,278,342); the discount for lack of marketability (15%); and the discount for lack of super-majority control (7.5%). That is why only two contested questions remain, both of which implicate valuation methodology: Did the Tax Court err as a matter of law in the methodology that it chose for (1) dealing with the assets' built-in tax liability when determining the Corporation's asset-based value, and (2) assigning relative weights to the asset-based and earnings-based values? The parties to this appeal agree with the Tax Court's starting point that "[t]he dispute in the instant case concerns the proper method for valuing an interest in a company in which asset-based value and earnings-based value are widely divergent."[21] We therefore begin by ex-

18 United States v. Cartwright, 411 U.S. 546, 551 [31 AFTR 2d 73-1461] (1973)(quoting Treas. Reg. § 20.2031-1(b)).

19 See Shannon P. Pratt et al., Valuing a Business: The Analysis and Appraisal of Closely Held Companies 45 (4th ed. 2000) [hereinafter Valuing a Business].

20 See Treas. Reg. § 20.2031-2(f); see also Rev. Rul. 59-60, 1959-1 C.B. 237, § 4.01.

21 Dunn, 79 T.C.M. (CCH) at 1338 (emphasis added).

amining de novo the method employed by the Tax Court for dealing with the built-in tax liability of assets in connection with the asset-based approach to value. We then review de novo the method employed by the court in determining the relative weights to be given to Dunn Equipment's ''widely divergent'' asset-based and earnings-based values.

• Adjustment for Built-In Tax Liability of Assets

None can dispute that if Dunn Equipment had sold all of its heavy equipment, industrial real estate, and townhouse on the valuation date, the Corporation would have incurred a 34% federal tax on the gain realized, regardless of whether that gain were labeled as capital gain or ordinary income.[22] The question, then, is not the rate of the built-in tax liability of the assets or the dollar amount of the inherent gain, but the method to employ in accounting for that inherent tax liability when valuing the Corporation's assets (not to be confused with the ultimate task of valuing its stock).

The Estate's expert took the position that, when determining the asset-based value to be used in calculating the fair market value of the Corporation, its assets must be treated as though they had in fact been sold, in which event the Corporation would have incurred federal income tax equal to 34% of the gain realized on the sale. This in turn would have instantly reduced the Corporation's fair market value, dollar for dollar, for taxes payable. But, if the willing buyer were to purchase the Decedent's block of stock with the assets still owned by the Corporation, then regardless of whether thereafter that buyer could and would cause all or essentially all of the Corporation's assets to be sold, either in the ordinary course of business or globally in liquidation, the value to the Corporation of its assets qua assets would still be the amount that the Corporation could realize on disposition of those assets, net of all costs (including gains tax). The Estate contends that, like advertising and transportation costs, commissions, and other unavoidable expenses of disposition of these assets accepted by the Tax Court, the assets' gross value must be reduced by their built-in gains tax liability to reach their net fair market value for purposes of calculating the asset-based value of the Corporation.

In diametric opposition, the Commissioner argued to the Tax Court that no reduction for built-in tax liability should be allowed. He grounded this contention solely on the assertion that liquidation was not imminent or even likely.

Although the Tax Court accepted the 34% rate and acknowledged that the value of the Corporation had to be reduced by some factor to account for inherent tax liability of its assets, the court followed the Commissioner's ''no imminent liquidation'' red herring and concluded that only if the hypothetical willing buyer of the Decedent's block of stock intended to liquidate the Corporation in the short term — which the holder of that block of stock, acting alone, could not force — would that buyer seek a substantial reduction for built-in capital gain. The Tax Court then proceeded to discuss such a postulational buyer's alternatives to liquidation and to calculate the present value (actually, negative value) of future tax liability. The court concluded that the asset-based value of Dunn Equipment should be reduced by only 5% for potential tax costs, not by the full 34% gains tax that the Corporation would have to pay when and if its assets were sold, whether in globo or seriatim.

The Tax Court's fundamental error in this regard is reflected in its statement that — for purposes of an asset-based analysis of corporate value — a fully-informed willing buyer of corporate shares (as distinguished from the Corporation's assemblage of assets) constituting an operational-control majority would not seek a substantial price reduction for built-in tax liability, absent that buyer's intention to liquidate. This is simply wrong: It is inconceivable that, since the abolition of the General Utilities doctrine and the attendant repeal

[22] Id. at 1344, n.9 (referring in its analysis to I.R.C. §§ 1245, 11, and 1201).

of relevant I.R.C. sections, such as § 333 and § 337, any reasonably informed, fully taxable buyer (1) of an operational-control majority block of stock in a corporation (2) for the purpose of acquiring its assets, has not insisted that all (or essentially all) of the latent tax liability of assets held in corporate solution be reflected in the purchase price of such stock.

We are satisfied that the hypothetical willing buyer of the Decedent's block of Dunn Equipment stock would demand a reduction in price for the built-in gains tax liability of the Corporation's assets at essentially 100 cents on the dollar, regardless of his subjective desires or intentions regarding use or disposition of the assets. Here, that reduction would be 34%. This is true ''in spades'' when, for purposes of computing the asset-based value of the Corporation, we assume (as we must) that the willing buyer is purchasing the stock to get the assets,[23] whether in or out of corporate solution. We hold as a matter of law that the built-in gains tax liability of this particular business's assets must be considered as a dollar-for-dollar reduction when calculating the asset-based value of the Corporation, just as, conversely, built-in gains tax liability would have no place in the calculation of the Corporation's earnings-based value.[24]

The Tax Court made a more significant mistake in the way it factored the ''likelihood of liquidation'' into its methodology, a quintessential mixing of apples and oranges: considering the likelihood of a liquidation sale of assets when calculating the asset-based value of the Corporation. Under the factual totality of this case, the hypothetical assumption that the assets will be sold is a foregone conclusion — a given — for purposes of the asset-based test.[25] The process of determining the value of the assets for this facet of the asset-based valuation methodology must start with the basic assumption that all assets will be sold, either by Dunn Equipment to the willing buyer or by the willing buyer of the Decedent's block of stock after he acquires her stock. By definition, the asset-based value of a corporation is grounded in the fair market value of its assets (a figure found by the Tax Court and not contested by the estate), which in turn is determined by applying the venerable willing buyer-willing seller test. By its very definition, this contemplates the consummation of the purchase and sale of the property, i.e., the asset being valued. Otherwise the hypothetical willing parties would be called something other than ''buyer'' and ''seller.''

In other words, when one facet of the valuation process requires a sub-determination based on the value of the company's assets, that value must be tested in the same willing buyer/willing seller crucible as is the stock itself, which presupposes that the property being valued is in fact bought and sold. It is axiomatic that an asset-based valuation starts with the gross market (sales) value of the underlying assets themselves, and, as observed, the Tax Court's finding in that regard is unchallenged on appeal: When the starting point is the assumption of sale, the ''likelihood'' is 100%! This truism is confirmed by its obverse in today's dual, polar-opposite approaches (cash flow; assets). The fundamental assumption in the income or cash-flow approach is that the assets are retained by the Corporation, i.e., not globally disposed of in liquidation or otherwise. So, just as the starting point for the asset-based approach in this case is the assumption that

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23 This is easily illustrated by a simplified example: Buyer B wants an assemblage of assets identical to Corporation C's assets. Those assets are worth $1 million on the open market but are depreciated on C's books to a tax basis of $500,000. B has two options: (1) He can buy the assets from C for $1 million and depreciate them to zero over, e.g., seven years (or buy them on the open market and have the same cash flow and tax experience), leaving C to pay its own 34% tax ($170,000) on its gain; or (2) he can buy C's stock, get no depreciation deductions other than, at the corporate level, to the extent the assets are further depreciable, and have a 34% built-in corporate tax liability at sale of the assets. Surely a buyer of the stock rather than the assets would insist on a price reduction to account for the full amount of the built-in gain tax and the loss of the depreciation opportunity.

24 Pratt et al., Valuing a Business, at 47 (''[T]ax consequences of ownership and/or transfer of stock . . . usually are quite different from those of ownership and/or transfer of direct investment in underlying assets. These tax implication often have a significant bearing on value.'').

25 Id. at 34 (''[I]f valuing a minority ownership interest, one would normally adopt the premise of 'business as usual . . . .''). Compare id. at 443 (''[T]he asset-based approach tends to be more appropriate when valuing a controlling ownership interest than a noncontrolling ownership interest.''). The Decedent's non-supermajority interest is a hybrid, somewhere between minority and full control, so neither approach trumps the other totally.

the assets are sold, the starting point for the earnings-based approach is that the Corporation's assets are retained — are not sold, (other than as trade-ins for new replacement assets in the ordinary course of business) — and will be used as an integral part of its ongoing business operations. This duly accounts for the value of assets — unsold — in the active operations of the Corporation as one inextricably intertwined element of the production of income.

Bottom Line: The likelihood of liquidation has no place in either of the two disparate approaches to valuing this particular operating company. We hasten to add, however, that the likelihood of liquidation does play a key role in appraising the Decedent's block of stock, and that role is in the determination of the relative weights to be given to those two approaches: The lesser the likelihood of liquidation (or sale of essentially all assets), the greater the weight (percentage) that must be assigned to the earnings(cash flow)-based approach and, perforce, the lesser the weight to be assigned to the asset-based approach.

Belabored as our point might be, it illustrates the reason why, in conducting its asset- based approach to valuing Dunn Equipment, the Tax Court erred when it grounded its time-use-of-money reduction of the 34% gains tax factor to 5% on the assumption that the corporation's assets would not likely be sold in liquidation. As explained, the likelihood of liquidation is inapposite to the asset-based approach to valuation.

In our recent response to a similarly misguided application of the built-in gains tax factor by the Tax Court, we rejected its treatment as based on ''internally inconsistent assumptions.''[26] In that case we reversed and remanded with instructions for the Tax Court to reconsider its valuation of the subject corporation's timber property values by using a more straightforward capital gains tax reduction. Similarly, because valuing Dunn Equipment's underlying corporate assets is not the equivalent of valuing the Company's capital stock on the basis of its assets, but is merely one preliminary exercise in that process, the threshold assumption in conducting the asset-based valuation approach as to this company must be that the underlying assets would indeed be sold. And to whom? To a fully informed, non-compelled, willing buyer. That is always the starting point for a fair market value determination of assets qua assets. That determination becomes the basis for the company's asset-based value, which must include consideration of the tax implications of those assets as owned by that company. We must reject as legal error, then, the Tax Court's treatment of built-in gains tax liability and hold that — under the court's asset-based approach — determination of the value of Dunn Equipment must include a reduction equal to 34% of the taxable gain inherent in those assets as of the valuation date.[27] Moreover, the factually determined, ''real world'' likelihood of liquidation is not a factor affecting built-in tax liability when conducting the asset-based approach to valuing Dunn Equipment stock.[28] Rather, the probability of a liquidation's occurring affects only (but significantly) the relative weights to be assigned to each of the two values once they have been determined under the asset-based and income-based approaches, respectively — which brings us to the second methodology issue presented in this appeal.

• Assignment of Weight to Values

a. Cash Flow Vis-à-Vis Earnings

Prior to determining the appropriate method of valuing Dunn Equipment, the Tax Court reviewed the factors that bear on the fair market value of a block of

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26 Estate of Jameson v. Comm'r. 267 F.3d 366, 372 [88 AFTR 2d 2001-5922] (5th Cir. 2001).

27 We observe a slight discrepancy between the amount of the built-in gain mentioned by the Tax Court in its opinion ($7,109,000) and the gain referred to in the Estate's appellate brief ($7,117,638) to which a 34% tax should be applied. We are satisfied that this minor difference can be resolved by the court and the parties on remand or, alternatively, ignored on the maxim de minimis non curat lex, the net difference to the taxable value of the subject block of stock being roughly $1,200.

28 The likelihood of liquidation is also taken into account in another way, albeit indirectly and implicitly: in the court's assignment of a 7.5% discount to the Decedent's block of Dunn Equipment stock for lack of supermajority control. For it is liquidation that, absent supermajority, the operational majority stockholder alone cannot force. Thus this discount is grounded in inter alia, the block's inability to make liquidation happen.

stock in a closely-held, non-traded, operating corporation and concluded that the value of Dunn Equipment is best represented by a combination of an earnings-based value using capitalization of net cash-flow and an asset-based value using fair market value of assets, with an appropriate discount for a lack of marketability and lack of super-majority control.[29]

In so doing, the Tax Court rejected the approach of the Estate's expert, who used capitalized net earnings to determine the income-based value of the Corporation, and went instead with a capitalized net cash-flow method. As the Estate is not contesting the Tax Court's choice of the cash-flow approach over the earnings approach, we too accept the court's choice.

b. The Tax Court's Determination of Value

To its credit, the Tax Court flatly rejected the Commissioner's legally and factually absurd contention at trial that no weight should be given to the Corporation's earnings-based value and that its value should be based entirely in an asset-based approach, with no consideration of built-in tax liability. In so doing, the Tax Court concluded that the Commissioner "puts too much emphasis on the fair market value of assets"[30] — to us, a classic understatement — and stated correctly that "because Dunn Equipment was an operating company, the better question is not whether we should disregard the earnings-based value, but whether we should disregard the asset-based value."[31] The Tax Court went on to voice agreement with the basic position urged by the Estate's valuation expert that substantial weight should be given to both the asset-based value and the earnings-based value of the Corporation. Although we wholeheartedly endorse the point made by the Tax Court's rhetorical question whether any weight at all should be given to the asset-based value — and see little hyperbole in it — we are constrained to proceed, as proposed by the Estate and as done by the Tax Court, with a methodology that assigns some weight to each of the values generated by those two disparate approaches.

The final determination required to complete the pre-discount valuation methodology in this case, then, is the selection of the respective weights (percentages) to be assigned to each of the Corporation's theoretical values, asset-based and earnings-based. As observed in our discussion of the potential effects (or lack thereof) of the likelihood of liquidation and latent gains tax liability on the value of the Corporation's assets, it is in the exercise conducted to determine the relative weights to be accorded to each of the two differently calculated values of the Corporation — and only in that exercise — that the likelihood of liquidation vis-à-vis the likelihood of indefinitely retaining and using the assets, comes into play.

The Tax Court was of the opinion — and we agree — that the hypothetical willing buyer of the Decedent's block of stock would be unlikely to provoke liquidation of the company, even if he could. The Tax Court bolstered that conclusion with the recognition that even though the Estate's block of stock represents day-to-day control, the buyer of that block would lack the power to compel liquidation, merger, or consolidation.[32] In this regard, the court cogently emphasized that Dunn Equipment's history, community ties, and relationship with its employees would make it difficult if not virtually impossible for the holder of the Estate's block of stock to secure the votes of additional shares sufficient to institute liquidation. After concluding that the likelihood of liquidation was slight, the Tax Court added:

A rapid liquidation would have flooded the market with equipment, reducing the value obtained for each piece. A lengthy, drawn-out liquidation (also called a "creeping liquidation") would have risked the loss of customers who, at some point, would have realized that Dunn Equipment no longer meant to stay in business and

29 Dunn, 79 T.C.M. (CCH) at 1339 (emphasis added).

30 Id.

31 Id. at 1340 (boldface ours).

32 See Tex. Bus. Corp. Act Ann. art. 6.03 (Vernon 1991).

who would therefore have sought other suppliers of equipment.[33]

Despite having asked rhetorically — but, in our opinion, insightfully — whether the asset-based value of the Corporation should not be disregarded altogether, the Tax Court simply reiterated the factors that should be considered (largely paraphrasing Rev. Rul. 59-60), then conclusionally completed its pre-discount valuation methodology by assigning unequal percentages of weight to the results of its two approaches to valuation.

Given the stipulated or agreed facts, the additional facts found by the Tax Court, and the correct determination by that court that the likelihood of liquidation was minimal, our expectation would be that if the court elected to assign unequal weight to the two approaches, it would accord a minority (or even a nominal) weight to the asset-based value of the Corporation, and a majority (or even a super-majority) weight to the net cash flow or earnings-based value. Without explanation, however, the Tax Court baldly — and, to us, astonishingly — did just the opposite, assigning a substantial majority of the weight to the asset-based value. The court allocated almost two-thirds of the weight (65%) to the results of the asset-based approach and only slightly more than one-third (35%) to the results of the earnings-based approach. We view this as a legal, logical, and economic non sequitur, inconsistent with all findings and expressions of the court leading up to its announcement of this step in its methodology. We also note that the Tax Court's ratio roughly splits the difference between the 50:50 ratio advanced by the Estate and the 100:0 ratio advocated by the Commissioner.

Irrespective of whether the crucial step in the Tax Court's methodology, the assignment of relative weights to the results of the different valuation approaches, is deemed to be an issue of law or a mixed question of fact and law, we review it de novo. Our plenary review leads us inescapably to the conclusion that the Tax Court's 65:35 ratio in favor of its asset-based value constitutes reversible error. How, we must ask, can the value of a corporation that possesses all the attributes verbalized by the Tax Court conceivably be governed essentially twice as much by its asset-based value as by its earnings or cash flow-based value, when its assets (1) are not susceptible of appreciation (except, possibly, de minimis by the condo and the plant sites), (2) are physically depreciated and depreciating as a result of their being used as intended, (3) are being replaced constantly with newer models at great cost, and (4) are virtually certain not to be put up for sale because indefinite operation — not liquidation — is all that can be predicted as the Corporation's future, both long-term and short?

At this point we must emphasize the fact that the lion's share of the Corporation's assets comprised heavy equipment which, to such an operating company, is virtually indistinguishable from consumable supplies — and likely would be so regarded were it not for the administratively necessary but economically unrealistic artificiality of 12-month tax years. Those assets are constantly depreciating from heavy use and obsolescence; they are being replaced to the tune of $2 million annually; their highest and best use is short-term rental, frequently impossible to accomplish without the furnishing of operators by the Corporation; and the tax effects of their unlikely sale to third parties would greatly diminish their value to the Corporation. Indeed, it takes eight salesmen and 123 common-law employees, working full time in this highly competitive industry, to make these heavy-equipment assets produce even moderately acceptable levels of profitability.

Throughout its comprehensive and logical background analysis, the Tax Court recognized that Dunn Equipment is an operating company, a going business concern,

[33] Dunn, 79 T.C.M. (CCH) at 1340. The Tax Court nevertheless opined that the earnings value of the company appeared to be understated because the earnings projections are based on a low period in a cyclical business. We see this observation as clearly erroneous: Dunn Equipment's business and earnings had been flat for over 10 years — hardly a cycle — and nothing known to the Corporation or any hypothetical buyer as of the valuation date predicted any kind of sustained upturn in the foreseeable future. The Tax Court's belief, grounded in that erroneous analysis of the business cycle, that a hypothetical buyer and seller would give asset value added weight, is likewise clearly erroneous.

the Decedent's shares in which would almost certainly be purchased by a willing buyer for continued operation and not for liquidation or other asset disposition. For purposes of valuation, Dunn Equipment is easily distinguishable from true asset-holding investment companies, which own properties for their own intrinsic, passive yield and appreciation — securities, timberland, mineral royalties, collectibles, and the like. For the Tax Court here to employ a valuation method that, in its penultimate step of crafting a weighting ratio assigns only one-third weight to this operating company's income-based value, defies reason and makes no economic sense.[34] Our conclusion is all the more unavoidable when viewed in the light of the Tax Court's disregard of the ubiquitous factor of dividend paying capacity — in this case, zero — which, if applied under customarily employed weighting methods, would further dilute the weight of the asset-value factor and reduce the overall value of the Corporation as well. The same can be said for the effect on cash flow of the underpayment of officers' compensation. When we review the objective, factual record in this case — which is all that remained for the Tax Court to rely on after it disregarded most expert testimony — we are left with the definite impression that an error was committed at the weighting step of the method employed here. This review also mandates that something between zero and a small percentage of weight be assigned to the Corporation's asset-based value, and that the remainder of the weight be assigned to its earnings-based value. Under different circumstances, we might be inclined to remand for the Tax Court to make another try at assigning relative weights and constructing a reasonable ratio. Given the state of the record and the seven-plus years that this case has languished in the courts (over a year now in ours), such a remand, coupled with its potential for yet another appeal, militates against sending this particular issue back to the Tax Court. After all, the record of this case, free as it is of credibility calls and genuine disputes of material fact between the parties (other than as to their experts) places us in exactly the same methodological vantage point as the Tax Court when it comes to assigning relative weights to the results of the valuation approaches employed. This is true regardless of whether that assignment be labeled a question of law or a mixed question of fact and law.

Tempting as it is to follow the implication of the Tax Court's rhetorical question and disregard the asset-based value altogether, we remain cognizant of the venerable Cohan[35] rule, which counsels against assigning a zero value or probability to anything under any circumstances, and therefore resist that temptation. Recognizing the impossibility of ever making an absolutely precise and universally accepted determination of weighting percentages,[36] we nevertheless hold that the proper method of valuing the stock of Dunn Equipment, under all the relevant circumstances and discrete facts of this case (not the least of which is the "unlikelihood" of liquidation of its assets), requires assigning a weight to its earnings-based value somewhere between 75% and 90%, and to its asset-based value somewhere between 10% and 25%. Within these ranges we select 85% for the earnings-based weight and 15% for the as-

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34 See e.g., B. F. Sturtevant Co. v. Comm'r, 75 F.2d 316, 324 [15 AFTR 174] (1st Cir. 1935)(holding that good business judgment must prevail, "and a failure or refusal to exercise that judgment constitutes an error of law").

35 Cohan v. Comm'r, 39 F.2d 540, 544 [8 AFTR 10552] (2d Cir. 1930) (L. Hand, J.) ("But to allow nothing at all appears to us inconsistent . . . . The amount may be trivial and unsatisfactory, but there was a basis for some allowance, and it was wrong to refuse any . . . . ").

36 Fomented in significant part by myriad valuation challenges instituted by the IRS over the past decades, a full-fledged profession of business appraisers, such as the American Society of Appraisers, has emerged, generating its own methodology and lexicon in the process; which in turn have contributed to the profession's respect and mystique. Because — absent an actual purchase and sale — valuing businesses, particularly closely held corporations, is not a pure science replete with precise formulae and susceptible of mechanical calculation but depends instead largely on subjective opinions, the writings and public pronouncements (including expert testimony) of these learned practitioners necessarily contain some vagaries, ambiguities, inexactitudes, caveats, and qualifications. It is not surprising therefore that from time to time disagreements of diametric proportion arise among these practitioners. As the methodology we employ today may well be viewed by some of these professionals as unsophisticated, dogmatic, overly simplistic, or just plain wrong, we consciously assume the risk of incurring such criticism from the business appraisal community. In particular, we anticipate that some may find fault with (1) our insistence (like that of the Estate's expert) that, in the asset-based approach, the valuing of the Corporation's assets proceed on the assumption that the assets are sold; and (2) our determination that, in this case, the likelihood of liquidation or sale of essentially all assets be factored into the weighting of the results of the two valuation approaches and not be considered as an integral factor in valuing the Corporation under either of those approaches. In this regard, we observe that on the end of the methodology spectrum opposite oversimplification lies over-engineering.

set-based weight, producing a 85:15 weighting ratio.

III. Conclusion

The Tax Court calculated Dunn Equipment's earnings-based value before discount at $1,321,740, and the Estate does not appeal that determination. Therefore, on remand the Tax Court shall give the results of that approach a weight of 85% in computing the Corporation's value. In contrast, the asset-based value, to which a weight of 15% shall be given, must be recalculated by the Tax Court by applying to the previously determined market value of the Corporation's assets, a reduction equal to 34% of those assets' built-in taxable gains. After thus recalculating the Corporation's asset-based value and computing the pre-discount value of the Corporation by application of this 85:15 ratio, the Tax Court shall then reduce the Estate's 62.96% ratable portion of that value by 22.5% for lack of marketability and lack of super-majority control, pursuant to the unappealed discount methodology originally selected by the Tax Court. With the correct value of the Estate's block of stock in Dunn Equipment thus determined, the court shall recalculate (or the parties shall stipulate) the correct estate tax liability for Decedent's Estate. This will enable the court to enter an appropriate final judgment to account for the Estate's overpayment of taxes as well as interest and any other relevant factors.

Finally, given the Commissioner's delays in issuing his notice of deficiency and his extreme and unjustifiable trial position in advocating a valuation based entirely on asset value (with no reduction for built-in tax liability and no weight given to income-based value), exacerbated by his failure to adduce expert appraisal testimony in support of his own exorbitant proposed value, the Tax Court shall entertain any claim that the Estate might elect to assert under I.R.C. § 7430, if perchance the revaluation of the Decedent's block of Dunn Equipment's stock should reduce the net worth of the Estate to a sum below the $2 million cap on entitlement to relief under that section.[37]

REVERSED and REMANDED, with instructions.

[37] See 28 U.S.C. § 2412(d)(1)(B); I.R.C. § 7430(c)(4)(ii).

¶2002-5179

UNITED STATES OF AMERICA, PLAINTIFF v. Jacob EVSEROFF, N.Y. State Dept. of Taxation, Paul Lawrence Evseroff, Kenneth James Evseroff, Lynn R. Terrelonge, and Barry A. Schneider, DEFENDANTS. U.S. District Court, Eastern Dist. of New York, (DC NY) Docket CV 00-6029 (DGT), July 8, 2002. Earlier proceeding at (2001, DC NY) 88 AFTR 2d 2001-6926, 2001-2 USTC ¶50783. Later proceeding at (2002, DC NY) 90 AFTR 2d 2002-5442. Years 1978, 1979, 1980, 1981, 1982, 1991, 1992, 1996. Decision for Taxpayer in part and for Govt. in part.

1. Collection actions—procedure—discovery—costs. Govt.'s objection to magistrate judge's order allowing taxpayer-attorney to designate expert out of time to present information in govt.'s collection action on value of taxpayer's law practice was denied: information was relevant to govt.'s claim that taxpayer's asset transfers to trust rendered him insolvent and were fraudulent; and govt., which knew well in advance that taxpayer was seeking to designate expert, wasn't prejudiced by any resulting delay. Also, govt.'s objection to imposition of costs on taxpayer himself, who allegedly lacked resources to pay, rather than on his attorneys was rejected. *Reference:* United States Tax Reporter ¶74,035.01(100). IRC §7403.

2. Interest—computations—extension of limitations on assessments; indefinite extensions—sanctions. Taxpayer-attorney's motion for deficiency interest recomputation was denied: IRC §6601(c)'s interest restrictions didn't apply to Forms 872-A/indefinite extensions that taxpayer indisputably signed; argument that he didn't understand consequences of signing wasn't plausible; and argument that IRS mistakenly gave him wrong forms, and that he should have been provided and intended to sign Forms 872, which would have stopped interest assessment, was belied by his vigorous attempts to litigate deficiencies over 18-20 years that followed forms' signing. But, govt.'s request to sanction taxpayer's counsel for vexatious litigation and belated raising of interest is-

sue was denied despite fact that their actions caused govt. delay and unnecessary costs, based on complexity of tax issues and significant size of taxpayer's potential liability. *Reference:* United States Tax Reporter ¶66,015.02(50); 62,135.03(10). IRC §6213; 6601.

3. Actions to reduce assessments to judgment—temporary restraining orders; injunctions. Govt. was granted temporary restraining order and injunction against taxpayer-attorney, barring distributions, except for limited tax payment and preparation purposes, from trust to which taxpayer allegedly fraudulently transferred assets; and requiring taxpayer to provide govt. with information about his accounts receivable, retirement funds and pension accounts, pay govt. his accounts receivable proceeds, and hand over to govt. copies of his law practice books and records for last 3 years, subject to provision that govt. not file such information with court except under seal. Also, govt. was allowed to request hearing on its installment payment and garnishment requests; and judgment entry was ordered. *Reference:* United States Tax Reporter ¶74,035.01(28). IRC §7403.

United States District Court for the Eastern District of New York.

Memorandum and Order

TRAGER, District Judge:

NOT FOR PUBLICATION

This action involves the government's claim that defendant Jacob Evseroff owes taxes, interest, and penalties from 1978–82, 1991–92, and 1996. Familiarity with the facts of the case is assumed. See United States v. Evseroff, 88 A.F.T.R.2d 2001–6926, 2001 WL 1571881 (E.D.N.Y. Nov. 26, 2001). There are several motions and requests pending from the parties that will be addressed in this Memorandum and Order. First, the government objects to Magistrate Judge Viktor Pohorelsky's May 9, 2002 order allowing Evseroff to designate an expert out of time. Second, Evseroff requests a recalculation of the amount of interest assessed by the government and reflected in the government's proposed amended judgment. This issue has led to a request by the government for sanctions against Evseroff.

Discussion

(1)

Rule 72 Objection

[1] On May 9, 2002, Judge Pohorelsky entered an order allowing Evseroff to designate an expert out of time, provided that the defendants pay "as a sanction" one-half of the attorney's fees reasonably expended by the government in preparation of its motions that sought an injunction against any distributions from Evseroff's trust fund (except to pay taxes and associated accounting fees), installment payments, an a writ of garnishment. See Order of May 9, 2002. On May 22, 2002, the government timely objected to Judge Pohorelsky's order under Rule 72 of the Federal Rules of Civil Procedure ("FRCP").

In pertinent part, Rule 72(a) provides:

> The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

Fed. R. Civ. Pro. 72(a).

Under the August 9, 2001 scheduling order, parties in this case were to designate experts no later than December 1, 2001. Discovery on factual issues was to completed by January 31, 2002, a date later extended by order to February 28, 2002. Evseroff did not designate any experts in the voluntary disclosures under Rule 26(a)(1) and did not identify any experts prior to December 1, 2002. However, in a February 28, 2002 conference call between the parties and Judge Pohorelsky, Evseroff requested leave to designate an expert witness out of time. The government objected, and Judge Pohorelsky set a briefing schedule followed by oral argument on May 9, 2002. On that day, the government contended that it filed its motions for an injunction, installment payments, and a writ of garnishment on April 10, 2002 based on its belief that all discovery was closed, and thus was prejudiced by Judge Pohorelsky's order.

[2] At issue is the need for an expert to testify regarding the value of Evseroff's

legal practice in 1992 when he transferred his residence and approximately $220,000 to the trust. The value of the practice is relevant to the government's claim that Evseroff was made insolvent by the transfers, and thus he engaged in constructive fraud under New York Debt & Credit Law §273.

Evseroff's accountant, Fred Blumer, testifying as a fact witness,[1] stated in a February 21, 2002 deposition that Evseroff's practice was worth $75,575 at the time of the transfers. However, when asked about goodwill by Evseroff's counsel, Blumer admitted that he was not an expert on valuation, but estimated the goodwill value of the practice to be $250,000. And in a February 7, 2002 deposition, Evseroff stated that his practice was worth nothing when he was not present. Subsequent to this testimony, Evseroff requested that a valuation expert be named out of time.

The precise value of Evseroff's practice is especially significant because the value of this asset may determine whether or not the transfers made Evseroff insolvent. In the government's most recent filing in this case (and in several earlier filings), it computed that the transfers left Evseroff with $715,000 in assets, and that he owed $744,000 to the government at the time. In making this calculation, the government valued Evseroff's practice at $150,000, "a number roughly between Blumer's two estimates, and greater than Evseroff's admission that his practice is worth nothing without him." Pl. Rule 72 Objection at 9.

Judge Pohorelsky's order was not clear error or contrary to law. Judge Pohorelsky was certainly within his power to amend his earlier scheduling order. Moreover, the government's suggestion that a valuation expert is unnecessary is simply incorrect. To decide whether Evseroff was insolvent at the time of the transfers, it may be necessary to have an accurate valuation of his assets, including his legal practice. To rely on the barely supported guesswork of Blumer or Evseroff himself, or some estimate based on these figures, would deny the court and potentially a jury of crucial information.

In addition, the government's claim that it filed its motions when it did because it believed that all discovery was completed cannot justify setting aside Judge Pohorelsky's order. The government was aware on February 28, 2002 - more than six weeks before it filed its motions - that Evseroff wanted to designate a valuation expert. If the government expected to suffer from significant prejudice by filing its motions when it did, it could have waited until Judge Pohorelsky decided on the expert issue before filing. Accordingly, the government's Rule 72 objection to modify this element of Judge Pohorelsky's order should be denied.

The government also requests that any expert testimony be expressly limited to the issue of the goodwill value of Evseroff's practice. However, a meaningful valuation of Evseroff's practice would include a consideration of not only goodwill but other factors as well.

Finally, the government objects to Judge Pohorelsky's imposition of the costs on Evseroff himself, as opposed to his attorneys. The government argues that since Evseroff claims that he has insufficient funds to pay the deficiencies he owes the government, requiring only Evseroff to pay these costs will merely reduce the amount would have available to pay toward the deficiencies. Although this may be correct, it was not clearly erroneous for Judge

[1] Evseroff claims that Blumer testified as both a fact witness and an expert. However, the only indication that Evseroff ever intended to use Blumer as anything other than a fact witness is a one-page letter dated November 21, 2001 in which Blumer stated that the total value of Evseroff's practice was $325,000 in 1992. This falls far short of the materials and documentation necessary to make Blumer's testimony that of an expert.

Pohorelsky to impose costs in this way. The government has not offered any cases in support of its argument and has failed to present any compelling reason to alter Judge Pohorelsky's order.

(2)

Computation of Judgment

At the May 9, 2002 oral argument before this court on the government's motions for an injunction, installment payments, and a writ of garnishment, the government requested entry of an amended judgment that, unlike the original judgment entered after summary judgment was granted on November 6, 2001, would contain an exact sum owed by Evseroff. In response, Evseroff's counsel requested time to check the computations proposed by the government, and was given seven days to do so.

On May 23, 2002, Evseroff filed a letter discussing alleged errors in the government's computation of interest. Specifically, Evseroff claimed that the government incorrectly assessed interest on his deficiency during the period while certain waivers of statutes of limitations signed by Evseroff and his then-wife Lorraine Evseroff were in effect.[2] In response, the government contended that the statutory provisions cited by Evseroff for his argument that interest may not be imposed while waivers are in effect are not applicable. Faced with this argument, Evseroff effectively conceded in a June 28, 2002 letter that the government was correct.[3] However, Evseroff made a new allegation in the letter, claiming for the first time that an IRS agent presented him with the wrong waiver form, which Evseroff then signed. Evseroff appears to contend that the waiver form he believes he should have signed would have barred the IRS from assessing interest on his tax deficiency.

The parties agree that Evseroff signed several waivers regarding his alleged tax liability for 1978 to 1982. Four documents have been submitted, three of which are IRS Form 872-As. The Form 872-As that address Evseroff's 1978 and 1981 tax liability were signed by Evseroff, Lorraine Evseroff, and two IRS officials, in April 1982 and March 1985, respectively. The Form 872-A that addresses his 1982 tax liability was signed only by Evseroff and Lorraine Evseroff in April 1986. All three of these forms are title "Special Consent to Extend the Time to Assess Tax."

Both Evseroff and the government also submitted an unsigned and undated Form 870. This form is titled, "Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment." The form names the Evseroffs as the taxpayers in question, and lists the amount of taxes and penalties owed for 1978–82. Just above the unused signature line, the form states:

> I consent to the immediate assessment and collection of any deficiency (increase in tax and penalties) and accept any overassessment (decrease in tax penalties) shown above, plus any interest provided by law. I understand that by signing this waiver, I will not be able to contest these years in the United States Tax Court, unless additional deficiencies are determined for these years.

This submitted document is a standard form that was revised by the IRS in February 1986.

In his original letter, Evseroff argued that 26 U.S.C. §6601(c) barred the imposition of interest on a tax deficiency while the waiver he signed was in effect. Section 6601(c) states:

> In the case of a deficiency as defined in section 6211 (relating to income, estate, gift, and certain excise taxes), if a waiver of restrictions under section 6213(d) on the assessment of such deficiency has been filed, and if notice and demand by the Secretary for payment of

[2] This argument appears to be beyond the scope of Evseroff's counsel's request at the oral argument, and is in some way a reargument of issues that were decided in 1992 by the Tax Court and in 2000 as part of Evseroff's suit against the IRS. Nevertheless, these points will be addressed.

[3] Evseroff stated that he disagreed with the government's "narrow and literal interpretation" of the statute in question, but would adopt it for the purpose of the reply letter. See Letter of June 28, 2002 at 2.

such deficiency is not made within 30 days after the filing of such waiver, interest shall not be imposed on such deficiency for the period beginning immediately after such 30th day and ending with the date of notice and demand and interest shall not be imposed during such period on any interest with respect to such deficiency for any prior period.

Evseroff did not specifically claim that any waivers he signed were done so under 26 U.S.C. §6213(d), but by the plain language of the statute this suspension of interest is only applicable if that is part of his argument.

However, as Evseroff conceded in his June 28, 2002 letter, the three waivers he signed are not waivers under §6213(d), and thus §6601(c) is inapplicable to them. That is, §6213(d) addresses the waiver of a different limitations period than Evseroff waived by signing the three Form 872-As.

Some background here is helpful. In general, the IRS has only three years after an income tax return is filed to assess[4] a taxpayer with a deficiency. 26 U.S.C. §6501(a). Some administrative audits, especially complex ones such as the tax shelter audit in this case, take longer than this limitation period. Thus, the IRS often asks taxpayers being audited to extend this statute of limitations. See Steven C. Salch, How to Handle a Tax Controversy at the Restructured IRS in Court, Administrative Procedures: Audits: General Overview, SG063 ALI-ABA 113, 148 (American Law Institute 2002) (''Salch''); see also 26 U.S.C. 6501(c)(4) (time limitations of §6501 may be extended by agreement). If the taxpayer refuses to grant an extension, the IRS will often issue a ''notice of deficiency'' ''which 'protects the revenue' by asserting as much additional income as possible as disallowing as many deductions and credits as possible.'' Salch at 149. Therefore, it is often in the taxpayers interest to grant the extension.

These extensions are granted through a Form 872. Id. A normal Form 872 grants an extension to a specific date, and a Form 872-A grants an indefinite extension that can be terminated in several ways. Id. at 149–50; see also Aronson v. C.I.R., 989 F.2d 105, 106 [71 AFTR 2d 93-1349] (2d Cir. 1993). Evseroff signed three Form 872-As that indefinitely extended the IRS' time to assess a deficiency.

On the other hand, §6601 and §6213(d) address waivers of restrictions on the IRS assessment of a tax deficiency. Again, some background is helpful. Under §6212(a), if the IRS determines that there is a tax deficiency, it may send a notice of deficiency to the taxpayer. 26. U.S.C. §6212(a). Under §6213(a), within 90 days after the notice of deficiency is mailed, the taxpayer may challenge the deficiency in the United States Tax Court. 26 U.S.C. §6213(a). Unless a notice of deficiency has been issued, the Tax Court does not have jurisdiction over the taxpayer's challenge. Id.; Camila E. Watson, Tax Lawyers, Ethical Obligations, and the Duty to the System, 47 U. Kan. L. Rev. 847, 875 n.132 (1999) (notice of deficiency a prerequisite to Tax Court jurisdiction).

In addition to these limitations, §6213(a) also bars the IRS from making an assessment, or initiating any levy or proceeding in court to collect the deficiency until after a notice of deficiency has been mailed to the taxpayer, and 90 days have passed since it was mailed. Id. If the taxpayer challenges the deficiency in Tax Court, no assessment, levy, or proceeding in court may be initiated until after the decision of the Tax Court becomes final.

It is these restrictions that are addressed in §6213(d) and by Form 870. Section 6213(d) authorizes a taxpayer to waive the restrictions, which is normally done in the context of settlement discussions between the taxpayer and the IRS. 26 U.S.C. §6213(d). Kretchmar v. United States, 9 Cl. Ct. 191 [57 AFTR 2d 86-306] (1985) (a Form 870 is used ''to register and memorialize settlement negotiations''); see also Sara Lee Corp. v. United States, 29

[4] ''An assessment is an administrative determination that a certain amount is currently due and owing as a tax. It makes the taxpayer a debtor in much the same way as would a judgment.'' Rambo v. United States, 492 F. 2d 1060, 1062 n.2 [33 AFTR 2d 74-750] (6th Cir. 1974).

Fed. Cl. 330 [72 AFTR 2d 93-6421] (1993). As expressly stated on the Form 870, by signing it, the taxpayer agrees to the immediate assessment and collection of any deficiency, and accepts any overassessment, plus any interest, without requiring the IRS to mail a notice of deficiency or wait for the 90-day post-mailing period to expire. By signing a Form 870, the taxpayer also waives his right to challenge the deficiency in Tax Court, but may still do so in a refund suit in federal district court or in the Court of Claims. See Philadelphia & Reading Corp. v. United States, 944 F.2d 1063, 1067 [68 AFTR 2d 91-5501] (3d Cir. 1991).

As §6601(c) explicitly states, if a §6213(d) waiver has been filed, no interest may be imposed on the deficiency beyond 30 days after the filing unless the IRS has issued a notice and demand for payment.[5] See id.

Therefore, it is clear that §6601(c) does not apply to the extensions actually signed by Evseroff. By signing the three Form 872-As, Evseroff indefinitely extended the period during which the government could assess a deficiency against him. Evseroff did not waive the restrictions on assessment imposed by §6213(d). Accordingly, §6601(c) does not apply. See Forester [sic, Forster] v. Comm'r of Internal Revenue, T.C. Memo. 1985-602 [¶85,602 PH Memo TC] (1985) (suspension of interest under §6601(c) not triggered by Form 872 waiver); Cannon v. Comm'r of Internal Revenue, T.C. Memo. 1990-410 [¶90,410 PH Memo TC] (1990) (same, with Form 872-A waiver).

As noted above, in his June 28, 2002 letter Evseroff claimed, in effect, that he should have signed a Form 870 waiver, not the three Form 872-A waivers. Evseroff argues that a Form 870 waiver would have been the logical waiver for him to sign at the time that the IRS was conducting its audits of the tax shelters that led to his tax deficiency because it would have been advantageous to both himself and the IRS. Thus, Evseroff surmises that an IRS agent mistakenly presented him with a Form 872-A instead of a Form 870. Evseroff also claims that he was pressured into signing a waiver by the IRS agent. Finally, Evseroff claims that since the Form 872-A does not advise the taxpayer that interest accrues on his deficiency while the waiver is in effect, it was reasonable for Evseroff to assume that interest was not accumulating.

Evseroff's arguments have no merit. Foremost, Evseroff unquestionably signed the Form 872-A waivers, not a Form 870. Although Evseroff alleges that an IRS agent mistakenly presented him with the wrong form, the signed Form 872-A is quite clearly an extension of time to assess taxes, not a form that memorializes a settlement or indicates that the taxpayer has, at least for the moment, accepted the government's calculation of the deficiency.[6] Moreover, as an attorney, Evseroff cannot now claim that he did not understand the consequences of signing the Form 872-As. Nor does Evseroff offer any evidence that he intended to sign a Form 870 rather than a Form 872-A, or that the IRS intended to present him with a Form 870 and simply made a mistake. Indeed, Evseroff's claim that it was logical for the IRS to seek and for him to sign a Form 870 waiver at the time when he signed the three Form 872-As makes little sense.

First, this assumes that Evseroff wanted to consent to the amount of deficiency he owed, including any interest, and waive his right to challenge the assessment in Tax Court. There is no evidence that this was Evseroff's intention, and Evseroff did, in fact, later challenge the assessment in Tax Court. Evseroff's claim that his intention to accept the IRS' determination of his deficiency is proven by his consent to the Tax Court's 1992 decision that fixed his liability is belied by his pursuit after the decision of an offer-in-compromise that already has been an issue in this case.

Second, Evseroff signed each of the three Form 872-As at exactly the time

[5] This is one benefit to the taxpayer of executing a Form 870 - doing so stops interest from accruing on the deficiency. Otherwise, interest may continue to accrue while the case is litigated in Tax Court. See Philadelphia & Reading Corp., 944 F.2d at 1067.

[6] Unlike a Form 870, there is no place on a Form 872-A to include the terms of a settlement.

when the three-year statute of limitations on assessment would have expired for his 1978, 1981, and 1982 tax years.[7] This undermines Evseroff's claim that the IRS agent intended to present him with a Form 870. In addition, Evseroff only alleges one instance in which he was misled by the IRS agent. But Evseroff signed three separate Form 872-As on three separate dates, further calling into question his claim.

Finally, it would have been impossible for Evseroff to sign the submitted Form 870 he claims he should have signed at the time when he signed the first two Form 872-As. Although the submitted Form 870 is undated, it was revised in February 1986 - after Evseroff signed the first two Form 872-As. Finally, it is far too late, and the wrong forum, for Evseroff to raise the argument for the first time that he signed the wrong form. The waivers were signed between 18 and 20 years ago. Since then, Evseroff has aggressively litigated his claim in Tax Court, in a Taxpayer Bill of Rights action, and in this lawsuit. Had Evseroff intended to settle his disagreement with the IRS in 1982, 1985, or 1986 he should have said so much sooner, particularly to the Tax Court.

As Evseroff raised no further issues regarding the government's computation of his deficiency, his request for a recalculation is denied.

(3)

Sanctions

Finally, the government moved for sanctions under 28 U.S.C. §1927 against Evseroff's attorney Richard Schneyer for vexatiously multiplying the proceedings by raising the §6601(c) issue and by not coop-erating with the government's attorney, Alan Shapiro. The government claims Ev-seroff's letter was legally unsupportable and not properly researched, and that this caused Shaprio to expend many hours researching and writing his response. In addition, the government claims that Schneyer refused to turn over any waivers in his possession and was recalcitrant in telephone conversations. The government alleges that these efforts delayed its filings and delayed the court.

As to the friction between counsel and Schneyer's alleged lack of cooperation, it is obvious that neither side has been pleasant to each other. A sanction is not warranted on this basis. However, the efforts of Evseroff's representatives are perilously close to improper. At oral argument on May 9, 2002, Evseroff's attorneys agreed to take one week to check the government's computation of interest. Two weeks later, Schneyer filed a letter that raised arguments beyond the scope of this request. This required the government to research and submit a lengthy response on May 31, 2002. Schneyer's reply did not arrive until June 28, 2002, and when it did, it in effect abandoned his earlier arguments and raised the entirely new issue that an IRS agent mistakenly presented Evseroff with the wrong form. Nor is this the first time in this case that Evseroff has raised a new factual claim that could have been presented earlier. See Memorandum and Order of April 26, 2002. On the other hand, this is a complex area of tax law, and Evseroff may end up with a liability in the millions if he does not prevail in this case. Therefore, Evseroff's attorneys will not be sanctioned at this time, but they are warned not to engage in further tactics of this sort.

Conclusion

For the foregoing reasons, the government's Rule 72 objection is denied, as is its request for sanctions against Evseroff and his attorneys. In addition, Evseroff's motion for a recalculation of his deficiency is denied.

Dated: July 8, 2002

Brooklyn, New York

SO ORDERED:

David G. Trager

United States District Judge

[7] A 1978 tax return would have been due April 15, 1979. The Evseroffs signed the first Form 872-A on April 6, 1982, almost exactly three years later. Similarly, a 1981 tax return would have been due April 15, 1982, and Evseroff signed the second Form 872-A on March 6, 1985 (Lorraine Evseroff signed it on March 19, 1985). A 1982 tax return (if not extended) would have been due April 15, 1983, and the Evseroffs signed the third Form 872-A on April 22, 1986.

Order Granting Injunction, Requiring Jacob Evseroff to Provide Financial Information, Authorizing Entry of Amended Judgment, and Authorizing Hearing on Request for Installment Payments and Writ of Garnishment

[3] The Court has considered the United States' request for a temporary restraining order, injunction, installment payments, and application for writ of garnishment, and the United States' request for entry of an amended judgment, and the United States' pre-motion letter, the opposition papers thereto, and heard oral argument thereon, and it is hereby

ORDERED that no distributions shall be made from the Jacob Evseroff Trust, except for the payment of taxes and for accounting fees incurred for the purpose of preparing tax returns. All present and future trustees of the trust, including Robert McCully, are enjoined from making any distributions from the trust, except for the limited purposes authorized herein, until the Court orders otherwise.

ORDERED FURTHER that Jacob Evseroff is to prepare a list of all of the accounts receivable of his law practice and provide them to trial counsel for the United States within 30 days of the date of this order. The list shall include the name, address, and telephone number of the party for each account, the date the accounts arose, and the balance presently owed on each account.

ORDERED FURTHER that Jacob Evseroff is to pay to the United States (United States Department of Justice, Tax Division, P.O. Box 55, Washington, D.C. 20044), within five days of receipt, all proceeds of the accounts receivable listed pursuant to this Order.

ORDERED FURTHER that, within 30 days from the date of this order, Jacob Evseroff is to provide to trial counsel for the United States (Alan Shapiro, Trial Attorney, United States Department of Justice, Tax Division, P.O. Box, 55, Washington, D.C. 20044), a copy of the books and records of his law practice for the last three years.

ORDERED FURTHER that the United States shall not file with the Court the copy of the books and records of Jacob Evseroff's law practice, except under seal, and that it shall take reasonable measures to protect the privacy of Jacob Evseroff and his clients with regard to the copy of the books and records.

ORDERED FURTHER that, within 14 days from the date of this order, Jacob Evseroff is to provide trial counsel for the United States with the name, address, and telephone number of any person who held or who holds his pension or retirement funds or funds that he received from pension or retirement accounts. Jacob Evseroff is to provide the dates during which the funds were maintained with each respective person and the amount of funds that were maintained with them.

ORDERED FURTHER that, within 14 days from the date of this order, Jacob Evseroff is to provide trial counsel for the United States with the name, address, telephone number, and account number and information for any financial, brokerage, or bank business or institution where his pension or retirement funds presently are located. Jacob Evseroff is to provide the dates during which the funds were maintained in each respective location and the amount of funds that are maintained there.

ORDERED FURTHER that, within 14 days from the date of this order, Jacob Evseroff is to provide trial counsel for the United States with the name, address, telephone number, and account number and information for any financial, brokerage, or bank business or institution where his pension or retirement funds have been maintained in the two year period preceding the date of this order. Jacob Evseroff is to provide the dates during which the funds were maintained in each respective location and the amount of funds that were or are maintained there.

ORDERED that the Amended Judgment submitted by the United States, setting forth a sum certain, plus statutory interest from a set date, owed by Jacob Evseroff in this action shall be entered.

ORDERED that the United States may request a hearing on its request for installment payments and application for writ of garnishment to determine assets subject to collection and assets exempt from collection.

IT IS SO ORDERED:

DATE: July 8, 2002

DAVID G. TRAGER

UNITED STATES DISTRICT JUDGE

¶2002-5180

SUCCESSION OF BETTY FELIX HELIS, by Esther Helis Henry and David A. Kerstein, Testamentary Co-Executors, PLAINTIFF v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) Docket No. 97-190T, July 12, 2002. Reconsideration of (2002, Ct Fed Cl) 90 AFTR 2d 2002-5042, 52 Fed Cl 745, granted in part and denied in part. Earlier proceeding at (2001, Ct Fed Cl) 88 AFTR 2d 2001-5199. Date of death 4-12-80. Decision for Govt. in part.

1. Estate tax deductions—administrative expenses—interest; executor and attorney's fees; "overhead"—reimbursements—reconsideration. Govt. was granted partial reconsideration of order on issue of succession's reimbursements to partnership, and case was re-opened for purpose of completing record with respect to govt.'s alleged request for documentary verification of reimbursements. But, reconsideration was denied as to interest and overhead issues where motion offered no new arguments nor established that order was erroneous. *Reference:* USTR Estate & Gift Taxes ¶20,535.02(5); 20,535.06(10); 20,535.05(5); 20,535.02(10). IRC §2053; 7502.

In the United States Court of Federal Claims.

Order

BRUGGINK, Judge:

[1] Pending is defendant's motion for reconsideration. The motion is denied in part and granted in part as follows. With respect to Part I (interest) and Part II B (overhead), the motion offers no new arguments nor does it establish that the court's previous ruling was in error. Reconsideration of Part I and Part II B of the motion is denied.

With respect to the remaining issue, Part II A (reimbursement), we note the following: The end of discovery was set by the court as May 17, 2002. *See* Order of February 6, 2002. Defendant contends that it first received the tableaus on March 11, 2002. This was two months before the close of discovery and three months before oral argument or trial. Defendant contends that documentary verification of the reimbursements were included in its discovery requests. The court discerns no such specific request. In any event, if such documents were requested and not produced, defendant filed no motion to compel their production. Nor did defendant object to testimony on this subject during oral argument. Nor did defendant indicate in its pretrial materials that it wished to offer testimony or exhibits on this issue. Accordingly, as the government's primary concern appears to be completing the record with respect to such documentation, we re-open the opinion of June 25, 2002, with respect to Part II A of the motion for reconsideration. If plaintiff wishes to respond to the motion it may do so, on or before July 22, 2002. As part of its response, it may submit evidence of the reimbursement to the Estate of William G. Helis, A Partnership from the succession, as supplementation to its motion for summary judgment materials. Upon filing of plaintiff's response the court will notify the defendant whether a reply is needed.

ERIC G. BRUGGINK

Judge

¶2002-5181

In Re: NOVUS CORPORATION, Debtor(s). U.S. Bankruptcy Court, Northern Dist. of Texas, (Bktcy Ct TX) Docket No. 00-37455-SAF-11, March 15, 2001. Decision against Taxpayer.

1. Bankruptcy court procedure—disgorgement of attorney fees. Chap. 11 debtor-corp.'s 11 USC §329 motion for order requiring tax attorney to disgorge flat fee was denied: taxpayer's retention of tax specialist with full focus on resolving its employment tax issues, without any indication of other creditor/business problems, wasn't "in contemplation of" bankruptcy. But, bankruptcy court noted that flat fee would be subject to review if statute applied. *Reference:* United States Tax Reporter ¶68,726.52(3).

Memorandum Opinion and Order

FENSENTHAL, Bankruptcy Judge:

Novus Corporation, the debtor-in-possession, moves the court to order Scott Seideman to disgorge attorney's fees pursuant to 11 U.S.C. §329. The court conducted an evidentiary hearing on the motion on February 14, 2001.

The allowance of compensation for attorneys representing the debtor in connection with a bankruptcy case constitutes a core matter over which this court has jurisdiction to enter a final order. 28 U.S.C. §§157(b)(2)(A) and 1334. This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rules 7052 and 9014.

In October 2000 Novus paid attorney Scott Seideman a $7,500 flat fee to represent Novus before the I.R.S. on issues concerning employment taxes for six quarters. Novus filed its chapter 11 petition on November 20, 2000. Novus anticipates that its plan of reorganization will address the employment tax issues. On December 6, 2000, Novus requested an accounting of the services by Seideman, for presentation to the court. Seideman responded with a letter by his counsel that described, in general terms, the services rendered but did not provide an accounting. Thereafter, Novus filed the instant motion, seeking disgorgement of the $7,500 fee based on non-disclosure and excessiveness. Novus principally contends that Seideman's services duplicate the services to be provided to the debtor by its bankruptcy counsel.

[1] Section 329 of the Bankruptcy Code provides:

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent necessary, to-

(1) the estate, if the property trans-ferred-

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

11 U.S.C. §329. Section 329 authorizes bankruptcy courts to review fees paid to a debtor's attorney within one year prior to the filing of a case to the extent that the fees are for services provided "in contemplation of or in connection with the case." 11 U.S.C. §329. A subjective test applies in determining whether payments were made in contemplation of bankruptcy. See Wootton v. Ravkind (In re Dixon), 143 B.R. 671, 675–76 n.3 (Bankr. N.D. Tex. 1992); 3 Collier on Bankruptcy 329.03 at p. 329–10 to 329–11 (15th ed. 1999). "The controlling question is the state of mind of the debtor, i.e., whether, in making the transfer, the debtor is influenced by the possibility or imminence of a bankruptcy proceeding." Dixon, 143 B.R. at 675–76 n.3; Collier at 329.03 at 329–11. Services devoted to preventing bankruptcy may also fall within the scope of §329. See Arens v. Boughton (In re

Prudhomme), 43 F.3d 1000, 1004 (5th Cir. 1995) (payment by debtors in "desperate financial straits" to attorney for representation in resolving their dispute with their largest creditor were paid in contemplation of or in connection with their bankruptcy case).

Accordingly, the court must determine if Novus retained Seideman in contemplation of bankruptcy. If so, then the fees paid to Seideman are subject to review by the court, notwithstanding the terms of any fee arrangement between the attorney and the debtor. Dixon, 143 B.R. at 675.

George Niemirowski, the president of the debtor, testified that the debtor had tax problems resulting from a business problem that disrupted the debtor's revenue stream. The adverse business condition impacted six quarterly tax periods. After watching a television advertisement for Seideman's services as a tax specialist, Niemirowski met with Seideman on October 24, 2000, the day before a scheduled appointment he had with the I.R.S. They discussed the debtor's tax problems, focusing on employment withholding taxes due. Niemirowski and Seideman agreed that Seideman would represent the debtor on the employment tax matter for a flat fee of $7,500.

Niemirowski testified that when he met with Seideman the debtor had not been considering filing a petition under Chapter 11. Seideman testified that he thought the employment tax issues could be resolved expeditiously in meetings and negotiations with the I.R.S. He did not mention the possibility of resolving the tax issues through a bankruptcy case. Niemirowski did not discuss any other creditor problems with Seideman.

After Seideman talked to a revenue officer, Seideman learned that Novus had not filed corporate income tax returns for five years. Seideman called Niemirowski. Niemirowski explained that a business problem had been corrected resulting in an anticipated revenue stream that would allow Novus to resolve its tax obligations.

Without telling Seideman, Novus filed its bankruptcy petition on November 20, 2000. In his letter to Seideman on December 6, 2000, debtor's counsel acknowledges that "these tax difficulties did not precipitate the chapter 11 filing [.]"

Applying the subjective test, this evidence does not establish that Novus retained Seideman in contemplation of bankruptcy. Although retained within one month of the bankruptcy filing, Novus hired Seideman on the eve of a meeting with the I.R.S. Novus was not anticipating or planning a bankruptcy filing when it retained Seideman. Other than the I.R.S., Niemirowski and Seideman did not discuss creditor problems. They did not discuss bankruptcy. Niemirowski believed the anticipated revenue stream of Novus would allow Novus to resolve its tax obligations. Retention of counsel to negotiate with one of the debtor's major creditors may be considered as evidence of services rendered in contemplation of bankruptcy. Prudhomme, 43 F.3d at 1004. Here the retention of a tax specialist with the full focus of the debtor on resolving its tax obligations, without any indication of other creditor problems or business problems and without any discussion of bankruptcy, was not in contemplation of bankruptcy.

As a result, the court does not review the attorney's fees under §329.

The court notes, however, that if the court found under the subjective test that Novus did retain Seideman in contemplation of bankruptcy, Seideman's fees would be subject to review even though Novus paid him a flat fee of $7,500. As this court explained in Dixon, 143 B.R. at 675–677, under §329, attorney's fees are subject to review by the court notwithstanding the terms of any fee arrangement between an attorney and a debtor. This includes a pre-petition flat fee. The court must determine the reasonableness of a fee, applying the lodestar analysis, irrespective of the contract between the debtor and the attorney. After engaging in that analysis, if the court determines that the pre-petition payments received by an attorney are excessive, the

court may order the excess to be paid to the bankruptcy estate.

Thus, in the instant situation, the court would analyze the reasonable number of hours spent by Seideman on the work performed pre-petition and assign a reasonable hourly rate to that work. Seideman testified that his hourly rate is $260 per hour, if he were to charge by the hour. He has three years of experience as an attorney. The record does not establish that $260 an hour is the prevailing rate in the community for a tax specialist with three years of experience.

Seideman and his assistant spent 34 hours on the assignment pre-petition, resulting in an average hourly charge of $220.50. But he acknowledges that he did not fully earn his flat fee because he did not complete his representation of Novus on the tax issues, the bankruptcy petition having intervened and the debtor-in-possession not having retained Seideman.

On a flat fee retainer, counsel would not reflect on whether the time spent on a project would be billable on an hourly basis. Consequently, Seideman spent a considerable amount of time researching issues for which a tax specialist might not actually bill a client, about 8 hours. He also spent a considerable amount of time outlining and organizing his presentations, about another 8 hours, that might have been helpful to him, but not fully billable, in the exercise of reasonable billing judgment, to a client.

Had §329 applied, the court would have engaged in this kind of a lodestar analysis. The court makes these observations for instructional purposes only.

Based on the foregoing,

IT IS ORDERED that the motion to disgorge under 11 U.S.C. §329 is DENIED.

Signed this ___ day of March, 2001.

Steven A. Felsenthal

United States Bankruptcy Judge

¶2002-5182

Phyllis FIER and Andrew L. FIER, PLAINTIFFS v. NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE and Internal Revenue Service, DEFENDANTS. In Re: Phyllis Fier and Andrew L. Fier, Debtors. U.S. Bankruptcy Court, Southern Dist. of New York, (Bktcy Ct NY) Docket No. 00-15686; Adv. Pro. No. 01-02457, May 21, 2001. Decision for Taxpayers.

1. Tax claims in bankruptcy—dischargeability. IRS and state tax agency's claims against Chap. 7 debtors were dischargeable: unchallenged allegations showed claims were listed on taxpayers' schedules; taxes were 3 years old and assessed more than 240 days before petition was filed; nonfraudulent returns were filed at least 2 years prepetition; and taxpayers didn't wilfully evade taxes. *Reference:* United States Tax Reporter ¶68,726.52(27).

United States Bankruptcy Court, Southern District of New York.

Order and Judgment Discharging Debtors from the Duly Listed and Scheduled Claim of the New York State Department of Taxation and Finance and Internal Revenue Service

LIFLAND, Bankruptcy Judge:

Chapter 7

[1] Upon the Summons and Notice of Pretrial Conference in an Adversary Proceeding with annexed Complaint, dated March 14, 2001, filed by the debtors, Phyllis Fier and Andrew L. Fier ("Debtors" or "Plaintiffs"), by and through their attorneys, the Law Offices of Bryan W. Kishner, requesting that this Court issue an Order and Judgment declaring that the duly listed and scheduled claims held by the New York State Department of Taxation and Finance and the Internal Revenue Service against the Debtors be deemed dischargeable; upon the Pretrial Conference conducted by this Court on April 26, 2001; upon the appearances made before this

Court via Bryan W. Kishner, Esq. of the Law Offices of Bryan W. Kishner representing the Debtors; upon the fact that no other appearances were made before this Court by the New York State Department of Taxation and Finance and the Internal Revenue Service; upon the fact that no answer nor other form of response having been received from the New York State Department of Taxation and Finance and the Internal Revenue Service in response to the Complaint; and appearing that the Complaint has been duly served upon the New York State Department of Taxation and Finance and the Internal Revenue Service; upon the representations made before this Court by Bryan W. Kishner, Esq., attorney for the Debtors; upon the unchallenged representations made in the Complaint and before this Court that Plaintiffs are entitled to a discharge because: (i) the claim in issue was duly listed on Debtors' schedules; (ii) the debt in issue stems from personal income taxes; (iii) the taxes are three (3) years old; (iv) the taxes were assessed more than 240 days prior to the filing of Debtors' bankruptcy petition; (v) the tax returns were filed at least two (2) years prior to bankruptcy; and (vi) the tax returns were non-fraudulent and there was no willful tax evasion by Debtors; and it appearing that good cause exists for the relief requested, it is hereby

ORDERED, that the duly listed and scheduled claim held by the New York State Department of Taxation and Finance and the Internal Revenue Service against Debtors be deemed dischargeable and that Plaintiffs have judgment to that effect.

SO ORDERED:

May 21st, 2001

/s/Burton R. Lifland

Honorable Burton R. Lifland

U.S. Bankruptcy Judge

¶2002-5183

John D. HENDERSON, PLAINTIFF v. UNITED STATES OF AMERICA & Internal Revenue Service, DEFENDANTS. In re: John D. Henderson 602 Mumford #1 Anchorage, AK 99508-1121 SSN 556-74-0490 Debtor. U.S. Bankruptcy Court, Dist. of Alaska, (Bktcy Ct AK) Docket No. 00-00144 DMD, June 20, 2001. Years 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1999. Decision for Taxpayer in part and Govt. in part.

1. Tax claims in bankruptcy—dischargeability—tax liens—valuation of secured claim. Pursuant to final judgment, Chap. 7 debtor's tax liabilities for 14 of 17 years, and penalties for 1 year, were dischargeable; but, tax liabilities for 2 years were nondischargeable under 11 USC §523(a)(1)(A) and §523(a)(1)(B)(i). Also, IRS's claim as to 7 years and penalty for 1 year for which debts were dischargeable was secured by prepetition lien notices; value of prepetition property secured by such liens equaled stated amount, plus prepetition refund for remaining year, plus interest; and all such liens were released. *Reference:* United States Tax Reporter ¶68,726.52(27); 68,726.51(25); 68,726.53(2).

Ronald A. Offret, Esq. Aglietti & Offret 733 W. 4th Avenue, Suite 206 Anchorage, AK 99501 Telephone: (907) 279-8657 Telefax: (907) 279-5534 Attorney for Debtor.

The United States Bankruptcy Court for the District of Alaska.

Final Judgment

McDONALD, Bankruptcy Court:

Chapter 7

The parties hereto having filed a stipulation of settlement, which addresses all of the issues in this case, and good cause appearing the court makes the following its FINAL JUDGMENT;

1. **[1]** That debtor's 1996 and 1997 federal income taxes are non-dischargeable pursuant to 11 USC 523(a)(1)(A) and (B)(i) respectively.

2. Debtor's 1982 through 1995 federal income taxes and the penalties for 1985 are dischargable in personem;

3. The Internal Revenue Services claim respecting taxable years 1983, 1985, 1987, 1989, 1990, 1991, 1993 and the penalty for 1985 was a secured claim by virtue of the notices of federal tax liens having been filed prior to Debtor's filing of this bankruptcy petition;

4. The value of Debtor's pre-petitioned property secured by the aforementioned is $1,000 plus a pre-petitioned income tax refund for 1999 in the amount of $440 plus interest, which amounts have been paid to the Internal Revenue Service, and all federal tax liens hereto filed for the years mentioned are hereby released.

6/20/01

DATE

Judge McDonald

U.S. Bankruptcy Court Judge

I declare under penalty of perjury that

A true and correct copy of the foregoing

Was sent to the following counsel of

Record via U.S. MAIL

Kay Hill

Attorney in Charge

Anchorage Office

Internal Revenue Service

605 W. 4th Avenue, Room 235

Anchorage Alaska 99501

Dated June 8, 2001, at Anchorage Alaska

Aglietti & Offret

Ina J. Pizzolato

Serve: R. Offret, Esq.

K. Hill, Esq.

J. Stafford, Adv. Case Mg

S. Watkins, Case Closing Clerk

6/21/01

¶2002-5184

JARRETT WOODWORKING, INC., PLAINTIFF v. UNITED STATES OF AMERICA, United States Department of Treasury and Internal Revenue Service, DEFENDANTS. In Re: Jarrett Woodworking, Inc., Debtor. U.S. Bankruptcy Court, Southern Dist. of New York, (Bktcy Ct NY) Docket No. 95-B-43334 (PCB), April 17, 2001. Decision against Taxpayer.

1. Tax claims in bankruptcy—dismissal of adversary proceeding. Pursuant to settlement, Chap. 11 debtor-corp.'s adversary proceeding was dismissed with prejudice. *Reference:* United States Tax Reporter ¶68,726.52(40).

Todtman, Nachamie, Spizz & Johns, P.C. Attorneys for Jarrett Woodworking, Inc. 425 Park Avenue New York, New York 10022 (212) 754-9400 Scott S. Markowitz (SSM-0849)

United States Bankruptcy Court, Southern District of New York.

Order Dismissing Adversary Proceeding

BEATTY, Bankruptcy Judge:

Chapter 11

[1] Based upon the settlement reached upon the record at a hearing held on March 20, 2001, and upon the letter dated March 20, 2001 from the United States Attorney for the Southern District of New York to counsel to Jarrett Woodworking, Inc., it is

ORDERED, that the above-captioned adversary proceeding is hereby dismissed with prejudice pursuant to rule 7041 of the Federal Rules of Bankruptcy Procedure.

Dated: New York, New York

April 17, 2001

Prudence Carter Beatty

UNITED STATES BANKRUPTCY JUDGE

¶2002-5185

TAX ANALYSTS, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Dist. of Columbia, (DC Dist Col) Docket Civil Action No.: 99-0372 (RMU), Aug. 5, 2002. Decision for Govt.

1. FOIA—exemptions—treaty secrecy exemption—tax convention information. IRS was granted summary judgment on tax publisher's FOIA complaint for disclosure of information relating to international treaty partners: requested information, which included identification of specific treaty partners with specific tax issues and was exchanged at Pacific Assn. of Tax Administrators and ''G-4'' meetings pursuant to nondisclosure provisions, was exempt from disclosure under Exemption 3 and IRC §6105(c)(1)(E) as protected tax convention information. Publisher's reliance on IRC §6103 and argument that IRC §6105's reach was limited to individual taxpayer return information was belied by IRC §6105's clear ''any information'' language and purpose of providing heightened protection for disclosures made by treaty partners; and case law focusing only on IRC §6103 wasn't controlling. *Reference:* United States Tax Reporter ¶61,055.01(5); 76,556.502(10). IRC §6103; 6105.

Counsel for the plaintiff William A. Dobrovir 65 Culpeper Street, Suite 102 Warrenton, VA 20186
Cornish F. Hitchcock 110 17th Street, N.W. 10th Floor Washington, D.C. 20036-4601
Counsel for the defendant Stuart D. Gibson Christopher J. Kayser U.S. Department of Justice P.O. Box 227 Ben Franklin Station Washington, D.C. 20004

United States District Court for the District of Columbia.

Memorandum Opinion

Ricardo M. Urbina United States District Judge

Granting the Defendant's Motion for Summary Judgment; Denying the Plaintiff's Motion for Summary Judgment

I. INTRODUCTION

This matter comes before the court on the parties' cross-motions for summary judgment. Tax Analysts (''the plaintiff''), a nonprofit corporation, brings this action under the Freedom of Information Act (''FOIA''), 5 U.S.C. § 552, seeking disclosure of certain records maintained by the Internal Revenue Service (''the defendant'' or ''IRS''). For the reasons that follow, the court grants the defendant's motion for summary judgment and denies the plaintiff's motion for summary judgment.

II. BACKGROUND

Tax Analysts is a nonprofit corporation whose primary public education function is to publish and disseminate information concerning the ''enactment and administration of the tax laws of the United States and the several states, the adjudication of tax cases by courts and other tribunals of the United States and the several states, and other subjects relating to taxation.'' Compl. at 1–2. On November 19, 1996, May 5, 1998, and December 1, 1998, Tax Analysts sent FOIA requests to the IRS. *Id.* at 3–4. It sought all records of the IRS relating to the Pacific Association of Tax Administrators (''PATA''), including its meetings, deliberations, decisions and staffing. *Id.* at 3. The PATA consists of the United States, Japan, Australia, and Canada. *Id.*PATA members discuss tax administration issues of joint concern, including cross-border tax avoidance, tax evasion, and other international tax issues. *Id.* at 2; Answer at 2. In addition, the December request specified the release of all records of the IRS relating to the ''Group of Four'' meetings (''G-4''), consisting of the United States, United Kingdom, France, and Germany. Compl. at 4. The IRS processed about 57,000 pages of responsive records, produced in whole or in part, and prepared an index identifying the withheld or redacted documents with the corresponding claimed exemption under 5 U.S.C. § 552(b)(3), (5), and (6). Stipulation dated Oct. 15, 2001 (''Stipulation'') at 1–2.

On February 17, 1999, Tax Analysts filed this suit for failure to produce all the information sought in the FOIA requests. *Id.* at 1, 5. Tax Analysts narrowed this case to only the claimed exemption under 5 U.S.C. § 552(b)(3), leaving exemptions 5 and 6 uncontested. *Id.* at 2. Some of the specific information requested includes the identification of the countries with respective documents, the disclosure of countries'

representatives, and other material associated with a foreign country's tax law. Pl.'s Opp'n to Def.'s Mot. for Summ. J. & Pl.'s Cross-Mot. for Summ. J. ("Pl.'s Opp'n & Cross-Mot.") at 9–12.

On June 14, 2001, the court issued an order granting the plaintiff's motion to withdraw as moot its initial motion for partial summary judgment because Congress had recently enacted 26 U.S.C. § 6105 (2000), codifying treaty secrecy provisions such as the nondisclosure language in dispute here. Order dated June 14, 2001; Def.'s Mot. for Summ. J. at 2 n.3. Both parties now move the court for summary judgment. In short, they dispute whether the IRS can properly withhold the requested information pursuant to the treaty secrecy exemption set forth in 26 U.S.C. § 6105(c)(1)(E). Stipulation at 2.

III. ANALYSIS

A. Legal Standard for Summary Judgment

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than "the mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment. *Id.*

In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999); *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Greene*, 164 F.3d at 675. If the evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249–50 (internal citations omitted).

B. The Defendant Properly Withheld Information Requested Pursuant to Exemption 3

[1] FOIA mandates the disclosure of all nonexempt information requested by specific parties. 5 U.S.C. § 552(a)(3); *Judicial Watch of Florida, Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 10 (D.D.C. 2000) (Urbina, J.). "Summary judgment is available to the defendant in a FOIA case when the agency proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester." *Moore v. Aspin*, 916 F. Supp. 32, 35 (D.D.C. 1996) (citing *Weisberg v. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983)). The agency bears the burden of showing that there is no genuine issue of material fact by proving the validity of the exemptions it asserts. *Weisberg*, 705 F.2d at 1350; *Tax Analysts v. IRS*, 152 F. Supp. 2d 1, 9 [87 AFTR 2d 2001-1470] (D.D.C. 2001), *rev'd in part on*

other grounds,[1] 2002 WL 1300028 [89 AFTR 2d 2002-2948] (D.C. Cir. 2002)). Exemption 3 specifically allows an agency to withhold or redact information prohibited from disclosure by another statute if the statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(B); *Flores v. Executive Office for the United States Attorneys Freedom of Info./Privacy Act Unit*, 121 F. Supp. 2d 14, 16 (D.D.C. 2000) (Urbina, J.).

In the case at bar, various countries exchanged information at the PATA and G-4 tax conventions pursuant to a nondisclosure provision, which the parties agree is consistent with the United States Model Income Tax Convention ("U.S. Model Treaty" or "Art. 26, cl. 1"). Stipulation at 2–3. The relevant language is as follows:

> Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the *domestic* laws of that State *and* shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the convention or the oversight of the above.

Id. (emphasis added) (quoting U.S. Model Treaty Art. I, cl. 1). As discussed *supra*, Congress codified the quoted nondisclosure provision when enacting 26 U.S.C. § 6105 in December 2000. Entitled "Confidentiality of Information Arising Under Treaty Obligations," Section 6105(a) states, "Tax convention information shall not be disclosed." 26 U.S.C. § 6105(a). "In doing so, Congress addressed the very issue [the] plaintiff raised in its motion for [partial] summary judgment and concluded: 'Section 6105 satis fies [e]xemption 3 of the FOIA,'" validating the treaty secrecy provision as a statute under exemption 3. Def.'s Mot. for Summ. J. at 2 n.3 (quoting H.R. Conf. Rep. No. 106-1033, at 1012 (2000)).

Both parties agree that for the purpose of their cross-motions for summary judgment, the only question at issue is whether any information contained in the requested documents "that otherwise would not be treated as secret under the domestic laws of the United States is nevertheless treated as confidential or secret under the tax conventions and therefore would constitute tax convention information as defined by 6105(c)(1)(E)." Stipulation at 2. In other words, the debate focuses on whether the information requested by the plaintiff falls within the ambit of the U.S. Model Treaty in conjunction with Section 6105.

The plaintiff contends that the U.S. Model Treaty provides for the protection only of taxpayer information that appropriately corresponds with 26 U.S.C. § 6103. Pl.'s Opp'n & Cross-Mot. at 19–21. Section 6103 protects taxpayer privacy by preventing the disclosure of tax return information. *Id.* at 21. The defendant counters that notwithstanding Section 6103, Section 6105 exempts the information requested from the PATA and G-4 tax conventions because Congress enacted this section to protect information that participating countries chose not to disclose, and more specifically, "tax convention information . . . including the association of a particular treaty partner with a specific issue or matter." Def.'s Mot. for Summ. J. at 10–11 (quoting H.R. Conf. Rep. No. 106-1033, at 1011). The defendant asserts that the documents fall under Section 6105(c)(1)(E)'s definition of "tax convention information" as "any other information exchanged pursuant to a tax convention which is treated as confidential or secret under the tax convention." *Id.* at 10 (quoting Section 6105). In short, the defendant contends that the language of the U.S. Model Treaty does not restrict Section 6105, but instead requires the nondisclo sure of the tax convention information in dispute here pursuant to exemption 3. *Id.* at 4.

[1] The D.C. Circuit did not address the district court's exemption 3 ruling because neither party appealed that component of the court's judgment. *Tax Analysts v. IRS*, 2002 WL 1300028, at 4 (D.C. Cir. 2002).

The court concludes that the defendant can make the requisite showing, and, in contrast, the plaintiff fails to proffer any rationale beyond conclusory statements. *Greene*, 164 F.3d at 675. The court first examines the plain language used by Congress in the U.S. Model Treaty. U.S. Model Treaty, Art. I, cl. 1. The provision begins with "any information," and uses the conjunction "and" to indicate that "any information" shall be treated as secret if it is *both* protected by U.S. domestic law *and* is disclosed to only the relevant tax authorities. U.S. Model Treaty, Art. I, cl. 1; Def.'s Mot. for Summ. J. at 8. Likewise, Section 6105(c)(1)(E) provides for the protection of "*any other* information exchanged." Section 6105 (emphasis added); Def.'s Reply & Opp'n to Pl.'s Cross-Mot. for Summ. J. ("Def.'s Reply") at 2–3. The court agrees with the defendant that both the language of the treaty and the statute show Congress's clear intent not to limit the nondisclosure provisions to information regarding individual taxpayers and also to require the release to appropriate authorities. 26 U.S.C. § 6105(b)(4); H.R. Rep. 106-1033, at 1011; Def.'s Mot. for Summ. J. at 8. In fact, Congress created an exception under Section 6105(b)(4) that "any tax convention information *not relating to a particular taxpayer*" may be disclosed only "if the Secretary determines, after consultation with each other party to the tax convention, that such disclosure would not impair tax administration." H.R. Rep. No. 106-1033, at 1011–12 (emphasis added); Def.'s Reply at 5. The defendant thus acted properly by consulting with respective tax convention members and withholding information that other countries "treated as secret." U.S. Model Treaty Art. I, cl. 1; Def.'s Reply at 5.

Nonetheless, the plaintiff insists that Section 6103 is controlling and points to a D.C. Circuit holding that Section 6103 does not protect legal analysis and legal conclusions. *Tax Analysts v. IRS*, 117 F.3d 607, 611–12 [80 AFTR 2d 97-5152] (D.C. Cir. 1997); Pl.'s Opp'n & Cross-Mot. at 19. This case does not apply, however, since Section 6103 is not at issue in the case at bar. Indeed, in response to the D.C. Circuit's opinion in *Tax Analysts*, Congress enacted Section 6105, expressing its clear intent to fully exempt previously unprotected information under Section 6103 if the material qualifies as "tax convention information." *Tax Analysts*, 152 F. Supp. 2d at 12; H.R. Conf. Rep. No. 106-1033, at 1008–09. Contrary to the plaintiff's position that the U.S. Model Treaty most resembles Section 6103, the defendant persuasively points out that Congress believed "the exchange of information articles [cited in Section 6105 and other nondisclosure treaty provisions] may be similar to, or represent a variation on, Article 26 of the 1996 U.S. model income tax treaty." Def.'s Mot. for Summ. J. at 11 (quoting H.R. Conf. Rep. 106-1033, at 1006).

For the plaintiff's textual argument to succeed, the court must apply Section 6103 over Section 6105 and render superfluous the second clause of the treaty confining the release of information to relevant tax authorities. *Tax Analysts*, 152 F. Supp. 2d at 12 (noting that Section 6105 is separate and distinct from Section 6103); Def.'s Reply at 4–5.

> It is a well-established principle that when interpreting statutes or contractual provisions, a court should "absent a clear indication to the contrary, ... read the statute [or provision] so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless or nugatory."

Air Line Pilots Ass'n, Int'l v. Pension Benefit Guar. Corp., 193 F. Supp. 2d 209, 218 (D.D.C. 2002) (quoting Norman J. Singer, Sutherland Stat. Const. § 46.03); *see also Potter v. United States*, 155 U.S. 438, 446 (1894); *United States v. Wilson*, 290 F.3d 347, 352, 356 (D.C. Cir. 2002). The court agrees with the defendant's interpretation that the nondisclosure provision of Section 6105 - enacted by Congress less than two years ago - restricts the release of some information exchanged under the U.S. Model Treaty, which is not independently protected under Section 6103. Def.'s Mot. for Summ. J. at 11.

In addition, another member of this court has already ruled on Section 6105(c)(1)(E), agreeing with the IRS's previous argument. In *Tax Analysts*, the court deemed persuasive the IRS's explanation that:

> although the exchange of information articles . . . do not specifically set forth that the ''identity of a country'' or ''identity of a treaty partner'' is to remain confidential, a treaty partner seeking information from the United States expects its identity and the content of that communication to remain confidential under the treaty articles.

Tax Analysts, 152 F. Supp. 2d at 11 n.15 (Kollar-Kotelly, J.). This court agrees with this line of reasoning.

While the court need not consider the legislative history of Section 6105 since its plain meaning is clear, even if the court were to assess the congressional intent underlying the statute, such an analysis would support the defendant's position. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 [63 AFTR 2d 89-652] (1989) (holding that when a ''statute's language is plain, the sole function of the court is to enforce it according to its terms''). Congress's recent enactment of Section 6105 indicates that it intended for tax convention information to be subject to heightened disclosure standards as opposed to enacting legislation that would protect information that was already exempt from disclosure under Section 6103. 26 U.S.C. § 6105. Furthermore, the ''IRS has expressed the precise concern that Congress sought to address in enacting § 6105 . . . to avoid adversely affecting the working relationship among treaty partners.'' *Tax Analysts*, 152 F. Supp. 2d at 13. Moreover, the statute's text stating that, ''any other information . . . which is treated as confidential or secret . . .,'' emphasizes the importance of honoring the treaty partners' expectations and actions at the time of the requested disclosure. 26 U.S.C. § 6105(c)(1)(E) (emphasis added); Def.'s Reply at 8–9.

The court concludes that the information specifically withheld by participating countries must remain exempt. The PATA and G-4 information satisfies Section 6105(c)(1)(E)'s definition of tax convention material. 26 U.S.C. § 6105. Based on the recent expansion of FOIA's exemption 3 to include tax convention nondisclosure provisions via Section 6105, the court rules that the defendant need not produce the requested materials. In sum, the defendant has met its burden of showing that there is no genuine issue of material fact by proving the validity of the exemption it asserts. *Weisberg*, 705 F.2d at 1350; *Tax Analysts*, 152 F. Supp. 2d at 9. Accordingly, the court concludes that the defe ndant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp.*, 477 U.S. at 322.

IV. CONCLUSION

For all these reasons, the court grants the defendant's motion for summary judgment and denies the plaintiff's motion for summary judgment. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this ___ day of August, 2002.

Ricardo M. Urbina

United States District Judge

ORDER

Granting the Defendant's Motion for Summary Judgment; Denying the Plaintiff's Motion for Summary Judgment

For the reasons stated in this court's Memorandum Opinion separately and contemporaneous ly issued this ___ day of August, 2002, it is hereby

ORDERED that the defendant's motion for summary judgment is GRANTED; and it is

FURTHER ORDERED that the plaintiff's motion for summary judgment is hereby DENIED.

SO ORDERED.

Ricardo M. Urbina

United States District Judge

¶2002-5186

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Marvin W. SIMMONS, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-16867 July 29, 2002. District Courts, (2002, DC CA) 89 AFTR 2d 2002-2973, and (2001, DC CA) 88 AFTR 2d 2001-5809, which denied reconsideration of (2001, DC CA) 87 AFTR 2d 2001- 2448, which denied reconsideration of (2000, DC CA) 86 AFTR 2d 2000-7112, reconsideration denied at (2000, DC CA) 87 AFTR 2d 2001-464, affirmed. Earlier proceedings at (2000, DC CA) 86 AFTR 2d 2000-6445, 2000-2 USTC ¶50801; (2000, DC CA) 86 AFTR 2d 2000-5563; (1999, CA9) 84 AFTR 2d 99-6458, 194 F3d 1319, 99-2 USTC ¶50894; (1998, DC CA) 81 AFTR 2d 98-2372; (1998, DC CA) 81 AFTR 2d 98-2371; (1998, DC CA) 81 AFTR 2d 98-2040, 98-1 USTC ¶50419; and (1998, DC CA) 81 AFTR 2d 98-2032, 98-1 USTC ¶50418. Years 1963, 1964, 1970, 1977, 1978, 1979, 1980, 1984, 1985, 1986, 1987. Decision against Taxpayer.

1. Review of district court decision—jurisdiction—motion for reconsideration—amended judicial sale order—collection actions—judicial sales—motion to stay—post-judgment motions. District court orders denying pro se taxpayer's repeat motion for reconsideration of amended judicial sale order and ordering surrender and sale of counterfeit coins were affirmed without discussion. *Reference:* United States Tax Reporter ¶74,035.03(100); 74,025.01(3); 74,025.01(132). IRC §7402; 7403.

Appeal from the United States District Court for the Eastern District of California, D.C. No. CV-96-05948-AWI/DLB. United States Court of Appeals for the Ninth Circuit.

Before: BROWNING, KOZINSKI, and BERZON, Circuit Judges.

Memorandum*

Anthony W. Ishii, District Judge, Presiding

Submitted July 22, 2002**

NOT FOR PUBLICATION

[1] Marvin W. Simmons appeals pro se the district court's order denying his motion to reconsider the district court's orders amending an order of judicial sale to satisfy federal tax liens. Simmons also appeals the district court's order concluding that certain counterfeit coins be surrendered to the United States Secret Service to be smelted and sold in accordance with the court's amended order of judicial sale. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review for abuse of discretion the district court's denial of reconsideration, *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223 (9th Cir. 2000), as well as the district court's order for disposition of the counterfeit coins, *United States v. Stonehill*, 83 F.3d 1156, 1160 [77 AFTR 2d 96-2212] (9th Cir. 1996). We affirm.

The district court did not abuse its discretion by denying reconsideration. *See* Fed. R. Civ. P. 60(b); *American Ironworks & Erectors, Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 899 (9th Cir. 2001).

The district court did not abuse its discretion by ordering the disposition of the counterfeit coins. *See* 28 U.S.C. § 2004; *Stonehill*, 83 F.3d at 1160.

Simmons' remaining contentions lack merit.

AFFIRMED.

¶2002-5187

Lance C. STANDIFIRD, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-16727

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** Because the panel unanimously finds this case suitable for decision without oral argument, Appellant's request for oral argument is denied. *See* Fed. R. App. P. 34(a)(2).

July 29, 2002. District Court affirmed. Decision against Taxpayer.

1. Collection due process—review of administrative determination—frivolous return penalties—summary judgment—proper parties. District court properly granted govt. summary judgment in pro se taxpayer's action to vacate IRS's determination notice upholding his frivolous return penalty assessments: uncontroverted evidence showed IRS provided taxpayer adequate notice; and taxpayer raised no material fact issues as to whether Appeals officer abused his discretion in determining that IRS met IRC §6330(c)(1)'s applicable law and procedural requirements. Also, U.S., as real party in interest, was properly substituted for named IRS officers. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(2); 74,336.505(15). IRC §6330; 6702.

Appeal from the United States District Court for the District of Arizona. United States Court of Appeals for the Ninth Circuit.

Before: BROWNING, KOZINSKI, and BERZON, Circuit Judges.

Memorandum*

James A. Teilborg, District Judge, Presiding

Submitted July 22, 2002**

NOT FOR PUBLICATION

[1] Lance C. Standifird appeals pro se the district court's summary judgment in favor of the United States in Standifird's action seeking to vacate an Internal Revenue Service (''IRS'') Notice of Determination approving assessments of frivolous return penalties for Standifird's 1990, 1991, and 1992 tax returns. We have jurisdiction pursuant to 28 U.S.C. § 1291, and after de novo review, *Hansen v. United States*, 7 F.3d 137, 138 [72 AFTR 2d 93-5922] (9th Cir. 1993)(per curiam), we affirm.

Summary judgment was proper because the IRS presented uncontroverted evidence establishing that it provided Standifird with adequate notice, *see Hughes v. United States*, 953 F.2d 531, 536 [69 AFTR 2d 92-472] (9th Cir. 1992), and Standifird failed to raise a genuine issue of material fact as to whether the IRS appeals officer abused his discretion in determining, pursuant to 26 U.S.C. § 6330(c)(1), that the IRS had met the requirements of applicable law or administrative procedures, *see Hansen*, 7 F.3d at 138.

The district court properly substituted the United States for the two IRS appeals officers Standifird named in his original complaint because the United States is the real party in interest. *See Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992).

Standifird's remaining contentions lack merit.

AFFIRMED.

¶2002-5188

UNITED STATES OF AMERICA, PLAINTIFF v. Michael B. GASKO and Nancy E. GASKO, DEFENDANTS. U.S. District Court, Northern Dist. of Indiana, (DC IN) Docket No. 3:01-CV-0747RM, July 10, 2002. Decision for Govt.

1. Actions to reduce assessments to judgment—summary judgment. Taxpayers' unpaid tax, interest and penalty assessments were reduced to judgment on summary judgment: taxpayers offered no evidence to show that they weren't liable for assessments. *Reference:* United States Tax Reporter ¶74,035.01(25). IRC §7403.

United States District Court, Northern District of Indiana, South Bend Division.

Judgment in a Civil Case

[ ] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. 34(a)(2).

[X] Decision by Court. This action came to trial, hearing or consideration before the Court. The issues have been tried, heard or considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the plaintiff and against the defendant in the amount of $621,999.90 plus interest and other statutory additions accruing from and after May 24, 2002.

Stephen R. Ludwig, Clerk

By /s/

Deputy Clerk

Equivalent Coupon Issue Yield: 2.06%

This document entered pursuant to Rules 79(a) and 58 of the Federal Rules of Civil Procedure on July 10, 2002.

Memorandum and Order

MILLER, JR., District Judge:

[1] On May 30, the United States filed its motion for summary judgment[1] asking the court to grant judgment against Michael and Nancy Gasko for unpaid federal taxes. The Gaskos did not respond with evidence in opposition to the motion that would allow reasonable jury to find in their favor — a burden that rests upon them. See Robin v. Espo Engineering Corp., 200 F.3d 1081, 1087–88 (7th Cir. 2000) ("To defeat a motion for summary judgment, the non-moving party cannot rest on the mere allegations or denials contained in his pleadings, but 'must present sufficient evidence to show the existence of each element of its case on which it will bear the burden at trial'").

Because the United States came forth with evidence that would place upon the Gaskos the burden of showing that they are not liable for the assessments, and the Gaskos have presented no evidence in opposition to that presented by the government or in support of their own burden of proof at trial, the court GRANTS the United States motion for summary judgment. [Docket No. 6]. The United States is entitled to judgment on its claim for money damages against Michael B. Gasko and Nancy E. Gasko, jointly and severally, in the amount of $621,999.90, plus interest and other statutory additions accruing from and after May 24, 2002.

SO ORDERED.

ENTERED: July 9, 2002

Robert L. Miller, Jr., Judge

United States District Court

cc: D. Snoeyenbos

R. Mysliwiec

¶2002-5189

Fred Raymond WALLACE and Marilyn Joyce WALLACE, PLAINTIFFS-APPELLANTS v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Tenth Circuit, (CA10) Docket No. 02-8032, Aug. 6, 2002. District Court, (2001, DC WY) 89 AFTR 2d 2002-347, 2002-1 USTC ¶20163, reconsideration denied (2002, DC WY) 90 AFTR 2d 2002-5343, affirmed. Decision against Taxpayers.

1. Actions against IRS employees—dismissal—jurisdiction; waiver of sovereign immunity; exhaustion of administrative remedies; Anti-Injunction Act—motion to remand—reconsideration. District court properly dismissed taxpayers' quiet title action against IRS employees challenging validity of assessments and IRS liens, and denied their post-judgment motions: taxpayers didn't satisfy 28 USC §1346(a)(1)'s jurisdictional prerequisites; didn't exhaust their administrative remedies under IRC §7433; AIA barred injunctive relief; 28 USC §2410 barred collaterally attack on assessments' merits; and appeal raised no new claims. Also, taxpayers' conditional petition for declaratory relief was denied. *Reference:* United States Tax Reporter ¶74,025.01(83); 74,336.506(25); 74,215.05(5); 74,335.01(5). IRC §7402; 7421; 7433.

[1] The government's motion is accompanied by a memorandum in support of a partial summary judgment motion, but the motion addresses all of the claims in the government's complaint. Today's order is intended to resolve all of the allegations in the complaint.

United States Court of Appeals, Tenth Circuit.

Before KELLY, McKAY, and MURPHY, Circuit Judges.

Order and Judgment*

McKAY, Circuit Judge:

After examining the briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[1] The underlying action from which this appeal stems was filed in state court framed as a quiet title action attacking a lien filed by the Internal Revenue Service. Notwithstanding Plaintiffs' objections, it was properly removed to federal court pursuant to 28 U.S.C. § 1442 because it was against federal officers or agencies.

After reviewing Plaintiffs' many pleadings and claims, the trial court properly determined that the case was simply an attempt to challenge the validity of federal tax assessments and resulting liens. The trial court properly concluded that Plaintiffs had not satisfied the necessary prerequisites to qualify for the limited waiver of federal sovereign immunity provided for in tax refund cases by 28 U.S.C. § 1346(a)(1). The trial court was also correct in concluding that Plaintiffs could not rely on 26 U.S.C. § 7433(a) because they failed to allege exhaustion of administrative remedies. Likewise, it properly held that 28 U.S.C. § 2410 does not permit a taxpayer to collaterally attack the merits of a tax assessment. The trial court's final obviously correct blow to Plaintiffs' action was its holding that the case should be dismissed for lack of subject matter jurisdiction because the Anti-Injunction Act, 26 U.S.C. § 7421, bars injunctive relief as to the collection activities of the Internal Revenue Service.

The claims on appeal are various ways of raising the same claims. Therefore, after full review, we conclude that the trial court's order dismissing the complaint for lack of jurisdiction and its denial of a variety of post-judgment motions are correct. Plaintiffs-Appellants' Conditional Petition for Declaratory Relief is denied. The trial court's judgment of dismissal is AFFIRMED.

Entered for the Court

Monroe G. McKay

Circuit Judge

¶2002-5190

In Re: FORMAN ENTERPRISES, INC., Debtor. THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF FORMAN ENTERPRISES, INC., PLAINTIFF v. Sam FORMAN, Lawrence Ashinoff, Brett Forman, Richard Forman, and Wendy Forman, DEFENDANTS. U.S. Bankruptcy Court, Western Dist. of Pennsylvania, (Bktcy Ct PA) Docket No. 00-20523-BM, Aug. 2, 2002. Earlier proceeding at (2002, Bktcy Ct PA) 89 AFTR 2d 2002-848. Years 1997, 1998, 1999. Decision for Taxpayers.

1. Tax claims in bankruptcy—net operating losses (NOLs); S corp. losses—avoidable transfers—postpetition transfers—unjust enrichment; constructive trust. Chap. 7 trustee was denied state-law based claims for turnover of debtor-S corp.'s shareholders' passthrough NOL-based refunds: although taxpayers' federal preemption argument was rejected, trustee still failed to make viable claims. Facts that corp. paid taxpayers dividends to enable them to pay taxes and that secured creditor would be deprived of NOL didn't alone prove that taxpayers were unjustly enriched or breached fiduciary duties; and, absent unjust enrichment, imposition of constructive trust wasn't warranted. Also, trustee's alternative 11 USC §549(a) argument failed where NOL and corp.'s right to use it wasn't bankruptcy estate property; or even if it were, taxpayers' election not to waive prescribed order of NOL's appli-

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

cation gave rise to no postpetition "transfer" under §549(a). *Reference:* United States Tax Reporter ¶68,726.535; 68,726.52(3).

Owen W. Katz, Esq. and Roman Iwanyshyn, Esq., Co-Counsel for Carlota M. Bohm, Chapter 7 Trustee, Successor Plaintiff.
James L. Weisman, Esq., for Forman Defendants.
Philip E. Beard, Esq., for Defendant Lawrence Ashinoff.

United States Bankruptcy Court, Western Dist. of Pennsylvania.

Memorandum Opinion

MARKOVITZ, Bankruptcy Judge:

The chapter 7 trustee seeks in this adversary action to recover tax refunds defendants as shareholders of an S corporation have received (or expect to receive) as a result of their carrying back a net operating loss (hereinafter "NOL") suffered by the S corporation to income taxes paid in previous years. Recovery is based on theories of unjust enrichment, breach of fiduciary duty and impermissible post-petition transfer. The trustee also seeks imposition of a constructive trust.

Defendants steadfastly deny that the chapter 7 trustee is entitled to any relief in this case.

We will enter judgment in favor of defendants and against the chapter 7 trustee for reasons set forth in this memorandum opinion.

FACTS

Debtor was incorporated by defendant Sam Forman on October 4, 1995. The next day it issued 1,000 shares of common stock, all of which were acquired by Sam Forman. At the time of the closing Sam Forman paid in capital to the debtor in the amount of $1,000,000 and loaned it the additional sum of $4,190,000.

Immediately thereafter debtor elected to become an S corporation in accordance with 26 U.S.C. § 1361 et seq., which election remained in effect through its tax year ending on January 4, 2000.

On February 19, 1996, Sam Forman sold thirty percent of his shares of stock to defendant Larry Ashinoff for the sum of $993,000 and sold him a thirty percent interest in the above note for the sum of $1,257,000.

Sam Forman and Larry Ashinoff executed a shareholder's agreement at the time Ashinoff acquired his shares of debtor's stock. Section 9.01 of the agreement provided in part as follows:

> .... Commencing with tax-year 1996 and for each year thereafter for which the [debtor] is an S corporation for federal income tax purposes, the [debtor] shall pay a dividend to each of the stockholders to allow such stockholder to pay the federal and state income tax or tax estimates payable by such stockholders attributable to such stockholders' allocable share of the [debtor's] income computed for such year.

At some time after February 19, 1996, Sam Forman gave a portion of his remaining shares of stock as a gift to his children, defendants Brett Forman, Wendy Forman and Richard Forman. Sam Forman owned fifty percent of debtor's shares as a result of the gift whereas Larry Ashinoff owned thirty percent, Brett Forman and Wendy Forman each owned nine percent; and Richard Forman owned two percent.

Sam Forman, Brett Forman and Larry Ashinoff were members of director's board of directors at all times relevant to this case.

Sam Forman received dividend payments from debtor in April and June of 1996 totaling $550,000 to pay income tax he owed for 1995 on debtor's taxable income.

Defendants received dividend payments from debtor in January of 1997 totaling $850,001 to pay income taxes they owed for 1996 on debtor's taxable income.

Defendants received dividend payments from debtor in January and June of 1998

totaling $1,311,750 to pay income taxes they owed for 1997 on debtor's taxable income.

Defendants received dividend payments in June and September of 1998 and in January and April of 1999 totaling $721,038 to pay income taxes they owed for 1998 on debtor's taxable income.

Defendants received dividend payments in April and June of 1999 totaling $1,065,220 to pay income taxes they owed for 1999 on debtor's taxable income.

All of these dividend payments to defendants were made in accordance with § 9.01 of the above shareholders' agreement executed on February 19, 1996.

Debtor's CFO projected in September of 1999 that debtor would suffer a loss of $1,000,000 to $1,500,000 for 1999. He recommended that each shareholder execute a promissory note evidencing repayment of his or her pro rata dividend for 1999 by December 31, 1999.

All four of the Forman defendants agreed to repay dividends they had received from debtor in 1999 to pay income taxes they owed for 1999 on debtor's taxable income. To this end, they executed promissory notes in favor of debtor which were then assigned to PNC Bank, debtor's secured lender.

Defendant Ashinoff, however, refused to repay the dividends he had received from debtor in 1999 to pay income tax he owed in 1999 on debtor's taxable income. Without his consent, debtor carried on its books as an account receivable the dividends paid to Ashinoff in 1999 for his estimated 1999 income tax payment. Debtor then assigned the account receivable to PNC Bank.

Debtor filed its federal income tax return for taxable year 1999 in July of 2000. It reported an NOL in the amount of $16,695,074, some fifteen to sixteen million dollars greater than it had projected in September of 1999.

Defendants thereafter filed their personal income tax returns for taxable year 1999. As shareholders of an S corporation, they availed themselves of debtor's NOL and carried it back to taxable years 1998 and 1997 seeking to recover tax refunds for those years exceeding $5,289,000 in the aggregate. Defendants either have received or are awaiting receipt of tax refunds as a result of debtor's 1999 NOL.

Debtor filed a voluntary chapter 11 petition on January 26, 2000. A creditors' committee was constituted several days later. Many and various activities occurred during the period when debtor languished in chapter 11. None of said activities appeared to direct debtor toward reorganization. To the contrary, debtor's assets were sold, leaving debtor a base shell and the proceeds were paid to the secured creditor and the professionals. When the tangible assets and possibility of reorganization were gone, the case was converted to a chapter 7 proceeding and was reassigned to this member of the court on June 6, 2001. A chapter 7 trustee was appointed the same day.

On December 21, 2001, while debtor's bankruptcy was still a chapter 11 proceeding, the committee of unsecured creditors commenced the above adversary action against defendants seeking to recover the above tax benefits and refunds received by defendants arising out of debtor's 1999 NOL. The chapter 7 trustee stepped into the shoes of the committee and took over prosecution of the adversary action after conversion of the case.

Count I of the complaint states a claim for unjust enrichment and requests that defendants be required to pay over any tax refunds they receive as a result of utilizing the 1999 NOL. Count II seeks imposition of a constructive trust in favor of debtor for any refunds defendants receive as a result of utilizing the NOL. Count III asserts that defendants' election not to waive loss carrybacks arising from the NOL and to utilize it instead to offset debtor's taxable income in future years constitutes an avoidable post-petition transfer under § 549(a) of the Bankruptcy Code. Count V seeks pursuant to § 550 to recover for the benefit of creditors the full amount of the

refunds received by defendants.[1] Count VI asserts that defendants breached their fiduciary duty to debtor and its creditors by causing debtor to pay them dividends then utilizing the NOL to obtain tax refunds for themselves. Plaintiff seeks to recover the tax refunds received.

The case was tried on May 22, 2002, at which time the parties were given an opportunity to offer evidence on the issues raised.

DISCUSSION

Federal Preemption

[1] On October 5, 1995, debtor elected in accordance with 26 U.S.C. § 1362(a) to be an S corporation. In its simplest terms, this means that the tax attributes of the corporation pass through to the shareholders. If the corporation earns a profit in a particular year the shareholders may elect to take same, pay the tax and keep the balance. If the corporation sustains a loss, the shareholders may utilize same by offsetting other income and reducing their tax due. In the case at hand, these shareholders elected not to generally take profits as they accrued but, instead, decided to only take a sum sufficient to pay the tax due and leave the balance of the profits earned in the corporation as a capital infusion.

The election remained in effect until it was terminated in January of 2000. Once the election was made, responsibility for payment of taxes owed on debtor's income and the right to utilize its NOLs passed through to debtor's shareholders based on each shareholder's pro rata share of debtor. 26 U.S.C. § 1366(a)(1)(A).

An NOL from a given taxable year can be carried back to each of the two taxable years preceding the loss 26 U.S.C. § 172(b)((1)(A)(I). The entire amount of the NOL for any taxable year is first carried back to the earlier of these taxable years. The portion of the loss which is carried back to the other taxable year is the excess, if any, of the amount of the loss over the sum of the taxable income for the prior taxable year to which it may be carried. 26 U.S.C. § 172(b)(2). A taxpayer entitled to a carryback period under § 172(a) may elect to relinquish the entire carryback period with respect to an NOL for a taxable year. The relinquishment, once it is made, is irrevocable. 172(b)(3).

The chapter 7 trustee does not dispute that defendants complied with the requirements of the Internal Revenue Code in carrying back the NOL to prior taxable years to obtain refunds of income taxes paid for those years. She also concedes that they are entitled to refunds under the Internal Revenue Code. The chapter 7 trustee instead seeks to recover the refunds from defendants for the bankruptcy estate by asserting various state law causes of action.

Defendants preliminarily maintain that the chapter 7 trustee's state law causes of action for unjust enrichment and breach of fiduciary duty are preempted by federal law, in this instance the Internal Revenue Code. They assert that their right to receive refunds under the Internal Revenue Code ''trumps'' such state law causes of action, which consequently cannot be used to deprive them of rights granted under federal law. Congress, in other words, ''left no room'' for state law to intervene.[2]

There are three varieties of federal preemption: (1) express preemption, (2) field preemption (also known as implied preemption); and (3) conflict preemption. Green v. Fund Asset Management, L.P., 245 F.3d 214, 222 (3d Cir.2001).

Preemption is express when a federal statute explicitly provides that state law is displaced. Id. A prime example is ERISA, which expressly provides at 29 U.S.C. § 1144(a) that it ''shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan''. See Orson, Inc. v. Miramax Film Corp., 189 F.3d 377, 381 (3d Cir.1999), cert denied, 529 U.S. 1012, 120 S.Ct. 1286, 146 L.Ed.2d 232 (2000).

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[1] The complaint has no Count IV.

[2] Defendants do not assert that the cause of action asserted in accordance with §§ 549 and 550 of the Bankruptcy Code also is preempted by the Internal Revenue Code. We therefore will not address whether the Internal Revenue Code would ''trump'' the Bankruptcy Code in this regard if they are in conflict.

Field preemption occurs when "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress no room for the States to supplement it". Id. (citing Cippolone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 907 (1992)).

Conflict preemption applies if state law presents a conflict with federal law when: (1) it is impossible to comply with both state law and federal law; or (2) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". Orson, 189 F.3d at 382.

These categories of federal preemption are not necessarily exclusive of one another. Field preemption may be understood as a species of conflict preemption. Orson, 189 F.3d at 382.

The party claiming that federal preemption applies has the burden of proof on the issue. Green, 245 F.3d at 230.

Defendants have not indicated which of these categories of preemption displaces the trustee's state law causes of action for unjust enrichment and breach of fiduciary duty. After giving the matter due consideration, we conclude that none of them applies to this case.

Express preemption does not apply here. We know of no provision of the Internal Revenue Code which states that it supersedes any state law cause of action which may require a taxpayer to turn over to a third party a refund to which the taxpayer is entitled under the Internal Revenue Code.

The chapter 7 trustee, we have noted, does not contend that defendants are not entitled under the Internal Revenue Code to use the 1999 NOL to receive refunds of income taxes they paid in previous years. She instead asserts that defendants should not be permitted to retain the refunds for themselves but instead should be required to turn them over to the trustee for distribution to debtor's creditors.

When viewed in this context, it also becomes apparent that neither field preemption nor conflict preemption applies in this instance. As they are employed by the trustee, neither the doctrine of unjust enrichment nor that of breach of fiduciary duty supplements or conflicts with the Internal Revenue Code. They do not impose requirements that are in addition to or that conflict with the requirements set forth in the Internal Revenue Code for a shareholder in an S corporation to receive a refund based on the corporation's NOL. They are aimed at requiring defendants to turn over to the trustee the refunds to which they are entitled under the Internal Revenue Code instead of retaining them for their own use and enjoyment.

Unjust Enrichment

The chapter 7 trustee asserts in Count I of the complaint that defendants were unjustly enriched when they used the 1999 NOL for their personal benefit to obtain refunds of income taxes they paid in previous years. This cause of action is without merit in light of the facts of this case.

The parties disagree concerning whose common law of unjust enrichment applies in deciding this claim. The chapter 7 trustee maintains that the common law of Pennsylvania, where debtor had its principal place of business, applies. Defendants maintain that the common law of Delaware, where debtor was incorporated, applies.

We need not decide this issue to resolve the claim for unjust enrichment. The outcome is the same regardless of which state's law applies: the trustee's cause of action for unjust enrichment fails.

Unjust enrichment is a doctrine based in equity. Mitchell v. Moore, 729 A.2d 1200, 1203 (Pa.Super.), appeal denied, 561 Pa. 698, 751 A.2d 192 (1999). Where it applies, the law implies a contract--often referred to as a quasi-contract--which requires a party who is unjustly enriched to make restitution in quantum meruit. Schenck v. K.E. David, Ltd., 446 Pa.Super. 94, 97, 666 A.2d 327, 328 (1995), appeal denied, 544 Pa. 660, 676 A.2d 1200 (1996). To prevail on a claim for unjust enrichment, one must demonstrate that the party from whom restitution is sought ei-

ther procured or received a benefit, the retention of which would be unconscionable. Torchia on Behalf of Torchia v. Torchia, 346 Pa.Super. 229, 233, 499 A.2d 581, 582 (1985).

The requirements under Pennsylvania law for establishing unjust enrichment are:

(1) that a benefit was conferred on defendant; (2) that defendant retained the benefit; and (3) that it would be inequitable for defendant to retain the benefit without paying its value. Schenck, 446 Pa.Super. at 97, 666 A.2d at 328. A showing of wrongful intent on defendant's part is not required. The focus instead is on whether defendant was unjustly enriched. Torchia, 346 Pa.Super. at 233, 499 A.2d at 581–82.

Unjust enrichment under Delaware law requires: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law. Jackson National Life Insurance Co. v. Kennedy, 741 A.2d 377, 393 (Del. Ch.1999).

Regardless of which state's law applies here, the chapter 7 trustee would have to demonstrate that it would be inequitable for defendants to retain the tax refunds for themselves (Pennsylvania law) or that there is no justification for them to do so (Delaware law).

In our estimation, it would not be inequitable or unjustifiable for defendants to retain for themselves the tax refunds arising out of their utilization of the 1999 NOL suffered by debtor. Although it is disconcerting that the secured creditor--i.e., PNC -, who would be entitled to any proceeds of the cause of action will not be permitted to utilize the NOL and the tax refund to further reduce its claim while debtor's shareholders will reap the benefit of the tax refunds, this, standing alone does not suffice to incite equity to take measures it deems necessary to rectify this inequity.

The chapter 7 trustee's theory of the case, especially the cause of action for unjust enrichment, is predicated on the proposition that debtor, not defendants, paid defendants' income taxes while defendants retained the tax refunds. Were this characterization accurate, we might be inclined to agree with the trustee that it would be inequitable or unjustifiable, and that defendants would be unjustly enriched, if they were to retain the tax refunds for themselves when debtor had paid the income taxes they owed.

Looking at the issue from a different perspective, it is clear that if the shareholders had a tax liability for the tax years, 1995, 1996, 1997, and 1998, that the corporation earned a profit during that period. Rather than taking all of the profit and utilizing a portion of same to pay the tax, the shareholders merely took a sum sufficient to pay the tax and left the balance in the corporation as a capital infusion. Greedy insiders having no concern for creditors might not have elected this option. These shareholders did so elect

We reject the chapter 7 trustee's ''spin'' concerning who paid defendants' income taxes in the first place. As we see it, defendants, not debtor, paid the income taxes defendants owed as shareholders of an S corporation.

In accordance with § 9.01 of the shareholders' agreement, debtor merely paid a dividend from its income to each shareholder so the shareholder could pay income tax he or she owed that was attributable to the shareholder's allocable share of debtor's income. When viewed in this light, without something more it would not be inequitable or unjustifiable for defendants to retain for themselves a refund of income taxes they themselves paid from dividends from income they had received as shareholders of an S corporation.

The trustee offered no evidence showing that this arrangement between debtor and defendants was ''done on the sly'' or that it was an artifice devised by defendants to benefit themselves and to deprive debtor's creditors should debtor become insolvent. It instead was done so defendants could lawfully avail themselves of the tax benefits provided by the Internal Revenue Code concerning S corporations. We conse-

quently see no basis for "looking behind the scene" to ascertain what "truly" transpired.

It is a non sequitur to conclude that a S corporation paid the tax owed by its shareholder on the corporation's income merely because the S corporation paid a dividend to the shareholder to enable the shareholder to pay the tax owed by the shareholder on the S corporation's income and the shareholder utilized the dividend to pay the tax owed. As a matter of logic this conclusion does not follow.

We acknowledge that a court of equity has powers not possessed by a court of law. Its powers, however, are not without limits. One of these limitations is logic. A court of equity cannot blithely disregard the principles of logic concerning what follows from what any more than a court of law can.

We conclude in light of the foregoing that the chapter 7 trustee has failed to demonstrate that defendants would be unjustly enriched if they retained the tax refunds for themselves and did not turn them over to the chapter 7 trustee for distribution to debtor's creditors.

Breach of Fiduciary Duty

The chapter 7 trustee also asserts that defendants breached the fiduciary duty they owed to debtor and its creditors by retaining for themselves the tax refunds instead of making them available for distribution to debtor's creditors.

A director of a corporation stands in a fiduciary relationship to the corporation and is obligated to perform his or her duties in good faith and in a manner reasonably believed to be in the best interest of the corporation. The director must utilize such care, skill and diligence as would a person of ordinary intelligence under similar circumstances. 15 Pa.C.S.A. § 512(a).

The duty owed by a director arising under § 512(a) generally is owed solely to the corporation and may be enforced directly by the corporation or indirectly by a shareholder in a shareholder derivative action brought under the right of the corporation. The duty may not be enforced directly by a shareholder, by another director, or by any other person or group. 15 Pa.C.S.A. § 517.

There are, however, exceptions to these general principles. Where a corporation is insolvent, for instance, its directors hold their powers "in trust" for creditors of the corporation. Bernstein v. Donaldson (In re Insulfoams, Inc.), 184 B.R. 694, 703–04 (Bankr.W.D. Pa.1995), aff'd, 104 F.3d 547 (3d Cir.1997). Under such circumstances bankruptcy trustee may bring an action on behalf of creditors seeking to recover for breach of fiduciary duty. Id.

The test for liability for breach of fiduciary duty is whether a director was unjustly enriched by his or her actions Seaboard Industries v. Monaco, 442 Pa. 256, 262, 276 A.2d 305, 309 (1971); also Bailey v. Jacobs, 325 Pa. 187, 194, 189 A.2d 320, 324 (1937).

The chapter 7 trustee's cause of action for breach of fiduciary duty must fail because we have determined that unjust enrichment will not result if defendants are permitted to retain the tax refunds for themselves instead of paying them over to the chapter 7 trustee for distribution to debtor's creditors.

Constructive Trust

The chapter 7 trustee seeks to have a constructive trust imposed in favor of debtor's creditors with respect to the tax refunds defendants have received as a result of carrying back the 1999 NOL to previous taxable years.

A constructive trust arises when a person holding title to property is subject to an equitable duty to convey it to another on the theory that he would be unjustly enriched if allowed to retain it for his own benefit. Yohe v. Yohe, 466 Pa. 405, 411, 353 A.2d 417, 431 (1976).

The necessity for such a trust may arise from circumstances evidencing fraud, duress, undue influence, or mistake. Id. The controlling factor in determining whether a constructive trust ought to be imposed is whether it is necessary to prevent unjust enrichment. Roberson v. Davis, 397

Pa.Super. 292, 296, 580 A.2d 39, 41 (1990).

A heavy burden lies with one who seeks to have a constructive trust imposed. The evidence must be ''clear, direct, precise and convincing''. Masgai v. Masgai, 460 Pa. 453, 460, 333 A.2d 861, 865 (1975). Equity ''should not convert absolute ownership into an estate of lesser quality'' unless evidence in support of a constructive trust ''is of the highest probative value''. Id.

The trustee's request for a constructive trust in this case will be denied. The sole basis offered by the trustee for a constructive trust is the alleged unjust enrichment that would result if defendants were permitted to retain the above tax refunds for their own benefit and enjoyment. We have determined that unjust enrichment will not result if defendants are permitted to retain the tax refunds. As a consequence, there is no need to impose a constructive trust in this case.

Avoidable Post-Petition Transfer

Finally, the chapter 7 trustee asserts that defendants' election not to waive loss carrybacks arising from the NOL and to use it instead to offset debtor's taxable income for future years amounts to a voidable post-petition transfer for purposes of s 549(a) of the Bankruptcy Code. She seeks in accordance with § 550(a) to recover for the benefit of creditors the value of the alleged post-petition transfer..

With exceptions not relevant here, a chapter 7 trustee may avoid: (1) a transfer; (2) of property of the bankruptcy estate; (3) that occurs after the commencement of the bankruptcy case; and (4) that was not authorized by any provision of the Bankruptcy Code or by order of the bankruptcy court. See 11 U.S.C. § 549(a).

The third and fourth of these requirements are not at issue here. If a post-petition transfer of property of the bankruptcy estate occurred, it was not authorized by any provision of the Bankruptcy Code or by an order of the bankruptcy court. To prevail in this case, the chapter 7 trustee must demonstrate that a transfer of property of the bankruptcy estate occurred when defendants purportedly elected not to waive the loss carrybacks arising from the NOL and to use them instead to offset against debtor's income for future taxable years.

A bankruptcy estate consisting of debtor's property is created at the commencement of the case. 11 U.S.C. § 541. Property of the estate includes, among other things, ''all legal and equitable interests of the debtor in property as of the commencement of the case''. 11 U.S.C. § 541(a). The terms ''property of debtor'' and ''interests of the debtor in property'' are co-extensive for purposes of § 541(a)(1). Begier v. IRS, 496 U.S. 53, 59 n. 3 [65 AFTR 2d 90-1095], 110 S.Ct. 2258, 2263 n. 3 [65 AFTR 2d 90-1095], 110 L.Ed.2d 46 [65 AFTR 2d 90-1095] (1990).

The legislative history of § 541(a) indicates that it is expansive and includes ''all kinds of property, including tangible or intangible property, causes of action ... and all other forms of property specified in section 70(a) of the Bankruptcy Act. U.S. v. Whiting Pools, 462 U.S. 198, 205 n. 9 [52 AFTR 2d 83-5121], 103 S.Ct. 2309 [52 AFTR 2d 83-5121], 76 L.Ed.2d 515 (1983). Although it is expansive, the concept is not without limit. Westmoreland Human Opportunities, Inc. v. Walsh, 246 F.3d 233, 243 (3d Cir.2001)

The trustee asserts that the NOL and debtor's right to use it are property of its bankruptcy estate. As support for this proposition the trustee relies upon: Official Committee of Unsecured Creditors v. PSS Steamship Co, Inc.(In re Prudential Lines, Inc), 928 F.2d 565, 569–71 [67 AFTR 2d 91-972] (2d Cir.), cert denied, 502 U.S. 821, 112 S.Ct. 82, 116 L.Ed.2d 55 (1991); Gibson v. U.S. (In re Russell), 927 F.2d 413, 417–18 [67 AFTR 2d 91-664] (8th Cir.1991); Parker v. Saunders (In re Bakersfield Westar, Inc.), 226 B.R. 227, 233–34 [82 AFTR 2d 98-6877] (9th Cir. BAP1998); and Guinn v. Lines (In re Trans-Lines West, Inc.), 203 B.R. 653, 661–62 [78 AFTR 2d 96-7650] (Bankr.E.D.Tenn.1996).

Reliance upon these cases is misplaced. None of them asserts that, in the case of an S corporation, a debtor's NOL and the right to use it are property of the debtor's bankruptcy estate. Each case is readily distinguishable from the present case and sheds no light on the issue presently before us.

Although Prudential Lines and Russell held that an NOL and the right to use it were property of the debtor's bankruptcy estate, the debtors therein were not S corporations. The debtor in Prudential Lines was a C corporation rather than an S corporation. The debtor in Russell was an individual rather than a corporation. When the C corporation and/or the individuals filed for bankruptcy, the estate created contained all of their assets. Included therein were their tax attributes, including NOLs.

When this debtor filed, its estate did not contain this asset, as years previous the tax attributes were transferred to the shareholders. Surely transferring this asset from the shareholders to the debtor would in fact be a transfer. Refusing to transfer an asset not owned by the estate to the estate can hardly be termed a transfer. The logic is tortured.

Bakersfield Westar and Trans-Line West held that the right to revoke one's S corporation status was property of the debtor corporation's bankruptcy estate but said nothing about whether the right to use an NOL was property of the corporate debtor's bankruptcy estate. In addition, we are reluctant to believe that a post-bankruptcy revocation of S status could, under the tax laws of the United States, be utilized to undo previously executed acts. Humpty Dumpty could not be restructured using this scenario.

In the context of avoidance actions brought pursuant to the provisions of the Bankruptcy Code, it has been held that something qualifies as property of the bankruptcy estate if its transfer would deprive the estate of something that otherwise could be utilized to satisfy the allowable claims of creditors. E.g., In the Matter of Merchants Inc., 93 F.3d 1347, 1353 (7th Cir.1996), cert denied, 519 U.S. 1111, 117 S.Ct. 948, 136 L.Ed.2d 837 (1997); In re Bullion Reserve of North America, 836 F.2d 1214, 1217 (9th Cir.), cert. denied, 486 U.S. 1086, 108 S.Ct. 2824, 100 L.Ed.2d 925 (1988).

Applying this criterion, we conclude that the NOL and the right to use it were not property of debtor's bankruptcy estate. Under the provisions of the Internal Revenue Code cited previously, the NOL and the right to use it automatically passed through by operation of law to defendants as S corporation shareholders. Debtor was merely a ''conduit'' through which the NOL and the right to use it passed to them. See US. v. Farley, 202 F.3d 198, 201 n. 1 [85 AFTR 2d 2000-615] (3d Cir.2000), cert denied, 531 U.S. 1111, 121 S.Ct. 874, 148 L.Ed.2d 769 (2001). Any tax benefits resulting from the NOL and the right to use it inure solely to the benefit of defendants as shareholders and would not be available to satisfy claims of the corporation's creditors.

We further conclude that the requisite transfer for purposes of § 549(a) did not occur in this instance.

In the first place, it is not clear what the alleged transfer was in this case. According to the chapter 7 trustee, defendants' determination not to elect to waive loss carrybacks for the 1999 NOL and to utilize the NOL instead to offset income in future years constituted a transfer of debtor's interest in the NOL. We are not certain what to make of this tortured locution. The chapter 7 trustee apparently maintains that defendants' decision to carry the NOL back to past taxable years instead of carrying it forward to future taxable years somehow was a ''transfer''. We disagree.

Under the Internal Revenue Code, an NOL is first applied to the year in which the loss occurred. Any unused portion of the NOL is next carried back to the two taxable years preceding the loss. 26 U.S.C. § 172(b)(1). The carryback can under certain circumstances be waived and instead carried forward. 26 U.S.C. § 172(b)(3).

An NOL, in other words, is first automatically carried back to prior years unless the taxpayer decides to waive the car-ryback and instead carries it forward to future years. We fail to comprehend how a decision by defendants not to waive the prescribed order in which an NOL is applied under the Internal Revenue Code amounts to a transfer of any kind.

Every mode of disposing of or parting with property or an interest in property, whether direct or indirect, voluntary or involuntary, absolute or conditional, qualifies as a transfer for purposes of the Bankruptcy Code. See 11 U.S.C. § 101(54). It follows from the previous determination that the NOL and the right to use it were not property of debtor's bankruptcy estate, that debtor did not part with an interest therein, and that no transfer for purposes of § 549 consequently occurred when defendants determined not to waive the loss carrybacks and to carry the NOL forward to future taxable years.

We conclude in light of the foregoing that, as was the case with the other causes of action asserted by the chapter 7 trustee, the cause of action based on § 549(a) of the Bankruptcy Code must fail.

An appropriate order shall issue.

ORDER OF COURT

AND NOW this 2nd day of August, 2002, for reasons set forth in the accompanying memorandum opinion, it hereby is ORDERED, ADJUDGED, and DECREED that judgment is entered IN FAVOR OF defendants Sam Forman, Lawrence Ashinoff, Brett Forman, Wendy Forman and Richard Forman and AGAINST The Official Committee of Unsecured Creditors of Forman Enterprises, Inc.

It is SO ORDERED.

2002 WL 1790524 (Bankr.W.D.Pa.)

¶2002-5191

UNITED STATES OF AMERICA v. Charles H. RINGWALT. U.S. District Court, Eastern Dist. of Pennsylvania, (DC PA) Docket No. 01-192, July 31, 2002. Earlier proceeding at (2002, DC PA) 90 AFTR 2d 2002-5212. Years 1994, 1995. Decision against Taxpayer.

1. Tax crimes—tax evasion; willfully subscribing to false returns—motions for judgment of acquittal and new trial—evidence. Convicted tax evader/S corp. owner's motions for judgment of acquittal and new trial were denied: evidence including taxpayer's signing of numerous corp. checks for personal expenses and financial control showed his direct involvement in sham deduction scheme; and findings that he willfully evaded taxes and filed false returns were supported by his consistent underreporting of over $1 million, prior years' engagement in similar scheme, failure to give accountants all information, and witness testimony. Also, admitting into evidence prior years' returns, expense calendar he prepared post-return filing, and testimony about extramarital relationship with secretary was proper where it showed willfulness, use of common scheme or plan and fact that secretary not controller was responsible for classifying and booking taxpayer's personal expenses; limitation on taxpayer's expert's testimony was warranted; argument that govt. improperly suppressed exculpatory evidence contained in special agent's notes was meritless; and prosecutorial misconduct was non-prejudicial harmless error. *Reference:* United States Tax Reporter ¶72,015.11(5); 72,065.01(5); 73,446.520(5). IRC §7201; 7206.

In the United States District Court for the Eastern District of Pennsylvania.

Memorandum

ROBRENO, District Judge:

On April 10, 2001, a federal grand jury returned an indictment against defendant Charles H. Ringwalt, III, charging him with two counts of income tax evasion

under 26 U.S.C. § 7201,[1] three counts of willfully subscribing to false tax returns under 26 U.S.C. § 7206(1),[2] and one count of aiding and assisting the preparation of false tax returns under 26 U.S.C. § 7206(2). The charges involved the filing of false and fraudulent personal and corporate income tax returns relating to the defendant's taxable income in 1994 and 1995 from Stelwagon Manufacturing Corporation (''Stelwagon''), a Subchapter S corporation in which defendant Ringwalt was the president and sole shareholder. The government charged that in 1994 and 1995 defendant willfully evaded taxes by fraudulently deducting approximately $1.6 million dollars of personal expenditures as business expenses. At trial, the government produced evidence showing that the defendant used this money to support a lavish lifestyle that included gambling, country club memberships, private school tuition, landscaping, limousines, parties, home furnishings, and jewelry. The defendant admitted that the returns at issue were not accurate but claimed that this was the fault of the company's controller and of accountants defendant had retained to prepare his tax returns. The issue was whether the defendant acted with the requisite intent in filing inaccurate tax returns for the two years included in the indictment. On January 17, 2002, defendant was convicted by a jury on all counts.

Presently before the court are defendant's Motion for a Judgment of Acquittal (doc. no. 64), Motion for a New Trial under Federal Rule of Criminal Procedure 29 (doc. no. 65), and Supplemental Post-Trial Motion for a New Trial (doc. no. 112).[3] Defendant argues that he is entitled to a judgment of acquittal because the evidence produced by the government at trial was insufficient to prove that he possessed the requisite intent when he committed the acts charged in the indictment. Defendant also maintains that he is entitled to a new trial for the following reasons. First, the court erred in admitting the following evidence: (1) defendant's 1992 and 1993 tax returns, not charged in the indictment, (2) defendant's extra-marital sexual relationship with a Stelwagon employee and government witness Melanie Costa, and (3) government exhibit 489, purporting to be a calendar prepared after defendant filed his 1994 tax return in order to document his business expenses for the 1994 tax year. Second, the court erred in precluding defense expert, Samuel Fisher, CPA, from testifying about the failure of John Curran, the Stelwagon controller, to meet the professional responsibilities of his job. Third, the government failed to disclose evidence favorable to the defendant and material to his defense in violation of his Fifth Amendment rights to due process as set forth in Brady v. Maryland, 373 U.S. 83 (1963). Lastly, the defendant maintains that the government's failure to turn over this Brady material, while arguing facts not in evidence which were contrary to the nondisclosed evidence, constituted prosecutorial misconduct which deprived defendant of due process under the Fifth Amendment.

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[1] The elements of a § 7201 offense are willfulness, the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax. See Sansone v. United States, 380 U.S. 343, 351 [15 AFTR 2d 611] (1965).

[2] Section 7206(1) states that it is a felony for an individual to ''[w]illfully make[] and subscribe[] any return, statement or other document, which contains or is verified by a written declaration that is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . .'' 26 U.S.C. § 7206(1).

[3] A procedural background of the post-trial briefing in this case is instructive. After defendant's conviction on January 17, 2002, the court issued a scheduling order for the filing of post-trial motions. Defense counsel, John Rogers Carroll, Esquire, of Carroll & Carroll, filed timely motions for judgment of acquittal (doc. no. 64) and for a new trial (doc. no. 65) on January 31, 2002. Thereafter, Mr. Carroll filed a timely brief in support of these motions on April 19, 2002. In mid-April, 2002, defendant retained new counsel, Jeffrey M. Kolansky, Esquire, of Kolansky, Tuttle, & Rocco, P.C., and on April 29, 2002, Mr. Carroll was granted permission to withdraw from the case.

A hearing on defendant's original post-trial motions was held on June 20, 2002. On June 19, 2002, defendant filed a supplemental post-trial motion (doc. no. 97) asserting that trial counsel failed to call key witnesses to testify at trial. The court thereafter continued the hearing to July 19, 2002, to allow for further briefing on any additional post-trial issues. At the June 20, 2002 hearing, Mr. Kolansky informed the court that he did not have access to defendant's file in possession of Carroll & Carroll. After a series of hearings and conferences between new counsel, former counsel, the government and the court, on June 28, 2002, the court ordered that Mr. Kolansky be given access to a portion of the file. Mr. Kolansky was given access to the file on that date. On July 3, 2002, defendant filed a new supplemental post-trial motion (doc. no. 112) seeking (1) to withdraw the earlier supplemental post-trial motion (doc. no. 97) and (2) a new trial based on the government's failure to disclose Brady material. The government filed a response on July 12, 2002. On July 19, 2002, the court heard oral argument regarding the defendant's Brady motion. At the close of the hearing, the defendant provided the court and the government with a written reply to the government's July 12, 2002 response to defendant's Brady motion asserting an additional argument of prosecutorial misconduct in support of his post-trial relief. The government filed a response on July 22, 2002. Thus, all of the issues raised in the exten-sive post-trial briefing in this case are ripe for decision.

The court finds that the evidence produced by the government at trial was sufficient to support the jury's verdict on all counts. The court further finds that the admission of the evidence to which defendant objects and the limitation on the testimony of Mr. Fisher was proper under the Federal Rules of Evidence. Moreover, the court holds that defendant has not demonstrated a Brady violation and to the extent that prosecutorial misconduct occurred in this case, it does not warrant a new trial. Thus, defendant's motions will be denied.

A. Motion for Judgment of Acquittal Pursuant to Rule 29(c).

[1] Defendant's argument in support of his motion for judgment of acquittal is identical to his defense asserted at trial, i.e., that the evidence produced by the government was insufficient to prove that defendant knew at the time the 1994 and 1995 tax returns were filed that they were false and that he willfully filed a false tax return or willfully evaded taxes due. ''[W]hen deciding whether a jury verdict rests on legally sufficient evidence [pursuant to Federal Rule of Criminal Procedure 29] ... [a court] must view the evidence in the light most favorable to the government, and ... sustain the verdict if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'' United States v. Dent, 149 F.3d 180, 187 (3d Cir. 1998).

The Supreme Court defined ''willfulness'' in the criminal tax context as a ''voluntary, intentional violation of a known legal duty.'' Cheeks v. United States, 498 U.S. 192, 201 [67 AFTR 2d 91-344] (1991). The government's burden of proving knowledge of a legal duty ''requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good faith belief that he was not violating any of the provisions of the tax laws.'' Id. at 202. As the Third Circuit has stated:

> Willfulness is closely connected to the affirmative act element of § 7201. Evidence of affirmative acts may be used to show willfulness, and the defendant must commit the affirmative acts willfully to be convicted of tax evasion. Under § 7201, if the affirmative act element is satisfied, there is no question that willfulness is also present.

United States v. McGill, 964 F.2d 222, 237–38 [70 AFTR 2d 92-5043] (3d Cir. 1992) (citations and quotations omitted).

The government may prove willfulness through direct or circumstantial evidence. As the Third Circuit has explained:

> In the majority of criminal cases, the element of intent is inferred from circumstantial evidence. The rule is no different in tax evasion prosecutions. The Supreme Court [has] stated that ''any conduct, the likely effect of which would be to mislead or conceal,'' is suf-ficient to satisfy the ''affirmative act'' element. These cases simply require that there be some evidence from which a jury could infer an intent to mislead or conceal beyond mere failure to pay as-sessed taxes; it is for the jury to deter-mine, as a matter of fact, whether the af-firmative act was undertaken, in part, to conceal funds from or mislead the gov-ernment.

United States v. Voight [sic, Voigt], 89 F.3d 1050, 1090 [78 AFTR 2d 96-5577] (3d Cir. 1996) (citations omitted) (emphasis in original).

The government may show willfulness by pointing to evidence that the defendant kept a double set of books, made false entries or alterations in his books of accounting, created false invoices or documents, concealed assets or covered up sources of income, or did ''any conduct, the likely effect of which would be to mislead or to conceal.'' United States v. Spies, 317 U.S. 492, 499 [30 AFTR 378] (1943).

Defendant argues that while the uncontested evidence clearly showed that over $1 million of defendant's personal expenses and cash advances were recorded in the books for Stelwagon as business expenses for the 1994 and 1995 tax years, the government failed to offer sufficient evidence that at the time defendant signed the returns, he was aware that these personal expenditures had been lumped to-

gether with the business expenses. Defendant contended, through the testimony of former employee, Jack Keenan, and cross-examination of government witnesses and arguments of counsel,[4] that he was an absentee owner of Stelwagon who relied on his controller, John Curran, to separate personal and business expenses and to manage the bookkeeping; Curran knew that the business account contained mixed personal and business expenses and it was Curran's job to sort between the two, if necessary, and that Curran failed to do so. Moreover, according to defendant, he never submitted expense reports or made up anything in an attempt to make it appear that his personal expenses were business expenses. Rather, he left this job up to Curran. Defendant also maintained that he relied on his accountant Ray Mock, of the accounting firm Maillie Falconiero, to prepare and file accurate tax returns. Finally, the defendant asserted that the government produced no evidence that, prior to signing and filing his 1994 and 1995 tax returns, defendant discussed the content of those returns with his attorneys.

In support of this defense, defendant cites United States v. Pechenik, 226 F.2d 844 [50 AFTR 221] (3d Cir. 1956). In Pechenik, the government alleged that the defendant improperly treated capital expenditures as operating expenses, thereby deducting in a single year expenditures which should have been deducted over a period of years through depreciation. Id. at 845. The Third Circuit reversed Pechenik's tax evasion conviction because the:

> defendant, notwithstanding the business experience attributed to him, left the books, bookkeeping and preparation of tax returns to the bookkeeper and accountant .... There is no evidence that the defendant interfered with either of them or with the books. On the contrary, the invoices and payments were taken care of by the bookkeeper in the ordinary course of business and he made the decisions as to classifications of expenditures according to his own best judgment.

Id. at 846. Furthermore, in Pechenik, the accountant was hired to perform quarterly audits of the corporation's books, although this did not include an examination of the corporation's invoices. Id.

The court finds that defendant's reliance on Pechenik is misplaced. Unlike Pechenik, the instant case presents substantial evidence of defendant's direct involvement in the scheme to report personal expenses as business expenses. First, the defendant's direct involvement was shown by evidence that the defendant signed and authorized a number of large corporate checks for personal expenses for which he did not provide John Curran with back up or expense reports. Secondly, unlike the bookkeeper in Pechenik, John Curran testified that defendant directed him to classify certain personal expenses as business expenses and rebuffed Curran's attempts to discuss the mixing of personal and business expenses. Third, defendant's purported "absence" defense differs from Pechenik because, according to the testimony of Curran and defendant's accountant, Ray Mock, during the course of two audits and a burgeoning criminal investigation of defendant's tax affairs, defendant never stated to investigating authorities that he believed that Curran or Mock had committed professional errors, or that the expenditures at issue were anything other than business expenses. Fourth, the accountants in Pechenik conducted quarterly audits of defendant's books while defendant Ringwalt never engaged his outside accountant to do so here. Finally, Pechenik involved a the relatively complex tax issue of whether a certain deduction could be expensed all in one year or must be depreciated over a period of years. By contrast, this case involves the prohibition, nearly axiomatic particularly in the case of an experienced businessperson, against deducting personal expenses as business expenses

[4] As he was constitutionally entitled to do, defendant did not testify at trial.

for the purpose of decreasing tax liability.[5]

Additionally, based on the following evidence introduced by the government at trial, the court finds that there was sufficient evidence for a reasonable jury to find beyond a reasonable doubt that defendant willfully evaded taxes and filed false tax returns. First, based on the defendant's consistent pattern of under-reporting large amounts of taxable income - more than $1 million over 2 consecutive years, from 1994 to 1995, totaling more than 50% of defendant's overall income - a reasonable jury could have determined that defendant's conduct was not the result of mistake. Where there is ''evidence of a consistent pattern of under-reporting large amounts of income, and of the failure on the [defendants'] part to include all of their income in their books and records,'' the Supreme Court held that ''the jury could [find] that these acts supported an inference of willfulness,'' supporting a guilty verdict. Holland v. United States, 348 U.S. 121, 139 [46 AFTR 943] (1954) (citing Spies, 317 U.S. at 499–500).

Second, defendant's pursuit of the identical tax evasion scheme during 1992 and 1993 is additional evidence of willfulness for the charged years of 1994 and 1995. ''[A] defendant's past taxpaying record is admissible to prove willfulness circumstantially.'' United States v. Bok, 156 F.3d 157, 165 [82 AFTR 2d 98-6383] (2d Cir. 1998) (holding that defendant's failure to file returns for years before and after those in the indictment admissible to show intent to evade tax system). See also United States v. Johnson, 893 F.2d 451, 453 [71A AFTR 2d 93-3389] (1st Cir. 1990) (''The evidence that [defendant] submitted W-4 form in 1987 claiming more allowances than he was entitled to and did not file an income tax return for 1987, was relevant to show [defendant's] willfulness and absence of mistake in filing the Schedule C forms containing false information during the years 1982–86.''); United States v. Ebner, 782 F.2d 1120, 1126 n.7 [57 AFTR 2d 86-759] (2d Cir. 1986) (''The jury may consider evidence of intent to evade taxes in one year as evidence of intent to evade payment in prior or subsequent years.''); United States v. Adcock, 558 F.2d 397, 402 (8th Cir. 1977) (''It is ... well settled that in a tax case the government may show proof of unreported income in prior years indicating a pattern of understatement of income which is relevant to the issue of willful intent.'').

Third, the court finds that it was reasonable for the jury to infer, from the circumstances surrounding defendant's receipt of manual checks from the business accounts, that the checks were a substitute for payroll. Melanie Costa, defendant's secretary and paramour during the relevant period, and John Curran, Stelwagon's controller, testified that defendant obtained, signed and cashed manual checks three or four times a month, and the amounts of the checks were consistent and in large round dollar amounts. This evidence is particularly revealing in light of the fact that the defendant's receipt of his ''7550 account''[6] checks began to climb significantly in 1991, the same year in which he removed himself from the company payroll and converted Stelwagon from a Subchapter C to a Subchapter S corporation.[7]

Fourth, according to the testimony of defendant's accountant Ray Mock and as reflected in engagement letters Mock sent to defendant, defendant was informed of the difference between an audit and a compilation. It was explained to the defendant that the latter would be created entirely on the basis of information that defendant provided to his accountants and that the individual with the ultimate responsibility for

[5] Furthermore, subsequent opinions in other circuits have distinguished Pechenik on facts similar to those present here. See, e.g., United States v. Garavaglia, 566 F.2d 1056, 1059–60 [41 AFTR 2d 78-381] (6th Cir. 1977) (distinguishing Pechenik because alleged tax evasion was defendant's personal failure to record receipts which constituted business income); Windisch v. United States, 295 F.2d 531, 532 [8 AFTR 2d 5666] (5th Cir. 1961) (unlike Pechenik, defendant did not engage accountant to make an audit, and the accountant relied upon defendant to supply the necessary information as to income and expenditures).

[6] The ''7550 account'' is Stelwagon account number 1007550, which was set up to record the business-related selling expenses of defendant.

[7] A Subchapter S corporation profit or loss is passed through to shareholders and reported on the shareholders' tax returns. A Sub-chapter S corporation generally does not pay tax at the corporate level. Defendant was the 100% shareholder of Stelwagon Manufacturing Corporation.

the accuracy of the corporate tax returns is the officer (i.e. defendant) who will sign them and would not require verification of the company's books and records by the accountants. In the past, Stelwagon had its books audited, but in the early 1990's defendant changed the method of accounting and hired the accountants to perform compilations, not audits. Based on this evidence, a reasonable jury could infer that defendant chose a compilation over the audit method because he had something to hide.

Fifth, John Curran's testimony was probative of defendant's willfulness. Curran testified that defendant told him that his corporate American Express account reflected business expenses. Curran also stated that defendant rebuffed him on several occasions throughout the years when he suggested to defendant that if he was running personal expenditures through his 7550 expense account and the American Express account, those expenditures should be identified and separated from the ordinary business expenses. Finally, Curran testified that in 1995 defendant dismissed Curran's concerns regarding the large dollar amounts being booked through the 7550 account by informing Curran that if defendant ever got caught, he would pay it.[8] This evidence could have been construed by the jury as a direct admission by the defendant of his criminal willfulness.

Sixth, during the City of Philadelphia's audit of Stelwagon for the 1994 tax year, defendant's accountants asked him to provide documentation for his claim that the disputed expenses were business-related. In response, defendant sent his accountant a calendar for 1994 which purported to justify these business-related expenses allegedly incurred entertaining clients, including dates and amounts. However, many of Stelwagon's biggest roofing customers during the 1990s testified at trial that the defendant never entertained them, or at most took them out on one or two occasions during the entire business relationship spanning many years.[9] This testimony was absolutely contrary to the defendant's claim that he had used the large amounts of money for legitimate business related expenses. Thus, the jury could have reasonably concluded that the calendar was a conscious effort on defendant's part to cover up his willful tax evasion.

Lastly, on February 26, 1996, Maillie Falconiero, the defendant's outside accountants, sent defendant a letter describing the result of the City's audit: a disallowance of $814,073 in asserted business expenses appearing to be personal in nature. Despite this advice, defendant signed and filed his 1995 tax return which listed the very same type of expenses as business expenses that the City had disallowed as business expenses. That defendant was aware of the disallowance of these expenses by the City auditors and nevertheless took no steps to insure that the alleged "mistakes" were not repeated in his 1995 federal tax returns is evidence of willfulness.

Thus, based on the foregoing evidence produced by the government at trial, the court finds that viewed in the light most favorable to the government, the winner of the jury verdict, the evidence was more than sufficient to support the jury's verdict. Accordingly, defendant's motion for a judgment of acquittal will be denied.

B. Defendant's Motion for a New Trial.

Defendant has moved for a new trial on the basis that the court erred in admitting (1) defendant's 1992 and 1993 tax returns, not charged in the indictment, (2) defendant's extra-marital sexual relationship with a Stelwagon employee and government witness Melanie Costa, and (3) government exhibit 489, a calendar prepared after defendant filed his 1994 tax return documenting his alleged business expenses for 1994, into evidence at trial, and that the court erred in precluding defense ex-

[8] Defendant argues that this statement does not prove defendant's intent because Curran was not able to date the alleged conversation or confirm whether it occurred before the filing of the 1994 or 1995 returns. Further, the statement does not specify whether it was made in the context of the City of Philadelphia audit or another event. However, these infirmities go to the weight of the evidence presented by Curran; it was for the jury to decide whether or not his testimony was believable.

[9] This was confirmed by other witnesses including defendant's son, a vice-president at Stelwagon, and Jack Keenan, Stelwagon's general manager.

pert, Samuel Fisher, CPA, from testifying about the failure of John Curran, the Stelwagon controller, to meet the professional responsibilities of his job.

Federal Rule of Criminal Procedure 33 allows a court, upon motion of a defendant, to "grant a new trial to that defendant if required in the interest of justice." Fed. R. Crim. P. 33. Where a claim is made that evidence was improperly admitted or excluded, a new trial should be granted if the error was "of sufficient magnitude to require reversal on appeal." 3 Charles A. Wright, et al., Federal Practice and Procedure: Criminal, § 556, at 306, 309 (2d ed. 1982). The decision to grant a new trial pursuant to Rule 33 lies within the sound discretion of the trial court. See United States v. Adams, 759 F.2d 1099, 1108 (3d Cir. 1985). The court will address each of the defendant's arguments seriatum.

1. The admission of evidence concerning defendant's 1992 and 1993 tax returns.

The government moved in limine to admit defendant's 1992 and 1993 personal and corporate tax returns as evidence of defendant's willfulness and to show the existence of a similar scheme and plan to evade income taxes. After hearing argument on this issue, the court ruled that the 1992 and 1993 returns were admissible under Federal Rule of Evidence 404(b) and that the probative value of the evidence substantially outweighed its prejudicial effect under Federal Rule of Evidence 403.

Rule 404(b) is a rule of inclusion, not exclusion and the burden on the government when proffering 404(b) bad act evidence "is not onerous." United States v. Sampson, 980 F.2d 883, 888 (3d Cir. 1992). Yet, the government "must clearly articulate how the evidence fits into a chain of logical inferences no link of which can be the inference that because the defendant committed ... offenses before, he therefore is more likely to have committed this one." Id. at 886. Once the government has done so, the district court must weigh the probative value of the evidence against its potential to cause undue prejudice, pursuant to Rule 403, and articulate a rational explanation on the record for its decision to admit or exclude the evidence. United States v. Himmelwright, 42 F.3d 777, 780 (3d Cir. 1994).

Defendant argues that the earlier tax returns are a repetition of the charged acts and are not evidence of willfulness, knowledge, plan or scheme or absence of mistake because defendant conceded that the 1994 and 1995 tax returns were inaccurate, albeit mistakenly so. According to defendant, evidence that the same mistake was made in the earlier years, i.e., business and personal expenses were commingled in the earlier years in the same way as the years for which the defendant is charged, is not probative of whether the defendant knew all along that the business expenses deducted for the tax years charged in the indictment were false.

The court disagrees. It is clear that "a defendant's past taxpaying record is admissible to prove willfulness circumstantially." Bok, 156 F.3d at 165 (holding that defendant's failure to file returns for years before and after those in the indictment admissible to show intent to evade tax system). See also Johnson, 893 F.2d at 453; Ebner, 782 F.2d at 1126 n.7; Adcock, 558 F.2d at 402. In Adcock, the court noted that the government may offer evidence of past taxpaying record during its case-in-chief without waiting for the defendant to deny the existence of intent because intent is an essential element of the offense which must be proved beyond a reasonable doubt. Id. at 558.

In this case, the government's "chain of logical inferences" consisted of evidence that defendant's 1992 and 1993 corporate and personal income tax returns showed the existence in those prior years of the identical scheme and plan to evade income taxes that was used by defendant in 1994 and 1995, and willfulness, intent and absence of mistake by defendant for the charged years. The government proffered evidence that, in the early 1990s, the defendant removed himself from the company payroll, took large amounts of money from the company 7550 account and American Express account, and deducted

the same expenses as business expenses in his 1992 and 1993 tax returns. This was the very same scheme the defendant used to generate improper deductions in the 1994 and 1995 tax returns. Thus, in light of the defendant's theory that the inaccuracies in the 1994 and 1995 returns were the result of mistake or the fault of the accountants, the tax returns from the earlier years were probative on the issues of common scheme or plan as well as willfulness. Next, the court found that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice under Federal Rule of Evidence 403.[10]

Finally, the court gave an appropriate limiting instruction to the jury during the charge explaining the very limited purpose for which the evidence concerning the prior years' returns was offered, and cautioned the jury that they may consider the evidence only for this limited purpose.[11]

Thus, the court finds that evidence concerning defendant's 1992 and 1993 income tax returns was properly admitted for the limited purposes of proving willfulness, intent and absence of mistake and common scheme or plan, that the probative value of the evidence substantially outweighed the danger of unfair prejudice to the defendant, and that an appropriate cautioning instruction was given to the jury.

2. The admission of Ringwalt's extramarital sexual relationship with a subordinate.

The court also granted the government's motion in limine to admit evidence of defendant's adulterous affair with his secretary, Melanie Costa.[12] Defendant argues that this ruling was in error because it was uncontested that Melanie Costa signed expense checks and other false documents and had forged defendant's wife's signature on defendant's joint tax returns. According to the defendant, there was no justification for admitting proof of adultery to color these office activities which Costa did at the request of defendant. In addition, the defendant argues that because the government showed Costa's bias via her testimony that she was defendant's employee and friend for over 20 years and she felt loyal to him, the additional probative value of the sexual affair was substantially outweighed by the danger of unfair prejudice. Finally, the defendant contends that the court unduly minimized the prejudicial effect of the evidence of the affair. Tr. Trans., 1/7/02, at 30 (doubting whether the evidence would ''inflame'' the jury ''to the degree that it would cloud the ability of the jury to see the defendant in light of the evidence.''). Defendant argues that the evidence is extremely prejudicial because some members of the jury may have believed that a person who cheats on his wife also cheats on his taxes.

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[10] The court set forth its reasoning for this finding on the record:

The probative value of the evidence of the 1992 and 1993 tax returns is significant and directly deals with a key element of the government's case, namely the defendant's state of mind. Likewise, while prejudicial, the evidence does not present a substantial danger of unfair prejudice because it is limited in time and has a nexus to the immediate years which are the subject of this case. Therefore, the court finds that the evidence is permissible under Rule 403.

Order, January 7, 2002, at 3–4 (doc. no. 36).

[11] The charge to the jury was as follows:

The government has offered evidence tending to show that on different occasions the defendant engaged in conduct similar to the charges in the indictment. You have heard evidence tending to show that Mr. Ringwalt's personal expenses were deducted as corporate expenses resulting in incorrect corporate and personal returns for the years '92 and '93. The government argues that this was misconduct on the part of Charles Ringwalt and it is similar to the conduct charged in the indictment as happening April 1995 and 1996 as to the 1994 and 1995 tax years. Let me caution you that defendant is not on trial for committing any offense in 1993 or 1994 with respect to his 1992 and 1993 returns and that you may not consider the evidence about the 1992 and 1993 return as substitute for proof of the conduct charged in the indictment in later years. Nor may you consider this evidence as showing that Mr. Ringwalt had bad character. This evidence is admitted only for the limited purpose because the government contends it is evidence that the defendant acted knowingly and intentionally in filing the later returns and did not do it because of errors in accounting, mistake or other innocent reason. If you believe that the defendant committed some misconduct as to the 1992 and 1993 years you still need not draw any inference that he acted knowingly or intentionally with respect to the charged offenses in April of 1995 and April 1996. The government still bears the burden of proving willfulness as to the charges in the indictment. Apart from showing lack of mistake or accident or knowledge or intentionally [sic] conduct, the evidence of similar conduct may not be considered by you for any other reason and particularly not for the purpose of concluding that if Mr. Ringwalt was guilty of misconduct related to the 1992 and 1993 years he is therefore guilty of the charges for the years charged in the indictment.

Charge of the Court, Tr. Trans., 1/17/02, at 63–64.

[12] Costa was called to testify as a government witness about the mechanics of the computer-generated and manual checks taken out of the 7550 account, the American Express account, the filing of tax returns, and general Stelwagon office activities.

The government asserts, and the court agrees, that there are two reasons why the existence of the ongoing sexual relationship between Costa and defendant was admitted for a proper purpose. First, in order to defeat the defense claim that John Curran was responsible for the false tax returns that were filed by defendant and signed by both defendant and Costa (who forged defendant's wife's signature on the returns) and for the jury to understand how defendant's tax scheme continued for many years and in large volume, it was essential for the jury to understand the close nature of the relationship between Costa and defendant and why defendant trusted Costa to forge his wife's signature on tax returns and to handle his large cash advances and other personal expenses. The government argued at trial that not only was defendant incorrect in claiming that it was solely Curran's job to separate personal and business expenses, but that in fact, Costa had exclusive control, as per the defendant's directions, over the handling of defendant's personal financial affairs and corporate cash advances. It was important for the jury to know why Costa was entrusted with such duties. Evidence of parties' relationship with one another (including co-participation in uncharged criminal activity) has been held to be properly admitted to show familiarity amongst parties and their relationship of trust. See, e.g., United States v. Gibbs, 190 F.3d 188, 217–18 (3d Cir. 1999) (in case involving conspiracy to deliver crack, evidence of a subsequent attempted homicide with which the defendant was not charged was admissible to show that conspiracy existed between the parties); United States v. Traitz, 871 F.2d 368, 369 (3d Cir. 1989) (evidence of uncharged acts of violence went to shared tradition of violence and symbiotic relationship, and was properly admitted to show the background of the charges, the parties' familiarity with one another and their concert of action); United States v. O'Leary, 739 F.2d 135, 136 (3d Cir. 1984) (evidence of other crimes properly admitted for same purposes).

The court finds that the relationship between Costa and defendant was properly admitted to explain the nature of the relationship between the parties and to place in context the unique factual circumstances which explain why Costa - and not John Curran - assumed responsibility for preparing, booking and classifying the personal expenditures of the defendant as selling expenses of the company. The second reason why the evidence was properly admitted is because the ongoing sexual affair between Costa and defendant gave Costa a personal stake in the outcome of the trial and was evidence of bias. Federal Rule of Evidence 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." Fed. R. Evid. 607. "The partiality of the witness is subject to exploration at trial and is always relevant as discrediting the witness and affecting the weight of h[er] testimony." United States v. Carter, 966 F. Supp. 336, 352 (E.D. Pa. 1997) (quoting Davis v. Alaska, 415 U.S. 308, 316 (1974)). Courts have found bias in a wide variety of situations, including familial or sexual relationships, employment or business relationships, friendships, common organizational memberships, and situations in which the witness has a litigation claim against another party or witness. See Weinstein's Federal Evidence §§ 607.04[5]–[7] (1997) (collecting cases).[13]

The court finds that the evidence was properly admitted to show bias. Because Costa's testimony on direct, cross and redirect contained many contradictions regarding her role in the business and her belief that it was Curran's job to separate business and personal expenses, the jury was entitled to know that Costa had a personal stake, beyond that of a loyal employee, in

[13] The government relies on United States v. Willis, 647 F.2d 54 (9th Cir. 1981) where the court reversed a conviction, in part, where defendant was not allowed to show possible bias arising from the witness' sexual relationship with the defendant's former live-in girlfriend. Defendant argues that this case is not on point because the evidence did not relate to the defendant, rather to a witness, and was therefore less prejudicial. Defendant cites to United States v. Lawrence, 189 F.3d 838 (9th Cir. 1999) where evidence of defendant's unconventional marriage, which included dating other women, was improperly admitted in a bankruptcy fraud trial. However, Lawrence is distinguishable because, there, the evidence was not in any way related to the alleged fraud nor did defendant's wife or the other women with whom he was involved testify. Thus, there was no assertion that the evidence was somehow probative of bias on the part of any witness or that the marriage or affairs were somehow relevant to the case, unlike the instant case. Thus, neither Willis nor Lawrence provide insight here.

the outcome of the case as a result of her long-term and on-going sexual relationship with defendant. Furthermore, the court instructed the jury that the evidence of the affair was to be received for a very limited purpose.[14]

Lastly, the government did not make any remarks concerning the affair during its closing argument or otherwise emphasize the relationship during the trial. In fact, the only reference in the entire trial record to the sexual relationship between Costa and defendant is one brief set of questions and answers at the end of Costa's testimony.[15] Due to the limited scope of the evidence offered and its importance to negate the defense of mistake and reliance and to show bias, the court concludes its probative value was not substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. 403.

3. The admission of exhibit 489.

Before trial commenced, defendant moved to exclude government exhibit 489, a calendar prepared by the defendant in September 1995 in connection with the City of Philadelphia examination of the 1994 returns. Defendant argued that because the calendar was created five months after his 1994 individual and corporate returns were filed, they could not show his state of mind at the time the 1994 returns were filed. The court rejected this argument, holding that even though the calendar was created after the filing of the 1994 return, it bears upon and is relevant to the offense because it involved defendant's after the fact attempt to cover up the inaccuracies in his 1994 return and the defendant's state of mind at the time of the filing of the 1995 returns. Tr. Trans., 1/9/08, at 2.

The court finds that the decision to allow the calendar into evidence was not error. The probative value of the calendar is substantial for the following reasons. First, it reflects defendant's willfulness and intent to evade taxes as it constitutes an attempt to conceal the true nature of the business expenses filed on his 1994 return and to evade the consequences of the City of Philadelphia's audit. False explanations or false exculpatory statements offered by defendants for prior fraudulent conduct is evidence of willfulness in criminal tax cases. See United States v. Bishop, 264 F.3d 535, 550 [88 AFTR 2d 2001-5991] (5th Cir. 2001) (''creating false invoices or documents'' among conduct sufficient to support willful tax evasion); United States v. Chesson, 933 F.2d 298, 304 [68 AFTR 2d 91-5065] (5th Cir. 1991) (defendants' ''methods of ... obliterating and altering addresses and purchase descriptions, and of destroying certain original invoices'' could lead a reasonable jury to infer willfulness).

Second, the calendar is also relevant of the defendant's intent because it demonstrates that when confronted with the inaccuracies in his 1994 return, defendant did not take the position which he now asserts, that the errors were attributable to Ray Mock or John Curran. Furthermore, the creation of the calendar pre-dates the sign-

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[14] The court's charge was as follows:

The government has also offered evidence concerning the defendant's action in having a sexual affair with witness Melanie Costa and of regular high stakes gambling. Again, the defendant is not on trial for committing these other acts, not for committing acts not alleged in the indictment. Accordingly, you may not consider this evidence as a substitute for proof that the defendant committed the crimes charged. Nor may you consider the evidence as proof that the defendant has a criminal personality or bad character. The evidence of the sexual affair was admitted for the much more limited purpose as evidence which in the government's view tends to explain the nature of the relationship, the reasons why Ms. Costa allegedly signed some of the tax returns at issue in this case and to show bias on her part as a witness .... Evidence of all of these acts may not be considered for you by any other purpose and you may not use as evidence to conclude that because the defendant committed these other acts he also must have committed the acts charged in the indictment.'

Charge of the Court, Tr. Trans., 1/17/02, at 64–65.

[15] That testimony was as follows:

Q: Ma'am, at some point in time, had your relationship with Mr. Ringwalt became more than just that of emloyer/employee?

A. Yes.

Q. Okay. And when was that?

A. In the early 90s.

Q. Okay. And can you just tell us briefly what the nature of your relationship was with him?

I have a personal relationship with him.

Q. Okay. And what type of personal relationship?

A. A personal, sexual relationship.

Q. Okay. And it that ongoing today, ma'am?

A. Yes, it is.

Tr. Trans., 1/10/02, at 98.

ing and filing of defendant's 1995 tax return, an offense charged in the indictment. In this regard, the defense of innocent error as to the 1995 return is negated by evidence that the defendant continued to use the American Express and 7550 accounts for personal expenses in his 1995 tax return after the City of Philadelphia auditors had disallowed $814,000 as alleged business expenses. Thus, the court finds that the admission of the calendar at trial was proper.

4. The restriction of defense expert witness' testimony regarding the professional responsibilities and lapses of John Curran, Controller of Stelwagon.

During the trial, the court granted, in part, the government's motion to exclude the testimony of defendant's expert, Samuel Fisher, CPA. While permitting Fisher to offer his expert opinion on whether the outside accountant's conduct was consistent with generally accepted accounting principles, the court precluded Fisher from testifying regarding the alleged failure of John Curran to satisfy the controller's standard of care by failing to meet certain of his duties as controller of Stelwagon.

According to defendant, Mr. Fisher would have testified that Curran held himself out to be a competent and responsible controller and that he did not live up to the standards of performance of a controller based on Curran's experience and qualifications and the recommendations for the implementation of internal control at Stelwagon made to defendant by his accountants. Although Mr. Fisher could not identify any nationally recognized standard of care for controllers, defendant contends that Mr. Fisher's testimony would have been helpful to the jury in understanding complex issues. See United States v. Morales, 108 F.3d 1031 (9th Cir. 1997) (where defendant's lack of bookkeeping competence was at issue, ''bookkeeping principles and [defendant's] grasp of them - was clearly beyond the common knowledge of the average layperson.'').[16]

Under Federal Rule of Evidence 702, the proponent of expert testimony must show that the expert is qualified, that the testimony is reliable, and that it will ''fit'' the facts of the case. See Elcock v. K-Mart Corp., 233 F.3d 734, 741 (3d Cir. 2000). Under Federal Rule of Evidence 703, the opinion must have a reasonable factual basis of the type relied upon by experts in the particular field. See Stecyk v. Bell Helicopter Textron, Inc., __ F.3d __, 2002 U.S. App. LEXIS 13249, at 11–12 (3d Cir. July 3, 2002).[17] Here, the court concluded that because the expert failed to identify a standard generically applicable to the job of controller and the issue regarding the terms of Curran's employment and his professional obligations and whether he satisfied those obligations was a factual issue and not a proper subject of expert testimony, the proposed expert opinion was inadmissable as lacking a reasonable factual basis. Tr. Trans., 1/16/02, at 90–91, 100.

Mr. Fisher intended to opine that the inaccuracies on the returns were the result of John Curran's failure to perform his professional duties as controller of Stelwagon as set forth in the internal control recommendations from Maillie Falconiero. The issue with respect to Curran was not what an ordinary controller's duties were or whether Curran had satisfied these standards. Rather, the issue was whether the defendant had explicitly placed limits on Curran's performance. To this end, outside the jury's presence, Mr. Fisher testified that he had no personal knowledge of the

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16 The issue in Morales was whether the defendant's bookkeeping inaccuracies were intentional or the result of ignorance of bookkeeping procedures. The Ninth Circuit held that it was improper for the district court to completely exclude the testimony of a defense rebuttal expert witness as to the defendant's ability to understand bookkeeping where the government presented a number of witnesses who all testified that the defendant had a good knowledge of the subject. Id. at 1034.

The court finds that Morales is distinguished from the instant case because the expert testimony in Morales was essential to rebut direct testimony offered by the government on the identical issue. Here, in contrast, Fisher's proffer was contrary to and disregarded the trial evidence that John Curran did not possess the duties or responsibilities that Fisher claims he violated. Moreover, part of the Ninth Circuit's concern in reversing the district court in Morales was that the district court did not explain is reasoning for completely excluding the evidence. Id. at 1038. Here, the court carefully considered the arguments on this issue, heard a proffer from Mr. Fisher and articulated its reasons for limiting the testimony on the record.

17 Federal Rule of Evidence 703 states that ''[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.'' Fed. R. Evid. 703.

internal control recommendations made by Maillie Falconiero to the defendant, that he never discussed the recommendations with Stelwagon's accountants, that he did not know the content of any discussions between defendant and Curran concerning the implementation of the internal control recommendations, and never observed the operation of the Stelwagon accounting department or how the employees performed their duties. Because Mr. Fisher had no knowledge of Stelwagon's accounting practices, or of the control recommendations made by the outside accountants, or whether defendant or Curran decided which of the recommendations were to be implemented,[18] Mr. Fisher's opinion as to whether or not Curran breached any standard of care or failed to implement the recommendations was merely speculative and lacked a reasonable basis for its admission. See Stecyk, 2002 U.S. App. LEXIS 13249, at 31 (Sloviter, J. dissenting).[19] Thus, the court, after holding a hearing and receiving briefing and oral argument, properly and fairly exercised its discretion in limiting the scope of the expert testimony offered by the defendant as the Federal Rules of Evidence dictate.[20]

B. Defendant's Supplemental Post-Trial Motion for a New Trial.

Defendant seeks a new trial for the additional reasons that (1) the government suppressed evidence favorable to defendant and material to his defense, thereby violating his right to due process as set forth in Brady v. Maryland, 373 U.S. 83 (1963); and (2) the government's failure to disclose the evidence coupled with its closing argument, which included facts not in evidence and was contrary to the undisclosed materials, constituted prosecutorial misconduct entitling defendant to a new trial. For the following reasons, the court finds that both arguments lack merit.

1. The Brady issue.

Defendant's Brady argument centers on certain handwritten notes dated March 15, 2001 taken by Special Agent Shantelle Kitchen during an interview with an individual named Deborah McQuiston, which were produced to the defendant upon counsel's request on April 15, 2002, three months after trial. McQuiston performed part-time bookkeeping and accounting work for defendant and Stelwagon, for a limited time period in 1989–1990. The defendant argues that the McQuiston interview notes are exculpatory and material evidence which should have been turned over to the defense because the notes contradict the testimony of the government's key witness John Curran.

A valid Brady claim contains three elements: (1) the prosecution must suppress or withhold evidence,[21] (2) which is favorable, and (3) material to the defense. United States v. Perdomo, 929 F.2d 967,

[18] The evidence at trial showed that Curran performed his job at defendant's direction. Although defendant's accountants supplied defendant with recommendations for internal controls, the evidence showed that it was up to the defendant, and not John Curran, to implement the recommendations. Curran had no power to force defendant to submit expense reports or account for his expenses. Specifically, with respect to the manual checks cashed by defendant and the American Express account that formed the basis of this prosecution, Curran played no role in and was specifically excluded from the preparation, posting, classification and payment of these amounts.

[19] Furthermore, the court did not exclude all of the proposed expert testimony of Mr. Fisher. Despite government objections, Fisher was permitted to testify at trial and provide his conclusions to the jury as to the allegedly irresponsible and unprofessional behavior of defendant's accountant with respect to defendant's tax returns.

[20] Defendant also argues that in rejecting the expert testimony as to Curran's job, the court ignored defendant's Sixth Amendment right to compulsory process for obtaining witnesses. "The Compulsory Process clause protects the presentation of the defendant's case from unwarranted interference by the government, be it in the form of an unnecessary evidentiary rule, a prosecutor's misconduct, or an arbitrary ruling the by the trial judge." Government of the Virgin Islands v. Mills, 956 F.2d 443, 445 (3d Cir. 1992). The defendant maintains that the subject of Curran's functions and responsibilities as controller, and whether he lived up to those responsibilities, would have helped the jury to understand the core issue in the case. Mr. Fisher was qualified to identify the standard of care applicable to Curran based on the responsibilities inherent in the controller position and the recommendations made by Maillie Falconiero.

Defendant's argument is unpersuasive. The issue here is not whether defendant was permitted to present expert testimony but, rather, the extent to which his expert would be permitted to offer testimony which did not conform with Federal Rules of Evidence 702 and 703. The court did permit Mr. Fisher to testify, but simply limited that testimony to that which had a reasonable factual basis.

[21] This element applies whether the suppression of the evidence was purposeful or inadvertent. "[T]he prosecution is obligated to produce certain evidence actually or constructively in its possession." United States v. Perdomo, 929 F.2d 967, 970 (3d Cir. 1991). The government does not contest this legal principle and concedes the fact that the McQuiston interview notes were in the government's constructive possession and "suppressed or withheld" from the defendant prior to trial.

970 (1991).[22] Evidence may be considered exculpatory if it "goes to the heart of the defendant's guilt or innocence [or if it] might well alter the jury's judgment of the credibility of a crucial prosecution witness." United States v. Starusko, 729 F.2d 256, 260 (3d Cir. 1984). Moreover, "evidence is 'material' under Brady, and the failure to disclose it justifies setting aside a conviction where there exists a 'reasonable probability' that had the evidence been disclosed the result at trial would have been different." Woods v. Bartholomew, 516 U.S. 1, 5 (1995) (per curiam) (quoting Kyles v. Whitley, 514 U.S. 419, 433 (1995)). In United States v. Bagley, 473 U.S. 667, 675 (1985), the Supreme Court advised:

> The Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.

Id. (footnotes omitted).

The only evidence at trial concerning McQuiston was presented through John Curran, who testified as to his observations of the work performed by McQuiston:

> And they had an outside person that was - girl by the name of Debra McQuiston (ph.) was coming in a month-end closing transactions. And she at that time I knew was making some changes to the - some of the expenses and I believe some of them maybe reclassifying some of them and one of them was the American Express. I know Mr. Ringwalt just wasn't happy about some of the changes and he told me that the American Express is business, that it should be left in there.

Tr. Trans., 1/11/02, at 34. On cross, Curran testified that he was not exactly certain of the adjustments that were being made by McQuiston. Id., at 55 ("That's what she - that's what she would come in and make some adjustments but I didn't - I wasn't exactly sure what she was doing."). On redirect, he testified as follows:

> And what was Mr. Ringwalt's reaction when Ms. McQuiston attempted to separate personal from business items on the American Express bills?
>
> Well, I know he wasn't happy about it, he was - at one point I remember him being annoyed that she made the change.
>
> And how long did Ms. McQuiston actually work for this company?
>
> I don't know the exact length of time, she was there for about six months during the - after I was hired, I mean, I'm not sure how long she was there prior to that.

Id., at 109–10. In its closing to the jury, government counsel made the following reference to the testimony of Curran concerning Deborah McQuiston:

> Mr. Curran knew [defendant] went off salary and so what did he do? In 1991, '92, '93 he went to this man and he said, Mr. Ringwalt, and I'm sure he said it respectfully, if these are a substitute for payroll, then they should not be booked as selling expenses.

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[22] The government argues that defendant's motion for a new trial based on Brady is barred because defendant failed to meet the requirements of Federal Rule of Criminal Procedure 33 which provides 7 days after verdict or a time fixed by the court within the 7 day period to file a motion for a new trial. However, "[a] motion for new trial based on newly discovered evidence may be made ... within three years after the verdict or finding of guilt." Fed. R. Crim. P. 33. The government argues that defendant does not qualify for the newly discovered evidence prong of Rule 33 because he fails to meet the five-part test applicable to a motion for a new trial on this basis. See United States v. Adams, 759 F.2d 1099, 1108 (3d Cir. 1985) ("(a) the evidence must be in fact, newly discovered, i.e., discovered since trial; (b) facts must be alleged from which the court may infer diligence on the part of the movant; (c) the evidence must be relied on, must not be merely cumulative or impeaching; (d) it must be material to the issues involved; and (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal."). However, the five part test generally applicable to a motion for a new trial is not strictly applicable where the basis of such a motion is exculpatory or impeachment evidence which was in the possession of the government. See United States v. Bagley, 473 U.S. 667, 680 (1985) ("if the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.") (citation omitted); Perdomo, 929 F.2d at 972 ("a defendant is not required to show that [Brady] evidence, if disclosed, probably would have resulted in acquittal.").

> That was probably a pretty frightening thing for Mr. Curran to do. He thought, as he told you, he'd be fired if he challenged Mr. Ringwalt. After all, what happened to Ms. McCristin [sic]? Remember Ms. McCristin? [sic] You heard a lot of testimony about her. She had the audacity to go through this man's American Express bills while Mr. Curran was there and try to separate out business and personal. And what happened? Mr. Ringwalt got angry with her. John Curran was there. He's no dummy. He saw what Ms. McCristin [sic] fell out of favor with Mr. Ringwalt and she was gone within six months after Mr. Curran was there. Mr. Curran did what he was told.

Id., at 13.

Special Agent Kitchen's notes of the McQuiston interview contain the following notations: ''no conversations of business or personal expenses''; ''Chuck never talked to her about income and expenses''; ''possible reviewed AMEX; but not sure''; ''never had any conversations about expenses''; ''did not do tax return''; ''no recollection of computerized checks or manual checks''; and ''not much interaction w/ Curran; not there that long.'' With respect to the circumstances surrounding McQuiston's departure from Stelwagon, the notes are ambiguous and include reference such as: ''stayed couple of months after he [John Curran] was hired left, had no authority''; ''did not apply for job; no interest''; ''wanted to keep independent CPA's - 2 small kids at time - not interest''; and ''John Curran took over her duties.''

The defendant argues that these notes contradict the government's premise asserted in its closing argument that McQuiston had been fired because of her refusal to change the American Express entries, because, in fact, she had not been fired at all. However, the court finds that the defendant's argument is misguided for the following reasons.

First, the McQuiston interview notes are not Brady evidence because facts pertaining to Deborah McQuiston were known by or readily available to the defendant long before trial. It is well-settled that the government does not violate Brady by failing to disclose exculpatory or impeaching evidence that is available to the defense from other sources in the exercise of due diligence. See, e.g., United States v. Hicks, 848 F.2d 1, 4 (1st Cir. 1988) (no Brady violation for failure to disclose grand jury testimony of potential witness not called to testify at trial because defense knew of and had access to witness and thus was ''on notice of the essential facts required to enable him to take advantage of [the] exculpatory testimony'') (citation omitted); Lugo v. Munoz, 682 F.2d 7, 9–10 (1st Cir. 1982) (government has no Brady burden when facts are readily available to a diligent defender); United States v. Zackson, 6 F.3d 911, 918 (2d Cir. 1993) (''Evidence is not 'suppressed' if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.''); United State v. Perdomo, 929 F.2d 967, 973 (3d Cir. 1991) (dicta) (''Evidence is not considered suppressed if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence.''); United States v. Todd, 920 F.2d 399, 405 (6th Cir. 1990) (nondisclosure of possible exculpatory material does not violate Brady when the ''defendant was aware of the essential facts that would enable him to take advantage of the exculpatory evidence.''); United States v. Romo, 914 F.2d 889, 899 (7th Cir. 1990) (when defense counsel knows about a witness with possible exculpatory information, and has an opportunity to subpoena that witness, prosecutor has no obligation to seek out and provide the information).[23]

[23] Defendant argues that while he was aware of McQuiston, he was unaware that an interview with her had taken place prior to trial. However, this distinction is irrelevant. The law is clear that Brady does not apply to evidence which defendant knew or should have known in the exercise of reasonable diligence. Here, defendant hired and supervised McQuiston and had firsthand knowledge of the circumstances surrounding her employment and departure from Stelwagon. The fact that what the defendant knew was now reduced to a piece of paper is not controlling.

Here, McQuiston worked for the defendant and provided accounting and bookkeeping services to him in 1989–1990. The nature of the accounting work she performed for him and the reasons for her departure were therefore known firsthand by the defendant.[24] If defendant believed that the trial testimony of John Curran concerning his understanding of McQuiston's responsibilities at Stelwagon was somehow inconsistent with the true facts, then he could have called McQuiston as a trial witness to rebut the testimony of Curran. Thus, there is nothing in the interview notes that was not already known or knowable by the defendant through the exercise of reasonable diligence. To put it another way, there was no error in the government's failure to tell defendant that which he already knew.

Secondly, the court finds that the McQuiston interview notes are not exculpatory. Brady only applies to exculpatory evidence. See United States v. Nixon, 881 F.2d 1305, 1308 (5th Cir. 1989); United States v. Kendall, 766 F.2d 1426, 1440 (10th Cir. 1985). As such, Brady does not apply to neutral evidence. See United States v. Dillman, 15 F.3d 384, 390 (5th Cir. 1994) (grand jury testimony from witness who could not recall or remember alleged meeting was "neutral, not exculpatory or impeaching in nature," and thus not Brady material). Here, defendant's claim that the interview notes are exculpatory is that "had prior counsel had the interview notes of SA Kitchen before or even during trial, he could have shown that the Government's repeated assertions that Ms. McQuisten [sic] was relieved of her duties because she would not participate in Mr. Ringwalt's alleged fraud was untrue and highly prejudicial to the defendant." Def.'s Supp. Mot. ¶ 22.

Defendant, however, misapprehends the purpose for which the McQuiston testimony was offered. Central to the defendant's theory at trial was Curran's credibility, i.e., Curran was now trying to cover up his incompetence as a controller by blaming the defendant. The McQuiston testimony was offered by the government to explain why Curran went along with the defendant's directions which he claimed he knew at the time were improper, i.e., he feared he would be fired if he did not, in part, because he believed McQuiston had been let go for complaining about the treatment of the American Express account. Tr. Trans., 1/11/02, at 34 ("I know Mr. Ringwalt just wasn't happy about some of the changes [McQuiston made] and he told me that the American Express is business . . . ."). In light of these comments by the defendant and because McQuiston was only employed at Stelwagon for a short period of time, Curran came to understand that her early departure was the result of the defendant's displeasure with McQuiston's inquiries into the American Express account. In other words, the McQuiston evidence went to show why Curran did what he did, i.e., fear of losing his job made him go along with the defendant's illegal scheme without much protestation. Properly understood, the notes would not have contradicted Curran's testimony because the notes do not go to Curran's state of mind, and, thus, if produced, the notes would have been neither exculpatory nor impeaching of Curran.

Lastly, the court finds that the McQuiston interview notes are not material and would not have changed the outcome of the trial. The standard of materiality that applies to the government's non-production of alleged Brady information is whether "the omitted evidence creates a reasonable doubt that did not otherwise exist." United States v. Hill 976 F.2d 132, 135 (3d Cir. 1992) (quoting United States v. Agurs, 427 U.S. 97, 109–10 (1976)). In order to demonstrate a reasonable probability of a different outcome, the defendant must show "the favorable evidence [withheld] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 420 (1995). However, in making this determination, the assessment of the omitted evidence's impact

[24] According to the government, consistent with the fact that defendant was McQuiston's employer and supervisor, defendant referred to McQuiston on at least three unprompted occasions during his April 29, 1993 deposition, taken during the defendant's lawsuit against his former return preparers.

must take account of the cumulative effect of the suppressed evidence in light of the other evidence, not merely the probative value of the suppressed evidence standing alone. Id. at 436–37. In United States v. Pellulo, 14 F.3d 881 (3d Cir. 1994), it was discovered after trial that an IRS interview memorandum of a key government witness, setting forth facts inconsistent with the trial testimony of the witness, particularly with respect to when and where the witness met two co-defendants, was not produced. Id. at 886. The court stated that a reversal is warranted only when the suppression of the Brady evidence ''undermines confidence in the outcome of the trial'' and held that the fact of some inconsistencies between the trial testimony and the interview report concerning the witness was ''merely cumulative and impeaching'' and would not have changed the outcome of the trial. Id. See also United States v. Adams, 759 F.2d 1099, 1108 (3d Cir. 1985) (information regarding witness' participation in robbery not material where other evidence more than sufficient for finding of guilt).

Similarly, here, as explained above, there was strong evidence of defendant's willful and long standing tax evasion scheme, which continued for five years after McQuiston's employment at Stelwagon ended, presented to the jury at trial. See Part A, supra. In light of this evidence, the court finds that even if the government had produced the interview notes and assuming defendant had called McQuiston to testify as to her work at Stelwagon and her departure from the company, it cannot be said that a reasonable probability exists that the outcome of the trial would have been different.

2. Prosecutorial Misconduct.

The defendant also argues, based on the McQuiston notes, that the government committed prosecutorial misconduct which deprived defendant of his Fifth Amendment right to due process by arguing facts about Deborah McQuiston in its closing which were not in evidence and which were contradicted by the non-disclosed McQuiston interview notes in the government's constructive possession. The defendant's argument is twofold: one, part of the government's closing argument was not supported by evidence on the record, and, two, it was contrary to the statements made by McQuiston in the interview notes taken by Special Agent Kitchen, which were not disclosed to the defendant.

When a defendant seeks a new trial based on allegedly improper arguments of government counsel, the focus of the inquiry is whether any remarks by the prosecutor ''unfairly prejudiced the defendant.'' United States v. Young, 470 U.S. 1, 12 (1985). The Third Circuit has described the test as follows:

> In determining prejudice, we consider the scope of the objectionable comments and their relationship to the entire proceeding, the ameliorative effect of any curative instructions given, and the strength of the evidence supporting the defendant's conviction. As the Supreme Court has emphasized, ''a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context.'' United States v. Young, 470 U.S. at 11 (finding harmless error where the prosecutor had stated his opinion that the defendant was guilty and urged the jury to ''do its job.'').

United States v. Zehrbach, 47 F.3d 1252, 1265 (3d Cir. 1995). Here, government counsel referenced McQuiston in its closing in the context of explaining Curran's state of mind and why Curran did what he testified he was told to do by the defendant. Again, government counsel argued:

> Mr. Curran knew [defendant] went off salary and so what did he do? In 1991, '92, '93 he went to this man and he said, Mr. Ringwalt, and I'm sure he said it respectfully, if these are a substitute for payroll, then they should not be booked as selling expenses.

That was probably a pretty frightening thing for Mr. Curran to do. He thought, as he told you, he'd be fired if he challenged Mr. Ringwalt. After all, what happened to

Ms. McCristin [sic]? Remember Ms. McCristin? [sic] You heard a lot of testimony about her. She had the audacity to go through this man's American Express bills while Mr. Curran was there and try to separate out business and personal. And what happened? Mr. Ringwalt got angry with her. John Curran was there. He's no dummy. He saw what Ms. McCristin [sic] fell out of favor with Mr. Ringwalt and she was gone within six months after Mr. Curran was there. Mr. Curran did what he was told.

Tr. Trans., 1/17/02, at 13. John Curran had testified that he believed that McQuiston had made some changes to the American Express account and that defendant was unhappy about the changes that she made and that she left the company within six months. Id., 1/11/02, at 34 (''I know Mr. Ringwalt just he wasn't happy about some of the changes and he told me that the American Express is business, that is should be left there.''). On redirect, Curran reiterated that defendant was annoyed by McQuiston's conduct and further stated that she left the company six months after he was hired. Id. at 109–10.

As to defendant's first argument that the closing was not supported by the evidence, the court finds that the government's closing argument with respect to Curran's state of mind and beliefs regarding defendant's relationship with McQuiston and what had happened to McQuiston for pointing out defendant's failure to separate out the American Express account comports with the trial testimony. Thus, the government's closing argument in this regard was not error.[25]

However, as to defendant's second argument that the closing was contrary to the undisclosed interview notes, to the extent that government counsel suggested in its closing that not only did Curran believe that McQuiston was fired for her conduct concerning the American Express account, but that the evidence reflected that in fact McQuiston was fired by defendant for separating out the American Express account,[26] that portion of the closing was not supported by the trial testimony. Moreover, such argument was contrary to the interview notes of which the government had constructive knowledge and had been withheld from the defendant. See McQuiston Interview Notes (''possible reviewed AMEX; but not sure,'' ''never had conversations about expenses,'' ''Chuck never talked to her about income and expenses,'' ''did not apply for job; no interest,'' and ''wanted to keep independent CPA's - 2 small kids at time - not interest.''). Viewed in this light, the issue is whether the failure to disclose the McQuiston interview notes together with the reference in the closing to facts contrary to the McQuiston interview notes ''unfairly prejudiced the defendant.'' Young, 470 U.S. at 12. The court concludes for the reasons that follow that they did not.

As set forth above, the government produced at trial a compelling amount of evidence of the defendant's criminal intent, including evidence of a consistent multi-year pattern by the defendant of extracting millions of dollars from his corporation through false bookings and cashed manual checks which became the functional equivalent of payroll checks which the defendant had stopped giving himself. The evidence also included inculpatory admissions by the defendant and his manufacturing of a phony calendar, prepared for the purpose of explaining away the booking of personal expenses as business expenses during an audit for the 1994 tax year by the City of Philadelphia and before the defendant continued the identical scheme into 1995. In light of all this evidence, described in detail to the jury by the govern-

25 The defendant never objected to this argument during closing. Accordingly, this issue should be decided under the Rule 52(b) of the Federal Rules of Criminal Procedure which states that ''[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.'' Under the plain error standard, ''there must be (1) an error; (2) which is clear or obvious; and (3) which affects substantial rights (i.e., it affected the outcome of the district court proceedings).'' See United States v. Navarro, 145 F.3d 580, 584 (3d Cir. 1998) (citing United States v. Olano, 507 U.S. 725, 733–34 (1993)). If these three requirements of Rule 52(b) are satisfied, the court has discretion to notice a plain error which ''(a) causes the conviction or sentencing of an actually innocent defendant, or (b) seriously affect[s] the fairness integrity or public reputation of judicial proceedings.'' Navarro, 145 F.3d at 585 (citing Olano, 507 U.S. at 735–36). However, here, because the court finds that there was no error, further analysis under Rule 52(b) is unnecessary.

26 I.e., ''Remember Ms. McCristin [sic]? You heard a lot of testimony about her. She had the audacity to go through this man's American Express bills .... And what happened? Mr. Ringwalt got angry with her.'' Id., 1/17/02, at 13.

ment during closing argument, the court finds that the references made by government counsel about McQuiston, which went beyond the context of Curran's state of mind, were marginal in their import and their impact and, thus, did not unfairly prejudice the defendant.

Furthermore, the court finds that there is no reasonable probability that government counsel's overreaching comments during its closing argument changed the outcome of these proceedings. Because the alleged prosecutorial misconduct here involves the failure to disclose evidence, the Brady standard of materiality is instructive. In order to demonstrate a reasonable probability of a different outcome, the defendant must show "the favorable evidence [withheld] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, 514 U.S. 419, 420. Again, based on the breadth of evidence the government produced at trial on the issue of defendant's intent, the court finds that government counsel's statements regarding McQuiston, which were contrary to the McQuiston interview notes, do not under-mine confidence in the verdict or affect the fairness of the proceedings.

Lastly, the court finds that any error by the government does not undermine confidence in the criminal justice system. Prosecutorial misconduct, albeit error, "does not always warrant the granting of a mistrial. The Supreme Court has recognized that given 'the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial, and that the Constitution does not guarantee such a trial.'" Zehrbach, 47 F.3d at 1265 (quoting United States v. Hasting, 461 U.S. 499, 508–09 (1983)). Furthermore, "a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by doing so can it be determined whether the prosecutor's conduct affected the fairness of the trial." Young, 470 U.S. at 11.

Here, the government's error does not undermine the confidence in the criminal justice system. First, while the McQuiston interview notes were in the government's constructive possession, they were not in the actual possession of government trial counsel.[27] Thus, while the government's failure to disclose the notes prior to trial combined with the limited reference in the closing argument was not proper, that conduct of government's counsel can not be described as intentional or constituting bad faith. Second, the scope of the government's error is minimal. Viewing the contested portion of the government's closing as a whole, see p. 45, supra, the heart of the argument pertains to Curran's state of mind about how Curran viewed the relationship between defendant and McQuiston and why he went along with defendant's scheme - information which is not contradicted by the interview notes. Thus, the government's misconduct was both limited and inadvertent.

The court finds that to the extent the government's closing argument technically could be characterized as prosecutorial misconduct it did not unfairly prejudice the defendant, affect the integrity of the proceedings or undermine the confidence of

[27] Although the interview notes of McQuiston were taken by Special Agent Kitchen, the prosecutors were unaware of the existence of the notes until after the trial in this case.

the public in the criminal justice system.[28] Thus, the defendant's motion for a new trial on this ground will be denied.

CONCLUSION

The defendant's motion for judgment of acquittal will be denied because the court finds that the evidence presented at trial was sufficient to support the jury's verdict of guilty as to all counts charged in the indictment. Furthermore, for the reasons stated above, the defendant has not cited to a trial error entitling him to a new trial nor has defendant shown that he has been deprived of his Fifth Amendment right to due process because of a Brady violation, and to the extent that the government's closing is characterized as prosecutorial misconduct, it is not reversible error. Thus, defendant's motions for a new trial will be denied.

An appropriate order follows.

ORDER

AND NOW, this 31st day of July, 2002, upon consideration of defendant's post-trial motions and pursuant to the court's memorandum dated July 31, 2002, it is hereby ORDERED that:

1. Defendant's Motion for Judgment of Acquittal (doc. no. 64) is DENIED;

1. 2. Defendant's Motion for a New Trial (doc. no. 65) is DENIED;

1. 3. Defendant's Motion to Withdraw Original Supplemental Post-Trial Motion (doc. no. 112-1) is GRANTED;[29]

1. 4. Defendant's Additional Supplemental Post-Trial Motion (doc. no. 112-2) is DENIED.

AND IT IS SO ORDERED.

¶2002-5192

UNITED STATES OF AMERICA v. Staci J. HEIMER, APPELLANT. U.S. Court of Appeals, Third Circuit, (CA3) Docket No. 01-3623, July 31, 2002. District Court affirmed. Decision against Taxpayer.

1. Tax crimes—filing false returns—sentencing—obstruction of justice. Taxpayer's sentence for filing false returns and bank fraud was affirmed: 2-level obstruction of justice enhancement based on FBI agent's unsworn testimony at sentencing hearing that taxpayer's false statement to FBI significantly delayed indictment was proper. Case law showed unsworn, reliable, probative evidence could be relied on in order to determine appropriate sentence; as investigation's facilitator, agent's uncontested testimony regarding time and effort spent on investigation after taxpayer gave false statement was highly reliable; and district court's reliability findings based on its observation of proceedings and agent's testimony were given great deference. *Reference:* United States Tax Reporter ¶72,065.01(50). IRC §7206.

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[28] Defendant's reliance on United States v. Mastrangelo, 172 F.3d 288 (3d Cir. 1999) is misplaced. There, the government and defendant entered into a stipulation stating that defendant "had the chemical background to know the ingredients and equipment necessary to make methamphetamine." Id. at 295. In its closing, the government repeatedly misrepresented the stipulation and stated that defendant had knew how to make methamphetamine and that there was no evidence that anyone else in the conspiracy had similar knowledge. Id. at 296. Despite the defendant's objection and an attempted curative instruction, on rebuttal, the prosecutor made an additional misrepresentation. Id. at 297. The court held that these errors constituted prosecutorial misconduct requiring a new trial. The court reasoned:

> The impropriety of these statements is evident. They distort the substance of the Stipulation, inflating the limited stipulation that [defendant] had the chemical background to know the ingredients and equipment necessary to make methamphetamine to encompass a meaning that . . . that because of his knowledge of the ingredients and equipment needed, [defendant] knew how to make methamphetamine. Furthermore, the prosecutor's statement that there was no evidence that anyone else had similar knowledge impermissibly shifted the burden of proof to [defendant] to demonstrate that one of the other conspirators knew how to make methamphetamine.
>
> * * *
>
> The prosecution sought to have the jury infer that [defendant] . . . turned the ingredients into methamphetamine, but it had no evidence, direct or indirect, of that fact. If the prosecutor could convince the jury that [defendant] was the only conspirator who knew how to make methamphetamine, the jury might reasonably draw that inference. However, there was no evidence that [defendant] knew how to make methamphetamine, and it was highly improper . . . to shift the meaning of the Stipulation to fill that missing link.

Id. at 296, 298.

Mastrangelo is distinguishable. There, the government clearly made repeated argument based on facts which were not only not in evidence, but dealt with facts to which defendant himself stipulated. Furthermore, the issue in Mastrangelo went to the heart of the government's case and placed upon the defendant an improper burden to prove knowledge on the part of his co-conspirators. None of these factors are present here. As described above, the government's closing was not contradicted by the interview notes, and, the issue with respect to McQuiston did not go to the heart of the case against the defendant.

[29] Defendant's Supplemental Post-Trial Motion (doc. no. 97) is WITHDRAWN.

On Appeal from the United States District Court for the Middle District of Pennsylvania (D.C. Criminal No. 01-cr-00111). District Judge: The Honorable James F. McClure, Jr. United States Court of Appeals, Third Circuit.

Before SLOVITER, NYGAARD, and BARRY, Circuit Judges.

Opinion of the Court

NYGAARD, Circuit Judge:

Unpublished Disposition

Appellant, Staci J. Heimer, seeks review of her sentence of 27 months imprisonment imposed by the District Court of the Middle District of Pennsylvania. Appellant alleges that unsworn testimony at the sentencing hearing should not have been admitted to support an obstruction of jus-tice enhancement under U.S.S.G. 3C1.1 because it did not meet the ''indicia of re-liability'' standard required by U.S.S.G. 6A1.3. We have jurisdiction to hear this appeal pursuant to 28 U.S.C. 1291 and 28 U.S.C. 3742(a) and review it for clear error.

On May 31, 2001, pursuant to a plea agreement, Heimer pleaded guilty to two counts, one count of bank fraud and one count of filing false income tax returns, of a five count indictment. In the presentence report the probation officer recommended a two-level enhancement for obstruction of justice based on Heimer's untruthful allegation that her employer at the Art Printing Company had participated in her fraudulent activities. The probation officer reported that the false statement had significantly impeded the federal investigation meriting a two-level enhancement. Heimer objected to the enhancement for obstruction of justice admitting that the statements were false, but arguing that they did not impede the federal investigation significantly enough to warrant the two-level enhancement.

On September 18, 2001, the District Court conducted a sentencing hearing. Defendant voiced her objection to the enhancement again, alleging that the investigation was not significantly impeded by her false statement. The District Court requested testimony from the FBI case agent, Special Agent Glodek, to seek information on how much extra work resulted from the false statement. Agent Glodek, without taking an oath, answered the Court's questions by explaining that Heimer had initially provided the victims' attorney a taped confession admitting she forged the victims' checks. After Heimer received a target letter from the United States Attorney, she alleged that one of the victims had assisted and directed her to cash the checks fraudulently and told her she would receive a part of the proceeds. Agent Glodek explained various additional steps which were taken as a result of Heimer's false statement. He concluded that it delayed the indictment for about two years and that 90 to 95 percent of the investigation was conducted after Heimer provided the false information.

The Court overruled Defendant's objection to the obstruction of justice enhancement, finding that Heimer's statements were materially false and ''significantly obstructed and impeded the official investigation of the [offense].'' (App. 64–65). The Court imposed the two-level enhancement for obstruction of justice and Heimer was sentenced to 27 months imprisonment, 3 years supervised release, $43,022 restitution, and a special assessment of $200. Heimer is only appealing the 27 months imprisonment.

[1] The sentencing court has been given broad discretion in determining an appropriate sentence in order to punish and deter the criminal and to protect society. See 18 U.S.C. 3661 (''No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense ... for the purpose of imposing an appropriate sentence.'') We have held that the sentencing court, ''may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial.'' United States v. Yeaman, 194 F.3d 442, 463 (3d Cir.1999) citing United States v. Brothers, 75 F.3d 845, 848 (3d Cir.1996). In United States v. Miele, we suggested that a sentencing court could ''credit hear-

say evidence over sworn testimony, especially where there is other evidence to corroborate the inconsistent hearsay statement.'' 989 F.2d 659, 664 (3d Cir.1993).

Given the broad discretion of the sentencing court and the variety of sources and information it can consider, it is imperative that the information used in determining a defendant's sentence be reliable and unbiased to ''such impermissible factors as race, religion, national origin, or the result of coerced statements, uncounseled convictions and the like.'' United States v. Torres, 926 F.2d 321, 324 (3d Cir.1991). Section 6A1.3 of the United States Sentencing Guidelines states,

> In resolving any dispute concerning a factor important to the sentencing determination, the court may consider relevant information without regard to its admissibility under the rules of evidence applicable at trial, provided that the information has sufficient indicia of reliability to support its probable accuracy. U.S.S.G. 6A1.3(a).

Thus, where there is an objection to the information the court is considering for sentencing, the court must establish whether the information is reliable.

Heimer alleges that the FBI agent's unsworn testimony lacked the required indicia of reliability to support the resultant two-level enhancement. She argues that taking an oath is essential to the reliability and accuracy of the judicial fact-finding process. The testimony at issue in the instant case is not a regular matter of the judicial fact-finding process. This process is normally associated with the trial, and falls under the rules of evidence. However, the normal rules of evidence do not apply in sentencing hearings and unsworn, reliable, probative evidence can be relied on for purposes of determining appropriate sentences. Yeaman, 194 F.3d at 462. Therefore, as long as the Agent's testimony can be construed as reliable, the District Court can take the information into consideration to determine a proper sentence.

In Yeaman, we suggested that the district court was not in error when it based an enhancement on evidence, unsworn expert testimony, and the court's own inferences. Id. (remanded for district court to reevaluate unsworn letters which alleged frustration and not actual injury).

Other circuits have suggested that sufficient indicia of reliability are shown by factors including sworn statements, in-court testimony, observed or recorded statements or corroborating evidence. United States v. Fennell, 65 F.3d 812, 814 (10th Cir.1995) (holding there was insufficient indicia of reliability in ''unsworn out-of-court statements made by an unobserved witness and unsupported by other evidence.''). The Second Circuit has advised that reliability can be associated with a witness' familiarity with the details of the activity. United States v. Pless, 982 F.2d 1118, 1125 (2d Cir.1992).

In United States v. Lee, the Eleventh Circuit suggested that interest and status of the witness are factors in determining the indicia of reliability. 68 F.3d 1267, 1276 (11th Cir.1995) (''We find that his penal interest fails to qualify as a sufficient indicia of reliability, particularly in view of Russell's status as a fugitive from justice. Lee also indicates that reliability may be established by supporting evidence and the opportunity for the district court to observe the witnesses first-hand. Id. The First Circuit has suggested that the sentencing judge who presided over the case can form an independent assessment of reliability, which receives a high degree of deference. United States v. Zuleta-Alvarez, 922 F.2d 33 (1st Cir.1990).

Regarding the indicia of reliability of Agent Glodek's testimony, the objection to the obstruction of justice enhancement was not to show that the Appellant did not give a false statement to the FBI. Heimer readily admitted the falsity of her statement and apologized to the court for implicating the victim. Instead, the objection contested the degree upon which the false statement impeded the investigation. The information provided to the court by Agent Glodek concerned the amount of effort and time

which was put into the investigation after the false statement was given. As the FBI case agent, Agent Glodek is the most reliable source and can be considered a veritable expert for testimony regarding the extent, duration and content of the investigation because he was a facilitator of the investigation.

The content of the Agent's testimony is also a factor for determining its indicia of reliability. The subject of the testimony pointed to the details of the investigation and not to whether Heimer's statement was false. If the falsity of the statement had been at issue, the reliability of the testimony may have been more questionable because opposing testimonies may have been voiced. Since there was no evidence to oppose the Agent's testimony and his experience with the information was firsthand, a sufficient indicia of reliability regarding the evidence was shown.

Additionally, the sentencing court had the benefit of observing the proceedings, including the Agent's testimony. In the instance of in-court testimony, reliability can be inferred by the judge from the witness' words and actions. We give great deference to a presiding district judge in such proceedings, because he or she is able to directly observe the parties, witnesses, interactions and events of the court room.

For the foregoing reasons, the sentencing court's finding that the Agent was reliable was not clearly erroneous. We will affirm the judgment of the District Court.

¶2002-5193

Charles William LEDFORD, PLAINTIFF-APPELLANT v. UNITED STATES, DEFENDANT-APPELLEE. U.S. Court of Appeals, Federal Circuit, (CA Fed Cir) Docket No. 02-5027, Aug. 6, 2002. Court of Federal Claims affirmed per curiam. Years 1996, 1997, 1998. Decision against Taxpayer.

1. Court of Federal Claims jurisdiction—habeas corpus and declaratory relief—Anti-Injunction Act—damages—refund. Fed. Cir. affirmed per curiam decision dismissing for lack of jurisdiction pro se taxpayer's action for habeas corpus, injunctive and declaratory relief, damages and refund for years he failed to file returns: although subject of IRS criminal investigation, habeas relief was properly denied because taxpayer didn't allege that he was in custody and Court of Federal Claims wasn't statutorily empowered to grant such relief; AIA barred injunctive relief in tax-related matters, and RCFC 65(d) and meritless argument that wages weren't income were irrelevant; U.S. Common Law Court's "judgments" weren't binding; district courts had exclusive jurisdiction over IRC §7433 damages claims; and taxpayer didn't allege full tax payment. *Reference:* United States Tax Reporter ¶74,336.510(5); 74,215.05(5); 74,336.510(70); 74,225.01(5). IRC §7421; 7422.

Charles William Ledford, of Colorado Springs, CO, pro se.
Robert L. Baker, Attorney, Appellate Section, Tax Division, Department of Justice, of Washington, DC, for defendant-appellee. With him on the brief were Eileen J. O'Connor, Assistant Attorney General; and David I. Pincus, Attorney.

Appealed from United States Court of Federal Claims, Judge Christine O.C. Miller. United States Court of Appeals, Federal Circuit.

Before CLEVENGER, RADER, and BRYSON, Circuit Judges.

PER CURIAM:

Charles William Ledford appeals the United States Court of Federal Claims's order dismissing his complaint for lack of jurisdiction. We affirm.

I

Mr. Ledford paid no federal income tax for the years 1996, 1997 or 1998. He reported no taxable income in those years because, in his view, the federal income tax does not reach compensation received for personal labor. The Internal Revenue Service (IRS), which disagrees with this proposition, instituted collection actions

and began a criminal investigation of Mr. Ledford.

In an effort to halt the collection proceedings and the investigation of his failure to pay any income tax, Mr. Ledford filed a complaint in the Court of Federal Claims seeking habeas corpus relief, injunctive and declaratory relief, money damages and the refund of federal taxes for 1996, 1997 and 1998. The government filed a motion to dismiss for lack of subject matter jurisdiction the claims for habeas corpus, injunctive and declaratory relief, as well as the request for damages arising from the IRS's allegedly unlawful tax collection activities and criminal investigation. The government also moved to dismiss the tax refund claim for failure to state a claim, arguing that Mr. Ledford did not satisfy the jurisdictional requirements for a tax refund suit in the Court of Federal Claims. After Mr. Ledford failed to file a reply, the court granted the government's motion and entered an order dismissing the complaint. Mr. Ledford then filed a request for reconsideration, which alleged that the court had erred in dismissing his complaint because, inter alia, "the court has never addressed the issue that United States law does not tax compensation for personal labor." He also claimed that the court was bound under res judicata principles to follow a "common law judgment" from the so-called "Common Law Court of the United States of America" that, according to Mr. Ledford, establishes an implied contract between himself and the United States granting him "common law immunity" from taxation. The court denied Mr. Ledford's request for reconsideration and entered an order instructing the clerk not to accept any further filings of any nature from Mr. Ledford. Mr. Ledford now appeals the dismissal of his complaint. We have jurisdiction over an appeal from a final judgment of the Court of Federal Claims under 28 U.S.C. § 1295(a)(3).

II

[1] We review de novo whether the Court of Federal Claims properly dismissed for lack of subject matter jurisdiction Mr. Ledford's claims for habeas corpus and equitable relief, Massie v. United States, 166 F.3d 1184, 1187 (Fed.Cir.1999), and whether the court properly dismissed the refund claim for failure to state a claim for which relief may be granted, Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed.Cir.1991).

Turning to Mr. Ledford's request for a writ of habeas corpus, we affirm the dismissal of that claim on two grounds. First, the habeas statute gives federal courts the authority to issue a writ only if the petitioner is "in custody," 28 U.S.C. § 2241 (2000), and therefore there is a jurisdictional requirement "that the habeas petitioner be 'in custody' under the conviction or sentence under attack at the time his petition is filed." Maleng v. Cook, 490 U.S. 488, 490 91 (1989). Although he is the subject of a criminal investigation by the IRS, because Mr. Ledford has not alleged that he is currently in custody, habeas jurisdiction does not lie. Second, and equally important, the habeas statute does not list the Court of Federal Claims among those courts empowered to grant a writ of habeas corpus, and the trial court therefore is without power to entertain Mr. Ledford's petition. Thus, we affirm the court's dismissal of the habeas petition.

As the government notes, Mr. Ledford's brief to this court does not appear to challenge the trial court's dismissal of his other claims for relief. Under such circumstances, we would normally consider Mr. Ledford to have waived any arguments asserting jurisdiction under statutes other than the habeas statute. However, because Mr. Ledford is proceeding pro se, we will also review the trial court's dismissal of his requests for injunctive and declaratory relief, damages, and a refund of taxes.

We turn first to Mr. Ledford's request for injunctive and declaratory relief halting the IRS collection proceedings. It is well established that the Court of Federal Claims "has jurisdiction only where and to the extent that the government has waived its sovereign immunity, and any waiver of sovereign immunity 'cannot be implied but

must be unequivocally expressed.''' Overall Roofing & Constr. Inc. v. United States, 929 F.2d 687, 688 (Fed.Cir.1991) (quoting United States v. King, 395 U.S. 1, 4 [23 AFTR 2d 69-1358] (1969)). In order to establish jurisdiction over these claims, therefore, Mr. Ledford must point to some statute specifically conferring power upon the trial court to grant his desired relief. This he has failed to do-perhaps because no statutory authority exists that would grant the Court of Federal Claims the power to enjoin an IRS collection proceeding. Indeed, aside from a few very limited exceptions not implicated here, 26 U.S.C. § 7421 flatly prohibits any suits ''for the purpose of restraining the assessment or collection of any tax ... in any court by any person.'' Although Mr. Ledford cites Rule of Procedure 65(d) of the Court of Federal Claims as authority for granting such relief, it is well established that federal rules of civil procedure cannot expand a court's subject matter jurisdiction. Snyder v. Harris, 394 U.S. 332, 337–38 (1969). Furthermore, a review of the pleadings indicates that Mr. Ledford bases his entitlement to this relief on his view that the federal tax code does not tax compensation received for personal labor. Mr. Ledford's view of the tax law is mistaken, as the tax code quite plainly defines income to include amounts received in compensation for services rendered. 26 U.S.C. § 61(a) (2000) (''[G]ross income means all income from whatever source derived including (but not limited to) the following items: (1) Compensation for services, including fees, commissions, fringe benefits, and similar items ....''). Indeed, every court that has considered the matter has found this argument to be wholly without merit—so much so that merely raising it is considered sanctionable. E.g., Casper v. Comm'r, 805 F.2d 902 [58 AFTR 2d 86-6210], 906 (10th Cir.1986) (''Merely raising the argument that value received for labor does not constitute taxable income, but rather constitutes a nontaxable exchange of property, justifies the imposition of sanctions.''); Connor v. Comm'r, 770 F.2d 17, 20 [56 AFTR 2d 85-5647] (2d Cir.1985) (per curiam) (''Wages are income. The argument that they are not has been rejected so frequently that the very raising of it justifies the imposition of sanctions.'' (internal citation omitted)); Lovell v. United States, 755 F.2d 517, 519–20 [55 AFTR 2d 85-917] (7th Cir.1984) (per curiam); see also United States v. Connor, 898 F.2d 942, 943–44 [66 AFTR 2d 90-5713] (3d Cir.1990) (noting that ''[e]very court which has ever considered the issue has unequivocally rejected the argument that wages are not income,'' and collecting cases).

The so-called Common Law Court of the United States, a contrary judgment of which Mr. Ledford claims binds the trial court and this court as a matter of res judicata, is not a recognized court of law of any jurisdiction, and its ''judgments'' are not persuasive, much less binding authority on any matter involved in this case. We affirm the trial court's dismissal of these claims for lack of subject matter jurisdiction.

Mr. Ledford also brought a claim seeking damages flowing from the allegedly unlawful collection activities of the IRS. The Internal Revenue Code provides in relevant part:

> If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the [IRS] recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.
>
> Except as provided in section 7432,[1] such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

26 U.S.C. § 7433(a) (2000) (emphases added). Thus, Congress has provided that claims for damages such as those alleged by Mr. Ledford must be brought exclu-

[1] Section 7432, which governs damages for failure to release a tax lien, also provides solely for jurisdiction in the district courts. See 26 U.S.C. § 7432(a) (2000).

sively before a district court of the United States. The Court of Federal Claims is not a district court of the United States, and therefore it lacks subject matter jurisdiction over Mr. Ledford's damages claims. We therefore affirm the trial court's dismissal of the damages claims.

Finally, we turn to Mr. Ledford's claim for a tax refund for calendar years 1996, 1997 and 1998. Although the trial court does have jurisdiction to adjudicate claims for a refund of federal taxes, see 28 U.S.C. ss 1346(a)(1), 1491 (2000), payment of the assessed taxes in full is a prerequisite to bringing a refund claim. Flora v. United States, 362 U.S. 145, 177 [5 AFTR 2d 1046] (1960); Rocovich v. United States, 933 F.2d 991, 993–94 [67 AFTR 2d 91-1210] (Fed.Cir.1991). Mr. Ledford does not allege that he has paid the assessments for 1996–1998, and indeed the 1996–1998 tax returns appended to his complaint, as well as the transcripts of Mr. Ledford's tax account for 1996–1997 submitted by the government demonstrate that he did not pay any taxes for those years. Because Mr. Ledford has not yet paid the assessed tax for which he seeks a refund, the trial court is without jurisdiction to hear his claim for a refund. Thus, we affirm the court's dismissal of Mr. Ledford's refund claim.

III

For the reasons given above, we affirm the trial court's dismissal of Mr. Ledford's complaint in its entirety.

AFFIRMED.

¶2002-5194

John N. BACH, PLAINTIFF v. TETON COUNTY, ET AL., DEFENDANTS. U.S. District Court, Dist. of Idaho, (DC ID) Docket No. CV-01-266-E-TGN, June 25, 2002. Decision for Govt.

1. Actions against U.S. and govt. officials—conspiracy—constitutional violations—failure to state claim for relief—res judicata. Taxpayer's 3d tax-related claim against govt., various federal and state officials and others of "grand conspiracy" and religious discrimination were largely dismissed: 42 USC §1981 and §1982 applied only to racial, not religious discrimination claims; and taxpayer didn't state claim as protected class member under 42 USC §1985 or §1986. Similarly, generalized allegations of conspiracy, racketeering and constitutional violations didn't state viable claim; taxpayer didn't properly serve govt.; laches and res judicata precluded him from raising 5-year old collection-related bankruptcy stay arguments that were litigated in prior case; judicial defendants were immune from suit; and, except for potential 42 USC §1983 claims against certain county officials, no viable claim against local officials or private defendants was stated. *Reference:* United States Tax Reporter ¶74,336.504(43); 74,336.504(42); 74,337.503(75).

In the United States District Court for the District of Idaho.

Memorandum Decision and Order

NELSON, Circuit Judge:

Pending before the Court are several motions directed to the Amended Complaint. Pursuant to Local Civil Rule 7.1(d)(4), the Court finds that these motions may be resolved without oral argument and, therefore, will be decided on the submissions by the parties.

I. BACKGROUND

Plaintiff has appeared as a plaintiff in two prior actions filed in this court. The overlap between the claims in those cases and those presented here make it necessary to discuss those cases as a part of the decision on the pending motions.

A. Prior Proceedings[1]

1. Bach v. Mason, et al., No. 98-CV-0383-E-EJG.[2]

In 1998, Plaintiff and others, acting *pro se*, filed an action against the following defendants: the United States, nineteen IRS officials, six Idaho counties, a number of

[1] The Court takes judicial notice of the files in the two earlier cases referenced in this subsection.

[2] 190 F.R.D. 567 (D. Idaho 1999), *aff'd* 2001 WL 177179 [87 AFTR 2d 2001-1881] (9th Cir. 2001) *cert. denied*, __ U.S. __ _, 122 S. Ct. 818 (2002).

state and county officials, all the federal district and magistrate judges in the District of Idaho, and a number of private persons and entities. Those persons and entities include Alva Harris, Jared Harris, Darrell Harris, Scona, Inc., Pro Indivisio, Inc., and the Harrises as alter egos of Scona and Pro Indivisio. The complaint seemed to be directed at unfair tax treat-ment of Plaintiffs' spendthrift trusts. The complaint, as described by Judge Garcia, alleged "a grand conspiracy among vari-ous city, county, state and federal officials, as well as private parties, to deprive Plain-tiffs of their constitutional rights."

An Amended Complaint was filed after Judge Garcia dismissed the original complaint without prejudice and with instructions. He described the Amended Complaint as being as "confusing, verbose and unintelligible as the original complaint." He then dismissed the action with prejudice. (Order of Oct. 21, 1999.) The dismissal was upheld on appeal by the Ninth Circuit (Case No. 99-36180, Memorandum filed Feb. 21, 2001), and the U.S. Supreme Court denied certiorari.

2. Bach v. Moulton, et al., No. 99-CV-14-E-BLW.[3]

Filed on January 11, 1999, Plaintiff named as defendants Roy C. Moulton, individually and on behalf of Teton County, Idaho. John J. Stewart; Steve Urry, individually and dba Trout's Teton Ranch; Jack L. McLean; Armin Ross and Kathy Ross, husband and wife; Katherine D. Miller, individually and dba R.E.M.; Terrina Beatty; and Does 1 through 50. Some of Plaintiff's allegations in that case mentioned the Latter Day Saints (L.D.S.) membership of some of these defendants; Plaintiff's membership in the NAACP, ACLU; and Plaintiff's support of minority workers in the area. He alleged a conspiracy among the defendants and the Does to defame him and injure him in business and personal relationships.

Judge Winmill dismissed the case on summary judgment in an order dated May 31, 2001. The case is now pending on appeal.

B. Present Case

On June 11, 2001, Plaintiff filed a complaint in this action naming about 100 persons and entities. The thrust of the complaint appeared to be that Plaintiff was being harmed by a conspiracy centered in Teton County, Idaho, at least partly driven by the fact that his persecutors are members of the L.D.S. church, and he is not.

The complaint was neither short nor plain nor clear. Accordingly, on March 7, 2002, this Court dismissed the complaint with leave to amend. The Court gave Plaintiff explicit instructions on how to proceed and how to simplify his complaint in light of Rule 8 of the Federal Rules of Civil Procedure:[4]

> If Plaintiff chooses to amend his 42 U.S.C. § 1983 complaint, he must allege in specific terms the following: (1) the names of the persons who caused or personally participated in causing the alleged deprivation of his constitutional rights; (2) the dates on which the conduct of each defendant allegedly took place; and (3) the specific conduct or action of each defendant that Plaintiff alleges is unconstitutional. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 19889); *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Vague and conclusory allegations of official participation in civil rights violations are not sufficient. *See Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).
>
> Furthermore, Plaintiff's amended complaint must contain all of his allegations. It may not rely upon or incorporate by reference prior pleadings. D. Idaho L. Civ. R. 15.1 ("Any amendment to a pleading, whether filed as a matter of course or upon a motion to amend, must reproduce the entire pleading as amended.") Plaintiff shall set forth each set of factual allegations in a separate, numbered paragraph.

[3] Judgment filed June 15, 2001 (D. Idaho), *appeal filed* Case No. 02-35330 (9th Cir. Apr. 9, 2002).

[4] Order dated March 7, 2002 (docket No. ___).

The Court encourages the Plaintiff to state facts in support of his claims. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief." It is not possible to state a claim without stating some facts to give context to the claim for relief. The pleader must include facts in order to show that he or she is entitled to relief.

The Court discourages Plaintiff from including unnecessary adjectives, adverbs, and conclusory appellations. Plaintiff's filings to date include phrases like "Miller Crazed Posse." Such phrases add nothing to the reader's understanding of what Plaintiff is alleging. Instead, they serve to cloud the issues Plaintiff attempts to raise.

Short declarative sentences, stripped of conclusory statements, are the pre-ferred vehicle for presenting the claims. Plaintiff is legally trained, attended a good law school, and practiced law for a number of years. The Court has confidence that he will be able to assemble a clear complaint in the spirit of the federal rules.

Plaintiff should by now be aware of the immunity available to the State of Idaho and its officials as to claims for money damages. *Ex Parte Young*, 209 U.S. 123, 155–56 (1909). If Plaintiff seeks injunctive relief against state officials, he must clearly show that the officials have some connection with the conduct sought to be enjoined. *Id.*

Plaintiff also knows, from prior orders, that judicial officers, including their law clerks, have absolute judicial immunity for their judicial acts. Such immunity is presumed to apply in the absence of clear and specific allegations showing that it should not. There are two instances in which a judicial officer loses the immunity: when he or she acts in the absence of all jurisdiction, or when the specific action is not taken in his or her official capacity. *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9th Cir. 1986). If Plaintiff decides to proceed against any of the judicial officers he has named, he must make specific, factual allegations which demonstrate, as a matter of pleading, that judicial immunity does not apply.

If Plaintiff includes a conspiracy claim in his amended complaint, it must include the "indispensable elements of civil conspiracy . . . a wrongful act and knowledge on the part of alleged conspirators of [the conspiracy's] unlawful objective." *Moore v. Brewster*, 96 F.3d 1240, 1245 (9th Cir. 1996).

The Court suggests that Plaintiff set out each instance of allegedly wrongful conduct separately and state what part each defendant allegedly played. For clarity, each such instance might be sequentially numbered as a "count" or "claim." This will aid the understanding of the undersigned, who knows nothing about what happened in Teton County during the time in question except what the parties submit.

The Court also suggests that the Plaintiff then sit back, put his feet up, and consider which defendants he really needs to include in order to present the case he wants the Court to consider.

Subsequently, Plaintiff filed an amended Complaint. Unfortunately, despite the Court's explicit instructions, it is no better than the first. Plaintiff's failure to file a comprehensible complaint in compliance with the fairly minimal requirements of Rule 8, Federal Rules of Civil Procedure, plus the clear lack of legal authority supporting some of the statutory claims, make dismissal with prejudice appropriate at this stage as to almost all of his claims. The only exceptions as to those defendants who have moved to dismiss are those defendants listed in the last part of paragraph 6 of the order.[5]

II. ANALYSIS

[5] The Court notes that Judge Garcia gave explicit instructions to the Plaintiffs in Case No. 98-CV-383, which were available to Mr. Bach as well.

A. The Federal Statutory and Constitutional Claims

[1] Plaintiff's Amended Complaint centers around a vast conspiracy involving RICO and other federal laws. There are some references which imply that Plaintiff is trying to assert some stand-alone claims in addition to his conspiracy allegations. Therefore, the Court will address possible federal claims prior to dealing with the alleged conspiracy or conspiracies.

The dismissals are ordered to be with prejudice. The Court allowed Plaintiff to file an Amended Complaint, after giving Plaintiff instructions on how to proceed. The Amended Complaint does not comply with the Court's previous instructions set out above.

1. 42 U.S.C. §§ 1981 and 1982.

Section 1981, by its terms, protects the rights of all persons to the same contractual and legal benefits as white persons. Thus, the statute prohibits "discrimination based on race, ethnic background, ancestry, and/or national origin."[6]

Plaintiff has not alleged any conduct by any of the defendants that support a claim under § 1981. His basic claim seems to be religious discrimination. He cites no authority, and the Court has found none, which holds that § 1981 applies to religious discriminations, however.

The same is true of § 1982, which also requires a showing of racial discrimination.[7]

2. 42 U.S.C. § 1983.

A plaintiff claiming a violation of § 1983 "must allege a violation of his constitutional rights and show that the defendant's actions were taken under color of state law."[8] This Court's order of March 7, 2002, told Plaintiff that he must provide names, dates and specific conduct of each defendant alleged to have violated § 1983. Plaintiff has failed to do so as to the majority of the defendants. As to a few, he did do so. Later in this order, the Court will specifically identify the moving defendants as to whom Plaintiff has perhaps stated a claim.

3. 42 U.S.C. § 1985.

There are two subsections to § 1985. Subsection (3) extends beyond race "only when the class in question can show that there has been a governmental determination that its members require and warrant special federal assistance in protecting their civil rights."[9]

Plaintiff's claims of membership in a protected class appear to consist of being a member of the ACLU, NAACP, NOW, and a non-Mormon. None of these groups constitutes a protected class.

Subsection (2) has been construed to have two separate parts:

> The first part of the subsection addresses conspiracies which deter by force, intimidation, or threat a party or witness in federal court. The second part of the subsection creates a federal right of action for damages against conspiracies which obstruct the due course of justice in any State of Territory with intent to deny equal protection.[10]

Although it is difficult to tell, Plaintiff may be trying to assert claims under the first and second parts of subsection (2). However, he does not identify any witness intimidation or how he was prevented from putting on an effective case. He says summarily in one place that Katherine Miller perjured herself in case No. 99-014, but goes no further. He does not say that the alleged perjury deterred him in any way in that case or otherwise. Accordingly, any claim alleged under Part 1 of subsection (2) shall be dismissed.

In paragraph 26, Plaintiff alleges generally that all defendants except the federal defendants have violated Plaintiff's rights by "perjury, falsification of evidence, subornation of perjury, destruction and at-

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6 *Mustafa v. Clark County Sch. Dist.*, 157 F.3D 1169, 1180 (9th Cir. 1998).

7 *West Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1527 (9th Cir. 1990).

8 *Gritchen v. Collier*, 254 F.3d 807, 812 (9th Cir. 2001).

9 *Orin v. Barclay*, 272 F.3d 1207, 1217 n.4 (9th Cir. 2001) (internal quotation marks and citations omitted).

10 *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 763 (9th Cir. 1991) (internal quotation marks and citations omitted).

tempted destruction of evidence, documents, etc., as sought/requested by plaintiff in discovery in state criminal actions and civil actions before this court, involving plaintiff.'' This claim will be dismissed as to all defendants.[11]

His claim under the second part of subsection (2) requires a showing of membership in a protected class as well as an allegation that defendants intended to deny him equal protection.[12]

4. 42 U.S.C. § 1986.

A claim under § 1986 requires that a claim exist under § 1985.[13] Because Mr. Bach stated no claim under § 1985, he has also stated no claim under § 1986. The Amended Complaint will be dismissed as to all defendants concerning claims under § 1986.

5. Conspiracy.

In the March 7, 2002, order, this Court told Plaintiff the things he needed to allege in order to state a federal conspiracy claim. His failure to do so is patent, so the claims of conspiracy will be dismissed as to all defendants.

6. RICO[14]

Plaintiff alleges that all of the named defendants violated 18 U.S.C. §§ 1961-64, the Racketeering Influence and Corruption Act (RICO). To state a claim under RICO, Plaintiff must allege injury due to: ''(1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.''[15]

To show a pattern under RICO, the Plaintiff must prove that there are a sufficient number of ''indictable'' predicate acts and that a threat of continued criminal activity exists.[16] The existence of only one victim tends to show that no continuity or threat of future illegal action against others exists[17] In paragraph 34, Plaintiff says, in part, that all of the defendants except the federal defendants have participated in numerous existing enterprises

> which enterprises affected and still affect interstate or foreign commerce; that all of said defendants in each grouping and among all said groupings were associated with the enterprise, participating directly and indirectly, and in control of the affairs of the numerous enterprises, through a pattern of racketeering activity by committing ... more than two predicate acts of extortion, grand theft, subnoration [sic] of perjury, concealing or otherwise dealing in narcotics, dangerous drugs, obstruction ....

Paragraph 34 goes on further, but nowhere does in introduce facts, dates or persons, much less any allegation showing a causal relationship with Plaintiff's claimed injury. Plaintiff has failed to allege facts sufficient to state a claim. For these reasons, the Court will dismiss the RICO claims as to all defendants.

With respect to the constitutional claims, the Court finds that the sweeping allegations made in the complaint are unsupported by statements of fact which state a claim on which relief could be granted. The first eight amendments to the Constitution are applicable to the federal government and to state governments through the Fourteenth Amendment. These amendments are not applicable to private citizens. Inasmuch as the Thirteenth Amendment abolishes slavery, it is unclear how Plaintiff's claim applies in this case. With respect to the Fourteenth Amendment, as noted above, Plaintiff claims only that he holds sympathies for a protected class, not that he is the member of a protected class. These claims will be dismissed.

B. Pending Motions

As noted above, the only potentially viable federal claims are those arising under 42 U.S.C. § 1983. The Court will address the pending motions without separately

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11 *Blankenship v. McDonald*, 176 F.3d 1192, 1196 (9th Cir. 1999) (internal quotation marks and citation omitted).

12 *See Bagley*, 923 F.2d at 763.

13 *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1990).

14 The discussion in Parts 6 and 7 is adapted from the order dismissing the complaint in Case No. 99-014-E-BLW.

15 *See Sun Savings and Loan Assoc. v. Dlerdorff*, 825 F.2d 187, 191 (9th Cir. 1987).

16 *Howard v. America Online Inc.*, 208 F.3d 741, 748 (9th Cir. 2000).

17 *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1535 (9th Cir. 1992).

discussing the federal claims which have been dismissed.

1. The United States.

The United States filed a motion to dismiss (docket No. 200) supported by affidavits. Plaintiff responded and correctly asserted that the motion had been converted to a motion for summary judgment. Because the Plaintiff has had the opportunity to respond and present pertinent materials himself, the Court will treat the motion as one for summary judgment.[18] Any issues of fact Plaintiff alleges to be present are not material.

a. Lack of Personal Jurisdiction.

The United States asserts that it has not been served and that therefore this Court lacks jurisdiction. Plaintiff does not claim that he has in fact served the United States, but rather that his service on the judicial defendants and their subsequent appearance gives this Court jurisdiction over the United States.

Plaintiff is mistaken. Rule 4(i), Federal Rules of Civil Procedure, sets forth clear requirements for service on the United States. Plaintiff has not met these requirements.

Ordinarily, a dismissal for failure to serve in these circumstances would be without prejudice. For the reasons stated below, however, it is apparent that service on the United States would be futile. Therefore, the dismissal will be with prejudice.

b. Laches.

Plaintiff's claim against the United States arises from an IRS assessment of delinquent taxes and a subsequently levy on and sale of his real property at 195 N. Hwy 33 in Teton County, Idaho.

Prior to the August 5, 1997, sale, Plaintiff filed a petition in U.S. Bankruptcy Court in the District of Idaho.[19] The United States moved to lift the automatic stay as to the Teton County property. The case was dismissed by the bankruptcy court on June 3, 1997, thus mooting the United States' request to lift the stay.

The United States then set the sale of the property for August 5, 1997. On the day before the sale, Plaintiff filed a Chapter 13 petition in the bankruptcy court in Sacramento, California, Case No. 97-31942-A-13.

Violations of the automatic stay are subject to equitable doctrines, such as *laches*, which the United States raises in its motion.[20] Whether the defense should apply is a matter in the sound discretion of the court considering the issue.[21]

A party can establish the defense of *laches* by showing there was inexcusable delay in asserting a known right that has resulted in prejudice.[22] While mere delay alone may not be sufficient, it may be enough it it is unreasonable and unexplained and has caused a disadvantage to the defendant.[23]

Plaintiff's failure to raise the violation of the automatic stay in the obvious place and at the obvious time, the bankruptcy court in Sacramento, leaves the Government exposed to claims from the subsequent owner(s) of the property as well as potential statutes of limitations defenses by Plaintiff when it attempts to recover the $57,000.00 it previously credited to his tax liability. The fact that these problems have not yet specifically affected the United States does not obviate the fact that the Government is clearly disadvantaged by now being faced with these problems, five years after the sale.

There is a further problem with Plaintiff's claim against the United States. The Court previously mentioned the case of *John N. Bach, et al. v. United States of America, et al.*, Case No. 98-383-E-EJG. Plaintiff, joined by some of his declarants

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18 *See* Fed. R. Civ. P. 12(b)(6).

19 *See* Case No. 97-40107, filed Feb. 10, 1997.

20 *United States v. Hemmen*, 51 F.3d 883, 886 [75 AFTR 2d 95-1646] (9th Cir. 1995); *Thornton v. First State Bank of Joplin*, 4 F.3d 650, 653 (8th Cir. 1993).

21 *See Apache Survival Coalition v. United States*, 21 F.3d 895, 905 (9th Cir. 1994).

22 *Trustees for Alaska Laborers Constr. Indus. Health & Sec. Fund v. Ferrell*, 812 F.2d 512, 518 (9th Cir. 1987).

23 *Thornton*, 4 F.3d at 653.

on the pending motion, sued the United States and a number of IRS agents, including IRS Agent James Mason, along with state officials, counties and county officials from six Idaho counties. Also named were private individuals and entities, including Alva Harris, Scona, Inc., and Pro Indivisio, Inc. In addition, Alva Harris, Jared Harris, and Darrell Harris were alleged to be doing business as or as alter egos of Scona, Inc. and Pro Indivisio, Inc.

The case alleged a "grant conspiracy among various city, county, state and federal officials, as well as private parties, to deprive plaintiff of their constitutional rights." (Order Dismissing Second Amended Complaint at 3, Oct. 21, 1999.) The Amended Complaint, dismissed with prejudice by Judge Garcia, read in pertinent part:

> James L. Mason, Alva A. Harris and Judge Ted V. Wood, have in particular refused to recognize an automatic stay order from the U.S. Bankruptcy Court, Sacramento Division, in the Chapter 13 proceedings by John N. Bach, Number 97-31942-A-13 ... despite said James L. Mason and Alva A Harris, individually and on behalf of said sham entities Scona, Inc. and Pro Indivisio, Inc., having been personally informed in advance of any I.R.S. [sic] of a claimed "nominee interest" in his mother's spendthrift trust, the VASA N. BACH FAMILY TRUST holding investments as aforesaid in Teton County, Idaho.[24]

It is clear that this claim is identical to that now presented here. The defense of *res judicata* is available to all defendants who are claimed to have any connection with the August 5, 1997, sale. This Court can *sua sponte* consider issues of claim and issue preclusion.[25]

It would be futile to permit Plaintiff to pursue service of process against the United States, as the claims Plaintiff states against the United States are barred by *res judicata*. The action will be dismissed with prejudice as to the United States.

2. *Judicial Defendants*

Defendants B. Lynn Winmill and Mark Echohawk (the judicial defendants) have moved to dismiss the Amended Complaint. (Docket No. 198.)

Plaintiff's Amended Complaint alleges that the judicial defendants violated his rights by permitting Mr. Echohawk to preside at "status, scheduling or pretrial conferences" with no record having been made. He further argues that they conspired with others to violate his rights.

It is well established, as noted in the Court's prior order, that judges and their law clerks are absolutely immune from suit for actions taken in the course of their official duties.[26] Plaintiff alleges nothing that conceivably could fall outside the course of the defendant's duties.

The nature of the act being performed determines whether it carries immunity with it.[27] Status, scheduling and pretrial conferences are procedures integral to the judicial process. The fact that Mr. Echohawk led the discussion does not strip him or Judge Winmill of their immunity. Plaintiff's claims of conspiracy in the judicial process also do not pierce the defendants' immunity.[28]

Finally, some mention should be made of the case oft-cited by Plaintiff, *Sanders v. Union Pacific R.R.*, 193 F.3d 1080 (9th Cir. 1999). The problem in that case was not that a law clerk presided over a pretrial conference, but that the trial judge summarily dismissed the case without notice. *Sanders* does not save Plaintiff's claim against the judicial defendants.

The motion to dismiss by the judicial defendants is granted, and the action is dismissed with prejudice as to Defendants Winmill and Echohawk.

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24 *Bach v. Mason*, 190 F.R.D. 567 (D. Idaho 1999) (Complaint at 16).

25 *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321 (9th Cir. 1995); *McClain v. Apodaca*, 793 F.2d 1031 (9thCir. 1986).

26 *Moore v. Brewster*, 96 F.3d 1240, 1244–45 (9th Cir. 1996).

27 *Stump v. Sparkman*, 435 U.S. 349, 362 (1978).

28 *See Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir. 1986) (*en banc*).

3. Defendants Runyan and Woelk.

Defendants Cody Runyan and Galen Woelk have moved to dismiss the Amended Complaint. (Docket No. 205.)

Plaintiff's original complaint named Runyan and Woelk as defendants. The Court dismissed the complaint with leave to amend, with instructions to Plaintiff on how to proceed. The Amended Complaint does not expand on the allegations as to Runyan and Woelk in any meaningful fashion and only refers to them here and there.

Two of the references in the Amended Complaint are general and, by themselves, do not state a claim. The first of these is paragraph 5(b) which puts movants in "The Attorneys Union and Group." The succeeding paragraph includes no facts or specific allegations of wrongdoing. Paragraph 34, contains the other reference. It includes movants in a general discussion of RICO, but again without any factual allegations or specific allegations of wrongdoing.

The first allegation that in any way resembles a claim for relief is in paragraph 16. Movants are therein alleged to have been retained by Plaintiff in connection with civil case No. 99-CV-14-E-BLW, *Bach v. Moulton*. Plaintiff alleges he shared confidences with movants in connection with their representation of him and later discovered that movants were representing and meeting with various defendants in the case. He also allegedly discovered that movants had helped prepare some form answers to be filed by unrepresented parties herein.

There are some other vague accusations about Kathy Runyan and a real estate listing on an adjacent property.

The most that can be gleaned from paragraph 16 is that Plaintiff claims that movants violated rules of professional conduct in their representation of Plaintiff. But nowhere is there any allegation that any acts were done under color of state law, or that racial discrimination was involved.

In short, the Amended Complaint fails to state a claim in this federal action. The Court gave Plaintiff the opportunity to file an amended complaint. He has now done so. Apparently, even with instructions, he cannot state a claim as to these defendants. The Amended Complaint is dismissed with prejudice as to Defendants Runyan and Woelk.

4. The Bank Defendants.

Defendants Donna Woolstenhulme, David Kearsley, and the Bank of Commerce have filed a motion to dismiss the Amended Complaint (docket No. 184), contending that it does not state a claim on which relief can be granted. Defendants are correct.

In his response to defendants' motion, Plaintiff refers the Court to paragraphs 7 and 21 of the Amended Complaint. These paragraphs do not save Plaintiff's position. Paragraph 7 is a general allegation of "racketeering and unlawful activities" joined in by the Bank defendants. Paragraph 21 refers to Plaintiff's $15,000.00 delivered to Defendant McLean on November 14, 2000. There are no facts or specifics alleged in either paragraph and no attempt to comply with this Court's order of March 7, 2001. As to any federal laws, the Amended Complaint states no claim against the Bank defendants and it is dismissed with prejudice.

5. Teton County Defendants.

Defendants Teton County, Laura Lowry, Eileen Hammon, Nolan Boyle, Yolanda Vallo, Phyllis Hansen, Lavell Johnson, William Moulton, Roy Moulton, Jay Calderwood, Mark Trupp, Dave Oveson, James Dewey, Brent Robson, Dave Trapp, and Terry Milton moved to dismiss the Amended Complaint (docket No. 178). The movants constitute part of the "first grouping of defendants" set out in paragraph 3 of the Amended Complaint.

a. Roy Moulton and William Moulton.

Roy Moulton, according to paragraph 12, is a former Teton County prosecuting attorney who has represented various Teton County officials. In paragraph 13, Plaintiff accuses him, along with county officials, of using county money for personal pur-

poses. In paragraph 18, Plaintiff alleges that Roy Moulton consulted with Ms. Miller about a battery complaint. There may be other scattered references to Mr. Moulton, but none suffice to state a claim under § 1983 as there is no reference to state action.

The Amended Complaint alleges that William Moulton is the brother of Roy Moulton and the chairman of the county Planning and Zoning Commission (paragraph 3(i) of the Amended Complaint). The Amended Complaint alleges that he, along with Roy Moulton, used county funds for personal purposes. Then in paragraph 17, the Amended Complaint alleges that he advised Ms. Miller concerning "converting his water rights and rights to his properties." There is no mention of how his Planning and Zoning Commission position impacted Plaintiff or how state law was used against Plaintiff.

Defendants Moulton are also lawyers who allegedly consulted with some of the other defendants. These allegations, coupled with the others, do not state a claim under § 1983. The action will be dismissed with prejudice as to Roy Moulton and William Moulton.

b. Nolan Boyle.

Defendant Boyle is described in paragraph 3(d) as Teton Country's Clerk-Recorder. Paragraph 13 contains allegations that he participated with other defendants in using county funds improperly. No allegations link the alleged misuse to Plaintiff. These allegations do not state a claim under § 1983, and the action is dismissed with prejudice as to Defendant Boyle.

c. Yolanda Vallo.

The complaint describes Defendant Vallo in paragraph 3(f) as a Teton County Assistant Assessor. Defendant Vallo does not appear to be mentioned elsewhere. The action is dismissed with prejudice as to Defendant Vallo.

d. Phyllis Hansen.

The complaint describes Defendant Hansen in paragraph 3(g) as an employee in the Teton County Clerk's Office. Defendant Hansen does not appear to be mentioned elsewhere. The action is dismissed with prejudice as to Defendant Hansen.

e. Clint Calderwood.

The Amended Complaint alleges, in paragraph 3(h) that Clint Calderwood is the son of Jay Calderwood, a Teton County Commissioner. There is apparently no other reference to Defendant Clint Calderwood in the Amended Complaint, and it is dismissed with prejudice as to him.

f. Remaining Defendants.

The other moving defendants in the "Teton County Defendants" grouping are Teton County; Laura Lowry, described as a Teton County Prosecutor in paragraph 3(a); Lavell Johnson, Brent Robson, Mark Trupp, and Dave Trapp, described as Teton Commissioners in paragraph 3(e); Jay Calderwood, described as a Teton Commissioner in paragraph 3(h); Eileen Hammon, James Dewey, and Terry Milton, described in paragraph 3(c) as Teton County Deputy Sheriffs; and Dave Oveson, described in paragraph 3(c) as a Teton County Sheriff.

The Court has considered the entire Amended Complaint in determining whether a claim has been stated against any or all of the above-listed defendants. The Amended Complaint is as confusing and verbose as was the complaint described by Judge Garcia and as the first complaint in this action. However, it is possible that paragraph 18 may state a claim. There, Plaintiff says that he called "911" for assistance in making a citizen's arrest of two defendants. He alleges that Defendants Kaufman, Lowry, Hammon, Dewey, and Luke had agreed that Plaintiff and his properties would not be protected.

This presents the possibility of stating a claim under § 1983. For now, the Court will deny the motion to dismiss as to the defendants listed above without prejudice to renewal. By separate order, the Court will permit further briefing on this issue.

g. Dennis Thomas.

Paragraph 3(f) describes Defendant Dennis Thomas as the Teton County Assessor. Although he did not move to dismiss the

Amended Complaint, a court may *sua sponte* dismiss an action against nonmoving defendants where "such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related."[29]

Defendant Thomas is mentioned in paragraph 21 in reference to Plaintiff's desires to have county records amended to reflect his sole ownership of the property sold at the August 5, 1997, sale. Because Plaintiff is entitled to no relief from that sale, there is no change that the county records will be amended, and the action is dismissed with prejudice as to Defendant Thomas.

6. Defendant Larry Wiliamson.

Defendant Larry Williamson filed a motion to dismiss the complaint (docket No. 194).

Paragraph 6(c) of the Amended Complaint names Defendant Larry Williamson, individually and as agent of Grand Targhee Summer and Ski Resort. Paragraph 19 alleges that Plaintiff had ski passes during the ski season of 1999–2000 and 200–2001. Employed by the resort were Defendant Williams and Defendants Mark Trupp, Russell Ferris, Gary Blake and Jan Blake. Defendants Gary and Jan Blake apparently were not named elsewhere in the Amended Complaint. During the ski season, certain other defendants allegedly assaulted, stalked, and threatened Plaintiff. Defendant Williamson is alleged to have known of these events and was kept informed of the others. Defendant Williamson met with Mark Trupp, Ryan Kaufman, and an unknown private investigator.

These allegations do not state a claim under § 1983 as there is no allegation of state action.

Defendants Craig Crase, Mary Langdon, Ann-Toy Broughton, Jack Webb, and Janet Woodland are alleged to have been present at the resort and to have participated in the wrongful acts. They are apparently not mentioned elsewhere in the Amended Complaint except in the listing in paragraph 4. As with Defendant Williamson, no claim is stated as to these defendants, and the Court *sua sponte* dismisses the action with prejudice as to each and all of them.

C. California State Law Claims

Count 7 of the Amended Complaint charges violations of California Civil Code §§ 51 through 53 and California Government Code §§ 12 and 949 et seq. The activities alleged in the complaint are claimed to have occurred in Idaho. No basis for applying California law appears. This claim will be dismissed.

III. ORDER

THEREFORE, IT IS HEREBY ORDERED:

1. All conspiracy claims are DISMISSED with prejudice as to all defendants.

2. The motion to dismiss (docket No. 200) filed by the United States is GRANTED, and the action is DISMISSED with prejudice as to the United States of America.

3. The motion to dismiss (docket No. 198) filed by the judicial defendants is GRANTED and the action is DISMISSED with prejudice as to Defendants B. Lynn Winmill and Mark Echohawk.

4. The motion to dismiss (docket No. 205) filed by Defendants Runyan and Woelk is GRANTED, and the action is DISMISSED with prejudice as to Defendants Cody Runyan and Galen Woelk, individually, and dba Runyan and Woelk.

5. The motion to dismiss (docket No. 184) filed by the Bank defendants is GRANTED, and the action is DISMISSED with prejudice as to the Bank of Commerce, David Kearsley, and Donna Woolstenhulme.

6. The motion to dismiss (docket No. 178) filed by Defendants Teton County, Idaho; Laura Lowry, Eileen Hammon, Nolan Boyle, Yolanda Vallo, Phyllis Hansen, Lavell Johnson, William Moulton, Roy Moulton, Jay Calderwood, Mark Trupp, Dave Oveson, James Dewey, Brent Rob-

[29] *Silverton v. Department of Treasury*, 644 F.2d 1341, 1345 (9th Cir. 1981).

son, and Dave Trapp, Terry Milton, et al., (the Teton County Defendants) is GRANTED as to Defendants Roy Moulton, William Moulton, Nolan Boyle, Yolanda Vallo, Phyllis Hansen, Clint Calderwood, and Dennis Thomas, and the action is DISMISSED with prejudice as to each and all of those defendants. The motion is DENIED without prejudice to renewal as to Defendants Teton County, Laura Lowry, Lavell Johnson, Brent Robson, Mark Trupp, Dave Trapp, Jay Calderwood, Eileen Hammon, James Dewey, Terry Milton, and Dave Oveson.

7. The motion to dismiss the Amended Complaint filed by Defendant Larry Williamson is GRANTED, and the action is DISMISSED with prejudice as to Defendant Larry Williamson, individually and as agent of Grand Targhee Summer and Ski Resort. The action is also DISMISSED with prejudice as to Defendants Craig Crase, Mary Langdon, Ann-Toy Broughton, Jack Webb, and Janet Woodland.

8. All claims asserted against any and all defendants under 42 U.S.C. §§ 1981, 1982, 1985, and 1986 are DISMISSED with prejudice.

9. All claims asserted against any and all defendants pursuant to the Federal Racketeer Influenced and Corrupt Organizations Act (RICO)[30] are DISMISSED with prejudice.

10. All claims asserted against any and all defendants pursuant to the Constitution of the United States of America are DISMISSED with prejudice.

11. All claims asserted against any and all defendants under and pursuant to the laws of the State of California are DISMISSED with prejudice.

12. Plaintiff's motion to strike (docket No. 216) is DENIED.

DATED this 25th day of June, 2002.

THOMAS G. NELSON

United States Circuit Judge

Sitting by Designation

¶2002-5195

Robert L. ALLUM, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Montana, (DC MT) Docket No. CV-02-12-BU-SEH, July 9, 2002. Decision for Govt.

1. Actions against U.S.—Declaratory Judgment Act—constitutional claims—jurisdiction. Taxpayer's action was dismissed for lack of jurisdiction: issue of whether DJA could constitutionally deprive district courts of jurisdiction of cases involving constitutional challenges to IRC didn't present cognizable constitutional claim; and taxpayer had remedy. *Reference:* United States Tax Reporter ¶74,336.504(25); 74,336.504(10).

In the United States District Court for the District of Montana, Great Falls Division.

Order

HADDON, District Judge:

[1] The parties have filed a Joint Case Management Plan in this case in which they stipulate the sole issue for resolution is "can the Declaratory Judgment Act (28 U.S.C. Section 2201) constitutionally deprive federal district courts of jurisdiction of cases involving constitutional challenges to the Internal Revenue Code (26 U.S.C.)?" This issue, however, does not present a cognizable constitutional claim.[1] Mitchell v. Riddell, 402 F.2d 842, 846 [22 AFTR 2d 5816] (9th Cir. 1968). Further, Plaintiff has a remedy. Id. at 847.

ORDERED:

Defendant's Motion to Dismiss is GRANTED. The case is DISMISSED.

DATED this 9th day of July, 2002.

SAM E. HADDON

United States District Judge

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30 18 U.S.C. §§ 1961-1964.

1 Defendant moved to dismiss arguing: 1) *Res Judicata*; 2) lack of consent to suit; 3) lack of subject-matter jurisdiction pursuant to 28 U.S.C. § 2201; and 4) standing. Because Mitchell is dispositive, there is no need to address the arguments raised in Defendant's Motion to Dismiss.

¶2002-5196

Donald D. BAILEY, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. Donald D. BAILEY, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA; Philip Ward; Carey Reeves; Rick Holster; Andrew Horning; David Valadez, DEFENDANTS-APPELLEES. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-16061; D.C. No. CV-95-00267-ACM; No. 01-16837; D.C. No. CV-00-00037-JMR, July 16, 2002. District Courts, (2001, DC AZ) 87 AFTR 2d 2001-2328, and (2001, DC AZ) 87 AFTR 2d 2001-1624, affirmed. Earlier proceedings at (1997, CA9) 80 AFTR 2d 97-5579, affirming (1996, DC AZ) 77 AFTR 2d 96-1892, 927 F Supp 1274, 96-1 USTC ¶50270. Years 1991, 1992, 1994. Decision for Govt.

1. Res judicata—district court jurisdiction—actions against U.S. and IRS employees—damages; F.R.Civ.P. 60(b)—fraud upon court; fraudulent alteration of returns. Taxpayer's 3d and 4th actions seeking damages under Federal Tort Claims Act or motion to set aside judgement based on claim that IRS used forged documents to obtain judgments against him were barred by res judicata, so judgments upholding IRS's penalty assessments were affirmed. Taxpayer's claim that res judicata shouldn't apply due to his fraud allegations was rejected where he didn't allege with particularity facts showing that he tried to uncover concealed information. Also, to extent claims sought to set aside judgment in 1st action, they should have been brought in 2d action. And to extent construed as F.R.Civ.P. 60(b) motion, actions were untimely and claim regarding penalty for returns his clients didn't sign was waived where it wasn't raised in district court. *Reference:* United States Tax Reporter ¶74,337.503(75); 74,337.503(10); 74,025.01(3). IRC §7402.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Appeal from the United States District Court for the District of Arizona Alfredo C. Marquez, District Judge, Presiding

Appeal from the United States District Court for the District of Arizona John M. Roll, District Judge, Presiding

Before: CANBY and RYMER, Circuit Judges, and BERTELSMAN, Senior District Judge.***

MEMORANDUM*

Submitted July 12, 2002** San Francisco, California.

NOT FOR PUBLICATION

[1] The cases now before us on consolidated appeal represent Donald Bailey's third and fourth federal lawsuits aimed at undoing the effects of a penalty assessed against him by the IRS. Whether characterized as a claim for damages under the Federal Tort Claims Act, or as a motion to set aside the adverse judgment in Bailey's first suit, both cases turn on the same allegations — namely, that the IRS used forged documents to obtain a successful ruling in Bailey's first action, *Bailey v. United States*, 927 F. Supp. 1274 [77 AFTR 2d 96-1892] (D. Ariz. 1996), *aff'd*, 117 F.3d 1424 [80 AFTR 2d 97-5579] (9th Cir. 1997) (unpublished disposition). This charge repeats allegations made in Bailey's second suit, *Bailey v. IRS*, 188 F.R.D. 346 (D. Ariz. 1999) *aff'd*, 232 F.3d 893 [86 AFTR 2d 2000-5761] (9th Cir. 2000) (unpublished disposition). We have jurisdiction under 28 U.S.C. § 1291, and we affirm both of the judgments now on appeal.

Both of Bailey's present cases are barred by the res judicata effects of his earlier, unsuccessful suits. Bailey's contention that res judicata should not apply because of his fraud allegations lacks merit. Even assuming that there is a general fraud exception to the rules of claim preclusion, Bailey does not fall within the exception

*** Honorable William O. Bertelsman, Senior United States District Judge for the Eastern District of Kentucky, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

because he has failed to plead with particularly facts establishing that, during his first action, he diligently attempted to uncover the information that he says was concealed. *Constantini v. Trans World Airlines*, 681 F.2d 1199, 1202 (9th Cir. 1982). Moreover, to the extent that Bailey's present cases function as separate suits to set aside the judgment in his first action, they present claims for relief that could have and should have been brought in Bailey's second action. Construed as a motion under Fed. R. Civ. P. 60(b)(3), Bailey's present suits are clearly untimely. Bailey's argument that he should never have been penalized for tax returns that his clients did not actually sign was not articulated in the district court and is waived. Both of the cases now on appeal were properly dismissed with prejudice.

AFFIRMED.

¶2002-5197

Glen Dale, BELL, ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA, ET AL., DEFENDANTS. U.S. District Court, Eastern Dist. of California, (DC CA) Docket No. CV F 02-5077 AWI DLB, June 28, 2002. Decision against Taxpayers.

1. Actions against U.S.—jurisdiction—res judicata—refunds—judicial immunity. Pro se taxpayers' complaint against U.S., govt. officials and IRS agent challenging district court's jurisdiction over govt.'s prior collection action and seeking lien cancellation and return of seized funds was dismissed with leave to amend: under F.R.Civ.P. 8(a) taxpayers didn't properly allege grounds upon which jurisdiction rested. Taxpayers were advised that amended complaint would have to establish that jurisdictional prerequisites to any IRC §7422(a) claim were met, that res judicata wouldn't bar their repeat Rule 60(b) claim, and how judge could be named as defendant in complaint where judicial immunity applied. *Reference:* United States Tax Reporter ¶74,025.01(145); 74,225.01(3); 74,337.503(75); 74,336.506(30). IRC §7402; 7422.

In the United States District Court for the Eastern District of California.

Order Dismissing Plainitffs' Complaint for Lack of Subject Matter Jurisdiction with Leave to Amend and Deny Defendant's Motions as Moot

ISHII, District Judge:

[Docs. 1 & 7]

PROCEDURAL HISTORY

On October 23, 1998, the court entered judgment in civil case CV F 95-5346 OWW SMS against Glen D. Bell, Jeanette Bell, Glen and Jeanette Bell as trustees of the Glen D. Bell Family Trust, Glen D. Bell and Jeanette Bell as trustees of the Racine Trust, Glen D. Bell as trustee of Stark Management Company, and Stockton Financial Corporation. Pursuant to the judgment, the United States was authorized to recover against Glen D. Bell in the amount of $2,680,283.30, plus interest and other statutory additions as allowed by law. The judgment authorized the United States to recover against Jeanette Bell in the amount of $1,022,865.20, plus interest and other statutory additions as allowed by law.

The judgment also confirmed that the United States had valid federal tax liens in the amounts stated above against all property and property rights of Glen D. Bell and Jeanette Bell, specifically, but not limited to, the property located at 3549 Kiernan Road, Modesto, California. The judgment authorized the United States to enforce the federal tax liens and sell the property pursuant to 28 U.S.C. § 2001.[1]

Subsequent to the entry of judgment, numerous post-judgment orders have been filed in case CV F 95-5346 OWW SMS, including, among others, an order of judicial sale, an order denying the Bell's motion to vacate the judgment pursuant to

[1] Stockton Financial Corp., a named defendant in the action, was found to have a promissory note against a portion of the property owned by the Bells. That lien was adjudged to have priority over the federal tax liens and that upon sale of the property, Stockton Financial Corp. would recover $5,527.32 for attorney's fees incurred in defense of the action.

Rule 60(b) of the Federal Rules of Civil Procedure, and an order of ejectment of all unauthorized persons from the property located in Modesto, California.

On January 16, 2002, Glen D. Bell, Jeanette Bell, Wayne Rulon Bevan (lessor) and the Funding Center (a trust with Wayne Rulon Bevan as executive trustee) (collectively "Plaintiffs") filed the complaint currently before the court, naming as defendants the United States of America, G. Patrick Jennings (Tax Division Trial Attorney), Charles J. Stevens (U.S. Attorney), Oliver W. Wanger (U.S. District Court Judge), Paul H. O'Neill (Secretary of the Treasury), Randy Reece (Revenue Agent) and Does 1-100 (collectively "Defendants"). The complaint appears to allege[2] that the United States District Court for the Eastern District of California lacked subject matter jurisdiction in case CV F 95-5346 OWW SMS. Specifically, the complaint alleges that there was not a proper assessment, verified notice and demand, or a procedurally proper warrant for distraint issued against the Bells or the property in question. Also, the complaint alleges that the U.S. officers, acting in their official capacity, were not properly authorized to carry out their duties in connection with the case because of improper procedures and a lack of jurisdiction by the court. In its prayer for relief, the complaint states that Plaintiffs request the court cancel all liens, return all sums taken or withheld from them by the Defendants in the prior case, award them three times the difference between the sum of money actually owed and the amount of debt Defendants claim they owe, award them statutory interest, costs of bringing the current action, and punitive damages as determined by a jury.

The addendum to the complaint, filed the same day on January 16, 2002, reiterates the allegations concerning the previous court lacking subject matter jurisdiction and argues that Plaintiffs are within the time limitations for filing a motion to vacate a judgment under Rule 60(b) of the Federal Rules of Civil Procedure.

On March 18, 2002, Defendant United States brought a motion to substitute party, strike the complaint as to Plaintiff the Funding Center, dismiss Plaintiff Wayne R. Bevan and Plaintiff the Funding Center for lack of standing, and dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. First, the United States contends that because the federal officers named in the complaint are all being sued solely in their official capacity, the United States is entitled to be substituted in their place. Second, the United States contends that the complaint, as to Plaintiff the Funding Center, must be stricken because it is an entity that is not being represented by an attorney as required. Third, the United States contends that Plaintiffs Bevan and the Funding Center lack standing to bring the current suit because neither was a party to case CV F 95-5346 OWW SMS nor do they have a valid interest in the property in question. Last, the United States contends that since Plaintiffs are precluded from relitigating the validity of the tax assessments against them, their complaint fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Based on the same preclusion argument, the United States argues that Plaintiffs' claim pursuant to Rule 60(b) is without merit.

On April 30, 2002, this court filed an order vacating the hearing on Defendant United States' motions originally set for May 6, 2002. The court found that Plaintiffs had failed to file an opposition or a notice of non-opposition to Defendant United States' motions. Therefore, pursuant to Local Rule 78-230(c), Plaintiffs were not entitled to be heard at oral argument in opposition to the motions. This court found the motions suitable for decision without oral argument and took the matter under submission as of May 6, 2002.

[2] The complaint and the contents within are hard to decipher because the allegations are made in question form and there are citations to records with no explanation as to why they are included. Due to Plaintiffs proceeding pro per, the court has attempted to ascertain those claims it appears Plaintiffs are raising.

DISCUSSION

[1] From this court's examination of Plaintiffs' complaint, and without specifically addressing its merits or those specifically raised in Defendant United States' motions, this court lacks the necessary subject matter jurisdiction to adjudicate Plaintiffs' claims.

A. Federal Rule of Civil Procedure 8(a)

Rule 8(a) of the Federal Rules of Civil Procedure requires that a pleading contain "a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it[.]" Fed. R. Civ. P. 8(a)(1).

It is a fundamental legal principle that federal courts are courts of limited jurisdiction. "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). Lack of subject matter jurisdiction may be raised by any party at any time, and it is never waived: "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3); Hernandez v. McClanahan, 996 F.Supp. 975, 977 (9th Cir. 1998). Federal courts "jealously" guard their own jurisdiction and, where appropriate, will dismiss a case for lack of subject matter jurisdiction even if the issue is not raised by the parties. *See* In re Mooney, 841 F.2d 1003, 1006 (9th Cir. 1998), *overruled on other grounds*, Partington v. Gedan, 923 F.2d 686, 688 (9th Cir. 1991). For this reason this court can raise the issue of subject matter jurisdiction sua sponte. *See* American Vantage Cos., Inc. v. Table Mountain Rancheria, ___ F.3d ___, 2002 WL 1301449 1, 1 (9th Cir. 2002).

The plaintiff in a case bears the burden of establishing that the court has jurisdiction. Rio Props., Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1019 (9th Cir. 2002); *see also* KVOS, Inc. v. Assoc. Press, 299 U.S. 269, 278 (1936). In this case, Plaintiffs' complaint does label paragraph 2 as "JURISDICTION." However, Plaintiffs do not cite a recognized statute or case law giving this court subject matter jurisdiction over their claim against Defendants in paragraph 2.[3] Though the court recognizes that Plaintiffs are proceeding unassisted by counsel, the court is unable to determine the applicable authority upon which Plaintiffs rely giving this court jurisdiction. Until this court is presented with the authority that gives it jurisdiction over Plaintiffs' claims, it is improper to consider the merits of either parties' claims and motions.

The court will give Plaintiffs an opportunity to file an amended complaint that alleges the grounds under which this court has jurisdiction over their claims. While the court recognizes the factual basis of the complaint concerns allegations that the prior court did not have jurisdiction, it is unclear what the legal basis is for this action. Because of Plaintiffs' pro se status, the court will give Plaintiffs notice of their pleading deficiency and an opportunity to amend.

2. Internal Revenue Code Section 7422 (26 U.S.C. § 7422)

From the court's examination of Plaintiffs' complaint, it appears that Plaintiffs may be attempting to raise a claim under Internal Revenue Code ("IRC") section 7422(a). This section deals with civil actions for refunds of "any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected . . . ." Though Plaintiffs did not raise this statute in their complaint, it is possible this action is based on section 7422(a). If this is a statute that Plaintiffs relied upon in bringing this action, or intend to rely on in the future, the court will address the jurisdictional aspects of section 7422.

[3] Plaintiffs assert that the United States Constitution give this court jurisdiction pursuant to Article VI because this "action is a controversy in law . . . , and Plaintiffs have a right to a trial by jury and the government has a duty to provide the trial by jury."

Under IRC section 7422(a), a civil action for a refund may only be maintained in any court after "a claim for refund or credit has been duly filed with the Secretary [of the Treasury], according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." Therefore, in order for this court to have jurisdiction under a claim brought pursuant to IRC § 7422(a), the person claiming the refund must first file a claim with the Secretary of the Treasury for a refund that complies with the regulations established for that particular statute, *See* 26 C.F.R. § 301.6402-2(b)(1); *see also* Quarty v. United States, 170 F.3d 961, 972 [83 AFTR 2d 99-1562] (9th Cir. 1999) ("Compliance with these specificity requirements is a prerequisite to subject matter jurisdiction over a claim for a refund."); Boyd v. United States, 762 F.2d 1369, 1371 [56 AFTR 2d 85-5266] (9th Cir. 1985) (same). The purpose of the requirement that claims first be presented to the Secretary of the Treasury is to ensure that the IRS is given adequate notice of each claim and the facts giving rise to them so that a proper administrative investigation and determination may be made. Quarty, 170 F.3d at 972. Furthermore, a district court is generally void of jurisdiction over suits for the refund of penalty amounts until the taxpayer has paid the "*full amount*" of the contested penalty. Thomas v. United States, 755 F.2d 728, 729 [55 AFTR 2d 85-1094] (9th Cir. 1985) (emphasis in original); *see also* Flora v. United States, 357 U.S. 63 [1 AFTR 2d 1925] (1958), *aff'd on reh'g*, 362 U.S. 145 [5 AFTR 2d 1046] (1960).

After reviewing Plaintiffs' complaint and all papers subsequently filed, the court is unable to find documentation by Plaintiffs that they would meet the jurisdictional requirements for a suit pursuant to IRC § 7422(a). The statute, by its language, requires administrative exhaustion before filing suit in any court. If this is a statute Plaintiffs intend to rely upon when filing any amended complaint, Plaintiffs must provide documentation that Plaintiffs have complied with all requirements necessary under section 7422(a) and the applicable regulations. Also, Plaintiffs would need to submit documentation that shows they have paid the full amount of the penalty that they are trying to recover pursuant to section 7422(a).

C. Federal Rule of Civil Procedure 60(b)

In the addendum to Plaintiffs' complaint, Plaintiffs assert that they are entitled to relief from the judgment issued against them in the prior case pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure.

Rule 60(b)(4) allows for a court to relieve a party from a final judgment where the judgment is found to be void. Though the court is not going to address the merits of Plaintiffs' claims, relief under Rule 60(b) is ordinarily obtained by motion in the court that rendered the judgment. *See*Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2865. If Plaintiffs raise Rule 60 as the basis for their legal action in the amended complaint, Plaintiffs must provide authority for how Rule 60 provides this court with independent jurisdiction.

D. Estoppel

Additionally, the court notes that it appears Plaintiffs would be estopped from raising a Rule 60 motion because the Ninth Circuit Court of Appeals has ruled that the district court, in case CV F 95-5346 OWW SMS, did not err when it denied Plaintiffs' Rule 60(b)(4) motion on the ground that the court lacked jurisdiction. United States v. Bell, No. 00-16515, 2001 U.S. App. LEXIS 19482, 2 (9th Cir. April 28, 2001).[4] The Ninth Circuit stated that Plaintiffs failed to establish that the district court lacked jurisdiction. Id.

Res judicata, or claim preclusion as it is commonly known, bars relitigation in a subsequent action of any claims that were or could have been raised in an earlier action. Federated Dep't Stores, Inc., v. Moi-

[4] The court recognizes that this is an unpublished opinion; however, it takes judicial notice of the record from the previous case in which the decision by District Court Judge Oliver W. Wanger was affirmed by the Ninth Circuit. Ninth Circuit Rule 36-3 allows unpublished cases to be cited for res judicata and factual purposes.

tie, 452 U.S. 394, 398 (1981). The res judicata doctrine applies where there is: (1) an identity of claims; (2) a final judgment on the merits; and (3) an identity or privity between the parties. Western Radio Services Co., Inc. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997). The doctrine of res judicata is meant to protect parties against being harassed by repetitive actions. *See* Clements v. Airport Auth. of Washoe, 69 F.3d 321, 329 (9th Cir. 1995). It also "conserves judicial resources" and "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." United States v. Schimmels, 127 F.3d 875, 881 (9th Cir. 1997). Thus, Plaintiffs would have to establish how claims brought in this action are not barred because they have already been litigated.

E. Judicial Immunity

The court also notes that the complaint lits Judge Oliver W. Wanger as a defendant. Plaintiffs are hereby informed that a judge is generally immune from a civil action for damages. Mireles v. Waco, 502 U.S. 9, 9 (1991); Dennis v. Sparks, 449 U.S. 24, 27 (1980); Pierson v. Ray, 386 U.S. 547 (1967); Moore v. Brewster, 96 F.3d 1240, 1244 (9th Cir. 1996). A judge's immunity applies no matter how "erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." Cleavinger v. Saxner, 474 U.S. 193, 199–200 (1985). A judge is immune even if the plaintiff al-leges the judge committed grave procedu-ral errors or took an action in excess of the judge's judicial authority. Moore, 96 F.3d at 1244; Schucker v. Rockwood, 846 F.2d 1202, 1204 (9th Cir. 1988).

A judge loses absolute immunity only when he acts in the clear absence of all jurisdiction or performs an act that is not judicial in nature. Schucker, 846 F.2d at 1204. The Supreme Court has explained the narrow exception that is meant by the "absence of jurisdiction" as follows:

> [I]f a probate judge, with jurisdiction over only will and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

Stump v. Sparkman, 435 U.S. 349, 357 (1978). Thus, a judge's mistake over whether a particular statute or fact pattern provides him with jurisdiction is not actionable.

Accordingly, Plaintiffs would have to show in any amended complaint how Judge Wanger can be named as a defendant.

F. Amended Complaint

Finally, as discussed above, Plaintiffs must allege in any amended complaint the basis of the court's jurisdiction. Whether Plaintiffs are basing their claim for relief upon IRC section 7422(a) or some other theory, Plaintiffs will need to make clear in their complaint the claim or claims upon which they base this action. Rule 8(a)(2) requires a "short and plain statement." The purpose of the complaint is to provide the opposing party with fair notice of the claim against it. Lynn v. Sheet Metal Workers' Intern. Ass'n, 804 F.2d 1472, 1482 (9th Cir. 1986). Although the Federal Rules have adopted a flexible pleading policy, a complaint must still give fair notice and state the elements of the claim plainly and succinctly. Jones v. Community Redev. Agency, 733 F.2d 646, 649 (9th Cir. 1984).

In addition, Plaintiffs are informed that the court cannot refer to a prior pleading in order to make Plaintiffs' amended complaint complete. Local Rule 15-220 requires that an amended complaint be complete in itself without reference to any prior pleading. This is because, as a general rule, an amended complaint supersedes the original complaint. *See*Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967). Once Plaintiffs file an amended complaint, the original pleading no longer serves any function in the case. Therefore, in any amended complaint, as in an original complaint, each claim and the involvement of

each defendant must be sufficiently alleged.

CONCLUSION AND ORDER

For the reasons stated in the above memorandum opinion, the court orders:

(1) The complaint is DISMISSED WITH LEAVE TO AMEND;

(2) Plaintiffs have thirty (30) days in which they may file and serve an amended complaint that alleges the jurisdiction of this court and clearly states the claim or claims upon which they seek relief;

(3) Defendant has twenty (20) days, per Rule 12(a)(1)(A) of the Federal Rules of Civil Procedure, in which to file and serve an opposition or other response to Plaintiffs' amended complaint

(4) In light of the court's dismissal of the complaint for lack of jurisdiction, Defendant's motions are DENIED as moot; and

(5) Plaintiffs are forewarned that failure to timely file an amended complaint will result in this action's dismissal.

IT IS SO ORDERED.

DATE: June 28, 2002

JUDGE ANTHONY W. ISHII

UNITED STATES DISTRICT JUDGE

¶2002-5198

BRANDAR MANAGEMENT TRUST, a Common Law Trust; Gilbert Goo, Trustee, PLAINTIFFS v. UNITED STATES OF AMERICA; Department of the Treasury; and Doe Purchaser of Property, DEFENDANTS. Gilbert GOO, PETITIONER, v. COMMISSIONER of Internal Revenue, ex rel, United States of America, DEFENDANT. U.S. District Court, Dist. of Hawaii, (DC HI) Docket No. CV. NO. 02-00113 DAE-BMK; CV. NO. 02-00114 DAE-BMK, July 2, 2002. Earlier proceeding at (2002, DC HI) 89 AFTR 2d 2002-1449. Decision for Govt.

1. Actions against U.S.—abatement of taxes—foreclosure—res judicata—sovereign immunity. Tax protester/trustee's repeat actions against govt. for abatement of allegedly illegally assessed taxes and challenging foreclosure against properties held by trust were dismissed: res judicata barred taxpayer from raising same arguments that he made or could have made in earlier suit determining that trust was merely taxpayer's alter ego and upholding his liability for subject assessments. Also, taxpayer showed no applicable sovereign immunity waiver to suit. *Reference:* United States Tax Reporter ¶74,337.501(40); 74,336.506(25).

In the United States District Court for the District of Hawaii.

Order

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

The court heard Defendants' Motion To Dismiss on July 1, 2002. Plaintiff Gilbert Goo appeared pro se. Department of Justice Attorney Keith S. Blair and AUSA Rachel Moriyama appeared on the briefs or at the hearing on behalf of the Defendants. After reviewing the motion and the supporting and opposing memoranda, the court GRANTS Defendants' Motion To Dismiss.

BACKGROUND

On or about August 2, 2000, the United States filed United States v. Gilbert Goo, et al., Civil No. CV 00-0540 DAE-LEK ("Goo I") seeking to: (i) reduce to judgment the outstanding federal income tax liabilities assessed against taxpayer Gilbert Goo ("Defendant"); (ii) foreclose its tax liens against two parcels of real property, including the property at issue in the present action; and (iii) to set aside as fraudulent the transfer of two parcels of property on the basis that Brandar Management Trust was the alter-ego or nominee of Gilbert Goo. On July 3, 2001, the Court entered an order granting the United States' motion for summary judgment. In that order, the court found that Brandar was Goo's alter ego. Judgment was entered against Goo on July 16, 2001, and a sale of the property was scheduled for February 21, 2002.

On August 24, 2001, Goo filed Gilbert Goo, et al. v. United States, Civil No. CV 01-00565 ACK-BMK (''Goo II''), entitled a ''petition'' to dismiss Goo I. His petition relied on the argument that the Kingdom of Hawaii is being illegally occupied by the United States of America and that the laws of the United States do not apply in Hawaii as it is a sovereign kingdom. On February 6, 2002, the Goo II court granted the United States' motion to dismiss.

On February 21, 2002, the Internal Revenue Service sold the two parcels of property. The court filed its Order Confirming the Sale and Granting Writ of Possession for these two properties on April 29, 2002 and an Amended Order Confirming Sale and Granting Writ of Possession on May 30, 2002. Goo filed a Motion for Reconsideration of the April 29, 2002 order on May 6, 2002.

In its Order dated June 3, 2002, the court denied Goo's Motion to Vacate Judgment and the Motion to Reconsider filed on April 29, 2002.

On February 20, 2002, Goo filed the instant actions, Brandar Management Trust, et al. v. United States et al, CV 02-00113 DAE-BMK (''Goo III'') and Gilbert Goo v. Commissioner of Internal Revenue, CV 02-000114 DAE-BMK (''Goo IV''). The United States moved to consolidate these cases and now moves to dismiss them both. No opposition to the Motions to Dismiss have been filed.

STANDARD OF REVIEW

In a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the plaintiff's allegations are not presumed to be truthful, and the plaintiff has the burden of proof that jurisdiction exists. Thornhill Publishing Company, Inc. v. General Telephone & Electronics Corporation, 594 F.2d 730 (9th Cir. 1979).

A motion to dismiss pursuant to Rule 12(b)(6) will be granted where the plaintiff fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). For the purposes of a 12(b)(6) motion, ''[r]eview is limited to the contents of the complaint.'' Cleqq v. Cult Awareness Network, 18 F.3d 752, 755 (9th Cir. 1994).

A complaint should not be dismissed ''unless it appears beyond doubt that plaintiff can prove no set of facts in support of [his] claim which would entitle [him] to relief.'' Buckey v. County of Los Angeles, 968 F.2d 791, 794 (9th Cir. 1992) (quoting Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989)) (further citations omitted). All allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. See id. Conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim. Pillsbury, Madison & Sutro v. Lerner, 31 F.3d 924, 928 (9th Cir. 1994).

DISCUSSION

In the Complaint in Goo III, Goo, as trustee of Brandar, argues that Brandar holds record title to the property and that it is not responsible for the alleged tax debt of Goo. In Goo IV, Goo seeks abatement of ''illegally assessed tax.'' Goo asserts that he is not subject to the United States' tax laws because he is a non-resident alien, and that he is not within the territorial jurisdiction of the United States.

[1] Defendants argue that Plaintiff's Complaints should be dismissed based on res judicata. The Supreme Court has stated that res judicata consists of two preclusion concepts: issue preclusion and claim preclusion. Migra v. Warren City School Dist. Bd. of Education, 465 U.S. 75, 77 n.1 (1984). Under the claim preclusion doctrine, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Once a final judgment has been entered by a court of competent jurisdiction, that judgment is res judicata and acts as an absolute bar to subsequent litigation; it is conclusive not only as to all matters which were decided, but also as to all matters which might have been decided. See Commissioner v. Sunnan, 3333 U.S. 591 [36 AFTR 611] (1948). This court has previously held that Brandar Management is the alter ego of Gilbert Goo in Goo I. All of the arguments in the Goo III Complaint either were made, or should have

been made in Goo I. Goo is precluded from making these arguments in this proceeding. Therefore, the Goo III Complaint is barred by res judicata. In addition, the court has previously held that Goo is liable for the taxes at issue. Any arguments about Goo's tax liability were made, or should have been made, in Goo I. Accordingly, the Complaint in Goo IV is also barred by res judicata.

Moreover, the instant actions are barred by sovereign immunity and should be dismissed for lack of subject matter jurisdiction. It is well settled that the United States, as a sovereign, is immune from suit unless it has waived its sovereign immunity and consented to be sued. United States v. Dalm, 494 U.S. 596, 608 [65 AFTR 2d 90-1210] (1990); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 [56 AFTR 2d 85-5567] (9thCir. 1985). Waivers of sovereign immunity ''must be expressly expressed'' and must be ''strictly construed in favor of the sovereign and may not be extended beyond the explicit language of the statute.'' United States Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992); see also United States v. Nordic Village Inc., 503 U.S. 30, 33–34 [69 AFTR 2d 92-687] (1992). Where the United States has not consented to suit, the court lacks subject matter jurisdiction over the action, and the complaint must be dismissed. See Fed. R. Civ. P. 12(b)(1); United States v. Mitchell, 463 U.S. 206, 212 (1983).

Goo has alleged no statutes which show that the United States has waived its sovereign immunity. Because Plaintiff Goo has not shown that the United States has waived its sovereign immunity, the court does not have subject matter jurisdiction over these matters, and Goo's Complaints should be dismissed.

¶2002-5199

Thomas O'BRIEN, PLAINTIFF v. UNITED STATES OF AMERICA, ET AL., DEFENDANTS. U.S. District Court, Dist. of Nevada, (DC NV) Docket No. CV-N-97-256-DWH (RAM), July 10, 2002. Earlier proceedings at (2001, DC NV) 88 AFTR 2d 2001-5920, vacating (1998, DC NV) 82 AFTR 2d 98-6554 [82 AFTR 2d 98-5803], adopting in part (1998, DC NV) 82 AFTR 2d 98-5803. Decision for Govt.

1. Actions against U.S.—damages—unauthorized collection—failure to state claim for relief. Taxpayer's amended IRC §7433 damages claim was dismissed for failure to state claim: any damages taxpayer suffered in connection with IRS activities resulted only from his loss of job promotion after IRS agents disclosed his criminal dealings to employer, not directly from agents' alleged collection-related demands, accusations, and threats against him. Also, taxpayer didn't show that any collection actually resulted from agents' threats or that agents otherwise violated any IRC section; and magistrate judge's inconsistent rulings on sufficiency of taxpayer's original allegations of agents' intentional disregard and recklessness weren't binding. *Reference:* United States Tax Reporter ¶74,335.01(7). IRC §7433.

United States District Court, District of Nevada.

Judgment in a Civil Case

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

___ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X Decision by Court. This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT THE PLAINTIFF'S COMPLAINT IS DISMISSED.

JULY 10, 2002

LANCE S. WILSON

Clerk

Oma L. Rose

Deputy Clerk

Order

THOMAS O'BRIEN, Plaintiff, v. UNITED STATES OF AMERICA, DOES IRS AGENTS 1-5, Defendants.

CV-N-97-0256-DWH(RAM)

Before the court is defendant United States of America's motion to dismiss (#61). Plaintiff opposed (#64) and defendant replied. (#66).

I. Background

Plaintiff filed this action on April 24, 1997, alleging a violation of 26 U.S.C. §7433. (#1.) By order entered September 14, 1998 (#26), the court granted defendant's motion for summary judgment, treating it as a motion to dismiss for failure to state a claim. *See also* Rep. & Rec., #23. The court dismissed plaintiff's complaint without prejudice and granted plaintiff thirty days to file an amended complaint. Plaintiff failed to file a complaint within thirty days and the action was dismissed by order entered October 29, 1998. (#27)

On November 10, 1998, plaintiff filed a Motion for Relief from Order and to Re-Open Case File pursuant to Rule 60(b). (#28.) Plaintiff then filed a notice of appeal on December 2, 1998. (#31.) The court denied plaintiff's motion by order entered December 11, 1998. (#32.) On December 16, 1998, plaintiff filed a Motion to Reconsider regarding the court's denial of the Rule 60(b) motion. (#35.) The court denied the motion on January 8, 1999. (#38.)

On October 11, 2000, the Ninth Circuit vacated the court's December 11, 1998 and January 8, 1999 orders and remanded the matter with instructions to consider the Rule 60(b) motion in light of Kevin Mirch's affidavit. (#52.) On July 23, 2001, the court granted plaintiff's Rule 60(b) motion and gave plaintiff thirty days leave to amend his complaint. (#55.) Plaintiff file an Amended Complaint (#56) on August 19, 2001. The issue before the court is whether plaintiff's amended complaint must be dismissed for either lack of subject matter jurisdiction or failure to state a claim.

II. Analysis

A. Standard on Motion to Dismiss for Lack of Subject Matter Jurisdiction

Dismissal is appropriate when the district court lacks subject matter jurisdiction over the claim. *See* Fed. R. Civ. P. 12(b)(1). Federal subject matter jurisdiction must exist at the time the action is commenced. *See Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989). A Rule 12(b)(1) motion may either attack the sufficiency of the pleadings to establish federal jurisdiction, or allege an actual lack of jurisdiction which exists despite the formal sufficiency of the complaint. *See Thornhill Publ'g Co., Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). In reviewing a motion to dismiss based on lack of subject matter jurisdiction, the court may consider affidavits or any other evidence properly before the court. *Sommatino v. U.S.*, 255 F.3d 704, 710 (9th Cir. 2001).

Subject matter jurisdiction is a threshold issue which goes to the power of the court to hear the case. Therefore, a Rule 12(b)(1) challenge should be decided before other grounds for dismissal, because they will become moot if dismissal is granted. *See Alvares v. Erickson*, 514 F.2d 156, 160 (9th Cir. 1975), *cert. denied*, 423 U. S. 874 (1975); see also 5A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1350, 209–10 (2d ed. 1990).

A federal court is presumed to lack subject matter jurisdiction until the contrary affirmatively appears. *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989). An action should not be dismissed for lack of subject matter jurisdiction without giving the plaintiff an opportunity to amend unless it is clear that the jurisdictional deficiency cannot be cured by amendment. *May Dept. Store v. Graphic Process Co.*, 637 F.2d 1211, 1216 (9th Cir.1980).

B. Standard on Motion to Dismiss for Failure to State a Claim

In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court must accept as true all material allegations in the complaint as well as all reasonable inferences which may be drawn from such allegations. *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998). The allegations of the complaint must also be construed in the light most favorable to the nonmoving party. *Id.*The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint. *North Star Int'l v. Arizona Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). "A complaint should not be dismissed unless a plaintiff could prove no set of facts in support of his claim that would entitle him to relief." *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). A court may consider exhibits attached to a complaint without converting the motion to dismiss into one for summary judgment. *See id.* A complaint may be dismissed as a matter of law for either (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

C. Application of the Standards

[1] By his complaint, plaintiff alleges a violation of 26 U.S.C. § 7433, which authorizes suits for damages against the United States "[i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title." 26 U.S.C. § 7433(a). According to § 7433, a finding of liability entitles a plaintiff to the lesser of $1,000,000 or the "actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee." 26 U.S.C. § 7433(b)(1). Section 7433 also requires that the administrative remedies available within the Internal Revenue Service be exhausted before a plaintiff is awarded damages under subsection (b).[1] 26 U.S.C. § 7433(d)(1).

Defendant argues that plaintiff's complaint should be dismissed for three reasons. First, defendant argues that the United States' sovereign immunity is not waived because plaintiff's allegations concern unauthorized tax determination actions rather than unauthorized tax collection actions. It was on this ground that the court previously dismissed plaintiff's complaint. Plaintiff's original complaint contained no allegations concerning collection activities of the IRS agents. However, plaintiff has amended the complaint to include the following allegations which might be construed as concerning collection activities:

> 7. Under Section 7433 the Internal Revenue Service has intentionally refused to follow its own rules and regulations including but not limited to . . . attempting to collect taxes that were not due (through threats and coercion).
>
> 8. Agents Ruiz and Salmonson threatened Mr. O'Brien that if he did not "come clean" and pay his taxes immediately, that they would criminally prosecute him. Mr. O'Brien believed from the conversation that he was required to immediately confess and pay over taxes to agents Ruiz and Salmonson or be prosecuted.
>
> 11. Agents Ruiz and Salmonson were agents, officers and/or employees of the Internal Revenue Service when they made the threats, attempted to collect taxes not due . . .
>
> 12. Agents Ruiz and Salmonson acted recklessly, intentionally, and/or by reason of negligence in improperly attempting to collect taxes without authority that were not due; threatening Plaintiff with criminal prosecution if he did not confess to laundering drug monies and pay over to them taxes due on the same.

[1] The court notes that plaintiff has not alleged in his complaint that he exhausted his administrative remedies as required by § 7433(d)(1) and 26 CFR § 301.7433-1. At most, plaintiff alleges that he requested an explanatory letter from the IRS to cure the situation with his employer. (#56, ¶ 10.) Because the court dismisses the complaint on other grounds, the court declines to address this issue.

Defendant refers to the court's September 14, 1998 order and argues that the credibility of these allegations is at issue because of the circumstances under which the allegations came about and because the IRS agents' affidavits contradict plaintiff's allegations. Because the court concludes that plaintiff's amended complaint fails to state a claim on other grounds discussed below, the court does not reach the issue of credibility here.

Second, defendant argues that plaintiff fails to state a claim because he has not alleged any actual, economic damages as a proximate result of the IRS agents' actions. Under § 7433(a) and (b), a plaintiff may bring an action for "actual, direct economic damages sustained by plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee." 26 U.S.C. § 7433(b)(1). As alleged by plaintiff, he sustained damages insofar as he lost promotions within Dean Witter. However, as the Magistrate Judge recognized in the July 27, 1998 Report and Recommendation, the court understands these allegations to mean that plaintiff's damages resulted from the IRS agents' disclosing plaintiff's alleged illegal conduct to Dean Witter, not from the IRS agents' alleged demand for taxes, accusations of illegal conduct, and threats of criminal prosecution made to plaintiff. Plaintiff has not alleged that these actions proximately damaged him in any other way. Therefore, plaintiff has not adequately stated a claim for damages as a proximate result of the IRS agents' alleged demands, accusations, and threats to plaintiff.

Third, defendant argues that plaintiff has not alleged the violation of a specific provision of the Internal Revenue Code. Defendant argues that other courts have recognized this as a ground to dismiss for failure to state a claim under § 7433. *See Ludtke v. United States*, 84 F. Supp. 294, [85 AFTR 2d 2000-383] 302 (D. Conn. 1999) (citations omitted) (recognizing that several courts have granted a motion to dismiss where plaintiff failed to allege *how* the IRS recklessly or intentionally disregarded the Internal Revenue Code by referring to a specific statute or regulation). Plaintiff argues that this issue was resolved in the July 27, 1998 Report and Recommendation which was adopted by the court, except as provided in the court's September 14, 1998 order.

In the Report and Recommendation, Magistrate Judge Atkins recognized defendant's argument that plaintiff failed to allege a reckless or intentional disregard of the tax code or its provisions. (#23 at 16.) Magistrate Judge Atkins reasoned that plaintiff sufficiently alleged the "reckless or intentional" disregard of the tax code where plaintiff alleged that the IRS "intentionally refused to follow its own rules and regulations including but not limited to falsely accusing the Plaintiff of laundering drug monies .. [and] disclos[ing] the same information to Plaintiff's employer, Dean Witter." (#23 at 16.) However, this reasoning is set forth in the portion of the Report and Recommendation finding subject matter jurisdiction over plaintiff's claims and denying defendant's motion for summary judgment. The court's September 14 order, on the other hand, found that subject matter jurisdiction was lacking (albeit on other grounds) and granted defendant's motion as if it were one under Rule 12(b)(6). Therefore, the court does not agree that it is bound to the Magistrate Judge's finding that plaintiff's allegations in this regard are sufficient.

In his complaint, plaintiff alleges that jurisdiction is conferred by "Sections 7422(a), 7433, 7422, 5432(a), 28 U.S.C.A. 1341, 1346, 7426(a), and 7426(b)(1) of Title 26, United States Code as amended." (¶ 3.) The court reads this as referring to §§ 7422, 7422(a), 7433, 5432(a),[2] 7426(a), and 7426(b)(1) of Title 26, and §§ 1341 and 1346 of Title 28. The Title 28 sections are irrelevant to this argument because § 7433 permits suit for IRS violation of the Internal Revenue Code, found at Title 26. Considering plaintiff's allegations in connection with the Title 26 provisions, it is clear that plaintiff has failed to state a claim under § 7433. As defendant notes, §

[2] The court cannot find a § 5432 in either Title 26 or Title 28.

7422[3] is entitled "Civil actions for refund" and deals with lawsuits regarding refund claims. Plaintiff has alleged nothing with regard to a claim for refund. Further, plaintiff has not alleged that any assessments or collections actually resulted from the meeting with the IRS agents. Also, § 7426[4] permits civil actions for wrongful levies. Plaintiff has alleged nothing with regard to wrongful levies. Therefore, because plaintiff has failed to refer to a specific tax statute or regulation, or to allege facts in support of the statutes he has cited, plaintiff has failed to state a claim under § 7433. For the foregoing reasons, the complaint on its face fails to state a claim under the subject matter jurisdiction it invokes and therefore, it must be dismissed.

III. Conclusion

Accordingly, IT IS ORDERED that defendant's motion (#61) is GRANTED. IT IS FURTHER ORDERED that plaintiff's complaint is dismissed.

DATED: This 9th day of July, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5200

Cecil BRUMMETT, JR. and Sharon BRUMMETT, Husband and Wife, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Oregon, (DC OR) Docket No. 02-3005-CO, July 9, 2002. Years 1992, 1993, 1994, 1995. Decision for Govt.

1. Limitations periods on refunds—mitigation—reclassification of pension benefits as worker's compensation benefits. Magistrate judge recommended dismissing with prejudice taxpayers' action to recover tax and interest paid on taxable pension benefits that were later partially reclassified by Labor Dept.'s Worker Compensation Appeals Board (WCAB) as tax-exempt worker's compensation benefits: mitigation provisions didn't apply where WCAB wasn't "court of competent jurisdiction" under IRC §1313(a)(1), so didn't make "determination" of erroneous tax treatment; and taxpayers couldn't circumvent limitations period where administrative reclassification was under Title 5, not Title 26. Also, taxpayers didn't show double inclusion of gross income or that Congress or Treas. Secy. delegated authority to WCAB resulting in inconsistent position. And taxpayers' proposal of "pure estoppel theory" seeking equitable relief was rejected based on prior Supreme Court precedent. *Reference:* United States Tax Reporter ¶13,135.001(5); 13,125.001(40); 13,115.02(5); 65,325.01(75). IRC §1311; 1312; 1313; 6532.

In the United States District Court for the District of Oregon.

Findings and Recommendation

COONEY, Magistrate Judge:

Plaintiffs filed this action for recovery of federal income tax and interest erroneously or illegally assessed and collected. Plaintiffs allege Defendant failed to apply the statute of limitations mitigation provisions, 26 U.S.C. §§ 1311–14. Plaintiffs allege jurisdiction pursuant to 28 U.S.C. § 1346(a)(1), 26 U.S.C. § 6532 and 26 U.S.C. § 7422.

Defendant moves to dismiss the complaint for a lack of subject matter jurisdiction (#5).

I. FACTS

The following paragraphs paraphrase relevant portions of Plaintiffs' complaint allegations, as well as statements contained in the Declaration of Jeremy N. Hendon:

Plaintiff Cecil Brummett, Jr. received taxable pension benefits for 1992–95. (Plaintiffs' Complaint ¶ 4). He and Plaintiff Sharon Brummett filed and paid their

[3] § 7422(a) provides in part: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary."

[4] § 7426(a) provides in part: "If a levy has been made on property or property has been sold pursuant to a levy, any person . . . who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States."

tax liability no later than April 19 the following respective years. (Hendon Declaration Exhibits 1–4).

In June 1998, the U.S. Department of Labor's Worker's Compensation Appeals Board (WCAB) ruled the U.S. Department of Labor's Office of Worker's Compensation Programs improperly terminated Plaintiff Cecil Brummett, Jr.'s tax-exempt worker's compensation benefits. (Pls.' Compl. ¶s 5, 7). He retroactively received worker's compensation benefits for 1992–95, reduced by the pension benefits previously received. (Pls.' Compl. ¶ 6).

In November 1999, Plaintiffs sought a refund from the Internal Revenue Service (IRS) of $14,486 in income tax paid for 1992–95. (Pls.' Compl. ¶s 11, 17, 23, 29). Plaintiffs based the claim on the WCAB's reclassification of pension benefits to tax-exempt worker's compensation benefits. (Id.). In December 1999, the IRS denied the claim, because it received the claim after the filing deadline and was unable to mitigate the statute of limitations. (Pls.' Compl. ¶s 12, 18, 24, 30).

II. LEGAL STANDARDS

The court presumes lack of subject matter jurisdiction until Plaintiffs prove otherwise in response to Defendant's Rule 12(b)(1) motion. Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); La Reunion Francaise SA v. Barnes, 247 F.3d 1022, 1026 n.2 (9th Cir. 2001). Defendant factually attacks the existence of subject matter jurisdiction. Thornhill Publ'g Co., Inc. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). When determining subject matter jurisdiction, the court may consider material outside the pleadings without con-verting the motion to dismiss into a motion for summary judgment. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988), cert. denied, 489 U.S. 1052 (1989). In resolving the matter based on declara-tions without an evidentiary hearing, the court presumes the truthfulness of the com-plaint allegations. McLachlan v. Bell, 261 F.3d 908, 909 (9th Cir. 2001).

III. DISCUSSION

Both parties agree Plaintiffs failed to meet the statute of limitations. Plaintiffs argue: (1) the mitigation provisions circumvent the statute of limitations; and (2) equitable estoppel prevents the Defendant from invoking the statute of limitations. Defendants contends: (1) Plaintiffs failed to satisfy the mitigation provisions; and (2) equitable estoppel is inappropriate against the government.

Mitigation Provisions

[1] Plaintiffs argue the mitigation provisions provide subject matter jurisdiction. For the mitigation provisions to apply, Plaintiffs must show: (1) a determination of erroneous tax treatment as defined by 26 U.S.C. § 1313(a) and 26 U.S.C. § 1311(a); (2) an error that falls within a circumstances in 26 U.S.C. § 1312; and (3) a determination that is consistent with a determination made in another prior year as defined by 26 U.S.C. § 1311(b). Beaudry Motor Co. v. United States, 98 F.3d 1167, 1168 [78 AFTR 2d 96-6494] (9th Cir. 1996). The mitigation provisions only provide relief in limited circumstances and are narrowly construed. Id. (citing Schwartz v. United States, 67 F.3d 838, 839–40 [76 AFTR 2d 95-6800](9th Cir. 1995)). "The party asserting mitigation has the burden of showing its applicability." Schwartz, 67 F.3d at 840; United States v. Rushlight, 291 F.2d 508, 514 [8 AFTR 2d 5001] (9th Cir. 1961) (construing predecessor statute, 26 U.S.C. § 3801).

Plaintiffs fail to show a determination of erroneous tax treatment. Plaintiffs contend the WCAB's action is a determination. Defendant contends the WCAB is not a court of competent jurisdiction and cannot make a determination.

A determination includes "a decision by the Tax Court or judgment, decree, or any other order by any court of competent jurisdiction, which has become final." 26 U.S.C. § 1313(a)(1). Congress did not define a "court of competent jurisdiction" for the mitigation provisions. Courts generally recognize determinations made by Article III courts. See, e.g., Comm'r v. Estate of Weinreich, 316 F.2d 97, 104 [11 AFTR

2d 1235] (9th Cir. 1963) (accepting determination by U.S. court of appeals); Chertkof v. Comm'r, 649 F.2d 264, 267 [48 AFTR 2d 81-5194] (4th Cir. 1981) (accepting determination by U.S. district court); Birchenough v. United States, 410 F.2d 1247, 1249 [23 AFTR 2d 69-1376] (Ct. Cl. 1969) (accepting determination by U.S. Court of Claims). However, courts do not always treat a judicial decision as a determination. See, e.g., Shields v. United States, 375 F.2d 457, 460 [19 AFTR 2d 1043] (6th Cir. 1967) (rejecting decision by Ohio probate court); Provident Nat'l Bank v. United States, 507 F.Supp. 1197, 1202 [47 AFTR 2d 81-744] (E.D. Pa. 1981) (rejecting U.S. Tax Court decision on estate tax matter); Fruit of the Loom, Inc., v. Comm'r, 68 T.C.M. (CCH) 867 [1994 RIA TC Memo ¶94,492] (U.S. Tax Ct. 1994) (rejecting U.S. court of appeals and district court decisions unrelated to disputed tax).

The court cannot find any precedent of the WCAB acting as a "court of competent jurisdiction" to make a "determination." Plaintiffs cite Gant v. United States, 1970 WL 334 [26 AFTR 2d 70-5148] (M.D. Fla. June 11, 1970), aff'd, 441 F.2d 1130 [27 AFTR 2d 71-1304] (5th Cir. 1971). Gant does not address the issue or apply.

However, the U.S. Court of Federal Claims declined to accept a decision by an executive branch agency as sufficient to achieve the mitigation provision's goal: circumvention of the statute of limitations. Sullivan v. United States, 46 Fed. Cl. 480 [85 AFTR 2d 2000-1446] (2000). In Sullivan, the U.S. Department of Veteran Affairs (VA) reclassified retired U.S. Navy Capt. Sullivan's status to 100 percent disabled eight years after his initial claim. Id. at 482–83. Capt. Sullivan asked the IRS to refund taxes paid on income previously received as taxable retirement benefits, but reclassified by the VA as exempt disability payments. Id. at 483. Capt. Sullivan cited language in Title 38 (Veteran's Benefits) authorizing the VA's retroactive benefit reclassification. Id. at 488. The court found that the language "does not address retroactivity under the tax code, which is found in Title 26. The Plaintiffs have not cited to any specific language in Title 38 which overrides the tax code provisions regarding the applicable statute of limitations in tax cases." Id.

Plaintiffs, like Capt. Sullivan, argue they can circumvent the statute of limitations because of the administrative benefit reclassifications. In Sullivan, the court refused to ignore the statute of limitations, because Capt. Sullivan's administrative reclassification came under Title 38 (Veterans' Benefits) and not Title 26 (Internal Revenue Code). Plaintiffs raise an administrative reclassification under Title 5 (Government Organization and Employees), rather than Title 26. Applying Sullivan, the court finds Plaintiffs may not use an administrative reclassification outside Title 26 to achieve the mitigation standards' purpose: circumvention of the statute of limitations.

Plaintiffs fail to show a determination by a court of competent jurisdiction to satisfy the mitigation provisions' first requirement. The WCAB does not function as a court of competent jurisdiction for matters of tax liability, so its action is not a determination to satisfy the mitigation provisions.

Even if the WCAB's action serves as a determination, Plaintiffs fail to satisfy the mitigation provisions' second requirement: the determination falls within a circumstance identified in 26 U.S.C. § 1312. Plaintiffs argue there is "[d]ouble inclusion of an item of gross income." 26 U.S.C. § 1312(1). Defendant contends there is no double inclusion.

To be considered double inclusion, "[t]he determination requires the inclusion [of an item] in gross income . . . which was erroneously included in the gross income of the taxpayer for another taxable year . . . ." § 1312(1). Gross income fits in one of 15 categories. 26 U.S.C. § 61. Pension benefits are gross income. 26 U.S.C. § 61(a)(11). Worker's compensation benefits are not gross income. 26 U.S.C. § 104(a)(1). "'[G]ross income,' as it is used in § 1312, must be given the same meaning that it has in 26 U.S.C. § 61." Bean v.

United States, 1996 WL 115456, at 3 [77 AFTR 2d 96-585] (W.D. Wash. Jan. 8, 1996).

The Code of Federal Regulations illustrates double inclusion. 26 C.F.R. § 1.1312-1. Two examples involve a discrete item of income reported erroneously in one year and shifted to be reported properly in another year. § 1.1312-1(b). "[T]he final determination requires the double inclusion of an item of gross income in the sense that double taxes on the same item of gross income were paid to the IRS and remain in their possession." Cocchiara v. United States, 779 F.2d 1108, 1113 [57 AFTR 2d 86-538] (5th Cir. 1986).

Plaintiffs can only show a single inclusion of a discrete item as gross income: worker's compensation benefits for 1992–95 that remains erroneously treated as pension benefits. Any subsequent correct treatment of the 1992–95 income as worker's compensation benefits places the income outside of gross income and precludes invocation of double inclusion. Plaintiffs cannot show inclusion of a discrete item of gross income in "another taxable year" and fail to show double inclusion.

Plaintiffs argue a hypothetical double inclusion. The initial inclusion results from the 1992–95 income taxed as pension benefits. A second inclusion occurs if Plaintiff Mr. Brummett stops receiving worker's compensation benefits and again receives pension benefits. The IRS then will tax the pension benefits a second time as Plaintiffs already paid taxes on the pension benefits for 1992–95.

Plaintiffs do not provide any statutes or cases to support their position. Gant does not support their argument. That case involved a discrete item of income shifted between two existing years: 1961 and 1962. Plaintiffs only show an initial inclusion of income in 1992–95; they do not provide evidence of a second inclusion of the same income. Therefore, Gant does not apply.

The court is unwilling to allow Plaintiffs to continue their action using the mitigation provisions based on a hypothetical situation. Plaintiffs fail to show double inclusion of gross income to satisfy the mitigation provisions.

Even if a determination and double inclusion exist, Plaintiffs fail to show an inconsistent position. To invoke the mitigation provisions, Plaintiffs must show "there is adopted in the determination a position maintained by the Secretary ... and the position maintained by the Secretary ... is inconsistent with the erroneous inclusion [in the disputed year] ...." 26 U.S.C. § 1311(b)(1).

If the WCAB can and did make a determination, the court considers whether the "Secretary" maintained a position in the determination. Plaintiffs uses statutory definitions to argue the WCAB acts as the secretary's delegate, creating an inconsistent position relative to the IRS's position. Defendant contends the WCAB is not the secretary's delegate. The secretary does not maintain a position for the determination, Defendant argues, and no inconsistent position exists.

The mitigation provision uses the term "Secretary," defined as "the Secretary of Treasury or his delegate." 26 U.S.C. § 7701(a)(11)(B). Delegate, "when used with reference to the Secretary of the Treasury, means any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context." 26 U.S.C. § 7701(a)(12)(A)(i). Delegate, "when used with reference to any other official of the United States, shall be similarly construed." 26 U.S.C. § 7701(a)(12)(A)(ii). Delegate, "in relation to the performance of functions in Guam or American Samoa ..., also includes any officer or employee of any other department or agency of the United States, or of any possession thereof, duly authorized by the Secretary (directly, or indirectly by one or more redelegations of authority) ...." 26 U.S.C. § 7701(a)(12)(B).

Plaintiffs' statutory interpretation is not plausible based on the explicit statutory language for delegation of authority to non-treasury entities in Guam and Ameri-

can Samoa. Plaintiffs fail to cite any precedent to support their position. Gant does not address a non-treasury entity holding an inconsistent position.

Congress specifically authorized the U.S. Attorney General, at the request of the "Secretary," to adjudicate tax matters to final determination. 26 U.S.C. § 7401, 7403; see, e.g., United States v. McCallum, 970 F.2d 66, 68–69 [70 AFTR 2d 92-5590] (5th Cir. 1992); United States v. Miller, 1999 WL 250769, at 2 [83 AFTR 2d 99-1661] (W.D. Wash. March 1, 1999). "The method which the Secretary uses most often to delegate authority to department heads, including the Commissioner, is the issuance of a Treasury Department Order." Stamos v. Comm'r, 95 T.C. 624, 629 (1990) (citing Hatcher v. United States, 733 F. Supp. 218 [65 AFTR 2d 90-1083] (M.D. Pa. 1990)); see, e.g., Hoffman v. United States, 2002 WL 1299991, at 5 [89 AFTR 2d 2002-2647] (W.D. Wash. May 3, 2002) ("The Secretary of the Treasury properly delegated his authority pursuant to statute and regulation to IRS employees."); Elias v. United States, 1992 WL 465749, at 8 [71 AFTR 2d 93-879] (C.D. Cal. Nov. 6, 1992) (government presents delegation order). In Howard v. Adle, the court found during government seizure of property, "[a]n employee of another executive department, such as the Post Office, does not meet the definition of 'delegate.'" 538 F. Supp. 504, 507 [49 AFTR 2d 82-799] (E.D. Mich. 1982).

Plaintiffs fail to present any factual support showing Congress or the secretary of the U.S. Department of Treasury delegated authority to the WCAB. Without factual or legal support showing the WCAB is a delegate of the Secretary, Plaintiffs fail to show an inconsistent position necessary to invoke the mitigation provisions.

Plaintiffs may not invoke the mitigation provisions. They have failed to show that they satisfy any of the three requirements.

Equitable Relief

Plaintiffs propose a "pure estoppel theory" and ask the court to use its "equitable authority" so they may maintain their claim. The Supreme Court specifically rejected equitable tolling and generally rejected all equitable relief from the statute of limitations for refunds under 26 U.S.C. § 6511. United States v. Brockamp, 519 U.S. 347 [79 AFTR 2d 97-986] (1997). "Can courts toll, for nonstatutory equitable reasons, the statutory time (and related amount) limitations for filing tax refund claims set forth in § 6511 of the Internal Revenue Code of 1986? We hold that they cannot." Id. at 348.

> Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended "equitable" exceptions into the statute that it wrote. There are no counterindications. Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.
>
> . . . The nature and potential magnitude of the administrative problem [of allowing equitable claims for relief from the statute of limitations] suggest that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system. At the least it tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires.

Id. at 352–53.

Courts consistently read Brockamp broadly to reject all equitable relief. E.g., Pala, Inc., v. United States, 234 F.3d 873, 880 n.40 [86 AFTR 2d 2000-7079] (5th Cir. 2000) ("[C]ourts can not equitably toll the statute of limitations for refund claims under section 6511 of the Internal Revenue Code."); Video Training Source, Inc. v. United States, 991 F. Supp. 1256, 1263 [82 AFTR 2d 98-6393] (D. Colo.

1998) (''Brockamp proscribes all 'equitable' exceptions to the limitations periods of section 6511.''); Beydoun v. United States, 969 F. Supp. 283, 285 n.5 [80 AFTR 2d 97-5828] (D.N.J. 1997) (Brockamp ''pertains to all equitable exceptions, both estoppel and tolling.''); Thomasson v. United States, 1997 WL 220321, at 4 [79 AFTR 2d 97-2678] (N.D. Cal. April 21, 1997) (Brockamp ''foreclosed all equitable exceptions to the limitations period provided in § 6511.''); Chaney v. United States, 45 Fed. Cl. 309, 319 [84 AFTR 2d 99-7137] (1999) (''Due to the consistency strict application of the applicable statute of limitations in tax refund claims, plaintiffs are precluded from relying on equitable estoppel in order to extend the statute of limitations against the IRS.'') Plaintiffs fail to cite any authority to support their position. Based on Brockamp, the court may not use its equitable power to provide relief for the Plaintiffs.

III. RECOMMENDATION

Based on the foregoing, it is recommended that Defendant's motion to dismiss be granted with prejudice.

This recommendation is not an order that is immediately appealable to the Ninth Circuit of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have ten (10) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties have ten (10) days within which to file a response to the objections. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

DATED this 9 day of July, 2002.

/s/

UNITED STATES MAGISTRATE JUDGE

¶2002-5201

C & J TRUST, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Eastern Dist. of California, (DC CA) Docket No. CV-F-02-5694 LJO, June 26, 2002. Years 1999, 2000. Decision against Taxpayer.

1. Third-party summons enforcement—petition to quash—notice—sanctions. Magistrate judge denied trust's petition to quash 3d-party summons IRS issued on bank for records of trust account over which targeted taxpayers had signatory authority: trust lacked standing to challenge IRS's failure to notify trustees/other co-owners where neither those co-owners nor trust were named in summons. Also, govt. established prima facie enforcement case with IRS agent's declaration that no criminal referral had been made, and that requested records were relevant to legitimate investigation of taxpayers' tax liabilities and weren't already in IRS's possession; and trust didn't show any abuse of process or lack of good faith on part of govt. And, trust's request for sanctions on grounds govt. issued summons solely for harassment or with ''subjective'' bad faith was denied. *Reference:* United States Tax Reporter ¶76,095.01(30); 76,095.01(10). IRC §7609.

In the United States District Court for the Eastern District of California.

Order on Petition to Quash IRS Summons, Motion for Summary Enforcement of IRS Summons and Motion for Sanctions

O'NEILL, Magistrate Judge:

(Docs. 1, 7, 8, 10.)

INTRODUCTION

Petitioner C & J Trust (''C & J Trust'') seeks to quash a sumons issued by the Internal Revenue Service (''IRS'') to Clovis Community Bank (''bank'') and seeks a $1,500 sanction against the IRS and its

counsel pursuant to 28 U.S.C. § 1927. The IRS seeks summary enforcement of the summons to the bank and to deny C & J Trust's petition to quash the IRS summons and motion for the $1,500 sanction.

Pursuant to 28 U.S.C. § 636(c) and F.R.Civ.P. 73, the parties consented to proceed before United States Magistrate Judge Lawrence J. O'Neill, and by a June 25, 2002 order, this action was assigned to United States Magistrate Judge Lawrence J. O'Neill for all further proceedings. After review of the parties' papers, this Court considered the matter on the record and without the June 28, 2002 hearing or oral argument, pursuant to this Court's Local Rule 78-230(h).

For the reasons discussed below, this Court:

1. DENIES C & J Trust's petition to quash the summons;
2. GRANTS the IRS' motion for summary enforcement of its summons; and
3. DENIES C & J Trust's motion for a 28 U.S.C § 1927 sanction.

BACKGROUND

The IRS and its Revenue Agent Roslyn Brooks (''Agent Brooks'') are investigating federal income tax liabilities of Clinton R. and Judith L. Kneeland (the ''Kneelands'') for tax years 1999 and 2000. On March 1, 2000, Agent Brooks issued an IRS summons (''summons'') to the bank to seek banking documents for all accounts of the Kneelands or for which they had signature authority for December 1998 to January 2001. The summons references known account 3015955 and specifically seeks signature cards, bank statements, deposit slips, checks for March, June and October, disbursement and repayment records for loan and credit line accounts, and savings account documents. In her declaration, Revenue Agent Brooks claims that based upon her review of a 1998 IRS audit of the Kneelands, she learned the Kneelands has signature authority over account 3015955.

Revenue Agent Brooks completed a proof of service to certify she sent a copy of the summons by certified mail to the Kneelands at their post office box. The bank has not produced the requested records which are not in IRS possession. Agent Brooks notes in her declaration that this matter has not been referred as a criminal proceeding under 26 U.S.C. § 7602(d).[1]

On March 20, 2002, C & J Trust filed its Petition to Quash Summons (''petition'') and noted that on March 5, 2000, the Kneelands, who are not trustees of C & J Trust, received notice of the summons but that C & J Trust trustees Catherine Carroll (''Ms. Carroll'') and Scott A. Shoop (''Mr. Shoop'') had not received notice. According to the petition, the summons was issued without legitimate purpose to harass the Kneelands. C & J Trust claims Ms. Carroll and Mr. Shoop are the only owners of account 3015955.

DISCUSSION

Standing To Quash An IRS Quash Summons

[1] The IRS has broad investigatory powers under the Internal Revenue Code. *See* 26 U.S.C. §§ 7601–7613. Under section 7602(a)(1), the IRS is empowered to issue a summons to compel examination of ''books, papers, records or other data which may be relevant or material'' to an inquiry for purpose of ''ascertaining the correctness of any return, making a return where none has been made'' and ''determining'' and ''collecting'' tax liability. The relevance requirement under section 7602 is whether the requested material ''might have thrown light upon the correctness of the return.'' *United States v. Arthur Young & Co.*, 465 U.S. 805, 813–815 & n. 11 [53 AFTR 2d 84-866], 104 S.Ct. 1495, 1501 & n. 11 [53 AFTR 2d 84-866] (1984); *David H. Tedder & Associates, Inc. v. United States*, 77 F.3d 1166, 1169 [77 AFTR 2d 96-1148] (9th Cir. 1996).

Under section 7608(a) and (b), IRS agents are authorized to ''serve subpoenas and summonses issued under authority of

[1] Unless otherwise indicated, all further statutory references will be to the Internal Revenue Code, 26 U.S.C. §§ 1, *et seq.*

the United States.'' Section 7602 provides the IRS is not limited to issuing summonses to taxpayers under investigation and is authorized to summon ''any person having possession, custody, or care of books of account'' relating to the taxpayer or to summon ''any other person the Secretary may deem proper'' to produce such information relevant and material to inquiry. 26 U.S.C § 7602(a)(2). A summons may be directed to almost anyone. *See, e.g., Chen Chi Want v. United States*, 757 F.2d 1000, 1002 [55 AFTR 2d 85-1374] (9th Cir. 1985) (statute provides IRS with ''broad powers to summon information relevant to determining the liability of any taxpayer.'') The summons power must be construed broadly since it is ''critical to the investigative and enforcement functions of the IRS.'' *United States v. Arthur Young & Co.*, 465 U.S. 805 [53 AFTR 2d 84-866], 104 S.CT. 1495, 1501 (1984).

A ''special procedure'' is provided under section 7609 for third-party summonses. Under section 7609(a)(1), a summons may be issued to a third party (not the taxpayer) and which requires the third party to give ''testimony on or relating to, the production of any portion of records made or kept on or relating to, or the production of any computer software source code ... with respect to, any person (other than the person summoned) who is identified in the summons ...'' Section 7609(a)(1) further provides that ''notice of the summons shall be given to any person so identified.'' (Emphasis added). The statute further provides that ''[s]uch notice shall be accompanied by a copy of the summons which has been served and shall contain an explanation of the rights under subsection (b)(2) to bring a proceeding to quash the summons.'' 26 U.S.C. § 7609(a)(1). Under section 7609(b)(2)(A), the right to challenge a summons is given to ''any person who is entitled to notice of a summons under subsection (a).'' (Emphasis added.) When an IRS summons is issued to a third party record keeper, the taxpayer, as a person ''entitled to notice of a summons'' under section 7609(a) has twenty days from the date of notice to bring a proceeding to quash the summons. 26 U.S.C. § 7609(b)(2)(A); *Ponsford v. Untied States*, 771 F.2d 1305, 1309 [56 AFTR 2d 85-5888] (9th Cir. 1985).

Section 7609's primary purpose is ''to require that the target taxpayer be given notice, so that he would be able to assert appropriate defenses.'' *United States v. Pittsburgh Trade Exchange, Inc.*, 644 F.2d 302, 305 [47 AFTR 2d 81-1153] (3rd Cir. 1981); *United States v. First Bank*, 737 F.2d 269, 271 [54 AFTR 2d 84-5393] (2nd Cir. 1984). The ''plain meaning'' of section 7609(a) requires that notice be given only to the person(s) ''identified'' in the summons. *First Bank*, 737 F.2d at 273.

''[I]f a person is not entitled to notice under § 7609(a), he or she has no standing to initiate an action to quash the summons.'' *Ip v. United States*, 205 F.3d 1168, 1170, [85 AFTR 2d 2000-1095] n. 3 (9th Cir. 2000). Section 7609(b)(2) ''merely grants standing to the person entitled to notice so that he or she may challenge the summons in district court.'' *Ip*, 205 F.3d at 1172.

The IRS contends that it satisfied section 7609(a)'s notice requirements by notifying the Kneeland as the persons identified in the summons and that C & J Trust lacks standing to quash the subpoena because it is not entitled to notice. The IRS argues that even if C & J Trust has signature authority over account 3015955, C & J Trust was not entitled to notice because it was not identified in the summons. The IRS relies on *First Bank*, 737 F.2d at 273, where the IRS was not required to give notice to a bank account's co-owner who was not target of IRS investigation and who was not identified in summons.

C & J Trust argues Ms. Caroll and Mr. Shoop as trustees own account 3015955 to entitle them to notice. C & J Trust asserts the IRS and Agent Brooks failed to articulate an exception to third-party notice requirements and to comply with section 7609(a) notice requirements. C & J Trust points to *Ip*, 205 F.3d 1168 [85 AFTR 2d 2000-1095], which addressed whether an individual with no tax liability and never under IRS investigation was entitled to notice when summonses were issued for her

personal bank account records to aid IRS investigation into a corporation and collection of its tax liability. The Ninth Circuit noted the IRS had not presented evidence that the corporate assessed taxpayer had an interest in the individual's personal bank account to fall under an exception to the third party notice requirement (former 26 U.S.C. § 7609(c)(2)(B) (now 28 U.S.C. § 7609(c)(2)(D)). *Ip*, 205 F.3d at 1176. Accordingly, the individual was entitled to section 7609(a) notice to confer section 7609(b)(2) standing to challenge the summonses. *Ip*, 205 F.3d at 1177.

As noted by the IRS, *Ip* is distinguishable in that the taxpayers (the Kneelands) have at least a signature interest in account 3015955 which is not an individual account. The summons clearly identifies the Kneelands who were entitled to and received section 7609(a) notice as the persons ''so identified.'' Such notice fulfills section 7609's chief purpose to notify target taxpayers to allow them to raise defenses. The summons does not identify C & J Trust to grant it standing under section 7609(b)(2) to challenge the summons. The clear focus of the summons is the Kneelands. The situation at hand is analogous to *First Bank* in that the Kneelands have signature authority or co-control over account 3015955. In *Ip*, the individual whose personal bank records were sought and her bank accounts were not associated with the corporate target. Failing to quash the summons here is consistent with broad application of section 7609 for the IRS' critical investigative and enforcement powers.

Enforcement Of Summonses

In addition to opposing C & J Trust's petition, the IRS seek to enforce the summons. In a proceeding to quash an IRS summons, the IRS ''may seek to compel compliance with the summons.'' 26 U.S.C. § 7609(b)(2)(A). To enforce an IRS summons, the IRS must establish a prima facie case to demonstrate its ''good faith'' that the summons: (1) is issued for a legitimate purpose; (2) seeks information relevant for that purpose; (3) seeks information that is not already within IRS possession; and (4) satisfies all administrative steps required by the United States Code. *United States v. Powell*, 379 U.S. 48, 57–58 [14 AFTR 2d 5942], 85 S.Ct. 248, 254–255 [14 AFTR 2d 5942] (1964); *Fortney v. United States*, 59 F.3d 117, 119 [76 AFTR 2d 95-5398] (9th Cir. 1995).

In *Liberty Financial Services v. United States*, 778 F.2d 1390 [57 AFTR 2d 86-449], 1392 (9th Cir. 1985), the Ninth Circuit Court of Appeals explained the shifting burdens from the IRS to the taxpayer to address enforcement of IRS summonses:

> To establish a need for judicial enforcement, this showing need only be minimal. This is necessarily true because the statute must be read broadly in order to ensure that the enforcement powers of the IRS are not unduly restricted. *United States v. Balanced Financial Management, Inc.*, 769 F.2d 1440, 1443 [56 AFTR 2d 85-5662] (10th Cir. 1985). Assertions by affidavit of the investigating agent that the requirements are satisfied are sufficient to make the prima facie case. *United States v. Samuels, Kramer & Co.*, 712 F.2d 1342, 1345 [52 AFTR 2d 83-5760] (9th Cir. 1983); *United States v. Kis*, 658 F.2d 526, 536–37 [48 AFTR 2d 81-5839] (7th Cir. 1981), *cert. denied*, 455 U.S. 1018, 102 S.Ct. 1712, 72 L.Ed.2d 135 (1982). The burden then shifts to the taxpayer to show an abuse of process, *e.g.*, that the summons was issued in bad faith and for an improper purpose. *United States v. Powell*, 379 U.S. at 58, 85 S.Ct. at 255. The burden is a heavy one. *United States v. Balanced Financial Management, Inc.*, 769 F.2d at 1444. The taxpayer must allege specific facts and evidence to support his allegations. *United States v. Samuels, Kramer & Co.*, 712 F.2d at 1347–48.

The Ninth Circuit has further commented:

> The government's burden is a ''slight one'' and typically is satisfied by the introduction of the sworn declaration of the revenue agent who issued the summons that the *Powell* requirements have been met. *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1414 [72 AFTR 2d

93-6305] (9thCir. 1993); *United States v. Gilleran*, 992 F.2d 232, 233 [71 AFTR 2d 93-1646] (9th Cir. 1993). Once a prima facie case is made a "heavy" burden is placed on the taxpayer to show an "abuse of process" or "the lack of institutional good faith." *Dynavac*, 6 F.3d at 1414.

Fortney, 59 F.3d at 119.

The IRS contends it has established a prima facie case to enforce the summons because the requested routine records serve the legitimate purpose to help determine the Kneelands' 1999 and 2000 tax liabilities. The IRS argues C & J Trust fails to meet its heavy burden to establish abuse of process or lack of institutional good faith in that C & J Trust makes only conclusory assertions without alleging supporting specific facts or evidence. C & J Trust claims the summons was issued solely for harassment and without legitimate purpose.

This Court finds that Agent Brooks' declaration satisfies the *Powell* requirements to establish a prima facie case that she issued the summons in good faith. In her declaration, Agent Brooks explained that she issued the summons in the course of her legitimate investigation into Kneelands' 1999 and 2000 tax liabilities and that based on a 1998 audit of the Kneelands, she learned they have signature authority over account 3015955. She confirmed she served the Kneelands notice of the summons on March 1, 2002 by certified mail. In addition, she declared that all IRS administrative procedures for issuance of the summons were followed, the IRS lacks possession of the information and documents sought by the summons, and there has been no referral for a criminal proceeding. C & J Trust offers no evidence to satisfy its heavy burden to show IRS because of process or the lack of institutional good faith.

Sanctions

C & J Trust seeks a $1,500 sanction under 28 U.S.C. § 1927 for what it characterizes as the IRS and its counsel's frivolous summonses and motions and knowing failure to follow administrative requirements. C & J Trust points to a prior action entitled *C & J Trust v. United States*, Case No. CV F 00-5696 REC DLB, where the IRS withdrew its summons for what C & J Trust claims was failure to follow administrative requirements.

28 U.S.C. § 1927 addresses liability for excessive costs and provides in relevant part:

> Any attorney or other person admitted to conduct cases in any court of the United States ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

The statute is strictly construed "so that the legitimate zeal of an attorney in representing her client is not dampened." *F.D.I.C. v. Conner*, 20 F.3d 1376, 1384 (5th Cir. 1994) (quoting *Browning v. Kramer*, 931 F.2d 340, 344 (5th Cir. 1991)). A 28 U.S.C. § 1927 sanction is appropriate when the multiplication of proceedings is both "unreasonable" and "vexatious." *Conner*, 20 F.3d at 1384 (5th Cir. 1994). A 28 U.S.C. § 1927 sanction is "penal." *Conner*, 20 F.3d at 1384; *Browning v. Kramer*, 931 F.2d 340, 344 (5thCir. 1991).

A 28 U.S.C. § 1927 sanction "must be supported by a finding of subjective bad faith." *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1306 (9th Cir. 1989); *see Estate of Blas ex rel. Chargualaf v. Winkler*, 792 F.2d 858, 860 (9th Cir. 1986); *Barnd v. City of Tacoma*, 664 F.2d 1339, 1343 (9th Cir. 1982). "Bad faith is present when an attorney knowingly or recklessly raises a frivolous argument or argues a meritorious claim for the purpose of harassing an opponent." *Estate of Blas*, 792 F.2d at 860.

C & J Trust provides insufficient detail regarding its prior action to quash an IRS summons to demonstrate the IRS or its counsel unreasonably and vexatiously multiplied proceedings based on bad faith. As discussed above, the IRS does not pursue

frivolous arguments here and there is no showing of IRS harassment or ''subjective'' bad faith. A 28 U.S.C. § 1927 sanction is unwarranted.

Moreover, as noted by the IRS, if C & J Trust is a prevailing party, under section 7430, C & J Trust may seek an award of legal expenses unless the IRS establishes its position ''is substantially justified.'' 26 U.S.C. § 7430(a) and (c)(4)(B)(i).

CONCLUSION AND ORDER

For the reasons discussed above, this Court:

1. DENIES C & J Trust's petition to quash the summons;
2. GRANTS the IRS' motion for summary enforcement of its summons;
3. DENIES C & J Trust's motion for a 28 U.S.C. § 1927 sanction; and
4. DIRECTS this Court's clerk to close this action.

DATED: June 26, 2002

LAWRENCE J. O'NEILL

UNITED STATES MAGISTRATE JUDGE

¶2002-5202

Luis CORTES, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NE) Docket No. CV-S-01-0940-RLH (LRL), July 11, 2002. Decision for Govt.

1. Collection due process (CDP)—review of administrative determination—jurisdiction. Taxpayer's complaint for damages and to set aside as invalid CDP determination to impose levy on him for failure to pay income tax was dismissed for lack of jurisdiction: Supreme Court precedent that Tax Court, as Article I court, was ''Court of Law'' refuted taxpayer's claim that Tax Court was barred from ruling on legal matters; and Tax Court had primary jurisdiction over income tax matters, including levies, under Reg. §301.6330-1T(f)(2), Q-F3/A-F3 and IRC §7442. *Reference:* United States Tax Reporter ¶63,305.01(10); 74,425.01(5). IRC §6330; 7442.

United States District Court, District of Nevada.

Judgment in a Civil Case

___ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed. Judgment is entered in favor of defendant United States of America and against plaintiff Luis Cortes.

July 11, 2002

Date

LANCE S. WILSON

Clerk

/s/

By Deputy Clerk,

Order

HUNT, District Judge:

(Motion to Dismiss - #2)

Before the Court is Defendant's Motion to Dismiss (#2), filed October 18, 2001. The Court has also considered Plaintiff's Opposition (#5), filed December 4, 2001.

BACKGROUND

On August 31, 2000, Plaintiff received a notice from the Defendant Internal Revenue Service (''IRS''), informing him of their intention to levy to collect his outstanding federal income tax liabilities. The notice was sent via certified mail to Plaintiff's last known address. Included with the notice of intent to levy was information notifying Plaintiff of his right to request a Collection Due Process (''CDP'') hearing pursuant to 26 U.S.C. § 6330(a). On February 28, 2001, a CDP hearing was held.

On July 11, 2001, Defendant then sent Plaintiff a Notice of Determination con-

cerning collection actions under 26 U.S.C. § 6330. In this Notice, Defendant informed Plaintiff of his right to judicial review of the determination by the United States Tax Court pursuant to 26 U.S.C. § 6330(d)(1)(A). On August 10, 2001, Plaintiff filed a complaint in this Court for damages and requested that the CDP determination be set aside as invalid. Defendant requests this Court to dismiss the complaint for lack of subject matter jurisdiction.

DISCUSSION

[1] Under Fed. R. Civ. P. 12(h)(3), lack of subject matter jurisdiction, unlike many other objections to jurisdiction of a particular court, cannot be waived and can be raised at any time by a party to an action or by the court *sua sponte*. *Csibi v. Fustos*, 670 F.2d 134 (9th Cir. 1982).

In general, the United States is immune from suit under the doctrine of sovereign immunity unless it explicitly waives such immunity. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The plaintiff has the burden of establishing that the government has waived sovereign immunity and to identify the specific statutory provision containing the waiver. *See Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987). The waiver must be express and will not be implied. *Lane v. Pena*, 518 U.S. 187, 192 (1996). The scope of a waiver of sovereign immunity is to be strictly construed in favor of the sovereign. *Dep't of the Army v. Blue Vox, Inc.*, 525 U.S. 255, 261 (1999).

Title 26 U.S.C. § 6330(d) provides a limited waiver of sovereign immunity to taxpayers who disagree with the outcome of a CDP hearing. Pursuant to 26 U.S.C. § 6330(d)(1)(A), a person may, within 30 days of receiving a Notice of Determination, appeal such determination in a United States Tax Court, provided that the Tax Court has jurisdiction with respect to such matter. If the Tax Court does not have jurisdiction of the underlying tax liability, the appeal shall be made to a district court of the United States. 26 U.S.C. § 6330(d)(1)(B). If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court so determines to file an appeal with the correct court. *Id.*

In his Opposition, Plaintiff contests the jurisdiction of the Tax Court, stating that the Tax Court is barred from ruling on matters of law. The Supreme Court has held, however, that the Tax Court, which is an Article I court, is a "Court of Law" under the Appointments Clause, *Freytag v. Comm'r*, 501 U.S. 868, 888, 891 [68 AFTR 2d 91-5025] (1991); *see also Crawford v. C.I.R.*, 266 F.3d 1120, 1121 [88 AFTR 2d 2001-5962] (9th Cir. 2001) ("The Tax Court is an Article I court created by Congress with limited jurisdiction to rule on deficiencies assessed by the government on taxpayers.").

Under 26 U.S.C. § 7442, the U.S. Tax Court has jurisdiction over matters of federal income tax. Treas. Reg. § 301.6330-1T(f)(2), Q-F3/A-F3 states that the Tax Court has jurisdiction over matters related to income tax, including levies imposed for the purpose of collecting taxes. *See Krugman v. Comm'r*, 112 T.C. 230, n.6 (1999) (noting that with respect to an underlying income tax liability, "the Tax Court has jurisdiction to review determinations under sec. 6330 relating to proposed levies").

Here, Defendant IRS sought to impose a levy on Plaintiff for failing to pay income tax. Although a court of limited jurisdiction, the Tax Court has primary jurisdiction over income tax disputes. Because the underlying issue set forth in the Notice of Determination involves income tax liability, this Court lacks jurisdiction. Plaintiff's failure to petition the proper court for review of the IRS's administrative determination is not fatal to his claim, since Section 6330(d) permits refiling in the correct court 30 days after this Court's determination.

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#2) is GRANTED.

Dated: June 28, 2002.

ROGER L. HUNT

United States District Judge

¶2002-5203

John Alfred EBANEZ and Darcy Jean Mapuana EBABEZ, Individually and Jointly, COMPLAINANTS v. Emy TAMANAHA, a Private Party, and Aloha Airlines Incorporated; and Susan Meredith, a Private Party, and The Internal Revenue Service, RESPONDENTS. U.S. District Court, Dist. of Hawaii, (DC HI) Docket No. 02-00198 ACK-LEK, June 27, 2002. Decision for Govt.

1. District court jurisdiction—dismissal—proper defendant. Govt.'s motion to dismiss taxpayer's action was granted where govt., not IRS, was proper defendant, district court lacked jurisdiction, and even if it had jurisdiction, taxpayer's failed to state claim for relief. *Reference:* United States Tax Reporter ¶74,025.01(83). IRC §7402.

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Michael Chun, Theodore Meeker, Assistant U.S. Attorneys Room 6-100, PJKK Federal Building 300 Ala Moana Blvd. Honolulu, Hawaii 96850 Telephone: (808) 541-2850.
Charles M. Duffy, Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 683, Ben Franklin Station Washington, D.C. 20044-0683 Telephone: (202) 307-6406.

In the United States District Court for the District of Hawaii.

Order Granting United States' Motion to Dismiss; Certificate of Service

KAY, District Judge:

ORDER GRANTING UNITED STATES' MOTION TO DISMISS

[1] This matter having come before the Court on the United States' motion to dismiss, in support of which the following three grounds were asserted: (1) that the United States (and not individual federal employee Susan Meredith or the Internal Revenue Service) is the proper federal defendant; (2) that the Court lacks subject matter jurisdiction regarding any claims against the United States [see Federal Rule of Civil Procedure 12(b)(1)]; and (3) assuming *arguendo*the Court has subject matter jurisdiction, that the plaintiffs have failed to state a claim upon which relief can be granted against the United States [see Federal Rule of Civil Procedure 12(b)(6)]. There being no opposition filed and good cause appearing therefore, the United States' motion is granted in full.

IT IS ORDERED, ADJUDGED AND DECREED that the United States is the proper federal defendant in this case; that the Court lacks subject matter jurisdiction with respect to any and all claims against the United States; and even assuming *arguendo* that the Court has subject matter jurisdiction, the plaintiffs have failed to state a claim against the United States upon which relief can be granted.

DATED: Jun 27 2002

HONORABLE ALAN C. KAY

United States District Judge

Ebanez v. Tamanaha, et al., Civil

No. 02-00198 ACK/LEK

''Order Granting United States'

Motion to Dismiss''

¶2002-5204

Charles FORDJOUR, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Arizona, (DC AZ) Docket No. CV-98-1977-PHX-ROS (JRI), July 15, 2002. Earlier proceeding at (2002, DC AZ) 89 AFTR 2d 2002-2812. Decision for Taxpayer.

1. Refund actions—motion to dismiss—jurisdiction. District court granted pro se taxpayer opportunity to file opposition to govt.'s motion to dismiss for lack of jurisdiction his refund claims, and to present specific documentary evidence that he exhausted his administrative remedies regarding 1 year's tax liability and that matter of his refund claim for other

year wasn't currently pending in Tax Court. But, court warned that failure to timely file such documents would result in summary dismissal of instant action. *Reference:* United States Tax Reporter ¶74,225.05(45). IRC §7422.

In the United States District Court for the District of Arizona.

Order

SILVER, District Judge:

Pending before the Court is Dependant United States of America's Motion to Dismiss Counts 1 and 2 for lack of subject matter jurisdiction (Doc. #42-1) and a Motion to Determine that the Complainant Makes No Other Claims for Which Relief Can be Granted (Doc. #42-3). For the reasons set forth below, the Court will give Plaintiff Charles Fordjour an opportunity to present evidence in opposition to Defendant's Motion to Dismiss Counts 1 and 2 before the Court resolves the motion.[1]

Background

On October 30, 1998, Plaintiff, a prisoner confined in the Arizona State Prison Complex in Douglas, Arizona, filed pro se a Complaint (Doc. #1) against the IRS Commissioner for income tax refunds pursuant to 28 U.S.C. § 1346(a). The Court screened the Complaint pursuant to 28 U.S.C. § 1915A and dismissed it for lack of jurisdiction in a December 27, 1999 Order (Doc. #15). The Court dismissed the Complaint in part because Plaintiff improperly named the IRS Commissioner as a defendant. (See 12/27/99 Order at 4). In addition, the Court found that "even if the United States were substituted as the proper defendant, the Court is without subject matter jurisdiction because Plaintiff has not satisfied the jurisdictional prerequisites by exhausting his administrative remedies after having paid his tax assessments in full." (Id.).

In a July 18, 2000 Order (Doc. #23), the Court Granted Plaintiff's Motion to Vacate Judgment to Permit Plaintiff to Amend Complaint (Doc. #17). The Court gave Plaintiff thirty days to file an amended complaint against the United States for income tax refunds pursuant to 28 U.S.C. § 1346(a). (7/18/00 Order at 3). The Court instructed Plaintiff as follows: "The amended complaint . . . must seek only refund of taxes paid and must allege, if Plaintiff can do so in good faith, the Plaintiff has exhausted his administrative remedies after having paid his tax assessments in full." (Id.) (emphasis in original).[2] Pursuant to the Court's Order, Plaintiff filed a First Amended Complaint on August 18, 2000 (Doc. #25). The Amended Complaint names the United States as the sole Defendant and seeks income tax refunds for the years 1994 (Count 1), 1995 (Count 2), and 1999 (Count 3).

On January 18, 2002, Defendant filed the present Motion to Dismiss Counts 1 and 2 for lack of jurisdiction. Defendant also file a supporting Memorandum (Doc. #43), a Statement of Undisputed Material Facts (Doc. #45), and a Declaration of Norma J. Schrock (Doc. #44), counsel for Defendant. Plaintiff filed an Opposition (Doc. #48) on February 21, 2002,[3] and Defendant filed a Reply (Doc. #53) on March 5, 2002.

Discussion

I. LEGAL STANDARD

"The party asserting jurisdiction has the burden of proving all jurisdiction facts." Indus. Tectonics, Inc. v. Aero Alloy, 912 F.2d 1090, 1092 (9th Cir. 1990) (citing McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936)); see Kokkonen v. Guardian Life Ins. Co. of Am., 114 S. Ct. 1673, 1675 (1994); Fenton v. Freedman, 748 F.2d 1358, 1359, n.1 (9th Cir. 1994); see also William W. Schwarzer et al., Federal Civil Procedure Before Trial §

[1] Defendant has also filed a motion for Summary Judgment on Count Three (Doc. #49) and an Amended Motion for Summary Judgment on Count Three (Doc. #60). The Court will resolve all of Defendant's motions in one order after Plaintiff has had an opportunity to present evidence in opposition to Defendant's Motion to Dismiss Counts 1 and 2.

[2] The Court also advised Plaintiff that if he failed to timely comply with every provision of the Order, the action would be dismissed without notice pursuant to Fed.R.Civ. P.41(b). (Id. at 3–4) (citing Ferdik v. Bonzelet, 936 F.2d 1258 (9th Cir.) cert. denied, 506 U.S.915 (1992)).

[3] The Court notes that plaintiff filed his Opposition after the Court imposed deadline. As discussed below, the Court will not consider Plaintiff's evidence in opposition to Defendant's Motion to Dismiss if it is not timely filed.

9:77, at 9–17 (2002). In effect, the court presumes lack of jurisdiction until the plaintiff proves otherwise. See Kokkonen, 114 S. Ct. at 1675; Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). The defense of lack of subject matter jurisdiction may be raised at any time by the parties or the court. See Fed. R. Civ. P. 12(h)(3). A Rule 12(b)(1) motion to dismiss "for lack of subject matter jurisdiction may either attack the allegations of the complaint or may be made as a 'speaking motion' attacking the existence of subject matter jurisdiction in fact." Thornhill Publ'g Co. v. Gen. Tel. & Elecs. 594 F.2d 730, 733 (9th Cir. 1979); see Federal Civil Procedure Before Trial § 9:78, at 9–18.

In resolving the former motion, a "facial attack" under Rule 12(b)(1), the district court must accept the allegations of the complaint as true. See Federal Civil Procedure Before Trial § 9:84, at 9–20 (citing Valdez v. United States, 837 F. Supp. 1065, 1067 (E.D. Cal. 1993), aff'd (9th Cir. 1995)). Unlike a Rule 12(b)(6) motion, however, the court will not reasonably infer allegations sufficient to support federal subject matter jurisdiction because a plaintiff must affirmatively allege such jurisdiction. Id. § 9:84a, at 9–20.

In resolving a "speaking motion" or "factual attack" under Rule 12(b)(1), the court is not limited to the allegations in the pleadings if the "jurisdictional issue is separable from the merits [the] case." Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir. 1987); see Greene v. United States,—F. Supp. 2d—, No. CIV-S-01-08777GGH, 2000 WL 1307309, at (E.D. Cal. May 16, 2002) (citing Trentacosta v. Frontier Pac. Aircraft Indus., 813 F.2d 1553, 1558 (9th Cir. 1987)). Instead, "[t]he court may view evidence outside the record, and no presumptive truthfulness is due to the complaint's allegations that bear on the subject matter [jurisdiction] of the court." Greene, 2000 WL 1307309, at (citing Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983)); see Roberts, 812 F.2d at 1177; Valdez, 837 F. Supp. at 1067; see also Federal Civil Procedure Before Trial § 9:86, at 9–21. Indeed, "the district court is[] 'free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary.'" Id. (quoting Augustine, 704 F.2d at 1077); see Federal Civil Procedure Before Trial § 9:85, at 9–20.

However, the court must hold an evidentiary hearing before resolving issues of credibility or genuinely disputed material facts. See Federal Civil Procedure Before Trial § 9:85.1, at 9–21.[4] If the court resolves a Rule 12(b)(1) motion on declarations alone without an evidentiary hearing, it must accept the complaint's factual allegations as true. See id. (citing McLachlan v. Bell, 261 F.3d 908, 909 (9th Cir. 2001)); Greene, 2000 WL 1307309, at ("[I]n the absence of a full-fledged evidentiary hearing, disputes in the facts pertinent to subject matter [jurisdiction] are viewed in the light most favorable to the opposing party.") (citing Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1997)). Similarly, without an evidentiary hearing, genuinely "disputed facts related to subject matter jurisdiction should be treated in the same way as one would adjudicate a summary judgment motion." Greene, 2000 WL 1307309, at (citing Dreier, 106 F.3d at 847).

II. DEFENDANT'S MOTION TO DISMISS COUNTS 1 AND 2

[1] In its Motion to Dismiss Counts 1 and 2, Defendant states that the Court lacks jurisdiction over Count 1, Plaintiff's refund claim for 1994, because Plaintiff was assessed $7,742.62 in unpaid federal income tax for 1994 and has not satisfied the jurisdictional prerequisite of paying that tax assessment in full. (Mot. at 3–5) (citing Def.'s Statement of Undisputed Material Facts ("SOF") §§ 13–14; 28 U.S.C. § 1346(a)(1); United States v. Dalm, 494 U.S. 596, 608–10 [65 AFTR 2d 90-1210] (1990); Flora v. United States, 362 U.S. 145, 150–51 [5 AFTR 2d 1046] (1960)). Defendant further states that the Court lacks jurisdiction over Count 2, Plaintiff's

[4] The court has the discretion to order an evidentiary hearing before trial or postpone the motion until trial. See id.

refund claim for 1995, because the matter is currently pending in Tax Court. (Mot. at 3, 9) (citing Def.'s SOF §§ 18–19; 26 U.S.C. § 6512(a); Flora, 362 U.S. at 166; United States v. Wolf, 238 F.2d 447, 451 [50 AFTR 713] (9th Cir. 1956); Russell v. United States, 592 F.2d 1069, 1071 [43 AFTR 2d 79-927] (9th Cir. 1979)).

In his Opposition, Plaintiff repeatedly "cautions" the Court regarding the appropriate legal standards and correctly sets forth the legal standard for Rule 12(b)(6) motions to dismiss for failure to state a claim. (Opp'n at 3–4). Plaintiff also correctly notes that if the Court considers matters outside the pleadings in ruling on a Rule 12(b)(6) motion, it must treat the motion as a Rule 56 motion for summary judgment and give all parties reasonable opportunity to present evidence in support of or in opposition to such motion. (Id. at 3).

Here, however, Defendant has filed a Rule 12(b)(1) Motion to Dismiss for lack of jurisdiction. "Because [Defendant's] [M]otion to [D]ismiss is a factual attack, this Court may determine the facts for itself, considering the allegations of the complaint and extrinsic evidence." Valdez, 837 F. Supp. at 1067 (citations omitted). In addition, the "Court may weigh [genu-inely] disputed evidence and determine the facts to evaluate for itself the merits of jurisdictional claims." Id. "Moreover, no presumptive truthfulness attaches to [P]laintiff's allegations or any inferences drawn therefrom" if the Court holds an evidentiary hearing. Id. Finally, the Court need not formally convert Defendant's Motion to Dismiss into a Rule 56 motion for summary judgment merely because Defendant presented supporting evidence and the Court will consider such evidence in ruling on Defendant's Motion to Dismiss. See Greene, 2000 WL 1307309, at ("The government has noticed this motion both pursuant to [Rule] 12(b)(1) (subject matter jurisdiction), and in the alternative, summary judgment. [T]he most appropriate procedural vehicle to drive the court's decision is Rule 12(b)(1)[.]").

The Court, however, will give Plaintiff a reasonable opportunity to present *evidence* in opposition to Defendant's Motion to Dismiss. Similarly, the Court will give Defendant a reasonable opportunity to respond to any evidence Plaintiff presents before the Court resolves the motion. Accordingly, Plaintiff shall have until July 31, 2002 within which to file (1) an opposition to Defendant's Motion to Dismiss Counts 1 and 2, and (2) a separate statement of facts—supported by *specific documentary evidence*—in response to Defendant's Statement of Undisputed Material Facts. See Rule 1.10(1)(1), Rules of Practice of the United States District Court for the District of Arizona ("Local Rules").[5] Plaintiff is advised that conclusory factual and legal *allegations*, such as those contained in his present Opposition that he owes no taxes for 1994 and 1995, will *not* be sufficient to meet his burden of establishing this Court's jurisdiction. Instead, Plaintiff must present *specific documentary evidence* in opposition to Defendant's evidence. Specifically, Plaintiff must present documentary evidence that (1) he has exhausted all of his administrative remedies *after having paid his 1994 tax assessment in full*, and (2) the matter of Plaintiff's 1995 refund claim is *not currently pending in Tax Court*. If Plaintiff files an opposition and separate statement of facts pursuant to Local Rule 1.10 by July 31, 2002, Defendant shall have until August 9, 2002 within which to file an appropriate reply and response to Plaintiffs statement of facts.

Finally, Plaintiff's attention is again directed to Local Rule 1.10(i), which pro-vides, in pertinent part:

> If a motion [or opposition] does not conform in all substantial respects with the requirements of this Rule, or if the opposing party does not serve and file the required answering memoranda . . . such

[5] The Court notes that Plaintiff has previously been advised in this case as to the requirements of Local Rule 1.10. On March 8, 2002, United States Magistrate Judge Jay Irwin issued an Order (Doc.#54) regarding the briefing schedule on Defendant's Motion for Summary Judgment on Count 3. In the Order, Judge Irwin gave Plaintiff notice on the issues related to motions for summary judgment and advised Plaintiff on the provisions of Local Rule 1.10. Complying with the Order, Plaintiff filed an Opposition (Doc. #58) to Defendant's Motion for Summary Judgment and a Separate Statement of Facts (Doc. #59) pursuant to Local Rule 1.10 on April 5, 2002.

non-compliance may be deemed a consent to the ... granting of the motion and the Court may dispose of the motion summarily.

Thus, pursuant to Rule 1.10(i), the Court may deem Plaintiffs' failure to substantially comply with the requirements of Rule 1.10 or his failure to timely respond a consent to the granting of the Defendant's Motion to Dismiss. See Brydges v. Lewis, 18 F.3d 651, 652 (9th Cir. 1994) (holding that Arizona district court did not err in summarily granting defendants' motion for summary judgment pursuant to former Local Rule 11(i) where pro se plaintiff failed to respond to motion after district court had warned plaintiff that it would deem his failure to respond a consent to granting of motion);[6] United States v. Warren, 601 F.2d 471, 472–74 (9th Cir. 1979) (holding that Arizona district court did not err in summarily dismissing indictments pursuant to local rule where government failed to respond to motions to dismiss indictments); Ghazali v. Moran, 46 F.3d 52, 53–54 (9th Cir. 1995) (holding that district court did not abuse its discretion in summarily granting defendants' motion to dismiss pursuant to local rule where pro se plaintiff had time to respond to motion but failed to do so and, citing Warren, stating that "[f]ailure to follow district court's local rules is a proper ground for dismissal'); United States v. $22,474 in U.S. Currency, 55 F. Supp. 2d 1007, 1011 (D. Ariz. 1999) (citing Rule 1.10(i) and stating that failure to comply with Local Rules "would be grounds upon which to summarily grant the Government's motion to dismiss").[7]

Plaintiff faces additional consequences for failing to timely respond to Defendant's Motion to Dismiss. If Plaintiff fails to prosecute this action or comply with the rules or any Court order, the Court may dismiss the action pursuant to Fed. R. Civ. P. 41(b). See Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir.), cert. denied, 506 U.S. 915 (1992) (holding that Arizona district court did not abuse its discretion in dismissing pro se plaintiff's complaint for failing to comply with court order). Rule 41(b) further provides: "Unless the [C]ourt in its order for dismissal otherwise specifies, a dismissal under this subdivision ... operates as an adjudication upon the merits."

IT IS THEREFORE ORDERED that Plaintiff Charles Fordjour shall have until July 31, 2002 within which to file, as set forth in this Order: (1) an Opposition to Defendant's Motion to Dismiss Counts 1 and 2; and (2) a separate Statement of Facts in response to Defendant's Statement of Undisputed Material Facts. If Plaintiff fails to timely file either of these documents, the Court will summarily grant Defendant's Motion to Dismiss Counts 1 and 2.

IT IS FURTHER ORDERED that Defendant United States of America shall have until August 9, 2002 within which to file an appropriate Reply and Responsive Statement of Facts.

DATED this 12 day of July, 2002.

Roslyn O. Silver

United States District Judge

¶2002-5205

Finley Jay GRANT and Hilda Joyce GRANT, PLAINTIFFS v. F. BOOHER, ET AL., DEFENDANTS. U.S. District Court, Eastern Dist. of Washington, (DC WA) Docket No. CS-02-171-FVS, July 11, 2002. Decision for Govt.

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[6] In January 1994, the Local Rules were amended and former Rule 11(i) was recodified as Rule 1.10(i). See Gabaldon v. IRS, No. CIV-96-1862, 1997 WL 460187, at n.1 (D. Ariz. April 29, 1997) (discussing Brydges and Henry v. Gill Indus., Inc., 983 F.2d 943 (9th Cir. 1993), and stating that district courts have discretion to determine whether noncompliance with Rule 1.10(i) should be deemed consent to granting of motions for summary judgment).

[7] See also Powell v. United States, No. CIV-97-108-TUC-ACM, 1997 WL 440929 [79 AFTR 2d 97-2788], at [74 AFTR 2d 94-6735] (D. Ariz. May 13, 1997) (summarily granting defendant's motion to dismiss pursuant to Rule 1.10(i) based on plaintiff's failure to respond to motion); Rathmann v. Niemiec, No. CIV-93-2355-PCT-RCB, 1994 WL 713734, at [74 AFTR 2d 94-6735] (D. Ariz. Sept. 29, 1994) (summarily granting motion to dismiss for lack of proper service pursuant to Rule 1.10(i) based on plaintiff's failure to respond to motion); cf. Merrit v. United States, No. CIV-94-1262-PHX-SMM, 1996 WL 650120, at (D. Ariz. June 1, 1995) (summarily granting motion to amend complaint pursuant to Rule 1.10(i) based on defendant's failure to respond to motion); Nepsk, Inc. v. Town of Houlton, 283 F.3d 1, 5–6 n.5 (1st Cir. 2002) (citing Rule 1.10(i) and stating that "districts throughout the country have adopted similar rules to 'ensure the orderly, efficient, and expeditious management of the extensive motion practice' of the district courts") (citation omitted).

1. Actions against IRS employees—jurisdiction—removal and remand—sovereign immunity. Taxpayers' motion to remand to state court action against IRS employees for withdrawal of lien notices was denied, and action was dismissed with prejudice: removal was proper under 28 USC §1442(a) where employees were sued for acts taken in their official capacities and alleged sovereign immunity defense to taxpayers' claims; taxpayers' characterization of action as in rem was irrelevant for jurisdictional purposes; and U.S., which was proper defendant, didn't consent to suit. *Reference:* United States Tax Reporter ¶74,336.508(60); 74,336.506(25).

United States District Court, Eastern District of Washington.

Judgment in a Civil Case

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Defendant's Motion to Dismiss the Plaintiff's Claims [Ct Rec. 9] is GRANTED.

The Plaintiffs' claims are DISMISSED WITH PREJUDICE.

July 11, 2002

Date

JAMES R. LARSEN

Clerk

(By) Deputy Clerk

Renea Grogan

Order

SICKLE, Chief District Judge:

THIS MATTER comes before the Court without oral argument based upon conflicting motions. The plaintiffs move to remand this case to state court. The defendants move to dismiss the plaintiffs' claim(s).

BACKGROUND

The plaintiffs own real property in Grant County, Washington. They allegedly failed to pay federal income taxes. In an effort to collect taxes allegedly due the United States, the defendants, who are Revenue Officers for the Internal Revenue Service, filed notices of federal tax liens with the Grant County Auditor. These notices currently encumber the plaintiffs' real property. In response, the plaintiffs filed a civil action against the defendants in Grant County Superior Court seeking an order compelling the defendants to withdraw the notices of federal tax liens. The defendants removed the action to federal court pursuant to 28 U.S.C. § 1442(a). This statute provides that civil actions which are filed in state court against the United States, its agencies, or its officers may be removed to federal court.

JURISDICTION

[1] Although the only defendants in this action are Revenue Officers, the plaintiffs argue both that their lawsuit is an action in rem and that Grant County Superior Court as jurisdiction over their claim(s). Accordingly, they move to remand this action to state court. 28 U.S.C. § 1447(c). The defendants urge the Court to deny the plaintiffs' request. The defendants say they have an absolute right to have the plaintiffs' claim(s) resolved in federal court under 28 U.S.C. § 1442(a)(1).

To qualify for removal under § 1442(a), the defendants must satisfy two requirements. See Jefferson County, Alabama v. Acker, 527 U.S. 423, 431, 119 S. Ct. 2069, 2075, 144 L.Ed.2d 408 (1999). For one thing, they must present a "colorable federal defense." Id. For another thing, they must show they are being sued "for an act under color of office." Id. (internal punctuation and citation omitted). The defendants have satisfied both requirements. Insofar as the former is concerned, they insist the plaintiffs' claim(s) are barred by the doctrine of sovereign immunity. Insofar as the latter is concerned, the defendants insist they are being sued for performing acts which they must perform as part of their employment as Revenue Officers. Since

the defendants have fulfilled both requirements for removal under § 1442(a), this Court properly may exercise jurisdiction over the plaintiffs' claims. See Cook v. Peter Kiewit Sons Co., 775 F.2d 1030, 1035 (9th Cir.1985), cert. denied, 476 U.S. 1183, 106 S.Ct. 2919, 91 L.Ed.2d 547 (1986). Despite the preceding authorities, the plaintiffs claim this Court lacks jurisdiction over their lawsuit because it is an action in rem. However, the plaintiffs have cited no authority, and independent research has failed to uncover any authority, suggesting that they may defeat the defendants' rights under § 1442(a) by characterizing this lawsuit as an action in rem.

SOVEREIGN IMMUNITY

The plaintiffs do not allege they have suffered personal injury or damage as a result of any act that has been performed by the defendants. Instead, they seek a declaration that actions performed by the defendants in their official capacities as Revenue Officers are invalid. In truth, then, it is not the individual defendants who are being sued by the plaintiffs, but it is the United States that is being sued. See Gilbert v. DaGrossa, 756 F.2d 1455, 1458 [56 AFTR 2d 85-5567] (9th Cir.1985) (suit against IRS employees in their official capacity is essentially suit against United States). However, the United States may not be sued by the plaintiffs "absent express statutory consent to sue[.]" Id. Since the plaintiffs have been unable to cite any such consent — and, indeed, no such consent exists — their claim(s) are barred by the doctrine of sovereign immunity. Id. at 1458–59.

CONCLUSION

The Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1442(a)(1). Nevertheless, neither § 1442(a) nor any other statute waives the sovereign immunity of the United States. See Powelson v. United States, 150 F.3d 1103, 1105 [82 AFTR 2d 98-5427] (9th Cir.1998) ("A statute may create subject matter jurisdiction yet not waive sovereign immunity."). As a result, the plaintiffs' motion to remand will be denied and their claim(s) will be dismissed with prejudice.

IT IS HEREBY ORDERED:

1. The plaintiffs' motion to remand this case to Grant County Superior Court (Ct. Rec. 6) is DENIED.

2. The defendants' motion to dismiss the plaintiffs' claims (Ct. Rec. 9) is GRANTED. The plaintiffs' claims are dismissed with prejudice.

IT IS SO ORDERED. The District Court Executive is hereby directed to file this order, enter judgment accordingly, furnish copies to the plaintiffs and to counsel for the defendants, and close this case.

DATED this 11 day of July, 2002.

Fred Van Sickle

Chief United States District Judge

¶2002-5206

HALSTEAD CONTRACTORS, INC., PLAINTIFF v. C&C EXCAVATING, INC., Colonial Bank, Inc., Southeast Materials Corporation, Asphalt Paving Company, inc., Sherman International Corp., Gary Ingram Grading & Paving, Inc., the United States of America, the State of Alabama, and Action Utility Contractors, Inc., DEFENDANTS. In Re: C&C Excavating, Inc., Debtor. U.S. Bankruptcy Court, Northern Dist. of Alabama, (Bktcy Ct AL) Docket No. 00-43424, July 17, 2002. Decision against Govt.

1. Bankruptcy court procedure—bankruptcy estate property—lien property. General contractor was granted summary judgment on request to pay contract balance due converted Chap. 7 debtor-subcontractor over to sub-subcontractors which debtor admittedly failed to pay: funds weren't bankruptcy estate property, accounts receivable or contract rights of debtor to which IRS's or other competing creditors' liens could attach where debtor, by virtue of its breach of contract to pay, had no legal or equitable claim to funds. Also, IRS's reliance on non-controlling

case law was misplaced; and other creditor's argument that allowing payments to sub-subcontractors violated bankruptcy distribution scheme was rejected since distribution scheme applied only to estate property. But, contractor's request for attorney's fees of interpleader action was rejected since contractor didn't file suit as interpleader. *Reference:* United States Tax Reporter ¶68,726.52(3).

In the United States Bankruptcy Court Northern District of Alabama, Eastern Division.

Memorandum of Opinion and Order

SLEDGE, Bankruptcy Judge:

Chapter 7

Plaintiff Halstead Contractors, Inc.(''Halstead'') is a general contractor that entered into various subcontracts with C&C Excavating, Inc. (the ''Debtor''). The Debtor agreed to be a subcontractor for Halstead in the construction of projects in Tuskegee, Greenville, and Montgomery, Alabama. The Debtor failed to pay its subcontractors (the ''Sub-subcontractors''), and the Debtor filed for bankruptcy protection under chapter 11 of the United States Bankruptcy Code on November 16, 2000. At that time, Halstead was holding a total of $180,740.74 (the ''Contract Balance or the 'Funds'). Halstead brings this action against the named defendants seeking a ruling that the Contract Balance is not property of the Debtor's bankruptcy estate and that therefore it may pay the Contract Balance to the Sub-subcontractors. This action is presently before the Court on various motions for summary judgment. Appearances were noted on the record. Halstead filed a motion for summary judgment ('Halstead's Motion'). Colonial Bank, Inc. ('Colonial') and the United States of America (the 'IRS') are the only parties that filed a response to Halstead's Motion. Colonial, which claims a first priority perfected security interest in the Debtor's accounts receivable, also filed a Motion for Summary Judgment ('Colonial's Motion') in which it claims that the Contract Balance is property of the Debtor's bankruptcy estate and therefore Halstead should be required to pay the Contract Balance into the bankruptcy estate. Further, Gary Ingram Grading & Paving, Inc. ('Ingram') filed a Motion for Summary Judgment ('Ingram's Motion') in which it claims that it has a perfected mechanic's lien in the unpaid contract balance owing at the time it sent its notice of intent to file lien to the owner of the Tuskegee Project (as defined below). Halstead filed a response and objection to Colonial's Motion and Ingram's Motion. The aforementioned motions are collectively referred to as the 'Motions.' Although the IRS filed a motion for summary judgment, counsel for the IRS informed the Court in oral argument that this motion is to be treated as a response to Halstead's Motion.

The Court, having reviewed the Motions, and their exhibits, the Affidavit of Foy Tatum, the Memoranda Submitted by the Parties, and all the files, records, and proceedings in this matter, and having heard the arguments of counsel, and based on the undisputed facts contained in the record, finds that Halstead's Motion is due to be granted as specified herein. Ingram's Motion is moot because the Court has found that the Contract Balance is not property of the bankruptcy estate and Halstead is authorized to distribute the Funds to Ingram and the other Sub-subcontractors. The Court further finds that Colonial's Motion is due to be denied because the Contract Balance is not property of the estate and therefore Colonial's liens do not attach to the Contract Balance.

The Court has concluded that the following are:

UNDISPUTED FACTS

1. Halstead is a general contractor engaged in general construction of buildings for companies including CVS Pharmacy (''CVS'') and Kentucky Fried Chicken (''KFC'').

A. The Tuskegee Project.

2. On or about June 5, 2000, Halstead, as general contractor, entered into a subcontract (the ''Tuskegee Contract'') with Debtor under which Debtor agreed to be a

subcontractor in the construction of a CVS store in Tuskegee, Alabama (the ''Tuskegee Project'').

3. Subsequently, to perform its obligations under the Tuskegee Contract, the Debtor subcontracted with various material suppliers and other Sub-subcontractors, including Ingram, Sherman International Corp. (''Sherman''), and Action Utility Contractors, Inc. (''Action'').

4. Ingram has claimed that it is owed approximately $65,160.91 for work and materials that Ingram allegedly provided to the Tuskegee Project. Sherman has claimed that it is owed approximately $2,059.13 for work and materials that Sherman allegedly provided to the Tuskegee Project. Action has claimed that it is owed approximately $5,195.33 for work and materials that Action allegedly provided to the Tuskegee Project. It is undisputed that neither Sherman nor Action took any steps to perfect liens on the Tuskegee Project. Indeed, neither Sherman nor Action claim a lien on the Tuskegee Project.

5. Ingram claims two liens on the Tuskegee Project, one to secure an indebtedness in the amount of $7,601.41 and another to secure an indebtedness in the amount of $57,559.50. The indebtedness in the amount of $7,601.41 is alleged to have matured on September 13, 2000. The indebtedness in the amount of $57,559.50 is alleged to have matured on September 13, 2000. On March 12, 2001, Ingram filed suit to enforce its lien in the Circuit Court of Macon County, Alabama. The last date upon which Ingram furnished materials or labor for the Tuskegee Project is alleged to be September 13, 2000. It appears that on January 12, 2001, Ingram filed Statements of Lien for both of its alleged liens. Further, it appears that on or about December 23, 2000, Ingram provided written notice of its lien. On that same date, the unpaid contract balance owing to Halstead from the owner was $53,200.08.

6. The current balance (not accounting for payments owed to the sub-subcontractors) owing under the Tuskegee Contract is approximately $27,604.00 (the ''Tuskegee Contract Balance'').

7. Neither the IRS nor the Alabama Department of Revenue (''ADR'') filed liens in Macon County, Alabama.

B. The Greenville Project.

8. On or about June 30, 2000, Halstead, as general contractor, entered into a subcontract (the ''Greenville Contract'') with Debtor under which Debtor agreed to be a subcontractor in the construction of a CVS store located in Greenville, Alabama (the ''Greenville Project'').

9. Subsequently, to perform its obligations under the Greenville Contract, the Debtor subcontracted with various material suppliers and other Sub-subcontractors, including Sherman, Asphalt Paving Company, Inc. (''Asphalt''), and Action.

10. Sherman has claimed that it is owed approximately $6,673.10 for work and materials that Sherman allegedly provided to the Greenville Project. Asphalt has claimed that it is owed approximately $76,075.00 for work performed or materials provided to the Greenville Project. Action has claimed that it is owed approximately $9,955.45 for work and materials that Action allegedly provided to the Greenville Project. Only Asphalt and Sherman have taken certain steps towards perfecting their liens upon the Greenville Project pursuant to Alabama law. The entire debt owing to Sherman on the Greenville Project is alleged to have matured on September 14, 2000. Sherman allegedly filed suit to enforce its lien in the Circuit Court of Butler County, Alabama. It is unclear when Sherman furnished the last item of its material for the Greenville Project. It appears that on December 15, 2000, Sherman filed a Verified Statement of Lien with the Probate Court for Butler County. It further appears that on or about December 13, 2000, Sherman provided a Notice of Intent to File Materialman's Lien to Oahu Properties, LLC, the apparent owner of the Greenville Project. On that same date, the unpaid contract balance owing to Halstead by the project owner was $203,240.00.

11. Additionally, the entire indebtedness owing to Asphalt allegedly matured on De-

cember 7, 2000. It appears that on or about March 6, 2001, Asphalt filed suit to enforce its lien in the Circuit Court of Butler County, Alabama. The last date upon which Asphalt furnished materials to the Greenville Project was allegedly December 15, 2000. On January 8, 2001, it appears that Asphalt filed a Statement of Lien in the Probate Court for Butler County, Alabama. On or about December 28 or 29, 2000. Asphalt allegedly provided written notice of its lien to CVS Pharmacy. On that same date, the unpaid contract balance owing to Halstead was $44,626.37.

12. The current balance (not accounting for payments owed to the Sub-subcontractors) owing under the Greenville Contract is approximately $88,806.74 (the "Greenville Contract Balance").

13. Neither the IRS nor the ADR filed liens in Butler County, Alabama.

C. The Montgomery Project.

14. On or about August 11, 2000, Halstead, as general contractor, entered into a subcontract (the "Montgomery Contract") with Debtor under which Debtor agreed to be a subcontractor in the construction of a KFC restaurant located on Atlanta Highway in Montgomery, Alabama (the "Montgomery Project").

15. Subsequently, to perform its obligations under Montgomery Contract, the Debtor subcontracted with various materials providers and other Sub-subcontractors including Sherman, Southeast Materials Corporation ("Southeast"), Asphalt, and Action.

16. Sherman has claimed that it is owed approximately $7,354.81 for work it allegedly performed and materials it allegedly provided for the Montgomery Project. Southeast has claimed that it is owed approximately $677.33 for work it allegedly performed and materials it allegedly provided to the Montgomery Project. Asphalt has claimed that it is owed the sum of $60,300.00 for work it allegedly performed and materials it allegedly provided to the Montgomery Project. Action has claimed that it is owed approximately $2,000.00 for work it allegedly performed and materials it allegedly provided to the Montgomery Project. It is undisputed that Action does not claim a lien on the Montgomery Project. The entire debt owing to Sherman for work performed on the Montgomery Project is alleged to have matured on November 5, 2000. Sherman allegedly filed suit to enforce its lien in the Circuit Court of Montgomery County on May 7, 2001. On or about October 6, 2000, Sherman allegedly furnished its last item of material for the Montgomery Project. It appears that on or about January 17, 2001, Sherman filed its Verified Statement of Lien with the probate judge for the Circuit Court of Montgomery County, Alabama. Moreover, on or about January 10, 2001, Sherman provided a written Notice of Intent to File Materialman's Lien to KFC of America, Inc. On that same date, the unpaid contract balance owing to Halstead by the project owner was $51,846.00.

17. Additionally, Asphalt alleges that the entire indebtedness owing to Asphalt matured on November 9, 2000. It appears that Asphalt filed a lawsuit in the Circuit Court of Montgomery County, Alabama on March 5, 2001. The last date upon which Asphalt delivered materials to the Montgomery Project was allegedly November 17, 2000. Further, it appears that Asphalt filed a Statement of Lien on January 5, 2001 with the probate judge for Montgomery County, Alabama. On or about December 28, 2000, Asphalt allegedly provided notice of its intent to file lien. On that same date, Halstead was owed the unpaid contract balance in the amount of $51,846.00.

18. The current balance owing under the Montgomery Contract (not accounting for amounts owed to sub-subcontractors) is approximately $64,330.00 (the "Montgomery Contract Balance").

19. Neither the IRS nor ADR filed liens in Montgomery County, Alabama.

D. General for All Projects.

20. Pursuant to the terms of Article XIV of each contract, "should sub-contractor (Debtor) at any time fail to pay for all labor, materials or supplies used by sub-con-

tractor in said work when due, Contractor (Halstead) may, at his option, pay for same and charge to sub-contractor.''

21. Pursuant to the terms of the general construction contract between Halstead and the owner of each of the Projects, Halstead may be obligated to indemnify the owners of each Project for any and all amounts owing for any lien claims filed by any vendors, subcontractors or sub-subcontractors of each Project.

22. Moreover, Article X(a) of each contract states as follows: ''Sub-contractor shall turn said work over to Contractor (Halstead) in good condition and free and clear of all claims, encumbrances, or liens and shall protect and save harmless Contractor and Owner from all claims, encumbrances and liens growing out of the performance of this sub-contract and Sub-contractor will at his own cost and expense (including attorney's fees), defend all suits to establish such claims, and pay any such claim or lien so established.''

23. The Contract Balance (not accounting for payments owed to the Sub-subcontractors) is approximately $180,740.74.

24. The Debtor has failed to pay the Sub-subcontractors as agreed to in the Contracts.

25. On November 16, 2000, the Debtor filed for bankruptcy protection under chapter 11 of the United States Bankruptcy Code.

26. On October 2, 2001, the bankruptcy case was converted to a case under chapter 7 of the United States Bankruptcy Code.

E. Colonial's Claim.

27. Colonial filed a UCC-1 Financing Statement on or about August 12, 1996 with the Alabama Secretary of State in which it described its collateral as including ''accounts . . .'' Colonial claims it is owed approximately $110,000.00 and claims a first priority lien on, inter alia, all accounts and contract rights of the Debtor, including proceeds thereof.

F. Taxing Authorities' Claims.

28. The IRS did not file in the counties where the Projects were located (that is, the counties where the lien claimants could have searched the probate records before choosing to perform work for the Debtor). Indeed, the IRS states in its Motion for Summary Judgment that it only filed Notices of Federal Tax Liens in St. Clair County (Ashville), St. Clair County (Pell City), and with the Alabama Secretary of State on September 5, 2000, September 6, 2000, and September 13, 2000, respectively.

29. The Alabama Department of Revenue (''ADR'') did not file in counties where the Projects are located (that is, the counties where the lien claimants could have searched the probate records before choosing to perform work for the Debtor). Indeed, when asked to explain in discovery why it has a superior right to the Funds, the ADR did not state that it had filed in the counties where the Projects are located. The IRS and the ADR are sometimes collectively referred to herein as the ''Taxing Authorities.''

The Court has concluded that the action should be resolved by application of the following:

JURISDICTION

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This adversary proceeding is a core proceeding under 28 U.S.C. § 157(b) and venue is proper under 28 U.S.C. § 1409(a). The parties have submitted to the jurisdiction of this Court.

THE SUMMARY JUDGMENT STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, a party seeking to recover on a claim may move for summary judgment in the party's favor upon all or any part thereof. As clarified by the ruling of the United State Supreme Court in Celotex Corp. v. Catrrett, 477 U.S. 317, 323, 325, 106 S. Ct. 2548, 2553–54 (1986), a party moving for summary judgment is not required to present evidence negating the opposing party's claims. Such a duty does

not arise until such time as the opposing party produces substantial evidence demonstrating a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). ''Genuine'' means enough evidence that a reasonable jury could return a verdict for the non-moving party under the substantive evidentiary standard applicable to the case. Anderson, 477 U.S. 248–49. Even if a party presents some evidence in its favor, summary judgment may be granted if the evidence is merely colorable or is not significantly probative. Id. at 249–50. The non-moving party cannot rest on speculation, suspicion or the mere hope that something will turn up at trial. See, e.g., Conaway v. Smith, 853 F.2d 789, 794 (10th Cir. 1988).

0LEGAL CONCLUSIONS

[1] Halstead is entitled to pay the Funds to the parties who earned it - that is, the Sub-subcontractors and vendors -- because the Funds are not property of the bankruptcy estate. 11 U.S.C. § 541 defines ''property of the estate'' and states in pertinent part:

> a. The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

11 U.S.C. § 541(a)(1).

Although the definition of ''property of the estate'' is indeed broad, it is not unlimited in scope. For example, it is axiomatic that a bankruptcy estate acquires no greater ownership rights over property than the Debtor would have acquired prior to the bankruptcy filing. See Universal Bonding Insurance Co. v. Gittens and Sprinkle Enterprises, 960 F.2d 366, 372 (3rd Cir, 1992); 4 Colliers On Bankruptcy § 541.13 at 541–66 (15th ed. 1983) (''the rule is elementary that the estate succeeds only to the title and rights in the property that the debtor possessed . . . .''); Pearlman v. Reliance Insurance Company, 371 U.S. 132, 135 (1962) (''Property interests in a fund not owned by a bankrupt at the time of adjudication, whether complete or partial, legal or equitable, mortgages, liens, or simple priority of rights, are of course not a part of the bankrupt's property and do not vest in the trustee.'').

It is a general rule that ''[a]lthough section 541 defines property of the estate, we must look to state law to determine if a property right exists and to stake out its dimensions.'' In re Nejberger, 934 F.2d 1300, 1302 (3d Cir. 1991); In re Livingston, 804 F.2d 1219, 1221 (11th Cir. 1986).

In Alabama, ''[c]ourts should not enforce an agreement where the party seeking enforcement has failed to perform his part of the agreement.'' Gray v. Reynolds, 553 So.2d 79, 82 (Ala. 1989); see also Smith v. Clark, 341 So.2d 720, 721 (Ala. 1977) (''this court should not enforce an agreement where the party seeking to enforce the agreement has failed to perform his part of the bargain.''). Thus, in Alabama, one who fails to perform the requirements of a contract is not entitled to the benefits of said contract. See id.

The case styled Fidelity and Casualty Company of New York v. Central Bank of Birmingham, 409 So.2d 788 (Ala. 1982) is on point and is dispositive. In Fidelity and Casualty Company, the subcontractor was owed $30,000 under the terms of its contract with the general contractor. Central Bank had a perfected security interest covering all of the subcontractor's inventory, accounts receivable, and contract rights, including proceeds thereof. Additionally, the surety had been required to pay $38,000.00 as a result of the subcontractor's failure to pay its material suppliers. Moreover, the contract between the general contractor and the subcontractor required the subcontractor to pay all of its laborers and material suppliers and further provided that the contractor could withhold payment to the subcontractor until it received proof that the subcontractor had paid all of its materialmen. The crux of the dispute was whether Central Bank or the surety had priority as

to the $30,000 which the general contractor owed to the subcontractor. Focusing upon the contract language and the surety's rights to be subrogated to the rights of the unpaid materialmen, the Alabama Supreme Court held as follows:

> [T]he contract funds which were in the hands of [the general contractor] did not belong to [the subcontractor] once it had failed to pay the material supplier. [The surety], through its obligation to pay under the bond, is entitled to the funds, and not [the subcontractor] or Central Bank, claiming through [the subcontractor]. It makes no difference in this situation when the Bank's assignment was perfected because there is nothing owing to [the subcontractor] to pass by virtue of the assignment.

Id. at 790–91.

Similarly, it is undisputed that the Debtor failed to pay the Sub-subcontractors as required under the terms of the Contracts. Hence, under Alabama law, the Debtor has no legal or equitable rights in the Contract Balance.

Furthermore, under Alabama law, as a result of the Debtor's breach of the Contracts, the Funds do not represent an ''account receivable'' or ''contract right'' of the Debtor and therefore neither Colonial Bank, the IRS, nor the ADR has a claim to the Funds based on their arguments that their liens attach to accounts receivable or contract rights of the Debtor. Alabama Code Section 7-9-106 describes an account receivable as follows: '''Account' means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.'' Ala. Code § 7-9-106. As evidenced above, the Debtor has breached each of the Contracts by failing to remit payment to the Sub-subcontractors. Accordingly, Halstead has the express contractual right to pay the Sub-subcontractors directly and charge said payments back to the Debtor. Thus, the Debtor has no ''right to payment'' and the Funds do not constitute accounts receivable or contract rights of the Debtor under Alabama law.

Having determined that under Alabama law a subcontractor has no rights to withheld contract funds if it fails to pay its Sub-subcontractors or suppliers, it is apparent that such withheld contract funds are not property of the subcontractor's bankruptcy estate under Section 541 of the Bankruptcy Code. The analysis of this issue begins with the Supreme Court case of Pearlman v. Reliance Insurance Company, 371 U.S. 132 (1962). The dispute in Pearlman was between the bankruptcy trustee of a government contractor and the contractor's payment bond surety over which had the superior rights to funds withheld by the government out of earnings due the contractor. At the time the contractor filed bankruptcy, the government was holding $87,735.35 which would have been paid to the contractor had it paid its subcontractors. Because the subcontractors were not paid, the surety was required to pay in excess of $300,000 to satisfy their claims. Relying upon its right of subrogation arising from its payment of the general contractor's suppliers, the surety made a claim to the withheld funds. In response, the bankruptcy trustee argued that the funds were property of the estate to which the estate had a superior interest. The court began its analysis by noting that if ''the surety at the time of adjudication was, as it claimed, either the outright legal or equitable owner of this fund, or had an equitable lien or prior right to it, this property interest of the surety never became a part of the bankruptcy estate to be administered, liquidated, and distributed to general creditors of the bankrupt.'' Id. at 136. Relying upon its previous decisions in Prairie State Nat. Bank v. United States, 164 U.S. 227 (1896) and Henningsen v. United States Fidelity & Guar. Co., 208 U.S. 404 (1908), the Supreme Court held as follows:

> We therefore hold in accord with the established legal principles stated above that the Government had a right to use the retained fund to pay laborers and materialmen; that the laborers and materialmen had a right to be paid out of the fund; that the contractor, had he completed his job and paid his laborers and materialmen, would have become enti-

tled to the fund; and that the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it.

Id. at 141–42.

Additionally, the case of In re Modular Structures, Inc., 27 F.3d 72 (3d Cir. 1994) is on point and particularly persuasive. Prior to filing for bankruptcy, Modular had contracted to serve as general contractor for the development of a new corporate headquarters for the Salvation Army. Subsequent to the bankruptcy filing, the bank, as secured creditor of the debtor, filed a notice of motion for turnover to obtain the contract proceeds held by the Salvation Army. The bonding company filed a cross motion to place those contract proceeds in escrow to assure that there were funds available to pay the subcontractors. The bank had loaned to the debtor $1.5 million and had taken a perfected security interest in all of the debtor's accounts receivable, contracts and proceeds thereof. Following the debtor's bankruptcy filing, the bank pursued collection of the debtor's accounts receivable. The bonding company argued that the unpaid contract proceeds held by the Salvation Army were not properly characterized as accounts receivable owing to the debtor and therefore the bank's lien would not apply to them. In support of its argument, the bonding company pointed to the terms of the contract between the debtor and Salvation Army wherein the debtor agreed that it would not be paid until it had paid its subcontractors. In reversing both the bankruptcy court and the district court which had ruled that the withheld funds were property of the bankruptcy estate, the Third Circuit instructed as follows:

> The contract between Modular and the Salvation Army requires Modular to pay its subcontractors before final payment is due to Modular. Moreover, it is undisputed, based upon the record currently available in this case, that Modular has failed to pay some of its subcontractors. The question, then, is whether Modular is owed the funds retained by the Salvation Army. Under New Jersey law, ''[a] contract right becomes an account as performance is made under the contract.'' (Citations omitted). Thus, if the contract is not performed, nothing comes into existence upon which a lien could attach.

Id. at 77.

The court in In re Modular Structures, Inc. further relied upon the Supreme Court's ruling in Pearlman and instructed that the Pearlman decision was not limited solely to situations where there was a government contract involved. As the court instructed, ''[t]he equitable obligation of the owner to pay subcontractors from contract funds remaining in the owner's hands is not confined to government projects.'' Id. at 79 (citing Mid-Continent Casualty Company v. First National Bank and Trust Company of Chickasha, 531 P.2d 1370, 1376 (Okla. 1975) (surety has priority over secured lender in dispute over remaining contract funds regardless of whether contract is private or public)). Thus, the withheld contract funds were not property of the debtor's bankruptcy estate because of the debtor's breach of its contract with the Salvation Army. As a result of this breach, the debtor was not owed these monies and therefore the monies were not part of its bankruptcy estate to which the bank's lien could attach. Id. at 80. See also Damato v. Leone Constr. Co., 41 N.J. Super. 366 [50 AFTR 206] (App. Div. 1956) (holding that a tax lien could not attach to the unpaid balance of a construction contract because of the contractor's failure substantially to perform his contract); United States v. Commonwealth of Pennsylvania Department of Highways, 349 F. Supp. 1370, 1381–82 [31 AFTR 2d 73-911] (E.D. Pa. 1972) (where contractor's failure to pay subcontractors constituted a breach of its contract, the remaining contract funds were not due to the contractor and thus not part of the bankrupt's estate); Atlantic Ref. Co. v. Continental Casualty Company, 183 F. Supp. 478, 482–83 [5 AFTR 2d 1389] (W.D. Pa. 1960) (holding that ''a failure by the contractor here to pay for labor and materials is just as much a failure to perform and

carry out the terms of the contract as an abandonment of the work would have been.''; consequently, the contractor ''could 'not get' the withheld balances.'').

Additionally, In re Pacific Marine Dredging and Construction, 79 B.R. 924 (Bankr. D. Ore. 1987) is instructive. In early 1984, Key Bank provided a line of credit for the debtor and took back a perfected security interest in all of the debtor's accounts and general intangibles. Subsequently, the debtor entered into a contract with plaintiff under which debtor would serve as general contractor on a project. The contract required that the debtor promptly pay its subcontractors for their work and further provided that the debtor was not entitled to final payment until it provided proof that it had paid all of its subcontractors. When it received notice that the debtor had failed to pay its subcontractors, the plaintiff withheld payment to the debtor. The plaintiff ultimately interpled the unpaid contract balance which was claimed by both the debtor and the surety which had paid the subcontractors. The surety argued that the unpaid contract balance was not property of the debtor's bankruptcy estate and therefore neither Key Bank nor the debtor had any interest in the funds. In agreeing with the debtor, the court instructed as follows:

> Generally, 11 U.S.C. § 541 provides that all legal or equitable interests of the debtor in property as of the commencement of the case becomes property of the estate. Here, debtor breached the contract by not paying its subcontractors. Plaintiff exercised its statutory and contractual rights and withheld the final payment.
>
> This court agrees with other courts that have found that the contractor's failure to pay for labor and materials is just as much a failure to perform and carry out the terms of the contract as an abandonment of the work. In short, the plaintiff is not contractually obligated to pay the fund to debtor. Due to debtor's breach of contract, the debtor does not have any legal or equitable interest in the fund. Accordingly, the fund is not property of the estate.

Id. at 929 (citing United States v. Commonwealth of Pennsylvania Department of Highways, 349 F. Supp. 1370, 1381–92 [31 AFTR 2d 73-911] (E.D. Pa. 1972); Atlantic Ref. Co. v. Continental Casualty Company, 183 F. Supp. 478, 482–83 [5 AFTR 2d 1389] (W.D. Pa. 1960)).

Further, In re LWMcK Corporation d/b/a National Building Systems (Donald Hoagland v. Edward Hines Lumber Company), 196 B.R. 421 (Bankr. S.D. Ill. 1996) (''Hoagland'') supports these results. In Hoagland, Cambridge, the owner of a construction project, entered into a construction contract with LWMcK which then entered into a subcontract with Greenwell. Greenwell subsequently purchased materials from the defendant sub-subcontractor. After Greenwell failed to pay for said materials, the defendant sub-subcontractor filed a notice of mechanic's lien pursuant to Illinois law. LWMcK subsequently filed a petition in bankruptcy. Subsequently, Cambridge paid the amounts owing to the defendant and the defendant executed a lien waiver.

The bankruptcy trustee, pursuant to Section 549 of the Bankruptcy Code, sought to recover for the bankruptcy estate the payment that Cambridge made to the defendant sub-subcontractor to satisfy the defendant's lien claim. The court held that the payment made by Cambridge could not be recovered for the bankruptcy estate because the money was not property of the Debtor's bankruptcy estate. In making this decision, the court noted the general rule that ''payments made by a contract debtor of the bankrupt to a creditor of the bankrupt do not become part of the bankruptcy estate where there is an independent obligation on the part of the contract debtor to pay the creditor.'' Id. at 423.

In determining whether Cambridge had such an independent obligation, the court pointed to the language of the contract between Cambridge and LWMcK. Under the contract, Cambridge had the right to withhold any monies otherwise owing to the Debtor to pay any sub-subcontractors that

the Debtor failed to pay. According to the court: ''While the language in [the contract] may not create an independent obligation between Cambridge and Defendant [sub-subcontractor], its legal effect on the bankruptcy estate is the same - to exclude from the bankruptcy estate property which, but for the contractual terms, would otherwise be estate property under 11 U.S.C. § 541.'' Id. at 424. Thus, the money paid by Cambridge to the sub-subcontractor was not property of the Debtor's bankruptcy estate and was therefore not recoverable by the trustee.

In the case at bar, the Contracts are very similar to those at issue in the above referenced cases. In particular, the Contracts contain the following language in Article XIV: ''(c) Should Sub-contractor at any time fail to pay for all labor, materials, or supplies used by Sub-contractor in said work when due, Contractor may, at its option, pay for same and charge to Sub-contractor.'' Further, there is language in the contract with the owner of each of the Projects that imposes a duty upon Halstead to indemnify the owners for any lien claims filed by subcontractors or sub-subcontractors. Moreover, Article X(a) of each contract states as follows: ''Sub-contractor shall turn said work over to Contractor (Halstead) in good condition and free and clear of all claims, encumbrances, or liens and shall protect and save harmless Contractor and Owner from all claims, encumbrances and liens growing out of the performance of this sub-contract and Sub-contractor will at his own cost and expense (including attorney's fees), defend all suits to establish such claims, and pay any such claim or lien so established.''

It is beyond dispute that the Debtor has breached the terms of the Contracts in its failure and refusal to pay the Sub-subcontractors. Thus, pursuant to the terms of the Contracts, Halstead has the right to withhold the Funds and pay them directly to the Sub-subcontractors. Further, Halstead has an independent obligation to pay the Sub-subcontractors pursuant to the general contract with the owners on each of the Projects. Accordingly, the Funds are not property of the Debtor's bankruptcy estate. Because the Funds are not property of the estate, neither the Taxing Authorities' liens not Colonial's lien attach to the Funds. See, e.g., In re HLW Enterprises of Texas, Inc., 157 B.R. 592, 598 (Bankr. W.D. Tex. 1993) (''As HLW had no rights to the Interpleaded Funds, the IRS levy was ineffective and did not attach to the fund.'').

Colonial's attempts to distinguish the above referenced cases on the basis that they involve sureties is without merit. As evidenced by the foregoing cases, the fact that there were sureties making demand upon the funds is not the reason why the courts found that the contract balances were not property of the bankruptcy estate. Rather, the courts in those cases found that the withheld contract funds were not property of the bankruptcy estate because the debtors had breached the contracts at issue and therefore had no interest in the withheld funds. Further, the Hoagland case did not involve sureties, and the subcontract at issue there was nearly identical to the Contracts in the case at bar. See Hoagland, 196 B.R. at 424. Just as in the Hoagland case, the effect of the language in the Contracts authorizing Halstead to pay the Sub-subcontractors directly if the Debtor fails to do so, is to remove the Contract Balance from the Debtor's bankruptcy estate.

Additionally, Colonial has argued that Halstead attempts to thwart the distribution scheme under the Bankruptcy Code. Again, this argument is misplaced because the distribution scheme enacted under the Bankruptcy Code only applies to property of the bankruptcy estate. Because the Funds are not property of the bankruptcy estate, they are not subject to the distribution scheme enacted under the Bankruptcy Code. Further, Colonial's arguments that it has a secured claim in the Funds superior to Halstead's claim is without merit because Colonial's security interest does not attach to the Funds, which are not property of the Debtor's bankruptcy estate. Moreover, Colonial's arguments that the Contract Balance is an account receivable of the Debtor is without merit because, as explained above, the Debtor, as a result of its breach

of the Contracts, has no interest in the Funds and therefore no right to payment, as required for an account receivable to exist under Alabama law. See Ala. Code § 7-9-106. Accordingly, Colonial's Motion is due to be denied. The Court does not find it necessary to reach the merits of Colonial's arguments concerning perfection of liens because Halstead is allowed to pay the Sub-subcontractors directly regardless of whether they are The Parties have also raised the issue of whether the Sub-subcontractors have properly perfected their liens. The Court does not find it necessary to resolve this issue because Halstead is authorized to pay the Sub-subcontractors regardless of whether the Sub-subcontractors have perfected liens. perfected.[1]

The Court further finds that Ingram's Motion is moot because the Court has found that Halstead's Motion is due to be granted and Halstead is authorized to pay the Sub-subcontractors (including Ingram) directly regardless of whether they have perfected liens.

Although the IRS filed a motion for summary judgment, based upon the representations of counsel for the IRS, this motion is to be treated as a response to Halstead's Motion. The IRS' response is also without merit. The IRS relies primarily upon the case styled Superpumper, Inc. v. Nerland Oil. Inc., et al. (In re Nerland Oil, Inc.), 2001 WL 1203386 [88 AFTR 2d 2001-6079] (D.N.D. 2001) for the proposition that the Contract Balance must be paid into the bankruptcy estate. However, this case is inapposite because in Nerland Oil, there is no question that the proceeds of the loan claimed by the IRS under its lien were actually due and owing to the debtor. Unlike in the case at bar, there was no accusation in the Nerland Oil case that the debtor had breached the terms of the promissory note, the proceeds of which the IRS claimed through its tax lien. Thus, unlike in the case at bar, the IRS' lien attached to the loan proceeds owing to the debtor in Nerland Oil. See id. at 2.

Halstead, relying on United States Fidelity and Guaranty Company v. Sidwell, 525 F.2d 472, 475 (10th Cir. 1975), seeks a determination that it is entitled to its reasonable attorneys' fees prior to distributing the contract balance. However, this case was not filed as an interpleader, per Fed. R. Bankr. P. 7022, and that case is inapposite. The request for attorneys' fees is DENIED.

Accordingly, pursuant to Rule 56 of the Federal Rules of Civil Procedure, made applicable to the instant adversary proceeding through Rule 7056 of the Federal Rules of Bankruptcy Procedure, it is hereby ordered that:

A. Halstead's Motion is GRANTED as follows: The Contract Balance is not property of the Debtor's bankruptcy estate, and Halstead is hereby authorized to distribute the Contract Balance pursuant to the applicable contracts. No attorneys' fees are to be deducted. Any excess remaining after distribution is determined to be property of the Debtor's bankruptcy estate and is due to be paid into that estate.

B. Ingram's Motion for Summary Judgment is DENIED;

C. Colonial's Motion for Summary Judgment is DENIED;

D. All motions and objections not expressly granted are DENIED.

SO ORDERED this 17th day of June, 2002.

The Honorable James S. Sledge

United States Bankruptcy Judge

¶2002-5207

Joan HARRIMAN, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Eastern Dist. of New York, (DC NY) Docket No. 96 CV 3670 (JS) (MLO), July 22, 2002. Years 1973, 1976, 1980, 1987, 1990, 1992, 1993, 1994. Decision for Taxpayer in part and for Govt. in part.

[1] The Parties have also raised the issue of whether the Sub-subcontractors have properly perfected their liens. The Court does not find it necessary to resolve this issue because Halstead is authorized to pay the Sub-subcontractors regardless of whether the Sub-subcontractors have perfected liens.

1. District court procedure—motion to vacate default judgment. District court vacated entry of default against IRS in pro se taxpayer's action for refund, damages and injunctive relief: F.R.Civ.P. 60 didn't apply where default judgment was never entered; and govt.'s failure to respond for 3 years in which 3 separate attorneys handled case was negligent, not willful. Also, IRS's limitations period and sovereign immunity defenses were meritorious; and vacatur of default wouldn't be prejudicial to taxpayer. *Reference:* United States Tax Reporter ¶74,025.01(95). IRC §7402.

2. Actions against U.S.—refund, damages and injunctive relief—11th Amendment immunity—Anti-Injunction Act—limitations periods. Pro se taxpayer's action against IRS for refund, damages and injunctive relief was dismissed in part: U.S., which was substituted as proper defendant, waived 11th Amendment immunity under 28 USC §1346(a)(1) with respect to taxpayer's refund claim where she had contact with IRS claims dept. and Forms 843 Claim for Refund were filed and ignored; but, neither §1346 nor §2680(c) supported pain and suffering claim. Also, AIA barred claim for injunctive relief; but, dismissal was denied on limitations periods grounds where it was unclear whether taxpayer had timely brought each of her tax claims. *Reference:* United States Tax Reporter ¶74,336.501(10); 74,336.504(44); 74,215.05(5); 65,025.02(3). IRC §6502; 7421.

For Plaintiff: Joan Harriman, pro se P.O. Box 40 East Hampton, New York 11937. For Defendants: Bartholomew Cirenza Trial Attorney U.S. Department of Justice Tax Division, P.O. Box 55 Ben Franklin Station Washington, D.C. 20044.

United States District Court, Eastern District of New York.

Memorandum and Order

SEYBERT, District Judge:

Pending before the Court is Joan Harriman's (''Plaintiff''), motion pursuant to Fed. R. Civ. P. 15(c) to name the United States as Defendant instead of the Internal Revenue Service (''Defendant'' or the ''Government''), the Defendant's motion for an order pursuant to Fed. R. Civ. P. 55(c) to set aside the entry of default against the United States and Defendant's motion for an order pursuant to Fed. R. Civ. P. 12(b)(1) and/or 12(b)(6) dismissing Plaintiff's complaint.

BACKGROUND

Plaintiff commenced suit on July 24, 1996 by filing a complaint with this Court. As a basis for federal jurisdiction, Plaintiff asserted 28 U.S.C. 1346(a)(1), 28 U.S.C. 1331, 28 U.S.C 1396 and 28 U.S.C. 1402(a)(1) and Sections 6502(a), 6331(d) and 6501(a) of the Internal Revenue Code. Plaintiff's complaint seeks to claim a refund for taxes levied for tax years 1973, 1976, 1980, 1987, 1990, 1992, 1993, and 1994, totaling $6,097.56, plus interest and damages in the amount of $100,000 for pain and suffering. Plaintiff also sought a permanent injunction to prevent the Internal Revenue Service from applying any future tax overpayments to her tax lien. Plaintiff filed and served an amended complaint on August 7, 1996. Defendant subsequently requested an extension to answer from the Plaintiff and was denied. On February 24, 1999, Plaintiff made a request to have a default judgment entered against the government. The Clerk of the Court certified the default on February 25, 1999. Defendant requested that the Court schedule a pre-motion conference to discuss the government's motion to vacate the default. Plaintiff failed to appear at the initial conference and subsequently failed to appear at a later scheduled conference. As a result, Defendant has moved to vacate the default judgment entered against it.

LEGAL STANDARD

[1] The Court will first address Defendant's motion to vacate the default pursuant to Fed. R. Civ. P. 55(c). Rule 55(c) permits this Court, in its discretion, ''[f]or good cause shown . . . [to] set aside an entry of default.'' Fed. R. Civ. P. 55(c). The Government argues that this Court does not have jurisdiction over this action

because the United States did not consent to suit in this manner and has accordingly not waived its immunity. Defendant argues that this Court's lack of jurisdiction is good cause, as required by Rule 55(c), to set aside the default.

The Court never entered judgment of default so Fed. R. Civ. P. 60(b) does not apply to this action. This Court is bound to consider the following factors in determining whether an order vacating the entry of default is appropriate: "(1) whether the default was willful; (2) whether setting aside the default would prejudice the adversary; and (3) whether a meritorious defense is presented." Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993). The Second Circuit has expressed a "preference for resolving disputes on the merits," and, therefore, all inferences should be resolved in favor of the defaulting party. Id. at 95, 96; see also Shah v. N.Y. State Dep't of Civil Serv., 168 F.3d 610, 615 (2d Cir. 1999).

ANALYSIS

Viewing all inferences in favor of Defendant, the defaulting party for the reasons set forth below, the Court hereby vacates the entry of default.

1. Willfulness of the Default

Defendant argues that three separate attorneys handled this case on behalf of the tax division, but fails to supply a reason for the government's failure to respond. Plaintiff argues that the fact that Defendant has done nothing for three years is per se willful. She further argues that pursuant to Fed. R. Civ. P. 60, Defendant's motion to vacate the default is barred by the one year statute of limitations. However, as noted above, judgment of default was never entered in this case and accordingly, Rule 60 does not apply. Finally, Plaintiff states that Defendant's default was willful because Defendant has not "presented a meritorious defense to the court by providing any reasonable excuse for their negligence."

"Willfulness in the context of a default [is] conduct that is more than merely negligent or careless." S.E.C. v. McNulty, 137 F.3d 732, 738 (2d Cir. 1998). Neither party has adequately provided an explanation of the default to show that it was willful. It seems that Plaintiff has admitted in her opposition to defendant's motion to vacate the default that the Defendant was negligent. The Court finds the government's handling of this case extremely poor to say the least, however, there is no evidence of willful conduct on the government's part with respect to the default.

2. Meritorious Defense

A meritorious defense need only consist of evidence, which if proven at trial, would constitute a complete defense. Williams v. Helbig, 01 CV 4448 (ILG), 2002 WL 1358675, 4 (E.D.N.Y. June 19, 2002) (citing McNulty, 137 F.3d at 740). Defendant argues that the statute of limitations and the doctrine of sovereign immunity bars Plaintiff's claims. Defendant asserts that the United States has not consented to be sued in the manner contemplated by the Plaintiff herein. If Defendant succeeds in its argument that sovereign immunity applies, it would win the case. Further the statutes of limitation pertinent to the present action provide in part that a claim for a refund must be filed within the later of three years from the time the return was filed or two years from the date the tax was paid. See 26 U.S.C. § 6511(a). Plaintiff's claim is further limited by §6511(b)(2)(A) which provides that if a claim is filed within the three year period set forth above, the amount of credit or refund to which a claimant is entitled shall not exceed any taxes paid in the three years prior to the filing plus the period of extension of time for filing a return. Plaintiff asserts that Defendant has waived its claim of lack of jurisdiction and its claim to sovereign immunity.

The Court finds that if Defendant adequately proves either of its defenses it will have two separate complete defenses. Accordingly, Defendant does have a meritorious defense to this action.

3. Prejudice to Plaintiff

Defendant asserts that, pursuant to Fed. R. Civ. P. 55(e) "[n]o judgment of default shall be entered against the United States

. . . unless the claimant establishes a claim or right to relief by evidence satisfactory to the Court.'' The Court finds that Plaintiff will not be prejudiced by a finding that the default in this action should be vacated, as there is a preference that cases be decided on the merits.

For the reasons set forth above, the entry of default in this action is hereby vacated.

LEGAL STANDARD

1. Defendant's Rule 12(b)(6) motion

A district court should grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim only if ''it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'' H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249–50, 109 S. Ct. 2893, 2906, 106 L. Ed. 2d 195 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984)); Annis v. County of Westchester, 36 F.3d 251, 253 (2d Cir. 1994).

In applying this standard, a district court must ''read the facts alleged in the complaint in the light most favorable'' to the plaintiff and accept the factual allegations as true. H.J. Inc., 492 U.S. at 249, 109 S. Ct. at 2906; Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L. Ed. 2d 90 (1974), *overruled on other grounds by* Harlow v. Fitzgerald, 457 U.S. 800 (1982); Christ Gatzonis Elec. Contractor, Inc. v. New York City Sch. Constr. Auth., 23 F.3d 636, 639 (2d Cir. 1994); see also Leatherman v. Tarrant County Narcotics Intelligence and Coordinator Unit, 507 U.S. 163, 165, 113 S. Ct. 1160, 1163, 122 L. Ed. 2d 517 (1993) (citing Fed. R. Civ. P. 8(a)(2) to demonstrate liberal system of ''notice pleading'' employed by the Federal Rules of Civil Procedure).

The Court's duty ''is merely to assess the legal feasibility of the [amended] complaint, not to assay the weight of the evidence which might be offered in support thereof.'' Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980). Accord Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). The appropriate inquiry, therefore, is not ''whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'' Scheuer, 416 U.S. at 236, 94 S. Ct. at 1686; Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123–24 (2d Cir. 1991) (noting that plaintiff is not com-pelled to prove his or her case at the pleading stage).

Additionally, a claimant is not required to set out in detail the facts upon which he or she bases a claim. Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957). A claimant need only give a statement of his or her claim that will give defendant ''fair notice of what the . . . claim is and the grounds upon which it rests.'' Id. Therefore, where a complaint is filed that charges each element necessary to recover, dismissal of the case for failure to set out evidential facts can seldom be warranted. United States v. Employing Plasterers' Ass'n of Chicago, 347 U.S. 186, 189, 74 S. Ct. 452, 454, 99 L. Ed. 618 (1954). Individual allegations, however, that are so baldly conclusory that they fail to give notice of the basic events and circumstances of which the plaintiff complains are meaningless as a practical matter and, as a matter of law, insufficient to state a claim. See Barr v. Abrams, 810 F.2d 358, 363 (2d Cir. 1987). Additionally, on a motion to dismiss, a complaint shall be deemed ''to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference . . . and documents that the plaintiff[] either possessed or knew about and upon which [they] relied in bringing the suit . . . .'' Rothman v. Gregor, 220 F.3d 81, 88–89 (2d Cir. 2000) (citations omitted). It is within this framework that the Court will address the present motion to dismiss.

2. Defendant's Rule 12(b)(1) motion

[2] The Eleventh Amendment bars suit against the United States government. The government may only be sued to the extent that such Eleventh Amendment immunity has been abrogated by statute. United States v. Testan, 424 U.S. 392, 399,

96 S.Ct. 948, 953 (1976). If such immunity is not validly abrogated, dismissal of a suit against a governmental entity is required as jurisdiction does not exist. Stout v. United States, 229 F.3d 918 (1956). Defendant further asserts that the statute of limitations bars Plaintiff's causes of action.

ANALYSIS

1. Eleventh Amendment Immunity

In the interests of judicial economy, the Court will first address the issue of Eleventh Amendment Immunity. Plaintiff has asserted, as the basis for jurisdiction 28 U.S.C. 1346(a)(1), 28 U.S.C. 1331, 28 U.S.C. 1396 and 28 U.S.C. 1402(a)(1) and Sections 6502(a), 6331(d) and 6501(a) of the Internal Revenue Code. The Court finds that 28 U.S.C. § 1346(a)(1) is sufficient to waive Eleventh Amendment immunity with respect to Plaintiff's claim for a refund. See R.E. Dietz Corp. v. United States, 87 CV 1455, 1990 WL 110936,7 [66 AFTR 2d 90-5772] (N.D.N.Y. Aug. 3, 1990) (finding that having paid to the IRS income taxes allegedly wrongfully assessed and otherwise having complied with certain other prerequisites, plaintiff is entitled to bring suit in federal district court pursuant to 28 U.S.C § 1346(a) to litigate its claim for a refund). 28 U.S.C. § 1346(a)(1) provides that ''[t]he district courts shall have original jurisdiction ... of (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected.'' While there is a requirement that Plaintiff first file an administrative claim for a refund, it is unclear from the face of the Complaint whether she in fact filed such a claim but she does note that she had contact with the claims department and that ''Forms 843 Claim for Refund have been filed and ignored.'' Accordingly, viewing all inferences in Plaintiff's favor, the Court will assume that such a claim was filed. However, Plaintiff's claim for $100,000 for pain and suffering is not supported by Section 1346. Moreover, 28 U.S.C. § 2680(c) prohibits tort suits against the federal government arising as a result of a the collection or assessment of taxes. Accordingly, while Plaintiff must meet certain prerequisites, Eleventh Amendment Immunity has been validly waived with respect to Plaintiff's claim for a refund, but Plaintiff's claim for pain and suffering is dismissed as barred by the Eleventh Amendment.

2. Motion to Dismiss

Defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for violations of the statute of limitations shall, for the reasons set forth below, be denied in its entirety. On a motion to dismiss, the Court is bound to view all inferences in favor of the non-movant. Plaintiff has brought her complaint concerning tax years 1973, 1976, 1980, 1987, 1990, 1992, 1993 and 1994 and is seeking to recover just over six thousand dollars in refund money plus pain and suffering and an injunction. Plaintiff fails to raise any argument in response to Defendant's motion except that Defendant has waived any jurisdictional defense by its failure to raise such in a timely manner. This Court finds that Defendant has not waived its statute of limitations defense. As previously noted, the interests of justice dictate that this matter be adjudicated on the merits. Although a great amount of time has transpired since this action was commenced, there has been no intentional waiver of the statute of limitations.

This Court is bound to view all infer-ences in favor of the non-movant and to read the Complaint liberally. The Court has disregarded the exhibits filed by the Defendant as inappropriate on a motion to dismiss, and it is unclear from the Com-plaint whether Plaintiff has complied with the statute of limitations with respect to each of her tax claims. Plaintiff in this ac-tion is proceeding pro se and the Court therefore shall grant her every opportunity to plead her case. Accordingly, this matter is referred to Magistrate Judge Michael L. Orenstein for the purpose of conducting a hearing to determine whether the statute of limitations has run with respect to each of Plaintiff's claims and to write a report and recommendation thereon.

INJUNCTION

As previously noted, Plaintiff seeks to have an injunction issued, barring the "IRS from taking any further refunds from her income tax returns and from illegally charging her any late. fees." Defendant argues that Plaintiff's claim for injunctive relief should be denied because courts are generally barred from restraining the collection of any tax. Plaintiff does not oppose Defendant's argument. The rule set forth in 26 U.S.C. § 7421(a) which states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed," applies to the case at bar to restrict an injunction on the assessment or collection on any taxes. Accordingly, Defendant's motion to have Plaintiff's claim for an injunction dismissed is GRANTED.

RULE 15(c) MOTION

Finally, Plaintiff's motion to change the named defendant from the Internal Revenue Service to the United States is GRANTED.

CONCLUSION

For the reasons set forth above, Defendant's motion to vacate the entry of default is GRANTED;

Defendant's motion to dismiss Plaintiff's complaint based upon Eleventh Amendment immunity is DENIED to the extent that Plaintiff seeks a refund and GRANTED to the extent that Plaintiff seeks damages for pain and suffering;

Defendant's motion to dismiss based upon Fed. R. Civ. P. 12(b)(6) alleging violations of the statute of limitations is DENIED;

Defendant's motion to dismiss Plaintiff's claim seeking an injunction is GRANTED; and

Plaintiff's motion to change the name of the Defendant from the Internal Revenue Service to the United States is GRANTED.

This action is hereby referred to Magistrate Judge Orenstein to hold a hearing to determine whether Plaintiff has violated the statute of limitations with respect to each of her claims.

SO ORDERED.

Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York

July 22, 2002

¶2002-5208

Jane HESS, PLAINTIFF v. COMMISSIONER of Internal Revenue, DEFENDANT U.S. District Court, Eastern Dist. of California, (DC CA) Docket No. CIV S-02-0010-GEB-PAN-PS, June 20, 2002. Year 1998. Decision for Govt.

1. District court jurisdiction—damages for emotional distress—unauthorized collection of employment taxes—failure to satisfy F.R.Civ.P. Magistrate judge recommended dismissing for lack of jurisdiction taxpayer's damages action against IRS Commissioner for emotional distress from alleged wrongful collection of employment taxes that were later refunded: jurisdiction was lacking under 28 USC §1346(a) where action wasn't against govt. and even if it was, taxes were later refunded with interest, under 28 USC §1346(b) which specifically excluded claims related to tax collection, and under IRC §7433 where administrative prerequisites and 2-year limitations period weren't satisfied. Also, taxpayer's summary and default judgment motions were denied for failure to satisfy F.R.Civ.P. 56(c) and 4. *Reference:* United States Tax Reporter ¶74,336.501(5); 74,336.501(25); 74,335.01(5); 74,336.504(61). IRC §7433.

United States District Court, Eastern District of California.

Findings and Recommendation

NOWINSKI, Magistrate Judge:

[1] Plaintiff sues the Commissioner of Internal Revenue for damages for emotional distress resulting from the alleged wrongfully collection from her in 1998 of

$9,000 employment taxes later refunded with interest.

On April 9, 2002, plaintiff moved for summary judgment. That motion is denied upon the ground plaintiff has not satisfied Fed.R.Civ.P. 56(c).

On April 25, 2002, plaintiff moved for default judgment. The motion is denied as plaintiff has failed to show that defendant was properly served. Fed.R.Civ.P. 4.

Defendant moves to dismiss for lack of jurisdiction. Plaintiff opposes, claiming the court has jurisdiction under 28 U.S.C. §§ 1346(a) and 1346(b)(1).

Section 1346(a) confers upon this court jurisdiction concurrent with the Court of Federal Claims over any civil action against the United States to recover an internal revenue tax erroneously or illegally collected. This is not such an action; even if a suit against the Commissioner be deemed one against the United States, it is not an action to recover a tax because plaintiff alleges the tax collected from her in 1998 was later refunded with interest.

The jurisdiction conferred by section 1346(b) specifically excludes claims arising in respect of the collection of any tax. 28 U.S.C. § 2680(c).

26 U.S.C. § 7433 permits an action in district court for damages for unauthorized collection actions but requires exhaustion of administrative remedies and is subject to a two-year limitation period, neither of which requirements does plaintiff satisfy.

Plaintiff has not demonstrated this court's jurisdiction and upon that ground I recommend the action be dismissed.

Dated: June 19, 2002.

Peter A. Nowinski

United States Magistrate Judge

¶2002-5209

In Re: Indian Motocycle Company, Inc., Debtor. In Re: Indian Motocycle Apparel and Accessories Co., Inc., Debtor. In Re: Indian Motocycle Manufacturing Company, Inc., Debtor. U.S. Bankruptcy Court, Dist. of Massachusetts, (Bktcy Ct MA) Docket No. 93-41954-HJB, July 25, 2002. Earlier proceedings at (2001, DC MA) 88 AFTR 2d 2001-7201; and *U.S. v. Sterling Consulting Corp*, (2001, Bktcy CA1) 88 AFTR 2d 2001-5528, vacating (2001, Bktcy CA1) 87 AFTR 2d 2001-1569, 259 BR 458. Years 1994, 1995, 1996, 1997, 1998, 1999. Decision for Govt. in part.

1. Bankruptcy court—receivership actions—jurisdiction. Massachusetts bankruptcy court recommended, in conjunction with Colorado district court's concurrent transfer of related receivership proceedings to Massachusetts district court, that Massachusetts district court's reference of bankruptcy cases be withdrawn: withdrawal would help avoid conflicting decisions, interminable appeals and dissipation of assets and would aid in preserving comity. *Reference:* United States Tax Reporter ¶68,726.52(5); 74,025.01(42). IRC §7402.

United States Bankruptcy Court, District of Massachusetts.

Jointly Administered

BOROFF, Bankruptcy Judge:

Chapter 7

Chapter 7

Chapter 11

RECOMMENDATION OF BANKRUPTCY JUDGE THAT DISTRICT COURT WITHDRAW THE ORDER OF REFERENCE

In accordance with an understanding reached with the United States District Court for the District of Colorado (Weinshienk, D.J. and Schlatter, M.J.)(jointly the "Colorado District Court"), I respectfully recommend to the United States District Court for the District of Massachusetts (the "Massachusetts District Court") that, pur-

suant to 28 U.S.C. 157(d)[1] , the Massachusetts District Court withdraw the reference of the above-captioned cases to the United States Bankruptcy Court for the District of Massachusetts (the 'Bankruptcy Court')[2] , for the cause shown below, and conduct all further proceedings with respect thereto.

I. BACKGROUND AND TRAVEL OF THE CASE[3]

On July 15, 1993, involuntary Chapter 7 petitions were filed in this Court against Indian Motocycle Company, Inc. and Indian Motocycle Apparel and Accessories Company, Inc., affiliated corporations. In February of 1994, Indian Motocycle Manufacturing, Inc. filed a voluntary Chapter 11 petition in the United States Bankruptcy Court for the District of North Carolina. Venue was transferred to this Court, and that case was subsequently converted to Chapter 7 as well. In January of 1995, I ordered that the three estates be jointly administered and a single Chapter 7 trustee was appointed.

In 1995, a federal receivership proceeding was instituted in the Colorado District Court against Indian Motocycle Manufacturing, Inc. (a fourth company), entitled *Eller Industries, Inc. v. Indian Motocycle Manufacturing, Inc.*, Civ. Action 95-Z-777 (D. Colo.)(the ''Receivership Proceeding''). Sterling Consulting Corporation was appointed Receiver. In October of 1995, the Receiver claimed to have purchased 100% of the stock of the bankruptcy debtors as well as certain claims against them. Thus, the Receiver now claimed to be both a creditor of the bankruptcy debtors and the owner of their equity.

Shortly after the commencement of the Receivership Proceeding, the trustee in bankruptcy of these bankruptcy estates[4] (the ''Trustee'') found himself engaged in ongoing negotiations, disputes and litigation with the Receiver. Those disputes emanated primarily from the competing claims of the bankruptcy and receivership estates to the Indian Motocycle trademarks and intellectual property (jointly the ''Trademarks'') and from the intertwined relationships between the creditors and stockholders of the bankruptcy and receivership estates. The effort to resolve those disputes has engendered, from time to time, great contentiousness by the Trustee and the Receiver in dealing with each other and with third parties.

After considerable negotiation, the original Trustee and the Receiver entered into an agreement for the joint sale of the assets by the bankruptcy estates and the receivership estate. On or about December 12, 1995, the Receiver filed with the Bankruptcy Court its ''Motion for Approval of Receiver's Request for Procedural Order Approving a Procedural Plan for a Coordinated Sale and Coordinated Interim Administration of the Massachusetts Bankruptcy Cases and the Receivership'' (the ''Coordinated Sale Motion''). Differences between the parties remained, but they too were settled, and the Trustee and the Receiver subsequently filed their ''Joint Motion for Approval of Stipulation Regarding Coordinated Sale and Coordinated Administration.'' I approved that Stipulation. In essence, the parties agreed that the value in the Trademarks was so great that all creditors in both the receivership and bankruptcy cases would be paid in full. Accordingly, the Receiver and the Trustee agreed to temporarily put aside their conflicting claims to the Trademarks and work together to locate a buyer. Further, in light of the seemingly overlapping jurisdiction by the Bankruptcy Court and the Colorado District Court over the Trademarks until title thereto was determined, it was agreed

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[1] 28 U.S.C. § 157(d) provides in relevant part:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party for cause shown.

While this section does not expressly grant authority to a bankruptcy court to make such a recommendation, I believe that I have authority to do so inasmuch as the bankruptcy court is a unit of the district court and further pursuant to 11 U.S.C. § 105(a) (''The court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title . . .).

[2] The original reference from the Massachusetts District Court is authorized by 28 U.S.C. § 157(a) and is effected by Massachusetts District Court Local Rule 201.

[3] I acknowledge that the Colorado District Court does not agree with all of the characterizations set forth below.

[4] The first appointed Trustee and his successor are interchangeably referred to as the ''Trustee,'' unless otherwise noted.

that the Receiver would take the lead role in locating and negotiating with an appropriate buyer, but no sale could be consummated absent the joint approval of the Colorado District Court and the Bankruptcy Court.

Problems continued, notwithstanding the Receiver's earlier promises to ensure that all bankruptcy creditors would be paid in full. When a buyer (IMCOA Licensing America, Inc. (''IMCOA'')) for the Trademarks was located in late 1998, the Receiver sought in the sale agreements to impose a cap on funds to be paid on account of the bankruptcy estate creditors or exclude some bankruptcy estate creditors altogether. When I indicated my inclination not to approve the sale under those conditions, the Trustee and the Receiver agreed to settle their newest dispute by placing in escrow under their joint signature and control the sum of $3.5 million of the total sale price of $17.3 million (plus other consideration). Although the Receiver reserved his right to assert competing claims to those escrowed funds, the Trustee assured me that the amount escrowed was more than sufficient to pay all bankruptcy estate claims in full. Accordingly, on January 13, 1999, I approved the sale to IMCOA. But, in a separate unpublished Memorandum of Decision of even date, I severely criticized the Receiver for what appeared me to be inappropriate conduct, including actions seemingly designed to goad a jurisdictional dispute between the Bankruptcy Court and the Colorado District Court.[5]

Not unexpectedly, following the approval of the sale, the Receiver and the Trustee had multiple disagreements as to the disposition of the $3.5 million held in escrow, including claims by the Receiver that it was entitled to certain of the funds. But, on September 9, 1999, the Trustee filed a ''Motion of Trustee to Authorize and Approve Mutual Release and Settlement Agreement with Sterling Consulting Corporation, as Receiver'' (the ''Settlement Motion''; the ''Release and Settlement Agreement''). In summary, the Release and Settlement Agreement provided for immediate payment to the Receiver out of the escrowed funds on account of a $550,000 superpriority lien claim asserted by the Receiver; allowance (but subordinated to allowed bankruptcy estate claims) of a claim allegedly purchased by the Receiver (the ''Mandleman Judgment''); an acknowledgment by the Trustee that payment in full of bankruptcy claims would not include postpetition interest; a promise of payment of the residue to the Receiver after bankruptcy estate claims had been paid in full; mutual releases[6] ; and complex schema for the division of the seemingly overlapping jurisdiction by and between the Bankruptcy Court and the Colorado District Court assuming that vari-ous contemplated (and non-contemplated) disputes might arise.[7] Most relevant here, the escrowed funds were now entrusted exclusively to the Trustee, with the Receiver's claims now asserted in the same fashion as might be asserted by any other creditor or equity security holder. The Release and Settlement Agreement provided, in pertinent part:

> 6. Escrowed Funds/Signature Requirements. Promptly, and in no event later than seven business days after payment of the Superpriority Lien in the amount of $550,000, the receiver and the Trustee shall take any and all actions and execute and deliver any and all documents or instruments as may be necessary to *terminate the joint signature requirement with respect to the Escrowed Funds or to transfer them to a new account such that the Trustee shall have sole signature authority with respect to the balance of the Escrowed Funds. The Trustee thereafter shall have sole signature authority with respect to the Escrowed Funds, provided, however, that the Trustee shall*

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5 The descriptions in the aforesaid Memorandum of Decision, dated January 13, 1999, are incorporated herein by reference. In my Clarifying Order, dated March 16, 2002, described below, I repeated and added to that criticism.

6 For reasons never fully explained, the Receiver had earlier asserted some sort of claim directly and personally against the Trustee.

7 One of those contemplated disputes was with respect to any claim by the United States against the bankruptcy estates. In light of the Receiver's obvious interest in any residue after bankruptcy claims were paid in full and the Trustee's lack of interest in the funds after payment of all administrative tax and bankruptcy claims, the Trustee agreed to prepare and file the returns, but the Receiver agreed to ''utilize the procedures in the Colorado District Court to have all federal tax returns approved on an expedited basis, consistent with Section 505 of the Bankruptcy Code.'' (Release and Settlement Agreement ¶ 11 (g).)

not make any payment except on account of Allowed Claims, and shall not make any payment on account of Allowed Claims that exceed the amount allowed or estimated in the Schedule filed with the Colorado District Court . . . , unless he obtains the prior consent of the receiver or an order of the Massachusetts Bankruptcy Court, after notice to the receiver, authorizing such payment.

. . . .

11. Jurisdiction and Venue. The Trustee and the receiver agree and acknowledge that due to the *in rem* nature of the Bankruptcy and the Receivership, disputes between the Trustee and the receiver tend to arise in both cases. In an effort to minimize jurisdictional disputes between the Bankruptcy Court and the Colorado District Court, the Trustee and the receiver agree to the following concerning the appropriate venue for any action or legal proceedings to enforce the Settlement Agreement or any of its terms or for the recovery of any loss by the Trustee or the receiver, or for any disputes between the Trustee and the receiver:

. . .

c. Receiver's Claims in the Bankruptcy Estate -Any dispute regarding any claim (including the Superpriority Lien) that has been filed in the Massachusetts Bankruptcy Court by the receiver shall be . . . . [heard in the Bankruptcy Court first, but subject to limited review by the Colorado District Court] . . . . For purposes of this paragraph, the receiver's claims shall include, without limitation, the Superpriority Lien, the Mandelman Judgement, and any distribution of the Escrowed Funds *except to holders of allowed claims for administrative expenses and to third party claimants in the Bankruptcy Estate.*

(Emphasis added).

The purpose and effect of the Release and Settlement Agreement was threefold. First, the agreement reflected a final resolution of the dispute over the funds to which the bankruptcy estates were entitled from the sale of the Trademarks. Second, the agreement reflected a final resolution as to the nature of the Receiver's claims against the bankruptcy estates and how those claims would be treated. Third, the agreement delineated the jurisdiction of each of the Bankruptcy Court and the Colorado District Court as future disputes might arise. The Colorado District Court approved the Release and Settlement Agreement first; and, subsequently, on September 21, 1999, over the objection of the United States trustee,[8] I granted the Settlement Motion, thereby granting the Trustee leave to enter into the said Agreement.

On or about October 29, 1999, the Trustee filed all of the relevant bankruptcy estate tax returns with the Internal Revenue Service, together with a request for an expedited audit under 11 U.S.C. § 505(b). Pursuant to the provisions of the Release and Settlement Agreement, the Receiver simultaneously filed with the Colorado District Court two motions seeking the Colorado District Court's determination of the tax liability of both the receivership and the bankruptcy estates. The United States objected in the Receivership Proceeding on jurisdictional grounds, claiming that the Colorado District Court lacked jurisdiction to determine the tax liability of the bankruptcy estates. The Colorado District Court overruled that objection, and ruled that it had jurisdiction over all matters which might affect the receivership estate, including the right to determine the tax liability of the bankruptcy estates. The United States appealed the Colorado District Court determination to the Tenth Circuit Court of Appeals.

In the meantime, in late December of 1999, the Trustee and the Receiver became convinced that, for reasons not relevant here, final distribution of monies to credi-

[8] The United States trustee objected only to the Release and Settlement Agreement provisions waiving postpetition interest on bankruptcy claims and providing for immediate payment of the Receiver's superpriority lien claim.

tors of the bankruptcy estates before year's end afforded significant tax advantages for each estate. However, at that time, the Receiver and the Trustee still found themselves at odds with the United States with respect to the administrative tax liability, if any, of the bankruptcy estates to the United States. The ongoing dispute with the United States remained an obstacle to a final distribution. A plan to overcome that Obstacle was formed by the Receiver and the Trustee. On December 22, 1999, the Trustee filed his final accounts in each of the bankruptcy cases and asked for expedited determination of their approval. At the hearing, the Trustee and the Receiver suggested that I authorize the Trustee's request for approval of a final distribution to creditors of the bankruptcy estates. The sum of approximately $437,000 would be distributed to the Receiver on account of the administrative tax claim, but be held in escrow for the United States pending the Colorado District Court determination of the amount due. The United States objected. It argued again that the Colorado District Court had no jurisdiction to determine the tax obligations of the bankruptcy estates, notwithstanding the Receiver's claim to the residue of the escrowed funds. It further argued that the administrative tax obligations of the bankruptcy estates might approximate as much as $1.2 million. Attempting to accommodate the concerns of the United States (but concededly over its objection), I, on December 30, 1999, estimated the claim of the United States at $1.2 million for the purposes of distribution, pursuant to 11 U.S.C. § 502(c) and granted the Trustee leave, inter alia, to (i) transfer $1.2 million to the Receiver to be held in escrow subject to the Colorado District Court administrative tax determination, and (ii) pay the remainder of the $3.5 million allocation to bankruptcy estate creditors.

Specifically, in the December 22, 1999 Order, I found and ruled in relevant part:

FINDINGS OF FACT

22.

. . . .

(b) Delivery of $1.2 Million dollars to Receiver to be held in escrow. The Trustee will deliver a check in the amount of $1.2 Million Dollars to the Receiver to be deposited into an interest bearing account and held in escrow for distribution as described below.

. . . .

(d) Disposition of funds to be held in escrow by Receiver. The Receiver agreed to hold the $1.2 Million Dollars distributed to him in escrow. Those funds will be held in escrow to be paid out in the following order of priority and at the following times: (i) first, to the IRS in the amount necessary to fully satisfy all federal tax liabilities . . . (ii) next, to all holders of allowed general unsecured claims in the Bankruptcy Cases until said claims have been paid 100% of the allowed amount as set forth in the Accounts, and (iii) then any remaining funds to the Receiver on account of the Mandelman Judgment and pursuant to the Release and Settlement Agreement.

(e) Interest on the escrowed funds. Any interest accruals on the $1.2 Million held by the Receiver in escrow shall be retained by the Receiver.

. . . .

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

. . .

ORDERED and ADJUDGED that the Receiver's Agreement to act as escrow agent for purposes of making distributions to the IRS (if any) and to general unsecured creditors is approved and the Receiver shall hold in escrow all $1.2 Million Dollars delivered to it pursuant to the Modifications for the benefit of the IRS and the general unsecured creditors of the Debtors. The Receiver will act as an escrow agent with no discretion to disburse funds other than according to the terms of this Order. Notwithstanding the foregoing, the Receiver is authorized to retain any interest accruals on the $1.2 Million Dollars to be distributed to it [.]

(December 30, 1999 Findings of Fact, Conclusions of Law and Order Approving Trustee's Amended Final Accounts at 7, 8, 14–15.)

Accordingly, by complementary orders issued by the two courts, I attempted to cede jurisdiction over outstanding administrative tax claims against the bankruptcy estates to the Colorado District Court, and the Colorado District Court attempted to accept that jurisdiction. That effort failed. Upon appeal by the United States, the Bankruptcy Appellate Panel for the First Circuit and the Tenth Circuit Court of Appeals issued their respective reversals. See United States v. Sterling Consulting Corp. (In re Indian Motocycle, Co.), 259 B.R. 458 [87 AFTR 2d 2001-1569] (2001), *vacated and superseded* by Sterling Consulting Corp. v. United States, 261 B.R. 800 [88 AFTR 2d 2001-5528] (BAP 1st Cir. 2001) and by Sterling Consulting Corp. v. United States, 245 F.3d 1161 [87 AFTR 2d 2001-1645] (10th Cir. 2001), *cert. denied,* 122 S.Ct. 921 (2002).[9]

Following the rulings by the First Circuit BAP and the Tenth Circuit Court of Appeals, I, again at the insistence of the United States, sought to return matters to the *status quo ante.* Despite these efforts, return and accounting of the funds transferred to the Receiver and the interest earned thereon was not forthcoming. Moreover, the Receiver continued litigation and/or discovery in the Colorado District Court, with the apparent purpose of affecting the determination of tax obligations against the bankruptcy estates (which determination had been reserved to this Court alone by both the First Circuit BAP and the Tenth Circuit Court of Appeals). The United States, the affected tax claimant, sought injunctive and other relief against the Receiver in the Bankruptcy Court, claiming a violation by the Receiver of the automatic stay provisions (11 U.S.C. § 362(a)) of the Bankruptcy Code. I repeatedly encouraged settlement, but without success. Finally, I was required to rule, in light of the automatic stay under 11 U.S.C. § 362(a) and the exclusive jurisdiction over estate property conferred by 28 U.S.C. § 1334(a) on the United States District Court for the District of Massachusetts (of which the Bankruptcy Court is a unit), that the Receiver must return the funds delivered to him in escrow, account for the interest accrued and terminate the discovery ongoing in the Colorado District Court. I also denied the Receiver's request that I transfer venue of the bankruptcy cases to the Colorado District Court, pursuant to 28 U.S.C. § 1412. See In re Indian Motocycle Company, Inc., et. al., 266 B.R. 243 (Bankr. D. Mass. 2001). The Receiver appealed to the Massachusetts District Court, but sought no stay from that court pending appeal.

On August 20, 2001, Magistrate Judge Schlatter, issued his decision in response to the Receiver's request for instructions. Judge Schlatter disagreed with my view of the applicable law, but he instructed the Receiver to return the $1.2 Million to the Bankruptcy Court, to provide an accounting of interest in some form, and to defer the outstanding discovery. The moneys were subsequently returned and are now held by the Trustee, subject to further order of this Court. However, the accounting

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[9] In its ruling of March 13, 2001 in United States of America v. Sterling Consulting Corp. (In re Indian Motocycle, Co.), 259 B.R. 458 [87 AFTR 2d 2001-1569] (BAP 1st Cir. 2001), *vacated and superseded* on April 26, 2001, 261 B.R. 800 [88 AFTR 2d 2001-5528] (BAP 1st Cir. 2001) (the "BAP Decision"), the BAP reversed my December 30, 1999 order and remanded. It held that I improperly ceded jurisdiction of the bankruptcy estates' administrative tax liability to the Colorado District Court and had no right to abstain to the Colorado District Court because that court "was without jurisdiction to determine the tax liabilities of the bankruptcy estates, which are core matters within the exclusive jurisdiction of the bankruptcy court." In re Indian Motocycle, Co., 261 B.R. at 808. The BAP further held that I had no authority to estimate the administrative tax liability under 11 U.S.C. §502(c) in light of the rights afforded the United States under 11 U.S.C. §505(b). Accordingly, the BAP reversed both my order limiting the tax liability of the bankruptcy estates to the United States and the order making the final distributions. Id. at 810. And, as to the latter, the BAP's attention was squarely fixed on reversing the distribution of the $1.2 Million Dollars delivered in escrow to the Receiver. Id. at 806.

On April 10, 2001, the Tenth Circuit Court of Appeals issued a complementary ruling (the "Tenth Circuit Decision"), reversing the Colorado District Court's order accepting jurisdiction to determine the said tax. Sterling Consulting Corp. v. United States, 245 F.3d 1161 [87 AFTR 2d 2001-1645] (10th Cir. 2001). It ruled, inter alia, that, (i) pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and its exemptions, district courts are precluded from making declaratory judgments with respect to the federal taxes owed by bankruptcy estates, except as permitted by 11 U.S.C. §§ 505 and 1146, Id. at 1165–66, and (ii) the jurisdiction to invoke § 505 is limited to the district court in which the bankruptcy case is filed, Id.; 28 U.S.C. § 1334(b). The court specifically noted that, while I attempted to cede jurisdiction of the tax dispute to the Colorado District Court, I did not "effectuate a transfer of the bankruptcy proceeding to the district court in Colorado pursuant to 28 U.S.C. § 1412, which might have conferred jurisdiction on the [District Court] over a § 505 action." Id. at 1166.

was repeatedly delayed.[10] In the interim, the Receiver presented new theories to the Colorado Colorado District Court supporting its power to distribute the $1.2 million now held by the Trustee and/or affect the determination of the administrative tax claim, if any, owed by the bankruptcy estates to the United States.

The United States responded by seeking renewed injunctions against the Receiver in the Bankruptcy Court. Again, in light of 11 U.S.C. § 362(a) and 28 U.S.C. §1334(a), I had no option. In a carefully worded Order, dated November 21, 2001, I crafted an injunction tailored to enjoin the Receiver from bringing any actions before the Colorado District Court which would (i) affect the administrative tax claim, (ii) determine the Receiver's claim against the bankruptcy estates, or (iii) determine the distribution of the funds which I had already held were property of the bankruptcy estates and which both courts had previously ruled were to be distributed by the Trustee.[11] Once more, the Receiver appealed my Order to the Massachusetts District Court, but sought no stay from that court pending appeal.

On or about March 5, 2002, the Receiver took another path. It filed a ''Motion to the Judicial Panel on MultiDistrict Litigation [the 'MultiDistrict Panel'] for Consolidated Proceedings Pursuant to 28 U.S.C. § 1407.'' The Colorado District Court found favor with the Receiver's approach.[12] It offered itself as a ''transferee court,'' and in a subsequent letter to the MultiDistrict Panel, dated May 23, 2002, even suggested the Massachusetts District Court as an alternative transferee court. Ultimately, in a ruling, issued June 17, 2002, the MultiDistrict Panel declined jurisdiction, but encouraged the parties to consider creative solutions to the jurisdictional conflict.

Following the decision of the MultiDistrict Panel, the Receiver sought to move its efforts forward in the Colorado District Court, and urged a case management conference on various issues, including, an action filed against the Trustee under 28 U.S.C. § 2410 for a determination of title to assets which I had previously held were property of the bankruptcy estates and protected by the automatic stay under § 362(a). The Colorado District Court scheduled that case management conference for July 16, 2002. Because the case management conference included requests by the Receiver which I had previously ruled to be violations of the automatic stay, the Trustee and the United States countered by filing a motion with the Bankruptcy Court seeking injunctive relief and sanctions against the Receiver.

Mindful of (i) the Multidistrict Panel's suggestion that a creative solution be sought, and (ii) the Colorado's District Court's suggestion to the Multidistrict Panel that the Colorado District Court would find the Massachusetts District Court as a suitable alternative as a ''transferee'' court, and concerned about an impending jurisdictional ''showdown'' arising from the parties' recent pleadings, I scheduled an emergency status conference in the bankruptcy cases for July 15, 2002, one day in advance of the case management conference scheduled by the Colorado District Court. In that July 15, 2002 status conference, I openly suggested[13] that, if the Colorado District Court would favorably consider transferring the Receivership Proceeding to the Massachusetts District Court, this time pursuant to 28 U.S.C. § 1412 (as it had offered to do in

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10 Notwithstanding the August 3 Order, the Receiver simply ignored the deadline set forth in that Order for providing the accounting on accrued interest. Extensions were sought from and granted by the Colorado Magistrate Judge.

11 On February 28, 2002, Judge Weinshienk issued a strongly worded Order criticizing me for issuing the November 21, 2001 Order and ''suggested'' that it be withdrawn. On March 16, 2002, I issued a ''Clarifying Order,'' which demonstrated that Judge Weinshienk had relied on the wrong document in reaching her conclusions. Since that time, I have received a communication from Magistrate Judge Schlatter, acknowledging Judge Weinshienk's error. While the Colorado District Court still holds the view that its fundamental conclusions of law on jurisdiction are correct, Judge Schlatter communicated his regret and that of Judge Weinshienk as to the apparent ''air of friction'' between the two courts. I have always respected the views held by the Colorado District Court. I also believe that friction, if any, between the courts has not been of our own making, and I join in an expression of regret that the referenced jurisdictional dispute has not been more easily soluble.

12 I was not asked for, and did not offer, a position on the Receiver's request, but had some doubts about whether the Panel was formed to handle the kinds of jurisdictional issues raised by the instant fact pattern.

13 I arranged for an audio tape of the status conference to be sent to Magistrate Judge Schlatter by overnight mail.

its correspondence to the MultiDistrict Panel), I would recommend to the Massachusetts District Court that the reference of the bankruptcy cases be withdrawn so that the jurisdictional conflict could be resolved

On July 17, 2002, Magistrate Judge Schlatter advised me that the Colorado District Court found the proposal favorable, and was in the process of issuing an order transferring the Receivership Proceeding to the Massachusetts District Court.[14] The Order of Transfer was indeed issued by the Colorado District Court on July 19, 2002.

II. RECOMMENDATION

[1] I respectfully recommend that the reference of the bankruptcy cases from the Massachusetts District Court to the Bankruptcy Court be withdrawn, for cause shown. Absent acceptance of the transfer of the Receivership Proceeding from the Colorado District Court and withdrawal of the reference of the bankruptcy cases, the Bankruptcy Court and the Colorado District Court are likely to continue to adhere to their respective strongly held views that each has exclusive jurisdiction to determine the remaining issues between the Trustee and the Receiver. The determinations of the two courts would certainly be conflicting, leading to interminable appeals and a certain dissipation of the remaining assets claimed by both estates. Further, action by the Massachusetts District Court would preserve the comity which the Bankruptcy Court and the Colorado District Court have struggled to preserve, notwithstanding significant obstacles.

RESPECTFULLY SUBMITTED this 24th day of July, 2002

Henry J. Boroff

United States Bankruptcy Judge

ORDER

The Clerk of this Court is ordered to serve the foregoing by mail, on counsel for the Receiver, the Trustee, counsel for the United States[15] , the United States trustee, and on the service list employed by this Court with reference to its Clarifying Order of March 16, 2002, and to forward an additional copy to the attention of the Honorable Zita L. Weinshienk, Senior District Judge of the United States Colorado District Court for the District of Colorado and O. Edward Schlatter, United States Magistrate Judge.

Dated: July 24, 2002

Henry J. Boroff.

¶2002-5210

In Re: Receivership Estate of INDIAN MOTORCYCLE MANUFACTURING, INC., a New Mexico corporation, and concerning United States of America, Intervenor. U.S. District Court, Dist. of Colorado, (DC CO) Docket No. 95-Z-777 (OES), July 19, 2002. Earlier proceedings at (2002, DC CO) 89 AFTR 2d 2002-2925; (2002, DC CO) 89 AFTR 2d 2002-1451; and (2001, CA10) 87 AFTR 2d 2001-1645, 245 F3d 1161, reversing (2001, DC CO) 87 AFTR 2d 2001-2065. Decision for Taxpayer and for Govt.

1. District court jurisdiction—receivership actions—bankruptcy—transfer of venue. District court transferred 7 year-old receivership case to district where related bankruptcy proceedings were pending: transfer was in interests of justice and judicial economy. Also, court recommended granting receiver's request for administrative expenses and legal fees. *Reference:* United States Tax Reporter ¶74,025.01(42). IRC §7402.

In the United States District Court for the District of Colorado.

Order of Transfer to the District of Massachusetts

WEINSHIENK, District Judge:

[1] This matter is before the Court on the Court's own motion for consideration of a transfer to another district court under

[14] I was pleased, but somewhat surprised, with the speed with which my suggestion was accepted, and regret that the Colorado District Court acted before I had an opportunity to present this proposal to the Massachusetts District Court.

[15] A copy of this Order shall also be transmitted to counsel for the United States by facsimile transmission.

28 U.S.C. § 1404(a), which provides that a district court may transfer any civil action to any other district where it might have been brought if the court determines that such a transfer would be "(f)or the convenience of parties ..." and "in the interest of justice."

This case is a receivership proceeding that has been active in this Court since 1995. The proceeding has been complex, time-consuming, and at times frustrating. Bankruptcy proceedings related to this receivership were filed in 1993 and 1994, and are presently pending before United States Bankruptcy Judge Henry J. Boroff in the District of Massachusetts (Case Nos. 93-41954-HJB; 93-41955-HJB; 94-42288-HJB). Over one million dollars is currently being held in escrow by the Bankruptcy Court pending resolution of tax issues.

A receiver was appointed by this Court in 1995, and was extraordinarily successful in marshaling the assets of the historical Indian Motorcycle Company, particularly in consolidating the ownership of the various Indian trademarks into one entity. The success of this receivership was reflected in the eventual sale of those assets for almost $20,000,000, a sum that allowed the receiver to reimburse all of the creditors of the receivership and bankruptcy estates at almost 100 percent of the amounts owed. The receiver was diligent in the performance of its duties, and performed at all times in an ethical manner. Throughout the receivership, the receiver worked closely with this Court, and with United States Magistrate Judge O. Edward Schlatter, who has done a yeoman job of managing, guiding, and ruling in this complex case. This Court sincerely regrets that it must, in the best interest of all the parties and in the interest of justice, transfer this case to another jurisdiction for its final resolution.

The vast majority of the proceedings in both the bankruptcy and receivership estates have been completed. Remaining are those issues that relate primarily to disputes over the assessments made by the Internal Revenue Service with regard to taxes. However, the disputes with regard to tax issues have taken a back seat to disagreements between the parties over which court has the jurisdiction to rule on the remaining issues, the Colorado District Court or the Massachusetts Bankruptcy Court. Enormous time and energy has been expended by counsel, and necessarily by both courts, in addressing these jurisdictional disputes.

Jurisdictional disputes have also given rise to a number of mis-communications and conflicting rulings between the two courts. As a result, the three judges in both of the courts, Magistrate Judge Schlatter, Bankruptcy Judge Boroff, and myself, have become aware that the most appropriate means for avoiding future mis-communications and inconsistent rulings is to transfer all remaining matters into a single forum.

This Order Of Transfer To The District Of Massachusetts is being made in response to a statement made by Judge Boroff to all counsel in a status conference that he concluded on July 15, 2002. Judge Boroff informed the lawyers that if the District of Colorado transferred its case to the District of Massachusetts, then he would submit a recommendation to the Massachusetts District Court that it withdraw the standing order of reference as to his cases. The goal of the transfer is to achieve a consolidation in one forum of all remaining issues in the receivership and bankruptcy cases, thereby resolving the unfortunate jurisdictional disputes which have adversely affected the expedient resolution of this case. Accordingly, I find that the interests of the parties and the interests of justice would be best served in this case by a transfer from the District of Colorado to the District of Massachusetts. This Court strongly believes that such a transfer will operate in the interests of judicial economy, and in the best interests of all involved.

Counsel for the receiver has asked that this Court, in transferring its case, recommend that the Clerk for the District of Massachusetts assign this case to a district court judge who sits in the City of Boston. The receiver states that travel arrangements from Colorado to cities other than Boston are very difficult, causing increased delay

and expense. That request for recommendation will be granted.

The receiver also requests this Court to enter an order that provides to the receiver some funding for administrative expenses and legal fees. This Court has never expected the receiver and his counsel to perform without compensation. However, because the case is being transferred to another jurisdiction, the receiver's request properly should be considered by the transferee court. This Court will recommend, however, that the District Court for the District of Massachusetts consider the receiver's request for funding at the earliest opportunity.

For all of the above reasons, and because this Court finds that the interests of justice will be best served by the transfer of this action to the District of Massachusetts, it is

ORDERED that pursuant to the provisions of 28 U.S.C. § 1404(a), this case is transferred to the United States District Court for the District of Massachusetts. It is

FURTHER ORDERED that the Clerk of this Court shall transfer the case file herein to the Clerk for the United States District Court for the District of Massachusetts. It is

RECOMMENDED that the Clerk for the District of Massachusetts assign this case to a district judge who sits in the City of Boston. It is

FURTHER RECOMMENDED that the district judge to whom this case is assigned consider, at the earliest opportunity, a request from the receiver for funding for administrative expenses and legal fees.

DATED at Denver, Colorado, this 19 day of July, 2002.

BY THE COURT:

ZITA L. WEINSHIENK, Senior Judge

United States District Court

¶2002-5211

Rodell JOHNSON, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Colorado, (DC CO) Docket No. 01-WY-1107-CB, July 3, 2002. Year 1999. Decision for Govt.

1. Recovery of erroneous refunds—limitations periods—income exclusions—damages for personal injuries or sickness—Americans with Disabilities Act. Govt. was granted summary judgment on its counterclaim to recover erroneous refund of taxes on front and back pay portions of taxpayer's ADA award, which he tried to exclude from gross income under IRC §104(a)(2): payments weren't excludable where they were received on account of discrimination, not physical injuries; and fact that taxpayer wouldn't have suffered discrimination but for those underlying injuries was too tenuous/indirect to bring his claim within statute's reach. Also, limitations period didn't bar govt.'s claim where it was timely filed approximately 6 months after refund's issuance. *Reference:* United States Tax Reporter ¶1045.02(15); 74,055.01(32). IRC §104; 6532; 7405.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

CLARENCE A. BRIMMER, UNITED STATES DISTRICT JUDGE

This case involves a disputed income tax refund originally claimed by Plaintiff on his 1999 tax return. The case is now before the Court on Defendant's Motion for Summary Judgment. After reading the briefs, hearing oral argument, and being fully advised of the premises, the Court FINDS and ORDERS as follows:

Parties and Jurisdiction

Plaintiff Rodell Johnson is a resident of the state of Colorado. Defendant is the United States of America. Jurisdiction is proper pursuant to 28 U.S.C. § 1346, as this is a civil action against the United States for the recovery of an internal-revenue tax alleged to have been erroneously assessed against the Plaintiff. Venue is proper pursuant to 28 U.S.C. § 1391(e).

Background

Plaintiff was employed as a guard at a Colorado juvenile correctional institution under the control of the State of Colorado and its Department of Corrections. During the course of his employment, Plaintiff was injured in a confrontation with a juvenile. When Plaintiff could not return to his previous job because of his continuing physical problems, he was fired. Plaintiff brought suit against the State of Colorado under the Americans with Disabilities Act (42 U.S.C. §§ 12101–12213) for failing to accommodate him in his physically injured state, and subsequently discharging him. Plaintiff prevailed on his claim of discrimination and was awarded a verdict in the amounts of: $103,300.00 back pay; $190.100.00 front pay; $50,000.00 emotional distress; $8.304.00 pre-judgment interest; and $70,127.00 attorneys fees and costs. See Judgment Order and Verdict Form in Rodell Johnson v. Colorado Department of Human Services, Division of Youth Services. (96-CV-3100) attached as Exhibit 3 to Def.'s Mot. for Summ. J.

In 1999, the State of Colorado paid Plaintiff pursuant to the Judgment Order. The state withheld $90,373.00 of that judgment, which it paid to the IRS for federal income taxes. $75,694.00 was applied to Plaintiff's 1999 tax liability on the $293,400.00 front and back pay portions of the judgment. Plaintiff filed his 1999 income tax return on August 9, 2000 which did not claim the front and back pay awards as income, and which claimed that he had overpaid in the amount of $75,694.00. Plaintiff claimed that he was owed this refund pursuant to 26 U.S.C.§104[1] as the front and back pay should be considered an 'Exemption from income of compensation for physical injuries and damages arising directly therefrom.'

Approximately three months later. Plaintiff was informed that his return had been assigned for audit. IRS Auditor Spraggins then contacted Plaintiff for a meeting on December 15,2000 with regard to the audit. Plaintiff, his accountant, and his attorney met with Spraggins twice. On April 4, 2001, Spraggins informed Plaintiff orally that he was rejecting his refund request. The IRS determined that Plaintiff was not entitled to the refund because the front and back pay awards were not exempt from taxation pursuant to 26 U.S.C.§104. Plaintiff filed the present suit on June 18, 2001, claiming that since he had not received a formal IRS rejection as dictated by 26 U.S.C. § 6213, he was entitled to sue under 28 U.S.C. §§ 1346(a)(1), 2412 and 26 U.S.C. § 7422. Less than one month after Plaintiff filed suit, he received a refund from the IRS in the amount of $84,211.61, representing the exact amount Plaintiff claimed he had overpaid plus interest.

This Court denied Defendant's motion to dismiss for lack of subject matter jurisdiction in January, 2002, and instructed Defendant to file its counterclaim, which it has since done. Defendant also filed a motion for summary judgment which is now before the Court. Defendant alleges in its Counterclaim that the IRS accidently and erroneously issued a refund to Plaintiff in the amount of $84,211.61 even though it determined that Plaintiff was not entitled to the refund. Defendant claims that because Plaintiff negotiated the erroneous refund check. Plaintiff now owes Defendant $84,211.61. Defendant claims that the refund was an error because the $293,400.00 front and back pay awarded as a result of Plaintiff's ADA lawsuit was actually taxa-

[1] 26 U.S.C. § 104(a)(2) provides in pertinent part: "Compensation for injuries or sickness. (a) In general. Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include ... (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness ....

ble income, and not under 26 U.S.C.§104, as Plaintiff claims.

Discussion

Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there are no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." Jenkins v. Wood, 81 F.3d 988, 990 (10th Cir. 1996) (quoting Fed. R. Civ. P. 56(c)). The court views the evidence in the light most favorable to the party opposing summary judgment. Jenkins, 81 F.3d at 990.

The party moving for summary judgment bears the initial burden of demonstrating that there is an absence of evidence to support the nonmoving party's claims. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The burden then shifts to the nonmoving party to establish the existence of an essential element of the claims on which they bear the burden of proof at trial. Id. And "[w]hile the movant bears the burden of showing the absence of a genuine issue of material fact, the movant need not negate the nonmovant's claim." Jenkins, 81 F.3d at 990.

To satisfy this burden, the nonmoving party must go beyond the pleadings and designate specific facts to make a showing that there is a genuine issue for trial. Ford v. West, 222 F.3d 767, 774 (10th Cir. 2000) (quoting McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998)). In order to successfully resist summary judgment, there must be sufficient evidence on which a jury could reasonably find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986). "The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is 'genuine'; an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant." Lawmaster v. Ward, 125 F.3d 1341, 1347 (10th Cir. 1997).

Recovery of a Tax Refund Erroneously Issued

[1] As Plaintiff has already received the refund that he was originally requesting in filing this suit, the still-outstanding issues as Plaintiff states them are: "1) adjudication of reasonable attorney's fees and costs based on the IRS's adherence to a legal position which is not substantially justified and has been unreasonable considering that it took this suit to force them to pay Plaintiff's claim; and 2) Plaintiff's demand that the IRS be ordered to correct its own records, correct records which by law and agreement are transmitted to the State of Colorado, and to correctly report to any jurisdiction and credit reporting entity that Plaintiff is no longer indebted." See Plaintiff Johnson's Response to Defendant United States' Motion to Dismiss, p. 3. As Plaintiff's remaining issues depend upon whether or not the refund was in error, the Court will determine that issue initially, and the determination thereon will render Plaintiff's other arguments moot.

26 U.S.C. § 7405(b) provides: "Refunds otherwise erroneous. Any portion of a tax imposed by this title which has been erroneously refunded ... may be recovered by civil action brought in the name of the United States." To prevail in an action to recover an erroneous refund brought pursuant to Section 7405(b), the government must establish; 1) that a refund was paid to the taxpayers; 2) the amount of the refund; 3) that the government's recovery action was timely; and 4) that the taxpayers were not entitled to the refund which the government seeks to recover. See United States v. Daum, 968 F.Supp. 1037, 1041–42 [81 AFTR 2d 98-792] (W.D.Pa. 1997), citing United States v. Commercial National Bank of Peoria, 874 F.2d 1165, 1169 [63 AFTR 2d 89-1428] (7th Cir. 1989). In the present case. Plaintiff does not dispute that a refund was issued to him in the amount of $84,211.61. Also, Plaintiff has not disputed the timeliness of Defendant's Counterclaim, though he has made some reference indicating that the "IRS was negligently out of time to insist on compliance with ordinary administrative

procedure exhaustion." See Plaintiff Johnson's Response to Defendant United States' Motion to Dismiss, p. 3. As the United States filed its Counterclaim approximately six months after the issuance of the refund, this action is timely.[2] Therefore, the only issue in this case is whether Plaintiff was entitled to the refund that he received or whether it was issued in error—this is strictly a question of law which involves the interpretation of 26 U.S.C. § 104(a)(2).

26 U.S.C. § 104(a)(2) provides in pertinent part; "Compensation for injuries or sickness. (a) In general. Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include ... (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness...." Plaintiff claims that this section excludes from his gross income for 1999 the amounts of front and back pay that he received as part of his Judgment in his ADA suit, as these amounts "aris[e] directly out of his physical injuries while employed by the State of Colorado ... [as these amounts] were a direct measure of his physical injury together with the tort damages which he received for severe emotional distress. Although the plaintiff's case was brought under the parameters of the ADA and common law tort for severe emotional distress, the true core of the case arose directly from Johnson's on-the-job physical injuries absent with he would have had no other claims." See Plaintiff Johnson's Response to Defendant United States' Motion to Dismiss, p. 5. Plaintiff misreads the law.

Gross income is broadly defined. Commissioner of Internal Revenue v. Schleier, 515 U.S. 323, 327–28 [75 AFTR 2d 95-2675] (1995). "Except as otherwise pro-vided in this subtitle, gross income means all income from whatever source derived." 26 U.S.C. § 61(a). The United States Supreme Court has repeatedly emphasized the "sweeping scope" of this section and its statutory predecessors. Id., citing Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 429 [47 AFTR 162] (1955); United States v. Burke, 504 U.S. 229, 233 [69 AFTR 2d 92-1293] (1992): Helvering v. Clifford, 309 U.S. 331, 334 [23 AFTR 1077] (1940). Courts give effect to the broad definition of § 61 (a) by interpreting statutory exclusions from gross income narrowly. Burke, 504 U.S. at 233.

The United States Supreme Court has articulated two independent requirements that must be met in order for a person to exclude amounts from gross income under 26 U.S.C. § 104(a)(2): 1) taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is based upon tort or tort type rights; and 2) taxpayer must show that the damages were received on account of personal injuries or sickness. Schleier, 515 U.S. at 337. Since Schleier, Congress has amended § 104(a)(2) to impose even further restrictions on excludable income, making the language in the second prong of the Schleier test read "personal *physical* injuries or *physical* sickness." 26 U.S.C. §104(a)(2) (emphasis added).

The first prong of the Schleier test requires that the underlying cause of action be based on tort type rights. However, in the present case, both parties focus their argument on the second prong of the Schleier test, namely, Plaintiff's claim that his personal physical injuries are the underlying cause of his recovery of back pay and front pay in his ADA suit, and are thus excludable. Thus, as neither party disputes that the ADA could be considered to be based on tort type rights, the Court will assume without deciding that Plaintiff's ADA suit satisfies the first prong of the Schleier test. As the ADA offers a broad range of remedies, including compensatory, damages it probably satisfies the test, were that a contested issue in this case. See Burke, 504 U.S. at 235 (Remedial princi-

[2] 26 U.S.C. § 6532(b) provides in relevant part: "Suits by United States for recovery of erroneous refunds. Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund...."

ples figure prominently in the definition and conceptualization of torts .... one of the hallmarks of traditional tort liability is the availability of a broad range of damages to compensate the plaintiff fairly for injuries caused by the violation of his legal rights.), citing Carey v. Piphus, 435 U.S. 247, 257 (1978).

The second prong of the Schleier test focuses on whether or not the damages that a taxpayer received were on account of personal physical injuries or physical sickness. Congress has specifically stated that emotional distress shall not be treated as a physical injury or physical sickness for the purposes of exemption from income. See 26 U.S.C. § 104. Plaintiff argues that he was discriminatorily discharged from his job due to physical injuries that he received during the course of his employment duties, giving rise to his recovery of front and back pay under the ADA. Defendant argues that this causal link is too tenuous to support exemption from taxation under §104(a)(2), and that the actual injury that Plaintiff recovered for was discrimination, which does not qualify as a physical injury for the purposes of § 104(a)(2). The Court agrees with Defendant on both points.

In attempting to define the phrase "on account of," the United States Supreme Court rejected the "but-for" causal connection that Plaintiff is arguing should apply to his case. O'Gilvie v. United States, 519 U.S. 79 [78 AFTR 2d 96-7454] (1996). First, it must be noted that the phrase "on account of" is not amenable to an unambiguous definition. Id. at 82. In O'Gilvie, the Court rejected the petitioners' argument that only a "but-for" causal connection needed to exist between the damages awarded and the underlying suit:

> On one linguistic interpretation of those words, that of petitioners, they require no more than a "but-for" connection between "any" damages and a lawsuit for personal injuries. They would thereby bring virtually all personal injury lawsuit damages within the scope of the provision, since: "but for the personal injury, there would be no lawsuit, and but for the lawsuit, there would be no damages." On the Government's alternative interpretation, however, those words impose a stronger causal connection, making the provision applicable only to those personal injury lawsuit damages that were awarded by reason of, or because of, the personal injuries .... We agree with the Government's interpretation of the statute. For one thing, its interpretation gives the phrase "on account of" a meaning consistent with the dictionary definition. See, e.g., Webster's Third New International Dictionary 13 (1981) ("for the sake of: by reason of: because of").

Id. at 82–83.

In the present case, Plaintiff urges that the Court accept an argument similar to the petitioner's in O'Gilvie—namely, but for the physical injuries that Plaintiff sustained during the course of his employment, he would not have been discriminatorily discharged and thus not have received a verdict in his ADA lawsuit. Such a causal connection is too tenuous to support Plaintiff's exclusion of front and back pay under § 104(a)(2). The damages that Plaintiff received were "on account of" discrimination, not "on account of" physical injuries. To find otherwise would be contrary to O'Gilvie, as the Court there found that punitive damages were awarded not "on account of" the physical injury suffered, but rather "on account of" "a defendant's reprehensible conduct and the jury's need to punish and to deter it."[3] Id. at 83. The Tenth Circuit has also recognized that there must be a closer connection than the "but-for" causation proposed by Plaintiff in interpreting Supreme Court precedent, namely "that the Court emphasized that there should be a direct link between the injury and the remedial relief. See Brabson v. United States, 73 F.3d 1040, 1047 [77 AFTR 2d 96-572] (10th Cir. 1996) (citing Schleier, 515 U.S. at 330) ('Thus, in our automobile hypotheti-

[3] Note that § 104(a)(2) was amended by Congress subsequent to this opinion to specifically include punitive damages in taxable income, effectively codifying the Supreme Court's holding in O'Gilvie.

cal, the accident causes a personal injury which in turn causes a loss of wages.'). Other circuits have also emphasized the importance of this direct causal connection. See Greer v. United States, 207 F.3d 322, 334 [85 AFTR 2d 2000-1876] (6th Cir. 2000) (requiring concrete evidence demonstrating the precise causal connection between personal injuries and damages recovered, a showing Schleier requires before a court can render a payment excludable); Fabry v. Commissioner, 223 F.3d 1261, 1269–70 [86 AFTR 2d 2000-5672] (11th Cir. 2000) (in order to satisfy Schleier and qualify for the exclusion, it appears that a cause and effect relationship must be established between the tort, the personal injury resulting, and the amount received).

In the present case, there is no such direct link between the Plaintiff's physical injuries and his ADA recovery. Instead, they are one step removed, with the discriminatory discharge of Plaintiff separating them.[4] Therefore, the Court finds that Plaintiff's front and back pay awards are not excludable from his income for 1999 under 26 U.S.C. § 104(a)(2) as he has argued. Therefore, the IRS is entitled to recover the tax refund erroneously made to Plaintiff. As this was a purely legal question and no genuine issue of material fact remains. Defendant's Motion for Summary Judgment is GRANTED as to its Counterclaim to Recover Erroneous Tax Refund. Thus, the Court need go no further to address Plaintiff's other concerns, namely that he should receive attorney's fees as Defendant's suit was unjustified, and that Defendant should remove the mark created by his tax default from his credit report - as neither of these issues remain after finding that Plaintiff did in fact owe income tax on his ADA judgment.

Conclusion

Therefore, for all of the aforementioned reasons, the Court finds that Plaintiff's award of front and back pay pursuant to his ADA judgment are not excludable from his gross income under 26 U.S.C. § 104(a)(2). Defendant's Motion for Summary Judgment as to its Counterclaim to Recover Erroneous Tax Refund is therefore GRANTED and Plaintiff's claims shall be DISMISSED WITH PREJUDICE. Plaintiff is HEREBY ORDERED to repay the erroneous tax refund in the amount of $84,211.61, to the IRS, plus interest accruing at 2.13% from the date that Plaintiff negotiated the refund check (on or about July 16, 2001) through the date of payment of the full amount. Payment shall be made within ten days from the date upon which this judgment becomes final after the thirty day period for notice of appeal expires or, if an appeal is conducted, after the mandate of the Court of Appeals is filed in this Court after the appeal is concluded.

Dated this 3rd day of July, 2002.

CLARENCE A. BRIMMER,

UNITED STATES DISTRICT JUDGE

¶2002-5212

David HEMPEL, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Western Dist. of Washington, (DC WA) Docket No. C01-1334P, July 23, 2002. Earlier proceeding at (2002, DC WA) 90 AFTR 2d 2002-5236. Decision against Taxpayer.

1. Actions against U.S.—Declaratory Judgment Act—injunctive relief—ex parte petitions—reconsideration—local rules. Taxpayer's motion to reconsider denial of declaratory judgment was stricken as unauthorized under local rules: motion was filed more than 10 days after denial of original motion for ''emergency ex parte declaratory judgment''; if construed as motion to reconsider prior denied reconsideration motion, it was still untimely filed; and local rules didn't contemplate repetitive motions to reconsider.

[4] Additionally, it should be noted that (although Plaintiff does not seem to argue this), Congress amended § 104(a)(2) in the Small Business Job Protection Act of 1996 to exclude non-physical injury awards from deserving exclusion from income. As discrimination is not a physical injury. Plaintiff's claim would also fail on this basis. See 26 U.S.C. § 104 Historical and Statutory Notes, P.L. 104-188 § 1605; Fabry v. Commissioner, 223 F.3d 1261, 1262], fn. 1 [86 AFTR 2d 2000-5672 (11th Cir. 2000) (''The amendment provides that damages received on account of a non-physical injury (e.g. age discrimination and injury to reputation) are not excludable from gross income.'').

Reference: United States Tax Reporter ¶74,336.504(61); 74,217.502(5); 74,336.504(65).

United States District Court, Western District of Washington at Seattle.

Order Denying Motion to Reconsider

PECHMAN, District Judge:

[1] Pending before the Court is plaintiff's Motion for Reconsideration of Denial of Declaratory Judgment. Dkt. No. 36. Having reviewed plaintiff's motion, as well as the remainder of the record, the Court STRIKES plaintiff's motion as unauthorized under the Local Rules for the Western District of Washington.

Plaintiff originally brought his motion for emergency *ex parte* declaratory judgment on April 12, 2002. Dkt. No. 27. The Court denied that motion on April 15, 2002. Dkt. No. 28. Plaintiff moved for reconsideration on April 22, 2002 Dkt. No. 32. The Court denied the motion to reconsider on June 25, 2002. Dkt. No. 34. Plaintiff now moves again for reconsideration.

"Motions for reconsideration are disfavored." Local Rule CR 7(h)(1). Parties who bring on such motions are constrained to follow strict procedural standards, and are obligated to make a significant showing of error in the contested ruling. See Local Rule CR 7(h)(1) and (2). A motion for reconsideration shall be brought on "within ten judicial days following the order to which it relates." Local Rule CR 7(h)(2). The Court originally denied plaintiff's motion for declaratory judgment on April 15, 2002. Dkt. No. 28. The pending motion was not filed until July 15, 2002, some three months later. Dkt. No. 36. Even assuming that plaintiff seeks to challenge the Court's order denying the first of his motions to reconsider (Dkt. No. 34), the pending motion was still not filed within the requisite ten judicial days. Moreover, the Local Rules do not contemplate that a party may repeatedly seek review of an unsatisfactory ruling.

Plaintiff's pending motion is no authorized under Local Rule CR 7(h), and it is accordingly STRICKEN. The clerk of the Court is directed to distribute a copy of this Order to plaintiff and to all counsel of record.

Dated this 23 day of July, 2002.

Marsha J. Pechman

United States District Judge

¶2002-5213

USA v. Darlene KOFF. U.S. District Court, Eastern Dist. of California, (DC CA) Docket No. CIV S-00-1954 LKK DAD, July 22, 2002. Earlier proceeding at (2002, DC CA) 89 AFTR 2d 2002-2842. Years 1982, 1983, 1984, 1985. Decision for Govt.

1. Actions to reduce assessments to judgment—validity of assessments; clerical errors—summary judgment. Magistrate judge's recommendations were adopted, so summary judgment was entered in govt.'s favor in amount stated plus interest. *Reference:* United States Tax Reporter ¶74,035.01(25); 62,015.01(30); 65,035.03(10); 65,025.03(3). IRC §6201; 6502; 6503; 7403.

United States District Court, Eastern District of California,

Judgment in a Civil Case

XX — Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED.

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF JULY 22, 2002.

ENTERED: July 22, 2002

Jack L. Wagner

Clerk of the Court

by: /s/

B. Dotson, Deputy Clerk

Order

The matter was referred to a United States Magistrate Judge pursuant to 28

U.S.C. 636, et seq., and Local Rule 72-302.

On June 18, 2002, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice to the parties that any objections to the findings and recommendations were to be filed within ten days. No objections to the findings and recommendations have been filed.

The court has reviewed the file and finds the findings and recommendations to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. **[1]** The findings and recommendations filed June 18, 2002, are adopted in full;

2. Plaintiff's motion for summary judgment on the amount of judgment is granted, and the judgment is entered in favor of the United States, and against Darline Koff, in the amount of $586,949.45, together with interest pursuant to § 6621 of the Internal Revenue Code from the date of April 15, 2002; and

3. This action is dismissed.

DATED: July 22, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5214

Greg OLSON, PLAINTIFF v. Veronica HERNANDEZ, ET AL., DEFENDANTS. U.S. District Court, Dist. of Arizona, (DC AZ) Docket No. CIV 02-093-TUC-CKJ, July 1, 2002. Years 1995, 1996, 1997. Decision for Govt.

1. Collection due process—review of administrative determination—jurisdiction—sovereign immunity—Administrative Procedures Act—mandamus. Pro se taxpayer's district court IRC §6330 action against IRS officers for review of IRS's administrative determination to proceed with collection was dismissed: claim that officers didn't follow determination notice issuance procedures was claim against them in official capacities, so wasn't basis for personal liability; and *Bivens* relief was unavailable in tax-related matters. Also, Tax Court had exclusive jurisdiction over action involving taxpayer's underlying income tax liabilities; APA claim was meritless; and mandamus relief was unavailable. *Reference:* United States Tax Reporter ¶74,336.506(25); 63,305.01(10); 74,336.504(45). IRC §6330.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

ORDER

Cindy K. Jorgenson United States District Judge

Pending before the Court is Defendants' Motion to Dismiss (Doc. # 6). As set forth below, the Motion to Dismiss is GRANTED, this matter is DISMISSED WITH PREJUDICE as to Defendants Veronica Hernandez, Wiley Davis, United States Attorney, and John Ashcroft and WITHOUT PREJUDICE as to the United States, and the Clerk of the Court SHALL ENTER judgment accordingly.

Factual & Procedural Background

On February 25, 2002, Plaintiff Greg Olson, proceeding *pro se*, filed a Complaint against Defendants Veronica Hernandez, Wiley Davis, United States Attorney, and John Ashcroft seeking a judicial review of the determination of the Internal Revenue Service (''IRS'') Office of Appeals. *See* Doc. # 1. Plaintiff thereafter filed an Amended Complaint on March 25, 2002. *See* Doc. # 3. Apparently, Plaintiff is seeking judicial review of a Notice of Determination Concerning Collection Action(s) issued by the IRS and dated January 24, 2002. *See* Exhibit 3 to Doc. # 3.

In 1998, Congress enacted 26 U.S.C. § 6330 as part of the IRS Restructuring and Reform Act of 1998, Pub.L. No. 105-206. This statute provides that prior to the issuance of an administrative tax levy, the IRS must provide the taxpayer with notice of an opportunity for a Collection Due Pro-

cess (''CDP'') hearing before the IRS Office of Appeals. *See* 26 U.S.C. § 6330(a), (b). A taxpayer must request a hearing within 30 days of the date notice of a right to a hearing is provided. *See* 26 U.S.C. § 6330(a)(2), (a)(3)(B).

At a hearing conducted by an appeals office of the IRS Office of Appeals, the government is required to provide verification that all applicable law and administrative procedure requirements have been met. *See* 26 U.S.C. § 6330(c)(1). The taxpayer has the opportunity to raise any relevant issue relating to the unpaid tax or proposed levy. *See* 26 U.S.C. § 6330(c)(2)(A). The taxpayer can also raise challenges to the amount of the underlying tax liability if the taxpayer did not receive any statutory notice of deficiency or did not otherwise have an opportunity to dispute such tax liability. *See* 26 U.S.C. § 6330(c)(2)(B). Within thirty (30) days of the issuance of the determination by the appeals officer, the taxpayer may appeal the determination to the United States Tax Court, or if the Tax Court does not have jurisdiction of the underlying tax liability, to a United States District Court. *See*26 U.S.C. § 6330(d)(1).

Plaintiff's Amended Complaint avers that he ''did not file any 1040 tax returns for the years 1995, 1996, or 1997.'' Doc. # 3, p. 4. Plaintiff also avers that the IRS issued ''two alleged 'Notice of Deficiency' notices alleging [personal income] tax liabilities'' for 1995–1997.' Doc. # 3, p. 4–5. Plaintiff also attests to the fact that he received the required Notices of Intent to Levy from the IRS and that he requested an Appeals Consideration. *See* Doc. # 3, p. 5. Furthermore, attached to Plaintiff's Amended Complaint is a January 24, 2002 Notice of Determination Concerning Collection Action that informed Plaintiff that the proposed levy action to collect his personal income tax liabilities was appropriate. *See* Exhibit 3 to Doc. # 3.

Analysis

[1] Defendants have moved that this Court dismiss this action for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), and failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). In particular, Defendants argue as follows:

1. The only proper Defendant is the United States;
2. Plaintiff has failed to state a claim against the individually named Defendants in their individual capacities; and
3. This Court lacks subject matter jurisdiction over Plaintiff's claims as Plaintiff is required to seek review in the United States Tax Court.

As set forth below, the Court finds Defendants' arguments persuasive and correct, and thus dismisses this action with prejudice against the individually named Defendants and without prejudice as to the United States.

A. Plaintiff Has Failed to State A Claim Upon which Relief Can Be Granted Against the Individually Named Defendants.

In reviewing Defendants' Rule 12(b)(6) motion for Plaintiff's failure to state a claim, this Court must take all factual allegations in the Amended Complaint as true and construe them in the light most favorable to the nonmoving party. *See Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998). At this stage of the litigation, ''[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'' *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

A suit against an IRS employee in his or her official capacity is essentially a suit against the United States. *See Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 [56 AFTR 2d 85-5567] (9th Cir. 1985) *citing Hutchinson v. United States*, 677 F.2d 1322, 1327 [50 AFTR 2d 82-5117] (9th Cir. 1982). Plaintiff's Amended Complaint and attachments allege that the individually named Defendants have failed to follow various procedures leading up to and including the issuance of the Notice of Determination. The challenged conduct of the Defendants falls squarely within their official capacities as employees of the IRS and thus pro-

vides no basis for the imposition of personal liability.

To the extent, Plaintiff might attempt to argue that his claims against the individually named defendants for violations of his constitutional rights are brought under *Bivens v. Six Unknown Named Agents fo the Fed. Bureau of Narcotics*,403 U.S. 388 (1971), such claims must also be dismissed. The United States Court of Appeals for the Ninth Circuit has refused to recognize a constitutional violation arising from the collection of taxes. *See Wages v. Internal Revenue Service,* 915 F.2d 1230, 1235 (9th Cir. 1990), *cert. denied,* 498 U.S. 1096 (1991). Furthermore, the remedies provided by Congress, particularly the right to sue the government for a refund of taxes, foreclose a damage action under *Bivens. See id. See also McMillen v. United States Dep't of Treasury,* 960 F.2d 187, 190–91 [69 AFTR 2d 92-1067] (1st Cir. 1991). Accordingly, Plaintiff's claims against the individually named Defendants should be dismissed, and such claims are properly construed as brought against the United States.

B. This Court Lacks Subject Matter Jurisdiction Over Plaintiff's Remaining Claims.

Defendants have also moved to dismiss the Amended Complaint for lack of subject matter jurisdiction. *See* Rule 12(b)(1), Fed. R. Civ. P. In considering such a motion, this Court is not restricted to the face of the pleadings, but may review evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. *See Federal Deposit Ins. Corp. v. Nichols,* 885 F.2d 633, 635–36 (9th Cir. 1989).

It is well-established that the United States as a sovereign is immune from suit unless it has consented to be sued. *See United States v. Dalm,* 494 U.S. 596, 608 [65 AFTR 2d 90-1210] (1990). A waiver of sovereign immunity must be explicit and is strictly construed in favor of the United States. *See id.* The party suing the United States bears the burden of establishing a waiver of immunity. *See Cominotto v. United States,* 802 F.2d 1127, 1129 (9th Cir. 1986).

Because Plaintiff's suit is, as noted above, against the United States, the Court lacks jurisdiction unless sovereign immunity has been explicitly waived by statutory consent to jurisdiction. In the Amended Complaint, Plaintiff invokes 26 U.S.C. § 6330 and 5 U.S.C. § 706. In his response brief, Plaintiff also invokes 28 U.S.C. § 1361.

Plaintiff relies upon 26 U.S.C. § 6330 as the basis for this Court's subject matter jurisdiction and as a waiver of sovereign immunity. Defendants argue that exclusive jurisdiction rests with the United States Tax Court because Plaintiff is, in essence, seeking judicial review of a determination involving his income tax liability. Title 26 U.S.C. § 6330(d)(1) provides that within 30 days of the determination by the appeals office, the taxpayer may seek judicial review of the determination by filing a petition with the Tax Court or "if the Tax Court does not have jurisdiction of the underlying tax liability," to the appropriate federal district court.

Here, Plaintiff challenges the adverse Notice of Determination issued by the Appeals Office following a CDP hearing, which found that the proposed levy action to collect certain of Plaintiff's income tax liabilities was appropriate. While Plaintiff's challenge focuses somewhat upon claimed procedural irregularities, the underlying action rests upon Plaintiff's income tax liabilities. Section 6330(D)(1), Treasury Regulations § 301.6330 - 1T(F)(2)Q & A-F3, and the case law make clear that jurisdiction is dependent upon the underlying tax liability, not whether the claims are characterized as procedural or substantive. When the IRS' proposed levy involves an underlying income tax liability, judicial review over a determination made in a CDP hearing lies in the United States Tax Court, not the district court. *See Bartschi v. Tracy,* 88 A.F.T.R.2d 2001-6223, 3 [88 AFTR 2d 2001-6223] (D. Ariz. 2001) and cases cited therein. *See also Krugman v. Commissioner,* 112 T.C. 230, 236 n.6 (1999). Thus, since the tax liabilities at issue are

income taxes, the United States Tax Court has exclusive jurisdiction.[1]

Furthermore, Plaintiff's reliance on the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, and the federal mandamus statute, 28 U.S.C. § 1361, in support of a waiver of sovereign immunity is without merit. The APA does waive the government's sovereign immunity in certain limited instances; however, the APA does not provide an independent basis for subject matter jurisdiction in district courts. *See Tucson Airport Authority v. General Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998). Accordingly, the APA cannot provide this Court with subject matter jurisdiction. *See Gallo Cattle Co. v. United States Dep't of Agriculture*, 159 F.3d 1194, 1198 (9th Cir. 1998) and *Hughes v. United States*, 953 F.2d 531, 537 [69 AFTR 2d 92-472] (9th Cir. 1992). Similarly, Plaintiff's invocation of 28 U.S.C. § 1361 is also futile because that statute does not waive the government's sovereign immunity. *See Smith v. Grimm*, 534 F.2d 1346, 1352 n. 9 (9th Cir. 1976) *and Lonsdale v. United States*, 919 F.2d 1440, 1444 [67 AFTR 2d 91-1049] (10th Cir. 1990).

For the reasons discussed above, Plaintiff's claim for judicial review of the IRS determination is dismissed for lack of subject matter jurisdiction.[2]

Conclusion

Accordingly, IT IS HEREBY ORDERED that:

1. Defendants' Motion to Dismiss (Doc. # 6) is GRANTED;
2. This matter is DISMISSED WITH PREJUDICE as to Defendants Veronica Hernandez, Wiley Davis, United States Attorney, and John Ashcroft and WITHOUT PREJUDICE as to the United States; and
3. The Clerk of the Court SHALL ENTER JUDGMENT accordingly.

Dated this 27 day of June, 2002.

Cindy K. Jorgenson

United States District Judge

JUDGMENT IN A CIVIL CASE

X DECISION BY COURT. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion to Dismiss (Document #6) is GRANTED.

IT IS FURTHER ORDER AND ADJUDGED that this matter is DISMISSED WITH PREJUDICE as to Defendants Veronica Hernandez, Wiley Davis, United States Attorney, and John Ashcroft; and, WITHOUT PREJUDICE as to the United States, due to lack of subject matter jurisdiction.

June 28, 2002

Date

RICHARD H. WEARE

CLERK

(By) Judy Johnson, Deputy Clerk

Copies to: ALL PARTIES, CKJ, JDGBK

¶2002-5215

Paul PALMER, Angela PALMER, PLAINTIFFS v. COMMISSIONER of Internal Revenue Service, DEFENDANT. U.S. District Court, Dist. of Idaho, (DC ID) Docket No. CV01-395-C-EJL, July 8, 2002. Years 1976, 1977, 1978, 1979. Decision against Taxpayers.

1. Refund actions—res judicata. Taxpayers' action for refund of taxes paid pursuant to stipulated judgment and to set aside remaining assessments was barred by res judicata: suit was really improper attempt to relitigate their liability for same years covered by earlier case and to over-

[1] While Defendants do not raise the timeliness of Plaintiff's Complaint in their motion, the Court notes that Plaintiff did not file his original Complaint in this Court until 32 days after the IRS' January 24, 2002 determination. Since the thirty-day statutory period for filling is jurisdictional and cannot be extended, this Court also arguably lacks jurisdiction to hear an appeal under §6330(d) because Plaintiff's appeal was not timely filed. *See* 26 U.S.C. 6330(d)(1) (providing a thirty day limit to file an appeal); *McCune v. CIR*, 115 T.C. 114, 116 (T.C. 2000) (holding that the thirty day filing period is jurisdictional and cannot be extended); and *Goza v. CIR*, 114 T.C. 176, 182 (T.C. 2000) (holding that a court's jurisdiction to hear an appeal under § 6330(d) is contingent on a timely petition for review being filed). However, as Defendants have not requested dismissal on this ground, the Court does not rely upon it in reaching its decision.

[2] Pursuant to 26 U.S.C. §6330(d)(1)(B), Plaintiff may be entitled to file his appeal with the United States Tax Court within thirty (30) days from the date of this Order.

turn prior judgment. *Reference:* United States Tax Reporter ¶74,337.503(75); 74,225.01(75). IRC §7422.

In the United States District Court for the District of Idaho.

Judgment

LODGE, District Judge:

On July 8th 2002, the Court entered an Order dismissing this action with prejudice. Based upon that Order, and the Court being fully advised in the premises, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's cause of action is DISMISSED with prejudice.

DATED this 8th day of, 2002.

EDWARD J. LODGE

UNITED STATES DISTRICT JUDGE

Order

LODGE, District Judge:

Pending before the Court are the following motions: (1) Defendant's Motion to Dismiss (Docket No. 7); (2) Plaintiff's Motion for Judgment on the Pleadings (Docket No. 11); and (3) Plaintiff's Motion for Summary Judgment (Docket No. 15).

Having fully reviewed the pleadings and evidence before it, the Court finds that the parties have adequately presented the facts and legal arguments in their briefs and that the decisional process would not be significantly aided by oral argument. Therefore, in the interest of avoiding further delay, the Court shall decide the outstanding motions based on the pleadings without oral argument. Local Rule 7.1(b).

I. BACKGROUND

The tax issues set forth in the Plaintiff's Complaint arose when they failed to file tax returns for the years 1976 through 1979. After Plaintiffs, Paul and Angela Palmer, failed to meet with Internal Revenue Service (IRS) agents, the IRS conducted an investigation regarding income information for the unreported years. IRS agents discovered income information for the years 1976 and 1979. The agents also learned that Mr. Palmer may have generated income through self-employment as an electrician during these years. Ultimately, the IRS reconstructed income for the Palmers during these years based on national median household income statistics. *See Palmer v. United States Internal Revenue Service*, 116 F.3d 1309, 1310 [80 AFTR 2d 97-5100] (9th Cir. 1997).

The IRS sent deficiency notices to the Palmers, listing deficiencies in the amount of $16, 558 for Paul Palmer and $3,610 for Angela Palmer, plus penalties in the amount of $5,042. Plaintiffs did not respond to the deficiency notices. The IRS prepared assessments against the Plaintiffs and eventually filed liens against a parcel of real property held in the name of the Paul B. Palmer, Jr. Family Preservation Trust. Angela Palmer was the trustee of the trust. Angela Palmer filed a wrongful levy action in this Court, alleging that the property belonged to the trust, rather than to the Plaintiffs. *Palmer*, 116 F.3d at 1311. The government filed a counterclaim to enforce the liens and a third-party complaint against Plaintiffs in their individual capacities in order to reduce the assessments to a judgment. The government moved for partial summary judgment on the unpaid assessed taxes, penalties, and interest. Then motion was granted, and the parties later entered into a stipulated settlement of all remaining issues not included in the Court's summary judgment ruling. Plaintiffs paid $68,000.00 as part of the stipulated settlement agreement, and a final judgment was entered in the case, reflecting $10,284.87 as the outstanding balance. *Id.*

Plaintiffs appealed the Court's partial summary judgment order, and the Ninth Circuit affirmed the Court's ruling in favor of the IRS on the third party complaint. Plaintiffs claimed on appeal that summary judgment was wrongly granted because the IRS tax calculations were not entitled to a presumption of correctness and also due to alleged procedural errors. The Ninth Circuit ruling stated that the IRS did not provide an explanation for its reliance upon national median household income statistics to reconstruct the Palmer's income.

Neither did the IRS explain why this method of calculating the Palmer's income was a rational method. The court then stated: ''We would therefore be inclined to agree with the Palmers that simply attributing median national income statistics to the tax payers is not a rational method for reconstructing the Palmers' income, were the question properly before us.'' *Palmer,* 116 F.3d at 1312. The court then determined that ''the Palmers have waived their right to appeal the district court's conclusion that the deficiency determination was entitled to the presumption of correctness.'' *Id.* Accordingly, the court of appeals did not consider the Palmer's challenge to the method used to reconstruct their income.

The Palmers also argued on appeal that the government had failed to offer sufficient evidence linking them to income-generating activities. In regard to this issue, the court stated that when a deficiency determination ''rests on the reasonable inference that the taxpayers must have had sufficient income to support themselves for years when no income was reported, and statistics are used to reconstruct income, the evidentiary foundation necessary for the presumption of correctness to attach is minimal.'' *Palmer,* 116 F.3d at 1313. The court held that when the reasonable inference of sufficient income is combined with evidence linking Paul Palmer to wages for part of the four-year deficiency period, then there is a sufficient evidentiary foundation to support the presumption of correctness. *Id.* The Palmers could then rebut this evidence through evidence that the inference was unreasonable, but the district court did not find their evidence sufficient to overcome the inference.

The Palmer's also argued on appeal that the case must be dismissed for lack of jurisdiction because the IRS based the deficiency determination on statistics, rather than on actual evidence of their concealed income. In response to this argument, the court stated: ''Were the Palmers correct, the IRS would never by able to collect taxes owed by those who, like them, illegally hide their income to avoid paying taxes, all the while taking advantage of the many privileges enjoyed by law-abiding citizens.'' *Palmer,* 116 F.3d at 1314.

Plaintiff's allege in their Complaint that they are entitled to a refund of the $68,000.00 paid pursuant to the stipulated judgment and the Court's partial summary judgment order. Plaintiff's also appear to believe they are entitled to have the judgment set aside in their case, thereby relieving them of the obligation to pay the outstanding tax liability balance.

II. DISCUSSION

[1] Plaintiff's Complaint alleges that they are not bound by the Court's judgment in their tax liability case. This mistaken belief is based on a statement found in the Ninth Circuit's opinion affirming the District Court's summary judgment ruling in this case. Therefore, the judgment in the case, consisting of an order in favor of the government on their motion for partial summary judgment and a stipulated agreement regarding the amount of tax liability the Palmer's would pay to the IRS, serves as a final determination on all issues arising in the Palmer's case. Because there was a final determination in the previous case which has been affirmed on appeal, the Palmer's present lawsuit is barred by the principle of res judicata.

Once a final judgment on the merits of a case has been entered, the parties are precluded from relitigating all issues connected with the action. *Rein v. Providian Financial Corp.*, 252 F.3d 1095, 1098 (9th Cir. 2001). The res judicata principle precludes subsequent claims where: ''(1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded to a final judgment on the merits; and (4) the same claim or cause of action was involved in both suits.'' *Id.*''[I]f a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is res judicata as to any subsequent proceeding involving the same claim and same tax year.'' *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591, 598 [36 AFTR 611], 68 S.Ct. 715, 719–20 [36 AFTR 611] (1948); *see also Baker v. In-*

ternal Revenue Service, 74 F.3d 906, 910 [77 AFTR 2d 96-460] (9th Cir. 1996). Also, a stipulated judgment between the parties is a judgment on the merits for purposes of the res judicata principle. *Baker*, 74 F.3d at 910.

In Plaintiff's case, the Court entered a partial summary judgment on the government's motion to reduce the Palmer's outstanding tax liability to a judgment. The parties then agreed to a stipulated judgment on all issues in the tax liability case. A final judgment was entered in February 1995. It is obvious that the principle of res judicata precludes Plaintiffs from bringing this lawsuit to overturn the judgment in their previous case. If Plaintiffs disagreed with the Ninth Circuit's decision to affirm the judgment in their case, then their remedy was to appeal the ruling to the Supreme Court of the United States. Plaintiffs are attempting to relitigate the tax liability assessments against them for the same four-year period for which a judgment has been entered. Accordingly, their lawsuit is subject to dismissal for failure to state a claim upon which relief can be granted.

III. PLAINTIFFS' MOTIONS

Plaintiffs filed a motion requesting judgment on the pleadings in the case. Plaintiffs also filed a motion requesting entry of summary judgment. Based on the principle of res judicata, their lawsuit is subject to dismissal. Therefore, Plaintiffs' motions requesting a judgment in their favor are denied.

ORDER

NOW THEREFORE IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (Docket No. 7) is GRANTED. Plaintiffs' Complaint is dismissed with prejudice for failure to state a claim upon which relief can be granted.

IT IS FURTHER HEREBY ORDERED that Plaintiffs' Motion for Judgment on the Pleadings (Docket No. 11) is DENIED.

IT IS FURTHER HEREBY ORDERED that Plaintiffs' Motion for Summary Judgment (Docket No. 15) is DENIED.

DATED this 8th day of July, 2002.

EDWARD J. LODGE

UNITED STATES DISTRICT JUDGE

¶2002-5216

PARCC HEALTH CARE, INC., PLAINTIFF v. UNITED STATES OF AMERICA, Commissioner of Internal Revenue, and Department of the Treasury, DEFENDANTS. U.S. District Court, Dist. of Connecticut, (DC CT) Docket No. 3:01CV00379, July 18, 2002. Earlier proceeding at (2002, DC CT) 90 AFTR 2d 2002-5267. Years 1994, 1995, 1996, 1997. Decision for Taxpayer in part.

1. Penalties—failure to pay taxes and make payroll deposits—reasonable cause—financial hardship—summary judgment—failure to timely file returns; returned checks—reasonable cause—willful neglect. Stipulated judgment was entered for corp. on its claims for overpayment of penalties assessed for failure to pay and to deposit employment taxes in amounts stated, plus interest from payment dates, subject to its offer in compromise; and action was dismissed with prejudice in all other respects, except that claim for overpayment of penalties for failure to timely file employment tax returns, and to pay and deposit taxes for 1 quarter was dismissed for lack of jurisdiction. *Reference:* United States Tax Reporter ¶66,515.14(15); 66,565.01(15); 66,515.11(15); 66,575.01(5). IRC §6651; 6656; 6657.

Kenneth A. Votre 667 State Street New Haven, Connecticut 06511 (203) 962-9955 Ct. 05981.
Elizabeth Lan Trial Attorney, Tax Division U.S. Department of Justice Post Office Box 55 Ben Franklin Station Washington, DC 20044.

In the United States District Court for the District of Connecticut.

Stipulated Dismissal and Entry of Judgment

ARTERTON, District Judge:

[1] It is hereby stipulated and agreed that, pursuant to 26 U.S.C. §§6621, and 6622, and 28 U.S.C. §1961(c), judgment may be entered in favor of the plaintiff, PARCC Health Care, Inc., and against the United States of America, on plaintiff's claims to an overpayment of the penalties assessed against plaintiff for failure to pay employment taxes (Form 941) withheld from the plaintiff's employees for the following quarterly tax periods, and for the penalties assessed against plaintiff for failure to pay employment taxes (Form 940) withheld from the plaintiff's employees for the following tax years, for an overpayment in the following amounts, plus interest from the following dates of payment. Such overpayment is subject to the rights and obligations of the Offer in Compromise submitted by Plaintiff on May 18, 2000, which was accepted by the Internal Revenue Service on June 15, 2000, copies of which are attached hereto, as well as any other provisions of law.

Form	Tax Period Ending	Penalty Amount	Date of Payment
941	September 30, 1995	$375.49	July 18, 1996
941	December 31, 1995	$9,423.55	April 26, 1999
941	March 31, 1996	$6,466.38	October 17, 1997
941	December 31, 1996	$3,233.65	August 10, 1998
941	March 31, 1997	$285.19	February 17, 1998
941	June 30, 1997	$1,016.64	June 9, 1998
940	December 31, 1995	$156.35	June 24, 1996
940	December 31, 1996	$42.12	November 9, 1998
940	December 31, 1997	$281.99	May 24, 2000

It is further hereby stipulated and agreed that, pursuant to 26 U.S.C. §§6621, and 6622, and 28 U.S.C. §1961(c), judgment may be entered in favor of the plaintiff, PARCC Health Care, Inc., and against the United States of America, on plaintiff's claims to an overpayment of the penalties assessed against plaintiff for failure to deposit employment taxes (Form 941) withheld from the plaintiff's employees for the following quarterly tax periods, and for the penalties assessed against plaintiff for failure to deposit employment taxes (Form 940) withheld from the plaintiff's employees for the following tax years, for an overpayment in the following amounts, plus interest from the following dates of payment. Such overpayment is subject to the rights and obligations of the Offer in Compromise submitted by Plaintiff on May 18, 2000, which was accepted by the Internal Revenue Service on June 15, 2000, copies of which are attached hereto, as well as any other provisions of law.

Form	Tax Period Ending	Penalty Amount	Date Of Payment
941	September 30, 1995	$13,755.27	July 18, 1996
941	December 31, 1995	$37,496.17	April 26, 1999
941	March 31, 1996	$28,367.98	July 21, 1997
941	June 30, 1996	$7,839.94	October 17, 1997
941	December 31, 1996	$16,586.05	August 10, 1998
941	March 31, 1997	$6,017.13	February 17, 1998
941	June 30, 1997	$26,439.85	June 9, 1998
940	December 31, 1995	$1,042.35	June 24, 1996
940	December 31, 1996	$24,642.50	November 9, 1998
940	December 31, 1997	$1,203.84	May 24, 2000

It is further hereby stipulated and agreed that in all other respects the plaintiff's action for overpayment is dismissed with prejudice, with each party to bear their respective costs, including any attorneys' fees or other expenses of this litigation, except that plaintiff's claim for an overpayment of the penalties assessed against plaintiff for failure to file timely quarterly employment tax returns, to pay and deposit

employment taxes withheld from the plaintiff's employees for the quarterly tax period ending December 31, 1997, is dismissed for lack of jurisdiction.

It is further hereby stipulated and agreed that the Court shall retain jurisdiction over the enforcement of this judgment.

For Plaintiff, PARCC Health Care, Inc.

KENNETH A. VOTRE

667 State Street

New Haven, Connecticut 06511

(203) 962-9955

Ct. 05981

For Defendant, United States of America,

ELIZABETH LAN

Trial Attorney, Tax Division

U.S. Department of Justice

Post Office Box 55

Ben Franklin Station

Washington, DC 20044

IT IS SO ORDERED.

Date: 18 July 2002

HON. JANET BOND ARTERTON

United States District Judge

¶2002-5217

UNITED STATES OF AMERICA, PLAINTIFF v. Thomas P. MALONE; Janet E. MALONE; C.I.T. Financial Services, Inc.; JDS Mortgage & Investments, Inc.; United Mortgage Company; Bank of America; and City of Littleton, Colorado, DEFENDANTS. U.S. District Court, Dist. of Colorado, (DC CO) Docket No. 01-N-1929, July 17, 2002. Decision for Govt.

1. Collection actions—lien priority—dismissal of defendants. Final judgment was entered against taxpayer in amount stated, plus interest; Counts 2 and 3 of complaint were dismissed with prejudice; and taxpayer-wife was dismissed from action. Also, 2 defendants-financial institutions lacked any interest in taxpayers' real property; defendant-mortgage co. was dismissed from action; and federal tax liens and mortgage co. and/or bank's claims against property were prior and superior to local lien against wife, and would be paid 1st upon property's sale. *Reference:* United States Tax Reporter ¶74,035.01(30); 74,035.03(20). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

FINAL JUDGMENT

Judge Edward W. Nottingham

In accordance with orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(2), the following FINAL JUDGMENT is hereby entered.

1. **[1]** Pursuant to the written Order for Entry of Judgment and for Dismissal of Counts II and III of the Complaint filed by Judge Edward W. Nottingham on July 8, 2002, judgment is entered as follows:

a. Judgment is awarded in favor of the plaintiff United States of America and against the defendant Thomas P. Malone in the amount of $171,748.27, plus interest as provided by 28 U.S.C. §1961(c) and 26 U.S.C. § 6621 from June 25, 2002.

b. Counts II and III of the Complaint are hereby DISMISSED with prejudice and the defendant Janet E. Malone is DISMISSED from this action.

2. Plaintiff United States of America and the defendants Thomas P. Malone and Janet E. Malone shall each bear their own costs.

Dated this 16 day of July, 2002.

APPROVED BY THE COURT:

EDWARD W. NOTTINGHAM

United States District Judge

ENTERED FOR THE COURT:

JAMES R.MANSPEAKER, CLERK

By

Stephen P. Ehrlich

Chief Deputy Clerk

ORDER

Edward W. Nottingham United States District Judge

Upon the motion of plaintiff United States of America, and for good cause shown, it is hereby ORDERED that defendants C.I.T. Financial Services, Inc., and JDS Mortgage & Investments, Inc., have no interest in the real property located at 7775 West Ottawa Drive, Littleton, Colorado 80128, and particularly described as follows:

Lot 8, Block 2, Columbine West Hillside Addition, according to the recorded plat thereof, County of Jefferson, State of Colorado.

DATED this 16 day of July, 2002.

BY THE COURT:

Edward W. Nottingham

United States District Judge

ORDER DISMISSING UNITED MORTGAGE COMPANY

Edward W. Nottingham United States District Judge

Upon the motion of plaintiff United States of America, and for good cause shown, it is hereby ORDERED that defendant United Mortgage Company is dismissed from this action.

DATED this 16 day of July, 2002.

BY THE COURT:

Edward W. Nottingham

United States District Judge

ORDER

Edward W. Nottingham United States District Judge

Upon the motion of plaintiff United States of America, and the Stipulation between the City of Littleton, Colorado and the United States of America, it is hereby ORDERED that the federal tax liens of the United States of America and the claims of United Mortgage Company and/or Bank of America against the subject property, are prior and superior to the statement of lien against Janet E. Malone, filed by the City of Littleton, Colorado with the Clerk and Recorder for the County of Jefferson, Colorado on November 20, 2000; and it is further

ORDERED that the federal tax liens against Thomas P. Malone, and the claims of United Mortgage Company and/or Bank of America, shall be paid before the lien of the City of Littleton upon any sale of the real property located at 7775 West Ottawa Drive, Littleton, Colorado, which is the subject of this action, and is more particularly described below:

Lot 8, Block 2, Columbine West Hillside Addition, according to the recorded plat thereof, County of Jefferson, State of Colorado.

an it is further

3. ORDERED that the City of Littleton need not participate further in this matter.

BY THE COURT:

Edward W. Nottingham

United States District Judge

¶2002-5218

Tim L. MARTINEC, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) Docket No. CV-S-01-1207-RLH (LRL), July 11, 2002. Years 1998, 1999. Decision for Govt.

1. Collection due process (CDP)—review of administrative determination—frivolous return penalties. IRS's administrative determination to proceed with collection of frivolous return penalties against taxpayer who filed "zero" returns was upheld: Reg. §301.7701-9 authorized Treasury Secy.'s delegation of levy power to IRS agents; CDP hearing officer didn't abuse his discretion in determining that applicable legal and procedural requirements were met, and in relying on computer generated records and Form 4340 to verify that assessment was made and issued to taxpayer; and taxpayer didn't raise any spousal defenses, challenge appropriateness of proposed collection method, or offer alternative collection means.

Reference: United States Tax Reporter ¶63,305.01(5); 67,025.01(2). IRC §6301; 6330; 6702.

United States District Court, District of Nevada.

Judgment in a Civil Case

HUNT, District Judge:

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed. Judgment is entered in favor of defendant United States of America and against plaintiff Tim L. Martinec.

July 11, 2002

Date

LANCE S. WILSON

Clerk

(By) Deputy Clerk,

Order

(Motion to Dismiss - #4)

Before the Court is Defendant's Motion to Dismiss (#4), filed January 7, 2002. The Court has also considered Plaintiff's Opposition (#8), filed March 15, 2002.

BACKGROUND

For the calendar years 1998 and 1999, Plaintiff attached a statement to each of his returns indicating that he was not required to file a federal income tax return, that he had ''zero'' income and there was no Code section which made him ''liable'' for any income tax. For each of these years, the Defendant Internal Revenue Service (''IRS'') assessed a penalty for filing a frivolous return.

On November 30, 2000, the IRS sent Plaintiff, via certified mail, a notice informing him of their intent to levy to collect the outstanding civil penalties assessed against him for his 1998 and 1999 tax years pursuant to 26 U.S.C. § 6702. The collection activity with respect to the civil penalty assessments resulted from the federal income tax returns filed by Plaintiff for his 1998 and 1999 tax years. The returns filed by Plaintiff had zeros on all the lines of the returns which reflected income or tax due to the Government. Yet, both the 1998 and 1999 tax returns had a Form W-2 attached to the return which showed that Plaintiff received wages of $64,364.67 for his 1998 tax year and $63,834.51 for his 1999 tax year. On each of the returns, Plaintiff also requested a refund of the tax which had been withheld for that tax year. Plaintiff also attached documentation explaining why he did not believe he owed federal income taxes.

Included with the notice of intent to levy was information notifying Plaintiff of his right to request a Collection Due Process (''CDP'') hearing pursuant to 26 U.S.C. § 6330(a). On July 24, 2001, a CDP hearing was held. At the hearing, the appeals officer provided Plaintiff with a Form 4340, Certificate of Assessments and Payments with regard to the civil penalty assessments made against the Plaintiff for his 1998 and 1999 tax years.

On September 13, 2001, pursuant to 26 U.S.C. § 6330, Defendant then sent Plaintiff a Notice of Determination concerning collection actions for the amount of the civil penalties owed. In this Notice, Defendant informed Plaintiff of his right to judicial review of the determination in the appropriate United States District Court. On October 12, 2001, Plaintiff filed a complaint asking, in addition to damages, that this Court set aside the CDP determination as invalid. Defendant requests this Court to dismiss the complaint for failure to state a claim for which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

DISCUSSION

I. Motion to Dismiss Standard Under Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for ''failure to state a claim upon which relief can be granted.'' ''[A] complaint should not be dismissed

for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see also Yamaguchi v. U.S. Dept of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to [p]laintiffs." *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1999). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

II. Collection of Fines by the IRS

Under 26 U.S.C. § 6702(a), a civil penalty of $500 may be imposed if any individual files what purports to be a return of the tax imposed by subtitle A but which contains information that on its face indicates that the self-assessment is substantially incorrect and the conduct referred to is due to a position which is frivolous. Title 26 U.S.C. § 6330(a) provides that before proceeding with the collection by way of levy, the IRS must provide the taxpayer notice of the right to a hearing on the matter. 26 U.S.C. § 6303(a) states that notice shall be left at the taxpayer's dwelling or usual place of business or be sent by mail to the taxpayer's last known address. The taxpayer has a right, within 30 days of the Section 6330 notice, to request a hearing with the IRS Office of Appeals. *Id.* § 6330(a)(3)(B). At the hearing, the taxpayer may raise any issue relevant to the unpaid tax and the proposed levy, including challenges to the propriety of the levy and offers of collection alternatives. *Id.* § 6330(c)(2).

The impartial IRS Appeals Officer who conducts the hearing must then formulate his or her determination based on: (1) the verification that the requirements of any applicable law or administrative procedure have been met; (2) the issues raised by the taxpayer; and (3) the proper balance between the need for efficient tax collection and the legitimate concern that any collection action be no more intrusive than necessary. *See id.* § 6330(c)(3). At the hearing, the taxpayer may address any of the statutorily-specified issues allowed at a collection due process hearing, including spousal defenses, the appropriateness of an intended collection action, and possible alternative means of collection. *See* 26 U.S.C. § 6330(c); *see also Sego, v. Comm'r of Internal Revenue*, 114 T.C. 604, 609 (2000). Following the hearing, the Appeals Officer sends a Notice of Determination to the taxpayer that summarizes the matters raised during the hearing and responds to any offers or objections made by the taxpayer. If the taxpayer is dissatisfied with the administrative determination, he may seek judicial review in the United States Tax Court within 30 days of receiving the Notice or, if the Tax Court does not have jurisdiction over the underlying tax liability, the appropriate United States District Court. *Id.* § 6330(d)(1). Review is limited to matters actually raised at the administrative hearing. Temp. Treas. Reg. § 301.6330-1T(f) (2001).

Section 6330(d) does not specify the standard of review a district court should apply to an appeal of a Notice of Determination. However, the legislative history indicates that the court should conduct a *de novo* review only "where the validity of the tax liability was properly at issue at the administrative hearing." H. R. Conf. Rep. No. 105-599, at Sess. 266 (1998). Where the amount of the underlying tax liability is not properly part of the appeal, the court reviews a Notice of Determination for abuse of discretion. *See Sego* 114 T.C. at 609–10; *Goza v. Comm'r of Internal Revenue*, 114 T.C. 176, 179–80 (2000). An administrator abuses its discretion if it relies on clearly erroneous findings of fact in its determinations. *Taft v. Equitable Life Assurance. Soc'y*, 9 F.3d 1469, 1473 (9th Cir. 1993).

[1] Here, the issue before the Court is related to the collection action regarding the penalties incurred by Plaintiff for filing frivolous tax returns for the calendar years

1998 and 1999. This Court is not reviewing the underlying income tax liability which, pursuant to 26 U.S.C. § 6330 (b)(1)(A), is reviewable by a United States Tax Court. Therefore, since the underlying income tax liability is not at issue, this Court has jurisdiction and applies an abuse of discretion standard in its review.

In his opposition to the Motion to Dismiss, Plaintiff raises several issues regarding the authority of the IRS to assess and issue the determination that the collection action is based upon. Plaintiff specifically questions the authority of the IRS Appeals Officer as well as his reliance on Form 4340 and computer generated records provided to Plaintiffs during his Collection Due Process hearing that indicated assessments were actually made and issued.

First, Plaintiff's argument that there is no evidence of any delegated authority from the Secretary of Treasury cannot prevail. Relevant statues and regulations demonstrate that the Secretary does have the power to collect taxes, and that such power can be delegated to local IRS agents. 26 U.S.C. § 6301 provides that "[t]he Secretary shall collect the taxes imposed by the internal revenue laws." The actual task of collecting the taxes, however has been delegated to local IRS directors. *See Hughes v. United States*, 953 F.2d 531, 536 [69 AFTR 2d 92-472] (9th Cir. 1992); 26 C.F.R. § 301.6301-1 ("[t]he taxes imposed by the internal revenue laws shall be collected by district directors of internal revenue"). District directors in turn are authorized to redelegate the levy power to lower level officials such as collection officers. *Hughes*, at 536. The delegation of authority down the chain of command, from the Secretary, to the Commissioner of Internal Revenue, to lo-cal IRS employees constitutes a valid dele-gation by the Commissioner to the dele-gated officers and employees. *See* C.F.R. § 301.7701-9. Therefore, the agents involved in the instant case were acting within their authority when they made and sent a Notice of Determination regarding the collection action.

Second, the IRS hearing officer did not abuse his discretion when he determined that the requirements of applicable law had been met and that Plaintiffs had been afforded statutorily-required administrative procedures. The hearings officer attempted to address the issues raised by Plaintiff; however, Plaintiff did not address any of the statutorily-specified issues that may be raised at a collection due process hearing, such as spousal defenses, the appropriateness of an intended collection action, and possible alternative means of collection. Instead Plaintiff attempted to revisit the issue of his underlying tax liability at the collection hearing at issue.

Appeals of the underlying claims are only appropriate at a collection due process hearing if the plaintiff did not receive notice of tax liability, *Goza*, 114 T.C. at 182, or "had no previous opportunity to contest the validity of those claims." *Kintzler v. Internal Revenue Serv.*, 2001 WL 1137294, at [88 AFTR 2001-5823] (D. Nev. 2001). The *Hughes* court and other circuit courts have held that Form 4340 Certificate of Assessments and Payments provided to the plaintiffs as well as the IRS' reliance on computer generated information indicating that notice of assessment was made and demand for payment was issued on a certain date were sufficient to establish that assessments were actually made and issued. *Hughes*, at 535; see *also U.S. v. Chila*, 871 F.2d 1015 [63 AFTR 2d 89-1278] (11th Cir. 1989) (finding that Certificate of Assessments and Payments (4340) is presumptive proof of a valid assessment).

The IRS Hearings Officer did not abuse his discretion by relying on computer generated records and a Form 4340, which he provided to Plaintiff, that indicated that an assessment was made and issued to Plaintiff.

Plaintiff has not, and cannot, prove any set of facts in support of his claim which would entitle him to relief. Defendant's Motion to Dismiss will therefore be granted. See *Goza*, 114 T.C. at 183 (dismissing tax protester's appeal of IRS Notice of Determination for failure to state a claim).

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#4) is GRANTED.

Dated: July 3, 2002.

ROGER L. HUNT

United States District Judge

¶2002-5219

Rodger E. MATHIS and Jeanette MATHIS, ET AL., PLAINTIFFS v. Fred SKALUBA, ET AL., DEFENDANTS. U.S. District Court, Dist. of Wyoming, (DC WY) Docket No. 02-CV-102-B, July 1, 2002. Decision against Taxpayers.

1. Actions against IRS employees—jurisdiction—removal and remand. Pro se taxpayers were denied remand of collection-related action against levy notices, IRS employees and pres. of bank which honored levies: removal was proper under 28 USC §1442(a)(1) where action involved federal officers; and was proper under §1441, where action challenging assessments and levy notices sent to bank arose under federal law. *Reference:* United States Tax Reporter ¶74,336.508(60).

In the United States District Court for the District of Wyoming.

Order Denying Remand

BRIMMER, District Judge:

This action arises from Plaintiffs' apparent challenge to the assessment of Federal Taxes and the four Notices of Levy against them, sent to the Sundance Bank on April 24, 2002. The matter is currently before the Court on the Plaintiffs' Motion to Remand (entitled Notice of Non-Acceptance of Removal and Petition to Remand Case back to State Jurisdiction). Upon reading the briefs, and being fully advised of the premises, the Court FINDS and ORDERS as follows:

BACKGROUND

On April 24, 2002 the Internal Revenue Service (''IRS'') sent four Notices of Levy, the apparent impetus for this lawsuit, to the Sundance State Bank. The IRS levies demanded payment of any of the Plaintiffs' property or money held by the bank. Sundance State Bank honored the IRS levies and sent two checks to the IRS totaling $23,597.38.

On May 30, 2002, Plaintiffs Rodger E. Mathis and Jeanette D. Mathis, proceeding *pro se*, initiated this action by filing a Complaint in the District Court of the Sixth Judicial District, Crook County, Wyoming. The Action was removed to the United States District Court, District of Wyoming, by order of the Court dated May 31, 2002. The Complaint names the four IRS Notices of Levy as the ''in rem'' subjects of the lawsuit and names IRS employees Fred Skaluba and Richard Hardman, as well as James R. Durfee, President of Sundance State Bank, as Defendants.

Plaintiffs' complaint appears to allege that the IRS Notices of Levy and underlying income tax and penalty assessments are deficient. In support of this, Plaintiffs claim that these levies are not supported by valid law, that IRS levies are ''outside the territorial jurisdiction of congress,'' and that the IRS levies violate the due process provisions of the Wyoming Constitution.

ANALYSIS

[1] Plaintiffs seek to remand this action to state court by claiming that: 1) Plaintiffs did not consent to removal; 2) Wyoming state courts have ''exclusive original jurisdiction'' over this action; and 3) the IRS employees consented to state court jurisdiction by sending Notices of Levy to the Sundance State Bank.

In addressing Plaintiffs' ''Notice of Non-Acceptance of Removal and Petition to Remand Case Back to State Jurisdiction'' herein treated as a motion to remand, the Court finds that such a motion should be denied. First, this action is obviously made against federal officers or agencies, and as such, this action is clearly one which may be removed to the federal

courts pursuant to 28 U.S.C. § 1442.[1] Additionally, removal is also proper pursuant to 28 U.S.C. § 1441, as this is a civil action challenging the Federal Tax Assessments and Notices of Levy against the Plaintiffs, sent to the Sundance State Bank, all of which directly arise under the laws of the United States.[2]

Therefore, for the aforementioned reasons, the Court HEREBY ORDERS that Plaintiffs' Motion to Remand (entitled Notice of Non-Acceptance of Removal and Petition to Remand Case back to State Jurisdiction) is DENIED.

Dated this 1ST day of July, 2002.

Clarence A. Brimmer,

United States District Judge

¶2002-5220

Rodger E. MATHIS and Jeanette MATHIS, ET AL., PLAINTIFFS v. Paul H. O'NEILL, ET AL., DEFENDANTS. U.S. District Court, Dist. of Wyoming, (DC WY) Docket No. 02-CV-55-B, June 25, 2002. Earlier proceeding at (2002, DC WY) 89 AFTR 2d 2002-2907. Decision against Taxpayers.

1. District court procedure—petition to vacate—remand. Taxpayers' petition to vacate judgment dismissing with prejudice their lien cancellation claims and remand action to state court was denied: petition was merely attempt to reiterate arguments previously rejected. Also, taxpayers were barred from filing additional motions in instant case without court permission. *Reference:* United States Tax Reporter ¶74,025.01(3); 74,336.508(60). IRC §7402.

In the United States District Court for the District of Wyoming.

Order Denying Plaintiffs' Petition to Vacate a Void Judgment and Petition to Remand Case Back to State Jurisdiction

BRIMMER, District Judge:

[1] This action arises from Plaintiffs' apparent challenge to the assessment of Federal Taxes and the subsequent Federal Tax Liens levied against them. The matter is currently before the Court on the Plaintiffs' Petition to Vacate a Void Judgment and Petition to Remand Back to State Jurisdiction filed on June 20, 2002. Upon reading the briefs, and being fully advised of the premises, the Court FINDS and ORDERS as follows:

At the June 14, 2002 hearing on various motions in this action and in a subsequent written Order, the Court granted Defendants' Motion to Dismiss, and dismissed the Plaintiffs' claims with prejudice.[1] Plaintiffs now request that the Court vacate its judgment and remand the case back to state court.

The Court finds that the Plaintiffs' motion should be denied, as it is merely an attempt to reiterate arguments that have already been considered by the Court in the earlier proceedings and seek to convince this Court that its application and interpretation of the law is erroneous and should be reversed. Thus, the Court declines the request to reconsider its earlier rulings and persists in its earlier findings and rulings in all respects.

---

[1] 28 U.S.C. § 1442 states in pertinent part:

(a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency thereof, sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

28 U.S.C. § 1442 (a)(1).

[2] 28 U.S.C. § 1441(b) states that: "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

[1] At the June 14, 2002 hearing as well as the subsequent written Order, the Court also DENIED the following motions made by Plaintiffs: 1) Plaintiffs' Motion to Remand (entitled Notice of Non-Acceptance of Removal and Petition to Remand Case back to State Jurisdiction); 2) Plaintiffs' Petition to Vacate a Void Judgment and Petition to Remand Back to State Jurisdiction; 3) Plaintiffs' (first) Petition for Declaratory Relief; 4) Plaintiffs' (second) Petition for Declaratory Relief; 5) Plaintiffs' Application for Entry of Default, Petition for Order of Cancellation of Liens, and Petition for Writ of Execution. It is interesting to note that Plaintiffs "Petition to Vacate a Void Judgment and Petition to Remand Back to State Jurisdiction" which was earlier denied by this Court is virtually identical to the Plaintiffs' current motion.

Conclusion

For the aforementioned reasons, the Court HEREBY ORDERS THAT Plaintiffs' Petition to Vacate a Void Judgment and Petition to Remand Case Back to State Court is DENIED. It is further ORDERED that Plaintiffs shall not be permitted to file any additional motions in this case unless they receive the permission of the Court to do so.

Dated this 25Th day of June, 2002.

Clarence A. Brimmer,

United States District Judge

¶2002-5221

Antoinette Ahee MITCHELL, Arnell MITCHELL, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) Docket No. CV-S-02-0116-PMP (RJJ), July 12, 2002. Decision for Govt.

1. Collection due process—review of administration determination—jurisdiction. Taxpayer's complaint to invalidate CDP determination, prohibit collection of taxes and penalties, and for refund was dismissed for lack of jurisdiction: Tax Court, not district court was proper forum to contest CDP determinations. *Reference:* United States Tax Reporter ¶63,305.01(10). IRC §6330.

United States District Court, District of Nevada.

Order

PRO, District Judge:

[1] This action was commenced on January 25, 2002, by the filing of Plaintiff's Complaint to Invalidate the CDP Determination, Prohibit the Collection of Income Taxes and Penalties by the Internal Revenue Service, and to Recover Overpayment of Federal Income Tax (#1).

On June 20, 2002, Defendant United States filed a Motion to Dismiss Plaintiff's Complaint (#5). Plaintiff filed a Response in opposition to Defendant's Motion to Dismiss (#7) on June 29, 2002. A review of the foregoing persuades the Court that Defendant's Motion to Dismiss must be granted for the reason that this Court lacks subject matter jurisdiction. As noted by Defendant in its Motion, judicial review over determinations made in a Collections Due Process hearing lies with United States Tax Court, not United States District Court.

IT IS THEREFORE ORDERED that Defendant United States' Motion to Dismiss (#5) is granted.

DATED: July 12, 2002

PHILIP M. PRO

United States District Judge

¶2002-5222

UNITED STATES OF AMERICA, PLAINTIFF v. Edward G. NOVOTNY, in His Individual Capacity and as Trustee of Midwest Limited and Sunrise Investment; Etta B. Novotny, in Her Individual Capacity and as Trustee of Midwest Limited and Sunrise Invest-ments; and the State of Colorado, De-partment of Revenue, DEFENDANTS. U.S. District Court, Dist. of Colorado, (DC CO) Docket No. 99-RB-2196 (PAC), July 3, 2002. Earlier proceedings at (2001, DC CO) 89 AFTR 2d 2002-338; (2001, DC CO) 88 AFTR 2d 2001-7194, granting in part and denying in part reconsideration of (2001, DC CO) 88 AFTR 2d 2001-6204, 2001-2 USTC ¶50719. Years 1989, 1990, 1991. Decision for Govt. in part.

1. Collection actions—assessments reduced to judgment—business expenses—proof—Anti-Injunction Act—damages. Assessments against pro se taxpayer were reduced to judgment: taxpayer wasn't entitled to business deductions for years he reported no business income; didn't prove business vs. personal purpose of other year's claimed expenses; and didn't otherwise rebut presumptively correct assessments with frivolous pro-tester-type arguments. Also, AIA and sov-ereign immunity barred wife's claims to enjoin assessments and for damages.

Reference: United States Tax Reporter ¶74,035.01(30); 1625.019(5); 74,215.05(5); 74,335.01(7). IRC §162; 7403; 7421; 7433.

2. Collection actions—foreclosure—property held by trust—nominees; alter egos; sham trusts—quiet title—jointly owned property. Govt. was entitled to foreclose liens against and sell properties allegedly owned by taxpayer's trusts: properties remained titled to taxpayer and wife where their earlier transfers to trust weren't effective under Colorado law; or, even if titles did transfer, foreclosure was still proper where taxpayer's retention of complete dominion and control, use and possession of properties showed trusts were merely his nominees, alter ego and/or shams. Also, trusts lacked actual ownership or possession of properties, so couldn't establish quiet title claims; and, even if they could, claims were still defeated by nominee/alter ego findings. But, wife was granted judgment quieting title to her undivided 50% interest in properties and establishing right to 50% of sale proceeds. *Reference:* United States Tax Reporter ¶74,035.01(30); 63,215.02(200); 74,336.507(60). IRC §6321; 7403.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

MEMORANDUM OPINION AND ORDER

Judge Robert E. Blackburn

INTRODUCTION

The United States of America (''Government'') through its complaint and concomitant claims for relief seeks to reduce to judgment outstanding federal tax assessments against defendant Edward Novotny (''Novotny''). The assessments concern unpaid 1989, 1990, and 1991 federal income taxes, penalties, and interest. In addition, the Government seeks to foreclose the resultant federal tax liens under 26 USC §§ 7401 and 7403 on seven parcels of real property in Montezuma County, Colorado, titled in the names of defendants Midwest Limited (''Midwest'') and Sunrise Investments (''Sunrise'') (collectively referred to as ''Trusts''). The Trusts have filed a counterclaim against the Government and cross-claims against the other defendants to quiet title to these seven parcels of real property. Defendant Etta Novotny is the wife of Novotny and is named as a defendant because she may have an interest in the real property at issue. Etta Novotny has filed a counterclaim against the Government to quiet title, if any, in the subject properties. Defendant Colorado Department of Revenue (''Colorado'') has filed cross-claims against the defendants seeking to foreclose its tax liens against the seven parcels of real property to satisfy a judgment entered in the Montezuma County District Court, case No. 99-CV-202, in favor of Colorado against Novotny for unpaid 1989 and 1990 Colorado income taxes, penalties, and interest.

The case was tried to the court June 3 through June 6, 2002. Philip E. Blondin and August Imholtz, III, appeared on behalf of the government. Robert Clark appeared on behalf of the state of Colorado. William Cohan appeared on behalf of the Trusts. Novotny and Etta Novotny appeared *pro se.*

The court having judicially noticed all relevant adjudicative facts in the file and record of this action; having considered the evidence educed at trial (including via deposition transcripts); and having considered the arguments advanced and authorities cited by the parties, enters the following findings of fact (based on preponderance of the evidence), conclusions of law, orders, judgments, and decrees.

FINDINGS OF FACT

A. Edward Novotny's Federal Income Tax Liability

1. Novotny stopped filing federal income tax returns starting with the 1979 tax year. See Exhibit 69.

2. Novotny maintains he is not required to pay federal income taxes.

Respondent has claimed that he is not a ''person'' required to file, and that he has no tax liability, as he is acting in a ''private capacity,'' and not ''corporate''

nor ''privileged'', nor does he receive any ''consideration'' from his actions.

Exhibit 38, Edward Novotny's Responses to United States Interrogatories at p. 5, ¶ 3; see also Exhibits 14, 47, and 49.

3. Novotny did not file federal income tax returns for the 1989, 1990, and 1991 tax years. After conducting audits for 1989, 1990, and 1991, the Internal Revenue Service sent Notices of Deficiency for the 1989, 1990, and 1991 tax years to Novotny. See Exhibits 34 and 35; United States' Requests for Admission Directed to Edward Novotny and Edward Novotny's Response to Requests for Admission at para. 4–7; Exhibits 4 and 5, Notices of Deficiency sent to Edward G. Novotny; and Exhibit 49, letter to Douglas Kahl, Internal Revenue Service.

4. On the dates and in the amounts set forth below, a delegate of the Secretary of the Treasury of the United States made assessments against Novotny for unpaid federal income taxes and statutory additions to tax and gave notice and demand for payment thereof, for the following taxable periods:

TAX PERIOD ENDING	ASSESSMENT DATE	AMOUNT ASSESSED
12/31/1989	5/17/93	$ 85,700.00[1]
	5/17/93	$ 5,796.00[2]
	5/17/93	$ 35,615.20[3]
	5/17/93	$ 21,425.00[4]
	7/26/93	$ 10.00[5]
12/31/1990	5/17/93	$ 7,312.00[1]
	5/17/93	$ 482.00[2]
	5/17/93	$ 1,774.78[3]
	5/17/93	$ 1,828.00[4]
	7/26/93	$ 10.00[5]
12/31/1991	11/14/94	$ 7,672.00[1]
	11/14/94	$ 441.00[2]
	11/14/94	$ 1,948.78[3]
	11/14/94	$ 1,918.00[4]
	Total:	$171,932.76

[1] Assessment of tax.
[2] Assessment of failure to pay estimated tax penalty.
[3] Assessment of interest.
[4] Assessment of late-filing penalty.
[5] Assessment of fees and collection costs.

See Exhibits 1, 2, and 3, Certificate of Assessments and Payments for Edward G. Novotny for 1989, 1990, and 1991 tax years respectively.

5. This court already has found that the Government has established that Novotny received income in the amounts set forth in the Notices of Deficiency sent to him for the 1989, 1990, and 1991 tax years. See Memorandum Opinion and Order dated September 14, 2001, p. 20 (hereafter ''Opinion'');[1] see also Exhibits 4 and 5. This court has held that the sole issue for trial with respect to Novotny's federal income tax liability is whether he is entitled to reduce his taxable income as determined by the Internal Revenue Service by deducting certain business expenses. Id.

6. Novotny has produced admissible evidence in an attempt to support his claim that he is entitled to reduce his taxable income for 1989 by expenses that were incurred in the operation of his business, Four Corners Auto Parts and Salvage. Novotny's business was operated on Parcel

[1] The parties consented to the exercise of jurisdiction by U.S. Magistrate Judge Coan with respect to the pending dispositive motions on June 11, 2001. See Notice of Availability of United States Magistrate Judge to Exercise Jurisdiction, dated June 11, 2001 [#172].

3. The Novotny's personal residence also is located on Parcel 3.

7. The evidence in the record, which includes the testimony of Novotny and of Etta Novotny, does not provide a reasonable means to differentiate between personal expenses incurred by the Novotnys in 1989 and expenses incurred in operating the business during 1989. Most notably, Novotny claims that amounts paid for utilities such as water, electricity, propane gas, and telephone service, are business expenses. The evidence in the record demonstrates the cost of various utility services provided for the buildings on Parcel 3 during 1989. However, this evidence does not provide any basis to determine what portion of these expenses is related to the business and what portion is related to Novotnys' personal use. Absent some reasonable basis on which the court can distinguish between personal expenses and business expenses, the court cannot conclude that Novotny has established the amount of any reasonable business expenses he incurred in 1989.

8. Novotny claimed business expenses for 1990 and 1991. However, Novotny had no business income in 1990 or 1991. Thus, he is not entitled to reduce his taxable income by demonstrating that he incurred business expenses.

9. The court finds that the Assessment for tax year 1989 is correct, and that Novotny is not entitled to any reduction of his taxable income for that year based on his claimed business expenses. See Exhibit 1, Certificate of Assessments and Payments for Edward G. Novotny for 1989.

10. The court finds that the Assessments for tax years 1990 and 1991 are correct, and that Novotny is not entitled to any reduction of his taxable income for those years. See Exhibits 2, and 3, Certificate of Assessments and Payments for Edward G. Novotny for 1990, and 1991 tax years respectively.

11. The court finds that, as of June 3, 2002, Novotny owed the Government $383,446.33 (three hundred and eighty-three thousand, four hundred and forty-six dollars and thirty-three cents) in unpaid taxes and statutory additions for the 1989, 1990, and 1991 tax years.

B. The Seven Parcels of Property

12. Parcel 1 consists of two vacant lots on the corner of Empire and Broadway, Cortez, Colorado. These lots are sometimes referred to as 710 and 720 North Broadway. On or about February 3, 1977, a deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado, conveying title to Parcel 1 (all references to the parcels are to the parcels set forth in the Government's Complaint. The parties have stipulated to the legal descriptions contained therein with the exception of the amount of acreage in Parcel 3 from Max Hamilton and Shyrel Noreen Hamilton to Edward G. Novotny and Etta B. Novotny, as joint tenants, for the stated consideration of $10.00 (ten dollars). The documentary fee stamp applied when the deed was recorded indicates that the purchase price was $17,000.00 (seventeen thousand dollars). See Exhibit 51.

13. Parcel 2 consists of two commercial buildings located at 483 and 485 N. Broadway, Cortez, Colorado. On November 18, 1977, a deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado, conveying title to Parcel 2 from James R. Carpenter and Gail R. Carpenter to Edward G. Novotny and Etta B. Novotny, as joint tenants, for the stated consideration of $10.00 (ten dollars). The documentary fee stamp applied when the deed was recorded indicates that the purchase price was $58,000.00 (fifty-eight thousand dollars). See Exhibit 53.

14. Parcel 3 consists of approximately 62 acres of land located at 13106 U.S. Highway No. 666, Cortez, Colorado. The Novotnys' primary personal residence is located on this parcel. On or about September 15, 1956, a deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado, conveying title to Parcel 3 from Georgia Spickert a/k/a Mrs. Georgia Spickert to Edward G. Novotny and Etta B. Novotny, a joint tenants, for the stated consideration of $10.00 (ten dollars) See Exhibit 55.

15. Parcel 4 consists of 17 acres of land and is located at 23400 Road N, Cortez, Colorado. On or about August 7, 1975, a deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado, conveying title to Parcel 4 from Charles Dean Stone to Edward G. Novotny and Etta B. Novotny, as joint tenants, for the stated consideration of $10.00 (ten dollars). The documentary fee stamp applied indicates that the purchase price was $16,000.00 (sixteen thousand dollars). See Exhibit 57.

16. Parcel 5 is located at 112 North Street, Cortez, Colorado. This parcel includes a 900 square foot house. On or about March 2, 1978, a deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado conveying Parcel 5 from Glenda C. Pool to Edward G. Novotny and Etta B. Novotny, as joint tenants, for the stated consideration of $10.00 (ten dollars). The documentary fee stamp applied when the deed was recorded indicates that the purchase price was $19,000.00 (nineteen thousand dollars). See Exhibit 59.

17. Parcel 6 consists of 40 acres of vacant land and is located at 26058 Highway 145, Cortez, Colorado. On or about August 25, 1975, a deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado, conveying title to Parcel 6 from John L. King and Ruth D. King to Edward G. Novotny and Etta B. Novotny as joint tenants, for the stated consideration of $10.00 (ten dollars). The documentary fee stamp applied when the deed was recorded indicates that the purchase price was $56,000.00 (fifty-six thousand dollars). See Exhibit 61.

18. Parcel 7 is located at 29456 County Road U, Montezuma County, Colorado. The parcel includes a small cabin. On or about May 17, 1967, a Treasurer's Deed was recorded in the Clerk and Recorder's Office for Montezuma County, Colorado, conveying title to Parcel 7 to Edward G. Novotny and Etta B. Novotny. A true and correct copy of this Deed is attached to the Complaint as Exhibit 17. See also Exhibit 63.

C. The Federal Tax Liens

19. On or about June 23, 1993, a Notice of Federal Tax Lien was recorded in the Clerk and Recorder's Office of Montezuma County, Colorado, listing assessments made against Novotny for the 1989 and 1990 tax years. See Exhibit 65.

20. On or about June 23, 1993, a Notice of Federal Tax Lien was recorded in the Clerk and Recorder's Office of Montezuma County, Colorado, naming several entities, including the Trusts as nominees, alter egos, and/or transferees of Novotny with respect to the assessments made against him for the 1989 and 1990 tax years. See Exhibit 66.

21. On or about March 1, 1995, a Notice of Federal Tax Lien was recorded in the Clerk and Recorder's Office of Montezuma County, Colorado, listing assessments made against Novotny for the 1991 tax year. See Exhibit 67.

22. On or about March 1, 1995, a Notice of Federal Tax Lien was recorded in the Clerk and Recorder's Office of Montezuma County, Colorado naming several entities, including the Trusts as nominees, alter egos, and/or transferees of Novotny with respect to the assessments made against him for the 1991 tax year. See Exhibit 68.

D. Colorado's Tax Lien

23. On December 13, 1999, the Montezuma County District Court entered judgment for Colorado against Novotny in the amount of $34,264 for unpaid state income tax and statutory additions for 1990 and 1991. See Exhibit 99-C. The state of Colorado recorded on December 15, 1999, a transcript of judgment docket with the clerk and recorder of Montezuma County. See id.

E. The Attempt to Transfer the Subject Property to Sunrise and Midwest

24. On August 3, 1979, Edward G. Novotny and Etta B. Novotny attempted to transfer the seven parcels of real property (described in paragraphs 10–16 above) to Midwest and Sunrise. The Novotnys attempted to transfer title to parcels 1, 2, 4,

5, and 6 to Midwest. See Exhibits 52, 54, 58, 60, and 62. The Novotnys attempted to transfer title to parcels 3 and 7 to Sunrise. See Exhibits 56 and 64.

25. In consideration of $10.00 (ten dollars) and 100 Trust Certificate Units (''TCUs'') the Novotnys conveyed their interests in Parcels 1, 2, 4, 5, and 6 to Midwest Ltd. on June 1, 1979. In consideration of $10.00 (ten dollars) and 100 TCUs, the Novotnys conveyed their interests in Parcels 3 and 7 to Sunrise on June 1, 1979. See Exhibits 72 and 76.

26. The documentary fee stamps applied when the Deeds to Parcels 1, 2, 4, 5, and 6 were recorded indicate that the Novotnys paid approximately $166,000.00 (one hundred and sixty-six thousand dollars) for those five parcels of property. It is unclear what the Novotnys paid for Parcels 3 and 7.

27. This court has previously held that the attempted transfers of the seven parcels from the Novotnys to Midwest and Sunrise were ineffective as a matter of Colorado law, because Midwest and Sunrise failed to comply with section 38-30-166, C.R.S., the Colorado statute that permits trusts to hold title to real property. See Opinion, p. 29. This court further held that because title to all seven parcels was never transferred to Midwest and Sunrise, title to the seven parcels remains with Novotny and Etta Novotny, unless Midwest and Sunrise prevail in their quiet title actions. See Opinion, pp. 29–30.

F. Creation of Midwest and Sunrise

28. On June 1, 1979, for the purposes of estate planning and asset protection, the Novotnys formed two trusts, Midwest and Sunrise, by purchasing trust packages to form ''family trusts'' or ''common law trusts'' from a trust promoter named Lowell Anderson (''Anderson'').

29. Anderson and several co-conspirators subsequently were indicted and charged with conspiracy to defraud the Government by selling common law trust packages designed to avoid the payment of federal income taxes. See United States v. Tranakos, 911 F.2d 1422, 1424 (10th Cir. 1990); see also United States v. Anderson, 778 F.2d 602 (10th Cir. 1985); United States v. Anderson, 577 F.Supp. 223 (D. Wyo. 1983). Anderson died before trial, but his co-conspirators were convicted. See Tranakos, 911 F.2d at 1429.

1. Midwest: The ''Trustees''

30. Midwest was governed by several trustees immediately after its formation, including Novotny, Etta Novotny, Anderson, and Frank Pena (''Pena''). See Exhibit 82. In addition to these individual trustees, another trust also served as trustee of Midwest - the Pioneer Trust through its trustee C. A. Anderson (''C.A. Anderson'' as distinguished from ''Anderson''). See id.

31. At the time Midwest was formed, the Novotnys barely knew Anderson or Pena, two of the first trustees.

32. After they were appointed as trustees of Midwest in April 1979, Novotny, Etta Novotny, and Pena resigned as trustees in August 1979. See Exhibit 82. After the Novotnys resigned as trustees, Anderson and the Pioneer Trust, the remaining trustees, appointed Novotny as Midwest's ''manager'' and Etta Novotny as the ''assistant manager.'' See Exhibit 82.

33. In 1984, another trust, the Common Estates Company, was appointed as a trustee of Midwest. See Exhibit 82.

34. The Common Estates Company and Anderson shared the same address: P.O. Box 328, Greybull, Wyoming, 82426. See Exhibit 82.

35. In October 1985, Novotny and Etta Novotny were appointed as trustees of Midwest and Sunrise by the then current trustees, Anderson and Common Estates Company, both of whom resigned as trustees several days later. See Exhibits 82 and 84.

36. In September 1993, after the IRS issued a Notice of Deficiency to Novotny for the 1989 and 1990 tax years, the Novotnys resigned as trustees of Midwest and appointed Barbara Costello (''Costello'') and Jimmy Chisum (''Chisum'') as trustees. See Exhibit 82.

2. Sunrise: The ''Trustees''

37. Sunrise, like Midwest, was governed by a number of trustees immediately after its formation, including Novotny, Etta Novotny, Anderson, C. A. Anderson, and Pena. See Exhibit 84.

38. It is unclear whether C. A. Anderson served as a trustee of Sunrise in her individual capacity or in her capacity as trustee of the Pioneer Trust. See Exhibit 84.

39. At the time Sunrise was formed, the Novotnys barely knew Anderson or Pena, two of the first trustees.

40. After they were appointed as trustees of Sunrise in April 1979, Novotny, Etta Novotny, and Pena resigned as trustees in August 1979. See Exhibit 84.

41. Sunrise, unlike Midwest, did not have a ''manager'' or ''assistant manager.''

42. The Novotnys have been the only trustees of Sunrise since 1985.

G. Operation of Midwest and Sunrise

43. Novotny has been the ''manager'' of Midwest from 1979 to date. He maintains and repairs the five parcels that the Novotnys attempted to transfer to Midwest. He has not received compensation from Midwest for performing these services.

44. It is unclear what duties Etta Novotny performs as Midwest's ''assistant manager.''

45. With the exception of the Novotnys and Costello's involvement with the house on 112 North Street located on Parcel 5, none of the other individual trustees of Midwest or Sunrise has participated directly in managing any of the seven parcels. Costello's role with respect to the house on 112 North Street was primarily that of a renter who maintains the property in exchange for her use of the house.

46. While Chisum appears on trust documents as a trustee of Midwest, Chisum has not performed any duties as a trustee. Even though the Novotnys do not know where Chisum lives, he has not been replaced as a trustee. See Exhibit 82.

47. Neither Midwest nor Sunrise has made any distributions of principal or income to the designated beneficiaries. The designated beneficiaries are not even aware of the details of Midwest and Sunrise; several of them incorrectly think that they are ''trustees'' of Midwest and/or Sunrise.

48. Neither Sunrise nor Midwest has maintained financial statements.

49. Neither Midwest nor Sunrise has filed federal income tax returns since they were formed. See Exhibit 74, ¶ 2 and Exhibit 78, ¶ 2.

50. Neither Midwest nor Sunrise has maintained consistent and legitimate trust minutes. Indeed, many of the most important decisions regarding the subject property are not memorialized in the minutes. See Exhibits 82 and 84.

51. The Novotnys have not paid rent as such to Midwest or Sunrise for their use of any of the seven parcels.

52. Neither Sunrise nor Midwest has placed specific restrictions on the Novotnys' use of the seven parcels.

53. Novotny and Etta Novotny make virtually all of the decisions concerning the seven parcels.

54. Midwest or Sunrise has paid the property taxes on each of the seven parcels from 1979 to the present. In those years when the Trusts had the money to pay the taxes, they did. In other years when the Trusts lacked the money to pay the taxes, the Novotnys paid them for the Trusts.

55. In June 1979, Novotny negotiated a lease with a rancher permitting him to use Parcel 6 for livestock grazing for $300.00 (three-hundred dollars) per year.

H. Parcel 3: The Residence and Business

56. In June 1979, Sunrise entered into an agreement to lease Parcel 3 to Midwest for the nominal rent of $10.00 (ten dollars) per year, Midwest has not paid any rent to Sunrise. See Exhibit 96. There does not appear to be any legitimate purpose for the lease.

57. Parcel 3 consists of the Novotnys' primary personal residence and approxi-

mately 50 acres of land that was used for Novotny's business, Four Corners Auto Parts and Salvage, until approximately 1990. Since 1979, the Novotnys have lived almost continuously in the residence located on Parcel 3, just as they had before they attempted to transfer it to Sunrise.

58. The Novotnys have not paid rent to either Midwest or Sunrise for their nearly continuous and extensive use of the Parcel 3 residence. In lieu of rent, the Novotnys have secured, maintained, and improved the property. Additionally, in any year in which the Trusts lacked the funds necessary to pay the required property taxes, the Novotnys either loaned the Trusts the money to pay the taxes or paid them for the Trusts, thereby eschewing the sale of Parcel 3 for delinquent taxes.

59. Neither Novotny nor his business, Four Corners Auto Parts and Salvage, has paid Midwest or Sunrise rent for the use of the portion of Parcel 3 that was devoted to the auto parts and salvage business. Again, in lieu of rent, Novotny has secured, maintained, and improved the property. This portion of Parcel 3 has been free from waste and trespass during Novotny's use and occupancy.

60. Novotny, in conjunction with the sale of scrap metal to Copperstate Metals, Inc., leased Parcel 3 ostensibly on behalf of Midwest to David Zack ("Zack") of Copperstate Metals, Inc., for approximately two-to-three years. See Exhibit 20.

61. Novotny, purportedly acting as the manager of Midwest, negotiated the lease of Parcel 3 with Zack. The lease required monthly lease payments in the cash equivalent of 1,200 Federal Reserve Notes, which the lease specified was $225.00 (two-hundred and twenty five dollars). The lease required that the monthly lease payments be made in cash or money order. See Exhibit 20.

62. The lease payments were made by money order directly to Novotny in his name, not to Midwest. See Exhibit 21. However, the rent was expended by the Novotnys ostensibly for the benefit of Midwest.

63. Novotny, purportedly acting as manager of Midwest, wrote to Zack on several occasions concerning late payment of rent. See Exhibits 23–26; 28–34.

64. When Copperstate Metals, Inc., tried to pay the monthly lease payment with a check, Novotny returned it to Copperstate Metals, and wrote a letter reminding Zack that the lease agreement required the payments be made in cash or money order. See Exhibit 27. Novotny wrote "I know that this will cause some inconvenience, but it could cause me a great deal more if it is not done that way." Id.

65. Despite the fact that the Novotnys had purportedly transferred Parcel 3 to Sunrise, which then purportedly leased it to Midwest, it was Novotny, supposedly acting as manager of Midwest, who gave Zack the option to purchase Parcel 3. The option to purchase the property was open for the duration of the lease with Copperstate Metals, Inc. See Exhibit 20.

66. The lease between Midwest and Sunrise did not provide Midwest with the authority to sublet Parcel 3 or to offer it for sale. See Exhibit 96. There is nothing in the trust minutes reflecting a decision by the trustees of Midwest or Sunrise to grant Mr. Zack, or any other party, an option to purchase Parcel 3. See Exhibits 82 and 84.

67. Novotny, purportedly acting as the manager of Midwest, drafted a contract that provided for the sale of the entire inventory of Four Corners Auto Parts and Salvage, including used cars, classic cars, new and used automotive parts, and junk cars, from Midwest to Copperstate Metals. See Exhibit 20. There is no record, however, that Four Corners Auto Parts and Salvage, or its principal Novotny, ever sold, gifted, or otherwise transferred the entire inventory of new, used, and junk vehicles and auto parts to Midwest.

I. Parcel 2: The Commercial Rental Property

68. Parcel 2 consists of two commercial buildings located at 483 and 485 Broadway in Cortez, Colorado.

69. Novotny managed and controlled Parcel 2 before the Novotnys attempted to

transfer it to Midwest, and he continued to manage and control it in the same manner after the attempted transfer, despite never receiving compensation from Midwest.

70. An unrelated third party, James Rodd (''Rodd''), leased Parcel 2 from Midwest from approximately 1979 until approximately 1994 pursuant to an oral lease agreement with Novotny dating to 1979. See Exhibit 95. During the term of this lease, Rodd operated an auto repair business from the commercial parcel.

71. When Rodd stopped paying the rent for Parcel 2, Novotny filed a document titled ''Equity Claim and Interest'' with the Montezuma County Recorder for the unpaid rent allegedly owed by Rodd for use of Parcel 2. See Exhibit 95. The ''Equity Claim and Interest'' provides that ''this claim and interest is assignable by Edward G. Novotny to any person/citizen or to any assignee(s) or heirs(s).'' See id. Early on in this document Novotny states that he is acting for and on behalf of Midwest. See id.

J. The Financial History of Midwest Limited

72. When Midwest maintained a bank account, Novotny was a signatory on that account, and he authorized payment of Midwest's bills. See Exhibits 7, 8, 11, 12, and 87. Novotny's wife and curiously his daughter were also signatories on Midwest's bank account. See Exhibits 7 and 8. There is no indication that trustees of Midwest, other than the Novotnys, ever were signatories on its bank account. See Exhibits 7 and 8.

73. Novotny also used Midwest's bank account to pay personal bills and expenses, including his gas bill and electric bill. See Exhibit 87. Novotny wrote checks from that account to the Tenth Circuit Court of Appeals and to a court reporter in conjunction with a federal criminal case in which he was convicted of illegally removing timber from a national forest. See Exhibit 87, pp. 00030 and 00038; see also United States v. Novotny, 968 F.2d 22 (10th Cir. 1992) (unpublished). He also wrote checks from Midwest's bank account to West Publishing. See Exhibit 87, pp. 00053 and 00062. He wrote numerous checks in large dollar amounts from Midwest's bank account to himself and to his business, Four Corners Auto Parts and Salvage. See Exhibit 87. He wrote checks from Midwest's bank account to various individuals and businesses. See Exhibit 87, p. 00070 (check to Jim Crosby marked ''loan''), p. 00094 (check to his daughter), and p. 00133 (check to the ''Computer Corner''). Novotny even wrote a check from Midwest's bank account to a publication called the ''Justice Times'' for a two-year subscription. See Exhibit 87, p. 00044. These expenditures are not discussed or authorized in the trust minutes. See Exhibit 82. These expenditures could represent partial repayment of monies loaned out of financial necessity by the Novotnys to Midwest. However, from the extant and scant paper trail it is impossible to determine who was owed what at any given time. Clearly, Novotny assumed he had *carte blanch* to use Midwest funds however he deemed necessary without discussion with or authorization by other trustees.

74. Because any Midwest bank account became potentially subject to levy and seizure by the IRS and/or Colorado, Novotny maintained a cash box in his house where he kept cash to pay bills associated with the seven parcels on behalf of the Trusts.

75. The Novotnys have loaned approximately $17,500.00 (seventeen thousand and five hundred dollars) of their own funds to Midwest although the loan, or series of loans, is not formally discussed or authorized in the trust minutes See Exhibit 82. The Novotnys have not charged interest to Midwest. The loan has not been documented, e.g., as in a promissory note, and is unsecured.

76. The rental income from Parcel 2 has been used to pay expenses associated with all seven parcels, including those purportedly owned by Sunrise.

77. When the rent from Parcel 2 has not been sufficient to pay the expenses, such as property taxes, associated with the seven parcels, Novotny and/or his wife

have paid these bills with their personal funds to insure survival of the Trusts and their assets for the benefit of the trust beneficiaries as well as themselves.

78. Sunrise has never had a bank account or source of income. It appears that the expenses related to the property held by Sunrise were either paid with the rental income from Parcel 2 or with Novotny's personal funds or with funds from Four Corners Auto Parts and Salvage. See Exhibit 38, p. 9, ¶ 7.

CONCLUSIONS OF LAW

A. Jurisdiction

[1] 1. The Government seeks to reduce to judgment federal income tax assessments against defendant Novotny and to foreclose federal tax liens against seven parcels of real property (''the subject property''). Defendant Colorado has filed cross-claims against the defendants seeking to foreclose its tax liens against the seven parcels of real property to satisfy a judgment entered in the Montezuma County District Court, case No. 99-CV-202 in favor of Colorado against Novotny for unpaid 1989 and 1990 Colorado income taxes, penalties, and interest. Midwest and Sunrise filed counterclaims seeking to quiet title to the subject property in their names. Defendant Etta Novotny filed a counterclaim seeking to quiet title to her interest in the seven parcels.

2. The Court has jurisdiction over the Government's action to reduce the federal income tax assessments to judgment and foreclose the federal tax liens pursuant to 26 U.S.C. §7402 and 28 U.S.C. 1340 and 1345. The Court has personal jurisdiction over each of the defendants.

3. The Court has jurisdiction over the quiet title claims of defendants Midwest, Sunrise, and Etta Novotny, pursuant to 28 U.S.C. § 2410. In her counterclaim against the United States, Etta Novotny also seeks to enjoin the tax assessments at issue. This claim is barred by the Anti-injunction Act, 26 U.S.C. § 7421. *See, e.g., Stafford v. U.S.*, 208 F.3d 1177, 1179 [85 AFTR 2d 2000-1255] (10th Cir. 2000) (actions challenging enforcement of tax liens are barred under 26 U.S.C. § 7421). To the extent Etta Novotny asserts a claim for damages against the government, that claim is barred by sovereign immunity. Etta Novotny has not demonstrated that the Government has waived sovereign immunity as to this claim.

B. Edward Novotny's Federal Income Tax Liability.

4. This suit is based upon IRS assessments against defendant Novotny for unpaid federal income taxes, penalties, and interest as reflected on the Certificates of Assessments and Payments, plus accrued but unassessed statutory additions to tax. See Exhibits 1, 2, and 3.

5. A Certificate of Assessments and Payments is admissible pursuant to Fed. R. Evid. 803(8).

6. An assessment of taxes, when properly certified, is presumptively correct evidence of a taxpayer's liability and satisfies the Government's burden of proof so that the Government may rest its case. See United States v. Janis, 428 U.S. 433, 440–441 [38 AFTR 2d 76-5378] (1976); Anderson v. United States, 561 F.2d 162, 165 [40 AFTR 2d 77-5642] (8th Cir. 1977).

7. It is well established that a Certificate of Assessments and Payments is sufficient evidence that the assessments were made in the manner prescribed by 26 U.S.C. § 6203 and the accompanying regulations. See Long v. United States, 972 F.2d 1174, 1181 [70 AFTR 2d 92-5555] (10th Cir. 1992); United States v. Chila, 871 F.2d 1015 [63 AFTR 2d 89-1278] (11th Cir. 1989); United States v. Miller, 318 F.2d 637, 639 [12 AFTR 2d 6182] (7th Cir. 1963); United States v. Schaeffer, 245 B.R. 407 [84 AFTR 2d 99-5786], 84 A.F.T.R.2d 99-5786 (Colo. 1999) (Nottingham, J.).

8. An assessment of tax as well as an assessment for failure to file tax returns and make estimated tax payments are entitled to a presumption of validity. See United States v. Dixon, 672 F. Supp. 503 [60 AFTR 2d 87-5672] (M.D. Ala. 1987), aff'd 849 F.2d 1478 (11th Cir. 1988) (Certificate of Assessments and Payments suffi-

cient of establish that taxpayer was liable for taxes, penalties, and interest).

9. The Certificates of Assessments and Payments establish that: (1) the federal income taxes, penalties and interest were assessed (Sections 6201-6203 of the Internal Revenue Code); (2) notice and demand for payment of these taxes, penalties, and interest were properly made (Sections 6303(a) and 6321 of the Internal Revenue Code); and (3) the taxpayer is presumptively liable for the unpaid taxes, penalties, and interest shown on the Certificate. See Schaeffer, supra.

10. Novotny has the burden of presenting admissible evidence to rebut the presumption of correctness accorded the Certificates of Assessments and Payments. See United States v. Gosnell, 961 F.2d 1518, 1519 [69 AFTR 2d 92-1165] (10th Cir. 1992), quoting Jones v. Commissioner, 903 F.2d 1301, 1303 [66 AFTR 2d 90-5089] (10th Cir. 1990).

11. This Court ruled on the Government's Motion for Summary Judgment and held that the Government has established Novotny's income for the years at issue. See Opinion, pp. 18–20. The Court held that the sole remaining issue to be addressed at trial is whether Novotny is entitled to reduce this income by establishing that he is entitled to deduct business expenses that may be related to Four Corners Auto Parts and Salvage. See Opinion, p. 20.

12. A taxpayer bears the burden of showing that he is entitled to deductions from income. See INDOPCO, Inc., v. Commissioner, 503 U.S. 79 [69 AFTR 2d 92-694] (1992); New Colonial Ice Co. v. Helvering, 292 U.S. 435 [13 AFTR 1180] (1934).

13. With respect to claimed business expenses, Novotny "bears the burden of substantiating the amount and purpose of the item for the claimed deduction." Ashley v. Commissioner, 80 TCM 841 [TC Memo 2000-376] , 2000 WL 1839373 (2000).

14. Novotny has repeatedly advanced the untenable position that he is immune from federal taxation. To the extent his arguments are decipherable, a representative sampling includes the following: he has not entered into a written agreement with the federal government that would subject him to taxation; he is not the type of person required to file a tax return; the tax system is voluntary; he is not a federal employee; and he has returned the bills (notices of deficiency) sent to him by the Internal Revenue Service with dishonor. Novotny's contentions are frivolous and have been explicitly rejected by the courts. See Lonsdale v. United States, 919 F.2d 1440, 1448 [67 AFTR 2d 91-1049] (10th Cir. 1990).

15. Novotny is not entitled to claim any business expenses as deductions against his gross income for the tax years 1989, 1990, or 1991. Novotny has not presented sufficient evidence to establish that he is entitled to any such deductions.

16. The Certificate of Assessments and Payments for the tax year 1989 is correct. Novotny is indebted to the United States for the amounts reflected in the Certificate of Assessments and Payments for the tax year 1989, plus interest and statutory additions calculated through June 3, 2002.

17. The Certificates of Assessments and Payments for the tax years 1990 and 1991 are correct. Novotny is indebted to the United States for the amounts reflected in the Certificates of Assessments and Payments for the tax years 1990 and 1991, plus interest and statutory additions calculated through June 3, 2002.

18. As of June 3, 2002, the first day of trial in this matter, Novotny owed the United States $383,446.33 (three hundred and eighty-three thousand, four hundred and forty-six dollars and thirty-three cents) in unpaid taxes and statutory additions for the 1989, 1990, and 1991 tax years.

C. The Federal Tax Liens Should Be Foreclosed Upon the Seven Parcels of Subject Property.

1. The Federal Tax Liens.

19. Section 6321 of Title 26 of the United States Code provides that after (1) assessment of tax and (2) notice and demand for payment, a lien arises in favor of

the Government in the amount of the assessment. The tax lien is all encompassing; it attaches to all property and rights to property belonging to the taxpayer on the date the lien arises. See 26 U.S.C. §6321 and 6322. In addition, the federal tax lien attaches to any property interest subsequently acquired by the taxpayer while the federal tax lien remains in force. See Glass City Bank v. United States, 326 U.S. 265, 267–68 [34 AFTR 1] (1945).

20. The tax lien continues in full force until the liability is paid in full or becomes unenforceable due to lapse of time. See 26 U.S.C. §6323; see also United States v. Cache Valley Bank, 866 F.2d 1242, 1244 [63 AFTR 2d 89-647] (10th Cir. 1989). A federal tax lien is perfected upon assessment and no further action need be taken. See United States v. Vermont, 377 U.S. 351, 352 [13 AFTR 2d 1599] (1964).

21. Federal tax liens arose against Novotny when the IRS made assessments against him for unpaid federal income tax liabilities for the 1989, 1990, and 1991 tax years in May of 1993 and November of 1994. See Exhibits 1 and 2. The IRS recorded the corresponding Notices of Federal Tax Lien with respect to the 1989 and 1990 tax years on June 23, 1993. The IRS recorded the corresponding Notice of Federal Tax Lien with respect to the 1991 tax year on March 1, 1995.

2. Foreclosure of Federal Tax Liens - Generally.

[2] 22. Novotny has an interest in the seven parcels against which the federal tax liens may be foreclosed. Because Midwest and Sunrise failed to comply with recording requirements under Colorado law that permit trusts to take and hold title to real property, the attempted transfers of the seven parcels from Novotny and Etta Novotny to Midwest and Sunrise were ineffective as a matter of Colorado law. Thus, title to the seven parcels remain with the Novotnys. Even if the trusts did hold title to the seven parcels, the federal tax liens may nevertheless be foreclosed for three reasons: (1) Midwest and Sunrise hold the seven parcels as nominees of Novotny; (2) Midwest and Sunrise should be disregarded because they are shams; and (3) Midwest and Sunrise are alter egos of Novotny.

3. The Trusts Did Not Comply With the Colorado Recording Requirements That Permit Trusts to Hold Title To Real Property.

23. This Court has previously held that, as a matter of Colorado law, the attempted transfers of the seven parcels from Etta Novotny and Novotny to Midwest and Sunrise were ineffective and that the trusts never took title to the property. See Opinion, p. 29–30. Thus, title to the seven parcels has remained with the Novotnys, despite the attempted transfers. Accordingly, because title remained with the Novotnys despite the attempted transfers, Novotny had an undivided one-half interest in the seven parcels to which the federal liens attached when they arose in May 1993 and November 1994, and to which the state tax lien attached on December 15, 1999. The federal and state tax liens against Novotny have not expired or been released and thus remain attached to the property. See United States v. Cache Valley Bank, *supra*.

4. Midwest and Sunrise Are Nominees of Edward Novotny.

24. It is firmly established that the Government may foreclose its federal tax liens on property held by the nominee of a taxpayer in order to collect the taxpayer's liability. See United States v. Miller Bros. Constr. Co., 505 F.2d 1031, 1036 [34 AFTR 2d 74-6241] (10th Cir. 1974); Shades Ridge Holding Co. v. United States, 888 F.2d 725, 728–729 [64 AFTR 2d 89-5426] (11th Cir. 1989); United States v. Schaeffer, 245 B.R. 407 [84 AFTR 2d 99-5786], 84 A.F.T.R.2d ¶ 99-5209 (D. Colo. 1999) (Nottingham, J.); United States v. Stonier, 73 A.F.T.R.2d ¶ 94-971 [73 AFTR 2d 94-2084] (D. Colo. 1994), aff'd by unpublished decision 48 F.3d 1233 [75 AFTR 2d 95-1513] (10th Cir. 1995), cert. denied, 516 U.S. 1183 (1996); Cityview Trust v. United States, 98-2 USTC ¶ 50-872, 1998 WL 1031525 (D. Wyo. 1998).

25. This Court has held that whether analyzed under state or federal law "[t]he

following considerations are relevant in determining whether an individual or a corporation holds property as the nominee of another: (1) the lack of consideration paid by the nominee; (2) the control exercised over the property by the transferor while the title is in the nominee's name; (3) the close relationship between the transferor and the nominee; (4) the use by the transferor of the transferred property; and (5) lack of interference in transferor's use of property by the nominee.'' Stonier, 73 A.F.T.R. 2d ¶ 94-971 at p. 94-2087, aff'd by unpublished opinion 48 F.3d 1233 (10th Cir. 1995), cert. denied, 516 U.S. 1183 (1996).

26. Additionally, courts sometimes consider whether the property was placed in the name of a nominee in anticipation of a suit or the occurrence of liabilities. See Cityview Trust v. Hutton, 98-2 USTC p 50,872, 1998 WL 1031525 (D. Wyo. 1998).

27. A review of the factors to be considered in making a nominee determination requires a finding that Midwest and Sunrise hold the subject property as nominees of Novotny.

28. First, despite the attempted transfer of the subject property to Midwest and Sunrise, Novotny continued to exercise virtually complete dominion and control (the second factor) over the seven parcels. The exercise of dominion and control is the key factor in determining whether a nominee situation exists. See Stonier, supra. He continued to use Parcel 3 as his residence and even operated his business from it. Novotny did not pay rent to either Midwest or Sunrise for his extensive use of Parcel 3.

29. With respect to all seven parcels, little or nothing changed after the Novotnys attempted to transfer them to Midwest and Sunrise. Novotny's use and enjoyment of the property was not restricted in any way by the trusts. He controlled and managed the improved parcels for his benefit just as he had prior to the attempted transfers, despite the fact that he did not receive any compensation from the trusts.

30. With respect to Parcel 6, which consists of raw land, Novotny negotiated the lease allowing a rancher to use it for grazing. There is no evidence that any individual or entity other than Novotny and/or his wife, regardless of any designation on trust documents, exercised any significant dominion or control over the seven parcels.

31. Second, there is and was a close relationship between the transferor and nominee (the third factor). Novotny, with the assistance of the trust promoters, created Midwest and Sunrise. He was a signatory on Midwest's bank account (when Midwest had a bank account). He makes disbursements related to the subject property. He has used his own personal funds to pay expenses related to property purportedly held in the names of the trusts. He also paid his own personal bills and expenses with funds from Midwest's bank account. After Midwest stopped maintaining a bank account, expenses for the subject property were (and continue to be) paid out of a cash box which Novotny maintains and controls.

32. The fourth and fifth factors in a nominee determination are (4) the use by the transferor of the property transferred to the nominee and (5) the nominee's lack of interference with the transferor's use of the property. The evidence unequivocally establishes that the fourth and fifth factors also apply because Novotny has exercised complete dominion and control over the seven parcels since the attempted transfers. See Shades Ridge Holding Co., 888 F.2d at 728 (nominee determination hinges on who has active or substantial control). Novotny has continued to use the putatively transferred property for his benefit without any interference from the trusts. He lived on one of the parcels and operated his salvage yard from it. With respect to the other parcels, he has continued to make virtually all of the decisions concerning their use. Neither Midwest nor Sunrise has interfered with Novotnys' use of the property in any way. While several of the parcels of subject property are undeveloped, to the extent that they have been used, Novotny has determined and con-

trolled their use. For example, one parcel has been leased to a rancher by Novotny.

33. With respect to the sixth factor, Novotny stopped filing federal income tax returns and paying federal income taxes in 1979, the same year that the Novotnys attempted to transfer the subject property to Midwest and Sunrise.

34. In sum, because Novotny decided to form Midwest and Sunrise; attempted to transfer the seven parcels to the trusts, but continued to use the property for his own benefit as if the attempted transfers had never occurred; and exercised almost complete dominion and control over the seven parcels after the attempted transfers, Midwest and Sunrise must be considered nothing more than his nominees or alter egos. There is no evidence that the seven parcels were used by, or managed for the benefit of, anyone other than Novotny and Etta Novotny.

5. Midwest and Sunrise Are Shams.

35. Courts have routinely held that so-called ''family trusts'' that are similar or identical to the trusts in the instant case are nullities for federal and state tax purposes.

36. Courts have uniformly rejected taxpayers' attempts to limit their tax liability by assigning income to such trusts, and then having the trusts deduct payments to the taxpayers as expenses, finding the trusts to be shams lacking any substance. See Holman v. United States, 728 F.2d 462, 465 [53 AFTR 2d 84-862] (10th Cir. 1984); United States v. Krall, 835 F.2d 711, 714 [61 AFTR 2d 88-333] (8th Cir. 1987); Joe G. Schneider, 54 TCM 1044 [1987 PH TC Memo @ ¶87,560] (1987).

37. Courts also have found trusts, similar if not identical to the instant ones, that were controlled by the taxpayers to be shams, and have permitted the Government to use assets held by these trusts to satisfy the tax liability of the individual taxpayer who transferred the assets to the trust. See F.P.P. Enters. v. United States, 830 F.2d 114, 115–117 [60 AFTR 2d 87-5710] (8th Cir. 1987); James E. Edwards Family Trust v. United States, 572 F. Supp. 22, 24–25 [51 AFTR 2d 83-719] (E.D.N.M. 1983). Here, although Novotny did not attempt to assign income to the trusts (deciding instead that he was altogether immune from taxation), the trusts should similarly be disregarded as shams.

38. In F.P.P. Enters. v. United States, 830 F.2d 114, 115 [60 AFTR 2d 87-5710] (8th Cir. 1987), the taxpayers transferred their property to trusts promoted by Anderson in exchange for ''trust certificate units.'' Id. at 116. The Government levied on property titled in the name of the trusts to collect the individual taxpayers' liability. In upholding the District Court's determination that the trusts were shams, the Eighth Circuit noted:

> The trusts here are without economic substance. Soester as ''creator'' and the Andersons as ''trustees'' established ''paper trust'' entities on December 21, 1978. Soester never held or contributed any of the real property placed in the trusts. Instead, the property was conveyed by the Beasons to the trusts approximately four months later. The Beasons continued to treat the property in exactly the same manner after the transfers as they did before that time, quite simply, as their own. The trust property may therefore be levied on to satisfy the Beason's tax liability.

F.P.P. Enters., 830 F.2d at 117.

39. The situation in the instant case is identical to that faced by the Eighth Circuit in F.P.P. Enters. ''Paper trusts'' were created for the Novotnys. The Novotnys then attempted to transfer the seven parcels to Midwest and Sunrise and continued to treat the property as their own after the attempted transfers.

40. F.P.P., supra, is particularly instructive because the Government argued, and the District Court and Eight Circuit agreed, that even if the entities were considered valid trusts under Nebraska law, they should not be considered entities separate from the taxpayer. F.P.P. Enters., supra, 830 F.2d at 117–118 (because trusts were shams and shells acting as alter egos they were not entities separate from the taxpayer). Therefore, as in F.P.P. Enters.,

supra, the trusts in the instant case are shams.

41. The defendant trusts' central argument - that a taxpayer's interest in property is limited by state law - does not override the well-established doctrine that, for federal and state income tax purposes, an entity may be disregarded if it lacks any economic reality. Furthermore, of central importance here, state law does not pro-hibit the United States or Colorado from establishing that a taxpayer has a beneficial interest in property held by an entity that is a sham, or is the taxpayer's nominee or alter ego. See ¶s 28–49, herein.

42. Indeed, the Trusts' argument that the Government and Colorado cannot foreclose upon the subject property because the trusts may be considered valid under state law would effectively eviscerate the doctrine of nominee and sham trust. The logical result of accepting the trusts' position would be to elevate form over substance. It would permit any taxpayer to avoid collection of unpaid federal and state income taxes merely by placing his real property and other valuable assets into a trust that satisfies state-law formalities, even if the taxpayer continued to use and enjoy the property as if it were his own.

43. The evidence establishes that Midwest and Sunrise are nothing more than sham trusts and that Novotny has a beneficial interest in the seven parcels purportedly held by these sham trusts that may be foreclosed upon by the Government and Colorado.

6. Midwest and Sunrise Are Alter Egos of Edward Novotny.

44. When an entity is so dominated by a taxpayer that it does not have a separate and independent existence, it is considered be an alter ego of the taxpayer. G.M. Leasing Corp. v. United States, 514 F.2d 935 [35 AFTR 2d 75-1460] (10th Cir. 1975), rev'd on other grounds, 429 U.S. 338 [39 AFTR 2d 77-475] (1977); Lemaster v. United States, 891 F.2d 115, 119–120 [64 AFTR 2d 89-5858] (6th Cir. 1989). The Government may use the assets held by the alter ego of a taxpayer to satisfy the taxpayer's federal tax liabilities. Id.

45. Midwest and Sunrise are so dominated by Novotny that they have no separate existence from him and, accordingly, are his alter egos. See United States v. Gosnell, 961 F.2d 1518 [69 AFTR 2d 92-1165] (10th Cir.1992).

46. As discussed in detail above, Novotny, despite the attempted transfer of the subject property to Midwest and Sunrise, continues to treat the subject property as his own.

47. Various individuals like Anderson and Chisum have been listed as trustees, but they do not perform duties for the trusts. Indeed, Novotny does not even know where Chisum, purportedly a trustee, is located. Despite his lack of participation, Chisum has not been replaced as a trustee.

48. Trustee meetings are sporadic or non-existent.

49. The trusts have not filed federal income tax returns.

50. The individuals listed as trust beneficiaries have had little or no involvement with the subject property and have received no distributions since the formation of Midwest and Sunrise in 1979.

D. Dismissal of the Trusts' Quiet Title Actions.

51. Midwest and Sunrise have asserted quiet title claims in an attempt to defeat the federal and state tax liens. The trusts' attempt to defeat the federal and state tax liens through their quiet title claims must fail because Midwest and Sunrise cannot satisfy the elements of the quiet title claims that they asserted.

1. Midwest and Sunrise Cannot Satisfy The Elements of Their Quiet Title Claims.

52. Midwest and Sunrise asserted quiet title claims pursuant to §38-41-108 and §38-41-111, C.R.S.

53. In order to prevail under §38-41-108, C.R.S., Midwest and Sunrise must prove that: (1) they have been in actual and exclusive possession of the seven parcels of subject property; (2) under claim

and color of title made in good faith; (3) for a period of seven successive years; and (4) they paid taxes on the seven parcels during that period. See §38-41-108, C.R.S.; see also Peters v. Smugler Durant Mining Co., 930 P.2d 575, 579–80 (Colo. 1997); Ginsburg v. Stanley Aviation Corp., 568 P.2d 35 (Colo. 1977). Midwest and Sunrise must show that they have satisfied all these elements prior to the time that the federal tax liens attached to the subject property.

54. Midwest and Sunrise have not had actual and exclusive possession of the seven parcels. Instead, as discussed extensively above, despite the attempted transfers, the Novotnys retained possession of and exercised virtually complete dominion and control over all seven parcels.

55. Second, the Trusts' claim to the subject property was not made in good faith. The Novotnys attempted to transfer the seven parcels to Midwest and Sunrise at about the same time that Novotny decided to opt out of the federal income tax reporting and payment system. Midwest and Sunrise cannot be considered to have acted in good faith because, at their core, they are merely sham entities that the Novotnys created in a thinly veiled attempt to shield their assets from legitimate creditors like the Government.

56. Third, although Midwest and Sunrise can show that the real property taxes for the seven parcels have been paid for seven years, they cannot escape the ineluctable conclusion that they were the nominees and alter egos of Novotny since shortly after their formation, if not as of their creation. Sunrise never had a bank account or assets from which it could pay taxes. The evidence shows that the Novotnys used rental payments from parcel two and their personal funds to pay expenses for all of the properties, including taxes. Importantly, because Midwest and Sunrise cannot be said to have an existence separate from Novotny, they cannot be considered to have paid any taxes. Instead, only Novotny can be considered to have paid the taxes related to the subject property.

57. To establish ownership of property under §38-41-111, C.R.S., the Trusts must prove (1) actual ownership of the seven parcels, and (2) that the deeds conveying the property were recorded for a seven-year period. See §38-41-111, C.R.S.; see Ginsberg v. Stanley Aviation Corp., 568 P.2d 35, 38 (Colo. 1977); Cavat v. Juhan, 206 P.2d 600 (1949).

58. Midwest and Sunrise cannot establish the elements necessary for a successful quiet title claim pursuant to §38-41-111, C.R.S. Midwest and Sunrise never had actual and continuous possession of the seven parcels. These trusts were shams and the nominees and alter egos of Novotny. The Novotnys maintained possession of, and exercised virtually complete dominion and control over, the seven parcels despite their ostensible attempt to transfer them to Midwest and Sunrise.

2. The Relationship Between The Trusts' Counterclaims to Quiet Title And The Taxing Authorities' Sham, Nominee, And Alter Ego Theories

59. Even assuming *arguendo* that the evidence had been sufficient to sustain the Trusts' counterclaims to quiet title, the federal and state taxing authorities are not precluded from asserting their theories of nominee, alter-ego, and sham because of the state law statues of limitation concerning actions to set aside a conveyance or deed.

60. The relevant portions of §38-41-111(1), C.R.S., place a time limit on actions to "question or attack the validity of or to set aside ... any instrument of conveyance or deed." If the party claiming title is in possession of the property and the document has been recorded and remained of record for seven years, an action to set aside the document or render it inoperative is barred. (Emphasis added). Of course, if the Trusts were able to establish title under §38-41-108 or §38-41-111, C.R.S., they would own the relevant parcel or parcels. If the bar of §111 were applicable, the Government could not "question or attack the validity of ... (the) instrument of conveyance or deed" under which the Trusts claim title.

61. A claim that the Trusts are shams, or are nominees of or alter egos of Novotny, is not an attack on the validity of the conveyances to the Trusts or the validity of the recorded deeds supporting the Trusts' claims of ownership. Rather, a sham, nominee, or alter ego claim is an attack on the validity of the Trusts as independent entities. For example, if the Trusts are alter egos of Novotny, the actions and holdings of the Trusts are the actions and holdings of Novotny. When an alter ego theory has been proven, "a court will disregard (the alter ego entity) ... and consider the actions ostensibly taken by the (alter ego entity) to be those of the (underlying entity)." *Double B Trading Co, Inc.*, 893 P.2d at 1362. Here, Novotny is the underlying entity.

62. Under these theories, if the Trusts own the property, Novotny owns the property. In other words, claims that the Trusts are shams, nominees, or alter egos can be asserted even when operating under the assumption that the Trusts hold valid title to the properties. These theories simply posit that the valid property interests of the Trusts amount to valid property interests of Novotny; that any property owned by the Trusts is, legally, property of Novotny. This is so because, as shams, nominees, or alter-egos, the Trusts are, in reality, the same as Novotny.

63. In short, proof that the Trusts are shams, or are nominees or alter egos of Novotny is, in essence, proof that the Trusts are Novotny. If the Trusts are Novotny, the Trusts' property is Novotny's. There is ample authority for the proposition that the federal and state government can collect taxes by levying on property held by a nominee or alter ego of the taxpayer.

64. The Government's alter ego, sham, and nominee theories are not barred by §38-41-111(1), C.R.S. Section 38-41-111(1), C.R.S., limits only claims that question or attack the validity of the instrument of conveyance or deed under which the Trusts claim title. The limitation of §38-41-111(1), C.R.S., is not applicable to the Government's sham, nominee, and alter ego claims because these claims do not question or attack the validity of an instrument of conveyance or deed under which the Trusts claim title. Rather, these theories assert that any valid claim of title of tile held by the Trusts flows through to Novotny.

E. Colorado's Tax Lien And Concomitant Foreclosure

65. On December 13, 1999, the Montezuma County District Court entered judgment for Colorado against Novotny in the amount of $34,264 (thirty-four thousand, two-hundred and sixty-four dollars) for unpaid state income tax and statutory additions for 1990 and 1991. The state of Colorado recorded a transcript of judgment docket with the clerk and recorder of Montezuma County on December 15, 1999. Therefore, Colorado has a valid tax lien against any property in which Novotny has a legal or equitable interest. This tax lien is subordinate and junior to that of the Government. For the reasons discussed above, the Trusts do not hold title to the seven parcels of property. Rather, the Novotnys hold title to the seven parcels of property. Further, even if the Trusts did hold title to the properties, those property interests would flow through to the Novotnys because the Trusts holding paper title to the subject seven parcels of real property have been found to be shams and the nominees and alter egos of Novotny. As a result, Colorado may enforce its tax lien against Novotny's undivided one-half interest in that real property.

F. Mrs. Novotny's Quiet Title Claim

66. As part of her quiet title claim, Etta Novotny claims that, if the Trusts are found not to hold valid title to the properties, that she holds an undivided one-half interest in the properties, in joint tenancy with Novotny. The Government does not dispute this claim, and the record supports this claim. The properties originally were conveyed to Novotny and Etta Novotny as joint tenants. Because the Trusts' claim of title to the properties is invalid, the Novotny's continue to hold title to the properties as joint tenants.

67. Etta Novotny is entitled to judgment quieting title to her interest in each of the seven parcels. This judgment shall reflect that Mrs. Novotny holds title to the properties in joint tenancy with Novotny, and that Etta Novotny holds an undivided one-half interest in each of the properties.

THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

1. That judgment be entered against Edward G. Novotny and in favor of the Government with respect to the 1989, 1990, and 1991 tax years in the amount of $383,446.33, (three hundred and eighty-three thousand, four hundred and forty-six dollars and thirty-three cents) plus interest and statutory additions as provided by law from June 3, 2002;

2. That judgment shall enter in favor of Etta Novotny on her quiet title claim. The judgment shall decree that Etta Novotny holds title to the to the seven parcels of real estate described in this Order in joint tenancy with Novotny, and that Etta Novotny holds an undivided one-half interest in each of the properties;

3. That the federal and state tax liens are foreclosed against the seven parcels of real property described above;

4. That the seven parcels shall be sold by the United States Marshal, with one half of the net sale proceeds to be applied first to Edward G. Novotny's federal tax liability, and if this liability is satisfied and funds remain, then to Edward G. Novotny's Colorado state tax liability; the other half of the net proceeds to be paid to Etta Novotny;

5. That a deficiency judgment shall be entered against Edward G. Novotny in favor of the United States of America if the proceeds of the sale do not satisfy his federal tax liabilities;

6. That a deficiency judgment shall be entered against Edward G. Novotny in favor of the Department of Revenue, State of Colorado if the proceeds of the sale do not satisfy Novotny's state tax liabilities;

7. That the counterclaims and cross-claims of defendants Midwest and Sunrise are DISMISSED WITH PREJUDICE;

8. That the counterclaims and cross-claims of Etta Novotny, other than the quiet title counterclaim described in paragraph four (4), above, are DISMISSED WITH PREJUDICE;

9. That the Government and the State of Colorado shall recover their costs and shall submit a bill of costs within eleven (11) days of the date of this Order; and

10. That the Government shall submit a proposed Order of Foreclosure and Decree of Sale within 45 (forty-five) days.

DATED: July 3, 2002.

BY THE COURT:

Robert E. Blackburn

United States District Judge

¶2002-5223

In Re: SCOTT CABLE COMMUNICATIONS, INC., Debtor. U.S. Bankruptcy Court, Dist. of Connecticut, (Bktcy Ct CT) Docket No. 98-51923, July 18, 2002. Earlier proceedings at (2002, Bktcy Ct DE) 89 AFTR 2d 2002-1645; (2001, Bktcy Ct CT) 87 AFTR 2d 2001-2611, 263 BR 6, on remand from (2001, DC CT) 87 AFTR 2d 2001-1547, reversing and remanding (1999, Bktcy Ct CT) 83 AFTR 2d 99-2495, 232 BR 558, 99-1 USTC ¶50513; and (1998, Bktcy Ct CT) 83 AFTR 2d 99-1028, 227 BR 596, 99-1 USTC ¶50288. Decision against Govt.

1. Bankruptcy court procedure—application to use cash collateral—IRS objection. Chap. 11 debtor-in-possession/intervenor's application to use cash collateral to pay administrative expenses incurred in connection with transferred adversary proceeding was granted over IRS's and state tax authority's objections: application was in accord with prior orders declaring debtor's right to intervene in proceeding and to make any request for administrative expenses arising out of such proceeding. *Reference:* United States Tax Reporter ¶68,726.52(3); 68,726.52(30).

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United States Bankruptcy Court, District of Connecticut.

Order Granting Debtor's Application to Use Cash Collateral and Denying Motions to Convert or Appoint Trustee

SHIFF, Chief Bankruptcy Judge:

Chapter 11

[1] On June 7, 2001, this court, *sua sponte*, transferred adversary proceeding 98-5104 along with any "administrative expense and cash collateral applications associated with it" to the bankruptcy court for the district of Delaware, pursuant to 28 U.S.C. § 1412, Rule 1014 F.R.Bankr.P., and 11 U.S.C. § 105.[1] The quoted language was intended to provide the maximum latitude to the Delaware court, so that it could consider any requests by Scott for the payment of administrative expenses arising out of that adversary proceeding. As stated on the record on June 5, 2002, any such determination by the Delaware court would be paid from cash collateral allowed here after notice and a hearing.

Scott's instant cash collateral application is opposed by the IRS, the office of the United States Trustee, and the State of Connecticut Department of Revenue Services, (collectively, "the government") for the reasons, *inter alia*, that Scott has a conflict of interest and its intervention in the transferred adversary proceeding is redundant to the efforts of the defendant State Street Bank and would impose an unwarranted and unreasonable economic burden on the creditors of Scott's estate.[2] But, as noted at the June 5th hearing, the Delaware court had expressly found that Scott's intervention in the adversary proceeding was warranted:

> The United States argues that Debtor is not entitled to intervene as a "party in interest" because it has no meaningful financial or other interest to protect in the adversary proceeding. I disagree.
>
> Although Debtor may not have a significant financial interest in the outcome of the adversary proceeding, it does have an interest and fiduciary duty, as debtor-in-possession, to ensure that the Estate's assets are distributed in accordance with the proper legal and equitable priorities of the parties in interest. It also has an interest in the adversary proceeding because the outcome of the proceeding has the potential to disrupt Debtor's current capital structure as established by the confirmation order entered in connection with Debtor's prior reorganization case.

In re Scott Cable Communications, Inc., 2002 WL 417013 at 3 (Bankr. D. Del., March 4, 2002). The final order of the

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[1] Familiarity with the record is assumed. *See United States v. State Street Bank and Trust (In re Scott Cable) ("Scott")*, 263 B.R. 6 [87 AFTR 2d 2001-2611] (Bankr. D. Conn. 2001).

[2] The IRS has also filed separate motions to convert this case to chapter 7, *see* 11 U.S.C. §1112, and for the appointment of a chapter 11 trustee. For the same reason, i.e., the debtor's alleged conflict of interest, it opposes the debtor's cash collateral application. The State of Connecticut and the United States Trustee support the IRS' position.

Delaware Bankruptcy Court is not subject to collateral review.[3]

The language quoted in the transfer order was intended to provide the maximum latitude to the Delaware court, as this court recognized that the Delaware court would be the only forum that could assess the necessity and reasonable value of any administrative expenses arising out of that adversary proceeding.

Accordingly, the government's objections to the cash collateral application are OVERRULED, the application is GRANTED,[4] the motion to convert is DENIED, the motion for the appointment of a trustee is DENIED, and it is

SO ORDERED this 18th of July, 2002.

Alan H.W. Shiff

Chief United States Bankruptcy Judge

¶2002-5224

Eva Jordan SHERMAN, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Central Dist. of California, (DC CA) Docket No. CV 02-01996 DDP (AJWx), June 26, 2002. Year 1992. Decision for Govt.

1. Limitations periods on refunds—untimely claims—jurisdiction. Pro se taxpayer's refund action based on over-reporting of pension payments was dismissed for lack of jurisdiction: action was untimely under IRC §6511(a) where taxpayer filed amended return claiming refund more than 3 years from date original return was filed. *Reference:* United States Tax Reporter ¶65,115.04(70); 74,225.01(20). IRC §6511; 7422.

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA,

FINAL JUDGMENT

DEAN D. PREGERSON United States District Judge

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

[Motion filed on 05/10/02]

Pursuant to the Order filed herewith, IT IS ORDERED AND ADJUDGED that the motion to dismiss filed by the defendant is granted. The action is dismissed with prejudice. The Court ORDERS that such judgment be entered.

IT IS SO ORDERED.

Dated: 6-25-02

DEAN D. PREGERSON

United States District Judge

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

DEAN D. PREGERSON United States District Judge

This matter comes before the Court on the defendant's motion to dismiss. After reviewing and considering the materials submitted by the parties and hearing oral argument, the Court grants the defendant's motion to dismiss with prejudice.[1]

BACKGROUND

On March 8, 2002, the plaintiff in pro se, Eva Jordan Sherman (''Sherman'' or the ''plaintiff''), filed the instant action against the defendant, the United States of America (''USA'' or the ''defendant''). The plaintiff seeks to recover from the USA internal revenue taxes for the taxable year 1992 in the amount of $5,254. (Compl.)

The plaintiff alleges that the Internal Revenue Service (IRS) erroneously and illegally assessed and collected income taxes from her for 1992 in the amount of $5,254 based on her over-reporting of her pension

[3] The State of Connecticut's suggestion that ''once this court approves a cash collateral order, . . . the money will be spent'' is rejected for the reason that no fee applications will be approved without a notice and opportunity for objection. *See* transcript of June 5, 2002 hearing at 32–34. The United States Trustee's supplemental June 7 memorandum, is stricken as untimely filed. *See In re Levitt*, 137 B.R. 881, 882 (Bankr. D. Mass 1992); *In re Smith*, 179 B.R. 437 447 (Bankr. E.D. Penn. 1995).

[4] The application's proposed 2002 total budget of $829,400 seeks to set aside $10,000 for the payment of bankruptcy court costs, $800,000 for legal fees, $6,000 for indenture trustee fees, $10,000 for record keeping, $1,000 for tax return preparation and $2,400 for long term storage costs. Scott withdrew its application with respect to bank charges. *See* transcript of June 5 hearing at 43–44.

[1] Although the Court is bound by the applicable statute to grant the defendant's motion to dismiss, the Court commends Ms. Sherman on the articulate presentation of her case at oral argument.

payments from the State Teachers' Retirement System. (Compl.) On her 1992 federal income tax return, on line 17b, the plaintiff reported that she received $44,074.54 in pension payments. (Id.) The plaintiff should have only reported the amount of $27,159, which was the amount reflected as gross pension distributions reported as paid to her on an IRS Form 1099 issued to her by the State Teachers' Retirement System. (Id.) The plaintiff did not realize the error until April 2000. (Id.)

On April 2, 2000, the plaintiff submitted to the IRS an IRS form 1040X, Amended U.S. Tax Return, for 1992. (Id.) On the amended income tax return for 1992, the plaintiff asserted that she had a reduced tax liability for that year due to a mistake she made in putting the amount of $44,072.68 on line 17b of her 1992 income tax return rather than the amount of $27,159 shown on an IRS Form 1099-R for her gross pension distributions for 1992. (Id.) The plaintiff further asserted: "During the processing of my return the processor evidentially did not compare the amount $44,072.68, shown as the taxable amount of my pension on line 17b, with the amount $27,159.00, shown as my gross distribution (total pension) on my 1099R form for 1992. Accurate processing would have detected this error." (Id.) The plaintiff claims that she is entitled to a refund of tax in the amount of $5,254. (Id.)

On April 4, 2000, the IRS received the plaintiff's claim for a refund. (Id.) On April 28, 2000, the IRS disallowed the plaintiff's claim for a refund. (Id.) The plaintiff filed an administrative appeal of the disallowance of her claim for a refund. On September 21, 2000, the IRS informed the plaintiff that it could not process her claim. (Id.) On March 8, 2002, the plaintiff filed the instant case.

DISCUSSION

A. Legal Standard

1. Subject Matter Jurisdiction

"A federal court always has the power to determine its own subject matter jurisdiction (i.e. whether it may adjudicate the particular type of case involved)." William W. Schwarzer et al., Federal Civil Procedure Before Trial § 2:21 (1999). Federal courts must determine issues of subject matter jurisdiction before considering a case on its merits. Id. at § 2:22.

B. Analysis

[1] The defendant contends that the Court does not have subject matter jurisdiction over the instant case because the plaintiff failed to file a timely refund pursuant to 26 U.S.C. § 6511. (Def's Mtn. at 8.) The plaintiff alleges that subject matter jurisdiction is conferred over the instant action for refund of taxes pursuant to 28 U.S.C. § 1346(a)(1).[2]

However, any tax refund suit brought pursuant to 28 U.S.C. § 1346(a)(1) is subject to the requirements of 26 U.S.C. § 7422(a), which provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof ....

Id. Under 26 U.S.C. § 7422(a), the government consents to be sued for a tax refund, provided that a claim for refund is duly filed with the IRS, which means the claim has to be timely under 26 U.S.C. § 6511. United States v. Dalm, 494 U.S. 596, 608 [65 AFTR 2d 90-1210] (1990); see also Crismon v. United States, 550 F.2d 1205, 1206 [39 AFTR 2d 77-1279] (9th Cir. 1977) (holding that a taxpayer is prevented

[2] 28 U.S.C. § 1346(a) provides: "The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, ... under the internal-revenue laws ...." Id.

from maintaining a suit in any court for a tax refund until a claim for refund has been duly filed). Thus, the issue in the instant case is whether the plaintiff's claim for refund was timely under 26 U.S.C. § 6511.

26 U.S.C. § 6511(a) provides that a claim for credit or refund of any overpayment of any tax must be filed within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within two years from the time the tax was paid. Yuen v. United States, 825 F.2d 244, 245 [60 AFTR 2d 87-5523] (9th Cir. 1987). Section 6511(b)(1) provides that no credit or refund shall be allowed after the expiration of the period of limitations prescribed in § 6511(a), unless a claim therefore is timely filed. "Unless a taxpayer has duly filed a claim for refund of federal taxes with the IRS, a district court is without jurisdiction to entertain a suit for refund, and a claim is not duly filed unless it is timely." Yuen, 825 F.2d at 245 (citations omitted); see also, 26 U.S.C. §§ 6511(a) and 7422(a) (no tax refund suit may be maintained unless a claim for refund is duly filed); Dalm, 494 U.S. at 601–02.

Under § 6511(a), the plaintiff had three years from April 15, 1993, the date she filed her original 1992 income tax return, to file with the IRS an amended return to correct any mistakes and to claim a refund of any overpaid taxes. To be timely, the plaintiff must have filed her amended return by April 15, 1996. The plaintiff filed her amended return on April 4, 2000.

The Court is bound to follow § 6511(b)(1). Section 6511(b)(1) is statutory law enacted by Congress, which legally precludes the IRS and this Court from allowing any refund of plaintiff's 1992 income tax payments for 1992 because her refund claim was not timely. Because the plaintiff's claim for refund was not timely, the Court is without jurisdiction to adjudicate the instant action.

CONCLUSION

Based on the foregoing, the Court grants the defendant's motion to dismiss with prejudice.

IT IS SO ORDERED.

Dated: 6-25-02

DEAN D. PREGERSON

United States District Judge

¶2002-5225

John Bruce STEIDEL, PLAINTIFF v. Russ EVANS, ET AL., DEFENDANTS. U.S. District Court, Western Dist. of Washington, (DC WA) Docket No. C02-5205RJB, July 22, 2002. Years 1996, 1997, 1998. Decision for Govt.

1. Collection due process—review of administrative determination—district court jurisdiction. Taxpayer's action against IRS employees for review of administrative determination to proceed with collection was dismissed: Tax Court had exclusive jurisdiction over IRC §6330 actions contesting income tax liabilities; and argument that district court had jurisdiction because action involved employment taxes was frivolous where final notice and determination notice described liabilities as Form 1040 taxes and taxpayer's official records contained no employment tax liabilities. But, taxpayer had 30 days to appeal to Tax Court. *Reference:* United States Tax Reporter ¶63,305.01(10). IRC §6330.

2. Actions against IRS employees—sovereign immunity—collection due process. Taxpayer's action against IRS employees for review of administrative determination to proceed with collection was dismissed: U.S., which was proper defendant to claims involving acts taken in employees' official capacities, didn't waive sovereign immunity under 28 USC §1331 where statute contained no waiver for actions against U.S. in district court; and IRC §6330 didn't waive sovereign immunity for district court actions involving in-

come taxes. *Reference:* United States Tax Reporter ¶74,336.506(25). IRC §6330.

United States District Court, Western District of Washington at Tacoma.

Order Granting United States' Motion to Dismiss or, in the Alternative, for Summary Judgment, and Dismissing Case

BRYAN, District Judge:

This matter comes before the court on the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment. Dkt. 6. The court has considered the pleadings filed in support of and in opposition to the motion, and the remainder of the file herein.

PROCEDURAL HISTORY

On April 22, 2002, plaintiff filed a Petition for Review of Determination of Internal Revenue Service Office of Appeals and Denial of Due Process. Dkt. 1. The persons named as defendants are Russ Evans, Team Manager of the Appeals section of the Internal Revenue Service; and Tim Paul, Appeals Officer of the Appeals section of the Internal Revenue Service. Dkt. 1, at 2–3. In his complaint, plaintiff alleged that this court has federal question jurisdiction under 28 U.S.C. § 1331. He bases the federal question on 26 C.F.R. § 601.102, which provides that employment taxes are not within the jurisdiction of the U.S. Tax Court. Dkt. 1, at 2. In the complaint, plaintiff alleges that the I.R.S. issued a Notice of Determination without affording him the right to an in-person appeals conference; that he did not receive a statutory notice of deficiency; and that the tax assessments for the years 1996, 1997, and 1998 were not authorized by fact of law. Dkt. 1.

The United States has filed a Motion to Dismiss or, in the Alternative, for Summary Judgment (Dkt. 6), contending that the federal district court does not have jurisdiction over the claims raised in the complaint. The United States claims that (1) plaintiff's claims may be brought in the U.S. Court of Claims rather than the U.S. District Court because the determination at issue involves income taxes, not employment taxes; (2) the United States should be substituted for defendants Evans and Paul in this case, as the claims are against these defendants in their official capacities; (3) the United States is protected by sovereign immunity in this action because the underlying taxes are income taxes.

Plaintiff opposes the United States' motion, contending that (1) the district court should rule on this appeal because plaintiff was denied due process when he requested and was denied an in-person hearing; (2) the Tax Court does not have jurisdiction over this matter because the I.R.S. violated his constitutional rights by assessing tax liabilities that were not valid; (3) the defendants violated their duties when they failed to provide him a hearing; (4) the district court has jurisdiction because the appeals hearing was for a determination of employment taxes, not income taxes.

DISCUSSION

1. Jurisdiction of District Court

[1] 26 U.S.C. § 6330 provides the procedures for administrative collection actions. The law requires that (1) the IRS give 30 days' written notice of the taxpayer's right to a CDP hearing before making a levy; (2) a hearing be conducted by an officer or employee who has no prior involvement with the subject tax liability; (3) the Appeals Office obtain verification from the IRS that the requirements of any applicable law or administrative procedure have been met; (4) the taxpayer may raise any relevant issue relating to the unpaid tax or the proposed levy at the CDP hearing, including challenges to the appropriateness of collection actions and offers of collection alternatives; (5) the taxpayer may challenge the existence or amount of the underlying tax liability under some circumstances; and (6) the final determination by the Appeals Officer shall take into consideration (a) the verification that applicable law and administrative procedures have been met, (b) the issues raised by the taxpayer, and (c) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of

the person that any collection action be no more intrusive than necessary. *See* 26 U.S.C. § 6330(a), (b)(1), (c), (c)(2)(B), and (c)(3)(C).

A taxpayer may appeal the determination of the Appeals Office to the Tax Court or to a federal district court, whichever has jurisdiction over the underlying tax liability. 26 U.S.C. § 6330(d). When the underlying taxes are income taxes, the Tax Court has exclusive jurisdiction. *See* 26 U.S.C. § 6213 (providing for filing petition in Tax Court for redetermination of deficiency in tax determined by Secretary pursuant to 26 U.S.C. § 6212); Treas. Reg. § 601.102(b)(1)(identifying income taxes as being within the jurisdiction of Tax Court; *True v. Commissioner*, 108 F.Supp.2d 1361, 1364 [87 AFTR 2d 2001-2617] (M.D. Fla. 2000)(district court lacks subject matter jurisdiction over a Section 6330 case involving income tax as opposed to employment tax).

If the court in which the action is commenced determines that it was filed in the incorrect court, the plaintiff shall have thirty days after the court decision to file in the correct court. 26 U.S.C. § 6330(d)(1).

Although this court would have jurisdiction if the underlying taxes were employment taxes, as petitioner has alleged, the evidence shows that the underlying taxes owed by plaintiff for tax years 1996, 1997, and 1998 were income taxes. The Final Notice attached to the complaint describes the liabilities by the form number of income tax returns, 1040. Dkt. 1. Attachment. The Notice of Determination attached to the complaint also describes the liabilities as 1040 taxes. Dkt. 1, Attachment. The liabilities were based on income taxes assessed on February 5, 2001. Dkt. 7, at 3. The amounts of the assessments correspond to the amounts set forth as ''Unpaid Amount[s] from Prior Notices'' on the final page of the Final Notice. Dkt. 1, Attachment. Plaintiff's official records do not contain any employment tax liabilities. Dkt. 7, at 4. Petitioner's arguments in his opposition to this motion to the effect that the taxes at issue are employment taxes are frivolous and without merit.

Because the underlying taxes in this case are Form 1040 taxes, jurisdiction for an action for judicial review under 26 U.S.C. § 6330(d)(1) lies exclusively with the Tax Court. Accordingly, this case should be dismissed, and plaintiff should be afforded the opportunity to refile in Tax Court, provided that appeal is timely filed, that is, within thirty days after the date of this order. 26 U.S.C. § 6330(d)(1).

2. Sovereign Immunity

[2] In light of the discussion above, the court need not reach the issue of Sovereign Immunity. However, the court will address this issue as an alternative basis for the decision on the United States' motion.

The United States argues that this action is barred by sovereign immunity. The United States first contends that this is an action against the United States because the remedy is sought against the individual defendants in their official capacities. Even if the United States were substituted as the sole defendant in this case, the United States argues that there has been no waiver of Sovereign Immunity.

A suit against an officer of the United States with respect to actions taken in his or her official capacity, where relief sought would expend itself against the federal fisc, is deemed to be against the United States. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458–59 [56 AFTR 2d 85-5567](9th Cir. 1985); *Ferrel v. Brown*, 847 F.Supp. 1524, 1526 [72 AFTR 2d 93-6693] (W.D. Wash. 1993) *aff'd*, 40 F.3d 1049 [74 AFTR 2d 94-7036] (9th Cir. 1994). The actions alleged in the complaint are against defendants Evans and Paul in their official rather than personal capacities. Accordingly, this action may proceed, if at all, only against the United States.

As a sovereign, the United States may be sued only to the extent that it has consented to be sued. *United States v. Sherwood*, 321 U.S. 584, 586 (1941). A plaintiff who brings an action against the United States must find an express waiver

of sovereign immunity that allows such an action. *Lonsdale v. United States*, 919 F.2d 1440, 1444 [67 AFTR 2d 91-1049] (10th Cir. 1990). When there is no waiver of sovereign immunity, it is appropriate for the court to dismiss the action for lack of subject matter jurisdiction. *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 [56 AFTR 2d 85-5567] (9th Cir. 1985).

Plaintiff has alleged federal question jurisdiction under 28 U.S.C. § 1331. Section 1331 contains no waiver of sovereign immunity for an action against the United States in district court. *North Side Lumber Co. v. Block*, 753 F.2d 1482, 1484 (9th Cir. 1985). Moreover, 26 U.S.C. § 6330(d)(1) does not waive sovereign immunity for actions in district court if the underlying taxes are income taxes. As discussed above, the underlying taxes in this case are income taxes.

Because this is an action against the United States, and because there has been no waiver of sovereign immunity for a challenge of a determination of income tax liability in district court, this case should be dismissed. The United States has consented to an action in Tax Court under 26 U.S.C. § 6330.

Therefore, it is hereby

ORDERED that the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment (Dkt. 6) is GRANTED. This action is DISMISSED without prejudice to plaintiff to file the action in U.S. Tax Court within thirty days of the date of this order.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 22 day of July, 2002.

ROBERT J. BRYAN

United States District Judge

¶2002-5226

Solomon and Lily TEKLE, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Central Dist. of California, (DC CA) Docket No. CV 01-11096 RSWL (Ex), April 30, 2002. Years 1994, 1995. Decision for Govt.

1. Actions against U.S., IRS and IRS employees—damages—limitations periods—Anti-Injunction Act—jeopardy assessments. Govt. was granted summary judgment on incarcerated tax evader's and impoverished wife's action for collection injunction and damages relating to allegedly wrongful jeopardy assessments and levy: no exception to AIA's prohibition on tax-related injunction claims applied where taxpayers didn't show govt. couldn't ultimately prevail; didn't timely file suit within IRC §7429(b)'s limitations period; and didn't show that IRS failed to serve them proper deficiency or levy notices. Also, IRS wasn't suable entity; jeopardy assessment even if wrongful wasn't actionable under IRC §7433; and damages claims thereunder against IRS employees otherwise failed for untimeliness and for failure to show employees engaged in any collection-related misconduct. *Reference:* United States Tax Reporter ¶74,215.05(5); 74,295.01(15); 62,125.03(9); 63,315.01(15); 74,335.01(7). IRC §6212; 6331; 7421; 7429; 7433.

United States District Court, Central District of California.

Order Granting Defendant's Motion for Summary JudgmentOrder Denying Plaintiffs' Motion for Summary Judgment

LEW, District Judge:

Before the Court is Defendant United States of America's Motion for Summary Judgment. This matter was scheduled to be heard on April 22, 2002, but was taken off calendar pursuant to Rule 78 of the Federal Rules of Civil Procedure for disposition based on the papers filed. For the reasons set forth below, the Court hereby GRANTS Defendant United States of America's Motion for Summary Judgment and DENIES Plaintiffs Solomon and Lily Tekle's Motion for Summary Judgment.

I. INTRODUCTION

Plaintiffs Solomon and Lily Tekle ("Plaintiffs") bring this action in propria personae against the United States of America ("Defendant") for unlawful tax assessment and improper tax collection allegedly conducted by the Internal Revenue Service ("IRS").

The Complaint alleges causes of action for: (1) Violation of 26 U.S.C. Section 6212(a) (failure to timely issue Notice of Deficiency); (2) Violation of 26 U.S.C. Section 6331(d) (failure to issue Notice of Intent to Levy); (3) Violation of 26 U.S.C. Section 7433 (misconduct of IRS agents in connection with collection of taxes). Plaintiffs seek injunctive relief and damages.

Defendants now move the Court for summary judgment on the grounds that Plaintiffs' causes of action and prayer for injunctive relief all fail as a matter of law. Plaintiffs oppose the Motion and concurrently move for summary judgment.

II. BACKGROUND

In 1995, the IRS commenced an investigation of Plaintiffs. Plaintiffs claim that the IRS made a determination of income tax deficiency against them on March 20, 1998. According to Plaintiffs, since the IRS failed to send them a statutory deficiency notice within ninety days of the determination, they did not receive timely notice and were therefore denied the opportunity to challenge the deficiency in Tax Court without first having to pay the tax. Plaintiffs further claim that they do not have the means to raise the $859,427 tax due in order to bring a refund suit because Solomon Tekle is currently in prison. Lily Tekle and the children receive public assistance. (Compl. ¶s 9, 65–66.)

On March 23, 1998, IRS agents arrested Plaintiffs. Plaintiffs were subsequently prosecuted and convicted of federal income tax evasion for tax years 1994 and 1995. Solomon Tekle was also convicted of drug trafficking and money laundering. (Id. ¶s 9, 13; Def.'s Mot. at 3, lns. 8–9.)

In March 1999, pursuant to a court order, Plaintiffs' home was sold and the IRS seized the proceeds. (Id. ¶ 14, Ex. C.)

On May 5, 1999, the IRS made a jeopardy assessment against Plaintiffs in the amount of $716,166. (Compl. ¶ 15, Ex. D.)

On May 6, 1999, the IRS recorded a notice of federal tax lien in the amount of $716,166 against Plaintiffs' business, ST & T, Inc., DBA Food Bargain Market ("Market"). On the same day, the IRS issued a notice of levy and levied on the proceeds from the sale of the Market. (Compl. ¶ 16, Ex. D) Plaintiffs claim that the IRS failed to provide them with ten days notice of intent to levy. (Id. ¶ 7.)

On May 7, 1999, Plaintiffs filed a letter requesting the IRS to stay enforcement of the jeopardy assessment and to review the amount of the assessment. On June 16, 1999, an IRS appeals officer determined that the jeopardy assessment action was reasonable under the circumstances and that the jeopardy assessment amount was correctly computed and appropriate. The IRS based its determination on the same information about unreported income used to prosecute Plaintiffs for tax evasion. (Id. ¶ 19, Ex. E.)

According to Plaintiffs, the IRS' failure to release the lien and levy on the Market has created extreme financial hardship on Plaintiffs and their three minor children. Plaintiffs claim that the loss of income has made them insolvent to the point of bankruptcy. (Id. ¶ 19, 66.)

On July 2, 1999, the IRS issued to Plaintiffs a notice of deficiency for tax years 1994 and 1995. (Request for Judicial Notice, Ex. C., Prior Complaint at 15, lns. 14–17, Ex. 8 attached thereto.)

On June 10, 1999, Plaintiffs filed a civil action in this Court against the Commissioner of Internal Revenue alleging unlawful taxation and illegal assessment ("Prior Complaint"). This Court granted the Commissioner's motion to dismiss that action for lack of subject matter jurisdiction. The Ninth Circuit affirmed the dismissal.

On December 26, 2001, Plaintiffs filed the instant action. Like the Prior Complaint, Plaintiffs allege that the 1994 and 1995 income tax assessments were unlaw-

ful and that the IRS' collection actions were procedurally improper. Plaintiffs seek: (1) an order enjoining the IRS from collecting past due taxes, interest, and penalties; (2) the return of proceeds from the sale of their Market business, $8,142 taken from their home, $1,200 bond on their van which the IRS later seized, any allowable interest; and (3) money damages under 26 U.S.C. Section 7433 for alleged IRS employee misconduct for failure to provide timely notice.

III. DISCUSSION

A. Legal Standard: Summary Judgment

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue is one in which the evidence is such that a reasonable fact-finder could return a verdict for the non-moving party. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). The evidence, and any inferences based on underlying facts, must be viewed in a light most favorable to the opposing party. Diaz v. Am. Tel. & Tel., 752 F.2d 1356, 1358 n.1 (9th Cir. 1985).

Where the moving party has the burden of proof at trial - the plaintiff on a claim for relief or the defendant on an affirmative defense - the movant must establish "all of the essential elements of the claim or defense to warrant judgment in his favor." Fontenot v. Upjohn Co., 780 F.2d., 1190, 1194 (9th Cir. 1986); Selnick v. Turner Entm't Co., 990 F. Supp. 1180, 1183 (C.D. Cal. 1997). "The crucial question for the court is whether there is a 'genuine issue' of fact concerning any essential element of the claim on which judgment is being sought." Fontenot, 780 F.2d at 1195.

Where the moving party does not have the burden of proof at trial on a dispositive issue, the moving party may meet its burden for summary judgment by showing an "absence of evidence" to support the non-moving party's case. Celotex v. Catrett, 477 U.S. 317, 325 (1986).

The non-moving party, on the other hand, is required by Rule 56(e) to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. Id. at 324. Conclusory allegations unsupported by factual allegations, however, are insufficient to create a triable issue of fact so as to preclude summary judgment. Hansen v. United States, 7 F.3d 137, 138 [72 AFTR 2d 93-5922] (9th Cir. 1993) (citing Marks v. Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978)). A non-moving party who has the burden of proof at trial must present enough evidence that a "fair-minded jury could return a verdict for the [opposing party] on the evidence presented." Anderson, 477 U.S. at 255.

The moving party has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. In fact, the moving party need not produce any evidence at all on those matters. Celotex, 477 U.S. at 323.

Upon a showing that there is no genuine issue of material fact as to a particular claim or defense, the court may grant summary judgment in the party's favor "upon all or any part thereof." Fed. R. Cir. P. 56(b).

In ruling on a motion for summary judgment, the Court's function is not to weigh the evidence, but only to determine if a genuine issue of material fact exists. Anderson, 477 U.S. at 249.

B. Defendant's Request for Judicial Notice

[1] The Court hereby GRANTS Defendant's request for judicial notice of: (1) a copy of the Civil Docket Sheet for ST & T, Inc., dba Food Bargain Market; Solomon Tekle; and Lily Tekle v. Commissioner of Internal Revenue, CV 99-5962 RSWL (C.D. Cal.); (2) a copy of Plaintiff's Prior Complaint with exhibits; and (3) Plaintiffs' Opposition, with exhibits, to Commissioner's motion to dismiss. The documents contain relevant adjudicative facts which are not subject to reasonable dispute in that they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).

C. Defendant Is Entitled to Summary Judgment

1. Plaintiffs' Claims for Injunctive Relief

The district court has original jurisdiction of any civil action arising under the Internal Revenue Code. See 28 U.S.C. § 1340. However, actions to enjoin the assessment and collection of taxes by the IRS are narrowly limited by the Anti-Injunction Act ("Act"), 26 U.S.C. § 7421. Cool Fuel, Inc. v. Connett, 685 F.2d 309, 313 [50 AFTR 2d 82-5746] (9th Cir. 1982). In pertinent part, the Act states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person[.]" 26 U.S.C. § 7421(a). However, there are several statutory exceptions and one judicial exception to the Act. See 26 U.S.C. §§ 6212(a), (c), 6213(a), 6672(b), 6694(c), 7426(a), (b) (1), 7429(b) (statutory exceptions); Univ. v. Simon, 416 U.S. 725, 736–37 [33 AFTR 2d 74-1279] (1974) (judicial Bob Jones exception).

The district court must dismiss for lack of subject matter jurisdiction any suit that does not fall within one of the exceptions to the Act. Jensen v. IRS, 835 F.2d 196, 198 [61 AFTR 2d 88-362] (9th Cir. 1987). Thus, once a taxpayer satisfies one of the exceptions to the Act, he is no longer jurisdictionally barred from seeking an injunction. Id. In addition to satisfying an exception to the Act, the taxpayer must also allege sufficient grounds for equitable relief. *See id.*; Elias v. Connett, 908 F.2d 521, 523 [66 AFTR 2d 90-5346] (1990).

The Court concludes that Plaintiffs are jurisdictionally barred from seeking an injunction because they do not satisfy an exception to the Act. Since Plaintiffs fail to show that the government cannot ultimately prevail on the merits, the judicial exception does not apply here. Id., 908 F.2d at 525. The Court, therefore, turns to the relevant statutory exceptions.

26 U.S.C. Section 7429 provides for judicial review of the reasonableness of a jeopardy assessment or levy and the appropriateness of the assessment amount. 26 U.S.C. § 7429(b)(1), (g). After administrative review of the jeopardy assessment, the taxpayer may bring a civil action against the United States in district court within 90 days after (a) the date of the administrative determination or (b) the 16th day after the taxpayer's request for administrative review (whichever is earlier). Id. § 7429(b)(1).

Here, Plaintiffs requested an administrative review of the jeopardy assessment on May 7, 1999. The IRS made its determination on June 16, 1999. Thus, Plaintiffs were required to seek judicial review by August 23, 1999, or soon thereafter. Plaintiffs filed their Prior Complaint on June 10, 1999, against the Commissioner of the IRS. Because Plaintiffs sued an improper defendant, this Court dismissed the Prior Complaint for lack of subject matter jurisdiction. The Ninth Circuit later affirmed the dismissal.

Since Plaintiffs did not file the instant action until December 26, 2001, they are foreclosed from seeking judicial review of the reasonableness of the jeopardy assessment and the appropriateness of the assessment amount. For these reasons, the Court finds that Plaintiffs do not satisfy the statutory exception of Section 7429(b).

The Court also finds that Plaintiffs do not meet the statutory exceptions of Sections 6212(a) and 6213(a). Section 6212(a) authorizes the IRS to send a notice of deficiency to the taxpayer. Section 6213(a) generally provides that no assessment of a tax deficiency and no levy or proceeding in court for its collection can be made, begun, or prosecuted until a notice of deficiency has been mailed to the taxpayer. Assessments pursuant to Section 6861 (jeopardy assessments of income, estate, gift, and certain excise taxes) are specifically excluded from the general procedure under Section 6213. 26 U.S.C. § 6861(a). Furthermore, Section 6331 allows the IRS to make a levy upon a person's salary, wages, or other property without pre-collection notice when the IRS has made a jeopardy assessment. 26 U.S.C. § 6861(d)(3).

Under Section 6861(a), if the IRS believes that the assessment or collection of a deficiency will be jeopardized by delay, it is authorized to make an immediate assessment without following the procedures re-

quired for an ordinary assessment. Miller v. United States, 66 F.3d 220, 222 [76 AFTR 2d 95-6584] (9th Cir. 1995). However, the IRS must send the taxpayer a notice of deficiency within 60 days after making the jeopardy assessment. 26 U.S.C. § 6861(b).

Here, Plaintiffs admit that on May 5, 1999, the IRS made a jeopardy assessment against them and sent them a "Notice of Jeopardy Assessment and Right of Review." (Compl. ¶ 15, Ex. D.) On July 2, 1999, within 60 days after making the jeopardy assessment, the IRS issued a notice of deficiency. (Request for Judicial Notice, Ex. C., Prior Complaint at 15, lns. 14–17, Ex. 8 attached thereto.) Thus, Defendant's evidence shows that the IRS timely issued a notice of deficiency which gave Plaintiffs 90 days to file a petition with the Tax Court for pre-payment redetermination of their tax obligation. 26 U.S.C. § 6213. Plaintiffs give no reasons for their failure to timely petition the Tax Court. Accordingly, the Court GRANTS Defendant's Motion for Summary Judgment as to Plaintiffs' first claim for failure to timely issue a notice of deficiency and second claim for failure to timely issue a notice of intent to levy.

Furthermore, since Plaintiffs do not satisfy the narrow statutory exceptions of the Anti-Injunction Act, the Court therefore DENIES Plaintiffs' Motion for Summary Judgment, in particular, their request for injunctive relief to enjoin the IRS from further collection action and for full return of the proceeds from sale of their property.

2. Plaintiffs' Claim for Money Damages

The "Taxpayer Bill of Rights" allows a taxpayer to sue the United States in district court if, in connection with any collection of federal tax, any IRS officer or employee negligently, recklessly, or intentionally disregards any IRS provision or regulation. 26 U.S.C. § 7433(a). Collection actions include notice and demand for payment and filing of notice of tax lien. Miller, 66 F.3d at 222. The assessment or tax determination part of the process, even if improper, is not an act of collection and therefore not actionable under Section 7433. Id. Furthermore, the taxpayer must exhaust all administrative remedies and bring the action within two years after the date the right of action accrues. 26 U.S.C. § 7433(d).

Here, the body of Plaintiffs' Complaint identifies as a defendant the IRS. It also identifies as defendants the Commissioner of the Internal Revenue Service; Michael Gallo, IRS agent; Rudy Carpio, IRS agent; F. Stevens, IRS Revenue Officer; and Michael Glyer, IRS Appeals Officer (the "IRS Employees"). Since the IRS is not an entity subject to suit, it is hereby DISMISSED. Lake v. IRS, No. CV-F-91-302REC, 1991 WL 336919, at 3 (E.D. Cal. Oct. 31, 1991) (citing Krouse v. United States Gov't Treas. Dept. IRS, 380 F. Supp. 219, 221 [35 AFTR 2d 75-999] (C.D. Cal. 1974)).

As to the IRS Employees, the parties dispute whether they have been properly served. Even if service was proper, Plaintiffs have failed to show that the IRS Employees committed tortious misconduct in connection with the collection of Plaintiffs' taxes, supra. Moreover, Plaintiffs' right of action accrued, at the latest, when they received the IRS appeals officers' administrative determination on June 16, 1999. Since they did not file the instant action until December 26, 2001, their claim against the IRS Employees is time-barred.

For these reasons, the Court GRANTS Defendant's Motion for Summary Judgment as to Plaintiffs' third claim for IRS employee misconduct.

IV. CONCLUSION

The Court concludes that there are no triable issues of material fact and that Defendant United States is entitled to judgment as a matter of law on Plaintiffs' first claim for failure to timely issue notice of deficiency, second claim for failure to timely issue notice of intent to levy, and third claim for IRS employee misconduct. Accordingly, the Court hereby GRANTS Defendant's Motion for Summary Judgment and DENIES Plaintiffs' Motion for Summary Judgment. IT IS SO ORDERED.

RONALD S.W. LEW

United States District Judge

DATED: APRIL 30 2002

No. CV 01-11096 RSWL [Solomon Tekle et al. v. U.S.A.: Motion for Summary Judgment]

(orders/Tekle.sj/78/U)

¶2002-5227

THE PEOPLE OF CALIFORNIA, ex rel Cecil B. Swim, Jr., Citizen in Party, PLAINTIFF v. DISTRICT DIRECTOR, California Internal Revenue Service, in His Individual Capacity, Does I-XX DEFENDANT. U.S. District Court, Central Dist. of California, (DC CA) Docket No. EDCV 02-00495-VAP (SGLx), July 8, 2002. Year 1998. Decision for Govt.

1. Actions against IRS officers—mandamus—unlawful collection; failure to release liens and levies—sovereign immunity. Pro se taxpayer's mandamus action against IRS District Director and anonymous Does for alleged unlawful collection and failure to release liens and levies was dismissed without leave to amend: taxpayer didn't show that U.S., which was proper defendant to claims involving acts taken in employees' official capacities, waived its sovereign immunity. And, taxpayer didn't oppose motion to dismiss, so failed to set forth additional facts that would cure his counterclaim. *Reference:* United States Tax Reporter ¶74,217.501(30); 74,336.506(25); 74,335.01(15); 74,325.01. IRC §7432; 7433.

United States District Court, Central District of California.

Order Granting Defendant's Motion to Dismiss Petition for Lack of Subject Matter Jurisdiction

PHILLIPS, District Judge:

[Motion filed on May 31, 2002.]

The Court has received and considered all papers filed in support of Defendant's Motion to Dismiss for Lack of Subject Matter jurisdiction. No opposition has been filed. The Motion is appropriate for resolution without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. For the reasons set forth below, the Motion is GRANTED without leave to amend.

I. BACKGROUND

Petitioner Cecil B. Swim, Jr, (''Plaintiff'') commenced this action by filing a ''Verified Petition for Writ of Mandamus'' in the California Superior Court, County of San Bernardino, on May 6, 2002, alleging the District Director, California Internal Revenue Service (''IRS''), acted unlawfully in the collection of taxes for the year 1998, and has failed to release various levies and liens involving the taxable year 1998. [Respondent's Motion to Dismiss (''Respt's Mot.'') at 3.] Respondent IRS (''Respondent'') removed this action to this Court on May 22, 2002. Respondent now brings the current Motion to Dismiss for Lack of Subject Matter Jurisdiction and Lack of Personal Jurisdiction.[1]

II. LEGAL STANDARD

A. 12(b)(1)

Pursuant to Federal Rule of Civil Procedure 12(b)(1), a district court must dismiss an action if the court lacks jurisdiction over the subject matter of the suit. Fed. R. Civ. P. 12(b)(1). The party seeking to invoke federal jurisdiction bears the burden of establishing that jurisdiction exists. Scott v. Breeland, 792 F.2d 925, 927 (9th Cir. 1986). A complaint will be dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction if (1) the cause does not ''arise under'' any federal law or the United States Constitution, (2) there is no cause or controversy within the meaning of that constitutional term, or (3) the cause is not one described by any jurisdictional statute. Baker v. Carr, 369 U.S. 186, 198 (1962). A 12(b)(1) Motion is appropriate when a Plaintiff's claim is barred by sovereign immunity. See Porter ex rel. Porter v. Board of Trustees of Manhattan Beach Unified School Dist., 123 F. Supp. 2d 1187, 1194 (C.D. Cal. 2000); Wright, Miller & Cooper, Federal Practice & Procedure: Cicil § 1350 (3d ed. 1998).

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[1] The Court need not consider whether it has personal jurisdiction as subject matter jurisdiction is lacking.

B. Timely Opposition Required

This Motion is unopposed. Under Local Rule 7-9, a party must file opposition papers no later than 14 days before the date designated for the hearing of the motion. Failure to do so, under Local Rule 7-12, may result in a finding that the party has consented to granting the motion. Despite Plaintiff's failure to file Opposition, the Court considers the merits of Defendant's Motion to Dismiss.

III. DISCUSSION

[1] Although Petitioner attempts to sue the District Director of the IRS in his individual capacity, this is a suit against the United States. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 [56 AFTR 2d 85-5567] (9th Cir. 1985) (holding suit against IRS employee acting in official capacity suit against government). Consequently, ''absent express statutory consent to sue, dismissal is required.'' Id.

''The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.''' Dugan v. Rank, 372 U.S. 609, 620 (1963) (quoting Land v. Dollar, 330 U.S. 731, 738 (1947), and Larson v. Domestic & Foreign Corp., 337 U.S. 682, 704 (1949)). The United States, as a sovereign, may not be sued without its consent; ''[w]aivers of [its] sovereign immunity, to be effective, must be 'unequivocally expressed.''' U.S. v. Nordic Village Inc., 503 U.S. 30, 33–34 [69 AFTR 2d 92-687] (1992) (quoting Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95 (1990) (quoting U.S. v. Mitchell, 445 U.S. 535, 538 (1980), and United States v. King, 395 U.S. 1, 4 [23 AFTR 2d 69-1358] (1969)); Cominotto v. U.S., 802 F.2d 1127, 1129 (9th Cir. 1986) (''[W]aiver of immunity must be demonstrated by the party suing the United States.'').

This action is against the United States even though Petitioner names an individual as Respondent. Gilbert, 756 F.2d 1458 (''[S]overeign immunity cannot be avoided by naming officers and employees of the United States as defendants.'') (citing Larson, 337 U.S. at 688). Petitioner sues for acts done by federal employees in their official capacities; namely, the assessment and collection of Petitioner's unpaid federal income tax liabilities. [Respt's Mot. at 7.] As such, absent a waiver by Respondent, the Petition must be dismissed.

Petitioner has not demonstrated that the United States waived its sovereign immunity. Petitioner did not file opposition to Respondent's Motion,[2] and it does not appear from the face of his Petition that he alleges a waiver. Accordingly, the Petition is dismissed.

IV. DISMISSAL WITHOUT LEAVE TO AMEND

''Dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment.'' Polich v. Burlington Northern, Inc., 942 F.2d 1467, 1472 (9th Cir. 1991). Plaintiff did not file opposition to Defendant's Motion, and thus has failed to set forth any facts which he could add to save his Counterclaim. See In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 991 (9th Cir. 1999) (citing In re VeriFone Sec. Litig., 11 F.3d 865, 872 (9th Cir. 1993) (dismissing without leave to amend when plaintiffs failed to allege additional facts which might cure defects in complaint)).[3]

V. CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss is GRANTED without leave to amend.

Dated: July 8, 2002

VIRGINIA A. PHILLIPS

United States District Judge

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[2] This failure alone may be deemed his assent to the dismissal of his action. See Local Rule 7-12.

[3] Plaintiff's pro se status does not affect the Court's capacity to dismiss without leave to amend. ''Pro se litigants in the ordinary civil case should not be treated more favorably than parties with attorneys of record.'' Jacobsen v. Filler, 790 F.2d 1362, 1364 (9th Cir. 1986).

¶2002-5228

Robert C. WARD v. INTERNAL REVENUE SERVICE at Fresno; Criminal Investigation Department, Department of the Treasury; Informant Claims Examiner at Fresno; United States Government; Laverna Taylor, Informant Claims Examiner at Ogden, Utah. U.S. District Court, Central Dist. of California, (DC CA) Docket No. CV-02-01613 CAS (JTLx), June 18, 2002. Decision for Govt.

1. Informants' rewards—sovereign immunity—Federal Tort Claims Act. Pro se informant's FTCA action against U.S., IRS and IRS employee for refusal to pay reward for information he provided on delinquent taxpayer was dismissed for lack of jurisdiction: sovereign immunity wasn't waived under FTCA where rewards pro-vided to tax informants were discretionary under IRC §7623; defendants weren't required to answer complaint before filing dismissal motion; and request for appointment of counsel was denied. *Reference:* United States Tax Reporter ¶76,235.01(30); 76,557.53(12). IRC §7623.

United States District Court, Central District of California.

Minute Order

SNYDER, District Judge:

Maynor Galvez, Deputy Clerk

PROCEEDINGS: FEDERAL DEFENDANTS' MOTION TO DISMISS (filed May 10, 2002)

I. BACKGROUND

Plaintiff, acting *pro se*, filed the complaint in this action on February 25, 2002, alleging that he provided information to the Internal Revenue Service ("IRS") Center's Criminal Investigation Department in Fresno, California, which led to the collection of taxes from a delinquent taxpayer. Plaintiff purports to bring this action pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671 et seq., and seeks the monetary reward he alleges is due to him. On May 10, 2002, defendants[1] filed the instant motion to dismiss plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1), (2), (5), and (6).[2]

II. FACTS

Plaintiff alleges that on December 4 and 5, 1997, he provided information regarding a "60 million dollar I.R.S. rip off" to the IRS Center Criminal Investigation Department in Fresno. Complaint ("Comp.") ¶s 2, 3. Plaintiff appears to allege that as a result, the IRS collected millions of dollars in taxes, fines, and penalties from several individuals. Id. ¶ 7. Plaintiff alleges that in March 2001, he wrote to the IRS requesting assistance in obtaining the reward he contends he is due. Id. ¶ 12. Plaintiff al-leges that on approximately August 1, 2001, he completed a "claim for reward" form and sent it to the IRS informant claims examiner for processing. Id. ¶ 14. Plaintiff alleges that in November 2001, claims examiner Laverna Taylor informed him that she required more time to process the claim; shortly thereafter, plaintiff sent Taylor additional information regarding his claim. Id. ¶s 15, 16. Plaintiff alleges that on January 11, 2002, he received a letter denying his claim for reward. Id. ¶ 18. Plaintiff then initiated this lawsuit.

In the caption of the complaint, plaintiff names as defendants the following persons and entities: (1) the IRS Center at Fresno; (2) the Criminal Investigation Department, Department of the Treasury; (3) Informant Claims Examiner at Fresno; (4) the United States Government; and (5) Laverna Taylor, Informant Claims Examiner at Ogden, Utah.

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[1] Although the moving parties refer to themselves as "the federal defendants," all defendants joined in the instant motion. Therefore, the Court will refer to them simply as "defendants."

[2] On May 20, 2002, plaintiff attempted to file an opposition to defendants' motion; however, on May 22, 2002, the Court rejected plaintiff's opposition because no proof of service was attached to the document and because plaintiff had attached a state court summons. On June 3, 2002, defendants, who had received a copy of plaintiff's opposition, filed a reply brief. On June 4, 2002, plaintiff properly filed his opposition to defendants' motion to dismiss. Thereafter, the Court took the matter under submission.

III. STANDARD FOR MOTION TO DISMISS PURSUANT TO 12(b)(1)

A motion to dismiss an action under Federal Rule of Civil Procedure 12(b)(1) raises the question of the federal court's subject matter jurisdiction over the action. The objection presented by this motion is that the court has no authority or competence to hear and decide the case. This defect may exist despite the formal sufficiency of the allegations in the complaint. See T.B. Harms Co. v. Eliscu, 226 F.Supp. 337, 338 (S.D.N.Y.), aff'd 339 F.2d 823 (2d Cir. 1964) (the formal allegations must yield to the substance of the claim when a motion is filed to dismiss the complaint for lack of subject matter jurisdiction). When considering a Rule 12(b)(1) motion challenging the substance of jurisdictional allegations, the Court is not restricted to the face of the pleadings, but may review any evidence, such as declarations and testimony, to resolve any factual disputes concerning the existence of jurisdiction. See McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988).

The burden of proof on a Rule 12(b)(1) motion is on the party asserting jurisdiction. See Sopcak v. Northern Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir. 1995). If jurisdiction is based on a federal question, the pleader must show that he has alleged a claim under federal law and that the claim is not frivolous. See 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1350, pp. 229–30. On the other hand, if jurisdiction is based on diversity of citizenship, the pleader must show real and complete diversity, and also that his asserted claim exceeds the requisite jurisdictional amount of $75,000.00. See id.

IV. DISCUSSION

[1] Defendants contend that this action should be dismissed pursuant to Rule 12(b)(1) of the Fed. R. Civ. P. for lack of subject matter jurisdiction. Motion of Federal Defendants to Dismiss ("Mot.") at 5. As a sovereign, the United States is immune from suit unless it has expressly waived its sovereign immunity. Gilbert v. DaGrossa, 756 F.2d 1455, 1458 [56 AFTR 2d 85-5567] (9thCir. 1985); see also Carelli v. Internal Revenue Service, 668 F.2d 902, 904 [49 AFTR 2d 82-529] (6th Cir. 1982) (sovereign immunity bars informant's suit to claim reward for providing information about underpaid taxes). Naming federal agencies, agency components, and employees as defendants "does not keep this action from being a suit against the United States," as parties sued in their official capacity are also immune from suit unless there is an express statutory waiver of immunity of the United States. Gilbert, 756 F.2d at 1258.

In the instant case, plaintiff purports to sue the United States, its agencies, and an agency employee to recover a monetary reward from the IRS. See Comp., *passim.* A suit is considered "against the sovereign" if the judgment sought would be paid out of the public treasury, or if the effect would be to restrain the government from acting or compel it to act. Dugan v. Rank, 372 U.S. 609, 620 (1963). Because the relief requested by plaintiff in the instant action is against the United States as sovereign, plaintiff must allege a waiver of sovereign immunity in order to maintain this lawsuit. Gilbert, 756 F.2d at 1458; Carelli, 668 F.2d at 904.

Plaintiff purports to bring this suit pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. ("FTCA"). See Comp., Caption. Defendants argue that the FTCA does not waive the government's sovereign immunity for suits to recover monetary rewards from the IRS, because the granting of rewards is a discretionary function of the government. Mot. at 7. Pursuant to 26 U.S.C. § 7623, the statute authorizing the IRS to make monetary rewards for informants, and the regulations thereunder, see 26 C.F.R. § 301.7623-1(a)[3] , the IRS has discretion to determine whether a reward is paid to an informant

[3] 26 C.F.R. § 301.7623-1(a) provide:

In cases where rewards are not otherwise provided for by law, a district or service center director may approve a reward, in a suitable amount, for information that leads to the detection of underpayments of tax, or the detection and bringing to trial and punishment of persons guilty of violating the internal revenue laws or conniving at the same.

and the amount of any reward. Krug v. U.S., 168 F.3d 1307, 1310 [83 AFTR 2d 99-885] (Fed. Cir. 1999); Carelli, 668 F.2d at 904; Destefano v. U.S., 52 Fed.Cl. 291, 293 [89 AFTR 2d 2002-1535] (2002) (26 U.S.C. § 2973 and 26 C.F.R. § 301.7623-1 "do not mandate monetary rewards and consequently do not create a substantive right to money damages.")

"Discretionary activities belong to a class of conduct of government officials in which the Congress has expressed an intention not to waive sovereign immunity." Carelli, 668 F.2d at 904; see also Hutchinson v. United States, 677 F.2d 1322, 1327 [50 AFTR 2d 82-5117] (9th Cir. 1982) ("the provisions of the [FTCA] specifically exclude claims based upon the performance of a discretionary function by a government officer and claims arising with respect to the assessment and collection of any tax," citing 28 U.S.C. § 2680(a) and (c)); see also Destefano, 52 Fed.Cl. at 293 (because they are discretionary, "plaintiff cannot premise jurisdiction on either [26 U.S.C. § 7623] or the regulation.") Thus, because the provision of rewards to tax informants is discretionary, plaintiff's claim is barred by the doctrine of sovereign immunity.[4]

Plaintiff does not offer any argument or authority in response. See Motion in Opposition to Defendants' Motion to Dismiss ("Opp. Mot."), *passim.* Instead, plaintiff appears to contend that defendants must answer the complaint before the Court can consider the motion to dismiss. Opp. Mot. at 1–2. Plaintiff's contention is without basis. Defendants are not required to answer the complaint before filing a motion to dismiss pursuant to Rule 12.[5]

V. CONCLUSION

Therefore, defendants' motion to dismiss is GRANTED. Plaintiff shall file a First Amended Complaint curing the defect noted herein within 20 days hereof.

IT IS SO ORDERED.

¶2002-5229

WHITE MOUNTAIN SERVICES CORP., f/k/a Source One Mortgage Services Corp., PLAINTIFF v. Cal B. WHITWORTH, Patricia E. WHITWORTH, Department of the Treasury-Internal Revenue Service, Boston Water & Sewer Commission, Boston Edison Company, and Boston Gas Company, DEFENDANTS. U.S. District Court, Dist. of Massachusetts, (DC MA) Docket No. 00-CV-12334-GAO, July 11, 2002. Decision for Govt. in part.

1. Lien property—interpleader—distribution orders. Pursuant to agreed order, balance of interpleaded foreclosure sale proceeds were to be distributed 1st to judgment lienholder and then to govt. in partial satisfaction of its tax lien. *Reference:* United States Tax Reporter ¶63,215.02(246). IRC §6321.

Michael K. Callahan, Esq. NSTAR Electric and Gas Corp. Prudential Tower 800 Boylston Street, 17th Floor Boston, MA 02199 (617) 424-2102
Wendy J. Kisch, Esq. Trial Attorney, Tax Division Department of Justice Ben Franklin Station Washington, D.C. 20044 (202) 307-6553 Attorney for the Defendant

United States District Court, District of Massachusetts.

Agreed Order

(formerly Superior Court of the Commonwealth of Massachusetts Suffolk, ss Case No. 00-3844F)

[1] The United States of America, named as the Department of the Treasury-Internal Revenue Service and Boston

[4] In light of this holding, the Court does not reach defendants' additional arguments that this matter should be dismissed for failure to state a claim, insufficient service of process, and lack of personal jurisdiction. Mot. at 11–17.

[5] In his opposition, plaintiff also appears to request appointment of counsel. Opp. Mot. at 2. There is no constitutional right to counsel in a civil case. Lassiter v. Dep't of Social Services, 452 U.S. 18, 25 (1981). However, pursuant to 28 U.S.C. § 1915(e)(1), a district court may request that an attorney represent a litigant who is proceeding *in forma pauperis.* The court may ask counsel to represent an indigent litigant under § 1915 only in "exceptional circumstances," the determination of which requires an evaluation of both (1) the likelihood of success on the merits and (2) the ability of the plaintiff to articulate his claims pro se in light of the complexity of the legal issues involved. Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991); Wilborn v. Escalderon, 789 F.2d 1328, 1331 (9th Cir. 1986). Insofar as plaintiff's request can be construed as a request for appointment of counsel, the Court declines to appoint counsel.

Edison Company hereby STIPULATE AND AGREE:

WHEREAS, Plaintiff filed the instant interpleader action on or about October 16, 2000 in the Plymouth County Superior Court, depositing into the court the surplus proceeds from a foreclosure sale of real estate owned by Cal and Patricia Whitworth in the amount of $51,362.20;

WHEREAS, the United States thereafter removed this action to the U.S. District Court for the District of Massachusetts and the interpled funds were transferred to the Clerk of the U.S. District Court;

WHEREAS, Boston Edison holds a judgment lien on the Cal Whitworth's property which judgment was entered on May 16, 1994, in the amount of $6,051 and an execution was filed on or about June 6, 1994 (*See* Attachment A);

WHEREAS, Cal Whitworth is currently indebted to Boston Edison for that judgment in the amount of $7,475.08, including interest through June 24, 2002 (*See* Attachment B);

WHEREAS, the United States holds a federal tax lien on all of Cal and Patricia Whitworth's property and rights to property in the amount of $51,981.83, including interest through June 30, 2002. (*See* Attachment C);

WHEREAS, the United States filed notices of federal tax liens against the property of Cal and Patricia Whitworth in March and December of 1997 (*See* Attachment D);

WHEREAS, on April 11, 2001, the Court awarded plaintiff $1, 715.00 in attorney fees and $192.50 in costs (for a total of $2,078.50) incurred in connection with this interpleader action;

WHEREAS, on April 11, 2001, the Court endorsed plaintiffs motion to dismiss the plaintiff from this interpleader action;

WHEREAS, on May 18, 2001, the Court entered an order clarifying that the amount of the attorney fees awarded to plaintiff would be subtracted from any funds awarded to Boston Edison, and would not reduce any amount awarded to the United States;

WHEREAS, on September 5, 2001, a default judgment was entered against Cal B. Whitworth, Patricia E. Whitworth, Boston Water & Sewer Commission and Boston Gas Company, for failing to plead or otherwise defend this action;

WHEREAS, on or about February 25, 2002, the attorney fees and costs awarded were distributed to plaintiff's attorney;

WHEREAS, the Clerk of the Court currently holds $51,257.26.

THEREFORE, it is hereby ORDERED that the funds currently held by the Clerk of the Court shall be distributed as follows:

(1) $5,296.58 to Boston Edison ($7,475.08, less the $2,078.50 awarded to plaintiff for attorney fees and costs);

(2) the remaining $45,960.68 of the interpled funds, (plus any additional interest accrued through the date of distribution, up to a maximum distribution of $51,981.83) to the United States; and

(3) the parties are to bear their own fees and costs relating to this matter.

Michael K. Callahan, Esq.

NSTAR Electric and Gas Corp.

Prudential Tower

800 Boylston Street, 17th Floor

Boston, MA 02199

(617) 424-2102

Wendy J. Kisch, Esq.

Trial Attorney, Tax Division

Department of Justice

Ben Franklin Station

Washington, D.C. 20044

(202) 307-6553

Attorney for the Defendant

IT IS SO ORDERED.

Dated: July 11, 2002

/s/

U.S. DISTRICT COURT JUDGE

¶2002-5230

Robert WIRENGARD, PLAINTIFF(S) v. Steven T. MILLER and Internal Revenue Service, DEFENDANT(S). U.S. District Court, Middle Dist. of Florida, (DC FL) Docket No. 8:01-CV-985-T-27MSS, July 19, 2002. Decision for Govt.

1. Declaratory judgments—exempt status—jurisdiction. Pro se taxpayer's amended complaint seeking reversal of IRS's ruling denying his IRC §501(c)(3) exemption claim was dismissed for lack of jurisdiction: pursuant to IRC §7428, only Tax Court, U.S. Claims Court or District Court for District of Columbia had jurisdiction to review Treasury Secy.'s exempt status determinations; and issue of service was irrelevant. *Reference:* United States Tax Reporter ¶74,285.01(7). IRC §501; 7428.

United States District Court, Middle District of Florida, Tampa Division.

Order of Dismissal

WHITTEMORE, District Judge:

[1] Before the court is Defendant's Second Motion to Dismiss (Dkt. 15), to which Plaintiff has not responded. This action was initiated *pro se* seeking an " . . . immediate reversal of the 'final adverse ruling with respect to [your] claim of exemption from federal income taxation under § 501(c)(3) of the Internal Revenue Code.'" (Dkt. 1). Attached to the initial Complaint is correspondence dated April 9, 2001 directed to Amend16Robert Wirengard c/o Robert O. Wirengard from the Department of the Treasury, Internal Revenue Service denying Plaintiff's claim of exemption from federal income taxation under § 501(c)(3) of the Internal Revenue Code. In an apparent attempt to bring this action within the jurisdiction of the Court, Plaintiffs purportedly amended the Complaint, again complaining that the Department's adverse ruling with respect to Plaintiff's claims of exemption was erroneous. (Dkt. 7). This case has languished because of the failure of Plaintiffs to effect service of process and/or demonstrate effective service of process pursuant to this Court's orders and Federal Rule of Civil Procedure 4.

Regardless of whether Plaintiffs have affected service of process on all Defendants, it is apparent to the Court that it lacks subject matter jurisdiction to consider Plaintiffs' claims. Pursuant to Title 26 U.S.C. §7428, subject matter jurisdiction to review a determination of exempt status by the Secretary of the Treasury is vested exclusively in the United States Tax Court, the United States Claims Court or the District Court of the United States for the District of Columbia. Accordingly it is

ORDERED AND ADJUDGED that this cause is DISMISSED for lack of subject matter jurisdiction. The Clerk is directed to close this file and terminate any pending motions.

DONE AND ORDERED in chambers this 19th day of July, 2002.

JAMES D. WHITTEMORE

United States District Judge

Copies to:

Counsel of Record

Courtroom Deputy

Law Clerk

¶2002-5231

In Re: Craig WISLER, Shanda WISLER, Debtors. U.S. Bankruptcy Court, Southern Dist. of Indiana, (Bktcy Ct IN) Docket No. 00-5546-FJO-13, Nov. 30, 2000. Decision for Govt.

1. Tax claims in bankruptcy—dismissal of petition—bad faith—sanctions. Pro se debtors' Chap. 13 bankruptcy petition was dismissed under 11 USCS §1307 for bad faith: taxpayers caused unreasonable delay where they didn't provide all asset and income information; intentionally lowered property's stated value; claimed inflated and unreasonable expenses; unfairly prioritized payments of unsecured Air Force debt and didn't provide for payment to listed creditors/IRS and 3d party in plan;

and didn't comply with document production order or answer questions regarding schedules and petition at examination. Also, 180-day filing bar was imposed, with warning that similar bad faith filings could result in more severe sanctions. *Reference:* United States Tax Reporter ¶68,726.52(40).

United States Bankruptcy Court, Southern District of Indiana, Indianapolis Division.

Order

OTTE, Bankruptcy Judge:

This matter came before the Court upon the filing of the Motion for Voluntary Recusal of the Honorable Frank J. Otte, or in the Alternative Refer the Matter to Presiding Judge filed by the Debtors on October 2, 2000. The Court, after reviewing this matter, now finds that the relief prayed for therein should be denied. It is, therefore

ORDERED, ADJUDGED AND DECREED that the Motion for Voluntary Recusal of the Honorable Frank J. Otte, or in the Alternative Refer the Matter to Presiding Judge is DENIED.

Date Nov 30 2000

FRANK J. OTTE

BANKRUPTCY JUDGE

DISTRIBUTION:

Debtors

Attorneys of Record

United States Trustee

Entry Dismissing Case

OTTE, Bankruptcy Judge:

The Court incorporates herein the Memorandum entered simultaneously containing the findings of fact and conclusions of law on this matter. This Court, based upon its findings of fact and conclusions of law set forth in said Memorandum, ORDERS this case DISMISSED and FURTHER ORDERS that the Debtors be barred from refiling a subsequent case for a period of 180 days from the date of this Entry.

Date NOV 30 2000

FRANK J. OTTE

BANKRUPTCY JUDGE

DISTRIBUTION:

Debtors

Attorneys of Record

All Creditors

United States Trustee

Memorandum Dismissing Case

This matter came before the Court upon the filing of the Motion to Dismiss with Prejudice filed by the United States of America, Internal Revenue Service (''IRS''). The Court scheduled a hearing on September 27, 2000. The day before the hearing, the Debtors filed a Notice of Filing of Verified Complaint in Federal District Court Against IRS Federal Agency, Petition to Hold Proceedings in Abeyance.

The Court, on the record at the September 27, 2000 hearing, denied the Petition to Hold Proceedings in Abeyance and proceeded to hear the Amended Motion to Dismiss.

The Court after reviewing this matter, now makes the following findings of fact and conclusions of law. A separate entry will be made in accordance with these findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Debtors filed their Chapter 13 Bankruptcy Petition on May 9, 2000. A review of the court's files indicate that the Debtors had filed a Chapter 7 on October 1, 1990 (Case #90-8610-RLB-7) and received a discharge on July 18, 1991.

2. The Debtors' Schedule J (Current Expenditures) lists certain expenses which this Court finds are either unreasonable or inflated. Such expenses are as follows: telephone - $310.09; food - $1,071; transportation, not including gas - $399.73; over $1000 per month in car payments; $1,000 a month to support of ''others'' with no explanation as to whom these payments are made or why these payments are necessary.

3. The Debtors' Plan does not provide for any payments to general unsecured creditors.

4. Dr. Wisler lists that he receives $475 a month from the United States Air Force for reserve duty. He lists his employment as a dentist with monthly income of $12,137.75 and lists the deductions of payroll taxes and social security from his wages. However, Dr. Wisler admits he is not currently having federal income taxes withheld because he believes that he is exempt from paying federal income taxes. The Debtors assert that they do not have gross income subject to taxation because they claim, in part, that only citizens of a possession and foreigners are taxed upon U.S. sources. In addition, Dr. Wisler states that the federal government receives sufficient revenue to operate from the tax on alcohol, tobacco, and fire arms.

5. The Debtors' Schedules and Statement of Financial Affairs are deficient in the listing of the value of their real estate. Schedule A lists the value of the real estate at $122,800. The Debtors admit they relied upon the purported assessed value of their home and further admitted that the fair market value of their home would be higher than the value they listed. Further evidence that the market value is higher than that listed by the Debtors is that they have it insured for $213,000 and they list secured indebtedness of $169,000 on the property on Schedule A.

6. The Debtors failed to list any savings or checking account on their Schedules and Statement of Financial Affairs. The Court finds it highly unlikely that an individual with income in excess of $12,000 a month does not keep a checking account. The Debtors later admitted that they need to amend their schedules to accurately reflect their financial accounts because, in fact, they do have financial accounts. The Court does not believe that such omission was merely an oversight on the Debtors' part.

7. When the Debtors appeared at a 2004 examination on June 29, 2000, they refused to answer any questions, asserting their rights under the Fifth Amendment, and refused to turn over any documents they had been ordered to produce.

DISCUSSION

This is a core proceeding under 28 U.S.C. section 157(b) (2) which arises in a case under Title 11. Therefore, this Court has jurisdiction to enter a final order in this matter under 28 U.S.C. section 1334 and 28 U.S.C. section 151.

The rules require that pro se debtors are held to the same rules of practice as an attorney. The Court notes that although the Debtors are pro se in these proceedings, their pleadings are complex and indicate a general understanding of what is before the Court. However, this Court is not persuaded by the arguments or legal conclusions asserted in the Debtors' pleadings.

This Court also points out that the Debtors initiated this bankruptcy of their own free will. They picked this forum; and in doing so, they are required to comply with all provisions of the Bankruptcy Code and Rules if they are to enjoy the protections of bankruptcy.

The issue before this Court is whether, based upon the Motion of the IRS, this Court should dismiss this case with prejudice pursuant to 11 U.S.C. section 1307(c). Section 1307 provides for the conversion or dismissal of a case by the Court, after notice and hearing. Section 1307(c) sets forth a litany of situations which form the basis for dismissing a Chapter 13 case and although good faith is not specifically stated therein, it is implicit to the concept. In re Graffy, 216 B.R. 888, 891 (Bkrtcy. M.D. Fla. 1998).

The determination of whether a debtor has filed a Chapter 13 proceeding in good faith is made on a case-by-case basis. The Court must look at the "totality of the circumstances" test when it examines whether the filing is fundamentally fair to the creditors of the estate and whether it is fundamentally fair and consistent with the spirit of the Bankruptcy Code. Matter of Love, 957 F.2d 1350, 1354 (7th Cir. 1992).

Some of the factors which the Court must look at is whether the debts listed

would be nondischargeable in a Chapter 7 proceeding, the timing of the filing of the petition, the debtor's treatment of creditors before and after the filing of the petition, and ''whether the Debtors have been forthcoming with the bankruptcy courts and the creditors.'' Id at 1357. A finding by the Court of a filing in bad faith is sufficient cause for a case to be dismissed with prejudice. In re Leavitt, 209 B.R. 935, 939 (B.A.P. 9th Cir. 1997).

In the case before the Court, the Debtors have not provided complete information with regard to their assets and income. On Schedule B, the schedule of personal property, the Debtors responded that they had no bank accounts, checking accounts or other financial accounts. As even admitted to by the Debtors, they in fact have accounts but chose not to list the accounts on their schedules.

The Debtors also listed the value of their residence at $122,800, which they based on the assessed value rather than market value. The bankruptcy schedules specifically state to list the market value of the property. The Debtors have their house insured for far more than the value they listed on their petition and they listed the mortgage at almost $170,000. The Court believes that the Debtors knowingly and intentionally used a lower value for their property to deflate the value of their real property.

The Court also finds that the expenses listed on Schedule J are either intentionally inflated or unreasonable. A review of these unreasonable expenses clearly demonstrates that the Debtors' plan was not proposed in good faith because the Debtors have not committed all of their disposable income to the plan.

The Debtors' Chapter 13 Plan lists two creditors on Schedule F (Creditors holding Unsecured Nonpriority Claims): IRS for $100,000 and USA Group Loan Program for $22,118.32. The Plan fails to provide for any payment to these creditors. The Debtors unfairly prioritize repayment of an unsecured debt to DFAS (pay back of military bonus) for almost $20,000. Dr. Wisler admits that he wishes to repay his debt to the Air Force so he can receive retirement benefits for his military service.

The Debtors were ordered to appear for a 2004 Examination on June 29, 2000 and were further ordered to bring certain documents with them to the examination. The Debtors appeared at the 2004 examination; however, they failed to produce the documents as ordered and they failed to answer any questions concerning their bankruptcy schedules and petition. Instead, they asserted the Fifth Amendment as grounds for not answering the questions or turning over the documents.

Although individuals have the right to assert the Fifth Amendment, there may be consequence to such assertion. By filing this bankruptcy proceeding, the Debtors have put their assets, liabilities, income and expenses at issue for creditors and the Court to review. A creditor has the right to inquire as to these matters. The IRS was within its rights to inquire into these matters at a 2004 examination. The Debtors refusal to provide information, even under the assertion of the Fifth Amendment, is grounds for the dismissal of this bankruptcy proceeding.

As previously stated, the Debtors chose to participate in the bankruptcy proceeding. To take advantage of the benefits and protections of the bankruptcy process, the Debtors must fully comply with all of the bankruptcy requirements. They may not pick and choose which aspects of this bankruptcy process fit their need and which they want to avoid. Which, in this Court's opinion, is exactly what these Debtors have attempted to do in this case.

[1] In looking at the ''totality of the circumstances'', it is clear that the filing is not ''fundamentally fair'' to the creditors nor is it ''fundamentally fair'' in a manner consistent with the spirit of the Bankruptcy Code. Matter of Love, 957 F.2d at 1354. These Debtors have intentionally failed to provide complete and accurate information on their petition and schedules and, therefore, have caused an unreasonable delay in this proceeding. The Debtors have refused to provide information to a creditor which is critical information for the creditors to

analyze the Debtors' bankruptcy petition and plan.

The Court believes that the Debtors' actions in this case are part of a grander scheme to continue their challenge to the payment of taxes. This Court makes no comment on the substance of the Debtors' challenge with the IRS, nor does it need to address this issue to rule on the matter of dismissal. That matter should more properly be handled by a different tribunal, not the Bankruptcy Court.

The Court considered the IRS's request to dismiss this case with an extended bar from refiling. While Section 1307(c) sets forth the basis for dismissal of a Chapter 13 case, section 349 of the Bankruptcy Code governs dismissal of a case with prejudice and provides the bankruptcy court with the authority to bar both the subsequent discharge of existing debt and to bar successive petitions under section 109. In re Leavitt at 941.

This Court previously addressed the issue of an extended bar in the case of Marcellus (94-6296-FJ0-13). Marcellus had filed a Chapter 13. The IRS filed a motion to dismiss. The Court found that Marcellus had previously filed a bankruptcy action and had failed to pay overdue taxes as ordered by the Court. Marcellus also had not filed any federal or state income tax returns for approximately ten years. This Court found that Marcellus had failed to propose a feasible plan and he had been evasive in providing information to the Court. This Court dismissed Marcellus' bankruptcy petition and prohibited him from refiling for a period of two years on the grounds that Marcellus had filed the petition only to get an automatic stay as part of his attempt to prevent collection by the IRS. This Court's decision was affirmed on appeal by District Court and by the Seventh Circuit Court. (Matter of Marcellus, 124 F.3d 204, Unpublished Disposition, 1997 WL 464100 [80 AFTR 2d 97-5753] (7th Cir. (Ind.), Aug. 4, 1997) (No. 95-3451).

A similar issue was before the bankruptcy court in In re Shugrue, 221 B.R. 394 (Bkrtcy. W.D. 1998). The court dismissed the debtor's Chapter 13 case and barred the debtor from refiling for 180 days or until the debtor was current with the filing of federal income tax returns. The facts of this case are similar to those in Shugrue, except Mr. Shugrue filed a previous Chapter 13 case which was dismissed because the debtor had not filed his tax returns. The court concluded it was impossible for the debtor to have a confirmed plan because it was impossible to determine the amount of the claim of the IRS because the debtor was refusing to file his returns. In re Shugrue at 395.

This Court found many of the comments of the Shugrue court amusing and perhaps applicable to the present case. However, because this is the Debtors' first Chapter 13 filing and there is not the ten year history of failing to file returns as was true in the Marcellus case, this Court will only impose a bar from subsequent refilings for a period of 180 days from the date of this entry. However, this Court strongly cautions the Debtors to better familiarize themselves with the purpose of filing a Chapter 13 bankruptcy petition. A Chapter 13 case is not the avenue for individuals to battle out their beliefs over the impropriety of the federal tax laws. As stated by the Shugrue court: "... should the Debtor have an honest and good faith intention to enter into a Chapter 13 to pay his creditors what he owes them out of his disposable income, all he has to do is file his delinquent tax returns." In re Shugrue at 396.

This Court cautions the Debtors that if they refile another Chapter 13 case with the same pattern of conduct as in this case, this Court will impose stronger penalties than just the 180 day bar.

Conclusion

Based upon the foregoing findings of fact and conclusions of law, this Court concludes that this case shall be dismissed and the Debtors are barred from refiling a subsequent petition for 180 days from the date of this entry.

The Court will enter a separate Entry based on its findings of fact and conclusions of law stated herein.

Date NOV 30 2000

FRANK J. OTTE

BANKRUPTCY JUDGE

DISTRIBUTION:

Debtors

Attorneys of Record

United States Trustee

¶2002-5232

Thomas L. MONK, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) Docket No. CV-S-02-0008-PMP (LRL), July 12, 2002. Decision for Govt.

1. Collection due process—review of administrative determination—jurisdiction; failure to state claim for relief. Taxpayer's appeal of collection due process hearing determination pursuant to IRC §6320 was dismissed: district court lacked jurisdiction under F.R.Civ.P. 12(b)(6) to review contested determination notice involving income tax assessments. *Reference:* United States Tax Reporter ¶74,025.01(83); 63,205.01(10). IRC §6320; 7402.

United States District Court, District of Nevada.

Judgment in a Civil Case

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the action is DISMISSED due to lack of jurisdiction. Judgment is hereby entered in favor of the defendant, United States of America and against the plaintiff, Thomas L. Monk.

July 12, 2002

LANCE S. WILSON

Clerk of the Court

/s/

(By) Deputy Clerk

Order

PRO, District Judge:

[1] On January 3, 2002, Plaintiff Thomas Monk filed an Appeal of Determination of Collection Due Process Hearing Pursuant to 26 U.S.C. § 6320 (#1). Also on January 3, 2002, Plaintiff filed a Motion that this Court Declare Invalid the IRS "Determination" at Issue (#2). On June 4, 2002, Defendant United States of America filed a Motion to Dismiss and for Summary Judgment (#10) to which Plaintiff Monk filed an Opposition (#12) on June 24, 2002. Plaintiff United States did not file a Reply Memorandum in support of its Motion.

Because this Court finds it lacks subject matter jurisdiction, Defendant's Motion to Dismiss (#10) must be granted in accord with Rule 12(b)(6) of the Federal Rules of Civil Procedure. Specifically, as is correctly maintained in Defendant's Motion to Dismiss, this Court lacks jurisdiction to review the contested Notice of Determination relating to income tax assessments.

IT IS THEREFORE ORDERED that Defendant United States' Motion to Dismiss (#10) is granted.

DATED: July 10, 2002.

PHILIP M. PRO

United States District Judge

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the action is DISMISSED due to lack of jurisdiction. Judgment is hereby entered in favor of the defendant, United States of America and against the plaintiff, Thomas L.Monk.

July 12, 2002

LANCE S. WILSON
Clerk of the Court
/s/
(By) Deputy Clerk

¶2002-5233

Larry MORGAN, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) Docket No. CV-S-01-1072-RLH (RJJ), July 10, 2002. Decision for Govt.

1. Collection due process—review of administrative determination—district court jurisdiction. Taxpayer's district court IRC §6330 petition for damages, injunctive relief, and to set aside of IRS's collection determination notice was dismissed for lack of jurisdiction: Tax Court had exclusive jurisdiction where case involved taxpayer's underlying tax liabilities. But, taxpayer was entitled under IRC §6330(d) to refile suit in Tax Court within 30 days of instant ruling. *Reference:* United States Tax Reporter ¶63,305.01(10). IRC §6330.

United States District Court, District of Nevada.

Order

HUNT, District Judge:

(Motion to Dismiss - #2)

Before the Court is Defendant's Motion to Dismiss (#2), filed October 23, 2001. The Court has also considered Plaintiff's Opposition (#6), filed December 7, 2001.

BACKGROUND

On October 12, 2000 Defendant Internal Revenue Service ("IRS") sent Plaintiff via certified mail, a notice informing him of their intention to levy to collect his outstanding federal income tax liabilities. Included with the notice of intent to levy was information notifying Plaintiff of his right to request a Collection Due Process ("CDP") hearing pursuant to 26 U.S.C. § 6330(a). On April 12, 2001, a CDP hearing was held.

On August 15, 2001, Defendant then sent Plaintiff a Notice of Determination concerning collection actions under 26 U.S.C. § 6330. In this Notice, Defendant informed Plaintiff of his right to judicial review of the determination by the United States Tax Court pursuant to 26 U.S.C. § 6330(d)(1)(A). On September 14, 2001, Plaintiff filed a complaint in this Court for damages, injunctive relief and a request that the CDP determination be set aside as invalid. Defendant requests this Court to dismiss the complaint for lack of subject matter jurisdiction.

DISCUSSION

[1] Under Fed. R. Civ. P. 12(h)(3), lack of subject matter jurisdiction, unlike many other objections to jurisdiction of a particular court, cannot be waived and can be raised at any time by a party to an action or by the court *sua sponte*. *Csibi v. Fustos*, 670 F.2d 134 (9th Cir. 1982).

In general, the United States is immune from suit under the doctrine of sovereign immunity unless it explicitly waives such immunity. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The plaintiff has the burden of establishing that the government has waived sovereign immunity and to identify the specific statutory provision containing the waiver. *See Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987). The waiver must be express and will not be implied. *Lane v. Pena*, 518 U.S. 187, 192 (1996). The scope of a waiver of sovereign immunity is to be strictly construed in favor of the sovereign. *Dep't of the Army v. Blue Vox, Inc.*, 525 U.S. 255, 261 (1999).

Title 26 U.S.C. § 6330(d) provides a limited waiver of sovereign immunity to taxpayers who disagree with the outcome of a CDP hearing. Pursuant to 26 U.S.C. § 6330(d)(1)(A), a person may, within 30 days of receiving a Notice of Determination, appeal such determination in a United States Tax Court, provided that the Tax Court has jurisdiction with respect to such matter. If the Tax Court does not have jurisdiction of the underlying tax liability, the appeal shall be made to a district court of the United States. 26 U.S.C. §

6330(d)(1)(B). If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court so determines to file an appeal with the correct court. *Id.*

In his Opposition, Plaintiff contests the jurisdiction of the Tax Court, stating that the Tax Court is barred from ruling on matters of law. The Supreme Court has held, however, that the Tax Court, which is an Article I court, is a ''Court of Law'' under the Appointments Clause. *Freytag v. Comm'r*, 501 U.S. 868, 888, 891 [68 AFTR 2d 91-5025] (1991); *see also Crawford v. C.I.R.*, 266 F.3d 1120, 1121 [88 AFTR 2d 2001-5962] (9th Cir. 2001) (''The Tax Court is an Article I court created by Congress with limited jurisdiction to rule on deficiencies assessed by the government on taxpayers.'').

Under 26 U.S.C. § 7442, the U.S. Tax Court has jurisdiction over matters of federal income tax. Treas. Reg. § 301.6330-1T(f)(2), Q-F3/A-F3 states that the Tax Court has jurisdiction over matters related to income tax, including levies imposed for the purpose of collecting taxes. *See Krugman v. Comm'r*, 112 T.C. 230, n.6 (1999) (noting that with respect to an underlying income tax liability, ''the Tax Court has jurisdiction to review determinations under sec. 6330 relating to proposed levies'').

Here, Defendant IRS sought to impose a levy on Plaintiff for failing to pay income tax. Although a court of limited jurisdiction, the Tax Court has primary jurisdiction over income tax disputes. Because the underlying issue set forth in the Notice of Determination involves income tax liability, this Court lacks jurisdiction. Plaintiff's failure to petition the proper court for review of the IRS' administrative determination is not fatal to his claim, since Section 6330(d) permits refiling in the correct court 30 days after this Court's determination.

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#2) is GRANTED.

Dated: June 28, 2002.

ROGER L. HUNT

United States District Judge

Judgment in a Civil Case

___ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed. Judgment is entered in favor of defendant United States of America and against plaintiff Larry E. Morgan.

July 11, 2002

Date

LANCE S. WILSON

Clerk

/s/

(By) Deputy Clerk,

¶2002-5234

Maurice C. MOSES, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) Docket No. CV-S-01-1325-LRH (LRL), June 28, 2002. Years 1996, 1997, 1999. Decision for Govt.

1. Collection due process—review of administrative determination—summary judgment. Govt. was granted summary judgment on tax protestor's IRC §6330 petition seeking to set aside IRS's collection determination notice and damages: taxpayer's frivolous challenges to legitimacy of income taxes, imposition of frivolous return penalty for ''zero returns'' filing, IRS employees' authority to issue determination notice, and Appeals Officer's reliance on account transcripts to verify assessments, had been uniformly rejected by courts; and taxpayer raised no

collection alternative or other statutorily-recognized defense to collection. *Reference:* United States Tax Reporter ¶63,305.01(5). IRC §6330.

United States District Court, District of Nevada.

Order

HICKS, District Judge:

On February 27, 2002, Defendant the United States filed a Motion to Dismiss (Docket #5) or, in the alternative, for Summary Judgment. (#6). Plaintiff filed a timely Opposition and Declaration on March 13, 2002, (#7 & #8). Because the United States attaches exhibits to its motions, the Court must consider the motion as a Motion for Summary Judgment. Fed. R. Civ. P. 12(b); Anderson v. Angelone, 86 F.3d 932, 934 (9th Cir. 1996).

I. Background

Plaintiff Maurice C. Moses filed a Complaint seeking damages and requesting that the Court set aside an invalid collection determination pursuant to 26 U.S.C. § 6330. In essence, the Complaint alleges that the "determination" issued by the Internal Revenue Service ("IRS") on October 16, 2001, after a Collection Due Process Hearing was invalid.

The Collection Due Process Hearing was held on September 7, 2001, pursuant to 26 U.S.C. §§ 6320(a), 6330(a) and (b) after Plaintiff had received a Notice of Federal Tax Lien. The Notice of Federal Tax Lien was allegedly sent to Plaintiff because his 1996, 1997 and 1999 individual tax returns contained a row of zeros down the right hand column while Plaintiff's respective W-2s for 1996, 1997 and 1999 revealed income.

II. Analysis

A. Standard of Review

[1] A motion for summary judgment terminates, without a trial, actions in which "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate "'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)). Thus, in order to preclude a grant of summary judgment, the non-moving party must set forth "'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The substantive law defines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). All justifiable inferences must be viewed in the light most favorable to the non-moving party. County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1184, 1154 (9th Cir. 2001) (citing Zenith Radio Corp., 475 U.S. at 587).

Section 6330(d) does not specify the standard of review a district court should apply to an appeal of a Notice of Determination. However, the legislative history indicates that the court should conduct a de novo review only "where the validity of the tax liability was properly at issue at the administrative hearing." H. Conf. Rept. 105-599, 105th Cong.2d Sess. 266 (1998). Where the amount of the underlying tax liability is not properly part of the appeal, the court reviews a Notice of Determination for abuse of discretion. See Sego v. Comm'r of Internal Revenue, 114 T.C. 604, 609–10 (2000).

B. Plaintiff's Section 6330 Appeal

Plaintiff raises many of the same issues before this Court that the raised at the September 7, 2001 hearing. First, he argues that he is not liable for income tax. In fact the Supreme Court had held early and often that it is lawful to impose a tax on "every person residing in the United States . . . upon the entire net income arising from all sources." S. Pacific Co. v. Lowe, 247 U.S. 330, 333–34 [3 AFTR 2989] (1918).

Second, Plaintiff challenges the $500 frivolous return penalty imposed upon him as invalid. This Circuit found that a person

who fills out his return with zeros while attaching W-2s showing income has filed a frivolous return that is subject to a penalty. See Olson v. United States, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985).

Third, Plaintiff makes the conclusory allegation that the Collection Due Process Hearing was not in accordance with law. Such a conclusory allegation need not be accepted in the absence of facts. In actual fact, Plaintiff did not appear to raise any of the statutory-specified issues that may be raised at a Collection Due Process Hearing such as spousal defenses, the appropriateness of the intended collection action or the possibility of alternative means of collection. 26 U.S.C. § 6330(c).

Fourth, Plaintiff argues that the Notice of Determination is invalid because is was not sent by the Secretary of the Treasury. This argument, that IRS employees are not ''delegates'' of the Secretary of the Treasury has been previously rejected. Browder v. Commissioner, T.C. Memo 1990-408 [¶90,408 PH Memo TC], 1990 WL 108316.

Fifth, Plaintiff questions whether computer generated transcripts are valid to show notice and amounts owed. Again, this argument has been uniformly rejected. Davis v. Commissioner, 115 T.C. 35, 40 (2000).

III. Conclusion

In summary, Plaintiff has failed to set forth a valid argument to support his claim that the Notice of Determination of October 16, 2001, should be vacated. Because Plaintiff fails to raise a disputed issue of material fact, Defendant's Motion for Summary Judgment (#6) is GRANTED. Defendant's Motion to Dismiss (#5) is DENIED as moot. The clerk is directed to close the file.

IT IS SO ORDERED.

DATED: JUNE 25, 2002

LARRY R. HICKS

United States District Judge

Judgment in a Civil Case

_ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (#6) is granted. Defendant's Motion to Dismiss (#5) is denied as moot.

June 28, 2002

LANCE S. WILSON

Clerk, U.S. District Court

By: /s/

Deputy Clerk

¶2002-5235

UNITED STATES OF AMERICA, PLAINTIFF v. EXECUTIVE AUTO HAUS, INC. and Frank C. Holtham, Sr., DEFENDANTS. U.S. District Court, Middle Dist. of Florida, (DC FL) Docket No. 6:00-cv-154-Orl-18KRS, June 28, 2002. Later proceeding at (2002, DC FL) 90 AFTR 2d 2002-5822. Years 1991, 1992, 1993. Decision for Taxpayers.

1. Collection actions—closely owned corps.—fraudulent transfers—proof. Auto dealership corp. and pres./controlling shareholder were granted summary judgment on govt.'s excise tax collection complaint: govt.'s theory that corp. transferred dealership sale proceeds to pres. with intent to defraud govt. of subject taxes was rejected. Neither corp. nor pres. had any knowledge at time of transfer of tax debts, which arose from 3d-party employee's then-undisclosed criminal acts; and corp. both received reasonably equivalent value in form of pres.'s assumption of corp.'s known debts from, and wasn't rendered insolvent by transfer. Also, govt.'s trust fund liability theory was similarly rejected based

on solvency finding. *Reference:* United States Tax Reporter ¶74,035.01(50). IRC §7403.

In the United States District Court for the Middle District of Florida, Orlando Division.

Order

THIS CAUSE comes before the Court on the following matters:

(1) Plaintiff's Motion for Partial Summary Judgment (Doc. 36, filed February 4, 2002);

(2) Defendant's Motion for Summary Judgment (Doc. 43, filed February 28, 2002).

(3) Plaintiff's Response to Defendant's Motion for Summary Judgment (Doc. 51, filed March 15, 2002).

I. BACKGROUND

Frank C. Holtham, Sr. (''Holtham'') was the president and controlling shareholder of Executive Auto Haus, Inc. (''EAH''), a luxury automobile dealership incorporated on August 30, 1984. Holtham also owned Executive Auto, Inc. (''EA''), another automobile dealership. On September 23, 1993, EAH and EA jointly sold their assets and inventory to Cocoa Investment for $2,910,866.50. Upon closing, EAH received $244,214.62 in net proceeds, an undetermined amount of which represented proceeds from EA's sale,[1] which was deposited into EAH's bank account. From this amount, EAH paid Jack Hamell & Associates a $110,000 commission for brokering the sale.[2] EAH then distributed the remaining $134,214.62, the amount at issue in this case, to Holtham, who deposited the funds it into a personal bank account.

Holtham contends that he used this money to satisfy EAH's outstanding known creditors and that Cocoa Investment would not have purchased EAH and EA's assets if Holtham had not assured them such known creditors would be reimbursed. Holtham indicates that EAH had five known creditors.[3] First, EAH owed landlord David Catalano $100,000 for failure to pay rent when EAH was first incorporated. EAH and Catalano reduced this debt to a note, on which Holtham cosigned. At all times prior to the sale of its assets, EAH made interest payments on the note. Holtham assumed primary responsibility to pay the principle on the note when Cocoa Investments acquired EAH and by October 1996, satisfied the note. Second, EAH owed Holtham approximately $700,000 for lending money to EAH when it was declared ''out of trust'' by its floorplan provider, Barnett Bank. Barnett Bank accepted a $700,000 check from Holtham, who immediately hired a brokerage firm in an attempt to sell EAH and recoup his loan. Third, EAH was potentially liable in the amount of $100,000 to Dusty Troyer & Associates, the brokerage firm originally retained to sell EAH. Upon EAH's sale, Holtham assumed responsibility for this potential liability, eventually settling the ensuing litigation for $20,000. Fourth, EAH owed attorney Stanley Goldsmith $47,575.46 in fees involved in EAH's sale. Fifth, EAH owed attorney Stanley Goldsmith $6,032.13 in fees for the Dusty Troyer & Associates litigation. These five obligations represent the only creditors known to EAH or Holtham at the time of EAH's sale. It is undisputed that Holtham was unaware that EAH was indebted to the United States of America (''Plaintiff''), and had no reason to be aware of such indebtedness, at the time EAH was sold.[4]

At approximately the same time Cocoa Investment purchased EAH and EA, the Internal Revenue Service (''IRS'') began investigating Charles Prescott Lunt (''Lunt''), an EAH employee, for unpaid excise taxes. Lunt's actions caused EAH to understate its liability to Plaintiff for fed-

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1 The exact percentages of the net proceeds attributable to EAH and EA is a disputed issue of fact not material for the purposes of this order.

2 Plaintiff concedes that this payment was in satisfaction of a legitimate obligation of EAH.

3 Plaintiff does not dispute that these debts existed, but rather contends that EAH received no benefit from Holtham's actions. The Court rejects this assertion for reasons detailed below.

4 Both parties stipulated to this fact in the joint pre-trial statement. (Doc. 53 at 14.)

eral excise taxes due on automobile sales. Lunt eventually pled guilty to aiding and assisting in preparation of false income tax returns on May 22, 1996. In 1995, the IRS levied approximately $130,000 in tax assessments for the unpaid taxes accrued between March 1991 and September 1993. EAH agreed to extend the statute of limitations for the earliest tax periods; therefore, all liabilities were timely assessed. Plaintiff demanded $247,275.69 in unpaid taxes, interest and penalties from EAH and Holtham, an acknowledged "insider"[5] of EAH.[6]

II. DISCUSSION

A. Summary Judgment

A court will grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); e.g., Edwards v. Acadia Realty Trust, Inc., 141 F. Supp. 2d 1340, 1344–45 (M.D. Fla. 2001). Material facts are those that may affect the outcome of the case under the applicable substantive law. Disputed issues of material fact preclude the entry of summary judgment, but factual disputes that are irrelevant or unnecessary do not. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The moving party bears the initial burden of proving that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317, 324–25 (1986). In determining whether the moving party has satisfied its burden, the Court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. Matsushita Elec. Ind. v. Zenith Radio Corp., 475 U.S. 574, 587–88 (1986). The moving party may rely solely on his pleadings to satisfy its burden. Celotex, 477 U.S. at 323–24. A non-moving party bearing the burden of proof, however, must go beyond the pleadings and submit affidavits, depositions, answers to interrogatories or admissions that designate specific facts indicating there is a genuine issue for trial. Id. at 324. If the evidence offered by the nonmoving party is merely colorable, or is not significantly probative, the Court may grant summary judgment. Anderson, 477 U.S. at 249–50. Similarly, summary judgment is mandated against a party who fails to prove an essential element of its case. Celotex, 477 U.S. at 322.

B. Uniform Fraudulent Transfer Act

[1] Plaintiff alleges that the $134,214.62 transfer of EAH's remaining assets to Holtham violated the Uniform Fraudulent Transfer Act ("UFTA"). Fla. Stat. ch. 726.101–726.201 (West 2001). Plaintiff asserts three theories for recovery under UFTA: 1) EAH fraudulently transferred $134,214.62 to Holtham with actual intent to hinder, delay or defraud Plaintiff in violation of Fla. Stat. ch. 726.105(1)(a); 2) in a transaction that rendered EAH insolvent, it fraudulently transferred Holtham $134,214.62 without receiving reasonably equivalent value in violation of Fla. Stat. ch. 726.106(1); or 3) Holtham, an insider, fraudulently accepted a $134,214.62 transfer to satisfy an antecedent debt from the insolvent EAH when Holtham had reasonable cause to believe EAH was insolvent at the time in violation of Fla. Stat. ch. 726.106(2).

1. Fla. Stat. ch. 726.105(1)(a): Intentional Fraud

A transfer from a debtor to a creditor is fraudulent if the debtor makes the transfer "with actual intent to hinder, delay or defraud any creditor of the debtor . . . ." Fla. Stat. ch. 726.105(1)(a). There is no evidence that EAH transferred the proceeds of sale to Holtham with an actual intent to hinder, delay or defraud Plaintiff. In fact, it is undisputed that both EAH and Holtham had no knowledge of the taxes accrued due

[5] Under the Uniform Fraudulent Transfer Act, if the debtor is a corporation, an "insider" is defined as: 1) a director of the debtor; 2) an officer of the debtor; 3) a person in control of the debtor; 4) a partnership in which the debtor is a general partner; 5) a general partner in a partnership described in (4), or 6) a relative of a general partner, director, officer or person in control of the debtor. Fla. Stat. ch. 726.102(7)(b)(1-6) (West 2001).

[6] EAH was administratively dissolved on August 25, 1995.

to the criminal activity of an EAH employee at the time transfer was made.

The Uniform Fraudulent Transfer Act lists 11 factors which, among other things, the Court may utilize to determine if actual intent existed. See Id. at ch. 726.105(2)(a–k). Plaintiff argues that the presence of several of these "badges of fraud" demonstrates EAH's intent to defraud Plaintiff. While a single badge of fraud may only create a suspicious circumstance, several considered together may allow an inference of fraud. General Trading Inc. v. Yale Materials Handling Corp., 119 F.3d 1485, 1498 (11th Cir. 1997). Courts, however, do not determine the presence or absence of actual intent in a vacuum. Id. Rather, courts take all facts surrounding the conveyance into account. Id. at 1498–99.

In this case, by the admission of both parties, EAH could not have possessed the actual intent to defraud Plaintiff because EAH was undisputedly unaware of the unpaid taxes. Badges of fraud are merely factors which aid the Court in determining whether intent existed. Their limited presence in this situation is not determinative of actual intent.

2. Fla. Stat. ch. 726.106(1)

A transfer from a debtor to a creditor is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving reasonably equivalent value in exchange for the transfer and the debtor was insolvent at the time. Fla. Stat. ch. 726.106(1). Under UFTA, Plaintiff's claim may be deemed to have arisen, even though EAH was unaware of its tax liability at the time of transfer.[7] EAH, however, received reasonably equivalent value for the transfer to Holtham and was not insolvent or rendered insolvent thereby.

a. Reasonably Equivalent Value

As a matter of law, the Court finds that Holtham's agreement to satisfy EAH's known creditors for $134,214.62 constituted reasonably equivalent value for the transfer. Although Plaintiff concedes that the actual amount at issue in this case may be less than $134,214.62, owing to the joint sale of EAH and EA, the obligations that Holtham assumed exceeded the entire transfer amount.

Even upon excluding the $700,000 loan Holtham made to EAH that was forgiven by the transfer, EAH had over $253,000 of outstanding debt to known third party creditors. In exchange for $134,214.62, EAH acquired forgiveness of these debts. Undisputed evidence shows that Holtham satisfied the $100,000 Catalano loan, brokered and paid a $20,000 to Dusty Troyer & Associates, and paid over $53,000 to attorney Stanley Goldsmith.

Plaintiff relies upon a Bulk Sales Affidavit executed by Holtham in contending that EAH had no debt at the time of the closing with Cocoa Investments. Plainly, EAH had five outstanding known creditors. Equally plainly, the only reason EAH had no debt when it closed with Cocoa Investments is because Holtham assumed all known debts. Undeniably, acquiring a company without any known creditors is more attractive to a potential buyer than acquiring a company with close to $1 million in outstanding debt. The Court holds that Holtham's assumption of EAH debts constituted reasonably equivalent value for EAH.

b. Insolvency

UFTA offers two explanations of insolvency. First, "a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation." Fla. Stat. ch. 726.103(1). Second, "a debtor who is generally not paying his or her debts as they become due is presumed to be insolvent." Id. at 726.103(2). When EAH transferred its remaining assets to Holtham in exchange for Holtham's agreement to satisfy outstanding creditors, it became devoid of assets or liabilities.[8]

[7] UFTA defines "claim" as: "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured." Fla. Stat. ch. 726.102(3). The Court notes that this broad definition seems inconsistent with the statutory intent, because a claim which has accrued, but which is unknown to the debtor, cannot be "fraudulently" disfavored.

[8] To conclude that, in hindsight, EAH was insolvent because of an unknown creditor's claim would require a tortured reading of the statute. Certainly, nothing is gained by doing a retrospective analysis of EAH's solvency at the time of the transfer. As defined by the statute, EAH was not insolvent at the time of the transfer.

Other than the taxes owed to Plaintiff, which would not be disclosed until more than a year later, all EAH's outstanding debts were satisfied. Its assets equaled its debts, and EAH insured that all its debts were paid as they became due by transferring the remainder of its assets to Holtham. By the very nature of Holtham's undertaking, he insured EAH's solvency.

3. Fla. Stat. 726.106(2)

A transfer from a debtor to a creditor is fraudulent as to a creditor whose claim arose before the transfer was made if: 1) the transfer was made to an insider; 2) for antecedent debt; and 3) the debtor was insolvent or the insider had reasonable cause to believe the debtor was insolvent. Fla. Stat. ch. 726.106(2). Holtham was an undisputed insider and the transfer was made at least partially for an antecedent debt. The Court's discussion of Fla. Stat. ch. 726.106(2), however, establishes that EAH was not insolvent at the time of the transfer.

Furthermore, Holtham had no reasonable cause to believe EAH was insolvent, as the very purpose of the transfer was to erase EAH's known liabilities. Plaintiff concedes that Holtham had no knowledge of the unpaid taxes, the existence of which Plaintiff alleges rendered EAH insolvent. This argument is logically inconsistent and cannot prevail. For these reasons, Fla. Stat. 726.106(2) is inapplicable.

C. Trust Fund Theory of Liability

Finally, Plaintiff asserts that "trust fund" theory of recovery against Holtham. "Under the trust fund theory, a shareholder receiving corporate assets upon dissolution of the corporation is liable for corporate debts if the corporation were either insolvent at the time of the transfer or rendered insolvent thereby." United States v. Samples Contracting Co., 1977 WL 1322 at 1 [41 AFTR 2d 78-778] (N.D. Ga. Dec. 16, 1777). Under this theory, stockholders are not ordinary transferees of corporate assets, but receive it subject to the pro rata liabilities of the corporation. Id. (citing Neill v. Phinney, 245 F.2d 645, 651 [51 AFTR 605] (5th Cir. 1957).

In this case, Holtham did not receive corporate assets on the basis of his status of EAH stockholder. Rather, he received $134,214.62 in exchange for satisfying the outstanding known debts of EAH. Additionally, the Court has ruled that the transaction between EAH and Holtham did not render EAH insolvent. Therefore, Plaintiff cannot recover under the trust fund theory of liability.

III. CONCLUSION

The Court finds that the undisputed facts and the reasonable inferences drawn therefrom do not establish a genuine issue of material fact that would justify bringing this lawsuit to trial. Based on the foregoing discussion and upon careful considerations of the record, arguments of counsel, and all relevant law, the Court rules as follows:

it is ORDERED and ADJUDGED that:

(1) Plaintiff's Motion for Partial Summary Judgment (Doc. 36, filed February 4, 2002) is DENIED.

(2) Defendant's Motion for Summary Judgment Doc. 43, filed February 28, 2002 is GRANTED.

DONE AND ORDERED in Orlando, Florida this 28 day of June, 2002.

GREGORY A. PRESNELL

UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record

¶2002-5236

UNITED STATES OF AMERICA v. Amaryllis E. CORBETT, Amaryllis E. CORBETT, B.A., M.A., APPELLANT. U.S. Court of Appeals, Third Circuit, (CA3) Docket No. 01-4419, Aug. 6, 2002. District Court affirmed in part, and vacated and remanded in part. Years 1994, 1995, 1996, 1997, 1998. Decision for Taxpayer in part and for Govt. in part.

1. Tax crimes—tax evasion—affirmative acts—evidence—jury instructions—sentencing—grouping of offenses. Taxpayer's IRC §7201

conviction on her scheme to evade tax on and defraud govt. of her dead mother's retirement benefits was affirmed: evidence proving her affirmative evasion acts included her maintenance of joint account under her and mother's name for many years after mother died, use of ATM/cash transactions to avoid detection, and refusal of any mail from IRS; and erroneous jury instruction to consider taxpayer's pre-indictment acts was harmless where any earlier acts on which jury may have relied continued through indictment dates. But, taxpayer's sentence was vacated and remanded for reconsideration of her argument that tax counts should have been grouped with mail and wire fraud counts that were all part of same scheme. *Reference:* United States Tax Reporter ¶72,015.02(5); 73,446.514(25); 73,446.516(55). IRC §7201.

Renee Pietropaolo, Esquire (Argued), W. Penn Hackney, Esquire, Karen S. Gerlach, Esquire, Office of Federal Public Defender, Pittsburgh, PA, for Appellant.
Robert S. Cessar, Esquire (Argued), Bonnie R. Schlueter, Esquire, Michael L. Ivory, Esquire, Office of the United States Attorney, Pittsburgh, PA, for Appellee.

On Appeal from the United States District Court for the Western District of Pennsylvania D.C.Crim. No. 00-cr-00063. District Judge: The Honorable Donetta W. Ambrose. United States Court of Appeals, Third Circuit.

Before SLOVITER, NYGAARD, and BARRY, Circuit Judges.

Opinion

BARRY, Circuit Judge:

Unpublished Disposition

Following a jury trial in the United States District Court for the Western District of Pennsylvania, appellant Amaryllis E. Corbett was convicted of five counts of income tax evasion in violation of 26 U.S.C. 7201, two counts of wire fraud in violation of 18 U.S.C. 1343, and two counts of mail fraud in violation of 18 U.S.C. 1341. The District Court sentenced Corbett, as relevant here, to thirty months of imprisonment and restitution in the amount of $107,241.60 to the Social Security Administration (''SSA'') and $260,674.71 to the Office of Personnel Management (''OPM''). Corbett appeals only her tax evasion convictions and her sentence. We have jurisdiction pursuant to 18 U.S.C. 3742(a) and 28 U.S.C. 1291 and will affirm Corbett's convictions but vacate her sentence.

We write only for the parties who are familiar with the facts of the case, so we need not repeat them here. Accordingly, we will forthwith address the three arguments raised by Corbett that insufficient evidence supports her convictions for tax evasion because the United States failed to prove an affirmative act of evasion for the periods charged in the Indictment; that the District Court erred in instructing the jurors to examine any conduct from any time period to find an affirmative act of evasion; and that the tax evasion and fraud counts should have been grouped under U.S.S.G. 3D1.2.

I.

[1] Corbett argues that there is insufficient evidence of an affirmative act of evasion during the time frame of the Indictment to support her convictions for tax evasion. We view the evidence in the light most favorable to the government and will sustain the jury's verdict if ''any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'' Jackson v. Virginia, 443 U.S. 307, 319 (1979); accord United States v. McGill, 964 F.2d 222, 229–30 (3d Cir.1992). Section 7201 prohibits a person from ''willfully attempt[ing] in any manner to evade or defeat any tax imposed by this title or the payment thereof.'' The essential elements of this offense are: (1) willfulness; (2) a tax deficiency; and (3) an affirmative act of evasion. Sansone v. United States, 380 U.S. 343, 351 [15 AFTR 2d 611] (1965) (citations omitted). Corbett's argument is limited to the third element.

To be convicted of tax evasion, a defendant must commit some willful act in addition to not filing a return and not paying

the tax due. Spies v. United States, 317 U.S. 492, 499 (1943). Examples of such acts include concealing assets, hiding sources of income, and avoiding recorded transactions. Id. ''[A]ny conduct, the likely effect of which would be to mislead or to conceal'' qualifies as an affirmative act. Id.

Here, the evidence shows that Corbett committed numerous affirmative acts of evasion. First, she maintained the Mellon Bank account under her name and that of her mother, Dr. Jane Matuzel, after the latter's death and conducted all transactions via the ATM in order to minimize in-person contact with bank employees. This included the deposit of separate monetary U.S. Treasury checks made payable to Jane Matuzel, one based on widow's survivors benefits from the SSA and the other based on Dr. Matuzel's pension benefits from the OPM. On the few occasions when Corbett did communicate with bank personnel, she failed to mention Dr. Matuzel's death, and in the case of the November 25, 1997 letter, used the words ''we'' and ''our'' to refer to the account. Second, Corbett opened a post office box in her and Dr. Matuzel's names in 1987, even though Dr. Matuzel had been dead for almost four years. Corbett paid the biannual rent in cash and used the post office box to collect Dr. Matuzel's social security checks. She refused to accept certified mail from the IRS or to respond to the notices sent by the SSA. The one exception is when Corbett signed Dr. Matuzel's name to a SSA payment review form in November 1996. Each of these acts is sufficient to satisfy the third element of the crime of willful evasion of assessment.

Corbett counters that, regardless of the nature of her conduct, none of her acts occurred within the time frame set forth in the Indictment and, thus, cannot form the basis of her convictions for tax evasion. The Indictment charged Corbett with committing tax evasion on or about the fifteenth of April in the years 1994 through 1998. The evidence showed that Corbett continuously operated her ATM scheme through January 1999. Likewise, Corbett continuously rented and used the post office box during every year alleged in the Indictment. Moreover, with specific reference to certain specific counts, on November 15, 1996, Corbett signed Dr. Matuzel's name to the SSA payment review form and returned it to the SSA. This act is sufficiently near the April 15, 1996 date alleged in count three of the Indictment. Her response to Mellon Bank's ''no contact'' letter in July 1997 and her ''we'' letter of November 25, 1997 occurred within the time frame alleged in count four. Finally, her deposit of U.S. Treasury checks made payable to Dr. Matuzel in May 1998 falls within the April 15, 1998 date alleged in count five.

In sum, sufficient evidence supports Corbett's convictions for tax evasion.

II.

Corbett also argues that the District Court incorrectly instructed the jury to look at any conduct from any time period to find an affirmative act of evasion. Corbett did not raise this argument before the District Court; therefore, plain error review applies. Under plain error review, we may exercise our discretion to correct an error that is plain and that affects the ''substantial rights'' of the defendant. United States v. Olano, 507 U.S. 725, 732 (1993).

Corbett's attack on the jury instructions consists of two parts. First, Corbett suggests that the language in the jury instructions, ''[a]ny conduct of the Defendant having the likely effect of misleading or concealing will support a finding of guilt of tax evasion,'' misstates the law on affirmative acts. Corbett is wrong. This language tracks almost precisely the language used by the Supreme Court in Spies, which defines an affirmative act as ''any conduct, the likely effect of which would be to mislead or to conceal.'' Spies v. United States, 317 U.S. 492, 499 [30 AFTR 378] (1943). By including the above language in the jury instructions, the District Court did not err.

Second, Corbett maintains that the District Court constructively amended the Indictment when it charged the jury to consider as affirmative acts conduct that

occurred "prior to the tax year, concomitant with the tax year, or subsequent with the tax year." A constructive amendment arises when a defendant is deprived of his or her "substantial right to be tried only on charges presented in an indictment returned by a grand jury." United States v. Miller, 471 U.S. 130, 140 (1985) (quoting Stirone v. United States, 361 U.S. 212, 217 (1960)); accord United States v. Syme, 276 F.3d 131, 148 (3d Cir.2002). Under plain error review, a constructive amendment is presumed prejudicial. Syme, 276 F.3d at 136, 154.

Corbett is correct when she argues that the District Court erred in instructing the jury to consider acts that transpired before the dates alleged in the Indictment. See United States v. Voigt, 89 F.3d. 1050, 1089 [78 AFTR 2d 96-5577] (3d Cir.1996) ("[T]he government's failure to include a predeficiency period in the indictment's specification of the offense precludes it from relying on conduct predating the existence of the deficiency as substantive evidence of affirmative acts of evasion."); accord United States v. McGill, 964 F.2d 222, 231 [70 AFTR 2d 92-5043] (3d Cir.1992). This error, however, is harmless as there are no acts upon which the jury could have relied that did not continue through the dates of the Indictment. Although Corbett started her ATM scheme sometime after Dr. Matuzel's death in 1983, she continued her modus operandi until January 1999. Similarly, Corbett continued using the post office box that she opened in 1987 until at least the fall of 1998. No other conduct began prior to April 15, 1994.

III.

In addition to attacking her convictions for tax evasion, Corbett contests her sentence. Specifically, Corbett asserts that the tax evasion counts should have been grouped with the mail and wire fraud counts under U.S.S.G. 3D1.2 because her criminal conduct was all part of one scheme to defraud the United States of Dr. Matuzel's retirement benefits. A district court's factual findings underpinning a grouping determination are reviewed for clear error while its interpretation of the Sentencing Guidelines is reviewed de novo. United States v. Vitale, 159 F.3d 810, 813 (3d Cir.1998).

Section 3D1.2 provides that closely related counts shall be grouped for purposes of calculating the total offense level. Counts are closely related if they involve "substantially the same harm," which exists:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

U.S.S.G. 3D1.2 (2001).

At sentencing, Corbett advanced arguments under each of the four subsections. It appears, however, that the District Court rejected Corbett's arguments based on our decisions in United States v. Astorri, 923 F.2d 1052 (3d Cir.1991), and United States v. Vitale, 159 F.3d 810 [82 AFTR 2d 98-7098] (3d Cir.1998). The District Court was correct in relying on Astorri and Vitale in rejecting Corbett's argument under 3D1.2(c). See Astorri, 923 F.2d at 1057; Vitale, 159 F.3d at 815. Neither case, however, discusses the propriety of grouping tax evasion counts with fraud counts under the remaining subsections. Accordingly, Corbett's sentence will be vacated and the case remanded to the District Court for analysis under U.S.S.G. 3D1.2(a), (b), and (d).

In analyzing the issue of grouping, the District Court should consider those subsections' requirements. In order for 3D1.2(a) and (b) to apply, there first must be a finding that the counts involve the same victim. Indirect and secondary victims should be excluded. U.S.S.G. 3D1.2, cmt. n. 2 (2001). ''Generally, there will be one person who is directly and most seriously affected by the offense and is therefore identifiable as the victim.'' Id.

If the District Court concludes that there is only one victim, it should proceed to the second requirement of 3D1.2(a), the same act or transaction, and of 3D1.2(b), two or more acts connected by a common objective. Although legally distinct, offenses may be grouped if they ''are part of a single course of conduct with a single criminal objective and represent essentially one composite harm to the same victim.'' U.S.S.G. 3D1.2, cmt. n. 4 (2001); see United States v. Riviere, 924 F.2d 1289, 1306 (3d Cir.1991); see also United States v. Cusumano, 943 F.2d 305, 313 (3d Cir.1991) (upholding district court's grouping of conspiracy, money laundering, embezzlement, unlawful kickbacks, and travel act offenses).

Finally, the District Court should consider whether grouping would be appropriate under 3D1.2(d). This subsection permits grouping when the counts are of ''the same general type'' and ''the offense level is determined largely on the basis of the total amount of harm or loss.'' United States v. Seligsohn, 981 F.2d 1418, 1425 (3d Cir.1992) (citations omitted); see United States v. Rudolph, 137 F.3d 173, 180 (1998).

IV.

For the foregoing reasons, we will affirm Corbett's convictions for tax evasion but vacate her sentence and remand the matter to the District Court for reconsideration of the sentence imposed.

¶2002-5237

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE/CROSS-APPELLANT v. Thomas Jeffrey FRISBY, DEFENDANT-APPELLANT/CROSS-APPELLEE. U.S. Court of Appeals, Sixth Circuit, (CA6) Docket No. 01-4173; 01-4240, Aug. 6, 2002. District Court remanded. Decision for Taxpayer.

1. Tax crimes—willful failure to file returns—appeals; taxpayer's death. Pursuant to stipulation, deceased taxpayer's conviction for failure to file tax returns and endeavoring to obstruct tax law administration was remanded: fact that taxpayer died while appeal was pending required that conviction be vacated and indictment be dismissed. *Reference:* United States Tax Reporter ¶72,035.01(5). IRC §7203.

United States Court of Appeals, Sixth Circuit.

Before SILER, COLE, and CLAY, Circuit Judges.

Unpublished Disposition

[1] The defendant appealed his conviction and sentence for failure to file tax returns and endeavoring to obstruct the administration of laws. The government cross-appealed. In view of the defendant's death, the parties have filed a joint stipulation to remand this matter to the district court to vacate the conviction. When a criminal defendant dies while a direct appeal is pending, the case abates and the action must be remanded to the district court for dismissal of the indictment. United States v. Wilcox, 783 F.2d 44 (6th Cir.1986).

Therefore, it is ORDERED that this appeal and cross-appeal be remanded to the district court to vacate the conviction and dismiss the indictment.

¶2002-5238

UNITED STATES OF AMERICA v. Virgil E. JONES. U.S. District Court, Northern Dist. of Illinois, (DC IL) Docket No. 01 C 5524, July 9, 2002. Decision against Taxpayer.

1. Tax crimes—filing false tax returns—post-appeal motions—motion to

vacate sentence—ineffective assistance of counsel. Convicted taxpayer's post-appeal 28 USC §2255 motion to vacate his sentence for filing false returns and related crimes was denied: prosecutorial misconduct claim not previously raised on appeal was barred; and ineffective assistance of counsel argument was rejected for lack of proof that attorney's alleged failures to object to jury instructions and govt.'s evidence, introduce evidence, cross-examine or call certain witnesses, or object to govt.'s failure to turnover allegedly exculpatory evidence changed trial's or appeal's outcome. Also, argument that attorney had conflict of interest because he was under IRS investigation himself at time of trial and appeal was meritless. *Reference:* United States Tax Reporter ¶73,447.511(10); 73,447.511(12). IRC §7203.

Assistant U.S. Attorney, United States Attorney's Office, Chicago, IL, for Plaintiff. Virgil E. Jones, Chicago, IL, Pro se.

United States District Court, Northern Dist. of Illinois, Eastern Division.

Memorandum Opinion and Order

BUCKLO, District Judge:

Following affirmance on appeal, 224 F.3d 621, of his convictions of conspiracy to commit extortion, attempted extortion, and filing false income tax returns, defendant moved to vacate, set aside or correct his sentence. The District Court, Bucklo, J., held that: (1) prosecutorial misconduct claim was procedurally defaulted; (2) Batson challenge that was rejected on direct appeal would not be re-examined; and (3) trial counsel did not provide ineffective assistance.

Motion denied.

Virgil E. Jones, a former alderman in Chicago, Illinois, was convicted of one count of conspiracy to commit extortion, two counts of attempted extortion, and two counts of filing false income tax returns. I sentenced him to a total of forty-one months imprisonment, two years of supervised release, and a $1,000 fine. He appealed and his conviction was affirmed. United States v. Jones, 224 F.3d 621 (7th Cir.2000). Eleven months later, on July 17, 2001, he filed this motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. The government finally responded to the motion on May 28, 2002. I deny the motion.

I.

The facts underlying Mr. Jones' conviction are set out in the Seventh Circuit's opinion, 224 F.3d at 623, but the short version follows. In 1991 and 1992, while Mr. Jones was Alderman and Democratic Ward Committeeman in the 15th Ward in Chicago, he accepted cash payments from John Christopher, an FBI mole, in exchange for overlooking Mr. Christopher's illegal dumpsite in Mr. Jones' ward. Mr. Jones also accepted payments from Mr. Christopher in exchange for influence and assistance with violation notices and in obtaining a permit for a rock-crusher at the dumpsite. Mr. Jones never paid taxes on these cash payments. He was indicted in 1997.

II.

[1] Mr. Jones raises three general grounds for vacating his conviction: (1) that the prosecution concealed exculpatory evidence; (2) that he received ineffective assistance of counsel; and (3) that the prosecution impermissibly used its peremptory strikes to rid the jury of African-American members. His ineffective assistance of counsel claim contains at least twenty-two separate allegations of deficient performance by his counsel, and the remainder of his motion is peppered with allegations that his counsel was deficient.

Mr. Jones did not raise his prosecutorial misconduct claim, or any of the additional claims in his "Motion for Summary Judgment and Expansion of the Record," on direct appeal. He has not offered an excuse for this procedural default, so the claims are barred. See McCleese v. United States, 75 F.3d 1174, 1177 (7th Cir.1996) (holding that issues not raised on direct appeal may not be raised in a § 2255 motion unless the defendant can demonstrate either

cause and prejudice or that refusal to consider the claims would lead to a fundamental miscarriage of justice).

Likewise, "in the absence of changed circumstances of fact or law, [I] will not reconsider an issue which was already decided on direct appeal." Olmstead v. United States, 55 F.3d 316, 319 (7th Cir.1995). Mr. Jones raised his Batson challenge to the prosecution's use of peremptory strikes on direct appeal, and the Seventh Circuit carefully considered and rejected it, so I will not re-examine his claim here. The other two issues raised on appeal related to cross-examination of Christopher related to his dealings with Edward Vrdolyak, a politically-connected private attorney, and a jury instruction defining "wilfully." 224 F.3d at 626. Mr. Jones does not raise these issues directly; instead he charges his attorney with ineffective assistance of counsel with regard to both of these issues.

Ineffective assistance of counsel claims not raised on direct appeal are not barred from review on § 2255 motion where, as here, the petitioner was represented by the same counsel at trial and on appeal. See Guinan v. United States, 6 F.3d 468, 472 (7th Cir.1993). A petitioner claiming that his counsel was constitutionally ineffective must "demonstrate that his counsel's performance fell below an objective standard of reasonableness," and "that he was prejudiced by the deficient performance." Hough v. Anderson, 272 F.3d 878, 890 (7th Cir.2001) (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Reasonableness is measured according to prevailing professional norms and under the totality of the circumstances, and "to prevail, the [petitioner] must overcome the presumption that the challenged act or omission might have been considered sound trial strategy." Id. at 890–91. To demonstrate prejudice, the petitioner must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Id. at 891. If the petitioner makes an insufficient showing on either prong of the test, I need not consider the other prong. Id. at 890.

With regard to the jury instruction, Mr. Jones says that his attorney should have objected to a jury instruction about intent. He does not specifically identify the instruction, so he has waived the argument, see United States v. Lanzotti, 205 F.3d 951, 957 (7th Cir.2000) ("[P]erfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived."), and to the extent that he means the instruction defining "willfully," the Seventh Circuit held that the instruction was not erroneous, 224 F.3d at 626 n. 3, so any failure to object was not constitutionally ineffective. See Stone v. Farley, 86 F.3d 712, 717 (7th Cir.1996) ("Failure to raise a losing argument ... does not constitute ineffective assistance of counsel.").

Mr. Jones' attorney cross-examined FBI mole Christopher about his relationship with Vrdolyak. Tr. at 469; see also 224 F.3d at 626. Mr. Jones argues that his attorney should have introduced evidence of a loan agreement between Christopher and Vrdolyak to show Vrdolyak's motive to assist Christopher and to show that Christopher did not need assistance from Mr. Jones in light of the payments to Vrdolyak. Mr. Jones' attorney did attempt to impeach Christopher with his relationship with Vrdolyak, and Mr. Jones has not shown that the failure to introduce evidence of the loan agreement was not a trial strategy. See United States v. Alex Janows & Co., 2 F.3d 716, 722 (7th Cir.1993) (holding that, where there was evidence of trial strategy and defendant did not offer evidence outside the record to establish deficient performance, ineffective assistance of counsel claim failed). He also says that his lawyer failed to pursue a line of questioning that would have impeached Christopher with his connections to organized crime, but his lawyer did ask Christopher about his ties to organized crime, see Tr. at 382, 385–87; see also 441–42 (cross-examination by co-defendant's counsel), so his performance was not deficient. Mr. Jones' final claim with regard to Christopher is that

his counsel should have called three witnesses who were present at their first meeting in 1991 and would have testified that there was no discussion of bribes. There was substantial evidence that Jones was later observed taking cash payments from Christopher, though, so the omission of fact that there was no explicit discussion of bribery at their first meeting did not prejudice him.

Mr. Jones states that the evidence was insufficient to convict and that his attorney's failure to cite the case law in that respect was ineffective assistance of counsel. However, his counsel challenged the sufficiency of the evidence both in the post-trial motions and on appeal, so there is no support for this claim. Mr. Jones also claims that there are City of Chicago licenses and applications from 1991 that show that the dumping site alleged to be illegal was actually legitimate and licensed, and that his attorney was ineffective for failing to introduce evidence of the licenses in light of government testimony that the site was unlicensed for rock-crushing. In the motion for new trial, his attorney did argue that the license and application were exculpatory, and said he was still trying to obtain the documents. The government attached the permit and application to its response. There was no evidence that the application for a rock-crushing permit was granted, and the license was merely a general business license. Not only was there no deficiency because counsel raised the objection, there was no prejudice because the documents were not exculpatory.[1]

Mr. Jones argues that his counsel had an undisclosed conflict of interest because he was allegedly being investigated by the Internal Revenue Service at the time of his trial and appeal. He bases this claim on a 2001 column (nearly two years after his trial and a year after his appeal) from the Chicago Sun-Times criticizing Mr. Jones's attorney, who had recently been sworn in as a Cook County Associate Judge, for failing to pay child support and for owing back taxes. The article is hearsay because it is offered for the truth of the matters asserted in it, so it cannot be used to support his claim. See Fed.R.Evid. 802. Moreover, he offers no legal basis, nor am I aware of any, for a conflict of interest in a tax evasion case where defendant's counsel owes back taxes. See Small v. Endicott, 998 F.2d 411, 417–18 (7th Cir.1993) (''While the courts liberally construe pro se pleadings as a matter of course, judges are not also required to construct a party's legal arguments for him.'').

At one point during the trial, Mr. Jones alleges that his attorney referred to him as ''Lock 'Em Up Jones,'' and he claims that this could have prejudiced the jury. He does not explain how it could have prejudiced him, or even allege that it actually did, so he has waived this vague and undeveloped argument. See Lanzotti, 205 F.3d at 957. Mr. Jones alleges conclusorily that his indictment was improperly amended in violation of the Fifth Amendment, and that his attorney failed to object, but he has waived this claim as well by failing to develop it. See id.

Mr. Jones raises a number of claims relating to FBI ''302 reports,'' which are interview reports. First, he claims that his counsel failed to object to a Brady violation based on the government's failure to turn over ''numerous 302 reports from interviews with former staff and business persons in t[he] 15th ward and the grand jury testimony of quite a few persons whose statements and testimony would have aided the defendant in his theory of his defense.'' He also claims that his counsel failed to file a motion for disclosure under the Jencks Act of all interview notes and 302 reports. Mr. Jones does not attach any of the allegedly suppressed reports, nor does he describe them with sufficient detail to determine whether it was material for the purposes of Brady, see United States v. Silva, 71 F.3d 667, 671 (7th Cir.1995), or whether any alleged Jencks

[1] Mr. Jones also claims that his attorney should have introduced ''two maps from the [C]ity of Chicago map department for the years 1989 and 1992'' along with the license and application, but he does not explain the significance of these maps, so he cannot demonstrate prejudice from the failure to introduce them. Because I conclude that the license and application were not exculpatory, there was no ineffective assistance of counsel in failing to introduce FBI 302 reports relating to the application.

Act violation was harmless, see Jackson v. United States, No. 93-3782, 28 F.3d 1216, 1994 WL 375427, at *2 (7th Cir.1994) (Jencks Act claim failed where petitioner did not name any government witnesses that testified and whose statements may have been discoverable pursuant to 18 U.S.C. § 3500.). Because he provides insufficient information to evaluate the strength of the underlying claims, Mr. Jones fails to demonstrate that he was prejudiced by his attorney's failure to raise these objections.

He also claims that his attorney should have introduced two 302 reports relating to statements of Michael Gerard, an unindicted co-conspirator. He does not attach either report, but he does describe their contents generally. The first report supposedly established that Gerard knew that Christopher was an informant, which Mr. Jones says would have established that there could be no conspiracy with a known government informant. However, the evidence at trial established a conspiracy between Mr. Jones and his co-defendant, Charles Nix, to extort Christopher in violation of the Hobbs Act, so the existence of a conspiracy between Gerard and Christopher is irrelevant. The second report involved a conversation between Gerard and Christopher in which Gerard admitted to obtaining a $10,000 loan for Christopher. Mr. Jones argues that Gerard's assistance to Christopher would have shown that Gerard was not trying to extort Christopher, but the government is correct that, regardless of Gerard's relationship with Christopher, this evidence would not bear on the conspiracy between Mr. Jones and Charles Nix. For the same reason, evidence that Christopher had retained the law firm of Daley & George to assist him in obtaining a permit, which Mr. Jones' attorney did not introduce and which Mr. Jones says would have shown that Christopher did not intend to do anything illegal to get a license, has no bearing on Mr. Jones' intent to extort Christopher.

Mr. Jones also claims that his attorney ought to have introduced a tape in which Christopher discussed his connections to the mayor and the mayor's brother's law firm, because Mr. Jones had spoken openly against the mayor. The motivation for his prosecution is irrelevant to the question of his guilt. To the extent that he means that his attorney should have argued that he was the victim of prosecutorial vindictiveness, he has not come forward with any "objective evidence showing genuine prosecutorial vindictiveness." United States v. Spears, 159 F.3d 1081, 1086 (7th Cir.1998). Mr. Jones was not prejudiced by the failure to introduce this evidence.

Mr. Jones also claims that his counsel was ineffective in cross-examining Dan Walsh, a prosecution witness who testified that he dealt with Christopher because he was afraid that he would otherwise not have been able to get permits. Mr. Jones says that this is false testimony because Walsh grew up with Mayor Daley and their fathers had been close; presumably he means that any contractor who is connected to the mayor need not fear a denial of construction permits. Even accepting this tenuous factual premise, Mr. Jones has not demonstrated that he was prejudiced in any way by the absence of this testimony, because the issue was Mr. Jones' state of mind.

During closing arguments, the Assistant United States Attorney characterized Mr. Jones as a "liar." Although his attorney did not object to this statement during closing arguments, Mr. Jones has not rebutted the presumption that the decision not to object was sound trial strategy. See United States v. Driver, 798 F.2d 248, 255 (7th Cir.1986).

Mr. Jones claims that his attorney should have called the owner of an establishment called the Checkerboard # 2 to testify about a Christmas party in 1992 and a birthday party in 1993. He claims that he was prejudiced by the absence of this testimony, but he does not even minimally explain the relevance of those two parties to his defense, so he has not established ineffective assistance.

Mr. Jones describes a videotape of a television program on WYCC in which he claims to have blown the whistle on the il-

legal dumping site, which he says his attorney did not attempt to obtain and which would have shown that he was not trying to cover up the site. However, he provides neither the tape, nor the date that it aired, so I cannot determine what impact, if any, it would have had on Mr. Jones' defense, and Mr. Jones has failed to demonstrate that he was prejudiced by its absence at his trial.

Mr. Jones says that his lawyer should have objected when the government introduced recorded conversations that had been transferred to CD-Rom rather than presenting them in their original taped format. He refers to the "Filiberto case," by which I assume he means United States v. Filiberto Ojeda Rios, 495 U.S. 257, 110 S.Ct. 1845, 109 L.Ed.2d 224 (1990), in which the Supreme Court held that a delay in sealing original recordings pursuant to 18 U.S.C. § 2518(8)(a) warrants exclusion of recordings, id. at 264, 110 S.Ct. 1845, unless the government provides a satisfactory explanation for excusable delay, id. at 265, 110 S.Ct. 1845. There is no evidence of any delay in sealing the recordings here, so Ojeda Rios is inapposite. Moreover, to the extent that Mr. Jones infers that the recordings were altered, he has provided no specific allegations from which I could evaluate his claim, and has therefore waived it.

Mr. Jones says that his attorney should have objected that his prosecution violated the Speedy Trial Act, 18 U.S.C. § 3161, and that the prosecution failed to state a Hobbs Act violation, but, on the record before me, these were losing arguments that his lawyer had no obligation to raise. See Stone, 86 F.3d at 717. Mr. Jones argues that the prosecution waited more than four years to seek an indictment, but the Sixth Amendment and the Speedy Trial Act do not apply to pre-indictment delays. See United States v. Williams, 738 F.2d 172, 175 (7th Cir.1984). He claims that he was disadvantaged, but has not explained how he was prejudiced by the pre-indictment delay, so he cannot make out a claim for a due process violation. See Spears, 159 F.3d at 1084 ("For a defendant to successfully assert a due process violation based on an unjustified pre-indictment delay, he must first show that the delay caused actual and substantial prejudice to his right to a fair trial."). Mr. Jones argues that the government improperly charged him with an attempted Hobbs Act violation because the alleged conduct involved a completed offense, but he offers no basis for concluding that it was improper to charge him with the lesser offense of attempt. He also argues that there was no economic loss or actual impact on commerce, but there was overwhelming evidence of quid pro quo extortion, see United States v. Giles, 246 F.3d 966, 971 (7th Cir.2001), to support Mr. Jones's conviction. There was also sufficient evidence of a de minimis effect on interstate commerce to satisfy the jurisdictional requirements of the Hobbs Act. See Tr. at 269–78 (evidence and stipulations that equipment used in Christopher's business had been shipped in interstate commerce); United States v. Peterson, 236 F.3d 848, 851 (7th Cir.2001).

Before his trial, Mr. Jones says that he found two transmitters--one in his office, and one in a mailbox--and that he gave them to his pre-trial attorney, who sealed them in an envelope. When he later asked his trial attorney (a different attorney) about the transmitters, his trial attorney said he was unaware of them. Mr. Jones claims that his trial attorney ought to have made every effort to recover the transmitters, which supposedly contained conversations with Christopher in which Mr. Jones resisted offers of money and claimed not to want to hear anything about illegal activities. Although he describes the content of the conversations, he produces no support for this claim, such as an affidavit of his first attorney, that these transmitters actually exist, so he cannot make out a claim of deficient performance by his trial attorney.

Finally, the government played a videotaped examination of unindicted co- conspirator Ed Norsworthy during the trial, and Mr. Jones claims that his attorney should have objected when the government turned off the videotape before testimony

that would have shown that Mr. Jones was unaware of an unidentified meeting or before Norsworthy told Christopher that Mr. Jones did not trust him. Neither of these statements would have had any impact in light of the wealth of evidence against Mr. Jones, so there is no reasonable probability that he was prejudiced by his attorney's failure to object.

III.

Because none of Mr. Jones' claims has merit, I DENY the motion to vacate his sentence. His "motion for Summary Judgment and Expansion of the Record" is therefor DENIED as moot.

¶2002-5239

UNITED STATES OF AMERICA, on behalf of its agency, the Internal Revenue Service, APPELLANT, v. Abel Cosmo GALLETTI; Sarah GALLETTI, APPELLEES. In re: Abel Cosmo Galletti, aka Al Galletti, and Sarah Galletti, Debtors. In re: Francesco Briguglio, aka Frank Briguglio, and Angela Briguglio, aka Angie Briguglio, Debtors. UNITED STATES OF AMERICA, APPELLANT v. Francesco BRIGUGLIO, aka Frank Briguglio; Angela Briguglio, aka Angie Briguglio, APPELLEES. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-55953, Aug. 8, 2002. District Courts, (2001, DC CA) 88 AFTR 2d 2001-5580, affirming (2000, Bktcy Ct CA) 86 AFTR 2d 2000-6433, 2000-2 USTC ¶50825, and (2001, DC CA) 87 AFTR 2d 2001-1639, affirming (2000, Bktcy Ct CA) 86 AFTR 2d 2000-6438, 2000-2 USTC ¶50782, affirmed. Years 1992, 1993, 1994, 1995. Decision for Taxpayers.

1. Tax claims in bankruptcy—objection to proof of claim—partnership debts—partner assessments and collection—limitations periods. 9th Cir. affirmed disallowance of IRS's proofs of claim against Chap. 13 debtors-partners for partnership employment tax assessments: IRS had to, but admittedly didn't, assess partners separately before pursuing collection against them; and, since limitations period had already expired, govt. was now time-barred from making assessments or pursuing its claim. Govt.'s argument that partners weren't separate taxpayers from their partnerships was belied by IRC and applicable case law; its reliance on cases involving partner *liability* rather than collection procedures was misplaced; and California law on collecting partnership debt from partners was unavailing where IRS had not 1st obtained requisite judg-ment against partners before pursuing col-lection. *Reference:* United States Tax Reporter ¶62,015.01(110); 68,726.51(10); 34,015.39(30); 65,015.03(5); 77,015.36(55). IRC §3401; 6201; 6203; 6501; 7701.

Thomas J. Clark and Andrea R. Tebbets, Attorneys, Tax Division, Department of Justice, Washington, D.C., for the appellant.

Mark R. Campbell, Haberbush & Campbell, LLP, Long Beach, California, for the appellees.

Appeals from the United States District Court for the Central District of California. United States Court of Appeals for the Ninth Circuit. PHILLIPS, District Judge, Presiding

Before: Andrew J. KLEINFELD and Susan P. GRABER, Circuit Judges, and Susan R. BOLTON,* District Judge.

Opinion

GRABER, Circuit Judge:

FOR PUBLICATION

Argued and Submitted May 9, 2002—Pasadena, California.

Debtors Abel Cosmo Galletti, Sarah Galletti, Francesco Briguglio, and Angela Briguglio filed Chapter 13 bankruptcy petitions. The United States Internal Revenue Service (IRS) filed proofs of claim against Debtors for unpaid employment taxes assessed against a partnership in which Debtors were general partners. The bankruptcy court disallowed the IRS's claims, and the

* The Honorable Susan R. Bolton, United States District Court for the District of Arizona, sitting by designation.

district court affirmed. We also affirm. The IRS's claims were properly disallowed because (1) the IRS cannot collect a partnership's tax deficiency directly from the partners without first making individualized assessments against the partners or ob-taining judgments against the partners holding them jointly and severally liable for the partnership's tax debts; and (2) the statute of limitations now bars the IRS from making such individual assessments or obtaining such judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Debtors were general partners of Marina Cabrillo Partners (the Partnership). From 1992 to 1995, the Partnership failed to pay the requisite amount of federal employment taxes, prompting the IRS to assess those unpaid taxes against the Partnership in 1994, 1995, and 1996.

On October 20, 1999, Debtors Abel and Sarah Galletti filed a joint petition for relief under Chapter 13 of the Bankruptcy Code. Debtors Francesco and Angela Briguglio filed a joint petition under Chapter 13 on February 4, 2000. In the course of those bankruptcy proceedings, the IRS filed proofs of claim against all Debtors for the unpaid taxes that the IRS had assessed against the Partnership. Debtors objected to the claims on the ground that the IRS had assessed only the Partnership and not the individual partners and that the statute of limitations for assessment had run. The IRS conceded that it had not assessed Debtors within the usual three-year limit, 26 U.S.C. § 6501, but argued that its timely assessments against the Partnership extended the time for collection of the taxes from Debtors, 26 U.S.C. § 6502(a). The bankruptcy court sustained Debtors' objections in two separate orders.

The IRS timely appealed those orders. The district court affirmed, and the IRS filed timely notices of appeal. We consolidated the two appeals.

STANDARD OF REVIEW

We review de novo the district court's decision on an appeal from a bankruptcy court. *Neilson v. Chang (In re First T.D. & Inv., Inc.)*, 253 F.3d 520, 526 (9th Cir. 2001) (citing *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074, 1084 n.9 (9th Cir. 2000) (en banc)). We review the bankruptcy court's conclusions of law de novo and its factual findings for clear error. *Id.* (citing *Beaupied v. Chang (In re Chang)*, 163 F.3d 1138, 1140 (9th Cir. 1998)).

DISCUSSION

[1] In order to collect unpaid taxes from a taxpayer, the IRS must, within three years after the filing of the taxpayer's return, either assess the tax against the taxpayer or bring an action to collect the tax. 26 U.S.C. § 6501(a). Here the IRS did neither. Nonetheless, it seeks to collect unpaid taxes from Debtors by way of proofs of claim in their bankruptcy proceedings. The IRS offers two theories to justify its filing of these claims against Debtors. First, the IRS argues that its timely assessment of taxes against the Partnership allows it to collect taxes directly from the individual partners even though no separate assessment of tax liability was made against them. Second, the IRS argues that, because California law makes partners jointly and severally liable for the debts of the partnership, the IRS could bring a state-law action against Debtors to collect the tax liability assessed against the Partnership. Neither theory gives rise to an allowable bankruptcy claim in the circumstances of this case.

A. Assessment of the Partnership

As noted, the IRS may collect tax deficiencies from a taxpayer by making an assessment against the taxpayer within three years of the filing of the taxpayer's return. 26 U.S.C. §§ 6203, 6501(a). By assessing a tax deficiency, the IRS gains advantages in its collection efforts. For example, assessment extends the statute of limitations for a judicial action to collect the tax liability to ten years from the date of the as-

sessment. 26 U.S.C. § 6502(a).[1] Similarly, because a final assessment operates in much the same way as a judgment, the IRS may proceed directly against the assets of a taxpayer whose tax deficiency has been properly assessed. *Id.*[2]

The IRS made a timely assessment against the Partnership for unpaid employment taxes. The IRS argues that Debtors, as partners, are not separate "taxpayers" within the meaning of the statutory provisions governing assessment and collection of taxes. It follows, says the IRS, that the timely assessment against the Partnership allows the IRS to collect taxes directly from the individual partners. We are not persuaded.

1. Statutory Provisions

Section 6203 of the Internal Revenue Code provides that an "assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary." 26 U.S.C. § 6203. As defined under the code, a "taxpayer" is "any person subject to any internal revenue tax," and a "person" includes "an individual, a trust, estate, partnership, association, company or corporation." 26 U.S.C. § 7701(a)(14), (a)(1).

As noted, an "individual" is included in the statutory definitions of "person" and "taxpayer" in § 7701 and, by extension, in §§ 6203 and 6501. An "individual" can be a partner but is distinct from a "partnership." The regulation interpreting § 6203 provides that a valid assessment "shall provide identification of *the taxpayer.*" 26 C.F.R. § 301.6203-1 (emphasis added). Section 6502, which governs collection of tax after an assessment has been made, likewise presumes that "the taxpayer" against whom a deficiency has been assessed is the same taxpayer for whom the statute of limitations is extended. In all these statutes, the individual or entity assessed must be a separately identified "taxpayer."

The Partnership is a "taxpayer" within the meaning of the statute, but so is each individual Debtor a separate "taxpayer." Each has its, his, or her own taxpayer identification number. Thus, the IRS's failure to assess tax deficiencies against Debtors within the three-year period provided under § 6501(a) bars it from collecting the unpaid debts of the Partnership directly from Debtors. The assessment against the Partnership extended the statute of limitations only with respect to the Partnership, but it left unaltered the limitations period applicable to Debtors. Because the bankruptcy court may disallow claims that are "unenforceable against the debtor and the property of the debtor," 11 U.S.C. § 502(b)(1), the court did not err in sus-taining Debtors' objections to the IRS's claims.

2. Case Law

Although no published Ninth Circuit decision directly addresses the question before us, our precedents weigh against the IRS's position.

The IRS argues that we should follow *Young v. Riddell*, 60-1 U.S. Tax Cas. (CCH) ¶ 9831, at 76,049 [5 AFTR 2d 1037] (S.D. Cal. 1959), *aff'd* 283 F.2d 909 [6 AFTR 2d 6228] (9th Cir. 1960).[3] In that case, the IRS had assessed unpaid taxes against a partnership called the "Riviera Room." *Id.* at 76,054. One of the general partners paid his share of the taxes but later brought an action for a refund. *Id.* at 76,050. The district court held that the partner was not entitled to a refund:

> Where taxes are assessed against a partnership and under state law each member of the partnership is jointly and

[1] Title 26 U.S.C. § 6502(a) provides, in relevant part:

Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 10 years after the assessment of the tax[.]

[2] Alternatively, so long as the IRS brings an action to collect the taxes within three years after the taxpayer's return was filed, an assessment is unnecessary. 26 U.S.C. § 6501(a); *Goldston v. United States (In re Goldston)*, 104 F.3d 1198, 1200–01 [79 AFTR 2d 97-567] (10th Cir. 1997). The IRS filed no action to collect taxes, either against the Partnership or against Debtors.

[3] We discuss the district court's opinion in *Young* at some length, to respond to the IRS' contentions and to provide context for our own opinion in *Young*.

> severally liable for the debts of the partnership, it is unnecessary and superfluous to name the individual partners in the assessment in order to create liability; their liability arises as a matter of state law.

Id. at 76,054. Although the government had not made a valid assessment against the partner, the court refused to order a refund because state law made the partner substantively liable for taxes assessed against the partnership.

The district court's holding in *Young* was more limited than the IRS suggests. The court did not hold that the government would have been entitled to *collect* the same tax in the absence of an individual assessment, a judgment against the partner, or a voluntary payment. In fact, other portions of the court's opinion demonstrate that the opposite is true:

> It is the government's contention that where an assessment names an entity such as in the instant case, that it is unnecessary to name the individual members of the entity in order to establish individual liability and that *the only reason for naming such individual or adding such individuals' names as here is to enable collection of the tax without resorting to court action. With this contention I agree* . . . .

Id. at 76,050 (emphasis added). Thus, the court acknowledged that to *collect* the tax for which the partner was liable, the IRS would have had to either resort to court action or individually assess the taxes against the partner. An assessment was unnecessary only because the tax already had been collected. *Id.* at 76,054. The district court's holding, therefore, was much narrower than the IRS acknowledges, namely, that "[a] person liable for taxes *may not recover a refund of taxes* he paid because of the fact the assessment did not name him." *Id.* at 76,054 (emphasis added).

Our affirmance of the district court's decision in *Young* did not reject the district court's interpretation. *Young v. Riddell*, 283 F.2d 909 [6 AFTR 2d 6228] (9th Cir. 1960). Only one passage in our opinion lends any support to the IRS's position: "Having been found a general member of the partnership, appellant is personally liable for the debts and liabilities of the partnership, including its tax liability, even though his status as a partner was not discovered or formally noted in tax records until after termination of the partnership." *Id.* at 910. That statement does not aid the IRS, however, as it merely restates the holding of the district court that the partner was not entitled to a refund because he was liable for the debts of the partnership under state law. Nothing in our opinion contradicts the district court's suggestion that the IRS could not have *collected* the tax against the partner had he refused to pay it.

Thus, ultimately our opinion in *Young* supports Debtors' position because their *liability* for the tax assessed against the Partnership is not at issue in this case. To the contrary, Debtors concede that they are liable for the tax but argue only that, in the absence of individual assessments or judgments against them, the IRS is procedurally barred from *collecting* the unpaid taxes from them.

The foregoing limited interpretation of *Young* is buttressed by *United States v. Coson*, 286 F.2d 453 [7 AFTR 2d 589] (9th Cir. 1961). In that case, the IRS assessed unpaid taxes against a partnership and later claimed a lien against the property of Coson, who allegedly was a general partner. *Id.* at 454. Coson challenged the validity of the lien on a number of grounds, including that the assessment against the partnership did not name him individually. *Id.* at 458; *United States v. Coson*, 169 F. Supp. 671, 675 [3 AFTR 2d 462] (S.D. Cal. 1958) (The "plaintiff does not seek to contest the correctness of an assessment; instead, he contends there just never was any assessment of the taxes in question against him.").

The district court, pointing to § 6203 and its implementing regulations, noted that one of the requirements for a valid assessment was that the taxpayer be identified. *Id.* Further, it noted that the assessment at issue named only the partnership

and "an unknown number of unidentified taxpayers." *Id.* Relying on the fact that Coson had never been assessed individually, the district court held that the IRS's attempts to collect the unpaid taxes from Coson were improper:

> [T]his court is of the opinion that such a lien does not exist against a particular individual's property pursuant to §[§] 6321 and 6322 unless the underlying tax obligation has been assessed against him under § 6203.
>
> Since plaintiff never was assessed and no lien exists without such an assessment, it follows that the Government does not have any lien.'

Id. at 676 (footnote omitted).[4]

On appeal, we affirmed. We relied on a different ground than the district court had used, namely, that the lien was procedurally defective for reasons other than the government's failure to timely assess the tax against Coson. *Coson*, 286 F.2d at 458, 462–63. Nonetheless, in a passage that supports Debtors' position in dictum, we noted:

> In holding as we do that the lack of proper notice or demand was fatal to the acquisition of the Government's lien against Coson, the emphasis here is somewhat different than that employed by the trial judge who held that the assessment itself was void as against Coson because the taxes were never assessed to Coson, the record of assessment in the office of the Bureau making no reference whatever to Coson. The Government argues that there is no requirement that an assessment be made against any person. Although our decision as to the lack of proper notice or demand is sufficient to dispose of this case, it would appear that *the trial court was right in holding the assessment was insufficient for failure to comply with the statutory requirements.*

Id. at 464 (emphasis added).

In its petition for rehearing, the IRS asserts that the Seventh Circuit has held that the IRS can bring suit against individual partners, and obtain a judgment against them, for as long as the tax obligations remain a valid debt of the partnership, citing *United States v. Wright*, 57 F.3d 561 (7th Cir. 1995). *Wright* is distinguishable because, in that case, the IRS had assessed both the partnership (Empire Wood Company) *and* the individual partners. *United States v. Wright*, 868 F. Supp. 1070, 1071 & n.1 (S.D. Ind. 1994). Those assessments extended to six years the statute of limitations with respect to both the partnership and the partners. By contrast, here, no assessment was made against the individual partners.

Subsequently, the Empire Wood partnership filed for bankruptcy protection and entered a period of reorganization, thus tolling of the statute of limitations as to the partnership. *Wright*, 57 F.3d at 562. See 26 U.SC. § 6503(h) (tolling the statute of limitations during the period in which the Bankruptcy Code prohibits the government from pursuing a collection action). More than six years after the initial tax assessment but before the end of the limitations period applicable to the partnership, the IRS brought an action against the individual partners to collect the unpaid taxes. *Wright*, 57 F.3d at 562-63. The partners argued that, although an action against the partnership would have been timely, the statute of limitations had expired as to them because it had not been tolled during the period of the partnership's bankruptcy. *Id.* Accordingly, the only relevant question in *Wright* was whether the statute of limitations applicable to the partners should be tolled while the limitations period was tolled with respect to the partnership. The Seventh Circuit therefore had no opportunity to address the question before us.

In summary, we hold that the assessment of tax liability against the Partnership, without more, does not allow the IRS to collect those taxes directly from the individual partners.

[4] The IRS attempts to distinguish this case on the ground that Coson was challenging the validity of a lien on his property, while no lien is challenged here. However, the asserted lien was a tax lien, the validity of which depended on an underlying assessment.

B. California Partnership Law

In an attempt to avoid the time-bar on assessments, the IRS argues in the alternative that it was not required to make individual assessments against Debtors because they are jointly and severally liable for the debts of the Partnership under California law. This argument overreaches under state law.

Superficially, the IRS's argument is logical. The IRS assessed unpaid employment taxes against the Partnership in 1994, 1995, and 1996. Therefore, under federal law, the IRS has a right to bring proceedings against the Partnership to collect those taxes for up to ten years after assessment, in this case until 2004, 2005, and 2006. 26 U.S.C. § 6502(a)(1). Under California law, general partners such as Debtors are "liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." Cal. Corp. Code § 16306(a); *see also Young*, 283 F.2d at 910 (holding that, under California law, partners are "personally liable for the debts and liabilities of the partnership, including its tax liability"). Because the assessed employment taxes are a debt of the Partnership that the IRS has a right to collect against it, the IRS asserts that it may bring an action under state law to obtain a judgment holding Debtors responsible for the unpaid taxes. Cal. Corp. Code § 16307(b); *see also Remington v. United States*, 210 F.3d 281, 282–83 [85 AFTR 2d 2000-1344] (5th Cir. 2000) (holding that, under the Texas Uniform Partnership Act, the government was "entitled to collect the ... tax liability, indisputably a partnership debt, from any one of the general partners"); *United States v. W. Prods., Ltd.*, 168 F. Supp. 2d 84, 91 [87 AFTR 2d 2001-1841] (S.D.N.Y. 2001) (allowing government to collect withholding taxes from general partner under the New York Partnership Law even though the assessments were made in the name of the part-

nership); 14 Mertens, The Law of Federal Income Taxation § 55:109 (West 2002) (stating that the government may bring an action to "collect the withholding taxes from one or more general partners under the applicable state partnership laws"). The Bankruptcy Code permits a creditor to make a claim against the estate of a debtor so long as the creditor has a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A). Such a claim may be disallowed by the bankruptcy court only if it "is unenforceable against the debtor and property of the debtor, under ... applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). The IRS argues that, at the time Debtors' petitions were filed, its state-law claim against Debtors for the tax liability of the Partnership was not unenforceable and, therefore, the bankruptcy court erred as a matter of law by disallowing the claim.

Under California law, however, a creditor may not automatically collect from a general partner a debt that the partnership owes to the creditor. To the contrary, the creditor must first obtain a judgment against the partner holding the partner liable for the partnership's debt: "A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner." Cal. Corp. Code § 16307(c); 9 B.E. Witkin, Summary of California Law § 60V (9th ed. Supp. 2001) ("[A]lthough a partner need not be named individually in an action against a partnership, the partner must be individually named and served in the action or in a later suit, and judgment entered against that partner, in order to reach the partner's personal assets."). Thus, although under state law each individual partner is *liable* for the debts of the partnership, a claim against the partnership does not automatically give rise to a right to *collect* against the individual partners. Instead, a creditor may collect a debt for which the partner is jointly and severally liable only by first obtaining a judgment against the partner.

The IRS has obtained no judgment against Debtors. The time for doing so has expired. 26 U.S.C. § 6501(a). As we have explained, the assessment extended the statute of limitations only as to the Partnership.

CONCLUSION

The assessment against the Partnership was not an assessment against the individual partners (Debtors), because they are separate taxpayers. Consequently, the assessment against the Partnership extended the statute of limitations (to ten years from the date of assessment) only for the Partnership; it had no effect on the ordinary three-year statute of limitations for Debtors.

California partnership law does not aid the IRS because, under state law, a creditor may not collect a partnership debt from an individual partner without first obtaining a judgment against the partner. The IRS did not obtain a judgment against Debtors, and it is too late to do so because the applicable statute of limitations was three years.

Thus, the IRS does not have allowable bankruptcy claims under either of its theories. Accordingly, we affirm the bankruptcy court's disallowance of the claims.

AFFIRMED.

¶2002-5240

Richard L. SMITH; Vanalco, Inc., PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 00-70124, Aug. 12, 2002. Tax Court, *Vanalco Inc*, (1999) TC Memo 1999-265 [1999 RIA TC Memo ¶99,265], RIA TC Memo ¶99265, 78 CCH TCM 251 [1999 RIA TC Memo ¶99,265] (opinion by Parr, *J.*), affirmed. Years 1992, 1993. Decision for Govt.

1. Business expenses—capitalization—cell lining and floor replacement costs—business deductions—plant roof repairs—proof. Tax Court properly determined that aluminum smelting S corp.'s replacement of aluminum reduction cell linings were capital costs, not currently deductible business expenses: cell relining, which was appropriately measured by reference to individual cell rather than entire cell line, wasn't merely incidental repair. Lining was critical cell component whose replacement effectively rebuilt cell, materially increasing its value and giving it new 3-year life expectancy; neither lining's relative size nor fact that relining added no additional functionality were dispositive; and Court's use of ''1-year guidepost'' in future benefits analysis was upheld. Similarly, replacement of parts of cell room brick floors with Fondag cement were capital costs where it substantially increased floors' material and functional values, making them easier to repair, electrically non-conductive in shorter time and mitigating risk of injury; and fact that replacement didn't encompass entire floor area wasn't controlling. *Reference:* United States Tax Reporter ¶2635.18(5); 1625.175(15). IRC §162; 263.

Ronald L. Berenstain, Perkins Coie LLP, Seattle, Washington, for the petitioners-appellants.
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Appeal from a Decision of the United States Tax Court. United States Court of Appeals for the Ninth Circuit.

Before: Thomas M. REAVLEY,* A. Wallace TASHIMA, and Johnnie B. RAWLINSON, Circuit Judges.

Opinion

TASHIMA, Circuit Judge:

Argued and Submitted July 9, 2002—Seattle, Washington.

FOR PUBLICATION

The Commissioner of the Internal Revenue Service (''Commissioner'') disallowed deductions taken by appellant Vanalco, Inc. (''Vanalco'') in 1992 and 1993 for expenses related to replacing the lining of aluminum smelting machines and portions of its facility's floors. The Commissioner determined that these items were capital expenditures depreciable under 26 U.S.C. § 263, rather than ordinary and necessary business expenses currently deductible under 26 U.S.C. § 162(a). The tax court upheld the Commissioner's determination on Vanalco's appeal. *See Vanalco v. Comm'r*, 78 T.C.M. (CCH) 251 [1999 RIA TC Memo ¶99,265] (1999) (''*Vanalco I*''). We have jurisdiction over appeals from the tax court pursuant to 26 U.S.C. § 7482(a), and we affirm.

I. BACKGROUND[1]

A. Vanalco's Smelting Operations

During 1992 and 1993, Vanalco was in the business of smelting aluminum. Vanalco operated a smelting facility in Vancouver, Washington, that it purchased in 1987 from ALCOA, which had owned the facility since 1940.

Aluminum is made from bauxite, an ore that contains large amounts of aluminum hydroxide. Bauxite is refined to make aluminum oxide, also known as alumina. Aluminum is produced by use of the chemical process electrolysis, which involves the decomposition of a chemical compound into ions by passage of electricity through an electrolytic solution. During the smelting process, large buckets carried by overhead cranes dump alumina into hoppers attached on top of reduction cells (''cells'').[2] The hoppers feed the alumina down the center of each cell, where it is dissolved in a bath of molten cryolite solution. An anode, which is a cubical carbon block attached to a copper rod, is then introduced into the cell, and an electrical current is passed from the anode, through the alumina/cryolite solution, and into a cathode, which is a

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* The Honorable Thomas M. Reavley, United States Circuit Judge for the Fifth Circuit, sitting by designation.
1 The factual background is taken from the parties' joint stipulation of facts.
2 The terms ''cells'' and ''pots'' are used interchangeably.

carbon block that lines the bottom of each cell.

The electrical current separates the alumina into molten aluminum, which accumulates on top of the cathode at the bottom of the cell, and oxygen, which combines with the carbon anode at the top to produce carbon dioxide. This process produces aluminum continuously. At the Vanalco plant, the molten aluminum is removed from the cell every other day and transferred to a casting area called the ingot plant. In the ingot plant, the molten aluminum is poured into molds or combined with other alloys to be cast into pig or log shapes.

Vanalco used 636 low current density (''LCD'') cells and fourteen ''N-40'' cells. The LCD cells were oblong steel shells approximately 22 feet long, 76 inches wide, and 36 inches high. The N-40 cells were the same in all material respects, except that they were shorter in length by about three feet. The shells sat on steel ''cradles'' over which anodes hung from a large steel superstructure.

Vanalco's 650 cells were divided equally into ten rooms, where the cells were spaced an average of 24 to 28 inches apart. Two rooms of cells were connected together in a cell line consisting of 130 cells, which were connected by busbars that allowed the cells to share the same electrical current.[3] The cells were arranged in such a way that a particular cell could be bypassed when necessary. A cell was bypassed or ''shunted'' from the line by disconnecting the riser from the superstructure and redirecting the flow of electricity. On average, eight to 10 cells were taken out of the line for replacement of their linings at any one time; however, without substantial modifications to its electrical system, Vanalco required a minimum of 112 functioning cells in order to operate its system on a sustained basis.

B. Cell Relining

The lining of the cell is located in the cell shell and consisted of cathode blocks made of carbon materials, collector bars, refractory brick made of a lightweight silicate material, castable refractory, steel plate, insulation board, carbon sidewall blocks, carbon lining paste, and various nuts and bolts. The cell lining of each LCD cell consisted of eight cathode blocks that were 60 inches × 18 inches × 14 inches; two that were 60 inches × 15 inches × 14 inches; one that was 60 inches × 17 inches × 14 inches; two that were 30 inches × 18 inches × 14 inches; and two that were 30 inches × 17 inches × 14 inches. The average life of the cell lining was three years.[4]

Cells were monitored by Vanalco in two ways. One involved measuring the iron content of the molten aluminum within each cell twice a week. If the iron content increased above a certain level, it was a sign that the cell lining had eroded to expose the steel collector bars or the shell. Failure to replace the cell lining in this circumstance would cause the cell to eventually rupture, spilling molten metal onto the floor. In addition, the voltage of the cells was monitored to ensure that the cells were running efficiently. If the voltage could not be maintained at a designated level or within a specified range, it was an indication that there was something wrong with the cell lining. In this situation, if all other attempts to improve the operation of the cell failed, the cell would be bypassed and removed from service for relining.

Once the cell was shunted, the relining process involved removing the carbon anodes, cooling the cell for 20 hours, then adding water to further cool the cell and soften the lining materials. The superstructure and shields were then removed, and the superstructure was taken to the potlining area for any necessary repairs. The cell lining crew then removed the cooled, solidified electrolyte and solid aluminum metal from the cell cavity, and the cell was

[3] Once the current flowed out of a cathode in one cell, it passed through collector bars onto a riser and into the anodes in the next cell.

[4] Based on a simple averaging of each cell component's average life span, the life of a cell was calculated to be approximately 22 years. Based on a weighted average that takes into account the cost of each component as a fraction of the total cost, the life span of a cell was calculated as 40.009 years.

dug with pot diggers to extract the remaining cell lining. The shell and cradle of the cell were removed and taken to the shell repair area with a crane and wagon. In the shell repair area, the shell and cradle were straightened and necessary welding repairs were made. The repaired shell and cradle were put in a vacant spot in the cell line, which was usually different from their original location.

The replacement lining was installed in layers. First, the bottom of each cell was lined with two layers of insulating block cemented together. The cell lining crew then placed a layer of sheet metal on top of the insulating block, which formed a vapor barrier. Two layers of heavy refractory fire brick were added on top of the vapor barrier and the cathode blocks with embedded collector bars were placed in rows on top of the refractory fire brick. The cell lining crew then installed the carbon sidewall blocks around the sides of the shell to cover the area from the top of the cathode blocks to the top of the shell. Finally, the crew installed a ramming paste around and between the cathode blocks to create a solid and smooth cell cavity.

After the lining was replaced, the collector bars were attached to the ring bus, the superstructure was reinstalled on top of the cell, new anodes were hung from the superstructure, and cell shields were reinstalled over the shell. At this point, the cell was reconnected to the cell line, although it was not immediately placed back into service. Instead, it remained empty for approximately 48 hours while the new lining and cathode blocks "baked." The average time for a cell to be out of service for relining was 15 days.

During the 1992–1993 period, the cost for the replacement of cell lining, including labor and allocable overhead expenses, was $17,933.[5] In addition, Vanalco incurred approximately $5,401 per cell to tear out the old cell lining, as well as miscellaneous expenses. Vanalco replaced 206 cell linings in 1992 and 192 cell linings in 1993. Vanalco employed a cell lining crew of 22 to 26 workers. It reported a repair expense for relining of $4,411,245 in 1992 and $4,224,991 in 1993.

C. Floor Repair

Vanalco had ten cell rooms,[6] each approximately 722 feet long and 47 feet wide. Each room was divided into three sections: a center section where the cells were located, an area to one side of the cells known as the "tap end," and a narrower area to the other side of the cells called the "duct end." The tap end of each room, which varied in size from 7,000 to 8,500 square feet, was where the front end loaders operated, metal was tapped, spent anodes were placed after removal, and excess bath was removed from the cells.

Originally, each cell room had a concrete subfloor strengthened with iron rebar overlaid with bricks. The brick on top of the floor operated as an insulator to prevent the risk of electrocution resulting from contact with the concrete rebar. This type of floor had been used for over 40 years with the brick replaced as necessary by ALCOA using a full-time brick replacement crew. Over time, however, the brick floors began to wear down (in some areas to the sub-floor), creating safety and production concerns. The brick floor was damaged due to mechanical equipment traffic, as well as the fact that it came into direct contact with molten aluminum and bath, crucibles of aluminum, and the spent anodes removed from the cells. The old brick floor was also very irregular from the replacement of sections of floor bricks over the years, creating a safety hazard for employees who could easily trip and fall. In fact, Vanalco reported 21 accidents during the first half of 1992 due to the irregular floor surface.

Between 1991 and 1995, portions of the brick floors of the tap end and center passage sections of each cell room were removed and replaced with Fondag cement. Fondag cement was more pliable than regular cement, set much more quickly, and

[5] The parties stipulated that the total cost for replacing each component of a cell was $99,666.

[6] The cell rooms were numbered 4, 6, 8, 10, 12, 14, 16, 18, 20, and 22.

was easier to patch. The Fondag cement had other advantages over brick: it was easier to clean and repair; it became electronically non-conductive in 24 hours, in comparison to seven days or longer for brick; and it enhanced safety by creating a more level surface and leaving a smoother wearing pattern.[7] In 1992, Vanalco replaced bricks with Fondag cement in the tap end in cell room 20, the tap end and center areas of cell rooms 16 and 22, and the center areas of cell rooms 10, 12, 14, and 18. In 1993, Vanalco replaced bricks with Fondag cement in the tap end areas in cell rooms 8 and 10, as well as the tap end and center areas of cell rooms 14 and 18.

In connection with these replacements, Vanalco reported $386,327 in expenditures in 1992 and $408,154 in 1993. The bulk of the expenditures were for tap end repairs.

D. Procedural History

Vanalco filed an S corporation income tax return for 1992, in which it deducted $4,411,245 for cell relining and $386,327 for floor replacement as ordinary and necessary business expenses. In its 1993 return, Vanalco similarly deducted $4,224,991 for cell relining and $408,154 for floor replacement. The Commissioner sent two separate notices of Final S Corporation Administrative Adjustment ("FSAA") to Vanalco's tax matters person, appellant Richard Smith. The FSAAs disallowed the 1992 and 1993 cell relining and floor replacement deductions under § 162(a), instead requiring that the costs be treated as capital expenditures and depreciated under § 263. Vanalco petitioned the tax court for a redetermination. The tax court upheld the Commissioner's determination that the cell relining and floor replacement costs were capital expenditures under § 263 and not ordinary and necessary business expenses. *Vanalco I*, 78 T.C.M. (CCH) 251 [1999 RIA TC Memo ¶99,265]. Vanalco filed this timely appeal.

II. STANDARD OF REVIEW

We review the tax court's conclusions of law *de novo*. *Schachter v. Comm'r*, 255 F.3d 1031, 1033 [88 AFTR 2d 2001-5030] (9th Cir. 2001), *cert. denied*, 122 S. Ct. 65 (2001).[8] The tax court's factual findings, including factual inferences drawn from a stipulated record, are reviewed for clear error. *Moss v. Comm'r*, 831 F.2d 833, 837 [60 AFTR 2d 87-5910] (9th Cir. 1987). "Mixed questions of law and fact that require the consideration of legal concepts and involve the exercise of judgment about the values underlying legal principles are reviewable *de novo*." *Mayors v. Comm'r*, 785 F.2d 757, 759 [57 AFTR 2d 86-1045] (9th Cir. 1986) (citation omitted).

III. ANALYSIS

[1] Vanalco contends that the tax court mischaracterized expenses incurred in 1992 and 1993 related to cell relining and floor replacement as capital expenditures subject to depreciation under § 263, rather than ordinary and necessary business expenses deductible against current income under § 162(a). Section 162(a) allows for the deduction of "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." 26 U.S.C. § 162(a). In contrast, § 263 disallows deduction for a capital expenditure, which is "[a]ny amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate." *Id.* § 263(a)(1). "The primary effect of characterizing a payment as either a business expense or a capital expenditure concerns the timing of the taxpayer's cost recovery: While business expenses are currently deductible, a capital expenditure usually is amortized and depreciated over the life of the relevant asset . . . ." *INDOPCO, Inc. v. Comm'r*, 503 U.S. 79, 83–84 [69 AFTR 2d 92-694] (1992).

In general, "an income tax deduction is a matter of legislative grace and . . . the burden of clearly showing the right to the

[7] Vanalco had tried patching the floors with Portland cement; however, this did not prove satisfactory because it required a longer drying time (approximately two weeks) and did not withstand heavy use as well as the Fondag cement.

[8] The tax court's application of the law to a stipulated factual record is subject to *de novo* review. *Sennett v. Comm'r*, 752 F.2d 428, 430 [55 AFTR 2d 85-736] (9th Cir. 1985).

claimed deduction is on the taxpayer.'' *Interstate Transit Lines v. Comm'r*, 319 U.S. 590, 593 [30 AFTR 1310] (1943) (citations omitted). In order to qualify for a deduction under § 162(a), ''an item must (1) be 'paid or incurred during the taxable year,' (2) be for 'carrying on any trade or business,' (3) be an 'expense,' (4) be a 'necessary' expense, and (5) be an 'ordinary' expense.'' *Comm'r v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345 [27 AFTR 2d 71-1542], 352 (1971). The term ''necessary'' imposes ''only the minimal requirement that the expense be 'appropriate and helpful' for 'the development of the [taxpayer's] business.''' *Comm'r v. Tellier*, 383 U.S. 687 [17 AFTR 2d 633], 689 (1966) (alteration in the original) (quoting *Welch v. Helvering*, 290 U.S. 111, 113 [12 AFTR 1456] (1933)). An ''ordinary'' expense must be related to a transaction ''of common or frequent occurrence in the type of business involved.'' *Deputy v. Du Pont*, 308 U.S. 488, 495 [23 AFTR 808] (1940) (citation omitted).

Treasury regulations provide that no deductions are allowed for amounts expended ''(1) to add to the value, or substantially prolong the useful life, of property owned by the taxpayer, such as plant or equipment, or (2) to adapt property to a new or different use.'' 26 C.F.R. § 1.263(a)-1(b). The costs of incidental repairs, however, are typically deductible:

> The cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition, may be deducted as an expense .... Repairs in the nature of replacements, to the extent that they arrest deterioration and appreciably prolong the life of the property, shall either be capitalized and depreciated in accordance with section 167 or charged against the depreciation reserve if such an account is kept.

26 C.F.R. § 1.162-4.[9]

A. Cell Relining Expenses

The tax court held that ''replacing the cell linings cannot be classified as an incidental repair, and the cost must therefore be capitalized.'' *Vanalco I*, 78 T.C.M. (CCH) at 256. The tax court based this ruling on a number of factors: (1) ''the cell lining performs a function that is vital and integral to the smelting process;'' (2) ''the cell lining has a life that is independent of the cell unit as a whole, and the cost of the lining as a percentage of the total cost of the cell unit is substantial;'' (3) ''the replacement cell lining material is a very substantial portion of the cell unit;'' and (4) ''[i]n replacing the lining the cell essentially is rebuilt, thereby obtaining a new life expectancy of 3 years.'' *Id.* Vanalco takes issue with several aspects of the tax court's ruling, which we address in turn.

1. The Cell as Separate Property

As a threshold matter, Vanalco argues that the tax court erred by treating each individual cell, rather than an entire cell line, as the appropriate unit of property for the purposes of determining the nature of the expenses incurred. This matters, Vanalco contends, because viewing the relevant unit of property as the entire cell line means that the cell linings under repair during 1992 and 1993 would have constituted a very small physical and economic component of that property. The relative cost of the relining could affect its tax treatment since under *Libby & Blouin, Ltd. v. Comm'r*, 4 B.T.A. 910, 914 (1926), ''[e]xpenditures for small parts of a large machine, in order to keep that machine in an efficient working condition ... are ... ordinary and necessary expenses and are not capital expenditures.''

To support its position that the cell line is the appropriate unit of property, Vanalco points to the stipulated fact that, in the absence of substantial modifications to its electrical system, it could not conduct smelting on a sustained basis without a minimum of 112 cells in operation. This,

[9] Some courts have employed a ''put'' versus ''keep'' distinction to identify capital expenditures and business repair expenses:

> The test which normally is to be applied is that if the improvements were made to ''put'' the particular capital asset in efficient operating condition, then they are capital in nature. If, however, they were made merely to ''keep'' the asset in efficient operating condition, then they are repairs and are deductible.

Walling's Estate v. Comm'r, 373 F.2d 190, 192–93 [19 AFTR 2d 693] (3d Cir. 1967) (citation omitted); *accord Moss*, 831 F.2d at 835.

according to Vanalco, demonstrates that it is the interconnected cell line, not the cell itself, that should be the focus of inquiry. In contrast, the Commissioner notes that there is nothing in the record to suggest that an individual cell could not operate by itself; rather, it appears that the need for a minimum of 112 operating cells stemmed from the design of Vanalco's electrical system, not the inherent characteristics of the cells themselves. Each cell could independently produce aluminum and was essentially interchangeable, capable of being withdrawn from the cell lines for repair purposes and replaced by a different cell.

The question, then, is whether the realities of Vanalco's smelting operations justify viewing the cells as independent units or constituent parts of a larger whole. The resolution of this issue requires drawing inferences from the stipulated facts, rather than arriving at an independent legal conclusion and therefore is subject to the clearly erroneous standard of review. The tax court, albeit not explicitly, found that the cells were sufficiently free-standing to constitute property separate and apart from the interconnected cell lines. We cannot say that this finding was clearly erroneous and therefore we reject Vanalco's contention that the cell line should be deemed the appropriate unit of property.[10] As to Vanalco's alternative argument that the cell, rather than the cell lining, should be viewed as the relevant property, it is clear that the tax court implicitly accepted this position—a judgment in which we concur. We therefore treat the cell as the relevant unit of property for the purposes of this appeal.

2. Material Increase in Value

Vanalco next contends that the tax court erred by failing to conclude that the cell relining expenses did not increase the value of the cell. Deductions are not allowed for expenditures that materially add value to property. *See* 26 C.F.R. §§ 1.162-4, 1.263(a)-1(b). Vanalco asserts that the tax court misapplied *Plainfield-Union Water Co. v. Comm'r*, 39 T.C. 333, 338 (1962), *nonacq.*, 1964-2 C.B. 3, in which the tax court stated that the proper test for determining whether an expenditure materially increased the value of property "is whether the expenditure materially enhances the value, use, life expectancy, strength, or capacity as compared with the status of the asset prior to the condition necessitating the expenditure." According to Vanalco, the tax court erred by comparing the value of the cells after the linings had deteriorated with their value after relining had occurred. Vanalco argues that had the tax court engaged in the proper analysis—assessing whether relining materially increased the value of the cells relative to their value before the linings wore out—it would have decided in favor of the deductibility of the expenses, since relining simply returned the cells to their condition before the linings deteriorated.

Viewed in isolation, Vanalco's argument regarding *Plainfield-Union*'s value test makes intuitive sense: any increase in property value attributed to repairs must be assessed relative to the condition of the property in its original functioning state. Otherwise, every repair would be deemed a capital expenditure since it would always be the case that a repair would enhance the value of property relative to its deteriorated condition. However, the interpretation that Vanalco proposes similarly proves too much. Clearly, any replacement of a machine's worn out part would return the machine back to its condition prior to the deterioration of the part. Under this logic, all repairs would be deductible under § 162(a), no matter how substantial they might be. Thus, replacing the engine in a car would constitute a deductible business expense to the same extent as would replacing the tires. This result would be contrary to existing precedent, *see LaSalle Trucking Co. v. Comm'r*, 22 T.C.M.

[10] The cases Vanalco cites do not require a different result. In *Ingram Indus. v. Comm'r*, 80 T.C.M. (CCH) 532, 538 [TC Memo 2000-323] (2000), the tax court simply determined that tug boat engines should not be treated separately from the tug boats themselves in determining whether engine repair costs were business expenses or capital expenditures. There is nothing to suggest a strong analogy between tugboat engines and individual aluminum smelting cells in a cell line. Likewise, *Badger Pipe Line Co. v. Comm'r*, 74 T.C.M. (CCH) 856, 859 [1997 RIA TC Memo ¶97,457] (1997), involved the relocation of a small stretch of continuous pipeline—a fact situation so distinct from the present context that it cannot be considered controlling.

(CCH) 1375, 1383 [¶63,274 PH Memo TC] (1963) (holding that the cost of replacing a truck engine was not deductible as a repair), and would render meaningless any distinction between a business expense and capital expenditure.

Thus, it is insufficient merely to look at increased value as the determinative factor for the purposes of characterizing the cell relining costs. Instead, a court must look beyond the increased value test to other indicia of deductibility or capitalization. For instance, it is inescapable that the relative importance of a component part will play a vital role in determining whether its replacement is treated as an ordinary and necessary business expense or a capital expenditure. That is, in order to determine whether a repair is "incidental" in the sense that it is only necessary to maintain property in an efficient operating condition, the significance of the part under repair to the operation of the property is a critical inquiry. For this reason, we hold that the tax court did not err in focusing on the essential functional nature of the cell lining rather than its value-enhancing attributes.[11]

In addition to its argument regarding *Plainfield-Union*, Vanalco asserts that the court should look at two factors in determining whether relining costs materially increased the value of the cells: (1) whether the costs enhanced the functionality of the cells, and (2) the cost of relining relative to the cost of replacing the entire cell.

With respect to the functionality factor, Vanalco argues that capitalization under § 263 is not warranted because the cell's functionality was not improved, nor was its use or ability changed, as a result of the new lining. Although the tax court did not address the functionality issue directly, it did suggest that relining enhanced functionality by noting that "the productive phase of each cell's cycle ends upon the exhaustion of its lining." *Vanalco I*, 79 T.C.M. (CCH) at 256. In other words, the cell itself loses functionality upon the deterioration of the cell, making the relining process integral to "putting" the cell back into its original functional state. *See Walling's Estate*, 373 F.2d at 192–93. Again, this is not inconsistent with *Plainfield-Union*, since we are dealing here with the effective reconstitution of the cell upon the deterioration of the lining. Clearly, this process of reconstitution augments the functionality of the cell, restoring it from a state of functional exhaustion to full functional operation. Given this process of reconstitution, the fact that relining does not confer additional functionality above and beyond that which existed prior to the deterioration of the lining is not controlling.[12]

With respect to the issue of relative cost, Vanalco argues that the tax court erred in concluding that relining costs were not deductible under § 162(a) based on the fact that "the cost of the lining as a percentage of the total cost of the cell unit is substantial." *Vanalco I*, 78 T.C.M. (CCH) at 256. According to Vanalco, the cost of relining is minor (less than one-fifth) relative to the cost of replacing all of the parts in the cell. Even accepting the tax court's calculation that the relining cost was 22.21% of the cost of a completely rehabilitated cell unit, Vanalco contends that the relining cost is still *de minimis*.

We agree with the tax court that the substantial relative cost of relining weighs in favor of characterizing it as a capital expenditure. The record is clear that the cell lining was, aside from the cost of replacing a cell's superstructure (which occurred

[11] In fact, Vanalco's entire argument regarding increased value under *Plainfield-Union* is somewhat curious given that the tax court never explicitly addressed the issue. Vanalco seems to argue that the tax court's failure to specifically conclude that the value of the cells was not increased by relining implies that it believed that relining had in fact resulted in increased value. However, there is nothing the in record to support this argument. Moreover, to the extent that Vanalco suggests that the tax court erred by simply ignoring the increased value issue, this implies that the increased value test is determinative of the tax characterization of the expenses, which is not the case. Rather, as *Plainfield-Union* itself makes clear, increased value is one factor among many that a court may consider in determining the appropriate tax treatment of any given expense. *See* 39 T.C. at 338.

[12] The cases Vanalco cites in favor of its argument do little to buttress its position, as they all deal with factually dissimilar contexts. *See Ingram Indus.*, 80 T.C.M. (CCH) at 536 (stating that the cleaning and inspection of towboat engines does not increase its horsepower); *Jacks v. Comm'r*, 55 T.C.M. (CCH) 968, 970 [¶88,237 PH Memo TC] (1988) (holding that transmission repair costs were deductible business expenses because the repair simply restored the CAT loader "to the operating condition it was in prior to the necessity of incurring the expense"); *Libby & Blouin*, 4 B.T.A. at 914 (concluding that the costs associated with replacing copper tubes in a sugar evaporator were not capital expenditures since the expenses "merely kept the evaporator in an ordinary, efficient working condition").

only once every 54 years), by far the most expensive part of the cell to replace,[13] supporting the tax court's conclusion that the lining was a critical component of the cell that required treatment as a capital expenditure. Again, the cases cited by Vanalco do not compel a different result, but rather highlight the highly fact sensitive nature of the inquiry. *See Dominion Res. Inc. v. United States*, 219 F.3d 359, 372 [86 AFTR 2d 2000-5443] (4th Cir. 2000) (requiring capitalization of $2.2 million in environmental cleanup costs where the appraised value of the property was less than $1.6 million); *Jacobson v. Comm'r*, 47 T.C.M. (CCH) 499, 502 [¶83,719 PH Memo TC] (1983) (allowing a deduction for $5,000 in repairs to a rental property purchased for $30,000); *LaSalle Trucking Co.*, 22 T.C.M. (CCH) at 1383 [¶63,275 PH Memo TC] (denying deductibility for a new engine, truck cab, and petroleum tank that cost approximately $8,500 in comparison to the cost of $16,000 to $17,000 for a new truck). Accordingly, we reject Vanalco's argument that the tax court erred by failing to conclude that the relining expenses did not materially increase the value of the cells.

3. New Life Expectancy

Vanalco next contests the tax court's conclusion that the process of relining gave the entire cell a new life expectancy of three years. Vanalco asserts that this conclusion was error because the cell lining contributes very little to the average life of the entire cell. Specifically, Vanalco notes that the stipulated facts indicate that the weighted average life of a cell is approximately 40 years, with the lining contributing only one percent of this average life. Thus, according to Vanalco, this case is analogous to *Libby & Blouin*, 4 B.T.A. at 912–14, where the board of tax appeals held that the cost of replacing copper tubes with a two-to-four-year life span in a sugar evaporator machine with a 20-year life span was deductible as a business expense. Vanalco distinguishes the case cited by the tax court, *Ruane v. Comm'r*, 17 T.C.M (CCH) 865, 871 [¶58,175 PH Memo TC] (1958), since that case dealt with costs associated with the reconditioning of an entire coke oven that had a life expectancy of only three to four years.

Again, resolution of this issue depends primarily on how one characterizes the relationship of the cell lining to the entire cell. Implicit in the discussion of a "new life expectancy" is the notion that if a component part is so integral to the overall functioning of a machine, its replacement effectively confers a new life span on the machine equivalent to the life of the part. Thus, if one were to agree with Vanalco that the lining is a relatively minor, frequently worn out part of a larger, more durable cell, there would be no basis to conclude that replacing the lining would breathe new life into the cell as a whole. In contrast, if one accepts the tax court's position that the cell lining is critical to the functioning of the cell and its replacement essentially constitutes a refurbishment of the entire cell, then it could be said that relining would confer a new life expectancy equivalent to that of the lining itself.

In light of the entire process of relining stipulated in the record, we conclude that the lining is a critical component of the cell and its replacement is tantamount to reconstituting the cell itself. Specifically, cell relining involved taking individual cells offline and rerouting the electrical current through the remaining cells in the cell line; removing the superstructure and cradle to a repair area where they were separately attended to; adding the cell lining in a number of layers, which included insulating block, heavy refractory fire brick, carbon sidewall blocks, and ramming paste; replacing the superstructure, anodes, and cell shields; and leaving the new lining and cathode blocks to bake for 48 hours. The entire process generally lasted 15 days and cost in excess of $20,000 dollars. Given that this relining process effectively rebuilt the cell, the tax court did not err in ruling that relining

[13] Vanalco notes that the yearly cost of anode replacement far exceeded the yearly cost of relining, since the anodes had to be replaced every two weeks.

conferred a new life expectancy on the cell of three additional years.

4. Prolonged Life

In a related argument, Vanalco objects to the tax court's determination that the cell relining prolonged the useful life of the cell. Vanalco argues here that the tax court (1) misapplied *Plainfield-Union*; (2) improperly concluded that the repair of "essential" components requires capitalization, and (3) erred in characterizing the cell lining as a substantial contributor to the cell's overall functioning. These arguments largely track those already analyzed and, for similar reasons, fail.

With respect to the application of *Plainfield-Union*, Vanalco renews its contention that the tax court incorrectly compared the life span of the cell after relining with the life span of the cell after the lining had deteriorated. As we have already discussed, given the essential nature of the cell lining to the functioning of the entire cell, it was not error for the tax court to conclude that relining prolonged the cell's life expectancy.

Vanalco asserts that a rule requiring capitalization for costs incurred replacing an essential machine part goes too far, effectively authorizing the Commissioner to require capitalization of even minor working parts that are critical to the overall functioning of a larger machine. We disagree that an essential component rule necessarily leads to this result and reiterate that the rule Vanalco proposes is unworkable. In particular, the interpretation of *Plainfield-Union*that Vanalco suggests—one that would compare a machine's life span before a part deteriorated and after it was replaced—would permit deductions under § 162(a) for any repair expense, no matter how substantial, since it would always be the case that replacement simply restored the machine to its previous working condition. Courts have recognized this, at least implicitly weighing of the importance of the machine part at issue in analyzing deductibility versus capitalization. *See, e.g., W. Va. Steel Corp. v. Comm'r*, 34 T.C. 851, 859 (1960) (holding that the cost of replacing engine in a delivery vehicle was a capital expenditure); *Jacks*, 55 T.C.M. (CCH), at 970 (ruling that cost of engine replacement was capital in nature); *Hudlow v. Comm'r*, 30 T.C.M. (CCH) 894, 923 [¶71,218 PH Memo TC] (1971) (concluding that the repairs done on forklifts represented "the replacement of major parts . . . to put the machines into such condition that they would no longer be unduly susceptible to breakdowns"). These cases weaken Vanalco's slippery slope argument, demonstrating that courts are capable of distinguishing essential parts from minor working parts of a machine in characterizing capital expenditures.

Vanalco next contends that, even if it were to accept an essential component rule, the cell linings in this case should not be characterized as essential to the functioning of the cell as a whole. Vanalco reiterates its argument that the cell lining contributes approximately one percent to the weighted average life of the cell as a whole and physically only constitutes a minor part of the overall cell structure—the lining is slightly over 14 inches thick while the cell structure rises to 10 feet high. On this basis, Vanalco asserts that the "small parts of a large machine" standard of *Libby & Bouin*, 4 B.T.A. at 914, should apply to permit deduction as a business expense. However, to the extent that Vanalco argues that the tax court erred as a factual matter, there is no basis for concluding that the tax court's decision was clearly erroneous. Even Vanalco admits that "the volume of the cell lining is roughly a quarter of the cell as a whole." Moreover, it is clear from the tax court's opinion that it was not viewing size alone as the determinative factor in concluding that the cell lining is an essential component of the cell.

Vanalco contends that the tax court's ruling on the essential nature of the cell lining also constituted error. We disagree. Indeed, despite Vanalco's attempts to distinguish it, this case is controlled by *Buffalo Union Furnace Co. v. Helvering*, 72 F.2d 399 [14 AFTR 456] (2d Cir. 1934). *Buffalo Union* addressed the proper tax treatment for costs incurred for relining blast furnaces, which was necessary an av-

erage of every two to two-and-a-half years. *Id.* at 401. In holding that the relining costs were capital expenditures, Judge Learned Hand observed that ''[t]he furnace had to be laid off for a considerable time, and the whole interior cleaned of the old brick and relined with the new; the expense of this was roughly from $50,000 to $100,000 for each furnace.'' *Id.* at 402. On this basis, Judge Hand concluded that it was ''more natural'' to treat these costs as depreciable capital expenditures. *Id.* We follow *Buffalo Union* and affirm the tax court's treatment of the cost of cell re-lining as a depreciable capital expenditure.

5. Provision of Benefits Beyond One Year

Finally, Vanalco takes issue with the tax court's consideration of whether Vanalco's relining expenditures allowed it to realize benefits beyond the year in which the expenditures were incurred. Vanalco suggests that because other courts have not adhered to this one-year guidepost, the tax court somehow erred in doing so here. It is well established, however, that courts may consider the accrual of benefits beyond one year as a factor that weighs in favor of capitalization: ''Although the mere presence of an incidental future benefit—'some future aspect'-may not warrant capitalization, a taxpayer's realization of benefits beyond the year in which the expenditure is incurred is undeniably important in determining whether the appropriate tax treatment is immediate deduction or capitalization.'' *INDOPCO*, 503 U.S. at 87; *see also United States v. Wehrli*, 400 F.2d 686, 689 [22 AFTR 2d 5568] (10th Cir. 1968) (noting that the one-year rule serves as a ''guidepost for the resolution of the ultimate issue''). The tax court, therefore, did not err in relying on the one-year guidepost as one factor supporting its decision.

In conclusion, we affirm the tax court's determination that the costs incurred by Vanalco in 1992 and 1993 associated with cell relining were capital expenditures under § 263.

B. Floor Replacement Expenses

The tax court also held that Vanalco's costs in connection with replacing the tap end and center sections of various cell room floors constituted a capital expenditure. In arriving at this conclusion, the tax court emphasized the substantial nature of the repairs in question, the functional improvement created by replacing the brick floor with Fondag cement, and the fact that the improved floors made the property more valuable to Vanalco in its business. *Vanalco I*, 78 T.C.M. (CCH) at 257–58. Vanalco contends that the tax court erred because these repairs did not materially increase the value or prolong the life of its property.

1. Material Increase in Value

Vanalco's primary argument is that, because it did not replace the entire floor in any of the cell rooms, it did not materially increase the value of the property and therefore the costs associated with the repairs should be deductible.

The resolution of this issue is complicated somewhat by the fact that the record does not disclose the precise dimensions of the repair work. Vanalco argues that the extent of the repairs was insubstantial, pointing to the fact that the tap end is approximately 25 percent of the cell room floor area and the bulk of expenditures during the tax years in question were for tap end repairs. In contrast, the Commissioner contends that in the rooms where both the tap end and center areas were repaired, almost 50 percent of the floor space was replaced. Vanalco contests this figure, stating that in the rooms where the center areas were repaired, the record suggests that only the areas around—and not under—the cells were replaced. The tax court did not definitively resolve this question; rather it based its conclusion that the repairs in question were ''substantial'' on the fact that between 1991 and 1995, Vanalco engaged in a project of replacing the brick floors in the tap end and center sections of all of its cell rooms with Fondag cement.

Thus, during the specific tax years in question, the most one could say is that it is likely that between 25 and 50 percent of the floors in cell rooms 10, 14, 16, 18, and 22 were replaced, as these rooms received

repairs to both the tap end and center areas. In evaluating this figure, it must be kept in mind that the cells themselves took up a large portion of the center areas and were probably not moved during the repairs. In addition, with respect to rooms 8, 12, and 20, where only tap end or center area repairs were made, the extent of replacement was likely somewhere below 25 percent of the floor.

Vanalco argues that these repairs did not materially increase the value of the floors, citing several different cases for the proposition that only the replacement of an entire floor area, or something close thereto, constitutes a capital expense. *See, e.g., Denver & Rio Grande W. R.R. v. Comm'r*, 279 F.2d 368, 373 [5 AFTR 2d 1728] (10th Cir. 1960) (ruling that the cost of replacing all the floor planks of a viaduct was a capital expenditure); *Phillips & Easton Supply Co. v. Comm'r*, 20 T.C. 455, 460 (1953) (holding that the replacement of an entire building floor was a capital expenditure). These cases, however, do not articulate a bright line rule regarding the extent of repairs necessary to constitute a substantial replacement—in other words, they do not clearly indicate a threshold percentage beneath which the extent of repairs is considered too small to warrant capitalization. Given the facts of this case, we agree with the tax court that the repairs here were substantial enough materially to increase the value of the floors as a whole. This is especially true in light of the fact that during the period from 1991 to 1995, Vanalco was engaged in an ongoing process of floor replacement that resulted in significant repairs to the floors in every one of the cell rooms.[14]

Moreover, the scope of repairs is not the only factor in characterizing costs as ordinary expenses or capital expenditures. The tax court was correct in concluding that the repairs to the cell room floors were capital in nature based on the enhanced functionality of the floors after the new portions were installed. In particular, we agree with the tax court that the use of Fondag cement provided significant functional benefits over the previous brick floors that materially increased their value. In contrast to brick, Fondag cement was easier to clean and repair, became electrically non-conductive in a shorter period of time, and wore down in a smoother pattern. This certainly would increase the value of the floor in the context of Vanalco's business, reducing costs associated with repair and mitigating the risk of injury.

Vanalco cites *Hudlow*, 30 T.C.M. (CCH) at 922–23, in support of its position that the floors' value was not increased, but that case is distinguishable on the facts. Specifically, the tax court in *Hudlow* concluded that the taxpayer did not replace the floor, but simply poured concrete over the preexisting floor in a leased facility. *Id.* In determining that the concrete overlay did not materially increase the value of the floor, the tax court relied on its assessment that, although there was some functional value to having a sturdy floor with uniform thickness, that value was counterbalanced by the fact that the concrete eliminated drains that had previously been in the floor. *Id.* Here, there is no countervailing detriment weighing against the benefits of the Fondag cement.

Similarly, Vanalco's attempt to distinguish *Phillips & Easton*, 20 T.C. at 460, upon which the tax court relies, also fails. Although, as Vanalco points out, that case involved the replacement of an entire floor, in concluding that the replacement costs were capital expenditures, the tax court emphasized the fact that the old floor was thin and worn, while the new floor was thicker and made for heavy wear. *Id.* Like-

[14] In this sense, one could argue that the repairs in question were made pursuant to a longer-term plan to repair the tap end and center areas in all of the cell rooms. Typically, "an expenditure made for an item which is part of a 'general plan' of rehabilitation, modernization, and improvement of the property, must be capitalized, even though, standing alone, the item may appropriately be classified as one of repair." *Wherli*, 400 F.2d at 689. Although the tax court did not specifically find that Vanalco had engaged in a general rehabilitation plan, it suggests that Vanalco's ongoing process of replacing brick floors with Fondag cement during the tax years in question was a relevant factor in its decision. We agree that Vanalco's multi-year replacement activities weighs in favor of treating its expenditures as depreciable under § 263. To the extent that the repairs were part of an overall plan, this would also distinguish the present situation from *Farmers Creamery Co. v. Comm'r*, 14 T.C. 879 (1950), *acq.*, 1954-1 C.B. 4, *nonacq.*, 1954-1 C.B. 8, which Vanalco cites. In that case, although the tax court held that costs to repair less than half of a floor were deductible, it specifically noted that they "were not made in accordance with any overall plan." *Id.* at 880.

wise, in this case there is no dispute that the brick was replaced because the wear and tear caused by equipment traffic and the molten bath from the cells created a significant safety concern. The Fondag cement was selected because, after experimenting with other types of concrete, Vanalco concluded that it would provide the most satisfactory functional benefits. Accordingly, we agree with the tax court's determination that Vanalco's floor repair expenditures increased the property's value and were therefore capital in nature.

2. Prolonged Life

Vanalco's final argument is that the tax court erred because there is no evidence that the repairs in question prolonged the life of cell room floors. The tax court, however, did not rest its decision on whether the floor repairs resulted in prolonged life. Instead, it properly grounded its decision on the increased functional and material value conferred by the improvements. Since the tax court was not obligated to address the prolonged life issue, *see* 26 C.F.R. § 1.263(a)-1(b) (stating that expenses are not deductible if they ''add to the value, *or* substantially prolong the useful life'' of property (emphasis added)), there was no error.

IV. CONCLUSION

For the foregoing reasons, the decision of the tax court is AFFIRMED.

¶2002-5241

In Re: Paul B. CHAUNCEY, III and Annette B. Chauncey, Debtors. U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) Docket No. 01-2138-BKC-3F3, Feb. 11, 2002. Decision for Govt.

1. Tax claims in bankruptcy—objection to proof of claim—partnership debts—partner assessments and collection—limitations periods. IRS's proofs of claim against Chap. 13 debtors-partners for partnership employment tax assessments were allowed: partners' argument that IRS had to 1st assess them separately from partnership before pursuing collection against them individually was rejected, and case law to contrary wasn't followed. Contrary case law erroneously focused on collection mechanism, rather than partners' underlying *liability* for partnership assessments, which was what proofs of claim were grounded on and was established by virtue of partners' partner status and state law, and required no separate assessments. Also, state law requirement that judgment against partners individually be obtained before collecting partnership debts from them wasn't controlling since requirement went only to collection but didn't establish partners' underlying liability. *Reference:* United States Tax Reporter ¶62,015.01(110); 68,726.51(10); 65,015.03(5); 77,015.36(55). IRC §6201; 6203; 6501; 7701.

Andrew J. Decker, III, for Debtors.
Michael D. Zima, for Internal Revenue Service.

United States Bankruptcy Court, Middle District of Florida, Jacksonville Division.

Findings of Fact and Conclusions of Law

FUNK, Bankruptcy Judge:

This case came before the Court upon Debtors' Objection to Claim 18 filed by the Internal Revenue Service. The Court conducted a hearing on November 21, 2001 at which the parties stipulated to the following facts.

STIPULATED FACTS

Debtor Paul B. Chauncey, III is a general partner of Chauncey Commercial Concrete Construction, a Florida Partnership (the ''partnership''). Debtor Paul B. Chauncey, III owns a one-half interest in the partnership. The partnership owes employment taxes reflected by Claim 18 filed by the Internal Revenue Service (the ''Service''). There is no dispute that the amounts reflected on the proof of claim correctly state the delinquent tax liabilities of the partnership.

The partnership's 941 return for the first quarter of 2000 was filed on April 8, 2000. The 941 returns for the third and fourth quarters of 2000 were filed on March 8,

2001. The 940 return was filed on March 8, 2001. The assessments made against the partnership were not also made against the individual partners. This is the normal administrative practice of the Internal Revenue Service.

On March 15, 2001 Debtors filed a voluntary petition under Chapter 13 of the Bankruptcy Code.

At the hearing the Court instructed the parties to submit memoranda of law. The issue is whether a separate tax assessment against an individual partner for employment taxes incurred by the partnership is required to establish liability against the individual partner. Upon the stipulated facts and the memoranda of the parties, the Court makes the following Conclusions of Law.

CONCLUSIONS OF LAW

OBJECTION TO CLAIM STANDARDS

Objections to claims are governed by 11 U.S.C. § 502(a), providing that "A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest ... objects." Section 502(b) provides, "... [I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount...." A proof of claim filed in accordance with the rules "shall constitute prima facie evidence of the validity and amount of the claim." Fed. R. Bankr.P. 3001(f) (2002). The burden of proof is on an objecting party to produce evidence "equivalent in probative value to that of the creditor to rebut the prima facie effect of the proof of claim. However, the burden of ultimate persuasion rests with the claimant." In re VTN, Inc., 69 B.R. 1005, 1008 (Bankr.S.D. Fla. 1987) (citing In re DeLorean Motor Co. Litig., 59 B.R. 329 (E.D.Mich.1986)).

Debtors contend that Debtor Paul Chauncey is not liable for the partnership's Debtors argue that a valid assessment is a prerequisite to tax collection and that §s 6201, 6203, and 7701 of the Internal Revenue Code, taken together, require an individual[1] Debtors argue that the liability of an individual is a two-pronged analysis legal basis for imputed liability (such as state partnership laws) and 2) compliance with the assessment procedures set forth in the Internal Revenue Code. bookkeeping notation by which a taxpayer's liability is formally recorded but is not an delinquent taxpayer. The Service points out that a partner's liability for employment taxes of a partnership is a function of state law and that its right to bring suit and to obtain a judgment against Debtor Paul Chauncey is sufficient to give it an allowable claim.

ANALYSIS

There is no provision of the Internal Revenue Code which governs the collection of a partnership's employment tax liabilities from its partners. Partners are jointly and severally liable for the tax debts of their partnerships and partners' liability is a function of state law rather than the assessment provisions of the Internal Revenue Code. Ballard v. United States (In re Ballard), 17 F.3d 116, 118 [73 AFTR 2d 94-1613] (5th Cir.1994); Calvey v. United States, 448 F.2d 177, 179 [28 AFTR 2d 71-6346] (6th Cir.1971). No circuit court has specifically addressed the issue of whether a separate tax assessment against a general partner is required to establish liability against the partner for an employment tax liability incurred by the partnership.

[1] Debtors rely on two related California district court decisions affirming the bankruptcy court's holdings that a partner must be individually assessed to be liable for the tax obligations of the partnership. See United States v. Galletti, 2001 WL 752652 [88 AFTR 2d 2001-5580] (C.D.Cal. March 23, 2001); United States

[1] Sections 6201, 6203 and 7701 of the Internal Revenue Code respectively provide in pertinent part:

(a) .--The Secretary is authorized and required to make the inquiries, tax, and assessable penalties) imposed by this title, or accruing under any former internal revenue law, §6203 Method of assessment accordance with rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the § 7701. Definitions intent thereof--

.--The term "person" shall be construed to mean and include an individual, a trust, estate, (14) Taxpayer

v. Briguglio, 2001 WL 429820 [87 AFTR 2d 2001-1639] (C.D.Ca. March 23, 2001). In Galleti and Briguglio, the debtors were general partners in a partnership against which the Service had assessed taxes of approximately $427,000.00. The Service had not assessed taxes against the debtors individually in their capacities as general partners. The Service filed proofs of claim in the debtors' bankruptcy cases. The debtors objected to the claims, asserting they were invalid because the Service had not assessed them individually. The bankruptcy court held the tax assessment against the partnership was not effective to bind the partners individually. The court based its decision on the following: 1) a partnership is liable for taxes required to be deducted or withheld; 2) under California law a judgment must be entered against a partner in order for the partner to be liable for the debts of the partnership; 3) a taxpayer must be validly assessed to be liable for tax obligations; and 4) the decision in El Paso Refining, Inc. v. Internal Revenue Service, 205 B.R. 497 [81 AFTR 2d 98-728] (W.D.Tex.1996) in which the district court affirmed the bankruptcy court's holding that a lien against a partner for the partnership's taxes was void because the Service did not assess the partner directly. The district court in Galleti and Briguglio seized on a distinction between assessment and liability and assessment and collection.

> "The Debtors do not dispute their liability as partners; rather, they dispute Appellant's attempt to collect taxes without individual assessments." Galletti, 2001 WL at 4; Briguglio, 2001 WL at 4.

The Court does not quarrel with the Galleti and Briguglio bankruptcy court's finding that a partnership is liable for taxes required to be deducted or withheld. The Court also agrees that California law requires that a judgment be entered against a partner in order for a creditor to attach the partner's assets for debts of the partnership.[2] However, the bankruptcy court's finding that California law requires a judgment against a partner in order for the partner to be held liable for the debts of the partnership and the court's statement that "it naturally follows that in order for partners to be jointly and severally liable for tax liabilities, they must be assessed separately" are without merit. As the Service points out, a judgment is not necessary to make a debtor jointly and severally liable for a partnership's debts. State partnership laws establish a partner's liability. Debtor Paul Chauncy's liability stems from his liability under Florida law for all obligations of the partnership.[3] Additionally, although an assessment imbues the Internal Revenue Service with certain administrative methods by which to collect taxes, liability for federal taxes does not depend upon whether the Internal Revenue Service has made a valid assessment. Goldston v. United States, 104 F.3d 1198, 1200 [79 AFTR 2d 97-567] (10th Cir.1997). The Service may still bring suit to bring suit to reduce an un-assessed liability to judgment. United States v. Jersey Shore State Bank, 781 F.2d 974, 979 [57 AFTR 2d 86-530] (3d Cir.1986).

11 U.S.C. § 101(5)(A) defines a claim as a "right to payment, whether or not such right is reduced to judgment, liquidated, un-liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." The Internal Revenue Service's right to look to Debtor Paul Chauncey for payment of the partnership's tax obligations is sufficient to give the Service an allowable claim. The Court holds that a separate tax assessment against an individual partner for employment taxes incurred by the partnership is not required to establish liability against the individual partner.

CONCLUSION

A separate tax assessment against an individual partner for employment taxes incurred by the partnership is not required to

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[2] Florida law contains a similar provision. Fla. Stat. § 620.8307 provides in pertinent part:

Actions by and against partnership and partners

3) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is also a judgment against the partner.

[3] Fla. Stat. § 620.8306 provides in pertinent part: 1) Except as otherwise provided in subsections (2) and (3), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by a claimant or provided by law.

establish liability against the individual partner. The Court will therefore overrule Debtors' objection to Claim 18 filed by the Internal Revenue Service.

2002 WL 1822867 (Bankr.M.D.Fla.)

¶2002-5242

Jeffrey C. GARDNER, PLAINTIFF v. UNTIED STATES OF AMERICA, DEFENDANT. U.S. District Court, Western Dist. of Texas, (DC TX) Docket No. Civ.A.SA 02-CV-104-E, June 12, 2002. Decision for Govt.

1. Refund actions—failure to state claim for relief—administrative refund claims—Anti-Injunction and Declaratory Judgment Acts. Taxpayer's refund action to recover allegedly erroneously held private earnings and for injunctive and declaratory relief was dismissed for failure to state claim: taxpayer didn't file administrative refund claim; or, even if he had, action was still barred by AIA and DJA since it involved federal tax collection. Also, taxpayer's motion for damages was denied as moot. *Reference:* United States Tax Reporter ¶74,225.01(3); 74,215.05(5). IRC §7421; 7422.

United States District Court, Western District of Texas, San Antonio Division.

Order Granting Defendant's Motion to Dismiss

PRADO, District Judge:

On February 4, 2002, the plaintiff, Jeffery C. Gardner, filed an action for the refund of erroneously held private earnings. While Gardner did not include a prayer in his complaint, the filings and briefs indicate the plaintiff also seeks injunctive relief, a declaration as to his right not to be subject to federal income tax, damages in the amount of $32,000.00 for emotional distress, and compensation in the amount of $1096.25 for expenses associated with his claim. The defendant, the United States, moved to dismiss the plaintiff's complaint under Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for failure to state a claim upon which relief can be granted. See FED. R. CIV. P. (12)(b).

Standard of Review

The district court analyzes a motion to dismiss under Rule 12(b)(1) under the same judicial standard as a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6). See Marsaw v. Trailblazer Health Enterprises L.L.C., No. Civ.A. G-01-633, 2002 WL 507535, at 2 (S.D.Tex. Mar. 28, 2002). In a motion to dismiss under Rule 12(b)(6), the district court will view the plaintiff's complaint and allegations as true in a light most favorable to the non-moving party, so long as the complaint is devoid of conclusory allegations or legal conclusions presented as factual conclusions. Id. at 3; Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 284 (5th Cir.1993); NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir.1986).

Defendant's Motion to Dismiss

[1] The defendant asks the Court to dismiss the plaintiff's complaint for lack of subject matter jurisdiction. Dismissal for lack of subject matter jurisdiction is proper when the claim is "so insubstantial, implausible, foreclosed by prior decision of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." Western Trans. Co. v. Couzens Warehouse, & Distrib., 695 F.2d 1033, 1037 (7th Cir.1982) (citing Oneida Indian Nation of New York v. County of Oneida, 414 U.S. 661 (1974)). The district courts have original jurisdiction over any civil action against the United States for the recovery of any internal revenue tax that is allegedly erroneously or illegally assessed or collected according to internal revenue laws. See 28 U.S.C. § 1346(a)(1). Before bringing such a suit, a plaintiff must first file a claim with the Internal Revenue Service. Otherwise, the district court has no jurisdiction over the case. See United States v. Dalm, 494 U.S. 596, 601–602 [65 AFTR 2d 90-1210] (1990). Specifically, section 7422(a) of the Internal Revenue Service Code (the Code) provides that:

No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C.A. § 7422(a). In particular, the Code requires a claimant to claim a "credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later ...." 26 U.S.C. § 6511(a). In the instant case, the plaintiff has not filed a claim for refund of the earnings he seeks, but instead asserts that income taxes were erroneously taken. Consequently, the plaintiff has not satisfied the pre-requisite administrative remedies by filing federal income taxes for the years covered by his complaint. As a result, the plaintiff's claim for a refund of taxes is appropriately dismissed under Rule 12(b)(6) for failing to state a claim for which relief can be granted. Even if the plaintiff had filed for a refund under the Code, however, the Court would still lack jurisdiction over the plaintiff's request for declaratory and injunctive under 26 U.S.C.A. § 7421(a) and 28 U.S.C.A. § 2201.

Section 7421(a) of the Anti-Injunction Act (the Act) states that no person can bring suit for the purposes of restraining an assessment or collection of any tax. See 26 U.S.C. § 7421. A taxpayer's recourse once taxes have been assessed and collected is to pay the tax in full and bring suit for a refund. See Jones v. United States, 889 F.2d 1448, 1449–50 [65 AFTR 2d 90-387] (5th Cir.1989). Although the Act set forth exceptions, the plaintiff has not claimed that any of the exceptions apply. Until the party seeking the injunction asserts an exception, the district court has no jurisdiction to consider the action. See Blech v. United States, 595 F.2d 462, 466 [44 AFTR 2d 79-5065] (9th Cir.1979).

Although the plaintiff seeks a declaratory judgment as to his legal relation to the United States to determine his duty to pay federal income taxes, such a declaration is barred by the Declaratory Judgment Act. See 28 U.S.C. § 2201. The only exceptions to this bar are cases involving federal taxes other than declarations concerning the status of non-profit organizations. 28 U.S.C.A. § 2201(a). In a factually similar case, a taxpayer seeking recovery of income taxes and a declaratory judgment appealed the portion of the district court's order striking his complaint for declaratory judgment. See Carmichael v. United States, 245 F.2d 676 [52 AFTR 381] (5th Cir.1957). On appeal, the United States Court of Appeals for the Fifth Circuit determined "[t]he statute setting out the declaratory judgment remedy, 28 U.S.C.A. § 2201, specifically excepts controversies with respect to federal taxes," and that the district court did not have jurisdiction to determine taxpayers status. Id. at 677. Similarly, the Court of Appeals for the Ninth Circuit held that "Title 28 Untied States Code, Section 2201, makes it clear that there is no jurisdiction in this court to declare the rights and other legal relations of plaintiffs ... or their rights with respect to federal taxes." Mitchell v. Ridell, 402 F.2d 842 [22 AFTR 2d 5816] (9th Cir.1968). Because the plaintiff seeks a declaration that he is not subject to federal income tax, his request for a declaratory judgment is appropriately dismissed.

Conclusion

Because the plaintiff has not complied with the pre-requisite elements for a refund action under 28 U.S.C.A. § 1346(a), and because the Court lacks jurisdiction to grant declaratory judgment or injunctive relief in a case involving federal income taxes, the Court GRANTS the defendant's motion to dismiss (docket entry # 6). Accordingly, the Court DENIES Gardner's motion for damages (docket entry # 7) as moot and DISMISSES this cause.

2002 WL 1821581 (W.D.Tex.)

¶2002-5243

Donald John PIANO, PLAINTIFF-APPELLANT v. UNITED STATES, DEFENDANT-APPELLEE. U.S. Court of Appeals, Federal Circuit, (CA Fed Cir) Docket No. 02-5026, Aug. 6, 2002. Court of Federal Claims affirmed. Years 1992, 1993, 1994. Decision against Taxpayer.

1. Court of Federal Claims jurisdiction—habeas corpus and declaratory relief—Anti-Injunction Act—damages—refund. Court of Federal Claims properly dismissed tax protester's collection-related habeas corpus petition and damages claims against U.S. and state of Colorado: Court had no authority to hear habeas corpus petition, and no jurisdiction over federal tax collection-related damages claims or suits against states. Also, to extent seeking refund, taxpayer failed to meet jurisdictional prerequisites to suit. *Reference:* United States Tax Reporter ¶74,336.510(45); 74,335.01(7); 74,225.01(5). IRC §7422; 7433.

United States Court of Appeals, Federal Circuit.

Before CLEVENGER, RADER, and BRYSON, Circuit Judges.

PER CURIAM:

Unpublished Disposition

Donald John Piano appeals from the judgment of the United States Court of Federal Claims dismissing his complaint for lack of jurisdiction. Piano v. United States, No. 01-169T (Ct.Fed.Cl. August 22, 2001). We affirm.

I

[1] Mr. Piano, a Colorado resident, filed no federal tax returns and paid no federal or state income tax for 1992, 1993, or 1994. Both Colorado and the Internal Revenue Service (IRS) instituted collection proceedings against Mr. Piano, who then sued both the United States and Colorado in the United States Court of Federal Claims in an attempt to halt the collection proceedings. Mr. Piano seeks a writ of habeas corpus to terminate the state and federal collection actions as well as "unliquidated damages" against the United States for instituting the allegedly unlawful collection proceedings. Mr. Piano claims that the collection proceedings are unlawful because, in his view, neither the United States nor Colorado may tax compensation received in exchange for services. The trial court consolidated Mr. Piano's action with a virtually identical suit brought by Charles William Ledford. See Ledford v. United States, No. 02-5027 [90 AFTR 2d 2002-5593] (Fed.Cir. August 6, 2002). The government filed a motion to dismiss for lack of subject matter jurisdiction, which the court granted on August 22, 2001. The court subsequently denied Mr. Piano's request for reconsideration, and Mr. Piano now appeals. We have jurisdiction over this appeal under 28 U.S.C. § 1295(a)(3).

II

As the trial court observed, "[f]undamentally, this is a suit by a tax protestor, who rejects the notion that the Sixteenth Amendment to the U.S. Constitution authorizes Congress to levy a tax on his income from rendering personal labor." Piano, slip op. at 3. Mr. Piano's case raises virtually identical factual and legal issues to that of Charles Ledford. See Ledford, slip op. at 2. For the reasons expressed in our disposition of Ledford, we affirm the trial court's dismissal of Mr. Piano's habeas petition and damages claim against the United States. As we stated in Ledford, the Court of Federal Claims does not have the power to entertain a petition for a writ of habeas corpus, and Congress has provided that the district courts shall have exclusive jurisdiction over damages claims from unlawful collection activities by the IRS. Id. at 3, 6.

The trial court carefully reviewed Mr. Piano's pleadings, and concluded that "[t]he suit is in the nature of a tax refund." Piano, slip op. at 3. We agree with the trial court that to the extent that Mr. Piano's complaint can be construed as a suit for a refund of federal taxes, he has

failed to allege sufficient facts to establish jurisdiction. The primary defect in Mr. Piano's suit is that he, like Charles Ledford in the companion case, fails to allege that he actually paid his tax liability in full. As we explained in Ledford, a party seeking a refund must pay his tax assessment in full before bringing suit in the Court of Federal Claims. Ledford, slip op. at 6; see also Rocovich v. United States, 933 F.2d 991, 993–94 [67 AFTR 2d 91-1210] (Fed.Cir.1991). Furthermore, as noted by the trial court, Mr. Piano "has failed to plead that he has filed an administrative claim with the Commissioner of the Internal Revenue Service seeking a refund," Piano, slip op. at 3, and this too is a prerequisite for filing a refund suit. 26 U.S.C. § 7422(a) (2000). Thus, to the extent that Mr. Piano has attempted to assert a refund claim, we affirm the trial court's dismissal of that claim.

Finally, we affirm the trial court's dismissal of Mr. Piano's claims against the State of Colorado. The Court of Federal Claims hears claims against the United States, but it has no jurisdiction over claims against the several states. See 28 U.S.C. §§ 1491-1509 (2000) (providing jurisdiction for various claims against the United States in the United States Court of Federal Claims).

III

For the reasons given above, we affirm the trial court's judgment dismissing Mr. Piano's complaint in its entirety.

2002 WL 1808685 (Fed.Cir.), Unpublished Disposition

¶2002-5244

Jose A. PEREZ, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of Texas, (DC TX) Docket No. H-02-1306, July 18, 2002. Years 1984, 1985, 1986, 1987. Decision for Govt.

1. Actions against U.S.—res judicata—liens and levies. Taxpayer's repeat action for removal of liens and wage levy was dismissed on summary judgment: res judicata barred relitigation of claims that were based on same nucleus of operative facts underlying identical claims already adjudicated and dismissed in prior final judgment. Also, fact that appeal was pending in earlier case wasn't controlling since res judicata applied unless and until earlier case was reversed. *Reference:* United States Tax Reporter ¶74,337.503(5); 63,315.03(30). IRC §6331.

In the United States District Court for the Southern District of Texas, Houston Division.

Memorandum and Order

Pending is the United States of America's Motion to Dismiss and/or for Summary Judgment (Document No. 5). After having carefully reviewed the motion, response, reply, surreply, and applicable law, the Court concludes that the Motion for Summary Judgment should be granted.

I. Background

The Internal Revenue Service (IRS) placed a lien upon Plaintiff Jose Perez's property and rights to property in 1989 based upon deficiencies in Perez's income tax returns for the years 1984 through 1987. Several years later, in 1997, the IRS levied upon Perez's wages. In 2000, Perez filed an action against the United States in the United States District Court for the Western District of Texas alleging that the IRS liens were invalid. In his Third Amended Complaint in that action, Perez alleged that the IRS violated 26 U.S.C. § 6331 by levying on his wages without first serving him notice, and that the IRS's liens and collection actions were time-barred. Perez conceded signing a Form 900 waiver, which extended the statute of limitations for the IRS's collection actions, but argued that the waiver was invalid. Perez requested the court to remove the federal tax lien from his property and rights to property.

The district court dismissed Perez's § 6331 claim, holding that the court lacked subject matter jurisdiction over the claim because the claim was raised in an administrative action over which the Tax Court,

not federal district court, had jurisdiction. The court rejected Perez's argument that the Form 900 waiver was invalid, and held that the statute of limitations did not bar the IRS's collection actions. On March 8, 2002, the court signed a Final Judgment denying all relief requested by Perez and entering monetary judgment in favor of the United States. Perez appealed that order to the Fifth Circuit. In addition, Perez filed or transferred his claims to the United States Tax Court. Perez's Fifth Circuit appeal and his action in Tax Court both are currently pending.

Before he appealed the judgment entered against him in the Western District of Texas, Perez filed this action in the Southern District of Texas, once again requesting removal of the aforementioned liens against his property. Perez again argues that he did not receive notice prior to the IRS's levy on his wages pursuant to 26 U.S.C. § 6331, objects to his Form 900 waiver, and argues that because the Form 900 waiver is invalid, the IRS's tax collection action became time-barred on June 6, 1998.

The United States moves to dismiss or for summary judgment on Perez's claims on the ground that they are res judicata. Because the United States has submitted evidence not attached to the pleadings, and because the United States clearly placed Perez on notice of its alternative motion for summary judgment, the United States's motion will be considered under the standards for a motion for summary judgment.

II. Standard of Review

Rule 56(c) provides the summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must "demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986).

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. *See* id. at 2553–54. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials in a pleading, and unsubstantiated assertions that a fact issue exists will not suffice. *See* Morris v. Covan World Wide Moving, Inc., 144 F.3d 377, 380 (5th Cir. 1998) (citing Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2514–15 (1986)). "[T]he nonmoving party must set forth specific facts showing the existence of a 'genuine' issue concerning every essential component of its case." Id.

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. *See* Anderson, 106 S. Ct. at 2513–14. All justifiable inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *See* Matsushita Elec. Indus. Co. v. Zenith Ra-dio Corp., 106 S. Ct. 1348, 1356 (1986). "If the record, viewed in this light, could not lead a rational trier of fact to find" for the nonmovant, then summary judgment is proper. Kelley v. Price Macemon, Inc., 992 F.2d 1408, 1413 (5th Cir. 1993) (citing Matsushita, 106 S. Ct. at 1351). On the other hand, if "the fact finder could rea-sonably find in [the nonmovant's] favor, then summary judgment is improper." Id. (citing Anderson, 106 S. Ct. at 2511). Even if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that "the better course would be to proceed to a full trial." Anderson, 106 S. Ct. at 2513.

III. Discussion

[1] "Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *See* Allen v. McCurry, 101 S. Ct. 411, 414 (1980). The judgment puts an end to the cause of action, meaning that it cannot be re-submitted between the parties or their privies upon any ground whatsoever, absent fraud or some other factor

invalidating the judgment. *See* Nevada v. United States, 103 S. Ct. 2906, 2918 (1983); Commissioner v. Sunnen, 68 S. Ct. 715, 719 [36 AFTR 611] (1948).

"The preclusive effect of a prior federal court judgment is controlled by federal res judicata rules." Ellis v. Amex Life Ins. Co., 211 F.3d 935, 937 (5th Cir. 2000). *Res judicata* applies when four elements are satisfied: (1) the parties in both suits must be identical or at least in privity; (2) the prior judgment must have been rendered by a court of competent jurisdiction; (3) there must have been a final judgment on the merits in the prior action; and (4) the same claim or cause of action must be involved in both cases. Id. A "transaction test" is used to determine whether two cases involved the same cause of action. *See* id. at 938; Agrilectric Power Partners, Ltd. v. General Elec. Co., 20 F.3d 663, 665 (5th Cir. 1994).

> Under this approach, the critical issue is not the relief requested or the theory asserted but whether the plaintiff bases the two actions on the same nucleus of operative facts. If the factual scenario of the two actions parallel, the same cause of action is involved in both. The substantive theories advanced, forms of relief requested, types of rights asserted, and variations in evidence needed do not inform this inquiry.

Agrilectric, 20 F.3d at 665 (quotation & footnotes omitted); *see also* Ellis, 211 F.3d at 938 & n.1.

Perez contends in his current lawsuit that (1) the IRS failed to serve him with pre-seizure notices under 26 U.S.C. § 6331 prior to levying on his wages in 1997, and (2) the IRS's tax collection action is time-barred because his Form 900 waiver is invalid. These claims are based on the precise nucleus of operative fact that formed the basis for his identical claims already raised and finally adjudicated in the Western District of Texas against the same defendant. *See* Agrilectric, 20 F.3d at 665. Perez's attempts to raise the same claims in this action are barred by res judicata.

Perez argues that his § 6331 claim is not barred by res judicata because that claim was dismissed in his prior action for lack of subject matter jurisdiction. A dismissal for lack of subject matter jurisdiction is not on the merits, and does not make an entire subsequent action res judicata. Equitable Trust Co. v. Commodity Futures Trading Comm'n, 669 F.2d 269, 272 (5th Cir. 1982). However, principles of res judicata apply to judicial determinations regarding subject matter jurisdiction. Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 102 S. Ct. 2099, 2104 n.9 (1982); Equitable Trust Co., 669 F.2d at 272. "[A] dismissal for lack of subject-matter jurisdiction, while not binding as to all matters which could have been raised, is, however, conclusive as to matters actually adjudged." Equitable Trust Co., 669 F.2d at 272 (quotation omitted). Therefore, a determination by a federal district court that it lacks subject matter jurisdiction over an action bars access to the federal courts and is *res judicata* as to the lack of the federal court's power to act. *See* id. at 272–73; *see also* Darlak v. Bobear, 814 F.2d 1055, 1064 (5th Cir. 1987); Daigle v. Opelousas Health Care, Inc., 774 F.2d 1344, 1348 (5th Cir. 1985).

In dismissing Perez's § 6331 claim, the Western District of Texas held: "The levy issue is the subject matter of Plaintiff's administrative action, and, as noted in this Court's April 16, 2001, Order, jurisdiction over the administrative action does not lie with this Court." (Memorandum Opinion, Ex. 2 to Defendant's Motion to Dismiss and/or for Summary Judgment, at p. 20.) The prior order to which the court referred held that the Tax Court, not the federal district court, had jurisdiction to review Perez's administrative action. (Order Regarding Defendant's Motion to Dismiss, Ex. 1 to Defendant's Motion to Dismiss and/or for Summary Judgment, at pp. 5–6.) Under principles of res judicata, the judicial determination by the Western District of Texas that it lacked jurisdiction over Perez's claim precludes Perez's attempt to relitigate the same claim in another federal district court.

Perez also argues that res judicata does not apply to his claim because the final judgment in his prior lawsuit is currently on appeal. A case pending appeal is res judicata unless and until it is reversed. Fid. Standard Life Ins. Co. v. First Nat'l Bank & Trust Co. of Vidalia, Georgia, 510 F.2d 272, 273 (5th Cir. 1975); Prager v. El Paso Nat'l Bank, 417 F.2d 1111, 1112 (5th 1969); 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4433, at pp. 71, 78–79 (2d ed. 2002). Because Perez's present claims against the United States arise from the same nucleus of operative fact as the claims he brought against the United States in the Western District of Texas, upon which final judgment was entered, Perez's claims are barred by *res judicata* and will therefore be dismissed.

IV. Order

Based on the foregoing, it is

ORDERED that United States of America's Motion for Summary Judgment (Document No. 5) is GRANTED, and this case is DISMISSED.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 17th day of July, 2002.

EWING WERLEIN, JR.

UNITED STATES DISTRICT JUDGE

¶2002-5245

UNITED STATES OF AMERICA, APPELLANT v. FLEET NATIONAL BANK, ET AL., APPELLEE. In Re: Calore Express Company, Inc., Debtor. U.S. District Court, Dist. of Massachusetts, (DC MA) Docket No. 96-12277-NG, July 19, 2002. Earlier proceedings at (2002, CA1) 89 AFTR 2d 2002-2290, reversing and remanding (2000, DC MA) 86 AFTR 2d 2000-7262; and (1998, DC MA) 81 AFTR 2d 98-1163, 26 BR 727. Decision against Govt.

1. Tax claims in bankruptcy—jurisdiction—bankruptcy estate—related matters. District court dismissed bankruptcy case for lack of jurisdiction: once bankruptcy estate was entirely disposed of and no longer existed, there was no bankruptcy court or bankruptcy appeals jurisdiction to exercise over govt.'s restitution request or any other remaining dispute. *Reference:* United States Tax Reporter ¶68,726.52(5); 74,025.01(42). IRC §7402.

United States District Court for the District of Massachusetts.

Memorandum and Order

GERTNER, District Judge:

I have reviewed the First Circuit's decision, In re Calore Express Co., 288 F.3d 22 (1st Cir. 2002), and the parties' submissions regarding the appropriate disposition of this case. I have concluded that because the bankruptcy estate originally at issue in this case no longer exists, bankruptcy jurisdiction no longer exists over this case -- either in the bankruptcy court or before me in the posture of a bankruptcy appeal. Accordingly, if it wishes to proceed in the courts, the government should file a new suit for restitution in any federal district court with subject-matter and personal jurisdiction over this matter, including this one.[1] The present case is hereby DISMISSED for lack of subject-matter jurisdiction.

I. THE FIRST CIRCUIT'S DECISION

In reviewing the First Circuit's decision in this case, the recurring and resounding theme is the insufficiency of the record to support the bankruptcy court's decision and this Court's affirmance of that decision. E.g., 288 F.3d at 28 (''We reverse the entry of judgment against the government, because the bankruptcy court could not draw the legal conclusions it did without developing facts to support them .... Our decision today does not guarantee the government success on its restitution claim if and when a court better develops the

[1] If the government so desires, it is welcome to list the new case as a ''related case'' to the bankruptcy appeal and have it assigned to me.

facts involved in this case.''); id. at 49 (''[T]he underlying theme remains that it is not clear on the present record that the government's inaction was unreasonable or inappropriate.''); id. at 49 (''On the present record, the bankruptcy court's decision can stand on none of the grounds it gave . . . .''). In other words, the First Circuit found that the bankruptcy court's ruling was insufficiently supported by the record, and thus unwarranted at this stage -- not that it was necessarily or ultimately incorrect.

Accordingly, it seems clear to me that, before judgment can enter one way or the other, the record on the waiver issue warrants further development before a court. The question then remains: which court?

II. BANKRUPTCY JURISDICTION

As the Supreme Court and numerous circuits have made it abundantly clear, 28 U.S.C. § 1334(b) provides comprehensive jurisdiction to the bankruptcy courts ''so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.'' Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (citing Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)); see also H.R. Rep. No. 95-595, at 43–48 (1977). Accordingly, when considering the issue of ''related to'' jurisdiction over a matter under 28 U.S.C. § 1334(b), as the Supreme Court has explained:

> ''The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy . . . . An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.'' . . .
>
> But whatever test is used, . . . bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor.

Celotex, 514 U.S. at 308 n.6 (quoting Pacor, 743 F.2d at 994, and noting that all circuits except the Second and the Seventh have followed Pacor).

[1] Viewed in this light, I cannot agree with Fleet that the bankruptcy court now has ''related to'' jurisdiction in this matter. Both the case law and the legislative history make it clear that the lodestar of bankruptcy jurisdiction is the effect of a given action on a bankruptcy estate; thus, where there is no estate, the only logical conclusion is that there is no bankruptcy jurisdiction. Put another way, there are two dimensions on which to assess ''related to'' jurisdiction: substantive and temporal. A matter may be unrelated to a bankruptcy estate because it substantively has no impact on that estate, or it may be unrelated because the estate does not exist anymore. Either way, if a given dispute is unrelated to a bankruptcy estate, a bankruptcy court (or a district court sitting in the capacity of hearing a bankruptcy appeal) has no subject-matter jurisdiction over that dispute.

Accordingly, because the bankruptcy estate of Calore Express has been entirely disposed of, I hold that there is no longer bankruptcy jurisdiction over this matter. If the government wishes to proceed with a restitution suit, it will be required to do so in a court of general jurisdiction. At that time, the court may resolve the issue of how best to address the government's concerns about prejudice drawing from the bankruptcy court's decision, including issues of the burdens of proof and interest rates on the debtor's tax liabilities.[2]

III. CONCLUSION

This case is hereby DISMISSED for lack of subject-matter jurisdiction. The government is welcome to file suit for restitution in any court with appropriate jurisdiction.

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[2] While the judge to whom the case is drawn will have to make his or her own decision, the government's concerns, articulated in note 13 of its brief, about the propriety of suit in this district are not wholly convincing. Even if Judge Rosenthal of the bankruptcy court is a witness in this case, it is not at all clear that this will create a conflict of interest or any other problem with every single judge on the district court serving as the trier of fact.

SO ORDERED.

Dated: July 19, 2002

NANCY GERTNER, U.S.D.J.

ORDER OF DISMISSAL

GERTNER, D.J.

For the reasons set forth in the accompanying Memorandum and Order of the same date, this case is hereby DISMISSED for lack of subject-matter jurisdiction.

SO ORDERED.

Dated: July 19, 2002

NANCY GERTNER, U.S.D.J.

¶2002-5246

Ronald HERIP, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Ohio, (DC OH) Docket No. 1:02CV0540, July 25, 2002. Years 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties—jurisdiction. IRS's administrative determination to proceed with collection of pro se taxpayer's IRC §6702 frivolous return penalties was upheld on summary judgment: taxpayer was precluded from challenging underlying tax liabilities for which he had admittedly received deficiency notice; challenges to Service Center Director's authority to sign notices and to Appeals Officer's failure to give him requested information before hearing were meritless; and taxpayer didn't offer any collection alternative or otherwise raise any statutorily-recognized collection defense. Also, Tax Court, not district court, had exclusive jurisdiction to review separate administrative determina-tion regarding taxpayer's tax liability. *Reference:* United States Tax Reporter ¶67,025.01(2); 63,305.01(10). IRC §6330; 6702.

United States District Court Northern District of Ohio, Eastern Division.

Order

O'MALLEY, District Judge:

For the reasons set forth in this Court's memorandum and opinion of this date, the Court GRANTS Defendant's motion for summary judgment and DISMISSES this case.

The Court further certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

KATHLEEN McDONALD O'MALLEY

UNITED STATES DISTRICT JUDGE

Memorandum & Order

O'MALLEY, District Judge:

On March 21, 2002, *pro se* Plaintiff Ronald Herip filed this action against the United States of America (''the Government''). Mr. Herip sought to set aside a Notice of Determination issued by an Internal Revenue Service (IRS) Appeals Officer on February 27, 2002. Mr. Herip asserted he was entitled to relief pursuant to 26 U.S.C. § 6330 because the Appeals Officer failed to conduct the collection due process hearing in accordance with the law.

Upon initial review, the Court advised Herip that his complaint may be subject to dismissal for failure to state a claim upon which relief may be granted. On April 12, 2002, the Court ordered Plaintiff to file an amended complaint setting forth a valid claim within 15 days. The Court indicated that there were no facts alleged in the original complaint which could be construed to state a valid federal claim for relief. *See Goza v. Commissioner of Internal Revenue*, 114 T.C. 176, 183 (T.C. 2000).

Plaintiff subsequently filed a timely ''Amended Addition to Original Complaint'' on April 26, 2002. The document includes five paragraphs outlining Herip's basis for filing a complaint in this Court pursuant 26 U.S.C. § 6330, as follows:

a. The Tax Court has no jurisdiction to review these issues.

b. The lawless seizure of property which the IRS seeks is not supported by any testimony or documented evidence.

c. Defendants did not conduct the CDP hearing in accordance with the law.

d. Defendant employees who issued the determinations had no basis in law or fact to issue such adverse determinations.

e. Defendant violated Plaintiff's rights and injured him by compelling him to expend time, money and energy to litigate these fraudulent determinations to prevent illegal seizure of his property pursuant to code 6331.

(Am. Compl. at 1). Contrary to the Court's order, Plaintiff filed an amended pleading which essentially summarizes the same issues raised in his original complaint.

On May 30, 2002, the Government filed a motion for summary judgment, asserting that (1) the Court lacks jurisdiction over Plaintiff's federal income tax liability for tax year 1996; (2) the Court lacks jurisdiction over Plaintiff's damages claims; and (3) the IRS Appeals Office did not abuse its discretion in making the determination made at Plaintiff's Collection Due Process ("CDP") hearing. Plaintiff has opposed that motion, asserting that material disputes of fact exist that preclude judgment in favor of the Government and that, at a minimum, the Court should afford him discovery before entry of any judgment.

For the reasons stated below, the Court finds that further proceedings are unnecessary in this case and GRANTS Defendant's motion for summary judgment.

I. Background

For purposes of this motion, the following material facts are not in dispute. On June 28, 2001, Herip filed a Request for a CDP Hearing, Form 12153 in response to a Notice of Intent to Levy/Seizure previously issued by the IRS. Plaintiff contested the IRS's Notice with respect to income tax due for 1996 and civil penalties imposed pursuant to 26 U.S. § 6702 for tax years 1984 through 1999. He asserted that "the IRS made a procedural error in the assessments, such as no assessments were made. I did not have the opportunity to dispute the assessed liability." (Pl.'s Ex. C).

On October 12, 2001, Plaintiff's CDP hearing was held before an IRS Appeals Officer. Plaintiff complains that the appeals officer failed to provide any of the "verification" he previously requested.[1] From this he concludes that the IRS violated 26 U.S.C. §§ 6330(c)(1) and 6330(c)(3)(A).[2] He alleges that no document was provided by the Appeals Officer that verified that the "requirements of any applicable law or administrative procedure have been met" as required by Treasury Regulation 301.6320-IT(e).

Herip further maintains that, because section 6211 does not provide for a "deficiency" if no return is filed or if no "tax due" is shown by the taxpayer on his return, the IRS could not legally issue a deficiency because he never indicated taxes were due on his tax return for the years at issue.[3] He also disputes the legitimacy of the deficiency notices sent to him because they were signed by a Director of a Service Center, and not personally by the Secretary, as Plaintiff asserts is required by

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[1] Plaintiff requested the following information regarding the IRS employees who imposed the "frivolous penalty": (1) names; (2) federal identification numbers; (3) delegation orders from the Secretary authorizing them to impose the penalty; (4) official job descriptions; (5) the Treasury Department regulation that allows them to impose a "frivolous penalty"; and (6) the Treasury Department regulation requiring Plaintiff to pay a penalty.

[2] The relevant subsections provide:

(1) Requirement of investigation. - The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

26 U.S.C. § 6330(c)(1).

(3) Basis for the determination- The determination by an appeals officer under this subsection shall take into consideration-

(A) the verification presented under paragraph (1);

26 U.S.C. § 6330(c)(3)(A).

[3] The term "deficiency" is defined, in relevant part, under Title 26 Section 6211 as:

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the tax payer thereon . . . .

law. Plaintiff asserts that because ''there is no regulation that implements Code Section 6702, there is no regulation that Plaintiff can comply with . . . '' (Orig. Compl. at 6–7) and, therefore, he is not required to pay any frivolous tax penalties. Herip explained that during the CDP hearing he ''put both his checkbook and IR Code book on the table in front of the Appeals Officers and repeatedly offered to pay all of the taxes and penalties at issue right then and there, if [sic] Appeals Officers would provide him with the regulation that implements the frivolous penalty code section and requires him to pay the penalty.'' (Orig. Compl. at 6).

On February 27, 2002, IRS Appeals Team Manager Joseph W. Weiss issued two Notices of Determination. The notices addressed Plaintiff's ''1040 tax'' for 1996 and ''civil penalty taxes'' pursuant to Internal Revenue Code (IRC) section 6702 for 1984–96. As an attachment to the Notice, Mr. Weiss provided an outline of the following issues discussed during the hearing: Summary and Recommendation, Brief Background, Discussion and Analysis, Verification of Legal and Procedural Requirements, Issues Raised by the Taxpayer, and Balancing Efficient Collection and Intrusiveness. In summarizing the issues Plaintiff raised during the CDP hearing, the Appeals Officer noted that Herip failed to show that any procedural error was made in the assessment.

With regard to the civil penalties at issue, Mr. Weiss noted that Herip was assessed civil penalties under IRC Section 6702 because he filed frivolous income tax returns from 1984 through 1996. The IRS issued a final notice of intent to levy to Herip by certified mail on June 16, 2001. Plaintiff's Request for Collection Due Process Hearing was received by the IRS on July 3, 2001. In addressing Plaintiff's income tax return for 1996, the Officer noted that the IRS sent Mr. Herip a notice on October 29, 1998 proposing changes to his income tax. Mr. Herip responded to the notice by filing an amended return, Form 1040X, showing ''no income'' and claiming a refund of the income tax paid. The return was determined to be a frivolous return and Plaintiff was assessed a civil penalty under IRC § 6702, after being given an opportunity to correct the amended return. A statutory notice of deficiency was sent on March 17, 1999 by certified mail to Herip's last known address. On June 16, 2001 a final notice of intent to levy was sent to Plaintiff by certified mail to which he responded by requesting a CDP hearing.

Under the Determination heading, Issues Raised by the Taxpayer, the Appeals Officer explained the following to Herip: ''You did not present any relevant issues at the hearing. You asked for a copy of the 'statutory notice of deficiency' and 'notice and demand'. The Internal Revenue Service does not maintain copies of 'notice and demand'. However, subsequent to the hearing, you were sent a literal transcript of your account. A copy of the 'statutory notice of deficiency' was also mailed to you with an explanation of the adjustments made to your return.'' (Ex. A at 4). He determined further that ''[s]ince you did not show you did not receive the 'statutory notice of deficiency' mailed to you by certified mail on March 17, 1999, you cannot raise the issue of the underlying liability at the Collection Due Process Hearing.'' *Id.* In each Determination, Mr. Weiss concluded ''that no relief is to be granted and that the proposed levy action is sustained. The Internal Revenue Service has complied with code and procedural requirements in collecting the tax.'' (Ex. B at 2).

Herip challenges both Determinations because he believes the IRS's failure to provide information he considers critical to a valid CDP hearing renders the hearing illegitimate. Based on his conclusions, Herip requests that the Court invalidate the IRS Determination, order the government to reimburse him for the cost of bringing this action and award him ''punitive damages as equity relief dictates.''

II. Standard of Review

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein . . . . The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Ass'n Inc.*, 909 F.2d 941, 943–44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.*at 252.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479–80 (6th Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. *Id.*

Pro se pleadings, however, are to be liberally construed. *Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

III. Analysis

A. The Appeals Office Did Not Abuse Its Discretion When Issuing Its Determination

[1] The Government argues that this Court must review the determination of the IRS Appeals Office under an abuse of discretion standard. The Government contends that Herip received a valid CDP hearing where he had the opportunity to raise any relevant issue relating to his tax liabilities or the proposed collection action. Instead, the Government contends, Herip persisted in raising meritless arguments. Thus, the Government argues that the Appeals Office

did not abuse its discretion in issuing its determination.

Under the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998), Pub.L. 105-206, sec. 3401, 112 Stat. 685, 746, Congress enacted section 6330 (pertaining to levies) to provide due process protection for taxpayers in tax collection matters. This addresses instances where the Secretary is authorized to collect taxes by levy upon property belonging to a person who is liable to pay any tax, but the person neglects or refuses to pay such tax within 10 days after notice and demand for payment. 26 U.S.C. § 6331(a). Before proceeding with the collection by way of levy, however, the IRS must provide notice to the person of his or her right to a hearing on the matter. 26 U.S.C. § 6330(a). The individual has a right, within 30 days of the section 6330 notice, to request a collection due process hearing with the IRS Office of Appeals. 26 U.S.C. § 6330(a)(3)(B). At the hearing, the taxpayer may raise any issue relevant to the unpaid tax and the proposed levy, including challenges to the propriety of the levy and may propose offers of collection alternatives. 26 U.S.C. § 6330(c)(2).

At the conclusion of a CDP hearing, the Appeals Officer is tasked to formulate a determination based on: (1) the verification that the requirements of any applicable law or administrative procedure have been met; (2) the issues raised by the taxpayer; and (3) the proper balance between the need for efficient tax collection and the legitimate concern that any collection action be no more intrusive than necessary. 26 U.S.C. § 6330(c)(3). Following the hearing, the Appeals Officer sends a Notice of Determination to the complainant that summarizes the matters raised during the hearing and responds to any offers or objections made by the complainant. If the individual is dissatisfied with the adminis-trative determination, he or she has 30 days within which to appeal to "the Tax Court (and the Tax Court shall have juris-diction to hear such matter); or (B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States." 26 U.S.C. § 6330(d)(1). Review is limited to matters actually raised at the administrative hearing. Temp. Treas. Reg. § 301.6330-IT(f) (2001).

Although section 6330 does not prescribe the standard of review that the district court is to apply in reviewing the Commissioner's administrative determinations, the legislative history indicates that the Court should conduct a *de novo* review only "where the validity of the tax liability was properly at issue at the administrative hearing." H. R. Conf. Rep. No. 105-599, at 266 (1998). Where the amount of the underlying tax liability is not properly part of the appeal, the Court reviews a Notice of Determination for abuse of discretion. *Sego v. Comm'r of Internal Revenue*, 114 T.C. 604, 609–10 (T.C. 2000); *Goza v. Comm'r of Internal Revenue*, 114 T.C. 176, 179–80 (T.C. 2000). *See also MRCA Information Services v. United States*, 145 F.Supp. 2d 194, 199 [89 AFTR 2d 2002-694] (D. Conn. 2000) (holding that district court applies an abuse of discretion standard when reviewing an IRS Settlement Officer's determination under 26 U.S.C. § 6330). The Sixth Circuit has held that an administrative agency abuses its discretion where there is no evidence to support its decision, or the agency misapplies the law. *National Engineering & Contracting Co. v. Occupational Safety & Health Administration*, 928 F.2d 762, 768 (6th Cir. 1991).

Section 6330(c) provides that an individual may raise any relevant issues relating to the unpaid taxes or a proposed levy during the course of a CDP hearing, including spousal defense to collection, challenges to the appropriateness of the Commissioner's intended collection action, and offers of alternative means of collection. 26 U.S.C. § 6330(c)(2)(A). The statute does, however, bar a person from contesting the existence or amount of the underlying taxes *unless* that individual did not receive a notice of deficiency for the taxes in question or did not otherwise have an earlier opportunity to dispute such tax liability. 26 U.S.C. § 6330(c)(2)(B).

Plaintiff's threshold complaint is that the IRS cannot assess any penalties against him because the underlying income tax liability is questionable. The basis for this argument is his attack on the legitimacy of the Notice of Intent to Levy issued by the IRS. Herip first claims that he never received the deficiency notices, yet he asks the Court, in his opposition brief, to take judicial notice that he received notice from the Chief of the Automated Collection Branch. (Plaint. Opp. Brief, p. 3). While Plaintiff can plead in the alternative, this admission, coupled with the attached copies of the deficiency notices in the Government's motion for summary judgment (Govn. Exh. D & I), clearly belie Herip's contention that he never received such notice. Herip also disputes the legitimacy of the deficiency notices sent to him because they were signed by the Director of a Service Center and the Chief of the Automated Collection Branch, not the Secretary "as required by law." He maintains that because "there is no regulation that implements Code Section 6702, there is no regulation that Plaintiff can comply with . . ." (Compl. at 6–7) and therefore he is not required to pay any frivolous tax penalties.

Herip is fundamentally challenging the merits of the IRS's determination in the Notice of Deficiency; he has not challenged the intended method of collection, offered an alternative means of collection, or raised spousal defenses to collection. His attempt to invalidate the notice based on the "questionable" authority of the Director is without merit. It is well established that the authority to determine and issue statutory notices of deficiency is vested by statute in the Secretary of the Treasury *or his delegate*. §§ 6212(a), 7701(a)(11)(B), and 7701(a)(12)(A)(i) (emphasis added). Pursuant to 26 C.F.R. §§ 301.6212-1(a) and 301.7701-9(b), the Secretary has delegated to District Directors the authority to send deficiency notices.[4] *Hoffman v. United States*, No. C02-5023RJB, 2002 WL 1299991, at 5 [89 AFTR 2d 2002-2647] (W.D. Wash. May 3, 2002); (rejecting identical argument brought by plaintiff as frivolous and without merit); *Kellogg v. Commissioner*, 88 T.C. 167, 172 (T.C. 1987); *Perlmutter v. Commissioner*, 44 T.C. 382, 385 (T.C. 1965), *affd.* 373 F.2d 45 [19 AFTR 2d 708] (10th Cir. 1967). Herip, therefore, cannot sustain a claim that he was entitled to challenge the existence of an underlying income tax liability during the CDP hearing on grounds that he never received statutory notice of the deficiency. Again, he concedes he received notice of the deficiency—his only complaint is a misguided one about the authority of the signatory on that notice.

With regard to his claim that the Appeals Officer was obligated to respond to his prior requests for certain verifications at the CDP hearing, Plaintiff has failed to state a valid claim. The Settlement Officer owed the Plaintiff no duty to produce this information. *Lindsey v. Commissioner of Internal Revenue*, No. 9014-00L, T.C. Memo 2002-87 [TC Memo 2002-87], 2002 WL 487164 (T.C. Apr 2, 2002) (citing *Nestor v. Commissioner*, 118 T.C. 162, 166 (T.C. 2002) and holding that asserted error in IRS determination could not be based on petitioner's claim that the IRS appeals officer failed to furnish requested documentation prior to the CDP Hearing). Herip also argues that the appeals officer failed to provide documentation that supported the imposition of the penalties assessed against him, including the names of the individuals who determined that penalties were appropriate and whether such individuals were authorized to make these determinations. This argument is also without merit. *Hoffman*, 2002 WL 1299991, at 5 (rejecting identical argument as frivolous and without merit); *Kelly v. United States*, No. 4:01CV1803JCH, 2002 WL 1096809, at 8–9 (E.D. Mo. April 19, 2002) (re-jecting identical argument as information sought was not required to be disclosed by the IRS in a CDP hearing and was irrelevant to plaintiff's underlying claims). The requests notwithstanding, Herip never draws a nexus between the information he requested and its relevance to the statuto-

[4] To the extent Herip claims that a written delegation order is required, both 26 C.F.R. §§ 301.6212-1(a) and 301.7701-9(b) provide such written authority.

rily specified issues available for discussion during the CDP hearing.

The IRS hearing officer did not abuse his discretion when he determined that the requirements of applicable law had been met and that Herip had been afforded statutorily required administrative procedures. *See* 26 U.S.C. § 6330(c)(1). The hearing officer also attempted to address the issues raised by Plaintiff; however, Herip did not acknowledge any of the statutorily-specified issues that may be raised at a collection due process hearing, such as spousal defenses, the appropriateness of an intended collection action, and possible alternative means of collection. *See* 26 U.S.C. § 6330(c); *see also Sego*, 114 T.C. at 609. Instead, Plaintiff attempted to revisit the issue of his underlying tax liability at the collection hearing.

Based on the foregoing, Plaintiff has not, and cannot, prove any set of facts in support of his request to set aside the Notice of Determination that he is liable for frivolous tax penalties. Accordingly, the Government's motion for summary judgment on that ground is GRANTED and that portion of Plaintiff's appeal is DISMISSED. As the Court has concluded that Herip's underlying claim regarding the CDP hearing lacks merit, it need not reach the Government's second issue regarding the Court's jurisdiction over Herip's damages claims.

B. The Court Lacks Jurisdiction to Review Determinations of Herip's 1996 Tax Liability

The Government also argues that this Court lacks jurisdiction over any review of the IRS Appeals Office's determination relating to Herip's federal income tax liability for tax year 1996. The Government asserts that only a United States Tax Court, and not a District Court, has jurisdiction to hear these claims. Herip, in his opposition brief to the Government's motion for summary judgment, acknowledges that this Court would lack subject matter jurisdiction over such a claim and expressly disclaims intending to make such a claim. As such, that portion of Plaintiff's appeal is also DISMISSED.

IV. Conclusion

For the reasons stated above, the Court GRANTS Defendant's motion for summary judgment and DISMISSES this case.

The Court further certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

KATHLEEN McDONALD O'MALLEY

UNITED STATES DISTRICT JUDGE

¶2002-5247

In Re: Anita ADAMS, Debtor. U.S. Bankruptcy Court, Western Dist. of Texas, (Bktcy Ct TX) Docket No. 01-52273-LMC, July 12, 2002. Years 1995, 1996. Decision for Govt.

1. Tax claims in bankruptcy—objection to proof of claim—amended proof of claim. Pursuant to agreed order, IRS's amended proof of claim for secured, priority and unsecured general claims against Chap. 13 debtor was allowed in amounts stated; and taxpayer's objections and request to direct IRS to pay refund were dismissed. *Reference:* United States Tax Reporter ¶68,726.51(10).

Tony Hervol Bar No. 00784264 5720 Bandera Rd., Suite 2 San Antonio, TX 78238 Attorney for the Debtor.
Jonathan R. Williams Trial Attorney, Tax Division Bar No. 178810-FLA U.S. Department of Justice Maxus Energy Tower 717 N. Harwood, Suite 400 Dallas, TX 75201 Attorney for the United States.

In the United States Bankruptcy Court for the Western District of Texas, San Antonio Division.

Agreed Order on Debtor's Objection to Claim of the IRS and Debtor's Motion to Direct Payment of Tax Refund

CHAPTER 13

There is presently pending before this Court in the above-captioned proceeding, the Debtor's Objection to Proof of Claim of the IRS and Debtor's Motion to Direct

Payment of Tax Refund. The United States, Internal Revenue Service, is represented herein by the United States Department of Justice, Tax Division. The Debtors and the United States have reached an agreement for resolution of this dispute and have requested that the Court enter this Agreed Order.

It is therefore ORDERED, ADJUDGED AND DECREED that:

[1] The Internal Revenue Service has a valid secured claim in the amount of $2,520.00 for unpaid income taxes, penalties, and interest for the 1995 and 1996 tax years as reflected on the IRS's amended proof of claim dated 3/263/02;

The Internal Revenue Service has a valid priority claim in the amount of $4,431.31 for unpaid income taxes ad interest for 1996 and 1997, as reflected on the IRS's amended proof of claim dated 3/263/02;

The Internal Revenue Service has a valid unsecured general claim in the amount of $373.34 for unpaid penalties and interest for 1996 and 1997, as reflected on the IRS's amended proof of claim dated 3/263/02; and,

All other relief sought in the Objection to Proof of Claim of the IRS and Debtor's Motion to Direct Payment of Tax Refund is dismissed and each party shall bear its respective costs of this litigation, including attorneys' fees.

SIGNED this 12 day of July, 2002

/s/

UNITED STATES BANKRUPTCY JUDGE

AGREED AS TO FORM AND CONTENT:

TONY HERVOL

Bar No. 00784264

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San Antonio, TX 78238

ATTORNEY FOR THE DEBTOR

JONATHAN R. WILLIAMS

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Bar No. 178810-FLA

U.S. Department of Justice

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717 N. Harwood, Suite 400

Dallas, TX 75201

ATTORNEY FOR THE UNITED STATES

¶2002-5248

In re: Rocco Dominick LIMITONE and Mildred Ann LIMITONE, Debtor. Rocco Dominick LIMITONE and Mildred Ann LIMITONE, PLAINTIFFS, - against - INTERNAL REVENUE SERVICE, DEFENDANT. U.S. Bankruptcy Court, Southern Dist. of New York, (Bktcy Ct NY) Case No. 00 B 12466 (JJC); Adv. Proc. 00-2870A, Jan. 23, 2001. Decision for Taxpayers in part and for Govt. in part.

1. Bankruptcy court procedure—objection to proof of claim—amended proof of claim. Pursuant to stipulation, Chap. 13 debtors' motion to expunge original IRS claim was granted, amended claim was allowed in agreed amounts, and adversary proceeding was withdrawn with prejudice. *Reference:* United States Tax Reporter ¶68,726.51(5).

NATHAN HOROWITZ (NH-2649) Attorney for Debtors 175 Main St. suite 307 White Plains, NY 10601 Tel: (914) 684-0551

MARY JO WHITE United States Attorney for the Southern District of New York EDWARD CHANG (EC-8218) Assistant United States Attorney Tel: (212) 637-2736

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK,

STIPULATION AND ORDER

John J. Connelly UNITED STATES BANKRUPTCY JUDGE

Chapter 13

[1] WHEREAS, on June 2, 2000 (''Petition Date'') Rocco Dominick Limitone and Mildred Ann Limitone (collec-

tively, ''Debtors'') filed a voluntary petition for relief under Chapter 13, Title 11 of the United States Code (''Bankruptcy Code''); and

WHEREAS, on April 3, 1996, the United States of America (''Government''), through its Department of the Treasury, Internal Revenue Service (''IRS''), filed a Notice of Federal Tax Lien (''IRS Lien'') against the Debtors with the Office of the Clerk of the County of Westchester; and

WHEREAS, on or about October 10, 2000, the Government, through the IRS, filed a Proof of Claim on account of the Debtors' due and owing, but unpaid, pre-petition federal income taxes, interest, and penalties in the total amount of $27,179.14 (''Original IRS Claim''); and

WHEREAS, on or about November 1, 2000, the Debtors commenced the present adversary proceeding (''Adversary Proceeding'') seeking an order to reclassify the Original IRS Claim and to expunge the IRS Lien; and

WHEREAS, the Debtors have asserted that, as of the Petition Date, the pre-petition assets to which the IRS Lien attached totaled $5,520.01 (''Pre-Petition Assets'');

WHEREAS, on or about December 13, 2000, the Government, through the IRS, filed an amended Proof of Claim on account of the Debtors' due and owing, but unpaid, pre-petition federal income taxes, interest, and penalties in the total amount of $26,179.14 (''Amended IRS Claim''); and

WHEREAS, of the Amended IRS Claim, $5,520.01 was classified as secured by the IRS Lien (''IRS Secured Claim''), and $20,659.13 was classified as a general unsecured claim (''IRS General Claim''); and

NOW, THEREFORE, IT IS HEREBY ORDERED, STIPULATED AND AGREED that:

1. The Adversary Proceeding complaint is withdrawn with prejudice, and without costs or attorney's fees to either the Debtors or the Government.

2. The Original IRS Claim is expunged.

3. The Amended IRS Claim shall be allowed as follows:

a. Pursuant to sections 502, 506(a) and 1325(a)(5)(B) of the Bankruptcy Code, the IRS Secured Claim shall be allowed as a secured claim in the amount of $5,520.01, plus statutory interest at the rate set forth in 26 U.S.C. § 6621.

b. Pursuant to section 502 of the Bankruptcy Code, the IRS General Claim shall be allowed in the total amount of $20,659.13.

4. This Stipulation and Order is subject to the approval of the Bankruptcy Court. In the event that the Court declines to enter it, the Stipulation and Order shall be null and void, with no force or effect.

Dated: January 16, 2001

New York, NY

SO ORDERED this 23rd day of January, 2001

/s/ John J. Connelly

UNITED STATES BANKRUPTCY JUDGE

¶2002-5249

Albert LYNN BARCROFT, PLAINTIFF v. Paul H. O'NEILL, ET AL., DEFENDANTS. U.S. District Court, Eastern Dist. of Texas, (DC TX) Docket No. 3:01-CV-58, July 22, 2002. District Court adopted. Earlier proceedings at (2002, DC TX) 89 AFTR 2d 2002-2855; and (2002, DC TX) 89 AFTR 2d 2002-2399. Decision for Taxpayer in part.

1. Actions against Treas. Secretary and other officials—parties to suit. Magistrate judge's report and recommendation to dismiss county and school district from federal tax-related suit was adopted pursuant to amended judgment. *Reference:* United States Tax Reporter ¶74,336.505(10).

In the United States District Court for the Eastern District of Texas, Paris Division.

Order

DAVIS, District Judge:

Plaintiff's Motion to Alter or Amend Judgment is GRANTED to the extent that the court will enter an Amended Memorandum Adopting Report and Recommendations of United States Magistrate Judge. All other relief not granted herein is denied.

Signed this 22 day of July, 2002.

LEONARD DAVIS

UNITED STATES DISTRICT JUDGE

Amended Memorandum Adopting Report and Recommendation of United States Magistrate Judge

DAVIS, District Judge:

[1] Came on for consideration the Initial Report of the United States Magistrate Judge in this action, this matter having been heretofore referred to United States Magistrate Judge Robert Faulkner pursuant to 28 U.S.C. § 636. On May 14, 2002, the Report of the Magistrate Judge was entered containing his proposed findings of fact and recommendations that the Defendants Fannin County Appraisal District, Fannin County and Leonard Independent School District's Motion to Dismiss pursuant to Rule 12 should be granted.

Having received the report of the United States Magistrate Judge pursuant to its order, and no objections thereto having been timely filed, this Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct and adopts same as the findings and conclusions of the Court. It is, therefore,

ORDERED, ADJUDGED and DECREED that the Defendants Fannin County Appraisal District, Fannin County, and Leonard Independent School District's Motion to Dismiss pursuant to Rule 12 is hereby GRANTED, and the Fannin County Appraisal District, Fannin County, and Leonard Independent School District are hereby dismissed without prejudice.

Signed this 22 day of July, 2002.

LEONARD DAVIS

UNITED STATES DISTRICT JUDGE

¶2002-5250

Hilary M. BECK, ET AL., PLAINTIFFS v. UNITED STATES, DEFENDANT. U.S. District Court, Eastern Dist. of Kentucky, (DC KY) Docket No. 01-256-WOB, July 22, 2002. Decision for Govt.

1. Third-party summons enforcement—petition to quash—discovery. Magistrate judge granted govt. protective order in taxpayers' petition to quash IRS's 3d-party summonses: in summons proceeding, taxpayers weren't entitled to requested admissions or other discovery absent preliminary showing of necessity or governmental abuse of process. Also, govt.'s failure to make formal certification was excusable where parties wouldn't have been able to resolve matter extra-judicially; and taxpayers' sanctions request was de-nied. *Reference:* United States Tax Reporter ¶76,095.01(10). IRC §7609.

United States District Court, Eastern District of Kentucky at Covington.

Memorandum Order

WEHRMAN, Magistrate Judge:

[1] On April 15, 2002, the court filed a scheduling order instructing the parties to conclude any discovery on or before June 3, 2002, with status reports to be filed the same date. On June 12, 2002, both parties to this action filed their separate reports, advising the court that each party anticipated filing dispositive motions.

This action was initiated by plaintiffs with the filing of a petition seeking to quash one or more summonses issued by the IRS to one or more third-parties, pursuant to 26 U.S.C. §7609(h). The United States filed an answer to the petition seeking denial of the petition and enforcement of the summonses. The United States has not filed a separate petition to enforce summons pursuant to 27 U.S.C. §7602, nor

has the government filed any dispositive motion to date.[1]

On July 3, 2002, the United States filed a motion for a protective order concerning plaintiffs' request for admissions, to which the plaintiffs have filed a response. In addition, on July 5, 2002, plaintiff-petitioners filed a request for an order quashing the third party summons and granting any other appropriate relief, based upon the failure of the United States to timely respond to her request for admissions.

In order to obtain an order permitting even limited discovery in a summons enforcement proceeding, a taxpayer must make a substantial preliminary showing of necessity. *See, e.g., United States v. Morgan Guaranty Trust Co.*, 572 F.2d 36, 42–43 n.9 [41 AFTR 2d 78-644] (2d Cir.), *cert. denied*, 739 U.S. 822 (1978). In this case, the plaintiffs' requests for admissions seek information concerning the legal interpretation of various provisions of the Internal Revenue Code, among other topics. The plaintiffs have not made any showing of abuse of process which would entitle them to the requested discovery. Because plaintiffs have no right to discovery in this proceeding, the motion of the United States will be granted. *See United States v. Will*, 671 F.2d 963, 968 [49 AFTR 2d 82-768] (6th Cir. 1982).

In response to the motion of the United States, the plaintiffs argue that the motion should be denied based upon the failure of the United States to certify that it has in good faith conferred or attempted to confer with plaintiff in an effort to resolve the dispute without court intervention. The plaintiffs are generally correct in their interpretation of the rules governing discovery, *see* Rule 37, Fed. R. Cir. P.; LR 37.1. However, this court will excuse the lack of a formal certification in this instance because it is clear from the motions filed by both sides that the parties would not be able to resolve this dispute extra-judicially, and because the dispute is not over the scope of discovery but instead concerns the availability of any discovery in this action.

The request of the plaintiffs for an order granting all relief "as may be deemed just and proper" including but not limited to the relief sought in the complaint (quashing the third party summonses) also will be denied. The sole basis relied upon for the relief sought is defendant's failure to answer the outstanding requests for admissions. The plaintiffs cite no authority for their request, but the court construes it as a motion to compel or for sanctions under Rule 37, Fed. R. Civ. P.[2] Because discovery is not warranted in this case, no sanctions are warranted for defendant's failure to respond.

Accordingly, IT IS ORDERED HEREIN:

1. Defendant's motion for a protective order [DE #11] is granted;

2. Plaintiffs' construed motion to compel or for sanctions including default judgment [DE #10] under Rule 37 is denied;

3. Either party may file a dispositive motion on or before August 15, 2002. Barring the filing of any dispositive motions, this matter will be set for a hearing before the presiding district judge;

4. The Clerk of Court shall forward to each party with this order a copy of the form used to consent to trial before a magistrate judge. 28 U.S.C. §636(c). If the parties so consent, they shall execute and file said forms on or before August 15, 2002. Consent to trial before a magistrate judge has no effect on a party's right to a jury trial, but may result in earlier final pretrial and trial dates than otherwise would occur before the district judge.

This 22 day of July, 2002

J. GREGORY WEHRMAN

UNITED STATES MAGISTRATE JUDGE

[1] The court's April order instructed the parties to file any such motions on or before July 5, 2002. The United States indicated in its status report that it intended to file a motion for summary denial of the petition to quash and for summary enforcement of the summons on or before June 28, 2002, but no such motion has been filed of record.

[2] Technically, plaintiffs' motion is also deficient under LR 37.1 and Rule 37 because it fails to include the requisite certification.

¶2002-5251

BROWN BROTHERS CONCRETE, INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Middle Dist. of Florida, (DC FL) Docket No. 3:01-cv-1257-J-21TJC, July 26, 2002. Decision for Govt.

1. Collection due process—review of administrative determination—jury demand. Magistrate judge granted govt.'s motion to strike taxpayer's demand for jury trial on its CDP petition: 7th Amendment jury trial right didn't apply to suits against U.S.; no explicit jury trial right was provided in IRC §6320 or IRC §6330; and 28 USC §2402 didn't apply. Also, F.R.Civ.P 39(c)'s advisory jury rule was similarly unavailing. *Reference:* United States Tax Reporter ¶63,305.01(5); 63,205.01(10). IRC §6320; 6330.

United States District Court, Middle District of Florida, Jacksonville Division.

Order

CORRIGAN, Magistrate Judge:

This case is before the Court on defendant's Motion to Strike Jury Trial Demand (Doc. 10) to which plaintiff filed a lengthy objection (Doc. 13). Because plaintiff's objection raised new issues, the Court directed defendant to file a response to plaintiff's objection and defendant has now done so (Doc. 15).

II. Background

The Internal Revenue Service ("IRS") assessed $56,557.77 against plaintiff for unpaid payroll taxes. On April 24, 2001, the IRS filed a Notice of Federal Tax Lien against plaintiff. Plaintiff appealed the imposition of the lien to the IRS Office of Appeals.[1] The appeals officer conducted a collection due process hearing and subsequently issued a Notice of Determination on October 19, 2001, finding that the lien was appropriately imposed against plaintiff. Plaintiff filed this action appealing the determination pursuant to 26 U.S.C. §§6320(c) and 6330(d) and demanded a jury trial. Defendant now moves to strike the jury demand.

III. Discussion

[1] The Seventh Amendment preserves the right to jury trial "in suits at common law." Since there was no right of action at common law against a sovereign, enforceable by jury trial or otherwise, there is no constitutional right to a jury trial in a suit against the United States. Lehman v. Nakshian, 453 U.S. 156, 164 (1981); Mathes v. Comm'r, 576 F.2d 70, 71 (5th Cir. 1978), cert. denied, 440 [42 AFTR 2d 78-5379] U.S. 911 (1979).[2] The United States Supreme Court has explained:

> The reason that the Seventh Amendment presumption in favor of jury trials does not apply in actions at law against the United States is that the United States is immune from suit, and the Seventh Amendment right to a jury trial, therefore, never existed with respect to a suit against the United States. Since there is no generally applicable jury trial right that attaches when the United States consents to suit, the accepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action.

Lehman, 453 U.S. at 164; see also 9 C. Wright & A. Miller, *Federal Practice & Procedure* §§ 2314, at 68–69 (1971)("there is a right to a jury trial in an action against the United States only if a statute, expressly or by fair implication, so provides").[3]

Here, plaintiff brought this action in federal court against the government pursuant to 26 U.S.C. §§6320(c) and 6330(d). Briefly stated, § 6320 provides that the IRS cannot proceed with the collection of

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[1] Plaintiff did not challenge the underlying tax liability during the administrative process and is not doing so in this action. See Doc. 13 at 2.

[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981)(en banc), the Eleventh Circuit adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

[3] Because there is no Seventh Amendment right to a jury trial in actions against the United States, the Court need not consider plaintiff's three-pronged analysis as to whether this action is a common law controversy as to which the Seventh Amendment right to jury trial applies. See Doc. 13 at 5–12.

taxes by imposing a lien on a taxpayer's property until the taxpayer has been given notice and an opportunity for administrative review. Section 6320 expressly incorporates § 6330(d) which permits the taxpayer to appeal the determination by the appeals officer to a United States District Court under certain circumstances.[4] Neither §6320 nor §6330 provide for a trial by jury. Cf. Retirement Care Assoc's, Inc. v. United States, 3 F. Supp. 2d 1434, 1445 (N.D. Ga. 1998)(concluding that plaintiffs were not entitled to jury trial on tax claims pursuant to 26 U.S.C. §7431 and §7433). Plaintiff has cited no other statutory basis for the right to a jury trial in this case. Indeed, plaintiff cites 28 U.S.C. §2402 as the only federal statute "known to provide for jury trials in civil tax disputes" and concedes that section 2402 is not applicable in this case. Doc.13 at 4.[5]

Plaintiff contends that Rule 39(c), Fed. R.Civ. P. preserves the Seventh Amendment right of jury trial in cases where the United States is the defendant. Rule 39(c) provides:

> In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

Although Rule 39(c) has been construed to permit advisory juries in cases where the United States is a defendant, the Rule does not authorize a regular jury trial under the circumstances of this case. See Hamm v. Nasatka Barriers, 166 F.R.D. 1, 2 (DC Dist. Col 1996)(holding that Rule 39(c) permits advisory juries in cases where the United States is a defendant but noting that the Rule expressly prohibits regular jury trials);[6] 9 C. Wright & A. Miller, *Federal Practice & Procedure*§§ 2335, at 214–15 (1971). Thus, at most, Rule 39(c) would permit the Court to use an advisory jury.

Because the Seventh Amendment does not apply in cases where the United States is a defendant and §§6320(c) and 6330(d) do not provide, either expressly or "by fair implication," for a trial by jury, plaintiff's demand for a jury trial should be stricken. Accordingly, it is hereby

ORDERED:

Defendant's Motion to Strike Jury Trial Demand (Doc. 10) is GRANTED. Plaintiff's Jury Trial Demand is hereby STRICKEN and this case should be scheduled as a non-jury trial.

DONE AND ORDERED at Jacksonville, Florida this 26 day of July, 2002.

TIMOTHY J. CORRIGAN

United States Magistrate Judge

a.

Copies:

Hon. Ralph W. Nimmons, Jr.

United States District Judge

Denise Seymour (CRD)

Counsel of Record

¶2002-5252

CARDINAL HEALTHCARE INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of Illinois, (DC IL) Docket No. Civil No. 01-4300-JLF, July 26, 2002. Years 1998, 1999, 2000. Decision for Taxpayer in part and for Govt. in part.

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[4] Section 6330(d) provides for judicial review in a district court of the United States "if the Tax Court does not have jurisdiction of the underlying tax liability." The government does not contend that this action was improperly filed in district court.

[5] 28 U.S.C. § 2402 provides that where a taxpayer seeks recovery under 28 U.S.C. § 1346(a)(1), either party may request that the case be tried by jury. Section 1346(a)(1) grants original jurisdiction to district courts over actions against the United States for the "recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty alleged to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." Here, plaintiff is not challenging the validity of the tax liability but rather whether the IRS met the procedural and legal requirements for filing a notice of federal tax lien; thus, §1346(a)(1) does not apply. Doc. 1 at 4–6.

[6] Plaintiff mistakenly cites Hamm in support of its contention that Rule 39(c) preserves the Seventh Amendment right of jury trial in cases where the United States is a defendant. See Doc. 13 at 5 & n.8.

1. Collection due process (CDP)—review of administrative determination—notice and opportunity for hearing before levy—abuse of discretion—failure to state claim for relief. IRS's administrative determination to proceed with collection of corp.'s payroll taxes, over which district court had review jurisdiction, was summarily affirmed, but govt.'s motion to dismiss for failure to state claim was denied since taxpayer's complaint properly requested review of administrative determination: IRS Appeals Officer didn't abuse his discretion where he complied with all laws and procedures and taxpayer had notice and opportunity to raise issues at CDP hearing. Taxpayer's arguments that Appeals Officer didn't have all necessary documents, and that determination notice didn't contain adequate facts for review or to affirm were rejected since no additional documents were needed; taxpayer had notice of IRS's rejection of its installment proposal; taxpayer failed to provide updated financial information; and IRS agent reasonably determined taxpayer could pay in full. *Reference:* United States Tax Reporter ¶63,305.01(15). IRC §6330.

In the United States District Court for the Southern District of Illinois.

Memorandum and Order

FOREMAN, District Judge:

Before the Court is defendant's motion to dismiss for failure to state a claim (Doc. 10-1). In the alternative, defendant has filed a motion for summary affirmance of a Notice of Determination of the Internal Revenue Service Appeals Office (Doc. 10-2). Plaintiff has filed a response (Doc. 15). At the request of the Court, the parties have supplemented their briefs (Docs. 18,19).

I. Background.

On July 19, 2000, the Internal Revenue Service (IRS) sent plaintiff a Notice of Intent to Levy $590,363.19 of payroll taxes for the quarters ending December 31, 1998, through March 31, 2000 (Doc. 1, Exh. A). Also in this Notice of Intent to Levy, the IRS indicated that it may also file a Notice of Federal Tax Lien (Doc. 1, Exh. A, p.3).

On August 3, 2000, plaintiff sent IRS Officer H. A. Williamson a letter outlining a proposal to pay the tax liability by installments (Doc. 1, Exh. E). On August 17, 2000, plaintiff appealed the Notice of Intent to Levy by sending another letter to Officer Williamson requesting a Collection Due Process Hearing (Doc. 1, Exh. B). With this letter, plaintiff enclosed Form 12153, which stated plaintiff's reasons for disagreeing with the Notice of Intent to Levy as follows:

> Taxpayer has made an offer to make installment payments to bring accounts current. No response to the offer has been received. See attached correspondence. Also notice of intent for tax periods other than 9/30/99 and 12/31/99 was not mailed to the taxpayer's representative.
>
> *(Doc 1, Exh. B).*

Plaintiff also stated his reasons for disagreeing with the IRS's indication that it may file a Notice of Federal Tax Lien as follows:

> Agent Williamson has advised he intends to file tax lien which will jeopardize taxpayer's ability to make payments if the installment payment offer is accepted.
>
> *(Doc 1. Exh. B).*

On September 12, 2000, IRS Appeals Officer Sallie Humble sent plaintiff a letter stating that she had received this case for consideration and that she would write or call to schedule a conference (Doc. 10, Exh. 1). On January 29, 2001, Ms. Humble sent plaintiff another letter stating that plaintiff was entitled to a hearing but that she thought the case could be best handled through correspondence. Ms. Humble's letter further stated that the purpose of the hearing is to "raise alternative collection methods, so that payment is made by the least intrusive method." Ms. Humble's letter told plaintiff that it had the following options:

1. Pay the balance in full.

2. Set up an installment agreement.
3. Request or file an offer in compromise (if certain requirements are met), or
4. Request some other alternative collection method.

(Doc. 10. Exh. 2).

Ms. Humble's letter further noted:

> Please explain in detail what method you are proposing to pay the liability. Any method must consider paying the entire liability including interest within the collection statute. If you are proposing an installment agreement, it may be necessary to submit an updated financial statement. Because Appeals is not an investigative function of the Service, it may be necessary to refer this information to Compliance for verification.
>
> Please consider the above and respond by February 13, 2001 on how you would like to resolve the issue.

(Doc. 10. Exh. 2).

On February 1, 2001, plaintiff's counsel responded to Ms. Humble as follows:

> I am in receipt of your letter dated January 29, 2001 regarding the consideration of the appeal submitted by Cardinal Healthcare. I have forwarded your letter to the appropriate officer at Cardinal Healthcare for review and reply. The purpose of this letter is to advise you that we did make an installment offer to the collections officer, Mr. Williamson, which was rejected. According to your letter, if we are proposing to make an installment payment arrangement, you may submit this proposal back to compliance for verification. However, I believe this would again end up in the hands of Mr. Williamson who previously rejected what I believe to have been a very workable payment arrangement. Therefore, if my client agrees, I would like to submit the proposal directly to your office for consideration. If this is not possible, let me know, otherwise, I expect to submit such an offer to you within the time frame set forth in your letter. Thank you for your attention to this matter.

(Doc 10, Exh. 3).

On February 7, 2001, plaintiff's counsel sent another letter:

> I spoke with the representatives of Cardinal Healthcare with respect to your letter dated January 29, 2001 ... My client desires to enter into an installment agreement with the Internal Revenue Service regarding its outstanding payroll tax liabilities. As I indicated in my prior letter, such an offer was made on August 3, 2000, to the Revenue Officer collecting on behalf of the Internal Revenue Service but the offer was rejected.
>
> Despite the rejected offer and the appeal of the collection process, Cardinal Healthcare, Inc. has made many payments to be applied to its past due payroll tax liability. In addition, I believe it has remained current on its payroll tax liabilities since September 2000. My client again proposes to pay $15,000 per month, beginning this month, to be applied toward its past due payroll tax liability until such time as the past due tax liability is satisfied. In addition to making this monthly payment on its past due liability, Cardinal Healthcare will continue to remain current on its tax liabilities for all future months and quarters. Please consider this proposal and advise us whether it is acceptable and how it will be implemented.

(Doc 10, Exh 4).

On March 7, 2001, Ms. Humble responded:

> I have reviewed your letter. The taxpayer requested Appeals consideration. Because Appeals is not an investigative function of the Service, it is necessary to refer financial statements to Compliance (Collection) for verification. The decision of whether to accept or reject the installment agreement is made by the appeals officer. The appeals officer will also consider based on the financial information whether the taxpayer should be granted an installment agreement based on past history.
>
> If the taxpayer would like to propose an installment agreement as a collection al-

ternative, an updated Form 433B should be submitted. If no proposal is submitted or the offer is unacceptable, it will be recommended that Collection proceed with enforcement action. The taxpayer should be current in filing federal tax returns.

Please respond within 15 days of the above date of this letter. Any method must consider applying the entire liability including interest within the collection statute.

If you have questions, I can be contacted at the above telephone number or address.

(Doc. 10. Exh. 5).

There is nothing in the record to suggest that plaintiff responded to this letter. There is also no indication that plaintiff sent in an updated Form 433B or that plaintiff submitted a proposal to the Appeals Officer.

On March 19, 2001, the IRS issued another Notice of Intent to Levy an additional $45,926.87 in payroll taxes for the quarter ending June 30, 2000 (Doc. 1, Exh. B). On April 18, 2001, plaintiff appealed this second Notice of Intent to Levy by sending a letter to Officer Williamson requesting a Collection Due Process Hearing. Plaintiff's letter also stated:

Please find enclosed Cardinal HealthCare's request for a collection due process hearing related to the Notice of Intent to Levy dated March 19, 2001. As you recall my client made an installment payment proposal some time ago which remains open at this time. Cardinal HealthCare is willing to pay according to its offer. In addition Cardinal HealthCare has made substantial payments on its past liabilities. On behalf of my client I respectfully ask that you reconsider its installment offer. If you believe another meeting with Mr. Hunter will be helpful we are available to meet. Finally I ask that you provide me with a transcript of Cardinal HealthCare's payroll accounts for all quarters beginning with the 4th quarter of 1998 up to and including the 2nd quarter of 2000. If you have any questions regarding this request please call me at your convenience.

(Doc 1, Exh. D).

With this letter, plaintiff enclosed Form 12153, which stated plaintiff's reasons for disagreeing with the Notice of Intent to Levy as follows:

Taxpayer has made an offer to make installment payments to bring its account current. The taxpayer has made substantial payments on its past due liabilities while awaiting a response to the installment offer. Taxpayer respectfully request reconsider [sic] the offer a copy of which is enclosed.

(Doc. 1, Exh. D).

On May 8, 2001, Ms. Humble sent another letter to plaintiff that is similar to the January 29, 2001 letter (but pertaining to the tax period ending June 30, 2000). It explained that plaintiff was entitled to a hearing and identified the four options set forth above:

1. Pay the balance in full.
2. Set up an installment agreement.
3. Request or file an offer in compromise (if certain requirements are met), or
4. Request some other alternative collection method.

(Doc. 10, Exh. 7).

This letter further stated:

If you are proposing an installment agreement, *an updated Form 433B should be submitted* . . . .

Please consider the above and respond by May 25, 2001 with your proposal.

(Doc. 10, Exh. 7) (emphasis added).

On May 25, 2001, plaintiff sent a letter to Ms. Humble requesting an extension of time (Doc. 10, Exh. 8). On July 10, 2001, plaintiff sent to Ms Humble a letter and copies of corporate tax returns for the years ended 9/30/99 and 9/30/00 (Doc. 10, Exh. 9). Plaintiff did not, however, send a proposal for installment payments nor did plaintiff send a Form 433B.

On July 11, 2001, Ms. Humble sent a letter to plaintiff that stated:

> I received the copies of the corporate tax returns. To date, you have not submitted a proposal to Appeals to resolve the liability. You have not requested a hearing to discuss collection alternatives. You indicated you are interested in an installment agreement. I have previously mailed you Form 433B, which has not been returned. Current financial information is needed. Please provide the following information:
>
> Complete Form 433-B, Collection Information Statement for Businesses; Explain your proposal in detail to resolve the liability Have you started making payments?
>
> . . . Please respond by July 23, 2001. If no response is received from you, a Determination Letter will be issued. You may then petition the U.S. Tax or District Court.

(Doc. 10, Exh. 10).

There is no indication in the record that plaintiff responded to this letter.

On November 8, 2001, the Illinois Appeals Office of the IRS issued a Notice of Determination which stated that:

> Based on all information available, the Collection enforcement action, notice of intent to levy, is the appropriate action in this case. You were contacted by the Appeals Office but did not respond to our inquiry to finalize alternative collection methods. Therefore, we recommend that the collection action be pursued.

(Doc 1, Exh. F) Attached to this Notice was a list of "Matters Considered at the Appeals Hearing." This list stated that the matters presented by the plaintiff included the fact that it had "made an offer to make installment payments to bring the account current," and that "the revenue officer determined the taxpayer could full pay and rejected the installment agreement." (Doc. 1, Exh. F).

On December 4, 2001, plaintiff filed this lawsuit seeking a *de novo* review of the Notice of Determination regarding the IRS's Notices of Intent to Levy (Doc. 1, Exh. F). Plaintiff also asks the Court to compel the IRS to accept plaintiff's payment proposal. Defendant has filed a motion to dismiss for failure to state a claim, or in the alternative, a motion for summary affirmance of the Notice of Determination. Defendant's motions are discussed below.[1]

II. Jurisdiction.

[1] Initially, the Court notes that under Title 26 U.S.C. § 6330(d)(1), judicial review of IRS determinations is with the Tax Court unless the Tax Court does not have jurisdiction, in which case jurisdiction lies in a federal district court. *26 U.S.C § 6330(d)(1).* The Tax Court does not, however, have jurisdiction over payroll tax issues, such as FICA/Social Security tax issues, withholding tax issues, or unemployment tax issues. *See Chatterji v Commissioner*, 54 T.C. 1402 (June 14, 1970); *Purdy v. Commissioner*, Nos. 5870–81, 5910–81, 1982 WL 10945 [1982 PH TC Memo ¶82,652] (Nov. 15, 1982). Accordingly, this Court has jurisdiction over plaintiff's claim for appellate review of the Notice of Determination regarding the IRS's Notice of Intent to Levy payroll taxes. *26 U.S C. § 6330(d)(1)*

III. Motion to Dismiss (Doc. 10-1).

As noted, defendant has moved to dismiss plaintiff's complaint for failure to state a claim. Specifically, defendant argues that plaintiff's complaint does not ask the court to review either: 1) the issues raised during the collection due process hearing, or 2) the grounds for the Determinations of the Appeals Officer. Defendant also notes that plaintiff's complaint fails to allege that the August 3, 2000 installment payment proposal was raised during the collection due process hearing.

The Federal Rules of Civil Procedure require notice pleading, not fact pleading *Fed.R Civ Proc. 8.* A plaintiff is required

[1] Plaintiff's complaint also appears to ask for a review of a Notice of Determination regarding a federal tax lien (Doc. 1, Exh. G). Plaintiff has indicated, however, that it is *not* seeking review of this particular Notice of Determination. *(See Doc. 19)* Defendant's position is that the complaint does not state a cause of action with respect to this Notice of Determination. Accordingly, the Court's review will be limited to the Notice of Determination that pertains to the IRS's Notice of Intent to Levy (Doc. 1, Exh. F).

only to provide a short and plain statement of the claim "that will give the defendant fair notice of the claim and the grounds upon which it rests." *Leatherman v. Tarrant County Narcotics Intelligence Unit*, 113 S. Ct. 1160 (1993) (*quoting Conley v Gibson*, 355 U.S. 41, 47 (1957) (footnote omitted)). When reviewing a motion to dismiss, the sole issue is whether relief is possible under any set of facts that could be established consistent with the allegations in the complaint. *Bartholet v. Reishauer A.G.*, 953 F.2d 1073, 1078 (7th Cir.1992) (*citing Conley*, 355 U.S. at 45–46 (1957)).

Contrary to defendant's assertions, plaintiff's complaint clearly asks for a "review of plaintiff's appeal of Defendant's Notices of Intent to Levy" and a "redetermination of the Notice of Determination issued by Defendant." (Doc. 1, p.3). In addition, plaintiff has attached the Notice of Determination to his complaint which show that the installment payment proposal was raised during the collection due process hearing. (Doc. 1, Exh. F). Accordingly, defendant's motion to dismiss for failure to state a claim (Doc. 10-1) is denied.

IV. Motion for Summary Affirmance (Doc. 10-2).

As noted, defendant has filed a motion for summary affirmance of the determinations of the Appeals Office of the Internal Revenue Service.

A. The Internal Revenue Service Restructuring and Reform Act of 1998.

By way of background, in July 1998, the Internal Revenue Service Restructuring and Reform Act of 1998 was enacted. Title 26 U.S.C. § 6331 provides that:

> (a) Authority of Secretary - If any person liable to pay any tax neglects or refuses to do so within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax ... by levy upon all property and rights to property ... belonging to such person.
>
> *26 U S.C § 6331.*

Before proceeding with the levy, however, the IRS must provide the taxpayer notice of the right to a hearing on the matter. *26 U.S.C. § 6331.* The taxpayer then has a right to request a "Collection Due Process" hearing with the IRS Office of Appeals, but must do so within 30 days of the notice. *26 U S C. § 6330(a)(3)(B).* At the hearing, the taxpayer may raise any issue relevant to the unpaid tax and the proposed levy, including challenges to the propriety of the levy and offers of collection alternatives. *26 U.S.C. § 6330(c)(2).* After the hearing, the IRS Appeals Officer must send a Notice of Determination to the taxpayer that summarizes the matters raised during the hearing and that responds to any offers or objections made by the taxpayer. If the taxpayer is dissatisfied with the administrative determination, he may seek judicial review within 30 days of the Notice being issued either in the Tax Court or the appropriate United States District Court, if the Tax Court does not have jurisdiction over the underlying tax liability. *26 U.S.C. § 6330(d)(l).* Judicial review must be limited to matters actually raised at the administrative hearing. *26 C.F.R § 301.6330-lT(f)*

B. Standard of Judicial Review.

Title 26 U.S.C. § 6330(d) provides for judicial review of the IRS's administrative determinations, however, the statute is silent with respect to the standard of review that the reviewing court must apply. A conference report accompanying the IRS Restructuring Act, however, does discuss the issue. Specifically, this conference report states that in cases where the validity of the underlying tax liability itself is properly at issue, the administrative determination will be reviewed *de novo.* Where the validity of the underlying tax liability is not properly part of the appeal, the taxpayer may challenge the determination for abuse of discretion. *HR. Conf. Rep. No 105-599, at 266 (1998), Goza v. Commission of Internal Revenue*, 114 T.C. 176, 181–182 (2000) (concluding that a court must review the IRS officer's determinations using an abuse of discretion standard when the validity of the tax liability itself is not at issue); *MRCA Information Services v. United States*, 145 F.Supp.2d 194,

199 (D.Conn. 2000) (same); *Geller v. United States*, 88 A.F.T.R.2d 6494, 2001 [88 AFTR 2d 2001-6494] WL 1346669, at 2 (S.D.Ohio Sept. 25, 2001)(same).

Here, plaintiff does not challenge the validity of the underlying tax liability, thus, the appropriate standard of review to apply is ''abuse of discretion.'' *Goza*, 114 T.C. at 181–182. In the United States Court of Appeals for the Seventh Circuit, the ''abuse of discretion'' standard means something more than a belief that the reviewing court would have acted differently if placed in the circumstance confronting the lower tribunal, rather, the decision of the lower tribunal decision must strike the reviewing court as ''fundamentally wrong.'' *Johnson v. J.B. Hunt Transport, Inc*, 280 F.3d 1125, 1131 (7th Cir. 2002); *Cooper v Eagle River Memorial Hosp., Inc.*, 270 F.3d 456, 459–60 (7th Cir. 2001).

C. Analysis.

Under 26 U.S.C § 6330(c)(3), the IRS Appeals Officer who conducts the Collection Due Process hearing must formulate his or her determination based on: (1) the verification that the requirements of any applicable law or administrative procedure have been met; (2) the issues raised by the taxpayer; and (3) the proper balance between the need for efficient tax collection and the legitimate concern that any collection action be no more intrusive than necessary. *26 U.S.C. § 6330(c)(3)*

Here, the Notice of Determination indicates that the IRS Appeals Officer complied with all of the applicable law and procedures. Specifically, the Notice of Determination reflects that the requirements regarding notice to the taxpayer, the taxpayer's opportunity to raise all relevant issues at a hearing, and the absence of any prior involvement by the appeals officer were all considered and found in compliance with 26 U.S.C. § 6330. Furthermore, the Notice of Determination reflects that the issues raised by plaintiff were duly considered. Plaintiff does not dispute that it was afforded an opportunity to raise issues or that its claims were fairly considered, *See Geller*, 2001 WL 1346669 at 4.

Plaintiff argues that the Court does not have all of the documents necessary to perform an adequate review, such as Form 433B, the Collection Information Statement for Businesses and attachments, or other financial information and tax returns. As noted, however, the Court's review is limited to determining whether the appeals officer abused her discretion and failed to meet the requirements of 26 U.S.C. § 6330(c)(3). The Court has found that the requirements of 26 U.S C. § 6330(c)(3) were met and finds that no additional documents are needed for this Court's review.

Plaintiff also argues that the Notice of Determination does not contain sufficient recitation of the facts for the Court to make a proper review. For example, plaintiff argues that the Appeals Officer stated that the revenue officer ''rejected'' plaintiff's installment proposal, but plaintiff asserts that no response to the installment proposal had been received. Plaintiff's argument is belied by the fact that as of February 1, 2001, plaintiff knew that the collections officer had rejected its installment proposal. On February 1, 2001, plaintiff wrote a letter to Ms. Humble which stated that, ''The purpose of this letter is to advise you that we did make an installment offer to the collections officer, Mr. Williamson, which was rejected.'' As another example, plaintiff argues that the Appeals Officer references her request for financial statements but fails to note that plaintiff provided a financial statement on July 26, 2000. What plaintiff fails to admit, however, is that the financial statement that plaintiff provided was to the revenue officer. Plaintiff ignores the fact that once the case was before the appeals officer, the *appeals officer* requested *updated* financial information which plaintiff failed to provide.

Finally, plaintiff argues that the Notice of Determination fails to provide a factual basis to allow the Court to summarily affirm it, and fails to take into account all of the relevant facts. For example, plaintiff states that its August 3, 2000 letter informed the IRS that the levy would force plaintiff to close its facility, require the re-

moval of all of the current residents, and cause 140 individuals to lose their jobs. It is clear, however, from a review of the Notice of Determination, that the appeals officer considered the fact that the revenue officer had determined, based on the information provided by plaintiff, that the taxpayer corporation could pay in full. The appeals officer gave plaintiff an opportunity to contest this determination by asking plaintiff to provide to the appeals officer updated financial information and an updated installment proposal. This request was reasonable, and there is no indication that plaintiff complied.

In summary, although a levy upon property may arguably be an intrusive collection tactic, the appeals officer considered the issues raised by plaintiff and balanced plaintiffs's interests and concerns against the need for efficient tax collection. The Notice of Determination states that although plaintiff made an offer to make installment payments to bring the account current, the revenue officer determined that the taxpayer could pay in full and rejected the installment agreement. The Notice of Determination further states that plaintiff was afforded an second opportunity to present another installment proposal but failed to send in the documents that were required to enable the appeals officer to evaluate the proposal. The Court finds that the decision of the IRS Appeals Officer is reasonable and is not fundamentally wrong. There is no evidence of error by the appeals officer, nor any specific allegation by plaintiff, that would support a finding of abuse of discretion. Accordingly, defendant's motion for summary affirmance (Doc. 10-2) is granted. The Notice of Determination of the IRS Appeals Officer regarding the IRS's Notice of Intent to Levy (Doc. 1, Exh. F) is AFFIRMED.

V. Summary.

Based on the foregoing, defendant's motion to dismiss for failure to state a claim (Doc. 10-1) is DENIED. Defendant's motion for summary affirmance (Doc. 10-2) is GRANTED. The November 8, 2001 Notice of Determination of the IRS Appeals Officer regarding the IRS's Notice of Intent to Levy (Doc. 1, Exh. F) is AFFIRMED. This action is DISMISSED with prejudice. A separate Judgment shall accompany this Memorandum and Order.

IT IS SO ORDERED.

DATED: 7/15/02

/s/

DISTRICT JUDGE

JUDGMENT

In accordance with the Memorandum and Order entered this day, defendant's motion for summary affirmance is granted. The November 8, 2001 Notice of Determination of the IRS Appeals Officer regarding the IRS's Notice of Intent to Levy (Doc. 1, Exh. F) is affirmed. This action is dismissed with prejudice. Judgment is entered in favor of the defendant and against plaintiff. Each party to bear its own costs.

NORBERT G. JAWORSKI, CLERK OF COURT

By: /s/

Deputy Clerk

7-25-02

Date

Approved: /s/

Judge

EOD: 7-26-02

¶2002-5253

Linda CARTER, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Western Dist. of Tennessee, (DC TN) Docket No. 01-2304 G/A, July 26, 2002. District Court, (2002, DC TN) 89 AFTR 2d 2002-3010, 2002-2 USTC ¶50493, amended. Years 1992, 1993. Decision against Govt.

1. Wrongful levy—lien priority—judgment lien creditor—return of seized property—amount allowed—damages—exhaustion of administrative remedies. District court order granting in part and denying in part taxpayer's motion for summary judgment was amended to read 26 USC §6323 instead of 28 USC §6323.

Reference: United States Tax Reporter ¶74,265.01(7); 63,235.09(5); 74,265.01(50); 74,335.01(5). IRC §6323; 7426; 7433.

In the United States District Court for the Western District of Tennessee, Western Division.

Amendment to Order Granting in Part and Denying in Part Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment

GIBBONS, District Judge:

[1] On May 22, 2002, the court entered an order in this action granting in part and denying in part plaintiff's motion for summary judgment. In the seventh paragraph, that order states: "Second, Carter claims that she qualifies as a judgment lien creditor pursuant to 28 U.S.C. 6323, making her interests in Account No. 68901 superior to the government's lien." That sentence is now changed to: "Second, Carter claims that she qualifies as a judgment lien creditor pursuant to 26 U.S.C. 6323, making her interests in Account No. 68901 superior to the government's lien."

IT IS SO ORDERED.

JULIA SMITH GIBBONS

UNITED STATES DISTRICT JUDGE

July 26, 2002

DATE

¶2002-5254

Alan E. CECH, Trustee for Shannopin Mining Company PLAINTIFF(S) v. CRESCENT HILLS COAL COMPANY DEFENDANT(S). In Re: Shannopin Mining Company Debtor(s). U.S. Bankruptcy Court, Western Dist. of Penn-sylvania, (Bktcy Ct PA) Docket No. 96-2185, Aug. 2, 2002. Decision for Govt. in part.

1. Bankruptcy court procedure—bankruptcy estate property—settlements—notice to creditors. Bankruptcy court judge recommended that special trustee be ordered to provide all creditors notice of proposed/revised settlement between IRS, state tax authority and 3d party with respect to disgorgement and re-distribution of portion of "Black Lung" fund that Chap. 7 trustee had earlier improperly ceded to 3d party without notice to IRS or other creditors. Although cost and complexity of recouping and redistributing fund would further delay bankruptcy estate administration and could confuse creditors who wouldn't share in distribution, bankruptcy rules and procedures required proper notice to *all* creditors of proposed use of bankruptcy estate property. Judge also recommended that provision be made for objections to be filed to settlement's continued failure to provide for certain fees and other items and for her to review such. *Reference:* United States Tax Reporter ¶68,726.52(48); 68,726.52(3).

2. Tax claims in bankruptcy—improper service and notice—IRS objection—motion for relief from orders—fraud; misrepresentation; mistake—jurisdiction. Bankruptcy judge recommended that IRS's amended motion for relief from district court order, which had withdrawn reference of bankruptcy case and approved earlier settlement between Chap. 7 trustee and certain creditor, be allowed to go forward: although IRS didn't sufficiently allege that Chap. 7 trustee's and 3d party's use of improper court filings to effect distribution of bankruptcy estate property without notifying IRS or other creditors was fraudulent, it did adequately allege misrepresentation. Also, 3d party's and Chap. 7 trustee's requests to strike or for more definite statement were rejected; and limitations periods and standing arguments were meritless. *Reference:* United States Tax Reporter ¶68,726.52(30); 68,726.52(7); 68,726.52(5).

Joseph S. Sisca, Stephen I. Goldring, Office of the United States Trustee

Robert Edmundson, Office of Attorney General, for the Pennsylvania Department of Revenue

Stuart D. Gibson, for USA, Internal Revenue Service

Robert O Lampl, and John Lacher, Counsel for Crescent Hills Coal Company
Peter V. Marcoline, Jr., Counsel for Alan Cech
Alan E. Cech, Chapter 7 Trustee and Counsel for Chapter 7 Trustee
Robert G. Sable, David Lampl, Counsel for Committee of Unsecured Creditors
Michael J. Yurcheshen, Counsel for Debtor
Marilyn Baker, for 1992 UMWA Benefit Plan
Eric A. Schaffer, Counsel for LTV Steel
Martin E. Bertocchi, Counsel for Republic Insurance Company
Claudia Davidson, Counsel for the Collective Bargaining Unit of Employees and Retirees of Shannopin Mining Co.
Ralph Finizio, Counsel for UMWA Combined Benefit Fund
James R. Walsh, Special Trustee

In the United States District Court for the Western District of Pennsylvania.

Report and Recommendation[1]

Judith K. Fitzgerald United States Bankruptcy Judge

''NOT FOR PUBLICATION''

Chapter 7

Second Amended Motion of Special Trustee to Approve Notice of Settlement and to Determine the Parties Entitled to Notice Thereof, as Well as For Determination that the Notice and Motion Adequately Inform Parties in Interest of the Substance of the Proposed Settlement

IRS's Amended Motion for Relief from Orders

Crescent Hills Coal Company's Motion to Dismiss the Internal Revenue Service's Amended Motion for Relief from Orders Pursuant to Bankruptcy Rule 7012; Motion to Strike Pursuant to F.R.C.P. 12(f) Which is Adopted by Bankruptcy Rule 7012 and Pursuant to Bankruptcy Rule 9018; and Motion for More Definite Statement Pursuant to F.R.C.P. 12(e) Which is Adopted by Bankruptcy Rule 7012

Trustee's Motion to Strike and Motion for More Definite Statement

I. Matters Before the Court

Various matters are before the court: (1) the IRS's Amended Motion for Relief from Orders (''IRS's Amended Motion''); (2) Crescent Hills Coal Company's (''Crescent'') ''Motion to Dismiss the Internal Revenue Service's Amended Motion for Relief from Orders Pursuant to Bankruptcy Rule 7012[2] ; Motion to Strike Pursuant to F.R.C.P. 12(f)[3] Which is Adopted by Bankruptcy Rule 7012 and Pursuant to Bankruptcy Rule 9018[4] ; and Motion for More Definite Statement Pursuant to F.R.C.P. 12(e)[5] Which is Adopted by Bankruptcy Rule 7012' ('Crescent's Motion to Dismiss'); (3) the Chapter 7 Trustee's 'Motion to Strike Pursuant to Federal Rule of Civil Procedure 12(f) Which is Adopted by Bankruptcy Rule 7012 and Pursuant to Bankruptcy Rule 9018; and Motion for More Definite Statement Pursu-

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1 The Court's jurisdiction was not at issue. This Memorandum Opinion constitutes our findings of fact, conclusions of law, and recommendations to the District Court.

2 Fed.R.Bankr. P. 7012 is entitled 'Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on Pleadings' and provides, *inter alia*, that Fed.R.Civ.P. 12(b) through 12(h) apply in adversary proceedings. Fed.R.Civ.P. 12(b) requires assertion of failure to state a claim upon which relief can be granted in a responsive pleading; 12(e) speaks to motions for definite statement; 12(f) pertains to motions to strike.

3 Fed.R.Civ.P. 12(f) provides:

Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

4 Fed.R.Bankr.P. 9018 provides:

SECRET, CONFIDENTIAL, SCANDALOUS, OR DEFAMATORY MATTER. On motion or on its own initiative, with or without notice, the court may make any order which justice requires (1) to protect the estate or any entity in respect of a trade secret or other confidential research, development, or commercial information, (2) to protect any entity against scandalous or defamatory matter contained in any paper filed in a case under the Code, or (3) to protect governmental matters that are made confidential by statute or regulation. If an order is entered under this rule without notice, any entity affected thereby may move to vacate or modify the order, and after a hearing on notice the court shall determine the motion.

5 Fed.R.Civ.P. 12(e) provides:

Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

ant to Federal Rule of Civil Procedure 12(e) Which is Adopted by Bankruptcy Rule 7012.' Both Crescent's and the Chapter 7 Trustee's motions raise similar concerns ('Chapter 7 Trustee's Motion to Strike'); and (4) The 'Second Amended Motion of Special Trustee to Approve Notice of Settlement and to Determine the Parties Entitled to Notice Thereof, as well as for Determination that the Notice and Motion Adequately Informs Parties in Interest of the Substance of the Proposed Settlement' ('Special Trustee's Second Amended Motion'). I will address the IRS's and Special Trustee's motions and will include an analysis of the other pending motions to afford the District Court the opportunity to fully assess my recommendations.[6]

II. History

Debtor filed for Chapter 11 relief in 1991. There are two Black Lung Funds involved in this case: the Shannopin Black Lung Fund and the Crescent Black Lung Fund. In November of 1994, Debtor proposed to pay the secured claim of Mellon Bank, N.A. Mellon was secured in the Shannopin Black Lung Fund. See Bankruptcy Court Memorandum Opinion of August 30, 1994, at 3. At a hearing concerning Debtor's proposal, Crescent appeared in the case for the first time and asserted ownership of some of the black lung funds that are at the center of this controversy. Crescent was not listed as a creditor on the bankruptcy schedules and has never filed a proof of claim, a proof of interest, or otherwise initiated an action to establish an interest in the Crescent Black Lung Fund.[7]

Debtor and Crescent disputed which one of them owned the Crescent Fund. Prepetition, Debtor and Crescent were related entities, according to the Adversary Complaint,[8] and various administrative and field activities of the businesses were combined. They maintained separate insurance funds (the Shannopin Black Lung Fund and the Crescent Black Lung Fund), each in its own name, to pay black lung liability and traumatic injury claims made against them by their respective employees.

Before June 30, 1986, Debtor owned certain shares of Crescent's stock. On or about June 30, 1986, Debtor entered into an agreement to sell its shares in Crescent to Atlas Alloys Company, Inc. In order to do so, Debtor and Crescent had to apportion the assets and liabilities of each company between themselves. See Bankruptcy Court Memorandum Opinion of November 8, 1996, at 2.

In the June 30, 1986, Assumption and Release Agreement, Debtor and Crescent agreed to the apportionment of assets and liabilities. The agreement provided that

- Debtor would assume all assets and liabilities of Crescent under the International Business and Mercantile Reinsurance Company Workers' Compensation Traumatic Retrospective Program and Black Lung Escrow Program as of June 30, 1986 [i.e., the Crescent Fund];
- Crescent would assign to Debtor all of its right, title and interest in and to
- certain machinery and equipment
- Canon Coal Company;
- Crescent and Debtor and their officers, directors, etc. would release each other from all claims, causes of action, etc., including all intercompany liabilities;
- Neither waived rights with respect to "future actions or omissions, including actions or omissions relating to the terms of this Assumption and Release Agreement."

See Exhibit A to Complaint. At the time of the 1986 Agreement, Debtor and Crescent believed that the "Crescent Fund" had a negative value of over $500,000.00 See

[6] I have not been asked to address the professional responsibility and ethics issues that this case presents. These are considerations more appropriate for the District Court inasmuch as the actions described in the following text and footnotes were undertaken before the District Court.

[7] Crescent filed a counterclaim in the declaratory judgment adversary brought by the Chapter 7 Trustee but a counterclaim is not a proof of claim, at least where there has been no showing of excusable neglect. See In re Trans World Airlines, Inc., 96 F.3d 687 (3d Cir. 1996).

[8] The Special Trustee's Amended Motion states that from 1983 through the relevant part of 1986 the Debtor owned 86 percent of Crescent's stock.

Special Trustee's Amended Motion at 5, ¶11(v), (x). After the 1986 agreement was executed, Old Republic Insurance Company (''ORIC''), which managed the Funds, continued to maintain two accounts, although it treated all the money as Debtor's pursuant to instructions Old Republic had received. See Report of The Old Republic Insurance Company Quarter Ending March 31, 1998.

III. The 1994 Settlement Agreement

A. Terms

In 1994, after the case was converted from chapter 11 to chapter 7,[9] the Chapter 7 Trustee and Crescent proposed to the Bankruptcy Court a settlement of their verbal dispute. The 1994 proposed settlement provided, inter alia, that the $2 million then held by ORIC and available for immediate distribution would be distributed as follows:

- $1,566,343.70 to Mellon Bank in full satisfaction of its secured claim
- $200,000.00 to Debtor
- the balance to Crescent
- Chapter 7 Trustee would assign to Crescent all of Debtor's right, title, and interest in the Shannopin Black Lung Fund
- any excess escrow from either fund would not be estate property.

The Chapter 7 Trustee's 1994 motion to settle set forth his opinion that money may have been ''erroneously transferred'' from the Crescent Black Lung Fund to the Shannopin Black Lung Fund. In the Chapter 7 Trustee's opinion at that time, Crescent's ''claim'' was ''well founded'' and the trustee asked the Bankruptcy Court to approve the settlement to avoid expensive litigation. ORIC at that time held in excess of $2,009,586 plus interest from April 8, 1994. The 1994 settlement agreement stated that Crescent had asserted a claim against the Debtor and ORIC. However, Crescent has never filed a proof of claim, a proof of interest, or instituted an action to assert its interest and certainly had not done so at the time the 1994 settlement was proposed.

B. The Bankruptcy Court's Memorandum Order of August 30, 1994

The 1994 motion to settle was scheduled for hearing. Objections were filed by the creditors' committee, LTV Steel Company, the UMWA 1992 Benefit Plan, UMWA District 4, and Debtor's salaried employees. LTV objected to the 1994 settlement on the ground that the 1986 agreement transferred all interest in the Crescent Black Lung Fund to the Debtor. A Memorandum Order was signed on August 30, 1994, Main Case Dkt. #623. In that Order the Court noted that

(1) no motion or adversary proceeding was pending and therefore the Court could not ascertain what cause of action or proof the trustee would present concerning the settlement;

(2) in order to approve a settlement the Court must evaluate certain factors: the probability of success in litigation, the complexity of litigation, the cost and expense, inconvenience, and delays involved in collection, and the interest of creditors, which is paramount;

(3) the trustee appeared to be relying on the 1986 agreement which transferred shares of Crescent stock from Debtor to Atlas Alloys Company, Inc., while Debtor assumed all assets and liabilities related to its and Crescent's Black Lung Funds. At the time of the 1986 agreement, however, it was expected that liabilities would increase. Surplus funds were not expected. In fact, the reverse occurred and Crescent claimed the surplus for itself. (ORIC continued to maintain two funds, one in Crescent's name and the other in Debtor's.)[10]

The Court found itself without sufficient information to make a decision on the motion to settle. The Court therefore ordered the Chapter 7 Trustee, or a creditor with Court permission, to file a complaint pleading ''with particularity in the nature

[9] The case was converted on August 19, 1992.

[10] I note that the 1986 agreement also contained mutual releases with respect to all claims, causes of action, etc., including those for intercompany liabilities. Thus, from the face of the document, the Chapter 7 Trustee had defenses to assert to any suit brought by Crescent.

of a pretrial statement the proof it would present to try this case.'' Memorandum Order of August 30, 1994, at 3 (emphasis in original). The Court also scheduled a hearing on the settlement for November of 1994. The adversary was filed in the Bankruptcy Court on September 30, 1994, at Adversary No. 94-2349.

IV. The Adversary Action

A. Background

Adversary proceedings are lawsuits separate from the main bankruptcy case. This adversary proceeding was filed by the Chapter 7 Trustee against Crescent seeking a declaratory judgment that money held in the Crescent Black Lung Fund was part of Debtor's estate. This was only a two party action seeking a determination of ownership of the Crescent Black Lung Fund. The suit did not involve the Shannopin Black Lung Fund. It did not name any creditors as parties, although all creditors ultimately were affected. The assertion that the funds were property of the estate was diametrically opposed to the Chapter 7 Trustee's initial position (asserted in the 1994 motion to settle) that Crescent's claim to ownership of the Crescent Fund was ''well founded.'' Instead, he sought a declaratory judgment that the Crescent Black Lung Fund belonged to the estate.[11] With the Complaint of record, the Chapter 7 Trustee continued to pursue the settlement.

B. The Bankruptcy Court's Memorandum Order of December 13, 1994

In a Memorandum Order dated December 13, 1994, Adv. Dkt. #5, confirming an order entered on the record at the November hearing, the Bankruptcy Court again denied approval of the settlement. Before the November hearing, objections had been filed by the creditors' committee, LTV Steel Company, the UMWA 1992 Benefit Plan, UMWA District 4, and Debtor's salaried employees. The Bankruptcy Court again examined the factors[12] attendant to the decision of whether to approve a settlement and again found itself unable to evaluate the probability of success or the difficulty of litigation. In the Memorandum Order of December 13, 1994, at 3–4, Adv. Dkt. #5, Main Case Dkt. #632, the Court noted that

> [d]espite repeated questioning by the Court, allowing for numerous opportunities to respond, [Crescent] chose not to represent its facts which would create a reasonable dispute as to the entitlement of these excess funds. Rather, the claimant raised issues concerning jurisdiction of this Court and potential jury trial. These are interesting issues, however, they are neither helpful nor relevant to the Court in assessing the likelihood of success which it is required to do in ruling on a settlement.

Id. at 3–4. The Court found that collection was not a problem because ORIC had the funds; that the issue of ownership was not complex; and, therefore, that litigation would not be complex.

Finally, the Court noted that the ''paramount interest of creditors weighs heavily in favor of denial of this settlement,'' id. at 4, focusing on the fact that several creditors had objected to the settlement based primarily on the 1986 Assumption and Release Agreement between Debtor and Crescent which did not support Crescent's claim of entitlement to the funds. Under that 1986 agreement it was clear to the Bankruptcy Court that Debtor had agreed to assume all of Crescent's assets and liabilities and Crescent would have no claim to any of the funds.[13] The Court concluded that Crescent and the Chapter 7 Trustee had failed to show that the settlement was in the creditors' best interests and the Court could not assess the merits. The Court therefore refused to approve the settlement and ordered that a new sum-

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[11] No allegation was made concerning the Shannopin Black Lung Fund and no adjudication was sought as to it, although the Chapter 7 Trustee signed the Joint Motion to approve the 1997 settlement which provided that the Debtor would ''waive, transfer, and or assign'' to Crescent its interest in the Shannopin Black Lung Fund as well. Joint Motion to Approve Settlement at 5, ¶20, Civil Action No. 96-2185, Dkt. No. 8.

[12] The court cited In re Grant Broadcasting of Philadelphia Inc., 71 B.R. 390, 395 (Bankr. E.D.Pa. 1987). See also In re Martin, 91 F.3d 389, 393 (3d Cir. 1996).

[13] See Sanford Investment Co., In. v. Ahlstrom Machinery Holdings, Inc., 198 F.3d 415, 421 (3d Cir. 1999) (court determines intent of parties ''as they objectively manifest it'' and, when the language of a contract is unambiguous, ''the intent is to be discovered only from the express language of the agreement'').

mons be issued to the trustee which included a date by which Crescent was required to file an answer to the complaint.

Thereafter, a summons was issued, and an answer, "new matter" and counterclaim were filed on February 9, 1995, on behalf of Crescent. On February 9, 1995, the same day Crescent filed its answer to the complaint, Crescent also filed a motion to withdraw the reference which was denied by the District Court by order entered August 1, 1995.[14] In the interim, cross-motions for partial summary judgment were filed by Crescent and the Chapter 7 Trustee.

C. The Bankruptcy Court's Memorandum Order of July 24, 1995, and Events Leading Thereto

In its response to the Chapter 7 Trustee's motion for summary judgment, Crescent included affidavits of Richard Esposto and James Gross (neither of whom signed the Assumption and Release Agreement) which stated that they had personal knowledge that the parties to the agreement intended that the Debtor would assume any liabilities of the Crescent Black Lung Fund which accrued before June 30, 1986, but that any assets or liabilities accruing thereafter would belong to Crescent.

The Bankruptcy Court scheduled an argument for June 12, 1995, which was not held due to the illness of Crescent's counsel. On June 21, 1995, the Court issued a pretrial order which noted that the affidavits did not negate the plain language of the Assumption and Release Agreement. Crescent was given the opportunity to supplement its response to the Chapter 7 Trustee's motion for summary judgment and the parties were ordered to file pretrial statements. The pretrial statements were required to include, inter alia, facts the parties intended to prove at trial, a list of witnesses and a summary of their trial testimony, and exhibits. The hearing was rescheduled for July 10, 1995. Instead, Crescent filed, on June 28, 1995, a motion for clarification and reconsideration of the pretrial order and asked for a continuance. The Chapter 7 Trustee filed his pretrial statement and also filed objections to Esposto's and Gross's affidavits on the ground that each failed to set forth facts to support a finding that either had firsthand knowledge of the transaction by which Crescent laid claim to Crescent's Black Lung Fund. See Memorandum Order of July 24, 1995.

The Bankruptcy Court viewed Crescent's motion for clarification and reconsideration as inadequate to defeat the Chapter 7 Trustee's motion for summary judgment. The Court rejected Crescent's argument that the Court had shifted the burden of proof and reiterated that Crescent failed to show that a disputed issue of material fact existed in light of the evidence presented by the Chapter 7 Trustee in his motion for summary judgment. The Bankruptcy Court held that the plain language of the 1986 Assumption and Release Agreement supported the Chapter 7 Trustee's position and that Crescent had not made "a showing sufficient to establish the existence of a disputed fact . . . pursuant to Rule 56 after the trustee made his showing in his motion for summary judgment. The burden of making that showing remains on Crescent." Memorandum Opinion and Order of July 24, 1995, at 6. In the Court's view, Crescent had, without more, simply denied the Chapter 7 Trustee's allegations, and the affidavits of Esposto and Gross, who were not parties to the Assumption and Release Agreement, did not carry the day for Crescent.

The Bankruptcy Court then ordered Crescent to notify it within ten days whether it would file a pretrial statement in accordance with the Court's earlier order. See Memorandum Order of July 24, 1995. As noted earlier, on August 1, 1995, the District Court denied the first (pre-appeal) motion to withdraw the reference filed by Crescent. Civil Action No. 95201 at Dkt. #8. Two days later, on August 3, 1995, in

[14] The Bankruptcy Court's Memorandum Order of July 24, 1995, says that the motion to withdraw the reference was filed in the District Court but the District Court docket at Civil Action No. 95-201 states that it received original documents, including Crescent's motion to withdraw the reference, from the Bankruptcy Court. The Bankruptcy Court docket establishes that the February 1995 motion to withdraw the reference was properly filed in the Bankruptcy Court, see, e.g., Adv. Dkt. #9, #11, and delivered by the Bankruptcy Clerk's Office to the District Court Clerk's Office, as is contemplated by Fed. R. Bankr. P. 5011.

the Bankruptcy Court, Crescent filed a "Submission in Compliance with Memorandum Order of Court dated 7/24/95" (Adv. Dkt. #36). On September 5, 1995, Crescent filed a pretrial statement.

D. Bankruptcy Court Memorandum Opinion and Order of November 8, 1996

In its November 8, 1996, Memorandum Opinion and Order the Court granted the Chapter 7 Trustee's motion for summary judgment and held that the Crescent Black Lung Fund was property of Debtor's estate, finding that the language of the 1986 agreement was unambiguous. The Court also found that even if it were to consider extrinsic evidence, the affidavits proffered by Crescent in support of its position were insufficient to establish an ambiguity in the 1986 agreement. Crescent appealed. At that point, the procedural posture of this case served to deny all creditors and parties in interest an opportunity to participate in the estate.

V. The Appeal, Civil Action No. 96-2185

A. Summary

The Chapter 7 Trustee, with an order in hand that determined the dispute in his favor, did not prosecute the appeal to conclusion. Rather, the Chapter 7 Trustee, in a procedurally improper fashion, moved to withdraw the reference of the entire bankruptcy case by filing a motion to do so in the District Court in the Adversary action then on appeal. The motion to withdraw the reference was not filed with the Bankruptcy Clerk and was served only on counsel for Crescent and not on any creditors in the case. Crescent and the Chapter 7 Trustee then filed a motion in the District Court, allegedly to settle the dispute, but in reality reversing the Bankruptcy Court's 1994 decision by agreement and disbursing funds to selected creditors on terms that were (a) different from the terms originally brought before the Bankruptcy Court in 1994 and (b) not in compliance with the distribution and notice provisions of Chapter 7 of the Bankruptcy Code. See Fed.R.Bankr.P. 2002(a)(3) (notice of hearing on settlement must go to all creditors); Fed.R.Bankr.P. 9019(a) ("On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the Court may direct") (emphasis added).[15]

Using (1) the procedure of withdrawal of the reference of the entire bankruptcy within an appeal of a separate lawsuit pending in the bankruptcy case and (2) the proposal of a different settlement than was presented to the Bankruptcy Court, this two-party declaratory judgment action seeking a ruling that a disputed asset belonged to the estate was converted from an appellate matter concerning ownership of funds to a bankruptcy level matter involving distribution of the primary assets of the estate. This was done

(1) without notice to creditors and parties in interest who should have had notice;

(2) without creditors and parties in interest ever being joined; and

(3) without adherence to the Bankruptcy Code and Rules. The end result was a distribution which, in method and substance, violated Bankruptcy Code and Rules. That is, the bankruptcy process involves, inter alia, creditors filing claims to which the trustee objects or not, as appropriate, and professionals filing fee applications subject to objections by the U.S. Trustee and parties in interest, followed by Bankruptcy Court review, whether or not objections are filed. See In re Busy Beaver, 19 F.3d 833, 841 (3d Cir. 1994). Only after claims are allowed and fees are approved are distributions permitted, and then only after the trustee secures the approval of the U.S. Trustee to file a report and proposed distribution, both of which also are noticed to creditors and approved by the court.

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[15] Rule 9019(a) permits the court to approve a compromise or settlement upon notice to creditors and other entities as provided in Rule 2002. Rule 9019(b) permits the court, after "a hearing on such notice as the court may direct", to fix a class of controversies and authorize the trustee to settle without further notice or hearing. Rule 2002(a)(3) requires notice to all creditors, and others, of the hearing on approval of a settlement. Section 704(1) of the Bankruptcy Code requires the trustee to collect and reduce to money estate property. Section 726 details how property is to be distributed.

B. Motion to Withdraw the Reference

On February 2, 1997, during the course of the appeal, the Chapter 7 Trustee filed a motion to withdraw the reference, which was granted. The motion to withdraw the reference was procedurally defective in that it was (1) filed erroneously in the District Court, (2) with notice only to counsel for Crescent rather than to all creditors as required by the bankruptcy laws, and (3) without being transmitted to or docketed in the Bankruptcy Court. The procedural irregularities of the motion to withdraw the reference are numerous.

1. Filing and Notice of the Motion to Withdraw the Reference

First, the motion sought to withdraw the reference of the entire bankruptcy case. Second, the motion with respect to the bankruptcy case was filed in the adversary, which was before the District Court through its appellate jurisdiction. Third, it was filed in a separate lawsuit that involved only two parties. The Chapter 7 Trustee and an entity, Crescent, that was not even identified by the Debtor as a creditor or as an owner of property held by or on behalf of the Debtor, were the only two parties. Fourth, the subject matter of the adversary sought only a declaratory judgment as to ownership of one asset and nothing more. Fifth, the motion was filed in the District Court rather than in the Bankruptcy Court. See Fed.R.Bankr.P. 5011 and Committee Notes thereto.[16] Sixth, the improperly filed motion was never transmitted to the Clerk of the Bankruptcy Court nor was the Bankruptcy Court notified of the motion. Fed.R.Bankr.P. 5005(c).[17] As a result,

(1) nothing appeared on the Bankruptcy Court's docket to alert creditors that action was being taken by the Chapter 7 Trustee in the District Court that would substantively affect their rights or property of the estate;

(2) creditors would have no reason to check the District Court docket because the Bankruptcy Court docket reflected only that a two-party declaratory judgment action was on appeal. Thus, creditors had every reason to expect notice of proceedings affecting estate assets and distribution thereof occurring after the appeal was decided. This did not occur; and

(3) the only party in interest served, according to the certificate of service attached to the motion to withdraw the reference, was counsel for Crescent, and Crescent is not a creditor of the estate.

Bankruptcy Rule 5005 (Filing and Transmittal of Papers) and Bankruptcy Rule 5011 (Withdrawal and Abstention from Hearing a Proceeding) serve an important function in requiring the filing of the motion to withdraw the reference in the Bankruptcy Court in the first instance, or transmittal to the Bankruptcy Court if filed in the wrong court. That function is one of notice and, therefore, due process. Filing in the Bankruptcy Court (or transmittal to it if erroneously filed elsewhere) results in the motion being docketed in the Bankruptcy Court and alerts the debtor, trustee, creditors and the bankruptcy judge assigned to the case of the scope of the requested withdrawal.[18] It provides notice to creditors that proceedings that may affect them are taking place in a different forum and that the docket of that other forum should be monitored.[19] In the instant case,

16 In its motion to dismiss the IRS's amended motion, Crescent states that "[o]ne can also respond that since such a motion is specifically required to be heard by a District Court Judge pursuant to Rule 5011, the filing of the motion in District Court was not an error at all despite the provisions in the Notes following the Rule." Motion to Dismiss at 29, ¶87. (Emphasis in original.) Crescent advances this disingenuous argument despite the fact that its counsel filed the first motion to withdraw the reference properly in the Bankruptcy Court. Furthermore, Fed.R.Bankr.P. 5005(a) provides that all motions to withdraw the reference shall be filed "with the clerk." "Clerk" is defined in Fed.R.Bankr.P. 9001(3) as "bankruptcy clerk." Crescent's argument is devoid of merit.

17 The District Court Clerk's failure to transmit the motion to the Bankruptcy Court for docketing is not surprising. It would be difficult to recognize the need to do so, given the procedural quagmire created by this filing when the District Court already had appellate jurisdiction over the Adversary in which the motion to withdraw the reference was filed.

18 Sometimes parties seek to withdraw the reference only as to a particular motion or event in a case, sometimes with respect to the entire case or to an adversary proceeding filed within the case. When the reference to the entire case, as opposed to a discreet proceeding, is withdrawn, the Bankruptcy Court no longer has jurisdiction to act. If the bankruptcy judge is not aware that the motion to withdraw the reference is pending or that the reference has been withdrawn it is quite possible that the Bankruptcy Court and the District Court will rule on the same issue. The problems with such a turn of events are obvious.

19 Upon withdrawal of the reference, the District Court began acting as an appellate and a trial court in the same matter. See discussion infra.

neither the Bankruptcy Court nor the creditors were aware that the reference of the entire case had been withdrawn because the motion was not filed in or transmitted to the Bankruptcy Court and the order granting the motion was not transmitted to the Bankruptcy Court. Neither the Bankruptcy Court nor the creditor had notice that the Bankruptcy Court's jurisdiction had been withdrawn. Consequently, the creditors were not on notice to transfer their attention to the District Court docket in order to determine what was happening to estate assets against which they had claims. The Bankruptcy Court was awaiting the decision on the appeal of the declaratory judgment entered in favor of the Chapter 7 Trustee and had no inkling that the Chapter 7 Trustee was negotiating to give away not just that asset, but another asset as well (i.e., the Shannopin Fund).

The Chapter 7 Trustee and Crescent's counsel are experienced in bankruptcy matters and are charged with knowledge of the law, in this instance the requirement under Fed.R.Bankr.P. 5011 that the motion for withdrawal of the reference must be filed in the Bankruptcy Court. It is abundantly evident from the record that counsel for Crescent knew the correct procedure because in February of 1995 he filed a motion for withdrawal of the reference of the adversary proceeding only in the Bankruptcy Court. See Adv. Dkt. #9 (the motion), #35 (the order of the District court denying the motion). Counsel for Crescent is an officer of the Court with the duty of candor toward the Court. Pa.R.Prof.Conduct 3.3, 42 Pa.Cons.Stat.Ann. Thus, when the Chapter 7 Trustee filed his motion to withdraw the reference in the District Court it was incumbent upon counsel for Crescent to bring the error to the District Court's (or the District Court Clerk's) attention. Nonetheless, the Chapter 7 Trustee, who also is an officer of the Court and a fiduciary of the bankruptcy estate, should have known the requirements of Fed.R.Bankr.P. 5011. He, too, knew of the record of this case and Crescent's earlier motion to withdraw the reference, yet he proceeded in derogation of the Bankruptcy Rules.

It is the IRS's position that the procedures employed by the Chapter 7 Trustee in moving to withdraw the reference of the bankruptcy case in the course of the appeal in the adversary and by the Chapter 7 Trustee and Crescent in obtaining approval of the settlement agreement, as well as the terms of the settlement agreement, violated the Bankruptcy Code and Rules. The IRS also alleges that facts recited in its Amended Motion "tend to support the conclusion that the Trustee, acting in concert with ... Crescent Hills, acted in a way which defrauded the Court and creditors." Amended Motion at ¶13. However, the IRS also stated that it did "not possess enough information to determine whether the Trustee filed his Motion to Withdraw in the wrong Court by mistake, or with the intent to defraud the Court and creditors. Similarly, the United States cannot draw any conclusion about the motives of the Trustee and ... Crescent Hills in filing the Joint Motion for Approval of Settlement." Id.[20]

Crescent makes much of that provision of Rule 5005 providing for transmittal to the correct court of papers filed in the wrong court. In this case, it is easy to see how the District Court Clerk would not identify the motion to withdraw the reference as a matter subject to Fed.R.Bankr.P. 5005 inasmuch as the motion was filed in a matter on appeal. The District Court already had jurisdiction over the appeal and the motion to withdraw the reference was filed at the appeal as if it were a motion within the appeal itself. Nonetheless, Rule 5005 does not discharge counsel and the trustee from their obligations to determine and adhere to proper procedure.

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20 "Fraud on the court" is defined as

> A scheme to interfere with judicial machinery performing task of impartial adjudication, as by preventing opposing party from fairly presenting his case or defense. Finding of fraud on the court is justified only by most egregious misconduct directed to the court itself such as ... fabrication of evidence by counsel and must be supported by clear, unequivocal and convincing evidence .... It consists of conduct so egregious that it undermines the integrity of the judicial process.

Black's Law Dictionary 661 (6th ed. 1990). "Fraud on the court" is distinguished from other misconduct to which Rule 60(b) applies. See discussion of Rule 60(b) infra.

2. Deficiencies in the Substance of the Motion for Withdrawal of the Reference

a. Asserted Justifications for Withdrawing the Reference

(i). Too Much Litigation

In the motion to withdraw the reference itself the Chapter 7 Trustee asserted that

> because the claim of the [UMWA] Combined Fund involves the interrelation of the bankruptcy code with various federal statutes relating to mine workers, pension benefits, etc., affecting interstate commerce, it is entirely likely that such litigation would have to take place in the District Court.

Motion for Withdrawal of the Reference, Civil Action No. 96-2185 at 3, ¶11, Dkt. #5. But see note 24, infra. In Crescent's motion to dismiss the IRS's Amended Motion for Relief from Orders, Crescent avers that the Chapter 7 Trustee sought to have the reference withdrawn because certain issues arising in settlement discussions related to the appeal "were likely to be beyond the jurisdiction of the Bankruptcy Court." Crescent's Motion to Dismiss at 5, ¶19, Adv. Dkt. #82.

This asserted justification for withdrawing the reference of the entire case in the context of an appeal of a two-party declaratory judgment action is spurious at best. None of the litigation (or potential litigation) referred to by Crescent or the Chapter 7 Trustee in the motion was relevant to the adversary on appeal, an action distinct and separate from the main bankruptcy case, and which dealt only with which entity was entitled to the Crescent Black Lung Fund and nothing more. Any disputed claims of the mine workers or any other creditor to a distribution from those or other estate assets would have to be dealt with in the main bankruptcy case, not in a declaratory judgment adversary between two parties. Moreover, whether claims litigation would ensue at all would depend on whether the estate had the wherewithal to pay claims. This could not be known until the question of whether Debtor or Crescent owned the asset was decided in the appeal. Once ownership of the asset was determined on appeal, the District Court may have decided to withdraw the reference to the main case in order to decide disputed claims, review and adjudicate fee petitions, and hear the trustee's final report and account, all of which is necessary before distribution can be approved. However, the parties deprived the District Court of the opportunity to administer the case and review the propriety of the distribution by inappropriately wrapping into a two-party action a "settlement" involving non-litigants who were not parties to the dispute on appeal and by ignoring other creditors who had a superior statutory or other[21] right to payment.

By withdrawing the reference of the entire case before the adversary was decided, the District Court acted as the trial court while sitting as an appellate court. The Court of Appeals for the Third Circuit in In re Pruitt, 910 F.2d 1160 (3d Cir. 1990), noted that although not expressly forbidden by the statute, withdrawal of the reference by the District Court while it is acting in its appellate capacity leaves the appeal in limbo, can jeopardize the uniformity of bankruptcy administration, and will encourage forum shopping. In addition, it gives parties a second opportunity to adduce facts which will increase expense to the estate and prolong the bankruptcy process.[22] In essence, a judge cannot act as both the trial court (fact finder) and the appellate court (reviewer) in the same proceeding. Cf. Metro Transportation Co. v. North Star Reinsurance Co., 912 F.2d 672, 676 (3d Cir. 1990) (district court can act under its bankruptcy power pursuant to 28 U.S.C. §1334 or as an appellate court as the result of the appeal from the Bankruptcy Court pursuant to 28 U.S.C. §158(a) and §158 is not an available predicate for

[21] For example, LTV, which had been granted a superpriority by court order, was not a party to, and received no notice of, the "settlement" and was not included in the distribution despite its superior entitlement.

[22] See, e.g., In re Dow Corning Corp., 280 F.3d 648 (6th Cir. 2001) (rehearing denied), petition for cert. filed 70 USLW 3726 (April 20, 2000) (No. 01-1686). Withdrawing the reference on appeal also is in conflict with the statutory objectives of using bankruptcy judges' expertise and preserving the appellate process. In re Pruitt, 910 F.2d at 1168–69. However, in the instant case, this is a secondary consideration. The primary concerns are notice to creditors and the statutorily mandated distribution scheme that were circumvented.

jurisdiction ''in the court of appeals,'' citing U.S. v. Nicolet, Inc., 857 F.2d 202, 204 (3d Cir. 1988)). See also Universal Minerals, Inc v. C.A. Hughes & Co., 669 F.2d 98, 101, 102 (3d Cir. 1981) (as a court of review, district court does not sit as factfinder; on review it cannot disturb bankruptcy court's findings of fact unless clearly erroneous). See also, In re Fegeley, 118 F.3d 979, 982 [80 AFTR 2d 97-5268] (3d Cir. 1997) (court of appeals reviews bankruptcy court's findings by standards district court uses—i.e., clearly erroneous). Accord In re First Jersey Securities, Inc., 180 F.3d 504, 508 (3d Cir. 1999). See also In re Cohn, 54 F.3d 1108, 1111, 1113, 1118 (3d Cir. 1995) (in bankruptcy cases district court sits as appellate court. ''It is error for a district court, when acting in the capacity of a court of appeals, to make its own factual finding'' (citing Universal Minerals, supra) and to do so is ''beyond its authority''). Accord In re Sacred Heart Hospital of Norristown, 133 F.3d 237, 241 (3d Cir. 1998).

b. Fulfilling the Trustee's Statutory Duties Would Be Too Time Consuming

The Chapter 7 Trustee also asserted that if the Bankruptcy Court was affirmed and/or other possible litigation was resolved in Debtor's favor, and the funds were found to be estate property, the trustee would ''have to engage in a time consuming review of claims, preparation of final accounts, fee applications, etc.'' Motion for Withdrawal of the Reference, Civil Action No. 96-2185, at ¶12. However, the Chapter 7 Trustee is statutorily obligated to review claims and prepare a final account as long as there are assets to be distributed,[23] regardless of whether the Bankruptcy or District Court is sitting as the trial court. Moreover, in order to be paid his attorney's fee (and in order for Debtor's counsel and other court-approved professionals to be paid), fee applications are required to be filed and notice of same provided to all creditors and the U.S. Trustee with an opportunity to object and for a hearing. See 11 U.S.C. §330(a)(1)(after notice and a hearing the court may award fees to professionals employed under §327 or §1103). Furthermore, the court must review the fee applications before approving them, even if neither the U.S. Trustee nor any creditor objects to the fees. See 11 U.S.C. §330. See also In re Busy Beaver, 19 F.3d 833, 841 (3d Cir. 1994) (''Beyond possessing the power, we think the bankruptcy court has a duty to review fee applications, notwithstanding the absence of objections by the United States trustee, creditors, or any other interested party, a duty which the Code does not expressly lay out but which we believe derives from the court's inherent obligation to monitor the debtor's estate and to serve the public interest''). There is nothing in the motion for withdrawal of the reference that discloses to the District Court that the Chapter 7 Trustee is required to perform the ''time consuming functions'' or that fee applications must be filed by all professionals claiming entitlement to be paid from estate funds and must be reviewed by the court.[24]

Furthermore, claims litigation, fee petitions, and the final reports and accounts are not matters initially treated at the appellate level but at the bankruptcy level, regardless of whether the Bankruptcy or District Court is handling the main case.

The bottom line is that in all asset cases the Chapter 7 Trustee has the duty to perform the activities he complained of to the District Court, regardless of how burdensome some duties may prove to be to the trustee personally.[25] However, the machinations of the parties to this adversary resulted in (a) significant violations of the Bankruptcy Code; (b) denial of due process to creditors who did not receive notice and who did not receive payment to which

[23] If there are no assets to administer, the trustee must file a ''no asset report.''

[24] The Chapter 7 Trustee was authorized by the Bankruptcy Court to pursue this Adversary on a contingent fee basis based on his representation that because the Bankruptcy Court would not approve the 1994 settlement and creditors were continuing to object to it he would have to litigate ownership of the Crescent Fund, intercompany claims, claims against certain officers and directors, and claims against ORIC. Notwithstanding the basis for his motion in the Bankruptcy Court, the Chapter 7 Trustee and counsel for Crescent represented to the District Court that the reference had to be withdrawn because the amount of litigation to sort matters out would be time consuming and expensive.

[25] The Chapter 7 Trustee accepted his appointment. The court, creditors, and public are entitled to rely upon the statutorily created expectation that, having agreed to function as a trustee, he would do so.

they were entitled; (c) overpayment of at least some of those who were paid; and (d) payment of some entities which would not have been paid at all, had the Bankruptcy Code distribution scheme been followed.

C. The 1997 Settlement

1. Deficiencies in the Notice of the Settlement and the Order Approving It

After the reference was withdrawn, Crescent and the Chapter 7 Trustee filed a Joint Motion to Approve Settlement in the District Court in which the Chapter 7 Trustee surrendered to Crescent not only the Crescent Black Lung Fund involved in the adversary and appeal but also the funds in the Shannopin Black Lung Fund. As noted earlier, neither the declaratory judgment action nor the appeal involved the Shannopin Black Lung Fund at all. The settlement provided for distribution of the proceeds of both Funds primarily to Crescent, to certain creditors of the bankruptcy estate, to attorneys involved in the chapter 11, and to the Chapter 7 Trustee.[26] See Special Trustee's Second Amended Motion at ¶s11 (xxix), (xxx), (xxxxi), and (xxxv) for a summary. By the time this motion to settle was brought before the District Court, the Funds had increased from a little over $2 million to approximately $4.8 million ($4,748,642). See 1994 Motion to Settle at 5, ¶20, Civil Action No. 96-2185, Dkt. #8. The settlement was approved by the District Court and thereafter notice of the approval was sent, allegedly to creditors on the Special Service List.[27] The notice, although captioned ''to all creditors and parties in interest,'' was not served on all creditors and parties in interest. Despite the caption in the notice, the certificate of service itself refers to service only on counsel for some entities on the Special Service List.[28] The Special Service List did not list all creditors and parties in interest. Therefore, even if notice went to all those on the Special Service List, the notice was inadequate to notify all creditors and parties in interest. In addition, the Chapter 7 Trustee did not use the most recent service list, much less notify all creditors. A ''Second Amended Service List'' was a more current list approved in the chapter 11.

Further, the Special Service List had been approved by me for use in the chapter 11 phase of the case. When the chapter 11 converted to chapter 7, the chapter 11 service list was no longer applicable. No new service list permitting limited notice was ever authorized after the case was converted to chapter 7. As a general rule, limited service lists in large chapter 11 cases are approved only after a motion is filed and notice and an opportunity to be heard with respect to any objections are provided to creditors. The limited list receives notice of routine matters that are not of significance to all creditors. Settlements which purport to dispose of all estate assets are of significance to all creditors. Bankruptcy Rule 9019, through reference to Bankruptcy Rule 2002, requires that with respect to a settlement, notice be provided to all creditors.[29] According to the

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[26] The District Court stayed further distributions to Crescent by order dated March 17, 1998. The total in the funds, if nothing had been disbursed to Crescent, would approach $6 million. See Special Trustee's Amended Motion at ¶s11, 12, and 13, attached to the Special Trustee's Second Amended Motion as Exhibit 1.

[27] All agree that notice was not sent to all creditors but dispute whether the notice that was sent to some creditors was adequate. The IRS questions whether any notice was actually sent. Although the Chapter 7 Trustee contends that notice went to those on the Special Service List, not all those on that list received the notice, including, for example, LTV Steel Co., a superpriority creditor.

[28] There were two certificates of service, one signed by counsel for Crescent at Civil Action No. 96-2185, Dkt. #8, and one by the Chapter 7 Trustee. Id. at Dkt. #10. The certificate of service filed by counsel for Crescent was filed with the Joint Motion to Approve Settlement six days before the District Court entered the order approving the settlement. The certificate of service filed by the Chapter 7 Trustee was filed two days after the order was entered and recited that he served all parties on the Special Service list which was purported to be attached. Id. However, no copy could be located in the District Court file when this matter was transferred back to the Bankruptcy Court. There was, nonetheless, an amended certificate of service dated January 29, 1998, and docketed at number 14 in the District Court which had attached to it the Special Service List. That list included the names and addresses of parties in interest served with the order. Besides the two parties to this adversary, those identified as served with the Joint Motion on the certificate of service filed by counsel for Crescent are Claudia Davidson who represented the Collective Bargaining Unit of Employees and Retirees of Debtor and the UMWA District 4, Michael Yurcheshen who represents Debtor, David Lampl for the creditors' committee, Marilyn Baker for the UMWA 1992 Benefit Plan, Ralph A. Finizio for the UMWA Combined Benefit Fund, and Martin Bertocchi for ORIC.

[29] Bankruptcy Rule 9019 provides that

> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed.R.Bankr.P. 9019(a) (emphasis added). Rule 2002(a)(3) requires 20 days' notice of a proposed settlement to all creditors, with an exception not relevant here. See Fed.R.Bankr.P. 4001(d). The notice itself provided for an objection to the order before the settlement or notice thereof was circulated to any creditors.

certificate of service of the Joint Motion to Settle, served by counsel for Crescent, the only parties in interest who received notice were those receiving funds, ORIC which held the funds, and the U.S. Trustee. The amended certificate of service of the March 12, 1997, order approving the settlement at Civil Action No. 96-2185, Dkt. #14,[30] lists additional parties in interest but does not correspond to either of the service lists approved in the chapter 11.

Bankruptcy Rule 9019 provides that the court may approve a compromise after notice and a hearing to "creditors" and others. The notice of settlement and the order approving the settlement were both signed by the District Court on March 12, 1997, indicating that prior notice and opportunity to be heard were not provided. " . . . [T]he purpose of Rule 9019 is to protect the interest of others who are not parties to the agreement and whose rights may be affected." In re Nelson Co., 117 B.R. 813, 820 n.19 (Bankr. E.D.Pa. 1990), affirmed 959 F.2d 1260 (3d Cir. 1992). Thus, the dissemination of the notice of settlement was insufficient as a matter of law under the Bankruptcy Rules.[31]

Even assuming that the District Court provisionally approved the settlement before creditors received notice and an opportunity to be heard, the notice approving the settlement should have been served on all creditors but was not. Furthermore, the notice should have provided enough detail so that creditors would be aware that their rights, and not just the rights of the parties to the adversary, were being affected.[32] Thus, creditors were deprived of notice to which they were entitled.

2. Content of the Notice of Settlement

The content of the notice did not apprise creditors of the terms of the settlement. The notice contained ten lines, five of which stated the names and addresses of the Chapter 7 Trustee and counsel for Crescent. The notice merely stated that a Joint Motion to Approve Settlement had been filed and approved and that any objections must be filed with the Clerk of the District Court and sent to the Chapter 7 Trustee and counsel for Crescent.

What the settlement actually did was much different from declaring or settling ownership of the one fund (Crescent) at issue. In addition to relinquishing the Crescent Black Lung Fund, the Chapter 7 Trustee also released the Shannopin Black Lung Fund to Crescent. The 1997 settlement failed to pay pro rata all creditors similarly situated. It paid professionals who had not filed fee applications. It paid professionals who had fees approved in the chapter 11 an amount greater than what had been approved by the Bankruptcy Court. It failed to pay all professionals. In direct conflict with §726(b) (7) of the Bankruptcy Code, it paid some chapter 11 administrative expenses before it paid the chapter 7 administrative expenses. It failed to pay the U.S. Trustee's and Clerk's fees. It failed to pay LTV's superpriority

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30 The Amended Certificate of Service states that it was filed because the Chapter 7 Trustee had received information that the "Special Service List" had not been attached to the original certificate of service or had "otherwise been detached" from that certificate. Civ. Action No. 96-2185 at Dkt. No. 14.

31 Bankruptcy Rule 2002(a) (3) provides for notice to all creditors of a settlement "unless the court for cause shown directs that notice not be sent." Had the court been made aware of the expanded scope of this "settlement," the court may have decided that "cause" had not been shown.

32 The Notice simply said:

NOTICE OF SETTLEMENT

TO ALL CREDITORS AND PARTIES IN INTEREST:

Please take notice that a Joint Motion to Approve Settlement has been filed by the Parties in this Case and approved by this Court. Any party wishing to object to the settlement must do so in writing filed with the Clerk of this Court with a copy of said objection sent to Alan Cech, Trustee of Shannopin Mining Company, 110 Swinderman Road, Wexford, Pennsylvania 15090 and Robert O Lampl, Counsel for Crescent Hills Coal Company, 960 Penn Avenue, Suite 1200, Pittsburgh, PA 15222 within ten (10) days after service of this Notice by the Trustee. Any inquiries regarding the settlement may be directed to Alan Cech, Trustee of Shannopin Mining Company, 110 Swinderman Road, Wexford, Pennsylvania 15090, (412) 635-0414. No hearing will be scheduled unless objections are filed as set forth herein.

The notice itself is misleading because entities other than "parties" to the appeal were participating in a distribution negotiated between only some of the creditors affected. Nothing alerted creditors that their interests and statutory priorities were about to be jeopardized.

claim.[33] Because the notice was woefully inadequate, even if all creditors had been sent the notice, which they weren't, the notice would not make them aware of the terms of the settlement. Because all of this occurred in the appeal of the two-party declaratory judgment action, creditors were not even notified that more than an appeal over a declaration of ownership of an asset was at stake, much less distribution of the primary estate assets. The Chapter 7 Trustee and counsel for Crescent excuse their conduct on the basis that notice was provided but the notice was inadequate to advise creditors of anything.

The next effort to justify these actions is the argument that when the settlement was approved, all the money became Crescent's to disburse as it chose, without regard to the Bankruptcy Code priorities. This approach cannot save the day. If the District Court had reversed the Bankruptcy Court's ruling on summary judgment and eventually there was a finding that the Crescent Black Lung Fund was not an asset of the estate, the Chapter 7 Trustee would still have the Shannopin Black Lung Fund as an estate asset which he then would administer or abandon. However, the settlement also relinquished the Shannopin Black Lung Fund, which had never been at issue.

The Bankruptcy Court ruled in 1996 that the Crescent Black Lung Fund was an asset of the bankruptcy estate. After two unsuccessful efforts to convince the Bankruptcy Court otherwise, the Chapter 7 Trustee and Crescent effected a negation of the Bankruptcy Court's ruling through their maneuvers. Furthermore, the 1996 ruling that was appealed did not deal with the Shannopin Black Lung Fund at all, yet the 1997 settlement turned that Fund over to Crescent as well. The Chapter 7 Trustee could not, in the proper exercise of his fiduciary duties, simply "gift" estate assets to a noncreditor. His obligation, at a minimum, was to notify all creditors of the details of the "settlement" through which he gave up the estate's interests in a significant asset. Notifying only those creditors who noisily protest the deal unless they share in the spoils is insufficient.[34] Furthermore, whether abandoning assets (see 11 U.S.C. §554) or settling a dispute, prior notice and opportunity to be heard are required.[35]

In addition, the Chapter 7 Trustee is required to file a final report and account which is reviewed by the U.S. Trustee, and approved by the court after notice to all creditors and parties in interest. 11 U.S.C.

[33] However, after the IRS filed its Motion for Relief from Orders, LTV got wind of the settlement and Crescent allegedly "bought" LTV's claim for 100 cents on the dollar. Assuming for purposes of this discussion that Crescent's action in purchasing LTV's claim was proper, neither Crescent nor LTV filed evidence of the transfer as required by Fed. R.Bankr. P. 3001(e) until August 31, 2000, after I ordered that deficiency in the record to be corrected. See Main Case Dkt. #694. Note that the record of this case reflects that LTV objected to the original 1994 motion to settle (Main Case Dkt. #615) before the Bankruptcy Court yet it was never served with the motion, notice or order entered in the appeal of the Bankruptcy Court's 1996 ruling.

[34] Of course, LTV protested and was not included in the notice.

[35] Bankruptcy Rule 6007 governing abandonment says notice to all creditors is required unless otherwise directed by the court. However, due process requires notice to all creditors when major estate assets are disposed of. Furthermore, in a typical abandonment, the assets are returned to the debtor. In this case, the Chapter 7 Trustee simply turned them over to a non-creditor. The Shannopin and Crescent Black Lung Funds were not abandoned by any bankruptcy procedure.

§ 704(9).[36] This mandatory requirement also was avoided.[37]

In essence, the Chapter 7 Trustee, through a "settlement," fashioned a distribution that adversely affected creditors without pursuing alternatives that are available through the Bankruptcy Code such as (1) abandoning assets, (2) noticing the settlement adequately, or (3) moving to reconvert the case to chapter 11 so as to negotiate a plan and provide the opportunity for all creditors to vote. Chapter 7 does not provide the flexibility to a trustee to propose the kind of distribution scheme effected in this case. See, e.g., In re LMS Holding Company, 197 B.R. 915, 918 (Bankr.N.D.Okla. 1996). The Chapter 7 Trustee's obligation was to find assets, reduce them to money, analyze claims, object to any he found to be improper and to distribute funds to the allowed claims in the order specified in the Code. His personal distaste for paying the creditors in that order is not relevant. Without filing a single objection to a claim or defending the estate's interests on appeal, the Chapter 7 Trustee (1) ignored the dictates of the Bankruptcy Code and Rules; (2) disposed of not only the disputed asset (the Crescent Black Lung Fund) but an undisputed asset of the estate (the Shannopin Black Lung Fund); (3) agreed to accept a large fee (without first filing an application for compensation, providing notice and an opportunity for objections and obtaining an order allowing the fee); and (4) allowed other entities to pick and choose who would share in the largesse.

3. Terms of the 1997 Settlement

I note that the original order approving the settlement was entered March 12, 1997. Notice of it was sent to at least some entities[38] on the Special Service List[39] after the order was entered which resulted in a number of objections being filed. As a result of the objections, the District Court entered another order dated April 11, 1997, which provided that certain salaried employees, 13 in number, would receive $70,000.00 which Crescent agreed to pay. See Stipulation Regarding Objections to Settlement, Civil Action No. 96-2185 at Dkt. #11, and Order of April 11,

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[36] When this matter was referred to me after the IRS filed its Motion for Relief from Orders, I ordered the U.S. Trustee (and the Chapter 7 Trustee) to show cause why a successor trustee should not be appointed. The U.S. Trustee filed its "Report of United States Trustee in Response to February 6, 1998, Order and Rule to Show Cause." Adv. Dkt. #63. The U.S. Trustee appeared in court for the rule to show cause hearing and has not appeared in this matter since. The U.S. Trustee's report consisted of a "summary of the pertinent facts of record, and an outline of the usual procedures required by statute, bankruptcy rules, and national and local guidelines for the distribution of assets by a Chapter 7 Trustee." Report of U.S. Trustee, at ¶9, Adv. Dkt. #63. Its summary of statutory requirements focuses first on the professional fee issue then on the distribution priority required by the Bankruptcy Code and the procedures the U.S. Trustee has in place to try to ensure that statutory requirements are adhered to. While I appreciate its recitation of the basics of chapter 7 bankruptcy law, it is disturbing that the U.S. Trustee did not comment on, or supervise adequately the Chapter 7 Trustee's prosecution of the appeal and distribution of estate assets.

According to the certificate of service attached to the 1997 settlement, the U.S. Trustee was served with a copy of the settlement by hand delivery. Part of the U.S. Trustee's statutory duty is to monitor trustees and adversary proceedings and settlements. It also must monitor cases, particularly asset cases. See generally 28 U.S.C. §§581–589a. Section 586(a)(5) provides that the U.S. Trustee shall perform duties prescribed under title 11 "and such duties consistent with title 11 and this title as the Attorney General may prescribe." The Manual sets forth in detail the U.S. Trustee's duties. The Manual is available online at http://www.usdoj.gov/u.s. Trustee. See Volume 2, Chapter 7 Case Administration at §§2–2.1, et seq. Furthermore, at the time that this matter was referred for disposition of the IRS's Amended Motion, §2–2.13 provided that

> [a]s part of the United States Trustee's ongoing supervision of trustees, a system to audit Chapter 7 Trustee operations has been established. Every trustee who administers a chapter 7 estate is to be audited by the Office of the Inspector General (OIG) or the United States Trustee at least once every other year. In those years where an audit is not conducted, the United States Trustee is to conduct a field office visit of the trustee.

(The current provision is at §2–3.12.) The irregularities occurring with the Chapter 7 Trustee's administration of this case through the adversary should have been glaringly apparent during such an audit and should have sparked the U.S. Trustee to action. Other portions of that section contained further audit provisions, any one of which should have been a red flag to the U.S. Trustee. There are numerous other illustrative portions of the chapter 7 section of the U.S. Trustee's Manual that are not cited here. The U.S. Trustee Manual requires chapter 7 trustees to lodge reports with the U.S. Trustee every six months with respect to the status of cases assigned to them, particularly asset cases. It is not clear whether this trustee did so since those reports are not filed with the court. What is clear is that the U.S. Trustee, which has the duty to monitor trustees, either was not aware of any of the events at issue in time to advise the District Court of the aberrant procedures and insufficient notice to creditors that led to the current conundrum, or simply failed to do so.

The U.S. Trustee should have acted, either by objecting to the settlement or by advising the District Court that at a minimum (a) no fee petitions had been filed by some of the professionals, including the Chapter 7 Trustee, (b) no final account had been proposed or filed by the Chapter 7 Trustee, (c) chapter 11 administrative expenses were being paid before chapter 7 administrative expenses, (d) not all creditors of the same class were being paid, and those who were being paid were not paid pro rata, all in violation of the Bankruptcy Code. I note that the current Assistant U.S. Trustee, Joseph S. Sisca, was not in office when any of the events involved herein occurred.

[37] On November 19, 1997, the Chapter 7 Trustee filed with the Bankruptcy Court a notice that his final report and account had been transmitted to the U.S. Trustee. Pending completion of this proceeding, the U.S. Trustee cannot review the report. Until that occurs, the document can not be filed with the court.

[38] The notice attached to the Joint Motion lists only the payees under the settlement. Civil Action No. 96-2185 at Dkt. #8.

[39] The Chapter 7 Trustee contends that he served all those on the Special Service List. LTV was on that list and did not get notice. In fact, LTV apparently did not learn of the 1997 settlement until after the IRS filed its Amended Motion.

1997, Adv. Dkt. #46.[40] In addition to the payment to the salaried employees, the 1997 settlement provided that

- Debtor waived and transferred any interest in either its or Crescent's Black Lung Fund to Crescent. The fund available in excess of potential black lung and traumatic injury claims, based on actuarial analysis, at that time was $4,748,642.00.
- The money was to be distributed in this way
- $2,020,000.00 in satisfaction of "the following employee related claims"[41]
- $700,000.00 to the UMWA 1992 Benefit Plan in full payment of its disputed claim of $3,000,000.00[42] which was expected to increase at the rate of $50,000.00 per month
- $740,000.00 to Claudia Davidson, agent for and representative of Debtor's employees and retirees collective bargaining units[43]
- $120,000.00 to the UMWA Combined Benefit Fund

In addition to the employee claims, the following amounts were to be disbursed to some of the bankruptcy professionals:

- $110,000.00 was to be paid to Sable, Makoroff & Gusky, counsel for the creditors' committee[44]

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40 The Stipulation was signed by the Chapter 7 Trustee, counsel for Crescent, and Thomas S. Galey, counsel for the salaried employees who received the benefit of the April 11, 1997, Order. There is a certificate of service executed by counsel for Crescent that indicates that service of the Stipulation was made only to the Chapter 7 Trustee and Mr. Galey. There is no certificate of service of the District Court's Order with respect to the Stipulation, although the District Court docket reflects that a copy of the order was mailed to "all parties of record."

In addition, the Stipulation provides that "[o]f the amount of funds to be distributed to Crescent Hills . . . , Crescent shall pay or cause Old Republic or the Trustee to pay . . . ($70,000) . . . . This settlement amount shall be paid to Buchanan Ingersoll Professional Corporation for distribution to the salaried employees . . . and for the legal fees and expenses of such employees."

41 Although in the Joint Motion to Approve Settlement the Chapter 7 Trustee stated that "the following employee related claims" would be paid and listed six entities, only the first three entries related to employee claims. See Joint Motion to Approve Settlement, Civil Action No. 96-2185 at Dkt. #8.

42 The UMWA apparently was advancing an administrative expense claim, accruing in the chapter 11 phase of the case, under the Coal Act. The status of such claims, at least upon conversion of the case to chapter 7 was not settled. When a chapter 11 is converted to a chapter 7, chapter 7 administrative claims must be paid first and in full, before any chapter 11 claims are paid. 11 U.S.C. §726(b). Any claim the UMWA might have would remain a core matter, 28 U.S.C. §157(b) (2) (B) ("[c]ore proceedings include . . . allowance or disallowance of claims against the estate . . . ."), notwithstanding the argument advanced by the Chapter 7 Trustee in support of his motion to withdraw the reference that the Combined Fund claim would have to be litigated in the District Court. Since the Chapter 7 Trustee had not objected to the claim, one cannot hypothesize where litigation may have ensued. Nonetheless, the Bankruptcy Code priority rules still apply.

43 This payment was to be in full satisfaction of any claims these employees had against Debtor in the bankruptcy case as well as in a matter which the parties represented as being on appeal to the Third Circuit at Circuit No. 95-3174, which was Antol v. Esposto, District Court Civil Action No. 95-951. The Joint Motion to Approve Settlement filed in the District Court at Civil Action No. 96-2185 was filed on March 6, 1997. The Court of Appeals had rendered a decision in 95-3714 (Civil Action No. 95-951) on January 24, 1997, affirming the District Court's judgment in Civil Action No. 95-951, six weeks before the Joint Motion was filed. See Antol v. Esposto, 100 F.3d 1111 (3d Cir. 1996). Counsel for Crescent knew that Antol v. Esposto was decided because he represented many of the defendants in that case. In Antol v. Esposto, plaintiffs were employees of Debtor who were owed wages earned during the pendency of the bankruptcy and which remained unpaid. Defendants were seven individuals and three corporations. This group included major stockholders, owners, operators and agents of Shannopin. Plaintiffs sued under the Pennsylvania Wage Payment and Collection Law. Because the plaintiffs' claims were based on a collective bargaining agreement, the court held that the Pennsylvania Wage Payment and Collection Law was preempted by the Labor Management Relations Act and the National Labor Relations Act. The case had been filed in the Court of Common Pleas and removed by the defendants to federal court. As of March 6, 1997, no one had sought certiorari.

44 The settlement provided that this payment was in satisfaction of any claims counsel for the creditors' committee may have had under the "common fund" theory as well as any claims it may have had against Debtor or Crescent. First, the common fund doctrine was inapplicable in this case under the bankruptcy laws. Creditors' committee counsel did nothing to create this asset and no distributions were made to the unsecured creditors they represented.

Second, as a court appointed professional, creditors' committee counsel could not be paid for work performed in the bankruptcy case without first filing a fee petition in accordance with the Bankruptcy Code and Rules. The common fund doctrine is an exception to the American Rule that each party bears its own legal costs and expenses and provides that fees may be awarded when an attorney recovers a common fund for the benefit of persons other than the attorney's client. See In re Lloyd Securities, Inc., 183 B.R. 386, 397 (E.D.Pa. 1995), aff'd 75 F.3d 853 (3d Cir. 1996). Under the common fund doctrine the costs of litigation are spread evenly so one beneficiary does not bear the entire cost while others benefit at no cost. See also Lake v. First Nationwide Bank, 900 F.Supp. 726, 734 (E.D.Pa. 1995). In bankruptcy, however, it is the purpose and function of the attorneys for the creditors' committee and the trustee to benefit the creditors of the estate. Here, the unsecured creditors represented by counsel for the committee did not benefit at all and, had the Bankruptcy Code been followed, counsel would not have been paid even if the Chapter 7 Trustee had prevailed on appeal.

Counsel for the committee argued in its Brief in support of its response to the Amended Motion for Relief from Orders, Adv. Dkt. #76, that it was entitled to payment because it "rallied objections to the [1994] settlement . . . and, as a result of such objections, the [chapter 7] Trustee was forced to proceed with the litigation against Crescent Hills." Brief at 4 (emphasis in original). The common fund doctrine does not apply when counsel is simply doing the job for which counsel was hired—in bankruptcy cases that includes monitoring the trustee's collection and distribution of assets for the benefit of creditors and the estate. Because unsecured creditors were not paid and committee counsel did not generate the fund or even participate with the Chapter 7 Trustee in litigating ownership of the fund, counsel for the committee would not be entitled to payment under the common fund doctrine. In addition, committee counsel did not recover funds for the benefit of persons other than himself or his clients. See In re Lloyd Securities, Inc., 183 B.R. 386 (E.D.Pa. 1995), aff'd 75 F.3d 853 (3d Cir. 1996). Moreover, the committee's counsel had only a chapter 11 administrative claim which was not entitled to be paid at all unless all chapter 7 administrative claims were paid in full.

- $100,000.00 to Yurcheshen & Baggett, counsel for Debtor[45]
- $250,000.00 to Cech as the attorney for the Chapter 7 Trustee[46]
- Crescent received the balance of approximately $2,728,642.00.

See Joint Motion to Approve Settlement, Civil Action No. 96-2185, at 5–7, ¶20.[47] This is significantly different from the 1994 proposal which paid only Mellon, Debtor, and Crescent (although Mellon received payment pursuant to an order dated December 23, 1992, Main Case Dkt. #515).[48]

Thereafter, the case was remanded to the Bankruptcy Court in September of 1997.[49] The Bankruptcy Court adversary docket reflects little activity until January of 1998[50] when the IRS filed a Motion and Amended Motion for Relief from Orders which the District Court referred to this Court for me to make recommendations of findings of fact and conclusions of law.

VI. The IRS's Amended Motion for Relief From Orders

A. Summary of the IRS's Amended Motion

In its Amended Motion the IRS alleges numerous improprieties and irregularities with respect to the settlement approved on April 11, 1997: (1) lack of notice of withdrawal of the reference, (2) lack of notice of the proposed settlement, (3) lack of notice of the terms of the settlement, and (4) violation of the Bankruptcy Code and Rules in the procedure used to approve the settlement in the District Court. Specifically, the following errors were cited by the IRS in support of its request for relief:

a. the motion to withdraw the reference was filed in the District Court and not the Bankruptcy Court as required by Fed.R.Bankr.P. 5011;

b. the District Court cannot act as fact finder when it is acting as an appellate Court and Crescent and the trustee failed to so advise the District Court;

c. the certificate of service attached to the motion to withdraw the reference on the entire case shows that the motion was served only on counsel for Crescent in contravention of Fed.R.Bankr.P. 2002 and 9013;

d. the failure to file the motion to withdraw in the Bankruptcy Court "effectively prevented the other creditors from protecting their interests";

e. Crescent and the Trustee did not advise the District Court of the requirement for Court approval of professional fees or that the order approving the settlement would distribute all assets of the bankruptcy case without the Trustee filing and the Court approving a final account and without notice to all creditors.

f. the Joint Motion to Approve Settlement approved by the District Court contained inaccurate statements of fact, to-wit:

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45 The payment was said to be in full satisfaction of any claims Debtor's counsel may have had under the common fund theory and any claims against Debtor or Crescent. This theory of payment fails for many of the same reasons it failed with respect to the creditors' committee's counsel. Counsel for Debtor did not provide an economic benefit to Debtor or the estate — no funds went to Debtor or the estate and the fund wasn't created by counsel for Debtor. Moreover, once a case is converted to chapter 7 the role of counsel for Debtor often is much diminished while the trustee administers the estate. Post-conversion, counsel for Debtor often has a limited role and this case was no exception. The case was converted on August 19, 1992. In addition, an order was entered on June 2, 1992, approving fees for counsel for Debtor of $40,324.00 and expenses of $2,237.00 No other fee applications were filed on behalf of Debtor's counsel.

46 As are creditors' committee and Debtor's attorneys, the attorney for the trustee is required to file a fee petition and have it approved in accordance with the Bankruptcy Code and Rules, etc. No such application was filed.

47 Although not part of the 1997 settlement, counsel for the creditors' committee paid $10,000 to its accountants, Coopers & Lybrand, P.C. which creditors' committee counsel "indicates was agreed to be accepted as payment in full of its Chapter 11 claim as a professional." Special Trustee's Amended Motion at 16, ¶16(vii) (attached to Special Trustee's Second Amended Motion as Exhibit 1). Accountants for the creditors' committee are subject to the same limitations as are other professionals appointed under the Bankruptcy Code and are required to file fee petitions which are subject to prior notice to creditors and opportunity to object.

48 The December 23, 1992, order was entered pursuant to Mellon Bank's motion for relief from stay. The order granted the relief and directed the Chapter 7 Trustee to turn over to Mellon "$537,211.06 which includes a black lung surplus and other monies held in Trustee's account. Trustee shall pay same to Mellon within 15 days hereof. Any other proceeds received by Trustee from the black lung funds may be paid to Mellon by Trustee, in an amount not to exceed a total of $1.3 million without further Order. However, upon payment of same, Trustee shall file and serve a notice that funds have been distributed." The docket does not reflect that the Chapter 7 Trustee did so. Mellon Bank filed a response to the motion to approve the 1994 settlement stating that it did not object as long as it was paid immediately from funds to be distributed by ORIC.

49 The Bankruptcy Court docket entry of November 5, 1997, states that the filing fee for the motion to withdraw the reference was paid in full on that date. This is a reference, however, to the first motion to withdraw that was properly filed in the Bankruptcy Court and denied by the District Court in August of 1995.

50 There was activity in the main case on an objection to a claim unrelated to the adversary.

(i) all parties who objected to the settlement in the Bankruptcy Court joined in the District Court settlement;

(ii) the Trustee neglected his duty to act in the best interests of all creditors;

(iii) the Notice of Settlement did not advise that the settlement would result in distribution of all remaining estate assets and did not comply with the trustee's obligation to file a final account;

(iv) the value of the Black Lung Fund increased significantly between the time of the settlement disapproved by the Bankruptcy Court and the time of the Joint Motion to Approve Settlement filed in the District Court;

(v) the settlement ceded 57 percent of the estate's interest in the Black Lung Fund and paid the Trustee a significant sum in fees without requisite Court approval pursuant to Fed. R.Bankr. P. 2016;

(vi) other attorneys were paid without filing fee applications and without notice and an opportunity for hearing pursuant to Fed.R.Bankr.P. 2002(a)(6);

(vii) neither the Trustee nor Crescent apprised the District Court of the requirements of the Bankruptcy Code and Rules concerning payment of professional fees;

(viii) the Trustee failed to advise the District Court that approval of the settlement would distribute all estate assets without the requisite filing and approval of a final account;

(ix) the settlement violated the rules for priority of distribution under chapter 7.[51]

The record fully supports the IRS's assertions.

B. Rulings After the IRS Filed its Motion

After the District Court referred the matter back to this Court, I suspended Mr. Cech as trustee only with regard to the IRS's motions(s) and the proceedings generated thereby due to the seriousness of the allegations against him and the conflict they created between him and the creditors of the estate. The U.S. Trustee presented an order appointing James R. Walsh as Special Trustee, which I signed. Among other things, the appointment required the Special Trustee to examine claims under various scenarios and to compare the distributions that should have been made with the distributions actually made in light of the priority scheme of §726 of the Bankruptcy Code. On March 17, 1998, on this court's recommendation, the District Court also entered an order suspending further distributions to Crescent pending a ruling on the IRS's Amended Motion. The funds remain escrowed with ORIC, which files periodic accounts that are docketed in the Adversary.

VII. Summary of the Special Trustee's Report

The Special Trustee has filed interim status reports. In the meantime, a settlement between Crescent and the IRS (and the Pennsylvania Department of Revenue, which joined in the IRS's Amended Motion for Relief from Orders) was reached which the Special Trustee has presented to this Court as an "Amended Motion of Special Trustee to Approve Notice of Settlement and to Determine the Parties Entitled to Notice Thereof, as well as for Determination that the Notice and Motion Adequately Inform[] Parties in Interest of the Substance of the Proposed Settlements." Adv. Dkt. #157. A Second Amended Motion was filed by the Special Trustee on October 23, 2000, at Dkt. #185.

In his status reports the Special Trustee articulated certain assumptions regarding allowance of claims and reached the conclusion that, if the priority distribution scheme of the Bankruptcy Code had been adhered to, funds would have been available to pay only a portion of (1) the chapter 7 administrative claims which include the U.S. Trustee's chapter 11 quarterly fees (see infra) and clerk's office charges; (2) after allowance, upon petition, notice and opportunity for hearing, fees for counsel for the Chapter 7 Trustee; (3) tax claims;

[51] In its motion to dismiss, Crescent avers that the IRS has not pleaded facts but innuendo and that its allegations are not verified. Its argument regarding pleading of facts is without merit. The record and the Bankruptcy Code and Rules fully support the IRS's recitation of error. Further, Bankruptcy Rule 9011(e) specifically provides that "papers filed in a case under the Code need not be verified."

and (4) the claims of the UMWA. Under the 1997 settlement, however, the Bankruptcy Code's distribution provisions were not followed. Rather, some, but not all, chapter 11 administrative claims were paid even though the chapter 7 administrative expenses were not paid in full as is required by 11 U.S.C. §726(b). The Special Trustee characterizes this turn of events as resulting from "voluntary reductions" in amounts paid to the Chapter 7 Trustee, his attorney, and the various UMWA funds See Special Trustee's Amended Motion at ¶17. See also 11 U.S.C. §726(b). However, as stated in the Commonwealth of Pennsylvania's Joinder in IRS's Amended Motion, Adv. Dkt. #72, exclusive of LTV's superpriority claim,

> inequitable distribution of the proceeds of the bankruptcy estate [occurred because the 1997 settlement did not] provid[e] a pro rata distribution among members of the same class of creditors and by not following the hierarchy of distribution mandated by the Bankruptcy Code. Only eight creditors ... received payment ... but not all eight shared the same creditors' class for priority in distribution. Further, some creditors holding Chapter 11 administrative claims, including the taxing authorities, a high priority class of creditors under the Bankruptcy Code, received no compensation pursuant to the settlement agreement.

Id. at ¶5. That is, under the April 11, 1997, settlement agreement, some creditors were paid who would not have been paid if the Bankruptcy Code was adhered to; some of those who would have received distributions if 11 U.S.C. §726 had been followed were paid more than they should have been; and some creditors entitled to payment (e.g. LTV on its superpriority claim) were not paid. See Amended Motion of Special Trustee at 14–16, ¶s16–18.

The Special Trustee favors the newest settlement proposed by the parties to resolve the issues raised in the IRS's Amended Motion for Relief From Orders. In the Special Trustee's view, a new settlement, proposed by Crescent, is in the best interests of all concerned inasmuch as it will avoid litigation that will be expensive in terms of time and money and will consume assets that would otherwise be available for distribution to the settling creditors of the bankruptcy estate. A proposed settlement agreement was filed with the Bankruptcy Court on August 30, 2000. It failed to address issues of unpaid chapter 7 administrative expenses and the fact that some but not all chapter 11 professional fees were paid, including those paid without fee petitions. The court provided additional time to resolve these issues.[52]

VIII. Particulars of the Special Trustee's Report

A. Summary and Footnoted Comments

The Special Trustee's report is summarized below. The Special Trustee assumes that the Chapter 7 Trustee would have received his entire contingent fee of more than $1.5 million and that the UMWA 1992 Combined Benefit Plan's $3.9 million claim would have been allowed as a chapter 7 expense.[53] If the UMWA's claim had been so allowed, the estate would have been administratively insolvent. Accordingly, the chapter 7 administrative claimants would have received, at best, a pro rata distribution and the chapter 11 claimants would have received nothing. Although the Special Trustee's report does not address all scenarios, I have analyzed his report and conclude that if the UMWA's claim was not allowed as a chapter 7 administrative claim and all other figures stayed the same, there would have been funds for a pro rata distribution to chapter 11 administrative claimants. Whether, after justifying their fees through fee petitions, etc., the professionals would have received the amounts they enjoyed through the 1997 settlement cannot be known since requisite fee petitions were

[52] At a hearing on September 29, 2000, the parties reported that they have addressed the issue of payment of chapter 7 administrative expenses and the Chapter 7 Trustee is holding enough money to pay those expenses.

[53] At the time of the settlement and the Special Trustee's Second Amended Motion, whether the UMWA's claim would have been allowed as a chapter 7 administrative claim had not been resolved.

not filed by all professionals. In light of the size of the UMWA's claim it is doubtful that any chapter 11 administrative claimant would have received the full amount claimed.

The details of the discrepancy between distribution pursuant to the April 1997 settlement and distribution in compliance with the Bankruptcy Code are explained in the Special Trustee's various Reports and in his Amended Motion which are appended to this recommendation and illustrated below.

1. Distribution as Projected by Special Trustee

A. Chapter 7 Trustee and Counsel to Chapter 7 Trustee, Alan Cech:

Maximum Statutory Trustee Fee From Settlement Proceeds of $4,748,642.00: $142,459.00

Maximum Contingent Fee as Counsel to Chapter 7 Trustee (40% if matter went to trial and Chapter 7 Trustee prevailed): $1,582,722.00

B. U.S. Trustee Claim for Chapter 11 Administrative Fees[54] $8,750.00

C. UMWA 1992 Combined Benefit Plan Claim for $3,913,318.95 as of September 30, 1998, increasing at projected rate of $54,299.44/month[55]

D. UMWA 1992 Combined Benefit Plan Claim for Premiums Due as of September 20, 1998: $293,000.00+[56]

E. UMWA Combined Benefit Fund

Chapter 7 Administrative Claim: $45,000.00+/–

Chapter 11 Administrative Superpriority Claim: $8.7 million

Chapter 11 Administrative Claim: $7 million[57]

F. Superpriority Chapter 11 Claim of LTV: $100,000.00

G. U.S. Trustee Claim for Chapter 11 Administrative Fees $8,750.00[58]

H. Frank E. Sparr & Co. Claim for Professional Fees as Accountant to Chapter 7 Trustee: $12,720.00

I. Clerk, U.S. Bankruptcy Court, Claim: $4,628.25

2. Claims Not Addressed by Special Trustee That Could Have Been Classified as Chapter 11 Administrative Claims But Would Not be Allowed as Such

A. 11 claims totaling $107,731.52 filed on behalf of trade creditors, each of which would have been chapter 11 administrative claims but were not filed as such. Special Trustee's Amended Motion at 16, ¶21 (attached to Special Trustee's Second Amended Motion as Exhibit 1).

B. 332 claims totaling $419,990.93 filed on behalf of Health Care Providers who provided services postpetition but were not filed as administrative claims and some of which were included in employee claims that were addressed in the amounts paid to Buchanan Ingersoll and the UMWA. Id.

3. Claims Timely Filed as Administrative Claims and Which Could Have Been Entitled to Payment as Chapter 7 Administrative Claims and Pro Rata as Chapter 11 Administrative Claims

A. U.S. Trustee: $8,750.00

B. Pa. Department of Labor & Industry:[59]

(i) $38,929.81 for 1st quarter, 1992, asserted as chapter 11 administrative claim

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54 Although this fee was incurred in the chapter 11 phase of the case, it would be allowed as a chapter 7 administrative expense. See In re Endy, 104 F.3d 1154 (9th Cir. 1997); In re Juhl Enterprises, Inc., 921 F.2d 800 (8th Cir. 1990).

55 Although these claims arose in the chapter 11 phase of the case, the Special Trustee notes that there is case law holding that the claims are allowable as chapter 7 administrative claims. As stated supra, when the Special Trustee filed his Second Amended Motion, the Third Circuit Court of Appeals has not decided the issue yet. See note 53, supra. See also Special Trustee's Amended Motion at 16, ¶14(C) (attached to Special Trustee's Second Amended Motion as Exhibit 1).

56 These claims also qualify as chapter 7 claims. See Special Trustee's Amended Motion at 16, ¶14(D) (attached to Special Trustee's Second Amended Motion as Exhibit 1).

57 On September 30, 1993, at Adversary No. 91-0630 the Bankruptcy Court approved a settlement giving the Fund a superpriority lien against the Shannopin Black Lung Fund. In the Special Trustee's opinion, litigation among the various UMWA entities could have ensued with respect to whether the chapter 11 superpriority claims were entitled to payment prior to the chapter 7 claims. See Special Trustee's Amended Motion at 16, ¶14(E) (attached to Special Trustee's Second Amended Motion as Exhibit 1).

58 This paragraph simply repeats ¶B.

59 No objection to this claim has been filed. Pursuant to 11 U.S.C. §502(a) it is presumed allowed and entitled to pro rata distribution.

(ii) $5,944.01 for 2nd quarter of 1992, asserted as chapter 11 administrative claim

C. Coopers & Lybrand: $57,627.00 asserted as chapter 11 administrative claim[60]

D. Thorp, Reed & Armstrong, initial counsel to Debtor: $39,140.04[61]

E. Price Waterhouse, accountant for Official Committee of Unsecured Creditors: $85,140.00. See note 57, supra.

F. 21 claims for wages as chapter 11 administrative claims: $98,299.78[62]

G. U.S. Department of the Interior:[63] $192.00 as chapter 11 administrative claim

H. Pa. Department of Environmental Protection:[64] $94,690.00 as chapter 11 administrative claim

4. Additional Unpaid Chapter 7 Administrative Claims

A. Special Trustee and Counsel to Special Trustee: fees and expenses in excess of $39,100.00

B. Frank E. Sparr & Co., accountant to Chapter 7 Trustee: $12,720.00

C. Clerk, U.S. Bankruptcy Court: $4,628.25

5. Distribution Effected Under the Settlement

A. Buchanan Ingersoll, P.C.: $70,000.00[65]

B. Healey, Davidson & Hornack: $740,000.00[66]

C. UMWA 1992 Benefit Plan: $700,000.00[67]

D. UMWA Combined Benefit Fund: $120,000.00[68]

E. Michael J. Yurcheshen, counsel to Debtor: $100,000.00[69]

F. Alan E. Cech, Chapter 7 Trustee and Counsel to Chapter 7 Trustee: $240,000.00[70]

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60 Coopers & Lybrand has since merged with Price Waterhouse. The Special Trustee contacted Lawrence Ranallo of PricewaterhouseCoopers ("PwC") who advised him that PwC's records do not show a claim. PwC does not oppose the settlement, according to the Special Trustee, and is not seeking payment.

61 The Special Trustee noted that this claim would be objected to if now asserted. Thorp, Reed & Armstrong was Debtor's prepetition counsel and was paid $50,000.00 as a retainer. Of that $50,000.00, prepetition Thorp, Reed & Armstrong applied $30,073.27 to outstanding invoices which, in the Special Trustee's opinion, was not an "ordinary course" payment and therefore would be subject to challenge.

62 Claim No. 1100 filed by one Ed Smith was stated as $0.00.

63 No objection to this claim has been filed. Pursuant to 11 U.S.C. §502(a) it is presumed allowed and entitled to pro rata distribution

64 No objection to this claim has been filed. Pursuant to 11 U.S.C. §502(a) it is presumed allowed and entitled to pro rata distribution.

65 Buchanan Ingersoll was paid this amount as the result of objections it filed to the settlement as originally proposed to the District Court. Buchanan Ingersoll filed the objections on behalf of 13 salaried Employees it represented who asserted chapter 11 administrative claims totaling $144,312.01.

66 Healey, Davidson & Hornack received payment on behalf of 257 claimants asserting chapter 11 administrative claims, on behalf of union members, for health care benefits that accrued postpetition for retirees and postpetition employee wages, accrued vacation benefits, and 35 percent of health care benefits that accrued postpetition but were unpaid.

67 The Benefit Plan asserted entitlement to a chapter 7 administrative claim of more than $3.7 million that increased at a rate of $54,000.00 +/– per month. This amount represented that owed for claims to the Plan and it is asserted that more than $263,900.00 would have been owed to the Plan as chapter 7 administrative claims for annual prefunding premiums. This claim exceeded $3.9 million and was projected to increase at the rate of $53,300.00 +/– per month until the estate closed. The Benefit Plan filed a motion for payment of an administrative expense but no order was entered.

68 The amount paid was pursuant to a settlement at Adv. 91-2630 approved by the Bankruptcy Court on September 30, 1993. The settlement gave the Fund a superpriority lien against the Shannopin Black Lung Fund. The Combined Benefit Fund asserted a chapter 7 administrative claim in the amount of $45,000.00 +/–, a chapter 11 administrative superpriority expense claim of $8.7 million, and a chapter 11 administrative expense claim of $7 million.

69 The Special Trustee reported that Mr. Yurcheshen's time sheets shows that for the period between December 3, 1991, and March 31, 1992, as reflected in an Interim Fee Application filed by counsel, fees and expenses were incurred in the amount of $42,561.90. The Bankruptcy Court entered an order approving these fees but the order provided that payment was not to be made until further order. Counsel's time records for the period between March 31, 1992, and May 11, 1994, show additional time expended in the amount of $42,435.00 for a total of $102,460.87, excluding 2 to 3 weeks in July and August of 1992 for which no time records were located. I note that no fee petition for this additional amount has ever been filed.

70 The Chapter 7 Trustee indicated to the Special Trustee that after filing a Second Application for Trustee's [Statutory] Commission, the Chapter 7 Trustee administered $1.6 million of black lung distributions which he paid to Mellon Bank which held an allowed secured claim. The Chapter 7 Trustee calculated that the maximum amount of commission on that amount would have been $48,000.00, if allowed.

The Chapter 7 Trustee's position is that he would have been entitled to $142,459.00 if he had prevailed at trial and recovered the entire $4,748,642.00. According to the Special Trustee, this would have resulted in "aggregate commissions of $190,459.00." Special Trustee's Amended Motion at 16, ¶16(vi) (attached to Special Trustee's Second Amended Motion as Exhibit 1). The Special Trustee notes that the Bankruptcy Court authorize a 40 percent contingent fee for the Chapter 7 Trustee if he prevailed at trial. That fee could have exceeded $1.5 million. However, there never was a trial so the contingent fee would not have been paid. If there was no trial only 33⅓ percent was authorized if the Chapter 7 Trustee prevailed.

G. Sable, Makoroff & Gusky, P.C., Counsel to Official Committee of Un-secured Creditors: $110,000.00[71]
H. LTV: $100,000[72]

6. What Would Have Resulted If the Chapter 7 Trustee Lost on Appeal

Receipt by Crescent $4,297,317 + $1,249,851 (*potentially*) *less amounts between* $730,000 & $1,600,000 representing recoupment/setoff in favor of ORIC resulting in a total to the Chapter 7 Trustee of between $3.57 million and $2.6 million.[73]

Retained by Debtor the amount in the Shannopin Black Lung Fund which would have been distributed pro rata to chapter 7 claimants

B. Additional Comments

1. Without filing a proof of claim or interest, Crescent received $4,297,317.00 of Debtor's funds and used $2,080,000.00 to pay certain selected claims owed by the bankruptcy estate resulting in a net benefit to Crescent of $927,317.00 as of the settlement date.

2. Professionals who were paid pursuant to the settlement received less than the amount which, in the Special Trustee's opinion, would have been approved by the court if fee applications had been filed. This is speculation on the part of the Special Trustee but, assuming he is correct and that all fees sought would have been approved, they would not have been paid fully due to insufficient funds.

Furthermore, the Special Trustee concluded that the only payments that would have been made if this Chapter 7 Trustee followed the Bankruptcy Code priorities would have been to the Chapter 7 Trustee, his counsel, the UMWA 1992 Combined Benefit Plan, and the UMWA 1992 Combined Fund, (assuming the UMWA's claims were allowed as chapter 7 administrative claims which issue was never raised or decided in the Bankruptcy Court). This conclusion is incomplete inasmuch as the U.S. Trustee and the Bankruptcy Clerk's fees also have to be paid as chapter 7 administrative expenses.[74]

3. If the Chapter 7 Trustee had prevailed on the merits in the appeal, the estate would have received $4,748,642.00 plus the potential for an additional $1,355,000.00 at an unknown future date. As noted in text accompanying note 58, the Special Trustee reported that the Chapter 7 Trustee calculated that his statutory trustee commission on this amount would have been $190,459.00 if allowed in full[75] and that the 40 percent contingent fee could have exceeded $1,582,722.00 Special Trustee's Amended Motion at 15, ¶16(vi).

The 40 percent contingent fee was approved in the event there was a trial. If

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71 Sable, Makoroff & Gusky, P.C., no longer exists and the two attorneys from the firm who appeared in this case, Robert Sable and David Lampl, are now in two separate firms. The Special Trustee reported that Sable, Makoroff & Gusky's time sheets and records show charges in excess of $125,000.00. In April of 1992 the Bankruptcy Court approved fees for the firm in the amount of $42,590.74 and expenses in the amount of $3,469.90, but payment of the allowed amounts was never authorized.

Of the $110,000.00 received by Sable, Makoroff & Gusky, P.C., the firm paid $10,000.0 to Coopers & Lybrand, P.C., accountants to the Committee, in full satisfaction of the accounts' chapter 11 claim. Coopers & Lybrand filed a motion for compensation on February 19, 1992, which was dismissed, without prejudice, on or about March 20, 1992. Main Case Dkt. #224. It filed another motion on April 6, 1992, and an order was entered on April 23, 1992, approving fees in the amount of $35,689.00 and expenses of $606.20. Payment, however, was not to be made until further order. Main Case Dkt. #262. No order was entered approving payment of these allowed amounts. On August 19, 1992, an order was entered converting the case to chapter 7. Main Case Dkt. #417. A third motion seeking compensation was filed by Coopers & Lybrand on January 11, 1993. No order allowing or disallowing the additional requested fees and expenses was ever entered. See id. at #518. Note that the January 1993 fee petition was for services performed in the chapter 11 and, unless there were funds available for creditors in excess of chapter 7 administrative claims, the fee petition would not have been addressed.

72 The claim of LTV was allowed by the Bankruptcy Court as a chapter 11 superpriority secured claim. This amount was not paid under the settlement. However, Crescent "purchased" the claim after the settlement and after the IRS filed the motions under consideration herein.

73 The right of recoupment or setoff in favor of ORIC represents the total pre- and postpetition advances of Crescent funds to the Debtor. Thus, the actual amount the Chapter 7 Trustee would have received would have been between $3,570,000.00, plus or minus, and $2,600,000.00, plus or minus.

74 The Special Trustee concluded that professionals who were paid voluntarily reduced their claims. This conclusion is based on the fact that, otherwise, there were insufficient funds to flow to the chapter 11 administrative level. However, there is nothing of record to suggest that some professionals reduced or waived their claims. In fact, some had fee petitions of record, others had interim fees previously allowed after notice and hearing, and others had not yet filed fee petitions. Thus, not all chapter 11 administrative claimants had an approved claim that could be waived. Further, neither LTV nor the taxing body creditors (the latter now seek to settle their claims) agreed to waive any portion of their claims and were not included in the settlement.

75 This amount stems from allowance of the maximum statutory fee of $142,459.00, from the $4,748,642.00 settlement amount plus a $48,000.00 statutory fee on $1.6 million in Black Lung Fund distributions which the Chapter 7 Trustee made. Special Trustee's Amended Motion at 12–13, 15, ¶s14(i) (A), 16(vi).

settled before trial the fee would be 33⅓ percent. There was no trial in this case so the Chapter 7 Trustee would not have been entitled to 40 percent of any fund recovered. His maximum fee would have been 33⅓; percent.

Chapter 7 administrative claims could have received nothing in light of LTV's and the UMWA Funds' superpriority claim (if the latter were entitled to payment before chapter 7 expenses).

There now are chapter 7 administrative claims that remain unpaid:

- claims of the Special Trustee and his counsel which the Special Trustee estimates total approximately $40,000.00 as of August 30, 2000;
- claim of Frank E. Sparr & Co., court appointed accountant to the Chapter 7 Trustee, in the amount of $12,720.00[76]

IX. What Happens Now

A. The Proposed Settlement[77]

[1] The proposed settlement presented to me in court on August 30, 2000, pro-vides for payment to the IRS of $100,000.00 and to the Pennsylvania De-partment of Revenue of $20,000.0 which will be paid out of non-estate funds by "the [Chapter 7] Trustee, individually, Sa-ble, Yurchesan [sic] and Crescent" within 30 days of entry of a final non-appealable order.[78] In court on August 30, 2000, counsel for Crescent stated that the pro-posed settlement contemplates that Cres-cent would stand for the $120,000.00 to be paid and that others would contribute, in-cluding himself, Crescent, and the Chapter 7 Trustee. Initially, no representative other than counsel signed for Crescent. However, the settlement agreement was resubmitted with a complete set of counterpart signa-tures on or about October 3, 2000. Adv. Dkt. #179. The representation that these individuals and entities will contribute differs from the terms of the Agreement itself but appended to the copy of the Agreement are the signatures of the Chapter 7 Trustee, counsel for Crescent, the agent for the collective bargaining unit of employees and retirees, counsel for Debtor, Robert Sable (former counsel for the creditors' committee), the Special Trustee, ORIC, UMWA Combined Benefit Fund, the UMWA 1992 Benefit Plan, the IRS by the Department of Justice, and the Commonwealth of Pennsylvania Department of Revenue.

The proposed settlement is not without its problems. For example, it does not provide for payment to the U.S. Trustee, the Bankruptcy Clerk, the accountant for the Chapter 7 Trustee, or the Special Trustee. These are administrative expenses that

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[76] On October 4, 1991, at Motion No. 91-7265, the Debtor filed a motion to employ Sparr as accountant (Main Case Dkt. #11). The motion was withdrawn on November 26, 1991. The docket reflects that Sparr was allowed to file a fee application as an administrative expense within 30 days. He never did. At Main Case Dkt. #644 the Chapter 7 Trustee moved to employ Sparr as accountant which motion was granted by order of February 21, 1997. See Main Case Dkt. #645.

[77] In considering the advisability of sending the "new" settlement agreement (filed in court on August 30, 2000), out for notice, the District Court should note that the parties to the 1997 settlement advised me that they will honor their new agreement even though some participants would have received more money if the original settlement had not been wrought.

[78] It appears that the Agreement presented in court was not docketed. However, the Settlement Agreement with counterpart signatures was later filed and is at Adversary Docket #179. The Agreement provides that upon court approval of the settlement and the IRS's and Commonwealth's receipt of payment, the Motion (and Amended Motion) for Relief from Orders will be dismissed with prejudice. The taxing bodies shall also be "forever bar[red] ... from asserting the claims that were or could have been raised against the Respondents to the Motion for Relief From Orders and/or their predecessors, successors in interest, past or present agents or attorneys ... except to the extent that this Settlement was obtained by fraud, or to correct a mutual mistake. Settlement Agreement and Mutual Release at 5, ¶4a. It further provides that upon court approval and payment the 'Shannopin Group' shall release the IRS and the Commonwealth and their predecessors, successors, agents, attorneys, etc. Settlement Agreement and Mutual Release at 6, ¶5a. The Agreement states that the term 'Shannopin Group' is 'defined above', but there is no definition in the Agreement. I assume that the 'Shannopin Group' is the four entities contributing funds to pay the settlement. Some clarification is needed.

must be paid.[79] However, the Chapter 7 Trustee asserts that he is holding sufficient funds, derived from sources other than those included in the settlement, to pay these claims.

The Special Trustee's Second Amended Motion to approve the notice of settlement proposes that the terms of the 1997 settlement be submitted only to counsel for parties listed on Exhibit 4 (Special Trustee's Second Amended Motion at ¶s11, 14) (former employees of Debtor who were represented either by Buchanan Ingersoll, P.C., or Claudia Davidson). He proposes that notice not be sent to creditors on Exhibit 6 (Special Trustee's Second Amended Motion at ¶s13, 15) (trade creditors ''and other parties that asserted claims that were filed as claims not asserting entitlement to allowance as Chapter 7 or 11 administrative claims''). The Special Trustee reasons that because these creditors would not be paid under any scenario notice would only confuse them. With respect to creditors on Exhibit 4, their counsel will represent and protect their rights.[80]

Limited notice is not appropriate under the circumstances. Limited notice is what created the instant problem and limiting it again may only compound confusion in the long run. The terms of the settlement between the IRS, the Pennsylvania Department of Revenue, and Crescent provide for payment to the IRS of $100,000 and to the Pennsylvania Department of Revenue of $20,000 which will be paid out of non-estate funds by unspecified non-debtor parties.[81] The Special Trustee also proposes that the terms of the 1997 settlement be submitted to all creditors except those on Exhibits 4 and 6. The Special Trustee proposes to exclude former employees (Exhibit 4) from receiving notice so as to avoid confusion because they were represented by counsel who can protect their interests. Exclusion of creditors on Exhibit 6 is proposed because these creditors would not have received a distribution under any scenario. Pursuant to the Special Trustee's Second Amended Motion, the notice includes items not included in the 1997 settlement; to-wit, amounts to be paid under the Crescent/taxing body settlement to the IRS and the Pennsylvania Department of Revenue, the fees and expenses of the accountant and the attorney for the Special Trustee and amounts owed to the U.S. Trustee and the Clerk of the Bankruptcy Court. See Exhibit 2 to Special Trustee's Second Amended Motion.

I agree with the Special Trustee that money already disbursed may be difficult to recover for redistribution in accordance with the Bankruptcy Code and the cost and complexity of litigation to recoup the disbursements would further delay the admin-

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79 I note that the proposed settlement does not undo the 1997 settlement. On the record, I invited the parties several times to provide authority for approving a distribution that violates the priority scheme of the Bankruptcy Code, even through the 1997 settlement. They failed to do so. I am not aware of any such authority. In fact, the law is to the contrary. In In re O'Brien Environmental Energy, Inc., 181 F.3d 527 (3d Cir. 1999), a chapter 11 case, the court of appeals found

> no support for the proposition that courts may create a right to recover from the bankruptcy estate where no such right exists under the Bankruptcy Code .... The structure of the Bankruptcy Code further counsels against judicial expansion of the potential for recovery from the debtor's estate. The filing of a petition for bankruptcy protection ... creates an estate, consisting of all property in which the debtor holds an interest ... and precludes all efforts to obtain or distribute property of the estate other than as provided by the Bankruptcy Code .... This statutory control over the right to recover property from the debtor's estate is integral to the purposes and goals of federal bankruptcy law.

O'Brien, 181 F.3d at 532. See also In re Coron, Inc., 161 B.R. 449 (Bankr.N.D.Ill. 1993). Cf. In re Boston Regional Center, Inc., 265 B.R. 838, 852 (1st Cir. BAP 2001), affirmed 291 F.3d 111 (1st Cir. 2002) (state law cannot alter priority scheme of Bankruptcy Code).

> Even in chapter 11, if a creditor who is impaired by the debtor's chapter 11 plan objects to confirmation, the plan cannot be crammed down unless the creditor receives on account of his claim property of a value that is not less than the amount the creditor would receive if the debtor were liquidated under chapter 7. 11 U.S.C. §1129(a)(7). See Bank of America Nat'l Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 119 S.Ct. 1411 (1999), discussing the absolute priority rule. See also United States v. Noland, 517 U.S. 535 [77 AFTR 2d 96-2143], 116 S.Ct. 1524 (1996) (''Decisions about the treatment of categories of claims in bankruptcy proceedings ... are not dictated or illuminated by principles of equity ....'', quoting In re Burden, 917 F.2d 115, 122 [66 AFTR 2d 90-5792] (3d Cir. 1990) (Alito, J., concurring and dissenting)).

80 The Special Trustee's Amended Motion referred to an Exhibit 7. The Second Amended Motion states that this reference was in error.

81 No actual motion to settle is docketed at the adversary number. The docket reflects motions to extend time to file a motion to settle and proposed notice and it shows orders granting these motions. However, on February 8, 1999, the Special Trustee filed his ''Motion By special counsel James R. Walsh To Approve Notice of Settlement and To Determine the Parties Entitled to Notice Thereof, as Well as For Determination that the Notice and Motion Adequately Informs Parties in Interest of the Substance of the Proposed Settlements.'' Adv. Dkt. #156. On February 10, 1999, the Special Trustee filed at Adv. Dkt. #157 his Amended Motion. Attached is a letter dated January 11, 1999, from Milan D. Karlan, Chief, Office of Review of U.S. Attorney General Tax Division, to Robert O. Lampl, counsel for Crescent, and a proposed notice to creditors. The letter ''refers to your [Lampl's] offer of July 10, 1998 - as modified by your letters of October 27, 1998, and November 13, 1998, and the Tax Division's letters of November 5, 1998, and November 13, 1998- to settle.'' On October 25, 2000, at Adv. Dkt. #186 an order was entered granting a motion to extend the time to file an amended motion to settle. However, On October 3, 2000, at Adv. Dkt. #179 the settlement agreement, with all counterpart signatures, was filed.

istration of this estate (and possibly deplete its assets further). Notwithstanding the convenience of limiting notice of this settlement, limited notice is what created the present problem. Bankruptcy Rule 2002(a) requires, among other things, that notice go to all creditors of a proposed use of estate property other than in the ordinary course of business unless the court orders otherwise, for cause shown. I do not think that the reasons advanced by the Special Trustee constitute sufficient cause to limit service of the notice, although I agree that service of the actual proposed settlement itself can be limited to those on the certificate of service attached to the Special Trustee's Amended Motion and to those who request it.

Notwithstanding the legitimacy of the Special Trustee's concerns, upon reflection and careful consideration, I recommend that the amended notice be given to all creditors and parties in interest. An additional paragraph can be added to the notice to alleviate confusion to the employees and another paragraph can be added to clearly advise general unsecured creditors that they will not receive a distribution under any circumstances.

B. The District Court's Options

1. Vacate the 1997 Order Approving Settlement

The District Court may vacate the order approving the 1997 settlement and resolve the merits of the appeal.[82] If this approach is taken the result could be either that the 1994 Bankruptcy Court decision on summary judgment that the Crescent Black Lung Fund was property of the Debtor's estate would be (a) reversed and the matter remanded for trial or (b) affirmed. (a) If reversed, the Bankruptcy Court would then have to admit parol evidence to determine ownership of the Crescent Black Lung Fund. If the ultimate decision, after trial, is that Crescent is the owner of the funds, that is the end of the matter with respect to ownership of the Fund.[83] The complications of undoing the distributions made as the result of the 1997 settlement are obvious, but would have to be addressed by the Bankruptcy Court (or by the District Court if the reference were to be withdrawn after the appeal is concluded).

(b) If the District Court determines to resolve the merits of the appeal and affirms the Bankruptcy Court, the District Court has the option of ordering disgorgement of all payments made under the 1997 settlement and either remanding the matter to the Bankruptcy Court to wind up the estate or withdrawing the reference at that point in order to supervise and rule on the trustee's recovery of funds and filing of a final report and account.

2. Noticing the New Settlement, Setting Objection and Hearing Dates

If the District Court chooses this option I recommend that the District Court refer the matter back to the Bankruptcy Court to implement service on all creditors and parties in interest of the amended notice of settlement with notice of a date by which objections must be filed and a hearing date, allowing at least 20 days' notice for objections.[84] The Bankruptcy Court should then hear any objections which may be filed, recommend a resolution of same to the District Court, and propose a final order that would address the current settlement proposal.

In its present form the proposed settlement, in effect, would reaffirm the 1997 settlement, with the addition of payments to the taxing bodies, Clerk of the Bankruptcy Court, the U.S. Trustee, and the Special Trustee's counsel and accountant. It does not undo the unequal distributions to chapter 7 professionals and chapter 11 administrative claimants or fix the violation of the Bankruptcy Code and Rules that require professionals to be paid only after they file fee petitions and have their

[82] If the order approving the settlement is vacated the problem of what to do about the funds already disbursed may have to be addressed, presenting a host of issues that are not ripe.

[83] Trial seemingly would not involve the Shannopin Black Lung Fund since nothing was pleaded as to it.

[84] Bankruptcy Rule 2002(a)(3) provides that 20 days' notice of a settlement shall be given "other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent." Rule 4001(d) is inapplicable inasmuch as it pertains, inter alia, to agreements relating to "prohibiting or conditioning the use, sale, or lease of property" and identifies who shall be served.

fees and expenses reviewed and allowed by the court. However, the Chapter 7 Trustee stated in court that he is holding sufficient funds to pay the chapter 7 administrative claimants and the professionals who have appeared in court have asserted that they will waive any requirement for pro rata distributions. Given the uncertainty that attends future litigation, the difficulties to be encountered in attempting to rectify the Chapter 7 Trustee's failure to act in accord with the Bankruptcy Code, and the statements of counsel that their clients will abide by the 1997 settlement, that choice appears to be best designed to ferret out and resolve the remaining issues. Note that the record is not clear that all creditors or equity owners will be satisfied with the new proposal. Thus, notice and the opportunity to object and be heard is required.

C. Conclusion

I recommend that the District Court require the Bankruptcy Court to cause an appropriate notice of settlement, together with an explanation of the status of the case and a summary of the Special Trustee's investigation, to be sent to all creditors and parties in interest. The Special Trustee should draft the new settlement proposal and the new notice for review by the Bankruptcy Court. The notice should specify a date for objections or responses to be filed and provide for a hearing in the Bankruptcy Court on the settlement and any objections, allowing at least 20 days' notice as required by Fed.R.Bankr.P. 2002(a)(3). The Bankruptcy Court should then recommend a resolution of the objections, if any, to the District Court. That recommendation may or may not suggest approval of the settlement, depending upon the factors in In re Martin, 91 F.3d 389, 393 (3d Cir. 1996).[85] The District Court should then enter a final order.

X. Other Pending Matters

[2] I will now address the other pending matters so that the District Court will be informed of the posture of the case.

A. Crescent's Motion to Dismiss, Strike, and For a More Definite Statement

I suggest that the District Court defer these matters pending the hearing on the Special Trustee's Amended Motion to approve settlement. If the settlement is approved, Crescent's motion becomes moot. If the settlement with the IRS and the Commonwealth is not approved and it becomes necessary to decide Crescent's motion, I recommend that it be denied for reasons which follow.[86]

1. Failure to State a Claim Upon Which Relief Can be Granted

a. Fraud, Misrepresentation, Misconduct, Mistake

(i) Fraud — Fed. R.Civ. P. 60(b)(3)

Crescent moves to dismiss the IRS's Amended Motion for failure to state a claim on various grounds:

> Count I. Failure to Comply with Bankruptcy Rule 7009; Failure to Meet the Elements Necessary for Relief Under Rule 60(b)(3)
>
> Count II. Failure to State a Claim Upon Which Relief Can be Granted— Elements of Rule 60 Relief Not Established; Failure to Comply With Bankruptcy Rule 7009
>
> Count III. Failure to State a Claim Upon Which Relief Can be Granted—Timeliness
>
> Count IV. Failure to State a Claim Upon Which Relief Can be Granted—Lack of Standing

[85] The factors the court should consider are "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." In re Martin, 91 F.3d at 393. Cf. In re RFE Industries, Inc., 283 F.3d 159 (3d Cir. 2002) (bankruptcy court did not make findings of fact but disapproved settlement on ground that debtor had not waived objection to it and case was closed but these grounds were insufficient for approval or disapproval of a settlement; the Martin factors must be examined).

[86] Crescent complains that the "matter has become notorious within the local bar." This is an insufficient ground to dismiss the Amended Motion.

Rule 60(b), made applicable to bankruptcy cases by Fed.R.Bankr.P. 9024,[87] pro-vides:

> On motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect ... (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

Federal Rule of Civil Procedure 9(b), made applicable to bankruptcy cases by Federal Rule of Bankruptcy Procedure 7009, provides:

> Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Crescent contends that the requirement to plead fraud with particularity set forth in Fed.R.Civ.P. 9 applies to Fed.R.Civ.P. 60(b)(3), that the IRS failed to plead with the requisite specificity and, therefore, its Amended Motion must be dismissed.[88]

If necessary to address this issue, I recommend a finding that the IRS has not pleaded fraud with the specificity required under the Rules of Civil and Bankruptcy Procedure. Although condition of mind, i.e., fraudulent intent, under Fed.R.Civ.P. 9 (made applicable to bankruptcy cases by Fed.R.Bankr.P. 7009) can be generally averred, the averment still must exist. The IRS expressly refrains from alleging fraudulent intent in ¶13 of its Amended Motion, stating that it has insufficient information on the point. Although "the particularity requirement is not applied rigidly in this circuit, and a court should consider the general preference for simplicity and flexibility that underlies the Federal Rules," Triffin v. 611 Mach. Sales, Inc., 1992 WL 229870 at 2 (E.D.PA., Sept. 8, 1992), the IRS's allegations in its Amended Motion do not allege fraud for purposes of Fed.R.Civ.P. 9. Thus, the IRS should be afforded an opportunity to file a complaint alleging fraud with some specificity or to withdraw the allegation of fraud. Failing either, I recommend that the District Court dismiss the count or the Bankruptcy Court be given authority to dismiss the count.

(ii) Misrepresentation, Misconduct — Fed.R.Civ.P. 60(b)(3)

Rule 60(b) (3) also permits relief from a final judgment or order on the grounds of "misrepresentation, or other misconduct of an adverse party." In its Memorandum of Law in Support of Amended Motion, the IRS asserts that the Chapter 7 Trustee and Crescent engaged in conduct which circumvented bankruptcy rules governing withdrawal of the reference, settlements, professional fees, and distribution of bankruptcy estate property. Memorandum of Law in Support of Amended Motion for Relief from Orders at 19 (hereafter "IRS's Memorandum of Law"). As already illustrated in the discussion of the history of the case and proposed settlement, the IRS's statement is correct and it has stated a claim. Indeed, the existing record fully supports the IRS's conclusions in this regard. Whether Crescent and the Chapter 7 Trustee acted intentionally or not, in its Amended Motion for Relief from Orders the IRS cites examples, and the record supports a finding, of misrepresentation and misconduct sufficient to withstand a motion to dismiss. The misrepresentations have been detailed above. With respect to misconduct, the IRS quotes:

> "Misconduct" does not demand proof of nefarious intent or purpose as a prerequisite to redress .... The term can cover even accidental omissions ... Accidents—at least avoidable ones—should not be immune from the reach of

87 Bankruptcy Rule 9024 provides:

Rule 60 F.R. Civ. P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330.

88 The IRS argued that Fed.R.Civ.P. 60(b) fraud does not necessarily incorporate the specificity requirements of Fed.R.Civ.P. 9.

> this rule. Thus, we agree with the Fifth Circuit that, depending upon the circumstances, relief on the ground of misconduct may be justified, ''whether there was evil, innocent or careless purpose.''

IRS's Memorandum of Law at 18, citing Anderson v. Cryovac, Inc., 862 F.2d 910, 932 (1st Cir. 1988), citing Bros. Inc. v. W.E. Grace Mfg. Co., 351 F.2d 208, 211 (5th Cir. 1965), cert. denied, 383 U.S. 936, 86 S.Ct. 1085 (1966). See also Lonsdorf v. Seefeldt, 47 F.3d 893, 897 (7th Cir. 1995) (Fed.R.Civ.P. 60(b)(3) applies to intentional and unintentional misrepresentations). If necessary to address this, I recommend that the District Court find that the IRS has alleged sufficient facts to withstand a motion to dismiss on Fed.R.Civ.P. 60(b)(3) grounds.

(iii) Mistake — Fed.R.Civ.P. 60(b)(1)

Crescent asserts that the IRS has failed to state a claim on Rule 60(b)(1) grounds, to-wit, mistake. Crescent asserts in Count II that the mistakes to be corrected under Rule 60(b)(1) are only of fact, not of law. For this proposition it cites Torrington Co. v. Local Union 590 of Intern. Union, United Auto., Aerospace and Agr. Implement Workers of America, 803 F.2d 927, 929 (7th Cir. 1986). Although an interpretation of Torrington for that proposition is arguable, more direct authority to the contrary exists. See In re Ebel, 120 F.3d 270 (10th Cir. 1997) (unpublished) (Table—Text in Westlaw 1997 WL 428574) (''Rule 60(b)(i) provides an avenue for relief under these circumstances only for 'obvious errors of law, apparent on the record'''), 1997 WL 428574 at 6, citing Van Skiver v. U.S., 952 F.2d 1241, 1244 [69 AFTR 2d 92-436] (10th Cir. 1991), rehearing denied 1992, cert. denied 506 U.S. 828, 113 S.Ct. 89 (1992). See also U.S. Dept. of Labor v. Pierce Processing, Inc., 116 F.3d 1481 (6th Cir.) (unpublished) (Text in Westlaw 1997 WL 243228), cert. denied 522 U.S. 1016, 118 S.Ct. 602 (1997) (mistakes of law could have been raised under Rule 60(b)(1)). See also Brown v. Reich, 1997 WL 68320 (D.C. Cir. Jan. 15, 1997), citing Orner v. Shalala, 30 F.3d 1307, 1309 (10th Cir. 1994), for the proposition that '''[A] mistake of law cannot be reached under [Rule] 60(b)(1) where ... no notice of appeal was timely filed from the order in which the mistake is alleged to have occurred and the time for filing such a notice of appeal had expired when the [Rule] 60(b) motion was filed'''). 1997 WL 68320 at 1. In this matter the IRS was not a party to the adversary[89] and alleges either that it had no notice at all or insufficient notice of a proceeding that would have given rise to a right to appeal from the order approving the 1997 settlement. The allegation is sufficient to state a claim and the expiration of the appeal period is not dispositive under the circumstances.

In Cashner v. Freedom Stores, Inc., 98 F.3d 572, 576 (10th Cir. 1996), the court said

> Rule 60(b) is not intended to be a substitute for a direct appeal. Morris v. Adams-Millis Corp., 758 F.2d 1352, 1356–57 (10th Cir. 1985). Thus, as a general proposition, the ''mistake'' provision in Rule 60(b)(1) provides for the reconsideration of judgments only where: (1) a party has made an excusable litigation mistake or an attorney in the litigation has acted without authority from a party, or (2) where the judge has made a substantive mistake of law or fact in the final judgment or order.

(Emphasis added). Cashner noted that ''judicial mistakes are included within the scope of Rule 60(b).'' 98 F.3d at 576. The IRS has alleged in its Amended Motion that the District Court acted under a misapprehension of bankruptcy law and procedure and that Crescent and the Chapter 7 Trustee failed to apprise the District Court of requirements relative to fee applications or distribution of estate property. See also Security Mut. Cas. Co. v. Century Cas. Co., 621 F.2d 1062, 1067 (10th Cir. 1980) (recognizing that Fed.R.Civ.P. 60(b)(1) can be used to correct judicial error of substantive law on a theory of mistake of law, cited in Cashner, 98 F.3d at 577). The re-

[89] The fact that the ''settlement'' involved other entities that were not parties to the adversary being settled but failed to include all creditors of similar status is largely responsible for the current situation.

cord supports the conclusion that Crescent and the Chapter 7 Trustee failed to apprise the District Court of the requirements of the Bankruptcy Code and Rules. If necessary to reach this issue, I recommend that the District Court find that even if, arguendo, the IRS's Amended Motion failed to allege mistake sufficiently, the IRS has alleged at least misconduct and, therefore, the motion to dismiss should be denied.

Crescent argues that there was full disclosure to the District Court and because it has original jurisdiction over bankruptcy matters, there could be no objection to the District Court's withdrawing the reference and handling the case. First, the matter was on appeal and, therefore, not properly subject to a motion to withdraw the reference until the appeal was decided. Second, the record does not support a conclusion that full disclosure was made to the District Court. Even if it did, there was not proper or sufficient notice to creditors and parties in interest.[90] Furthermore, even if the reference is withdrawn, the Bankruptcy Code and Rules remain applicable with respect to notice and distribution. Crescent's argument is without merit. Although the Bankruptcy Code and Rules permit limited notice in some circumstances, they do not do so with respect to the trustee's final report and account or efforts to abandon or dispose of assets of the estate.

Before distribution in a chapter 7, the trustee is required to file a final report and account with the court and the U.S. Trustee, 11 U.S.C. §704(9), and must give all creditors a summary of the final report if the net proceeds exceed $1,500.00. Fed. R.Bankr. P. 2002(f). There is no provision in the Bankruptcy Code or Rules for limiting this notice. The notice of settlement issued with respect to the 1997 settlement which disbursed nearly all of the estate assets in this case was not calculated to comport with the Bankruptcy Code and Rules, much less fundamental due process.

In Taylor v. Slick, 178 F.3d 698 (3d Cir. 1999), cert. denied 528 U.S. 1079 (2000), the court of appeals noted as follows:

> '''[A]dequate notice detailing the reasons for a proposed termination''' of a constitutionally protected liberty or property interest must be afforded to individuals prior to the deprivation.' Sullivan v. Barnett, 130 F.3d 158 (3d Cir. 1998), rev'd on other grounds sub nom. American Manufacturers Mut. Ins. Co. v. Sullivan, ___ U.S. ___, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999) (quoting Goldberg v. Kelly, 397 U.S. 254, 267–268, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)). To satisfy due process requirements, the notice provided must be 'reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.' Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); see also Chemetron Corp. v. Jones, 72 F.3d 341, 346 (3d Cir. 1995); First Eastern Bank, 637 A.2d at 1366. The level of notice to be given, however, depends on the interest at issue because 'due process is flexible and calls for such procedural protections as the particular situation demands.' Morrisey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

178 F.3d at 703.

2. Timeliness of the IRS's Amended Motion For Relief From Orders

If necessary to address this issue, I recommend that the District Court find to be without merit Crescent's argument that the IRS failed to act in a timely manner because it waited over ten months to challenge the District Court's order. The IRS

[90] Crescent contends that because the settlement turned over all the funds to it, Crescent was not required to follow the Code's statutory scheme when it chose to pay certain creditors. This argument is entirely unavailing, given that Crescent received through the settlement and then paid out the very funds that the Bankruptcy Court determined were property of the estate, which determination was appealed but never decided on appeal. Thus, the funds Crescent paid out were estate property and had to be distributed in accordance with the Bankruptcy Code. Even if the funds were Crescent's, the Chapter 7 Trustee and other bankruptcy professionals are required at least to disclose the source of compensation paid to them from non-estate sources. Fed.R.Bankr.P. 2014(a). See generally 11 U.S.C. §§326–331; Fed.R.Bankr.P. 2013, 2014, 2016, 2017. Of particular concern is payment to the bankruptcy professionals, especially the Chapter 7 Trustee, by Crescent, an entity with an interest clearly adverse to the estate. The conflict of interest represented by bankruptcy professionals who are fiduciaries of the estate accepting payment from non-creditors raises serious questions. Indeed, in analogous circumstances, the U.S. Trustee has refused to permit chapter 7 trustees to sell assets when only a secured creditor will benefit, even though that creditor pays the trustee and the trustee's counsel's fees.

had no notice of the withdrawal of the reference and, at best, insufficient notice of the 1997 settlement in the District Court or of the terms of that settlement. When it found out, it filed its motion promptly. It is not disputed that neither the motion to withdraw the reference nor notice of the order withdrawing the reference went to all creditors. In fact, the Chapter 7 Trustee's certificate of service with respect to his motion to withdraw the reference states that he served only Crescent, Civil Action No. 96-2185, Dkt. #5, and that the Joint Motion to Approve Settlement, the notice of settlement, and the order approving it went only to a few individuals and entities. Id. at Dkt. #8, #14. Accordingly, the IRS was not on notice to monitor the District Court docket. Thus, even if the IRS received the general notice of the April 1997 settlement that allegedly went to creditors on the Special Service List, it would not have been on notice to inquire into the terms of the settlement because to all appearances the settlement (1) was limited to the dispute between Crescent and the Chapter 7 Trustee concerning ownership of the Crescent Fund, (2) did not affect other creditors, and (3) did not provide for a distribution.

Creditors are entitled to notice and a hearing before a settlement is approved, see Fed.R.Bankr.P. 9019, and before a trustee abandons or distributes assets. See 11 U.S.C. §554, Fed.R.Bankr.P. 6007, 11 U.S.C. §705(9), Fed.R.Bankr.P. 2002(a)(2), (f). The IRS (and every other creditor) is entitled to trust that the Chapter 7 Trustee will properly exercise his statutory, fiduciary, and ethical responsibilities in providing notice and in preparing and an interim or final account and proposed distribution before making a distribution, as required by law. Thus, I recommend that the District Court find that the IRS's motion for relief from orders was timely filed.

3. The IRS's Standing

Crescent attacks the IRS's standing on the ground that the settlement to which it objects was reached in an adversary proceeding in which it could not have intervened and because the settlement involved matters not related to the bankruptcy proceedings.[91] This argument is untenable, without merit and completely inconsistent with Crescent's argument that the IRS should have monitored the District Court proceedings and filed an objection to the settlement when it was presented to the District Court. Nonetheless, I will address the argument. The reference to the entire bankruptcy case had been withdrawn through the appeal. The settlement distributed what the Bankruptcy Court had held were estate assets, a ruling that was not reversed after appellate review. By agreement, Crescent and the Chapter 7 Trustee countermanded the Bankruptcy Court without providing for pro rata disbursements to those creditors entitled to be paid with estate funds. The IRS held a large postpetition priority claim and, under the Bankruptcy Code, would have been entitled to payment. It is a party aggrieved. I recommend that the District Court find that the IRS has standing.

On a motion to dismiss for failure to state a claim, the court must

> accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant. ... a court looks only to the facts alleged in the complaint and its attachments without reference to other parts of the record. Moreover, a case should not be dismissed for failure to state a claim unless it clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiff's allegations.

Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir.

[91] Utilizing a two-party dispute which merely sought a declaratory judgment as to ownership of a fund to resolve claims of non-creditors and to affect the property interests of other creditors in an appeal that does not involve those other creditors is neither authorized nor recognized as a proper procedural or substantive device in the Bankruptcy Code or Rules. No motion to join indispensable parties was filed and no other parties were joined. Thus, the device of distributing funds to many creditors (which should have been pursued in the main bankruptcy case and not through a two-party adversary on an unrelated issue) through a two-party dispute is entirely without legal or factual basis.

1994). I recommend that the District Court find the facts pleaded in the IRS's motion to be sufficient to withstand a motion to dismiss insofar as they portray violations of the Bankruptcy Code and Rules and that the District Court find that the IRS has stated a claim upon which relief can be granted. I also recommend that the District Court deny the motion to dismiss the IRS's Amended Motion.

B. Motion for a More Definite Statement

Crescent alleges that the Amended Motion is ''vague or ambiguous,'' that the IRS failed to assert a basis for standing, failed to state harm, and failed to assert mistakes of fact entitling it to relief. Based on previous statements in this Report and Recommendation, I recommend that the District Court find that the Amended Motion is not vague or ambiguous and that, even without allegations of mistakes of fact, the Amended Motion is sufficiently specific to put Crescent on notice of the relief sought and the basis for the requested relief.

I also recommend that the District Court find that the IRS has alleged harm. It has alleged, for example, that the bankruptcy laws were violated by the procedure employed by the Chapter 7 Trustee and Crescent and that the mandatory distribution scheme of the Bankruptcy Code was not followed, thereby depriving the IRS, a priority creditor, of monies to which it would be entitled if the Bankruptcy Judge's ruling was affirmed on appeal and the Chapter 7 Trustee did what he was supposed to do. For these reasons, if it becomes necessary to address this motion, I recommend that the motion for more definite statement be denied.

C. Motion to Strike Pursuant to Fed.R.Civ.P. 12(f) and Bankruptcy Rule 9018

Crescent states that ''[t]he IRS has created an impression in its Amended Motion that intentional wrongs were committed knowingly by'' the Chapter 7 Trustee and Crescent. Motion to Dismiss at 30, ¶94. Crescent also argues that the IRS has ''misrepresented what was and was not disclosed to the [District] Court and other creditors by the Chapter 7 Trustee and Crescent's counsel and what was required to be disclosed. The IRS has created an impression in its Amended Motion that intentional wrongs were committed knowingly by said individuals.'' Motion to Dismiss at 30, ¶94. To the contrary, the IRS specifically stated in its Amended Motion that it was without sufficient information to plead intentional wrongdoing. Amended Motion at ¶13. Furthermore, on the record as it has developed so far, I see no misrepresentation by the IRS with respect to disclosures made or required to be made. The record itself establishes facts to support a claim upon which relief can be granted. Thus, the IRS's motion states a claim. I recommend that the District Court deny this motion if it becomes necessary to address it.

Federal Rule of Civil Procedure 12(f) provides that ''the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.'' ''Allegations may be stricken as scandalous if the matter bears no possible relation to the controversy or may cause the objecting party prejudice.'' Talbot v. Robert Matthews Distributing Co., 961 F.2d 654, 664 (7th Cir. 1992). '''Impertinent' matter consists of statements that do not pertain, and are not necessary, to the issues in question.'' Fantasy, Inc. v. Foqerty, 984 F.2d 1524, 1527 (9th Cir.), rev'd on other grounds 510 U.S. 517, 114 S.Ct. 1023 (1993). Although Crescent repeatedly refers to impertinent and scandalous allegations, it has not identified the specific allegations it finds objectionable. Nevertheless, I recommend that the District Court find that the matters alleged by the IRS are all relevant to determination of whether the proper procedure was employed in connection with the motion to withdraw the reference and the settlement agreement and whether the Bank-

ruptcy Code and Rules were violated. The Motion to Strike should be denied.[92]

Crescent's undefined allegations of harm to its counsel and to the Chapter 7 Trustee as a basis for its motion to strike are both unusual and unfounded. The harm to be addressed is harm to the parties, not to their counsel whose actions are self-directed and undertaken as agents for their clients. Furthermore, Crescent has no standing to raise harm to the Chapter 7 Trustee, and the fact that it does raises concerns about the independence of this Chapter 7 Trustee in matters involving Crescent.

Crescent also complains about the March 17, 1998, order issued by the District Court which "froze distributions to Crescent" from the Black Lung Fund. The District Court entered the order suspending distributions and denied Crescent's motion to reconsider that order. The cessation of distributions from the Black Lung Fund is temporary and was fashioned to maintain the status quo until the District Court enters a final order. Should the District Court determine that the 1997 settlement be set aside and order disgorgement of all distributions that would not otherwise have been paid under the Bankruptcy Code, protecting the remaining funds still in possession of ORIC makes eminent good sense for creditors of this estate. As ORIC's status reports show, significantly more money is held in the Shannopin Fund than in the Crescent Fund.

D. The Chapter 7 Trustee's Motion to Strike and Motion for More Definite Statement

The Chapter 7 Trustee's Motion to Strike and Motion for More Definite Statement is directed in large part to Rule 9 and makes basically the same arguments raised by crescent which have already been discussed. What I have said regarding Crescent's motions to strike and for a more definite statement applies to the Chapter 7 Trustee's motion. The Chapter 7 Trustee also asserts that the IRS has not identified mistakes of fact or a misrepresentation. I addressed these arguments in connection with Crescent's motions and I recommend, as I did with respect to Crescent's motions, that the District Court reject the Chapter 7 Trustee's arguments.

A proposed form of order for the District Court's consideration is attached.

Judith K. Fitzgerald

United States Bankruptcy Judge

DATED: July 25, 2002

¶2002-5255

UNITED STATES OF AMERICA, PLAINTIFF v. Thomas C. COON, ET AL., DEFENDANTS. U.S. District Court, Western Dist. of Michigan, (DC MI) Docket No. 1:01cv700, July 25, 2002. District Court, (2002, DC MI) 90 AFTR 2d 2002-5342, adopted. Decision for Govt.

1. Actions to reduce assessments to judgment—foreclosure—default judgment. Magistrate judge's recommendation was adopted and default was entered against taxpayer as sanction under Rule 16(f). *Reference:* United States Tax Reporter ¶74,035.03(135); 74,025.01(143). IRC §7402; 7403.

United States District Court for the Western District of Michigan, Southern Division.

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92 Crescent also claims that the IRS made "false statements in a ... defamatory manner." Motion to Dismiss at 31, ¶98. Crescent does not detail what statements are false. Furthermore, the record supports the allegations made. Except for uncertainty over whether any notice of the settlement at all was given in the first instance, the parties do not dispute the procedure that was followed in this case while it was on appeal. Rather, they contest its propriety and legality. Furthermore, there is an absolute privilege with respect to alleged defamatory remarks in pleadings, or at trial or argument of a case. See Binder v. Triangle Publications, Inc., 275 A.2d 53 (Pa. 1971). See also Mosley v. Observer Pub. Co., 619 A.2d 343 (Pa. Super.), allocatur denied, 629 A.2d 1382 (Pa. 1993); Preiser v. Rosenzweig, 614 A.2d 303 (Pa. Super. 1992), aff'd 646 A.2d 1166 (Pa. 1994).

> The reasons for the absolute privilege are well recognized. A judge must be free to administer the law without fear of the consequences. This independence would be impaired were he to be in daily apprehension of defamation suits. The privilege is also extended to parties to afford freedom of access to the courts, to witnesses to encourage their complete and unintimidated testimony in court and to counsel to enable him to best represent his clients' interests.
>
> Preisser v. Rosenzweig, 614 A.2d at 306 (citations omitted).

Order Approving Magistrate Report and Recommendation

HILLMAN, District Judge:

[1] The court has reviewed the Report and Recommendation filed by Magistrate Judge Scoville in this action. The Report and Recommendation was duly served on the parties, and no objection has been made thereto within the time required by law.

Therefore, IT IS ORDERED that the Report and Recommendation is hereby approved and adopted as the opinion of the court.

IT IS FURTHER ORDERED that default is hereby entered against defendant Thomas C. Coon as a sanction under Rule 16(f).

Douglas W. Hillman

Senior District Judge

Dated: July 25, 2002

¶2002-5256

UNITED STATES OF AMERICA, PLAINTIFF v. EXECUTIVE AUTO HAUS, INC., & Frank Holtham, Sr., DEFENDANTS. U.S. District Court, Middle Dist. of Florida, (DC FL) Docket No. 6:00-cv-154-Orl-31KRS, July 22, 2002. Earlier proceeding at (2002, DC FL) 90 AFTR 2d 2002-5728. Years 1991, 1992, 1993. Decision for Taxpayers.

1. Collection actions—closely owned corps.—fraudulent transfers—proof. Final judgment was entered for taxpayers in accord with prior order. *Reference:* United States Tax Reporter ¶74,035.01(50). IRC §7403.

United States District Court, Middle District of Florida, Orlando Division.

Final Judgment in a Civil Case

Decision by Court. This action came before the Court, the Honorable Gregory A. Presnell, presiding. The issues having been heard and a decision having been rendered.

IT IS ORDERED AND ADJUDGED

[1] Judgment is entered for Defendants', Executive Auto Haus, Inc. and Frank Holtham, Sr., and against Plaintiff, United States of America

Date: July 22, 2002

SHERYL L. LOESCH, CLERK

By:

H. Lang, Deputy Clerk

Order

PRESNELL, District Judge:

In accordance with this Court's Order granting Defendants' Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment (Doc. 73), the Clerk is directed to enter Final Judgment for Defendant and to close this file.

DONE and ORDERED in Chambers, Orlando, Florida this 19 day of July, 2002.

GREGORY A. PRESNELL

UNITED STATES DISTRICT JUDGE

¶2002-5257

THE PEOPLE OF COLORADO, ex rel Dennis W. Brown, Citizen in Party, PLAINTIFF, v. DISTRICT DIRECTOR, SECURITY, Colorado Internal Revenue Service, in his individual capacity; and DOES I–XX,, DEFENDANTS. U.S. District Court, Dist. of Colorado, (DC CO) Civil Action No. 01-D-1625, July 12, 2002. District Court, (2002, DC CO) 90 AFTR 2d 2002-5073, adopted. Decision for Govt.

1. Actions against IRS officers—damages—jurisdiction—Anti-Injunction, Declaratory Judgment, and Federal Tort Claims Acts. Magistrate judge's recommendation to dismiss pro se taxpayer's collection-related damages action against IRS District Director and anonymous Does was adopted: district court lacked jurisdiction where action was dismissed in state court in which it was originally filed before it was removed to federal court. Also, taxpayer's conclusory allegations, absent specific examples of unlawful collection, were insufficient to state claim for relief or sur-

vive dismissal motion. *Reference:* United States Tax Reporter ¶74,336.508(60); 74,215.05(5); 74,217.502(5); 76,557.53(12); 74,335.01(7). IRC §7421; 7433.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

ORDER ADOPTING AND AF-FIRMING MAGISTRATE JUDGE'S RECOMMENDATION

Judge Wiley Y. Daniel

[1] THIS MATTER is before the Court on United States' Motion to Dismiss, filed September 24, 2002. The matter was referred to Magistrate Judge Craig B. Shaffer for a Recommendation, which was issued on June 6, 2002, and is incorporated herein by reference. See 28 U.S.C. § 636(b), Fed. R. Civ. P. 72. Magistrate Judge Shaffer finds in the Recommendation that Defendant's Motion should be granted and the case should be dismissed with prejudice. On June 28, 2002, Petitioner filed an Opposition to Motion to Dismiss (''Opposition''), which will be treated as a timely Objection and necessitates a de novo determination as to those specified proposed findings or recommendations to which objection is made since the nature of the matter is dispositive. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1).

After reviewing the pleadings and the Magistrate Judge's Recommendation, I find it proper to grant the United States' Motion to Dismiss on several grounds. First, as stated in the Recommendation, this case should be dismissed for lack of subject matter jurisdiction because on June 12, 2001, prior to its removal on August 17, 2001, this case was dismissed in the District Court, County of El Paso, Colorado, where it was originally filed. Fundamental to the right of removal is the requirement that there be a case to remove. See MHM Sponsors Co. v. Permanent Mission of Pakistan to U.N., 672 F.Supp. 752, 753 (S.D.N.Y. 1987). There is generally no jurisdiction to remove a closed case because no case or controversy exists when a case is closed. See Philpott v. Resolution Trust Corp., 739 F.Supp. 380, 384 (N.D.Ill. 1990). Thus, courts have held that removal is not possible where the case reached final judgment in state court. See Id. Accordingly, because this case was dismissed subsequent to its removal to this Court, I find that I do not have subject matter jurisdiction over this case.

Furthermore, Plaintiff has failed to present facts sufficient to state a claim. In his Objection, Plaintiff reprinted the identical arguments he presented in his Affidavit of Points and Authorities In Support of Plaintiff's Objection to Defendant's Motion to Dismiss (''Affidavit''), filed October 29, 2001, and were rejected in the Recommendation. Plaintiff claims that he brought action ''because of the reckless and unlawful collection actions of specific agents, acting outside the scope and authority of the law and the Constitution of the United States,'' Affidavit, p.2. However, Plaintiff fails to present any such unlawful actions or demonstrate how his rights were allegedly violated.

The Court must accept Plaintiff's allegations of fact as true and determine if, standing alone, the Complaint ''is legally sufficient to state a claim for relief.'' Wyoming v. United States, 279 F.3d 1214, 1222 (10th Cir. 2002). A pro se litigant's pleadings are to be construed liberally and are held to a less stringent standard than formal pleadings drafted by lawyers. See Hall v. Bellmon, 935 F.2d 1106 (10th Cir. 1991). At the same time, it is not the proper function of this Court to assume the role of advocate for the pro se litigant. Id. Plaintiff has merely made general assertions in support of his claim, and conclusory allegations are not facts. See Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir. 1998). Accordingly, I find Plaintiff's conclusory allegations insufficient to survive Defendant's motion to dismiss. Thus, for the aforementioned reasons in addition to those discussed in detail in the Recommendation, it is

ORDERED that the Recommendation is AFFIRMED and ADOPTED. United States' Motion to Dismiss, filed September

24, 2002, is GRANTED, this case is DISMISSED with prejudice, and each party must bear its own costs and attorney's fees.

DATED at Denver, Colorado, this 12th day of July, 2002.

BY THE COURT:

WILEY Y. DANIEL

United States District Judge

¶2002-5258

In Re: William E. HOEY, Debtor. Deborah MENOTTE, Trustee, PLAINTIFF, v. UNITED STATES OF AMERICA, Internal Revenue Service, DEFENDANT. U.S. Bankruptcy Court, Southern Dist. of Florida, (Bktcy Ct FL) Case No. 00-35503-BKC-SHF; Adv. Proc. No. 01-3269-BKC-SHF-A, July 22, 2002. Years 1992, 1993, 1994, 1995, 1996. Decision for Govt.

1. Tax claims in bankruptcy—prepetition liens—preferential transfers—new value. Chap. 7 trustee's motion to avoid as 11 USC §547(b) preferential transfer lender's direct payment of portion of debtors' loan proceeds to govt. to satisfy unpaid tax liability was denied: govt. didn't receive more that it would have under Chap. 7 liquidation where tax lien was secured and took priority over earlier-recorded mortgage that had been removed from record pursuant to state court decision; and fact that mortgage might be reinstated on appeal was irrelevant since reinstated mortgages couldn't by law relate back to original mortgage date, so would necessarily be inferior to govt.'s tax lien. Also, taxpayers' separate payment of penalties wasn't preferential transfer since penalties were encompassed within tax lien. And, §547(C)(1) further precluded trustee's avoidance claim where release of fully secured lien constituted ''new value.'' *Reference:* United States Tax Reporter ¶68,726.53(10).

James Telepman, Esq. Attorney for Trustee 712 U.S. Highway One, Suite 400 North Palm Beach, FL 33408

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Deborah Menotte, Trustee P.O. Box 211087 West Palm Beach, FL 33421

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF FLORIDA.

ORDER GRANTING DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STEVEN H. FRIEDMAN U.S. BANKRUPTCY JUDGE

Chapter 7 Proceeding

THIS MATTER came on to be heard on April 2, 2002, upon the Motion for Summary Judgment, filed by Plaintiff Deborah Menotte, Trustee (''Trustee''), and upon the Cross Motion for Summary Judgment, filed by Defendant United States of America, Internal Revenue Service (''United States''). The parties stipulate that there are no disputed issues of fact. Pursuant to Fed. R. Civ. P. 56, incorporated by Fed. R. Bankr. P. 7056, summary judgment is proper if ''the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine as to any material fact and that the moving party is entitled to judgment as a matter of law.'' Summary judgment should be entered ''against a party who fails to make a showing to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial.'' Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Having considered the argument of counsel and for the reasons set forth below, the Court grants the United States' Cross Motion for Summary Judgment and denies the Trustee's Motion for Summary Judgment.

Statement of Facts

The debtor, William Hoey, and his wife, Shirley Hoey (collectively ''the Hoeys''), at all material times owned real property located at 3451 Lantern Bay Drive, Jupiter, Florida. On April 6, 1988, a mortgage in favor of Amerifirst Federal Savings & Loan (''Amerifirst'') was recorded in the Public Records of Palm Beach County, Florida. In 1993, Amerifirst initiated a foreclosure suit. On September 6, 2000, the Palm Beach County Circuit Court entered final judgment quieting title in favor of the Hoeys on the basis that the mortgage holder had lost the note and mortgage, and that the statute of limitations for reestablishing a lost note and mortgage had passed. Contemporaneously, the Hoeys failed to fully pay their federal income tax liabilities for the tax years 1992–1996. A Notice of Federal Tax Lien (''tax lien'') for outstanding taxes for the tax years 1992–1996 was filed on October 6, 1997. The Hoeys subsequently obtained a loan from Francis Child, Gary Fox, Gordon Kenyon, and Rochelle Kenyon (collectively ''the Child's Group'') in the principal amount of $215,000, of which $101,178.92 was disbursed directly to the Hoeys. In addition, the sum of $87,801.33 was paid at closing to the United States in satisfaction of the 1992–1996 tax liability of the Hoeys. The United States then released its Notice of Federal Tax Lien on November 6, 2000. On December 11, 2000, William Hoey filed his Chapter 7 petition. The Trustee initiated this adversary proceeding to avoid the transfer of $87,801.33 from the Child's Group to the United States, claiming that it constitutes a preferential transfer avoidable under 11 U.S.C. § 547(b).

Conclusions of Law

[1] The payment of $87,801.33 from the Child's Group to the United States is not a preferential transfer because the United States did not receive more than it would have under a chapter 7 liquidation. Pursuant to 11 U.S.C. § 547(b)(5):

[T]he Trustee may avoid any transfer of an interest of the debtor in property—

* * *

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The United States did not receive more than it would have received under a chapter 7 liquidation. The tax lien occupied a first priority position, secured by all of the Debtor's property, including the real property located at 3451 Lantern Bay Drive, Jupiter, Florida. The tax lien was not inferior to Amerifirst's mortgage, which, as a result of a final judgment entered in the prior state court foreclosure action, was removed from the records. The state court's final judgment extinguished the Amerifirst lien from the public records, and quieted title in the Hoeys. Therefore, at the time of final judgment, the United States' tax lien became the predominant lien on the property. The Trustee's argument that the tax lien's status is still in doubt due to Amerifirst's pending appeal of the state court judgment is not persuasive. The state court judgment has *res judicata* effect, unless and until the decision is reversed on appeal. Fidelity Standard Life Ins. Co. v. First National Bank, 510 F.2d 272, 273 (5th Cir. 1975). As of this time, the appellate court has not reversed the state court's judgment.

Even if the state court judgment was reversed on appeal, Amerifirst's interest would not ''relate back'' to its prior status of first priority, but would remain inferior to the tax lien. Mortgage holders cannot rely upon the principle of relation back to obtain priority over tax liens. Haas v. IRS, 31 F.3d 1081, 1091 [74 AFTR 2d 94-6280] (11th Cir. 1994) (relation back is prohibited by Treasury Reg. § 301.6323(h)-1(a)(2)). Furthermore, since the mortgage is incapable of relating back, the federal common law principle of ''first in time, first in right'' would preclude any ''reinstated'' mortgage from becoming su-

perior to that of the tax lien. *See* United States v. McDermott, 507 U.S. 447, 449 [71 AFTR 2d 93-1154], 113 S. Ct. 1526, 1528 [71 AFTR 2d 93-1154] (1993) (stating that ''priority for purposes of federal law is governed by the common-law principle of 'first in time, first in right,'''). Any restoration of Amerifirst's mortgage would be inferior to the tax lien because the tax lien was recorded prior to the reinstated mortgage. The payment to the United States was not a preferential transfer because the United States held a prior lien. Therefore, the requirement under 11 U.S.C. § 547(b)(5) is not satisfied, in that the ''transfer'' manifest by the recording of the tax lien in favor of the United States does not enable the United States to receive more than it otherwise would have received.

The Trustee is further precluded from avoiding the transfer on the basis that the transfer constitutes an exchange for ''new value.'' Pursuant to 11 U.S.C. § 547(C)(1):

> The Trustee may not avoid under this section a transfer—
>
> (1) to the extent that such transfer was—
>
> (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and
>
> (B) in fact a substantially contemporaneous exchange.

(emphasis added). The release of the tax lien on the Hoeys' property constituted new value. Courts must look at the value of the lien as of the time of the transfer to determine if its release constituted new value. Jet Florida Systems, 861 F.2d 1555 (11th Cir. 1988). On November 6, 2000, the United States released its Notice of Federal Tax Lien, which was for $87,801.33 in outstanding taxes for the tax years 1992–1996. Further, the amount of the Hoeys' loan (''loan'') from the Child's Group, which was used to satisfy the tax lien, was $215,000. In the case *sub judice*, the tax lien attached to the entirety of the loan proceeds, because federal tax liens attach to all of a taxpayer's property and rights to property. 26 U.S.C. § 6321 (2002). Thus, the tax lien was fully secured by the loan. When the United States released its tax lien on the property, that action constituted an exchange for new value. The Trustee, on the other hand, contends that new value cannot be created by release of a lien because such value is ''highly speculative.'' In re: Empire Pipe and Development, Inc., 152 B.R. 339 (Bankr. M.D. Fla. 1993). Moreover, if the lien is not fully secured by property it would not be considered new value. Id. However, the determination of this issue is dependent upon whether or not the tax lien is fully secured, which ultimately depends upon the status of the Amerifirst mortgage. The state court judgment rendered the Amerifirst mortgage void. Therefore, the tax lien was fully secured and the release of the tax lien can constitute new value.

The United States' argument advocating the ''earmarking'' doctrine is moot as the transfer was not a preferential transfer. As discussed above, even if it was a preferential transfer, the United States gave ''new value'' in exchange for the Hoeys' payment. Therefore, the ''earmarking'' doctrine is irrelevant to this decision, and the issue of who bears the burden of proof with regard to pleading the ''earmarking'' doctrine is also moot.

The penalties, which the Hoeys' accrued due to late payments, are included within the tax lien. A federal tax lien covers ''the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto)'' of the tax liability. 26 U.S.C. § 6321 (2002) (emphasis added). On November 6, 2000, the Hoeys paid penalties in the amount of $9,762.61 to the United States. The payment of penalties, also, does not constitute a preferential transfer since the penalties were encompassed within the federal tax lien.

The Trustee has not met her burden, and the United States has established that, as a matter of law, it is entitled to judgment in its favor. Accordingly, it is

ORDERED that the United States' Cross Motion for Summary Judgment is granted, and that the Trustee's Motion for Summary Judgment is denied.

ORDERED in the Southern District of Florida this 22nd day of July, 2002

STEVEN H. FRIEDMAN

U.S. BANKRUPTCY JUDGE

¶2002-5259

Larry N. MILBY; Violet S. MILBY, APPELLANTS v. UNITED STATES OF AMERICA. U.S. Court of Appeals, Third Circuit, (CA3) NO. 01-3788, July 31, 2002. District Courts, (2001, DC PA) 88 AFTR 2d 2001-6542, 2001-2 USTC ¶50721, and (2001, DC PA) 87 AFTR 2d 2001-1774, 172 F Supp 2d 606, affirmed per curiam. Year 1987. Decision against Taxpayers.

1. Actions against U.S. and IRS employees—failure to release lien—limitations period; exhaustion of administrative remedies—unlawful collection—Federal Tort Claims Act. District court properly granted govt.'s motions to dismiss and for summary judgment on taxpayers' repeat tort and IRC §7432 and IRC §7433 damages complaint: damages claims were time-barred; sovereign immunity barred tort claims; and record supported decisions requiring them to supplement complaint and denying their motions for reconsideration and to compel discovery. Also, recusal argument wasn't supported; and taxpayers were warned against filing further repeat suits. *Reference:* United States Tax Reporter ¶74,325.01; 74,325.03(10); 74,335.01(30); 76,557.53(12). IRC §7432; 7433.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,

On Appeal From the United States District Court For the Western District of Pennsylvania (D.C. Civ. No. 00-cv-00116)

District Judge: Honorable D. Brooks Smith

Before: ALITO, ROTH and FUENTES, Circuit Judges.

OPINION

PER CURIAM

UNREPORTED-NOT PRECEDENTIAL

[1] Larry and Violet Milby appeal several of the District Court's orders, including those granting appellee's motions to dismiss and for summary judgment. The details of the Milbys' claims, as well as the procedural history of their numerous lawsuits, are well known to the parties and will not be discussed at length. In short, the Milbys alleged several violations of their rights by the government with respect to the assessment and collection of their taxes. The District Court granted the government's motion to dismiss in part, concluding that several claims were either time-barred or duplicative of claims raised in other lawsuits. The District Court subsequently granted the government's motion for summary judgment and found the remaining claim time-barred. The Milbys filed a timely notice of appeal and we have jurisdiction under 28 U.S.C. § 1291.

We exercise plenary review over the District Court's orders granting appellees' motions to dismiss and for summary judgment. Gallo v. City of Philadelphia, 161 F.3d 217, 221 (3d Cir. 1998). When reviewing a complaint under Rule 12(b)(6), the Court must accept the allegations in the complaint as true. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). The Court should not dismiss a complaint unless it is clear that no relief could granted under any set of facts that could be proved. Id. A grant of summary judgment will be affirmed if our review reveals that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). We review the facts in a light most favorable to the party against whom summary judgment was entered. See Coolspring Stone Supply, Inc. v. American States Life Ins. Co., 10 F.3d 144, 146 (3d Cir. 1993).

After a thorough review of the record, we agree with the District Court that the Milbys' claims were time-barred under the two-year statute of limitations of 26 U.S.C.

§§ 7432 and 7433 and that the government did not waive its sovereign immunity to their federal tort claims. See 28 U.S.C. § 2680(c). The District Court did not err in requiring the Milbys to supplement their complaint[1] or in denying their motion for reconsideration and to compel discovery.

The Milbys also argue on appeal that the District Court Judge should have recused himself. Because they did not raise this issue in the District Court, we will review this assertion under a plain error standard. Osei-Afriyie v. Medical College of Pa., 937 F.2d 876, 886 (3d Cir. 1991). Plain errors are those that "seriously affect the fairness, integrity or public reputation of judicial proceedings." Id. at 881. (cite omitted). Under 28 U.S.C. § 455, a judge should disqualify himself if his impartiality might reasonably be questioned or he has a personal bias concerning a party. A litigant's displeasure with the District Court's legal rulings is not an adequate basis for recusal. Securacomm Consulting, Inc. v. Securacom Inc., 224 F.3d 273, 278 (3d Cir. 2000). The Milbys have not shown any partiality or antagonism on the part of the District Court Judge such that a failure to sua sponte recuse himself would rise to the level of plain error.

Because the Milbys have filed numerous, repetitive lawsuits based on the same set of allegations, we warn them that continued attempts to litigate these issues may result in possible sanctions and limitations on their ability to file lawsuits.

For the above reasons, as well as those set forth by the District Court, we will affirm the District Court's judgment.

¶2002-5260

UNITED STATES OF AMERICA, PETITIONER v. TELEPHONE AND DATA SYSTEMS, INC. and subsidiaries, RESPONDENT. U.S. District Court, Western Dist. of Wisconsin, (DC WI) 02-C-0030-C, July 16, 2002. Decision for Taxpayers in part and for Govt. in part.

1. Third-party summons enforcement—petition to quash—attorney-client privilege; attorney work-product. Govt. was granted in part enforcement of summonses for taxpayer's allegedly privileged records: attorney-client privilege applied to letters and attachments prepared by taxpayer's attorneys or tax manager discussing legal ramifications of certain stock transactions, but not to correspondence with accountants/tax advisors that merely discussed transactions' tax consequences and gave no legal advice. Also, work-product doctrine didn't apply where, even if taxpayer prepared documents in anticipation of audit, it didn't prove its claim that audit would necessarily lead to litigation or that documents were otherwise prepared expressly for litigation. *Reference:* United States Tax Reporter ¶76,025.07(15); 76,025.07(50). IRC §7602.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN,

OPINION AND ORDER

BARBARA B. CRABB District Judge

This is a civil action for injunctive relief brought pursuant to the Internal Revenue Code, 26 U.S.C. § 7401. Petitioner United States of America seeks an order directing respondent. Telephone and Data Systems, Inc. to produce seven documents pursuant to two Internal Revenue Service summonses issued for the purpose of determining respondent's federal tax liability for the 1995 and 1996 tax years. Respondent al-leges these documents are protected under the attorney-client privilege and the work product doctrine. Jurisdiction is present under 26 U.S.C. §§ 7402(b) and 7604(b).

Presently before the court is (1) petitioner's petition to enforce the IRS summonses and (2) respondent's motion to quash these summonses.

On June 27, 2002, this court ordered an ex parte, in camera review of the seven disputed documents. On July 21, 2002, re-

[1] The Milbys apparently believed the order required them to express all their claims in only four lines; rather, it appears that the District Court wished the Milbys to clearly and simply list their claims using one line for each of the four pieces of information the Court requested on each claim - the nature of the claim, the defendant, the basis of the claim, and the date the claim accrued.

spondent submitted the documents in question and the court has reviewed them. Because I find that three of the documents are protected by the attorney-client privilege and the work product doctrine is inapplicable, I will deny in part and grant in part both respondent's motion to quash and petitioner's petition to enforce.

OPINION

A. The Disputed Documents

Petitioner issued a summons and made the following request:

1. Provide a complete and unedited copy of the September 26, 1996 memorandum authored by Ross J. McVey and James C. Michaelson. The recipient was Murray L. Swanson. Greg Wilkinson and Ron Webster were copied. This document was identified in Response to IDR No. 100, Exhibit A, attached thereto, as the taxpayer's privilege log (dated August 3, 2001) (hereinafter "the log") as # 1.

2. Provide all documents or memoranda received from Sidley & Austin and Arthur Andersen LLP relating to and/or referred to in the September 26, 1996 memorandum referenced above.

3. Provide a complete and unedited copy of the October 24, 1996 outline analysis, in which the author is apparently unknown. The recipients of the outline were James C. Michaelson, Ross J. McVey, P. Anthony Nissley, Sidley & Austin. This document was identified as document # 6 per the log.

4. Provide a complete and unedited copy of the November 8, 1996 letter to Arthur Andersen LLP. The letter was authored by James C. Michaelson. The recipient was P. Anthony Nissley. LeRoy T. Carlson, LeRoy T. Carlson, Jr., Murray L. Swanson, Greg Wilkinson, Ross J. McVey, Steve Fortey, Tamara Witt, Joe Tapajna, Keith Kechik, Tom Scherer, Melissa Page, Michael Hron, and Robert Wootton were copied. This document was identified as document # 2 per the log.

5. Provide a complete and unedited copy of the January 10, 1997 letter to Jenner & Block. The letter was authored by James C. Michaelson. The recipient was James M. Lynch. LeRoy T. Carlson, LeRoy T. Carlson, Jr., Murray L. Swanson, Grey Wilkinson, Ross J. McVey, Steve Fortey, Tamara Witt, Michael Hron, Robert Wootton, P. Anthony Nissley, Phil Lorenzini and Mark Krohse were copied. This document was identified as document # 3 per the log.

6. Provide a complete and unedited copy of the November 10, 1997 opinion issued by Jenner & Block. The opinion was authored by Jenner & Block. The recipients were the taxpayer, Ross J. McVey, Sidley & Austin, and Kramer, Rayson, Leake, Rodgers & Morgan. Francis J. Wirtz, Andrea M. Despotes, James M. Lynch and Kenneth L. Harris were copied. This document was identified as document # 4 per the log.

7. Provide a complete and unedited copy of the December 2, 1997 opinion issued by Arthur Andersen LLP. The opinion was authored by Arthur Andersen LLP. The recipients were the taxpayer, Ross J. McVey, Sidley & Austin, Jenner & Block, and Kramer, Rayson, Leake, Rodgers & Morgan. Murray L. Swanson, Greg Wilkinson, Keith Kechik, Robert A. Kleczynski, Mark A. Masek and Joseph J. Tapajna were copied. This document was identified as document #5 per the log.

B. Attorney-Client Privilege

[1] It is well established that the IRS's summons power is "not absolute and is limited by the traditional privileges, including the attorney-client privilege." Upjohn Co. v. United States, 449 U.S. 383, 398 [47 AFTR 2d 81-523] (1981). The Court of Appeals for the Seventh Circuit has adopted the general principles of the attorney-client privilege outlined by Professor Wigmore:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

United States v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997) (quoting 8 Wigmore, Evidence §2292 (McNaughton rev. 1961); see also United States v. White, 970 F.2d 328, 334 (7th Cir. 1992) (quoting United States v. Lawless, 709 F.2d 485, 487 [52 AFTR 2d 83-5818] (7th Cir. 1983)). "The party seeking to invoke the privilege bears the burden of proving all of its essential elements." Evans, 113 F.3d at 1461. Because the privilege is in derogation of the search for the truth, it must be strictly confined. See id. Claims of privilege must be made and adjudged on a communication by communication basis. See White, 970 F.2d at 334. Simply transmitting information to an attorney does not cloak it in the privilege: "a communication is not privileged simply because it is made by or to a person who happens to be a lawyer." Evans, 113 F.3d at 1463 (citation omitted). "The attorney-client privilege shields only those communications by a client to an attorney that were intended to be confidential." Id. at 1462. The attorney-client privilege applies to communications between corporate employees and counsel made at the direction of corporate superiors in order to secure legal advice. See Upjohn, 449 U.S. at 390–94.

Because the documents have been submitted ex parte for in camera inspection, I will determine whether the attorney-client privilege is applicable to each document in turn. (The numbering sequence corresponds to the log.)

1. September 26, 1996 Memorandum

This document is a summary of the conclusions by tax advisers, including Sidley & Austin, Arthur Andersen and Skadden Arps, involving a high basis low value stock transaction. This is a business opinion by tax and transaction experts. The attorney-client privilege does not apply to this memorandum.

2. November 8, 1996 Letter

This document requests two tax opinions. The letter is from respondent's Tax Manager and to Arthur Andersen. Respondent alleges in its brief that this letter was written "on the advice of [in-house counsel]." This reference to counsel does not turn tax advice into legal advice. Thus, the attorney-client privilege does not apply to this letter.

3. January 10, 1997 Letter

This letter requests a tax opinion regarding whether the IRS would recognize the loss generated by the transactions at issue. The letter is from respondent's tax manager to Jenner & Block. Although this is a close call, I conclude that the attorney-client privilege applies to this letter.

4. November 10, 1997 Letter

This is an opinion from Jenner & Block to respondent examining the legal issues presented by the transactions in question. This is legal advice and the attorney-client privilege applies to this letter.

5. December 2, 1997 Letter

This is a letter from Arthur Anderson to respondent. It outlines the federal income tax consequences of the transactions at issue. Although it is somewhat similar to the November 10, 1997 letter from Jenner & Block, the law firm did not ask for it or incorporate it into their opinion. Thus, this is accounting advice from an accounting firm and not legal advice from a law firm. The attorney-client privilege does not apply to this letter.

6. October 24, 1996 Outline Analysis

Respondent contends that this outline analysis was prepared as a framework for addressing legal issues. The document was prepared by Arthur Andersen. This is tax advice and the attorney-client privilege does not apply to this outline analysis.

7. October 8, 1997 Letter and Attachments

This is a letter from Sidley & Austin to respondent in which a memorandum and a mark-up of an Arthur Andersen opinion had been enclosed. The attorney-client privilege applies to this letter and both attachments.

B. Work Product Doctrine

Respondent argues that because it is audited regularly (as a large-case taxpayer in the Coordinated Examination Program), it

"anticipated that, when audited, the Transaction would lead to federal income tax controversy proceedings, including litigation." See Rspt.'s Reply, dkt. #19, at 10. Therefore, respondent argues, when it produced the disputed documents, it did so in anticipation of litigation. Although it seems logical for respondent to anticipate an audit, it is unclear from the briefs why respondent also anticipated that such an audit would not result in a ruling in its favor and, moreover, would lead to litigation. The problem with respondent's assumptions is that they are too remote from litigation to invoke the work product doctrine.

The Court of Appeals for the Seventh Circuit has held that "[a]lthough litigation could ultimately have ensued in connection with the [taxpayer's] tax filings, a remote prospect of future litigation is not sufficient to invoke the work product doctrine." In re Special September 1978 Grand Jury (II), 640 F.2d 49, 65 (7th Cir. 1980) (citing Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977)). "At most, the materials were prepared with an eye toward a possible administrative proceeding before the Internal Revenue Service." Id.; see also Velsicol Chemical Corp. v. Parsons, 561 F.2d 671 (7th Cir. 1977) (court refused to apply work product doctrine to documents prepared for actual rather than potential administrative proceedings). Moreover, the "party seeking to assert the work product privilege has the burden of proving that 'at the very least some articulable claim likely to lead to litigation [has] arisen.'" Binks Manufacturing Co. v. National Presto Industries, Inc., 709 F.2d 1109, 1119 (7th Cir. 1983) (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980). Respondent has not articulated any such claim. Even if it were true that respondent prepared the documents in anticipation of an audit, "the purpose of the audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels." United States v. Baggot, 463 U.S. 476, 480 [52 AFTR 2d 83-5248] (1983). Because the documents were not produced in anticipation of litigation, the work product doctrine does not attach to prevent disclosure.

ORDER

IT IS ORDERED that

1. Respondent Telephone and Data Systems, Inc.'s motion to quash the Internal Revenue Summons is GRANTED in part and DENIED in part. It is GRANTED as to the (a) January 10, 1997 letter to Jenner & Block; (b) November 10, 1997 letter from Jenner & Block; and (c) October 8, 1997 letter (and both attachments) from Sidley & Austin. It is DENIED as to the remaining four documents.

2. Petitioner United States of America's petition to enforce the Internal Revenue Summons is GRANTED in part and DENIED in part. It is GRANTED as to the (a) September 26, 1996 memorandum; (b) November 8, 1996 letter to Arthur Andersen; (c) December 2, 1997 letter from Arthur Andersen; and (d) November 24, 1996 outline analysis. It is DENIED at the remaining three documents.

3. The Clerk of court is directed to close the file.

Entered this 16th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB

District Judge

¶2002-5261

UNITED STATES OF AMERICA, PLAINTIFF v. Grady F. HEROLD, SR., ET AL., DEFENDANTS. U.S. District Court, Southern Dist. of Texas, (DC TX) CIVIL NO. B-01-053, July 24, 2002. Decision for Govt.

1. Actions to enforce liens—foreclosure—recovery of estate taxes—estate tax deductions; statutory interest—distribution of proceeds. Final judgment was entered against estate with U.S. and state to recover federal estate and state inheritances taxes, penalties and interest, plus statutory interest reduced by 50% deduction under IRC §2053 and IRC §2011. And, estate tax lien, and deed of trust as-

serted by U.S., and state inheritance tax lien were foreclosed, but appointment of receiver and sale were subject to trigger event. Also, proceeds would be applied 1st to sale costs, with remainder distributed to 3d-party corp., county, U.S. and state. *Reference:* USTR Estate & Gift Taxes ¶20,535.06(10). United States Tax Reporter ¶74,035.03(100). IRC §2011; 2053; 7403.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION,

FINAL JUDGMENT

The Hon. Hilda G. Tagle U.S. DISTRICT JUDGE

On June 24, 2002, this action came on for trial before the Court, Honorable Hilda G. Tagle, U.S. District Judge presiding, and the issues were having been duly tried and a decision was having been duly rendered, It is ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. **[1]** That the United States recover from the Estate the stipulated amount of federal estate tax, penalty and interest in the sum of $2,763,920, plus the amount of accrued statutory interest after December 31, 2001, as reduced by a 26 U.S.C. §2053 deduction for 50% of all federal interest accruing on the stipulated liability after December 31, 2001, until such sum is finally paid by the Estate.

2. That the State of Texas recover from the Estate the stipulated amount of state inheritance tax, penalty and interest in the sum of $771,504.72, as of June 24, 2002, together with interest at the rate of ten percent per annum until paid, as reduced by a deduction pursuant to 26 U.S.C. §§2011 and 2053 for 50% of all federal interest accruing on the stipulated liability after December 31, 2001, until such sum is finally paid by the Estate.

3. That the estate tax lien and deed of trust asserted by the United States of America and the inheritance tax lien asserted by the State of Texas upon the two tracts of property owned by the Estate of Lillian A. Schwarz (Estate) that are described in the attached Government Exhibit 1 (the Property) are hereby foreclosed, subject to paragraph 4 hereinafter.

4. That the appointment of a receiver pursuant to 26 U.S.C. §7403 or a sale under 28 U.S.C. 2001 shall not take place until the occurrence of the earlier of the following (the occurrence of which shall constitute a "Trigger Event") (a) June 25, 2003, or (b) upon notice of application to the Court that the November 16, 2001, contract between the Estate and Legendary SPI, Inc. has been terminated. Legendary and the Estate shall promptly notify the Court in writing with copies sent to the other parties of any termination of the November 16, 2001, agreement.

5. That a receiver shall be appointed after the Trigger Event and that the Property be sold pursuant to 26 U.S.C. §7403 on or after the Trigger Event.

6. That the sale proceeds shall be distributed in the following priority:

(a) to payment of the expenses of sale;
(b) pro rata, to

(i) Legendary SPI, Ltd. in the amount of $629,823.51, together with interest at the rate of 8% per annum from April 17, 2002, and

(ii) Cameron County, Texas, Laguna Madre Water District, Cameron County Emergency Services, Southmost Union Jr. College District, Point Isabel Independent School District, the Town of South Padre Island, South Texas Independent School District and the Cameron County Appraisal District ("the property taxing jurisdictions") in the amount of any unpaid and past due ad valorem property taxes assessed on the Property for calendar year 2002 and subsequent years or to the holder of said Ad Valorem Tax liens for such taxes if the liens are not held by the property taxing jurisdictions;

(c) to the United States of America up to the amount stated in paragraph 1;
(d) to the State of Texas up to the amount stated in paragraph 2; and

(e) any funds remaining to the Estate.

7. All other relief not expressly granted herein is DENIED.

Done at Brownsville, Texas on July 24, 2002.

The Hon. Hilda G. Tagle

U.S. DISTRICT JUDGE

¶2002-5262

IES INDUSTRIES, INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Iowa, (DC IA) No. C97-206, July 22, 2002. On remand from (2001, CA8) 87 AFTR 2d 2001-2492, 253 F 3d 350, 2001-2 USTC ¶50471, reversing and remanding (1999, DC IA) 84 AFTR 2d 99-6445, 2001-2 USTC ¶50470. Years 1991, 1992. Decision for Govt. in part.

1. Tax avoidance transactions—American depository receipt (ADR) transactions—foreign tax credits—recoupment—time for claiming deductions—accrual method taxpayers—all events test—economic performance—Energy Policy Act (EPACT). On remand, govt. was allowed to amend proposed judgment on taxpayer's claim for refund on ADR transactions: amendment seeking to offset 1 year's refund based on reinclusion of previously removed ADR-related dividend income wasn't inconsistent with 8th Cir.'s directive that taxpayer's refund be re-computed in accord with finding that ADR transactions were valid and not shams; and fact that govt. raised recomputation issue late wasn't fatal. Also, allowing govt. to equitably recoup underpayments from earlier years' carryback-based overpayments was proper since it would be inherently inconsistent to grant taxpayer those carrybacks while ignoring underpayment-generating dividend income that arose from same transactions. *Reference:* United States Tax Reporter ¶79,007.01(23); 9015.01(15); 64,025.23(10); 4615.16(7); 4615.41(25). IRC §451; 461; 901; 6402.

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION,

ORDER

Edward J. McManus, Judge UNITED STATES DISTRICT COURT

This matter is before the court on the parties' Report Concerning Entry of Judgment, filed December 14, 2001, and on defendant's resisted Motion to Amend Answer to Conform to Evidence in ADR Summary Judgment Stipulation, filed January 15, 2002. Motion to Amend granted. Ordered in accordance herewith.

On October 22, 2001, the Court of Appeals filed a decision in this matter affirming in part and reversing in part the judgment entered by this court on December 16, 1999. The Court of Appeals held that IES was entitled to summary judgment on its claim for a tax refund, and remanded the matter for further action consistent with its decision.

Pursuant to their Report filed December 14, 2001, it appears that the parties are able to stipulate to judgment upon the 1989 and 1990 tax years. On January 15, 2002, they filed proposed judgments incorporating all matters, together with briefs in support of their proposals.

The nature of this action has been fully characterized in the Court of Appeals' decision, however, it is useful to restate a portion of the Court of Appeals' summary:

[F]or its 1991 and 1992 taxes, IES:

1. Reported gross dividend income on the ADR dividends of nearly $90.8 million.
2. Claimed a foreign tax credit on the ADR dividends for the amount of foreign tax withheld and paid to foreign governments, over $13.5 million.
3. Recognized capital losses from the ADR purchases and sales and sought to carry back more than $82.7 million to offset capital gains earned in 1989 and 1990. An additional $56,643 in capital losses offset capital gains earned in 1992.

4. "[I]ncluded the commissions it paid to purchase ADRs in its basis, and deducted the commissions paid to sell ADRs from the amount realized." Brief of Appellant IES at 17.

5. Deducted over $3.1 million in interest expense incurred in purchasing the ADRs on margin.

The Internal Revenue Service (IRS) audited IES's tax returns for 1991 and 1992 and disallowed the claimed capital losses and the concomitant 1989 and 1990 capital loss carrybacks. The IRS further disallowed the ADR-related foreign tax credit and eliminated the reported dividend income. Deductions for interest expenses, commissions, and one-half of the foreign income tax paid on the ADR transactions were allowed.

IES Industries Inc. v. US, 253 F3d 350, 352–353 (8th Cir. 2001).

As noted in its decision, the Court of Appeals found that plaintiff's ADR trades in 1991 and 1992 were not sham transactions, held that plaintiff was entitled to summary judgment on its claim for a tax refund, and remanded to this court for further action consistent with its decision. Upon that decision, the parties stipulate that plaintiff overpaid its federal taxes by $46,553.71 for 1989, and $27,794,980.49 for 1990 as a result of now permissible capital loss carrybacks.

Defendant asserts that as to plaintiff's claim for a refund of $4,615,405 for the 1992 year, re-inclusion of dividend income previously eliminated by the IRS for that year is consistent with the Court of Appeals' decision, and upon the re-inclusion of that dividend income, a recalculation of the tax liability shows that plaintiff is not entitled to a refund for that year.

Moreover, defendant asserts that reversal of all adjustments previously made by the IRS upon its theory that the ADR trades were sham transactions would result in reinstatement of $90.8 million in dividend income for 1991 and 1992 from ADR trades. Defendant urges that upon reinstatement of the previously eliminated dividend income, additional taxes would have been owing for those years in the amount of $8,431,051.00 for 1991, and $5,511,099.00 for 1992. Defendant asserts that the underpayment of tax for those years should be equitably recouped from the 1989 and 1990 overpayments concededly due plaintiff as a result of reversing the IRS adjustments made for the 1991 and 1992 years on the sham theory. Defendant therefore urges that judgment should be entered for plaintiff in the amount of $13,899,384.20, which represents the total overpayments above, reduced by the claimed underpayments. Defendant seeks leave to amend its Answer to incorporate those positions.

It is the court's understanding that plaintiff does not dispute that the computations set forth at p. 3 of defendant's brief (docket #98) correctly reflect the results of reversing the adjustments the IRS made based on its sham theory, but rather plaintiff urges that defendant now impermissibly raises for the first time new defenses that would eliminate the claimed 1992 refund, and that would also permit defendant to equitably recoup taxes for the 1991 and 1992 tax years. Additionally, plaintiff asserts that even if the equitable recoupment defense were properly before the court, it does not apply here.

While late in the day, upon this record the court is satisfied that the defenses sought to be raised by defendant may now be raised where, as here, the evidence supports the defense. Plaintiff has had ample opportunity to respond, and will suffer no prejudice. See Coohey v. United States, 172 F3d 1060, 1064 fn. 8 [83 AFTR 2d 99-1791] (8th Cir. 1999). Defendant's Motion to Amend Answer shall be granted. FRCP 15.

[1] Upon review, it is the court's view that defendant may properly seek an offset of the $4,615,405 1992 refund based upon the inclusion of the previously removed $46.1 million of 1992 dividend income. Lewis v. Reynolds, 284 US 281, 283 [10 AFTR 773], modified, 284 US 599 (1932). It appears undisputed that the inclusion of that 1992 dividend income would eliminate the claimed refund, and

judgment will be entered on that matter accordingly.

Turning to the question of whether defendant may equitably recoup claimed underpayments for 1991 and 1992 from the refunds due for 1989 and 1990, the doctrine of equitable recoupment ''applies only when the statute of limitations has expired for assessment or collection of the tax liability at issue. Its application is a means of avoiding an unjust result caused by the enforcement of the statute of limitations.'' Coohey, supra, 172 F3d at 1062. Plaintiff urges that the doctrine has no application here, first asserting that the doctrine requires that the party against whom recoupment is sought must have adopted inconsistent positions to the detriment of the opposing litigant. Additionally, plaintiff asserts that the doctrine applies only where a single transaction constitutes the taxable event and the one considered in recoupment, or where a single transaction has been subject to two taxes upon inconsistent legal theories.

In Coohey, the Court of Appeals stated that ''[i]n Bull v. United States, 295 US 247 [15 AFTR 1069] (1935) the Supreme Court recognized that for the doctrine of equitable recoupment to apply, the party against whom that defense was asserted must have adopted inconsistent positions to the detriment of the opponent.'' Id. at 1064. While plaintiff urges that it has not taken inconsistent positions, the record establishes that plaintiff is entitled to recognize and carry back to 1989 and 1990 some $82.7 million in capital losses arising from the ADR transactions in 1991 and 1992. It is the court's view that it is inherently inconsistent to permit the recognition of the capital losses arising from these transactions, while at the same time disregarding some $90.8 million in income arising from those same transactions. This would result in an unjust windfall for plaintiff. Additionally, as to the plaintiff's single transaction assertion, it is the court's view that where, as here, the Court of Appeals has required reversal of the IRS adjustments from the ADR transactions in question, the doctrine of equitable recoupment, with ''its roots in the equitable concerns of unjust enrichment,'' Coohey, supra, 172 F3d at 1064, precludes ignoring the $90.8 million in dividend income arising from the same transactions that generated the $82.7 million in capital losses which plaintiff may now carry back to offset unrelated capital gains. Equitable recoupment is appropriate, where, as here, it ''is in the nature of a defense arising out of some feature of the transaction[s] upon which the plaintiff's action is grounded.'' Bull v. U.S., supra, 295 US 247, 262 [15 AFTR 1069] (1935). Accordingly, defendant shall be permitted to equitably recoup the 1991 and 1992 tax underpayments from the 1989 and 1990 tax overpayments resulting from reversing the IRS adjustments in this matter.

It is therefore

ORDERED

Motion to Amend granted. Ordered in accordance herewith.

The parties shall confer and submit a proposed judgment in accordance herewith by not later than Monday, August 5, 2002.

July 22, 2002.

Edward J. McManus, Judge

UNITED STATES DISTRICT COURT

¶2002-5263

In Re: Joseph W. THOMAS; Sandra G. THOMAS, Debtors. Claude C. LIGHTFOOT, JR., Trustee, PLAINTIFF v. UNITED STATES OF AMERICA, through the Internal Reve-nue Service, the state of Louisiana, through the Louisiana Department of Revenue & Taxation; and Liberty Bank & Trust Company, DEFENDANTS. U.S. Bankruptcy Court, Eastern Dist. of Louisiana, (Bktcy Ct LA) No: 99-12285 ''B''; Adversary Proceeding No. 01-1309, July 19, 2002. Earlier proceed-ing at (2001, Bktcy Ct LA) 88 AFTR 2d 2001-5309. Years 1990, 1993, 1994, 1995. Decision against Govt.

1. Bankruptcy court procedure—lien priority. Chap. 7 trustee was granted unopposed motion for summary judgment,

ranking competing federal and state tax liens and establishing liens' subordination to bankruptcy estate's claims that fell under 11 USC §507(a)(1)-(7). *Reference:* United States Tax Reporter ¶68,726.52(3).

Paul Douglas Stewart, Jr. (24661) Taylor, Porter, Brooks & Phillips, L.L.P. Post Office Box 2471 451 Florida Street, 8th Floor Baton Rouge, Louisiana 70821-2471 (225)381-0223 Tel. (225)346-8049 Fax dstewart@tpbp.com

UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF LOUISIANA,

JUDGMENT ON MOTION FOR SUMMARY JUDGMENT

JUDGE JERRY A. BROWN

CHAPTER 7

This matter came up for hearing on July 10, 2002, on a Motion for Summary Judgment as to the ranking of several Louisiana liens as against five federal tax liens, filed by Chapter 7 Trustee, Claude C. Lightfoot (hereafter ''Trustee''), pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Appearing at the hearing was ELISABETH QUINN ZELDEN, counsel for the Trustee. No opposition, nor any objection, was filed by any defendant.

[1] After considering the Petition and Amended Petition of the Trustee, and after reading the written memoranda of counsel for all parties, consisting only of memoranda of the Trustee's counsel, including any and all exhibits attached thereto, and considering the oral argument of counsel for the Trustee, and for oral reasons announced at the conclusion of the hearing, particularly that there was no genuine issue of material fact as to the priority and ranking of the liens and as to the subordination of those liens to claims of the Bankruptcy Estate falling under 11 U.S.C. § 507(a)(1)–(7);

IT IS ORDERED, ADJUDGED AND DECREED, that the Motion for Summary Judgment to rank the Louisiana liens against the existing federal tax liens and to subordinate all such liens to claims of the Bankruptcy Estate falling under § 507(a)(1)–(7) filed in this proceeding on behalf of Trustee, be and it is hereby granted; that all of the liens delineated below are subordinate to § 507(a)(1)–(7) claims; and that the Louisiana and federal tax liens are ranked in the following order:

La. Lien A- *Notice of State Tax Assessment and Lien*, State of Louisiana, Department of Revenue & Taxation (''LADRT''), filed March 7, 1989, in the amount of *$1,185.35* on all property of the tax debtor, both movable and immovable.

Fed. Lien 1 - *Notice of Federal Tax Lien*, Internal Revenue Service (IRS), attached March 14, 1994 and filed June 20, 1994, in the amount of *$79,867.99*on all property and rights to property belonging to this taxpayer

Fed. Lien 2 - *Notice of Federal Tax Lien*, IRS, attached May 30, 1994 and filed August 11, 1994, in the amount of *$167,455.21* on all property and rights to property belonging to this taxpayer

La. Lien B - *Notice of State Tax Assessment and Lien*, LADRT, filed June 29, 1995, in the amount of *$21,730.03* on all property of the tax debtor, both movable and immovable.

La. Lien D - *Notice of State Tax Assessment and Lien*, LADRT, filed September 16, 1996, in the amount of *$24,929.43* on all property of the tax debtor, both movable and immovable

Fed. Lien 3 - *Notice of Federal Tax Lien*, IRS, attached October 21, 1996 and filed April 2, 1997, in the amount of *$83,818.79* on all property and rights to property belonging to this taxpayer

Fed. Lien 4 - *Notice of Federal Tax Lien*, IRS, attached November 18, 1996 and filed April 2, 1997, in the amount of *$109,115.02* on all property and rights to property belonging to this taxpayer

La. Lien F - *Notice of State Tax Assessment and Lien*, LADRT, filed March 27, 1997, in the amount of $179.01 on all property of the tax debtor, both movable and immovable

Fed. Lien 5 - *Notice of Federal Tax Lien*, IRS, attached April 30, 1998 and filed July 15, 1998, in the amount of *$215,681.36* on all property and rights to property belonging to this taxpayer

La. Lien C - *Notice of Tax Assessment & Lien*, State of Louisiana, Department of Labor (LADL), filed March 19, 1996, in the amount of *$148.56*

La. Lien E - *Judgment*, LADL, filed November 18, 1996, in the amount of *$6,764.74*

JUDGMENT RENDERED on July 10, 2002.

JUDGMENT SIGNED on the 19th day of July, 2002, in the United States Bankruptcy Court for the Eastern District of Louisiana, at New Orleans, Louisiana.

JUDGE JERRY A. BROWN

¶2002-5264

UNITED STATES OF AMERICA, PLAINTIFF v. Kevin P. MAHONEY, d/b/a The Liberty Network, Liberty Estate Planning, Association for Certified Estate Planning Attorneys, Citadel Group, and Cornerstone Financial Group, DEFENDANT. U.S. District Court, Dist. of Massachusetts, (DC MA) Civil No. 02-CV-10673, July 12, 2002. Decision for Govt.

1. Abusive tax shelter promotion—injunctions. Tax preparer was permanently enjoined from promoting abusive tax shelters or helping to prepare other taxpayers' returns that understated their tax liabilities: conduct was subject to penalty under IRC §6700 and IRC §6701 since it interfered with enforcement of internal revenue laws. Also, tax preparer was ordered to provide records identifying others for whom he prepared tax returns or to whom he sold trust packages and to mail them copies of complaint and permanent injunction and to display copies on his websites. *Reference:* United States Tax Reporter ¶67,005.01(15); 74,085.01(50). IRC §6700; 6701; 7408.

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS,

DEFAULT JUDGMENT OF PERMANENT INJUNCTION

This action comes before the Court upon the entry of default by the clerk on June 20, 2002, and the plaintiff's motion for entry of judgment under Rule 55(b)(2) of the Federal Rules of Civil Procedure, supported by a declaration demonstrating that defendant is not an infant or incompetent person or in the military. Accordingly, judgment is hereby entered in favor of the plaintiff, United States of America, and against defendant Kevin P. Mahoney, d/b/a/ The Liberty Network, Liberty Estate Planning, Association for Certified Estate Planning Attorneys, Citadel Group and Cornerstone Financial Group.

[1] The Court finds that defendant Mahoney, d/b/a The Liberty Network, *et al.*, engaged in conduct subject to penalty under 26 U.S.C. §§ 6700 and 6701, and that injunctive relief is appropriate under 26 U.S.C. § 7408 to prevent the defendant and anyone acting in concert with him from engaging in further such conduct. The Court further finds that defendant Mahoney, d/b/a The Liberty Network, *et al.*, engaged in conduct that interferes with the enforcement of the internal revenue laws, and that injunctive relief is appropriate pursuant to the Court's inherent equity powers and 26 U.S.C. § 7402(a) to prevent the recurrence of that conduct. It is further

ORDERED, ADJUDGED AND DECREED that Kevin P. Mahoney, d/b/a The Liberty Network, *et al.*, and all those acting in concert with him, are restrained and enjoined under 26 U.S.C. §§ 7402 and 7408 from directly or indirectly:

a. Organizing, promoting, marketing, or selling his ''Pass-Through Technology'' programs, ''Constitutional'' and ''Pure'' trust programs, ''Contract Business Trust'' and ''Family Estate Trust'' programs, and any other abusive tax shelter, plan or arrangement that incites taxpayers to attempt to violate the internal revenue laws or unlawfully evade the assessment or collective of their federal income taxes;

b. Inciting other individuals and entities to understate their federal tax liabilities, avoid the filing of federal tax returns, or avoid paying federal taxes;

c. Further engaging in any conduct subject to penalty under 26 U.S.C. § 6700, *i.e.*, making or furnishing, in connection with the organization or sale of an abusive shelter, plan or arrangement, a statement the defendant knows or has reason to know is false or fraudulent as to any material matter;

d. Further engaging in any conduct subject to penalty under 26 U.S.C. § 6701, *i.e.*, assisting others in the preparation of any tax forms or other documents to be filed with the Internal Revenue Service that the defendant knows, if so filed, will result in the understatement of income tax liability; and

e. Further engaging in any conduct that interferes with the administration and enforcement of the internal revenue laws.

It is further ORDERED, ADJUDGED AND DECREED that defendant Mahoney provide to the United States any records in his possession, or to which he has access, that identify all persons or entities for whom the defendant (or any entity through which he operates) has prepared income tax returns, sold trust packages to, or has provided any services on behalf of Liberty Estate Planning or Citadel Group, including but not limited to all Liberty Estate Planning and Citadel Group members since January 1, 1995.

It is further ORDERED, ADJUDGED AND DECREED that defendant Mahoney is required to mail a copy of the Complaint in this action and this Court's Order of Permanent Injunction to:

a. All persons for whom the defendant or his agents prepared federal income tax returns or any other federal tax forms from January 1, 1995, to the present;

b. All persons who purchased trust packages from defendant or his agents or designees;

c. All persons who conducted any transactions with Liberty Estate Planning, Association for Certified Estate Planning Attorneys, Citadel Group and Cornerstone Financial Group since January 1, 1995; and

d. All Liberty Estate Planning or Citadel Group members since January 1, 1995.

The defendant shall do this within 20 days of the date of this order and shall, within 25 days of the date of this order, file with the Court and serve on Government counsel a list of the names and addresses of all persons who have been so notified.

It is further ORDERED, ADJUDGED AND DECREED that defendant Mahoney, d/b/a Liberty Estate Planning, *et al.*, display prominently on the first page of any website he maintains a copy of this Court's Order of Permanent Injunction and to maintain such websites for a period of at least one year from the date of this order.

It is further, ORDERED, ADJUDGED AND DECREED that the United States may engage in post-judgment discovery to monitor the defendant's compliance with this injunction.

SO ORDERED this 12 day of July 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5265

UNITED STATES OF AMERICA, PLAINTIFF v. Perry G. MATHEWS, DEFENDANT. U.S. District Court, Northern Dist. of Ohio, (DC OH) Civil No.: 1:02CV909, July 23, 2002. Year 1991. Decision for Govt.

1. Tax liability reduced to judgment. Pursuant to stipulation, judgment was entered against taxpayer for unpaid taxes and penalties in stated amount. *Reference:* United States Tax Reporter ¶74,035.01(30). IRC §7403.

STEPHEN A. SHERMAN Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 55 Ben Franklin Station Washington, D.C. 20044 Telephone: (202) 307-6404

IRVING BELL Attorney for Perry Mathews 5171 Mayfield Road Cleveland, Ohio 44124 (440) 449-4560

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO,

STIPULATED JUDGMENT

Judge Patricia A. Gaughan

[1] The Plaintiff United States and the Defendant Perry G. Mathews, by and through counsel, do hereby stipulate to the entry of a judgment in favor of the United States for its tax claims as set forth in the complaint. Specifically, Mr. Perry Mathews agrees to a judgment that he is liable to the United States for his federal income taxes for the 1991 tax year in the amount of $45,993 as of May 7, 2002, plus statutory additions.

IT IS SO ORDERED:

JUDGE PATRICIA GAUGHAN

U.S. District Court

Date: July 23, 2002

Stipulated by:

/s/ Steve A. Sherman

STEPHEN A. SHERMAN

Trial Attorney, Tax Division

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/s/ Irving Bell

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¶2002-5266

In Re: Paula JUKE. U.S. Bankruptcy Court, Dist. of New Jersey, (Bktcy Ct NJ) Case No. 99-13833/JHW, July 23, 2002. Decision against Taxpayer.

1. Tax claims in bankruptcy—proof of claim—100% penalty for failure to pay over withholding taxes—jurisdiction. Chap. 13 debtor/ IRC §6672 responsible person's request to pay non-debtor corp.'s pre-petition employment tax debts through her bankruptcy plan was denied: absent IRS's filing of proof of claim against taxpayer under IRC §6672, or her filing such claim on IRS's behalf, tax wasn't one for which taxpayer was considered "liable" under 11 USC §507(a)(8)(C) and thus wasn't payable through bankruptcy. Also, bankruptcy court didn't have jurisdiction to determine non-debtor corp.'s tax liability. But, court noted that absent proper IRC §6672 proof of claim, taxpayer's personal liability for such debt would be subject to discharge on plan's completion. *Reference:* United States Tax Reporter ¶68,726.52(15); 68,726.52(5). IRC §6672.

Robert Manchel, Esq. Executive Center of Greentree 1 Eves Drive, Suite 111 Marlton, New Jersey 08053
Beatriz T. Saiz, Esquire Trial Attorney, Civil Trial Section P.O. Box 227 Ben Franklin Station Washington, D.C. 20044

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY,

LETTER OPINION

JUDITH H. WIZMUR BANKRUPTCY JUDGE

Dear Counsel:

[1] I am in receipt of Mr. Manchel's response to my request for clarification. I have reviewed the oral argument on April 8, 2002, and note the following:

On April 8, I determined that the debtor would have an opportunity, as a responsible person under 11 U.S.C. § 6672, to pay the tax liability of Mellman and Jukel, Inc., attributable to employee withholding taxes. I determined further that no discharge of the obligation of Mellman and Jukel, Inc. could be achieved by this opportunity. I determined as well that a stay of collection activity against Mellman and Jukel, Inc. by the IRS may be imposed as to the portion of employee withholding liability being paid by the debtor.

Upon more deliberate review of the issues, I must reconsider my decision to allow the debtor to pay the corporate obligation of Mellman and Jukel, Inc. through her personal bankruptcy case, in the absence of a claim asserted by the IRS against the debtor as a responsible person under 28 U.S.C. § 6672. The debtor relies in part on 11 U.S.C. § 507(a)(8)(C), which provides priority status to allowed un-secured claims of governmental units, to the extent that such claims are for "a tax required to be collected or withheld and for which the debtor is liable in whatever capacity." If a proof of claim is filed in the debtor's case under 26 U.S.C. § 6672 for responsible person liability, the debtor would not only be permitted to pay such liability through her Chapter 13 plan, but would be required to do so under 11 U.S.C. § 1322(a)(2). However, where no such proof of claim has been filed, there is no opportunity to declare that "the debtor is liable" within the meaning of § 507(a)(8)(C).

The necessary procedure for a debtor who seeks to pay a claim through a Chapter 13 case, where the claim has not been filed by the creditor, is to file the claim on behalf of the creditor under 11 U.S.C. § 501(c). Bankruptcy Rule 3004 provides that if a creditor fails to file a proof of claim, within 30 days after the expiration of time for filing a proof of claim under Rule 3002, the debtor may file a proof of claim for the creditor. In this case, the IRS filed a proof of claim reflecting the individual tax liability of the debtor, without reference to any § 6672 responsible person liability for Mellman and Jukel, Inc. employee withholding taxes. Arguably, the debtor could have filed a proof of claim under § 501(c) to provide the mechanism for payment to the IRS on this obligation. This was not done within the time prescribed by Rule 3004.[1]

The case law cited by the debtor to support its position that opportunity exists here to pay the debtor's liability through the Chapter 13 plan and to stay collection efforts by the IRS against the related corporate entity, is inapposite. The debtor is certainly correct to cite United States v. Sotelo, 436 U.S. 268 [42 AFTR 2d 78-5001], 98 S.Ct. 1795 [42 AFTR 2d 78-5001], 56 L.Ed. 2d 275 (1978) for the proposition that the IRS may assert § 6672 responsible person liability against a debtor, which may be treated as a claim in bankruptcy case. Nothing in the cases cited by the IRS dispels this basic concept. In Quattrone Accountants, Inc. v. Internal Revenue Service, 895 F.2d 921 [65 AFTR 2d 90-580] (3d Cir. 1990), the determination of the bankruptcy court that a corporate debtor was a § 6672 responsible person who wilfully failed to pay over federal employment taxes incurred by a company for whom it performed accounting services was affirmed by the Court of Appeals. The court also determined that the bankruptcy court has no jurisdiction under 28 U.S.C. § 1334 to determine the § 6672 tax liability of the non-debtor principal of the debtor corporation. And in Datlof v. United States, 370 F.2d 655, 656 [19 AFTR 2d 335] (3d Cir. 1966), the Third Circuit Court of Appeals affirmed that the personal liability created by § 6672 is separate and distinct from that imposed upon the employer under 26 U.S.C. § 3403.

The debtor incorrectly contends here that by not permitting her to pay § 6672 tax liability to the IRS through her Chapter 13 plan, "the court is allowing the IRS to purposely avoid the court's jurisdiction by not including said taxes on their proof of claim" and "permitting the IRS to avoid the automatic stay and collect said taxes directly from the debtor." As to the debtor, if the IRS does not amend its proof of claim to include § 6672 tax liability, and if the debtor does not obtain court approval to file an amended proof of claim on behalf of the IRS, then any such liability to the IRS by the debtor will be discharged upon successful completion of her Chapter 13 plan. No collection opportunity will be afforded to the IRS against the debtor. As to the corporation, this court has no jurisdiction to determine the tax lia-

[1] It is noted that Bankruptcy Rule 9006(b)(1) permits enlargement of time for a debtor to file a proof of claim after the expiration of the specified period where the failure to act was the result of excusable neglect, and where the enlargement is requested by formal motion.

bility of a non-debtor, and no basis to offer injunctive relief to the non-debtor on this record.

I have entered an order herein, a copy of which is enclosed, which reconsiders the oral decision entered on the debtor's motion on April 8, 2002, and denies the relief sought.

Very truly yours,

JUDITH H. WIZMUR

U.S. BANKRUPTCY JUDGE

Enclosure

JHW: tob

ORDER RECONSIDERING ORAL DECISION AND DENYING DEBTOR'S MOTION TO CURE MELLMAN AND JUKEL, INC'S PRE-PETITION TAX ARREARS THROUGH THE BANKRUPTCY PLAN

The relief set forth on the following pages, numbered two (2) through two (2) is hereby ORDERED.

Dated: July 23, 2002

JUDITH H. WIZMUR

U.S. BANKRUPTCY JUDGE

This matter comes on to be heard upon the debtor's motion to allow the debtor to cure Mellman and Jukel, Inc.'s pre-petition tax arrears through the bankruptcy plan. On April 8, 2002, an oral decision was rendered affording relief to the debtor. For the reasons advanced in the Letter Opinion dated July 23, 2002, and for good cause,

It is ORDERED that the debtor's motion to allow the debtor to cure Mellman and Jukel, Inc.'s pre-petition tax arrears through the bankruptcy plan is denied.

¶2002-5267

In re: Barbara J. WASHBURN, Debtor, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) Case No. 01-15534-9P7; Adv. Proc. No. 01-712, July 16, 2002. Years 1992, 1993, 1994, 1995, 1996, 1997. Decision for Govt.

1. Tax claims in bankruptcy—dischargeability—untimely returns. Chap. 7 debtor-real estate broker's tax debts were excepted from discharge under 11 USC §523(a)(1)(B): Forms 1040 taxpayer prepared only after IRS prepared return substitutes, made assessments and threatened levy weren't qualified ''returns'' for §523(a)(1)(B) purposes; and her emotional upset at husband's death didn't excuse her nonfiling, particularly where she continued to conduct business or pay creditors other than IRS during years at issue. Also, taxpayer's post-assessment settlement attempts didn't show reasonable effort to comply with tax laws. *Reference:* United States Tax Reporter ¶68,726.52(27).

UNITED STATES BANKRUPTCY COURT MIDDLE DISTRICT OF FLORIDA FORT MYERS DIVISION,

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

ALEXANDER L. PASKAY United States Bankruptcy Judge

The matter under consideration in this Chapter 7 Case, is ''Motion by United States for Summary Judgment,'' filed by the United States of America (Government), in the above-captioned adversary proceeding. The Complaint, which is filed by Barbara J. Washburn (Debtor), seeks a determination by this Court that the tax obligations for the years of 1992, 1993, 1994, 1995, 1996 and 1997 are not within the exception of discharge set forth in 11 U.S.C. § 523(a)(1) because the returns (1) were due more than three years prior to the filing of the bankruptcy case; (2) were actually filed more than two years before the date of the filing of the Petition; and (3) were not assessed within the 240 days prior to the commencement of this case.

The Government, in its Motion, contends that there are no genuine issues of material facts, and based on the same, the liabilities of the Debtor for the tax years in question, are within the exception 11 U.S.C. § 523(a)(1)(B)(i).

The facts relevant to the resolution of the issue are indeed without dispute and can be summarized as follows. The Debtor, who is a widow, failed to file the required 1040 tax returns for the years indicated above. At all times relevant, the Debtor was a licensed real estate broker and worked as such since 1971. During the 1970's, the Debtor and her husband owned and operated a real estate firm in Michigan (Exh. 10, p. 13). Because of the husband's first major heart attack in 1979, they abandoned the Michigan brokerage firm and moved to Florida in 1981.

In Florida, each accepted positions as real estate sales persons and worked for other real estate companies. (Exh. 10, p. 10–14). In 1992, the Debtor's husband retired and received only social security retirement income, but the Debtor continued to be employed as a real estate broker and basically earned all of the income for the couple in the year 1992. Prior to 1992, the Debtor and her husband filed joint federal income tax returns. In 1992, the couple moved to 7121-614 Golden Eagle Court, Ft. Myers, Florida. It was this address that they filed a joint 1991 income tax return.

In January 1993, the Debtor's husband died of a heart attack. After his death, the Debtor learned that $40,000 life insurance policy, which she had counted on, did not exist. Moreover, she learned that they were indebted in excess of $40,000 in credit cards and she was not previously aware of this obligation. When the time came to prepare and file the 1992 federal income tax return in April of 1993, the Debtor approached an accountant for the purpose of discussing the filing of the return but she had difficulty in locating receipts and other relevant documents necessary for filing the tax return. No return was filed for the year 1992.

In September 1993, the Debtor moved form the Golden Eagle Court home. It is without dispute that the Debtor did not filed the required tax returns for the years 1994, 1995, 1996, and 1997. And, it is also without dispute that the Debtor did not notify the IRS of her change of address. According to her testimony given at her deposition, the Debtor stated that she did not file the 1992 return because she did not know to do it and did not seek assistant of an accountant because she did not want to paint her husband in a bad light. It is also without dispute that in 1993, 1994, and 1995, she had sole control of her tax records, that she saved all records of her deductibles, notwithstanding, she did not file the tax returns because she was embarrassed of the situation she had created herself.

In 1995, the Debtor made a determined effort to pay off her creditors other than the Government. In fact, she managed to pay off a substantial amount on her credit card obligations in an amount of between $15,000 and $20,000. The Debtor made no voluntary payments at all towards her federal income tax liabilities. Between the years 1992 and 1995, there was no withholding payments or estimated payments made by the Debtor. In the year 1999 and 2000, the Debtor conditionally tendered to the Government the sum of $500, in connection with separate offers to compromise her unpaid income tax liabilities. The Debtor never contacted the IRS during the years 1993 and 1998. And, the IRS could not reach her since she had vacated her previous residence and moved to an address unknown.

The IRS repeatedly sent notices to the old address requesting that she file her turns. In July of 1994, September of 1994, October of 1994, and again November of 1994, the IRS sent delinquency notices to the Debtor. The IRS ultimately classified her as a NON-FILER and the IRS prepared an SFR or substitute for return (SFR). In 1997, the IRS issued a notice of deficiency, which was sent by certified mail to the Debtor's last known address for each of the years 1992, 1993, 1994, and 1995. On May 11, 1998, the IRS assessed income taxes against the Debtor the years of 1992, 1993, 1994, and 1995, on the basis of the SFR prepared by the service and made a formal notice and demand for payment.

In November 1998, the IRS served on the employer of the Debtor a Notice of

Levy to collect her unpaid income tax liabilities for the years 1992 through 1995, in the amount of $131,453.48. Upon receipt of the Notice of Levy, the Debtor engaged the services of an accountant, went through her tax records, located her records concerning the year 1992 and with the help of the accountant prepared a 1040 for the years of 1992 up to and including 1997, and filed the same with the IRS.

Each of the forms (the 1040s) filed by the Debtor in 1998 for these years reported a lesser amount of tax than the IRS previously assessed based on the SFR. The IRS accepted the reduced amount and abated the payment of some of the taxes. The assessed balance owed by the Debtor for 1992, 1993, 1994 and 1995, crediting the abated amounts and exclusive of interest accrued for the dates of assessment are as follows:

Year	Assessed Balance Due
1992	$15,608.69
1993	$19,567.42
1994	$28,565.32
1995	$ 1,357.77
total:	$65,098.77

In due course, the Debtor filed an Affidavit in opposition to the Government's Motion. The Debtor, in her Affidavit, contends that prior to her husband's death, her husband was responsible for household expenses including for the preparation and filing of the income tax returns. In her Affidavit, she states that in September of 1993, she moved from the residence located at 7121–614 Golden Eagle Court to 14887 West Point Drive, Ft. Myers, Florida. She also states that she filed a change of address form with the United States Post Office. Upon learning of the levy, the Debtor contacted Joanee C. Holt, CPA, who in turn, contacted an agent of the IRS. It is the Debtor's contention that the IRS agent told the CPA that she would have 10 days to file all delinquent tax returns. The Debtor contends that in reliance of this extension by the agent of the IRS, she retained Ms. Holt, who prepared the returns for the years in question, which were mailed to the IRS, Team C, at 400 West Bay Street, Suite 35087, Jacksonville, Florida.

In 1998, after the IRS imposed a levy, the Debtor made an Offer of Compromise and tendered $500, which was rejected by the IRS. Thereafter, the Debtor made an additional offer to settle her tax liability on May 24, 1999, for $14,000, which was rejected in August of 2000 by the IRS. Thereafter, she made an offer on November 7, 2000 for $3,600, which was also rejected in May 2001.

In the year 1992, the Debtor had gross income of $47,000 and an adjusted gross income of $31,000. In the year 1993, the Debtor had gross income of $64,000 and an adjusted gross income of $40,000. She also had gross receipts of $95,000, and adjusted income of $46,000. In 1995, the Debtor had $35,000 gross receipts.

As noted, the Debtor paid all of her creditors in full other than the IRS during the relevant time period. The Debtor is an intelligent and very knowledgeable person and well knew that she had a legal obligation of filing an income tax return for the years in question. The only defense that she was depressed because of the loss of her husband is not an acceptable defense that she failed to file the tax returns. Basically, these are the controlling facts of the ultimate issue which is whether the admitted liabilities of the Debtor for unpaid taxes is within the exception of Section 523(a)(I)(B)(i) of the Code and therefore not protected by the general bankruptcy discharge.

[1] In many respects, the fact pattern in the present instance is similar to those considered by numerous courts where the tax payer relies on the proposition that if he or she files the required return after the IRS already made the assessment and filed on behalf of the tax payer the SFR, the tax payer's liability for unpaid taxes should be discharged. In the case of In re Hindenlang, 164 F.3d 1029 [83 AFTR 2d 99-509] (6th Cir. 1999), the Sixth Circuit held that the tax forms filed by the debtor tax payer after the IRS assessed deficien-

cies were not ''returns'' for purposes of discharge exception for taxes for which the required return was not filed. The Court in Hindenlang also held that, as a matter of law, a document purporting to be a federal tax return is not a ''return'' if it serves no tax purpose and has no effect on the IRS.

In Hindenlang, the debtor failed to file a federal tax return for the years 1985 through and including 1988. The IRS sent a notice to the debtor of the proposed deficiency (a 30-day letter) for each year. When the debtor did not consent to the proposed liability, the IRS prepared an SFR for each of the years involved. In 1991, the IRS, after waiting the statutory prescribed 90 days, assessed the deficiencies against the debtor. In 1993, or two years after the assessment, the debtor sent to the IRS a form 1040, which purported to be his income tax return for the years in question. Hindenlang, 164 F.3d at 1031–1032. The debtor never filed the deficiency. On January 22, 1996, the debtor filed his Chapter 7 Petition. The debtor also commenced an adversary proceeding and sought a determination that his liabilities for unpaid taxes were within the protection of the general bankruptcy discharge. Both the debtor and the IRS filed motions for summary judgment. The bankruptcy court granted summary judgment for the debtor, which was affirmed by the district court. See In re Hindenlang, 214 B.R. 847 [80 AFTR 2d 97-6708] (S.D. Oh. 1997).

The district court applied a four-part test to determine whether filing with the IRS constituted a return. Under this test, in order for a document to qualify as a return: (1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of the tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law. Hindenlang, 164 F.3d at 1033 *quoting* Hindenlang, 214 B.R. at 848. The case relied on by the district court was derived from Germantown Trust Co. v. Commissioner, 309 U.S. 304 [23 AFTR 1084], 60 S. Ct. 566 [23 AFTR 1084], 84 L. Ed. 770 (1940) and Zellerbach Paper Co. v. Helvering, 293 U.S. 172 [14 AFTR 688], 55 S. Ct. 127, 79 L. Ed. 264 (1934). Bankruptcy courts and others have uniformly adopted the test developed by the Supreme Court in Zellerback and Germantown. The Court of Appeals in applying this test, found that the 1040 form submitted by the debtor was purported to be a return, it was executed under penalty of perjury, and the form included all data needed to calculate the tax payer's liability. In reversing the district court, the Court of Appeals held that as a matter of law, the form 1040 is not a ''return'' if it serves no tax purpose or has any effect on the Internal Revenue Code. Hindenlang, 164 F.3d at 1035. The Court of Appeals also held that the return was filed too late after the government had made the assessment and filed an SFR, and therefore, the return could not constitute an honest and reasonable attempt to satisfy the requirements of the tax law.

Hindenlang was followed by In re Hatton, 220 F.3d 1057 [86 AFTR 2d 2000-5572] (9th Cir. 2000), wherein the Ninth Circuit held that the term ''return,'' as used in the statutory exception of discharge for tax debts, should be given strict construction and interpreted in accordance with its ordinary meaning. In applying the Supreme Court test, the court in Hatton concluded that neither a substitute return prepared by the IRS without any input or assistance of a chapter 7 debtor nor an installment agreement that the debtor agreed to sign only after the IRS threatened to levy his wages and seize his property qualified as a tax ''return.'' Hatton, 220 F.3d at 1061. Therefore, the Ninth Circuit reversed the bankruptcy court and B.A.P.'s decision and held that the debtor's tax liability was excepted from discharge.

The Chief Judge of this District also had an opportunity to consider the issue on appeal from the bankruptcy court in the case of United States v. Ralph, 266 B.R. 217 [88 AFTR 2d 2001-5639] (M.D. Fla. 2001). In Ralph, the bankruptcy court held (at 258 B.R. 594) that the documents that the debtor wife had filed with the assistance of an accountant is response to a tax

amnesty program qualified as tax ''returns'' and therefore were sufficient to meet the discharge of her debts. On appeal, Chief Judge Kovachevich held that the return filed by the debtor after the filing of the SFR served no purpose, and therefore, did not constitute a ''return'' for dischargeability purposes.

Last year, this Court had the opportunity to consider the same issue in the case of In re Sgarlet, 217 B.R. 688 (Bankr. M.D. Fla. 2001). This Court granted summary judgment to the Government and concluded that an ultimately 1040 submitted by a debtor after the IRS made a formal assessment does not represent the honest and reasonable attempts of the debtor to satisfy the requirements of tax law. Thus, the document did not satisfy the requirement of a ''return'' for the purposes of dischargeability.

In the present instance, it is without dispute that the actual return was filed by the Debtor not only after the IRS filed an SFR but after the Government already served the Notice of Levy on the Debtor's employer. Clearly, under Hindenlang, that was not a return. Moreover, in the present instance, it is without dispute that the Debtor was very well aware of her obligations to file the return, having earned substantial taxable income in the years in question. Especially since the Debtor had sufficient funds to pay her creditors except the IRS. Yet, the fact of the matter is that once she consulted an accountant to do something about it, there was nothing done, and she did not file an actual return until the IRS filed the SFR and served a Notice of Levy.

In order to overcome the compelling reasoning of the cases cited, the Debtor attempts to show that due to her mental frame of mind, because of the loss of her husband, she was too upset to relieve the IRS problem. This proposition is completely belied by this record based on the undisputed facts that she had more than sufficient *compos mentis* to meet her other obligations and pay off her other creditors during the relevant years. The additional contention of the Debtor that the IRS agent gave her 10 days to file a return, thus the IRS is estopped to contend that she did not make a reasonable effort to comply with the tax laws, must also be rejected. It is true that the Debtor made three attempts to settle her tax liability with the Government, all of which were rejected. A similar claim was also rejected in the case of Hatton, supra, where the debtor entered into an installment agreement, which the debtor did sign but only after the IRS threatened to levy. In Hatton, the court held that neither the SFR nor the installment agreement qualified as a ''return'' for the purpose of dischargeability. In sum, this Court is satisfied that based on the undisputed facts, the Government established with the requisite degree of proof that the Debtor's liability for unpaid taxes for the years in question are within the exception for discharge under Section 523(a)(1)(B)(i) of the Code.

A separate final judgment will be entered in accordance to the foregoing.

DONE AND ORDERED at Tampa, Florida, on JUL 16 2002.

ALEXANDER L. PASKAY

United States Bankruptcy Judge

FINAL JUDGMENT

ALEXANDER L. PASKAY United States Bankruptcy Judge

THIS CAUSE came on for consideration upon the Court's own Motion for the purpose of entering a Final Judgment in the above-captioned adversary proceeding. The Court has considered the record and finds that this Court has entered Findings of Fact, Conclusions of Law, and Memorandum Opinion. Therefore, it appears appropriate to enter this Final Judgment.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that Final Judgment be, and the same is hereby, entered in favor of the Defendant, United States of America, and against Plaintiff Barbara J. Washburn with respect to the all Counts of the Complaint. It is further

ORDERED, ADJUDGED AND DECREED that the tax obligations for the

years of 1992, 1993, 1994, 1995, 1996, and 1997 are within the exception of discharge set forth in 11 U.S.C. § 523(a)(1).

DONE AND ORDERED at Tampa, Florida, on JUL 16 2002.

ALEXANDER L. PASKAY

United States Bankruptcy Judge

¶2002-5268

UNITED STATES OF AMERICA, APPELLEE v. Norman BERNSTEIN, DEFENDANT-APPELLANT. United States Court of Appeals, Second Circuit, (CA2) Docket No. 01-1118, Aug. 14, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—conspiracy; tax fraud—U.S. Sentencing Guidelines—double counting—guilty plea. Taxpayer's conviction and sentence for conspiracy to commit tax and mail fraud were affirmed: offense grouping, and consequent loss amounts' aggregation, under U.S.S.G. §3D1.2(d) rather than under §3D1.2(c) was proper according to case precedent, U.S.S.G.'s text and fact that grouping under §3D1.2(c) wouldn't significantly serve that section's purpose. Also, district court's discretionary denial of taxpayer's request for downward departure was unreviewable, absent showing that court misapprehended its departure authority; and taxpayer waived his right to contest pretrial rulings when he entered knowing, voluntary and unconditional guilty plea. *Reference:* United States Tax Reporter ¶73,446.516(55); 73,446.505(5).

Maranda E. Fritz, Maranda E. Fritz, P.C., New York, NY, for Appellants.
Robert R. Strang, Assistant United States Attorney, Southern District of New York (Mary Jo White, United States Attorney, Christine H. Chung, Assistant United States Attorney, of counsel), New York, NY, for Appellee.

United States Court of Appeals, Second Circuit,

Appeal from the United States District Court for the Southern District of New York (Richard Conway Casey, Judge).

Present ELLSWORTH VAN GRAAFEILAND, RALPH K. WINTER, and ROBERT D. SACK, Circuit Judges.

SUMMARY ORDER

UPON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED IN PART AND DISMISSED IN PART.

Norman Bernstein appeals from his conviction and from the sentence imposed by Judge Casey following his plea of guilty to charges of conspiracy, in violation of 18 U.S.C. § 371, to commit mail fraud in violation of 18 U.S.C. § 1341 and tax fraud in violation of 26 U.S.C. § 7206(1). Appellant challenges: (i) the district court's grouping of offenses, and the resulting aggregation of related dollar amounts, under United States Sentencing Guidelines Manual § 3D1.2(d); (ii) the district court's denial of appellant's pretrial motions; and (iii) the district court's decision not to grant a downward departure. We affirm with re-gard to claims (i) and (ii) and dismiss the claim regarding the downward departure.

Following the denial of his pre-trial motions, appellant pled guilty to Count One of the indictment, charging conspiracy to commit mail fraud and tax fraud. The plea agreement contained stipulations concerning the loss amounts resulting from appellant's mail and tax fraud offenses and stipulations concerning application of the Sentencing Guidelines, including an ac-knowledgment of a two-level enhancement under the tax evasion guideline, s 2T1.1(b)(1), for the failure to report in-come in excess of $10,000 derived from criminal activity. There was no agreement on whether or how the mail and tax fraud offenses should be grouped under § 3D1.2.

At sentencing, the district court grouped appellant's mail and tax fraud offenses under § 3D1.2(d) of the Sentencing Guidelines, pursuant to which the loss amounts applicable to the two offenses were aggregated and applied, under § 3D1.3(b), to the

more stringent of the applicable sentencing tables. This resulted, after various adjustments, in a final offense level of 19, which the court reduced to 18 so as to reflect the agreement reached by the parties at the time of the plea. Appellant's motion for a downward departure based on his health and family circumstances was denied, and he was sentenced to twenty- seven months of imprisonment, the lowest sentence within the offense level 18 sentencing range.

Appellant argues that his mail fraud and tax evasion offenses should be grouped, not under § 3D1.2(d), but rather under s 3D1.2(c), which would avoid the aggregation of loss amounts and result, after various adjustments, in an offense level of 16. Appellant claims that grouping under s 3D1.2(d) leads to ''double counting'' of offenses, see Appellant's Brief at 22, because the mail fraud dollar amounts are aggregated for initial sentence calculation purposes, and then an additional two-point sentence enhancement is added under the tax evasion guideline, § 2T1.1(b)(1), for failure to report criminally-derived income in excess of $10,000.

The government contends that the district court was correct to group the offenses under § 3D1.2(d), arguing, first, that § 3D1.2(c) simply does not apply to appellant's offenses by its own terms, and, second, that the district court was precluded from grouping appellant's offenses under s 3D1.2(c) by our decisions in United States v. Fitzgerald, 232 F.3d 315, 320-21 [86 AFTR 2d 2000-6909] (2d Cir.2000), and United States v. Petrillo, 237 F.3d 119, 124–25 [87 AFTR 2d 2001-323] (2d Cir.2000). Both Fitzgerald and Petrillo, in the government's view, direct us to group mail fraud and tax evasion under s 3D1.2(d), rather than § 3D1.2(c).

Appellant in return urges us to revisit Fitzgerald and Petrillo and clarify that these two decisions merely allow the grouping of fraud and tax offenses under s 3D1.2(d), but do not direct us to do so. Thus, appellant argues, Fitzgerald notwithstanding, the district court still had the option of grouping under § 3D1.2(c).

[1] Since argument, however, we rendered a decision in United States v. Gordon, 291 F.3d 181 [89 AFTR 2d 2002-2757] (2002). For the reasons stated therein, appellant's mail and tax fraud offenses were properly grouped under s 3D1.2(d) of the Sentencing Guidelines. See id. at 191–93; see also id. at 198 (Newman, J., concurring).

While we acknowledge a degree of ambiguity as between the text of the Sentencing Guidelines, which in our view provides for grouping under § 3D1.2(d), and a 1992 staff advisory opinion issued by the sentencing commission and cited by appellant, which indicates that grouping under s 3D1.2(c) would be appropriate, the text of the Sentencing Guidelines must take precedence over a nonbinding advisory opinion.

Nor can we conclude that the underlying purpose of § 3D1.2(c), avoiding ''double counting'' of offense behavior, see U.S.S.G. § 3D1.2, cmt. n. 5, would be significantly served in this particular case by a grouping under § 3D1.2(c). First, the loss associated with the mail fraud offense greatly exceeds the $10,000 threshold required to trigger the two-point enhancement for tax fraud under § 2T1.1(b)(1), and any ''double counting'' would be limited to $10,000 of the approximately $456,000 mail fraud loss. Indeed, under the approach proposed by appellant, the portion of the loss in excess of $10,000 would not be re-flected at all in the sentence. Minimal double counting would be avoided, there-fore, only at the expense of proportionality. Second, the two- point enhancement under § 2T1.1(b)(1) for failure to report crimi-nally derived income was actually based not on income from the approximately $456,000 mail fraud, but on income from the separate $600,000 check-cashing scheme pleaded to by appellant. Therefore, the $10,000 double counting is not at issue here.

Moreover, putting § 3D1.2(d) aside, we do not believe the applicable text of s 3D1.2(c)--that grouping shall occur where one count ''embodies conduct'' that is treated as an ''adjustment to'' the guideline for another count, U.S.S.G. §

3D1.2(c)--can reasonably be read to require grouping under § 3D1.2(c) in this case. The failure to report or to correctly identify the source of income ... from criminal activity,' see U.S.S.G. § 2T1.1(b)(1), is not embodied in the mail fraud count. The failure to report occurs after the mail fraud has been carried out.

In any event, we have held definitively that the text, structure, and commentary of the Sentencing Guidelines, as currently in force, require the grouping of mail fraud and tax fraud offenses under § 3D1.2(d), even where the same funds are the object of both the mail fraud and the tax fraud, and even where § 3D1.2(c) might otherwise apply. See Gordon, 291 F.3d at 192–93 (noting that application of § 3D1.2(d) is appropriate where both mail fraud and tax evasion ''involve the same funds,'' and that ''the Guidelines suggest that crimes falling within the special category of quantifiable-harm offenses require treatment under § 3D1.2(d)'' (emphasis added)). We therefore affirm the district court's grouping of appellant's offenses under U.S.S.G. § 3D1.2(d).

With regard to appellant's challenge of the district court's denial of his pretrial motions, we hold that by entering a knowing, voluntary, and unconditional plea of guilty, appellant waived his right to contest the pretrial rulings. See Lebowitz v. United States, 877 F.2d 207, 209 (2d Cir.1989) (''The settled rule is that a defendant who knowingly and voluntarily enters a guilty plea waives all nonjurisdictional defects in the prior proceedings.''). After a judgment of conviction has been entered upon a defendant's unconditional plea of guilty, the defendant is limited to attacking the voluntary and knowing character of the guilty plea. Tollett v.. Henderson, 411 U.S. 258, 267 (1973). We therefore affirm the district court's denial of appellant's pretrial motions.

Finally, because appellant does not allege that the denial of his departure motion was based on an error of law or on the district court's misapprehension of the court's departure authority, the denial of the downward departure is unreviewable. We review district court's denial of a motion for a downward departure only where ''the guidelines were misapplied'' or ''the court misapprehended its authority or imposed an illegal sentence.'' United States v. Haynes, 985 F.2d 65, 68 (2d Cir.1993). Appellant did not produce clear evidence that the district judge misapprehended the scope of his departure authority. See United States v. Stephenson, 183 F.3d 110, 120 (2d Cir.1999). We therefore lack appellate jurisdiction over this claim.

We have considered appellant's remaining arguments and we find them to be without merit. We therefore affirm in part and dismiss in part.

¶2002-5269

In re: Lawrence Ray McCUBBINS, a/k/a Larry McCubbins, Debtor. LAWRENCE RAY McCUBBINS, PLAINTIFF/APPELLANT v. UNITED STATES OF AMERICA, Internal Revenue Service, DEFENDANT/APPELLEE. U.S. District Court, Dist. of Alaska, (DC AK) USDC Appeal No. A01-0035-CV (HRH); Adv. Case No. A93-00284-002 (HAR); BANCAP No. 99-3060, Aug. 27, 2001. [Ed. Note: Per district court, original judgment date of 8/27/1999 is incorrect and should be 2001.] Bankruptcy Courts, (2000, Bktcy Ct AK) 86 AFTR 2d 2000-7141, reconsideration denied (2000, Bktcy Ct AK) 86 AFTR 2d 2000-7352, (2000, Bktcy Ct AK) 86 AFTR 2d 2000-5859, reconsideration denied (2000, Bktcy Ct AK) 86 AFTR 2d 2000-6214, and (2000, Bktcy Ct AK) 85 AFTR 2d 2000-1327, 2001-2 USTC ¶50470, affirmed. Earlier proceeding at (2000, Bktcy Ct AK) 85 AFTR 2d 2000-778. Years 1976, 1977, 1978, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987. Decision for Govt.

1. Tax claims in bankruptcy—dischargeability—pre-petition levy—pensions—summary judgment—fraud—collateral estoppel—motion to amend; proof of claim—taxes, penalties and interest—fraudulent returns. Bankruptcy court properly granted govt. partial sum-

mary judgment on nondischargeability of taxpayer's tax debts: res judicata and prior Tax Court case in which taxpayer materially participated precluded him for purposes of 11 USC §523(a)(1)(C)'s discharge exception from relitigating his fraud for certain years; and taxes for years he filed no returns were clearly excepted from discharge under §523(a)(1)(B). Also, court properly determined that taxpayer's vested interest in ERISA-qualified pension plan was subject to levy. *Reference:* United States Tax Reporter ¶68,726.52(27); 68,726.52(3); 63,315.03(142); 74,337.504(5). IRC §6331.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA,

DECISION ON APPEAL

H. Russel Holland, Judge District of Alaska

In an adversary proceeding before the bankruptcy court, plaintiff Lawrence Ray McCubbins has appealed[1] the judgment[2] of the court dismissing his complaint with prejudice.

Underlying the judgment are three orders of the bankruptcy court: The first granted partial summary judgment in favor of the United States on the issue of whether or not plaintiff's debt for federal income taxes for the years 1976–78 and 1980–87 had been discharged in bankruptcy.[3] In so ruling, the bankruptcy judge held in abeyance the question of whether or not the Internal Revenue Service was entitled to levy upon plaintiff's pension funds. The bankruptcy judge modified this order, raising the question of whether or not plaintiff had sufficiently participated in underlying tax court proceedings for the doctrine of collateral estoppel to apply to the results of those tax court proceedings.[4] The matter having been reexamined, by further order the bankruptcy court determined that plaintiff participated in the tax court litigation, actively defending against the affirmative allegations of the Internal Revenue Service on the issue of fraud.[5] This order had the effect of readopting the bankruptcy court's initial order granting summary judgment on the issue of discharge.

Finally, and after further proceedings, the bankruptcy court granted the United States' further motion for summary judgment, holding that plaintiff's pension plan was fully vested prior to any levy by the Internal Revenue Service.[6] The bankruptcy court in substance held that plaintiff's plan proceeds were subject to levy by the Internal Revenue Service, and judgment dismissing the adversary complaint of plaintiff was entered.

The appeal to this court followed, and the briefs of the parties have now been received.[7]

Discerning what issues plaintiff would raise on appeal is well nigh impossible. As a consequence, the court has reviewed this matter for the purpose of ascertaining whether there were any issues suggested by the actions of the bankruptcy court which could fairly be the subject of review. Based upon its examination of the record, the court is satisfied that there were no genuine disputes of fact material to the issues decided by the bankruptcy court. Accordingly, it was appropriate for the bankruptcy court to consider and rule upon the legal issues presented by plaintiff's adversary complaint as challenged by the United States' motions for summary judgment.

The court reviews the bankruptcy judge's orders on motion for summary judgment employing the de novo standard of review based upon the evidence considered in the light most favorable to the party against whom summary judgment

1 RoA No. 82.
2 RoA No. 72.
3 RoA No. 24.
4 RoA No. 28.
5 RoA No. 47.
6 RoA No. 70.
7 Clerk's Docket Nos. 14, 15 & 16.

was granted. Carolco Television, Inc. v. National Broadcasting Co., 963 F.2d 1269, 1271–1272 (9th Cir.), cert. denied, 506 U.S. 918 (1992).

[1] The record is clear that plaintiff filed a false tax return for the year 1976, and that he filed no federal income tax returns for the years 1977 or 1978, nor for the years 1980 through 1987. It is undisputed that plaintiff's pension from the Operating Engineers Employees Retirement Fund vested prior to any levy upon the fund by the Internal Revenue Service.

The record before the bankruptcy court--and in particular the declaration of Kaye Hill, filed July 14, 2000[8] --reflects the nature and extent of plaintiff's participation in the tax court proceedings; and the memorandum opinion of the tax court reflects that the decision of that court was made on the merits with the participation of plaintiff (petitioner before the tax court).[9]

The bankruptcy court properly concluded that this case is not controlled by Palmer v. United States, 207 F.3d 566 [85 AFTR 2d 2000-1157] (9th Cir. 2000). Plaintiff materially participated in the tax court proceedings, and the doctrine of res judicata precludes him from contesting the decision of the tax court to the effect that he engaged in fraudulent conduct with respect to federal income taxes owed for 1976, 1977, and 1978. Because of plaintiff's fraudulent conduct, tax liabilities for those three years are not discharged by virtue of 11 U.S.C. § 523(a)(1)(C).

With respect to years in which plaintiff filed no tax return (1977, 1978, and 1980 through 1987),[10] any tax liability owed by plaintiff was not discharged pursuant to 11 U.S.C. § 523(a)(1)(B)(i).

Finally, with respect to the collection efforts of the Internal Revenue Service, the tax code provides that taxes may be collected by levy upon ''all property and rights'' belonging to the taxpayer. 26 U.S.C. § 6331. Subsection 6334(c) of the code provides that:

> Notwithstanding any other law of the United States (including Section 207 of the Social Security Act), no property or rights to property shall be exempt from levy other than the property specifically made exempt by Subsection (a).

Subsection 6334(a) exempts certain property from levy, but it does not exempt ERISA qualified pension plans such as that of the Operating Engineers Employees Retirement Fund.

Having conducted its own de novo review of the decisions of the bankruptcy court in this case, the orders and judgment of the bankruptcy court are affirmed.

DATED at Anchorage, Alaska, this 27 day of August, 1999.

H. Russel Holland, Judge

District of Alaska

¶2002-5270

IN RE: CM HOLDINGS, INC.; Camelot Music, Inc.; G.M.G. Advertising and Grapevine Records and Tapes, Inc., Debtors. INTERNAL REVENUE SERVICE v. CM HOLDINGS, INC., APPELLANT. U.S. Court of Appeals, Third Circuit, (CA3) No. 00-3875, Aug. 16, 2002. District Court, (2000, DC DE) 86 AFTR 2d 2000-6470, 254 BR 578, 2000-2 USTC ¶50791, affirmed. Earlier proceeding at (1998, DC DE) 82 AFTR 2d 98-6436, 221 BR 715. Years 1991, 1992, 1993, 1994. Decision against Taxpayer.

1. Interest deductions—corporate owned life ins. (COLI) policy loan interest—sham transactions—substance vs. form—business purpose—genuine debt—shams in fact—safe harbor relief—4-out-of-7 rule—level premiums. District court's determination that taxpayer's broad-based, highly-leveraged COLI plan was, as whole, sham lacking economic substance was affirmed: although court's sham-in-fact finding on ''loading dividend'' component wasn't supported, overall sham finding was supported by re-

[8] Supplemental Designation of Record on Appeal, Attachment No. 7, Clerk's Docket No. 11.
[9] Supplemental Designation of Record on Appeal, Attachment No. 3, Exhibit 1, Clerk's Docket No. 11.
[10] Supplemental Designation of Record on Appeal, Declaration of Blair, Attachment No. 3, Exhibit 2, Clerk's Docket No. 11.

cord. Notably, objective lack of economic substance was shown by plan's complete lack of any pre-interest deduction/non-tax profitability, component transactions' ''fleeting and inconsequential'' nature, and illusory benefit from any mortality gains. Also, contrary gross-up analysis wasn't supported or appropriate; and taxpayer admittedly netted its ''force-out'' income against offsetting loss carryback. And, subjective lack of economic substance/business purpose was again reflected in plan's careful design to be mortality neutral and ensure zero net equity at each month's end, use of highest possible interest rates for policy loans, and plan's marketing as tax-driven investment vehicle. *Reference:* United States Tax Reporter ¶1635.004(5); 1635.004(17); 2645.05(10); 79,007.15(15); 79,007.07(10); 2645.13(5); 1635.004(15); 79,007.13(5); 77,025.01(10); 2645.13(15); 79,007.01(23). IRC §163; 264; 7702.

2. Accuracy-related substantial understatement penalties—substantial authority; reasonable cause—corporate owned life insurance (COLI) policy loans—sham transactions. Accuracy-related substantial understatement penalties were properly upheld against corp. that claimed erroneous interest deductions on loans from sham, highly leveraged COLI policy: taxpayer had no substantial authority for its position; and exception for cases of 1st impression was unavailing where statutory language was clear. *Reference:* United States Tax Reporter ¶66,625.01(10). IRC §6662.

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,

Appeal from the United States District Court for the District of Delaware (D.C. Civil Action No. 97-cv-00695)

District Judge: Honorable Murray M. Schwartz

Before: SLOVITER, NYGAARD and AMBRO, Circuit Judges

OPINION OF THE COURT

AMBRO, Circuit Judge

PRECEDENTIAL

Appellant CM Holdings, Inc. (''CM Holdings''), the parent company of Camelot Music, Inc. (''Camelot''),[1] challenges the District Court's holding that loading dividends used to fund insurance premiums for corporate-owned life insurance (''COLI'') policies were shams in fact, and that the transactions as a whole lacked economic substance. We affirm, based on the latter reasoning, that the COLI policies lacked economic substance and therefore were economic shams. We also affirm the

[1] Although CM Holdings is the appellant in this case, many of the relevant decisions were made by Camelot. For the sake of simplicity, we refer to both entities as ''Camelot.''

District Court's assessment of penalties against Camelot for inaccuracies in stating its income.

I. Background

The District Court excelled in its explication of the facts. In re CM Holdings, Inc., 254 B.R. 578 [86 AFTR 2d 2000-6470] (D. Del. 2000). We review here only the minimum necessary, and begin with the basics of whole life insurance policies.

Throughout an insured's life, the insurer receives annual premiums to fund the policy. Most of each premium is credited to the policy value. However, a percentage, known as an expense charge, is set aside to cover the projected costs of administering the policy. Risk-averse as insurers are, it is unsurprising that often these projected costs exceed actual expenses by a small amount (known as a "margin"), which is credited back to the policy value at the year's end when the actual expenses are known.

The policy value rises in time, not only because premiums add to the accumulating total each year, but also because interest accrues on the growing policy value at a rate specified by the insurer. This value may be used as collateral for a loan, called a policy loan, borrowed from the insurer. Even when a policy is fully encumbered, the insurer still credits interest on its value.

Life insurance policies are tax-favored in two ways. First, upon death of the insured, the beneficiary receives policy proceeds free of federal income tax. Second, the gain the policy value receives from the interest rate credited to it, known as the "inside build-up," accrues on a tax-deferred basis.

In the case before us, Camelot purchased life insurance policies for 1,430 of its employees (known as "COLI VIII" policies because they were the eighth version of the COLI plan) underwritten by Mutual Benefit Life Insurance Company ("MBL"). Camelot designated itself as the beneficiary of those policies. MBL's COLI business was later purchased by the Hartford Life Insurance Company ("Hartford"). We will first describe certain features of the plan, and then the events leading up to Camelot's decision to buy the policies.

A. The COLI VIII plan

The COLI VIII plan's purpose was to achieve positive cash flows from its inaugural year. Its success turned on 26 U.S.C. § 264's "4-of-7" safe harbor. This permits life insurance premiums to be paid with the proceeds of a loan whose collateral is the policy itself, but only as long as this payment method is used for no more than three of seven consecutive years. To comply with this stricture, in years 1–3 several events happened simultaneously on the first day of the policy year:

(i) Camelot paid a premium of about $14 million, creating $14 million in policy value;

(ii) Camelot took a policy loan of about $13 million, using the policy value created by the premium as collateral;

(iii) the $13 million loan offset almost fully the $14 million premium payment; and

(iv) in net effect, Camelot paid only $1 million cash.

CM Holdings, 254 B.R. at 592–93. The payment of a premium with the proceeds of a loan whose collateral is the premium it pays for is somewhat chimeral, but § 264 permits such a payment mechanism for up to three years, as long as policy loans do not fund the premium payments for the other four years. The result is that in years 1–3, in a simultaneous netting transaction, over 90% of the payment for annual premiums and accrued policy loan interest came from a policy loan, with only the remainder paid in cash.

The payment mechanism for the following four years used a "loading dividend" to fund the premiums. For those years, in a simultaneous netting transaction occurring on the first day of the policy year:

(i) Camelot paid the annual premium plus accrued interest;

(ii) approximately 95% of the annual premium was taken by MBL as an expense

charge, while approximately 5% was credited to the policy value;

(iii) approximately 5–8% of the expense charge was set aside to cover MBL's actual expenses;

(iv) approximately 92–95% of the expense charge was immediately returned to Camelot in the form of a "loading dividend";

(v) Camelot received a partial withdrawal of policy value in an amount equal to approximately 99% of the accrued loan interest;

(vi) the loading dividend and partial withdrawal were used to offset payment of the annual premium and accrued loan interest; and

(vii) Camelot paid the balance due in cash.

CM Holdings, 254 B.R. at 593. The broad structure of the plan, then, was to fund year 1–3 premiums with proceeds from the policy loans, and year 4–7 premiums with a loading dividend that offset the payments due.

The interest rate Camelot paid MBL on the loan it received affected the amount of interest-payment deductions to which it was entitled. Of several available interest rates, Camelot always selected the highest one. CM Holdings, 254 B.R. at 595.[2]

B. Camelot's decision to purchase the COLI VIII plan

The evolution of Camelot's COLI plan began in 1985, when Henry F. McCamish, a life insurance entrepreneur, developed a series of COLI policies to produce maximum cash flow (through interest deductions) for the companies that bought them. CM Holdings, 254 B.R. at 586. The original plan evolved over time to reflect changes in the tax law. In response to a 1986 amendment limiting deductibility of policy loan interest to $50,000 per insured, the payment schedule was altered so that payments ceased once the $50,000 loan limit was reached. Id. at 587. The plan was further modified to reduce the amount of premium paid per thousand dollars of death benefits to comply with 26 I.R.C. § 7702A, also enacted in 1986. Id. at 588. As noted, Camelot purchased the eighth version of the plan developed, known as the "COLI VIII plan."

The Newport Group, Inc. ("Newport") marketed the COLI VIII plan to Camelot. Jack Rogers, the CFO of Camelot, spoke with James Campisi of Newport in detail about it. Campisi described the COLI VIII plan's "key factor" to be its ability "to absorb the interest deductions." Id. at 588. In December 1989, Campisi sent Rogers a set of 40-year sales illustrations showing projected cash flows and earnings performance. Id. at 589. In a memorandum, Rogers enumerated the risks attendant for Camelot: "1) A retroactive tax law change[,] 2) Camelot's failure to generate taxable income over several years in a row[, and] 3) IRS attack." Id. at 590.

Despite these risks, the policies went into effect on February 16, 1990. Although the policies were designed to be mortality neutral (i.e., neither Camelot nor MBL expected to profit from the timing of employees' deaths), Camelot did receive an unexpected aggregate mortality gain of $1.3 million for the first eight years. CM Holdings, 254 B.R. at 633. However, even with this gain, absent interest deductions the plan would not have been profitable to Camelot. Id. at 634. Hartford (which, as noted, purchased MBL's COLI business) later added surcharges to recoup its mortality losses and ensure that such losses would not recur. Id.

After Congress passed the Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936, 2090, which phased out interest deductions on COLI loans, "Camelot quickly instructed Hartford to stop billing it for annual premiums and to allow the policies to function as paid-up policies for a reduced amount of death benefit coverage." CM Holdings, 254 B.R. at 640. At the same

[2] Theoretically, Camelot also received interest for that portion of the policy value that was not being used as collateral for a loan. However, because the policies were projected to have net equity of zero at the end of each policy year, this "unloaned crediting rate" did not come into play. Id.

time, Camelot made a partial withdrawal of policy value, called a "force-out," and used it to pay off $26 million of the loan. Camelot recognized the $26 million as income, but was able to offset it with net operating loss carry forwards. Id. at 641 & n.82.

In August 1996, Camelot filed for Chapter 11 bankruptcy protection in the District of Delaware. The District Court automatically referred the proceeding to the Bankruptcy Court. In November 1997, the Internal Revenue Service ("IRS") filed a proof of claim for $4.4 million in taxes, $1.8 million in pre-petition interest, and a $1.35 million accuracy-related penalty. Camelot objected, creating an adversary proceeding, and the Government requested the District Court to withdraw the automatic reference from the Bankruptcy Court pursuant to 28 U.S.C. §157(d). The District Court granted the motion. Internal Revenue Serv. v. CM Holdings, Inc., 221 B.R. 715, 724 [82 AFTR 2d 98-6436] (D. Del. 1998).

On the merits, the District Court held that the loading dividends for years four through seven were shams in fact, and that the plan as a whole was a sham in substance. It also imposed accuracy-related penalties under 26 U.S.C. § 6662 for Camelot's substantial understatement of taxable income. CM Holdings, 254 B.R. at 654.[3]

II. Discussion

[1] The relevant Internal Revenue Code provisions are relatively simple. Section 163(a) of the Code allows a deduction for "all interest paid or accrued within the taxable year on indebtedness." 26 U.S.C. § 163(a). However, § 264 provides that

> [n]o deduction shall be allowed for ... (3) ... any amount paid or accrued on indebtedness incurred or continued to purchase or carry a life insurance ... contract ... pursuant to a plan of purchase which contemplates the systematic direct or indirect borrowing of part or all of the increases in the cash value of such contract.

Section 264(d) provides a safe harbor, however, "if no part of 4 of the annual premiums due during the 7-year period ... is paid under such plan by means of indebtedness." 26 U.S.C. § 264(d). In other words, although the IRS generally allows deductions for interest payments on loans, if the loan in question is being used to pay the premiums for a life insurance contract whose cash value is itself the collateral for the loan, a deduction is allowable only if this mechanism is used to pay premiums for three years or fewer out of seven.

We can forgo examining the intersection of these statutory details, for pursuant to Gregory v. Helvering, 293 U.S. 465 [14 AFTR 1191] (1935), and Knetsch v. United States, 364 U.S. 361 [6 AFTR 2d 5851] (1960), courts have looked beyond taxpayers' formal compliance with the Code and analyzed the fundamental substance of transactions. Economic substance is a prerequisite to the application of any Code provision allowing deductions. Lerman v. Commissioner, 939 F.2d 44, 52 [68 AFTR 2d 91-5223] (3d Cir. 1991). It is the Government's trump card; even if a transaction complies precisely with all requirements for obtaining a deduction, if it lacks economic substance it "simply is not recognized for federal taxation purposes, for better or for worse." ACM Partnership v. Commissioner, 157 F.3d 231, 261 [82 AFTR 2d 98-6682] (3d Cir. 1998) (Lerman 939 F.2d at 45). The rationale behind the Gregory and Knetsch line of cases is that courts should not elevate form over substance by rewarding taxpayers who have engaged in transactions that lack any purpose save that of tax savings. The taxpayer has the burden of showing that the form of the transaction accurately reflects its substance, and the deductions are permissible. National Starch and Chemical Corp. v. Commissioner, 918 F.2d 426, 429 [66 AFTR 2d 90-5844] (3d Cir. 1990).

A. Economic Substance

We analyze two aspects of a transaction to determine if it has economic substance:

[3] The District Court had jurisdiction pursuant to 28 U.S.C. §§ 157(d) and 1334. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over the legal findings of the District Court, including its interpretation of 26 U.S.C. § 264. ACM Partnership v. Commissioner, 157 F.3d 231, 245 [82 AFTR 2d 98-6682] (3d Cir. 1998).

its objective economic substance and the subjective business motivation behind it. ACM Partnership, 157 F.3d at 247. ''However, these distinct aspects of the economic sham inquiry do not constitute discrete prongs of a 'rigid two-step analysis,' but rather represent related factors both of which inform the analysis of whether the transaction had sufficient substance, apart from its tax consequences, to be respected for tax purposes.'' ACM Partnership, 157 F.3d at 247 (citations omitted). Although our Court has hinted that the objective analysis may be more important than the subjective, the latter analysis remains important. See ACM Partnership, 157 F.3d at 248 n.31 (''[W]here a transaction objectively affects the taxpayer's net economic position, legal relations, or non-tax business interests, it will not be disregarded merely because it was motivated by tax considerations.'').[4]

Camelot's COLI plan lacked economic substance. It fails the objective prong because, outside of tax considerations, the transaction had no net economic effect on Camelot's financial position. It fails the subjective prong because at the time the plan was under consideration and agreed on, all parties focused solely on the tax benefits the plan provided. Ultimately the most damning piece of evidence against Camelot is that the marketing information presented to its executives showed that, absent tax deductions, the plan would lose money. Camelot agreed to the plan knowing the tax deductions were the only thing that made it worthwhile.

1. Objective Economic Substance

There are several different formulations of the objective portion of the economic substance inquiry. Knetsch voided a transaction because it ''did not appreciably affect [the taxpayer's] beneficial interest except to reduce his tax.'' 364 U.S. at 366 (internal citations omitted). In United States v. Wexler we held that ''[w]here a transaction has no substance other than to create deductions, the transaction is disregarded for tax purposes.'' 31 F.3d 117, 122 [74 AFTR 2d 94-5310] (3d Cir. 1994). In ACM Partnership we required a ''net economic effect on the taxpayer's economic position.'' 157 F.3d at 249. The main question these different formulations address is a simple one: absent the tax benefits, whether the transaction affected the taxpayer's financial position in any way.

We examine the COLI VIII plan's pre-interest deduction profitability just as the District Court did. The plan was never pre-tax profitable. As the District Court pointed out, without interest deductions the 20-year cash flow illustrations Camelot reviewed showed a loss of over $19 million. CM Holdings, 254 B.R. at 625.

The main nontax benefits insurance plans generally offer are mortality gains to the beneficiary, who does not pay tax on proceeds, and interest-free inside build-up. These benefits did not make the Camelot COLI plan pre-tax profitable, however. Even in the anomalous period where Camelot received $1.3 million in benefits, the plan was profitable only if deductions on interest are factored in. CM Holdings, 254 B.R. at 633–34. To correct for the ''problem'' of the unforeseen mortality gains during this period, Hartford assessed Camelot surcharges since 1995 to recoup its losses and ensure mortality neutrality going forward. Id. at 634.

Similarly, the COLI VIII plan did not use the second potential benefit of insurance contracts. No tax-deferred inside build-up was possible because each month the policies had zero net equity.[5] Id. at 631–32.

[4] This subjective inquiry appears to be an heir to the ''business purpose'' requirement applied in early cases. See Gregory, 293 U.S. at 267. Whether it is a direct descendent, it does play the same basic role of evaluating whether the taxpayer had a business reason, aside from tax avoidance, for engaging in the transaction.

[5] As the District Court pointed out, this was a particularly telling feature of the plan: ''MBL recognized that this zero net equity feature was a significant indicator of the COLI VIII plan's lack of economic substance. When a tax lawyer for a COLI broker suggested to MBL's Wendell Bossen that it would be very difficult to convince a court of the economic substance of the COLI arrangement given the 'uninterrupted string of zeros' in the net equity column of the COLI VIII product illustrations, Bossen recommended to McCamish that the net equity column be eliminated 'since anything we can do to remove self-made traps in the illustration would be helpful.''' CM Holdings, 254 B.R. at 632.

Camelot attempts to characterize both Supreme Court and Third Circuit jurisprudence on economic shams as hinging on their "fleeting and inconsequential" nature. Appellant's Br. at 35, citing ACM Partnership, 157 F.3d at 250. For example, it points to the corporate reorganization plan in Gregory ending as soon as its use was served, and to Knetsch, Wexler, and Lerman. It argues that in contrast to those "fleeting and inconsequential investments," the COLI VIII plan was a long-term investment.

Camelot misreads the case law on this point. Duration alone cannot sanctify a transaction that lacks economic substance. The appropriate examination is of the net financial effect to the taxpayer, be it short or long term. The point of our analysis in ACM Partnership is that the transactions "offset one another with no net effect on ACM's financial position." ACM Partnership, 157 F.3d at 250. It is not the brevity of the transaction that renders it a sham, but the fact that it is solely tax-driven. The net effect in all these cases is the same: a flow of transaction upon transaction that yields no appreciable financial benefit to the taxpayer absent tax deductions.

Regardless, the individual transactions that made up the COLI plan were "fleeting and inconsequential." Take, for example, the dividend payment mechanism of years 4–7, where a premium payment was made and simultaneously credited back in the form of a dividend from MBL, so that the net payment was far less than the credited one. Or consider that the use of sophisticated computer programs ensured that the net value of each policy was zero at the end of the month, taking up what little value MBL credited to the policy each month. Each separate transaction was fleeting and insubstantial. Repeating a series of such impermanences cannot lend substance to the scheme as a whole.

Comparing this case with Knetsch provides a helpful gloss on the objective economic substance inquiry. Striking similarities exist. Knetsch purchased $4,000,000 in annuities paying 2.5% annual interest, financed with nonrecourse loans with an interest rate of 3.5%, secured by the bonds themselves. This "investment" cost more money than it made, unless interest deductions were factored into the calculation. The Supreme Court found that the transaction lacked economic substance. As the Court in American Electric Power v. United States Power[6] pointed out,

> [t]he similarities between Knetsch's annuity transactions and the AEP COLI VIII plan are striking. They include first-day, first-year loans, which paid for all but a small percentage of the total premium and generated substantial interest deductions. There was a pattern of annual borrowings, which consumed nearly all of the equity in the annuity bonds and produced even more tax-deductible interest expense. The potential economic benefit of the annuity bonds, substantial annuity payments thirty years hence, was wiped out by the borrowings. The only real benefit to Knetsch was the tax deductions.

American Electric Power, 136 F. Supp. 2d 762, 793 [87 AFTR 2d 2001-917] (S.D. Ohio 2001).

Camelot attempts to distinguish Knetsch because the potential benefit of the annuity bonds was the "mere pittance" of $1,000. Appellant's Br. at 17. In contrast, Camelot argues, the potential death benefits to Camelot, and those actually realized in the early years of the plan ($1.3 million in total mortality gains), represent more than a "mere pittance." But even with these mortality gains the plan was not profitable, and the chance of mortality gains ever being enough to render the plan pre-tax profitable was essentially nonexistent. MBL designed the policies to obviate the risk of mortality loss: the policy was designed to be "mortality neutral," with neither side making money on the risk of employees dying early or late. Things did not go as planned, however, and unexpectedly high death benefits were paid from 1996 to December 1998. Rather than accept this loss as one that may sometimes occur no matter how carefully actuaries attempt to chart the

[6] American Electric Power involved the same underlying COLI plan at issue in this case.

vagaries of life and death, Hartford assessed surcharges to recoup its losses and ensure mortality neutrality in the future. CM Holdings, 254 B.R. at 634.

Amicus Hershey Foods Corp. (''Hershey'') argues that our analysis of the non-tax benefits of the COLI policies is flawed, and that we must ''gross up'' anticipated tax benefits in order to assess fairly pre-tax effects on Camelot's economic position. ''Such a gross-up would have produced positive pre-tax numbers for Camelot on an overall basis.'' Amicus Br. at 16. The illustration Hershey offers to support its position is a deceptively simple one. It posits a loan of 5% to pay for a tax-free municipal bond paying 4% and a taxable corporate bond paying 6%. Depending on the buyer's tax rate, there may be situations where the 4% tax-free bond is the more profitable investment. But purchase of a 4% tax-free municipal bond with the proceeds of a 5% loan makes no economic sense without consideration of the tax benefit.

The District Court did not consider grossed-up numbers and offered three reasons for its refusal. It first pointed out that Camelot offered no expert testimony at trial to counter Government testimony that ''grossing up tax-favored income is not a correct financial method to analyze the economic substance of the transaction because a gross-up does not reflect the actual cash flows of an investment.'' CM Holdings, 254 B.R. at 626. Second, all the illustrations Camelot considered at the time of policy purchase focused on after-tax consequences of the plan. None of them showed pre-tax cash flows, ''much less grossed-up pre-tax cash flows.'' Id. Finally, there is no evidence in the record that Camelot compared the grossed-up returns of the plan to any taxable investments available at the time.

For the reasons stated by the District Court, as well as for one more fundamental one, grossing up is not appropriate here. Hershey makes a logical leap in equating the economic substance analysis with a situation ''without tax benefits being taken into account.'' Amicus Br. at 17. Knetsch did not gross up the benefit to the taxpayer when evaluating the substance of the transaction. The point of the analysis is to remove from consideration the challenged tax deduction, and evaluate the transaction on its merits, to see if it makes sense economically or is mere tax arbitrage. Courts use ''pre-tax'' as shorthand for this, but they do not imply that the court must imagine a world without taxes, and evaluate the transaction accordingly. Instead, they focus on the abuse of the deductions claimed: ''[w]here a transaction has no substance other than to create deductions, the transaction is disregarded for tax purposes.'' Wexler, 31 F.3d at 122. Choosing a tax-favored investment vehicle is fine, but engaging in an empty transaction that shuffles payments for the sole purpose of generating a deduction is not.

Finally, Camelot offers its force-out of $26 million to pay off policy loans, resulting in a taxable gain of over $17 million, as evidence of the COLI VIII plan's non-tax effect on the taxpayer. Appellant's Br. at 33. Although Camelot reported the gain, it concedes that it ''was ultimately able to net the force-out income against a net operating loss ('NOL') carryforward.'' Id. at 34. Camelot cannot cite the reporting of gain on which it ultimately paid no taxes as evidence of a non-tax effect.

2. Subjective Business Purpose

On appeal Camelot does not assert any non-tax motives for the COLI VIII plan. Instead, it argues that the District Court erred in using a subjective analysis to determine that the plan was an economic sham. It maintains that the transaction had objective non-tax economic effects, and thus the Court must not look further. Camelot's view of the law is mistaken, however. From the time of Gregory's analysis of the ''rational business purpose,'' courts have evaluated taxpayers' purposes when determining whether a transaction has economic substance.

The subjective prong provides that ''interest charges [are] not deductible if they [arise] from a transaction entered into without expectation of economic profit and [with] no purpose beyond creating tax de-

ductions.'' ACM Partnership, 157 F.3d at 253 (citation omitted). There is Supreme Court language that at first seems at odds with a subjective inquiry into a transaction's business purpose. In Gregory the Court remarked that ''[t]he legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.'' Gregory, 293 U.S. at 469. However, in the next breath it added, ''[b]ut the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended.'' Id. If Congress intends to encourage an activity, and to use taxpayers' desire to avoid taxes as a means to do it, then a subjective motive of tax avoidance is permissible. But to engage in an activity solely for the purpose of avoiding taxes where that is not the statute's goal is to conduct a sham transaction.

In the case of Gregory, the taxpayer made use of a corporate reorganization for the sole purpose of avoiding income tax liability. Because this was not what the corporate reorganization statute had intended, the taxpayer lost. This is what distinguishes Sacks v. Commissioner, 69 F.3d 982 [76 AFTR 2d 95-7138] (9th Cir. 1995), a case Camelot cites, from this case. Appellant's Br. at 22. Sacks involved the question of whether depreciation deductions and investment credits were allowed on a transaction involving the sale and leaseback of solar energy equipment. Id. at 984–85. The Ninth Circuit reasoned that both federal and state legislatures had specifically encouraged investment in solar energy and thereby ''skewed the neutrality of the tax system.'' Id. at 991.

Amicus Hershey attempts to infer Congressional approval of the COLI interest deductions from their gradual phasing out by Congress in the years subsequent to 1996. Although the taxpayer in Winn-Dixie Stores v. Commissioner, 113 T.C. 254, 290 (T.C. 1999), similarly argued that this ''soft landing'' implied Congressional approval of the deductions pre-1996, in fact the Joint Committee report stated that ''the IRS would not be precluded from applying common-law doctrines or statutory or other rules to challenge corporate-owned life insurance plans to which present law rules apply.'' Description Of Revenue Provisions Contained In The President's Fiscal Year 1997 Budget Proposal, Staff of the Joint Committee on Taxation, at 82 (March 27, 1996). Section 264's 4-of-7 safe harbor was designed specifically to recognize the importance of borrowing on policies for ''other than tax saving purposes.'' S. Rep. No. 830 (1964), reprinted in 1964 U.S.C.C.A.N 1673, 1750 (emphasis added). Congress gave taxpayers a narrow window of opportunity in which to use this deduction; Camelot's loading dividends attempted to force this window open too far. The loading dividends in years 4–7 are a transparent effort to circumvent the law by following its letter while violating its spirit.

Camelot received 20- and 40-year illustrations of the proposed plan's operation before it finalized its agreement. CM Holdings, 254 B.R. at 625. The District Court's analysis concluded that ''with the benefit of the policy loan interest deductions, Camelot's COLI VIII plan was projected to produce large positive cash flows, but ... absent those loan interest deductions, the plans would produce negative cash flows for each and every year and in the aggregate.'' Id. at 625. The benefits most life insurance plans offer, chiefly tax-free death benefits and tax-deferred inside build-up, were conspicuously absent from Camelot's COLI VIII plan. MBL designed it to be ''mortality neutral.''[7] The potential tax-free inside build-up was never realized because the plan was carefully calculated to ensure that there was zero net equity at the end of each month. Id. at 631.

Another clue that Camelot's motives were strictly tax-driven is its choice of the highest possible interest rate for the policy loans.

[7] As noted above, although Camelot did receive some ''mortality gains'' in the early years of the plan, Hartford even corrected for these by instituting surcharges to recoup losses and ensure neutrality going forward. Notwithstanding these early ''windfall'' gains, the plan was not pre-tax profitable.

> When a transaction is structured so that the borrower actually benefits from a higher loan interest rate and the borrower is permitted to chose [sic] its own interest rate from a range of rates that begins with a rate that far exceeds the industry maximum, the interest rate component of the transaction lacks economic substance.

American Electric Power, 136 F. Supp. 2d at 790. There is no explanation for Camelot's choosing the high interest rate except that it permitted a larger deduction.

Finally, the plan was marketed as a tax-driven investment. A member of the Newport Group first introduced the plan by describing that "the key factor is being able to absorb the interest deductions." CM Holdings, 254 B.R. at 638. Newport offered suggestions about how to tailor the program "to best fit Camelot's taxable income expectations." "The policy was rushed into effect on February 20, 1990, the day before Congressional hearings on COLI legislation were to begin." Id. at 640. When weighing the pros and cons of the plan, the chief dangers noted to Camelot were "1) a retroactive tax law change[,] 2) Camelot's failure to generate taxable income over several years in a row[, and] 3) IRS attack." Id. at 590. Camelot plainly understood that tax advantage was the engine driving this investment.

To summarize, the purchase of the COLI VIII plan had no net effect on Camelot's economic position, so it fails the objective prong of economic sham analysis. There was no legitimate business purpose behind the plan, so it fails the subjective prong as well. The District Court was correct in holding that the transaction as a whole lacked economic substance, and thus was an economic sham.[8]

B. Factual Sham

The District Court's holding that the COLI transaction as a whole lacked economic substance, and thus was an economic sham, is undoubtedly correct. Thus, we do not reach the issue of whether the separate components of the transaction were factual or economic shams. However, we must clarify that we do not find the loading dividends to be factual shams. Factual shams are "transactions" that never actually occurred. Lerman v. Commissioner, 939 F.2d 44, 48 n.6 [68 AFTR 2d 91-5223] (3d Cir. 1991). A circular netting transaction, where different loans and payments are deemed to occur simultaneously (and thereby offset each other), is not by definition a factual sham. As the District Court pointed out, the simultaneous netting of the payment and the loan with the policy value as collateral that occurred in years 1–3 is common in the industry, and is a transaction with economic substance. CM Holdings, 254 B.R. at 602. The loading dividends of years 4–7 were similar simultaneous netting transactions that "actually occurred," and are therefore not factual shams. They were not "performed in violation of some of the background assumptions of commercial dealing, for example arms-length dealing at fair market values." Horn, 968 F.2d at 1236 [70 AFTR 2d 92-5196] n.8. The fact that these dividends were not industry practice is, however, evidence that they were economic shams.

C. Correctness of Penalties for Inaccuracy

We affirm the District Court's application of accuracy-related penalties for Camelot's understatements of income on its returns. There was no substantial authority for the interest deduction. CM Holdings, 254 B.R. at 647–48. Only one case has broadened the common law exception for

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[8] In addition to analyzing the objective economic substance and subjective business motivation, a few courts have read the Supreme Court's holding in Frank Lyon Co. v. United States, 435 U.S. 561 [41 AFTR 2d 78-1142] (1978), to require that a trial court assess the transaction's economic consequences for other parties. To the extent that the taxpayer on the opposite side of the transaction reported as income what the taxpayer in question reported as an expense, the transaction becomes more palatable to the IRS. Id. at 580. The recipient's reported income balances the payor's deduction. Under this logic, if MBL reported interest payments to it as income, Camelot's deduction arguably would have more economic substance.

In American Electric Power, which involved the same underlying COLI plan at issue here, the Court held that although MBL reported the premiums and policy loan interest paid to it as income, this reporting did not alter the insurance company's net economic position because MBL's reported income was free of the taxes usually accompanying such income. American Electric Power, 136 F. Supp. 2d at 789. MBL offset the income from the policy loan interest paid to it with the portion of that interest (nearly all) it contributed to the inside build-up of the COLI policies, so that it only paid tax on the one-percent "spread" between the two sums. Id. Just as in American Electric Power, the minimal net consequences here to the insurers do not lend substance to the COLI policies.

cases of first impression, which prevents the imposition of penalties, to the field of accuracy-related penalties for substantial understatement. Mitchell v. Commissioner, 2000 WL 428644, T.C.M. (RIA) 2000-145 [2000 RIA TC Memo ¶2000-145] (2000). But even this exception is reserved for issues where the statutory language was unclear. Neonatology Assoc. v. Commissioner, No. Civ. 01-2862, 2002 WL 1747513, at 11 n.24 [90 AFTR 2d 2002-5442] (3d Cir. July 29, 2002). As the District Court pointed out, in this case there is no unclear statutory language, only ''applying novel facts to the judicially created sham transaction doctrine.'' 254 B.R. at 653.

* * * * *

The COLI policies lacked economic substance because they had no net economic effect on Camelot and existed solely for the purpose of avoiding taxes. The District Court was correct in applying accuracy-related penalties for Camelot's understatement of income. We therefore affirm.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

¶2002-5271

Astrid E.A. OMOHUNDRO, individually and as the beneficiary of the estate of Stuart W. Omohundro, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 00-56558, Aug. 19, 2002. District Court reversed and remanded per curiam. Year 1993. Decision for Taxpayer.

1. Refund actions—limitations periods—returns as claims. District court improperly dismissed for lack of jurisdiction taxpayer's action for overpaid taxes: taxpayer's administrative claim was timely filed where she had 3 years from return filing date to file claim for credit, and claim was included in her return and considered filed on same date under Reg. §301.6402-3(a)(4). 9th Cir. case law requiring that taxpayer file return within 2 years of tax payment to recover refund or credit wasn't binding in light of intervening Supreme Court decision requiring deference to *RevRul 76-511*, 1976-2 CB 428, in which IRS decided that taxpayer's return/refund claim was timely filed within IRC §6511(a)'s 3-year limitations period; and appellate case law, later IRS pronouncements, statutory history, and recent legislation obviating ''forum shopping'' concerns was consistent with RevRul and IRS's interpretation of statute; so, under IRC §6511(a), taxpayer's claim for credit or refund was timely if filed within 3 years from date of return filing date, regardless of when return was filed. *Reference:* United States Tax Reporter ¶65,115.04(69); 65,115.04(10); 74,225.01(20). IRC §6402; 6511; 7422.

Arthur V. Pearson and Joan E. Low, Murphy, Pearson, Bradley & Feeney, San Francisco, California, for plaintiff-appellant Astrid E.A. Omohundro.

Claire Fallon, Richard Farber, and Rachel L. Wollitzer, Department of Justice Tax Division, Washington, D.C., for defendant-appellee United States of America.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Appeal from the United States District Court for the Central District of California, Los Angeles

Manuel L. Real, District Judge, Presiding

Before: James R. Browning, Stephen Reinhardt, and Richard C. Tallman, Circuit Judges.

OPINION

PER CURIAM:

FOR PUBLICATION

Appellant Astrid Omohundro (''Omohundro'') appeals an order of the district court dismissing her complaint seeking credit for the overpayment of her 1993 income taxes. Relying on our decision in *Miller v. United States*, 38 F.3d 473 [74 AFTR 2d 94-6694] (9th Cir. 1994), the district court held it lacked jurisdiction because Omohundro failed to file a timely administrative claim for credit

with the Internal Revenue Service (''IRS''). We reverse.

I.

To bring an action for credit or refund of overpaid taxes, a taxpayer must first file an administrative claim with the IRS. *See* I.R.C. § 7422(a) (2002). The administrative claim must be filed:

> within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

I.R.C. § 6511(a) (2002). A taxpayer's failure to file an administrative claim within the time periods imposed by statute divests the district court of jurisdiction over an action for a refund or credit.[1] *See United States v. Dalm*, 494 U.S. 596, 602 [65 AFTR 2d 90-1210] (1990).

The issue in this case is whether a taxpayer's claim for credit or refund of overpaid taxes is timely under I.R.C. § 6511(a) if the claim is filed within three years of the date the taxpayer filed his return, regardless of whether the return was filed on or before the date it was due. Omohundro and the United States argue that all claims made within three years of the date of the filing of the return are timely and urge us to overturn *Miller*.

In *Miller*, we held under I.R.C. § 6511(a) that a taxpayer must file a return within two years of payment of the taxes to recover a refund or credit. *Miller*, 38 F.3d at 475. We reasoned that the point at which the court must determine whether a return was filed for purposes of the clause ''if no return was filed'' is two years after payment of the tax, otherwise no claim could ever be finally barred by the two-year after-payment clause. *Id.* at 475–476.

We also found our construction of I.R.C. § 6511(a) was necessary to prevent ''forum shopping.'' *Id.* at 476. Under the 1994 version of § 6512(b)(3), if a taxpayer failed to file a tax return and was issued a deficiency notice, the amount of refund he could recover in tax court was limited to the tax paid during the two-year period immediately preceding the date of the notice. We reasoned if we held that a three-year limitation period applied in district court, taxpayers would improperly derive an advantage by filing a claim there rather than in tax court. *Id.*

II.

[1] Both Omohundro and the United States contend *Miller* was incorrectly decided and that *Miller* does not bind this panel. We are not bound by the decision of a prior panel if a subsequent en banc decision, Supreme Court decision, or legislation has undermined it. *See Nghiem v. NEC Electronic, Inc.*, 25 F.3d 1437, 1441 (9th Cir. 1994).

In deciding *Miller*, we did not consider Revenue Ruling 76-511 which was directly on point and in effect at the time. In 76-511, a taxpayer sought advice on whether he could recover a refund when he filed his 1972 tax return, including a refund claim, on April 30, 1976. The IRS decided the refund claim was timely, stating, ''[i]n this case, A [taxpayer] filed a claim for a refund within the 3-year period of limitation prescribed by section 6511(a) of the Code, because, under section 30.6402-3 of the regulations, A's 1972 income tax return was a claim for a refund.'' Rev. Rul. 76-511, 1976-2 C.B. 428 (1976).

In *United States v. Mead Corp.*, 533 U.S. 218 (2001), the Supreme Court held that an administrative agency's interpretation of a statute contained in an informal rulemaking must be accorded the level of deference set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *Mead*, 533 U.S. at 234. The Court held the deference required depends on the ''thoroughness evi-

[1] Even if a taxpayer files an administrative claim within the applicable limitations period prescribed by I.R.C. § 6511(a), §6511(b) establishes two ''look-back'' periods which may limit the amount of refund or credit a taxpayer may recover:

(A) Limit where claim filed within 3-year period — If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return . . .

(B) Limit where claim not filed within 3-year period — If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

dent in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade . . . '' *Id.* at 228. (citing *Skidmore*, 323 U.S. at 140). *Mead* involved a Customs Service tariff ruling, which is closely akin to an IRS revenue ruling. Given that the two types of agency rulings are analogous, we are required to apply *Mead*'s standard of review to an IRS revenue ruling. *See Matz v. Household Int'l Tax Reduction Investment Plan*, 265 F.3d 572, 575 [88 AFTR 2d 2001-5805] (7th Cir. 2001).

In light of the Supreme Court's intervening holding in *Mead*, we must decide whether Revenue Ruling 76-511 commands deference. We believe it does. First, the IRS's reasoning is valid. Although the IRS's interpretation of I.R.C. § 6511(a) may render the statute's time limitations somewhat ''illusory,'' the look-back provisions of I.R.C. § 6511(b) effectively eliminate any danger of taxpayers recovering on stale claims.[2] Every appellate court that has addressed this issue has reached the same decision as the IRS or has indicated it would do so. *See Weisbart v. United States*, 222 F.3d 93, 95–96 [86 AFTR 2d 2000-5524] (2d Cir. 2000) (holding a taxpayer has three years from the date his return is actually filed to file a claim for refund or credit); *Richards v. C.I.R.*, 37 F.3d 587, 589 [74 AFTR 2d 94-6552] (10th Cir. 1994) (noting the ''benchmark date'' for measuring the triggering events of the relevant limitations period is the date on which taxpayer actually files a return); *Oropallo v. United States*, 994 F.2d 25, 26–27 [71 AFTR 2d 93-1969] (1st Cir. 1993) (declining to decide the issue but assuming a three-year limitations period applied when a tax-payer filed a return containing a claim for a refund more than two years after payment of the tax).

Revenue Ruling 76-511 is consistent with later IRS pronouncements. In February of 2001, the Department of the Treasury and the IRS issued a final regulation regarding the application of the ''mailbox'' rule to late-filed returns including refund claims. The example in the regulation assumes a claim for a refund of overpaid 2001 taxes is timely under I.R.C. § 6511(a) when the claim was included in a return filed on April 15, 2005. *See* Timely Mailing Treated as Timely Filing/Electronic Postmark, 66 Fed. Reg. 2257 (Jan. 11, 2001) (to be codified at 26 C.F.R. pt. 301).

The IRS's interpretation of I.R.C. § 6511(a) is supported by the legislative history of the statute. Under the 1954 version of the statute, the three-year period was intended to run from the date the taxpayer's return was due, not the date it was actually filed. *See* S. Rep. No. 83-1622 (1954), *reprinted in* 1954 U.S.C.A.A.N. 4621, 5235. In 1958, Congress amended the statute, expressing concern that taxpayers had to file a timely return in order to benefit from the three-year limitation period while the IRS had three years to complete assessments regardless of whether the return was timely. *See* S. Rep. No. 85-1983 (1958), *reprinted in* 1958 U.S.C.A.A.N. 4791, 4887. By amending I.R.C. § 6511(a), Congress intended that ''a claim for a refund or credit of any tax may be filed within three years from the time the return was actually filed (or, as under present law, within 2 years from the time of payment, whichever is later).'' *Id.*

Subsequent legislation has also significantly undermined *Miller*'s reasoning. The *Miller* court found its holding was necessary to prevent taxpayers who received a deficiency notice from ''forum shopping'' between district court and tax court. The Taxpayer Relief Act of 1997 eliminated any disparity in deadlines between tax court and district court by amending I.R.C. § 6512(b)(3) to allow a three-year look-back period for a refund claim filed in tax court where no return has been filed and the mailing date of the deficiency notice is during the third year after the return due date. *See* I.R.C. § 6512(b)(3)(B), (C) (2002). Under the current statute, *Miller*

[2] This is well-illustrated by Revenue Ruling 76-511 in which the IRS found a refund claim was timely under I.R.C. § 6511(a), but was barred by I.R.C. § 6511(b) since the taxpayer did not pay the tax to be refunded within the three-year period immediately preceding the date the return was filed.

actually creates a disparity since a taxpayer must file a return within two years of payment of the tax in district court, but need not do so in tax court.

In light of the intervening Supreme Court decision in *Mead*, which requires that we accord *Skidmore* deference to revenue rulings, as well as the recent legislation that has obviated the *Miller*court's concern with potential forum-shopping, we conclude we are no longer bound by *Miller*. Accordingly, we hold that under I.R.C. § 6511(a), a taxpayer's claim for credit or a refund is timely if it is filed within three years from the date his income tax return is filed, regardless of when the return is filed.

The district court had jurisdiction over Omohundro's claim for credit for overpaid income taxes because her administrative claim was timely filed. Omohundro's 1993 tax return was considered filed on October 14, 1997, *see* 66 Fed. Reg. at 2260, and she had three years from that date to file her claim for credit. Her claim for credit was included in her tax return and was considered filed on the same date. *See* Treas. Reg. § 301.6402-3(a)(4).

We REVERSE and REMAND to the district court for further proceedings.

¶2002-5272

UNITED STATES OF AMERICA, APPELLEE v. David R. STINSON and Joyce R. STINSON, APPELLANTS. U.S. Court of Appeals, Third Circuit, (CA3) No. 01-3891, Aug. 16, 2002. District Court, (2001, DC PA) 88 AFTR 2d 2001-6341 [88 AFTR 2d 2001-5340], adopting (2001, DC PA) 88 AFTR 2d 2001-5340, affirmed. Years 1985, 1986, 1987, 1988, 1991. Decision against Taxpayers.

1. Actions to reduce assessments to judgment—effect of installment payment agreement—validity of assessments. District court properly granted govt. summary judgment reducing taxpayers' tax, penalty and interest assessments to judgment: although court's ruling that IRC §6331(k)(2) didn't bar govt.'s suit was irrelevant, suit was proper where taxpayers' refusal to extend IRC §6501(a)'s 10-year collection period was equivalent to refusal to pay their tax obligation. Whether taxpayers' payroll deduction agreement (PDA) was construed as IRC §6159 installment agreement wasn't dispositive; Reg. §301.6159-1's inexhaustive list of permissible govt. actions didn't exclude suit to reduce taxpayers' obligation to judgment if limitations period on assessed liability was set to expire during pendency of installment agreement; and detrimental reliance on govt.'s alleged misrepresentation that PDA was installment agreement wasn't shown. *Reference:* United States Tax Reporter ¶63,315.01(60); 74,035.01(30); 74,338.511(5). IRC §6331; 7403.

Mark J. Krauland, Esq. (Argued) Mark J. Krauland & Assoc., P.C. 912 Western Ave. Pittsburgh, PA 15233 Counsel for Appellants

Sara A. Ketchum, Esq. (Argued) Tax Division Department of Justice P.O. Box 502 Washington, D.C. 20044 Counsel for Appellee

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,

Appeal from the United States District Court for the Western District of Penn-sylvania

District Judge: Honorable Robert J. Cindrich

Before AMBRO and STAPLETON, Circuit Judges, and O'NEILL, District Judge.*

OPINION OF THE COURT

O'NEILL, J.:

NOT PRECEDENTIAL

Appellants David and Joyce Stinson appeal the District Court's entry of summary judgment in favor of the United States in the amount of $152,239.34, reflecting income taxes, penalties and interest assessed by the Internal Revenue Service against

* Honorable Thomas N. O'Neill, Jr., U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

appellants for the years 1985, 1986, 1987, 1988, and 1991.

I.

The IRS had assessed liabilities against appellants on March 12, 1990 (for the tax year 1988), March 19, 1990 (for the tax years 1985, 1986, and 1987) and May 25, 1992 (for the tax year 1991). These taxes were not paid upon notice and demand, thus giving rise to federal tax liens. On April 6, 1998, appellants entered into a payroll deduction agreement (''PDA'') with the IRS to pay their tax liability in monthly installments. Under the terms of this agreement $1,132 was to be deducted each month from the wages of Joyce Stinson. This agreement was signed by Harold and Joyce Stinson and a representative of Mrs. Stinson's employer. In the space marked ''IRS Originator, title and IDRS number'' the words ''Harold Stanton Revenue Officer 2122'' are printed. Payments were deducted and forwarded to the IRS each month from May, 1998 through October, 2000. On March 13, 2000 the United States filed this action seeking to reduce to judgment the balance remaining on the assessments made against appellants. As of December 31, 2000 the total amount of these assessments left unpaid was $152,239.34.

The IRS moved for summary judgment and on July 17, 2001, Magistrate Judge Kenneth Benson filed a Report and Recommendation in favor of the government. Judge Benson rejected appellants' contention that the PDA should act as a bar to the government's suit because it constituted an installment agreement under 26 U.S.C. § 6159.[1] According to Judge Benson, since no signature appeared in the box on the PDA marked ''Agreement examined or approved by (*Signature, title, and function*)'' it was never reviewed or approved by any official authorized to bind the IRS, and therefore there was no evidence that the PDA was in effect at the time this action was filed. Accordingly, Judge Benson held that the IRS was not barred by 26 U.S.C. § 6331(k)(2) from maintaining this suit.[2] Appellants objected to this recommendation on the grounds that (1) proper authority was delegated to Stanton in compliance with IRS regulations, (2) if Stanton had no such authority then there is a triable issue as to whether appellants knew or could have known this and whether he represented himself to the Stinson's as having such authority, and (3) the principles of equitable estoppel should operate to bar the government from bringing this action.

On September 18, 2001, District Court Judge Robert Cindrich granted the government's motion for summary judgement; however, he did not adopt the reasoning of the Magistrate Judge, finding instead that the PDA appeared ''to fit within the language of Section 6159.'' Judge Cindrich held further that even if the PDA constituted a valid installment agreement, appellants' argument must fail because § 6331(k)(2) was not in effect when the PDA began to operate in May, 1998 and therefore could not be relied on by appellants to bar the current action. Since at the time the PDA was signed installment agreements were not yet covered by § 6331(k), Judge Cindrich held there could have been no detrimental reliance on any alleged misrepresentation by the government that the PDA was such an agreement; therefore, appellants' estoppel argument also failed.

On appeal the Stinsons continue to assert that the PDA constitutes an installment agreement under § 6159(a). Appellants contend that it was not they but Magistrate Judge Benson who first attempted to apply § 6331(k), and argue that the existence of a valid § 6159 agreement bars the type of action brought against them by the govern-

[1] This section describes the circumstances under which a taxpayer ''is allowed to satisfy liability for payment of any tax in installment payments . . . .'' 26 U.S.C. § 6159(a).

[2] Section 6331(k)(2) states that ''no levy pursuant to § 6331(a) shall be made on the property or rights to property of any person with respect to any unpaid tax (A) during the period that an offer by such person for an installment agreement under § 6159 for payment of such unpaid tax is pending with the Secretary;'' and ''(C) during the period such an installment agreement for payment of such unpaid tax is in effect.''

Section 6331(a) states: ''If any person liable to pay any tax neglects or refuses to pay the same within 10 days of notice and demand it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.''

ment irrespective of the applicability of § 6331(k). Should we find that the PDA is not a valid installment agreement under § 6159, appellants argue that the doctrine of equitable estoppel should bar the action against them.

II.

On appeal from an order entering summary judgment, this Court undertakes de novo review, applying the same standard the District Court should apply. Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

[1] Appellants contend that the District Court's ruling that § 6331(k)(2) does not bar the government's suit is not relevant to their appeal. We agree. Section 6331(k)(2) bars the Secretary of the Treasury from levying upon the property or rights to property of any person with respect to any unpaid tax during the period that an offer for an installment agreement under § 6159 is pending and during the period such an installment agreement is in effect. Appellants do not contend that the IRS imposed an unlawful levy on their property. Rather, appellants argue that since § 6159 states that the Secretary is authorized to enter into agreements under which the "taxpayer is allowed to satisfy liability for payment of any tax in installment payments . . . ", their compliance with the PDA satisfied their outstanding tax liability.

The IRS "limits the length of installment agreements to the 10-year statutory collection period[3] except in instances when a reasonable extension of the statutory period for collection will allow an agreement to be accepted. In these cases, waivers of the CSED [(Collection Statute Expiration Date)] should be secured." Int. Rev. Man. 5.14.2.1(2). Appellants point out that "[i]n an area of the [PDA] listed as 'IRS Use Only', there is a circle around an indicator for the statement 'No future action is required,' and an entry listing the CSED as 3/19/00." (App. Br. at 11). According to appellants, since the PDA does not include a condition extending the period of limitations and appellants have never waived the statutory expiration date, the agreement by its terms expired on March 19, 2000. We note that the PDA does not list the CSED as "3/19/00" but lists the *earliest* CSED as "3/19/00" (emphasis added), and that payments continued to be deducted and forwarded to the government through October, 2000. There is nothing on the face of the PDA that suggests that it was the intention of either party that the PDA have a definite termination date of March 19, 2000. But there is also nothing contained in the PDA indicating that the IRS was willing to take less than the full amount owed by appellants.

At oral argument counsel for appellants admitted that as the ten year statute of limitations approached on the earliest assessment, March 12, 1990, the IRS asked appellants to agree to a voluntary extension of the statute of limitations that would allow the terms of the PDA to remain in place. Appellants refused. This left the IRS with the choice of either allowing appellants to avoid their outstanding tax liability or bringing suit prior to March 13, 2000.[4] 4 28 U.S.C. §§ 7403(a) states in relevant part:

> In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability . . . .

Appellants' refusal to extend the statutory period is the functional equivalent of a refusal to pay their tax obligation, thereby rendering an action to reduce this obligation to judgment appropriate. This is true

[3] Under 26 U.S.C. § 6501(a) the government may bring suit against a taxpayer 'only if the . . . proceeding [is] begun within ten years after the assessment of the tax.'

[4] March 12, 2000, fell on a Sunday. The government filed this suit on March 13, 2000, the first day following that was not a Saturday, Sunday or legal holiday. See Fed. R. Civ. P. 6(a).

whether the PDA is construed to be a § 6159 installment agreement or not.[5] Treasury Regulation § 301.6159-1(d) states:

> Except as otherwise provided by the installment agreement, during the terms of the agreement the director may take actions to protect the interests of the government with regard to the unpaid balance of the tax liability to which the installment agreement applies . . . , including any actions enumerated in the agreement.

26 C.F.R. § 301.6159-1. Appellants argue that the government's suit against them is not authorized by this regulation because it does not fit among any of the examples of permissible action that are listed immediately following the regulation.[6] We disagree. The four scenarios listed are merely examples of such action and do not provide an exhaustive list of the only actions that may ever be taken by the IRS to protect the interests of the government. If during the pendency of an installment agreement the limitations period on the assessed liability of the taxpayer is about to expire, the government may protect the interests of the United States by reducing the taxpayer's obligation to judgment.

Since in our view the government properly brought this action against appellants whether the PDA constitutes a valid installment agreement under § 6159 or not, there could have been no detrimental reliance on any alleged misrepresentation by the government that the PDA was an installment agreement. Therefore we need not address appellants' argument the government should be equitably estopped from bringing suit against them.

III.

For the foregoing reasons, we will affirm the Order of the District Court granting the government's motion for summary judgment.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Thomas N. O'Neill, Jr.

District Judge

¶2002-5273

Dick DeGUERIN and Lewis Dickson, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of Texas, (DC TX) CIVIL ACTION NO. H-01-1053, Aug. 5, 2002. Year 1995. Summary judgment denied.

1. Penalties for failure to file information returns—cash transactions—summary judgment—estoppel. Attorneys' IRC §6721 penalty liability for omitting client identity and fee information from Forms 8300 wasn't determinable on summary judgment: whether attorneys were required to report such information or allowed to withhold it as privileged was remaining material fact question that depended on whether reporting would also reveal any interconnected confidential client communications. Similarly, whether, absent privilege, attorneys' failures of their admittedly known reporting duty were excusable by reasonable cause was remaining material fact question that depended on whether they could show reasonableness of their belief in information's privilege and that their subsequent negotiations and correspondence with IRS were significant steps to mitigate reporting failures. Also,

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[5] Even if the PDA does constitute a § 6159 installment agreement, appellants have not been able to identify any reason why such a circumstance would bar the government from bringing an action to reduce their outstanding tax liability to judgment. See 26 U.S.C. §§ 7401-03 (authorizing the IRS to reduce an unpaid tax assessment to judgment and to foreclose federal tax liens which arise from such an assessment in federal court).

[6] The regulation states: "The actions include, for example:

1. Requesting updated financial information from any party to the agreement;

2. Conducting further investigations (including the issuance and enforcement of summonses) in connection with the tax liability to which the installment agreement applies.

3. Filing or refiling notices of federal tax lien; and

4. Taking collection action against any person who is not a party to the agreement but who is liable for the tax to which the agreement applies.'

26 C.F.R. § 301.6159-1(d)(1-4).

attorneys' bare allegations that govt. imposed penalties out of retaliation or vindictiveness were rejected; estoppel claims weren't supported with any proof that govt.'s seeming inconsistency in not applying penalties earlier was affirmative misconduct or prejudiced them; and laches didn't apply. *Reference:* United States Tax Reporter ¶67,215.01(5); 74,338.511(5). IRC §6721.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION,

MEMORANDUM AND ORDER

SIM LAKE UNITED STATES DISTRICT JUDGE

Pending before the court are the Motion for Summary Judgment (Docket Entry No. 24) filed by Dick DeGuerin and Lewis Dickson (collectively "Plaintiffs") and the Motion for Summary Judgment (Docket Entry No. 19) filed by the United States of America. For the reasons stated below, both motions will be denied.

I. Background and Facts

A. Overview

This case marks the culmination of a dispute between the parties that has been brewing for more than a decade. As will be discussed in more detail below, under Internal Revenue Code ("IRC") § 6050I, any person who in the course of trade or business receives more than $10,000 in cash must report to the Internal Revenue Service ("IRS"), among other things, the name, address, and taxpayer identification number of the person from whom the cash was received. 26 U.S.C. § 6050I(b)(2)(a). IRS Form 8300, "Report of Cash Payments Over $10,000 Received in a Trade or Business," is the vehicle by which this information must be transmitted to the IRS. 26 C.F.R. § 1.6050I-1(e)(2). Form 8300 requests the name of the person from whom the cash was received (hereinafter "payer"), and the name of the person on whose behalf the transaction was conducted (hereinafter "beneficiary"). (See, e.g., 1995 Form 8300, Docket Entry No. 24, Exhibit 76 at p. 188.)

This dispute involves penalties the IRS assessed against Plaintiffs for failing to include payer and beneficiary names on certain Form 8300s filed in 1995. The IRS contends that Plaintiffs "intentionally disregarded" their § 6050I filing obligations by failing to include the names. Plaintiffs argue that they should not be assessed penalties because at the time of filing they reasonably believed the names were protected from disclosure by the attorney-client privilege.

B. History of the Dispute Between the Parties

Dick DeGuerin and Lewis Dickson were partners in the law firm of DeGuerin & Dickson from 1982 to 1995. (DeGuerin Aff., Docket Entry No. 24, Exhibit 2 ¶ 3) Although the partnership dissolved in 1995, the two still practice law together, specializing in criminal defense work at both the trial and appellate levels. (DeGuerin Aff. ¶ 3) Over the years, Plaintiffs have been paid by or on behalf of their clients in cash amounts greater than $10,000 on a regular basis, necessitating the filing of an appreciable number of Form 8300s. In 1995 Plaintiffs filed a number of Form 8300s, nineteen of which were missing information (hereinafter the "1995 Form 8300s"). (1995 Form 8300s, Docket Entry No. 24, Exhibits 29, 76)

Plaintiffs' dispute with the IRS over the disclosure of allegedly privileged information began in 1989 when IRS agent Peter Orth began an inquiry regarding certain Form 8300s Plaintiffs had filed in 1989. (DeGuerin Aff. ¶ 14; Letter from Peter Orth, Docket Entry No. 24, Exhibit 15) While that inquiry was ongoing, in the spring and summer of 1990, DeGuerin received three summons seeking fee information that DeGuerin characterizes as similar to that sought by the Form 8300. (DeGuerin Aff. ¶ 14) DeGuerin believed Orth's Form 8300 inquiry and the summons activity were related. (DeGuerin Aff. ¶ 15) DeGuerin implies that the IRS was using its summons powers to circumvent DeGuerin's refusal to comply with the §

6050I filing requirements. (DeGuerin Aff. ¶s 14, 15) Through letters from his lawyer, Samuel Buffone, DeGuerin refused to provide the information sought. (DeGuerin Aff. ¶ 14) The IRS did not take any further action to obtain the names omitted from the Form 8300s that were the subject of Orth's 1989 audit. (DeGuerin Aff. ¶ 16)

From 1990 to 1997 Plaintiffs continued to file Form 8300s omitting information when they believed it to be protected from disclosure by the attorney-client privilege. (Spear Aff., Exhibits a–e and h, Docket Entry No. 19, Exhibit 1) With each such Form 8300, Plaintiffs filed a statement explaining their reasons for the omission. (DeGuerin Aff. ¶ 17,; e.g., Spear Aff., Exhibits c–e) In response to each of these incomplete forms Plaintiffs received a computerized notice from the IRS requesting the omitted information be provided. (DeGuerin Aff. ¶ 17; e.g., Spear Aff., Exhibits b–e) Plaintiffs responded to each notice by referring the IRS to the explanatory statement originally filed with the Form 8300. (DeGuerin Aff. ¶ 17; e.g., Spear Aff., Exhibits c–e) No other action was taken by the IRS during that time period. (DeGuerin Aff. ¶ 17)

In the fall of 1997, IRS agent Jerry Spear informed Plaintiffs that he would be conducting an audit of Form 8300s for the years 1995 through 1997.[1] (DeGuerin Aff. ¶ 20) On October 8, 1997, DeGuerin and Buffone attended a meeting with agent Spear and counsel for the IRS during which the parties discussed their legal positions regarding disclosure of client identification. (Buffone Aff., Docket Entry No. 24, Exhibit 1 ¶ 31) Thereafter, letters were exchanged and conversations were had in an effort to resolve the controversy between the parties. (Buffone Aff. ¶s 32–34; Protest Letter, Docket Entry No. 24, Exhibit 27; Letter from Bufone, et al. to IRS, Docket Entry No 24, Exhibit 28; Letter from Buffone, et al. to IRS, Docket Entry No. 24, Exhibit 29) On March 9, 1998, however, Plaintiffs received notice that they were being assessed penalties for intentionally disregarding their filing obligations under § 6050I with respect to the 1995 Form 8300s. (Buffone Aff. ¶ 35)

Plaintiffs filed an administrative appeal with the IRS, which was denied on the ground that there was no adequate basis for the assertion of the attorney-client privilege. (Buffone Aff. ¶ 35; Letter from IRS to Plaintiffs' Counsel, Docket Entry No. 24, Exhibit 30) The IRS apparently stayed enforcement of the penalties during the pendency of the administrative appeal process. After the appeal agent Spear's audit continued and further attempts were made to resolve the matter, including referral of the case to the IRS National Office for review. (Buffone Aff. ¶s 36–38) Finally, on January 26, 2001, counsel for the IRS informed Plaintiffs that it would abate the penalties assessed for five of the 1995 Form 8300s but that it would lift the stay on the remaining assessments for that year and begin a collection action. (Letter from IRS, Docket Entry No. 24, Exhibit 31)

C. Procedural Posture

On February 14, 2001, counsel for Plaintiffs sent a check in the amount of $12,000 to agent Spear in payment of the $25,000 penalty assessed with respect to the Form 8300 filed on February 9, 1995, and assigned IRS identification number 9504500826.[2] (Check, Docket Entry No. 1, Exhibit A at p. 3) At the same time, Plaintiffs filed a Form 843[3] requesting a refund of the penalty assessed with respect to the February 9, 1995, Form 8300. (Form 843, Docket Entry No. 1, Exhibit A at p. 4) On March 12, 2001, the IRS denied Plaintiffs' request for a refund and advised Plaintiffs that they could file suit in the United States District Court to recover the amount of the penalty paid. (Letter from IRS, Docket Entry No. 1, Exhibit B) On March 28, 2001, Plaintiffs filed suit in this court seeking to recover the amount paid. (Complaint, Docket Entry No. 1) On May

[1] DeGuerin alleges that the IRS initiated this audit in retaliation because DeGuerin embarrassed an IRS agent on the witness stand during cross-examination at the 1997 trial of James Manuel "Smokey" Phillips. (DeGuerin Aff. ¶s 18–20)

[2] The IRS owed Plaintiffs certain credits in connection with another matter. The credits plus the $12,000 check covered the $25,000 fine. (Letter, Docket Entry No. 1, Exhibit A at 1)

[3] Form 843 is entitled "Claim for Refund and Request for Abatement."

29, 2001, the United States filed a counterclaim seeking to recover the unpaid penalties assessed with respect to the remainder of the incomplete Form 8300s filed by Plaintiffs in 1995. (United States' Answer and Counterclaim, Docket Entry No. 10) Both parties have filed motions for summary judgment.

II. Analysis

A. Summary Judgment Standard

Summary judgment is authorized when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Facts are "material" if they "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 106 S. Ct. 2505, 2510 (1986). A material fact creates a "genuine issue" if, under the evidence, the trier of fact reasonably could resolve the factual dispute in favor of either party. Id. at 2511.

When the movant bears the ultimate burden of proof at trial, summary judgment cannot be granted unless the movant makes a showing on each required element and the nonmovant's response fails to raise a genuine issue of material fact as to any element. See Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986); National State Bank v. Federal Reserve Bank, 979 F.2d 1579, 1582 (3d Cir. 1992). A court must "view the evidence presented through the prism of the substantive evidentiary burden" that would operate at trial. Anderson, 106 S. Ct. at 2513.

B. An Overview of the Statutory Scheme

1. The Form 8300 Reporting Requirement

IRC § 6050I(a) states

> (a) Cash receipts of more than $10,000. —Any person—
>
> (1) who is engaged in a trade or business, and
>
> (2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions),

shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe.

IRC § 6050I(b)(2) states that

> "[a]" return is described in this subsection if such return
>
> (2) contains—
>
> (A) the name, address, and TIN of the person from whom the cash was received,
>
> (B) the amount of cash received;
>
> (C) the date and nature of the transaction, and
>
> (D) such other information as the Secretary may prescribe.

Although there are statutory exceptions to the reporting requirement, none of them exempts an attorney from reporting his client's name or fee information.

The regulations enacted pursuant to IRC § 6050I require that a Form 8300 be filed with the IRS by the fifteenth day after the date the cash is received. 26 C.F.R. § 1.6050I-1(e)(1), (2). The form must include all of the statutorily required information, as well as any other information required by the form itself. 26 C.F.R. § 1.6050I-(e)(2).

2. Intentional Disregard

IRC § 6721(a) imposes a penalty of $50 for each failure to file a Form 8300 on or before the required filing date or failure to include all of the information required to be shown on the form. However, IRC § 6721(e) provides for enhanced penalties in certain situations.

> (e) Penalty in case of intentional disregard.—If 1 or more failures described in subsection (a)(2) are due to intentional disregard of the filing requirement (or the correct information reporting requirement), then, with respect to each such failure—
>
> . . .
>
> (2) the penalty imposed under subsection (a) shall be $100, or, if greater—

. . .

(C) in the case of a return required to be filed under section 6050I(a) with respect to any transaction (or related transactions), the greater of—

(i) $25,000, or

(ii) the amount of cash (within the meaning of section 6050I(d)) received in such transaction (or related transactions) to the extent such cash does not exceed $100,000 . . .

3. Reasonable Cause

IRC § 6724(a) provides that "[n]o penalty shall be imposed under this part with respect to any failure if it is shown that such failure is due to reasonable cause and not to willful neglect." Thus, even if a person intentionally disregards the § 6050I reporting requirements, he will not be subject to any penalty if he can show reasonable cause for his non-compliance.

C. Application of the Law to the Facts of this Case

[1] Plaintiffs do not dispute that they omitted information from several Form 8300s filed in 1995. (1995 Form 8300s, Docket Entry No. 24, Exhibit 76) Nor do Plaintiffs dispute that they were fully aware of and understood the § 6050I filing requirements. (DeGuerin Aff., Docket Entry No. 24, Exhibit 2 ¶ 10) Plaintiffs do not contend that they were not in possession of all the information necessary to complete the Form 8300s in a timely manner had they chosen to do so. (See, e.g., Letter Accompanying Form 8300, Docket Entry No. 24, Exhibit 76 at p. 189 (stating the DeGuerin routinely obtained and maintained the information sought in Form 8300).) The central issues in this case are whether Plaintiffs' failure to provide information on the 1995 Form 8300s, claiming the attorney-client privilege, amounted to intentional disregard of their filing obligations under IRC § 6050I and whether the penalties should be waived because Plaintiffs had reasonable cause for omitting the information.

1. Summary of the Parties' Contentions

Plaintiffs argue that penalties for intentional disregard of their filing obligations are not warranted because they did not act "willfully" in omitting information from the Form 8300s. Because they believed they were not required to report privileged information to the IRS, and because they believed the omitted information was privileged, Plaintiffs argue that their failure to fully complete the 1995 Form 8300s was not "wilfull" and was thus not in "intentional disregard" of the filing requirements.

Alternatively, Plaintiffs argue that even if they intentionally disregarded their filing obligations, no penalties are warranted because Plaintiffs acted with "reasonable cause" and not with "willful neglect" within the meaning of the IRC § 6724 waiver provision.[4] Plaintiffs contend that they did everything within their power to determine their filing obligations and acted as any reasonable attorney would under the same or similar circumstances. Plaintiffs also argue that the rules of professional responsibility and the attorney-client privilege not only allow them to withhold their clients' identities, but actually forbid them from disclosing their clients' identities without authorization.

Plaintiffs also argue that the penalties in this case are "arbitrary and capricious" because the IRS abated the penalties with respect to some of the 1995 Form 8300s but not with respect to others, even though the factual showings with respect to them were similar. Plaintiffs argue that this "arbitrary and capricious" abatement of penalties demonstrates that there is no genuine issue of material fact as to whether the penalties were warranted.

Plaintiffs also argues that the court should use its equitable powers to grant Plaintiffs' summary judgment motion because the penalties were assessed out of vindictiveness and retaliation and because

[4] Plaintiffs argue that a person acts with intentional disregard only if his actions were willful. Plaintiffs also argue that a person's actions cannot be willful if they acted with reasonable cause. It thus appears that Plaintiffs are arguing that a finding of reasonable cause precludes a finding of intentional disregard and compels the application of the IRC § 6724 waiver.

they are entitled to summary judgment on the grounds of equitable estoppel, judicial estoppel, and laches.

The United States argues that Plaintiffs did not have a valid reason to believe that a client's identity could be protected from disclosure by the attorney-client privilege when the Form 8300s were filed in 1995. The United States argues that intentional disregard penalties were warranted because Plaintiffs knew of the IRC § 6050I filing requirements and knew that their clients' identities must be reported, but chose not to do so. The United States argues that the reasonable cause waiver does not apply in this case because there are no "significant mitigating factors" as required by IRS regulations. The United States also argues that even if a client's identity might be privileged under certain circumstances, Plaintiffs have failed to establish that they believed such circumstances existed at the time the 1995 Form 8300s were filed.

2. The Burden of Proof

Because the assessment of a penalty by the IRS is entitled to a presumption of correctness, the party opposing the penalty normally has the burden of proving that the penalty assessment was erroneous. Sandvall v. Commissioner, 898 F.2d 455, 459 [66 AFTR 2d 90-5065] (5th Cir. 1990); Marcello v. Commissioner, 380 F.2d 499, 507 [19 AFTR 2d 1700] (5th Cir. 1967). Citing Dellacroce v. Commissioner, 83 T.C. 269 (T.C. 1984), Plaintiffs argue that the presumption of correctness does not apply in this case because the penalties were assessed as the result of unconstitutional conduct on the part of the IRS.[5] According to Plaintiffs, the burden of proof should be on the United States to show that the penalties assessed are correct. The court disagrees.

Plaintiffs have failed to show that the penalties in this case were assessed as the result of unconstitutional conduct. According to Plaintiffs, the IRS began the 1997 audit only after DeGuerin had embarrassed an IRS agent on cross-examination during a high profile criminal trial. Plaintiffs cite evidence that IRS special agent Elizabeth Wiggington desired to retaliate against Plaintiffs by forcing them to spend a great deal of money in defending against a Form 8300 audit. (D'Amico Aff., Docket Entry No. 24, Exhibit 4 at p. 2) Even if these facts are true, Plaintiffs have not explained how the Constitution has been violated. Plaintiffs have not even stated which constitutional right they believe has been violated. Not every bad act by the government is a violation of the United States Constitution.

Plaintiffs also argue that because the IRS abated the penalties with respect to some, but not all, of the forms under similar facts, the IRS's assessment of penalties was arbitrary and capricious, thus shifting the burden of proof to the government. Plaintiffs do not dispute that they omitted information from several Form 8300s filed during 1995. The penalties in this case were assessed because of those omissions. The court therefore sees no reason to shift the burden of proof to the United States. Dellacroce, 83 T.C. at 287; see also Sealy Power, Ltd. v. Commissioner, 46 F.3d 382, 387 [75 AFTR 2d 95-1213] (5th Cir. 1995) (refusing to shift the burden of proof and holding that the burden in a case where the Commissioner rejects a deduction or credit, as distinguished from a case where the Commissioner claims the taxpayer underreported his income, should always remain on the taxpayer because the taxpayer is the best source of information concerning entitlement to the claimed deduction or credit).

[5] Dellacrose does not stand for the proposition for which Plaintiffs cite it — that the burden of proof shifts to the government when it is shown that the penalty was assessed as the result of unconstitutional conduct. In Dellacrose the Commissioner of Internal Revenue determined that the taxpayer had failed to report certain income for the 1965 tax year. Dellacrose, 83 T.C. at 271. This deficiency determination was based solely upon hearsay evidence. Id. at 284. The issue before the court was whether the deficiency determination was arbitrary and thus not entitled to the presumption of correctness. The government argued that the deficiency should not be held arbitrary because evidence of the taxpayer's failure to report income could be inferred from the taxpayer's refusal to answer certain questions during discovery on Fifth Amendment grounds. The Tax Court declined to draw such a negative inference and found that, absent the inference, there was no admissible evidence in the record to support the deficiency determination. Id. at 286. Because it was not supported by any admissible evidence, the court concluded that the Commissioner's deficiency determination was arbitrary and not entitled to a presumption of correctness. Id. at 287. Absent the presumption of correctness, the burden shifted to the Commissioner to demonstrate that the deficiency determination was correct. Id.

3. Were Plaintiffs Obligated to Report their Client's Identities on the Form 8300s?

Before any analysis on intentional disregard or reasonable cause is undertaken the court must first determine whether Plaintiffs had any obligation to report the omitted information in the first place. It is important to note that in this case the parties seek only to recover money. The United States is not seeking the information omitted from the 1995 Form 8300s. However, if the United States was not entitled to the omitted information in the first instance, then no penalties were warranted.

Plaintiffs refused to disclose information identifying some of the persons that paid them in cash on the ground that their names were privileged. The law has long been settled that a client's identity and fee information are not normally privileged. In re Grand Jury Proceedings (Jones), 517 F.2d 666, 670–71 (5th Cir. 1975). However, as will be discussed in more detail below, there are exceptions to this rule and, under certain circumstances, a client's identity may be protected from disclosure by the attorney-client privilege.

Every reported appellate opinion to have considered the issue has either expressly held (or has at least left open for consideration) that privileged information need not be disclosed to the IRS on a Form 8300. United States v. Sindel, 53 F.3d 874, 876 [75 AFTR 2d 95-1894] (8th Cir. 1995); United States v. Blackman, 72 F.3d 1418, 1426 [77 AFTR 2d 96-313] (9th Cir. 1995) (expressly recognizing that where fee payer identity is privileged compliance with § 6050I is excused, but noting that ''[w]e are hard pressed to imagine such a case''); United States v. Leventhal, 961 F.2d 936, 940 [70 AFTR 2d 92-5001] (11th Cir. 1992); United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 506 [67 AFTR 2d 91-1166] (2d Cir. 1991) (noting that only in ''special circumstances'' will client and fee information be protected); Lefcourt v. United States, 125 F.3d 79, 86 [80 AFTR 2d 97-6523] (2d Cir. 1997) (citing Goldberger & Dubin and confirming that ''special circumstances'' might excuse disclosure of privileged information). Because privileged information need not be disclosed on a Form 8300, a client's name need not be disclosed on a Form 8300 if it is privileged. But a client's name and fee information will only be considered privileged in a few, very narrow, special circumstances. In other words, if the information withheld from the 1995 Form 8300s was in fact privileged, Plaintiffs were excused from disclosing it and no penalties were warranted. The critical question is whether the omitted names were privileged.

On several occasions the Fifth Circuit has considered whether a client's identity and fee information are privileged. Because the parties vehemently disagree about the law on this point, a short discussion of the leading Fifth Circuit authorities is required. In In re Grand Jury Proceedings (Jones), 517 F.2d 666, 668 (5th Cir. 1975), the United States subpoenaed several attorneys to appear before a federal grand jury to answer questions regarding payment of their fees for certain clients. The attorneys refused to answer questions regarding the identities of third parties who might have paid the legal fees of the attorneys' known clients. Id. at 669. The court explained that

> [j]ust as the client's verbal communications are protected, it follows that other information, not normally privileged, should also be protected when so much of the substance of the communications is already in the government's possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions.

Id. at 674.

A few years later the Fifth Circuit, en banc, expressly recognized that ''limited and narrow exception'' stated in Jones as ''one that obtains when the disclosures of the client's identity by his attorney would have supplied the last link in an existing chain of incriminating evidence likely to lead to the client's indictment.'' In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc). The Pavlick court also noted that Jones

rested on its peculiar facts and '''should not be taken as any indication of how we would decide a similar question if the inculpatory value of sought-after testimony were less obvious or largely attenuated.' Id. Plaintiffs read these cases as establishing a 'last link' exception to the general rule that client identity is not normally privileged. According to Plaintiffs, if the revelation of a client's identity would provide probative links in a chain of evidence against the client, the client's name is privileged.

The Fifth Circuit clarified the rules relating to disclosure of client identity and fee information in In re Grand Jury Subpoena for Attorney Representing Reyes-Requina, 913 F.2d 1118 (5th Cir. 1990) (hereinafter ''Reyes-Requina I''). In Reyes Requina I Dick DeGuerin, one of the Plaintiffs herein, represented his brother Mike DeGeurin[6] in connection with a grand jury subpoena that sought disclosure of the identity of the person that paid the legal fees for one of Mike DeGeurin's clients.

The court reemphasized that matters relating to the payment of fees and client identity are not generally privileged. Id. at 1123. The court pointed out that the holding in Jones is somewhat misleading in its seeming extension of the attorney-client privilege to information that is merely inculpatory, but not privileged in the traditional sense, and explained that the privilege only reaches communications between attorney and client. Id. at 1124–25 & n.11. The court explained that ''a proper reading of Jones, followed by Ravlick demonstrates that those cases did not fashion a 'last link' or 'affirmative link' attorney-client privilege independent of the privileged communication between an attorney and his client.'' Id. at 1124.

According to the Fifth Circuit, the ''last link'' or ''affirmative link'' exceptions discussed in Jones and Pavlick did ''not significantly amend the normal scope of the attorney-client privilege.'' Id. ''[T]he attorney-client privilege shields the identity of a client or fee information only where revelation of such information would disclose other privileged communications such as the confidential motive for retention.'' Id. at 1125 (noting that this principles is reconcilable with Jones). The Reyes-Requina I court held that the subpoena should not have been quashed because DeGeurin had failed to show that disclosure of the fee payer's identity would reveal a privileged communication because no evidence was presented that the fee payer was DeGeurin's client. Id. at 1126.

On appeal after remand, in In re Grand Jury Subpoena for Attorney Representing Reyes-Requina, 926 F.2d 1423, 1432–33 (5th Cir. 1991) (hereinafter ''Reyes-Requina II''), the Fifth Circuit held that the identity of the person who paid Mike DeGeurin's fees was privileged. The court did not apply a ''last link'' exception or ground its decision upon the fact that revealing the fee-payer's identity may incriminate the fee-payer. Instead, the court applied the law it had set forth in Reyes-Requina I, id. at 1431 n.7, and held that the fee-payer's identity was privileged in light of evidence that DeGeurin had been hired to represent Reyes-Requina and the fee-payer jointly and that revelation of the fee-payer's identity would also reveal the confidential motive for which the fee-payer had hired DeGeurin, id. at 1432. The court reiterated that ''even if the anonymous benefactor were DeGeurin's client, his identity and fee arrangements are privileged only if intertwined with confidential communications made for the purpose of obtaining legal advice for the anonymous benefactor.'' Id. (citing Reyes-Requina I) (emphasis in original).

The law in the Fifth Circuit is clear. The attorney-client privilege protects only confidential communications between attorney and client made for the purpose of securing legal advice. Jones, 517 F.2d at 670. If revelation of a client's identity would also reveal a privileged communication, both the identity and the communication are privileged. Reyes-Requina II, 926 F.2d at 1431. In one specific application of these principles, because a client's confidential purpose for seeking legal advice may be

[6] The brothers spell their last names differently.

privileged, id., a client's identity may be protected from disclosure if its revelation will also reveal the confidential purpose for which the client sought legal advice.

Applying these legal principles to the facts of this case to decide whether the names withheld from the 1995 Form 8300s were privileged, the court must determine whether the person whose name was withheld was Plaintiffs' client and whether disclosure of the name would also reveal a confidential communication between attorney and client. The evidence presented by Plaintiffs is not sufficient for the court to conclude as a matter of law that any of the names omitted from any of the subject Form 8300s were privileged.

Plaintiffs have not explained specifically with respect to each of the forms what privileged communication would be revealed by disclosure of the omitted name. For example, Plaintiffs base their claim of privilege with respect to one of the Form 8300s on the following facts:

> At the time of the payment, the client was under arrest for the possession of marijuana. At the time he was arrested, the client was in a vehicle that belonged to a relative. The relative made the payment to [Plaintiffs] to represent the beneficiary on the marijuana charges, and also sought legal advice from [Plaintiffs] concerning his potential exposure to criminal charges arising from the same underlying activity. The benefactor was never indicted and it is unknown whether he was ever investigated in connection with this activity. The beneficiary pled guilty.

(Factual Basis for Claim of Privilege (Tab 1), Docket Entry No. 24, Exhibit 29 at 37) From these facts it is not clear what privileged communication would have been disclosed had Plaintiffs included the fee-paying benefactor's name on a Form 8300. The fact that upon disclosure of the benefactor's name the government might have been inclined to initiate an investigation of the benefactor does not transform the benefactor's name into a privileged communication. Moreover, even applying the somewhat questionable "last link" exception as stated in Pavlick, it is not clear on these facts how providing the omitted name would have "provided the last link in an existing chain of incriminating evidence likely to lead to the client's indictment." See Pavlick, 680 F.2d at 1027.

Similarly, Plaintiffs base their claim of privilege with respect to another of the Form 8300s on the following facts:

> The client and his/her spouse were both arrested and charged in state court with possession with intent to distribute cocaine. The spouse was represented by separate counsel. The client pled guilty and is in prison.

(Factual Basis for Claim of Privilege (Tab 2), Docket Entry No. 24, Exhibit 29 at 38) On the basis of these facts alone it is not clear that a privileged communication would be disclosed by the disclosure of either the client's or the client's spouse's name on a Form 8300. The client's spouse was not Plaintiff's client, and since the client pleaded guilty, his identity was apparently not a confidential matter. Again, there is no indication that revelation of the omitted information would have provided the "last link" in a chain of incriminating evidence.

The factual showings with respect to the rest of the 1995 Form 8300s are similar to these two examples. Because Plaintiffs have not presented sufficient evidence to demonstrate that the information withheld from the 1995 Form 8300s was privileged, the court cannot conclude as a matter of law that Plaintiffs had no obligation to supply the names requested on the 1995 Form 8300s. Because Plaintiffs have not established as a matter of law that they had no duty to disclose the names omitted from the 1995 Form 8300s, the court must proceed to analyze whether the Plaintiffs intentionally disregarded their filing obligations, and, if so, whether Plaintiffs had reasonable cause for doing so.

4. Did the Plaintiffs Intentionally Disregard their Reporting Obligation?

Under IRC § 6721(e), the penalties for failure to comply with § 6050I are enhanced if the failure is due to "intentional

disregard'' of the filing requirement. The parties disagree about the meaning of the phrase ''intentional disregard.'' The United States argues that a person intentionally disregards the filing requirement if he knows of the filing requirement and knowingly or willfully disregards it. Plaintiffs argue that a person does not have the requisite mens rea for intentional disregard if he has ''reasonable cause'' for failing to comply with the filing requirement.

The Internal Revenue Code does not define ''intentional disregard,'' but the Treasury Regulations state that ''[a] failure is due to intentional disregard if it is a knowing or willful (i) failure to file timely, or (ii) failure to include correct information.'' 26 C.F.R. § 301.6721-1(f)(2). Whether such a failure is knowing or willful ''is determined on the basis of all the facts and circumstances in the particular case.'' 26 C.F.R. § 301.6721-1(f)(2)(ii), 26 C.F.R. § 301.6721-1(f)(3) sets forth examples of the facts and circumstances that may be taken into account:

> (3) Facts and circumstances considered. The facts and circumstances that are considered in determining whether a failure is due to intentional disregard include, but are not limited to--
>
> (i) Whether the failure to file timely or the failure to include correct information is part of a pattern of conduct by the person who filed the return of repeatedly failing to file timely or repeatedly failing to include correct information;
>
> (ii) Whether correction was promptly made upon discovery of the failure;
>
> (iii) Whether the filer corrects a failure to file or a failure to include correct information within 30 days after the date of any written request from the Internal Revenue Service to file or to correct; and
>
> (iv) Whether the amount of the information reporting penalties is less than the cost of complying with the requirement to file timely or to include correct information on an information return.

26 C.F.R. § 301.6721-1(f)(3). These examples of facts and circumstances indicate that ''intentional disregard'' has nothing to do with a person's justification for failing to comply with the filing requirements. Instead, these examples show that a court should consider whether the person has voluntarily, as opposed to mistakenly, failed to comply with the filing requirements.

For example, a pattern of failing to comply with the filing requirements suggests the absence of a mistake, and a person's prompt correction of a failure suggests the presence of a mistake. Similarly, the fact that a person failed to comply under circumstances where the cost of complying was greater than the penalty for not complying suggests a calculated, as opposed to a mistaken, decision to disregard the filing requirement. In Lefcourt v. United States, 125 F.3d 79, 83 [80 AFTR 2d 97-6523] (2d Cir. 1997), the only federal appellate court that has directly considered the meaning of ''intentional disregard'' in the context of IRC § 6721, the court explained that

> the ''intentional disregard'' set forth in § 6721's penalty provision means conduct that is willful, a term which in this context requires only that a party act voluntarily in withholding requested information, rather than accidentally or unconsciously. Once it is determined ... that the failure to disclose client-identifying information was done pur-posefully, rather than inadvertently, it is irrelevant that the filer may have be-lieved he was legally justified in with-holding such information. The only question that remains is whether the law required the disclosure.

The court concludes that a person intentionally disregards a filing requirement when he knows of the requirement and has the ability to comply with it but fails to comply purposefully and not mistakenly.

It is undisputed in this case that Plaintiffs were aware of the filing requirements of § 6050I (DeGuerin Aff., Docket Entry No. 24 ¶ 10), had possession of the information required on the Form 8300s (e.g.,

Attachment to Form 8300, Docket Entry No. 24, Exhibit 79 at p. 174), and were thus capable of providing that information had they chosen to do so. Plaintiffs do not allege that they withheld the names accidentally. It is therefore undisputed that Plaintiffs withheld information required by IRC § 6050I purposefully and voluntarily, and not as a result of mistake or accident. The court therefore concludes as a matter of law that, to the extent that the information omitted from the 1995 Form 8300s was not in fact privileged,[7] it was withheld in intentional disregard of the § 6050I filing requirement.

5. Did the Plaintiffs Have Reasonable Cause for Omitting their Clients' Identities from the Form 8300s?

Even if Plaintiffs intentionally disregarded their § 6050I filing obligations, they are not subject to any penalty if their failure to report the information was "due to reasonable cause and not to willful neglect." IRC § 6724(a). The Treasury Regulation that defines reasonable cause allows a waiver of the penalty only if the person can establish that (i) there are significant mitigating factors with respect to the failure, or (ii) the failure arose from events beyond the filer's control, but in any event, the person must show that he acted in a "responsible manner" both before and after the failure occurred. 26 C.F.R. § 301.6724-1(a)(2). Acting in a "responsible manner" means

(i) [t]hat the filer exercised reasonable care, which is that standard of care that a reasonably prudent person would use under the circumstances in the course of its business in determining its filing obligations . . . and

(ii) [t]hat the filer undertook significant steps to avoid or mitigate the failure.[8]

26 C.F.R. § 301.6724-1(d). In the context of withholding information from a Form 8300, the Second Circuit explained that "if a reasonable attorney would have no basis for concluding that nondisclosure of client-identifying information was justified under existing law, the attorney-client privilege cannot serve to excuse the imposition of a penalty under § 6721." Lefcourt, 125 F.3d at 85.

The parties' arguments center on whether Plaintiffs acted in a responsible manner in omitting information from the 1995 Form 8300s. The United States argues that as of 1995, the great weight of authority across the United States held that client identifying information was not privileged, and that even if such information were privileged, IRC § 6050I preempts any state ethical rule that might prevent a lawyer from disclosing his client's identity and fee information to the Internal Revenue Service. The United States also argues that Plaintiffs cannot show that they undertook significant steps to mitigate their failure to file as is required by 26 C.F.R. § 301.6724-1(d)(ii). Plaintiffs argue that not only did they take significant steps to mitigate their failure to file, but they did everything possible to determine their filing obligations and thereafter formed a good faith belief that they were not obligated to provide the omitted names.

Although there is ample authority for the proposition that client identity and fee information is not generally privileged, as explained above, in the Fifth Circuit such information is privileged if its disclosure is so intertwined with a confidential communication between attorney and client that disclosure of the identity or fee information would also disclose the communication. See Part II.C.3, supra. Therefore, for Plaintiffs to show that they acted in a "responsible manner" within the meaning of 26 C.F.R. § 301.6724-1(d), they must demonstrate that they had a reasonable basis for believing, at the time the Form 8300s were filed, that disclosure of the client's identity would also disclose a confidential attorney-client communication. 26 C.F.R. § 301.6724-1(d)(i); Lefcourt, 125

[7] Information that was in fact privileged did not need to be disclosed. See Part II.C.3, supra.

[8] Mitigation is a factor in both the general definition of "reasonable cause" under 26 C.F.R. § 301.6724-1(a)(2)(i), and in the definition of "responsible manner" under 26 C.F.R. § 301.6724-1(d)(ii). Because Plaintiffs are not arguing that their failures to file arose from events beyond their control, they must, if at all, fall under the "significant mitigating factors" prong of reasonable cause. The court will address all of the mitigating factors at once to avoid confusion.

F.3d at 85. Plaintiffs must also demonstrate that they "undertook significant steps to avoid or mitigate the[ir] failure [to file]." 26 C.F.R. § 301.6724-1(d)(ii).

Although the record contains substantial evidence to show that Plaintiffs acted reasonably in attempting to determine the contours of their filing obligations, a question of fact remains as to whether, with respect to each individual Form 8300, Plaintiffs had reason to believe the omitted information was privileged. Specifically, Plaintiffs have submitted the affidavit of their attorney, Samuel J. Buffone, that demonstrates that Plaintiffs were advised by an attorney who had significant knowledge of the Form 8300 filing requirements as well as the law of attorney-client privilege as it relates to client identity. (Buffone Aff., Docket Entry No. 24, Exhibit 1 ¶s 1–4, 9, 18, 20, 24–28) Mr. Buffone advised Plaintiffs with respect to the law generally and with respect to the specific Form 8300s that Plaintiffs filed. (See generally Buffone Aff.) However, Mr. Buffone's affidavit is devoid of any specific facts about any of the individual 1995 Form 8300s that would show that Plaintiffs had a good faith belief in their claims of privilege. The fact that Plaintiffs went to great lengths to learn the law governing their filing obligations does not compel the conclusion that, as to the specific Form 8300s at issue, Plaintiffs had a reasonable belief in their claims of privilege.

Plaintiffs have also presented DeGuerin's own affidavit, which demonstrates that he undertook significant independent research to determine his filing obligations. (See, e.g., DeGuerin Aff., Docket Entry No. 24, Exhibit 2 ¶s 11, 12 (detailing the dozens of sources of information relied upon in determining his filing obligations).) But DeGuerin's affidavit does not present specific facts as to each of the 1995 Form 8300s to demonstrate that in 1995, DeGuerin had a reasonable basis to believe that each omitted name was privileged. Dickson's affidavit suffers from the same defect. (Dickson Aff., Docket Entry No. 24, Exhibit 3 ¶ 11)

Both DeGuerin and Dickson state that they had a good faith belief that the information withheld was privileged and that their actions in omitting such information were consistent with the standard of care to which a criminal defense practitioner at the time would have adhered. (DeGuerin Aff. ¶ 10; Dickson Aff. ¶ 11) However, such broad, conclusory statements will not suffice at the summary judgment stage to demonstrate reasonable cause under IRC § 6724. Cf. Reyes-Requina I, 913 F.2d at 1126 (finding Mike DeGeurin's conclusory affidavit insufficient to demonstrate the privileged nature of the withheld name absent a showing that there was a confidential communication involved in the fee arrangement with Reyes-Requina).

Moreover, the documents that Plaintiffs have provided do not contain facts sufficient to demonstrate that Plaintiffs were reasonable in their belief that the withheld names were privileged. Plaintiffs have attached to their motion a set of nineteen documents, each entitled "Factual Basis For Claim Of Privilege" and each corresponding to one of the 1995 Form 8300s. (Docket Entry No. 24, Exhibit 29 at pp. 37–54). Although these documents give some general information relating to the type of representation undertaken and the relationship of the benefactor and beneficiary to the representation, none make clear what privileged communication Plaintiffs believed would be disclosed or why Plaintiffs believed the mere inclusion of the client's name on a Form 8300 would disclose that communication. (Docket Entry No. 24, Exhibit 29) To the extent that Plaintiffs were applying the Pavlick/Jones "last link" exception, none of these documents contain sufficient facts to show that Plaintiffs had a reasonable belief that disclosure of the omitted name would form the last link in an existing chain of inculpatory evidence likely to lead to an indictment.

Similarly, the attachments to each Form 8300 submitted to the IRS in 1995 do not provide specific factual information to demonstrate that Plaintiffs were reasonable in their belief that the names were privileged. (Docket Entry No. 24, Exhibit 79)

In fact, each of the attachments, although pertaining to a different Form 8300, recites the same conclusory, boilerplate statement that Plaintiffs had a good faith belief in the claim of privilege. (See, e.g., Attachment to Form 8300, Docket Entry No. 24, Exhibit 79 at p. 174.) A question of fact therefore remains whether Plaintiffs reasonably believed that each omitted name was protected from disclosure by the attorney-client privilege.

Referring again to the definitions of "reasonable cause" and "responsible manner" under 26 C.F.R. § 301.6724-1(a) and (d), Plaintiffs must demonstrate both that "there are significant mitigating factors with respect to the failure," 26 C.F.R. § 301.6724-1(a)(2)(i), and that they "undertook significant steps to avoid or mitigate the failure" in order to have their penalties waived under IRC § 6724. A non-exclusive list of "significant mitigating factors" referred to in 26 C.F.R. § 301.6724-1(a)(2)(i) is contained in subparagraph (b) of that regulation:

> The mitigating factors include, but are not limited to—
>
> (1) The fact that prior to the failure the filer was never required to file the particular type of return or furnish the particular type of statement with respect to which the failure occurred, or
>
> (2) The fact that the filer has an established history of complying with the information reporting requirement with respect to which the failure occurred. In determining whether the filer has such an established history, significant consideration is given to—
>
> (i) Whether the filer has incurred any penalty under § 301.6721 . . . in prior years for the failure . . . , and
>
> (ii) If the filer has incurred any such penalty in prior years, the extent of the filer's success in lessening its error rate from year to year.

26 C.F.R. § 301.6724-1(b). A non-exclusive list of the "significant steps to avoid or mitigate the failure" referred to in subparagraph (d) include

> (A) requesting appropriate extensions of time to file, when practicable, in order to avoid the failure,
>
> (B) attempting to prevent an impediment or a failure, if it was forseeable,
>
> (C) acting to remove an impediment or the cause of a failure, once it occurred, and
>
> (D) rectifying the failure as promptly as possible once the impediment was removed or the failure was discovered . . . .

26 C.F.R. § 301.6724-1(d)(1)(ii)(A-D).

Plaintiffs recite several facts to show that they took significant steps to mitigate their failures in this case. For example, in 1990 Plaintiffs requested that the IRS initiate judicial enforcement proceedings so that they could be ordered to disclose the omitted names rather than being put in the position of having to voluntarily disclose them. (Buffone Aff., Docket Entry No. 24, Exhibit 1 ¶ 15) Plaintiffs requested that their clients allow them to disclose their names on the Form 8300s. (Dickson Aff., Docket Entry No. 24, Exhibit 3 ¶ 10) Plaintiffs also note that between 1989 and 1997, their "Attachment[s] to the Form[s] 8300" appeared to have satisfied the IRS. (DeGuerin Aff., Docket Entry No. 24, Exhibit 2 ¶ 17)

Despite Plaintiffs' firm belief that their actions constitute "significant steps to mitigate" their failures, this assessment is inherently one for a finder of fact. A finder of fact will have to balance Plaintiffs' evidence of mitigation against the facts that, for example, Plaintiffs, with full knowledge of the § 6050I filing requirements, took cash in amounts greater than $10,000 instead of requiring a different payment method or refusing the representation altogether, and that Plaintiffs did not amend the vast majority of the 1995 Form 8300s after their clients were convicted or acquitted—

The United States argues that, even if the omitted names were privileged, an attorney may nevertheless divulge them in order to comply with IRC § 6050I. There is authority for the proposition that in 1995, a reasonable attorney could, without

running afoul of the rules of professional responsibility, disclose a client's identity even if privileged. Rule 1.05(c)(4) of the Texas Disciplinary Rules of Professional Conduct, Tex. Govt. Code, Title 2, Subtitle G, App. A, Art. 10, § 9 (hereinafter "Rule 1.05"), states that a lawyer may reveal confidential information "[w]hen the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rules of Professional Conduct, or other law." Rule 1.05(c)(4) (emphasis added). According to the United States, IRC § 6050I is an "other law" that would justify disclosure of confidential information by an attorney. Plaintiffs have presented substantial evidence, however, that a reasonably prudent attorney in 1995 would not have disclosed his client's name if he believed it was privileged despite Rule 1.05's authorization to do otherwise. (Goldstein Aff., Docket Entry No. 24, Exhibit 5 ¶s 4–7, 12 (citing many authorities for his opinion)) Therefore, even if an attorney might be permitted to disclose his client's name, a question of fact remains whether an attorney in 1995 would nevertheless reasonably believe he was ethically prohibited from disclosing the name.

Plaintiffs argue that because the United States abated the penalties with respect to certain of the 1995 Form 8300s, there can be no genuine issue of material fact as to Plaintiffs' reasonable cause with respect to the remainder of the forms. The court is not persuaded by this argument. The fact that the United States agreed with Plaintiffs' privilege claims as to some of the forms may be probative of whether Plaintiffs acted with reasonable care in omitting information from other forms under similar factual circumstances. But it does not follow that no fact issue remains as to the forms with respect to which the penalties were not abated. The circumstances justifying the assessment of a penalty with respect to the omission of information from one form are independent from those with respect to all other forms.

6. Summary

Plaintiffs have failed to present sufficient evidence to demonstrate that the names omitted from the 1995 Form 8300s were actually privileged. To the extent those names were not privileged, the court has concluded as a matter of law that Plaintiffs intentionally disregarded their filing obligations by failing to include them in the 1995 Form 8300s. However, genuine issues of material fact exist as to whether Plaintiffs had reasonable cause for omitting the names.

D. Plaintiffs' Equitable Arguments

1. Evidence of Vindictiveness and Retaliation

As one of their grounds for summary judgment, Plaintiffs argue that the IRS assessed the penalties "out of vindictiveness and retaliation rather than the facts in light of the law." (Plaintiffs' Motion, Docket Entry No. 24 at p. 22) Plaintiffs then explain that this court "has inherent powers of equity which, when coupled with notions of due process and fair play, should not play host to the Defendant-IRS's claims." Id. Plaintiffs give many details and provide substantial factual support for their claim of retaliation, id. at pp. 25–26, 53–54, but do not cite any authority or make any legal argument to show that vindictiveness or retaliation alone entitle them to summary judgment. The closest Plaintiffs come to doing so is to say that "[t]he Defendant-IRS ought not be allowed to single us out for this Godforsaken, costly, administrative merry-go-round because we somehow displeased it along the way." Id. at p. 52. The facts Plaintiffs allege might very well support an equitable ground for relief, but it is not the court's function to supply Plaintiffs with their arguments.

2. Equitable Estoppel

The facts upon which Plaintiffs base their equitable estoppel argument tend to show that the government knew of Plaintiffs' position with respect to the § 6050I reporting requirements, made a couple of half-hearted attempts to enforce those requirements, and then did nothing for several years. (Plaintiffs' Motion, Docket En-

try No. 24 at pp. 56–58) Plaintiffs complain that they were lulled into a belief that omitting their clients' identities from the Form 8300s was proper because the government made some efforts to enforce the reporting requirements and then deliberately chose to do nothing except to send computerized notices to Plaintiffs of their failure to report.

Equitable estoppel applies to the federal government only in the narrowest of circumstances. Linkous v. United States, 142 F.3d 271, 277 (5th Cir. 1998). To establish, equitable estoppel against the government, not only must the Plaintiffs show the four traditional elements of equitable estoppel,[9] but they must also demonstrate affirmative misconduct on the part of the government, Id. "Affirmative misconduct" requires an affirmative misrepresentation or affirmative concealment of a material fact by the government. Moosa v. INS, 171 F.3d 994, 1004 (5th Cir. 1999). Affirmative misconduct should not be confused with affirmative action; the government's conduct must be wrongful for it to be categorized as misconduct. Carrillo v. United States, 5 F.3d 1302, 1306 (9th Cir. 1993) (cited with approval by the Fifth Circuit in Linkous, 142 F.3d at 278 n.3).

Although Plaintiffs have cited a number of circumstances that might be misleading, and although Plaintiffs have arguably made out a case for each of the traditional elements of equitable estoppel, Plaintiffs have failed to identify any affirmative misconduct on the part of the United States. The fact that the government might have made an attempt to enforce the § 6050I requirements and then backed off is not a wrongful act of misconduct. Neither was it an act of affirmative misconduct for the government to decide to stop enforcement actions in the Fifth Circuit in favor of enforcing the § 6050I requirements in the Second Circuit. Again, these actions might have been misleading, but they were not "affirmative misconduct." Absent evidence of misconduct, Plaintiffs' are not entitled to summary judgment on this ground.

3. Judicial Estoppel

Plaintiffs point out that during the administrative proceedings before the various authorities within the IRS, the government contended that penalties were appropriate with respect to all of the Form 8300s from which information was omitted in 1995. Plaintiffs also point out that on January 26, 2001, in a letter from M. Katherine Bellis, the government decided to abate the penalties with respect to some of the Form 8300s. (Docket Entry No. 24, Exhibit 31) Plaintiffs argue that the United States should be judicially estopped from taking these inconsistent positions. The court is not persuaded by this argument.

"Judicial estoppel is 'a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position.' In re Coastal Plains, Inc., 179 F.3d 197, 205 (5th Cir. 1999) (citing Brandon v. Interfirst Corp., 858 F.2d 266, 268 (5th Cir. 1988). 'The doctrine is generally applied where "intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice."' Id. at 206 (citing Scarano v. Central R. Co., 203 F.2d 510, 513 (3d Cir. 1953). The Supreme Court has identified the following three factors that courts often analyze in applying the doctrine: (1) a party's later position must be clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. New Hampshire v. Maine, 121 S. Ct. 1808, 1815 (2001).

Plaintiffs have failed to support their claim of judicial estoppel. First, it does not appear that the IRS has yet persuaded any

[9] The four traditional elements of equitable estoppel are that the party to be estopped (1) was aware of the facts, and (2) intended his act or omission to be acted upon; and that the party asserting estoppel (3) did not have knowledge of the facts, and (4) reasonably relied on the conduct of the other to his substantial injury. Linkous, 142 F.3d at 278.

court that any of the penalties were proper. Plaintiffs argue that the IRS should be estopped from taking a different position in this litigation than it did during its own internal administrative proceedings. But for the IRS to convince itself, internally, of a particular position is not the same as convincing a court or other tribunal of that position.

More importantly, there is no indication at all that Plaintiffs have been prejudiced by the IRS's change in position. It is somewhat curious that Plaintiffs would complain that some of the penalties against them have been abated. Moreover, because, as discussed earlier, the fact of abatement may lend some credence to the Plaintiffs' reasonable cause arguments, Plaintiffs' case has been helped, not hurt, by the IRS's change in position.

Plaintiffs argue that they have been prejudiced because the government has been able, by virtue of its inconsistent positions, to manipulate the presumption of correctness and burdens of proof in this case. This argument makes no sense. Had the United States maintained its stance with respect to all of the penalties, the burden of proof would still remain on Plaintiffs. The burden of proof has not been manipulated by the United States' change of position with respect to the abated penalties. Judicial estoppel does not apply.

4. Laches

Plaintiffs argue that the doctrine of laches should prevent the United States from recovering the amounts assessed as penalties in this case. The court will not reach the merits of this argument because "'laches 'may not be asserted against the United States when it is acting in its sovereign capacity to enforce a public right or protect the public interest.'" In re Fein, 22 F.3d 631, 634 [73 AFTR 2d 94-2287] (5th Cir. 1994) (citing United States v. Popovich, 820 F.2d 134 (5th Cir. 1987)). Because the United States has assessed penalties for failure to comply with the requirements of an act of Congress, and is thus acting to protect the public interest, laches does not apply.

III. Conclusion and Order

Because Plaintiffs have failed to present sufficient evidence to demonstrate that they were under no obligation to report the names omitted from the 1995 Form 8300s, because genuine issues of material fact prevent the court from determining as a matter of law whether Plaintiffs had reasonable cause for omitting those names, and because Plaintiffs' equitable grounds for summary judgment have no merit, Plaintiffs' Motion for Summary Judgment (Docket Entry No. 24) is DENIED, and the United States' Motion for Summary Judgment (Docket Entry No. 19) is DENIED.

The Joint Pretrial Order will be filed by September 6, 2002. Docket call will be on September 13, 2002, at 4:00 p.m. in Court Room 9-B, 9th Floor, United States Courthouse, 515 Rusk Avenue, Houston, Texas.

SIGNED at Houston, Texas, on this 5th day of August, 2002.

SIM LAKE

UNITED STATES DISTRICT JUDGE

¶2002-5274

IN RE: WPG, INC., Debtor. INTERNAL REVENUE SERVICE, APPELLANT v. DISTRICT OF COLUMBIA ET AL., APPELLEES. U.S. District Court, Dist. of Columbia, (DC DC) Civil Action No.: 01-2338 (RMU), Aug. 19, 2002. Bankruptcy Court, (2001, Bktcy Ct Dist Col) 88 AFTR 2d 2001-5166, 266 BR 773, affirmed. Decision against Govt.

1. Tax claims in bankruptcy—lien priority—District of Columbia (DC) tax claims vs. federal tax liens—choateness—nonbankruptcy law; controlling law. Bankruptcy court properly held that DC's sales tax liens took priority under nonbankruptcy law over IRS's prior income tax liens against portion of Chap. 11 debtor's property sale proceeds that remained after satisfaction of postpetition tax debts: DC sales tax law was re-enactment of prior Congressional law which carried same meaning, so created exception to general choateness doctrine in bankruptcy cases; and case precedent showed that

DC's sales tax liens took priority over federal tax lien if DC law was enacted later, was more specific and was more limited in scope. *Reference:* United States Tax Reporter ¶63,215.04(5); 68,726.54. IRC §6321.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,

MEMORANDUM OPINION

Ricardo M. Urbina United States District Judge

Affirming the Bankruptcy Court's Ruling

I. INTRODUCTION

This matter comes before the court on an appeal by the Internal Revenue Service (''IRS'' or ''the appellant'') of a ruling by the U.S. Bankruptcy Court for the District of Columbia, granting summary judgment in favor of the District of Columbia against the IRS. The bankruptcy proceeding involved debtor WPG, Inc. (''WPG''), who declared bankruptcy in late 1999, at which point the IRS and the District of Columbia (''the District'' or, along with co-appellee WPG, ''the appellees'') filed competing claims for funds owed to them by WPG. The bankruptcy court decided in favor of the District, ruling that the District's lien took precedence over the IRS's lien.

The IRS appeals that ruling, claiming that the bankruptcy court erred as a matter of law in deciding in favor of the District. Specifically, the IRS contends that federal government liens take precedence over local government liens and that the bankruptcy court should have applied the federal ''choateness'' doctrine, which gives federal government liens precedence. The District counters that the bankruptcy court ruled correctly because Congress initially enacted the section of the D.C. Code that created the District's lien and thus the statute is a federal law. As such, this law creates an exception to the general federal choateness doctrine, conferring first priority to the District's lien. For the following reasons, the court affirms the judgment of the bankruptcy court.

II. BACKGROUND

On September 11, 1998, the IRS filed a notice of federal tax lien for its claim for taxes owed by WPG. Appellant's Br. at 1. On August 6, 1999, the District filed a lien against WPG for payment of unpaid sales taxes. Br. for Appellees District of Columbia (''Appellees'' Br.') at 1. On October 20, 1999, WPG filed a Chapter 11 petition in bankruptcy. *Id.*The bankruptcy court applied the proceeds from the sale of WPG's property first to post-petition taxes, which left $15,000 to be applied to the two tax liens. Bankr. Ct. Decision at 2.

On November 6, 2000, WPG filed an adversary proceeding to distribute the remaining proceeds between the IRS and the District. Appellees' Br. at 2. The District filed a motion for summary judgment, arguing that under non-bankruptcy law, D.C. Code § 47-2012, a congressional enactment, created an exception to the general federal rules governing the collection of tax liens in favor of the District. Bankr. Ct. Decision at 1. On July 13, 2001, the bankruptcy court granted the District's motion for summary judgment. *Id.* at 1–2. The bankruptcy court determined that the remaining proceeds would be distributed ''in accordance with the priority of the liens under nonbankruptcy law'' and held that the District's lien took precedence. *Id.* at 2. On July 19, 2001, the IRS filed a notice of appeal from the final order of the bankruptcy court. Appellees' Br. at 2.

III. ANALYSIS

A. Legal Standard for Review of a Bankruptcy Court Decision

U.S. district courts have jurisdiction over appeals of bankruptcy court decisions. 28 U.S.C. § 158(a). On appeal from a bankruptcy court, a district court may affirm, modify, or reverse a bankruptcy court's judgment, or remand with instructions for further proceedings. Fed R. Bankr. P.

8013; *In re Ford Johnson*, 236 B.R. 510, 518 (D.D.C. 1999). A district court shall not set aside findings of fact unless they are clearly erroneous, and the court shall give due deference to the bankruptcy court's opportunity to judge the credibility of the witnesses. *Id.* ''The burden of proof is on the party that seeks to reverse the Bankruptcy Court's holding. That party must show that the court's holding was clearly erroneous as to the assessment of the facts or erroneous in its interpretation of the law and not simply that another conclusion could have been reached.'' *In re Ford Johnson*, 236 B.R. at 518 (citing *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985)). ''A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'' *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). As the Seventh Circuit memorably explained, ''[t]o be clearly erroneous, a decision must . . . strike us as wrong with the force of a five week old, unrefrigerated dead fish.'' *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988). A court, however, should review questions concerning the application of the controlling law *de novo* on appeal. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

B. The Court Affirms the Bankruptcy Court's Ruling

[1] The issue presented in this case is whether the bankruptcy court erred in holding that D.C. Code § 47-2012 requires that a District of Columbia sales tax lien be accorded priority over an earlier filed federal tax lien. The appellant argues that the bankruptcy court erred in concluding that D.C. Code § 47-2012 is a federal law, entitling the District to first priority in collecting sales taxes owed by WPG. Appellant's Br. at 3. The appellant asserts that this law is merely an enactment of the D.C. City Council, to be viewed as the equivalent of a state tax lien. *Id.* at 5. Conflicting federal and state statutory liens are governed by the ''choateness'' doctrine and ''first in time is first in right.'' *United States v. City of New Britain*, 347 U.S. 81, 84 [44 AFTR 798] (1954); *In re Davis Perry Enters., Inc.*, 110 B.R. 97, 98 (D.D.C. 1989). In this case, the IRS contends that following this principle would accord the IRS's lien first priority. Appellant's Br. at 5. The District rebuts that D.C. Code § 47-2012 is actually a re-enactment of the District of Columbia Sales Tax Act of 1949 that Congress passed, and that this re-enactment into law carries the weight of a congressional act. Appellees' Br. at 5–7.

The choateness doctrine gives priority to a statutory lien based on the time it attached to the property in question and became choate, or complete. *City of New Britain, Conn.*, 347 U.S. at 86. A choate lien is defined as ''[a] lien in which the lienholder, the property, and the monetary amount are established so that the lien is perfected and nothing else needs to be done to make it enforceable.'' Black's Law Dictionary at 934 (7th ed. 1999). Because it filed its lien first, the IRS asserts that it has priority over the District in this case. But the D.C. Circuit has previously recognized the D.C. sales tax law as a congressional statute. *United States v. Saidman*, 231 F.2d 503, 509–10 [49 AFTR 456] (D.C. Cir. 1956) (referring to D.C. Code § 47-2609, predecessor to D.C. Code § 47-2012, as a congressional statute and stating that the language of the Act gives the District's claims for sales taxes ''a first priority in terms absolute''); *Dist. of Columbia v. Greenbaum*, 223 F.2d 633, 636 (D.C. Cir. 1955) (explaining that the D.C. Revenue Act of 1949 § 132, predecessor to D.C. Code § 47-2012, gives District sales tax liens priority in local insolvency proceedings not governed by the Bankruptcy Act); *Malakoff v. Washington*, 434 A.2d 432, 437 (D.C. 1981).

The IRS argues that the recodification by the D.C. City Council of the District of Columbia Revenue Act of 1949 into D.C. Code § 47-2012 annulled its status as an Act of Congress. Appellant's Br. at 3–4. When there is a conflict between codification and statutes at large, however, statutes

at large prevail. *Abell v. United States*, 518 F.2d 1369, 1376–77 (Ct. Cl. 1975); *see also* 1 U.S.C. § 112. Re-enactment of a law carries the same meaning as that contained in the prior law. *Harvin v. United States*, 445 F.2d 675, 687–88 (D.C. Cir. 1971) (concurring opinion). Furthermore, for congressional legislation concerning the District of Columbia, Congress maintains its national stature, and its enactments are not the equivalent of state actions.[1] *Neild v. Dist. of Columbia*, 110 F.2d 246, 250–51 (D.C. Cir. 1940); *see also*Appellees' Br. at 3. "In fact, when [Congress] legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a state legislature . . . . " *Neild*, 110 F.2d at 250.

Consequently, as a federal statute, the D.C. sales tax law creates an exception to the general federal priority followed in the federal lien doctrine in bankruptcy cases, allowing a D.C. sales tax lien to take priority. *Saidman*, 231 F.2d at 509. In addition, the D.C. Circuit has held that a lien under the D.C. sales tax law takes precedence over a general federal tax law lien if the D.C. sales tax law was enacted later, is more specific, and is also more limited in scope. *Id.* By this reasoning, the District's sales tax lien should also take precedence over the IRS's lien. *Id.*

In sum, the court affirms the bankruptcy court's ruling that D.C. Code § 47-2012 carries the authority of an Act of Congress, and therefore determines that the bankruptcy court properly interpreted the applicable law in allowing the District to satisfy its claim against WPG before the IRS. *Cooter & Gell*, 496 U.S. at 405; *In re Ford Johnson*, 236 B.R. at 518.

IV. CONCLUSION

For all these reasons, the court affirms the bankruptcy court's decision granting summary judgment in favor of the appellees. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this ___ day of August, 2002.

Ricardo M. Urbina

United States District Judge

ORDER

Affirming the Bankruptcy Court's Ruling

For the reasons stated in this court's Memorandum Opinion separately and contemporaneously issued this ___ day of August, 2002, it is hereby

ORDERED that the ruling of the U.S. Bankruptcy Court is AFFIRMED.

SO ORDERED.

Ricardo M. Urbina

United States District Judge

¶2002-5275

Brenda WARD, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Western Dist. of Virginia, (DC VA) Civil Action No. 01-00753, July 24, 2002. Years 1984, 1985, 1987. Decision for Govt.

1. Refund actions—administrative refund claims; informal claims—limitations periods—violation of discharge injunction. Taxpayer's action for refund of amounts IRS collected under void assessments or recoupment of wrongfully collected taxes was dismissed for lack of jurisdiction: taxpayer failed to timely file administrative refund claim. Attorney's let-ter to IRS which failed to identify tax years at issue, dates credits were posted, or refund amount sought didn't constitute in-formal refund claim; and, even if it did, letter was submitted beyond IRC §6511(a)'s limitations period. Also, distin-guishable case law didn't support claim that prior adversary complaints were infor-mal claims; and bankruptcy proceedings weren't informal claims where they didn't detail grounds or facts on which refund was claimed. And, IRS didn't violate 11 USC §524(a)'s discharge injunction since

[1] The court cannot help but note the irony of a rule to the contrary. If congressional enactments for the District *were* deemed to be the equivalent of state actions, then not only would the District of Columbia *not* be considered a state for purposes of having voting representatives in the United States Congress, i.e., in situations which would presumably serve to advance the District's interests, but also, the District of Columbia *would be deemed a state* in situations when it disserved the District.

it didn't collect on discharged debts. *Reference:* United States Tax Reporter ¶65,115.04(2); 65,115.04(70); 74,225.01(20); 68,726.52(10). IRC §6511; 7422.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA Roanoke Division,

MEMORANDUM OPINION

James C. Turk United States District Judge

This case is before the Court on the Internal Revenue Service's (''IRS'') Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff Brenda Ward (''Ward'') brings this action under 42 U.S.C. § 7422 alleging in Count One that she is due a refund from the IRS for the collection of taxes it made under void assessments. Alternatively, Ward claims that this is a suit for ''recoupment of tax wrongfully collected'' under 28 U.S.C. § 1346 (a). In Count Two, Ward alleges that the IRS violated the discharge injunction of 11 U.S.C. § 524. The Court heard oral arguments on April 8, 2002 and again on July 2, 2002. Upon consideration of the record, the arguments of counsel, and the applicable law, the Court grants the Defendant's Motion to Dismiss.

I.

Plaintiff Brenda Ward filed a petition under Chapter 7 of the Bankruptcy Code with her husband Barry Ward on March 22, 1991.[1] Notice of the bankruptcy petition and stay was sent to the IRS at the Philadelphia Regional Service Center. On November 1, 1990, the IRS issued a notice of deficiency to the plaintiff at her last known address.[2] On April 15, 1991, the IRS assessed additional tax, interest, and penalties to the Wards for tax years 1984, 1985, and 1987.[3] Such assessments were made without obtaining relief from the automatic stay resulting from the bankruptcy filing. The IRS did not file a motion to obtain relief from the stay after-the-fact by requesting that the stay as to the IRS be annulled pursuant to Bankruptcy Code § 362(d). Plaintiff received a discharge in the bankruptcy case on July 8, 1991, and their case was closed on September 26, 1991.

In January 1992, the IRS began collecting the back taxes due by garnishing Plaintiff's pay. The IRS continued garnishing Plaintiff's pay until the summer of 1997. At least $40,000 was garnished from Plaintiff's wages during the period 1992–1997. On January 24, 2000, Plaintiff filed a motion to reopen her bankruptcy case, which was granted.[4] Plaintiff filed an adversary proceeding seeking determination of whether assessments made by the IRS against the Debtors on April 15, 1991 while the automatic stay pursuant to 11 U.S.C. § 362 was in effect, and without having obtained relief from the stay, were void or simply voidable. In a January 29, 2001 Order, the Bankruptcy Court declared the April 15, 1991 IRS assessments ''to be void and of no legal effect.'' See Adversary Proceeding No. 7-00-00050-WSR Order, January 29, 2001. Plaintiff then filed suit in this Court seeking a refund from the IRS for the collection of taxes it made under void assessments. Alternatively, Ward claims that this is a suit for ''recoupment of tax wrongfully collected'' under 28 U.S.C. § 1346 (a). Ward also alleges that the IRS violated the discharge injunction of 11 U.S.C. § 524.

II.

A challenge to the court's jurisdiction under Fed. R. Civ. P. 12(b)(1) may be raised when the allegations of the complaint are facially insufficient to sustain the court's jurisdiction. When confronted with a motion of this kind, the court must pro-

[1] Mr. Barry Ward is now deceased.

[2] This fact was disputed earlier in this case but now is agreed upon by the parties. Because the IRS assessed deficiencies to the Plaintiff, 26 U.S.C. § 6511 is applicable.

[3] The IRS contends that the assessments were made without effective knowledge of the bankruptcy stay because its Special Procedures office, which handles all tax matters of taxpayers who are the subject of pending bankruptcy cases, had not been notified of the Wards' filing as of the date the assessments in question were made. This fact is not contested by the parties.

[4] In 1997, the Plaintiff and her husband filed an adversary proceeding in bankruptcy court requesting that the court determine the amount of their tax liability. The Plaintiff's husband died during that case and the case was dismissed. When Plaintiff was administering her husband's estate, she discovered papers relating to the adversary proceeding. Plaintiff then commenced the 2000 adversary proceeding.

ceed as it would for failure to state a claim under Fed. R. Civ. P. 12 (b)(6). Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). Dismissal under Rule 12(b)(6) is improper "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45–46 (1957). In considering a motion to dismiss, the court accepts as true all well-pleaded allegations and views the complaint in the light most favorable to the plaintiff. Mylan Labs., Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir. 1993).

The defendant based its motion to dismiss on Rule 12(b)(1), claiming that the complaint is barred by the doctrine of sovereign immunity; and on Rule 12(b)(6), claiming the plaintiff failed to state a claim upon which relief can be granted.

III.

[1] The Internal Revenue Code requires that a taxpayer must timely file an administrative claim for refund before filing a refund suit in district court. See 26 U.S.C. § 6511(a). Section 6511(a) operates as a statute of limitations that bars refund suits if an administrative claim for refund is not timely filed. See United States v. Dalm, 494 U.S. 596, 601–02 [65 AFTR 2d 90-1210] (1990). Even if this suit is characterized as a claim for recoupment of tax wrongfully collected under 28 U.S.C. § 1346(a), instead of a refund suit under 26 U.S.C. § 7422(a), the statute of limitations provision of Section 6511(a) still applies. See Dalm, 494 U.S. at 602.

Section 6511 (a), Period of Limitations on Filing a Claim, states that

> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. 26 U.S.C. § 6511(a).

Section 6511(b), Limitation on Allowance of Credit and Returns, states that

> (1) Filing of Claim within prescribed period. No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period. 26 U.S.C. § 6511(b).

Accordingly, the claim for refund must contain sufficient information to allow the Commissioner to address the merits of the dispute. Consistent with this objective, the Secretary of the Treasury enacted § 301.6402-2(b)(1), which requires the taxpayer to state the specific grounds upon which a refund is claimed and the factual basis pertinent thereto:

> (b) Grounds set forth in claim. (1) No refund or credit will be allowed after the expiration of the statutory period of limitation applicable to the filing of a claim therefor except upon one or more of the grounds set forth in a claim filed before the expiration of such period. The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof . . . A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit. Beckwith Realty v. United States, 896 F.2d 860, 862 [65 AFTR 2d 90-757] (4th Cir. 1990) quoting §301.6402-2(b)(1).

Courts have routinely held that an informal claim for refund that is timely filed and later perfected may be treated as a valid claim. See Crocker v. United States, 563 F. Supp. 496, 499–500 [52 AFTR 2d 83-5265] (S.D.N.Y. 1983). An informal claim must fairly advise the IRS of the nature and ground of the taxpayer's claim and intent to request a refund. See United States v. Kales, 314 U.S. 186, 193–94 [27 AFTR 309] (1941). It must "set forth facts sufficient to enable the [IRS] to make an intelligent administrative review of the claim." Crocker, 563 F. Supp. 496 [52 AFTR 2d 83-5265] at 500 (quoting Scovill

Mfg. Co. v. Fitzpatrick, 215 F.2d 567, 269 [46 AFTR 546] (2d Cir. 1954). In addition, the claim must have a written component; oral claims alone are insufficient. See Gustin v. United States Internal Revenue Service, 876 F.2d 485, 488 [64 AFTR 2d 89-5163] (5th Cir. 1989). The general approach of the Courts has been to examine each allegation of the informal claim on its own facts "with a view towards determining whether under those facts the Commissioner knew, or should have known, that a claim was being made." Id. at 488–89 (quoting Newton v. United States, 163 F. Supp. 614, 619 [2 AFTR 2d 5272] (Ct. Cl. 1958). In addition, an informal claim

> must afford the IRS clear notice of a demand for refund in order to enable to administration of that office to conduct its affairs, necessitate that the writing be sufficiently specific to apprise the IRS that the taxpayer desires a refund and to pin-point the area of dispute, thereby facilitating an examination of the claim if appropriate. Miller v. United States, 949 F.2d 708, 711 [68 AFTR 2d 91-6073] (4th Cir. 1991).

Plaintiff claims that she took several actions that constitute an informal claim for refund. First, she argues that the letter from plaintiff's counsel to the IRS, dated May 2, 2001, constitutes an informal claim for refund. Next, Plaintiff argues that her earlier bankruptcy proceedings are an informal claim for refund. The Court will take each of these arguments in turn.

Plaintiff's first argument that she satisfies 26 U.S.C. § 7422(a) is that her attorney's May 2, 2001 letter to Mr. Mike Colley of the IRS constitutes an informal claim for refund. Plaintiff's attorney sent a copy of the bankruptcy court's January 29, 2001 Order and stated in his letter that "[i]t seems to me that the IRS owes Mrs. Ward a refund for the taxes which were credited to tax liability arising from void assessments." Gary Bowman's May 2, 2001 letter to Mike Colley, Richmond, VA IRS. Plaintiff claims that this letter "set[s] forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof" in order to meet the standard necessary for an informal claim. Beckwith Realty, 896 F.2d at 862.

The Court finds that plaintiff's letter and attached Order were not sufficiently specific to notify the IRS that plaintiff sought a refund. See Beckwith Realty, 896 F.2d at 862. The letter does not identify the tax periods at issue, it does not identify the dates the credits were posted, and it does not identify the refund amount sought by Plaintiff.

Even if the Court found the letter to be a valid informal claim for refund, Plaintiff's complaint is still barred by 26 U.S.C. § 6511(a).[5] Section 6511(a) mandates that a claim for refund must be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever is later. In this case, plaintiff is seeking a refund for taxes incurred in the years 1984, 1985 and 1987. The last dates on which plaintiff could have filed a timely claim for refund are as follows: (1984) October 2, 1997; (1985) February 5, 1999; (1987) January 27, 1999. See Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss at 11. Therefore, even if the letter sent by Mr. Bowman to Mr. Colley constituted an informal claim for refund, the letter was submitted beyond the statute of limitations period in § 6511(a).

Plaintiff's next argument that she satisfied the requirements of 26 U.S.C. § 7422(a) is that the amended complaint she filed in Bankruptcy Court on May 19, 2000 constitutes an informal claim. Plaintiff filed that adversary proceeding seeking determination of whether assessments made by the IRS against the Debtors on April 15, 1991 while the automatic stay pursuant to 11 U.S.C. § 362 was void or simply voidable. In a January 29, 2001 Order, the Bankruptcy Court declared the April 15, 1991 IRS assessments "to be void and of no legal effect." See Adversary Proceeding No. 7-00-00050-WSR Or-

[5] The "statute of limitations" provisions provided by 26 U.S.C. § 6511(a) also apply to suits for recoupment of taxes wrongfully collected. See United States v. Dalm, 494 U.S. at 602.

der, January 29, 2001. She argues that the complaint specifically requests a refund, states why she requests a refund, was served on the IRS, caused the IRS to investigate and litigate the claim, and caused the Bankruptcy Court to issue an opinion.

In the alternative, Plaintiff argues that the complaint filed in Bankruptcy Court on July 22, 1997 was an informal claim for refund. The complaint raised the issues relating to the "tax years prior to 1988" which "were discharged" in the bankruptcy case, and complained that the "IRS has continued to collect money from the debtors after the discharge in the case."

Plaintiff relies on two cases, A.G. Rushlight & Co. v. United States, 146 F. Supp. 338 [50 AFTR 926] (D. Oregon 1956) and Fisher v. United States, 1990 U.S. Dist. LEXIS 15229 (N.D. Cal. 1990), aff'd, 967 F.2d 585 (9th Cir. 1992) to support her position that a complaint to determine tax liability filed with the bankruptcy court constitutes an informal claim for refund sufficient to meet the requirements of 26 U.S.C. § 7422(a). In both cases, however, the district courts held that a petition for redetermination of tax deficiencies filed in the Tax Court could be considered informal claims for refund when a formal claim for refund is later filed. See A.G. Rushlight, 146 F.Supp at 338 [50 AFTR 926]; Fisher, 1990 U.S. Dist. LEXIS at 6–8. The district courts determined that the petitions filed with the Tax Court "gave sufficient notice and set forth the claim adequately." A.G. Rushlight, 146 F. Supp. at 339. See also Fisher, 1990 U.S. Dist. LEXIS at 6–8.

In this case, because the Plaintiff neither filed a complaint with the Tax Court or later filed a formal claim for refund, the facts are distinguishable from both the A.G. Rushlight and Fisher cases. The Fourth Circuit has strictly construed the requirements for an administrative claim for refund as set forth in Beckwith Realty and Miller. Because the bankruptcy proceedings did not "set[s] forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof," the bankruptcy proceedings cannot be considered by the Court to be informal claims. Beckwith Realty, 896 F.2d at 862; see also Miller, 949 F.2d at 711.

Because Plaintiff failed to timely file an administrative claim for refund as required by 26 U.S.C. § 7422 (a) and 26 U.S.C. § 6511 (a), the Court does not have subject matter jurisdiction over her claim for refund or recoupment of taxes wrongfully collected. Accordingly, the Court will dismiss Count One of the Plaintiff's Complaint with prejudice.

IV.

In Count Two, Plaintiff alleges that the IRS violated the bankruptcy court's 1991 discharge injunction.[6] Section 524 of the Bankruptcy Code provides that a discharge operate as an injunction against actions to collect on discharged debts. See 11 U.S.C. §524(a). The IRS collected against plaintiff's 1984, 1985 and 1987 tax liabilities. These tax liabilities were not discharged. Because the IRS did not collect on a discharged debt, the IRS did not violate § 524's discharge injunction. Therefore, the Court will dismiss Count Two for failure to state a claim upon which relief can be granted, and will do so without prejudice.

For the above-stated reasons, the Defendant's Motion to Dismiss shall be granted.

ENTER: This 23rd day of July, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5276

UNITED STATES OF AMERICA, PLAINTIFF v. JAMES L. WRAY, DEFENDANT. U.S. District Court, Middle Dist. of Tennessee, (DC TN) No. 3:02-cv-360, July 25, 2002. Decision for Govt.

1. Actions to enjoin income tax preparers—default judgment. Tax preparer was enjoined from acting as preparer on default judgment: preparer engaged in conduct subject to penalty under IRC §6694 and IRC §6695 where he com-

[6] As the parties recognize, this claim should have been brought in bankruptcy court as a violation of the automatic stay.

pleted Schedule C for taxpayers not engaged in sole proprietorship or business activity generating information reportable on Schedule C; listed unsupported or nondeductible expenses; and didn't provide copies of returns to taxpayers for whom they were prepared. *Reference:* United States Tax Reporter ¶74,075; 74,025.01(95). IRC §6694; 6695; 7402; 7407.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE Nashville Division,

DEFAULT

Judge Nixon

Pursuant to Fed. R. Civ. P. 55(a), DEFAULT is hereby entered against defendant JAMES L. WRAY for his failure to plead in or otherwise defend against this action.

Dated this 25th day of July, 2002.

By: /s/

U.S. District Judge

ORDER GRANTING UNITED STATES OF AMERICA'S MOTION FOR DEFAULT JUDGMENT

JOHN T. NIXON Senior United States District Judge

[1] Defendant James L. Wray, having failed to plead or otherwise defend in this action and his default having been duly entered by the Clerk of the Court,

NOW, upon request of plaintiff United States of America and upon affidavit that defendant James L. Wray, as a result of his actions as a tax return preparer in contravention of 26 U.S.C. §§ 6694 and 6695 and other provisions and specifications of the Internal Revenue Code, should be permanently enjoined from the foregoing, and it appearing that defendant James L. Wray is not an infant or an incompetent person, nor in the military service of the United States, it is hereby

ORDERED, ADJUDGED and DECREED that judgment shall be entered in favor of the United States of America and against defendant James L. Wray.

Dated this 25th day of July, 2002.

JOHN T. NIXON

Senior United States District Judge

PERMANENT INJUNCTION

The Court has considered the United States of America's complaint for injunctive relief and the evidence in support of that complaint. The Court, having entered judgment by default in favor of the United States in light of defendant's failure to respond to the complaint, now grants the injunctive relief sought by the United States.

The Court finds that, since 1996, and continuing to the present time, defendant James L. Wray has been preparing Federal individual income tax returns and amended returns for taxpayers, and has been doing so for money, in the form of a flat fee and/or a percentage of any refund recovered. The Court further finds that defendant James L. Wray, in preparing returns, has engaged in conduct subject to penalty under 26 U.S.C. §§ 6694, 6695: he has completed a Schedule C for taxpayers, even though those taxpayers have not been engaged in a sole proprietorship or business activity generating information reportable on Schedule C; he has listed deductions which are not supported, or are not deductible under the Internal Revenue Code; and he has failed to provide a copy of the return to the taxpayer for whom it was prepared.

Accordingly, the Court, pursuant to 26 U.S.C. §§ 7402(a), 7407(b), hereby orders that defendant James L. Wray be, and therefore is, ENJOINED from acting as an income tax return preparer, and is specifically enjoined from:

1) preparing any part of a return or claim for refund that includes an unrealistic position;

2) failing to provide clients with copies of the return or claim for refund he has prepared for them; and

3) engaging in any conduct that interferes with the administration and enforcement of the internal revenue laws by the Internal Revenue Service; and it is further

ORDERED that defendant James L. Wray notify any current clients that he has been enjoined from preparing tax returns and instruct them to make alternative arrangements for the preparation of their returns; and it is further

ORDERED that defendant James L. Wray produce a list of his clients to the Internal Revenue Service by mailing the list to government counsel within twenty (20) days of the date of this order.

Dated this 25th day of July, 2002.

JOHN T. NIXON

Senior United States District Judge

¶2002-5277

Ronald A. CHICK, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-3976, Aug. 14, 2002. District Court affirmed. Years 1987, 1988, 1989. Decision for Govt.

1. Actions against U.S.—wrongful collection—res judicata. District court properly dismissed with prejudice pro se taxpayer's 3d IRC §7433 claim against govt.: res judicata barred action where identical claims were dismissed twice before for failure to state claim and on res judicata grounds, and 2d dismissal was affirmed. Also, even if instant lawsuit was timely filed, court wasn't required to discuss facts of case except as necessary to determine that claim was precluded; and argument that taxpayer didn't exhaust administrative remedies before bringing earlier actions was previously rejected on appeal. *Reference:* United States Tax Reporter ¶74,337.503(75); 74,335.01(5). IRC §7433.

United States Court of Appeals, Sixth Circuit,

Before NELSON, BOGGS, and NORRIS, Circuit Judges.

ORDER

This case was not selected for publication in the Federal Reporter.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

[1] Ronald A. Chick, a pro se Ohio plaintiff, appeals a district court order and judgment dismissing his complaint filed under 26 U.S.C. § 7433. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

Chick operates a sole proprietorship, Holiday Travel International, in Youngstown, Ohio. He alleged that, in January 1992, an agent of the Internal Revenue Service (IRS) audited Holiday Travel after he failed to file tax returns for fiscal years 1987, 1988, and 1989. In June 1992, the agent presented him with a demand for payment of back taxes in excess of $52,000. Chick claimed that this assessment was erroneous and was the result of errors committed by the auditor. His claim is supported by the fact that an internal investigation by the Inspector General resulted in a refund to Chick on July 9, 1999, of $102,958.97. This amount represented the excess taxes that had been levied from his personal and business accounts, plus interest. Chick asserts that the actions of the IRS ruined his health, reputation, and business and sued under §7433 for wrongful collection with malicious intent. He sought $10 million in compensatory damages.

The district court summarily dismissed Chick's complaint in an opinion and order entered on August 7, 2001. A separate judgment was entered the same day. The district court found that Chick had at-

tempted to bring his §7433 claim twice before. Both times the complaint was dismissed for failure to state a claim upon which relief may be granted; the second dismissal was based upon the doctrine of res judicata. The district court concluded that this third complaint was also barred by res judicata and dismissed the action with prejudice.

On appeal, Chick argues that the district court erred in dismissing his complaint without referring to the facts of the case. In addition, he argues that the prior two claims should not be used to bar this claim because he had not then exhausted his administrative remedies.

Upon review, we affirm the district court's judgment for the reason stated therein. This court reviews de novo a district court's dismissal of a case on res judicata grounds. Begala v. PNC Bank, 214 F.3d 776, 779 (6th Cir.2000), cert. denied, 531 U.S. 1145 (2001). Pursuant to the doctrine of res judicata, a claim will be barred by prior litigation if the following elements are present: (1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their "privies"; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action.

Bittinger v. Tecumseh Prods. Co., 123 F.3d 877, 880 (6th Cir. 1997) (emphasis omitted).

The district court did not err in dis-missing Chick's complaint on res judicata grounds. Chick brought his cause of action against the United States in two prior suits before courts of competent jurisdiction. The first lawsuit was dismissed on the merits and the second was properly dismissed under the doctrine of res judicata, as affirmed by this court in an unpublished order. See Chick v. United States, No. 01-3141, 2001 WL 1109748 [88 AFTR 2d 2001-5908] (6th Cir. Sept. 14, 2001).

Even if it is assumed that Chick's current lawsuit was filed within the two-year limitations period provided by §7433, this lawsuit meets all of the requirements necessary for a finding of claim preclusion. Regarding the specific issues raised on appeal, the district court was not required to discuss the facts of this case except insofar as necessary to determine that the case was properly barred by res judicata. Chick's argument related to the lack of exhaustion of administrative remedies prior to bringing the earlier actions has already been rejected by this court.

Accordingly, the district court's judgment is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

2002 WL 1879955 (6th Cir. (Ohio))

¶2002-5278

TRIGON INSURANCE COMPANY (Formerly Blue Cross and Blue Shield of Virginia), PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Eastern Dist. of Virginia, (DC VA) No. 3:00CV365, Aug. 9, 2002. Earlier proceeding at (2001, DC VA) 88 AFTR 2d 2001-6883. Years 1989, 1990, 1991, 1992, 1993, 1994, 1995. Decision for Govt.

1. Losses—terminated contracts—Blue Cross/Blue Shield (BC/BS) orgs.—transitional rules—Fresh Start Basis Rule—applicability. IRC §1012(c)'s Fresh Start Basis Rule applied to former BC/BS org.'s post-'86 terminated/cancelled subscriber and provider contracts: contracts were clearly assets amenable to Fresh Start treatment; and govt.'s attempt to limit Rule's reach only to sale or exchange situations was foreclosed by statute's clear, open-ended gain/loss language, overall context and subsequent amendments, plus Congressional purpose of protecting former BC/BS orgs. from having to include in tax liability calculations previously unrealized gain/loss when transitioning from exempt to taxable orgs. Also, under established valuation methodologies and applicable case law, neither absence of secondary market for individual contracts nor difficulty of predicting particular contract's income stream otherwise precluded application of Rule's FMV standard to basis

calculations. *Reference:* United States Tax Reporter ¶10,125.64(3). IRC §1012.

2. Losses—terminated contracts—Blue Cross/Blue Shield (BC/BS) orgs.—applicability of loss rules—closed and completed transactions. IRC §165's loss deduction rules potentially covered former BC/BS org.'s post-'86 losses from terminated/cancelled or abandoned subscriber and provider contracts: contract termination was identifiable event evidencing closed and completed transaction under Reg. §1.165-1(d)(1) that resulted in sudden termination of contract's usefulness in taxpayer's business and rendered contracts worthless; and fact taxpayers systematically pursued new contracts with those who cancelled or terminated was irrelevant since new contracts, if entered, would become separate assets distinct from terminated contracts, not continuation thereof. *Reference:* United States Tax Reporter ¶1655.0601(80). IRC §165.

3. Losses —terminated contracts—former Blue Cross/Blue Shield (BC/BS) orgs.—Fresh Start Basis—valuation—discounted cash flow (DCF) method; cost approach. Former BC/BS org.'s refund claim for post-'86 terminated contract loss deductions was denied for failure to adequately support for IRC §1012(c) purposes contracts' underlying valuation: existence of individual listed subscriber contracts or overall contract number wasn't verified; expert didn't cross-check his income and DCF analyses, which were prone to produce widely divergent results for other plans with premium income similar to taxpayer's; and his use of questionable or faulty data, along with ignorance of industry competition and changes, in ''lifing'' analysis and remaining computations resulted in inflated subscriber contract valuations. Similarly, taxpayer's expert's provider contract cost-approach valuation wasn't adequately supported with accurate data. *Reference:* United States Tax Reporter ¶10,125.64(5); 1655.0921(40). IRC §165; 1012.

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Stephen W. Miller, Esquire, United States Attorney's Office, Richmond, for Government.
Carolyn V. Grady, Esquire, Epperly, Follis & Schork, P.C., Richmond, for Defendant.

United States District Court, E.D. Virginia, Richmond Division,

JUDGMENT ORDER

PAYNE, District J.

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby ORDERED that judgment is entered herein in favor of the Defendant, United States of America, and that this action is hereby dismissed with prejudice.

The Clerk is directed to send a copy of this Order to all counsel of record by regular mail.

It is so ORDERED.

MEMORANDUM OPINION

Plaintiff, Trigon Insurance Company (''Trigon''), formerly known as Blue Cross and Blue Shield of Virginia, filed this action to recover federal income taxes, plus interest, alleged to have been erroneously overpaid in the years 1989 through 1995. The United States opposes the refund on several grounds.

The dispute between the parties is over the meaning and effect of certain sections of the Tax Reform Act of 1986 (the ''1986 Act'')[1] which, for the first time, subjected Blue Cross and Blue Shield health care insurance organizations to federal income taxation. The core issues are matters of first judicial impression and, therefore, it is useful to recount the factual background in which those issues arose as well as the background of the 1986 Act.

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[1] Pub.L. No. 99-514, 100 Stat.2085 (1986), now codified as 26 U.S.C. § 833.

I. BACKGROUND

A. The Evolution Of The Blue Cross/Blue Shield Organizations In Virginia, The Competition Between Them And Their Merger To Form What Is Now Trigon

Trigon's two corporate predecessors, both Blue Cross and Blue Shield organizations (hereinafter referred to as "Blue Cross/Blue Shield"), were incorporated in the Commonwealth of Virginia in 1935 and 1945, respectively. During the years before 1986, three separate Blue Cross/Blue Shield plans operated in Virginia: Blue Cross/Blue Shield of the National Capital Area in northern Virginia (the "DC Plan"), Blue Cross/Blue Shield of Virginia in the eastern and central portions of Virginia (the "Richmond Plan"), and Blue Cross/Blue Shield of Southwestern Virginia (the "Roanoke Plan"). The relationship among these three companies was governed, in part, by the separate license agreements between each plan and the Blue Cross/Blue Shield Association ("BCBSA"). The BCBSA licensed the rights to use the Blue Cross name and service mark and the Blue Shield name and mark under separate agreements.

Before 1986, the Richmond and Roanoke Plans operated independently in the territory that Trigon now controls. Before 1983, competition between the Richmond and Roanoke plans was prohibited by state law. Thus, each plan operated exclusively in different geographic regions. In 1983, the Virginia legislature amended the state law to eliminate the territorial restrictions on the activities for the Richmond and Roanoke Plans, thereby allowing the two plans to compete directly against each other. As a result of the change, beginning in approximately July of 1983, the two plans engaged in a period of unusually intense competition. This fierce "interplan competition" was conducted principally by offering significant premium discounts in an effort to penetrate, and to establish a significant presence in, the territory formerly occupied exclusively by the rival plans. To that end, both the Richmond and Roanoke Plans offered sizeable competitive premium discounts that were lower than the premiums otherwise set by the actuarial and underwriting departments. The Roanoke Plan, which was smaller than the Richmond Plan, was the more aggressive of the two; and many of the discounted premiums offered by the Roanoke Plan were so significant that the premiums were insufficient to cover the claims and administrative costs expected under the contracts. The Richmond Plan tracked its discounts on an account-by-account basis, keeping records reflecting the difference between the premiums actually charged and those that would have been charged, but for the competition. The Roanoke Plan did not do that.

The intensity of the interplan competition was so great that the commercial health insurers operating in Virginia ceased active marketing within the geographic regions covered by the two plans during this period. As a result of their aggressive pricing strategies during the interplan competition and the corresponding absence of competition from commercial insurers, total enrollment for both the Richmond and Roanoke Plans grew during the period 1983 to 1985.

By late 1985, however, the Roanoke Plan was near financial collapse as a result of the interplan competition and its unsound pricing policies. Consequently, the Roanoke Plan approached the Richmond Plan with a proposal to consolidate. In September 1985, the Plans entered into an affiliation agreement and formally merged in March 1986. Trigon formed Consolidated Healthcare, Inc. ("CHI") in early 1986 as an affiliated management company to facilitate the merger between the two plans. The consolidation began in early 1986 and was not completed until the middle of 1987. Following the merger, the combined company began to manage the Roanoke Plan's business by offering the same products and using the same pricing methodology that the Richmond Plan used. Wood Tr. 11/15/01 855:5–18.[2]

[2] Trigon was reorganized as a mutual insurance company in 1990. In 1996, Trigon demutualized and, in connection with an initial public offering of stock, it became a wholly owned subsidiary of Trigon Healthcare, Inc., and changed its name to Trigon Insurance Company.

B. The 1986 Act And Trigon

The merged company immediately faced a changed tax landscape. Specifically, before 1987, Blue Cross/Blue Shield organizations were exempt from federal income tax pursuant to sections 501(a) and (c) of the Internal Revenue Code of 1954 (''I.R.C.'' or ''the Code''). As part of the 1986 Act, Congress determined that Blue Cross/Blue Shield organizations should become subject to federal income taxation beginning with their first taxable years after December 31, 1986. Congress implemented this decision by enacting section 501(m) of the Code. When it subjected Blue Cross/Blue Shield organizations to income tax, Congress enacted a number of transitional rules, including section 1012(c)(3)(A)(ii) of the 1986 Act (the ''Fresh Start Basis Rule'') which provides that:

> for purposes of determining gain or loss, the adjusted basis of any asset held on the 1st day of such taxable year shall be treated as equal to its fair market value as of such day.

The purpose behind the Fresh Start Basis Rule was to prevent any unrealized gain or loss that had accrued while a Blue Cross/Blue Shield organization was exempt from tax from being factored into the determination of tax liability once it became a taxpayer. See H.R. Conf. Rept. 814, 99th Cong., 2d Sess. Vol. II at 350, reprinted in 1986 U.S.C.C.A.N. 4075, 4437–38 (''The basis adjustment is provided because the conferees believe that such formerly tax-exempt organizations should not be taxed on unrealized appreciation or depreciation that accrued during the period the organization was not generally subject to income taxation.''). By requiring that the basis of each asset held on January 1, 1987 be adjusted to its fair market value on that date, the Fresh Start Basis Rule ensures that taxable income or loss of a Blue Cross/Blue Shield organization will be based solely on items of income and loss that economically accrue after the organization became subject to federal income tax.

Trigon's taxable year coincides with the calendar year, thus its first taxable year beginning after December 31, 1986, was the calendar year that began January 1, 1987. Pursuant to the Fresh Start Basis Rule, Trigon's basis in each asset owned on January 1, 1987, was equal to the asset's fair market value on that date.

In 1987, after the merger of the two Plans and after the 1986 Act took effect, Trigon began to identify its assets so as to apply the Fresh Start Basis Rule in filing federal income tax returns. This task was assigned to Stephen Meyer, director of corporate tax, who undertook to ''understand the new tax law and its ramifications and implications to the plan and to explain that to management.'' Meyer Tr. (11/13/01) 342:2–4. As a result, by late 1987 or early 1988, Trigon had identified as among its assets, the contracts with subscribers (Trigon's customers) and providers (the doctors and hospitals who agreed to provide service to Trigon subscribers). Meyer Tr. (11/13/01) 345:23–346:2; 347:1–2.

Trigon has claimed, at various times that, on January 1, 1987, it owned between 20,000 and 24,000 group health insurance subscription contracts organized into the following lines of business: (1) Community Rated groups; (2) Local Experience Rated contracts; (3) Local Cost plus contracts; (4) Small Business contracts; (5) Control National contracts; (6) Participating National contracts; (7) the State of Virginia account; (8) the Federal Employee Program; and (9) Large Accounts (Local Experience Rated, Control National, and Local Cost Plus). Defense Exh. 103 at TR46012165.

Even now, after extensive and exhaustive pre- and post-trial briefing, as well as teleconferences on this point, the precise number of group subscriber contracts actually owned by Trigon as of January 1, 1987 is difficult of ascertainment. For example, in its Proposed Findings of Fact p 19, Trigon said that it owned 23,780 subscriber contracts which included a number of ''sub-contracts,'' thereby reducing to 21,642 contractual relationships with subscriber groups. Trigon's valuation expert valued 22,509 subscriber contracts. At trial, a Trigon witness said that the number ought to be reduced by ''at least'' or ''ap-

proximately'' 500. Hunt Tr. (11/13/01) 448:9–449:18. When, in August 2002, Trigon was asked to supply citations in the record to document the number of subscriber contracts owned, Trigon responded in a letter dated August 6, 2002, that the 22,509 number used by the valuation expert ought to be reduced, and not by 500, but by 793. Thus, as of August 6, 2002, Trigon claims that the number of subscriber contracts actually owned on January 1, 1987, was 21,716. See Letter from Gilbert E. Schill, Jr., counsel for Trigon, dated August 6, 2002.

Trigon also carried contracts with physician and hospital providers of health care services. These provider contracts allowed Trigon to reimburse the physicians and hospitals at rates below what the providers typically charge for their services. Having a broad provider network was also a significant factor in marketing Trigon's health insurance contracts. See Bilbray Tr. (11/16/01) 1178:14–23; Slone Tr. (11/13/01) 311:13–312:9. Trigon had two types of contracts with physician providers, ''Key Care'' contracts and ''Participating'' contracts. In some instances, Trigon owned both Key Care and Participating provider contracts with the same physician. The total number of physicians with whom Trigon owned provider contracts on January 1, 1987 (either Key Care, Participating or both), was 9,436.

Trigon's provider contracts with hospitals and other health care facilities, included a contract with Smyth County Community Hospital, under which those facilities agreed to provide health care services to Trigon's members in exchange for negotiated payments. The total number of hospital or health care facility provider contracts was 278.

From time to time after January 1, 1987, these contracts were terminated, most often by the subscriber or provider, but occasionally by Trigon. When filing its federal income tax returns for the years 1987 through 1995, Trigon did not claim as losses the value of contracts terminated in any of those nine years. However, on November 14, 1996, Trigon filed amended federal income tax returns for the years 1987 through 1995 claiming loss deductions for the value of contracts terminated in the years 1987 through 1995.[3]

In explaining why Trigon did not initially claim these terminated contracts as loss deductions, Phyllis Cothran, Trigon's Chief Financial Officer at the time, testified that ''there was so little guidance from the IRS at that time as to how to proceed with those type deductions that Steve Meyer had talked to me about that and said with everything, that we should move slowly and cautiously and wait until guidelines were issued and wait until we understood those and work with other Blue Cross Blue Shield plans and any outside expertise that he needed.'' Cothran Tr. (11/12/01) 220:3–11. ''[W]e weren't going to do anything until we'd had more time to think about it, wiser minds had more time to look at it.'' Cothran Tr. (11/12/01) 266:23–267:1. The company's records, accounting or otherwise, contain no statements setting forth the company's views of these contracts, or their value, at or about the time that Trigon became subject to taxation, January 1, 1987.

In 1988, at Trigon's request, Arthur Andersen performed a fair market valuation of personal property and intangible assets owned by Trigon on January 1, 1987. See Defense Exh. 25. The valuation attributed a value of $1,325,543,000 to Trigon's subscriber contracts and $265,580,000 to the contracts that constituted Trigon's provider network. Defense Exh. 25 at TR01020028. Arthur Andersen, in valuing the subscriber contracts, used the income approach and discounted cash flow method,[4] calculating the average remaining life of the contracts, the income associated with the contracts in the future, and discounting the premiums back to present value as of January 1, 1987, with a discount rate identical to the one used by Michael C. Wierwille,

[3] Trigon owed no taxes in 1987 and 1988 by virtue of deductions not here relevant. However, in the 1996 amended tax returns, Trigon carried forward the losses from contract terminations in 1987 and 1988.

[4] The same methodology used by Plaintiff to value the subscriber contracts in this action. These techniques are described later in this Memorandum Opinion.

Trigon's valuation expert in this action. Defense Exh. 25 at TR01020038-39.

Arthur Andersen also used the income approach in arriving at a value for the provider contracts. Using the cost savings of each of the physician and facility contracts, Arthur Andersen determined that the value of the physician provider contracts was $194,811,000 and the value of the facility provider contracts was $70,769,000, for a total of $265,580,000. Defense Exh. 25 at TR01020040.

C. The 1996 Claim To Refund And This Action

In November 1996, Trigon timely filed administrative claims for refund pursuant to 26 U.S.C. § 6511 for the 1989 through 1995 tax years with respect to loss deductions arising from the cancellation, abandonment or termination of indemnity group health insurance subscription contracts, physician provider contracts and a hospital provider contract. The claimed deductions were based in part on the values of the terminated contracts described by Arthur Andersen in 1988. Meyer Tr. (11/16/01) 1114:2–23. The Internal Revenue Service ("IRS") denied those claimed deductions though it had agreed to apply the Fresh Start Basis Rule to some of Trigon's other internally developed intangible assets at an earlier point; namely, Trigon's internally developed computer software. See Technical Advice Memorandum 9533003 (May 2, 1995). Eventually, Trigon and the IRS reached a compromise on the treatment of losses arising in connection with the subscriber and provider contracts. However, the Congressional Joint Committee on Taxation effectively rejected that agreement. The administrative claims were subsequently denied by the IRS and Trigon filed this action seeking a refund.

The Complaint seeks a refund in the amount of "at least $61,649,000" but, by agreement, the sum sought just before trial was adjusted to $35,188,255. After Trigon produced a revised valuation of the subscriber contracts at trial (see Plaintiff's Exh. 282A prepared by Wierwille, Trigon's valuation expert,[5] Dennis van Miegham, Trigon's tax computation expert, submitted a revised refund amount of $33,181,966.[6] Plaintiff's Exh. 297A.

The basis for the loss deduction claimed by Trigon and disallowed by the IRS are Trigon's contentions that, on January 1, 1987:

(1) Trigon owned 22,509 group health insurance subscription contracts, and that between January 1, 1987, and December 31, 1995, 15,998 of the contracts were lost, the estimated loss, measured by the fair market value of such contracts on January 1, 1987, being $175,147,656;[7] and

(2) Trigon owned provider contracts with 9,436 physicians, each of whom held a "Participating" contract, a "Key Care" contract or both, and that between January 1, 1987, and December 31, 1995, 3,381 of the contracts were lost, the estimated loss, measured by the fair market value of such contracts on January 1, 1987, being $207,896; and

(3) Trigon also owned contracts with hospitals and other health care facilities throughout Virginia, many of which had multiple contracts with Trigon and that the contract with Smyth County Community Hospital was lost between January 1, 1987, and December 31, 1995, the estimated loss, measured by the fair market value of the contract on January 1, 1987, being $36,507.

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5 Wierwille revised his report after reviewing deposition transcripts and information that became available through those transcripts. Wierwille Tr. (11/14/01) 566:18–24. He made two adjustments, one relating to the competitive discounts granted as a result of the interplan competition, see infra, added back to the management financial projections, the other relating to the management fee which was being charged to Blue Cross Blue Shield of Virginia by CHI. Wierwille Tr. (11/14/01) 566:24–568:6. The effect of those adjustments was to reduce the values on a per contract basis ranging from 3 to 7 percent. Id.

6 As noted previously, during the 1987 and 1988 tax years, Trigon's income was fully offset by deductions unrelated to this case. Accordingly, Trigon paid no income tax in those years and they are no included in this lawsuit. The 1987 and 1988 tax years are relevant to this case, however, in that the losses Trigon incurred from the alleged cancellation, abandonment or termination of its subscriber and provider contracts resulted in net operating losses that can be carried forward and used to offset income in later years. See I.R.C. (26 U.S.C.) s 172.

7 This value is associated with Wierwille's original valuation. Plaintiff's Exh. 282. Wierwille's subsequent revised opinion did not explicitly state the revised value of the lost contracts (see Plaintiff's Exh. 282A); however, such value was appropriately figured into van Miegham's revised tax refund computation, Plaintiff's Exhibit 297A.

In essence, Trigon's Complaint presents the following basic theory in support of its claim for refund: On January 1, 1987, Trigon owned intangible assets in the form of health insurance subscriber and provider contracts; each of those contracts had a determinable fair market value on January 1, 1987; some of the contracts owned by Trigon on January 1, 1987, were lost by virtue of contract terminations during the 1987 through 1995 tax years; and the tax deductions for losses arising from the terminated contracts translate into federal income tax refunds for the 1989 through 1995 tax years.

The United States argues that, as a matter of law, the stepped-up basis provided by § 1012(c)(3)(A) is not available for tax deductions based on the alleged "cancellation, abandonment or termination" of the contracts at issue; and further: (1) that Trigon did not establish that the "cancellation, abandonment or termination" of Trigon's contracts constituted a tax deductible loss under the Internal Revenue Code; (2) that, because there is no market for the individual contracts, no fair market value can be ascertained; (3) that each contract is not an individual asset and cannot be valued separately; and (4) that Trigon did not meet its burden to prove, by a preponderance of the evidence, a reliable value for the contracts it owned as of January 1, 1987.[8]

The facts found above will be used in resolving the several issues presented for decision. However, most of the issues require further factual findings and those findings will be made as part of the discussion of the issues to which they relate.

II. DISCUSSION

A. Section 1012(c) Of The 1986 Act Gave Trigon A Fresh Start Basis In All Of Its Assets As Of January 1, 1987, Including The Subscriber And Provider Contracts At Issue Here

[1] When, by enacting the 1986 Act, Congress implemented its determination that Blue Cross/Blue Shield organizations should become subject to federal income taxation beginning with their first taxable year beginning after December 31, 1986, Congress also enacted a series of other statutory provisions that prescribe with considerable specificity the manner in which the transition of Blue Cross/Blue Shield organizations from nontaxable status to taxable status would occur. Among the detailed rules that Congress provided for the transition of Blue Cross/Blue Shield organizations to taxable status is the Fresh Start Basis Rule, which states:

> [F]or purposes of determining gain or loss, the adjusted basis of any asset held on the 1st day of such taxable year [the first taxable year beginning after December 31, 1986] shall be treated as equal to its fair market value as of such day.

26 U.S.C. § 1012(c)(3)(A)(ii).

Before assessing Trigon's claim for refund, it is necessary to confront several threshold issues presented by the United States.

1. Are Trigon's Subscriber And Provider Contracts Assets?

From time to time in this action, the United States has asserted that Trigon's subscriber and provider contracts are not assets and, for that reason alone, they are not amenable to treatment under the Fresh Start Basis Rule. Most recently, the United States appears to have eschewed this categorical theory and, instead, has adopted the refinement that the individual contracts are not assets because there is no market for individual contracts of this sort. This, in turn, says the United States, forecloses a fair market value of the individual contracts. That issue will be considered later in this Memorandum Opinion, but, to the extent that the United States continues to

[8] The United States raised a number of other issues and two affirmative defenses: (1) applying the concept of substance over form, the United States contends that Trigon's purported losses are actually depreciation deductions; and (2) that Trigon asserted its purported losses for the first time in its amended returns, and, in doing so, Trigon changed its method of accounting, an action for which it required, but did not have, the Internal Revenue Service's permission. The resolution of Trigon's claims on the grounds set forth in this Memorandum Opinion make it unnecessary to address the sundry other issues raised by the United States or its affirmative defenses.

press the categorical assertion that individual contracts cannot be assets at all, the theory is rejected as erroneous.

By its terms, the Fresh Start Basis Rule applies to "any asset" held by Trigon on January 1, 1987. The term "asset" means "[a]n item of value owned." Webster's Third New International Dictionary, 131 (3d Ed.1986). The Tax Court has held, and the IRS has acknowledged, that contracts similar to Trigon's subscriber contracts, are assets for federal income tax purposes. See Union Bankers Ins. Co. v. Commissioner, 64 T.C. 807 (1975), acq., 1976-2 C.B. 3; Rev. Rul. 76-411, 1976-2 C.B. 208. Furthermore, courts have treated other types of contractual relationships as separate assets, whether or not evidenced by a written contract. See, e.g., Super Food Services, Inc. v. United States, 416 F.2d 1236 [24 AFTR 2d 69-5309] (7th Cir.1969) (treating distributor contracts as separate assets); Commissioner v. Seaboard Finance Corp., 367 F.2d 646 [18 AFTR 2d 5803] (9th Cir.1966) (treating consumer loan contracts as separate assets); Hoffman v. Commissioner, 48 T.C. 176 (1967) (treating contracts for the location of vending machines as separate assets); North American Service Co. v. Commissioner, 33 T.C. 677 (1960), acq., 1960-2 C.B. 6 (holding that taxpayer was entitled to a fair market value basis in service contracts received upon liquidation of corporation); Silling v. Commissioner, 27 T.C. 701 (1957) (holding that contracts for the performance of services were assets and thus entitled to a stepped-up basis when received by a partner upon termination of a partnership, even though contracts had a zero basis in the hands of the partnership).

Because Trigon's subscriber contracts produce value to the owner and they can be transferred for consideration, Trigon's subscriber contracts, both individually and in blocks, clearly are assets. The provider contracts are also assets to be considered because they too produce value, the value being a provider network that ultimately saves subscribers and Trigon money and attracts subscribers to the Company.[9]

2. The Fresh Start Basis Rule Applies To More Than Just Sales And Exchanges

The losses claimed by Trigon arise as a result of the termination or cancellation of subscriber and provider contracts. In filing its Amended Tax Returns, Trigon represented to the IRS that "[a] deduction is being taken for abandonment of appraised assets that consist of terminated contracts." Plaintiff's Exhs. 1–5. In other words, Trigon seeks what has been termed an "abandonment loss deduction" that is permitted under I.R.C. § 165, as it is implemented by Treasury Regulation § 1.165-2(a) which provides in pertinent part that:

> A loss incurred in a business or in a transaction entered into for profit and arising from the sudden termination of the usefulness in such business or transactions of any nondepreciable property, in a case where such business or transaction is discontinued or where such property is permanently discarded from use therein, shall be allowed as a deduction under section 165(a) for the taxable year in which the loss is actually sustained.

The next part of the Treasury Regulation expressly provides that "[t]his section does not apply to losses sustained upon the sale or exchange of property." Treas. Reg. § 1.165-2(b).

Citing that language and seizing upon one sentence in the legislative history of the 1986 Act stating that the Fresh Start Basis Rule applies only to determine a gain or loss on the sale or exchange of property, the United States argues that Trigon is not entitled to use the Fresh Start Basis Rule provided in § 1012(c)(3)(A) of the 1986 Act.

The linchpin of the argument presented by the United States is the Conference Report to the 1986 Act, which in the following passage headed "Basis of assets," states:

> the basis of assets of such organizations is equal, for purposes of determining gain or loss, to the amount of the assets' fair market value on the first day of the

[9] Such a provider network is also theoretically transferrable as part of a going concern purchased by another company.

> organization's taxable year beginning after December 31, 1986. Thus, the formerly tax-exempt organizations utilizing a calendar period of accounting and whose first taxable year commences January 1, 1987, the basis of each asset of such organization is equal to the amount of its fair market value on January 1, 1987. The basis step-up is provided solely for purposes or determining gain or loss upon sale or exchange of the assets, not for purposes of determining amounts of depreciation or for other purposes. The basis adjustment is provided because the conferees believe that such formerly tax exempt organizations should not be taxed on such unrealized appreciation or depreciation that accrued during the period the organization was not generally subject to income taxation.

2 H.R. Conf. Rept. 841, 99th Cong.2d Sess. II-350 reprinted in U.S.C.C.A.N. 4075, 4437–38 (emphasis supplied).

Clearly, the language in the Conference Report is at odds with the statutory text that establishes the Fresh Start Basis Rule, which says that the step up in basis applies "for purposes of determining gain or loss," without in any way limiting the kind of gain or loss to be determined. The inconsistency must be resolved by resort to familiar rules of statutory construction. As explained below, when that is done, the argument of the United States fails.

Statutory interpretation, of course, begins "by examining the statutory language, bearing in mind that [a court] should give effect to the legislative will as expressed in the language." United States v. Murphy, 35 F.3d 143, 145 (4th Cir.1994), cert. denied, 513 U.S. 1135, 115 S.Ct. 954 (1995) (citing K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291, 108 S.Ct. 1811, 1817 (1988)). The judicial task is to determine whether the statutory "language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Robinson v. Shell Oil Co., 519 U.S. 337, 341, 117 S.Ct. 843, 846 (1997). And, the court's inquiry must end if the statutory language is unambiguous and "the statutory scheme is coherent and consistent. Id. (citing United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 240 [63 AFTR 2d 89-652], 109 S.Ct. 1026 [63 AFTR 2d 89-652] (1989)); see also Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253–254, 112 S.Ct. 1146 (1992); Robinson v. Shell Oil Co., 70 F.3d 325, 329 (4th Cir.1995) (en banc), rev'd on other grounds, 519 U.S. 337, 117 S.Ct. 843 (1997). When the statutory language is 'facially clear and "within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms."' Murphy, 35 F.3d at 145 (quoting Caminetti v. United States, 242 U.S. 470, 485, 37 S.Ct. 192, 194 (1917)). Here, there is no question of constitutional authority and thus the only question is the clarity of the statutory text.

To ascertain whether the statutory language is clear or ambiguous, the courts look to "the language [of the statute] itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson, 519 U.S. 337, 342, 117 S.Ct. 843, 846 (1997) (citing Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 477, 112 S.Ct. 2589, 2595 (1992); McCarthy v. Bronson, 500 U.S. 136, 139, 111 S.Ct. 1737, 1740 (1991)). Words used by Congress are typically given their common usage meaning. Murphy, 35 F.3d at 145 (citing Palestine Info. Office v. Shultz, 853 F.2d 932, 938 (D.C.Cir.1988)).

It is also true that Congress is presumed to know the existing statutory framework into which an amending statute fits. As the Supreme Court explained in Molzof v. United States, 502 U.S. 301, 307, 112 S.Ct. 711, 716 (1992), a cardinal rule of statutory construction holds that:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise in-

> structed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.

Id. (quoting Morissette v. United States, 342 U.S. 246, 263, 72 S.Ct. 240, 250 (1952), and citing as additional authority NLRB v. Amax Coal Co., 453 U.S. 322, 329, 101 S.Ct. 2789, 2794 (1981); Braxton v. United States, 500 U.S. 344, 351, n., 111 S.Ct. 1854, 1859, n. (1991)). Of course, the tax code is not centuries old, but it is nearing its first centennial anniversary and the principal recited by in Molzof is certainly applicable where, as here, the statutory scheme is well-settled and oft-addressed by Congress. See United States v. Neustadt, 366 U.S. 696, 707–08, 81 S.Ct. 1294, 1301 (1961) (''Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946, after spending 'some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment.''' (quoting United States v. Spelar, 338 U.S. 217, 219–220, 70 S.Ct. 10, 11 (1949)); see also Molzof, 502 U.S. at 307, 112 S.Ct. at 716.

The introductory clause of s 1012(c)(3)(A)(iii) articulates that its Fresh Start Basis Rule is to be used ''for purposes of determining gain or loss.'' The statutory text imposes no limit on the kind of gain or loss to which the Fresh Start Basis Rule applies. The common usage of the words ''gain or loss,'' without limitation, plainly includes any gain or loss. And, because the statute concerns specifically Blue Cross/Blue Shield organizations, that plain language means any gain or loss respecting Blue Cross/Blue Shield assets as to which gain or loss is pertinent in establishing federal income tax liability to which Blue Cross/Blue Shield organizations were, for the first time, being subjected. Thus, the statutory language at issue, given its ordinary meaning, is plain and unambiguous. Significantly, the United States does not contend otherwise.

Instead, the inconsistency relied on by the United States is created not by the text of statute but by a passage in the legislative history, which states the ''basis step-up is provided solely for purposes of determining gain or loss upon sale or exchange of the assets.'' 2 H.R. Conf. Rept. 841, 99th Cong.2d Sess. II-350 reprinted in U.S.C.C.A.N. 4075, 4437–38 (emphasis supplied). However, courts should not interpret a statute by reference to legislative history where, as here, the statutory language is unambiguous and ''the statutory scheme is coherent and consistent.'' Murphy, 35 F.3d at 145 (citing United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 [63 AFTR 2d 89-652], 109 S.Ct. 1026, 1030 [63 AFTR 2d 89-652] (1989)). As explained above, the statutory text is clear and it does not support the statutory construction urged by the United States.

If it were necessary to go further (which it is not), it is clear that the plain statutory text is fully consistent with the statutory context of the provision at issue and is consonant with the purpose of the statute, namely, to prevent any unrealized gain or loss that had accrued while a Blue Cross/Blue Shield organization was exempt from tax from being included in the calculation of tax liability once the company became subject to tax. See H.R. Conf. Rept. 814, 99th Cong., 2d Sess. Vol. II at 350, reprinted in 1986 U.S.C.C.A.N. 4075, 4437–38. Moreover, the broader context of the 1986 Act was to subject Blue Cross/Blue Shield organizations taxable under federal tax law just as were the commercial insurers with whom the Blue Cross/Blue Shield organizations were in competition. That body of law includes a comprehensive set of rules respecting permissible loss deductions and nothing in the text of the Fresh Start Basis Rule or the 1986 Act suggests that Congress intended to make that body of rules, or any part of them, inapplicable to Blue Cross/Blue Shield organizations. It would be inconsistent with the Congressional objectives reflected in the 1986 Act to interpret § 1012(c)(3)(A)(ii) to impose limits on the kinds of gains and losses to which its Fresh Start Basis Rules apply.

This view of the statute is underscored by the familiar principle that Congress is

presumed to be aware of existing statutory provisions when it enacts amending legislation. See Molzof, 502 U.S. at 307, 112 S.Ct. at 716; Neustadt, 366 U.S. at 707–08, 81 S.Ct. at 1301; Spelar, 338 U.S. at 219–220, 70 S.Ct. at 11. Nowhere is that concept more applicable than in the complex federal income tax statutes as to which Congress is often and extensively involved.

Without doubt, when Congress passed the 1986 Act, it was familiar with I.R.C. Section 165 and its implementing regulations permitting and regulating deductions for business losses. Thus, Congress was no doubt aware that Section 165 and its implementing regulations had long permitted deductions for business losses other than those sustained on the sale or exchange of property.

If Congress had intended to limit application of the Fresh Start Basis Rule to gains or losses incurred in sale or exchange transactions, it certainly could have done so in the statute. Indeed, it would have been a simple matter to have included in the statute language such as that which appears in the Conference Report. Congress, however, did not do so and it is not the office of the judiciary to conclude that Congress inadvertently failed to include that significant limitation in the statutory text and then, as the United States urges, correct that oversight.

To follow that course here would be inappropriate for the additional reason that Congress is no stranger to enacting taxation statutes providing for a stepped up basis. Indeed, the Fresh Start Basis Rule is similar to other tax statutes enacted over the years that have permitted or required taxpayers to adjust asset basis to fair market value when the taxpayers became subject to tax. For instance, when first subjecting assets obtained before March 1, 1913, to taxation, an asset's basis for purposes of determining gain would be its fair market value as of March 1, 1913:

> In the case of property acquired before March 1, 1913, if the basis otherwise determined under this subtitle, adjusted (for the period before March 1, 1913) as provided in section 1016, is less than the fair market value of the property as of March 1, 1913, then the basis for determining gain shall be such fair market value.

26 U.S.C. § 1053. As a result of the adjust-ment in basis of assets acquired before March 1, 1913, taxpayers computed losses based on an asset's value as of such date, regardless of its original cost. See Burnet v. Houston, 283 U.S. 223 [9 AFTR 1430] (1931); Lucas v. Alexander, 279 U.S. 573 [7 AFTR 8871] (1929). As a consequence of this rule, any appreciation or gain in an asset that economically accrued prior to the enactment of the federal income tax was permanently excluded from income tax. 26 U.S.C. § 1053.

A more recent example of Congressional familiarity with the stepped-up basis for gains or losses when providing for the transition of an organization from tax-exempt to taxable status occurred when Congress eliminated the federal income tax exemption for the Federal Home Loan Mortgage Corporation (''Freddie Mac'') in 1984. In doing so, Congress provided for an adjustment to the basis in each asset held by Freddie Mac on January 1, 1985. The statute provides that:

> [T]he adjusted basis of any asset of the Federal Home Loan Mortgage Corporation held on January 1, 1985, shall -
>
> (i) for purposes of determining any loss, be equal to the lesser of the adjusted basis of such asset or the fair market value of such asset as of such date, and
>
> (ii) for purposes of determining any gain, be equal to the higher of the adjusted basis of such asset or the fair market value of such asset as of such date.

Deficit Reduction Act of 1984, Pub.L. No. 98-369, § 177(d)(2), 98 Stat. 494, 709–712 (1984).

Thus, the history of federal income tax legislation demonstrates that, when Congress has intended to limit the applicability of a transitional basis adjustment, it has

employed specific language to do so. That certainly was the case before Congress passed the 1986 Act.

It was only two years after passing the Freddie Mac legislation that Congress enacted a different basis adjustment regime for Blue Cross/Blue Shield organizations. In contrast to the Freddie Mac basis rule, the Fresh Start Basis Rule applies without regard to the asset's cost basis and requires use of the fair market value basis for purposes of determining loss as well as gain. It is not to be presumed that Congress was unmindful of the differing treatments it had given stepped-up basis provisions before the 1986 Act.

Furthermore, subsequent, but related events, are relevant to the analysis here. Specifically, it is important to recall that, when Congress subjected Blue Cross/Blue Shield organizations to tax under I.R.C. Section 501(m), Congress exempted the pension businesses of Mutual of America (''MOA'') and the Teachers Insurance Annuity Association-College Retirement Equities Fund (''TIAA-CREF'') from federal income tax. See 1986 Act §§ 1012(c)(4)(A), (B). However, in 1997, Congress eliminated the grandfather relief for MOA and TIAA-CREF, thereby subjecting those organizations to § 1012(c) of the 1986 Act, the same statutory provision that applies to Trigon. See Taxpayer Relief Act of 1997, Pub.L. No. 105-34, § 1042(b)(2), 111 Stat. 788 (''for purposes of determining gain or loss, the adjusted basis of any asset held on the 1st day of such taxable year shall be treated as equal to its fair market value as of such day.''). At that time, Congress provided MOA and TIAA-CREF with a transition rule worded identically to the Fresh Start Basis Rule at issue here. The legislative history of the 1997 amendment describes the Fresh Start Basis Rule applicable to Blue Cross/Blue Shield organizations as applying ''for purposes of determining gain or loss,'' making no reference to the ''sale or exchange'' limitation sought by the United States in this case. See H. Rep. No. 105-148, 105th Cong., 1st Sess. 495–96 (1997). The same legislative history also states that the rule for MOA and TIAA-CREF would apply ''for purposes of determining gain or loss,'' again making no reference to the United States' ''sale or exchange limitation.''

Considering the plain and unambiguous statutory text, the context in which that language is used and the statutory framework of which it is a part, the Court would be rewriting the statute to give it the meaning urged by the United States. The statute means what it says, the Fresh Start Basis Rule applies in determining the gains or losses, incurred by Blue Cross/Blue Shield taxpayers, not just the gains or losses they incur on sales or exchanges of property.[10]

B. The Challenge Of The United States To The Nature Of the Claimed Losses

[2] Another threshold issue presented by the United States is whether the kind of loss claimed by Trigon is the kind of loss permitted by I.R.C. § 165. The first step in assessing that issue is to define the kind of loss claimed. In the Amended Tax Return that Trigon filed in November 1996, Trigon described the deduction as one that was ''being taken for abandonment of appraised assets that consist of terminated contracts . . . .'' Plaintiff's Exhs. 1–5.

The principal statutory authorization for the deductibility of losses generally is found in I.R.C. § 165(a), which provides:

> ''There shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.'' Section 165(b) provides that ''the basis for determining the amount of the deduction for any loss shall be the adjusted basis provided in Section 1011 for determining the loss from the sale or other disposition of

[10] The position of the United States also is inconsistent with the administrative practice of the IRS, which has acknowledged that the Fresh Start Basis Rule applies in a non-sale or exchange disposition of an asset to determine the amount of a loss recognized by a Blue Cross and Blue Shield organization under Section 165 of the Code. See Tech. Adv. Mem. 9533003 (May 2, 1995) (Internally developed computer software was allowed a fresh start basis according to its fair market value on January 1, 1987, as opposed to a cost basis under the same legislation at issue here. The IRS allowed the deduction though the software was obsolete and abandoned instead of sold or exchanged). Technical Advice Memoranda are not binding on the IRS, but they are informative of its interpretation of the statute at issue in this litigation.

property.'' Under Section 1011 of the Code and its implementing regulations, a taxpayer's gain or loss from any sale or other disposition of an asset is to be determined under the general provisions of the Code, ''or as otherwise specifically provided for under applicable provisions of internal revenue laws.'' Treas. Reg. (26 C.F.R.) § 1.1011-1 (emphasis supplied). The Fresh Start Basis Rule is an applicable provision of the internal revenue laws ''otherwise specifically'' providing rules for determining a gain or loss. Accordingly, the Fresh Start Basis Rule applies for purposes of determining any loss that is otherwise claimable under Section 165 in respect of any asset held by Trigon on January 1, 1987.

Regulations further establish when the taxpayer is entitled to claim a loss under Section 165:

> A loss shall be allowed as a deduction under Section 165(a) only for the taxable year in which the loss is sustained. For this purpose, a loss shall be treated as sustained during the taxable year in which the loss occurs as evidenced by closed and completed transactions and as fixed by identifiable events occurring in such taxable year.

Treas. Reg. § 1.165-1(d)(1). The regulations provide a deduction for:

> A loss incurred in a business or in a transaction entered into for profit and arising from the sudden termination of the usefulness in such business or transaction of any nondepreciable property, in a case where such business or transaction is discontinued or where such property is permanently discarded from use therein, shall be allowed as a deduction under Section 165(a) for the taxable year in which the loss is actually sustained.

Treas. Reg. § 1.165-2(a) (emphasis supplied).

It is this kind of loss that is at issue in this action. In order for such a loss to be deductible, it must be evidenced by a closed and completed transaction, fixed by an identifiable event, and sustained during the taxable year for which the loss is claimed. 26 C.F.R. § 1.165-1(b), (d). As the Sixth Circuit recently held, the identifiable event ''must be observable to outsiders and constitute 'some step which irrevocably cuts ties to the asset.''' United Dairy Farmers, Inc. v. United States, 267 F.3d 510, 522 [88 AFTR 2d 2001-6116] (6th Cir.2001) (quoting Corra Resources, Ltd. v. Commissioner, 945 F.2d 224, 226–27 [68 AFTR 2d 91-5719] (7th Cir.1991)).

The applicable regulation does not use the terms ''cancellation,'' ''termination'' or ''abandonment'' to describe the kind of loss for which a deduction is permitted. Rather, the regulation permits deductions of two sorts. First, there is a deduction for a loss incurred in a business or in a transaction entered into for profit and arising from the sudden termination of the usefulness in such business or transaction of any nondepreciable property, in a case where such business or transaction is discontinued.

Second, it permits a deduction ''where such property is permanently discarded from use [in the business or transaction].'' Treas. Reg. § 1.165-2(a). The loss at issue here occurred by way of contract termination, not by permanently discarding of the contracts by Trigon. Thus, it is a loss of the type described in the first clause of the regulation.

Trigon correctly argues that the cancellation or termination of a subscriber or provider contract is evidence of a closed and completed transaction and is an identifiable event within the meaning of Section 1.165-1(d)(1) of the regulations. Moreover, the cancellation or termination of a contract results in the sudden termination of its usefulness in Trigon's business and, therefore, satisfies the requirements for deductibility described in Section 1.165-2(a) of the Regulations.

Courts have recognized that the termination of a contract may result in a taxable loss under Section 165. See, e.g., George Freitas Dairy, Inc. v. United States, 582 F.2d 500 [42 AFTR 2d 78-6109] (9th Cir.1978) (where private quota system was abandoned and quotas became worthless,

taxpaying dairies sustained losses deductible under 165.); Super Food, 416 F.2d at 1236 [24 AFTR 2d 69-5309] (taxpayer, which sold supplies to franchised grocers, would be entitled to loss deduction under 165 for termination of franchise contracts on showing of cost of contracts.); Forward Communications Corp. v. United States, 608 F.2d 485 [44 AFTR 2d 79-5917] (Cl.Ct.1979) (where television station bought by taxpayer had dual network affiliation at time of taxpayer's purchase, the loss suffered by taxpayer upon termination of affiliation with one of the networks was a recognizable loss under 165(a), and taxpayer's deduction for such loss was not barred as a result of the additional network revenues it received under its exclusive affiliation with the other network.); see also Metro Pictures Film Exchange, 1 B.T.A. 721 (1925) (loss on termination of contract for distribution of motion pictures).

In Super Foods, Inc. v. Commissioner, 416 F.2d 1236, 1241 [24 AFTR 2d 69-5309] (7th Cir.1969), the taxpayer sought to deduct, under 26 U.S.C. § 165(a), the losses it suffered from its termination of franchise contracts it had previously purchased from a third-party. The court, in allowing the deduction there at issue, relied on Treas. Reg. § 1.165-2, the same regulation on which Trigon relies. Super Foods is in many ways similar to this case because in both cases, the contracts were terminated and valueless upon that termination, such termination having a specific date, the year of which the plaintiffs in both cases had to claim the deduction. Thus, Super Foods provides an example of reasoning that allows Trigon to take loss deductions under Treas. Reg. § 1.165-2.

In its Post-Trial Memorandum, the United States purports to rely on the position on this issue asserted in its pretrial Proposed Findings of Facts and Conclusions of Law and adds two other terse arguments. Each will be considered in turn, but, before turning to that task, it is appropriate to take a brief detour to explain terminology that permeates those arguments.

In the vernacular of the tax lawyers' world, the kind of loss at issue here is sometimes referred to as an "abandonment loss." Abandonment is an act taken by the taxpayer and is the type of loss that is permitted, under the second sentence of Treas. Reg. § 1.165-2(a), when the taxpayer permanently discards an asset from use in its business.

The arguments of the United States, and, to some extent, Trigon, do not differentiate between the two different events, cancellation or termination on the one hand, or permanently discarding or abandonment on the other. Nor do many of the decisions. The distinction between the kinds of events which give rise to the loss that is deductible is not of great significance in disposing of the arguments made by the United States, but it does somewhat becloud the real issue, which focuses on cancelled or terminated contracts, not on assets discarded by Trigon.

First, the United States seems to disagree that there were tax deductible abandonments, a position it does not support by further argument or any authority. By this, the United States seems to mean that the contract terminations are not abandonments because, immediately after a contract was terminated, Trigon undertook efforts (some successful, most not) to enter into new contracts with the terminating subscriber or provider.[11]

To qualify for the deduction when there is an abandonment, the taxpayer must show its intent to abandon the underlying asset. In Gulf Oil Corp. v. Commissioner, 914 F.2d 396, 402 [66 AFTR 2d 90-5552] (3d Cir.1990), the Third Circuit noted that "I.R.C. § 165 losses have been referred to as abandonment losses to reflect that some act is required that evidences an intent to discard or discontinue use permanently." See also Kraft, Inc. v. United States, 30 Fed. Cl. 739, 785 [73 AFTR 2d 94-912] (1994) ("Abandonment of an asset in tax law is defined as a permanent disposition, not sold, never to be used again and not retrieved for sale, exchange, or other dis-

[11] This interpretation of the argument made by the United States is gleaned from statements made by counsel in addressing certain evidentiary objections, from certain lines of questioning, and from closing arguments.

position . . . .''); CRST, Inc. v. Commissioner, 909 F.2d 1146, 1148 [66 AFTR 2d 90-5335] (8th Cir.1990) (''Section 165 requires both an intent to abandon the asset and an affirmative act of abandonment''); A.J. Industries, inc. v. Commissioner, 503 F.2d 660, 670 [34 AFTR 2d 74-5932] (9th Cir.1974) (''It has been repeatedly held that in order for a loss of an intangible asset to be sustained and to be deductible, there must be (1) an intention on the part of the owner to abandon the asset, and (2) an affirmative act of abandonment'').

It is clear that Trigon systematically pursued contractual relationships with those who cancelled or terminated their subscriber or provider contracts and that Trigon continued to hope that the lost subscriber or provider would enter into a new contract. The record shows, for instance, that, when a subscriber group cancelled its Trigon coverage, the fact of the cancellation, as well as the reason for the cancellation and other pertinent information, was logged into the group's account profile, which, in turn, was fed into the company's group subscriber accounting system for use by the head of sales and other executives. Slone Tr. (11/13/01) 296:20–297:6, 302:22–304:1; Cothran Tr. (11/12/01) 267:2–269:24. A cancelled group would also immediately go into the sales department's prospect database along with other businesses that had never had Trigon coverage. Slone Tr. (11/12/01) 297:7–19. Beyond question, Trigon wanted to secure new contracts with terminating subscribers and Trigon systematically pursued that objective.

However, there was no way for Trigon to know if, or when, a cancelled group would ever decide to buy another Trigon contract. Slone Tr. (11/13/01) 298:11–14; Davis Tr. (11/12/01) 167:12–168:15. Indeed, as one might expect, it generally was more difficult to convince a group that had terminated its contract with Trigon to buy a new contract than it was to convince a group that had never had Trigon coverage to purchase coverage for the first time. Convincing a cancelled group to buy a new contract was an ''uphill battle.'' Davis Tr. (11/12/01) 167:24–168:15.

These undisputed facts, says the United States, establish that Trigon did not abandon the contracts for which it seeks the abandonment loss. To support this position, the United States relies principally on United Dairy Farmers, Inc. v. United States, 107 F.Supp.2d 937 [85 AFTR 2d 2000-2235] (S.D.Ohio 2000), aff'd, 267 F.3d 510 [88 AFTR 2d 2001-6116] (6th Cir.2001), and cites that decision as determinative of whether Trigon abandoned the assets at issue here. In United Dairy Farmers, the taxpayer commissioned, between 1986 and 1992, engineering studies relating to various potential changes in an existing ice cream making facility. It deducted the costs for all of those studies in 1993, when it decided to construct another facility, claiming that construction of the other facility was the identifiable event evidencing abandonment of the studies; however, the taxpayer retained the facility to which the studies related. The district court denied the deduction, finding that the taxpayer had not truly abandoned the studies:

> The Court cannot square UDF's position that the Erlanger project caused it to decide not to invest further in the Norwood plant when it commissioned a new [engineering] study soon after claiming the Erlanger project caused it to abandon the first [engineering] study. This action tends to show that UDF's concept of whether a project has been abandoned is transitory in nature.

United Dairy Farmers, Inc. v. United States, 107 F.Supp.2d 937, 946 (S.D.Ohio 2000). The district court held that the decision to construct the new facility was ''not the 'identifiable event' which rendered the other studies worthless'' and concluded that the taxpayer had not met its burden of showing that there was an identifiable event in 1993 that fixed the loss. Id., 107 F.Supp. at 945. The Court of Appeals affirmed the denial of the deductions on October 3, 2001, shortly after the parties submitted their pretrial briefs in this matter. United Dairy Farmers, Inc. v. United States, 267 F.3d at 523.

Without doubt, Trigon systematically continued to pursue the re-establishment of relations with many of its subscribers and providers after they terminated their contracts; however, in contrast to the United Dairy Farmers decision, the termination or cancellation of a subscriber or provider contract was an identifiable event that completely changed the legal relationship between Trigon and the terminating subscriber or provider. Unlike the taxpayer in United Dairy Farmers, which retained the unilateral right to determine whether it would subsequently implement a study that it claimed to have abandoned, Trigon's ability to obtain a new contract with a terminated group depended on decisions to be made by an unrelated party. Any new contract between Trigon and the group or provider, if such a contract should ever come into existence, would become an asset separate and distinct from the terminated contract.

The ultimate termination or cancellation of the contract by the subscriber, provider or by Trigon represented the identifiable conclusion of the asset because the contract ended and there was no future income stream. The contracts at issue typically were year to year contracts the terms of which were renewed each year until there was a failure to renew or there was some other termination. Though year to year, the contracts, from a practical and realistic perspective, had an average life and an average value that could be ascertained given the conglomerated experience of a larger group of similar contracts. The end of that contract life is easily identifiable. If a subscriber or provider who had terminated or cancelled his contract with Trigon, again became a subscriber or provider of Trigon, a new contract would be entered into, and a new contract life would begin.

Finally, the Fourth Circuit has made clear that worthlessness is an appropriate basis for an abandonment loss under Section 165. Helvering v. Gordon, 134 F.2d 685, 687 [30 AFTR 1178] (4th Cir.1943) (''[I]n the case of personal property, such as securities, actual worthlessness is the test irrespective of retention of title since practical rather than technical considerations should prevail.''); see also Echols v. Commissioner, 935 F.2d 703, 707 [68 AFTR 2d 91-5157] (5th Cir.1991) (''As a general proposition, a taxpayer may claim a loss deduction under I.R.C. § 165(a) of the Code on either of two alternative grounds: abandonment or worthlessness.''). The termination of a contract rendered it worthless.

For the foregoing reasons, the fact that Trigon attempted to enter into new contracts with terminated subscribers or providers does not foreclose deduction of a loss for the terminated contract under Section 165 and its implementing rule. Treas. Reg. § 1.165-2(a). That is true whether the loss is considered as a cancellation/termination or an abandonment.

Second, the United States argues that, even if the claimed loss is appropriate in general, Trigon is not entitled to take the deduction until after the termination of all contracts owned as of January 1, 1987.[12] The argument is this: (1) individual contracts cannot be reliably valued and there is no market for individual contracts; (2) contracts can only be reliably valued, and only are sold, as blocks; (3) therefore, the asset is the block; and (4) an abandonment loss is not permitted for part of an asset; i.e ., the contracts terminated in the taxable years for which the loss is claimed.

The point is perhaps well-taken, if the asset is defined as a block of contracts, but the Court previously has found that each subscriber and provider contract is a clearly identifiable and severable asset. See Section A.1, supra. Hence, the argument is foreclosed for failure of its premise.

C. The Absence Of A Secondary Market For Single Contracts Does Not Preclude Application Of The Fair Market Value Standard

Yet another threshold contention in this case is that the absence of an active market in which individual subscriber and provider contracts are traded prevents those con-

[12] United States' Post-Trial Brief, pp. 25 – 26.

tracts from being valued under a fair market value standard.

It is an undisputed fact that there are no known sales of single group health insurance contracts between insurance carriers either before January 1, 1987, or after. Davis Tr. (11/12/01) 190:24–191:5; Cothran Tr. (11/12/01) 256:4–10; Snead Tr. (11/19/01) 1416:25–1417-5; Byrd Tr. (11/16/01) 1157:11–22; Pugh Tr. (11/15/01) 1046:24–1048:8. Transactions involving large blocks of health insurance contracts have occurred. Davis Tr. (11/12/01) 191:6–9.

An expert for the United States, Michael D. Pugh, testified that transactions in blocks of contracts generally occur with the sale of entire companies or when companies leave a market and sell all of their contracts in a given geographic region. Pugh Tr. (11/15/01) 1083:25–1084:13. But, the record is that, in large block transactions, neither party attempts to calculate a purchase price based on the purported value of individual contracts. Davis Tr. (11/12/01) 192:2–7; Cothran Tr. (11/12/01) 256:4–10; Snead Tr. (11/19/01) 1416:25–1417:8 and 1417:16–1418:6; Byrd Tr. (11/16/01) 1157:11–22; and Cellucci Tr. (11/19/01) 1184:3–17. Instead, the purchase price is based on the value of the entire block of contracts. Snead Tr. (11/19/01) 1418:17–1419:17; Byrd Tr. (11/16/01) 1158:8–1160:9. Trigon's own valuation expert, Wierwille, testified that buyers of large blocks of health insurance contracts do not value individual contracts when determining a purchase price. Wierwille Tr. (11/14/01) 628:9–20. After a transaction has closed, a purchaser occasionally will retain an appraiser to allocate the purchase price previously negotiated among the various assets that were acquired. Wierwille Tr. (11/14/01) 628:21–629:9.

When considering blocks of contracts, potential purchasers evaluate the profitability of the contracts under their own management, not the seller's management. Byrd Tr. (11/16/01) 1161:21–1162:5. Moreover, as even Trigon's executives recognize, different insurers will have different experiences even with the same blocks of contracts. Davis Tr. (11/12/01) 195:10–13. Trigon has acquired at least two blocks of health insurance contracts for which it paid little or no consideration. Meyer Tr. (11/16/01) 1122:9–13. When the Life of Virginia company and a company referred to in the record as ''MAMSI'' wanted to leave the health insurance business, Trigon assumed their contracts at no cost. Meyer Tr. (11/16/01) 1122:14–1123-18.

The United States asserts that the term ''fair market value'' by its express terms requires, as a predicate, that an asset can, in fact, be bought and sold in commercial transactions. In Transamerica Corp. v. United States, 15 Cl.Ct. 420, 474–75 [62 AFTR 2d 88-5489] (1988), the court held that:

> The term ''fair market value'' in the regulations does not apply to property in which the values cannot be identified with actual commercial market activity .... Where no one is willing to pay anything for property, its fair market value is zero.

Similarly, in Griffin v. United States, 935 F.Supp. 1 (D.D.C.1995), the estate of former President Richard M. Nixon was seeking compensation for the taking of his presidential papers. Under the applicable statute, compensation was set in terms of fair market value. While the court found that the estate was entitled to compensation for many of the records, it found that the estate was not entitled to compensation for documents the President could not legally transfer because they had no fair market value. In this regard, the court held:

> The measure of any compensation due attaches as of the date of the taking. Here, the taking occurred on the day the [Presidential Recordings and Materials Preservation Act] became effective. At that time, the national security materials were classified and subject to executive orders which would not allow a President to transfer ownership of them to a member of the public without violating the law. In fact, plaintiffs, through their motion for partial summary judgment granting declaratory relief, concede that

> compensation should be measured pursuant to the fair market value at the time of the taking. .... Accordingly, plaintiffs are not entitled to compensation for these materials ....

Id., 935 F.Supp. at 9–10 (emphasis supplied).

In the context of stock options, the IRS has long taken the position, sustained by the courts, that such options do not have a readily ascertainable fair market value unless they can legally be transferred. Treas. Reg. 1.83-7(b)(2); 26 C.F.R. §1.83-7(b)(2) provides in pertinent part:

> When an option is not actively traded on an established market, it does not have a readily ascertainable fair market value unless its fair market value can otherwise be measured with reasonable accuracy. For purposes of this section, if an option is not actively traded on an established market, the option does not have a readily ascertainable fair market value when granted unless the taxpayer can show that all of the following conditions exist:
>
> i. The option is transferable by the optionee; ....

See also Pagel, Inc. v. Commissioner, 905 F.2d 1190, 1191 [66 AFTR 2d 90-5165] (8th Cir.1990) (''If an option received as compensation is not publicly traded and the optionee is restricted from immediately exercising or disposing of the option, the option has no readily ascertainable fair market value'').

The United States argues that, in this action, there is no evidence that any sale of a single health insurance contract has ever taken place. And, that is true. Moreover, many of the witnesses in this case, including Trigon's valuation expert in its case-in-chief, Michael Wierwille, and its rebuttal expert, Robert F. Reilly, acknowledged that it was unlikely, for a variety of economic reasons, that any such sale could ever take place.

Trigon's expert appraiser testified that, although nobody would buy single health insurance contracts, those amounts set as their fair market value were still the prices at which the contracts would change hands in a hypothetical transaction for purposes of defining fair market value. Wierwille Tr. (11/14/01) 611:8–11. By contrast, Trigon's rebuttal expert testified as follows:

> Q. As an appraiser would you sign an opinion putting a fair market value on a single contract separate and apart from its block and represent that [it] was the price at which that one contract would change hands?
>
> A. No, because that would not be fair market value. In a fair market value transaction one contract would not change hands.

Reilly Tr. (11/20/01) 1591:21–1592:3.

Trigon contends that the argument made by the United States is based on a misconstruction of Reilly's testimony, which makes it clear that the determination of fair market value--for individual contracts--requires an assessment of the ''commercially reasonable level of trade'' for a particular asset. Reilly Tr. (11/20/01) 1592:8–1593:19. This does not mean, however, that because insurance contracts typically trade in blocks, therefore individual contracts do not have fair market value. Reilly Tr. (11/20/01) 1527:12–18. Rather, the ''level of trade'' merely identifies the methodology used by the valuation expert in applying the willing buyer/willing seller standard. Reilly Tr. (11/20/01) 1588:22–1589:2 (level of trade determines source of valuation data).

Wierwille's individual fair market value determinations are based on an assumption that each subscriber and provider contract would be sold as part of a ''going concern'' that includes other contracts and assets. Wierwille Tr. (11/14/01) 754:7–25. In similar contexts, courts have recognized that ''when a business is sold as a package, its assets must be valued in that posture.'' Fedders Corp. v. Commissioner, 39 T.C.M. (CCH) 1, 19 [¶79,350 PH Memo TC] (1979), aff'd without pub. opinion, 659 F.2d 1066 (3d Cir.1981); see also Kraft Foods Co. v. Commissioner, 21 T.C. 513, 585 (1954), rev'd on other grounds, 232 F.2d 118 [49 AFTR 862] (2d

Cir.1956). Thus, Trigon's subscriber and provider contracts must be valued on the theory that they would be sold to a hypothetical willing buyer having facilities comparable to those of the seller. Knapp King-Size Corp. v. United States, 527 F.2d 1392, 1401–02 [37 AFTR 2d 76-501] (Ct.Cl.1975). Attempting to value the contracts on a stand-alone basis (which the government appears to advocate), rather than as part of a going concern, results in an improper determination of "liquidation value," rather than fair market value. Fedders, 39 T.C.M. at 19; see also Reilly Tr. (11/20/01) 1589:10–24 (failure to view contracts at appropriate level of trade results in liquidation value); Wierwille Tr. (11/14/01) 761:19–762:11 (failure to apply premise of highest and best use results in a determination of liquidation value). Valuing the contracts "in use" as Wierwille did is consistent with a determination of fair market value for each contract. Wierwille Tr. (11/14/01) 755:1–16; see also Defense Exh. 16 at TR01150006-07 (fair market value of an asset "in continued use . . . presupposes the continued use of the asset in connection with all other assets"). "The decisive consideration is not the lack of an established trading market but the lack of any reasonable factual basis from which to determine the probable sum that fair negotiations between a hypothetical buyer and seller would produce." Campbell v. United States, 661 F.2d 209, 215 [48 AFTR 2d 81-5962] (Ct.Cl.1981).

The United States responds that "highest and best use" is a concept that is applied almost exclusively to the valuation of real estate.[13] Typical cases involve issues such as whether real estate should be valued based on a commercial use or a noncommercial use. See, e.g., United States v. Banisadr Building Joint Venture, 65 F.3d 374 (4th Cir.1995) (determining whether an office building should be valued as regular office space or as a specialized "high tech" building). Here, the issue is not whether the highest and best use of Trigon's contracts is as part of an ongoing health insurance company. Indeed, that is the only use of the contracts. The issue, instead, is whether specific contracts can be valued separately from the block of contracts to which they belong.

In making this "no market, no value" argument, the United States disregards the authorities relied on by Trigon, which hold that the absence of a market for an asset does not preclude it from having a fair market value for federal tax purposes. The case law establishes that the willing buyer/willing seller standard governs the determination of the fair market value of an asset even if there is no established market for the asset and even if the particular asset cannot in fact be sold. See, e.g., Guggenheim v. Rasquin, 312 U.S. 254, 258 [25 AFTR 1166] (1941) ("[T]he absence of market price is no barrier to valuation."); Bank of California, N.A. v. Commissioner, 133 F.2d 428, 433 [30 AFTR 913] (9th Cir.1943) (Even if property "was not assignable, it still could have a fair market value."). see also Shackleford v. United States, 262 F.3d 1028, 1033 [88 AFTR 2d 2001-5658] (9th Cir.2001) ("Where a willing seller and willing buyer do not exist, we will presume both their presence and a hypothetical sale."); Collins v. Commissioner, 216 F.2d 519, 523 [46 AFTR 1023] (1st Cir.1954) ("Where there is no market price because the property is not transferable, the Tax Court has to take into account all relevant facts and elements of value."). Courts routinely have determined the fair market value of contingent claims, rights to contingency fees and similar interests held by decedents regardless of the absence of an established market for such assets. See Estate of Curry v. Commissioner,

[13] The United States conducted a Westlaw search seeking all Fourth Circuit decisions containing the term "highest and best use." It found twenty-two decisions, each one of which dealt with valuing real estate. In Jack Daniels Distillery v. United States, 379 F.2d 569 [19 AFTR 2d 1627] (Ct.Cl.1967), cited by Trigon, the plaintiff acquired the stock of a predecessor corporation by the same name. One of the issues, for purposes of assigning basis, was the value of the prior corporation's Jack Daniels whiskey that had not yet reached bottling age. The Government argued that the value of the Jack Daniels label was separate and distinct from the whiskey itself, and should not be included in the whiskey's basis. The court rejected the Government's argument, holding that, "[t]he fair market value test is predicated in part on the highest and best use which can be made of the subject matter, and the evidence certainly shows that the Jack Daniel whiskey would in 1956 have sold at the highest price under its own labels." 379 F.2d at 576. This holding clearly does not stand for the proposition that the value of an asset can be divided among its non-marketable component parts. Thus, it is irrelevant to Trigon's claims.

74 T.C. 540, 551 (1980); see also Rev. Rul. 58-402, 1958-2 C.B. 15 (''There are many cases in which contracts to receive indefinite amounts of income have been valued for tax purposes.''). As one court has explained:

> Fair market value is a term and a measure long used in the law as applicable to property having no actual current market place . . . , and this statute uses the term thus broadly . . . . Where the property is of a class . . . which has established markets where there are daily dealings, the ''fair market value'' is more easily and more accurately ascertainable, but the difference between such class and others is not that of the existence vel non of a ''fair market value'' but is solely one of the character and extent of proof.

Whitlow v. Commissioner, 82 F.2d 569, 572 [17 AFTR 670] (8th Cir.1936) (citations omitted). In Estate of Smith v. Commissioner, 28 T.C.M. (CCH) 127 [¶69,028 PH Memo TC] (1969), aff'd, 420 F.2d 1385 [25 AFTR 2d 70-1538] (4th Cir.1970), the Tax Court determined the fair market value of a reversionary interest in property for estate tax purposes, noting that because there was no market in which remainder or reversionary interests were regularly bought and sold, ''the fair market value to be determined in this case is a hypothetical fair market value which is equivalent to 'intrinsic or actual value.''' 28 T.C.M. at 133 (citations omitted).

Similarly, the fact that there is not an established market for an asset in a particular quantity or volume does not preclude application of the fair market value standard. See Jack Daniels, 379 F.2d at 578 (fair market value of unbottled inventory of whiskey should be determined by expert testimony; although there had been no bulk sales, ''it does not follow that the 'fair market value' standard can be disregarded . . . . '').

Even the Treasury Regulations establish that ''only in rare and extraordinary cases will property be considered to have no fair market value.'' Treas. Reg. § 1.1001-1(a). In the case of intangible assets such as the subscriber contracts at issue in this case, the IRS itself has taken the position that, in the absence of an established market, ''fair market value'' of the intangible assets of a business generally is determined by capitalizing the income of the business, subtracting the fair market of the tangible assets, and allocating the rest to the intangible assets. Rev. Rul. 68-609, 1968-2 C.B. 327.

Trigon argues that, like every other insurance company, Trigon sells insurance contracts to subscriber groups one contract at a time. See Slone Tr. (11/13/01) 287:3–20. While the United States does not challenge this fact, it nonetheless maintains that, because there is no established secondary market in which to measure the value of each contract, a determination of fair market value cannot be made. The United States' position is contradicted by the testimony of Trigon's valuation experts, both of whom confirmed that the absence of a secondary market for Trigon's contracts does not preclude a determination of their fair market value. Wierwille Tr. (11/14/01) 593:16–23; Reilly Tr. (11/20/01) 1533:17–25, 1563:25–1564:23. The United States' own valuation methodology expert does not subscribe to its position. See Foster Tr. (11/16/01) 1268:16–21 (''There are circumstances where you are presuming there are some willing buyers and willing sellers.'').

For the foregoing reasons, the Court finds that, as the testimony of Wierwille, Reilly and Foster confirms, fair market value assessments can be made without the existence of a market.

D. Individual Subscriber Contracts Can Have A Fairly Ascertainable Value

[3] The final preliminary issue that must be broached before addressing with the valuation case offered by Trigon is the contention of the United States that the income stream earned from the individual health insurance contracts at issue in this case cannot be determined with fair certainty, and therefore cannot have an ascertainable fair market value. In reliance on Burnett v. Logan, 283 U.S. 404 [9 AFTR 1453] (1931), and its progeny, the United

States contends that, because of the need to "pool" the risk inherent in health insurance contracts, to spread risk among a group of insureds, it is impossible to determine reliably the cash flow from individual contracts. Health insurers expect to use profitable contracts to subsidize unprofitable ones. But, the insurer does not know in advance which contracts will be profitable and which will not. According to the United States, none of these results can be accurately predicted for individual contracts. They can only be predicted reliably when contracts are aggregated into large blocks; and, therefore, says the United States, tax deductions cannot be allowed for the loss of particular contracts.

In Burnett v. Logan, 283 U.S. 404 [9 AFTR 1453] (1931), the decision on which this argument is predicated, the Supreme Court held that a contract did not have an ascertainable fair market value unless the income from the contract could be determined with "fair certainty." Id., 283 U.S. at 412. In Logan, the taxpayer owned stock in a steel company that, in turn, owned a minority interest in a mining company. 283 U.S. at 409–10. In 1916, she sold her stock to Youngstown Sheet & Tube Company ("Youngstown") and received cash plus a contractual right to 60 cents per ton of iron ore received by Youngstown in the future from the mining company. Id. There was no requirement, however, that the mining company extract any particular amount of ore. Id., 283 U.S. at 409. The taxpayer reported the sale using the open transaction method, arguing that she was entitled to recover her basis in the shares she had originally owned before having to report any income from the transaction. Id., 283 U.S. at 410–11. The IRS asserted that the transaction should be treated as closed in 1916 and the taxpayer's gain determined by reference to the fair market value of the Youngstown obligations in that year. The Supreme Court agreed with the taxpayer. According to the Court, Youngstown's promise to make future payments based on the ore mined by the mining company had "no ascertainable fair market value" and the taxpayer might never recover her basis "from payments only conditionally promised." Id., 283 U.S. at 413. Under such circumstances, the Supreme Court concluded that keeping the transaction open would ensure that the taxpayer ultimately paid tax on the correct amount of gain, holding that:

> future money payments [under the contract were] wholly contingent on facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. It had no ascertainable fair market value.

Id., 283 U.S. at 413.

The circuit court, whose analysis was approved by the Supreme Court, had cited the following reasons as to why the fair market value of the contract could not be ascertained:

> There were many uncertainties involved in the future receipt of 60 cents a ton by this petitioner. She, a minority stockholder, was not in control. The right to continue to receive ore was dependent on the continuance in force of the contract of December 16, 1914, between the stockholders of the Mahoning Company. That contract might be abrogated or changed. No maximum or minimum payment is provided for by the contract. The tonnage mined each year was subject to the discretion of the board of directors of the Mahoning Company. The ore mined each year in the future might not come up to the production estimated as necessary to exhaust the mine in 45 years.

Logan v. Commissioner, 42 F.2d 193, 195 [8 AFTR 11087] (2d Cir.1930).

The United States' reliance on Logan is misplaced. As Trigon correctly notes, the United States ignores a critical fact in Logan that distinguished it from the facts of this case. Specifically, in Logan, the taxpayer's mother had owned stock in the same company, which she sold to Youngstown in 1916 for the same package of consideration. In 1917, the taxpayer's mother died, and the taxpayer inherited one-half of her mother's right to receive contingent payments from Youngstown. That bequest

was valued at $277,165 for federal estate tax purposes, and that value was used to determine the taxpayer's basis in the contingent payment obligations inherited from her mother. Id., 283 U.S. at 410. Thus, the facts of Logan make it clear that, when it is necessary to determine the fair market value of the contingent obligation, it was possible to do so. The Court explained the distinction between open transaction treatment for the proceeds and the determination of fair market value for other purposes, including basis:

> We are not dealing with royalties or deductions from gross income because of depletion of mining property. Nor does the situation demand that an effort be made to place according to the best available data some approximate value upon the contract for future payments. This probably was necessary in order to assess the mother's estate.

283 U.S. at 412 (emphasis supplied).

Subsequent decisions have also recognized this distinction. In Dorsey v. Commissioner, 49 T.C. 606 (1968), the Tax Court recognized that Logan does not apply to "cases which involve March 1, 1913, values or estate tax valuations where the problem was such that there had to be an immediate determination of value without awaiting future experience." 49 T.C. at 632 (citations omitted). Id. As Trigon correctly assets, Section 1012(c)(3)(A)(ii) of the 1986 Act requires that Trigon determine its basis in each asset held on January 1, 1987, by reference to its fair market value on that date and that "an immediate determination of value" be made. See Tax Reform Act of 1986, § 1012(c)(3)(A)(ii). Thus, because of the Fresh Start Basis Rule, "the situation demand[s] that an effort be made to place according to the best available data some approximate value upon the contract[s]." Logan, 283 U.S. at 412. In this respect, this case is indistinguishable from cases that determined the fair market value of an asset owned on March 1, 1913, in order to fix the taxpayer's tax basis in the asset.

The fact that the income stream from a particular subscriber contract might be difficult to predict does not prevent a professional appraiser from determining fair market value. Trigon provided expert testimony from two appraisers, Wierwille and Reilly, each of whom has more than 20 years of experience valuing intangible assets. Both testified that the fair market value of separate group health insurance contracts can be determined. Wierwille Tr. (11/14/01) 755:10–16; Reilly Tr. (11/20/01) 1527:12–1528:18. Their testimony, which was not contradicted on this point by any of the government's experts, satisfies the applicable "best estimate which the circumstances allow" standard.

This is particularly true when an entire segment of industry is ordered by an act of Congress to ascertain the value of all assets as of a specific date. Even if the United States' argument that a deduction could only be claimed upon the termination of the entire block of contracts were taken for legal truth, at the point of termination, a value would have had to have been associated with the deduction, and, under the 1986 Act, the value of the contracts, and thus the value of any potential deduction, must be determined under the appropriate statute, as of January 1, 1987.

E. Description Of The Wierwille Report: Valuation Of Trigon's Subscriber And Provider Contracts

Having disposed of the several issues which, according to the United States, stand in the way of any valuation of Trigon's contractual assets, it is time now to turn to the actual asset valuation which is the predicate for Trigon's refund claim.

Valuation of the assets here at issue was first accomplished in 1988 by Arthur Andersen and that valuation was, to some extent, used as the basis for Trigon's initial refund claim to the IRS. Also, Trigon used the Arthur Anderson valuation during its negotiations with the IRS. Once this action was filed, however, Trigon abandoned reliance on the Arthur Andersen valuation and, instead, identified Wierwille as the

person whose valuation would be the basis of its refund claim.[14]

Trigon's valuation case at trial was presented through the testimony of Wierwille, who purported to value each specific health insurance contract that Trigon possessed on January 1, 1987, using the fair market value standard specified by §1012(c)(3)(A)(ii) of the 1986 Act.[15] Wierwille Tr. (11/13/01) 481:7–16 and 482:6–9. Wierwille reviewed lists of, and information about, contracts owned by Trigon on that date and designated for each contract an amount that he claimed was its fair market value. Plaintiff's Exh. 282 and Plaintiff's Exh. 282A;[16] Wierwille (11/13/01) 480:2–11.

On October 30, 2000, Wierwille issued a report detailing his methodology for arriving at the fair market value of the subscriber and provider contracts that Trigon owned on January 1, 1987. Plaintiff's Exh. 103. Wierwille opines that the subscriber and provider contracts were separate and distinct assets that can be valued using accepted valuation methodologies, in this case the "income approach" for the subscriber contracts and the "cost approach" for the provider contracts. At trial, Wierwille stated his opinion on valuation and explained the basis for it and the methodology used to arrive at it. As part of the predicate for Wierwille's opinion, Trigon offered testimony from current and former Trigon management and other evidence.

1. Valuation Of The Subscriber Contracts (Method And Value)

In valuing Trigon's subscriber contracts under the fair market value standard, Wierwille considered three generally accepted valuation methodologies: the market approach, the cost approach, and the income approach. Wierwille Tr. (11/13/01) 483:3–24. He rejected the market approach because he found no appropriate market comparables, and he rejected the cost approach as irrelevant to a determination of fair market value for income-producing assets. Wierwille Tr. (11/13/01) 483:3–24. Therefore, Wierwille determined the fair market value of Trigon's subscriber contracts using an "income approach" and the discounted cash flow methodology. Wierwille Tr. (11/13/01) 482:20–24.

To determine the fair market value of Trigon's contractual relationships with its subscribers, Wierwille applied the income approach by projecting the remaining anticipated useful life of each contract determined as of January 1, 1987, the valuation date, and then ascertaining the anticipated future profits of the subscriber contracts over the projected remaining life. He then discounted that total sum to the value as of January 1, 1987.

The income approach has been utilized by other valuation professionals to determine the fair market value of assets similar to those at issue here. Use of the income approach to determine the fair market value of the subscriber contracts is consistent with how courts have applied the fair market value standard to other customer-based intangible assets. See, e.g., Newark Morning Ledger, 507 U.S. at 546 [71 AFTR 2d 93-1380] Business Service Industries, Inc. v. Commissioner, 51 T.C.M. (CCH) 539 [¶86,086 PH Memo TC] (1986). It is also consistent with the official, published position of the IRS on the valuation of intangible assets for which there is no established market. See Rev. Rul. 68-609, 1968-2 C.B. 327.

The income approach, discounted cash flow method has three generally recognized components: (1) projection of asset life; (2) projection of the income or cash flow to be received from the asset over its life; and (3) discounting the future income or cash flow back to its net present value

[14] Wierwille is an expert in the valuation of intangible assets, and has been in the business of making fair market value determinations since 1973. Before September 1, 2001, Wierwille was a principal in the Corporate Value Consulting business of PricewaterhouseCoopers ("PwC"). That business is now part of Standard & Poor's.

[15] The definition of fair market value used by Wierwille was "[t]he price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the facts." Defense Dem. Exh. 1; Wierwille Tr. (11/14/01) 603:6–11. The United States agrees with that definition.

[16] Plaintiff's Exhibit 282 contains Wierwille's original conclusions of value. Later, he corrected his valuation conclusions, reducing the values by three to seven percent. Wierwille Tr. (11/14/01) 566:13–568:6. The modified values are set forth in Plaintiff's Exhibit 282A.

on the valuation date. See, e.g., Wierwille Tr. (11/13/01) 487:5–14; Newark Morning Ledger, 507 U.S. at 546; Business Service Industries, 51 T.C.M. (CCH) 539 [¶86,086 PH Memo TC]; Rev. Rul. 68-609, 1968-2 C.B. 327; Robert F. Reilly and Robert P. Schweihs, Valuing Intangible Assets, at 166 (1999). Wierwille applied these components in formulating his opinion as to the fair market value of each subscriber contract owned by Trigon on January 1, 1987.

a. Asset Life Projections

Trigon's total enrollment of subscribers grew by more than two percent during the interplan competition. Feldstein Tr. (11/19/01) 1372:24–1373:24; Joint Exh. 2 at TR01092306 (''[t]otal enrollment grew from 1982 to 1985 due to aggressive pricing strategies.''). However, Trigon expected that, after the competition ended, enrollment in the traditional ''Blue plan'' would decline by approximately five percent per year for the three years immediately following the competition. Feldstein Tr. (11/19/01) 1372:24–1373:24; Joint Exh. 1 at TR01090829 (''[e]nrollment is expected to decline at an average rate of 5% per year to bring total enrollment from 919,300 contracts at the end of 1986 to 775,600 contracts at the end of 1989. The decline will result from aggressive price competition from traditional competitors as well as from new Alternative Delivery Systems and provider-competitors.''). CHI also projected that its overall enrollment would reverse and begin to climb sometime after 1987, but that such growth would be in its HMO (Health Maintenance Organization) and TPA (Third Party Administrator). Joint Exh. 2 at TR01092302 (''[a]lternative Delivery Systems and Self-Insurance mechanisms will continue to erode the traditional base of Blue Cross Plans.'') and TR01092306 (''[e]nrollment drops off in 1986 and 1987 due to the aggressive pricing of commercial carriers and start-up Alternative Delivery Systems. Enrollment achieves 1985 levels again in 1989 as our HMO and TPA products become major components of total enrollment.''). The HMO and TPA products were offered by separate corporations that were not part of the Blue Cross Blue Shield plan. Cothran Tr. (11/12/01) 236:1–20.

The subscriber contracts typically were one year in duration, but were renewable. According to Trigon, it had a reasonable expectation that the contracts it owned on January 1, 1987, would renew, thereby generating income beyond their nominal one-year terms. See Hunt Tr. (11/13/01) 401:7–402:5; Byrd Tr. (11/14/01) 786:21–787:16. As a result, Wierwille concluded that, for valuation purposes, the subscriber contracts were subject to a statistical useful life (or ''lifing'') analysis. Wierwille Tr. (11/13/01) 505:2–4. That view is consistent with decisions in which the courts have recognized that, in valuing a contractual relationship, it is appropriate to determine the useful life of a contract by taking into account the likelihood of its renewal. See, e.g., Union Bankers, 64 T.C. at 807 (cancellable health insurance contracts estimated to have a useful life of seven years); Super Food, 416 F.2d at 1236 [24 AFTR 2d 69-5309] (retail franchise contracts terminable upon 30 days' notice found to have useful life of seven years); Seaboard Finance, 367 F.2d at 653 (''It is unnecessary that such a contract be limited to its duration on paper when taxpayer can demonstrate, as he did here, that the contract will be extended over a longer period of time.'').

Under the income approach, the taxpayer's own experience in connection with contract terminations is the most reliable indicator of useful life. Trigon provided Wierwille with historical contract cancellation data for contracts that were cancelled or terminated during the 1984 through 1986 time period. Meyer Tr. (11/13/01) 354:13–17; Plaintiff's Exh. 68, 68-A. Wierwille used this data to develop a series of lifing curves specific to each of Trigon's lines of business and, within those lines of business, specific to the age of a particular subscriber contract. Wierwille Tr. (11/13/01) 492:11–510:24 (the lifing curves are set forth in Defense Exhibit 103 at TR46012316-325). The lifing curve de-

termined for a line of business was then applied to each contract in that line owned by Trigon on the valuation date to predict the time period over which that contract could reasonably be expected to generate income. Wierwille Tr. (11/13/01) 493:23–494:4, 510:25–511:6.

b. Cash Flow Projections

The projected cash flow component of the income approach, as applied by Wierwille, has two elements: (i) a projection of annual underwriting profit margins, and (ii) a projection of contract-specific premium income.

(i) Profit Margin Projections

Trigon's underwriting department set the premiums for each contract. Perkins Tr. (11/20/01) 77:1–4; White Tr. (11/13/01) 325:20–326:10. In doing so, the underwriters relied on formulae developed by Trigon's actuarial department. White Tr. (11/13/01) 325:20–326:10. The premium formulae provided base rates in each line of business for the contract participants. Wood Tr. (11/15/01) 844:12–22.

To compute the formulae, Trigon's actuarial department set rates based on recent claims experience and projected trends in anticipated claims expense. Perkins Tr. (11/12/01) 66:16–71:15. To those costs, the actuaries added the cost expected for administrative expenses and sales commissions, as well as a profit "load." Perkins Tr. (11/12/01) 71:16–22 and 70:8–71:2.

The premium formulae were developed on a macro scale. Perkins Tr. (11/12/01) 69:14–25. The anticipated costs (both claims and administrative) and profits were calculated for an entire line of business. Perkins Tr. (11/12/01) 69:14–25; Hunt Tr. (11/13/01) 435:7–9; Wood Tr. (11/15/01) 862:8–23. For groups that were experience rated (and for cost-plus contracts), rates were based (to varying degrees) on the groups' claims experience. Perkins Tr. (11/12/01) 110:8–23. For community rated and small business groups, rates were based on tabular ratings that reflected group-specific demographics (age, gender, location and industry of the group and its members). See Perkins Tr. (11/12/01) 105:22–108:10. Those rates also reflected charges for administrative expenses and a profit load. Perkins Tr. (11/12/01) 70:17–76:25. The goal of this pricing exercise was to achieve a profit on each subscriber contract. Perkins Tr. (11/12/01) 127:3–128:3.

However, once the underwriting department had set a price for a particular group, the sales department provided input regarding competitive factors. White Tr. (11/13/01) 338:16–25. Under normal competitive circumstances, there was a natural tension between the underwriting department and the sales department. White Tr. (11/13/01) 339:1–13. The underwriting department wanted to hold to the formula prices while the sales department wanted to reduce prices to get new business. White Tr. (11/13/01) 339:7–10.

Premium discounting was, and is, a standard practice in the health insurance industry. Phyllis Cothran, Trigon's Chief Financial Officer in 1986 and 1987, testified that premium discounts were a part of normal competition. Cothran Tr. (11/12/01) 241:3–5. Thomas Snead, Trigon's CFO subsequent to Cothran (and Trigon's current Chief Executive Officer) testified that premium discounts were allowed throughout his tenure as CFO. Snead Tr. (11/19/01) 1420:8–16.

Historically, the health insurance industry has experienced a consistently low underwriting profit margin.[17] Davis Tr. (11/12/01) 189:14–17; Cothran (11/12/01) 223:20–224:6. Trigon's underwriting profit margin was no exception, having averaged less than one percent annually over the fifteen years from 1972 to 1986. Feldstein Tr. (11/19/01) 1347:22–1348:9; Wierwille Tr. (11/14/01) 699:10–13. Norwood Davis, Trigon's Chief Executive Officer and the Chairman of its Board of Directors on Jan-

[17] "Underwriting profit margin" refers to premiums minus claims and administrative expenses. Feldstein Tr. (11/19/01) 1347:1–8. Health insurance companies, including Trigon, rely on revenue from investments to supplement their overall profitability. The insurers invest the portion of their paid premiums not needed to cover current claims. The investment income bolsters the generally low underwriting profits. See Plaintiff's Exh. 34 at TR22330322 ("Investment income will continue to be the Plan's primary financial contributor"). "Underwriting profit margin" does not include investment income.

uary 1, 1987, testified that the low profit margins resulted from the industry's evolution from a non-profit position and from the fact that, when commercial carriers began offering health insurance, they offered it as a loss leader for other insurance lines. Davis Tr. (11/12/01) 189:21–190:7.

Wierwille determined underwriting profit margins for each of Trigon's lines of business as of January 1, 1987, using a ''benchmark'' margin equal to the profit that would have been realized in 1986 but for the competition between the Richmond and Roanoke plans. Wierwille Tr. (11/14/01) 699:15–700:2. Wierwille projected this benchmark margin forward by using forecasts contained in two internal documents prepared contemporaneously to the valuation date. Wierwille Tr. (11/13/01) 526:4–12. The first was a memorandum dated August 25, 1987, which included three-year financial projections approved by Trigon's board on December 18, 1986. Plaintiff's Exh. 32 at TR01041118–1123. The second was a three-year Trigon financial forecast dated December 18, 1986. Joint Exh. 1. Using information about premiums, claims and administrative expenses from these documents, again adjusted to account for the Richmond-Roanoke competitive discounts, Wierwille projected line of business-level profit margins for the years 1987 through 1992. Wierwille's estimated profit margins ranged from 2.37 percent up to 4.97 percent for 1987 through 1992. The management of Trigon had forecast an underwriting loss of $4.9 million in 1987, and underwriting profits of $9.7 million and $43.8 million for 1988 and 1989 respectively. Plaintiff's Exh. 32 at TR01041123.

Wierwille determined that, by 1992, Trigon would achieve a stabilized ''average'' profit margin of 5.4 percent that could be carried forward for the balance of the 40-year valuation projection period. Wierwille Tr. (11/14/01) 697:4–9. Wierwille's annual profit margin projections, by line of business, are detailed in Defense Exh. 103 at pages TR46012290–91. See also Wierwille Tr. (11/14/01) 633:1–14.

(ii) Premium Projections

Wierwille's premium projections are based on Trigon data files containing certain, but not complete, historical information about premiums, claims, administrative expenses and competitive discounts by line of business. Plaintiff's Exh. 66; Wierwille Tr. (11/13/01) 511:15–512:7; Meyer Tr. (11/13/01) 349:11–21. There was little or no such information about the Roanoke Plan. And, for the Richmond Plan, Wierwille used contract-specific historical financial data for 55 of the largest group contracts Trigon owned on January 1, 1987. Wierwille Tr. (11/13/01) 512:8–19; Plaintiff's Exh. 153 through Plaintiff's Exh. 206A.

Using that limited historical financial data, Wierwille determined contract-specific premium ''benchmarks,'' which he then projected forward at a seven percent growth rate based on the historical pattern of the Medical Consumer Price Index. Wierwille Tr. (11/13/01) 517:18–518:10. Once annual premiums for each contract were determined, Wierwille applied the lifing curves to them to reflect the probability that the contract would still be with Trigon for each year in a 40-year projection period. This process resulted in a determination of contract-specific ''probability weighted'' premiums for each year in the valuation projection period. Wierwille Tr. (11/13/01) 510:25–511:6.

Having determined the remaining useful life of each contract, Wierwille then determined the future cash flow expected to be produced by each contract over the remainder of its life.

c. Fair Market Value Of Subscriber Contracts According To Wierwille

Wierwille then applied the line of business-level profit margin projections to the contract-specific probability weighted premiums to establish annual underwriting income for each subscriber contract. Wierwille Tr. (11/14/01) 553:2–12. Underwriting income, as modified to account for several other components required by the income approach, was then reduced to present value as of January 1, 1987, using a

fifteen percent discount rate. Wierwille Tr. (11/14/01) 563:17–564:22. Wierwille then added an adjustment called a tax shield to this ''discounted cash flow''. Wierwille Tr. (11/14/01) 564:23–566:1. ''The tax shield is designed to recognize that the buyer of this asset will be able to either amortize it or deduct it in some fashion and create a benefit which could be represented by the deduction against federal income taxes, and the tax shield is designed to capture the present value of that tax benefit.'' Wierwille Tr. (11/14/01) 565:3–9. This formula, according to Wierwille, results in the determined fair market value of each subscriber contract. Wierwille's opinion as to the fair market value of each subscriber contract owned by Trigon on January 1, 1987, is contained in revised Appendix A to Plaintiff's Exh. 282. Plaintiff's Exh. 282A; Wierwille Tr. (11/14/01) 566:2–7. In Wierwille's initial opinion, the fair market value of the subscriber contracts, as of January 1, 1987, was $384,860,547, with the value of the cancelled or terminated contracts totaling $175,147,656. After submitting a revised opinion at the end of trial, the adjusted fair market value was $308,450.72 in Wierwille's opinion,[18] with the total value of the cancelled or terminated contract as of December 31, 1995, being something less than $175 million.[19]

2. Valuation Of Provider Contracts (Method And Value)

As part of its business, Trigon also contracted with physician and hospital providers of health care services. These provider contracts allowed Trigon to reimburse the physicians and hospitals at rates lower than what the provider typically charged for their health care services. Wierwille expressed the opinion that a fair market value can be determined for each of the physician provider contracts Trigon owned on January 1, 1987. To determine the fair market value of Trigon's physician and hospital provider contracts, Wierwille used a ''cost approach'' methodology. Wierwille Tr. (11/13/01) 482:25–483:2, 483:25–484:8. Wierwille has used this same methodology to determine the fair market value of provider contracts on approximately 20 other occasions. Wierwille Tr. (11/14/01) 578:23–579:10. When asked why the income approach could not be used to value the provider contracts, Wierwille stated that there is no income to ascribe to those contracts because the discounts are passed onto the consumer. Wierwille Tr. (11/14/01) 742:19–22. Under the cost approach, the fair market value of an asset is determined by calculating the costs associated with reproducing or replacing the asset.

On January 1, 1987, Trigon owned provider contracts with 9,436 physicians, each of whom held a ''Participating'' contract, a ''Key Care'' contract or both. Trigon's Exhibit 74 (the ''Provider Database'') contains a summary of the Key Care and Participating physician provider contracts owned by Trigon on January 1, 1987, and the subsequent history of those contracts with Trigon.

Depending on the type of contractual relationship the physician held with Trigon, i.e., a physician with a KeyCare contract, a Participating contract or both, there were different costs associated with replacing that contract. Wierwille Tr. (11/14/01) 572:23–573:6; Defense Exh. 103 at TR46012224. Specifically, Trigon management estimated the employee time that would have been required to spend to credential and contract with the physicians. Wierwille Tr. (11/14/01) 574:3–18. The costs associated with that time (salary and benefits) were then quantified by Trigon and Wierwille assigned a value to each of the physician provider contracts Trigon held on January 1, 1987, depending on the type of contractual relationship. Wierwille Tr. (11/14/01) 574:3–18; Defense Exh. 103 at TR46012224. This analysis resulted in a determination by Wierwille that the cost associated with replacing a physician

[18] This number was not explicitly stated in the record, rather, it is the simple addition of the total values of each of Trigon's lines of business in Wierwille's revised valuation. See Plaintiff's Exh. 282A. Such total value was confirmed by Trigon subsequent to a conference call with the parties on August 2, 2002. See Letter from Gilbert E. Schill, Jr., counsel for Trigon, dated August 6, 2002.

[19] The revised value of the total lost contracts is not evident in the record; however, van Miegham made the necessary adjustments to his revised refund calculations. See Plaintiff's Exh. 297A.

provider contract was $52 if a physician had only a KeyCare or a Participating contract and $78 if a physician held both types of contracts. Wierwille Tr. (11/14/01) 574:19–25; Defense Exh. 103 at TR46012224.

Wierwille determined the fair market value, as of January 1, 1987, of Trigon's contracts with 9,441 separate physicians. Between January 1, 1987, and December 31, 1995, 3,381 of these contracts were cancelled or terminated, resulting in losses, measured by the fair market value of such contracts on January 1, 1987, of $207,896.

On January 1, 1987, Trigon also held contracts with hospitals and other health care facilities throughout Virginia. Many of those facilities had multiple contracts with Trigon, however, only one of these facilities, Smyth County Community Hospital, completely severed its contractual relationship with Trigon between January 1, 1987, and December 31, 1995. Wierwille employed a similar cost approach methodology to value facility provider contracts Trigon owned on January 1, 1987, including contracts with hospitals, home health facilities and nursing facilities. Wierwille Tr. (11/14/01) 579:16–580:20. As with the physicians, Wierwille examined the costs, as of January 1, 1987, associated with entering into contractual relationships with the facilities. Defense Exh. 103 at TR46012226. The estimated costs that Trigon would have incurred on January 1, 1987, to replace the Smyth County Community Hospital contract are a reasonable measure of the fair market value of that contract. The estimated unit costs associated with replacing the facility provider contracts are set forth in Defense Exh. 103 at TR46012239. To replace the Smyth County Community Hospital contract on January 1, 1987, Trigon would have incurred salary, benefit, overhead, and other costs. As of January 1, 1987, in order to replace the Smyth County Community Hospital contract, Wierwille opined that Trigon would have incurred costs of $36,507. Wierwille Tr. (11/14/01) 584:1–7.[20]

3. Computation Of The Tax Refund Due To Trigon By Dennis Van Miegham, Insurance Tax Specialist At KPMG

Trigon retained an expert witness to compute the amount of tax refunds to which it claims entitlement. A report prepared by Trigon's expert, Dennis van Miegham, an accountant who is an expert in insurance taxation, was provided to the United States on December 22, 2000. The United States has stipulated that van Miegham's methodology is correct and that, if Wierwille's valuation report is accepted and the Court determines that Trigon is entitled to the loss deductions, the refund amounts computed in van Miegham's report are correct. Stipulation of Undisputed Facts ("Stip."), p 20.

Plaintiff's Exhibit 297A contains an updated computation of the refund amount, incorporating Wierwille's updated valuation opinions. Plaintiff's Exhibit 297A was introduced at trial after the testimony of Van Miegham and during Trigon's rebuttal case. Tr. (11/20/01) 1609:2–6. The United States reserved to right to object to the exhibit in a brief that would have been submitted a week subsequent to the introduction of the exhibit. Tr. (11/20/01) 1609:7–20. The United States informed counsel for Trigon and subsequently the Court that there was no objection to Van Miegham's calculation to the admission of such evidence. Since the United States has stipulated to Van Miegham's initial refund computation model, and did not object to the revised computations, the Court accepts the computations as accurate.[21] The revised computation results in a refund, if any, of $33,181,966 exclusive of interest.

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[20] The major component of these costs is the Uniform Prepayment ("UPP") that Trigon is required to pay to cover claims that are expected to be incurred by the facility during billing cycles. Wierwille Tr. (11/14/01) 582:3-1. This amount represents the cost of money to Trigon in not having the UPP funds on its balance sheet and available for investment. Wierwille Tr. (11/14/01) 582:3-1.

[21] In a conference call on August 2, 2002, the United States stipulated on the record that, if the Court determined that the amount of loss in Wierwille's revised opinion were correct, then the tax computation in Plaintiff's Exhibit 297A would also be correct.

F. Adequacy And Reliability Of Wierwille's Valuation Of Trigon's Contracts

Trigon has the burden to establish by a preponderance of the evidence that it has overpaid the taxes it seeks to recover in this action. Estate of Andrews v. United States, 850 F.Supp. 1279, 1289 [73 AFTR 2d 94-2395] (E.D.Va.1994). The United States did not retain an expert to provide an opinion on the value of Trigon's subscriber and provider contracts. Instead, the United States has relied on the fact that Trigon bears the burden of proof to establish the fair market value of each of the subscriber and provider contracts and asserts that, for several reasons, Trigon did not satisfy its burden. As explained below, the United States is correct.

1. Valuation Of The Subscriber Contracts

The lion's share of the claimed refund is attributable to the valuation of Trigon's subscriber contracts. For the following reasons, the Court finds, as a matter of fact, that the Wierwille valuation of the subscriber contracts is neither accurate nor reliable.

a. Trigon Did Not Prove The Existence Of Each Specific Contract And The Number Of Contracts Is Inflated

As explained above, in late 1987 and early 1988, Meyer, Trigon's chief tax lawyer, set out to identify the subscriber (and provider) contracts owned as of January 1, 19087. Meyer made a catalog of those contracts. Later, and in the context of this litigation, S. Owen Hunt, an attorney in Trigon's legal department, was assigned the task of ensuring the accuracy of the tax department's catalog of subscriber contracts, as well as the tax department's record of the subsequent history of the contracts. Hunt Tr. (11/13/01) 406:24–407:8, 408:13, 447:2–12. The results of Hunt's work are collected in Plaintiff's Exhibit 58, referred to as the "Subscriber Database."

To verify the existence of each contract as of the valuation date, Hunt and his staff reviewed a series of data files, Hunt Tr. (11/13/01) 412:6–413:8 and Plaintiff's Exh. 60, together with approximately 300 boxes of hard copy contracts and account profile documents. Hunt Tr. (11/13/01) 413:9–414:10. Hunt acted as an "auditor" in this process, removing contracts from the case if he could not verify the information. Hunt Tr. (11/13/01) 415:11–416:4.

At trial, Trigon presented Hunt's testimony together with the Subscriber Database, Plaintiff's Exhibit 282 and Plaintiff's Exhibit 282A as evidence of the group subscriber contracts owned by the company on January 1, 1987. The purpose of Hunt's work was to ensure that the refund claim contained only contracts that Trigon could verify were (1) owned on January 1, 1987, and (2) lost through termination during the 1987 through 1995 tax years. Trigon claims that the verification process was exhaustive, conservative in nature, and that it resolved all doubts against including contracts in the claim. Hunt Tr. (11/13/01) 423:14–425:16.

The United States has agreed that Plaintiff's Exhibit 58 is evidence of various group subscribers. Stip., p 10. And, the United States has agreed that Plaintiff's Exhibit 58 is an admissible summary of the writings and records underlying which are business records. However, the United States says that these admissible documents and Hunt's supporting testimony are insufficient proof of the existence of the subscriber contracts that are the subject of Wierwille's valuation opinion.

As the United States points out, there are substantial gaps in the proof of the existence of the listed subscriber contracts that, in turn, cast serious doubt on whether the total number of subscriber contracts is accurate. The list was compiled by Hunt and persons working for him and at his direction. Hunt Tr. (11/13/01) 408:1–11. To begin, Hunt acknowledged that Trigon does not have paper documents for many of the contracts at issue.[22] Hunt Tr. (11/13/01) 441:2–20. Nor was there an electronic data base showing a list of all subscriber contracts existing on January 1,

[22] For small and community rated products standard form insurance contracts were issued, that are based on standard benefit packages. There is a limited number of product variations available in those markets. Hunt Tr. (11/13/01) 441:7–20.

1987, Hunt Tr. (11/13/01) 445:22–446:12, or a list of the contracts that subsequently had been cancelled, terminated or abandoned. Id. As a result, Hunt had to attempt to identify subscriber contracts from a variety of sources.

Hunt began with a data base provided by Trigon's tax department. Hunt Tr. (11/13/01) 447:2–5. Through Trigon's Product Profitability Reporting (''PPR'') system, Hunt was able to verify the subscriber contracts for the Richmond Plan. Hunt Tr. (11/13/01) 447:24–448:8. At trial, Hunt testified that he had found ''at least'' 500 Richmond Plan contracts listed on the tax department's computer system as active on January 1, 1987, but which, in fact, had been cancelled before that date. Hunt Tr. (11/13/01) 448:12–18. Near the end of trial, and thereafter, Trigon says that Hunt found 793 such contracts.[23] While the record shows that Wierwille considered the erroneously included contracts in arriving at his valuation, they were excluded from the total number of lost contracts used as a basis for the deduction.

The fact that there were ''at least'' 500 errors in the list of the Richmond Plan's contracts also calls into question the accuracy of the total number of Roanoke Plan contracts because Hunt could not perform the same verification for the Roanoke Plan contracts for the reason that those contracts did not appear in the PPR system as of January 1, 1987. Hunt Tr. (11/13/01) 447:17–20 and 448:19–22. However, notwithstanding that he had discovered ''at least 500'' (actually 793) errors in the list of the Richmond Plan's contracts, Hunt accepted the Roanoke Plan list as correct simply stating that it was the company's best record of what transpired. Hunt Tr. (11/13/01) 449:2–10. The significant number of errors discovered through the verification of the Richmond contracts, sheds doubt as to the accuracy of the unverifiable Roanoke contracts. The number of errors found in the Richmond Plan contracts alone represents approximately 3.5% of the total number of contracts. This percent likely is much higher given the probability that a significant number of errors existed in the list of Roanoke Plan contracts.[24]

Furthermore, when Hunt's data comparison project was concluded, it became obvious that some of the Roanoke Plan's contracts listed on the tax department's data base as active on January 1, 1987, were missing from the PPR system for that date. Hunt Tr. (11/13/01) 450:7–13. Instead, those contracts appeared on the PPR several years later, id., and Hunt could not say whether those contracts were belatedly entered into the PPR system, or whether the groups had cancelled before January 1, 1987, and then subsequently entered into new contracts that appeared on the PPR system. Hunt Tr. (11/13/01) 451:6–24. Hunt solved that conundrum merely by assuming that the insurance coverage had been continuous, Hunt Tr. (11/13/01) 451:25–452:16, notwithstanding the absence of supporting evidence for such a conclusion. Hunt Tr. (11/13/01) 452:17–22.

Next, Hunt acknowledged that he included in the data base subscriber contracts with groups that had cancelled Blue Cross/Blue Shield coverage and had moved to the HMO owned by Trigon's parent company, CHI. Hunt Tr. (11/13/01) 465:4–17. In including these groups on his list of active contracts, Hunt was aware that the HMO was a separate, non-Blue Cross/Blue Shield corporation. Id. The company at issue here is Trigon, a Blue Cross/Blue Shield organization affected by the Fresh Start Basis Rule. Evidence has not been presented that contracts that parties made with CHI, or other organizations within CHI's purview are Blue Cross/Blue Shield contracts to which the statute at hand applies. Therefore, on this record those contracts should not have been included as subject to the Fresh Start Basis Rule. Unfortunately, it is not possible to ascertain how many such contracts were affected by

[23] See Letter from Gilbert E. Schill, Jr., counsel for Trigon, dated August 6, 2002.

[24] As indicated previously, the Roanoke Plan was experiencing higher attrition than the Richmond Plan after the interplan competition. The Roanoke Plan's poor record keeping (as evidenced by the fact the contracts could not be verified) and higher attrition indicate a probability that the rate of error would be higher than that of the Richmond Plan.

Wierwille's decision, nor did Wierwille explain how his opinion would be affected by the absence of such contracts from his base.

Finally, the United States complains that some contracts owned by Trigon on January 1, 1987, were not signed until after that date. That is true but irrelevant, because an insurance contract is entered into when there is a meeting of the minds between the insurer and the group over the terms of coverage and the corresponding premium charge. For each of the unsigned contracts, a binding contract existed, evidenced by the contract itself or by the written correspondence regarding the terms of the contract, and supported by the conduct of the parties in providing insurance coverage and paying premiums. See Hunt Tr. (11/13/01) at 455:11–465:2.[25]

For the foregoing reasons, the Court finds, as a matter of fact, that the number of subscriber contracts that Trigon claims to have owned on January 1, 1987, (and used as a predicate for Wierwille's opinion) is inflated. The extent of that inflation was not testified to by Wierwille even after it was demonstrated in his trial testimony. But, the fact is that the inflation of the number of contracts necessarily results in an inaccurate total value. The failure to demonstrate the effect of this infirmity in a critically important component of Wierwille's opinion is an important factor in deciding whether Trigon has carried its burden of proving, by a preponderance of the evidence, the fair market value of the subscriber contracts.

b. The Effect Of Wierwille's Failure To Verify The Calculations Made Under The Income Approach Against Calculations Using Other Valuation Approaches

As explained above, Wierwille formulated his judgment about the fair market value of each specific health insurance subscriber contract that Trigon possessed on January 1, 1987, by using the income approach, a generally accepted approach to valuation under certain circumstances. Wierwille Tr. (11/13/01) 481:7–16 and 482:6–9. To that end, Wierwille reviewed lists of Trigon's contracts allegedly owned on January 1, 1987, and designated for each contract an amount that he claimed was its fair market value. Plaintiff's Exh. 282 and Plaintiff's Exh. 282A; Wierwille Tr. (11/13/01) 480:2–11. Plaintiff's Exhibit 282 contains Wierwille's original conclusions of value. Later, he corrected his valuation conclusions, reducing the values by three to seven percent. Wierwille Tr. (11/14/01) 566:13–568:6. The modified values are set forth in Plaintiff's Exhibit 282A.

Wierwille's opinion on valuation was based solely on the income approach and, specifically, the discounted cash flow method in valuing Trigon's subscriber contracts. Wierwille Tr. (11/13/01) 482:20–24; 487:5–14. Dr. Foster, the United States' expert on valuation methodologies, testified that the:

> discounted cash flow approach is an approach that looks into the future and makes estimates about future parameters. And nobody's a clairvoyant. And there are good ways of making projections and there are less good ways of making projections. And what you concern yourself with a discounted cash flow approach is are there reliability checks on the inputs to the discounted cash flow, you can basically get such a large range of numbers that in the end you don't have a grounded reality in terms of valuation.

Foster Tr. (11/16/01) 1230:5–17. According to Dr. Foster, the income approach, discounted cash flow method is very sensitive to its inputs. Foster Tr. (11/16/01) 1230:3–1231:16. Robert F. Reilly, Trigon's rebuttal expert on valuation method

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[25] See generally 1 Couch on Insurance, § 13.1, at 13-2 to 13-3 (1996) (noting that prior to issuance of a formal policy, group insurance coverage is typically governed by a binder, "which may be temporary, sketchy, and informal, but is nonetheless a contract"); see also id. § 8.3, at 8–10 ("The effective date of coverage when the master policy commences is, as in the case of other types of insurance, a matter of the agreement between the parties . . . ."). Documents exchanged in advance of the actual signing of the contract, together with policy forms filed with the Bureau of Insurance, were honored as evidence of the contract, and Trigon would pay claims incurred during that period. Hunt Tr. (11/13/01) 461:1–462:25. For Trigon's non-experience rated lines of business, standard form contracts were used, so there would never be a question as to the terms of coverage. Hunt Tr. (11/13/01) 463:21–464:11.

agreed with Dr. Foster on that point. Reilly Tr. (11/20/01) 1574:22–1575:4.

Dr. Foster also testified that fair market valuations are most reliably accomplished by using different methods of valuation to cross-check the validity of the method principally relied upon. Foster Tr. (11/16/01) 1218:17–1223:6. That cross-checking sometimes is called "triangulation." It is undisputed that Wierwille did not cross-check his valuation against figures obtained by using other methods. Foster Tr. (11/16/01) 1220:12–1223:6; See also Reilly Tr. (11/20/01) 1573:10–15.[26]

It was Dr. Foster's professional opinion that Wierwille's failure to cross-check the analysis produced by the income approach rendered Wierwille's opinion substantially less reliable. According to Dr. Foster, Wierwille should have applied the cost approach to value Trigon's subscriber contracts. Dr. Foster described that approach as a "make or buy" analysis. Foster Tr. (11/16/01) 1231:17–1233:6. As explained by Dr. Foster, an appraiser using the cost approach would determine the cost that Trigon--or a hypothetical buyer--would have incurred to develop the set of subscriber contracts that were owned by Trigon on January 1, 1987, as well as the future costs it would have incurred to maintain those assets into the future. Foster Tr. (11/16/01) 1231:17–1232:9. That, of course, is basically the same approach utilized by Wierwille to value the provider contracts. Wierwille never satisfactorily explained why the value of the subscriber contracts under the income approach could not have been verified by the same cost approach being used for the provider contracts.[27]

Wierwille also testified that he had considered the market transaction approach to ascertaining the fair market value of the subscriber contracts, but he rejected that approach because of the lack of data on comparable transactions. Wierwille Tr. (11/13/01) 483:3–484:8. Nonetheless, the record shows that there have been market transactions involving similar contracts that could have been used to cross-check valuation under the income method. Indeed, both sides agree that market of transactions involving subscriber contracts took the form of the purchase of blocks of contracts or the purchase of a company with a portion of the purchase price associated with the subscriber contracts. Trigon itself considered purchasing the assets or stock of health insurers whose assets include subscriber contracts. However, for reasons neither expressed nor readily apparent, Wierwille claims that he could not lay his hands on the data respecting market transactions, even those considered by Trigon.

Neither Wierwille nor Reilly, Trigon's rebuttal expert and coauthor of a leading treatise on valuing intangible assets,[28] agreed that cross-checking or triangulation was absolutely necessary to arrive at a reliable outcome utilizing the income approach. However, unlike Wierwille, Reilly is of the view that cross-checking a valuation by use of different methods is a preferable course. And, notwithstanding that triangulation is important to the veracity of a valuation opinion, even Dr. Foster acknowledged that fair market value can be determined using only one valuation approach. Foster Tr. (11/16/01) 1280:14–1281:3. He also agreed that it is permissible to rely on the income approach if it is the only approach available. Foster Tr. (11/16/01) 1282:22–1283:15.

On this record, and considering the wide-spread use of the income approach, it cannot be said, as the United States argues, that the fair market value opinion here is invalid and inadequately supported merely because Wierwille used the income approach without triangulation or cross-checking against results achieved by using other methods. However, Wierwille's failure adequately to explain why the cost ap-

26 "Q. Mr. Reilly, I want to talk about the multiple methods first. As I understand it, whenever possible an appraiser should use more than one approach to valuation, would you agree?

A. Yes, more than one approach and if possible, more than one method within an approach."

27 That Wierwille, in fact, used unreliable data to value the provider contracts using the cost approach (see infra), would not have foreclosed the use of reliable data either there or in cross-checking the subscriber contracts.

28 Michael D. Pugh, an expert for the United States, testified that he had researched market transactions involving health insurance subscriber contracts but "couldn't find any consistent presentation of that information." Pugh Tr. (11/15/01) 1049:6–21.

proach could not have been used as a cross-check or why the market transaction data--even that from Trigon's own forays into the market--was not developed raises further serious doubt about the reliability of Wierwille's unverified, unchecked opinion, based, as it is, on the income approach.

As Dr. Foster explained, and Reilly agreed, when the income approach alone is the basis for valuation, it is critically important that the data used in applying that approach be accurate. Foster Tr. (11/16/01) 1230:3–1231:16; Reilly Tr. (11/20/01) 1535:15–1536:18. That is especially true because, as Dr. Foster explained, although it may be necessary to rely exclusively on the income approach on rare occasions, the income approach, depending on the inputs, can result in a "large range of numbers." Foster Tr. (11/16/01) 1230:3–17, 1233:23–1234:2.

The record here fully bears out this problem. For instance, although the income approach has been used by other experts to estimate the value of subscriber contracts owned by other Blue Cross/Blue Shield organizations, the use of that approach has produced widely varied results for other plans with premium income similar to Trigon's. (See Defendant's Exh. 22, a list of several Blue Cross/Blue Shield plans, their 1986 premiums, and the total values placed on their health insurance contracts). For example, the Cincinnati, Ohio Blue Cross/Blue Shield had premiums of $1.36 billion-very similar to Trigon's $1.3 billion (Wierwille Tr. (11/14/01) 736:19–21)-yet the value placed on Cincinnati's contracts was only $122 million. This is in stark comparison to Wierwille's valuation of Trigon's contracts at $384 million, or even Wierwille's revised figure of $308 million. Wierwille Tr. (11/14/01) 737:2–4. The Pennsylvania Blue Shield had premiums of $1.4 billion and the value placed on its contracts was only $100 million. New Jersey had premiums of $1.8 billion and the value placed on its premiums was only $287 million.

The most dramatic variance in the application of the income approach, however, appears in two different valuations of the subscriber contracts here at issue. Defendant's Exhibit 25 shows the valuation performed for Trigon by Arthur Andersen in 1988, which Trigon relied on in submitting its original claim to the IRS in 1996. Meyer Tr. (11/16/01) 1114:18–1118:14. Arthur Andersen, using the same approach as Wierwille and valuing the same contracts, concluded that the subscriber contracts had a value of $1,325,543,000-more than three times the value assigned by Wierwille. Defense Exh. 25 at TR01020028.

The fact that Arthur Andersen and Wierwille reached such divergent results applying the same approach to the same contracts calls into serious question both results. That is especially true where, as here, Wierwille did not explain why his valuation was so widely divergent from the one used by Trigon to support its claim initially. Indeed, absent such an explanation, there is justification for rejecting both valuations.

However, that disparity and the previously explained deviations from the valuation obtained by applying the income approach to other similarly situated Blue Cross/Blue Shield plans demonstrates quite clearly that valuation results will only be reliable if the inputs are accurate. Hence, the lifing and income stream components, as well as any other adjustments included or omitted from the calculus, must be closely scrutinized, because any deviation will multiply the inaccuracy of the final result. It is thus necessary now to evaluate the several inputs to the income valuation approach that are in significant dispute here.

c. The Inputs Used By Wierwille Were Unreliable

Reviewing the facts that are the basis of the lifing analysis, the future cash flow calculations, the discounting adjustments, and the other figures important to the accurate and reliable calculation of the fair market value of the subscriber contracts under the approach used by Wierwille, the Court, for reasons outlined below, finds, as matters of fact, that Wierwille used inputs

that consistently inflated the purported value and life of Trigon's contracts[29] and that the valuation on which Trigon relies is unreliable and inadequate to carry its burden of proof.

(i) Wierwille's Lifing Analysis Is Overstated

Wierwille's lifing analysis, the purpose of which was to determine how long Trigon's contracts could be expected to generate income, was the starting point for his valuation. Evaluating the lifing analysis, it is clear that the analysis fails to provide accurate and reliable proof of the average remaining lives of a specific and reliable number of contracts.

(1) Wierwille Relied on Incomplete or Unverifiable Data

In conducting this analysis, Wierwille predicted future attrition by looking at historical attrition rates. Wierwille Tr. (11/14/01) 643:13–17. He relied on contract cancellation data provided to him by Trigon for the years 1984–1986, Wierwille Tr. (11/14/01) 639:23–640:3. As explained previously, the data was confirmed only for the Richmond Plan's subscriber contracts and even that was questionable, but it was not confirmed at all for the Roanoke Plan's contracts. Wierwille Tr. (11/14/01) 640:4–10. With no supportable lifing data for the Roanoke Plan's contracts, there is significant doubt as to the accuracy of the lifing analysis, to the extent it relates to that plan's contracts and thus to the analysis as a whole.

(2) The Attrition Rates Were Skewed As A Result Of The Interplan Competition

Given that the interplan competition lasted from July 1983 until November 1985, much, if not all of the three year period relied on by Wierwille was influenced by the interplan competition. The intensity of the competition was so great that the commercial health insurers operating in Virginia stopped marketing in the geographic regions covered by the plans during this period. Davis Tr. (11/12/01) 175:2–12; Cothran Tr. (11/12/01) 232:22–233:21. Furthermore, the Richmond and Roanoke plans' aggressive pricing strategies and the corresponding absence of competition from commercial insurers caused enrollment for both plans to grow during the period from 1982 to 1985. Joint Exh. 2 at TR01092306.[30] Given these facts, it is logical to conclude that the effect of the interplan competition led to understated attrition because the lower premiums offered by Trigon during this period acted as an incentive for subscribers not to terminate a contract with Trigon. With skewed contract lifing, the value of the contracts were ultimately overstated.

(3) Wierwille Failed To Consider The New Competitive Atmosphere

Although Trigon determined that the Roanoke Plan, following the interplan competition, was experiencing higher attrition than the Richmond Plan (Plaintiff's Exh. 42 at TR46012014), Wierwille could not recall if he was aware of this fact and neither his report nor his testimony indicate that he was aware of it. Wierwille Tr. (11/14/01) 640:16–22. However, some documents on which Wierwille relied actually predicted declining enrollment because of the re-entry of commercial carriers and the change in the health care industry. Joint Exh. 1; Plaintiff's Exh. 32. The fact that Wierwille either ignored or overlooked the expert predictions of management about significant enrollment decline calls his attrition analysis into serious question.

(a) Background Information

This point requires further amplification. First, the record shows that, in February, 1986, Trigon's consultants reported that "CHI and other Blues will face increasing margin pressures as provider-based systems start price wars; these wars will be protracted, and will likely result in the demise of some Blue plans." Defense Exh. 18 at TR22330187. Second, the December 18, 1986, Three Year Financial Plan for CHI expressly warns that "[p]rotracted price wars are increasingly likely as competitors

[29] Both Dr. Feldstein and Dr. Foster concluded that Wierwille had used unreliable inputs. Feldstein Tr. (11/19/01) 1355:7–1359:15 and 1375:20–1376:17; Foster Tr. (11/16/01) 133:23–1236:21.

[30] TR01092306 states that "[t]otal enrollment grew from 1982 to 1985 due to aggressive pricing strategies."

jockey to capture market share.'' Joint Exh. 2 at TR01092303. Third, Trigon's 1987 Business Plan states ''[m]any carriers, traditional and ADS, are using aggressive rating tactics, substantially underpricing products which match our benefits, limiting our ability to attract new business and retain current business. Most of our business losses have been because of rates.'' Plaintiff's Exh. 32 at TR01041080.

After the interplan competition ended, the merged company was concerned that, if it raised premiums abruptly, it would experience a significant loss of insured groups. Cothran Tr. (11/12/01) 226:22–228:4. Trigon accordingly developed a plan to gradually raise premiums over a three year period, beginning in 1986. Id. However, Trigon anticipated that commercial carriers would renew active marketing within Virginia as a result of its higher premiums. Cothran Tr. (11/12/01) 241:6–242:13; Joint Exh. 1 at TR01090826 (''[r]ate discounts initiated during the interplan competition continue to adversely impact underwriting results. The recovery of these discounts is slowed by the increased competitiveness of commercial insurers as well as by competition from Alternative Delivery Systems.''), Joint Exh. 7 at TR22440085 (''[t]he Plans' ability to restore pricing to the general competitive level will be constrained by competition and customers' level of tolerance for price increases.''). Trigon expected that its commercial competitors would attempt to increase their market share by selling health insurance below their actual cost. Cothran Tr. (11/12/01) 239:15–240:5; Defense Exh. 9 at TR22330320 (stating that under the ''most likely'' scenario ''Pricing, however, is aggressive as new competitors attempt to buy market share.'').

In addition to the return of old competitors who had sat out the interplan competition, Trigon was expecting competition from insurers new to the market. Cothran Tr. (11/12/01) 231:25–232:16; Joint Exh. 6 at TR01091261. As explained in Plaintiff's Exhibit 32 (Trigon's 1987 Business Plan) at TR01041079:

> Competition in Virginia is representative of the rapid changes taking place in the health care industry nationwide. There is a surge of activity by traditional competitors and an influx of new and innovative competitors. Commercial carriers, alternative delivery systems and hospital/insurance company alliances are all aiming at our traditional market. The field is constantly changing with the introduction of new competitors and new products.

Trigon expected that it would have to continue its premium discounts in response to this new competition. Cothran Tr. (11/12/01) 241:3–17. In March of 1986, Cothran wrote to the board of directors of CHI regarding Trigon's effort to recover from the interplan competition that ''offsetting this margin improvement will be the rate discounts required to compete against the Plan's new competitors.'' Defense Exh. 9 at TR22330321. Trigon also expected that increasing competition would cause the health insurance market to become fragmented and that the changes taking place in the industry would accelerate. Joint Exh. 6 at TR01091260–61 (''The next three-year period is projected to be one when we will see a continuation and in fact an acceleration of many of the changes which have begun in the last two years in the fundamental structure of health care delivery.'' . . . . ''The market is expected to become increasingly competitive and fragmented with the large for profit providers of care being a greater competitive factor, commercial insurers increasing their emphasis on the health market . . . . '').

(b) Effect Of Competition On The Wierwille Lifing Analysis

The lifing analysis is made without factoring in the undisputed fact that, for other reasons, the competitive environment was abnormal. For example, Trigon's executives consistently testified that commercial health insurers sat ''on the sidelines'' during the interplan competition. Although Wierwille was aware of this fact, Wierwille Tr. (11/14/01) 649:25–650:21, the data on which Wierwille relied did not

reflect the impact of the absence of competition with commercial carriers, nor did Wierwille adjust the lifing analysis to account for the aberrational market in existence when he determined the expected life of the subscriber contracts. Nor does Wierwille's lifing analysis reflect that Trigon's management expected increased competition with commercial insurers after the interplan competition ended. Wierwille Tr. (11/14/01) 651:19–652:1. Although Wierwille was aware of strong evidence about this obvious factor bearing on contract terminations, he did not adjust his attrition analysis to reflect the effect of that increased competition. Id.

(4) Monumental Changes In The Health Care Industry Should Have Been Considered

(a) Background Facts

By January 1, 1987, the health care insurance industry was undergoing fundamental changes in the way in which it provided coverage. Cothran Tr. (11/12/01) 231:22–24. Trigon's management viewed it as a ''chaotic'' time. Cothran Tr. (11/12/01) 231:15–21. A February 12, 1986, presentation to Trigon's board of directors by its consultants, Booz, Allen & Hamilton, stated:

> The health care environment is undergoing a revolution. Payers (governments and employers) have been staggered by the accelerating spiral of health benefits costs-and have finally reacted by imposing a series of measures which effectively slash utilization.

Defense Exh. 18 at TR22330187.

The cost of medical care during the early 1980's had been escalating rapidly, forcing a corresponding increase in health insurance premiums. Palmer Tr. (11/15/01) 973:17–974:7; Joint Exh. 2 at TR01092305 (''[m]edical care costs continue to outpace the increase in the overall rate of inflation as measured by the CPI or the GNP Implicit Price Deflator. This trend is expected to be exacerbated during the 1987–89 forecast period as medical care costs are fueled by general inflationary increases ....''). Less expensive managed care products were increasingly replacing the comprehensive policies traditionally offered by Blue Cross Blue Shield plans. Feldstein Tr. (11/19/01) 1335:18–1336:17. Managed care products relied on deductibles, employee cost sharing, restricted choice in physicians and hospitals, and utilization review to keep premiums low. Feldstein Tr. 1336:22–1337:11. Specifically, managed care health insurance products involving Preferred Provider Organizations (''PPOs'') and Health Maintenance Organizations (''HMOs'') were becoming increasingly popular. Trigon predicted a ''steady shift'' of consumers away from its traditional products to newer managed care products. Joint Exh. 6 at TR01091262 (''[w]e expect over the next three years our mix of business will change from today's eighty-four percent traditional full service product level to a mix of thirty percent full service and seventy percent copay, KeyCare, or HMO products.'').

Blue Cross/Blue Shield plans, including Trigon, lagged behind commercial health insurance companies in offering these new managed care products. Feldstein Tr. (11/19/01) 1344:21–1345:2. In 1986 and 1987, Trigon did not offer an HMO. Its parent company, CHI, offered an HMO product through a separate corporation. But that product was only offered in limited areas of Virginia. Cothran Tr. (11/12/01) 236:1–23. Trigon was, however, competing against these new products being offered by other insurers. Feldstein Tr. (11/19/01) 1345:3–16.

Cothran testified that she considered the HMO offered by Trigon's parent to be a start-up product. Cothran Tr. (11/12/01) 238:12–14. This fact was echoed in CHI's 1987 Operational Plan. There, the company warned that ''[m]any of the Insurance Group's new products (HMOs, TPA, Flexible Benefits, etc.) are in the development stage and will post near term losses.'' Joint Exh. 4 at TR01091745. Cothran also recognized that, in marketing the new HMO products, Trigon would be unable to use its historic image as a traditional indemnity insurance company. Cothran Tr. (11/12/01) 238:15–20. See also Defense Exh. 9 at

TR22330320 (''CHI will need to build on the traditional image of the Blue Cross company as the community service plan but enhance the image to being the 'full line carrier of health benefits products.' With this new market image will come several critical tests-the attractiveness of the product design, the ability to price against our deep pocket competitors, the ability to control the 'anti-selection' impact inherent in the multi-choice environment, and the ability to service the integrated line of products.'').

The industry shift to managed care raised concerns among Trigon's management regarding ''adverse selection'', i.e., the migration of healthy individuals to lower priced products. Joint Exhibit 1 at TR01090826 states that ''[c]ompetition from Alternative Delivery Systems including dual-choice and multi-choice programs continues to fragment our business by targeting the best risks and creating anti-selection problems in the Plan's traditional product lines.'' Adverse selection results in an unbalanced risk pool. Palmer Tr. (11/15/01) 977:13–978:14. Consolidated Healthcare's 1986 projections explain this result, stating:

> By targeting smaller segments within groups through mandated ''dual choice'' options, HMO's and other Alternative Delivery System plans increase the risk characteristics of the Plan's subscriber base by attracting the younger, healthier individuals. This in essence destroys the concept of group insurance by segregating the risks in a group between two or more carriers or medical plans. This phenomenon of anti-selection will be one of the primary forces to be managed and controlled during the forecast period.

Joint Exh. 2 at TR01092312. Likewise, Joint Exhibit 2 at TR01092312 states that:

> Anti-selection occurs because the Plans have traditionally offered the highest benefit levels of any carrier (Full Service Benefits) with generally free choice of providers. This benefit level and this freedom of choice are most likely to appeal to those individuals with ongoing medical problems and to older subscribers with established physician relationships. Thus, given an option, the chronically ill and the elderly would be expected to retain their traditional Blue Cross and Blue Shield coverage. This gives rise to anti-selection and results in even higher future costs and future trend levels.

See also Joint Exh. 4 at TR01091074 (''The tendency of young, healthy subscribers to participate in these alternative delivery systems creates adverse selection and makes increasingly difficult our traditional role as the community service carrier and insurer of last resort.'').

Trigon anticipated that anti-selection would erode the profitability of its contracts. Feldstein Tr. (11/19/01) 1352:14–1353:6. See also Joint Exh. 2 at TR01092312 (''This gives rise to anti-selection, and results in even higher future costs and future trend levels'').

(b) Effect Of Changes In Industry On Valuation

While performing his lifing analysis, Wierwille knew that Trigon's management expected its insureds to migrate from its traditional indemnity products to new managed health care products. Wierwille Tr. (11/14/01) 672:24–673:5. That, of course, reflected the then-changing face of the health care insurance industry, but Wierwille did not take that into account in his lifing analysis. For instance, new managed care products were being offered by CHI, a Trigon-related company which was not part of the Blue Cross/Blue Shield plan. Wierwille Tr. (11/14/01) 673:10–16. Although Wierwille's mission was to determine the value of the contracts to a Blue Cross/Blue Shield plan, he did not consider it a termination if an insured group left such a plan to contract for managed care products offered by CHI. Wierwille Tr. (11/14/01) 673:17–674:3. ''To the extent that there were cancellations, not cancellations, but migration of entire groups from traditional insurance to the HMO or TPA during the period '84 through '86, I did not consider those to be terminations.'' Wierwille Tr. (11/14/01) 676:16–20.

Again, Wierwille did not adjust his attrition rate to reflect the expected migration away from Trigon. Wierwille Tr. (11/14/01) 673:6–9. That, of course, casts further doubt on the reliability of the lifing analysis.

(5) Bottom Line Results Of The Lifing Analysis Are Dubious

To begin, there is some confusion, and important confusion at that, as to what the results of the lifing analysis actually reflect. In Trigon's case-in-chief, Wierwille testified that, and Plaintiff's Exhibit 282 includes information that indicates that. on January 1, 1987, Trigon's contracts had average remaining lives of 12 to 14 years depending on the line of business. Plaintiff's Exh. 282 at Tab IV.1; Wierwille Tr. (11/14/01) 653:21–655:21. There he specifically interpreted the exhibit as showing "average remaining life." Wierwille Tr. (11/14/01) 653:21–655:21. For example, he testified concerning the exhibit:

> Q. And a contract that had a one year life in that group had an average remaining life in its first year of 14 years; is that correct?
>
> A. That's what it shows.
>
> Q. And then a contract that had lasted 14 years still had, or at that point had a 26 year remaining life, is that what you are showing?
>
> A. That's right.
>
> . . . .
>
> Q. And then under the community rated you have what is that, a one year old contract has a average remaining life of 13 years?
>
> A. Yes.
>
> Q. And then that runs pretty consistent, it dips down, winds its way around to about 14 years eventually?
>
> A. Right.
>
> Q. And then your small business contracts, they also have--well, they have a 12 year. A one year old contract in small business has a average remaining life of 12 years?
>
> A. Right.

Wierwille Tr. (11/14/01) 654:18–655:21.

During his rebuttal testimony, Wierwille made a signficant turnabout, asserting for the first time that Plaintiff's Exhibit 282 at IV.1 incorrectly stated that it reflected average "remaining" life. Wierwille Tr. (11/20/01) 1623:10–1624:6. He claimed, instead, that the exhibit actually showed "total life" and that he had known that the exhibit was in error for "some time" but did not notify the United States. Id. Wierwille then asserted that the average remaining life that he calculated actually was roughly six years. Wierwille Tr. (11/20/01) 1622:25–1623:9. This is inconsistent with his report and with his description of the exhibit during Trigon's case-in-chief. The Court does not credit Wierwille's revisionist testimony.

Wholly apart from the fact that Wierwille gave conflicting testimony about his own lifing analysis, there remains the fact that Wierwille's figures are significantly at odds with the testimony of Carl Slone, Trigon's Vice-President of Sales throughout the relevant period. Slone, whose job was to know these facts, testified that, depending on the size of the contracts, Trigon would keep accounts for two to three years. Slone Tr. (11/13/01) 318:20–319:1. Although Slone acknowledged that the best source for information on contract life would be the company's records (which is allegedly what Wierwille relied on), Slone Tr. (11/13/01) 319:17–23, those records, as explained previously, are of doubtful provenance.

In estimating Trigon's attrition rates, an expert for the United States, Dr. Paul Feldstein, took Trigon's management's own projections, which indicated attrition at a minus 5.5 percent, and took the difference between that projection and the 2 percent increase in attrition used by Wierwille, resulting in a 7.5 percent differential. Dr. Feldstein added the 7.5 percent to Wierwille's attrition rates. Feldstein Tr. (11/19/01) 1373:10–24.

Dr. Feldstein opined that it was unreasonable for Wierwille not to anticipate

higher attrition rates after January 1, 1987. According to Dr. Feldstein, Wierwille assumed that the removal of competitive discounts would have no affect on attrition, which is contrary to the fact that the subscribers were acutely price sensitive. Feldstein Tr. (11/19/01) 1375:20–1376:3. He added that Wierwille did this in spite of Trigon's own forecasts of lower enrollment in following years and when Trigon's own strategic plan discussed adverse selection, increased competition and many of the other factors indicating that enrollment would be down and attrition would be higher. Feldstein Tr. (11/19/01) 1376:2–9; Joint Exh. 1 at TR01090826. The record as a whole, including the contemporaneously recorded views of Trigon's management confirm that Dr. Feldstein was correct.

In sum, the lifing analysis is a vital component of a valuation under the income approach and the lifing analysis here is unreliable. It proceeds from questionable data respecting the identity and number of contracts and was made without consideration of many factors unique to these contracts that are highly pertinent to assessing their remaining life. And, the analysis is at odds with the testimony of the Trigon executive whose every day responsibility it was to know the duration of the company's contracts. Furthermore, it is evident from Dr. Feldstein's testimony and from Trigon's own documents that Wierwille did not credit the forecasts of Trigon, nor did he heed the admonition that the "Plan faces the most challenging era in its history." Joint Exh. 1 at TR01090826. On the facts of this record, this critical component of the determination of fair market value must be found wanting. Therefore, the Court finds, as a matter of fact, that the errors with the lifing analysis make Wierwille's valuation inaccurate and unreliable.

d. Wierwille's Profit Margins And Estimated Future Incomes Were Not Reliable

The second input on which Wierwille relied in his valuation was the income stream that Trigon's subscriber contracts would earn over their remaining life. As Wierwille was aware, profit margins in the health care industry were typically low and, reflective of that circumstance, Trigon's historical profit margins over the fifteen years prior to the valuation date had a weighted average of less than one percent. Wierwille Tr. (11/14/01) 698:2–699:13; see also Davis Tr. (11/12/01) 189: 14–19 (when asked whether the health insurance industry was historically a low margin industry, Davis replied that "It typically runs in the 1 to 2 percent--range of 1 to 2 percent"). In projecting the income stream, Wierwille used profit margins of 2.46% for 1987, 2.37% for 1988, 3.01% for 1989, 3.17% for 1990, 3.90% for 1991 and 4.97% for 1992. See Defense Exh. 103 at TR46012290–91. After 1992, Wierwille used a weighted average of 5.4%.

Wierwille's justification for using, in his valuation, these very high average profit margins that far exceeded the industry average and Trigon's historical experience, was that "[p]rofit margins in the past are not necessarily going to be predictive of the future if the facts have changed." Wierwille Tr. (11/14/01) 711:20–712:20. That explanation simply does not square with the record and is thus not credible.

First, Wierwille's explanation ignores the fact that the industry in which Trigon operated was a low margin industry. To use two to five fold increases in profit in valuing a company in that industry would require strong justification to be credible. Wierwille offered no such justification.

Second, Wierwille's explanation depends upon a change of facts that would support a substantial increase in profits. In the critical time period, Trigon was confronting changes in the facts that had kept its profitability at less than one per cent. But, the changes were harbingers of worse, not better, times to come.

This is illustrated by the two internal Trigon documents that Wierwille used as a starting point for his underwriting profit projections and that were the official views of Trigon's management in late 1986 about the company's future for the next three years, 1987 through 1989. The first was a memorandum dated August 25, 1987, which included a three-year financial fore-

cast approved by Trigon's board on December 18, 1986. See Plaintiff's Exh. 32 (Trigon's 1987 Business Plan) at TR01041118–1123. The other was a three-year financial forecast dated December 18, 1986. See Joint Exh. 1; Trigon's Opening Post-Trial Brief, at 31–32; Wierwille Tr. (11/13/01) 535:2–536:2; Wierwille Tr. (11/14/01) 697:4–9. It is difficult to discern how those documents permit a credible forecast of increased underwriting profit margins of two to five times the company's previous long term experience.

The document entitled "BLUE CROSS AND BLUE SHIELD OF VIRGINIA THREE YEAR FINANCIAL FORECAST AND 1987 EXPENDITURE REQUESTS," dated December 18, 1986, is instructive. Joint Exh. 1. It begins by describing the plan's environment, articulating that the plan is in the "most challenging era in its history." It recognizes that, in the words of the familiar folk song "the times, they are a-changin'"[31] in the health care industry generally, and particularly in Virginia in the coming three years. It then identifies serious new competitive threats from commercial insurers and alternate health-care delivery systems. It continues the litany of difficulty by forecasting significant increases in medical costs. It explicitly predicts continued adverse impacts from rate discounts in the interplan competition. And, it forecasts declining enrollment for the three year period.

The second document reflects a three year financial forecast as approved by Trigon's board of directors. Plaintiff's Exh. 32 (Trigon's 1987 Business Plan). It sounds the same themes as appeared in the December forecast. In perspective of this difficult, threatening and changing environment, Trigon's management predicted an underwriting loss of $4.9 million in 1987 and underwriting profits of $9.7 million and $43.8 million in 1988 and 1989 respectively. In contrast, Wierwille forecasted a profit of $33.9 million in 1987, $36 million in 1988 and $50.8 million in 1989.[32]

Wierwille says that he achieved this result by assuming that the projections made by management were correct (Wierwille (11/14/01) 713:4–25), and by adding to those figures the premium discounts that had been given during the interplan competition. Wierwille Tr. (11/14/01) 700:22–23. For 1986, this meant $53 million was added to Trigon's revenues. Wierwille Tr. (11/14/01) 701:21–25. For 1987, Wierwille added $39 million to Trigon's projected revenues and in 1988 he added $27 million. Wierwille Tr. (11/14/01) 702:5–9. See Plaintiff's Exh 32 (Trigon's 1987 Business Plan) at TR01041119.

Thus, in 1987, management had forecast a loss of $4.9 million but, with the addback of $39 million, Wierwille forecast a profit of 2.46% of the projected premiums or approximately $34 million. In 1988, management forecast a profit of $9.7 million, and Wierwille added back $27 million, forecasting a profit of 2.37% of the projected premiums or approximately $36 million. Finally, though Plaintiff's Exhibit 32 clearly states that the premium discounts resulting from the interplan competition would be zero in 1989,[33] it appears that Wierwille added the $7.25 million projected premium discount for that year onto the $43.8 million projected management forecast to come up with the profit forecast of 3.01% of the projected premiums or approximately $51 million. Suffice it to say, Wierwille's projections are significantly at odds with Trigon's own projections and are not at all reflective of the difficult competitive situation extant at the valuation date.

(i) Premium Discounts Should Not Have Been Added Back

Addbacks of the premium discounts was done notwithstanding that, at the valuation

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[31] See Bob Dylan "The Times They Are A-Changin'" (Album Released: Feb 10, 1964).

[32] Wierwille utilized percentages of projected premiums for his underwriting profit margins. Thus, the dollar figures above are converted from his percentages using Trigon's total projected premiums of $1,376.4 million, $1,522.1 million and $1,688 million in 1987, 1988 and 1989 respectively. See Plaintiff's Exh. 32 at TR01041123 and Defense Exh. 103 at TR46012290 (the Wierwille Report). These projected premiums were approved by Trigon's Board of Directors on December 18, 1986.

[33] Plaintiff's Exh. 32 at TR01041119 under the heading "COMPETITIVE DISCOUNTS". Wierwille stated that he added back the amount of premium discounts attributable to the interplan competition. Wierwille Tr. (11/14/01) 700:22–23.

date, management was forecasting both continued adverse effects (at least for three years following the interplan competition, 1986–1988) of the discounts given during the interplan competition and a significant increase in price competition from commercial insurers and alternate delivery systems. Dr. Feldstein explained that premium discounts should not have been added back because management had made a forecast based on the most likely scenario of what their underwriting profit margins would be and took into consideration in their forecasts the phasing out of the competitive discounts. Feldstein Tr. (11/19/01) 1355:7–1356:1. Dr. Feldstein's testimony on that point is entirely credible, while Wierwille's approach is utterly inconsistent with management's own expert view of the future.

Moreover, at least for 1987 (and longer for contracts of more than a year's duration), a prospective buyer would be bound by the premium discount that Wierwille added back. That simply defies logic because a buyer could never assume such a scenario. And, for 1987 and 1988, and perhaps 1989, the buyer could not significantly raise premiums because of competition and because the state and local governments pressured Trigon not to in-crease the premiums drastically back to normalize rates. Davis Tr. (11/12/01) 163:5–165:1.

Wierwille simply ignored these facts, just as he ignored the facts of the ad-versely changing environment that did not bode well for increasing profitability in the valuation period. As a result, Wierwille's profit projections are neither credible nor reliable.

(ii) Feldstein's Projections Are Commensurate With Past Profit Margins

Dr. Feldstein performed an underwriting profit margin projection based on the forecasts Wierwille relied upon, but he did not add back the competitive discounts and he accounted for the traditional fluctuation of the underwriting cycle, a phenomenon affecting the health care industry but ignored by Wierwille.[34] Feldstein Tr. (11/19/01) 1357:4–1359:15; Defense Exh. 86. Dr. Feldstein's projected underwriting profit margin was less than one percent on average for the 15 year period before January 1, 1987. Feldstein Tr. (11/19/01) 1347:22–1348:9. That forecast was consistent with the industry's long term profit picture, with Trigon's own long term profit results and with the rather dismal view of the three year future reflected in the views expressed by Trigon's management, as approved by its Board. All of these factors further corroborate that Wierwille's profit margins are overstated and unreliable.

(iii) The Addbacks Were Overstated

Additionally, assuming arguendo that the addbacks were proper, the United States correctly argues that the amounts of the so-called ''addbacks'' are overstated. Joint Exhibit 29 is a report prepared by Trigon's consultants related to the consolidation of the Richmond and Roanoke plans. The consultants reported:

> Since the start of competition between BCBS-SWVA (since July 1983), BCBS-VA has experienced a gap of approximately $50–60 million between formula-derived prices and actual prices. This probably overstates the actual ''marketplace cost'' of the competition to date. More realistically, the marketplace cost of the competition should be

[34] The record shows that profits of health insurance companies are subject to an industry-wide phenomenon known as the ''underwriting cycle''. It is a cyclical pattern of several years of positive underwriting profits followed by several years of underwriting losses. Perkins Tr. (11/12/01) 94:22–95:2. The underwriting cycle typically lasts six years-three years of gains followed by three years of losses. The underwriting cycle for any given company, however, can run longer than six years. White Tr. (11/13/01) 337:1–10. When Trigon began to focus resources on the underwriting cycle, its goal was not to erase it but simply to avoid the loss years. Cothran Tr. (11/12/01) 255:13–256:3; White Tr. (11/13/01) 337:11–21. The underwriting cycle continues to affect the profitability of health insurance carriers, including Trigon. Wood Tr. (11/15/01) 853:18–854:2. Wierwille assumed that the underwriting cycle would be managed in the future. Wierwille testified that he assumed that the underwriting cycle would continue to affect Trigon's profits after January 1, 1987, but he believed that, after averaging out the ups and downs, Trigon would be left with his projected profit margin of 5.4 percent. Wierwille Tr. (11/14/01) 709:7 711:17. Accordingly, he projected that profit margin forward from 1991. Wierwille Tr. (11/14/01) 708:20–711:18. At trial, Cothran made clear that she recognized the existence of the cycle in the early 1980s, and began taking steps to address it then. Cothran Tr. (11/12/01) 253:19–254:1. Those efforts were complicated by the Richmond-Roanoke competition. Cothran Tr. (11/12/01) 254:2–255:3. Wierwille's assumptions regarding the underwriting cycle are not consistent with the evidence indicating that, through the 1980s, Trigon recognized that its underwriting results were being affected by the cycle. See, e.g., Plaintiff's Exh. 51 at TR02040210–211.

> determined by the difference between actual prices and the "general competitive level" that would have existed without inter-plan competition. It would be difficult to reconstruct with precision a hypothetical general competitive level, and then calculate an accurate cost of the competition for BCBS-VA. However, it is realistic to believe that at least one-third of the shortfall, or at least $20 million, is related to inter-plan competition.

TR22440084 (emphasis supplied; footnote omitted).

The United States argues that Joint Exhibit 29 recognizes that competitive discounts are part of the normal competitive environment. Adding the full amount of the "gap" recorded by Trigon between the formula-driven prices and the actual prices served to inflate its expected revenues. Further, the United States argues, Wierwille should have made, but did not make, some allowance for competitive discounts in the future. It must be noted that the report is limited to a discussion of the impact of competitive discounts on the Richmond plan, and does not quantify the impact on the combined company. Furthermore, Trigon argues that Wierwille did not rely on the consultant's report for his competitive discount information, but rather, he relied on Joint Exhibit 1. See Post-Trial Reply, at 21.

According to Trigon, Joint Exhibit 1 makes clear that the competitive discount numbers it gives are projections of the lingering impact (going forward from December 1986) of Richmond-Roanoke competitive discounts, that they are combined company numbers, and that they are wholly attributable to the interplan competition and not other "general" competitive pressures. See Plaintiff's Post-Trial Reply Brief, at 21 (citing Joint Exh. 1). The Court does not interpret the document in this manner. Joint Exhibit 1 states explicitly:

> In all three scenarios[, the most likely case, the best case and the worst case,] rate discounts initiated during the Richmond-Roanoke competition are being phased out over three renewal years and continue to depress the underwriting results. These discounts are expected to peak at $52 million (4.0% of premium) in 1986, before declining to $30 million (2.2%) in 1987 and $13 million (0.7%) in 1988.

Id. The forecasts do not state or infer that the discounts are wholly attributable to the interplan competition, exclusive of other general competitive pressures. Thus, adding back the entire "gap" between formula-driven prices and the actual prices still inflates expected revenues. Plaintiff's Exhibit 32 (Trigon's 1987 Business Plan) at TR01041119, the other document Wierwille allegedly relied on in making his projections, also suffers from the same problems as the two documents cited above. It appears that Wierwille actually relied on Plaintiff's Exhibit 32 instead of Joint Exhibit 1.

On top of all of the problems respecting the premium discounts, Joint Exhibit 1 and Plaintiff's Exhibit 32 are inconsistent in the calculation of discounts for the years at issue. The premium discount for 1986 in Plaintiff's Exhibit 32 was $53 million instead of the $52 million figure in the projections of Joint Exhibit 1, $39 million in 1987 instead of the $30 million from the projections in Joint Exhibit 1, and $27 million in 1988 instead of $13 million. The projections are widely varied. It is apparent to the Court that all of the referenced documents suffer from the same problem, namely, the figures are not projections of discounts granted exclusively because of the interplan competition without regard to any normal level of competition. For instance, in Plaintiff's Exhibit 32 (Trigon's 1987 Business Plan) at TR01041119, the projected discounts continued in 1989 and 1990 and in the paragraph above the graph entitled "COMPETITIVE DISCOUNTS" it states: "Discounting done as part of the interplan competition is zero by 1989. Discounts in 1989 and later represent pricing considerations allowed in the sale of [particular health care service plans]." It is clear from the document that Wierwille seemed to have actually relied on (Plain-

tiff's Exhibit 32), that discounts would (1) continue beyond 1988, and (2) that the discounts other than those associated with the interplan competition were in existence and should have been, but were not, considered by Wierwille.

Furthermore, the text of the documents relied on by Wierwille do not make projections beyond 1990, nor do they establish the conclusion that profit will be at 5.4 percent from 1992 on, the level forecast by Wierwille. Wierwille (11/14/01) 714:9–18. For 1990 and beyond, Wierwille assumed that Trigon would grow and, solely as a result of that growth, its profit margins would increase because it was assumed that premiums would grow faster than administrative costs. Wierwille Tr. (11/14/01) 706:17–707:1 and 707:16–708:19. He then assumed that Trigon would reach a stabilized profit margin for all of its lines of business averaging 5.4 percent. Id.

The record here establishes that premium discounts of varying magnitude were part of the heath care industry's business reality at the time of the valuation and were expected to continue. Legal obligations, competitive factors, a drastically evolving industry and state government pressure made it virtually impossible to justify adding back the premium discounts and certainly not to the amount that Wierwille restored to premium income to get his profit margins.

(iv) Price Sensitivity And Other Final Considerations

Because of the interplan competition, Trigon's customer base had become extremely price sensitive. Because of the ongoing escalation in health care costs, it was expected that customers' price sensitivity would become even more acute. Discussing health insurance as of January 1, 1987, Dr. Paul Feldstein testified that "it was very price sensitive because a lot of times you could not tell much difference between health plans other than price .... So price sensitivity is very high particularly when the consumer or the employee has an incentive to chose." Feldstein Tr. (11/19/01) 1350:10–18.

Trigon's executives echoed these concerns at trial. Carl Slone, Trigon's vice-president of sales in 1987, testified that price was a major reason why groups discontinued their relationship with Trigon. Slone Tr. (11/13/01) 281:25–282:5 and 313:19–21. He further testified that small business groups are very volatile regarding price. Slone Tr. (11/13/01) 313:22-4. Price is the primary reason why they discontinue their relationships with Trigon. Slone Tr. (11/13/01) 313:25–314:2. See also Slone Tr. 304:13–19 (The small business market is "very, very price sensitive").[35]

Cothran testified that, when she wrote to Consolidated Healthcare's Board of Directors in 1985, she expected a greater price sensitivity by insureds. Cothran Tr. (11/12/01) 232:17–21; Joint Exh. 6. She still held this view in 1986 when she wrote another letter to the Board. Cothran Tr. (11/12/01) 234:23–235:10; Defense Exh. 9 at TR22330319.[36] Reflecting her concern over price sensitivity, Cothran wrote that, "this shift [to managed care] will be primarily driven by the out-of-pocket cost or the size of the monthly contribution which must be borne by employees for their health plans." Defense Exh. 9 at TR22330319. Because of the price sensitivity, Trigon could not have increased its premiums quickly without significant attrition.

As discussed in the analysis of Wierwille's lifing computations, Trigon was also confronted with the transition to managed care led by HMOs. The move to managed care was expected to create anti-selection, increasing the risk and costs associated with its traditional contracts because the healthier individuals would mi-

35 Small business contracts accounted for the majority of Trigon's business. Wierwille's valuation schedules, set forth in Plaintiff's Exhibit 282, include 290 pages listing small business contracts. Community Rated contracts, i.e., groups with 15 to 50 insureds, was the next largest line of business with 133 pages; Local Experience Rated contracts, i.e., groups with 50 or more insureds, had 33 pages; Local Cost Plus had five pages; Par National had five pages; Control National had two pages; Large Groups-Local Experience Rated had one page; Large Groups-Local Cost Plus had one page; and Large Groups-Control National had one page. See Perkins Tr. (11/12/01) 75:1–76:6 for the size of the groups.

36 The letter states that "[e]xpected is a continuation of--a heavier emphasis on the 'price' of the health benefits product ...." Defense Exh. TR22330319.

grate to the managed care products, leaving less healthy, more costly individu-als in the traditional plans.

Additionally, Trigon was confronting new federal income tax costs and a possible state tax on insurance premiums, from which it previously had been exempt. Trigon's December 18, 1986, projections state that the "[l]oss of Federal Income Tax and possible loss of state premium tax exemptions threaten our historical cost advantage in these areas." Joint Exh. 1 at TR01090826. A February 12, 1986, presentation to CHI's board of directors warned of protracted "price wars" and went on to state that "[t]he problem will be exacerbated with the incipient imposition of Federal income taxes." Defense Exh. 18 at TR22330187.

None of these factors support the rosy profit picture on which Wierwille fastens the income stream projection in his valuation opinion.

e. Conclusion Respecting Valuation Of The Subscriber Contracts

In conclusion, it is quite clear that the methodology used by Wierwille, in concept and properly applied, is capable of identifying a fair market value for the subscriber contracts. However, on this record, the facts foreclose a finding that Trigon has met, by a preponderance of the evidence, its burden to show that the valuation here at issue is accurate and reliable. First, the number of contracts is of questionable validity. Second, Wierwille did not cross-check the valuation figures obtained by using the income approach and the explanation for the failure to have done so was neither credible nor convincing. Third, the results of the income approach have varied widely among the Blue Cross/Blue Shield organizations similarly situated and even between the two valuations made for the particular contracts at issue here, further indicating its potential for unreliability depending on the quality of the valuation inputs. Fourth, because of the questionable data base, the lack of cross-checking and the widely varied results among Blue Cross/Blue Shield organiza-tions and valuation experts, it was of criti-cal, outcome determinative importance that the inputs used to arrive at the valuation were accurate and reliable; and, for the reasons stated above, the critical inputs here--the lifing analysis and the profit pro-jections--simply do not square with the facts of record and thus they cannot be considered accurate or reliable. For the reasons set forth in this Section, the Court finds that Trigon has not met its burden of proving by a preponderance of the evi-dence the reasonably accurate value for the subscriber contracts.

2. Valuation Of The Provider Contracts

When cataloging Trigon's assets in 1987 and 1988, Meyer identified physician and hospital (or facility) provider contracts the company owned on January 1, 1987. At the time, Trigon had two types of physician provider contracts, KeyCare and Participating. See Plaintiff's Exh. 91 (illustrative Participating and KeyCare contracts). A physician might have either one of these contracts or both. The KeyCare contracts owned by Trigon on January 1, 1987, are identified in Plaintiff's Exhibit 72. Stip., p 13. The Participating contracts owned by Trigon on that date are identified in Plaintiff's Exhibit 73. Stip., p 14. As evidence of the physician provider contracts in existence on January 1, 1987, Trigon submitted Plaintiff's Exhibits 72, 73 and 74. A complete list of the physician provider contracts valued by Wierwille is contained in Plaintiff's Exhibit 282, Appendix B.

Trigon also owned provider contracts with hospital providers. Only one of those contracts, the one with Smyth County Hospital, is at issue in this case because that is the only facility that completely severed its contractual relationship with Trigon during the relevant time period. The contract Trigon had with Smyth County Hospital on January 1, 1987, is marked as Plaintiff's Exhibit 92.

Wierwille relied on the "cost approach" to value Trigon's provider contracts.[37] Wierwille Tr. (11/14/01) 571:15–572:5. In doing so, Wierwille attempted to estimate the cost of entering into new contracts with each of the providers in Trigon's network as of January 1, 1987. Id. For the physician contracts, he was provided with estimates of the time it took a Trigon employee to check a physician's credentials, interview the physician and actually enter into a contract. Wierwille Tr. (11/14/01) 571:18–572:10; Defense Exh. 103 at TR46012224 (Wierwille Expert Report at Exhibit VII.2). No other information was used to arrive at the cost of replacing a physician contract. Id. He then considered that figure to be the fair market value of the contract. Id.

For the hospital and facility provider contracts, Wierwille was given the costs associated with obtaining hospital contracts, home health facility contracts and nursing facility contracts, as well as the total numbers of such contracts. See Defense Exh. 103 at TR46012225-6 (Wierwille Expert Report at Exhibit VII.3 and Exhibit VII.4). He also added the Uniform Pre-Payment amount Trigon was required to deposit and obtained the values opined in Defense Exhibit 103.

Dr. Foster pointed out that, as with the subscriber contracts, Wierwille did not use multiple valuation methods to cross-check the results obtained by using the cost method. Foster Tr. (11/16/01) 1249:22–1250:7. According to Dr. Foster, the income approach could have been employed as a cross-checking device. Foster Tr. (11/16/01) 1249:22–1250:7. That view is corroborated by the fact that, in Arthur Andersen's 1988 valuation of the provider contracts, Arthur Andersen utilized the income approach, taking the cost savings of the discounts as the income stream, but the results obtained by Arthur Andersen are of questionable reliability.

Wierwille, however, explained that the cost savings in provider contracts is "passed through" to the customers, so that Trigon does not earn a profit on the provider contracts. Wierwille's explanation is in congruity with common economic sense. However, when the savings are passed onto the customer, the amount of premiums they pay is reduced and therefore Trigon becomes a more attractive option for insurance. There is certainly a benefit to Trigon in attracting customers as a result of lower premiums. Nonetheless, on the facts as respects the provider contracts, their valuation using the income approach was not an endeavor that reasonably could have been undertaken under the circumstances, because the ability to attract customers as a result of lower premiums is too speculative to use as the predicate for assessing income.

Given the overall lack of disagreement by the United States as to the valuation methodology used to value the provider contracts, the fact that all parties appear to concede that fair market value can be determined by this approach, the Court finds that the approach used was proper. However, the data used in establishing the values must be accurate and therefore carefully scrutinized.

Wierwille opines that:

(1) To replace the physician provider contracts Trigon owned on January 1, 1987, Trigon would have incurred salary, benefit, overhead, and other costs. Between January 1, 1987, and December 31, 1995, Trigon lost 3,381 of the physician provider contracts it owned on January 1, 1987. The total fair market value of those contracts on January 1, 1987, as determined by Wierwille, was $207,896.

(2) On January 1, 1987, Trigon had a facility provider contract in place with Smyth County Community Hospital. To replace the Smyth County Community Hospital contract on January 1, 1987, Trigon would have incurred salary, benefit, overhead, and other costs. As of January 1, 1987, to replace the Smyth County Community Hospital contract, Trigon would

[37] There are no known sales of provider contracts separate from sales of entire health insurance companies, either singly or in blocks. In this regard, Trigon acknowledged that it was unlikely that any such sales would occur. Again, as noted earlier, this does not necessarily preclude a determination of fair market value.

have incurred costs of $36,507. Thus, the fair market value of the Smyth County contract was $36,507.

What Wierwille has done here is make an attempt to estimate the cost of entering into new contracts with each of the providers in Trigon's network as of January 1, 1987. Wierwille Tr. (11/14/01) 571:15–572:5. In making this estimate, Wierwille relied entirely on representations from Trigon's management. Wierwille Tr. (11/14/01) 744:8–16; Defense Exh. 103 at TR46012224 n. 1 and TR46012225.n.1 (Wierwille Expert Report at Exhibit VII.2 n. 1 and Exhibit VII.3 n. 1). The information forming the basis of Wierwille's opinion is an estimate by Trigon employees of the time required back on January 1, 1987, as to how long it will take to obtain new contracts. The evidence was not based upon records or other documentation, rather, it was anecdotal:

> THE COURT: Did they have any documents that showed that it took--that what their average was per group and how much time it took them per group to do the job?
>
> [WIERWILLE]: No, this information was communicated by individuals in the provider department based upon their experience.
>
> THE COURT: So it was anecdotal, basically.
>
> [WIERWILLE]: It was.

Wierwille Tr. (11/14/01) 578:14–23. Trigon computed the initial total cost it had incurred in establishing the provider contracts and, in essence, it seems that the only act Wierwille performed was to bless the figures with his name and divide the total cost by the total number of providers. He did not confirm the numbers himself through verifiable documentation. Furthermore, the numbers used were cost estimates for 1987, made by Trigon personnel in the year 2000. Wierwille Tr. (11/14/01) 576:19–577:6. Wierwille did not verify the information that was provided to him (Wierwille Tr. (11/14/01) 744:11–16), nor did he search Trigon's books and records using his keen expertise to discern the actual costs associated with establishing new contracts with physician and facility providers.

Given these fundamental defects, the Court cannot accept Wierwille's valuation of the provider contracts, as tendered, as proof by a preponderance of the evidence that the values are an accurate and reliable measure of the provider contracts' fair market value. The data underlying Wierwille's valuation are unreliable and unverified, thus, while the methodology utilized may be correct, the end result is unacceptable.

G. The Asserted Lack Of Independence Of The Expert Witnesses For The United States And Trigon's Negative Inference Argument

The factual challenge of the United States to the Wierwille valuation is an attack upon the method used by Wierwille and the reliability of certain components that affect application of the method used. These attacks, in part, are based on the testimony of five experts: Dr. Bruce A. Palmer, an expert in financial accounting; Dr. John M. Lacey, an expert in accounting and tax computation; Mr. Michael D. Pugh, an expert in health industry operations; Dr. George Foster, an expert in valuation; and Dr. Paul J. Feldstein, an expert health care economist. For most of the course of this litigation, the work of these experts was directed by Analysis Group/Economics (''AG/E''). The conduct and effect of AG/E's actions and the Court's view thereof are set forth in Trigon Insurance Co. v. United States, 204 F.R.D. 277 (E.D.Va.2001). At the end of that opinion, the Court advised that Trigon might be entitled to certain adverse inferences respecting the testimony of the five experts to be called as witnesses by the United States.

The Court has heard the testimony of those witnesses about their relationship with AG/E and their work in this action, as well the substance of their testimony. And, the Court is fully mindful of the criticism levied in the previous opinion against AG/E. But, having assessed first-hand the credibility of these five witnesses, in perspec-

tive of the record, as a whole, the Court finds, as a matter of fact, that no adverse inference against any of them is appropriate.

Thus, the Court credits the testimony of each of those five witnesses as reflective of their own independent opinions and as reliable, notwithstanding the conduct of AG/E, of which the Court continues to disapprove for the reasons stated in the previous opinion. A principal reason for finding that no adverse inference is called for is that the opinions and criticisms offered by each of these witnesses at trial finds support in parts of the record as to which AG/E had no input. And, all five witnesses offered sound reasons, tethered to the record and consonant with common sense, in support of their views.

Unlike Wierwille, the experts of the United States did not ignore the realities of the environment faced by Trigon at the relevant time. Nor did they offer opinions that could not be squared with the views of Trigon's management. Nor did they change their testimony at trial on any key aspect of the evidence they gave. As described elsewhere in this opinion, all of those defects, and more, are found in the opinion testimony of Wierwille.

CONCLUSION

For the foregoing reasons, Trigon is not entitled to the deductions at issue here for the years 1987 through 1995 and thus and is not entitled to a tax refund from the United States. Hence, judgment shall be entered in favor of the United States.

The Clerk is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

¶2002-5279

UNITED STATES OF AMERICA, APPELLEE v. Irwin E. BLOOM, DEFENDANT-APPELLANT. U.S. Court of Appeals, Second Circuit, (CA2) Docket No. 01-1630, Aug. 15, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—attempted tax evasion—jury instructions—indictments. Taxpayer/CPA's IRC §7201 conviction for attempt to evade tax on commission fees was affirmed: district court's failure to give curative jury instruction wasn't erroneous where instruction wasn't assured or unconditional and taxpayer's attorney had chance to argue underlying point on summation; and evidence supported finding that subject fees were taxable income, not gift and that taxpayer knew of their income character. Also, taxpayer wasn't prejudiced by pre-indictment delay. *Reference:* United States Tax Reporter ¶72,015.06(3); 73,446.514(35); 73,446.503(37). IRC §7201.

Harold J. Ruvoldt, Jr., Edwards & Angell, New York, N.Y. (Jordana Serebrenik and Jeffrey C. Dodson, on the brief), for Appellant.

Patricia A. Pileggi, Assistant United States Attorney for the Eastern District of New York, Brooklyn, N.Y. (Alan Vinegrad, United States Attorney, and Jo Ann M. Navickas, Assistant United States Attorney, on the brief), for Appellee.

United States Court of Appeals, Second Circuit,

Appeal from the United States District Court for the Eastern District of New York (Trager, J.).

Present DENNIS JACOBS, JOSE A. CABRANES, FRED I. PARKER, Circuit Judges.

SUMMARY ORDER

This case was not selected for publication in the Federal Reporter.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Second Circuit Rules § 0.23. (FIND CTA2 § 0.23.)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be AFFIRMED.

[1] Defendant-Appellant Irwin Bloom appeals from a judgment, entered in the United States District Court for the Eastern District of New York (Trager, J.), convicting him, following a jury trial, on two counts of attempted income tax evasion, in violation of 26 U.S.C. § 7201. On appeal, Bloom argues that the district court erred in (1) failing to issue a promised curative jury instruction; (2) permitting the government to introduce allegedly irrelevant and prejudicial evidence and barring Bloom from introducing alleged rebuttal evidence; and (3) failing to dismiss the indictment by reason of the government's five-year delay in bringing an indictment.

As to the promised jury instruction, Bloom's argument is not supported by the record. The curative jury instruction at issue was neither assured nor unconditional. After summations, the district court ruled that the curative jury instruction was unnecessary. Moreover, Bloom cannot show that he was substantially misled in formulating his argument or otherwise prejudiced by the failure of the district court to give the instruction. United States v. Crozier, 987 F.2d 893, 900 [71 AFTR 2d 93-1099] (2d Cir.1993) (citations omitted). Bloom's lawyer alluded to the instruction in summation, but he proceeded to argue at length about the very point expressed in the instruction. Bloom did not rely on the district court to make this point; his lawyer argued it exhaustively in summation.

As to the evidentiary rulings: even if Bloom prevailed on all the evidentiary rulings that he challenges on appeal, there was ample evidence to support the verdict that the commission fees at issue were taxable income, not a gift, and that Bloom (a C.P.A.) knew this. The evidence at issue on appeal was "unimportant in relation to everything else the jury considered on the issue in question." See United States v. Germosen, 139 F.3d 120, 127 (2nd Cir.1998) (citations omitted). Any error allegedly committed by the district court was therefore harmless.

Finally, as to the pre-indictment delay, Bloom can demonstrate neither actual prejudice nor intentional tactical delay in obtaining the indictment-the showing necessary for him to prevail. See United States v. Cornielle, 171 F.3d 748, 752 (2d Cir.1999).

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

¶2002-5280

In re: Douglas D. DUVALL, Linda G. Duvall, Linda Flanery, Patrick Dale James, Danielle Darleen James, Richard Yeaman Justice, Deborah Renae Justice, Gary Wayne Rainey, Tasha Michelle Rainey, Mary Ann Smith, Valerie Brooks, Kimberly Joy Moorman, Penny E. Morgan, Micole R. Shabazz, Jenny Allen, Debtors. U.S. Bankruptcy Court, Western Dist. of Kentucky, (Bktcy Ct KY) Nos. 02-40234; 02-40053; 02-30510; 02-40086; 02-40055; 02-30850; 02-40178; 01-37622; 02-30511; 01-35535; 02-30126, Aug. 9, 2002. Decision against Taxpayers.

1. Tax claims in bankruptcy—exemptions—earned income credits (EIC)—"public assistance." Trustees' objections to debtors' claimed exemption of portion of their refunds attributable to EIC as public assistance under Kentucky law were sustained: Supreme Court precedent showed EIC was refunded tax overpayment, not public assistance grant; prior bankruptcy case law holding that EIC constituted money grant for "needy children" wasn't followed; and 6th Cir. precedent showed that EIC was property of estate. *Reference:* United States Tax Reporter ¶68,726.52(32). IRC §32.

United States Bankruptcy Court, W.D. Kentucky,

MEMORANDUM-OPINION

STOSBERG, Bankruptcy J.

[1] Several cases[1] are before the Court on the question of whether a debtor, who is entitled to an Earned Income Tax Credit (''EIC''), may exempt this portion of his or her tax refund under K.R.S. s 205.220(3).

The EIC is codified at 26 U.S.C. § 32, providing certain low income taxpayers with a refundable tax credit if they meet the requirements of the section. The legislative history of the EIC provides more guidance than the statute itself as to the purpose of its enactment. As articulated by the Supreme Court in Sorenson v. Secretary of the Treasury of the U.S., 475 U.S. 851, 864 [57 AFTR 2d 86-1189] (1986),

The earned income credit was enacted to reduce the disincentive to work caused by the imposition of Social Security taxes on earned income (welfare payments are not similarly taxed), to stimulate the economy by funneling funds to persons likely to spend the money immediately, and to provide relief for low-income families hurt by rising food and energy prices.

Unlike other tax credits used to offset taxes that would otherwise be owed, the EIC is refundable. In re Rutter, 204 B.R. 57, 59 (Bankr.D.Ore.1997). ''The EIC program allows a percentage of the income of a qualifying individual as a credit against the tax otherwise owed for a taxable year.'' In re Montgomery, 224 F.3d 1193, 1194 [86 AFTR 2d 2000-6007] (10th Cir.2000). If the credit exceeds the tax liability of the taxpayer for that year, the excess is considered ''an overpayment'' pursuant to IRC §6401(b) and is refunded to the taxpayer pursuant to IRC §6402(a). Sorenson, 475 U.S. at 851.

The Court of Appeals for the Sixth Circuit has determined that the EIC is property of the estate pursuant to 11 U.S.C. §541(a). In re Johnston, 209 F.3d 611 [85 AFTR 2d 2000-1284] (6th Cir.2000). The refunded portion of the EIC comprises property of the estate for the tax year in which the bankruptcy petition is filed, prorated to the date of the filing. See Johnston, 209 F.3d at 613; In re Montgomery, 224 F.3d at 1194. Therefore, the question is whether debtors may exempt this property under applicable state law.

Kentucky has opted out of the federal exemption statutes and K.R.S. §205.220(3) provides:

> Public assistance shall not be assignable and shall be exempt from levy or execution. Furthermore, no assignment, pledge or encumbrance of any right to benefits due or payable under this chapter shall be valid. Public assistance benefits, as long as they are not mingled with other funds of the recipient, shall be exempt from any remedy for the collection of all debts, liens and encumbrances. No waiver of any exemption provided for in this subsection shall be valid.

This is the exemption section relied upon by debtors who claim an exemption in the EIC portion of their tax refunds. Therefore, for the EIC portion of the tax refund received by these debtors to be exempt, it must be considered ''public assistance.'' K.R.S. §205.010(3) defines ''public assistance'' as money grants and assistance in kind or services to or for the benefit of needy persons.

The trustees have proven that the exemption of EIC is not proper under the Supreme Court's decision in Sorenson. Although Sorenson concerned the interception of refunded EICs to collect child support payments, Sorenson's in-struction of the nature of the EIC mandates a finding that the EIC is not in the nature of public assistance but rather is a re-funded tax overpayment. Sorenson, 475 U.S. at 854–55. In holding that the EIC refunds could be intercepted, the Supreme Court found,

> [S]ince the Code expressly defined excess earned-income credits as ''overpayments,'' and disbursed those excess credits to recipients through the income tax refund process, the credits were

[1] This court by agreement with Judge Cooper, considered the Shabazz and Allen cases since they concern the same issues addressed herein and notes that Judge Cooper fully concurs with this Memorandum-Opinion.

> ''payable 'as' refunds of federal taxes paid'' and therefore could be intercepted.

Sorenson, 475 U.S. at 858. Thus, the Supreme Court clearly classifies the EIC as a tax overpayment, not as a public assistance grant.

We disagree with the case of In re Brown, 186 B.R. 224, 227 [81 AFTR 2d 98-1978] (Bankr.W.D.Ky.1995), where the court held that the EIC constitutes a money grant for ''needy children.'' In fact, EIC is not a grant but a refunded tax credit, Sorenson, 475 U.S. at 858, and, debtors are not even required to have a child to qualify for the EIC under 26 U.S.C. §32(b)(1) and (c). See also, In re Rutter, 204 B.R. 57, 59 (Bankr.D.Ore.1997). Therefore, the Court will no longer follow the decision of In re Brown, 186 B.R. 224 [81 AFTR 2d 98-1978] (Bankr.W.D.Ky.1995).

The Court finds support for its decision in the recent Sixth Circuit opinion holding that the EIC is property of the estate. In re Johnston, 209 F.3d 611 [85 AFTR 2d 2000-1284] (6th Cir.2000). In Johnston, the Sixth Circuit relied on the Montgomery decision from the 10th Circuit BAP in making the determination that the EIC portion of a debtor's tax refund is property of the bankruptcy estate. Id. at 612–13. After Montgomery, the Tenth Circuit BAP addressed the very question in this case and specifically found that the EIC portion of the tax refund is not exempt under the Wyoming exemption statute concerning public assistance. In re Trudeau, 237 B.R. 803, 806–07 [84 AFTR 2d 99-5870] (10th Cir. BAP1999). The 10th Circuit BAP articulately stated:

> Very simply, the earned income credit is not a welfare grant but an incentive to work. The Supreme Court has stated, ''the legislative history of § 43 did not suggest that the earned-income credit was intended primarily as a type of welfare grant; rather, it was meant to negate the disincentive to work caused by Social Security taxes.''

Trudeau, 237 B.R. at 807 (quoting Sorenson, 475 U.S. at 858).

Based on the above analysis, the Court finds that debtors may not exempt the EIC under K.R.S. §205.220(3) as public assistance, and the Court has entered an Order this same date sustaining the objection of the trustees to the debtors' claims of exemption under K.R.S. §205.220(3).

ORDER

Pursuant to the findings and conclusions of the Court's Memorandum entered this same date and incorporated herein by reference, and the Court being otherwise sufficiently advised,

It is hereby ORDERED that the Trustees' Objections to Exemptions claimed in the Earned-Income Credit in the above-styled cases be, and are hereby, sustained, and the debtors are denied an exemption in their EIC claimed pursuant to K.R.S. 205.220(3).

¶2002-5281

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Richard Joseph FINLEY, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-10087, Aug. 20, 2002. District Court reversed and remanded. Decision for Taxpayer.

1. Tax crimes—interference with tax law administration; false claims—expert testimony—psychologists. Conviction and sentence for attempting to interfere with tax law administration, making false claim against govt. and bank fraud against taxpayer engaged in phony financial instruments scheme were reversed and remanded: district court's exclusion under F.R.Evid. 702 or F.R.Crim.P. 16 of taxpayer's psychologist's testimony about his delusional disorder was erroneous. Testimony was admissible under Rule 702 where it was based on proper/''normal'' psychological methodologies, and didn't usurp role of but did assist jury in its decision-making about taxpayer's knowledge of instruments' falsity. And, Rule 16 wasn't violated where govt. was given at least basic, if not full, information about psychologist's proposed testimony; or,

even Rule 16's strictures weren't met, exclusion wasn't warranted where testimony was vital to taxpayer's defense and any disclosure failure wasn't willful. *Reference:* United States Tax Reporter ¶72,125.01(7). IRC §7212.

J. Toney, Woodland, CA, for the appellant.
John K. Vincent, United States Attorney, Norman Wong, Assistant United States Attorney, Thomas E. Flynn, Assistant United States Attorney, and Mark J. McKeon, Assistant United States Attorney, Sacramento, CA, for the appellee.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the Eastern District of California; William B. Shubb, District Judge, Presiding.

Before MYRON H. BRIGHT,* BETTY B. FLETCHER, and RAYMOND C. FISHER, Circuit Judges.

OPINION

BRIGHT, Circuit Judge.

On July 9, 1999, the government filed a second superceding indictment against Richard Joseph Finley charging him with one count of making a false claim against the United States in violation of 18 U.S.C. § 287, one count of attempting to interfere with the administration of the Internal Revenue Service in violation of 26 U.S.C. § 7212(a), and three counts of bank fraud in violation of 18 U.S.C. § 1344.

A jury trial began on December 21, 1999. In the middle of the defendant's presentation of his expert psychological witness, the government objected to the witness' testimony and requested that the testimony be struck as a sanction for the defendant's violation of Federal Rule of Criminal Procedure 16(b)(1)(C). After lengthy discussions outside the presence of the jury and after the district court conducted a hearing pursuant to Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), the district court excluded the entirety of defense expert's testimony as a sanction for violation of Rule 16 and as unreliable and irrelevant under Federal Rule of Evidence 702.

On January 5, 2000, the jury returned guilty verdicts on all but one bank fraud count. The court dismissed the one remaining bank fraud count based upon the jury's inability to reach a verdict.

Finley appeals his conviction and forty-eight-month sentence of imprisonment. Finley raises the sole issue of whether the trial court abused its discretion by excluding the entirety of his psychological expert's testimony.

We REVERSE and REMAND on this record determining that the trial court erred in striking all expert testimony presented by Finley that corroborated his defense.

I. BACKGROUND

A. Facts

Finley owned a law bookstore and ran a bar review course for students of non-accredited law schools. In 1992, Finley began looking for investors to assist him in opening a chain of approximately twenty bookstores across the United States. Finley could not obtain traditional bank financing because of a dispute he had with the IRS over a large tax claim.

In November 1995, a customer mentioned that he had attended an investment seminar in Montana run by Leroy Schweitzer.[1] Inspired by this suggestion, on December 22, 1995, Finley went to Schweitzer's farmhouse in rural Montana to attend the so-called investment seminar. Schweitzer explained that he possessed recorded liens against Norwest Bank of Montana, other banks, and individuals, and that he could draw on these accounts by issuing negotiable instruments.

At the conclusion of the seminar, each attendee received a five-minute audience

* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

1 Schweitzer led a group of people calling themselves the "Montana Freemen." Among other things, Schweitzer gave seminars on his version of the "common law." At the conclusion of these seminars, Schweitzer gave participants, such as Finley, fraudulent monetary instruments. The United States has prosecuted and convicted Schweitzer of various crimes.

with Schweitzer to explain the attendee's needs. When he met with Schweitzer, Finley explained his business plan to open a chain of bookstores. Finley also told Schweitzer that he owed the IRS about $180,000 and that he owed a mortgage on his condominium with Great Western Bank.

Schweitzer gave Finley several documents that looked like financial instruments and were entitled, ''Comptroller's Warrants'' and ''Certified Banker's Checks.'' Schweitzer made one document payable to Finley and the Bank of America for $6,125,000, Finley's estimate of the cost of starting his bookstore chain. Schweitzer made the second document out to Finley and Great Western Bank for $150,000, or about twice the remaining amount Finley owed on his mortgage. The third instrument named the IRS and Finley as payees for $360,000, twice the amount Finley owed in taxes. Although nothing existed in writing, Finley understood that Schweitzer would receive thirty-five percent of the profits from the bookstores.

Finley returned to Sacramento, California with the documents and prepared to open his new bookstores. He attempted to deposit the $6 million document with the Bank of America in late December 1995 and again in August 1996. Finley gave the Bank of America document to an officer who had handled Finley's business accounts for several years. The bank began processing the instrument, but it was returned marked ''fictitious check'' with a separate notice that indicated ''please resubmit when corrections are made.'' (Appellant's Br. 6) The bank also contacted the post office and received a ''fraud alert'' addressing similar instruments from Schweitzer. The bank gave a copy of the alert to Finley. Nonetheless, Finley attempted to negotiate the instrument a second time in August 1996. This time Finley told the bank to send it to a designated address, but the item came back unpaid again.

Similarly, on January 2, 1996, Finley attempted to use the $152,000 document to pay off his real estate mortgage with Great Western Bank. Finley included a note indicating the failure to refund the excess amount would constitute criminal conversion. Great Western did not negotiate the instrument because the bank had prior knowledge of fraud alerts regarding Schweitzer's instruments.[2]

On January 5, 1996, the chief of the fraud section of the Office of the Comptroller of the Currency wrote Finley stating that the Schweitzer document was ''not a valid obligation of the federal government; the special account number is not an account for redemption of payment of such an instrument; the format is not one used by the federal government'' and advised Finley to contact the FBI. (Appellant's Br. 8).

Undeterred by this information, Finley mailed the $360,000 document to the IRS Center in Ogden, Utah on January 17, 1996. Finley included a letter requesting ''immediate refund for overpayment'' in the amount of $180,000. The IRS did not credit the amount to Finley's balance because of its prior knowledge of Schweitzer's instruments. The IRS had received more than two hundred requests for refunds totaling $64,000,000 and IRS workers knew that no refunds should be issued.[3] Finley submitted the IRS document on a total of three separate occasions.

After determining that the IRS and the banks would not honor his documents, Finley embarked on an eight-month quest to learn why the government agencies would not honor what he believed to be valid financial instruments. Finley contacted in person or via mail, facsimile, or telephone several state and federal agencies in an attempt to learn how to negotiate the instru-

[2] Numerous alerts existed regarding the Schweitzer instruments including: (1) a Postal Bulletin Fraud Alert dated December 7, 1995; (2) an Office of the Comptroller of the Currency (OCC) fraud alert dated September 8, 1995; (3) an OCC fraud alert dated November 20, 1995; (4) a California State Banking Department weekly bulletin dated November 11, 1995, addressing Schweitzer's instruments; and (5) an OCC fraud alert dated February 8, 1996.

[3] The evidence indicated that certain persons who previously presented Schweitzer's instruments to the IRS had received about $17,000 in refunds.

ments. Every response indicated that the instruments were the subject of a fraud alert, deemed without value, and should not be honored.

In mid-1996, Finley prepared a "media packet" detailing his efforts to cash the instruments. He entitled the document "Robin Hood and the 9 Hoods" and portrayed various government officials as "bad guys" for not cashing the documents. (Appellant's Br. 9). He distributed this packet to numerous network news programs and national newspapers. No media responded to his packets.

In April 1996, the FBI arrested Schweitzer and others, but not Finley, on multiple charges of fraud based on Schweitzer's seminars and instruments. Around this time, Finley ceased his pursuit to have the instruments honored.

In June 1998, Finley testified at Schweitzer's trial in Montana. In his testimony he stated that the government had not prosecuted him for attempting to cash the instruments. This trial resulted in a hung jury. Prior to his testifying in the second trial of Schweitzer in October 1998, the government notified Finley that it would indict him. A grand jury formally indicted Finley on November 6, 1998.

B. Trial Proceedings

On August 18, 1999, Finley's counsel filed a notice under Fed.R.Crim.P. 12.2(b), informing the government that it intended to introduce testimony "relating to a mental disease or defect or any other mental condition" relevant to guilt. The government made a discovery request for information about the expert testimony. In response, on October 1, 1999, Finley's attorney sent a letter to the government summarizing the expert opinions of Dr. John J. Wicks. Dr. Wicks, a licensed clinical psychologist in California, had examined Finley. This letter represented that Finley "has an atypical belief system, a system which is very rigid." The letter also stated, "While Mr. Finley presents some indications of Shared Psychotic Disorder (Folie a Deux), Dr. Wicks does not at present make that diagnosis. Mr. Finley is not suffering under any mental condition which is reported in the DSM-IV."[4]

In a second letter dated October 25, 1999, Finley's counsel once again represented their intent to call Dr. Wicks at trial. In pertinent part, that letter reads:

Mr. Finley's mental condition, as set forth by Dr. Wicks, will be presented at trial to show that Mr. Finley did not have the intent to defraud, the requisite mens rea for the crime. The case of United States v. Rahm [,] 993 F.2d 1405 (9th Cir.1993) contains a very similar fact pattern and is legal authority for the admission of the evidence. I have attached a copy of the opinion for your convenience.

Thereafter, the prosecution moved under Fed.R.Evid. 704,[5] to preclude Finley from relying on expert mental health testimony at the trial. At the hearing on the motion, neither party sought an examination of the psychologist to qualify that testimony under the Daubert[6] /Kumho Tire[7]

[4] The full letter reads as follows:

Yesterday I spoke with John Wicks, Ph.D. on the subject matter of his evaluation of Mr. Finley. Dr. Wicks will not be preparing a report at this time, but gave me the following oral statement of his opinions on Mr. Finley's present mental status. This oral statement is all that I have at this time and is all that I will have in writing of the evaluation at present.

Dr. Wicks made the following observations of Mr. Finley:

Mr. Finley is in acceptable physical condition, suffering from some physical ailments and some anxiety and minimal depression.

He also has an atypical belief system, a system which is very rigid. Mr. Finley has some self destructive qualities and as a result it is hard to find an authority or source available which would satisfy him on the issue of the validity of the liens and warrants involved in this case. While Mr. Finley presents some indications of Shared Psychotic Disorder (Folie a Deux), Dr. Wicks does not at present make that diagnosis. Mr. Finley is not suffering under any mental condition which is reported in the DSM-IV. Thank you again for your courtesy and cooperation, and please do not hesitate to contact me at anytime to discuss this case.

DSM-IV is entitled "The Diagnostic and Statistical Manual of Mental Disorders," 4th Ed., 1994 (American Psychiatric Association).

[5] Federal Rule of Evidence 704 provides:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

[6] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

[7] Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

requirements. The government's contention was that Fed.R.Evid. 704(b) barred the testimony because it addressed an honestly-held ''value system.''

The court ruled that Dr. Wicks' testimony would be admissible and expressed its understanding that Dr. Wicks could not testify about any element of the crime charged. The court then advised counsel:

Then I think the way to handle it is to be careful on examination and to make appropriate objections, Mr. McKeon [the prosecutor].

If a question is asked that you feel calls for Dr. Wicks to express an opinion about Mr. Finley's actual belief or the sincerity of those beliefs, you may object. And then if he blurts it out, move to strike, and I'll strike it.

Additionally, the court instructed Finley's counsel to meet with Dr. Wicks to ''make it clear to him the areas that he's not supposed to go into ... [s]o he has to stay within the bounds of the Court's ruling on what's relevant.''

The parties proceeded to trial and the defense called Dr. Wicks. Dr. Wicks explained his thirty years of experience in psychology including his extensive experience in conducting psychological evaluations of patients. He stated that he spent two days with Finley, including administering a battery of psychological tests and interviewing him. As a result of the tests and examination, Dr. Wicks testified that Finley has an atypical belief system. Dr. Wicks explained that most people have an open belief system which is subject to change, but some people have closed belief systems. Closed belief systems are more abnormal because they are fixed and rigid. Dr. Wicks then testified how an atypical belief system operates. Dr. Wicks testified:

It's a closed belief system in which practical--or information from the real world that comes in is so grossly distorted that the person ends up with a belief system that the average person in the culture just simply would sit back and say, ''Huh? How can you believe that?'' If X, Y, and Z doesn't fit with that, they would then come up with an explanation how X, Y, and Z fit just fine with their belief system.

Dr. Wicks explained that a delusion is another psychological term for an atypical belief system and he stated there are three major categories of delusions. Dr. Wicks opined that Finley was vulnerable to a delusional disorder in December 1995, stating: ''He tends to hear what he wants to hear and believe what he wants to believe about someone. So this had happened even prior to 1995.'' The doctor concluded that Mr. Finley suffered from a delusional disorder from a minimum of 1995 until the present. He elaborated that a person with a delusional disorder can be dissuaded from the delusion ''[o]nly with tremendous, tremendous difficulty.''

At this point, the government objected to Dr. Wicks' testimony and moved to strike it as a discovery violation. After extensive discussion with counsel for both parties, the court expressed the view that defense counsel had sandbagged the prosecutor and the court. Then the court decided to conduct a Daubert hearing that afternoon before proceeding with trial.

At that hearing, Dr. Wicks explained his methodology and stated the psychological community accepted the methodology he used. That methodology included a history of the patient, consisting of family, vocational, educational, medical and legal histories, the observation of the patient's behavior, and the administration of standard psychological tests. He stated he did not diagnose Finley as having a delusional dis-order, although Finley's symptoms did fit within many of its criteria. He explained his fear that such a diagnosis might have suggested that Finley was legally incompetent, whereas Dr. Wicks believed Finley could assist counsel and understood his legal proceedings. This left Dr. Wicks with a diagnosis of an atypical belief system.

Dr. Wicks indicated that Finley's psychological tests were consistent with a diagnosis of a delusional disorder. Dr. Wicks explained that Finley's Million Clinical

Multiaxial Inventory indicated that he had a high level of narcissism, a trait of a delusional person. The test also showed an elevated anxiety scale and a mild level of depression. Dr. Wicks explained how he used these tests to rule out other psychological disorders including schizophrenia, manic depression, and psychosis.

At the conclusion of the Daubert hearing, the district court ruled from the bench. The court excluded the testimony on two grounds. It indicated that either ground was sufficient to exclude the testimony. First, under Fed.R.Evid. 702[8] the court ruled that "the testimony would not be helpful to the jury." The court indicated that the jury could independently determine Finley's credibility. The second ground for excluding the evidence struck the testimony as a sanction for a Fed.R.Crim.P. 16(b)(1)(C)[9] violation.

II. STANDARD OF REVIEW

We review for abuse of discretion a district court's decision to admit or exclude scientific evidence. General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). A court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous view of the facts. United States v. Morales, 108 F.3d 1031, 1035 (9th Cir.1997) (en banc). Under the abuse of discretion standard, we reverse where we have "a definite and firm conviction that the district court committed a clear error of judgment." United States v. Benavidez-Benavidez, 217 F.3d 720, 723 (9th Cir.2000). However, a trial court has "broad discretion" in assessing the relevance and reliability of expert testimony. United States v. Murillo, 255 F.3d 1169, 1178 (9th Cir.2001).

We review the interpretation of a discovery rule's meaning de novo. See United States v. Peters, 937 F.2d 1422, 1424 (9th Cir.1991). We review for abuse of discretion the propriety of excluding the evidence as a sanction when the rule has been violated. Id.

III. DISCUSSION

[1] The district court excluded Dr. Wicks' testimony as inadmissable under Fed.R.Evid. 702 and as a sanction under Fed.R.Crim.P. 16(b)(1)(C). The court indicated that it believed either ground was sufficient to exclude the testimony. Therefore, we must evaluate the admissibility of the proffered evidence under both rules.[10] We will first consider the reliability and relevance of Dr. Wicks' expert testimony under Rules 702 and 704(b), then we will consider the trial court's exclusion of the testimony as a Rule 16 sanction.

A. Exclusion of Dr. Wicks' Expert Testimony as Unreliable and Irrelevant

Federal Rule of Evidence 702 governs the admissibility of expert opinion testimony. The rule consists of three distinct but related requirements: (1) the subject matter at issue must be beyond the common knowledge of the average layman; (2) the witness must have sufficient expertise; and (3) the state of the pertinent art or scientific knowledge permits the assertion of a reasonable opinion. Morales, 108 F.3d at 1038.

Our Rule 702 analysis is guided by relevant Supreme Court precedent. See Benavidez-Benavidez, 217 F.3d at 724(explaining how the Daubert Court set out factors to be reviewed when applying Rule 702). In Daubert, the Supreme Court charged trial judges with the responsibility of act-

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[8] At the time of the district court's ruling, the language of Federal Rule of Evidence 702 read:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

We note that in the 2000 Amendments to the Federal Rules of Evidence, Rule 702 was amended in response to Daubert. Those changes do not affect our analysis in this case.

[9] Federal Rule of Criminal Procedure 16(b)(1)(C) provides:

Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial: (i) if the defendant requests disclosure under subdivision (a)(1)(E) of this rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

[10] In reaching its conclusions about the relevance and reliability of Dr. Wicks' testimony, the district court mentions only Rule 702 explicitly. Nonetheless, it is clear that considerations falling under Rule 704(b) are implicated as well. Rule 702 and Rule 704(b) are the two relevant federal rules which govern the admissibility of expert testimony. Morales, 108 F.3d at 1035.

ing as gate-keepers to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." 509 U.S. at 589. The Court articulated a two-step inquiry for determining whether scientific evidence or testimony is admissible. First, the trial court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592–93. The Court cautioned that the trial court must focus "on [the] principles and methodology, not on the conclusions that they generate." Id. at 595. Second, the court must ensure that the proposed expert testimony is relevant and will serve to aid the trier of fact. Id. at 592–93. Expert testimony assists the trier of fact when it provides information beyond the common knowledge of the trier of fact. Id. at 591. The Court, in Kumho Tire, clarified that the district court's gatekeeper function applies to all expert testimony, not just testimony based in science. See 526 U.S. at 147.

The government does not contest that Dr. Wicks possesses the qualifications to testify as an expert under Rule 702. The district court acknowledged that Dr. Wicks qualifies as an expert in his field. The main issues of contention between the parties center on whether Dr. Wicks' methodology is reliable and whether his testimony will assist the jury. In resolving this issue we will rely on the pertinent Federal Rules of Evidence, Daubert, Kumho Tire, and this circuit's case law.

1. Reliability: Dr. Wicks' Methodology

At the conclusion of the Daubert hearing, the district court made several observations about Dr. Wicks' reasoning and methodology. Initially, it concluded:

> Dr. Wicks' methodology is itself nothing unusual. The methodology itself is the form that is used by medical doctors uniformly. He considers the history given by the patient, his observations clinically of the patient's behavior, and any psychological testing .... I have no doubt that his psychological tests are well established tests that are widely accepted in the medical and psychological community.

However after making these general observations, the court went on to identify what it considered to be several problems with the reliability of Dr. Wicks' opinion. The court seemed troubled by the fact that the psychological tests did not reveal a conclusive diagnosis. The court recognized that Dr. Wicks' diagnosis was not inconsistent with the psychological tests, but said, the results are "not inconsistent with a lot of other things." The court also asserted that Dr. Wicks based his opinion on his belief that Finley was not faking or being deceptive:

> When you strip his opinion down to what it really seems to be based on, Mr. McKeon is correct. It's based on the assumption that what he's saying in his history and what he tells to Dr. Wicks is true. It relies upon the assumption that he is being truthful when he says what his views are.[11]

In its brief, the government extrapolates from the district court's position and argues that Dr. Wicks' opinion is not reliable because it "depends entirely on the doctor's subjective assessment of Finley's truthfulness." (Appellee's Br. 12). The government also contends that Dr. Wicks' methodology is deficient under Rule 702 because he based his conclusions on facts that were merely "commonsensical"[12] or beyond the scope of his expertise.[13]

It appears from the record before us that Dr. Wicks based his diagnosis on proper psychological methodology and reasoning. He relied on accepted psychological tests, from which he drew sound inferences, and he took a thorough patient history, including meeting with Finley's wife and observ-

[11] The court later complained, "there are no standards that we can put our fingers on for how you tell medically or scientifically whether somebody is telling the truth."

[12] These commonsensical matters include Dr. Wicks' observation of Finley's physical manifestations, such as facial flushing, hand trembling and stammering.

[13] These matters include Finley's refusal to accept the plea bargain and the possibility of his diagnosis being misconstrued as supporting a finding of legal incompetency.

ing Finley's behavior. Dr. Wicks did not base his conclusions solely on Finley's statements; rather, he used his many years of experience and training to diagnose Finley's mental condition. Finally, Dr. Wicks did not use any experimental techniques in his evaluation of Finley and he did not deviate in any way from his normal practice of conducting psychological evaluations. Thus, we reject the government's argument.

The government argues Dr. Wicks' diagnosis is unreliable because it is based on the fact that Dr. Wicks believed that Finley was not deceiving him. The government cites several out-of-circuit cases that it alleges support the argument that Dr. Wicks' opinion is founded on accepting Finley's truthfulness rather than on sound psychological methodology. See United States v. Charley, 189 F.3d 1251 (10th Cir.1999); United States v. Whitted, 11 F.3d 782, 785 (8th Cir.1993); United States v. Benson, 941 F.2d 598, 604–05 [68 AFTR 2d 91-5469] (7th Cir.1991); and Viterbo v. Dow Chem. Co., 826 F.2d 420 (5th Cir.1987). None of these cases is apposite.

Neither Charley nor Whitted supports the government's position because both cases involve a medical doctor's testimony about the truth of a child victim's report of sexual abuse. In both cases, the truth of the victim's report was the very substance of the doctor's testimony. The government acknowledges in its brief that Finley's truthfulness is not the substance of Dr. Wicks' opinion. (Appellee's Br. 13). The government instead contends that Dr. Wicks "founded" his opinion on Finley's truthfulness. Again, however, the facts of this case and the case law offered do not support the government's position.

In Charley and Whitted, medical doctors called as experts testified to their opinions that children were abused based primarily on the statements of the children that they were abused. Charley, 189 F.3d at 1267(describing opinions as based "largely" on witness statements); Whitted, 11 F.3d at 786 (describing opinions as based "solely" on witness statements). Thus, in each of those cases, the expert was merely reciting the allegation of the alleged victim "in the guise of a medical opinion," Whitted, 11 F.3d at 785–86, which "does nothing but vouch for the credibility of another witness ..., and therefore does not 'assist the trier of fact' as required by Rule 702." Charley, 189 F.3d at 1267. In addition, each court noted that the fact of whether the alleged abuse occurred was for the jury to decide and therefore the expert's testimony was usurping the role of the jury as the ultimate fact finder. See Charley, 189 F.3d at 1270; Whitted, 11 F.3d at 787.

Unlike the experts in Charley and Whitted, Dr. Wicks did not merely recite Finley's statements to the jury in the guise of a medical opinion. Dr. Wicks did not base his diagnosis of Finley on Finley's own conclusion that he had a mental impairment the way the doctors in Charley and Whitted based their diagnosis of the existence of abuse on the witnesses' statements that they were abused.

Nor did Dr. Wicks' diagnosis of Finley usurp the role of the jury with regard to an ultimate issue of fact. The jury needed to decide whether Finley knew the financial instruments were fake, not whether he had a mental impairment that might inhibit him from reaching the conclusion that the instruments were fake. The jury could accept Dr. Wicks' diagnosis and still find that Finley knew the instruments to be fraudulent. Neither Whitted nor Charley stands for the proposition the government would have it support: that a psychologist cannot provide expert testimony about his diagnosis of a mental disorder based on a variety of factors, including the statements made by the defendant to the psychologist in the course of his examination.

Likewise, Benson, 941 F.2d 598 [68 AFTR 2d 91-5469], and Viterbo, 826 F.2d 420, do not support the government's argument and are inapplicable to the facts of this case. In Benson, the Seventh Circuit found an abuse of discretion where the trial court allowed the government to introduce the testimony of an Internal Revenue Service agent whose purpose was to summarize the government's case and give his

expert opinion on whether the defendant was required to file income tax returns. The court concluded that much of the agent's testimony consisted of ''nothing more than drawing inferences from the evidence that he was no more qualified than the jury to draw'' and the agent relied on testimony from other witnesses whose ''credibility was vigorously attacked'' by the defendant. 941 F.2d at 604. Specifically, the court noted that the agent had no ''special skill or knowledge'' that would allow him to credit the truthfulness of the other witnesses. Id. As we have outlined, Dr. Wicks based his psychological analysis of Finley on more than a summary of Finley's statements, and he was eminently more qualified than a layperson on the jury to assess the significance of facts such as Finley's adamant refusal to accept, or even consider, the government's plea offer.[14]

Viterbo also is distinguishable from the present case. In Viterbo, the Fifth Circuit upheld the exclusion of the expert opinion of a medical doctor as lacking a reliable foundation because the doctor did not perform a proper medical history of the patient prior to developing his opinion. There, the medical expert sought to attribute the plaintiff's depression and other ailments to his exposure to a chemical based only on the plaintiff's statements that he experienced the symptoms and exposure to the chemical ''was the only possible cause.'' 826 F.2d at 424. The Fifth Circuit upheld the exclusion of that testimony because the doctor ''was not aware that Viterbo had a family history of depression and hypertension'' that could have explained the source of the symptoms. Id. at 423(concluding that the failure to take into account this history ''seriously weakens'' the reliability of the patient's oral history as a foundation for the doctor's expert opinion). It is not clear that Dr. Wicks made a similar error in diagnosing Finley. The trial record reveals that Dr. Wicks' opinion is based on more than simply crediting Finley's statements. Dr. Wicks administered psychological tests to rule out serious mental disorders, he took a case history and interviewed Finley's spouse to ascertain additional information, and he observed Finley's physical movements and conducted a physical exam to determine if there was a possible physiological problem. The government has not argued that Dr. Wicks' opinion is based on an inaccurate history or is lacking in any specific facts.

We also reject the government's argument because Dr. Wicks provided articulable reasons why he believed Finley was not being deceptive or faking. At the Daubert hearing, Dr. Wicks explained that ''there was no indication that he [Finley] was being deceitful on what probably amounted to four or five hours of testing.'' Dr. Wicks had previously explained how the psychological tests were specifically designed to detect someone who is trying to fake a mental illness. In addition, Dr. Wicks noted that Finley's responses were internally consistent, and Dr. Wicks had not identified any defensiveness in Finley or any indication that he was over-representing his symptoms. Based on his clinical experience and these facts, Dr. Wicks concluded that Finley was not faking or lying.[15]

A belief, supported by sound reasoning, that the patient is not faking or lying is sufficient to support the reliability of a mental health diagnosis. In a different factual context, we have stated that ''the law does not require every expert who testifies to be an expert in detecting deceit.'' United States v. Morales, 108 F.3d 1031, 1039 (9th Cir.1997) (reversing a district court's exclusion of defendant's bookkeeping expert who the district court excluded because the defendant ''may have intentionally deceived'' the expert about her true knowledge of bookkeeping principles). Analogously, we refuse to require that mental health experts prove themselves in-

[14] The government argues that Dr. Wicks was not qualified to assess the quality of a plea offer in a criminal case because he is not an attorney. While this may be true, Dr. Wicks can certainly assess the mode of reasoning that Finley employed to consider the plea offer and draw conclusions about Finley's apparent refusal to compromise or negotiate.

[15] To be clear, Dr. Wicks' conclusions that Finley was not faking a mental disorder are not the same as conclusions that he was being truthful about not knowing that Schweitzer's financial instruments were fake. The validity of Dr. Wicks' diagnosis does not implicate this type of factual matter, which is for a jury to resolve.

fallible lie detectors before accepting their psychological diagnoses.

The government next seeks to convince us that Dr. Wicks' diagnosis is unreliable because he based his conclusions on matters beyond his expertise. The doctor was initially hesitant to apply the delusional disorder terminology of the DSM-IV based on his fear that using certain terms would cause the court to question Finley's legal competence.[16]

In testimony before the jury prior to the government's objection, Dr. Wicks explained that a closed belief system, which distorts or rejects information that does not comport with certain beliefs, is called "atypical belief system." This system can also be referred to by the term "delusion."[17] Dr. Wicks then explained that there are three major categories of delusions: (1) bizarre delusions held by schizophrenics; (2) atypical delusions held by people who 'function very normally in everyday life unless you touch their delusions'; and (3) shared delusional systems known as folie a deux. Dr. Wicks did not classify Finley in any of these categories. He was interrupted by the government's objection shortly after presenting these three categories.

At the Daubert hearing, Dr. Wicks elaborated on how he diagnosed Finley as having an atypical belief system. He admitted that it was "an extremely gray diagnosis" and he "could have easily given him a diagnosis of a delusional disorder [but] that would have raised the question as to his competency in federal court" when Dr. Wicks believed that Finley was capable of assisting his attorney and understanding the court proceedings. Dr. Wicks explained his choice of terminology by saying that an "atypical belief system" is a "personality description, not a DSM-IV diagnosis." Nonetheless, Dr. Wicks believed that Finley's mental condition could fit the criteria for a delusional disorder under the DSM-IV.

We determine that Dr. Wicks' diagnosis should not be deemed unreliable based on his choice of terminology to describe the diagnosis. Dr. Wicks adequately explained his method of diagnosis to overcome any doubt that he was misdiagnosing Finley or intentionally misleading the government or the court. According to Dr. Wicks' testimony, the symptoms Finley exhibited could be described as either a delusional disorder or atypical belief system. Dr. Wicks simply chose the term, in his view, with the least potential for confusion. We have recognized that concepts of mental disorders are "constantly-evolving conception[s]" about which "the psychological and psychiatric community is far from unanimous" and a "district court may not exclude proffered expert psychological testimony simply because the defendant's condition does not fit within the expert's--or the district court's own--concept of mental 'disorder.'" United States v. Rahm, 993 F.2d 1405, 1411 (9th Cir.1993) (reversing the district court's exclusion of expert testimony that the defendant had perceptual difficulties making it impossible for her to recognize counterfeit currency).

We conclude that the district court erred in assessing the reliability of Dr. Wicks' testimony. Dr. Wicks did not base his opinions solely on the truthfulness of Finley's statement nor does the record before us demonstrate that the diagnosis was reached through unsound methodology or reasoning. It appears from the record that Dr. Wicks' diagnosis incorporates testing, case history, interviews with the patient and family, medical factors and expert experience applying the information con-

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16 The district court also commented on this fact in making its ruling to exclude Dr. Wicks' testimony:

It is troublesome to the Court that he admitted he makes his diagnosis based on what the consequences are. That confirms the Court's fears about what these so-called experts are doing in these cases. He is an expert in his field. But it concerns the Court what he's using his expertise for.

17 The following exchange occurred between Finley's counsel and Dr. Wicks:

Q. Now, is there another psychological term for atypical belief system?

A. A term that is used is a delusion.

Q. And can you explain what a delusion is?

A. It's a closed belief system in which practical--or information from the real world that comes in is so grossly distorted that the person ends up with a belief system that the average person in the culture just simply would sit back and say, "Huh?

How can you believe that?'

tained in the DSM-IV and other mental health publications. Dr. Wicks' experience with evaluating ''thousands'' of people should not be undervalued.

2. Relevance: Assist the Trier of Fact

The district court concluded that Dr. Wicks' testimony was not relevant because (1) the jury could make its own determination about the sincerity and veracity of Finley's beliefs, (2) the jury could also make the same observations Dr. Wicks made, and, (3) the government could not ''effectively cross-examine'' the expert diagnosis.[18] The government makes a similar argument to this court, contending that Dr. Wicks' testimony does not assist the trier of fact because it does not exceed the common knowledge of the trier of fact and crediting Dr. Wicks' testimony precludes the jury from finding that Finley possessed the necessary mens rea for the crime.[19]

a. Common Knowledge of the Trier of Fact

We reject the government's first argument and hold that the district court abused its discretion when it found that Dr. Wicks' expert opinion did not exceed the common knowledge of the average layperson.

We must be cautious not to overstate the scope of the average juror's common understanding and knowledge. As the Seventh Circuit has recognized, it is ''precisely because juries are unlikely to know that social scientists and psychologists have identified [such a personality disorder] ... that the testimony would have assisted the jury in making its decision.'' United States v. Hall, 93 F.3d 1337, 1345(7th Cir.1996).

Jurors are unlikely to know that psychologists have identified a personality disorder that explains why a seemingly normal person could reject or distort certain overwhelmingly true information. Dr. Wicks' testimony would have offered an explanation as to how an otherwise normal man could believe that these financial instruments were valid and reject all evidence to the contrary. While Finley could and did testify about how and why he believed the instruments were valid, only a trained mental health expert could provide a counterweight to the government's allegations against Finley. On the basis of the record before us, Finley was entitled to present Dr. Wicks' testimony to support his defense theory.

Our case law recognizes the importance of expert testimony when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond their knowledge. In United States v. Vallejo, 237 F.3d 1008, 1019–20 (9th Cir.2001), we reversed a trial court's decision to exclude a school psychologist's testimony that special education students whose first language is not English have difficulties communicating in English in high pressure situations. Even though this testimony was seemingly based on common sense, we stated that the expert testimony was necessary to explain how the defendant and an interrogating officer ''could have very different perceptions of what occurred during the interrogation, yet could both be correct from a communications standpoint.'' 237 F.3d at 1019. In Vallejo, we relied on the logic of a First Circuit case in which the court explained: ''[T]he expert testimony was needed to explain why the defendant would make 'false statements even though they were inconsistent with his apparent self-interest' when '[c]ommon understanding conforms to the notion that a person ordinarily does not make untruthful inculpatory statements.''' Id. at 1020 (quoting United States v. Shay, 57 F.3d 126, 133 (1st Cir.1995)) (concluding that the defendant should have been allowed to present expert testimony that he suffered from a mental disorder which caused him to tell grandiose, self-incriminating lies). The First Circuit reformulated the proper Rule 702 inquiry to be: ''[w]hether the untrained layman would be

[18] Indeed, the prosecution could show on cross-examination and in argument to the jury that if the jury did not credit Finley's beliefs as testified by him and as stated to Dr. Wicks, that would be a sound basis upon which to reject Dr. Wicks' diagnosis.

[19] According to the government's brief, the mens rea for the crime of bank fraud is ''to 'knowingly' defraud various financial institutions.'' (Appellee's Br. 19). This is the government's Rule 704(b) argument and we will address it as such, infra section III.A.2.b.

qualified to determine intelligently and to the best degree, the particular issue without enlightenment from those having a specialized understanding of the subject matter involved.'' Shay, 57 F.3d at 132 (citations omitted). In the instant case, the average layperson was not qualified to assess Finley's mental condition without the assistance of an expert's specialized understanding.

The district court also concluded that several factors in Dr. Wicks' diagnosis, including the elevated levels of narcissism and Dr. Wicks' observations of Finley's physical conduct, are the kinds of observations a jury is supposed to make. We reject the notion that the jury could make the same observations as Dr. Wicks about Finley's physical demeanor and his psychological test scores. First, we note the obvious distinction between a mental health professional examining a patient in private and a jury observing a defendant testifying on the witness stand. Second, while the jury members might have been able to visually identify Finley's demeanor, they were not trained to interpret and assess those observations.[20] The government describes these as ''commonsensical observations'' about Finley's demeanor, but Dr. Wicks was able to carefully detail his expert ability to recognize certain symptoms based on his training and years of experience.[21] We doubt the members of the jury possess such an ability. Finally, as Dr. Wicks explained, interpreting psychological testing scores requires years of experience and training. Providing the jury with this raw information would simply not have been enough.

The court also excluded Dr. Wicks' opinion because ''there's nothing that anybody can get their teeth into if you want to cross-examine him.'' Contrary to this position and as previously mentioned in note 18 of this opinion, all of the weaknesses the district court noted in Dr. Wicks' testimony, including the subjectivity of his conclusions and his reliance on the veracity of Finley's statements, can be properly addressed by the government on cross-examination. See e.g., Rahm, 993 F.2d at 1413 (''Any deficits in [the psychologist's] qualifications beyond her professional training go to the weight of her testimony rather than to its admissibility.''). ''Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.'' Daubert, 509 U.S. at 596. We note that even with the short notice the government effectively cross-examined Dr. Wicks during the Daubert hearing.

b. Rule 704(b) and the Necessary Compulsion Test

Expert testimony that compels the jury to conclude that the defendant did or did not possess the requisite mens rea does not ''assist the trier of fact'' under Rule 702 because such testimony encroaches on the jury's vital and exclusive function to make credibility determinations. Specifically, Rule 704(b) ''limits the expert's testimony by prohibiting him from testifying as to whether the defendant had the mental state or condition that constitutes an element of the crime charged.'' Morales, 108 F.3d at 1035. The ''rationale for precluding ultimate opinion testimony applies ... 'to any ultimate mental state of the defendant that is relevant to the legal conclusion sought to be proven.''' United States v. Campos, 217 F.3d 707, 711 (9th Cir.2000) (quoting S. Rep. 98-225 at 231). However, Rule 704(b) allows expert testimony on a defendant's mental state so long as the expert does not draw the ultimate inference or conclusion for the jury. Morales, 108

[20] During the Daubert hearing, the prosecutor asked Dr. Wicks if a jury of twelve random people would be able to determine as well as he whether Finley's beliefs were atypical. Dr. Wicks responded:

I would have to slightly disagree with that, because after 29 years of listening to psychotic, nonpsychotic, delusional, non-delusional patients, I think I have a slightly better understanding than the average jurist. I think the average jurist is very capable of making these decisions if given all the information, but I have access to some information that I am aware that they will not have access to.

[21] Dr. Wicks explained how he conducts a clinical observation of a patient during an interview:

You're looking for indications of distractibility[sic], indications of anxiety, somebody sitting there does this (indicating) through the whole interview, tapping their hands. You look for those kinds of signs. As to more basic, when they walk through the door you look at their walk to make sure their gait is normal. If you're looking for neurological problems, sometimes you look for hand tremors. You want to determine if those hand tremors are related to his just being nervous or if this, again, is some sort of neurological impairment. So the clinical interview starts long before you even start talking to the patient.

F.3d at 1037–38. It is, therefore, essential that we distinguish between expert opinions that "necessarily compel" a conclusion about the defendant's mens rea and those that do not.

In Morales, we concluded that the district court erred in barring expert testimony under Rule 704(b) because the expert's testimony did not compel the conclusion that Morales lacked the mens rea of the crime. Morales, charged with willfully making false bookkeeping entries, wanted an accounting expert to testify that her "understanding of accounting principles" was "weak." Id. at 1037. We stated:

> Even if the jury believed [the] expert testimony that Morales had a weak grasp of bookkeeping knowledge (and there was evidence to the contrary), the jury would still have had to draw its own inference from that predicate testimony to answer the ultimate factual question--whether Morales willfully made false entries. Morales could have had a weak grasp of bookkeeping principles and still knowingly made false entries.

Id. at 1037.

In Morales, we also cited with approval United States v. Rahm, in which we reversed the district court's exclusion of a defense expert who was going to testify that Rahm had poor visual perception and consistently overlooked important visual details. Morales, 108 F.3d at 1038. In Rahm, we drew a distinction between the ultimate issue--whether Rahm knew the bills were counterfeit--and the proffered testimony of the defendant's poor vision, from which the jury could, but was not compelled, to infer that she did not know the bills were counterfeit. Id. (citing Rahm, 993 F.2d at 1411–12).

On the other hand, we have applied Rule 704(b) to prohibit certain testimony that does compel a conclusion about mens rea. In Campos, we upheld a district court's exclusion of a polygraph expert from testifying that the defendant was truthful when she stated she did not know she was transporting marijuana. 217 F.3d at 711. We determined that the testimony compelled the conclusion that the defendant did not posses the requisite knowledge to commit the crime because polygraph test results offer an implicit opinion about whether the accused is being deceptive about the very matters at issue in the trial. Id. at 712.

Dr. Wicks' expert diagnosis that Finley has an atypical belief system falls into the Morales/Rahm line of reasoning and can be distinguished from Campos. The jury could have accepted the atypical belief diagnosis and still concluded that Finley knowingly defrauded the banks. If credited, Dr. Wicks' testimony established only that Finley's beliefs were rigid and he would distort or disregard information that ran counter to those beliefs. Dr. Wicks did not, and would not be allowed to, testify about Finley's specific beliefs with regard to the financial instruments. The jury was free to conclude that Finley knew the notes were fraudulent, despite the rigidity of his belief system. Just as in Morales and Rahm, the defense was entitled to present evidence so that the jury could infer from the expert's testimony that the defendant lacked the necessary intent to defraud, but such a conclusion was not necessarily compelled by the diagnosis. A psychological diagnosis, unlike a lie detector test, does not automatically entail an opinion on the truth of a patient's statements. Furthermore, the psychological diagnosis can be limited such that it in no way touches upon the specific issues of fact to be resolved by the jury.[22]

We also observe that a jury is free to reject Dr. Wicks' testimony. A jury might decide that Finley was untruthful with Dr. Wicks, as the government so strenuously argues in its brief to this court. See Vallejo, 239 F.3d at 1020 ("allowing the expert testimony would not displace the role of the jury because, after hearing the expert testimony, the jury was free to decide that the reason for the discrepancy was

[22] Indeed, upon remand, we refer the trial court back to its own pre-trial ruling on the Rule 704(b) issue, where the court advised the government, "If a question is asked that you feel calls for Dr. Wicks to express an opinion about Mr. Finley's actual belief or the sincerity of those beliefs, you may object."

Vallejo's lack of credibility--not his communications disorder'').

B. Exclusion of Dr. Wicks' Testimony as a Rule 16 Sanction

The district court also excluded Dr. Wicks' testimony as a sanction for Finley's failure to give proper notice under Fed.R.Crim.P. 16(b)(1)(C). Finley asserts that his notice complied with the requirements of Rule 16 and he should not be faulted for the government's failure to request additional discovery about Dr. Wicks' testimony as the Rule requires. Further, Finley contends that even if a discovery violation existed, the court erroneously excluded the entire testimony. We agree.

Rule 16(b)(1)(C) allows the government to obtain information regarding a defendant's expert witness. ''At the government's request,'' Rule 16 requires the defendant to disclose a summary consisting of the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications. Fed.R.Crim.P. 16(b)(1)(C).

Finley's counsel notified the government of their intent to present expert testimony on Finley's mental condition. In a letter dated October 1, 1999, counsel explicitly stated: ''He [Finley] also has an atypical belief system, a system which is very rigid.'' In a second letter, dated October 25, 1999, the defense made clear: ''Mr. Finley's mental condition, as set forth by Dr. Wicks, will be presented at trial to show that Mr. Finley did not have the intent to defraud, the requisite mens rea for the crime.'' Finley's counsel also supplemented the October 1 and October 25 letters with the psychological tests Dr. Wicks administered to Finley and provided the government with Dr. Wicks' resume disclosing his qualifications. The government did not make a motion for further disclosure of Dr. Wicks' opinion.

Later at the pretrial hearing, Finley's counsel orally explained the basic nature of Dr. Wicks' opinions. Additionally, in his written motion, Finley indicated that the testimony would support his defense theory that he did not have the required intent to commit the crimes. The motion also indicated that ''[t]he testimony that Mr. Finley suffers from a very rigid 'atypical belief system' is directly relevant to Mr. Finley's attempts to ascertain the legitimacy of the warrants and his claim that he believed them to be valid.'' Finally, Finley asserted that Dr. Wicks ''will merely be telling the jury his determination that Mr. Finley suffers from a character disorder that is directly relevant to his defense of lack of intent.'' The government suggested its intent to file a motion under Rule 12.2 for a more definite statement, but the government never filed such a motion. The record does not reveal any further inquiries from the government about the nature or scope of the proposed testimony prior to Dr. Wicks taking the stand.

We do not believe a violation occurred here. The disclosure may not have been as full and complete as it could have been or as the government would have liked. However, the disclosure met the minimum requirements of Rule 16(b)(1)(C). We believe that the information Finley provided to the government supplied the government with sufficient notice of the general nature of Dr. Wicks' testimony. In addition, the government does not argue that Finley failed to provide the basic information concerning Dr. Wicks' proposed testimony.

Instead, the government maintains that Finley's disclosure is deficient because it was diametrically opposed to the actual testimony at trial. The government argues that the district court properly excluded Dr. Wicks' testimony because Finley's counsel deliberately led it to believe that Finley did not have any mental disorders. We reject this argument.

Both the prosecutor and the trial judge assumed that Finley's Rule 16 disclosure limited the nature of Dr. Wicks' testimony to the precise language in the defendant's reports without further explanation. This was a misunderstanding and was not based on any deception or effort to mislead on the part of Finley's counsel. The trial court stated:

I was thinking when I ruled on his motion under Rule 704--don't interrupt me--when I ruled on this motion under Rule 704, I was thinking, what's Mr. McKeon's [sic] so worked up about? Here's somebody that's just going to come in and say that Mr. Finley has beliefs that are not typical, but he's going to say he has no mental disorder that is recognizable in the definitive book.

The court admitted that neither he nor the prosecutor understood that an "atypical belief system" was a "term of art" rather than "a lay term that doesn't amount to anything." In fact, the prosecutor explained that he interpreted the October 1 letter to indicate that Dr. Wicks would testify only that "Mr. Finley was stubborn but he wasn't mentally sick."

Nothing in this court's reading of the October 1 or October 25 letters directly supports the assumptions made by the prosecutor or the trial court about the nature of Dr. Wicks' testimony. Nothing indicates that "atypical belief system" is used as a lay term rather than a term of art. The letters stated that Dr. Wicks would testify Finley had an atypical belief system, which is exactly how he testified. In his testimony at the Daubert hearing, Dr. Wicks explained the nuances between applying the personality description, "atypical belief system" and making a diagnosis under the DSM-IV. Considering Dr. Wicks' testimony and the Rule 16 disclosure in their entirety, it is clear they are not in contradiction. Finally, we note the implausibility of believing that Finley would choose to present a defense theory based on expert testimony that "doesn't amount to anything" and relies on the idea that he is "stubborn rather than mentally sick." After all, the entire purpose behind the Rule 16 disclosure and the Rule 12.2 notice is to alert opposing counsel of a mental condition bearing upon the issue of guilt.

Even were we to assume a violation occurred, the district court, by excluding the entire testimony, imposed a too harsh remedy for the violation. Rule 16 allows the district court to "order [a violating party] to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances." Fed.R.Crim.P. 16(d)(2).

Exclusion is an appropriate remedy for a discovery rule violation only where "the omission was willful and motivated by a desire to obtain a tactical advantage." Taylor v. Illinois, 484 U.S. 400, 415 (1988) (upholding trial court's exclusion of witness where defendant deliberately failed to identify witness prior to trial) (emphasis added); see also United States v. Peters, 937 F.2d 1422, 1426 (9th Cir.1991) (holding district court erred in excluding testimony of forensic pathologist because no willful or blatant discovery violation occurred).

In this case, assuming there was an omission of some sort, it was not willfully done to gain a tactical advantage. Finley's counsel disclosed the basis of Dr. Wicks' testimony. Even at the pretrial hearing, the government did not seek a further clarification of the scope of Dr. Wicks' testimony.[23] In Taylor, the Supreme Court suggested that even for direct discovery violations, a sanction other than preclusion would be "adequate and appropriate in most cases." 484 U.S. at 413. The severe sanction of total exclusion of the testimony was disproportionate to the alleged harm suffered by the government.

Because the Supreme Court has recognized that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense," Taylor, 484 U.S. at 408, courts should use particular caution in applying the drastic remedy of excluding a witness altogether. In assessing the choice of sanctions, this circuit has instructed that the "decisive value" of the evidence be considered. United States v. Duran, 41 F.3d 540, 545 (9th Cir.1994)

[23] We observe that the government does not come into this argument without some discovery failures of its own. Prior to trial, the district court criticized the government for failing to disclose its expert witness. The court postponed the trial until Finley's counsel deposed the government's expert. While we do not condone such tactics, we note that both sides may have failed to give the opponent full and complete information relating to an expert's proposed testimony.

(examining whether the evidence was of ''decisive value'' or if the exclusion was ''disproportionate to the conduct of counsel''). In United States v. Scholl, 166 F.3d 964 [83 AFTR 2d 99-902] (9th Cir.1999), we determined that the exclusion of evidence, namely nine cashier's checks, was an appropriate sanction for a discovery rule violation. Id. at 972. Scholl's counsel possessed the cashier's checks for sometime, but only disclosed them after the start of trial. We allowed the exclusion, in part, because we determined that the checks did not have decisive value as the information contained in the checks was presented to the jury through testimony. Id.

Here, Dr. Wicks' testimony is essential to the defense. Dr. Wicks presented the only evidence of Finley's diagnosed mental disorder, and the court excluded the entire testimony. Finley's counsel did not have any other way of explaining the possibility that Finley suffered from a mental disorder. For this reason, we determine that the prejudice resulting from the error cannot be construed as harmless. See Peters, 937 F.2d at 1426(explaining the applicability of harmless error rests upon determining that the prejudice resulting from the error was more probably than not harmless).

IV. CONCLUSION

We offer some comments on remand. The government may offer evidence to challenge Dr. Wicks' opinion that Finley suffered from any form of delusion. The government may also request another Daubert hearing prior to trial and call its own witnesses.

Finley was entitled to present his defense to the jury with the use of expert testimony that meets the standards of relevance and reliability expressed in this opinion. Accordingly, we REVERSE and REMAND for proceedings consistent with this opinion.

¶2002-5282

Joseph G. TIMME, APPELLANT v. UNITED STATES OF AMERICA, APPELLEE. U.S. Court of Appeals, Second Circuit, (CA2) 02-6042, Aug. 16, 2002. District Court, (2001, DC NY) 89 AFTR 2d 2002-2019, 2002-1 USTC ¶50247, affirmed. Decision against Taxpayer.

1. Actions against U.S.—damages—failure to release liens; unauthorized collection; wrongful death—limitations periods. 2d Cir. affirmed decision dis-missing for failure to state claim pro se taxpayer's 42 USC §1983 claim, based on district court's reasoning: claims were barred by 2-year limitations periods applicable to claims against IRS for negligent failure to release lien, negligence by IRS employee, and wrongful death. Also, taxpayer's motion to submit additional evidence was denied. *Reference:* United States Tax Reporter ¶74,325.01; 74,335.01(30). IRC §7432; 7433.

United States Court of Appeals, Second Circuit,

Appeal from the United States District Court for the Eastern District of New York (Hurley, J.).

APPEARING FOR APPELLANT: MARIE POTTER reading statement of JOSEPH G. TIMME, pro se, Babylon, NY.

PRESENT: HON. DENNIS JACOBS, HON. JOSE A. CABRANES, HON. FRED I. PARKER, Circuit Judges.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be AFFIRMED.

[1] Joseph G. Timme (''Timme'') appeals from the judgment of the United States District Court for the Eastern District of New York (Hurley, J.), dismissing his claim brought under 42 U.S.C. § 1983. In his claim, Timme alleged that the Internal Revenue Service (''IRS'') had violated his civil and constitutional rights when, in the 1960s, it improperly placed a lien against the property of Timme and his wife and later sold real property belonging to Timme to pay the tax liability that gave rise to the lien. Timme claimed that the

IRS caused hardships including the death of his wife and two of his children. He sought damages against the United States in the amount of $10 million.

The district court dismissed Timme's claims, under Fed. R. Civ. Proc. 12(b)(6), for failure to state a claim for which relief may be granted. The court held that Timme's claims were barred by the two-year statute of limitations applicable to claims against the IRS for negligent failure to release a lien, negligence by an IRS employee, and wrongful death.

We affirm for substantially the reasons stated in Judge Hurley's opinion. See Joseph G. Timme v. United States of America, 00-CV-5459DRHWDW, 2001 WL 1835593 (E.D.N.Y. Jan. 31, 2001). Timme's pending motion to submit additional evidence is denied. 2002 WL 1900589 (2nd Cir.(N.Y.))

¶2002-5283

Kim Phuong Vu BUI, PLAINTIFF-COUNTER DEFENDANT--APPELLANT v. UNITED STATES OF AMERICA; ET AL., DEFENDANTS-COUNTER CLAIMANTS--APPELLEES. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-36171, Aug. 19, 2002. District Court, (2001, DC WA) 88 AFTR 2d 2001-6137, 2001-2 USTC ¶50670, amended (2001, DC WA) 88 AFTR 2d 2001-7066, affirmed. Decision against Taxpayer.

1. Return preparer penalties—false return preparation—substantial preparation; compensation—good faith. District court properly granted govt. summary judgment upholding IRC §6694 and IRC §6695 penalties against pro se tax preparer: appearance of tax preparer's signature and social security number on returns as paid preparer constituted declaration under penalty of perjury that she personally verified that information on returns was correct and thus subjected her to penalty for understating clients' tax liabilities. Also, preparer/sole proprietor was IRC §7701(a)(36) ''preparer'' with undivided ½ interest in return preparation business and its revenues under Washington law. *Reference:* United States Tax Reporter ¶66,945.01(20); 77,015.36(20). IRC §6694; 6695; 7701.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the Western District of Washington, Barbara J. Rothstein, Chief Judge, Presiding.

Before SCHROEDER, Chief Judge, TASHIMA, and RAWLINSON, Circuit Judges.

MEMORANDUM*

[1] Kim Phuong Vu Bui appeals pro se the district court's summary judgment for defendants in her action seeking a refund of penalties assessed against her as an income tax preparer pursuant to I.R.C. §§ 6694 and 6695. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo, Barnett v. Centoni, 31 F.3d 813, 815–16 (9th Cir.1994), and we affirm.

Bui contends summary judgment was improper because she did not prepare the income tax returns at issue, notwithstanding that her name and social security number appears on each return as the paid preparer. This contention lacks merit. Bui admitted that she either voluntarily signed returns she did not personally examine and/or was aware that her name was being signed by someone else. The district court properly held that Bui's signature and social security number constituted a declaration under penalty of perjury that she personally verified that the information on the return was correct and therefore subjected her to the penalty for preparers who understate a taxpayer's liability. See IRS Form 1040, Declaration of Paid Preparer; see also I.R.C. §§6065 and 6694.

Bui also contends that because she did not receive any compensation for preparing the tax returns, she cannot be considered a

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

preparer under I.R.C. §7701(a)(36). This contention also lacks merit. The district court properly found that Bui did receive compensation for the preparation of tax returns because she was licensed by the City of Seattle as the sole proprietor of the tax preparation business which received compensation. Under Washington state community property law, she had an undivided one-half interest in the business and its revenues. See Dean v. Lehman, 143 Wn.2d. 12, 19, 18 P.3d 523 (2001) (en banc); see also Wash. Rev.Code § 26.16.030.

Bui's remaining contentions lack merit.

AFFIRMED.

¶2002-5284

Andrew TEMPELMAN, PLAINTIFF v. Paul BARBADORO, ET AL., DEFENDANTS. U.S. District Court, Dist. of New Hampshire, (DC NH) Nos. C-02-242-M; 02-129-P-C, Aug. 19, 2002. Decision for Govt.

1. Actions against IRS and other federal employees—constitutional claims; libel; damages—immunity. Magistrate judge recommended dismissing pro se taxpayer's libel, conspiracy, fraud and other claims against judge who presided over his prior collection action and ordered foreclosure sale of his home: judicial immunity applied where judge's actions and orders, including ordering public notice of taxpayer's tax delinquencies and impending foreclosure, were clearly within his jurisdiction. Similarly, govt. attorneys and U.S. marshal had absolute immunity from suit challenging actions taken in their authority to carry out seizure/sale orders; 42 USC §1983 didn't apply to complaint founded on federal vs. state law; Bivens relief wasn't available with respect to constitutional claims against IRS agents individually; and sovereign immunity barred claims against them in their official capacities. Also, taxpayer's conclusory allegation that U.S. Attorney falsely certified that employees were acting in their official capacities was rejected. *Reference:* United States Tax Reporter ¶74,336.506(30); 74,336.504(40); 74,336.506(25); 76,557.53(30).

Andrew Tempelman, Milford, NH, for Andrew Tempelman, plaintiff, pro se.
Jeremy N. Hendon, U.S. Department of Justice, Tax Division, Ben Franklin Station, Washington, DC, for Paul Barbadoro, defendant.

United States District Court, D. New Hampshire,

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS

COHEN, Magistrate J.

NOT FOR PUBLICATION

The federal defendants[1] in this action, which was removed to the United States District Court for the District of New Hampshire by these defendants after it was filed in the New Hampshire Superior Court, Notice of Removal, etc. (included in Docket No. 1), and has been referred to this court due to the entry of recusal by all judges in the District of New Hampshire, Order dated and entered June 4, 2002 (included in Docket No. 1) and Procedural Order (Docket No. 3), move to dismiss all claims asserted against them by the plaintiff, who appears pro se.[2] I recommend that the court grant the motion.

I. Applicable Legal Standard

The motion to dismiss invokes Fed.R.Civ.P. 12(b)(1) and (b)(6). Federal Defendants' and United States' Motion to Dismiss, etc. (Docket No. 7) at 1. "When presented with a motion to dismiss, the district court must take as true the well-pleaded facts as they appear in the complaint, extending the plaintiff every reason-

[1] Also named as defendants in the complaint but not joining the motion are Margaret Langdell, William Drescher, members of the Board of Selectmen of Milford, New Hampshire and Frederick Douglas, John Winterburn, Richard Fortin, and Michael Dowd, identified as Milford policemen. Complaint, included in Docket No. 1, at [1].

[2] The complaint is signed by "Andrew Tempelman, Pro Se For Andrew Tempelman and Priscilla Tempelman, Pro Se." Complaint at [3]. In all of his other filings in this action, Andrew Tempelman appears pro se and does not purport to represent Priscilla Tempelman. Andrew Tempelman is not an attorney admitted to practice in the United States District Court for the District of New Hampshire and therefore I conclude that he lacks the capacity to represent Priscilla Tempelman in this action. Accordingly, Andrew Tempelman is the only party plaintiff in this action.

able inference in his favor.'' Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31, 34 (1st Cir.2002) (citation and internal punctuation omitted). The defendant is entitled to dismissal for failure to state a claim only when the allegations are such that the plaintiff can prove no set of facts to support the claim for relief. Clorox Co. Puerto Rico v. Proctor & Gamble Commercial Co., 228 F.3d 24, 30 (1st Cir.2000) (citation and internal punctuation omitted); see also Tobin v. University of Maine Sys., 59 F.Supp.2d 87, 89 (D.Me.1999).

An action may be dismissed pursuant to Rule 12(b)(1) when the court lacks jurisdiction over the subject matter of the action. It is the plaintiff's burden to prove the existence of subject-matter jurisdiction. Aversa v. United States, 99 F.3d 1200, 1209 (1st Cir.1996).

> In ruling on a motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1), the district court must construe the complaint liberally, treating all well-pleaded facts as true and indulging all reasonable inferences in favor of the plaintiff.

Id. at 1209–10 (citation omitted). When the jurisdictional facts are disputed by a defendant, materials of evidentiary quality outside the pleadings may be offered to and considered by the court. Valentin v. Hospital Bella Vista, 254 F.3d 358, 363 (1st Cir.2001).

II. Factual and Procedural Background

The complaint alleges that Paul Barbadoro, a judge of the United States District Court for the District of New Hampshire, committed libel by ''publishing in the legal section of several daily newspapers the known falsehood that Andrew Tempelman and Priscilla Tempelman owed the IRS and the Town of Milford several hundreds of thousands of dollars in back taxes.'' Complaint at [1]. According to the complaint, Judge Barbadoro ''ordered the purchase and payment of newspaper advertisements for the auction of the Tempelman property,'' and the property at issue was sold at auction on October 23, 2001. Id. The complaint further alleges that Judge Barbadoro and defendants Christine Colley, John V. Cardone, David Broderick,[3] Gary DiMartino, Richard A. Cooper,[4] and Megan Smith engaged in a conspiracy to commit libel, violated the plaintiff's Fourth and Seventh Amendment rights as well as ''NH Jury Trial Protection before disputed transfer of title, as well as Croydon constraints,'' engaged in a conspiracy to deprive the plaintiff of ''Rights and Property,'' committed fraud and engaged in a conspiracy to commit fraud. Id. These defendants as well as defendants Maria Russo, Paul Proulx, Mark Payeur and Joseph Fallon are alleged to have violated the plaintiff's Fourth Amendment rights and to have engaged in ''Unwarranted Search and Seizure.'' Id. The complaint also alleges that these defendants ''are also charged with Civil Rights abuses under Amendment IV, U.S. Constitution, with using this Libel to engage in Homeland Terrorism of other citizens through the media, using fear and terrorism and hatred and coercion instead of national pride and other such positive inducements in their methods of revenue collection.'' Id.

Specifically, the complaint alleges that ''[t]he falsehood is that the plaintiff and his wife and business, Andrew and Priscilla Tempelman and the Ram in the Thicket, a restaurant, inn, and their church, The Fellowship of Perfect Liberty, owed certain taxes to the Internal Revenue Service and to the Town of Milford.'' Id. at [2].

The complaint demands the following relief: (i) an order allowing the plaintiff to re-occupy the premises at 24 Maple Street, Milford, New Hampshire pending a jury trial; (ii) an order directing ''those who moved the Tempelman's [sic] goods out of their home, to move them back in, at their cost, replacing them as they were when

[3] Misidentified in the complaint as ''William Broderick.'' Memorandum in Support of Federal Defendants' and United States' Motion to Dismiss (''Federal Memorandum'') (Docket No. 8) at 2 n. 4. The moving defendants assert that this court ''should construe David Broderick as joining this motion,'' id. at 1 n. 1, but there is no indication in the court record as of the date of this recommended decision that Broderick has been served with the complaint and summons. Accordingly, the court cannot consider him a party to this action at this time and cannot consider him to have joined in the motion.

[4] Identified in the complaint as ''Rick Cooper.''

they were taken away, and replacing any property which has been lost or discarded by subsequent forced entry occupiers or the buyer . . . or his agents, and to put the property back into the condition it was in when the Tempelmans were forcibly barred from re-entering it, or in a condition such as they approve without changes;'' and (iii) compensatory damages. Id. at [2]–[3].

The complaint refers to ''a related case filed in this Court'' in which orders ''authorizing and approving the sale of the property at the illicit auction'' were entered, which orders ''are being challenged under the New Hampshire Croydon decision and under U.S. and NH Constitutional requirements for a Jury Trial for any disputed transfer of title with a value over $20 (US) or $1,800 (NH).'' Id. at [2]. The complaint was initially filed in state court, and it is not clear whether a separate action is currently pending or was at any time pending in state court with respect to title to the property located at 24 Maple Street in Milford, New Hampshire. However, the case in which title to that property was involved and the federal defendants were also involved was United States v. Tempelman, Docket No. 98-CV-697, in the United States District Court for the District of New Hampshire, in which the United States sought to recover federal tax assessments made against Andrew D. Tempelman and Priscilla Tempelman, to set aside as fraudulent their conveyance of their interest in the property at issue and to foreclose a federal tax lien on that property. Complaint, United States v. Tempelman, Docket No. 98-CV-697-B, United States District Court for the District of New Hampshire (Docket No. 1). Judge Barbadoro granted the government's motion for summary judgment in that case (id., Docket No. 28) and issued an order of foreclosure by sale on the property at issue (id., Docket No. 35). Following an appeal in which the First Circuit affirmed the entry of summary judgment (id., Docket No. 45), Judge Barbadoro granted the government's motion for entry of an order of ejectment (id., Docket No. 51) and later granted the government's motion to confirm the sale of the property (id., Docket No. 58). Ordinarily, in weighing a motion under Rule 12(b)(6), ''a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment.'' Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir.2001). ''There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint.'' Id. (citation and internal quotation marks omitted). In this case, the records of the underlying case are official public records, they are central to the plaintiff's claim and the plaintiff does not dispute their authenticity (although he clearly disputes their validity). Therefore, I will refer to the documents and orders filed in the underlying action in making my recommended decision on the motion to dismiss.

The complaint identifies defendants Russo, Proulx, Payeur and Fallon as ''of the Nashua Office, Internal Revenue Service;'' and gives the addresses of defendant Colley as 10 Causeway Street, Boston, Massachusetts, Cardone as Box 55, Washington, D.C. and Broderick, DiMartino, Cooper and Smith as 55 Pleasant Street, Concord, NH 03031. Complaint at [1]. The United States Attorney for the District of New Hampshire has certified pursuant to 28 U.S.C. § 2679(d)(1) & (2) that defendants Colley, Cardone, DiMartino, Cooper, Smith, Russo, Proulx, Payeur and Fallon were acting within the scope of their employment as employees of the United States at the time of the incidents that form the basis of this action. Certification (dated May 20, 2002), included in Docket No. 1.

III. Discussion

A. Judge Barbadoro

[1] Judge Barbadoro contends that he is entitled to dismissal of the claims against him under the doctrine of judicial immunity. Federal Memorandum at 6.

> [A] federal judge may not be held accountable in damages for a judicial act taken within his court's jurisdiction. Such immunity applies however erroneous the act may have been, and however injurious its consequences may have proved to the plaintiff. Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed.

Cleavinger v. Saxner, 474 U.S. 193, 199–200 (1985) (citations and internal quotation marks omitted). ''Only judicial actions taken in the clear absence of all jurisdiction will deprive a judge of absolute immunity.'' Cok v. Cosentino, 876 F.2d 1, 2 (1st Cir.1989). The plaintiff makes no attempt to establish a clear absence of jurisdiction for the acts which the complaint alleges he undertook. Objection to Defendants' Motion to Dismiss (''Plain-tiff's Opposition'') (Docket No. 10) at 2–4, 5–8. Indeed, ordering the publication of notices in connection with a court action to collect unpaid taxes, Complaint at [1], is well within the jurisdiction of a federal court. None of the actions of Judge Barbadoro alleged in the complaint, con-strued with reasonable inferences in favor of the plaintiff, suggests that Judge Barbadoro acted outside the court's juris-diction. See Stump v. Sparkman, 435 U.S. 349, 356–64 (1978); Pierson v. Ray, 386 U.S. 547, 553–54 (1967).

The plaintiff does argue that he may nonetheless seek injunctive relief against Judge Barbadoro under 42 U.S.C. § 1983. Plaintiff's Opposition at 2, 4, 5–7.[5] However, that statute provides relief only in circumstances where the defendants have acted under color of state law. No action under section 1983 lies against federal officials acting pursuant to federal law. Soldevila v. Secretary of Agriculture, 512 F.2d 427, 429 (1st Cir.1975). The case law cited by the plaintiff involves actions by state judges. E.g., Olson v. Hart, 965 F.2d 940, 943 (10th Cir.1992). A quick review of the complaint in the underlying action reveals that it invokes only federal law. Complaint, United States v. Tempelman, Docket No. 98-CV-697-B, United States District Court for the District of New Hampshire. No action lies against Judge Barbadoro for injunctive relief by the terms of the complaint in this action. See Pulliam v.. Allen, 466 U.S. 522, 541 (1984) (s 1983 intended to reach unconstitutional state judicial action).

Judge Barbadoro is entitled to dismissal of all claims asserted against him.[6]

B. Christine Colley and John Cardone

John V. Cardone is one of the attorneys of record for the United States in the underlying action. Docket Sheet, United States v. Tempelman. The plaintiff does not challenge the defendants' representation that Christine Colley ''is the attorney in the Office of Chief Counsel, IRS who recommended the initiation at [sic] the previous case against plaintiff.'' Federal Memorandum at 2 n. 2. The United States Attorney for the District of New Hampshire has certified that both were acting within the scope of their employment as employees of the United States at the time of the incidents that form the basis of this lawsuit. Certification. Both contend that they have absolute immunity from the claims asserted by the plaintiff. Federal Memorandum at 6–9.

Because both of the attorney defendants in this case could only have acted pursuant to federal law, no claims may be brought against them under section 1983. Even if they could somehow be construed to have acted under color of state law, prosecutors are absolutely immune from liability under section 1983 for their conduct in initiating a prosecution and in presenting the government's case. Burns v. Reed, 500 U.S. 478, 486 (1991). ''[I]n initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for

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5 The plaintiff has filed a document entitled ''Sur-Reply to Reply to Objection to Defendants' Motion to Dismiss.'' Docket No. 13. The plaintiff did not seek leave to file such a memorandum, which is required by Local Rule 7.1(e)(3) of the United States District Court for the District of New Hampshire. Accordingly, the court will disregard the memorandum.

6 The plaintiff contends that the attorney who filed the federal defendants' motion to dismiss does not represent Judge Barbadoro and that the motion is thus void as to Judge Barbadoro. Plaintiff's Objection at 7–8. To the contrary, the attorney has properly entered his appearance on behalf of Judge Barbadoro. Letter dated June 21, 2002 from Jeremy N. Hendon to Clerk, United States District Court, Concord, New Hampshire, with enclosure (noting copy sent to plaintiff).

damages under § 1983.'' Imbler v. Pachtman, 424 U.S. 409, 431 (1976). To the extent that the complaint seeks to recover against Cardone and Colley under section 1983, they are accordingly entitled to dismissal. See Spear v. Town of West Hartford, 954 F.2d 63, 66 (2d Cir.1992).

To the extent that the plaintiff seeks relief against these defendants on any other basis, it is not possible reasonably to interpret the allegations of the complaint to allege any claims against these defendants other than claims based ''entirely upon their official conduct as attorneys for the government.'' Flood v. Harrington, 532 F.2d 1248, 1250 (9th Cir.1976). The doctrine of absolute immunity protects attorneys ''if their allegedly improper conduct was intimately associated with the judicial phases'' of litigation concerning federal tax liability. Id. at 1251 (citation and internal quotation marks omitted). From all that appears in the complaint, nothing beyond such conduct by Colley and Cardone is alleged here. They are entitled to dismissal of all claims asserted against them. Fry v. Melaragno, 939 F.2d 832, 836 (9th Cir.1991); Barrett v. United States, 798 F.2d 565, 571–72 (2d Cir.1986).

C. Gary DiMartino, Richard Cooper and Meaghan Smith

At all relevant times, DiMartino was the chief deputy United States marshal in Concord, New Hampshire and Cooper and Smith worked in the United States Marshal's Service. Federal Memorandum at 2 n. 3; Plaintiff's Attachment to Writ of Summons, included in Docket No. 1 (listing address of these defendants as ''US Marshals Office, 55 Pleasant Street, Concord, NH''). These defendants seek dismissal based on absolute immunity, contending that they acted at all times within the scope of their authority carrying out facially valid court orders. Federal Memorandum at 9–10. To the extent that the claims against these defendants arise out of the execution of court orders, their position is well taken. Slotnick v. Garfinkle, 632 F.2d 163, 166 (1st Cir.1980); see also Mays v. Sudderth, 97 F.3d 107, 113 (5th Cir.1996). The complaint asserts that these defendants engaged in the following activities which caused the plaintiff damage: conspiracy to commit libel, the only libel alleged being the publication of ''the known falsehood'' that the plaintiff owed back taxes; violation of the Fourth Amendment, which prohibits unreasonable search and seizure; denial of a jury trial before transfer of title to property;[7] conspiracy to deprive the plaintiff of unspecified rights and property; fraud and conspiracy to commit fraud; and ''conspiracy to deprive of property in order to punish for the plaintiff's views of the IRS as admitted in certain writings by these perpetrators.'' Complaint at [1]. None of these claims can reasonably be construed to arise out of anything other than the seizure of the plaintiff's property, which took place at the order of the court.[8] Accordingly, these defendants are entitled to dismissal of the claims asserted against them in the complaint.

D. Paul Proulx, Maria Russo, Marc Payeur and Joseph Fallon

The remaining federal defendants were employees of the Internal Revenue Service at all relevant times. Federa; Memorandum at 2 n. 2; Plaintiff's Attachment to Writ of Summons (listing address of these defendants as ''IRS Office, 410 Amherst Street, Birch Pond Entrance, Nashua NH''). These defendants contend both that the complaint fails to state a claim against them under the doctrine of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and that they are entitled to qualified immunity from the plaintiff's constitutional claims. Federal Memorandum at 10–22. Of course, these defendants, like the employees of the Marshals Service, do not have the power to grant or deny anyone a jury trial, and any

[7] Of course, these defendants had no power to grant or deny the plaintiff a jury trial.

[8] In addition, to the extent that the complaint may reasonably be construed to allege a cause of action under 42 U.S.C. § 1983 against these defendants, they could only have been acting under color of federal rather than state law. Relief under section 1983 is not available in these circumstances. Rogers v. Vicuna, 264 F.3d 1, 4 [88 AFTR 2d 2001-5662] (1st Cir.2001).

Seventh Amendment claim asserted against them must be dismissed.[9]

Bivens actions for money damages against federal officers have been allowed in limited circumstances where "there were no special factors counselling hesitation in the absence of affirmative action by Congress, no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy." Schweiker v. Chilicky, 487 U.S. 412, 421 (1988) (citation and internal quotation marks omitted). "When the design of a Government program suggests that Congress has pro-vided what it considers adequate mechanisms for constitutional violations that may occur in the course of its administration," no Bivens remedy is provided. Id. at 423. That is the case with the administration of federal taxation by the Internal Revenue Service. National Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1248 (10th Cir.1989) (alleged Fifth Amendment violations); Baddour, Inc. v. United States, 802 F.2d 801, 807–09 [58 AFTR 2d 86-6035] (5th Cir.1986) (alleged Fourth and Fifth Amendment violations). Specific statutory remedies for overzealous tax collection efforts are provided by 26 U.S.C. §§ 7432–33. Those remedies are sufficient to bar Bivens claims against individual employees of the Internal Revenue Service. McMillen v. United States Dep't of Treasury, 960 F.2d 187, 190 [69 AFTR 2d 92-1067] (1st Cir.1991).

Any claims asserted against these defendants that could not properly be construed as Bivens claims are barred by the substitution of the United States as a party pursuant to the certification of the United States Attorney. The relevant statute provides:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1). The attorney general has delegated the authority to issue such certifications to United States attorneys. 28 C.F.R. § 15.3(a).

Here, the plaintiff challenges the certification on two grounds: that the United States Attorney "has certified falsely that the defendants were operating 'within the scope of their employment'" and that he "is a known liar." Plaintiff's Opposition at 5. To contest the propriety of substitution based on a certification issued pursuant to section 2679, a plaintiff must produce evidence that demonstrates that each such employee was not in fact acting within the scope of his or her employment. Singleton v. United States, 277 F.3d 864, 871 (6th Cir.2002); Larsen v. Frederiksen, 277 F.3d 1040, 1041 (8th Cir.2002). A claim that the certifier is "a known liar" is irrelevant to this determination. The plaintiff's conclusory, unsworn statement that the certification is false, without more, is not evidence. Further, the complaint itself pleads conduct by the federal defendants that would be within the scope of their employment; under these circumstances, regardless of allegations of bad motives, summary dismissal of a challenge to the certification is warranted. RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1143–44 (6th Cir.1996).

Accordingly, no claims remain against the individual IRS defendants and it is not necessary to reach their claim of qualified immunity.

E. The United States and Government Agencies

The complaint asserts that its claims are brought against the individual defendants and "the gov't agencies which employed them." Complaint at [1]. With respect to such claims and the claims for which the United States has been substituted as a de-

[9] Even if that were not the case, summary judgment was granted to the government in the underlying action, Docket Sheet, United States v. Tempelman, at 6. The Seventh Amendment is not violated by the entry of summary judgment. Shannon v. Graves, 257 F.3d 1164, 1167 (10th Cir.2001). There is no right to jury trial on a motion for foreclosure and sale. Mile High Indus. v. Cohen, 222 F.3d 845, 856 (10th Cir.2000).

fendant, no claims may be asserted pursuant to 42 U.S.C. § 1983, Hindes v. FDIC, 137 F.3d 148, 158 (3d Cir.1998) (federal agencies); International Islamic Cmty. of Masjid Baytulkhaliq, Inc., 981 F.Supp. 352, 364 (D.V.I.1997) (United States), aff'd 176 F.3d 472 (3d Cir.1998), or Bivens, Mooney v. Clerk of Courts, 831 F.Supp. 7, 10 (D.N.H.1993). Any other claims are governed by the Federal Tort Claims Act (''FTCA''), 28 U.S.C. § 2671 et seq. United States v. Smith, 499 U.S. 160, 165–66 (1991). ''Tort claims against the United States must be presented to the appropriate federal agency pursuant to s 2675(a) of the FTCA.'' United States v. Berk & Berk, 767 F.Supp. 593, 603 (D.N.J.1991). This is a jurisdictional requirement. Id. The complaint fails to allege that the plaintiff has complied with this exhaustion requirement and any tort claims must therefore be dismissed. Even if that were not the case, the United States is not answerable in tort for actions arising out of the assessment or collection of federal taxes. 26 U.S.C. § 2680(c).

F. State Law Claim

The complaint also alleges ''Civil Rights violations of ... Croydon constraints'' by the federal defendants. Complaint at [1]. This is an apparent reference to Thomas Tool Servs., Inc. v. Town of Croydon, 761 A.2d 439 (N.H.2000), in which the New Hampshire Supreme Court held that an alternative procedure for collecting state taxes under New Hampshire state law violated the New Hampshire constitution, id. at 441–42. The federal defendants in this case could not possibly have been involved in the collection of state taxes, and the complaint in the underlying action deals only with federal tax liability. The state statute at issue in Croydon did not and could not purport to govern the assessment or collection of federal taxes. Accordingly, the complaint fails to state a claim upon which relief may be granted against any of the moving defendants on this basis.

IV. Conclusion

For the foregoing reasons, I recommend that the motion to dismiss of the federal defendants presently before the court in this action be GRANTED.[10]

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

¶2002-5285

AHMED ABDELSAMED, PLAINTIFF v. UNITED STATES OF AMERICA, State of Colorado, El Paso County, Gregory John Hock, Steven Taffet, Christine Jobin and Jean Dubofsky, DEFENDANTS. U.S. District Court, Dist. of Colorado, (DC CO) CIVIL ACTION NO. 01-N-1774 (CBS), July 23, 2002. Decision for Govt.

1. Actions against U.S.—sovereign immunity—conspiracy; damages; constitutional violations—damages—refunds—motion for relief from judgment. Magistrate judge recommended dismissing taxpayer's action against U.S., state officials and various private parties who allegedly conspired to criminally and unconstitutionally deprive him of interpleaded funds: 35-page incomprehensible complaint with 70 pages of appendices failed F.R.Civ.P. 8(a)'s short-plain-statement pleading rule. Also, conclusory conspiracy allegations failed to state claim or establish 42 USC §1983 violation; criminal claims couldn't

[10] The complaint also states that ''[t]hese gov'ts and their agents are also charged with Civil Rights abuses under Amendment IV, U.S. Constitution, with using this Libel to engage in Homeland Terrorism of other citizens through the media ....'' Complaint at [1]. The plaintiff lacks standing to bring a claim on behalf of any otherwise-unidentified ''other citizens,'' and all such claims are also subject to dismissal.

be pursued in civil action; no applicable sovereign immunity waiver to non-tax claims against govt. or proof that taxpayer met jurisdictional prerequisites to refund suit was shown; State of Colorado was immune from suit; other various unsupported arguments against private defendants were rejected; and motion for relief from prior distribution order was untimely. Also, magistrate recommended imposition of prefiling sanctions order. *Reference:* United States Tax Reporter ¶74,336.504(61); 74,336.506(25); 74,335.01(7); 74,225.01(20); 74,025.01(133). IRC §7402; 7422; 7433.

2. Actions against U.S.—conspiracy—limitations periods—equitable tolling. Magistrate judge determined that limitations period barred pro se taxpayer's conspiracy claim against U.S. and various other non-federal defendants who allegedly conspired to deprive him of funds via interpleader action: taxpayer didn't file claim within 2 years of its accrual date, which was date of interpleader action's resolution and distribution order; and equitable tolling didn't apply where taxpayer by his own statements and prior suits clearly knew interpleader action had been filed and settled. Also, continuing conspiracy argument was rejected. *Reference:* United States Tax Reporter ¶74,336.504(40).

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

RECOMMENDATIONS ON DEFENDANTS' MOTIONS TO DISMISS and PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT and MOTION FOR THE EXPRESS DISMISSAL/SETTING ASIDE OF THE INTERPLEADER ACTION ''94-N-2198''

Magistrate Judge Craig B. Shaffer

THIS MATTER comes before the court on motions to dismiss *pro se* Plaintiff Abdelsamed's First Amended Verified Complaint filed by Defendants Dubofsky (February 21, 2002), Taffet (February 21, 2002), Jobin (February 22, 2002), Hock (February 22, 2002), United States (February 25, 2002), El Paso County (May 13, 2002) and State of Colorado (May 31, 2002). Defendants argue that Abdelsamed's First Amended Verified Complaint should be dismissed for failure to state a claim upon which relief can be granted. On April 1, 2002, Mr. Abdelsamed filed his Reply to Defendants' Motion to Dismiss, as well as various legal memoranda addressing ''Conspiracy and Section 1983,'' ''Plaintiff's Commentary Notes to Defendants' Responses,'' and ''Criminal Charges.''

On January 23, 2002, Abdelsamed filed his Motion for Summary Judgment Against Defendants Taffet, Dubofsky, Hock and Jobin. Abdelsamed filed a Motion for Summary Judgment and An Application for An Entry of a Final Default Judgment Against Defendant United States of America on January 4, 2002.[1] On July 3, 2002, Abdelsamed filed a Motion for Summary Judgment Against Defendant State of Colorado.

Also before the court is Abdelsamed's Motion for the Express Dismissal/Setting Aside of the Interpleader Action ''94-N-2198,'' filed on January 23, 2002. Abdelsamed's motion, pursuant to Fed.R.Civ.P. 60(b), seeks an order setting aside the final judgment entered in Civil Action 94-N-2198. Abdelsamed contends that distribution of funds under that judgment resulted from fraud on the District Court and misrepresentations and other misconduct committed by the Defendants in this action. Defendants Jobin, Hock, Taffet, Dubofsky and United States filed separate responses in opposition on February 21 and 22, 2002.

Pursuant to the General Order of Reference dated September 14, 2001, this matter was referred to the Magistrate Judge to, *inter alia*, ''hear and determine any pretrial matter which has been or will be presented in this case, except any motion to award injunctive relief, to grant judgment on the pleadings, to grant summary judgment, to dismiss the entire action involuntarily, or to dismiss or permit maintenance of a class action.'' As to the latter motions, the Mag-

[1] On January 2, 2002, the Clerk's Office declined to note a default on the part of Defendant United States.

istrate Judge was designated to conduct hearings and submit proposed recommendations for the District Court's determination. The court has reviewed the pending motions and responses, the entire case file, and the applicable law, and is sufficiently advised in the premises. Given the nature of the issues raised and the arguments asserted in the parties' papers, the court does not believe that oral argument would substantially assist its analysis.

BACKGROUND

Abdelsamed states in his First Amended Verified Complaint that the present action "relates to case no 94-N-2198 [Gregory John Hock (sic.) conservator for Ahmed Abdelsamed v. New York Life] filed and proceeded before this court . . . ." *See* First Amended Verified Complaint at ¶ 1. To place the pending dispositive motions in the proper context, it is necessary to review briefly Abdelsamed's litigation history.

In March 1986, Abdelsamed was hospitalized with a "major affective disorder, depressed type," while working on an engineering contract in Egypt. *See Hock, Conservator for Ahmed Abdelsamed, v. New York Life Insurance Company*, 876 P.2d 1242, 1246 (Colo. 1994).[2] At various times in 1986, Abdelsamed was hospitalized and received psychiatric treatment. *Id.*In March 1987, the El Paso County District Court committed Abdelsamed to the state hospital in Pueblo, after determining that he was mentally ill and a danger to himself and others. Although Abdelsamed was released from the state hospital seventeen days later, he continued to receive psychiatric care at least through 1994. *Id.* In November 1987, Abdelsamed initiated litigation in El Paso County District Court against New York Life Insurance Company, alleging claims for breach of contract and bad faith based upon New York Life's refusal to pay benefits under a disability insurance policy. *See Abdelsamed v. New York Life Insurance Company*, 87 CV 6188. At the conclusion of trial, the jury returned a verdict in favor of Abdelsamed for $209,644 on his breach of contract claim, and $915,933 on his bad faith claim. That judgment was upheld by the Colorado Supreme Court in *Hock v. New York Life Insurance Company*, 876 P.2d 1242 (Colo. 1994).

In April 1991, Abdelsamed filed a chapter 7 bankruptcy petition in the United States Bankruptcy Court for the District of Colorado. In that bankruptcy proceeding, Abdelsamed claimed as exempt property any proceeds recovered from New York Life. An Order entered by the United States Bankruptcy Court held that damages and costs under Abdelsamed's breach of contract claim was non-exempt property, while the damages and interest on the bad faith claim was exempt property and not subject to administration by the bankruptcy trustee. Abdelsamed received a bankruptcy discharge on December 5, 1991.

On May 14, 1992, El Paso County District Court Judge Donald E. Campbell appointed Gregory Hock as conservator for Abdelsamed. Public records indicate that Abdelsamed attended that hearing, along with his counsel, Andrew Brake.

On September 6, 1994, after the Colorado Supreme Court's decision in *Hock v. New York Life Insurance Company*, New York Life Insurance filed a motion to allow interpleader and the deposit of checks totaling $1,992,327.46 with the El Paso County District Court. New York Life advised the court in a supplemental pleading, also filed on September 6, 1994, that the United States Department of Treasury, Internal Revenue Service, had issued a Notice of Levy and was asserting a claim to money owed to Abdelsamed in the amount of $849,833.16. New York Life further stated that the trustee in bankruptcy for Abdelsamed was seeking payment to the bankruptcy estate of the $209,644.07, plus interest, awarded under Abdelsamed's breach of contract claim. On September 23, 1994, pursuant to 28 U.S.C. § 1444, the United States filed a notice of removal in Case No. 87-CV-6118. Section 1444 specifically permits the United States to remove an interpleader action to the United States District Court where the United

[2] On his appeal to the Colorado Supreme Court, Mr. Abdelsamed was represented by Jean Dubofsky, Esq.

States has asserted a claim to personal property by issuing and serving a Notice of Levy. In addition to the claims asserted by the United States and the bankruptcy trustee, a charging lien was asserted against funds on deposit by Steven Taffet, Esq., who had represented Abdelsamed in the original litigation against New York Life under a contingent fee agreement which contemplated attorneys fees not to exceed 45% of the interpleaded fund, plus costs. Upon removal, the state interpleader action was docketed as Civil Action No. 94-N-2198 (''the Interpleader Action''). In the Interpleader Action, Conservator Hock was represented by Christine Jobin, Esq.

On March 17, 1995, Defendant Hock, as conservator for Abdelsamed, filed a Motion for Order Authorizing Disbursement from Interpleaded Fund. Hock advised the District Court that he had reached a ''global settlement with Steven Taffet and the United States pursuant to which these claimants ... agreed to resolve their claims against the Interpleaded Fund in consideration of payments to them in the respective amounts of $830,000 and $624,000.'' Under the terms of his settlement, Taffet agreed to compromise his original claim of $953,516.86 in consideration of payment of $830,000. Taffet further agreed that Dubofsky's claim for legal services rendered in the amount of $80,680.42, would be paid from the $830,000 settlement amount. The United States also agreed to compromise its claim of $839,000 in exchange for a payment of $624,000.[3] The terms of these settlements had been approved by the Probate Court for El Paso County on March 2, 1995. The United States District Court previously had authorized disbursement of $278,132.31 to Abdelsamed's bankruptcy estate. On March 20, 1995, the United States District Court granted Hock's request for authorization to make disbursements consistent with the negotiated settlements, and also directed that Conservator Hock receive $524,001.94 from the deposited funds. Of the $1,992,327.46 deposited with the El Paso County District Court, $1,719,694.94 was disbursed to the United States, Taffet, Dubofsky and Hock in the aggregate.

Against this backdrop, Abdelsamed alleges a multi-faceted conspiracy to violate criminal laws, wrongfully obtain his property, deprive him of his constitutional rights, and defraud the courts. The First Amended Verified Complaint generally alleges that Defendants ''conducted concealment fraudulent operations ... to achieve control over plaintiff and his assets, to deprive plaintiff of his constitutional rights and to finally acquire his assets by fraud.'' ¶ 2. Abdelsamed invokes the District Court's jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(1), 1346(a)(1) and (b)(1), 1367(a) and Rule 60 of the Federal Rules of Civil Procedure. The First Amended Verified Complaint asserts claims under 42 U.S.C. § 1983, 42 U.S.C. § 1985(2) and (3), and Colorado common law. Abdelsamed seeks to set aside all prior payments to Defendants and to recover the amounts he claims were wrongfully received by Defendant Taffet ($830,000), Defendant United States (in excess of $900,000), Defendant Hock (in excess of $70,000), Defendant Jobin ($80,680.42), and Defendant Dubofsky ($80,680.42), together with interest. In addition, Abdelsamed seeks other unspecified compensatory and punitive damages.

The First Amended Verified Complaint also requests an order to set aside the judgment in the Interpleader Action, Civil Action No. 94-N-2198. That same relief is sought in Abdelsamed's pending Motion for The Express Dismissal/Setting Aside Of The Interpleader Action. That motion, brought under Rule 60 of the Federal Rules of Civil Procedure, argues that the judgment in the earlier action was derived from Defendants' fraud upon the District Court and their denial of Abdelsamed's due process rights.

Abdelsamed has filed three other lawsuits in this Court since October 1999. Each of these cases arise from or relate to the same bankruptcy action, probate pro-

[3] Under the terms of the settlement with the United States, the Department of Treasury received $258,307 from the bankruptcy estate and $365,693 from the Interpleaded Fund.

ceedings, and Interpleader Action that are implicated in this action. Those cases are:

1. *Abdelsamed v. United States*, No. 99-WM-2012 (D. Colo.) (complaint filed October 15, 1999, seeking recovery of taxes illegally paid and collected, dismissed without prejudice for repeated failure to comply with Fed.R.Civ.P. 8). *See also Abdelsamed v. United States*, 2002 WL 462027 (10th Cir., March 27, 2002).

2. *Abdelsamed v. United States*, No. 00-B-702 (D. Colo.) (complaint filed April 5, 2000, challenging proceedings before and rulings of bankruptcy court, dismissed without prejudice pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6)).

3. *Abdelsamed v. State of Colorado, et al.*, No. 00-WM-1629 (D. Colo.) (complaint filed August 15, 2000, against State of Colorado and several El Paso County district judges, dismissed without prejudice for repeated failure to comply with Fed.R.Civ.P. 8). *See also Abdelsamed v. State of Colorado*, 2001 WL 289978 (10th Cir., March 26, 2001)

In these cases, Abdelsamed alleged, *inter alia*, that various lawyers and state judges conspired to defraud and deprive him of due process in the context of his bankruptcy proceedings, that state judges conspired with federal officials and court appointees to deprive him of his constitutional rights and property, and that the Internal Revenue Service wrongfully assessed and collected taxes for various tax years. Many of the Defendants in this case figure prominently in the factual allegations presented in Abdelsamed's earlier lawsuits.

ANALYSIS

I. Defendants' Motions to Dismiss

Several Defendants' motions to dismiss raise identical challenges to the First Amended Verified Complaint. Defendants Hock, Taffet, Jobin and Dubofsky (''the Private Defendants'') argue that the First Amended Verified Complaint fails to comply with the pleading requirements in Fed.R.Civ.P. 8(a) and 9(b), and fails to properly plead a conspiracy claim. These Defendants also contend that Abdelsamed lacks standing to assert federal criminal violations, has failed to state a constitutional violation under the Fourteenth Amendment in the absence of state action, and asserts claims that are barred by the applicable statute of limitation. Finally, the Private Defendants argue that Abdelsamed's claim for breach of fiduciary duty is barred by his failure to comply with the procedural requirements imposed by Colo.Rev.Stat. § 13-20-602. In addition to the pleading deficiencies cited by the Private Defendants, Defendants United States and State of Colorado move to dismiss for lack of subject matter jurisdiction in the absence of a waiver of sovereign immunity. Defendant El Paso County has moved to dismiss based on Abdelsamed's failure to name a proper party pursuant to Colo.Rev.Stat. 30-11-105.

A. Standard of Review

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a motion to dismiss may be granted if the court does not have subject matter jurisdiction over the matter. The determination of subject matter jurisdiction is a threshold question of law. *Madsen v. United States ex. rel. United States Army Corps of Engineers*, 841 F.2d 1011, 1012 (10th Cir. 1987). The court applies a rigorous standard of review when presented with a motion to dismiss for lack of subject matter jurisdiction. *Consumers Gas & Oil, Inc. v. Farmland Indus. Inc.*, 815 F. Supp. 1403, 1408 (D. Colo. 1992). ''[T]he party invoking federal jurisdiction bears the burden of proof.'' *Marcus v. Kansas Dept. of Revenue*, 170 F.3d 1305, 1309 (10th Cir. 1999).

''Motions to dismiss pursuant to Rule 12(b)(1) may take two forms.'' *Amoco Production Co. v. Aspen Group*, 8 F. Supp.2d 1249, 1251 [82 AFTR 2d 98-5279] (D. Colo. 1998). First, a party may attack the facial sufficiency of the complaint and the court must accept the allegations of the complaint as true. *Id.* Second, a party may attack the factual assertions regarding subject matter jurisdiction through affidavits and other documents and the court ''has wide discretion to allow af-

fidavits, other documents and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).'' *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). The present motion appears to be in the nature of a facial attack, wherein the court must accept the allegations in the complaint as true.

Defendants also have moved to dismiss the First Amended Verified Complaint pursuant to Fed.R.Civ.P. 12(b)(6). Rule 12(b)(6) states that a court may dismiss a complaint for ''failure to state a claim upon which relief can be granted.'' When reviewing a Rule 12(b)(6) motion to dismiss, the court accepts the well-pleaded allegations of the complaint as true and construes them in the light most favorable to the plaintiff. *Ramirez v. Dep't of Corrections*, 222 F.3d 1238, 1240 (10th Cir. 2000) (citation omitted). A complaint should not be dismissed under Rule 12(b)(6) ''unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'' *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

The court notes that on April 1, 2002, Abdelsamed filed a Motion to Request Admission of Evidence. Attached to that motion were several exhibits. In his Reply to Defendants' Motion to Dismiss, Abdelsamed argues that Defendants' motions to dismiss must be treated as motions for summary judgment under Fed.R.Civ.P. 56 in light of his submission of evidence. To the contrary, on a motion to dismiss the court is not permitted to consider factual material submitted outside of the complaint unless all parties are given notice that the motion to dismiss is being converted to a motion for summary judgment and given an opportunity to submit additional affidavits or exhibits. *See Tagare v. NYNEX Network Systems Co.*, 921 F. Supp. 1146 (S.D.N.Y. 1996). Abdelsamed may not unilaterally convert Defendants' motions by filing supplementary materials, and the court is not required to take cognizance of those materials. *Cardona Del Toro v. United States*, 791 F. Supp. 43 (D.P.R. 1992) (recognizing that court has broad discretion in deciding whether to treat motion to dismiss as motion for summary judgment). Under the circumstances of this case, the court will decline Abdelsamed's request to reclassify the pending motions and will apply the appropriate standards under Rule 12(b).

B. Pleading Requirements

[1] The First Amended Verified Complaint consists of 35 pages and 178 numbered paragraphs. The First Amended Verified Complaint also incorporates by reference various appendices which set forth the specific claims asserted against each individual defendant. These appendi-ces, which are attached to the First Amended Verified Complaint, comprise an additional 70 pages and 389 numbered paragraphs. Defendants contend that Abdelsamed's First Amended Verified Complaint should be dismissed for failure to comply with pleading requirements im-posed by the Federal Rules of Civil Proce-dure.

Rule 8(a) of the Federal Rules of Civil Procedure states that a complaint shall contain a ''short and plain statement of the claim showing that the pleader is entitled to relief.'' This pleading requirement is intended to ''give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'' *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). *See also Blinder & Robinson Co. v. SEC*, 748 F.2d 1415, 1419 (10th Cir. 1984) (''a plaintiff must state a compensable claim for relief that details the facts forming the basis for the claim''). The information provided by the pleader must be adequate to set forth the basis of his claim ''as distinguished from a bare averment that he wants relief and is entitled to it.'' *See* Wright & Miller, *Federal Practice and Procedure*, Civil 2d § 1215 and 145 (1990). While *pro se*pleadings should be construed liberally and held to a less stringent standard than formal proceedings drafted by lawyers, *Gibson v. City of Cripple Creek*, 1995 WL 94483 (10th Cir. March 1, 1995), that standard does not override a *pro se* plaintiff's responsibility

to provide a simple and concise statement of his claims and the specific conduct that gives rise to each asserted claim. *See Conley*, 355 U.S. at 48 (*pro se*plaintiff's complaint must be sufficient to give the defendant ''fair notice of what the plaintiff's claim is and the grounds upon which it rests''). *See also Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994) (pro se litigant required to follow the rules of federal and appellate procedure).

This court cannot be this *pro se* litigant's advocate. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). A court may not assume that a plaintiff can prove facts that have not been alleged, or that a defendant has violated laws in ways that a plaintiff has not alleged. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983). *See also Whitney v. State of New Mexico*, 113 F.3d 1170, 1173–74 (10thth Cir. 1997) (court may not ''supply additional factual allegations to round out a plaintiff's complaint''). The court may disregard and dismiss without a hearing claims that are vague and conclusory. *Johnson v. Richards*, 617 F. Supp. 113, 114 (W.D. Okla. 1984). *See also Cotner v. Hopkins*, 795 F.2d 900, 902 (10th Cir. 1986) (a failure to provide specific factual allegations renders a complaint vague and conclusory).

Defendants also assert that Abdelsamed has failed to comply with the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure, which requires that ''in all averments of fraud ... the circumstances constituting fraud ... shall be stated with particularity.'' *See Jurgens v. Abraham*, 616 F. Supp. 1381 (D. Mass. 1985) (holding that Rule 9(b) pleading requirements are applicable even if the complaint does not explicitly use the word ''fraud''). Allegations of fraud must provide sufficient notice of the grounds upon which the claim rests to permit defendant to answer or otherwise defend itself. *Gardner v. Investors Diversified Capital, Inc.*, 805 F. Supp. 874, 876 (D. Colo. 1992).

Abdelsamed cannot claim ignorance of the pleading requirements imposed by the Federal Rules of Civil Procedure. In earlier lawsuits, Abdelsamed repeatedly has been told that his complaints did not comply with the short and plain statement requirement of Rule 8. Abdelsamed's pattern of non-compliance with Rule 8 was referenced by the Tenth Circuit in an Order entered in *Abdelsamed v. United States of America*, 2002 WL 462027 (10th Cir., March 27, 2002).

> [A]s we admonished this plaintiff before, the parties and the court are under no obligation to craft legal theories for the plaintiff, nor may they supply factual allegations to support a pro se plaintiff's claim for relief.... Plaintiff persists in failing to comply with Fed.R.Civ.P. 8(a) which requires a ''short and plain statement'' of the court's jurisdiction and the claims showing entitlement to relief, and a demand for judgment on the relief sought.... This case is merely another chapter in a long history of plaintiff's inability to comply with the rules of Rule 8(a).

See also Abdelsamed v. Colorado, 2001 WL 289978 (10th Cir., March 26, 2001) (in affirming dismissal without prejudice, noted that it would ''be manifestly unfair to expect Defendants to respond reasonably to Plaintiff's colossal, often incomprehensible, complaint).

Defendants characterize the First Amended Verified Complaint as ''totally incomprehensible,'' ''unintelligible,'' and ''vague and virtually unreadable.'' This court agrees. Even after a careful review of the operative pleading, it is difficult to determine how many counts or separate claims have been asserted. Rather than designating specific claims for relief by number, the various appendices refer to claims by category (*e.g.*, ''fraud upon the court claims,'' ''discrimination claims''). The reader is left to guess how many discrete claims may fall within these broad categories. Abdelsamed's use of appendices only compounds the confusion. One appendix purports to set forth a ''statement of claims against all defendants.'' That appendix includes a reference to ''fraud upon the court claims.'' Other appendices for in-

dividual defendants also refer to "fraud claims." It is not clear whether the latter appendices purport to allege additional claims sounding in fraud or are simply redundant. Indeed, many of the paragraphs in the First Verified Amended Complaint seem to repeat the same allegations. While mindful of the liberal treatment accorded *pro se* pleading, it is not the responsibility of the court or defendants to decipher prolix allegations in order to divine Abdelsamed's claims. *Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368, 371–72 (10th Cir. 1989). *See also DeRito v. Ideal Basic Indus., Inc.*, 617 F. Supp. 79, 81 (D. Colo. 1985) ("[T]he plaintiff is only required to state facts sufficient to give the opposing party fair notice of the claim."). Abdelsamed has failed to comply with that minimal standard. Given his failure to comply with Rule 8(a), the court need not address the deficiencies under Rule 9(b), save to acknowledge the merits of Defendants' argument.

Defendants also challenge the legal sufficiency of Abdelsamed's conspiracy claim. To survive a motion to dismiss, a complaint alleging a conspiracy to deprive a person of constitutional rights must contain more than conclusory, vague or general allegations of conspiracy. *Leon v. Murphy*, 988 F.2d 303, 311 (2d Cir. 1993). *Cf. Scott v. Hern*, 216 F.3d 897, 908 (10th Cir. 2000) (upholding dismissal of an amended complaint that failed to provide factual averments as to the nature of the alleged conspiracy or the defendant's role in the alleged activities); *Alfaro v. E.F. Hutton & Co.*, 606 F. Supp. 1100, 1117–18 (E.D. Pa. 1985) (holding that a general conspiracy allegation without a statement of facts is insufficient to state a cause of action).

While the First Amended Verified Complaint describes specific instances of conduct attributable to individual Defendants, the several conspiracy allegations offer little more than legal conclusions and speculative assumptions. It is impossible to determine whether Abdelsamed is alleging one overarching conspiracy, or several different conspiracies consisting of specific defendants and other identified and unidentified third parties. For example, Abdelsamed alleges that "defendants Jobin and Hock reopened and conspired with other parties and state officials to reopen plaintiff's bankruptcy case without plaintiff's knowledge, participation, input or consents." First Amended Verified Complaint at ¶ 58. Abdelsamed fails to identify these "other parties and state officials" or explain what role each alleged coconspirator played. *Cf. Loftus v. Southeastern Pennsylvania Transportation Authority*, 843 F. Supp. 981, 987 (E.D. Pa. 1994) (noting that "parallel but independent action by actors does not import conspiracy"). Similarly, Abdelsamed alleges that "defendant Dubofsky conspired and acted in concert with state judge Campbell ... to influence his decisions and rulings and to harm plaintiff's opportunities in recovery." First Amended Verified Complaint at ¶ 70. *But see Sales v. Murray*, 862 F. Supp. 1511, 1517 (W.D. Va. 1994) (conspiracy complaint must allege facts suggesting agreement or meeting of minds). Abdelsamed claims that Dubofsky "in her phone calls and written letters to state judge Campbell sold herself cheaply to represent the state court ... rather than representing plaintiff as agreed upon before." First Amended Verified Complaint at ¶ 72. *But see Hernandez v. Joliet Police Dept.*, 197 F.3d 256, 263 (7th Cir. 1999) (conspirators must act with a single plan, the general nature and scope of which is known to each would-be conspirator). The First Amended Verified Complaint does not describe any communication, cooperation or command from which a conspiracy between Defendant Dubofsky and Judge Campbell could be inferred. Abdelsamed's conclusory allegations of a conspiracy are not sufficient to survive a motion to dismiss. *Scott v. Hern*, 216 F.3d at 908.

Abdelsamed argues that federal officials who conspire with state officials act under color of state law for purposes of § 1983. *See Hampton v. Hanrahan*, 600 F.2d 600, 615 (7th Cir. 1979), *cert. granted in part, judgment reversed in part on other grounds*, 446 U.S. 754 (1980). Yet, the First Amended Verified Complaint is de-

void of any facts that would support such a conspiracy claim. Paragraph 127 of the First Amended Verified Complaint summarily claims that Defendant United States acted as '''Third Party Conspirators' along with others to conspire and act in concert with state officials 'Clothed Under Color of State Law'" to engage in certain conduct which allegedly deprived Abdelsamed of constitutional rights and property. The same general allegation is set forth in paragraph 29 of the "Statement of Claims Against Defendant United States of America" appended to the First Amended Verified Complaint. As noted above, such conclusory allegations are insufficient as a matter of law. In short, Abdelsamed has failed to properly allege a common law conspiracy or a conspiracy under 42 U.S.C. §1985.

C. Fourteenth Amendment Claim

To assert a claim under section 1983, Abdelsamed must allege a deprivation of a federal or constitutional right by a person acting under color of state law. *Watson v. City of Kansas City, Kan.*, 857 F.2d 690, 694 (10th Cir. 1988). Section 1983 does not impose liability in the absence of action taken under color of state law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970). If the action of the defendant does not qualify as state action, then the inquiry into section 1983 liability ends. *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982). Here, Defendants Hock, Taffet, Jobin and Dubofsky argue that Abdelsamed has not alleged facts that would satisfy the "color of law" element of a § 1983 claim.

"The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' *West v. Atkins*, 487 U.S. 42, 49 (1988). Purely private acts are not consider acts under color state law unless that conduct is furthered by an actual or purported state authority. *Jojola v. Chavez*, 55 F.3d 488, 493 (10th Cir. 1995). *See also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (court must determine whether private party's 'conduct has sufficiently received the imprimatur of the State so as to make it "state action" for purposes of the Fourteenth Amendment'). To be 'fairly attributable to the state,'

> [f]irst, the "deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the state is responsible." Second, the private party must have "acted together with or ... obtained significant aid from state officials or engaged in conduct 'otherwise attributable to the State.'"

Pino v. Higgs, 75 F.3d 1461, 1465 (10th Cir. 1996) (citations omitted).

The First Amended Verified Complaint does not set forth facts that would suggest that Defendants Hock, Taffet, Jobin or Dubofsky were functioning in any capacity other than as private actors. *See Lemmons v. Law Firm of Morris and Morris*, 39 F.3d 264, 266 (10th Cir. 1994) ("the conduct of retained counsel does not rise to the level of state action within the meaning of § 1983"); *Barnard v. Young*, 720 F.2d 1188, 1189 (10th Cir. 1983) (attorney does not become state actor merely because he is representing a client before a state court). For purposes of a motion to dismiss, the court must accept as true all of the "well-pleaded facts of the complaint and [construe] them in the light most favorable to the plaintiff." *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 619 (10th Cir. 1998). However, pursuing litigation on behalf of a client or seeking relief through the use of state judicial proceedings does not constitute state action. *Cf. Scott v. Hern*, 216 F.3d at 906–07 (private individual does not engage in state action by submitting affidavit in support of petition for involuntary civil commitment). Abdelsamed's allegations of state law violations or private misuse of state judicial procedures does not change the character of the Private Defendants' conduct. *Cobb v. Saturn Land Co., Inc.*, 966 F.2d 1334, 1336 (10thCir. 1992); *Roemer v. Security*

Bancshares, Inc., 978 F. Supp. 988, 991 (D. Kan. 1997).

Abdelsamed argues the Private Defendants were engaged in one or more conspiracies with state judges and other state officials, which would satisfy the state-action requirement under § 1983. Certainly, state judges are state actors within the meaning of the Fourteenth Amendment. *People v. Garberding*, 787 P.2d 154 (Colo. 1990). A conspiracy between private parties and state officials, if properly alleged, would satisfy the state action requirement. *See Tower v. Glover*, 467 U.S. 914, 920 (1984) (private person acts "under color of" state law when engaged in conspiracy with state officials to deprive another of federal rights); *Dixon v. City of Lawton, Okl.*, 898 F.2d 1443, 1449 n. 6 (10th Cir. 1990). However, to satisfy the state action requirement under § 1983, state officials must do more than offer mere approval of or acquiescence in the actions or initiatives of private actors. *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442, 1448 (10th Cir. 1995). As noted previously, Abdelsamed's conspiracy allegations fail to state a claim for relief. For the same reasons, Abdelsamed's conclusory allegations will not sufficient to satisfy the requirement of "state action."

> When a plaintiff in a § 1983 action attempts to assert the necessary "state action" by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleading must specifically present facts tending to show agreement and concerted action.

Scott v. Hern, 216 F.3d at 907 (citations omitted). Construing the *pro se* amended complaint in a light most favorable to Abdelsamed, the court concludes that Abdelsamed has not stated a claim under § 1983.

D. Claims Asserting Criminal Violations

In his April 1, 2002 legal memorandum regarding "Criminal Charges," Abdelsamed claims that various Defendants and non-parties are indictable under federal criminal statutes. The First Amended Verified Complaint also purports to assert claims against all Defendants for "criminal fraud" and seek "criminal damages." *See* Statement of Claims Against All Defendants at ¶s 13 and 48. Elsewhere in the First Amended Verified Complaint, Abdelsamed alleges that Defendants engaged in "criminal premeditated collusion," "criminal premeditated active concealment," and "criminal premeditated diversion and conversion of plaintiff's property and assets." *See* First Amended Verified Complaint at ¶s 153–160. None of these allegations state a cognizable claim for relief.

"Criminal statutes cannot be enforced by civil actions." *Winslow v. Romer*, 759 F. Supp. 670, 673 (D. Colo. 1991) ("private citizens generally have no standing to institute criminal proceedings"). Abdelsamed does not have standing to institute criminal proceedings through a civil lawsuit. *Martinez v. Ensor*, 958 F. Supp. 515, 518 (D.Colo. 1997). *See also Bass Angler Sportsman Society v. United States Steel Corp.*, 324 F. Supp. 412, 415 (S.D. Ala. 1971) (recognizing "the firmly established principle that criminal statutes can only be enforced by the proper authorities of the United States Government and a private party has no right to enforce these sanctions"). Any "criminal charges" or claims in the First Amended Verified Complaint which seek criminal sanctions must be dismissed as a matter of law.

E. Breach of Fiduciary Duty Claim

Under Colorado law, a plaintiff is required to support a professional negligence claim with a certificate of review from a licensed professional who has expertise in the area of the alleged negligent conduct. This certificate of review must state that the professional has reviewed the relevant facts and has concluded that the plaintiff's claim of negligence does not lack substantial justification. *See* Colo. Rev. Stat. § 13-20-602(1)(a) and (3)(a). The Colorado Supreme Court has held that this certification requirement extends to any claim, including claims for breach of fiduciary duty, for which expert testimony is necessary to es-

tablish a *prima facie*case. *Martinez v. Badis*, 842 P.2d 245, 249 (Colo. 1992).

> For example, unless a breach of fiduciary duty claim is admitted by the defendant, the plaintiff alleging a breach of fiduciary duty arising from the attorney-client relationship must establish by means of expert testimony the applicable standard of care and the defendant's failure to adhere to that standard of care.

Id. at 252.

In this case, the claims against Defendants Jobin, Taffet and Dubofsky for breach of fiduciary duty clearly implicate applicable standards of care and the Colorado Rules of Professional Conduct. Abdelsamed has alleged, for example, that Defendant Dubofsky engaged in conduct that created a conflict of interest. *See* First Amended Verified Complaint at ¶ 72 (''defendant Dubofsky ... sold herself cheaply to represent the state court and its unlawful probate action against plaintiff's interests, rather than representing plaintiff as agreed upon before''). Elsewhere, Abdelsamed alleges that Defendant Taffet breached his fee agreement through his ''unethical and criminal conduct.'' *See, e.g.,*First Amended Verified Complaint at ¶s 26 and 92. Abdelsamed repeatedly claims that Defendants Taffet, Jobin and Dubofsky conspired to pursue legal actions ''without plaintiff's knowledge, participation, input or consents.'' *See, e.g.,* First Amended Verified Complaint at ¶s 4(r), 4(u), 5 and 58. By their very nature, these allegations will require expert testimony. *See, e.g., Town of Alma v. Azco Construction, Inc.*, 10 P.3d 1256, 1263 (Colo. 2000) (attorney-client relationship creates independent duty of care); *Crystal Homes, Inc. v. Radetsky*, 895 P.2d 1179, 1182 (Colo. App. 1995) (agreeing with the trial court's conclusion that expert testimony was required to support plaintiff's claim for either negligent misrepresentation or breach of fiduciary duty). As such, Abdelsamed's claims for breach of fiduciary duty fall within Colo.Rev.Stat. § 13-20-602(1)(a) and (3)(a).

The statute requires that a certificate of review be filed within sixty days after service of the complaint unless the court determines that a longer period of time is necessary for good cause shown. *See* Colo.Rev.Stat § 13-20-602(1)(a). If the plaintiff does not file a certificate of review or a motion to extend the filing period, the defendant may move to dismiss the case or move for an order requiring plaintiff to file a certificate of review. *See Martinez v. Badis*, 842 P.2d at 251. The plaintiff may then demonstrate that no expert testimony is required to prove his claims or that good cause exists for failure to comply with time requirements of subsection 602(1). *Id.*

The court having concluded that a certificate of review is required, dismissal of Abdelsamed's breach of fiduciary duty claims is appropriate unless Abdelsamed establishes good cause for his failure to timely file a certificate of review. *Martinez v. Badis*, 842 P.2d at 251. Abdelsamed neither attempts to establish nor establishes good cause for his failure to timely file a certificate of review and the court finds no justification to afford Abdelsamed another opportunity to file a certificate of review at this stage of the proceedings. Abdelsamed has filed numerous pleadings and papers since the commencement of this lawsuit in September 2001, none of which constitute an appropriate certificate of review. Abdelsamed's claims for breach of fiduciary duty against Defendants Taffet, Jobin and Dubofsky must be dismissed for failure to comply with the Colorado certificate of review requirement.

F. Statute of Limitations

[2] The Private Defendants have moved to dismiss, arguing that Abdelsamed's claims against them are barred by the statute of limitations. Defendant United States' motion to dismiss also raises statute of limitations issues. *Cf. Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996) (quoting 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 352 (1990) (''A complaint showing that the statute of limitations has run on the claim is the most common situation in which the affirmative defense appears on the face of the plead-

ing,' rendering dismissal appropriate''). Here, the First Amended Verified Complaint challenges conduct by Defendants that allegedly occurred between 1990 and April 1999. *See, e.g.*, First Amended Verified Complaint at ¶s 20, 23, 41, 51–52, 81, 94, 96 and 110.

It is well-settled that in a § 1983 action, a plaintiff must satisfy the forum state's personal injury statute of limitations. *See Wilson v. Garcia*, 471 U.S. 261, 280 (1985); *Industrial Constructors v. United States Bureau of Reclamation*, 15 F.3d 963, 968 (10th Cir. 1994); *Blake v. Dickason*, 997 F.2d 749, 751 (10thCir. 1993). Because § 1983 actions are best characterized as personal injury actions, the two-year statute of limitations provided in Colo. Rev. Stat. § 13-80-102 is the appropriate state statute of limitations.[4]

A § 1983 claim accrues ''either when the plaintiff has knowledge of his claim or when he is put on notice — *e.g.*, by the knowledge of the fact of injury and who caused it — to make reasonable inquiry and that inquiry would reveal the existence of a colorable claim.'' *Nasim v. Warden, Maryland House of Corrections*, 64 F.3d 951, 955 (4th Cir. 1995) (finding that a prisoner's claims under § 1983 were time-barred when brought four years after his exposure to asbestos). *See also United States v. Kubrick*, 444 U.S. 111, 122–24 (1979) (holding that under federal law, a cause of action accrues when plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action); *Johnson v. Johnson County Com'n Bd.*, 925 F.2d 1299, 1301 (10th Cir. 1991) (a cause of action accrues when the plaintiff knows or has reason to know of the injury which forms the basis for his claim) (internal quotation marks and citations omitted).

Based upon Abdelsamed's allegations that Defendants' conspiracy continued until February 27, 1997 ''about two years after the foresaid Interpleader Action,'' Colorado's two-year statute of limitations required Abdelsamed to file the instant case no later than February 28, 1999. *See* First Amended Verified Complaint at ¶s 51 and 52. The original complaint was filed on September 10, 2001, and the First Amended Verified Complaint was filed on January 25, 2002, dates which were both beyond the statute of limitations. Thus, Abdelsamed's claims are time-barred unless he can demonstrate a basis for tolling the statute of limitations. Without some factual allegation that would extend the limitations period or excuse the untimely filing of the complaint, Abdelsamed has failed to state a claim upon which relief can be granted against these Defendants. *See Aldrich v. McCulloch Properties, Inc.*, 627 F.2d 1036, 1041 n. 4 (10th Cir. 1980).

Abdelsamed argues that the limitation period should be tolled because Defendants fraudulently concealed and conspired to conceal their constitutional violations and their unlawful taking of his property. In his First Amended Verified Complaint, Abdelsamed alleges that Defendants concealed information through

> material misrepresentations, fraud concealment, concealment of evidence, concealment of actions, concealment of procedures, concealment of money distribution, misleading and deception among myriad of crimes and criminal conduct against plaintiff.

See First Amended Verified Complaint at ¶ 11. Abdelsamed summarily claims that ''[b]efore May 12, 2000 and thereafter plaintiff never knew or was ever aware of'' material facts, such as ''the fact that an Interpleader Action took place, the case number for the Interpleader Action, the Colorado District Judge's order for the money distribution, and state judge Campbell's court order.'' *Id.* at ¶s 12 and 13. The First Amended Verified Complaint further alleges that ''material facts and evidence are still concealed from plaintiff due to the concealment that is still in place including but not limited to the vacation and

[4] The Colorado statute of limitations for personal injury claims expressly sets a two-year limitation period for ''all actions upon liability created by a federal statute where no period of limitation is provided in said federal statute'' and for ''all other actions of every kind for which no other period of limitation is provided.'' Colo.Rev.Stat. § 13-80-102.

destruction of evidence by defendants . . . . " *Id* at ¶ 14.

To establish a basis for equitable tolling, Abdelsamed must allege that the Defendants' wrongful conduct prevented him from asserting his claims in a timely manner. *Dean Witter Reynolds, Inc. v. Hartman*, 911 P.2d 1094, 1096–97 (Colo. 1996) (citations omitted). Abdelsamed cannot sustain this burden by vague and conclusory allegations, or by claims that he did not know all of the relevant facts or could not identify all of the relevant individuals. *Pike v. City of Mission, Kansas*, 731 F.2d 655, 658–59 (10th Cir. 1984). *See also Sands v. New Age Family Partnership, Ltd.*, 897 P.2d 917, 922 (Colo.App.1995) (trial court did not abuse its discretion by declining to apply the doctrine of equitable tolling because there was no allegation that defendant failed to disclose any required information, induced or encouraged plaintiffs to allow the statute of limitations to run, or otherwise prevented plaintiffs from filing a timely claim); *Sharp Bros. Contracting Co. v. Westvaco Corp.*, 878 P.2d 38, 44 (Colo.App.1994) (rejecting equitable tolling where opposing party did not engage in any conduct which adversely affected the filing of defendant's claims); *Samples-Ehrlich v. Simon*, 876 P.2d 108, 110 (Colo.App.1994) (equitable tolling inapplicable absent evidence to demonstrate that defendant's conduct adversely affected the filing of plaintiff's claim).

Abdelsamed's allegations are silent on the question of his own due diligence and inability to discover information contained in publicly-available court files. Moreover, Abdelsamed's claim for equitable tolling is challenged by his past filings in the District Court. In deciding a motion to dismiss for failure to state a claim for relief, the trial court may take judicial notice of court documents and matters of public record. *See, e.g., Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017–18 (5th Cir. 1996); *Henson v. CSC Credit Services*, 29 F.3d 280, 284 (7th Cir. 1994). *See also Southmark Prime Plus, L.P. v. Falzone*, 776 F. Supp. 888, 892 (D. Del. 1991) (consideration of judicially noticed facts on motion under Rule 12 does not convert motion into motion for summary judgment).

Here, the court will take judicial notice of the complaint filed on October 15, 1999 in *Abdelsamed v. United States of America*, No. 99-WM-2012. In that action, Abdelsamed sought to recover taxes he alleged had been erroneously and illegally collected by the Internal Revenue Service. In paragraph 97 of his 1999 complaint, Abdelsamed states that he "did not even know of the settlement agreement [that resolved the interpleader action] despite persistent attempts to learn of the balance of his award until late 1997." Abdelsamed attached to the same complaint a memorandum he sent to the District Director, Internal Revenue Service, dated November 13, 1998. In that memorandum, Abdelsamed states that his "suspicions had been aroused that the IRS might have been paid when he finally learned that only some 7% of the taxpayer original funds were left to be distributed to him in late 1996." Abdelsamed also attached to his complaint a January 11, 1999 memorandum that he sent to the Internal Revenue Service in support of his claim for refund of taxes. In this memorandum, Abdelsamed alleges that: "taxpayer's trial attorney Steve Taffet conspired with the IRS to file a lien in November 1990;" that "the trial attorney and trial judge used [information sensitive to the taxpayer] to bring a probate action against the taxpayer in a conservatorship action;" and "the result after the probate was that Attorney Taffet received over $820,000 contrary to the original fee agreement of $323,000." Accepting the truth of these allegations for purposes of the pending motions, it certainly appears that by January 1999, Abdelsamed was aware that a settlement had been reached in the Interpleader Action, that the United States had received $624,000 as part of that settlement, that Defendant Taffet had received $820,000 in the same settlement, and that the Interpleader Action had left him with only a very small percentage of the total amount at issue. It further appears that Abdelsamed believed in January 1999

that a conspiracy had existed between the Internal Revenue Service and Taffet.

While Abdelsamed may now claim that certain material facts were only discovered on May 12, 2000, he clearly knew by January 1999 that the Interpleader Action had been initiated and settled, and that considerable sums had been distributed to his trial attorney and the United States. Armed with the knowledge that he possessed in January 1999, Abdelsamed certainly had the ability to research documents that were publicly available in federal and state courts. Abdelsamed's claim that he was ignorant of the Interpleader Action is belied by the complaint he filed and the correspondence he authored in 1999.[5] Given the information that Abdelsamed admittedly knew in January 1999, his attempt to invoke the doctrine of equitable estoppel to avoid the statute of limitations in this case is legally insufficient. Even assuming the truth of Abdelsamed's allegations that Defendants' conspired to conceal material facts, the record indicates that by January 11, 1999, Abdelsamed had knowledge of his claims or had notice sufficient to make reasonable inquiries as to the existence of a colorable claim against one or more defendants. However, the original complaint was not filed until September 10, 2001, well beyond the two-year statute of limitations.

Abdelsamed also cannot avoid the consequences of the limitations period by alleging a continuing conspiracy. "A continuing violation is occasioned by continual unlawful acts, not continual ill effects from an original violation." *National Advertising Co.* v. City of Raleigh, 947 F.2d 1158, 1166 (4th Cir. 1991) (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)). Abdelsamed challenges discrete actions occurring on specific dates. There are no well-pleaded allegations that the conduct that occurred prior to February 1999 in connection with the state probate and federal interpleader actions involved a continuing practice after that date. "A 'continuing wrong' theory should not provide a means of relieving plaintiff from [his] duty of reasonable diligence in pursuing [his] claims." *National Advertising Co.*, 947 F.2d at 1168 (quoting *Ocean Acres Ltd. v. Dare County Board of Health*, 707 F.2d 103).

> Injury and damage in a civil conspiracy action flow from the overt acts, not from "the mere continuance of a conspiracy." ... Consequently, the cause of action runs separately from each overt act that is alleged to cause damage to the plaintiff, ... and "[s]eparate conspiracies may not be characterized as a single grand conspiracy for procedural advantage." ... Accordingly, plaintiffs may recover only for the overt acts ... that they specifically alleged to have occurred within the ... limitations period.

Scherer v. Balkema, 840 F.2d 437, 439 (7th Cir.)(internal citations omitted), *cert. denied*, 486 U.S. 1043 (1988). This rule of law was endorsed in *Merrigan v. Affiliated Bankshares of Colorado, Inc.*, 775 F. Supp. 1408, 1412 (D. Colo. 1991) ("where there is an alleged conspiracy, the statute of limitations runs from each act of conspiracy").

To support a claim for equitable tolling, Abdelsamed must allege facts showing that Defendants concealed material facts that prevented him from knowing a cause of action exists and that his ignorance of those facts was not the result of his own lack of diligence. Abdelsamed has not sustained that burden. Construing the allegations in the most favorable light, the court determines that Abdelsamed has not alleged facts that would extend the period of filing or excuse his failure to bring this action within the applicable limitation period. Therefore, the claims asserted in the First Amended Verified Complaint are properly dismissed.

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[5] The court notes, in passing, that by filing a pleading, a *pro se* litigant certifies that the pleading "is not being presented for any improper purpose, such as to ... cause unnecessary increase in the cost of litigation," and that the "allegations and other factual contentions [in the pleading] have evidentiary support." *See* Fed.R.Civ.P. 11(b). *See also Smith v. Midland Brake, Inc.*, 911 F. Supp. 1351, 1361 (D. Kan. 1995) (noting that a party may be precluded from arguing "whatever state of facts seems advantageous at a point in time, and a contradictory state whenever self-interest may dictate a change"), *rev'd on other grounds*, 180 F.3d 1154 (10th Cir. 1999).

G. Sovereign Immunity

Defendant United States has moved to dismiss based on a lack of subject matter jurisdiction. Specifically, the United States argues that the First Amended Verified Complaint fails to allege a waiver of sovereign immunity for the claims asserted against the United States. It is well-established that the United States is immune from suit unless it has consented to be sued. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Where the United States has not consented to suit, dismissal of the action for lack of subject-matter jurisdiction is required. *Id.* at 538. The United States has not waived its sovereign immunity for constitutional torts. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971). *See also Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 483–86 (1994) (holding that a *Bivens* action may not be brought against the United States).

Abdelsamed's response to the United States' motion to dismiss does not cite any waiver of sovereign immunity which would extend to the non-tax claims asserted in this case. *See United States v. $30,006.25 in United States Currency*, 236 F.3d 610, 613 (10th Cir. 2000) (a ''waiver of sovereign immunity cannot be implied but must be unequivocally expressed''). The statutes cited by Abdelsamed as the bases for jurisdiction in this action, *i.e.* 28 U.S.C. §§ 1331, 1343 and 1346, do not include a waiver of sovereign immunity. *Lonsdale v. United States*, 919 F.2d 1440, 1443–44 [67 AFTR 2d 91-1049] (10th Cir. 1990). In the absence of a waiver, the non-tax claims against the United States must be dismissed.

Defendant United States also moves to dismiss Abdelsamed's tax-related claims pursuant to Rule 12(b)(1). In the First Amended Verified Complaint, Abdelsamed alleged that he ''filed a tax refund claim and seeks in part a refund under this complaint ... pursuant to Title 26 U.S.C. sec. 6511(a) and 7422(a).'' *See* Statement of Claims Against Defendant United States of America at ¶ 3. Elsewhere in the First Amended Verified Complaint, Abdelsamed alleges that in 1995 the IRS wrongfully assessed, applied and collected income taxes, interests, and penalties for tax years 1984, 1985 and 1986. *See* First Amended Verified Complaint at ¶s 112, 113 and 123.

In addition to the general criteria established under 28 U.S.C. § 1346(a)(1), a party suing for recovery of any tax erroneously or illegally collected also must show compliance with the requirements under 28 U.S.C. §§ 6511(a) and 7422(a), which establish a limitations period for filing refund claims. A suit for refund may not be maintained unless a claim for refund has been filed within the established time limits. *United States v. Dalm*, 494 U.S. 596, 602 [65 AFTR 2d 90-1210] (1990); *Kuznitsky v. United States*, 17 F.3d 1029 [73 AFTR 2d 94-1303] (7th Cir. 1994). Absent a timely filed refund claim, the district court does not have subject matter jurisdiction over a tax refund suit. *Video Training Source, Inc. v. United States*, 991 F. Supp. 1256, 1259 [82 AFTR 2d 98-6393] (D. Colo. 1998) (dismissing claim pursuant to Fed.R.Civ.P. 12(b)(1)).

Rather than complying with these pleading requirements, Abdelsamed summarily claims that he ''filed a tax refund claim'' and that his ''complaint is filed timely and properly.'' *See* Statement of Claims Against Defendant United States of America at ¶ 3. Abdelsamed has not alleged when his tax refund claim was filed. That omission is significant. Section 6511 (a) requires that a refund claim be filed within three years from the time the tax return was filed or two years from the time the tax was paid, whichever date is later. Unless Abdelsamed filed a timely refund claim, this court lacks subject matter jurisdiction. *Angle v. United States*, 996 F.2d 252, 254 [72 AFTR 2d 93-5314] (10th Cir. 1993). The court also notes, in passing, that the allegations in the First Amended Verified Complaint do not indicate the grounds asserted in Abdelsamed's purported tax refund claim. However, a taxpayer is barred from raising in a refund suit grounds for recovery not clearly and specifically set forth in its claim for a refund. *See True v. United States*, 190 F.3d

1165, 1172–73 [84 AFTR 2d 99-5950] (10th Cir. 1999) (citing *Brown v. United States*, 890 F.2d 1329, 1346 [65 AFTR 2d 90-448] (5th Cir. 1989)). At this juncture, it is impossible to determine whether Abdelsamed can meet the jurisdictional prerequisites for a refund suit. For that reason, Abdelsamed's tax-related claims should be dismissed without prejudice. *See Moody v. United States*, 1999 WL 1127634 1 [84 AFTR 2d 99-7215] (10th Cir. 1999). *See also Tabbee v. United States*, 30 Fed.Cl. 1, 7 (Fed.Cl. 1993) (granting leave to file amended complaint indicating how taxpayer's claim not barred by statute of limitations and how jurisdictional prerequisites had been met).

The State of Colorado also has raised the issue of sovereign immunity. States are protected by Eleventh Amendment immunity. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989); *Meade v. Grubbs*, 841 F.2d 1512, 1525–26 (10th Cir. 1988). "It is well established that absent an unmistakable waiver by the state of its Eleventh Amendment immunity, or an unmistakable abrogation of such immunity by Congress, the amendment provides absolute immunity from suit in federal courts for states and their agencies." *Ramirez v. Oklahoma Dep't of Mental Health*, 41 F.3d 584, 588 (10th Cir. 1994). The State of Colorado has not waived its Eleventh Amendment immunity. *Griess v. Colorado*, 841 F.2d 1042, 1044–45 (10th Cir. 1988). Accordingly, the claims against Defendant State of Colorado must be dismissed. The court also agrees that the First Amended Verified Complaint fails to properly assert claims against Defendant El Paso County pursuant to Colo.Rev.Stat. 30-11-105. Defendant El Paso County should be dismissed from this litigation.

II. Abdelsamed's Motions for Summary Judgment

In view of this court's recommendation on Defendants' motions to dismiss, Abdelsamed's Motion for Summary Judgment Against Defendant State of Colorado (filed July 3, 2002), Abdelsamed's Motion for Summary Judgment Against Defendants Taffet, Dubofsky, Hock and Jobin (filed January 23, 2002), and Abdelsamed's Motion for Summary Judgment and An Application for an Entry of a Final Default Judgment Against Defendant United States (filed January 4, 2002) are moot. I recommend each motion be denied on that basis.

III. Abdelsamed's Motion for the Express Dismissal/Setting Aside of the Interpleader Action

The court's recommendation for dismissal of the First Amended Verified Complaint also renders moot Abdelsamed's Motion for the Express Dismissal/Setting Aside of the Interpleader Action (filed January 23, 2002). While the court recommends that this motion be denied, it may be appropriate to briefly address the issues raised in this motion.

Abdelsamed's motion, pursuant to Fed.R.Civ.P. 60(b), seeks relief from the District Court's Order in the Interpleader Action authorizing the disbursement of funds to Defendants. Abdelsamed contends that he was denied notice of the litigation and that the District Court's Order was the product of fraud perpetrated by Defendants. Under Rule 60(b), a party, by motion or initiation of a new action, may seek relief from a judgment based upon a showing of

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to more for a new trial under Rule 59(b); (3), fraud ... misrepresentation or other misconduct of an adverse party, ... or (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b). A motion under Rule 60(b) must be "made within a reasonable time" and must be made not more than one year after the judgment was entered if relief is sought under subsections (1), (2) or (3). *Id.* Where a party seeks to invoke Rule 60(b) in a separate action, relief should be "reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." *United States v. Beggerly*, 524 U.S. 38, 46 (1998) (quoting

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244 (1944)). Relief under Rule 60(b) is an extraordinary remedy reserved for exceptional circumstances. *Provident Savings Bank v. Popovich*, 71 F.3d 696, 698 (7th Cir. 1995) (holding that an order denying relief under Rule 60(b) should be reviewed for an abuse of discretion).

Here, Abdelsamed asserted his claim for relief under Rule 60(b) in his original complaint filed on September 10, 2001, some five years and six months after the Order to disburse funds was entered in Civil Action No. 94-N-2198 on March 20, 1995. Abdelsamed's motion falls well outside the one-year period contemplated under Rule 60(b). *See Mounkes v. Conklin*, 922 F. Supp. 1501 (D. Kan. 1996) (court precluded from extending time for bringing motions under Rule 60(b)). Abdelsamed has made no showing of good cause for his failure to act within a reasonable period of time. *See Sasso v. M. Fine Lumber Co., Inc.*, 144 F.R.D. 185 (E.D.N.Y. 1992) (movant failed to file Rule 60(b) motion within "reasonable period of time" and motion could be denied on that basis alone). In fact, the court will take judicial notice of the fact that since 1999, Abdelsamed has filed no less than three other lawsuits that address, directly or indirectly, the disposition of funds encompassed by the March 20, 1995 order. While Abdelsamed's complaints are extremely difficult to decipher, it does not appear that he made any attempt in any of those earlier cases to seek relief under Rule 60(b). As the Tenth Circuit noted in *Colorado Interstate Gas Company v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1534 (10th Cir. 1992), application of Rule 60(b) must acknowledge the concern for finality and the admonition that "litigation must end sometime." Having failed to seek relief under Rule 60(b) in a reasonable time period, Abdelsamed's motion should be denied.[6]

IV. Limitation on Further Filings by Abdelsamed

Federal courts have both the inherent power and constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out the functions mandated by Article III of the United States Constitution. There is no constitutional right to access to the courts to prosecute an action that is frivolous, harassing, abusive or malicious. *Phillips v. Carey*, 638 F.2d 207, 208 (10thCir. 1981). The District Court has the power to enjoin litigants who abuse the court system. *Tripati v. Beaman*, 878 F.2d 351 (10th Cir. 1989). *See also Fed.R.Civ.P.* 11. Groundless and vexatious litigation will justify an order enjoining a litigant from filing any claims without first seeking leave of court. *See Ketchum v. Cruz*, 961 F.2d 916, 921 (10th Cir. 1992); *Winslow v. Romer*, 759 F. Supp. 670, 677–78 (D. Colo. 1991); *State of Colorado ex rel. Colo. Judicial Dep't v. Fleming*, 726 F. Supp. 1216, 1221 (D. Colo. 1989). The District Court's ability to fair dispense justice is compromised when it is forced to devote its limited resources to the processing of repetitious and frivolous pleadings. *In re Sindram*, 498 U.S. 177, 179–80 (1991).

As noted previously, Abdelsamed is not unfamiliar with the requirements imposed upon a litigant in federal court. He has a long history of filing vexatious pleadings, many of which have been struck for failure to comply with the Federal Rules of Civil Procedure. Recently, the Tenth Circuit has restricted Abdelsamed's ability to file further actions without explicit permission from the District Court. *See Abdelsamed v. United States*, 2002 WL 462027 (10th Cir., March 27, 2002). Formal action is required by this Court to prevent Abdelsamed from violating the Tenth Circuit's prohibition and abusing those he names as defendants in his lawsuits. I recommend that Abdelsamed be enjoined from proceeding as a proponent of any claim in the United States District Court for the District of Colorado without the representation of an

[6] To the extent that Abdelsamed alleges fraud as a basis for relief under Rule 60(b), the court finds that the fraud allegations in the First Amended Verified Complaint fail to comply with the requirements of Rule 9(b), and finds that deficiency to be an alternative basis for denying Abdelsamed's motion.

attorney licensed to practice in the State of Colorado, and admitted to practice in this Court, unless Abdelsamed first has obtained leave of this Court to proceed *pro se*. I recommend that this limit on Abdelsamed's ability to file or prosecute any claim in this Court, while acting *pro se*, be imposed under the specific terms stated in the Appendix to this Recommendation.

Abdelsamed as the right to oppose, in writing, the imposition of additional filing restrictions. *See White v. General Motors Corp.*, 908 F.2d 675, 686 (10th Cir. 1990; *Tripati v. Beaman*, 878 F.2d at 354; Fed.R.Civ.P. 11(c). Abdelsamed will have an opportunity to object to this Recommendation. If Abdelsamed wishes to oppose the imposition of filing restrictions, he may state the basis of his opposition in an objection to this Recommendation.

V. Conclusion

For the foregoing reasons, it is RECOMMENDED that the motions to dismiss Plaintiff Abdelsamed's First Amended Verified Complaint filled by Defendants Dubofsky (February 21, 2002) (doc. # 97), Taffet (February 21, 2002) (doc. # 95), Jobin (February 22, 2002) (doc. # 101), Hock (February 22, 2002) (doc. # 102), the United States (February 25, 2002) (doc. #104), El Paso County (May 13, 2002) (doc. # 143), and the State of Colorado (May 31, 2002)(doc. # 146) be GRANTED as set forth above. It is further RECOMMENDED that the First Amended Verified Complaint be dismissed without prejudice based upon Abdelsamed's failure to file a complaint that complies with the pleadings requirements of Fed.R.Civ.P. 8 and 9.

FURTHER, IT IS RECOMMENDED that Abdelsamed's Motion for Summary Judgment Against Defendant State of Colorado (filed July 3, 2002) (doc. # 153), Abdelsamed's Motion for Summary Judgment Against Defendants Taffet, Dubofsky, Hock and Jobin (filed January 23, 2002) (doc. # 82), and Abdelsamed's Motion for Summary Judgment and An Application for an Entry of a Final Default Judgment Against Defendant United States (filed January 4, 2002) (doc. # 73) be DENIED, and that Abdelsamed's Motion for the Express Dismissal/Setting Aside of the Interpleader Action (filed January 23, 2002) (doc. 81) be DENIED.

FURTHER IT IS RECOMMENDED that the District Court sanction Mr. Abdelsamed by entering an Order ENJOINING Abdelsamed from proceeding in the United States District Court for the District of Colorado, as the proponent of any claim asserted in the First Amended Verified Complaint, without the representation of an attorney licensed to practice in the State of Colorado, and admitted to practice in this Court, unless he first has obtained leave of this Court to proceed *pro se*. I recommend that this limit on Abdelsamed's ability to file or prosecute any claim in this Court, while acting *pro se*, be imposed under the specific terms stated in the Appendix to this Recommendation.

FURTHER IT IS ORDERED that Abdelsamed's Motion to Request Admission of Evidence (filed April 1, 2002) (doc. # 113) be DENIED; the Notice of Withdrawal of attorney Leslie Stratton (filed April 1, 2002) (doc. # 116) is APPROVED/GRANTED; Taffet's Motion for Leave to Reply (filed April 11, 2002) (doc. # 127) be GRANTED; Abdelsamed's Motion for Leave to File an Objection and Response (filed April 15, 2002) (doc. # 128) be GRANTED; Abdelsamed's Motion for Leave to File Request for Admission of Evidence (filed April 15, 2002) (doc. # 129) is DENIED; Abdelsamed's Motion for Leave to File an Objection and Response (filed April 26, 2002) (doc. # 136) is GRANTED; Abdelsamed's Motion to Supplement Response (filed July 3, 2002) (doc. # 151) is GRANTED; and Abdelsamed's Motion for Request to Review Evidence (filed July 3, 2002) (doc. # 152) is DENIED.

Advisement to the Parties

Within ten days after service of a copy of the Recommendation, any party may serve and file written objections to the magistrate judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed.

R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995).

The district judge shall make a *de novo*determination of those specific portions of the proposed findings or recommendations to which specific objection is made. 28 U.S.C. § 636(b)(1). A general objection that does not put the district court on notice of the basis for the objection will not preserve the objection for *de novo* review by the district court. *See In re Griego*, 64 F.3d at 583; *United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Oklahoma*, 73 F.3d 1057, 1060 (10th Cir.), *cert. denied*, 519 U.S. 909 (1996). The district judge may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. § 636(b)(1). The district judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1).

"[A] party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." *One Parcel of Real Property Known As 2121 East 30th Street*, 73 F.3d at 1060. Failure to make timely objections to the magistrate judge's proposed findings and recommendations will bar *de novo* review by the district judge of the magistrate judge's proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *In re Key Energy Resources, Inc.*, 230 F.3d 1197, 1199–1201 (10th Cir. 2000); *Theede v. United States Department of Labor*, 172 F.3d 1262, 1267–68 (10th Cir. 1999); *One Parcel of Real Property Known As 2121 East 30th Street*, 73 F.3d at 1059–60.

Dated this 23rd day of July, 2002.

BY THE COURT:

Craig B. Shaffer

United States Magistrate Judge

Appendix

IT IS ORDERED that Plaintiff Abdelsamed is ENJOINED from proceeding as a proponent of any claim in the United States District Court for the District of Colorado without the representation of an attorney licensed to practice in the State of Colorado and admitted to practice in this Court, unless Mr. Abdelsamed first has obtained leave of this Court to proceed pro se.

The Clerk of the Court shall not accept any pleadings submitted by Mr. Abdelsamed initiating a civil action unless Mr. Abdelsamed is represented by an attorney licensed to practice in the State of Colorado and admitted to practice in this Court, or unless Mr. Abdelsamed first has obtained leave of this Court to file the action pro se.

Any documents Mr. Abdelsamed wishes to submit for filing in this district shall be delivered to Room 145 of the Office of the Clerk, United States District Court, United States Courthouse, 1929 Stout Street, Denver, Colorado 80294. As a requisite to filing a *pro se* complaint or other paper, Mr. Abdelsamed must tender three documents:

(1) A petition titled, "Petition Pursuant to Court Order Seeking Leave to File a *Pro Se* Action." Mr. Abdelsamed shall affix a copy of this order to the petition;

(2) An affidavit in proper legal form as directed below; and

(3) A copy of the complaint or other paper sought to be filed in this district or a copy of the claims sought to be filed in this district.

The Petition Pursuant to Court Order Seeking Leave to File a *Pro Se* Action must contain the following information:

(1) a statement advising the court whether any defendant to the lawsuit was a party to, or was any way involved in, any prior lawsuit involving Mr. Abdelsamed, and if so in what capacity;

(2) a list of all lawsuits in the United States District Court for the District of Colorado, the United States Court of Ap-

peals for the Tenth Circuit, the United States Supreme Court, and state courts in which Mr. Abdelsamed was or is a party; the name and citation of each case, if applicable, including jurisdiction; Mr. Abdelsamed's involvement in each lawsuit; the status of each lawsuit; and the disposition;

(3) a list of all federal or state cases in which a judgment was rendered against Mr. Abdelsamed, if any; the name and citation of each case; the amount of judgment rendered against him, if any; the amount of the judgment that remains outstanding; and the reasons why the judgment remains outstanding;

(4) a list of all federal or state cases in which a judgment was rendered in favor of Mr. Abdelsamed, if any; the name and citation of each case; the amount of judgment rendered in favor of him, if any; the amount of the judgment that remains outstanding; and the reasons why the judgment remains outstanding; and

(5) a listing specifically identifying any procedural or monetary sanctions, assessment of attorneys' fees, contempt orders or jail sentences arising out of a civil prosecution, imposed against him by any court, including all appellate courts, if any; the name and citation of each case; a brief statement explaining the sanctions, attorneys' fees, contempt order, or jail sentence imposed, if any; the type or amount of sanctions; and the outstanding amount of monetary sanctions or attorneys' fees, if any; the status of the sanctions or contempt orders, if any; and their disposition.

Failure to satisfy monetary sanctions or the assessment of attorney fees imposed against Mr. Abdelsamed by a court may be a consideration precluding approval of the petition seeking leave to file a *pro se* action.

The affidavit shall be in proper legal form, with appropriate jurat and notarization, and is to contain the following recitals:

(1) that the claim or claims Mr. Abdelsamed wishes to present never before have been raised by him and disposed of by any federal or state court;

(2) that to the best of Mr. Abdelsamed's knowledge the claim or claims are not frivolous or taken in bad faith; that the claim or claims are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; that the lawsuit is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *See* Fed. R. Civ. P. 11; and

(3) that the claim or claims are not meant to harass any individual or entity.

The Court notes that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct." *See* 28 U.S.C. § 1927 (1994).

The complaint or other paper sought to be filed in this district or claims sought to be filed in this district must comply with this order, Fed. R. Civ. P. 8, all other provisions contained in the Federal Rules of Civil Procedure, and the Local Rules of Practice for the United States District Court for the District of Colorado.

The procedure for review of Mr. Abdelsamed's intended filings is as follows:

Whenever Mr. Abdelsamed submits a petition for leave to file a *pro se* action pursuant to this court order, the Clerk of the Court, or designated deputies, will accept the documents, mark them received, and immediately forward them to a United States District Judge.

The District Judge shall order approval or disapproval of the petition. The District Judge shall consider the following:

(1) whether Mr. Abdelsamed has complied with this order in all particulars;

(2) whether Mr. Abdelsamed's complaint or other paper complies with the Federal Rules of Civil Procedure and the Local Rules of Practice for the United

States District Court for the District of Colorado;

(3) whether the complaint or other paper is frivolous, abusive, harassing or malicious;

(4) whether the claims raised in Mr. Abdelsamed's complaint or other paper have been raised by him and disposed of by any federal or state court;

(5) whether there has been full compliance with Fed. R. Civ. P. 11, and all complaints or other papers and filings are not violative of 28 U.S.C. § 1927;

(6) whether the complaint or other paper alleges claims against individuals or entities that may have immunity from suit; and

(7) such other reasonable requirements established by the court or the District Judge.

The District Judge shall not otherwise address the merits of the complaint or other paper.

In the discretion of the District Judge, the documents may be presented directly to a Magistrate Judge who shall pass on the petition, following the procedures set forth herein. The Magistrate Judge shall submit proposed findings and a recommendation as to disposition of the petition to the District Judge or his or her designees. Copies of the proposed findings and recommendations shall be mailed to the petitioner and all interested parties who shall have ten (10) days after service thereof to serve and file written, specific objections. If no such objections are timely filed, the Magistrate Judge's proposed findings and recommendations may be accepted by the District Judge or his or her designees and appropriate orders entered without further notice. *See* Fed. R. Civ. P. 72(a). No provision is made for oral presentations in support of the petition. *Tripati v. Beaman*, 878 F.2d 351, 354 (10th Cir. 1989).

Failure to comply with the procedures and principles mandated by this order shall be sufficient grounds for denying the petition for leave to file.

The District Judge may order disapproval of the petition upon false recitals in the documents. Upon false recitals in the documents, Mr. Abdelsamed may be considered in violation of this order, and he may be subject to other orders of the court, including appropriate sanctions. The provisions contained in Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 are incorporated into this order.

If the Court enters an order granting the petition, the Clerk of the Court shall cause the complaint or other paper and materials to be filed *nunc pro tunc* to the date the documents were tendered. The assignment of the case shall be pursuant to the Local Rules of Practice for the United States District Court for the District of Colorado.

All filings in the matter shall be in strict conformity with the Federal Rules of Civil. Procedure and the Local Rules of Practice for the United States District Court for the District of Colorado. This order shall not interfere in any way with pending actions, orders or judgments of any federal court involving Mr. Abdelsamed.

¶2002-5286

Linda E. AHEE, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-0211-KJD (LRL), July 22, 2002. Earlier proceeding at (2002, DC NV) 89 AFTR 2d 2002-1247. Decision for Govt.

1. Collection due process (CDP)—review of administrative determination—exhaustion of administrative remedies. Taxpayer's motion to reopen case to invalidate IRS's collection determination was denied: taxpayer received adequate due process in CDP hearing. Presence of settlement officers of appeals satisfied requirement that hearing be conducted by appeals officer; and, taxpayer refused to restrict discussion to collection issues, and instead introduced irrelevant exhibits and asserted frivolous arguments relating to individuals' liability to pay taxes. *Reference:* United States Tax Reporter ¶63,305.01(5). IRC §6330.

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA,

ORDER

Kent J. Dawson United States District Judge

[1] This matter is before the Court on Plaintiff's Motion to Reopen this Case to Invalidate an IRS Determination resulting from a CDP Hearing (#12).

In an Order entered December 28, 2001 (#9), the Court remanded this case for further review in an administrative hearing. Plaintiff now requests that the case be reopened after Plaintiff did not receive the desired relief in the administrative hearing process. The Court has reviewed the full transcript of the hearing and the accompanying exhibits. There appear to be no grounds warranting the reopening of the case.

The Court is fully satisfied that Plaintiff received adequate due process in the Collection Due Process hearing. The presence of the settlement officers of appeals at the hearing satisfies the requirement that the hearing be conducted by an appeals officer. Furthermore, Plaintiff refused to restrict the discussion to the matters at hand. Plaintiff continually insisted on introducing irrelevant exhibits and asserted frivolous arguments relating to an individual's liability to pay taxes. There is no longer a need to have this case burdening the Court's resources.

IT IS THEREFORE ORDERED that Plaintiff's Motion to Reopen this Case to Invalidate an IRS Determination resulting from a CDP Hearing (#12) is DENIED.

DATED this 22nd day of July 2002.

Kent J. Dawson

United States District Judge

¶2002-5287

John N. BACH, PLAINTIFF, v. TETON COUNTY, ET AL., DEFENDANTS. U.S. District Court, Dist. of Idaho, (DC ID) No. CV-01-266-E-TGN, July 25, 2002. Earlier proceeding at (2002, DC ID) 90 AFTR 2d 2002-5596. Decision against Taxpayer.

1. Actions against U.S. and govt. officials—conspiracy—constitutional violations—failure to state claim for relief—res judicata—failure to show cause. Taxpayer's 2d amended complaint was dismissed with prejudice as to stated defendants: taxpayer didn't comply with court's order to show cause why defendants' motions for judgment on pleadings shouldn't be granted. Also, summary judgment motion and objections filed by 3 defendants were denied as moot. *Reference:* United States Tax Reporter ¶74,336.504(43); 74,336.504(42); 74,337.503(75); 74,025.01(143). IRC §7402.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO,

ORDER

THOMAS G. NELSON United States Circuit Judge Sitting by Designation

[1] On May 16, 2002, the Court entered an order denying a number of motions for judgment on the pleadings without prejudice to later renewal (docket No. 218). On June 25, 2002, the court entered an order (docket No. 242) withdrawing its order of May 16, 2002, and reinstating the motions for judgment on the pleadings. The court also ordered Plaintiff to show cause within twenty-one days why those motions should not be granted. Plaintiff has not filed anything in response to the Court's order.

THEREFORE, IT IS HEREBY ORDERED that the Second Amended Complaint be DISMISSED WITH PREJUDICE as to each and all of the following defendants:

Docket Number	Party
168	Harrop, Lovell & Lorraine
169	Melehes, Mark
170	Bergmeyer, Mori
172	Brink, Roger
176	Runyan, Kathy
181	Byers, Frank
187	Miller, Katherine M.

	McLean, Jack L.
	Ehrler, Paula
188	Harris, Alva A.
	Scona, Inc.
	Targhee Powder Emporium, Inc.
	Targhee Powder Emporium, Unltd.
	Targhee Powder Emporium, Ltd.
189	Dawson, Wayne & Donna
191	Blair, Kenneth & Harlene
196	Ferris, Russell
204	Kemstra, Benjamin
209	Levandoski, Jan
210	Hamblin, Earl
211	Fitzgerald, Bob
212	Johnson, Lavell
213	Curtis, Lowell
214	Blackmer, Bruce

It is now unnecessary to consider the Motion for Summary Judgment filed by Mark Melehes (docket No. 249) and the objections by Defendants Kathy Runyan and Roger Brink (docket No. 254). Accordingly, the motion and the objections are each DENIED as moot.

DATED this 25th day of July, 2002.

THOMAS G. NELSON

United States Circuit Judge

Sitting by Designation

¶2002-5288

BROWNING-FERRIS INDUSTRIES, INC., a Delaware Corporation, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Arizona, (DC AZ) CV 00-440-PHX-SMM, July 24, 2002. Year 1989. Decision for Taxpayer.

1. Refund actions—jurisdiction—partnership vs. nonpartnership items—settlements. District court had jurisdiction over partner's claim for refund of partnership-related investment tax credit (ITC) that was included in Form 870-P settlement agreement: agreement converted ITC from partnership to non-partnership item, to which IRC §7422(h)'s jurisdictional bar didn't apply. *Reference:* United States Tax Reporter ¶74,225.06(90); 62,315.01(35). IRC §6231; 6232; 7422.

2. Refund actions—summary judgment—converted partnership items—settlements. Partner's claim for refund of investment tax credit (ITC) that was included in Form 870-P settlement agreement was upheld on summary judgment: form's explicit bar against reopening refund or credit claims that were based on "change in treatment of partnership items" was binding only as to specific agreed-on final adjustment/disallowance of certain non-creditable expenses, not erroneously computed "as reported" ITC that was mechanically carried over to agreement. *Reference:* United States Tax Reporter ¶74,225.01(50); 62,215; 71,215.07(5). IRC §6221; 7121; 7422.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

ORDER

Stephen M. McNamee Chief United States District Judge

Pending before the Court are Defendant's Motion for Summary Judgment (Doc. #52) and Plaintiff's Cross-Motion for Summary Judgment (Doc. #53). After considering the arguments raised by the parties in their briefing and in oral argument, the Court now issues the following ruling.

BACKGROUND

During the fiscal year ending September 30, 1989 ("fiscal 1989"), Plaintiff Browning-Ferris Industries, Inc. ("Plaintiff"), was a general partner in American Ref-Fuel Company of Hempstead, a general partnership ("the Partnership"). The Partnership erroneously calculated the amount of the investment tax credit that it originally reported on its tax return for fiscal 1989 (the "As Reported Investment Credit"), as well as Plaintiff's share of that credit. (Affidavit of Richard D. Howe ("Howe Aff.") ¶ 6; Affidavit of Barry J. Miller ("Miller Aff.") ¶ 6.) The Internal Revenue Service ("IRS") later audited the Partnership for fiscal 1989, and neither party was aware during this audit of the Partnership's erroneous calculation. Defen-

dant United States of America (''Defendant'') does not dispute that the audit focused only on certain expenditures which the IRS contended did not qualify for the investment tax credit. (Defendant's Statement of Material Facts (''DSMF'') ¶ 6.) The IRS' proposals did not otherwise address, consider, or report upon the make up or computation of the Partnership's ''As Reported Investment Credit'', or Plaintiff's share of the credit. (Howe Aff. ¶ 8; Miller Aff. ¶ 8.) Nor does Defendant dispute that the parties reached a settlement of these challenged specific expenditures which resulted in an adjustment to the investment tax credit of $110,095 for fiscal 1989 that was reflected in a Form 870-P settlement agreement signed by the parties. (DSMF ¶ 6; Howe Aff. ¶s 11, 12; Miller Aff. ¶s 11, 12.) This adjustment was the only treatment encompassed in the Form 870-P, and the erroneously computed ''As Reported Investment Credit'' figure reflected in the Form 870-P had been mechanically carried over from the Partnership's income tax return for fiscal 1989. (Howe Aff. ¶ 12; Miller Aff. ¶ 12.) The signed Form 870-P settlement reflected no agreement to fix the amount of the Partnership's investment tax credits at any specific level. (Id.) The parties agree that Plaintiff's refund claim does not seek to change or amend the adjustment reflected in Form 870-P. (DSMF ¶ 6).

Plaintiff seeks an income tax refund of $1,371,248.00, plus statutory interest, for the taxable year 1989. (Complaint ¶s 3, 4 and 24.) Defendant acknowledges that the suit was timely filed, but refuses to pay Plaintiff's refund claim, arguing that: (1) this Court does not have jurisdiction over this refund suit; and (2) Form 870-P prohibits the refund Plaintiff seeks. Defendant filed a Motion for Summary Judgment, to which Plaintiff filed a Cross-Motion for Summary Judgment in response.

STANDARD OF REVIEW

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, ''show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'' Fed. R. Civ. P. 56(c) (1995); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986); Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines which facts are material. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986); see also Jesinger, 24 F.3d at 1130. ''Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'' Anderson, 477 U.S. at 248. The dispute must also be genuine, that is, the evidence must be ''such that a reasonable jury could return a verdict for the nonmoving party.'' Id.; see also Jesinger, 24 F.3d at 1130.

A principal purpose of summary judgment is ''to isolate and dispose of factually unsupported claims.'' Celotex, 477 U.S. at 323–24. Summary judgment is appropriate against a party who ''fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'' Id. at 322; see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir. 1994). The moving party need not disprove matters on which the opponent has the burden of proof at trial. See Celotex, 477 U.S. at 317. The party opposing summary judgment ''may not rest upon the mere allegations or denials of [the party's] pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial.'' Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585–88 (1986); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995).

DISCUSSION

I. Whether this Court has jurisdiction over Plaintiff's refund suit.

[1] Defendant first argues that this Court does not have subject matter jurisdiction over Plaintiff's refund claim. It is Defendant's position that 26 U.S.C. § 7422(h) bars refund claims based on treatment of partnership items, and Plaintiff's refund claim does not meet the require-

ments of either of the two exceptions to this provision.

Plaintiff argues that 26 U.S.C. § 7422(h) is not applicable to the facts of this case. This statute prohibits suits for "refund[s] attributable to partnership items" subject to two exceptions. Plaintiff contends that the statute does not prohibit its refund suit because the investment tax credit in this case was no longer a "partnership item" once the Form 870-P settlement agreement was signed. Plaintiff cites 26 U.S.C. § 6231(b)(1)(C) and several cases for the proposition that section 7422(h) ceased to apply to bar jurisdiction once a valid Form 870-P has been executed. Pursuant to § 6232(b)(1)(C), items become non-partnership items as of the date "the Secretary enters into a settlement agreement with the partner with respect to such items." Execution of a valid settlement agreement converts partnership items into nonpartnership items and thereby lifts the jurisdictional bar of § 7422(h). See Alexander v. United States, 44 F.3d 328, 331 [75 AFTR 2d 95-1064] (5th Cir. 1995); Treaty Pines Investments Partnership v. Commissioner, 967 F.2d 206, 210 [70 AFTR 2d 92-5435] (5thCir. 1992); and Olson v. United States, 37 Fed. Cl. 727, 733–734 [79 AFTR 2d 97-2175] (1997). In fact, Plaintiff correctly notes that Olson stands for the proposition that while an item does not lose its partnership status for the purpose of enforcing a settlement agreement, the item can take on non-partnership status, at the same time, for the jurisdictional purposes of §7422. See Olson, 37 Fed. Cl. at 734 n.8 (citation omitted).

Here, the investment tax credit was no longer a "partnership item" with respect to Plaintiff when the IRS (the Secretary's designee) entered into a Form 870-P settlement agreement with Plaintiff on May 16, 1995. (Howe Aff. ¶ 11 and Exhibit L to Howe Aff..) Since the IRS does not dispute the validity of the settlement agreement, the conversion was effective when the settlement was made. See Alexander, 44 F. 3d at 331. This Court finds that because the execution of the Form 870-P settlement agreement converted the investment tax credit into a nonpartnership item, the jurisdictional bar of § 7422(h) does not apply and this Court thus has subject matter jurisdiction over this refund suit by virtue of 28 U.S.C. § 1346(a)(1). This statute grants the district courts original jurisdiction over "[a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected."

II. Whether Plaintiff's refund claim is based on any "change in the treatment of partnership items" under Form 870-P and thus prohibited by that Form.

[2] Defendant also argues that Form 870-P prohibits the refund Plaintiff seeks. Under the terms of the Form 870-P "the treatment of partnership items under this agreement will not be reopened in the absence of fraud, malfeasance, or misrepresentation of fact; and no claim for refund or credit based on any change in the treatment of partnership items may be filed or prosecuted" once the parties sign the form. Defendant contends that the parties reached an agreement to fix the amount of the Partnership's investment tax credit at the specific amounts listed on the Form 870-P. According to Defendant, "at the time [Plaintiff] signed that form, the amount of the credits at issue was already unambiguously settled by the Form 870-P." (Defendant's Memo. in support of Motion for Summary Judgment at p. 13.) Defendant asserts that this agreement, and not the specific adjustments encompassed in the Form 870-P, constituted the treatment of partnership items that is made binding by Form 870-P. To hold otherwise would subject the government to endless litigation.

Plaintiff argues that Form 870-P prohibits only a refund claim that is based on a "change in the treatment of partnership items" under that form. Plaintiff claims that the "treatment of partnership items" under the Form 870-P was the $110,095 adjustment that flowed directly from, and related solely to, the agreed disallowance of certain identified expenditures that the IRS contended did not qualify for the investment tax credit. Furthermore, Plaintiff argues that the agreements it made with

the IRS ultimately concerned only those adjustments to the investment tax credit in the Form 870-P, and the Form 870-P is binding only with respect to those final adjustments set forth in that form. Plaintiff asserts that the Form is not binding with respect to the figures utilized to calculate these final adjustments. Defendant agrees that Plaintiff is not seeking to change or modify these final adjustments. (DSMF ¶ 6.) Thus, Plaintiff contends that they are not seeking to "reopen the treatment of partnership items under [this particular] settlement agreement", and the refund claim is not based upon any "change in the treatment of partnership items" under Form 870-P and is therefore not prohibited by that form.

Plaintiff points to the affidavits of Richard D. Howe and Barry D. Miller to demonstrate that the sole focus of the audit and settlement of that audit was the agreed disallowance of specific expenditures that resulted in the $110,095 adjustment set forth in the Form 870-P. Plaintiff contends that other than this specific disallowance and adjustment, the parties did not even consider any "agreement" with respect to the amount of the investment tax credit that the Partnership had erroneously calculated on its original return and erroneously carried over to the Form 870-P. (Howe Aff. ¶s 7–12; Miller Aff. ¶s 7–12.) Thus, Plaintiff maintains that its inclusion in the Form 870-P did not, and could not, reflect any agreement to fix the Partnership's investment tax credits at any specific amount. (Howe Aff. ¶ 12; Miller Aff. ¶ 12.)

Additionally, Plaintiff observes that statutory and case law make Form 870-P binding only with respect to the adjustments set forth in that form. In Alexander v. United States, 44 F.3d 328 [75 AFTR 2d 95-1064] (5th Cir. 1995), the Fifth Circuit equated the adjustments agreed to in Form 870-P with the treatment of partnership items under that form. The court held that the purpose of the settlement agreement was "merely to cement the treatment of partnership items" and concluded that because "the adjustments to the partnership items are firm and binding," the taxpayer's refund claim was not based on a change in the treatment of partnership items and thus not prohibited by Form 870-P. Alexander, 44 F.3d at 332.

Similarly, 26 U.S.C. § 6224(c)(1) makes partnership settlement agreements binding only with respect to the "determination" of partnership items reflected in the settlement, and the Defendant has admitted that the "determination" involved in this case was the adjustment of $110,095 for fiscal year 1989. (Compl. ¶s 20–21 and Answer ¶s 20–21.) This establishes that the Form 870-P was binding only with respect to this specifically agreed-upon final adjustment.

This Court finds that Form 870-P does not prohibit Plaintiff's refund claim since Plaintiff does not seek to change the $110,095 adjustment, which constitutes the "treatment of the partnership items" for purposes of this case. See Alexander, 44 F.3d at 332. Defendant has failed to establish that an agreement to fix the amount of the Partnership's investment tax credits at the specific amounts listed on the Form 870-P, and not the specific adjustments reflected in the Form 870-P, constituted the "treatment of partnership items" that is made binding by Form 870-P. Thus, Plaintiff's refund claim is not based on any "change in the treatment" of partnership items under that form and therefore is not prohibited by that form.

CONCLUSION

For the reasons stated in the foregoing discussion,

IT IS ORDERED that Defendant's Motion for Summary Judgment (Doc. # 52) is DENIED;

IT IS FURTHER ORDERED that Plaintiff's Cross-Motion for Summary Judgment (Doc. #53) is GRANTED.

DATED this 24 day of July, 2002.

Stephen M. McNamee

Chief United States District Judge

JUDGMENT IN A CIVIL CASE

Browning-Ferris Industries, Inc., Plaintiff, v. United States of America Defendant.

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Court has granted Plaintiff's Cross Motion for Summary Judgment, therefore, judgment is entered in favor of the Plaintiff.

July 29, 2002

Date

RICHARD H. WEARE

District Court Executive/Clerk

/s/

(By) Deputy Clerk

¶2002-5289

In Re: Charles J. and Patricia A. STIENES. U.S. Bankruptcy Court, Dist. of New Jersey, (Bktcy Ct NJ) Case No. 02-13057/JHW, July 31, 2002. Year 2001. Decision for Govt.

1. Tax claims in bankruptcy—IRS right to setoff—automatic stay—tax refund. Chap. 13 debtors were denied turnover of prepetition refund IRS was holding under ''administrative freeze,'' and IRS was allowed to setoff such refund against their prepetition tax debts: 11 USC §553's mutuality and other setoff requirements were indisputably met; and govt. was entitled to relief from stay where funds were subject to immediate dissipation. Also, equity didn't otherwise preclude setoff where IRS engaged in no inequitable conduct and, although refund's turnover would ease taxpayers' burden, setoff wouldn't actually jeopardize reorg. *Reference:* United States Tax Reporter ¶68,726.52(20); 64,025.28(20); 68,726.52(10). IRC §6402.

Ronald DeSimone, Esq. 1300 Route 73, Suite 314 Mt. Laurel, New Jersey 08054 Lawrence P. Blaskopf, Esq. Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 227, Ben Franklin Station Washington, D.C. 20044

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY,

LETTER OPINION

JUDITH H. WIZMUR BANKRUPTCY JUDGE

MITCHELL H. COHEN U.S. COURTHOUSE P.O. BOX 2067 CAMDEN, NJ 08101-2067

Dear Counsel:

The debtors seek the release of their 2001 tax refund in the amount of $8,512.00 from the Internal Revenue Service (''IRS''), which is holding their refund as a setoff against other tax liabilities. The IRS cross-moves for relief from the automatic stay to exercise its setoff rights against the debtors' pre-petition tax liabilities.

The debtors filed a Chapter 13 petition on March 27, 2002. The IRS filed a secured proof of claim for unpaid income taxes for the years of 1995, 1996, and 1997, secured by all of the debtors' right, title and interest to property under 26 U.S.C. § 6321, based on a Notice of Federal Tax Lien filed on March 7, 2002, and by a right of set-off of the debtors' 2001 income tax refund. The IRS also filed an unsecured priority claim for estimated income tax liability for the year 2000. The IRS placed an ''administrative freeze'' on the debtors' 2001 tax refund of $8,512.00. According to the debtors, the withholding of the refund by the IRS forced Mrs. Stienes to withdraw moneys from her 401(k) plan so that the debtors could keep up with their mortgage and trustee payments.

[1] The IRS has an express statutory right of setoff under 26 U.S.C. § 6402(a),[1]

[1] 26 U.S.C. § 6402(a) provides:

In the case of any overpayments, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d) and (e), refund any balance to such person.

which is preserved in the Bankruptcy Code under 11 U.S.C. § 553.[2] Section 553 does not create an independent right to setoff, "[r]ather, it recognizes and preserves setoff rights that exist under applicable nonbankruptcy law." In re Hazelton, 85 B.R. 400, 403 (Bankr. E.D.Mich.), rev'd on other grounds, 96 B.R. 111 (E.D.Mich. 1988).

The requisite elements of a Section 553 setoff include that: (1) the creditor holds a claim against the debtor that arose before the commencement of the case; (2) the creditor owes a debt to the debtor that also arose before the commencement of the case; (3) the claim and debt are mutual, and (4) the claim and debt are each valid and enforceable. See, e.g., In re Whitaker, 173 B.R. 359 [80 AFTR 2d 97-8337] (Bankr. S.D.Ohio, 1994). The IRS has a claim against the debtor for unpaid taxes that arose before the commencement of the case. The 2001 refund to the debtors was payable to them as of December 31, 2001, prior to the debtors' bankruptcy filing. See, e.g., In re Glenn, 207 B.R. 418, 420 [79 AFTR 2d 97-750] (E.D.Pa. 1997). The claim and debt in this case are mutual, meaning that the debts are between the same parties, standing in the same capacities. In re Blanton, 105 B.R. 321, 334 (Bankr. E.D.Va. 1989). There is no challenge to the validity and enforceability of either the claim or the debt. The § 553 setoff elements have been met.

The right to setoff is not absolute, but is limited by the provisions of the automatic stay under 11 U.S.C. § 362. In re Patterson, 967 F.2d 505, 509 (11th Cir. 1992). In order to exercise a valid right of setoff, a creditor must move for relief from the automatic stay under 11 U.S.C. § 362(d). Id. Where a valid right of setoff is established, the creditor's claim is secured to the extent of the amount subject to the setoff under 11 U.S.C. § 506(a), and the creditor is entitled to adequate protection in that amount. 11 U.S.C. § 362(d)(1).

The debtors propose to protect the IRS interest in the debtors' tax refund by paying the IRS claim through their Chapter 13 plan. Under 11 U.S.C. § 362(d)(1), relief from the stay may be granted "for cause, including the lack of adequate protection of an interest in property of such party in interest." Although the debtors are paying on their Chapter 13 plan, they propose to dissipate the tax refund by meeting ongoing mortgage and trustee obligations. The debtors are current with the payments, but the payments have not been made regularly. Since the March 2002 filing, one payment of $514 was received by the Chapter 13 trustee on May 7, 2002, while a second series of payments was received by the Chapter 13 trustee in the amount of $2,056 on July 24, 2002. The burden of proof to show adequate protection falls on the debtor. 11 U.S.C. § 362(g)(2). Given the intended immediate dissipation of the funds by the debtors, I conclude that the debtors have failed to meet their burden. Cf. United States v. Norton, 717 F.2d 767, 770 [52 AFTR 2d 83-5923] (3d Cir. 1983) (Adequate protection available to the IRS where the debtor's Chapter 13 plan has been confirmed and where the debtor's conscientiously conformed to the terms of the plan.)

In Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 166 S. Ct. 286, 133 L.Ed. 2d 258 (1995), the Supreme Court, holding that a bank's temporary administrative hold on a debtor's bank account was not an exercise of setoff rights in violation of the automatic stay, highlighted that section 553(a) sets forth a general rule, with certain exceptions, that a creditor's pre-petition right to setoff is not affected by the Bankruptcy Code, and that section 542(b) of the Code, which requires turnover of property to the estate, specifically excepts property from turnover "to

[2] Section 553 provides that bankruptcy "does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case ... against a claim of such creditor against the debtor that arose before the commencement of the case." 11 U.S.C. § 553.

the extent that such debt may be offset under section 553 of this title against a claim against the debtor.'' 11 U.S.C. § 542(b).

Notwithstanding the basic proposition articulated in Strumpf that a creditor's pre-petition setoff rights are generally not affected by the Bankruptcy Court, with limited exceptions, cases have continued to express the view that the application of setoff is permissive and can be modified through the exercise of the equitable powers of the court. See, e.g., In re Lazar, 219 B.R. 212, 213 (Bankr. N.D.Ohio 1998). ''Setoff may be denied where the creditor acted inequitably; where the setoff would jeopardize the debtor's ability to reorganize; or in a liquidation context where the setoff would result in either a preference or priority over other unsecured creditors.'' In re Lykes Bros. S.S. Co., 217 B.R. 304, 313 (Bankr. M.D.Fla. 1997).

Here, there is no equitable basis to warrant the denial or further delay of the setoff of the debtors' tax refund against the pre-petition debt due to the IRS. The IRS did not engage in any inequitable conduct. The administrative freeze on the refund was validated by the Supreme Court in Strumpf, supra. With regard to the impact on the debtors' ability to reorganize, there is no doubt that the availability of the tax refund would ease the burden on the debtors and would facilitate the payment of post-petition obligations, including payments to the Chapter 13 trustee. However, the debtors demonstrate in their schedules the feasibility of the plan, and show disposable income after fixed expenses to apply to the Chapter 13 plan. The debtors have now tapped their 401(k) plan to access funds to get them started with their plan. The claim of the IRS will be reduced by the amount of the setoff, thereby reducing the debtors' required monthly payments. There is no showing that the setoff will jeopardize the debtors' Chapter 13 reorganization.

For the reasons expressed, the debtors' motion for turnover of their 2001 tax refund is denied. The motion of the IRS for relief from the stay to effect a setoff of the refund against the debtors' pre-petition debt is granted. The IRS shall submit an order in conformance herewith.

Very truly yours,

JUDITH H. WIZMUR

U.S. BANKRUPTCY JUDGE

¶2002-5290

Henry D. GOLTZ, PLAINTIFF, v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Western Dist. of Texas, (DC TX) Civil Action No: SA-02-CA-235-EP, Aug. 2, 2002. Year 1999. Decision for Govt.

1. Collection due process (CDP)—review of administrative determination—frivolous return penalties—summary judgment. IRS's administrative determination to proceed with collection of IRC §6702 penalty against tax protester who filed ''zero'' return was upheld on summary judgment: penalty was appropriate based on frivolous return position that taxpayer's and wife's substantial wages as shown on Forms W-2s weren't taxable income, and that no IRC section established income tax liability or required self-assessment; CDP hearing was fair where taxpayer received prior notice that issues regarding IRS's authority to collect taxes and assess penalty wouldn't be discussed; and taxpayer raised no genuine fact issue about penalty's assessment. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(2). IRC §6330; 6702.

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION,

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

EDWARD C. PRADO UNITED STATES DISTRICT JUDGE

On March 11, 2002, the plaintiff in the above numbered and styled cause filed a complaint against the defendant to appeal the result of a Collection Due Process (CDP) hearing conducted by the Internal Revenue Service (IRS). In his complaint,

the plaintiff challenged the assessment of a $500 fine based on the IRS's determination that the plaintiff's 1999 tax return was frivolous. The plaintiff complained that he did not receive a fair hearing and the determination that his 1999 return was frivolous was a fraud and a mockery. In response, the defendant moved for summary judgment.

Standard of Review for Summary Judgment

In the usual case, the party who seeks summary judgment must show by affidavit or other evidentiary materials that there is no genuine dispute as to any fact material to resolution of the motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317,325 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.4 (1986); *Lavespere v. Niagra Machine & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). To satisfy this burden, the movant must either submit evidentiary documents that negate the existence of some material element of the nonmoving party's claim or defense or, if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmoving party's claim or defense. *See Celotex Corp.*, 477 U.S. at 325; *Lavespere*, 910 F.2d at 178.

Once the moving party has carried that burden, the burden shifts to the nonmoving party to show that summary judgment is not appropriate. The nonmoving party cannot discharge this burden by referring to the mere allegations or denials of the nonmoving party's pleadings; rather, that party must, either by submitting opposing evidentiary documents or by referring to evidentiary documents already in the record, set out specific facts showing that a genuine issue exists. *See Celotex*, 477 U.S. at 324. In order for a court to find there are no genuine material factual issues, the court must be satisfied that no reasonable trier of fact could have found for the nonmoving party or, in other words, that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict for the nonmovant. *See Liberty Lobby*, 477 U.S. at 249–50; Fed. R. Civ. P. 56(e).

Where the party opposing the motion for summary judgment will have the burden of proof on an essential element of his case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, summary judgment may be entered against him. *Celotex*, 477 U.S. at 322–24; *Fontenot*, 780 F.2d at 1194–95.

The Defendant's Motion for Summary Judgment

[1] The defendant argues it is entitled to summary judgment because there is no genuine issue of material fact about the IRS's determination that the plaintiff's 1999 tax return was frivolous. Section 6902 of the Internal Revenue Code pro-vides for a civil penalty in the amount of $500 for a taxpayer who files a tax return that is substantially incorrect, and based on a position which is frivolous. In the instant case, the summary judgment evidence shows that for the tax year 1999, the plaintiff filed his federal income tax return claiming zero taxable wages. The plaintiff also submitted a Form W-2 from his employer, showing wages earned as $51,920.22 for the taxable year 1999. In addition, the plaintiff submitted his wife's Form W-2 showing she earned $20,246.96. Although the plaintiff reported no income on line seven of his Form 1040, the Form W-2s prepared by his and his wife's employers belie that report. The evidence demonstrates that the plaintiff's return was substantially incorrect.

The summary judgment evidence also shows that the plaintiff's return was based on a position that is frivolous. The plaintiff attached a document to his tax return detailing his position about why his wages were not considered taxable income. The plaintiff's justification for reporting no taxable wages was expressed in a two page list of objections and legal arguments. The plaintiff's arguments included that his wages were not taxable income according

to the United States Supreme Court's definition of the word income, that no section of the Internal Revenue Code establishes an income tax liability or provides that taxes have to be paid on the basis of a return, and that no statute requires a self assessment. The United States Court of Appeals for the Fifth Circuit previously rejected similar arguments in a summary opinion. *See Crain v. Commissioner*, 737 F.2d 1417 [54 AFTR 2d 84-5698] (5th Cir. 1984).

In determining a tax protestor's arguments challenging the IRS's authority to levy taxes were frivolous, the court of appeals reasoned that "[t]he constitutionality of our income tax system—including the role played within that system by the Internal Revenue Service and the Tax Court—has long been established." *Crain*, 737 F.2d at 1417–18 [54 AFTR 2d 84-5698]. The court of appeals explained that the courts "are not obligated to suffer in silence the filings of baseless, insupportable appeals presenting no colorable claims of error and designed only to delay, obstruct, or incapacitate the operations of the courts or any other governmental authority." *Id.* at 1418. This court has considered and researched the plaintiff's arguments, and concluded that the plaintiff's arguments are baseless, unsupportable, and designed to obstruct the operations of the IRS. As a result, the defendant has shown that there is no genuine issue of material fact about the merits of the IRS's determination that his return was frivolous and that the $500 penalty was appropriate.

Although the plaintiff responded to the defendant's motion, he failed to raise a genuine issue of material fact. Instead, the plaintiff challenged the IRS's authority to collect taxes and assess a fine for filling a frivolous return, questioned the procedures used for making such a determination, and asked for summary judgment. Although the plaintiff characterized his numerous legal complaints as issues of material fact, the plaintiff's arguments[1] have been addressed by many courts and have been are well litigated. While the plaintiff contends his CDP hearing was unfair because he was not afforded the forum or the opportunity to reiterate his justification that the wages earned by he and his wife in the taxable year 1999 were not taxable, the IRS gave the plaintiff notice, prior to the CDP hearing, that issues such as the ones the plaintiff wanted to raise at the hearing would not be discussed.[2]

In its motion for summary judgment and in its reply, the defendant carefully analyzed the plaintiff's allegations and explained why the plaintiff's arguments about the propriety of the CDP hearings are irrelevant to a determination that the plaintiff's return was frivolous. The plaintiff has failed to raise a genuine issue of facts about the assessment of the fine. As a result, the defendant is entitled to summary judgment. Accordingly, the Court GRANTS the defendant's motion for summary judgment (docket entry #10) and DENIES the plaintiff's motion for summary judgment (docket entry #15).

SIGNED this 2nd day of August, 2002.

EDWARD C. PRADO

UNITED STATES DISTRICT JUDGE

JUDGMENT

EDWARD C. PRADO UNITED STATES DISTRICT JUDGE

In accordance with the order entered by this Court on this same date, it is hereby ORDERED, ADJUDGED, and DECREED that judgment be entered in favor of the defendant, the United States of America, and against the plaintiff, Henry D. Goltz. Costs of this lawsuit shall be borne by the plaintiff.

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[1] In his response to the defendant's reply to the plaintiff's objection to the defendant's motion for summary judgment, the plaintiff summarized his arguments as the following: "How can the Hearing be legal since no notification from the Secretary (or his duly authorized delegate) was delivered? Have you obtained the verification from the Secretary or his duly authorized delegate? How was the return determined to be frivolous? Under what legal authority was the person operating when he made the frivolous determination? If I am required to pay, I wish to pay, now. Will you show me the law or regulation that requires me to pay this penalty even though you cannot show me what is frivolous about my return? What law makes one liable for the tax, anyway?"

[2] The settlement officer, Janet Day, advised the plaintiff by letter that "administrative appeal procedures do not extend to cases involving solely the failure or refusal to comply with the tax laws because of moral, religious, political, constitutional, conscience or similar grounds. Therefore if you insist on rasing the issues that are listed on your request for a hearing, I will be unable to argue these points at the Appeals level. (Reg. Sec 601.106(b), Statement of Procedural Rules)." (Letter from IRS Appeals Office to Plaintiff of 11/23/01, at 1).

SIGNED this 2#nd day of August, 2002.

EDWARD C. PRADO

UNITED STATES DISTRICT JUDGE

¶2002-5291

David HAAS, PLAINTIFF v. UNITED STATES OF AMERICA, ET. AL., DEFENDANTS. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-0905-KJD (RJJ), July 25, 2002. Years 1996, 1999. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties. Taxpayer's action to set aside allegedly invalid IRS determination to proceed with collection of IRC §6702 penalties for years he filed ''zero'' returns was dismissed: IRC §6330's requirements were met where taxpayer received timely, properly authorized levy notice, requested and received CDP hearing, acknowledged signing subject returns, and didn't raise any relevant, non-frivolous issues or collection defenses or dispute his underlying liability at hearing; and final determination stated that all required statutory elements were considered. Also, payment notice and demand wasn't required to be sent on any specific form; Appeals Officer's reliance on computer transcripts to verify assessments was proper; IRC §6702(a) provided statutory authority for assessing penalty and didn't by its terms require any implementing regs; and district court lacked jurisdiction to consider income tax deficiencies. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(2). IRC §6330; 6702.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA,

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That judgement is entered for Defendants and against Plaintiff.

July 25, 2002

Date

LANCE S. WILSON

Clerk

/s/

By Deputy Clerk,

ORDER

This matter comes before the Court on Defendant's Motion to Dismiss (#2). Plaintiff filed a response in opposition (#3).

I. Factual and Procedural History

Plaintiff asks this Court to set aside an allegedly invalid IRS determination that collection actions against him should not be restricted. The collection activity at issue stems from a frivolous return penalty the IRS assessed against Plaintiff for returns he filed for the 1996 and 1999 tax years. In December 1999, Plaintiff filed Form 1040X, amending his 1996 U.S. Individual Tax Return, and in April 2000 he filed Form 1040, U.S. Individual Income Tax Return for the 1999 tax year. Both returns had zeroes on all lines which reflected amounts of income earned or taxes due. Plaintiff also requested a refund of all of taxes either withheld or paid for each year. The 1996 amended return had a hand written note in ''Part II- Explanation of Changes to Income, Deductions, and Credits'' which stated, among other things, that due to ignorance, Plaintiff had reported sources of income when in fact he had no statutory income to report. Finally, attached to the 1999 return was a two page document which set forth arguments as to why Plaintiff did not believe that he owed federal income taxes for 1999. On September 4, 2000, the IRS assessed a $500 civil penalty against Plaintiff under 26 U.S.C. § 6702 for filing the above described tax returns. Section 6702 assesses a civil penalty of $500 if an individual ''files what purports to be a return'' but which contains ''information that on its face indicates that the self-assessment is substantially incor-

rect'' and is due to ''a position which is frivolous.'' Plaintiff's self assessment of his 1996 and 1999 income tax liability was substantially incorrect in that he entered zeros for all income and tax information. Plaintiff's self-assessment was based on his positions that there is no statutory income tax liability that applies to him and that his wages do not constitute income. Because the Plaintiff's self-assessment was on its face substantially incorrect and was based on frivolous positions[1] , there is no doubt as to the validity of the penalty.

On November 30, 2000, the IRS sent Plaintiff a ''Final Notice-Notice of Intent to Levy and Notice of Your Rights to a Hearing.'' This letter provided Plaintiff with notice of his right to appeal within 30 days the intent to levy by requesting a Collection Due Process Hearing (''CDP Hearing''). Plaintiff filed Form 12153 ''Request for a Collection Due Process Hearing'' which the IRS received on December 28, 2000. Plaintiff's CDP Hearing was held on June 13, 2001 in Las Vegas, Nevada. Plaintiff attended the hearing with a witness and audio taped the hearing. On July 12, 2001, the IRS Appeals Office sent, by certified mail, a ''Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330.'' The letter informed Plaintiff that the proposed collection action would not be restricted. The letter also informed Plaintiff of his right to dispute the determination by filing a complaint in Federal District Court within 30 days. Plaintiff filed a timely complaint with this court. Defendant has now filed a motion to dismiss, or in the alternative for summary judgment.

II. Standard of Review

A dismissal for failure to state a claim pursuant to Rule 12(b)(6) is a ruling on a question of law. See Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994). In reviewing a Rule 12(b)(6) motion, the Court ''must construe the complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true.'' Swarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000). Moreover, because Plaintiff in this action is proceeding pro se, the Court must liberally construe all arguments set forth in his complaint. See Boag v. MacDougall, 454 U.S. 364, 365 (1982). Review is limited to the contents of the complaint. See Sprewell v. Golden State Warriors, 231 F.3d 520, 527 (9th Cir. 2000). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45–46 (1957); Sprewell, 231 F.3d at 528. If matters outside the pleadings are considered, the court should treat the motion as one for summary judgment. See Fed. R. Civ. P. 12 (c).

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Fed. R. Civ. P. 56(e). The evidence, as well as all justifiable inferences drawn from it, must be viewed in the light most favorable to the nonmoving party. See Matsushita, 475 U.S. at 587. Summary judgment shall be entered ''against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'' See Celotex, 477 U.S. at 322.

III. Analysis

[1] From what the Court can glean from it, Plaintiff's complaint contains a

[1] Courts have found both of these positions to be frivolous and patently without merit. See Sisemore v. United States, 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir 1986); Olson v. United States, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985).

barrage of meritless arguments which he insists this Court must address. The only genuine issue before this Court is whether the IRS Appeals Office met all requirements of applicable laws or administrative procedures when making its determination that the collection action against Plaintiff should continue unrestricted. This issue will be addressed first, followed by a discussion of Plaintiff's purely meritless arguments.

A. Collection Procedure

Procedures for administrative collection actions are found in 26 U.S.C. § 6330 which requires that (1) the IRS give 30 days' written notice of the taxpayer's right to a CDP Hearing before making a levy; (2) a hearing be conducted by an officer or employee who has no prior involvement with the subject tax liability; (3) the Appeals Office obtain verification from the IRS that the requirements of any applicable law or administrative procedure have been met; (4) the taxpayer may raise any relevant issue relating to the unpaid tax or the proposed levy at the time of the CDP Hearing, including appropriate spousal defenses, challenges to the collection actions and offer of collection alternatives; (5) the taxpayer may challenge the existence of the underlying tax liability under some circumstances; and (6) the final determination by the Appeals Officer shall take into consideration (a) the verification that applicable law and administrative procedures have been met, (b) the issues raised by the taxpayer, and (c) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

A review of Plaintiff's complaint illustrates that all of the above requirements have been met: (1) Plaintiff received timely notice of levy and requested a CDP hearing; (2) Plaintiff attended his CDP Hearing on June 13, 2001 with IRS Settlement Officer Gerald Bowcut, who had no prior involvement with the subject tax liability; (3) in a letter to Plaintiff dated May 9, 2001, Officer Bowcut attested to the fact that he had verified the validity of the IRS assessment through the examination of a complete computer transcript;[2] (4) Plaintiff raised no relevant issues or appropriate defenses pertaining to the proposed collection action; (5) At the hearing, Plaintiff acknowledged signing the returns for which the frivolous penalty was assessed af-firming his liability and did not dispute the underlying tax liability; and (6) the final determination of the Appeals Officer stated that he took into consideration all required statutory elements. Finally, attachment 3194 to the Notice of Determination noted that Plaintiff did not raise any non-frivolous arguments at the hearing.

B. Plaintiff's Arguments

1. Inadequacy of Notice

Plaintiff contends that the notice entitling him to a CDP hearing was not sent to him by the Secretary of the Treasury and there was no proof that the person who sent the notice had been properly delegated to do so. Plaintiff received the notice, signed by a representative of the IRS. The Secretary of the Treasury properly delegated his authority pursuant to statute and regulation to IRS employees. See 26 U.S.C. § 7701(a)(11)(A), (12)(A)(i); 26 C.F.R. § 301.7701-9; Delegation Order 193 (Rev. 6). Thus, the Court finds that Plaintiff received the required notice.

2. Adequacy of Supporting Documentation

Plaintiff contends the IRS has never produced a document supporting imposition of the penalties at issue. He does not believe that a computer transcript is adequate to verify an assessment. Plaintiff's argument is completely unfounded as Courts have held that an appeals officer may rely on computer transcripts that contain the requisite information in order to verify an assessment. See Huff v. United States, 10 F.3d 1440, 1446–1447 [72 AFTR 2d 93-6682] (9th Cir. 1993); Hughes, 953 F.2d at 535.

[2] Absent independent proof that the assessment is invalid in some manner, a CDP Hearing Officer is not required by law to consider any challenge to the validity of the assessment. See Hughes v. United States, 953 F.2d 531, 535 [69 AFTR 2d 92-472] (9th Cir. 1992).

3. Statutory Notice and Demand for Payment

Plaintiff contends that he was never sent the required Statutory Notice and Demand for payment with regard to the penalties at issue. Plaintiff received notice of the assessment and an opportunity to appeal that assessment. Plaintiff contends that he should have received a Form 17A, rather than the notice he received. Form 17A relates to assessment of unpaid income tax *not* a frivolous return penalty, which is the subject tax liability in this case. In addition, Notice and demand is not required to be sent on any particular form so long as the requisite information is included. Hughes, 953 F.2d at 536

4. Regulation Requiring Plaintiff to Pay Penalty

Plaintiff contends that no Treasury Department regulation requires that he pay the penalties at issue and Defendant has not produced any such regulation. 26 U.S.C. § 6702(a), however, provides the statutory authority for assessing the penalty and does not by its terms require any implementing regulations. See Hoffman v. United States, No. C02-5023RJB, 2002 WL 1299991, at 5 [89 AFTR 2d 2002-2647] (W.D. Wash. May 3, 2002).

5. Underlying Liability for Income Tax

Plaintiff contends that no statute establishes an underlying liability for the income tax to which the penalties relate, and the IRS has not identified any such statute. Plaintiff's liability for tax deficiencies (what he owed in taxes for the years 1996 and 1999) is not at issue in this case, although he consistently tried to make it so at the CDP Hearing and in the instant complaint. Plaintiff's remedy with regard to the liability for tax deficiencies does not lie in this Court. This Court does not have jurisdiction to consider income tax deficiencies. See 26 U.S.C. § 6213(a); Moore v. Commissioner, 114 T.C. 171, 175 (2000).

III. Conclusion.

Plaintiff's 1996 Form 1040X and 1999 Form 1040 were clearly frivolous and the civil penalty was validly assessed. More importantly, for purposes of this action, the Defendant properly followed all requirements of applicable laws and administrative procedures when assessing the civil penalty and then determining the collection action should continue unrestricted. Finally, the arguments that the Court could glean from Plaintiff's disjunctive complaint and opposition to Defendant's motion are purely meritless. Moreover, because Plaintiff's complaint lacks any merit, had the Defendant moved for Rule 11 sanctions this Court would have freely granted such motion.

Accordingly, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#2) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Complaint is DISMISSED.

Dated this 24th day of July, 2002.

Kent J. Dawson

United States District Judge

¶2002-5292

DENNIS NEEDHAM, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-0752-LRH (PAL), July 19, 2002. Earlier proceedings at (2002, DC NV) 90 AFTR 2d 2002-5260, 2002-2 USTC ¶ 50,563; and (2002, DC NV) 89 AFTR 2d 2002-2342. Years 1998, 1999. Decision for Govt.

1. Collection due process—review of administrative determination—abuse of discretion—summary judgment. Govt. was granted summary judgment in taxpayer's action. *Reference:* United States Tax Reporter ¶63,305.01(5). IRC §6330; 6331; 6702.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA,

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the Court for a trial by jury. The issues

have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

[1] IT IS ORDERED AND ADJUDGED that defendant's Motion for Summary Judgment (#8) is granted. Judgment is hereby entered in favor of defendant, United States of America, and against the plaintiff, Dennis Needham.

July 19, 2002

LANCE S. WILSON, CLERK

By: /s/

Deputy Clerk

¶2002-5293

Andrew RICHTER, PLAINTIFF v. U.S. DEFENDANT. U.S. District Court, Central Dist. of California, (DC CA) CV 01-5240 LGB (RNBx), April 1, 2002. Year 2000. Decision for Govt.

1. Collection due process—review of administrative determination—summary judgment—discovery. Govt. was granted summary judgment in taxpayer's action for review of IRS's determination to proceed with collection of his payroll tax penalty: no material fact issues existed where record showed IRS officer reviewed applicable law and administrative procedures, properly concluded that levy and lien notice requirements were met, and found that levy balanced need for efficient collection with taxpayer's concerns; whether taxpayer cooperated with IRS in his attempt to obtain offer in compromise (OIC) was irrelevant since he never submitted such; and officer's insistence that, before entering OIC, taxpayer file returns or produce separate property agreement for years he allegedly had no income wasn't abuse of discretion where taxpayer never submitted any written verification that he wasn't required to file. Also, taxpayer's F.R.Civ.P. 56(f) request for information as to specific steps officer took in determining that levy was appropriate was denied as speculative. *Reference:* United States Tax Reporter ¶63,305.01(5). IRC §6330.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA,

ORDER GRANTING DEFENDANT UNITED STATE'S MOTION FOR SUMMARY JUDGMENT; ORDER DENYING PLAINTIFF'S RULE 56(F) REQUEST

LOURDES G. BAIRD United States District Judge

I. INTRODUCTION

Pursuant to 26 U.S.C. § 6330(d)(1)(B), Plaintiff Andrew Richter (''Plaintiff'') brings the instant action against Defendant United States (''Defendant'') seeking a judicial review of the Internal Revenue Service (''IRS'') appeals office's determination that a levy upon Plaintiff's income and assets to enforce the payment of certain overdue taxes is appropriate. By the instant motion, Defendant seeks summary judgment in its favor on the grounds that no disputed issues of material fact exist and that it is entitled to a judgment as a matter of law because the IRS did not abuse its discretion by making the determination at issue. Plaintiff argues that genuine issues of fact exist that preclude summary judgment or, in the alternative, that pursuant to Fed. R. Civ. P. 56(f), Defendant's motion must be denied so as to allow discovery concerning whether the IRS appeals officer who made the determination followed all necessary procedures.

For the reasons set forth below, the Court GRANTS Defendant's motion for summary judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

Unless otherwise noted, the following facts are undisputed. Plaintiff owes a payroll tax penalty previously assessed against him by the IRS. D's Statement of the Uncontroverted Facts and Conclusions of Law (''D's Statement of Facts'') ¶ 3; P's Statement of Genuine Issues in Opposition to D's Motion for Summary Judgment (''P's Statement of Genuine Issues'') ¶ 3. IRS records show that the unpaid amount of the

payroll tax penalty on June 21, 2000 was $222,279.59, and that the total amount owed at that time, including accrued penalties and interests, was $458,486.70. Id. In anticipation of taking levy action to collect the payroll tax penalty on June 21, 2000, the IRS sent Plaintiff a ''Notice of Intent to Levy and Notice of Your Right to a Hearing.'' Id. Plaintiff timely protested the IRS's Notice of Intent to Levy and requested a hearing before the IRS appeals office pursuant to Section 6330(b)(1). D's Statement of Facts ¶ 4; P's Statement of Genuine Issues ¶ 4. The only issue raised by Plaintiff in his written request for a hearing is his statement, ''I request offer and compromise.'' D's Statement of Facts ¶ 5; P's Statement of Genuine Issues ¶ 5. IRS records show that Plaintiff had previously submitted an offer to compromise the tax liability in July 1998, and that the offer was returned to Plaintiff in May 2000. D's Statement of Facts ¶ 6; P's Statement of Genuine Issues ¶ 6. The parties dispute whether the IRS had requested verification of financial information pro-vided in connection with the offer but had not received all of the requested information. D's Statement of Facts ¶ 6; P's Statement of Genuine Issues ¶ 6.

On or about August 21, 2000, IRS Settlement Officer Adlai Climan (''Climan'') sent Plaintiff a letter inviting him to call and schedule a conference. D's Statement of Facts ¶ 8; P's Statement of Genuine Issues ¶ 8. The parties dispute whether Climan ever received a response to his letter. Id. On or about December 21, 2000, Climan sent Plaintiff a letter inviting him to file the Offer in Compromise which Plaintiff's appeal letter had stated he wanted to file. D's Statement of Facts ¶ 9; P's Statement of Genuine Issues ¶ 9. Climan's letter included the forms needed to make an Offer in Compromise, and the letter also advised Plaintiff that he would have to file his unfiled 1999 income tax return in order for the offer to be processed. Id. Climan did not receive any responses to his December 21, 2000 letter. D's Statement of Facts ¶ 10; P's Statement of Genuine Issues ¶ 10. On March 30, 2001, Climan sent Plaintiff another letter advising Plaintiff that an appeals conference in the matter was being scheduled for April 16, 2001. D's Statement of Facts ¶ 11; P's Statement of Genuine Issues ¶ 11. On April 13 2001, Plaintiff's representative called to request that the conference be rescheduled, and the conference was rescheduled for April 20, 2001. D's Statement of Facts ¶ 12; P's Statement of Genuine Issues ¶ 12. During the confer-ence, Plaintiff's representative stated that his client wanted to submit an Offer in Compromise. Id. The parties dispute whether this was the only issue raised-Plaintiff asserts that his representative stated to Climan that his client had already submitted an offer in compromise and wanted to know on what basis it had been rejected. Id. During the appeals conference, Plaintiff's representative stated that Plain-tiff had no income in 1999 or 2000, and that Plaintiff was therefore not required to file any tax returns for those years. D's Statement of Facts ¶ 13; P's Statement of Genuine Issues ¶ 13.

On April 20, 2001, at the conclusion of the appeals conference, Climan prepared and sent another letter advising Plaintiff that the completed Offer in Compromise, along with a Collection Information Statement and certain documents needed to verify Plaintiff's income and expenses, must be submitted in order for the IRS to consider an Offer in Compromise. D's Statement of Facts ¶ 14; P's Statement of Genuine Issues ¶ 14. The parties dispute whether Plaintiff was only asked to file ''required returns'' or whether Climan made it ''very clear'' that he would not accept an Offer in Compromise for consideration without returns from Plaintiff reporting half of his wife's wages. Id. The parties dispute whether Plaintiff filed a joint return with his wife for 1998 and whether Climan knew of a separate prop-erty agreement between Plaintiff and his wife or was otherwise told that such an agreement existed. D's Statement of Facts ¶ 15; P's Statement of Genuine Issues ¶ 15. Finally, the parties also disputed whether Plaintiff ever responded to Climan's April 20, 2001 letter. D's State-ment of Facts ¶ 16; P's Statement of Gen-

uine Issues ¶ 16. On May 14, 2001, the IRS Appeals Office issued its Notice of Determination that is the basis of this appeal. In that determination, the office determined that IRS levy action was appropriate because Plaintiff had made no acceptable proposal for resolution or payment of the tax liability. Id.; Exhibit 8 to Decl. of Russo in Opposition to D's Motion. On June 12, 2001, Plaintiff filed the instant action seeking a judicial review of the IRS Appeals Office's determination.

III. LEGAL STANDARDS AND ANALYSIS

A. Legal Standards

1. Standard governing Plaintiff's appeal of the Notice of Determination

Pursuant to 26 U.S.C. § 6330(d)(d)(1), this Court may review a timely-filed appeal of an IRS Notice of Determination. On appeal to this Court, Plaintiff may raise only those issues raised with the Appeals Office at the Collection Due Process hearing. See TTK Management v. United States, 2000 WL 33122706 1 [87 AFTR 2d 2000-350] (C.D. Cal. 2000); see Temporary Treasury Regulation ¶ 301.6320-1T, Q & A F5. The parties do not dispute that during the appeals hearing, Plaintiff asked Climan to consider an Offer-in-Compromise as an alternative to a levy action for collection.

If the validity of the tax liability is not in issue, the taxpayer may challenge the determination of the appeals officer for abuse of discretion. TTK, 2000 WL 33122706 1; H. Conf. Rept. 105-599, at 266 (1998). The Ninth Circuit has stated that an abuse of discretion is "a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." Wing v. Asarco, Inc., 114 F.3d 986 (9th Cir. 1997). The burden is on the taxpayer when challenging an IRS collection action. See Redmond v. United States, 507 F.2d 1007, 1011–1012 (5th Cir. 1975).

2. Fed. R. Civ. P. 56(b)

Rule 56 of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those that may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

The moving party for summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Rule 56(e) of the Federal Rules of Civil Procedure requires that the party opposing the summary judgment motion "forth specific facts showing that there is a genuine issue for trial" in its opposition papers.

3. Fed. R. Civ. P. 56(f)

Fed. R. Civ. P. 56(f) provides that

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Fed. R. Civ. P. 56(f). In order to make a proper Rule 56(f) showing, a party must make clear what information is sought and how it would preclude summary judgment. Margolis v. Ryan, 140 F3d 850, 852 (9th Cir. 1998). Summary judgment may not be granted until the court first determines the merits of the opposing party's request for continuance under Rule 56(f). Garrett v. San Francisco, 818 F.2d 1515, 1518–19 (9th Cir. 1987). The burden is on the party seeking additional discovery to proffer suf-

ficient facts to show that the evidence sought exists and that it would prevent summary judgment. Nidds v. Schlinder Elevator Corp., 113 F.3d 912, 920 (9th Cir. 1997).

Courts have denied a Rule 56(f) application for lack of sufficient showing to support further discovery where it was clear that the evidence sought was almost certainly nonexistent or was the object of pure speculation. Exxon Corp. v. Federal Trade Comm'n, 663 F.2d 120, 127 (D.C. Cir. 1980) (Rule 56(f) application properly denied where "there [were] simply no facts in the record" to support existence of object of plaintiff's proposed discovery, and where defendant's evidence affirmatively indicated nonexistence of object of discovery).

B. Analysis

[1] Plaintiff argues that Defendant has not met its burden of demonstrating the absence of a genuine issue of material fact, and that it is entitled to judgment as a matter of law. Specifically, he contends that a genuine issue of material fact exists as to 1) whether Climan independently verified that all applicable laws and administrative procedures had been met, 2) whether Climan was aware of Plaintiff's separate property agreement, 3) whether Plaintiff cooperated with the IRS in his attempts to obtain an Offer and Compromise, and 4) whether Climan performed the balancing test required by statute. Pl's Opposition at 9–13. In the alternative, Plaintiff requests that Defendant's motion for summary judgment be denied pursuant to Fed. R. Civ. P. 56(f) so as to allow him to depose Climan with regards to issues 1, 2, and 4. Id. at 13. For reasons set forth below, the Court concludes that Defendant is entitled to summary judgment.

1. The absence of genuine issues of material fact precluding summary judgment

As an initial matter, the Court notes that Plaintiff has erroneously shifted the burden of proof to Defendant. It is not only his burden to show that genuine issues of material fact exist so as to preclude summary judgment but it is also his burden in challenging the validity of the IRS collection action. Plaintiff has satisfied neither here.

First, Plaintiff attempts to raise a genuine issue of fact as to whether Climan independently verified that all applicable laws and administrative procedures had been met by pointing out that though "Climan's [d]eclaration contains his conclusory statement that his review of IRS files indicated that the IRS had complied with requirements of applicable laws and procedures, counsel for Defendant tacitly admits that this allegation was of insufficient value to support a finding of fact by not including it in [Defendant's Statement of Uncontroverted Facts]." Pl's Opposition to D's Motion at 9. The Court agrees with Defendant that the exclusion of this ultimate fact from its Statement of Uncontroverted Facts does not constitute an admission on its part that there is a genuine issue as to whether Climan performed his statutory duties; such an omission is simply irrelevant. Based on the record before it, the Court finds that Climan reviewed the applicable law and administrative procedures and properly concluded that the necessary requirements regarding the IRS's proposed levy action and the filed Notice of Federal Tax Lien had been met. This is so because there is an unpaid assessment of tax liability, the tax liability had been properly and timely assessed, there had been notice and demand made for the payment of the liability and a neglect or refusal to pay, and Plaintiff had been pro-vided with the appropriate notice and opportunity for a collection due process hearing. Exhibit 8 to Decl. of Russo in Support of Pl's Opposition, Notice of De-termination at 3; see also Decl. of Climan to Pl's Motion ¶ 3. Plaintiff has not brought forth any evidence to raise a genu-ine issue of fact as to this matter. Though Plaintiff raises issues regarding his previ-ous Offer in Compromise and the return of the offer to his as "unprocessible." Pl's Opposition at 9, that offer is irrelevant not only to the instant motion but to the action as a whole.

Second, Plaintiff similarly misses the mark in attempting to raise a genuine issue of fact as to whether Climan performed the balancing test required by statute by pointing to Defendant's failure to include this ultimate fact in its Statement of Uncontroverted Facts. In addition, he also notes that "[n]owhere in Climan's declaration does he state that he performed this balancing test. It is reasonable to infer that had he done so it would have been stated in his declaration." Pl's Opposition to D's Motion at 12–13. The Court refrains from reaching this inference on the grounds that it would be inappropriate, and finds Plaintiff's quibbles with minor details to be misdirected, especially given that the Notice of Determination states that Climan found that the proposed enforced collection action balances the need for efficient collection of the liability with Plaintiff's concerns. Exhibit 8 to Decl. of Russo in Support of Pl's Opposition, Notice of Determination at 3. The Notice of Deter-mination thus states that "You have made no acceptable alternative proposal for pay-ment of the liability. The proposed levy action appears no more intrusive than nec-essary considering the government's need to collect the debt." Id. Plaintiff has not proffered any evidence to create a genuine issue of fact as to this matter.

Third, Plaintiff's argument that there are material issues of fact as to whether he cooperated with the IRS in his attempts to obtain an Offer and Compromise is also irrelevant, given that it is undisputed that he ultimately failed to submit an Offer and Compromise to the IRS for processing and consideration. Pl's Opposition at 12.

Plaintiff's strongest argument appears to be that there are genuine issues of material fact as to whether Climan was aware of his separate property agreement, Pl's Opposition at 10–12, but this too ultimately lacks merit and is insufficient to bar the grant of summary judgment in favor of Defendant. The Notice of Determination shows that Climan's decision was based on the fact that Plaintiff "made no acceptable proposal for resolution or payment of the subject tax liability." Exhibit 8 to Decl. of Russo in Support of Pl's Opposition, Notice of Determination at 2. More specifically, Climan notes that Plaintiff "ha[d] submitted to Offer in Compromise, or made any proposal for installment payments." Id. Defendant thus contends that it did not abuse its discretion by determining that IRS levy action was appropriate in light of the fact that Plaintiff raised only the issue of an Offer in Compromise and yet ultimately failed to tender one. D's Reply Brief at 5–7; id. at 8 ("Mr. Richter simply cannot expect the government to grant his request for a compromise if Mr. Richter refuses to make an offer.").

Plaintiff, however, counters that the reason that he did not submit an offer is because Climan had continuously insisted that he file his 1999 and 2000 tax returns despite the fact that he had allegedly informed Climan that he need not file such documents. See Pl's Opposition at 10–11 ("Since the Richters had a prenuptial agreement providing that their income was to remain their separate property, and he had no income during 1999 or 2000, there was no legal requirement that he file a return reporting ½; of his wife's income during those years."); Comm'r of Internal Revenue v. Harmon, 323 U.S. 44, 55 n. 8 [32 AFTR 1411] (1944) (if in traditional community property states, community property is transmuted by agreement of spouses into the separate property of one spouse, the income thereafter is taxable solely to the latter); United States v. Elam, 112 F.3d 1036, 1038 [79 AFTR 2d 97-2391] (9th Cir. 1997) (noting that transmutation agreements that are valid under state law are also binding on the government for federal tax purposes); Helvering v. Hickman, 70 F.2d 985, 987 [14 AFTR 229] (9th Cir. 1934) (finding wife's income was not taxable on the husband because transmutation agreement kept her earnings as separate property). Under the circumstances, Plaintiff argues that he knew that to submit an offer without filing the returns would be considered useless by the IRS and as such, did not submit the offer. Plaintiff concludes that Climan's insistence on the returns as a condition for the

processing and consideration constitutes an abuse of discretion.

Even assuming that Plaintiff indeed informed Defendant of the existence of the separate property agreement. Climan's insistence on the filing of the 1999 and 2000 returns does not create genuine issues of material fact as to whether the IRS abused its discretion in issuing the Notice of Determination. The Court construes Plaintiff as making an equitable estoppel-type of argument against Defendant, for he acknowledges that he did not submit an Offer in Compromise to the IRS but blames his reliance of Climan's alleged oral representation for such a failure. In dealing with the government, however, Plaintiff is charged with knowledge of applicable statutes and regulations. Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947). The applicable treasury regulations require that an Offer in Compromise and an acceptance be in writing. 26 C.F.R. § 301.7122-1(d)(1), (d)(3). Thus, Plaintiff should have known that Climan's oral representations were not binding and should have known that he needed to initiate the process by submitting an offer, thereby placing the burden upon Climan to justify any subsequent rejection of the offer. Moreover, a rejection of an Offer in Compromise does not occur until the government formally rejects the offer. United States v. McGee, 993 F.3d 184, 186 (9th Cir. 1993). Climan's alleged representations to Plaintiff thus do not constitute an appealable ''rejection'' despite Plaintiff's attempts to now paint them as such. In addition, it is well-settled that the IRS will not process proposed collection alternatives for past liabilities when a taxpayer has not been meeting its current payroll tax obligations. See TTK Management v. United States, 2000 WL 33122706 2 (C.D. Cal. 2000); AJP Management v. United States, 2000 WL 33122693 2 [87 AFTR 2d 2000-347] (C.D. Cal. 1999). The IRS puts the taxpayer seeking to compromise his tax liabilities on notice of this fact since the Form 656 package states that ''[w]e'll also consider your overall history of filing and paying taxes.'' D's Supplemental Brief, Form 656 at 1. In addition, the package also states that ''[y]ou are not eligible for consideration of an Offer in Compromise on the basis of doubt as to collectibility or effective tax administration if ... you haven't filed all required federal tax returns.'' Id. at 2. Though Plaintiff alleges that he informed Climan of the existence of a separate property agreement, he does not allege that he ever produced the agreement for Climan's review or otherwise submitted written verification that he need not file the 1999 and 2000 returns.

Based on the foregoing, the Court finds that Plaintiff has failed to raise genuine issues of fact as to whether the issuance of the Notice of Determination constitutes an abuse of discretion, either on the part of Climan or the IRS as a whole.

2. Plaintiff's Rule 56(f) Request

This Court must determine the merits of Plaintiff's Fed. R. Civ. P. 56(f) request before it can grant Defendant's motion for summary judgment. Margolis, 140 F.3d at 852. Plaintiff has produced an affidavit from his counsel stating that Climan has personal knowledge as to the specific steps he took, if any, to verify that all statutory, regulatory, and administrative requirements for the proposed collection action have been met and what steps, if any, he took to determine that the proposed collection action balanced the need for efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary. Exhibit of Brager in Opposition to D's Motion ¶ 2. Plaintiff's counsel state that

> [i]n response to informal discovery requests, the IRS has provided me with the files kept by [] Climan in connection with the Collection Due Process hearing upon which this case is based. Having reviewed them, I believe that [] Climan's deposition will reveal that he performed his statutory duties in a perfunctory manner, if at all.

Id. ¶ 3. Thus, Plaintiff seeks information specifically regarding the steps that Climan took in making his determination that IRS levy action is appropriate. The Court, however, finds that Plaintiff has failed to bear his burden of proffering sufficient facts to

show that the evidence sought exists and how it would preclude summary judgment. Nidds, 113 F.3d at 920. In light of counsel's conclusory statement that a review of Climan's files forms the basis of his belief that Climan performed his duties in an inadequate manner, the Court has no choice but to conclude that the evidence sought by Plaintiff is the "object of pure speculation." Exxon Corp., 663 F.2d at 127. Ultimately, Plaintiff has done nothing more than "rely on vague assertions that additional discovery will produce needed, but unspecified facts." International Shortstop, Inc., et al. v. Rally's, Inc., 939 F.2d 1257, 1267 (5th Cir. 1991) (internal quotations omitted).

IV. CONCLUSION

Based on the foregoing, the Court finds that besides failing to create a genuine issue of material fact as to preclude the grant of Defendant's motion for summary judgment, Plaintiff has also failed to adequately support his Rule 56(f) request. The Court finds that viewing the facts in the light most favorable to Plaintiff as the nonmoving party, Defendant did not abuse its discretion by issuing the Notice of Determination being appealed here

For the reasons set forth above, the Court GRANTS Defendant's motion for summary judgment. The case is hereby termed closed.

IT IS SO ORDERED.

Dated: April 1, 2002

LOURDES G. BAIRD

United States District Judge

¶2002-5294

Stephen M. Robison, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) Case No.: CV-S-01-0934-RLH (LRL), July 17, 2002. Year 1999. Decision for Govt.

1. Collection due process—review of administrative determination—prior opportunity to contest deficiencies—penalties for filing false withholding information. Tax protester's petition for review of IRS's administrative determination to proceed with collection of IRC §6682 penalty and for damages was dismissed for failure to state claim: Appeals Officer didn't abuse his discretion in determining that requirements of all applicable laws had been met and that taxpayer was afforded statutorily-required procedures; delegation of authority argument was meritless; and taxpayer wasn't entitled to challenge his underlying liabilities where he had received notice that his "exempt" status claim was improper and had ample opportunity to dispute assessment. *Reference:* United States Tax Reporter ¶63,305.01(5); 63,305.01(15); 66,825.01(10). IRC §6330; 6682.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA,

ORDER

ROGER L. HUNT United States District Judge

(Motion to Dismiss—#4)

Before the Court is Defendant's Motion to Dismiss (#4), filed December 5, 2001. The Court has also considered Plaintiff's Opposition (#11), filed January 18, 2002, and Defendant's Reply (#13), filed February 7, 2002.

BACKGROUND

In August 1999, Plaintiff Stephen M. Robison filed a Form W-4, Employee's Withholding Certificate, with his employer in which he claimed he was "exempt" from the withholding of federal income tax. On September 16, 1999, the Defendant IRS sent a letter to Plaintiff which informed him that the exempt status claimed on his Form W-4 filed for 1999 was disallowed. The letter also informed Plaintiff that pursuant to 26 U.S.C. § 6682 the civil penalty for false information with regard to withholding would be assessed for 1999 unless, within 15 days, he could provide a reasonable basis for the statement reflected in the Form W-4. The letter also informed Plaintiff of his right to appeal the IRS's determination within 30 days from the date

of the letter. Plaintiff responded in a timely manner acknowledging receipt of the IRS's September 16 letter and objected to payment of the penalty without giving a reasonable basis for the statements regarding the false information made on Plaintiff's Form W-4 for 1999.

On February 14, 2000, an assessment in the amount of $500.00 was made against Plaintiff pursuant to 26 U.S.C. § 6682. On the same day the assessment was sent, a notice of the assessment of the penalty and demand for payment was also sent to Plaintiff. Additional notices of the assessment of the penalty and demand for payment were sent on March 20, 2000 and April 24, 2000.

On August 31, 2000, a Final Notice-Notice of Intent to Levy and Notice of Your Right To a Hearing was sent to Plaintiff. The notice informed Plaintiff of IRS's intent to levy to collect the outstanding civil penalty assessed against him pursuant to 26 U.S.C. § 6682 for the 1999 tax year. The notice also informed Plaintiff of his right to request a Collection Due Process (''CDP'') Hearing with the IRS. A CDP Hearing was held on May 11, 2001.

On July 11, 2001, a Notice of Determination Concerning Collection Action Under Section 6320 and/or 6330 was sent by certified mail to Plaintiff. The Notice of Determination informed Plaintiff of the matters considered at the appeals hearing and the conclusion that it would be appropriate for the Government to pursue levy action. In addition, the Notice of Determination informed Plaintiff of his right to dispute the IRS's determination in court by filing a petition with the United States District Court for a redetermination within 30 days from the date of the notice. On August 10, 2001, Plaintiff filed a complaint with this Court. In addition to damages, Plaintiff asks that this Court set aside the CDP determination as invalid. Defendant requests this Court to dismiss the complaint for failure to state a claim for which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6) or in the alternative, to enter summary judgment pursuant to Fed. R. Civ. P. 56 in favor of the United States.

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. . .

DISCUSSION

I. Motion to Dismiss Standard Under Rule 12(b)(6)

[1] Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for ''failure to state a claim upon which relief can be granted.'' ''[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'' *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see also Yamaguchi v. U.S. Dep't of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). All factual allegations set forth in the complaint ''are taken as true and construed in the light most favorable to [p]laintiffs.'' *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1999). Dismissal is appropriate ''only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations.'' *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

II. Collection of Fines by the IRS

Under 26 U.S.C. § 6682, a civil penalty of $500 may be imposed if any individual makes a statement with respect to withholding that results in a decrease in the amounts deducted and withheld and there is no reasonable basis for the statement at the time it is made.

Here, Plaintiff filed an exempt Form W-4 for the 1999 tax year claiming that he owed no income tax. The IRS found that Plaintiff was subject to pay income tax for 1999 and subsequently assessed a $500 civil penalty pursuant to 26 U.S.C. § 6682.

Title 26 U.S.C. § 6330(a) provides that before proceeding with the collection by way of levy, the IRS must provide the taxpayer notice of the right to a hearing on the matter. 26 U.S.C. § 6303(a) states that notice shall be left at the taxpayer's dwelling or usual place of business or be sent

by mail to the taxpayer's last known address. The taxpayer has a right, within 30 days of the Section 6330 notice, to request a hearing with the IRS Office of Appeals. *Id.* § 6330(a)(3)(B). At the hearing, the taxpayer may raise any issue relevant to the unpaid tax and the proposed levy, including challenges to the propriety of the levy and offers of collection alternatives. *Id.* § 6330(c)(2).

The impartial IRS Appeals Officer who conducts the hearing must then formulate his or her determination based on: (1) the verification that the requirements of any applicable law or administrative procedure have been met; (2) the issues raised by the taxpayer; and (3) the proper balance between the need for efficient tax collection and the legitimate concern that any collection action be no more intrusive than necessary. *See id.* § 6330(c)(3). At the hearing, the taxpayer may address any of the statutorily-specified issues allowed at a collection due process hearing, including spousal defenses, the appropriateness of an intended collection action, and possible alternative means of collection. *See* 26 U.S.C. § 6330(c); *see also Sego v. Comm'r of Internal Revenue*, 114 T.C. 604, 609 (2000). Following the hearing, the Appeals Officer sends a Notice of Determination to the taxpayer that summarizes the matters raised during the hearing and responds to any offers or objections made by the taxpayer. If the taxpayer is dissatisfied with the administrative determination, he may seek judicial review in the United States Tax Court within 30 days of receiving the Notice or, if the Tax Court does not have jurisdiction over the underlying tax liability, the appropriate United States District Court. *Id.* § 6330(d)(1). Review is limited to matters actually raised at the administrative hearing. Temp. Treas. Reg. § 301.6330-1T(f) (2001).

Title 26 U.S.C. § 6330(d) does not specify the standard of review a district court should apply to an appeal of a Notice of Determination. However, the legislative history indicates that the court should conduct a *de novo* review only "where the validity of the tax liability was properly at issue at the administrative hearing." H. R. Conf. Rep. No. 105-599, at 266 (1998). Where the amount of the underlying tax liability is not properly part of the appeal, the court reviews a Notice of Determination for abuse of discretion. *See Sego* 114 T.C. at 609–10; *Goza v. Comm'r of Internal Revenue*, 114 T.C. 176, 179–80 (2000). An administrator abuses his or her discretion if he or she relies on clearly erroneous findings of fact in his or her determinations. *Taft v. Equitable Life Assurance. Soc'y*, 9 F.3d 1469, 1473 (9th Cir. 1993).

Here, the issue before the Court is related to the collection action regarding the penalties incurred by Plaintiff for filing a false Form W-4 for the 1999 tax year. This Court is not reviewing the underlying income tax liability which, pursuant to 26 U.S.C. § 6330(b)(1)(A), is reviewable only by the United States Tax Court. Therefore, this Court will apply an abuse of discretion standard in reviewing the Notice of Determination at issue.

In his opposition to the Motion to Dismiss, Plaintiff raises several issues regarding the authority of the IRS to assess and issue the determination that the collection action is based upon. Plaintiff questions the authority of the IRS Appeals Officer as well as his reliance on Form 4340 that was provided to Plaintiff during his Collection Due Process hearing that indicated an assessment was actually made and issued.

Here, the IRS hearing officer did not abuse his discretion when he determined that the requirements of applicable law had been met and that Plaintiff had been afforded statutorily-required administrative procedures. The hearings officer attempted to address the issues raised by Plaintiff; however, Plaintiff did not address any of the statutorily-specified issues that may be raised at a collection due process hearing, such as spousal defenses, the appropriateness of an intended collection action, and possible alternative means of collection. Instead Plaintiff attempted to revisit the issue of his underlying tax liability at the collection hearing at issue.

Further, Plaintiff's argument that there is no evidence of any delegated authority from the Secretary of Treasury cannot prevail. Relevant statues and regulations demonstrate that the Secretary does have the power to collect taxes, and that such power can be delegated to local IRS agents. 26 U.S.C. § 6301 provides that "[t]he Secretary shall collect the taxes imposed by the internal revenue laws." The actual task of collecting the taxes, however has been delegated to local IRS directors. *See Hughes v. United States*, 953 F.2d 531, 536 [69 AFTR 2d 92-472] (9th Cir. 1992); 26 C.F.R. § 301.6301-1 ("[t]he taxes imposed by the internal revenue laws shall be collected by district directors of internal revenue"). District directors in turn are authorized to redelegate the levy power to lower level officials such as collection officers. *See Hughes*, at 536. The delegation of authority down the chain of command, from the Secretary, to the Commissioner of Internal Revenue, to local IRS employees constitutes a valid delegation by the Commissioner to the delegated officers and employees. *See* C.F.R. § 301.7701-9. Therefore, the agents involved in the instant case were acting within their authority when they made and sent a Notice of Determination regarding the collection action.

Appeals of the underlying claims are only appropriate at a collection due process hearing if the plaintiff did not receive notice of tax liability, *Goza*, 114 T.C. at 182, or "had no previous opportunity to contest the validity of those claims." *Kintzler v. Internal Revenue Serv.*, 2001 WL 1137294, at 2 [88 AFTR 2d 2001-5823] (D. Nev. 2001). The *Hughes* court and other circuit courts have held that Form 4340 Certificate of Assessments and Payments provided to the plaintiffs indicating that notice of assessment was made and demand for payment was issued on a certain date were sufficient to establish that assessments were actually made and issued. *Hughes*, at 535; see *also U.S. v. Chila*, 871 F.2d 1015 [63 AFTR 2d 89-1278] (11th Cir. 1989) (finding that Certificate of Assessments and Payments (4340) is presumptive proof of a valid assessment). In addition, the Ninth Circuit has held that an allegation of nonreceipt by a taxpayer will not defeat a motion for summary judgment supported by a Form 4340. *Hansen v. United States*, 7 F.3d 137, 138 [72 AFTR 2d 93-5922] (9th Cir. 1993).

Although Plaintiff claimed that he did not receive the first notice requesting payment and demand of the civil penalty assessed, IRS records indicate that, in addition to the February 14, 2000 notice, subsequent notices were sent on March 20, 2000 and April 24, 2000. Plaintiff had ample opportunity to properly dispute the penalty assessment. The IRS Hearings Officer did not abuse his discretion by relying on Form 4340, which he provided to Plaintiff, that indicated that an assessment was made and issued to Plaintiff.

Plaintiff has not, and cannot, prove any set of facts in support of his claim which would entitle him to relief. Defendant's Motion to Dismiss will therefore be granted. See *Goza*, 114 T.C. at 183 (dismissing tax protester's appeal of IRS Notice of Determination for failure to state a claim).

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#4) is GRANTED.

Dated: July 17, 2002.

ROGER L. HUNT

United States District Judge

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed. Judgment is entered in favor of defendant United States of America and against plaintiff Stephen M. Robison.

July 23, 2002

Date

LANCE S. WILSON

Clerk

/s/

(By) Deputy Clerk,

¶2002-5295

Davina SEGO; Steven SEGO; and David Pilon, PLAINTIFFS v. Dennis L. Molenaar; Scott L. Poorman; Erika B. Ellingsen; Daniel English; Kootenai County; John Peterson; James L. Mason; Internal Revenue Service; Edward J. Lodge, DEFENDANTS. U.S. District Court, Dist. of Idaho, (DC ID) Case No. CV-01-624-N-BLW, July 25, 2002. Decision for Govt.

1. Actions against IRS and IRS employees—jurisdiction—sovereign immunity—Anti-Injunction Act. Pro se taxpayers' incomprehensible collection-related action against IRS, IRS employees and various non-federal defendants was dismissed for lack of jurisdiction: diversity between adverse parties was lacking; complaint contained no coherent factual allegations against actions IRS employees took either in their official or personal capacities; and, to extent seeking to prevent levy, suit was barred by AIA. Also, taxpayers' motions for joinder of new parties and writ of "error default-judgment" were denied. *Reference:* United States Tax Reporter ¶74,336.504(5); 74,336.506(25); 74,215.05(5). IRC §7421.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO,

MEMORANDUM DECISION AND ORDER

B. LYNN WINMILL Chief Judge, United States District Court

INTRODUCTION

The Court has before it a Motion to Dismiss, filed by Defendants John Peterson and James L. Mason and Plaintiffs' Motion for the Joinder of New Parties. (Docket Nos. 6, 9). The Court has sent the Plaintiffs, pro se litigants, a notice setting forth the requirements for responding to a Motion to Dismiss. (Docket No. 10).[1] The Court has considered all of the parties' filings. For the reasons discussed below, the Court will GRANT Defendants' Motion to Dismiss and DENY Plaintiffs' Motion for the Joinder of New Parties.

ANALYSIS

I. Motion to Dismiss

[1] The Plaintiffs' Complaint is largely incomprehensible.[2] Nonetheless, the Court has reviewed, and liberally construed, all of the Plaintiffs' filings in an attempt to identify whether any cognizable claims have been raised. *See Balistreria v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Defendants Peterson and Mason seek dismissal of Plaintiffs' claims for lack of subject matter jurisdiction. *See*Federal R. Civ. P. 12(b)(1).[3]

A. Lack of Subject Matter Jurisdiction

The Court has no subject matter jurisdiction in the instant case. Federal district courts are courts of limited jurisdiction. They have subject matter jurisdiction over cases in diversity or cases in which a federal question is presented. *See*28 U.S.C. §§ 1331–1332. Diversity is not alleged in Plaintiffs' Complaint, nor could it be alleged in this matter because the Plaintiffs and at least one of the Defendants are residents of Idaho. (Docket No. 1).

Whether subject matter jurisdiction exists is a question of law. *See Nike, Inc. v. Commercial Iberica De Exclusivas Deportivas, S.A.*, 20 F.3d 987, 990 (9th Cir. 1990). The party seeking to invoke federal jurisdiction has the burden of establishing

[1] The Court is unable to ascertain the relationship of David Pilon to the instant case. Defendants Peterson and Mason have no knowledge of any dealings with this plaintiff. (Docket No. 7) (Exhibits A, B).

[2] The Plaintiffs attempt to make claims against the Defendants based on unrecognized causes of action, *e.g.*, for a "no fiction-jurisdiction" and "constructive treason." Plaintiffs also list a litany of claims from which the Court is unable to discern any relevancy to the instant case, e.g., extortion, conspiracy, tort, etc.

[3] Defendants seek dismissal on other grounds which the Court declines to consider at this time. (Docket No. 7).

it. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994).

In any action against it, the United States must waive its sovereign immunity. *See Arford v. United States of America*, 934 F.2d 229, 231 [67 AFTR 2d 91-1135] (9th Cir. 1991) (citations omitted).[4] Waiver of sovereign immunity must be express, not implied. *See Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 [56 AFTR 2d 85-5567] (9th Cir. 1985) (citing *United States v. King*, 395 U.S. 1, 4 [23 AFTR 2d 69-1358] (1969)). The United States must consent to be sued. *See id.*; *Gilbert*, 756 F.2d at 1458. If the United States has not expressly consented then the suit must be dismissed. *See Gilbert*, 756 F.2d at 1458 (citations omitted).

Defendants Peterson and Mason are employees of the Internal Revenue Service, hereinafter "IRS." (Docket No. 8).[5] The doctrine of sovereign immunity extends to federal employees acting within the scope of their official duties as federal employees. *See Gilbert*, 756 F.2d at 1458. The Plaintiffs have failed to include in their Complaint, or Amended Complaint, any coherent factual allegations against the Defendants, either in their official capacity as employees of the IRS or in their personal capacities, that might establish jurisdiction. (Docket Nos. 1, 2).

Plaintiffs' Complaint and subsequent filings appear to be an attempt to express their disapproval of the government's attachment of their wages and real property.[6] Defendants Peterson and Mason, as employees of the IRS, are permitted to collect unpaid tax liabilities through the use of administrative levies. *See* 26 U.S.C. § 6331; *see also Farr v. United States of America*, 990 F.2d 451, 455–56 [71 AFTR 2d 93-1312] (9th Cir. 1993) (citation omitted). Section 6331(a) empowers the IRS "to collect such tax ... by levy upon all property and rights to property ... belonging to such person ..."

The Court recognizes that an injunction may sometimes issue to prevent the collection of taxes where the taxpayer demonstrates that the government could not possibly prevail on the merits and the taxpayer will suffer irreparable harm. *See Farr*, 990 F.2d at 453. Plaintiffs have made no such showing in their pleadings to the Court. Thus, to the extent that the Plaintiffs seek to prevent the collection of taxes by the IRS, the Court lacks subject matter jurisdiction. *See* 26 U.S.C. § 7421(a); *see also Hughes v. United States of America*, 953 F.2d 531, 535 [69 AFTR 2d 92-472] (9th Cir. 1992).[7] Therefore, the Court will grant Defendants' Motion to Dismiss for lack of subject matter jurisdiction.[8]

II. Motion for the Joinder of New Parties

Plaintiffs have filed a Motion for the Joinder of New Parties, attempting to join Judge Edward J. Lodge and Kootenai County to this case. (Docket No. 9). However, because the Court does not have subject matter jurisdiction over Plaintiffs' claims, the Motion for Joinder of New Parties is denied.

Order

NOW THEREFORE IT IS HEREBY ORDERED, that Defendants' Motion to Dismiss shall be GRANTED, and that this action is DISMISSED IN ITS ENTIRETY, with prejudice.[9] (Docket No. 6)

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4 Plaintiffs have not named the United States as a party. Defendants Peterson and Mason argue that the claims against them are actually claims against the United States. The Court agrees.

5 The Court has attempted to extract from Plaintiffs' diffuse and incoherent pleadings the actual claims against Defendants Peterson and Mason. From those pleadings, the Court can only hypothesize that the claims against Defendants Peterson and Mason are related to their actions as employees of the IRS.

6 Defendants Peterson and Mason have acknowledged the filing of federal tax liens on the property of Plaintiff Steven Sego. (Docket No. 8).

7 The Ninth Circuit has yet to recognize a constitutional violation arising from the collection of taxes. *See Wages v. IRS*, 915 F.2d 1230, 1235 (9th Cir. 1990).

8 The Court dismisses Plaintiffs' claims against all of the named Defendants in this case. *See Silverton v. Dep't of Treasury*, 644 F.2d 1341, 1345 (9th Cir.), *cert. denied*, 454 U.S. 895 (1981) (concluding that the Court may properly "dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where a claims against such defendants are integrally related.")

9 "Leave to amend need not be granted when an amendment would be futile." *Fischer v. Vanitive Corp.*, 283 F.3d 1079, 1097 (9th Cir. 2002) (citation omitted). The Court's discretion in granting leave to amend is even more broad where the Plaintiff has already amended its original complaint. *See id.* at 1097–98 (citing *Allen v. City of Beverly Hills*, 911 F.2d 367, 343 (9th Cir. 1990)).

IT IS FURTHER ORDERED, that Plaintiffs' Motion for Joinder of New Parties, shall be DENIED. (Docket No. 9).

IT IS FURTHER ORDERED, that Plaintiffs' ''Writ of the Error Default-Judgment,'' shall be DENIED. (Docket No. 5)

Dated this 25th day of July, 2002.

B. LYNN WINMILL

Chief Judge, United States District Court

¶2002-5296

SELECT REHAB., INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Middle Dist. of Pennsylvania, (DC PA) CIVIL ACTION NO. 3:01-CV-01278, July 30, 2002. Earlier proceeding at (2002, DC PA) 89 AFTR 2d 2002-2234, 205 F Supp 2d 376, 2002-1 USTC ¶50397 [89 AFTR 2d 2002-2234]. Years 1992, 1993, 1994, 1995. Decision for Taxpayer in part and for Govt. in part.

1. Employment taxes—safe harbor relief—employee vs. independent contractor—physicians. Judgment was entered that both taxpayer and govt. take nothing on their claims in accordance with prior order granting taxpayer partial summary judgment. *Reference:* United States Tax Reporter ¶34,015.38(12). IRC §3401.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA,

JUDGMENT

(JUDGE CAPUTO)

[1] In accordance with the order of this Court filed on April 8, 2002 granting partial summary judgment in favor of plaintiff and also in accordance with an agreement of the parties partially resolving this case, it is ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff take nothing on its claim.
2. Defendant take nothing on its counterclaim.
3. Each party shall bear its own costs related to this action.

SO ORDERED this 30th day of July, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5297

THE CHRISTIAN COALITION INTERNATIONAL, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. Dist. Court, Eastern Dist., VA, (DC VA) Civil Action No. 2:01cv377, July 30, 2002. District Court, (2002, DC VA) 89 AFTR 2d 2002-3035, adopted. Decision against Taxpayer.

1. Discovery—IRS records—deliberative process privilege—motion to compel interrogatories—attorney-client privilege. Magistrate judge's denial of religious org.'s motion to compel production of documents for which IRS asserted deliberative process privilege was sustained: applicable case law didn't allow exception for situation where decision-making process itself was subject of suit; documents' failure to identify author was irrelevant; document descriptions adequately showed that they contained agency personnel's personal impressions; lack of dates on other clearly pre-decisional, deliberative documents didn't remove them from privilege; and taxpayer didn't show documents were disclosed to outside source or that privilege was otherwise waived. Also, judge's general denials of taxpayer's motion and its objection to govt.'s interrogatory requests weren't clearly erroneous. *Reference:* United States Tax Reporter ¶76,556.501(10); 76,556.501(30).

IN THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF VIRGINIA Norfolk Division,

ORDER AND OPINION

This matter is before the court on plaintiff Christian Coalition International's objections to the Magistrate's Order Compel-

ling Discovery. After examination of the briefs and record, this court determines that oral argument is unnecessary to decide the pending motion. For the reasons stated below, the findings of the Magistrate Judge are SUSTAINED.

I. FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff filed a Motion for Entry of Order Compelling Discovery on December 26, 2001. The government also filed a motion to compel. The parties argued their respective motions in a hearing before Magistrate Judge Tommy E. Miller on February 11, 2002. In the hearing, the plaintiff argued for the production of inter-nal IRS documents relating to that agency's decision to deny the plaintiff's tax-exempt status. Judge Miller requested a *Vaughn* Index from the government, essen-tially a short description of every contested document. After reviewing the govern-ment's index, Judge Miller denied the plaintiff's Motion to Compel in an Opinion and Order filed on May 31, 2002.

II. DISCUSSION

A. Standard of Review

Fed. R. Civ. P. 72(a) authorizes magistrate judges to enter final orders on nondispositive pretrial matters. Rule 72(a) also sets forth the procedure a party must follow to object to a non dispositive pretrial order issued by a magistrate judge. Specifically, a party must file written objections within ten days of entry of the order. If a party files timely objections to a nondispositive order, then the district court reviews the order under a "clearly erroneous or contrary to law" standard.[1] *See* Fed. R. Civ. P. 72(a). Accordingly, this court reviews Judge Miller's challenged decisions under the deferential "clearly erroneous or contrary to law" standard because no evidence exists that the discovery orders at issue are dispositive. *See Thomas E. Hour, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990) ("[m]atters concerning discovery generally are considered 'nondispositive' of the litigation") (citations omitted)

B. Deliberative Process Privilege

[1] Judge Miller denied the plaintiff's Motion to Compel numerous internal IRS documents on the basis that the documents were protected under the deliberative process privilege. The deliverative process privilege protects agency deliberations from public scrutiny in order to encourage "open [and] frank discussion between subordinate and chief concerning administrative action." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1973); *see also, Hennessey v. United States Agency for International Development*, 121 F.3d 698, 1997 WL 537998, at 2 (4th Cir. 1997) (unpublished). The privilege permits the government to withhold certain document whose release would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *In re: Sealed Case*, 116 F.3d 550, 557 (D.C. Cir. 1997) (citation omitted). The ultimate issue in evaluating any deliberative process privilege claim is "whether the materials bear on the formulation or exercise of agency policy-oriented judgment . . . [and] whether disclosure would tend to diminish candor within an agency." *Virginia Beach v. Dep't of Commerce*, 995 F.2d 1247, 1254 (4th Cir. 1993) (citation and internal quotation marks omitted).

To invoke the deliberative process privilege successfully, the government must show that in "the context in which the materials are used," the documents are both (1) predicisional and (2) deliberative. *Virginia Beach*, 995 F.2d at 1253. Predecisional documents are "prepared in order to assist an agency decisionmaker in arriving at his decision." *Id.* Deliberative materials are documents that reflect "the give-and-take of the consultative process by re-vealing the manner in which the agency evaluates possible alternative policies or outcomes." *Id.* Thus, the privilege protects "recommendations, draft documents, pro-

[1] Rule 72(a) additionally provides that failure to serve timely objections waives the right to do so in the future. *See United States v. Schronce*, 727 F.2d 91, 94 (4th Cir. 1984) (finding that without enforcement of waiver rule, litigant might bypass district court review).

posals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.*

The plaintiff first asserts that the privilege does not apply because the decision-making process itself is the subject of the litigation. The plaintiff cites no Fourth Circuit cases for this proposition, nor does the Fourth Circuit's decision in *Virginia Beach* mention such an exception. Indeed, the facts in *Virginia Beach*, where the city alleged internal agency prejudices dictated the agency's decision, suggests that the plaintiff's proposed exception would have been applicable to that case. Because the Fourth Circuit did not recognize any exception to its rule in *Virginia Beach*, this court holds that the government may properly invoke the privilege.

The plaintiff then argues that Judge Miller's opinion should be overturned because many of the documents do not qualify for that privilege. The plaintiff asserts that several entries in the Index contain an unknown author or an inadequate document description (e.g. "handwritten word notes"). The court finds that the author of the document is irrelevant in this case and a review of the document descriptions in question clearly reveal they contain the personal impressions of agency personnel. *See Hunt v. United States Marine Corp.*, 935 F. Supp. 46, 51–52 (D.D.C. 1996) (withholding drafts, recommendations, and subjective memos as predecisional and deliberative). Accordingly, the government has met its burden under the deliberative process privilege for those documents.

The plaintiff next argues the privilege does not apply to undated documents or those containing an unknown year or dated after April 8, 1999, the date of the final determination letter. When considering the dates of documents, it follows that there is a difference between pre-decisional communications, which are privileged, and communications made after the agency decision to explain the decision, which are not privileged. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151–53 (1975). The government responds that the documents in question are still pre-decisional because the deliberative process did not cease after the initial determination that the plaintiff was not tax-exempt. According to the government, the IRS began a second set of deliberations regarding the tax ramifications of the denial of the plaintiff's tax-exempt status and the deliberative process privilege protects this ongoing decisional process.

Support for the government's position can be found in the Fourth Circuit's decision in *Virginia Beach*. In that case, the court held the government need not

> identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do no ripen into agency decision; and the lower courts should be wary of interfering with this process ... the line between predecisional documents and postdecisional documents may not always be a bright one.

Virginia Beach, 995 F.2d at 1253 (quoting *NLRB*, 421 U.S. at 151–152). This court undertook an independent review of the entire *Vaughn* Index and agrees with the government that the post-dated documents concern an ongoing decisional process and are protected under the deliberative process privilege. Similarly, the undated documents or those containing an unknown year are both predecisional and deliberative.

In sum, an independent review of the Index did not reveal any documents that clearly fall outside the deliberative process privilege. The plaintiff similarly identifies no specific documents that could meet the necessary criteria. Further, the documents apparently do not concern communications made after the agency's decision to explain the decision nor was there disclosure of information to outside sources. *See Virginia Beach*, 995 F.2d 1253 (holding an agency may waive the deliberative process privilege by disclosure to a nongovernmental recipient). Accordingly, Judge Miller's de-

cision upholding the deliberative process privilege is not clearly erroneous.

C. Remaining Objections

The plaintiff next objects to Judge Miller's failure to agree with its objections to the United States' invocation of 26 U.S.C. § 6103 and 26 U.S.C. § 6110 as a privilege protecting the disclosure of certain documents. Section 6103 prohibits the release by the government of ''return information'' of a taxpayer except as specifically authorized by the statute. Section 6110 provides for public inspection of ''written determinations'' with redaction of any confidential information. While Judge Miller's written order did not specifically address these issues, he denied the plaintiff's motion to compel generally. Finally, the plaintiff objects to the number of interrogatories requested by the government. The court carefully reviewed the file and cannot find any of these rulings to be clearly erroneous.

III. CONCLUSION

For the reasons set forth above, the findings of the Magistrate Judge are SUSTAINED.

The Clerk is REQUESTED to send copies of this Order to all counsel of record.

IT IS SO ORDERED.

/s/

UNITED STATES DISTRICT JUDGE

July 30, 2002

Norfolk, Virginia

¶2002-5298

Peter J. TKAC, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Maryland, (DC MD) CIVIL ACTION NO. MJG-01-3758, Aug. 1, 2002. Year 1994, 1995, 1996. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties—prior opportunity to contest assessment. IRS's administrative determination to proceed with collection of IRC §6702 penalty against taxpayer who filed ''zero'' returns was upheld on summary judgment: taxpayer wasn't entitled to contest his underlying liability for assessments that he had prior opportunity via IRC §6703 to contest; and didn't offer collection alternative or raise any non-frivolous, statutorily-recognized defense to collection. Also, fact that Tax Court previously determined he had no tax liabil-ity for earlier year and that it lacked juris-diction to review penalties' imposition was irrelevant. *Reference:* United States Tax Reporter ¶63,305.01(15); 67,025.01(10). IRC §6330; 6702; 6703.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND,

JUDGMENT ORDER

Marvin J. Garbis United States District Judge

By separate Order issued this date, the Court has granted summary judgment o the Defendant.

Accordingly:

1. Judgment shall be, and hereby is, entered in favor of Defendant United States of America against Plaintiff Peter J. Tkac dismissing all claims with prejudice with costs.

2. The IRS may proceed to collect, by levy and all other legally proper means, the tax liabilities at issue.

3. Any and all prior rulings disposing of any claims against any parties are incorporated by reference herein.

4. This Order shall be deemed to be a final judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure

SO ORDERED this 1st day of August, 2002.

Marvin J. Garbis

United States District Judge

MEMORANDUM AND ORDER

Marvin J. Garbis United States District Judge

The Court has before it Defendant's Motion for Summary Judgment, the United States' Second Motion for a Protective Order and the materials submitted relating thereto. The Court finds that a hearing is unnecessary.

I. BACKGROUND

The Court must note, at the threshold, that it would have been greatly assisted had Government counsel troubled himself to present a concise and clear statement of the underlying facts and principles. Instead, Government counsel ''dumped'' a collection of documents on the record and, in effect, left the Court to sort matters out on its own. Judges (and/or law clerks) unfamiliar with tax matters could find this a daunting task. Fortunately, most briefing by the Justice Department Tax Division is more helpful. Nevertheless, the Court has been able to discern the facts from the evidence sufficiently to reach its decision.

It appears that Peter J. Tkac (''Tkac'') timely filed purported federal income tax returns for the years 1994, 1995, and 1996. These ''returns'' reported tax liabilities of zero based upon various ''Constitutional'' and other arguments to the effect that Tkac did not have to pay income tax on ''wages'' or anything else.

Apparently, in May of 1998, the Internal Revenue Service (''IRS'') conducted an audit of the years 1994, 1995, and 1996. (Tkac letter of October 28, 1998). The IRS did not assert any deficiency in tax for these years but, on August 24, 1998, assessed a $500.00 ''frivolous return'' penalty under Section 6702[1] for each of the three years 1994, 1995, and 1996.

The Statute, § 6702(a) provides:

> If:
>
> (1) any individual files what purports to be [an income tax return] but which -
>
> (A) does not contain information on which the substantial correctness of the self-assessment may be judged, or
>
> (B) contains information that on its face indicates that the self-assessment is substantially incorrect; and
>
> (2) the conduct referred to in paragraph (1) is due to -
>
> (A) a position which is frivolous, or
>
> (B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws,
>
> then such individual shall pay a penalty of $500.

A taxpayer, such as Mr. Tkac, may contest a § 6702 assessment and obtain judicial review before full payment. The taxpayer may, within 30 days of notice and demand, pay at least fifteen percent of the amount assessed and timely file a claim for refund. § 6703(c). This action will block collection of the balance due until final resolution of the liability. §6703(c)(1), (2). If the refund claim is disallowed, or six months passes without IRS action, the taxpayer can proceed to a United States District Court for an adjudication of the validity of the assessment. §6703(c). For a general discussion of tax refund suit procedure see Paula M. Junghans & Joyce K. Becker, ''Federal Tax Litigation, Part III (1992).

Tkac did not take the necessary steps to contest the validity of the § 6702 assessment prior to full payment. Therefore, the Internal Revenue Service was not foreclosed from proceeding with collection efforts by virtue of § 6703(c)(1).

II. RELEVANT STATUTORY FRAMEWORK

The instant case arises under Internal Revenue Code Amendments enacted in the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L.105-206, 112 Stat. 685 (1998).

With exceptions not here relevant, the IRS cannot levy on a person's property unless the Service has adequately given notice of the right to a hearing before the

[1] All § references herein are to the Internal Revenue Code, Title 26 of the Unite States Code.

levy is made. § 6330(a)(1). If the person given notice timely requests a hearing, the hearing, sometimes referred to as a "Due Process Hearing", is to be conducted by the IRS Office of Appeals. § 6330(b).

At the Due Process Hearing, the person given notice may raise any relevant issue including offers of collection alternatives, an installment agreement or an offer in compromise. § 6330 (c)(2)(A)(iii).

The statute provides that:

> the determination by an appeals officer shall take into consideration ... whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

§ 6330(c)(3).

If a Due Process Hearing is requested, the subject levy actions[2] are suspended[3] while the hearing and any appeals therein are pending. § 6330(e).

If not satisfied with the Appeals Office determination, the person given notice may appeal the determination to the Tax Court or, for assessments over which there is no Tax Court jurisdiction, to a district court. § 6330(d)(1).

III. DISCUSSION

[1] Succinctly put, § 6330 permits a taxpayer who is deemed to owe a tax liability to block IRS collection by levy for as long as it may take to provide a Due Process Hearing and for any post hearing judicial process to be completed. Tkac has fully exploited the statute and has delayed, for more than three years, IRS efforts to collect a total of $1,500 plus interest and possible late payment penalties.

On April 27, 1999, the IRS sent Tkac a Notice of Intent to Levy pursuant to § 6330(a). On May 6, 1999, Tkac filed a request for a hearing pursuant to § 6330(a)(3)(B) and set forth various matters relating to the contention that Tkac did not have any valid obligation to the IRS.

On November 1, 1999, the IRS wrote Tkac explaining that the purpose of a § 6330 Due Process Hearing was to discuss "the filing of a lien or our intent to levy on your sources of funds." On November 6, 1999, Tkac responded with a letter contending the validity of the assessed liabilities and requesting a Due Process Hearing.

Ultimately, on March 8, 2000, an IRS Appeals Officer met with Tkac at the Due Process Hearing requested. At the hearing, Tkac presented arguments as to the alleged invalidity of the assessed liabilities, but did not wish to discuss collection alternatives to lien or levy. The IRS Appeals Officer determined that the collection action proposed was appropriate and balanced the need for collection against the absence of any alternatives to such action.

On March 13, 2001, the Appeals Office mailed Tkac a Notice of Determination concluding that a levy was appropriate.

On December 3, 2001, Tkac filed the instant lawsuit relating to the § 6702 penalties,[4] presumably pursuant to § 6330(d)(1). The pertinent statute provides that this action should be brought within 30 days of the determination from which an appeal is taken. Government counsel, presumably for a valid reason, has not contended that the instant case was filed late. The Court will, therefore, assume that the case was timely brought.

It appears, albeit the matters have not yet been addressed by the Fourth Circuit, that in a § 6330(d) appeal the district court should review the Appeals Officer's determination as to the appropriateness of the collection activity on an abuse of discretion standard. H.Rep. No. 105-599 at 266. See Goza v. Comm., 119 [sic, 114] TC 176, 182 (2000).

In this case, Tkac presents nothing to create any question as to the reasonableness of the IRS discretionary decision to proceed with collection. Tkac was not per-

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2 As well as the running of certain periods of limitations.

3 Subject to exceptions not here relevant.

4 Tkac's appeal relating to the 1992 income tax assessment would be presented to the United States Tax Court. § 6330(d)(1)(A)

mitted to raise any challenge to the existence or amount of the liability at issue since he had an opportunity to dispute the liability under IRC §6703(c)(1)§ 6703(c)(1). See § 6330(c)(2)(B).

Tkac's opposition to be summary judgment is based upon the presentation of a collection of frequently presented and uniformly rejected ''tax protestor'' arguments, which warrant no discussion. Even if any of these arguments had merit, Tkac cannot contest the merits of the assessment at issue in the instant case. Nor can Tkac create a genuine issue of material fact by means of his affidavit which does not dispute the receipt of the documents the IRS asserts were sent but, rather, takes the position that those documents did not meet the requirements of the Internal Revenue Code as read by Tkac. Finally, Tkac has presented nothing to put in issue the bona fides and/or authority of the IRS personnel involved in the case.

In sum, Tkac has not made a showing justifying any further delay in IRS collection efforts.

IV. CONCLUSION

For the foregoing reasons:

1. Defendant's Motion for Summary Judgment is GRANTED.

2 The United States' Second Motion for a Protective Order is DENIED AS MOOT.

3 The IRS may proceed to collect, by levy and all other legally proper means, the tax liabilities at issue.

4 Judgment shall be entered by separate Order.

SO ORDERED this 1st day of August, 2002.

Marvin J. Garbis

United States District Judge

MEMORANDUM AND ORDER RE PLAINTIFF'S MOTION

Marvin J. Garbis United States District Judge

The Court has before it Plaintiff's Dispositive Pretrial Motion for Summary Judgment and the materials submitted relating thereto. The Court finds that neither a response nor a hearing is necessary.

The Court has, this date, granted summary judgment to Defendant for reasons set forth in the Memorandum and Order issued herewith. The Court denies the instant motion on the rationale set forth in the said Memorandum and Order.

In the instant motion, Plaintiff notes that the Tax Court determined that there was no income tax liability due from Plaintiff for the 1992 calendar year. That fact is immaterial to the instant case which involves only the 26 U.S.C. §6702 penalties for the years 1994, 1995 and 1996. Nor is it material that the Tax Court decided that it did not have jurisdiction over the said penalties.

For the foregoing reasons:

1. Plaintiff's Dispositive Pretrial Motion for Summary Judgment is DENIED.

2. Judgment for Defendant shall be entered by separate Order.

SO ORDERED this 1st day of August, 2002.

Marvin J. Garbis

United States District Judge

¶2002-5299

Mary Ann TOBIN PLAINTIFF v. Jennifer TROUTMAN and UNITED STATES OF AMERICA DEFENDANTS. U.S. District Court, Western Dist. of Kentucky, (DC KY) Civil No. 3:98CV-663-H, July 31, 2002. Earlier proceedings at (2002, DC KY) 89 AFTR 2d 2002-2271, 2002-1 USTC ¶50392; (2001, DC KY) 89 AFTR 2d 2002-459, 2002-1 USTC ¶50260; and (1999, DC KY) 83 AFTR 2d 99-2951, 99-2 USTC ¶50628. Years 1992, 1993, 1994. Decision for Taxpayer.

1. Refund actions—prerequisites to suit—failure to exhaust administrative remedies. Pursuant to stipulation, judgment was entered for taxpayer on her refund complaint, with govt. retaining its right to appeal on jurisdictional grounds.

Reference: United States Tax Reporter ¶74,225.05(30). IRC §7422.

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STEPHEN B. PENCE United States Attorney Attorneys for the United States

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE,

STIPULATION FOR ENTRY OF JUDGMENT

JOHN G. HEYBURN II CHIEF JUDGE, U.S. DISTRICT COURT

[1] It is hereby stipulated and agreed that judgment may be entered in favor of plaintiff Mary Ann Tobin and against the United States for the following amounts of overpayment of income tax liability for the following taxable years, plus interest on the overpayments as provided by law, with the United States retaining its right to appeal the judgment on the basis that the Court lacks jurisdiction over the plaintiffs's claims for refund in this suit as set forth in the memoranda supporting the United States' Motion to Dismiss and its Renewed Motion to Dismiss:

Year	Amount of Overpayment
1992	$ 1,854.76
1993	$82,075.95
1994	$44,588.65

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STEPHEN B. PENCE

United States Attorney

Attorneys for the United States

ORDER

IT IS SO ORDERED, this 31st day of July 2002.

JOHN G. HEYBURN II

CHIEF JUDGE, U.S. DISTRICT COURT

cc: Counsel of record

¶2002-5300

UNITED STATES OF AMERICA, PLAINTIFF v. Perry G. MATHEWS, DEFENDANT. U.S. District Court, Northern Dist. of Ohio, (DC OH) Civil No.: 1:02CV909, July 23, 2002. Year 1991. Decision for Govt.

1. Actions to reduce assessments to judgment—stipulated judgment. Pursuant to stipulation, judgment was entered against taxpayer in stated amount, plus statutory additions. *Reference:* United States Tax Reporter ¶74,035.01(30). IRC §7403.

STEPHEN A. SHERMAN Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 55 Ben Franklin Station Washington, D.C. 20044 Telephone: (202) 307-6404
IRVING BELL Attorney for Perry Mathews 5171 Mayfield Road Cleveland, Ohio 44124 (440) 449-4560

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO,

STIPULATED JUDGMENT

Judge Patricia A. Gaughan

[1] The Plaintiff United States and the Defendant Perry G. Mathews, by and through counsel, do hereby stipulate to the entry of a judgment in favor of the United States for its tax claims as set forth in the complaint. Specifically, Mr. Perry Mathews agrees to a judgment that he is liable to the United States for his federal income taxes for the 1991 tax year in the amount of $45,993 as of May 7, 2002, plus statutory additions.

IT IS SO ORDERED:

JUDGE PATRICIA GAUGHAN

U.S. District Court

Date: July 23, 2002

¶2002-5301

WEAVER GROUP, INC., PONDEROSA 190, PLAINTIFF v. UNITED STATES OF AMERICA and Tax Commissioner of the Internal Revenue Service, DEFENDANTS. U.S District Court, Northern Dist. of Ohio, (DC OH) Civil No. 4:01CV1791, Aug. 5, 2002. Years 1996, 1997, 1998, 1999. Decision for Govt. in part.

1. Collection due process—review of administrative determination—failure to timely request hearing. Taxpayer's petition for review of IRS's administrative determination to proceed with collection of its employment tax debts for 3 quarters was dismissed with prejudice, pursuant to stipulation and based on taxpayer's failure to timely request CDP hearing. But, govt. agreed to provide taxpayer informal reconsideration of findings for those quarters as set out in IRS's ''decision letter''; and agreed that taxpayer retained its right to petition for review of determination regarding other quarters for which it was still entitled to statutory hearing. *Reference:* United States Tax Reporter ¶63,305.01(5); 63,305.01(30). IRC §6330.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO,

STIPULATION AND CONSENT ORDER FOR DISMISSAL AND REMAND TO INTERNAL REVENUE SERVICE FOR A COLLECTION DUE PROCESS HEARING

JUDGE ECONOMUS

The parties, by their undersigned counsel, hereby stipulate and agree as follows:

1. **[1]** Plaintiff's request for judicial review of the Collection Due Process Determination of the IRS for unpaid employment taxes for the quarters ending June 30, 1997, September 30, 1997 and March 31, 1998, is hereby dismissed with prejudice, because plaintiff failed to request a Collection Due Process Hearing within thirty (30) days of the ''Final Notice-Notice of Intent to Levy'' dated March 12, 1999 as required by 26 U.S.C. §6330(a); however, the United States agrees that the IRS will informally reconsider the findings set forth in a ''Decision Letter'' dated June 25, 2001 with respect to said quarters when it considers plaintiff's claims for the quarters set forth in ¶ 2, below.

2. Plaintiff's request for judicial review of the IRS' Collection Due Process Determination for unpaid employment taxes for the quarters ending March 31, 1999, June 30, 1999 and a civil penalty for the period ending December 31, 1996, is hereby dismissed without prejudice, and, as such, Plaintiff hereby preserves its rights to judicial review of and subsequent to the Collection Due Process Hearing set forth in ¶ 3 below.

3. The United States agrees that the IRS Appeals Office in Cleveland, Ohio, will provide to plaintiff on a mutually agreeable date and time a Collection Due Process

Hearing with respect to the tax liabilities set forth in ¶ 2, above.

SO ORDERED:

DATE: 8/5/02

PETER C. ECONOMUS

United States District Judge

APPROVED:

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Counsel for Plaintiff

¶2002-5302

Myron BARLOW and Arlene BARLOW, PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-1161, Aug. 21, 2002. Tax Court, (2000) TC Memo 2000-339, RIA TC Memo ¶2000-339, 80 CCH TCM 632 (opinion by Dawson, *J.*), affirmed. Years 1982, 1983, 1984, 1985. Decision against Taxpayers.

1. Increased interest on tax-motivated transactions—constitutionality—opportunity to contest assessments—Tax Court jurisdiction. Tax Court properly upheld increased interest on tax-motivated transactions against partner-physician and wife with respect to their sham plastics recycling partnership investment: Court's overpayment jurisdiction extended to taxpayer's challenge that he had overpaid interest; and lack of prepayment forum to make such challenge wasn't due process violation where taxpayers had available, and did use, post-payment judicial forum and didn't dispute "tax-motivated transaction" characterization or IRS's calculations. Also, IRC §6601(a)'s clear language foreclosed taxpayers' contention that IRS was required to 1st issue deficiency notice before making interest assessments. *Reference:* United States Tax Reporter ¶66,215.01(6); 66,215.01(20); 65,125.02(5). IRC §6512. Former IRC §6621.

2. Negligence penalties—sham transactions—reasonable reliance. Negligence penalties were properly upheld against physician and wife who invested in overvalued plastics recyclers: investment in itself showed lack of due care; and taxpayers' alleged reliance on accountant who was unfamiliar with industry and to whom not all information was given was unreasonable, particularly in light of taxpayer's own educational and investing background and complete disregard for his own attorney's advice and offering memo's blatant warnings about significant tax risks. *Reference:* United States Tax Reporter ¶66,535.09(35); 66,535.09(50). Former IRC §6653.

ARGUED: Neal Nusholtz, Noveck & Nusholtz, Bingham Farms, Michigan, for Appellants.
Laurie Snyder, United States Department of Justice, Washington, D.C., for Appellee.
ON BRIEF: Neal Nusholtz, Noveck & Nusholtz, Bingham Farms, Michigan, for Appellants.
Laurie Snyder, Bruce R. Ellisen, United States Department of Justice, Washington, D.C., for Appellee.

United States Court of Appeals, Sixth Circuit,

On Appeal from the United States Tax Court. Nos. 95-04651; 95-04652; 95-

06393; 95-06394; Howard A. Dawson, Jr., Tax Court Judge.

Before SILER and CLAY, Circuit Judges; OBERDORFER, District Judge.*

OPINION

CLAY, Circuit Judge.

Petitioners, Myron Barlow and his wife Arlene Barlow, appeal from the orders entered by the United States Tax Court on November 22, 2000, for Tax Court docket numbers 6393-95 and 6394-95, and from the orders entered on December 11, 2000, for Tax Court docket numbers 4651-95 and 4652-95, in these four tax cases consolidated for purposes of appeal. This case is one in a series of cases, involving these and other taxpayers, to appear before the Tax Court regarding limited partnership tax shelters that claimed tax benefits attributable to sham transactions with respect to machines designed to recycle plastic scrap material into pellets. On appeal, Petitioners challenge the Tax Court's ruling finding them liable for negligence and a tax-motivated interest penalty. For the reasons set forth below, we AFFIRM the Tax Court's orders.

BACKGROUND

Procedural History

Petitioners claimed losses on their income tax returns for 1982–1985, and investment and energy credits on their 1982 return, based upon an investment made in 1982 in a plastics recycling limited partnership tax shelter known as Dickinson Recycling Associates (''Dickinson''). In September of 1988, Petitioners amended the returns in order to satisfy anticipated underpayments of tax attributable to the losses and credits they claimed in connection with the tax shelter. It is undisputed that the partnership transactions underlying the claimed tax benefits were shams, that the value of the plastic recycling machines was overstated for tax purposes, and that, as a result, until Petitioners filed the amended returns, they had underpaid their taxes for 1982–1985.

The Commissioner of Internal Revenue (''the Commissioner'') issued Petitioners notices of deficiency asserting additions to tax for negligence for all four years (1982–1985), in the respective amounts of $4,829, $49, $22, and $25 (Internal Revenue Code (''IRC'') § 6653(a)(1)), plus fifty percent of the interest due on the portions of the underpayments attributable to negligence (IRC § 6653(a)(2)), and an addition to tax for valuation overstatement (IRC § 6659) for 1982. The Commissioner also charged Petitioners $27,914 in interest on the 1982 underpayment, as computed at the increased interest rate mandated by IRC § 6621(c) for underpayments attributable to tax-motivated transactions. Petitioners paid the § 6621(c) interest before commencing these proceedings.

In the Tax Court, Petitioners disputed the additions to tax for negligence on factual grounds, and sought a refund of the § 6621(c) interest they had paid for 1982 on procedural grounds. Petitioners did not dispute that they were liable for the addition to tax under IRC § 6659 for 1982, nor did they dispute that the underpayment for 1982 was attributable to a tax-motivated transaction. Although the facts were largely stipulated, a trial was held with respect to the negligence issue. Two witnesses testified at trial, Petitioner Myron Barlow, and Fred Gordon, the promoter of the Dickinson tax shelter.

The Tax Court issued an opinion sustaining the Commissioner's position in all respects. The Tax Court accordingly entered decisions finding that Petitioners were liable for all of the asserted additions to tax for the years 1982–1985, and denied their claims for a refund of the interest paid for 1982. This appeal ensued.

Facts

In December of 1982, Myron Barlow (hereinafter ''Barlow'') invested $50,000 in the Dickinson tax shelter which was one of the limited partnership tax shelters that claimed tax benefits attributable to sham transactions involving machines designed to recycle plastic scrap material into pel-

* The Honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

lets. Prior to 1982, Barlow received a bachelor's degree from Johns Hopkins University, a medical degree from the University of Michigan School of Medicine, and three years of specialized medical training in dermatology from Wayne State University. During the years at issue, Barlow practiced medicine as an employee of a professional corporation, earning salaries of $294,263 in 1982; $348,630 in 1983; $250,000 in 1984; and $356,590 in 1985. Prior to investing in the Dickinson tax shelter, Barlow had invested in a variety of property, including stocks and bonds, real estate, a partnership that invested in real estate, a coal mining company, and a communications system that he rented to a medical clinic.

Barlow was introduced to the Dickinson tax shelter in November of 1982 by Herbert Krickstein, a friend and medical colleague, and Fred Gordon, an attorney, while on a golf vacation in Florida. Gordon was actively engaged in promoting investments in Dickinson, and received a commission from Dickinson on each sale. After returning home from the golf trip in 1982, Barlow received a copy of Dickinson's private offering memorandum from Gordon in the mail, in which 18 units in Dickinson was offered at $50,000 each. The offering warned the potential investor in bold capital letters that "THIS OFFERING INVOLVES A HIGH DEGREE OF RISK, See CERTAIN BUSINESS RISKS and CERTAIN TAX RISKS AND CONSEQUENCES." (J.A. at 124.) In addition, the offering provided that "AN INVESTMENT IN THE PARTNERSHIP INVOLVES A HIGH DEGREE OF BUSINESS AND TAX RISKS AND SHOULD, THEREFORE, BE CONSIDERED ONLY BY PERSONS WHO HAVE A SUBSTANTIAL NET WORTH AND SUBSTANTIAL PRESENT AND ANTICIPATED INCOME AND WHO CAN AFFORD TO LOSE ALL OF THEIR CASH INVESTMENT AND ALL OR A PORTION OF THEIR ANTICIPATED TAX BENEFITS." (J.A. at 125.)

The offering reported other business and tax risks such as a "substantial likelihood" of an Internal Revenue Service ("IRS") audit of the partnership and each individual partner; the partnership had no operating history; the limited partners had no control over the business and the business was dependent upon the general partner; and there was no established market for the re-cyclers, as well as other warnings. (J.A. at 131–36.) However, the offering also included as an attachment a copy of a favorable tax opinion prepared by the law firm of Boylan & Evans and addressed to Sam Winer, Dickinson's general partner. In discussing the recyclers' value, upon which the amount of the investment and energy tax credits depended, Boyan & Evans did not proffer its own valuation, but referred to the report of one of the evaluators. Boyan & Evans stated that their opinion as to the offering was for the general partner's "individual guidance" and that "no prospective purchaser is entitled to rely upon this letter." (J.A. at 187.)

The offering also included the opinions of two evaluators, both of whom owned interests in partnerships that leased the recyclers at issue. One of the opinions was that of Stanley N. Ulanoff, professor of marketing at the City University of New York and the author of books on technical and marketing subjects. Although Ulanoff concluded that the price for the recyclers was fair and reasonable, he did not cite that price in his report and appeared to be unaware of it. The other opinion, made by Samuel D. Burstein, an associate professor of mathematics at New York University, did not purport to appraise the recyclers, but simply concluded that they would be operationally reliable and capable of continuously recycling polyethylene.

Barlow "browsed" through the offering memorandum, but did not read it cover to cover. Rather, he consulted with Philip Nusholtz, an attorney with whom he had a long-standing professional relationship, and whose judgment he respected and advice he valued.[1] Nusholtz also did not read the offering; however, he advised Barlow

[1] Philip Nusholtz was the father of Petitioners' counsel in the matter at hand, Neal Nusholtz. (J.A. at 259.)

not to invest in any promotion marketed by Gordon, and to focus on more conservative investments.

Barlow then took the offering to his accountant and tax return preparer, Gerald Kabeck. Kabeck read through the offering and told Barlow that he thought that the investment was reasonable. At that time, Kabeck had no specialized knowledge or experience in plastics materials or plastics recycling and no specialized knowledge in valuing plastics recycling machines such as those in question. Barlow did not pay Kabeck for his advice.

In December of 1982, Barlow filled out and signed a subscription agreement and purchased one limited partnership unit (a 5.5% interest) in Dickinson for $50,000. A section of the agreement entitled "Purchaser's Representative(s)" stated that "[t]he undersigned understands that said Representative[s] may be compensated (to the extent of 10% of the price of the Units purchased) out of the proceeds of the offering, and, accordingly, said Representative(s) may have an interest in seeing the Offering consummated." (J.A. at 237.) In signing the agreement, Barlow claims that he assumed that the purchaser's representative referred to in this section was Gordon.

Before signing the subscription agreement and investing in Dickinson, Barlow did not make any independent investigation of the fair market value of the recycler, nor did he seek the advice of any expert in the plastics industry. Instead, Barlow was influenced to sign the agreement because he assumed that Krickstein and other medical colleagues were investing in Dickinson. Barlow, however, did not have any specific conversations with his colleagues about either Dickinson or plastics recycling before making the investment. Barlow did not believe, nor is there any evidence in the record to suggest, that Barlow's colleagues had any knowledge in plastics recycling; Barlow himself did not have any such knowledge. However, Barlow did know at the time of signing the agreement that he would receive immediate tax benefits in excess of his $50,000 investment.

Based on his initial and only investment of $50,000 in Dickinson, Barlow claimed on his 1982 tax return investment and energy credits of $77,001, which were promised in the offering, and a loss of $39,155. These claims reduced Petitioners' tax liability by $96,583, an amount that exceeded his investment by almost two to one. In addition, Barlow claimed partnership losses on Petitioners' returns for 1983 through 1985 in the respective amounts of $1,961, $866, and $1,014. Barlow never made a profit in any year from his investment in Dickinson.

Sometime in the mid-1980s, Barlow became concerned about his participation in Dickinson. In September of 1988, Barlow amended his returns for 1982 through 1985 in order to satisfy anticipated underpayments of tax attributable to the Dickinson investment.

Dickinson was a so-called "TEFRA" partnership subject to the unified partnership audit and litigation procedures set forth in IRC §§ 6221-6233. On May 15, 1989, the Commissioner mailed a Notice of Final Partnership Administrative Adjustment ("FPAA") to Sam Winer, the tax matters partner of the Dickinson partnership, for each of the taxable years 1982–1985. A copy of each FPAA was also mailed to Barlow.

The FPAAs advised Barlow of adjustments that the Commissioner proposed to make to the partnership returns filed by Dickinson. Specifically, the FPAAs disallowed deductions and credits claimed by Dickinson in connection with its plastics recycling activities for 1982 through 1985. On June 12, 1989, Sam Winer petitioned the Tax Court with respect to the FPAA, commencing the case of Dickinson Re-cycling Associates v. Commissioner. While that case was pending, the Tax Court, in 1992, decided that the plastics recycling transaction involved in Provizer v. Commissioner, 63 T.C. 2531 [1992 RIA TC Memo ¶92,177] (1992) were shams, and this Court affirmed in an unpublished decision. See 996 F.2d 1216 (6th Cir.1993). Winer, who was also the tax matters partner of the partnership involved in Provizer,

conceded in Dickinson that the Commissioner had correctly disallowed all items of income, loss, and credit, and that the re-cyclers were overvalued. Accordingly, on February 23, 1994, the Tax Court entered its decision in Dickinson sustaining the Commissioner's FPAA determinations for 1982–85.

On November 18, 1994, after the Tax Court's decision in the Dickinson partnership-level proceeding became final, the Commissioner mailed a letter to Petitioners in connection with the 1982 tax year, advising them that 1) their 1982 amended return had been accepted as filed; 2) their $96,583 underpayment was attributable to a tax-motivated transaction; and 3) as a result, IRC § 6621(c) interest was applicable. Section 6621(c) provides for an increased rate of interest with respect to underpayments attributable to a tax-motivated transaction. See 26 U.S.C. § 6621(c). The Commissioner notified Petitioners on December 12, 1994, that the amount of interest assessed against them under § 6621(c) was $27,914. Petitioners paid the interest later that month.

Thereafter, in March of 1995, the Commissioner sent Petitioners notices of deficiencies for each of the years 1982–1985, determining that Petitioners were liable for additions to tax for negligence. The Commissioner also determined that Petitioners were liable for another addition to tax for 1982 for overstating the value of the re-cycling machines. Petitioners took their case to the Tax Court, challenging only the additions to tax for negligence and the § 6621(c) interest for 1982. Trial was held in connection with the negligence issue, wherein two witnesses testified. Barlow was one of the witnesses to testify, stating that he received advice about investing in Dickinson, and Gordon testified as to his role in promoting the Dickinson investment. With respect to the § 6621(c) issue, Barlow did not dispute that the underpayment for 1982 was attributable to a tax-motivated transaction, but, instead, claimed that because no court would have jurisdiction to review his liability for the interest before it was paid, the imposition of the § 6621(c) interest violated due process requirements of the Fifth Amendment.

The Tax Court issued an opinion upholding the Commissioner. With respect to the negligence additions, the Tax Court opined that in light of various signs indicating that the leasing transactions were invalid and that the recycling machines were overvalued, a reasonably prudent person with Barlow's education and investment experience would have made an independent investigation into the validity of the investment, which Barlow failed to do. With respect to the § 6621(c) interest issue, the Tax Court recognized that in cases such as this, where tax-motivated interest is assessed on an underpayment that is attributable to a partnership transaction that is tax-motivated, a prepayment judicial determination as to the amount of the taxpayer's liability for such interest is unavailable to the taxpayer. The Tax Court held that this fact did not violate due process inasmuch as there were judicial forums, including the Tax Court, in which Petitioners could seek judicial review of this assessment after it had been paid, and Petitioners have availed themselves of the forums.

DISCUSSION

I. Whether the Tax Court Acted Without Jurisdiction in Finding Statutory and Constitutional Authority for the Assessment of Interest under 1954 IRC § 6621.

[1] This Court reviews de novo the Tax Court's legal conclusions made based upon its findings of fact. See Smith v. Commissioner, 937 F.2d 1089, 1096 [68 AFTR 2d 91-5076] (6th Cir.1991).

Petitioners argue that not all tax assessments may be made without notice and opportunity for a hearing, and claim that the denial of a pre-assessment hearing denied them due process. Petitioners also make several circular arguments claiming such things as inconsistencies in the tax code regarding Tax Court jurisdiction, and that the legislative history of § 6621(a) suggests that the tax-motivated interest penalty was intended to be part of Tax Court proceed-

ings when, in 1984, Congress instructed the Tax Court to issue various penalties, including § 6621(c) to reduce its enormous workload due to tax shelters. Petitioners suggest, ''[h]ow would the Tax Court use the tax motivated interest penalty to lighten its docket if it was not intended to have jurisdiction over it in the first place? The greatest likelihood is that if Congress had intended assessments of tax motivated interest to be done without the benefit of notice of deficiency, it would have done so directly, as it had done on previous occasions.'' Petitioners conclude that ''[i]f the tax motivated interest penalty is not interest and subject to Tax Court jurisdiction under IRC § 6621(c)(4), then the assessment has been made without specific statutory authority. Such assessments are void as a denial of due process.'' See Petitioners' Brief on Appeal at 16.

The Commissioner argues that Petitioners' due process argument based upon the Tax Court's jurisdiction--or lack thereof--to review the imposition of interest at the rate set forth in IRC § 6621(c) is without merit. The Commissioner maintains that pursuant to IRC §§ 6213 and 7442, the Tax Court has jurisdiction to redetermine a ''deficiency,'' as that term is defined in § 6211. The Commissioner further maintains that where the Tax Court has deficiency jurisdiction over a particular tax year, then pursuant to IRC § 6512(b), the Tax Court has jurisdiction to review a taxpayer's claim that there has been an overpayment with respect to that year. And although a taxpayer must first pay the amount in dispute, he may contest his tax liability by way of a refund suit in the appropriate district court or in the Court of Federal Claims under 28 U.S.C. §§ 1346(a)(1) & 1491(a)(1). We agree with the Commissioner's argument in all respects.

In White v. Commissioner, 95 T.C. 209, 210 (1990), the Commissioner issued a notice of deficiency to the petitioners after a partnership-level proceeding was completed determining that the petitioners were liable for additional interest under IRC § 6621(c), as well as additions to tax under IRC §§6651(a)(1), 6653(a)(1), 6653(a)(2) and 6659. The petitioners filed a petition for redetermination, and the Commissioner filed a motion to dismiss for lack of jurisdiction as to the petitioner's claims regarding liability for interest under §6621(c). Id. The Tax Court examined its statutory grant of jurisdiction to review matters regarding the imposition of § 6621(c) interest on an underpayment attributable to a partnership transaction when the matter is brought by an individual taxpayer-partner. Id. at 211–13. The Tax Court held that it had no jurisdiction to review the matter because under IRC § 6621(a), 6230(a), and 6601(e)(1), interest computed at the increased rate prescribed by § 6621(c) does not constitute a ''deficiency'' within the meaning of section 6621. Id. at 213–14. The Tax Court reasoned that, in general, a partnership's items of income, deduction, loss, and credit are determined at the partnership level, and the Tax Court has jurisdiction to review the Commissioner's determinations with respect to such matters in a partnership-level proceeding brought by the tax matters partner under IRC § 6626(a). In addition, the Tax Court found that it had jurisdiction to determine any ''deficiency'' attributable to affected items that require partner-level determinations brought by a taxpayer-partner with respect to his own tax liability pursuant to IRC §§ 6230(a)(2)(A) and 6231(a)(5). The court opined that ''deficiency'' as defined by § 6211(a), is the amount by which the tax imposed exceeds the amount paid. The Tax Court noted, however, that IRC § 6601(e)(1) specifically excludes § 6601(a) interest from the definition of tax for purposes of deficiency proceedings. Id. The Tax Court therefore determined that the interest due was not a ''deficiency,'' and as a result the Tax Court did not have jurisdiction to redetermine the assessed amount. Id. at 213–17. Specifically, the Tax Court opined that ''this Court does not have jurisdiction under section 6621(c)(4) in the setting presented in this case to determine whether additional interest applies because the deficiency before the Court is not a substantial underpayment attributable to tax-motivated transactions.'' Id. at 216–17.

About one year later, in Barton v. Commissioner, 97 T.C. 548 (1991), the Tax Court carved out a narrow exception to the rule expounded in White. In Barton, the Tax Court held that it had jurisdiction to consider a challenge to a § 6621(c) interest assessment brought by a taxpayer-partner with respect to his own tax liability as a result of a partnership-level proceeding if the taxpayer-petitioner had paid the interest and the Tax Court otherwise had jurisdiction over the year involved. Id. at 551–53. The Tax Court reasoned that once the interest had been paid, it could be considered an overpayment, and the Tax Court had jurisdiction to determine whether there was an overpayment pursuant to § 6512(b). Id. The Tax Court distinguished White on the basis that the issue there did not involve an overpayment, opining as follows:

Respondent [Commissioner] argues that since this Court does not have jurisdiction over section 6621(c) interest as a ''deficiency,'' we cannot have jurisdiction over such interest as an ''overpayment.'' Respondent's only authority for this proposition is White v. Commissioner, supra. However, as explained above, White held that section 6601(e) prohibits the treatment of interest as tax for purposes of our deficiency jurisdiction. No such restriction exists with respect to our jurisdiction to determine an overpayment.

Likewise, our holding in White that we had no jurisdiction pursuant to section 6621(c)(4), because the section 6621(c) interest in White was not based on a deficiency over which the Court had jurisdiction, was predicated on a reading of the provisions of section 6621(c)(4). As previously discussed, the provisions governing overpayment jurisdiction lead to a different result.

Accordingly, we hold that in the exercise of our jurisdiction to determine whether an overpayment exists and the amount of any such overpayment, we may determine petitioners' liability for increased interest under section 6621(c).

Barton, 97 T.C. at 554–55 (footnotes and citation omitted).

In the matter at hand, Petitioners argue that, Barton aside, because there is a lack of a pre-payment forum in which they may challenge the overpayment of § 6621(c) interest, their due process rights under the Fifth Amendment have been violated. The Tax Court rejected Petitioner's due process argument. Citing Phillips v. Commissioner, 283 U.S. 589, 595 [9 AFTR 1467] (1931) and Johnston v. Commissioner, 429 F.2d 804, 806 [26 AFTR 2d 70-5274] (6th Cir.1970), the Tax Court held that the law is well settled that the availability to a taxpayer of a post-payment judicial forum in which to obtain a determination of his tax obligations is sufficient to satisfy due process requirements. (J.A. at 282–84.) We agree with the Tax Court and opine that because Petitioners had available to them judicial forums wherein they could seek redetermination of the alleged overpayments, and where Petitioners have in fact availed themselves of such forums, they have received all the process to which they are entitled. See Johnston, 429 F.2d at 806. We conclude that this is particularly so where Petitioners did not dispute that their underpayment was attributable to tax-motivated transactions, nor did they dispute the Commissioner's calculation of the amount owing.

We further conclude that Petitioners' argument that the interest assessment is void because the Commissioner did not issue a notice of deficiency with respect to the disputed interest before assessing it, is likewise without merit. Section 6601(e)(1) mandates that interest prescribed by section 6601, ''shall be ... assessed, collected, and paid in the same manner as taxes,'' and is treated as a tax ''except [for purposes of] subchapter B of chapter 63, relating to deficiency procedures.'' 26 U.S.C. § 6601(e)(1). Accordingly, this provision authorizes the Commissioner to assess and collect the interest prescribed by § 6601(a) on an underpayment without first issuing a notice of deficiency asserting the taxpayer's liability for the interest. Because the issue in the matter at hand was prescribed by § 6601(a)--albeit at the rate set forth in § 6621(c)--the Commissioner was not required to issue a notice of deficiency

with respect to the interest due on Petitioners' 1982 underpayment, and the assessment at issue was valid.

In summary, we conclude that because Petitioners are challenging the overpayment of § 6621(c) interest, the Tax Court had jurisdiction to hear the matter, see Barton, 97 T.C. at 554–55, and because Petitioners had a judicial forum available to them wherein they could challenge the overpayment (and in fact availed themselves of that forum), the Tax Court properly exercised jurisdiction over this case and Petitioners were not denied due process of law under the Fifth Amendment. See Johnston, 429 F.2d at 806.

II. Whether the Tax Court Properly Determined Negligence on the Part of Petitioners.[2]

We review a Tax Court's factual findings regarding a determination of negligence for purposes of IRC § 6653 under a clearly erroneous standard. See Pasternak v. Commissioner, 990 F.2d 893, 902 [71 AFTR 2d 93-1469] (6th Cir.1993).

During the years at issue, 1982–1985, section 6653(a)(1) provided for an addition to tax equal to 5% of any underpayment of tax if any part of the underpayment was due to negligence, and section 6653(a)(2) provided for a further addition to tax equal to 50% of the interest payable on the portion of the underpayment attributable to such negligence. See Pasternak, 990 F.2d at 902. For purposes of section 6653, "negligence" is defined as "'lack of due care or failure to do what a reasonable and ordinarily prudent person would do under the circumstances.'" Id. (quoting Leuhsler v. Commissioner, 963 F.2d 907, 910 [69 AFTR 2d 92-1289] (6th Cir.1992)). The Commissioner's determination of negligence is presumed to be correct, and a taxpayer has the burden of showing that he was not negligent. Id. (citing Skeen v. Commissioner, 864 F.2d 93, 96 [63 AFTR 2d 89-531] (9th Cir.1989)); see also Illes v. Commissioner, 982 F.2d 163, 166 [71 AFTR 2d 93-1724] (6th Cir.1992).

The Commissioner argues that Petitioners failed to meet their burden of proof in the matter at hand. The Commissioner notes that courts have found that a taxpayer is negligent if he puts his faith in a scheme that, on its face, offers improbably high tax advantages, without obtaining an objective, independent opinion on its validity. According to the Commissioner, the Dickinson offering here was such a scheme, and Petitioners failed to obtain the independent assurance of validity before investing, thereby making them negligent. We agree.

The offering memorandum revealed that Dickinson would acquire rights to four Sentinel recycling machines through an elaborate series of simultaneous paper transactions, and quoted an exorbitant price of $1,500,000 for each machine, for which there was no established market, while warning that the IRS might challenge that price as being in excess of fair market value. Based upon the recited price, the offering memorandum also projected that in the initial year, each partner would receive tax savings almost double his investment in the partnership. In addition to these "too good to be true" returns on an investment, the offering memorandum also expressly warned potential investors as to the high degree of tax risk. For example, the offering provided in bold capital letters, "THIS OFFERING INVOLVES A HIGH DEGREE OF RISK"; stated that "[a]n investment in the partnership involves a high degree of business and tax risks and should, therefore, be considered only by persons who ... can afford to lose all of their cash investment and all or a portion of their anticipated tax benefits"; and also stated that there was a substantial likelihood of audit by the IRS. (J.A. at 125, 135.) The offering memorandum further warned that the partnerships had no prior operating history, that the general partner had no prior experience in marketing recycling equipment, that there was no established market for the Sentinel re-cyclers, and that there was no assurance

[2] Section 6653 was repealed by the Omnibus Budget Reconciliation Act of 1989, effective for returns due after 1989.
Negligence of the type at issue here is now one component of the accuracy-related penalty found in Section 6662. See 26 U.S.C § 6662(b)(1).

that market prices for virgin resin would remain at their then-current level.

Outside sources also warned Barlow not to invest in the Dickinson offering. Specifically, Philip Nusholtz, an attorney with whom Barlow had a long-standing professional relationship, and whose tax advice Barlow valued and trusted, advised Barlow not to invest in the Dickenson offering. Nusholtz refused to read the offering memorandum and advised Barlow not to invest in any offering made by promoter Fred Gordon. Barlow invested $50,000 in the Dickinson offering despite these warnings and knowledge of the risky nature of the investment. And, four months after making the investment, Barlow claimed the promised tax benefits on his 1982 tax returns, thereby reducing his tax liability for that year by over $96,000.

The Tax Court found that Barlow's primary motivation for investing in the Dickinson offering was to obtain these tax savings, and Barlow does not challenge the Tax Court's finding in this regard. As a result, it is undisputed that Barlow invested in a sham transaction without the primary profit motivation, which in itself is enough to find Petitioners' claim on this issue to be without merit. See Howard v. Commissioner, 931 F.2d 578, 582 [67 AFTR 2d 91-918] (9th Cir.1991) (''In a case ... where the taxpayers have been found to have entered into sham transactions without a primary profit motivation, they have failed to meet their burden of showing due care.'')

Barlow claims that he relied on the advice that he received from his accountant and tax return preparer, Gerald Kabeck, prior to investing in Dickinson, and that reliance on this professional advice serves as a basis for finding that he was not negligent. Good faith reliance on a tax advisor professional concerning tax laws is a defense to negligence. See United States v. Boyle, 469 U.S. 241, 246 [55 AFTR 2d 85-1535] (1985); Zfass v. Commissioner, 118 F.3d 184, 188 [79 AFTR 2d 97-3188] (4th Cir.1997). ''However, that reliance must be reasonable and the taxpayer must show that the accountant had all the necessary information to make an informed decision.'' See Zfass, 118 F.3d at 188. Here, Petitioners have failed to show that Barlow acted reasonably or that Kabeck had all the information to make an informed decision. For example, the record indicates that Barlow was an educated man and a sophisticated investor, and yet he did not heed the warnings set forth in the offering memorandum, nor did he accept the advice of his long-time friend and advisor, attorney Philip Nusholtz. In addition, as the Tax Court found, Kabeck did not have the knowledge and expertise to advise Barlow inasmuch as Kabeck did not have any first-hand knowledge about the leasing transactions involved in this case, nor did he have any experience in the area of plastic re-cycling or in the area of investment-related advice in general. As a result, Petitioners have failed to meet their burden in demonstrating that Barlow was not negligent when he invested in the Dickinson offering. See id.

CONCLUSION

For the above-stated reasons, we AFFIRM the Tax Court's orders.

¶2002-5303

UNITED STATES OF AMERICA, APPELLEE v. Joseph LOUIS, DEFENDANT, APPELLANT. United States Court of Appeals, First Circuit, (CA1) No. 01-1836, Aug. 20, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—assisting with preparation of false tax returns—U.S. Sentencing Guidelines—downward departure. District court properly denied taxpayer's motion for ''extraordinary family circumstances'' downward departure from Guidelines sentence on his IRC §7206(2) conviction: even if court had considered taxpayer's racial background and non-custodial relationship with biracial child, departure wouldn't have been warranted since taxpayer's imprisonment, and family's consequent loss of his emotional and financial support, gave rise to no exceptional, out of the ordinary hardship.

Reference: United States Tax Reporter ¶72,065.01(50). IRC §7206.

Leo T. Sorokin, Federal Defender Office, for appellant. Charles W. Rankin, Rankin & Sultan, and John Reinstein, ACLU of Massachusetts, on brief as amicus curiae for appellant.
Karen M. Quesnel, with whom Eileen J. O'Connor, Assistant Attorney General, Robert E. Lindsay, Alan Hechtkopf, Michael Karam, and Michael J. Sullivan were on brief, for appellee.

United States Court of Appeals, First Circuit,

[Hon. Reginald C. Lindsay, U.S. District Judge]

Before LIPEZ, Circuit Judge, CAMPBELL and BOWNES, Senior Circuit Judges.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

LIPEZ, Circuit Judge.

During his sentencing hearing for assisting in the preparation of false tax returns, Defendant Joseph Louis argued that he should receive a downward departure from the sentence prescribed in the Sentencing Guidelines because of his family ties and responsibilities, including his relationship as a person of color with his biracial son. The district court denied his motion for a downward departure, stating that it could not consider the racial aspect of Louis's family circumstances because the Sentencing Guidelines prohibit departures on account of race. Louis appeals this legal determination, arguing that the district court could have considered the racial aspect of his relationship with his son. Finding that Louis would be ineligible for an "exceptional family circumstances" departure even if the district court had taken race into account, we affirm without addressing the legal correctness of the district court's refusal to consider the racial aspect of Louis's relationship with his son.

I.

[1] After a jury trial, Louis was convicted of 14 counts of assisting in the preparation of false tax returns, in violation of 26 U.S.C. § 7206(2). Before sentencing, he filed a motion for a downward departure based on his "family ties and responsibilities." U.S.S.G. § 5H1.6. If approved, the departure would have permitted Louis to receive a sentence of probation with a special condition of home detention for twelve to fifteen months. Louis was instead sentenced to twenty-one months in prison.

The motion for a downward departure focused on Louis's relationship with his nine-year-old son, Ryan Joseph Louis (Ryan). Although Louis does not live with Ryan (he and Ryan's mother, Kelly Mahon, are divorced), he submitted evidence describing his close relationship with his son. Of particular importance was a report from a psychologist, Dr. John Daignault, describing Louis's relationship with Ryan and the potential impact of his incarceration on Ryan. Dr. Daignault observed that Louis "willingly cares for Ryan when Ryan's mother Kelly Mahon must work," and plays an "especially important role" in responding to Ryan's asthma. According to the report, Louis has "Ryan with him either every or every other weekend ... telephones his son daily and takes him out for other activities during the week." Dr. Daignault noted that "Ryan himself articulates a deep attachment to his father." He opined that "[t]o rob Ryan of this integral parental relationship would run the risk of significant deterioration of the child's emotional and psychological functioning .... Ryan would be significantly adversely affected by the prolonged absence of his father from his day-to-day life."

Dr. Daignault's report also focused on Ryan's ethnicity. He is biracial, the child of a Caucasian mother and a Haitian father. According to Dr. Daignault:

> It is also of considerable significance in our culture, in terms of Ryan's identity development, that Ryan's father is a person of color, as he is, whereas his

> mother is Caucasian. According to clinical research and my own experience, there is considerable importance to the availability of the parent of color to the offspring of color, in order for the child to have a needed role model in the developmental process, given the realities of our culture. In Ryan's case, this clinical impression takes on further relevance, as Ryan is reportedly the brunt of teasing by some peers at school.

Upon request by Louis's counsel, Dr. Daignault supported his assessment of the importance of a parent of color to a biracial child with a number of academic articles.[1]

Building on Dr. Daignault's report, Louis's counsel argued at the sentencing hearing that a downward departure was appropriate here because of the unusual circumstances of Louis's case. He focused on Louis's unique capacity to serve as a role model for Ryan as a parent of color, arguing that Louis's family circumstances are exceptional because biracial children "need to have the parent of color present and involved." Responding to that argument, the district court stated "[t]he only thing that makes this different from lots of cases I have seen is the one point about this being a biracial child." The government pointed out that section 5H1.10 of the Sentencing Guidelines makes race irrelevant to the determination of a sentence. Accepting that argument, the district court denied the downward departure motion.

II.

Although a district court's decision rejecting a downward departure is largely unreviewable, we review de novo a district court's determination that it is without power to depart. United States v. Carvell, 74 F.3d 8, 11 (1st Cir.1996). Responding to the departure sought by Louis on the basis of "exceptional family circumstances," the court said that it could not grant the request because of its dependence on the race of the defendant:

> Well, I don't believe that I have authority to make this departure, because what [the government's attorney] says, it is taking race into account, and [the government's attorney] is right, that however you look at this, if it's because the child is biracial, it is because the defendant, being one of the two races involved, that his race plays a factor, plays a role. So I don't think I have the authority to make this departure.

The district court based this determination on the Sentencing Guidelines, which state that "race, sex, national origin, creed, religion, and socio- economic status ... are not relevant in the determination of a sentence." U.S.S.G. § 5H1.10 (implementing Congress's mandate in 28 U.S.C. § 994(d) that the guidelines be "entirely neutral" as to such factors).

Louis argues that this provision only proscribes departures based solely on a prohibited factor, and not a departure granted on another ground (i.e., family ties and responsibilities) in which the race of the defendant plays some part. See Carvell, 74 F.3d at 11 (1st Cir.1996) (permitting a departure on "lesser harm" grounds, even though the factual predicate for the departure "subsume[d] particular facts that would be precluded ... from forming a basis for departure").

We need not resolve that question here. Even if the district court had considered Louis's race and cultural background while deciding whether to depart on the basis of his family ties and responsibilities, it could not have granted the downward departure. Indeed, the court essentially made that very point:

> I remember that we are going uphill because we are talking about discouraged factor, and what we are talking about is one more hardship on this family that

[1] The articles included: The Morehouse Conference on African American Fathers, Turning the Corner on Father Absence in Black America (1999); Lundy Langston, Force African-American Fathers to Parent Their Delinquent Sons--A Factor to be Considered at the Disposition Stage, 4 Colum. J. Gender & L. 173 (1994); Marc A. Zimmerman et al., Family Structure and Psychosocial Correlates Among Urban African-American Adolescent Males, 66 Child Development 1598 (1995); Aurora P. Jackson, The Effects of Nonresident Father Involvement on Single Black Mothers and Their Young Children, Social Work, March 1999, at 156; and Rebekah Levine Conley, Children's Socialization Experiences and Functioning in Single-Mother Households: The Importance of Fathers and Other Men, 69 Child Development 219 (1998). 2002 WL 1880374 (1st Cir.(Mass.))

> results from the biracial, because of the factor there is a biracial child involved. You know, occasionally I have a child with a serious illness, and father is important or mother is important because the child is ill. I don't know that is different in this case, but in any case, I think I am not authorized to make this departure, so I deny the motion for departure.

Put simply, the record before the court could not support a determination that Louis's family circumstances merited a departure. "Had the district departed on the basis of these facts, its decision could not have withstood legal challenge." United States v. Rushby, 936 F.2d 41, 42 (1st Cir.1991) (citing United States v. Diaz-Villaphane, 874 F.2d 43, 49 (1st Cir.1989)).

The Sentencing Commission has stated that "[f]amily ties and responsibilities and community ties are not ordinarily relevant in determining whether a sentence should be outside the applicable range guidelines." U.S.S.G. § 5H1.6. The Sentencing Guidelines deem family circumstances a "discouraged" ground for departure, and a district court may depart on the basis of a discouraged ground only in an "exceptional" case. U.S.S.G. Ch. 5, Pt. H, intro. comment; see also United States v. Pereira, 272 F.3d 76, 80 [88 AFTR 2d 2001-7124] (1st Cir.2001). A case is "exceptional" only when the discouraged ground is "of a kind, or [exists] to a degree, not adequately taken into consideration by the Sentencing Commission." U.S.S.G. § 5K2.0 (policy statement). Although departure is permitted in such situations, the district court must "explain how the case (compared to other cases where the reason is present) is special." United States v. Rivera, 994 F.2d 942, 951 (1st Cir.1993). The district court could not have done so in this case.

A defendant's incarceration will invariably cause hardship to his family. We cannot "presume, as a general matter, that the Commission either overlooked or inadequately considered" such a consequence in formulating the guidelines. United States v. Clase-Espinal, 115 F.3d 1054, 1057 (1st Cir.1997) (citing 18 U.S.C. § 3553(b) and U.S.S.G. § 5K2.0). Only circumstances which "render [a] case atypical and take it out of the 'heartland' for which the applicable guideline was designed" are permissible grounds for a downward departure. United States v. Carron-Cruz, 92 F.3d 5, 6 (1st Cir.1996). "Regrettably, the 'heartland' of cases under the Guidelines encompasses immense and heart-wrenching hardships." United States v. Bogdan, 284 F.3d 324, 330 (1st Cir.2002) (citing United States v. Dyce, 91 F.3d 1462, 1467–68 (D.C.Cir.1996) (holding that the district court erred when it departed based on the defendant's status as a single mother with three children under the age of four, one of whom was being breast-fed, and where incarceration would require placing the children in foster care)). Here, even if we assume arguendo that Louis's race and cultural background could form part of the factual predicate for a "family ties and responsibilities" departure, they would not take this case out of the heartland of cases where such departures are inappropriate. The issue is not the importance and value of the particular support that Louis gives to his son. That support is unquestionably important and valuable to Ryan. The question, rather, is whether that support is so different in kind or degree from the many kinds of support that can be important in the parent/child relationship that it makes the family ties and responsibilities factor in this case exceptional. We think not. Indeed, the hardship visited upon Louis's family by his incarceration does not match the hardship endured by other families in cases where we refused to authorize a departure.

For example, in United States v. Carr, 932 F.2d 67 (1st Cir.1991), we reversed a district court's decision to depart on family circumstances grounds, even though Carr had a four-year-old child and her husband was also facing imminent imprisonment. Id. at 72. We observed that the child "would not be left unsupported" because Carr's mother could care for her while Carr and her husband were imprisoned. Id. Similarly, Ryan's mother will continue to care for him during Louis's imprisonment.

In United States v. Chestna, 962 F.2d 103, 107 (1st Cir.1992), we concluded that the familial hardship caused by incarcerating the single mother of four young children (aged thirteen, eleven, four, and less than one) was not enough to justify a downward departure. We reasoned that "single mother status is not an 'idiosyncratic' circumstance, distinguishing her case from the 'mine-run.'" Id. at 107 (quoting United States v. Aguilar-Pena, 887 F.2d 347, 349–50 (1st Cir.1989) and citing Carr, 932 F.2d at 72, and United States v. Brand, 907 F.2d 31, 33 (4th Cir.1992) ("[a] sole, custodial parent is not a rarity in today's society, and imprisoning such a parent will by definition separate the parent from the children.")). Here, while undoubtedly a committed and loving father, Louis is not even the primary caretaker for his nine-year-old son. A departure on family circumstances grounds will rarely be appropriate when "there are feasible alternatives of care that are relatively comparable to what the defendant pro-vides." Pereira, 272 F.3d at 83.

Louis contends that, besides him, there are no "feasible alternatives of care," id., for Ryan, because he is the only parental black role model available to Ryan, and "parents of color ... provide a type of support, understanding, and role modeling [developed out of] experiences enduring ... racial prejudice that white parents normally do not experience." That argument is not without force, but it is not enough to remove this case from the "heartland" of cases under the Guidelines. Under Carr and Chestna, a downward departure would not be warranted even if Louis could demonstrate that he was the only parent available to meet all of Ryan's needs. His contribution is not more important than the broad range of support deemed an insufficient factual predicate for a "family circumstances" downward departure in Carr and Chestna.

Louis argues that his case is comparable to other situations in which we have permitted the district court to determine the appropriateness of a downward departure. For example, in United States v. Sclamo, 997 F.2d 970, 972–74 (1st Cir.1993), we ruled that the defendant's important role in caring for a stepson who suffered from a psychiatric illness constituted an "exceptional case," especially because the boy's condition would likely deteriorate in the defendant's absence. Id. Louis has submitted expert testimony that his prolonged absence "would run the risk of significant deterioration of [Ryan]'s emotional and psychological functioning .... because Ryan would be significantly adversely affected by the prolonged absence of his father from his day-to-day life." However, Sclamo lived with his stepson, who was already suffering from a psychiatric illness. Louis does not have custody of Ryan during weekdays, and Ryan now exhibits no signs of illness. Although being separated from his father may have the adverse effect on Ryan's emotional well- being predicted by Dr. Daignault, Louis's incarceration does not threaten the sort of psychological damage foreseen in Sclamo, where the defendant's son was mentally ill well before Sclamo was sentenced.

Similarly, Louis's case may be distinguished from Rivera, 994 F.2d 942 (1st Cir.1993). There we determined that a downward departure may have been appropriate because a critical mass of hardships could accrue to the defendant's family. Id. at 948 ("It may not be unusual, for example, to find that a convicted drug offender is a single mother with family responsibilities, but, at some point, the nature and magnitude of family responsibilities (many children? with handicaps? no money? no place for children to go?) may transform the 'ordinary' case of such circumstances into a case that is not at all ordinary."). However, the hardship of Rivera's family due to her incarceration appeared much more severe than that faced by Louis's family. Rivera stated to the district court that

1) she has three small children, ages three, five, and six, who need a mother's care;

2) she lives solely on welfare, receiving no financial aid from her former husband;

3) she has virtually no contact with any other family member (except for a sister, with five children, also on welfare)

Id. at 952. Unlike Rivera, Louis has one child, who will be receiving care from a custodial parent. Louis has also failed to demonstrate that his family suffers from the same isolation and poverty that Rivera's three children faced.

All in all, Louis's case is closer to that of the defendants denied downward departures in Carr and Chestna than it is to Sclamo or Rivera. His situation is also closer to that of the defendant in United States v. Shoupe, 929 F.2d 116 (3d Cir.1991). Although a district court granted Shoupe a downward departure in part because of his family responsibilities, the Third Circuit reversed:

> [T]he defendant's presentence report revealed that he has a young son who resides with the defendant's former wife, that the defendant has paid regular child support, and that the defendant frequently spoke with the child by telephone. Defense counsel added at the sentencing hearing that his client is a good father and regularly visits with his son. These facts do not show such extraordinary family ties and responsibilities as to justify a departure despite Section 5H1.6.

Id. at 121. As in Shoupe's case, the level of hardship that will be visited upon Louis's family as a result of the sentence imposed here does not exceed the level of hardship countenanced in many other cases where a downward departure was prohibited. See Jason Binimow, Downward Departure from United States Sentencing Guidelines Based on Extraordinary Family Circumstances, 145 A.L.R. Fed. 559, § 4 (1998) (of twenty-seven circuit court cases determining whether a downward departure could be justified because of the effect upon a child of the incarceration of a nurturing family member, twenty-four concluded that such a departure could not be justified). Moreover, it does not approach the hardships contemplated in those few cases where we have authorized a downward departure because of family responsibilities.

III.

Even if the district court had considered the racial aspect of Louis's relationship with his biracial son, it could not have granted a downward departure here. The court recognized that underlying reality. That recognition was accurate. Louis's family ties and responsibilities do not remove his case from the ''heartland'' of cases covered by the Sentencing Guidelines.

Affirmed.

¶2002-5304

George E. PLUM, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Texas, (DC TX) No. 3-02-CV-0365BD(L), Aug. 15, 2002. Year 1998. Decision for Govt.

1. Refund actions—administrative refund claims—withheld taxes. Magistrate judge dismissed for lack of jurisdiction pro se taxpayer's action for refund of withheld taxes: taxpayer's ''zero'' return didn't constitute valid return or refund claim under Reg. §301.6402-2(b)(1); and argument that wages weren't taxable income under IRC §61 was frivolous. *Reference:* United States Tax Reporter ¶64,025.15(21); 74,225.01(20). IRC §61; 6402; 7422.

United States District Court, N.D. Texas, Dallas Division,

MEMORANDUM ORDER

KAPLAN, Magistrate J.

Defendant United States of America has filed a motion to dismiss this pro se tax refund case for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. For the reasons stated herein, the motion to dismiss for lack of jurisdiction is granted.

Plaintiff George E. Plum earned $459,930 in wages from his employer,

Texas Oncology, P.A., in 1998. A total of $121,716.26 was withheld by the employer and remitted to the Internal Revenue Service.[1] In his 1998 federal income tax return, plaintiff stated that he earned no income, claimed $8,800 in deductions, and sought a refund of $121,717. The IRS initially treated this filing as a valid return with a math error and computed plaintiff's tax liability at $152,251. Plaintiff protested this assessment. Following a collection due process hearing, an appeals officer determined that the case should have been processed under IRS deficiency procedures. A statutory notice of deficiency was issued on March 13, 2002. As part of this notice, plaintiff was advised of his right to contest the deficiency by filing a petition in the United States Tax Court within 90 days. No such action was initiated by plaintiff. Instead, plaintiff filed suit in federal district court seeking a refund of his withholding tax.

[1] Succinctly stated, plaintiff contends that he is entitled to refund of all monies withheld by his employer and remitted to the IRS for the 1998 tax year because his wages do not constitute taxable gross income within the meaning of 26 U.S.C. § 61. Despite the patent frivolity of this argument,[2] the court lacks subject matter jurisdiction to even consider the claim.

A federal district court has jurisdiction over a tax refund case pursuant to 28 U.S.C. §1346(a)(1). However, the party seeking a refund must make full payment of all tax liability and file an administrative claim for a refund. See Flora v. United States, 362 U.S. 145, 177 [5 AFTR 2d 1046], 80 S.Ct. 630, 647 [5 AFTR 2d 1046], 4 L.Ed.2d 623 [5 AFTR 2d 1046] (1960); Humphreys v. United States, 62 F.3d 667, 672 [76 AFTR 2d 95-6116] (5th Cir.1995). See also Gustin v. Internal Revenue Service, 876 F.2d 485, 488 [64 AFTR 2d 89-5163] (5th Cir.1989) (''Failure to file a claim for a refund deprives the court of subject matter jurisdiction.''). Although a valid tax return can constitute a claim for a refund, the return must ''furnish [ ] sufficient information to allow the IRS to make a reasonable and intelligent investigation and evaluation of the taxpayer's claim.'' Porcaro v. United States, 1999 WL 1249329 at 2 [84 AFTR 2d 99-7084] (E.D.Mich. Oct. 25, 1999), quoting Estate of Hale v. United States, 876 F.2d 1258, 1262 [63 AFTR 2d 89-1576] (6th Cir.1989). More particularly, a claim for refund:

> must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof. The statement of the grounds and facts must be verified by a written declaration that is made under the penalties of perjury. A claim which does not comply with this paragraph will not be considered for any purpose as a claim for refund or credit.

Treas. Reg. § 301.6402-2(b)(1). Here, plaintiff filed a tax return indicating a ''zero'' tax liability. This does not constitute a valid return and fails to comply with the administrative requirements for claiming a refund. See, e.g. Porcaro, 1999 WL 1249329 at 3 (rejecting argument that tax return reflecting zero income constituted valid claim for refund); Fearis v. Commissioner, 548 F.Supp. 408, 410 [51 AFTR 2d 83-395] (N.D.Tex.1982) (same).[3]

Accordingly, defendant's motion to dismiss for lack of subject matter jurisdiction is granted.

SO ORDERED.

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[1] Plaintiff alleges that $131,626.51 was withheld by Texas Oncology in 1998. However, his W-2 statement and form 1040 reflect that the proper amount of withholding tax was $121,716.26

[2] It is well settled that wages constitute taxable income. See Loofbourrow v. Commissioner, 208 F.Supp.2d 698 [89 AFTR 2d 2002-2800] (S.D.Tex.2002) (citing Commissioner v. Kowalski, 434 U.S. 77, 83 [40 AFTR 2d 77-6128], 98 S.Ct. 315 [40 AFTR 2d 77-6128], 54 L.Ed.2d 252 [40 AFTR 2d 77-6128] (1977) and numerous other cases).

[3] Defendant has submitted a three-page typewritten statement by plaintiff which apparently was submitted as part of his 1998 tax return. In this statement, which is not signed or verified, plaintiff contends that he is entitled to a refund of withholding tax pursuant to 26 U.S.C. § 6402 and ''13 Supreme Court decisions, 9 Internal Revenue Code Sections, 3 Privacy Act Notice provisions, and numerous other references.'' (Def.App. at 5). This vague, conclusory, and frivolous assertion does provide ''sufficient information to allow the IRS to make a reasonable and intelligent investigation and evaluation of the taxpayer's claims.'' Porcaro, 1999 WL 1249329 at 2. As a result, it does not satisfy the requirements for claiming a refund.

¶2002-5305

Alfred PERRECA and Marie A. PERRECA, PLAINTIFFS-APPELLANTS v. Michael GLUCK, individually and as Trustee and Administrator of Marketing Industries Group, Ltd. Employees' Retirement Plan, and Marketing Industries Group, Ltd., DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLEES, USI Retirement Systems, USI Retirement Services, Inc., Hogg Robinson Consulting Group, Inc., Innovative Retirement Concepts Co., and Pension Planning, Inc., THIRD-PARTY DEFENDANTS. U.S. Court of Appeals, Second Circuit, (CA2) Docket No. 01-9123, July 8, 2002. District Court affirmed in part, vacated in part and remanded. Decision for Taxpayers in part.

1. Qualified pension plans—lump-sum payments—anti-cutback rule—employer discretion—reinstatement—calculations. District court properly determined that retiree-former union member didn't qualify for lump sum payment of pension plan benefits: although plan's former "committee approval"/employer discretion requirement violated IRC §411(d)(6)'s anti-cutback rule, plan was validly reinstated under Reg. §1.411(d)-4, A-8 through adoption of objective, nondiscriminatory age criteria, which taxpayer admittedly didn't meet. But, court improperly rejected on summary judgment taxpayer's benefits calculation claim where, although trustee's alleged oral promise on benefits' accrual wasn't enforceable, material fact issues still remained concerning interpretation of plan's eligibility and multiple benefit provisions and what date taxpayer was actually removed from collective bargaining agreement and eligible to participate in plan. *Reference:* United States Tax Reporter ¶4115.45(60); 4105.02(10). IRC §402; 410; 411.

Arnold I. Rich, White Plains, NY, for Plaintiffs-Appellants.
Suzanne M. Halbardier, Barry, McTiernan & Moore, New York, NY, for Defendants-Appellees.

United States Court of Appeals, Second Circuit,

Before: CALABRESI, CABRANES, Circuit Judges, and MURTHA,* District Judge.

JOSE A. CABRANES, Circuit Judge:

Employee filed action against pension plan trustee/administrator and employer, alleging violations of Employee Retirement Income Security Act (ERISA) in connection with payment of retirement benefits. The United States District Court for the Southern District of New York, 2001 WL 1033547, Ronald L. Ellis, United States Magistrate Judge, granted summary judgment for defendants. Plaintiffs appealed. The Court of Appeals, Cabranes, Circuit Judge, held that: (1) genuine issues of material fact, as to date of employee's promotion which terminated his union membership and proper interpretation of plan terms, precluded summary judgment; (2) administrator's alleged oral promise to employee regarding date from which pension benefits would be calculated was unenforceable, and projected benefits statement was not promise concerning precise amount of benefits accrued, in light of disclaimer therein; and (3) although his request for lump sum payment was timely and did not have to be approved by committee, employee was not eligible for lump sum payment under rehabilitated version of plan.

Affirmed in part, vacated in part, and remanded.

We consider several questions in this case, including whether any genuine issues of material fact exist that preclude summary judgment on the calculation of plaintiffs' pension benefits; whether plaintiffs allege a viable claim of promissory estoppel; and whether plaintiffs are entitled to a lump sum payment of pension benefits.

Plaintiffs Alfred and Marie Perreca timely appeal from a judgment entered

* The Honorable J. Garvan Murtha, Chief Judge of the United States District Court for the District of Vermont, sitting by designation.

September 11, 2001 by the United States District Court for the Southern District of New York (Ronald L. Ellis, Magistrate Judge, with the consent of the parties pursuant to 28 U.S.C. § 636(c)) granting defendants' motion for summary judgment and denying plaintiffs' cross-motion for summary judgment.

Plaintiffs brought this action against defendants seeking money damages for their alleged violation of the Employee Retirement Income Security Act of 1974 (''ERISA''), as amended, 29 U.S.C. §§ 1001, et seq. Am. Compl. at 1–41. Plaintiffs alleged that defendants wrongfully denied Alfred Perreca (''Perreca'') the correct amount of his pension by calculating it from February 22, 1966 instead of August 1, 1959, despite the express terms of the retirement plan and in breach of a promise that defendant Michael Gluck (''Gluck'') allegedly made to Perreca in 1965; denied Perreca the possibility of receiving his benefits in a lump sum payment, in an attempt to single him out for negative treatment; and caused Perreca to lose income from 1986 to 1997 because he retired early based on his expectation that he would receive larger pension benefits. Id.[1]

In a September 7, 2001 Opinion & Order, the District Court granted defendants' motion for summary judgment; granted third-party defendants' cross-motion for summary judgment; and denied plaintiffs' cross-motion for summary judgment. Perreca v. Gluck, No. 99-1779, 2001 WL 1033547, at 1, 6 (S.D.N.Y. Sept.7, 2001). Addressing plaintiffs' claim that Perreca was denied the correct amount of his pension, the District Court first noted that there was no written documentation of defendant Gluck's alleged oral promise to Perreca in 1965 that Perreca's pension benefits would accrue from August 1, 1959--a promise which would have resulted in pension contributions for Perreca during a period (August 1, 1959 April 1966) when Perecca's employer, Sternberger Motor Corporation (''Sternberger''), had paid union benefits for Perecca. See id. at 5–6. In addition, the District Court observed that ''[t]he language of the pension plan is quite clear . . . that employees covered under a collective bargaining agreement are not covered under the pension plan. Thus, Perreca should have realized that such a promise would be illegal . . . . Any reliance on Perreca's part therefore was unreasonable.'' Id. at 6. The District Court also recalled that ''the documents [Perreca] received [over the years] listing his expected benefits [as accruing from August 1, 1959] included the disclaimer that '[a]ctual benefits are, of course, subject to verification before any payments are authorized.''' Id.

On plaintiffs' claim for a lump sum payment, the District Court stated that ''at the time of Perreca's retirement [on February 4, 1986], receiving pension benefits in a lump sum payment[ ] was subject to committee approval. When he retired, Perecca did not request a lump sum payment.'' Id. at 4. The Court noted that his request in 1997 for a lump sum payment ''was based on a typographical error in a 1995 summary of the [pension] plan'' for which ''a replacement page correcting the typographical error'' was mailed to employees. Id. Moreover, the District Court found that ''even if Perreca had not received the corrected page in 1995, he cannot prevail because the error occurred nine years after he retired. He could not have relied upon it at the time of this retirement.'' Id. In addition, the District Court concluded that because Perreca ''never sought lump sum payment of his benefits'' until 1997, he could not claim that he had been ''singled out in any way.'' Id. With respect to plaintiffs' lost income claim, the District Court held that ''Perreca may not recover under ERISA for 'extra contractual' damages.'' Id. at 6 (citing Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985)).

[1] Before the District Court, defendants impleaded the third-party defendants named in this case on the theory that, as the company retained by defendants to manage and control the pension plan at issue in this action, the third-party defendants would be liable for contribution, damages, and/or indemnification in the event that defendants were held liable. Third Party Compl. at pp 6–25. However, plaintiffs do not appeal from that portion of the District Court's judgment that granted summary judgment to the third-party defendants. See Pls.' Notice of Appeal at 1.

I.

In reviewing a district court's decision on a motion for summary judgment, we construe all facts of record in a light most favorable to the non-moving party and identify any genuine issues of material fact that remain for adjudication. See Samuels v. Mockry, 77 F.3d 34, 35 (2d Cir.1996) (per curiam).

Perreca was employed as a truck driver by Sternberger beginning on August 1, 1959. (Perreca Aff. of 11/4/00, p 7.) During his years as a truck driver for Sternberger, Perreca was a member of Local 138, International Brotherhood of Teamsters. Appellant's Br. at 6; (Perreca Dep. at 18–19). Sternberger paid into the union pension plan on behalf of Perreca during those years, pursuant to a collective bargaining agreement. (See Gluck Dep. at 30, 66.) When Perreca was promoted to Night Manager, he ceased being a member of the 219 Union. (Id. at 70; Perreca Aff. of 11/4/00, p 22.) As discussed in Section II.B.1. post, the date of this promotion is in dispute, with Perreca insisting that it occurred in 1963 (Perreca Supplemental Aff. of 12/22/00, pp 2, 3, 6) and Gluck asserting that it occurred in 1965 or 1966 (Gluck Dep. at 67–69; Gluck Aff. p 2). Union records indicate that Sternberger paid into the union pension on behalf of Perreca from August 1959 through April 1966. (Halbardier Aff., Ex. U at 9, 11.) Beginning in 1968, Perreca went on to hold several positions as an officer with Sternberger.[2] (Perreca Aff. of 11/4/00, pp 7–9.)

Sternberger first adopted a retirement plan and trust on behalf of its employees on December 6, 1965, with an effective date of January 1, 1965. (Perreca Aff. of 11/4/00, Ex. 1 p 1.12, p. 18; Ex. 2 at 1.) This company pension plan was entitled the Sternberger Employees' Retirement Plan (the "Sternberger Plan" or the "Plan").[3] (Id., Ex. 1 at 1.) Since the inception of the Sternberger Plan, Sternberger has used the same outside pension consulting firm, third-party defendant USI Retirement Systems, formerly known as Pension Planning Company. (See Gluck Dep. at 58–61.) Gluck has been a trustee of the Sternberger Plan since January 1, 1970 and a member of the Plan's Adminis-trative Committee since approximately the same date. (Id. at 36, 48–51.) He became the sole member of the Plan's Administra-tive Committee in approximately 1989. (Id. at 47–48.)

Under the terms of the Plan as it existed in 1984, Sternberger could "modify or amend in whole or in part any or all of the provisions of [the] Plan." (Perreca Aff. of 11/4/00, Ex. 29 § 10.01.) The Plan also provided for lump sum payment upon retirement "[w]ith the approval of the [Administrative] Committee." (Id., Ex. 29 at Ex. A-I p 3(e).) In 1985, the "Lump Sum Option" provision was amended to inform Plan members that "since the basic purpose of the Plan is to provide a lifetime pension, the Committee will approve a lump sum payment only in unusual circumstances." (Halbardier Aff., Ex. L. at 4.) In 1989, the Plan was amended, making the lump sum payment option available to Plan members who "terminated employment after age 65 and ... completed at least 10 years of service." (Perreca Aff. of 11/4/00, Ex. 28 § 4.05(b).)

Perreca claims that sometime in 1965, Gluck, upon returning from a meeting with the pension consulting firm, advised Perreca that Perreca would be a member of the pension plan as of 1959, despite his having been a union member for several years beginning in 1959. Appellants' Br. at 7, 24; (Id., p 116). Gluck denies ever having this conversation with Perreca. (Gluck Aff. p 2; Gluck Dep. at 365–66.) Moreover, Gluck maintains that Sternberger did not make any payments into the Sternberger Plan on Perreca's behalf while he was

[2] Effective January 1, 1977, Sternberger and certain of its affiliated companies became wholly owned subsidiaries of Agora Industries, Inc., a holding company that was incorporated in 1976. (Am. Compl. p 11; Answer p 11.) Agora changed its name to Marketing Industries Group, Ltd. on or about July 1, 1993. (Am. Compl. p 14; Answer p 14.) To avoid confusion, the company will be referred to as "Sternberger" throughout this opinion.

[3] The title of the company pension plan was redesignated in 1984 as "Agora Industries, Inc. Employees' Retirement Plan" and again in 1993 as "Marketing Industries Group, Ltd. Employees' Retirement Plan" to reflect the company's name changes. (See Am. Compl. pp 11, 13, 14; Answer pp 11, 13, 14); see also ante note 2. To avoid confusion, the company pension plan will be referred to as the "Sternber-ger Plan" or the "Plan" throughout this opinion.

a union member because such payments 220 were prohibited by the terms of the Plan. (Id.); Appellees' Br. at 6.

In an annual statement of his projected Plan benefits dated July 1, 1984,[4] Perreca was advised that on March 1, 1997, after he had reached age sixty-five,[5] he would begin receiving monthly pension payments of $4,028. (Halbardier Aff., Ex. V.) In 1985, Perreca decided that he would retire, though he knew that he would not be entitled to pension benefit payments until he reached age sixty-five. (Perreca Dep. at 110, 131.) On February 4, 1986 (the day after Perreca turned fifty-four years old), Perreca indeed retired.[6] (See Halbardier Aff., Ex. X pp 1, 6B.)

On appeal, plaintiffs principally argue that under the express terms of the Sternberger Plan and Gluck's oral promise in 1965, Perreca is entitled to have his pension calculated from August 1, 1959 instead of February 22, 1966. Appellants' Br. at 9–31. They further contend that they are entitled to lump sum payment of Perreca's pension benefits under the terms of the 1984 version of the Plan that was in effect when Perreca retired in 1986. Id. at 43–56. Defendants' response, see generally Appellees' Br. at 9–19, mirrors the District Court's analysis, which is recounted above.

II.

A. STANDARD OF REVIEW

We review the grant of summary judgment de novo. Schonholz v. Long Island Jewish Med. Ctr., 87 F.3d 72, 77 (2d Cir.1996). Reversal is required if "'there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "[Our] function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249, 106 S.Ct. 2505.

B. CALCULATION OF PERRECA'S PENSION BENEFITS

1. **[1]** A Genuine Issue of Material Fact Exists as to When Perreca Was Promoted to Night Manager, Thereby Automatically Terminating His Union Membership

The date that Perreca was promoted to Night Manager is a pivotal and disputed factual issue in this case.

On the date that Perreca was elevated to management, he would have (1) automatically ceased to be a member of the union--a fact that is conceded by both plaintiffs and defendants (see Perreca Aff. of 11/4/00, p 22; Gluck Dep. at 70); (2) no longer been subject to the union's collective bargaining agreement (Perreca Aff. of 11/4/00, p 22); and (3) become eligible to participate in the Sternberger Plan (see Perreca Aff. of 11/4/00, Ex. 1 §§ 1.12, 1.13, 2.1), under either plaintiffs' or defendants' interpretation of the Plan, which are discussed at Section II.B.2. post. Accordingly, determination of Perreca's promotion date will affect this case in two ways. First, under plaintiffs' interpretation of the express terms of the Sternberger Plan, if Perreca's membership in the union ended 221 prior to January 1, 1965, the effective date of the Plan (Perreca Aff. of 11/4/00, Ex. 1 § 1.12), he is entitled to have his pension benefits calculated from August 1, 1959, the date that he became employed by Sternberger. Appellants' Br. at 9. Second, even if a jury were to find that under the express terms of the Plan, Perreca is not entitled to company pension benefits calculated from August 1, 1959, he still may be entitled to company pension benefits calculated from January 1, 1965 (the effective date of the Sternberger Plan), in contrast to the 1966 starting date asserted by defendants.

The date that Perreca was promoted to Night Manager is a disputed issue, with both parties submitting sworn testimony

[4] This projected benefits statement is discussed more fully in Section II.B.3.b. post.

[5] Perreca turned sixty-five years old on February 3, 1997. (See Perreca Aff. of 11/4/00, p 124.)

[6] When Perreca retired, he received, inter alia, $1,206,911 under a stock buy-out agreement with Sternberger. (Halbardier Aff., Ex. X pp 1, 6B.)

and written records to support their respective claims. Perreca swears in an affidavit that he was promoted to Night Manager at Sternberger in 1963. (Perreca Supplemental Aff. of 12/22/00, pp 2, 3, 6.) He recalls this with certainty because that was the year that his two sons became ill with respiratory infections, requiring Perreca to be more available to assist with their care. (Id. pp 2–6.) As a result, Perreca requested that Sternberger no longer assign him to driving routes out of town. (Id. p 6.) In response, Sternberger promoted Perreca to Night Manager so that he could work in-house. (Id. pp 6–7.) To substantiate his claim that he was promoted in 1963, Perreca relies upon medical bills and receipts retained from his sons' treatments that bear dates from February through June 1963.[7] (Id. pp 2–6.) Perreca attaches this evidence to his affidavit in support of his claim. (See id., Ex. 38 at 1–5.)

In turn, Gluck agrees that Perreca was promoted to Night Manager in response to his request to be assigned locally due to his sons' illnesses. (Gluck Dep. at 68.) However, on August 25, 1999, Gluck testified that the promotion occurred in 1966. (Id.) Later, in an affidavit dated December 1, 2000, he swore that Perreca was promoted in 1965. (Gluck Aff. p 2.) Gluck offers no reason for his change of testimony and no reason as to why, over thirty years after the fact, 1965 or 1966 stands out in his mind as the year of Perreca's promotion. In addition, defendants have not produced Perreca's personnel and payroll records--despite plaintiffs' request--even though Gluck testified (1) that these records likely would reveal the date Perreca was promoted to Night Manager (Gluck Dep. at 71–72) and (2) that he was not aware of any of Sternberger's personnel files having been discarded (id. at 95). Rather, Gluck's December 1, 2000 affidavit claims that defendants "have not located any records from the 1950's or 1960's which relate to these topics." (Gluck Aff. p 9.)

In place of the direct evidence that Perreca's employment records would provide, defendants point to union records indicating that Sternberger paid into the union pension plan on behalf of Perreca until April 1966 (Halbardier Aff., Ex. U at 9, 11). While defendants suggest that this indicates that Perreca was a union member until April 1966, it is also possible that, due to an administrative oversight, Sternberger (1) neglected to stop contributing to the union pension plan when Perreca was promoted years earlier and (2) as a result of this inaccurate bookkeeping, failed to pay into the Sternberger Plan on behalf of 222 Perreca even though he was a member of the Plan. Moreover, even if we assume for the sake of argument that the union records accurately reflect that Perreca was a union member until April 1966, there then appears to be no explanation for the date asserted by defendants of February 22, 1966 as the starting date of Perecca's membership in the Sternberger Plan (see Halbardier Aff., Ex. Y). The absence of any objective support in the record to date for the February 22, 1966 starting date claimed by defendants is a factor that could be weighed by a jury, along with other admissible evidence, in determining the date that Perreca was promoted to Night Manager.

In light of the serious dispute over this important factual determination, the District Court's judgment is vacated with respect to the date from which company pension benefits should be calculated under the terms of the Sternberger Plan, and the cause is remanded to the District Court for trial on the issue of whether Perreca was promoted to Night Manager in 1963, as he contends--or for that matter, at any time prior to January 1, 1965, which was the effective date of the Sternberger Plan--or whether his union membership in fact continued until April 1966, as defendants insist.

[7] In Perreca's November 4, 2000 affidavit, he alleged that he became Night Manager in 1964. (Perreca Aff. of 11/4/00, pp 7, 22, 30, 37; see also Perreca Supplemental Aff. of 12/22/00, p 3.) However, upon locating and reviewing these medical bills and receipts, Perreca's recollection was refreshed, and he realized that the promotion was one year earlier. Id.

2. Genuine Issues of Material Fact Exist Concerning the Proper Interpretation of the Terms of the Plan

Plaintiffs argue that "according to the plain language of the original Sternberger Plan, an employee who stopped being a union member before the Sternberger Plan came into existence is entitled to receive benefit service from the date the employee was hired." Appellants' Br. at 18. Plaintiffs contend that because Perreca was not a union member on the effective date of the Plan (January 1, 1965), he is entitled to credit under the Plan starting from his first day of work on August 1, 1959. Id. at 6–7.

The Sternberger Plan defines the term "Employee," in relevant part, as "any person, excluding those covered under a collective bargaining agreement, regularly employed by an Employer [i.e., Sternberger] and who receives Compensation from an Employer not as a pension, severance pay, retainer or a fee under contract." (Perreca Aff. of 11/4/00, Ex. 1 § 1.13 (emphasis added)). Plaintiffs contend that this definition excluded from Plan participation only persons who were presently covered--that is, covered as of the effective date of the Plan, which was January 1, 1965--under a union plan; otherwise the Sternberger Plan could have easily stated that persons "presently or previously covered" under a union plan were excluded. Appellants' Br. at 19 (emphasis added). Accordingly, under plaintiffs' interpretation, since Perreca was not covered by a union plan on January 1, 1965, he was not excluded as an "Employee" from participating in the Plan. Id.

Plaintiffs argue that the "Exclusion of Multiple Benefits" provision of the Sternberger Plan "also does not exclude persons as 'Employees' who ceased their union membership prior to" January 1, 1965. Id. That provision states, in relevant part, that "[m]embership hereunder (or eligibility therefor, if an Employee has not become a Member) of any Employee terminates when his Employer is obligated to contribute to any other plan, involving pensions or other deferred compensation negotiated with a union which represents such Employee in an appropriate bargaining unit." (Perreca Aff. of 11/4/00, Ex. 1 § 2.4.) Thus, eligibility and membership were not terminated by the "Exclusion of Multiple Benefits" provision for an employee like Perreca who was a union member before the 223 Sternberger Plan came into existence, because the Employer was not, as of the effective date of the Plan (January 1, 1965), "obligated to contribute" to a union pension plan for that person. Appellants' Br. at 20.

Plaintiffs argue that Perreca also met the eligibility requirements articulated in the Plan, which states that "[e]ach Employee on the Effective Date who has not then attained his sixty-fifth (65th) birthday shall be eligible for membership on that date" (Perreca Aff. of 11/4/00, Ex. 1 § 2.1). Appellants' Br. at 21. As an Employee who had not attained his sixty-fifth birthday on January 1, 1965, Perreca, plaintiffs assert, was eligible for membership on that date. Id. In addition, plaintiffs explain how Perreca also met the sixty-day deadline for written application for membership that comes to pass either "sixty (60) days after the date [that an employee] becomes eligible to be a Member, or sixty (60) days after he receives notice of his eligibility from the [Administrative] Committee, whichever shall be later . . . ." (Perreca Aff. of 11/4/00, Ex. 1 § 2.2); Appellants' Br. at 21. For "when [ ] Perreca received a form from Sternberger [ ] for membership in the Sternberger Plan, he immediately completed and returned it to [Sternberger], as [the form] requested, and he became a Member of the Sternberger Plan." Id. at 21–22; (Perreca Aff. of 11/4/00, p 33). They further explain that upon application approval, membership was effective as of the date of eligibility, which, for Perreca, was the Plan's effective date of January 1, 1965. Appellants' Br. at 21–22; (Perreca Aff. of 11/4/00, Ex. 1 § 2.2).

Finally, plaintiffs point to the "Prior Service" provision of the Plan, which states that "[e]very Employee who becomes a Member of the Plan as of the Effective Date shall receive credited Prior

Service for the years and completed months of employment from his first date of hiring by an Employer or predecessor to the Effective Date'' (Perreca Aff. of 11/4/00, Ex. 1 § 3.1 (emphasis added)).

Appellants' Br. at 22. They argue that ''since Perreca became a member of the Sternberger Plan as of the Effective Date of January 1, 1965, he was entitled to receive credited Prior Service from August 1, 1959, the date of his hiring.'' Id.

We are mindful that, ''[a]s a general matter, unambiguous language in an ERISA plan must be interpreted and enforced in accordance with its plain meaning,'' Aramony v. United Way Replacement Benefit Plan, 191 F.3d 140, 149 (2d Cir.1999); see also Fay v. Oxford Health Plan, 287 F.3d 96, 104 (2d Cir.2002) (''This Court will review the [ERISA] Plan as a whole, giving terms their plain meanings.''). In addition, absent evidence indicating the intention of the parties, any ambiguity in the language used in an ERISA plan should be construed against the interests of the party that drafted the language. See O'Neil v. Ret. Plan for Salaried Employees of RKO Gen., Inc., 37 F.3d 55, 61 (2d Cir.1994) (In an ERISA case, ''[t]he rule is that when one party is responsible for the drafting of an instrument, absent evidence indicating the intention of the parties, any ambiguity will be resolved against the drafter.'' (internal quotation marks omitted)); Pagan v. NYNEX Pension Plan, 52 F.3d 438, 443 (2d Cir.1995) (relying on same quotation); Masella v. Blue Cross & Blue Shield of Conn., Inc., 936 F.2d 98, 107 (2d Cir.1991) (noting that when courts conduct de novo review of an interpretation under an ERISA insurance plan, ambiguities should be construed against the insurer); Fay, 287 F.3d at 104 (''Where there are ambiguities in an ERISA plan that this Court is reviewing de novo, those ambiguities are construed in favor of the plan beneficiary.''). 224 In light of these settled principles of contract interpretation, the plain language of the Plan could be understood to permit plaintiffs' claim for pension benefits coverage beginning August 1, 1959, as long as Perreca was not covered by a collective bargaining agreement on January 1, 1965.

However, it is also a ''cardinal principle of contract construction[] that a document should be read to give effect to all its provisions and to render them consistent with each other.'' Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); see also Kinek v. Paramount Communications, Inc., 22 F.3d 503, 509 (noting the well-established principle of contract construction that ''all provisions of a contract be read together as a harmonious whole, if possible''). Thus, defendants argue that plaintiffs' interpretation ''runs afoul of the unambiguous language of the Plan excluding 'multiple benefits.''' Appellees' Br. at 11. As defendants point out, Perreca's interpretation ''would require the Company to make double payments for any employee who had previously been a union member, something not intended under the Plan.'' Id. (emphasis added).

When one reads the Plan as a whole, defendants' argument casts doubt on the asserted plain meaning of the Plan because the intent or purpose of the ''Exclusion of Multiple Benefits'' provision clearly was to protect the Employer from having to pay into two pension plans (a union plan and the Sternberger Plan) for the same set of years for any given employee. See O'Neil, 37 F.3d at 61 (noting that ambiguity in an ERISA plan is construed against the drafter only absent evidence indicating the intention of the parties); Pagan, 52 F.3d at 443 (same). The fact that membership in the Plan terminates for any employee who becomes covered by a union pension plan during their employment (see Perreca Aff. of 11/4/00, Ex. 1 § 2.4) is strong evidence of this purpose.

It is thus clear that we are faced with a disputed issue of fact over the proper interpretation of the Plan by virtue of the apparent conflict between the ''plain meaning'' interpretation offered by plaintiffs and the evidence of the intent factor pressed by defendants. See Fay, 287 F.3d at 104 (''Language is ambiguous when it

is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire . . . agreement . . . . Whether contract language is ambiguous is a question of law that is resolved by reference to the contract alone.'' (internal quotation marks and citation omitted)).

Accordingly, the District Court's judgment is vacated with respect to the date from which company pension benefits should be calculated under the terms of the Sternberger Plan, and the cause is remanded to the District Court for trial on this issue as well.[8] See Thompson v. Gjivoje, 896 F.2d 716, 721 (2d Cir.1990) (''Where contractual language is ambiguous and subject to varying reasonable interpretations, intent becomes an issue of fact and summary judgment is inappropriate.'').

3. The Alleged Promise to Perreca

a. Gluck's Alleged Oral Promise

Plaintiffs' claim that, apart from the express terms of the Sternberger Plan, 225 Gluck orally promised Perreca in 1965 that August 1, 1959 would be the starting date from which Perreca's company pension benefits would accrue. Plaintiffs rely on this alleged oral promise as the basis for their claim of promissory estoppel. However, regardless of the accuracy of this allegation, plaintiffs' claim fails because oral promises are unenforceable under ERISA and therefore cannot vary the terms of an ERISA plan. Smith v. Dunham-Bush, Inc., 959 F.2d 6, 7, 10 (2d Cir.1992). As we observed in Smith when we rejected a plaintiff's claim that he had been orally promised additional benefits to supplement his employer's ERISA plan,

> ERISA explicitly provides, in section 402(a), that all agreements relating to pension benefits must be in writing. ERISA § 402(a), 29 U.S.C. § 1102(a)(1) (''Every employee benefit plan shall be established and maintained pursuant to a written instrument[.]''). The writing requirement protects employees from having their benefits eroded by oral modifications to the plan. Furthermore, the writing requirement protects the plan's actuarial soundness by preventing plan administrators from contracting to pay benefits to persons not entitled to such under the express terms of the plan. The statutory language of § 1102(a)(1) is clear and concise and must be enforced as written. To hold otherwise would not only thwart congressional purpose and intent, but would afford less protection to employees and their beneficiaries.

Id. at 10 (quoting Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1296 (5th Cir.1989)).

Accordingly, since Perreca may not, as a matter of law, rely upon an oral promise to modify the terms of an ERISA plan, we affirm the District Court's judgment to the extent that it denied plaintiffs' claim to calculate pension benefits from August 1, 1959 on the basis of Gluck's alleged oral promise. On remand, the success of plaintiffs' action at trial will depend upon their claim that the express language of the Plan permits Perreca's pension benefits to be calculated from August 1, 1959.

b. Projected Benefits Statements Received by Perreca

Perreca points to an ''Annual Statement of Benefits'' dated July 1, 1984 that calculated his Plan benefits from August 1, 1959 (Halbardier Aff., Ex. V) as evidence that he indeed was promised that his Sternberger Plan benefits would accrue from August 1, 1959. See Appellants' Br. at 28–29. This document, which was ''prepared for'' Perreca, stated, inter alia, that as of July 1, 1984, ''Your accrued pension under the Retirement Plan is $4,028 a month to start on March 1, 1997 at age 65. You have 25 years of service credited toward vesting . . . . Your date of employment is August 1, 1959.'' (Halbardier Aff., Ex. V.) At the bottom of this document, a statement in capital letters directed the recipient to consult the reverse side of the paper. This statement read, ''PLEASE SEE

[8] We note that it is possible that the ''Exclusion of Multiple Benefits'' provision is intended to prohibit the receipt by an employee of multiple benefits, rather than the making by the employer of multiple contributions. But that, of course, is simply another question that the jury may decide in interpreting the Plan.

THE REVERSE SIDE FOR NOTES REGARDING THE PREPARATION OF THIS STATEMENT AND AN EXPLANATION OF ACCRUED AND VESTED BENEFITS.'' Id. On the reverse side of the paper, there was a note that read in pertinent part, ''Every effort was made to avoid errors in the preparation of this statement. However, you will appreciate that errors may have occurred and that factors and assumptions used for projecting benefits may be subject to change. Actual benefits are, of course, subject to verification before any payments are authorized.'' (Id., Ex. W.)

To the extent that plaintiffs suggest that this statement of projected benefits alone 226 constituted a promise supporting their claim of promissory estoppel, we reject their claim. In light of the prominent disclaimer printed on the statement that specifically cautioned Perreca that ''[a]ctual benefits are ... subject to verification before any payments are authorized,'' (id.), the statement of projected benefits cannot, in the circumstances of this case, reasonably be construed as a promise concerning the precise amount of benefits accrued. The disclaimer was clearly printed on the statement prepared for Perreca and notified him that actual benefits were subject to verification before any payments would be authorized.

C. LUMP SUM PAYMENT

1. Do the Terms of the 1984 Version of the Plan, Including the Lump Sum Option, Govern Perreca's Pension Benefits?

In January 1997, Perreca requested for the first time lump sum payment of his pension benefits. (See Perreca Aff. of 11/4/00, p 73); Appellants' Br. at 47, 49, 50. Plaintiffs assert that the lump sum payment option should be available to them because that option was available under the terms of the 1984 version of the Sternberger Plan, which plaintiffs contend govern Perreca's company pension benefits since that was the plan in effect at the time Perreca retired on February 4, 1986.[9] Plaintiffs point to the Preambles of the 1984 and 1989 versions of the Plan to support the proposition that the 1984 version of the Plan governs Perreca's company pension benefits, as both of those Preambles state, ''With respect to any Employee or Member who had retired ... prior to the effective date of any change in the Plan, all rights and any benefits payable shall continue to be determined in accordance with the provisions of the Plan as in effect on the date of retirement....'' (Perreca Aff. of 11/4/00, Ex. 28 at 4, Ex. 29 at 3.) Moreover, defendants conceded at oral argument before us that Perreca's pension benefits are governed by the terms of the 1984 version of the Sternberger Plan that was in effect when Perreca retired on February 4, 1986. Accordingly, the parties here have effectively stipulated that the terms of the 1984 version of the Plan, as amended in 1985, govern Perreca's company pension benefits.

The 1984 version of the Sternberger Plan permits a member to elect certain pension payment options, including the ''Lump Sum Option.'' (Id., Ex. 29 at Ex. A-I pp 1–3.) If a member selects the ''Lump Sum Option,'' then, ''[w]ith the approval of the [Administrative] Committee [of the Plan], a lump sum equal to the Actuarial Value of the Member's Standard Pension shall be paid to the Retired Member upon retirement.'' (Id., Ex. 29 at Ex. A-I p 3(e).) Similarly, the 1985 Summary Plan Description, which reflects amendments to the Plan effective as of January 1, 1985, states, ''With Committee approval you may be granted a lump sum upon retirement. (But, since the basic purpose of the Plan is to provide a lifetime pension, the Committee will approve a lump sum payment only in unusual circumstances.).'' (Halbardier Aff., Ex. L at 4.)

2. Did Perreca Timely Request the Lump Sum Option?

Perreca concedes that he never sought committee approval for a lump sum payment at the time that he retired in 1986. See Appellants' Br. at 47. However, 227

[9] Amendments to the 1984 version of the Plan that became effective as of January 1, 1985 also necessarily govern the terms of Perreca's retirement, since those amendments became effective before Perreca retired on February 4, 1986. (See Halbardier Aff., Ex. L at 2–4.)

plaintiffs assert that under the terms of the ''Election Procedure'' provision of the 1984 version of the Plan, Perreca was entitled to elect a lump sum on or prior to March 1, 1997. Id. at 49. That provision states, in relevant part, that ''[a] Member may elect an option by filing a Prescribed Form with the Committee on any date which is: ... (b) less than one year prior to the Pension Conversion Date, provided the Member furnishes proof of good health satisfactory to the Committee.'' (Perreca Aff. of 11/4/00, Ex. 29 at Ex. A-I p 2.) The Plan defines ''Pension Conversion Date'' as ''the earlier of a Member's Pension Commencement Date or his Normal Retirement Date.'' (Id., Ex. 29 § 1.30(g).) The ''Pension Commencement Date'' is ''the first day of the month as of which Pension payments commence'' (id., Ex. 29 § 1.30(f)), which for Perreca was March 1, 1997 (id., Ex. 19 at 1, Ex. 34). The ''Normal Retirement Date'' is ''the first day of the month coinciding with or next following the Member's 65th birthday'' (id., Ex. 29 § 1.28), which for Perreca was also March 1, 1997 since he turned sixty-five years old on February 3, 1997 (see id. p 124); Appellants' Br. at 50.

Accordingly, plaintiffs' claim that Perreca was entitled to elect a lump sum on or prior to March 1, 1997 is confirmed by the terms of the 1984 version of the Plan. Thus, Perreca's first-time request to Sternberger in January 1997 for a lump sum payment of his pension benefits (see Perreca Aff. of 11/4/00, p 73); Appellants' Br. at 47, 49, 50, was timely under the 1984 version of the Sternberger Plan.

3. Is Perreca Subject to the ''Committee Approval'' Requirement of the Lump Sum Option as Stated in the 1984 Plan?

As indicated above in Section II.C.1., the ''Lump Sum Option'' provision of the 1984 version of the Plan states that approval of the Administrative Committee of the Plan is required before pension benefits may be paid in a lump sum to a retired member. (Perreca Aff. of 11/4/00, Ex. 29 at Ex. A-I p 3(e).) However, plaintiffs assert that under the Tax Reform Act of 1986, the ''committee approval'' requirement in the 1984 version of the Plan was unlawful by the time that Perreca requested a lump sum payment of his pension benefits in January 1997, thereby voiding retroactively the ''committee approval'' requirement in the 1984 version of the Plan and entitling plaintiffs to payment of the lump sum without limitation. See Appellants' Br. at 51–52. In contrast, defendants argue that

> Perreca cites no cases to support his argument that he can simply change the plain language of the 1984 Plan. If Perreca's retirement is governed by the 1984 Plan which was legal at the time he retired, he cannot recover because he did not seek Committee approval and none was granted. If he seeks it under any later Plan, he is not entitled to the benefit because he did not retire at age 65.

Appellees' Br. at 17.

Plaintiffs are incorrect in attributing the ban on an ''employer discretion'' requirement for a lump sum payment option to the Tax Reform Act of 1986. Rather, that prohibition was established by Treasury Regulation § 1.411(d)-4, which was created to ''reflect changes made by the Retirement Equity Act of 1984'' (''Retirement Equity Act'') and was intended to ''conform the regulations to section 301 of the Retirement Equity Act.'' Limitations on Alternative Benefits, 51 Fed.Reg. 3798 (proposed January 30, 1986) (codified at 26 C.F.R. pt. 1); see also Retirement Equity Act of 1984, Pub.L. No. 98-397, tit. III, § 301, 98 Stat. 1426, 1450–51. Section 301 228 of the Retirement Equity Act amended the so-called ''anti-cutback'' rules of ERISA § 204(g), 29 U.S.C. § 1054(g), and Internal Revenue Code (''IRC'') § 411(d)(6), 26 U.S.C. § 411(d)(6), that prohibit amendments to pension plans which diminish the accrued benefits of the participants. See Retirement Equity Act, § 301, 98 Stat. at 1450. ERISA § 204(g), 29 U.S.C. § 1054(g), provides in pertinent part,

> (g) Decrease of accrued benefits through amendment of plan

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of--
>
> . . .
>
> (B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits . . . . The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment [eliminating an optional form of benefit].

ERISA § 204(g), 29 U.S.C. § 1054(g). Similarly, IRC § 411(d)(6), 26 U.S.C. § 411(d)(6), provides in relevant part,

> (6) Accrued benefit not to be decreased by amendment.--
>
> (A) In general.--A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.
>
> (B) Treatment of certain plan amendments.--For purposes of subparagraph (A), a plan amendment which has the effect of--
>
> . . .
>
> (ii) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits.

IRC § 411(d)(6), 26 U.S.C. § 411(d)(6). Thus, the ''anti-cutback'' provisions found in ERISA and in IRC prohibit the same conduct.

Treasury Regulation § 1.411(d)-4, A-4(a) was adopted in order to effectuate these ''anti-cutback'' principles and states in relevant part,

> [A pension] plan that permits the employer,[10] either directly or indirectly, through the exercise of discretion, to deny a participant a section 411(d)(6) protected benefit provided under the plan for which the participant is otherwise eligible (but for the employer's exercise of discretion) violates the requirements of section 411(d)(6).

Id. (footnote added). In other words, a pension plan may not contain a provision that grants the employer discretion to deny a protected, accrued benefit--such as an optional form of benefit, which includes lump sum payments, see Treas. Reg. § 1.411(d)-4, A 1(b)--if the participating employee is otherwise eligible under the plan. See Treas. Reg. § 1.411(d)-4, A-4(a). Accordingly, plaintiffs are correct in asserting that the ''committee approval'' requirement of the ''Lump Sum Option'' 229 provision in the 1984 version of the Sternberger Plan is unlawful.

Because plaintiffs' action is one for retirement benefits pursuant to the civil enforcement provision of ERISA, 29 U.S.C. § 1132--as opposed to an action concerning disqualification of the Sternberger Plan for tax purposes--our analysis of Treasury Regulation § 1.411(d)-4 is guided by the ERISA ''anti-cutback'' provision.[11] As a practical matter, however, this is a distinction without a difference, since the ERISA and IRC ''anti-cutback'' provisions prohibit the same conduct and Treasury Regulation § 1.411(d)-4 enforces both provisions.

Treasury Regulation § 1.411(d)-4, A-8 governs rehabilitation of a previously existing ERISA plan that contains an ''employer discretion'' provision controlling the availability of a lump sum payment option, such as the 1984 version of the Sternberger Plan at issue in this case. To ease the im-

[10] ''The term employer includes plan administrator . . . [and] trustee . . . . '' Treas. Reg. § 1.411(d)-4, A-5.

[11] As indicated in the statutory excerpt quoted above, ERISA § 204(g)(2), 29 U.S.C. § 1054(g)(2), makes Treasury regulations applicable to the ERISA ''anti-cutback'' provision by stating that ''[t]he Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment [eliminating an optional form of benefit].'' Id.

pact of ERISA's ''anti-cutback'' prohibition, the regulation provides for ''transitional alternatives'' that work an exception to ERISA's ''anti-cutback'' ban by permitting the elimination or reduction of accrued benefits when specific regulatory requirements are satisfied, Treas. Reg. § 1.411(d)4, A-8(b), (c), (d). Treasury Regulation § 1.411(d)-4, A-8(b) states in relevant part,

> If the availability of an optional form[ ] of benefit ... under an existing plan[12] is conditioned on the exercise of employer discretion, the plan must be amended either to eliminate the optional form of benefit, ... to make such benefit available to all participants without limitation, or to apply objective and nondiscriminatory conditions to the availability of the optional form of benefit ....

Id. (footnote added). This regulation requires, then, that a plan administrator ''must'' eliminate any ''employer discretion'' requirement in an existing plan by (1) eliminating the optional form of benefit; (2) making the optional form of benefit available to all without limitation; or (3) applying objective, nondiscriminatory criteria in determining its availability. Id. The regulation goes on to state that the plan sponsor must select one of these alternatives on or before the ''applicable effective date for the plan,'' as determined by Treasury Regulation § 1.411(d)-4, A-9, and then operate the plan in accordance with that selection.

Treas. Reg. § 1.411(d)-4, A-8(c)(1). For an ''existing noncollectively bargained'' plan--that is, a plan that is not a product of collective bargaining, such as the one at issue in this case--the ''applicable effective date'' by which selection of one of the alternatives must be made is ''the first day of the first plan year commencing on or after January 1, 1989,'' Treas. Reg. § 1.411(d)-4, A-9(c)(2). ''A plan amendment conforming the plan to the particular alternative selected ... must [then] be adopted within the time period permitted for amending plans in order to meet the requirements of section 410(b) as amended by the [Tax Reform Act of 1986].'' Treas. Reg. § 1.411(d)-4, A-8(c)(2). Incidentally, the deadline for amending pension plans to comply with changes in the Tax Reform 230 Act is also ''the first plan year beginning on or after January 1, 1989.'' Tax Reform Act, § 1140, 100 Stat at 2489. ''Such conforming amendment must be consistent with the sponsor's selection as reflected in plan practice during the period from the effective date to the date the amendment is adopted.'' Treas. Reg. § 1.411(d)-4, A-8(c)(2). In other words, the amendment must be consistent with the alternative practice that was selected and in operation by ''the first day of the first plan year commencing on or after January 1, 1989'' until the date the amendment is adopted, which must also occur by the time of ''the first plan year beginning on or after January 1, 1989.'' See id.; Treas. Reg. § 1.411(d)-4, A-9(c)(2); Tax Reform Act, § 1140, 100 Stat at 2489.

In the instant case, the 1984 version of the Sternberger Plan states in relevant part that the '''Plan Year' means the 12-month period beginning on the Amendment Date, or any 12-month period beginning on the anniversary of said date in any subsequent year during which this Plan shall be in effect.'' (Perreca Aff. of 11/4/00, Ex. 29 § 1.34.) The ''Amendment Date'' is defined as ''July 1, 1984.'' (Id., Ex. 29 § 1.04.) Accordingly, the ''applicable effective date'' by which Sternberger was required to select an alternative to the ''employer discretion'' requirement was July 1, 1989, as that was ''the first day of the first plan year commencing on or after January 1, 1989.'' See Treas. Reg. §§ 1.411(d)-4, A-8(c)(1), A9(c)(2). Similarly, Sternberger was required to amend the Plan by July 1, 1989--''the first plan year beginning on or after January 1, 1989''--in a manner consistent with the alternative that it had selected. See Treas. Reg. § 1.411(d)-4, A-8(c)(2); Tax Reform Act, § 1140, 100 Stat at 2489.

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12 ''Plans ... that are both adopted and in effect prior to August 1, 1986, are 'existing plans' for purposes of this section.'' Treas. Reg. § 1.411(d)-4, A-9(c)(1).

As the record indicates, Sternberger officially amended and restated the Plan effective July 1, 1989 to provide that the "Lump Sum Option" is available only if "the Member has terminated employment after age 65 and ... has completed at least 10 Years of Service." (See Perreca Aff. of 11/4/00, Ex. 28 § 4.05(b).) In so doing, Sternberger fully complied with the requirements set forth in Treasury Regulation § 1.411(d)-4, A-8 for rehabilitating the 1984 version of the Sternberger Plan that contained an unlawful "employer discretion" element governing availability of the lump sum payment option. That is, through the amendment and restatement of the Plan in 1989, Sternberger simultaneously selected one of the transitional alternatives enumerated in Treasury Regulation § 1.411(d)-4, A-8(b) (namely, by applying objective and nondiscriminatory conditions to the availability of the lump sum payment option) by the applicable effective date of July 1, 1989, and amended the Plan in a manner consistent with that selection by the July 1, 1989 deadline for amendment by adopting objective, nondiscriminatory criteria to govern availability of the lump sum payment option (namely, (1) member terminated employment after age sixty-five and (2) member completed at least ten years of service). Consequently, the 1989 amendment and restatement of the Sternberger Plan qualified for the exception to the "anti-cutback" prohibition of ERISA provided in Treasury Regulation § 1.411(d)4, A-8 to rehabilitate a pension plan that is unlawful by virtue of an "employer discretion" element governing availability of an optional form of benefit. By complying with Treasury Regulation § 1.411(d)-4, A-8, the 1989 amendment and restatement of the Plan lawfully decreased the accrued benefit of the lump sum payment option that was previously available under the 1984 version of the Plan by making availability of this benefit contingent upon satisfaction of objective, nondiscriminatory criteria--namely, 231 termination of employment after age sixty-five with at least ten years of completed service.

Applying these new and lawful criteria to determine plaintiffs' eligibility for lump sum payment, we hold that since Perreca was only fifty-four years old when he retired on February 4, 1986, plaintiffs are not eligible for the lump sum payment benefit. Accordingly, we affirm the District Court's judgment on the issue of lump sum payment.

III.

To summarize our holdings: we hold that (1) a genuine issue of material fact exists as to when Perreca was promoted to Night Manager, thereby automatically terminating his union membership and qualifying him for membership in his employer's pension plan. Similarly, we conclude that (2) genuine issues of mate-rial fact exist concerning the proper inter-pretation of the terms of the employer's pension plan. We also hold that (3) regard-less of the accuracy of Perreca's allega-tions concerning defendant Gluck's oral promise, plaintiffs' claim of promissory es-toppel fails because oral promises are un-enforceable under ERISA and therefore cannot vary the terms of an ERISA plan. Smith v. Dunham-Bush, Inc., 959 F.2d 6, 7, 10 (2d Cir.1992). Moreover, we hold that (4) the projected benefits statement re-ceived by Perreca cannot be construed as a promise concerning the precise amount of benefits accrued, because a clear dis-claimer was printed on the document noti-fying Perreca that actual benefits were sub-ject to verification before any payments would be authorized.

Accordingly, (5) we vacate the District Court's judgment with respect to the date from which company pension benefits should be calculated under the terms of the employer's pension plan and remand the cause to the District Court for trial on the two disputed issues of fact. However, (6) because Perreca may not, as a matter of law, rely upon an oral promise to modify the terms of an ERISA plan, we affirm that portion of the District Court's judgment that denied plaintiffs' claim to calculate pension benefits from August 1, 1959 on the basis of defendant Gluck's alleged oral promise. On remand, the success of

plaintiffs' action at trial will depend upon whether the express language of the employer pension plan permits Perreca's pension benefits to be calculated from August 1, 1959 or, alternatively, from January 1, 1965.

With respect to plaintiffs' request for lump sum payment of company pension benefits, we affirm the District Court's judgment and hold (7) that the terms of the 1984 version of the company pension plan govern Perreca's retirement benefits; (8) that Perreca timely requested lump sum payment; and (9) that the 1989 amendment and restatement of the Sternberger Plan qualified for the exception to the "anti-cutback" prohibition of ERISA provided in Treasury Regulation § 1.411(d)-4, A-8 to rehabilitate a pension plan that is unlawful by virtue of an "employer discretion" element governing availability of an optional form of benefit. (10) By complying with Treasury Regulation § 1.411(d)-4, A-8, the 1989 amendment and restatement of the Plan lawfully decreased the accrued benefit of the lump sum payment option that was previously available under the 1984 version of the Plan by making availability of this benefit contingent upon satisfaction of objective, nondiscriminatory criteria--namely, termination of employment after age sixty-five with at least ten years of completed service. (11) Since Perreca was only fifty-four years old when he retired on February 4, 1986, plaintiffs are not eligible for 232 the lump sum payment benefit under the criteria established in the controlling 1989 amendment and restatement of the Plan.

The judgment of the District Court granting defendants' motion for summary judgment and denying plaintiffs' cross-motion for summary judgment is thus vacated in part and affirmed in part, and the cause is remanded with respect to the calculation of benefits; the judgment is affirmed with respect to the question of lump sum payment.

Costs to plaintiffs.

¶2002-5306

Beverly FREY, APPELLANT v. UNITED STATES, APPELLEE. U.S. Court of Appeals, Fifth Circuit, (CA5) NO. 01-10870, March 19, 2002. District Courts, (2001, DC TX) 87 AFTR 2d 2001-2376, and (2001, DC TX) 87 AFTR 2d 2001-2309, 2001-1 USTC ¶50417, affirmed. Decision against Taxpayer.

1. 100% penalty for failure to pay over employment taxes—assessments; limitations periods—incorrect social security number—responsible person; willfulness—summary judgment. 5th Cir. affirmed district court decisions without discussion. *Reference:* United States Tax Reporter ¶66,725.01(50); 62,015.01(20); 66,725.02(30); 66,725.03(80). IRC §6201; 6672.

United States Court of Appeals, Fifth Circuit,

Appeal From: N.D.Tex., No. 399CV831D

[1] Affirmed.

¶2002-5307

Kenneth A. EVANS v. UNITED STATES. U.S. Court of Appeals, Third Circuit, (CA3) NO. 01-3161, March 26, 2002. District Court, (2001, DC PA) 88 AFTR 2d 2001-5193, 2001-2 USTC ¶50541, reconsideration denied (2001, DC PA) 88 AFTR 2d 2001-6076, 173 F Supp 2d 334, affirmed. Decision for Govt.

1. Refund actions—variance doctrine—constitutional claims—duty to file returns—summary judgment—reconsideration. 3d Cir. affirmed district court's decisions without discussion. *Reference:* United States Tax Reporter ¶74,025.01(3); 74,225.05(40); 74,225.05(20); 60,125.02(50). IRC §6012; 7402; 7422.

United States Court of Appeals, Third Circuit,

Appeal From: E.D.Pa., No. 01-cv-00457

Kelly, J.

[1] Affirmed.

¶2002-5308

Robert C. JOHNSON, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Dist. of South Carolina, (DC SC) C/A No. 5:02-0304-22BC, Feb. 28, 2002. Adopted at (2002, DC SC) 90 AFTR 2d 2002-6050. Decision for Govt.

1. Actions against U.S.—sovereign immunity—Anti-Injunction Act—pending Tax Court petition. Magistrate judge recommended dismissing without prejudice pro se taxpayer's action against IRS relating to his pending Tax Court petition contesting deficiency determination against partnership in which he was partner without knowledge of business's alleged fraudulent practices: sovereign immunity wasn't waived under AIA where taxpayer had other adequate remedies at law. Also, taxpayer couldn't raise counterclaims and cross-claims in instant action against general partners over which court lacked jurisdiction; and couldn't add parties to instant action which admittedly raised same, or similar issues as were currently pending or had already been adjudicated before Tax Court. *Reference:* United States Tax Reporter ¶74,215.03(5); 74,336.505(10). IRC §7421.

UNITED STATES DISTRICT COURT DISTRICT OF SOUTH CAROLINA,

Report and Recommendation

Joseph R. McCrorey United States Magistrate Judge

[1] Plaintiff has filed this matter against the Internal Revenue Service alleging that this court has jurisdiction to hear his claims based on several federal statutes and also based on diversity jurisdiction. According to the complaint, a decision was issued by a United States Tax Court against Frederick H. Behrens on behalf of Oasis Date Associates (ODA), a limited partnership established under the laws of the state of California. According to the plaintiff the decision was binding on all the partners.

Plaintiff alleges he is a ''true and legal limited partner'' in ODA but maintains he was not a party to the proceeding before the United States Tax Court. Plaintiff claims he filed a timely petition on his own behalf in response to a Notice of Deficiency, dated May 26, 1993, which plaintiff alleges in pending before a U. S. Tax Court. Plaintiff alleges he purchased his shares and interest in ODA through the mail in a ''private offering'' from Brookers Exchange in Orangeburg, South Carolina, where plaintiff resides. Plaintiff alleges he had ''no knowledge nor input . . . in partnership business and accounting practices, and [is] legally and contractually barred from same''. The pending complaint filed in a U.S. Tax Court by plaintiff raises claims of fraud, ''entries lacking economic substance'', ''economic sham'', misstatement, and misrepresentation.

According to the above-captioned matter, Frederick H. Behrens, and others, were controlling partners in ODA and approximately forty other related partnerships involving agricultural production and fruit-growing operations, and were responsible for reporting the figures which were found to be deficient by the U.S. Tax Court.

Plaintiff maintains the activities of these multiple partnerships created conflicts of interest, and asserts that the relationships between Behren and others created opportunities for fraudulent and ''highly questionable'' loan and fee transactions. In addition, plaintiff maintains the general partners of the limited partnerships did not fund their interests in cash and therefore may not have legally been general partners under California law.

Plaintiff seeks to add some of the general partners as parties to the above-captioned action, and also to assert counterclaims and cross-claims against them based on the pleadings in the pending tax court matters described above. Plaintiff ''submits he does not wish to raise a question as to

jurisdiction nor venue in this matter . . . but feels the Court in its wisdom should deal with this issue in some way''. *See* Complaint @ 7.

Under established local procedure in this judicial district, a careful review has been made of the *pro se* complaint pursuant to the procedural provisions of 28 U.S.C. § 1915. The review has been conducted in light of the following precedents: Denton v. Hernandez, 504 U.S. 25, 60 U.S.L.W. 4346, 118 L.Ed.2d 340, 112 S.Ct. 1728, (1992); Neitzke v. Williams, 490 U.S. 319, 324–325, (1989); Haines v. Kerner, 404 U.S. 519 (1972); Nasim v. Warden, Maryland House of Correction, 64 F.3d 951, (1995); Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983); and Boyce v. Alizaduh, 595 F.2d 948 (4th Cir. 1979). This court is required to construe *pro se* complaints liberally. Such *pro se* complaints are held to a less stringent standard than those drafted by attorneys, Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir.), *cert. denied*, Leeke v. Gordon, 439 U.S. 970 (1978), and a federal district court is charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case. *See* Hughes v. Rowe, 449 U.S. 5, 9 (1980); and Cruz v. Beto, 405 U.S. 319 (1972). When a federal court is evaluating a *pro se* complaint the plaintiff's allegations are assumed to be true. Fine v. City of New York, 529 F.2d 70, 74 (2nd Cir. 1975). However, even under this less stringent standard, the complaint submitted in the above-captioned case is subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. Weller v. Department of Social Services, 901 F.2d 387, (4th Cir. 1990).

The sole defendant in the above-captioned matter is the Internal Revenue Service. The United States cannot be sued without its express consent, and express consent is a prerequisite to a suit against the United States. United States v. Mitchell, 463 U.S. 206, 212 (1983). The bar of sovereign immunity cannot be avoided by naming officers or employees as defendants. Gilbert v. Da Grossa, 756 F.2d 1455, 1458 [56 AFTR 2d 85-5567] (9th Cir. 1985). *Cf.* Hawaii v. Gordon, 373 U.S. 57, 58 (1963). Similarly, the bar of sovereign immunity cannot be avoided by the filing of a suit against a federal agency or a federal department, such as the Internal Revenue Service. *See* Campbell v. United States, 496 F. Supp. 36, 37–38 & n. * (E.D.Tenn. 1980).

Title 26 U.S.C. § 7421(a)(The Anti-Injunction Act) provides that, unless certain exceptions are applicable:

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person[.]

The United States Court of Appeals for the Fourth Circuit has held that, if there is no express provision for an exception in the Anti-Injunction Act itself, a lower federal court may not create an exception. *See* Clark v. Baker (In re Heritage Church and Missionary Fellowship), 851 F.2d 104, 105–106 [62 AFTR 2d 88-5107] (4th Cir. 1988)(the ''PTL'' bankruptcy case).[1]

The Supreme Court of the United States has indicated that the purpose of the Anti-Injunction Act is ''the protection of the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, 'and to require that the legal right to the disputed sums be determined in suit for a refund.''' Bob Jones University v. Simon, 416 U.S. 725, 736 [33 AFTR 2d 74-

[1] One distinguished commentator (now deceased) has noted:

> Section 6213(a) is no mere technicality. Prior to establishment in the mid-1920's of the Board of Tax Appeals (now the Tax Court), one could litigate a tax assessment only by paying the tax and suing for a refund in a district court or the Court of Claims (now the U. S. Claims Court). With the advent of the Board of Tax Appeals, one could litigate without paying. The keystone of the new system was a restraint on assessment until the taxpayer's right to petition the Board was exercised or waived or lapsed, and, thereafter, if the right was exercised, while litigation was proceeding. Violation of the rule by the Service was made one of the few exceptions to the Anti-Injunction statute now found in section 7421. Taxpayers retain the right to pay the tax and litigate in a federal district court or the Claims Court, but, not surprisingly, the vast majority of litigated cases (80 to 90 percent) follow the Tax Court route.

Charles S. Lyon, Disclosure of Grand Jury Materials: Why the Supreme Court Was Wrong in *Baggot*, 39 Tax Law Review 215, 216–217 (1984).

1279] (1974).[2] *See also* Rochefort v. Gibbs, 696 F. Supp. 1151, 1152–1153 [63 AFTR 2d 89-1297], 1988 U.S.Dist. LEXIS® 11515 (W.D.Mich. 1988).

The Supreme Court of the United States has judicially created a limited exception to the Anti-Injunction Act. *See*Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 [9 AFTR 2d 1594] (1962).[3] In order to establish a claim for injunctive relief under the holding in Enochs v. Williams Packing & Navigation Co., the taxpayer must show: *(1)* under the most liberal view of the applicable laws and facts, it is clear that the government cannot prevail on the merits; and *(2)* absent an injunction, irreparable injuries will occur for which there is no adequate remedy at law. 370 U.S. at 6–7. Unless *both* of these prerequisites are met, "a suit for preventive injunctive relief must be dismissed." United States v. American Friends Service Committee, 419 U.S. 7, 10 [34 AFTR 2d 74-6053] (1974).

As to the second prerequisite, the plaintiff has adequate remedies at law. All United States Court of Appeals have held that the right of a taxpayer to petition the Tax Court and his or her right, in the alternative, to sue for a refund (in a federal district court) are adequate remedies at law. *See, e.g.*, Cool Fuel, Inc. v. Connett, 685 F.2d 309, 313–314 [50 AFTR 2d 82-5746] & n. 1 (9th Cir. 1982)(denying injunction, even though the Service failed to mail notice of deficiency to the taxpayer's last known address, because the taxpayer did not establish that it had no adequate remedy at law, or that irreparable injury would result from the denial of the injunction).

The plaintiff has already petitioned the Tax Court. Any appeal of an unfavorable decision by the Tax Court would be to the Fourth Circuit Court of Appeals. *See* 26 U.S.C.A. § 7482(a). In addition, counterclaims and cross-claims must be raised, pursuant to the Federal Rules of Civil Procedure, in the same civil action which addresses the issues to be resolved. It is not proper or permissible to raise counterclaims and/or cross-claims in a separate suit, especially since this court does not have jurisdiction over the parties to which the counterclaims and cross-claims would apply. Finally, it is not proper to add parties to a separate proceeding that raises the same, or similar issues that have been raised in a separate court proceeding, such as the issues which plaintiff admits are currently pending, or have already been adjudicated, before a California Tax Court.

Recommendation

Accordingly, it is recommended that the District Court dismiss the complaint in the above-captioned case *without prejudice* and without issuance and service of process. *See* Denton v. Hernandez, supra; Neitzke v. Williams, supra; Haines v. Kerner, supra; Brown v. Briscoe, 998 F.2d 201, 202–204 & n. * (4th Cir. 1993), *replac-in-*gunpublished opinion originally tabled at 993 F.2d 1535 (4th Cir. 1993); Boyce v. ALizaduh, supra; Todd v. Baskerville, supra, 712 F.2d at 74; 28 U.S.C. § 1915(e)(2)(B)[essentially a redesignation of "old" 1915(d)]; The plaintiff's attention is directed to the important notice on the next page.

Columbia, South Carolina

Feb 28, 2002

(Date)

Joseph R. McCrorey

United States Magistrate Judge

¶2002-5309

Robert C. JOHNSON, PLAINTIFF v. COMMISSIONER, Internal Revenue Service, DEFENDANT. U.S. District Court, Dist. of South Carolina, (DC SC) C/A No. 5:02-0304-22BC, April 18, 2002. District Court, (2002 DC SC) 90 AFTR 2d 2002-6048, adopted. Decision for Govt.

1. Actions against U.S.—sovereign immunity—Anti-Injunction Act—pending Tax Court petition. Magistrate judge's

[2] Portions of the Court's holding in Bob Jones University v. Simon were modified by South Carolina v. Regan, 465 U.S. 367, 372–382 [53 AFTR 2d 84-732] (1984).

[3] The doctrine enunciated in Enochs v. Williams Packing & Navigation Co. was partially modified by South Carolina v. Regan, supra, 465 U.S. at 372–382, which is cited in footnote 2, supra.

recommendation to dismiss without prejudice pro se taxpayer's damages "counterclaim" against IRS Commissioner related to his Tax Court petition contesting deficiency determinations against allegedly fraudulent business tax scheme in which taxpayer was partner was adopted: meritless objections didn't refute findings that sovereign immunity barred damages action against govt. officers. Also, taxpayer's motion to amend complaint was denied as moot. *Reference:* United States Tax Reporter ¶74,336.506(25); 74,215.03(5); 74,336.505(10). IRC §7421.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA ORANGEBURG DIVISION,

ORDER

CAMERON McGOWAN CURRIE UNITED STATES DISTRICT JUDGE

[1] Plaintiff filed this complaint *pro se* on February 2, 2002. In accordance with the court's order of reference and 28 U.S.C. § 636(b), this matter comes before the court with the Report and Recommendation of United States Magistrate Judge Joseph R. McCrorey. The court is charged with make a *de novo* determination of any portion of the Report and Recommendation to which a specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b).

Plaintiff's complaint states the court's original jurisdiction over this case arises under ten different federal statutes and diversity of citizenship. *See* Plaintiff's Complaint, Feb. 1, 2002, at 1–2 (hereinafter "Complaint"). Plaintiff then asserts a "counterclaim" against Defendant "directly related" to a pending Petition Plaintiff filed in the Tax Court on May 26, 1993, No. 18457-93, in response to a Notice of Deficiency sent to him by the Internal Revenue Service (hereinafter "IRS"). *See* Complaint, at 3 ¶ 2, 7 ¶ 10. Plaintiff's "counterclaim" seeks damages against the Commissioner of the IRS for failing to investigate properly, provide timely notice of, settle fairly, and prosecute criminally a fraudulent business tax scheme in which Plaintiff was a partner without knowledge of the business's allegedly wrongful activity. *See id.* at 7–10 ¶ 12. Finally, Plaintiff asserts a "cross-claim and/or joinder of parties" against several individuals. *See id.* at 7–10 ¶ 11. Plaintiff asserts that these individuals are liable for tax refund and violations of various federal statutes. *See id.* at 10–11 ¶ 11.

Based on a review of the record, the Magistrate Judge recommended that this action be dismissed *without prejudice and without issuance and service of process.* First, the Report found that the Commissioner of the IRS, the sole defendant named in this action, is a federal officer entitled to sovereign immunity. The Report noted that sovereign immunity prevents any party from suing the United States for money damages without its express consent. *See* Report and Recommendation, Feb. 28, 2002, at 3 (hereinafter "Report"). Second, the Report concluded that in so far as Plaintiff contests the Commissioner's resolution of a tax dispute underlying this action, Plaintiff has taken advantage of other adequate remedies at law. The Report ascertained that Plaintiff filed a Petition, pending in Tax criminal and civil law as well as alleged violations of law by agents of the Commissioner as a matter of record.' *Id.* Further, Plaintiff alleges that the Commissioner violated his due process rights for finding Plaintiff 'no longer party to partnership.' *Id.* ¶ 5. These allegations, Plaintiff contends, are not within the Tax Court's jurisdiction, and, therefore, properly before this court. *Id.* ¶ 5.[1]

After reviewing the complaint, the applicable law, and the Report and Recommendation of the Magistrate Judge, the court agrees with the recommendation of the Magistrate Judge. The court finds Plain-

[1] Plaintiff also vaguely states that 'principals of the partnership ... [as] adversarial parties to the law suit ... [are] essential for a fair and just adjudication of the matters.' Objections, ¶ 4. Because the court agrees with the Report's recommendation to summarily dismiss this case, the court finds this statement, if an objection to the Report, without merit.

tiff's objections to the Report without merit. Plaintiff's objections do not dispute the Report's finding that the Commissioner is entitled to sovereign immunity, which bars suit against the United States or its officers for monetary damages. *See United States v. Mitchell*, 206, 212 (1983). Accordingly, this action is barred under the doctrine of sovereign immunity.

IT IS THEREFORE ORDERED that this action is dismissed *without prejudice* and *without issuance and service of process.*

IT IS FURTHER ORDERED that Plaintiff's motion to amend the complaint is DENIED AS MOOT.

IT IS SO ORDERED.

CAMERON McGOWAN CURRIE

UNITED STATES DISTRICT JUDGE

Columbia South Carolina

April 17, 2002

¶2002-5310

Orville MACKLIN, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Seventh Circuit, (CA7) No. 01-3489, Aug. 13, 2002. District Court, (2001, DC WI) 88 AFTR 2d 2001-6539, affirmed. Decision for Govt.

1. Actions against U.S.—quiet title; specific performance—limitations periods—removal and remand. District court properly dismissed father's quiet title action against U.S. as untimely: although jurisdiction was proper under 28 USC §1340, sovereign immunity wasn't waived under §2410 where father filed action more than 6 years after IRS filed nominee lien against him. §2401(a)'s general limitations provision governing civil actions against U.S. provided applicable limitations period for §2410 action; father's conclusory statements didn't prove that equitable tolling applied; and continuing violation doctrine didn't apply where father merely noted lingering injury of IRS's single alleged wrongdoing. *Reference:* United States Tax Reporter ¶74,336.507(3); 74,336.508(60).

In the United States Court of Appeals For the Seventh Circuit,

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 99 C 1344—J.P. Stadtmueller, *Chief Judge.*

Before Bauer, Ripple and Kanne, *Circuit Judges.*

Ripple, *Circuit Judge.*

On November 16, 1999, Orville Macklin ("Mr. Macklin") filed this quiet title action against the United States. Mr. Macklin challenged the validity of a federal tax lien that the Internal Revenue Service ("IRS") had recorded against his property during August 1993. The United States moved to dismiss the action, submitting that Mr. Macklin had failed to file his claim within the applicable statute of limitations period. The district court agreed and granted the Government's motion. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I. BACKGROUND

In July 1991, the IRS imposed a sizable tax assessment against Mr. Macklin's son, Gerald Macklin ("Gerald"). When the taxes remained unpaid in 1993, the IRS proceeded to federal court and obtained a ruling that reduced the assessment to judgment. Soon after, the IRS concluded that Gerald held a property interest in a parcel of land located in Waukesha County, Wisconsin ("Waukesha property").[1] Notably, Mr. Macklin, Gerald's father, purported to be the sole owner of the Waukesha property.

On August 6, 1993, the IRS filed a notice of a nominee tax lien[2] against the Waukesha property in the Register of Deeds' Office for Waukesha County, Wisconsin. Filed on IRS Form 668, the notice not only identified the taxpayer as "Orville

[1] The record does not reveal how the IRS reached this conclusion.

[2] In the case of a nominee lien, the IRS proceeds "against an alter ego or nominee of a delinquent taxpayer for the purposes of satisfying the taxpayer's obligations." *United States v. Letscher*, 83 F. Supp. 2d 367, 375 [84 AFTR 2d 99-6801] (S.D.N.Y. 1999).

Macklin, nominee of Gerald Macklin'' but also set forth the street address of the Waukesha property. In a letter dated August 16, 1993, the IRS informed Mr. Macklin of this action. A copy of the nominee lien was enclosed with the letter. In the years that followed, Mr. Macklin demanded on several occasions that the IRS remove the tax lien. The IRS denied his requests.

On November 16, 1999, over six years after the IRS recorded the lien, Mr. Macklin filed this action against the United States. The complaint, which contained no jurisdictional statement, alleged that the tax lien against the Waukesha property was invalid.[3] As such, Mr. Macklin requested that the lien be stricken from the records of the Register of Deeds' Office.

Construing Mr. Macklin's claim as an action pursuant to 28 U.S.C. § 2410—a provision waiving the Government's sovereign immunity to certain quiet title actions—the United States moved to dismiss the complaint. According to the Government, Mr. Macklin had failed to bring his action within what it deemed the applicable six-year statute of limitations period, 28 U.S.C. § 2401(a). The Government emphasized that this latter provision conditioned the waiver of sovereign immunity found in § 2410 and barred all civil actions against the United States ''unless the complaint is filed within six years after the right of action first accrues.'' 28 U.S.C. § 2401(a). In the Government's estimation, Mr. Macklin had failed to comply with this requirement, thereby barring his action against the United States.[4]

After considering the parties' submissions, the district court dismissed Mr. Macklin's action. According to the district court, the Government correctly asserted that 28 U.S.C. § 2401(a) conditioned the waiver of sovereign immunity found in 28 U.S.C. § 2410. Given this conclusion, Mr. Macklin's action against the Government could proceed no further. In particular, the district court noted that Mr. Macklin's claim accrued on August 6, 1993, the date on which the IRS filed the nominee lien on the Waukesha property. Having filed his complaint six years after this event, November 16, 1999, Mr. Macklin brought his claim outside the applicable statute of limitations period, rendering his action time-barred.

II. DISCUSSION

[1] Mr. Macklin submits that he properly invoked the waiver of sovereign immunity embodied in 28 U.S.C. § 2410, thereby allowing his quiet title action against the United States to proceed. To maintain a viable claim against the United States in federal court, a party must satisfy two requirements. In particular, the plaintiff not only must identify a statute that confers subject matter jurisdiction on the district court but also a federal law that waives the sovereign immunity of the United States to the cause of action. *See Harrell v. United States*, 13 F.3d 232, 234 [73 AFTR 2d 94-630] (7th Cir. 1993); *Arford v. United States*, 934 F.2d 229, 231 [67 AFTR 2d 91-1135] (9th Cir. 1991). Failure to satisfy either requirement mandates the dismissal of the plaintiff's claim.

A.

Because the parties' jurisdictional statements to this court proved problematic, we must consider whether Mr. Macklin has satisfied his initial obligation: identifying a federal statute that conferred subject matter jurisdiction on the district court over this type of action.[5] The parties operate on the premise that 28 U.S.C. § 2410 serves not only as a waiver of sovereign immunity but also as a grant of subject matter

[3] Mr. Macklin submitted that the underlying tax assessment against Gerald was without merit, rendering the lien invalid. He also alleged that neither he nor Gerald had received adequate notice that the lien would be filed against the Waukesha property.

[4] In response to the Government's motion to dismiss, Mr. Macklin filed a motion for summary judgment.

[5] Federal courts ''have an obligation—regardless of the arguments advanced to them by the parties—to assure themselves of their own jurisdiction.'' *Kelly v. United States*, 29 F.3d 1107, 1113 (7th Cir. 1994).

jurisdiction on the district courts.[6] This provi-sion does not serve this dual purpose. "All [§ 2410] does is waive sovereign immu-nity. It does not authorize quiet title suits; it does not confer federal jurisdiction over them; it merely clears away the obstacle that sovereign immunity would otherwise place in the path of such a suit." *Harrell*, 13 F.3d at 234. Simply put, the parties, particularly the plaintiff, have failed to identify in their pleadings or briefs to this court a federal statute that conferred sub-ject matter jurisdiction on the district court over this quiet title action.

We have noted, however, that "[a] court's discretion to dismiss for lack of subject matter jurisdiction when the plaintiff could have pleaded the existence of jurisdiction and when in fact such jurisdiction exists, should be exercised sparingly." *Hoefferle Truck Sales, Inc. v. Divco-Wayne Corp.*, 523 F.2d 543, 549 (7th Cir. 1975). In this case, the contents of Mr. Macklin's complaint indicate that jurisdiction was proper under 28 U.S.C. § 1340—a statute conferring original jurisdiction on the district courts in any action arising under the internal revenue laws of the United States. *See* 28 U.S.C. § 1340. In particular, through his complaint, Mr. Macklin alleged that "numerous defects in the lien and lien filing procedures" rendered the tax lien on the Waukesha property invalid. R.13. Federal law, specifically provisions of the federal Internal Revenue Code and its accompanying regulations, dictates the form and content of a federal tax lien. *See United States v. Union Cent. Life Ins. Co.*, 368 U.S. 291, 294–95 [8 AFTR 2d 5971] (1961); *Griswold v. United States*, 59 F.3d 1571, 1578 n.15 [76 AFTR 2d 95-5832] (11th Cir. 1995); *TKB Int'l, Inc. v. United States*, 995 F.2d 1460 [72 AFTR 2d 93-5132], 1464 (9th Cir. 1993); *see alsoinfra* footnote 8. Consequently, despite the defects in the parties' jurisdictional statements, Mr. Macklin's claim satisfies the requirements of 28 U.S.C. § 1340.

B.

Turning to the second requirement, the district court concluded that, because Mr. Macklin filed an untimely complaint, he failed to invoke properly the waiver of sovereign immunity contained in 28 U.S.C. § 2410. Mr. Macklin contests this conclusion. In particular, he emphasizes that the text of § 2410 neither references nor contains a statute of limitations period. Based on this omission, he theorizes that quiet title actions may be brought against the United States at any time. In response, the Government asserts that 28 U.S.C. § 2401(a), a catch-all statute of limitations provision, conditions 28 U.S.C. § 2410's waiver of sovereign immunity.

1.

It is axiomatic that the United States as sovereign cannot be sued without its consent. *See United States v. Dalm*, 494 U.S. 596, 608 [65 AFTR 2d 90-1210] (1990). If the Government does waive its sovereign immunity, it alone dictates the terms and conditions on which it may be sued. Consequently, depending upon the statute at issue, a plaintiff may have to satisfy certain technical pleading requirements, *see* 28 U.S.C. § 2410(b), to waive his right to a jury trial, *see* 28 U.S.C. § 2402, or to file his claim within an applicable statute of limitations period, *see* 28 U.S.C. § 2409a(g), to invoke properly the United States' waiver of sovereign immunity.

Under 28 U.S.C. § 2410, Congress has waived the Government's sovereign immunity to a limited class of civil actions. In particular, § 2410 provides in part: "[T]he United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other

[6] Before this court, Mr. Macklin also premised the district court's subject matter jurisdiction on 28 U.S.C. § 1346(f). However, that grant of jurisdictional authority is inapplicable to the present case. Under 28 U.S.C. § 1346(f), the "district courts shall have exclusive original jurisdiction of civil actions under [28 U.S.C.] section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States." 28 U.S.C. § 1346(f). In turn, 28 U.S.C. § 2409a waives the sovereign immunity of the United States in civil actions "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. § 2409a. Indeed, the provision states that "this section does not . . . apply to or affect actions which may be or could have been brought under section[ ] . . . 2410 of this title." *Id.* Because Mr. Macklin's claim is an action pursuant to § 2410, rather than § 2409a, the jurisdictional grant found in 28 U.S.C. § 1346(f) is inapplicable to his action.

lien.'' 28 U.S.C. § 2410(a)(1). As with other statutory waivers of sovereign immunity, § 2410 places certain conditions on the Government's consent to suit. For instance, if the quiet title action involves a federal tax lien, ''the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed.''[7] 28 U.S.C. § 2410(b). As Mr. Macklin notes, the text of § 2410 does not contain one common condition to a waiver of sovereign immunity, a statute of limitations period.

However, within the chapter containing § 2410, Congress created a general statute of limitations provision that governs civil actions filed against the United States. Often termed a catch-all statute of limitations provision, 28 U.S.C. § 2401(a) provides: ''Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.'' 28 U.S.C. § 2401(a). The federal courts have applied this limitations period to a wide variety of actions against the Government, including claims arising under the Administrative Procedure Act, *Wind River Mining Corp. v. United States*, 946 F.2d 710, 712–13 (9th Cir. 1991); *see also Vill. of Elk Grove v. Evans*, 997 F.2d 328, 331 (7th Cir. 1993), the Freedom of Information Act, *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987), and even state contract law, *see Victor Foods, Inc. v. Crossroads Econ. Dev. of St. Charles County, Inc.*, 977 F.2d 1224, 1226 (8th Cir. 1992) (dismissing action against Small Business Administration for failure to comply with limitations period in § 2401(a)). Indeed, as one court observed, ''the words 'every civil action' mean what they say . . . [.] § 2401(a) applies to all civil actions whether legal, equitable or mixed.'' *Spannaus*, 824 F.2d at 55.

The plain terms of § 2410 contemplate that the United States is amenable to ''any civil action or suit'' seeking to quiet title to property in which the Government has an interest. Mr. Macklin's claim is unquestionably a civil action against the United States, rendering 28 U.S.C. § 2401(a) applicable to this action. Moreover, as a matter of statutory construction, it is sensible for § 2401(a) to provide the applicable limitations period for § 2410. Both are located in the same statutory chapter addressing the United States as a party to an action. As such, we conclude that 28 U.S.C. § 2401(a) provides the applicable statute of limitations period for actions filed against the United States under 28 U.S.C. § 2410. *See Miller v. Tony & Susan Alamo Found.*, 134 F.3d 910, 915 [81 AFTR 2d 98-482] (8th Cir. 1998) (stating that limitations period in 28 U.S.C. § 2401(a) governs actions under 28 U.S.C. § 2410); *Fid. & Deposit Co. of Maryland v. City of Adelanto*, 87 F.3d 334, 335 n.2 [78 AFTR 2d 96-5069] (9th Cir. 1996) (same); *Nesovic v. United States*, 71 F.3d 776, 778 [77 AFTR 2d 96-435] (9th Cir. 1995) (same).

Mr. Macklin brought this action against the United States over six years after his cause of action accrued. In particular, during August 1993, the IRS not only filed a notice of federal tax lien against the Waukesha property in the Register of Deeds' Office for Waukesha County[8] but also notified Mr. Macklin of its actions in writ-

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[7] Mr. Macklin's complaint in this case failed to satisfy these pleading requirements. Indeed, the Government noted this deficiency in its motion to dismiss; yet, Mr. Macklin has never taken any action to amend the deficiencies in his pleadings. We note that this deficiency, standing alone, would support the dismissal of his action against the United States. *See Dahn v. United States*, 127 F.3d 1249, 1251 [80 AFTR 2d 97-7631] (10th Cir. 1997).

[8] Mr. Macklin submits that the lien was not properly filed because its form and content failed to conform to Wisconsin law. This contention is without merit. It is well-settled that federal, not state law, governs the form and content of a federal tax lien. *See United States v. Union Cent. Life Ins. Co.*, 368 U.S. 291, 294–95 [8 AFTR 2d 5971] (1961). Federal regulations provide that a federal tax lien on real property shall be filed on ''Form 668, 'Notice of Federal Tax Lien Under Internal Revenue Laws.''' Treas. Reg. 301.6323(f)-1(d). Indeed, the provision further states:

> Such notice is valid notwithstanding any other provision of law regarding the form or content of a notice of lien. For example, omission from the notice of lien of a description of the property subject to the lien does not affect the validity thereof even though State law may require that the notice contain a description of the property subject to the lien.

Id. Mr. Macklin does not dispute that the lien complied with the requirements of this regulation or Form 668.

ing. Yet, he did not commence this action until November 1999, six years after his claim accrued. Absent applicability of some toll-ing or accrual doctrine to this case, Mr. Macklin failed to file his claim within § 2401(a)'s limitations period.[9]

2.

Despite failing to file his complaint within six years of when the cause of action accrued, Mr. Macklin asserts that his claim remains timely. More precisely, Mr. Macklin submits that equitable tolling or the continuing wrong doctrine save his otherwise time-barred claim. The Government contests the applicability of either principle to this case.

a.

We first turn to Mr. Macklin's contention that § 2401(a) is subject to equitable tolling. Although this statutory provision conditions § 2410's limited waiver of sovereign immunity, the Supreme Court has made clear that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). Because this rule merely establishes a presumption, "Congress ... may provide otherwise if it wishes to do so."[10] *Id.* Simply put, in assessing the doctrine's applicability to a particular action against the United States, we must inquire: "Is there good reason to believe that Congress did *not* want the equitable tolling doctrine to apply?" *United States v. Brockamp*, 519 U.S. 347, 350 [79 AFTR 2d 97-986] (1997) (emphasis in original).

Irwin's progeny provides guidance as to the factors indicative of when equitable tolling should not apply to an action against the United States. In *United States v. Brockamp*, 519 U.S. 347 [79 AFTR 2d 97-986] (1997), a taxpayer, relying on *Irwin*, submitted that Section 6511 of the Internal Revenue Code[11] was subject to equitable tolling. The Supreme Court rejected the taxpayer's position, concluding that there were "strong reasons for answering *Irwin*'s question in the Government's favor." *Brockamp*, 519 U.S. at 350. In reaching this conclusion, the Supreme Court emphasized several factors, including: the emphatic and technical language of the provision's time limits; "the iteration of the limitations in both procedural and substantive forms"; and the explicit exceptions to the provision's basic limitations period. *Brockamp*, 519 U.S. at 351–52. Similarly, in *United States v. Beggerly*, 524 U.S. 38 (1998), the Court concluded that equitable tolling did not apply to actions brought under the Quiet Title Act ("QTA"), 28 U.S.C. § 2409a. In particular, the Court noted that the statute: had a built in tolling provision; contained a lengthy, twelve-year statute of limitations period; and dealt with the ownership of land. *See Beggerly*, 524 U.S. at 49.

Relying on the guideposts set forth in these cases, the Government urges us to conclude that equitable tolling does not apply to § 2401(a). In particular, the Government notes several similarities between this provision and the statutes at issue in *Brockamp* and *Beggerly*. The United States observes that § 2401(a), like the QTA, already provides a generous statute of limitations provision for plaintiffs. In addition, § 2401(a) contains a tolling provision that establishes special rules for those "under legal disability or beyond the seas at the time the claim accrues." 28 U.S.C. § 2401(a). Moreover, Mr. Macklin's claim concerns land burdened by a federal tax lien—a special type of security interest subject to the intricacies of the Internal Revenue Code. At the same time, in contrast to the statutes at issue in *Brockamp* and *Beggerly*, § 2401(a) is a catch-all statute of limitations provision that is largely devoid of nuance.

Because Mr. Macklin has failed to establish a case for equitable tolling in this

[9] In his brief to this court, Mr. Macklin implicitly concedes this point. *See* Appellant's Br. at 22 ("In any event, if in fact the court finds that the limiting provisions contained in § 2401(a) apply, the time limitation provided by the statute was equitably tolled ....").

[10] Nevertheless, *Irwin* also reaffirmed that a time restriction on suit against the Government "is a condition to the waiver of sovereign immunity and thus must be strictly construed." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990).

[11] Section 6511 established a limitations period for filing tax refund claims.

action, we decline to address whether Congress would not want the doctrine to apply to 28 U.S.C. § 2401(a). *See, e.g., LaBonte v. United States*, 233 F.3d 1049, 1053 [86 AFTR 2d 2000-7168] (7th Cir. 2000) (declining to decide applicability of equitable estoppel in a wrongful tax levy action because it was clear plaintiff was not entitled to the remedy); *Flight Attendants Against UAL Offset (FAAUO) v. Comm'r of Internal Revenue*, 165 F.3d 572, 577 [83 AFTR 2d 99-485] (7th Cir. 1999) (''Because the association has failed to make a case for equitable tolling, we need not decide (as the parties invite us to do) whether the doctrine may ever be invoked in a federal tax case.''). ''The doctrine of equitable tolling permits a prospective plaintiff to delay filing suit beyond the statute of limitations if despite due diligence on his part he cannot obtain the information he needs in order to determine, in time to sue within the deadline, whether he has a claim on which a suit can be founded.'' *Flight Attendants Against UAL Offset (FAAUO)*, 165 F.3d at 575. In this case, Mr. Macklin had information sufficient to maintain his action as early as August 1993. At that time, the Government informed Mr. Macklin via letter that it had filed a nominee lien on the Waukesha property. Even if the filing had not given adequate notice, this letter would have provided a reasonable person with sufficient information to recognize that he had a potential quiet title action against the United States. Simply put, other than his own conclusory statements, Mr. Macklin has proffered no evidence that the doctrine applies in this case.[12]

b.

We also must reject Mr. Macklin's contention that the continuing violation doctrine applies to this case. Unlike tolling principles, this doctrine is not equitable in nature; rather, it is ''best characterized as a doctrine governing the accrual of a claim.'' *Pitts v. City of Kankakee*, 267 F.3d 592, 595 (7th Cir. 2001); *see Heard v. Sheahan*, 253 F.3d 316, 319 (7th Cir. 2001). In general terms, this doctrine permits a plaintiff in certain circumstances to reach back to the beginning of a claim ''even if that beginning lies outside of the statutory period.'' *Heard*, 253 F.3d at 319. For instance, if the injury becomes apparent only in light of later events or if it is unreasonable ''to require or even permit [the plaintiff] to sue separately over every incident of the defendant's unlawful conduct,'' a continuing violation theory may render the action timely. *Id.* However, if a single incident merely produces a lingering injury, the doctrine generally may not be invoked to save an otherwise stale claim. *See id.* In this case, Mr. Macklin knew of the lien in August 1993; nothing prevented him from recognizing the potential injury at that time, nor would later events provide any greater insight into his possible cause of action. Rather, Mr. Macklin merely notes the lingering injury of a single alleged wrong, the filing of the tax lien. The continuing violation doctrine has no applicability in such cases. *See, e.g., Pitts*, 267 F.3d at 595 (finding no continuing violation when city erected sign stating ''Slum Property'' on the plaintiff's lawn); *Nesovic v. United States*, 71 F.3d 776, 778 [77 AFTR 2d 96-435] (9th Cir. 1995) (finding no continuing violation in Government's decision to file a tax lien on the plaintiff's property). Simply put, neither of these doctrines saves Mr. Macklin's time-barred claim. Consequently, the district court properly dismissed this action.

Conclusion

Mr. Macklin failed to file his action against the United States within the applicable statute of limitations period. Accordingly, we affirm the dismissal of his action.

Affirmed

A true Copy:

Teste:

[12] In some sense, Mr. Macklin appears to raise an equitable estoppel, rather than an equitable tolling argument. In particular, in his opening brief, he notes that he had entered negotiations with the Government concerning the possible removal of the tax lien from the Waukesha property. Although Mr. Macklin never elaborated on the point, his opening brief intimates that these negotiations dissuaded him from filing his action. However, in his reply brief, Mr. Macklin specifically disavowed any reliance on the doctrine of equitable estoppel, stating that he ''purposefully opts for using the doctrine of equitable tolling as opposed to the related theory of equitable estoppel.'' Appellant's Reply Br. at 8 n.5. Consequently, he has waived this argument.

Clerk of the United States Court of Appeals for the Seventh Circuit

¶2002-5311

Richard D. WARREN; Elizabeth K. WARREN, PETITIONERS-APPELLEES v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 00-71217, Aug. 26, 2002. Appeal from Tax Court, (2000) 114 TC 343 (opinion by Colvin, *J.*), dismissed. Years 1993, 1994, 1995. Decision for Taxpayers.

1. Income exclusions—parsonage allowance—rental value vs. amount used to provide home—appeals—intervention. Pursuant to stipulation, govt.'s appeal from Tax Court's declaratory decision that minister was entitled under IRC §107(2) to exclude from gross income entire amount of his annual cash housing allowance was dismissed. And, amicus's motion to intervene and challenge exclusion's constitutionality was denied: amicus wasn't entitled to intervention as of right where he wasn't affected by instant issue of minister's individual tax liability; and permissive intervention wasn't warranted where complex issues regarding exclusion's constitutionality and potential for abuse would be better explored in traditional procedural posture before district court. *Reference:* United States Tax Reporter ¶1075.01(25); 74,825.04(55). IRC §107; 7482.

Eileen J. O'Connor, Gilbert S. Rothenberg, Andrea R. Tebbets, Judith A. Hagley, United States Department of Justice, Washington, DC, for the respondent-appellant.
Arthur A. Oshiro, Saavedra & Zufelt, Long Beach, California, and John C. Eastman, the Claremont Institute Center for Constitutional Jurisprudence, Orange, California, for the petitioners-appellees.
Frank Sommerville, Hammar & Sommerville, Houston, Texas, for amicus National Association of Church Business Administration, et al.
Erwin Chemerinsky, University of Southern California Law School, Los Angeles, California, as court-appointed amicus.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Appeal from the United States Tax Court

Before: James R. Browning, Stephen Reinhardt, and Richard C. Tallman, Circuit Judges.

ORDER

Concurrence by Judge Tallman

FOR PUBLICATION

Tax Court No. 14924-98

Professor Erwin Chemerinsky has a filed a motion to intervene in this appeal, while the parties have filed a stipulation of dismissal under Fed. R. App. P. 42(b). We deny Prof. Chemerinsky's motion and dismiss this appeal.

Rev. Richard D. Warren received approximately $80,000 annually from his church as a cash housing allowance. He claimed this entire amount as a tax exclusion under 26 U.S.C. § 107(2), which provides generally that rental allowances paid to "ministers of the gospel" are not taxable income. The IRS filed a notice of deficiency, claiming that his exclusion was excessive because it exceeded his home's fair rental value. Rev. Warren sought a declaration in Tax Court that he was entitled to claim the full amount as an exclusion, and a majority of the Tax Court agreed. *See Warren v. Commissioner*, 114 T.C. 343 (2000). The government appealed.

After oral argument, we appointed Prof. Chemerinsky as amicus.[1] We requested supplemental briefing from the parties and amici on whether we should consider the constitutionality of § 107(2) and, if so, whether Rev. Warren's claimed exclusion violates the Establishment Clause because it provides a tax benefit available only to "ministers of the gospel." *See Warren v. Commissioner*, 282 F.3d 1119 (9th Cir. 2002). On May 20, 2002, the President

[1] We had previously allowed the National Association of Church Business Administration to participate as amicus on behalf of Rev. Warren. Other organizations have now also sought leave to participate as amici. In light of this disposition, we deny these motions as moot.

signed into law the Clergy Housing Allowance Clarification Act of 2002, Pub. L. No. 107-181, 116 Stat. 583, which resolved the question of statutory interpretation raised by the parties. Its sponsors explained that this bill was designed to prevent this Court from reaching the constitutionality of § 107(2).[2]

[1] On May 22, 2002, the parties filed a stipulation to dismiss this appeal under Fed. R. App. P. 42(b). On the same day, Prof. Chemerinsky filed an opposition to dismissal and a notice of motion to intervene, and on May 29 filed the actual motion to intervene as a private taxpayer. Although Prof. Chemerinsky acknowledges that his request is unusual, he argues that he should be allowed to intervene to bring a larger facial challenge to the constitutionality of § 107(2) and prevent the government from evading this question. As that issue has already been fully briefed, he contends that intervening now would be more efficient than filing a new taxpayer suit for declaratory and injunctive relief that would undoubtedly return to this Court.

Before enforcing the stipulated dismissal under Rule 42(b), we first consider whether Prof. Chemerinsky may properly intervene to become a party.[3] We assume arguendo that in an appropriate circumstance, a nonparty could intervene at this stage of an appeal. *Cf. Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1319 (9th Cir. 1997) (holding that putative class member could intervene for the purpose of appeal after parties settled claims and district court entered final judgment); *United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 719–20 (9th Cir. 1994) (holding that nonparty could intervene for appeal after parties filed stipulation of dismissal in district court). Here, however, Prof. Chemerinsky seeks to go further and intervene to raise an issue not raised by the parties as an alternative to filing a separate taxpayer action on his own behalf in district court. In the exercise of our discretion, we deny his motion.

First, Prof. Chemerinsky does not demonstrate an entitlement to intervention as of right under Fed. R. Civ. P. 24(a). Under Rule 24(a), Prof. Chemerinsky must demonstrate a "'significant protectable interest' relating to the property or transaction that is the subject of the action." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). Prof. Chemerinsky, however, is not directly affected by the subject matter of this litigation—Rev. Warren's individual tax liability.[4] Instead, he has a larger but more generalized interest as a taxpayer under *Flast v. Cohen*, 392 U.S. 83 (1968), in ensuring that the government does not provide a tax subsidy for ministers in violation of the Establishment Clause. Neither the voluntary dismissal here nor the passage of the Clergy Housing Allowance Clarification Act resolves the constitutionality of § 107(2). Because Prof. Chemerinsky may raise this issue through a separate lawsuit, our denial of intervention will not impair his ability to protect his interest as a taxpayer.

Second, Prof. Chemerinsky fails to articulate a compelling basis for permissive intervention under Fed. R. Civ. P. 24(b), at this stage of the proceedings. He argues that intervention is appropriate under *Benavidez v. Eu*, 34 F.3d 825 (9th Cir. 1994), where we held that a nonparty may intervene in an existing district court action and raise new claims as an alternative to filing a separate action:

> A court has discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims raised by the intervenor. This dis-

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[2] The amendment adopts the IRS's interpretation of the statute and provides that the housing allowance is limited to the fair rental value of a minister's housing. However, it also specifies that this interpretation applies only prospectively and not to the tax years in question here, 1993–1995. In the stipulation to dismiss the appeal, the IRS agreed—contrary to the government's position prior to the enactment of the statute—to allow Warren to deduct the full $80,000 cash allowance he received annually from his church for the years in question.

[3] As a practical matter, Chemerinsky filed his motion to intervene simultaneously with the stipulation of dismissal, as soon as he learned of the parties' agreement to dismiss. *Cf. United States v. Carpenter*, ___ F.3d ___, ___ (9th Cir. 2002) ("The intervenors acted as soon as they had notice that the proposed settlement was contrary to their interests.").

[4] We questioned the constitutionality of § 107(2) not because it was a freestanding issue that needed resolution, but only as necessary to determine whether the Tax Court had erred when it issued declaratory relief stating that Rev. Warren could exclude his entire housing allowance from taxation. As the government has abandoned its claims against Rev. Warren, we have no occasion to resolve this difficult issue now.

> cretionary procedure is properly utilized in a case in which it appears that the intervenor has a separate and independent basis for jurisdiction and in which failure to adjudicate the claim will result only in unnecessary delay. By allowing the suit to continue with respect to the intervening party, the court can avoid the senseless delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are.

Id. at 830 (quoting *Fuller v. Volk*, 351 F.2d 323, 328–29 (3d Cir. 1965)) (alternations and internal quotations omitted). However, we have never considered whether an intervenor may bypass a lower court altogether and raise new claims for the first time in an existing appeal.

We see no prudential reason for al-lowing intervention at this time. Given the weighty nature of Prof. Prof. Chemerinsky's constitutional arguments, they are better suited for consideration in the first instance in a traditional procedural posture before a district court. If Prof. Chemerinsky chooses to file a separate taxpayer action, the new parties could plead their claims and defenses more specifically and obtain whatever limited discovery and evidentiary proceedings are necessary.[5] Further, because the issues have already been fully developed and primarily involve a question of law, we have every confidence that the parties could proceed expeditiously in the district court.[6] We therefore see no need to allow the request for intervention merely for the sake of judicial efficiency.

Accordingly, we DENY Prof. Chemerinsky's motion to intervene without prejudice to his right to file a separate civil action. Because every correct party has stipulated to dismissal, we ORDER the clerk to dismiss this appeal. The parties shall bear their own costs.

APPEAL DISMISSED.

TALLMAN, Circuit Judge, specially concurring:

I concur only in the judgment of the Court. Because the parties had previously stipulated to a dismissal, pursuant to Federal Rule of Appellate Procedure 42(b), the Clerk should simply dismiss the appeal. The Court need not consider Professor Chemerinsky's subsequent motion to intervene because it is moot. Nothing more need be said.

¶2002-5312

CHASE MANHATTAN BANK, N.A. v. GOVERNMENT OF THE VIRGIN ISLANDS, Bureau of Internal Revenue, APPELLANT. U.S. Court of Appeals, Third Circuit, (CA3) No. 01-4317, Aug. 13, 2002. District Court, (2001, DC Virgin Islands) 88 AFTR 2d 2001-6845, 173 F Supp 2d 386, reversed and remanded. Years 1989, 1990, 1991, 1994, 1995, 1996, 1997. Decision against Taxpayer.

1. Interest on overpayments—applicable law—U.S. possession individual income tax; Virgin Islands (VI). District court improperly determined that VI Bureau of Internal Revenue (VIBIR) was required to calculate bank's overpayment interest according to VI law's 12% rate rather than lower federal rate: ''mirror Code'' required, in absence of jurisdictional confusion, manifest incompatibility or equality principle violation, that federal rate be applied, and wasn't dependent on or subject to any purported substantive/non-substantive distinctions between IRC

[5] We assume, without deciding, that the Anti-Injunction Act, 26 U.S.C. § 7421(a), and Declaratory Judgment Act, 28 U.S.C. § 2201(a), do not pose a jurisdictional bar. *See In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 584 [78 AFTR 2d 96-7021] (4th Cir. 1996) (''The purposes of the two statutory provisions are to allow the Federal Government to assess and collect allegedly due taxes without judicial interference and to compel taxpayers to raise their objections to collected taxes in suits for refunds.''). Prof. Chemerinsky is not seeking injunctive and declaratory relief to avoid paying taxes, but to challenge the constitutionality of an exclusion that singles out ministers for favorable tax treatment. Further, because he is not litigating his own tax liability, he does not have the alternative of paying a tax and then suing for a refund. *See South Carolina v. Regan*, 465 U.S. 367, 584 [53 AFTR 2d 84-732] (1984) (noting that the Anti-Injunction Act ''was not intended to bar an action where . . . Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax''); *Perlowin v. Sassi*, 711 F.2d 910, 911 [52 AFTR 2d 83-5654] (9th Cir. 1983) (interpreting the Declaratory Judgment Act as coextensive with the Anti-Injunction Act).

[6] Prof. Chemerinsky argues that we should allow intervention because the facts of this case provide a concrete factual example regarding the use of § 107(2), including its potential for abuse, and because Congress's effort to moot this case raises further questions about the constitutionality of § 107(2). We note that a district court in a subsequent action may take judicial notice of the circumstances of this appeal, including the facts previously stipulated by the government. Consequently, we have no need to consider these issues now.

provisions. *Reference:* United States Tax Reporter ¶66,115.01(3); 66,215.01(3); 76,545.01(20). IRC §6611; 6621; 7654.

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,

Appeal from the District Court of the Virgin Islands Division of St. Thomas (D.C. Civil Action No. 00-cv-00234)

District Judge: Honorable Thomas K. Moore

Before: AMBRO, FUENTES AND GARTH, Circuit Judges

OPINION OF THE COURT

AMBRO, Circuit Judge:

PRECEDENTIAL

At issue in this case is the interest rate that should apply to the overpayment of income tax owed to the Virgin Islands' taxing authority. The Virgin Islands Bureau of Internal Revenue (the "VIBIR") appeals the District Court of the Virgin Islands' application of the Virgin Islands Code rate of 12%, rather than the lower federal rate. We reverse.

I. Background

The facts of this case are not contested. Chase Manhattan Bank, N.A. ("Chase") overpaid its income taxes for the years 1989, 1990, and 1991. In 1994 Chase and the VIBIR agreed that Chase was owed a refund of $3,869,888, and that the VIBIR would accordingly allow Chase a $2 million tax credit for both tax years 1994 and 1995. This amount included an interest component, calculated at the federal statutory rate. To the extent that Chase owed less than $2 million in taxes in either year, the VIBIR would either carry over the balance or remit it to Chase. Until Chase received full payment, interest would continue to accrue at "the appropriate Bureau statutory rate and method for paying interest on overpayments."

Chase brought suit in the District Court because it alleged that the VIBIR incorrectly calculated the interest on the overpayments using the rate specified by the Internal Revenue Code (the "IRC") of the United States rather than using the higher rate set by the Virgin Islands Code. The IRC provides that "[i]nterest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621." 26 U.S.C. § 6611(a). Section 6621 fixes the interest rate on overpayment at "the Federal short-term rate ... plus ... 2 percentage points in the case of a corporation." 26 U.S.C. § 6621(a)(1). It further provides that "[t]o the extent that an overpayment of tax by a corporation for any taxable period ... exceeds $10,000," the corporate rate is only "0.5 percentage point" above the federal short term rate, rather than "2 percentage points." Id. The Virgin Islands Code provides that "[i]nterest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 12 percent per

annum.'' 33 V.I.C. § 1251. The Virgin Islands Code defines ''internal revenue tax'' as''any tax imposed by this subtitle ... and the Virgin Islands tax law.'' 33 V.I.C. § 1931(7). ''Virgin Islands tax law'' is defined as ''so much of the United States Internal Revenue Code as was made applicable in the Virgin Islands by the Act of Congress entitled 'An Act making appropriations for the naval service ... (48 U.S.C. § 1937).''' 33 V.I.C. § 1931(15).

The District Court held that only the substantive tax provisions of the IRC apply to Virgin Islands income tax law. Mem. Op. at 6. Because the Court found interest rates on taxpayers' overpayments to be nonsubstantive, it held that the Virgin Islands Code's 12% interest rate governed.

The District Court's order granting Chase's motion for summary judgment, and denying the VIBIR's cross-motion for summary judgment, was a final one. We have jurisdiction under 28 U.S.C. § 1291. Our review is plenary. Am. Med. Imaging Corp. v. St. Paul Fire & Marine Ins., 949 F.2d 690 (3d Cir. 1991).

II. Discussion

[1] Virgin Island income tax law generally tracks U.S. federal income tax law.

> The income-tax laws in force in the United States of America and those which may hereafter be enacted shall be held to be likewise in force in the Virgin Islands of the United States, except that the proceeds of such taxes shall be paid into the treasuries of said islands.

48 U.S.C. § 1397. This relationship is known as the ''mirror code'' because Virgin Islands law is statutorily designed to mirror stateside law. Danbury, Inc. v. Olive, 820 F.2d 618, 620–21 [59 AFTR 2d 87-1137] (3d Cir. 1987) (''Congress create[d] a separate taxing structure for the Virgin Islands 'mirroring' the provisions of the federal tax code except as to those provisions which are incompatible with such a separate tax structure.'') (citation omitted). The Virgin Islands legislature retains the power to ''amend, alter, modify, or repeal any local law or ordinance ... and to enact new laws not inconsistent with any law of the United States applicable to the Virgin Islands.'' 48 U.S.C. § 1574. Virgin Islands residents fulfill their U.S. tax obligations by paying all income taxes to the Treasury of the Virgin Islands. Abramson Enters. v. Gov't of the V.I., 994 F.2d 140, 142 [71 AFTR 2d 93-2054] (3d Cir. 1993).

Cracks sometimes appear when one jurisdiction's laws mirror another's, and courts have developed three rules of construction to guide the mirroring mechanism. The simplest is the substitution principle, whereby the words ''Virgin Islands'' are substituted for ''United States.'' Abramson, 994 F.2d at 142. Second, the equality principle dictates that the tax burden on individuals in the Virgin Islands be equivalent to what the United States would collect on the same income if the taxpayer resided in the United States. Id. (citing Johnson v. Quinn, 821 F.2d 212, 214 [60 AFTR 2d 87-5172] (3d Cir. 1987)). Finally, the manifest incompatibility principle requires that the IRC should not apply to Virgin Islands tax law if the result is ''manifestly inapplicable or incompatible with a separate territorial income tax.'' Id. (quoting Chicago Bridge & Iron Co. v. Wheatley, 430 F.2d 973, 976 [26 AFTR 2d 70-5114] (3d Cir. 1970)).

The mirror code unambiguously applies ''[t]he income-tax laws in force in the United States of America and those which may hereafter be enacted'' to the Virgin Islands tax law. 48 U.S.C. § 1397. Because the IRC assigns to overpayments of interest the federal short-term rate plus 0.5% to corporations owed payments of over $10,000, that is the rate at which Chase's interest accrues. This does not render § 1251's 12% rate void, however. The Virgin Islands legislature has the power ''to enact new laws not inconsistent with any law of the United States applicable to the Virgin Islands.'' 48 U.S.C. § 1574. Section 1251's 12% rate applies to all ''internal revenue'' taxes of the Virgin Islands aside from income tax,

i.e., local taxes such as property taxes, excise taxes, and inheritance taxes. 33 V.I.C. § 1251. As to overpayments of income tax, however, the mirror code calls for the federal interest rate to apply.[1] 26 U.S.C. § 6611(a).

The District Court's distinction between substantive and nonsubstantive law is unsupported by case law. To apply it would violate the equality principle because corporations in the Virgin Islands would be entitled to a greater overpayment than those organized within the mainland United States. But more to the point, most of our cases do not apply "nonsubstantive" tax provisions as the District Court did. Abramson, 994 F.2d at 140 [71 AFTR 2d 93-2054]; Johnson, 821 F.2d at 214; Danbury, 820 F.2d at 618 [59 AFTR 2d 87-1137]; Vitco, Inc. v. Government of the Virgin Islands, 560 F.2d 180 [40 AFTR 2d 77-5482] (3d Cir. 1977); HMW Indus. v. Wheatley, 504 F.2d 146 [34 AFTR 2d 74-5921] (3d Cir. 1974). The District Court relied on the language in two cases, Chicago Bridge & Iron Co. v. Wheatley, 430 F.2d 973 [26 AFTR 2d 70-5114] (3d Cir. 1970), and Dudley v. Commissioner, 258 F.2d 182 [2 AFTR 2d 5419] (3d Cir. 1958), but overlooked contextual differences that distinguish them from the current case.

Chicago Bridge arose from a complication with the substitution principle. Section 922 of the IRC of 1954 contained a "special deduction" for "Western Hemisphere trade corporations," a term defined as "domestic" corporations all of whose business is done in several countries, including the West Indies. 430 F.2d at 974. A mainland corporation doing business in the Virgin Islands should therefore qualify for the deduction. The taxpayer in Chicago Bridge was such a mainland corporation. However, the Commissioner of Finance for the Virgin Islands applied § 922's term "domestic" literally and disallowed a Western Hemisphere special deduction to the corporation in its Virgin Islands tax return, reasoning that the taxpayer was not "a domestic corporation" to the Virgin Islands because it was a mainland corporation. "Relying upon this definition, the district court ruled that only Virgin Islands corporations, and not mainland corporations like the taxpayer, are entitled to the special deduction allowed by section 922 when computing their income tax liability to the Virgin Islands." Id. at 975.

We applied the equality principle to resolve the issue, and concluded that the statute allowed the corporate taxpayer's deduction. In holding this, we observed that "the literal terms of the Internal Revenue Code should be modified only by those nonsubstantive changes in nomenclature as are necessary to avoid confusion as to the taxing jurisdiction involved." Id. at 976 (emphasis added) (citation omitted). Second, we cited Sayre & Co. v. Riddell, 395 F.2d 407, 410 [21 AFTR 2d 1520] (9th Cir. 1968), a similar Ninth Circuit case involving Guam, and observed that although changes in nomenclature were appropriate "where necessary to effect the intent" of the law, "the purpose of the amended statute was to give Guam a separate, integral tax system, which would duplicate the United States' tax system in all substantive particulars." Chicago Bridge, 430 F.2d 976 (emphasis added). Third, we stated in a footnote that "the substantive provisions of the Internal Revenue Code were made applicable in the Virgin Islands by congressional enactment in the Naval Service Appropriation Act of 1922." 430 F.2d at 975 n.2 (emphasis added).

Chicago Bridge's language must be read in context. The opinion juxtaposes "substantive" provisions with "nonsubstantive changes in nomenclature ... necessary to avoid confusion as to the taxing jurisdiction involved." 430 F.2d at 976 (emphasis added). It nowhere suggests that only substantive, and not procedural, income tax law is to be mirrored. If anything, it equates nonsubstantive with jurisdictional, using the term "substantive" to ensure that the "intent"

[1] Additionally, the 1994 agreement between Chase and the VIBIR itself anticipated this result. The interest component built into its $3,869,888 refund amount was calculated at the federal rate, not at 12%.

of federal law is carried over into the Virgin Islands system by treating the mainland corporation as if it were filing in the United States.

In Dudley, the taxpayer received a notice of deficiency that informed him that he could appeal to the District Court of the Virgin Islands. 258 F.2d at 183. However, he filed a petition for redetermination in the Tax Court of the United States. We concluded that the Tax Court has limited jurisdiction, and is authorized only to hear petitions for redetermination after the Secretary of the Treasury of the United States (or his or her delegate) issues a deficiency notice. Id. Because it was the Head of the Tax Division of the Department of Finance of the Government of the Virgin Islands (not a delegate of the U.S. Secretary of the Treasury) that issued the deficiency notice, the Tax Court had no jurisdiction. Id. at 184.

The Dudley Court cited § 3811 of the then extant IRC of 1939, which provided:

> All provisions of the laws of the United States applicable to the administration, collection, and enforcement of the tax imposed by subchapter E of chapter 1 (including the provisions relating to The Tax Court of the United States) ... shall, in respect to such tax, extend to and be applicable in the Virgin Islands in the same manner and to the same extent as if the Virgin Islands were a State, and as if the term "United States" when used in a geographical sense included the Virgin Islands.

258 F.2d at 186–87. We concluded: "It thus appears from section 3811 that Congress understood that the provisions of the internal revenue laws of the United States relating to tax administration and enforcement, especially those relating to the Tax Court, were without application to the Virgin Islands." 258 F.2d at 187. The District Court cited this last sentence, omitting the phrase about the Tax Court, to argue that we articulated the nonsubstantive/substantive distinction, and only apply the mirror code to substantive income tax provisions. However, the reference in Dudley to "provisions of the internal revenue laws of the United States relating to tax administration and enforcement" described the jurisdictional problem of appeal to the incorrect court. It did not announce a wholesale division between substantive and procedural law. Like Chicago Bridge, at heart Dudley dealt with jurisdictional confusion.

In this context, the District Court's reading of our case law missed the mark. As detailed above, it isolated stray phrases in two opinions to infer a distinction between substantive and nonsubstantive provisions. But, as noted, Chicago Bridge counterposed substantive tax law provisions to mere changes in nomenclature to avoid jurisdictional confusion. 430 F.2d at 975–76. Dudley held that on the particular jurisdictional issue--which was the proper court of appeal--Virgin Islands law was applicable. 258 F.2d at 187. We have never enunciated a rule that only substantive U.S. income tax law is mirrored in the tax laws of the Virgin Islands. The Virgin Islands Code is to mirror the IRC, except where to mirror literally would lead to jurisdictional confusion, manifest incompatibility, or a violation of the equality principle. None is applicable here.

Furthermore, to adopt a distinction between substantive and nonsubstantive in the rarefied and rule-based world of income tax law simply invites confusion. To parse substance from procedure in this context is a chimeral endeavor. The law does not require such feats of us.[2]

* * * * *

No distinction exists in our case law between substantive and nonsubstantive provisions of the U.S. income tax law in the context of the mirror code, which dictates that we apply IRC § 6621's interest rate for overpayments rather than

[2] Because we hold that it is the federal rate that governs, we need not reach the issue of whether Chase breached its 1994 agreement with the VIBIR. Chase contends that the agreement was not a closing agreement (and therefore that it could not be in breach). It also correctly points out that the VIBIR did not raise the issue of the agreement before the District Court, so we should not consider it. See United States v. Gilchrist, 215 F.3d 333, 339 (3d Cir. 2000).

the 12% rate of the Virgin Islands Code. Accordingly, we reverse the District Court's order granting Chase's motion for summary judgment and denying the VIBIR's cross-motion, and remand with instructions to enter summary judgment in favor of the VIBIR.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

¶2002-5313

HOHENBERG BROS. COMPANY, A.C. Monk and Company, Inc., The Austin Tobacco Company, Inc., Cargill Americas, Inc., Cargill Citro-America, Inc., Cargill Fertilizer, Inc., Cargill, Incorporated, Carolina Leaf Tobacco Company, Inc., Dibrell Brothers, Inc., Excel Corporation, General Electric Company, K.R. Edwards Leaf Tobacco Company, Inc., Maclin-Zimmer-McGill Tobacco Co., Inc., Monk-Austin International, Inc., Thorpe-Greenville Export Tobacco Co., Inc., T.S. Ragsdale Company, Inc., Universal Leaf Tobacco Company, Inc., United States Steel International, Inc., United States Steel Mining Co., Inc., USX Corporation, USX Engineers & Consultants, Inc., BASF Corporation, BASF Magnetics Corporation, Akzo Nobel Chemicals, Inc., Reynolds Metals Company, Zeneca Inc., ISK Biosciences Corporation, Archer-Daniels-Midland Company, ADM/Growmark River Systems, Inc., Valley Grain Products, Inc., The Coleman Company, Hill's Pet Nutrition, Inc., Standard Commercial Tobacco Company, Inc., Carolina Trading Corporation, James I. Miller Tobacco Co., Inc., PMA Incorporated, The Tobacco Trading Corporation, W.A. Adams Company, American Honda Motor Co., Inc., Honda Trading America Corporation, BP Chemicals, Inc., CBS Corporation, Continental Grain Company, Contiquincy Bunge, L.L.C., Tacoma Export Marketing Company, Farmland Industries, Inc., Farmland Foods, Inc., Farmland Hydro, L.P., Tradigrain, Inc., Tradigrain, S.A., Geneva, Lexmark International, Inc., McDonnell Douglas Corporation, Monsanto Company, Solar Turbines Incorporated, EEC International, Inc., Ecca Calcium Products, Inc., Koch Carbon, Inc., Koch Refining Company, Olin Corporation, Physics International Company, Sterling Chemicals, Inc., IMC Global Operations, Inc., IMC-Agrico Company, and International Multifoods Corporation, PLAINTIFFS-APPELLANTS v. UNITED STATES, DEFENDANT-APPELLEE. U.S. Court of Appeals, Federal Circuit, (CA Fed Cir) 01-1460; -1461; -1462; -1463; -1464; -1465; -1466; -1467; -1468; -1469; -1470; -1471; -1472; -1473; -1474; -1475; -1476; -1477; -1478; -1479; -1480; -1481; -1482; -1483; -1484; -1485; -1486; -1487; -1488; -1489; -1490; -1491; -1492; -1493; -1494; -1495; -1496; -1497; -1498; -1499; -1500; -1501; -1502; -1503; -1504; -1505; -1506; -1507; -1508; -1509; -1510; -1511; -1512; -1513; -1514; -1515; -1516; -1517; -1518; -1519; -1520; -1521; -1522; -1523; -1524; -1525; -1526; -1527; -1528; -1529; -1530; -1531; -1532; -1533; -1534; -1535; -1536; -1537; -1538; -1539; -1540; -1541; -1542; and -1543, Aug. 26, 2002. Court of International Trade affirmed. Decision against Taxpayers.

1. Harbor Maintenance Tax (HMT)—exports—refunds—interest—sovereign immunity. Fed. Cir. affirmed decision that exporters weren't entitled to prejudgment interest on HMT refund that had been awarded pursuant to consent judgment and in accord with test case brought under 28 USC §1581(i): test case clearly established §1581(i) as jurisdictional basis for suit and that no express sovereign immunity waiver authorized interest on HMT refund; and taxpayers' request to amend consent judgment to change jurisdictional basis was properly denied where, by entering consent, they waived any future HMT-related claims against govt. Also, constitutional arguments were rejected.

Reference: United States Tax Reporter ¶66,115.01(3). USTR Excise Taxes ¶44,615.01(10). IRC §4461; 4462; 6611.

Daniel G. Jarcho, McKenna & Cuneo, L.L.P., of Washington, DC, argued for plaintiffs-appellants. With him on the brief were Peter Buck Feller and Joseph F. Dennin.

Jeffrey A. Belkin, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With him on the brief were Robert D. McCallum, Jr., Assistant Attorney General; David M. Cohen, Director; Jeanne E. Davidson, Deputy Director; and Todd A. Hughes, Assistant Director. Of counsel on the brief was Richard K. McManus, Office of the Chief Counsel, United States Customs Service, of Washington, DC.

United States Court of Appeals for the Federal Circuit,

Appealed from: United States Court of International Trade,

Judge Jane A. Restani

Before MAYER, Chief Judge, RADER, and BRYSON, Circuit Judges.

RADER, Circuit Judge.

In the context of refunds of the Harbor Maintenance Tax, the United States Court of International Trade denied Hohenberg Bros., Co.'s motion to amend the court's consent judgments. Because the Court of International Trade did not abuse its discretion in denying the motion, this court affirms.

I.

These consolidated cases involve the refund of the Harbor Maintenance Tax (HMT) to certain exporters. The HMT, enacted as part of the Water Resources Development Act of 1986, 26 U.S.C. §§ 4461–4462, is an ad valorem tax on shipments of commercial cargo. Several thousand exporters challenged the constitutionality of the HMT as applied to exporters. In a test case, a three-judge panel of the Court of International Trade held that the HMT, as applied to exports, violated the Export Clause of the United States Constitution. United States Shoe Corp. v. United States, 907 F. Supp. 408 (Ct. Int'l Trade 1995). On appeal, a five-judge panel of this court agreed. United States Shoe Corp. v. United States, 114 F.3d 1564 [79 AFTR 2d 97-2813] (Fed. Cir. 1997). The Supreme Court affirmed. United States v. United States Shoe Corp., 523 U.S. 360 [81 AFTR 2d 98-1256] (1998).

After the Supreme Court affirmed the unconstitutionality of the HMT on exports, the Court of International Trade adopted a procedure for Customs to provide HMT refunds. In compliance with that procedure, each claimant executed a consent judgment as prescribed by the Court of International Trade. The consent judgment entitled the exporters to an immediate HMT refund within the two-year statute of limitations period for suits filed under 28 U.S.C. § 1581(i).

Concurrently, the Court of International Trade developed a test case procedure to resolve the remaining issues surrounding the HMT, including the award of prejudgment interest. The court selected International Business Machines Corp. v. United States, No. 94-10-00625, 1998 WL 325156 (Ct. Int'l Trade), as the test case to determine the eligibility of HMT refunds for prejudgment interest. In that case, IBM had filed its action under § 1581(i).

The Court of International Trade entered Hohenberg's consent judgment on March 30, 1999. Neither party appealed that judgment. Consequently, Hohenberg immediately received a refund of its HMT principal from Customs. That judgment, as well as the consent judgments executed by other exporters, noted the court's jurisdiction under 28 U.S.C. § 1581(i), consistent with that court's jurisdictional rulings at the time. The judgments also provided for interest on the principal if the appellate proceedings in the IBM test case found HMT refunds entitled to interest. In International Business Machines Corp. v. United States, 201 F.3d 1367, 1374 [85 AFTR 2d 2000-518] (Fed. Cir. 2000) (IBM), this court determined that no statute provided an inter-

est award arising out of a judgment under 28 U.S.C. § 1581(i).

Subsequently, on October 13, 2000, Hohenberg, along with those exporters who had received immediate HMT refunds under the consent judgments and who had initially challenged the HMT through the refund-request-and-protest process identified in Swisher International, Inc. v. United States, 205 F.3d 1358 [85 AFTR 2d 2000-1166] (Fed. Cir. 2000),[1] filed a motion before the Court of International Trade seeking to amend those judgments. Specifically, Hohenberg sought to amend the March 30, 1999 consent judgment to invoke the jurisdiction of that court under 28 U.S.C. § 1581(a) rather than 28 U.S.C. § 1581(i). Further, Hohenberg sought an award of post-summons interest under 28 U.S.C. § 2644, the interest provision applicable to awards under § 1581(a) jurisdiction. On December 28, 2000, the Court of International Trade denied that motion.

On March 21, 2001, Hohenberg renewed its motion to amend the March 30, 1999 judgment under Court of International Trade Rules (RCIT) 59(e) and 60(b) to acquire jurisdiction in the Court of International Trade under § 1581(a). Hohenberg additionally sought an award of post-summons interest under 28 U.S.C. § 2644, and an award of pre-summons interest under 19 U.S.C. § 1505, or in the alternative, under the Constitution of the United States. The trial court denied that motion on May 10, 2001. The court acknowledged that ''[a]s in Swisher, [Hohenberg] perfected § 1581(a) protest denial jurisdiction.'' Nonetheless, the Court of International Trade held that the judgment was not jurisdictionally defective and declined to amend the judgment. In so holding, the court reasoned that it had jurisdiction in this matter under either § 1581(a) or (i). Hohenberg timely appealed to this court, which has exclusive jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

On appeal, Hohenberg argues that this court's decision in Swisher requires the Court of International Trade to amend the jurisdictional statement in the judgment. Hohenberg asserts that because jurisdiction of the court was proper under § 1581(a), Hohenberg is entitled to post-summons interest on HMT refunds under 28 U.S.C. § 2644. Hohenberg further cites IBM as confirming that § 2644 requires an award of interest in this case. Additionally, Hohenberg contends that because the HMT is treated as a customs duty under 26 U.S.C. § 4462(f)(1) for administration and enforcement purposes, Hohenberg is entitled to pre-summons interest on HMT refunds pursuant to 19 U.S.C. § 1505. Alternatively, Hohenberg argues that the Export Clause mandates payment of interest on HMT refunds. Finally, Hohenberg argues that the government's retention of interest on the unconstitutional HMT amounts to a Fifth Amendment taking of private property.

II.

[1] This court reviews a refusal by the Court of International Trade to grant relief on a motion under RCIT 59 or 60 for an abuse of discretion. Mass. Bay Transp. Auth. v. United States, 254 F.3d 1367, 1378 (Fed. Cir. 2001). To constitute an abuse of discretion, the trial court's decision must be clearly unreasonable, arbitrary or fanciful, or based on clearly erroneous findings of fact or erroneous conclusions of law. Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1460 (Fed. Cir. 1998) (en banc). This court reviews legal determinations by the Court of Inter-national Trade de novo. Fla. Sugar Mktg. & Terminal Ass'n v. United States, 220 F.3d 1331, 1333 [86 AFTR 2d 2000-5467] (Fed. Cir. 2000).

Courts interpret a consent judgment according to general principles of contract law. Diversey Lever, Inc. v. Ecolab, Inc., 191 F.3d 1350, 1352 (Fed. Cir. 1999); Novamedix, Ltd. v. NDM Acquisition Corp., 166 F.3d 1177, 1180 (Fed. Cir. 1999). Furthermore, ''[t]he scope of a consent decree is limited to its terms and ...

[1] In Swisher International, Inc. v. United States, 205 F.3d 1358, 1364–65 (Fed. Cir. 2000), the exporter had initially challenged the HMT through the refund-request-and-protest process. This court found jurisdiction under 28 U.S.C. § 1581(a) for properly protested HMT refund claims.

its meaning should not be strained.'' Foster v. Hallco Mfg. Co., 947 F.2d 469, 481, 20 USPQ2d 1241, 1250 (Fed. Cir. 1991) (citing United States v. Armour & Co., 402 U.S. 673, 681 (1971)). Hence, as in a contract, the terms of the judgment bind its parties.

In this case, the Court of International Trade entered on March 30, 1999, a consent judgment (Judgment) executed by Hohenberg's counsel and the government's attorneys. The relevant paragraphs of the judgment are:

> 2. The court has jurisdiction under 28 U.S.C. § 1581(i) (1994).
>
> . . . .
>
> 6. Interest shall be paid on the refunded amounts in accordance with a schedule set by the court should appellate court proceedings in International Business Machines Corp. v. United States, Court No. 94-10-00625, finally resolve that interest is owing on HMT payments.
>
> . . . .
>
> 9. Upon entry of judgment, plaintiff releases, waives, and abandons all claims against the defendant, its officers, agents, and assigns, arising out of all HMT export payments for the non-severed quarters identified in the attached Harbor Maintenance Tax Payment Report, including, but not limited to, all claims for costs, attorneys fees, expenses, compensatory damages, and exemplary damages. Defendant releases
>
> . . . .

Hence, the judgment states that the Court of International Trade had jurisdiction under § 1581(i).[2] Judgment ¶ 2. The judgment also expressly states that interest on the refunded amounts depends on the outcome of IBM, the § 1581(i) interest test case. Id. ¶ 6. Moreover, under ¶ 9 of the judgment, Hohenberg waived all future claims. Id. ¶ 9.

In the § 1581(i) interest test case, the Court of International Trade entered judgment for IBM and ordered a refund of the principal. 1998 WL 325156, at 1. The court also adopted its earlier position awarding interest under 28 U.S.C. § 2411, a provision for interest on income tax overpayments. Id. On appeal, the Federal Circuit reversed the Court of International Trade's interest award. IBM, 201 F.3d at 1369. In IBM, this court held that the United States is liable for interest only in the event of a clear statutory waiver of sovereign immunity. Id. (citing Library of Cong. v. Shaw, 478 U.S. 310, 314 (1986)). This court also found that neither § 2411, nor any statutory provision of the customs laws, provides an express waiver of sovereign immunity sufficient to authorize interest on HMT refunds. Id. at 1374. In the present case, because the consent judgment unambiguously rests on jurisdiction under § 1581(i) and because interest on the refunded amounts is dependent on the outcome of IBM, Hohenberg is not entitled to any interest on its HMT refunds.

Hohenberg now claims that this court's decision in Swisher requires the Court of International Trade to amend the judgment to provide that jurisdiction in the court would have been proper under § 1581(a),[3] instead of § 1581(i). In Swisher, this court held that jurisdiction arises under § 1581(a) if a taxpayer has exhausted applicable administrative remedies, and timely filed suit in the Court of International Trade. Swisher, 205 F.3d at 1364–65. Because Hohenberg had initially challenged the HMT through the refund-request-and-protest process identified in Swisher, Hohenberg seeks to amend its consent judgment to assert jurisdiction under § 1581(a).

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[2] 28 U.S.C. § 1581(i) states:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for -- (1) revenue from imports or tonnage; (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

[3] 28 U.S.C. § 1581(a) states: ''The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.''

In its original complaint, Hohenberg had asserted jurisdictional bases under §§ 1581(a) and (i) in the alternative, but ultimately executed the consent judgment with the § 1581(i) jurisdictional statement. As the Court of International Trade noted, Hohenberg could have preserved its claim under § 1581(a) by not signing the consent judgment. Instead, Hohenberg chose to rely solely on its rights under § 1581(i) despite ongoing litigation as to § 1581(a) in Swisher. By voluntarily entering the consent judgment, Hohenberg benefited by receiving immediate refund of its HMT payments. Furthermore, Hohenberg did not seek more flexible language on the interest provision or on the jurisdiction in the consent judgment. Nor did Hohenberg appeal the judgment or the jurisdictional basis of the judgment until after this court issued its decision in Swisher.

As the government argues, all parties executed the judgment to gain immediate HMT refunds. By executing the judgment, Hohenberg also expressly waived all future claims arising out of its HMT export payments against the government. Judgment ¶ 9. In short, Hohenberg chose to receive immediate compensation and took a gamble on the outcome of IBM. Because parties to the consent judgment are bound by the terms of the judgment, the Court of International Trade did not abuse its discretion by holding Hohenberg to its bargain and refusing to amend the judgment.

Hohenberg asserts that because jurisdiction of the Court of International Trade was proper under § 1581(a), Hohenberg is entitled to post-summons interest on HMT refunds pursuant to 28 U.S.C. § 2644. Hohenberg further cites IBM as confirming that § 2644 requires an award of interest in this case. In IBM, this court cited 28 U.S.C § 2644 as a possible basis for an interest award, but concluded that that section did not apply in that case because IBM's action was filed under 1581(i). IBM, 201 F.3d at 1373. Thus, when read together with Swisher, IBM allows interest to those who invoked jurisdiction under § 1581(a). As discussed above, however, the Court of International Trade did not abuse its discretion by refusing to amend the judgment to assert jurisdiction under § 1581(a). Hence, Hohenberg is not entitled to post-summons interest on HMT refunds pursuant to 28 U.S.C. § 2644.

As to Hohenberg's alternative arguments that it is entitled to interest on HMT refunds under 19 U.S.C. § 1505, the Export Clause, and the Takings Clause, this court has recently held in United States Shoe Corp. v. United States, No. 98-1574 [90 AFTR 2d 2002-5376] (Fed. Cir. July 23, 2002), that neither the Constitution nor any statute mandates the payment of interest. Accordingly, these provisions do not give Hohenberg any entitlement to pre-summons interest on HMT refunds. In sum, the Court of International Trade did not abuse its discretion in denying Hohenberg's motion to amend the court's March 30, 1999 consent judgment.

COSTS

Each party shall bear its own costs.

AFFIRMED.

¶2002-5314

UNITED STATES OF AMERICA, PLAINTIFF v. Darlene KOFF, DEFENDANT. U.S. District Court, Eastern Dist. of California, (DC CA) Case No.: CIV. S-00-1954-LKK-DAD, June 17, 2002. Adopted by (2002, DC CA) 90 AFTR 2d 2002-5668. Earlier proceeding at (2002, DC CA) 89 AFTR 2d 2002-2842, 2002-1 USTC ¶50363. Years 1982, 1983, 1984, 1985. Decision for Govt.

1. Actions to reduce assessments to judgment—validity of assessments; clerical errors—community property—summary judgment. Magistrate judge recommended granting govt. summary judgment in judgment amount stated plus interest: although taxpayer's husband's pension was community property, taxpayer wasn't entitled to credit for half of amounts IRS seized where husband also had outstanding tax liabilities that IRS could have offset against. *Reference:* United States Tax Reporter ¶74,035.01(25); 62,015.01(30); 65,035.03(10); 65,025.03(3); 63,215.02(160).

IRC §6201; 6321; 6502; 6503; 7403.

JOHN K. VINCENT United States Attorney LODGED
NORMA J. SCHROCK Trial Attorney, Tax Division U.S. Department of Justice PO Box 683 Ben Franklin Station Washington DC 20044-0683 Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

FINDINGS AND REGARDING AMOUNT OF

DALE A. DROZD United States Magistrate Judge

Pursuant to Local Rule 72-302(c)(21) this action was referred to the undersigned for all purposes encompassed by that provision.

In its complaint, the United States seeks to reduce to judgment certain federal tax assessments against the defendant, Darline Koff. The United States filed a motion for summary judgment, which was granted in part and denied in part, pursuant to this Court's Findings and Recommendations dated March 1, 2002, adopted in full by order dated March 20, 2002. It was determined that the United States was entitled to judgment was a matter of law, but that there was inadequate evidence to determined the correct amount of judgment to be entered.

On April 17, 2002, the United States timely filed a summary judgment motion on the amount of judgment, as instructed by the Court, and properly noticed the motion for hearing.

The hearing on this second summary judgment motion was held by this Court on May 31, 2002. Norma J. Schrock of the U.S. Department of Justice, Tax Division, appeared telephonically on behalf of the plaintiff. Defendant Darline Koff, proceeding, pro se, appeared on her own behalf. After considering all written materials submitted with respect to the motion and arguments presented at the hearing, the Court makes the following findings and recommendations: As evidence in support of its motion, the United States submitted an original and a supplemental declaration of Supervisory Revenue Offcer Gerald Kinkade. The original declaration itemized the assessments against Darline Koff and accrued interest through April 15, 2002, for the tax periods at issue. The amounts are summarized in the following table:

	1982	1983	1984	1985
Tax assessed	$ 36,166.00	$ 25,090.00	$ 8,109.00	$ 3,730.00
Penalties, assessed	$ 42,014.63	$ 25,349.31	$ 7,409.87	$ 2,142.13
Interest assessed	$ 50,732.01	$ 29,412.37	$ 7,322.27	$ 2,020.53
Fees and Costs assessed	$ 152.00	$ 0.00	$ 0.00	$ 0.00
Payment and Credits	$ (50.00)	$(40,811.18)	$ 0.00	$ 0.061
Accrued Interest	$246,455.62	$ 82,796.79	$43,780.08	$15,128.02
Total	$375,470.26	$121,837.29	$66,621.22	$23,020.63
Grand Total		$586,949.45		

The supplemental declaration itemized the collection costs and fees for 1982.'

[1] Defendant Darline Koff opposed the government's motion. Most of her arguments in her opposition were issues already decided in the government's first motion for summary judgment. Because those issues were already discussed and decided in its prior findings and recommendations, the Court need not be addressed them here.

Defendant Koff's opposition raised one issue on the amount of the assessment, however, that is relevant to the issue presently before this Court. Defendant Koff asscrted that the IRS levied a portion of her husband's pension, and she argued that

California's community[1] property law requires that she be credited with one-half of the amount levied. In response, the government supplied publicly recorded documents showing that Darline Koff s husband also had outstanding tax liabilities, and argued that amounts levied from his pension could have been credited to his liabilities; even if the money was community property.

California law provides that community property is liable for a debt incurred by either spouse:

> Except as otherwise expressly provided by statute, the community estate is liable for a debt incurred by either spouse before or during marriage, regardless of which spouse has the management and control of the properly and regardless of whether one or both spouses are parties to the debt or to a judgment for the debt.

Cal. Farn. § 910. The Court agrees with the government that Darline Koff was not entitled to be credited with one-half of any amount that the IRS seized from her husband's pension.

CONCLUSION

For the reasons set forth above, IT IS HEREBY RECOMMENDED that plaintiff's motion for summary judgment on the amount of judgment be granted, and the judgment be entered in favor of the United States, and against Darline Koff. in the amount of $586,949.45, together with interest pursuant to section 6621 of the Internal Revenue Code from the date of April 15, 2002.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten (10)days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed with five(5) days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: June 17, 2002

DALE A. DROZD

United States Magistrate Judge

Submitted on June 11, 2002,

by:

JOHN K. VINCENT

United States Attorney

¶2002-5315

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Don H. PACE, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-10458, Aug. 22, 2002. District Court affirmed in part, and vacated and remanded in part. Year 1992. Decision for Taxpayer in part and for Govt. in part.

1. Tax crimes—subscribing false returns—venue—sentencing. Attorney's IRC §7206(1) conviction for making false return that omitted his foreign source income was affirmed: taxpayer's argument that venue was lacking in Arizona where case was tried because return was prepared in Ohio and signed in New York was rejected. "Making" false return was continuing offense that started when taxpayer initially subscribed, from his Arizona office, false statements that were essential to return about his foreign accounts and income. Also, govt.'s failure to timely disclose witness's letter about her questionable authority to verify documents relating to foreign funds' wire transfers to taxpayer's personal account didn't require new trial or downward departure on his sentence since 1 document would have been admitted even absent her testimony and uncontroverted evidence otherwise es-

[1] There was a question why the total amount of collection costs and fees increased $14.00 from the total listed on the Certificate of Assessments and Payments (Form 4340) submitted in March, 2001. The reason for the increase was a $14.00 assessment made after the Form 4340 was prepared.

tablished that funds were transferred in accord with his instructions. But, wire fraud conviction was vacated for lack of venue and case was remanded for resentencing. *Reference:* United States Tax Reporter ¶73,446.502(10); 72,065.01(5); 73,446.516(55). IRC §7206.

Bruce R. Heurlin, Karp, Heurlin & Weiss, Tucson, AZ, for the defendant-appellant.
Christina M. Cabanillas, Assistant U.S. Attorney, Tucson, AZ, for plaintiff-appellee.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the District of Arizona; Frank R. Zapata, District Judge, Presiding.

Before ALFRED T. GOODWIN, MICHAEL DALY HAWKINS and RAYMOND C. FISHER, Circuit Judges.

OPINION

GOODWIN, Circuit Judge:

Don Pace appeals his conviction and sentence for two counts of wire fraud, in violation of 18 U.S.C. § 1343, and one count of subscribing a false tax return, in violation of 26 U.S.C. § 7206(1). The main issue on appeal is whether venue existed in the District of Arizona. For the reasons that follow, we reverse Pace's wire fraud convictions but affirm his conviction for subscribing a false tax return.

Background

For 23 years, Don Pace ("Pace") worked as a successful trial attorney in Cleveland, Ohio. In 1986, he left his law practice and, two years later, formed Pace American Group ("PAG"), an insurance holding company. He remained president and CEO of the corporation until 1994. Pace also served as the vice president and director of American Bonding Company ("ABC"), a subsidiary of PAG providing surety bonds to construction contractors on federal, state, and local government projects. At the time of the alleged offenses, ABC was headquartered in Tucson, Arizona, and maintained a branch office in Pasadena, California.

In 1990, ABC expanded its business into Mexico and entered into a cooperative bonding agreement with Afianzadora Mexicana ("AFIMEX"). Under the terms of the agreement, ABC would reinsure and share the risks of bonds issued by AFIMEX in Mexico. In return, AFIMEX would remit a percentage of the bond premiums to ABC.

In 1992, AFIMEX deposited $36,659.28 of bond premiums to two bank accounts at the ABACO Financial Institution ("ABACO") in Mexico City. One account was under the name of ABC; the other was under American Insurance Group (AIG changed its name to Pace American Group in 1993). ABC was not aware that these accounts existed, and Pace did not disclose them to the company.

A. Count 78

On April 27, 1992, AFIMEX sent Pace a summary report of the premiums transferred to the ABC / AIG accounts at ABACO. It noted that two deposits had already been completed and that an additional $18,740.00 would be sent pursuant to wire transfer instructions from Pace. AFIMEX mailed this correspondence to AIG's business address in Tucson, Arizona.

Upon receipt of the letter, Pace authorized his secretary to provide ABACO with his personal bank information. On April 30, 1992, from the ABC branch office in Pasadena, California, Pace faxed ABACO instructions to transfer any funds in the ABC account to his personal bank account in Ohio.

AFIMEX made two attempts to transfer the $18,740.00. On April 27, 1992, AFIMEX wrote a check out to ABC in the amount of $18,740.00, but mailed it to Pace's Ohio bank for deposit. The check did not clear because it was made payable to ABC. AFIMEX then deposited the amount into the ABC account at ABACO. On June 19, ABACO successfully wired the money to Pace's bank account in Ohio.

B. Count 77

On or about May 8, 1992(after Pace faxed his wire transfer instructions), AFIMEX deposited another $17,919.28 to the ABC account at ABACO, which wired the amount to Pace's personal account in Cleveland, Ohio.

C. Count 81

Pace's 1992 tax returns were prepared by accountant John Patton (''Patton'') in Westlake, Ohio. Patton sent Pace a 1992 ''organizer'' in order to secure updated financial information from Pace for that tax year. The organizer was mailed to Pace's address in Arizona. Upon its receipt, Pace mailed a list of his 1992 income sources to Patton, but did not include any income from the ABACO wire transfers.

Enclosed in the organizer was also a questionnaire regarding income. Pace checked ''no'' when asked whether he had any income from foreign sources in 1992. Pace further replied that he had no financial interest in, or signing authority over, any foreign bank accounts.

Using the information provided in the organizer, Patton compiled Pace's 1992 statement of financial condition and sent it to Pace in Arizona. The statement did not list the ABC / AIG accounts at ABACO, and it did not report the $36,659.28 that Pace received as a result of the wire transfers. Pace verified the accuracy of the 1992 statement and assured Patton that, ''to the best of [his] knowledge and belief,'' he had ''made all financial records and related data available'' to Patton. The confirmation letter listed Pace's Arizona address in its heading.

When Patton completed the tax return, he sent it to Pace in Tucson. Pace testified that he reviewed the return while he was out of town on a business trip and that he signed the return while he was in Buffalo, New York.

D. Procedural history

On April 6, 1997, a federal grand jury filed an 81 count superseding indictment charging Pace with: conspiracy to commit mail fraud, mail fraud, wire fraud, money laundering, subscribing a false tax return, and forfeiture. [1]

At trial, through the testimony of an AFIMEX employee Carolina Garcia-Mena (''Garcia-Mena''), the government introduced a number of financial documents between AFIMEX and ABC, including: (1) an April 27 letter sent by AFIMEX in which it reported $18,740.00 in premiums owed to ABC; and (2) an April 30 correspondence from Pace to ABACO, confirming his instructions to wire all amounts deposited into the ABC/AIG accounts at ABACO to Pace's personal account in Ohio.

On December 14, 2000, the jury acquitted Pace on all but three counts: Counts 77 and 78 (wire fraud) and Count 81 (making and subscribing a false tax return).

Several weeks after the jury verdict, the government disclosed a letter Garcia-Mena had written to the IRS two years earlier. The letter was written in response to the government's desire to utilize her as a trial witness (''the IRS letter.'').

Garcia-Mena indicated that she could not confirm the accuracy of bank documents issued before she assumed a managing position at the treasury department of AFIMEX. She then recommended Julian Salle-Arevalo as a more appropriate witness.

Pace moved for a new trial based on the letter's untimely disclosure. The district court found that the content of the letter was already elicited during Garcia-Mena's cross-examination and denied the motion. At sentencing, Pace requested a downward departure based on the late disclosure. The district court denied the motion and granted a downward departure only for aberrant behavior. The court then ordered Pace to pay ABC $36,659.28 in restitution and sentenced him to four months of imprisonment, followed by concurrent two-year terms of supervised release on each count. This appeal follows.

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[1] Counts 1 through 76 involve allegations that Pace, in his capacity as company director, used ABC to generate ''kickbacks'' to a real estate partnership owned by Pace and his son. Pace was acquitted of all counts related to this transaction.

Discussion

A. Wire fraud

[1] Pace argues that venue for Counts 77 and 78 did not lie in Arizona because the "essential conduct" of wire fraud was not committed there. The government contends that venue appropriately lay in Arizona pursuant to one of two statutes. First, it contends that venue could lie pursuant to the "continuing offense" statute of 18 U.S.C. § 3237(a) because Pace's wire fraud scheme was "begun" or at least "continued" while he was in Arizona. Alternatively, the government contends that venue was proper under the "high seas" statute, 18 U.S.C. § 3238, because the wire transfers originated in Mexico.

The Sixth Amendment and Rule 18 of the Federal Rules of Criminal Procedure guarantee that a defendant will be tried in the state where the crime was committed. U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI; Fed.R.Crim.P. 18. When a defendant has been indicted on multiple counts, venue must be proper for each count. United States v. Corona, 34 F.3d 876, 879 (9th Cir. 1994). The government bears the burden of establishing venue by a preponderance of the evidence. United States v. Angotti, 105 F.3d 539, 541 (9th Cir. 1997). "[D]irect proof of venue is not necessary where circumstantial evidence in the record as a whole supports the inference that the crime was committed in the district where venue was laid." United States v. Childs, 5 F.3d 1328, 1332 (9th Cir. 1993) (internal quotation marks omitted).

In order to decide whether venue was proper in the District of Arizona, we "must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." United States v. Rodriguez Moreno, 526 U.S. 275, 279 (1999); accord United States v. Ruelas Arreguin, 219 F.3d 1056, 1061 (9th Cir. 2000). To determine the "nature of the crime," we look to the "essential conduct elements" of the offense. Rodriguez Moreno, 526 U.S. at 280.[2]

The wire fraud statute, 18 U.S.C. § 1343, provides:

> Whoever, having devised or intending to devise any scheme ... to defraud, or for obtaining money or property by means of false or fraudulent pretenses ... transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings ... for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

We have recognized that the nature of a wire fraud offense--the "gist and crux" of the offense--is the misuse of wires. See United States v. Garlick, 240 F.3d 789, 792 (9th Cir. 2001). It is appropriate, therefore, that we interpret the essential conduct prohibited by Section 1343 to be the misuse of wires as well as any acts that cause such misuse. See also Garlick, 240 F.3d at 790 (wire fraud statute prohibits the using or causing the use of wires).

The government, however, urges a broader reading of § 1343, and argues that venue is appropriate wherever Pace concocted his "scheme to defraud" ABC, AIG, AFIMEX and ABACO. Although a fraudulent scheme may be an element of the crime of wire fraud, it is using wires and causing wires to be used in furtherance of the fraudulent scheme that constitutes the prohibited conduct. See, e.g., United States v. Condolon, 600 F.2d 7, 8 (4th Cir. 1979) (gravamen of wire fraud offense is the misuse of interstate communication facilities to execute any scheme to defraud). Venue may therefore lie only in those locations where the wire transmission at issue originated, passed through, was received or from which it was "orchestrated," that is, caused. See United States v. Palomba, 31 F.3d 1456, 1461 (9th Cir. 1994). Our focus on the use of the wires for venue purposes is consistent with

[2] We note that the Court in Rodriguez-Moreno recognized that the verbs of a statute may be helpful to "identify[ ] the conduct that constitutes an offense" but emphasized that the " 'verb test' ... cannot be applied rigidly, to the exclusion of other relevant statutory language." Rodriguez-Moreno, 526 U.S. at 280.

our opinion in Garlick, in which we held that each use of the wires constitutes an independent violation of the law. 240 F.3d at 793.

Multiple convictions can arise from the same fraudulent scheme. See id. A scheme to defraud, however, without the requisite illegal use of wires does not violate the wire fraud statute. See, e.g., United States v. Dischner, 974 F.2d 1502, 1521 (9th Cir. 1992) (fraud need not succeed for there to be conviction under wire fraud statute), overruled on other grounds by United States v. Morales, 108 F.3d 1031, 1035 n. 1 (9th Cir. 1997) (en banc). Accordingly, venue may lie only where there is a direct or causal connection to the misuse of wires.

A1. 18 U.S.C. § 3237(a)

''Crimes consisting of a single noncontinuing act are 'committed' in the district where the act is performed. Crimes that are not unitary but instead span space and time, however, may be considered continuing offenses under 18 U.S.C. § 3237(a). Continuing offenses may be prosecuted 'in any district in which such offense was begun, continued, or completed.''' Corona, 34 F.3d at 879; 18 U.S.C. 3237(a); [3] see also Rodriguez Moreno, 526 U.S. at 281(''where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done.'') (internal quotations and citations omitted). Wire fraud is a ''continuing offense,'' subject to § 1327, and thus venue may lie in all of the places where any part was accomplished. See 18 U.S.C. § 3237(a).

The government has not met the burden of showing that Pace ''beg[a]n, continued, or completed'' wire fraud in Arizona. It contends that Pace regularly communicated with ABACO and AFIMEX from his Tucson business address. As support, the government offers the testimony of Pace's secretary, who confirmed that Pace had a business address in Tucson and that parties who needed to communicate with him with respect to ABC affairs would write or fax him using that address. This information, by itself, does not indicate that Pace ''used'' wires in Arizona or that he otherwise ''caused'' such use from Arizona.

The government also identifies two communications that AFIMEX sent to Pace in Tucson, Arizona: (1) the April 27 letter, in which AFIMEX requested wire transfer instructions, and (2) the confirmation letter AFIMEX sent after it deposited $17,608.00 into the ABC / AIG accounts at ABACO. Neither of these communications ''caused'' the wire transfer at issue. The confirmation letter came after the wire transfer and thus obviously could not have caused it. The April 27 letter, in which AFIMEX requested wire transfer instructions, presents a slightly more difficult question. However, it was ABACO--not AFIMEX--that transferred the company funds to Pace's personal account. Therefore, the causal nexus between ABACO's wire transfer and the April 27 letter is not sufficient to satisfy the ''caused'' language for venue purposes.

The government argues that these two communications, at a minimum, suggest that Pace instructed ABACO to wire $18,740.00 to his personal account while he was in Arizona. The government's argument ignores evidence that Pace specifically faxed ABACO the wire transfer instructions from Pasadena, California. Although Pace almost certainly received the April 27 request from AFIMEX and subsequently authorized his secretary to provide wire transfer instructions to ABACO, there is no direct evidence of the location from which he gave the authoriza-tion. The record contains no other corre-spondence regarding subsequent or alterna-tive wire transfer instructions.

A2. 18 U.S.C. § 3238

The government contends that, alternatively, venue exists pursuant to 18 U.S.C. § 3238, the federal venue statute for offenses begun or committed on the high seas or ''elsewhere out of the jurisdiction of any particular State or district.'' The government contends that, under Section

[3] 18 U.S.C. § 3237 provides that ''any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.''

3238, venue could lie in the District of Arizona, where Pace was arrested.

A review of the record indicates that the wire fraud offense was ''begun'' in the United States. As we explained above, the wire fraud statute prohibits the use of wires, but also criminalizes conduct that ''causes'' a wrongful transmittal. See 18 U.S.C. § 1343. The offense will begin with the first prohibited act. Here, the transmissions were caused by a fax containing wire transfer instructions from Pace. Because this fax was sent from Pasadena, California, the offense began in the Central District of California, not in Mexico as the government alleges.

In addition, the offense was ''committed'' in part in the United States. Although the wire transfers originated in Mexico, they were received in Ohio. The wire fraud offense was, therefore, partially ''committed'' in the District of Ohio. See Palomba, 31 F.3d at 1461. It is true that the offense was also committed in Mexico, but § 3238 does not apply unless the offense was committed entirely on the high seas or outside the United States (unless, of course, the offense was ''begun'' there). [4]

In sum, venue did not exist pursuant to the ''high seas'' venue statute because the wire fraud was not begun on the high seas or ''out of the jurisdiction of any particular State or district'' and it was committed in part in the United States.

B. Subscribing a false tax return

Pace contends that venue for Count 81 did not lie in the District of Arizona because his accountant prepared the false tax return in Ohio and Pace signed it in New York. Section 7206(1) makes it unlawful for any person willfully to make and subscribe a false tax return. See 26 U.S.C. § 7206(1). False statements may be ''made'' where they are ultimately received. See United States v. Angotti, 105 F.3d 539, 542 (9th Cir. 1997). However, the offense does not begin and end there.

A communication must be sent before it is received. Thus, the crime of ''making'' a false tax return commences when one furnishes information essential to the return, and is not completed until the information is received by the party to whom it was addressed. This conclusion is consistent with Angotti, 105 F.3d at 543, in which we held that ''making'' a false statement to a federal agency is a continuing offense and may be prosecuted in a district not only where the false statement is initially provided but where it is ultimately received. In so holding, we explained: ''[t]he statements continued to be false . . . not only when initially presented but also upon arrival [at the place] where the decision was reached . . . .'' Id. at 542 (quoting United States v. Candella, 487 F.2d 1223 (2d Cir. 1973). Consequently, the offense may be tried in a district where the defendant prepared and transmitted the false statements. Id. at 544 (quoting United States v. Zwego, 657 F.2d 248, 251 (10th Cir. 1981).

The same can be said for an offense under Section 7206(1). The act of making a tax return commences when one prepares and furnishes information material to the return and continues until that information is received by the IRS. For such continuing offenses, venue is proper in any district in which the continuing conduct has occurred. 18 U.S.C. § 3237(a); see Rodriguez-Moreno, 526 U.S. at 282; United States v. Barnard, 490 F.2d 907, 910 (9th Cir. 1973).

Here, Pace provided information essential to his tax return in Arizona. In response to a questionnaire sent by his accountant, Pace indicated he had no foreign income and no control over any foreign bank accounts in 1992. Based on the questionnaire, the accountant then compiled a statement of financial condition, which served as the basis for preparing Pace's tax return. The statement did not list the ABC / AIG accounts at ABACO, and it did not report the $36,659.28 that Pace received as a result of the wire transfers. Pace not only confirmed the statement's accuracy but

[4] But see United States v. Jensen, 93 F.3d 667, 671 (9th Cir. 1996) (B. Fletcher, J., concurring).

also indicated that he had "made all financial records and related data available" to Patton. As Pace furnished information essential to the completion of the tax return in Arizona, the § 7206(1) offense was properly tried there.

C. Motion for new trial, Sentencing

Pace contends that the district court erred in denying his motion for a new trial or, alternatively, in failing to depart downward at sentencing because of the government's failure to disclose an IRS letter written by Garcia-Mena, an AFIMEX employee testifying for the government. Garcia-Mena had indicated to the IRS that she could not testify as to the accuracy of AFIMEX documents drafted before she started in the company's treasury department. Because Garcia-Mena did not have "responsibility" in AFIMEX's treasury department until September 1992, Pace argues that two documents were improperly admitted through Garcia- Mena: (1) the April 27 letter in which AFIMEX reported the amount of premiums to ABC and requested Pace to send wire transfer instructions; and (2) the April 30 letter from Pace to ABACO, confirming his instructions to wire all amounts deposited into the ABC / AIG accounts to Pace's personal account in Ohio.

The record indicates that at least one of the documents would have been admitted even if Pace had timely learned of the IRS letter. The April 30 fax from Pace to ABACO was not introduced into evidence by Garcia-Mena, but by Pace's executive assistant, Carmen Barney, who identified the signature on the fax as that of Pace.

The April 27 correspondence, whether or not admitted, does not "weigh heavily against the verdict." See United States v. Chen, 754 F.2d 817, 821 (9th Cir. 1985). The evidence remains uncontroverted that Pace faxed wire transfer instructions to ABACO on April 30, directing it to transfer all funds deposited in the ABC / AIG accounts to his account in Ohio. The evidence is also undisputed that, after receiving the fax, ABACO made two wire transfers in accordance with Pace's instructions. That AFIMEX, not ABACO, requested wire transfer instructions on April 27 does not materially address whether ABACO transferred funds pursuant to Pace's instructions.

Pace argues that the late disclosure also prevented him from subpoenaing a witness. The IRS letter identified accountant Julian Salle-Arevalo ("Salle-Arevalo") as one familiar with AFIMEX payment orders and accounts at the time of the wire transfers. Had he timely learned of this information, Pace argues, he would have called Salle-Arevalo to the stand and asked him to explain the wire transfers.

Pace's argument is misplaced, because Salle-Arevalo worked for AFIMEX, not ABACO. Accordingly, Salle-Arevalo could have testified that AFIMEX deposited a certain amount of premiums into the ABC / AIG accounts of ABACO. He would not, however, have first-hand knowledge to testify about correspondence between ABACO and Pace or any transfers that took place as a result of their communications.

Although the government erred by not timely disclosing the IRS letter, the error did not prejudice Pace as to warrant a new trial or, alternatively, a downward departure at sentencing.

D. Restitution

Pace argues that he should not have to pay restitution to ABC because the company owes him over $800,000.00. We do not reach this issue in light of our decision to reverse his wire fraud convictions.

We AFFIRM Pace's conviction on Count 81, VACATE the judgment of conviction on Counts 77 and 78, and REMAND for resentencing on Count 81.

¶2002-5316

BEALS BROS. MANAGEMENT CORP., PETITIONER v. COMMISSIONER of Internal Revenue, RESPONDENT. U.S. Court of Appeals, Eighth Circuit, (CA8) No. 01-3922, Aug. 27, 2002. Tax Court, (2001) TC Memo 2001-234, RIA TC Memo ¶2001-234, 82 CCH TCM

485 (opinion by Laro, *J.*), affirmed. Year 1987. Decision for Govt.

1. Employee stock ownership plans (ESOPs)—qualification—minimum participation—affiliated service groups; controlled groups. Tax Court properly upheld IRS's revocation of controlled group member's ESOP's qualification for failure to meet IRC §401(a)(3)'s minimum participation standards: taxpayer didn't contest controlled/affiliated group finding; and didn't support IRC §410(b) aggregation argument with any credible proof that proportion of qualifying employer securities to total plan assets was substantially same for its own and affiliate's ESOPs, or that qualifying employer securities were all of same class. *Reference:* United States Tax Reporter ¶4105.10(10); 4015.01(5); 4145.02(5); 74,765. IRC §401; 410; 414; 501; 1563; 7476.

United States Court of Appeals FOR THE EIGHTH CIRCUIT,

Appeal from the United States Tax Court

Before WOLLMAN, RICHARD S. ARNOLD, and LOKEN, Circuit Judges.

LOKEN, Circuit Judge.

Petitioner Beals Brothers Management Corporation has funded an employee stock ownership plan (''ESOP'') since its incorporation in 1987. In 1999, following a protracted administrative review, the Commissioner of Internal Revenue ruled that the ESOP was not a qualified retirement plan during the tax years in question because the plan failed to satisfy the minimum participation requirements of 26 U.S.C. § 401(a)(3). Petitioner then filed this declaratory judgment action challenging the Commissioner's determination. The Tax Court upheld the Commissioner. Petitioner appeals, arguing the Tax Court erred in refusing to aggregate petitioner's ESOP with an affiliate's ESOP for purposes of determining whether the requirements of § 401(a)(3) were satisfied. ''We review de novo the Tax Court's legal conclusions, and for clear error its findings of fact.'' Howard E. Clendenen, Inc. v. Commissioner, 207 F.3d 107, 10731 [85 AFTR 2d 2000-1245] (8thCir. 2000). We affirm.

Petitioner was incorporated in 1987 to provide management and advisory services to Beals Brothers Manufacturing Company, an Iowa corporation that operates a sawmill and manufactures wood products. Petitioner has four employee-officers, all of whom are also officers and employees of Manufacturing. Since 1987, each company has maintained an ESOP. Petitioner's ESOP owns all of petitioner's common stock. During the years in question, petitioner received substantial fees from Manufacturing for its management services and used this income to make contributions or pay dividends to its ESOP in lieu of paying salaries to its four officers. At the same time, Manufacturing made virtually no contributions to its ESOP.[1] These disparities worked to the disadvantage of the full-time employees of Manufacturing who were not participants in petitioner's ESOP. Therein lies the crux of the Commissioner's concern.

Section 401(a)(3) of the Internal Revenue Code provides that, to qualify for the tax advantages in that Subpart of the Code, a trust forming part of an employer's stock bonus or profit-sharing plan must ''satisf[y] the requirements of section 410 (relating to minimum participation standards).'' The participation standards in § 410 are complex. At issue in this case is the core requirement that a qualifying plan must ''benefit[] at least 70 percent of employees who are not highly compensated employees.'' § 410(b)(1)(A). Here, the four owners of Manufacturing formed petitioner, created a separate ESOP in which they were the only participants, and used the management fees that Manufacturing paid petitioner to fund its ESOP. That left Manufacturing with virtually no funds to contribute to its own ESOP, which had a broader group of participants. The result seems contrary to the broad participation

[1] For example, in the fiscal year ending June 30, 1988, petitioner paid $131,000 in dividends to its ESOP, which in turn distributed $9,500 to each of its four officer-participants. Meanwhile, Manufacturing made no contributions to its ESOP, and that plan's asset value decreased from $199,337 to $192,541.

objective of the statute. But if the focus is only on petitioner's work force, all four employees participated in the ESOP, and the 70% test was satisfied.

However, as the tax Court recognized, sections 414(b) and (m) of the Code close this apparent loophole by providing that all members of a controlled group of corporations must be treated as a single employer, and all employees of the members of an affiliated service group must be treated as employees of the same employer. Here, the Tax Court found that petitioner and Manufacturing were members of either a controlled group of corporations or an affiliated service group, and that less than 70% of the eligible employees of both companies were covered by petitioner's ESOP. Petitioner does not challenge these findings on appeal. The Tax Court concluded that, by counting all full-time employees in the combined work force as potential participants in petitioner's ESOP, the ESOP failed to meet the 70% minimum coverage requirements of § 410(b) and therefore failed to satisfy the minimum participation standards of § 401(a)(3). Petitioner does challenge that conclusion.

[1] The issue petitioner presents on appeal arises because § 410(b)(6)(B) provides that, in certain circumstances, an employer may aggregate two or more trusts as part of one plan to determine whether the minimum coverage requirements of § 410(b) are met. Here, if the two ESOPs may be aggregated, petitioner easily meets the 70% minimum coverage requirement because all relevant employees of both companies were participants in one or both of the two ESOPs. The Tax Court acknowledged this aggregation principle "in passing" but concluded that "Petitioner has failed to produce credible evidence that [its] ESOP can be aggregated with [Manufacturing's] ESOP for this purpose." Petitioner argues it did produce such evidence.

The Treasury Regulations contain a specific provision limiting when ESOP plans may be aggregated for purposes of § 410(b)'s minimum coverage requirements:

> Two or more ESOP's . . . may be considered together for purposes of applying . . . section 410(b) only if the proportion of qualifying employer securities to total plan assets is substantially the same for each ESOP and:
>
> (i) The qualifying employer securities held by all ESOP's are all of the same class; or
>
> (ii) The ratios of each class held to all such securities held is substantially the same for each plan.

26 C.F.R. § 54.4975-11(e)(2). To be entitled to aggregate under this regulation, petitioner must first prove that "the proportion of qualifying employer securities to total plan assets is substantially the same for each ESOP." But the record on appeal is devoid of evidence revealing the nature of the assets held by Manufacturing's ESOP. In the Tax Court, petitioner introduced no financial statement or annual report detailing the specific assets held by the ESOP for any of the tax years in question. Petitioner did offer a document described by its financial adviser as a stock certificate issued by Manufacturing to its ESOP. But the document was excluded for lack of foundation, and petitioner failed to cure this evidentiary defect or to present other evidence of the assets held by this trust. On appeal, petitioner asks us to assume that the assets of Manufacturing's ESOP included non-voting common stock of Manufacturing. But petitioner refers us only to tax forms that did not purport to list the ESOP's specific assets. We agree with the Tax Court that there was a lack of proof on this issue that is fatal to petitioner's aggregation contention.

Moreover, Treas. Reg. § 54.4975-11(e) requires either that "[t]he qualifying employer securities held by all ESOP's are all of the same class," or that the ratio of each class held be substantially the same. In this case, we know that petitioner's ESOP held all of petitioner's common stock *and* purchased all of the voting common stock of Manufacturing from its four owners. Therefore, if we assume that Manufacturing's ESOP did own common stock of Manufacturing, it was non-voting common. In general, voting and non-voting

common stock are different classes of shares. See e.g., 11 Fletcher Cyc. Corp. § 5086 (perm. ed. 1995 rev.); Iowa Code Ann. § 490.601(3)(a). Petitioner presented no evidence that would overcome this general principle and support a finding that the voting and non-voting common shares of Manufacturing are ''all of the same class.'' For this second reason, petitioner failed to prove that it is entitled to aggregate the two ESOPs for purposes of the minimum coverage requirements of § 410(b).

The judgment of the Tax Court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

¶2002-5317

UNITED STATES OF AMERICA, PLAINTIFF v. Connie BRIGGS, DEFENDANT. U.S. District Court, Eastern Dist. of Louisiana, (DC LA) Civil No. 01-2914, May 29, 2002. Decision for Govt.

1. Actions to reduce assessments to judgment—default judgment. Govt. was granted default judgment against taxpayer establishing her liability for taxes, interest and statutory additions in amount stated, plus additional interest. *Reference:* United States Tax Reporter ¶74,025.01(95); 74,035.01(30). IRC §7402; 7403.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA,

DEFAULT JUDGMENT

MARY ANN VIAL LEMMON UNITED STATES DISTRICT JUDGE

[1] This Court, upon motion of the plaintiff, United States of America, and default having been entered against the defendant, Connie Briggs, hereby ORDERS, ADJUDGES, and DECREES as follows:

That the defendant Connie Briggs, pursuant to Title 26, United States Code, section 7402, is indebted to the United States in the amount of $172,368.57, including interest and statutory additions accrued through August 9, 2001, plus further interest and statutory addition as provided by law from August 9, 2001.

Done at New Orleans, Louisiana, this 28 day of May, 2002.

MARY ANN VIAL LEMMON

UNITED STATES DISTRICT JUDGE

¶2002-5318

In Re: J. Greg GOODYKOONTZ and Toni B. GOODYKOONTZ, Debtor(s). J. Greg GOODYKOONTZ and Toni B. GOODYKOONTZ, PLAINTIFF(S) v. UNITED STATES OF AMERICA on behalf of its agency, the Internal Revenue Service, and the state of West Virginia on behalf of its agency, The WV Dept. of Tax and Revenue, DEFENDANT(S). U.S. Bankruptcy Court, Northern Dist. of West Virginia, (Bktcy Ct WV) BK NO. 00-10902; AP NO. 00-1130, May 30, 2001. Years 1990, 1991, 1992, 1993, 1994, 1996. Decision for Govt.

1. Tax claims in bankruptcy—tax liens—exempt property. IRS was granted summary judgment in Chap. 11 debtors' adversary proceeding to determine validity of prepetition liens: appellate precedent refuted taxpayers' equation of terms ''lien'' and ''levy,'' and showed that tax liens properly attached to their exempt assets. *Reference:* United States Tax Reporter ¶68,726.53(2); 63,215.02(3); 63,315.03(155). IRC §6321; 6331.

UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA,

MEMORANDUM OPINION AND ORDER

This matter is before the Court pursuant to the Plaintiffs' motion for summary judgment. The Plaintiffs, who are debtors in possession, filed this adversary proceeding to establish the validity of tax liens and to value property subject thereto. The Court

has jurisdiction by virtue of 28 U.S.C. § 1334 and the standing order of reference in this District. The matter before the Court is a core proceeding pursuant to 28 U.S.C. § 157(b).

FACTS

The plaintiffs, J. Greg Goodykoontz and Toni B. Goodykoontz, (''debtors'') filed for relief under Chapter 11 of the Bankruptcy Code on April 6, 2000 and were authorized to continue operating as debtors in possession. The parties have stipulated to the value of property owned by the debtors at the time of filing. Neither the prior consensual liens on this property nor the claimed exemptions are in dispute.

Property	Value	Claimed Exemption	Prior Consensual Liens
Residence	175,000	0	150,713.36
Cash	50	50	0
Checking, City Nat'l	1,000	1,000	0
Checking, One Valley	75	75	0
Household Goods	7,420	7,420	0
Pictures	3,000	3,000	0
Jewelry	24,160	1,000	24,000
Tea Set	1,500	0	7,500
Wearing apparel	2,500	2,500	0
Firearms	250	250	0
401(k)	20,000	20,000	39,548
IRA	15,000	15,000	9,295
Partnership	17,000	15,000	0
Miata	3,500	3,500	0
Honda	18,000	0	18,120.94
Audi	13,000	0	14,000

Prior to the bankruptcy filing, tax liens were filed by the United States of America on behalf of the Internal Revenue Service (''IRS''), and by the State of West Virginia on behalf of the Department of Tax and Revenue (''State Tax Department''). On August 21, 2000, the debtors filed an adversary proceeding against the IRS and the State Tax Department seeking to determine the validity of the tax liens. By agreed order entered November 8, 2000, the debtors and the West Virginia State Tax Department stipulated that the value of the assets involved was such that after the satisfaction of the consensual secured debt and the tax liens of the IRS,[1] the state tax liens would be unsecured. The Court ordered that all tax liens filed pre-petition by the State Tax Department against the plaintiffs are of no further effect. The adversary proceeding continued with the IRS as the sole defendant.

The tax liens of the IRS are as follows:

Lien Amount	Period Ending	Assessed	Filed
$49,388.20	12/31/90	5/20/91	7/24/91
49,762.17	12/31/91	5/25/92	7/23/92
65,100.78	12/31/92	5/31/93	7/9/93
92,281.29	12/21/93	5/30/94	2/15/95
97,769.79	12/31/94	6/15/95	8/18/95
68,296.08	12/31/96	2/2/99	6/21/99

Following a pretrial hearing on October 12, 2000, the plaintiffs and the IRS stipulated to the property values and were to submit briefs setting forth whether the

[1] The IRS tax liens were undisputedly prior in time to those of the State Tax Department.

liens of the IRS are limited to the value of the property subject to levy, or whether the value of property which may not be levied against should support the tax lien. The debtors filed a motion for summary judgment, and the IRS filed an objection to the motion and a cross motion for summary judgment. The Court then took this matter under advisement.

DISCUSSION

[1] The Internal Revenue Code ("I.R.C.") provides that

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

28 U.S.C. § 6321.

The Code further provides that the lien imposed by § 6321 "shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed . . . is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. § 6322. The United States Supreme Court has stated that "[t]he statutory language 'all property and rights to property,' appearing in § 6321 . . . is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." United States v. National Bank of Commerce, 472 U.S. 713, 719–720 [56 AFTR 2d 85-5210] (1985), cited by In re Voelker, 42 F.3d 1050 [74 AFTR 2d 94-7438] (7th Cir. 1994) ("The language of the statute unambiguously shows that the federal tax lien attaches to all of a debtor's property, without exception.").

The debtors argue that under 26 U.S.C. § 6331, the tax lien does not apply to exempt property. Section § 6331 provides that

> (a) . . . If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property (*except such property as is exempt under section 6334*) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.
>
> (b) The term "levy" as used in this title includes the power of distraint and seizure by any means.

(Emphasis added).

The debtors' position is based upon the equation of the terms "lien" and "levy." However, the Seventh and the Ninth Circuits have found that the two terms have distinctly different meanings, and should be treated dissimilarly under the statute. The Seventh Circuit Court of Appeals stated that

> This dissimilarity in treatment makes sense, for as the Ninth Circuit discussed in *Barbier*, a lien and levy are different things. "A levy forces debtors to relinquish their property. It operates as a seizure by the IRS to collect delinquent incomes taxes." "citation omitted". On the other hand, "a lien . . . is merely a security interest and does not involve the immediate seizure of property. A lien enables the tax payer to maintain possession of protected property while al-lowing the government to preserve its claim should the status of [the] property later change.] [citation omitted]. Thus, if a debtor later sells the exempt property, the IRS could move to collect the proceeds from the sale.

Voelker, 42 F.3d at 1052, quoting United States v. Barbier, 896 F.2d 377 [71A AFTR 2d 93-3443] (9th Cir. 1990).

The court followed this analysis to the conclusion that a federal tax lien attached to all of a Chapter 13 debtor-taxpayer's property, without exception, even to personal property exempt from levy. Id. The Ninth Circuit Court of Appeals had previously reached a similar conclusion in United States v. Barbier, 896 F.2d 377 [71A AFTR 2d 93-3443], holding that the IRS' priority tax claim could be secured by Chapter 13 debtors' household effects and

other property which were otherwise exempt from administrative levy.

The Fourth Circuit Court of Appeals has not addressed this issue. The issue has, however, arisen before several courts within the Fourth Circuit. The findings of these courts are consistent with the Seventh and Ninth Circuit opinions on the matter. See In re O'Gorman-Sykes, 245 B.R. 815 [85 AFTR 2d 2000-581] (Bankr. E.D. Va. 1999) (tax refunds claimed exempt by debtor nevertheless subject to IRS' secured claim); In re Evans, Bankruptcy 94-00785-5-ATS, WL 760821 (Bankr. E.D. N.C. Nov. 7, 1999)(summary non-judicial seizure of property available to the IRS under the levy provision of § 6331 is separate and discrete from the IRS power to create a lien on property of the debtor); In re Dinatale, 235 B.R. 569 [85 AFTR 2d 2000-981] (Bankr. D. Md. 1999) (federal tax liens can properly attach to exempt assets); In re Deel, No. 7-93-02602-HPB-13, WL 571997 [76 AFTR 2d 95-5574] (W.D. Va. June 20, 1995) (debtors could not avoid federal tax lien on exempt property, but IRS could not levy on property).

The Court finds, therefore, that the liens of the IRS attach to the debtors' exempt assets, as well as their non-exempt assets. The motion for summary judgment of the debtors is DENIED and the cross motion for summary judgment of the IRS is GRANTED.

It is accordingly SO ORDERED.

The Clerk is directed to transmit copies of this Order to the parties in interest.

ENTER: 5/30/01

/s/

U.S. Bankruptcy Judge

JUDGMENT ORDER

It is hereby

ORDERED and ADJUDGED that judgment is entered consistent with the Judgment Order Pertaining to Secured Tax Claims of the State of West Virginia entered November 8, 2000, and the Memorandum Opinion and Order entered in the above-styled matter on May 30, 2001.

The Clerk is directed to transmit a copy of this order to the parties in interest.

Dated: 5/30/01

/s/

U.S. Bankruptcy Judge

¶2002-5319

Delmore D. HOLMSTROM d/b/a Cornerstone Enterprise, PETITIONER v. UNITED STATES, Internal Revenue Service, Robert Sullivan, Revenue Agent, RESPONDENTS. U.S. District Court, Middle Dist. of Florida, (DC FL) CASE NO. 8:02-MC-34-T-24MAP, Aug. 5, 2002. Decision against Taxpayer in part and against Govt. in part.

1. Third-party summons enforcement—petition to quash—jurisdiction—timely intervention—proof. Magistrate judge deferred ruling on govt.'s motion to dismiss and taxpayer's petition to quash 7 of 8 IRS 3d-party summonses, pending govt.'s submission of proof that petition was, as govt. contended, untimely filed more than 20 days after IRS gave taxpayer notice of summonses. But, dismissal was appropriate with respect to 8th summons that had been withdrawn. *Reference:* United States Tax Reporter ¶76,095.01(30); 76,095.01(10). IRC §7609.

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION,

ORDER

Mark A. Pizzo United States Magistrate Judge

[1] THIS CAUSE came before the Court on Petitioner's Motion to Quash Third Party Summons (doc. 1), Respondents' Motion to Dismiss (doc. 5), and Respondents' Supplemental Motion to Dis-

miss (doc. 8).[1] The Internal Revenue Service (''IRS'') issued eight administra-tive summons to third-party recordkeepers in its investigation of Delmore Holm-strom's tax liabilities.[2] The United States claims the IRS mailed the eight administra-tive summons on January 31, 2002 (1 sum-mons), February 1, 2002 (1 summons), February 4, 2002 (3 summons), February 7, 2002 (2 summons), and March 11, 2002 (1 summons), respectively. On March 25, 2002, Petitioner filed his motion to quash the summons.

When the IRS serves a summons on a third-party recordkeeper it must also give notice to the person to whom the record pertain.[3] A taxpayer may sue the United States to quash a summons within twenty days after the IRS gives notice to the taxpayer. 26 U.S.C. § 7609(b)(2)(A). The IRS is considered to have given notice on the date it mails the notice. *See Callahan v. Schultz*, 783 F.2d 1543, 1545 [57 AFTR 2d 86-985] (11th Cir. 1986). In this case, the United States claims seven of the eight administrative summons were mailed more than twenty days prior to the Petitioner filing his motion to quash, and as a result, this Court no longer has subject matter jurisdiction over the motion to quash concerning these seven administrative summons. However, the United States has not provided any proof or evidence as to the dates it claims the summons were mailed. Therefore, its motion to dismiss (doc. 5) is deferred and the United States is directed to submit evidence of the dates the summons were mailed within 30 days from the date of this order. The United States may provide proof by affidavit or by certified mail receipts. *See Shisler v. United States*, 199 F.3d 848, 851 [84 AFTR 2d 99-7532] (6th Cir. 1999).

In its Supplemental Motion to Dismiss (doc. 8), the United States claims the IRS has withdrawn the eighth administrative summons mailed on March 11, 2002, to GMAC Mortgage Corporation. Therefore, Petitioner's motion to quash as it relates to the administrative summons mailed on March 11, 2002, to GMAC Mortgage Corporation is moot. Accordingly, it is hereby

ORDERED:

1. Petitioner's Motion to Quash (doc. 1) is DEFERRED.

2. Respondents' Motion to Dismiss (doc. 5) is DEFERRED. The United States is directed to submit evidence within 30 days from the date of this order to show when notice was given to the Petitioner as it relates to the seven remaining administrative summons.

3. Respondents' Supplemental Motion to Dismiss (doc. 8) is GRANTED. The Petitioner's Motion to Quash as it relates to the administrative summons issued by the IRS on March 11, 2002, to GMAC Mortgage Corporation is DISMISSED.

DONE and ORDERED in chambers at Tampa, Florida on this 5 day of August, 2002.

Mark A. Pizzo

United States Magistrate Judge

¶2002-5320

Robert C. MacELVAIN, PLAINTIFF v. UNITED STATES OF AMERICA, ET AL., DEFENDANTS. U.S. District Court, Middle Dist. of Alabama, (DC AL) Civil Action No. 02-A-102-N, Aug. 9, 2002. District Court, (2002, DC AL) 90 AFTR 2d 2002-5255, adopted. Years 1980, 1981, 1982, 1983, 1984, 1985, 1986. Decision against Taxpayer.

1. Actions against U.S.—Anti-Injunction Act—exceptions—collateral estoppel—liens and levies. Magistrate judge's recommendation to deny pro se taxpayer's motion to preliminarily enjoin IRS and its agent from seizing his retirement benefits

[1] Pursuant to 28 U.S.C. § 636(b)(1)(A), Petitioner's Motion to Quash Third Party Summons (doc. 1), Respondents' Motion to Dismiss (doc. 5), and Respondents' Supplemental Motion to Dismiss (doc. 8) have been referred to the undersign for disposition by United States District Judge Susan C. Bucklew (see doc. 11).

[2] These third-party recordkeepers include First Union Bank, Fifth Third Bank, American Express Centurion Bank, SunTrust Bank, Bank of America, Providian National Bank, The Huntington National Bank, and GMAC Mortgage Corporation.

[3] Notice of an administrative summons must be accompanied by a copy of the summons which has been served on the third-party recordkeeper and must contain an explanation of the taxpayer's right to bring a proceeding to quash the summons. 26 U.S.C. § 7609(a)(1).

was adopted: benefits specifically *weren't* exempted from levy under IRC §6334, which overrode any general exemption that benefits may have had under Social Security Act; and taxpayer's reliance on IRC §6331(h)(1)'s 15% limitation was misplaced where subject levies were issued before statute's effective date. Also, injunctive relief was obviously inapplicable to past levies; and was barred by AIA with respect to any continuing levies. *Reference:* United States Tax Reporter ¶74,215.05(5); 63,315.03(165); 74,337.504(5). IRC §6213; 6331; 6334; 7421.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION,

ORDER

W. HAROLD ALBRITTON CHIEF UNITED STATES DISTRICT JUDGE

[1] This cause is before the court on the Recommendation of the Magistrate Judge, entered on June 21, 2002 and the Plaintiff's Reply to the Recommendation, which the court has construed as an objection to the Magistrate Judge's Recommendation. Upon independent evaluation, the court finds the objection to be without merit.

MacElvain' pro se Motion for Preliminary Injunction asked "the Court to enjoin Defendants . . . from seizing or attempting to seize Plaintiff's monthly retirement benefits from the Retirement Systems of Alabama, pending the outcome of the litigation" and "in the alternative to enjoin Defendants . . . from seizing or attempting to seize Plaintiff's monthly retirement benefits from the Retirement Systems of Alabama in excess of the maximum 15 percent allowed by law . . ." (Doc. 6). An affidavit attached to the Motion alleged that "the injunction sought is for levies that are in direct violation of 42 U.S.C. 407 and 26 U.S.C. § 6331(h)(1)." (Doc. 8 at ¶ 16). MacElvain's substantive arguments in support of the Motion and Defendant's Response, however, only discussed whether such action was barred by the Anti-Injunction Act, 26 U.S.C. § 7421.[1] (Doc. 7). Specifically, MacElvain suggested that the Anti-Injunction Act did not apply because the IRS did not properly follow the procedures for making tax assessments and failed to impose the deficiencies within the time allowed by the statute of limitations. Relying upon the substantive arguments of the parties, the Magistrate Judge determined, *inter alia*, that to the extent the motion sought to enjoin the ability of the IRS to collect taxes, the Anti-Injunction Act precluded it on collateral estoppel grounds (Doc. 24).

In the objection[2] MacElvain argues that, even assuming the invalidity of his challenge to the underlying obligation, the IRS cannot levy on his Social Security benefits insofar as they constitute exempt property within the meaning of 42 U.S.C. § U.S.C. 407. Citing 26 U.S.C. § 6331, he also challenges the propriety of the IRS's levy on his entitlement to a retirement pension from the State of Alabama and argues that that Section also precludes the continuous levy of more than 15% of his Social Security disability funds. Accordingly, he maintains that he is entitled to a preliminary injunction restraining that collection activity. For the several reasons set forth below, those arguments are patently without merit and MacElvain's objections are due to be overruled.

As a preliminary matter, to the extent that the IRS has lawfully assessed a tax deficiency for which MacElvain is liable, none of MacElvain's property, including his interest in Social Security and pension benefits, is exempt from levy. As the Su-

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[1] Section 7421(a) provides:

Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), and 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

"The manifest purpose of § 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 5 [9 AFTR 2d 1594] (1962).

[2] The court notes that the objection was untimely filed on July 16, 2002 although the July 3, 2002 Order (Doc. 28) granting MacElvain's Motion for Extension gave MacElvain only until July 15, 2002 to file objections.

preme Court explained in Drye v. U.S., 528 U.S. 49, 55–56 [84 AFTR 2d 99-7160] (1999):

> Under the relevant provisions of the Internal Revenue Code, to satisfy a tax deficiency, the Government may impose a lien on any ''property'' or ''rights to property'' belonging to the taxpayer. Section 6321 provides: ''If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.'' 26 U.S.C. § 6321. A complementary provision, § 6331(a), states:
>
> ''If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.''
>
> Section 6334(a) of the Code is corroborative. That provision lists property exempt from levy. The list includes 13 categories of items; among the enumerated exemptions are certain items necessary to clothe and care for one's family, unemployment compensation, and workers' compensation benefits. § 6334(a)(1), (2), (4), (7). The enumeration contained in § 6334(a), Congress directed, is exclusive . . .

Although McElvain correctly cites 42 U.S.C. § 407(a) of the Social Security Act for the proposition that social security benefits are generally exempt from levy,[3] subsection (b) of the same section recognizes that another statutory provision may supersede § 407 if it does so by means of an ''express reference'' to the section. Section 6334(c) provides such an express reference, as follows:

> ''Notwithstanding any other law of the United States (*including [42 U.S.C. § 407]*) no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).'' 26 U.S.C. § 6334(c) (emphasis added).

Section 6334(c) thus expressly provides that Social Security funds are not exempt from levy.[4] Neither do the pension benefits at issue fall under any 26 U.S.C. § 6334(a) exemption. See Shanbaum v. U.S., 32 F.3d 180, 183 [74 AFTR 2d 94-6292] (5th Cir.1994)(''Section 6334, which specifically exempts certain property from levy, does not exempt pension plan benefits from collection.''); United States v. Mitchell, 403 U.S. 190, 205 [27 AFTR 2d 71-1457] (1971)(''[Section 6334(c)] is specific and it is clear and there is no room in it for automatic exemption of property that happens to be exempt from state levy . . . . '').

McElvain has also relied on 26 U.S.C. § 6331(h)(1) which allows a continuing levy subject to a 15% percent limitation.[5] That provision is clearly inapplicable here inasmuch as MacElvain's complaints are addressed to IRS levies issued before 1997.

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[3] According to section 407(a), ''None of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment or other legal process.''

[4] Overton v. U.S., 74 F.Supp.2d 1034, 1045 [83 AFTR 2d 99-1258] (D.N.M.1999)(''Section 6334(a) of the I.R.C. sets forth an *exclusive*list of property and property rights which are exempt from levy. Included in this list are unemployment benefits, worker's compensation, certain public assistance payments, annuity/pension payments under the Railroad Retirement Act and certain military pensions. See I.R.C. §§ 6334(a) and 6334(c). General retirement benefits such as IRAs, self-employed Keough plans, thrift savings plans and Social Security benefits are not included within § 6334(a)'s exclusive list.''); Bonetti v. Department of Treasury of U.S., 1990 WL 155619, at 1 [71A AFTR 2d 93-4619] (S.D.N.Y.Oct. 12, 1990); U.S. v. Cleveland, 1994 WL 411376, at 3 [74 AFTR 2d 94-5677] (N.D.Ill. Aug. 3, 1994)(''Although subsection (a) of § 6334 lists various property exempt from levy by the IRS, social security benefits are not one of them.'')

[5] Section 6331(h) provides in pertinent part:

(1) If the Secretary approves a levy under this subsection, the effect of such levy on specified payments to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released. Notwithstanding section 6334, such continuous levy shall attach to up to 15 percent of any specified payment due to the taxpayer.

(2) For the purposes of paragraph (1), the term ''specified payment'' means--

(A) any Federal payment other than a payment for which eligibility is based on the income or assets of a payee,

(B) any payment described in paragraph (4), (7), (9), or (11) of section 6334(a), and

(C) any annuity or pension payment under the Railroad Retirement Act of benefit under the Railroad Unemployment Insurance Act.

"Section 6331(h) was enacted in 1997 and only applies to levies issued after August 5, 1997." U.S. v. Marsh, 89 F.Supp.2d 1171, 1178 (D.Hawaii 2000), citing Taxpayer Relief Act of 1997, Pub.L. No 105-34, § 1024(b), 111 Stat. 788, 923–24 (1997). MacElvain's Exhibit 4, which is attached to the complaint, is a notification from the Social Security Administration dated April 2, 1993 which advised him that his "Social Security benefit check ... [was] surrendered to the Internal Revenue Service ... in compliance with *a Notice of Levy*." MacElvain's Exhibit 5 is a December 28, 1992 letter from The Retirement Systems of Alabama which advised as follows:

> The enclosed document is your copy of *a Notice of Levy* this department has received against your retirement benefits from the Internal Revenue Service.
>
> Please be informed that to comply with this levy, the Retirement Systems of Alabama must withhold $303.75 of your monthly gross retirement pay and forward said amount to the Internal Revenue Service. The remaining $.1 [cent] of your monthly benefit will be mailed to you at your home address. This change will be effective with the December 31, 1992 allowance and will remain in effect until further notice from the Internal Revenue Service.

Based on the evidence presented, it appears that the levies on MacEvlain's Social Security and pension annuity payments were made well before August 1997, the effective date of § 6331(h)(1). Thus, MacElvain's reliance on 6331(h)(1) is misplaced.

Additionally, MacElvain's objections are frivolous to the extent that the motion for preliminary injunction is not addressed to ongoing conduct, but to the period between 1993 and 1999, when he claims that the IRS seized 100% of his Social Security benefits, rather than 15% of those benefits. (See Doc. 30 at ¶ 7). Inasmuch as MacElvain seeks to enjoin past conduct, his motion for preliminary injunction must fail. "Preliminary injunctive relief is appropriate only where the offense is ongoing or is likely to be committed in the future; it is not appropriate where only past transgressions are alleged." United States v. Savran, 755 F.Supp. 1165, 1178 (E.D.N.Y.1991); Dombrowski v. Pfister, 380 U.S. 479, 485 (1965)(noting "injunctive relief looks to the future"); Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 59 (1975)(noting that "the usual basis for injunctive relief, [is] 'that there exists some cognizable danger of recurrent violation'); U.S. v. W. T. Grant Co., 345 U.S. 629, 633 (1953)('The purpose of an injunction is to prevent future violations, Swift & Co. v. United States, 1928, 276 U.S. 311, 326, 48 S.Ct. 311, 314, 72 L.Ed. 587 and, of course, it can be utilized even without a showing of past wrongs. But the moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive.')

Insofar as MacElvain's motion addresses any present alleged injuries, it would nonetheless be precluded by the provisions of the Anti - Injunction Act absent any evidence that a statutory exception or the judicially -created exception to the Act applies. The Magistrate Judge's analysis of the application of the Anti-Injunction Act in the Recommendation, and conclusion that no exception to the Anti-Injunction Act applies to MacElvain's requested relief, is equally applicable to his claims that his Social Security benefits ought not to be levied and that continuous levies are subject to a 15% limitation. MacElvain has not objected to this aspect of the Recommendation, stating only that he wishes to revisit the issue of preliminary injunctive relief at a later time.

Accordingly, it is hereby ORDERED as follows:

1. The objection to the Magistrate Judge's Recommendation is OVERRULED.

2. The Magistrate Judge's Recommendation is ADOPTED and the Motion for Preliminary Injunction (Doc. #6) is DENIED.

Done this 9th day of August, 2002

W. HAROLD ALBRITTON

CHIEF UNITED STATES DISTRICT JUDGE

¶2002-5321

Don H. PACE and Bonnie L. PACE, and on behalf of themselves and all others similarly situated, PLAINTIFFS v. Leonard PLATT, Joan E. Klar, Timothy J. Lee, Henry O. Lamar, Jr., Jane and John Does 1-500, and the Internal Revenue Service, DEFENDANTS. U.S. District Court, Northern Dist. of Florida, Pensacola Division, (DC FL) Case No. 3:01-cv-452/LAC, Aug. 12, 2002. Years 1992, 1994, 1995. Decision for Govt.

1. Actions against IRS and IRS employees—constitutional violations—sovereign immunity—Federal Tort Claims Act—failure to exhaust administrative remedies—Declaratory Judgment Act—failure to state claim for relief. Pro se attorney and wife's action against IRS employees and IRS for declaratory relief for constitutional and tort violations due to freezing of taxpayers' tax accounts and resultant failure to timely receive refunds was dismissed with prejudice: action against IRS was barred by sovereign immunity; FTCA barred tax-related tort claims and taxpayers failed to exhaust administrative remedies thereunder; DJA barred tax-related declaratory relief; and *Bivens* claim failed to state claim where alternative remedy of refund suit existed. *Reference:* United States Tax Reporter ¶74,336.506(25); 76,557.53(12); 74,217.502(90); 76,557.53(30).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION,

ORDER

Lacey A. Collier United States District Judge

THIS CAUSE comes before the Court on Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment (Doc. 8). Plaintiffs responded in opposition (Doc. 41). Defendants replied (Doc. 30). For the reasons stated below, Defendants' Motion to Dismiss is due to be GRANTED. All other pending motions are DENIED as moot (Docs. 25–26, 34). This action is DISMISSED with prejudice.

I. Statement of Case

A. Background

Plaintiff DON H. PACE, a suspended Ohio attorney and perennial litigant (Doc. 30, Ex. A), proceeding *pro se*, and his wife, Plaintiff BONNIE L. PACE, also proceeding *pro se*, filed the instant complaint. Plaintiffs allege that, without notice, Defendant LEONARD PLATT, an employee of the Internal Revenue Service (IRS) Criminal Investigation Division imposed an administrative control code 914 (Code 914) on Plaintiffs' 1992, 1994, and 1995 federal income tax accounts, freezing the account activities (Doc. 1, ¶s 16, 55). As a result, Plaintiffs contend that they did not timely receive refunds which were due to them (*Id.*, ¶s 23–24, 55). Plaintiffs further contend that Defendants JOAN E. KLAR, TIMOTHY J. LEE, HENRY O. LAMAR, JR., IRS, and UNITED STATES OF AMERICA had supervisory authority over Defendant Platt and both ''neglected to adequately supervise'' him and ''participated in, ratified, approved and covered up'' his conduct (*Id.*, ¶ 58).[1] Plaintiffs also contend that Code 914 has been invoked thousands of times by Defendants Platt and JANE AND JOHN DOES 1-500 to seize and delay refunds (*Id.*, ¶s 56, 61). Plaintiffs attribute Platt and Does' alleged use of Code 914 to Defendants Klar, Lee, and Lamar.

[1] The caption of Plaintiffs' complaint does not include the United States of America as a defendant. However, Plaintiffs name the United States in Counts V and VI of their complaint. Further, since filing the complaint, this Court has ordered that, by operation of law, the United States be substituted for the individual Defendants in Counts III, IV, and VI (Doc. 29). Since the Court concludes that this action must be dismissed, the Court will proceed as though Plaintiffs had named the United States as a party in their complaint.

B. Procedural History

Plaintiffs filed a twenty-eight page, six-count complaint on December 3, 2001, relying on Title 28, United States Code, Sections 1343 and 1346(a)(1) & (b) for jurisdiction. In the first count of the complaint, brought pursuant to Title 42, United States Code, Section 1983, Plaintiffs seek declaratory judgment that Code 914 violates the Fifth Amendment of the United States Constitution. The second count, brought pursuant to *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), asserts a "constitutional tort"—namely, that the implementation of Code 914 by the individual Defendants allegedly violated the Fifth Amendment rights of Plaintiffs. The remaining counts allege tort claims for conversion against the individual defendants (Count III); negligent hiring and supervision against United States, IRS, Klar, Lee, Lamar and Does 1-500 (Count IV); *respondeat superior* against United States and IRS (Count V); and intentional infliction of emotional distress against all Defendants (Count VI). Plaintiffs bring Counts III through VI pursuant to the Federal Torts Claim Act (FTCA), Title 28, United States Code, Sections 2671 through 2680. Pursuant to Title 28, United States Code, Sections 2679(b)(2) and 2679(d)(2), this Court substituted the United States for the individual Defendants in Counts III through VI and dismissed the individual Defendants from those counts (Doc. 29). Defendants now move to dismiss all claims under various theories for want of subject matter jurisdiction and failure to state a claim upon which relief can be granted (Doc. 8).[2]

II. Motion to Dismiss

A. Standard

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure is designed to eliminate complaints or claims over which this Court lacks subject matter jurisdiction. As the party seeking this Court's jurisdiction, Plaintiffs have the burden of alleging facts sufficient to show federal jurisdiction is appropriate. *See McNutt v. Gen. Motors Acceptance Corp. of Ind., Inc.*, 298 U.S. 178, 188–89, 56 S. Ct. 780, 785, 80 L. Ed. 1135 (1936). Plaintiffs carry the burden throughout the litigation and must support their allegations of jurisdiction with sufficient facts if challenged by Defendants or the Court. *See id.* "A federal court must always dismiss a case upon determining that it lacks subject matter jurisdiction, regardless of the stage of the proceedings, and facts outside of the pleadings may be considered as part of that determination." *Goodman ex rel. Goodman v. Sipos*, 259 F.3d 1327, 1331 n.6 (11th Cir. 2001).

A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is designed to eliminate counts or complaints that fail to state a claim upon which relief can be granted. As such, this Court must accept all allegations of the complaint as true and construe those allegations in the light most favorable to Plaintiffs. *See Lopez v. First Union Nat'l Bank of Fla.*, 129 F.3d 1186, 1189 (11th Cir. 1997). A count may not be dismissed for failure to state a claim unless it appears beyond doubt that Plaintiffs can prove no set of facts in support of their claim which would entitled them to relief. *See id.* "The threshold of sufficiency that a complaint must meet to survive a motion to dismiss is exceedingly low." *Quality Foods de Centro Am. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 995 (11th Cir. 1983).

1. Sovereign Immunity

[1] Defendants argue that they are immune from suit on a number of Plaintiffs claims and that this Court lack subject matter jurisdiction over those claims because (a) Congress has not authorized suit against the IRS, (b) suits in respect to assessing and collecting a tax are excluded from the FTCA, and (c) Plaintiffs have failed to exhaust their administrative remedies "[T]he United States, as a sovereign, 'is immune from suit, save as it consents

[2] Defendants also move to dismiss the complaint for want of personal jurisdiction and insufficiency of service of process. Because the complaint is dismissed for lack of subject matter jurisdiction and for failure to state a claim for which relief can be granted, the Court need not address these arguments.

to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.''' *United States v. Dalm*, 494 U.S. 596 , 608 [65 AFTR 2d 90-1210], 110 S. Ct. 1361, 1368 [65 AFTR 2d 90-1210], 108 L. Ed. 2d 548 [65 AFTR 2d 90-1210] (1990). Any statutory waiver of sovereign immunity must be strictly construed in favor of the United States. *See United States v. Nordic Villiage, Inc.*, 503 U.S. 30, 33–34 [69 AFTR 2d 92-687], 112 S. Ct. 1011, 1014–15 [69 AFTR 2d 92-687], 117 L. Ed. 2d 181 [69 AFTR 2d 92-687] (1992); *Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1249 (11th Cir. 1996). When the United States has not consented to suit, the action must be dismissed for lack of subject matter jurisdiction. *See United States v. Mitchell*, 445 U.S. 535, 538, 100 S. Ct. 1349, 1351–52, 63 L. Ed. 2d 607 (1980); *Elias v. Connett*, 908 F.2d 521, 527 [66 AFTR 2d 90-5346] (9th Cir. 1990). Moreover, Plaintiffs, as the parties suing the United States, bear the burden of pointing to an ''unequivocable waiver of immunity.'' *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir.1983), *cert. denied*, 466 U.S. 958, 104 S. Ct. 2168, 80 L. Ed. 2d 552 (1984).

a. IRS as a Party Defendant

Plaintiffs have sued the IRS as a defendant in this action. However, Congress has not authorized suit against the IRS. Therefore, it lacks the capacity to be sued. *See Blackmar v. Guerre*, 342 U.S. 512, 514, 72 S. Ct. 410, 411, 96 L. Ed. 534 (1952); *Castleberry v. Alcohol, Tobacco & Firearms Div.*, 530 F.2d 672, 673 n.3 (5th Cir. 1976)[3] ; *Washburn v. Shapiro*, 409 F. Supp. 3, 8 [37 AFTR 2d 76-1391] (S.D. Fla. 1976); *Krouse v. U.S. Dept. of Treasury, Internal Revenue Serv.*, 380 F. Supp. 219, 221 [35 AFTR 2d 75-999] (C.D. Cal. 1974); *Baumohl v. Columbia Jewelry Co.*, 127 F. Supp. 865 [49 AFTR 1805] (D. Md. 1955). Accordingly, this Court lacks subject matter jurisdiction over suits against the IRS. Therefore, Defendants' motion is GRANTED to that extent and the IRS is DISMISSED with prejudice from this action.

b. FTCA Exclusion for Assessing and Collecting Taxes

Defendants argue that Plaintiffs' claims under Counts III through VI are specifically exempted from the FTCA and, therefore, that this Court lacks subject matter jurisdiction over those claims. The FTCA specifically excludes ''[a]ny claim arising in respect to the assessment or collection of any tax ....'' 28 U.S.C.A. § 2680(c) (West 1994). ''Section 2680(c) has been interpreted broadly by the courts to preclude suits for damages arising out the alleged tortious activities of IRS agents when those activities were in any way related to the agents' official duties.'' *Capozzoli v. Tracey*, 633 F.2d 654, 658 (5th Cir. 1981) (citing *Morris v. United States*, 521 F.2d 872, 874 [36 AFTR 2d 75-5842] (9th Cir. 1975); *Broadway Open Air Theatre v. United States*, 208 F.2d 257, 259 [44 AFTR 808] (4th Cir. 1953); *Pugh v. I.R.S.*, 472 F. Supp. 350, 352–353 [44 AFTR 2d 79-5185] (E.D. Pa. 1979); *Paige v. Dillon*, 217 F. Supp. 18, 20 [11 AFTR 2d 1333] (S.D.N.Y. 1963)); *see also Perkins v. United States*, 55 F.3d 910, 913 [75 AFTR 2d 95-1830] (4th Cir. 1995) (finding agent's asset seizure of mining equipment causing a miner's death was not actionable based on Section 2603 since it was ''remotely related'' to agent's official duties).[4]

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

[4] Plaintiffs rely on dicta by the Fifth Circuit stating,

> In holding that ... the United States has retained its sovereign immunity under 28 U.S.C. § 2680(c), we do not intend to suggest that the government is insulated from tort liability for any and all transgressions committed by IRS employees .... Of course, a tort committed under circumstances wholly unrelated to an IRS agent's official duties may ... be so far beyond the agent's scope of employment as to preclude vicarious liability on the part of the United States. However, it is conceivable that an IRS agent could engage in tortious conduct sufficiently removed from the agent's official duties of assessing or collecting taxes as to be beyond the scope of Section 2680(c), and at the same time sufficiently within the scope of his employment as to give rise to an action against the United States.

Capozzoli, 633 F.2d at 658. Based on this dicta, Plaintiffs assert that ''in order for the exemption of Section 2680(c) to apply, the Defendant has the burden of showing that the Code 914 was applied to collect 'a specific particular tax debt''' (Doc. 41, p. 16). Plaintiff's argument is contrary to the previously cited authority. Further, even assuming that this exception to the Section 2680(c) exemption is the law, the instant case clearly falls within the exemption, not in the ''grey area'' between the exemption and the outside boundaries of the FTCA.

Plaintiff's complaint raises claims that arise from the IRS's retention of certain taxes that Plaintiffs allege should have been refunded to them. Counts III through VI plainly arise "in respect of the assessment or collection of any tax" and the United States has not waived sovereign immunity on those claims.[5] Therefore, Defendant's motion must be GRANTED as to Counts III through VI, and those counts must be DISMISSED with prejudice.

c. FTCA Exhaustion

Even if the Court were to find that Defendants' actions did not fall under the assessment and collection exclusion, Counts III through VI still must be dismissed. Under the FTCA, Congress waived sovereign immunity and granted consent for the United States government to be sued for acts committed by any "employee of the Government while acting within the scope of his office or employment." 28 U.S.C.A. § 1346(b) (West Supp. 2001). However, a procedural prerequisite for such a suit is that "[a]n action ... not be instituted ... unless the claimant [has] first presented the claim to the appropriate Federal agency and his claim [has] been finally denied by the agency in writing and sent by certified or registered mail."[6] 28 U.S.C.A. 2675(a) (West 1994). The filing requirement is satisfied if the claimant "(1) gives the agency written notice of his or her claim sufficient to enable the agency to investigate and (2) places a value on his or her claim." *Adams v. United States*, 615 F.2d 284, 289 (5th Cir. 1980). A claim is "finally denied" when there has been a formal denial or when the agency fails to "make final disposition of a claim within six months." *Id.* This exhaustion prerequisite to suit is a jurisdictional requirement that cannot be waived and Plaintiffs must provide proof that they satisfied this requirement to institute suit against the United States. *See Lykins v. Pointer, Inc.*, 725 F.2d 645, 646–47 (11th Cir. 1984); *Employee Welfare Comm. v. Daws*, 599 F.2d 1375, 1378 (5th Cir. 1978). Accordingly, this Court does not have jurisdiction over a prematurely filed suit. *See McNeil v. United States*, 508 U.S. 106, 113, 113 S. Ct. 1980, 1983, 124 L. Ed. 2d 21 (1993).

In the instant case, Plaintiffs' sole allegation of satisfying the administrative exhaustion requirement is that "Plaintiff has duly made demand upon the [IRS] and has received no response" (Doc. 1, ¶ 8). This allegation is insufficient to fulfill Plaintiffs' procedural prerequisite. First, Plaintiffs do not allege that they instituted this action either six months after filing an administrative claim or after a formal denial of relief on their administrative claim. Further, by his own admission, one plaintiff—Don Pace—gave notice of his claim with the IRS regarding the imposition of Code 914 on August 10, 2001 (Doc. 41, p. 10 & Attach. Dec. ¶ 11).[7] However, Plaintiffs' complaint in this case was filed within six months of the notice, on December 3, 2001 (Doc. 1). Plaintiffs have not averred that their claim was formally denied. Therefore, had the Court reached this issue, it would have determined that Plaintiffs had not sufficiently averred or established proof of jurisdiction for Counts III through VI. Accordingly, the Court would have granted

[5] Plaintiffs efforts to characterize their claims as only questioning the motives of Defendants' actions in order to make them actionable are unconvincing. Allowing such a claim would allow any tax protestor's claim to avoid the Section 2680(c) bar, simply by characterizing it as one that questions the motives of an agent rather than that agent's actions. Such a result contravenes the broad exclusion Congress has granted in this area. *See* 28 U.S.C.A. § 2680(c) (West 1994); *Capozzoli*, 633 F.2d at 658.

[6] The purpose of this requirement is "to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." *Brown v. United States*, 838 F.2d 1157, 1160 (11th Cir. 1998) (quoting *Adams v. United States*, 615 F.2d 284, 289 (5th Cir. 1980); S. Rep. No. 1327, 89th Cong., 2d Sess. 6, *reprinted in* 1966 U.S.C.C.A.N. 2515, 2516).

[7] Defendants presented evidence that the claim was made on August 21, 2001 (Doc. 8, Ex. 9). However, whether the claim was filed on August 10, 2001, the beginning of August 2001, or August 21, 2001, the Court's result is unchanged.

Defendants' motion, and dismissed Counts III through VI.[8]

2. Declaratory Judgment

Defendants also argue that this Court lacks subject matter jurisdiction over Count I of Plaintiff's complaint and that Plaintiffs are not entitled to declaratory judgment on that count. Title 28, United States Code, Section 2201(a) provides, in relevant part:

> In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*other than actions brought under section 7428 of the Internal Revenue Code of 1986, ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C.A. § 2201(a) (West 1994) (emphasis added). Congress clearly established that, subject to limited exceptions that are inapplicable to the instant case, this Court does not have subject matter jurisdiction to grant declaratory relief in cases involving federal taxes. *See Willis v. Alexander*, 575 F.2d 495, 496 [42 AFTR 2d 78-5271] (5th Cir. 1978). Therefore, Defendants' motion is GRANTED as to Count I and it is DISMISSED with prejudice.

3. *Bivens* Constitutional Tort

Defendants argue that Plaintiffs' constitutional tort claim must be dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure because it fails to state a claim for which relief can be granted since Congress has provided an alternative remedial scheme to Plaintiffs' alleged injury. Courts will not create a damage remedy under *Bivens* for the violation of a constitutional right when Congress has created explicit remedies or when a court-created remedy would interfere with the effective functioning of the government. *See Cameron v. I.R.S.*, 773 F.2d 126, 129 [56 AFTR 2d 85-5851] (7th Cir. 1985) (citing *Bush v. Lucas*, 462 U.S. 367, 388–90, 103 S. Ct. 2404, 2416–17, 76 L. Ed. 2d 648 (1983); *Chappell v. Wallace*, 462 U.S. 296, 303–05, 103 S. Ct. 2362, 2367–68, 76 L. Ed. 2d 586 (1983); *Carlson v. Green*, 446 U.S. 14, 18–19, 100 S. Ct. 1468, 1471–72, 64 L. Ed. 2d 15 (1980)). The circuits that have specifically addressed this issue have uniformly agreed that Congress has already provided a comprehensive remedial scheme for Plaintiffs' alleged injury—deprivation of their tax refunds—"including, most fundamentally, the right to sue the government for a refund if forced to overpay taxes ...." *Id.; see Schriber v. Mastrogiovanni*, 214 F.3d 148, 150–51 [85 AFTR 2d 2000-1958] (3d Cir. 2000); *Nat'l Commodity and Barter Assoc. v. Archer*, 31 F.3d 1521, 1532 [74 AFTR 2d 94-5709] (10th Cir. 1994); *Vennes v. An Unknown Number of Unidentified Agents from the United States of America*, 26 F.3d 1448, 1453 [74 AFTR 2d 94-5144] (8th Cir. 1994), *cert. denied*, 513 U.S. 1076, 115 S. Ct. 721, 130 L. Ed. 2d 627 (1995); *McMillen v. U.S. Dep't of Treasury*, 960 F.2d 187, 190–91 [69 AFTR 2d 92-1067] (1st Cir. 1991) (per curiam) (dicta); *Wages v. I.R.S.*, 915 F.2d 1230, 1235 (9th Cir. 1990), *cert. denied*, 498 U.S. 1096, 111 S. Ct. 986, 112 L. Ed. 2d 1071 (1991); *Baddour, Inc. v. United States*, 802 F.2d 801, 808–09 [58 AFTR 2d 86-6035] (5th Cir. 1986); *see also* 26 U.S.C.A. § 7422 (West Supp. 2002). This Court will not substitute a judicially-created remedy for the one Congress has already explicitly provided. Accordingly, Plaintiffs' constitutional tort claim states a claim for which relief cannot

[8] Plaintiffs' argument that suit was not "instituted" until Defendants were served is without merit. The Supreme Court has held, "In its statutory context, we think the normal interpretation of the word 'institute' is synonymous with the words 'begin' or 'commence.' The most natural reading of the statute indicates that Congress intended to require complete exhaustion of Executive remedies *before invocation of the judicial process*." *McNeil*, 508 U.S. at 112, 113 S. Ct. at 1983–84 (emphasis added). The judicial process is invoked when a complaint is filed, not when a defendant is served. *Cf. Alexander v. Hawk*, 159 F.3d 1321, 1328 (11th Cir. 1998) (requiring exhaustion before "filing ... claims in federal court"); *Ivey v. United States*, 873 F. Supp. 663 (N.D. Ga. 1995) (relying on filing of complaint as institution of suit).

Further, even assuming *arguendo* that Plaintiffs' claims did not involve assessing and collecting taxes and that Plaintiffs had waited six months before filing the instant case, their claims under Counts III through VI still require partial dismissal. Plaintiffs did not allege—and the record does not demonstrate—that Plaintiffs filed an administrative claim within two years of the accrual of their claims for Counts III through VI. The FTCA provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after the claim accrues." 28 U.S.C.A. § 2401(b) (West 1993). Plaintiffs' complaint establishes that they were aware of their alleged right to refunds for their 1992 taxes and their 1995 taxes by April 1999 and January 1996, respectively (Doc. 1, ¶s25, 46–47). Therefore, had the Court reached the issue, to the extent that Counts III through VI rely on Plaintiffs' 1992 and 1995 tax accounts, they would have been dismissed.

be granted and Defendants' motion is due to be GRANTED in that regard. Therefore, Count II is DISMISSED with prejudice.[9]

III. Summary

The Court's ruling in this matter may be summarized as follows, and it is hereby ORDERED:

1. Defendants' Motion to Dismiss (Doc. 8) is GRANTED. This action is DISMISSED with prejudice.
2. Plaintiffs' Motion to Extend Time for Service as to Certain Defendants (Doc. 25) is DENIED as moot.
3. Plaintiffs' Motion for Continuance Under Rule 56(f) of Motion of Defendants Klar, Lee, and Lamar (Doc. 26) is DENIED as moot.
4. Plaintiffs' Supplemental Motion to Extend the Time for Service as to Defendant Henry O. Lamar, Jr. (Doc. 34) is DENIED as moot.
5. The Clerk of the Court is directed to close this file. Plaintiffs shall take nothing by this action and go without day.

ORDERED on this 12th day of August 2002.

Lacey A. Collier

United States District Judge

JUDGMENT

CASE NO. 3:01cv452 LAC/MCR

This action came before Honorable Lacey A. Collier and a decision has been rendered.

Plaintiffs shall take nothing by this action and go without day.

August 12, 2002

DATE

WILLIAM McCOOL, CLERK OF COURT

Deputy Clerk: Lynn Uhl

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DON H. PACE
VS
LEONARD PLATT, ET AL.

CASE NO. 3:01cv471 LAC/MCR

REFERRAL AND ORDER

Referred to Judge Lacey Collier on AUGUST 13, 2002
Motion/Pleadings: MOTION FOR SANCTIONS AGAINST DEFENDANT LEONARD PLATT FOR FALSE STATEMENTS UNDER PENALTY OF PERJURY

Filed by PLAINTIFF on 7/15/02 Doc.# 38

RESPONSES:
OPPOSITION BY DEFENDANT PLATT on 8/12/02 Doc.# 43
_____ on _____ Doc.# _____
_____ Stipulated _____ Joint Pldg.
_____ Unopposed _____ Consented

WILLIAM McCOOL, CLERK OF COURT

2
LC (1 OR 2)

Deputy Clerk: Jerry Marbut

ORDER

[9] The bases to dismiss Counts I and II apply equally to the named plaintiffs and to their proposed class. Therefore, Plaintiffs' complaint is dismissed in its entirety and the Court need not address Defendants' argument that Plaintiffs' proposed class has not exhausted its administrative remedies.

Upon consideration of the foregoing, it is ORDERED this 15th day of Aug, 2002, that:

(a) The relief requested is DENIED.

(b) _____

LACEY A. COLLIER

United States District Judge

¶2002-5322

UNITED STATES OF AMERICA, PLAINTIFF v. Nicholas C. PANAYIOTOU, DEFENDANT. U.S. District Court, Southern Dist. of Alabama, (DC AL) CIVIL ACTION NO. 01-0524-P-S, Aug. 9, 2002. Earlier proceeding at (2002, DC AL) 89 AFTR 2d 2002-2262. Years 1987, 1988, 1989, 1991, 1992, 1993, 1994, 1995. Decision for Govt.

1. Actions to reduce assessments to judgment—default judgment—interest. Govt. was granted default judgment against non-appearing taxpayer for his outstanding tax, penalty and interest debts in amounts stated, plus additional interest. *Reference:* United States Tax Reporter ¶74,035.01(30). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION,

DEFAULT JUDGMENT

[1] Upon Motion (doc. 13), and Supplemental Brief in support thereof (doc. 14), of the plaintiff the United States of America, by and through the United States Attorney for the Southern District of Alabama, and following a hearing on the same held before this court on June 20, 2002, it is ORDERED, ADJUDGED, and DECREED that judgment be entered in favor of plaintiff and against defendant Nicholas C. Panayiotou for federal income tax liabilities for the years 1987–89, 1991–95, as follows:

1. Defendant is indebted to plaintiff for assessed unpaid federal income taxes, penalties, and interest for the tax year 1987 in the amount of $502,680.95, plus accruals of interest and penalties through June 13, 2002, in the additional amount of $737,785.40, for a total of $1,240,466.35 ($502,680.95 + 737,785.40 = $1,240,466.35), as of June 13, 2002, plus further interest thereon from that date at 6% interest compounded daily through September 30, 2002, and thereafter, at the underpayment rate set by the Secretary of the Treasury, compounded daily, pursuant to 26 U.S.C. §§ 6601(a) and (e), 6621, 6622.

2. Defendant is indebted to plaintiff for assessed unpaid federal income taxes, penalties, and interest for the tax year 1988 in the amount of $7,106.31, plus accruals of interest and penalties through June 13, 2002, in the additional amount of $10,391.84, for a total of $17,498.15 ($7,106.31 + 10,391.84 = $17,498.15), as of June 13, 2002, plus further interest thereon from that date at 6% interest compounded daily through September 30, 2002, and thereafter, at the underpayment rate set by the Secretary of the Treasury, compounded daily, pursuant to 26 U.S.C. §§ 6601(a) and (e), 6621, 6622.

3. Defendant is indebted to plaintiff for accrued penalties and interest on federal income taxes for the year 1989 in the amount of $1,186.32, as of June 13, 2002, plus further interest thereon from the date at 6% interest compounded daily through September 30, 2002, and thereafter, at the underpayment rate set by the Secretary of the Treasury, compounded daily, pursuant to 26 U.S.C. §§ 6601(a) and (e), 6621, 6622.

4. Defendant is indebted to plaintiff for assessed unpaid federal income taxes, pen-

alties, and interest for the tax year 1991 in the amount of $116,527.50, plus accruals of interest and penalties through June 13, 2002, in the additional amount of $84,312.45, for a total of $200,839.95 ($116,527.50 + 84,312.45 = $200,839.95),as of June 13, 2002, plus further interest thereon from that date at 6% interest compounded daily through September 30, 2002, and thereafter, at the underpayment rate set by the Secretary of the Treasury, compounded daily, pursuant to 26 U.S.C. §§ 6601(a) and (e), 6621, 6622.

5. Defendant is indebted to plaintiff for assessed unpaid federal income taxes, penalties, and interest for the tax year 1992 in the amount of $21,840.24, plus accruals of interest and penalties through June 13, 2002, in the additional amount of $14,715.71, for a total of $36,555.95 ($21,840.24 + 14,715.71 = $36,555.95), as of June 13, 2002, plus further interest thereon from that date at 6% interest compounded daily through September 30, 2002, and thereafter, at the underpayment rate set by the Secretary of the Treasury, compounded daily, pursuant to 26 U.S.C. §§ 6601(a) and (e), 6621, 6622.

6. Defendant is indebted to plaintiff for assessed unpaid federal income taxes, penalties, and interest for the tax year 1993 in the amount of $18,238.37, plus accruals of interest and penalties through June 13, 2002, in the additional amount of $12,160.92, for a total of $30,399.29 ($18,238.37 + 12,160.92 = $30,399.29), as of June 13, 2002, plus further interest thereon from that date at 6% interest compounded daily through September 30, 2002, and thereafter, at the underpayment rate set by the Secretary of the Treasury, compounded daily, pursuant to 26 U.S.C. §§ 6601(a) and (e), 6621, 6622.

7 Defendant is indebted to plaintiff for assessed unpaid federal income taxes, penalties, and interest for the tax year 1994 in the amount of $9,075.45, plus accruals of interest and penalties through June 13, 2002, in the additional amount of $4,874.44, for a total of $13,949.89 ($9,075.45 + 4,874.44 = $13,949.89), as of June 13, 2002, plus further interest thereon from that date at 6% interest compounded daily through September 30, 2002, and thereafter, at the underpayment rate set by the Secretary of the Treasury, compounded daily, pursuant to 26 U.S.C. §§ 6601(a) and (e), 6621, 6622.

8 Defendant is indebted to plaintiff for assessed unpaid federal income taxes, penalties, and interest for the tax year 1995 in the amount of $702.12, plus accruals of interest and penalties through June 13, 2002, in the additional amount of $395.87, for a total of $1,097.99 ($702.12 + 395.87 = $1,097.99), as of June 13, 2002, plus further interest thereon from that date at 6% interest compounded daily through September 30, 2002, and thereafter, at the underpayment rate set by the Secretary of the Treasury, compounded daily, pursuant to 26 U.S.C. §§ 6601(a) and (e), 6621, 6622.

WHEREFORE, defendant Nicholas C. Panayiotou is indebted to plaintiff the United States of America for assessed unpaid federal income taxes, penalties, and interest in the total amount of $1,541,993.99 (1,240,466.35 + 17,498.15 + 1,186.32 + 200,839.95 + 36,555.95 + 30,399.29 + 13,949.89 + 1,097.99 = $1,541,993.99), including interest and statutory additions accrued through June 13, 2002, plus further interest thereon from that date at the underpayment rate, compounded daily, pursuant to 26 U.S.C. §§ 6601(a) and (e), 6621, 6622, for his failure to appear, answer, plead or otherwise defend this action as provided by the Federal Rules of Civil Procedure.

DONE this 9th day of August, 2002.

/s/

SENIOR UNITED STATES DISTRICT JUDGE

¶2002-5323

In Re: Paula SHARP, Debtor. U.S. Bankruptcy Court, Eastern Dist. of Kentucky, (Bktcy Ct KY) CASE NO. 02-50796, Aug. 9, 2002. Years 2001, 2002. Decision for Taxpayer in part and for Govt. in part.

1. Tax claims in bankruptcy—IRS right to setoff—exemptions—earned income credits (EIC). IRS's claim to setoff debtor's prepetition refund against her dischargeable tax debt was denied in part: under Kentucky law, taxpayer was entitled to exempt portion of refund representing her EIC, plus general exemption for $1000 of refund. But, IRS's setoff right, which wasn't affected by tax debt's dischargeability, covered remainder of refund. *Reference:* United States Tax Reporter ¶68,726.52(32); 68,726.52(20).

UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF KENTUCKY LEXINGTON DIVISION,

MEMORANDUM OPINION AND ORDER

Judge William S. Howard

This matter is before the court on the motion by creditor Internal Revenue Service (''IRS''), for relief from the automatic stay filed herein on April 29, 2002. The debtor filed an objection in response on May 7, 2002, and the matter was heard on June 20, 2002. The parties were given ten days to supplement their briefs, and the matter was to be taken under consideration for decision. No supplemental briefs have been filed and the matter is ripe for decision.

The IRS filed its motion seeking relief from the stay in order to exercise setoff rights against a refund owing to the debtor for the 2001 tax year in the amount of $4,715.00. The debtor owes an income tax liability to the IRS for 1992 tax year in the amount of $3,115.93. On June 3, 2002, the debtor and the IRS entered into an Agreed Order in *Paula Sharp v. Internal Revenue Service*, Adversary Case No. 02-5029, that the same 1992 tax debt is dischargeable.

The debtor filed another adversary proceeding against the IRS on May 7, 2002, Adversary Case No. 02-5045, seeking surrender of the 2001 tax refund, based on her qualification for an earned income credit (''EIC'') in the amount of $2,705.00 and her expectation of a refund in the amount of $2,010.00. The debtor stated in her complaint that she had claimed the EIC pursuant to K.R.S. 205.220, and the refund pursuant to K.R.S. 427.160, as exempt. The parties had informed the court that this proceeding was settled, but that settlement is apparently awaiting the resolution of the dispute herein concerning the IRS's setoff.

[1] The IRS contends that it has the right to setoff a taxpayer's overpayment of tax against a tax liability for prior years. *See Alexander v. United States*, 225 B.R. 145, 147–48 [81 AFTR 2d 98-1635] (Bankr. W.D. Ky. 1998), *aff'd* 245 B.R. 280 [84 AFTR 2d 99-6543] (W.D. Ky. 1999). The IRS further contends that although the 1992 tax debt is dischargeable, it is entitled to setoff any prepetition income tax overpayment against the debtor's debt for 1992 pursuant to 11 U.S.C. § 553. Section 553 preserves a right of setoff established by non-bankruptcy law. The I.R.S. cites *In re Luongo*, 259 F.3d 323, 334 [88 AFTR 2d 2001-5752] (5th Cir. 2001) in support of this proposition. The court there set out the requirements for proving a valid right to setoff under § 553: ''(1) a debt owed by the creditor to the debtor which arose prior to the commencement of the bankruptcy case; (2) a claim of the creditor against the debtor which arose prior to the bankruptcy case; and (3) the debt and claim must be mutual obligations.'' There is no dispute that these requirements have been met here.

In *Alexander*, *supra*, the court acknowledged that the IRS may setoff tax deficiencies against refunds owed when the above-stated requirements have been met. It went on, however, to distinguish the situation in which the debtor claims an exemption in these funds:

> Debtor claimed his 1996 Earned Income Credit as exempt under K.R.S. 205.220(3). That provision exempts all public assistance benefits from levy or execution. Federal Earned Income Credit benefits have been determined to be public assistance benefits within the meaning of K.R.S. 205.220(3), and therefore, are exempt from all claims of creditors in bankruptcy. (Cite omitted).

With regard to Debtor's 1996 tax refund based on an overpayment of withheld taxes, Debtor claimed $708.31 of that refund as exempt under K.R.S. 427.160. That Statute provides a $1,000.00 general exemption that can be applied by a debtor in bankruptcy to property of any nature.

As no objections were filed to Debtor's claimed exemptions, his 1996 federal tax refund became exempt under § 522(a). (Cites omitted). As a result, § 522(c) comes into play.

Section 522(c) provides in relevant part that property exempted from the bankruptcy estate shall not be liable for any debts arising before the bankruptcy was filed, unless such debt falls into one of the exceptions specified in § 522(c)(1) through (3).

The court went on to note that the exemptions contained in § 522(c)(1) through (3) regarding nondischargeable debts and debts secured by liens did not apply. (Paragraph (4) dealing with fraud in obtaining various forms of financial assistance for education was added in 2000. It is inapplicable herein as well.) *In re Alexander*, 225 B.R. at 148. This court has also held in *In re Goldsberry*, 142 B.R. 158, 159 [81 AFTR 2d 98-1985] (Bankr. E.D. Ky. 1992), that the EIC is exempt pursuant to K.R.S. 205.220(3).

This court therefore concludes that the debtor may claim an exemption as to her EIC in the amount of $2,705.00 and as to her 2001 refund in the amount of $1,000.00, for a total of $3,705.00 which the I.R.S. may not offset against her 1992 tax liability. The I.R.S. is granted relief from the automatic stay to offset the remaining $1,010.00 against the 1992 tax liability.

It is so ordered this 9 day of August, 2002.

By the court

Judge William S. Howard

¶2002-5324

UNITED STATES OF AMERICA, PLAINTIFF v. Billy Joe TORRENCE, Norma Ruth Jones TORRENCE, Steven Kelly Torrence, and Caroline Torrence Morris Rodden, DEFENDANTS. U.S. District Court, Eastern Dist. of Texas, (DC TX) 6:02cv204, Aug. 9, 2002. Years 1994, 1995, 1996, 1997, 1998, 1999, 2000. Decision for Govt.

1. Collection actions—foreclosure—funds held by third party—default judgment. Govt. was granted motion for default judgment against taxpayer's son to set aside as fraudulent taxpayer's transfer of funds to son, foreclose liens against funds, and apply them to taxpayer's outstanding tax debts: son didn't appear or otherwise properly respond to complaint. *Reference:* United States Tax Reporter ¶74,035.03(135). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION,

ORDER

Came on this day to be considered the *United States' Motion for Judgment by Default Against Steven Kelly Torrence Only, and Supporting Brief* (Docket No. 29). After careful consideration, the Court is of the opinion that the following Order should issue.

Background

On January 8, 2000, Mr. Torrence purchased a winning Texas lottery ticket with a cash value of $3.9 million, at a time when the Torrences were legally divorced but residing together. Mr. Torrence gave the ticket to Mrs. Torrence, and on January 9, 2000, she alone claimed all of the lottery winning in her name, in an attempt to defeat the IRS's right to collect Mr. Torrence's delinquent income taxes.

After income tax of $1,013,356.00 was withheld from the lottery winnings, the remaining amount of $2,604,559.42 was wire-transferred to a bank account in the

name of Norma Torrence. On the following day, she transferred the entire amount to a newly opened joint account in the names of Billy and Norma Torrence. Subsequently, Mrs. Torrence filed a 2000 federal income tax return with the IRS as a single person, reported the lottery winnings as her own income, and paid the correct amount of income tax on them.

In March 2000, Mr. Torrence allegedly became dissatisfied because Mrs. Torrence permitted third parties to draft the joint bank account. Without Mrs. Torrence's consent, he transferred the remaining $2,019,038.15 into a bank account in his name only. Mr. Torrence then began a fairly lavish lifestyle, buying expensive jewelry, a number of automobiles, motorcycles, and other property.

On March 20, 2002, the jury in the Torrences' divorce case found that, on January 8, 2000, the day Mr. Torrence won the lottery, the Torrences had a common law marriage, and that Mr. Torrence made a gift to Mrs. Torrence of one-half of the proceeds from the winning lottery ticket.

Procedural History

On May 8, 2002, the United States filed a Verified Complaint in order to reduce Mr. Torrence's $855,340.01 federal income tax liability to judgment, to foreclose federal tax liens on personal property, and to order the property sold in partial satisfaction of Mr. Torrence's tax liability. On June 24, 2002, the United States filed its amended complaint in this case, joining as additional defendants Steven Kelly Torrence and Caroline Morris Rodden Torrence. According to the return of service on the back of the summons filed on June 19, 2002, Steven Torrence was served with summons and a copy of the amended complaint on July 2, 2002, through his wife, at their ''dwelling house or usual place of abode,'' in accordance with the Federal Rule of Civil Procedure 4(e)(2).

Through the *United States' Verified Amended Complaint* (Docket No. 22), the United States seeks to obtain a judgment against Defendant Steven Kelly Torrence setting aside a fraudulent transfer of $600,000 to him by his father, Defendant Billy Joe Torrence, to foreclose the federal tax liens on these funds, to obtain a judgment against Steven Kelly Torrence for $600,000 to apply to the 1994–2000 federal income tax liability of Defendant Billy Joe Torrence, and other appropriate relief.

Although properly served, Steven Kelly Torrence has failed to appear or otherwise respond to the complaint within the time prescribed by Rule 12(a)(1)(A) of the Federal Rules of Civil Procedure. Steven Kelly Torrence's answer or response was due on July 22, 2002. Plaintiff's *Request to Clerk for Entry of Default* (Docket No. 4) was filed on March 12, 2002. The *Clerk's Entry of Default* (Docket No. 30) was filed on July 30, 2002.

Default Judgment

[1] Rule 55 of the Federal Rules of Civil Procedure permits entry of default as the consequence of failure to comply with Rule 12 of the Federal Rules of Civil Procedure requiring as answer within twenty days after service of the summons and complaint. Not only did Beverly fail to respond within twenty days after service of process, but he also has failed to respond at all in this action. Thus, the Clerk's entry of default was proper.

The Court notes that the entry of default judgment is committed to the discretion of the district judge. *Mason v. Lister*, 562 F.2d 343, 345 (5th Cir. 1977). Default judgments are not favored by the law because courts encourage trials on the merits. *See* 10A Wright and Miller, Federal Practice and Procedure §§ 2692–93 (1998). The Fifth Circuit has held that a ''party is not entitled to a default judgment as a matter of right, even where the defendant is technically in default.'' *Ganther v. Ingle*, 75 F.3d 207, 212 (5th Cir. 1996). In fact, ''[d]efault judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations.'' *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001). However, it is well established that the district court has the authority to dismiss or to enter default judgment, depending on which party is at fault, for failure to prosecute with reasonable dili-

gence or to comply with its orders or rules of procedure. *See Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1336, 8 L.Ed.2d 734 (1962), *affirming* 7th Cir., 291 F.2d 542; *Unites States v. Proctor & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958). The Fifth Circuit has also followed suit by holding that ''there is sample authority to uphold a district court's power to order entry of default for failure to comply with court orders or rules of procedure.'' *McGrady v. D'Andrea Electric, Inc.*, 434 F.2d 1000, 1001 (5th Cir. 1970).

Steven Kelly Torrence clearly has failed to comply with the Federal Rules of Civil Procedure. This Court can only assume that he knew of the instant suit, yet willfully failed to answer. When ''the court finds an intentional failure of responsive pleadings there need be no other findings.'' *Dierschke v. O'Cheskey*, 975 F.2d 181, 184 (5th Cir. 1992). Therefore, this Court will exercise its discretion and grant the default judgment against Steven Kelly Torrence.

It is therefore

ORDERED that the *United States' Motion for Judgment by Default Against Steven Kelly Torrence Only, and Supporting Brief* (Docket No. 29) is GRANTED.

SIGNED this 9th day of August, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5325

In Re: Bertha WILLIAMS, Debtor. U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) Case No.: 01-11007-6B3, Aug. 5, 2002. Decision for Taxpayer.

1. Tax claims in bankruptcy—objection to proof of claim. Debtor's unopposed objection to IRS's priority claim, based on misreported bad debt relating to mortgage which was being paid through her current Chap. 13 plan, was sustained. *Reference:* United States Tax Reporter ¶68,726.51(10).

UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION,

ORDER SUSTAINING THE OBJECTION TO CLAIM OF INTERNAL REVENUE SERVICE (CLAIM NO. 4)

ARTHUR B. BRISKMANN U. S. Bankruptcy Judge

[1] THIS MATTER came before the Court for consideration on July 30, 2002 upon Debtors' Objection to the Claim of Internal Revenue Service (Claim 4) (Hereafter, ''Creditor''). The Court, having reviewed the contents of the Debtors' Objection, and receiving no response from the Creditor, and being otherwise fully informed in the premises, hereby finds as follows:

1. The priority claim filed by the Internal Revenue Service is based on the misreported bad debt in the amount of $43,237.00 relating to the Debtor's mortgage which is being paid through the Debtor's current Chapter 13 plan.

Accordingly, IT IS HEREBY ORDERED that Claim No. 4 of the Internal Revenue Service is disallowed in its entirety.

DONE AND ORDERED this 5th of August, 2002, in Orlando, Florida.

ARTHUR B. BRISKMANN

U. S. Bankruptcy Judge

¶2002-5326

TAX ANALYSTS, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, District of Columbia, (DC Dist Col) Civil Action No.: 00-2914 (RMU), Aug. 27, 2002. Decision for Govt.

1. FOIA—exemptions—exempt org. denial and revocation rulings (EOs)—return information. IRS's denial of tax publisher's FOIA request that EOs be disclosed was upheld on summary judgment: EOs were confidential ''return information''under IRC §6103 protected by Exemption 3. Publisher's argument that EOs were analogous to FSAs which weren't

''return information'' was misplaced since FSAs were legal analyses that provided guidance not protected by IRC §6103, but EOs didn't provide advice or guidance. Also, IRS wasn't required to disclose EOs under IRC §6110 where Reg. §301.6110-1(a) and legislative history indicated EOs weren't ''written determinations''; EOs weren't subject to disclosure under IRC §6104 where Congressional intent was to make denials and revocations rulings confidential; and policy concern of protecting disclosure of tax data under IRC §6103 favored non-disclosure. *Reference:* United States Tax Reporter ¶76,556.502(10); 61,035.03(3). IRC §6103; 6104; 6110.

Counsel for the plaintiff William A. Dobrovir, P.C. 65 Culpeper Street Suite 102 Washington, D.C. 20186-3305
Counsel for the defendant Stuart D. Gibson U.S. Department of Justice Tax Division P.O. Box 227 Ben Franklin Station Washington, D.C. 20044

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,

MEMORANDUM OPINION

Ricardo M. Urbina, United States District Judge.

Granting the Defendant's Motion for Summary Judgment; Denying the Plaintiff's Motion for Summary Judgment

I. INTRODUCTION

This matter comes before the court on the parties' cross-motions for summary judgment. Tax Analysts (''the plaintiff'' or ''TA''), a nonprofit corporation, brings this action under the Freedom of Information Act (''FOIA''), 5 U.S.C. § 552, and Internal Revenue Code (''IRC'') § 6110, codified at 26 U.S.C. § 6110. The plaintiff seeks access to federal tax records held by the United States Internal Revenue Service (''the defendant'' or ''IRS''). The plaintiff claims that the IRS must disclose letter rulings that deny an organization's application for tax-exempt status or that revoke such status. The defendant counters that such records are confidential and are not subject to FOIA's mandatory disclosure requirements. The court concludes that the letter rulings are confidential and that the defendant does not have to disclose them. Accordingly, the court grants the defendant's motion for summary judgment and denies the plaintiff's motion for summary judgment.

II. BACKGROUND

TA is a nonprofit corporation that publishes and disseminates information concerning ''the enactment and administration of the tax laws of the United States, the several states and other countries, the adjudication of tax cases by courts and other tribunals ... and other subjects relating to taxation.'' Compl. at 2. On March 14, 2000, TA submitted a request to the IRS for access to all letter rulings issued in 1997, 1998, and 1999 by which the IRS denied any organization's application for tax exempt, or exempt organization (''EO'') status (''EO denial rulings'') or revoked such status (''EO revocation rulings''). *Id.* TA claims that the IRS's failure to timely respond constituted a *de facto* denial of its request. *Id.* at 3. On April 13, 2000, TA appealed this denial to the Commissioner of Internal Revenue. *Id.* TA revised its request on August 10, 2000, limiting it to ''a described, identifiable sample of six EO denial rulings and six EO revocation rulings ....'' *Id.* The IRS denied the revised request one month later. *Id.*

TA contends that the IRS must disclose the letter rulings under FOIA because they constitute ''final opinions in administrative adjudications and interpretations of the tax law adopted by [the] IRS ....'' Pl.'s Mot. for Summ. J. at 2. TA claims that an EO denial or revocation ruling is an opinion because it ''explains the final disposition'' of ''an agency process for the formulation of an order.'' *Id.* at 8. TA asserts that such rulings are issued in administrative cases, which are ''the only kind of 'cases' that [FOIA] refers to.'' *Id.* TA also alleges that the letter rulings are interpretations of the federal tax laws, including IRC § 501(c), which concerns tax-exempt organizations. *Id.*at 9–10.

In the alternative, TA claims that the ruling letters qualify as ''written determi-

nations'' and thus the IRS must disclose them under IRC § 6110.[1] Compl. at 4. TA claims that ''written determinations'' are ''rulings'' and ''determination letters,'' which include EO denial and revocation rulings. Pl.'s Mot. for Summ. J. at 1.

In its motion for summary judgment, the IRS contends that it can withhold the letter rulings because they are ''return information'' under Section 6103, which is an exception to FOIA.[2] Def.'s Mot. for Summ. J. at 14. The IRS argues that because FOIA does not apply, the documents could only be disclosed under IRC §§ 6110 or 6104. *Id.* at 4. The IRS insists that EO denial and revocation rulings are not written determinations under section 6110. *Id.* at 7. The IRS further argues that the letter rulings do not deal with an organization that is exempt from taxation under section 6104. *Id.* at 4. Thus, the IRS maintains that the records are confidential under section 6103's ''return information'' provision and that it need not disclose the records to the public. *Id.* at 9. The IRS also declares that the U.S. Department of the Treasury regulations specifically mandate that sections 6110 and 6104 do not apply to EO revocation or denial rulings. *Id.*(citing Treas. Reg. § 301.6110-1(a)). Consequently, the IRS urges the court to defer to the Treasury Department's interpretation of the IRC because of ''the complexity of the taxing statutes, and the specific expertise which the Treasury Department generally brings to administering and interpreting them.'' *Id.* at 11.

The court now turns to the parties' cross-motions for summary judgment.

III. ANALYSIS

A. Legal Standards

1. Legal Standard for a Motion for Summary Judgment

Summary judgment is appropriate when ''the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'' Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). To determine which facts are ''material,'' a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A ''genuine issue'' is one whose resolution could establish an element of a claim or defense and, therefore, affect the outcome of the action. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

In ruling on a motion for summary judgment, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. A nonmoving party, however, must establish more than ''the mere existence of a scintilla of evidence'' in support of its position. *Id.* at 252. To prevail on a motion for summary judgment, the moving party must show that the nonmoving party ''fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'' *Celotex*, 477 U.S. at 322. By pointing to the absence of evidence proffered by the nonmoving party, a moving party may succeed on summary judgment. *Id.*

In addition, the nonmoving party may not rely solely on allegations or conclusory statements. *Greene v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999); *Harding v. Gray*, 9 F.3d 150, 154 (D.C. Cir. 1993). Rather, the nonmoving party must present specific facts that would enable a reasonable jury to find in its favor. *Greene*, 164 F.3d at 675. If the evidence ''is merely colorable, or is not significantly probative, summary judgment may be granted.'' *Anderson*, 477 U.S. at 249–50 (internal citations omitted).

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[1] Section 6110(a) states, ''General Rule. — Except as otherwise provided in this section, the text of any written determination and any background file document relating to such written determination shall be open to public inspection at such place as the Secretary may by regulations prescribe.'' 26 U.S.C. § 6110(a).

[2] Section 6103(a) states, in pertinent part, ''General Rule. — Returns and return information shall be confidential . . . .'' 26 U.S.C. § 6103(a).

B. The Defendant Need Not Disclose EO Denial and Revocation Rulings

[1] FOIA mandates the disclosure of all nonexempt information requested by specific parties. 5 U.S.C. § 552(a)(3); *Judicial Watch of Florida, Inc. v. U.S. Dep't of Justice*, 102 F. Supp. 2d 6, 10 (D.D.C. 2000) (Urbina, J.) ''Summary judgment is available to the defendant in a FOIA case when the agency proves that it has fully discharged its obligations under FOIA, after the underlying facts and the inferences to be drawn from them are construed in the light most favorable to the FOIA requester.'' *Moore v. Aspin*,916 F. Supp. 32, 35 (D.D.C. 1996) (citing *Weisberg v. U.S. Dep't of Justice*, 705 F.2d 1344, 1350 (D.C. Cir. 1983)). The agency bears the burden of showing that there is no genuine issue of material fact by proving the validity of the exemptions it asserts. *Weisberg*, 705 F.2d at 1350.

In the case at bar, the plaintiff supports its FOIA claim by asserting that EO denial and revocation rulings are ''final opinions ... made in the adjudication of cases'' and ''interpretations which have been adopted by the agency and not published in the Federal Register.'' Pl.'s Mot. for Summ. J. at 2. The defendant does not refute this argument but contends that the ruling letters are subject to FOIA exemption 3 regardless of whether they originally qualified as ''final opinions'' or ''interpretations.'' Def.'s Mot. for Summ. J. at 2. Exemption 3 allows an agency to withhold records responsive to a FOIA request if another statute exempts the production of those documents. 5 U.S.C. § 552(b)(3).

The defendant correctly argues that IRC § 6103, which provides that ''return information shall be confidential,'' is a statute satisfying the requirements for exemption 3. *Church of Scientology v. Internal Revenue Serv.*, 484 U.S. 9, 11 [60 AFTR 2d 87-5832] (1987) (holding that ''if § 6103 forbids the disclosure of material, it may not be produced in response to a request under the FOIA''); *Lehrfeld v. Richardson*, 132 F.3d 1463, 1465 [81 AFTR 2d 98-529] (D.C. Cir. 1998) (holding that ''the IRS may not disclose 'return information' in response to a FOIA request because § 6103 specifically exempts such information from disclosure''); Def.'s Mot. for Summ. J. at 2–3. Therefore, the remaining question is whether EO denial and revocation rulings qualify as ''return information'' under Section 6103 for the purpose of FOIA exemption status.

''Return information'' includes ''a taxpayer's identity ... tax liability ... or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of [tax] liability.'' 26 U.S.C. § 6103(b)(2)(A). The D.C. Circuit has clarified this definition, explaining that ''data'' consists of ''facts'' as opposed to ''legal analysis.'' *Landmark Legal Found. v. Internal Revenue Serv.*, 267 F.3d 1132, 1137–38 [88 AFTR 2d 2001-6350] (D.C. Cir. 2001). In addition, ''data'' must be ''unique to a particular taxpayer.'' *Id.* at 1137. The term ''data'' does not include ''legal interpretations of statutes, rules, regulations, and judicial opinions, and the legal conclusions flowing from those interpretations.'' *Tax Analysts v. Internal Revenue Serv.*, 117 F.3d 607, 613–16 [80 AFTR 2d 97-5152] (D.C. Cir. 1997).

The D.C. Circuit has interpreted section 6103 to cover ''returns filed under compulsion of law which contain information necessary to determine federal tax liability.'' *Tax Analysts and Advocates v. Internal Revenue Serv.*, 505 F.2d 350, 355 n.1 [34 AFTR 2d 74-5731] (D.C. Cir. 1974) (stating that section 6103 was not meant to protect ''tax advice'' sought by taxpayers asking the IRS how to treat a specific set of facts relating to a tax return). In addition, the D.C. Circuit has specifically ruled that there is no distinction between ''whether an applicant satisfies the statutory criteria for exemption'' and ''an analysis of 'the applicant's income tax liability.''' *Lehrfeld.*, 132 F.3d at 1467; *see also Breuhaus v. Internal Revenue Serv.*, 609 F.2d 80, 83 [44 AFTR 2d 79-6032] (2d Cir. 1979) (holding that section 6103 ap-

plies to information related to tax-exempt organizations).

The court determines that EO denial and revocation rulings fall under section 6103's confidentiality provision. The letter rulings at issue consist of factual information concerning the tax-exempt status of an organization, and are clearly "necessary to determine federal tax liability." *Tax Analysts and Advocates*, 502 F.2d at 355 n.1. In addition, an organization's tax-exempt status is of a "taxpayer-specific character," which section 6103 was created to protect. *Landmark Legal Found.*, 267 F.3d at 1138.

Moreover, the plaintiff's argument that such rulings are not "return information" based on the reasoning in *Tax Analysts*, 117 F.3d 607 [80 AFTR 2d 97-5152], is misplaced. In that case, the D.C. Circuit held that Field Service Advice memoranda issued by the IRS's General Counsel were not "return information" under section 6103 because they constituted "written determinations" under section 6110. *Id.* at 616. The plaintiff misunderstands the difference between Field Service Advice memoranda and EO denial and revocation rulings. Field Service Advice memoranda are "means by which the national office of the Office of Chief Counsel provides field offices with advice about the tax laws in response to questions regarding specific factual situations." *Id.* The D.C. Circuit held that such "requests from field personnel for legal guidance" were "legal analyses" not protected under section 6103. *Id.* at 609, 616. In contrast, EO denial and revocation rulings do not constitute advice or guidance, since they merely inform a specific organization of its liability to the federal government. *Id.* The court therefore rules that EO denial and revocation rulings are "return information" under section 6103.

The next question is whether the letter rulings must be disclosed under an exception to section 6103. The plaintiff claims that the IRS must release EO denial and revocation rulings under IRC § 6110, which mandates disclosure of "written determinations." Compl. at 4. The defendant counters by maintaining that EO revocation and denial rulings do not qualify as written determinations under Treasury Regulation § 301.6110-1(a). Def.'s Mot. for Summ. J. at 7. The defendant urges the court to adopt the Treasury Department's interpretations since they are "reasonable . . . not arbitrary and capricious, and do not clearly contravene" the statute. *Id.* at 12. In addition, the defendant maintains that the Treasury regulations have remained unchallenged since their enactment 25 years ago. *Id.*

The court must engage in statutory interpretation, first examining the plain language used by Congress in IRC § 6110. *United States. v. Mead Corp.*, 533 U.S. 218, 231–32 (2001); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984); *United States & Kirsanow v. Wilson*, 290 F.3d 347, 352 (D.C. Cir. 2002). Under section 6110, a "written determination" is "a ruling, determination letter, technical advice memorandum, or Chief Counsel Advice." 26 U.S.C. § 6110(a)(1)(A). This language is ambiguous because Congress did not indicate what types of "rulings" or "determination letters" should be considered a "written determination."

Since IRC § 6110 permits either party's interpretation of the statute, the court must assess whether the IRS's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. "When Congress has 'explicitly left a gap for an agency to fill' . . . any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead Corp.*, 533 U.S. at 227 (quoting *Chevron*, 467 U.S. at 843–44). In addition, such regulations must be made in a "notice-and-comment rulemaking or formal adjudication." *Id.* at 230.

The court first concludes that the IRS's interpretation is entitled to *Chevron* deference since the Department of Treasury enacted Treasury Regulation § 301.6110-1(a) in a formal rulemaking process. *Mead Corp.*, 533 U.S. at 227. Therefore, the court must determine whether the regulation is a reasonable interpretation of sec-

tion 6110. *Id.*; *Lehrfeld*, 132 F.3d at 1466. The legislative history of section 6110 strongly supports the IRS's position, particularly the Senate reports, which clarify that a ''written determination'' is ''written advice to taxpayers on the tax treatment of their specific transactions.'' S. Rep. 94-938, at 303 (1976). The report goes on to state that ''[a]dvice with respect to a proposed transaction may be issued upon a written request from the taxpayer,'' and ''the letter of advice generally is called a 'ruling' and is in the form of a letter to the taxpayer.'' *Id.*This definition appears identical to that used by the D.C. Circuit to describe Field Service Advice memoranda. *Tax Analysts*, 117 F.3d at 609. The D.C. Circuit held that such ''advice'' constituted ''legal analyses'' falling under section 6110, and this court concluded above that EO revocation and denial rulings are not ''legal analyses.'' *Id.* Accordingly, the legislative history of section 6110 favors the defendant's argument that EO denial and revocation rulings are not ''written determinations.''[3]

In addition, the court ''must look not only at that section but at related provisions in the statute.'' *Id.* at 615. The other exception to IRC § 6103 is section 6104, which requires the IRS to disclose information concerning organizations that are ''exempt from taxation.'' 26 U.S.C. § 6104(a)(1)(A). The court determines that the plain language of this statute indicates Congress's intent to ensure that information is disclosed about organizations that are *granted* tax-exempt status. *Id.* Section 6104, however, does not mention any disclosure requirements for organizations whose tax-exempt status was revoked or denied. *Id.*

The court must therefore determine the reasonableness of Treasury Regulation § 301.6110-1(a) with respect to section 6104. The regulation states that EO revocation and denial rulings are not open to the public under section 6014. Treas. Reg. § 301.6110-1(a). Moreover, the regulation explains that ''[s]ome determination letters and other documents relating to tax exempt organizations that are not open to public inspection under section 6104(a)(1)(A) and the related regulations are nevertheless within the ambit of section 6104 for the purposes of section 6110.'' Treas. Reg. § 301.6110-1(a).

The court agrees with the defendant that such an interpretation is reasonable, given the case law on this statute and the language of section 6104. *Tax Analysts v. Internal Revenue Serv.*, 53 F. Supp. 2d 449, 453 [83 AFTR 2d 99-1278] (D.D.C. 1999) (explaining that in the case of tax-exempt organizations, Congress has provided a limited exception to Section 6103's rule regarding the confidentiality of tax returns and return information (citing IRC § 6104(a)(1)(A)); *Sklar v. Comm'r of Internal Revenue*, 282 F.3d 610, 616 [89 AFTR 2d 2002-808] (9th Cir. 2002) (holding that § 6014(a)(1)(A)'s disclosure requirement for documents in support of the exemption application is ''fully consistent with the already extensive disclosure generally required of tax-exempt organizations under § 6104'').

Furthermore, the defendant refers to a recommendation issued in January 2000 by the Joint Committee on Taxation, sug-gesting that the IRS make EO revocation and denial rulings open to the public. Def.'s Mot. for Summ. J. at 14. This indi-cates that Congress is considering, but has not yet enacted, an amendment to section 6104's disclosure requirements. *Id.* The court agrees with the defendant that ''it is not the role of the judiciary to sit as a committee of revision to perfect the administration of the tax laws.''' Def.'s Mot. for Summ. J. at 14; *Tax Analysts*, 53 F. Supp. 2d at 453 (stating that 'it is for Congress, not the courts, to modify the IRS disclosure rules'). Accordingly, the court concludes that section 6104, and not section 6110, covers information concerning tax-exempt organizations. Congress's exclusion of EO denial and revocation rulings from section 6104 displays Congress's intent to make such records confidential.

[3] The House reports do not elaborate on the meaning of ''written determination'' and are therefore not utilized in this analysis. HR REP. No. 94-455, 94th Cong., 2d Sess. (1976).

Finally, turning back to section 6110, the court must look at policy considerations in addition to legislative history and related statutes. *Chevron*, 467 U.S. at 864. The plaintiff submits that ''Congress intended and expected that §§ 6110 and 6104, enacted in the same section, § 1201, of the same public law, together would ensure disclosure of all rulings, including all rulings relating to tax exempt status .... ''Pl.'s Mot. for Summ. J. at 29. This interpretation, however, would undercut the purpose of section 6103, which is to ''impose greater restrictions on the disclosure of tax data.'' *Church of Scientology*, 484 U.S. at 17. Congress did not intend to permit disclosure of all rulings under section 6110, given section 6103's emphasis on protecting the confidentiality of taxpayer-specific information such as ''[r]eturns and return information.'' 26 U.S.C. § 6103.

In sum, caselaw, the underlying legislative history, related statutes, and policy considerations all support the IRS's reasonable interpretation of section 6110. In other words, Section 6110's term ''written determination'' does not cover EO denial and revocation rulings, which fall into the category of ''return information'' under section 6103 and thus need not be disclosed publicly.

IV. CONCLUSION

For all these reasons, the court grants the defendant's motion for summary judgment and denies the plaintiff's motion for summary judgment. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this ___ day of August, 2002.

Ricardo M. Urbina

United States District Judge

ORDER

Granting the Defendant's Motion for Summary Judgment; Denying the Plaintiff's Motion for Summary Judgment

For the reasons stated in this court's Memorandum Opinion separately and contemporaneously issued this ___ day of August, 2002, it is

ORDERED that the defendant's motion for summary judgment is GRANTED; and it is

FURTHER ORDERED that the plaintiff's motion for summary judgment is DENIED.

SO ORDERED.

Ricardo M. Urbina

United States District Judge

¶2002-5327

Beverly M. PARKER, PETITIONER v. UNITED STATES OF AMERICA, and Internal Revenue Service, RESPONDENTS. U.S. District Court, Eastern Dist. of North Carolina, (DC NC) Case No. 4:02cv117(H)(4), Aug. 2, 2002. Decision for Govt.

1. Third-party summons enforcement—petition to quash. Taxpayer's petition to quash IRS's 3d-party summons was dismissed without prejudice. *Reference:* United States Tax Reporter ¶76,095.01(10). IRC §7609.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA Eastern Division,

ORDER

[1] Having considered the Respondents' Motion to Dismiss Petition to Quash Internal Revenue Service Third-Party Summons, the supporting memorandum of points and authorities, any opposition and reply thereto, and the entire record of this proceeding, it is by the Court hereby

ORDERED that the motion hereby is GRANTED; and it is further

ORDERED that this action be, and hereby is, DISMISSED WITHOUT PREJUDICE; and it is further

ORDERED that the Clerk shall dis-tribute copies of this Order to the persons listed below.

SO ORDERED this 2nd day of August, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5328

In Re: Robert C. JOHNSON, Debtor. Robert C. JOHNSON, PLAINTIFF v. COMMISSIONER of Internal Revenue, DEFENDANT. U.S. Bankruptcy Court, Dist. of South Carolina, (Bktcy Ct SC) C/A No. 92-75816; Adv. Pro. No. 02-80185-W, July 31, 2002. Decision against Govt.

1. Bankruptcy court jurisdiction—new adversary proceeding—service. IRS's motion to dismiss new adversary proceeding Chap. 7 debtor filed after main case was closed was denied: bankruptcy court had jurisdiction to hear proceeding where it involved bankruptcy law-based issues of discharge injunction and automatic stay violations. Also, IRS's service argument was rejected where service certificates reflected compliance with Bankruptcy Rule 7004 and IRS had timely received service. *Reference:* United States Tax Reporter ¶68,726.52(5); 68,726.52(3).

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA,

ORDER

Chapter 7

[1] THIS MATTER comes before the Court upon Commissioner of Internal Revenue's (''Defendant'') Motion to Dismiss (the ''Motion''). In the Motion, Defendant argues that the Court should dismiss the Complaint filed by Robert C. Johnson (''Plaintiff'') pursuant to Federal Rule of Civil Procedure 12(b)(1–2) because the Court lacks subject matter jurisdiction and because there is no personal jurisdiction over Defendant.[1] Specifically, Defendant argues that the Court lacks subject matter jurisdiction because the main bankruptcy case is closed, Debtor has not filed a motion to reopen it, and the Court cannot consider Debtor's new adversary proceeding without first reopening the case. Regarding personal jurisdiction, Defendant argues there is none because Plaintiff failed to serve the Summons and Complaint properly.

To determine whether a bankruptcy court has subject matter jurisdiction, this Court looks to 28 U.S.C. §1134. Section 1334(b) provides that a district court has subject matter jurisdiction over matters that arise under the Bankruptcy Code or matters that arise in or are related to bankruptcy cases. For a court to decide whether a proceeding arises under the Bankruptcy Code, it must examine the pleading at issue and discern whether federal bankruptcy law creates the cause of action or if the plaintiff's right to relief necessarily depends upon resolution of a substantial question of federal bankruptcy law. See Poplar Run Five Ltd. P'ship v. Virginia Elec. & Power Co. (In re Poplar Run Five Ltd. P'ship), 192 B.R. 848, 855 (Bankr. E.D. Va. 1995). Applying this test to Plaintiff's complaint, the Court concludes it has subject matter jurisdiction over this adversary proceeding as Debtor raises two causes of action that the Bankruptcy Code created, a violation of the automatic stay and a violation of the discharge injunction.

The Court now considers whether there is personal jurisdiction of Defendant in this case. Federal Rule of Bankruptcy Procedure 7004(b)(4) provides that service upon the United States is performed properly by serving the United States Attorney for the district in which the action is brought, the Attorney General, and, in any action attacking the validity of an order of an officer or an agency of the United States not made a party, the officer or agency. Plaintiff provided Certificates of Service indicating that he served the Commissioner of the Internal Revenue Service, the Attorney General, and the United States Attorney for South Carolina. Defendant acknowledges that Plaintiff almost served the Summons and Complaint correctly but argues that service was deficient because service upon the Attorney General was specifically

[1] Plaintiff titled the pleading wherein he alleges his causes of action against Defendant as ''Petition.'' To reduce confusion, the Court will refer to this pleading with its typical title of Complaint.

directed to the Bankruptcy Section of the United States Department of Justice. Defendant argues that service directed specifically to the Bankruptcy Section was improper and that Plaintiff should have directed service only generally to the Attorney General or specifically to the Tax Division. Defendant, however, cites no case authority to support this argument. Moreover, the Summons and Complaint apparently reached Defendant in a timely manner as Defendant filed a timely motion to dismiss. Because Plaintiff's Certificates of Service indicate compliance with Bankruptcy Rule 7004, the Court finds that service was proper and that there is personal jurisdiction over Defendant.

Accordingly, the Court denies Defendant's Motion.

AND IT IS SO ORDERED.

/s/

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

July 31, 2002.

¶2002-5329

TAX AND ACCOUNTING SOFTWARE CORPORATION; Tim E. Kloehr; and Sheryl Kloehr, PLAINTIFFS - APPELLEES v. UNITED STATES OF AMERICA, DEFENDANT - APPELLANT. COLORADO SOFTWARE AND INTERNET ASSOCIATION; Software Finance and Tax Executives Council, AMICI CURIAE. U.S. Court of Appeals, Tenth Circuit, (CA10) No. 00-5196, Aug. 30, 2002. District Court, (2000, DC OK) 86 AFTR 2d 2000-5752, 111 F Supp 2d 1153, 2002-2 USTC ¶50672, reversed and remanded. Years 1993, 1994. Decision for Govt.

1. Research credits—qualified research—development of commercially licensed software. District court improperly granted software co. summary judgment on its IRC §41 research credit claim for costs of developing commercially licensed accounting software: neither taxpayer's nor govt.'s interpretation of "discovering information" requirement comported with statute's plain language, which reflected distinct requirement that taxpayer both discover new information and that such information have indepen-dent value that could be applied in new product development. Also, taxpayer couldn't as matter of law meet "process of experimentation" requirement which, al-though not prohibiting use of already-known methods, dictated that at least some uncertainty exist at outset about technical possibility of achieving end result, which uncertainty was concededly lacking in tax-payer's program development. *Reference:* United States Tax Reporter ¶415.01(20); 415.01(10). IRC §41.

Curtis C. Pett (Richard Farber with him on the briefs), Attorneys, Tax Division, Department of Justice, Washington, D.C., for the Defendant-Appellant.
Rebecca M. Fowler (Richard H. Foster with her on the brief), Tulsa, Oklahoma, for the Plaintiffs-Appellees.
Mark Reinhardt, Denver, Colorado, filed an amicus brief on behalf of Colorado Software and Internet Association.
Mark E. Nebergall, Washington, D.C., filed an amicus brief on behalf of Software Finance and Tax Executives Council.

UNITED STATES COURT OF APPEALS TENTH CIRCUIT,

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 98-CV-363)

Before LUCERO and McWILLIAMS, Circuit Judges, and STAGG,[1] District Judge.

LUCERO, Circuit Judge.

FILED

PATRICK FISHER

Clerk

PUBLISH

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[1] The Honorable Tom Stagg, District Judge for the Western District of Louisiana, sitting by designation.

Plaintiff taxpayers filed a refund suit seeking money allegedly owed them from a tax credit for research and development expenses under I.R.C. § 41. In a matter of first impression in this circuit, we interpret the scope of "qualified research" under I.R.C. § 41, including the requirement in § 41(d)(1) that the taxpayer must intend to "discover[] information" using a "process of experimentation." The district court granted summary judgment to the taxpayers and the government appealed. Our review of this case was abated from January 18, 2002, until May 24, 2002, pursuant to the government's request. We have jurisdiction under 28 U.S.C. § 1291, and we reverse and remand.

I

Plaintiffs-Tim Kloehr, his wholly owned Subchapter S corporation, Tax and Accounting Software Corporation ("TAASC"), and Mr. Kloehr's wife Sheryl Kloehr-filed suit seeking a refund of taxes paid by Mr. Kloehr for his 1993 tax year and by him and his wife for 1994.[1] TAASC is an Oklahoma corporation that develops and sells software for use by tax and accounting professionals. In 1993 and 1994, TAASC developed four computer software products for sale to its customers: EasyACCT, EasyMICR, Professional Tax System, and EasyTEL. The research and development expenses for these four products are at issue in this suit.

EasyACCT is an integrated accounting program that collects data for the preparation of financial statements and allows for the transfer of this information to TAASC's tax-preparation software. The parties agree that at the time of its introduction to the public EasyACCT was unique in the functions that it provided. EasyMICR is a software program designed to print magnetic-ink-character banking transit codes on blank check stock. It was developed in both DOS and Windows versions. A commercial failure, EasyMICR was subsequently integrated into EasyACCT.

Professional Tax System integrates a number of tax-preparation software programs into a single, seamless package and allows for the preparation of tax returns for both state and federal tax forms using the same data. It was the first commercial software program to allow for electronic filing with state and federal governments. The program was also designed to run with minimal memory and therefore is able to run on a wide range of computers.

EasyTEL is an automated, multi-task call-processing system that allows businesses to answer and transfer calls, take messages, provide information over the phone, convert faxes to e-mails, and distribute faxes automatically. EasyTEL is unusual because it was designed to run on low-cost computer hardware and requires little maintenance.

In 1993, TAASC incurred a total of $1,838,756 in research and development expenses for the development of these software products; in 1994, it incurred a total of $2,444,938 in expenses. TAASC claimed a portion of these expenses as research and development tax credits under I.R.C. § 41, but the Internal Revenue Service ("IRS") disallowed those tax credits. As a result, Mr. Kloehr faced tax deficiencies of $123,764 in 1993 and $192,510 in 1994. Mr. Kloehr paid the deficiencies and brought a refund suit on May 14, 1998 under I.R.C. § 7422(a) and 28 U.S.C. § 1346(a)(1). On the parties' cross-motions for summary judgment, the district court granted summary judgment for TAASC.

We review the district court's grant of summary judgment de novo. Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1326 (10th Cir. 1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When applying this standard, we view the evidence and draw reasonable inferences in

[1] The plaintiffs will be collectively referred to as TAASC throughout this opinion.

the light most favorable to the non-moving party. Simms, 165 F.3d at 1326. If there is no genuine issue of material fact in dispute, we determine whether the district court correctly applied the substantive law. Id.

II

[1] Central to the parties' dispute in this case is what constitutes "qualified research," which entitles a business to a tax credit under I.R.C. § 41. We begin our analysis with an overview of the provisions of I.R.C. § 41(d)(1), which defines "qualified research," and a brief history of the § 41 tax credit.

We initially note that the provision in question, I.R.C. § 41, is separate from the tax code provision that provides for a deduction for any "research or experimental expenditures" made by a business. I.R.C. § 174(a)(1). The latter expenditures have been defined by regulation as expenditures for "activities intended to discover information that would eliminate uncertainty concerning the development or improvement of a product." Treas. Reg. § 1.174-2. Our interpretation of the proper scope of the tax credit under § 41 has no bearing on the scope or applicability of the deduction under § 174.

A

Section 41(d)(1) lays out five separate requirements for "qualified research":[2]

(1) The research must qualify as expenses under I.R.C. § 174, the tax code provision providing for deductions of research expenses. I.R.C. § 41(d)(1)(A).

(2) The research must be "undertaken for the purpose of discovering information." § 41(d)(1)(B).

(3) The information discovered must be "technological in nature." § 41(d)(1)(B)(i).

(4) The "application" of the information described above must be "intended to be useful in the development of a new or improved business component of the taxpayer." § 41(d)(1)(B)(ii).

(5) "Substantially all" of the research must "constitute elements of a process of experimentation" for a valid purpose under the tax credit.[3] § 41(d)(1)(C).

The government concedes that TAASC has met the first and fourth requirements. The parties also do not dispute that the research undertaken by TAASC was "technological in nature" as required by I.R.C. § 41(d)(1)(B)(i). Thus, we consider only the proper interpretation of requirements two (the "discovering information" requirement) and five (the "process of experimentation" requirement).

B

The tax credit embodied in 41 was originally codified as 44F of the Internal Revenue Code and was enacted as part of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 221, 95 Stat. 172, 241–47. Like § 41 41, § 44F allowed a credit for "qualified research," but unlike § 41, § 44F provided no definition of "qualified research." Instead, the statute simply referred to "qualified research" for purposes of the existing tax deduction under § 174. See Pub. L. No. 97-34, § 221, 95 Stat. 172, 242. In 1981, "qualified research"

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[2] The full text of I.R.C. 41(d)(1) is:

(d) Qualified research defined. For purposes of this section

(1) In general. The term "qualified research" means research

(A) with respect to which expenditures may be treated as expenses under section 174,
(B) which is undertaken for the purpose of discovering information

(i) which is technological in nature, and
(ii) the application of which is intended to be useful in the development of a new or improved business component of the taxpayer, and

(C) substantially all of the activities of which constitute elements of a process of experimentation for a purpose described in paragraph (3).

Such term does not include any activity described in paragraph (4).

[3] The research that qualifies for the 41 tax credit may only be for certain purposes, listed in I.R.C. 41(d)(3). The validity of TAASC's research purposes is not at issue in this case.

for § 174 had no statutory definition and was defined by Treasury Regulations as "research and development costs in the experimental or laboratory sense." H.R. Rep. No. 97-201, at 110 (1981) (citing Treas. Reg. § 1.174-2(a) (1960) (amended 1994)).

In 1986, Congress reenacted the research tax credit with significant changes, creating the current 41. The provisions in I.R.C. § 41(d)(1) defining "qualified research" were added, including the "discovering information" requirement and the "process of experimentation" requirement.

Throughout the late 1980s and 1990s, the research tax credit was reenacted without any substantive changes to the relevant provisions. See Credit for Increasing Research Activities, 63 Fed. Reg. 66,503, 66,504 (Dec. 2, 1998).

In 1998, Congress reenacted the § 41 tax credit, and the relevant Conference Report included language regarding the definition of "qualified research" in § 41(d)(1). See H.R. Conf. Rep. No. 105-825, at 1548 (1998). In 1999, another reenactment of the tax credit prompted more Conference Report language regarding the meaning of § 41(d)(1). See H.R. Conf. Rep. No. 106-478, at 132 (1999).

Whether the legislative history is relevant to the disposition of this case, of course, depends on whether the meaning of each statutory requirement is plain. See United States v. Simmonds, 111 F.3d 737, 742 (10th Cir. 1997) ("[I]f the statutory language is ambiguous, a court can then resort to legislative history as an aid to interpretation."); Edwards v. Valdez, 789 F.2d 1477, 1481–82 (10th Cir. 1986) ("When the meaning of the statute is clear, it is both unnecessary and improper to resort to legislative history to divine congressional intent."). We will later discuss whether the meaning of each contested statutory requirement ("discovering information" and "process of experimentation") is sufficiently plain to preclude consideration of the legislative history.

C

TAASC's interpretation of the "discovering information" test is that it only requires a taxpayer to "discover[] technological information that led it to develop innovative ... products." (Appellees' Br. at 8.) Alternatively, TAASC argues that the "discovering information" test in § 41 should have the same meaning as it has in the definition of research for purposes of § 174 of the tax code.[4] TAASC also implies that because its products were new and innovative compared with the other commercially available products in the field of tax and accounting software, its research and development expenses for those products therefore must qualify for the tax credit.

The government argues that the 1986 amendments, including the addition of the "discovering information" requirement, were intended to narrow the scope of the tax credit significantly. As a result, to meet the "discovering information" requirement, qualified research must "rely upon, and expand or refine, principles of the physical or biological sciences, engineering or computer science." (Appellant's Br. at 13.) According to the government, TAASC's research did not "expand or refine" principles of computer science, a point that TAASC conceded before the district court. (1 Appellant's App. at 80–81.)

The district court, however, agreed with TAASC that § 41(d)(1) does not require the taxpayer to expand or refine principles of science or engineering in order to qualify for the tax credit. It added that the "emphasis should be on whether the information qualifies as being 'technological in nature' ..., not whether the work could be considered a revolutionary discovery in the scientific sense." Tax & Accounting Software Corp. v. United States, 111 F. Supp. 2d 1153, 1158 (N.D. Okla. 2000). Indeed, the court reasoned that the allegation that there is a separate requirement that the taxpayer "discover" information is erroneous and a "strained and improper

[4] There is no definition of research in the text of 174. The current Treasury regulations state that an expenditure represents a research cost if it is "intended to discover information that would eliminate uncertainty concerning the development or improvement of a product." Treas. Reg. 1.174-2(a).

reading without any support in the legislative history to back it up.'' Id. It concluded that as a matter of law TAASC had met the requirements of ''discovering information'' for purposes of 41(d)(1), id. at 1160, relying in part on the fact that TAASC's products were ''new and more efficient combination[s] of software that [were] not available to the public.'' Id.

The parties also disagree whether TAASC's software development process qualifies as a ''process of experimentation.'' TAASC argues that by trying various programming methods in order to achieve its desired results, it undertook a process of experimentation. The government responds that because TAASC used generally known computer programming skills to achieve its final objective, there was no ''experimentation,'' even if TAASC was unsure which particular technique would allow it to achieve its goal.

The government also contends that TAASC did not use a ''process of experimentation'' because TAASC believed at the outset that the final results of its research-the development of the software-were certain to be technically feasible. According to the government, the ''process of experimentation'' requirement requires the taxpayer to be uncertain as to whether the final result can be feasibly achieved. The district court concluded that TAASC's research satisfied the ''process of experimentation'' requirement. Tax & Accounting Software, 111 F. Supp. 2d at 1160–61.

III

We first analyze what Congress intended when it required that taxpayers ''discover'' information in order to qualify for the tax credit. In doing so, we apply traditional tools of statutory construction and interpretation, starting with an overview of the applicable principles.

A

At the time that this case began, the government's interpretation of § 41(d)(1) had not been incorporated into a final regulation that had gone through the notice-and-comment rulemaking process.(5) Under Christensen v. Harris County, 529 U.S. 576 (2000), this means that the government's position is only due respect to the extent that it has the '''power to persuade,''' id. at 587 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)), instead of the much greater deference due to regulations promulgated through the Administrative Procedure Act's notice-and-comment rulemaking process, see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).(6)

The respect that is owed to an agency position under Christensen and Skidmore is based on the ''body of experience and informed judgment'' that agencies have in the interpretation, enforcement, and implementation of the statutes for which they are responsible. Christensen, 529 U.S. at 587; Skidmore, 323 U.S. at 140. The respect owed to the agency interpretation ''will depend upon the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.'' Skidmore, 323 U.S. at 140.

The government's position regarding the ''discovering information'' requirement has been consistent in § 41(d)(1) litigation, see, e.g., Wicor, Inc. v. United States, 263 F.3d 659, 660 [88 AFTR 2d 2001-5474] (7th Cir. 2001); United Stationers v. United States, 163 F.3d 440, 444–46 [82 AFTR 2d 98-7488] (7th Cir. 1999); Wicor, Inc. v. United States, 116 F. Supp. 2d 1028, 1034–36 [86 AFTR 2d 2000-6567] (E.D. Wis. 2000); United Stationers, Inc. v. United States, 982 F. Supp. 1279, 1283–86 [80 AFTR 2d 97-7660] (N.D. Ill. 1997); Norwest Corp. v. Comm'r, 110

(5) The government has issued a new set of proposed regulations interpreting 41(d)(1), superseding regulations that became final in January 2001, but none of these regulations are at issue in this case. See Credit for Increasing Research Activities, 66 Fed. Reg. 66,362 (Dec. 26, 2001) (proposed regulations); Credit for Increasing Research Activities, 66 Fed. Reg. 280 (Jan. 3, 2001) (final regulations). Although the regulations are not at issue in this case, we nonetheless consider them as part of our analysis of the respect due the government's position under Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

(6) The district court applied a Chevron analysis in this case. Tax & Accounting Software, 111 F. Supp. 2d at 1157. Although its analysis was not explicit, the district court concluded that the language of 41(d)(1) was plain and contradicted the government's position and that therefore the government's position was foreclosed. Id. at 1158–60.

T.C. 454, 492–94 (T.C. 1998), but it has changed significantly as the government has developed regulations to implement § 41(d)(1). Compare Credit for Increasing Research Activities, 66 Fed. Reg. 280, 282–84 (Jan. 3, 2001) (stating that the "discovery requirement" can only be met when information is discovered that "exceeds, expands, or refines the common knowledge of skilled professionals in a particular field of science or engineering"), and Credit for Increasing Research Activities, 63 Fed. Reg. at 66,504–05 (same), with Credit for Increasing Research Activities, 66 Fed. Reg. 66,362, 66,363 (Dec. 26, 2001) (stating that the new proposed regulations "eliminate[] ... the requirement that qualified research must be undertaken to obtain knowledge that exceeds, expands, or refines the common knowledge of skilled professionals in a particular field of science or engineering"). Under Skidmore and Christensen, we conclude that the government's position is not entitled to substantial deference.

An additional factor to consider is that in construing the Internal Revenue Code, courts are expected to show "respect" and "deference" to the IRS's interpretation of the Code. See Jewett v. Comm'r, 455 U.S. 305, 318 [49 AFTR 2d 82-1470] (1982); Callaway v. Comm'r, 231 F.3d 106, 131 [86 AFTR 2d 2000-6148] (2d Cir. 2000); Dewees v. Comm'r, 870 F.2d 21, 31 [63 AFTR 2d 89-934] (1st Cir. 1989). However, given the IRS's changing position on this issue, we believe that deference is inappropriate here.

Finally, we note that tax credits are "a matter of legislative grace, and taxpayers bear the burden of clearly showing that they are entitled to them." Schumacher v. United States, 931 F.2d 650, 652 [67 AFTR 2d 91-939] (10th Cir. 1991) (citing New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 [13 AFTR 1180] (1934)). Thus, they are to be strictly and narrowly construed. See Texasgulf, Inc. v. Comm'r, 172 F.3d 209, 214 [83 AFTR 2d 99-1784] (2d Cir. 1999); Inland Steel Co. v. United States, 677 F.2d 72, 79 [49 AFTR 2d 82-1241] (Ct. Cl. 1982). Where there is clear provision in the statute for a particular credit, however, the credit is allowable. See New Colonial Ice, 292 U.S. at 440.

B

In interpreting a statute we begin with its plain language. United States v. Morgan, 922 F.2d 1495, 1496 (10th Cir. 1991). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) (emphasis added).

The word "information" has a broad meaning. See Webster's Third New International Dictionary Unabridged 1160 (1993) (defining "information" as, for example, "knowledge communicated by others or obtained from investigation, study, or instruction," or "knowledge of a particular event or situation"). Among other definitions, "discover" can mean "to make known (something secret, hidden, unknown, or previously unnoticed)," "to reveal the identity of," or "to disclose to view (something hidden, covered, or previously unseen)." Id. at 647; see also id. (stating that the word discover "means to come to know something not previously known, either by purposive search and investigation or by accident"). In the present statutory context, i.e., as one of the requirements for "research" that the government would have an interest in encouraging through a tax credit, we conclude that the word "discover" requires that what is "discovered"-in this case, information-be something new or previously unknown.[7]

Moreover, the new information that is discovered must also be information that is "intended to be useful in the development of a new or improved business component of the taxpayer." § 41(d)(1)(B)(ii). The new information therefore cannot merely be the product itself but must also have in-

[7] This information must not only be new to the taxpayer, but also be information that is generally unknown to the public as well. We cannot conclude that Congress intended to subsidize through tax credits research that might instead have been achieved through a trip to the library or a review of the relevant technical and professional literature. TAASC does not appear to dispute this point. It argues that its programs qualify under the discovery test because "TAASC was the first to make the discovery" that the programs could be developed. (Appellee's Br. at 30.)

dependent value that can be applied in the development of a new product. Cf. Wicor, 263 F.3d at 660 (distinguishing, for purposes of § 41, ''the domain of genuine research from that of implementation of existing research findings'').

In short, the statute requires that the taxpayer's research, in order to qualify, must have developed new information that is applied towards the development of a product. This is the ''discovery'' requirement of § 41.[8] Contrary to TAASC's arguments, mere evidence that the taxpayer has developed a new and useful product in and of itself will not qualify. Contrary to the government's argument, the new information need not ''expand, or refine, principles of the physical or biological sciences, engineering, or computer science.'' (Appellant's Br. at 13.) In other words, each of the positions of the parties is incorrect.

More importantly, for our purposes, the district court erred when it held that any ''discovery'' test was based on a ''strained and improper reading without any support,'' Tax & Accounting Software Corp., 111 F. Supp. 2d at 1158, a holding that essentially read the ''discovering information'' language out of the statute. The district court also erred when it rejected the argument that the ''discovering information'' language requires ''newness and expansion of existing knowledge.'' Id. at 1159. The term ''discovery'' means that the researcher must find new information or, in other words, must expand existing knowledge. Finally, the district court erred when it relied on the mere newness and innovation of the product itself, without determining that TAASC discovered new information separate from that product, in concluding that TAASC met the requirements of § 41. Id. at 1160.

To summarize, the ''discovering information'' language of § 41 establishes a separate requirement that the taxpayer must meet in order to qualify for the tax credit. Under that requirement, the taxpayer must show that he discovered new information and that information must be separate from the product that is actually developed.[9]

IV

The next issue is whether TAASC's work amounted to a ''process of experimentation.'' We analyze both (1) whether the ''process of experimentation'' test allows a taxpayer to use methods that are generally known, and (2) whether the test requires the taxpayer initially to believe that there is uncertainty as to whether the final result is feasible.

A

In construing the ''process of experimentation'' requirement, we again start with the language of the statute. ''Process'' has a broad meaning that supports TAASC's interpretation. See Webster's Third New International Dictionary Unabridged at 1808 (defining process in this context as ''a progressive forward movement from one point to another on the way to completion,'' ''the action of passing through continuing development from a beginning to a contemplated end,'' ''the action of continuously going along through each of a succession of acts, events or developmental stages,'' or ''a particular method or system of doing something, producing something, or accomplishing a specific result'').

The definition of ''experiment'' is ''a test or trial,'' ''a tentative procedure or policy,'' or ''an act or operation carried out under conditions determined by the experimenter (as in a laboratory) in order to discover some unknown principle or effect or to test, establish, or illustrate some suggested or known truth.'' Id. at 800.

Here, the definition of ''experiment'' is ambiguous with respect to the questions at issue. Concerning the first issue, none of

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[8] We reject TAASC's argument that the 41 discovery requirement should be the same as the one for 174. We find it difficult to understand how Congress, when it drafted the ''discovering information'' requirement of 41 in 1986, intended to adopt a definition of ''discovering information'' that was only developed in the Treasury Regulations after 41 was enacted. See Credit for Increasing Research Activities, 66 Fed. Reg. at 66,363; Research or Experimental Expenditures, 58 Fed. Reg. 15,819, 15,820 (Mar. 24, 1993) (proposing the definition of ''discovering information'' for 174). TAASC's argument that the ''requirement for 'discovery' was established in IRC 174'' and that therefore, by adopting the 174 definition of research, the original 44F tax credit also adopted any definition of ''discovering information'' in 174, is historically inaccurate. There was no ''discovery'' requirement in the 174 regulations until after 1981. See H.R. Rep. No. 97-201, at 110.

[9] Because we conclude that the statute's plain meaning addresses the question, we need not reach the parties' legislative history arguments.

the definitions clarifies whether the methods may be generally known. Regarding the second issue, whether the taxpayer must initially believe that there is uncertainty as to whether the final result is feasible, the first two definitions would best fit with TAASC's broad reading of the term. The last definition could support either the government's argument that the final results of the experimental process must be uncertain as to feasibility-the final result being an ''unknown principle or effect''-or TAASC's position that the final results may be certain as to feasibility-the final result may also be a ''known truth.'' Given that the ''process of experimentation'' must be used to discover new information (as we discussed above), however, the government's position regarding this last definition is stronger. New information cannot be a ''known truth.''

In light of the conflicting definitions, we conclude that the term ''process of experimentation'' is ambiguous as to the points at issue: namely, whether the final results must be certain as to feasibility and whether the methods to be used in the ''process of experimentation'' may be generally known. Because of this ambiguity, legislative history may properly be invoked in construing the ''process of experimentation'' requirement. See Simmonds, 111 F.3d at 742 (1997) (discussing the circumstances in which resort to legislative history is appropriate).

B

By all indications, the government has consistently argued in 41(d)(1) litigation that there must be uncertainty as to whether the final result can be achieved for the ''process of experimentation'' test to be satisfied. See, e.g., United Stationers, 163 F.3d at 445–46; Wicor, 116 F. Supp. 2d at 1035–36; United Stationers, 982 F. Supp. at 1284–86; Norwest, 110 T.C. at 496. However, the government has apparently not raised the issue of whether generally known techniques may be used in the ''process of experimentation'' in any of these cases. In the various versions of the regulations implementing 41(d)(1), the government implies that the end result may be certain so long as the method of achieving that result is uncertain at the outset. Over time, however, the government has apparently changed its view regarding whether the converse is true-i.e., whether the method of achieving the result may be certain provided that the end result itself is uncertain. Compare Credit for Increasing Research Activities, 63 Fed. Reg. at 66,508 (stating that the result must be one ''where the means of achieving that result are uncertain at the outset'' (emphasis added)), with Credit for Increasing Research Activities, 66 Fed. Reg. at 66,368 (stating that ''the capability or the method of achieving [the] result'' of the research, ''or the appropriate design of that result, [must be] uncertain as of the beginning of the taxpayer's research activities'' (emphasis added)), and Credit for Increasing Research Activities, 66 Fed. Reg. at 290 (stating that ''the capability or method of achieving [the] result'' of the research must be ''uncertain at the outset'' (emphasis added)).

As for the issue of whether generally known techniques may be used in the ''process of experimentation,'' the government has not addressed that question at all in any of the proposed or final regulations. See Credit for Increasing Research Activities, 66 Fed. Reg. at 66,364, 66,368–69; Credit for Increasing Research Activities, 66 Fed. Reg. at 284, 290; Credit for Increasing Research Activities, 63 Fed. Reg. at 66,505, 66,508. Because the government has either taken no position or has altered its position on both issues, its interpretation of the ''process of experimentation'' requirement is entitled to little deference. Skidmore, 323 U.S. at 140.

C

We conclude that the term ''process of experimentation'' can include research in which the taxpayer tries alternative methods to achieve a result and all of the methods are already commonly known, but it is uncertain which method will allow the taxpayer to achieve the result. As noted above, the definition of ''experiment'' does not seem to prohibit the use of commonly or generally known methods. The

government has apparently not made the argument that the methods cannot be commonly or generally known in previous litigation, nor has it discussed or considered this interpretation of the statute in its evolving regulations. Nor does the legislative history reflect a contrary legislative intent. Congress stated that a "process of experimentation" would include efforts to "develop, test, and choose among viable alternatives." H.R. Conf. Rep. No. 99-841, at II-72 (1986) (emphasis added). Viable alternative methods need not be new to the taxpayer nor must they be generally unknown to the public.

Moreover, as the Treasury Department itself noted in discussing the regulations implementing 41 early in 2001, "virtually all research utilizes existing scientific principles and technology." Credit for Increasing Research Activities, 66 Fed. Reg. at 283. Most scientific research requires the use of known methodologies to determine whether or not particular results are achievable. Although Congress intended to narrow the scope of the research tax credit in 1986,[10] we conclude that the government's position in this case overstates how narrow Congress intended the research credit to be. Congress did not intend to eliminate the use of already known tech-niques in the discovery of new information through its narrowing of the tax credit clause.

D

The second issue is whether the taxpayer must show that it was uncertain about whether the end result of the "process of experimentation" was technically feasible at the time that it commenced the research. Courts that have previously decided this issue have generally agreed with the government's position. See, e.g., United Stationers, 163 F.3d at 446 (stating that the legislative history strongly suggests that "qualifying research must from its outset involve some technical uncertainty about the possibility of developing the product" and concluding that "debugging pro-grams" alone can not constitute a "pro-cess of experimentation" because of the lack of uncertainty as to the final result); Norwest, 110 T.C. at 496 (holding that "at the outset uncertainty [must] exist about the ability to develop the product in the scientific or laboratory sense").

The government substantially relies on the legislative history. The 1986 House Report defines "process of experimentation" as:

> a process of scientific experimentation or engineering activities to design a business item where the design of the item as a whole is uncertain at the outset, but instead must be determined by developing one or more hypotheses for specific design decisions, testing and analyzing those hypotheses (through, for example, modeling or simulation), and refining or discarding the hypotheses as part of a sequential design process to develop the overall item.
>
> [C]osts of developing a new or improved business item are not eligible for the credit if the method of reaching the desired objective (the new or improved product characteristics) is readily discernible and applicable as of the beginning of the research activities, so that true experimentation in the scientific or laboratory sense would not have to be undertaken to develop, test, and choose among viable alternatives.

H.R. Rep. No. 99-426, at 180–81 (1986) (emphasis added). The 1986 Senate Report language is substantially identical, see S. Rep. No. 99-313, at 696 (1986), and the 1986 Conference Report used slightly different language, see H.R. Conf. Rep. No. 99-841, at II-72 (stating that a process of experimentation "means a process involving the evaluation of more than one alternative designed to achieve a result where the means of achieving that result is uncertain at the outset"). This legislative history suggests that the credit is inapplicable when the final design is certain at the outset or the taxpayer knows how to achieve the result at the beginning of the claimed research.

[10] See, e.g., H.R. Rep. No. 99-426, at 178 (1986) (stating that the prior definition of qualified research had been "applied too broadly in practice" and that the new definition "targets the extended credit").

TAASC cites subsequent legislative history from 1998 and 1999 to support its position on the issue. Specifically, it notes that during the 1998 reenactment of the tax credit, the conference committee stated that the process of experimentation test included research "even if the taxpayer knows at the outset that it may be technically possible to achieve the result." H.R. Conf. Rep. No. 105-825, at 1548. However, we cannot consider this subsequent legislative history.

In Pierce v. Underwood, 487 U.S. 552 (1988), the Supreme Court considered whether legislative history included with the 1985 reenactment of the Equal Access to Justice Act ("EAJA") would control the interpretation of a provision of the 1980 version of the EAJA that was reenacted without change in 1985. The legislative history indicated that Congress approved of the interpretation of that provision of the EAJA by some courts, but not by other courts. The Court held that Congress could not control the interpreta-tion of a statute in that way.

> If this language is to be controlling upon us, it must be either (1) an authoritative interpretation of what the 1980 statute meant, or (2) an authoritative expression of what the 1985 Congress intended. It cannot, of course, be the former, since it is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means. Nor can it reasonably be thought to be the latter-because it is not an explanation of any language that the 1985 Committee drafted, because on its face it accepts the 1980 meaning of the terms as subsisting, and because there is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation.

Id. at 566–67.

As was the case in Pierce, neither the 1998 nor the 1999 reenactments of the tax credit substantively changed the definition of "qualified research" in the text of the statute. The only reference to the definition was in the legislative history, and that legislative history does not indicate any intent to change the textual meaning of the "process of experimentation" requirement. See H.R. Conf. Rep. No. 106-478, at 132 (stating that Congress intended to "reaffirm" the original meaning of the requirement). Congress cannot retroactively change the meaning and intent of previously enacted statutory language through the introduction of legislative history which purports to state what the original meaning of that statutory language was. Congress must change the wording of the statute itself if it wishes to change the meaning of the statute. Following Pierce, we will not consider the subsequent legislative history urged upon us by TAASC. See also Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 484 (1997) (refusing to consider a footnote in subsequent legislative history to the Voting Rights Act because the Court "doubt[ed] that Congress" would amend the statute "by dropping a footnote in a Senate report instead of amending the statute itself"); Hadden v. Bowen, 851 F.2d 1266, 1268 (10th Cir. 1988) (refusing to consider subsequent legislative history in connection with the EAJA, following Pierce).

Looking to the legislative history for 44F, the predecessor to 41, it appears that at least part of the goal of the tax credit is to provide incentives for companies to invest in research that might not otherwise be undertaken because of its high risks. See H.R. Rep. No. 97-201, at 111 (suggesting that the 44F tax credit was intended to encourage businesses otherwise "reluctant to allocate scarce investment funds for uncertain research").[11] Thus, the very uncertainty of the research is a rationale for the tax credit in the first place. Allowing experimentation to qualify for the tax credit where the feasibility of the final result was certain would undermine that rationale, and might encourage compa-

[11] The conference report for the 44F tax credit states that the final version enacted by Congress followed the House bill. See H.R. Conf. Rep. No. 97-215, at 223–24 (1981).

nies to be more conservative in their allocation of resources, concentrating on problems with a solution that is evident from the outset.

TAASC's interpretation of the statute would allow relatively basic activities, such as debugging software, to be included as "experimentation" within the scope of § 41. See United Stationers, 163 F.3d at 445. Debugging software often requires the utilization of multiple known methods to eliminate the bug from the software. The software developer often has little or no doubt that one of the methods will eliminate the bug. Thus, without the government's limitation on what "experimentation" can mean, all debugging would qualify for the tax credit. The legislative history quoted above indicates that Con-gress did not intend such a result. We are further persuaded by the maxim that tax credits are to be narrowly interpreted. See New Colonial Ice Co., 292 U.S. at 440. In enacting the § 41 credit, Congress did not repeal the deduction under § 174, sug-gesting that less risky research activities were to remain deductible, not creditable.

V

We now apply our legal analysis to the record before us. With respect to the "discovering information" test, much of the record is filled with the conclusory assertions of both parties that the evidence clearly demonstrates that TAASC has, or has not, met the formulation of the test advanced by that party. TAASC's evidence emphasized that its products were new and innovative, and therefore must meet the test; the government's evidence minimized the innovations in TAASC's work. But a crucial question, as shown by our analysis of the plain language of the statute, is whether any new information that TAASC discovered in the course of its research was independent and separate from the new products that it developed. This issue was never developed by either party below, and thus summary judgment for TAASC was inappropriate on this issue.

As for the "process of experimentation" requirement, the affidavits submitted by TAASC under seal indicate to us that TAASC did explore a variety of alternatives to achieve the result in question. However, TAASC has also conceded in its briefs that "TAASC believed ... [its] goal was technically feasible," at least with respect to the Professional Tax Software project. (Appellee's Br. at 34.) And before the district court, TAASC "acknowledge[d] that its programmers did not question the technical feasibility of the products" in question. (1 Appellant's App. at 77.) TAASC therefore cannot, as a matter of law, meet this requirement.

VI

The judgment of the district court is REVERSED, and the case REMANDED.

ORDER

William M. Nickerson United States District Judge

IN THE UNITED STATES DISTRICT COURT OR THE DISTRICT OF MARYLAND

JUDICIAL WATCH, INC. v. CHARLES O. ROSSOTTI, et al.

Civil Action No. WMN-01-2672

On March 27, 2002, this Court issued a Memorandum and Order dismissing all claims against individual Defendants Rossotti, Dorsey, Breslan, Hampel and Miller. Still pending in this matter are Plaintiff's other, independent claims against the institutional Defendants: the Department of Treasury and the Internal Revenue Service.[1] Plaintiff now moves this Court to direct entry of a final judgment against the individual Defendants, pursuant to Fed. R. Civ. P. 54(b), which allows for the entry of final judgment on adjudicated claims, notwithstanding the pendency of other claims. Defendants consent to the motion.

A district court may direct the entry of a final judgment under Rule 54(b) if there is no just reason for delay and if there has been "an ultimate disposition of an individual claim entered in the course of a

[1] The claims against the individual Defendants alleged violations of Plaintiff's rights under the First and Fifth Amendments to the United States Constitution; the claims against the institutional Defendants assert violations of the Freedom of Information Act.

multiple claims action." Curtiss-Wright Corp. v. General Elec. Co., 446 U.S. 1, 7 (1980); see also Braswell Shipyards, Inc. v. Beazer East, Inc., 2 F.3d 1331, 1335 (4th Cir. 1993). In the present case, all claims against the individual Defendants were disposed of in the Order dated March 27, 2002. The remaining claims against the institutional Defendants state a different cause of action and appear to be separate and distinct from the adjudicated claims. Furthermore, Plaintiff has already filed an appeal of another issue decided in the March 27 Memorandum and Order, namely, this Court's denial of Plaintiff's Motion to Stay or Enjoin Enforcement of Administrative Summons. Judicial economy would be best served by allowing Plaintiff to appeal the claims against the individual Defendants at the same time.[2]

Having found that the conditions of Fed. R. Civ. P. 54(b) have been met as to the claims against the individual Defendants, this Court will grant Plaintiff's motion. Accordingly, IT IS this day of April, 2002, by the United States District Court for the District of Maryland, ORDERED:

1. That Plaintiff's Consent Motion to Direct Entry of a Final Judgment Pursuant to Rule 54(b), Paper No. 33, is hereby GRANTED;

2. That this Court's Order dated March 27, 2002, granting the Motion to Dismiss Counts I, II, and III of the Amended Complaint as to Defendants Rossotti, Dorsey, Breslan, Hampel and Miller, is a FINAL JUDGMENT;

3. That final judgment be and hereby is ENTERED in favor of Defendants Rossotti, Dorsey, Breslan, Hampel and Miller on all claims against them; and

4. That the Clerk of the Court shall mail or transmit copies of this Memorandum and Order to all counsel of record.

William M. Nickerson

United States District Judge

¶2002-5330

Robert FEINSCHREIBER and Margaret Kent, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of Florida, (DC FL) Case No. 01-3628-CIV-HUCK, July 30, 2002. Earlier proceedings at (2002, DC FL) 90 AFTR 2d 2002-5163; and (2002, DC FL) 89 AFTR 2d 2002-2874, 2002-2 USTC ¶50482. Years 1988, 1989, 1990, 1991, 1992. Decision for Govt. in part.

1. Attorney's fees and costs—bill of costs—prevailing party—reasonableness. Magistrate judge recommended granting in part govt.'s motion to tax costs against taxpayers: govt. was entitled as prevailing party in underlying action to recover deposition transcript costs, and related court reporter attendance and other fees that were incurred for use in case and not merely for govt.'s convenience, but only up to reasonable rates/amounts. *Reference:* United States Tax Reporter ¶74,336.511(80); 74,025.01(132). IRC §7402.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA,

REPORT AND RECOMMENDATION

MAGISTRATE JUDGE TURNOFF

This matter was referred to the undersigned for a Report and Recommendation on Defendant's Motion to Tax Costs and Memorandum of Law. (D.E. 61.) After a thorough review of the record and the parties' submissions, the undersigned finds that Defendant is entitled to reimbursement of a portion of his costs, but declines to recommend an award for the full amount requested.

BACKGROUND

On June 25, 2002, Final Judgment was entered in favor of the United States. (D.E. 56.) On July 3, 2002, the United States, as the prevailing party in this action, filed an

[2] Plaintiff's claims against the individual Defendants share several legal issues in common with Plaintiff's request for relief as to the administrative summons.

Application to Clerk to Tax Costs. (D.E. 59.) On July 12, 2002 Plaintiffs, Robert Feinschreiber and Margaret Kent (collectively, "Feinschreiber"), filed an Application to Limit or Exclude Costs. (D.E. 60.) On July 19, 2002 the United States filed a Reply. (D.E. 62.)

Analysis

[1] The United States seeks a total of $672.55 in costs pursuant to Federal Rule of Civil Procedure 54(d), 28 U.S.C. § 1920 and 28 U.S.C. § 1923. Federal Rule of Civil Procedure 54(d) provides that "costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P.54(d). The Supreme Court has interpreted Rule 54(d) to grant federal courts the discretion to refuse to tax costs in favor of the prevailing party. See Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987). Furthermore, "[i]n the exercise of sound discretion, trial courts are accorded great latitude in ascertaining taxable costs." Loughan v. Firestone Tire & Rubber Co., 749 F.2d 1519, 1526 (11th Cir. 1985). The following costs are recoverable under 28 U.S.C. § 1920: "(1) fees of the clerk and marshal; (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under section 1923 of this title; and (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." 28 U.S.C. § 1920. In addition, 28 U.S.C. § 1923(a) allows for recovery of attorney docket fees at $20.00 for trial or hearing and $2.50 for each deposition admitted into evidence.

COSTS

(1) Cost of Deposition Transcripts

The United States seeks a total of $650.05 for deposition transcripts.[1] Of this total amount, Feinschreiber argues that only $252.50 is taxable. 28 U.S.C. 1920(2) allows for the recovery of transcript fees which are "necessarily obtained for use in the case." Whether the transcripts were necessarily obtained depends on whether they were reasonably necessary at the time that they were taken. See EEOC v. W&O, Inc., 213 F.3d 600 (11th Cir. 2000); Barber v. Ruth, 7 F.3d 636, 645 (7th Cir. 1993). Deposition transcript costs are not recoverable where they are merely incurred for convenience, to aid in thorough preparation or for purposes of investigation only. See Weber v. Slingsby Aviation Ltd., Case No. 98-2223, 2001 U.S. Dist. Lexis 10350 3–4 (S.D. Fla., June 7, 2001).

(a) Court Reporter Attendance Fee

The United States seeks a total of $95.00 for court reporter attendance fees. Feinschreiber only objects to $35.00 of this amount, arguing that $60.00 is a more reasonable rate. The undersigned agrees, and recommends that the United States recover $60.00 in court reporter attendance fees.

(b) Expedited Deposition Transcript Fees and UPS Shipping Fees

The United States seeks a total of $477.60 for expedited deposition transcript fees and $48.25 for UPS shipping fees. Feinschreiber objects to the total amount of expedited transcript fees, arguing that he should only be taxed $3.85 per copy, a more reasonable rate, for a total expedited transcript cost award of $184.80. Feinschreiber further argues that he should only be taxed $3.50 in postage fees rather than the $48.25 in UPS shipping fees. The undersigned agrees, and recommends that the United States only recover $184.80 in expedited transcript fees and $3.50 in postage fees.

(c) Exhibit Copy Fees

The United States seeks a total of $4.50 in exhibit copy fees. Feinschreiber does not object to this amount. Accordingly, the undersigned recommends that the United States recover $4.50 in exhibit copy fees.

[1] This total amount is itemized as follows: $95.00 for attendance of reporter; $477.60 for an expedited transcript; $4.20 for copies of the exhibits; $10.00 for ASCII, $15.00 for mini-u-script; and $48.25 in UPS shipping fees. (D.E. 59.)

(d) Mini-Disk Transcript Fees

The undersigned finds that the costs for ASCII and mini-u-script were incurred solely for the convenience of defense counsel and are thus unrecoverable. Price v. United Technologies Corp., Case No. 99-8152 2000 U.S. Dist. LEXIS 21504 (S.D. Fla., Nov. 16, 2000) (finding that ''[m]ost courts have reasoned that mini transcripts and disk copies are only for the convenience of counsel''); Scallet v. Rosenblum, 176 F.R.D 522, 527 (W.D. Va. 1997) (citing Kansas v. Defenbaugh Indus., Inc., 154 F.R.D. 269, 270 (D. Kan. 1994)). Therefore, the undersigned recommends that $25.00 for ASCII and mini-u-script be denied.

(2) Docket Fees

The United States seeks a total of $22.50 in docket fees: $20.00 in attorneys fees for the trial of the case and $2.50 for each deposition admitted into evidence. Docket fees are taxable at $20.00 for attorneys fees at trial or hearing and $2.50 for each deposition admitted into evidence. 28 U.S.C. § 1923(a). Accordingly, the undersigned recommends that the United States be awarded $22.50 in docket fees.

IT IS HEREBY RECOMMENDED that Defendant's Motion to Tax Costs (D.E. 61) be GRANTED in part and DENIED in part. The undersigned recommends that Defendant be awarded a total of $273.80 in costs to be allocated as follows:

(1) $60.00 for court reporter attendance fees;
(2) $184.80 for expedited deposition transcript fees;
(3) $3.50 in U.S. postage fees;
(4) $4.50 in exhibit copy fees; and
(5) $22.50 in docket fees.

Pursuant to S.D. Fla. Magistrate Rule 4(b), the parties may serve and file written objections with the Honorable Paul C. Huck, United States District Judge, within ten (10) days after being served with a copy of this Report and Recommendation. Failure to file objections timely shall bar the parties from attacking on appeal any factual findings contained herein. RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993); LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988).

RESPECTFULLY RECOMMENDED, in Chambers, at Miami, Florida, this 30 day of July, 2002

WILLIAM C. TURNOFF

United States Magistrate Judge

¶2002-5331

Carl D. OLDHAM, PETITIONER v. UNITED STATES, Internal Revenue Service; Michele McGeachy, Internal Revenue Agent, Identification No. 93-02081; Greg Meadors, Group Manager; and JNR, Group Manager, RESPONDENTS. U.S. District Court, Dist. of Oregon, (DC OR) Civil No. 01-1225-ST, March 21, 2002. Later proceeding at (2002, DC OR) 89 AFTR 2d 2002-2487. Decision for Govt.

1. Third-party summons enforcement—petition to quash—jurisdiction. Magistrate judge's recommendation to grant govt. jurisdictional dismissal of or summary judgment on taxpayer's petition and amended petition to quash 3d-party summonses IRS issued on out-of-state financial institutions was adopted: fact that certain summoned entities maintained Web sites that were accessible in jurisdiction where petition was brought wasn't sufficient to establish jurisdiction under IRC §7609. *Reference:* United States Tax Reporter ¶76,095.01(75); 76,095.01(10). IRC §7609.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,

ORDER (Adopting Findings and Recommendation)

HAGGERTY, District Judge:

Magistrate Judge Stewart filed Findings and Recommendation on November 28, 2001, in the above entitled case. The matter is now before me pursuant to 28 U.S.C. §636(b)(1)(B) and Fed.R.Civ.P. 72(b).

When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the magistrate judge's report. See 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

[1] Petitioner has timely filed objections. I have, therefore, given de novo review of Judge Stewart's rulings and I find no error. The petitioner presents only one argument with any merit, and that is his contention that the word ''found'' in 26 U.S.C. §7609(h)(1) must be defined in terms of a ''minimum contacts'' analysis for personal jurisdiction. He has presented evidence that the recordkeepers who do not maintain offices in Oregon have interactive Web sites which can be accessed from within Oregon. However, that is not enough to confer jurisdiction under the statute. Fortney v. United States, 59 F.3d 117 [76 AFTR 2d 95-5398] (9th Cir. 1995); see also Masat v. United States, 745 F.2d 985 [54 AFTR 2d 84-6332] (5th Cir. 1984); Deal v. United States, 759 F.2d 442 [55 AFTR 2d 85-1471] (5th Cir. 1985); Dennis v. United States, 660 F.Supp. 870 [60 AFTR 2d 87-5039] (C.D.Ill. 1987); see generally GTE New Media Services, Inc. v. BellSouth Corp., 199 F.3d 1343, 1349 (D.C. Cir. 2000).

The petitioner's argument that the recordkeepers' securities are available for sale through independent sales representatives located in Oregon also fails. Congoleum Corp. v. DLW Aktiengesellschaft, 729 F.2d 1240 (9th Cir. 1984).

Accordingly, I ADOPT Magistrate Judge Stewart's Findings and Recommendation filed on November 28, 2001, in its entirety. The IRS's motion (#7) to dismiss for lack of subject matter jurisdiction is granted as to the summonses issued to American Century Investments; Franklin Templeton Investments; Trust Company of America; Janus; DST Systems; and Greenpoint Mortgage Funding. The IRS's motion (#7) to dismiss for failure to state a claim, which was properly converted to a motion for summary judgment, is granted as to the summonses issued to Fidelity Investments; Countrywide Home Loans; and State Farm Insurance Companies. The petition (#1) to quash and the first amended petition (#4) against the IRS are denied.

Dated this 21 day of March, 2002.

Ancer L. Haggerty

United States District Judge

¶2002-5332

Galen BEACH and Vickie BEACH, APPELLANTS v. J. Michael MORRIS, Trustee, APPELLEE. In Re: Galen BEACH and Vickie BEACH, Debtors. U.S. Bankruptcy Appellate Panel, Tenth Circuit, (Bktcy CA10) BAP No. KS-02-015, Aug. 19, 2002. Bankruptcy Court affirmed. Decision against Taxpayers.

1. Bankruptcy court procedure—turnover of tax return information to trustee. Bankruptcy court properly ordered Chap. 7 debtors to turn over their tax returns to trustee: taxpayers' reliance on IRC §6103 was misplaced since statute by its own terms didn't apply to trustee's request; and taxpayers had duty under Bankruptcy Code to cooperate with trustee's efforts to administer estate and assess what portion of taxpayers' refunds might be estate property. Also, taxpayers were warned that their non-compliance could result in discharge denial or revocation, criminal liability and sanctions. *Reference:* United States Tax Reporter ¶68,726.52(3).

United States Bankruptcy Appellate Panel of the Tenth Circuit,

Before CLARK, CORNISH, and MICHAEL, Bankruptcy Judges.

OPINION

CLARK, Bankruptcy Judge.

Trustee brought motion to compel Chapter 7 debtors to turn over copies of their state and federal tax returns and any portion of refunds related to the returns attributable to the prepetition year. The United States District Court for the District of

Kansas granted motion. Debtors appealed. The Bankruptcy Appellate Panel, Clark, J., held that requiring debtors to turn over copies of their state and federal tax returns to trustee was not error.

Affirmed.

Vickie and Galen Beach, the pro se Chapter 7 debtors (Debtors), appeal an "Order Granting Trustee's Motions to Compel and Turnover" entered by the United States Bankruptcy Court for the District of Kansas requiring the Debtors to provide copies of their 2001 state and federal tax returns (Returns) to the Chapter 7 trustee (Trustee) and turnover any portion of refunds related to the Returns attributable to the prepetition year. For the reasons set forth below, the bankruptcy court is AFFIRMED.[1]

I. Background

The Debtors filed a Chapter 7 petition on September 17, 2001.

Sometime thereafter, the Trustee requested that the Debtors provide him with copies of their Returns. When the Debtors failed to do so, the Trustee filed a motion in the bankruptcy court asserting that (1) he requested the Debtors to provide him with copies of their Returns, but they refused to do so; (2) any state or federal tax refund attributable to the prepetition year was property of the estate; and (3) because the Debtors failed to turnover their Returns he could not ascertain the amount of any refund that was estate property. The Trustee thus requested that the Debtors be ordered to turnover their Returns and to turnover any portion of their tax refunds that were property of the estate.

The Debtors filed an untimely response to the Trustee's motion, arguing, in relevant part, that the Trustee's motion should be dismissed for failure to state a claim or lack of jurisdiction. The Debtors maintained that 26 U.S.C. § 6103 requires that their Returns be kept confidential, and that res judicata barred litigation of the matter because issues related to the confidentiality of their Returns was governed by Russell v. Board of Plumbing Examiners, 74 F.Supp.2d 349 (S.D.N.Y.1999), aff'd, 1 Fed.Appx. 38 (2d Cir. Jan. 5, 2001). Finally, the Debtors contended that under s 6103 the Trustee was required to request the Returns from the Secretary of the Treasury, and his failure to do so barred his request of the Debtors.

A hearing on the Trustee's motion was held by the bankruptcy court on February 14, 2002, and on February 25, 2002, the bankruptcy court entered its "Order Granting Trustee's Motion to Compel and Turnover" (Order). The bankruptcy court held that § 6103(e)(4) has no application to a Chapter 7 trustee's request that a debtor turnover tax returns. The court also stated that when a debtor files Chapter 7, it waives its right to the confidentiality of its tax documents, and that such documents must be turned over to a trustee. Finally, the court held that any portion of the Debtors' 2001 tax refunds attributable to the prepetition year were property of the estate and the Debtors were required to turnover any such portion received.

The Debtors timely filed a notice of appeal from the bankruptcy court's final Order, and no party has elected to have this appeal heard by the United States District Court for the District of Kansas. Accordingly, this Court has jurisdiction over this appeal. 28 U.S.C. § 158(a)-(c); Fed. R. Bankr.P. 8002.

II. Discussion

[1] The Order on appeal requires the Debtors to turnover their Returns to the Trustee, and to turnover any refunds attributable to the prepetition year to the estate. The Debtors state that the sole issue on appeal is the application of 26 U.S.C. § 6301 to the Trustee's request for the Returns. Appellants' Brief at 4. Thus, the Debtors

[1] Also before the Court are four motions, which are summarized as follows: (1) the Debtors' Appendix is deficient because it is not paginated, and, therefore, the Court has construed the Appendix as a motion to allow a deficient Appendix ("Appendix Motion"); (2) the Debtors filed a Motion for an Order to Show Cause related to certain transcripts ("Transcript Motion"); (3) the Debtors filed a Motion to Withdraw the Transcript Motion because the transcripts were received ("Withdrawal Motion"); and (4) the Debtors filed transcripts outside of their Appendix, which the Court has construed as a motion to exempt the transcripts from the Debtors' Appendix ("Exemption Motion"). The Court hereby GRANTS the Appendix Motion and accepts the Debtors' deficient Appendix, GRANTS the Withdrawal Motion and thus DENIES the Transcript Motion as moot, and GRANTS the Exemption Motion.

have waived any appeal of the portion of the bankruptcy court's Order requiring them to turnover refunds attributable to the prepetition year, and we will not review the issue herein. State Farm Fire & Cas. Co. v. Mhoon, 31 F.3d 979, 984 n. 7 (10th Cir.1994) (issue waived if not raised and argued in appellate brief).

The Debtors maintain that the bankruptcy court erred in requiring them to turnover their Returns, because they are not required to do so under 26 U.S.C. § 6103, which states:

(a) General rule.--Returns and return information shall be confidential, and except as authorized by this title--

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6), (12), or (16) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term ''officer or employee'' includes a former officer or employee.

. . . .

(e) Disclosure to persons having material interest.--

(1) In general.--The return of a person shall, upon written request, be open to inspection by or disclosure to--

(A) in the case of the return of an individual--

(i) that individual,

(ii) the spouse of that individual if the individual and such spouse have signified their consent to consider a gift reported on such return as made one- half by him and one-half by the spouse pursuant to the provisions of section 2513; or

(iii) the child of that individual (or such child's legal representative) to the extent necessary to comply with the provisions of section 1(g);

(B) in the case of an income tax return filed jointly, either of the individuals with respect to whom the return is filed;

. . . .

(4) Title 11 cases and receivership proceedings.--If--

(A) there is a trustee in a title 11 case in which the debtor is the person with respect to whom the return is filed, or

(B) substantially all of the property of the person with respect to whom the return is filed is in the hands of a receiver,

such return or returns for prior years of such person shall, upon written request, be open to inspection by or disclosure to such trustee or receiver, but only if the Secretary [of the Treasury] finds that such trustee or receiver, in his fiduciary capacity, has a material interest which will be affected by information contained therein.

26 U.S.C. § 6103(a)(1)-(3), (e)(1) &(4).

By its terms, § 6103 has no application to a bankruptcy trustee requesting tax returns from a Chapter 7 debtor. Rather, this section applies to requests made on the Internal Revenue Service or a state taxing authority to divulge a taxpayer's tax return information. Thus, the bankruptcy court did not err in refusing to apply § 6103 to the Trustee's motion for turnover of the Debtors' Returns.[2]

[2] The Debtors have also argued that the Trustee did not follow the procedure set forth in § 6103 and that non-binding case law related to § 6103 is res judicata in this case. Based on our conclusion that § 6103 has no application to this case, we need not address these arguments.

Upon review of the record and the applicable law, we conclude that the bankruptcy court did not err in requiring the Debtors to turnover their Returns to the Trustee. The Trustee is required to "collect ... property of the estate for which such [T]rustee serves...." 11 U.S.C. § 704(1). Section 521 requires the Debtors to "cooperate with the [T]rustee as necessary to enable the [T]rustee to perform the [T]rustee's duties" under the Bankruptcy Code. Id. at § 521(3). It also mandates that the Debtors "surrender to the [T]rustee all property of the estate and any recorded information, including ... documents, records, and papers, relating to property of the estate...." Id. at § 521(4). Federal Rule of Bankruptcy Procedure 4002 further requires the Debtors to "cooperate with the [T]rustee in ... the administration of the estate." Fed. R. Bankr.P. 4002(4). In addition to imposing affirmative duties on the Debtors, these provisions impress the policy that a debtor who voluntarily submits him or herself to the jurisdiction of the bankruptcy court to obtain the benefit of a discharge of debts, must fulfill certain duties to insure that estate assets are administered in accordance with applicable law. In re Farmer, 237 B.R. 210, 212 (Bankr.M.D.Fla.1999); In re McDonald, 25 B.R. 186, 189 (Bankr.N.D.Ohio 1982).

The Debtors' Returns are imperative to allow the Trustee to assess what portion, if any, of the Debtors' tax refunds are property of the estate and to collect and administer the refunds in accordance with the Bankruptcy Code. Lubman v. Hall (In re Hall), 174 B.R. 210, 215 (Bankr.E.D.Va.1994). The Debtors are therefore required to turn the Returns over to the Trustee. Accord In re Stinson, 269 B.R. 172 (Bankr.S.D.Ohio 2001). A failure to turnover the Returns could result in the denial of the Debtors' discharge, or the revocation of any discharge granted. See 11 U.S.C. § 727(a)(4)(D), (a)(6)(A) & (d)(2)-(3); In re Love, No. WY-97-001, 1997 WL 837795, at 1 (10th Cir. BAP July 17, 1997) ("The debtor's cooperation with the trustee is a prerequisite to a granting of a discharge.") (citing Robb v. Sowers (In re Sowers), 97 B.R. 480, 486 (Bankr.N.D.Ind.1989); McDonald, 25 B.R. at 189). It could also make the Debtors subject to criminal liability. See, e.g., 18 U.S.C. § 152(1), (9) & 3284. And also to sanctions. See Stinson, 269 B.R. at 172.

III. Conclusion

For the reasons stated above, the bankruptcy court's Order is AFFIRMED.*

¶2002-5333

Jeffrey L. OKERLUND and Lorrie Schwan-OKERLUND; David J. Schwan and Diane C. Schwan; Mark D. Schwan; and Paul M. Schwan and Christine H.M. Weigel-Schwan, PLAINTIFFS v. THE UNITED STATES, DEFENDANT. Lorrie SCHWAN-OKERLUND and Jeffrey L. OKERLUND, PLAINTIFFS v. THE UNITED STATES, DEFENDANT.
U.S. Court of Federal Claims, (Ct Fed Cl) Nos. 99-133T; 99-134T, Aug. 23, 2002. Years 1992, 1994. Decision for Taxpayers in part and for Govt. in part.

1. Gift and income tax refunds—valuation—closely held corp. stock—expert opinions—burden of proof. Court of Federal Claims redetermined for gift and income tax refund purposes transfer date values of nonvoting stock in closely held ice cream corp. transferred between decedent-founder's children and grandchildren or to charitable orgs. Court accepted govt.'s expert's valuation with respect to 1 year's transfers: govt.'s expert's income and market approaches, employing pricing multiples near to guidelines median, reliably indicated value on freely-traded bases while taxpayer's expert overemphasized as-yet unrealized potential risks. But, Court adopted 45% discount for lack of marketability and lack of voting rights that closely comported with taxpayer's well-supported 50% estimate. And, taxpayer met its burden of proof with respect to valuation for 2d year's transfers, based on expert's unre-

* The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. Bankr.P. 8012. The case is therefore ordered submitted without oral argument.

futed, reliable and well-supported analysis of actual, already-realized risks and govt.'s failure to support its own contradictory positions. *Reference:* United States Tax Reporter ¶74,225.05(5); 74,915.01(5). USTR Estate & Gift Taxes ¶25,125.05(25). IRC §2512; 7422; 7491.

Allen Irving Saeks, Minneapolis, Minn., for plaintiffs.
G. Robson Stewart, Washington, D.C., for defendant.

United States Court of Federal Claims,

OPINION

WILSON, J.

This gift and income tax refund case came before the court for trial of two related issues: the fair market value of a minority nonvoting interest in Schwan's Sale Enterprises, Inc. (''SSE'') as of December 31, 1992 and as of December 31, 1994. Upon consideration of the expert testimony and other evidence presented at trial, the Court holds that the fair market value of the SSE stock at issue on December 31, 1992 was $24.36 per share, and on December 31, 1994, was $19.77 per share.

BACKGROUND

Unless otherwise noted, the following facts are contained in the parties' Joint Stipulation of Facts. Schwan's Sales Enterprises, Inc.(SSE) was founded in 1948 as a milk processing operation in Marshall, Minnesota. From 1948 to 1952, SSE expanded its enterprise from a milk bottling facility to a cafe and ice cream manufacturer. In 1952, Marvin Schwan created and marketed high quality ''Schwan's'' ice cream directly to farm families in the Marshall, Minnesota area.[1] This new strategy marked the beginning of the ''Retail Route Home Delivery System,'' which provides rural and metropolitan families with a varied selection of frozen foods. The route system formed the basis of SSE's growth and expansion during the decades that followed.

In 1965, SSE introduced a ''Wholesale Route System,'' which supplies retail food stores, restaurants and recreational establishments with a variety of prepackaged food products under numerous brand names, including Tony's Pizza, Red Barron Pizza, Better Baked Foods, and Tino's. Currently, SSE is a wholesaler and retailer of a variety of food products, approximately two-thirds of which are produced by the company and the remaining third purchased by the company and resold. (Def.'s Ex. 1003, at 11.) SSE's operations include international, as well as domestic sales, which totaled approximately $1.95 billion in 1992 (J.Ex. 508, at 38.) and $2.3 billion in 1994 (J.Ex. 77, at 2045.). SSE's workforce is comprised of approximately 16,500 employees. As of 1992, SSE's top management team consisted of President Marvin Schwan, a Tax Accountant, Director of Marketing, General Counsel, Controller, National Sales Manager, and Manufacturing Manager. (J.Ex. 508, at 24.)

SSE is a privately held company, capitalized with two classes of stock, voting and nonvoting. The stock is not listed on any stock exchange and is not publicly traded. Under the terms of its by-laws, the company has the right-of-first refusal on all sales or transfers of common stocks held by certain stockholders, based on a fair market value transfer price.

In December 1992, SSE nonvoting stock had a 100 to 1 split, increasing the number of nonvoting shares from 385,550 to 38,550,000. In addition, Marvin Schwan, SSE's CEO, purchased 3,755 newly-issued voting shares. As of the December 31, 1992 valuation date, a total of 50,000 shares of voting common stock, and 500,000,000 shares of nonvoting stock were authorized, and 7,610 shares of voting and 38,555,000 nonvoting shares were issued and outstanding. (J.Ex. 508, at 25.) SSE's capital structure was ''skewed;'' voting stock consisted of 0.02 percent of SSE's equity capital, while the remaining 99.98 percent was comprised of nonvoting shares. (Def.'s Ex. 1003, at 13.)

[1] A company brochure describes the birth of the retail route home delivery system with this anecdote: ''In 1952, ... Marvin Schwan discovered that ice cream was selling at a higher price north of Marshall. Identifying an opportunity to sell at a profit, he loaded a truck with ice cream, drove north, and sold the entire supply by sundown.'' (Def.'s Ex. 1003, at 2.)

On May 9, 1993, Marvin Schwan, the company's founder and top executive officer, died unexpectedly at the age of sixty-four. Prior to his death and to the December 1992 valuation date, Marvin Schwan contributed 2,485 of his recently-purchased voting shares to the pre-existing Marvin M. Schwan Revocable Trust. He also gifted 1,270 of these voting shares to a newly-created Great, Great Grandchildren's Trust (''3G Trust''). At the time of Marvin Schwan's death, 5,076 voting shares and 25,910,100 non-voting shares were held in the Marvin M. Schwan Revocable Trust. In accordance with Marvin Schwan's estate plan, a charitable foundation known as the King's Foundation received the shares owned by this revocable trust, which comprised two-thirds of outstanding SSE stock. The Foundation then sold these shares back to SSE pursuant to a February 4, 1993 Amended Redemption Agreement.

1992 Gift Tax

Marvin Schwan's four children and three of their spouses, Lorrie Schwan-Okerlund (Lorrie) and her husband Jeffrey Okerlund (Jeffrey), David J. Schwan (David) and his wife Diane (Diane), Paul M. Schwan (Paul) and his wife Christine H.M. Weigel-Schwan (Christine), and Mark D. Schwan (Mark) established separate trusts on December 31, 1992 for the primary benefit of their respective children. Plaintiffs Lorrie, David and Paul each transferred as gifts 50,000 shares of nonvoting stock to their respective trusts, splitting their gifts with their spouses pursuant to § 2513.[2] Mark, electing not to split his gift, transferred only 25,000 shares of SSE which were previously distributed to the Schwan children by Marvin Schwan's previously established trusts. Plaintiffs obtained a valuation of the SSE stock from Business Valuation Consultants (Gray) in June 1993. Based on Gray's per share value of $24.03, each plaintiff filed a gift tax return which reported a gift of $600,750, a unified credit of $192,800, a Generation-Skipping Tax (GST) exemption of $600,750, and a tax of $277.

In 1996, Willamette Management Associates (Willamette) provided plaintiffs with a lower value for SSE minority shares in connection with federal district court litigation involving a dispute between the Schwan children and SSE over the redemption of stock after Marvin Schwan's death in 1993. The matter was ultimately settled, and the non-voting stock sold back to SSE at a value of $26.00 per share in 1997. The Willamette appraisal reported a value of $17.40 per share for the valuation date of December 31, 1992. As a result of this reduced appraisal from $24.03 to $17.40 per share, in July 1996, the plaintiffs filed for a Claim for Refund and Request for Abatement with the IRS, seeking restoration of their respective unified credits in the amount of $59,100, a restoration of their respective GST exemptions in the amount of $165,760 each, and a gift tax refund of $277.

1994 Gift Tax

In January 1994, Lorrie, Mark, David and Paul each transferred $650,000 in cash to the Marvin M. Schwan 1992 Grandchildren's Irrevocable Trust. Accordingly, in April 1995, each plaintiff filed with the IRS a gift tax return reporting the $650,000 cash transfers. Lorrie, David and Paul consented to split their gifts with their spouses pursuant to § 2513. As a result, Lorrie, Jeffrey, David, Diane, Paul and Christine each reported GST exemptions in the amount of $325,000 for their 1994 gifts and $600,750 for their prior 1992 gifts. Each of their taxable gifts for 1994 and prior periods totaled $925,750.

In December 1994, Lorrie also trans-ferred 1,000 shares of nonvoting SSE stock to two separate trusts established for her children. Lorrie and Jeffrey reported the value of the 2,000 shares of nonvoting capital stock as $12.51 per share and a tax liability of $123,765. In October 1995, Lorrie and Jeffrey each submitted another gift tax return which added the $12,510 gift, representing the 1,000 share transfer in 1994, for a total taxable gift of $938,260.

[2] All sections refer to the Internal Revenue Code of 1986, as amended, codified at 26 U.S.C., unless otherwise noted.

In July 1996, plaintiffs filed claims for refund with respect to their 1994 gift tax returns, based on the adjustments reported in their 1992 claims for refund. Specifically, the 1994 refund claims stated that the 1992 transfers of SSE nonvoting stock were overvalued by $165,750 per transfer, based on the 1992 Willamette appraisal of $17.40 per share, resulting in a reduction from $925,750 to $760,000 in the total individual taxable gifts for 1992. The 1994 claims for refund reflected a revised gift tax liability of $59,400. Accordingly, each plaintiff's claim sought a gift tax refund of $64,365.

1994 Income Tax

In December 1994, Lorrie donated 27,000 shares of SSE nonvoting stock to Salt of the Earth Foundation, a § 501(c)(3) nonprofit organization. Lorrie and Jeffrey's 1994 income tax return, filed in November 1995, included a copy of an appraisal by Business Valuation Consultants (1995 Gray Report), reflecting a value of $20.85 per share of donated SSE minority stock as of December 31, 1994. At the time they filed their 1994 income tax returns, Lorrie and Jeffrey formally repudiated and rejected the value as an overstatement. Instead, Lorrie and Jeffrey reported a $337,770 (i.e., $12.51 per share) itemized charitable gift to the Salt of the Earth Foundation. Subsequently, in September 1998, Lorrie and Jeffrey filed an amended 1994 joint income tax return, increasing their charitable deduction from $337,770 to $533,912, based on a July 28, 1998 Willamette appraisal which valued the nonvoting stock at $19.77 per share as of December 31, 1994. The amended return reported a decreased tax liability of $77,672 and requested a refund of that amount.

On October 8, 1998, the IRS processed the amended income tax return and marked the return as "Accepted as Filed by Classification." Accordingly, on November 9, 1998, the IRS posted an abatement of $77,672 plus a credit of $19,977.21 in interest, and notified Lorrie and Jeffrey that the refund was being processed. The IRS subsequently cancelled the refund. Plaintiffs Lorrie and Jeffrey allege that they were not aware of the abatement and cancelled refund until they conducted pre-trial discovery in this case.

In 1999, subsequent to the filing of this action, the IRS, based on an appraisal prepared by Financial Research, Inc. (FRI), assessed deficiencies against each plaintiff. FRI valued SSE's nonvoting stock at $29.57 per share as of December 31, 1992. As a result, the IRS assessed a gift tax deficiency of $51,246 for 1992 and $4,055 for 1994 against each plaintiff. In addition, the IRS assessed each plaintiff an additional $37,335.62 in interest for 1992 and $1,955.64 in interest for 1994.

ANALYSIS

[1] The task of determining the fair market value of SSE's minority stock requires consideration of well-established statutory and regulatory criteria. Treasury Regulation § 25.2112-1 defines the fair market value of transferred property as the price at which the property would change hands by a hypothetical willing buyer and willing seller, neither being under duress to buy or to sell, as well as both having reasonable knowledge of the relevant facts. United States v. Cartwright, 411 U.S. 546, 551 [31 AFTR 2d 73-1461] (1973). The hypothetical willing buyer and hypothetical willing seller are presumed to be seeking to maximize their profit from the transaction. Estate of Davis v. Comm'r, 110 T.C. 530, 535 (1998) (citing Estate of Curry v. United States, 706 F.2d 1424, 1428 [51 AFTR 2d 83-1232] (7th Cir.1983)). A gift of property is valued as of the date of transfer. 26 U.S.C. § 2512(a). The value of the gift is determined by the value of the property passing from the donor, not the property received by the donee. Treas.Reg. § 25.2511-2(a).

Where there is no public market for the property to be valued and no arm's length transaction on which to base a valuation, as with the closely-held stock at issue in this case, the fair market value of the stock is determined by taking the company's net worth, earning potential, capacity to pay dividends and other relevant factors into consideration. Estate of Klauss v. Comm'r, 79 T.C.M.(CCH) 2177 (2000); Treas.Reg.

§ 25.2512-2(f). Revenue Ruling 59–60, which is ''widely accepted as setting forth the appropriate criteria to consider in determining fair market value,'' Estate of Newhouse v. Comm'r, 94 T.C. 193, 217 (1990), identifies eight of these relevant factors: (a) the nature of the business and the history of the enterprise from its inception; (b) the economic outlook in general and the condition and outlook of the specific industry in particular; (c) the book value of the stock and the financial condition of the business; (d) the earning capacity of the company; (e) the dividend-paying capacity; (f) whether or not the enterprise has goodwill or other intangible value; (g) sales of the stock and the size of the block of stock to be valued; and (h) the market price of freely traded stocks of corporations engaged in the same or a similar line of business. In addition, when valuing minority interest stock of a closely-held corporation, the application of certain discounts may be warranted to reflect the stock's lack of marketability and/or lack of voting rights. Central Trust Co. v. United States, 158 Ct.Cl. 504, 524 [10 AFTR 2d 6203] (1962) (consideration of a discount when a stock lacks marketability is a recognized appraisal technique for use in arriving at a fair market value for unregistered stock); see also Estate of Marmaduke v. Comm'r, 78 T.C.M. (CCH) 590 [1999 RIA TC Memo ¶99,342] (1999).

In valuation cases, the Court relies heavily on expert testimony about the fair market value of closely-held stock. Central Trust Co. v. United States, 148 Ct.Cl. 504, 514 (1962). However, the Court is not bound by an expert's opinion. Wall v. Comm'r, 81 T.C.M. (CCH) 1425 [TC Memo 2001-75] (2001). The Court weighs the credibility of an expert's testimony in light of his or her qualifications and the evidence before the Court. The Court may either accept the expert opinion in its entirety, accept portions of the expert's opinion, or reject the opinion altogether and reach a determination on its own after examining the evidence in the record. Helvering v. Nat'l Grocery Co., 304 U.S. 282, 295 [20 AFTR 1269] (1938); Lukens v. Comm'r, 945 F.2d 92, 96 [68 AFTR 2d 91-5754] (5th Cir.1991), aff'g 58 T.C.M. (CCH) 1470 [¶90,087 PH Memo TC] (1990).

Valuations, moreover, represent approximations. ''The valuation process is an 'inexact science' requiring reasonable practical, and rational approximation based upon all information before the court.'' Kraft, Inc. v. United States, 30 Fed.Cl. 739, 765 [73 AFTR 2d 94-912] (1994) (internal citations omitted); See also Anderson v. CIR, 250 F.2d 242, 249 [52 AFTR 1037] (5th Cir.1957), cert. denied, 356 U.S. 950 (1958) (determination of value need not be based on specific expert testimony, pro-vided the determined value is within the range of figures that may be deduced from the evidence).

Expert Qualifications

Plaintiffs challenged at trial both the qualifications of Dr. Spiro as an expert on valuation, and the admissibility of defendant's expert report, labeled the American Valuation Group Report (''AVG Report''). Fed.R.Evid. 702 provides that ''if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.''

The Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 (1993), characterized the Court's function as that of a ''gatekeeper'' in determining whether an expert's testimony constitutes ''scientific knowledge'' that will assist the trier of fact to understand or determine a fact in issue. A judge performs this function by ensuring that an expert's testimony is relevant and reliable. Id. at 597. The Supreme Court in Kuhmo Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999), extended the principles of Daubert applicable to scientific experts to all experts possessing ''technical'' or ''other specialized'' knowledge. In determining the admissibility of nonscientific expert testimony, the Court may consider the following Daubert factors:

1) whether a theory or technique can be or has been tested; (2) whether it has been subjected to peer review and publication; (3) whether a technique has a high rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique enjoys a general acceptance within the scientific community.

Kuhmo Tire at 149–150, (citing Daubert, 509 U.S. at 592–94). In assessing an expert witness's reliability, the court must determine whether the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Id. at 152. The use of data and methodology similar to those used by other experts is suggestive of reliability and relevance. Id.

Defendant's voir dire examination revealed that Dr. Spiro holds a doctorate in business economics and finance from the University of California at Los Angeles. For over ten years, he served as a tenured professor at California State University, where he taught courses in finance and business policy. Since 1985, Dr. Spiro has managed American Valuation Group, a consulting firm specializing in economic analyses and financial valuations. (Def.'s Ex. 1003, at 114.) In that capacity he directs 95 percent of all valuation assignments. (August 14–15, 2001 Trial Transcript (Tr.) at 219.) Dr. Spiro has testified as an expert approximately fifty times in various state and federal courts. In addition, in 2001, the California Superior Court appointed Dr. Spiro to serve as an arbitrator in a business valuation case with authority to issue a binding arbitration decision. (Tr. at 217–262.)

In addition to challenging Dr. Spiro's qualifications, plaintiffs challenged Dr. Spiro's personal knowledge of the AVG appraisal of SSE stock and the admissibility of the report based on the small number of hours billed by Dr. Spiro relative to his assistants. It is well-settled that an expert may render an opinion on hypothetical questions and may testify not only from facts or data perceived by him but also from what is made known during or before a hearing. Teen-Ed, Inc. v. Kimball Intern., Inc, 620 F.2d 399 (3rd Cir.1980). In other words, an expert's testimony need not be based on personal knowledge. Libas, Ltd. v. United States, 193 F.3d 1361 (Fed.Cir.1999); See also Estate Of Carey by Carey v. Hy-Temp Mfg., Inc., 929 F.2d 1229, reh'g denied (7th Cir.1991). In any event, on direct examination, Dr. Spiro testified that he supervised "all of the [firm's] work," directed the staff in conducting valuation research, and was familiar with the conclusion and methodologies of the AVG report. (Tr. at 262.) The Court found that both experts were sufficiently involved in the production of their respective reports and knowledgeable about its methods and conclusions to provide relevant and reliable testimony.[3]

Although the experts disagreed on the specific pricing multiples and discounts taken for lack of marketability, they did not differ on the use of generally accepted methodologies for appraising the value of closely-held stock. Indeed, the income and market approaches utilized by both experts have been considered reliable methods for business analysis for many years. Gross v. Comm'r, 78 T.C.M. (CCH) 201 [1999 RIA TC Memo ¶99,254] (1999). Because these valuation methods have enjoyed general acceptance within the valuation community, these approaches satisfy the Daubert and Kumho Tire standard for admissible expert testimony. Based on Dr. Spiro's academic and professional credentials, and in accordance with the criteria for expert testimony set forth in Daubert and Kumho Tire, the Court admitted the AVG report into evidence and certified Dr. Spiro as an expert for the purpose of testifying about the value of SSE stock.

[3] The government did not challenge Dr. Pratt's expert qualifications at trial. Dr. Pratt founded Willamette Management Associates in 1969. He holds a doctorate in business administration with a major in finance, is a fellow of the American Society of Appraisers and a master, certified business appraiser. (Tr. at 22–24.) Dr. Pratt has taught classes for the American Society of Appraisers, as well as for the American Institute of Certified Public Accountants. He has published eight books and over 100 articles, including a well-known treatise on business valuation. In addition, Dr. Pratt testified that he has conducted approximately 3,500 appraisals in twenty-two years. (Tr. at 35.)

Valuation Methodology

Both experts utilized the Market Approach and the Income Approach to determine the value of SSE stock.[4] Plaintiffs' expert also utilized the Transaction Method, another method incorporated in the Market Approach.[5] For the reasons discussed below, the Court found the indications of value derived by the government's expert using the market and income approaches more credible than the values derived by plaintiff's expert.

Market Approach

The market approach is based on the assumption that the most an investor will spend for an asset is the price other investors are paying for the same or a similar asset. Central to the capital market method is a comparison of the subject company to similar companies which are publicly traded, referred to as "guideline companies."[6] Consistent with the methodology, both experts derived market pricing multiples[7] from guideline companies' financial fundamentals and quoted trading prices, and then applied these market pricing multiples to SSE's financial fundamentals in order to arrive at indications of value.

Both experts relied upon essentially the same guideline companies in arriving at their respective market pricing multiples.[8] Both experts agreed that as of December 31, 1992, SSE was more profitable than the average guideline company. They also agreed that compared to the average guideline company, SSE's financial leverage was lower, it was more liquid, and it had experienced more growth, primarily through acquisitions. (Tr. at 167–68, 240, 283.)

Dr. Spiro, the government's expert, noted that SSE's lower level of financial leverage and its higher liquidity ratio[9] indicated a lower level of risk than the guideline companies. Recognizing that SSE lacked a nationally recognized brand name, in calculating the Market Value of Invested Capital (MVIC)/Sales multiple, Dr. Spiro chose a multiple close to the mean because SSE was more profitable and experienced higher growth rates than the guideline companies. (Tr. at 327.) The remaining multiples were selected near either the mean or median because of higher earnings, but also took into account that SSE was, on average, smaller in size and lacked a national brand name. Dr. Spiro gave the greatest weight to the MVIC/EBIT and MVIC/EBITDA in arriving at an average multiple because, he purported, they most

[4] Plaintiffs' and defendant's experts chose not to utilize a third broad approach known as the Asset-based Approach. Under the asset-based approach, the value of a business is equal to the cost that would be incurred in acquiring a group of assets of similar utility. (Def.'s Ex. 1003, at 26.) Dr. Spiro did not find this method useful for the valuation of stock because it fails to capture any intangible value resulting from having assets assembled in the manner that they are in SSE. Dr. Pratt did not utilize this method because the subject minority interest did not have the ability to liquidate SSE's underlying assets and thus the experts did not have access to the value of such assets. (J.Ex. 508, at 60.)

[5] The transaction method bases pricing multiples on transaction prices instead of trading prices. Therefore, an adjustment for a minority interest, or lack of control, must be made. "A minority interest discount reflects the minority shareholder's inability to compel either the payment of dividends or liquidation in order realize a pro rata share of a corporation's net earnings or net asset value." Estate of Branson v. Comm'r, 78 T.C.M. (CCH) 78 [1999 RIA TC Memo ¶99,231] (1999). Both expert witnesses testified that the transaction method serves as a "check" on the capital market method, but is not by itself critical to the analysis. (Tr. at 102, 337.)

[6] Both experts testified that publicly traded guideline companies are never identical to the subject company. (Tr. at 39, 237.)

[7] "Market multiples" are multiples of some type of capital as priced in the public market or as priced in a private transaction relative to some underlying company fundamental, such as book value, earnings or cash flow. (Tr. at 60.)

[8] Both experts included in their group of guideline companies Campbell Soup Company, Curtice-Burns Foods, Inc., Dean Foods Company, Dreyer's Grand Ice Cream, Inc., International Multifoods Corporation, Pet Inc., and Rykoff-Sexton, Inc.

[9] The liquidity ratio (current assets divided by current liabilities) is one indicator of a firm's ability to meet its short-term obligations.

closely measure cash flow.[10] (Tr. at 328–30.)

Dr. Pratt did not give great weight to the Price/Earnings and Price/Cash Flow multiples because, he purported, debt-free in-dicators are more reliable than the equity-based market pricing multiples due to their adjustment for the difference in capital structure between SSE and the guideline companies. (Tr. at 80–82.) Unlike Dr. Spiro, Dr. Pratt calculated the market pricing multiples based on two historical periods, the last twelve month period and an average of the last five fiscal years. In calculating the MVIC/EBIT and MVIC/EBDIT multiples, Dr. Pratt noted that SSE's EBIT and EBDIT growth were above average in comparison to the guideline companies during the last twelve month period. (Tr. at 61.) Dr. Pratt also noted that SSE's capital structure consisted of less debt than the guideline companies and that SSE's net sales were above the guideline companies' average. (Tr. at 167.) Moreover, Dr. Pratt's comparison of SSE with the guideline companies revealed that SSE's earnings and cash flow growth were both above average.

After calculating market pricing multiples based upon guideline company quoted trading prices and financial data, both experts adjusted for risk factors that affect the company as a whole.[11] The primary difference between the two experts' pricing multiples for valuing SSE common stock is that Dr. Pratt took a far more pessimistic view of the company as a result of certain risk factors.[12] The 1992 Willamette Report, submitted by plaintiffs, identified the following risks to the company: (1) reliance on a home delivery "route system;" (2) thin management ranks; (3) reliance on a key management figure, Marvin Schwan; (4) the risk of food contamination; (5) the competitors' greater human resources; (6) SSE's inability to invest in a national advertising campaign, based on its lack of a nationally recognizable brand name and the demographics of its customer base; (7) less diversity in product offerings than the guideline companies; and (8) the relatively small size of SSE's Board of Directors. Based on these perceived risk factors, Dr. Pratt selected pricing multiples for SSE that were generally near the bottom, if not

[10] Defendant's expert witness, Dr. Spiro, selected the following pricing multiples: (Def.'s Ex. 1003, at 39.)

Pricing Multiple	Selected Multiple	Comparison to Guideline Companies
Market Value of Invested Capital-to-Sales (MVIC/ Sales)	0.90	0.98 (mean)
MVIC-to-Earnings Before Interest and Taxes (MVIC/ EBIT)	11.00	11.92 (mean)
MVIC-to-Earnings Before Interest, Taxes, Depreciation and Amortization (MVIC/ EBITDA)	8.0	8.46 (median)
Price-to-Earnings Before Taxes (P/ EBT)	11.0	11.21 (median)
Price-to-Book Value of Equity (P/ Book)	3.5	3.28 (median)

[11] Risk factors that affect the value of the company as a whole are referred to as "enterprise risks." Risk factors that specifically affect whether an average buyer would invest in the company and at what price are referred to as "shareholder risks," and affect the calculation of the discount for lack of marketability. (Tr. at 83–84.)

[12] The following comparison between Dr. Spiro's and Dr. Pratt's pricing multiples, derived from the two expert reports, reveals a greater deviation from the guideline company median by Dr. Pratt:

Pricing Multiples	Defendant's Expert: Difference between median and selected multiple	Plaintiffs' Expert: Difference between median and selected multiple
MVIC/Sales	+5%	-20%
MVIC/EBIT	-12%	-44%
MVIC/EBDIT	-10%	-36%
MVIC/TBVIC	N/A	-5%
P/Book Value	+7%	N/A
P/EBT	-2%	N/A
P/E	N/A	-27%
P/Cash Flow	-13%	

below the range[13] for the guideline company multiples, despite his determination that SSE had much more positive financial fundamentals than the guideline companies and were above the average for every pricing multiple.[14] (J.Ex. 508, at 26; Tr. at 49–51.)

The Court is not persuaded that Dr. Pratt's assessment of the risks to SSE as of December 1992 should result in the selection of SSE multipliers at the low end of the range of the guideline companies or, in some instances, below the range. First, defendant's expert, Dr. Spiro, recognized some of the same risks to the company: thin upper management, the relatively small size of the company compared to the guideline companies, and the lack of a nationally recognizable brand name. Second, although the nature of the company contains some inherent risks, these same factors possess positive attributes. For example, although SSE's reliance upon the route system to supply both homeowners and wholesalers with its products poses the risk that a change in the behavior of its clients could have dire business consequences, the barriers to entry are sufficiently high to limit direct competition in much of SSE's market, particularly rural areas, and customer loyalty is high. (Tr. at 106.) Dr. Pratt recognized that while SSE's home delivery system possessed some drawbacks, it also had some countervailing benefits. For example, he acknowledged that establishing a home delivery system would be costly and a risky business proposition for competitors, thereby minimizing the risk of competition to SSE's home delivery system, which was firmly established. (Tr. at 107).

Moreover, plaintiffs did not demonstrate that the risk of food contamination faced by SSE in 1992 was greater or any different than that faced by the guideline companies. The existence of substantial product liability and life insurance policies immunized SSE to a certain extent from these two risk factors. Furthermore, although Marvin Schwan was undoubtedly a key management figure, neither his death the following year nor his retirement was expected as of the 1992 valuation date. Accordingly, the court finds that the key management figure and food contamination risk factors are overstated, as far as the December 1992 valuation is concerned.

The risk factors must be considered in the context of the financial fundamentals of SSE, in particular, and the outlook of the frozen food industry in general. Dr. Pratt testified that ice cream sales were projected to grow faster than overall food sales.[15] (Tr. at 104.) He noted that between 1987 and 1992, SSE did not lose any major companies. (Tr. at 105.) In addition, Dr. Pratt noted that half of SSE's sales came from its home delivery system, a system which created the highest profit margin for SSE and whose customer-base was very loyal. (Tr. at 106.) Dr. Pratt agreed that SSE's liabilities in 1992 were

[13] Dr. Pratt selected pricing multiples below the range of the guideline companies in three instances. One instance was for the latest 12-month multiples because Dr. Pratt believed that the multiples for the guideline companies in the middle of the range reflected a rebound from poor performance earlier in 1992. Therefore, Dr. Pratt testified that he believed that the multiples in the middle of the range for the guideline companies were too high. (Tr. at 199–200.) In general, Dr. Pratt chose below range pricing multiples because of the perceived enterprise and shareholder risk factors. (Tr. at 200–201.)

[14] Plaintiff's expert, Dr. Pratt, selected the following market pricing multiples:

Pricing Multiple	Selected Multiple (previous 12 months)	Comparison to Guildline Cos.	Selected Multiple (5-yr.average)	Comparison to Guideline Cos.
MVI/EBIT	7.5	9.5 (low)	9.75	9.1 (low)
MVIC/EBDIT	5.6	7.0 (low)	7.1	6.5 (low)
MVIC/Net Sales	0.86	0.95 (median)	1.05	1.05 (median)
MVIC/TBVIC	2.48	2.84 (mean)	2.48	2.84 (mean)
Tangible Book Value of Invested Capital)	(latest quarter)			
Price/ Earnings	13.5	14.0 (low)	14.3	10.9 (low)
Price/ Cash Flow	7.9	9.5 (median)	9.4	10.1 (median)

[15] Specifically, Dr. Pratt testified that for the time period after 1992, ice cream sales were anticipated to increase over 5 percent and in 1994, the largest single sector of the frozen food market for SSE was ice cream. (Tr. at 104.)

lower than the guideline companies, as was its interest-bearing debt. SSE also had a higher gross profit margin than the guideline companies, higher asset utilization, and was more liquid than the guideline companies. (Tr. at 167–68.) Dr. Pratt, moreover, testified that the guideline companies had a ''bad year'' in 1992, as compared to SSE which had a ''good year.'' (Tr. at 135.) Dr. Spiro further testified, based on corporate financial statements, that in the five year period up to and including 1992, SSE had doubled its sales and profitability, and had very low debt. (Tr. at 236–37.) Dr. Spiro also emphasized the strength of SSE lower and middle management, in addition to acknowledging the thinness of the top level management. (Tr. at 283.)

Finally, while Dr. Pratt's appraisal process included interviewing the management of SSE and conducting an inspection of its facilities in Marshall, Minnesota, and Dr. Spiro's admittedly did not, the Court is not persuaded that this methodological difference is as significant as plaintiffs suggest, at least with respect to the identification of enterprise level risks in 1992. Dr. Pratt's interview with SSE management on site in Marshall, Minnesota occurred after the death of Marvin Schwan, which poses the risk of ''20/20 hindsight'' with respect to the weight given to the risk factor of management succession and the company's reliance on a key figure. To the extent that the interviews revealed characteristics of the company not accessible through other sources, the Court finds that this information is more relevant to the assessment of shareholder risks rather than enterprise risks, and therefore, impacts the discount for lack of marketability to a greater extent than the value of shares on a freely traded basis under various methods.

In sum, although the risk factors identified by both experts are not insignificant, the totality of the circumstances and economic indicators considered by the Court in evaluating the credibility of the two appraisals weigh in favor of Dr. Spiro's pricing multiples, which more closely conform to the guideline company medians, for purposes of calculating the value of a minority share of SSE common stock as of the 1992 valuation date.

Income Approach

The income approach incorporates a number of valuation methods. The fundamental premise underlying these methods is that the value of an asset is a function of the income that will be generated by that asset over its expected life. Both experts relied on the discounted cash flow method of estimating an asset's future economic earnings stream and the application of an appropriate risk-adjusted present value discount rate.[16]

Discounted Cash Flow Analysis

The discounted cash flow method estimates the value of a company or shares of stock by forecasting the company's expected future cash flows and determining the present value of those cash flows by utilizing a risk adjusted present value discount rate.[17] The per share value is that of a voting minority interest in the subject company if it were publicly traded. Consequently, as with the value obtained through the Capital Markets Method, an additional discount for lack of marketability and for lack of voting rights, where applicable, must be taken from the freely traded value. Where the asset is a going concern with a life expectancy assumed into perpetuity, a terminal value (also called a ''reversion value'') is calculated to reflect the income stream after the terminal date. In this case, both experts projected the income stream of SSE for five years after the valuation date, calculating an amount for the terminal value.

Under this method, Dr. Spiro calculated a discount rate of 15.93 percent to arrive at a value of $1,583 million and a price per

[16] The income capitalization method is used to estimate the fair market value of income-producing property by considering the present value of the future stream of income to be produced by that property. Estate of Bennett v. Comm'r, 58 T.C.M. (CCH) 1056 [¶89,681 PH Memo TC], aff'd, 935 F.2d 1285 (4th Cir.1991). Neither expert utilized the dividend capitalization method because with one limited exception SSE had never paid dividends, nor was there any suggestion that dividends would ever be paid in the future. (Tr. at 45.) Consequently, the experts agreed that the dividend capitalization method is not a useful method of valuing SSE stock.

[17] The discount rate reflects the level of risk and expected growth associated with the subject investment.

minority share of SSE common stock, had the company been publicly traded, of $41.07. Dr. Pratt used a discount rate of 16.5 percent, taking into account a 7.4 percent risk premium with an additional 3 percent for the same risk factors used in calculating the market pricing multiples for the Capital Markets Method analysis, to arrive at a value of $1,280 million.

For the reasons discussed above with respect to the selection of market pricing multiples, the Court finds that the risks attributed by Dr. Pratt to SSE are overstated in comparison with Dr. Spiro's analysis of the enterprise risks facing SSE. Some of the risks that Dr. Pratt attributed to SSE stock, such as the company's reliance on Marvin Schwan and its risk from food contamination, were prospective rather than current risks or were common throughout the industry, rather than specific to SSE. Therefore, the Court accepts Dr. Spiro's discount rate of 15.93 percent as the more reliable rate for valuing SSE common stock under the discounted cash flow method. Applying this methodology results in the price per share of $41.07 before the application of discounts for lack of marketability and voting rights.

Applying the market approach, defendant's expert arrived at an initial value of $1,998.25 million for SSE with a $51.82 price per minority share. (Def.'s Ex. 1003, at 36.) The income approach produced an overall value of $1.583 billion and a per share value of $41.07. (Def.'s Ex. 1003, at 40.) Believing that the income approach captures the financial and operational attributes unique to SSE more accurately than the market approach, Dr. Spiro weighted the income approach at 70 percent and the market approach at 30 percent. (Tr. at 255.) Dr. Spiro arrived at an unadjusted value of $44.29 per share for minority nonvoting SSE stock. (Def.'s Ex. 1003, at 48.)

Plaintiffs' expert arrived at an initial value based on the market approach of $1,385 million, but did not provide an estimate for the per share value of SSE common stock. (J.Ex. 508 at 61.) Based on the income approach, plaintiff's expert produced an overall value of $1,280 million. Although Dr. Pratt testified that "discounting cash flow [under the income approach] is the most desirable method" because it is "the theoretically most correct method" (Tr. at 77), he gave approximately equal weight to the primary value indications derived from the market approach and income approach. Dr. Pratt assigned a 50 percent weight to the income approach, a 10 percent weight to the transaction approach, and a 40 to 45 percent weight to the market approach, resulting in an overall value of approximately $1,340 million, or $34.80 per share, for SSE's common equity before considering discounts. (J.Ex. 508, at 61.) For the reasons discussed above, the Court adopts the government expert's indication of value based on the two major approaches, $44.29, as the more reliable indication of value on a freely traded basis.

Both experts then applied discounts for lack of marketability and for lack of voting rights to the freely traded value. For the reasons discussed below, the Court finds plaintiffs' expert's analysis of the discount for lack of marketability more credible, but adjusted the recommended discount for 1992 downward by five percent.

Discounts for Lack of Marketability and Voting Rights

"A lack of marketability discount reflects the fact that there is no ready market for shares in a closely-held corporation." Estate of Branson v. Comm'r, 78 T.C.M. (CCH) 78 [1999 RIA TC Memo ¶99,231] (1999). As the Willamette Report notes, "the universe of realistically potential buyers for most closely held minority securities is an infinitesimally small fraction of the universe of potential buyers for publicly traded securities." Dr. Pratt described the discount rate as "the market's required rate of return for investing in stock of a company of this nature." (Tr. at 40.) The discount is taken from the actual or estimated price at which the minority shares could be sold if registered and freely traded on the public market.

Both experts relied on two sources of empirical data for aid in quantifying the

discount for lack of marketability: (1) discounts on sales of restricted shares of publicly traded companies; and (2) discounts on private transactions prior to initial public offerings (IPO's). Based on these studies, and an examination of the perceived risks facing a potential investor in SSE stock, Dr. Pratt concluded that a 45 percent discount for lack of marketability was appropriate, and Dr. Spiro concluded that a 30 percent discount was justified.

Dr. Pratt's expert reports contain a far more detailed analysis of the empirical studies of trading prices of restricted shares and pre-initial public offering transactions than the AVG Report. The eight independent studies of restricted stock transactions reviewed in the Willamette Reports reported average discounts ranging from 25 to 45 percent. According to Dr. Pratt, the two most important factors in determining the size of the discount were the amount of dividends paid (more dividends are associated with a lower discount for lack of marketability) and the perceived holding period (the longer the holding period the greater the discount for lack of marketability). (Tr. at 71–72.) The second major line of studies, involving pre-IPO transactions, observed discounts averaging approximately 45 to 47 percent.[18] (Tr. at 74.) Unlike the AVG Report, the Willamette Report considered the pre-IPO studies more relevant for the purpose of determining the appropriate discount for lack of marketability. According to Dr. Pratt, the discounts observed in restricted stock studies reflect the existence of a public market for the stock once the temporary restrictions lapse. For a variety of reasons, including an increasing number of transactions under Rule 144(a), which relaxes some of the restrictions, thus making the restricted securities more marketable, purchasers of restricted stock "generally expect to be able to resell the stock in the public market in the foreseeable future." (J.Ex. 508, at 78.) Pre-IPO discounts, on the other hand, are based on purely private transactions before a company enters the public market, a situation more comparable to closely held companies such as SSE. (Tr. at 205.) A total discount that "is only slightly above the averages of the discounts observed in the pre-IPO transactions" is appropriate, according to Dr. Pratt, because SSE stock, unlike the stock observed in the pre-IPO studies, had no prospect of an initial public offering (Tr. at 74, 205.)

The AVG Report's discussion of lack of marketability discounts relies on a smaller number of studies of restricted stock and pre-IPO transaction prices. The restricted stock studies cited in the AVG Report revealed discounts ranging from 10 to 90 percent, with an average discount of at least 35 percent (Def.'s Ex. 1003, at 62–63.), while the pre-IPO study cited reported mean and median discounts of 45 percent. The AVG Report concluded that the discount rate observed by the major pre-IPO study cited may be overstated because it reflects factors not reflected in insider transaction prices. For example, "a company's value may increase significantly leading up to the stock offering, due to the greater growth prospects typically associated with access to public capital as well as the prevailing market demand for public offerings." (Def.'s Ex. 1603, at 63.) This argument supports a higher discount for marketability for SSE stock than that observed in the pre-IPO study for the reason articulated by Dr. Pratt with respect to restricted stock studies. There is no public market for SSE stock, and the company does not contemplate entering the public market in the future.

Chief among the factors weighing in favor of a higher than average discount rate, in Dr. Pratt's view, are shareholder risks in the form of restrictive stock transfer provisions, and the provisions of Marvin Schwan's estate plan. The company by-laws contain a restrictive stock transfer provision in the form of a ninety day right-of-firstrefusal, which Dr. Pratt viewed as a deterrent to investment and Dr. Spiro dismissed as a "red herring" because he believed it would not impede long-term investment. (Tr. at 318.)

[18] The studies of pre-IPO transactions cited include a major study conducted by Willamette Management Associates. (J.Ex. 508, at 81.)

Two restrictions triggered by Marvin Schwan's death would, according to Dr. Pratt, have a far greater impact on investment in SSE. First, the 3G Trust would severely impinge upon SSE stock liquidity because the 3G Trust held the controlling share of SSE voting stock for three generations, amounting to almost 200 years in perpetuity. Second, Marvin Schwan's estate plan required the implementation of an agreement between the company and the Foundation whereby the Foundation received 5,076 shares of voting common stock and 25,910,000 shares of non-voting common stock owned by the Marvin Schwan Revocable Trust. SSE was then required to redeem the stock from the Foundation. The redemption agreement, once triggered by Marvin Schwan's death and the implementation of his estate plan, would increase the company's indebtedness by approximately $869 million, thereby rendering the company highly leveraged and hindering its ability to grow through acquisitions. Dr. Pratt opined that the ninety day right of first refusal and the 200-year holding period imposed by the 3G Trust would make SSE stock unattractive to investors (Tr. at 49, 87).

Based on his discussions with SSE management, Dr. Pratt identified additional shareholder risks affecting the discount for lack of marketability.[19] First and foremost, with one exception, SSE had never paid dividends to shareholders and had no intention of paying dividends in the foreseeable future, thereby closing off one means of obtaining a return on an investment. Members of management communicated to Dr. Pratt that SSE would remain a closely-held company and had no intention of either pursuing a third party sale or public offering, in accordance with the express wishes of Marvin Schwan. Dr. Pratt's interviews further revealed that the shareholders did not have easy access to company information because SSE management did not readily provide an an-nual report to the shareholders. Based on these factors, Dr. Pratt's determined that there was no real market for SSE's stock.

Dr. Spiro also identified specific factors influencing the applicable liquidity discount, which reflects the inability to convert the fair market value of an investment to its cash equivalent value.[20] According to the AVG Report, the factors suggesting a liquidity discount at the low end of the applicable range included SSE's high profitability and strong sales and earnings growth and the company's competitive position and favorable economic outlook. Recognizing that highly competitive nature of the food industry, the AVG Report nevertheless considered SSE's unique distribution system an advantage, and believed that SSE was well-positioned as an established leading supplier of prepared foods for future growth. (Def.'s Ex. 1003, at 54.)

Balanced against these advantages, the AVG Report identified three major factors that would make investment in SSE relatively unattractive to an investor, and thus increase the applicable liquidity discount: 1] the lack of dividend payment history, 2] SSE's relative lack of management depth and dependence on Marvin Schwan, and 3] the company's right of first refusal with regard to the purchase of SSE shares. Unlike Dr. Pratt, who found the restrictive stock transfer provision a very significant deterrent to an investor, Dr. Spiro concluded that the 90 day right of first refusal period should "only cause a minor increase in the applicable liquidity discount" because "a potential investor would consider an equity interest in SSE to be a long-term investment."[21] (Def.'s Ex. 1003, at 55.)

Dr. Spiro attached minimal if any significance to the redemption agreement on the ground that it was not in effect as of December 31, 1992. Instead of viewing the 3G Trust as a major deterrent to investment, Dr. Spiro hypothesized that shareholders of SSE stock would not tolerate

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19 The Willamette report identifies the following additional factors affecting marketability: the existence of put rights; the universe of potential buyers; the size of the company; the size of the subject block; offering or sale of company; the degree of information access and reliability; and the existence of restrictive transfer provisions. (J.Ex. 508, at 84–87.)

20 The AVG Report uses the terms "liquidity discount" and "discount for lack of marketability" interchangeably.

21 On cross examination, Dr. Spiro attributed the greater significance accorded the restrictive transfer provision at issue in the Simplot case to its longer duration (one year versus 90 days.) (Tr. at 318.)

the tying up of a controlling majority of voting shares for three generations. Dr. Spiro opined that later generations are often ''no longer interested in the company,'' but are ''interested in receiving the rewards;'' therefore, the trustees of the 3G Trust would ''have an obligation to serve their interests'' that might force Schwan to either ''merge with another company or go public'' to create liquid assets for the 3G beneficiaries. (Tr. at 331.) Consequently, Dr. Spiro concluded that the 3G Trust was not a relevant factor affecting SSE's marketability.

The Court finds Dr. Pratt's analysis of the appropriate discount for lack of marketability more persuasive than that of the government's expert. First, Dr. Spiro's speculation about the pressure to go public created by the 3G Trust may not be considered under the objective standard applicable to valuation of closely held stock. The court is precluded from considering imaginary scenarios as to ''who a purchaser might be, how long the purchaser would be willing to wait without any return on his investment, and what combinations the purchaser might be able to effect with [ ] children or grandchildren and what improvements in management of a highly successful company an outsider purchaser might suggest.'' Estate of Simplot v. Comm'r 249 F.3d 1191, 1195 [87 AFTR 2d 2001-2165] (9th Cir.2001). Dr. Spiro's imaginary scenario, however plausible, may not be considered in valuing what a hypothetical willing buyer and willing seller would pay for closely held stock. Second, the factors identified in the AVG Report that weigh against a high liquidity discount relating to company performance and competitiveness were already taken into account in determining the appropriate pricing multiples under the market approach. Thus, the re-emphasis of these factors in the liquidity discount analysis may result in overstatement. Finally, the Court finds Dr. Pratt's analysis of the relevant empirical studies and shareholder risks more persuasive than the AVG report's rather truncated analysis. In particular, the Court is persuaded that the Marvin Schwan estate plan provisions would deter investment to a greater extent than Dr. Spiro suggests.

However, rather than accepting Dr. Pratt's estimate of 45 percent, the Court holds that a 40 percent discount for lack of marketability is warranted for the December 31, 1992 valuation date. The Court agrees that the company's dividend payment history, restrictive stock transfer provision, the 3G Trust and the redemption agreement constitute significant deterrents to investment because of the restraints they impose on short or long term returns. However, in 1992 the estate plan provisions, although in place, had neither been triggered nor anticipated in the immediate future. In other words, they were prospective concerns rather than actual concerns as of the 1992 valuation date. It is well-established that ''valuation of the stock must be made as of the relevant dates without regard to events occurring subsequent to the crucial dates.'' Bader v. United States, 172 F.Supp. 833, 840 [3 AFTR 2d 1824] (S.D.Ill.1959); accord Hermes Consol., Inc. v. United States, 14 Cl.Ct. 398, 415 [61 AFTR 2d 88-823], n. 28 (1988), Fehrs v. United States, 223 Ct.Cl. 488 [45 AFTR 2d 80-1791], 620 F.2d 255, 264 n. 6 (1980), Central Trust Co. v. United States, 158 Ct.Cl. 504 [10 AFTR 2d 6203], 305 F.2d 393, 403 (1962).[22] In 1992, the major shareholder risks identified in the Willamette Report, and in Dr. Pratt's testimony, were in place, but had not yet been triggered by Marvin Schwan's death. The difference between potential versus actual deterrents to investment supports a 5 percent disparity between the appropriate discount for lack of marketability in 1992 (40 percent) and in 1994 (45 percent).

[22] Plaintiff's reliance on SSE's actual financial results for 1993 and 1994 to cast doubt on defendant's appraisal must be similarly rejected. Although the Federal Circuit in Knapf v. United States, 977 F.2d 1454, 1459 [70 AFTR 2d 92-5981] (Fed.Cir.1992), held that post-valuation date transactions may provide a ''parameter or give rise to an inference of the earlier value,'' and should not be absolutely barred from consideration, consideration of post-valuation financial results here would be improper. As the government points out, ''if such a technique were accepted, there would be little need to resort to the courts in valuation cases. The mere passage of time, together with the accumulation of postvaluation date data, would convert the valuation process form an inexact science to an exact science.'' Estate of Gillet v. Commissioner, 50 T.C.M. (CCH) 636, 645 [¶85,394 PH Memo TC] (1985).

Discount for Lack of Voting Rights

The Court accepts the shared view of the experts that a 5 percent discount for lack of voting rights is justified. A prospective buyer usually will pay a premium for shares with voting power or seek a discount for nonvoting shares. Wallace v. United States, 566 F.Supp. 904, 917 [49 AFTR 2d 82-1482] (D.Mass.1981) (voting shares appraised at a 5 percent premium over nonvoting shares). SSE's capital structure reflects a great disparity between the number of voting and nonvoting shares (7,610 voting to 38,550,000) issued by the company. Where there is a skewed distribution between the two classes of stock, the voting shares are at a premium. Based on their review of empirical studies, and other relevant literature, which observed lack of voting rights discounts ranging from 4 to 5.44 percent (in Dr. Spiro's report) and from 3 to 10 percent (in Dr. Pratt's report), both experts applied a 5 percent discount, which the Court adopts as well-founded.

1994 INCOME TAX

Plaintiffs argue that 26 U.S.C. § 7491(a)(1) places the burden of proof for plaintiff's 1994 income tax refund claim on the government rather than the taxpayer. As a general rule, the burden of proof is on the taxpayer in tax refund cases. Welch v. Helvering, 290 U.S. 111, 115 [12 AFTR 1456] (1933). However, pursuant to 26 U.S.C. § 7491(a)(1), enacted in 1988, if the ''taxpayer introduces credi-ble evidence with respect to any factual is-sue relevant to ascertaining the liability of the taxpayer,'' the burden of proof shifts to the government. By its terms, Section 7491 applies to court proceedings arising in con-nection with examinations commenced af-ter July 22, 1998. Internal Revenue Service Restructuring and Reform Act of 1998 (RRA1998), Pub.L. 105-206, sec. 3001(c)(2), 112 Stat. 727 (codified as amended at 26 U.S.C. § 7491). The government does not contest that plaintiffs' examination commenced after July 22, 1998, but claims that plaintiffs failed to present credible evidence of the value claimed, and therefore, the burden of proof is not shifted to the government.[23] Plaintiffs argue that the 1994 Willamette Report and testimony of Dr. Pratt constitute credible evidence that the value of SSE common stock was $19.77 as of December 31, 1994, and that the government failed to carry its burden of proof because it presented no evidence at trial of the 1994 value. Rather, the government relied solely on the value reported by the plaintiffs when they filed their 1994 income tax return, which was $12.51 per share. (J.Ex. 516.)

Setting aside the issue of whether the Act's preconditions have been met[24] , the Court finds that plaintiff prevails on the issue of the value of SSE stock as of December 1994 under both the original rule and 26 U.S.C. § 7491(a)(1). The government declined to present any independent evidence to support its assessment. Moreover, the government provided no explanation for the discrepancy between its reliance at trial on the $12.51 per share value, and the IRS's determination in 1998 that plaintiffs were entitled to an abatement based on the 1994 value of $19.77 reported on the plaintiffs' amended joint income tax return.

Although the Court may choose not to accept the second Willamette appraisal even if it is uncontradicted, see Hearst Corp. v. United States, 28 Fed.Cl. 202, 216 [71 AFTR 2d 93-1656] (1993), vacated, 36 F.3d 1116 [74 AFTR 2d 94-6385] (Fed.Cir.1994), the Court finds the methodological approaches and conclu-

23 ''Credible evidence'' is defined by the RRA 1998's legislative history as the ''quality of evidence which, after critical analysis, the court would find sufficient upon which to base a decision on the issue if no contrary evidence were submitted (without regard to the judicial presumption of IRS correctness).'' H.R.Conf.Rep. No. 105-599, at 240–41 (1998), 1998-3 C.B. 747, at 994–95.

24 Under the Act, four conditions must be met before the burden of proof shifts to the IRS: (1) the taxpayer must comply with the requirements of the Code and applicable regulations promulgated thereunder to substantiate any item; (2) the taxpayer must maintain records; (3) the taxpayer must comply with reasonable requests made by the Secretary for meetings, interviews, witnesses, information, and documents, and must first exhaust all administrative remedies; (4) taxpayers other than individuals or estates must meet the net worth requirements for awarding attorneys fees. 26 U.S.C. § 7491(a)(2). In coming to a determination whether these conditions have been met, ''[t]he taxpayer has the burden of proving that it meets each of these conditions, because they are necessary prerequisites to establishing that the burden of proof is on the Secretary.'' H.R.Conf.Rep. No. 105-599, at 240–41 (1998), 1998-3 C.B. 747, at 994–95. Although it seems likely that these preconditions have been satisfied, neither of the parties specifically address the issue. 2002 WL 1969642, 2002 WL 1969642 (Fed.Cl.)

sions of the 1994 report persuasive. The report constitutes both credible evidence under 26 U.S.C § 7491(a)(1), and, together with Dr. Pratt's testimony at trial, sufficient evidence to satisfy plaintiffs' burden of proof under the pre-existing general rule of Welch v. Helvering and Helvering v. Taylor, 293 U.S. 507, 514 [14 AFTR 1194 (1935) (plaintiffs bear the burden of showing the invalidity of the IRS's determination of deficiency and establishing the basis for judgment in the plaintiffs' favor by establishing the correct amount of assessment or of deduction claimed).

The 1994 Willamette Report identifies several additional risk factors inherent in an investment in SSE. These factors included (1) Company President and chairman Marvin Schwan's unexpected death on May 9, 1993; (2) a substantial increase in the company's leverage as a result of the Redemption triggered by Marvin Schwan's estate plan; (3) an October 1994 salmonella contamination, and resulting product recall and plant closure, as well as a class action suit involving affected customers; and (4) serious shareholder concerns about the appropriateness of the Redemption Agreement. In other words, the potential or projected events identified by plaintiffs in 1992, as well as additional risks, had actually occurred by 1994. The redemption agreement created approximately $884 million in interest-bearing debt, which dramatically reduced the overall value of the company to approximately $500 million as reflected in Pratt's 1994 report. Although the long-term effects of the salmonella outbreak were unknown in 1994, the contamination required significant short-term upheavals, including a 30 day plant closure and an immediate ice cream recall. The Court finds that these post-1992 events account for the reduction in the overall value of SSE after the 1992 valuation date, based on the application of pricing multiples below the average for guideline companies, and justify the full discount for lack of marketability (45%) applied by plaintiffs' expert.

CONCLUSION

For the reasons discussed above, the Court accepts the government's 1992 indication of value on a freely-traded basis based on the income and capital market valuation methods. However, the Court rejects Dr. Spiro's discount rate of 35 percent and finds that, for 1992, the appropriate combined discount rate is 45 percent, which represents a slight downward adjustment of Dr. Pratt's recommended 50 percent discount rate. Based on the application of a 45 percent discount rate (40% for lack of marketability and 5% for lack of voting rights) to Dr. Spiro's unadjusted value of $44.29 per share for SSE's nonvoting minority stock, the Court holds that the value of SSE minority nonvoting stock as of December 31, 1992 was $24.36 per share.

Several of the enterprise level and shareholder risks identified by Dr. Pratt and the Willamette Report for the 1992 valuation date had become economic and management realities by the 1994 valuation date. The government has not presented any reliable evidence to refute the value established by plaintiffs. The Court therefore adopts the plaintiffs' expert appraisal of the value of SSE minority stock for the December 31, 1994 valuation date. Specifically, the Court applies a 45% discount for lack of marketability and a 5% discount for lack of voting rights to the unadjusted value per share of $39.54. The Court finds that the value of SSE stock as of December 31, 1994 was $19.77 per share.

Accordingly,

(1) Counsel shall confer and reach agreement on the tax liability amount to be assessed against plaintiffs based on the Court's finding that the value of the SSE minority stock as of December 31, 1992 is $24.36 per share;

(2) Counsel shall confer and reach agreement on the tax refund amount to be entered based on the Court's finding that the value of the SSE minority stock as of December 31, 1994 is $19.77 per share;

(3) Counsel will present their joint calculations to the Court within 30 days so that judgment may be entered;

IT IS SO ORDERED.

¶2002-5334

Paul MONEGLIA, Jr. v. GAMBONE BROTHERS CONSTRUCTION CO. U.S. District Court, Eastern Dist. of Pennsylvania, (DC PA) No. Civ.A. 01-4838, Feb. 28, 2002. Decision against Taxpayer in part.

1. Employment taxes—employer's burden—damages to employees—unreported income—amendment of complaint. Taxpayer-employee's RICO and state law claim against employer, whose "tax-skimming" scheme allegedly caused taxpayer to incur additional tax, penalties and interest on unreported overtime pay, was dismissed with leave to amend. Taxpayer was advised that he could correct technical defects by amendment, but that he would also have to show that his injuries actually stemmed from employer's conduct rather than his own failure to report overtime compensation in his individual income. *Reference:* United States Tax Reporter ¶615.047(5); 34,025.01(3); 74,025.01(108). IRC §61; 3402; 7402.

United States District Court, E.D. Pennsylvania,

MEMORANDUM AND ORDER

FULLAM, J.

[1] Plaintiff's complaint contains two counts. The first asserts a RICO claim, the second asserts a state-law claim for intentional infliction of emotional distress. The defendant has filed a Motion to Dismiss the Complaint, under Fed.R.Civ.P. 12(b)(6).

According to the complaint, plaintiff began working for the defendant in 1993. In 1995, the defendant instituted a practice of paying its employees, including plaintiff, by two separate checks: a regular paycheck covering the first 40 hours per week, and a second check covering overtime. The employees were advised that the defendant considered them "independent contractors" to the extent of all work performed beyond 40 hours per week. Allegedly, only the "regular" pay was reported to the Internal Revenue Service; at least, no federal income tax was withheld by the defendant from the "overtime" paychecks.

On April 6, 2000, the owners and managers of the defendant (John A. Gambone, Anthony Gambone, William Murdock, Sandra Lee Gambone, John Gambone, Jr., and Robert Carl Meixner) were indicted on various charges in connection with the filing of false income tax returns, and several of them were eventually convicted and sentenced. Plaintiff asserts that he was a victim of their "taxskimming" activities, because he was eventually required to pay additional tax, plus interest and penalties, when the Gambones' scheme came to light.

Defendant's motion to dismiss asserts that the RICO claim in Count One is invalid, because the complaint does not allege that the defendant was involved in interstate commerce, and does not define an enterprise or distinguish between the enterprise and the individuals conducting it; and also because causation is not sufficiently alleged. The motion challenges that state-law count because the facts alleged do not suffice to give rise to a claim for intentional infliction of emotional distress, and because the RICO count must be dismissed and supplemental jurisdiction should not be exercised over the second count.

Plaintiff attempts to defend the adequacy of his complaint as to both counts, but (1) requests leave to amend the complaint to remedy any deficiencies, and (2) concedes that, if the first count is dismissed, this Court should not exercise supplemental jurisdiction over the second count.

The formal defects noted by the defendant-the failure to allege anything about interstate commerce, and the lack of clarity as to the definition of an enterprise and whether the named defendant was conducting an enterprise-are plainly well taken; in its present form, the complaint

must be dismissed. I assume that these technical objections can be overcome in an amended complaint, and will therefore grant plaintiff an opportunity to file an amended pleading. But I do not mean to suggest that remedying those deficiencies will suffice. There are, in my view, more serious potential defects which an amended pleading must address.

In its present form, plaintiff's complaint seems to assume that the defendant was solely responsible for "paying" the income tax on plaintiff's overtime compensation. Indeed, the complaint does not rule out the possibility that plaintiff himself may have failed to include the overtime compensation in his income tax returns. One would think that plaintiff would be chargeable with actual knowledge of the total amount paid to him by the defendant, and of the amount of withholding taxes paid on his behalf by the defendant. Responsibility for paying the appropriate amount of income tax on a timely basis rested, it would seem, upon plaintiff, not the defendant.

In short, although the defendant is alleged to have participated in a "tax-skimming" RICO conspiracy, it is not at all clear that these criminal activities (whatever they may have been) were the cause of harm to the plaintiff, These matters should be clarified, in any amended complaint plaintiff decides to file.

¶2002-5335

Bill Max OVERTON, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Tenth Circuit, (CA10) No. 02-6117, Aug. 22, 2002. District Court, (2000, DC OK) 89 AFTR 2d 2002-1858, 2002-1 USTC ¶50350, affirmed. Decision against Taxpayer.

1. Actions against U.S.—damages—offenses by U.S. employees—failure to state claim for relief. District court properly dismissed for failure to state claim pro se taxpayer's damages action against govt. for alleged TBOR violations: taxpayer didn't allege how or when purported IRC §7609 violations occurred or identify IRS officer who purportedly violated IRC §7214(a)(2). Also, court didn't abuse its discretion in denying taxpayer's unsupported conclusory recusal motion. *Reference:* United States Tax Reporter ¶72,145.01(10); 76,095.01(13). IRC §7214; 7609.

Bill Max Overton, Midland, TX, for Defendant-Appellant.
David English Carmack, [COR LD NTC ret], Curtis C. Pett, [COR NTC gvt], Phyllis J. Gervasio, [COR LD NTC gvt], United States Department of Justice, Tax Division, Washington, DC, for Defendant-Appellee.

United States Court of Appeals, Tenth Circuit,

Before SEYMOUR, HENRY and BRISCOE, Circuit Judges.

ORDER AND JUDGMENT*

ROBERT H. HENRY, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is, therefore, ordered submitted without oral argument.

Bill Max Overton, appearing pro se, filed an action raising seventeen claims against the United States; each claim sought damages for alleged violations of the Omnibus Taxpayer Bill of Rights, Pub.L. No. 100-647, Title VI, Subtitle J (codified as amended in scattered sections of 26 U.S.C.), which Congress passed on November 10, 1988. The government moved, pursuant to Fed.R.Civ.P. 8, 12(b)(1) and 12(b)(6), to dismiss Mr. Overton's complaint.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Construing Mr. Overton's allegations liberally pursuant to Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir.1991), the district court determined it did have jurisdiction over this matter via 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7432. The district court dismissed Mr. Overton's complaint, without prejudice, for failure to state a claim. The district court also denied Mr. Overton's motion for recusal. Mr. Overton now appeals.

[1] Sixteen of Mr. Overton's allegations contend that the government violated 26 U.S.C. § 7609 by seeking to obtain records from sixteen different banks without sending Mr. Overton any notice. We agree with the district court's conclusion that these allegations fail to state a claim because "no facts alleged ... indicate[ ] how or when these alleged violations occurred." Rec. doc. 56, at 2, at 2 (Dist. Ct. Order, filed March 19, 2002).

Mr. Overton's remaining allegation charges that he is entitled to damages because a "Revenue officer knowingly demanded greater sum than authorized by law" in violation of 26 U.S.C. § 7214(a)(2). Rec. doc. 1, at 11 (Complaint, filed Apr. 19, 2001). Apparently, Mr. Overton is challenging the government's assessment of his 1998 tax return as excessive. Mr. Overton does not identify the revenue officer or agent who allegedly violated the statute. In addition, a taxpayer may file suit for damages under this section only after a criminal conviction against the revenue officer or agent has been procured under this section. See Brunwasser v. Jacob, 453 F.Supp. 567, 572–73 [42 AFTR 2d 78-5457] (E.D.Pa.1978), aff'd, 605 F.2d 1194 (3d Cir.1979); see also Detweiler v. United States, 406 F.Supp. 695, 760 [37 AFTR 2d 76-453] (E.D.Pa.1975), aff'd, 544 F.2d 512 (3d Cir.1976). We therefore conclude that the district court properly dismissed this count of Mr. Overton's complaint without prejudice.

Finally, we turn to Mr. Overton's contention that the district court acted with bias and prejudice against him and improperly failed to grant his recusal motion. We review the denial of a motion to recuse only for an abuse of discretion. United States v. Burger, 964 F.2d 1065, 1070 (10th Cir.1992). "[C]onclusions, rumors, beliefs and opinions are not sufficient to form a basis for disqualification." Hinman v. Rogers, 831 F.2d 937, 939 (10th Cir.1987). Rather, Mr. Overton must allege "with required particularity the identifying facts of time, place, persons, occasion and circumstances." Id.

In this case, Mr. Overton's motion is based solely on his own conclusions, beliefs and opinions, and a review of the record shows that the district court did not act with bias or prejudice in any of its rulings. We conclude that the district court did not abuse its discretion in denying Mr. Overton's recusal motion.[1]

Accordingly, we AFFIRM the orders of the district court.

¶2002-5336

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE, CROSS-APPELLANT v. Guillermo A. SCHLAEN, Mauricio S. Schlaen, DEFENDANTS-APPELLANTS, CROSS-APPELLEES. U.S. Court of Appeals, Eleventh Circuit, (CA11) No. 01-10683, Aug. 8, 2002. District Court affirmed in part, and vacated and remanded in part. Decision for Govt.

1. Tax crimes—conspiracy; failure to report cash transactions—U.S. Sentencing Guidelines. Money laundering conviction against taxpayer-brother who engaged in unreported cash transactions in laundered drug funds was affirmed, despite his acquittal on related IRC §6050I charge: mere inconsistency between IRC §6050I finding and money-laundering verdict wasn't grounds for acquittal. But, district court abused its discretion in granting

[1] In light of our resolution of the issues raised by Mr. Overton, we DENY Mr. Overton's Motion to Call Forward the Entire Trial Court Record. In that motion, Mr. Overton alleges that the district court erred in striking from the record certain lists of evidence pertaining to his allegations of bias and prejudice. We note that Mr. Overton filed this motion after the district court entered judgment against him. Moreover, the evidence to which Mr. Overton refers consists only of his unsupported allegations.

taxpayers downward departure from Guidelines sentence on theory that money laundering was incidental to their IRC §6050I failures: court's theory contradicted jury verdict and wasn't supportable merely by absence of criminal purpose or sophisticated means. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §6050I.

Charles Garret White, Miami, FL, Abe Anselheart Bailey, Bailey, Martin & Associates, P.A., Miami, FL, for Guillermo and Mauricio Schlaen.
Anne R. Schultz, Laura Thomas Rivero, Miami, FL, for U.S.

United States Court of Appeals, Eleventh Circuit,

Appeals from the United States District Court for the Southern District of Florida.

Before EDMONDSON, Chief Judge, and BLACK and COX, Circuit Judges.

COX, Circuit Judge:

Defendants were convicted in the United States District Court for the Southern District of Florida, No. 99-00689-CR-ASG, Alan S. Gold, J., of money laundering, and they appealed. The Court of Appeals, Cox, Circuit Judge, held that: (1) acquittal on charges of failing to file Internal Revenue Service (IRS) cash transaction forms did not preclude convictions on related money laundering charges, and (2) downward departure sentences were not warranted.

Affirmed in part; vacated and remanded in part.

Guillermo A. and Mauricio S. Schlaen were charged with one count of conspiracy to commit money laundering, multiple counts of money laundering, and multiple counts of failing to file Form 8300 with the Internal Revenue Service ("IRS") for transactions involving the receipt of over $10,000 in cash. The jury acquitted them of the conspiracy count and the failure-to-file counts but convicted them on most of the money-laundering counts. The district court, after departing downward under s 5K2.0 of the Sentencing Guidelines, sentenced Guillermo to fourteen months in prison and Mauricio to six months in prison. Guillermo and Mauricio appeal their convictions. Guillermo argues, among other things, that his acquittal on the failure-to-file counts requires an acquittal on the money-laundering counts. The Government cross-appeals the district court's downward departure. We affirm the convictions but vacate the sentences and remand for resentencing.

I. BACKGROUND

A. THE SCHEME

Guillermo founded a company called AG-USA Corp in 1996, and his brother, Mauricio, became a partner in the business soon thereafter. In the beginning, the Schlaens sold computer parts, but they eventually graduated to assembling and exporting computers.

A business acquaintance of the Schlaens, Carlos Bruyn, was a sales representative for SED International, a publicly-traded company that exports computer parts to Latin America. In early 1998, Bruyn received a call from Sergio Ramirez and Tony Piazza, representatives of a company called OmegaTek. Ramirez and Piazza told Bruyn that they wished to buy merchandise with over $10,000 cash but did not want the transaction reported on IRS Form 8300, as required by law. Bruyn told Ramirez and Piazza that SED had a policy of filing Form 8300 but that he would put them in touch with other potential partners.

Bruyn called Guillermo and told him about OmegaTek's request. Guillermo asked Bruyn a couple of questions about the request and then asked Bruyn to contact OmegaTek on his behalf.

On March 3, 1998, Mauricio was contacted by Anna Maria, a representative of OmegaTek. She told Mauricio that she had a potential order for over $10,000 worth of merchandise for which she would like to pay with cash. She asked Mauricio if he could help her by not filing Form 8300. Mauricio said that he understood her request, and, a few days later, Ramirez called to place the order. Ramirez told Mauricio that he would pay $12,000 in cash for the order, and Mauricio told Ramirez that he would not file Form 8300.

Ramirez and Piazza visited AG-USA's office on March 27, 1998. They brought $6,031 in cash and told Mauricio that their buyers were drug traffickers who dealt primarily in cash. Mauricio told Ramirez and Piazza that he once worked for a company that sold expensive housewares and that he, on one occasion, laundered money by selling thousands of dollars of housewares to a Colombian couple who paid in bundles of cash. Piazza again asked if Mauricio would file Form 8300 to report this cash transaction, and Mauricio said he would not. In fact, said Mauricio, he would be willing not to report a cash transaction of up to $500,000.

On August 28, 1998, Guillermo received $18,952 in cash from OmegaTek and agreed to purchase $18,400 worth of computers from SED International on OmegaTek's behalf.[1] While giving Guillermo the cash, Ramirez emphasized that the cash came from the Colombian mafia and that the transaction could not be reported on a Form 8300. Guillermo assured Ramirez that it would not be reported. To avoid reporting the transaction, Bruyn, on SED's behalf, split the purchase between two invoices. One invoice was for $9,936, and the other was for $8,464. AG-USA paid one invoice in cash; credit was extended on the other invoice. Because of the split invoices, SED was not required to file Form 8300.

Guillermo received $36,364 in cash from OmegaTek on November 9, 1998, to pay for two orders. When he gave Guillermo the cash, Ramirez again explained that the cash came from the Colombian mafia and that the products he purchased would be sent to Colombia and sold for Colombian pesos. Despite this explanation, Guillermo and Mauricio engaged in six more transactions with OmegaTek and continued to ask for more business. They never filed Form 8300 with the IRS.

The Schlaens did not know that, while it appeared to be a functioning business, OmegaTek was actually a Government sting operation, intended to ferret out potential money launderers in the United States. The Colombian mafia receives a great deal of cash from its drug trafficking operations in the United States. These dollars are sent to purchasing agents in the United States, who use them to purchase goods, which are then exported to Colombia and sold for Colombian pesos. OmegaTek posed as a purchasing agent. ''Sergio Ramirez'' was actually Sergio Ramil, an undercover agent for the IRS; ''Tony Piazza'' and ''Anna Maria'' were confidential informants. OmegaTek's offices were outfitted with video cameras and audio-recording devices, used to gather evidence on money launderers.

B. THE PROCEEDINGS

Based on the evidence gathered at OmegaTek's offices, Guillermo, Mauricio, and Bruyn were arrested and indicted in the Southern District of Florida. Count One of the indictment charged them with conspiracy to commit money laundering, in violation of 18 U.S.C. §§ 1956(a)(3)(C) and 1956(h). Count Two charged only Mauricio with money laundering, in violation of 18 U.S.C. § 1956(a)(3)(C). Counts Three through Ten charged Guillermo and Mauricio with money laundering, in violation of 18 U.S.C. § 1956(a)(3)(C). Counts Eleven through Eighteen charged Guillermo and Mauricio with causing their company not to file IRS Form 8300, in violation of 26 U.S.C. §§ 6050I(f)(1)(A) and (C). The indictment against Bruyn was dismissed when he pleaded guilty in a related case. Guillermo and Mauricio proceeded to trial.

The jury found Guillermo guilty on all of his money laundering counts, Counts Three through Ten. The jury found Mauricio guilty on only six of his money laundering counts, Counts Five through Ten. The jury acquitted Guillermo and Mauricio on the conspiracy count and on all of the failure-to-file counts.

At sentencing, the district court calculated Guillermo and Mauricio's sentences pursuant to § 2S1.1, the prescribed guideline for violations of 18 U.S.C. § 1956. The total offense level, after appropriate adjustments, was twenty-one for Guillermo

[1] The $552 difference was compensation for the risk associated with not filing Form 8300.

and twenty for Mauricio. These levels yielded a sentencing range of thirty-seven to forty-six months for Guillermo and thirty-three to forty-one months for Mauricio.

The district court, after a series of hearings, found that Guillermo and Mauricio's money laundering was incidental to their avoidance of the Form 8300 filing requirement. The incidentalness of their money laundering, according to the district court, placed their conduct outside the heartland of cases contemplated in the Guidelines. The district court therefore recalculated their sentences, adjusting Guillermo's total offense level to thirteen, resulting in a sentencing range of twelve to eighteen months, and adjusting Mauricio's total offense level to twelve, resulting in a sentencing range of ten to sixteen months. The district court then sentenced Guillermo to concurrent sentences of fourteen months in prison and three years of supervised release on each count. It sentenced Mauricio to concurrent sentences of six months in prison, six months of house arrest, and three years of supervised release on each count.

Guillermo and Mauricio appeal their convictions, and the Government cross-appeals the downward departure.

II. ISSUES ON APPEAL

[1] On appeal, Guillermo and Mauricio both argue that: (1) the evidence was insufficient to support their money laundering convictions; and (2) the district court erred by giving Eleventh Circuit Criminal Pattern Jury Instruction 12.2 on entrapment rather than Pattern Jury Instruction 12.1. Mauricio also contends that the Government failed to make a sufficient showing of a predisposition to commit money laundering, thus requiring a finding of entrapment as a matter of law. These three arguments are meritless, and we reject them without discussion. See 11th Cir. R. 36-1.

Guillermo also raises the following issue: Whether the district court should have dismissed his money-laundering convictions because he was acquitted of the failure-to-file charges, which, he contends, are lesser-included offenses of money laundering. The Government, on cross-appeal, questions the legality of the district court's downward departure. We address each of these issues in turn.

III. STANDARDS OF REVIEW

Since Guillermo did not raise the lesser-included-offense issue in district court, we review it for plain error. United States v. Thayer, 204 F.3d 1352, 1358 (11th Cir.2000). We review the district court's downward departure for an abuse of discretion. United States v. Pickering, 178 F.3d 1168, 1171 (11th Cir.1999).

IV. DISCUSSION

A. GUILLERMO'S CONVICTION

Guillermo was convicted of money laundering in violation of 18 U.S.C. § 1956(a)(3)(C), which requires the Government to prove the following: (1) that the defendant conducted or attempted to conduct a financial transaction, (2) with the intent to avoid a transaction reporting requirement, and (3) that the property involved in the transaction was represented by a law enforcement officer to be the proceeds of narcotics trafficking. 18 U.S.C. § 1956(a)(3)(C), (c)(7)(B)(i) (2000); United States v. Nelson, 66 F.3d 1036, 1040 (9th Cir.1995); United States v. Breque, 964 F.2d 381, 386–87 (5th Cir.1992). On the other hand, Guillermo was acquitted of failing to file Form 8300 in violation of 26 U.S.C. §§ 6050I(f)(1)(A) and (C). Guillermo argues that, because intent to avoid a reporting requirement is an element of money laundering, and because failing to file Form 8300 is a means of avoiding a reporting requirement, then failing to file is a lesser-included offense of money laundering. Therefore, according to Guillermo, his acquittal on the lesser-included counts should preclude his conviction on the money-laundering counts.

The lesser-included-offense inquiry typically arises in the double-jeopardy context. See, e.g., United States v. Diaz, 190 F.3d 1247, 1262 (11th Cir.1999). However, the Double Jeopardy Clause, U.S. Const. amend. V, protects defendants against successive prosecutions, not simultaneous

ones, United States v. Farmer, 923 F.2d 1557, 1563 (11th Cir.1991), and therefore does not apply to this case. The lesser-included-offense inquiry is also triggered when a defendant requests a lesser-included-offense instruction under Rule 31(c) of the Federal Rules of Criminal procedure. Fed.R.Crim.P. 31(c); see, e.g., Schmuck v. United States, 489 U.S. 705, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989). Guillermo requested no such instruction in this case. Instead, Guillermo asserts that the verdicts are inconsistent and asks us to make the verdicts consistent by acquitting him on the money-laundering charges.

It is well-settled in federal criminal law that "[c]onsistency in the verdict is not necessary." Dunn v. United States, 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356 (1932); United States v. Powell, 469 U.S. 57, 62, 105 S.Ct. 471, 475, 83 L.Ed.2d 461 (1984). Even where conviction on one count and acquittal on another count is a logical impossibility, the conviction will stand, unless it was otherwise obtained in error. United States v. Mitchell, 146 F.3d 1338, 1342–45 (11th Cir.1998). Therefore, even if a violation of 26 U.S.C. §§ 6050I(f)(1)(A) or (C) is a lesser-included offense of a violation of 18 U.S.C. s 1956(a)(3)(C), a question that we need not decide, Guillermo's money-laundering convictions must stand, despite his acquittal on other counts.

B. THE SENTENCES

The district court granted a downward departure of six levels to Guillermo and Mauricio under § 5K2.0 of the Sentencing Guidelines. It found that Guillermo and Mauricio's money laundering was incidental to their avoidance of the transaction reporting requirements and, thus, outside of the heartland of § 2S1.1, the prescribed guideline for money laundering. By departing six levels, the district court put Guillermo and Mauricio in the sentencing range in which they would have been had they been convicted for failure to file rather than money laundering. The Government objected to this downward departure and, on appeal, argues that the downward departure was an abuse of discretion.

A court may grant a downward departure under § 5K2.0 when "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b); United States Sentencing Commission, Guidelines Manual, § 5K2.0 (Nov.1998); United States v. Smith, 289 F.3d 696, 710 (11th Cir.2002). In determining whether to grant such a departure, the district court considers two questions: (1) whether any circumstance makes the case atypical, meaning that it takes the case out of the "heartland" of cases involving the conduct described in the applicable guideline; and (2) whether that circumstance should result in a different sentence. United States v. Regueiro, 240 F.3d 1321, 1324 (11th Cir.2001).

When reviewing the district court's grant of a departure, we engage in a three-step process. United States v. Hoffer, 129 F.3d 1196, 1201 (11th Cir.1997); see also Koon v. United States, 518 U.S. 81, 98–100, 116 S.Ct. 2035, 2047, 135 L.Ed.2d 392 (1996). First, we deferentially review the district court's determination that the case falls outside of the heartland. Second, we determine whether the district court relied on appropriate circumstances in granting the departure. Finally, we review whether the circumstances are present to such an extraordinary degree as to warrant a departure.

In this case, the district court determined that Guillermo and Mauricio's money laundering was incidental to their failure to file Form 8300 and, thus, fell outside of the heartland of § 2S1.1. The district court relied on five circumstances in making this determination: (1) that the defendants did not find out that the cash was derived from drug trafficking until after they made the first transaction; (2) that the defendants did not know how much of the money was derived from drug trafficking; (3) that the defendants were lured into the operation before they knew that the cash was derived from drug trafficking; (4) that the defendants did not use the proceeds to further criminal acts; and (5) that the defendants

kept internal records regarding the cash transactions. (R.14 at 26–27.)

The first three circumstances cited by the district court conflict with the jury's verdict. In articulating each of these circumstances, the district court indicated its belief that the defendants were unaware that the money they were laundering was derived from drug trafficking. Guillermo and Mauricio were charged and convicted of engaging in financial transactions involving money that was represented to be the proceeds of narcotics trafficking. As stated above, one of the elements of this crime is that the property involved in the transaction was represented by a law enforcement officer to be the proceeds of narcotics trafficking. 18 U.S.C. § 1956(a)(3)(C), (c)(7)(B)(i) (2000); United States v. Nelson, 66 F.3d 1036, 1040 (9th Cir.1995); United States v. Breque, 964 F.2d 381, 386–87 (5th Cir.1992). If the court has doubts regarding whether this element was proven, it may consider granting a new trial or entering a judgment of acquittal. "But a district court cannot use the post-trial sentencing process to call a jury's verdict into question." United States v. Costales, 5 F.3d 480, 488 (11th Cir.1993). Therefore, the district court improperly relied on the first three circumstances in granting a downward departure.

The district court also stated that its departure was partly based on a fourth circumstance, the fact that the money laundering was not used to further criminal acts. While the absence of an intent to further other criminal acts is not mentioned as a basis for departure, the presence of such an intent, or what the Guidelines call "criminal purpose," is mentioned as a basis for upward departure. USSG § 5K2.9. The inclusion of criminal purpose as a circumstance warranting upward departure indicates that the Sentencing Commission adequately considered the effect that a criminal purpose had on a defendant's culpability. In doing so, it concluded that, while the presence of a criminal purpose might warrant an upward departure, the absence of a criminal purpose does not warrant a downward departure. United States v. Godfrey, 22 F.3d 1048, 1056 (11th Cir.1994). The district court, then, could not use this circumstance to justify a downward departure.

The only remaining circumstance is the fifth one, that the defendants kept internal records of their transactions. The Government argues that this finding is clearly erroneous, but we do not agree. During the course of their dealings with OmegaTek, the defendants indicated that they would keep some sort of internal record of the transactions, though the records differed somewhat from their usual records. This evidence supports the district court's finding. Nevertheless, we do not believe that this difference justifies a downward departure.

Section 2S1.1 does not indicate how the presence of a paper trail should affect a defendant's sentence. However, the district court believed that the paper trail was "inconsistent with planned concealment" (R.14 at 26) and made these defendants less culpable. When a circumstance is unmentioned in a guideline, the district court must consider "the 'structure and theory of both the relevant individual guidelines and the Guidelines taken as a whole'" in deciding whether to grant a downward departure. Koon, 518 U.S. at 96, 116 S.Ct. at 2045 (quoting United States v. Rivera, 994 F.2d 942, 949 (1st Cir.1993)).

A review of the Guidelines indicates that the Sentencing Commission was not unaware that efforts to conceal a crime could alter the sentencing equation. For instance, the commentary to § 2T1.1, the guideline for tax evasion, states that "unusually sophisticated efforts to conceal the offense decrease the likelihood of detection and therefore warrant an additional sanction for deterrence purposes." USSG § 2T1.1, comment. (backg'd.) In furtherance of this goal, § 2T1.1(b)(2) provides a two-level enhancement for sophisticated concealment. As in the criminal purpose context, this enhancement indicates that a defendant who uses sophisticated means receives additional punishment. But a defendant who uses unsophisticated means is not rewarded

for his use of unsophisticated means; rather, he avoids the enhancement.

While § 2S1.1 did not distinguish between sophisticated and unsophisticated means when Guillermo and Mauricio were sentenced,[2] the § 2T1.1 example indicates that it is the use of sophisticated means, not the use of unsophisticated means, that warrants unusual treatment. Therefore, the district court was not justified in granting a downward departure because the Schlaens used unsophisticated means.

Because it relied on improper circumstances in granting the downward departures, the district court abused it discretion. See Koon, 518 U.S. at 100, 116 S.Ct. at 2047.

V. CONCLUSION

We affirm the convictions of Guillermo and Mauricio Schlaen. But, because the district court did not articulate mitigating circumstances that would warrant a downward departure, we vacate the district court's downward departures and remand for resentencing.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

¶2002-5337

AMERICAN AIR LIQUIDE, INC. AND SUBSIDIARIES, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-70627, Aug. 29, 2002. Tax Court, (2001) 116 TC 23 (opinion by Laro, *J.*), affirmed. Years 1989, 1990, 1991. Decision against Taxpayer.

1. Foreign tax credits—limitation on credit—passive vs. general limitation income—royalties from foreign parent. Tax Court properly held that royalties domestic corp./sub. received from French parent corp. were IRC §904(d) passive income, not general limitation income: royalties didn't qualify for active business exception (exception) under IRC §954(c)(2)(A) where they weren't received from unrelated person. 9th Cir. declined to defer consideration of case until after proposed reg eliminating exception's unrelated person requirement was finalized where Treas. Secy. had discretion to make reg prospective only; and speculative suggestion that Secy. could later issue final reg with retroactive effect was unpersuasive. Also, Reg. §1.904-5's subsequently deleted ''reserved'' paragraph didn't support application of look-through treatment; regs at issue overrode earlier U.S.-France treaty's nondiscrimination provisions as to royalties' treatment; and to extent regs abrogated any treaty obligation, they were consistent with Congress' statutory scheme. *Reference:* United States Tax Reporter ¶9045.01(20). IRC §904.

United States Court of Appeals, Ninth Circuit,

Appeal from a Decision of the Internal Revenue Service.

Before SCHROEDER, Chief Judge, D.W. NELSON and REINHARDT, Circuit Judges.

MEMORANDUM*

[1] American Air Liquide, Inc. (''American Air'') appeals the IRS's notices of deficiency and argues that (1) the royalties should be considered general limitation income under the relevant statutory and regulatory framework, and (2) federal law and regulations establishing eligibility for the look-through exception impermissibly discriminate against American Air because of its French parent company in violation of a U.S.-France tax treaty. We reject both arguments and affirm the decision of the Tax Court.

The Internal Revenue Code generally classifies royalty income from a foreign source in the passive income basket. American Air, however, claims that two exceptions provided by the Code and cor-

[2] The money-laundering guideline now provides for a two-level enhancement if sophisticated means were used. United States Sentencing Commission, Guidelines Manual, § 2S1.1(b)(3) (Nov.2001).

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

responding Treasury Regulations apply in its case: the active business exception and the look-through exception. We disagree and find that neither exception applies.

The active business exception has two requirements: (1) the royalties must derive from the active conduct of business, and (2) the royalties must be received from an unrelated person. See 26 C.F.R. § 1.904-4(b)(2)(i); see also 26 U.S.C. § 954(c)(2)(A). The royalties in this case, paid by L'Air and received by American Air, do not qualify for the active business exception because they do not meet the second requirement.

The royalties received by American Air were not received from an unrelated person. Section 954(d)(3) of the Code defines a related person as any corporation that controls the U.S. taxpaying corporation through ownership of a majority of the taxpaying corporation's stock. 26 U.S.C. § 954(d)(3). In this case, American Air is the subsidiary of, and therefore related to, L'Air--who was the payor of the royalties in question. Thus, the active business exception cannot apply.

American Air, in response, urges us to consider the relevance of a proposed change to the exception noticed by the Treasury Department in the Federal Register. The proposed regulation would eliminate--but prospectively only--the active business exception's requirement that the royalties be from an unrelated person. See 66 Fed.Reg. 319, 320 (2001) (stating that the proposed change would only apply to royalties paid more than sixty days after the regulation was issued in final form). American Air suggests that we may wish to defer consideration of this case until after the regulation is finalized because a) the IRS lacks discretion to apply the proposed regulation only prospectively, or b) the regulation in final form may drop the "prospective-only" limitation.

We decline to wait for the final regulation. American Air's first argument for deferral fails because the Secretary of the Treasury clearly has the discretion to make the proposed regulation at issue prospective only. Section 7805(b) of the Internal Revenue Code states that "[t]he Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect." 26 U.S.C. § 7805(b); see also Redhouse v. Comm'r, 728 F.2d 1249, 1250–51 [53 AFTR 2d 84-995] (9th Cir.1984); Butka v. Comm'r, 91 T.C. 110, 129 (1988) (explaining that § 7805(b) gives the Secretary of the Treasury discretion to make regulations prospective only). American Air's second argument, that the Secretary of the Treasury might have a change of heart and issue a final regulation with retroactive effect, is also unpersuasive. We take the Secretary's word in the Federal Register that the regulation will be prospective only. The suggestion that the Secretary may reverse his position at a subsequent date is far too speculative to cause us to refrain from deciding a case that is now ripe for decision.

The look-through exception provides that any royalties received by a U.S. taxpaying shareholder from a controlled foreign corporation ("CFC") may be placed in the same income category as used by the CFC. 26 U.S.C. § 904(d)(3)(C); see also 26 C.F.R. § 1.904-5. American Air puts up only token resistance to the IRS's determination that the look-through exception does not apply.[1] American Air argues that a reserved paragraph in earlier proposed Treasury Regulations--that was titled "Special rule for payments from foreign parents to domestic subsidiaries" but contained no text--somehow operates to grant look-through treatment and require the IRS to treat the royalties it received as general limitation income. However, as the Third Circuit has recognized, a reserved paragraph has no legal force and is merely a place saver where text may be added in the future. See Conn. Gen. Life Ins. Co. v. Comm'r, 177 F.3d 136, 146 [83 AFTR 2d 99-2142] (3d Cir.1999). In addition, the so called reserved paragraph was deleted in the final regulations that were issued in 1992. Under these circumstances, a "tex-

[1] Instead, American Air spends the bulk of its time arguing that the failure of the look-through exception to apply violates U.S.-France treaty obligations. For the reasons we discuss infra, we find this argument unavailing.

tless'' reserved paragraph that was subsequently deleted cannot be said to require look-through treatment for the royalties received by American Air.

American Air also argues that the failure to apply the look-through exception violates the nondiscrimination provisions of U.S.-France treaties. We decline to reach the question of whether any such discrimination exists. Even assuming the regulations do discriminate against American Air because of its French parent company, we find that the Treasury Regulations at issue here override any treaty obligation of the U.S.

The government correctly argues that later-in-time federal law takes precedence over the United States' treaty obligations. Whitney v. Robertson, 124 U.S. 190, 194 (1888). In this case, the Tax Reform Act passed in 1986 must therefore take precedence over Article 24(3), passed in 1967. If there were any doubt, a statute passed by Congress explicitly stated that the changes made by the 1986 Tax Reform Act ''shall apply notwithstanding any treaty obligation of the United States .... '' See Technical and Miscellaneous Revenue Act of 1988 (''TAMRA''), Pub.L. No. 100-647, § 1012(aa)(2), 102 Stat. 3342, 3531 (stating that the amendments made by § 1201 of the Tax Reform Act of 1986 apply notwithstanding any treaty obligation of the United States). Thus, and regardless of whether the failure to accord look-through treatment to the royalties in this case violates Article 24(3), federal law must take precedence and requires that the Tax Court's decision be affirmed.

American Air counters that federal law does not take precedence here because the prohibited discrimination was actually created by the extension of look-through treatment effected by Treasury Regulations and not by the Tax Reform Act itself. Even if American Air is correct that the regulations effect the alleged discrimination, we find that the argument fails. The regulations were issued pursuant to express Congressional authorization and are fully consistent with Congress' statutory scheme. To the extent the regulations abrogate (if they do at all) any treaty obligation, they only do so at the command and express authorization of Congress.

Indeed, Congress implicitly ratified the regulations as they were issued in their original form. Treas. Reg. § 1.904-5 was promulgated in the Federal Register on July 18, 1988. Congress enacted TAMRA, explicitly sanctioning any treaty obligations the Tax Reform Act of 1986 may have abrogated, on November 10, 1988. Thus, Congress was on notice of the Treasury Regulations issued under the Tax Reform Act when it explicitly declared that the Tax Reform Act trumped any treaty obligations of the United States.

Accordingly, the decision of the Tax Court is AFFIRMED.

¶2002-5338

NATIONAL FEDERATION OF REPUBLICAN ASSEMBLIES, ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA, ET AL., DEFENDANTS. U.S. District Court, Southern Dist. of Alabama, (DC AL) CIVIL ACTION 00-0759-RV-C, Aug. 27, 2002. Earlier proceeding at (2001, DC AL) 87 AFTR 2d 2001-2413, 148 F Supp 2d 1273, 2001-2 USTC ¶50456 [87 AFTR 2d 2001-2413]. Decision for Taxpayers in part and for Govt. in part.

1. Political orgs.—disclosure requirements—constitutionality—standing. Self-described political orgs. had standing to challenge constitutionality of IRC §527(j)'s disclosure requirements: despite their failure to make IRC §527(i) election, absent which they themselves weren't subject to IRC §527(j), taxpayers still suffered injury in fact since statute effectively required them to choose between maintaining privacy and sacrificing tax exemption. Also, prudential standing requirements were met. *Reference:* United States Tax Reporter ¶5275.01(17). IRC §527.

2. Political orgs.—disclosure requirements—constitutionality—free speech; equal protection; 10th Amendment. District court determined constitutionality

of IRC §527(j): statute as applied to federal election *contribution* disclosures didn't infringe on taxpayers/political orgs.' free speech rights where 1st Amendment didn't automatically immunize contributions from tax; and statute merely cancelled or offset subsidy granted thereunder to orgs. that made IRC §527(i) election, but imposed no additional exaction as to contributions. Also, contributions clearly fell within broad category of gross income, fell under no express exclusion, and couldn't be excluded under conduit or gift theory. But, statute's expenditure disclosure requirement did violate taxpayers' free speech rights since it imposed additional exaction and wasn't narrowly tailored to meet govt.'s ostensible information and anti-corruption purposes; and also violated 5th Amendment Equal Protection Clause where govt. showed no compelling reason for treating political orgs. differently than other tax-exempt orgs. Also, statute violated 10th Amendment to extent it attempted to regulate state and local electoral advocacy. *Reference:* United States Tax Reporter ¶5275.01(3). IRC §527.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION,

ORDER

RICHARD W. VOLLMER, JR. SENIOR UNITED STATES DISTRICT JUDGE

This case presents a constitutional challenge to Public Law 106-230, codified at I.R.C. §§527(i) and (j). In its previous order addressing the defendants' motion to dismiss, the Court ruled that the plaintiffs' challenge to Section 527(i) is barred because: (1) Section 527(i) imposes a ''tax'' for purposes of the Anti-Injunction Act, I.R.C. § 7421; (2) the organizational plaintiffs do not satisfy any exception to the Anti-Injunction Act; and (3) the only individual plaintiff to challenge Section 527(i) lacks standing to do so. *National Federation of Republican Assemblies v. United States*, 148 F. Supp. 2d 1273, 1283, 1285–87 [87 AFTR 2d 2001-2413] (S.D. Ala. 2001). This case is now being prosecuted by seven plaintiffs as a challenge to Section 527(j).[1]

The case is before the Court on the parties' competing motions for summary judgment, (Docs. 35, 41).[2] While the parties have submitted evidentiary materials in support of their respective positions, they have represented that no genuine issue of material fact exists and that the case may be resolved without an evidentiary hearing. (Doc. 34 at 3). After carefully considering the parties' arguments as expressed in their briefs on motion for summary judgment, (Docs. 35, 42, 44–46), in their briefs on motion for preliminary injunction, (Docs. 4, 17, 20), and in their briefs on motion to dismiss, (Docs. 16, 19, 23), as well as their submitted evidentiary materials and all other relevant materials in the file, the Court concludes that each motion for summary judgment is due to be granted in part and denied in part.[3]

BACKGROUND

In 1975, Congress added Section 527 to the Internal Revenue Code, which recognized ''political organization'' as a class of taxpayer. A ''political organization'' was defined as an organization ''organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.'' I.R.C. § 527(e)(1). An ''exempt function'' was defined as ''the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or of-

[1] The amended complaint named eleven plaintiffs. (Doc. 6). Plaintiff Citizens for Reform was dismissed on stipulation of the parties. (Doc. 33). Plaintiff Freeman Jockisch was dismissed by the Court for lack of standing. 148 F. Supp. 2d at 1286. Because the plaintiffs now concede that the Libertarian Party of Indiana and the Horning 2000 Campaign Committee lack standing to challenge Section 527(j), (Doc. 42 at 5), they are hereby dismissed as parties plaintiff. The remaining plaintiffs are: the National Federation of Republican Assemblies, the Alabama Republican Assembly and the Mobile Republican Assembly (''the Assembly plaintiffs''); the Howard Jarvis Taxpayers Association; the Howard Jarvis Taxpayers Association Political Action Committee; the Libertarian National Committee; and Paul Haughton.

[2] The Court previously ordered the plaintiffs' motion for preliminary injunction, (Doc. 3), consolidated with a resolution on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). (Doc. 25).

[3] The defendants' motion to dismiss the individual defendants as improper parties, (Doc. 16 at 9; Doc. 35 at 29), is denied. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 8 (1976).

fice in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.'' *Id.* § 527(e)(2).

Section 527 established a ''general rule'' that a political organization is subject to income taxation, but only on its taxable income. I.R.C. §§ 527(a), (b)(1). ''Taxable income'' was defined as ''an amount equal to the excess (if any) of ... the gross income for the taxable year (excluding exempt function income), over ... the deductions allowed by this chapter which are directly connected with the production of the gross income (excluding exempt function income),'' subject to certain modifications. *Id.* § 527(c)(1). ''Exempt function income'' was defined as ''any amount received as ... (A) a contribution of money or other property, (B) membership dues, a membership fee or assessment from a member of the political organization, (C) proceeds from a political fundraising or entertainment event, or proceeds from the sale of political campaign materials, which are not received in the ordinary course of any trade or business, or (D) proceeds from the conducting of any bingo game (as defined in section 513(f)(2)), to the extent such amount is segregated for use only for the exempt function of the political organization.'' *Id.* § 527(c)(3). Thus, political organizations received a tax exemption with respect to certain income streams related to their principal purpose of influencing elections. As amended in 1978, Section 527 set the applicable tax rate on taxable income as the highest rate of tax applicable to corporations, *id.* § 527(b)(1), presently 35%. *Id.* § 11(b)(1)(D).

In late June 2000, without producing any committee report and after only brief floor debate, Congress passed Public Law 106-230, which in pertinent part added subsections (i) and (j) to Section 527. President Clinton signed the bill into law on July 1, 2000.

Section 527(i) provides that a political organization ''shall not be treated as an organization described in this section'' until and unless it provides a specified notice to the Secretary disclosing its name, address, purpose, and certain related individuals and entities. I.R.C. § 527(i)(1)–(3).[4] Those political organizations reasonably anticipating gross receipts of under $25,000 in a taxable year, or subject to the disclosure requirements of the Federal Election Campaign Act of 1971 (''FECA''), need not provide notice. *Id.* § 527(i)(5)–(6). ''In the case of an organization failing to meet the requirements of paragraph (1) for any period, the taxable income of such organization shall be computed by taking into account any exempt function income (and any deductions directly connected with the production of such income).'' *Id.* § 527(i)(4).

Under Section 527(j), ''[a] political organization which accepts a contribution, or makes an expenditure, for an exempt function during any calendar year shall file'' periodic reports with the Secretary. I.R.C. § 527(j)(2).[5] The reports ''shall'' disclose: ''(A) The amount of each expenditure made to a person if the aggregate amount of expenditures to such person during the calendar year equals or exceeds $500 and the name and address of the person (in the case of an individual, including the occupation and name of employer of such individual)''; and ''(B) The name and address (in the case of an individual, including the occupation and name of employer of such individual) of all contributors which contributed an aggregate amount of $200 or more to the organization during the calendar year and the amount of the contribution.'' *Id.* § 527(j)(3). For purposes of the disclosure provision, ''a person shall be treated as having made an expenditure or contribution if the person has contracted or is otherwise obligated to make the expenditure or contribution.'' *I.d.* § 527(j)(4). Disclosures are not required of organizations not required to give notice under Section 527(i), of ''any State or local committee of a political party or political committee of a State or local candidate,'' or ''with respect

[4] The Secretary has promulgated Form 8871 for this purpose.

[5] The Secretary has promulgated Form 8872 for this purpose.

to any expenditure which is an independent expenditure (as defined in section 301 of [FECA]).'' *Id.* § 527(j)(5). For ''failure to make the required disclosures'' or to include complete, correct information, ''there shall be paid by the organization an amount equal to the rate of tax specified in subsection (b)(1) multiplied by the amount to which the failure relates.'' *Id.* § 527(j)(1).

The plaintiffs allege that Section 527(j) violates the free speech and free association prongs of the First Amendment, the equal protection component of the Due Process clause of the Fifth Amendment, and the Tenth Amendment. In addition to challenging the merits of the plaintiffs' claims, the defendants argue that the plaintiffs lack standing to pursue a challenge to Section 527(j).[6]

DETERMINATIONS OF UNCONTROVERTED FACT

The Assembly plaintiffs are all ''political organizations'' as defined in Section 527(e). None of the Assembly plaintiffs has given the notice specified by Section 527(i). (Doc. 35, Exhibit A). The Assembly plaintiffs have experienced a decline in contributions due to contributors' concerns that their identities may be disclosed pursuant to Section 527(j). (Doc. 4, Declarations of Stephen Frank, Elaine Little and Owen McDonnell, Jr.).

CONCLUSIONS OF LAW

The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e).

Summary judgment should be granted only if ''there is no issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'' Federal Rule of Civil Procedure 56(c). The party seeking summary judgment bears ''the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial.'' *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Once the moving party has satisfied its responsibility, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. *Id.* ''If the nonmoving party fails to make 'a sufficient showing on an essential element of her case with respect to which she has the burden of proof,' the moving party is entitled to summary judgment.'' *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)) (footnote omitted). ''In reviewing whether the nonmoving party has met its burden, the court must stop short of weighing the evidence and making credibility determinations of the truth of the matter. Instead, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.'' *Tipton v. Bergrohr GMBH-Siegen*, 965 F.2d 994, 999 (11th Cir. 1992) (internal citations and quotations omitted).

I. Standing.

[1] The ''irreducible constitutional minimum of standing'' is three-fold: (1) ''the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, ... and (b) actual or imminent, not conjectural or hypothetical''; (2) ''there must be a causal connection between the injury and the conduct complained of'', such that ''the injury [is] fairly ... trace[able] to the challenged action of the defendant''; and (3) ''it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'' *Lujan v. Defenders of Wildlife*, 504 U.S. 550, 560–61 (1992)(internal quotations omitted).

The defendants offer various reasons why the remaining seven plaintiffs lack standing to challenge Section 527(j). With respect to the Assembly plaintiffs, the defendants' sole argument is that, because they have not given notice pursuant to Section 527(i), these plaintiffs are not required to make disclosures under Section 527(j) and therefore have not experienced ''injury

[6] The defendants also request the Court to reconsider its previous ruling that suit is not barred by the Anti-Injunction Act because Section 527(j) imposes a ''penalty'' rather than a ''tax.'' The defendants merely incorporate by reference their previous argument, without offering any additional argument in favor of their position and without identifying any error in the Court's analysis. For the reasons set forth in its previous ruling, the Court declines to reconsider the impact of the Anti-Injunction Act on the plaintiffs' challenge to Section 527(j).

in fact.'' The plaintiffs respond that Section 527(j) is ''mandatory,'' such that they are required by law to provide disclosures even if they would decline tax-exempt status.

The plaintiffs note that Section 527(j) ''require[s]'' a ''political organization'' to make disclosures and that Section 527 defines a ''political organization,'' in essence, as an organization organized and operated primarily for the purpose of influencing the selection of individuals to public office. I.R.C. § 527(e)(1)–(2). They conclude that any organization meeting the definition of Section 527(e) is required by Section 527(j) to make disclosures, regardless of whether the organization has given notice under Section 527(i). The plaintiffs' argument will not withstand a review of the statute.

Section 527(i) expressly states that ''an organization shall not be *treated as* an organization described in this section'' until and unless it provides the prescribed notice. I.R.C. § 527(i)(1)(emphasis added). An organization is ''treated as'' an organization under Section 527 by: (1) being granted a tax exemption as to certain income under Section 527(c); and (2) being required to provide certain disclosures under Section 527(j). By the plain and unambiguous language of the statute, an organization that does not provide notice under Section 527(i) is not subject to the disclosure requirements of Section 527(j).[7]

The plaintiffs suggest that, even if only those political organizations that give notice under Section 527(i) become subject to the disclosure requirements of Section 527(j), the notice provision of Section 527(i) is itself mandatory for all organizations meeting the statutory definition of a ''political organization,'' effectively making disclosure under Section 527(j) mandatory as well. Section 527(i), however, identifies the sole effect of a failure to give notice as that ''the taxable income of such organization shall be computed by taking into account any exempt function income.'' I.R.C. § 527(i)(4). The plain language of the statute again refutes the plaintiffs' argument.[8]

The defendants assume that, since the Assembly plaintiffs have not given notice under Section 527(i) and thus are not required to make disclosures under Section 527(j), they cannot have suffered ''injury in fact'' as required to establish their standing to challenge the latter provision. As discussed below, the defendants are mistaken.

Prior to the enactment of Public Law 106-230, federal law granted the Assembly plaintiffs the right to protect contributions from government exaction while providing no information about those contributions. Since the passage of Section 527(j), the Assembly plaintiffs can no longer shield their larger contributions from both disclosure and government exaction; they may maintain privacy or maintain freedom from government exaction, but they cannot do both. Either option carries adverse economic consequences. If the Assembly plaintiffs elect not to disclose their larger contributions, they must pay the government an amount equal to 35% of those contributions.[9] If they elect to disclose, they face the loss of larger contributions

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[7] The plaintiffs cite an agency document for the proposition that ''Section 527 is not an elective provision.'' I.R.S. Field Serv. Adv. 00-37-040 (Sep. 15, 2000). This is perfectly true, but it is of no aid to the plaintiffs. An organization cannot elect whether to *be* a political organization, because status as a political organization depends on satisfaction of the definition of a political organization provided in Section 527(e). *Id.* Such an organization is subject to tax pursuant to Section 527 whether it wishes to be or not. However, a political organization may elect whether to be *treated as* a political organization — obtaining a tax exemption and becoming subject to disclosure requirements — by its decision whether to file the notice prescribed by Section 527(i).

[8] The plaintiffs insist their interpretation of Section 527(i) must be correct because the Internal Revenue Service shares it. In fact, the Service has repeatedly recognized that the only effect of a political organization's failure to give notice under Section 527(i) is that income that would otherwise be exempt from taxation is included in the organization's taxable income. *See, e.g.*, Rev. Rul. 2000-49 (''If the organization fails to file Form 8871 on a timely basis, Section 527(i)(4) provides that until the organization satisfies the notice requirement, the taxable income of the organization includes its exempt function income . . . .''); I.R.S. Notice 02-34, 2002 I.R.B. 990 (Form 8871 must be filed by political organizations that ''wish to be exempt from federal income tax provisions''); I.R.S. Taxpayer Inf'n Pub. 553 (Jan. 2001)(Form 8871 is required of every political organization ''that is to be treated as a political organization under the rules of section 527'').

The plaintiffs' suggestion that the Court's previous order held the requirements of Sections 527(i) and (j) to be ''mandatory'' is equally unavailing; the Court noted only that Section 527(j) is mandatory as to organizations that have given notice under Section 527(i). *See* 148 F. Supp. 2d at 1281–83. To the extent the Court's opinion can be read otherwise, it is hereby clarified.

[9] If the Assembly plaintiffs elect not to give notice under Section 527(i), the exaction is a tax under Section 527(b); if they give notice, the exaction is a penalty under Section 527(j).

by those unwilling to have their support of the organizations made public. Both increased government exaction and decreased contributions constitute economic injury and satisfy the "injury in fact" requirement of standing. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 266 (1984)(that wholesalers were ultimately liable for remittance of a sales tax "plainly" supported standing to challenge the tax); *Florida Right to Life, Inc. v. Lamar*, 273 F.3d 1318, 1323 (11thCir. 2001)(organization's loss of donations due to statutory restrictions on contributors constituted economic injury and supported standing to challenge the statute).

Similarly, prior to July 2000 the Assembly plaintiffs could make expenditures to influence elections without disclosing these expenditures or being subject to government exaction. With the passage of Section 527(j), the Assembly plaintiffs may retain anonymity or freedom from government exaction, but they cannot have both. Just as increased government exaction represents injury in fact, the alternative loss of anonymity in political speech represents an infringement on the Assembly plaintiffs' First Amendment freedoms, *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995), and thus an injury in fact.

In short, a political organization may choose which sort of injury it will suffer at the hands of Section 527(j), but it cannot choose to avoid injury altogether. The Assembly plaintiffs' choice—to maintain privacy and sacrifice their tax exemption—satisfies the "injury in fact" element of standing.

The defendants do not challenge the other constitutionally mandated elements of standing, and they plainly are satisfied. The Assembly plaintiffs' injury is fairly traceable to Section 527(j) because, but for that statute, they would still be able to avoid government exaction without disclosing their larger contributions and expenditures.[10] A favorable decision will strike down Section 527(j), redressing the Assembly plaintiffs' injury by eliminating its source.

In addition to the constitutional elements of standing are several non-constitutional, prudential concerns: "'[T]he general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representa-tive branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.'" *Devlin v. Scardeletti*, ___ U.S. ___, 122 S. Ct. 2005, 2009 (2002)(quoting *Allen v. Wright*, 468 U.S. 737, 751 [54 AFTR 2d 84-5361] (1984)). The defendants assert no argument based on the prudential aspects of standing, and the Courts of Appeal are split as to whether a defendant's silence works a waiver obviating consideration of these concerns.[11] Because the Eleventh Circuit apparently has not resolved the issue, the Court proceeds to consider the prudential aspects of standing sua sponte.

No contention could plausibly be made that the plaintiffs' lawsuit raises political questions committed to other branches of government. Nor could it be argued that the First Amendment is unconcerned with coerced disclosures of political contributions and expenditures, that the equal protection component of the Fifth Amendment's due process clause is unconcerned with the disparate treatment of organizations as to such disclosures, or that the Tenth Amendment is unconcerned with federal statutes regulating matters dear to

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[10] The Assembly plaintiffs' election not to give notice under Section 527(i) does not break this causal connection. Even had they given notice, they still would not have provided disclosures under Section 527(j) and thus still would have been subject to a 35% government exaction on their larger contributions and expenditures. *See Becker v. Federal Election Commission*, 230 F.3d 381, 385–86 (1st Cir. 2000)(for standing purposes, the causal connection between the FEC's allowance of corporate funds to underwrite presidential debates and a candidate's exclusion from the debates was not broken by his choice to refuse corporate contributions), *cert. denied*, 532 U.S. 1007 (2001); *cf. Federal Election Commission v. Akins*, 524 U.S. 11, 25 (1998)(for standing purposes, the causal connection between an agency's action based on improper grounds and the plaintiffs' harm is not broken simply because the agency might have taken the same action based on proper grounds).

[11] *Compare Pershing Park Villas Homeowners Association v. United Pacific Insurance Co.*, 219 F.3d 895, 899–900 (9th Cir. 2000)(prudential aspects of standing can be waived); *United Transportation Union - Illinois Legislative Board v. Surface Transportation Board*, 183 F.3d 606, 611 (7th Cir. 1999)(same); *Ensley v. Cody Resources, Inc.*, 171 F.3d 315, 320 (5th Cir. 1999)(same) *with Wight v. Bankamerica Corp.*, 219 F.3d 79, 90 (2nd Cir. 2000)(prudential aspects of standing cannot be waived); *American Immigration Lawyers Association v. Reno*, 199 F.3d 1352, 1357 (D.C. Cir. 2000)(same); *Community First Bank v. National Credit Union Administration*, 41 F.3d 1050, 1053 (6th Cir. 1994)(same).

state sovereignty. Only the prudential restriction on third-party standing merits extended discussion.

With respect to their equal protection claim, the Assembly plaintiffs assert that they are required to provide disclosures when similarly situated tax-exempt organizations are not. They thus seek to vindicate their own Fifth Amendment rights. Similarly, the Assembly plaintiffs complain under their First Amendment claim that the disclosure of their expenditures burdens their own speech.

The Assembly plaintiffs' First Amendment claim also challenges the requirement that political organizations disclose the sources of their larger contributions. "[T]he act of contribution [to a political committee] involve[s] some limited element of protected speech," *California Medical Association v. Federal Election Commission*, 453 US. 182, 196 n. 16 (1981), but it is the speech of the contributor, not the recipient. While the Supreme Court has recognized generally a First Amendment right to receive speech,[12] the plaintiffs have not identified any authority for the proposition that a candidate or political organization has a First Amendment right to receive contributions. *But see Florida Right to Life v. Lamar*, 273 F.3d at 1323, 1329 (indicating without discussion that a state statute prohibiting candidates from contributing to certain organizations implicated the Fit Amendment rights of the recipient organizations).

The Assembly plaintiffs' contributors, however, do have a qualified First Amendment right to make anonymous contributions. *Buckley v. Valeo*, 424 U.S. at 64. The Assembly plaintiffs may assert their contributors' rights if they have suffered an injury in fact from the disclosure requirement, if they "have a close relation to" their contributors, and if there "exist[s] some hindrance to the [contributors'] ability to protect [their] own interests." *Powers V. Ohio*, 499 U.S. 400,411 (1991). As discussed previously, the Assembly plaintiffs have suffered injury in fact because they have sacrificed their preferred tax treatment so as to preserve their contributors' anonymity. The Assembly plaintiffs, as beneficiaries of their contributors' bounty, have a sufficiently close relation to them, and there is an obvious impediment to the contributors' assertion of their own right to anonymity: "To require that it be claimed by the [contributors] themselves would result in nullification of the right at the very moment of its assertion." *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 459 (1958); *accord Miller v. Albright*, 523 U.S. 420,449 (1998).[13]

At first blush, the plaintiffs' Tenth Amendment claim might appear to require application of third-party standing principles.[14] That amendment, however, "does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the protection of the public officials governing the States. On the contrary, the Constitution distributes authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). Thus, a private party subjected to federal regulation in an area reserved to the states has first-party standing to challenge the regulation as violative of the Tenth Amendment. *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 703 (7th Cir. 1999). *cert. denied*, 528 U.S. 1116 (2000); *Frank v. United States*, 78 F.3d 815, 825 (2nd Cir. 1996), *vacated on other grounds*, 521 U.S. 1114 (1997),

12 "'It is now well established that the Constitution protects the right to receive information and ideas.'" *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)(quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)); *accord Reno v. American Civil Liberties Union*, 521 U.S. 844, 874 (1997)(the Communications Decency Act "effectively suppresses a large amount of speech that adults have a constitutional right to receive"); *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, 518 U.S. 727, 817 (1996)("Viewers have a general right to see what a willing operator transmits ....").

13 While *NAACP v. Alabama* involved members rather than contributors, the Supreme Court's "decisions have not drawn fine lines between contributors and members but have treated them interchangeably." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976); *see also Connection Distributing Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998). *cert. denied*, 526 U.S. 1087 (1999)(publisher of "swingers" magazine had standing to assert the privacy rights of its readers). Moreover, "[t]he reasonable likelihood that the Association itself through diminished financial support ... may be adversely affected if production is compelled is a further factor pointing towards our holding that petitioner has standing to complain of the production order on behalf of its members." *NAACP v. Alabama*, 357 U.S. at 459–60. It is not only reasonably likely but uncontroverted that the Assembly plaintiffs will lose contributions should they make disclosures under Section 527(j).

14 Two of the Assembly plaintiffs are engaged in state and local electoral advocacy. (Doc. 6 at 9).

reinstated in pertinent part, 129 F.3d 273 (2nd Cir. 1997); *Wilson v. Jones*, 45 F. Supp. 2d 945, 949 (S.D. Ala. 1999), *aff'd*, 220 F.3d 1297 (11th Cir. 2000). While the Eleventh Circuit apparently has never expressly addressed this issue, it has repeatedly upheld the standing of private parties to raise a Tenth Amendment challenge without suggesting the existence of any prudential barriers to such standing. *See Dillard v. Baldwin County Commissioners*, 225 F.3d 1271, 1275–77 (11thCir. 2000); *Seniors Civil Liberties Association v. Kemp*, 965 F.2d 1030, 1034 n.6 (11th Cir. 1992); *Atlanta Gas Light Co. v. United States Department of Energy*, 666 F.2d 1359, 1368 n.16 (11th Cir. 1982).[15]

In summary, the Assembly plaintiffs satisfy the constitutional and prudential requirements of standing. Because these plaintiffs have standing, it is unnecessary to address separately the standing of the remaining plaintiffs.[16]

II. First Amendment.

[2] The parties agree that the constitutionality of disclosure requirements affecting political speech is ordinarily determined in accordance with *Buckley v. Valeo*, 424 U.S. 1 (1976). *Buckley* dictates that disclosure requirements "must survive exacting scrutiny," with the regulation bearing a "'substantial relation'" to a "sufficiently important" or "substantial governmental interest." *Id.* at 64, 66, 80 (quoting *Gibson v. FIorida Legislative Investigation Committee*, 372 U.S. 539, 546 (1963)). However, "there is no right to have speech subsidized by the Government," *Federal Election Commission v. Massachusetts Citizens for Life. Inc.*, 479 U.S. 238, 256 n.9 (1986), and a tax exemption represents such a subsidy. *Leathers v. Medlock*, 499 U.S. 439, 450 & n.3 (1991)("[A] legislature is not required to subsidize First Amendment rights through a tax exemption or tax deduction."). The defendants contend that Section 527(j) permissibly conditions a tax exemption on disclosure and so satisfies the First Amendment independently of *Buckley*.

A. Taxation with Representation.

Federal tax law provides income tax exemptions to several types of organizations, including charitable organizations recognized under I.R.C. § 501(c)(3) and social welfare organizations recognized under Section 501(c)(4). Contributions to charitable organizations are tax-deductible by the contributor (providing an incentive for such contributions and potentially increasing the organization's income), but such organizations may not engage in substantial lobbying. Conversely, contributions to social welfare organizations are not tax-deductible, but such organizations may engage in substantial lobbying. The plaintiff in *Regan v. Taxation with Representation*, 461 U.S. 540 [51 AFTR 2d 83-1294] (1983), sought recognition as a charitable organization, but its application was rejected because it intended to engage in substantial lobbying. *Id.* at 542. The plaintiff, desiring both the increased revenue incident to tax-deductibility and the political influence incident to substantial lobbying, argued that Section 501(c)(3) violated its First Amendment rights by conditioning its receipt of tax-deductible contributions on its forbearance from political expression in the form of substantial lobbying. *Id.* at 545.

In response, the Supreme Court distinguished two similar but subtly different tax schemes. In the first, the government denies a tax subsidy because the taxpayer engages in speech; in the second, the government denies a subsidy that *underwrites* the taxpayer's speech. The first sort of scheme was involved in *Speiser v. Randall*, 357 U.S. 513 (1958), in which California denied a property tax exemption to taxpayers who advocated the forcible overthrow of the government (or refused to take an oath disavowing such advocacy); this scheme implicated the First Amendment because it

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15 Similarly, a private party had standing to challenge fhe legislative veto in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 935 (1983). on the grounds that it violated the separation of executive and legislative powers, because "[i]n a very fundamental sense, separation of powers is designed to secure individual liberty." *Dennis v. Higgins*, 498 U.S. 439, 461–62 (1991)(Kennedy, J., dissenting).

16 For convenience, the following discussion of the merits refers to "the plaintiffs" rather than "the Assembly plaintiffs."

''penalized [the taxpayers] for such speech.'' *Id.* at 518. The second sort of scheme was involved in *Taxation with Representation*; unlike in *Speiser*, Congress did not penalize the taxpayer for engaging in speech but ''merely refused to pay for the [speech] out of public monies.'' 461 U.S. at 545. The latter scheme, the Court held, simply does not implicate the First Amendment. *Id.* at 546; *accord Commarano v. United States*, 358 U.S. 498, 513 [3 AFTR 2d 697] (1959).[17] The issue becomes whether Section 527 falls within *Taxation with Representation* or *Speiser*.

By definition, the primary purpose of political organizations is to receive contributions and/or make expenditures to influence electoral results. These expenditures represent speech. *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 657 (1990)(''[I]ndependent campaign expenditures constitute 'political expression ''at the core of our electoral process and of the First Amendment freedoms.''''')(quoting earlier Supreme Court cases). By excluding contributions and certain other receipts from the gross income of political organizations, Section 527 provides a subsidy that ''has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on [this] income.'' *Regan v. Taxation with Representation*, 461 U.S. at 544. This subsidy effectively allows the political organization to increase its expenditures and thus its speech. Because the tax exemption of Section 527 underwrites the speech of political organizations, it falls within *Taxation with Representation* rather than *Speiser*.

The plaintiffs do not seriously suggest that Section 527 fits the model of *Speiser*. Instead, they argue that Section 527 does not in fact grant a tax exemption. Since Section 527 does not grant a tax exemption, they conclude, neither could Section 527(j) offset the exemption. and it must therefore impose an additional, affirmative exaction rendering *Taxation with Representation* inapposite.

The plaintiffs correctly note that Section 527 could not exempt from taxation contributions received by a political organization unless those contributions were subject to income tax to begin with. They continue that, as a matter of constitutional law, ''Congress lacks the power to tax political contributions'' because of ''their unique character as First Amendment protected activity.'' (Doc. 19 at 8, 10). The plaintiffs rely on *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1943); and *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

Political contributions do indeed constitute speech for purposes of First Amendment analysis, *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431,440 (2001), but the plaintiffs' authorities do not support the proposition that such contributions are therefore constitutionally immune from income taxation. *Murdock* struck down a tax ''the payment of which [was] a condition of the exercise of these constitutional [First Amendment] privileges.'' 319 U.S. at 111. Section 527, however, does not tax contributors for exercising their First Amendment right to contribute; rather, it taxes the recipient political organizations on their income. The plaintiffs' other cases struck down statutes that taxed the press discriminatorily, but each expressly continued that ''[i]t is beyond dispute that ... the Federal Government can subject newspapers to generally applicable economic regulations [including taxes] without creating constitutional problems.'' *Minneapolis Star & Tribune v. Commissioner*, 460 U.S. at 581; *accord Arkansas Writers' Project v. Ragland*, 481 U.S. at 228; *Grosjean v. American Press*, 297 U.S.

[17] The First Amendment might nevertheless be implicated if Congress made selective decisions as to what speech to subsidize based on viewpoint. *Leathers v. Medlock*, 499 U.S. at 450; *Regan v. Taxation with Representation*, 461 U.S. at 548; *Cammarano v. United States*, 358 U.S. at 513; Speiser v. Randall, 357 U.S. at 519. Because political organizations span the ideological spectrum and Section 527(j) applies to all, it is viewpoint-neutral and this exception does not apply. The plaintiffs do not argue otherwise.

at 250.[18] The federal income tax, of course, is a "generally applicable" tax.[19] Accordingly, the Court concludes that the First Amendment does not immunize political contributions from income taxation.

The plaintiffs next argue that, even if the First Amendment does not prophylactically prohibit an income tax on political contributions, the Internal Revenue Code does so. The Code purposefully defines gross income with exceptional breadth. The opening section of its subtitle addressing income taxes defines gross income as "all income from whatever source derived," except as otherwise provided in the subtitle. I.R.C. § 61(a). Congress intended this definition to reach the outermost limits of its power under the Sixteenth Amendment, encompassing "any 'accessio[n] to wealth.'" *United States v. Burke*, 504 U.S. 229, 233 [69 AFTR 2d 92-1293] (1992)(quoting *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 [47 AFTR 162] (1955)). Thus, anything that constitutes "gross income" is subject to income taxation unless otherwise provided elsewhere in the Code. *United States v. Landry*, 450 U.S. 1, 5 [47 AFTR 2d 81-797] (1981).

The plaintiffs first point to the legislative history of Section 527 as establishing that political contributions could not have been taxed even absent its passage. In particular, the accompanying Senate report states that "political activity (including the financing of political activity) as such is not a trade or business which is appropriately subject to tax." S. Rep. No. 93-1357 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7478,7502. While this language may express the 93rd Congress's sense as to "appropriate" subjects of income taxation, it says nothing about whether the Code prior to 1975 in fact shielded political contributions from such taxation.

The plaintiffs also rely on the Internal Revenue Service's position concerning the status of political contributions. Since at least the 1930's the Service has considered political contributions not to constitute taxable income. *See* Rev. Rul. I.T. 3276, 1939-1 C.B. 108 ("[A] political gift received by an individual or by a political organization is not taxable to the recipient."); Rev. Rul. 54-80, 1954-1 C.B. 11 ("Where a political gift is received by an individual or a political organization and it is held or used for the purposes intended, i.e., for present or future expenses of a political campaign or for some similar purpose, it is not taxable income to the recipient."); Rev. Rul. 74-21, 1974-1 C.B. 14 ("[C]ampaign contributions are not includible in the gross income of the organization.").

The Congress that enacted Section 527 understood the Service's position to be based on the view that political contributions constitute "gifts" so as to be excluded from gross income by I.R.C. § 102(a). S. Rep. No. 93-1357, *reprinted in* 1974 U.S.C.C.A.N. at 7502. A gift rationale appears highly dubious[20] and it has been rejected by the Service. Gen. Couns. Mem. 35,664 & n.1 (Feb. 8, 1974). In-

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[18] Moreover, these cases do not bold that such discriminatory taxes are automatically unconstitutional, as the plaintiffs contend; rather, such taxes may be upheld if they are "necessary to serve a compelling governmental interest and [are] narrowly drawn to achieve that end." *Arkansas Writers' Project v. Ragland*, 481 U.S. at 231; *accord Minneapolis Star & Tribune v. Commissioner*, 460 U.S. at 582–83.

[19] A tax that discriminates among speakers may raise First Amendment issues if it "is directed at, or presents the danger of sup-pressing, particular ideas." *Leathers v. Medlock*, 499 U.S. at 453 (citing *Minneapolis Star & Tribune, Arkansas Writers' Project* and *Gros-jean*). The plaintiffs have asserted no claim that political contributions to political organizations are subject to income tax while similar con-tributions to other organizations are not; nor do they contend that any such differential treatment is intended to, or risks, suppressing particular ideas. Given that Section 527(j) applies indifferently to political organizations of all ideological stripes, any such contention would appear to be unsupportable.

[20] The Supreme Court has interpreted this exclusion to require that "[a] gift in the statutory sense . . . proceeds from a 'detached and disinterested generosity,' . . . 'out of affection, respect, admiration, charity or like impulses.'" *Commissioner v. Duberstein*, 363 U.S. 278, 285 [5 AFTR 2d 1626] (1960)(quoting earlier Supreme Court cases). The typical contributor to a candidate, political committee or other political organization would appear to be anything but "detached and disinterested"; on the contrary, political contributions are ordinarily given with the hope if not expectation that a particular candidate or viewpoint will prevail at the polls and ultimately result in political change (or stability) favorable to the contributor's own economic or other interests. That the contributor may admire and respect candidates and political organizations for their views does not obscure his underlying impetus of shaping political circumstances to advance his own interests. In *Stern v. United States*, 436 F.2d 1327 [27 AFTR 2d 71-1647] (5th Cir. 1971), for example, contributions to a group advocating the election of reform candidates were held not to be subject to gift tax given the taxpayer's interest in furthering economic growth for the state generally and her own business interests in particular by improving the state's image. *Id.* at 1328–30. The plaintiffs themselves insist that "[p]olitical contributions do not meet the requirements of 'detached and disinterested generosity'" established by *Duberstein* because "such contributions are made for the contributor's own political, ideological or even economic purposes." (Doc. 19 at 11 n.6). As discussed in text *infra*, Section 527(i)(4) expressly subjects political contributions to income taxation. Thus, even if such contributions were previously excluded under Section 102(a), Public Law 106-230 eliminated the exclusion.

stead, prior to Section 527's enactment the Service treated political contributions as excluded from gross income under a ''conduit'' or ''quasi-trust'' theory Gen. Couns. Mem. 39,813 &n.32 (Mar. 19, 1990).

The parties have not addressed the conduit approach. The Court's independent research suggests that transfers properly subject to conduit theory may lie beyond the reach of Section 61 — and hence beyond Congress's power to tax under the Sixteenth Amendment — because they do not constitute gain to the recipient.[21] If so, and if conduit theory properly applies to political contributions, such contributions are not susceptible to federal income taxation and Section 527 thus could not provide political organizations a tax exemption as to such contributions. The Court, however, concludes that political contributions are not properly subject to conduit theory.

The conduit approach proceeds on the theory that contributions ''are restricted donations subject to an offsetting obligation to spend them for charitable [or political] purposes.'' Gen. Couns. Mem. 39,813 & n.12. In other contexts in which the concept is employed, the Service has ''consistently sought to limit its use — taxing the recipient organization if it has more than ministerial powers over disposition of the receipts, or if there is no obligation to refund unexpended balances to the contributors upon termination.'' *Id.* & n.30. Thus, the Service has rejected conduit analysis with respect to contributions to organizations whose tax-exempt status under Section 501(c)(3) is retroactively revoked. Although such organizations ''have a general obligation under their charters and state law to apply funds to their stated purposes,'' they ''do in fact exercise considerable discretion and control in most cases over the disposition of contributed funds.'' *Id.* To qualify for conduit theory treatment, the Service has concluded, the organization must be ''clearly functioning as an agent,'' and the contributor must have ''earmarked the funds for a *specific* recipient or purpose.'' *Id.*(emphasis added).

The same attributes of charitable contributions that render them unfit for treatment under conduit theory apply equally to political contributions. As with charitable organizations, political organizations must use contributed funds consistently with their organizational purpose, but they retain substantial discretion in how, when and even whether to expend contributed funds. Unless the contributor earmarks the contribution otherwise, the political organization need not employ any particular means of advancing the organization's purpose and need not necessarily expend the funds at all. With respect to political organizations interested in more than one issue or candidate, the contributor of unearmarked funds cannot require the organization to expend the contribution on a particular issue or candidate. Nor, absent a specific agreement to the contrary, does it appear that a political organization upon dissolution is required to return unexpended contributions to its contributors. *See, e.g.*, Treas. Reg. § 1.527-(5)(c)(2001)(excess funds of a political organization are not considered as expended for the personal use of the organization if distributed to entities other than the original contributor); Ala. Code § 17-22-5(d)(requiring a political committee desiring to dissolve to file a notice of dissolution setting forth the intended disposition of any residual funds).

As the Service recognizes, its application of conduit theory to political contributions ''was never tested in court.'' Gen. Couns. Mem. 39,813.[22] Moreover, the Service has suggested that its treatment of

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21 ''The very essence of taxable income . . . is the accrual of some gain, profit or benefit to the taxpayer.'' *Commissioner v. Wilcox*, 327 U.S. 404,407 [34 AFTR 811] (1946)(construing the predecessor to Section 61), *overruled on other grounds, James v. United States*, 366 U.S. 213 [7 AFTR 2d 1361] (1961); *accord Commissioner v. Kowalski*, 434 U.S. 77, 82–83 [40 AFTR 2d 77-6128] (1977)(''Congress [intended] to tax all gains except those specifically exempted.'')(quoting *Commissioner v. Glenshaw Glass*, 348 U.S. at 429–30). In its seminal case applying conduit reasoning, the Tax Court quoted *Wilcox* and concluded that ''[n]o gain or profit was realized'' by the taxpayer, suggesting that the transfer did not result in ''gross income.'' *Seven-Up Co. v. Commissioner*, 14 T.C. 965.978-79 (1950).

22 While some courts assumed for argument that political contributions were excluded from gross income, *see, e.g., United States v. Jett*, 352 F.2d 179, 182 [16 AFTR 2d 5829] (6th Cir. 1965); *O'Dwyer v. Commissioner*, 266 F.2d 575, 585–86 [3 AFTR 2d 1386] (4th Cir. 1959), none directly addressed the issue, much less articulated a rationale for considering such contributions as not constituting gross income.

political contributions under conduit theory may have been an error corrected by the enactment of Section 527. *Id.* & n.35. The Court agrees with this assessment and concludes that conduit theory cannot justify the treatment of political contributions as not constituting ''gross income'' within Section 61.

Because political contributions fall within ''gross income'' as defined in Section 61, they are subject to income tax unless effectively excluded from taxation elsewhere in the Code. By its terms Section 527 declares that, until and unless the notice required by Section 527(i) is given, ''the taxable income of such organization shall be computed by taking into account any exempt function income,'' I.R.C. § 527(i)(4), and exempt function income includes political contributions. *Id.* § 527(c)(3). Because political contributions are potentially subject to income taxation, and because Public Law 106-230 expressly renders them taxable, Sections 527(c) and (i) do in fact grant a tax exemption, and *Taxation with Representation* is not, as the plaintiffs contend, inapposite.

That *Taxation with Representation* applies does not mean that it applies to the entirety of the plaintiffs' First Amendment challenge. *Taxation with Representation*demonstrates that Congress at its pleasure may withdraw a tax subsidy that underwrites taxpayer speech (so long as the withdrawal is not based on viewpoint) without implicating the First Amendment.[23] To the extent that Congress goes beyond the cancellation of a subsidy and imposes an additional exaction, the analysis reverts to that required by *Buckley*. The defendants insist that Section 527(j) does no more than offset the tax exemption/subsidy enjoyed by political organizations that give notice under Section 527(i), but this is true only in part.

The tax exemption granted by Section 527 extends to income in the form of contributions, membership dues and similar assessments, and proceeds from fund-raising and similar events. I.R.C. § 527(c)(3). Section 527(j) requires political organizations to file reports disclosing in-formation concerning both the sources of contributions of $200 or more in a calen-dar year and the recipients of expenditures of $500 or more in a calendar year. *Id.* § 527(j)(2), (3). The penalty for failing to make these disclosures is ''an amount equal to the rate of tax specified in subsec-tion (b)(1) multiplied by the amount to which the failure relates.'' *Id.* § 527(j)(1). That is, the penalty is imposed in exactly the amount of the tax exemption the organ-ization would receive with respect to the same amount of exempt income. Because disclosable contributions are exempt from tax under Sections 527(c) and (i), and be-cause the penalty imposed by Section 527(j) is equal to the tax break the political organization enjoys as to the undisclosed contributions, the application of Section 527(j) to a political organization's undis-closed contributions does no more than offset the organization's tax exemption.[24]

Section 527 defines the term ''contributions'' as having ''the meaning given to such term by section 271(b)(2).'' I.R.C. § 527(e)(3). Section 271 defines contributions as including not only actual receipts but also ''a contract, promise, or agreement to make a contribution, whether or not legally enforceable.'' *Id.* § 271(b)(2).[25] Were this definition applicable to disclosures of contributions under Section 527(j), there might be serious questions whether *Taxation with Representation* would apply, because such a definition would allow the

[23] It is possible that *Taxation with Representation* also requires a threshold degree of logical relationship between the speech being subsidized and the conditions Congress places on its subsidy. Section 527 easily satisfies any such requirement; the speech being subsidized is expenditures for political expression, and the conditions imposed by Section 527(j) are the disclosure of the largest of these expenditures and of the largest contributors whose contributions Section 527 exempts from taxation. This relationship is at least as direct as that present in *Taxation with Representation.*

[24] Early in this litigation, the defendants suggested that Section 527(j) requires disclosure of all types of a political organization's exempt function income, even if not a ''contribution.'' (Doc. 16 at 5). The suggestion, never explained or repeated, is rejected as contrary to the plain language of Section 527(j), which limits the disclosure requirement to ''contributions,'' and Section 527(c)(3), which identifies dues and assessments, fundraising proceeds and similar receipts exempt from tax as something other than a ''contribution.''

[25] Section 271, enacted in 1954, generally prohibits a taxpayer from taking a deduction for a bad debt owed by a political party. *Id.* § 271(a). A ''political party'' is defined in terms of its purpose of influencing elections through the receipt of ''contributions'' (or making of expenditures) as defined in subsection (b)(2).

taxpayer to be penalized for failing to disclose contributions (such as pledges) promised but not received. In the case of a taxpayer long on receivables but short on receipts, Section 527(j) would then impose a penalty exceeding the amount of the organization's tax exemption.

Public Law 106-230, however, provides a narrower definition of contributions to govern its disclosure requirements: ''For purposes of this subsection, a person shall be treated as having made an expenditure or contribution if the person has contracted or is otherwise obligated to make the expenditure or contribution.'' I.R.C. § 527(j)(4). Thus, while for other purposes of Section 527 a promise to make a contribution need not be ''legally enforceable,'' a promise to contribute need be disclosed under Section 527(i) only if the promise *is* legally enforceable. *See also* Rev. Rul. 2000-49 (disclosure requirement extends only to ''binding contracts''); Instructions for Form 8872 at 3 (''Treat contributions as accepted if the contributor has contracted or is otherwise obligated to make the contribution.'').

While the parties have not briefed the issue, it appears doubtful that any significant amount of contributions not actually received would be disclosable under this definition. Even in the context of charitable contributions, as to which the public policy of upholding pledges is at its zenith, most jurisdictions require consideration or detrimental reliance to render them enforceable. *E.g., King v. Trustees of Boston University*, 647 N.E.2d 1196, 1199 (Mass. 1995); *Arrowsmith v. Mercantile-Safe Deposit & Trust Co.*, 545 A.2d 674, 677 (Md. App. 1988). *See generally* R. Donaldson, Annotation, *Lack of Consideration as Barring Enforcement of Promise to Make Charitable Contribution or Subscription — Modern Cases*, 86 A.L.R. 4th 241 (1991). A true pledge to make a political contribution is unsupported by legal consideration. If the pledge is made in exchange for legal goods or services, consideration may be present but the pledge is no longer a contribution but a market transaction. Most such pledges, when received, will constitute ''proceeds from a political fundraising or entertainment event,'' which Section 527 expressly recognizes as something different than a ''contribution.'' I.R.C. § 527(c)(3)(A), (C).[26] If the pledge is made in exchange for an improper consideration (such as political favors from an incumbent), the promise also is presumably unenforceable as against public policy. Assuming that it is theoretically possible for a political pledge to become a legally binding obligation based on the political organization's detrimental reliance on the pledge, the plaintiffs have made no showing that such legally binding pledges occur with such predictability and frequency as to raise a reasonable possibility that the contribution disclosure requirements of Section 527(j) will in practice impose on political organizations a penalty in excess of their tax exemption.[27]

While Section 527(j) as applied to contributions raises at most a remote possibility of isolated instances in which the penalty imposed exceeds the amount of the political organization's tax exemption, as applied to expenditures Section 527(j) virtually guarantees that this will occur on a predictable basis. Most if not all political organizations that decline to disclose their expenditures will also decline to disclose their contributions.[28] Thus, the political organization's tax exemption as to such contributions will be offset by penalty before expenditures are even considered. To the extent the political organization's exempt-function expenditures of $500 or more exceed its tax-exempt income from non-disclosable sources, Section 527(j)

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[26] Fundraising events include such things as ''dinners, breakfasts, receptions, picnics, dances, and athletic exhibitions.'' Treas. Reg. § 1.527-3(d)(2001). Because Section 527 identifies the proceeds of fundraising events as something different than contributions, Section 527(j) does not require a political organization to treat as a contribution the difference between the cost of a ticket and the fair market value of the goods and services received. Thus, while a non-paying attendee might have a legally enforceable obligation to pay the entire admission price (since consideration need only be legally adequate, not commensurate with the value received), none of this amount would constitute a ''contribution'' subject to disclosure.

[27] Because contributions of under $200, as well as dues, assessments and proceeds of fundraising and other events constitute tax-exempt income as to which no disclosure requirement applies, only an organization whose legally binding pledges of $200 or more exceed the amount of these income streams could even theoretically face a penalty exceeding its tax exemption for failing to disclose contributions.

[28] The plaintiffs in this case, for example, repeatedly stress their passionate opposition to disclosing their larger contributions.

ceases to represent the offset of a subsidy and becomes an additional exaction. While not all political organizations will face this prospect, many will.

For example, political organizations that depend on large contributions for support will have little or no other tax-exempt income against which their penalty for failing to disclose expenditures could be offset. Even organizations with significant tax-exempt income other than disclosable contributions may well spend more in large exempt-function expenditures during a particular year (especially an election year) than they receive in non-disclosable tax-exempt income. This is especially so if the organization receives (and spends) a substantial amount of income that is not tax-exempt to begin with (such as investment income and the net proceeds of a trade or business). The problem is only exacerbated by Section 527(j)(4), which requires political organizations to disclose expenditures they have not yet made if they are contractually or otherwise obligated to make them.[29]

Two features of Public Law 106-230 might be argued to eliminate the prospect of political organizations being penalized in an amount exceeding their tax exemption, but neither does so. First, while Section 527(j) exempts from disclosure independent expenditures made for express electoral advocacy,[30] the determination of political organizations such as the plaintiffs to eschew express electoral advocacy in an effort to avoid regulation suggests that the exemption will have little effect. Second, a political organization can choose not to give notice under Section 527(i) and thereby cap its losses at the amount of its tax exemption without any danger of penalty under Section 527(j). *See* Part I, *supra.* Even indulging the generous assumption that political organizations will routinely and repeatedly weigh the risk of a penalty exceeding their tax exemption if they do give notice against the risk of unnecessarily forfeiting a tax exemption if they do not, mistakes will certainly be made in these predictions, and Section 527(j) applies equally whether or not the decision ultimately proves advantageous to the organization.

Another provision of the Code, noted but scarcely addressed by the parties, must still be considered. Section 7203 provides in pertinent part:

> *Any person required under this title to* pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or *supply any information,* who willfully fails to . . . supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misde-meanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year or both, together with the costs of prosecution.

I.R.C. § 7203 (emphasis added). Section 527(j) describes its disclosures as ''required.'' *Id.* § 527(j)(a)(A), (B). In its previous order the Court, noting the key term ''required'' in both statutes, assumed without deciding that Section 7203 applies to Section 527(j). 148 F. Supp. 2d at 1282–83.

The parties have not discussed whether Section 7203, if it applies to disclosures under Section 527(j), would render *Taxation with Representation* inapplicable. The defendants moot the issue by declaring that Section 7203 does not apply to Section 527(j) and that they are powerless to prosecute any political organization for failing to make disclosures under that section.

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[29] Thus, for example, a political organization that orders and receives advertising materials late in the year may be required to disclose the cost of these materials — and incur a penalty for failing to do so — even though payment is not due until the next year.

[30] Section 527(j)(5)(E) excludes ''any expenditure which is an independent expenditure (as defined in section 301 of such Act [the Federal Election Campaign Act ('FECA')].'' FECA defines an independent expenditure as ''an expenditure by a person expressly advocating the election or defeat of a clearly defined candidate . . . .'' 2 U.S.C. § 431(17). The Court utilizes the term ''express electoral advocacy'' in lieu of ''express advocacy.'' *See infra* note 33.

(Doc. 23 at 10).[31] It is unnecessary to resolve whether Section 7203 would otherwise apply to Section 527(j), because the defendants' disavowal of any legal authority to apply Section 7203 to Section 527(j) effectively establishes that it will not be used to sanction nondisclosing political organizations. Accordingly, Section 7203 need not be considered in assessing whether Section 527(j) does more than offset a tax exemption.

In summary, as applied to contributions Section 527(j) represents only the permissible withdrawal of a tax subsidy through a corresponding, offsetting penalty, so that no First Amendment issue is implicated. As applied to expenditures, however, Section 527(j) imposes an additional exaction, rendering *Taxation with Representation* inapplicable. With respect to expenditures, Section 527(j) must therefore pass muster under *Buckley v. Valeo* to survive the plaintiffs' First Amendment challenge.

B. Buckley v. Valeo.

Scrutiny under Buckley is required if Section 527(j) ''burdens the exercise of political speech.'' *Austin v. Michigan State Chamber of Commerce*, 494 U.S. at 652. As noted in Part II.A, independent campaign expenditures such as those made by political organizations constitute political speech, and ''mandatory reporting [of expenditures by a political group] undeniably impedes protected First Amendment activity.'' *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 355 (1995). Because Section 527j) thus burdens the exercise of political speech, ''the Court's focus must turn to an assessment of the [government's] interest and of the means utilized to advance that interest.'' *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1309 (SD. Ala. 2000). As in *Richey*, however, the Court must first address the plaintiffs' contention that any disclosure requirement, regardless of ends and means, is unconstitutional if the regulated organization does not expressly advocate the election or defeat of a particular candidate.

1. Express electoral advocacy.

Each of the organizational plaintiffs claims to be a ''political organization'' as defined in Section 527(e). That is, each is organized and operated primarily to accept contributions and/or make expenditures for influencing (or attempting to influence) the nomination, election or other selection of an individual to public office, and each has confirmed in this litigation its desire to debate the qualifications of candidates for public office. (Doc. 20 at 5). The plaintiffs, therefore, are not disinterested commentators on the great issues of our day but political players whose primary purpose is to help place in office individuals they deem sufficiently sympathetic to their views. In advancing their goals, however, they never expressly advocate the election or defeat of any candidate. (Doc. 42 at 11). The plaintiffs, relying on *Buckley*, maintain that their avoidance of express electoral advocacy places them beyond the reach of any constitutional disclosure requirement.[32]

According to the plaintiffs, *Buckley* divided all political speech into two categories: (1) ''express advocacy,'' by which the speaker explicitly advocates the election or defeat of a candidate by employing

[31] The defendants suggest that, despite its use of the term ''required disclosures,'' disclosures under Section 527(j) by organizations that have given notice under Section 527(i) are nevertheless ''voluntary.'' (*Id.*). The defendants have not provided sufficient argument or authority to enable the Court to evaluate the plausibility of this assertion.

However, the Court notes that most of the numerous appellate cases addressing Section 7203 concern prosecutions for failure to pay a tax or make a return. The few based on a failure to supply information appear uniformly to involve failures to supply information either required by the tax return itself or that is of assistance to the Service in calculating the fact and extent of tax liability. *See, e.g., United States v. Reynolds*, 919 F.2d 435,437 [67 AFTR 2d 91-779] (7th Cir. 1990)(failure to disclose all income); *United States v. Caggiano*, 667 F.2d 1176, 1177 (5th Cir. 1982)(failure to register as individuals engaged in a gambling business); *United States v. Quimby*, 636 F.2d 86, 87 [47 AFTR 2d 81-718] (5th Cir. 1981)(failure to supply information regarding gross income); *cf. Bickham Lincoln-Mercury Inc. v. United States*, 168 F.3d 790, 793 [83 AFTR 2d 99-1230] (5th Cir. 1999)(although ''[t]he purpose of the reporting requirement [of Section 6050I concerning cash transactions exceeding $10,000] is to detect money laundering schemes,'' reliance on Section 7203 was appropriate because Section 6050I expressly requires that violators be sanctioned as under Section 7203). The disclosure requirements of Section 527(j) do not fit within this pattern, since a political organization's expenditures are not income and its contributions, once it gives notice under Section 527(i), are not taxable. Nor, as noted in the Court's earlier opinion, can the disclosures be used to determine if the primary purpose of the organization is in fact to influence electoral results, because they capture only a subset of the organization's income and expenditures and so ''d[o] not assist the I.R.S. in performing any tax oversight functions.'' 148 F. Supp. 2d at 1280.

[32] The *Buckley* Court considered wide-ranging challenges to FECA as it existed at the time. Because FECA has been repeatedly amended since *Buckley*, in this opinion references to the statute as construed in *Buckley* are to the Supreme Court's opinion, which includes the relevant text of the statute as an appendix.

unambiguous language such as ''vote for (or against),'' ''elect (or defeat),'' ''support (or reject)''; and (2) ''issue advocacy,'' which encompasses all other political speech, regardless of its message or purpose. According to the plaintiffs, *Buckley* held that the First Amendment forbids any regulation — including disclosure requirements — in connection with speech that does not constitute ''express advocacy.'' Thus, they conclude, their failure to expressly advocate the election or defeat of any candidate insulates them from Section 527(j)'s disclosure requirement.

The Court agrees that *Buckley* identified ''express electoral advocacy'' as a form of political speech and that this form of speech is limited to ''communications containing express words of advocacy of election or defeat.'' 424 U.S. at 44 & n.52.[33] However, the Court rejects the plaintiffs' assertion that only express electoral advocacy is susceptible to regulation consistent with the First Amendment; at least with respect to organizations such as the plaintiffs and other Section 527 political organizations, *Buckley* affirmatively demonstrates that disclosure requirements are constitutionally permissible even absent express electoral advocacy.

The plaintiffs' threshold error is their insistence that all political speech that is not express electoral advocacy perforce constitutes ''issue advocacy.'' The Supreme Court in *Buckley* employed no such terminology and recognized no such dichotomy. Rather, the *Buckley* Curt saw political speech as comprised of ''issue discussion'' and ''advocacy of a political result.'' 424 U.S. at 79. This would represent only a semantic difference if ''advocacy of a political result'' were confined to express electoral advocacy, for then ''issue discussion'' would occupy the same terri-tory that the plaintiffs claim for ''issue ad-vocacy''—that is, all political speech that is not express electoral advocacy.

The *Buckley* Court, however, recognized that advocacy of a political result extends beyond express electoral advocacy. In construing FECA's cap on independent expenditures, which applied to expenditures ''advocating the election or defeat of [a] candidate,'' the Court found the quoted language vague because ''the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.'' 424 U.S. at 42.[34] Lacking a bright line between issue discussion and electoral advocacy, speakers might self-censor their speech in an effort to avoid crossing the indistinct border. *Id.* at 42–43. The *Buckley* Court introduced express electoral advocacy as a benchmark to provide speakers the clear boundary that the statutory cap on independent expenditures otherwise lacked. *Id.* at 43–44. If express electoral advocacy were the only form of electoral advocacy that exists, the Court would not have been concerned that speakers could not tell the difference between issue discussion and electoral advocacy; the Court established the express electoral advocacy standard precisely because other forms of electoral advocacy exist but may prove difficult to distinguish from issue discussion.[35]

Because many communications that do not expressly advocate the election or defeat of a candidate nevertheless contain a greater or lesser element of electoral advocacy, it is at best imprecise to employ the term, ''issue advocacy,'' to denote all political speech other than express electoral advocacy. Use of the term in this manner

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[33] Because one may expressly advocate things other than the election or defeat of a candidate (such as the adoption of the speaker's position on an issue or the approval or rejection of a ballot measure), in this opinion the Court utilizes the more precise term, ''express *electoral* advocacy,'' as did the Supreme Court in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238,249 (1986).

[34] The Court reasoned that candidates are not nominated and elected in a vacuum but are measured in large part by their actual or perceived positions vis-a-vis various public issues. *Id.* at 42. Thus, speech that pairs a public issue with a candidate's stand on that issue may partake of both issue discussion and electoral advocacy, making it difficult to assign the speech a single label. Indeed, even speech that discusses an issue without mentioning a candidate may affect public opinion and ultimately electoral results. *Id.* at 42 n.50 (quoting *Buckley v. Valeo*, 519 F.2d 821, 875 (D.C. Cir. 1975)).

[35] For example, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), a state statute required any newspaper that ''assails the personal character'' of a candidate or ''attacks his official record'' to give equal, free space for the candidate's reply. *Id.* at 243 n. 1. Even though the statute did not require express electoral advocacy to trigger its reply provision, the *Buckley* Court described the statute as a ''legislative restrictio[n] on advocacy of the election or defeat of political candidates.'' 424 U.S. at 50. The plaintiffs themselves admit that speech falling short of express electoral advocacy may nevertheless constitute ''advocacy related to elections.'' (Doc. 42 at 14).

incorrectly suggests that all political speech falling short of express electoral advocacy is essentially issue discussion (thereby skewing the constitutional analysis), re-gardless how plain the communication's electoral purpose. *Buckley* employed no such term, and the Supreme Court later used it to describe a much more limited range of political speech. *See Federal Elec-tion Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6 (1986)(distinguishing ''issue advocacy'' from ''activities on behalf of political candidates''); *see also Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 406 (Kennedy, J., dissenting)(describing ''advertisements that promote or attack a candidate's positions without specifically urging his or her election or defeat'' as ''*so-called* issue advocacy'')(emphasis added). For the sake of accuracy and neutrality, the Court avoids the term ''issue advocacy.''[36]

No other accurate, neutral and satisfactorily brief term presenting itself, the Court employs the lengthy but unobjectionable phrase, ''speech falling short of express electoral advocacy.''

The plaintiffs' second error is their insistence that *Buckley* held that all political speech other than express electoral advocacy lies beyond the reach of constitutional regulation, including disclosure requirements. As discussed below, *Buckley* articulated an express electoral advocacy benchmark in order to *avoid*deciding the permissible reach of disclosure require-ments. At any rate, *Buckley* employed an express electoral advocacy standard only in the context of organizations whose major purpose is not the nomination or election of candidates; *Buckley* makes plain that disclosure may, consistent with the First Amendment, be required of organizations whose major purpose is the nomination or election of candidates even if those organizations do not engage in express electoral advocacy.

The plaintiffs rely on that portion of *Buckley*which addressed a challenge to the disclosure requirements imposed by FECA on organizations other than political committees. As then enacted, Section 434(e) required disclosures by such organizations making ''contributions'' or ''expenditures'' of over $100 in a calendar year. 424 U.S. at 160. The required disclosures included information concerning the contributions and expenditures made by the reporting organization. *Id.* at 157–59. ''Contributions'' and ''expenditures,'' in turn, were defined in terms of their having been made ''for the purpose of influencing'' the selection of a person for federal office. *Id.* at 145–47. The Supreme Court found this language ambiguous, *id.* at 77, because it harbored the ''potential for encompassing both issue discussion and advocacy of a political result.'' *Id.* at 79.

As with any exercise in statutory construction, the *Buckley* Court sought to interpret this phrase by identifying Congress's intent. Because the legislative history contained no discussion of the intended meaning of the phrase ''for the purpose of influencing,'' the Court turned to the purpose underlying the disclosure provisions, since Congress presumably intended the phrase to be construed consistently with the legislation's overall purpose. The Court identified Congress's purpose as being ''to promote full disclosure of campaign-oriented spending to insure both the reality and the appearance of the purity and openness of the federal election process.'' 424 U.S. at 77–78.

The *Buckley* Court had two constitutional issues to consider as well before arriving at a construction of the phrase, ''for the purpose of influencing.'' First, a statute that both regulates speech and carries criminal sanctions for its violation must be sufficiently definite as to its scope that an ordinarily intelligent speaker has adequate notice of what is and is not proscribed, so that he may avoid unlawful speech without

[36] In so doing, the Court parts company with a number of appellate courts. *See Chamber of Commerce v. Moore*, 288 F.3d 187, 193 (5th Cir. 2002); *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000); *Vermont Right to Life Committee v. Sorrell*, 221 F.3d 376, 386 (2nd Cir. 2000); *Mariani v. United States*, 212 F.3d 761, 767 (3rd Cir.), *cert. denied*, 531 U.S. 1010 (2000); *Iowa Right to Life Committee v. Williams*, 187 F.3d 963, 968 (8th Cir. 1999); *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 708 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000); *Clifton v. Federal Election Commission*, 114 F.3d 1309, 1311 (1st Cir. 1997), *cert. denied*, 522 U.S. 1108 (1998).

unnecessarily avoiding lawful speech as well. 424 U.S. at 40–43. The Court considered that the disputed phrase's ambiguity "raise[d] serious problems of vagueness." *Id.* at 76–77. Constitutional jurisprudence thus compelled the Court to adopt a construction of the phrase, if one existed, that would be both consistent with Congress's identified purpose and sufficiently definite "to avoid the shoals of vagueness." *Id.* at 77–78 (citing *United States v. Harriss*, 347 U.S. 612, 618 (1954)).

Second, "[t]he overbreadth doctrine prohibits the Government from banning [or permissibly abridging] unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, ___ U.S. ___, 122 S. Ct. 1389, 1395 (2002). However, "[a]pplication of the overbreadth doctrine ... is ... strong medicine [and] has been employed by the Court sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Thus, "[w]hen a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982). The *Buckley* Court, while labeling this section of its opinion "Vagueness Problems," 424 U.S. at 76, suggested the possibility of lurking overbreadth issues by stating that its construction of the phrase, "for the purpose of influencing," would "insure that the reach of § 434(e) is not impermissibly broad." *Id.* at 80.

So as to accord with legislative intent, avoid unconstitutional vagueness about the scope of Section 434(e), and avoid any issue of overbreadth, the *Buckley* Court construed the phrase "for the purpose of influencing" to mean "used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80. So construed, the Court concluded that Section 434(e) was narrowly tailored to serve a suffi-ciently important governmental interest and thus survived First Amendment scrutiny. *Id.* at 80–82. The plaintiffs insist that "*Buckley* stands for the proposition that Congress may only place reporting and re-gistration requirements like those at issue [in this case] on '*express advocacy.*'" (Doc. 42 at 10 (emphasis in original)).

Buckley, however, made no such pronouncement. Nor could it easily have done so, since such a conclusion would have required a holding that the phrase, "for the purpose of influencing," was unconstitutionally overbroad in the context of Section 434(e) to the extent it encompassed anything beyond express electoral advocacy. The plaintiffs appear to assume that the *Buckley* Court limited the phrase to express electoral advocacy because it had already determined that the statute was otherwise overbroad; in fact, however, the Court gave the phrase a limiting construction to *avoid* deciding whether the statute was overbroad.

This is plain from a number of perspectives. First, the *Buckley* Court did not state that the statute was overbroad as applied to speech falling short of express electoral advocacy but only that the Court's limiting construction would "insure" that it was not overbroad — language comfortably connoting a prudent but perhaps unnecessary precaution. Second, as stated previously, well-established Supreme Court jurisprudence required the *Buckley*Court to address any overbreadth challenge only *after* giving the disputed language a limiting construction,[37] and the *Buckley* Court's single, fleeting reference to overbreadth *precedes* its adoption of a limiting construction. Finally, subsequent Supreme Court cases have recognized that *Buckley* did not hold that Section 434(e) was overbroad as applied to speech falling short of express electoral advocacy but rather limited the statute to express electoral advocacy to avoid reaching the overbreadth issue to begin with. *See Osborne v. Ohio*, 495 U.S. 103, 120 n.14 (1990)(the *Buckley*

[37] This is but a particular application of the "'cardinal principle' of statutory interpretation ... that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001)(quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

Court imposed a limiting construction "to avoid potential overbreadth problems"); *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 248 (the *Buckley* Court imposed a limiting construction "in order to avoid problems of overbreadth").

In summary, *Buckley* did not hold that disclosure requirements as applied to Section 434(e) organizations are unconstitutionally overbroad to the extent they reach beyond express electoral advocacy. Instead, and as discussed more fully below, this portion of *Buckley* stands only for the proposition that disclosure requirements may be unconstitutionally overbroad to the extent they reach pure *issue discussion*; vagueness concerns, not overbreadth concerns, drove the Court's decision to impose an express electoral advocacy requirement on Section 434(e).

Even had *Buckley* held that Section 434(e)'s disclosure requirement was unconstitutionally overbroad as applied to speech falling short of express electoral advocacy, any such ruling would not aid the plaintiffs. As noted, Section 434(e) required disclosures from organizations other than political committees. The *Buckley* Court construed the term "political committee" to encompass only "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. Thus, the only organizations encompassed within Section 434(e) — and the only ones captured by *Buckley*'s express electoral advocacy discussion — are those whose major purpose is *not* the nomination or election of a candidate. As discussed below, *Buckley* affirmatively *rejected* any express electoral advocacy requirement with respect to organizations with a major purpose to nominate or elect candidates.

Section 434(a) of FECA required political committees to make disclosures similar to those required of other organizations under Section 434(e). 424 U.S. at 155–59. Section 431(d) defined a "political committee" only in terms of the dollar amount of its contributions and expenditures. *Id.* at 145. Because "contributions" and "expenditures" were defined, as they were for purposes of Section 434(e), in terms of their having been made "for the purpose of influencing" the nomination or election of any person to federal office, *id.* at 145–47, the *Buckley* Court was concerned that the definition of a political committee "could be interpreted to reach groups engaged purely in issue discussion." *Id.* at 79. Such a construction "could raise similar vagueness problems" to those presented by Section 434(e). The Court concluded that this danger could be avoided, and the statutory purpose upheld, by confining political committees to organizations whose "major purpose is the nomination or election of a candidate." *Id.* at 79. Expenditures by such an organization "are, by definition, campaign related." *Id.* The Court did not, explicitly or implicitly, engraft an express electoral advocacy requirement in the context of political committees as so defined.

Buckley thus establishes that there is no prophylactic First Amendment prohibition on requiring disclosures of contributions and expenditures by organizations whose major purpose is the nomination or election of persons to public office. *Buckley* identified the threshold constitutional impediment to disclosure requirements as the danger of reaching pure issue discussion, which could render the regulation vague or overbroad. By definition, however, organizations whose major purpose is the nomination or election of candidates to public office are engaged in electoral advocacy, not simple issue discussion, obviating these constitutional concerns. *See also North Carolina Right to Life, Inc. v. Leake*, 108 F. Supp. 2d 498, 505–07 (E.D.N.C. 2000)(engaging in a similar analysis and concluding that "'campaign-related' groups, whose major purpose is electioneering, may be regulated without regard to *Buckley*'s express advocacy standard").

This portion of *Buckley* clarifies the error of the plaintiffs' assumption that all political speech falling short of express electoral advocacy is universally sacrosanct. The speech most protected from governmental regulation is issue discussion, *Akins v. Federal Election Commission*,

101 F.3d 731, 741 (D.C. Cir. 1996)(en banc), *vacated on other grounds*, 524 U.S. 11 (1998), and it was issue discussion that the Court sought to protect in *Buckley*. Electoral advocacy is not automatically immune from regulation but, to the extent it cannot easily be distinguished from issue discussion, it may be necessary to exclude electoral advocacy from regulation so as to avoid self-censorship by uncertain speakers and the resulting abridgement of issue discussion. The bright line of express electoral advocacy was required under Section 434(e), not because all speech falling short of express electoral advocacy is immune from regulation, but because no other means of readily distinguishing electoral advocacy from issue discussion presented itself. In the context of disclosures by political committees, in contrast, the nature of the organization allows both speaker and government to readily categorize speech; where the organization's major purpose is the nomination or election of candidates, its expenditures — whether or not containing express electoral advocacy — further that primary electoral purpose; "[t]hey are, by definition, campaign related." 424 U.S. at 79.

Technically, *Buckley*'s discussion of FECA's disclosure requirements as applied to political committees is dicta; the plaintiffs' only challenges to these requirements, both before the Supreme Court and below, were that their application to minor parties, and the $100 dollar threshold for disclosure of contributions, were unconstitutionally overbroad. 424 U.S. at 60–61; *Buckley v. Valeo*, 519 F.2d at 865; *see also Akins v. FEC*, 101 F.3d at 742. However, "dicta 'may be followed if sufficiently persuasive,'" *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001)(quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935)), and the plaintiffs have offered no reason why *Buckley* is not persuasive on this score. On the contrary, they insist that *Buckley* represents the Supreme Court's definitive word as to the permissible scope of disclosure requirements.

The plaintiffs avoid any analysis of *Buckley*. Instead, they insist that a long line of cases confirms and "jealously guard[s]" their understanding that *Buckley* prohibits the imposition of disclosure requirements on *any* organization not engaged in express electoral advocacy. In fact, however, none of the plaintiff's cases so holds. The Supreme Court in *FEC v. Massachusetts Citizens for Life* did extend the express electoral advocacy requirement to Section 441b of FECA. 479 U.S. at 248–49. That section, however, applies only to corporations whose major purpose is *not* the nomination or election of candidates. *Id.* at 262. *Massachusetts Citizens for Life* says nothing in support of an express electoral advocacy requirement with respect to organizations whose major purpose *is* the nomination or election of candidates.

Nor do any of the plaintiffs' lower court authorities hold that *Buckley* precludes disclosure requirements as to any organization not engaged in express electoral advocacy. They could scarcely have done so, because none of them involved both a plaintiff whose major purpose was not the nomination or election of a candidate and a statute that regulated the plaintiff without an express electoral advocacy requirement. *See Chamber of Commerce v. Moore*, 288 F.3d 187 (5th Cir. 2002); *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000); *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (2nd Cir. 1980)(en banc); *West Virginians for Life, Inc. v. Smith*, 960 F. Supp. 1036 (SD. W. Va. 1996); *Federal Election Commission v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996); *New York American Civil Liberties Union, Inc. v. Acito*, 459 F. Supp. 75 (S.D.N.Y. 1978). While some of these cases contain unexplained dicta arguably suggesting that express electoral advocacy is a universal, constitutional limitation on disclosure requirements, none so holds and none offers any textual analysis

of *Buckley* that could support such a proposition.[38]

Only a single case cited by the plaintiffs clearly stands for the proposition asserted. In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000), the Court stated that *Buckley* "defined political committee as including only those entities that have as a *major purpose* engaging in *express advocacy* in support of a candidate." *Id.* at 712 (emphasis in original). The Court offered no authority for this proposition,[39] which is plainly contrary to *Buckley* and which is dicta in any event.[40]

In summary, *Buckley* demonstrates that Congress may constitutionally require disclosures of organizations whose major purpose is the nomination or election of candidates even if the organization does not engage in express electoral advocacy. *See also Richey v. Tyson*, 120 F. Supp. 2d at 1310–12.

2. Ends and means analysis.

After announcing its express electoral advocacy standard for Section 434(e) organizations, the *Buckley* Court turned its attention to whether the statute, as construed, "bears a sufficient relationship to a substantial government interest." 424 U.S. at 80. The Court identified the government interest underlying Section 434(e) as an "informational interest," specifically, "information concerning those who support the candidates" through their expenditures, which "helps voters to define more of the candidates' constituencies," "alert[s] voters to the interests to which a candidate is most likely to be responsive and thus facilitate[s] predictions of future performance in office," and "allows voters to place each candidate in the political spectrum more precisely." *Id.* at 67, 81. The Court held that this is a sufficiently important government interest for purposes of First Amendment analysis. *Id.* at 80.

With respect to the means employed to advance the interest, the Court noted at the outset that "disclosure requirements — certainly in most applications — appear to be the least restrictive means of curbing the evils of campaign ignorance . . . ." 424 U.S. at 68. Turning to Section 434(e) as judicially construed, the Court held that its disclosure requirement was sufficiently "narrowly limited" to satisfy the First Amendment. The Court so held, not because disclosure was limited to express electoral advocacy, but because disclosure was limited to "spending that is unambiguously campaign related." *Id.* at 80–81.

The same analysis governs disclosure by political committees as defined by the *Buckley* Court. With respect to the governmental interest, the Court acknowledged that all of FECA's disclosure requirements — including those applicable to political committees — serve the same, constitutionally sufficient governmental interest of increasing the fund of information concerning the candidates' constituencies. 424 U.S. at 81. With respect to the means of advancing the governmental interest, the Court held that a disclosure requirement limited to expenditures that are "unambiguously campaign related" is sufficiently narrowly tailored, *id.* at 81, and the Court in substantively identical language described expenditures by organizations whose major purpose is the nomination or election of candidates as, "by definition, campaign related." *Id.* at 79.

Buckley thus establishes that Congress may, consistent with the First Amendment, require from organizations whose major purpose is the nomination or election of candidates disclosures of the sort required

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38 Curiously, the plaintiffs also rely on *North Carolina Right to Life, Inc. v. Leake*, 108 F. Supp. 2d 498 (E.D.N.C. 2000), a case which explicitly *rejects* any express electoral advocacy requirement in the context of organizations whose major purpose is the nomination or election of candidates. *See id.* at 505–07.

39 Other than *Buckley* itself, the *North Carolina Right to Life* Court cited only *Federal Election Commission v. Christian Action Network, Inc.*, 110 F.3d 1049 (4th Cir. 1997). *Christian Action Network*, however, involved only the disclosure requirements of Section 441b of FECA and, as noted previously, Section 441b applies only to corporations whose major purpose is *not* the nomination or election of candidates. *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 262. Any stray language in *Christian Action Network* arguably implying that express electoral advocacy is constitutionally required regardless of the organization's major purpose is as much unsupported dicta as *North Carolina Right to Life*'s explicit statement to that effect.

40 The North Carolina statute at issue required disclosures of organizations absent express electoral advocacy regardless of major purpose, and the organizational plaintiff's major purpose was not the nomination or election of candidates. *See id.* at 708, 712–13.

by FECA. *Buckley*'s analysis controls this case unless a political organization can be meaningfully distinguished from a political committee or unless Section 527(j)'s expenditure disclosure requirements can be meaningfully distinguished from those of FECA.

3. Application to Section 527(j).

A ''political organization'' is defined as an organization ''organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for ... the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office or office in a political organization, or the election of presidential or vice-presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed.'' I.R.C. § 527(e)(1), (2). Pared to its essential language, a political organization is an organization whose primary purpose is to influence the nomination, election or other selection of individuals to public office. This compares favorably with *Buckley*'s definition of a political committee as an organization whose major purpose is the nomination or election of a candidate to federal office.[41] The ''primary'' purpose of an organization is plainly no different than its ''major'' purpose. Nor is a purpose of nominating or electing candidates substantively different from a purpose of *influencing* their nomination or election. Organizations, of course, do not nominate or elect candidates; individual voters nominate and elect, and organizations can do no more than seek to influence how voters cast their ballots. It is thus not surprising that the Supreme Court has interpreted *Buckley*'s definition of a political committee as ''applicable to those groups whose primary objective is to *influence* political campaigns.'' *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 262 (emphasis added).

The plaintiffs nevertheless insist that a ''political committee'' under *Buckley* is a ''much narrower'' entity than a ''political organization'' under Section 527 because the latter term reaches organizations ''engaged in various forms of classic 'issue advocacy.''' (Doc. 19 at 26; Doc. 20 at 10). This argument depends on the notion, discredited in Part II.B.1, *supra*, that any political speech falling short of express electoral advocacy constitutes ''issue advocacy'' and that all such speech is con-stitutionally immune from regulation pur-suant to *Buckley*. In fact, *Buckley* estab-lishes that an organization whose major purpose is to further the nomination or election of candidates for public office may be required to disclose contributions and expenditures even if it does not engage in express electoral advocacy; the nature of its mission confirms that the speech of such an organization, whether a ''political committee'' under *Buckley* or a ''political organization'' under Section 527, repre-sents regulable electoral advocacy and not protected issue discussion.[42]

Because a political organization cannot be meaningfully distinguished from a political committee, Section 527(i) may constitutionally require disclosures of political organizations even if they engage in no express electoral advocacy. The issue becomes whether Section 527(j)'s expenditure disclosure requirements can survive the ends/means analysis required by *Buck-*

[41] The definition of a political organization is broader than that of a political committee in that it includes advocacy for ''appointment'' to office and reaches not only selection to public office but to office in a political organization as well. It may also reach more advocacy of persons who are not declared candidates for office. *Compare Federal Election Commission v. Florida for Kennedy Committee*, 681 F.2d 1281, 1287–88 (11th Cir. 1982)(unauthorized group seeking to draft a candidate is not a ''political committee'' within FECA) *with* Treas. Reg. § 1.527-2(c)(1)(2001)(Section 527 covers expenditures in support of an individual who is not, and who never becomes, a declared candidate). The plaintiffs do not challenge Section 527 in any of these particulars, and it is not clear that they would have standing to do so.

[42] The plaintiffs' complaint that the Internal Revenue Service construes the ''exempt function'' of Section 527 to reach speech falling short of express electoral advocacy, while correct, is therefore irrelevant. More to the point, the Service rejects any argument that pure issue discussion constitutes an exempt function. *See* Treas. Reg. § 1.527-6(b)(5)(2001) (''Expenditures for nonpartisan activities ... are not expenditures for an exempt function.''). The private letter rulings on which the plaintiffs rely make the same point. *See* Pvt. Ltr. Rul. 99-25-051 (June 25, 1999)(organization's activities ''cente[r] on issue advocacy connecting public concerns about your chosen issue to the views and records of federal, state and local candidates and incumbents''); Pvt. Ltr. Rul. 98-08-037 (Feb. 20, 1998)(organization's activities were designed to ''raise public consciousness about the importance of social and economic values that it favors and about the positions of incumbent public officials ... and candidates on those values'').

ley of all disclosure requirements.[43] The defendants claim that Section 527(j)'s disclosure requirements are supported by the government's interest in providing voters with information concerning those supporting candidates and in combating actual and perceived corruption. The Court considers these interests in turn.[44]

The expenditure disclosure requirements of Section 527(j) are much narrower than those of FECA. While Section 527(j) requires disclosures concerning expenditures of $500 or more in a calendar year, FECA set the threshold at $100.01. More importantly, while Section 527(j) requires disclosure only of certain identifying information concerning the recipient, FECA also required disclosure of the purpose of each expenditure and of the candidate sought to be assisted by the expenditure. *Compare* I.R.C. § 527(j)(3)(A) *with*424 U.S. at 158.

These differences are constitutionally significant. *Buckley* described the government's constitutionally sufficient interest as one of ''increas[ing] the fund of information concerning those who support the candidates.'' 424 U.S. at 81; *accord Federal Election Commission v. Akins*, 524 U.S. 11, 20 (1998)(the purpose of FECA's requirement that political committees disclose contributions and expenditures is ''to help voters understand who provides which candidates with financial support''). FECA's expenditure disclosure requirements advanced this interest because they provided information linking the expenditure to a particular candidate, allowing the public to assess the candidate by the nature of her supporters (both the organization and the contributors to the organization). Section 527(i), however, does not require a political organization to identify the candidate or candidates its expenditures are supporting, or even the purpose of the expenditure; thus, except to the extent that identifying the recipient of itself provides this information — as when the recipient is the candidate or the candidate's own campaign committee — Section 527(j) is not calculated to advance the governmental interest on which *Buckley* rested.

Although Section 527(j) does advance the government's informational interest in certain applications, it is not sufficiently tailored to satisfy the First Amendment. *Buckley* requires that disclosure requirements be ''narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced.'' 424 U.S. at 81. To the extent — and it is a large extent — that Section 527(j) requires disclosures that do not link the organization with a candidate or candidates, the disclosure carries no such substantial connection.

The defendants suggest that Section 527(j) is also supported by a federal interest in deterring actual or perceived corruption. (Doc. 35 at 20). The *Buckley* Court acknowledged that ''disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity.'' 424 U.S. at 67. However, the strength of this interest depends on whether the expenditures are independent of the candidate or are coordinated with — or given directly to — the candidate: ''[T]he independent advocacy restricted by the provision [capping independent ex-penditures] does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.'' *Id.* at 46. The absence of coordination with the candidate which is the hallmark of an independent expenditure ''not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as *quid pro quo* for im-

[43] Section 527(j) exempts from its disclosure requirements ''any person required (without regard to this subsection) to report under [FECA] as a political committee.'' I.R.C. § 527(j)(5)(A). Because both political organizations under Section 527 and political committees under FECA must make disclosures even if they do not engage in express electoral advocacy, there would appear to be a great deal of overlap in coverage, but no party suggests that this overlap renders Section 527(j) superfluous as to federal electoral advocacy.

[44] The defendants admit the federal government has no direct interest in combating campaign ignorance or corruption in state and local elections, but they claim an interest ''in ensuring that federal subsidies are not used in a manner that might lead to corruption'' or ignorance. (Doc. 44 at 14). Because, as discussed in Part II.A, Section 527(j)'s expenditure disclosure requirements cannot be justified as the conditioning of a tax subsidy, the government's only asserted interest in requiring disclosure of expenditures at the state and local level collapses. As to such disclosures, Section 527(j) thus violates the First Amendment.

proper commitments from the candidate." *Id.* at 47.

"The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000). The *Shrink Missouri Government* Court construed *Buckley* as "demonstrat[ing] that the dangers of large, corrupt contributions and the perception that large contributions are corrupt are neither novel nor implausible" but in fact well established by the record evidence before the Court. *Id.* The evidence presented in *Buckley*adequately establishes the existence of real and perceived corruption, and thus provides a satisfactory factual basis to support the government's interest in combating it, with respect to *contributions* given directly to candidates in connection with federal elections. Be-cause "coordinated expenditures are as useful to the candidate as cash," *Federal Election Commission v. Colorado Republi-can Federal Campaign Committee*, 533 U.S. 431, 446 (2001), the record in *Buck-ley* similarly provides sufficient evidence to support the government's interest in combating actual and perceived corruption with respect to coordinated expenditures in connection with federal elections.

With respect to independent expenditures, however, with its attenuated risk of corruption, the Supreme Court requires additional affirmative evidence to support the government's claimed interest. *Buckley*, for example, held that FECA's cap on independent expenditures "fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process." 424 U.S. at 47–48. *Buckley* simply "found no tendency in such [independent] expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption." *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 497 (1985). While "Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures . . . to influence candidate elections," *First National Bank v. Bellotti*, 435 U.S. 765, 788 (1978); *accord Austin v. Michigan State Chamber of Commerce*, 494 U.S. at 659, Congress must in fact make such a demonstration. Without affirmative evidence to support the proposition, "an exchange of political favors for uncoordinated expenditures remains a hypothetical possibility and nothing more." *FEC v. Notional Conservative PAC*, 470 U.S. at 498. "[T]he constitutionally significant fact [that independent expenditures are by definition not coordinated with the candidate] prevents us from assuming, absent convincing evidence to the contrary, that a limitation of political parties' independent expenditures is necessary to combat a substantial danger of corruption of the electoral system." *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 617–18 (1996). That "convincing evidence" must take the form of "record evidence or legislative findings." *Id.*at 618.

While each of these cases concerned *caps* on independent expenditures, the same degree of proof is required when the government seeks to justify the *disclosure*of independent expenditures. As *Shrink Missouri Government* teaches, 528 U.S. at 391, it is the novelty and plausibility of the "justification raised," not the degree of infringement on the plaintiff's First Amendment rights, that sets the bar for proof of the justification. This parallelism presumably explains why *Buckley* upheld Section 434(e)'s disclosure requirements based only on the government's informational interest, while noting that "[t]he corruption potential of these [independent] expenditures [is] significantly different" from that incident to coordinated expenditures. 424 U.S. at 81.

Public Law 106-230 requires political organizations to disclose "[t]he amount of each expenditure made to a person" if the person received $500 or more during the

calendar year. I.R.C. § 527(j)(3)(A).[45] Section 527(e)(3) defines an ''expenditure'' as does Section 271(b)(3), and the latter section does not distinguish between independent expenditures, coordinated expenditures and direct contributions. Thus, as the Service recognizes,[46] under Section 527 an ''expenditure'' encompasses all three types of spending.[47]

Section 527(j), in short, purports to require disclosure of independent expenditures as well as coordinated expenditures and direct contributions to candidates.[48] While *Buckley* establishes the adequacy of the government's interest in combating corruption with respect to coordinated expenditures and direct contributions, the defendants have identified no record evidence and no legislative findings with which to meet their burden of showing the existence of actual or perceived corruption in connection with independent expenditures.[49] As with its purported informational interest, the sufficiency of the government's corruption interest is supported only in certain applications, with vast portions of its reach unsupported by the articulated interest. Accordingly, Section 527(j) is not narrowly tailored to serve the government's interest in combating actual or perceived corruption.

Section 527(j) cannot be construed so that its scope is narrowly tailored to the government's informational and corruption interests. The Court cannot construe Section 527(j) to require additional information, not required by the statute's plain terms, linking disclosed expenditures to a candidate. Nor may the Court salvage the provision by restricting its scope to contributions and coordinated expenditures (to tailor the provision to the government's corruption interest) or to expenditures as to which identifying the recipient will adequately link the expenditure to a candidate (to tailor the provision to the government's informational interest). While courts will go far to avoid striking down a statute as overbroad by giving the statute a constitutional, limiting construction, that construction must at least be ''fairly possible.'' *Zadvydas v. Davis*, 533 U.S. at 689. The defendants have offered, and the Court discerns, no principled basis pursuant to which the unambiguous and unlimited phrase, ''each expenditure,'' could be construed (as opposed to amended) to reach only that subset of expenditures as to which disclosure is supported by an informational or corruption interest. *See also Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, ___, 122 S. Ct. 941, 956 (2002)(''[P]arties should not seek to amend the statute by appeal to the Judicial Branch.'').[50]

In summary, the Court concludes that Section 527(i) violates the First Amendment to the extent it purports to require political organizations to disclose expenditures.

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45 The expenditure need be disclosed only if it was made ''for an exempt function,'' I.R.C. § 527(j)(2), that is, to influence electoral results.

46 *See* Treas. Reg. § 1.527-2(c)(1)(2001)(''An exempt function ... includes *all* activities that are directly related to and support the process of'' influencing selection to public office)(emphasis added); Priv. Ltr. Rul. 99-25-051 (June 25, 1999)(''Contributions to candidates' campaigns ... are within the meaning of 'directly related' expenses in'' Section 1.527-2(c)(1)); Tech. Adv. Mem. 98-47-006 (Nov. 20, 1998)(discussing ''exempt function expenditures, such as political contributions made by the PAC'').

47 While Section 527(j) speaks at one point of a political organization making ''a contribution or expenditure,'' '>I.R.C. § 527(j)(2)(A)(II), it seems doubtful that Congress intended thereby to restrict the scope of Section 527(j)'s disclosure requirement to independent expenditures.

48 Section 527(j) does not require disclosures ''with respect to any expenditure which is an independent expenditure (as defined in section 301 of [FECA]).'' I.R.C. § 527(j)(5)(E). FECA, however, defines an ''independent expenditure'' to include only an expenditure ''expressly advocating the election or defeat of a clearly identified candidate'' and made independently of a candidate or her campaign. 2 U.S.C. § 431(17). Thus, Section 527(j) requires disclosure of the vast majority of independent expenditures, which do not expressly advocate an electoral result.

49 The legislative history of Public Law 106-230 contains the occasional reference to ''cleaning up the corrupt campaign finance system,'' 146 Cong. Rec. S5994-03 at S6000 (daily ed. June 28, 2000)(statement of Sen. Feingold), but no examples of actual or perceived corruption stemming from independent expenditures. Senator Lieberman asserted that, based on unidentified press reports, candidates and elected officials help establish and raise funds for political organizations and that this practice raises ''a real risk of corruption.'' *Id.* at S5995. Not only does this statement fall short of a legislative finding based on record evidence, it identifies the risk of corruption as flowing from the political organization's receipt of contributions and from its making of coordinated expenditures — not from independent expenditures.

50 The defendants insist that Section 527(j) is not only narrowly tailored but ''an exact fit,'' because only those political organizations seeking a tax benefit need make any disclosures. (Doc. 35 at 21 n.6). The tailoring required by the First Amendment, however, is between the speech regulated and the government interest that supports regulation.

III. Fifth Amendment.

Section 527(j) requires disclosures by political organizations — organizations whose primary purpose is to influence electoral results. The plaintiffs argue that Section 527(j) violates the equal protection component of the Fifth Amendment's due process clause because it singles out political organizations for such disclosures without requiring them of organizations which similarly receive contributions and/or make expenditures for the purpose of influencing electoral results but which do not do so as their primary purpose. They point in particular to labor unions, social welfare organizations and other organizations exempt from tax pursuant to I.R.C. § 501.

"Generally, statutory classifications are valid [under equal protection analysis] if they bear a rational relation to a legitimate government purpose. Statutes are subject to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech . . . ." *Regan v. Taxation with Representation*, 461 U.S. 540, 547 [51 AFTR 2d 83-1294] (1983). In particular, strict scrutiny applies to "statutory classifications [that] imping[e] upon th[e] right . . . to engage in political expression." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 666 (1990). The plaintiffs argue that strict scrutiny applies to their equal protection challenge, while the defendants insist that rational basis scrutiny supplies the governing standard. As discussed below, each is partially correct.

Strict scrutiny is required under equal protection analysis if the statute "affect[s],"[51] "imping[es] upon,"[52] "infringes,"[53] "interferes with"[54] or "jeopardizes"[55] a fundamental right such as political expression. To invoke strict scrutiny it is not necessary that the statute *unconstitutionally* affect, impinge on, infringe, interfere with or jeopardize the fundamental right; rather, strict scrutiny is required if the statute limits, makes more difficult or otherwise burdens the exercise of the fundamental right. *See, e.g., Austin v. Michigan State Chamber of Commerce*, 494 U.S. at 658, 666 (where the statute "burden[ed] expressive activity," strict scrutiny applied to the plaintiff's equal protection challenge even though the statute did not *unconstitutionally* burden speech in violation of the First Amendment).[56]

As discussed in Part II, the expenditures of political organizations for electoral advocacy represent speech, and a statute such as section 527(j) that has the direct or indirect effect of limiting such expenditures ordinarily constitutes a burden on speech. However, a "legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Regan v. Taxation with Representation*, 461 U.S. at 549. Thus, the conditioning of a tax deduction or tax exemption, though it adversely impacts the taxpayer's speech, implicates only rational basis scrutiny. *See id.* (that the tax deductibility of contributions was conditioned on the recipient organization's refraining from substantial lobbying represented a decision not to subsidize speech and so was subject only to rational basis scrutiny). As discussed in Part II.A, with respect to contributions Section 527(j) does no more than offset a tax exemption/subsidy, but with respect to expenditures it results in the imposition of an additional exaction. Accordingly, rational basis scrutiny applies to the plaintiffs' equal protection challenge concerning disclosure of contri-

51 *E.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988).

52 *E.g., Austin v. Michigan State Chamber of Commerce*, 494 U.S. at 666.

53 *E.g., Regan v. Taxation with Representation*, 461 U.S. at 549.

54 *E.g., Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457–58 (1988).

55 *E.g., Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992).

56 Apparently just once has the Court suggested that strict scrutiny is triggered only if the burden on the fundamental right is of unconstitutional proportions. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976)("[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification *impermissibly* interferes with the exercise of a fundamental right . . . .")(emphasis added). The *Murgia* Court cited *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), for this proposition, but *Rodriguez* employed no such limiting adverb. *See id.* at 16. Given the wealth of contrary and more recent precedent, *Murgia* cannot represent current Supreme Court jurisprudence.

butions,[57] but strict scrutiny applies to their challenge concerning disclosure of expenditures.

A statutory classification satisfies rational basis scrutiny "'if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Board of Trustees v. Garrett*, 531 U.S. 356, 367 (2001)(quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). Although the basis for the statutory distinction need not be articulated by Congress, *id.*, the legislative history of Public Law 106-230 asserts that other tax-exempt organizations, such as labor unions and business organizations, are meaningfully different from political organizations. First, unlike political organizations, influencing electoral results is not the focus of other tax-exempt organizations. Second, some political organizations adopt unrevealing names that prevent the public from deducing who is funding them. *See* 146 Cong. Rec. S6041-06 at S6045 (daily ed. June 29,2000)(statement of Sen. McCain); *id.* S5994-03 at S5996 (daily ed. June 28, 2000)(statement of Sen. Lieberman).

The government "has no obligation to produce evidence to sustain the rationality of a statutory classification." *Heller v. Doe*, 509 U.S. at 320. Instead, the plaintiffs "bea[r] the burden of proving that the 'facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.'" *Kimel v. Florida Board of Regents*, 528 U.S. 62, 84 (2000)(quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). The plaintiffs have not seriously attempted to meet their burden.

As discussed in Part II.B, Section 527(j) was intended in part to further the governmental interest in providing voters with information concerning those supporting particular candidates. Given this interest, it would be rational for Congress to target those groups best able to influence electoral results, and Congress could have reasonably conceived that the overtly political purpose of political organizations tends to render them more effective sources of electoral advocacy than other tax-exempt organizations. Similarly, it would be rational for Congress to focus on those groups as to which the public is least able to glean the information independently, and Congress could have reasonably conceived that the supporters of political organizations are less susceptible to identification from the organization's name.

That these distinctions between political organizations and other tax-exempt organizations are imprecise is immaterial because "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe*, 509 U.S. at 321. That no record evidence supports the proposition that political organizations are in fact meaningfully different from other tax-exempt organizations engaged in electoral advocacy is immaterial because the burden is not on the defendants to demonstrate that Congress's underlying assumptions are correct but on the plaintiffs to demonstrate that Congress could not reasonably have believed that meaningful differences exist. Given the forgiving nature of the rational basis standard, the Court concludes that Section 527(j) does not violate the Fifth Amendment's equal protection guarantee by its failure to require other tax-exempt organizations engaged in electoral advocacy to make similar disclosures of contributions.

As noted, strict scrutiny applies to the plaintiffs' equal protection challenge to Section 527(j)'s expenditure disclosure requirements. "Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. at 666. The burden lies with the defendants to prove these elements. *E.g., Republican Party of Minnesota v. White*, ___ U.S.

[57] Strict scrutiny might nevertheless be required "if Congress were to discriminate invidiously in its subsidies in such a way as to ai[m] at the suppression of dangerous ideas." *Id.* at 548 (internal quotations omitted). Section 527(j), however, is viewpoint-neutral, applying to political organizations regardless of ideology. *See also* notes 17, 19, *supra*.

___, 122 S. Ct. 2528, 2534 (2002)(First Amendment challenge).

The *Austin* Court's analysis of an equal protection challenge to campaign finance legislation under the strict scrutiny standard is instructive. By statute, Michigan prohibited corporations from making independent expenditures in connection with state elections but excluded unincorporated labor unions and incorporated media organizations from the prohibition. 494 U.S. at 655, 665–68. The state argued that "the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption." *Id.* at 658.

The Supreme Court agreed that the corporate form, which is a creature of state law, assists corporations in attracting capital and increasing earnings, yet stockholders and customers of a corporation do not necessarily share its political views. Thus, the risk of corruption stemming from "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" constituted a compelling governmental interest in regulating corporate independent expenditures. *Id.* at 660.

After rejecting the plaintiff's First Amendment challenge, the Court turned to the plaintiff's equal protection challenge. The Court recognized for purposes of equal protection analysis the same "compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations." 494 U.S. at 666. The Court rejected the argument that the state law was not narrowly tailored to serve this interest due to its failure to reach independent expenditures by unincorporated labor unions; while such organizations may amass wealth as do corporations, they do so without the unique advantages conferred on corporations by state law. Moreover, expenditures by unions for political purposes are more likely to reflect the political views of their members since, unlike corporate shareholders, members retain the option of not supporting their union's political activities while reaping other benefits of membership. *Id.* at 665–66.

The exclusion for media corporations rested on different footing. Because such corporations, like those regulated by the statute, amass wealth, enjoy state-granted advantages in doing so, and have political views that do not necessarily parallel those of their shareholders, the state's decision to exclude independent expenditures by the media had to be "justified by a compelling state purpose." 494 U.S. at 667. The Court found a "valid distinction" between media corporations and other corporations in the media's "unique role" of "'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'" *Id.* at 667–68 (quoting *First National Bank v. Bellotti*, 435 U.S. 765, 781 (1978)). Extending the ban on independent expenditures to media corporations could "hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events"; avoiding this danger provided the state a "compelling reason" to treat media corporations differently from other corporations. *Id.* at 668.

Austin sets forth the appropriate analysis for considering equal protection challenges to governmental regulation of speech under the strict scrutiny standard. First, the government must articulate a compelling interest in regulating the speech at issue. While preventing actual or apparent corruption may constitute a sufficiently important interest for purposes of First Amendment analysis, *Buckley v. Valeo*, 424 U.S. at 66–67, for purposes of equal protection analysis the governmental interest must be articulated with more refinement, so that it provides guidance as to why apparently similarly situated groups are being treated differently. Thus, in *Austin* the governmental interest was not simply to combat actual or perceived corruption in general but to do so by addressing a particular form of corruption — that incident to the use of wealth amassed with government-bestowed

advantages to express political views unsupported by the speaker's owners.

Next, the government must demonstrate that its regulation is narrowly tailored to advance its compelling interest. In the First Amendment context, this analysis is directed to whether the statute regulates more speech, or regulates it more severely, than is necessary to serve the government's interest. *E.g., Republican Party of Minnesota v. White*, ___ U.S. at ___, 122 S. Ct. at 2534–35. In the equal protection context, the inquiry is whether the statute improperly excludes groups that share the same critical characteristics identified in the government's articulation of its compelling interest. If, as with the unincorporated labor unions in *Austin*, the group does not in fact share these critical characteristics, the inquiry is at an end. If, as with the media corporations in *Austin*, the group does share these critical characteristics, the government must demonstrate a compelling reason for nevertheless excluding the group from regulation.

As discussed in Part IIB, providing voters with information concerning those supporting particular candidates and combating actual or perceived corruption constitute, in some applications, suffi-ciently important governmental interests for purposes of First Amendment analysis. To survive the plaintiffs' equal protection challenge under the strict scrutiny standard, however, the defendants must identify characteristics of political organizations that render them, but not other tax-exempt organizations that similarly engage in elec-toral advocacy, fit subjects for requiring disclosures of expenditures. Although the defendants have not done so, as discussed above the legislative history of Public Law 106-230 identifies two defining characteris-tics of political organizations: (1) their pri-mary purpose is to influence electoral re-sults; and (2) the public cannot identify their supporters from their names. While these explanations suffice to sustain Sec-tion 527(j)'s contribution disclosure re-quirements under the lenient rational basis standard, as discussed below they are in-sufficient to uphold its expenditure disclo-sure requirements under the strict scrutiny standard.

It is true that tax-exempt organizations other than political organizations do not share the characteristic of having a primary purpose of influencing electoral results. Nothing in the record, however, explains why it is less important to require disclosures of their expenditures for electoral advocacy than it is to provide similar disclosures of expenditures by political organizations. It cannot be the single-mind-edness of political organizations engaged in electoral advocacy as a primary purpose, because there is no record evidence that other tax-exempt organizations are any less zealous when engaged in electoral advo-cacy as a secondary purpose. It cannot be the amount of money so expended, be-cause there is no record evidence as to the relative amounts of expenditures by these groups, and it is undisputed that tax-exempt organizations other than political organizations spend many millions of dollars on electoral advocacy.[58] That, for purposes of rational basis scrutiny, Congress could have reasonably conceived these facts to be true is no substitute, under the strict scrutiny standard, for proof that they are indeed true. In short, while a primary purpose of influencing electoral results may be a technical distinction between political organizations and other tax-exempt organizations, it has not been shown to represent a meaningful difference in a critical characteristic justifying different expenditure disclosure requirements.[59]

[58] The defendants have not challenged the plaintiffs' assertion, based on a university-connected political center's report, that the majority of "issue advocacy" advertisements during the 1996 election cycle were conducted by organizations other than Section 527 political organizations. (Doc. 20 at 13). Nor have they challenged the plaintiff's assertion, based on a New York Times article, that organized labor expected to spend $75,000,000 on political activities in the year 2000. (*Id.*). The expenditures on electoral advocacy by a single large tax-exempt organization not subject to Section 527(j) could easily dwarf the combined expenditures of dozens or even hundreds of political organizations.

[59] The defendants suggest that, unlike political organizations, tax-exempt organizations whose primary purpose is not electoral advocacy probably receive many contributions unrelated to electoral advocacy. (Doc. 16 at 28). Assuming the proposition to be true despite the lack of record evidence, a distinction concerning *contributions to* these organizations cannot support disparate treatment in the disclosure of *expenditures by* these organizations.

Nor is there any record evidence that political organizations are more likely to adopt unrevealing names than other tax-exempt organizations. Of the nine original organizational plaintiffs in this action, for example, only one — Citizens for Reform — could plausibly be said to possess a cryptic name. Equally cryptic names can be found in the reported cases involving social welfare organizations tax-exempt under I.R.C. § 501(c)(4). *See, e.g., "Americans United" Inc. v. Walters*, 477 F.2d 1169, 1172 [31 AFTR 2d 73-582] (D.C. Cir. 1973), *rev'd*, 416 U.S. 752 [33 AFTR 2d 74-1289] (1974); *Federal Election Commission v. Public Citizen, Inc.*, 64 F. Supp. 2d 1327, 1328 (N.D. Ga. 1999), *vacated*, 268 F.3d 1283 (11th Cir. 2001); *Ohio Citizen Action v. City of Seven Hills*, 35 F. Supp. 2d 575, 581 (N.D. Ohio 1999).[60]

Moreover, Congress considered the obscurity of organizational names problematic because it "ma[kes] it hard to guess even the types of members funding political advocacy on behalf of each 527, much less their identities." 146 Cong. Rec. S6041-06 at S6045 (statement of Sen. McCain); *accord id.* S5994-03 at S5996 (statement of Sen. Lieberman). While disclosing *contributions* would address Congress's concern about hidden sources of funding to political organizations, disclosing *expenditures*could not possibly do so. Accordingly, even if there were evidence that political organizations are more likely to adopt obscure names than other tax-exempt organizations engaged in electoral advocacy, such a distinction would not constitute a meaningful difference in a critical characteristic justifying disparate expenditure disclosure requirements.

In assessing the government's articulated distinctions between regulated and unregulated groups, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Missouri Government PAC*, 528 U.S. at 391. The defendants have failed to show that the distinctions between political organizations and other tax-exempt organizations on which Congress relied both exist in fact and represent meaningful differences in critical characteristics rather than merely technical distinctions. Nor are the existence and constitutional significance of such distinctions so well established or so plain as to obviate their proof.

Because the defendants have not shown that political organizations possess critical characteristics supporting an expenditure disclosure requirement, which characteristics are not shared by other tax-exempt organizations engaged in electoral advocacy, they must demonstrate that Congress's differential treatment of political organizations is "justified by a compelling [governmental] purpose." *Austin v. Michigan State Chamber of Commerce*, 494 U.S. at 667. The defendants have not attempted to identify such a compelling purpose, and the only one suggested by the legislative history of Public Law 106-230 is that extending Section 527(j)'s disclosure requirements to such organizations would raise constitutional concerns under *Buckley*. 146 Cong. Rec. S6041-06 at S6045 (statement of Sen. McCain). It may be assumed for purposes of argument that Congress would have a compelling interest in treating other tax-exempt organizations differently than political organizations if it would be a violation of the First Amendment to treat them the same. *Cf. Shaw v. Hunt*, 517 U.S. 899, 915–16 (1996)(assuming for purposes of argument that avoiding liability under Section 2 of the Voting Rights Act could constitute a compelling state interest). As discussed below, however, Congress could have constitutionally required other tax-exempt organizations to disclose their expenditures.

By definition, tax-exempt organizations other than political organizations do not have as their primary purpose the influencing of electoral results. Thus, as discussed in Part II.B, *Buckley* teaches that disclosure requirements as to such organizations

[60] It appears that even Citizens for Reform was originally a Section 501(c)(4) organization. *See* 146 Cong. Rec. S5994-03 at S5995 (statement of Sen. Lieberman).

must be limited to express electoral advocacy. Because Section 527(j) requires disclosures of expenditures *not* employed for express electoral advocacy, its expenditure disclosure requirements cannot be freely extended to organizations whose primary purpose is not to influence electoral results.

As discussed in Part II.A, however, *Taxation with Representation* modifies this principle with respect to organizations receiving a federal tax subsidy. Because such subsidies are a matter of legislative grace, Congress may condition a tax exemption on the disclosure of information without offending the First Amendment. At least to the extent that other tax-exempt organizations receive contributions for electoral advocacy, Congress could constitutionally have conditioned the tax-exempt status of the recipient organization, or of this income, on the organization's disclosure of expenditures along the lines required of political organizations.

Section 527(j) includes both a disclosure requirement and an enforcement method. While the enforcement method chosen by Congress could not constitutionally have been imposed on other tax-exempt organizations without modification,[61] the disclosure requirement itself could constitutionally have been imposed on such organizations. Thus, the potential unconsti-tutionality of requiring other tax-exempt organizations engaged in electoral advo-cacy to disclose expenditures does not fur-nish a compelling reason for treating such organizations more favorably than political organizations with respect to the disclosure of expenditures.

Because the defendants have failed to establish that political organizations possess critical characteristics that justify treating them differently than other tax-exempt organizations engaged in electoral advocacy, and because they have failed to establish any compelling reason for treating political organizations differently despite the lack of critically different characteristics, the Court concludes that Section 527(j) violates the equal protection component of the Fifth Amendment's due process clause to the extent it requires political organizations to disclose expenditures.[62]

IV. Tenth Amendment.

''The constitutional power of Congress to regulate *federal* elections [including both congressional and presidential primaries and general elections] is well established . . . .'' *Buckley v. Valeo*, 424 U.S. at 13 & n.16 (emphasis added)(citing U.S. Const. art. I, § 4). The plaintiffs argue that Congress lacks a similar power to regulate state and local elections, so that Section 527(j) violates the Tenth Amendment to the extent it purports to require disclosures of political organizations operating in the state and local arena.

''The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.'' U.S. Const. amend. X. The Tenth Amendment ''could only 'reserve' that which existed before, [as] '[n]o state can say, that it has reserved, what it never possessed.''' *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 802 (1995)(quoting 1 Joseph Story, Commentaries on the Constitution of the United States § 627 (3rd ed.

61 As noted, Section 527(j) does not simply withdraw the tax exemption of a political organization that does not disclose expenditures as required; instead, it imposes a penalty that often will exceed the political organization's tax exemption. This enforcement approach does not offend the First Amendment as applied to political organizations because, since their primary purpose is to influence electoral results, disclosure of their expenditures may be required under *Buckley* independently of any tax exemption. With respect to other tax-exempt organizations, however, whose primary purpose is not to influence electoral results, *Buckley* authorizes disclosure only of expenditures used for express electoral advocacy. To reach less direct forms of electoral advocacy by such organizations, resort to the tax subsidy rationale of *Taxation with Representation* is necessary. Thus, Congress could not constitutionally have imposed on other tax-exempt organizations the same penalty on undisclosed expenditures that it imposed on political organizations, since such a penalty could well exceed the organization's tax exemption. Congress could, however, have devised an enforcement scheme that would do no more than offset or remove the organization's tax exemption.

62 An eleventh-hour alteration to the House bill apparently changed the sanction for non-disclosure from removal of tax-exempt status to the penalty provision ultimately enacted. *See* 146 Cong. Rec. S6041-06 at S6047 (statement of Sen. Reed). Had Congress phrased Section 527(j) so that a political organization declining to disclose its expenditures could not lose more than its tax exemption, the plaintiffs' First Amendment and equal protection challenges would have been subject to, and presumably a victim of, the forgiving scrutiny demanded by *Taxation with Representation*. The Court, however, must construe Section 527(j) as written, not as it might have been written.

1858)).[63] Thus, the threshold issue in Tenth Amendment analysis is whether the subject matter which the federal law addresses is one that, but for the Constitution, would be subject to state sovereignty.

"'The Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections.'" *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)(quoting *Oregon v. Mitchell*, 400 U.S. 112, 124–25 (1970)(opinion of Black, J.)); *accord Gregory v. Ashcroft*, 501 U.S. 452, 461–62 (1991). *Oregon v. Mitchell* concerned the qualifications of voters in state and local elections, *Gregory* the qualifications of state officeholders. The power to prescribe such qualifications "inheres in the State by virtue of its obligation ... 'to preserve the basic conception of a political community.'" *Sugarman v. Dougall*, 413 U.S. at 647 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)). The defendants do not dispute that the regulation of electoral advocacy in connection with state and local elections is similarly an attribute of state sovereignty.

That an activity is an attribute of state sovereignty establishes that it *may* be reserved to the states but does not establish that it *is* in fact so reserved. Nor does the text of the Tenth Amendment resolve the issue, because it expresses only the "tautology," inherent in a Constitution of limited and enumerated federal powers, that whatever is not conferred on the federal government or prohibited to the states is by process of elimination reserved to the states. *New York v. United States*, 505 U.S. 144, 156–57 (1992). Thus, analysis under the Tenth Amendment largely defers to analysis under Article I, for if the power Congress exercised was delegated to it, that power cannot have been reserved to the states. *Id.* at 155, 159. This does not render the Tenth Amendment irrelevant, because it serves as a reminder that federal power is not unlimited and that, absent a sufficiently clear delegation to Congress, federalism concerns may weigh against an interpretation of the enumerated power that would infringe on a core aspect of state sovereignty. *See id.* at 157.[64]

Before considering the *power* of Congress to impose disclosure requirements on political organizations engaged in state and local electoral advocacy, the *intent* of Congress to do so must first be considered. Congress cannot abrogate the states' Eleventh Amendment immunity unless its intent to do so is "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985). In *Gregory v. Ashcroft*, the Court adopted a similar "plain statement rule" as part of its Tenth Amendment analysis. 501 U.S. at 461, 464. Although the parties do not address the plain statement rule or even acknowledge its existence, the Court concludes that it is satisfied.

Gregory involved the application of the Age Discrimination in Employment Act ("ADEA") to state judges. The *Gregory* Court described the establishment of the qualifications of state judges as being not simply "an area traditionally regulated by the State" but one through which "a State defines itself as a sovereign." 501 U.S. at 460. Subsequent Supreme Court cases suggest that *Gregory*'s plain statement rule does not automatically apply whenever a Tenth Amendment challenge is asserted but only when the federal regulation at issue impinges on an "essential" state function, one "'of the most fundamental sort for a sovereign entity.'" *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998); *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 732 n.5 (1995)(quoting *Gregory v. Ashcroft*, 501 U.S. at 460); *see also BFP v. Resolution Trust Corp.*, 511 U.S. 531, 566 n. 17 (1994)(Souter, J., dissenting)(the plain statement rule applies to infringements on

[63] For example, the Tenth Amendment could not reserve to the states any power to regulate election to Congress, because the institution and its offices did not exist prior to adoption of the Constitution. *Cook v. Gralicke*, 531 U.S. 510, 522 (2001).

[64] For example, even when an enumerated power such as the Commerce Clause authorizes Congress to legislate in an area that would otherwise be reserved to the states, the Tenth Amendment limits Congress's ability to do so by issuing directives to the states as sovereigns. *See Reno v. Condon*, 528 U.S. 141 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). Because Section 527(j) operates only against private parties and not the state, it is unnecessary to consider the parameters of these limitations.

state powers '''at the heart of representative government''')(quoting *Gregory v. Ashcroft*, 501 U.S. at 463).

Gregory confirms that establishing the qualifications of state officeholders falls within the essential, fundamental core of state sovereignty. Establishing the regulations, if any, governing electoral advocacy in connection with the selection of state officeholders is a step removed from this core attribute of state sovereignty, but it is not a large step. ''Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution,'' and independent expenditures represent ''political expression 'at the core of our electoral process.''' *Buckley v. Valeo*, 424 U.S. at 14, 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)). Surely this speech is as integral to state and local governments as to their national counterpart and control of it as central to state as to national sovereignty.[65]

Applying the plain statement rule to Section 527(j), the Court concludes that Congress has indeed expressed its intention to require disclosures of political organizations engaged in state and local electoral advocacy in unmistakably clear language in the statute itself. The term ''political organization'' is defined to include any organization whose primary purpose is to influence the selection of any individual for state or local office. I.R.C. § 527(e)(1)–(2). Any political organization that has given notice under Section 527(i) is subject to the disclosure requirements of Section 527(j) unless expressly excluded by that subsection. The sole exclusion conceivably exempting political organizations engaged in state and local electoral advocacy reaches ''any State or local committee of a political party or political committee of a State or local candidate.'' *Id.* § 527(j)(5)(B). By its terms this exclusion applies only to a subset of those political organizations engaged in state and local electoral advocacy, leaving all others subject to Section 527(j)'s disclosure requirements.

A ''committee of a political party'' plainly cannot extend to a political organization not affiliated with a political party. The term ''political committee of a State or local candidate,'' while somewhat less precise, cannot plausibly be stretched to mean, ''all political organizations engaged in state or local electoral advocacy.'' Section 527 identifies a ''committee'' as only one form of organization constituting a political organization, 26 U.S.C. § 527(e)(1), so that an exclusion for a ''committee'' cannot be an exclusion for other forms of organization falling within Section 527. Moreover, the only committees excluded are those ''of'' a state or local candidate; this possessive preposition cannot reasonably be read as extending the exclusion beyond a candidate's own campaign committee.[66]

In *Gregory*, the ADEA plainly covered state employees, but the statute contained an exclusion for ''appointee[s] on the policymaking level,'' language so vague that it was not unmistakably clear that judges were outside the exclusion. 501 U.S. at 467; *see also Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. at 209. Here, in contrast, it is unmistakably clear that the statutory exclusion does not reach all political organizations engaged in state and local electoral advocacy. It is unnecessary for present purposes to define the precise parameters of Section 527(j)(5)(B)'s exclusion; whatever the universe of political organizations it may exempt from Section 527(j)'s disclosure requirements, it does not exempt them all. Accordingly, be-

65 It is true that Section 527(j) requires only disclosure of contributions and expenditures and that *Buckley* considered such disclosures under Section 434(e) to be a ''minimally restrictive'' means of combating campaign corruption and ignorance. 424 U.S. at 68, 82. That disclosure requirements ordinarily represent a minimal intrusion on the *First* Amendment, however, does not mean that they are a minimal intrusion on the *Tenth* Amendment. At any rate, application of the plain statement rule is triggered when the federal regulation impinges on a sufficiently core aspect of state sovereignty, not merely when it impinges on that aspect to some threshold degree.

66 The plain statement rule depends on an examination of statutory language. Thus, sufficiently clear statutory language is dispositive even if legislative history or other sources demonstrate that Congress did not in fact anticipate the statute's extension into an area of state sovereignty. *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. at 212. Nevertheless, the Court notes that the Internal Revenue Service construes Section 527(j)(5)(B) so that ''[a]ll other political organizations [than those listed], including state and local political action committees, are subject to the reporting requirements of § 527(j), even if they file reports with state or local election agencies.'' Rev. Rul. 2000-49.

cause Congress has adequately expressed its intent to subject political organizations engaged in state and local electoral advocacy to Section 527(j)'s disclosure requirements, the issue becomes whether the power Congress exercised in enacting Section 527(j) was delegated to it by the Constitution.

The defendants admit that "the federal government has no interest in regulating state and local elections." (Doc. 44 at 14). The admission is appropriate. *See Oklahoma v. United States Civil Service Commission*, 330 U.S. 127, 143 (1947)("[T]he United States is not concerned with, and has no power to regulate, local political activities as such of state officials . . . ."). However, "the Tenth Amendment has been consistently construed 'as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.'" *Id.* (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)); *accord Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 766 (1982). Thus, as previously noted, if Congress acted within the scope of one or more of its enumerated powers in ex-tending Section 527(j)'s disclosure requirements to political organizations engaged in state and local electoral advocacy, it cannot have violated the Tenth Amendment.

The defendants identify only Congress's taxing power as supporting Section 527(j)'s application to state and local electoral advocacy. The plaintiffs question whether Article I and the Sixteenth Amendment grant Congress the power to require disclosures of contributions and expenditures for state and local electoral advocacy. Even if such power exists, they continue, Congress did not in fact exercise its taxing power when it enacted Section 527(j). Because it is dispositive, the Court turns first to the plaintiffs' latter contention.

By requiring disclosures of contributions and expenditures for state and local electoral advocacy, Section 527(j) has the effect of regulating an area whose regulation is reserved to the states. However, because "[e]very tax is in some measure regulatory, . . . a tax is not any the less a tax because it has a regulatory effect." *Sonzinsky v. United States*, 300 U.S. 506, 513 [18 AFTR 1171] (1937). Nevertheless, "there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment." *Child Labor Tax Case*, 259 U.S. 20, 38 [3 AFTR 3156] (1922). At that point, the statute violates the Tenth Amendment. *Id.*

The placement of Section 527(j) along this scale depends on whether Congress intended to exercise its constitutional power to tax or intended instead to regulate state and local electoral advocacy. *Child Labor Tax Case*, 259 U.S. at 36; *Sonzinsky v. United States*, 300 U.S. at 514; *cf. A. Magnano Co. v. Hamilton*, 292 U.S. 40, 44–45, 46 (1934)(applying *Child Labor* to a due process challenge to a state statute). Were the Court permitted to consider the legislative history of Section 527(j) in gauging Congress's purpose, the matter would be quickly settled: the Congressional Record is replete with descriptions of Public Law 106-230 as "campaign finance" legislation, the purpose of which is to coerce political organizations into disclosing their larger contributions and expenditures.[67] The complete absence of any reference to a tax purpose simply underscores the lack of any legislative purpose other than regulation of electoral ad-

[67] "This is a vote for campaign finance reform." 146 Cong. Rec. S6041-06 at S6046 (statement of Sen. McCain); *see also id.* at S6043 (statement of Sen. Moynihan); *id.* at S6045 (statement of Sen. Snowe); *id.* at S6047 (statement of Sen. Lieberman); *id.* S5994-03 at S5995 (statement of Sen. Feingold); *id.* H5282-01 at H5284 (daily ed. June 27, 2000)(statement of Rep. Houghton); *id.* at H5285 (statements of Reps. Doggett, Archer, Moore and Castle); *id.* at H5286 (statements of Reps. Meehan, Lewis and McDermott); *id.* at H5287 (statements of Reps. Barrett and Frank); *id.* at H5288 (statement of Rep. Morella); *id.* at H5289 (statement of Rep. Coyne).

vocacy.[68] In short, there is not the slightest doubt that Congress in fact in-tended Public Law 106-230 as a regulation of state and local electoral advocacy and not as a tax measure.

For purposes of Tenth Amendment analysis, however, resort to legislative history will not do. *United States v. Kahriger*, 345 U.S. 22, 27 [43 AFTR 93] (1953), *overruled in part on other grounds, Marchetti v. United States*, 390 U.S. 39 [21 AFTR 2d 539] (1968); *Sonzinsky v. United States*, 300 U.S. at 513–14. Instead, ''we must construe the law and interpret the intent and meaning of Congress from the language of the act'' itself. *Child Labor Tax Case*, 259 U.S. at 36. It must appear on ''the face of the act'' that Congress intended to regulate rather than exercise its taxing power. *Id.* at 38, 39, 41, 43; *cf. Magnano Co. v. Hamilton*, 292 U.S. at 44–45, 46 (applying *Child Labor* to a state statute). A mixed motive of both tax and regulation will not support a Tenth Amendment challenge, even if the regulatory purpose predominates; rather, Congress's purpose must be ''*solely* ... the advancement of some other purpose plainly within state power.'' *Child Labor Tax Case*, 259 U.S. at 43 (emphasis added); *accord United States v. Sanchez*, 340 U.S. 42, 44 [39 AFTR 994] (1950) (''[A] tax does not cease to be valid merely because ... the revenue purpose of the tax may be secondary ....''). In gleaning Congress's purpose from the statute, ''[t]he words are to be given their ordinary meaning unless the context shows that they are differently used.'' *Child Labor Tax Case*, 259 U.S. at 36.

In *Child Labor, Kahriger* and *Sonzinsky*, the exactions at issue were designated by Congress as taxes. In contrast, Congress designated the exactions for failure to make required disclosures under Section 527(j) as a ''penalty.'' *See* 148 F. Supp. 2d at 1278. ''[A] penalty, as the word is here used [in contradistinction to a tax], is an exaction imposed by a statute as punishment for an unlawful act.'' *United States v. La Franca*, 282 U.S. 568, 572 [9 AFTR 985] (1931); *see also United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213, 224 [77 AFTR 2d 96-2562] (1996)(''[I]f the concept of penalty means anything, it means punishment for an unlawful act or omission.''). Both the ordinary meaning of a ''penalty''[69] and the meaning recognized by the Supreme Court[70] confirm that Congress used the term ''penalty'' to denote its understanding that Section 527(j) imposes a sanction for an unlawful omission — the failure to disclose contributions and expenditures for slate and local electoral advocacy. Indeed, as discussed in the Court's previous opinion, it is plain from any number of perspectives that Section 527(j) imposes a penalty and not a tax. *See* 148 F. Supp. 2d at 1278–81.[71]

The plaintiffs, relying on *Child Labor*, assume that Section 527(j)'s status as a penalty is dispositive of the Tenth Amendment issue. (Doc. 4 at 26). The *Child Labor* Court, however, used the term ''penalty'' to describe an enactment that, while purporting to be an exercise of the taxing

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[68] An almost identical version of Section 527(j) was introduced in the Senate as an amendment to the Department of Defense authorization bill in early June 2000. The main difference was that the earlier version would have eliminated the tax exemption of a non-disclosing political organization rather than imposing a penalty as under Section 527(j). 146 Cong. Rec. S6041-06 at S6047 (statement of Sen. Reed). In response to concerns that, at least technically, the amendment should originate in the House of Representatives as a revenue measure, its supporters insisted that the amendment ''is not a revenue raiser.'' 146 Cong. Rec. S4722-02 at *S4782 (daily ed. June 8, 2000)(statement of Sen. Levin). According to Senator Lieberman, ''[t]his is about political freedom, about electoral reform, about disclosure to the public. It is hardly at all, if at all, a revenue measure.'' *Id.* at *S4777.

[69] *See, e.g.*, Webster's Third New International Dictionary Unabridged 1668 (1986).

[70] Congress is presumed to appreciate relevant Supreme Court precedent when it enacts legislation. *E.g., Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990).

[71] The defendants, citing *Turnbull v. United States*, 929 F.2d 173 [67 AFTR 2d 91-895] (9th Cir. 1991), argue that Section 527(j) should be considered a ''tax'' rather than a ''penalty'' because it ''does no more than impose the equivalent of the tax imposed by Section 527(i)(4)'' and so operates as a sort of substitute tax. (Doc. 35 at 10 n.3). As a threshold matter, and as established in Part II.A, Section 527(j) in fact exacts more than the amount of the tax imposed by Section 527(i)(4). More fundamentally, a political organization subject to the disclosure requirements of Section 527(j) is not subject to taxation under Section 527(i)(4); such an organization, by giving notice under Section 527(i), has become subject to taxation only under Sections 527(b) and (c), which grant the organization a tax exemption. As noted in text *infra*, a political organization that fails to make disclosures does not lose this tax exemption. Thus, Section 527(j) does not '''brin[g] to the government only the same amount to which it was entitled by way of the tax.''' *Turnbull v. United States*, 929 F.2d at 178 n.6 (quoting *Newsome v. United States*, 431 F.2d 742, 745 [26 AFTR 2d 70-5078] (5th Cir. 1970)). Rather, Section 527(j) imposes an exaction *in addition to* the political organization's tax liability and cannot be other than a penalty.

power, demonstrates on its face that it is instead an attempt to regulate in a forbidden area. That is, as used by the *Child Labor* Court, a ''penalty'' constitutes a shorthand rendition of the conclusion that an enactment violates the Tenth Amendment. It does not express or confine the analysis required for reaching that conclusion, and it does not authorize the courts to condemn a statute as unconstitutional simply because it calls itself a penalty.

Similarly, the plaintiffs suggest that an enactment that does not ''result in the collection of some revenue'' cannot represent a valid exercise of the taxing power and must therefore represent unconstitutional regulation in an area reserved to the states. While a proper tax statute raises revenue if obeyed, they observe, Section 527(j) raises revenue only if disobeyed. (Doc. 4 at 26). The cases on which the plaintiffs rely involved exactions that purported to be ''taxes,'' and ''[t]axes are customarily enacted to raise revenue to support the costs of government.'' *Department of Revenue v. Kurth Ranch*, 511 U.S. 767, 787 (1994). The failure of a statute that purports to raise revenue to do so is strong if not conclusive evidence that Congress intended instead to exercise a forbidden power. This principle, however, has no application when, as here, the exaction does not purport to be a ''tax'' but a ''penalty.'' Penalties by definition raise no revenue unless some legal obligation is disobeyed, but that of itself cannot render them infringements on the Tenth Amendment.

That Section 527(j) imposes a penalty is significant, however, because it frames the remaining analysis. ''Penalty provisions in tax statutes added for breach of a regulation concerning activities in themselves subject only to state regulation have caused this Court to declare the enactments invalid,'' *United States v. Kahriger*, 345 U.S. at 31, and Section 527(j) fits this pattern. Such a penalty evinces Congress's intent to regulate rather than tax if the regulation it enforces is ''extraneous to any tax need'' and not ''supportable as in aid of a revenue purpose.'' *Id.; Sonzinsky v. United States*, 300 U.S. at 513; *Child Labor Tax Case*, 259 U.S. at 43 (''[T]he provisions of the so-called taxing act must be naturally and reasonably adapted to the collection of the tax . . . .''). *see also Charles Steward Machine Co. v. Davis*, 301 U.S. 548, 591 [19 AFTR 510] (1937); *Nigro v. United States*, 276 U.S. 332, 341 (1928). The rule is appropriate, since an enactment that does not serve a revenue purpose must serve a regulatory one instead.

The defendants assert that the revenue purpose served by Section 527(j) is that of ''ensuring that federal subsidies are not used in a manner that might lead to corruption or would conceal the source of campaign-related spending from the public.'' (Doc. 44 at 14). In fact, however, and as discussed in Part II.A, Section 527(j) does not content itself with offsetting a federal subsidy but continues to exact its penalty long after the benefits of any tax exemption have been exhausted. To the extent that Section 527(j) exacts a penalty in excess of the political organization's tax exemption, it is patently imposed purely for the purpose of coercing disclosures and cannot possibly be viewed as being ''in aid of a revenue purpose.'' It cannot be other than ''a penalty to coerce people of a state to act as Congress wishes them to act in respect of a matter completely the business of the state government under the federal Constitution.'' *Child Labor Tax Case*, 259 U.S. at 39.

Even to the extent that Section 527(j) neutralizes the effect of a tax exemption, it does not do so in aid of a revenue purpose. A regulation may be in aid of a revenue purpose if it assists the Commissioner in identifying taxpayers, confirming they are employing the correct tax status, determining the fact or amount of tax liability, or collecting the tax owed.[72] Section 527(j), however, serves none of these purposes. Any taxpayer identification function is per-

[72] A penalty, of course, raises revenue if the regulation it enforces is violated. This incidental revenue effect cannot satisfy the Tenth Amendment because it is the regulation the penalty enforces, and not the penalty itself, that must be in aid of a revenue purpose. *United States v. Kahriger*, 345 U.S. at 31. The penalty, despite any revenue it may incidentally generate, remains fundamentally not a revenue measure but ''punishment for an unlawful act or omission.'' *United States v. Reorganized CF&I Fabricators*, 518 U.S. at 224.

formed by Section 527(i), which requires political organizations seeking tax-exempt status to file a prescribed notice. Section 527(j)'s disclosures cannot be used to confirm that an organization claiming tax-exempt status truly has a principal purpose of electoral advocacy, because it requires disclosures of only a subset of the organization's contributions and expenditures. *See also* 148 F. Supp. 2d at 1279–80.[73] Section 527(j) obviously does not assist in collecting the tax imposed by Section 527(b).

Nor does Section 527(j) assist in determining the fact or amount of a political organization's tax liability. Section 527(i)(4) renders all income of a political organization subject to tax. Sections 527(c) and (i) then provide a tax exemption if and when the political organization files the required notice. If the political organization subsequently makes disclosures under Section 527(j), its tax exemption and tax liability cannot be affected regardless of what the disclosures reveal. Similarly, if the organization fails to make disclosures, it does not lose its tax exemption, in whole or in part; instead, it incurs a separate penalty. Because a political organization's tax liability is not affected by the content of its disclosures or by the failure to make disclosures, Section 527(j) cannot assist in determining the fact or amount of tax liability.

That Section 527(j) does not aid a revenue purpose but only a regulatory one is underscored by the scope of its exaction. As noted, Section 527(j) continues to exact a penalty even after it has offset a political organization's entire tax exemption. If, as the defendants claim, its purpose was a revenue one associated with political organizations' tax exemption, the penalty would be capped at the amount of the exemption. That its penalty continues unabated beyond this point plainly exposes the scheme for what it is — an effort to regulate state and local electoral advocacy absent any revenue purpose.

The defendants, (Doc. 44 at 14), object that "[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of the courts." *Sonzinsky v. United States*, 300 U.S. at 513–14; *accord Fernandez v. Wiener*, 326 U.S. 340, 362 [34 AFTR 276] (1945); *cf. A. Magnano Co. v. Hamilton*, 292 U.S. at 44 (applying the rule to a state statute). The objection places the cart before the horse; the first inquiry is whether Congress in fact "exercise[d] a power constitutionally conferred upon it," and this determination is made from the face of the act itself, not from "hidden" sources. Because it is plain from the face of Section 527(j) that Congress did not exercise its constitutionally conferred taxing power, the inquiry prohibited by *Sonzinsky* is a moot point.

In summary, even when the taxing power authorizes Congress to legislate in an area otherwise reserved to the states, a statute still violates the Tenth Amendment if it was not enacted pursuant to that power. Whether a statute was enacted pursuant to Congress's taxing power depends on Congress's purpose as disclosed on the face of the act itself. If the statute may plausibly be viewed as an exercise, at least in part, of the taxing power, Congress is conclusively presumed to have acted in the exercise of that power. That a statute cannot plausibly be viewed as an exercise of the taxing power because it serves no revenue purpose establishes that Congress's purpose was to regulate in a forbidden area rather than to exercise its taxing power. Because Section 527(j) is not a revenue measure and does not serve any revenue purpose, the Court concludes that on its face Section 527(j) reflects Congress's purpose to regulate state and local electoral advocacy and not to exercise its taxing power.[74] Accordingly, Section 527(j) violates the Tenth Amendment to the extent that it purports to require disclosures of

[73] Any such function is performed by the disclosures required by Section 6033(g) and implementing Form 990.

[74] Because Congress has the power to regulate federal elections, *Buckley v. Valeo*, 424 U.S. at 13, it has concomitant power to enforce its regulation. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 393 [24 AFTR 956] (1940)("Congress may impose penalties in aid of the exercise of any of its enumerated powers."). To the extent that it reaches federal electoral advocacy, it is thus immaterial whether Section 527(j) represents a valid exercise of Congress's taxing power.

contributions and expenditures in connection with state and local advocacy.[75]

More difficult is the question whether the taxing power delegated to Congress encompasses the power to enact legislation like Section 527(j) to begin with. As noted, while the Tenth Amendment does not reserve to the states that which has been delegated to the federal government, the federalism concerns that the Tenth Amendment embodies counsel hesitation before construing Congress's enumerated powers to intrude upon the core aspects of state sovereignty. Just as the Tenth Amendment limits Congress's power to is-sue directives to the states as sovereigns, *see* note 64, *supra*, it may limit Congress's power to regulate state and local electoral advocacy by the simple expedient of mak-ing such regulation a condition of preferen-tial tax treatment. If Article I and the Six-teenth Amendment empower Congress to enact Section 527(j), they appear equally to empower Congress to offer favorable tax treatment, for example, to newspapers in exchange for publishing (or refusing to publish) editorials or advertisements concerning state and local elections; to citizens in exchange for voting (or not voting) by absentee ballot in state and local elections; to state and local judicial candidates in exchange for announcing (or refusing to announce) their positions on particular issues; and to political organizations in exchange for supporting only major (or minor) party candidates in state and local elections. Such measures are unlikely and would of course implicate other constitutional issues, but they would be perfectly consonant with the Tenth Amendment.

The defendants have not offered, and the Court has not identified, any precedent for such a massive intrusion into this core area of state sovereignty.[76] The Supreme Court did uphold the Hatch Act against a Tenth Amendment challenge in *Oklahoma v. United States Civil Service Commission*, 330 U.S. 127 (1947), but its regulation of the political activity of state officials was a condition of the *state's* receipt of a financial benefit (through application of the Spending Clause). Because the benefit was extended to the states, each was given the opportunity to weigh its practical and philosophical objections to federal regulation of state and local political activity against the benefits of federal funding and accept or reject the federal regulation as its balancing demanded. Section 527(j) offers the states no similar choice, because the financial benefit is extended to private parties and not the state. Even if a state were empowered to accept an otherwise unconstitutional infringement on its sovereignty,[77] a citizen cannot accept that infringement as proxy for the state.

Because Congress did not in fact exercise its taxing power, Section 527(j) violates the Tenth Amendment regardless of whether the taxing power, as informed by the Tenth Amendment, is so extensive as to allow the enactment of such a statute. Accordingly, the Court pretermits further discussion of Congress's power to extend Section 527(j) to state and local electoral advocacy.

V. Severability.

The Court has concluded that Section 527(j) is constitutional to the extent that it requires disclosures of contributions in connection with federal electoral advocacy. Whether this portion of Section 527(j) may stand alone is a question of legislative intent: "'Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the in-valid part may be dropped if what is left is fully operative as a law.'" *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526

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[75] Because (as applied to contributions) Section 527(j) has the effect of offsetting a tax exemption, it is not subject to scrutiny under the First Amendment and survives rational basis scrutiny under the Fifth Amendment. *See* Parts II.A, III, *supra*. Section 527(j) nevertheless violates the Tenth Amendment as applied to contributions because its *effect* of offsetting a tax exemption does not disclose a revenue *purpose*.

[76] The only known decisions from the Eleventh Circuit and its predecessor addressing Tenth Amendment challenges to federal regulation of state and local electoral activity did not involve Congress's taxing power or the conditioning of a federal benefit on the acceptance of federal regulation. *See United States v. Bowman*, 636 F.2d 1003 (5th Cir. 1981)(prosecution for paying persons to vote in an election involving federal, state and local races); *United States v. Tonry*, 605 F.2d 144 (5th Cir. 1979)(conditioning probation on the probationer's refraining from running for political office or engaging in political activity).

[77] *See New York v. United States*, 505 U.S. at 182 ("The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed . . . .").

U.S. 172, 191 (1999)(quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)).

Section 527(j) is ''fully operative as a law'' if limited to the disclosure of contributions in connection with federal electoral advocacy because it is not ''incapable of functioning independently.'' *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987). Disclosures of contributions may easily be had even if disclosures of ex-penditures may not, and disclosures of contributions in connection with federal electoral advocacy may easily be had even if disclosures in connection with state and local electoral advocacy may not.

Congress plainly would have enacted legislation requiring disclosure of contributions in connection with federal electoral advocacy even had it known that Section 527(j) would be declared unconstitutional in its other applications, because this was the clear thrust of the legislation. Much of the floor debate concerning Public Law 106-230 emphasized the need for disclosure of contributions in connection with federal elections, with comparatively few references to the disclosure of expenditures or to disclosures in connection with state and local electoral advocacy.[78] It is far from ''evident'' on this record that Congress would have preferred no regulation to the regulation of contributions in connection with federal electoral advocacy.[79] On the contrary, the Court ''can find no reason why, in light of Congress' basic objective . . . , Congress would have pre-ferred no provisions at all to [a] provision standing by itself [which is] capable of functioning on its own [and which] still helps to achieve that basic objective.'' *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, 518 U.S. 727, 768 (1996)(plurality opinion). Accordingly, the unconstitutional applications of Section 527(j) are severable from its constitutional applications.

CONCLUSION

For the reasons set forth above, the Court concludes that I.R.C. § 527(j) is unconstitutional to the extent it requires disclosures of contributions and expenditures in connection with state and local electoral advocacy and to the extent it requires disclosures of expenditures. Accordingly, to this extent the plaintiffs' motion for summary judgment is granted and the defendants' motion for summary judgment is denied. The Court further concludes that Section 527(j) is constitutional to the ex-tent it requires disclosures of contributions in connection with federal electoral advocacy. Accordingly, to this extent the plaintiffs' motion for summary judgment is denied and the defendants' motion for summary judgment is granted. Judgment shall be entered accordingly by separate order.

DONE this 27 day of August, 2002.

RICHARD W. VOLLMER JR.

SENIOR UNITED STATES DISTRICT JUDGE

DECLARATORY JUDGMENT

RICHARD W. VOLLMER, JR. SENIOR UNITED STATES DISTRICT JUDGE

NATIONAL FEDERATION OF REPUBLICAN ASSEMBLIES, ALABAMA REPUBLICAN ASSEMBLY, MOBILE REPUBLICAN ASSEMBLY, HOWARD JARVIS TAXPAYERS ASSOCIATION, HOWARD JARVIS TAXPAYERS ASSOCIATION POLITICAL ACTION COMMITTEE, LIBERTARIAN NATIONAL COMMITTEE, and PAUL HAUGHTON, Plaintiffs v. UNITED STATES OF AMERICA, JOHN D. ASHCROFT, In his official capacity as the United States Attor-

[78] *See, e.g.*, 146 Cong. Rec. S5994-03 at *S5995 (statement of Sen. Lieberman)(''These groups exploit a recently discovered loophole in the tax code that allows organizations seeking to influence federal elections to fund their election work with undisclosed and unlimited contributions at the same time as they claim exemption from both Federal taxation and the Federal election laws.''); *id.* S6041-06 at *S6044 (statement of Sen. Levin)(''[W]e aren't closing the so-called 527 loophole here today — we are forcing the disclosure of the contributors who use the loophole.'').

[79] Congress considered Public Law 106-230 as an important ''first step'' towards reforming the campaign finance system. *See, e.g.*, 146 Cong. Rec. S5994-03 at *S5997 (statement of Sen. McCain); *id.* at *S5999 (statement of Sen. Schumer); *id.* S6041-06 at *S6046 (statement of San. Snowe); *id.* H5282-01 at H5284 (statement of Rep. Houghton); *id.* at H5286 (statement of Rep. Lewis); *id.* at *H5287 (statement of Rep. Barrett). Given the importance of this ''first step,'' it is inconceivable that Congress would have desired that the entire step be nullified if any portion of it were declared unconstitutional. On the contrary, Congress believed that ''some disclosure is better than no disclosure.'' *Id.* S6041-06 at *n S6042 (statement of Sen. Roth).

ney General[1] PAUL H. O'NEILL, In his official capacity as the Secretary of the Treasury[2] and DAVID A. YORK, In his official capacity as the United States Attorney for the Southern District of Alabama[3] Defendants

CIVIL ACTION NO. 1:00-0759-RV-C

In accordance with the court's order entered on the same date as the date of this judgment, the court hereby DECLARES that Internal Revenue Code § 527(j) is:

(1) CONSTITUTIONAL TO THE EXTENT THAT it requires disclosure of contributions in connection with federal electoral advocacy;

(2) UNCONSTITUTIONAL TO THE EXTENT THAT it requires disclosure of expenditures in connection with federal electoral advocacy; and

(3) UNCONSTITUTIONAL TO THE EXTENT THAT it requires disclosure of contributions and expenditures in connection with state and/or local electoral advocacy.

Defendants, their employees, agents, and all persons acting at defendants' request or direction are hereby ENJOINED from enforcing the herein-declared unconstitutional portions of I.R.C. § 527(j).

DONE this 27 day of August, 2002.

RICHARD W. VOLLMER, JR.

SENIOR UNITED STATES DISTRICT JUDGE

¶2002-5339

UNITED STATES OF AMERICA, PLAINTIFF v. Ransom M. CARDWELL and Reba CARDWELL, DEFENDANTS. U.S. District Court, Western Dist. of North Carolina, (DC NC) Civil No. 5:01cv72-V, Aug. 7, 2002. Year 1987. Decision for Govt.

1. Recovery of erroneous refunds—default judgment. Govt. was granted default judgment against taxpayers for erroneous refund plus interest. *Reference:* United States Tax Reporter ¶74,025.01(95); 74,055.01(5). IRC §7402; 7405.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA,

ORDER GRANTING DEFAULT JUDGMENT

Having considered the United States' motion for default judgment, together with the memorandum of law in support thereof, the Affidavit of Charles Little, and the Declaration of Dara B. Oliphant, and having further considered defendants' opposition, if any, the Court concludes that the motion should be granted. Accordingly, it is this 7th day of AUG., 2002, ORDERED AND ADJUDGED as follows:

1. **[1]** The United States' motion for default judgment is granted.

2. A judgment shall be entered in favor of the United States and against defendants Ransom M. Cardwell and Reba Cardwell for an erroneous tax refund, of $24, 482.26 plus interest for the tax year 1987 in the sum certain amount of $31,267.72 plus interest according to 28 U.S.C. § 1961(c) and 26 U.S.C. § 6621 from June 30, 2002.

3. The Clerk shall distribute conformed copies of this order to the parties listed below.

4. The Clerk shall enter judgment accordingly.

/s/

United States District Judge

8-7-02

¶2002-5340

Benny and J. Ruth MULLINS, PLAINTIFFS v. UNITED STATES OF

[1] In accordance with Federal Rule of Civil Procedure 25(d)(1), the now-current United States Attorney General is automatically substituted as a party.

[2] In accordance with Rule 25(d)(1), the now-current Secretary of the Treasury is automatically substituted as a party.

[3] In accordance with Rule 25(d)(1), the now-current United States Attorney for this federal district is automatically substituted as a party.

AMERICA, DEFENDANT. U.S. District Court, Eastern Dist. of Tennessee, (DC TN) No. 3:01-CV-171 Aug. 6, 2002. Years 1995, 1996, 1997. Decision for Govt. in part.

1. Refund actions—discovery—protective orders—depositions. Magistrate judge granted govt.'s motion in taxpayers' refund action for protective order barring deposition of IRS Appeals officer who reviewed deficiency exam and evaluated case for settlement purposes, based on govt.'s statement that neither officer's testimony nor report would be relied on as evidence in instant matter. But, magistrate denied protective order barring F.R.Civ.P. 30(b)(6) deposition of IRS: taxpayers weren't asking for judicial review of IRS's administrative action, but to obtain testimony that govt.'s assessment was unjustified and without evidentiary foundation. *Reference:* United States Tax Reporter ¶74,225.05(65); 74,336.516(10). IRC §7422.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF TENNESSEE AT KNOXVILLE,

MEMORANDUM AND ORDER

Thomas W. Phillips UNITED STATES MAGISTRATE JUDGE

[1] Before the court is defendant United States' motion for a protective order barring the deposition of Elaine Rhoton [Doc. 15], and defendant's motion for a protective order barring the Rule 30(b)(b) deposition of the Internal Revenue Service [Doc. 17]. The undersigned heard oral argument on the motions on August 5, 2002.

I.

The United States requests a protective order barring the deposition of Elaine Rhoton in this case. In support of its motion, defendant states that this a tax refund suit in which plaintiffs seek to recover monies paid over to the United States as taxes. Defendant would show that tax auditor Velvet Cole performed the examination which disallowed deductions for plaintiff's expenses from cattle raising, based on her determination that plaintiffs did not engage in cattle raising with the intent of realizing a profit. The proposed deponent, Elaine Rhoton, is the appeals officer who reviewed the deficiency examination and evaluated the case for settlement purposes. Plaintiffs faxed a subpoena to the United States scheduling the deposition of Elaine Rhoton for May 31, 2002. The United States contends that Ms. Rhoton has no personal knowledge of the factual matters relating to plaintiffs' cattle raising, therefore, her deposition is not reasonably calculated to lead to the discovery of admissible evidence.

Plaintiffs respond in opposition stating that defendant provided Ms. Rhoton's report as part of its Rule 26 initial disclosures, thereby identifying the report and its author as a document and an individual that defendant may use at trial to support its claims or defenses. Therefore, plaintiffs aver they should be allowed to discover Ms. Rhoton's knowledge of the facts in this case [Doc. 19].

Plaintiff's suit for refund is a *de novo* proceeding in which the court is required to undertake a comprehensive redertermination of plaintiff's income tax liabilities for the tax periods in dispute. *See Lewis v. Reynolds,* 284 U.S. 281, 283 [10 AFTR 773] (1932); *Cleveland Trust Co. v. United States,* 421 F.2d 475, 482 [25 AFTR 2d 70-1487] (6th Cir. 1970). "The court does not review the action of the Commissioner, for there is in fact, no record to review . . . . Thus, the court does not sit in judgment of the Commissioner; the court places itself in the shoes of the Commissioner," *National Right to Work Legal Def. & Educ. Foundation v. United States, 487 F.Supp. 801, 805 [45 AFTR 2d 80-764] (E.D.N.C. 1979)I.*

At the hearing held in conjunction with the pending motion, counsel for the United States stated that defendant would not call Ms. Rhoton as a witness nor would defendant seek to introduce her report as evidence in this case. Plaintiffs have already deposed the tax auditor, Velvet Cole, who performed the IRS examination and who subsequently recommended that plaintiffs'

deductions be disallowed. Base upon the statement of the government that neither the testimony of Ms. Rhoton nor her report will be relied on as evidence in this case, it does not appear to the undersigned that the deposition of Ms. Rhoton is reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the United States' motion for a protective order barring the deposition of Elaine Rhoton [Doc. 15] will be GRANTED at this time. However, if during the course of discovery, it becomes apparent that Ms. Rhoton's report or testimony becomes relevant to the issues to be decided in this case, plaintiffs may request the court for an order to take her deposition.

II.

The United States also seeks a protective order barring the Rule 30(b)(6) deposition of the Internal Revenue Service in this case. Defendant states that Velvet Cole is the only IRS representative with any personal knowledge of factual matters relating to plaintiff's cattle raising because she was the person who gathered the pertinent facts during the audit. Moreover, plaintiffs are in possession of all the facts relevant to the issue of whether plaintiffs were engaged in raising cattle with the primary purpose and intent of realizing a profit. Identification of legal issues and/or the opinions and conclusions of IRS employees is not a proper use of discovery, defendant argues. Therefore, the Rule 30(b)(6) deposition of the IRS is not reasonably calculated to lead to the discovery of admissible evidence and the court should bar plaintiffs from taking a Rule 30(b)(6) deposition of the IRS in this case.

Plaintiffs have responded in opposition, stating that in addition to seeking a refund of taxes paid for the years 1995, 1996, and 1997, they are also seeking a determination by the court that the government's position was not substantially justified, was arbitrary and unenforceable, and was without rational or evidentiary foundation. Plaintiffs aver that unless they are allowed to take appropriate discovery regarding the justification for the government's position, they will be unduly hamstrung in proving their theories on these issues, which form a substantial part of their case.

The government has argued that the Rule 39(b)(6) deposition of the IRS is not reasonably calculated to lead to the discovery of admissible evidence. The court does not agree. Plaintiffs are not asking the court to engage in a judicial review of the administrative action below, but rather seek to elicit testimony that the government's assessment was unjustified and without evidentiary foundation. The undersigned finds that plaintiffs' case would be unduly hamstrung were the court to deny discovery regarding the justification for the government's position. Plaintiffs should be allowed to adduce evidence in order to establish their contention that the assessment was erroneous. The government will have ample opportunity to object to the disputed evidence when, and if, it is offered at trial. *See Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir.) *cert. denied*, 423 U.S. 987 (1975). Therefore, for the reason stated, the United States' motion for a protective order barring the Rule 30(b)(6) deposition of the Internal Revenue Service [Doc. 17] is DENIED.

IT IS SO ORDERED.

ENTER:

Thomas W. Phillips

UNITED STATES MAGISTRATE JUDGE

¶2002-5341

Justin M. TUCHSCHERER, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT and THIRD-PARTY PLAINTIFF v. Michael R. SIMMONS, 5812 Jerry Lane Louisville, KY 40248-0000, THIRD-PARTY DEFENDANT. U.S. District Court, Western Dist. of Kentucky, (DC KY) Civil No. 3:00CV-438-H, Aug. 15, 2002. Years 1995, 1996. Decision for Govt.

1. 100% penalty for failure to pay over trust fund taxes—default judgment. 3d party's IRC §6672 penalty liability was upheld on default judgment.

Reference: United States Tax Reporter ¶66,725.02(40). IRC §6672.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY LOUISVILLE DIVISION,

JUDGMENT

[1] Upon consideration of the United States' Motion For Entry of Default Judgment Against Third-Party Defendant Michael R. Simmons and

The Court finding that good cause exits for granting said motion, it is hereby

ORDERED that the United States' Motion For Entry of Default Judgment Against Defendant Michael R. Simmons be and is GRANTED; and it is further

ORDERED that JUDGMENT be and hereby is entered in favor of the United States and against the defendant, Michael R. Simmons in connection with a 100 percent penalty assessed pursuant to 26 U.S.C. Section 6672 in the amount of $10,007.89, representing taxes withheld from the wages paid to the employees of Simmons Cabinets, Inc. during the fourth quarter of 1995 and the first and second quarters of 1996 but not paid over to the IRS., plus statutory additions accruing thereon according to law after June 30, 2002, until paid in full.

Dated: August 15, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5342

Theresa J. TURLEY, ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Western Dist. of Missouri, (DC MO) Case No. 02-4066-CV-C-NKL, Aug. 22, 2002. Decision for Govt. in part.

1. Actions against U.S.—unauthorized disclosure of return information—stay of proceedings. Govt. was granted 6-month stay of taxpayers' wrongful disclosure action: although taxpayers showed that IRS agents' disclosures of their return information damaged their business and reputation, allowing civil case to proceed would frustrate both IRS's ongoing criminal investigation and any future prosecution. Also, limited stay would promote judicial economy and efficiency in instant matter; and public interest in enforcement of internal revenue laws outweighed taxpayers' right to proceed with litigation, even if in good faith. *Reference:* United States Tax Reporter ¶74,315.01; 61,035.12(30). IRC §6103; 7431.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI CENTRAL DIVISION,

ORDER

NANETTE K. LAUGHREY United States District Judge

Pending before the Court is Defendant's Motion for Stay of Proceedings [Doc. # 6]. For the reasons stated below, the Motion will be granted in part and denied in part.

I. Factual Background

In 1999, Plaintiff Theresa J. Turley began doing business as AA Cleaning and, in May of 2000, she formed Plaintiff Labor Resources, L.L.C., for the purposes of finding and providing workers for temporary staffing needs in the hotel industry. (Compl. at ¶ 4). On or about September 20, 2001, Plaintiffs were visited by Internal Revenue Service (''IRS'') Special Agent Robert Jackson and another agent, who advised Plaintiffs that they were the subject of a criminal investigation. (Compl. at ¶ 8). On April 17, 2002, Plaintiffs filed a Complaint pursuant to 26 U.S.C. § 7431 seeking to recover actual and punitive damages and attorneys fees as the result of alleged wrongful disclosures of their tax return information and other wrongful conduct by agents of the IRS. In particular, the Complaint alleges that IRS Special Agent Jackson made two hundred thirty-one disclosures of confidential return information in violation of 26 U.S.C. § 6103 during the course of a pending criminal tax investigation of Plaintiffs. (Compl. at ¶ 9). Plaintiffs allege that Special Agent Jackson's disclosures included statements to

third-parties that Plaintiffs and other individuals were criminals, money launderers, involved in a grand conspiracy, employing ''illegals,'' using fraudulent social security numbers, filling out I-9 forms improperly, not paying taxes on their workers, running a scam, etc., and that those statements caused clients to terminate their contracts with Plaintiffs and have damaged their business. (Compl. at ¶s 9, 11). In addition, Plaintiffs assert that Special Agent Jackson attempted to influence witnesses through trickery and deceitful tactics such as appearing at witness interviews unannounced and threatening witnesses with criminal sanctions. (Compl. at ¶ 10). The United States filed its Answer to the Complaint on June 14, 2002, and is currently required to make its initial Fed. R. Civ. P. 26(a)(1) disclosures no later than September 6, 2002. The information that must be disclosed under that rule includes the name, address, and telephone number of those individuals likely to possess discoverable information, as well as a copy of, or description by category and location of, all documents that the Government may use to support its defenses.

II. Discussion

[1] The Government argues that to permit Plaintiffs' civil case to proceed during the pendency of the IRS's criminal investigation and any resulting prosecution would give Plaintiffs earlier and greater access to the evidence gathered during that investigation than they would otherwise be entitled to under the Federal Rules of Criminal Procedure. As a result, Plaintiffs would be able to construct defenses, tamper with potential evidence, intimidate potential witnesses, and otherwise interfere with both the investigation and any future prosecution (*See* Decl. of Special Agent Jackson at ¶s 6–7). Plaintiffs respond that the Government's arguments are merely speculation and conjecture because they focus upon the release of information anticipated to be sought by Plaintiffs and Special Agent Jackson's conclusory and defamatory assertions as to the conse-quences of releasing such information to the Plaintiffs. Plaintiffs further contend that the Government's concerns can be ade-quately addressed through an appropriate protective order under Fed. R. Civ. P. 26(c), if and when it becomes necessary, and that pretrial discovery limited to the il-legal disclosures of return information will not impose an impermissible burden on the IRS's criminal tax investigation.

Under certain circumstances, a court may, in its discretion, grant a stay of a pending civil action in order to avoid interfering in a pending criminal prosecution or grand jury investigation. The rationale behind such a stay is that a litigant should not be allowed to use the liberal discovery procedures applicable to a civil suit to avoid restrictions on criminal discovery and obtain documents he would not otherwise be entitled to for use in his criminal suit. *Campbell v. Eastland*, 307 F.2d 478, 488 [10 AFTR 2d 5279] (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963). In addition, courts will grant a stay of a civil case in order to preserve a defendant's ability to assert his Fifth Amendment privilege in a criminal proceeding that involves the same subject matter. *See U.S. v. Certain Real Property and Premises Known as 1344 Ridge Road, Laurel Hollow, Syosset, N.Y.*, 751 F.Supp. 1060, 1062 (E.D. N.Y. 1989) (stating ''[t]he noncriminal proceeding, if not deferred, might undermine the party's Fifth Amendment privilege against self-incrimination, expand rights of criminal discovery beyond the limits of Federal Rule of Criminal Procedure 16(b), expose the basis of the defense to the prosecution in advance of criminal trial, or otherwise prejudice the case.'').

Courts make the determination to stay proceedings ''in the light of the particular circumstances of the case.'' *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 993 (1980). ''In the absence of substantial prejudice to the rights of the parties involved, such parallel [civil and criminal] proceedings are unobjectionable under our jurisprudence.'' *Id.* at 1374. In deciding whether or not to grant a stay, courts must balance the right of the civil litigant to a reasonably prompt

determination of his claims with the public interest in law enforcement. *Campbell*, 307 F.2d at 487. In making this determination, courts generally weigh several factors, including: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation. *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 325 (9th Cir. 1995), *cert. denied*, 516 U.S. 827 (1995); *Nowaczyk v. Matingas*, 146 F.R.D. 169, 175 (N.D. Ill. 1993); *White v. Mapco Gas Products, Inc.*, 116 F.R.D. 498, 502 (E.D. Ark. 1987). The Court will consider each of these factors in the context of this case below.

A. Plaintiffs' Interest in Proceeding Expeditiously

Plaintiff's argue that the IRS agents' improper activities have negatively impacted their business and financial interests, and they seek a money judgment against the United States for damages suffered as a result of the IRS agent's conduct. The Government responds that Plaintiffs will not be harmed by a stay of the civil litigation, because the remedy of money damages will survive any criminal proceedings that might result from the current investigation and the Plaintiffs may resume this civil action at the conclusion of any criminal proceedings. In fact, "plaintiffs may actually benefit from a stay since the completion of the ... investigation and the resolution of any criminal cases might reduce the scope of discovery in the civil case or simplify the issues." *White*, 116 F.R.D. at 502. In addition, the Plaintiffs will then be able to conduct discovery "unaffected by the complicating factor of a parallel criminal proceeding." *Campbell*, 307 F.2d at 492. Although Plaintiffs will have an opportunity to proceed with their civil action after any criminal proceedings are resolved, the Plaintiffs have demonstrated that the IRS agents' disclosures have damaged and may continue to damage the Plaintiffs' business and reputation, and this factor weighs against staying the civil litigation.

B. Burden Imposed on Defendants

Plaintiffs contend that the Government would not be impermissibly burdened by allowing this civil case to proceed because the civil action relates only to the illegal disclosures of return information, other unacceptable conduct by Special Agent Jackson, and damages, and not to the IRS's criminal tax investigation. Plaintiffs assert that they will confine the scope of their discovery to these issues, and the Government's concerns can be addressed through an appropriate protective order, if necessary. While Plaintiffs have not yet initiated formal discovery or demonstrated an intention to use civil discovery to gain access to witnesses or information gathered during the course of the IRS's criminal investigation, the mandatory disclosure rules applicable to civil cases require the Government to voluntarily disclose to Plaintiffs the names of actual and potential witnesses, as well as a copy of, or description by category and location of, all documents that the Government may use to support its defenses. *See* Fed. R. Civ. P. 26(a)(1). As the Government points out, giving Plaintiffs access to that information at this point in the proceedings may frustrate both the ongoing investigation and any future prosecution. At the same time, it is unlikely that the Government can discover the full depth of Plaintiff Turley's knowledge of the relevant facts as the pendency of any criminal prosecution will enable her to assert her Fifth Amendment right against self-incrimination in response to the Government's discovery requests in the civil case. *See United States v. Kordel*, 397 U.S. 1, 7–8 (1970).

Even if Plaintiffs did not initiate this suit in an effort to circumvent the Federal Rules of Criminal Procedure, Plaintiffs' good faith is irrelevant. As the Fifth Circuit noted in *Campbell*:

> [T]he trial judge held that the suit for refund was a bona fide suit, and as such,

> it was completely ''independent'' of the criminal case. If a taxpayer files suit in bad faith, it is an abuse of process; but his good faith on a suit for refund does not sanctify the motion for discovery. We take the view that whether or not the suit, as distinguished from the motion, was bona fide, the effect of granting the motion was to give pre-trial discovery of documents denied the taxpayer in the criminal case.

Campbell, 307 F.2d at 488. Therefore, regardless of Plaintiffs' motives in filing their civil case, the Government has demonstrated that its criminal investigation will be impaired if discovery in Plaintiffs' civil case is allowed to proceed, and this factor weighs heavily in favor of staying the civil proceedings.

C. Burden on the Court

As counts in similar cases have recognized, the Court has competing concerns in deciding whether to stay a case. First, the Court has ''an interest in moving the cases on its docket to an expeditious conclusion.'' *Nowaczyk*, 146 F.R.D. at 175. However, the ''[r]esolution of the related criminal matter may eliminate much of the Court's work in the civil action'' by simplifying the issues or eliminating the conflict concerning Plaintiffs' potential assertion of the Fifth Amendment privilege, which should allow civil discovery to proceed more smoothly. *White*, 116 F.R.D. at 502. In a case such as this, where the Government's criminal investigation has not yet proceeded to the point of indictment, the Court is reluctant to grant a stay because it is uncertain how long the stay will persist. Nevertheless, the Court believes that a stay of limited duration will promote judicial economy and efficiency in this case.

D. Public Interest and Interests of Non-Parties

The public would appear to have an interest in the denial of the stay, because if IRS agents continue to make improper disclosures of return information, other individuals may be subjected to similar abuses. However, the public also has an interest in the fair and effective enforcement of internal revenue laws. As the Fifth Circuit stated, ''[a]dministrative policy gives priority to the public interest in law enforcement. This seems so necessary and wise that a trial judge should give substantial weight to it in balancing the policy against the right of a civil litigant to a reasonably prompt determination of his civil claims.'' *Campbell*, 307 F.2d at 487. In a case such as this, where there is no class action lawsuit or imminent threat of harm to the public at large, the Court finds that the public interest in the enforcement of internal revenue laws outweighs the right of two plaintiffs to promptly proceed with their civil litigation.

After a consideration of the competing interests listed above, the Court finds that allowing Plaintiffs to proceed with civil discovery will impose an impermissible burden on the Government's criminal investigation. However, the Court also recognizes Plaintiffs' important interest in proceeding with their civil litigation. Therefore, the Court will grant a six-month stay of Plaintiffs' civil case. If an indict-ment, if any, is issued in the criminal case, it should be issued within that six-month period. Otherwise, the Court will recon-sider the stay of the civil case in six months.

III. Conclusion

Accordingly, it is hereby

ORDERED that Defendant's Motion for Stay of Proceedings [Doc. #6] is GRANTED IN PART and DENIED IN PART. Plaintiffs' civil case is stayed for six months from the date of this Order.

s/ Nanette K. Laughrey

NANETTE K. LAUGHREY

United States District Judge

Dated: August 22, 2002

Kansas City, Missouri

¶2002-5343

In Re: CM HOLDINGS, INC.; Camelot Music, Inc.; G.M.G. Advertising and

Grapevine Records and Tapes, Inc., Debtors. INTERNAL REVENUE SERVICE v. CM HOLDINGS, INC., APPELLANT. U.S. Court of Appeals, Third Circuit, (CA3) No. 00-3875, Aug. 16, 2002. Judgment entered in accord with (2002, CA3) 90 AFTR 2d 2002-5850, affirming (2000, DC DE) 86 AFTR 2d 2000-6470, 254 BR 578, 2000-2 USTC ¶50791. Earlier proceeding at (1998, DC DE) 82 AFTR 2d 98-6436, 221 BR 715. Years 1991, 1992, 1993, 1994. Decision for Govt.

1. Interest deductions—corporate owned life ins. policy loan interest—sham transactions—substance vs. form—business purpose—genuine debt—shams in fact—safe harbor relief—4-out-of-7 rule—level premiums—accuracy-related substantial understatement penalties—substantial authority; reasonable cause. 3d Cir. entered judgment in accord with its separate opinion affirming district court. *Reference:* United States Tax Reporter ¶1635.004(5); 1635.004(17); 2645.05(10); 79,007.15(15); 79,007.07(10); 2645.13(5); 1635.004(15); 79,007.13(5); 77,025.01(10); 2645.13(15); 79,007.01(23); 66,625.01(10). IRC §163; 264; 6662; 7702.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,

Appeal from the United States District Court for the District of Delaware (D.C. Civil Action No. 97-cv-00695)

Before: SLOVITER, NYGAARD and AMBRO, Circuit Judges

JUDGEMENT

District Judge: Honorable Murray M. Schwartz

This cause came on to be heard on the record before the United States District Court for the District of Delaware and was argued October 30, 2001;

On consideration whereof,

[1] IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated October 16, 2000, is hereby affirmed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/

Acting Clerk

Dated: August 16, 2002

¶2002-5344

IN RE: WPG, INC., Debtor. INTERNAL REVENUE SERVICE, APPELLANT v. DISTRICT OF COLUMBIA, ET AL., APPELLEES. U.S. District Court, Dist. of Columbia, (DC DC) Civil Action No.: 01-2338 (RMU), Aug. 19, 2002. Judgment entered in accord with (2002, DC DC) 90 AFTR 2d 2002-5881, affirming Bankruptcy Court, (2001, Bktcy Ct Dist Col) 88 AFTR 2d 2001-5166, 266 BR 773. Decision against Govt.

1. Tax claims in bankruptcy—lien priority—District of Columbia tax claims vs. federal tax liens—choateness—nonbankruptcy law; controlling law. District court entered judgment in accord with its separate opinion affirming bankruptcy court. *Reference:* United States Tax Reporter ¶63,215.04(5); 68,726.54. IRC §6321.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,

ORDER

Ricardo M. Urbina United States District Judge

Affirming the Bankruptcy Court's Ruling

[1] For the reasons stated in this court's Memorandum Opinion separately and contemporaneously issued this 19th day of August, 2002, it is hereby

ORDERED that the ruling of the U.S. Bankruptcy Court is AFFIRMED.

SO ORDERED.

Ricardo M. Urbina

United States District Judge

¶2002-5345

UNITED STATES OF AMERICA, PLAINTIFF v. Lloyd F. and Maria D. PETILLO, ET AL., DEFENDANTS. U.S. District Court, Dist. of New Jersey, (DC NJ) Civil No. 01-CV-6187 (GEB), Aug. 5, 2002. Decision for Govt.

1. Actions to reduce assessments to judgment—foreclosure—final judgment. Final judgment was entered reducing taxpayers' tax liabilities to judgment, without prejudice to govt.'s right to reopen proceedings to pursue its foreclosure claim.

Reference: United States Tax Reporter ¶74,035.01(30). IRC §7403.

CHRISTOPHER J. CHRISTIE United States Attorney
SUSAN STEELE Assistant U.S. Attorney
ISAAC D. PAXMAN (IP 9459) Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 227 Ben Franklin Station Washington, D.C. 20044 Telephone: (202) 353-2260 Counsel for the United States of America

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY TRENTON DIVISION,

ORDER DIRECTING ENTRY OF FINAL JUDGMENTS AGAINST LLOYD F. PETILLO AND MARIA D. PETILLO ON COUNT 1

The Court finds that there is no just reason to delay entry of final judgments against Lloyd F. Petillo and Maria D. Petillo on Count 1 of the United States' complaint, which is a count to reduce federal tax liabilities to judgment.

Accordingly, the Clerk of the Court is directed to enter final judgments against Lloyd F. Petillo and Maria D. Petillo on Count 1 of the United States' complaint.

Date: August 5, 2002.

/s/

UNITED STATES DISTRICT JUDGE

ORDER ADMINISTRATIVELY TERMINATING CASE

[1] It is this day ordered that this matter be and hereby is administratively terminated, without prejudice to the right of the parties to reopen the proceedings for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation. This order is particularly without prejudice to the right of the United States to reopen the proceedings as it deems necessary to pursue its claim to foreclose federal tax liens, in the event that Ocwen Federal Bank, FSB v. Petillo, et al., (Docket No. F16477-01, Superior Court of New Jersey, Chancery Division, Monmouth County), the state court action through which the taxpayers' real property is anticipated to be sold, proceeds in a manner or yields a result that is unsatisfactory to the United States.

Date: August 5, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5346

Daniel KOBY, PLAINTIFF v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 99-317C, Aug. 29, 2002. Earlier proceeding at (2000, Ct Fed Cl) 86 AFTR 2d 2000-5194, 47 Fed Cl 99. Decision against Govt.

1. Seizure and sale—contracts—failure to provide notice—damages—proof. Govt.'s attempt to limit 3d-party purchaser's damages from IRS's breach of original contract for auction sale of taxpayer's former property was rejected: govt. didn't prove that purchaser could have mitigated his damages if he had participated in 2d auction, which was required as result of govt.'s failure to notify taxpayer of 1st auction and at which property was resold at lower price. Also, govt. didn't show purchaser's damage theories were unviable. But, whether or to what extent he was entitled to damages depended on remaining fact issues concerning whether taxpayer

would have redeemed property after original auction if he had received proper notice thereof and whether purchaser was legally required to make certain repairs to property before that redemption period expired. *Reference:* United States Tax Reporter ¶63,355.01(10); 74,336.510(45). IRC §6335; 6337.

Thomas R. Lamons, Santa Ana, California, and Arthur A. Oshiro, Saavedra & Zufelt, Long Beach, California, counsel for plaintiff.
Kyle Chadwick, U.S. Department of Justice, Washington, D.C., with whom was Assistant Attorney General Robert D. McCallum, Jr., for defendant.

United States Court of Federal Claims,

OPINION

ALLEGRA, J.

This contract case is before the court after trial in Pasadena, California. Previously, this court ruled that the Internal Revenue Service (IRS) breached a contract with plaintiff when it voided the sale of property it had seized from another individual for the payment of taxes. See Koby v. United States, 47 Fed. Cl. 99 [86 AFTR 2d 2000-5194] (2000). At issue here is defendant's affirmative defense that plaintiff failed properly to mitigate the damages incurred following this breach. The parties have also presented legal arguments anticipating plaintiff's damage theories, in an effort to streamline proof should a future trial on damages prove necessary. After careful consideration of the evidence presented at trial, as well as the parties' pretrial filings and post-trial briefs, the court finds that defendant's mitigation claim is not well-taken. The court also concludes that plaintiff's damage theories all pass preliminary muster, with their ultimate viability and dollar impact dependent on facts yet to be developed.

I. FACTS[1]

On March 25, 1997, the Internal Revenue Service ("IRS") seized a 20-unit apartment complex located in Oceanside, California (the "Oceanside property") due to the nonpayment of internal revenue taxes by the property's owner, Ronald D. Bachrach. That same day, the IRS issued a Notice of Public Auction Sale, which stated that on April 30, 1997, the Oceanside property would be sold at public auction pursuant to section 6335 of the Internal Revenue Code of 1986, 26 U.S.C. § 6335 (1994). The revenue officer responsible for the seizure and sale of the Oceanside property was Michael Rude, a twenty-year veteran of the IRS. Following IRS procedure, Mr. Rude prepared for the auction by completing a minimum bid worksheet on the property. That worksheet established the minimum acceptable price for sale, a price that incorporated Mr. Rude's assessment of the market value of the property, discounted to reflect the circumstances of the forced sale and any prior encumbrances.

In determining the market value of the property, Mr. Rude considered its location, condition and potential rental income stream. His assessment relied heavily on his personal judgment of the physical appearance of the property, which he based on a site visit. According to his testimony, he found the complex to be "run down" with "trash everywhere" and significant deferred maintenance. It was also located in an area he considered to be "very poor" with "high crime." The minimum bid worksheet prepared for the April 30th auction listed the value of the property as $300,000, with a corresponding minimum bid of $30,549.

Before the auction, Mr. Rude made several announcements to the thirteen assembled bidders. Critically, he indicated that the IRS had complied with all of the required procedures, including notifying Mr. Bachrach, the taxpayer- owner. He also reminded the bidders that the taxpayer had a statutory right to redeem the property within 180 days of the sale and, therefore, warned the successful bidder not to expend money on the property during that period.

[1] Additional facts concerning the breach of contract here may be found in this court's earlier opinion, 47 Fed Cl. at 100–02, and are incorporated herein by reference.

Daniel Koby was the successful bidder at the April 30th auction, proffering $171,000 for the Oceanside property. Mr. Koby marshaled the funds to purchase the property by borrowing against his assets, drawing from personal savings, and partnering with his brother, Alan Koby, who sold stocks and secured an advance on his credit card in order to contribute money to the venture.

Soon after the sale, Mr. Koby felt compelled to address what he considered to be significant safety and health hazards on the property. These included such things as trash and dangerous debris in common areas, faulty wiring, leaky plumbing and defective venting, as well as various security problems (e.g., broken exterior lights). At trial, he testified that he believed that, under California law, he was obligated immediately to remedy these conditions, rather than awaiting the October 29, 1997, expiration of the taxpayer redemption period.

On June 27, 1997, the IRS determined that Mr. Rude had not provided proper statutory notice of the sale to Mr. Bachrach, as required by 26 U.S.C. § 6335(b); in fact, Mr. Bachrach had not received notice of the April 30th sale of his property until May 14, 1997. Accordingly, the IRS made arrangements to void the April 30th sale to Mr. Koby and to reseize and resell the property. On July 15, 1997, Mr. Rude completed the new seizure documents and on July 16, 1997, he scheduled the second public auction of the Oceanside property for August 29, 1997. Also on July 16, 1997, Mr. Rude left a telephone message with Mr. Koby requesting a meeting. This cryptic voice mail message was Mr. Koby's first indication that something had gone awry with the April 30th sale.

Concerned and a little agitated, Mr. Koby appeared at Mr. Rude's office on July 17, 1997, where Mr. Rude informed him that the IRS was canceling the April 30th sale and that the property would be reseized and resold. Mr. Koby refused to accept Mr. Rude's offer of a Treasury check refunding his $171,000 purchase price. Embarrassed by his failure to comply with proper procedure, Mr. Rude did not tell Mr. Koby the real reason for the cancellation or the defects in the first sale--indeed, as corroborated by several witnesses, rather than revealing that notice to the taxpayer had not been sent at all, Mr. Rude told plaintiff that the problem was that Mr. Bachrach was insisting upon personal service.[2] Mr. Koby threatened to sue for breach of contract and requested a meeting with IRS legal counsel to resolve the matter. No such meeting was held prior to the second auction. On July 18, 1997, Mr. Rude mailed Mr. Koby the refund check he refused to accept at their meeting. Acting on the advice of Mr. Cruz Saavedra, his attorney, Mr. Koby did not cash that check until November 12, 1997, two weeks after the expiration of the taxpayer redemption period for the first sale.

Meanwhile, prior to the second auction, Mr. Rude revised the minimum bid worksheet for the Oceanside property. The revised worksheet listed the value of the property at $450,000 with a minimum bid price of $120,549, nearly four times the minimum bid at the first auction. Despite repeated requests by both Mr. Koby and Mr. Saavedra, the IRS, prior to the August 29th auction, left plaintiff in the dark as to its reason for canceling the first sale or its rationale for revising the minimum bid. On August 22, 1997, Mr. Koby filed a quiet title action in California state court naming as defendants Mr. Bachrach and a "John

[2] At trial, Mr. Rude intimated that he may have provided Mr. Koby with more details regarding why the first sale actually was canceled. He also suggested that he was even more specific with Mr. Koby's attorney. This testimony, however, was controverted by plaintiff's witnesses and flatly inconsistent with Mr. Rude's earlier deposition testimony (given only a couple of months earlier) at which he indicated that he provided no specific details either to Mr. Koby or his attorney. At that deposition, for example, Mr. Rude, when asked whether he had informed Mr. Koby of the reasons for the cancellation and new auction, stated:

> No, I mean, obviously, it was embarrassing for me to make such a mistake. I mean, I was pretty vague with him because I obviously was embarrassed about making a mistake. Mr. Rude gave similar deposition testimony regarding his conversations with Mr. Koby's attorney. When asked why his recollection had improved at trial, Mr. Rude responded that his memory had been refreshed, in part, by reviewing his case history. Yet, when pressed by plaintiff's counsel, he could not identify any entries in that history that might conceivably have served this restorative purpose. This court finds Mr. Rude's fuzzy trial testimony incredible and credits, instead, his clearer deposition testimony.

Doe'' (a placeholder for the successful bidder at the second auction).

On August 29, 1997, the Oceanside property was again sold at public auction, this time to Thomas McNamara for $155,000. Mr. McNamara had participated unsuccessfully in the first auction. There were only three registered bidders at the second auction, all of whom were informed of Mr. Koby's pending state court action. Acting on the advice of counsel, Mr. Koby attended the auction, but did not participate in it. Indeed, he uncontrovertedly testified that he would not have had adequate funds to participate without cashing the IRS's refund check from the first sale. The taxpayer redemption period following the second sale expired February 25, 1998. On February 24, 1998, Mr. Bachrach reclaimed the property by paying the redemption price of $172,287.65. Following this redemption, Mr. Koby voluntarily dismissed his quiet title action.

On May 18, 1999, Mr. Koby filed suit in this court seeking damages from the government for breach of the sales contract established by the April 30, 1997, auction. In an opinion issued on the parties' cross motions for summary judgment, the court determined that the government's conduct constituted a breach of an enforceable contract. See Koby v. United States, 47 Fed. Cl. 99 [86 AFTR 2d 2000-5194] (2000). Trial regarding the factual underpinnings of defendant's mitigation defense was held in Pasadena, California on October 22–23, 2001. Post-trial briefing was completed on February 26, 2002. Those briefs also presented various legal issues concerning plaintiff's damage theories.

II. DISCUSSION

[1] Two key issues must be resolved here. The first involves defendant's asserted mitigation defense; the second concerns the propriety, as a matter of law, of various of plaintiff's asserted theories of damages. The court will consider these matters seriatim.

A. Failure to Mitigate

Defendant's centerpiece contention is that by not participating in the second auction, Mr. Koby failed to mitigate his damages, thereby significantly limiting the amount he can recover. To a certain extent, but not entirely, this argument presupposes that, because the sale price of the property was $16,000 less at the second auction, Mr. Koby would have handily won the property a second time had he simply bid using the monies refunded from the first sale. For the reasons stated, the court finds these contentions not well-taken.

There is no dispute over the basic legal principles here--a non-breaching party generally may not recover damages attributable to that party's failure to take reasonable, non-burdensome steps to avoid its loss. Damages that the plaintiff might have ''avoided without undue risk, burden or humiliation'' are hence not recoverable. Restatement (Second) of Contracts § 350 (1981); see also Middleton v. United States, 175 Ct. Cl. 786, 792 (1966); Sun Cal, Inc. v. United States, 25 Cl.Ct. 426, 432 (1992). Application of this principle requires the court to consider whether a reasonable person, acting in light of the known facts and circumstances, would have taken steps to avoid certain damages. As stated by the Third Circuit:

> Whether or not the buyer's obligation to mitigate damages has been discharged depends on the reasonableness of its conduct. In this connection, reasonable conduct is to be determined from all the facts and circumstances of each case, and must be judged in the light of one viewing the situation at the time the problem was presented. Where a choice has been required between two reasonable courses, the person whose wrong forced the choice can not complain that one rather than the other was chosen.

In re Kellett Aircraft Corp., 186 F.2d 197, 198 (3rd Cir.1950); see also Beckman Cotton Co. v. First Nat'l Bank of Atlanta, 666 F.2d 181, 184 (5th Cir.1982); Tampa Electric Co. v. Nashville Coal Co., 214 F.Supp. 647, 652 (M.D.Tenn.1963). ''The rule of mitigation of damages may not be invoked by a contract breaker as a basis for hypercritical examination of the conduct of the injured party, or merely for the purpose of

showing that the injured person might have taken steps which seemed wiser or would have been more advantageous to the defaulter." In re Kellett Aircraft, 186 F.2d at 198–99; see also Apex Min. Co. v. Chicago Copper & Chemical Co., 306 F.2d 725, 731 (8th Cir.1962). Rather, the breaching party must show that reasonable possibilities for mitigation existed and were ignored. See T.C. Bateson Construction Co. v. United States, 319 F.2d 135, 160 (Ct.Cl.1963); Robinson v. United States, 50 Fed. Cl. 368, 370 (2001); Midwest Indus. Painting of Fla., Inc. v. United States, 4 Cl.Ct. 124, 134 (1983).

Burnishing this "undue risk and expense" standard, Williston on Contracts provides that "almost any risk of considerable loss to the injured person if he attempts to mitigate damages should be considered undue." 11 Samuel Williston, A Treatise on the Law of Contracts (Williston on Contracts) § 1353 (3d ed.1968); see also Brazos Electric Power Coop., Inc. v. United States, 52 Fed. Cl. 121, 129 (2002). While reasonable cost-avoiding steps include affirmative efforts to make substitute arrangements compensating for the lack of contract performance, such arrangements need not be entered into if they would expose the party to undue risk or significantly compromise its interests. See Restatement (Second) of Contracts § 350 cmts. c & g; see also Westamerica Mortgage Co. v. First Nationwide Bank, 1988 WL 76377 at 5 (D.Colo.1988). Thus, an injured party is not expected to "exalt the interests of the defaulter to his own probable detriment." In re Kellett Aircraft, 186 F.2d at 199; see also Contempo Design, Inc. v. Chicago and N.E. Ill. Dist. Council of Carpenters, 226 F.3d 535, 554–55 (7th Cir.2000), cert. denied, 531 U.S. 1078 (2001); John Calamari & Joseph Perillo, The Law of Contracts § 14–15 (3d ed.1987). Accordingly, courts have been reluctant to require parties, under the duty to mitigate, to deal further with the breaching party, especially if the breacher's alternative terms differ substantially from those of the original contract. Stanspec Corp. v. Jelco, Inc., 464 F.2d 1184, 1187 (10th Cir.1972); Campfield v. Sauer, 189 F. 576 (6th Cir.1911).[3] And, in particular, a plaintiff is not required to mitigate losses by "accepting an arrangement with the breaching party made conditional on the plaintiff's surrender of its rights under the repudiated contract." Brazos, 52 Fed. Cl. at 129; see also Teradyne, Inc. v. Teledyne Industries, Inc., 676 F.2d 865, 870 (1st Cir.1982); Restatement (Second) of Contracts § 350, cmt. e (1981).

Defendant asservates that the IRS's second auction presented plaintiff with a "suitable substitute transaction" on substantially the same terms as the first sale. It, therefore, claims that it was unreasonable for Mr. Koby not to participate in the second round of bidding, so as to mitigate the damages owed on the breach of the original contract. Per contra.

Of course, the second auction involved the same property as the first sale. But, after that, the terms of the two transactions diverged dramatically. The second auction was not an offer to sell plaintiff the Oceanside property, even on less advantageous terms, but rather an open-ended offer, extended to the public at large, to sell the apartments to the highest bidder. The latter transaction thus did not involve remotely the same type of performance owed under the prior contract--one required a sale at a specified price, subject only to the property being redeemed by its original owner; the other was little more than an offer to make an offer, with the price yet to be determined, and no assurance whatsoever that plaintiff would be the highest bidder. Indeed, apart from the basilar difference between a contract of sale and a mere invitation to participate in an auction, the terms of the second auction also differed significantly from those of the first--the second minimum sale price was almost four times the original minimum, and the second auction, under the terms of the tax redemption statute, afforded the prior owner 121 addi-

[3] See also Cain v. Grosshans & Petersen, Inc., 413 P.2d 98, 102 (Kan.1966) ("An innocent party is not [automatically] required to execute a less advantageous contract with one who has already welshed on his agreement."); Coppola v. Marden, Orth & Hastings Co., 118 N.E. 499 (Ill.1917) (purchaser has no duty to pay in cash when credit terms are material part of the contract); Charles J. Goetz & Robert E. Scott, The Mitigation Principle: Toward A General Theory of Contractual Obligation, 69 Va. L.Rev. 967, 993 n. 57 (1983).

tional days in which to redeem the property (e.g., 180 days from the second auction date).[4] Accordingly, defendant is simply wrong in suggesting that a reasonable person, acting under the circumstances, would have embraced the offer of participating in the second auction as a substitute for the performance lost when the IRS breached the original contract.

Indeed, contrary to defendant's claims, it is far from clear that Mr. Koby could have avoided any losses by participating in the second auction. Looking at the end result of that second auction, defendant blithely assumes that plaintiff would have won the property with a bid significantly lower than what he originally paid. But, this is rank speculation. The record offers multiple possible reasons why the winning bid at the second auction was less than at the first, despite the $90,000 increase in the minimum bid price. Mr. Koby's pending quiet title action and his threat to sue the winning bidder at the second auction, as well as the government's failure to announce its reasons for holding a second sale and revising the minimum bid, all likely contributed to reduce the number of bidders and, in turn, depress the resulting sale price. Had Mr. Koby relented and participated in the second auction, removing the cloud of extensive litigation over the property, the resulting price might have been much higher. We will never know. Defendant provided essentially no evidence on this point, choosing instead simply to assume, rather than prove, that the resulting price would have been the same. In the court's view, this assumption is not borne out by the record and represents a pedantic form of "Monday-morning quarterbacking" that is contrary to the established standard of evaluating reasonableness from the perspective of "one viewing the situation at the time the problem was presented." In re Kellett Aircraft, 186 F.2d at 198.

Even had Mr. Koby prevailed in the second sale, he could have, by his very participation, severely compromised his ability to seek any damages under the first contract. Mr. Koby testified that he used all of his available resources to pay the purchase price of the first sale and, therefore, did not have funds available to bid at the second sale without cashing the check he had received from the IRS relating to the first sale. Accepting the reimbursement of his consideration and engaging in further negotiations with the defendant for sale of the same property could easily have been construed as abandoning his rights under the first contract via some rescission, compromise, or accord and satisfaction. A decision to abandon contract rights can be conveyed through a formal agreement of rescission or through the acts and conduct of the parties indicating such an intent. See NEBCO & Assocs. v. United States, 23 Cl.Ct. 635, 642 (1991); Montana Bank of Circle, N.A. v. United States, 7 Cl.Ct. 601, 610 (1985); see also Restatement (Second) of Contracts §§ 279 & 283, cmt. a (1981). When a party engages in acts inconsistent with the existence of a contract, including acquiescing in a repudiation of the contract by the other party, courts have found an objective intent to abandon despite the party's assertion of subjective intent to the contrary.[5]

While it is unlikely that cashing the refund check alone would have been sufficient to indicate Mr. Koby's intent to abandon his contract rights, see Avemco Ins. Co., 38 P.3d at 565; Pino, 627 So.2d at 537, the combination of cashing the check and attempting to repurchase the property might have led a court to find that such an abandonment had occurred. That, in fact, is what the Supreme Court of Minnesota found when a defendant municipality repudiated a contract awarded through a public bidding process and the plaintiff subsequently submitted a revised bid for

[4] Notably, this extension of the redemption period occurred at a time when real estate prices were appreciating. Defendant admits that as the price of the property appreciated, the likelihood of the taxpayer redeeming increased.

[5] See Avemco Ins. Co. v. Northern Colo. Air Charter, Inc., 38 P.3d 555, 565 (Colo.2002) ("the subjective intent of [a party] not to rescind is immaterial when that [party] has acted in a manner that demonstrates an objective manifestation of consent to the rescission intended by the [other party]."); Minnesota Ltd., Inc. v. Pub. Utils. Comm'n of Hibbing, 208 N.W.2d 284, 286 (Minn.1973) ("A repudiation of a contract by one party, acquiesced in by the other, is tantamount to a rescission."). But see Pino v. Union Bankers Ins. Co., 627 So.2d 535, 538 (Fla.Dist.Ct.App.1993) ("unilateral announcement of rescission accompanied by a tender of the premiums to the insured does not evolve into an accord and satisfaction when the hapless insured deposits the check.").

the project. See Minnesota Ltd., Inc., 208 N.W.2d at 286–87. The Minnesota high court specifically rejected plaintiff's argument that its participation in the second round of bidding was an attempt to mitigate damages on the grounds that "it would be pure speculation that plaintiff would be the ultimate successful bidder." Id. at 287. Although obviously not binding on this court, this case, and others applying the doctrine of repudiation, certainly indicate that Mr. Koby's decision, on the advice of counsel, not to participate in the second auction was within the zone of reasonableness. Mr. Koby was not obligated to risk surrendering his rights under the first contract in order to minimize defendant's damages.[6] See Teradyne, 676 F.2d at 870; Stanspec Corp., 464 F.2d at 1187; Campfield, 189 F. at 579–80.

To be sure, plaintiff might have expressly reserved his rights under the first contract, indicating that his cashing of the check and participation in the second auction were not intended to waive defendant's prior breach. See U.S. Navigation Co. v. Black Diamond Lines, Inc., 124 F.2d 508, 510 (2d Cir.1942) (Hand, J.). But, the case law suggests that such a reservation still would have been somewhat risky. More importantly, any attempt to construct such an arrangement here was thwarted by defendant's own actions in shielding Mr. Koby from the truth. Mr. Rude acknowledged that, prior to the second sale, he never really explained to Mr. Koby the reasons for canceling the first contract, conducting the second auction and increasing the minimum bid.[7] Indeed, the record suggests that he essentially misled Mr. Koby into believing that the problem was that Mr. Bachrach had not received personal notice of the first sale, rather than no notice at all. Mr. Koby was not advised of the statutory violation in the first sale until September 22, 1997, three weeks after the second auction.[8] Further, while the IRS made the decision to rescind the prior sale and reauction the property on or about June 27, 1997, it waited three weeks, until July 17, 1997, to notify Mr. Koby of the rescission, and then waited three more weeks, until August 7, 1997, before notifying him about the new auction date. And, despite having failed to explain adequately the reasons for its prior breach of contract, the IRS refused to postpone the new auction date when repeatedly requested to do so by plaintiff.

Thus, the circumstances, as they were actually known to Mr. Koby prior to the second auction, were that the IRS had unilaterally and for questionable reasons canceled the original sales contract and then initiated a second public bidding process using a drastically increased minimum sales price. As explained in the letter Mr. Saavedra sent to Mr. Rude a week before the second sale, plaintiff's conclusion from these circumstances was that "the IRS simply wants another chance to sell this property at a higher price." The IRS perpetuated this view by failing to respond to the various inquiries and meeting requests made by plaintiff and his counsel. Plaintiff, acting on the advice of counsel, ultimately chose to encourage defendant to perform on the first contract, rather than make a second offer to purchase the property. On the facts known to Mr. Koby prior to the second auction, and given the relatively little time in which he had to act, the court cannot say that plaintiff's choice was unreasonable. Compare Hale Container Line,

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6 With a surreal twist, defendant blithely maintains that Mr. Koby could have participated in the second auction, bid whatever was necessary to win, and then recouped the difference between his first bid and his second from the United States. This contention, of course, flies in the face of defendant's initial litigating position in this case, to wit, that it had not breached any contract in canceling the first sale. Were this position correct, Mr. Koby could not have received any damages had he bought the property for a higher price at the second auction. The fact that defendant's position has since been rejected by this court does not alter the risks reasonably perceived by Mr. Koby at the time of the breach of the sale contract.

7 Mr. Rude testified that he did not remember exactly what he had told either Mr. Koby or his attorney prior to the sale. As noted above, in his deposition concerning his conversations with Mr. Koby, he indicated more candidly that "I was pretty vague with him because I obviously was embarrassed about making a mistake." Plaintiff's confusion regarding the reasons for the cancellation of the first sale apparently persisted through August 21, 1997, when Mr. Saavedra sent Mr. Rude a letter specifically requesting "a written explanation for the basis of canceling the April 30, 1997 sale, including any notices sent the taxpayer." That letter was followed by a similar letter, addressed to IRS district counsel, dated September 9, 1997, a little more than a week after the second auction. The September 9 letter requested "the courtesy of a response to our letter as to the legal grounds and basis for claiming the original sale was invalid."

8 In a September 22, 1997 letter from the IRS district counsel to Mr. Koby's attorney, the government for the first time clearly acknowledged that "In this case, Mr. Rude did not give notice of the sale to the owner until after the sale ... The sale to Mr. Koby was not conducted in accordance with the sale provisions of the Internal Revenue Code."

Inc. v. Houston Sea Packing Co., 137 F.3d 1455, 1474 (11th Cir.1998) (in determining reasonableness of plaintiff's mitigation efforts, court "must consider that 'the necessity for decision-making was thrust upon him by the defendant,'" and "'allow the injured party a wide latitude in determining how best to deal with the situation.'").

That plaintiff might have acted differently had he known what Mr. Rude and the IRS knew is irrelevant--"[m]itigation does not require prescience; it requires reasonableness." Ketchikan Pulp Co. v. United States, 20 Cl.Ct. 164, 166 (1990). Indeed, as the party in default, defendant here was all the more duty- bound to minimize damages and thus should not be heard to complain of plaintiff's supposed failure to mitigate when that failure, at least in part, is attributable to its own employees' lack of candor and responsiveness. See Williston, supra, § 1353 at 279; see also 5 Arthur L. Corbin, Corbin on Contracts (Corbin) § 1039 at 250–51 (1964) ("Losses are not regarded as avoidable if the defendant himself prevents the plaintiff from taking the steps necessary to avoid them."). Simply put, logic suggests that, at a minimum, plaintiff was entitled to know the real reason why the IRS had breached his first contract before he could be expected to enter into a second. See Corbin, supra, § 1043 at 274 (noting that cases requiring a plaintiff to deal with a defaulting defendant "should depend, to some extent, upon the reason causing the defendant to commit a breach and also upon the manner in which it was committed."). That information, however, was withheld from plaintiff until after the second auction. Under those circumstances, plaintiff was not required to take the economic equivalent of a Kierkegaardian leap of faith, sacrificing blindly his own interests in an effort to exalt those of the defaulting defendant.

Summarizing, this court finds that Mr. Koby acted reasonably in not participating in the second auction. As such, he did not fail improperly to mitigate his damages here. Defendant did not prove otherwise and its affirmative defense, therefore, must fail.

B. Viability of Plaintiff's Damage Theories

The court's next task is to determine, based on the facts revealed so far, whether any of plaintiff's damage theories are unviable. As will be discussed below, the court concludes that the viability of plaintiff's damage theories hinges on various yet unresolved questions of fact.

Plaintiff seeks damages on a myriad of alternative legal theories. First, in the nature of expectancy damages, he asserts that he is entitled to recover lost profits for rental income for the time period between the date of the breach and the date of trial. Alternatively, he seeks expectation damages as measured by the difference between the value of the property on the date of the breach and the contract price, plus consequential damages. Finally, he seeks reliance damages to recoup the expenses he incurred attempting to restore the habitability of the property while he was the beneficial owner. Defendant challenges each of these theories, arguing that plaintiff should receive no more than the amount of interest he would have earned had Mr. Bachrach redeemed the property prior to the end of the first redemption period. Because of the unique nature of this contract, however, defendant's attempts to limit plaintiff's damage awards are, at least, premature.

Under the contract here, defendant could fulfill its obligation by either: (i) conveying a Director's Deed to plaintiff upon the expiration of the redemption period; or (ii) refunding plaintiff's purchase price plus interest upon redemption by the taxpayer. Such contracts, typically referred to as alternative contracts, present unique damage issues when the party with optional performance commitments repudiates the contract anticipatorily. See In the Matter of The Community Medical Center, 623 F.2d 864, 867 (3rd Cir.1980); see also 5 Corbin, supra, § 1070 at 397 (If "either alternative operates as a complete discharge of the promisor's duty and prevents any further remedy against him" the agreement may be viewed as an alternative contract.). The

general rule is that, unless the contract specifically preserved the right of election for the promisee, "in the case of breach without an election (of alternatives), [damages] (shall be) in accordance with the alternative that will result in the smallest recovery." The Community Medical Center, 623 F.2d at 867–68 (quoting Restatement of Contracts § 344 (1932)); see also Western Oil & Fuel Co. v. Kemp, 245 F.2d 633, 640 (8th Cir.1957). The ratio dicendi for this rule is that the court may not place the promisee in a better position than had the contract been performed--it presumes that the promisor had bargained for the flexibility of the alternatives and, therefore, should be liable for no more than the least expensive alternative he could have chosen. See Podlesnick v. Airborne Exp., Inc., 627 F.Supp. 1113, 1116 (S.D.Ohio 1986), aff'd per curiam, 836 F.2d 550 (6th Cir.1987); see also Liberty Bank v. Talman Home Mortgage Corp., 877 F.2d 400, 407 (5th Cir.1989); 5 Corbin, supra, § 1079.

The difference here, of course, is that the election of performance alternatives was not to be made by either contracting party, but rather by the third-party taxpayer, who had 180 days in which to redeem the property. This distinction renders sui generis the rule limiting plaintiff to the alternative least burdensome to the defendant. See Podlesnick, 627 F.Supp. at 1116 (holding that the rules of recovery for breach of an alternative contract are not suitable in case where promisor did not retain flexibility of performance). What is critical is which alternative would have been selected by the taxpayer who previously owned the property had the government not breached the contract. And, on that count, the factual field is currently unplowed. Thus, while Mr. Bachrach paid the redemption price after the second sale, no evidence has been presented as to whether he was willing or able to have met the higher redemption price at the earlier deadline imposed by the terms of the first sale. Mr. Bachrach's willingness and ability to redeem according to the guidelines of the first sale may not be presumed, but must be proven. Thus, it would be premature to limit or define plaintiff's expectation damages at this time.[9]

Defendant also seeks to deny plaintiff the ability to recover the lost profits it arguably would have earned had it received the property. Defendant argues that plaintiff cannot prove such damages with sufficient certainty to meet the rigorous standards established for the recovery of lost profits. In the limited cases where lost profits have been awarded, plaintiffs have been required to show, by a preponderance of the evidence, that: (i) the loss was caused by the breaching party's action; (ii) the lost profits were foreseeable by the breaching party; and (iii) the amount of the lost profits can be established with "reasonable certainty." See Energy Capital Corp. v. United States, 47 Fed. Cl. 382, 393–94 (2000), aff'd, 2002 WL 1868983 (Fed.Cir.2002); see also Neely v. United States, 285 F.2d 438 (Ct.Cl.1961). In distinguishing between speculative profits and those recoverable, the Federal Circuit has focused on "profits on the use of the subject of the contract itself" versus "profits of ... collateral undertakings, which the corporation was unable to carry out." Wells Fargo v. United States, 88 F.3d 1012, 1022–23 (Fed.Cir.1996), cert. denied, 520 U.S. 1116 (1997) (quoting Ramsey v. United States, 121 Ct. Cl. 426, 101 F.Supp. 353 (1951)). The profits which plaintiff seeks here are those potentially generated by the specific contract that the government breached. Although rare, lost profits have been awarded in such circumstances, particularly, where, as here, an

[9] It is less clear, at this time, what impact Mr. Bachrach's testimony will have on any damages awarded. There are two possible ways to account for his testimony. The first would be to award plaintiff a full measure of damages if it is determined, based on a preponderance of the evidence, that Mr. Bachrach was not prepared to redeem the property within the first redemption period. The second approach, which some courts have called the loss of chance doctrine, would be to award plaintiff damages based upon the percentage likelihood that Mr. Bachrach would have redeemed the property--if there were 25 percent chance of redemption, then certain of plaintiff's damages would be discounted to reflect this likelihood of redemption. The latter approach is suggested by Restatement (Second) Of Contracts § 348(3), which provides that--"If a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of breach." In the court's view, the choice between these approaches may either be informed by future factual development here or rendered moot thereby (e.g., if proof indicated that it was a 100 percent surety either that Mr. Bachrach would redeem or not redeem the property). See Wright v. St. Mary's Medical Center of Evansville, Inc., 59 F.Supp.2d 794, 801 & n. 2 (S.D.Ind.1999). At all events, the court defers judgment on this matter.

ongoing business is involved. See Neely, 285 F.2d at 442 (lost profits permitted when the government breached an agreement to lease land for mining); see also Energy Capital, 2002 WL 1868983 at 11–12. As factual issues loom large regarding each of the critical elements for proving lost profits--reasonable certainty, causation and forseeability--it would be premature for this court to rule on plaintiff's entitlement or disentitlement to such damages without an appropriate factual predicate. See California Federal Bank, FSB v. United States, 245 F.3d 1342, 1349 (Fed.Cir.2001), cert. denied, 122 S.Ct. 920 (2002). In short, while plaintiff's attempt to recover lost profits faces an uphill climb, in the end, that steep slope may yet prove surmountable.

Finally, addressing one of plaintiff's alternative damage theories, defendant argues that Mr. Koby should not be allowed to recover the funds he expended on the property during the first redemption period. Defendant stresses that Mr. Rude warned the bidders at the first auction that they should not incur expenses on the property until the redemption period ran. It contends that plaintiff could not have recouped these expenses had the first sales contract been fully performed and asserts, therefore, that these expenses cannot be considered expectation damages, which are designed to place the wronged party in the position it would have been had the contract been performed. See White v. Delta Constr. Int'l, Inc., 285 F.3d 1040, 1043 (Fed.Cir.2002). Plaintiff retorts that, despite Mr. Rude's dire warning, he was required, under California law, to address immediately certain hazardous situations on the property and could not await the end of the redemption period. Yet, it is apparent that such expenses are not recoverable as expectation damages because plaintiff would not have been able to recover those expenses had the contract been fully performed.

Such expenses, however, may be recoupable as reliance damages. As observed by the Federal Circuit, "[i]n order to be recoverable as reliance damages, . . . , plaintiff's loss must have been foreseeable to the party in breach at the time of contract formation." Landmark Land Co., Inc. v. FDIC, 256 F.3d 1365, 1378 (Fed.Cir.2001). See also Glendale Federal Bank, FSB v. United States, 239 F.3d 1374, 1382–83 (Fed.Cir.2001); Restatement (Second) of Contracts § 344(b) (promisee's "reliance interest" is "his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made."). As to forseeability, the trial record certainly indicates that the IRS did not anticipate plaintiff making unnecessary capital improvements or performing maintenance that could be delayed. Yet, notwithstanding Mr. Rude's warning, the IRS hardly could have expected plaintiff to be forced into the Dickensian role of a slumlord and leave unremedied, for 180 days, dangerous or hazardous conditions that rendered the occupied apartments unsafe or uninhabitable. Certainly, the need to address immediately some of these problems should have been foreseen by Mr. Rude, who inspected the property and testified that it "was extremely run down." At trial, counsel for the government, indeed, readily admitted that under California law, Mr. Koby, as the temporary landlord of the property during the redemption period, was required to make the property habitable. This admission was well-advised.[10]

Instead, defendant correctly argues that this court must decide whether, and to what extent, hazards actually existed on the property that needed to be immediately remedied. Although the trial focused on facts relating to mitigation, the record incidentally included information that suggests that hazards, indeed, may have existed on the property. Thus, for example, Mr. Koby testified that there was abandoned furniture (including old mattresses), trash, and a car up on blocks in the common areas of the apartment complex, around which children

[10] See, e.g., Camacho v. Du Sung Corp., 121 F.3d 1315, 1317 (9th Cir.1997) (under California law, landlord "generally has a responsibility to inspect the premises and ensure that they are safe for the purposes intended"); Portillo v. Aiassa, 32 Cal.Rptr.2d 755, 757–59 (Cal.Ct.App..1994) (landlord has duty to discover dangerous conditions and address them).

were playing. He also testified as to pressing problems involving oil spills, broken exterior safety lighting, plumbing, exposed electrical sockets, other unsafe wiring, and blocked exhaust vents. Left unexplored at the trial were any significant details regarding these problems, and whether all the costs incurred by Mr. Koby related to these types of hazards and were reasonable in amount. In the court's view, proof that such hazards existed and that Mr. Koby appropriately responded to his obligations under California law as the property's landlord could pave the way for him to recover his reasonable expenses as reliance damages. Resolution of that matter, however, awaits another day.

III. CONCLUSION

So ends round two of this litigation. For the foregoing reason, this court finds that plaintiff was not required to mitigate its damages in the fashion that defendant contends. Further, in the court's view, all of plaintiff's damage theories remain viable, subject, of course, to further proof of the critical elements thereof. Toward the latter end, by September 23, 2002, the parties shall file a joint status report indicating how this case should proceed, including, if relevant, a schedule for trial proceedings on damages.

IT IS SO ORDERED.

¶2002-5347

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Charles H. MARTIN, DEFENDANT-APPELLANT. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 00-6700; 00-6701, Aug. 21, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—obstructing and impeding internal revenue laws; filing false returns—withdrawal of plea agreement—ineffective assistance of counsel. District court properly denied taxpayer's motion to withdraw his guilty pleas to impeding internal revenue laws, filing false returns, and nontax violation: motion filed over 6 months after entering knowing, voluntary and intelligent pleas was merely tactical maneuver; plea agreements weren't internally inconsistent; and govt. advised court of taxpayer's cooperation 2 months before sentencing, including facts that taxpayer had provided false and largely useless information. Also, trial counsel's failure to raise meritless claims regarding plea agreements and govt.'s breach of same didn't support ineffective assistance of counsel claim. *Reference:* United States Tax Reporter ¶73,446.505(10); 72,065.01(5); 72,125.01(7); 73,447.511(10). IRC §7206; 7212.

United States Court of Appeals, Sixth Circuit,

On Appeal from the United States District Court for the Eastern District of Tennessee.

Before KENNEDY, SUHRHEINRICH, and BATCHELDER, Circuit Judges.

ALICE M. BATCHELDER, Circuit Judge.

Defendant pleaded guilty in the United States District Court for the Eastern District of Tennessee to tax law violations and being a felon in possession of a firearm. Defendant appealed denial of his motion to withdraw plea agreement. The Court of Appeals, Batchelder, Circuit Judge, held that: (1) court's denial of defendant's motion to withdraw plea was not plain error, and (2) trial counsel was not ineffective.

Affirmed.

Defendant Charles H. Martin appeals his conviction on tax law violations and being a felon in possession of a firearm. Martin argues that his plea agreements were internally inconsistent and confusing, that the Government breached the plea agreements, that he should have been permitted to withdraw his guilty pleas, and that his trial counsel was ineffective. Finding that these claims are without merit we affirm.

I.

On April 14, 1998, a grand jury for the Eastern District of Tennessee returned a forty-four count indictment against Martin charging him with four counts of ob-

structing and impeding federal internal revenue laws in violation of 26 U.S.C. § 7212(a), and forty counts of filing false tax returns in violation of 18 U.S.C. §§ 287 and 2. In the ensuing months, Martin sought and obtained a number of continuances of the trial date, and persuaded the district court to dismiss two successive attorneys appointed to represent him. Martin also sought a mental examination, entered and later withdrew a notice of insanity defense, and underwent--at the instance of the district court--a competency hearing that resulted in his being found competent to stand trial.

On June 15, 1999, an additional indictment was returned against Martin, charging him with two counts of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). Finally, after requesting and obtaining additional continuances, Martin executed written plea agreements in both cases, and pleaded guilty to counts one through four of the first indictment and to count two of the second indictment. Each of the plea agreements states, in relevant part:

> 10. At the time of sentencing, the United States will bring to the Court's attention the nature, extent and value of the defendant's cooperation. This information will be provided to the Court so that it may be considered in determining a fair and appropriate sentence under the fact of the case. If, in the opinion of the United States, the defendant renders substantial assistance within the meaning of U.S.S.G. § 5K.1, the United States will file a motion pursuant to this provision.

On September 11, 2000, Martin filed a motion to withdraw his plea, giving as his reasons that:

a. He did not understand what he was doing at the time he entered his pleas of guilty. He also did not understand what he was signing when he signed his plea agreement.

b. He was under a great deal of stress due to his recent incarceration which diminished his ability to understand what he was doing.

c. He misunderstood the concept of cooperation with the government. He was under the false impression that if he told the government what he knew that he would be entitled to a motion for a downward departure and a reduction of his sentence. He further believed that his sentence would be reduced by approximately 50%.

That same day, the Government filed its response to Martin's motion, which also advised the district court of the nature and extent of Martin's cooperation. The district court denied Martin's motion and sentenced him to sixteen months on counts one through four of the first indictment and sixteen months on count two of the second indictment all to run concurrently.

II.

[1] We review for abuse of discretion Martin's claim that the district court erred when it denied his motion to withdraw his guilty pleas. United States v. Hunt, 205 F.3d 931, 936–37 (6th Cir.2000).

A defendant does not have a right to withdraw a guilty plea. United States v. Spencer, 836 F.2d 236, 238 (6th Cir.1987). Federal Rule of Criminal Procedure 32(e) provides that a court may permit the withdrawal of a plea if the defendant "shows any fair and just reason." Martin has the burden of showing that withdrawal is justified. United States v. Baez, 87 F.3d 805, 808 (6th Cir.1996). This circuit requires that a court must consider seven factors when deciding whether to grant a motion to withdraw:

> (1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) the degree to which the defendant has had prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted.

United States v. Bashara, 27 F.3d 1174, 1181 (6th Cir.1994), overruled in part on other grounds by statute as stated in United States v. Caseslorente, 220 F.3d 727, 734-35 (6th Cir.1994).

In this case the district court went through each factor in turn and determined that Martin had not advanced a reason sufficient to justify the granting of his motion. The court noted that Martin had waited over six months after entering his pleas to file his motion to withdraw them and had provided the court no reason for that delay beyond his having been advised by the Government that it did not intend to move for a downward departure. The court observed that Martin had never indicated that he was innocent; that the record demonstrated that Martin's plea was knowing, voluntary, and intelligent; and that Martin had considerable prior experience in the criminal justice system and was well acquainted with its workings. Finally, noting that it was not necessary that the court find that the Government would be prejudiced by withdrawal of the plea, the court acknowledged that the Government might suffer prejudice if the motion were granted because it had stopped keeping track of the numerous witnesses for the case following entry of the pleas. In short, the court concluded that Martin's motion to withdraw his pleas was nothing more than a tactical maneuver, which would not suffice as a fair and just reason to withdraw the plea. We find no abuse of discretion here.

Because Martin failed to raise before the district court either his claim that the plea agreements were internally inconsistent or his claim that the Government breached the plea agreement, we review for plain error. United States v. Page, 232 F.3d 536 (6th Cir.2001). To reverse for plain error the reviewing court must find: (1) error that (2) is plain, (3) affects substantial rights, and (4) seriously affects the fairness, integrity, or public reputation of the judiciary. Id. at 544.

To the extent that we understand Martin's claim that the plea agreements are internally inconsistent, we find no merit to the claim and no error whatever, let alone plain error. We have read those agreements, and they leave no room for doubt that whether the cooperation provided by Martin--if any--is of a kind or degree to warrant a motion for a downward departure is entirely, solely and exclusively within the discretion of the Government. The provisions of that agreement cited by Martin as being internally inconsistent are not inconsistent at all. Whatever ''uncertainty'' Martin may now claim was in his mind with regard to the agreement's provisions, and whatever he may now claim that he ''anticipated'' the Government would do with regard to a motion for downward departure, he cannot demonstrate that his uncertainty or anticipation had its genesis in the plea agreements.

Martin claims on appeal that the Government violated paragraph ten of each of the plea agreements by failing to inform the district court of the nature, extent and value of his cooperation with the Government. There is no merit whatever to this claim either. The record proves that the Government did comply with the plea agreements, which required that ''at the time of sentencing,'' the Government would advise the court of Martin's cooperation, if any. On September 11, 2000, some two months before Martin was sentenced, the Government--albeit in response to Martin's motion to withdraw his pleas--detailed the extent and value of his cooperation, including the fact that Martin had provided information that proved to be false, and information that was largely useless because it was not new to the Government.

Martin's last assignment of error is that his trial counsel was ineffective for failing to raise before the district court the foregoing issues regarding the pleas and the plea agreements. We ordinarily do not entertain on direct appeal claims of ineffective assistance of counsel. United States v. Fortson, 194 F.3d 730, 736 (6th Cir.1999) (''This court generally does not review claims of ineffective assistance of counsel for the first time on appeal, instead requiring that a record be developed pursuant to a motion under 28 U.S.C. § 2255.'') In this case,

however, we will make an exception. It is clear beyond peradventure that Martin's claims with regard to the plea agreements, his attempt to withdraw his pleas and his claims that the Government breached the plea agreements are wholly meritless. Failure of trial counsel to raise wholly meritless claims cannot be ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686–87, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This claim is meritless as well.

CONCLUSION

For all of the foregoing reasons, we AFFIRM the judgment of the district court.

¶2002-5348

Taylor W. FITHIAN, III, and Margarita FITHIAN, PLAINTIFFS-APPELLANTS v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-16443, Aug. 27, 2002. District Court affirmed. Decision against Taxpayers.

1. Alimony—liability beyond death. District court properly held that bonus-sharing payments taxpayer made to ex-wife pursuant to divorce decree weren't alimony: payments didn't satisfy IRC §71(b)(1)(D)'s termination-on-death requirement. Divorce decree was ambiguous as to whether termination-on-death condition applied; Oregon law didn't clearly impose termination condition on spousal support provisions; and decree's "money judgment" section's express provision of termination condition for other forms of spousal support but not for subject payments showed absence of such condition was intended. *Reference:* United States Tax Reporter ¶715.20(5). IRC §71.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the Northern District of California, James Ware, District Judge, Presiding,

Before FERGUSON, W. FLETCHER, Circuit Judges, and KING,** District Judge.

MEMORANDUM*

Taxpayers sued United States, alleging that bonus-sharing payments made pursuant to divorce decree constituted "alimony" for purposes of calculating income tax. The United States District Court for the Northern District of California, James Ware, J., determined that payments were not "alimony." Taxpayers appealed. The Court of Appeals held that payments did not satisfy statutory requirement that, in order for payment to constitute "alimony," there could be no liability to make payment after death of payee spouse.

Affirmed.

The parties are familiar with the facts and procedural history of this case, and they need not be repeated.

[1] Appellants contend that the District Court erred in holding that the divorce decree provisions for bonus payments in lieu of property did not satisfy the termination requirement of 26 U.S.C. § 71(b)(1)(D) and, therefore, did not meet the definition of alimony in § 71(b)(1).[1] The District Court determined that the bonus payments failed to satisfy § 71(b)(1)(D). It found the "Money Judgment" section of the divorce decree, which contained no language terminating the payment obligation in the event of Ms. Richard's death, to be controlling.

Prior cases considering the same question have conducted a two-part inquiry. First, courts have looked for an unambiguous termination condition, initially as expressed in the plain language of the divorce decree itself, and then as imposed by

** The Honorable George H. King, United States District Judge for the Central District of California, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

[1] Section 71(b)(1) sets forth four requirements for a payment to be considered alimony. See Baker v. Comm'r, 79 T.C.M. (CCH) 2050 [TC Memo 2000-164] (2000); Heller v. Comm'r, 68 T.C.M. (CCH) 730 [1994 RIA TC Memo ¶94,463] (1994). The only requirement at issue here is § 71(b)(1)(D), which provides: "[T]here is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse." 26 U.S.C. § 71(b)(1)(D).

operation of state law.[2] Lovejoy v. Comm'r, 293 F.3d 1208, 1212–13 [89 AFTR 2d 2002-2989] (10th Cir.2002); Hoover v. Comm'r, 102 F.3d 842 [78 AFTR 2d 96-7589], 847–48 (6th Cir.1996). Second, where there is no unambiguous termination condition, courts have independently evaluated "the language of the decree" as a whole to determine whether payments in question satisfy § 71(b)(1)(D). Hoover, 102 F.3d at 848.

First, we find that the plain language of the divorce decree does not clearly include a termination condition. Support payment provisions are recited in two different sections of the divorce decree. In the "Money Judgement" section, which was certified by both parties' attorneys, the paragraph concerning the bonus payments contains no termination language. In contrast, the "Spousal Support" section does include express termination language in its bonus payment paragraph.[3] In light of these conflicting provisions, the divorce decree as a whole is ambiguous as to whether a termination-on-death condition applied to the bonus-sharing payments.

As the decree is ambiguous, we must determine whether the spousal support provisions terminate by operation of Oregon state law. We find that they do not. Oregon statutes regarding spousal support do not directly address the question of termination of spousal support obligations upon death of the payee spouse. Or.Rev.Stat. § 107.105(1)(d). Nor does any published Oregon case establish this proposition directly. See Prime v. Prime, 172 Or. 34, 139 P.2d 550 (Or.1943); cf. In the Matter of the Marriage of Bates, 303 Or. 40, 733 P.2d 1363, 1366 (Or.1987). Thus, Oregon state law did not clearly impose a termination condition on the spousal support provisions of Mr. Fithian's divorce decree.

Finally, faced with an ambiguous divorce decree and no state law resolution of the question, we independently review "the language of the decree itself" to "make our own determination as to the satisfaction of the § 71(b)(1)(D) requirement." Hoover, 102 F.3d at 846. We give greater weight to the "Money Judgment" section (rather than to the "Spousal Support" section) because it is the only section certified by both parties' attorneys.

The "Money Judgment" section of the decree expressly provides a termination-on-death condition for the other two forms of spousal support identified in the decree, but not for the bonus payments in lieu of property. Plaintiffs nowhere argue that this omission was inadvertent. From this omission, we infer that the absence of a termination-on-death condition in the bonus payment paragraph was intended.

Because Mr. Fithian's obligation to make bonus payments was not subject to a termination condition, the decree fails to satisfy § 71(b)(1)(D).[4]

AFFIRMED.

¶2002-5349

Pamela J. DILTZ, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. Court of Appeals, Fourth Circuit, (CA4) No. 02-1562, Sept. 4, 2002. District Court, (2002, DC NC) 89 AFTR 2d 2002-2778, affirmed per curiam. Decision against Taxpayer.

1. Summons enforcement. 4th Cir. affirmed per curiam decision enforcing IRS summons and denying pro se taxpayer's motions for clarification and injunctive relief, based on district court's reasoning. *Reference:* United States Tax Reporter ¶76,025.04(25). IRC §7602.

Pamela J. Diltz, Appellant Pro Se. David I. Pincus, Annette Marie Wietecha,

[2] As originally enacted, 26 U.S.C. § 71(b)(1)(D) required that the termination on death of the payee spouse condition be expressly stated. A 1986 modification retroactively repealed this requirement, thus allowing ambiguous instruments to be saved by operation of state law. Hoover, 102 F.3d at 846.

[3] "Notwithstanding the above, this obligation for spousal support shall terminate as above provided or upon the death of Wife, whichever first occurs."

[4] Our conclusion is also supported by a provision in the divorce decree allowing Ms. Richard to retain legal title to shares of California Forensics Medical Group stock "for collateral purposes to secure payment of sums" owed to her under the decree. See Hoover, 102 F.3d at 848 (finding that payments were not subject to a termination condition based in part on the fact that the payee spouse received a lien on shares of stock to secure payments specified in the divorce decree).

Dara B. Oliphant, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT,

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. (CA-02-7-1-T)

Lacy H. Thornburg, District Judge.

Before WIDENER and MICHAEL, Circuit Judges, and HAMILTON, Senior Circuit Judge.

PER CURIAM:

UNPUBLISHED

[1] Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

Pamela J. Diltz appeals the district court's orders granting the Government's motion to enforce an IRS summons and denying Diltz's motions for clarification and injunctive relief. Our review of the record and the district court's opinions discloses no reversible error. Accordingly, we affirm on the reasoning of the district court. Diltz v. United States, No. CA-02-7-1-T (W.D.N.C. May 1 & May 17, 2002). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

¶2002-5350

James Clay BOYD, ET AL., PETITIONERS v. UNITED STATES OF AMERICA, RESPONDENT. U.S. District Court, Eastern Dist. of Kentucky, (DC KY) CIVIL ACTION NO. 01-472-JMH, Aug. 12, 2002. Earlier proceeding at (2002, DC KY) 90 AFTR 2d 2002-5050. Years 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999. Decision for Govt.

1. Third-party summons enforcement—criminal investigations—procedure—notice. Magistrate judge's recommendation to deny taxpayers' petition to quash and enforce summonses IRS served on CPA was adopted, taxpayers' motion for judgment and motion to amend petition were denied, and action was dismissed. Also, CPA was ordered to fully comply with summonses; but, both parties' objections were overruled. *Reference:* United States Tax Reporter ¶76,025.03(5); 76,095.01(30). IRC §7602; 7609 .

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY LEXINGTON,

JUDGMENT

Joseph M. Hood, Judge

In conformity with the Order of even date,

[1] IT IS ORDERED and ADJUDGED herein as follows:

(1) That the objections of Petitioners be, and the same hereby are, OVERRULED.

(2) That Petitioners' motion to quash the Internal Revenue Service summonses served on R. Douglas Anderson, C.P.A. be, and the same hereby is, DENIED.

(3) That Respondent's motion for summary denial of the petition to quash summonses [Record No. 6] be, and the same hereby is, GRANTED.

(4) That Respondent's motion for summary enforcement of the summonses served by IRS Special Agent J. Trent Tyson on R. Douglas Anderson, C.P.A. on November 1, 2001 and November 2, 2001 [Record No. 6] be, and the same hereby is, GRANTED.

(5) That Petitioners' motion for judgment and their motion to amend petition [Record No. 15] be, and the same hereby is, DENIED.

(6) That the objections of Respondent be, and the same hereby are, OVERRULED.

(7) That R. Douglas Anderson, C.P.A. fully comply with the summonses served

by IRS Special Agent J. Trent Tyson on November 1, 2001 and November 2, 2001 by no later than September 13, 2002. Should Mr. Anderson fail to comply with the Court's directive, Respondent is free to seek further relief.

(8) That this action be, and the same hereby is, DISMISSED without prejudice to Respondent's right to seek compliance with this Court's Orders and STRICKEN from the docket.

This is a final and appealable order.

This the 12th day of August, 2002.

Joseph M. Hood, Judge

ORDER

Joseph M. Hood, Judge

The above-styled action is before the Court on Magistrate Judge James B. Todd's Proposed Findings of Fact and Recommendation dealing with Petitioners' motion to quash certain third-party, record-keeper summonses served upon their accountant, R. Douglas Anderson, C.P.A., as well as with the government's motion for summary enforcement of those summonses [Record No. 20]. Having considered the matter de novo in light of the objections of the parties [Record Nos. 21 and 22], and finding Magistrate Judge Todd's recommended disposition of the matter to be entirely appropriate, and being advised,

IT IS ORDERED herein as follows:

(1) That the objections of Petitioners be, and the same hereby are, OVERRULED.

(2) That Petitioners' motion to quash the Internal Revenue Service summonses served on R. Douglas Anderson, C.P.A. be, and the same hereby is, DENIED.

(3) That Respondent's motion for summary denial of the petition to quash summonses [Record No. 6] be, and the same hereby is, GRANTED.

(4) That Respondent's motion for summary enforcement of the summonses served by IRS Special Agent J. Trent Tyson on R. Douglas Anderson, C.P.A. on November 1, 2001 and November 2, 2001 [Record No. 6] be, and the same hereby is, GRANTED.

(5) That Petitioners' motion for judgment and their motion to amend petition [Record No. 15] be, and the same hereby is, DENIED.

(6) That the objections of Respondent be, and the same hereby are, OVERRULED.

(7) That R. Douglas Anderson, C.P.A. fully comply with the summonses served by IRS Special Agent J. Trent Tyson on November 1, 2001 and November 2, 201 by no later than September 13, 2002. Should Mr. Anderson fail to comply with the Court's directive, Respondent is free to seek further relief.

(8) That this action be, and the same hereby is, DISMISSED without prejudice to Respondent's right to seek compliance with this Court's Orders and STRICKEN from the docket.

This the 12th day of August, 2002.

Joseph M. Hood, Judge

¶2002-5351

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Harry L. DANTZLER, DEFENDANT-APPELLANT. UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. James W. JOHNSON, a/k/a Pappa, DEFENDANT-APPELLEE. U.S. Court of Appeals, Fourth Circuit, (CA4) Nos. 02-4048; 02-4053, Sept. 4, 2002. District Court affirmed per curiam. Years 1998, 1999. Decision against Taxpayers.

1. Tax crimes—conspiracy to defraud govt.; submitting false claims to Treas. Dept.—evidence—jury instructions. Taxpayers/local sheriff and tax preparer's convictions for conspiracy to defraud govt. with respect to false claims and submitting false claims to Treas. Dept. were affirmed per curiam: admission of testimony that tax preparer was previously indicted and arrested for conspiracy and aiding in filing of false returns was proper where evidence was relevant, probative of taxpayer's intent, and necessary to prove he was on notice of illegality of his current conduct; and

district court properly instructed jury on limited use of testimony. Also, facts supported willful blindness instruction. *Reference:* United States Tax Reporter ¶72,065.01(40); 72,065.01(47); 73,446.514(25). IRC §7206.

William T. Toal, Johnson, Toal & Battiste, P.A., Columbia, South Carolina; Brian G. O'Keefe, Martin Law Firm, Charleston, South Carolina, for Appellants. J. Strom Thurmond, Jr., United States Attorney, John M. Barton, Assistant United States Attorney, Columbia, South Carolina, for Appellee.

United States Court of Appeals, Fourth Circuit.

Appeals from the United States District Court for the District of South Carolina, at Charleston. (CR-01-331),

David C. Norton, District Judge.

Before WILKINS, MICHAEL, and GREGORY, Circuit Judges.

OPINION

PER CURIAM.

UNPUBLISHED Please use FIND to look at the applicable circuit court rule before citing this opinion. Fourth Circuit Rule 36(c). (FIND CTA4 Rule 36(c).)

Defendants were convicted in the United States District Court for the District of South Carolina, David C. Norton, J., of conspiracy to defraud the government with respect to false and fraudulent claims, and submitting false claims to the United States Department of Treasury, and they appealed. The Court of Appeals held that: (1) admission of testimony of government witnesses, under rule governing evidence of other crimes, that one defendant was previously indicted and arrested for conspiracy and aiding and assisting others in the filing of false tax returns, was within district court's discretion, and (2) evidence supported giving of a willful blindness instruction.

Affirmed.

Affirmed by unpublished PER CURIAM opinion.

Harry L. Dantzler and James W. Johnson were indicted in an eighteen-count indictment charging them with conspiracy to defraud the government with respect to false and fraudulent claims, in violation of 18 U.S.C. § 286 (2000), and submitting false claims to the United States Department of Treasury, in violation of 18 U.S.C. § 287 (2000). Both Appellants were convicted on all counts and sentenced to 51 months imprisonment (Johnson) and 46 months imprisonment (Dantzler), followed by three years of supervised release.

Viewed in the light most favorable to the Government, United States v. Burgos, 94 F.3d 849, 862 (4th Cir.1996), the evidence adduced at trial established the following. During 1998 and 1999, Johnson, then the Sheriff of Orangeburg County, South Carolina, and Dantzler, a paid income tax preparer, submitted a number of tax returns on IRS Form 1041, annual return for or on behalf of a trust or estate. The returns were filed in the names of non-existent trusts on behalf of individual taxpayers. The income of the "trust" was calculated as the total lifetime earnings of the particular taxpayer, and from that figure was subtracted a "fiduciary fee" in the same amount as the reported income, resulting in a reported income of zero. The amount of taxes purportedly paid by the "trust" was the amount estimated to be paid by the taxpayer over his or her lifetime--resulting in a claimed refund in that same amount.

[1] At trial, the Government presented evidence that Dantzler had been investigated in the past for similar conduct. In particular, Government witnesses testified--over Dantzler's objection--that Dantzler was indicted and arrested in early 1999 for conspiracy and aiding and assisting others in the filing of false tax returns. Dantzler contends that the district court erred by allowing the government to introduce this evidence.

This court reviews a district court's determination of the admissibility of evidence under Fed.R.Evid. 404(b) for abuse of discretion. United States v. Queen, 132 F.3d 991, 995 (4th Cir.1997). A district court

will not be found to have abused its discretion unless its decision to admit evidence under Rule 404(b) was arbitrary or irrational. United States v. Haney, 914 F.2d 602, 607 (4th Cir.1990).

Rule 404(b) permits evidence of other crimes, wrongs, or acts to be introduced to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. Fed.R.Evid. 404(b). This court has treated Rule 404(b) as an inclusionary rule, excluding only evidence that has no purpose other than to prove criminal disposition. United States v. Sanchez, 118 F.3d 192, 195 (4th Cir.1997). Evidence is admissible under Rule 404(b) if it is: (1) relevant to an issue other than character, (2) necessary, and (3) reliable. Id.

We find that the district court's decision to allow the evidence of Dantzler's previous indictment and arrest was not arbitrary or irrational. Such evidence was both relevant and probative of Dantzler's intent; i.e., that he knew the claims he filed were false. See United States v. Ford, 88 F.3d 1350, 1362 (4th Cir.1996) (upholding admission of previous arrest as relevant to defendant's intent). The evidence was also necessary to prove that Dantzler was on notice of the illegality of his conduct, yet continued to file false returns. Moreover, the district court properly instructed the jury on the limited use of the evidence.

Next, the Appellants claim that the district court erred in giving a "willful blindness" instruction. A willful blindness instruction allows a jury to infer the element of knowledge if the evidence indicates that the defendant "purposely closed his eyes to avoid knowing what was taking place around him." United States v. Schnabel, 939 F.2d 197, 203 (4th Cir.1991). In a tax case, a willful blindness instruction is warranted if the record supports a finding that the defendant was aware of a high probability that his understanding of the tax laws was erroneous and consciously avoided obtaining actual knowledge of his obligations. United States v. Fingado, 934 F.2d 1163, 1166 [68 AFTR 2d 91-5620] (10th Cir.1991); see also United States v. Whittington, 26 F.3d 456, 463 (4th Cir.1994) (holding that "[t]he record need not contain direct evidence ... that the defendant deliberately avoided knowledge of wrongdoing; all that is necessary is evidence from which the jury could infer deliberate avoidance of knowledge"). We find that there was sufficient evidence to support a willful blindness instruction.

For the foregoing reasons, we affirm Johnson's and Dantzler's convictions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

¶2002-5352

In Re: MADISON RECYCLING ASSOCIATES, Debtor. MADISON RE-CY-CLING ASSOCIATES, APPEL-LANT v. INTERNAL REVENUE SERVICE, APPELLEE. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-5595, Sept. 4, 2002. District Court, (2001, DC KY) 87 AFTR 2d 2001-1583, 2001-1 USTC ¶50361, affirmed per curiam. Deci-sion for Govt.

1. Appeals to Courts of Appeal—review of bankruptcy court decisions—violation of automatic stay—Tax Court proceedings—partnerships. District court properly determined that going forward with partners' Tax Court case after partnership filed Chap. 7 wasn't automatic stay violation: actual parties in Tax Court case were individual partners, not debtor-partnership, so Tax Court case wasn't one "concerning debtor." Also, merely listing partnership in heading of Tax Court case didn't otherwise render it party to that case. *Reference:* United States Tax Reporter ¶68,726.52(10); 68,726.527(15).

On Appeal from the United States District Court for the Eastern District of Kentucky,

United States Court of Appeals, Sixth Circuit,

Before KEITH and DAUGHTREY, Circuit Judges, and CARR,* District Judge.

PER CURIAM.

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION*

[1] This case originated in the bankruptcy court when the debtor, Madison Recycling Associates, filed a petition under Chapter 7 of the Bankruptcy Code on February 1, 2000. Several days later, the debtor filed an emergency motion in the bankruptcy court seeking to have the bankruptcy judge hold the IRS in contempt for failing to abide by the automatic stay in effect from the time the Chapter 7 petition was filed, in conformity with 11 U.S.C. § 362(a)(8). The debtor argued that the automatic stay should be invoked in proceedings instituted in 1988 in the United States Tax Court in the name of Madison Re-cycling Associates by its individual part-ners, who were seeking readjustment of items set out in the notice of final partner-ship administrative adjustment issued by the IRS for the partners' 1982 tax year. The tax court case was scheduled to go to trial on February 6. (That case has since been tried and appealed. See Madison Re-cycling Associates et al., v. Commissioner of Internal Revenue, 295 F3d. 280 [90 AFTR 2d 2002-5132] (2d Cir.2002), af-firming the Tax Court's judgment in favor of the Commissioner.) The bankruptcy judge denied relief, holding that the auto-matic stay provision of the Bankruptcy Code prohibits only "the commencement or continuation of a proceeding before the United States tax court concerning the debtor," id. (emphasis added), and that a tax court proceeding to determine the tax liability of the individual partners in a part-nership cannot be interpreted as a matter "concerning the debtor," where the part-nership has no assets to which the individ-ual partners could assert a claim in bank-ruptcy.

On appeal, the district court affirmed the bankruptcy court's order, holding-- correctly, we conclude--that under the Internal Revenue Code, the actual parties in an FPAA proceeding are the partners, not the partnership. See 26 U.S.C. § 6226(c) and (d); Tax Ct. R. 247; see also 1983 Western Reserve Oil & Gas v. Comm'r, 95 T.C. 51, 58 (1990), aff'd without published opinion, 995 F.2d 235 (9th Cir.1993) ("[U]nder the statute and our Rules, it is not the partnership, but the partner filing a petition in the Tax Court, who is the petitioner. Thus, it is clear that the bankruptcy proceeding and the proceeding in this Court involve different parties.") (citations omitted). As did the district court, we reject the debtor's contention that despite this authority, the partnership is "the real party in interest." If nothing else, the flaw in this argument should be obvious from the simple fact that partnerships are not subject to federal income tax. We likewise reject the argument that listing the partnership in the heading of the Tax Court action made the debtor a party.

Having had the benefit of oral argument, and having studied the record on appeal and the briefs of the parties, we are not persuaded that the district court erred in affirming the order of the bankruptcy court. Because the reasons why judgment should be entered in favor of the IRS have been fully articulated by the bankruptcy court and the district court, the issuance of a detailed opinion by this court would be duplicative and would serve no useful purpose. Accordingly, we AFFIRM the judgment of the district court for the rea-sons set out above and upon the reasoning set out by that court in its order filed March 1, 2001.

2002 WL 31001521 (6th Cir.(Ky.))

¶2002-5353

MARSH & McLENNAN COMPANIES, INC. AND SUBSIDIARIES, PLAINTIFF-APPELLANT v. UNITED STATES, DEFENDANT-APPELLEE. U.S. Court of Appeals for the Federal Cir-

* The Hon. James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

* Sixth Circuit Rule 28 (g) limits citation to specific situations. Please see Rule 28 (g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28 (g). (Find CTA6 Rule 28.)

cuit, (CA Fed Cir.) 02-5002, Sept. 6, 2002. Court of Federal Claims, (2001, Ct Fed Cl) 88 AFTR 2d 2001-5381, 50 Fed Cl 140, 2001-2 USTC ¶50575, affirmed. Years 1985, 1986. Decision against Taxpayer.

1. Interest on overpayments—date interest runs; applicable end date—"use of money" principle. Court of Federal Claims properly determined that end date for accrual of interest on corp.'s calendar year agreed overpayments was date on which tax was due for later-arising liability, not date when overpayments were actually applied to such liability: although IRC §6611(b)(1) was ambiguous as to whether "due date" referred to return's due date or date on which there was net deficit in taxpayer's account for particular year, Reg. §301.6611-1(h)(1) resolved ambiguity in govt.'s favor that due date was last day for tax payment. Also, Reg's disregard for interest calculation purposes of credit elect overpayments comported with legislative history; IRC §6402(a) didn't apply; case law involving underpayment and IRC §6601(a) was distinguishable; IRC §6621(d)'s equalization of underpayment and overpayment interest rates was irrelevant; use of money principle couldn't override statutory language and regs; and taxpayer couldn't otherwise avoid consequences of seeking credit elect rather than refund with fairness argument. *Reference:* United States Tax Reporter ¶66,115.09(30); 66,115.07(5). IRC §6611.

A. Duane Webber, Baker & McKenzie, of Washington, DC, argued for plaintiff-appellant. Of counsel was Neal J. Block, Baker & McKenzie, of Chicago, Illinois. Paula K. Speck, Attorney, Tax Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were Eileen J. O'Connor, Assistant Attorney General; and Richard Farber, Attorney.

United States Court of Appeals for the Federal Circuit,

Appealed from: United States Court of Federal Claims,

Judge Christine O. C. Miller

Before MAYER, Chief Judge, MICHEL, and DYK, Circuit Judges.

DYK, Circuit Judge.

Marsh & McLennan Companies, Inc. ("Marsh") appeals the decision of the United States Court of Federal Claims granting summary judgment for the United States. The court held that Marsh is not entitled to interest on overpayments of federal income tax for 1985 and 1986 (which were applied to satisfy tax liabilities for 1987 and 1988) for the period after the due date of its 1987 and 1988 tax returns. Marsh & McLennan Cos. v. United States, 50 Fed. Cl. 140 [88 AFTR 2d 2001-5381] (2001). Because the language of the pertinent statute, as authoritatively interpreted by a Treasury regulation, plainly denies such interest, we affirm.

BACKGROUND

The facts of this case are not in dispute. Marsh, a financial services company, overpaid its 1985 federal income taxes by $275,139 ("1985 overpayment") and overpaid its 1986 taxes by $3,412,083 ("1986 overpayment").

Marsh also overpaid the amount of 1987 federal income taxes shown on the return by $12,694,216, and at the time the 1987 return was filed, Marsh elected to apply this overpayment to its 1988 tax liability ("1987 credit elect overpayment"). The Internal Revenue Service ("IRS") permits a corporate taxpayer that has paid more than its liability in one year to claim a credit for the excess against its estimated taxes for the succeeding year. 26 U.S.C. § 6402(b) (2000).[1] The credit is called a "credit elect overpayment." As discussed below, credit elect overpayments do not earn interest. The 1987 credit elect over-

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[1] Section 6402(b) provides:

The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable year.

26 U.S.C. 6402(b) (2000).

The pertinent language of the code and regulations has not changed since the relevant time period.

payment was transferred by the IRS from Marsh's 1987 tax account into its 1988 tax account on March 15, 1989, the due date of its 1988 tax return.

Marsh also overpaid the amount of 1988 taxes shown on the return by $28,336,308, and at the time the 1988 return was filed, Marsh elected to apply this overpayment to its 1989 tax liability (''1988 credit elect overpayment''). A portion of the 1988 credit elect overpayment was transferred by the IRS from Marsh's 1988 tax account into its 1989 tax account on September 15, 1989, to satisfy its estimated 1989 tax liability, and the remainder of the 1988 credit elect overpayment was transferred from Marsh's 1988 tax account into its 1989 tax account on March 15, 1990, to satisfy its final 1989 tax liability.

Thus, Marsh had made four separate overpayments (if the 1987 and 1988 tax liabilities as shown in the returns were accurate): (1) the 1985 overpayment; (2) the 1986 overpayment; (3) the 1987 credit elect overpayment; and (4) the 1988 credit elect overpayment.

In 1994, the IRS determined that Marsh had in fact underpaid its 1987 taxes by $978,135. This increase in tax was less than the amount of the 1987 credit elect overpayment. The IRS applied Marsh's 1985 overpayment and a portion of its 1986 overpayment to its 1987 tax account on March 15, 1989, the date the 1987 credit elect overpayment was applied to Marsh's 1988 tax account.

Similarly, in 1994, the IRS determined that Marsh had in fact underpaid its 1988 taxes by $2,709,087. This increase in tax was less than the amount of the 1988 credit elect overpayment. The IRS applied the remainder of Marsh's 1986 overpayment to its 1988 tax account. The actual transfers were made on September 15, 1989 (the date the 1988 credit elect overpayment was applied to the estimated tax payment for 1989), and March 15, 1990 (the date the remainder of Marsh's 1988 credit elect overpayment was applied to Marsh's 1989 tax account).

There is no dispute concerning the amount of Marsh's 1985 and 1986 overpayments, the dates that those payments were credited to later years' taxes, the amount of the 1987 and 1988 credit elect overpayments, the dates on which those credit elect overpayments were needed to satisfy later years' obligations, or the amount of Marsh's 1987 and 1988 tax liabilities. The ultimate issue concerns the amount of interest due on the 1985 and 1986 overpayments.

An ''overpayment'' occurs when a taxpayer ''has paid as an installment of the tax more than the amount determined to be the correct amount of such installment.'' 26 U.S.C. § 6403 (2000). The IRS has authority to either refund or credit the overpayment to any unpaid installment. Id. Unlike credit elect overpayments, overpayments bear interest. See id. § 6611(a). For the 1985 overpayment amount and the portion of the 1986 overpayment amount credited against Marsh's 1987 tax liability, the IRS allowed interest through April 15, 1988, the due date for Marsh's 1987 tax return (plus one month).[2] For the portion of the 1986 overpayment amount credited against Marsh's 1988 tax liability, the IRS allowed interest through April 15, 1989, the due date for Marsh's 1988 tax return (plus one month). The government stopped the running of interest on those dates because it reasoned that overpayment interest runs only until the ''due date'' of a taxpayer's federal income tax return for the year to which the over-payment was applied.

The governing statute, 26 U.S.C. § 6611 (2000), entitled ''Interest on overpayments,'' provides in relevant part that ''[s]uch interest shall be allowed and paid as follows: . . . In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken.'' Id. § 6611(b)(1). Treasury Regulation § 301.6611-1(h)(1) provides:

[2] Although the due date of corporate federal income tax returns is March 15 of the following year, 26 U.S.C. § 6072(b) (2000), the IRS computed and paid interest on Marsh's 1985 overpayment until April 15, 1988, rather than March 15, 1988. Similarly, the IRS computed and paid interest on Marsh's 1986 overpayment until April 15, 1989. The government concedes that the statute of limitations bars recovery of the interest attributable to the additional month, so it is not at issue on appeal.

"General rule. If an overpayment of tax is credited, interest shall be allowed from the date of the overpayment to the due date ... of the amount against which such overpayment is credited." 26 C.F.R. § 301.6611-1(h)(1) (2001). "Due date" is defined in subsection 301.6611-1(h)(2)(i): "In general. The term 'due date,' as used in this section, means the last day fixed by law or regulations for the payment of the tax (determined without regard to any extension of time) ...." Id. § 301.6611-1(h)(2)(i). For taxes reported on a return, this payment date is the last unextended date fixed for filing the return. 26 U.S.C. § 6151(a) (2000).

The parties apparently agree that, absent the credit elect overpayments, the two due dates involved here were March 15, 1988, and March 15, 1989 (i.e., the due dates for the 1987 and 1988 tax returns respectively) and that interest on the 1985 and 1986 overpayments would have ceased on those dates. Thus, the issue on appeal is the effect of the credit elect overpayments on the running of interest. It is well established that the taxpayer earns no interest on credit elect overpayments. If a taxpayer elects to credit against its estimated liability for one taxable year an overpayment shown on its return for the preceding year, it collects no interest even though at one point it has paid the IRS more than was due. 26 C.F.R. § 301.6611-1(h)(2)(vii) (2001); Martin Marietta Corp. v. United States, 572 F.2d 839, 841 [41 AFTR 2d 78-986] (Ct. Cl. 1978). The question is whether credit elect overpayments must be taken into account in calculating the interest due on other overpayments.

PROCEEDINGS BELOW

Marsh filed a complaint in the Court of Federal Claims seeking $833,522 in overpayment interest for the period between April 15, 1988, and March 15, 1989, for its 1985 overpayment and a portion of its 1986 overpayment; for the period between April 15, 1989, and September 15, 1989, for a portion of its 1986 overpayment; and between April 15, 1989, and March 15, 1990, for the remainder of its 1986 overpayment, the ending dates representing the dates on which the credit elect overpayments were applied to subsequent tax year liabilities. The government filed a motion for summary judgment, and Marsh filed a cross motion for summary judgment.

Marsh argued that 26 U.S.C. § 6611, which provides for the accrual of interest on overpayments "to the due date of the amount against which the credit is taken," should be construed to mean that interest runs until an account actually becomes deficient, that is, "due and unpaid." Marsh argued that its 1987 tax account was not actually deficient until March 15, 1989, when the 1987 credit elect overpayment was applied to its 1988 tax account. Similarly, Marsh argued that its 1988 tax account was not actually deficient until September 15, 1989, when a portion of its 1988 credit elect was applied to its 1989 estimated taxes, and on March 15, 1990, when the remainder of its 1988 credit elect was applied to its 1989 tax account.

The government argued that, under the plain meaning of section 6611 and Treasury Regulation § 301.6611-1(h)(2), the "due date of the amount against which the credit is taken" is the due date of a taxpayer's federal income tax return for the year to which the overpayment is applied. Marsh's 1985 overpayment and a portion of its 1986 overpayment were applied to its 1987 tax account, and the remainder of the 1986 overpayment was applied to Marsh's 1988 tax account. Marsh was required to file its 1987 tax return on March 15, 1988, and its 1988 tax return on March 15, 1989. Therefore, the government argued, Marsh was entitled to interest on its 1985 overpayment and a portion of its 1986 overpayment until March 15, 1988, and on the remainder of its 1986 overpayment until March 15, 1989.[3]

The Court of Federal Claims recognized that the case turned on the interpretation of section 6611, and determined that, read in isolation, the statutory language, "which is, at best, not a model of clarity," does not "yield[] a satisfactory result." Marsh, 50 Fed. Cl. at 143. Similarly, the court

[3] As noted, the government actually paid Marsh interest through April 15, 1988, and April 15, 1989.

concluded that neither the "use of money" principle, under which overpayments and underpayments are generally netted in calculating interest, nor IRS revenue rulings provided the answer. Id. at 143–45. The court then assessed the relative "predictability" of the parties' competing interpretations. Id. at 146. The court noted that Marsh's interpretation would make interest accrual cease on the date an overpayment was actually credited against another tax liability, and, under Marsh's interpretation, "the 'due date' becomes wholly dependent on the IRS's accounting procedures, which have not been shown to be governed by the statutory language of I.R.C. § 6611(b)(1)." Id. at 142. The court rejected Marsh's interpretation in large part because the "due date" would be impossible to predict in advance in that it depended on the "vagaries" of the IRS internal accounting procedures, and accepted the government's interpretation because it "harmonizes with the principle of predictability and comports with the statutory language." Id. at 146. Accordingly, the court granted summary judgment in favor of the government.

Marsh timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

STANDARD OF REVIEW

We review a trial court's grant of a motion for summary judgment without deference. Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1330 (Fed. Cir. 2001). Summary judgment is appropriate when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

DISCUSSION

[1] This case involves the question when interest on tax overpayments ceases to run.

As noted above, the parties apparently agree that, if there had been no credit elect overpayment in 1987 or 1988, the "due date" for the additional tax due for 1987 and 1988 would have been March 15 of the year following the tax year in question, here March 15, 1988, and March 15, 1989. Under either party's interpretation of section 6611, interest on the 1985 and 1986 overpayments would have ceased to run on those dates.

The parties' disagreement arises from the existence of the 1987 and 1988 credit elect overpayments. Marsh argues that because of the credit elect overpayments, there was no outstanding liability in its 1987 account until the 1985 overpayment and a portion of the 1986 overpayment were applied to its 1988 tax account on March 15, 1989, and there was no outstanding liability in its 1988 account until the remainder of the 1986 overpayment was applied to its estimated 1989 tax on September 15, 1989, and its final 1989 tax on March 15, 1990.

Marsh urges that, as a result of its 1987 credit elect overpayment, it overpaid the government between the period of the credit elect overpayment and the due date of the tax return of the year to which the credit elect overpayment was applied, that is, from March 15, 1988, to March 15, 1989. Similarly, Marsh urges that, as a result of its 1988 credit elect overpayment, it overpaid the government from March 15, 1989, to September 15, 1989, and March 15, 1990.

Marsh contends that there was no payment "due" until its 1987 tax account actually became negative on March 15, 1989, i.e., the date that the 1987 credit elect overpayment was applied to its 1988 tax account. Similarly, Marsh contends that there was no payment "due" until its 1988 tax account became negative on September 15, 1989, the date when a portion of its 1988 credit elect overpayment was applied to its 1989 tax account, and again on March 15, 1990, when the remainder of its 1988 credit elect overpayment was applied to its 1989 tax account.

The government urges that the "due date" for purposes of section 6611 is the due date of the returns, and that this date does not change as a result of the 1987 and 1988 credit elect overpayments.

We agree with the government and disagree with Marsh for several reasons.

First, the language of section 6611(b)(1), as interpreted by Treasury Regulation § 301.6611-1(h)(2), requires this result.

Both parties argue from their view of the supposed plain language of section 6611(b)(1). In fact, the statutory language is ambiguous. The "due date" could refer either to the due date of the return (the government's position) or the date on which there is a net deficit in the amount due in the taxpayer's account for the particular year (the taxpayer's position). Under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843–44 (1984), we look to the Treasury regulations to resolve the ambiguity. See United States v. Mead Corp., 533 U.S. 218, 227–28 (2001); United States v. Haggar Apparel Co., 526 U.S. 380, 392 (1999). The Treasury regulations are, we think, quite clear. They provide: "General rule. If an overpayment of tax is credited, interest shall be allowed from the date of the overpayment to the due date ... of the amount against which such overpayment is credited," 26 C.F.R. § 301.6611-1(h)(1) (2001), and define "due date" as: "In general. The term 'due date,' as used in this section, means the last day fixed by law or regulations for the payment of the tax (determined without regard to any extension of time)," id. § 301.6611-1(h)(2)(i). Marsh notes that because the regulations state that this definition of "due date" will be used "[i]n general," they do not purport to interpret the entire phrase "due date of the amount against which the credit is taken" in section 6611(b)(1). As the government points out, however, Treasury Regulation § 301.6611 is actually keyed to the relevant section of the code, section 6611, indicating that it does in fact relate to section 6611. We agree with the government that the regulation does apply.

Marsh also contends that the regulations are "unreasonable." We cannot agree. For reasons that we discuss below, there is nothing unreasonable in disregarding credit elect overpayments in calculating overpayment interest. And, while an IRS interpretation of its regulation might be entitled to deference where there is an ambiguity, Am. Express Co. v. United States, 262 F.3d 1376, 1382 [88 AFTR 2d 2001-5568] (Fed. Cir. 2001), Marsh cites no interpretation of the regulations by the IRS in a context similar to this one that would contradict their plain meaning.[4]

Contrary to Marsh's argument, the legislative history of section 6611 does not support Marsh. Section 6611 as it reads today was enacted in the Technical Amendments Act of 1958, Pub. L. No. 85-866, § 83, 72 Stat. 1606, 1663–64 (1958), reprinted in 1958 U.S.C.C.A.N. 1925, 1997, and is identical in relevant part to section 1019 of the Internal Revenue Act of 1924.[5] Marsh urges that the legislative history establishes that the "due date against which the credit is taken" is the date on which the overpayment is economically offset against a liability. Marsh argues that the legislative history reveals that "Congress intended that interest accrue on a credited overpayment until the date on which an overpayment and underpayment simultaneously existed (i.e., on the date on which 'mutuality of indebtedness' arose)," citing the Senate Finance Committee Report, S.

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[4] For example, Marsh cites Field Service Advice 200202056 (Oct. 11, 2001), available at 2001 FSA LEXIS 201 ("FSA 200202056"), to argue that the IRS interprets section 6611 as allowing interest until "the effective date on which the overpayment is credited against an outstanding liability." (Appellant's Reply Br. at 8–9.) FSA 200202056 involved whether the transfer of overpayments from taxpayer's year 1 and year 2 tax accounts into its year 9 tax account constituted a credit elect overpayment, which earns no interest, or an overpayment, which earns interest. The IRS ruled that "the transfer cannot constitute a credit elect ...," since the payment was not credited to the estimated taxes for the year immediately succeeding the tax year, and found that taxpayer was entitled to interest. FSA 200202056 at 7.

Similarly, Marsh cites Technical Advice Memorandum 9443007 (May 19, 1994), available at 1994 PRL LEXIS 1285, ("TAM 9443007") to argue that Treasury Regulation § 6611-1(h)(2)(i) was not intended to cut off interest on an overpayment on the filing date of a return when that date was prior to the date on which the taxpayer's liability arose. TAM 9443007 involved the question whether the accrual of overpayment interest allowable under section 6611, which is credited against a later deficiency resulting from an excessive refund, terminates on the date of the excessive refund or on the filing date for the year of the credit carryback that gave rise to the excessive refund. The IRS concluded that interest terminates on the date of the excessive refund.

[5] That section provided in part:

> Upon the allowance of a credit ... of any sum which was excessive ..., interest shall be allowed and paid on the amount of such credit ... from the date such tax, penalty, or sum was paid ... to the due date of the amount against which the credit is taken ....

Internal Revenue Act of 1924, § 1019, 43 Stat. 253, 346 (1924).

Rep. No. 1983, 85th Cong., 2d Sess., 234–35 (1958), reprinted in 1958-3 C.B. 922, 1156. But the legislative history on which Marsh relies does not address the precise issue here or suggest that a credit elect overpayment must be considered in calculating interest. In enacting and amending section 6611 and its predecessor, section 1019, Congress sought to address specific issues, such as: to eliminate the distinction between the running of interest in the situation where an overpayment is credited against a later-arising deficiency and where it is credited against an underpayment of original tax; to eliminate the running of interest where overpayments and underpayments offset each other; to address the anomaly in the transitional situation in which a taxpayer (which owed money to the government on taxes imposed by a prior revenue act) paid no interest but collected interest upon money the government owed it; and to eliminate the requirement of a protest as a condition precedent for a taxpayer to receive overpayment interest.[6] Thus, the legislative history does not support Marsh's interpretation of the statute.

Second, contrary to Marsh's argument, section 6402(a) of the code does not require a different result. That section pro-vides:

> In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsections (c), (d), and (e) refund any balance to such person.

26 U.S.C. § 6402(a) (2000) (emphasis added). Marsh argues that there was no "liability" within the meaning of section 6402(a) until the credit elect overpayments were applied to subsequent years' taxes. Marsh points out that the IRS in fact did not apply the 1985 and 1986 overpayments to the 1987 tax account until the 1987 tax account actually became negative, that is, when the 1987 credit elect overpayment was transferred to the 1988 tax account on March 15, 1989. Similarly, the IRS did not apply the 1986 overpayment to the 1988 tax account until the 1988 tax account in fact became negative, that is, when the 1988 credit elect overpayment was transferred to pay 1989 estimated taxes on September 15, 1989, and the final 1989 taxes on March 15, 1990.

Section 6611 makes no reference to section 6402, and whatever limitations section 6402 may impose on the IRS's authority to credit, section 6402 does not define the term "due date" for purposes of section 6611. There is no indication in section 6402 that it was designed to affect the running of overpayment interest.

Third, Marsh argues that we should follow the Second Circuit's decision in Avon Products, Inc. v. United States, 588 F.2d 342 [42 AFTR 2d 78-6266] (2d Cir. 1978), which Marsh interprets as holding that there is no tax liability until the credit elect overpayments were in fact credited to later years' taxes. Avon is distinguishable and does not stand for the broad proposition attributed to it by Marsh. In Avon the taxpayer initially reported an overpayment on its 1967 return, and made a credit elect. 588 F.2d at 343. Thereafter, it filed an amended return showing a 1967 deficiency, and the IRS later assessed an additional 1967 deficiency. Id. The IRS assessed interest on the deficiencies without regard to the credit elect overpayment. Id.

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[6] S. Rep. No. 1983, at 234–35 (1958), reprinted in 1958-3 C.B. 922, 1156 (explaining that "section 6611(b)(1) is amended to remove the distinction now existing in the running of interest where the overpayment is credited against an underpayment of original tax and where it is credited against an additional assessment. Interest on a credited overpayment would in either case now run only from the date of the overpayment to the original due date of the amount against which it is credited."); H.R. Rep. 775, at 45 (1957), reprinted in 1958-3 C.B. 811, 855; S. Rep. No. 1983, at 234–35, reprinted in 1958-3 C.B. 922, 1020–21 (eliminating interest on overlapping periods of underpayment and overpayment, thereby remedying situations where "even though underpayments and overpayments offset each other, the [IRS] collects more interest than it pays or the taxpayer is entitled to more interest than he owes the Government."); S. Rep. No. 52, at 38 (1926) (noting that "in the case of a credit taken against an additional assessment," and where the "taxes [were] imposed by acts prior to the revenue act of 1921, the taxpayer pays no interest in the case of underpayment up to the date of assessment," and that this leads to the problem that "a taxpayer who owes the Government money, upon which he is paying no interest, is collecting interest upon money which the Government owes him."); H.R. Rep. No. 179, at 35 (1924) (regarding the elimination of the requirement of a protest as a condition precedent to the allowance of interest: "If the amounts in question were not legally owing to the Government, it is equitable that the Government should pay a reasonable rate of interest during the period of their retention; and the fact of protest or a claim does not affect the merits of such interest payment.").

The Second Circuit held that this was impermissible, and that the credit elect overpayment could not be disregarded; interest on the deficiencies did not run until the date the credit elect overpayment was applied to the next year's tax. Id. at 344. Marsh argues that the same should be true here, and that the amount of the deficiencies should be offset by the amount of the credit elect overpayments.

However, Avon was an underpayment case, interpreting the section of the statute governing underpayment interest, section 6601(a). That section provides "If any amount of tax . . . is not paid on or before the last date prescribed for payment, interest on such amount . . . shall be paid for the period from such last date to the date paid." 26 U.S.C. § 6601(a) (2000) (emphasis added). Unlike the situation here, the language of the statute contradicted the government's position since the statute focused on the question whether the tax was "paid," and not on the "due date" for the tax. As the Second Circuit noted, "if we were to construe § 6601(a) literally, it would not even be apposite to this case. Avon's full tax was in fact paid 'on or before the last date prescribed for payment,' June 15, and so the premise of the provision is undercut." Avon, 588 F.2d at 344. To avoid a result clearly contrary to the statutory language, the court interpreted section 6601(a) as providing that underpayment interest shall begin running when a tax becomes "both due and unpaid." Id.

As the Avon court noted, the tax code differentiates between underpayment and overpayment interest situations. Id. at 345. It does not, as Marsh argues, require identical treatment.[7] Underpayment interest ceases to run on "the date paid," 26 U.S.C. § 6601(a) (2000), while overpayment interest ceases to run on "the due date of the amount against which the credit is taken," id. § 6611(b). Thus, cases like Avon interpreting the section of the statute governing underpayment interest situations are irrelevant. See also May Dep't Stores Co. v. United States, 36 Fed. Cl. 680, 688 [78 AFTR 2d 96-7034] (1996) (holding that the government was not entitled to underpayment interest between the date of payment of the estimated tax and the date of filing of the return where the taxpayer overestimated its overpayment and elected to apply the overpayment to the following year's estimated tax as a credit elect, thereby creating a deficiency); Revenue Ruling 99-40, reprinted in 1999-2 C.B. 441 (analyzing the calculation of underpayment interest in the context of a credit elect overpayment and subsequently determined deficiency). Moreover, the court in Avon expressly distinguished the case before it from cases involving overpayment interest, and emphasized that the statutory scheme governing overpayment interest, as well as the policy considerations underlying it, were very different:

> [T]his case is not covered by the cited regulation [Treasury Regulation § 301.6611-1(h)(2)(vii), governing overpayment interest]. Nor do we believe that it provides a helpful analogy. Indeed, the fact that there is a Treasury Regulation explicitly denying the taxpayer interest in the [credit elect overpayment] situation . . . but nothing comparable suggesting that Avon must pay interest for its later-created deficiency would indicate that the contrary result is compelled.

Avon, 588 F.2d at 345.

To support its argument that there is symmetry in the payment of overpayment and underpayment interest, Marsh cites a section of the code that equalizes underpayment and overpayment interest rates, 26 U.S.C. § 6621(d) (2000). But the issue here is the running of interest, not what interest rate applies. Marsh also cites Brown & Williamson, Ltd. v. United States, 688 F.2d 747, 750 [50 AFTR 2d 82-5617] (Ct. Cl. 1982), and United States v. Koppers Co., 348 U.S. 254, 267 [46 AFTR 1348] (1955), for the same proposition. Brown & Williamson involved the amount of over-

[7] Marsh cites Consolidated Paper Co. v. United States, 59 F.2d 281 [11 AFTR 461] (Ct. Cl. 1932), cert. denied, 288 U.S. 615 (1933), as evidence of Congress's intent to treat all overpayments identically, whether they are ultimately refunded or credited. Consolidated Paper involved a technical statute of limitations issue concerning the date that a credit was allowed and taken by the Commissioner. It has no relevance here.

payment interest that should be paid on a refund resulting from a retroactive reduction of taxes by an income tax treaty. Brown & Williamson, 688 F.2d at 750. Koppers involved the calculation of interest under a provision allowing abatement of wartime excess profits taxes. Koppers, 348 U.S. at 267. Neither Brown & Williamson nor Koppers is helpful here.

Fourth, Marsh argues that the government had the use of its money and should pay interest. We agree that the IRS had the use of Marsh's money represented by the credit elect overpayments, and that Marsh will not receive interest on those amounts. However, this is not an anomaly. Once the taxpayer designates an overpayment as a credit elect overpayment, the taxpayer loses control over that money. Once the election is made, that election is irrevocable and binding on both the IRS and the taxpayer. Martin Marietta, 572 F.2d at 842. The regulations expressly provide that interest shall not be allowed on credit elect overpayments under section 6611(a). 26 C.F.R. § 301.6611-1(h)(2)(vii) (2001);[8] Martin Marietta, 572 F.2d at 841. Marsh does not contest this principle, and admits that "[t]his exception is set forth in Treas. Reg. §§ 301.6402-3(a)(5) and 301.6611-1(h)(2)(vii), and was ratified by Congress."[9] (Appellant's Reply Br. at 27 n.14.) Just as the taxpayer cannot get interest on the credit elect overpayment, the taxpayer cannot use the credit elect overpayment to increase the amount of interest that otherwise would be due on the 1985 and 1986 overpayments.

In any event, the "use of money" cases, on which Marsh so heavily relies, cannot contradict the statutory language as interpreted by the regulation. In general, the "use of money" principle is a tool of statutory construction that supports the payment of interest to compensate one party for the time the other party had the use of its money. See, e.g., Manning v. Seeley Tube & Box Co., 338 U.S. 561, 565–66 [38 AFTR 1202] (1950). The use of money principle has been recognized by the IRS generally,[10] and has been applied by the statute and the regulations in specific situations.[11] But Marsh has not called our attention to any case in which the use of money principle has been held to override statutory language requiring a contrary result. See MNOPF Trustees, Ltd. v. United States, 123 F.3d 1460, 1465 [80 AFTR 2d 97-6117] (Fed. Cir. 1997) (determining the starting date for interest on an overpayment attributable to a refund to be the unextended date by which the banks that withheld the money were required to file returns reporting the withholding, based on the relevant Treasury regulation, rather than from the date that the government actually had "use of" the funds); May Dep't Stores, 36 Fed. Cl. at 688 (reaffirming the Avon principle that underpayment interest may be imposed only for the period during which a tax is both due and unpaid, based on "the plain language" of section 6601); Avon, 588 F.2d

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[8] Treasury Regulation § 301.6611-1(h)(2)(vii) provides:

> Estimated income tax for succeeding year. If the taxpayer elects to have all or part of the overpayment shown by his return applied to his estimated tax for his succeeding taxable year, no interest shall be allowed on such portion of the overpayment credited and such amount shall be applied as a payment on account of the estimated tax for such year or the installments thereof.

26 C.F.R. § 301.6611-1(h)(2)(vii) (2001) (emphasis added).

[9] See H.R. Rep. No. 98-432, pt. 2, at 1490 (1984) ("[T]he taxpayer may elect to credit the overpayment to an estimated tax payment .... Where the credit is made to an estimated tax payment arising prior to the election, interest on any overpayment will not be payable ...." (citing Treas. Reg. § 301.6611-1(h)(2)(vii))).

[10] See Field Serv. Adv. 200149028 (Sept. 7, 2001), available at 2001 WL 1559040 ("Compensation for the use of money is the principal rationale for charging interest with respect to both overpayments and underpayments."); Tech. Adv. Mem. 973005 (April 7, 1997), available at 1997 WL 415375 (discussing section 905(c) as "a special exception to the general interest rules" relating to foreign tax credit: "[t]he Code's interest provisions reflect the economic basis for interest, i.e., use of money ... [u]nder § 6611, the government pays the taxpayer interest on an overpayment for the time the government has use of the taxpayer's money."); Rev. Proc. 60-17, § 2.01, reprinted in 1960-2 C.B. 942, 943 ("Under the general rule, interest is paid on a tax overpayment for the time the government has the use of the taxpayer's money .... The underlying objective is to determine in a given situation whose money it is and for how long the other party had the use of it.").

[11] See 26 U.S.C. § 6601(f) (2000) ("[N]o interest shall be imposed under [the underpayment interest provision] on the portion of the tax [satisfied by credit of an overpayment] for any period during which, if the credit had not been made, interest would have been allowable with respect to such overpayment."); Id. § 6621(d) ("To the extent that, for any period, interest is payable ... and allowable ... on equivalent underpayments and overpayments by the same taxpayer ... the net rate of interest under this section on such amounts shall be zero for such period."); 26 C.F.R. § 301.6611-1(h)(2)(vi) (2001) ("In the case of a credit against an additional amount, addition to the tax, or assessable penalty, the due date is the earlier of the date of assessment or the date from which such amount would bear interest if not satisfied by payment or credit.").

at 343–44 (recognizing the use of money principle as a background principle, then interpreting section 6601 as required by the statutory language and legislative history). The use of money principle does not trump the language of the relevant statute and Treasury regulations.

Finally, Marsh argues that if it had sought a refund instead of making the credit elect in 1987, it would have had the use of those funds. This is true enough, but we fail to see how that assists Marsh. There is no principle that requires that the taxpayer be treated the same whether it seeks a refund or a credit elect. Indeed, the statute as interpreted by the regulations provides that, for a refund, interest will be allowed from the date of the overpayment until "a date (to be determined by the Secretary) preceding the date of the refund check by not more than 30 days," 26 U.S.C. § 6611(a)(2) (2000), but denies interest on credit elect overpayments, 26 C.F.R. § 301.6611-1(h)(2)(vii) (2001). The taxpayer could have sought a refund for the excess funds, or left the excess funds as an interest-bearing overpayment. A taxpayer that makes a credit elect has no one to blame but itself for the non-payment of interest on that amount. See Avon, 588 F.2d at 345. See also Mellon Bank, N.A. v. United States, 265 F.3d 1275 [88 AFTR 2d 2001-5800] (Fed. Cir. 2001) ("The Supreme Court has 'observed repeatedly that, while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not . . . .'" (quoting Comm'r v. Nat'l Alfalfa Dehydrating & Milling Co., 417 U.S. 134, 149 [33 AFTR 2d 74-1347] (1974))).

In essence, Marsh urges that we interpret the statute to achieve what it regards as a more just result. But we cannot revise the language of the statute as interpreted by the Treasury to achieve what might be perceived to be better tax policy, just as we cannot approve the Court of Federal Claims' decision below interpreting the code to achieve greater predictability. The tax code is complex, see generally Cheek v. United States, 498 U.S. 192, 199–200 [67 AFTR 2d 91-344] (1991), and we must be careful to enforce the statute as written and interpreted, see Philadelphia & Reading Corp. v. United States, 944 F.2d 1063, 1074 [68 AFTR 2d 91-5501] (3d Cir. 1991) ("The precision and complexity of our tax laws . . . bespeak Congress's intent to keep the Article III judiciary out of the administration of the tax code except to enforce and monitor the precise rules Congress has written . . . ."). It is noteworthy that some of the very cases on which Marsh relies recognize that the tax code interest provisions are not to be interpreted, contrary to their language, to require the favorable netting of overpayments and underpayments that Marsh urges is essential to tax equity. See Seeley Tube, 338 U.S. at 565–66 (declining to offset deficiency by loss carry-back for interest purposes); N. States Power Co. v. United States, 73 F.3d 764, 768 [77 AFTR 2d 96-323] (8th Cir. 1996), cert. denied, 519 U.S. 862 (1996) (holding that, in calculating interest, overpayments and underpayments need not be netted to avoid interest rate differential).

We have considered the taxpayer's other arguments, and find them to be without merit.

COSTS

No costs.

AFFIRMED.

¶2002-5354

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Michael John MODENA, DEFENDANT-APPELLANT. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 00-2477, Sept. 9, 2002. District Court affirmed in part, and vacated and remanded in part. Decision for Taxpayer in part and for Govt. in part.

1. Tax crimes—conspiracy to evade taxes—right to counsel—evidence—sentencing. Taxpayer's conviction for conspiracy to evade taxes through sham trust scheme was affirmed: district court properly accepted taxpayer's admittedly knowing waiver of right to counsel and

wasn't required to conduct 2d waiver hearing just because taxpayer expressed interim doubts; erroneous admission of co-conspirators' convictions and evidentiary summaries was harmless where proof of taxpayer's involvement in scheme otherwise supported his conviction; and prosecutor's improper conduct in closing arguments wasn't so flagrant as to warrant reversing conviction. But, court's imposition of drug and alcohol testing as conditions of taxpayer's supervised release was improper where drugs and alcohol played no role in his crime and such conditions bore no relationship to taxpayer's rehabilitation or public's protection. *Reference:* United States Tax Reporter ¶73,447.511(30); 72,015.03(25); 73,446.516(55). IRC §7201.

ARGUED: Paul L. Nelson, FEDERAL PUBLIC DEFENDER'S OFFICE, Grand Rapids, Michigan, for Appellant.
Donald A. Davis, ASSISTANT UNITED STATES ATTORNEY, Grand Rapids, Michigan, for Appellee.
ON BRIEF: Paul L. Nelson, FEDERAL PUBLIC DEFENDER'S OFFICE, Grand Rapids, Michigan, for Appellant.
Donald A. Davis, ASSISTANT UNITED STATES ATTORNEY, Grand Rapids, Michigan, for Appellee.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT,

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids. No. 99-00047--Robert Holmes Bell, Chief District Judge.

Before: CLAY and GILMAN, Circuit Judges; HAYNES, District Judge.*

OPINION

RONALD LEE GILMAN, Circuit Judge.

RECOMMENDED FOR FULL-TEXT PUBLICATION*

Michael John Modena was convicted of conspiracy to defraud the United States because of his participation in a tax-evasion scheme. He now appeals his conviction and sentence, arguing that (1) the district court failed to properly determine whether he knowingly and voluntarily waived his right to counsel, (2) the government improperly introduced evidence regarding his coconspirators' convictions, (3) the government presented inadmissible summaries of the evidence, (4) the government engaged in prosecutorial misconduct, and (5) the district court imposed unjustified special conditions on his term of supervised release. For the reasons set forth below, we AFFIRM Modena's conviction, VACATE his sentence, and REMAND the case for resentencing.

I. BACKGROUND

This case arises from the efforts of five brothers to avoid paying federal income taxes. These men, Denver Lee Russell, Orval Dean Russell, Timothy Patrick Russell, Daniel Thomas Russell, and Jack Allen Russell (referred to collectively as the Russell Brothers), purchased sham trusts that they used to hide their income. Modena helped set up and administer several of these trusts.

In April of 1999, a federal grand jury returned a 26-count indictment against the Russell Brothers and Modena. Count 1 charged all of the defendants with conspiracy to defraud the United States, in violation of 18 U.S.C. § 371. The remaining counts charged only the Russell Brothers with failure to file income tax returns and income tax evasion, in violation of 26 U.S.C. §§ 7203 and 7201, respectively. In September of 1999, the Russell Brothers were convicted on all counts. Modena, however, evaded arrest until June of 2000. His case was set for trial in the United States District Court for the Western District of Michigan shortly after his arrest.

At the initial pretrial conference, Modena informed the magistrate judge that he wished to proceed pro se. The magistrate judge then asked Modena a series of questions to ensure that he understood the consequences of his decision to represent himself. Modena indicated that he understood

* The Honorable William J. Haynes, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

* Pursuant to Sixth Circuit Rule 206

the difficulties involved in self-representation, but wished to do so anyway. Based upon Modena's answers and demeanor, the magistrate judge concluded that Modena "knowingly and voluntarily waived his right to counsel." The magistrate judge nevertheless appointed the Federal Public Defender to serve as standby counsel in the event that Modena changed his mind.

Five days later, Modena sent a letter to the district court requesting that counsel be appointed on his behalf. But he withdrew this request in a subsequent letter that he sent to the district court three days thereafter. At the final pretrial conference before the district court, Modena again stated his desire to represent himself. The district court therefore permitted him to do so without further inquiry.

Modena was tried before a jury in August of 2000. To establish Modena's guilt on the conspiracy count, the government called 30 witnesses and offered more than 200 exhibits. Modena sat silent throughout the entire trial, raising no objections and presenting no defense on his own behalf. After a three-day trial, the jury found Modena guilty on the conspiracy count.

Modena then sent a letter to the district court requesting that he receive the assistance "of a more qualified attorney in tax related matters" during the sentencing proceedings. While waiting for a response from the district court, Modena was asked to participate in an interview with a presentence investigator. Modena declined, explaining that he would not participate in the interview without the assistance of counsel. In response, the investigator claimed that Modena had already declined to have appointed counsel present, and therefore no longer had the right to counsel. Modena still refused to participate in the interview. The presentence investigation report (PSR) was thus prepared without his input. Modena later received a letter from the district court informing him that the Federal Public Defender had already been appointed to provide any assistance that he might need.

At the sentencing hearing, the district court sentenced Modena to 60 months in prison, followed by 3 years of supervised release. The district court later issued its sentencing order, which added special conditions to Modena's term of supervised release. Specifically, the order provided that Modena must receive testing and treatment for alcohol and drug abuse and abstain from the use of alcoholic beverages. Modena now appeals his conviction and sentence.

II. ANALYSIS

A. Waiver of counsel

[1] Modena contends that the district court erred in concluding that he knowingly and voluntarily waived his right to counsel, a right guaranteed by the Sixth Amendment to the United States Constitution. He presents this argument for the first time on appeal, however, and must therefore establish that the district court committed plain error in making that determination. United States v. Koeberlein, 161 F.3d 946, 949 (6th Cir. 1998) ("Where, as here, a criminal defendant has failed to object below, he or she must demonstrate that the error was plain as defined by Fed. R. Crim. P. 52(b) before we may exercise our discretion to correct the error.") (footnote omitted). "To establish plain error, a defendant must show (1) that an error occurred in the district court; (2) that the error was plain, i.e., obvious or clear; (3) that the error affected 'the' defendant's substantial rights; and (4) that this adverse impact seriously affected the fairness, integrity, or public reputation of the judicial proceedings." United States v. Schulte, 264 F.3d 656, 660 (6th Cir. 2001).

We must first decide whether the district court properly determined that Modena had waived his right to counsel. This court has held that, before allowing a criminal defendant to represent himself, a district court must conduct a colloquy substantially similar to the one set forth in the Bench Book for United States District Judges. United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987). The required colloquy consists of several questions and statements that are designed to gauge the defendant's understanding of the legal proceedings, to

assess his willingness to bear the consequences of proceeding pro se, and to urge him to accept the assistance of appointed counsel. Id. at 251–52. This court also requires the district court to make an express finding that the defendant has knowingly and voluntarily waived his right to counsel under the Sixth Amendment. Id. at 250. In the present case, Modena concedes that the magistrate judge conducted the required colloquy and concluded that Modena knowingly and voluntarily waived his right to counsel. He maintains, however, that the district court had an obligation to conduct the waiver-of-counsel proceeding a second time after Modena had expressed doubts about representing himself prior to trial.

We disagree. A magistrate judge is authorized by statute to determine whether a criminal defendant has effectively waived the right to counsel. 28 U.S.C. § 636(b)(1)(a) (''A' judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court . . . .''). The magistrate judge in the present case exercised that authority and followed the procedures required by this court in doing so. Although Modena had an interim change of heart regarding his decision to proceed pro se, he ultimately gave the district court no reason to suspect that he was uncertain about representing himself. Specifically, he sent the district court a letter explicitly withdrawing his earlier request to be represented by appointed counsel and, at the final pretrial conference, reiterated his desire to proceed pro se.

Modena gives no compelling reason why we should break new ground by requiring that a district court reevaluate a magistrate judge's acceptance of the defendant's waiver of counsel solely because the defendant at one point had second thoughts about representing himself. To require such a reconsideration would defeat one of the key purposes of the Magistrates Act; namely, the conservation of judicial resources. See Howard v. Sec'y of Health & Human Servs., 932 F.2d 505, 509 (6th Cir. 1991) (recognizing that '''t'his duplication of time and effort 'by a district court and a magistrate judge' wastes judicial resources rather than saving them, and runs contrary to the purposes of the Magistrates Act''). The district court, therefore, did not commit any error, plain or otherwise, in accepting Modena's waiver of his right to counsel.

B. Coconspirators' convictions

Modena next maintains that the admission of testimony regarding the convictions of his coconspirators, the Russell Brothers, deprived him of a fair trial. During direct examination, the prosecutor questioned Daniel Russell as to whether he and his brothers had been convicted of conspiracy. The questioning went as follows:

> Q. You were on trial in this courtroom last year in August, were you not?
>
> A. Yes, I was.
>
> Q. And you were convicted of the five individual counts against you as well as the conspiracy count, were you not?
>
> A. Yeah.
>
> Q. And your brothers were likewise convicted of the same counts?
>
> A. Yes, sir.

Modena did not object to the government's line of questioning, so we are limited to the determination of whether the admission of the testimony at issue constituted plain error. Koeberlein, 161 F.3d at 949.

Evidence that a coconspirator has been convicted of conspiring with a criminal defendant is generally inadmissible, because it might lead the jury to ''regard the issue of the remaining defendant's guilt as settled and 'conclude that' the trial is a mere formality.'' United States v. Griffin, 778 F.2d 707, 711 (11th Cir. 1985); Fed. R. Evid. 403 (providing that relevant evidence ''may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice''). If the coconspirator testifies at trial, however, evidence of his prior convictions may be introduced so that the jury can accurately assess his credibility. United States v. Sanders, 95 F.3d 449, 454 (6th Cir. 1996); Fed. R. Evid. 609(a) (allowing evidence of prior convictions for

the purpose of evaluating a witness's credibility). In allowing the admission of such evidence, however, the district court must instruct the jury that it may not consider the coconspirator's prior conspiracy conviction as evidence of the defendant's guilt. Sanders, 95 F.3d at 454 (''When a guilty plea or conviction is introduced into evidence, the district court is required to give a cautionary instruction to the effect that the jury may use the conviction or guilty plea only to determine the testifying witness's credibility.'').

Daniel Russell testified at trial as a witness for the government. The prosecutor, therefore, was entitled to question Russell about his prior conspiracy conviction in order to ''remove the sting'' of any attempt to impeach his credibility with his conviction on cross-examination. Fed. R. Evid. 609 advisory committee's note. But the district court was required to issue a cautionary instruction after Russell acknowledged his conspiracy conviction. Sanders, 95 F.3d at 454. The district court failed to do so. As a result, the admission of Daniel Russell's testimony concerning his prior conspiracy conviction was erroneous. Furthermore, Daniel Russell was the only one of the Russell Brothers to testify at trial, and thus his testimony regarding the convictions of his brothers was not admissible for the purpose of assessing their credibility.

Modena must do more, however, than simply show that the district court erred in admitting testimony regarding the Russell Brothers' conspiracy convictions. Under the plain-error standard of review, he must also establish that the admission of this testimony affected his substantial rights. United States v. Schulte, 264 F.3d 656, 660 (6th Cir. 2001). An error affects the substantial rights of a criminal defendant when it is prejudicial; that is, when it ''affect's' the outcome of the district court proceedings.'' United States v. Olano, 507 U.S. 725, 734 (1993). In determining whether an error is prejudicial, we must examine it in the context of the record as a whole. United States v. Young, 470 U.S. 1, 16 (1985) (holding that an appellate court must view ''a claim 'of plain error' against the entire record'').

At trial, Daniel Russell testified that his brothers purchased trusts from Modena in order to hide their income. He also explained that Modena marketed these trusts as a means to avoid federal income taxes. In addition, three other individuals testified that they served as trustees for trusts set up by Modena on behalf of the Russell Brothers, but that they never performed any substantive functions as trustees. They instead allowed Modena to use their names and signed whatever documents he presented to them. Furthermore, an agent with the Internal Revenue Service testified that, based upon his knowledge and experience, the trusts established by Modena lacked any economic substance and were designed solely to hide income. Modena offered no rebuttal to any of this testimony.

As shown above, the government offered ample evidence to establish Modena's guilt beyond a reasonable doubt. The strength of the government's case against Modena makes it highly unlikely that the admission of the testimony concerning the Russell Brothers' conspiracy convictions had any effect on the jury's verdict. Furthermore, Daniel Russell acknowledged the convictions without any elaboration, and the government did not emphasize this aspect of Russell's testimony. For all of these reasons, we conclude that the admission of this testimony did not constitute plain error.

C. Summaries

Modena also challenges the admission of several evidentiary summaries that were introduced by the government. He argues that the government did not comply with the requirements for admitting these summaries as set forth in Rule 1006 of the Federal Rules of Evidence. Because Modena did not object to the admission of the summaries, we consider his challenge under the plain-error standard of review. Koeberlein, 161 F.3d at 949.

Rule 1006 governs the admissibility of evidentiary summaries. It provides in pertinent part as follows:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at "a" reasonable time and place.

Fed. R. Evid. 1006. This court has interpreted Rule 1006 as imposing five requirements for the admission of an evidentiary summary: (1) the underlying documents must be so voluminous that they cannot be conveniently examined in court, (2) the proponent of the summary must have made the documents available for examination or copying at a reasonable time and place, (3) the underlying documents must be admissible in evidence, (4) the summary must be accurate and nonprejudicial, and (5) the summary must be properly introduced through the testimony of a witness who supervised its preparation. United States v. Bray, 139 F.3d 1104, 1109–10 (6th Cir. 1998).

Modena maintains that the government failed to satisfy the first three requirements set forth above in introducing numerous summaries of the Russell Brothers' financial transactions. He maintains that the "most significant violation of Rule 1006" was the government's alleged failure to make the documents underlying these summaries, labeled as Exhibits 63-76, 78-123, 156-60, 167, and 169, available for examination or copying. In response to this allegation, the government contends that it filed a Statement of Discovery that informed Modena that, upon request, it would make any records intended for use at trial available for inspection. It points out that Modena never made such a request.

But Rule 1006 "operates independently of the discovery rules . . . ." Air Safety, Inc. v. Roman Catholic Archbishop of Boston, 94 F.3d 1, 8 (1st Cir. 1996). The government, therefore, had a duty to "state when and where" the documents underlying its summaries could be viewed, without regard to whether Modena made a request for these records. Id. ("Thus, to satisfy the 'made available' requirement, a party seeking to use a summary under Rule 1006 must identify its exhibits as such, provide a list or description of the documents supporting the exhibit, and state when and where they may be reviewed."). Moreover, the Statement of Discovery filed by the government provided that Modena could inspect the documents only if he allowed the government to examine the materials that Modena planned to introduce at trial. Nothing in Rule 1006 indicates that the right to examine or copy records underlying a summary may be conditioned in such a manner. Id. (recognizing the "absolute right" to examine the records underlying a summary).

The district court therefore erred in admitting the challenged summaries into evidence. But we conclude that the district court did not commit plain error in doing so. First, as set out above in Part II.B., the government offered compelling, unrebutted evidence of Modena's guilt without regard to the summaries in question. Second, because Modena does not contend that the summaries inaccurately reported the Russell Brothers' financial dealings, we would be hard-pressed to determine that the admission of the summaries "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." See Bray, 139 F.3d at 1110–11 (concluding that the improper admission of summaries was not plain error where the appellant never claimed that the summaries were inaccurate). Modena has thus failed to meet his burden of showing that the admission of the summaries constituted plain error.

D. Prosecutorial misconduct

Modena next contends that the prosecutor engaged in misconduct during the closing arguments. He specifically argues that the prosecutor vouched for several of the government's witnesses, pressured the jury to return a guilty verdict, and exhorted the jury to "send a message" with its verdict. Modena, however, never objected to any of these arguments. He must therefore show that their utterance constituted plain error. Koeberlein, 161 F.3d at 949.

In reviewing a claim of prosecutorial misconduct under the plain-error standard of review, we must first determine whether the statements at issue were improper. United States v. Carter, 236 F.3d 777, 783 (6th Cir. 2001). If so, we then have to decide whether they were sufficiently flagrant to warrant reversal of the defendant's conviction despite his failure to object to them at trial. Id. (''P'rosecutorial misconduct may be so exceptionally flagrant that it constitutes plain error, and is grounds for reversal even if the defendant did not object to it.'') (quoting United States v. Carroll, 26 F.3d 1380, 1385 n.6 (6th Cir. 1994)).

Modena first maintains that the prosecutor improperly vouched for several of the government's witnesses when the prosecutor told the jury that these witnesses ''got their lives together'' after rejecting their former resistance to the federal tax laws. He particularly finds fault with the following comments made by the prosecutor regarding Daniel Russell:

> I've got to say it's real satisfying to see that this community lost an angry law breaker and may soon get back a productive, law-abiding man who will rejoin his family as a hardworking taxpayer and a positive role model for both the community and for his family.

This court has held that a ''prosecutor cannot improperly vouch for the credibility of his witnesses.'' United States v. Emuegbunam, 268 F.3d 377, 404 (6th Cir. 2001). ''Improper vouching occurs when a jury could reasonably believe that a prosecutor was indicating a personal belief in a witness' credibility.'' Id. (internal quotation marks omitted). In the present case, the prosecutor made vague statements to the effect that several witnesses were no longer protesting the federal income tax. These statements by themselves are not indicative of the prosecutor's personal view as to the witnesses' credibility. But the prosecutor also shared with the jury his evaluation that Daniel Russell is now a ''law-abiding man.'' A law-abiding man does not, of course, commit perjury. The prosecutor's description of Russell therefore at least implicitly conveyed to the jury the prosecutor's personal belief that Russell is a credible witness. Such vouching is impermissible.

Modena also claims that the prosecutor improperly pressured the jury to return a guilty verdict by stating that ''I think we can all take some measure of satisfaction in the investigation and prosecution of the Russells, of John Modena. But we're not finished. We're not finished until this verdict is returned.'' Statements that exhort the jury to ''do its job'' are improper. United States v. Young, 470 U.S. 1, 18 (1985). The above-quoted argument, although ambiguous, can be construed as pressuring the jury to help the government finish its self-described laudable goal of bringing Modena to justice. This kind of pressure ''has no place in the administration of criminal justice.'' Id.

According to Modena, the prosecutor engaged in further misconduct when he implored the jury to ''tell, through your verdict, tell Michael John Modena that what he did with the Russell 'B'rothers was criminal and that the tax laws of this country apply to Michael John Modena.'' This court has held that arguments that invite the jury to ''send a message'' to the defendant through its verdict, although disfavored, do not ''cross the line into prosecutorial misconduct.'' United States v. Reliford, 58 F.3d 247, 251 (6th Cir. 1995) (concluding that the prosecutor's argument to the jury that it should ''return a verdict that tells the defendant . . . that the citizens . . . won't tolerate these types of crimes'' was not improper) (internal quotation marks omitted). Indeed, Modena acknowledges that this argument, standing alone, is not improper. But he maintains that the statement constitutes prosecutorial misconduct when viewed in connection with the other improper arguments set forth above. He fails to explain, however, how an acceptable remark made by a prosecutor becomes improper solely because the prosecutor engaged in misconduct at some other point during the closing argument.

Based on the above analysis, we conclude that the prosecutor improperly vouched for Daniel Russell's credibility and pressured the jury to return a guilty verdict. The question, then, is whether the prosecutor's statements were so flagrant as to warrant reversing Modena's conviction. Carroll, 26 F.3d at 1385 n.6. This court has identified four factors to guide this inquiry: ''(1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong.'' Carter, 236 F.3d at 783.

The first factor focuses on the effect of the improper arguments at issue; namely, whether they were misleading or otherwise prejudicial to the defendant. In the present case, the prosecutor's arguments did not mislead the jury as to the evidence against Modena. They did, however, prejudice Modena both by implicitly vouching for the testimony of Daniel Russell and by improperly pressuring the jury to find Modena guilty. This factor therefore favors Modena.

In evaluating the second factor, we consider whether the improper arguments made by the prosecutor were isolated. The prosecutor in the present case made two improper statements, both of which were made during closing argument. But because the prosecutor did not make an extensive series of improper statements, this factor favors the government.

The third factor requires us to consider whether the prosecutor deliberately or accidentally made the improper arguments in question. Both of the improper remarks at issue appear to be deliberate attempts to bolster the government's case against Modena. The government, moreover, does not contend that the arguments were unintentional. Accordingly, this factor favors Modena.

The last factor centers on whether the government had a strong case against the defendant, such that the improper arguments likely had no impact on the outcome of the trial. As discussed above in Part II.B., the government offered a substantial amount of evidence to establish Modena's guilt, evidence that Modena failed to rebut. This factor thus favors the government.

In sum, the relevant factors do not disproportionately favor either the government or Modena. But Modena bears the burden of showing that the prosecutorial misconduct in the present case was so ''exceptionally flagrant that it constitutes plain error.'' Carter, 236 F.3d at 783 (internal quotation marks omitted). Modena has not met this burden because, in light of the evidence offered against Modena at trial, he cannot show that the prosecutor's isolated remarks had any effect on the jury's guilty verdict. Although regrettable, the prosecutor's improper arguments thus do not warrant the reversal of Modena's conviction.

E. Conditions of supervised release

Modena's final challenge relates to his sentence. He contends that the district court erroneously imposed special conditions on his supervised release. In particular, Modena claims that the district court lacked any basis for requiring him to receive testing and treatment for drug and alcohol abuse and to abstain from the use of alcoholic beverages during his three-year term of supervised release. We will set aside a supervised-release condition only if we determine that the district court abused its discretion in imposing the condition. United States v. Ritter, 118 F.3d 502, 504 (6th Cir. 1997). ''Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment.'' Bowling v. Pfizer, Inc., 102 F.3d 777, 780 (6th Cir. 1996).

Federal law requires that a district court impose specified conditions on a term of supervised release under certain circumstances, none of which is at issue in the present case. 18 U.S.C. § 3583(d). A district court may also impose ''special'' conditions of supervised release that it deems appropriate. Id. To impose a special condition, however, the district court must determine, among other things, that the condition

> is reasonably related to specified sentencing factors, namely the nature and circumstances of the offense and the history and characteristics of the defendant, and the need to afford adequate deterrence, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . . .

Ritter, 118 F.3d at 504; United States v. Bortels, 962 F.2d 558, 560 (6th Cir. 1992) (recognizing that the imposition of a special condition is not an abuse of discretion if that condition is "reasonably related to the dual goals of probation, the rehabilitation of the defendant and the protection of the public").

Modena claims that the district court abused its discretion by imposing the following special conditions on his supervised release:

> * * *
>
> (8) The defendant shall participate in a program of testing and treatment for drug abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.
>
> (9) The defendant shall participate in a program of testing and treatment for alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.
>
> * * *
>
> (11) The defendant shall abstain from all use of alcoholic beverages.

Neither alcohol nor drug use played a role in Modena's crime. Nor does the record indicate that Modena has any substance abuse problem. Indeed, the PSR specifically states that the probation officer "has no information pertaining to substance abuse/use pertaining to Mr. Modena." The special conditions at issue, therefore, do not bear a reasonable relationship to either rehabilitating Modena or protecting the public. United States v. Prendergast, 979 F.2d 1289, 1292–93 (8th Cir. 1992) (striking special conditions that prohibited the defendant from purchasing, possessing, or using alcohol, where the record did not show that "alcohol was a contributing cause of his crime or that the defendant otherwise is in need of any substance abuse rehabilitation").

But the government contends that Modena is to blame for the absence of information as to whether he has a substance abuse problem. It points out that Modena refused to participate in an interview with the presentence investigator, during which time he would have had the opportunity to provide an account of his past drug and alcohol use, or his lack thereof. Modena counters that he did not participate in the interview as a result of the confusion regarding his legal representation. We need not decide which party is responsible for the record being silent as to whether Modena has a substance abuse problem. A defendant's failure to provide information to a presentence investigator does not give the district court license to impose any special condition it chooses. See United States v. Bass, 121 F.3d 1218, 1223 (8th Cir. 1997) (noting that a district court's discretion in imposing special conditions "is not unfettered"); United States v. Tolla, 781 F.2d 29, 34 (2d Cir. 1986) ("'C'onditions that restrict a probationer's freedom must be especially fine-tuned.").

This court has also held that a district court must, "at the time of sentencing, . . . state in open court the reasons for its imposition of the particular sentence, including its rationale for mandating special conditions of supervised release." United States v. Kingsley, 241 F.3d 828, 836 (6th Cir. 2001) (internal quotation marks omitted). The district court failed to do so in the present case. Instead, the only mention of the special conditions is in the sentencing order that the court issued after the conclusion of the hearing.

Based on all of the above, we conclude that the district court abused its discretion in requiring Modena to undergo testing and treatment for drug and alcohol abuse and to abstain from the use of alcoholic bever-

ages during his three-year term of supervised release. We therefore vacate Modena's sentence and remand the case with instructions to resentence Modena without the special conditions at issue. Bass, 121 F.3d at 1225 (vacating the defendant's sentence and remanding the case to the district court with instructions that it eliminate the special conditions regarding the possession and use of alcohol that were imposed without any basis in the record); Prendergast, 979 F.2d at 1293 (same).

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM Modena's conviction, VACATE his sentence, and REMAND this case for resentencing without the special conditions on Modena's supervised release that require him to undergo testing and treatment for drug and alcohol abuse and to abstain from the use of alcoholic beverages.

¶2002-5355

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Ronald W. SKEDDLE, DEFENDANT-APPELLANT. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 00-3195, Aug. 29, 2002. District Court affirmed per curiam. Decision against Taxpayer.

1. Attorney's fees—criminal proceedings; acquittals—Hyde Amendment. District court didn't abuse its discretion in denying "Hyde Amendment" attorney's fees request of taxpayer acquitted of tax fraud: govt.'s prosecution wasn't "vexatious, frivolous or in bad faith." Govt.'s theory that taxpayer made his children record owners of co. he operated to conceal his income wasn't so defective as to be nefarious; and govt.'s shell theory and argument that taxpayer retained children's salaries for his personal use weren't frivolous or taken in bad faith. *Reference:* United States Tax Reporter ¶74,336.511(100); 74,336.514(5).

United States Court of Appeals, Sixth Circuit,

On Appeal from the United States District Court for the Northern District of Ohio.

Before BOGGS and MOORE, Circuit Judges; and RUSSELL, District Judge.*

PER CURIAM.

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION*

Ronald W. Skeddle appeals the district court's order denying him attorneys' fees under the Hyde Amendment, 18 U.S.C. § 3006A, statutory note. Skeddle's claims that he is entitled to attorneys' fees in-curred in defending against a prosecution for various counts of tax fraud and filing false tax returns. According to Skeddle, the United States's legal positions in that prosecution were "vexatious, frivolous, or in bad faith," given the readily ascertainable facts. For all of the following reasons, we affirm the district court's denial of his motion under the Hyde Amendment.

I

Skeddle's claim for attorneys' fees is the product of a lengthy and complicated federal criminal prosecution. In 1995, the government obtained a 313-count indictment against Skeddle, Darryl J. Costin, see United States v. Costin, Nos. 00-3195, 00-3287, 00-3288, and six other co-defendants. After pre-trial motions, Costin, Skeddle, and their co-defendants were tried on over 200 counts, which included mail and wire fraud, conspiracy, and money laundering. These charges were all directed at a transaction between Libbey-Owens-Ford Company ("LOF"), of which Skeddle and Costin were executives, and Computer Technoloy Management ("CTM"), a computer services company that Skeddle and

* The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

* Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

Costin established. LOF contracted with CTM for computer consulting work.

CTM was itself a complicated entity. It was wholly owned by three corporations, operated by Professor Clarence Martin, a computer scientist and friend of Costin and Skeddle. These three corporations were known as the Martin Companies. Each of three companies, CJD (owned and operated by Costin), SWR (operated by Skeddle), and BBE (owned and operated by Edward Bryant, another LOF executive), wholly owned one of the three Martin Companies respectively. SWR was formally owned by Skeddle's young children.

The indictment alleged that this elaborate configuration of corporations was designed to conceal self-dealing of LOF business to the three LOF executives and to embezzle money from LOF through payments to CTM for phantom computer-consulting services. After an extensive jury trial, the jury acquitted all of the defendants of all counts.

Coming up empty on the first prosecution, government prosecutors referred Costin, Skeddle, and Robert Hobe, their accountant, to the Tax Division of the Department of Justice. The government then obtained an eighteen-count indictment against Costin, Skeddle, and Hobe, including various charges of tax fraud. At various points in the proceedings, the district court entered judgments of acquittal for the defendants on sixteen of the eighteen counts. By the end of the trial, the district court had entered judgments of acquittal on all of the counts against Skeddle. Only four counts--two against Hobe and two against Costin--remained when the case was finally submitted to the jury.

After the court had dismissed all charged against Skeddle by judgment of acquittal, Skeddle filed a motion for attorneys' fees under the Hyde Amendment. Skeddle claimed that each of the charges brought by the government had obvious flaws that could have been revealed through the slightest investigation by the government. Skeddle's attorney claimed that the fees, costs, and expenses incurred in defending against the tax fraud prosecution amounted to $654,000. Although none of the counts on which Skeddle was indicted reached the jury, the district court denied Skeddle's motion for attorneys' fees. According to the court, the government's prosecution of Skeddle was neither vexatious, frivolous, nor taken in bad faith. While noting that the government's legal position in the prosecution was "legally incorrect," the district court held that it was not "unreasonable."

Skeddle now appeals the district court's denial of attorneys' fees.

II

[1] Enacted in 1997, the Hyde Amendment permits courts to award criminal defendants damages when the government takes a position in a prosecution that "was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances would make such an award unjust." 18 U.S.C. § 3006A, statutory note. Given the recency of the Amendment's passage, we have not had occasion extensively to discuss the standard governing the decision to award fees - although the Amendment does provide us some additional guidance. Awards shall be made, according to the Amendment, pursuant to the "procedures and limitations (but not the burden of proof) provided for an award" under the Equal Access to Justice Act. See 28 U.S.C. § 2412.

The mere fact that the government prosecution was unsuccessful does not establish that the prosecution was "vexatious, frivolous, or in bad faith." United States v. Gilbert, 198 F.3d 1293, 1302–03 (11th Cir.1999). Indeed, a criminal defendant seeking recovery under the Hyde Amendment faces "a daunting burden." Ibid. To demonstrate that a prosecution was taken in bad faith, the defendant must show more than simple negligence, but some evidence of conscious wrongdoing on the part of the government. See United States v. True, 250 F.3d 410, 422–23 (6th Cir.2001). For a position of the government to be vexatious, it must be "without reasonable cause or excuse." Ibid.

The substantive standard, requiring that the United States's position be ''vexatious, frivolous, or in bad faith'' before attorneys' fees are awarded, is not further defined in the statute. The elements of the standard are disjunctive: the position of the United States need only be either ''vexatious'' or ''frivolous,'' or ''in bad faith'' to permit recovery. Several courts have struggled with clarifying the standard that the Hyde Amendment establishes. For example, one circuit court of appeals has explained at length that the ''vexatious'' prong of the Amendment requires that the government's position be both without factual or legal foundation and provide objective evidence of maliciousness on the part of government prosecutors. See Knott, 256 F.3d at 30–31. We note that even if the vexatious prong of the Amendment requires maliciousness, a prevailing party may still recover because the government position was ''frivolous,'' which appears only to require that the government's position completely lack evidential or legal merit. See ibid. (recognizing that the ''frivolous'' element does not require a finding of maliciousness). The Hyde Amendment is not aimed at the general run of prosecutions, or even those that the government loses, but instead at instances of ''prosecutorial misconduct,'' where the government had undertaken obviously groundless positions in a prosecution or positions intended solely to harass defendants rather than to vindicate the rule of law. Gilbert, 198 F.3d at 1303; Knott, 256 F.3d at 28. In contrast, the Hyde Amendment does not shift to the government the risk of not prevailing always associated with litigating matters of law and fact on which reasonable people can disagree before courts and juries.

Insofar as the Hyde Amendment requires that the government's position be ''vexatious, frivolous, or in bad faith'' before the recovery of fees is permitted, it establishes a substantially more rigorous standard than the Equal Access to Justice Act, which merely requires that the government's position be ''not substantially justified.'' 28 U.S.C. § 2412(d)(1)(A); United States v. Knott, 256 F.3d 20, 28 (1st Cir.2001) (explaining that Congress expressly rejected the EAJA's substantive standard for recovery because it was too easy to meet). Also unlike the EAJA, the Hyde Amendment places the burden to prove the standard for a fee award on the criminal defendant. Knott, 256 F.3d at 29. Compare Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (requiring that courts award attorneys' fees to a private party prevailing against the United States ''unless the court finds that the position of the United States was substantially justified or that special circumstances make the award unjust'').

Most importantly, we will only overturn a district court's denial of a request for fees under the Hyde Amendment for an abuse of discretion. True, 250 F.3d at 421. The district court, having conducted the entire trial and witnessed the government's case, is in a far superior position to evaluate whether the government's position was vexatious, frivolous, or in bad faith. The court has a fresh recollection of the government's conduct that this court's review of the cold record simply cannot provide. Nevertheless, the deferential abuse of discretion standard of review is not completely toothless: we will overturn a district court determination as an abuse of discretion when we are ''firmly convinced that a mistake has been made,'' or put differently, ''when were are left with a definite and firm conviction that the trial court committed a clear error in judgment.'' Id. at 422 n. 9.

We are not convinced that the district court abused its discretion in this case. Skeddle argues that the government's prosecution of him was ''vexatious, frivolous, or in bad faith'' in three respects. First, Skeddle contends that the government's position that he had filed a false tax return of SWR, by claiming that his children were the sole owners of the corporation, had no basis in law or fact. The district court found that it was literally true that Skeddle's children were the only owners of SWR and that the government ''could have discovered earlier that it could not prevail on this claim.'' If we were to characterize the government's position as simply that

Skeddle misrepresented the legal owners of SWR, we might hold that its true owners were so easy to discover that the government must have been consciously avoiding knowledge at best. But the government's theory was far more complicated, that Skeddle made his children record owners in order to conceal income that was actually his. While this theory of filing a false income tax return may not have survived a motion for acquittal, it certainly was not so clearly defective so as to lead us to suspect that the government was up to something nefarious.

Second, Skeddle contends that the government's "shell theory" was taken in bad faith. Similar to the allegations in Costin's prosecution, the government contended that SWR never engaged in any computer consulting and, therefore, was not a business and was not entitled to any business deductions. According to Skeddle, the government should have known that it could not prevail on this argument, given some evidence in the record that Skeddle used his contacts in the business community to create business for CTM. The district court found that because Skeddle's activities for CTM were so "modest," the government's theory was not frivolous, even if ultimately unsuccessful. We agree with the district court that Skeddle's consulting activities were sufficiently subtle that, given the significant income that SWR had from alleged consulting and the complexity created by the Martin pass-through corporations, the government's position was not so patently without merit that we must agree that the government had to be aware of its defects.

Third and finally, Skeddle argues that the government's contention that he never paid his children the salaries claimed as expenses by SWR was frivolous and taken in bad faith. According to Skeddle, it should have been clear to the government, from the fact Skeddle withheld taxes for the children, that the salaries were paid. To us, however, the government's position does not seem all that absurd. While Skeddle withheld the taxes, the government's theory was that he retained the salaries for his own use--a reasonable, if ultimately unsuccessful, claim given that he controlled all his children's assets.

Throughout his argument, Skeddle claims that the government's case bears many similarities to United States v. Holland, 34 F.Supp.2d 346 (E.D.Va.1999), in which the district court awarded the criminal defendant attorneys' fees under the Hyde Amendment. But Skeddle must see the difference between the district court's position in Holland and this court reviewing a district court's denial of a Hyde Amendment fees. While granting fees in Holland may have been within the district court's discretion, the denial of fees quite likely would also have been within its discretion. Because we review the district court's denial of fees for an abuse of discretion, even a finding that this case and Holland were "on all fours" would not determine our result.

III

Because the district court did not abuse its discretion, we AFFIRM the district court's order denying Skeddle fees under the Hyde Amendment.

¶2002-5356

Cecil BRUMMETT, JR. and Sharon BRUMMETT, husband and wife, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Oregon, (DC OR) Civil No. 02-3005-CO, Aug. 15, 2002. District Court, (2002, DC OR) 90 AFTR 2d 2002-5619, adopted. Years 1992, 1993, 1994, 1995. Decision for Govt.

1. Limitations periods on refunds—mitigation—reclassification of pension benefits as worker's compensation benefits. Magistrate judge's recommendation to dismiss taxpayers' action was adopted. *Reference:* United States Tax Reporter ¶13,135.001(5); 13,125.001(40); 13,115.02(5); 65,325.01(75). IRC §1311; 1312; 1313; 6532.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,

ORDER

Ann Aiken, United States District Judge

[1] Magistrate Judge Cooney filed his Findings and Recommendation on July 9, 2002. The matter is now before me. See 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). No objections have been timely filed. This relieves me of my obligation to give the factual findings de novo review. Lorin Corp. v. Goto & Co., Ltd., 700 F.2d 1202, 1206 (9th Cir. 1982). See also Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983). Having reviewed the legal principles de novo, I find no error.

THEREFORE, IT IS HEREBY ORDERED that, I adopt Judge Cooney's Findings and Recommendation.

Dated this 15 day of August, 2002.

Ann Aiken, United States District Judge

JUDGMENT

Based on the record,

IT IS ORDERED AND ADJUDGED that this action is dismissed.

DATED this 23rd day of August, 2002.

DONALD M. CINNAMOND

CLERK, U.S. DISTRICT COURT

/s/ Craig W. Meyer

by Craig W. Meyer, Deputy Clerk

¶2002-5357

UNITED STATES OF AMERICA, PLAINTIFF v. Edward T. CLARKE & Kathleen M. CLARKE, DEFENDANTS. U.S. District Court, Northern Dist. of Ohio, (DC OH) Civil No. 1:01cv1749, Aug. 19, 2002. Years 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999. Decision for Govt.

1. Actions to reduce assessments to judgment—100% penalty for failure to pay over trust fund taxes. Stipulated judgment was entered against taxpayer-husband for unpaid IRC §6672 penalty liabilities, and against both him and wife for their unpaid income tax debts, in amounts stated plus interest. *Reference:* United States Tax Reporter ¶74,035.01(30); 66,725.06(5). IRC §6672; 7403.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION,

STIPULATED JUDGMENT

Judge Nugent

[1] The United States of America and the defendants, Edward and Kathleen Clarke stipulate that judgment is entered as follows:

1. Judgment is entered in favor of the United States and against Edward Clarke in the amount of $84,898.08, plus interest accruing from May 28, 2002, for outstanding section 6672 liabilities for quarters ending 199203 (inclusive of trust fund liabilities for the fourth quarter of 1990, the first, second, third, and fourth quarters of 1991, and the first quarter of 1992); 199412 (inclusive of trust fund liabilities for the third quarter of 1993, and the first, second, third and fourth quarters of 1994); and the first quarter of 1995. Interest will continue to accrue on this amount as provided by law.

2. Judgment is entered against Edward Clarke *and* Kathleen Clarke in the amount of $136,232.57, plus interest accruing from May 28, 2002, for outstanding federal income tax liabilities for the years 1989, 1992, 1995, 1996, 1997, 1998, and 1999. Interest will continue to accrue on this amount as provided by law.

3. The parties will bear their respective costs, including any attorney's fees or

other expenses, stemming from this litigation.

IT IS SO ORDERED:

Dated this 19th day of August, 2002.

DISTRICT JUDGE

DONALD C. NUGENT

¶2002-5358

Jennings W. SISLER, ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Ohio, (DC OH) CASE NO. 5:01 CV 1240, Aug. 29, 2002. Decision for Govt.

1. Refund actions—dismissal. Taxpayers' refund action was dismissed with prejudice pursuant to parties' agreement and taxpayers' lack of proof. *Reference:* United States Tax Reporter ¶74,225.05(45). IRC §7422.

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION,

ORDER OF DISMISSAL WITH PREJUDICE

Judge Dan Aaron Polster

[1] Plaintiffs filed this tax refund case on May 21, 2001. *ECF No. 1.* On October 22, 2001, the Court held a Case Management Conference. At the conference, plaintiffs' counsel acknowledged that it would be difficult to obtain the evidence necessary to support their case. *ECF No. 17.* The parties and the Court agreed to a period of time within which the plaintiffs could attempt to obtain necessary evidence. *Id.* Thereafter, one plaintiff, Mr. Sisler, died. *Id.* He had not been deposed and could not help plaintiffs' counsel in trying to obtain evidence or analyze it, making it even more difficult for the plaintiffs to prove their case. *Id.*

On June 27, 2002, Plaintiffs filed a Notice of Dismissal, seeking to dismiss this case without prejudice, under Federal Rule 41(a)(1). *ECF No. 16.* Defendant responded with a Motion for Dismissal with Prejudice arguing the plaintiffs had ample opportunity to discover and prove their case and they were unable to do so. *ECF No. 17.* On August 27, 2002, Plaintiff's counsel, Robert Fedor, Esq., informed the Court that his client has no opposition to this case being dismissed with prejudice.

Accordingly, the above-captioned case is dismissed with prejudice, each party to bear their own costs.

IT IS SO ORDERED.

Dan Aaron Polster

United States District Judge

¶2002-5359

Frederick B. CAMPBELL, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Second Circuit, (CA2) No. 01-6270, Sept. 6, 2002. District Court, (2001, DC NY) 88 AFTR 2d 2001-6762, 2001-2 USTC ¶50716, affirmed. Years 1996, 1997, 1998. Decision against Taxpayer.

1. Deductions—limitations—constitutional claims—state and local income taxes; residence interest; health insurance costs. District court's dismissal of pro se taxpayer's constitutional challenges to IRC §68, IRC §106, IRC §162(1) and IRC §163(h) was affirmed, based on court's reasoning. Also, taxpayer's request for leave to amend complaint, raised for 1st time on appeal, was denied. *Reference:* United States Tax Reporter ¶685.01(5); 1625.040(10); 1635.052(5). IRC §68; 106; 162; 163.

Appearing for Appellant: Frederick B. Campbell, *pro se*, New York, NY
Appearing for Appellee: Elizabeth Wolstein and Gideon A. Schor, Assistant United States Attorneys, New York, NY (James B. Comey, United States Attorney for the Southern District of New York), *for the United States of America.*

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Appeal from the United States District Court for the Southern District of New York (Lawrence M. McKenna, *Judge*).

SUMMARY ORDER

HON. RICHARD J. CARDAMONE, HON. CHESTER J. STRAUB, HON. ROBERT A. KATZMANN. Circuit Judges.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 6th day of September, Two thousand and Two.

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

[1] Plaintiff-Appellant Frederick B. Campbell, *pro se*, appeals from an order of the United States District Court for the Southern District of New York (Lawrence M. McKenna, *Judge*), denying his motion for partial summary judgment and granting appellee's motion to dismiss his complaint seeking a tax refund. We assume familiarity with the factual background and procedural history set forth in the opinion of the District Court, *Campbell v. United States*, No. 00 Civ. 4746, 2001 WL 1262934 (S.D.N.Y. Oct. 22, 2001).

Plaintiff filed a timely notice of appeal and subsequently submitted an appellate brief, largely restating the arguments he previously advanced in challenging the constitutionality of three provisions of the Internal Revenue Code ("IRC") and seeking a refund of federal income taxes. Specifically, he argued that: (1) the federal income taxes on amounts taken as state and local income taxes pursuant to 26 U.S.C. § 68 was beyond the authority granted to Congress by the Sixteenth Amendment, and infringed on the reserved rights of the States in violation of the Tenth Amendment; and (2) the current forms of the health insurance tax exclusion and the residential mortgage interest deduction, 26 U.S.C. §§ 106,162(1) and 163(h), were unlawful delegations of Congress's taxing power to private entities outside the Government, and that the exclusions should apply equally regardless of whether the individual is self-employed or has obtained a mortgage. Plaintiff further sought leave to amend his complaint to seek injunctive relief.

This Court reviews a district court's application of law with regard to its denial of a motion for partial summary judgment, as well as its grant of a motion to dismiss, de novo.* See S.E.C. v. Credit Bancorp, Ltd., 290 F.3d 80, 87 (2d Cir. 2002); Sweet v. Sheahan, 235 F.3d 80, 83 (2d Cir. 2000). Having considered all of plaintiff's contentions on this appeal, we affirm both the denial of his motion for partial summary judgment and the grant of the government's motion to dismiss for substantially the reasons set forth in the District Court's opinion.

Plaintiff's request to amend his complaint to seek injunctive relief is denied since appellant failed to raise this request in the District Court before the appellee filed its motion to dismiss, and appellant cannot do so for the first time on appeal. See Dwares v. City of New York, 985 F.2d 94, 101 (2d Cir. 1993)(leave to amend denied because plaintiff made no effort to exercise his right to amend under Fed. R. Civ. P. 15(a) before defendant filed motion to dismiss in lieu of answer

* Ordinarily, an order that denies summary judgment or grants partial summary judgment cannot by itself be the basis for appeal, as it is nonfinal. However, upon entry of final judgment, earlier, nonfinal orders that affect judgment become subject to appellate review. See United States v. 228 Acres of Land and Dwelling Located on Whites Hill Road in Chester, Vt., 916 F.2d 808, 811 (2d Cir. 1990). The District Court's order denying partial summary judgment is clearly nonfinal; however, the District Court also granted the Government's motion to dismiss, rendering the order final and reviewable, in its entirety, on this appeal.

and where plaintiff raises request to amend for the first time on appeal).

Accordingly, the judgment of the District Court is AFFIRMED.

FOR THE COURT:

ROSEANN B. MACKECHNIE, CLERK

BY:

DATE:

¶2002-5360

UNITED STATES OF AMERICA, PLAINTIFF v. Stanley J. GAYNOR, ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of Illinois, (DC IL) No. 01 C 4753, Sept. 3, 2002. Year 1992. Decision for Govt. in part.

1. Actions to reduce assessments to judgment—foreclosure—summary judgment—final judgment. Govt. was granted summary judgment on its claim for taxpayer's outstanding tax debt: taxpayer's unsupported argument that 3d party should have been making payment to IRS on his behalf didn't prove govt.'s initial assessment or calculation of amount currently due were incorrect. But, entry of final judgment was denied where money judgment claim necessarily overlapped with govt.'s remaining foreclosure claim and, considering 7-year delay between assessment and filing suit, additional few months delay wouldn't impair its interests. *Reference:* United States Tax Reporter ¶74,035.01(25). IRC §7403.

United States District Court, N.D. Illinois, Eastern Division,

MEMORANDUM OPINION AND ORDER

PLUNKETT, Senior J.

This case is before the Court on the government's Federal Rule of Civil Procedure (''Rule'') 56 motion for summary judgment on its claim for a money judgment against Mr. Gaynor and its motion to enter final judgment on that claim pursuant to Rule 54(b). For the reasons set forth below, the summary judgment motion is granted and the Rule 54(b) motion is denied.

The Legal Standard

To prevail on a summary judgment motion, ''the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, [must] show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'' Fed.R.Civ.P. 56(c). At this stage, we do not weigh evidence or determine the truth of the matters asserted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). We view all evidence and draw all inferences in favor of the non-moving party. Michas v. Health Cost Controls of Ill., Inc., 209 F.3d 687, 692 (7th Cir.2000). Summary judgment is appropriate only when the record as a whole establishes that no reasonable jury could find for the non-moving party. Id.

Facts

In October 1993, Stanley Gaynor filed his federal income tax return for 1992. (Pl.'s LR 56.1(b)(3)(A) Stmt. p 3.) That return showed a tax liability of $1,653,118.00. (Id.)

On January 10, 1994, a delegate of the Secretary of the Treasury made an assessment against Mr. Gaynor for income tax, penalties and interest for the year 1992 of $1,813,962.00. (Id. p 4.) Notice of the assessment and demand for its payment were sent to Mr. Gaynor within five days of the date of the assessment. (Id. p 5.)

Mr. Gaynor has yet to pay the assessment in full and, though he disputes the amount, the government says he now owes more than $3,697,340.68 in unpaid taxes, interest, and penalties. (Id.)

Discussion

[1] The government's ''calculation of tax assessments is presumed to be correct, and the taxpayer bears the burden of rebutting this presumption.'' Estate of Starkey v. United States, 223 F.3d 694, 698 [86

AFTR 2d 2000-5620] (7th Cir.2000). Mr. Gaynor admits that the government's initial assessment of his tax liability for 1992, $1,813,962.00, is correct, but contends that the amount it currently seeks, $3,697,340.68, is too high. According to Mr Gaynor, the government has failed to credit him more than $200,000.00 that should have been paid to the IRS on his behalf between 1998 and 2000. (See Pl.'s LR 56 1(b)(3)(B) Stmt. p 8.)

Those payments, Mr. Gaynor says, were supposed to have been made on his behalf by Koll Management Services pursuant to a consulting agreement between them. But the record contains no evidence to suggest that Koll ever made, or even proffered, those payments to the IRS. Koll's alleged failure to make those payments might constitute a breach of its agreement with Mr. Gaynor, but it does not provide Mr. Gaynor with a defense to the government's claim. Because Mr. Gaynor has offered no evidence to suggest that the government's initial assessment of his 1992 tax liability or its calculation of the amount currently due are incorrect, the government's motion for summary judgment on this claim is granted.

The government also asks the Court to enter a final judgment on this claim pursuant to Rule 54(b). In relevant part, that Rule provides: ''When more than one claim is presented in an action, ... the court may direct the entry of a final judgment as to one or more but fewer than all of the claims ... only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.'' The government contends that a Rule 54(b) judgment is appropriate in this case because: (1) there is no legal or factual overlap between this claim and its remaining claims for foreclosure of a tax lien; and (2) delay will adversely impact its ability to collect the outstanding debt from Mr. Gaynor.

The Court disagrees. The issue with respect to the claim for a money judgment is whether Mr. Gaynor, in fact, owes the amount the government seeks to collect from him. Mr. Gaynor's liability for the amount assessed against him is also a threshold issue for the foreclosure claims. See 26 U.S.C. § 6321 (''If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.'') (emphasis added). Because the money judgment claim is not, as the government contends, wholly distinct from the foreclosure claims, entering a Rule 54(b) judgment would create the risk of duplicative appellate review, a risk the Seventh Circuit has instructed us to avoid. See ODC Communications Corp. v. Wenruth Investments, 826 F.2d 509, 512 (7th Cir.1987) (stating that the word ''[c]laim under Rule 54(b) is defined with a view to avoiding double appellate review of the same issues'') (internal quotation marks and citation omitted).

Even if the money judgment claim were entirely independent of the foreclosure claims, we could not certify that there is no just reason for delay in this case. The government says that delay might hamper its ability to recover the amount due, a somewhat disingenuous claim given the history of this case. The government assessed Mr. Gaynor's 1992 tax liability on January 10, 1994, but did not file this suit until June 22, 2001, though Mr. Gaynor made little effort in the intervening years to pay that debt. Having waited more than seven years to collect, the government cannot credibly contend that a delay of a few months more will seriously impair its interests.

Conclusion

For the reasons set forth above, there is no genuine issue of material fact on the government's claim for a money judgment against Mr. Gaynor. The government's motion for summary judgment on that claim is, therefore, granted. The government's motion for entry of a Rule 54(b) judgment on that claim is denied.

¶2002-5361

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Ernest Patrick DE TOMASO, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 98-50624, Aug. 19, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—forcible rescue of seized property—evidence—jury instructions. Taxpayer's IRC §7212(b) conviction and sentence for ''rescuing'' store property seized by IRS were affirmed, and his counsel was permitted to withdraw from case: taxpayer's requests for dismissal or judgment of acquittal were meritless where statute on its face allowed for prosecution for forcible rescue of seized property, taxpayer admitted IRS agent was properly authorized to conduct underlying seizure, and taxpayer knew his forcible rescue was illegal. Also, limited admission of taxpayer's other related bad acts was proper; jury instructions weren't erroneous; and fact taxpayer didn't physically remove seized items from their physical space was irrelevant since statute only required that he remove them from govt.'s control, which taxpayer did by re-entering store, changing locks and safe combinations and removing seizure tags. Also, court's discretionary denial of taxpayer's motion for downward departure on sentencing wasn't reviewable. *Reference:* United States Tax Reporter ¶72,125.01(10); 73,446.516(55). IRC §7212.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the Central District of California, Robert J. Timlin, District Judge, Presiding.

Before SCHROEDER, Chief Judge, TASHIMA and RAWLINSON, Circuit Judges.

MEMORANDUM*

[1] Defendant was convicted of forcible rescue of seized property, in the United States District Court for the Central District of California, Robert J. Timlin, J. Defendant appealed. The Court of Appeals held that defendant could be convicted of offense even though he had not physically removed any items seized by government.

Affirmed.

Ernest Patrick De Tomaso appeals his conviction and sentence following a jury trial for one count of forcible rescue of seized property in violation of 26 U.S.C. § 7212(b). Pursuant to Anders v.. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), De Tomaso's attorney has filed a motion to withdraw as counsel of record and De Tomaso has filed a supplemental brief.

Counsel has identified several potential issues and correctly determined that they are without merit. The trial court properly denied De Tomaso's motion to dismiss because 26 U.S.C. § 7212(b), on its face, allows for the prosecution of individuals who forcibly rescue property seized by the IRS under title 26, and De Tomaso conceded that Revenue Officer Bettencourt was properly authorized under the Internal Revenue Code to conduct the seizure.

The district court also did not err in allowing evidence of other related bad acts with a proper limiting instruction. See United States v. Arambula-Ruiz, 987 F.2d 599, 602 (9th Cir.1993); United States v. Winters, 729 F.2d 602, 604 (9th Cir.1984) (upholding introduction of Rule 404(b) evidence with a proper limiting instruction).

The district court properly denied De Tomaso's Fed.R.Crim.P. 29 motion for judgment of acquittal because the government put on sufficient evidence that Officer Bettencourt was authorized to conduct the seizure of appellant's property; that appellant was aware that removal of the property from government control was unlawful; and that appellant forcibly removed the seized property from the control of the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

government. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); United States v. Gasho, 39 F.3d 1420, 1429 (9th Cir.1994) (interpreting forcible rescue under 18 U.S.C. § 2233).

Counsel also correctly concluded that the jury instructions do not provide any basis for appeal. First, the district court properly instructed the jury that they had to determine whether the defendant's property was seized by a proper official authorized under the Internal Revenue Code. See id. As the instruction given fairly and adequately covered the issue presented, and was not misleading, the district court's refusal of defendant's ''lawful seizure'' instruction was not an abuse of discretion. See Chuman v.. Wright, 76 F.3d 292, 294 (9th Cir.1996). Second, the district court properly declined to give an instruction defining ''rescue'' as the actual taking away of an item. See Gasho, 39 F.3d at 1429 (defining rescue as removal of the property from the dominion and control of the government). Finally, the district court did not err by giving this circuit's model jury instruction defining reasonable doubt. United States v. Velasquez, 980 F.2d 1275, 1278 (9th Cir.1992).

With regard to sentencing, counsel also correctly points out that the court's discretionary denial of De Tomaso's departure request is not subject to our review. See United States v. Lipman, 133 F.3d 726, 731–32 (9th Cir.1998).

In his pro se supplemental brief, De Tomaso contends that his actions following the seizure of his business by Internal Revenue Agents were not sufficient to constitute a rescue under § 7212(b) because he did not physically remove any of the seized items. This contention is without merit. Because rescue requires only the removal of seized items from the dominion and control of the government, rather than removal from a physical space, De Tomaso's actions of re-entering his store, changing the locks and safe combinations, removing the seizure tags and opening for business were sufficient to constitute rescue. See Gasho, 39 F.3d 1429.

Our independent review of the record pursuant to Penson v. Ohio, 488 U.S. 75, 83, 109 S.Ct. 346, 102 L.Ed.2d 300 (1988), discloses no issues for review. Counsel's motion to withdraw is GRANTED, and the district court's judgment is AFFIRMED.

¶2002-5362

JUDICIAL WATCH, INC., ET AL., PLAINTIFFS v. Charles O. ROSSOTTI, ET AL., DEFENDANTS. U.S. District Court, Dist. of Columbia, (DC DC) Civil Action No. 02-928 (RCL), Aug. 2, 2002. Decision against Taxpayers.

1. District court jurisdiction—case assignments—related cases—related parties. Taxpayer's Notification of Related Case was rejected, and case was returned to clerk for re-assignment: case couldn't be ''related'' to prior dismissed case absent identical parties. *Reference:* United States Tax Reporter ¶74,336.505(10).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,

ORDER

[1] Now before the Court is Defendants' Objection to Plaintiffs' Notification of Related Case and Plaintiffs' Response to Defendants' Objection. Upon consideration of the pleadings, relevant decisions by prior federal courts and the record of this case, the Court hereby finds that the instant case is NOT RELATED to Judicial Watch, Inc. v. Internal Revenue Service, Civil No. 99-931 (RCL), and shall therefore be RETURNED to the Clerk for random reassignment.

Plaintiff filed a notice with the Court asserting that the instant case is related to Judicial Watch, Inc. v. Internal Revenue Service, Civil No. 99-931 (RCL), and should therefore be assigned to Judge Lamberth. The party requesting related-case designation and seeking to avoid random assignment bears the burden of showing that the cases are related under a provision of Local Civil Rule 40.5. Dale v. Exec. Off. of the Pres., 121 F. Supp.2d 35 (D.D.C.

2000). Rule 40.5(a)(4) provides that a case "shall be deemed related where a case is dismissed, with prejudice or without, and a second case is filed involving the same parties and relating to the same subject matter." The rule requiring the "same parties" has been interpreted strictly; a subsequent case may be "related" only where it involves the same subject matter as the original case and is filed by "identical parties, not parties in interest." Thomas v. Nat'l Football League Players Assoc., 1992 WL 43121 (D.D.C. Feb. 18, 1992). The Calendar Committee of this Court has previously held that

> [t]he fundamental rationale for the general rule requiring random assignment of cases is to ensure greater public confidence in the integrity of the judicial process. The rule guarantees fair and equal distribution of cases to all judges, avoids public perception or appearance of favoritism in assignments, and reduces opportunities for judge-shopping.

Tripp v. Exec. Off. of the Pres., 196 F.R.D. 201, 202 (D.D.C. 2000) (three judge panel).

The earlier case, Civil No. 99-931, lists the following parties as defendants: Internal Revenue Service, Federal Bureau of Investigation, and the Executive Office of the President. The instant case lists the following parties as defendants: Charles O. Rossotti, Internal Revenue Service (11 different offices), Treasury Inspector General for Tax Administration, Department of Justice Office of Information and Privacy, Department of Justice Tax Division, and Department of Justice Criminal Division. Because the prior case has already been dismissed, in order for plaintiff to claim that the instant case is related the identities of the parties must be identical. Thomas v. Nat'l Football League Players Assoc., 1992 WL 43121 (D.D.C. Feb. 18, 1992). The parties here are not identical, and the cases are therefore not related.

Accordingly, the Court finds that the instant case is not related to Judicial Watch, Inc. v. Internal Revenue Service, Civil No. 99-931 (RCL). The instant case shall therefore be returned to the Clerk for random reassignment pursuant to Local Civil Rule 40.3(a).

SO ORDERED.

Royce C. Lamberth

United States District Judge

Date: 8-2-02

¶2002-5363

Kip R. RAMSEY, dba Tiin-Ma Logging Co.; Tiin-Ma Logging Co., PLAINTIFFS-APPELLEES v. UNITED STATES OF AMERICA, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-35014; D.C. No. CV-99-03070-WFN, Sept. 11, 2002. District Court, (2000, DC WA) 86 AFTR 2d 2000-7174, 134 F Supp 2d 1203, reversed and remanded. Years 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993. Decision for Govt.

1. Excise tax refunds—heavy vehicle use and diesel fuel excise taxes—U.S.-Yakama Indian treaty. District court improperly granted Yakama Indian Nation member/logging co. owner who hauled timber cut on tribal land to off-Reservation mill sites refund of IRC §4481 excise taxes, penalties and interest: court's deferral to case law that involved only state tax exemption was erroneous since standard for federal taxation differed from that for state taxation of Indian tribal members. And, under federal standard, no exemption was allowed absent express provision of such in statute or treaty. *Reference:* USTR Excise Taxes ¶40,415.01(3); 44,815.01(35). IRC §4041; 4481; 7871 .

COUNSEL David English Carmack, Department of Justice, Washington, D.C., for the defendant-appellant.
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Timothy Weaver, Weaver Law Office, Yakima, Washington, for the plaintiffs-appellees.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Appeal from the United States District Court for the Eastern District of Washington Wm. Fremming Nielsen, Chief Judge, Presiding

Opinion by Judge Trott

Before: Melvin Brunetti, Stephen S. Trott, and M. Margaret McKeown, Circuit Judges.

OPINION

TROTT, Circuit Judge:

FOR PUBLICATION

OVERVIEW

The United States appeals the district court's grant of summary judgment in favor of Kip R. Ramsey (''Ramsey'') awarding him a refund of federal heavy vehicle and diesel fuel taxes, penalties, and interest. The government argues that Ramsey's prior federal lawsuit challenging a similar Washington *state* tax is not controlling, and that the district court erred by deferring to it. We have jurisdiction pursuant to 28 U.S.C. § 1291. As in his prior suit, Ramsey claims that the 1855 Yakama[1] Treaty exempts him from all taxes burdening his use of the public roads. We agree that the Treaty is the relevant starting point, but we disagree with Ramsey's gloss on its interpretation. The federal standard requires a definite expression of exemption stated plainly in a statute or treaty before any further inquiry is made or any canon of interpretation employed. Applying the federal standard to this case, we find no ''express exemptive language'' in the relevant Treaty provision. Thus, we reverse the district court's decision and remand for entry of summary judgment in favor of the United States.

BACKGROUND

Ramsey is a member of the federally recognized Yakama Indian Tribe (''Yakama''). He lives and works on the Yakama Reservation. He is the sole owner of Tiin-Ma Logging, which cuts timber only on the reservation. Ramsey hauls his lumber to off-reservation markets using diesel fuel trucks that exceed 55,000 pounds gross vehicle weight.

Section 4481 of the Internal Revenue Code, 26 U.S.C. § 4481[2] (''heavy vehicle tax''), requires that Ramsey pay a tax on his trucks that exceed 55,000 pounds. Section 4041[3] (''diesel fuel tax'') mandates that Ramsey pay tax on diesel fuel. *See* 26 U.S.C. § 4041. For the period between 1986 and 1993, Ramsey was assessed and paid $460,702.55 in federal heavy vehicle and diesel fuel taxes, penalties, and interest.

Ramsey disputed the assessed taxes and requested a refund from the Internal Revenue Service (''IRS''), claiming the federal taxes were preempted by the Treaty with the Yakamas, June 9, 1855, 12 Stat. 951 (1859) (''Treaty''). In particular, Article III, paragraph 1, of the Treaty reads:

> [I]f necessary for the public convenience, roads may be run throughout the said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right in common with citizens of the United States, to travel upon all public highways.

12 Stat. at 952–53. Ramsey argued that the Treaty exempted the Yakama from paying fees to use the public highways, citing as authority his successful challenge to a similar, state-imposed, highway-related tax in *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229 (E.D. Wash. 1997), which we affirmed in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (*Cree II*). Un-

[1] Although the original treaty is entitled ''Treaty with the Yakimas,'' Yakama Tribal Resolution T-053-94 recognized the official spelling as ''YAKAMA.'' (Jan. 14, 1994). Therefore, we use ''Yakama'' throughout this opinion.

[2] § 4481 imposes a $100 per year tax for 55,000 pound vehicles, plus $22 for each additional 1,000 pounds up to 75,000 pounds.

[3] § 4041 imposes a 15 cent per gallon tax on diesel fuel used in highway vehicles, but exempts vehicles engaged in ''an off-highway business use.''

swayed, the IRS denied Ramsey's request for a refund.

Ramsey filed suit in district court to settle the refund dispute. On cross motions for summary judgment, the district court held, based on *Cree II*, that the Yakama were exempt from federal taxes for the use of public highways. The district court entered judgment in favor of Ramsey. The United States appealed.

DISCUSSION

A. Standard of Review

"We review de novo the interpretation and application of treaty language." *Cree II*, 157 F.3d at 768. A grant of summary judgment is also reviewed de novo. *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1021 (9th Cir. 2001). We must determine, viewing the evidence in the light most favorable to the government, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See id.*

B. Tax Exemption Analysis — Federal and State Standards

[1] Ramsey argues that this case is controlled by *Cree II*'s exemption of the Yakama from state heavy vehicle taxes. In the alternative, Ramsey argues that the "in common with" language in the highway use provision of the Treaty creates an exemption from the federal heavy vehicle and diesel fuel taxes.

1. Application of *Cree II*

Ramsey's argument begins with *Cree v. Waterbury*, 873 F. Supp. 404 (E.D. Wash. 1994), in which several Yakama Indians who operated logging companies, including Ramsey, claimed that Article III of the Treaty precluded application of Washington's heavy vehicle tax to the Yakama. The district court agreed with the Yakama, but based its decision on the Supreme Court's construction of the "in common with" language in the Treaty's fishing rights provision without analyzing separately the "in common with" language in the highway use provision. *Waterbury*, 873. F. Supp. at 422–23 (citing *Tulee v. Washington*, 315 U.S. 681 (1942), and *United States v. Winans*, 198 U.S. 371 (1905)).

On appeal, this Court concluded that "[s]tate tax laws applied to Indians outside of Indian country, such as those at issue here, are presumed valid 'absent express federal law to the contrary.'" *Cree v. Waterbury*, 78 F.3d 1400, 1403 (9th Cir. 1996) (*Cree I*) (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148–49 (1973)). We remanded the case and instructed the district court to "examine the Treaty language as a whole, the circumstances surrounding the Treaty, and the conduct of the parties since the Treaty was signed in order to interpret the scope of the highway right." *Cree I*, 78 F.3d at 1405. The district court was to determine if the Treaty prohibited state heavy vehicle taxation of the Yakama based on the Treaty's language and the parties' intent when they signed the Treaty.

On remand, the district court considered extrinsic evidence of the Yakama's understanding of the treaty and found that the Treaty, as understood by the Yakama, "unambiguously reserve[d] to the Yakamas the right to travel the public high-ways without restriction for purposes of hauling goods to market." *Flores*, 955 F. Supp. at 1248. In the alternative, the district court found that even if the Yakama's right to travel was not so unambiguously expressed in the Treaty, the Indian-friendly canons of construction required that it should be read in the Yakama's favor. *Id.* at 1249. We affirmed on these latter grounds in large part because the state offered no evidence to suggest that the parties to the Treaty intended to limit the Yakama's broad reading of this right. *Cree II*, 157 F.3d at 771.

In this case, the United States agrees that if *Cree II*'s interpretation of the Treaty is equally applicable to both state and federal taxes, Ramsey would be exempt from federal road use taxes. The government argues, however, that the *Cree II* analysis is inapplicable to federal taxes because there is a different standard for exemptions from federal taxation. We agree.

In fact, this Court recognized a distinction between the standard for state tax exemptions and federal tax exemptions in *Cree I*:

> The State argues that the fees "implement federal highway financing policy," and that consequently the fees are valid unless the Treaty creates a "definitely expressed" exemption. *The State presents no authority for this court to find that the state-imposed truck fees should be judged according to the standard for federal fees.*

78 F.3d at 1403 n.4 (emphasis added) (citation omitted). The different standards stem from the state and federal government's distinct relationships with Indian tribes. The federal government has plenary and exclusive power to deal with tribes. *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976). "The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1975). States, on the other hand, interact with the tribes in a more limited capacity. A state's regulatory authority over tribal members is limited by the tribal right of self-government and the preemptive effect of federal law. *Id.* at 141–142. For this reason, all citizens, including Indians, are subject to federal taxation unless expressly exempted, *Hoptowit v. Commissioner*, 709 F.2d 564, 566 [52 AFTR 2d 83-5290] (9th Cir. 1983) (citing *Squire v. Capoeman*, 351 U.S. 1, 6 [49 AFTR 178] (1956)), while a state's authority to tax tribal members is limited depending on the subject and location of the tax, *see McClanahan v. State Tax Comm'n*, 411 U.S. 164, 170–71 (1973) (holding that state taxes are not applicable to Indians on reservations absent congressional consent); *Mescalero*, 411 U.S. at 148–49 ("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory State law[s].").

The applicability of a federal tax to Indians depends on whether express exemptive language exists within the text of the statute or treaty. The language need not explicitly state that Indians are exempt from the specific tax at issue; it must only provide evidence of the federal government's intent to exempt Indians from taxation. Treaty language such as "free from incumbrance," "free from taxation," and "free from fees," are but some examples of express exemptive language required to find Indians exempt from federal tax.

Only if express exemptive language is found in the text of the statute or treaty should the court determine if the exemption applies to the tax at issue. At that point, any ambiguities as to whether the exemptive language applies to the tax at issue should be construed in favor of the Indians. In *Karmun v. Commissioner*, 749 F.2d 567, 569 [55 AFTR 2d 85-480] (9th Cir. 1984), we noted that "[n]otwithstanding the canon of interpretation that resolves ambiguities in statutes and treaties in favor of Indians, we have recognized that the intent to exempt income of Indians from taxation must be clearly expressed." In addition, we stated that "[p]olicy considerations by themselves are insufficient to justify the implication of a tax exemption absent express exemptive language." *Id. Confederated Tribes of Warm Springs Reservation v. Kurtz*, 691 F.2d 878, 881 [50 AFTR 2d 82-6279] (9th Cir. 1982) (noting that the intent to exempt must be definitely expressed before the court can construe the statute or treaty to create an exemption), *United States v. Anderson*, 625 F.2d 910, 913 [46 AFTR 2d 80-5703] (9th Cir. 1980) (noting that the canon of construction reading statutes and treaties in favor of the Indians does not come into play absent express exemptive language). Therefore, when reviewing a claim for a federal tax exemption, we do not engage the canon of construction favoring the Indians unless express exemptive language is first found in the text of the statute or treaty. Only if such language exists, do we consider whether it could be "reasonably construed" to support the claimed exemption. *See Hoptowit*, 709 F.2d at 566 (concluding that treaty language setting apart tribal lands "for the exclusive use and benefit" of the tribe

could not be construed to support an exemption from federal income tax).

When a court interprets a state's taxation of Indians' off-reservation activities, the court determines if there is an express federal law prohibiting the tax. The federal law must be interpreted in the light most favorable to the Indians, and extrinsic evidence may be used to show the federal government's and Indians' intent. Unlike the federal standard, there is no requirement to find express exemptive language *before* employing the canon of construction favoring Indians.

In *Cree II* this Court implemented the Indian-friendly canon of construction and analyzed the history of the Treaty and the understanding of the Yakama to find an "express federal law" which exempted the Yakama from state taxation. *Cree II*, 157 F.3d at 769. We held that the Yakama Treaty should be interpreted "to guarantee the Yakamas the right to transport goods to market over public highways without payment of fees for that use." *Id.* Ramsey argues that *Cree II*'s Treaty interpretation, finding an "express federal law" exempting the Yakama from state heavy vehicle taxes, controls this case when looking for "express exemptive language" to exempt the Yakama from similar federal taxation. *Cree II*'s interpretation, however, is not binding on the question of *federal* taxation because the initial inquiry when exempting Indians from *federal* taxes is whether the federal law in question contains express exemptive language at all. The canon of construction favoring the Indian when ambiguities are present in a statute or treaty does not come into play absent such language. We are not persuaded that the Supreme Court's recent reference in *Chickasaw Nation v. United States*, 122 S. Ct. 528, 535–36 [88 AFTR 2d 2001-6967] (2001), to potential differences between the application of the Indian-friendly canons to congressional statutes and to Indian treaties has changed our long standing precedent in the treaty context which has already resolved any conflicts between those canons and the express exemption requirement. *See, e.g., Squire*, 351 U.S. at 6; *Confederated Tribes*, 691 F.2d at 881. Thus, *Cree II*'s analysis of the same Treaty provision utilizing extrinsic evidence and interpreting the provision most favorably to the Yakama does not control our analysis.

2. Application of the Federal Standard

Applying the federal standard, we hold that the relevant Treaty provision contains no "express exemptive language." The Treaty simply states that "free access from the [reservation] to the nearest public highway, is secured to [the Yakama]; as also the right, in common with citizens of the Unites States, to travel upon all public highways." 12 Stat. at 953. This provision does not provide express language from which we can discern an intent to exempt the Yakama from federal heavy vehicle and diesel fuel taxation. The only exemptive language in the Treaty is the "free access" language. "Free access," however, does not modify the right to travel upon the public roadways. Indeed, the clause granting the Yakama the "right, in common with citizens of the United States, to travel upon all public highways" contains no exemptive language. "In common with" does not express an intent to exempt the Yakama from taxes. Thus, there is no express exemptive language in the Treaty to exempt the Yakama from the generally applicable, federal heavy vehicle and diesel fuel taxes. Absent any express exemptive language to the contrary, the taxes at issue apply to the Yakama, and the district court's judgment in favor of Ramsey must be reversed and summary judgment entered in favor of the United States.

CONCLUSION

Ramsey's prior federal case, analyzing a state's heavy vehicle tax and the Yakama Treaty, is not binding in this lawsuit dealing with a similar federal tax. When the Treaty is analyzed under the federal standard, there is no express language exempting the Yakama from the heavy vehicle and diesel fuel taxes, nor can we find any broader exemptive language that could be reasonably construed as encompassing such an exemption. Thus, we remand for entry of summary judgment in favor of the United States.

REVERSED and REMANDED.

¶2002-5364

Nickolas ABONDOLO, ET AL., and their successors as Trustees of the Amalgamated Meat Cutter and Retail Food Store Employees Union Local 342 Pension Fund, ET AL., PLAINTIFFS v. GGR HOLBROOK MEDFORD, INC. a/k/a MEAT FARMS, INC., ET AL., DEFENDANTS. U.S. District Court, Eastern Dist. of New York, (DC NY) 91-CV-4740 (TCP) (VVP), Aug. 15, 2002. Decision for Govt. in part.

1. District court procedure—intervention—lien property—bankruptcy. Govt. was granted motion to intervene in 3d-party trustee's 3d-party damages complaint against bankrupt taxpayer's trustee: govt. was entitled to intervene as matter of right under IRC §7424 where it had valid liens against property that taxpayer had allegedly fraudulently conveyed to wife. Govt. also had right to intervene under F.R.Civ.P. 24 where it filed timely intervention motion, and had clear interest in action which could be harmed by unfavorable disposition and which 3d-party trustee might not adequately protect; or, was entitled to permissive intervention, based on commonality between it's and 3d-party trustee's claims and fact that its intervention wouldn't prejudice other parties. *Reference:* United States Tax Reporter ¶74,245.01(5). IRC §7424.

2. District court jurisdiction—bankruptcy—withdrawal of reference—core matters. Govt.'s request to withdraw bankruptcy court reference of pending motions in 3d-party trustee's 3d-party damages complaint against taxpayer/Chap. 7 debtor and Chap. 7 trustee was granted in part, even though motions were "core matters" in bankruptcy: withdrawing motions that concerned taxpayer's alleged fraudulent conveyances of property to wife would be efficient use of judicial resources, save time and money, promote uniformity in bankruptcy administration, and prevent forum shopping. But, withdrawal of remaining motions concerning IRS and other creditors' classifications and proposed settlement between Chap. 7 trustee and taxpayer's wife wasn't appropriate. *Reference:* United States Tax Reporter ¶74,025.01(42); 68,726.52(5). IRC §7402.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK,

MEMORANDUM AND ORDER

PLATT, District Judge.

The United States moves pursuant to Title 26 U.S.C. § 7424 and Rule 24 of the Federal Rules of Civil Procedure to intervene in an action currently pending before this Court under docket number 91-CV-4740. The United States also moves to withdraw to this Court four motions pending before the United States Bankruptcy Court for the Eastern District of New York in a related bankruptcy action filed under docket number 800-83212-288. The bankruptcy trustee for the bankruptcy estate of George A. Gamaldi, Sr. joins in both of the United States' motions.

For the reasons stated below: (1) the United States' Motion to Intervene is GRANTED; and (2) the United States' Motion to Withdraw the Reference is GRANTED IN PART and DENIED IN PART.

BACKGROUND

This case arises primarily under the Employee Retirement Income Security Act of 1974 ("ERISA"). It suffers from a long and tortured procedural history.

A. The Events Leading to These Motions

In July of 1990, Albert V. Faraldi ("Faraldi") and entities he owned, including Faraldi Food Industries, Limited ("Faraldi Foods"), entered into an asset purchase agreement with George A. Gamaldi, Sr. ("Gamaldi"). *In re Albert V. Faraldi*, No. 800-83212-288, slip op. at 2 [89 AFTR 2d 2002-2353] (Bankr. E.D.N.Y. Feb. 1, 2002). Pursuant to that asset purchase agreement, Faraldi and Faraldi Foods agreed to purchase a chain of food stores owned by Gamaldi ("Gamaldi Foods"). *Id.*

In connection with that asset purchase agreement, Faraldi Foods executed promissory notes in both Gamaldi's and Gamaldi Foods' favor. *Id.* Faraldi personally guaranteed those notes. *Id.*

Faraldi Foods defaulted on those promissory notes shortly after executing them. *Id.* On May 6, 1991, Gamaldi sent Faraldi a letter demanding payment under the guaranty that Faraldi had personally executed. *Id.* Faraldi did not honor that demand. *Id.*

Two months later, Faraldi began transferring some of his personal property to his wife. Specifically, Faraldi transferred to his wife: (1) his interest in a house in Huntington, New York; (2) an oceanfront condominium in Montauk, New York; (3) a forty-four foot yacht; and (4) approximately $700,000.00 in liquid assets.[1] *Id.*

In December of 1991, the trustees of a union pension fund commenced this ERISA action against Gamaldi Foods under docket number 91-CV-4740. *Id.* On May 11, 1992, Gamaldi filed a Third-party Complaint against Faraldi and Faraldi Foods in this ERISA action. *Id.* That Third-party Complaint sought indemnification and damages for the breached asset purchase agreement and the defaulted guaranty (''Third-party Action''). *Id.* Faraldi subsequently defaulted in that Third-party Action. *Id.*

On June 28, 1993, the Internal Revenue Service (''IRS'') assessed Faraldi with a trust fund recovery penalty for failure to remit withheld employee payroll taxes. (United States' Mem. in Supp. Mot. to Withdraw Referral and Consolidate at 2.) On October 20, 1993, the IRS docketed a federal tax lien of $1,800,000.00 against Faraldi and his property with the Suffolk County Clerk. *In re Albert V. Faraldi*, No. 800-83212-288, slip op. at 2 (Bankr. E.D.N.Y. Feb. 1, 2002); (United States' Mem. in Supp. Mot. to Withdraw Referral and Consolidate at 2.)

On July 6, 1994, Gamaldi filed for bankruptcy relief under Chapter 7 of the United States Bankruptcy Code. *Id.*A trustee was appointed for Gamaldi's bankruptcy estate (''Gamaldi Trustee''). *Id.* at 3. The Gamaldi Trustee was subsequently substituted as plaintiff in the Third-party Action against Faraldi and Faraldi Foods for breach of the asset purchase agreement and the guaranty. *Id.* at 3.

On June 26, 1996, the Gamaldi Trustee obtained a default judgment of $9,117,795.10 against Faraldi and Faraldi Foods in the Third-party Action. *Id.* On July 24, 1997, that default judgment was rescinded and was replaced with one in the same amount that named only Faraldi. *Id.* That second default judgment named only Faraldi because Faraldi Foods had itself filed for bankruptcy relief in the interim. *Id.* The Gamaldi Trustee eventually filed that second default judgment against Faraldi with the Suffolk County Clerk. *Id.*

On November 9, 1998, the Gamaldi Trustee commenced a special proceeding against Faraldi and his wife in this Court: (1) to enforce the default judgment entered against Faraldi; and (2) to void the conveyances made by Faraldi to his wife in July of 1991 (''Fraudulent Conveyance Action''). *Id.* Faraldi subsequently moved unsuccessfully for summary judgment of that Fraudulent Conveyance Action. *Id.*

On January 18, 2000, this Court denied Faraldi's motion to vacate the default judgment that had been entered against him on July 24, 1997 in the Third-party Action. *Id.*Faraldi subsequently appealed that ruling to the United States Court of Appeals for the Second Circuit. *Id.* That court denied Faraldi's appeal on April 10, 2000. *Id.*

This Court consequently scheduled jury selection in the Fraudulent Conveyance Action for May 15, 2000. (United States' Mem. in Supp. Mot. to Withdraw Referral and Consolidate at 2.) Jury selection in that action never occurred however, because on May 12, 2000, Faraldi individually filed a bankruptcy petition under Chapter 7 of the United States Bankruptcy Code and thereby received an automatic stay under Title 11 U.S.C. § 362. (United States' Mem. in Supp. Mot. to Withdraw

[1] Both Huntington, New York and Montauk, New York are located in Suffolk County, New York.

Referral and Consolidate at 2.) Allen B. Mendelsohn (''Faraldi Trustee'') was appointed trustee for Faraldi's bankruptcy estate. *In re Albert V. Faraldi*, No. 800-83212-288, slip op. at 3 (Bankr. E.D.N.Y. Feb. 1, 2002).

At some point, the Faraldi Trustee moved to modify the automatic stay in place in Faraldi's bankruptcy action to allow the Fraudulent Conveyance Action to proceed in this Court. On May 17, 2000, the bankruptcy court modified the stay in Faraldi's bankruptcy action to permit the Fraudulent Conveyance Action to proceed. (United States' Mem. in Supp. Mot. to Withdraw Referral and Consolidate at 2.) On March 12, 2001, the bankruptcy court granted Faraldi a discharge in his bankruptcy proceeding. (United States' Mem. in Supp. Mot. to Withdraw Referral and Consolidate at 2.)

On June 3, 2000, this Court ''So Ordered'' a stipulation between the Faraldi Trustee and the Gamaldi Trustee wherein the Gamaldi Trustee acknowledged that his fraudulent conveyance claims against the Faraldis belonged to the Faraldi Trustee. (Faraldi Mem. in Opp. Mot. to Intervene at 4.) Nevertheless, in August of 2001, the Gamaldi Trustee moved the bankruptcy court to compel the Faraldi Trustee to abandon his position as petitioner in the Fraudulent Conveyance Action currently pending in this Court. (Faraldi Mem. in Opp. Mot. to Intervene at 4.) Around that same time, the IRS also intervened in Faraldi's bankruptcy action in support of the Gamaldi Trustee's motion to compel the Faraldi Trustee to abandon his position as petitioner in the Fraudulent Conveyance Action. (Faraldi Mem. in Opp. Mot. to Intervene at 4.)

On February 1, 2002, United States Bankruptcy Judge Stan Bernstein ruled partially in the Gamaldi Trustee's favor on his motion to compel the Faraldi Trustee to abandon certain fraudulent conveyance claims. (''February 1st Order''). *In re Albert V. Faraldi*, No. 800-83212-288, slip op. at 1 (Bankr. E.D.N.Y. Feb. 1, 2002). Specifically, Bankruptcy Judge Bernstein ordered the Faraldi Trustee to abandon to the Gamaldi Trustee the fraudulent conveyance claims pending in this Court that concern the Huntington home and the Montauk condominium. *Id.*However, Bankruptcy Judge Bernstein did not rule on the fraudulent conveyance claims that concern the forty-four foot yacht or the $700,000.00 in liquid assets. *See id.*Accordingly, those fraudulent conveyance claims still belong to the Faraldi Trustee.

B. The Current Motions Before this Court

There are currently two motions before this Court. The first is a motion (''First Motion'') by the United States that is joined by the Gamaldi Trustee. By that first motion, the United States seeks to intervene in the Third-party Action pending before this Court to assert federal tax liens against Faraldi and his wife. The First Motion also seeks to set aside the 1991 conveyances made by Faraldi to his wife on grounds that those conveyances were fraudulent as to Faraldi's creditors (including the United States). Additionally, the United States seeks to file a ''United States Complaint in Intervention'' in the Third-party Action.

The second motion is also made by the United States and is also joined by the Gamaldi Trustee (''Second Motion''). The Second Motion seeks: (1) to withdraw to this Court four motions currently pending before the bankruptcy court in Faraldi's bankruptcy action; and (2) to consolidate those motions with the Third-party Action currently pending in this Court. Specifically, the United States seeks to have the following motions removed from the bankruptcy court to this Court: (1) the Gamaldi Trustee's application to compel the Faraldi Trustee to abandon his remaining fraudulent conveyance claims to the Gamaldi Trustee; (2) the United States' motion to compel the Faraldi Trustee to abandon those fraudulent conveyance claims; (3) the Faraldi Trustee's motion to reclassify the IRS, New York State and the Gamaldi Trustee as unsecured creditors; and (4) the Faraldi Trustee's motion to approve a settlement with Faraldi's wife. (United States Mem. in Supp. Mot. to Withdraw the Reference at 4, 6–7.)

The United States filed its Second Motion before Bankruptcy Judge Bernstein issued the February 1st Order that compelled the Faraldi Trustee to abandon some of the fraudulent conveyance claims pending in this Court to the Gamaldi Trustee. (Mem. in Joinder and Supp. by the Gamaldi Trustee of United States' Mots. at 2.) Nevertheless, the Second Motion remains viable because Bankruptcy Judge Bernstein's February 1st Order did not compel the Faraldi Trustee to abandon to the Gamaldi Trustee the fraudulent conveyance claims that concern the forty-four foot yacht or the $700,000.00 in liquid assets.

DISCUSSION

A. The United States' Right to Intervene in the Third-party Action

1. Title 26 U.S.C. § 7424

[1] The United States first argues that it may intervene by right in the Third-party Action pursuant to 26 U.S.C. § 7424 because it has filed a valid tax lien against some of the assets that are at issue in that action. The Faraldi Trustee argues that § 7424 does not permit the United States to intervene in the Third-party Action. The United States posits the more persuasive argument.

The United States may intervene in any action concerning property against which it claims a tax lien. 26 U.S.C. § 7424 (2000); *Gen. Ins. Co. of Am. v. Tilcon N.Y.*, No. 96 Civ. 1258, 1996 U.S. Dist. LEXIS 9634, at 2 (S.D.N.Y. July 11, 1996). The United States may claim a tax lien against any property which has been fraudulently transferred by a debtor. *See United States v. McCombs*, 30 F.3d 310, 321–22 [74 AFTR 2d 94-5408] (2d Cir. 1994). *See generally United States v. Mazzeo*, No. 98-CV-3060, 2001 U.S. Dist. LEXIS 1698, at 2 (E.D.N.Y. Jan. 10, 2001) (Seybert, J.).

Debtors fraudulently transfer property against the United States when they owe a debt to the United States and they transfer that property: (1) "with actual intent to hinder, delay, or defraud a creditor;" or (2) "without receiving reasonably equivalent value in return" when the debtor (a) "was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction" or (b) "intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due." 28 U.S.C. § 3304(b) (2000). Property transfers are fraudulent to the United States whether the debts owed to the United States were incurred prior or subsequent to the transfers. *Id.*

The IRS assessed a trust fund penalty against Faraldi on June 28, 1993, and docketed a $1,800,000.00 federal tax lien against his property with the Suffolk County Clerk on October 20, 1993. *In re Albert V. Faraldi*, No. 800-83212-288, slip op. at 2 (Bankr. E.D.N.Y. Feb. 1, 2002); (United States' Mem. in Supp. Mot. to Withdraw Referral and Consolidate at 2.) Faraldi had already transferred some of his property to his wife in 1991 when the IRS docketed its lien against that property.

The United States may assert a fraudulent transfer claim against Faraldi because he transferred property he owned to his wife and subsequently incurred a debt to the United States. *See* 28 U.S.C. § 3304 (b). The United States may accordingly claim a tax lien against that property because it asserts that Faraldi fraudulently transferred it. *See McCombs*, 30 F.3d at 321–22; *see also Mazzeo*, 2001 U.S. Dist. LEXIS 1698, at 2. Consequently, because the United States may claim a tax lien against that property, it may intervene by right in the Third-party Action to protect its rights to that property. *See* 26 U.S.C. § 7424; *Gen. Ins. Co. of Am.*, 1996 U.S. Dist. LEXIS 9634, at 2.

The United States may therefore intervene in the Third-party Action to assert its tax lien. The United States Motion to Intervene must accordingly be granted.

2. Intervention Under the Federal Rules of Civil Procedure

a. Intervention by Right

The United States alternatively argues that it may intervene by right in the Third-party Action pursuant to Rule 24 of the

Federal Rules of Civil Procedure. The Faraldi Trustee argues that the United States may not intervene by right in the Third-party Action pursuant to Rule 24 of the Federal Rules of Civil Procedure because: (1) the United States failed to demonstrate the timeliness of its motion;[2] and (2) the United States has no interest in the Third-party Action. The United States is correct and the Faraldi Trustee is mistaken.

Rule 24 of the Federal Rules of Civil Procedure permits parties to intervene in actions by right: (1) if so authorized by a federal statute; or (2) if they demonstrate an interest that is at risk in the litigation. *See* Fed. R. Civ. P. 24(a)(1)-(2). To intervene in actions by right without statutory authorization, parties must: (1) file timely intervention motions; (2) demonstrate an interest in the litigation; (3) demonstrate that their interest in that litigation will be impaired by an unfavorable disposition; and (4) demonstrate that their interest may not be adequately protected by the parties to the litigation. *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 128–29 (2d Cir. 2001); *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176 (2d Cir. 2001); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001). Failure to satisfy any of those elements warrants denying an intervention motion. *Butler, Fitzgerald & Potter*, 250 F.3d at 176; *D'Amato*, 236 F.3d at 84; *Weisshaus v. Swiss Bankers Ass'n (In re Holocaust Victim Assets Litig.)*, 225 F.3d 191, 197–98 (2d Cir. 2000).

The interest parties assert in a litigation must be "'direct, substantial, and legally protectable'" to intervene by right in that litigation. *United States v. Peoples Benefit Life Ins. Co.*, 271 F.3d 411, 415 (2d Cir. 2001) (quoting *Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990)); *Brennan*, 260 F.3d at 129. That interest may not be speculative or remote. *Peoples Benefit Life Ins. Co.*, 271 F.3d at 415; *Brennan*, 260 F.3d at 129.

District Courts determine, within their discretion and under the totality of the circumstances, whether motions to intervene by right without statutory authorization are timely. *D'Amato*, 236 F.3d at 84; *In re Holocaust Victim Assets Litig.*, 225 F.3d at 198; *see Butler, Fitzgerald & Potter*, 250 F.3d at 182. To determine if intervention motions are timely, courts consider: "'(1) how long the applicant had notice of the interest before [he moved] ... to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness.'" *D'Amato*, 236 F.3d at 84 (quoting *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994)); *see Butler, Fitzgerald & Potter*, 250 F.3d at 182; *In re Holocaust Victim Assets Litig.*, 225 F.3d at 198.

The United States may first intervene by right in the Third-party Action because 26 U.S.C. § 7424 statutorily grants that right. *See* Fed. R. Civ. P. 24(a)(1); *see also* DISCUSSION A.1. *supra*. The United States may also intervene by right in the Third-party Action because: (1) it filed a timely intervention motion; (2) it has a clear interest in the Third-party Action; (3) its interest could be harmed by an unfavorable disposition in that action; and (4) the Gamaldi Trustee may not adequately protect the United States' interests in that action. *See Brennan*, 260 F.3d at 128–29; *Butler, Fitzgerald & Potter*, 250 F.3d at 176; *D'Amato*, 236 F.3d at 84; *see also* Fed. R. Civ. P. 24(a)(2).

i. Timeliness of the United States' Motion

The totality of the circumstances demonstrate that the United States' intervention motion is timely. *See D'Amato*, 236 F.3d at 84; *In re Holocaust Victim Assets Litig.*, 225 F.3d at 198; *see also Butler, Fitzgerald & Potter*, 250 F.3d at 182. First, the United States claims that it only recently learned of Faraldi's alleged fraudulent transfers to his wife and of the pending Fraudulent Conveyance Action. *See Butler, Fitzgerald & Potter*, 250 F.3d at 182; *D'Amato*, 236

[2] The Faraldi Trustee does not argue that the United States' Motion to Intervene is barred by any statute of limitations, but instead argues laches.

F.3d at 84; *In re Holocaust Victim Assets Litig.*, 225 F.3d at 198; *Pitney Bowes, Inc.*, 25 F.3d at 70. The United States only appeared in Faraldi's bankruptcy action sometime in August of 2001, which renders that assertion reasonably plausible.

Second, neither the Faraldi Trustee nor the Gamaldi Trustee will be prejudiced if the United States intervenes in the Third-party Action, because the United States will not unnecessarily delay or complicate that proceeding. *See Butler, Fitzgerald & Potter*, 250 F.3d at 182; *D'Amato*, 236 F.3d at 84; *In re Holocaust Victim Assets Litig.*, 225 F.3d at 198; *Pitney Bowes, Inc.*, 25 F.3d at 70.

Third, the United States may be severely prejudiced if it is not permitted to intervene in the Third-party Action, because it will be denied the opportunity to litigate the ownership of property over which it claims a substantial interest. *See Butler, Fitzgerald & Potter*, 250 F.3d at 182; *D'Amato*, 236 F.3d at 84; *In re Holocaust Victim Assets Litig.*, 225 F.3d at 198; *Pitney Bowes, Inc.*, 25 F.3d at 70.

Finally, unusual circumstances warrant the United States' intervention in the Third-party Action, because Faraldi: (1) may have fraudulently concealed several of his assets for many years; and (2) owes substantial fines for unpaid payroll taxes. *See Butler, Fitzgerald & Potter*, 250 F.3d at 182; *D'Amato*, 236 F.3d at 84; *In re Holocaust Victim Assets Litig.*, 225 F.3d at 198; *Pitney Bowes, Inc.*, 25 F.3d at 70. Accordingly, the totality of the circumstances indicate that the United States' intervention motion is timely.

ii. The Other Three Intervention by Right Factors

The other three intervention by right factors also favor the Untied States' intervention in the Third-party Action. First, the United States has a clear interest in the Third-party Action because it has filed a substantial tax lien against Faraldi's property and might be able to satisfy some of that lien if it could recover the property that Faraldi allegedly transferred fraudulently. *See Brennan*, 260 F.3d at 128–29; *Butler, Fitzgerald & Potter*, 250 F.3d at 176; *D'Amato*, 236 F.3d at 84.

Second, any disposition of the Third-party Action that was unfavorable to the Gamaldi Trustee might terminate the United States' interest in Faraldi's property. *See Brennan*, 260 F.3d at 128–29; *Butler, Fitzgerald & Potter*, 250 F.3d at 176; *D'Amato*, 236 F.3d at 84.

Finally, the Gamaldi Trustee may not adequately protect the United States' tax lien interests in that Third-party Action. *See Brennan*, 260 F.3d at 128–29; *Butler, Fitzgerald & Potter*, 250 F.3d at 176; *D'Amato*, 236 F.3d at 84. Therefore, the other three intervention by right factors favor intervention as well.

iii Intervention by Right Conclusions

The United States has a statutory fight to intervene in the Third-party Action. *See* 26 U.S.C. § 7424; *see also* DISCUSSION A.1. *supra*. It has also satisfied the factors that govern intervention by right under Rule 24's non-statutory intervention procedure. *See Brennan*, 260 F.3d at 128–29; *Butler, Fitzgerald & Potter*, 250 F.3d at 176; *D'Amato*, 236 F.3d at 84. The United States may therefore intervene by right in the Third-party action.

b. Permissive Intervention

The United States alternatively argues that it should be permitted to intervene in the Third-party Action if the Court concludes that it may not intervene by right. This Court agrees.

Parties may be permitted to intervene in actions: (1) where authorized by federal statute; or (2) when there is a common question of law or fact between the movant's claim and the suit in which the movant seeks to intervene. Fed. R. Civ. P. 24(b). When considering permissive intervention motions, courts must examine whether intervention will prejudice the parties to the action or cause undue delay. *D'Amato*, 236 F.3d at 84; *In re Holocaust Victim Assets Litig.*, 225 F.3d at 202.

District court permissive intervention rulings are reviewed for abuse of discretion. *Ferenc v. Buchanan Marine, Inc.*, No.

99-9253, 2000 U.S. App. LEXIS 9977, at 2 (2d Cir. May 12, 2000). District court permissive intervention rulings are afforded heightened deference however. *Schonfeld v. City of New York*, No. 00-7387, 2001 U.S. App. LEXIS 16776, at 8 (2d Cir. July 25, 2001); *Ferenc*, 2000 U.S. App. LEXIS 9977, at 2–3. In fact, "'[r]eversal of a district court's ... permissive intervention [ruling] is a very rare bird indeed, so seldom seen as to be considered unique.'" *Ferenc*, 2000 U.S. App. LEXIS 9977, at 2–3 (quoting *Pitney Bowes, Inc.*, 25 F.3d at 73–74); *see Schonfeld*, 2001 U.S. App. LEXIS 16776, at 8.

This Court permits the United States to intervene in the Third-party Action. First, as previously noted, the United States may intervene under 26 U.S.C. § 7424. *See* 26 U.S.C. § 7424; Fed. R. Civ. P. 24(a)(2); DISCUSSION A.1. *supra.*

Second, there are common questions of law and fact between the United States' claim to the property that Faraldi allegedly transferred fraudulently and the Gamaldi Trustee's claim to that property. *See* Fed. R. Civ. P. 24(b).

Finally, neither the Faraldi Trustee nor the Gamaldi Trustee will be prejudiced if the United States intervenes in the Third-party Action, because the United States will not unduly hinder or delay that action. *See D'Amato*, 236 F.3d at 84; *In re Holocaust Victim Assets Litig.*, 225 F.3d at 202.

Accordingly, the Court exercises its considerable discretion and permits the United States to intervene in the Third-party Action. *See Schonfeld*, 2001 U.S. App. LEXIS 16776, at 8; *Ferenc*, 2000 U.S. App. LEXIS 9977, at 2–3.

C. The United States' Second Motion and Withdrawal of the Four Bankruptcy Court Motions

[2] The United States' Second Motion seeks: (1) to withdraw four motions currently pending before the bankruptcy court in Faraldi's bankruptcy action; and (2) to consolidate those motions with the Third-party Action pending before this Court. The United States' Second Motion is granted.

District courts have original jurisdiction over all cases arising under Title 11 of the United States Code. 28 U.S.C. § 1334(a) (2000). District courts may refer cases arising under Title 11 to bankruptcy courts. *Id.* § 157(a).

Bankruptcy cases in this district are automatically referred to bankruptcy courts upon filing pursuant to a standing order issued on August 28, 1986. *See Braniff Int'l Airlines v. Aeron Aviation Res. Holdings II, Inc.* (*In re Braniff Int'l Airlines*), 159 B.R. 117, 121 (Bankr. E.D.N.Y. 1993). District courts may withdraw bankruptcy references *sua sponte* or upon motion for cause. 28 U.S.C. § 157(d).

Cause is an undefined term. *South St. Seaport Ltd. P'ship v. Burger Boys* (*In re Burger Boys*), 94 F.3d 755, 762 (2d Cir. 1996); *Orion Pictures Corp. v. Showtime Networks* (*In re Orion Pictures Corp.*) 4 F.3d 1095, 1101 (2d Cir. 1993). Factors district courts consider to determine if cause for withdrawing bankruptcy references exist are: "(1) whether the claim is core or non-core, (2) what is the most efficient use of judicial resources, (3) what is the delay and what are the costs to the parties, (4) what will promote uniformity of bankruptcy administration, (5) what will prevent forum shopping, and (6) other related factors." *In re Burger Boys*, 94 F.3d at 762; *see In re Orion Pictures Corp.*, 4 F.3d at 1101; *LTV Steel Co., Inc. v. City of Buffalo* (*In re Chateaugay Corp.*) No. 00 Civ. 9429, 2002 U.S. Dist. LEXIS 5318, at 17–18 (March 12, 2002).

The core/non-core factor is the most important factor to consider when determining if cause for withdrawing bankruptcy references exists, because that factor drives the efficiency and uniformity determinations. *In re Burger Boys*, 94 F.3d at 762; *In re Orion Pictures Corp.*, 4 F.3d at 1101. For example, it may be more efficient and may promote uniformity for district courts to decide non-core matters, because bankruptcy courts are only empowered to submit proposed factual findings and legal conclusions to district courts for *de novo*

review in non-core matters. *In re Orion Pictures Corp.*, 4 F.3d at 1101. It may conversely be more efficient and may promote uniformity for bankruptcy courts to determine core matters, because bankruptcy courts may be more familiar with the law and facts surrounding those matters. *Id.*

Core proceedings include ''matters concerning the administration of the estate,'' ''counterclaims by the estate against persons filing claims against the estate,'' ''orders to turn over property of the estate,'' ''proceedings to determine, avoid, or recover fraudulent conveyances,'' ''determinations of the validity, extent, or priority of liens,'' and ''other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship.'' 11 U.S.C. § 157(b)(1)(A), (C), (E), (H), (K), (O). Matters concerning administration of the estate should be broadly interpreted. *In re Best Products Co.*, 68 F.3d 26, 31 (2d Cir. 1995); *In re Orion Pictures Corp.*, 4 F.3d at 1102.

1. Core and Non-Core Matters

The first two motions the United States seeks to withdraw from the bankruptcy court concern which party may pursue the Fraudulent Conveyance Action in this Court. Those motions accordingly involve ''proceedings to determine, avoid, or recover fraudulent conveyances'' and are therefore core matters. *See* 11 U.S.C. § 157(b)(1)(H).

The third Bankruptcy Court motion the United States wishes to withdraw to this Court seeks to reclassify the IRS, New York State and the Gamaldi Trustee as unsecured creditors. That third motion is one to ''adjust[] . . . the debtor-creditor or the equity security holder relationship,'' and is therefore also a core matter. *Id.* § 157(b)(1)(O).

The fourth and final motion the United States seeks to withdraw to this Court is the Faraldi Trustee's motion to approve a settlement with Faraldi's wife. The United States did not disclose the terms of that settlement to the Court, but that motion may concern ''counterclaims by the estate against persons filing claims against the estate,'' ''orders to turn over property of the estate,'' or ''proceedings to determine, avoid, or recover fraudulent conveyances.'' *Id.* § 157(b)(1)(C), (E), (H). Accordingly, that motion may concern core matters as well.

Therefore, three of the four motions the United States seeks to withdraw to this Court definitively concern core bankruptcy matters, and the fourth may as well. For its Motion to Withdraw the Reference to be granted, the United States must consequently overcome the presumption that bankruptcy courts, and not district courts, should determine core matters. *SeeIn re Burger Boys*, 94 F.3d at 762; *In re Orion Pictures Corp.*, 4 F.3d at 1101.

2. Efficient Use of Judicial Resources

The first two bankruptcy court motions the United States seeks to withdraw concern who may litigate the Fraudulent Conveyance Action in this Court. The Fraudulent Conveyance Action will proceed in this Court regardless of which party litigates it.

Consequently, judicial resources will be most efficiently allocated if this Court determines which party may litigate the Fraudulent Conveyance Action before it, because that issue presents questions of law and fact common to the substantive Fraudulent Conveyance Action itself. Judicial economy is accordingly best served if this Court heard the first and second motions.

The third motion the United States seeks to withdraw concerns a pure core matter that is unrelated to either the Fraudulent Conveyance Action or the Third-party Action. The fourth motion the United States seeks to withdraw may similarly concern a matter unrelated to either the Fraudulent Conveyance Action or the Third-party Action.

The bankruptcy court is already familiar with the facts and law surrounding those third and fourth motions and is therefore better placed to decide them. *See In re Orion Pictures Corp.*, 4 F.3d at 1101. Accordingly, judicial resources are better uti-

lized if the third and fourth motions remain before the bankruptcy court.

3. Delay and Cost to the Parties

The first two bankruptcy court motions which the United States seeks to withdraw directly relate to the Fraudulent Conveyance Action pending in this Court. The parties will save time and money if they argue those motions before this Court in the first instance, because any appeal they would take of the bankruptcy court's ruling on those motions would ultimately be presented to this Court anyway. *In re Burger Boys*, 94 F.3d at 762; *In re Orion Pictures Corp.*, 4 F.3d at 1101. Accordingly, this Court will prevent unnecessary cost and delay to the parties by withdrawing those two motions. *See In re Burger Boys*, 94 F.3d at 762; *In re Orion Pictures Corp.*, 4 F.3d at 1101.

Conversely, it would cause undue delay and increase the cost to the parties to litigate the third and fourth motions before this Court, because those motions are generally unrelated to any other matters pending before this Court, and the bankruptcy court is already familiar with the law and facts surrounding those motions. *See In re Burger Boys*, 94 F.3d at 762; *In re Orion Pictures Corp.*, 4 F.3d at 1101. Accordingly, those two motions are better left before the bankruptcy court.

4. Uniformity in Bankruptcy Administration

The uniformity factor favors withdrawing the first and second motions to this Court and counsels leaving the third and fourth motions before the bankruptcy court. This Court will decide the Fraudulent Conveyance Action and should therefore also decide which party has the right to litigate that action. Deciding who may litigate that action may entail making findings and rulings that substantively affect the Fraudulent Conveyance Action itself. Uniformity is therefore assured if the same court that ultimately decides the Fraudulent Conveyance Action also makes the preliminary determination as to which party may litigate it.

That same rationale suggests that the third and fourth motions should not be removed from the bankruptcy court. That court is already familiar with the law and facts surrounding the third and fourth motions, and those motions are more related to Faraldi's bankruptcy proceeding than the Third-party Action. Consequently, uniformity would not be promoted if this Court decided those motions.

It accordingly promotes consistency in bankruptcy administration for this Court to hear the first two motions and for the bankruptcy court to hear the third and fourth motions.

5. Prevention of Forum Shopping

Hearing the first two motions in this Court and the third and fourth motions in the bankruptcy court will also prevent forum shopping. The Faraldi Trustee would be allowed to forum shop if he were permitted to argue before another court which party may litigate the Third-party Action before this Court.

Conversely, the United States would be permitted to forum shop if it were allowed to argue the third and fourth motions before this Court when those motions are unrelated to the Third-party Action. Accordingly, the first and second motions should be heard by this Court and the third and fourth motions should be heard by the bankruptcy court.

6. Other Factors and Conclusions

The Court does not need to consider other factors to decide the United States' Second Motion. The factors that are relevant favor: (1) withdrawing the first two motions to this Court; and (2) leaving the third and fourth motions before the bankruptcy court. Accordingly, this Court will withdraw the first two bankruptcy motions concerning which parties may litigate the Fraudulent Conveyance Action and will leave the third and fourth motions before the bankruptcy court.

CONCLUSION

The United States' Motion to Intervene is GRANTED. The United States' Motion to Partially Withdraw the Reference is

GRANTED IN PART and DENIED IN PART.

SO ORDERED.

Thomas C. Platt, U.S.D.J.

Dated: Central Islip, New York

August, 15 2002

¶2002-5365

UNITED STATES OF AMERICA, PLAINTIFF v. Gary B. ANDERSON; Gail L. Anderson; Peterson Ross Schloerb and Seidel; Michael T. Slott; Gary B. Anderson Trust, Gail L. Anderson Trustee and Gary B. Anderson Trustee as Nominees of Gary B. Anderson and Gail L. Anderson, DEFENDANTS. PETERSON, ROSS, SCHLOERB & SEIDEL n/k/a PETERSON & ROSS, COUNTER-PLAINTIFF/CROSS-PLAINTIFF v. UNITED STATES OF AMERICA, COUNTER-DEFENDANT, and Gary B. Anderson Trust, Gail L. Anderson Trustee and Gary B. Anderson Trustee; Gary B. Anderson Trust, Gail L. Anderson Trustee and Gary B. Anderson Trustee as Nominees of Gary B. Anderson and Gail L. Anderson, CROSS-DEFENDANTS. U.S. District Court, Northern Dist. of Indiana, (DC IN) No. 3:98CV0317AS, Aug. 14, 2002. Earlier proceeding at (2001, DC IN) 88 AFTR 2d 2001-6044, 169 F Supp 2d 952, 2001-2 USTC ¶50643 [88 AFTR 2d 2001-6044]. Years 1984, 1985, 1986, 1987. Decision for Govt.

1. Limitations periods on assessment and collection—suspensions; computation—proof—amendment of complaint. Govt. was granted motion to reopen action and supplement its complaint pursuant to F.R.Civ.P. 15(d): although 4 years had passed since case was filed, govt. sought only to supplement pleadings with matters occurring since filing; and defendant/counter-plaintiff didn't show that filing of supplemental pleadings would cause it any unfair prejudice. Also, court set deadlines for filing supplemental pleadings and dispositive motions; and accepted notice of termination of automatic stay. *Reference:* United States Tax Reporter ¶65,025.05(75); 65,015.27(20); 65,035.02(5); 74,025.01(108). IRC §6501; 6502; 6503; 7402.

ORDER

JUDGE ALLEN SHARP UNITED STATES DISTRICT COURT

[1] Presently before the court is the Plaintiff Unites States' motion seeking the following actions by the court: (1) to reopen the above entitled action; (2) to supplement the complaint pursuant to Rule 15(d) of the Federal Rules of Civil Procedure; (3) to set a new dispositive motion schedule; and (4) for the court to take notice of the termination of the automatic stay. The following motion was filed on July 2, 2002 and service of said motion indicates that all parties have been given adequate notice of the motion and an opportunity to respond. The only defendant to respond to the motion is Peterson & Ross.

Peterson & Ross argues that the plaintiff should not be given the opportunity to respond because it would be dilatory for the plaintiff to seek to supplement its complaint four years after the filing of this case. However, given that Rule 15(d) limits the extent to which the pleadings may be supplemented to matters that have occurred since the filing and the plaintiff has indicated that it wishes only to supplement its pleading with such information, the court finds this contention to be without merit. Peterson & Ross has raised other contentions but the court finds these to be equally without merit. Under the governing considerations of Rule 15(d), Peterson & Ross has not come forward with any indication that leave to file such supplemental pleadings will cause it any unfair prejudice. *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir.1995)(''Leave is normally granted, especially when the opposing party is not prejudiced.'')

The court now GRANTS the motion to reopen the above entitled action. The court now GRANTS the plaintiff's motion to supplement its complaint with the caveat that the supplemental pleadings are re-

stricted to events occurring since the initiation of the suit in accordance with Rule 15(d) of the Federal Rules of Civil Procedure. Any and all supplemental pleadings shall be filed by September 15, 2002. The Defendants shall have until October 15, 2002 to file an amended answer related only to any supplemental pleadings filed by the plaintiff on September 15, 2002. Any and all dispositive motions shall be filed by February 1, 2003. No further extensions of any of the above deadlines will be granted. Finally, the court accepts the notice of termination of the automatic stay. IT IS SO ORDERED.

Dated: AUGUST 14, 2002

JUDGE ALLEN SHARP

UNITED STATES DISTRICT COURT

¶2002-5366

UNITED STATES OF AMERICA, PLAINTIFF v. William M. ARNOLD, Dorothy N. ARNOLD, Robert B. Arnold, DBA Marketing, Inc., as successor in interest to Carnegie Multi International Corporation, DBA Marketing, Inc., as successor in interest to Carnegie Mortgage Securities, Inc., DBA Marketing, Inc., as successor in interest to Murtaugh Corporation, DBA Marketing, Inc., as successor in interest to Thoroughbred Sales, Inc., Nahama Limited Company, The Arnold Group, Inc., Multi-Housing of Florida, Inc., R.B. and Associates, Inc., The Chestertown Bank of Maryland, Barnett Bank of Marion County, N.A., and Colonial Bank, as successor to First Family Federal Savings & Loan Association, Regency Savings Bank, FSB, successor by assignment to Barnett Bank of Marion County, N.A., DEFENDANTS. U.S. District Court, Middle Dist. of Florida, (DC FL) CIVIL ACTION NO. 5:99-CV-161-OC-21, Aug. 13, 2002. Earlier proceedings at (2002, DC FL) 90 AFTR 2d 2002-6344; (2002, DC FL) 90 AFTR 2d 2002-6342; (2002, DC FL) 90 AFTR 2d 2002-5228; (2002, DC FL) 89 AFTR 2d 2002-2823; (2002, DC FL) 89 AFTR 2d 2002-2500; (2001, DC FL) 89 AFTR 2d 2002-1167, 2002-1 USTC ¶50300, amending (2001, DC FL) 88 AFTR 2d 2001-5867, 2001-2 USTC ¶50605; and (2001, DC FL) 88 AFTR 2d 2001-5284, 2001-2 USTC ¶50553. Decision for Govt.

1. Collection actions—sale of receivership estate property—"alternative amount" withholding rule. Receiver's motion for confirmation of sale of property of receivership estate was granted, and receiver was authorized to proceed with private sale free and clear of any federal tax liens held by govt. Also, under "alternative amount" withholding rule in Reg. §1.1445-2(d)(3), taxpayer won't realize any proceeds from sale, so neither receiver nor purchaser must withhold any proceeds to pay federal taxes. But after satisfying liens to be paid as conditions of sale and other costs, receiver must disburse balance to govt. *Reference:* United States Tax Reporter ¶74,035.03(100); 14,455.01(10). IRC §1445; 7403.

IN THE UNITED STATES DISTRICT COURT OF THE MIDDLE DISTRICT OF FLORIDA OCALA DIVISION,

ORDER ON MOTION FOR CONFIRMATION OF SALE OF PROPERTY OF THE RECEIVERSHIP ESTATE (Belleview Quads and Oakwood Apartments)

RALPH W. NIMMONS, JR. UNITED STATES DISTRICT JUDGE

[1] Filed herein is the Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Belleview Quads and Oakwood Apartments) to Patrick H. Moses, Janine McKinney and Lindsey Davis, (Dkt. 311). Pursuant to the Order on Motion for Leave to Proceed with Private Sales Of Defendants' Real Property Assets Pursuant to 28 U.S.C. §2001 (Dkt. 103) and Order Establishing Private Sales Procedures (Dkt. 269) and based upon the representations in the Receiver's Certificate attached to the Motion for Confirmation of Sale of Property of the Receivership Estate (Belleview Quads and Oakwood Apartments) (Dkt 311) that the Receiver has received no competing offers subsequent to the publication of the required Notice of

Private Sale, this Court has considered this matter on an ex parte basis. Upon consideration thereof, it is hereby ORDERED:

1. The Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Belleview Quads and Oakwood Apartments) (Dkt. 311), is GRANTED.

2. The Receiver is authorized to proceed with the sale of the property described in Exhibit "A" attached hereto and known as the Belleview Quads and Oakwood Apartments to Patrick H. Moses, Janine McKinney and Lindsey Davis, on the terms and conditions set forth in the proposed Agreement of Purchase and Sale, with modification of such terms and conditions (Other than reduction of the purchase price) as the Receiver may reasonably deem to be non material.

3. The private sale of the Subject Property known as Belleview Quads and Oakwood Apartments to Patrick H. Moses, Janine McKinney and Lindsey Davis is CONFIRMED.

4. The private sale of the Subject Property shall be free and clear of any federal tax liens held by the United States of America.

5. The Court finds that under the special "alternative amount" withholding rule in I.R.S. Reg.§1.1445-2(d)(3), the owner of the Subject Property, Defendant, DBA Marketing, Inc., will not realize any proceeds from the sale of the Subject Properties and therefore neither the Receiver nor Patrick H. Moses, Janine McKinney and Lindsey Davis is required to withhold any of the sale proceeds for the purpose of paying federal taxes on the sales.

6. The Receiver is authorized to satisfy any liens or encumbrances that are to be paid as a conditions of the sale, to pay all closing costs associated with the sale, including the Receiver's attorneys' fees and costs, and to pay the Receiver's commission pursuant to the provisions of the Order on Motion of Receiver for Approval of Receiver's Compensation Arrangements and for Authority to Pay the Receiver's Compensation and Expenses of the Receivership on a Monthly Basis (Dkt. 54). The Receiver shall disburse the balance of the sale proceeds to Plaintiff.

DONE AND ORDERED at Jacksonville, Florida this 13th day of August, 2002.

RALPH W. NIMMONS, JR.

UNITED STATES DISTRICT JUDGE

¶2002-5367

Joseph EARL, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Southern Dist. of Florida, (DC FL) CASE NO. 02-60709-CIV-ZLOCH, Aug. 13, 2002. Decision for Govt.

1. Actions against IRS—sovereign immunity—Anti-Injunction Act—constitutional claims—state exemptions. Pro se taxpayer's amended petition for declaratory judgment against IRS was dismissed with prejudice: U.S., which was proper defendant, didn't waive sovereign immunity; and claim that IRS waived immunity by moving against "citizen's" property was meritless. Also, AIA barred claims for injunctive and declaratory relief with respect to federal taxes; taxpayer's due process argument was meritless where constitutionally valid remedies existed and he didn't allege he was precluded from their use; and even assuming court had jurisdiction, taxpayer failed to state claim since Florida's homestead exemption didn't apply to IRS. *Reference:* United States Tax Reporter ¶74,336.506(25); 74,215.05(5). IRC §7421.

Joseph Earl, Pro Se 6417 NW 22nd Street Margate, FL 33063
Deborah M. Morris, Esq. For Defendant

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA,

FINAL ORDER OF DISMISSAL

WILLIAM J. ZLOCH Chief United States District Judge

THIS MATTER is before the Court upon the Defendant, the Internal Revenue Service's Motion To Dismiss (DE 3). The

Court has carefully reviewed said Motion and the entire court file and is otherwise fully advised in the premises.

The Court notes that the Plaintiff, Joseph Earl (hereinafter "Earl") commenced the above-styled cause by filing an Amended Petition For Declaratory Judgment (DE 1, Ex. A) in state court seeking a declaration of his homestead rights under Article X, Section 4 of the Florida Constitution.[1] Earl also sought a declaration enjoining the Defendant, the Internal Revenue Service (hereinafter the "IRS") from placing or maintaining a Notice of Lien for federal taxes on his homestead property. Specifically, Earl alleges that his homestead property is protected by Article X, Section 4 of the Florida Constitution and that the IRS's lien does not lie upon or against his property.

In the instant Motion, the IRS argues that (1) this Court lacks jurisdiction over the IRS because the United States of America (hereinafter the "USA") enjoys sovereign immunity; (2) Earl cannot obtain a declaratory judgment or other injunctive relief with respect to federal taxes; and (3) Earl fails to state a claim for relief because state exemptions are not binding on the federal government. Earl responds by arguing that (1) the IRS waives immunity when it moves against a citizen's property; (2) this case falls within the equity jurisdiction of this Court; and (3) the IRS cannot remained "unscathed" when it takes property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitu-tion.

I. Discussion

[1] The Court notes that only a generalized statement of facts need be set out to comply with the liberal pleading requirements of the Federal Rules of Civil Procedure. See Fed.R.Civ.P. 8(a). A classic formulation of the test often applied to determine the sufficiency of a complaint was set out by the United States Supreme Court in Coney v. Gibson, 355 U.S. 41, 45–46 (1957), wherein the Court stated:

> . . . In appraising the sufficiency of the Complaint we follow . . . the accepted rule that a Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

The Court adds that a complaint may not be dismissed because the plaintiff's claim does not support the legal theory he relies on since the Court must determine if the allegations provide relief on any possible theory. See Robertson v. Johnston, 376 F.2d 43, 44–45 (5th Cir. 1967).

Here, however, the Court finds that Earl's Amended Petition must be dismissed for a number of reasons. First, lawsuits against the IRS are essentially lawsuits against the USA and such suits cannot be brought unless the USA waives sovereign immunity. Swofford v. United States of America, 2000 WL 1039495, at 2 [86 AFTR 2d 2000-5175] (S.D.Ill. 2000); see also United States v. Mitchell, 445 U.S. 535, 538 (1980) ("It is elementary that [t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain suit."). Earl bears the burden of establishing the existence of a waiver of sovereign immunity. Swofford, 2000 WL 1039495, at 2; Baker v. United States, 817 F.2d 560, 562 (9th Cir. 1987). He must point to a specific statutory provision in which the USA has waived its sovereign immunity. Swofford, 2000 WL 1039495, at 2. He has failed to do so. And his argument that the IRS waives immunity when it moves against a citizen's property is without merit. Therefore, the Court finds that it lacks jurisdiction over the IRS in this case.

Second, the Anti-Injunction Act, 26 U.S.C. § 7421, which states that "no suit for the purpose of restraining the assess-

[1] Article X, Section 4 of the Florida Constitution states in relevant part that "[t]here shall be exempt from forced sale under process of any court, and no judgment, decree or execution shall be a lien thereon, . . . the following property owned by a natural person: (1) a homestead, ..." Art. X, § 4(a)(1), Fla. Const.

ment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed,'' bars claims for injunctive relief and declaratory relief with respect to federal taxes. See McCarthy v. United States, 563 F.Supp. 236, 240–41 [52 AFTR 2d 83-5159] (N.D.Ill. 1983). There are a number of statutory exceptions to this prohibition, but none apply to this case. And there is a narrow judicial exception which likewise does not apply. The judicial exception states that the Anti-Injunction Act applies (1) unless the United States can prevail under no circumstances; and (2) if equity jurisdiction otherwise exists. Enochs v. Williams Packing & Navigating Co., 370 U.S. 1, 7 [9 AFTR 2d 1594] (1962). Here, the IRS could clearly prevail in this matter because their lien against the property is valid. See Weitzner v. United States, 309 F.2d 45, 47 [10 AFTR 2d 5950] (5th Cir. 1962) (tax lien by United States against homestead property valid). And equity jurisdiction does not lie because Earl has not established that he lacks an adequate remedy at law. Earl has offered nothing to show that he could not go to Tax Court or that he could not pay his taxes and file a refund suit. Therefore, Earl's argument that this case falls squarely under the equity jurisdiction of this Court fails.

The Court also finds that Earl's due process argument is without merit. As noted above, Earl has not claimed he was denied the opportunity to go to Tax Court or to pay his taxes and file suit seeking a refund. ''Where constitutionally valid remedies such as these exist ... and [Earl] does not allege he was precluded from their use, the requirements of due process are satisfied.'' McCarthy, 563 F.Supp. at 239.

Third, even assuming this Court could exercise jurisdiction over the above-styled cause (which it cannot), Earl fails to state a claim upon which relief can be granted because Florida's homestead exemption does not apply to the IRS. See United States v. Mitchell, 403 U.S. 190, 204 [27 AFTR 2d 71-1457] (1971) (federal law, not exempt status under state law, governs what is exempt from federal levy).

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. The Defendant, the Internal Revenue Service's Motion To Dismiss (DE 3) be and the same is hereby GRANTED;

2. The above-styled cause be and the same is hereby DISMISSED with prejudice; and

3. To the extent no otherwise disposed of herein, all pending Motions are DENIED as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 13th day of August, 2002.

WILLIAM J. ZLOCH

Chief United States District Judge

¶2002-5368

Michael FLEMING, PLAINTIFF v. SEVEN RECORDS OF LIEN, DEFENDANT. U.S. District Court, Middle Dist. of Florida, (DC FL) CASE NO. 8:02-CV-781-T-17TGW, Aug. 13, 2002. Earlier proceeding at (2002, DC FL) 90 AFTR 2d 2002-5405. Decision against Taxpayer.

1. District Court procedure—summary judgment. Taxpayer's post-dismissal, frivolous IRC §861-based summary judgment motion was denied. *Reference:* United States Tax Reporter ¶74,025.01(132). IRC §861; 7402.

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION,

ORDER

ELIZABETH A. KOVACHEVICH United States District Judge

[1] This cause is before the Court on the following:

Dkt. 25 Motion for Summary Judgment

Plaintiff filed this motion after the dismissal of this case. In addition, the motion is frivolous because it is based on the "Section 861" argument. Accordingly, it is

ORDERED that the Motion for Summary Judgment (Dkt. 25) is denied.

DONE and ORDERED in Chambers, in Tampa, Florida on this ___ day of August, 2002.

ELIZABETH A. KOVACHEVICH

United States District Judge

¶2002-5369

Said M. KARARA, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Middle Dist. of Florida, (DC FL) Case No. 2:01-cv-679-FTM-29DNF, Aug. 22, 2002. Years 1993, 1994. Decision for Govt.

1. Actions against U.S.—IRS right to setoff—tax relief refund—collection due process (CDP)—jeopardy levy. Taxpayer's complaint for "expedited review of jeopardy levy" was dismissed for failure to state claim: govt.'s application of taxpayer's tax relief refund against his unpaid taxes was offset, not levy, to which prohibition against levies during pendency of administrative proceedings, including CDP proceeding at issue, didn't apply. *Reference:* United States Tax Reporter ¶64,025.23(10); 63,305.01(5). IRC §6330; 6402.

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA FORT MYERS DIVISION,

ORDER

JOHN E. STEELE UNITED STATES DISTRICT JUDGE

This matter comes before the Court on defendant's Motion to Dismiss (Doc. #11), filed February 19, 2002. The plaintiff filed a Response to Defendant's Motion to Dismiss (Doc. #13) on March 1, 2002.

I. Standard on Motion to Dismiss

In deciding a motion to dismiss, the Court must accept as true all factual allegations in the Complaint. Hughes v. United States, 110 F.3d 765, 767 (11th Cir. 1997); Brown v. Crawford County, Ga., 960 F.2d 1002, 1010 (11th Cir. 1992). The Complaint must be viewed and all reasonable inferences must be made in favor of the plaintiff. Sawinski v. Bill Currie Ford, Inc., 866 F. Supp. 1383, 1385 (M.D. Fla. 1994)(citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). A Complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45–46 (1957) (footnote omitted); Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1072 (11th Cir. 2000), reh'g denied, 244 F.3d 143 (11th Cir. 2000); Grossman v. Nationsbank, N.A., 225 F.3d 1228, 1231–32 (11th Cir. 2000). Federal Rule of Civil Procedure 8 requires only that plaintiff set forth a short and plain statement of the claim that will give defendant fair notice of the claim and the grounds upon which it rests. Conley, 355 U.S. at 47. However, dismissal is warranted under Fed. R. Civ. P. 12(b)(6) if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue which precludes relief. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Brown, 960 F.2d at 1009–10.

II. Analysis

In July 1999, the United States Tax Court denied plaintiff's petitions for reconsideration of the deficiencies assessed by the IRS for tax years 1993 and 1994. Plaintiff appealed to the Eleventh Circuit Court of Appeals, which affirmed the decision of the Tax Court in May 2000. Following that decision, plaintiff filed a petition for writ of certiorari in the United States Supreme Court, which was denied. In July or August 2001, plaintiff was served with a notice of levy to collect his unpaid 1993 tax liability. Plaintiff filed a request for a collection due process hearing by the IRS Office of Appeals pursuant to 26 U.S.C. § 6330(a)(3). As of the date of plaintiff's response to the defendant's mo-

tion to dismiss, plaintiff contends that no decision has been rendered by the Office of Appeals.

[1] In the summer of 2001, plaintiff received a postcard from the IRS informing him that he would be receiving a check in the amount of $300 as a result of the immediate tax relief provided by Congress. In September 2001, plaintiff received a statement from the IRS notifying him that the $300 to which he was entitled as a result of the immediate tax relief had been applied to his outstanding balance of unpaid taxes. On December 14, 2001, plaintiff filed this complaint for "expedited review of jeopardy levy," claiming that the government: (1) seized his $300 without first finding that its efforts at tax collection were in jeopardy; (2) failed to give notice of his tax deficiency and demand for immediate payment as required by 26 U.S.C. § 6331(a); and (3) proceeded with the seizure while his tax matter was before the IRS Office of Appeals.

Defendant argues that this case should be dismissed because plaintiff has failed to state a claim. In his complaint, plaintiff characterizes the application of the $300 tax refund for the year 2000 to his balance of taxes due for the year 1993 as a levy and requests a release of this levy. The defendant argues that this application of money was not a levy, but rather was an offset, and that the defendant had a right to offset the tax relief refund against plaintiff's unpaid taxes.

The IRS is prohibited from serving a levy to seize property during the pendency of the type of administrative proceeding at issue in this case, i.e., a collection due process proceeding. See 26 U.S.C. § 6330(e)(1). However, the prohibition against levies during the pendency of an administrative proceeding does not extend to offsets. See Treas. Reg. § 6330-1(g)(2) Q&A-G3.

The Internal Revenue Code permits the IRS to apply an overpayment made by a taxpayer as an offset against any outstanding tax liability owed by the same taxpayer. It states:

> In the case of any overpayment, the Secretary, ... may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment ...

26 U.S.C. § 6402(a). An offset is the application of funds already in the government's possession, whereas a levy is a means by which the IRS acquires possession of a taxpayer's property. See United States v. National Bank of Commerce, 472 U.S. 713 [56 AFTR 2d 85-5210] (1985).

In this case, plaintiff became entitled to a $300 refund as a result of the tax relief provided by Congress in 2001. Plaintiff never actually had possession of the $300. Therefore, pursuant to § 6402(a), the IRS was authorized to offset the overpayment against plaintiff's unpaid tax bills. The application of the plaintiff's $300 refund to his unpaid tax deficiency was an offset. There is no prohibition against an offset during the pendency of an administrative proceeding. Therefore, even assuming the truth of the factual allegations contained in the complaint, the plaintiff has failed to state a claim for which relief can be granted.

Accordingly, it is now

ORDERED:

1. Defendant's Motion to Dismiss (Doc. #11) is GRANTED.
2. The Clerk is directed to enter judgment dismissing the case against the United States with prejudice. The Clerk shall terminate any other pending motions and close the file.

DONE AND ORDERED at Fort Myers, Florida, this 22nd day of August, 2002.

JOHN E. STEELE

UNITED STATES DISTRICT JUDGE

Copies:

Counsel of record

Pro se parties

DCCD

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that pursuant to the Court's order entered on August 22, 2002, the case against the United States is dismissed with prejudice.

Date: August 22, 2002

SHERYL L. LOESCH, CLERK

By:

Libby Pointer, Deputy Clerk

¶2002-5370

UNITED STATES OF AMERICA, PLAINTIFF v. Patricia LABATO, Denise Labato Hunt, and Brevard County, Florida, DEFENDANTS. U.S. District Court, Middle Dist. of Florida, (DC FL) Case No. 6:97-cv-900-Orl-28JGG, Aug. 14, 2002. Earlier proceedings at (2002, DC FL) 90 AFTR 2d 2002-5406; and (2002, DC FL) 90 AFTR 2d 2002-5244, 2002-2 USTC ¶50541. Year 1992. Decision against Taxpayer.

1. Actions to enforce tax liens—fraudulent conveyances; foreclosure and sale—motion to vacate. Taxpayer's and intervenors' motion for relief from, and to vacate sale order for error and fraud pursuant to F.R.Civ.P. 60(b)(1), (3), and (4) was denied. *Reference:* United States Tax Reporter ¶74,035.03(100). IRC §7403.

United States District Court Middle District of Florida Orlando Division,

ORDER

JOHN ANTOON II United States District Judge

[1] This cause came on for consideration without oral argument in Defendant's and Intervenors' Motion for Relief From, and to Vacate the Order of Sale for Error and Fraud Pursuant to Rule 60(b)(1), (3) and (4) (Doc. No. 135, filed July 22, 2002) and Plaintiff's Opposition to "Defendant's and Intervenor's Motion for Relief From, and to Vacate the Order of Sale for Error and Fraud Pursuant to Rule 60(b)(1), (3) and (4)" (Doc. No. 136, filed August 6, 2002). After review of this matter, it is ORDERED that:

Defendant's and Intervenors' Motion for Relief From, and to Vacate the Order of Sale for Error and Fraud Pursuant to Rule 60(b)(1), (3) and (4) (Doc. No. 135) is DENIED.

DONE and ORDERED in Chambers, Orlando, Florida, this 13 day of August, 2002.

JOHN ANTOON II

United States District Judge

¶2002-5371

ROBERT C. MacELVAIN, PLAINTIFF v. UNITED STATES OF AMERICA, and Revenue Officers of the United States of America, personally and Johnd Doe, personally and Jane Doe, personally, Fran Keith, personally, DEFENDANTS. U.S. District Court, Middle Dist. of Alabama, (DC AL) CIVIL ACTION NO. 02-A-102-N, Aug. 14, 2002. Earlier proceedings at (2002, DC AL) 90 AFTR 2d 2002-6084, adopting (2002, DC AL) 90 AFTR 2d 2002-5255. Years 1980, 1981, 1982, 1983, 1984, 1985, 1986. Decision for Govt.

1. Refund actions—jurisdiction—full payment—administrative refund claims. Magistrate judge recommended dismissing pro se taxpayer's refund complaint against U.S., IRS employee and 2 anonymous defendants for lack of jurisdiction: taxpayer neither paid tax in full nor timely filed administrative refund claim; and his attempt to recharacterize complaint as one for account stated or implied contract was rejected. Also, taxpayer didn't effect proper personal service on IRS employee. *Reference:* United States Tax Reporter ¶74,336.501(10); 74,225.01(5); 74,225.01(20). IRC §7422.

2. Actions against U.S. and IRS officers—damages—unlawful collection—constitutional claims—collateral estoppel; res judicata. Magistrate judge recommended dismissing pro se taxpayer's collection-related damages complaint against U.S., IRS employee, and anony-

mous defendants on summary judgment: collateral estoppel or res judicata precluded taxpayer from relitigating adequacy of deficiency notice and assessments where such issues were identical to those litigated and necessarily decided in earlier, final Tax Court and district court decisions. Also, IRS employee individually wasn't proper defendant to claims against actions she took in her official capacity; Bivens relief from her alleged collection-related constitutional violations wasn't available; 42 USC §1983 didn't provide jurisdictional basis for constitutional claims against govt.; and IRC §7433 claims failed where taxpayer didn't exhaust his administrative remedies thereunder or meet 2-year limitations period. *Reference:* United States Tax Reporter ¶74,337.504(5); 76,557.53(30); 74,336.504(40); 74,335.01(5); 74,335.01(30). IRC §7432; 7433.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION,

RECOMMENDATION OF THE MAGISTRATE JUDGE

DELORES R. BOYD UNITED STATES MAGISTRATE JUDGE

In this lawsuit challenging the allegedly unlawful assessment and collection of federal income taxes, the plaintiff, Robert C. MacElvain (''MacElvain''), sues the United States, Internal Revenue Service (''IRS'') official, Fran Keith (''Keith''), and two fictitious defendants designated as John and Jane Doe[1] , for compensatory and punitive damages as well as costs. This matter is now before the court on the Defendants' *Motion to Dismiss, Or in the Alternative, for Summary Judgement* (Doc. 20, filed June 3, 2002). After careful consideration of the parties' submissions and the relevant law, the Magistrate Judge recommends that summary judgment be GRANTED.[2]

I. JURISDICTION

Although MacElvain asserts 42 U.S.C. §1346(a)(1)[3] as the sole jurisdictional basis of this cause of action, he also seeks jurisdictional support from 42 U.S.C. §1983 and 26 U.S.C. §§ 1340 and 7433. Defendants deny the sufficiency of any of MacElvain's claims for subject matter jurisdiction pursuant to 28 U.S.C. § 1331 or personal jurisdiction over Keith. The parties do not contest venue.

II. FACTUAL BACKGROUND

In 1984, MacElvain contested in Tax Court the June 15, 1984 deficiency notices assessed for his 1980 tax liability. Prior to the scheduled trial in 1986, MacElvain entered into a stipulated decision with the IRS for a deficiency assessment. The decision of the Tax Court became final when MacElvain elected not to appeal. *See* 26 U.S.C. §§ 7481(a)(1), 7483, MacElvain also timely challenged the 1981 deficiency notice issued on August 19, 1988 (*See*Defs.' *Ex. 1*), and the Tax Court's Order of Dismissal and Decision sustained the IRS determinations because MacElvain failed to prosecute his case in compliance with court orders. MacElvain did not appeal. The Tax Court dismissed on procedural grounds MacElvain's timely contest of the June 15, 1990 deficiency for 1983 taxes. Specifically responding to MacElvain's disavowals, the Tax Court determined that he received a deficiency notice for that year. (Defs.' *Ex. 1*). MacElvain did not appeal that dismissal, and the Tax Court's decision became final when MacElvain elected not to appeal.

In a 1993 federal court action, MacElvain challenged the validity of the

[1] Except where the discussion warrants differentiation, the Magistrate Judge will refer to the United States and Keith collectively as "Defendants." Because fictitious party practice is not permitted under the Federal Rules of Civil Procedure, the fictitious defendants are due to be dismissed. *See New v. Sports and Recreation, Inc.*, 114 F.3d 1092, 1094 n. 1 (11th Cir. 1997); *Edwards v. Alabama Dept. of Corrections*, 81 F.Supp.2d 1242, 1257 (M.D.Ala. 2000).

[2] MacElvain received due notice that the Magistrate Judge might construe Defendants' alternative motions as a motion for summary judgment and instructed him to conform his submissions to Rule 56, Fed. R. Civ. P. requisites. (*See* Doc. 23, filed July 14, 2002).

[3] In pertinent part, 42 U.S.C. §1346(a)(1) provides:

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . .

1980–1986 tax assessments. Contending, *inter alia*, ''that the IRS did not properly follow the procedures for making tax assessments and failed to impose the deficiencies within the time allowed by the statute of limitations.'' he demanded an injunction requiring the IRS to withdraw all liens filed against his property and to refrain from filing future liens. *MacElvain v. U.S.*, 867 F.Supp. 996, 998 [74 AFTR 2d 94-6241] (M.D.Ala.1994)(J. Thompson). In denying injunctive relief, the Court found *first*, that MacElvain offered no evidence or specific argument to rebut the presumption of procedural correctness which attends IRS certificates of assessment, and *second*''MacElvain's contention that his tax liabilities were not assessed within the time period allowed by the statute of limitations ... without merit.'' *Id.* at 999.

In March 1996, the United States sued MacElvain in the same court to secure a final judgment on the government's tax claims from 1980 to 1982. (*See* Defs.' *Ex. 1*at 6, ¶2). Rejecting MacEIvain's challenge that the statute of limitations precluded the assessments because the government fraudulently altered his master file, the Court entered judgment in favor of the United States ''for unpaid taxes, interest, penalties and lien fees for the years 1980, 1981 and 1982 ...''[4]

On January 29, 1999, the IRS sent MacElvain a final notice of intent to levy which showed his tax liability for tax years 1980 through 1986. MacElvain reasserted his contention that ''the time for making an assessment for all periods listed on your 'NOTICE OF LEVY' was negated on May 8, 1987.'' When the Appeals Office of the IRS declined to hear MacElvain's petition, noting his earlier opportunities to litigate that matter in the Tax Court and the District Court, MacElvain filed a fourth petition for review in the Tax Court. He alleged in that petition — as he does before this Court - that he was not liable ''for the underlying taxes because of the expiration of the period of limitations on assessment for the years in issue and government fraud.'' The IRS asserted issue preclusion on any contest of the 1980–1983 deficiency notices, and, accordingly moved for partial summary judgment. Granting the motion, the Tax Court reasoned as follows:

> The record in the instant case shows that petitioner received notice of deficiency for the taxable years 1980, 1981, 1982, and 1983. Moreover, petitioner filed petitions with the Court contesting those notices. As previously discussed, those petitions were disposed of either by stipulated decision, order of dismissal and decision, or order of dismissal for lack of jurisdiction .... Petitioner has failed to state a justiciable claim for relief in this Lien and Levy proceeding with respect [sic] the taxable years 1980, 1981, 1982, and 1983. Petitioner's claim that the period of limitations for assessment expired on May 9, 1987, for these years constitutes a challenge to the existence of the underlying tax liabilities. Section 6330(c)(2)(B) precludes review of those tax liabilities in this proceeding.[5]

In a decision filed September 19, 2001, the Tax Court found, pursuant to a stipulation between MacElvain and the IRS, that ''the determinations set forth in the Notice of Determination Concerning Collection Action for the taxable years 1980, 1981, 1982, 1983, 1984, 1985 and 1986 upon which this case is based are sustained in full.'' (*See* Defs.' *Ex. 3*).

III. DISCUSSION

Proceeding pursuant to Rule 12(b)(1), *Fed.R.Civ.P.*, Defendants challenge the viability of all claims asserted against the United States on sovereign immunity and

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[4] The Magistrate Judge takes judicial notice of *United States v. MacElvain*, Civil Action No. 96-D-501-N (M.D.Ala. Mar. 21, 1996), the case referenced by Defs.' *Ex. 1*, wherein MacElvain filed a voluminous exhibit purporting to prove that the IRS not only failed to provide deficiency notices for the tax years at issue but also falsified his Master File for the purpose of issuing assessments beyond the statute of limitations. *See U.S. v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994)(citation omitted) (noting a ''court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings'.'')

[5] Moreover, the Tax court determined, based on its prior decisions, ''that the doctrine of *res judicata* preclude[d] [MacElvain] from relitigating his liabilities'' for taxable years 1980 through 1982. *See U.S. v. Shanbaum*, 10 F.3d 305, 314 [73 AFTR 2d 94-571] (5th Cir. 1994), *citing Commissioner v. Sunnen*, 333 U.S. 591, 598 [36 AFTR 611], (1948)(noting ''if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding involving the same claim and the same tax year.'')

jurisdictional grounds. Defendants further contend that claims against Keith are also subject to dismissal not only under Rule 12(b)(2), because this court lacks personal jurisdiction over her, but also under Rule 56, because MacElvain's challenges to the tax assessment are procedurally barred and he has failed to state actionable claims against the United States or Keith for violation of his federal statutory and constitutional rights. The Magistrate Judge will discuss each argument in turn.

A. RULE 12(b)(1) - LACK OF SUBJECT MATTER JURISDICTION

[1] The court must first address whether it has subject matter jurisdiction because that question implicates the court's "very power to hear the case." *Whitson v. Staff Acquisition, Inc.*, 41 F.Supp.2d 1294, 1296 (M.D.Ala. 1999), *quoting Bell v. Hood*, 327 U.S. 678, 682–683 (1946). Defendants challenge the factual sufficiency of the jurisdictional allegations in the complaint. Such factual attacks pursuant to Rule 12(b)(1) "challenge the existence of subject matter jurisdiction in fact, irrespective of the pleading, and matters outside the pleadings, such as testimony and affidavits, are considered." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990).

MacElvain avers in Count I of the maundering complaint: "Defendants made assessments of tax, plus statutory additions, against Plaintiff, for tax periods ending 1980, 1981, 1982, 1983,1984, 1985 and 1986, which assessments were time-barred and fraudulent because the assessments were made beyond the statute of limitations and the Defendants intentionally backdated the assessment date, in the master file records to conceal the fact that they are timebarred." (Compl. at ¶ 48). Those actions, according to MacElvain, resulted in the wrongful seizure of his Social Security and retirement benefits. *Id* at ¶s 2–3; 38–42. Count III comprises allegations legally indistinct from those in Count I insofar as MacElvain seeks to displace assessments underlying liens against certain benefits and demands entitlement to damages as well as "to a full abatement and refund of the unlawfully assessed and collected taxes." *Id.* at ¶s 62–68; 53.

To the extent that MacElvain purports to pursue a refund action against the United States pursuant to 28 U.S.C. § 1346(a)(1), Defendants contend that he has not complied with two jurisdictional preconditions for filing such an action — (1) the full payment of the taxes in dispute, and (2) the filing of a timely claim for refund with the IRS. As discussed below, the Magistrate Judge concurs with these contentions for lack of subject matter jurisdiction.

1. Payment of Disputed Tax

"As sovereign, the United States, in the absence of its consent, is immune from suit," *Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986), "and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941). In keeping with those well-established principles, the Supreme Court instructs that waivers of sovereign immunity must be both unequivocally expressed and strictly construed in favor of the United States. *United States v. Nordic Village*, 503 U.S. 30, 33 [69 AFTR 2d 92-687] (1992); *see also McMahon v. United States*, 342 U.S. 25, 27 (1951). A party who sues the United States has the burden of identifying specific statutes waiving the government's sovereign immunity and showing that the requirements of such statues have been met. *Cole v. U.S.*, 657 F.2d 107, 109 (7th Cir. 1981), *citing Malone v. Bowdoin*, 369 U.S. 643 (1962).

Section 1346(a)(1) constitutes a limited waiver for the government's sovereign immunity from suit by authorizing federal courts to adjudicate "any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." That limited waiver of sovereign immunity clearly encompasses MacElvain's Count I and Count III claims for refund of amounts allegedly

wrongfully seized from his Social Security and retirement benefits.[6] The right to bring such a tax refund action is conditioned, however, on the full payment of the taxes in dispute. *See Flora v. United States*, 357 U.S. 63 [1 AFTR 2d 1925] (1958), *aff'd on rehearing*, 362 U.S. 145 [5 AFTR 2d 1046] (1960). Because MacElvain concedes he has not fully paid the tax liability for the years at issue[7] (Compl. at ¶76; Pl.'s Resp. at ¶51), his claims for refund or abatement of taxes are due to be dismissed for lack of subject matter jurisdiction.[8]

2. Timely Filing a Refund Claim

Defendants also correctly note that inasmuch as MacElvain failed to satisfy timely the administrative filing requirement in 26 U.S.C.§ 6511, a jurisdictional pre-condition to filing a refund suit, the claim is subject to dismissal in any event. According to the Supreme Court, "[Section] 1346(a)(1) must be read in conformity with other statutory provisions [26 U.S.C. §§ 7422(a) and 6511(a)] which qualify a taxpayer's right to bring a refund suit." *United States v. Dalm*, 494 U.S. 596, 601–602 [65 AFTR 2d 90-1210] (1990)(*emphasis in original*). Section 6511(a) provides the following guidance about the limitations period for refund claims:

> (a) Period of limitation on filing claim — Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

Section 6511(b)(1) then provides:

> "[n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed ... unless a claim for ... refund is filed ... within such period."

When collectively considered, the import of §§1346(a)(1) and 6511 (a) is that unless a prospective plaintiff timely files a claim for refund of a tax, "a suit for refund, regardless of whether the tax is alleged to have been erroneously, illegally, or wrongfully collected, may not be maintained in any court." *Dalm*, 494 U.S. at 602 (*citations omitted*).[9]

Moreover, although 26 U.S.C. § 6511 permits suspension of the statute of limitations under circumstances not applicable here, it does not, as suggested by MacElvain's Response, permit equitable tolling until discovery of the alleged fraud. *See* (Pl.'s Resp., at ¶s 53–55). Rather, as explained by the Supreme Court in *U.S. v. Brockamp*, 519 U.S. 347, 352–352 [79 AFTR 2d 97-986] (1997):

> Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms,

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[6] It is of no moment that MacElvain premises his refund claims on 42 U.S.C. § 407 and 26 U.S.C. § 6331(h)(1). Such claims that the IRS seized amounts in excess of statutory limits are adjudicable only in the context of a refund suit. 26 U.S.C. § 7422(a) describes a tax refund suit as a "suit or proceeding ... in any court for the recovery of any revenue tax alleged to have been erroneously or illegally assessed or collected, ... or of *any sum* alleged to have been ... *in any manner* wrongfully collected ...." (emphasis added); *Kaucky v. Southwest Airlines Co.*, 109 F.3d 365, [sic, 349] 370 [79 AFTR 2d 97-1536] (7th Cir. 1997)("Money collected in error by a lawful agent, public or private, of the [IRS] can be recovered only from the government, because a claim or suit to collect such money is a claim or suit for a tax refund.").

[7] *See Pena v. United States*, 883 F. Supp. 154, 156–57 [75 AFTR 2d 95-977] (S.D.Tex. 1994), *aff'd*, 66 F.3d 520 [sic, 320] [76 AFTR 2d 95-5906] (5th Cir. 1995)(noting that a partial payment will not support jurisdiction in district court.)

[8] A prospective plaintiff's inability to pay the full amount of the tax before initiating a federal lawsuit for a refund is not an insurmountable hardship because the Tax Court exists to resolve such claims without cost to the aggrieved taxpayer, as the Supreme Court has suggested in *Flora v. U.S.*, 362 U.S. 145, 175 [5 AFTR 2d 1046] (1960):

> A word should also be said about the argument that requiring taxpayers to pay the full assessments before bringing suits will subject some of them to great hardship. This contention seems to ignore entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent. If he permits his time for filing such an appeal to expire, he can hardly complain that he has been unjustly treated, for he is in precisely the same position as any other person who is barred by a statute of limitations. On the other hand, the Government has a substantial interest in protecting the public purse, an interest which would be substantially impaired if a taxpayer could sue in a District Court without paying his tax in full.

[9] Notwithstanding MacElvain's impassioned assertions about the merits of his refund claim, the Court cannot entertain them. *See West Pub. Co. Employees' Preferred Stock Ass'n v. U.S.*, 198 Cl.Ct. 668, 775 [SIC 66F.3d 320] (1972)("The statute of limitation on the right to a refund or to recover an amount assessed and collected as a tax cannot be made to depend upon the question of whether there was any legal authority for the assessment and collection. If the plaintiff were correct in its contention in this case the statute of limitation would be practically of no force or effect. The statute of limitation is jurisdictional in this court, and when it appears, as here, that the time within which a person may bring a suit against the United States has expired, or that plaintiff has not complied with the requirements necessary to give him a right to maintain a suit, this court is without jurisdiction to entertain it.")

and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, "equitable" exceptions into the statute that it wrote.

There are no counterindications . . .

For these reasons, we conclude that Congress did not intend the "equitable tolling" doctrine to apply to § 6511's time limitations.

The evidence fails to substantiate that MacElvain timely filed an administrative refund claim. Consequently, the Court must dismiss MacElvain's § 1346(a)(1) claim to the extent it seeks a refund.

3. Account Stated or Implied Contract

MacElvain argues that his action challenging the collection of taxes is not time-barred if it is construed as an "account stated" or "implied contract," rather than as a refund claim (Pl.'s Resp. at ¶ 44–46).[10] However, MacElvain has neither pleaded nor substantiated such a claim.

Although "courts do and should show a leniency to *pro se* litigants not enjoyed by those with the benefit of a legal education," *GJR Investments, Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1369 (11th Cir.1998), *citing Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir.1990), that leniency does not permit this Court either to serve as *de facto* counsel for MacElvain or to consider claims which he has not properly pleaded. Absent indication in the *complaint* that MacElvain purports to state a claim for an account stated or his properly filed motion to amend the complaint, the Court is under to no obligation to consider such a claim. Nevertheless, in deference to his *pro se* status, the Magistrate Judge substantively addresses MacElvain's claims solely to explain why no merit whatsoever attends them.

An action for an account stated is the only significant exception to the general rule that a suit against the United States for the recovery of a tax overpayment must be based on a timely filed refund claim and brought within the two-year period of limitations. Such a contract-based action is timely if filed within the general six-year period of limitations for contractually premised actions against the United States. *Daube v. United States* 289 U.S. 367, 372–73 [12 AFTR 51] (1933).

The elements of a suit for an *account stated*are: (1) that the Service and the taxpayer agree that there is a tax overpayment of a specified amount; (2) that the Service has communicated to the taxpayer that it intends to refund the overpaid amount to the taxpayer in satisfaction of the taxpayer's account for the taxable period; and (3) that the taxpayer agrees to accept the refund of the stated amount in satisfaction of the account. *See West Publishing Co. Employee's Preferred Stock Ass'n v. United States*, 198 Ct.Cl. 668, 675 [30 AFTR 2d 72-5007] (1972); *see also Bonwit Teller & Co. v. United States*, 283 U.S. 258 [9 AFTR 1421] (1931).

To prove an *account stated*, the taxpayer must show "beyond peradventure" that the Government has in fact agreed to pay a stated sum and communicated this intention to the taxpayer. *Id.* If the purported account stated is "provisional and tentative," or otherwise lacking in finality, there is no agreement. *See R.H. Stearns Co. v. United States*, 291 U.S. 54, 66 [13 AFTR 842] (1934). Moreover, the Supreme Court has cautioned against expanding the concept of an *account stated* beyond the established narrow confines. *Daube*, 289 U.S. at 372–73; *R. H. Stearns Co.*, 291 U.S. at 64–67 (no account stated in certificate of over-assessment sent to taxpayer with understanding that it was to be set off against the tax for an earlier

[10] MacElvain predicates this argument on the September 2001 stipulated judgment (Defs. *Ex. 3*) between the parties which stated, in relevant part:

It is hereby stipulated by the parties that the petitioner [MacElvain] shall pay in full within 30 days from the date of the court's final order and determination any total balance due, corrected and adjusted for any mathematical errors, set-offs or offsets, whatsoever, from any and all stipulations, assessments and court order(s) relating to the tax years 1980, 1981, 1982, and 1984, and 1986 at issue in this case, including any and all outstanding unpaid judgments or balances relating to those years whatsoever.

In compliance with that agreement, MacElvain ultimately forwarded to the IRS "claims for making adjustments for all mathematical errors, set-offs and offsets." (*See*Pl.'s *Ex. 21*). The IRS notified MacElvain that "we have not resolved the matter because we haven't completed all the processing necessary for a complete response." (*See* Pl.'s *Ex. 23*)

year); *United States*v. *A. S. Kreider Co.*, *supra*, 313 U.S. 443, 448–49 [25 AFTR 1264] (1941) (no account stated in certificate of over-assessment saying that a sum had in fact been overpaid but refund was time-barred).

Absolutely no element for *account stated* is satisfied by the proffered evidence. Indeed, the evidence indicates the parties' fundamental disagreement regarding the amount of taxes owed for the tax years in controversy and even whether assessed taxes have been properly collected. *See* n.10, *supra*. Consequently, no merit attends MacElvain's arguments regarding the efficacy of an *account stated* claim. Inasmuch as the applicable statute of limitations precludes the refund claim "whether the tax is alleged to have been erroneously, illegally, or wrongfully collected," *Dalm*, 494 U.S. at 602, MacElvain's ancillary arguments about whether the IRS properly extended the limitations period to collect taxes are procedurally foreclosed.

B. RULE 12(b)(2)-LACK OF PERSONAL JURISDICTION OVERKEITH

Although the complaint indicates plainly that MacElvain purports to assert claims against Keith "personally," the Defendants note that MacElvain served Keith with process only by certified mail as an official of the United States and did not effect personal service on her individually. Pursuant to Fed.R.Civ.P. 4(i)(2)(B), service of a lawsuit against a federal official sued in his personal capacity must be "effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4 (e), (f), or (g)." Absent proper service of process, this Court cannot exercise jurisdiction over Keith. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc*, 526 U.S. 344, 350 (1999) ("In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant.")*(emphasis in original); Pardazi v. Cullman Medical Center*, 896 F.2d 1313, 1317 (11th Cir.1990)("Service of process is a jurisdictional requirement: a court lacks jurisdiction over the person of a defendant when that defendant has not been served.")

In response to Defendants' facially valid challenge to personal jurisdiction, MacElvain "must bear the burden of establishing its validity." *Aetna Business Credit, Inc. v. Universal Decor & Interior Design, Inc.*, 635 F.2d 434, 435 (5th Cir.1981). If the court does not conduct an evidentiary hearing to assist in resolving a Rule 12(b)(2) motion, and instead relies solely on affidavits and pleadings, the plaintiff need only establish a prima facie case of jurisdiction.[11]

The mail notification of certified service to Keith which accompanies MacElvain's complaint substantiates the accuracy of the Defendants' assertion regarding lack of proper personal service. MacElvain has provided no contrary argument or proof. Generally, "a court can acquire personal jurisdiction over a federal officer only by personal service made on that officer within the territorial limits of the state in which the court sits." *Blum v. Morgan Guaranty Trust Co. of New York*, 539 F.2d 1388, 1391 (5th Cir. 1976); *see also Praytor v. Manning*, 2001 WL 350211, at 3 [87 AFTR 2d 2001-1300] (S.D.Ala.2001)(noting that "defendants in *Bivens* actions must be served as individuals, pursuant to Rule 4(e)" and dismissing under Rule 12(b)(2) because defendants were served only in official capacities). Therefore, MacElvain has failed to carry his burden of establishing a prima facie case of personal jurisdiction and Defendants' Rule 12(b)(2) motion is due to be granted.

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11 *See e.g., Francosteel Corporation, Unimetal-Normandy v. M/V Charm, Tiki, Mortensen & Lange*, 19 F.3d 624, 626 (11thCir.1994)("A prima facie case ... consists of sufficient evidence ... to get plaintiff past a motion for directed verdict in a jury case or motion to dismiss in a nonjury case. It is the evidence necessary to require the defendant to proceed with his case."); *Bracewell v. Nicholson Air Services, Inc.*, 748 F.2d 1499, 1504, n. 2 (11thCir.1984) *(citation omitted); Consolidated Development Corp. v. Sherritt*, Inc. 216 F.3d 1286, 1291 (11thCir.2000)("The court, in considering the motion, must take all allegations of the complaint that the defendant does not contest as true, and, where the parties' affidavits conflict, the court must construe all reasonable inferences in favor of the plaintiff."); *See also Huey v. American Truetzschler Corp.*, 47 F.Supp.2d 1342, 1344 (M.D.Ala. 1999).

C. RULE 56 - SUMMARY JUDGMENT MOTION

[2] Independent of Rule 12(b)(1) and Rule 12(b)(2), Defendants move for summary judgment, pursuant to Fed.R.Civ.P.56, on the grounds that MacElvain's claims regarding allegedly unlawful collections and assessment are procedurally barred by collateral estoppel and otherwise substantively flawed.

1. Rule 56 Standard of Review

Rule 56(c) directs that summary judgment is appropriate when ''the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'' ''One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses . . . .'' *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–324 (1986).

The court's function in deciding a motion for summary judgment is to determine whether there exist genuine, material issues of fact to be tried; and if not, whether the movant is entitled to judgment as a matter of law. *See Dominick v. Dixie Nat'l Life Ins. Co.*, 809 F.2d 1559 (11thCir. 1987). It is substantive law that identifies those facts which are material on motions for summary judgment. *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 258 (1986); *see also De Long Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499 (11th Cir. 1989). When a court considers a motion for summary judgment, it is to refrain from deciding any material factual issues. All evidence and inferences drawn from the underlying facts must be viewed in the light most favorable to the nonmovant. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990). The movant bears ''the exacting burden of demonstrating that there is no dispute as to any material fact in the case.'' *Warrior Tombigbee Transp. Co. v. M/V/Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983).

Although ''pro se complaints are entitled to a liberal interpretation by the courts, . . . a pro se litigant does not escape the essential burden under summary judgment standards of establishing that there is a genuine issue as to a fact material to his case in order to avert summary judgment.'' *Brown v. Crawford*, 906 F.2d 667, 670 (11th Cir. 1990); *See Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981)(holding summary judgment is ''not only proper, but required,'' when a party's response consists of nothing ''more than a repetition of his conclusional allegations.'')

2. Collateral Estoppel

Highlighting MacElvain's several, prior unsuccessful lawsuits in the Tax Court and the District Court regarding the legality of assessment, including the validity of notice of deficiency procedures for specified tax years, Defendants argue that issue preclusion obtains to bar the present action. Ample documentation establishes, Defendants contend, that MacElvain duly availed himself of the opportunity to contest these deficiency notices in Tax Court. In each instance, Defendants assert, the Tax Court resolved the dispute either by issuing a decision pursuant to the parties' stipulations or by issuing final judgments against MacElvain. The District Court has also ruled against MacElvain in previous assessment challenges. Therefore, after reviewing the substance, the reasoning, and the record in the prior decisions, the Court must determine whether issue preclusion bars re-litigation of this matter.

Issue preclusion ''recognizes that suits addressed to particular claims may present issues relevant to suits on other claims, and requires that the identical issue in question was actually litigated and necessary to the judgment of an earlier suit.'' *Manning v. City of Auburn*, 953 F.2d 1355, 1358 (11th Cir. 1992), *citing Kaspar Wire Works, Inc. v. Leco Engineering and Mach., Inc.*, 575 F.2d 530, 535 (5th Cir. 1978) *and Hart v. Yamaha-Parts Distrib., Inc.*, 787 F.2d 1468, 1473 (11th Cir. 1986). Four elements must be present for issue preclusion:

(1) the issue at stake is identical to the one involved in the prior proceeding;

(2) the issue was actually litigated in the prior proceeding;

(3) the determination of the issue in the prior litigation must have been ''a critical and necessary part'' of the judgment in the first action; and

(4) the party against whom collateral estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Christo v. Padgett, 223 F.3d 1324, 1339 (11th Cir.2000), *citing Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354, 1359 (11thCir. 1998). Issue preclusion, ''like the related doctrine of *res judicata*, serves to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.''' *U.S. v. Mendoza*, 464 U.S. 154, 158 (1984), *quoting Allen v. McCurry*, 449 U.S. 90, 94 (1980). In furtherance of that goal, prevailing authority dictates that ''once an *issue* is raised and determined, it is the entire *issue* that is precluded, not just the particular arguments raised in support of it in the first case.'' *Yamaha Corp. of America v. U.S.*, 961 F.2d 245, 254 (D.C. Cir. 1992)(emphasis in original).[12] Accordingly, '[p]reclusion cannot be avoided simply by offering evidence in the second proceeding that could have been admitted, but was not, in the first.' *Id.*[13]

Applying these principles, the Magistrate Judge finds from the factual record that MacElvain's tax liability for the years in question and the adequacy of deficiency notices were exhaustively litigated before the Tax Court, and the Tax Court issued its final judgments before the proceedings began in this Court. *See* I.R.C. §§ 7483, 7481(a).

After considering MacElvain's claims, the Tax Court specifically determined that he received the notices of deficiency for each of the years at issue in the complaint and that such notices were adequate to sustain a Notice of Determination Concerning Collection Action for those years. The District Court also considered and rejected MacElvain's arguments regarding the timeliness of the notices of deficiency. Issue preclusion thus bars this Court from revisiting MacElvain's arguments regarding the validity of procedures attendant to imposing the 1980 to 1986 assessments.

To the extent that the Tax Court decisions arising from the 1980 through 1986 contests do not affirmatively show that any substantive issue was ''actually and necessarily determined,'' *Montana v. U. S.*, 440 U.S. 147, 153 (1979), those judgments, even if final, do not form an adequate basis for application of issue preclusion. Such summary and stipulated decisions are wholly sufficient, however, to establish preclusion based on *res judicata* insofar as the issues contested in both proceedings are identical; the parties to the subsequent proceeding are the same as, or are in privity with, the parties to the earlier proceeding; and the earlier proceeding resulted in a final judgment on the merits. *Nevada v. United States*, 463 U.S. 110, 129–130 (1983); *See Baptiste v. C.I.R.*, 29 F.3d 1533, 1539–1540 [74 AFTR 2d 94-7477] (11th Cir.1994)(noting ''a final decision of the tax court determining the tax liability of a taxpayer is a judgment on the merits for the purposes of *res judicata*, 'whether or not the basis of the agreements on which [it] rest[s] reached the merits.'''')

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12 *See also Montana v. U. S.*, 440 U.S. 147, 155 (1979)(''To determine the appropriate application of collateral estoppel . . . necessitates [an inquiry] 'whether the issues presented by this litigation *are in substance the same* as those resolved [in prior litigation]')(emphasis added); *Securities Indus. Ass'n v. Board of Governors*, 900 F.2d 360, 364 (D.C.Cir. 1990); *Rambacher v. C.I.R.*, 2001 WL 133123, at 2 [87 AFTR 2d 2001-812] (6th Cir.2001); *Kamilche Co. v. U.S.*, 53 F.3d 1059, 1063 [75 AFTR 2d 95-2076] (9th Cir. 1995); 1B Moore's Federal Practice ¶ 0.443[2] ('Any contention that is necessarily inconsistent with a prior adjudication of a material and litigated issue . . . is subsumed in that issue and precluded by the effect of the prior judgment as collateral estoppel.'); *See also* Restatement (Second) of Judgments § 27 ('[I]f the party against whom preclusion is sought did in fact litigate an issue . . . and suffered an adverse determination, . . . new arguments may not be presented to obtain a different determination of that issue.')

13 This authority renders unavailing MacElvain's assertion that 'the allegation that the Defendants made time-barred and fraudulent assessment' has not been actually litigated because he has new affidavit evidence from forensic accountant Victoria Osbourne to substantiate that the Government willfully and intentionally made time-barred assessments by backdating the assessment date'' in his Master File. That argument relies on evidence earlier presented and is an obvious reiteration of the statute of limitations issues decided adversely to MacElvain in previous litigation.

MacElvain argues that "when the Government agreed to the [September 2001] stipulation, and specifically carried out part of the agreement, they waived their right to a [preclusion] defense on these grounds for the remaining part of the agreement." (Pl.'s Resp. at ¶s 45–46). The Magistrate Judge does not concur.[14] Moreover, even assuming some legal impediment existed to prevent the Defendants from raising a preclusion defense, this Court could properly consider it now *sua sponte*. As explained by the Supreme Court in *Arizona v. California*, 530 U.S. 392, 412 (2000):

> Judicial initiative of this sort might be appropriate in special circumstances. Most notably, "if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised. This result is fully consistent with the policies underlying *res judicata*: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste."[15]

Justifying *sua sponte* determination of *res judicata* in this case is the fact of MacElvain's multiple opportunities to litigate the issues presented herein in various forums, including this District Court, for the past ten years.

3. Official Capacity Claim Against Keith

MacElvain sues officially IRS agent Keith for her alleged role in processing the extension of the statute of limitations for pursuing collection of his taxes. (*See* Compl. at ¶ 58). In support of summary judgment, Defendants contend correctly that assuming this action is for "injuries arising from any negligent or wrongful act or omission of a government employee," the only proper defendant is the United States. Two equally compelling axioms mandate the requested summary judgment on this claim.

The pertinent statute, 28 U.S.C. § 2679(b)(1), unequivocally permits a recovery, subject to specified exceptions, only against the United States for common-law torts committed by a federal employee acting within the scope of his employment. *See Matsushita Elec. Co. v. Zeigler*, 158 F.3d 1167, 1169 (11th Cir.1998); 28 U.S.C. § 2679(b)(1).[16] Indeed, MacElvain's action against the United States is "the exclusive remedy for torts committed by Government employees in the scope of their employment"[17] even though certain exceptions discussed *supra* effectively foreclose any liability against the United States. *See Perry v. U.S.*, 936 F.Supp. 867, 872– 873 (S.D.Ala.1996), *citing United States v. Smith*, 499 U.S. 160, 165 (1991).

Moreover, notwithstanding a plaintiff's designations, generally a lawsuit is deemed to be against the United States "if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (*citations and quotations omitted*). Since a judgment recovered against Keith in her official capacity would be paid by the United States, the action is, in practical effect, a lawsuit against the

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[14] *See U.S. v. Harrison*, 188 F.Supp.2d 77, 81 (D.Mass.2002), *citing* 14 Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, *Federal Practice and Procedure*, § 3652 (1998)(noting that "private litigants generally cannot assert the equitable defense of estoppel against the government").

[15] *See also Warnock v. Pecos Cty.*, 116 F.3d 776, 778 (5th Cir. 1997) (noting two exceptions for when a court should raise *sua sponte* an affirmative defense of *res judicata*--when the defense arises out of the court's own earlier judgment, or when "the demands of comity, continuity in the law, and essential justice confront the court and all relevant records are before the court); *Hrabe v. Paul Revere Life Ins. Co.*, 76 F.Supp.2d 1297, 1297–98 n. 1 (M.D.Ala. 1999).

[16] According to 28 U.S.C. § 2679(b)(1):

> The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred. (*emphasis added*).

[17] MacElvain does not dispute that Keith's tax collection efforts were committed in the line and scope of her employment as an IRS agent. Moreover, the court notes that the allegations in the complaint are plainly related to Keith's official duties and responsibilities as an IRS agent. *See Christensen v. Ward*, 916 F.2d 1462, 1476 (10th Cir. 1990) ("Decisions to initiate, prosecute or continue proceedings such as audits and assessments are the official duties of IRS agents.")

United States. *See also Stafford v. Briggs*, 444 U.S. 527, 542 n. 10 (1980) (''In deciding whether an action is in reality one against the Government, the identity of the named parties defendant is not controlling; the dispositive inquiry is 'who will pay the judgment?'''). Accordingly, the claims against Keith in her official capacity are due to be dismissed. *See e.g., Johnson v. U.S.*, 816 F.Supp. 1519, 1522 (N.D. Ala. 1993).

4. Personal Capacity Claims Against Keith

MacElvain purports to state a constitutional claim personally against Keith, as follows:

> The Defendant Fran Keith, as an individual and personally is properly named as she (1) deprived Plaintiff of his Constitutional Right to Due Process and (2) acted under the color of Federal Statues (3) acted in bad faith (4) knowingly made and delivered certificates and/or other writings she knew to be false (5) made materially false, fictitious and fraudulent statements (6) violated federal tax laws. (Compl. at ¶ 11)

Construing MacElvain's *pro se* allegations liberally, the court interprets this reference to the ''Constitutional Right to Due Process'' as an attempt to state a Fifth Amendment claim pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1970). Defendants do not dispute that *Bivens* can create a remedy for violations of constitutional rights by federal officials, including the right not to be deprived of liberty or property without due process of law. *See, e.g., Davis v. Passman*, 442 U.S. 228 (1979). Instead, the Defendants contend that MacElvain cannot pursue a *Bivens*action[18] action against Keith, *an IRS official*, for violations of his Constitutional rights because (1) Congress has provided an alternative remedy for recovery or (2) because this case ''involves . . . special factors counseling hesitation in the absence of affirmative action by Congress.'' *Bivens*, 402 U.S. at 396–397. As now discussed, the Magistrate Judge concludes that merit attends each argument.[19]

Defendants argue that adequate alternative remedies available under 26 U.S.C. §§ 7432 and 7433 militate against permitting MacElvain to proceed with a *Bivens* claim against Keith. Under the provisions of 26 U.S.C. § 7432, a taxpayer may pursue a civil action for actual damages and costs ''[i]f any officer or employee of the Internal Revenue Service knowingly, or by reason of negligence, fails to release a lien under section 6325 on property of the tax-

[18] Both *Bivens* and 28 U.S.C. § 2679(b)(2) provide that plaintiff may bring an action for damages against a federal employee in his personal capacity for an alleged violation of constitutional or federal statutory law.

[19] While the Eleventh Circuit has apparently not considered whether *Bivens* claims can be pursued against IRS officials, in other contexts, this Circuit has consistently used the ''special factor'' analysis set forth in *Bush v. Lucas*, 462 U.S. 367, 388–90 (1983) and clarified in *Schweiker v. Chilicky*, 487 U.S. 412, 427–428 (1988) to limit *Bivens* claims against federal officials. *See Wells v. F.A.A.*, 755 F.2d 804, 810 (11th Cir.1985); *Hallock v. Moses*, 731 F.2d 754, 757 (11th Cir. 1984); *McCollum v. Bolger*, 794 F.2d 602, 607 (11th Cir. 1986). *But see Hatley v. Department of Treasury, I.R.S.*, 876 F.Supp. 1262, 1268 [74 AFTR 2d 94-7237] (S.D.Ala. 1995), *citing Chilicky*, 487 U.S. at 412 (''The provision by Congress of a statutory scheme for adjudication of claims such as those brought by the plaintiff precludes the plaintiff from recovering against these [IRS] defendants in a *Bivens*-type action.'')

payer.''[20] Similarly, 26 U.S.C. § 7433[21] permits a taxpayer to pursue litigation for damage relief against the United States if an IRS employee recklessly, intentionally, or negligently undertakes a tax collection action. Both sections thus permit an aggrieved taxpayer to address ''the validity of the Government's demand'' and, if successful, to claim actual damages and costs, in light of an IRS employee's negligent or otherwise wrongful conduct, *Rutherford v. U.S,* 702 F.2d 580, 584 [51 AFTR 2d 83-1084] (5th Cir. 1983), and both provide meaningful and adequate statutory remedies.[22]

Because taxpayer actions against IRS officials potentially implicate each of the ''special factors counseling hesitation in the absence of affirmative action by Congress,'' it is well-established that ''constitutional tort remedies are not available against IRS agents because such claims would interfere with the effective functioning of the specific statutory remedies provided for actions against the agency.'' *See Christensen v. Ward*, 916 F.2d at 1476, *citing Bush v. Lucas*, 462 U.S. at 388–90 and *Cameron v. I.R.S.*, 773 F.2d 126, 128 [56 AFTR 2d 85-5851] (7thCir.1985).

Relying principally on *Shweiker v. Chilicky*, 487 U.S. at 427, Defendants have demonstrated that the unique remedial scheme of the IRS is a ''special factor'' which also warrants dismissal of MacElvain's *Bivens*claims against Keith. In *Chilicky*, respondents were three individuals whose Title II disability benefits were terminated pursuant to a continuing disability review. In rejecting the respondents' claims for money damages against federal employees in their individual capacities for ''emotional distress and for loss of food, shelter and other necessities proximately caused by petitioner's denial of benefits without due process,'' the Supreme Court refused to create a *Bivens* remedy even though Congress failed to provide ''complete relief.'' *Id.* at 419. More specifically, in light of the complex remedial structure created by Congress to address the problems of Social Security claimants, the Supreme Court declined to allow imposition of a new substantive legal liability under *Bivens*because, it was ''convinced that Congress is in a better position to decide whether or not the public interest would be served by creating it.'' *Id.* at 426.

Other courts have recognized that the *Chilicky*holding precludes a plaintiff from pursuing a *Bivens* claim against IRS em-

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20 Section § 7432 provides the following remedies:

(a) In general. — If any officer or employee of the Internal Revenue Service knowingly, or by reason of negligence, fails to release a lien under section 6325 on property of the taxpayer, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

(b) Damages. — In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the sum of —

(1) actual, direct economic damages sustained by the plaintiff which, but for the actions of the defendant, would not have been sustained, plus

(2) the costs of the action.

21 Section 7433 states, in relevant part:

(a) In general. — If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

(b) Damages.--In any action brought under subsection (a) or petition filed under subsection (e), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $1,000,000 ($100,000, in the case of negligence) or the sum of--

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee, and

(2) the costs of the action.

22 Relief must merely be adequate, as the Supreme Court resolved in *Schweiker v. Chilicky*, 487 U.S. at 427–428:

it is evident that if we were ''to fashion an adequate remedy for every wrong that can be proved in a case ... [the complaining party] would obviously prevail.'' In neither case, however, does the presence of alleged unconstitutional conduct that is not *separately* remedied under the statutory scheme imply that the statute has provided ''no remedy'' for the constitutional wrong at issue. (*emphasis in original*)

See also Bush v. Lucas, 462 U.S. at 388 (concluding that the statutory framework created by Congress provided ''meaningful remedies'' and refusing to create a *Bivens* action even though it assumed a First Amendment violation and acknowledged that ''existing remedies do not provide complete relief for the plaintiff'').

ployees.[23] Even prior to the decision in *Chilicky*, courts routinely concluded under a similar rationale that a *Bivens* remedy should not be available for damages against IRS agents.[24] The *Chilicky* rationale dictates an identical outcome in this case. Because MacElvain can state no *Bivens* claim against Keith, an IRS employee, the Magistrate Judge recommends dismissal of that claim.[25]

5. Claims Against the United States

a. Claim Pursuant to 42 U.S.C. § 1983

Defendants seek dismissal of MacElvain's Count IV claim that "Defendant, through it's [sic] agency the Internal Revenue Service, and Fran Keith, employed by the IRS, have recklessly and intentionally violated the Plaintiff's Constitutional right to due process, and under the claim of federal authority."(Compl. at ¶ 67). Insofar as this claim is brought pursuant to 42 U.S.C. § 1983 for a violation of constitutional rights,[26] two equally compelling reasons dictate dismissal.

First, Section 1983 neither applies to agents of the United States government nor forms a premise for claim of monetary damages against the United States. Claims under 42 U.S.C. § 1983 can be brought only against individuals acting under color of state law. *See Mack v. Alexander*, 575 F.2d 488, 489 [42 AFTR 2d 78-5282] (5th Cir.1978)(noting that § 1983 "provides a remedy for deprivation of rights under color of state law and do[es] not apply when the defendants are acting under color of federal law"); *Rodriguez v. Ritchey*, 556 F.2d 1185, 1190 n. 13 (5th Cir. 1977), *citing District of Columbia v. Carter*, 409 U.S. 418 (1973)("Section 1983, however, does not apply to the actions of the federal government.")

Second, the doctrine of sovereign immunity precludes MacElvain's constitutional claim against the United States. *See U. S. v. Timmons*, 672 F.2d 1373, 1380 (11thCir.1982)("It is well established in this circuit that the United States has not waived its immunity to suit under the provisions of the civil rights statutes.")

b. Claim Pursuant to 26 U.S.C. § 7433

In Count II, MacElvain alleges that "Defendants, through its agency the Internal Revenue Service, and Fran Keith, Collection officers employed by the IRS, have recklessly disregarded the tax laws [in regard to] the assessment and collection of the tax at issue ... as the assessments are time-barred ... and fraudulent because Defendants intentionally backdated the assessment." (Compl. at ¶ 58–59).

Section 7433 allows taxpayers to recover against the United States the actual economic loss caused by IRS employees who recklessly, intentionally or negligently disregard the Internal Revenue Code or its regulations during the collection of a federal tax. 26 U.S.C. §§ 7433(a)–(b).[27] MacElvain cannot proceed under § 7433, however, unless he has exhausted adminis-

[23] *See, e.g, National Commodity and Barter Ass'n, National Commodity Exchange v. Gibbs*, 886 F.2d 1240 [64 AFTR 2d 89-5783] (10th Cir.1989)("The same considerations which led the Supreme Court in *Chilicky* to conclude that the recognition of a *Bivens* claim would be inappropriate are applicable here with respect to the NCBA's allegations of violations of the fifth amendment due process clause and of various provisions of the Internal Revenue Code."); *Hollett v. Browning*, 711 F.Supp. 1009, 1012 [63 AFTR 2d 89-482] (E.D.Cal. 1988)("In the court's opinion, the rationale of *Chilicky* should be applied to preclude a *Bivens* remedy for damages for alleged violations of constitutional rights in the collection of federal taxes. It is hard to imagine a statutory system more equitable to the Social Security Act than the Internal Revenue Code.")

[24] *See Baddour, Inc. v. United States*, 802 F.2d 801, 807–809 [58 AFTR 2d 86-6035] (5thCir. 1986)("To open up an entirely new avenue of relief resulting in the personal liability of Internal Revenue Service employees would serve to hamper the ability of such employees to perform a function that is a difficult one and one that is vital to our nation."); *Felak v. United States*, 677 F.Supp. 606, 607–608 [61 AFTR 2d 88-432] (D.Minn. 1988)("The plaintiff had available to him the means of challenging the assessments complained of under 26 U.S.C. section 7429. His failure to do so within the time limits prescribed by statute does not entitle him to redress under a *Bivens* theory. In fact, the existence of this statutory remedy makes a *Bivens*remedy inappropriate."); *Cameron v. I.R.S.*, 773 F.2d at 129 ("Congress has given taxpayers all sorts of rights against an overzealous officialdom, including, most fundamentally, the right to sue the government for a refund if forced to overpay taxes, and it would make the collection of taxes chaotic if a taxpayer could bypass the remedies provided by Congress simply by bringing a damage action against Treasury employees.")

[25] In light of the conclusion that MacElvain fails to state a *Bivens* claim, the Magistrate Judge declines to devote considerable discussion to the Defendants' final argument that the claim is barred by the two-year statute of limitations applicable to such claims. *See Owens v. Okure*, 488 U.S. 235, 236 (1989); Ala. Code § 6-2-38(5). The Magistrate Judge merely notes that because the factual predicate of the complaint is tax collection activity which substantially pre-dates January 1999, a *Bivens* claim against Keith is clearly time-barred.

[26] The Magistrate Judge infers that MacElvain purports to bring this claim under § 1983 in light of his assertion that "this action seeks damages under 42 U.S.C. 1983 for injuries incurred in violation of federally protected rights by individuals acting under color of federal law depriving Plaintiffs of their constitutional rights."(Compl. at ¶ 5).

[27] Because §7433 only provides for an action against the United States, Keith is not amenable to MacElvain's § 7433 claim. *See Hurt v. U.S.*, 914 F.Supp. 1346, 1351 [77 AFTR 2d 96-1208] (S.D.W.Va. 1996).

trative remedies, as required by 26 U.S.C. § 7433(d)(1). Section 7433 specifically states that "[a] judgment for damages shall not be awarded under [this section] unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service." "Case law has interpreted this provision as jurisdictional, dismissing outright claims in which administrative remedies have not been exhausted." *Simmons v. U.S.*, 875 F.Supp. 318, 319 [74 AFTR 2d 94-7120] (W.D.N.C. 1994). MacElvain's summary representation that he has "exhausted administrative remedies," fails to substantiate that he filed any claim with the IRS; consequently, he has not satisfied the statutory prerequisite for bringing this action,[28] and this Court does not have jurisdiction to entertain MacElvain's claims under 26 U.S.C. § 7433.

Even a finding that this claim is not procedurally barred would still foreclose its review on a substantive jurisdictional ground. MacElvain asserts that failure by the IRS to execute timely notices of deficiency rendered the tax assessments improper, a claim which addresses the merits of an assessment. *Bouquett v. U.S.*, 1995 WL 755128, at 4 [76 AFTR 2d 95-7073] (S.D.Ohio 1995)(stating that "sending a notice of deficiency is an *assessment* activity"). Such claims are not cognizable under § 7433.[29]

Assuming, for the sake of argument, that MacElvain's claim regarding the deficiency notices pertains to tax *collection*, rather than *assessment*activity, to the extent that MacElvain purports to challenge allegedly wrongful collection activities which oc-curred before the November 10, 1988 ef-fective date of Section 7433, those claims also fail. According to Pub.L. No. 100-647, 102 Stat. 3342 (November 10, 1988), Section 7433 applies only "to actions by officers or employees of the Internal Revenue Service after the date of the enactment of this Act."

Moreover, such a collection action "may be brought . . . only within 2 years after the date the right of action accrues." 26 U.S.C. § 7433(d)(1). Relevant Treasury Regulations further provide that "[a] cause of action . . . accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action." 26 C.F.R. § 301.7433-1(g)(2); *see Johnson v. U.S.*, 188 F.R.D. 692, 700 (N.D.Ga.1999).

In this action filed January 24, 2002, MacElvain purports to challenge the propriety of deficiency notices from 1980 to 1986 as well as ensuing collection activity. Given the extensive litigation and discovery conducted between MacElvain and the IRS since 1981, the Magistrate Judge concludes that MacElvain had a reasonable opportunity to discover the elements of his Section 7433 action prior to January 2002. *See Johnson v. U.S.*, 188 F.R.D. at 702. Indeed, despite his claims that the IRS actively concealed information regarding its collection activity, MacElvain's initiation of prior litigation regarding this identical issue compels the conclusion that MacElvain possessed actual knowledge of potential Section 7433 claims well before he filed the instant lawsuit.

IV. CONCLUSION

Based upon the foregoing findings, rationale, and conclusions, the MAGISTRATE JUDGE hereby RECOMMENDS that the *Defendants' Motion to Dismiss, Or in the Alternative, for Summary Judgment* (Doc. 20, filed on June 3, 2002), be GRANTED to the extent that summary judgment be entered for the defendants.

DONE this 14th day of August, 2002.

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28 *See* 26 CFR § 301.7433-1 (e), (f), and(g) for the manner and form of procedures for an administrative claim, limits on the monetary amount sought in any federal district court, and the two-year limitations period on a federal court action. Pursuant to 26 CFR § 301.7433-2, "a cause of action under paragraph (a) of this section accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action."

29 *Bjerke v. Freemyer*, 25 Fed.Appx. 577, 579 [89 AFTR 2d 2002-378] (9th Cir. 2001); *see Miller v. U.S.*, 763 F.Supp. 1534, 1543 [68 AFTR 2d 91-5658] (N.D.Cal.1991)(noting that a mere determination of tax liability, which must precede any collection action by the IRS, is not a collection action cognizable under 7433). "Section 7433--by its specific words--allows a taxpayer to sue the government only if, 'in connection with any *collection* of Federal Tax with respect to a taxpayer, any officer or employee of the [IRS] recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title. . . .'" *Shaw v. U.S.*, 20 F.3d 182, 184 [73 AFTR 2d 94-1998] (5th Cir. 1994), *citing* 26 U.S.C. § 7433(a). (*emphasis in original*)

DELORES R. BOYD

UNITED STATES MAGISTRATE JUDGE

ORDER

DELORES R. BOYD UNITED STATES MAGISTRATE JUDGE

The clerk of the court is ORDERED to file the Recommendation of the Magistrate Judge and to serve by mail a copy thereof on the parties to this action. The parties are DIRECTED to file any objections to the said Recommendation within a period of 13 days from the date of mailing to them. Any objections filed must specifically identify the findings in the Magistrate Judge's Recommendation objected to. Frivolous, conclusive, or general objections will not be considered by the District Court.

Failure to file written objections to the proposed findings and recommendations in the Magistrate Judge's report shall bar the party from *de novo* determination by the district court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the district court except upon grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (11th Cir. Unit B. 1982). *See Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). *See also Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981, *en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

DONE this 14th day of August, 2002.

DELORES R. BOYD

UNITED STATES MAGISTRATE JUDGE

¶2002-5372

ESTATE OF Elizabeth Paramore O'NEAL, deceased, Elizabeth O'Neal Shannon, Emmet O'Neal, II, and Emmet O'Neal, III, Personal Representatives, PLAIN-TIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Alabama, (DC AL) CIVIL ACTION NUMBER: CV-97-J-2189-S, July 31, 2002. On remand from (2001, CA11) 88 AFTR 2d 2001-5245, 258 F 3d 1265, affirming in part, and vacating and remanding in part (1999, DC AL) 84 AFTR 2d 99-7088, 81 F Supp 2d 1205. Date of death 7-23-94. Decision for Taxpayer in part.

1. Estate tax deductions—claims against estate—gift taxes; transferee liability. On remand, district court redetermined date-of-death value of donees' claims against estate for reimbursement of transferee tax, interest and penalty liabilities that they incurred on stock gifts from decedent: court relied principally on 1 of taxpayer's experts/experienced tax attorney and judge, based on his extensive tax and valuation experience, his unbiased posture in case and fact that he presented well-founded, detailed analysis of donees' likelihood in prevailing in their claims against estate. But, estate's deduction was limited under IRC §2053(c)(2) to value of decedent's property that was subject to such claims. *Reference:* USTR Estate & Gift Taxes ¶20,535.07(78); 25,025.01(15); 63,245.02(5); 20,535.05(55); 25,045.01(35). IRC §2053; 2502; 2504; 6324.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION,

ORDER

INGE P. JOHNSON UNITED STATES DISTRICT JUDGE

In accordance with the Memorandum Opinion entered contemporaneously herewith, it is ORDERED, ADJUDGED and DECREED by the Court as follows:

The date-of-death value of the claims that the children and grandchildren of Elizabeth Paramore O'Neal ("Mrs. O'Neal") had against Mrs. O'Neal's estate ("Mrs. O'Neal's Estate") arising out of the liability of Mrs. O'Neal's children and grandchildren as transferees for an alleged underpayment of gift taxes, generation-

skipping transfer taxes, penalties, and interest with respect to gifts of O'Neal Steel, Inc. common stock made by Mrs. O'Neal in November 1987, is $5,835,000.00.

While the date-of-death value of the claims is $5,835,000.00, the deduction allowed to Mrs. O'Neal's Estate for the claims of Mrs. O'Neal's children and grandchildren is limited by 26 U.S.C. § 2053(c)(2) to $5,303,744.00.

The deduction for the claims of Mrs. O'Neal's children and grandchildren reduces the amount of the taxable estate to zero.

The defendant is ORDERED to refund to the plaintiffs $1,883,762.00, as the full amount of the estate taxes paid by Mrs. O'Neal's Estate, and $191,129.99, as the full amount of the interest paid by Mrs. O'Neal's Estate with respect to such estate taxes, together with interest as provided by law.

No interest on unpaid estate taxes is owed by Mrs. O'Neal's Estate, and the issue concerning the administration expense deduction under 26 U.S.C. § 2053(a)(2) for interest accruing on the estate's unpaid estate tax liability is DISMISSED as MOOT.

It is further ORDERED by the Court that costs are taxed to the defendant.

DONE and ORDERED this the 31 day of July, 2002.

INGE P. JOHNSON

UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

This case is before the Court on remand from the Court of Appeals for the Eleventh Circuit for further consideration consistent with its opinion in *O'Neal v. United States*, 258 F.3d 1265 [88 AFTR 2d 2001-5245] (11th Cir. 2001), affirming in part, vacating in part, and remanding with instructions this Court's decision reported at 81 F. Supp. 2d 1205 (N.D. Ala. 1999).

The central issue in this case involves the estate tax deduction by the Estate of Elizabeth P. O'Neal, deceased, (''Mrs. O'Neal's Estate'') under 26 U.S.C. § 2053(a)(3) for claims against Mrs. O'Neal's Estate resulting from transferee gift tax and generation-skipping transfer tax liabilities asserted against the children and grandchildren of Elizabeth P. O'Neal (''Mrs. O'Neal'') as donees of certain gifts made by Mrs. O'Neal. The Court of Appeals held that for purposes of the deduction, the claims are to be valued as of the date of Mrs. O'Neal's death without regarded to events occurring after her death and remanded this issue with instructions to conduct an evidentiary hearing to value the claims giving rise to the deduction as of the date of Mrs. O'Neal's death. 258 F.3d at 1266, 1275.

FINDINGS OF FACT

The opinion of the Court of Appeals and this Court's original memorandum opinion set forth in detail the facts concerning the gifts made by Mrs. O'Neal, the expiration of the statute of limitations for assessing gift tax, generation-skipping transfer tax and penalties against Mrs. O'Neal for the gifts to her children and grandchildren, and the assertion of transferee tax liabilities against Mrs. O'Neal's children and grandchildren as donees of the gifts. This opinion summarizes relevant facts from those opinions and sets forth additional findings of fact relevant in determining the value of the deduction on remand.[1]

Mrs. O'Neal and her husband, Kirkman O'Neal, (''Mr. O'Neal'') made gifts of O'Neal Steel, Inc. (''O'Neal Steel'') common stock to their children and grandchildren on November 3, 1987, reported the gifts on timely filed gift tax returns, and paid gift taxes based on the reported values of the gifts. The reported values of the gifts were based upon an amended buy/sell agreement (the ''1951 Buy-Sell Agreement'') which set option prices for the O'Neal Steel Class A non-voting common stock at $54.00 per share and for the O'Neal Steel Class B voting common stock at $61.00 per share.

[1] The facts in this case are largely undisputed. The parties agreed to a Modified Statement of Facts which was filed with the Court. At the trial of the case, the parties stipulated in open court that the agreed portion of the Modified Statement of Facts (*i.e.*, the statements of facts that neither side disputed) were in the nature of stipulations.

Mr. O'Neal died on August 7, 1988. An audit of his estate tax return led to the examination of Mr. and Mrs. O'Neal's 1987 gift tax returns. After the expiration of the statute of limitations for assessing gift tax, generation-skipping transfer tax and penalties against Mr. and Mrs. O'Neal for the 1987 gifts, the IRS asserted that the reported values of the stock were understated and sought to collect additional gift tax, generation-skipping transfer tax, penalties and interest from Mr. and Mrs. O'Neal's children and grandchildren. Mrs. O'Neal died on July 23, 1994, while the IRS proceedings against her children and grandchildren were pending.

Although the 1951 Buy-Sell Agreement could possibly have established the value of the O'Neal Steel common stock for estate tax purposes, the IRS estate tax attorney examining Mr. and Mrs. O'Neal's 1987 gift tax returns determined that buy-sell agreements are not binding for gift tax purposes. *See* Section 8 of Rev. Rul. 59–60, 1959-1 C.B 237. The IRS then engaged Mitchell Kaye, an outside fee appraiser, to value the gifted stock.

On February 6, 1992, Mr. Kaye issued a valuation report that opined that the November 3, 1987 value of the O'Neal Steel Class A non-voting common stock was $375.00 per share and that the value of the O'Neal Steel Class B voting common stock was $415.00 per share.[2] Based upon Mr. Kaye's valuation report, the IRS issued Notices of Transferee Liability (the "Notices of Liability") to Mrs. O'Neal's children and grandchildren on April 13, 1992, with respect to Mrs. O'Neal's 1987 gifts.[3] The Notices of Liability asserted $7,038,677.00 in aggregate transferee tax liability for Mrs. O'Neal's gift tax, $197,651.00 in aggregate transferee tax liability for Mrs. O'Neal's generation-skipping transfer tax and $2,170,898.00 in undervaluation penalties pursuant to 26 U.S.C. § 6660.[4] The Notices of Liability also asserted that the children and grandchildren were liable for interest as provided by law.

At about the same time as the Notices of Liability were issued, Mrs. O'Neal, her children and grandchildren, and Mr. O'Neal's estate employed attorney David D. Aughtry ("Mr. Aughtry") to represent their common interests with regard to the Notices of Liability.[5]

On July 9, 1992, Mr. Aughtry filed petitions in the United States Tax Court on behalf of Mrs. O'Neal's grandchildren contesting the Notices of Liability (the "Tax Court Cases"). The lead counsel for the litigation team representing the IRS in the Tax Court was IRS District Counsel Attorney Michael T. Breen ("Mr. Breen"). The Tax Court Cases were ongoing when Mrs. O'Neal died.

Mrs. O'Neal's children contested their transferee liability by paying the tax shown on their Notices of Liability, filing claims for refund, and then filing suits for refund in the United States District Court for the Northern District of Alabama. Answers were filed by the government in the children's suits for refund in June, 1994, that denied the correctness of the reported values of the gifted stock and asserted that no refund was due to the children. Nothing further happened in the children's refund suits prior to Mrs. O'Neal's death.

The Tax Court Cases were the lead cases challenging the IRS's findings as to the value of the gifted stock and the donees' transferee liability. In these cases, the grandchildren essentially pursued two lines of defense. The first was an argument that the Notices of Liability were untimely due to the IRS's failure to assess gift tax, generation-skipping transfer tax or penalties

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[2] At the request of the IRS, Mr. Kaye issued a supplemental report on September 2, 1993, reaffirming his February 6, 1992 valuation of the gifted stock and stating that he had considered the impact of the restrictions in the 1951 Buy-Sell Agreement and the effect of "Black Monday" (*i.e.*, the stock market crash that occurred on October 19, 1987) in his original report.

[3] Similar IRS Notices of Liability were issued on the same day to the children and grandchildren with respect to the gifts from Mr. O'Neal. Also, an IRS notice of deficiency with respect to Mr. O'Neal's estate tax return was issued to Mr. O'Neal's estate on April 28, 1992. The notice of deficiency issued to Mr. O'Neal's estate included a finding that increased the value of the adjusted taxable gifts reported on Mr. O'Neal's estate tax return by $12,814,717.00. The increase in Mr. O'Neal's adjusted taxable gifts was also based on Mr. Kaye's valuation of the O'Neal Steel common stock as of November 3, 1987.

[4] References herein to 26 U.S.C. § 6660 refer to that section prior to its amendment in 1989.

[5] Mrs. O'Neal's children and grandchildren were also represented by attorneys Roy J. Crawford and E. T. Brown, Jr. Mrs. O'Neal and Mr. O'Neal Estate were separately represented by attorney C. Fred Daniels.

against the donors. The second defense was that the values of the gifts were correctly reported on the gift tax returns. Mr. Aughtry testified at the trial of this case that he believed that the first defense was the strongest of the two.

The grandchildren obtained a draft valuation study dated March 15, 1992, from the brokerage firm of Sterne, Agee & Leach, Inc. ("Sterne, Agee") that valued both the O'Neal Steel Class A non-voting common stock and O'Neal Steel Class B voting common stock at $182.00 per share as of November 3, 1987. Sterne, Agee revised their draft study on September 14, 1992, to value both the O'Neal Steel Class A non-voting common stock and the O'Neal Steel Class B voting common stock at $178.00 per share. The Sterne, Agee study was not finalized prior to Mrs. O'Neal's death, and neither draft was furnished to the IRS. Mr. Aughtry testified that when Mrs. O'Neal died, he was not planning to use a Sterne, Agee report in the trial of the Tax Court Cases.

The children and grandchildren also obtained marketability opinions from Jefferson Capital Fund, Ltd., Noble Ventures International, and The Breckenridge Group, Inc., who are venture capitalists or investment bankers, not appraisers of closely-held corporate stock. The marketability opinions indicated that the gifted stock could not be sold for more than the price determined by the 1951 Buy-Sell Agreement. Mr. Aughtry testified that the marketability opinions were not prepared in accordance with the Uniform Standards of Professional Appraisal Practice.

Eventually, the IRS and the grandchildren filed cross-motions for summary judgment addressing the grandchildren's first line of defense—were the Notices of Liability untimely due to the IRS' failure to assess gift tax, generation-skipping transfer tax and penalties against Mr. and Mrs. O'Neal? Arguments on these motions were heard by the Tax Court on September 29, 1993. On April 28, 1994, the Tax Court granted the IRS's motion for partial summary judgment and held that the Notices of Liability were timely and that the grandchildren were liable for the transferee tax liability. *O'Neal v. Commissioner*, 102 T.C. 666 (1994). The amount of the grandchildren's transferee tax liability was not addressed by the Tax Court at that time.

Thereafter, the grandchildren filed a Motion to Calendar the Tax Court Cases for trial. In June, 1994, slightly more than a month before Mrs. O'Neal's death, the IRS filed a Notice of Objection to the Motion to Calendar the cases stating that it had just hired Martin D. Hanan ("Mr. Hanan") of Business Valuation Services, Inc., to testify as an expert witness in addition to Mr. Kaye. The grandchildren responded to the hiring of Mr. Hanan by hiring Chris Mercer ("Mr. Mercer") of Mercer Capital to value the gifted stock.[6] Having just been hired, both Mr. Hanan's work and Mr. Mercer's work had just begun when Mrs. O'Neal died.

At the time of Mrs. O'Neal's death, the value of the assets she owned was $5,303,744.00. Mrs. O'Neal's debts at her death totaled $13,124.00, plus the amount that she owed to her children and grandchildren on account of the transferee tax liability.

PROCEDURAL BACKGROUND

In this case, the Personal Representatives of Mrs. O'Neal's Estate seek a refund of the federal estate taxes and interest paid by Mrs. O'Neal's Estate because the estate is entitled to a deduction for the claims by Mrs. O'Neal's children and grandchildren against Mrs. O'Neal and her estate for the transferee gift tax and generation-skipping transfer tax liabilities, together with penalties and interest asserted against them. Mrs. O'Neal's Estate asserted that the amount of the deduction was the amount that the IRS was seeking from the children

[6] The government argued in this case that the employment of Mr. Hanan by the IRS and Mr. Mercer by the grandchildren was evidence that the IRS and the taxpayer abandoned their experts prior to Mrs. O'Neal's death. That is contrary to the evidence. Mr. Breen testified that the IRS had not abandoned Mr. Kaye as an expert. The IRS's Notice of Objection to the Motion to Calendar the Tax Court Cases and the memorandum in support thereof identified Mr. Hanan as a "second expert", not a replacement expect. Mr. Aughtry testified that the grandchildren were not planning to use a Sterne, Agee report and that he was still seeking a valuation report from a qualified expert to counter Mr. Kaye's report and Mr. Hanan's anticipated report.

and grandchildren when Mrs. O'Neal died. The government asserted that Mrs. O'Neal's Estate was not entitled to a deduction.

Following a hearing on cross-motions for summary judgment filed by the parties, this Court issued its Order and Memorandum Opinion holding that Mrs. O'Neal's Estate is entitled to the deduction but that the amount of the deduction should be based upon the settlement of the Tax Court Cases, which occurred after Mrs. O'Neal died. 81 F. Supp. 2d at 1226, 1227.

Both the government and Mrs. O'Neal's Estate appealed the decision. The government appealed the issue of whether Mrs. O'Neal's Estate was entitled to any deduction for the children's and grandchildren's claims. The government subsequently moved to dismiss its appeal, however, and its appeal was dismissed with prejudice.

The appeal by Mrs. O'Neal's Estate was based, *inter alia*, upon its contention that this Court should have considered only pre-death events in determining the amount of the deduction and the deduction should be in the amount demanded by the IRS.[7] In opposing the arguments presented by Mrs. O'Neal's Estate on appeal, the government argued that the amount of the deduction should be based upon the post-death settlement.

The Court of Appeals rejected the government's argument and held that the deduction to be taken by Mrs. O'Neal's Estate for the children's and grandchildren's claims against Mrs. O'Neal's Estate is the value of such claims as of the date of Mrs. O'Neal's death, determined without consideration of post-death events. 258 F.3d at 1275. The Court of Appeals plainly held that Mrs. O'Neal's Estate is entitled to a deduction in some amount (clearly not zero). *Id.* at 1271 n.20. The Court of Appeals also stated, however, that the value of the deduction is not necessarily the amount that was demanded by the IRS. *Id.* at 1275.

The Court of Appeals then remanded the valuation issue with instructions to hold an evidentiary hearing to value the claims giving rise to the deduction at the date of death. *Id.* at 1276. Events that occurred after Mrs. O'Neal's death that alter value were to be disregarded. The mandate of the Court of Appeals included the following:

> On remand, the district court is instructed neither to admit nor consider evidence of post-death occurrences when determining the date of death value of the Section 2053(a)(3) deduction. [Citation to *Estate of Smith v. Commissioner*, 198 F.3d 515, 526 [84 AFTR 2d 99-7393] (5th Cir. 1999).] It will be incumbent on each party to supply the district court with relevant evidence of pre-death facts and occurrences supporting the date-of-death value of the deductions as advocated by that party. *Id.* The district court will then, by using informed judgment, reasonableness and common sense, weighing all relevant facts and evaluating their aggregate significance, determine a sound valuation. *See* Revenue Ruling, 1959-1 C.B. 237, Rev. Rul. 59–60 (1959).

258 F.3d at 1275.

DISCUSSION

[1] The issue on remand is the value of the deduction as of July 23, 1994, the date of Mrs. O'Neal's death. In support of its contentions as to value, Mrs. O'Neal's Estate established the status of the transferee tax liability proceedings as of the date-of-death through the testimony of Mr. Augthry and the introduction of documents from those proceedings. Mrs. O'Neal's Estate then offered the testimony and reports of two experts who testified as to the value of the children's and grandchildren's claims as of Mrs. O'Neal's death.

The government chose not to offer an expert to assist the Court. Instead, the government sought to establish a timeline of

[7] Mrs. O'Neal's Estate also appealed this Court's holding that attorney's fees paid to Mr. Aughtry after Mrs. O'Neal's death are not deductible, holding that fees paid to Mr. Aughtry prior to Mrs. O'Neal's death should be included as assets of her gross estate, and determination of the amount of a deduction for interest expense. The Court of Appeals affirmed this Court's decision with regard to the post-death and pre-death fees paid to Mr. Aughtry. The issue of the deduction for interest expense was remanded to this Court to be determined at the conclusion of this litigation.

events by cross-examining Mr. Aughtry and the taxpayer's experts, and offering the testimony of Mr. Breen, Mrs. O'Neal's accountant, the IRS estate tax attorney who conducted the tax audit, and an IRS employee who participated in the engagement of Mr. Kaye. However, the government offered no evidence which would transform the timeline of events into admissible evidence of value, which is the question that the Court of Appeals placed before this Court. What this Court needed from the government, and did not receive, was evidence to assist this Court in determining the value of the claims as of Mrs. O'Neal's date of death.[8]

In *Estate of Smith v. Commissioner*, 198 F.3d 515 [84 AFTR 2d 99-7393] (5th Cir. 1999), the Fifth Circuit offered the following guidance regarding the type of evidence that assists a court in establishing the date-of-death value of claims against an estate:

> The actual value of Exxon's claim prior to either settlement or entry of a judgment is inherently imprecise, yet "even a disputed claim may have a value to which lawyers who settle cases every day may well testify, fully as measurable as the possible future amounts that may eventually accrue on an uncontested claim." [Footnote citing *Gowetz v. Commissioner*, 320 F.2d 874, 876 [12 AFTR 2d 6219] (1st Cir. 1963)]
>
> In fact, when addressing situations that are the obverse of the one in the instant case, i.e., when the decedent-estate taxpayer is a plaintiff rather than a defendant in a pending lawsuit, the Commissioner has considered himself capable of determining the value of a pending lawsuit in exact dollars and cents, even when the claim has not been reduced to judgment. [Footnote citing *Estate of Davis v. Commissioner*, 65 T.C.M. (CCH) 2365 [1993 RIA TC Memo ¶93,155] (1993)] Furthermore, courts have consistently held that "inexactitude is often a byproduct in estimating claims or assets without an established market and provides no excuse for failing to value the claims ... in the light of the vicissitudes attending their recovery." [Footnote citing *Estate of Curry v. Commissioner*, 74 T.C. (CCH) 540, 551 (1980)]

Estate of Smith, 198 F.3d at 525 (emphasis in original).[9]

Also complicating this case is the fact that the positions of the parties regarding the value of the gifted stock essentially are the reverse of their positions in the litigation regarding the transferee liability. Unlike the transferee litigation, the government in the present case has an incentive to minimize the value of the gifted stock and the children's and grandchildren's transferee liability, while Mrs. O'Neal's Estate has an incentive to maximize the value of the stock and the transferee liability.

As previously stated, Mrs. O'Neal's Estate offered the reports and testimony of two experts, both of whom currently practice as attorneys and one of whom is also a recently retired Federal District Judge. Tax cases valuing legal claims often use attorneys and retired judges as expert witnesses. *See, e.g., Estate of Smith v. Commissioner*, 82 T.C.M. (CCH) 909, 915–916 [TC Memo 2001-303] (2001) (IRS used testimony of a lawyer who had settled and mediated numerous cases involving similar disputes to value claim against estate); *Estate of Davis v. Commissioner*, 65 T.C.M. (CCH) 2365, 2366 [1993 RIA TC Memo ¶93,155] (1993) (lawsuit included as asset in estate valued by attorney with experience evaluating lawsuits); *Estate of Lennon v. Commissioner*, 62 T.C.M. (CCH) 326, 328 [1991 TC Memo ¶91,360] (1991) (retired judge who practiced appel-

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[8] The Court of Appeals urged the parties to furnish this court with such evidence: "It will be incumbent on each party to supply the district court with relevant evidence of pre-death facts and occurrences supporting the date of death value of the deduction as advocated by that party" (emphasis added). *See O'Neal*, 258 F.3d at 1275.

[9] The taxpayer in *Smith* choose to utilize a similar strategy on remand as the government has followed here and did not offer the report and testimony of an expert to assist the Tax Court in valuing the claim. The Tax Court observed that "the estate ... has decided not to follow the Court of Appeals's [sic] guidance that 'it is incumbent on each party to supply the Tax Court with relevant evidence of predeath facts and occurrences to support the value of the Exxon claim advocated by that party.'" *Estate of Smith*, 82 T.C.M. (CCH) 909, 914 [TC Memo 2001-303] (2001).

late law following retirement from the bench testified as to value of lawsuit on appeal at death). Indeed, both the First Circuit in *Gowetz v. Commissioner*, 320 F.2d 874 [12 AFTR 2d 6219] (1st Cir. 1963), and the Fifth Circuit in *Estate of Smith* held that "lawyers who settle cases every day" can testify as to the value of disputed claims. *Gowetz*, 320 F.2d at 876; *Estate of Smith*, 198 F.3d at 525.

Both experts testified as to the date-of-death value of the claims against Mrs. O'Neal based upon the likely outcome of the transferee tax litigation given the facts known as of Mrs. O'Neal's death.[10] Each expert then discounted that value to reflect contingencies related to restitution litigation between Mrs. O'Neal or her estate as donor and her children and grandchildren as donees. Neither expert considered or relied upon events, facts or occurrences after Mrs. O'Neal's death on July 23, 1994.

One of the experts, Sam C. Pointer, Jr. ("Judge Pointer"), is the recently retired Chief Judge of the United States District Court for the Northern District of Alabama, having served as a United States District Court Judge for twenty-nine and one-half years and having extensive experience in taxation and dispute resolution. After law school but prior to going on the bench, Judge Pointer studied at New York University as a Kenneson Fellow where he earned the degree of Masters of Law (in Taxation). Judge Pointer was in private practice for twelve years before being appointed as a District Judge. A substantial part of his practice involved matters related to federal estate and gift taxes—both in estate planning and in the resolution of disputes with the IRS, including disputes related to estate and gift taxes. Several of the tax matters related to the valuation of closely-held businesses. Litigation in his practice included tax litigation.

As a District Judge, Judge Pointer was involved in the resolution (whether by summary disposition, by settlement, or by trial) of thousands of cases. He presided as a judge in tax cases, including cases involving gift or estate taxes. In fact, when Judge Pointer first went on the bench, all of the tax cases in the Northern District of Alabama were assigned to him because of his background in tax law. His cases while on the bench included cases where either he or a jury working with him had the responsibility of valuing closely-held companies.

Judge Pointer returned to the private practice of law in April 2000. A significant portion of his current practice involves the mediation and arbitration of disputes. Judge Pointer is designated as a national panelist by the CPR Institute for Dispute Resolution. He has served as a mediator or arbitrator by court appointment and in disputes administered by JAMS and AAA. In addition to mediation and arbitration, his practice also involves the representation of clients in litigation, both as plaintiffs and as defendants.

The Court finds that Judge Pointer who, having participated in the resolution of innumerable disputes and having exceptional expertise in tax disputes, is qualified to render his opinion as an expert for purposes of this case.

Judge Pointer testified that his assigned task was to value, as of July 23, 1994, the restitution claims that Mrs. O'Neal's children and grandchildren had against Mrs. O'Neal's estate arising out of their liability as transferees for an alleged underpayment of gift taxes (and generation-skipping transfer taxes), penalties, and interest with respect to gifts of O'Neal Steel common stock made by Mrs. O'Neal in November 1987.

Judge Pointer started with an analysis of the children's and grandchildren's transferee tax liability. He determined that there were at least four possible outcomes of the transferee tax litigation: (1) acceptance of the $375.00 per share value of the O'Neal Steel, Inc. Class A non-voting common stock as determined by Mr. Kaye;[11] (2)

[10] As stated above, the government offered no expert testimony. As a result, all expert testimony discussed herein refers to experts testifying on behalf of Mrs. O'Neal's Estate.

[11] Judge Pointer's analysis disregarded the potential for a higher value for the O'Neal Steel, Inc. Class B voting common stock since, as a result of the few number of shares and the small potential increased value, an adjustment related to their additional value is *de minimis*.

acceptance of a value at or near the $54.00 per share argued by the transferees; (3) acceptance of a value at or near the $178.00 per share amount set forth in the September 14, 1992 Sterne, Agee report; or (4) a value based on the midpoint between the $54.00 value based on the 1951 Buy-Sell Agreement and the $375.00 value in the Notices of Liability based on Mr. Kaye's valuation report. Because Judge Pointer concluded that there was roughly an equal chance of each of these values being the outcome of the transferee liability litigation, he found a 25% likelihood for each of the four possible outcomes.

Judge Pointer summarized his calculations using the following chart:

• a 20% to 30% chance[12] of a per-share value at or near $54 .25 x $54 =	$ 13.50
• a 20% to 30% chance of a per-share value at or near $178 .25 x $178 =	$ 44.50
• a 20% to 30% chance of a per-share value at or near $375 .25 x $375 =	$ 93.75
• a 20% to 30% chance of a per-share value at or near the intermediate point between $54 and $375 .25 x $214.50 =	$ 53.63
• composite per-share value expectancy	$205.38

A per-share value of $205.38 results in an expected transferee liability, with penalties and interest, of approximately $7,780,000.00 as of July 23, 1994.

Judge Pointer next analyzed the likelihood that the children and grandchildren would prevail under Alabama law with their restitution claims against Mrs. O'Neal or her estate. Initially, he identified potential defenses to the claims. However, Judge Pointer concluded that these defenses were not likely to succeed. For those reasons, he assigned a 75% probability that the children and grandchildren would have been able to establish and enforce their restitution claims against Mrs. O'Neal or her estate as of July 23, 1994.

Judge Pointer's well-reasoned analysis of the law of restitution and its application to this case is extremely helpful to the Court, and that portion of his report is hereinafter set out:

> The question is this: what, as of July 1994, was the likelihood of the transferees' being able to prevail under Alabama law with restitution claims against Mrs. O'Neal or her Estate based upon their having to pay taxes, penalties, and interest because she underreported and underpaid the gift taxes due as a result of her 1987 gifts to the transferees.
>
> Faced with such restitution claims, the Estate would have had the following potential defenses to the entirety of the claims: (1) restitution is unwarranted because the transferees were not called upon to pay Mrs. O'Neal's liability under I.R.C. §§ 2502(c) and 2603(a)(3), but rather their own liability under § 6324(b); (2) because of the statute of limitations, Mrs. O'Neal did not in July 1994 have any potential tax liability to the government as a result of her 1987 gifts; (3) in November 1987 it had, in essence, been agreed that the transferees, rather than Mrs. O'Neal, would be responsible for any underpayment of taxes relating to the gifts; and (4) the transferees did not assert any claim against Mrs. O'Neal during the two-year period between the time they were assessed with transferee tax liability and the time of her death. As a partial defense, the Estate might possibly also have contended that any interest accruing after the April 1992 assessment of transferee liability—

[12] This outcome includes the possibility of an appellate decision concluding that no transferee liability could be imposed on the transferees because the IRS did not assert a deficiency or challenge the valuation prior to the running of the statute of limitations, a defense that the Tax Court had rejected just a few months before Mrs. O'Neal's death.

or at least the excess of the statutory rate over the market rate—should be the sole responsibility of the transferees and not subject to recovery from the Estate. [Footnote: Because of the relatively small impact of this interest and the size of the remainder of the claim in comparison with the size of the probate estate, I doubt that this would have been actively pursued as a defense and accordingly have not separately analyzed the prospect of this limited defense being sustained.]

These potential defenses are not frivolous. Indeed, there is a trial court decision from New Jersey, *Fidelity Union Trust Co. v. Anthony*, 81 A.2d 191 (N.J. Super. Ct. Ch. Div. 1951), which squarely rejected just such a restitution claim.

However, in Alabama and elsewhere, courts in analogous situations have decided cases that support the right of a donee/transferee to maintain a restitution claim against a donor/transferor for unpaid/underpaid gifts taxes. In Illustration 8 to Section 76 of ALI's Restatement of Restitution the reverse of the present case is presented—a restitution claim by an Estate against an heir arising from the heir's failure to pay the full amount of *succession/inheritance* taxes initially imposed on the heir—and the note indicates that the Estate would be entitled to reimbursement. This illustration was based on an 1819 English decision (*Hales v. Freeman*), which under Ala. Code § 1-3-1 (1975) would have been adopted as part of the law of Alabama. Similarly, restitution was allowed by the highest courts of the states of Penn-sylvania and New York for claims brought by the transferor of bank stock against the transferee relating to amounts the transferor was statutorily required to pay because the transferee failed to pay the statutory assessment. *See Penn-sylvania Co. for Insurance on Lives & Granting Annuities v. Clark*, 18 A.2d 807 (Pa. 1941); *Brown v. Rosenbaum*, 41 N.E. 2d 77 (N.Y. 1942).

While there is no Alabama case directly on point, the Supreme Court of Alabama has twice allowed a person, secondarily called upon to pay an obligation primarily owed by another, to obtain reimbursement for payment of that obligation. *See Mitchell v. Conway*, 60 So.2d 676 (Ala. 1952); *Schuessler v. Shelnutt*, 171 So. 259 (Ala. 1936).

The New Jersey trial court in *Fidelity Union* accepted the argument, advanced by the government in the current estate tax litigation, that, as it affects a restitution claim, a transferee's liability under I.R.C. § 6324(b) is independent of, and not secondary to, the obligation of the donor under §§ 2503 and 2603. I believe this is a misreading of the applicable statutes, regulations, and *Mississippi Valley Trust Co. v. Comm'r*, 147 F.2d 186 [33 AFTR 635] (8th Cir. 1945), and most likely would be so held by an Alabama court (or by a federal court predicting Alabama law).

Federal gift taxes are excise taxes based on making a gift (not on receiving a gift). These taxes are to be reported and paid by the donor—whether or not the identity of the donee is known or can even be ascertained—and the obligation of a transferee under § 6324(b) arises only if and to the extent the donor fails to pay the applicable taxes. That the transferee's liability is secondary to that of the donor is highlighted by the fact that the amount of a transferee's liability is not based on the calculation of a tax rate applied to the amount of the gift received by the transferee, but indeed (via the imposition of a lien) on the full amount owed by the donor as taxes on all gifts during the year (up to the total value of the gift to the transferee). That the transferees were being called upon to pay the liability of Mrs. O'Neal is reinforced by the fact that they were also being charged with a 30% penalty under I.R.C. § 6660 for Mrs. O'Neal's undervaluation of the stock in her gift return, something over which they had no control.

That Mrs. O'Neal was not, because of the running of the statute of limitations on an assessment against her, still directly liable to the IRS in 1994 for unpaid gift taxes would, in all likelihood, not have affected her liability (or the liability of her Estate) for a restitution claim brought by the transferees. While claims for indemnification or restitution sometimes are brought—arguably prematurely—before payment of the underlying claim, the law allows the person seeking indemnification or restitution to wait until the underlying claim is resolved. This is so, even though the indemnification/restitution claim may then be brought after the time would otherwise have run on a direct claim by the underlying claimant against the defendant.

The argument could be made—as has the government in the present case—that the Supplemental Stock Purchase Agreement and Escrow Agreement entered into in November 1987 constituted an agreement that any gift taxes not paid by Mrs. O'Neal would be the responsibility (on a pro rata basis) of the transferees. And, hence, according to this argument, there was an understanding that Mrs. O'Neal (and her estate) would be relieved from further responsibilities for gift taxes.

The fundamental flaw in this argument is that these November 1987 agreements addressed only the issue of an equitable initial sharing *as among the donees* of any transferee liability that might be later assessed against one or more of them, and not the responsibility of Mrs. O'Neal—either to the IRS or to the donees—with respect to payment of the appropriate gift taxes. At the time of these agreements Mrs. O'Neal had not reported or paid any gift taxes on these gifts, and from the fact that five months later, in April 1988, she filed a gift tax return and paid over $800,000 in taxes, it is clear that she and the donees expected her to pay (as the law required) the appropriate taxes.

Finally, there is the argument that, though confronted in April 1992 with a multi-million dollar assessment, the transferees apparently made no restitution claim until Mrs. O'Neal's death in July 1994. [Footnote: The transferees did promptly file a restitution claim against the Estate of Kirkman O'Neal.] This, however, would not have constituted a defense by her Estate to the restitution claims: the statute of limitations (even if it had started running when the transferees received the assessment rather [than] on payment of the liability) would not have expired in July 1994.

As indicated above, I do not consider these potential defenses by the Estate to the transferees' restitution claim to be frivolous. On analysis, however, it is my opinion that they were very unlikely to succeed, and, indeed, that, as of July 1994, the transferees had a 75% probability of being able to establish and enforce their restitution claims against the estate.

Applying this 75% probability to the $7,780,000.00 expected transferee tax liability, penalties and interest, Judge Pointer concluded that the children's and grandchildren's claims had a value of $5,835,000.00 as of Mrs. O'Neal's date of death.

The Court finds Judge Pointer's analysis to be adept, thorough and persuasive. His testimony made clear that he approached his task as an unbiased expert, not as an advocate. The Court places great weight on his opinion.

The other expert offered by Mrs. O'Neal's Estate was Harold I. Apolinsky (''Mr. Apolinsky''). Mr. Apolinsky is a practicing attorney. Like Judge Pointer, he attended New York University where he earned the degree of Masters of Law (in Taxation). Mr. Apolinsky's practice focuses on tax planning and tax dispute resolution. He represents clients in the making of gifts of business interests and is called upon to review and comment upon the work of business appraisers. Mr. Apolinsky represents taxpayers before the Internal Revenue Service, the United States Tax

Court, the United States District Court, and the Court of Appeals. He has successfully represented taxpayers in tax litigation before the United States Supreme Court. Mr. Apolinsky is experienced in evaluating lawsuits for settlement and for trial, including evaluating tax cases for settlement and for trial and evaluating cases involving equitable remedies.

Mr. Apolinsky's practice also includes non-tax dispute work, such as, for example, disputes among family members over inheritances, disputes between children of a first marriage and a surviving spouse, and arguments among families where some family members own and work for a family business and others do not own and work there.

Mr. Apolinsky has acted as a mediator and an arbitrator. He successfully mediated a tax case in which the government was represented by the Department of Justice and had accepted him as a mediator.

Mr. Apolinsky taught estate and gift tax courses and estate planning courses for 24 years at the University of Alabama School of Law and for 28 years at Cumberland School of Law. He has authored publications involving the drafting of buy/sell agreements.

The Court finds that Mr. Apolinsky who, having practiced and taught estate and gift tax law, having extensive experience in the resolution of both tax and non-tax disputes, and having expertise as a mediator, is qualified to render his opinion as an expert for purposes of this case.

Mr. Apolinsky began his analysis with the $16,643,158.00 amount be calculated that the IRS was seeking from the transferees at Mrs. O'Neal's death. This amount consisted of $7,236,238.00 in underpayment of gift and generation-skipping transfer tax, $2,170,898.00 in penalties, and $7,235,932.00 in interest to the date of Mrs. O'Neal's death. He then applied three approaches, which he labeled as the specific approach, the general approach, and the blended approach.

The specific approach included an analysis of the 1951 Buy-Sell Agreement, the expert appraisal reports, the marketability reports, and relevant settlement offers. He did not attempt to appraise the gifted stock. Instead, Mr. Apolinsky examined the methodologies of the appraisers, the comparisons to other companies, the weighting between book value and earnings valuations, and the discounts in order to determine what a court most likely would do in a similar situation. Based on this analysis, he opined that a court would likely hold that the value of the O'Neal Steel Class A non-voting common stock was $291 00 per share and that the value of the O'Neal Steel Class B voting common stock was $306.00 per share as of November 3, 1987.

Under the general approach, Mr. Apolinsky used a valuation matrix to analyze the IRS's success in litigating transfer tax values determined in its notices of deficiency and he concluded that the IRS's success ratio was approximately 60% in cases involving closely-held businesses. Applying the likely 60% success factor, a person evaluating the Tax Court Cases would have considered the value of the O'Neal Steel Class A non-voting common stock to have been $223.00 per share and the value of the O'Neal Steel Class B voting common stock to have been $247.00 per share as of November 3, 1987.

The blended approach combined the values derived through the specific approach and the general approach to reach a final opinion on the proper gift tax value of the stock. It results in a value of the O'Neal Steel Class A non-voting common stock of $257.00 per share and the O'Neal Steel Class B voting common stock of $277.00 per share.

Based on the blended approach values, Mr. Apolinsky calculated a $4,379,059.00 underpayment of gift tax with respect to Mrs. O'Neal's 1987 gift tax return. The $4,379,059.00 underpayment would result in a $1,313,718.00 penalty under 26 U.S.C. § 6660. The interest through Mrs. O'Neal's date of death would have been $4,245,025.00, resulting in an aggregate transferee liability of $9,937,802.00. However, Mr. Apolinsky reduced the interest

amount by $262,663.00 to take into account the possible application of *Pointer [sic Poinier] v. Commissioner*, 86 T.C. (CCH) 478, 489 (1986), *rev'd*, 858 F.2d 917 [62 AFTR 2d 88-6006], 920 (3d Cir. 1988), and *Baptiste v. Commissioner*, 29 F.3d 433, 438 [74 AFTR 2d 94-5220] (8th Cir. 1994),[13] to the computation of transferee interest, resulting in a transferee liability of $9,675,139.00.

The Court notes that the conclusions of both Judge Pointer and Mr. Apolinsky as to the likely outcome of the transferee tax litigation as of Mrs. O'Neal's date of death are not dissimilar, even though they were determined independently. The $1,895,139.00 differential between their conclusions is slightly more than 11% of the $16,643,158.00 amount that the IRS was seeking when Mrs. O'Neal died. For both Judge Pointer and Mr. Apolinsky to independently reach conclusions within 11% of each other is evidence supporting each of their opinions.

Mr. Apolinsky next analyzed the hazards of litigation involved in the children's and grandchildren's restitution claims against Mrs. O'Neal or her estate. After evaluating the law related to the liability for claims, Mr. Apolinsky concluded, like Judge Pointer, that the transferees had a high likelihood of success on the merits. Mr. Apolinsky concluded that a 20% discount should be applied to account for the hazards of litigation. Applying this discount, Mr. Apolinsky opined that the value of the children's and grandchildren's claims as of the date of Mrs. O'Neal's death was $7,700,000.00 (rounded).

Again, it is compelling that both Judge Pointer and Mr. Apolinsky concluded that the children's and grandchildren's restitution claims had a high likelihood of success had they been decided on the day Mrs. O'Neal died. Judge Pointer and Mr. Apolinsky, independent of each other, reached conclusions regarding the probability of success that, when expressed as percentages, differ by only 5%.

The Court finds that the methodologies used by both Judge Pointer and Mr. Apolinsky are consistent with the way cases are analyzed by lawyers for settlement purposes and for trial and are accepted methods for evaluating cases for settlement and for trial.

In addition to the reports and testimony of the expert witnesses, other evidence indicates that the value of the children's and grandchildren's claims was as least as great as Judge Pointer's opinion as to the value. When Mrs. O'Neal died, the IRS was seeking in excess of $16,000,000.00 from the children and the grandchildren. Just three months prior to Mrs. O'Neal's death, the Tax Court had ruled against the grandchildren on the question of whether they were liable as transferees. Under Rev. Rul. 59–60, 1959-1 C.B 237, the values in the 1951 Buy-Sell Agreement were not binding for gift tax valuation purposes. Not only did the IRS already have Mr. Kaye available to testify in support of the values it had determined, the IRS had engaged a second valuation expert shortly before Mrs. O'Neal's death. In support of Mr. Kaye's valuation, the IRS stated in response to the grandchildren's discovery in the Tax Court Cases that the values asserted in the Notices of Liability were greatly discounted. In response to questions from the Court during trial, Mr. Breen reaffirmed the IRS' discovery response by testifying there was "a big discount, greatly." This testimony was not contradicted.

In contrast, the grandchildren's defense in the Tax Court Cases at the time of Mrs. O'Neal's death was grounded in three marketability opinions, all of which relied on the 1951 claims on that date was *at least* as great as the $5,835,000.00 value determined by Judge Pointer.

With respect to the opinions of both expert witnesses, the Court concludes that Judge Pointer's opinion is more persuasive. Since the issue before the Court involves determinations of the likely outcome of litigation in the Tax Court and litigation of a

[13] The Eleventh Circuit's decision in the related case of *Baptiste v. Commissioner*, 29 F.3d 1533 [74 AFTR 2d 94-7477] (11th Cir. 1994), was not considered because it was not rendered until after Mrs. O'Neal died and, thus, would not have been available to the parties to value the claims.

claim for restitution, the Court places great weight on the experience of Judge Pointer who spent twenty-nine and one-half years on the federal bench resolving cases, many of which were of a similar nature. Moreover, having reviewed the exhibits offered into evidence and having heard the testimony of the witnesses, particularly the testimony of the lead attorneys for the parties in the Tax Court Cases, the Court has reached the same conclusion as Judge Pointer. The value of the children's and grandchildren's claims as of Mrs. O'Neal's date of death is $5,835,000.00.

While the value of the claims is $5,835,000.00, the amount of the deduction under 26 U.S.C. § 2053(a)(3) is less. 26 U.S.C. § 2053(c)(2) disallows a deduction for amounts described in 26 U.S.C. § 2053(a) to the extent that the amounts exceed the value as of the decedent's death of the property subject to claims (except to the extent that the deductions represent amounts paid before the date for filing the estate tax return). In this case, the value of Mrs. O'Neal's property that was subject to claims as of the date of her death was $5,303,744.00, and the amount of the deductions under 26 U.S.C. § 2053(a) cannot exceed this amount.

CONCLUSION

The Court finds that the value of the children's and grandchildren's claims as of Mrs. O'Neal's date of death was $5,835,000,00. The Court further finds that the amount of the deduction allowed to Mrs. O'Neal's Estate for the children's and grandchildren's claims is limited by 26 U.S.C. § 2053(c)(2) to $5,303,744.00. Since the deduction for the children's and grandchildren's claims reduces the taxable estate to zero, the Court finds that the full amount of the estate taxes paid by Mrs. O'Neal's Estate, together with interest as provided by law, is due to be refunded.[14]

A separate order in conformity with this Memorandum Opinion will be entered contemporaneously herewith.

DONE this the 31 day of July, 2002.

INGE P. JOHNSON

UNITED STATES DISTRICT JUDGE

¶2002-5373

UNITED STATES OF AMERICA, PLAINTIFF v. SEAGA CORPORATION OF ILLINOIS, Seaga Manufacturing Corporation Southwest Financial Co., DEFENDANT. U.S. District Court, Northern Dist. of Illinois, (DC IL) Case No. 00 C 50389, Sept. 11, 2002. Years 1989, 1990, 1991, 1992, 1993, 1994. Decision for Govt. in part.

1. Actions to reduce assessments to judgment—fraudulent conveyances; foreclosure—discovery. Magistrate judge granted in part govt.'s motion to compel in its action to reduce corp.'s payroll and corp. income tax assessments to judgment, set aside corp.'s alleged fraudulent conveyances of assets to successor corp./alter ego, and foreclose tax liens against alter ego: taxpayers didn't object to request for production of corp.'s returns; and disclosure of successor corp.'s returns for 3-year period after its establishment was ordered where such was relevant to alter ego claim. But, financial co.'s returns weren't relevant to any claim or defense and thus nondiscoverable. *Reference:* United States Tax Reporter ¶74,035.01(10). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS WESTERN DIVISION,

MEMORANDUM OPINION AND ORDER

Magistrate Judge P. Michael Mahoney

The government (''Plaintiff'') brought this action to reduce to judgment its tax claims for payroll taxes and corporate income taxes from Defendant, Seaga Corpo-

[14] The decision of the Court of Appeals also addressed an administration expense deduction under 26 U.S.C. § 2053(a)(2) for interest accruing on the estate's unpaid estate tax liability. This Court was instructed to recalculate the amount of the interest deduction at the conclusion of all litigation. 258 F.3d at 1277. Inasmuch as this Court has determined that Mrs. O'Neal's Estate is entitled to a refund of all estate taxes paid by Mrs. O'Neal's Estate, there are no unpaid estate taxes and no interest is owed. This issue is moot and need not be addressed further.

ration (''Seaga I''). The government seeks to set aside alleged fraudulent conveyances of certain assets and to foreclose its tax liens that attached to the assets of Seaga Manufacturing (''Seaga II''), the alleged alter ego of Seaga I. The government seeks discovery of tax returns from all three defendants for periods 1989 through 1992, with an additional two years on either side. Defendants objected and the Plaintiff now brings a Motion to Compel. For the following reasons, Plaintiff's Motion to Compel is granted in part and denied in part.

Background

On January 15, 1993, Seaga I ceased doing business and transferred all its assets to Seaga II. Steven Chesney was the sole stockholder and principal officer of both Seaga I and II. After the transfer, Seaga II obtained a loan from Southwest Financial Capital Company (''Southwest''), who filed and perfected its security interest in all Seaga II's assets. On May 8, 2001, Plaintiff filed an Amended Complaint naming Seaga I, Seaga II, and Southwest as defendants. In its Amended Complaint, Plaintiff named Southwest a defendant ''because it may claim an interest in the property that is the subject of this action.'' (Pl's Amended Complaint). Plaintiff named Seaga II as a defendant because it is the alleged alter ego and possessor of assets fraudulently transferred from Seaga I. (Pl's Substitute Amended Complaint). It should be noted that Plaintiff's complaint asserts no allegation of wrongdoing on the part of Southwest.

Discussion

Under Federal Rules of Civil Procedure 26(b), ''[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, ... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.'' Fed. R. Civ. P. 26(b)(1). The 2000 amendments to Rule 26(b)(1) narrowed the scope of discoverable material with the inclusion of the term ''relevant to the claim or defense of any party'' and the removal of the term ''relevant to the subject matter involved in the pending action.'' *Compare State of Illinois v. Tri-Star Industrial Lighting, Inc.*, No 99 C 8156, 2000 WL 1508248, 1 (N.D. Ill. Oct. 6, 2000)(stating ''The key phrase in this definition—'relevant to the subject matter involved in the pending action'--has been construed broadly ....)(citing *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 351 (1978)), *with Behler v. Hanlon*, 199 F.R.D. 553, 555 (D. Md. 2001)(stating the 'new version of Rule 26(b)(1) ... defines the scope more narrowly ....') However, the narrowing of Rule 26(b) does not mean that a fact must be alleged in a pleading for the party to be entitled to discovery or information concerning that fact. Rather, it means that the fact 'must be germane to a specific claim or defense asserted in the pleading for information concerning it to be a proper subject of discovery.' *See* 6 Moore's Federal Practice, § 26.41 (Matthew Bender 3d ed.). With this in mind, this court will address the tax returns as to each defendant individually.

Seaga I's Tax Returns

[1] Defendants, in their response to Plaintiff's motion to compel, state ''[t]o the extent copies of Seaga Corporation of Illinois' income tax returns are in existence for the period 1989 through 1992, no objection is being made.'' (Defendants' Response to Plaintiff's Motion to Compel). Therefore, this court orders production of Seaga I's tax returns for the period 1989 through 1992 to the Plaintiff. Further, because it appears that Seaga I was in operation until January 15, 1993, this court orders Defendant, Seaga I, to produce 1993 tax returns, if any were filed.

Seaga II's Tax Returns

This court now turns to Seaga II's tax returns. Plaintiff argues that Seaga II's tax returns are discoverable because the ''financial information ... may shed light on the value of the assets transferred, the sufficiency of consideration, [and] sources of payment ....'' (Pl's Motion to Compel at 6). Defendants argue that ''there is nothing included in a tax return which is relevant to a fraudulent conveyance theory.'' (Def.s' Response to Plaintiff's Motion to

Compel). Although this court tends to agree with Defendants as to the fraudulent conveyance claim, this court recognizes that count two of the complaint is an alter ego claim and finds that tax return are relevant, and thus discoverable. *See Daval Steel Products v. M/V Fakredine*, 951 F.2d 1357, 1368 (2d Cir. 1991)("We are persuaded that information concerning financial transactions and movements of corporate assets, subsequent to the transaction giving rise to this litigation was 'reasonably calculated to lead to the discovery' of evidence admissible on the issue of alter ego liability within the meaning of Rule 26(b)(1).") However, Plaintiff in its complaint states "Seaga II is an Illinois Corporation established December 21, 1992." As such, tax returns for the period 1989 through 1991 would be impossible. Therefore, this court orders Defendants to produce tax returns for Seaga II for the period 1992 through 1994.

Southwest's Tax Returns

Lastly, this court turns to Southwest's tax returns. Plaintiff argues that Southwest's tax returns are discoverable because the "financial information is relevant as [to] ... whether the alleged loan from Southwest [to Seaga II] is bona fide or part of a scheme to defraud creditors." (Pl's Motion to Compel). Defendants correctly argue against Plaintiff's Motion to Compel because the "only claim the government advances is that its lien should be superior to Southwest's." (Def.s' Response to Plaintiff's Motion to Compel at 2). Defendants' argument is supported by Plaintiff's inclusion of Southwest only because "it may claim an interest in the property that is subject to this action," and the complete lack of any allegations against Southwest in Plaintiff's Amended Complaint. (Pl's Amended Complaint). Under Revised Rule 26(b), this court finds that any tax returns of Southwest are not relevant to any claim or defense and thus not discoverable. Plaintiff may, however, attempt to gain information on the loan from Southwest to Seaga II through discovery, but because there has been no allegation that Southwest is part of a scheme to defraud, this court does not find any reason to compel Southwest to produce its tax returns.

Conclusion

For the above stated reasons, this court orders that Plaintiff's Motion to Compel is granted in part and denied in part. This court orders Seaga I to produce its tax returns for the period 1989 through 1992 and 1993, if filed, within 21 days of the date of this order. Additionally, this court orders Seaga II to produce its tax returns for the period 1992 through 1994 within 21 days of the date of this order. Finally, this court denies Plaintiff's Motion to Compel as to the tax returns of Southwest.

ENTER:

P. MICHAEL MAHONEY, MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

DATE: 9/11/02

¶2002-5374

UNITED STATES OF AMERICA, PLAINTIFF v. Willie GREEN, JR., DEFENDANT. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 00-4341, Sept. 12, 2002. District Court affirmed in part, and reversed and remanded in part. Decision for Taxpayer in part and for Govt. in part.

1. Tax crimes—conspiracy—sentencing. Taxpayer's drug conviction relating to multi-count drug and tax evasion conspiracy was affirmed: taxpayer's evidentiary and prosecutorial misconduct challenges were rejected. Also, grouping for sentence calculation purposes of taxpayer's drug and failure to appear at sentencing hearing convictions was proper; but sentence was vacated and remanded based on court's failure to give taxpayer's attorney right to allocute. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §7201.

ARGUED: Irwin G. Lichter, LAW OFFICES OF IRWIN G. LICHTER, Miami, Florida, for Appellant. Michael J. Burns, ASSISTANT UNITED STATES ATTOR-

NEY, Columbus, Ohio, for Appellee. ON BRIEF: Irwin G. Lichter, LAW OFFICES OF IRWIN G. LICHTER, Miami, Florida, for Appellant. Michael J. Burns, ASSISTANT UNITED STATES ATTORNEY, Columbus, Ohio, for Appellee.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT,

Appeal from the United States District Court for the Southern District of Ohio at Columbus.

Joseph P. Kinneary, District Judge.

Before: GUY and BATCHELDER, Circuit Judges; COHN, Senior District Judge.*

OPINION

AVERN COHN, Senior District Judge.

I. Introduction

This is a criminal case. Defendant-Appellant Willie Green (Green) appeals from his conviction and sentence. He raises five errors, which include evidentiary errors, prosecutorial misconduct, an error in sentencing, and a claim that his counsel was denied a right to allocute at sentencing. We find no merit to Green's assignments of error with one exception - that the district court denied his counsel's right to allocute at sentencing. Accordingly, we affirm in part, reverse in part, and remand for resentencing.

II. Background

A.

On January 19, 1990, Green was charged with several others in a 37-count indictment in a multi-count drug conspiracy and tax evasion conspiracy/criminal enterprise. Green was charged in Count 1 with conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. § 846, and in Counts 21, 27, 31, and 33 with possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

Green's co-defendants were Robin Warner, Michelle Angel, Joyce Richmond, Juniata Redd, Claudette Foster, and Linda Hardy. Green, Warner, Angel, Richmond and Redd went to trial on May 7, 1990. Foster and Hardy pled guilty and testified for the government. On May 18, 1990, Green was found guilty by a jury as charged in the indictment. Green was released on bond pending sentencing.

On August 24, 1990, Green failed to appear for sentencing and a bench warrant was issued. Meanwhile, Green's co-defendants were sentenced and appealed their convictions, which a panel of this court affirmed in United States v. Warner, 971 F.2d 1189 (6th Cir. 1992).

Almost ten years later, on April 26, 2000, Green was arrested on the outstanding warrant. He was living in Florida under an assumed name. On June 27, 2000, a single count information was filed charging him with failing to appear, in violation of 18 U.S.C. § 3146(a)(1) and § 3146(b)(1)(A)(i). On July 27, 2000, Green pled guilty to the information and the cases were consolidated for sentencing. The plea agreement contained no agreement as to sentencing, other than to state that Green understood he faced a maximum penalty of 10 years on the failure to appear charge and that any sentence imposed would be consecutive to his drug sentence.

On October 12, 2000, Green was sentenced to 151 months imprisonment on the drug charges and 14 consecutive months on the failure to appear charge, for a total of 165 months imprisonment.

B.

The factual background leading to Green's conviction is as follows:

> Members of the organized crime drug enforcement task force in Columbus, Ohio, began investigating Robin Warner's alleged drug network in August of 1988. The investigation was spearheaded by the Internal Revenue Service, the Drug Enforcement Administration and the Columbus Police Department's Organized Crime Bureau.
>
> Working with the United States Attorney's office, the Task Force conducted a

* The Honorable Avern Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

lengthy grand jury investigation that involved the service of over 200 grand jury subpoenas. Special Agent Denise Pickering (IRS) and Detective Ronald Price utilized a confidential informant, Kevin Richmond, to record inculpatory conversations between co-conspirators Linda Hardy, Joyce Richmond and Robin Warner, the latter being interviewed July 11, 1989. Prior to the interview Pickering advised Ms. Warner that she was a target of the Grand Jury's investigation. Pickering also advised Warner of her Miranda rights. During the interview Ms. Warner cited two false sources of income, gifts and inheritance.

On July 24, 1989, Pickering and Price interviewed Juniata Redd at the residence of Redd's parents. Redd was advised of the existence of the federal grand jury investigation, and the agents explained they were investigating a drug organization headed by Robin Warner. Redd admitted she had previously taken paid trips with Warner, her cousin, to Atlanta before but maintained that she had discontinued such activity.

Marvin Warner, husband of Robin Warner, was arrested and interviewed by Special Agent Pickering and Detective Price on September 1, 1989. A search warrant was then obtained for Mr. Warner's apartment. Thereafter, Mr. Warner became a government witness. Marvin Warner was charged with two federal narcotics violations and entered into a plea agreement which required his truthful testimony.

Several other co-conspirators, Claudette Foster, Effie Thomas, Linda Hardy, John Davie and Leo Buggs, were interviewed and re-interviewed. Each provided detailed documentary information (bank records, pager records and personal records) linking Robin Warner to cocaine trafficking. Handwriting exemplars were received from each defendant and were compared with hotel reservation cards at several Atlanta hotels and other related documents. Positive handwriting identifications were made for Warner, Angel and Richmond. An additional probable handwriting identification was made for Angel. Similarities in handwriting were found to exist in questioned documents examined relating to defendant Willie Green.

Voluminous telephone records, car rental records, hotel registrations, credit card bills and bank records were utilized to trace and corroborate each alleged cocaine trip to Atlanta, Georgia. Summary exhibits were prepared by Price and Pickering for each charged trip to Atlanta.

The evidence adduced at trial established that, during the calendar years 1985–1988, Robin Warner failed to report a minimum of $217,829.00 on her federal income tax returns. A review of the record indicates that the vast majority of the unreported income was determined by documenting purchases of large-ticket luxury items: a new house, a swimming pool, an entertainment system, a sable bedspread for $5,577.75, ten sable pillows for $1,300.00, furniture invoices, expensive furs and clothing, a pool table and ten rental properties. Witnesses established that Robin Warner and her assistants counted thousands of dollars prior to making each trip to Atlanta to meet an individual named "Kenny." Several witnesses knew cocaine and money were stored in a safe in Robin Warner's son's bedroom closet. An examination of the hotel records revealed Robin Warner and her assistants would drive to Atlanta, remain less than 24 hours and immediately return. Telephone toll records indicated that a call would be placed to Willie Green's residence and/or business in Miami after Ms. Warner arrived in Atlanta. Thereafter, a phone call from Green's residence would be placed to a phone number in greater Atlanta. A review of the hotel registration cards indicates a check-out immediately following the call. Hotel bills indicating occupancy by Robin Warner, Joyce Richmond and Juniata Redd were paid with Robin Warner's American Express cards. Marvin Warner and Kevin Richmond identified the pho-

tograph of Willie Green as "Kenny," the drug supplier from Miami.

. . . .

Testimony at trial, if believed, established that the following individuals were supervised or managed by Robin Warner: the three housekeepers (Hardy, Foster and Thomas), Kevin and Joyce Richmond, Marvin Warner, Willie Cross [sic], Michelle Angel and Juniata Redd.

Warner, 971 F.2d at 1192–94 (internal footnote omitted).

Green was primarily implicated by the testimony of Marvin Warner, the ex-husband of Robin Warner who pled guilty and testified for the government, and Kevin Richmond, Joyce Richmond's husband. Green was the supplier of the cocaine used in the conspiracy.

Green claims five errors:

1. The trial court erred in allowing the government to call Marvin Warner's attorney to testify, in violation of the witness sequestration order, and in further limiting the defendant's cross-examination of Warner.
2. The prosecutor's comments during closing argument constituted impermissible comments on the burden of proof and on defendant's failure to testify.
3. The prosecutor improperly questioned defense witnesses about an alleged seizure of $18,000 from the defendant in 1979.
4. The district court erred in its calculation of the sentencing guidelines for the failure to appear charge in connection with the drug offense.
5. The trial court through misleading comments improperly limited counsel's right to allocution on behalf of his client.

Each claimed error will be separately considered.

III. Analysis

A. Marvin Warner's Attorney's Testimony

1.

[1] Green argues that the district court erred in allowing Marvin Warner's attorney to testify despite the presence of a witness sequestration order and that the trial court should have granted a mistrial because of this. Green also argues that the trial court improperly limited the cross-examination of Marvin Warner's attorney, in violation of his right of confrontation. The district court's rulings are reviewed for an abuse of discretion. See United States v. Gibson, 675 F.2d 825, 835–36 (6th Cir. 1982); see also United States v. Wall, 130 F.3d 739, 745 (6th Cir. 1997) (holding that the court reviews a district court's denial of a motion for a mistrial for an abuse of discretion which "exists when the reviewing court is firmly convinced that a mistake has been made.")

The record does not contain a sequestration order. However, the government appears to concede that such an order was in place at trial, and a review of the relevant portions of the transcript tends to indicate that such an order was in place -- both the government and Green's counsel referred to such an order. Thus, we assume that a sequestration order was in fact in effect at trial.

2.

Federal Rule of Evidence 615 provides that: "at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses." This rule serves two purposes: (1) it prevents witnesses from tailoring testimony to that of other witnesses; and (2) it aids in detecting false testimony. United States v. Warren, 578 F.2d 1058 (5th Cir. 1978) (en banc) on reh'g. 612 F.2d 887 (en banc), cert. denied, 446 U.S. 956 (1980). It is well-established that a violation of a sequestration order does not automatically bar a witness' testimony. United States v. Bostic, 327 F.2d 983 (6th Cir. 1964).

In Gibson, supra, a panel of this court explained:

> Most authorities agree that "particular circumstances" sufficient to justify exclusion of a witness are indications that the witness has remained in court with the "consent, connivance, procurement

or knowledge'' of the party seeking his testimony. United States v. Kiliyan, 456 F.2d at 560; Taylor v. United States, 388 F.2d 786 (9th Cir. 1967); United States v. Bostic, 327 F.2d 983 (6th Cir. 1964); United States v. Schaefer, 299 F.2d 625 (7th Cir.), cert. denied, 370 U.S. 917, 82 S.Ct. 1553, 8 L.Ed.2d 497 (1962).

Gibson, 675 F.2d at 835–36.

Federal Rule of Evidence 611 limits cross-examination to the ''subject matter of the direct examination.'' See also United States v. Moore, 917 F.2d 215 (6th Cir. 1990).

3.

Here, Marvin Warner testified on direct examination that the cocaine supplier was an individual he knew as ''Kenny Green'' and identified Green at trial. On cross-examination, however, Green's counsel produced a letter written by Marvin Warner to his ex-wife Robin Warner in which he wrote: ''I have also heard someone named Willie Green got picked up in Florida. That was the name in the paper under your write-up. Who is that?''

The government was not aware of the existence of the letter prior to trial. As a result, the government sought to call James Tullis Rogers (Rogers), Marvin Warner's attorney, to question him regarding Marvin Warner's knowledge of Green's identity. Marvin Warner gave a limited waiver of attorney-client privilege for Rogers to testify in this regard. On direct-examination, Rogers testified, apparently over an objection which is not on the record, that he received a phone call from Marvin Warner shortly after his arrest in which he stated that he remembered ''Kenny's'' last name. Rogers then testified that he called a Detective Price to relay the information. Thus, Roger's direct-examination was confined as to how and when Rogers first heard from Marvin Warner regarding Green's identity.

During cross-examination by Robin Warner's attorney, Rogers admitted that he had been present for part of Marvin Warner's testimony. During cross-examination by Green's counsel, the lawyer attempted to ask Rogers why Marvin Warner sought his representation. The trial court refused to allow this line of questioning, based on the limited waiver of attorney-client privilege and because the questioning was outside of the scope of the direct examination.[1]

4.

From our review of the record, we find no violation of the sequestration order. As the government points out, it did not know of the existence of the letter prior to Marvin Warner's cross-examination. Thus, the government could not have known to have Rogers absent during Marvin Warner's testimony. Under these circumstances, the district court did not abuse its discretion in permitting Rogers to testify or in denying Green's motion for a mistrial because of Rogers' testimony.

We also conclude that the trial court properly limited Green's counsel from questioning Rogers about his representation of Marvin Warner as being outside the scope of direct-examination and outside the limited waiver of attorney-client privilege. As such, there was no violation of Green's right of confrontation.

B. Prosecutorial Misconduct

1.

Green says that the prosecutor in closing argument urged him to explain ''why'' certain facts were present in the case in an attempt to improperly shift the burden of proof and violate his constitutional right not to testify. The government argues that Green's counsel did not properly object to the government's comments and that the complained of comments were simply rhetorical questions for the jury to answer to themselves during deliberations.

Allegations of prosecutorial misconduct contain questions of fact and law that we review de novo. United States v. Francis, 170 F.3d 546, 549 (6th Cir. 1999). We must first examine whether this incident

[1] Incidentally, Marvin Warner testified on redirect that he wrote the letter as a ruse.

amounts to prosecutorial misconduct, and if so, whether it was so egregious as to warrant a new trial. Id. In reviewing a claim of prosecutorial misconduct, we first determine whether the statement was improper. United States v. Francis, 170 F.3d 546, 549 (6th Cir. 1999). To warrant the reversal of a conviction, the improper statements must also be flagrant, which requires consideration of the following factors: "1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused." Id. at 549–50.

2.

Green points to the following passages from the government's closing argument to support his claim of prosecutorial misconduct:

> Another thing that they are sure to do, and so I'm going to bring it up now, is every lawyer that gets up here is going to tell you there is no case here, there is no drug case because you don't have any cocaine. First of all, you do have cocaine, and you know very well that this went on at a continuous and constant basis. And if you think that there is no cocaine in this case, then you ask them to explain why Ruby Melton isn't married anymore; you ask them to explain why Claudette Foster and Juniata Redd had to go through rehab; you ask them why Curtis Slater spent the entire bulk of his life savings, and you ask them why they caught Marvin Warner with the cocaine at the Whitehall motel. There's plenty of cocaine in this case.
>
> . . . .
>
> The repeated phone activity between Robin Warner, Michelle Angel and Willie Green's home and business. They're going to tell you that this is all about some goddaughter. Then why if it's about a goddaughter, do you try to reach somebody by a pager I suggest to you that this is about the dope business. It's not about calls to set up meetings down in Florida so we could all get together and discuss the kids.
>
> . . . .
>
> Furthermore, on that pen register you're going to see cellular phone telephone calls. Why are cellular phones calling Robin's house. You're going to see pager numbers. Why are these pager numbers on this pen register stuff? And if she's really in the flower business and she only has one driver and two vehicles, what does she need 10 pagers for?
>
> . . . .
>
> The same thing happens with his van. Isn't it odd that a guy takes out a van and he lists his address not as his address down in Florida; but the dope van that he uses to deliver dope in, he keeps that as a Georgia License: Highway 332, Post Office Box 84. What kind of address is that for a guy who's a businessman, a legitimate businessman from Miami Florida?

3.

As an initial matter, we reject the government's argument that Green's counsel failed to properly object. Green's counsel objected to the closing argument and moved for a mistrial at the end of the closing argument. The fact that Green's counsel did not object continuously during the closing after the alleged improper remarks does not mean that this issue is not preserved for review.

However, having reviewed the challenged comments together with the entire closing argument, we do not find that they constitute prosecutorial misconduct or an attempt to shift the burden of proof. The questions posed by the government were presented in such a way as to indicate that they were for the jury to decide during its deliberations. There is nothing improper about posing rhetorical questions within the broad scope of a closing argument. The district court did not abuse its discretion in so concluding.

C. Questioning about the Airport Incident

1.

The government asked Green's wife, Ruth Green, and William Roberts, a longtime personal friend of Green's, who were both character witnesses for Green, if either of them were aware of an alleged seizure of $18,000 from Green at the Atlanta airport in 1979. Both denied any knowledge of the incident. The government did not pursue any further questioning about the incident.

Green argues that the government's questions were an improper attempt to assert facts not in evidence and the questions were unfairly prejudicial and should have been excluded under Fed. R. Civ. P. 403. The government says that the questions were proper cross-examination of character witnesses.

A district court's evidentiary rulings are reviewed for abuse of discretion. Hancock v. Dodson, 958 F.2d 1367 (6th Cir. 1992).

2.

Federal Rule of Evidence 405(a) establishes the procedure for introducing character evidence and the general scope of cross-examination, stating in part that "[i]n all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct." Fed. R. Evid. 405(a). This court has noted that "relevant specific instances of conduct are only instances going to the accuracy of the character witnesses' testimony. If ... direct testimony is addressed to community reputation, inquiry may be made about conduct, and even about charges, which may have come to the attention of the relevant community." United States v. Curtis, 644 F.2d 263, 268 (6th Cir. 1981).

3.

Here, both Ruth Green and William Roberts testified on direct examination as to Green's good character and that Green was a law-abiding citizen. Given this testimony, the government could inquire as to whether they were aware of the airport incident. When both denied having any knowledge of the incident, the government properly ended this line of questioning. The district court therefore did not abuse its discretion in allowing this line of questioning.

D. Sentencing Calculation

1.

The presentence report (PSI) grouped Green's drug and failure to appear convictions together for calculating his sentencing range. The drug conviction had a base offense level of 32 and two levels were added for obstruction of justice under U.S.S.G. § 3C1.1, producing an adjusted offense level of 34. The failure to appear conviction had a base offense level of 6. Nine levels were added under U.S.S.G. § 2J1.6(b)(2)(A) as a special offense characteristic because the underlying offense, the drug conviction, was punishable by a term of imprisonment of 20 years, producing an adjusted offense level of 15. As explained more fully below, the grouping rules require that the highest adjusted offense level be used to calculate the total offense level. In Green's case, this was level 34. Green's criminal history category was calculated as category I, producing a sentencing range of 151–188 months. Because any sentence imposed for a failure to appear conviction must be consecutive, see 18 U.S.C. § 3146, the PSI noted that Green's total sentence, including any sentence for his failure to appear, could not exceed 188 months.

Green objected to the PSI calculations and the two-level increase for obstruction of justice, arguing that the failure to appear calculation should be made separately rather than as an upward adjustment to his drug conviction. In other words, Green argued that the two offenses should not be grouped together.

The district court denied the objection in a written opinion, noting a circuit split on the issue of grouping, and followed a majority of circuits holding that grouping is permissible under the circumstances.

2.

Green initially argues for the first time on appeal that the 1990 edition of the guidelines should have been used to calculate his sentence instead of the 1998 edition. Green argues that the 1990 edition does not call for grouping his offenses, and if his convictions were not grouped, but rather separately counted, his guideline range for the drug conviction would have been 121–151 months and his guideline range for the failure to appear conviction would have been 12–18 months or 18–24 months. Because according to Green, the possibility of a lower sentence was present, he argues that the use of the 1998 edition raises an ex post facto problem.

Because Green did not challenge the application of the 1998 edition before the district court, we review the issue for plain error. United States v. Fountain, 2 F.3d 656, 669–70 (6th Cir. 1993).

An ex post facto problem exists where "the Guidelines in effect at the time of sentencing provide for a higher range than those in effect at the time the crime was committed." United States v. Milton, 27 F.3d 203, 210 (6th Cir. 1994) (quotation and citation omitted). The relevant language is "in effect at the time the crime was committed." Green argues that the failure to appear offense occurred, or was committed on August 24, 1990, when he failed to show up for sentencing, and therefore the 1990 edition should apply. The government argues that the failure to appear offense is a "continuing offense," and therefore was not "committed" for purposes of the guidelines until later.

This circuit has not considered whether the failure to appear is a continuing offense. The Second, Ninth and Tenth Circuits have considered the issue and hold that a failure to appear is a continuing offense. See United States v. Lopez, 961 F.2d 1058 (2d Cir. 1992); United States v. Gray, 876 F.2d 1411 (9th Cir. 1989); United States v. Martinez, 890 F.2d 1088 (10th Cir. 1089). We agree.

The Supreme Court has stated that an offense will be deemed continuing when "the explicit language of the substantive criminal statute compels such a conclusion or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." Toussie v. United States, 397 U.S. 112, 115 (1970). In this vein, the Supreme Court has found that the crime of escape is a continuing offense. See United States v. Bailey, 444 U.S. 394, 413 (1980).

The statutory language of 18 U.S.C. § 3146, the failure to appear statute, does not shed any light on whether Congress intended a failure to appear to be a continuing offense, but simply provides in part that:

> (a) Offense.--Whoever, having been released under this chapter knowingly--
>
> (1) fails to appear before a court as required by the conditions of release; or
>
> (2) fails to surrender for service of sentence pursuant to a court order; shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 3146.

However, considering the nature of the crime of a failure to appear compels the conclusion that a failure to appear is a continuing offense. Like the crime of escape, the crime is not complete on the day that a defendant fails to appear for sentencing, but rather continues until the defendant is apprehended and finally appears for sentencing. A defendant who fails to appear for sentencing poses the same societal threat as a defendant who has escaped -- both are convicted criminals obligated to serve, or waiting to serve, a sentence. Each day that the defendant fails to appear enhances the threat and the dangers posed by the delay and demonstrates the continuing nature of the offense. We therefore join our sister circuits in holding that a failure to appear is a continuing offense. Accordingly, the 1998 edition of the guidelines applies to Green's sentence.

We also note that even if the guidelines changed from the time Green initially failed to appear in 1990 and when he was sentenced, it was not a change to the

guidelines which disadvantaged him, but rather his election to continue his criminal activity in 1990 by failing to appear for sentencing.

3.

Green also argues, as he did before the district court, that his offenses should not have been grouped together even under the 1998 edition because grouping is not consistent with the failure to appear statute. This issue involves interpreting the guidelines, which is a question of law subject to de novo review. United States v. Edgecomb, 910 F.2d 1309, 1311 (6th Cir. 1990).

The punishment provision of the failure to appear statute provides in relevant part:

> (1) The punishment for an offense under this section is-
>
> (A) if the person was released in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction for-
>
> (i) an offense punishable by death, life imprisonment, or imprisonment for a term of 15 years or more, a fine under this title or imprisonment for not more than ten years, or both;
>
> (ii) an offense punishable by imprisonment for a term of five years or more, a fine under this title or imprisonment for not more than five years, or both;
>
> (iii) any other felony, a fine under this title or imprisonment for not more than two years, or both;
>
> . . . .
>
> (2) A term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense.

18 U.S.C. § 3146(b) (emphasis added).

As seen from above, the failure to appear statute does not specify a set term of imprisonment to be imposed; instead, it states that a violation may be punished by a fine, imprisonment, or both. See 18 U.S.C. § 3146(b). The statute's only requirement is that, if a sentence of imprisonment is imposed (as opposed to simply a fine), that sentence must run consecutively to any sentence imposed for the underlying offense(s).

In addition to the above statutory language, there are three relevant guidelines provisions with respect to grouping. First, U.S.S.G. § 3D1.1 sets forth the procedure for determining an overall offense level on multiple counts that are grouped. Section 3D1.1(a) provides:

> When a defendant has been convicted of more than one count, the court shall:
>
> (1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts (''Groups'') by applying the rules specified in § 3D1.2.
>
> (2) Determine the offense level applicable to each Group by applying the rules specified in § 3D1.3.
>
> (3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in § 3D1.4.
>
> (b) Exclude from the application of I§§ 3D1.2–3D1.5 any count for which the statute (1) specifies a term of imprisonment to be imposed; and (2) requires that such term of imprisonment be imposed to run consecutively to any other terms of imprisonment. Sentences for such counts are governed by the provisions of § 5G1.2.

Subsection (b) was added in 1998 by amendment. See Appendix C, amendment 579 (1998). Amendment 579 was intended ''to clarify how several guidelines provisions, including those on grouping multiple counts of conviction, work together to ensure an incremental, consecutive penalty for a failure to appear count.'' U.S.S.G. Supplement to App. C, Amendment 579 (1998).

The Commentary to § 3D1.1 states:

> Application Note:
>
> 1. Subsection (b) applies if a statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such

term of imprisonment be imposed to run consecutively to any other term of imprisonment. See, e.g., 18 U.S.C. § 924(c) (requiring mandatory minimum terms of imprisonment, based on the conduct involved, to run consecutively). The multiple count rules set out under this Part do not apply to a count of conviction covered by subsection (b). However, a count covered by subsection (b) may affect the offense level determination for other counts. For example, a defendant is convicted of one count of bank robbery (18 U.S.C. § 2113), and one count of use of a firearm in the commission of a crime of violence (18 U.S.C. § 924(c)). The two counts are not grouped together pursuant to this guideline, and, to avoid unwarranted double counting, the offense level for the bank robbery count under §2B3.1 (Robbery) is computed without application of the enhancement for weapon possession or use as otherwise required by subsection (b)(2) of that guideline. Pursuant to 18 U.S.C. § 924(c), the mandatory minimum five-year sentence on the weapon-use count runs consecutively to the guideline sentence imposed on the bank robbery count. See §5G1.2(a).

Unless specifically instructed, subsection (b) does not apply when imposing a sentence under a statute that requires the imposition of a consecutive term of imprisonment only if a term of imprisonment is imposed (i.e., the statute does not otherwise require a term of imprisonment to be imposed). See, e.g., 18 U.S.C. § 3146 (Penalty for failure to appear); 18 U.S.C. § 924(a)(4) (regarding penalty for 18 U.S.C. § 922(q) (possession or discharge of a firearm in a school zone)); 18 U.S.C. § 1791(c) (penalty for providing or possessing a controlled substance in prison). Accordingly, the multiple count rules set out under this Part do apply to a count of conviction under this type of statute.

Background: This section outlines the procedure to be used for determining the combined offense level. After any adjustments from Chapter 3, Part E (Acceptance of Responsibility) and Chapter 4, Part B (Career Offenders and Criminal Livelihood) are made, this combined offense level is used to determine the guideline sentence range. Chapter Five (Determining the Sentence) discusses how to determine the sentence from the (combined) offense level; §5G1.2 deals specifically with determining the sentence of imprisonment when convictions on multiple counts are involved. References in Chapter Five (Determining the Sentence) to the "offense level" should be treated as referring to the combined offense level after all subsequent adjustments have been made.

(emphasis added).

Also important to consider is U.S.S.G. § 2J1.6, the guideline regarding failure to appear, providing in part that:

(a) Base Offense Level:

(1) 11, if the offense constituted a failure to report for service of sentence; or

(2) 6, otherwise.

(b) Specific Offense Characteristics

. . . .

(2) If the base offense level is determined under subsection (a)(2), and the underlying offense is--

(A) punishable by death or imprisonment for a term of fifteen years or more, increase by 9 levels

. . . .

Section 2J.16 was also amended in 1998 by Amendment 579. In particular, Application Note 3 was added, which provides:

3. In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. See §5G1.3(a). The guideline range for the failure to appear count is to be determined independently and the grouping rules of §§3D1.1–3D1.5 do not apply.

However, in the case of a conviction on both the underlying offense and the failure to appear, other than a case of failure to appear for service of sentence, the failure to appear is treated under §3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense, and the failure to appear count and the count or counts for the underlying offense are grouped together under §3D1.2(c). (Note that 18 U.S.C. § 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, although if a sentence of imprisonment on the failure to appear count is imposed, the statute requires that the sentence be imposed to run consecutively to any other sentence of imprisonment. Therefore, unlike a count in which the statute mandates both a minimum and a consecutive sentence of imprisonment, the grouping rules of §§3D1.1–3D1.5 apply. See §3D1.1(b), comment. (n.1), and §3D1.2, comment. (n.1).) The combined sentence will then be constructed to provide a "total punishment" that satisfies the requirements both of §5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. § 3146(b)(2). For example, if the combined applicable guideline range for both counts is 30–37 months and the court determines that a "total punishment" of 36 months is appropriate, a sentence of 30 months for the underlying offense plus a consecutive six months' sentence for the failure to appear count would satisfy these requirements. (Note that the combination of this instruction and increasing the offense level for the obstructive, failure to appear conduct has the effect of ensuring an incremental, consecutive punishment for the failure to appear count, as required by 18 U.S.C. § 3146(b)(2).)

(emphasis added).

The third relevant guideline provision is U.S.S.G. § 3D1.2, which states that "all counts involving substantially the same harm shall be grouped together in a single group." Section 3D1.2(c) defines "substantially the same harm" to include "when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts." Clearly, this is true with a failure to appear and the underlying offense, as the failure to appear is a specific offense characteristic of the drug offense.

As to case law on the issue of grouping, we first note that prior panels of this court have found that grouping a failure to appear with the underlying offense is proper. As one panel stated, prior to the 1998 amendments:

> The probation office outlined the proper method for determining a defendant's sentence when he is both convicted of failure to appear and found to have obstructed justice by failing to appear during the prosecution of the underlying offense. Under this method, both counts are grouped together under U.S.S.G. § 3D1.2. See United States v. Beckner, 983 F.2d 1380, 1384 (6th Cir. 1993) ("if an obstruction [of justice] offense has been used to adjust the sentence for a related offense, then in sentencing for the obstruction offense the court is required to group that offense with the related offense even when the two were separately charged and separately tried and are being separately sentenced.") The enhanced offense level for the underlying offense is compared to the offense level under § 2J1.6 . . . and the higher offense level only is used to impose a single sentence.

United States v. Flores, No. 93-3771, 1994 WL 163766 (6th Cir. May 2, 1994) (unpublished). See also United States v. Stokes, No. 96-6440, 1998 WL 13409 (6th Cir. Jan. 7, 1998) (per curiam) (unpublished) (noting that under commentary to § 2J1.6 precludes grouping a failure to appear count on a failure to appear for service of sentence, as opposed to a failure to appear for sentencing).

We further note that the grouping issue is the subject of a circuit split, which this circuit has not clearly addressed in a published opinion. Several of our sister circuits have similarly concluded that group-

ing the failure to appear offense with the underlying offense for sentencing is appropriate based on the guidelines and the commentary. See United States v. Gigley, 213 F.3d 503 (10th Cir. 2000); United States v. Kirkham, 195 F.3d 126, 130–32 (2d Cir. 1999); United States v. Jernigan, 60 F.3d 562, 564 (9th Cir. 1995); United States v. Pardo, 25 F.3d 1187, 1193–94 (3d Cir. 1994); United States v. Agoro, 996 F.2d 1288, 1291 (1st Cir. 1993); United States v. Lechuga, 975 F.2d 397, 401 (7th Cir. 1992). See also United States v. Magluta, 203 F.3d 1304, 1305 (11th Cir. 2000) (remanding the case to the district court for it to apply § 2J1.6 as amended in 1998), vacating in part 198 F.3d 1265 (11th Cir. 1999).

The Eighth and Fifth Circuits, on the other hand, have found that the sentencing guidelines in conflict with the statutory language of § 3146(b)(2) regarding the imposition of a consecutive sentence and have therefore refused to group the failure to appear offense with the underlying offense for sentencing. United States v. Crow Dog, 149 F.3d 847, 849 (8th Cir. 1998); United States v. Packer, 70 F.3d 357, 360 (5th Cir. 1995). These circuits rely on the Supreme Court holding that a guideline or guideline commentary is not authoritative if it violates a federal statute. See Stinson v. United States, 508 U.S. 36, 38 (1993).

We believe that the majority of the circuits have the better view -- the sentencing guidelines, U.S.S.G. §§ 3D.1, 2J1.6, and 3D1.2, clearly call for grouping a failure to appear with the underlying offense and do not violate the consecutive sentence requirement under 18 U.S.C. § 3146(b)(2). As the district court explained:

> The statute governing failure to appear simply states that if a term of imprisonment is imposed for failure to appear, it must run consecutive to the underlying offense. See 18 U.S.C. § 3146(b)(2). The creative approach taken by the Sentencing Guidelines, which enhances the underlying offense [for obstruction of justice] and then designates a portion of the total punishment as the consecutive sentence for the failure to appear offense, does not offend the plain language of the statute. The court still technically issues a separate, consecutive sentence for the failure to appear offense. In fact, Amendment 579, added in 1998, attempted to clarify the guidelines regarding grouping of the failure to appear offense . . . .

Additionally, we note that grouping does not amount to double counting. Although in calculating the base offense level for the drug offense, two points were added for obstruction of justice based on the failure to appear, the failure to appear conviction was separately calculated. Because under the grouping rules the highest offense level is used, the offense level for the failure to appear conviction, which in this case was 15, was not used in determining Green's ultimate sentencing range. Rather, only the offense level for the drug conviction, which takes into consideration the failure to appear by imposing the two-point enhancement, was used. See Offense Level Computations, attached as Appendix A. Overall, Green's sentencing range was correctly calculated under the guidelines.

E. Allocution at Sentencing

1.

The district court at sentencing indicated that he was going to sentence Green at the bottom of the guidelines range, which was 151 months. Green's counsel then said that his presentation would be shorter. However, the district court then imposed a 151-month sentence for the drug conviction and a 14-month consecutive sentence for the failure to appear conviction. When Green's counsel attempted to object to the 165-month sentence, the district court declined to entertain his comments.

Green argues that the district court misled his counsel at sentencing into shortening his sentencing arguments and denied his counsel a right of allocution. Green also argues that the district court's imposition of a harsher sentence than indicated denied him due process.

The government argues that Green's counsel and the district court merely misunderstood one another, that the district

court already had in mind the sentence it was going to impose regardless of what Green's counsel said, and in any event, the sentence imposed was within the guidelines range.

This court reviews Green's claim de novo. United States v. Wolfe, 71 F.3d 611, 614 (6th Cir. 1995).

2.

It is clear that Green's counsel had a right to allocute at sentencing. Federal Rule of Criminal Procedure 32(c)(3) states in part that "before imposing sentence, the court must . . . afford defendant's counsel an opportunity to speak."

Here, Green's counsel began his statement to the court arguing that Green should receive a sentence "at the bottom level, or 151-months." The district court replied that "not to interfere with your statement, that's what I had in mind." Green's counsel then replied, "Judge, I think my presentation will be significantly shorter then." At which point, Green's counsel made a brief statement to the district court, followed by Green's own statement. After the district court imposed the 151-month sentence on the drug charges and the 14-month consecutive sentence on the failure to appear charge, the following exchange took place:

> Mr. Lichter [Green's counsel]:Judge, I believe at this point the Court would ask me if we have any objections to the manner of sentence or the way it was imposed. And I have to tell the Court that I feel somewhat uncomfortable. I do object because I had -
>
> The Court:You object to what?
>
> Mr. Lichter:I object to the way the Court imposed the sentence. The way I understood it, the guidelines for both offenses was 151 to 188 months. That's the way it's laid out in the PSI. The guidelines for his drug offense was level 32. It's 120 -
>
> The Court:That is at the discretion of the Court, isn't it?
>
> Mr. Lichter:Yes sir, it is. But when I asked the Court about it, you told me that you were going to sentence him at the bottom of the guidelines.
>
> The Court:Take your appeal if you think the Court doesn't have that authority. You ought to be grateful that the court is letting this defendant off as easy as he can.
>
> Mr. Lichter:Judge, this is a man who doesn't deserve what he's getting here today. Judge, the Court --
>
> The Court:That's all. That's all. No more.

3.

Our review of the record establishes that the district court did not give Green's counsel a right of allocution. After informing Green's counsel that he was going to impose a sentence at the low end of the guidelines, or 151 months, Green's counsel understandably said that his argument would be much shorter. However, the district court imposed a sentence of 165 months, an obvious surprise to Green's counsel who legitimately expected a sentence of 151 months. With considerable candor, the government stated at oral argument in response to a question that it too expected Green to be sentenced to 151 months based on the district court's comments. When Green's counsel attempted to raise an objection to the sentence, the district court essentially stopped Green's counsel from saying anything more and thus denied him the opportunity to allocute on behalf of his client. Accordingly, this case must be remanded for resentencing to afford Green's counsel the right to allocute as required by the Federal Rules of Criminal Procedure.

V. Conclusion

For the reasons stated above, we AFFIRM IN PART, REVERSE IN PART, AND REMAND this case to the district court for resentencing consistent with this opinion.

APPENDIX A

Offense Level Computations

The 1998 edition of the Guidelines Manual was used to calculate Green's sentencing range.

With respect to Green's drug offense, all of the counts (Counts 1, 21, 27, 31 and 33) would be grouped together under U.S.S.G. § 3D1.2(d) as the offense level is determined on the basis of the total amount of the quantity of controlled substances involved.

Count 1: Conspiracy to Distribute Cocaine
Counts 21, 27, 31, and 33: Possession with Intent to Distribute Cocaine
Base Offense Level: The guideline for violations of 21 U.S.C. Secs. 841(a)(1) and 846 are found at U.S.S.G. Sec. 2D1.1 (a)(3)(c)(4). That section provides that the base offense level for at least 5 kilograms, but less than 15 kilograms of cocaine of 32. 32
Adjustment for Obstruction of Justice: As Green failed to appear for sentencing on August 24, 1990, his offense level was increased by two levels for obstruction of justice under U.S.S.G. Sec. 3C1.1. + 2
Adjusted Offense Level: (Subtotal): 34
Count 1: Failure to Appear for Sentencing
Base Offense Level: The guideline for a violation of 18 U.S.C. Sec. 3146(a)(1) is found at U.S.S.G. Sec. 2J1.6(a)(2). That section provides that the base offense level is six. 6
Specific Offense Characteristic: As the base offense level was determined under subsection (a)(2), and the underlying offense was punishable by a term of imprisonment of 20 years, the offense level is increased by nine levels, under U.S.S.G. Sec. 2J1.6(b)(2)(A). + 9
Adjusted Offense Level: (Subtotal): 15
Multiple Count Adjustments:
Because the failure to appear offense embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to the drug offense, they are grouped together under U.S.S.G. Sec. 3D1.2(c). Also U.S.S.G. 2J1.6, Application Note 3, states that in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under 3C.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense, and the failure to appear offense and the drug offense are grouped together under 3D1.2(c). As the courts are grouped together under 3D1.2(c), the group which results in the highest offense level is used. U.S.S.G. 3D1.3(a). In Green's case, that is an offense level of 34.
Total Offense Level: 34

¶2002-5375

UNITED STATES OF AMERICA, PLAINTIFF v. Diane RUSSELL, in her capacity as representative of the estate of Gregory Russell (aka Gregory LeCoursier), DEFENDANT. U.S. District Court, Eastern Dist. of Michigan, (DC MI) CASE NO.: 00-75597, Aug. 22, 2002. District Court reversed. Years 1984, 1985. Decision for Govt.

1. Collection actions—lien priority—Federal Insolvency Statute—personal liability of fiduciary—amendment of complaint. Magistrate judge's order denying govt.'s motion for leave to amend complaint to sue estate's representative in her individual capacity was reversed, and case was reopened: magistrate's ruling that it would be futile for govt. to amend its complaint was clearly erroneous. Although govt.'s lapsed lien wasn't entitled to priority over bank's secured/perfected lien under 31 USC §3713(a) against estate property that fiduciary had transferred to herself and mortgaged, IRC §6323 was silent as to whether tax liability had priority against other unlisted creditor classes, including estate beneficiaries; so, personal liability under 31 USC §3713(b) could later attach if it were determined that fiduciary, by transferring such property, had misappropriated funds, in derogation of estate's

debt to govt. *Reference:* United States Tax Reporter ¶74,035.03(20); 63,235.04(65); 68,727.54(80). IRC §6321; 6323; 7403.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION,

OPINION AND ORDER (1) GRANTING PLAINTIFF'S OBJECTIONS TO THE MAGISTRATE JUDGE'S ORDER DENYING PLAINTIFF'S MOTION TO FOR LEAVE TO AMEND THE COMPLAINT, (2) REVERSING THE MAGISTRATE JUDGE'S ORDER, AND (3) REOPENING THE CASE

PAUL D. BORMAN UNITED STATES DISTRICT JUDGE

Before the Court is Plaintiff's appeal of (i.e., objections to) the Magistrate Judge's March 6, 2002 Order[1] denying Plaintiffs' motion for leave to amend the complaint (Docket Entry # 21). Upon consideration of the objections, the submissions of the parties, the oral argument, and the applicable law, the Court will REVERSE the Magistrate Judge's Order, and GRANT leave to permit the United States of America to file an amended complaint.

I. BACKGROUND

The Government now seeks to amend its complaint to sue Diane Russell in her individual capacity. The original suit was filed against Ms. Russell in her representative capacity, as the Independent Personal Representative of the Estate of Gregory Russell (aka Gregory LeCoursier), her late husband. The parties stipulated to a judgment on March 26, 2002, against Ms. Russell in her representative capacity, for the unpaid assessed balance of federal income taxes owed by Mr. Russell (aka LeCoursier) prior to his death. The Government now seeks to pursue its claim for taxes by amending the complaint to state a claim against Ms. Russell personally.

The operative facts are not in dispute. At the time of his death, Mr. Russell (aka LeCoursier) had pre-existing, unpaid federal income tax liabilities for the years of 1984, 1985, and 1995.[2] In December of 1989, the IRS filed a Notice of Federal Tax Lien as to each liability (1984 and 1985) with the Register of Deeds in Wayne and Oakland Counties, in Michigan. Those tax liens operated as to Mr. Russell's only asset — his property (a condominium) located in Southfield, Michigan.

Those federal tax liens ''self-released'' (i.e., expired by their terms) in March of 1998 and September of 1999 respectively. The IRS did not timely re-file the notices.[3] In June of 2000, Ms. Russell, after consulting a tax attorney, caused the condominium to be transferred into her name, allegedly to enable her to mortgage the property in September of 2000 and use the proceeds to pay the debts of Mr. Russell's estate.

The Magistrate Judge denied, via Order dated March 6, 2002, Plaintiff's motion to amend its complaint to sue Diane Russell in her personal capacity. Plaintiff is now objecting to that Order.

II. ANALYSIS

A. Standard of Review of Magistrate's Ruling

The standard of review under 28 U.S.C. § 636(b)(1)(A) and Fed. R. Civ. P. 72(a) prescribes that a magistrate's nondispositive pretrial orders shall not be disturbed unless ''found to be clearly erroneous or contrary to law.'' *United States v. Curtis*, 237 F.3d 598, 603 (6th Cir. 2001) (''A district court shall apply a 'clearly erroneous or contrary to law' standard of review for the 'nondispositive' preliminary measures of § 636(b)(1)(A).''). The ''clearly erroneous'' standard mandates that the district court affirm the magistrate's decision

[1] The Magistrate Judge had originally denied the motion from the bench on February 14, 2002; the March 6, 2002 Order was the written order which the parties stipulated was consistent with the previous bench ruling.

[2] The 1995 tax liability is not in dispute in the current case — it was paid by Ms. Russell in May of 2000.

[3] The IRS did file a Revocation of Certificate of Release of Federal Tax Lien and new Notice(s) of Federal Tax Lien on November 21, 2000. However, those filings are immaterial, because the allegedly improper transfer occurred in June of 2000, five months prior to the refiling — at the time of the transfer, in other words, there was no effective tax lien on file.

The existence of the underlying tax liability is not in dispute. The parties have stipulated that the Estate of Mr. Russell remains indebted to the Government (IRS) for the tax liabilities.

unless, on the entire evidence, it "is left with the definite and firm conviction that a mistake has been committed." *Ocelot Oil Corp. v. Sparrow Industries*, 847 F.2d 1458, 1464 (10th Cir. 1988) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, (1948)). In the absence of clear error, the magistrate's order must stand. *See Farley v. Farley*, 952 F. Supp. 1232, 1235 (M.D. Tenn. 1997).

The Magistrate Judge ruled that this claim would be subject to dismissal as a matter of law, it would be "futile," and under Fed. R. Civ. P. 15, and thus that the Government was not entitled to amend its complaint to bring a futile claim. The Court concludes that Plaintiff has established a clear error of law in the Magistrate Judge's ruling; that it would not be futile to amend the complaint under Rule 15.

B. Analysis

[1] Under FED. R. CIV. P. 15(a), leave to amend a complaint should be freely given "when justice so requires." There are several factors to consider when determining whether to grant a motion to amend: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment." *Thiokol Corp. v. Department of Treasury, State of Michigan, Revenue Div.*, 987 F.2d 376, 382 (6th Cir. 1993). The controlling factor at issue here is "futility," to wit, the Court should not grant a motion to amend if the amendment could not withstand a motion to dismiss. *Id.* at 382–83.

The Government's argument is that personal liability is imposed upon Ms. Russell via 31 U.S.C. § 3713(b), which states:

> A representative of a person or an estate . . . paying any part of a debt of the person or estate before paying a claim of the Government is liable to the extent of the payment for unpaid claims of the Government.

31 U.S.C. § 3713(b). Subsection (b) is the second part of the Federal Insolvency Statute, 31 U.S.C. § 3713. Subsection (a) provides for a priority benefitting the Government, which is then enforced via subsection (b). In other words, liability under § 3713(b) is predicated upon a prior-ity granted by § 3713(a). If the Govern-ment is not entitled to a priority granted by § 3713(a), Ms. Russell cannot be held personally liable under § 3713(b), as a matter of law. Thus, Defendant argues the amendment is futile.

The Government argues that the Federal Insolvency Statute operates as an alternative to the Federal Tax Lien Act, 26 U.S.C. § 6321 *et seq.*. In other words, the Government argues that regardless of whether it maintained a priority via the tax lien, it still maintained a priority via the Federal Insolvency Statute.

In *United States v. Estate of Romani*, 523 U.S. 517 [81 AFTR 2d 98-1729] (1998), the Government asserted that it should have been granted a priority for the deceased's unpaid tax liabilities, pursuant to 31 U.S.C. § 3713(a), although it had failed to file its Notice of Tax Lien prior to a judgment creditor's perfection and filing of its secured lien with regard to real property. The Supreme Court engaged in extensive statutory interpretation of the Tax Lien Act and Federal Insolvency Statute, noted that the Tax Lien Act is "the governing statute when the Government is claiming a preference in the insolvent estate of a delinquent taxpayer," 532 U.S. at 532, and specifically held that "nothing in the text or the long history of interpreting the federal priority statute justifies the conclusion that it authorizes the equivalent of a secret lien as a substitute for the expressly authorized tax lien" which Congress provided in 23 U.S.C. § 6321. *Romani*, 532 U.S. at 534. Put another way, the Supreme Court expressly rejected the Government's argument in *Romani* that if the Government fails to follow the correct procedures for securing/maintaining its statutorily-authorized tax lien, it can somehow fall back onto 31 U.S.C. § 3713 in order to gain a priority over other secured creditors.

In the instant case, because the Government was not entitled to a priority under 31 U.S.C. § 3713(a) since its tax lien had self-released (i.e., lapsed), it was not entitled to be paid before Bank One's secured/perfected lien against the property. However, the analysis does not end there; § 3713(a) operates as to other classes of creditors.

The tax lien priority statute is contained in 26 U.S.C. § 6323. Subsection (a) of that statute states that a tax lien (imposed by § 6321) "shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary." 26 U.S.C. § 6323(a). In other words, a tax lien will be granted a priority against those four types of creditors only if the tax lien is properly (and timely) filed (and refiled). But the statute is silent as to whether the tax liability has a priority against others (i.e., those that are not listed in § 6323). In order to determine whether the tax liability has a priority against all others, the Court must turn to 31 U.S.C. § 3713.

Title 31 U.S.C. § 3713 is not, strictly speaking, an alternative to 26 U.S.C. § 6323. *See, e.g., Romani, supra.* As to the four classes of creditors in § 6323, the statutes cannot operate together. In other words, in the situation presented in *Romani*, the Supreme Court held that because § 6323 specifically addresses judgment lien creditors (and others, for instance, secured creditors), the Government cannot rely on § 3713, when the filing or refiling of the tax lien is not effectuated in accordance with §§ 6323(f) & (g), in order to gain a priority over creditors who have properly perfected their liens. However, *Romani* did not specifically address at least part of the situation here.

Section 3713(a)(1)(B) states that the Government is entitled to be "paid first when . . . the estate of a deceased debtor, in the custody of the executor or administrator, is not enough to pay all debts of the debtor." This statute applies to creditors other than the four classes of creditors specifically addressed in § 6323(a). In other words, the Government is entitled to priority over other creditors except "purchaser[s], holder[s] of a security interest, mechanic's lienor[s], or judgment lien creditor[s]" and those others listed in § 6323(b).[4]

At the time Ms. Russell transferred the property to herself, and mortgaged it, it was not encumbered by a tax lien. However, the underlying tax liability still existed — it just could not, according to § 6323(a), take priority over "purchaser[s], holder[s] of a security interest, mechanic's lienor[s], or judgment lien creditor[s]." It can still, however, take priority over, for instance, the beneficiaries of Mr. Russell's estate.

Thus, it is factually possible that, at some point, it will be determined that Ms. Russell has appropriated funds to which she is not entitled, in derogation of the estate's debt to the Government. The Government argues that if that becomes true, personal liability under § 3713(b) will attach.

The Government is correct, and is therefore entitled to amend its complaint to set forth a cause of against Ms. Russell in her individual capacity; such an amendment would not be "futile." Thus, the Court concludes that Plaintiff has established a clear error in the Magistrate Judge's ruling rejecting the amendment to the complaint.

The Magistrate Judge's ruling is therefore REVERSED.

III. ORDER

For the reasons stated above, the Court REVERSES the Magistrate Judge's Order, and REOPENS the case. Plaintiff should file its amended complaint within ten (10) days of the date of this Order.

SO ORDERED.

Date: AUG 22 2002

Detroit, Michigan

PAUL D. BORMAN

[4] Section 6323(b) also lists exceptions to the Government's priority, but those individually listed items do not appear to be applicable to the instant case, and neither party has asserted that they are.

UNITED STATES DISTRICT JUDGE

¶2002-5376

UNITED STATES OF AMERICA, PLAINTIFF v. Ronald SMITH, ET AL., DEFENDANTS. U.S. District Court, Southern Dist. of Ohio, (DC OH) Case No. C-1-99-974, Aug. 23, 2002. Years 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991. Decision for Govt. in part.

1. Collection actions—fraudulent conveyances—summary judgment. Magistrate judge recommended denying govt. summary judgment on its claim to set aside tax protester's conveyance of ½ property interest to parents: whether taxpayer's transfer was fraudulent under Ohio law was remaining fact issue. Although facts that taxpayer made transfer to "insiders" while knowing he was subject to potential tax liability and retained possession of property indicated fraud, whether he received reasonably equivalent value or was rendered insolvent wasn't shown. But, taxpayer's alleged common-law wife's summary judgment claim to dower interest was also rejected. *Reference:* United States Tax Reporter ¶63,215.02(255); 74,035.01(50); 63,215.02(155). IRC §6321; 7403.

2. Actions to reduce assessments to judgment—foreclosure—summary judgment. Magistrate judge recommended granting govt. summary judgment on its complaint to reduce tax protester's assessments to judgment: taxpayer's frivolous protester arguments didn't rebut assessments' presumptive validity; and criminal court's acceptance of taxpayer's *belief* that he filed accurate Forms 1040NR pursuant to prior plea agreement didn't actually establish returns' validity or in any way compromise his civil tax liability. But, equitable concerns regarding taxpayer's mother's, brother's and purported common-law wife's potential interests in subject property militated against granting govt. summary judgment on its foreclosure claim. *Reference:* United States Tax Reporter ¶74,035.01(25); 74,035.03(80). IRC §7403.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF OHIO WESTERN DIVISION,

REPORT AND RECOMMENDATION

Timothy S. Hogan United States Magistrate Judge

(Dlott, J.; Hogan, M. J.)

This matter is before the Court on motions for partial summary judgment and for summary judgment (Docs. 13, 14), and the parties' responsive memoranda. (Docs. 15, 17, 18, 19). The matter has been referred to the undersigned for initial consideration and a report and recommendation pursuant to 28 U.S.C. § 636(b). (Doc. 20).

Plaintiff, the United States of America ("United States" or "government") brought this tax action pursuant to 26 U.S.C. §§ 7401, 7403. The government seeks to reduce to judgment unpaid federal tax assessments against defendant Ronald E. Smith ("Smith") and to foreclose on federal tax liens on two parcels of real property located at 4311 Tylersville Road, Hamilton, Butler County, Ohio. The government also seeks to set aside an allegedly fraudulent conveyance of an interest in the property made by Smith to his parents, Barney Smith (now deceased) and Naoma Smith, and to declare that Naoma Smith and Gregory Smith, Smith's brother, hold interests in the property as nominees of Smith. The government also named Smith's alleged common law wife, Donna Schaller, as a party defendant on the ground that she may seek to claim an interest in the property in her own right.

I. FACTUAL AND PROCEDURAL HISTORY

In January 1991, Smith pleaded guilty to charges of wilful failure to file income tax returns for tax years 1983, 1984, and 1985. Pursuant to a plea agreement, Smith agreed to file tax returns for the years in question. The plea agreement provided in part that "this agreement does not address or compromise in anyway any tax liability of Mr.

Smith for the tax years 1982–1989." (Doc. 14, Ex. C). Smith later submitted "nonresident returns," forms 1040NR, for the years 1983 through 1990.

At that time he entered his plea, Smith was the owner of the Tylersville Road property, which he had acquired by warranty deed in 1986. On or about May 22, 1991, Smith sold an undivided one-half interest in the property to his parents, Barney Smith and Naoma Smith, for $85,000.00. In April 1995, in alleged contemplation of Barney Smith's final illness, Barney Smith and Naoma Smith transferred an undivided one-fourth interest in the real estate to Gregory Smith. Smith continues to reside at the Tylersville Road address; Naoma Smith resides in Cincinnati, Ohio; and Gregory Smith resides in Maineville, Ohio.

In January 1995, a delegate of the Secretary of the Treasury made assessments against Mr. Smith for unpaid taxes for the years 1982–1991. Notices of the assessments were filed with the Butler County Recorder's Office on June 16, 1995 and June 11, 1996.

On November 18, 1999, the United States filed its complaint against Smith, Naoma Smith, Gregory Smith, and Donna Schaller. (Doc. 1). The government alleges that Smith is liable for the assessed and accrued taxes, penalties, and interest, which totaled $3,464,751.82 as of August 2, 1999. (*Id.*). The government seeks a judgment against Smith in that amount, plus additions and interest as allowed by law. (*Id.*). The government asks this Court to set aside the conveyance to Barney and Naoma Smith as fraudulent with respect to the United States, to declare that Naoma Smith and Gregory Smith hold their interests in the Tylersville Road property as nominees of Smith, and to adjudge that the United States has valid liens on all property and rights to property of Ronald Smith. (*Id.*). Finally, the government asks this Court to order that the federal tax liens be foreclosed upon the real property and that the property be sold at a judicial sale.

Naoma Smith, Gregory Smith, and Donna Schaller, by counsel, filed a motion for partial summary judgment in their favor. (Doc. 13). These three defendants request this Court to find, as a matter of law, (1) that their interests in the real property are not subject to federal tax liens, (2) that the conveyance of a one-half interest to Barney and Naoma Smith was not fraudulent, (3) that Naoma Smith and Gregory Smith do not hold their interests in the property as alter egos or nominees for Smith; and (4) that Donna Schaller is the lawful spouse of Smith and is entitled to a dower interest in his property under the laws of the State of Ohio. (*Id.*).

Smith filed a separate pro se response to the government's motion for summary judgment alleging, in part, that he is not a taxpayer and is not liable to the United States for any tax. (Doc. 16). Smith maintains that he is a citizen only of the State of Ohio and that he is not a citizen or resident of the United States. (*Id.*). He contends that the nonresident returns were filed in compliance with a provision in his plea agreement that he would file "true, correct and accurate income tax returns for the calendar years 1982 to 1989" and were accepted as such at his sentencing proceeding. (*Id.*) Smith also argues that the income tax is an excise tax and claims not be subject to any excise tax. (*Id.*). Finally, Smith challenges the authority of the United States Attorney, Lydia D. Bottome, to prosecute this case. (*Id.*).

II. STANDARD OF REVIEW

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The moving party has the burden of showing the absence of genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. *Celotex*, 477 U.S. at 323.

A party may move for summary judgment on the basis that the opposing party will not be able to produce sufficient evidence at trial to withstand a motion for

judgment as a matter of law. In response to a summary judgment motion properly supported by evidence, the non-moving party is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial. *Sixty Ivy Street Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987); *Harris v. Adams*, 873 F.2d 929, 931 (6th Cir. 1989). Conclusory allegations, however, are not sufficient to defeat a properly supported summary judgment motion. *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990). The non-moving party must designate those portions of the record with enough specificity that the Court can readily identify those facts upon which the non-moving party relies. *Karnes v. Runyon*, 912 F. Supp. 280, 283 (S.D. Ohio 1995) (Spiegel, J.).

The trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine factual issue for trial. *Anderson*, 477 U.S. at 249–50. In so doing, the trial court does not have a duty to search the entire record to establish that there is no material issue of fact. *Karnes*, 912 F. Supp. at 283. *See also Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479–80 (6th Cir. 1989); *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988). The inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 249–50.

If, after an appropriate time for discovery, the opposing party is unable to demonstrate a *prima facie* case, summary judgment is warranted. *Street*, 886 F.2d at 1478 (citing *Celotex* and *Anderson*). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. ANALYSIS

A. Authority of the United States Attorney

As a threshold matter, Smith challenges the authority of the United States Attorney to prosecute his case on the grounds that Lydia Bottome, the attorney assigned to this case, has not been admitted to practice before this Court. His argument is unavailing.

Pursuant to 28 U.S.C. §§ 516, 517, the Attorney General may send any officer of the Department of Justice to attend to the interests of the United States in a suit pending in a court in the United States. *Huff v. United States*, 10 F.3d 1440, 1444 [72 AFTR 2d 93-6682] (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994). Section 516 provides that "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested . . . is reserved to officers of the Department of Justice." 28 U.S.C. § 516; *Huff*, 10 F.3d at 1444. *See also United States v. Plesinski*, 912 F.2d 1033, 1038 (9th Cir. 1990) (indicating that either the Department of Justice or United States Attorneys can represent the United States in litigation), *cert. denied*, 499 U.S. 919 (1991). Moreover, § 517 states that "any officer of the Department of Justice . . . may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States." 28 U.S.C. § 517; *Huff*, 10 F.3d at 1444.

The government has established that Lydia Bottome, an attorney in the tax division of Department of Justice, is an officer of the Department of Justice and that she was is authorized to represent the interests of the United States in this matter. (*See* Doc. 18, Exs. A, B).

B. Fraudulent Conveyance

[1] Where a taxpayer is alleged to have fraudulently disposed of his property prior to the existence of federal tax liens, the United States may seek relief under the applicable fraudulent conveyance laws of the particular state in which the property is located. *Commissioner v. Stern*, 357 U.S. 39, 45 [1 AFTR 2d 1899] (1958); *Citizens Bank of Clearwater v. Hunt*, 927 F.2d 707,

710 (2d Cir. 1991); *United States v. Fernon*, 640 F.2d 609, 611–12 [47 AFTR 2d 81-1387] (5th Cir. 1981). Because the property which is the subject of this dispute is located in Ohio, Ohio law applies. The government seeks summary judgment on its claim of a fraudulent transfer under the Ohio Uniform Fraudulent Transfer Act (''OUFTA''), Ohio Rev. Code §§ 1336.01–1336.11, et. seq. (*See* Doc. 14).

Under OUFTA, a transfer made by a debtor is fraudulent as to a creditor, whether the claim arose before or after the transfer was made, if the debtor made the transfer in either of the following ways:

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor;

(2) without receiving a reasonably equivalent value in exchange for the transfer . . . and if either of the following applies: (a) the debtor was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (b) the debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due.

Ohio Rev. Code § 1336.04(A). The government contends that the facts support a finding of summary judgment in its favor under both the actual fraud theory of § 1336.04(A)(1) and the constructive fraud theory of § 1336.04(A)(2).

1. The Statute of Limitations

Defendants, Naoma Smith, Gregory Smith, and Donna Schaller,[1] oppose the government's motion for summary judgment in part on grounds that the extinguishment provision of OUFTA, Ohio Rev. Code Ann. § 1366.09, bars the government's claim.

Section 1366.09 provides as follows:

A claim for relief with respect to a transfer or an obligation that is fraudulent under section 1336.04 or 1336.05 of the Revised Code is extinguished unless an action is brought in accordance with one of the following:

(A) If the transfer or obligation is fraudulent under division (A)(1) of section 1336.04 of the Revised Code, within four years after the transfer was made or the obligation was incurred or, if later, within one year after the transfer or obligation was or reasonably could have been discovered by the claimant;

(B) If the transfer or obligation is fraudulent under division (A)(2) of section 1336.04 or division (A) of section 1336.05 of the Revised Code, within four years after the transfer was made or the obligation was incurred;

(C) If the transfer or obligation is fraudulent under division (B) of section 1336.05 of the Revised Code, within one year after the transfer was made or the obligation was incurred.

Ohio Rev. Code Ann. § 1366.09. The government filed its complaint on November 18, 1999, more than four years after Smith conveyed an undivided one-half interest in the property to his parents.

Defendants concede that, as a general rule, the United States is not bound by state statutes of limitation except where it has expressly bound itself to them. *See United States v. Summerlin*, 310 U.S. 414, 416 (1940); *United States v. Isaac*, No. 91-5830, 1992 WL 159795, 2 (6th Cir. July 10, 1992). *See also United States v. Fernon*, 640 F.2d 609, 611–12 [47 AFTR 2d 81-1387] (5th Cir. 1981). The Court in *Summerlin* held that ''the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its fights.'' *Summerlin*, 310 U.S. at 416 (1940). Defendants argue that the extinguishment provision is not a traditional statute of limitations and that *Summerlin* should not apply.

Although the Sixth Circuit has not yet ruled on the specific question, the Ninth Circuit has determined that a similar extin-

[1] Ronald E. Smith did not oppose the government's motion for summary judgment on its claim that the conveyance to Barney and Naoma Smith was fraudulent. (*See* Doc. 16).

guishment provision in the California Uniform Fraudulent Transfer Act (''CUFTA'') could not evade the rule of *Summerlin*:

> First, although the IRS [Internal Revenue Service] must rely on the CUFTA to establish Petitioner's transferee liability, the government's underlying right to collect money in this case clearly derives from the operation of federal law (i.e., the Internal Revenue Code). Second, in its efforts to collect taxes, the United States unquestionably is acting in its sovereign capacity; indeed, the right to collect taxes is among the most basic attributes of sovereignty. Because the United States is here acting in its sovereign capacity in an effort to enforce rights ultimately grounded on federal law, the rule of *Summerlin* will not allow the ''extinguishment'' of a valid, fully accrued claim by the IRS brought under the CUFTA.

Bresson v. Commissioner, 213 F.3d 1173, 1178 [85 AFTR 2d 2000-1901] (9th Cir. 2000).

Defendants' reliance on the extinguishment provision is unavailing. The government's action is not barred under Ohio Rev. Code Ann. § 1366.09.

2. ''Badges of Fraud'' — Actual Fraud Theory Under Ohio Rev. Code § 1336.04(A)(1)

As set forth above, under Ohio law, a transfer made with actual intent to hinder, delay, or defraud any creditor is fraudulent as to the creditor and may be set aside. Ohio Rev. Code Ann. § 1336.04(A)(1). ''No effort to hinder or delay creditors is more severely condemned by the law than an attempt by a debtor to place his property where he can still enjoy it and at the same time require his creditors to remain unsatisfied.'' *United States v. Leggett*, 292 F.2d 423, 426 (6th Cir. 1961) (internal quotations omitted). The burden of proof in a fraud case rests with the party asserting the fraud. *McKinley Fed. Savings & Loan v. Pizzuro Enterprises, Inc.*, 585 N.E.2d 496 (Ohio Ct. App. 1990). The fraud must be proven by clear and convincing evidence. *Cardiovascular & Thoracic Surgery of Canton, Inc. v. DiMazzio*, 37 Ohio App.3d 162, 166, 524 N.E.2d 915, 918 (Ohio Ct. App. 1987). However, direct evidence of a party's fraudulent intent is not necessary. *Leggett*, 292 F.2d at 426. Because it is impossible to look into a defendant's mind for the purpose of ascertaining his intent, the trier of fact must consider the circumstances surrounding the transaction and determine intent from what a party does or fails to do. *Id.* at 426–27.

The issue of fraud is commonly determined by certain recognized indicia, denominated ''badges of fraud,'' which are circumstances so frequently attending fraudulent transfers that an inference of fraud arises from them. *Long Development, Inc. v. Oak Park Village Limited Partnership*,117 F.3d 1420, (unpubl.) 1997 WL 377055, at ___ (July 2, 1997) (citing *Leggett, supra*). Ohio Rev. Code Ann. § 1336.04(B) lists several statutory factors, or the so-called ''badges of fraud,'' that a court considers to determine if an inference of fraud exists. The relevant factors include, but are not limited to, the following:

(1) Whether the transfer or obligation was to an insider;

(2) Whether the debtor retained possession or control of the property transferred after the transfer;

(3) Whether the transfer or obligation was disclosed or concealed;

(4) Whether before the transfer was made or the obligation was incurred, the debtor had been sued or threatened with suit;

(5) Whether the transfer was of substantially all of the assets of the debtor;

(6) Whether the debtor absconded;

(7) Whether the debtor removed or concealed assets;

(8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

(9) Whether the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

(10) Whether the transfer occurred shortly before or shortly after a substantial debt was incurred:

(11) Whether the debtor transferred the essential assets of the business to a lienholder who transferred the assets to an insider of the debtor.

Ohio Rev. Code Ann. § 1336.04(B).

''Although 'badges of fraud' are not conclusive and are more or less strong or weak according to their nature and the number occurring in the same case, a concurrence of several badges will always make out a strong case.'' *Long Development, Inc.*, 1997 WL 377055, at 6 (citing *Leggett, supra*). If the party alleging fraud is able to demonstrate a sufficient number of badges, the burden of proof then shifts to defendants to prove that the transfer was not fraudulent. *Baker & Sons Equipment Co. v. GSO Leasing, Inc.*, 87 Ohio App.3d 644, 650, 622 N.E.2d 1113, (Ohio Ct. App. 1993) (citing *Cardiovascular & Thoracic Surgery, supra*).

The government alleges that the evidence is sufficient to establish at least five of the relevant badges: (1) the transfer was made to insiders, i.e., Smith's parents; (2) Smith has retained full possession and control of the property since the transfer; (3) Smith made the transfer knowing that he was subject to potential civil tax liability for tax years 1982 through 1989, and knowing that pursuant to his plea agreement in the criminal case he was liable for up to $225,000.00 in criminal fines; (4) the subject property represented substantially all of Smith's assets at the time of the transfer; and (5) the value of the consideration allegedly received for his parents' one-half interest was not reasonably equivalent to the value of the transferred property.

In response, defendants Naoma Smith, Gregory Smith and Donna Schaller claim that the May 1991 conveyance was not fraudulent. They oppose the government's motion for summary judgment, in part, on the ground that the government has not shown sufficient ''badges of fraud'' to satisfy the fraudulent transfer statute. According to these defendants, the evidence establishes only one badge — that Smith transferred the property to insiders. De-fendants further argue that: (1) the transfer of the property was properly recorded and never concealed; (2) Smith had neither been sued nor threatened with suit by the IRS at the time of the transfer; (3) because Smith transferred only one-half of the property, such a transfer does not consti-tute ''substantially all of the asset''; (4) Smith has not absconded; (5) an $85,000.00 payment by Naoma and Barney Smith for their undivided one-half interest constituted fair market price for the prop-erty and therefore was reasonably equivalent to the value of the asset trans-ferred. In support of their motion, defend-ants submitted an expert appraisal which valued the Tylersville Road property at $206,940.00, as of May 22, 1991, (Doc. 13, App. 1, Affidavit of Thomas A. Devitt, attached), and affidavits in which they at-test that the $85,000.00 payment was con-sidered a fair price for the sale of half the property. (See Doc. 13, Apps. 3,5,6, Affi-davits of Naoma Smith, Donna Schaller, and Ronald Smith, respectively).

It is undisputed that Smith transferred the property to insiders when he allegedly sold a one-half undivided interest in the Tylersville Road residence to his parents, Barney and Naoma Smith. Furthermore, defendants do not dispute the government's assertion that Ronald Smith retained possession of the property following the transfer. Rather, defendants Naoma and Gregory Smith argue that at all times they retained their right to possess and control the real estate or otherwise dispose of their interest in the property. (Doc. 13, App. 3, Naoma Smith Aff., ¶ 8; App. 4, Gregory Smith Aff., ¶ 8). Ohio Rev. Code Ann. § 1336.04(B)(2). In addition, there is unrebutted evidence that Smith made the transfer shortly before or shortly after a substantial debt was incurred, as the transfer took place four months after the plea agreement and six months before he was fined in excess of $100,000.00 in the criminal case. Ohio Rev. Code Ann. § 1336.04(B)(10). Thus, it appears that these three badges favor the government. How-

ever, as defendants noted, the transfer was never concealed and Smith has not absconded. Ohio Rev. Code Ann. § 1336.04(B)(3) & (6). Moreover, questions of fact remain as to whether the transfer of a one-half interest was substantially all of Smith's assets, whether Smith was or became insolvent following the transfer, and whether the $85,000.00 allegedly received by the Smith was reasonably equivalent to the value of the property interest trans-ferred. Smith admits that he was forced to sell an interest in the property to pay debts incurred defending against the criminal case. While defendants Naoma and Gregory Smith and Donna Schaller submitted evidence that the Tylersville Road property was valued at $206,940.00, as of May 22, 1991, there is no evidence other than the parties' affidavits that the purchase price of $85,000.00 was paid to Smith. Therefore it is recommended that defendants' motion for partial summary judgment be denied, and that the plaintiff's motion for summary judgment be denied in part. Genuine issues of material fact remain as to whether sufficient badges of fraud have been shown to support a finding that the conveyance of a one-half interest in the property to Barney and Naoma Smith was fraudulent.

3. Constructive Fraud Theory Under Ohio Rev. Code § 1336.04(A)(2)

The government also contends that evidence supports a finding of a fraudulent conveyance under a constructive fraud theory. In support of its motion for summary judgment on this issue, the government argues that Smith did not receive reasonably equivalent value in exchange for the transfer and that at the time of the transfer, he should have believed that he would incur debts beyond his ability to pay as they came due.

Pursuant to Ohio Rev. Code § 1336.04(A)(2)(b), a transfer is fraudulent if a debtor transfers property without receiving a reasonably equivalent value in exchange for the transfer, and the debtor intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due. The government asserts that the $85,000.00 purchase price allegedly paid by Smith's parent's for their one half interest is not reasonably equivalent to the value of half the property transferred. The government also claims that in the wake of his plea agreement, Smith knew or should have known that he was liable for a maximum criminal fine of $225,050.00 and that he would be subject to civil tax liabilities for at least 8 years of unpaid taxes. Defendants counter that the $85,000.00 purchase price was roughly equivalent to the property's value at the time of the transfer (See Doc. 13, App. 1, expert appraisal, attached). Defendants further argue that plaintiff's evidence to the contrary is an uncertified document and therefore inadmissible. Defendants also note that at the time of the transfer, Smith had not been sued, nor had he been threatened with suit by the IRS. Plaintiff replies that there is no evidence that the $85,000.00 payment was ever made to Smith.

A question of fact clearly exists as to the value of the property at the time of the transfer and whether the payment changed hands. Furthermore, while Smith was subject to a maximum criminal penalty at the time of the transfer, the District Court had not assessed a fine at the time of the transfer. Accordingly, issues of fact preclude summary judgment for both plaintiff and defendants on the question of constructive fraud, and both motions should be denied in part on this basis.

C. Donna Schaller's Dower Interest

Defendant Donna Schaller seeks partial summary judgment declaring that she is the Smith's common law spouse and that she is entitled to a dower interest in the property. In response, the government maintains that Schaller is not entitled to summary judgment because that there remains a genuine issue of material fact as to sufficiency of indicia that she is the spouse of defendant Smith.

Under current Ohio law, common law marriages are prohibited. Ohio Rev. Code Ann. § 3105.12(B)(1). However, the statute provides an exception for common law marriages that occurred prior to the effective date of the statute, October 10, 1991,

and that have not been terminated by death, divorce, dissolution of marriage or annulment. Ohio Rev. Code Ann. § 3105.12(B)(2); *Lyon v. Lyon*, 621 N.E.2d 718, 720 (Ohio Ct. App. 1993).

Prior to October 10, 1991, a common law marriage could be established in Ohio by a showing of certain required elements: (1) an agreement of marriage *in praesenti;* (2) cohabitation as husband and wife; and (3) a holding out by the parties to those with whom they normally come into contact, resulting in a reputation as a married couple in the community. *State v. DePew*, 528 N.E.2d 542, 549 (Ohio 1988).

In support of her motion for partial summary judgment, Schaller presents her own affidavit and the affidavits of Smith, Gregory Smith, Naoma Smith, and Robert J. Doss, a long-time friend. (*See* Doc. 13, Exs. 2–6). Each affidavit recites the same conclusory language that as early as 1988, Smith and Schaller have lived together as husband and wife, have always considered themselves married, and have held themselves out as husband and wife, resulting in a long reputation as a married couple in the community. No other evidence in support of Schaller's claim has been presented.

The government opposes the motion on the ground that Schaller has failed to present evidence of an agreement to marry in praesenti. The government's argument is well taken.

The agreement to marry *in praesenti* is an essential element of a common-law marriage and its absence precludes the establishment of such a relationship even though the parties lived together and openly engaged in cohabitation. *Brooks v. Brooks*, No. CA2000-08-079, 2001 WL 433376, 2 (Ohio Ct. App. April 30, 2001) (citing *Nestor v. Nestor*, 472 N.E.2d 1091, 1094 (Ohio 1984)). Even if a party proves cohabitation and reputation, the lack of an agreement *in praesenti* will be fatal to any claim that there is a common-law marriage. *Brooks*, 20001 WL 43376 at 2; *Nestor*, 1472 N.E.2d at 1094; *In re Estate of Hall*, 588 N.E.2d 203, 206 (Ohio Ct. App. 1990). An agreement to marry *in praesenti* must be proved by clear and convincing evidence, either direct evidence which establishes agreement or by proof of cohabitation, acts, declarations, and conduct of the parties and their recognized status in the community in which they reside. *Brooks*, 20001 WL 43376 at 2; *Nestor*, 472 N.E. 2d at 1094. *See also Lynch v. Romas*, 139 N.E.2d 352, 359 (Ohio Ct. App. 1956) (citing *Markley v. Hudson*, 54 N.E.2d 304 (Ohio 1944)).

The affidavits in support of the motion for partial summary judgment are insufficient to establish an agreement to marry *in praesenti* as a matter of law. Therefore, it is recommended that the motion for partial summary judgment declaring Donna Schaller the common-law wife of defendant Ronald Smith should be denied.

D. Ronald Smith's Tax Liability

The government seeks summary judgment in part on its claim that Smith is liable for the taxes, interest, and penalties claimed. In support of its motion, the government presented certificates of assessment and payment for the tax years 1982 through 1991. (Doc. 14, Exs. F–O). Certificates of assessments are presumptively correct and enable the government to establish a prima facie case of tax liability. *Gentry v. United States*, 962 F.2d 555, 557 [69 AFTR 2d 92-1158] (6th Cir. 1992); *United States v. Walton*, 909 F.2d 915, 918–19 [66 AFTR 2d 90-5379] (6th Cir. 1990). The burden is on the taxpayer to produce evidence to the contrary. *Walton*, 909 F.2d at 918–19.

Smith has submitted no evidence to refute the government's position. Instead he asserted various arguments as to why he is not liable for payment of the taxes allegedly owed. Smith maintains that he is only a common law citizen of Ohio and is not a citizen or resident of the United States. He further contends that the income tax is an "excise" tax from which he is exempt. All of Smith's arguments are frivolous.

The Sixth Circuit, as well as other courts, has rejected as frivolous the argument that a person who claims to be a resident or citizen only of a state is not subject

to federal income taxes. *See United States v. Mundt*, 29 F.3d 233, 237 [74 AFTR 2d 94-5228] (6th Cir. 1997); *United States v. Gosnell*, 961 F.2d 1518, 1520 [69 AFTR 2d 92-1165] (10th Cir. 1992); *United States v. Collins*, 920 F.2d 619, 629 [67 AFTR 2d 91-1037] (10th Cir. 1990), *cert. denied*, 500 U.S. 920 (1991). *See also United States v. O'Brien*, No. 99-4314, 2000 WL 1175278, 1 (6th Cir. Aug. 11, 2000).

His contention that income tax is an unauthorized excise tax is also frivolous. *See Martin v. Commissioner*, 756 F.2d 38, 40–41 [55 AFTR 2d 85-1002] (6th Cir. 1985) (concluding that the "not a taxpayer" and "unlawful excise tax" contentions are meritless and grounds for assessing sanctions); *Coleman v. Commissioner*, 791 F.2d 68, 72 [57 AFTR 2d 86-1420] (7th Cir. 1986) (describing the "unlawful excise tax" argument as "objectively frivolous"); *Parker v. Commissioner*, 724 F.2d 469, 472 [53 AFTR 2d 84-716] (5th Cir. 1984) (stating that the "excise tax" argument is frivolous, stale, and long "put to rest"). *See also Everett v. United States*, No. 00-2159, 2001 WL 549457 [87 AFTR 2d 2001-2258] (6th Cir. May 18, 2001) (imposing sanctions for a frivolous appeal based on the "not a taxpayer" and "unlawful excise tax" contentions) *cert. denied*, 122 S. Ct. 1174 (2002).

Smith also claims that he has no tax liability because the 1040NR nonresident returns that he filed pursuant to his plea agreement were accepted by the trial court as "true, correct and accurate." The plea agreement required Smith to file "true, correct and accurate income tax returns for the calendar years 1982 to 1989" and to make a good faith effort to settle any and all civil liability he faces with the Internal Revenue Service. (*See* Doc. 14, Ex. C). In an apparent attempt to comply with the agreement, Smith filed the 1040NR nonresident returns stating that he was not a resident and that he had no income.

Smith's reliance on the plea agreement is misplaced. Contrary to Smith's assertions, the trial judge did not rule that the 1040NR returns were in fact "true, correct and accurate," but only that he recognized that Smith believed them to be so:

> The Court finds that Smith has filed according to his view true, correct, accurate federal income tax returns for these years and from his point of view that he has complied with his good faith effort to settle.

(Doc. 14, Ex. D, p. 0237). Moreover, the plea agreement expressly states that it "does not address or compromise in any way any civil liability Mr. Smith may be subject to in connection with the tax years 1982 through 1989." (Doc. 14, Ex. C).

Smith has failed to come forward with any evidence to show that a genuine issue of material fact exists with respect to his tax liability or to the imposition of a federal tax lien on his property and interests in property. Therefore it is recommended that the government's motion for summary judgment should be granted in part and that judgment be entered in favor of the United States in the amount claimed.

E. Lien and Foreclosure

The government contends that the federal tax liens on the Tylersville Road property should be foreclosed by means of a forced judicial sale. Plaintiff argues that even if the Court were to find in favor of defendants Naoma and Gregory Smith that the transfer was not fraudulent, and find that Donna Schaller has a dower interest in the property, the government is still entitled to foreclose. According to the government, under 26 U.S.C. § 7403(c), it would simply distribute the proceeds of the sale to those third parties found to have a legally enforceable interest, proportionally according to each parties' interest.

Smith has failed to come forward with any evidence to show that genuine issues of fact exist with respect to the government's claim for foreclosure. While Defendants Naoma and Gregory Smith and Donna Schaller argue that they retain legally enforceable interests in the property by virtue of the transfer of a one-half interest and Schaller's alleged dower rights as Smith's common law wife, these defendants do not assert any arguments in opposi-

tion to the government's motion with respect to foreclosure and a forced sale of the property.

Pursuant to 26 U.S.C. § 7403(a), the government is authorized to file suit in the United States district courts in order to enforce a tax lien. *See Bank of Fraser v. United States*, 861 F.2d 954, 958 [63 AFTR 2d 89-389] (6th Cir. 1988). The statutory language authorizing the tax lien "is broad and reveals on its face that Congress meant to reach every interest in property that a taxpayer might have." *United States v. National Bank of Commerce*, 472 U.S. 713, 719–720 [56 AFTR 2d 85-5210] (1985). "Stronger language could hardly have been selected to reveal a purpose to assure the collection of taxes." *Bank of Fraser*, 861 F.2d at 958 (citing *Glass City Bank v. United States*, 326 U.S. 265, 267 [34 AFTR 1] (1945)).

Section 7403 provides in full as follows:

> (a) Filing.--In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary [of the Treasury], may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, [of] whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability. For purposes of the preceding sentence, any acceleration of payment under section 6166(g) or 6166A(h) shall be treated as a neglect to pay tax. (b) Parties.--All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto. (c) Adjudication and decree.--The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States. If the property is sold to satisfy a first lien held by the United States, the United States may bid at the sale such sum, not exceeding the amount of such lien with expenses of sale, as the Secretary directs. (d) Receivership.--In any such proceeding, at the instance of the United States, the court may appoint a receiver to enforce the lien, or, upon certification by the Secretary during the pendency of such proceedings that it is in the public interest, may appoint a receiver with all the powers of a receiver in equity.

As a general matter, the "lien of the United States" referred to in § 7403(a) is that created by 26 U.S.C. § 6321, which provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." Thus, the federal tax lien under 26 U.S.C. § 6321 attaches to all of a taxpayer's property. *See United States v. Big Value Supermarkets, Inc.*, 898 F.2d 493, 496 [65 AFTR 2d 90-957] (6th Cir. 1990).

The Supreme Court has clearly held that courts may order the judicial sale of an entire property, not just a delinquent taxpayer's interest in the property, to satisfy the taxpayer's tax indebtedness. *United States v. Rodgers*, 461 U.S. 677, 693–97 [52 AFTR 2d 83-5042] (1982). Section 7403 protects those third parties with vested interests in the property and ensures that the government receives no more from the proceeds of the sale than that to which it is entitled. *Id.* at 699. *See also Kingman v. United States*, 2000 WL 1566280, at 3 [86 AFTR 2d 2000-6790] (S.D. Ohio Sept. 13, 2000) (Beckwith, J.) ("There is no controversy over the power of this Court to

require a sale of the [. . .] properties due to [defendant's] federal tax indebtedness . . . . This is so even though [defendant's wife] also has a one-half interest in the [. . .] properties.''). However, the Court's power to require a judicial sale is ''limited to some degree by equitable discretion.'' *Rodgers*, 461 U.S. at 680; *Kingman*, 2000 WL 1566280 at 3.

Because the federal government has a paramount interest in the ''prompt and certain'' collection of delinquent taxes, the Court's exercise of its discretion *not* to order a sale must be applied ''rigorously and sparingly.'' *Rodgers*, 461 U.S. at 711. There are ''virtually no circumstances, for example, in which it would be permissible to refuse to authorize a sale simply to protect the interests of the delinquent taxpayer himself or herself.'' *Rodgers*, 461 U.S. at 709. Yet, when a third party has an interest in property that may be subject to a judicial sale, the Court must evaluate the following equitable considerations: (1) the extent of prejudice to the Government's financial interest if the Court orders a sale of only the delinquent taxpayer's interest; (2) whether the interested third parties would, under normal circumstances, hold a legally recognizable expectation that their interests would not be sold by the delinquent taxpayer or his creditors; (3) what, if any, prejudice the third parties will incur ''both in personal dislocation costs and in undercompensation from the forced sale . . . . ''; and (4) the differences between the interests held by the delinquent taxpayer and the third parties, and whether any differences weigh against a compelled sale. *Kingman*, 2000 WL 1566280 at 3–4 (citing *Rodgers*, 461 U.S. at 710–11).

Because genuine issues of material fact exist with respect to whether Smith's transfer of a one-half interest in the Tylersville Road property was fraudulent and whether Donna Schaller is Smith's common law wife and therefore entitled to a dower interest in his property, no determination has been made as to whether Naoma and Gregory Smith and or Donna Schaller have a legally enforceable interest in the subject property. Consequently, the Court is unable evaluate those equitable factors set forth in *Rodgers* until these underlying factual questions are resolved. Therefore, even though there is no question of fact as to Smith's liability for the amount claimed by the government, it is recommended that the Court decline to order a forced sale of the property until findings of fact have been made with regard to whether the transfer was fraudulent, and whether defendant Schaller is entitled to a dower interest in Smith's portion of the property as his common law wife.

IT IS THEREFORE RECOMMENDED THAT:

1. The motion for partial summary judgment filed by defendants Naoma Smith, Gregory Smith, and Donna Schaller (Doc. 13) should be DENIED;

2. Plaintiff's motion for summary judgment (Doc. 14) should be GRANTED in part and DENIED in part.

Date: August 22, 2002

Timothy S. Hogan

United States Magistrate Judge

¶2002-5377

UNITED STATES OF AMERICA, PLAINTIFF v. Susan SNYDER, ET AL., DEFENDANTS. U.S. District Court, Dist. of Connecticut, (DC CT) Civ. No. 3:01cv796(PCD), Aug. 14, 2002. Years 1989, 1990, 1991. Decision against Govt.

1. Collection actions—foreclosure—property held by third party—nominees; fraudulent conveyances; constructive trusts. Govt. was denied summary judgment on its complaint to foreclose liens against property lived in by taxpayers but purchased by and held in daughter's name: even if applicable, govt. didn't support nominee theory with any proof that taxpayers transferred funds for down payment to daughter in anticipation of liability or litigation or that conveyance wasn't recorded. Also, govt. didn't show it made assessment, notice and demand such that liens attached before taxpayers transferred funds to daughter; and, although not time-

barred, constructive trust claim wasn't determinable since fact issues remained as to whether funds were transferred with fraudulent intent or as gift. And, daughter retained her right to rescind her invocation of 5th Amendment privilege against self-incrimination; and motion to approve stipulation with bank was moot. *Reference:* United States Tax Reporter ¶74,035.03(80); 63,215.02(115); 63,215.02(205). IRC §6321; 7403.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT,

RULING ON UNITED STATES'S MOTION FOR SUMMARY JUDGMENT

Peter C. Dorsey, Senior United States District Judge

Plaintiff, the United States of America, moves for summary judgment. Its motion is denied.

I. JURISDICTION

Subject matter jurisdiction is pursuant to 28 U.S.C. §§ 1340, 1345 and 22 U.S.C. §§ 7402, 7403.

II. BACKGROUND

The following facts are undisputed. During 1989, 1990, and 1991, Russell and Stelle Mahler (''Russell and Stelle'') accrued federal tax debt for willfully failing to collect, account for, and pay taxes on the wages of their company's employees. On July 12, 1995, Stelle gave her daughter, Defendant Susan Snyder, $44,000 for the purpose of purchasing the property located at 14 Michele Lane, Madison, Connecticut (''14 Michele Lane''). To her Uniform Loan Application for the purpose of purchasing 14 Michele Lane, Defendant attached a ''Certificate of Gift,'' signed by Stelle indicating that the $44,000 was a gift. On or about August 4, 1995, Defendant used the $44,000 as a down payment on the purchase of 14 Michele Lane for $282,500. The 14 Michele Lane deed remains in Defendant's name. Defendant's place of residence before and after the purchase of 14 Michele Lane is 12577 McIntire Drive, Woodbridge, Virginia. Russell and Stelle maintain 14 Michele Lane as their residence. Evidence submitted in the form of bank checks shows that Russell regularly makes the mortgage payments from funds over which Defendant has no control. On September 30, 2000, the United States received a judgment pursuant to 26 U.S.C. § 6672 (trust fund recovery penalty) against Russell and Stelle for their unpaid tax debt. On February 28, 2001, the federal tax lien judgment was amended and principal amounts were entered against Russell and Stelle of $200,991 and $200,249, respectively. Pursuant to IRC § 6321, unpaid federal tax liens remain against all property and rights of Russell and Stelle.

The United States now moves for summary judgment. In the alternative, the United States moves to preclude Defendant from testifying in her defense.

III. DISCUSSION

The United States argues that (1) Defendant holds bare legal title to 14 Michele Lane as a nominee for her parents; (2) that there are no genuine issues of material fact as to whether the lien against Russell and Stelle can attach to 14 Michele Lane; and (3) the $44,000 transfer was fraudulent and that a constructive trust should therefore be imposed as an equitable remedy. Defendant asserts that the $44,000 was intended to be a gift from Stelle, and as a gift, there is no presumption of a constructive trust.

A. Standard of Review

Rule 56(c) provides that summary judgment ''shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file ... show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'' FED. R. CIV. P. 56(c). The mere existence of an alleged factual dispute is not, on its own, sufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986).

While the court is required to view the inferences to be drawn from the facts in the light most favorable to the opposing party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587

(1986) (citation omitted), a party may not "rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986).

The party without the burden at trial may defeat summary judgment by providing sufficient facts to establish that there exists a genuine issue of material fact necessary for trial. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Mere denials or conclusory allegations in legal memoranda are not, on their own, evidence and cannot create a genuine issue of mate-rial fact where none would otherwise exist. *See Quinn v. Syracuse Model Neighbor-hood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980) (citation omitted). "[A] party who asserts the privilege against self-incrimina-tion must bear the consequence of lack of evidence, and the claim of privilege will not prevent an adverse finding or even summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litiga-tion." *United States v. 4003–4005 5th Ave.*, 55 F.3d 78, 83 (2d Cir. 1995) (inter-nal citation and quotation marks omitted).

B. Nominee Theory

Under the nominee doctrine, an owner of property may be considered a mere "nominee" and thus may be considered to hold only bare legal title to the property. The District Court of New York, in deciding a case on remand from the Second Circuit, applied the nominee doctrine in the case of *LiButti v. United States*, 968 F. Supp. 71 [80 AFTR 2d 97-5463] (N.D.N.Y. 1997). The United States, in an attempt to collect unpaid tax debt, asked that court to declare a father the "true" owner of a race horse, title to which was in his daughter's name. *Id.* at 75. In reviewing New Jersey state law, that court found no reported New Jersey cases applying the nominee doctrine. *Id.* Nonetheless, that court chose to apply six factors used by other states' courts for the purpose of determining whether a transferee is a mere nominee of the transferor. *Id.* at 76. The six factors considered by *LiButti* in determining whether a transferee is a nominee are: (1) whether inadequate or no consideration was paid by the nominee; (2) whether the property was placed in the nominee's name in anticipation of a lawsuit or other liability while the transferor remains in control of the property; (3) whether there is a close relationship between the nominee and the transferor; (4) whether they failed to record the conveyance; (5) whether the transferor retains possession; and (6) whether the transferor continues to enjoy the benefits of the transferred property. *Id.*

[1] The United States presents no case law wherein a Connecticut court has applied the nominee theory, nor is this court aware of any. This court declines the invitation to make the nominee theory Connecticut state law, especially in light of the available statutory remedies the legislature has already provided. Even if this court did apply these six factors to the $44,000 transfer from Stelle to Defendant, the United States has failed to successfully show that Defendant holds title to 14 Michele Lane as a mere nominee. The second factor, whether the property was placed in the nominee's name in anticipation of a lawsuit or other liability, is not satisfied. The United States proffers no evidence to show that in 1995, Stelle and Russell anticipated a lawsuit or other liability. Also, the United States concedes the fourth factor, whether they failed to record the conveyance, is not satisfied. Therefore, the United States would not benefit at summary judgment from this court's adoption of the six-factor nominee test.

C. Lien Theory

The Internal Revenue Code, 26 U.S.C. §§ 6321, 6322, governs the IRS's authority to place a lien in favor of the United States upon the property, and rights to property, of any person liable to pay taxes, and who, after a demand has been made, refuses or

neglects to pay his taxes.[1] Where, as in this case, an employer willfully fails to collect, account for, and pay over taxes withheld from the wages of employees, "[a]fter assessment, notice, and demand, the IRS may, therefore, create a lien upon the property of the employer, § 6321, and levy, distrain, and sell the employer's property in satisfaction." *Slodov v. United States*, 436 U.S. 238, 244 [42 AFTR 2d 78-5011] (1978) (footnote omitted). "Assessment is made by recording the liability of the taxpayer in the office of the Secretary of the Treasury, 26 U.S.C. § 6203, and notice of the assessment and demand for payment generally are required to be made within 60 days of the assessment. 26 U.S.C. § 6303(a)." *Id.* at 244 n.5.

Pursuant to 26 U.S.C. § 6321, the United States argues that Russell's and Stelle's judgment for willfully failing to pay taxes authorizes federal tax liens upon all Russell's and Stelle's property and rights to property, including 14 Michele Lane. In order for this argument to succeed, the United States must show that "assessment, notice, and demand" were made prior to the $44,000 transfer of funds from Stelle to Defendant in 1995. Unless a demand had been made, a lien against property of Russell and Stelle did not yet exist at that time. Though trust fund recovery penalties were assessed against Russell and Stelle in 1996 and though the United States received judgments against Russell and Stelle in 2000, the United States has not submitted evidence which shows that a demand was made prior to the $44,000 transfer in 1995. As to whether the unpaid federal tax liens against Russell and Stelle can be applied to 14 Michele Lane under a lien theory, summary judgment is denied.

D. Fraudulent Conveyance Theory

1. Statute of limitations

Pursuant to CONN. GEN. STAT. § 52-552j, the statute of limitations with respect to a fraudulent transfer extinguishes a claim unless the action is brought within four years of the transfer or, if later, within one year of when the transfer could have reasonably been discovered by the claimant. However, "[t]he Connecticut three-year statute of limitations for setting aside fraudulent transfers is not applicable to a suit by the United States to recover the value of allegedly fraudulently conveyed property in partial satisfaction of outstanding tax deficiencies." *United States v. Upton*, 967 F. Supp. 57, 58 [79 AFTR 2d 97-1788] (D. Conn. 1997) (citing *United States v. Fernon*, 640 F.2d 609, 612 [47 AFTR 2d 81-1387] (5th Cir. 1981)). Since this case involves a suit by the United States to partially satisfy outstanding tax liens by recovering allegedly fraudulently conveyed property, the four-year statute of limitations is not applicable.

2. Merits of fraudulent conveyance theory

The United States argues that since Defendant acquired 14 Michele Lane fraudulently, Defendant holds only bare legal title to the property and so a constructive trust should be imposed as an equitable remedy. The proposed constructive trust would provide the United States a source of partial satisfaction towards Russell's and Stelle's outstanding tax deficiencies. The Connecticut Supreme Court has held that "the party seeking to set aside a conveyance as fraudulent bears the burden of proving either: (1) that the conveyance was made without substantial consideration and rendered the transferor unable to meet his obligations; or (2) that the conveyance was made with a fraudulent intent in which the grantee participated." *Wendell Corp. Tr. v. Thurston*, 239 Conn. 109, 115–16 (1996) (citation, alteration, and emphasis omitted); *Bizzoco v. Chinitz*, 193 Conn. 304, 312 (1984); *Zapolsky v. Sacks*, 191 Conn. 194, 200 (1983). Either test defined by the Connecticut Supreme Court is sufficient to set aside the conveyance. *Wendell Corp. Tr.*, 239 Conn. at 116. A fraudulent conveyance must be proven by "clear and convincing" evidence. *Tessitore v. Tessitore*,31 Conn. App. 40, 43 (1993). A party who seeks to set aside a transfer as fraudulent bears the burden of proving

[1] 26 U.S.C. § 6321 provides, "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

fraudulent intent. *Tyers v. Coma,* 214 Conn. 8, 11 (1990). ''[T]he determination of the question of fraudulent intent is clearly an issue of fact which must often be inferred from surrounding circumstances .... Such a fact is, then, not ordinarily proven by direct evidence, but rather, by inference from other facts proven — the indicia or badges of fraud.'' *Dietter v. Dietter,* 54 Conn. App. 481, 487 (1999) (citation omitted; ellipsis in original).

An imposition of a constructive trust can be an appropriate remedy where property has been fraudulently conveyed. *See generally Wendell Corp. Tr.,* 239 Conn. 109. ''A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.'' *Cohen v. Cohen,* 182 Conn. 193, 203 (1980) (citation omitted). A constructive trust arises against one who by actual or constructive fraud or questionable means has obtained or holds the legal right to property which in the interest of equity he should not hold. *Giulietti v. Giulietti,* 65 Conn. App. 813, 856, *cert. denied,* 258 Conn. 946, *cert. denied sub nom. Giulietti v. Vernon Vill., Inc.,* 258 Conn. 947, *and cert. denied,* 258 Conn. 947 (2001).

The first fraudulent transfer test, requiring the conveyance to have been made without substantial consideration and to have rendered transferor unable to meet his obligations, is not fully satisfied. Defendant concedes the $44,000 was conveyed without substantial, or indeed any, consideration and was used to purchase 14 Michele Lane. That being said, the United States has not put forward any evidence to prove that the transfer left Russell and Stelle unable to meet their obligations.[2]

The second fraudulent transfer test, requiring proof that conveyance was made with fraudulent intent, is not satisfied. In order to set aside a conveyance as fraudulent the United States must show that Russell and Stelle knew of their indebtedness to the United States at the time of the $44,000 transfer of funds. The United States puts forward some evidence to the effect that 14 Michele Lane was conveyed with fraudulent intent. In particular, the United States submits documents which show significant discrepancies between Defendant's reported income on her mortgage application for 14 Michele Lane and income reported on her tax returns submitted to the IRS. On the first page of Defendant's 1995 Uniform Residential Loan Application for the purpose of purchasing 14 Michele Lane, Defendant indicated that she was employed as a ''Director'' for Broad Store Corporation, a corporation controlled by Russell. Defendant further submitted to the loan company an IRS W-2 form showing that as Director of Broad Store Corporation she earned $88,000 in 1993 and $94,000 in 1994. In contrast to these representations, Defendant's 1993 and 1994 federal income tax returns show no income from Broad Store Corporation. Rather, Defendant listed her occupation as ''Homemaker/PT Recept.'' The presumably fraudulent IRS W-2 forms[3] submitted to the loan company were never submitted to the IRS as part of Defendant's federal income tax returns, as would have been required by law. The foregoing pertains to the purchase of 14 Michele Lane, not to the conveyance of the $44,000, which may be related. These factors, while regardable as evidence of fraud in the purchase of the home, are not so determinative that every reasonable jury must determine that it is clear and convincing evidence of the intent to defraud the United States at the time of the alleged fraudulent $44,000 transfer.

The conveyance which the United States seeks to set aside as fraudulent is the $44,000 transferred from Stelle to Defendant. The chronological order of events does not, as a matter of law, prove fraudulent intent with regard to the $44,000 transfer. The United States submits no evi-

[2] Also left unresolved is whether Russell and Stelle even knew they had outstanding tax obligations to the United States at the time of the transfer.

[3] Presumably, as it is possible that the IRS W-2 forms submitted to the loan company were accurate and her 1993 and 1994 federal income tax forms were fraudulent. Or both were fraudulent.

dence that in 1995, at the time of the $44,000 transfer, Russell and Stelle knew of their indebtedness to the United States. Judgments for the tax deficiencies were not entered against Russell and Stelle until 2000. Therefore, a genuine issue of material fact exists as to the existence of fraudulent intent at the time of the $44,000 conveyance in 1995. The "clear and convincing" standard of proof required in order to set aside the conveyance as fraud-ulent is not satisfied, especially when con-sidered as a matter of summary judgment. Since Russell's and Stelle's intent at the time of the transfer has not been conclu-sively established, it would therefore be improper to impose a constructive trust on 14 Michele Lane as a matter of law. Rather the issue of fraudulent intent is a question of fact.

E. Intent to Gift

Where the nominal grantee is the natural object of the payor's bounty the law presumes a donative intent. *E.g., Walter v Home Nat'l Bank & Trust Co. of Meriden*, 148 Conn. 635, 639 (1961); *see* RESTATEMENT (SECOND) OF TRUSTS § 442. Particularly, where purchase money is provided by parents to their child, there is a presumption of a gift of money, rather than an intention of a trust. *See Zack v. Guzauskas*, 171 Conn. 98, 102 n.1 (1976). This presumption is one of fact, not of law, and may be rebutted. *Whitney*, 171 Conn. at 33. For instance, the presumption of a gift was rebutted in the case of *LiButti v. United States*, 107 F.3d 110, 125 [79 AFTR 2d 97-1240] (2d Cir. 1997) (interpreting New Jersey state law), where the Second Circuit held, in remanding an injunction barring the IRS from enforcing a tax levy against Plaintiff, that a nominee ownership could be determined based on the fact that a father who transferred money to his daughter for the purchase of a racehorse, did so with the intent to hide the funds from creditors. In *LiButti*, the facts showed that the father had supplied money to his daughter to purchase a race horse, in her name, subsequent to his being assessed by the IRS for several million dollars in unpaid income taxes. *Id.* at 113–14.

Defendant submits an affidavit signed by Stelle which states that the $44,000 was a gift to Defendant, to be utilized as a down payment for 14 Michele Lane. In her affidavit, Stelle asserts her belief that at the time of the purchase of 14 Michele Lane, Defendant planned to relocate from Virginia to 14 Michele Lane for the purpose of assisting in the family gasoline station and convenience store business. Defendant also submitted a "Certification of Gift" signed by Stelle as part of Defendant's Uniform Loan Application for the purchase of 14 Michele Lane. In response, the United States correctly argues that the intent of a gift is irrelevant where a transfer is deemed fraudulent. However, since the United States has failed to show conclusively that the $44,000 transfer from Stelle to Defendant was made with fraudulent intent, a genuine issue of material facts exists as to Defendant's assertion of an intent to give the $44,000 as a gift.

F. Motion to Preclude Susan Snyder from Testifying in Her Defense

Defendant asserted her Fifth Amendment privilege against self-incrimination during discovery. In doing so, the United States and Defendant agree that Defendant waived her right to testify at trial. However, Defendant requests to reserve her right to move this court to modify the preclusion order and reopen discovery should she subsequently decide to waive her privilege. "[S]o long as a district court attempts to accommodate a claimant's fifth amendment interests, the nature and extent of accommodation should be left primarily to that court's discretion." *United States v. Parcels of Land*, 903 F.2d 36, 44 (1st Cir. 1990). In cases where a litigant chooses to withdraw their Fifth Amendment privilege, "[t]he district court should, in general, take a liberal view towards such applications, for withdrawal of the privilege allows adjudication based on consideration of all the material facts to occur." *4003–4005 5th Ave.*, 55 F.3d at 84. In deciding whether to allow such a litigant to waive his or her privilege, it should be taken into

consideration whether the privilege was originally invoked in a manner as to manipulate or gain an unfair advantage over opposing parties. *Id.* at 85. Evidence has not been submitted to the effect that Defendant has asserted her Fifth Amendment privilege in an abusive or manipulative manner. Therefore, Defendant retains the right to rescind the invocation of her right not to incriminate herself and thus any preclusion of her testimony, as to which this court will not now comment.

G. Order Approving Stipulation

Still pending is the United States's motion to approve a stipulation between the Bank of America, N.A. and the United States. As the underlying stipulation has already been approved, (Dkt. No. 15, margin endorsement), the motion is denied as moot.

IV. CONCLUSION

The United States's motion to approve stipulation between Bank of America, N.A. and the United States as an order of the court, (Dkt. No. 16-2), is denied as moot. The United States's motion for summary judgment, (Dkt. No. 25-1), is denied. The United States's motion to preclude Defendant from testifying at trial of this matter in her defense, (Dkt. No. 25-2), is granted.

SO ORDERED.

Dated at New Haven, Connecticut, August 8, 2002.

Peter C. Dorsey

Senior United States District Judge

¶2002-5378

Peter THOSTESON, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-COUNTER-CLAIMANT-APPELLEE, Quentin GARNER Umphrey, ET AL., COUNTER-DEFENDANTS. U.S. Court of Appeals, Eleventh Circuit, (CA11) No. 01-14520, Sept. 11, 2002. District Court, (2001, DC AL) 88 AFTR 2d 2001-5564, vacated and amended at (2001, DC AL) 88 AFTR 2d 2001-5859, affirmed. Earlier proceeding at (2001, DC AL) 88 AFTR 2d 2001-5715. Years 1994, 1995. Decision against Taxpayer.

1. 100% penalty for failure to pay over employee withholding taxes—responsible person—willfulness. District court properly granted govt. judgment as matter of law upholding vice pres./pres.'s IRC §6672 liability: taxpayer was responsible person where he helped incorporate corp., owned stock, had hiring and firing and check signing authority and was in charge of marketing; and even if his superior was more culpable responsible person and limited taxpayer's check writing authority, such wouldn't excuse taxpayer from responsibility. Also, taxpayer's claim that he was merely acting under superior's orders by not paying tax debt after he became aware of it was similarly unavailing; whether his payment of other creditors including himself and wife's co. over IRS was merely innocent attempt to keep business going was irrelevant to willfulness finding; and reasonable cause defense couldn't be maintained in light of his conscious decision to pay creditors other than govt. while knowing taxes were unpaid. *Reference:* United States Tax Reporter ¶66,725.01(25); 66,725.04(35). IRC §6672.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT,

Appeal from the United States District Court for the Middle District of Alabama

Before EDMONDSON, Chief Judge, CARNES and SILER* [1], Circuit Judges.

SILER, Circuit Judge:

[PUBLISH]

Plaintiff Peter Thosteson filed this action against the United States seeking a refund of his partial payment of the tax penalty assessment made against him pursuant to

* Honorable Eugene E. Siler, Jr., U.S. Circuit Judge for the Sixth Circuit, sitting by designation

[1] Judgment was actually entered for $1,560,235.45, which includes interest from the date of the assessment. Plaintiff did not contest this figure below, nor does he contest it in this appeal.

26 U.S.C. § 6672, based on the failure of the company for which he worked to submit payroll withholding trust fund taxes (the "taxes"). A trial was held, and the jury returned a verdict in his favor for all tax quarters at issue. Pursuant to Rule 50 of the Federal Rules of Civil Procedure, the district court granted judgment as a matter of law for the Defendant United States of America (the "government"), finding Thosteson liable for all tax quarters at issue. Thosteson appeals that decision. We affirm.

I.

In response to an Internal Revenue Service (IRS) assessment, Thosteson filed this action against the government. He seeks a refund of his partial payment of the taxes from the third quarter of 1994 through all four quarters of 1995 (until November 28, 1995), which his employer, Lorac, Inc., failed to remit to the government. The judgment amounts to $1,293,427.09.[2]

Prior to submission of the case to the jury, the government made a motion for judgment as a matter of law. The court reserved decision on that motion. After the jury began deliberations, it returned with a question: "If the jury were to find that plaintiff was a responsible person for only following quarters, third quarter of 1995, fourth quarter of 1995, but was not willful in the failure to pay taxes of said quarters, will Mr. Thosteson be assigned a penalty?" The court answered that an individual must be both "responsible" and "willful" to be liable for the penalty. Subsequently, the jury returned a verdict in favor of the taxpayer. For the last two quarters of 1994 and the first two quarters of 1995, the jury found that Thosteson was not a responsible party. For the third and fourth quarters of 1995, the jury found that Thosteson was a responsible party, but his conduct in not paying the taxes was not willful.

The government renewed its request for a judgment as a matter of law. The court granted that motion, overturning the jury verdict and entering judgment for the government.

The district court recounted the following basic facts in its opinion granting the Rule 50 motion:

Plaintiff was an incorporator of Lorac, Inc., an employee leasing business. Initially he was one of the company's vice-presidents, and his main responsibility was sales and "growing" the business. He had limited authority to hire and fire employees, to determine financial policy, to set salaries and wages, to pay employees, and to enter loan agreements on Lorac's behalf. He opened bank accounts for Lorac with People's Bank in Dothan, Alabama, and was a signatory on those accounts with the ability to write checks under his sole signature for amounts up to $750. Lorac had two different kinds of checks: Checks that expressly required two signatures for amounts above $750, and checks that did not. On at least three occasions, Plaintiff wrote checks for more than $750 under his sole signature on Lorac checks that did not expressly require two signatures [checks in the amount of $1,000, $923.04 and $45,000]. The evidence at trial did not show that those checks were not honored, and conclusively proved that at least one such check was honored [entered into evidence along with the bank statement indicating that the check was cashed and honored]. Further, Plaintiff also had the authority to sign Lorac's Form 941 withholding tax returns, and he did so for the third and fourth quarters of 1995.

In the spring of 1995, Plaintiff purchased a 24% stake in Lorac from its sole shareholder, Garner Umphrey, for $288. Umphrey, however, did not cash the check that Plaintiff used to pay him. At some point before the bankruptcy, Plaintiff also became the president of Lorac.

Plaintiff testified at trial that he knew during the entire period at issue in this suit that a responsible person has a duty under

[2] Section 6672 provides: Any person required to collect, truthfully account for, and pay over any tax imposed by this title [Title 26 of the United States Code] who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. 26 U.S.C. § 6672(a).

the law to assure that withholding taxes are remitted to the United States. And he testified that as of August 28, 1995[,] he was aware that Lorac had failed to remit withholding taxes to the United States, and that, in October 1995, he became aware of the full amount of withholding taxes that Lorac owed.

The undisputed evidence showed that after Plaintiff became aware that Lorac owed withholding taxes to the government and after he became aware of the full amount of the taxes that were owed, he continued to write check after check to other creditors under his signature alone, including checks to Tack and So Forth, Inc. (a joint venture of Lorac and Plaintiff's wife) [for $1,000, dated October 18, 2001], himself [for $280, dated October 20, 1995], Builder's Cash and Carry [for $923, dated October 13, 1995], and Garner Insurance Agency [for $45,000, dated October 13, 2001].

Thosteson v. United States, 182 F. Supp. 2d 1189, 1191-92 (M.D. Ala. 2001) (notes omitted).

On appeal, Thosteson emphasizes the role of Garner Umphrey, who has also been sued by the government but has disappeared. He describes their relationship as beginning in the late 1980's through Umphrey's uncle, who attended Thosteson's church. In 1993, Umphrey approached Thosteson about starting an employee leasing business in the civilian context. Umphrey was already involved in employee leasing on behalf of military contractors. Thosteson claims that he originally had no related experience or background, but he educated himself in the computer program area of the business and proceeded to build the company through sales and marketing. He credits his sales and marketing efforts in late 1994 and early 1995 for making the new business become very successful. During 1995, the company had between four thousand and five thousand employees.

Nevertheless, Thosteson claims that Umphrey was not only the sole stockholder up through April 1995, but he and his wife also controlled all major decisions within the business. He alleges that Umphrey started diverting money from the company into his other business enterprises, and these alleged transfers amounted to hundreds of thousands of dollars.

Regarding the taxes, Thosteson claims that he was not aware of the corporation's failure to pay them until August 28, 1995. He alleges that he was hospitalized when he found out that the taxes had not been paid. Further, after finding out about the tax arrears in August 1995, even though not knowing the amounts of those arrearages, he used his best efforts to try to establish a repayment plan. Thosteson testified that on August 28, 1995, he confronted Umphrey's wife and confirmed with her that the company had substantial overdue payroll tax liabilities. Thereafter, he arranged for Lorac to make weekly payments of $30,000 to the IRS. Thosteson and Umphrey's wife signed three checks for $30,000 on an account of the company, payable to the IRS, and dated August 31, September 6 and September 15, 1995. He alleges that his efforts were frustrated by Umphrey who contradicted his orders and stopped the tax restitution payments. Thosteson does not deny, however, that he knew Umphrey ordered the payments to cease. He claims that he continued to use his best efforts to make the business successful because based on his meeting with Lorac's bookkeeper, he felt that if they continued with the business, then the taxes could be successfully repaid. Thosteson signed the payroll tax return for the third and fourth quarters of 1995.

He testified that in November 1995, he became the president of Lorac through Umphrey's consent and in order to formulate a Chapter 11 bankruptcy plan to repay the taxes and keep the business going. The company's original petition for reorganization eventually converted to a Chapter 7 liquidation case, and the company went out of business in 1997.

The principal service offered by Lorac to its clients, in addition to volume discounts for workers compensation insurance, was relief from the paperwork of handling payroll, including the filing of federal employment tax returns and the

payment of those taxes. The client's employees became employees of Lorac for purposes of payroll processing and payroll taxes.

II.

We review de novo a district court's grant of judgment as a matter of law under Rule 50, applying the same standards as the district court. Slicker v. Jackson, 215 F.3d 1225, 1229 (11th Cir. 2000). We consider whether such sufficient conflicts exist in the evidence to necessitate submitting the matter to the jury or whether the evidence is so weighted in favor of one side that one party must prevail as a matter of law. Mendoza v. Borden, Inc., 195 F.3d 1238, 1244 (11th Cir. 1999) (en banc). Although we look at the evidence in the light most favorable to the non-moving party, the non-movant must put forth more than a mere scintilla of evidence suggesting that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." Id. (quoting Walker v. NationsBank of Florida, N.A., 53 F.3d 1548, 1555 (11th Cir. 1995)).

III.

Section 6672 imposes liability upon (1) a responsible person (2) who has willfully failed to perform a duty to collect, account for, or pay over federal employment taxes.[3] See Williams v. United States, 931 F.2d 805, 810 [67 AFTR 2d 91-1024], reh'g granted and opinion supplemented, 939 F.2d 915 [68 AFTR 2d 91-5448] (11th Cir. 1991).

A. Allocation of the Burden of Proof

In tax refund cases, the burden of proof is on the plaintiff to show that the IRS's findings in assessing a deficiency are incorrect because its "deficiency determinations are presumed correct." Trucks, Inc. v. United States, 234 F.3d 1340, 1342 [86 AFTR 2d 2000-7180] (11th Cir. 2000) (citing Mays v. United States, 763 F.2d 1295, 1297 [56 AFTR 2d 85-5335] (11th Cir. 1985)). Specifically in the context of § 6672 cases, however, we have held that "[o]nce an individual is established as a 'responsible person,' the burden shifts to the individual to disprove willfulness." Malloy v. United States, 17 F.3d 329, 331 [73 AFTR 2d 94-1569] (11th Cir. 1994); see also Williams, 931 F.2d at 810 (same). The district court observed that though we have allocated to the taxpayer the burden of disproving willfulness, we have "not directly decided who bears the burden of proof on the issue of whether a taxpayer is a responsible person . . . ." The district court, nevertheless, concluded that it "need not reach that issue here because both parties have agreed that the taxpayer in this suit bears the burden of showing that he was not a responsible person." We agree that the government would prevail under either standard, but we disagree that the taxpayer bears the burden of showing that he was not a responsible person. In Malloy, using "is established" with regard to responsibility coupled with "the burden shifts" to the taxpayer logically refers to the government as bearing the burden on the issue of responsibility. Therefore, to the extent this burden was not clear after Malloy, we clarify the standard in this regard to be that once the government satisfies its burden in establishing a taxpayer as a "responsible person," the burden shifts to the taxpayer to disprove his willfulness in order to avoid liability.

B. "Responsible" Person

[1] A person is responsible within the meaning of § 6672 if he has a duty to collect, account for, or pay over taxes withheld from the wages of a company's employees. Thibodeau v. United States, 828 F.2d 1499, 1503 [60 AFTR 2d 87-5763] (11th Cir. 1987). Responsibility is a matter of status, duty and authority, not knowledge. Mazo v. United States, 591 F.2d 1151, 1156 [43 AFTR 2d 79-853] (5th Cir.

[3] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

1979).[4] Section 6672 responsibility is a matter of the power and authority to make payment of withholding taxes, which is not dispositively determined by corporate title or position. Neckles v. United States, 579 F.2d 938, 940 [42 AFTR 2d 78-5807] (5th Cir. 1978). "Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees." George v. United States, 819 F.2d 1008, 1011 [60 AFTR 2d 87-5214] (11th Cir. 1987).

In the case at bar, the government has met its burden by presenting overwhelming evidence as to all of the mentioned indicia of responsibility. Thosteson vehmently argues that Umphrey was the responsible person. However, a company may have more than one responsible person within the meaning of § 6672. Thibodeau, 828 F.2d at 1503. Because Umphrey was responsible does not absolve Thosteson of responsibility. Thosteson helped incorporate Lorac, served as vice-president and president, owned varying levels of stock in Lorac from 24% to 100%, and possessed the authority to hire and fire. It is logical that a vice-president who was also a significant shareholder would be a responsible person under the statute. Furthermore, the government's point that Thosteson admits to being in charge of marketing is well taken. The principal benefit to this employee leasing arrangement, which Lorac's marketing materials stressed, is the tax and administrative savings, and much of the administrative savings has to do with tax-related payroll deductions and withholdings.

Thosteson's principal argument as to the limits of his authority and "responsibility" under § 6672 relates to his claim that he had limited check writing authority, up to only $750, without a countersignature of Umphrey or his wife. In dispensing with this same argument, the Fifth Circuit observed: "[Plaintiff] also argues that he did not have the actual authority to pay the entire tax bill because his check writing authority was limited to relatively small amounts . . . . [but] [t]he Internal Revenue Service would certainly not have objected to payment of the tax deficiency by several small checks." Gustin v. I.R.S., 876 F.2d 485, 492 [64 AFTR 2d 89-5163] (5th Cir. 1989). We agree. Thus, even presuming the limitations on his authority imposed by Umphrey and ignoring the overwhelming evidence presented by the government to the contrary, this would not remove his "responsibility" under § 6672. Therefore, the finding that Thosteson was a "responsible" person as a matter of law was not erroneous. The government has more than met its burden here.

C. Willful Failure

Turning to the requirement of willfulness, this court has held that the willfulness requirement of § 6672 is satisfied if the responsible person has knowledge of payments to other creditors after he becomes aware of the failure to remit the withheld taxes. Williams, 931 F.2d at 810 (citing Smith v. United States, 894 F.2d 1549, 1553 [71A AFTR 2d 93-3456] (11th Cir. 1990) and Thibodeau, 828 F.2d at 1505). Willfulness, however, "does not require a fraudulent or other bad motive on the part of the responsible person." Id. (citing Hewitt v. United States, 377 F.2d 921, 924 [19 AFTR 2d 1572] (5th Cir. 1967)).

Thosteson admits that he became aware of the trust fund arrearages on August 28, 1995. He claims, however, that Umphrey ordered the suspension of the $30,000 weekly repayment schedule. Nevertheless, the "Nuremburg defense," as some courts have referred to it, is not available to Thosteson. See Brounstein v. United

[4] See also Gephart v. United States, 818 F.2d 469 [59 AFTR 2d 87-1099] (6th Cir. 1987) (holding nonshareholder general manager was a responsible person, notwithstanding testimony that major shareholder had told him it was none of his business that withheld taxes were not being paid); Howard v. United States, 711 F.2d 729 [52 AFTR 2d 83-5777] (5th Cir. 1983) (holding director and treasurer of corporation, who had signatory authority over main corporate checking account, was a responsible person even though chief executive officer upon hearing of payment to IRS had ordered plaintiff not to pay IRS any more money and subsequently suspended him for several weeks; after resigning in part based on company's failure to remit the taxes, plaintiff notified IRS of corporation's unpaid taxes, but though corporation then had substantial assets, when IRS sought to collect taxes more than two years later, it had none); Greenberg v. United States, 46 F.3d 239 [74 AFTR 2d 94-7343] (3d Cir. 1994) (holding controller was a responsible person even though the chief executive officer ordered him not to pay trust fund taxes, and he believed that if he issued a check for the taxes, it would bounce and he would be fired).

States, 979 F.2d 952, 956 n.5 [71 AFTR 2d 93-1714] (3d Cir. 1992) (discussing and dismissing "Nuremburg defense," holding it is no defense that taxpayer "served only as a nominal president whose signature constituted a mere 'rubber stamp' for [principal shareholder-director's] decisions" and "instructions from a superior not to pay taxes do not ... take a person otherwise responsible ... out of that category"); Roth v. United States, 779 F.2d 1567 [57 AFTR 2d 86-603] (11th Cir. 1986) (holding vice president and minority shareholder who handled day-to-day operations and wrote corporate checks was a responsible person even though the president had instructed him not to pay the government).[5] Thosteson knew that the taxes were owed and that they were not being paid under Umphrey's order. Acting, or rather failing to act, under orders from his superior does not negate his culpability under the statute.

Thosteson admits that he became the undisputed president of the company, with concomitant authority, at the beginning of November, prior to the filing of bankruptcy. He was aware of the arrearages, and after he became aware of this deficiency, he still issued 262 checks to various creditors and others, including himself and his wife's company. Even if a "responsible" person is unaware that withholding taxes have gone unpaid in past quarters, a responsible person who becomes aware that taxes have gone unpaid in past quarters in which he was also a responsible person, is under a duty to use all "unencumbered funds" available to the corporation to pay those back taxes. Mazo, 591 F.2d at 1157; see also United States v. Kim, 111 F.3d 1351 [79 AFTR 2d 97-2238], 1357 (7th Cir. 1997) (same); Honey v. United States, 963 F.2d 1083, 1089 [69 AFTR 2d 92-1333] (8th Cir. 1992) (same). This duty extends not only to funds available to the corporation at the time the responsible person becomes aware but also to any unencumbered funds acquired thereafter. If the responsible person fails to use such unencumbered funds to satisfy the past unpaid liability, he is deemed personally liable for the taxes that went unpaid in the past while he was responsible. The responsible person deemed liable for the unpaid liability of past tax quarters is considered to have "willfully" failed to pay over the taxes for those past quarters, even though he was unaware at that time that the taxes were going unpaid. Mazo, 591 F.2d at 1157. Even giving Thosteson the benefit of the doubt, that he was merely paying other creditors in order to keep the company going and preserve its ability to repay the tax debt, he is still liable under the law of this Circuit.

D. Reasonable Cause

Finally, Thosteson raises the putative defense of "reasonable cause." See, e.g., Finley v. United States, 123 F.3d 1342 [80 AFTR 2d 97-6321] (10th Cir. 1997) (reasonable cause sufficient to excuse a responsible person's failure to pay withholding taxes occurs in circumstances where (1) the taxpayer has made reasonable efforts to protect the trust funds, but (2) those efforts have been frustrated by circumstances outside the taxpayer's control). This Circuit has not yet addressed whether a defense of "reasonable cause" can avoid a finding of willfulness in this context. We decline, however, to address this issue today. Such defense as applied by other circuits would still not be applicable under the facts of this case for the same reasons set forth by the Fifth Circuit in addressing a similar situation:

We have consistently held that the reasonable cause defense to a § 6672 action is exceedingly limited. In Bowen v. U.S., 836 F.2d 965, 968 [61 AFTR 2d 88-564] (5th Cir. 1988), we stated that "[a]lthough we have recognized conceptually that a reasonable cause may militate against a finding of willfulness, no taxpayer has yet carried that pail up the hill." See also Newsome v. U.S., 431 F.2d 742, 747 [26 AFTR 2d 70-5078] (5th Cir. 1970). No such defense may be asserted by a respon-

[5] Thosteson's assignment of error relating to the court's response to the jury's question is mooted by our finding that judgment as a matter of law was not in error. Likewise, there is no merit to his claim that the grant of the judgment as a matter of law denied him his right to a jury trial.

sible person who knew that the withholding taxes were due, but who made a conscious decision to use corporate funds to pay creditors other than the government. Newsome, 431 F.2d at 747 n.11; Frazier v. U.S., 304 F.2d 528, 530 [9 AFTR 2d 1743] (5th Cir. 1962).

Here, [plaintiff] consciously decided to make payments to creditors other than the government even though he knew that the withholding taxes had not been paid. The facts [plaintiff] relied on were not sufficient to support a reasonable cause defense.

Logal v. United States, 195 F.3d 229, 233 [84 AFTR 2d 99-7047] (5th Cir. 1999); cf. Finley, 123 F.3d at 1342 [80 AFTR 2d 97-6321] (finding potential ''reasonable cause'' where as soon as individual determined that taxes were owed, ordered subordinate to pay the taxes without reason to doubt that subordinate would do so, and subordinate did not pay the taxes; when the failure was discovered, no unencumbered funds were available to pay the liability).

IV.

We do not quarrel with Thosteson's contention that Umphrey is the more culpable party, but even so conceding, being less culpable does not exonerate Thosteson from his responsibility, which he knowingly disregarded. As we have observed, ''[t]he seeds of common sense compassion sown by the jury find scant hospitality on this rock hard legal landscape.'' Williams, 931 F.2d at 811. The district court did not err in setting aside of the jury's verdict and granting judgment as a matter of law to the government. (6) AFFIRMED.

¶2002-5379

CAPE ANN SAVINGS BANK, PLAINTIFF v. Walter R. JOHNSON, Janet L. JOHNSON, and Salem Five Cents Savings Bank, DEFENDANTS v. UNITED STATES OF AMERICA, INTERPLEADER v. MASSACHUSETTS DEPARTMENT OF REVENUE, INTERESTED PARTY. CAPE ANN SAVINGS BANK, PLAINTIFF v. Walter R. JOHNSON and Janet L. JOHNSON, DEFENDANTS v. UNITED STATES OF AMERICA, INTERPLEADER v. MASSACHUSETTS DEPARTMENT OF REVENUE, INTERESTED PARTY. U.S. District Court, Dist. of Massachusetts, (DC MA) CIVIL ACTION NO. 02-10032-GAO; CIVIL ACTION NO. 02-10036-GAO, Aug. 12, 2002. Decision against Govt.

1. Interpleader actions—jurisdiction and dismissal—lien property—indispensable parties. Bank's interpleader action, involving IRS's and Massachusetts Dept. of Revenue's (MDOR) competing claims to surplus proceeds from foreclosure sale of lien properties, was dismissed over govt.'s objection: MDOR was immune under 11th Amendment from federal court suit by private party; such immunity wasn't affected or negated by fact suit had originally been filed in state court; and, since MDOR was indispensable party, its dismissal necessitated dismissal of entire case. *Reference:* United States Tax Reporter ¶63,215.04(147); 74,336.505(18). IRC §6321.

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS,

ORDER

O'TOOLE, D.J.

[1] Cape Ann Savings Bank (''Cape Ann'') held real estate mortgages for two separate pieces of property owned by the defendants, Walter and Janet Johnson. The mortgages were foreclosed, and the properties were sold at public auction. After satisfying its own debt, Cape Ann filed interpleader actions in the Massachusetts Superior Court to determine how to dis-burse the surplus funds to subordinate in-terest and lien holders. Among the entities having interests in the surplus funds are the Internal Revenue Service (*hereinafter* ''the United States'') and the Massachu-setts Department of Revenue (*hereinaf-ter*''the Commonwealth''). The United

States removed the cases to this Court pursuant to 28 U.S.C. §§ 2410 and 1444.

The Commonwealth then filed motions to remand the cases back to state court. The Commonwealth has now withdrawn those motions and has instead moved to dismiss each action as against it on Eleventh Amendment sovereign immunity grounds and subsequently to dismiss the entire action due to the absence of a necessary party under Fed. R. Civ. P. 19.

The complicated procedural posture of this case has created the conflict that is the subject of the Commonwealth's motions to dismiss. Cape Ann, a private plaintiff, filed this action in state court and included as interested parties the Commonwealth and the United States. The United States invoked its statutory right to remove the action to federal court pursuant to 28 U.S.C. § 1444, which allows the United States to remove any action affecting property on which the United States has a lien. See 28 U.S.C. § 2410. The Commonwealth, finding itself in federal court as a defendant in an action prosecuted by a private party, invokes its Eleventh Amendment right not to be sued by private parties in federal court.

The United States argues that the Eleventh Amendment does limit a federal court's jurisdiction over tax lien claims by the United States granted by 28 U.S.C. §§ 2410 and 1444, and therefore the Commonwealth's invocation of the Eleventh Amendment must give way to the United States' right to have cases involving tax liens determined in a federal forum. The United States also contends that since the United States, and not the private citizen plaintiff, removed the case to federal court the case is analogous to cases holding that states cannot invoke the Eleventh Amendment when they are sued by the United States, citing West Virginia v. United States, 479 U.S. 305, 311 (1987), or to cases holding that the United States can implead a State as a third-party defendant in a suit brought by a private citizen, citing Parks v. United States, 784 F.2d 20, 23 (1st Cir. 1986).

The United States' first argument fails to surmount a hurdle erected by Seminole Tribe of Florida v. Florida, 517 U.S. 44, 56 (1996), where the Supreme Court explained that a congressional intent to abrogate a State's Eleventh Amendment sovereign immunity must be ''unmistakably clear in the language of the statute.'' The removal statutes do not make that clear. The flaw in the United States' second argument is that the proposed analogies assume that the Commonwealth is subject only to claims by the United States. In the interpleader, however, there will also be claims by interested private parties, including a claim by Cape Ann to be released from any obligation to the Commonwealth beyond the payment of the surplus amount into court for appropriate disbursement.

It must be concluded that the Commonwealth has properly invoked its Eleventh Amendment immunity. The motions to dismiss the Commonwealth as a party are granted. (Dkt. Nos. 12, 10). The parties have offered several alternative resolutions to the procedural problems presented in this case, all of which involve cooperation between the United States and the Commonwealth and none of which this Court can order. In the absence of some accommodation, however, it appears that the Commonwealth is an indispensable party, warranting dismissal of the cases in their entirety. See Fed. R. Civ. P. 19(b). The actions are DISMISSED.

IT IS SO ORDERED.

August 12, 2002

DATE

/s/

DISTRICT JUDGE

¶2002-5380

In Re: NERLAND OIL, INC. SUPERPUMPER, INC., CLAIMANT v. NERLAND OIL, INC., DEBTOR. UNITED STATES OF AMERICA through the Internal Revenue Service, CREDITOR. U.S. Court of Appeals, Eighth Circuit, (CA8) No. 01-2962, Sept. 12, 2002. District Court, (2001, DC ND) 88 AFTR 2d 2001-6079, affirming

Bankruptcy Court, affirmed. Years 1993, 1994. Decision for Govt.

1. Appeals to Courts of Appeal—bankruptcy court procedure—lien priority—state-created setoff rights. IRS was properly granted summary judgment that its federal tax liens had priority over 3d-party creditor's state-created right to setoff credit card receivables due from bankrupt taxpayer against its outstanding obligations to taxpayer: IRS's tax liens were choate before 3d-party's setoff rights and encompassed all taxpayer's property, including after-acquired property; and facts that 3d party was both debtor as well as creditor and that attempted setoff preceded taxpayer's bankruptcy filing were irrelevant. Also, 3d party's attempt to treat its and taxpayer's debts interchangeably was rejected; and its IRC §6323 argument for superpriority treatment as "purchaser" was rejected where most 3d party acquired was right not to make balance of payments on its note, not legally enforceable right to receive payments. *Reference:* United States Tax Reporter ¶68,726.52(3); 63,215.04(50); 63,235.06(62). IRC §6321; 6323.

United States Court of Appeals FOR THE EIGHTH CIRCUIT,

Appeal from the United States District Court for the District of North Dakota

Before McMILLIAN, BOWMAN and MURPHY, Circuit Judges.

McMILLIAN, Circuit Judge.

In this Chapter 7 bankruptcy matter filed by the debtor Nerland Oil, Inc. ("Nerland Oil"), Superpumper, Inc. ("Superpumper") appeals from a final order entered in United States District Court for the District of North Dakota[1] affirming the bankruptcy court's[2] grant of summary judgment in favor of the United States, through the Internal Revenue Service ("IRS"), on the ground that federal tax liens previously assessed by the IRS against Nerland Oil took priority over a North Dakota state court judgment affirming an arbitration award enabling Superpumper to setoff its debt to Nerland Oil. See In re Nerland Oil, Inc., No. A3-01-05 (D.N.D. June 13, 2001) (memorandum and order). For reversal, Superpumper argues that the district court erred in determining that (1) Superpumper did not complete a valid setoff under state law in 1996, (2) unfiled federal tax liens prevented Superpumper's setoff of debt, and (3) Superpumper could not assert the same defenses against the IRS as it could against Nerland Oil. For the reasons discussed below, we affirm the order of the district court.

Jurisdiction

Jurisdiction in the bankruptcy court was proper based upon 28 U.S.C. § 157(b) (transferring jurisdiction of cases arising in or related to Title 11 from district court to bankruptcy court), pursuant to 28 U.S.C. § 1334 (providing original federal jurisdiction for Title 11 bankruptcy cases). Jurisdiction in district court was proper based upon 28 U.S.C. § 158(a)(3) (enabling district court to consider interlocutory orders of bankruptcy courts). Jurisdiction in this court is proper based upon 28 U.S.C. § 158(d) (authorizing appeals from final district court judgments reviewing bankruptcy court appeals). The notice of appeal was timely filed pursuant to Fed. R. App. P. 4(a).

Background

The parties stipulated to the following facts in the bankruptcy court's record. In the mid-1970s, Brent Nerland founded Nerland Oil, a petroleum products wholesale marketing business. Nerland Oil established a "jobber" relationship with Conoco, in which it contracted with Conoco to distribute Conoco products to Conoco retail stations and to forward credit card receivables to Conoco retail stations after Conoco processed the credit card transactions. Over time, Nerland Oil acquired several convenience stores, including a Conoco retail station and convenience store

[1] The Honorable Rodney S. Webb, Chief Judge, United States District Court for the District of North Dakota.

[2] The Honorable William A. Hill, United States Bankruptcy Judge for the District of North Dakota.

called the Dakota Fuel Stop in Jamestown, North Dakota.

In June 1995, Superpumper, an owner and operator of convenience stores, bought the Dakota Fuel Stop from Nerland Oil. To partially finance the purchase, Superpumper executed a promissory note payable to Nerland Oil in the amount of $350,000 and secured by a second mortgage on the Dakota Fuel Stop. The note required Superpumper to make quarterly payments of $7,545 to Nerland Oil at an annual interest rate of nine percent. The balance of the note was to be paid on September 30, 2000, or earlier if Superpumper sold the Dakota Fuel Stop.

As a condition of the purchase, Superpumper agreed to arrange future fuel supply and freight in a form acceptable to Nerland Oil, and therefore entered into two contracts with West Fargo Truck Stop, Inc. (''WFTS''), another company owned by Brent Nerland. Together the contracts credited Superpumper with $579,332 toward the purchase price of the Dakota Fuel Stop. The first agreement designated WFTS as the exclusive supplier of the Dakota Fuel Stop's Conoco brand fuel requirements. The second contract required WFTS to haul fuel products to various Superpumper locations in the Red River Valley.[3] Both contracts contained clauses requiring disputes to be submitted to binding arbitration. Although neither contract established Nerland Oil as the Conoco jobber to service the Dakota Fuel Stop, Nerland Oil acted in that capacity. Consequently, Nerland Oil was responsible for forwarding from Conoco to Superpumper the credit card receivables generated by the Dakota Fuel Stop. Superpumper and Nerland Oil did not have a contract governing this relationship, but it is a well-known industry practice which is generally not recognized in writing.

By the spring of 1996, Nerland Oil began failing to remit the Dakota Fuel Stop credit card receivables from Conoco to Superpumper, and the amount of the arrearage grew over the course of the year. As of October 31, 1996, Nerland Oil owed Superpumper $348,856.26 in credit card receivables, and Superpumper owed Nerland Oil $359,790.18 under the promissory note and mortgage. On October 28, 1996, Superpumper terminated its jobber relationship with Nerland Oil. At that time, Superpumper desired to apply the outstanding balance of credit card receivables against the amount due under the promissory note and mortgage held by Nerland Oil. Nerland Oil refused the proposed debt setoff.

On January 28, 1997, Superpumper commenced a lawsuit against Nerland Oil in North Dakota state court seeking to setoff the debts. Because the contracts at issue contained arbitration clauses, the state court ordered that the dispute be submitted to arbitration. After Superpumper unsuccessfully appealed the arbitration order to the state supreme court, the dispute went to arbitration before a three-member panel of attorneys. On August 18, 1999, the arbitration panel granted Superpumper's request for setoff.

On November 5, 1999, before judgment confirming the arbitration award was entered in state court, Nerland Oil filed a Chapter 7 bankruptcy petition. As a result, Nerland Oil's bankruptcy estate was subject to an automatic stay which barred issuance or enforcement of any state court judgment affecting the estate. See 11 U.S.C. § 362(a)(1), (2). Therefore, on November 18, 1999, Nerland Oil and WFTS resisted confirmation of the arbitration decision in state court and WFTS moved to vacate the arbitration award. Although the state trial court originally adopted the arbitration award, the state supreme court reversed the trial court's decision, holding that, due to the automatic stay triggered by the bankruptcy filing, the arbitration award was not final or enforceable. Superpumper, Inc. v. Nerland Oil, Inc., 620 N.W. 2d 159 (N.D. 2000).

Superpumper then initiated this adversary proceeding on April 19, 2000, seeking summary judgment to adopt the arbitration

[3] The existence of these contracts is puzzling, as WFTS was not a Conoco jobber authorized to sell the Conoco fuel products required, nor did it have any trucks that could haul fuel.

award in the United States Bankruptcy Court for the District of North Dakota. See 28 U.S.C. §§ 157, 1334; 11 U.S.C. § 553 (enabling creditor of bankruptcy estate to offset a mutual debt arising before commencement of bankruptcy filing). Nerland Oil counterclaimed, seeking reversal of the arbitration award and monetary damages resulting from Superpumper's breach of the long-term supply and freight agreements with WFTS.

Additionally, the United States, through the IRS, cross-moved for summary judgment against Nerland Oil, arguing that it possessed a superior interest in the promissory note payments on the basis of several prior federal tax liens against Nerland Oil. The federal tax liens originated in the early 1990s, when the IRS assessed unpaid federal excise and employment taxes against Nerland Oil for the following dates: August 9, 1993, August 30, 1993, September 20, 1993, December 27, 1993, January 3, 1994, December 9, 1996, December 31, 1996, November 3, 1997, December 22, 1997, and September 20, 1999. Nerland Oil did not pay these tax assessments, and the IRS filed proper notice of its federal tax liens against Nerland Oil on September 21 and 22, 1998. At the time Nerland Oil filed its. bankruptcy petition, it owed the IRS $1,693,979.57 for federal tax liens covering the 1993 and 1994 time period, which occurred prior to the sale of the Dakota Fuel Stop to Superpumper. The IRS argued that it should not be bound by the arbitration award since it was not a party to the arbitration.

On September 19, 2000, the bankruptcy court conducted a hearing to consider the cross-motions for summary judgment. At the hearing, the parties agreed to rely on the record established during the arbitration proceeding, supplemented by evidence regarding the federal tax liens. The bankruptcy court addressed for the first time the impact of the federal tax liens on Superpumper's right of setoff. On October 20, 2000, the bankruptcy court denied Superpumper's motion for summary judgment and granted summary judgment in favor of the IRS, concluding that (1) the federal tax liens became choate when the federal taxes were assessed against Nerland Oil in 1993 and 1994, thus giving the IRS priority over Superpumper in collecting its debt from Nerland Oil, and (2) because Superpumper did not qualify as a holder of an implied security interest, the IRS's lien collection right was not invalid under 26 U.S.C. § 6323(a). See Superpumper, Inc. v. Nerland Oil, Inc., No. 99-31826 (Bankr. D.N.D. Oct. 20, 2000).

Superpumper appealed the bankruptcy court decision to the district court. The district court affirmed, agreeing with the bankruptcy court that the federal tax liens took priority over Superpumper's setoff. The district court also clarified that, because a setoff does not introduce any new money into the estate, it is treated as a lien, not a payment, for purposes of determining priority, and therefore must be treated as a lien inferior to the federal tax liens. Further, the district court concluded that because Superpumper was unable to identify or trace the credit card receivables, as a result of Nerland Oil's commingling the receivables with its general funds, Superpumper must be classified as a general creditor of the Nerland Oil bankruptcy estate and therefore assume an inferior position for debt repayment. Last, the district court refused to categorize Superpumper as a "purchaser" under 26 U.S.C. § 6323. because the asset in question was not the convenience store itself, but Nerland Oil's right to receive payments under the promissory note. See In re Nerland Oil, Inc., No. A3-01-05 (D.N.D. June 13, 2001). This appeal followed.

On August 31, 2001, pursuant to Fed. R. Civ. P. 27(a) and 8th Cir. R. App. P. 27A, Nerland Oil's bankruptcy trustee moved to dismiss this appeal on the ground that the bankruptcy judgment was not a final appealable order. On September 19, 2001, pursuant to Fed. R. Civ. P. 54(b), the bankruptcy court certified that its October 20, 2000 judgment was final. See Superpumper, Inc. v. Nerland Oil, Inc., No. 99-31826 (Bankr. D.N.D. Sept. 19, 2001). The district court affirmed. On November 9, 2001, this court denied Nerland

Oil's bankruptcy trustee's motion to dismiss the appeal for lack of a final appealable order. See Superpumper, Inc. v. Nerland Oil, Inc., No. 01-2962 (8th Cir. Nov. 9, 2001) (denial of motion to dismiss).

On October 17, 2001, the bankruptcy court lifted the bankruptcy stay. As a result, Nerland Oil moved to vacate and modify the arbitration award in state court, and Superpumper renewed its motion to confirm the arbitration award in state court. The state trial court denied the motion to vacate the arbitration award on June 6, 2002, and affirmed the arbitration award on June 18, 2002. Superpumper accordingly supplemented the record in this appeal to reflect the state court's favorable order. See Superpumper, Inc. v. Nerland Oil, Inc., No. 01-2962 (8th Cir. July 10, 2002) (order).

Discussion

We review a grant of summary judgment *de novo*, viewing the evidence in the light most favorable to the nonmoving party, to determine whether there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Minnesota Dep't of Revenue v. United States, 184 F.3d 725, 727 [84 AFTR 2d 99-5030] (8th Cir. 1999) (Minnesota Dep't of Revenue) (reviewing *de novo* a grant of summary judgment regarding priority of federal tax lien).

I. Priority of Federal Tax Liens

[1] "Priority for purposes of federal law is governed by the common-law principle that 'the first in time is the first in right.'" Minnesota Dep't of Revenue, 184 F.3d at 728 (quoting United States v. McDermott, 507 U.S. 447, 449 [71 AFTR 2d 93-1154] (1993)). According to federal law, "'the priority of a lien depends on the time the lien attached to the property in question and became choate.'" Id. at 728 (quoting Cannon Valley Woodwork, Inc. v. Malton Construction Co., 866 F. Supp. 1248, 1250 [79 AFTR 2d 97-1887] (D. Minn. 1994)). A federal tax lien attaches and becomes choate at assessment. See 26 U.S.C. §§ 6321 (consequence of unpaid taxes after assessment is "a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person"), 6322 (lien arises at the time assessment of unpaid taxes is made against delinquent taxpayer). Therefore, a federal tax lien's priority order is based upon the time when the lien is assessed, not when it is filed. See United States v. Jepsen, 268 F.3d 582, 584 [88 AFTR 2d 2001-6344] (8th Cir. 2001) (tax assessment creates a lien in favor of the United States on all property and rights to property pursuant to 26 U.S.C. §§ 6321, 6322); Minnesota Dep't of Revenue, 184 F.3d at 728 ("The lien arises automatically when the assessment is made and continues until the taxpayer's liability is either satisfied or becomes unenforceable due to the lapse of time."); Horton Dairy Inc. v. United States, 986 F.2d 286, 291 [71 AFTR 2d 93-1026] (8th Cir. 1993) (Horton Dairy) ("Federal law determines choateness, and the federal rule is that liens are perfected in the sense that there is nothing more to be done to have a choate lien - when the identity of the lienor, the property subject to the lien, and the amount of the lien are established.") (quoting United States v. New Britain, 347 U.S. 81, 84 [44 AFTR 798] (1954) (internal quotations omitted)).

In this case, federal tax liens totaling $1,693,979.57 against Nerland Oil were assessed and became choate over the course of 1993 and 1994. A competing state interest cannot take priority over those assessments unless (1) the state interest became choate before the federal tax assessment, see Minnesota Dep't of Revenue, 184 F.3d at 728, or (2) the state interest falls within the statutorily-defined exceptions to the IRS's lien priority order. See 26 U.S.C. § 6323.

II. Inferiority of the Attempted Setoff Transaction

We apply federal law to determine the priority order of liens competing with federal tax liens. See Minnesota Dep't of Revenue, 184 F.3d at 728 (citing Aquilano v. United States, 363 U.S. 509, 513–14 (1960)). However, we apply state law to

determine the nature of the competing legal interest at stake. See Bremen Bank & Trust Co. v. United States, 131 F.3d 1259, 1263 [80 AFTR 2d 97-8389] (8th Cir. 1997).

Superpumper asserted its claim under 11 U.S.C. § 553(a), which preserves rights of creditors to offset mutual debts arising before a bankruptcy petition is filed. See United States v. Gerth, 991 F.2d 1428, 1431 (8th Cir. 1993). However, § 553(a) only preserves setoff rights that are otherwise valid under applicable nonbankruptcy law. See In re Sauer, 223 B.R. 715, 724 (Bankr. D.N.D. 1998). When Superpumper demanded a setoff of the mutual debts from Nerland Oil in October 1996, its state-law interest in the attempted setoff transaction became choate. See Horton Dairy, 986 F.2d at 291 (state-created right of setoff becomes choate when it is exercised).

However, by October 1996, $1,693,979.57 in unpaid federal taxes already had been assessed against Nerland Oil (some as early as 1993). As a result, any subsequent transaction, including Superpumper's attempted setoff transaction, must take an inferior position to the federal tax liens. See id. (treating the holder of an inchoate state-created setoff right as a lienholder inferior to a choate federal tax lien). As an inferior lienholder, Superpumper may not effect a setoff transaction to compensate it for the loss of the credit card receivables until after the superior federal tax liens are satisfied. See 26 U.S.C. § 6322 (federal tax lien remains in effect until liability "is satisfied or becomes unenforceable"). As a practical matter in the present case, satisfaction of the federal tax liens will deplete entirely the Nerland Oil bankruptcy estate. See In re: Nerland Oil, Inc., No. 99-31826 (Bankr. D.N.D. 2000).

Moreover, the scope of the federal tax liens includes all the delinquent taxpayer's property interests, including interests acquired after the liens were assessed. See 26 U.S.C. §§ 6321; Shawnee State Bank v. United States, 735 F.2d 308, 310 [54 AFTR 2d 84-5150] (8th Cir. 1984) ("[t]he lien attaches to all the property of the defaulting taxpayer, including property acquired by the taxpayer after the lien arises") (citing Glass City Bank v. United States, 326 U.S. 265, 267–69 [34 AFTR 1] (1945)). Consequently, the federal tax liens attached to all of Nerland Oil's property interests, including the promissory note acquired in exchange for the sale of the Dakota Fuel Stop, which was signed after the federal tax liens were assessed.

Superpumper attempts to distinguish this case from a typical lien priority case, arguing that (1) as Nerland Oil's debtor, not its creditor, Superpumper's debt was not part of the property subject to the federal tax liens; (2) because the funds used to complete the setoff transaction - the credit card receivables -were actually Superpumper's own funds held in trust by Nerland Oil, not the property of Nerland Oil, those funds were not part of the property subject to the federal tax liens; and (3) because the bankruptcy filing occurred after Superpumper's completion of the setoff transaction,[4] only the remaining amount on the promissory note and mortgage should be considered part of the bankruptcy estate.[5]

We find these arguments unpersuasive. Nothing distinguishes this case from typical lien priority cases. First, Superpumper's debt in the form of the promissory note constitutes the type of property typically subject to a federal tax lien. See St. Louis Union Trust Co. v. United States, 617 F.2d 1293, 1301 n.11 [45 AFTR 2d 80-1030] (8th Cir. 1980) (considering escrow agreement providing income payable to debtor-taxpayer to be property available to satisfy federal tax lien). We apply federal law to determine whether or not the interest at stake constitutes property for purposes of federal tax lien satisfaction. See Drye v. United States, 528 U.S. 49, 50 [84 AFTR 2d 99-7160] (1999) ("whether a state-law right constitutes 'property' or 'rights to

[4] Superpumper defines the date of completion of the setoff transaction as August 18, 1999, the date on which the arbitration panel applied state law to conclude that the setoff should be mandated. The bankruptcy petition was filed on November 5, 1999.

[5] If the setoff transaction was valid, $10,994 remained on the promissory note and mortgage.

property' under § 6321 is a matter of federal law'') (quoting United States v. National Bank of Commerce, 472 U.S. 713, 727 [56 AFTR 2d 85-5210] (1985) (internal quotations omitted)). ''Property'' broadly includes ''every species of right or interest protected by law and having an exchangeable value.'' Id. The promissory note clearly has value - the right to collect payments on it - as well as transferability. See Black's Law Dictionary 1085 (7thed. 1999) (defining ''promissory note'' as a ''negotiable instrument''); see also UCC § 3-104 (categorizing a promissory note as a negotiable instrument).

Second, Superpumper incorrectly classifies the property at stake as the funds used to complete the setoff transaction. Superpumper confuses the issue by conflating two separate debts: (1) Superpumper's debt to Nerland Oil under the promissory note, and (2) Nerland Oil's debt to Superpumper resulting from its failure to remit the credit card receivables. Superpumper seeks to treat the two debts interchangeably, as the attempted setoff transaction would have done. However, we recognize that the two debts are separate and distinct from one another, and thus involve different rights and consequences.

We agree with the district court that the relevant property interest is Superpumper's debt to Nerland Oil involving the right to collect payments under the promissory note. See In re Nerland Oil, Inc., No. A3-01-05 (D.N.D. June 13, 2001). The federal tax liens transferred to the IRS the right to all of Nerland Oil's property, including Nerland Oil's later-acquired right to collect Superpumper's debt under the promissory note. Therefore, Superpumper's debt under the promissory note was owed to the IRS, not Nerland Oil. It does not matter what type of funds the credit card receivables are, because by the time Superpumper attempted the setoff transaction, there was no debt owed to Nerland Oil to setoff the debt Nerland Oil owed to Superpumper.[6]

Third, the date of the attempted setoff transaction in relation to the bankruptcy filing is irrelevant because, as already discussed, the assessment of the federal tax liens occurred as early as 1993 and 1994 and thus predated the attempted setoff transaction in October 1996 and thus nullified it.

III. Applicability of 26 U.S.C. § 6323

Superpumper's only recourse lies in 26 U.S.C. § 6323, which protects specific types of creditors in a bankruptcy proceeding from the priority rule favoring the IRS. See 26 U.S.C. § 6323(a)[7] ; Millers Mutual Ins. Assoc. of Illinois v. Wassall, 738 F.2d 302, 304 n.5 [54 AFTR 2d 84-5454] (8th Cir. 1984) (''[26 U.S.C.] [s]ection 6323 of the Federal Tax Lien Act of 1966 is the exclusive source of exceptions to the priority of federal tax liens'') (quoting Campagna-Turano Bakery, Inc. v. United States, 632 F.2d 39, 41 [46 AFTR 2d 80-5785] (7th Cir. 1980)). Section 6323(a) invalidates properly filed federal tax liens against purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors. See Hoggarth v. Somsen, 496 N.W.2d 35, 39 (N.D. 1993) (federal priority statutes give IRS priority unless competing state interests are accorded ''purchaser'' status prior to IRS filing). A ''purchaser'' is defined as ''a person who, for adequate and full consideration in money or money's worth, acquires an in-

[6] Although Superpumper does not claim explicitly an action for constructive trust based on wrongful conversion of the credit card receivables, it appears that Superpumper intends to pursue that theory by claiming that the credit card receivables were Superpumper's own funds held in trust by Nerland Oil and therefore should be exempted from the bankruptcy estate property accessible to satisfy the IRS tax liens. However, North Dakota law imposes a substantial evidentiary burden on the party seeking to establish a constructive trust, see Napolean Livestock Auction, Inc. v. Rohrich, 406 N.W.2d 346, 356 (N.D. 1987), and it is impossible for us to review whether that burden has been satisfied because (1) the issue was not raised before the original factfinder of the bankruptcy court, see First Bank Investors' Trust v. Tarkio Coll., 129 F.3d 471, 476–77 (8th Cir. 1997) (requiring factual issues to be considered on appeal to be presented to bankruptcy court first), and (2) Superpumper agreed to stipulate to the facts already in the record following the arbitration panel proceeding, which are insufficient to substantiate a constructive trust claim. See Napolean Livestock Auction, Inc. v. Rohrich, 406 N.W.2d at 356–57 (imposition of constructive trust not allowed in absence of both parties' recognition of issue and acquiescence in the introduction of evidence on that issue).

[7] In 1966, Congress enacted the Federal Tax Lien Act, codified at 26 U.S.C. § 6323, which carved out specific exemptions from the otherwise broad scope of federal tax liens imposed by the IRS. ''Before 1966, the requirement of choateness ... generally operated to prevent a nonfederal lien from gaining priority over a federal tax lien with respect to property acquired by the debtor after the tax lien had arisen.'' Shawnee State Bank v. United States, 735 F.2d at 310. The purpose of the Act was ''to specifically enumerate certain 'superpriorities' ... and commercial financing transactions ... that defeat a federal tax lien.'' Dugan v. United States, 472 F.2d 944, 950 n.9 [31 AFTR 2d 73-771] (8th Cir. 1973).

terest (other than a lien or security interest) in property which is valid under local law against subsequent purchasers without actual notice.'' 26 U.S.C. § 6323(h)(6).

Superpumper contends that it should be considered a purchaser within the meaning of § 6323(a) because (1) it made continuing installment payments of the purchase price of the Dakota Fuel Stop through the promissory note, and (2) the setoff transaction acted as a payment on the purchase-money mortgage.

Even if the installment payments made pursuant to the promissory note could transform Superpumper into a purchaser, at most Superpumper was a purchaser of the Dakota Fuel Stop, not a purchaser of the right to receive payments under the promissory note. Therefore, Superpumper would only be protected by § 6323(a) against any taxes levied against the Dakota Fuel Stop, which is not an issue in this case.

Superpumper next advances the theory that it purchased the right to receive payments under the promissory note by virtue of the attempted setoff transaction. Superpumper attempted the setoff transaction in October 1996, prior to the filing of the federal tax liens in September 1998. If Superpumper was a purchaser under § 6323 at that time, then it would be protected against the unfiled federal tax liens. However, ''[p]arties claiming the protected status of [§] 6323(a) have the burden of proving that they qualify for that protection.'' Hoggarth v. Somsen, 496 N.W.2d at 39. To satisfy that burden, Superpumper must prove that (1) it gave ''adequate and full consideration in money or money's worth,'' (2) it acquired an interest in property ''other than a lien or security interest,'' and (3) the interest is ''valid under local law against subsequent purchasers.'' 26 U.S.C. § 6323(a).

We do not agree that the attempted setoff transaction converted Superpumper into a purchaser within the meaning of § 6323. Because the two interests involved in the attempted setoff transaction were mutual debts, there was no exchange of ''adequate and full consideration in money or money's worth.'' Id. Rather, Superpumper sought to obtain the right not to pay the balance on the promissory note. We agree with the district court's reasoning that because the attempted setoff transaction did not propose to pay any new money into the bankruptcy estate, it cannot be considered a payment in exchange for the right to receive payments under the promissory note.

To be considered a payment, either money or something of value must be ''given and accepted in partial or full discharge of an obligation.'' Black's Law Dictionary 1150. The record does not contain any evidence to indicate that, at the time Nerland Oil began failing to remit the credit card receivables, Superpumper gave Nerland Oil permission to cease remitting the credit card receivables in exchange for release of its obligation to pay the amounts owed under the promissory note.Nor is there any evidence demonstrating that Nerland Oil accepted this arrangement. On the contrary, the record reflects that Superpumper sought the setoff as an after-the-fact remedy and that Nerland Oil rejected the proposed setoff.[8] See Black's Law Dictionary 1376 (defining ''setoff'' as the ''right to reduce the amount of debt by any sum the debtor owes the creditor'').

''The exceptions permitted under § 6323 are carefully crafted and narrowly limited,'' Janssen v. United States, 213 B.R. 558, 564 [80 AFTR 2d 97-7467] (B.A.P. 8th Cir. 1997) (quoting Battley v. United States (In re Berg), 121 F.3d 535, 537 [80 AFTR 2d 97-5988] (9thCir. 1997)), and we cannot justify expanding the definition of purchaser as Superpumper urges. Rather, we think Superpumper is characterized more accurately as a judgment lien creditor, whose interest in the attempted setoff transaction was perfected and became

[8] We note that Superpumper's ''setoff as payment'' theory was not presented to the bankruptcy court and the record contains no evidence to substantiate that theory. We address the issue only insofar as we may draw legal conclusions from the established record. We consider any argument requiring additional factual findings to have been waived. See First Bank Investors' Trust v. Tarkio Coll., 129 F.3d 471, 476–77 (8th Cir. 1997) (enabling appellate court to consider arguments not raised in bankruptcy court only ''when the argument involves a purely legal issue in which no additional evidence or argument would affect the outcome of the case'') (quoting Universal Title Ins. Co. v. United States, 942 F.2d 1311, 1314–15 [68 AFTR 2d 91-5962] (8th Cir. 1991)).

choate on June 18, 2002, the date the state court entered final judgment enforcing the attempted setoff transaction. Because that date occurred after the IRS properly filed its tax liens in September 1998, Superpumper is not entitled to superpriority under the protection of § 6323(a). See Horton Dairy, 986 F.2d at 291 (treating a setoff as a competing lien when determining priority); United States v. Scovil, 348 U.S. 218, 221 [46 AFTR 990] (1955) (considering transaction involving cancellation of debt not to be a purchase for purposes of taking priority over a federal tax lien).

As a result, we hold that the district court did not err in affirming the bankruptcy court's decision to give priority to the federal tax liens when distributing the property in Nerland Oil's bankruptcy estate.

Conclusion

Accordingly, the order of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

¶2002-5381

UNITED STATES OF AMERICA, PLAINTIFF v. William M. ARNOLD, Dorothy N. ARNOLD, Robert B. Arnold, DBA Marketing, Inc., as successor in interest to Carnegie Multi International Corporation, DBA Marketing, Inc., as successor in interest to Carnegie Mortgage Securities, Inc., DBA Marketing, Inc., as successor in interest to Murtaugh Corporation, DBA Marketing, Inc., as successor in interest to Thoroughbred Sales, Inc., Nahama Limited Company, The Arnold Group, Inc., Multi-Housing of Florida, Inc., R.B. and Associates, Inc., The Chestertown Bank of Maryland, Barnett Bank of Marion County, N.A., and Colonial Bank, as successor to First Family Federal Savings & Loan Association, Regency Savings Bank, FSB, successor by assignment to Barnett Bank of Marion County, N.A., DEFENDANTS. US. District Court, Middle Dist. of Florida, Ocala Division. (DC FL) CIVIL ACTION NO. 5:99-CV-161-OC-21, Aug. 13, 2002. Earlier proceedings at (2002, DC FL) 90 AFTR 2d 2002-6344; (2002, DC FL) 90 AFTR 2d 2002-6260; (2002, DC FL) 90 AFTR 2d 2002-5228; (2002, DC FL) 89 AFTR 2d 2002-2823; (2002, DC FL) 89 AFTR 2d 2002-2500; (2001, DC FL) 89 AFTR 2d 2002-1167, 2002-1 USTC ¶50300, amending (2001, DC FL) 88 AFTR 2d 2001-5867, 2001-2 USTC ¶50605; and (2001, DC FL) 88 AFTR 2d 2001-5284, 2001-2 USTC ¶50553. Decision for Govt.

1. Collection actions—sale of receivership estate property—"alternative amount" withholding rule. Receiver's motion for confirmation of sale of property of receivership estate was granted, and receiver was authorized to proceed with private sale free and clear of any federal tax liens held by govt. Also, under "alternative amount" withholding rule in Reg. §1.1445-2(d)(3), taxpayer won't realize any proceeds from sale, so neither receiver nor purchaser must withhold any proceeds to pay federal taxes. But after satisfying liens to be paid as conditions of sale and other costs, receiver must disburse balance to govt. *Reference:* United States Tax Reporter ¶74,035.03(100); 14,455.01(10). IRC §1445; 7403.

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IN THE UNITED STATES DISTRICT COURT OF THE MIDDLE DISTRICT OF FLORIDA OCALA DIVISION,

ORDER ON MOTION FOR CONFIRMATION OF SALE OF PROPERTY OF THE RECEIVERSHIP ESTATE (PINE STREET RESTAURANT)

RALPH W. NIMMONS, JR. UNITED STATES DISTRICT JUDGE

[1] Filed herein is the Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Pine Street Restaurant) to Latinos Y Mas, Inc., (Dkt. 310). Pursuant to the Order on Motion for Leave to Proceed with Private Sales Of Defendants' Real Property Assets Pursuant to 28 U.S.C. §2001 (Dkt. 103) and Order Establishing Private Sales Procedures (Dkt. 269) and based upon the representations in the Receiver's Certificate attached to the Motion for Confirmation of Sale of Property of the Receivership Estate (Pine Street Restaurant) (Dkt 310) that the Receiver has received no competing offers subsequent to the publication of the required Notice of Private Sale, this Court has considered this matter on an ex parte basis. Upon consideration thereof, it is hereby ORDERED:

1. The Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Pine Street Restaurant) (Dkt. 310), is GRANTED.

2. The Receiver is authorized to proceed with the sale of the property described in Exhibit "A" attached hereto and known as the Pine Street Restaurant to Latinos Y Mas, Inc., on the terms and conditions set forth in the proposed Agreement of Purchase and Sale, with modification of such terms and conditions (other than reduction of the purchase price) as the Receiver may reasonably deem to be non material.

3. The private sale of the Subject Property known as Pine Street Restaurant to Latinos Y Mas, Inc. is CONFIRMED.

4. The private sale of the Subject Property shall be free and clear of any federal tax liens held by the United States of America.

5. The Court finds that under the special "alternative amount" withholding rule in I.R.S. Reg.§1.1445-2(d)(3), the owner of the Subject Property, Defendant, Robert B. Arnold or the Estate of Robert B. Arnold, will not realize any proceeds from the sale of the Subject Properties and therefore neither the Receiver nor Latino Y Mas, Inc. is required to withhold any of the sale proceeds for the purpose of paying federal taxes on the sales.

6. The Receiver is authorized to satisfy any liens or encumbrances that are to be paid as a conditions of the sale, to pay all closing costs associated with the sale, including the Receiver's attorneys' fees and costs, and to pay the Receiver's commission pursuant to the provisions of the Order on Motion of Receiver for Approval of Receiver's Compensation Arrangements and for Authority to Pay the Receiver's Compensation and Expenses of the Receivership on a Monthly Basis (Dkt. 54). The Receiver's shall disburse the balance of the sale proceeds to Plaintiff.

DONE AND ORDERED at Jacksonville, Florida this 13th day of August, 2002.

RALPH W. NIMMONS, JR.

UNITED STATES DISTRICT JUDGE

EXHIBIT "A"

LEGAL DESCRIPTION

Beginning at a point on the Westerly right-of-way of Orange Street (Old U.S. Highway # 441) that is § 89°26'15" W 292.26 feet and § 18°21'45" E 121.00 feet from the NE corner of Lot 26, MCINTOSH SUBDIVISION of the West ½ of the Sanchez Grant, as recorded in Plat Book E, Page 4, Public Records of Marion County, Florida, said point being 50.00 feet, measured at right angles from center line of said street; thence § 18°21'45" E along said Westerly right-of-way line 222.53 feet; thence S 56°16'35" W 149.95 feet to the Easterly right-of-way line of New State Road #500; thence N 33°42'45" W along said Easterly right-of-way line 125.00 feet; thence N 33°5'15" E 227.26 feet to the Point of Beginning.

¶2002-5382

UNITED STATES OF AMERICA, PLAINTIFF v. William M. ARNOLD, Dorothy N. ARNOLD, Robert B. Arnold, DBA Marketing, Inc., as successor in interest to Carnegie Multi International Corporation, DBA Marketing, Inc., as successor in interest to Carnegie Mortgage Securities, Inc., DBA Marketing, Inc., as successor in interest to Murtaugh Corporation, DBA Marketing, Inc., as successor in interest to Thoroughbred Sales, Inc., Nahama Limited Company, The Arnold Group, Inc., Multi-Housing of Florida, Inc., R.B. and Associates, Inc., The Chestertown Bank of Maryland, Barnett Bank of Marion County, N.A., and Colonial Bank, as successor to First Family Federal Savings & Loan Association, Regency Savings Bank, FSB, successor by assignment to Barnett Bank of Marion County, N.A., DEFENDANTS. U.S. District Court, Middle Dist. of Florida, Ocala Division, (DC FL) CIVIL ACTION NO. 5:99-CV-161-OC-21, Aug. 13, 2002. Earlier proceedings at (2002, DC FL) 90 AFTR 2d 2002-6342; (2002, DC FL) 90 AFTR 2d 2002-6260; (2002, DC FL) 90 AFTR 2d 2002-5228; (2002, DC FL) 89 AFTR 2d 2002-2823; (2002, DC FL) 89 AFTR 2d 2002-2500; (2001, DC FL) 89 AFTR 2d 2002-1167, 2002-1 USTC ¶50300, amending (2001, DC FL) 88 AFTR 2d 2001-5867, 2001-2 USTC ¶50605; and (2001, DC FL) 88 AFTR 2d 2001-5284, 2001-2 USTC ¶50553. Decision for Govt.

1. Collection actions—sale of receivership estate property—"alternative amount" withholding rule. Receiver's motion for confirmation of sale of property of receivership estate was granted, and receiver was authorized to proceed with private sale free and clear of any federal tax liens held by govt. Also, under "alternative amount" withholding rule in Reg. §1.1445-2(d)(3), taxpayer won't realize any proceeds from sale, so neither receiver nor purchaser must withhold any proceeds to pay federal taxes. But after satisfying liens to be paid as conditions of sale and other costs, receiver must disburse balance to govt. *Reference:* United States Tax Reporter ¶74,035.03(100); 14,455.01(10). IRC §1445; 7403.

IN THE UNITED STATES DISTRICT COURT OF THE MIDDLE DISTRICT OF FLORIDA OCALA DIVISION,

ORDER ON MOTION FOR CONFIRMATION OF SALE OF PROPERTY OF THE RECEIVERSHIP ESTATE (Ocala Executive Center/Lots 2,3,8 and 9, Block D, Ocala Gardens)

RALPH W. NIMMONS, JR. UNITED STATES DISTRICT JUDGE

[1] Filed herein is the Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Ocala Executive Center/Lots 2,3,8 and 9, Block D, Ocala Gardens) to Opportunity Holdings, Inc., (Dkt. 312). Pursuant to the Order on Motion for Leave to Proceed with Private Sales Of Defendants' Real Property Assets Pursuant to 28 U.S.C. §2001 (Dkt. 103) and Order Establishing Private Sales Procedures (Dkt. 269) and based upon the representations in the Receiver's Certificate attached to the Motion for Confirmation of Sale of Property of the Receivership Estate (Ocala Executive Center/Lots 2,3,8 and 9, Block D, Ocala Gardens) (Dkt 312) that

the Receiver has received no competing offers subsequent to the publications of the required Notice of Private Sale, this Court has considered this matter on an ex parte basis. Upon consideration thereof, it is hereby ORDERED:

1. The Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Ocala Executive Center/Lots 2,3,8 and 9, Block D, Ocala Gardens) (Dkt. 312), is GRANTED.

2. The Receiver is authorized to proceed with the sale of the property described in Exhibit "A" attached hereto and known as the Ocala Executive Center/Lots 2,3,8 and 9, Block D, Ocala Gardens to Opportunity Holdings, Inc., on the terms and conditions set forth in the proposed Agreement of Purchase and Sale, with modification of such terms and conditions (other than reduction of the purchase price) as the Receiver may reasonably deem to be non material.

3. The private sale of the Subject Property known as Ocala Executive Center/Lots 2,3,8 and 9, Block D, Ocala Gardens to Opportunity Holdings, Inc., is CONFIRMED.

4. The private sale of the Subject Property shall be free and clear of any federal tax liens held by the United States of America.

5. The Court finds that under the special "alternative amount" withholding rule in I.R.S. Reg.§1.1445-2(d)(3), the owner of the Subject Property, Defendant, The Arnold Group, Inc., will not realize any proceeds from the sale of the Subject Properties and thereof neither the Receiver nor Opportunity Holdings, Inc., is required to withhold any of the sale proceeds for the purpose of paying federal taxes on the sales.

6. The Receiver is authorized to satisfy any liens or encumbrances that are to be paid as a conditions of the sale, to pay all closing costs associated with the sale, including the Receiver's attorneys' fees and costs, and to pay the Receiver's commission pursuant to the provisions of the Order on Motion of Receiver for Approval of Receiver's Compensation Arrangements and for Authority to Pay the Receiver's Compensation and Expenses of the Receivership on a Monthly Basis (Dkt. 54). The Receiver shall disburse the balance of the sale proceeds to Plaintiff.

DONE AND ORDERED at Jacksonville, Florida this 13th day of August 2002.

RALPH W. NIMMONS, JR.

UNITED STATES DISTRICT JUDGE

¶2002-5383

Daniel Trent OLDHAM, PETITIONER v. INTERNAL REVENUE SERVICE, ET AL., RESPONDENTS. U.S. District Court, Dist. of Oregon, (DC OR) Civil No. 01-952-HU, April 1, 2002. District Court, (2002, DC OR) 89 AFTR 2d 2002-1453, adopted. Years 1997, 1998, 1999. Decision for Govt.

1. Third-party summonses—petition to quash—jurisdiction—procedure—authorization— to strike. Magistrate judge's recommendation to grant IRS's motion for partial dismissal of 2d amended petition to quash and for summary denial of remaining portions of such petition, and to deny taxpayer's motion to strike was adopted without discussion. *Reference:* United States Tax Reporter ¶76,095.01(75); 76,095.01(10); 74,025.01(3). IRC §7402; 7609.

Daniel Trent Oldham 333 S. State Street, #141 Lake Oswego, OR 97034 Petitioner Pro Se

Jeremy Nolan Hendon U.S. DEPARTMENT OF JUSTICE Tax Division P.O. Box 683 Ben Franklin Station Washington, D.C. 20044-0683 Attorney for Respondents

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,

ORDER

JONES, Judge:

[1] Magistrate Judge Dennis James Hubel filed Findings and Recommendation (#33) on March 22, 2002, in the above-en-

titled case. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). No objections have been timely filed. This relieves me of my obligation to give the factual findings de novo review. Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983). Having reviewed the legal principles de novo, I find no error.

Accordingly, I ADOPT Magistrate Judge Hubel's Findings and Recommendation (#33) dated February 28, 2002, in its entirety. Respondent's motion for partial dismissal of the Second Amended Petition to Quash and motion for summary denial of the remaining portions of the Second Amended Petition to Quash (#18) is granted. Petitioner's motion to strike (#30) is denied.

IT IS SO ORDERED

DATED this 1st day of April, 2002.

ROBERT E. JONES

United States District Judge

¶2002-5384

Eva Jordan SHERMAN, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Central Dist. of California, (DC CA) No. CV 02-01996DDP AJWX, June 26, 2002. Earlier proceeding at (2002, DC CA) 90 AFTR 2d 2002-5703. Year 1992. Decision against Taxpayer.

1. Limitations periods on refunds—untimely claims—jurisdiction—motion to be relieved. Taxpayer's motion to be relieved of statutory requirement of timely filed administrative refund claim was denied: district court was bound by its prior dismissal with prejudice of taxpayer's refund claim as untimely filed under IRC §6511(b)(1), and court had no discretion to relieve taxpayer from timely filing requirement. *Reference:* United States Tax Reporter ¶65,115.04(70); 74,225.01(20); 74,025.01(3). IRC §6511; 7402; 7422.

United States District Court, C.D. California,

ORDER DENYING PLAINTIFF'S MOTION TO BE RELIEVED FROM STATUTORY REQUIREMENT OF A TIMELY FILED ADMINISTRATIVE CLAIM FOR REFUND OF TAXES

PREGERSON, District J.

[1] This matter comes before the Court on the plaintiff's motion to be relieved from the statutory requirement of a timely filed administrative claim for refund of taxes.

Pursuant to 26 U.S.C. § 6511(b)(1) no credit or refund shall be allowed after the expiration of the period of limitations prescribed in § 6511(a), unless a claim is timely filed. On June 17, 2002, the Court heard oral argument on the defendant's motion to dismiss. On that same day, the Court granted the defendant's motion to dismiss with prejudice because the Court found that the plaintiff's claim for refund of taxes was not timely filed. The Court is bound to follow § 6511(b)(1). Section 6511(b)(1) does not give the Court discretion to relieve the plaintiff from the requirement that her claim be timely filed. Accordingly, the Court denies the plaintiff's motion.

IT IS SO ORDERED.

¶2002-5385

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Nabil N. GHALI, DEFENDANT-APPELLANT. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-3282, Sept. 10, 2002. District Court affirmed. Decision against Taxpayer.

1. Tax crimes—filing false returns—U.S. Sentencing Guidelines—withdrawal of plea. Taxpayer who pleaded guilty to filing false returns for medical corp. of which he was pres. under IRC §7206(1) was properly sentenced using base offense level of 14 with 2-level obstruction of justice enhancement: court didn't clearly err in concluding that extensive records and multiple changes were intended to make it difficult for court to interpret what happened, or in refusing downward acceptance

of responsibility departure where taxpayer only offered long string of excuses. Also, court didn't abuse its discretion by not allowing taxpayer to withdraw guilty plea where he waited until sentencing was complete to try to withdraw plea and never claimed he was innocent of filing false returns. *Reference:* United States Tax Reporter ¶72,065.01(50); 73,446.505(10). IRC §7206.

United States Court of Appeals, Sixth Circuit,

On Appeal from the United States District Court for the Northern District of Ohio.

Before NORRIS and BATCHELDER, Circuit Judges; FORESTER, District Judge.*

OPINION

PER CURIAM

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION*

Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

Defendant Dr. Nabil N. Ghali appeals the sentence entered after his plea of guilty to one count of filing false income tax returns, 26 U.S.C. § 7206(1). He also appeals the district court's refusal to permit him to withdraw his guilty plea after the sentencing hearing. Finding no error in the district court's sentencing determination and no abuse of discretion in its refusal to permit defendant to withdraw his plea, we affirm the judgment.

The government filed a four-count indictment against defendant on February 23, 2000, charging him with filing false corporate income tax returns for Academy Medical Center, Inc. (''the Center'') for the years 1993 through 1996 in violation of 26 U.S.C. § 7206(1). The indictment alleged that defendant, who was president of the Center, failed to report income totaling more than $969,000 for those years resulting in additional tax liability of $270,000.

Defendant ultimately pleaded guilty to count two of the indictment pursuant to a written plea agreement. The agreement stated that the relevant Sentencing Guideline sections were U.S.S.G. §§ 2T1.1 and 2T4.1, which provide for a base offense level of 14 based on a tax loss of more than $70,000. Defendant, however, reserved the right to argue for a lower tax loss in the agreement. The agreement further provided that the government would recommend a two-level reduction for acceptance of responsibility under § 3E1.1(a) of the Guidelines provided defendant cooperated in the investigation.

Sentencing was originally scheduled for January 19, 2001, but the district court granted defendant's motion for a continuance. Several days prior to the rescheduled hearing defendant filed a presentencing memorandum in which he renewed his argument that there was no actual tax loss to the government because of significant unclaimed cash expenses incurred by the Center. Among other sources of these expenditures, defendant included the names of two additional doctors, Drs. Weinburg and Siner, who he claimed had been paid in cash for numerous procedures at the Center. Defendant provided patient records which he claimed documented the procedures performed by these doctors.

The government contacted the Ohio Medical Board and determined that no doctors with the names provided by defendant were licensed to practice in Ohio. The government also determined that all of the procedures defendant claimed were performed by these two doctors were actually performed by two other doctors at the Center. The government filed a sentencing memorandum in which it contended that defendant's presentation of falsified records constituted obstruction of justice warranting a two-level enhancement under U.S.S.G. § 3C1.1. In addition, the government argued that defendant's actions were

* The Honorable Karl S. Forester, United States District Judge for the Eastern District of Kentucky, sitting by designation.

* Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

inconsistent with acceptance of responsibility and, therefore, that the court should not apply the two-level downward adjustment under U.S.S.G. § 3E1.1.

After a lengthy sentencing hearing, the court accepted the government's arguments and sentenced defendant to a base level of 14 under U.S.S.G. § 2T4.1 with a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1, resulting in a base offense level of 16. Pursuant to these guidelines, the court sentenced defendant to 27 month in prison followed by one year of supervised release.

Defendant then moved to withdraw his guilty plea arguing that the government breached its plea agreement. The court denied the motion. Defendant appeals both his sentence and the court's denial of his motion to withdraw his guilty plea.

[1] We review a district court's application of U.S.S.G. § 3C1.1 for clear error. See United States v. Jackson-Randolph, 282 F.3d 369, 390 (2002). The court's decision whether to apply U.S.S.G. § 3E1.1 is a factual question which we also review for clear error. See United States v. Mahaffey, 53 F.3d 128, 134 (6th Cir. 1995).

Section 3C1.1 provides for the application of a two-level enhancement where ''the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing,'' and the obstructive conduct related to the offense. As noted above, the government presented evidence during the sentencing hearing that defendant falsely claimed that two additional doctors performed procedures which in fact other doctors had performed. Defendant admitted those records were incorrect at the sentencing hearing but contended that the mistake was inadvertent.

After hearing this and other detailed testimony concerning the records, the district court concluded that the extensive records and multiple changes presented by defendant amounted to ''a clear effort here to make it well nigh impossible for anyone to interpret what happened [in the records] . . . ,'' and applied § 3C1.1 as a result. We do not think that the court committed clear error in coming to the conclusion that defendant deliberately attempted to create confusion through his manipulation of the records.

With respect to the acceptance of responsibility question, the court concluded that, rather than accepting responsibility, defendant had produced ''a long string of excuses for what happened,'' and, therefore, refused to apply the downward adjustment under § 3E1.1. As the government points out, a defendant who obstructs justice is entitled to a reduction for acceptance of responsibility only in extraordinary cases. U.S.S.G. § 3E1.1, comment (n.4); see also Mahaffey, 53 F.3d at 135. Defendant has presented no argument that there is anything extraordinary about this case at all, must less one sufficient to show that the court's decision not to apply this adjustment was clear error.

Defendant also argues that the district court abused its discretion in refusing to permit him to withdraw his guilty plea after the sentencing hearing. We review a district court's denial of a motion to withdraw a guilty plea under an abuse discretion standard. United States v. Alexander, 948 F.2d 1002, 1003 (6th Cir. 1991). It is the defendant's burden to demonstrate that proper grounds exist for the granting of such a motion. United States v. Bazzi, 93 F.3d 1025, 1027 (6th Cir.1996).

We have set forth a series of factors to consider in determining whether the court's denial was an abuse discretion. Id. All of the relevant factors in this case favor upholding the district court's denial of defendant's motion. Most significant in this respect are the fact that defendant waited until after the completion of his sentencing hearing to withdraw the plea despite notification by the government that it would argue for the enhancement prior to the hearing, and the fact that he does not contend that he is innocent of the underlying charge. Moreover, defendant has failed to demonstrate any valid reason to justify the withdrawal of his plea. Accordingly, we

are unable to say the district court abused its discretion in denying plaintiff's motion.

The judgment of the district court is affirmed.

¶2002-5386

UNITED STATES OF AMERICA, APPELLEE v. Myron C. PIGGIE, APPELLANT. U.S. Court of Appeals, Eighth Circuit, (CA8) No. 01-2518, Sept. 16, 2002. District Court affirmed. Year 1998. Decision against Taxpayer.

1. Tax crimes—willful failure to file returns—U.S. Sentencing Guidelines. IRC §7203 sentence was upheld against basketball coach who didn't report income from his illegal scheme to recruit amateur basketball players for pay: taxpayer's attempt on appeal to challenge tax loss calculation to which he had earlier stipulated was rejected. Also, use of *intended* loss rather than actual, lower loss amount for loss calculation purposes was proper under U.S.S.G. §2F1.1; and restitution award was appropriate. *Reference:* United States Tax Reporter ¶72,035.01(10). IRC §7203.

United States Court of Appeals FOR THE EIGHTH CIRCUIT,

Appeal from the United States District Court for the Western District of Missouri.

Before RILEY, BEAM, and MELLOY, Circuit Judges.

RILEY, Circuit Judge.

In the mid to late 1990's, Myron Piggie (Piggie) created and pursued a secret scheme to pay talented high school athletes to play basketball for his "amateur" summer team. Because the athletes intended to play college basketball, the scheme produced multiple violations of National Collegiate Athletic Association (NCAA) rules which require college athletes to be amateurs. Piggie pled guilty to one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 371 and one count of failure to file an income tax return in violation of 26 U.S.C. § 7203. Piggie appeals the calculation of his sentence and the amount of the restitution award, arguing the district court[1] misapplied the United States Sentencing Guidelines (Guidelines).

The district court based the Guidelines calculation on an evaluation and comparison of the actual and the intended losses Piggie's actions caused the high school attended by two athletes, the universities where the individual athletes were recruited, the NCAA, and the athletes. For the tax loss calculation, the district court relied on the tax loss stipulated in the plea agreement. The district court ordered restitution in the amount of $324,279.87. We affirm.

I. BACKGROUND

Between 1995 and 1999, Myron Piggie devised a scheme to assemble elite high school basketball players and compensate them for their participation on his traveling Amateur Athletic Union (AAU) basketball team, known first as the Children's Mercy Hospital 76ers and later as the KC Rebels. The payments were designed to retain top athletes on his team, gain access to sports agents, obtain profitable sponsorship contracts, and forge ongoing relationships with players to his benefit when the athletes joined the National Basketball Association (NBA).

The pre-sentence report shows Piggie realized at least $677,760 in income through his scheme. In the plea agreement, Piggie concedes that, as a result of his fraud, he received a total of $420,401 between 1995 and 1998. Piggie received at least $184,435 from team owner Tom Grant, $159,866 from team sponsor Nike, and $76,100 from sports agents Jerome Stanley and Kevin Poston. He further planned on receiving a portion of his players' compensation when they became professional athletes.

Piggie received a gross income of approximately $99,100 from these sources during the 1998 calendar year, and he knowingly and willfully failed to file a tax

[1] The Honorable Gary A. Fenner, United States District Judge for the Western District of Missouri.

return by April 15, 1999. Piggie also failed to file income tax returns in 1995, 1996, and 1997. In the plea agreement, the parties stipulated to a total tax loss of $67,662.69 for the period of 1995 to 1998.

Piggie took portions of the money he was receiving as the coach of this elite AAU team and made payments to the high school athletes in a clandestine manner, frequently hiding the money in Nike shoe boxes. All of the parties intended to keep the payments a secret from authorities. During the conspiracy, Piggie paid Jaron Rush[2] $17,000, Korleone Young (Young) $14,000, Corey Maggette (Maggette) $2,000, Kareem Rush $2,300, and Andre Williams (Williams) $200.

After accepting Piggie's payments to play AAU basketball, Jaron Rush, Maggette, Kareem Rush, and Williams submitted false and fraudulent Student-Athlete Statements to the universities where they were to play intercollegiate basketball.[3] These four athletes falsely certified that they had not previously received payments to play basketball. The athletes delivered through the U.S. Postal Service signed letters of intent asserting their eligibility. Based upon the false assertions that these athletes were eligible amateurs, the University of California, Los Angeles (UCLA); Duke University (Duke); the University of Missouri-Columbia (Missouri); and Oklahoma State University (OSU) (collectively Universities) awarded. scholarships to these athletes, enrolled them in classes, and allowed them to play on NCAA basketball teams.

NCAA regulations permit universities to award only thirteen basketball scholarships per year. When Piggie's payments to these players were discovered, the Universities became subject to NCAA penalties. Each school lost the use of one of the thirteen scholarships and lost the value of each player's participation due to the player's NCAA-required suspension. The scholarships were forfeited, and the Universities lost the opportunity to award the scholarships to other top amateur athletes, who had actual eligibility to play intercollegiate basketball. In 1999 and 2000, UCLA lost the benefit of playing Jaron Rush, the $44,862.88 scholarship awarded to him, and also forfeited $42,339 in tournament revenue; Missouri lost the benefit of playing Kareem Rush, and the $9,388.92 scholarship awarded to him; and OSU lost the benefit of playing Williams and the $12,180 scholarship awarded to him. Duke provided Maggette with a $32,696 scholarship for the 1998–1999 season based upon the false assertion that he was an eligible amateur. As a result of the ineligible athlete's participation, the validity of Duke's entire 1998–1999 season was called into question.[4]

NCAA regulations also required each of the four Universities involved to conduct costly internal investigations after Piggie's scheme was discovered. UCLA spent $59,225.36 on the NCAA-mandated investigation of Jaron Rush, Duke spent $12,704.39 on the NCAA-mandated investigation of Maggette, Missouri spent $10,609 on the NCAA-mandated investigation of Kareem Rush, and OSU spent $21,877.24 on the NCAA-mandated investigation of Williams. The total monetary loss to the Universities was $245,882.79. The scandal following the disclosure of Piggie's scheme caused further intangible harms to the Universities including adverse publicity, diminished alumni support, merchandise sales losses, and other revenue losses.

Pembroke Hill High School (Pembroke), where Jaron and Kareem Rush played high school basketball, sustained a loss of $10,733.89 in investigative costs and forfeiture of property as a result of the conspiracy. Pembroke was placed on probation by the State of Missouri after the viola-

[2] Piggie spent an unnecessary portion of his brief and oral argument attempting to refute the allegation that a $5,000 payment he made to Jaron Rush was a bribe for Jaron Rush to attend UCLA instead of the University of Kansas. The reason why Jaron Rush chose to attend UCLA is irrelevant to the issues before us on appeal.

[3] Young signed a contract in 1998, directly out of high school, to play for the NBA Detroit Pistons, and did not play intercollegiate basketball.

[4] Maggette played the full 1998–1999 season for Duke before Piggie's scheme was uncovered. At the time of the sentencing hearing, NCAA action against Duke was still pending. Duke was subject to the forfeiture of its second place finish in the 1999 NCAA Tournament and the loss of $226,814.51 in tournament revenue.

tions of Jaron and Kareem Rush were discovered and a mandatory investigation of the matter was concluded.

After Piggie's guilty plea, the district court sentenced him to 37 months imprisonment, three years supervised release, and $324,279.87 in restitution.

II. DISCUSSION

[1] Piggie contends the district court (1) miscalculated the losses, actual and intended, in determining his Guidelines base offense level; (2) erred in including consequential or incidental losses for restitution; and (3) based the tax loss calculation on insufficient evidence. We will address these issues in order.

A. Loss Calculation

A scheme to deprive a university of its right to the "honest services" of college basketball players is within the definition of mail and wire fraud, even if it results in a winning basketball program. See United States v. Gray, 96 F.3d 769, 774–75 (5th Cir. 1996) (finding wire and mail fraud prosecution appropriate for Baylor University basketball coaches who schemed to obtain scholarships for ineligible players). The coaches' scheme in Gray was fraudulent "because Baylor did not get the quality student it expected . . . [and Baylor] might have been able to recruit other qualified, eligible students to play basketball." Id. at 775. Like the Universities and Pembroke, Baylor instead "was forced to institute a costly investigation" and withhold players from competition. Id. Piggie and his co-conspirators, the athletes, intentionally. misled the Universities into believing the athletes were amateurs. This caused each University to be deprived of the honest services of an athlete as well as the use of one of the basketball scholarships awarded annually. The scheme also directly resulted in investigative costs and fines to ensure compliance with NCAA regulations.

Piggie argues the district court incorrectly calculated the amount of loss attributable to him in enhancing his base offense level under the Guidelines. See U.S.S.G. § 2F1.1(b)(1) (2000).[5] We review the district court's interpretation and application of the Guidelines de novo. United States v. Oligmueller, 198 F.3d 669, 671 (8th Cir. 1999). Loss calculations also involve factual findings, which we review for clear error and reverse only if "we are left with the definite and firm conviction that the district court erred." United States v. Whatley, 133 F.3d 601, 606 (8th Cir. 1998).

The calculation method must be reasonable. The amount of loss "need not be determined with precision." Id. The loss determination is not limited to money handled by Piggie, but includes reasonably foreseeable losses caused by co-conspirators, which losses were part of the same conspiracy. Id. at 606–07.

In calculating the amount of loss under section 2F1.1(b)(1) of the Guidelines, the district court uses either the amount of the *actual* loss suffered by the victims or the amount of loss the defendant *intended* to cause the victims. U.S.S.G. § 2F1.1 cmt. n.8(6); United States v. Morris, 18 F.3d 562, 570 (8th Cir. 1994). In instances where the actual and intended loss are not the same amount, the district court uses whichever amount is greater. Id. In Piggie's case, the district court determined the greater loss for consideration under the Guidelines was the intended loss to Pembroke and the Universities, including forfeited scholarships, investigation costs, and fines.

Piggie contends on appeal that he did not intend any loss to the Universities, because if the scheme had gone as he planned, the payments to the players would never have been discovered and the Universities would have incurred no loss. This self-serving argument fails in that it is undisputed that Piggie intended to deprive the Universities, their athletic conferences, and the NCAA of the intangible right to award scholarships to *amateur* players and maintain a system of *amateur* athletic competition. Even if his scheme had never been

[5] The district court utilized the Guidelines in place at the time of sentencing, section 2F1.1(b)(1) of the 2000 Guidelines. In November 2001, the Sentencing Commission consolidated section 2F1.1 with section 2B1.1.

discovered, the Universities would have been deprived of the services of honest, amateur basketball players. We decline to accept Piggie's invitation to calculate intended losses based upon Piggie's succeeding with his fraud and deception. We agree with the district court that all of the losses to Pembroke and the Universities were "intended as the natural and probable consequences of the defendant's actions in this matter."

Piggie argues under Oligmueller and similar cases that the full loss to the Universities cannot be considered intended for the purpose of the Guidelines, because Piggie never intended that the Universities would suffer as a result of his scheme. See Oligmueller, 198 F.3d at 671; see also United States v. Anderson, 68 F.3d 1050, 1054–55 (8th Cir. 1995). In Oligmueller, when a farmer secured a loan using fraudulent collateral, but fully intended to pay the loan back, the *intended* loss calculation was zero and the actual loss determined the sentence. Oligmueller, 198 F.3d at 671. The *actual*loss calculation was the entire value of the loan reduced only by payments made from the "sale of pledged assets." Id. Even though the bank received value in the form of payments made with other assets, we refused to reduce the *actual*loss calculation based upon those other payments. Id. Even if we were convinced Piggie's intentions were analogous to the farmer's intentions in Oligmueller, and thus reduced the intended loss calculation, Piggie's actions still caused the actual losses in the amount of the full scholarships, fines, and investigative fees. The Guidelines calculation utilizes whichever loss calculation is greater. Morris, 18 F.3d at 570. Supposing arguendo that Piggie intended the Universities to receive some value from the athletes' participation in intercollegiate basketball, Piggie's intent does not diminish the amount of *actual* loss he caused the Universities and Pembroke.

Finally, we agree with the district court that the greatest loss caused by Piggie's fraud is the most difficult to appraise — the damage Piggie did to the athletes' lives. Although Piggie's behavior does not excuse the young athletes from the bad choices they made, these high school students put their faith and trust in Piggie, counting on him to help them develop their talent. Piggie took advantage of the trust these young athletes placed in him and exploited their immaturity and vulnerability. Instead of acting as a positive role model to the young men in his care, Piggie led them down the path of corruption and deception. As the district court stated, "bad decisions, wrong decisions and career-threatening and devastating decisions were caused to be made" and these decisions will no doubt have life-long repercussions for each athlete involved.

We therefore affirm the district court's loss determination.

B. Restitution Award

The district court ordered restitution under the Mandatory Victim's Restitution Act of 1996 (MVRA), 18 U.S.C. § 3663A. Piggie argues for the first time on appeal that the district court committed plain error in including incidental or consequential damages in the restitution award. Restitution orders are reviewed for plain error when the defendant does not preserve his challenge to the restitution order below. United States v. Riebold, 135 F.3d 1226, 1231 (8th Cir. 1998). Our plain error review is "extremely narrow and is limited to those errors which are so obvious or otherwise flawed as to seriously undermine the fairness, integrity, or public reputation of judicial proceedings." United States v. Beck, 250 F.3d 1163, 1166 (8th Cir. 2001).

We do not agree with Piggie that the district court committed plain error in including the investigative costs and NCAA fines in the calculation of the restitution order, because these investigative fees and fines are not incidental or consequential damages. These losses were "caused by the specific conduct that is the basis for the offense of conviction." See United States v. Akbani, 151 F.3d 774, 780 (8th Cir. 1998) (citations omitted). The district court did not commit plain error by includ-

ing the investigative fees and fines in the restitution order.

C. Tax Loss Calculation

Piggie argues the court clearly erred in calculating his gross unreported income and tax due. Piggie contends on appeal the amount of tax loss should have been $18,286, instead of $67,662.69 as determined by the district court. Piggie argues the government had the burden of proving the tax loss and the only documentation before the district court was the pre-sentence report, to which Piggie had objected. On the contrary, Piggie stipulated in the plea agreement that there was "a tax loss of $67,662.69 for the period of 1995–1998." A defendant who voluntarily accepts the provisions of a plea agreement cannot challenge on appeal the punishment to which he willingly exposed himself, because the defendant accepts both the benefit and the burden of the plea agreement. United States v. Durham, 963 F.2d 185, 187 (8th Cir. 1992). We find the district court's tax loss determination was not in error.

III. CONCLUSION

For the foregoing reasons, we affirm the opinion of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

¶2002-5387

UNITED STATES OF AMERICA, PLAINTIFF v. Michael D. RICHMOND and Rex E. Black, d/b/a The Liberty Network, Liberty Estate Planning, The Liberty Institute, Fiduciary Management Group, National Council of Certified Estate Planners, Association for Certified Estate Planning Attorneys, and Eagle Publication Trust, DEFENDANTS. U.S. District Court, Northern Dist. of Illinois, (DC IL) Case No. 02 C 1559, Sept. 10, 2002. Decision for Govt.

1. Abusive tax shelter promotion—injunctions—contempt. Govt. was granted motion to hold abusive trust promoter in contempt of prior injunction order: promoter's "conditional acceptance" of order and complete inaction showed blatant refusal to acknowledge or comply with order's directives that he refrain from further organizing or selling shelters, stop making false statements about them, provide govt. list of clients who purchased such trusts, post order on his website and send order copy to clients. *Reference:* United States Tax Reporter ¶74,085.01(50); 74,025.01(11); 74,075. IRC §7402; 7407; 7408.

For the Plaintiff: UNITED STATES DEPARTMENT OF JUSTICE Post Office Box 7238 Ben Franklin Station Washington, DC 20044 BY: MS. KARI M. LARSON (202) 514-6540
Defendant, Pro Se: MR. REX EUGENE SEMI-COLON BLACK
Court Reporter: MS. MAELLEN E. PITTMAN, RDR, FCRR 219 South Dearborn Street Room 2342 Chicago, Illinois 60604 (312) 435-5576

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION,

HONORABLE CHARLES R. NORGLE

ORDER

CHARLES R. NORGLE, District Judge:

Before the Court is the Government's motion to hold Defendant Rex E. Black in contempt of court. The Court grants the Government's motion and issues the following order.

FACTUAL FINDINGS

By an order dated June 14, 2002, the Court permanently enjoined Black from the following:

a. Organizing or selling his abusive tax shelters, or instruction others to sell his abusive tax shelters through Liberty Institute courses;

b. Making false statements about the tax benefits of his tax shelters;

c. Instructing or advising taxpayers to understate their federal tax liabilities, and;

d. Engaging in similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

The order required Black, by June 24, 2002 to:

a. Provide the United States with a complete list of clients (including names, addresses, phone numbers, and social security numbers or employer identification numbers) who have purchased Contract Business Trusts or Family Estate Trusts, or who have obtained any services from Fiduciary Management Group, including but not limited to tax return preparation and trustee services;

b. Maintain the websites, www.mcep.com, www.libertyinsitute.com, www.nationalCEP.com, and display prominently on the first page of those websites a copy of this Court's order of injunction; and

c. Mail a copy of the Complaint and Injunction Order to all trust customers, tax return preparation customers, and all course attendees at any Liberty Institute course from 1995 to the present.

Black has failed to comply with any of these provisions.

FINE

Beginning within 21 days from the date this Contempt Order is issued, until Black fully complies with the June 14, 2002 Injunction Order, and until he fully pays all fines imposed pursuant to this Contempt Order, a $2,000 daily fine will be imposed against Black, payable to the Clerk of the Court, Michael Dobbins.

CONDITION TO PURGE THE CONTEMPT

In addition to payment of all fines imposed pursuant to this Order, the following condition must be satisfied to purge the contempt:

1. Provide the United States with a complete list of clients (including names, addresses, phone numbers, and social security numbers or employer identification numbers) who have purchased Contract Business Trusts or Family Estate Trusts, or who have obtained any services from Fiduciary Management Group, including but not limited to tax return preparation and trustee services;

2. Maintain the websites, www.mcep.com, www.libertyinsitute.com, www.nationalCEP.com, and display prominently on the first page of those websties a copy of this Court's order of injunction; and

3. Mail a copy of the Complaint and Injunction Order to all trust customers, tax return preparation customers, and all course attendees at any Liberty Institute course from 1995 to the present.

Should Black fail to pay all fines associated with this Order, or should he fail to fully comply with the June 14, 2002 Injunction Order, the Government is directed to file a motion, supporting affidavit, and proposed arrest order with the Court.

IT IS SO ORDERED

ENTER:

CHARLES RONALD NORGLE, Judge

United States District Court

DATED: 9-10-02

OPINION

CHARLES R. NORGLE, District Judge:

Before the Court is the Government's motion to hold Defendant Rex E. Black in contempt of court. For the following reasons, the Court grants the Government's motion.

I. BACKGROUND[1]

This case involves the promotion of abusive tax schemes and false statements about the tax laws. The Government filed a civil action on March 4, 2002, to enjoin Rex Black (''Black'') and Michael Rich-

[1] The court takes the facts from the court file as well as the brief submitted by the Government. Defendant's only response to the Government's motion for contempt was the statements he made at the hearing on September 6, 2002. (See Transcript of Contempt Hearing, September 6, 2002, Ex. A).

mond (''Richmond'') from promoting abusive tax schemes. Specifically, Black and Richmond advised customers to claim unallowable federal tax benefits. Black and Richmond further prepared tax returns for their customers claiming unallowable deductions resulting in substantial understatements. On June 14, 2002 this Court found Black and Richmond in violation of 26 U.S.C. § 7402, 26 U.S.C. § 7407, and 26 U.S.C. § 7408 of the Internal Revenue Code. The Court permanently enjoined Black from:

Organizing or selling his abusive tax shelters, or instructing others to sell his abusive tax shelters through Liberty Institute course;
Making false statements about the tax benefits of his tax shelters;
Instructing or advising taxpayers to understate their federal tax liabilities, and
Engaging in similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

The Court's order also required Black, by June 24, 2002, to:

Provide the United States with a complete list of clients (including names, addresses, phone numbers, and social security numbers or employer identification numbers) who have purchased Contract Business Trusts or Family Estate Trusts, or who have obtained any services from Fiduciary Management Group, including but not limited to tax return preparation and trustee services;
Maintain the websites, www.mcep.com, www.libertyinsitute.com, www.nationalCEP.com, and display prominently on the first page of those websites a copy of this Court's Order of Injunction; and
Mail a copy of the Complaint and Injunction Order to all trust customers, tax return preparation customers, and all course attendees at any Liberty Institute course from 1995 to the present.

On September 6, 2002 the Government presented this motion for contempt of court against Black. Black appeared at the hearing for presentment of the motion, but the offered no response to he motion nor did he ask for time to respond. Rather, Black continually deferred stating his name to the Court and challenged the Court's right to know his name. (See Transcript of Contempt Hearing, September 6, 2002, Ex. A); see also John Coe v. County of Cook, 162 F.3d 491, 498 (7th Cir. 1998) (Parties to federal litigation must litigate under their real names).

II. DISCUSSION

[1] Civil contempt proceedings arise under 18 U.S.C. § 401(3). ''A court's civil contempt power rests in its inherent limited authority to enforce compliance with court orders and ensure judicial proceedings are conducted in an orderly manner.'' United States v. Dowell, 257 F.3d 694, 699 (7th Cir. 2001) (quoting Jones v. Lincoln Elec. Co., 188 F.3d 709, 737 (7th Cir. 1999)). To hold a party or witness in civil contempt, the court must be able to point to an order which specifically sets forth an unequivocal command that the party in contempt violated. See Jones, 188 F.3d at 738. Sanctions for civil contempt are designed either to compel the contemnor into compliance with an existing court order or to compensate the complaintant for losses sustained as a result of the contumacy. Dowell, 257 F.3d at 699 (citing Jones, 188 F.3d at 738). The proof for civil contempt must be clear and convincing. Dowell, 257 F.3d at 699 (citing Stotler & Co. v. Able, 870 F.2d 1158, 1163 (7th Cir. 1989)). The court does not have to find that the violation was willful, and may find a party in civil contempt if that party has not been reasonably diligent and energetic in attempting to accomplish what was ordered. Goluba v. School Dist. of Ripon, 45 F.3d 1035, 1037 (7th Cir. 1995) A district court has broad discretion to fashion sanctions in a contempt proceeding. See South Suburban Housing Center v. Berry, 186 F.3d 851, 854 (7th Cir. 1999). Appropriate sanctions may include a coercive daily fine, a compensatory fine, attorneys' fees

and costs, and coercive incarceration. See In the Matter of Grand Jury Proceedings, 280 F.3d 1103, 1109–1110 (7th Cir. 2002).

It is clear that Black has not complied with any aspect of the Court's Order of June 14, 2002. The Court need not look any further than the "Conditional Acceptance" that Black filed with the Court on June 26, 2002. (See R. 40.) Black's "Conditional Acceptance" is a blatant refusal to acknowledge the validity of the injunction issued by the Court. (See id.) As further evidence of a refusal to acknowledge the validity of the injunction, Black has failed to take any of the steps the Court instructed. Black has failed to provide a client list to the Government, failed to post a copy of the Court's Order of June 14, 2002 on any of his websites, and failed to provide any of his clients or course attendees with copies of the Court's Order of June 14, 2002 or the Government's Complaint. (See Shoemaker Decl., ¶ 2; Cantrell Decl., ¶s 3 and 5.) Based on Black's stated as well as demonstrated refusal to acknowledge or comply with the Court's order, the Court finds Black in contempt of the Court's Order of June 14, 2002.

III. CONCLUSION

For the foregoing reasons, the Government's motion for contempt of court is granted.

IT IS SO ORDERED

ENTER:

CHARLES RONALD NORGLE, Judge

United States District Court

DATED: 9-10-02

September 6, 2002

TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE CHARLES RONALD NORGLE, SR.

For the Plaintiff:

UNITED STATES DEPARTMENT OF JUSTICE

Post Office Box 7238

Ben Franklin Station

Washington, DC 20044

BY: MS. KARI M. LARSON

(202) 514-6540

Defendant, Pro Se:

MR. REX EUGENE SEMI-COLON BLACK

Court Reporter:

MS. MAELLEN E. PITTMAN, RDR, FCRR

219 South Dearborn Street

Room 2342

Chicago, Illinois 60604

(312) 435-5576

(Proceedings heard in open court:)

THE CLERK: 02 C 1559, United States versus Michael Richmond. Motion for contempt.

MS. LARSON: Good morning, your Honor. Kari Larson for the United States.

THE COURT: Good morning.

MR. RICHMOND: Mr. Clerk, are you calling for the creditor or the debtor in this issue?

THE COURT: What is your name, please?

MR. RICHMOND: Are you calling for the creditor or the debtor in this issue?

THE COURT: What is your name?

MR. RICHMOND: I'm the secured party for this debtor.

THE COURT: What is your name?

MR. RICHMOND: My Christian name, living sentient mean --being. It's Rex Eugene Semi-Colon Black.

THE COURT: Do you have any other names?

MR. RICHMOND: Pardon?

THE COURT: Do you have any other names?

MR. RICHMOND: I'm the secured party for the debtor of this issue.

THE COURT: What is your name?

MR. RICHMOND: And I request the release of the order --

THE COURT: What is your name?

MR. RICHMOND: -- to me.

THE COURT: What is your name?

MR. RICHMOND: What is your name?

THE COURT: Please be seated. We will call the case later.

MS. LARSON: Okay.

MR. RICHMOND: I would like --

THE COURT: Be seated. Be seated.

(The Court attends to other matters on its call, afterwhich the following further proceedings were heard in open court:)

THE CLERK: 02 C 1559, United States versus Michael Richmond. Motion for contempt of Rex E. Black.

THE COURT: Who represents the plaintiff?

MS. LARSON: Kari Larson for the United States.

THE COURT: And what is your name?

MR. RICHMOND: The question that was on the table is are you calling for the creditor or the debtor in this issue. If not, I am the secured party to this matter.

Here are the original papers that were sent, and they are accepted and returned to the parties from which they came from. And I ask that the order of Court be released unto me.

THE COURT: Is there anything further you wish to say?

MR. RICHMOND: No, sir.

THE COURT: All right. The matter is under advisement. I will issue an order shortly.

MS. LARSON: Thank you, your Honor. (Proceedings concluded.)

CERTIFICATE

I hereby certify that the foregoing is a true and correct transcript of proceedings in the above-entitled case.

Maellen E. Pittman

Official Court Reporter

9-10-02

Date

¶2002-5388

THE TRAVELERS INSURANCE COMPANY, PLAINTIFF-APPELLEE v. UNITED STATES, DEFENDANT-APPELLANT. U.S. Court of Appeals, Federal Circuit, (CA Fed Cir) 01-5137, Sept. 16, 2002. Court of Federal Claims, (1993, Ct Fed Cl) 72 AFTR 2d 93-5276, 28 Fed Cl 602, 93-2 USTC ¶50412, and (1996, Ct Fed Cl) 77 AFTR 2d 96-1464, 35 Fed Cl 138, 96-1 USTC ¶50231, reversed. Earlier proceedings at (2000, Ct Fed Cl) 85 AFTR 2d 2000-1369; and (1992, Cl Ct) 69 AFTR 2d 92-593, 25 Cl Ct 141, 92-1 USTC ¶50108. Years 1975, 1976, 1977, 1978, 1979, 1980. Decision for Govt.

1. Life ins. co. income—U.S. source income—foreign tax credit limitation—policyholders' share exclusion—election not to be treated as partner—change in accounting method. For purposes of FTC limitation and life ins. co taxable income calculations, Court of Federal Claims improperly permitted domestic life insurance co. to treat policyholders' income share as deduction vs. exclusion: IRC §804 and IRC §809's plain exclusion language foreclosed deduction analogy; and taxpayer's reliance on IRC §810's annual reserve increase/decrease provisions or case law involving tax benefit rule was misplaced. *Reference:* United States Tax Reporter ¶8125.01(25); 8615.29(20); 9075.01(10); 7615.02(19); 4465.24(25). IRC §446; 761; 812; 861; 907.

2. Accounting methods—clear reflection of income—translation of foreign currency profits and losses into U.S. dollars. Court of Federal Claims improperly rejected IRS's determination that domestic life ins. co.'s regularly used method for translating its Canadian branch foreign currency profits and losses into U.S. dollars didn't clearly reflect income: Court erroneously concluded that IRS was required to provide explicit findings identifying IRC §446 as basis for its determination before it would be entitled to any deference. And, under correct substantial deference standard, IRS determination had to be sus-

tained where taxpayer showed no abuse of discretion in IRS's substitution of its established profit and loss method; and fact IRS had not challenged taxpayer's method in prior years was irrelevant. Also, although govt. erroneously determined that IRC §805 *compelled* use of historical rather than current year-end exchange rates to compute foreign branch assets' bases, govt. still had *discretion* to require such. *Reference:* United States Tax Reporter ¶4465.01(5). IRC §446.

Peter H. Winslow, Scribner, Hall & Thompson, LLP, of Washington, DC, argued for plaintiff-appellee.
Edward T. Perelmuter, Attorney, Tax Division, Department of Justice, of Washington, DC, argued for defendant-appellant. With him on the brief were Eileen J. O'Connor, Assistant Attorney General; David English Carmack, and David I. Pincus, Attorneys.

United States Court of Appeals for the Federal Circuit,

Appealed from: United States Court of Federal Claims

Senior Judge Loren A. Smith

Before SCHALL, DYK, and PROST, Circuit Judges.

DYK, Circuit Judge.

This federal income tax refund case has been pending in the Court of Federal Claims for over a decade. It presents two issues, each of which relates to special rules for the taxation of life insurance companies, such as the Travelers Insurance Co. (''Travelers'' or ''taxpayer''), the appellee in this case. The first issue is whether the policyholders' share of income should have been excluded from ''taxable income'' for purposes of computing the limitation on the foreign tax credit in section 904 of the Internal Revenue Code, 26 U.S.C. § 904 (1976). For life insurance companies, ''taxable income'' is defined in terms of taxpayer's ''life insurance company taxable income'' (''LICTI''). Id. § 802. We hold that Congress explicitly provided for the exclusion of the policyholders' share from LICTI in 26 U.S.C. §§ 804(a)(1) and 809(a)(1) (1976), and accordingly reverse the decision of the Court of Federal Claims to the contrary.

The second issue is whether, under 26 U.S.C. § 446 (1976), the Internal Revenue Service (''IRS'' or ''Service'') properly determined that the taxpayer's method of translating foreign currency profits and losses from Canadian branch operations into United States dollars failed to ''clearly reflect income.'' We hold that the Court of Federal Claims erred in declining to defer to the IRS determination, and that the taxpayer has not shown that the IRS abused its discretion. Accordingly, we reverse the decision of the Court of Federal Claims to the contrary.

BACKGROUND

Taxpayer is a stock life insurance company, which writes various forms of life and accident insurance. This case presents two issues concerning the taxpayer's income tax liability—one relating to the foreign tax credit and the other concerning the taxation of income from taxpayer's Canadian branch operations.

I The Foreign Tax Credit Issue

In 1970, taxpayer entered into an agreement with an offshore drilling company under which taxpayer received a 3% interest in an Indonesian oil exploration and drilling joint venture. Every year between 1975 and 1980, taxpayer received net income from its participation in the joint venture. During those years, taxpayer paid taxes to Indonesia on the income it earned from the joint venture and claimed foreign tax credits under sections 841 and 901 of the Internal Revenue Code, 26 U.S.C. §§ 841, 901 (1976). In all relevant respects, the pertinent sections of the Tax Code were unchanged between 1975 and 1980. For ease of reference, this opinion refers to the 1976 version of the Tax Code. Many of the statutory provisions involved in this case have been revised or repealed since 1980.

Computation of LICTI

In order to understand the foreign tax credit issue, it is necessary to understand

the method by which the income tax of life insurance companies was computed. Instead of using the familiar concept of "taxable income," 26 U.S.C. § 11 (1976), as the base, the Code provided that in the case of life insurance companies the base was to be "life insurance company taxable income" ("LICTI"), id. § 802. During the relevant taxable years, taxpayer computed its LICTI under provisions enacted in the Life Insurance Company Tax Act of 1959, Pub. L. No. 86-89, 73 Stat, 112 (1959), which were codified in former sections 801 to 820 of the Code, 26 U.S.C. §§ 801–820. Under those provisions, taxpayer initially was required to compute both its "taxable investment income" and its "gain from operations." Id. § 802(b). To compute its taxable investment income, the company began with its gross investment income, an item that included traditional investment income such as interest, dividends, rents, and royalties, as well as income from non-insurance business enterprises, such as oil-related income. Id. § 804(b). The company then subtracted from its gross investment income its investment expenses. The balance was referred to as "investment yield." Id. § 804(c).

The next computation involved the division of "investment yield" into a "policyholders' share" and the "company's share." Id. § 804(a). The first step in this computation was the development of a fraction, which was the amount of investment income needed for policyholder and other contract liability requirements (i.e., the amount that must be added to reserves), divided by the total investment yield. This fraction was then multiplied by "each and every item of investment yield," id. § 804(a)(1), to obtain the policyholders' share of that item. The policyholders' share of each item was then excluded from income. Id. § 804(c)(1). The company's taxable investment income was the sum of the company's share of each item and the net capital gain. Id. § 804(a)(2).

"Gain from operations," in contrast to taxable investment income, consisted of all of the company's income—investment income and underwriting income. See id. §§ 809(b), (c) & (d); United States v. Atlas Life Ins. Corp., 381 U.S. 233, 235 n.2 [15 AFTR 2d 1001] (1965). Like the computation of taxable investment income, the investment income portion of gain from operations was only "the life insurance company's share of each and every item of investment yield[.]" 26 U.S.C. § 809(b)(1)(A). The policyholders' share of each and every item of investment yield was again excluded. Id. § 809(a)(1).

After computing its "taxable investment income" and "gain from operations," the company compared the two figures. If the company's gain from operations was less than its taxable investment income (because, for example, the company had underwriting losses), its tax base (LICTI) was gain from operations. Id. § 802(b)(1). On the other hand, if the company's gain from operations was greater than its taxable investment income, its tax base (LICTI) was taxable investment income plus one half of the excess of gain from operations over taxable investment income. Id. § 802(b)(2).

Although the method of computing taxable income was complex, the central fact for present purposes is that the policyholders' share of "taxable investment income" and "gain from operations" reduced taxable income (LICTI).

The Foreign Tax Credit Provisions

For insurance companies, the foreign tax credit was authorized by 26 U.S.C. § 841 (1976), which incorporated the general foreign-tax-credit provision of 26 U.S.C. § 901 (1976). Section 841 provided that:

> The taxes imposed by foreign countries or possessions of the United States shall be allowed as a credit against the tax of a domestic insurance company subject to the tax imposed by section 802 [on LICTI] . . . to the extent provided in the case of a domestic corporation in section 901 (relating to foreign tax credit).

26 U.S.C. § 841 (1976). Section 901 authorized a taxpayer to claim the credit "subject to the limitation of section 904

. . . .'' Id. § 901(a). Section 904(a), in turn, provided:

> The total amount of the credit taken under section 901(a) shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources without the United States (but not in excess of the taxpayer's entire taxable income) bears to his entire taxable income for the same taxable year.

Id. § 904(a). As applied to life insurance companies, section 841 provided that ''life insurance company taxable income'' was to be used as ''taxable income'' for purposes of the foreign tax credit. Id. § 841. The section 904 ''limitation'' may be expressed by the following formula, in which the right-hand side of the formula is re-ferred to hereafter as the ''section 904 fraction'':

$$\text{United States Income Tax Liability before Application of Foreign Tax Credit} \times \frac{\text{Foreign Source LICTI}}{\text{Worldwide LICTI}}$$

In cases involving oil-related income, section 907(b) provided that the section 904 limitation was to be applied separately for ''foreign oil related income'' and ''other taxable income.'' Id. § 907(b)(1).[1]

Proceedings Below

The central dispute in the Court of Federal Claims[2] was whether the policyholders' share of both foreign source LICTI and worldwide LICTI, which respectively comprise the numerator and denominator of the section 904 fraction, should be treated as an exclusion or a deduction. If the policyholders' were an exclusion, both the taxpayer and government agreed that the policyholders' share should be excluded from the numerator and denominator of the section 904 fraction, and that no refund was due. On the other hand, if the policyholders' share were a deduction, the taxpayer argued that it should be ignored in calculating the numerator — foreign source LICTI — because the deduction was properly attributable to United States operations under the sourcing rules of 26 C.F.R. §§ 861–863 (1977).[3] But the policyholders' share, in the taxpayer's view, was still properly deducted from the denominator to compute worldwide LICTI.[4]

On April 30, 1993, the Court of Federal Claims issued its first opinion, granting partial summary judgment to taxpayer on the foreign tax credit issue. Travelers Ins. Corp. v. United States, 28 Fed. Cl. 602 [72 AFTR 2d 93-5276] (1993). In its opinion, the Court of Federal Claims acknowledged that ''[b]oth parties present coherent arguments for their positions on the nature of the policyholders' share.'' Id. at 612. The Court of Federal Claims recognized that under sections 804(a)(1) and 809(a)(1) of the Code the policyholders' share of income is ''exclud[ed]'' from both the numerator and denominator of the section 904 fraction. Id. at 607. However, relying almost entirely on section 810(b) of the Code, which relates to adjustment of life insurance company reserves, the court found that the statutory exclusion was in

[1] There is also a separate section 907(a) limitation applicable to ''foreign oil and gas extraction income,'' 26 U.S.C. § 907(a) (1976), but the application of that limitation apparently has no effect here. As the Court of Federal Claims noted, ''Under defendant's computation, [s]ection 907(b) imposes the greatest restriction upon Travelers' allowable foreign tax credit related to the Indonesian oil venture. Thus, [s]ection 907(b) provides the lesser foreign tax credit under [s]ection 901(a), and is the operative limitation in this case.'' Travelers Ins. Corp. v. United States, 28 Fed. Cl. 602, 608 [72 AFTR 2d 93-5276] (1993).

[2] When the complaint was first filed on August 19, 1988, the Court of Federal Claims was known as the United States Claims Court.

[3] Specifically, taxpayer cited Treas. Reg. § 1.861-8(a), which provides in pertinent part:

> (1) Scope. Sections 861(b) and 863(a) state in general terms how to determine taxable income of a taxpayer from sources within the United States after gross income from sources within the United States has been determined. Sections 862(b) and 863(a) state in general terms how to determine taxable income of a taxpayer from sources without the United States after gross income from sources without the United States has been determined. This section provides specific guidance for applying the cited Code sections [which include section 904] by prescribing rules for the allocation and apportionment of expenses, losses, and other deductions (referred to collectively in this section as ''deductions'') of the taxpayer.

26 C.F.R. § 1.861-8(a) (1977) (emphasis added).

[4] Even if the policyholders' share were a deduction, the government argued that it should be deducted from foreign source LICTI in computing the section 904 fraction.

fact more "accurately viewed as a deduction." Id. at 613. This was so because the excluded amounts (the policyholders' share) reduced the amount of the reserves and hence the deduction allowed for addition to reserves. The overall effect was to increase LICTI after accounting for the deduction. The court reasoned, "[i]n reality, the policyholders' share exclusion is the required interest portion of the reserve deduction which is fully recouped by the corresponding decrease in the year-end reserves under [s]ection 810." Id. at 613. The court then concluded that this "deduction" was "properly allocated to Travelers' gross income from its domestic insurance business and not to its Indonesian oil investment activities." Id. at 614. Therefore, the policyholders' share was improperly excluded from foreign source LICTI, which is the numerator of the section 904 fraction, but properly deducted from worldwide income to compute worldwide LICTI. Id. at 615.[5]

II The Foreign Currency Translation Issue

The second issue concerns foreign currency translation. During the years 1977 through 1980, taxpayer derived income from insurance underwriting and investment operations in Canada. On its United States tax returns for those years, taxpayer calculated its taxable gain and income from its Canadian operations in Canadian dollars. Taxpayer combined those amounts with United States dollar amounts attributable to its other operations.[6] Taxpayer then made a "Canadian Exchange Adjustment" to the combined figure and reported that figure in United States dollars as part of the process of computing both its taxable investment income and its gain from operations for purposes of determining its LICTI for the relevant taxable years. In making this exchange adjustment, taxpayer used the current, end-of-the-year exchange rate.

On audit, the IRS recomputed taxpayer's LICTI by converting each line amount attributable to Canadian operations into United States dollars, combining that amount with the United States dollar amounts attributable to taxpayer's other operations, and reporting the total amount in United States dollars. In making this adjustment, the IRS concluded that taxpayer's method failed to clearly reflect its LICTI.

There is another significant difference between the IRS and the taxpayer concerning the treatment of the historical basis of certain taxpayer assets. The IRS converted the adjusted basis of Canadian bonds, mortgages, and joint ventures from Canadian dollars to United States dollars using historical exchange rates (i.e., the rates in effect at the time of the original acquisition of the asset). The government urges that this historical exchange rate was required by section 805(b)(4), which provides that "the amount attributable to— ... (B) any other asset shall be the adjusted basis, of such asset for purposes of determining gain on sale or other disposition." 26 U.S.C. § 805(b)(4)(B) (1976).

Taxpayer paid the additional tax resulting from the Commissioner's determinations and filed a refund claim with the IRS. After the IRS denied the refund claim, taxpayer filed this refund suit claiming that the IRS had erred in substituting its own accounting method for the method employed by taxpayer.

On March 21, 1996, the Court of Federal Claims issued another opinion. In again granting partial summary judgment for the taxpayer, the Court of Federal Claims noted that "[i]t is not the intention of this court to modify or limit the amount of latitude that has been consistently accorded the Secretary in determining what method of accounting will accurately reflect a taxpayer's income." Travelers Ins. Corp. v. United States, 35 Fed. Cl. 138, 141 [77 AFTR 2d 96-1464] (1996). Nonetheless, the court concluded that no deference was due the IRS determination for two reasons. First, the court found that the IRS abused its discretion by imposing its

[5] The government correctly points out that the Court's assumptions as to the operation of the reserve provisions were not correct. In light of our disposition of this issue, we need not address the Court of Federal Claims' error in this respect.

[6] The parties dispute whether taxpayer combined the amounts before or after it translated the Canadian dollars to United States dollars. This dispute is irrelevant to the outcome of this appeal.

own accounting method without making the necessary formal and explicit determination that the taxpayer's method did not clearly reflect income. Id. at 145–46. Second, the court found:

> De novo review of the taxpayer's method of accounting may, at first blush, seem to contradict the express language of section 446(b) because implicit in the phrase "in the opinion of the Secretary" is the concept of Secretarial discretion. Upon further examination of the placement of that language within the section, however, it is clear that section 446(b) contemplates two different levels of judicial review. The first determination to be made by the Secretary—whether the taxpayer's regularly used method of accounting clearly reflects income—is not subject to the Secretary's opinion and therefore is to be reviewed de novo. The second determination—what alternative method does clearly reflect income—is subject to the "opinion of the Secretary" and therefore must be accorded the significant degree of deference normally accorded to an administrative agency by a court.

Id. at 141 (citations omitted) (emphasis added).

The court then examined the two methods of conversion generally recognized by the IRS: the "profit and loss" and the "net worth" methods. Id. at 142. The "profit and loss" method involves computing net income attributable to foreign branch operations in foreign currency and then using end-of-the-tax-year exchange rates to translate the income into United States dollars. Id. The "net worth" method translates the balance sheet net worth, not just the income of the foreign branch. The increase in net worth is treated as taxable income. Id. As an example of a profit and loss method, the court identified Revenue Ruling 75-107, which provides in pertinent part that "[t]he balance of the net profits, expressed in [foreign] Country Y's units should be converted into United States money at the rate of exchange as of the end of the taxable year, regardless of the fact that the profits may not have been remitted to M [a domestic corporation]." Id.; Rev. Rul. 75-107, 1975-1 C.B. 32. The court then concluded that "[t]he Travelers' Method, which computes net gain or loss in Canadian currency and then converts this amount to U.S. dollars by the end-of-the-year exchange rate," Travelers, 35 Fed. Cl. at 142, was "essentially the same as the profit and loss method described in Revenue Ruling 75-107," 33 Fed. Cl. at 143. The court accepted this revenue ruling as evidence that Travelers' Method clearly reflected income. Id.

The court further concluded that the government had "not offered any conclusive evidence in support of the Service's determination that the Travelers' Method does not clearly reflect income," id. at 144, and more specifically, that "the government has failed to show any basis for its position that the Travelers' Method of accounting did not accurately reflect plaintiff's income for taxable years 1977 through 1980," id. at 145. In light of taxpayer's consistent use of this accounting method in addition to the IRS's previous acceptance of the method, the court held that the IRS exceeded the scope of section 446(b) by requiring taxpayer to use the Service Method. Id. at 145. In addressing the foreign currency translation issue, the Court of Federal Claims did not discuss section 805.

When the Court of Federal Claims entered a final judgment on June 22, 2001, the United States appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

[1] The issues in this case are issues of law, which we review without deference to the Court of Federal Claims. Conti v. United States, 291 F.3d 1334, 1338 (Fed. Cir. 2002).

I The Foreign Tax Credit Issue

The clear language of the Code governs the foreign tax credit issue. Those provisions excluded the policyholders' share from LICTI.

As noted above, the "section 904 fraction" for purposes of the foreign tax credit is calculated in terms of taxpayer's "life

insurance company taxable income'' (''LICTI''), which is, in turn, calculated from the company's ''taxable investment income'' and ''gain from operations.'' 26 U.S.C. §§ 841, 802(b) (1976). Section 804(a)(1) provides in pertinent part that ''[t]he policyholders' share of each and every item of investment yield (including tax-exempt interest and dividends received) of any life insurance company shall not be included in taxable investment income.'' Id. § 804(a)(1) (emphasis added). Section 809(a)(1) similarly provides that ''[t]he share of each and every item of investment yield (including tax-exempt interest and dividends received) of any life insurance company set aside for policyholders shall not be included in gain or loss from operations.'' Id. § 809(a)(1) (emphasis added). Thus, both provisions require that the policyholders' share be excluded from any computation of LICTI. Indeed, the Supreme Court recognized that the policyholders' share should be treated as an exclusion in United States v. Atlas Insurance Corp., 381 U.S. 233 [15 AFTR 2d 1001] (1965), stating: ''Each item of investment income, including tax-exempt interest, is divided into a policyholders' share and a company's share. The policyholders' share is added to the reserve, is excluded for tax purposes from the gross income of the company and is not taxed to either the company or the policyholders.'' Id. at 239 (emphasis added).

Taxpayer's primary argument, adopted by the Court of Federal Claims, is that any exclusion is only a temporary exclusion because the amount of the exclusion is later included in income by an adjustment to the reserves of the company. Thus, according to the taxpayer, this ''exclusion'' is in reality a ''deduction'' and that ''deduction ... is fully recouped by the corresponding decrease in the year-end reserves under [s]ection 810.'' Travelers, 28 Fed. Cl. at 613.[7]

The taxpayer misunderstands the function of section 810. ''Life insurance reserves may be defined simply as that fund which, together with future premiums and interest, will be sufficient to pay future claims.'' Atlas, 381 U.S. at 236 n.3; accord 26 U.S.C. § 801(b)(1) (1976). Section 810 provides the method of computing its decreases or increases in annual reserves. A net decrease produces a corresponding increase in income, and a net increase produces a reserve deduction (and a decrease in income). 26 U.S.C. §§ 810(a), (b), 809(d)(2) (1976). Sections 810(a) and (b) provide parenthetically that prior to computation of any net decrease or increase in reserves, the items taken into account in calculating the adjustment in reserves[8] must first be ''reduced by the amount of investment yield not included in gain or loss from operations for the taxable year by reason of section 809(a)(1).'' Id. § 810(a) and (b) (parentheses omitted). In other words, the policyholders' share is not taken into account in computing the increase or decrease in reserves. While the net effect of section 810 may be that the reserve deduction is decreased (and the taxpayer's income increased) in some circumstances by the policyholders' share, nothing in section 810 alters the provisions of sections 804 or 809 or converts an exclusion into a deduction.

As the Supreme Court has repeatedly recognized, ''[c]ourts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.'' Badaracco v. Comm'r, 464 U.S. 386, 398 [53 AFTR 2d 84-446] (1984); see also TVA v. Hill, 437 U.S. 153, 194–95 (1978). Here the taxpayer effectively requests that this court rewrite the Tax Code and treat a clearly labeled statutory exclusion as a deduction. Although the parties

[7] An exclusion is defined as ''[a]n item of income excluded from gross income.'' Black's Law Dictionary 585 (7th ed. 1999). On the other hand, a deduction is defined as ''[a]n amount subtracted from gross income when calculating adjusted gross income, or from adjusted gross income when calculating taxable income.'' Id. at 422.

[8] These items include life insurance reserves, unearned premiums and unpaid losses included in total reserves, amounts necessary to satisfy obligations under insurance or annuity contracts, premiums received in advance, liabilities for premium deposit funds, and special contingency reserves. 26 U.S.C. § 810(c) (1976).

urge us to consider legislative history[9] and policy considerations to determine the appropriate treatment of the policyholders' share, that is quite unnecessary. The Code is clear on its face, and we are not charged with rewriting it to convert an exclusion into a deduction based on the theory proposed by the taxpayer and adopted by the Court of Federal Claims. See Marsh Corp., Inc. v. United States, No. 02-5002, slip op. at 20 [90 AFTR 2d 2002-6216] (Fed. Cir. Sept. 6, 2002); Phila. & Reading Corp. v. United States, 944 F.2d 1063, 1074 [68 AFTR 2d 91-5501] (3d Cir. 1991).[10]

Taxpayer relies on our decision in American Mutual Life Insurance Corp. v. United States, 267 F.3d 1344 [88 AFTR 2d 2001-6127] (Fed. Cir. 2001), to urge that the policyholders' share is more analogous to a deduction than an exclusion. In American Mutual, the taxpayer argued that it received only a partial tax benefit from the deductions it took for increases in reserves. American Mutual, 267 F.3d at 1349. Consequently, the taxpayer urged that the corresponding reserve releases (i.e., reductions in reserves) in later tax years should not have been taxed as income, relying on the tax benefit rule codified at section 111.[11] Id. at 1349–50. The tax benefit rule ensures that "if a taxpayer takes a deduction attributable to a specific event, and the amount is recovered in a subsequent year, income tax consequences of the later event depend in some degree on the prior related tax treatment." Id. at 1346 (citation omitted). Affirming the Court of Federal Claims, we held that "because American Mutual received a benefit from the reserve deductions taken, it cannot resort to the tax benefit rule to exclude from income amounts corresponding to release of those reserves." Id. at 1354. Nothing in American Mutual remotely suggests that the policyholders' share is a deduction from reserves rather than an exclusion.[12]

Therefore, we conclude that the Code requires that the policyholders' share be treated as an exclusion from both the numerator and the denominator of the section 904 fraction, and we reverse the Court of Federal Claims' decision to the contrary.

II The Foreign Currency Translation Issue

A.

2

We turn now to the second issue relating to foreign currency translation. Taxpayer argues that neither the Code nor the regulations required that a particular accounting method be used to translate the foreign currency into United States dollars. Taxpayer urges that its accounting method, which reported its Canadian branch taxable investment income and gain from operations in Canadian dollars and then applied year-end exchange rates to convert those figures into United States dollars, clearly reflected income because it was in essence the profit and loss method identified in Revenue Ruling 75-107. Revenue Ruling 75-107 provides in pertinent part that "[t]he balance of the net profits, expressed in [foreign] Country Y's units should be converted into United States money at the rate of exchange as of the end of the taxable year, regardless of the fact that the profits may not have been remitted to M [a domestic corporation]." Rev. Rul. 75-107, 1975-1 C.B. 32. The taxpayer acknowledges that its accounting method differs from Revenue Ruling 75-107 in that it is applied in two separate phases, which yield two exchange rate conversions, rather than

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9 If we were to consider the legislative history, we would conclude that it favors the government, not the taxpayer. All of the pertinent legislative history indicates that the policyholders' share was to be treated as an exclusion, not a deduction. See, e.g., S. Rep. No. 291, at 22 (1959), reprinted in 1959 U.S.C.A.N. 1575, 1596 ("Under your committee's amendments the required interest is omitted here because it is represented by the exclusion of that portion of the investment yield set aside for policyholders."). Indeed, the Court of Federal Claims noted that "the legislative history indicates that Congress specifically designated the policyholders' share as an exclusion after initially labeling it as a deduction." Travelers, 28 Fed. Cl. at 612.

10 There is no inconsistency in this respect with the Supreme Court's decision in Atlas, which characterized the tax consequences of the Code for purposes of a constitutional issue, not for purposes of statutory construction. Atlas, 381 U.S. at 250–51.

11 The tax benefit rule codified in section 111(a) provides: "Gross income does not include income attributable to the recovery during the taxable year of any amount deducted in any prior taxable year to the extent such amount did not reduce the amount of tax imposed by this chapter." 26 U.S.C. § 111(a) (2000).

12 Taxpayer also urges that the government has taken a different position on appeal to this court from the previous position that it took in its brief to this court filed in American Mutual. Even if its two positions were inconsistent, such an inconsistency is irrelevant, because our task is to determine the correct interpretation of the statute. In any event, the government did not say anything inconsistent in its brief in that case with its current position in this court.

just one phase as the revenue ruling suggests. However, the taxpayer argues that this difference is an immaterial variation.

The government urges that taxpayer's accounting method does not clearly reflect income and that the IRS has broad discretion to set aside a taxpayer's accounting method if it does not clearly reflect income. The government contends that the profit and loss method of accounting identified in Revenue Ruling 75-107 differs markedly from taxpayer's accounting method. Specifically, the government urges that taxpayer combined its taxable gain and income from its Canadian operations with the taxable gain and income from other United States operations without first translating the Canadian dollars to United States dollars. The government then states that taxpayer applied an unspecified "Canadian Exchange Adjustment" to the combined figure using the current, year-end exchange rates. The government argues that taxpayer's method fails to clearly reflect income and contends that the Court of Federal Claims erred by substituting its judgment for that of the IRS when it concluded that taxpayer's accounting method clearly reflected income.

A second foreign currency translation issue concerns the calculation of the basis of certain assets. The government urges that section 805(b)(4) dictates that the taxpayer should have used historical rather than current year-end exchange rates for the foreign currency translation of certain assets. The taxpayer urges that section 805(b)(4) does not govern this case because "[t]he purpose of section 805(b)(4) is to quantify assets to determine the current earnings rate," App. Br. at 59, and it does not address whether historical or current exchange rates should be used in calculating the basis of those assets. As noted above, the Court of Federal Claims failed to address this issue.

B.

Initially, we note that the decision of the Court of Federal Claims on the foreign currency translation issue rests on two quite mistaken premises concerning the authority of the IRS acting pursuant to section 446 of the Code. Section 446 provides in pertinent part:

(a) General Rule

Taxable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books.

(b) Exceptions

If no method of accounting has been regularly used by the taxpayer, or if the method used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the Secretary, does clearly reflect income.

26 U.S.C. § 446 (1976) (emphasis added).

First, the Court of Federal Claims erred when it concluded that no deference was due the IRS determination because the IRS had not made an explicit determination that the Service Method clearly reflected income. Travelers, 35 Fed. Cl. at 145. There is no requirement in section 446 that the IRS make explicit findings identifying section 446 as the source of its authority. Such a determination is implicit when the IRS substitutes its method for the method of the taxpayer.

Second, the Court of Federal Claims, following its own decision in Mulholland v. United States, 28 Fed. Cl. 320, 335 [71 AFTR 2d 93-1916] (1993), erred in applying a de novo standard of review as to whether the taxpayer's accounting method clearly reflected income within the meaning of section 446(b). See Travelers, 35 Fed. Cl. at 141. We find no support for the Court of Federal Claims' position in the language of the statute. Under section 446, the Commissioner has broad discretion to set aside a taxpayer's accounting method if he believes that it does not clearly reflect income. Over 70 years ago, in Lucas v. American Code Corp., 280 U.S. 445 [8 AFTR 10278] (1930), the Supreme Court emphasized the broad discretion that the Service should be given to interpret the Code, including provisions such as the precursor to section 446:

> And the direction that net income be computed according to the method of accounting regularly employed by the taxpayer is expressly limited to cases where the Commissioner believes that the accounts clearly reflect the net income. Much latitude for discretion is thus given to the administrative board charged with the duty of enforcing the Act. Its interpretation of the statute and the practice adopted by it should not be interfered with unless clearly unlawful.

Id. at 449. See also Thor Power Tool Corp. v. Comm'r, 439 U.S. 522, 532 [43 AFTR 2d 79-362] (1979) (indicating that section 446, inter alia, "vest[s] the Commissioner with wide discretion in determining whether a particular method of inventory accounting should be disallowed as not clearly reflective of income.").

So too, our prior decisions reject a de novo standard of review. See LaCrosse Footwear, Inc. v. United States, 191 F.3d 1372, 1379 [84 AFTR 2d 99-6040] (Fed. Cir. 1999) (finding that the Commissioner did not abuse his discretion when he concluded that taxpayer's accounting method did not clearly reflect income); Morgan Guar. Trust Corp. of N.Y. v. United States, 585 F.2d 988, 997 [42 AFTR 2d 78-6085] (Ct. Cl. 1978) (finding that the Commissioner abused his discretion when he rejected taxpayer's accounting method). Accordingly, the Court of Federal Claims must accord substantial deference to the IRS determination that the taxpayer's method does not clearly reflect income.

C.

Applying the correct standard, we conclude that the IRS determination must be sustained. The taxpayer here made no showing that the IRS abused its discretion in determining (1) that the taxpayer's method did not clearly reflect income and (2) substituting its own methodology. The IRS properly required the use of the established profit and loss method. The fact that the taxpayer's methodology may have been "conceptually similar" to or "essentially the same as" the IRS-approved method is irrelevant. Contrary to the Court of Federal Claims' decision, it is also of no moment that the IRS did not challenge the taxpayer's methodology in each year. The IRS is not bound by its earlier position. See Dickman v. Comm'r, 465 U.S. 330, 343 [53 AFTR 2d 84-1608] (1984); Caldwell v. Comm'r, 202 F.2d 112, 115 [43 AFTR 271] (2d Cir. 1953). We have considered and reject the taxpayer's other challenges to the IRS determination. However, one aspect of the IRS determination requires further comment.

The government contends that section 805 compels that the basis of bonds, mortgages, and joint venture assets be computed at historical rather than current, year-end exchange rates. We are unable to find any such requirement in section 805.

Section 805 provides in pertinent part:

> (b) Adjusted reserves rate and earnings rates.
>
> . . . .
>
> (4) Assets
>
> For purposes of this part, the term "assets" means all assets of the company (including nonadmitted assets), other than real and personal property (excluding money) used by it in carrying on an insurance trade or business. For purposes of this paragraph, the amount attributable to—
>
> (A) real property and stock shall be the fair market value thereof, and
>
> (B) any other asset shall be the adjusted basis, of such asset for purposes of determining gain on sale or other disposition.

26 U.S.C. § 805 (1976) (emphasis added). Section 805(b)(4) describes how to quantify assets to determine the adjusted reserves rates and earnings rates for any taxable year. Nothing in section 805 specifies whether, for income tax purposes, the basis of assets for computing capital gain or loss should be computed using historical or current, year-end exchange rates. Section 805 does not specifically define "adjusted basis." That section evidently contemplates use of standard basis provisions. Section 1011(a), a generally applicable section of the Code, simply provides that

the "adjusted basis" shall be determined under section 1012. Id. § 1011(a). Section 1012(a), in turn, provides that "[t]he basis of property shall be the cost of such property . . . ." Id. § 1012. Thus, section 805 does not specify the use of a particular basis for foreign branch assets of life insurance companies purchased with foreign currency. We hold that section 805 does not require the result for which the government argues—namely, determining the basis of bonds, mortgages, and joint venture assets for income tax purposes by reference to historical exchange rates.[13] Nonetheless, we conclude that the IRS could properly, as an exercise of discretion, require the use of historical exchange rates in order to capture the gain attributable to the purchase of capital assets in depreciated foreign currency, which have since increased in value.[14]

CONCLUSION

For the above reasons, we reverse the decision of the Court of Federal Claims on both the foreign tax credit and the foreign currency translation issues.

COSTS

No costs.

¶2002-5389

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Jay Dee PFANNENSTIEL, DEFENDANT-APPELLANT, and Western Bank, Gallup, New Mexico; Lori Herrera Silva; Golden Growth Enterprises Company; Treasurer of McKinley County, New Mexico; Tax Assessor of County of McKinley, New Mexico, DEFENDANTS. U.S. Court of Appeals, Tenth Circuit, (CA10) No. 02-2006, Sept. 13, 2002. District Court affirmed. Decision for Govt.

1. Actions to reduce assessments to judgment—foreclosure—jurisdiction—evidentiary objections. District court properly granted govt. judgment in its action to reduce pro se taxpayer's assessments to judgment, set aside property conveyance as fraudulent and foreclose liens: taxpayer's jurisdictional and evidentiary challenges to govt.'s proof of its deficiency notice mailing were meritless. Also, court properly admitted assessment certificates as proof of assessments' validity; and limitations period argument was rejected. *Reference:* United States Tax Reporter ¶74,035.01(30); 74,035.03(80). IRC §7403.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,

Before KELLY and BALDOCK, Circuit Judges, and BRORBY, Senior Circuit Judge.

ORDER AND JUDGMENT*

Paul J. Kelly, Jr. Circuit Judge

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[1] The United States commenced this action to reduce to judgment federal tax assessments against Jay Dee Pfannenstiel. It also sought to set aside as fraudulent Pfannenstiel's conveyance of certain real property located in New Mexico, to foreclose tax liens on that property, and to obtain a deficiency judgment for any deficiency remaining after the sale of the property. Appearing pro se, Pfannenstiel appeals the district court's ruling in favor of the United States.

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13 We also note that the foreign currency cases on which the government relies do not involve capital assets held by foreign branch operations. See, e.g., KVP Sutherland Paper Corp. v. United States, 344 F.2d 377 [15 AFTR 2d 919] (Ct. Cl. 1965); Bennett's Travel Bureau, Inc. v. Comm'r, 29 T.C. 350 (1957); The Joyce-Koebel Corp. v. Comm'r of Internal Revenue, 6 B.T.A. 403 (1927); Appeal of Bernuth Lembcke Corp., 1 B.T.A. 1051 (1925).

14 We note that these foreign currency issues are now governed by legislation enacted in the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (1986). The Conference Committee Report on that legislation noted that under the law existing before the new statute for purposes of the net worth method, historical exchange rates were to be used. H.R. Conf. Rep. No. 99-841, at II-674 (1986), reprinted in 1986 U.S.C.C.A.N. 4075, 4762.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

The parties are familiar with the facts, so we need not repeat them here. On appeal, Pfannenstiel argues that the government's complaint lacked a critical allegation, namely, that the government issued Pfannenstiel a notice of deficiency. As a result, asserts Pfannenstiel, the district court lacked jurisdiction. He claims, as well, that the government's evidence, showing that it did in fact mail a notice of deficiency to Pfannenstiel, was inadmissible hearsay and should not have been admitted by the district court. The district court ruled that Pfannenstiel's jurisdictional challenge lacks any basis in law, and it similarly rejected Pfannenstiel's eviden-tiary objection. As to both rulings, we conclude that the district court was correct.

Pfannenstiel also raises an evidentiary challenge to certain documents admitted by the district court demonstrating the validity of the tax assessments leveled against him. We again conclude that in admitting the government-prepared "Certificates of Assessments and Payments," the district court did nothing improper. Nor do we believe that the district court's reliance on this evidence had the effect of erroneously shifting the burden of proof to Pfannenstiel. Lastly, we reject Pfannenstiel's assertion that the government's suit was untimely.

For reasons substantially the same as stated by the district court, we AFFIRM the judgment of the United States District Court for the District of New Mexico.

Entered for the Court

Paul J. Kelly, Jr.

Circuit Judge

¶2002-5390

Hexin E. McPHEE, PLAINTIFF v. INTERNAL REVENUE SERVICE, ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of Texas, (DC TX) No. Civ.A. 300CV2028D, Sept. 10, 2002. Reconsideration of (2002, DC TX) 90 AFTR 2d 2002-5350, denied. Decision against Taxpayer.

1. Actions by third parties—wrongful levy—community property—state law—reconsideration. Husband was denied reconsideration of decision rejecting his claim that home against which IRS affixed lien for his ex-wife's separate tax debts was his separate, non-lienable property: under Texas law, even if separation agreement husband and ex-wife entered before he bought property was valid partition agreement, such failed to effect or even address partition of after-acquired property. Or, alternatively, agreement was voided by their subsequent temporary reconciliation. *Reference:* United States Tax Reporter ¶74,265.01(25); 63,215.02(160). IRC §6321; 7426.

United States District Court, N.D. Texas, Dallas Division,

MEMORANDUM OPINION AND ORDER

FITZWATER, J.

[1] Plaintiff Hexin E. McPhee ("McPhee") moves the court to reconsider its memorandum opinion and order holding that he failed to prove by clear and convincing evidence that the residence ("Residence") against which the Internal Revenue Service ("IRS") affixed a tax lien that secured the recovery of unpaid income taxes owed by his former wife was his separate property. See McPhee v. IRS, 2002 WL 1477433 (N.D.Tex. July 5, 2002) (Fitzwater, J.). The court denies the motion.

I

McPhee maintains that, in its reconciliation analysis, the court erred in its application of cases like Cox v. Mailander, 178 S.W. 1012 (Tex.Civ.App.1915, writ ref'd). He contends that Cox is distinguishable on its facts. The court disagrees with the assertion that it misapplied Texas law and therefore denies reconsideration on this basis.

II

A

McPhee principally argues that the court failed to give proper effect to the 1948

amendment to Tex. Const. Ann. art. 16, s 15 (amended 1980, 1987, 1999)[1] and to Tex. Fam.Code Ann. § 4.102 (Vernon 1998).[2] He points to a passage from Ellis v. Ellis, 225 S.W.2d 216 (Tex.Civ.App.1949, no writ), in which the court noted that "[t]he provisions of the amendment of Article 16, Section 15, of the Texas Constitution, Vernon's Ann. St., adopted November 2, 1948, are not applicable to this case." Id. at 219. From this statement he argues that reconciliation cases decided before the 1948 amendment, and on which this court relied in deciding against him, do not control.

The court will assume arguendo on reconsideration that the rights of spouses to partition their community property effected by the 1948 amendment to Tex. Const. art. 16, § 15 and provided for by Texas statute require the court to modify its reasoning and to address a basis for partitioning property that would not be subject to annulment based on reconciliation.[3] Even so, for the reasons that follow,[4] the court holds that McPhee has failed to prove by clear and convincing evidence that he acquired the Residence with his separate property funds or otherwise to show that it was his separate property.

B

To place the court's decision on reconsideration in proper context, it will begin by reiterating some of the legal analysis set out in McPhee. See McPhee, 2002 WL 1477433, at 3–4. "Any property acquired during marriage is presumed to be community property in the absence of clear and convincing evidence to the contrary." Dutton v. Dutton, 18 S.W.3d 849, 852 (Tex.App.2000, pet.denied) (citing Tex. Fam.Code Ann. § 3.003 (Vernon 1998)). "In order to rebut the community property presumption, the party claiming separate property must trace and identify the property claimed as separate property by clear and convincing evidence." Celso v. Celso, 864 S.W.2d 652, 654 (Tex.App.1993, no writ). "Tracing involves establishing the separate origin of the property through evidence showing the time and means by which the spouse originally obtained possession of the property. Separate property will retain its character through a series of exchanges so long as the party asserting separate ownership can overcome the presumption of community property by tracing the assets on hand during the marriage back to property that, because of its time and manner of acquisition, is separate in character." Id. (citations omitted). Texas law generally, and the Texas Family Code in particular, provide that "'[c]lear and convincing evidence' means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established." Tex. Fam.Code Ann. § 101.007 (Vernon 1996); see State v. Addington, 588 S.W.2d 569, 570 (Tex.1979) (per curiam). "This is an intermediate standard, falling between the preponderance standard of ordinary civil proceedings and the reasonable doubt standard

[1] Article 16, § 15 was amended in 1999 in a manner that does not apply to the present case. The version adopted in 1948 stated: All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of the wife; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband; provided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse. This Amendment is self-operative, but laws may be passed prescribing requirements as to the form and manner of execution of such instruments, and providing for their recordation, and for such other reasonable requirements not inconsistent herewith as the Legislature may from time to time consider proper with relation to the subject of this Amendment. Should the Legislature pass an Act dealing with the subject of this Amendment and prescribing requirements as to the form and manner of the execution of such instruments and providing for their recordation and other reasonable requirements not inconsistent herewith and anticipatory hereto, such Act shall not be invalid by reason of its anticipatory character and shall take effect just as though this Constitutional Amendment was in effect when the Act was passed. Tex. Const. Ann. art. 16, § 15 (amended 1980, 1987, 1999).

[2] Section 4.102, entitled "Partition or Exchange of Community Property," provides:

At any time, the spouses may partition or exchange between themselves any part of their community property, then existing or to be acquired, as the spouses may desire. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property.

[3] The United States appears to complain that McPhee should have raised these arguments initially rather than for the first time on motion for reconsideration. See Resp. at 2. Although the court agrees, in the interest of justice, and because it can do so based on the trial evidence already presented, the court will address McPhee's contention.

[4] The court sets out in this memorandum opinion and order additional findings of fact and conclusions of law in support of its holding on reconsideration.

of criminal proceedings.'' Addington, 588 S.W.2d at 570.

Under the ''quasi-community property'' statute, Tex. Fam.Code Ann. § 7.002 (Vernon Supp.2002), ''property that would be classified as community property if the spouses had resided in Texas at the time of its acquisition is classified as community property on divorce in Texas regardless of the characterization of the property in the state of its acquisition.'' Dawson-Austin v. Austin, 920 S.W.2d 776, 789 (Tex.App.1996) (addressing precursor § 3.63(b)), rev'd on other grounds, 968 S.W.2d 319 (Tex.1998).

C

Under Article 16, § 15 of the Texas Constitution and § 4.102 of the Texas Family Code, McPhee and his wife, Debra, could have partitioned their community property then existing or to be acquired. Applying the ''quasi- community property'' statute, Tex. Fam.Code § 7.002, the court determines whether they complied with Tex. Fam.Code Ann. § 4.104 (Vernon 1998). Section 4.104 provides that ''[a] partition or exchange agreement must be in writing and signed by both parties.'' ''Absent a specific reference to a partition or language indicating that such a division was intended, Texas courts have refused to uphold transactions between spouses as partitions.'' Byrnes v. Byrnes, 19 S.W.3d 556, 559 (Tex.App.2000, no pet.).[5]

The only written agreement introduced in evidence at trial that could conceivably qualify as a partition agreement is the so-called California separation agreement (''Separation Agreement'') (PX1), dated November 3, 1987 and approved by the California Superior Court on November 6, 1987. The Separation Agreement-which is entitled ''Stipulation and Order''-provides:

> IT IS HEREBY STIPULATED by and between the parties hereto as follows:
>
> 1. The Order to Show Cause hearing set for November 9, 1987, shall be taken off calendar.
>
> 2. The restraining order against Respondent, Hexin McPhee, and American S [a]vings and Loan re CD account # 349-5566-6 shall remain in full force and effect until the maturity date, to wit: December 21, 1987.
>
> 3. On December 21, 1987, American Savings and Loan shall immediately divide the funds in CD Account # 349-5566-6 precisely in half. One-half of said funds shall be put in the name of Hexin McPhee in another similar 90 day CD account. The other one-half of said funds shall be paid to Debra McPhee in the form of a cashier's check and mailed to Debra McPhee in care of her attorneys. Evidence that American Savings and Loan has complied shall be sent to the attorneys for Petitioner, to wit: Pelletier, Supanic & Gill, Attorneys at Law[,] 21600 Oxnard St., Suite 2000, Woodland Hills, CA 91367.
>
> 4. Petitioner shall have sole legal and physical custody of the minor children, DEBRIEL McPHEE, born 9-22-79 and DENISE McPHEE, born 8-14-85. Respondent shall have frequent reasonable visitation to be agreed to between the parties. Respondent shall give Petitioner 24 hours notice of his intent to exercise visitation.
>
> 5. The parties shall continue to cohabit in the family residence, in separate bedrooms. Each party shall contribute an equal amount to the payment of all living expenses, the mortgage, bills, child care, etc. until such time as the parties live in separate residences.
>
> 6. When the parties start living in separate residences, Respondent shall immediately pay Petitioner $225.00 per month per child, for a total of $450.00 per month, payable one-half (1/2) on the 1st and one-half (1/2) on the 15th of each and every month.
>
> 7. The parties are restrained from transferring, encumbering, hypothecating, concealing or in any way disposing of any property, real or personal,

[5] Of course, although ''[t]here is extensive common-law precedent empowering a husband and wife to effect a division of their property on permanent separation[,]'' Patino v. Patino, 687 S.W.2d 799, 801 (Tex.App.1985, no writ), the court held in its earlier decision that McPhee and Debra annulled their agreement by reconciling, see McPhee, 2002 WL 1477433, at 5 (''Their reconciliation in 1994 and 1995 annulled the Separation Agreement.'').

whether community, quasi-community, or separate, except in the usual course of business or for the necessities of life.

8. Each party shall notify the other of any proposed extraordinary expenditures.

9. Both parties are restrained and enjoined f[ro]m cashing, borrowing against, canceling, transferring, disposing of, or changing the beneficiaries of any insurance or other coverage including life, health, automobile, and disability held for the benefit of the parties or their minor children.

10. Neither party shall incur any debts or liabilities for which the other may be held responsible, other than in the ordinary course of business or for the necessities of life.

11. The parties are restrained from annoying, harassing, molesting, dis-turbing or in any other manner causing pain or discomfort to the other either physical or emotional.

12. The parties are restrained from removing the minor children from the jurisdiction of the court without the written consent of the other party or a court order.

PX1.

Assuming that the Separation Agreement qualifies as a partition agreement, cf. Byrnes, 19 S.W.3d at 559, it is quite narrow in scope. In fact, it does not address at all the partition of property acquired in the future. And it partitions only a single item of existing property: one certificate of deposit. Id. p 3. Read as a whole, the Separation Agreement appears more concerned with restricting conveyances of property than with partitioning property. Compare id. pp 7–9 with id. p 3. Accordingly, the court holds that McPhee has failed to prove by clear and convincing evidence that he and Debra partitioned their community property in such a manner that he acquired the Residence with his separate property.[6]

III

McPhee also argues that the court has not accorded full faith and credit to the Separation Agreement. The court disagrees. After giving it effect, the court has then applied either Texas law that annuls after reconciliation common law post-nuptial agreements that partition community property, see McPhee, 2002 WL 1477433, at 4–5, or on motion for reconsideration has applied Texas law concerning the requirements for partitioning community property.

* * *

Accordingly, McPhee's motion to reconsider is denied. For the additional reasons set out, the court adheres to its conclusion that McPhee has failed to prove by clear and convincing evidence that the Residence was his separate property. The court will decide in due course the remaining issue concerning the extent of the IRS' lien rights in the Residence.

SO ORDERED.

¶2002-5391

Robert D. ARONFELD, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-0548-JCM, Aug. 15, 2002. Years 1995, 1996, 1997, 1998, 1999. Decision for Govt.

1. Actions against IRS—damages—unlawful collection—failure to state claim. Magistrate judge recommended dismissing pro se taxpayer's amended IRC §7433 complaint against IRS for "waiver" of assessed taxes and damages: action was really just legally frivolous attempt to challenge prior Tax Court decisions concerning subject assessments and alleged no facts to support IRC §7433 claim.

[6] In view of this analysis, for purposes only of its alternative holding on reconsideration, the court modifies its finding that McPhee made the $2,500 earnest money payment for the Residence "from his separate property personal checking account." McPhee, 2002 WL 1477433, at 2. In McPhee the court held that because McPhee and Debra reconciled in 1994 and 1995, this annulled the Separation Agreement and, as a consequence, the $2,500 that McPhee used to make the earnest money deposit on the Residence was community property. Id. at 5. Under the court's alternative reasoning, McPhee failed, by clear and convincing evidence, to trace the proceeds of his personal checking account from a separate property origin under the terms of a partition agreement, and he therefore failed to prove by clear and convincing evidence that he made the earnest money payment from his separate property.

Reference: United States Tax Reporter ¶74,335.01(7). IRC §7433.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA,

FINDINGS AND RECOMMENDATIONS

(Amended Complaint - #11)

This matter was submitted to the undersigned United States Magistrate Judge for Findings and Recommendations pursuant to 18 U.S.C. § 636(b)(1)(B), Local Rule IB 1-4, on plaintiff's Amended Complaint (#11).

BACKGROUND

On May 14, 2001, plaintiff submitted an Application to Proceed In Forma Pauperis (IFP) and a Complaint. On May 23, 2001, the court ordered plaintiff to submit a financial affidavit in support of his IFP application. On June 12, 2001, plaintiff submitted a financial affidavit, and on November 13, 2001, the court granted plaintiff IFP application. The November 13, 2001 order (#9) informed plaintiff that his complaint was deficient and ordered him to file an amended complaint. After reviewing plaintiff's original complaint, it appeared plaintiff was possibly attempting to bring the suit pursuant to 26 U.S.C. § 7433 which governs civil damages for un-authorized tax collection activities. Plaintiff did not refer to this statutory provision in his complaint, and had not alleged that he had exhausted available administrative remedies. The court granted plaintiff leave to amend the complaint to clarify whether plaintiff was bringing suit pursuant 26 U.S.C. § 7433, and, if so, to state whether or not he had exhausted his administrative remedies, and, if not, what alternative basis under the IRS Code he relied upon in bringing suit.

On December 12, 2001, plaintiff filed an amended complaint (#11). The court has now reviewed plaintiff's amended complaint and will recommend to the District Judge that the complaint be dismissed.

DISCUSSION

[1] Plaintiff is proceeding *pro se* and *in forma pauperis*. The federal *in forma pauperis* statute authorizes federal courts to dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227–28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke, 490 U.S. at 327.

A complaint, or portion thereof, should only be dismissed for failure to state a claim upon which relief may be granted if it appears beyond doubt that plaintiff can prove no set of facts in support of the claim or claims that would entitle him to relief. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) (citing Conley v. Gibson, 355 U.S. 41, 45–46 (1957)); Palmer v. Roosevelt Lake Log Owners Ass'n., 651 F.2d 1289, 1294 (9th Cir. 1981). In reviewing a complaint under this standard, the court must accept as true the allegations of the complaint in question, Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 740 (1976), construe the pleadings in the light most favorable to the plaintiff, and resolve all doubts in the plaintiff's favor, Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

The court must dismiss an action brought under § 1915 if the court determines that the action is frivolous, or fails to state a claim on which relief may be granted. Nichols v. Weissberg, 2001 WL 761310, 1 (N.D.Cal. 2001). The district court "may review the complaint and dismiss *sua sponte* those claims premised on meritless legal theories or that clearly lack any factual basis." Stotts v. Salas, 938 F.Supp. 663, 666 (D.Haw. 1996), citing, Denton v. Hernandez, 504 U.S. 25, 26–27,

112 Ct. 1728, 1730–31, 118 L.Ed.2d 340 (1992); Franklin v. Murphy, 745 F.2d 1221, 1225 (C.A.9 1984).

Plaintiff's complaint purports to be brought pursuant to 26 U.S.C. § 7433. That statute provides a private right of action for damages incurred in connection with the collection of Federal taxes. Specifically, § 7433(a) states that:

> If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence disregards any provision of this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

In his complaint, citing 26 U.S.C. § 7433, the plaintiff asks that taxes assessed by the Internal Revenue Service for the years 1995, 1997, 1998, and 1999, and interest thereon, be waived. He also seeks expenses incurred in bringing suit, as well as "actual and economic damages brought by the plaintiff as resulting from the reckless and intentional damages." The amended complaint, however, fails to allege a single fact which would support a claim under 26 U.S.C. § 7433. Plaintiff claims that he had an initial hearing before IRS agent Ross Peterson in July, 1998, concerning "the amount in question" for his 1995 and 1996 returns, and that he subsequently spoke with IRS Appeals Officer Julie Peterson in August of 1999. He alleges he thereafter filed suit in the United States Tax Court in August of 1999, and that a hearing was apparently conducted on May 2, 2000, by that court concerning his tax returns for the years 1995, 1996, and 1997. The amended complaint lists 14 issues that he addressed that were heard by the Tax Court "including my 1998 and 1999 income tax returns." After listing 14 issues which he asserted were addressed by the court, his amended complaint inconsistently states "the above-mentioned issues were never decided or even addressed by the Court."

No where in the amended complaint does plaintiff allege he suffered damages in connection with an attempt to collect federal taxes. The complaint does not allege plaintiff has exhausted available administrative remedies. Plaintiff's amended complaint fails to state a claim for relief under 28 U.S.C. § 7433. It would appear plaintiff was dissatisfied with the result of his prior case before the United States Tax Court and is seeking to appeal or relitigate the Tax Court's decision. If that is the case, this court lacks jurisdiction to hear such an appeal. The United States Courts of Appeals have exclusive jurisdiction to review the decisions of the Tax Courts. See, 26 U.S.C. § 7482.

CONCLUSION

Plaintiff was ordered to file an amended complaint curing the defects in his original complaint. The court has reviewed his amended complaint and determined that it is legally frivolous and fails to state a claim upon which relief may be granted.

Based on the foregoing,

IT IS THE RECOMMENDATION of the undersigned United States Magistrate Judge that plaintiff's Amended Complaint (#11) be DISMISSED.

Dated this 15th day of August, 2002.

PEGG A. LEEN

UNITED STATES MAGISTRATE JUDGE

NOTICE

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, petitioner may file written objections with the court. Pursuant to Local Rule of Practice (LR) IB 3-2(a), any party wishing to object to the findings and recommendations of a magistrate judge shall file and serve *specific written objections* together with points and authorities in support of those objections, within ten (10) days of the date of service of the findings and recommendations. The document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Petitioner is

advised that failure to file objections within the specified time may waive the right to appeal the District Court's Order. Martinez v. Ylst, 951 F.2d 1153 (C.A.9 1991). The points and authorities filed in support of the specific written objections are subject to the page limitations found in LR 7-4.

¶2002-5392

In Re: Larry CROWELL and Mary S. CROWELL, Debtors. Larry CROWELL, Mary S. CROWELL, Duane C. Olcsvary, and Patricia C. Olcsvary, APPELLANTS v. UNITED STATES OF AMERICA and Internal Revenue Service, APPELEES. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-5374, Sept. 18, 2002. District Court, (2001, DC TN) 87 AFTR 2d 2001-1134, 258 BR 885, 2001-1 USTC ¶50303, affirming (2000, Bktcy Ct TN) 85 AFTR 2d 2000-1572, 2000-1 USTC ¶50260, affirmed. Earlier proceeding at (1999, Bktcy Ct TN) 84 AFTR 2d 99-6636, 240 BR 264 [84 AFTR 2d 99-6636], 99-2 USTC ¶50907. Years 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995. Decision for Govt.

1. Closing agreements—validity—delegated authority of IRS agents; effect of pending Tax Court case. 6th Cir. affirmed validity of partnership-related closing agreements that IRS agent entered with partners while partnerships' Tax Court cases were pending: under IRS Delegation Order (DO) 209's specific delegation provisions, which applied over DO 97's more general settlement provisions, agent was authorized to enter partnership-related settlement regardless of pending cases. DO 209's governance was shown by fact it dealt solely with partnership and S corp. settlements, was issued specifically to implement IRC §6224(c), and was consistent with TEFRA goals and established IRS internal operating procedures; and fact that govt.'s trial counsel initially misapprehended which DO governed was irrelevant. Also, taxpayers' argument that IRC §6224(c) and DO 209 applied only on partnership-wide basis was belied by statute's terms; use of Form 906 didn't otherwise render statute or DO 209 inapplicable; and cited case law was distinguished. *Reference:* United States Tax Reporter ¶71,215.03(10). IRC §7121.

ARGUED: Kyle R. Weems, WEEMS & ASSOCIATES, Chattanooga, Tennessee, for Appellants. Karen D. Utiger, UNITED STATES DEPARTMENT OF JUSTICE, APPELLATE SECTION TAX DIVISION, Washington, D.C., for Appellees. ON BRIEF: Kyle R. Weems, WEEMS & ASSOCIATES, Chattanooga, Tennessee, for Appellants. Karen D. Utiger, Kenneth L. Greene, UNITED STATES DEPARTMENT OF JUSTICE, APPELLATE SECTION TAX DIVISION, Washington, D.C., for Appellees.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT,

Appeal from the United States District Court for the Eastern District of Tennessee at Chattanooga. No. 00-00070--R. Allan Edgar, Chief District Judge.

Before: SUHRHEINRICH, SILER, and GILMAN, Circuit Judges.

OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION

SILER, Circuit Judge. Debtors Larry and Mary Crowell and Duane and Patricia Olcsvary appeal the ruling of the bankruptcy and district courts that Internal Revenue Service (''IRS'') Delegation Order (''DO'') 209 applies to their agreements with the IRS settling the tax treatment of certain partnership items. Because DO 209 deals specifically with delegated authority to enter into written settlement agreements in partnership cases, as opposed to the more general DO 97, we AFFIRM.

BACKGROUND

Debtors Larry and Mary Crowell and Duane and Patricia Olcsvary were partners in various cattle-breeding tax shelter partnerships owned and operated by W.J. Hoyt III (''the Hoyt partnerships''). To settle

their tax liabilities arising out of these partnerships, debtors entered into written agreements with the IRS. R.M. Spooner, associate chief of appeals, signed the agreements on behalf of the IRS. These agreements, each prepared using a "Form 906 Closing Agreement," purportedly resolved disputes between debtors and the IRS regarding tax treatment of certain partnership items. After the agreements were signed, the IRS adjusted debtors' tax deficiencies to reflect the terms of the agreements.

Subsequently, the Crowells and the Olcsvarys filed for Chapter 13 bankruptcy. The IRS filed proofs of claim in each bankruptcy for tax deficiencies calculated in accordance with the terms of the agreements. The Crowells and the Olcsvarys then filed adversary proceedings against the IRS seeking to have its claims denied. As grounds, debtors asserted that the agreements are invalid because Spooner lacked authority to execute them under DO 97. At the time Spooner executed the agreements, proceedings involving the Hoyt partnerships were pending before the tax court. DO 97 bars an IRS official in Spooner's position from executing a closing agreement in a case docketed in the tax court. The IRS responded that another, more specific delegation order, DO 209, authorized Spooner to execute the agreements. DO 209, which delegates authority in partnership matters, authorizes associate chiefs of appeals to enter into and approve written settlement agreements with one or more partners, without any limitation on cases pending in the tax court.

Considering the rule of construction that "the specific governs the general," the bankruptcy court determined that DO 209 is the more specific of the two delegation orders because its area of operation is limited to partnerships and subchapter S corporations. According to the bankruptcy court, the IRS's internal guidelines and procedures confirm that DO 209 governs the execution of written settlement agreements between the IRS and partners in a partnership and contemplate that such agreements will be executed by IRS officials of Spooner's rank, regardless of whether the partnership has a case before the tax court. In conclusion, the bankruptcy court held that DO 209 authorized Spooner to execute the agreements and that the agreements are therefore valid and binding on both parties. The district court affirmed the bankruptcy court's judgment.

STANDARD OF REVIEW

Applying the same standards of review as the district court, we review the bankruptcy court's legal conclusions *de novo* and uphold its factual findings unless clearly erroneous. *In re 255 Park Plaza Assocs. Ltd. P'ship*, 100 F.3d 1214, 1216 (6th Cir. 1996).

DISCUSSION

[1] Under 26 U.S.C. § 7121, entitled "Closing Agreements," the Secretary of the Treasury ("the Secretary") "is authorized to enter into an agreement in writing with any person relating to the liability of such person . . . in respect of any internal revenue tax for any taxable period." 26 U.S.C. § 7121(a). An agreement approved by the Secretary is "final and conclusive, . . . except upon a showing of fraud or malfeasance, or misrepresentation of a material fact." *Id.* § 7121(b). The Secretary has delegated the authority to administer and enforce the Internal Revenue Code ("the Code") to the Commissioner of Internal Revenue ("the Commissioner"). Treas. Order No. 150-10 (Apr. 22, 1982) (J.A. at 193). Treasury regulations authorize the Commissioner to enter into written closing agreements relating to a person's tax liability and give these agreements final and conclusive effect. 26 C.F.R. § 301.7121-1(a), (c).

Pursuant to that authority, the Commissioner has issued DO 97, a general delegation of authority to certain IRS officials and employees to execute closing agreements. It provides in relevant part:

> The Assistant Commissioner (International); Regional Commissioners; Regional Counsel; Regional Chief Compliance Officers; Service Center Directors; Director, Austin Compliance Center, District Directors; Regional Directors of

> Appeals; Assistant Regional Directors of Appeals; Chiefs and Associate Chiefs of Appeals Offices; and Appeals Team Chiefs with respect to his/her team cases, are hereby authorized in cases under their jurisdiction (*but excluding cases docketed before the United States Tax Court*) to enter into and approve a written agreement with any person relating to the Internal Revenue tax liability of such person (or of the person or estate for whom he/she acts) for a taxable period or periods ended prior to the date of agreement and related specific items affecting other taxable periods.

DO 97(4) (emphasis added).[1] Some of the Hoyt partnerships in which the Crowells and the Olcsvarys had invested had proceedings pertaining to certain years docketed before the tax court at the time the agreements were executed. Consequently, if DO 97 applies, then Spooner, an associate chief of appeals, lacked authority to execute the agreements with respect to those cases and years. *See In re Klee*, 216 B.R. 42, 44–45 [80 AFTR 2d 97-7303] (Bankr. D. Ore. 1997) (holding that Spooner did not have authority to execute closing agreement under DO 97 and therefore agreement was invalid).

The IRS argues, and the bankruptcy and district courts agreed, that a different delegation order, DO 209, applies under the circumstances of this case and vests authority in Spooner to execute the closing agreements with the Crowells and the Olcsvarys. DO 209, entitled ''Delegation of Authority in Partnership and S Corporation Matters,'' provides in relevant part:

> Authority to enter into and approve a written settlement agreement with one or more partners or shareholders with respect to the determination of partnership or subchapter S items and any items affected by such items for such partnership or S corporation taxable year is delegated to:
>
> a. chiefs and associate chiefs of appeals offices;
>
> b. appeals team chiefs as to their respective cases;
>
> c. appeals officers in service centers and the Austin Compliance Center but not as to their respective cases;
>
> d. revenue agents (reviewers), (grade GS-11 and higher), in Examination Division or Office of Taxpayer Service and Compliance, Assistant Commissioner (International); and
>
> e. revenue agents (grade GS-11 and higher) in service centers and the Austin Compliance Center.

DO 209(3).

As the district court noted, DO 209 differs from DO 97 in three key ways. First, DO 209 involves a more limited subject matter. As opposed to DO 97's general delegation of authority over closing agreements, DO 209 deals solely with agreements related to partnerships and S corporations. Second, DO 209 authorizes a wider range of IRS employees to execute settlement agreements in partnership cases. Third, DO 209 does not limit signatory authority with respect to cases docketed in the tax court. Given these distinctions, if DO 209 applies, rather than DO 97, then Spooner had authority to enter into the closing agreements, regardless of whether the Hoyt partnerships had matters docketed in the tax court, and thus those agreements are valid and binding on the parties.

Although administrative orders delegating authority to agency officials and employees do not carry the full weight of statutes, such orders warrant the use of similar rules of construction to aid in their interpretation. A basic rule of statutory construction is that ''a specific statutory provision governs a general one.'' *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 405 (6th Cir. 1998); *see also Edmond v. United States*, 520 U.S. 651, 657 (1997) (''Ordinarily, where a specific provision conflicts with a general one, the specific governs.''). Consequently, DO 209, as the more specific delegation, governs the closing agreements here.

[1] This language is taken from the 1995 version of DO 97, Deleg. Order No. 97 (Rev. 32), 1995 WL 768847, the version in effect at the time Spooner executed the agreements with the Crowells and the Olcsvarys.

DO 97 was issued pursuant to the regulation authorizing the Commissioner to enter into closing agreements, 26 C.F.R. § 301.7121-1. Although neither the regulation nor the delegation order expressly cites 26 U.S.C. § 7121, that section, which authorizes the Secretary to enter into closing agreements, clearly is the legislative source for the Commissioner's authority to settle tax cases. As the district court noted, "DO 97 does not apply to any particular area of taxation or type of agreement. Instead, DO 97 serves as the general authority for the named IRS officials to execute closing agreements."

In contrast, DO 209 was issued "[p]ursuant to the authority vested in the Commissioner of Internal Revenue by IRC 6223, 6224, 6228, 6229, 6231(a)(7), 6232, 6243, and 6244." The listed sections fall within the Code's provisions for assessing tax on partnership and S-corporation items, 26 U.S.C. §§ 6221–6245. Congress en-acted these sections dealing with tax treatment of partnership items as part of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), Pub. L. No. 97-248, 96 Stat. 324. TEFRA created a single unified procedure for determining the tax treatment of all partnership items at the partnership level, rather than separately at the partner level. *See* H.R. Conf. Rep. No. 97-760, at 599–600. TEFRA also addressed the settlement of partnership tax liabilities. While §§ 7121 and 7122 provide the general authority for the Secretary to settle tax cases, § 6224(c) details the binding effect such an agreement will have when a partnership is involved and requires that other partners be given the right to enter into consistent agreements.[2]

DO 209, the delegation order issued to implement § 6224(c), is the more specific order, applying expressly to the settlement of tax liabilities with respect to partnerships items. Since the agreements here served to settle the tax liabilities of the Crowells and the Olcsvarys involving the Hoyt partnerships, DO 209 applies and vests Spooner with authority to execute the agreements.

The IRS's construction of DO 209 supports the conclusion that DO 209 governs the closing agreements with the Crowells and the Olcsvarys. To carry out Congress's goal of unifying partnership determinations, the IRS has developed procedures for handling TEFRA matters, which are set forth in the *Appeals Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) Handbook ("TEFRA Handbook").* The *TEFRA Handbook*specifically states:

(1) All appeals agreement forms must be accepted by an authorized appeals person per Delegation Order 209 .... The appeals forms will generally reflect a settlement based on hazards. Therefore, examination personnel have not been designated the authority to accept such settlements.

(2) Appeals personnel will execute agreements secured in nondocketed and docketed cases ....

---

[2] Section 6224(c) provides:

c) Settlement agreement.--In the absence of a showing of fraud, malfeasance, or misrepresentation of fact--

(1) Binds all parties.--A settlement agreement between the Secretary or the Attorney General (or his delegate) and 1 or more partners in a partnership with respect to the determination of partnership items for any partnership taxable year shall (except as otherwise provided in such agreement) be binding on all parties to such agreement with respect to the determination of partnership items for such partnership taxable year ....

(2) Other partners have right to enter into consistent agreements.--If the Secretary or the Attorney General (or his delegate) enters into a settlement agreement with any partner with respect to partnership items for any partnership taxable year, the Secretary or the Attorney General (or his delegate) shall offer to any other partner who so requests settlement terms for the partnership taxable year which are consistent with those contained in such settlement agreement ....

(3) Tax matters partner may bind certain other partners.--

(A) In general.--A partner who is not a notice partner (and not a member of a notice group described in subsection (b)(2) of section 6223) shall be bound by any settlement agreement-

(i) which is entered into by the tax matters partner, and

(ii) in which the tax matters partner expressly states that such agreement shall bind the other partners.

(B) Exception.--Subparagraph (A) shall not apply to any partner who (within the time prescribed by the Secretary) files a statement with the Secretary providing that the tax matters partner shall not have the authority to enter into a settlement agreement on behalf of such partner.

TEFRA Handbook § 665. Similarly, the *TEFRA Handbook* provides:

> Delegation Order No. 209 as revised, authorizes appropriate officials to sign notices . . . and settlement agreements . . . . The full authority to sign [notices] and settlement agreements . . . has been given to chiefs and associate chiefs of appeals offices, and to the appeals team chiefs as to their respective cases.

TEFRA Handbook § 5(15)0; *see also id.* § 664.3(3) (stating that agreement forms should be submitted through the TEFRA coordinator to the associate chief or chief for signing). Therefore, the IRS has applied DO 209, rather than DO 97, to TEFRA settlements and has established procedures whereby IRS officials and employees named in DO 209, including associate chiefs of appeals, are authorized to execute settlement agreements regarding partnership items in cases both docketed and undocketed in the tax court. The IRS's internal operating procedures are entitled to some deference. *See Reno v. Koray*, 515 U.S. 50, 60–61 (1995) (holding that an internal agency guideline "is still entitled to some deference"); *Orr v. Hawk*, 156 F.3d 651, 655 (6th Cir. 1998) ("[A]n internal rule [is] entitled to only limited deference."). Debtors contend that the IRS never considered DO 209 as applying to the agreements at issue, citing the fact that the IRS originally asserted that DO 97 authorized Spooner to execute the agreements. Because authority was properly delegated to Spooner in accordance with DO 209 under established IRS procedures, trial counsel's temporary misapprehension as to the source of Spooner's authority is irrelevant.

Debtors also argue that § 6224(c) and DO 209 apply only to partnership-wide settlement agreements and not to agreements with individuals. But § 6224(c)(1) applies by its terms to agreements between the IRS and one or more partners with respect to the determination of partnership items for any partnership taxable year, and states that such an agreement is binding on all parties to the agreement. Section 6224(c)(2) provides that other partners have a right to enter into consistent agreements, but contains no requirement that settlements must be binding on a partnership-wide basis. Therefore, § 6224(c) and DO 209 apply to agreements with individual partners as well as to partnership-wide agreements.

Contrary to debtors' assertions, the use of a Form 906 Closing Agreement does not render § 6224(c) and DO 209 inapplicable. Section 6224(c) does not prohibit the use of any particular form, but merely provides that the IRS may enter into a "settlement agreement" with one or more partners with respect to partnership items. Here, the Crowells and the Olcsvarys, partners in the Hoyt partnerships, entered into the agreements purporting to resolve their tax liabilities arising out of the partnerships; therefore, the agreements are "settlement agreements" within the meaning of § 6224(c). *See Crnkovich v. United States*, 202 F.3d 1325, 1331–33 [85 AFTR 2d 2000-772] (Fed. Cir. 2000) (holding that a Form 906 Closing Agreement constitutes a "settlement agreement" for TEFRA purposes); Internal Revenue Manual § 4.31.1.12.9.9(1) ("A Form 906, Closing Agreement on Final Determination Covering Specific Matters, is a settlement agreement referred to in IRC 6224(c).").

Not one of the cases cited by debtors addresses the applicability of DO 209 to agreements settling partnership items. The IRS does not disagree with the statements in the cases cited by debtors that 26 U.S.C. §§ 7121 and 7122 govern the settlement of disputed tax liabilities and authorize the Secretary or an authorized delegate to settle tax cases. *See, e.g., Klein v. Commissioner*, 899 F.2d 1149, 1152 [65 AFTR 2d 90-1039] (11th Cir. 1990). Section 6224 should not be construed as providing an independent source of authority for settling TEFRA partnership cases, but rather as detailing the binding effect that a settlement agreement will have in such cases. That does not mean that the Secretary may not delegate his or her authority to settle cases under § 7121 or that DO 97 applies to the exclusion of DO 209.

CONCLUSION

Because DO 209 applies to the closing agreements at issue and vests Spooner with authority to execute them, the agreements are valid and enforceable. The judgment of the district court affirming the bankruptcy court is AFFIRMED.

¶2002-5393

UNITED STATES OF AMERICA, PLAINTIFF v. Dennis R. SCHAFFER, DEFENDANT. U.S. District Court, Northern Dist. of Ohio, (DC OH) CASE NO. 3:02 CV 7328, Aug. 14, 2002. Years 1997, 1998. Decision for Govt.

1. Recovery of erroneous refunds—judgment. Pursuant to stipulation, judgment was entered against taxpayer on govt.'s erroneous refund complaint in amounts stated plus interest. *Reference:* United States Tax Reporter ¶74,055.01(5). IRC §7405.

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION,

JUDGMENT ENTRY

JUDGE LESLEY WELLS

[1] This case is before the Court on a stipulated entry of judgment approved by counsel for the parties. In accordance with the stipulation of the parties, judgment is entered in favor of Plaintiff United States of America and against Defendant Dennis R. Schaffer for the 1997 erroneous refund issued to him in the amount of $1,576.15, plus interest from 4 September 2000 until paid in accordance with law, and for the 1998 erroneous refund issued to him in the amount of $1,808.87, plus interest from 3 July 2000 until paid in accordance with law. Each party shall bear its own costs.

IT IS SO ORDERED.

/s/ Lesley Wells

UNITED STATES DISTRICT JUDGE

¶2002-5394

UNIONBANCAL CORPORATION, F.K.A. Union Bank, successor in interest to Standard Chartered Holdings, Inc. and includable subsidiaries, PETITIONER v. COMMISSIONER of Internal Revenue, RESPONDENT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 00-70764, Sept. 18, 2002. Tax Court, (1999) 113 TC 309 (opinion by Thornton, *J.*), affirmed. Year 1988. Decision against Taxpayer.

1. Related taxpayers—validity of Temp. Reg. §1.267(f)-1T(c)(6)—losses on sale of loans—tax treaties; elective retroactivity of final reg. Tax Court properly upheld validity of Temp. Reg. §1.267(f)-1T(c)(6)'s restriction against restoring deferred loss deductions to ex-members of controlled groups, which necessarily precluded U.S. bank/original seller from taking deduction for IRC §267(f) deferred loss on pre-'95 outside sale of loan portfolio *after* bank had already left group. Reg was reasonable interpretation of IRC §267(f), which didn't necessarily require that loss deferred thereunder be restored to original seller and did allow Commissioner discretion in prescribing time limits for loss's recognition. Also, reg was consistent with IRC §267's general scheme to keep deferred loss with subject property until it was resold outside group; legislative history didn't require otherwise; and fact that no group member received loss deduction's benefit was merely aberration resulting from particular factual circumstances, not any blanket disallowance in reg or violative of '75 U.S.-U.K. Tax Convention's nondiscrimination clause. And, Commissioner was within his discretion in deciding to make subsequently enacted Reg. §1.267(f), which would have allowed taxpayer's deduction, non-retroactive. *Reference:* United States Tax Reporter ¶2675.16(35); 15,025.03(24); 78,055.01(10). IRC §267; 1502; 7805.

Frederick R. Chilton, Jr., Paolo M. Dau, and Ward S. Connelly (on the brief),

Paulo Dau (argued), Fenwick & West LLP, Palo Alto, California, for the petitioner.
Jonathan S. Cohen and Charles Bricken (on the brief), Charles Bricken (argued), Department of Justice, Tax Division, Washington, D.C., for the respondent.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Appeal from a Decision of the Tax Court

Opinion by Judge Kleinfeld; Dissent by Judge Thomas

Before: Melvin Brunetti, Andrew J. Kleinfeld and Sidney R. Thomas, Circuit Judges.

OPINION

KLEINFELD, Circuit Judge:

FOR PUBLICATION

Tax Court No. 11364-97

This is a tax case regarding availability of a loss deduction to a company whose predecessor-in-interest left a "controlled group."[1]

FACTS

The facts are undisputed, because the parties stipulated to them before the Tax Court, but the details are complex. Here is a simplified summary. The Appellant, UnionBanCal, is the successor-in-interest of an American bank that once belonged to a group of affiliated British and American companies, considered a "controlled group"[2] under federal tax law. While a part of this controlled group, the predecessor sold a loan portfolio at a loss to a British company in the group, Standard Chartered Bank. A statute barred the predecessor from deducting its loss at that time, because Standard was a member of the controlled group.[3] When the predecessor left the group, the statute still wouldn't let it deduct the loss because Standard still owned the loans and was still in the group; instead, the loss was "de-ferred."[4] Standard later sold the loans to a party outside of the group, and at that time, the statute provided that the deferred loss could be restored. But the statute wouldn't let the predecessor take the loss as a deduction, because it had left the controlled group before the loans were sold outside of the group. The Commissioner would have let Standard take the loss as a stepped-up basis in the portfolio, but that didn't do Standard, a British firm, any good, because British tax authorities wouldn't recognize the stepped-up basis. Thus UnionBanCal's predecessor incurred a loss, of sorts, when it was part of the controlled group and sold the loan portfolio to Standard, that has never been reflected in any firm's taxes, but has reduced the basis and thereby increased the taxable gain for Standard. The predecessor's $1.7 million tax deficiency, for which UnionBanCal is responsible, is at issue.

The facts are hard to understand without the legal background. Under 26 U.S.C. § 267(a)(1), "No deduction shall be allowed in respect of any loss from the sale or exchange of property, directly or indirectly, between persons" in certain relationships.[5] These relationships include, among others, those between family members,[6] individuals and the corporations they control,[7] the grantors or beneficiaries of a trust and its fiduciaries,[8] and "[t]wo corporations which are members of the same controlled group,"[9] such as corporations in a parent-subsidiary chain.[10]

The statute works like this. Suppose you want to generate a tax loss without a real loss, so you sell to your wife for $80 stock you bought for $100 a share. It won't work. Section 267(a)(1) of the statute

1 *See* 26 U.S.C. §§ 267(b)(3), 267(f)(1), 1563 (2000).
2 *See id.*
3 *See* 26 U.S.C. §267(f)(2).
4 *Id.*
5 26 U.S.C. § 267(a)(1).
6 *Id.* § 267(b)(1).
7 *Id.* § 267(b)(2).
8 *Id.* § 267(b)(4)-(8).
9 *Id.* § 267(b)(3).
10 *See id.* §§ 267(f)(1), 1563(a)(1).

won't let you take the $20 per share loss, because of your relationship.[11] But fortunately, when your wife sells the stock on the open market after it's risen to $110, she gets to use your $100 basis, not her $80 basis, to calculate her taxable gain. She gets your basis because, although the statute prevents you from taking the sham loss you generated by selling the stock to her, it also says in section 267(d) that her "gain shall be recognized only to the extent that it exceeds so much of such loss as is properly allocable to the property sold or otherwise disposed of by the taxpayer."[12] This limitation on deductions for transfers between related parties protects the fisc against sham transactions and manipulations without economic substance. Not infrequently, though, there are honest and important non-tax reasons for sales between related parties, so it's important to fairness to preserve the pre-sale basis where loss on the sale itself isn't recognized for tax purposes. Otherwise, the statute would be a heads-I-win, tails-you-lose proposition for the IRS: the seller can't take his loss, but the IRS calculates the buyer's gain on resale using the lower basis.

A variant of this scheme applies to "controlled groups," that is, corporations with interlocking ownership as specified by the statute.[13] Instead of being disallowed under section 267(a)(1), the loss is "deferred" under section 267(f)(2) until one of two conditions pertains: either

(1) "until the property is transferred outside such controlled group and there would be recognition of loss under consolidated return principles"; or

(2) "until such other time as may be prescribed in regulations."[14]

Instead of the buyer getting the benefit of the loss as a stepped-up basis, as in the husband-wife example, the seller takes the loss as a deduction, but not until the buyer sells the property outside of the controlled group or until the regulations otherwise provide. UnionBanCal's predecessor-in-interest was a seller in such a "controlled group" when it sold its loan portfolio to Standard at a loss, and UnionBanCal complains that the IRS improperly denied the predecessor's deduction for that loss.

UnionBanCal's predecessor couldn't take the loss because the predecessor left its controlled group before its buyer within the group sold the property to an outsider. In 1984, the year the predecessor made the sale, the Commissioner of Internal Revenue issued a temporary regulation under section 267(f)(2) governing sales between controlled group members.[15] The temporary regulation provided that "[i]f a selling member of property for which loss has been deferred ceases to be a member when the property is still owned by another member, then ... that loss shall never be restored to the selling member."[16]

The temporary regulation's "never" limitation still doesn't create a heads-I-win, tails-you-lose situation for the IRS. When, under its provisions, a selling member may "never" take a loss, the regulation falls back on a rule analogous to that in the husband-wife example: the buyer within the controlled group gets to use the seller's higher basis when the buyer resells the property outside of the group. The temporary regulation states: "On the date the selling member ceases to be a member, the owning member's basis in the property shall be increased by the amount of the selling member's unrestored deferred loss at the time it ceased to be a member ...."[17] Thus, if UnionBanCal's predecessor-in-interest had bought the property for $100 and sold it to Standard for $80, and then left the controlled group while Standard was still a member, the temporary regulation wouldn't let the predecessor take the $20 loss, but it would let Standard

11 *See* 26 U.S.C. § 267(a)(1).

12 *Id.* § 267(d).

13 *See id.* §§ 267(b)(3), 267(f)(1), 1563.

14 *Id.* § 267(f)(2)(B).

15 26 C.F.R. § 1.267(f)-1T (1984).

16 *Id.* § 1.267(f)-1T(e)(6).

17 *Id.* § 1.267(f)-1T(e)(7)(i).

use UnionBanCal's $100 basis, rather than its $80 basis, when it sold the property to an outsider.

In this case, however, because of the international character of the controlled group and the transaction, the temporary regulation really did create a heads-I-win, tails-you-lose situation. UnionBanCal didn't get to take the loss as a deduction because of the temporary regulation's "never" provision. But Standard didn't get to use UnionBanCal's basis, as American law allowed, because British law, which controlled Standard's tax liability, didn't allow it. UnionBanCal argues that this result demonstrates that the temporary regulation is contrary to both the legislative scheme and the British-American tax treaty and that it should be allowed to take its predecessor's loss as a deduction.

In 1995, after UnionBanCal's predecessor left the controlled group and after Standard sold the loan portfolio outside of the controlled group, the Commissioner changed the Treasury Department's position in a way that would have let UnionBanCal benefit from its predecessor's loss, had the change been retroactive. The Commissioner replaced the 1984 "temporary" regulation with a final regulation[18] under which, had it been in effect, UnionBanCal's predecessor-in-interest could have taken its loss from its sale to Standard when it left the controlled group, even though Standard hadn't yet sold the loans outside of the controlled group. The final regulation states that a seller's "loss or deduction from an intercompany sale is taken into account under the timing principles of [26 C.F.R. § 1.1502-13], treating the intercompany sale as an intercompany transaction."[19] Under 26 C.F.R. § 1.1502-13(f) (1995),

> the deferred ... loss attributable to property ... shall be taken into account by the selling member ... [i]mmediately preceding the time when either the selling member or the member which owns the property ceases to be a member of the group ....[20]

This provision appears to mean that the seller in a controlled group transaction may claim its deferred loss when it leaves the controlled group, even if the buyer has not yet sold the property to an unrelated party[21] — precisely what the former, temporary regulation prohibited. But this 1995 regulation, the benefit of which UnionBanCal seeks, doesn't apply to transactions that took place before July 12, 1995,[22] which means it doesn't apply to UnionBanCal's predecessor's intra-group transaction.

Here, in more detail, are the events giving rise to this litigation:

1984 Union Bank, Appellant UnionBanCal's predecessor-in-interest, was the indirect American subsidiary of a British company, Standard Chartered Bank.[23] Both were members of a controlled group. Union Bank sold a portfolio of loans to foreign countries with a face value of $434.6 million to Standard for $423 million and claimed an $11.6 million loss on its federal tax return.

1988 Union Bank left the controlled group (along with its American parent and indirect parent), and through a series of mergers and acquisitions became UnionBanCal, the Appellant.[24]

1989 Standard sold the loan portfolio to an outsider.

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18 *See* 26 C.F.R. § 1.267(f)-1 (2001).

19 *Id.* § 1.267(f)-1(a)(2).

20 *Id.* § 1.1502-13(f) (1995).

21 *See id.* §§ 1.267(f)-1, 1.1502-13.

22 *Id.* § 1.267(f)-1(l)(3).

23 Standard Chartered Bank (a British company) owned all of the stock in Standard Chartered Overseas Holdings, Ltd., which owned all of the stock in Standard Chartered Holdings, Inc. (an American company), which was the sole shareholder in Union Bancorp, which was the sole shareholder Union Bank.

24 California Bank bought Standard Chartered Holdings, Inc. — of which Union Bancorp was a subsidiary and Union Bank an indirect subsidiary — and liquidated it and its subsidiaries, then changed its name to Union Bank. BanCal Tri-State Corporation owned the Bank of California. BanCal merged into Union Bank. Then Union Bank transferred all of its assets to the Bank of California. Union Bank then changed its name to UnionBanCal.

1994 The IRS audited Union Bank's 1984 return. UnionBanCal claimed that the loan portfolio was actually worth only about $350.5 million, so its loss was about $84.1 million (face value less economic value at the time of the sale within the controlled group). The IRS took the position that Union Bank wasn't entitled to recognize any loss at all.

1995 Subsequently the IRS and UnionBanCal reached partial settlement. The settlement allowed UnionBanCal to take a $2.3 million loss on its predecessor's 1984 tax return and deferred the rest of the loss. The IRS audited Union Bank's 1988 federal tax return and, citing the "never" provision of the temporary regulation, rejected UnionBanCal's claim that the deferred loss should be applied to the 1988 return.

1996 UnionBanCal requested under the 1975 United States-United Kingdom Tax Convention that British and American "Competent Authorities" determine the loan portfolio's fair market value and the tax treatment for Union Bank's loss.

The Competent Authorities determined that the loan portfolio's fair market value at the time Union Bank sold it to Standard in 1984 was $346.6 million, which was $88 million less than face value, and agreed that $88 million was Union Bank's loss on the sale. (Standard paid Union Bank only $11.6 million less than face value for the portfolio, not $88 million. So one might think Union Bank's loss was only $11.6 million, because Standard didn't pay fair market value, but $76.4 million above market value, and Union Bank never gave that $76.4 million back. But Standard's overpayment has been treated as a capital contribution, rather than as payment for the loan portfolio, so Union Bank's loss on the loan portfolio is $88 million.)

But the Competent Authorities did not agree on the tax treatment for the loss. The American authority wouldn't allow Union Bank to take the loss because of the temporary regulation; the British authority wouldn't allow Standard an increased basis in the loan portfolio because of British tax law. The result was that both Standard and Union Bank were required to pay taxes as though they hadn't lost $88 million (except for the $2.3 million loss allowed under UnionBanCal's settlement agreement with the IRS).

1997 The IRS issued UnionBanCal a statutory notice of an approximately $1.7 million deficiency relating to Union Bank's 1988 return.

UnionBanCal petitioned the Tax Court for relief, which tried the case on stipulated facts and denied the petition. UnionBanCal appeals the Tax Court's decision to us.

ANALYSIS

[1] We have jurisdiction to review the Tax Court's decision.[25] The facts are stipulated. We review the Tax Court's interpretation of tax code provisions, regulations, and treaties *de novo*.[26]

UnionBanCal challenges the Commissioner's decision on the same grounds rejected by the Tax Court: (1) the 1984 temporary regulation is invalid because it is inconsistent with section 267(f); (2) the temporary regulation is invalid because it violates the United States-United Kingdom Tax Convention; and (3) the Commissioner's decision to preclude retroactive application of the 1995 final regulation was not permissible.

A. Validity of the 1984 Temporary Regulation.

UnionBanCal argues that the statute requires two things that the temporary regulation denies: (1) that the loss on a sale between controlled group members must be *deferred*, not *denied*; and (2) that seller's loss in an intra-group transaction must remain for the use of the *seller*. We cannot disagree with the first point: section 267(a)(1) says that loss deductions for sales between the related persons specified in section 267(b) are disallowed, but section 267(f) says that loss deductions for sales between members of controlled

[25] 26 U.S.C. § 7482.

[26] *Baizer v. Comm'r*, 204 F.3d 1231, 1233 [85 AFTR 2d 2000-1067] (9th Cir. 2000) (construction of tax code); *Ann Jackson Family Found. v. Comm'r*, 15 F.3d 917, 920 [73 AFTR 2d 94-1023] (9th Cir. 1994) (interpretation of regulations). *See United States v. Idaho*, 210 F.3d 1067, 1072 (9th Cir. 2000) (stating that appeals court reviews interpretation of treaties *de novo*).

groups ''shall be deferred.''[27] Congress plainly meant to draw a distinction between members of controlled groups and other related parties and to provide for deferral rather than disallowance of losses arising from sales of property within controlled groups.

But UnionBanCal's second point is not persuasive. Section 267(f) says ''such loss'' — that is, the loss from the sale of property between members of the controlled group — ''shall be deferred.''[28] The statutory language does not compel the conclusion that once the deferred loss is recognized, the seller must be the one who gets the tax benefit. Members of a controlled group do not deal with one another at arms length, so the financial and tax consequences of intra-group transactions are entirely controllable and manipulable by the group. When members of a controlled group accomplish an intragroup sale, the price between them is arbitrary and any loss is without economic substance for the group as a whole. So deciding who actually bore the loss in such a transaction is inherently arbitrary.

Since Standard controlled Union Bank and, through intermediaries, owned it, it could buy the depressed loans from Union for face value, for $11 million below fair market value, for $88 million below face value, or for whatever price it believed would best serve the group's financial and regulatory objectives. So the existence and magnitude of any ''loss'' Union Bank suffered was entirely a matter of Standard's choice and without any practical financial consequences. The words of section 267(f), especially when read in light of the practicalities of controlled group transactions, do not support the inference that the tax benefit of a loss must remain with the purported seller.

The phrase ''such loss shall be de-ferred'' in section 267(f) doesn't imply that the purported seller gets the tax advan-tage of the loss, but that the loss won't be recognized for tax purposes at the time of the sale. This inference is compelled by the phrases that follow ''such loss shall be deferred'' — ''until the property is trans-ferred outside the controlled group'' or ''until such other time as may be pre-scribed in regulations.''[29] When read to-gether, these phrases show that Congress is not assuring the paper seller that, come hell or high water, it gets to use the loss sometime. Rather, Congress is assuring the fisc that, so long as the property remains within the controlled group, the ''loss'' won't be recognized. After all, so long as the property and both parties to its sale remain within the controlled group, the ''loss'' is like the loss to your left pocket when you move money to your right pocket, somewhat like a sham transaction, so the general principle that transactions without economic substance will not be recognized for tax purposes supports nonrecognition in these circumstances as well.[30]

Section 267(f) provides alternative dates for when the deferred loss on an intragroup sale may be recognized. The first date is whenever ''the property is trans-ferred outside such controlled group and there would be recognition of loss under consolidated return principles.''[31] The second date is ''such other time as may be prescribed by regulations.''[32] This gives the Commissioner authority to prescribe the time for recognition, which is what the Commissioner used to issue the 1984 temporary regulation.[33] As regulations commonly do, this temporary regulation dealt with a complexity not fully covered by the statute: what happens if one member leaves the controlled group before the other member sells the property to an out-

27 26 U.S.C. § 267(f)(2).

28 *Id.*

29 26 U.S.C. § 267(f)(2).

30 *Cf. Sacks v. Comm'r of Internal Revenue*, 69 F.3d 982, 986 [76 AFTR 2d 95-7138] (9th Cir. 1995) (''It has long been the law that a transaction with no economic effects, in which the underlying documents are a device to conceal its true purpose, does not control the incidence of taxes.'').

31 26 U.S.C. § 267(f)(2)(B).

32 *Id.*

33 26 C.F.R. § 1.267(f)-1T (1984).

sider? The temporary regulation provides the answer: if the seller leaves the group before the buyer sells the property to an outsider, the seller's deferred loss ''never'' gets restored to it.[34] UnionBanCal cries foul over the word ''never,'' and claims it contradicts the statutory command that the loss must be ''deferred.''[35] But we can't see any inconsistency between this regulation and the statute: the loss still gets ''deferred,'' not disallowed; it just gets recognized by the buyer as a stepped-up basis, instead of by the seller as a deduction. UnionBanCal's complaint is that the loss doesn't get restored to the seller, but as we've discussed, the statute doesn't require that result. As the Tax Court below put it, ''Under the literal language of the statute, . . . what is deferred under section 267(f)(2)(B) is not the seller's recognition of the seller's loss, but rather the 'loss' itself.''[36]

Under the temporary regulation, the deferred loss stays with the property until the property leaves the controlled group. This is consistent with the general scheme of section 267. Under section 267(d), which provides for the recognition of losses disallowed under section 267(a)(1), recognition of the loss follows the property.[37] Under section 267(a)(1) and (d), when a husband sells stock to his wife, as in the hypothetical case we set out earlier, he doesn't get the loss when the wife calls a stockbroker and sells the stock — she gets the gain or loss on her sale, but gets to use his basis. The recognition of the loss follows the property, and gets triggered when the property goes to an unrelated party. Likewise, the temporary regulation makes recognition of the deferred loss follow the property and stick with it until the property is sold to an outsider: ''the loss is preserved within the group because no member of a group should under section 267(f) be able to recognize a loss while the group continues to hold property it purchased from itself.''[38] True, Congress defers recognition of losses for controlled groups,[39] instead of disallowing them as with the husband and wife example.[40] But the distinction between disallowance and deferral is not so sharp because in both cases *who* gets the tax benefit doesn't matter because of their identity of interest; it's *when* the loss gets recognized that matters. There's no reason why Congress should care about *who* gets the loss when the parties are so closely related or controlled, but Congress has a great concern with *whether there is a real loss.*

> The primary rationale for deferring loss on transfers between members of the same group is to prevent the premature recognition of loss merely because the property is transferred to a related person .... [A]n ancillary rationale for deferring loss is to prevent artificially increasing the amount of a loss taken by a member on the sale or exchange of property at less than fair market value to another member ....[41]

UnionBanCal argues that the legislative history shows that Congress intended something contrary to what the temporary regulation says. UnionBanCal cites a passage in the House Conference Committee Report saying that Congress wanted losses on sales within controlled groups subject to ''deferral (rather than denial).''[42] This legislative history adds nothing whatsoever to what the statute plainly says. True, a Senate Finance Committee Report says that the bill was intended to defer recognition until the property was sold to an outsider ''or the parties are no longer related.''[43] That would imply recognition as soon as UnionBanCal's predecessor left the con-

34 *Id.* § 1.267(f)-1T(c)(6).

35 26 U.S.C. § 267(f)(2)(B).

36 *UnionBanCal Corp. v. Comm'r of Internal Revenue*, 113 T.C. 309, 321 (U.S. Tax Court 1999).

37 *See* 26 U.S.C. § 267(d).

38 49 F.R. 46992, 46994 (1984).

39 26 U.S.C. § 267(f)(2).

40 *See id.* § 267(a)(1).

41 49 F.R. 46992, 46994 (1984).

42 H.R. Conf. Rep. 98-861, at 1033 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1445, at 1721

43 *Senate Committee on Finance, 98th Congress, Explanation of Provisions Approved by the Committee on March 21, 1984*, Vol. 1 (Comm. Print 1984), *reprinted in* S. Prt. 98-169, at 496.

trolled group, contrary to the temporary regulation. But the law — the bill that was passed by both houses of Congress and signed by the President[44] — doesn't say "or the parties are no longer related." It says "or until such time as may be prescribed by regulations."[45]

UnionBanCal argues that the Temporary Regulation is arbitrary and capricious because it allows recognition "to the wrong party at the wrong time." We reject this argument because, so long as the controlled group maintains its existence, it is within the group's control which party within it bears the paper loss. As for when the loss is recognized, one could reasonably choose either alternative, when the property is sold to an outsider, as the temporary regulation provides,[46] or when the seller leaves the controlled group, as the final regulation provides.[47] While they are together in the controlled group, and when they agree on terms for ending membership in the group, the parties can avoid unfairness to themselves from the way the taxes fall by adjusting their affairs in accord with tax regulations.

UnionBanCal argues that we ought not to defer to the regulation because, as a temporary regulation, it was adopted without notice and comment.[48] We need not decide generally whether absence of notice and comment would affect the degree of deference to a temporary regulation adopted by the Commissioner of Internal Revenue (which may differ from other temporary regulations issued by agencies dealing with other subject matters). In this case, Congress by law provided that the time for recognition, if the Commissioner adopted a regulation, would be "such other time as may be prescribed in regulations."[49] And Congress empowered the Commissioner to issue regulations without notice and comment, such as the temporary regulation the Commissioner issued here.[50] This is an express delegation of authority, and the temporary regulation is neither arbitrary nor capricious,[51] so it stands.[52]

The regulation arguably would be arbitrary if it not only denied the loss to the seller within the controlled group if it ceased to be a member while the property was still owned by another member, as it does, but denied the loss to *anyone*. That is, if the loss were altogether disallowed, that might be inconsistent with the Congressional directive that it be deferred rather than disallowed. But the temporary regulation doesn't do that. It gives the benefit of the loss to the member of the controlled group that bought the property, by increasing its basis by the amount of the seller's deferred loss. Thus when the property does eventually get sold to an out-

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44 *See* U.S. Constitution, article I, section 7. *See also Puerta v. United States*, 121 F.3d 1338, 1344 (9th Cir. 1997) ("The legislative history suffers the usual infirmity, that it was not passed by both houses of Congress and signed into law by the President. For that reason, it is not the law."); *Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1228 (9th Cir. 1999) ("The fact that such good 'legislative history' is available for both sides of the argument illustrates how easily it may be created by advocates of one position or the other during the legislative process who did not get their views into the statutory language, and also why it is so frequently a waste of time to use it to construe the statute. Better guidance is available from the words of the law duly passed and signed."); *see also Burns v. Stone Forest Industries, Inc.*, 147 F.3d 1182, 1184 (9th Cir. 1998).

45 26 U.S.C. § 267(f)(2)(B).

46 *See* 26 C.F.R. § 1.267(f)-1T(c)(6) (1984).

47 *See id.* §§ 1.267(f)-1(a)(2), 1.1502-13(f) (2001).

48 *See* 5 U.S.C. § 553 (2000) ("General notice of proposed rule making shall be published in the Federal Register .... After notice ..., the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments ...").

49 26 U.S.C. § 267(f)(2)(B).

50 *See* 5 U.S.C. § 553(b) ("Except when notice or hearing is required by statute, this subsection does not apply ... when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.").

51 *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.")

52 *See Redlark v. Comm'r of Internal Revenue*, 141 F.3d 936, 939 [81 AFTR 2d 98-1483] (9th Cir. 1998) (reviewing temporary Treasury regulation and stating that "Only if the [Internal Revenue Code] has a meaning that is clear, unambiguous, and in conflict with a regulation does a court have the authority to reject the Commissioner's reasoned interpretation and invalidate the regulation."); *Walthall v. United States*, 131 F.3d 1289, 1297 [80 AFTR 2d 97-7959] (9th Cir. 1997) (reviewing temporary Treasury regulation and stating that "[t]he statute is not susceptible only to the [appellant's] interpretation; the IRS's interpretation ... is reasonable. We must therefore show the IRS interpretation substantial deference."). *See also E. Norman Peterson Marital Trust v. Comm'r*, 78 F.3d 795, 798 [77 AFTR 2d 96-1184] (2d Cir. 1996) ("Until the passage of final regulations, temporary regulations are entitled to the same weight we accord to final regulations."); *McDonnell v. United States*, 180 F.3d 721, 722–23 [83 AFTR 2d 99-2638] (6th Cir. 1999) (upholding temporary Treasury regulation under *Chevron*); *Allen v. United States*, 173 F.3d 533, 537–38 [83 AFTR 2d 99-2114] (4th Cir. 1999) (same); *Miller v. United States*, 65 F.3d 687, 689–90 [76 AFTR 2d 95-6193] (8th Cir. 1995) (same).

sider, the loss is recognized. In this case, no one got the benefit. But that wasn't because of the temporary regulation. It was because British tax authorities wouldn't give Standard the increased basis. Standard, which owned Union Bank, and which owned the loan portfolio when Union Bank left the controlled group, was a British corporation. Under American, but not British, tax law, when Standard sold the loan portfolio, it would be entitled to have its basis increased by the amount of Union Bank's deferred loss. That is not a failure of the temporary regulation to conform to the statute. Rather, it is a difference between British and American taxation.

B. The treaty.

UnionBanCal argues that the temporary regulation is invalid because it violates the 1975 United States-United Kingdom Tax Convention.[53] Article 24 of the treaty, "Nondiscrimination," generally prohibits either state from subjecting nationals of one residing in the other to more burdensome taxation than their own resident nationals. The subsection dealing with corporate subsidiaries likewise provides that enterprises of one state owned or con-trolled by residents of the other "shall not be subjected to . . . any taxation or any requirement connected therewith which is other or more burdensome than the taxa-tion and connected requirements to which other similar enterprises of the first-men-tioned state are or may be subjected."[54] Thus an American subsidiary of a British corporation can't be taxed more heavily than an American subsidiary of an Ameri-can corporation.

UnionBancCal's argument is that, because Standard was British and it was American, they wound up worse off than if they had both been American. That doesn't violate the Treaty. UnionBancCal doesn't show that the United States imposed "more burdensome" taxation or requirements on British-owned subsidiaries than American-owned subsidiaries, which is what the treaty addresses. It was merely fortuitous that, because the British and American tax authorities could not agree on how to recognize the deferred loss, Union-BanCal and Standard were worse off than if they had been entirely of one country or the other.

True, UnionBanCal never got tax recognition of its loss on its sale of the loan portfolio to Standard because of the American statute and temporary regulation. But it hasn't shown that it would have been treated any differently had Standard been American. It would have been treated the same. And discrimination against foreign-owned subsidiaries is all that the nondiscrimination clause at issue protected it against.

C. Retroactivity.

The final regulation provides that the temporary regulation still applies to transactions occurring before July 12, 1995.[55] Union argues that the Commissioner was obligated to make the 1995 final regulation retroactive to its 1988 tax return.

Under 26 U.S.C. § 7805(b), as in effect during the relevant time, the Commissioner "may prescribe the extent, if any, to which any ruling or regulation, relating to internal revenue laws, shall be applied without retroactive effect."[56] The Commissioner plainly did just that in the provision specifying non-applicability of the final regulation to transactions before July 12, 1995.

That this was within the Commissioner's authority is unarguable. The authority is the "may prescribe" statute. That non-retroactivity was within the Commissioner's discretion, and not arbitrary, is also unarguable. Prospective application was reasonable to avoid disturbing transactions and tax returns based on what had been settled law since the Temporary Regulation was promulgated in 1984.

AFFIRMED.

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53 Convention between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, December 31, 1975, 31 U.S.T. (Part 6) 5668, T.I.A.S. 9682, *reprinted in* 1980-1 C.B. 394 (entered into force April 25, 1980).

54 *Id.*, art. 24, para. 5.

55 *See* 26 C.F.R. § 1.267(f)-1(l)(3).

56 26 U.S.C. § 7805(b) (1994).

THOMAS, Circuit Judge, dissenting:

Although the majority's analysis is thoughtful and insightful, I conclude that the plain words of the governing statute and the final agency regulation interpreting it are at odds with the temporary regulation upon which the Commissioner relied in denying the deductions in this case. Therefore, I must respectfully dissent.

Our review of an administrative agency's construction of the statute it administers is governed by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–45 (1984), as explained in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

Under *Chevron*, we must consider first "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'" *B rown & Williamson*, 529 U.S. at 132 (quoting *Chevron*, 467 U.S. at 843).

In making that assessment, we look not only at the statutory section in question, but analyze the provision in the context of the governing statute as a whole, *see id.* at 132, presuming congressional intent to create a "symmetrical and coherent regulatory scheme." *Id.* at 133 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)).

In this case, both the plain words and the structure of the statute indicate that Congress intended that deductions for the losses at issue be deferred, but not denied. In short, the temporary regulation denying deductions for the losses contradicts the statute; thus, we cannot defer to the agency's interpretation of it. "[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

Under the law as it existed prior to 1984, sellers were denied deductions for losses from the direct or indirect sale or exchange of property with certain specified affiliated entities which had a unity of economic interest with the seller. In the Tax Reform Act of 1984, Congress expanded the statute to include "controlled groups," including corporations in which fifty percent (50%) or more of the shares of common stock were owned by a common parent company. Pub. L. No. 98-369, § 174(b)(2)(B); 98 Stat. 494, 706. As to these controlled groups, Congress provided for a deferral, rather than disallowance of loss in 26 U.S.C. § 267(f)(2):

> Deferral (rather than denial) of loss from sale or exchange between members. — In the case of any loss from the sale or exchange of property which is between members of the same controlled group and to which subsection (a)(1) applies (determined without regard to this paragraph, but with regard to paragraph (3)) —
>
> (A) subsections (a)(1) and (d) shall not apply to such loss, but
>
> (B) such loss shall be deferred until the property is transferred outside such controlled group and there would be recognition of loss under consolidated return principles or until such time as may be prescribed in the regulations.

Under this statute, and the final regulations promulgated thereunder, a loss realized by a member of a controlled group on a sale to another member of a controlled group is deferred until the seller, the purchaser and the property are no longer all in the same controlled group. Under the final regulations, the deferred deduction is restored to the seller when the seller leaves the controlled group. Treas. Reg. § 1.1502-13; Treas. Reg. § 1.267(f)-1(c).

However, under temporary regulations promulgated immediately after enactment of the 1984 amendments, a seller's de-ferred loss deduction is forever denied to the seller if the sold property has not been transferred outside the controlled group when the seller leaves the controlled group. Temp. Treas. Reg. § 1.267(f)-1T.

The temporary regulation is at odds with the governing statutory language because the loss is denied under the temporary regulation, not deferred as the statute requires. Put another way, the statute authorizes the Commissioner to establish rules relating to the timing of loss recognition; it does not allow the Commissioner to deny the deduction. ''Deferral (rather than denial)'' does not mean ''Denial (rather than deferral).'' ''Until such time'' does not mean ''never.''

''A regulation may not serve to amend a statute, *Koshland v. Helvering*, 298 U.S. 441, 447 [17 AFTR 1213], 56 S.Ct. 767 [17 AFTR 1213], 770, 80 L.Ed.1268 (1936), nor add to the statute 'something which is not there.''' *California Cosmetology Coalition v. Riley*, 110 F.3d 1454, 1460–61 (9th Cir. 1997) (quoting *United States v. Calamaro*, 354 U.S. 351, 359 [51 AFTR 57] (1957)). The temporary regulation does precisely that. *Chevron* deference to agency interpretation is only appropriate when the statutory language is ambiguous and leaves ''gaps'' to be filled by regulation. When the statute is clear, we ''must give effect to the unambiguously expressed intent of Congress.'' *Chevron*, 467 U.S. at 843.

Even if we direct our gaze beyond the bare words of the law and survey the statutory context, the result is the same. The government's underlying theory, adopted by the tax court, is that the loss belongs to the controlled group, rather than any specific entity. However, as the taxpayer rightly argues here, amorphous controlled groups are not taxpayers, do not file tax returns and are not entitled to deductions. As a general principle, ''[a]bsent a specific statute to the contrary, a loss deduction may only be taken by the party bearing the expense.'' *Tennessee Securities, Inc. v. Commissioner*, 674 F.2d 570, 574 [49 AFTR 2d 82-1102] (6th Cir. 1982) (citing *Calvin v. United States*, 354 F.2d 202, 204 [16 AFTR 2d 6025] (10th Cir. 1965). That truism must, of course, be tempered in the complex context of a multinational controlled group setting. However, there is nothing in the words of the governing statute, nor in its structure, nor in its legislative history that would urge a contrary interpretation. Indeed, to construe the statute as the temporary regulation did would require us to embrace the concept of a loss unattached to any specific taxpaying entity — a ''free-floating loss'' in the words of the tax court — which might well materialize in a different form, such as an increase in another taxpayer's basis. In my estimation, such an ethereal construction of a levitating loss untethered to a taxpayer has slipped its statutory moorings.

All of these creative constructs might have retained some credibility if the Commissioner had not completely changed analytic course. In the final regulation pertaining to § 267(f)(2), the Commissioner corrected the interpretative error contained in the temporary regulation, and provided for allowance of the very deduction at is-sue here. This interpretive change of heart, however, does not affect this transaction because the Commissioner made the regulation effective prospectively; it did not apply to those transactions governed by the temporary regulation.

For this reason, even if the statutory language were ambiguous, we would owe little deference to the agency's earlier erroneous interpretation. Inconsistent agency interpretations are entitled to less judicial deference than consistently held positions. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.3 (1987). If an agency changes its statutory interpretation, and provides a reasoned analysis, the *new* — not the old — interpretation is entitled to some deference. *See Rust v. Sullivan*, 500 U.S. 173, 187 (1991) (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983)); *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 (9th Cir. 1996).

Of course, the shift of agency position puts the taxpayer in the extremely inequitable position of being subject to an agency interpretation of a statute which the agency itself has repudiated. With a loss of almost $90,000,000 in the balance, one can hardly

blame the taxpayer for not being amused at the irony.

In sum, although I find the majority's analysis excellent, in the end I cannot subscribe to the Commissioner's view in this case. Thus, I must regretfully differ and respectfully dissent.

¶2002-5395

UNITED STATES OF AMERICA, PLAINTIFF v. Thomas H. ASHBAUGH, County of Allegheny Treasurer's Office, Borough of Wilmerding, East Allegheny School System, and Pennsylvania Municipal Service Co., DEFENDANTS. U.S. District Court, Western Dist. of Penn-sylvania, (DC PA) Civil Action No. 01-637, Aug. 21, 2002. Decision against Taxpayer.

1. Collection actions—sale of lien property—joinder of necessary parties. Taxpayer's motion to dismiss govt.'s collection claim to foreclose liens against and sell his inherited Pennsylvania property was denied: taxpayer's argument that Pennsylvania was necessary party to action was rejected where Pennsylvania had no direct property interest that would be impeded by instant judgment; other parties could receive clear and complete relief without Pennsylvania's joinder; and taxpayer's potential incurrence of Penn-sylvania inheritance tax liability wouldn't result in double or inconsistent obligation. *Reference:* United States Tax Reporter ¶74,035.03(60). IRC §7403.

The Honorable Kenneth J. Benson
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA,

MEMORANDUM ORDER

GARY L. LANCASTER, District Judge.

Before the court is defendant Thomas Ashbaugh's motion to dismiss an eight (8) count amended complaint (Document #11) filed by the United States of America. The United States seeks in the first seven counts of the amended complaint to reduce to judgment federal income tax assessments made against Mr. Ashbaugh. The motion to dismiss, although nominally addressed to the entire amended complaint, focuses upon Count VIII, wherein the United States seeks a ruling that legal title to certain real estate owned by Mr. Ashbaugh's mother, now deceased, has passed to Mr. Ashbaugh under the Commonwealth of Pennsylvania's intestacy law. The United States seeks an order directing the sale of the property in question and the payment of the proceeds thereof to the United States towards satisfaction of liens the United States has filed against Mr. Ashbaugh's property and his rights to property.

Mr. Ashbaugh's motion to dismiss is premised upon Fed. R. Civ. P. 12(b)(7), which permits a party to seek dismissal of a complaint for failure to join a party under Fed. R. Civ. P. 19. Mr. Ashbaugh argues that his "potential interest" in his mother's property would be subject to inheritance taxes payable to the Commonwealth of Pennsylvania, and that "[p]ermitting the U.S. to proceed with the sale of the property to satisfy the tax liability of Ashbaugh without considering the interests of the Commonwealth of Pennsylvania and other potential creditors will prejudice those parties and potentially subject Ashbaugh to claims by them." (Document #11, ¶7). The Commonwealth of Pennsylvania and unnamed "other poten-

tial creditors'' are, in Mr. Ashbaugh's view, necessary parties whose absence requires dismissal of the complaint under Fed. R. Civ. P. 12(b)(7).

The United States has responded to the motion (Document #13) and notes that all entities who have filed liens against, or otherwise claimed an interest in, the property which is the focus of Count VIII have been joined as defendants. The Commonwealth of Pennsylvania, on the other hand, is said not to have asserted an interest in the real property.

Mr. Ashbaugh's Rule 12(b)(7) motion is premised upon his assertion that the United States has failed to join a necessary party under Rule 19. The court thus turns to Fed. R. Civ. P. 19(a), which sets forth the factors a court should consider in determining whether a party's joinder is ''necessary'' for a just adjudication of an action such that the party should be joined if feasible. Rule 19(a) provides in relevant part:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Fed. R. Civ. 19(a).

[1] We are satisfied that the Commonwealth of Pennsylvania is not a necessary party under Rule 19(a). Initially, it is clear that complete relief can be accorded to the parties already in the action absent the Commonwealth of Pennsylvania. This is the case since the Commonwealth of Pennsylvania has not asserted any interest in the real property that is the subject of Count VIII. In fact, Mr. Ashbaugh does not allege that the Commonwealth of Pennsylvania has a direct interest in the property. Instead, Mr. Ashbaugh's argument proceeds on the assumption that the Commonwealth of Pennsylvania will seek to recover inheritance tax from him or his mother's estate should this court rule that title to the property has passed or should pass to Mr. Ashbaugh.

The Advisory Committee Notes to Rule 19 state that subdivision (a)(1) was enacted to avoid ''partial or hollow relief''. See Fed. R. Civ. P. 19 advisory committee's note. For purposes of subdivision (a)(1), the effect the ''decision may have on the absent party is not material.'' Janney Montgomery Scott, Inc. v. Shepartd Niles, Inc., 11 F.3d 399, 405 (3d Cir. 1993). The accrual of inheritance tax liability, and any proceedings to collect such sums, are matters which do not directly touch upon any issue in this case. Thus, the parties to this case will be able to obtain complete relief even absent consideration of any potential future inheritance tax liability. Since no present party to this suit would receive ''partial or hollow'' relief in the absence of the Commonwealth of Pennsylvania, the Commonwealth of Pennsylvania is not a necessary party under Rule 19(a)(1).

The court must next determine whether under subdivision (a)(2)(i) of Rule 19, the disposition of this action without the Commonwealth of Pennsylvania will ''as a practical matter impair or impede'' the Commonwealth of Pennsylvania's ability to protect its interest in the subject of this litigation. The United States has made no argument with respect to this issue, and, as noted above, the Commonwealth of Pennsylvania is not alleged to have a direct interest in the property. Instead, the Commonwealth of Pennsylvania has a potential interest in collecting tax revenues the liability for which may be incurred when and if title to the property passes to Mr. Ashbaugh. A movant under Rule 12(b)(7) must make an affirmative showing concerning the nature of the interest possessed by the absent party and the matter in which such

interest will be impaired. Sunrise Fin., Inc. v. Painewebber, Inc., 948 F. Supp. 1002, 1006 (D. Utah 1996). Mr. Ashbaugh makes no such showing, and, hence, his motion may be denied on this basis as well.[1]

Finally, the court must consider whether the Commonwealth of Pennsylvania's absence might subject the existing parties to ''a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.'' See Fed. R. Civ. P. 19(a)(2)(ii). Fed. R. Civ. P. 19(a)(2)(ii) also serves to protect defendants from ''needless'' multiple litigation. Sindia Expedition, Inc. v. Wrecked & Abandoned Vessel, known as The Sindia, 895 F.2d 116, 122 (3d Cir. 1990). Mr. Ashbaugh does not assert that any party, other than himself, will be subjected to double or inconsistent obligations. Concerning his own situation, Mr. Ashbaugh asserts that, should the United States be granted the relief it requests in Count VII, he may be subjected to liability for inheritance taxes if title to his mother's property passes to him. He does not explain, however, how this additional liability would create a ''double,'' ''multiple'' or ''inconsistent'' obligation in this case. On the contrary, Mr. Ashbaugh's potential inheritance tax obligation is a matter with only a tangential relation to the claims made in this case, and certainly does not support a finding that will be subjected to multiple or inconsistent obligations if the Commonwealth of Pennsylvania is not joined as a party.

In conclusion, defendant Ashbaugh is not entitled to dismissal of this action on the basis that the Commonwealth of Pennsylvania is a an indispensable party.

Accordingly, this 21st day of August, 2002, upon consideration of defendant Thomas Ashbaugh's motion to dismiss (Document #11), IT IS HEREBY ORDERED that the motion is DENIED.

BY THE COURT:

/s/, J.

¶2002-5396

In Re: Michael Edward CARRICK, Debtor. U.S. Bankruptcy Court, Western Dist. of North Carolina, (Bktcy Ct NC) Case No. 02-31467, Aug. 23, 2002. Years 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002. Decision for Taxpayer in part and for Govt. in part.

1. Tax claims in bankruptcy—violation of automatic stay—sanctions; return of property. Pro se converted Chap. 7 debtor/tax protester's motion for sanctions and return of property alleging IRS and North Carolina Dept. of Revenue (NCDOR) levied his wages in violation of automatic stay was denied with respect to IRS: although IRS continued levying wages due to internal computer error after receiving notice of taxpayer's bankruptcy, levy was released and partial refund was forwarded immediately upon realizing such; taxpayer's testimony showed he suffered no damages from IRS's violation; and if taxpayer's willful failure to file returns resulted in action's dismissal, IRS could reimpose levy. But, hearing was continued as to NCDOR to allow for proper service; and IRS and taxpayer were ordered to appear at continued hearing if taxpayer didn't receive refund of remaining levied wages. *Reference:* United States Tax Reporter ¶68,726.52(10); 68,726.52(3).

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA Charlotte Division,

ORDER DENYING MOTION FOR SANCTIONS

Chapter 7

This matter came before the Court for hearing on August 15, 2002, upon the Debtor's Motion for Santions and Return of Property, the United States of America's

[1] For the same reason, Mr. Ashbaugh's assertions that some unnamed ''other potential creditors'' will be prejudiced by resolution of this dispute, or that such persons may ''potentially'' raise claims against him, are not sufficient, absent specifics, to permit the court to conduct a Rule 19 analysis. The motion to dismiss, to the extent that it relies upon such anonymous persons and their unspecified interests, will be denied.

response thereto, and the Debtor's Motion to Oppose United States of America's Response to Motion for Sanctions and Return of Property. The Debtor appeared *pro se*, and James Sullivan appeared on behalf of the United States of America.

Based upon the facts presented and the record, this Court finds:

1. The Debtor filed a Chapter 13 case with this Court on May 9, 2002, which was subsequently converted to a Chapter 7.

2. **[1]** In the Debtor's Motion for Sanctions and Return of Property, he alleges that the Internal Revenue Service (''IRS'') and the North Carolina Department of Revenue (''NCDOR'') have been levying his wages in violation of the automatic stay of 11 U.S.C. § 362. In his prayer for relief, the Debtor asks the Court to: (1) enjoin the IRS and NCDOR from ''willful violation of the Automatic Stay'', (2) order the IRS and NCDOR to return the levied wages, (3) and terminate the wage levies.

3. The Debtor did not properly serve his Motion for Sanctions and Return of Property on the NCDOR, as he did not serve the North Carolina Attorney General. Accordingly, the August 15, 2002, hearing is continued with respect to the NCDOR until September 12, 2002, to allow the Debtor an opportunity to serve the North Carolina Attorney General.

4. As for the Debtor's allegations against the IRS, at the time the Debtor filed bankruptcy petition, his wages were subject to an outstanding levy by the IRS for failure to pay any income tax since 1994. Pursuant to its levy, the IRS received payments from the Debtor totaling $4, 028.37 between May 14, 2002, and June 10, 2002.

5. On May 9, 2002, the Debtor served a copy of his petition on the IRS at the local IRS office in Charlotte, North Carolina. However, the Debtor failed to serve notice on the IRS Insolvency Unit in Greensboro, North Carolina, and the Insolvency Unit did not learn of the Debtor's bankruptcy until May 31, 2002.

6. Despite receiving notification of the Debtor's bankruptcy, the IRS continued levying the Debtor's wages until June 10, 2002, due to an internal computer error.

7. As soon as the IRS realized that the Debtor's wages had been levied in violation of the automatic stay, it took appropriate steps to rectify the situation. Specifically, the IRS released the wage levy and forwarded a partial refund to the Debtor. The remaining refund was being mailed to the Debtor at the time of the August 15, 2002, hearing.

8. Despite its technical violation of the automatic stay, the equities in this case weigh against sanctioning the IRS. The violation appears to be an isolated error, not a willful violation of the stay. Additionally, by his testimony, the Debtor has not suffered any damages as a result of the IRS' stay violation.

9. Moreover, the Debtor, a tax protester, has not filed an income tax return since 1994, and his failure to do so is the basis for his bankruptcy filing. Because the Debtor has not filed an income tax return since 1994, his tax liabilities will not be discharge in this bankruptcy proceeding. *See* 11 U.S.C. § 523 (a) (1) (B) (i). The Debtor's willful failure to file may result in dismissal of his bankruptcy case, although no motion is pending. Upon dismissal, or closing of this case, the IRS will, in all likelihood, promptly reimpose the wage levy.

It is therefore ORDERED that:

1. The Debtor's Motion for Sanctions and Return of Property with respect to the NCDOR is continued until September 12, 2002.

2. The Debtor's Motion for Sanctions and Return of Property with respect to the IRS is denied.

3. The IRS is to the Debtor the remaining wages that were levied in violation of the automatic stay. If the Debtor receives this refund before September 12, 2002, this matter will be considered resolved. If the Debtor does not receive this money before September 12, 2002, the IRS and the Debtor are to appear at the September 12, 2002, continued hearing.

This the 23d day of August, 2002.

/s/

U.S. Bankruptcy Court

¶2002-5397

Durwin Walter DAVIS, PLAINTIFF v. Dorothy W. RUCKER, ET AL., DEFENDANTS. U.S. District Court, Middle Dist. of Florida, (DC FL) CASE NO. 3:01-cv-627-J-25HTS, Aug. 23, 2002. Years 1990, 1991, 1992. Decision for Govt.

1. Actions against IRS employees—res judicata—Anti-Injunction and Declaratory Judgment Acts—failure to state claim for relief—constitutional claims. Pro se taxpayer's amended complaint against IRS and Treas. Dept. employees was dismissed without prejudice: except as to his claim that IRS maintained "blacklist," confirmation order in prior bankruptcy proceedings was res judicata as to instant action where both claims involved assessment and collection of same tax liabilities; U.S. was only party from which he could seek relief; and argument that res judicata didn't apply since bankruptcy court was Article I court was frivolous. Also, even if res judicata didn't apply, AIA and DJA barred injunctive and declaratory relief; claims that blacklist constituted "bill of attainder" and violated his due process rights were rejected; and taxpayer lacked standing to request declaratory and injunctive relief where he alleged no threat of future harm. *Reference:* United States Tax Reporter ¶74,337.503(5); 74,215.05(5); 74,217.502(5). IRC §7421.

2. Actions against IRS employees—sovereign immunity—Anti-Injunction and Declaratory Judgment Acts—amendment of complaint. Pro se taxpayer's amended complaint against IRS and Treas. Dept. employees was dismissed without prejudice: sovereign immunity didn't bar claim that IRS maintained "blacklist" if defendants were acting in contravention of law prohibiting maintenance of databases designating individuals as "tax protesters"; assuming action was really against U.S., its immunity wasn't waived from prospective relief; and AIA and DJA didn't apply to claims to enjoin illegal actions. Also, leave to amend complaint was granted to state "stigma-plus" claim for due process violations; but, taxpayer's remaining motions were denied. *Reference:* United States Tax Reporter ¶74,336.506(25); 74,336.504(25); 74,025.01(108). IRC §7402.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION,

ORDER

THIS CAUSE is before the Court on the government's Motion to Dismiss Amended Complaint (Dkt. 27), and Plaintiff's response thereto. Upon consideration of same, the Court finds as follows:

Defendants, sued in their individual capacities,[1] are employees of either the Treasury Department or the Internal Revenue Service ("IRS").[2] Plaintiff's allegations relate to the actions allegedly taken by these individuals in the assessment and collection of Plaintiff's federal income tax for the years 1990 through 1992. Plaintiff claims that Defendants tampered with computer records, backdated material, made fraudulent entries and gave misinformation regarding these income tax liabilities. To support these claims, Plaintiff specifically alleges that Defendants used false and fraudulent means to estimate his gross income without a known taxable activity and without a signed and verifiable "23C" assessment certificate. *See* First Amended Complaint at ¶ 12. According to Plaintiff, he "has never been involved [or] registered to do business in an [e]xcise taxable activity." *See* First Amended Complaint at ¶ 14. He claims that there is false informa-

[1] In violation of Federal Rule of Civil Procedure 10, the amended complaint does not set forth in the caption the names of the defendants being sued. However, in the body of the amended complaint, Plaintiff alleges that it is a suit againts Dorothy W. Rucker, Davida Parker, and Paul H. O'Neill.

[2] This action was originally brought in state court, pursuant to Florida Statute § 713.21, seeking to cancel federal income tax liens filed against his property, and seemingly to discharge his tax debts. The United States removed this action to federal court on June 6, 2001, pursuant to 28 U.S.C. §§ 1441(a) and 1442. Plaintiff filed an amended complaint on November 26, 2001.

tion in the IRS's computer records that "makes it appear that [P]laintiff is a person liable for a taxable activity in which Plaintiff is not involved." *See* First Amended Complaint at ¶ 21. He also complains of Defendants' "zero tolerance policy" and their use and maintenance of a "blacklist."

Plaintiff further alleges that by ignoring procedural requirements, Defendants committed fraud "to gain an increase in cash acquisition at any cost." *See* First Amended Complaint at ¶ 12. It appears that Plaintiff is contending that there are no enforcement regulations related to the taxes assessed against him by the IRS. Lastly, Plaintiff contends that prior to his tax assessments he was denied a "due process hearing to meet with [D]efendants involved in the matters raised herein and was denied the opportunity for meaningful participation and opportunity to reveal wrongful data contained in the IRS computer records . . . .,"*see* First Amended Complaint at ¶ 16, and that he was "deprived of the opportunity to examine and verify in person the identity and pocket commissions[3] of Defendants and to verify for the record the delegation of authority of Defendants," *see* First Amended Complaint at ¶ 22.

Based on the above, Plaintiff claims that his Fifth Amendment right to due process was violated and that the actions of which he complains violate the Bill of Attainder prohibitions in Article I, §§ 9 and 10 of the United States Constitution. Plaintiff seeks a declaration, pursuant to 28 U.S. C § 2201, that the acts and policies of Defendants violate Plaintiff's constitutional rights; an injunction, pursuant to 28 U.S.C. § 2202, enjoining Defendants from using a blacklist database and requiring Defendants to remove Plaintiff's name from the blacklist and a writ of prohibition prohibiting Defendants from maintaining classifications and records for purposes not authorized by the United States Constitution, pursuant to 28 U.S.C. §§ 1361, 1651 and Federal Rule of Civil Procedure 65(a).

The Government raises several arguments in support of its motion to dismiss. The Court addresses only a few of these arguments.[4]

Res Judicata

With the exception of his claim about the IRS maintaining a blacklist, Plaintiff's claims are thinly veiled collateral attacks on the assessment and collection activities regarding Plaintiff's tax liabilities for the years 1990–1992. These tax liabilities were the subject of his bankruptcy proceedings in *In re Durwin Walter Davis*, Case No. 97-5503-3F3 (Bankr. M.D. Fla.). These proceeding resulted in an order of confirmation. Therefore, any claims Plaintiff has against these Defendants for incorrectly classifying his tax status or liability are barred by the doctrine of *res judicata. See In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1552 (11th Cir. 1990) (bankruptcy court's order of confirmation "'is an absolute bar to the subsequent action or suit between the same parties . . . in respect of every matter which was actually offered and received to sustain the demand, but also as to every [claim] which might have been presented'").

The doctrine of *res judicata* applies if: "(1) the prior decision [was] rendered by a court of competent jurisdiction; (2) there [was] a final judgment on the merits; (3) both cases . . . involve the same parties or their privies; and (4) both cases . . . involve the same causes of action." *See In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir.2001)(citations omitted). Furthermore, if a claim in a new lawsuit was, or could have been, raised in a prior action, *res judicata*applies. *Id.*

There is no question that the confirmation order issued by the bankruptcy court constitutes a final judgment on the merits issued by a court of competent jurisdiction. There is also no doubt that both cases involve the same causes of action. In *Ci-*

[3] Pocket commissions are identification badges issued to IRS employees as a means of identifying themselves to the public when performing their official duties. *See* IRM §§ 1.16.4.1.1-1.2, 1.16.3.1-3.2.

[4] Many of the government's arguments pertain to claims for damages. Plaintiff has made no claim for damages; thus, these arguments are irrelevant and unnecessary.

tibank, N.A. v. Data Lease Fin. Corp., 904 F.2d 1498 (11th Cir.1990), the Eleventh Circuit articulated that "'if a case arises out of the same nucleus of operative fact ... as a former action, [then] the two cases are really the same "claim" or "cause of action" for purposes of *res judicata.*'" *Id.*at 1503 (quoting *Ruple v. City of Vermillion*, 714 F.2d 860, 861 (8th Cir.1983)). Because both of Plaintiff's claims issue from a single event, namely, the assessment and collection of his federal income tax liabilities for the years 1990 through 1992, the fourth element is met. The Court further finds that the third element has been met, even though these Defendants were not parties to the bankruptcy proceeding.

It is axiomatic to state that in order to obtain prospective relief in the form of a declaration or injunction, Plaintiff has to show a justifiable need for the relief. The only justifiable need Plaintiff could have for such relief is to extinguish his tax liabilities and the corresponding liens. The only party that can give him the relief he seeks regarding these tax liabilities is the United States. Thus, the third element is satisfied, and the doctrine of *res judicata* bars Plaintiff's claims, regarding these tax liabilities.

[1] Furthermore, Plaintiff's argument that *res judicata* cannot apply the bankruptcy court is an Article I court and not an Article II court is frivolous. Plaintiff had the opportunity to appeal any decision by the bankruptcy court to this court and, in fact, did take an appeal of the bankruptcy court's decision. However, his appeal was dismissed for failure to prosecute. Thus, any issues related to the assessment and collection activities of his tax liabilities for the years in question are finally decided.

Anti-Injunction Act and Declaratory Judgment Act

Even if the Court were to find that *res judicata*did not bar portions of this lawsuit, the Court would find that the Anti-Injunction Act, 26 U.S.C. § 7421(a),[5] and the Declaratory Judgment Act, 28 U.S.C. § 2201,[6] prohibit Plaintiff claims regarding the assessment and collection activities of Plaintiff's tax liabilities.

As part of the Internal Revenue Code, the Anti-Injunction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person ...." 26 U.S.C. § 7421(a). The "manifest purpose [of the Anti-Injunction Act] is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund."[7] *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 7 [9 AFTR 2d 1594] (1962). Thus, the focus of the Court's inquiry is whether the primary purpose of the relief requested is to restrain the collection and assessment of taxes or to enjoin the alleged actions of Defendants. *Linn v. Chivatero*, 714 F.2d 1278, 1282 [52 AFTR 2d 83-6052] (5th Cir.1983).

Insofar as Plaintiff complains of the inappropriateness of the classifications made by these officials and their authority to assess and collect taxes from Plaintiff, the Court finds that the Anti-Injunction Act bars this claim. The purpose of Plaintiff's relief is clearly to restrain the government's assessment and collection of these taxes.

In contrast, Plaintiff's allegation that Defendants maintained his name on a "blacklist" does not concern the assessment and collection of taxes. Plaintiff seeks to stop th use of such a list and to have his name removed from the list. It is clear that the

[5] The Anti-Injunction Act provides "no suit for the purpose of restraining the assessment or collection any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a).

[6] The Declaratory Judgment Act specifically excludes controversies regarding federal taxes. "In a case or controversy within its jurisdiction, ... except with respect to Federal taxes ... any court of the United States ... may declare the rights and other legal relations of any interested party seeking such declaration ...." 28 U.S.C. § 2201(a).

[7] "There is no dispute ... that the federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act." *Bob Jones University v. Simon*, 416 U.S. 725, 732 n.7 [33 AFTR 2d 74-1279] (1974). Thus, any analysis regarding the Anti-Injunction Act applies equally to Plaintiff's claims for declaratory relief.

primary purpose of the relief is akin to enjoining unconstitutional or illegal actions as opposed to restraining the collection and assessment of taxes. Accordingly, the Anti-Injunction and Declaratory Relief Act have no application to this claim.

Sovereign Immunity

Based on the above findings, all that arguably remains is Plaintiff's claim relating to Defendants' use of a ''blacklist.'' Therefore, the following analysis applies only to this claim.

Sovereign immunity operates as a complete bar to lawsuit against the United States. *See State of Florida Department of Business Regulation v. United States Department of the Interior*, 768 F.2d 1248, 1251 (11th Cir. 1985)(citations omitted). When sovereign immunity is invoked, the court must first determine whether the lawsuit is against the United States as sovereign. *Id.* (citations omitted). A plaintiff cannot escape the sovereign immunity problem simply by designating an officer as a defendant. *Id.*(citations omitted).

Generally, a suit for specific relief -- e.g., injunctive or declaratory relief -- against a named government official of the United States is deemed to be a suit against the sovereign. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687–88 (1949). ''Only where the official's conduct cannot be attributed to the sovereign because the official had no power to do the challenged acts can it properly be said that the action is not one against the United States as sovereign.'' *State of Florida Department of Business Regulation v. United States Department of the Interior*, 768 F.2d 1248, 1252 (11th Cir. 1985)(citations omitted). Thus, the focus is on whether a government official's conduct is so illegal that a suit for specific relief may be brought against the government officer in his individual capacity. Conduct which is considered ''so illegal'' is conduct that is outside the official's statutory powers or conduct that is within the official's statutory powers but the powers or exercise thereof are constitutionally void. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 702 (1949). ''In order to plead successfully that the acts of a government officer exceed his statutory authority a plaintiff must do more than simply allege that the actions of the officer are illegal or unauthorized.'' *Alabama Rural Fire Insurance Co. v. Naylor*, 530 F.2d 1221, 1226 (5th Cir. 1976).[8]

As part of the Internal Revenue Service Restructuring and Reform Act of 1998, enacted and effective as of July 22, 1998, section 3707 is an off-Code provision that prohibits the IRS from designating taxpayers as illegal tax protesters or any similar designation. *See* IRS Restructuring and Reform Act of 1998, § 3707(a)(1), Pub. L. 105-206, Title III, § 3707, July 22, 1998, 112 Stat. 778. Furthermore, under section 3707(a)(2), the IRS is required to remove such a designation from its individual master file and disregard any such designation located in a place other than the individual master file. Section 3707(c) states that the removal of any such designation is not required to begin before January 1, 1999. Thus, Congress has expressly legislated a prohibition against the maintenance of databases designating individuals as ''tax protesters.'' If Defendants are doing what this provision expressly prohibits, then they are acting *ulta vires* and can be made the object of specific relief. *See Larson*, 337 U.S. at 689. And, no waiver of sovereign immunity is necessary.

Even assuming, however, that this action is really against the United States as sovereign, the Court would still reject the Government's sovereign immunity defense. In 1976, Congress expressly waived the Government's sovereign immunity from prospective relief when it amended § 702 of the Administrative Procedure Act (''APA''). 5 U.S.C. § 702. *See Panola Land Buyers Ass'n v. Shuman*, 762 F.2d 1550, 1555 (11th Cir. 1985)(citing *Sheehan v. Army and Air Force Exchange Service*, 619 F.2d 1132, 1139 (5th Cir. 1980); 5 U.S.C. § 702). And, as noted above, the

[8] The Eleventh Circuit, in the *en banc* decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

Anti-Injunction and the Declaratory Judgment Acts do not prohibit this claim.

Failure to State a Claim for Relief

Any claim that this alleged blacklist somehow constitutes a ''bill of attainder'' is simply frivolous. A ''bill of attainder'' is ''a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without ... the protections of a judicial trial.'' *Nixon v. Administrator of General Services*, 433 U.S. 425, 468 (1977). To constitute a bill of attainder, the law must specifically identify the affected persons and must inflict punishment without the benefit of a trial. *Selective Service v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847 (1984). Accordingly, Plaintiff's claim for relief under this theory fails as a matter of law.

Plaintiff also contends that the use of the blacklist violated his Fifth Amendment right to due process by causing him to be vilified and the object of public shame, disgrace, ridicule and obluquy. Well settled is the principle that injury to reputation alone is not sufficient to state a claim for violation of due process. *Cypress Ins. Co. v. Clark*, 144 F.3d 1435, 1436–37 (11th Cir. 1998)(citing *Paul v. Davis*, 424 U.S. 693, 712 (1976)). When claiming an injury to reputation, a plaintiff is required to show that ''the government official's conduct deprived the plaintiff of a previously recognized property or liberty interest in addition to damaging the plaintiff's reputation.'' *Cypress Ins. Co. v. Clark*, 144 F.3d 1435, 1436–1437, (citing *Paul*, 424 U.S. at 712). This rule is referred to as the ''stigma-plus'' rule, and ''[it] is designated to prevent the Due Process Clause from becoming an all-purpose constitutionalization of state tort law.'' *Id.* at 1437 (citing *Paul*, 424 U.S. at 701). Plaintiff's allegations fall short of this standard.

Plaintiff faces other hurdles regarding his due process claim. The only injury alleged to be suffered by Plaintiff in this lawsuit is his obligation to pay his tax liabilities for the years 1990 through 1992. As explained above, Plaintiff is barred by the doctrine of *res judicata* and by the Anti-Injunction and Declaratory Acts from bringing such a claim, even collaterally.

Even assuming that Defendants violated Plaintiff's constitutional rights by using a so-called ''blacklist,'' Plaintiff does not have standing to request declaratory and injunctive relief against these Defendants because he has not alleged a threat of future harm or the need for prospective relief. Article III of the United States Constitution requires that a ''case'' or ''controversy'' be present in order to con-fer jurisdiction on federal courts for a par-ticular claim; standing to sue is an essen-tial part of that requirement. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). In *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Supreme Court held that a plaintiff who may have been illegally choked by police, who would have had standing to state a claim for damages, did not have standing to seek injunctive relief against the police, absent evidence that such action will occur in the future. *Id.* at 110. Moreover, without evidence of future harm, no immediate threat exists to war-rant injunctive relief. *Id.* at 105.

Leave to Amend

Plaintiff asks that the Court grant him leave to amend his complaint, if it finds that he failed to state a claim for relief. Federal Rule of Civil Procedure 15(a) provides that after a responsive pleading is filed ''a party may amend [the complaint] ... only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.'' Granting leave to amend following a dismissal of a complaint for failure to state a claim is particularly appropriate. *Thomas v. Farmville Mfg. Co., Inc.*, 705 F.2d 1307, 1307–08 (11th Cir. 1983).

The Court shall allow Plaintiff leave to amend his complaint. In granting Plaintiff leave to amend the complaint, the Court is not granting Plaintiff leave to add new claims. Instead, the Court is granting Plaintiff leave to amend the complaint to state a claim under the ''stigma-plus'' standard for violations of due process, if appropriate; to add an allegation about the statutory provision allegedly being violated by De-

fendants, and to allege facts to show that he has standing to seek prospective relief for his due process claim.

Furthermore, when Plaintiff amends the complaint, he shall follow Federal Rule of Civil Procedure 10 by naming in the caption each defendant being sued. Plaintiff shall further abide by Federal Rule of Civil Procedure 8 by providing a short and plain statement of his remaining stigma-plus claim and Rule 10(b) by making the contents of each numbered paragraph limited to a statement of a single set of circumstances.

Accordingly, it is ORDERED:

1. The Government's Motion to Dismiss Amended Complaint (Dkt. 27) is GRANTED without prejudice to Plaintiff to file an amended complaint in accordance with the above.

2. Plaintiff shall have ten (10) days leave to amend the complaint, if appropriate. Failure to amend the complaint within this ten-day period will result in the dismissal of this lawsuit with prejudice.

3. The Court's order staying discovery and relieving the government from Case Management reporting requirements (Dkt. 44) continues to be in effect, pending Plaintiff filing an amended complaint and the government answering or otherwise responding thereto.

DONE AND ORDERED in Chambers this 23 day of August, 2002.

HENRY LEE ADAMS, JR.

UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

Plaintiff, appearing pro se

ORDER

It is ORDERED:

1. Plaintiff's "Demand that Judicial Notice Pursuant to Rule 201 Fed. R. Evid. be Taken of the Attached Mike Brown Article . . ." (Dkt. 18) is DENIED.

2. Plaintiff's Demand for Judicial Notice and Rule 11 Sanctions and Sanctions Pursuant to 28 U.S.C. § 1927 Due to Contents of "Response" of Mac Cauley Signed by Bruce T. Russell Dated October 11, 2001 (Dkt. 20) is DENIED.

3. Plaintiff Durwin Walter Davis' Renewed Motion for Rule 11 Sanctions and Sanctions Pursuant to 28 U.S.C. § 1927 Because Mac Cauley's and Bruce T. Russell's Latest Response Continues to be Frivolous (Dkt. 22) is DENIED.

4. Plaintiff's Demand for Hearing to Compel Case Management Under Rule 26 Fed. R. Civ. P. (Dkt. 26) is DENIED.

5. Plaintiff's Motion to Strike (Dkt. 29) is DENIED.

6. Plaintiff Durwin Walter Davis' Request for Clarification of the United States District Court's Purpose of Form "AO 458 (Rev. 10/95) Appearance" and this Court's Obvious Waiver of Notice of Appearance Requirements for Various Attorneys throughout the above Styled Cause (Dkt. 41) is DENIED.

7. Objection by Plaintiff and Motion for De Novo Review by U.S. District Judge of Magistrate Snyder's Ruling on the Attached Order Dated March 14, 2002 Pursuant to 28 U.S.C. § 636 (Dkt. 43) is DENIED.

8. Plaintiff Durwin Walter Davis' Request for Clarification of How This Court in its March 27, 2002 Order Can Shut Down All Discovery and Staying of a Case Management Conference Sought to Be Compelled by the Plaintiff in His Ignored Demand & Demand to State in Writing, Findings of Fact and Conclusion of Law on All Court Orders (Dkt. 45) is DENIED.

9. Plaintiff's Motion to Strike as Shan (Dkt. 48) is DENIED.

DONE AND ORDERED in Chambers this 23 day of August, 2002.

HENRY LEE ADAMS, JR.

UNITED STATES DISTRICT JUDGE

¶2002-5398

Roger E. FILSON, PLAINTIFF v. UNITED STATES OF AMERICA, DE-

FENDANT. U.S. District Court, Western Dist. of Texas, (DC TX) Civil Action No.: SA-02-CA-285-EP, Aug. 14, 2002. Years 1990, 1993, 1994, 1995, 1996, 1997. Decision for Govt.

1. Collection due process—review of administrative determination—jurisdiction. Taxpayer's IRC §6330 complaint as to 2 of 6 years at issue was dismissed for lack of jurisdiction: Tax Court had exclusive jurisdiction over claims involving tax liability. *Reference:* United States Tax Reporter ¶63,305.01(10). IRC §6330.

2. Collection due process—review of administrative determination—frivolous return penalties—summary judgment. IRS's administrative determination to proceed with collection of IRC §6702 penalty against tax protester who filed "zero" returns was upheld on summary judgment: taxpayer's returns were substantially incorrect where he failed to report nonemployee compensation and took frivolous return position that no IRC section subjected him to income taxation. Also, taxpayer's other claims challenging IRS's authority to collect taxes and assess frivolous return penalties, procedural complaints and assertions that district courts weren't bound by Tax Court decisions, failed to raise any material fact issues. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(10). IRC §6330; 6702.

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION,

ORDER CONCERNING DEFENDANT'S MOTION TO DISMISS

EDWARD C. PRADO UNITED STATES DISTRICT JUDGE

On March 21, 2002, the plaintiff in the above numbered and styled cause filed a complaint against the defendant to appeal the result of a Collection Due Process (CDP) hearing conducted by the Internal Revenue Service (IRS). In his complaint, the plaintiff challenged the assessment of a $500 fine based on the IRS's determination that the plaintiff's 1994, 1995, 1996, and 1997 tax returns were frivolous and challenged the IRS's determination for unpaid income taxes for the tax years 1990 and 1993.[1] The plaintiff complained the CDP hearing was not valid because it was not held pursuant to the law and because the "determinations at issue are frauds and a mockery." In response, the defendant moved to dismiss the plaintiff's claim in regards to tax years 1990 and 1993 and moved for summary judgment for the remaining claims.

Defendant's Motion to Dismiss

[1] The defendant first argues that this Court lacks subject matter jurisdiction to hear the plaintiff's complaints about tax years 1990 and 1993. The defendant maintains that the Tax Court has jurisdiction over these claims because the plaintiff is complaining about the amount of unpaid income tax. The plaintiff's appeal arises under section 6330 of the Internal Revenue Code. According to this section, a federal district court has jurisdiction over an appeal of a determination only if the Tax Court does not have jurisdiction. *See* 26 U.S.C. § 6330(a). Although the plaintiff contends the Tax Court does not have jurisdiction because the conditions of section 6330(d) have not been met and because "the Tax Court is not a Court of Law but only a court of record," the Tax court has jurisdiction over the plaintiff's complaints about tax years 1990 and 1993 because those claims involve tax liability. *See Lewis v. IRS*, No. H-00-1122, 2000 WL 1793954 [86 AFTR 2d 2002-6839] (S.D. Tex. Oct. 31, 2000), at 1–2; *see also* Treas. Reg. § 301.6330-1(f)(2)Q&A-F-3. As a result, this Court has no jurisdiction over those claims. Consequently, the Court GRANTS the defendant's motion to dismiss (docket entry #6-1) and DISMISSES the plaintiff's claims about tax years 1990 and 1993.

Standard of Review for Summary Judgment

In the usual case, the party who seeks summary judgment must show by affidavit

[1] According to the defendant's Motion to Dismiss or alternatively Motion for Summary Judgment, the plaintiff has an unpaid balance of $3,395.10 for 1990 and an unpaid balance of $1747.00 for 1993.

or other evidentiary materials that there is no genuine dispute as to any fact material to resolution of the motion. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.4 (1986); *Lavespere v. Niagra Machine & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990); *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). To satisfy this burden, the movant must either submit evidentiary documents that negate the existence of some material element of the nonmoving party's claim or defense or, if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmoving party's claim or defense. *See Celotex Corp.*, 477 U.S. at 325; *Lavespere*, 910 F.2d at 178.

Once the moving party has carried that burden, the burden shifts to the nonmoving party to show that summary judgment is not appropriate. The nonmoving party cannot discharge this burden by referring to the mere allegations or denials of the nonmoving party's pleadings; rather, that party must, either by submitting opposing evidentiary documents or by referring to evidentiary documents already in the record, set out specific facts showing that a genuine issue exists. *See Celotex*, 477 U.S. at 324. In order for a court to find there are no genuine material factual issues, the court must be satisfied that no reasonable trier of fact could have found for the nonmoving party or, in other words, that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict for the nonmovant. *See Liberty Lobby*, 477 U.S. at 249–50; Fed. R. Civ. P. 56(e).

Where the party opposing the motion for summary judgment will have the burden of proof on an essential element of his case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, summary judgment may be entered against him. *Celotex*, 477 U.S. at 322–24; *Fontenot*, 780 F.2d at 1194–95.

Defendant's Motion for Summary Judgment

The defendant argues that it is entitled to summary judgment because there is no genuine issue of material fact about the IRS's determination that the plaintiff's tax return was frivolous. Section 6702 of the Internal Revenue Code provides for a civil penalty in the amount of $500 for a taxpayer who files a tax return that is substantially incorrect, and based on a position which is frivolous. In the instant case, the summary judgment evidence shows that the plaintiff filed his federal income tax returns for the years 1994–99 and reported zero taxable wages. Despite this representation, the defendant presented documents that show the plaintiff's nonemployee compensation as $60,721.00 in 1995; $81,037.00 in 1996; and $109,373.00 in 1997. Although the defendant stated that the IRS has been unable to recover information on the plaintiff's 1994 tax return, the Court observes that the plaintiff reported no income on line seven of his Form 1040 for all four years. This evidence demonstrates that the plaintiff's returns were substantially incorrect.

The summary judgment evidence also shows that the plaintiff's return was based on a position that is frivolous. The plaintiff attached a document to his tax return detailing his position about why he believed his wages were not considered taxable income. The plaintiff's justification for reporting no taxable wages was expressed in a two page list of objections and legal arguments. The plaintiff's arguments included: that taxes do not have to be paid on the basis of a tax return, that no section of the Internal Revenue Code makes him liable to pay income taxes, and that because he has no foreign earned income no other section of the Internal Revenue Code provides for liability to pay income taxes. The United States Court of Appeals for the Fifth Circuit previously considered and rejected similar arguments in a summary opinion. *See Crain v. Commissioner*, 737

F.2d 1417 [54 AFTR 2d 84-5698] (5th Cir.1984).

In determining a tax protestor's arguments challenging the IRS's authority to levy taxes, the court of appeals reasoned that "[t]he constitutionality of our income tax system-including the role played within that system by the Internal Revenue Service and the Tax Court-has long been established." *Crain*, 737 F.2d at 1417–18 [54 AFTR 2d 84-5698]. The court of appeals explained that the courts "are not obligated to suffer in silence the filings of baseless, insupportable appeals presenting no colorable claims of error and designed only to delay, obstruct, or incapacitate the operations of the courts or any other governmental authority." *Id.* at 1418. This Court has considered and researched the plaintiff's arguments, and concluded that the plaintiff's arguments are baseless, unsupportable, and designed to obstruct the operations of the IRS. As a result, the defendant has shown that there is no genuine issue of material fact about the merits of the IRS's determination that his return was frivolous and that the $500 penalty was appropriate.

Although the plaintiff responded to the defendant's motion, he failed to raise a genuine issue of material fact. Instead, the plaintiff challenged the IRS's authority to collect taxes and assess a fine for filing a frivolous return, repeated his original procedural complaints used for making such determinations, and asserted that district courts are not bound by Tax Court decisions. These arguments, however, do not raise issues of material fact. Because the plaintiff has failed to raise a genuine issue of fact about the assessment of the fine, the defendant is entitled to summary judgment. Consequently, the Court GRANTS the defendant's motion for summary judgment docket entry #6-2).

SIGNED this 13th day of August, 2002.

EDWARD C. PRADO

UNITED STATES DISTRICT JUDGE

JUDGMENT

EDWARD C. PRADO UNITED STATES DISTRICT JUDGE

In accordance with the order issued by this Court on this same day, it is hereby ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of the defendant, the United States of America, and against the plaintiff, Roger E. Filson. Costs of this lawsuit shall be borne by the plaintiff.

SIGNED this 13th day of August, 2002.

EDWARD C. PRADO

UNITED STATES DISTRICT JUDGE

¶2002-5399

In Re: Robert C. JOHNSON, Debtor. Robert C. JOHNSON, PLAINTIFF v. COMMISSIONER of Internal Revenue, DEFENDANT. U.S. Bankruptcy Court, Dist. of South Carolina, (Bktcy Ct SC) C/A No. 92-75816; Adv. Pro. No. 02-80185-W, Aug. 26, 2002. Earlier proceeding at (2002, Bktcy Ct SC) 90 AFTR 2d 2002-6106. Years 1981, 1982, 1984, 1985, 1986. Decision for Govt.

1. Tax claims in bankruptcy—violation of automatic stay—discharge injunction violation—summary judgment. Govt. was granted summary judgment on partner's IRC §7433 damages claim that IRS violated his automatic bankruptcy stay and discharge injunction: IRS couldn't have violated stay that had already ended before IRS commenced its allegedly offending conduct of issuing deficiency notice and participating in taxpayer's individual Tax Court case; discharge injunction didn't apply since unassessed but still assessable priority tax debt was excepted from discharge under 11 USC §523(a)(1)(A); and taxpayer didn't allege any other violative act by govt. meriting damages award under IRC §7433. Also, taxpayer's motion to reopen case was denied as moot. *Reference:* United States Tax Reporter ¶68,726.52(10); 68,726.52(27); 74,335.01(7). IRC §7433.

2. Partnership items—limitations periods—suspension—bankruptcy. Limitations periods didn't bar IRS's assessment against partner who filed bankruptcy while partnership case was pending in Tax Court:

period was suspended and remained open under IRC §6229(d) for 1 year after partnership case decision became final or under IRC §6229(f) for 1 year after taxpayer filed bankruptcy and partnership items became nonpartnership items. *Reference:* United States Tax Reporter ¶62,295.01(5). IRC §6229.

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA,

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Commissioner of Internal Revenue's (''Defendant'') Motion for Summary Judgment is granted as the undisputed material facts indicate that, as a matter of law, Defendant did not violate the automatic stay of 11 U.S.C. §362 or the discharge injunction of 11 U.S.C. §524 and that, accordingly, Robert C.Johnson (''Plaintiff'') has no basis for damages against Defendant pursuant to I.R.C. §7433(e). Because Defendant's Motion is granted, Plaintiff's Motion to Reopen Case is moot.

/s/

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

August 26, 2002.

ORDER

THIS MATTER comes before the Court upon the Motion to Reopen Case filed by Robert C. Johnson (''Plaintiff'') and the Motion for Summary Judgment filed by the Commissioner of Internal Revenue (''Defendant'').[1] Plaintiff moves to reopen his main case in order to prosecute his adversary proceeding against Defendant in which Plaintiff seeks damages of $5,000,000 pursuant to I.R.C. §7433 for Defendant's abusive, reckless, and negligent conduct as well as Defendant's intent to delay United States Tax Court proceedings. Plaintiff bases his damages claim upon Defendant's alleged violations of the automatic stay pursuant to 11 U.S.C. §362 and the discharge injunction pursuant to 11 U.S.C. §524.[2] According to Plaintiff, Defendant's actions in attempting to collect Plaintiff's tax deficiency violated these provisions of the Bankruptcy Code. Further, Plaintiff argues that the tax deficiency in question was discharged by his bankruptcy case. In addition to seeking $5,000,000 in damages, Plaintiff also asks the Court to order Defendant to cease further attempts to assess or collect the subject tax deficiency. In response, Defendant filed an Answer and also filed a Motion for Summary Judgment.[3] In his Motion for Summary Judgment, Defendant argues that there was no violation of the automatic stay because the stay was no longer in effect when the Internal Revenue Service (the ''Service'') mailed Plaintiff a Notice of Deficiency (the ''Notice'') and thereafter) participated in a proceeding in the United States Tax Court to resolve the issue of Plaintiff's tax deficiency. In addition, Defendant argues the Service did not violate the discharge injunction because the subject taxes were not discharged. According to Defendant, the taxes at issue were not assessed before the commencement of Plaintiff's bankruptcy case but were assessable after the commencement of the case. As such, the tax liability was not discharged pursuant to §523(a)(1)(A). Finally, Defendant claims that the Court lacks subject matter jurisdiction to consider Plaintiff's action for damages pursuant to I.R.C. §7433(a) and that the proper defendant is the United States, not the Commissioner of Internal Revenue. After considering the pleadings in the adversary proceeding, the evidence presented in support of the Mo-

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1 Plaintiff filed a Motion for Summary Judgment, and the Court scheduled a hearing on Plaintiff's motion for the same time as Defendant's Motion for Summary Judgment. At the hearing, however, Plaintiff withdrew his Motion for Summary Judgment.

2 Further references to the Bankruptcy Code shall be by section number only.

3 Defendant previously filed a Motion to Dismiss, which this Court treated in its Order entered on August 2, 2002. In the Order, the Court ruled that the Court had subject matter jurisdiction in this case as Plaintiff brought two causes of action created by the Bankruptcy Code. The Court also found that it did not lack personal jurisdiction based upon Plaintiff's improper service. Upon examining Plaintiff's service, the Court concluded Plaintiff properly served Defendant pursuant to Federal Rule of Bankruptcy Procedure 7004(b)(4).

tions, and the parties' arguments, the Court makes the following Findings of Fact and Conclusions of Law.[4]

FINDINGS OF FACT

1. Plaintiff was a limited partner in a tax shelter limited partnership, Oasis Date Associates.

2. By 1992, Oasis Date Associates was involved in a proceeding in the United States Tax Court.

3. Plaintiff filed a Voluntary Chapter 7 Petition on October 14, 1992.

4. When Plaintiff filed his bankruptcy petition, the Tax Court proceeding involving Oasis Date Associates was still pending.

5. Plaintiff received a Chapter 7 discharge on February 24, 1993.

6. On May 26, 1993, the Service mailed Plaintiff the Notice indicating that Plaintiff owes a deficiency for federal income tax liability for the tax years of 1981, 1982, 1984, 1985, and 1986. The Notice provides that Plaintiff has ninety days to contest the determination of his tax deficiency.

7. The parties agree that the disputed tax deficiency stems entirely from Plaintiff's participation in Oasis Date Associates, and the Notice outlines the grounds for the deficiency as the following:

a. Plaintiff did not sustain a net operating loss for the 1985 tax year; therefore, Plaintiff cannot carry back a net operating loss to the 1982 tax year;

b. Plaintiff's distributable share of ordinary income from Oasis Date Associates for the tax years of 1984, 1985, and 1986 is different from what was claimed on Plaintiff's returns. As a result, the Service increases Plaintiff's taxable income for these tax years to reflect Plaintiff's accurate share of distributions from the partnership;

c. Plaintiff's investment tax credit carryback from the 1985 tax year to the 1982 tax year is not allowable;

d. Plaintiff's investment tax credit carryback from the 1984 tax year to the 1981 tax year is not allowable; and

e. Because Plaintiff's income tax has increased for the 1984 and 1985 tax years, the investment tax credits that he attempted to carry back are now fully absorbed. There is no remaining credit that he can carry back.

8. On August 23, 1993, Plaintiff filed a petition in the United States Tax Court challenging the adjustment of his tax liability as set forth in the Notice.

9. To date, The United States Tax Court has not resolved the amount, if any, of the deficiency Plaintiff owes the Internal Revenue Service.

CONCLUSIONS OF LAW

A. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to adversary proceedings under the Bankruptcy Code by Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. Summary judgment is appropriate "if the evidence is such that a reasonable jury could not return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether summary judgment is appropriate, the court must view all evidence in the light most favorable to the non-moving party. See Matsushita Elec. Indus. Co v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

The moving party has the initial burden to show that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Celotex Corp v. Catrett, 477 U.S. 317, 332 (1986). Once this initial showing is made, the burden of

[4] The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

production shifts to the nonmoving party. The nonmoving party must "go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324; see also Fed. R. Civ. P. 5(e). In meeting this burden, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts and must demonstrate there is a genuine issue for trial." Matsushita, 475 U.S. at 586–87; see also Campbell v. Deans (In re J.R. Deans Co.), 249 B.R. 121, 128 (Bankr. D.S.C. 2000) (quoting Dunes Hotel Assoc. v. Hyatt Corp. (In re Dunes Hotel Assoc.), 194 B.R. 967, 976 (Bankr. D.S.C. 1995)) ("'[T]he party opposing summary judgment may not merely rely on his pleadings but must set forth specific facts which controvert the moving party's facts and which show the existence of a genuine issue for trial.'"). The Court should grant summary judgment "against a party who fails to make a showing sufficient to establish the evidence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Dunes Hotel Assoc., 194 B.R. at 976 (citing Celotex, 477 U.S. at 322).

B. Application of the Summary Judgment Standard to Plaintiff's Cause of Action for Violation of the Automatic Stay.

[1] Section 362(c)(2) provides that the automatic stay remains in effect until the earliest of the close of a case, the dismissal of a case, or the time a discharge is granted or denied. The undisputed facts indicate that the Court granted Plaintiff his discharge on February 24, 1993. On that date, the stay ended. The undisputed facts also indicate that the actions Plaintiff complains of, the Service submitting the Notice and the Service's continued attempts to collect the tax deficiency by participating in the Tax Court case, did not begin until May 26, 1993. Indeed, Defendant's actions took place after the stay ended, and, because the stay was no longer in effect, Defendant could not have violated the automatic stay. Accordingly, the Court finds that Defendant is entitled to summary judgment on Plaintiff's cause of action that seeks damages for a violation of the automatic stay.

C. Application of the Summary Judgment Standard to Plaintiff's Cause of Action for Violation of the Discharge Injunction.

Plaintiff argues that Defendant violated the discharge injunction when the Service mailed the Notice and participated in the Tax Court proceeding to resolve the amount of Plaintiff's tax deficiency. According to Plaintiff, the tax deficiency that the Service attempts to assess was discharged by the entry of this Court's discharge order. Defendant disagrees and argues that the tax deficiency falls within the definition of §507(a)(8)(A)(iii) and was consequently exempted from discharge by §523(a)(1)(A). In the simplest terms, the Court must decide whether the tax deficiency was discharged in Plaintiff's bankruptcy case.

To begin its analysis, the Court notes that a discharge order generally discharges all debts that arose before the debtor filed for bankruptcy. See §727; Waugh v. Internal Revenue Service (In re Waugh), 260 B.R. 806, 811 [87 AFTR 2d 2001-1257] (N.D. Tex. 2001). Certain debts, however, are not included in this discharge. For example, §523(a)(1)(A) provides that taxes entitled to a priority status under §507(a)(8) are excepted from discharge. To determine whether the tax deficiency falls within §507(a)(8)(A)(iii) as Defendant argues, the Court must decide (1) whether the tax was not assessed before the commencement of Plaintiff's bankruptcy case and (2) whether the tax was assessable after the commencement of Plaintiff's bankruptcy case.

Regarding the first prong, the Court concludes that the Service did not assess Plaintiff's tax deficiency before the commencement of Plaintiff's bankruptcy case and in fact has not yet assessed Plaintiff's tax deficiency. A tax deficiency is assessed for purposes of rendering the assessment nondischargeable not when the notice of the assessment is filed but when the assessment becomes final. See Franchise Tax

Board v. Bracey (In re Bracey), 77 F.3d 294, 295 (9th Cir. 1996). Once a taxpayer files a petition disputing the amount of a tax deficiency with the Tax Court, the filing of that petition stays all further assessment and collection activity until the Tax Court decision is final. See I.R.C. §6213(a); Doerge v. United States (In re Doerge), 181 B.R. 358, 363 [75 AFTR 2d 95-2517] (Bankr. S.D. Ill. 1995). Once the Tax Court renders its decision, it becomes final upon the expiration of a ninety day appeal period. See I.R.C. §§7481(a)(1), 7483; Doerge, 181 B.R. at 363. If no appeal is filed, the government then has sixty days following expiration of the appeal period in which to make the assessment. See I.R.C. §6503(a)(1); Doerge, 181 B.R. at 363.

Applying this law to the undisputed facts of the case, it is clear that the tax deficiency was not assessed before Plaintiff commenced his bankruptcy case. Indeed, the Service has merely filed a Notice alerting Plaintiff of a tax deficiency and participated in the Tax Court proceeding, and neither of these actions resulted in an assessment. Moreover, the Tax Court has not yet reached a decision concerning the amount of Plaintiff's tax deficiency, and the Service cannot assess Plaintiff's taxes until this decision is final and the time for an appeal has expired. Accordingly, the Court finds that the Service did not assess the subject taxes before the commencement of Plaintiff's bankruptcy case and that Defendant thereby satisfies the first prong of §507(a)(8)(A)(iii).

[2] Next, the Court must determine whether the Internal Revenue Service has the ability to assess the deficiency after Plaintiff's petition date. Whether the liability was assessable after the commencement of the case is determined by the Internal Revenue Code's provisions for when assessments can be made. See Waugh, 260 B.R. at 813. Generally, the Internal Revenue Service has three years from the date the return is filed during which it may audit a taxpayer's return and assess a deficiency. See I.R.C. §6501(a); Fox v. United States (In re Fox), 172 B.R. 247, 249 (Bankr. E.D. Tenn. 1994); Myron M. Sheinfeld et al., Collier on Bankruptcy Taxation, ¶TX4.02[1][iv] (15th ed. rev. 2001). This case, however, involves a tax deficiency relating to Plaintiff's participation in a partnership, and a different standard of limitations applies to partnership taxes. See Waugh, 260 B.R. at 813. In cases of partnerships, the Internal Revenue Service must make assessments within three years after the later of the date on which the partnership files its information return or the due date for filing the information return. See I.R.C. §6229(a); Waugh, 260 B.R. at 813. The period of limitations is suspended not by a notice of deficiency to the individual partners but by a final partnership administrative adjustment (''FPAA'') notice mailed to the tax matters partner. See I.R.C. §6229(d); Waugh, 260 B.R. at 813. The period of limitations is suspended by a FPAA until one year after the deadline for individual partners to file a petition contesting the FPAA or, if such a petition is filed, until one year after a final decision by the Tax Court. See I.R.C. §6229(d); Waugh, 260 B.R. at 813.

Because a Tax Court proceeding concerning Oasis Date Associates was pending when Plaintiff filed bankruptcy, the Court concludes that, pursuant to I.R.C. §6229(d), the Service could assess the tax after the Tax Court entered its decision, and, in this instance, the assessment could occur after the date Plaintiff's bankruptcy case commenced. See Waugh, 260 B.R. at 813. Moreover, the Service had the ability to assess the tax, which became a nonpartnership item when Plaintiff filed bankruptcy, after the commencement of Plaintiff's bankruptcy case pursuant to I.R.C. §6229(f)(1). I.R.C. §6229(f)(1) provides the Service a one year period after the date on which an item became a nonpartnership item to assess it. Because of these provisions, the Court concludes that the Service could assess the tax deficiency after the commencement of Plaintiff's bankruptcy case. Accordingly, the Court finds that the second prong of §507(a)(8)(A)(iii) is satisfied and that the disputed tax deficiency was exempted from Plaintiff's discharge.

Because the tax deficiency was not discharged, neither Defendant nor the Service violated the discharge injunction when the Service mailed the Notice to Plaintiff and attempted to collect the tax deficiency. The undisputed material facts indicate that Defendant is entitled to a judgment as a matter of law, and the Court grants Defendant's Motion for Summary Judgment as to Plaintiff's cause of action seeking damages for a violation of the discharge injunction.

D. Application of the Summary Judgment Standard to Plaintiff's Action for Damages under I.R.C. §7433.

Defendant also moved for summary judgment on the grounds that a bankruptcy court lacks subject matter jurisdiction to consider Plaintiff's claim for damages under I.R.C. §7433. The Court disagrees with Defendant's assessment of the Court's jurisdiction under I.R.C. §7433; however, in light of the ruling that summary judgment is appropriate for Plaintiff's causes of action alleging violations of the automatic stay and the discharge injunction, the Court believes it should grant summary judgment as well to Plaintiff's claim for damages pursuant to I.R.C.

Under I.R.C. §7433(e), a taxpayer can petition a bankruptcy court to recover damages against the United States if, in connection with any collection of a federal tax with respect to the taxpayer, an officer or employee of the Service willfully violates the automatic stay or the discharge injunction. To this Court, this provision clearly provides a bankruptcy court jurisdiction to consider the causes of action Plaintiff asserts. However, because the Court has concluded that the undisputed facts indicate as a matter of law that Defendant did not violate the automatic stay or the discharge injunction, there does not appear to a basis on which Plaintiff can recover damages against Defendant. Because Defendant has, under these undisputed facts, done nothing that merits a damages award under §7433, the Court grants Defendant's motion for this cause of action as well.

Finally, the Court notes that, although it is granting Defendant's summary judgment motion in full, it does so knowing that Plaintiff has a pending proceeding in the Tax Court that is scheduled for hearing in October 2002. This Tax Court proceeding should finally determine the amount of tax deficiency, if any, Plaintiff owes the Service. The Tax Court has great expertise in handling these matters and this Court is confident that Plaintiff will have a full and fair opportunity to have his day in court and to present any arguments he has to dispute the amount of the deficiency. Moreover, the Tax Court proceeding will bring closure to Plaintiff's tax situation, which, after nine years of disputing his liability for the deficiency, he understandably hopes to resolve.

Because the Court has granted Defendant's Motion for Summary Judgment regarding Plaintiff's three causes of action, the Court considers Plaintiff's Motion to Reopen Case moot.

CONCLUSION

From the arguments discussed above, it is therefore

ORDERED that Defendant's Motion for Summary Judgment is granted as the undisputed material facts indicate that, as a matter of law, Defendant did not violate the automatic stay of §362 or the discharge injunction of §524 and that, accordingly, Plaintiff has no basis for damages against Defendant pursuant to I.R.C. § 7433(e).

IT IS FURTHER ORDERED that Plaintiff's Motion to Reopen Case is moot.

AND IT IS SO ORDERED.

/s/

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

August 26, 2002.

¶2002-5400

Ronnie E. KEAHEY, PLAINTIFF v. Sharon M. ROBERTS, Department of Treasury-Internal Revenue Service and State of Alabama Department of Reve-

nue, DEFENDANTS. U.S. District Court, Southern Dist. of Alabama, (DC AL) Case Number: CV-01-560-CB-S, Aug. 29, 2002. Decision for Govt.

1. Lien property—funds in custody of court. IRS's motion for distribution of funds was granted. *Reference:* United States Tax Reporter ¶63,215.02(246).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA,

ORDER OF DISTRIBUTION

CHARLES R. BUTLER, JR. UNITED STATES DISTRICT CHIEF JUDGE

[1] Upon consideration of Motion for Order of Distribution filed by the named defendant, Department of Treasury Internal Revenue Service, this Court finds the motion well-taken and appropriate.

It is hereby ORDERED, ADJUDGED, and DECREED, that the clerk is directed to pay by check payable to the United States the sum of $59,874.29, plus interest which may have accrued, and to send said amount to the following address:

Department of Justice

Tax Division, Civil Trial Section

Attention: Wendy Vann, Room 6222

P.O. Box 14198

Ben Franklin Station

Washington D.C. 20044

CHARLES R. BUTLER, JR.

UNITED STATES DISTRICT CHIEF JUDGE

August 29, 2002

¶2002-5401

Estate of Beverly W. POWELL, John E. Lane, III, Executor, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Western Dist. of Virginia, (DC VA) Civil Action No. 6:00cv0004, Aug. 27, 2002. On remand from (2002, CA4) 89 AFTR 2d 2002-2026, 286 F3d 723, 2002-1 USTC ¶50372, affirming in part, and reversing and remanding in part (2001, DC VA) 88 AFTR 2d 2001-5400. Earlier proceedings at (2001, DC VA) 87 AFTR 2d 2001-1107, 2001-1 USTC ¶50327; (2000, DC VA) 86 AFTR 2d 2000-6678, 2000-2 USTC ¶50812; and (2000, DC VA) 86 AFTR 2d 2000-5310. Date of death 7-27-95. Years 1989, 1990, 1991, 1992, 1993, 1994. Decision for Govt.

1. Recovery of erroneous refunds—limitations periods—material misrepresentations—counterclaims—gift taxes—refunds—gifts vs. compensation for services. On remand, judgment was en-tered in govt.'s favor on its counterclaim against estate executor in amount stated plus interest. *Reference:* United States Tax Reporter ¶65,325.03(30); 74,055.01(10); 74,025.01(45). USTR Estate & Gift Taxes ¶65,325; 25,115.01(92); 74,225.01(10). IRC §2511; 6532; 7402; 7405; 7422.

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RICHARD G. JACOBUS VSB No. 41579 Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 227 Ben Franklin Station Washington, D.C. 20044 Telephone: (202) 616-0553 Counsel for the United States

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION,

AGREED ORDER DIRECTING ENTRY OF JUDGMENT ON THE UNITED STATES' COUNTERCLAIM

THIS MATTER CAME upon the mandate of the U.S. Court of Appeals for the Fourth Circuit, issued June 26, 2002, and the Court being sufficiently advised, IT IS HEREBY ORDERED as follows:

1. **[1]** The Clerk is directed to enter judgment in favor of the United States on its counterclaim, and against the plaintiff, John E. Lane, III, Executor of the Estate of Beverly W. Powell, in the amount of $21,794.46, plus interest according to law; and

2. The parties having stipulated that the plaintiff has paid the foregoing judgment, including interest, the Clerk is further directed to mark this judgment satisfied; and

3. The Clerk is further directed to close this case; and

4. The Clerk shall forward copies of this Order to all counsel of record below.

ENTERED At Lynchburg, Virginia this 27th day of August, 2002.

HONORABLE NORMAN K. MOON

UNITED STATES DISTRICT JUDGE

¶2002-5402

In the Matter of: Samuel H. RANGE, Debtor. Samuel H. RANGE; Connie C. RANGE, APPELLANTS v. UNITED STATES OF AMERICA, APPELLEE. U.S. Court of Appeals, Fifth Circuit, (CA5) No. 00-21152, Aug. 20, 2002. District Court, (2000, DC TX) 86 AFTR 2d 2000-7185, 256 BR 868, 2001-1 USTC ¶50102, affirming (2000, Bktcy Ct TX) 85 AFTR 2d 2000-1462, and (2000, Bktcy Ct TX) 85 AFTR 2d 2000-1385, 2000-1 USTC ¶50216, on remand from (1999, DC TX) 83 AFTR 2d 99-2183, 245 BR 266, 99-1 USTC ¶50457, affirmed. Years 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990. Decision against Taxpayers.

1. Tax claims in bankruptcy—dischargeabilty—fraud—proof—bankruptcy court procedure—motion to vacate—independent equitable action—litigation costs and fees—prevailing party. 5th Cir. affirmed nondis-chargeability of husband's tax debts: tax-payers' argument that taxes were covered by Chap. 7 discharge, and that IRS's fail-ure to timely reassess precluded it from collection, was rejected. Nondischarge under 11 USC §523(a)(1)(C), taxpayer's qualification for which wasn't disputed, re-quired no additional action by IRS and wasn't subject to §524(a)(2)'s permanent injunction. Also, taxpayers' reliance on IRS's subsequent abatement as defense to collection was misplaced where IRS had no legal authority to make such abatement; and taxpayers' independent action for relief from judgment under F.R.Bankr.P. 60(b) and motion for litigation costs and fees were properly denied. *Reference:* United States Tax Reporter ¶68,726.52(27); 68,726.52(3); 68,726.527(15); 68,726.52(27); 68,726.52(5); 74,305.01(40); 74,305.01(3). IRC §7430.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,

Appeal from the United States District Court For the Southern District of Texas, Houston Division

Before JONES, WIENER, and PARKER, Circuit Judges.

PER CURIAM:*

Appellants Samuel H. Range and Connie C. Range (collectively hereinafter "Ranges") appeal the district court's decision affirming the bankruptcy court's ruling pursuant to an adversary proceeding wherein the bankruptcy court held that Mr. Range's income tax liability for the 1983 through 1985 tax years was not discharged in his 1992 Chapter 7 bankruptcy. The Ranges also challenge the denial of their Rule 60(b) motion/independent action for relief from judgment and their motion for attorney's fees and costs. For the reasons that follow, we affirm.

BACKGROUND

The Ranges were married in 1980. Prior to 1980, Mr. Range had filed income tax returns, but Mrs. Range had not. For the 1980 tax year, the Ranges were granted an extension of time, until August 15, 1981, to file their 1980 joint income tax return. The Ranges did not file their 1980 return,

* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

however, until March 1983. Over the next several years, the Ranges filed for several more extensions of time but failed to ever file their income tax returns. In June 1987, after being contacted by the Criminal Investigation Division of the Internal Revenue Service (hereinafter ''IRS''), the Ranges filed their 1981 through 1985 income tax returns. No payment of the taxes was made, however, either prior to or contemporaneously with the filing of the 1981 through 1985 tax returns.

Although extensions were requested, the Ranges also failed to timely file their 1986 through 1989 income tax returns. After requesting an extension, the Ranges timely filed their 1990 return including a payment of $1,000 toward their reported tax liability. In 1991, The Ranges were charged in connection with their failure to file timely income tax returns. In return for dropping the charge against him for the 1984 tax year and all charges against Mrs. Range for the 1983 through 1985 tax years, Mr. Range pleaded guilty to charges of willful failure to file timely income tax returns for 1983 and 1985. In 1992, Mr. Range filed for Chapter 7 bankruptcy and received a discharge under 11 U.S.C. § 727. In May 1995, the IRS assessed penalties against the Ranges for fraud in connection with their taxes for the years of 1983 through 1986. On May 11, 1995, the IRS sent Mr. Range a Notice of Deficiency for Civil Fraud Penalties for the 1983 through 1985 tax years. On the same day, a joint notice was sent to the Ranges for fraud penalties for 1986. In July 1995, Mr. Range filed an adversary proceeding in the bankruptcy court seeking a determination that his income tax liability and penalties for the tax years of 1981 through 1985 were discharged in his 1992 bankruptcy. Mr. Range also sought damages from the IRS for allegedly violating the discharge injunction pursuant to 11 U.S.C. § 524 by sending him deficiency notices on May 11, 1995. Subsequently, the IRS agreed to withdraw the deficiency notices in exchange for Mrs. Range's agreement to file her own Chapter 7 bankruptcy. An Agreed Order was entered requiring withdrawal of the deficiency notices and an injunction against administrative collection efforts during the pendency of the adversary proceeding.

Mrs. Range filed for Chapter 7 bankruptcy on August 8, 1995. Despite entry of the Agreed order, the IRS failed to withdraw the deficiency notices and attempted to collect from Mrs. Range. In September 1995, the Ranges filed a motion for contempt against the IRS for violating the Agreed Order. The motion resulted in the entry of a second Agreed Order declaring the deficiency notices for the 1983 through 1986 tax years null and void; ordering the IRS not to take action to assess and/or collect pre-petition taxes, interest, or penalties while the adversary proceeding and Mrs. Range's bankruptcy petition were pending; and requiring the IRS to credit one of the Ranges' civil fraud penalties in the amount of $3,750.

Mrs. Range was granted a discharge in bankruptcy on April 5, 1996, and subsequently filed an adversary proceeding to determine the dischargeability of her tax liability and penalties. The two adversary proceedings were consolidated on September 16, 1996. In a Joint Pre-Trial Order, the government conceded that the penalties against Mr. Range for the years 1981 through 1988 and the penalties against Mrs. Range for the years 1981 through 1990 were discharged in their respective Chapter 7 bankruptcies pursuant to 11 U.S.C. § 523(a)(7). The bankruptcy court held a trial on the remaining matters in September 1997.

In February 1998, the bankruptcy court issued its Findings of Facts and Conclusions of Law wherein the bankruptcy court determined that the Ranges: (1) had a duty to pay the tax liability at issue; (2) knew that they had a duty to file tax returns and pay taxes; and (3) had the financial ability to pay the taxes but voluntarily and intentionally chose not to pay. The bankruptcy court further found that the ''IRS actually recognized the 'discharge' in Bankruptcy of the Ranges' liability and abated the taxes in question.'' Notwithstanding its findings regarding discharge and abatement, the bankruptcy court concluded that the tax liability remained a valid debt still

owing and subject to collection. The bankruptcy court also found that Mr. Range suffered no damages from the issuance of the deficiency notices that were not already compensated for by the Agreed Order crediting the Ranges' liability for the $3,750 civil fraud penalty. Additionally, the bankruptcy court noted that regardless of the Agreed Order, "the United States ha[d] not waived sovereign immunity from liability for damages for such a violation," and thus, damages were not recoverable. Premised upon its findings of willful evasion and the existence of a valid debt, the bankruptcy court rendered a Final Judgment on April 13, 1998, ordering that Mr. Range's income tax liabilities for 1981 through 1985 and Mrs. Ranges's income tax liabilities for 1981 through 1990 were not dischargeable pursuant to 11 U.S.C. § 523(a)(1)(C). The Final Judgment also ordered that Mr. Range was not entitled to damages from the IRS on his claim for alleged violation of the discharge injunction provided under 11 U.S.C. § 524(a)(2).

The Ranges appealed the bankruptcy court's decision to the district court. In March 1999, the district court affirmed the bankruptcy court's decision holding that the Ranges' tax liability was not discharged in bankruptcy and remained a valid debt. The district court vacated the bankruptcy court's decision with respect to the award of damages, however, and remanded the issue to the bankruptcy court for further consideration. Although the bankruptcy court had addressed the recovery of damages under 11 U.S.C. § 106, the Ranges argued on appeal that damages were recoverable under 26 U.S.C. § 7430. Because the bankruptcy court's factual findings addressed recovery only under § 106, the issue was remanded to determine whether the Ranges satisfied the requirements for recovery of damages under § 7430.

While the appeal was pending in the district court, the Ranges requested the Inspector General's office to investigate their tax matter. In June 1999, the Range allegedly received information from an investigator at the Inspector General's office indicating that the certified tax transcripts and certificates of assessment admitted at trial were falsified and testimony of the government's witnesses was perjured. In July 1999, the Ranges filed a motion for costs and fees under 26 U.S.C. § 7430 and a motion for relief from judgment, or in the alternative, an independent action for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure as incorporated by Bankruptcy Rule 9024. In support of their § 7430 motion, the Ranges argued that they were entitled to fees and costs because they prevailed in their contention that the assertion of the fraud penalties violated the bankruptcy discharge injunction. The crux of the Ranges' argument in support of their motion for re-lief was that the government used falsified documents at trial and the government witnesses committed perjury that resulted in a fraud upon the court. The Ranges argued that but for the alleged falsified documents and perjurious testimony, they would have prevailed on the issue concerning the dischargeability of their tax liability and thus, they are entitled to relief from judgment.

Between August and November of 1999, the Ranges made two requests for an evidentiary hearing on their motions. The bankruptcy court denied the Ranges' motions in January 2000, without conducting a hearing. Because the Ranges' arguments in support of their Rule 60(b) motion for relief demonstrated that their motion was actually an independent action for relief, the bankruptcy court treated it as such.

Addressing the procedural aspects of the Ranges' motion for relief, the bankruptcy court stated that had the Ranges filed a Rule 60(b) motion, it would have been untimely in that the motion was not filed within the one year deadline from the judgment issued in February 1998. Treating the motion for relief as an independent action for relief under the savings clause of Rule 60(b), however, the bankruptcy court held that the motion still failed to satisfy the more lenient temporal requirement of being filed within a reasonable time. As to the Ranges' equitable arguments, the bankruptcy court further held that the "issues

were open to litigation, were litigated, and plaintiffs had more than a fair opportunity to make [their] claim or defense,'' and thus, were precluded by res judicata from re-litigating the issues in an independent action.

With respect to the § 7430 motion, the bankruptcy court held that the dischargeability of the tax liability was the primary object of the trial, the bankruptcy court's judgment, and the appeal to the district court, and notwithstanding the IRS's concession on the discharge of the tax penalties assessed against Mr. Range, the Ranges failed to show that they were the ''prevailing party'' at trial as that term is defined in § 7430(c)(4)(A) and as required for recovery. Because the bankruptcy court determined that the Ranges were not the prevailing party at trial and that relief from judgment was not warranted, the requests for an evidentiary hearing were also denied.

The Ranges again appealed to the district court. In November 2000, the district court affirmed the decision of the bankruptcy court. In so doing, the district court found that the fraud upon the court alleged by the Ranges did not rise to the level of fraud required under Rule 60(b) because ''[a] fraud upon the Court does not exist where a judgment has simply been 'obtained with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury.''' The district court held that the bankruptcy court did not abuse its discretion in denying the Ranges' motion for relief because an independent action is not a viable vehicle for re-litigating issues that were previously decided in a former action where a party was afforded a fair opportunity to make their claim or defense in that action. Upon finding that the Ranges were not the ''prevailing party'' at trial as required to recover under § 7430, the district court held that bankruptcy court did not abuse its discretion in denying the Ranges' § 7430 motion for fees and costs. Accordingly, the district court found that the bankruptcy court did not abuse its discretion in denying the Ranges' requests for an evidentiary hearing.

The Ranges raise three issues in the instant appeal. First, the Ranges maintain that the bankruptcy court erred in holding that Mr. Range is liable for income taxes for the years of 1983 through 1985. Second, the Ranges contend that the bankruptcy court abused its discretion by denying their Rule 60(b) motion/independent action for relief from judgment without conducting an evidentiary hearing. Finally, the Ranges assert that the bankruptcy court improperly denied their § 7430 motion for fees and costs.

STANDARDS OF REVIEW

When reviewing a bankruptcy case on appeal, we must accept the bankruptcy court's findings of fact, ''whether based on oral or documentary or evidence,'' unless they are clearly erroneous. Fed. R. Bankr. P. 8013; *In re Sims*, 994 F.2d 210, 217 (5th Cir. 1993). The bankruptcy court's conclusions of law are reviewed *de novo*. *In re Herby's Foods, Inc.*, 2 F.3d 128, 131 (5th Cir. 1993). We review the denial of a motion for relief from judgment under Rule 60(b) for abuse of discretion. *United States v. O'Keefe*, 169 F.3d 281, 286 (5th Cir. 1999); *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 599 (5th Cir. 1996). Similarly, we review the denial of an independent action for relief pursuant to Rule 60(b) under an abuse of discretion standard. *Carter v. Dolce*, 741 F.2d 758, 760 (5th Cir. 1984); *Fuentes v. Stackhouse*, 182 B.R. 438, 442 (E.D. Va 1995). We review a ruling on the award of attorney's fees under § 7430 for abuse of discretion, *Marre v. United States*, 117 F.3d 297, 301 [80 AFTR 2d 97-5523] (5th Cir. 1997), and ''[w]e can only reverse if we have a definite and firm conviction that an error of judgment was committed.'' *Wilkerson v. United States*, 67 F.3d 112, 120 [76 AFTR 2d 95-6902] (5th Cir. 1995) (internal quotations and citation omitted).

DISCUSSION

[1] The Ranges argue that the bankruptcy court erred in holding that Mr. Range is liable for income taxes for the

years of 1983 through 1985. Specifically, the Ranges assert that Mr. Range's tax liability was discharged in his 1992 Chapter 7 bankruptcy. The Ranges maintain that because the tax liability was discharged in bankruptcy and subsequently abated, the previous assessment was eliminated. The Ranges contend that any tax liability after discharge and abatement would require a reassessment of the tax pursuant to the Treasury Regulations. The Ranges argue that because the three-year statutory limitations period expired, and the tax liability was not properly reassessed within the limitations period by an assessment officer signing the summary record of assessment as required by the Treasury Regulations, 26 C.F.R. § 301.6203-1, no tax liability remains for the IRS to collect.

In support of this argument, the Ranges assert that the bankruptcy court found that Mr. Range's tax transcripts reflected the IRS's recognition of the discharge in bankruptcy and abatement of his tax liability. The government argues, however, that Mr. Range's tax liability was neither discharged in his 1992 bankruptcy nor abated. The government contends that although the Ranges' tax transcript contained an entry acknowledging Mr. Range's discharge in bankruptcy, Mr. Range's liability was excepted from discharge under 11 U.S.C. § 523(a)(1)(C) due to his willful attempt to evade or defeat the tax. The government further contends the entry acknowledging the discharge was a clerical error resulting from an IRS technician's erroneous determination that Mr. Range's liability was dischargeable. Additionally, the government asserts that the tax liability at issue was not abated, but rather transferred from the Ranges' joint master file account to a non-master file account in the name of Mrs. Range as a result of the technician's erroneous determination that Mr. Range's liability was dischargeable. Finally, the government argues that the IRS is authorized to abate a tax assessment only where the liability is: (1) excessive in amount; (2) is assessed after the expiration of the period of limitations properly applicable thereto; or (3) is erroneously or illegally assessed, and none of these circumstances apply to tax liability at issue.

The Ranges initiated adversary proceedings to determine whether their income tax liabilities were discharged in their separate Chapter 7 bankruptcies. Both the government and the Ranges presented the bankruptcy court with documentary evidence regarding Mr. Range's tax liability. The documents, however, reflected two different account balances and each party argued that they supported their respective position. The government's witnesses also testified that the taxes were not abated and the entry in the transcripts acknowledging a discharge was made in error.

Although the bankruptcy court found that the "IRS transcripts in evidence reflect[ed] that the IRS actually recognized the 'discharge' in Bankruptcy of the Ranges' liability and abated the taxes in question," the bankruptcy court found the documentary evidence to be merely one form of evidence of the tax liability and the oral testimony another form of evidence of the tax liability. The bankruptcy court found that the Ranges: (1) had a duty to pay the taxes at issues; (2) knew that to pay the taxes at issues; (2) knew that they had that duty; and (3) had the financial ability to pay the taxes but voluntarily and intentionally chose not to pay, and notwithstanding the IRS's recognition of the discharge in bankruptcy of the Ranges' liability and abatement of the taxes in question, a valid debt existed which was subject to collection and not dischargeable.

The Ranges' arguments fail for several reasons. Under 11 U.S.C. § 524(a)(2), a § 727 discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any [debt discharged under § 727] as personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(2). Pursuant to 11 U.S.C. § 727, the court shall grant a Chapter 7 debtor a discharge from all debts that arose before the date of the order for relief, unless one of the conditions enumerated in § 727 is present. 11 U.S.C. § 727. One such condition enumerated in § 727 is when the lia-

bility is excepted from discharge under § 523. 11 U.S.C. § 727(b). Section 523 excepts from discharge, liabilities for a tax with respect to which the debtor willfully attempted in any manner to evade or defeat. 11 U.S.C. § 523(a)(1)(C). Except for the provisions of § 523(b)[1] , there are no limitations imposed by § 523 on the non-dischargeable status of these types of liabilities. 11 U.S.C. § 523. Thus, a tax liability excepted from discharge under § 523(a)(1)(C), because of a willful attempt in any manner to evade or defeat such tax, is non-dischargeable as a matter of law, and no additional action is required by the creditor.[2] Furthermore, a tax liability excepted from discharge under § 523(a)(1)(C) is not protected from collection by the permanent injunction provided under § 524(a)(2).

In *In re Bruner*, 55 F.3d 195 [76 AFTR 2d 95-5024] (5th Cir. 1995), we approved a three prong test for determining whether a tax liability is dischargeable pursuant to § 523(a)(1)(C). In the case of a debtor who is financially able to pay his taxes, a debt is non-dischargeable when the debtor: (1) had a duty to pay the taxes at issue; (2) knew that he had that duty; and (3) voluntarily and intentionally chose not to pay. *Id.*at 197.

Applying *Bruner* to the instant case, the bankruptcy court found that the Ranges attempted to evade or defeat their tax liabilities for the years of 1983 through 1985 and thus found the liabilities to be non-dischargeable under § 523(a)(1)(C). The Ranges fail to address the non-dischargeable status of Mr. Range's tax liability pursuant to § 523(a)(1)(C).[3] Although the Ranges argue that oral testimony is insufficient to establish a tax liability, this argument is not persuasive.

The Ranges' argument is premised upon the validity of the underlying abatement. Abatement of income taxes is authorized when the unpaid portion of the assessment or any liability in respect thereof is: (1) excessive in amount; (2) assessed after the expiration of the period of limitation properly applicable thereto; (3) erroneously or illegally assessed. 26 U.S.C. § 6404(a). The tax liabilities at issue in the instant case do not fall into any of the three enumerated categories in § 6404(a), and the Ranges do not dispute the validity of the original tax assessments for the years of 1983 through 1985. Furthermore, an abatement executed outside of the scope of the statutory authority conferred by § 6404(a) is not effective. Although evidence was presented indicating that the IRS acknowledged Mr. Range's discharge in bankruptcy, neither the certificates of assessments nor the certified tax transcripts indicated that the IRS abated Mr. Range's tax liability. Rather, that the IRS abated the taxes at issue was simply the position taken by the Ranges because the certified tax transcripts showed a zero tax liability and did not also show the entries transferring the tax liabilities to Mrs. Range as a result of the IRS technician's erroneous determination that Mr. Range's tax liability was discharged in his 1992 bankruptcy. It is not necessary that we determine whether the bankruptcy court was correct in determining that the documentary evidence indicated that the IRS actually abated the tax liabilities. Even assuming that the bank-

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[1] Section 523(b) applies to debts which were excepted from discharge in a prio‘ cable to the instant case.

[2] Debts excepted from discharge under § 523(a)(1)(C) differ from some other debts excepted under § 523 in that debts excepted under § 523(a)(1)(C) are excepted automatically and a creditor's failure to file a proof of claim or object to the discharge does not affect the dischargeability or non-dischargeability of the debt. In contrast, pursuant to § 523(c)(1), debts specified in § 523(a)(2), (4), and (6) are automatically discharged "unless, on request of the creditor to whom such debt is owed, and after notice and a hearing, the court determines such debt to be excepted from discharge." 11 U.S.C. § 523(c)(1). This interpretation is further supported by Bankruptcy Rule 4007 governing the determination of dischargeability of a debt. Rule 4007(c) provides that "[a] complaint to determine the dischargeability of any debt pursuant to § 523(c) (i.e. § 523(a)(2), (4), and (6)) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors" while Rule 4007(b) provides that "[a] complaint other than under § 523(c) may be filed at any time." Fed. R. Bankr. P. 4007(b) and (c). Furthermore, Rule 4007(a) provides that a complaint *may* be filed by a debtor or any creditor to obtain a determination of the dischargeability of any debt, but it does not require that a complaint *may* be filed by a debtor or any creditor to obtain a determination of the dischargeability of any debt, but it does not require that a complaint *must* be filed by either party. Fed. R. Bankr. P. 4007(a).

[3] The Ranges fail to address the non-dischargeable status of Mr. Range's tax liability pursuant to § 523(a)(1)(C) except to state their belief that *Bruner* does not accurately state the law on this issue. Rather, the Ranges contend that the issue is controlled by the Eleventh Circuit's holding in *In re Hass*, 48 F.3d 1153 [75 AFTR 2d 95-1585] (11th Cir. 1994), which requires proof that the taxpayer undertook an affirmative act to defeat or evade a tax in order for a tax liability to be non-dischargeable under § 523(a)(1)(C). This argument is without merit. We have repeatedly held that willful attempts to evade or defeat tax liabilities for purposes of determining dischargeability under § 523(a)(1)(C) include acts of omission as well as acts of commission. *See Bruner*, 55 F.3d at 200; *In re Grothues*, 226 F.3d 334, 339 [86 AFTR 2d 2000-5780] (5th Cir. 2000).

ruptcy court was correct, and the IRS did abate the taxes, the abatement would be ineffective as it would have been outside the IRS's abatement authority because the tax liabilities at issue did not fall within one of the three categories enumerated in § 6404(a) and thus were not eligible for abatement.

Because Mr. Range's tax liability was non-dischargeable under § 523(a)(1)(C) and no valid authority existed authorizing the IRS to abate the tax liability at issue, the bankruptcy court's determination that Mr. Range's tax liability for the years of 1983 through 1985 was not discharged in his 1992 bankruptcy and remains a valid debt subject to collection was not clearly erroneous.

The Ranges contend that the bankruptcy court abused its discretion and improperly denied their § 7430 motion for fees and costs and their Rule 60(b) motion/independent action for relief from judgment without conducting an evidentiary hearing. Having determined that Mr. Range is liable for income taxes for the years of 1983 through 1985, we find that the bankruptcy court did not abuse its discretion in denying either the Ranges' § 7430 motion for fees and costs or their Rule 60(b) motion/independent action for relief from judgment without conducting an evidentiary hearing.

CONCLUSION

For the reasons stated above, the district court's judgment affirming the bankruptcy court is AFFIRMED.

¶2002-5403

Zariq SIDDIQUI and Greta L. SIDDIQUI husband and wife; Joseph Vullo; Richard Vullo and Elizabeth Vullo, husband and wife; Vullo, Siddiqui & Associates, LTD., an Arizona corporation, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Arizona, (DC AZ) CIV-99-1596-PHX-ROS, Aug. 26, 2002. Earlier proceeding at (2002, DC AZ) 90 AFTR 2d 2002-5371. Decision for Taxpayers in part.

1. Unauthorized disclosure of return information—damages—punitive damages—summary judgment. Pursuant to stipulation, judgment was entered against govt. in amount of $1000 for each taxpayer on portion of their complaint, and remaining claims were dismissed. *Reference:* United States Tax Reporter ¶74,315.01. IRC §6103; 7431.

A. Jerry Busby 335 East Palm Lane Phoenix, AZ 85004 (602) 254-1006 ATTORNEY FOR PLAINTIFFS
Stuart D. Gibson Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 227 Ben Franklin Station Washington, D.C. 2004 (202) 307-6586 Appearing pursuant to 28 U.S.C. §517 ATTORNEY FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

ORDER FOR ENTRY OF JUDGMENT

ROSLYN O. SILVER United States District Judge

(Assigned to the Hon. Roslyn O. Silver)

The parties to this action having filed a Stipulation for Entry of Judgment on terms that conclude this matter in this Court, it is this 21 day of August, 2002, ORDERED that the Clerk enter JUDGMENT in this case on the terms described in the Stipulation for Entry of Judgment.

ROSLYN O. SILVER

United States District Judge

ENTRY OF JUDGMENT

[1] The parties to this action, by and through their undersigned counsel, pursuant to Fed.R.Civ.P. 41(a) (1) (ii) and 58, hereby stipulate:

1. All claims asserted in Count I of the First Amended Complaint are dismissed with prejudice;

2. Pursuant to the Order entered July 9, 2002, that the Court should direct the Clerk to enter Judgment for the plaintiffs and against the defendant on all claims asserted in Count II of the First Amended

Complaint, in the amount of $1,000 for each plaintiff;

3. All parties in the action shall bear their own costs of this action, and their own attorneys' fees;

4. Entry of Judgment according to this Stipulation shall be without prejudice of the right of any party to file an appeal.

¶2002-5404

UNITED STATES OF AMERICA, PLAINTIFF v. Geoffrey T. SUGDEN, DEFENDANT. U.S. District Court, Western Dist. of Pennsylvania, (DC PA) Case No. 02-cv-468, Aug. 21, 2002. Years 1988, 1989, 1990, 1996. Decision for Govt.

1. Collection actions—default judgment. Govt. was granted default judgment against taxpayer for outstanding income, employment and unemployment tax assessments in amounts stated plus interest. *Reference:* United States Tax Reporter ¶74,025.01(95). IRC §7402.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA,

ORDER GRANTING UNITED STATES OF AMERICA'S MOTION FOR DEFAULT JUDGMENT

Judge Lee

[1] Defendant Geoffrey T. Sugden, having failed to plead or otherwise defend in this action and his default having been duly entered by the Clerk of the Court,

NOW, upon request of plaintiff United States of America and upon affidavit that defendant Geoffrey T. Sugden, as a result of various assessments made against him by a delegate of the Secretary of the Treasury, is indebted to the United States, and it appearing that defendant Geoffrey T. Sugden is not an infant or an incompetent person, nor in the military service of the United States, it is hereby

ORDERED, ADJUDGED and DECREED that judgment shall be entered in favor of the United States of America and against defendant Geoffrey T. Sugden in the following amounts:

With respect to the assessment of June 8, 1998 for 1996 Federal individual income taxes, in the amount of $13,124.76, along with interest pursuant to 26 U.S.C. §§ 6601 and 6621 from the date of assessment;

With respect to the assessment of July 29, 1991 for Form 941 (Employer's Quarterly Federal Tax Return) taxes for the quarter ending December 31, 1988, in the amount of $478.80, along with interest pursuant to 26 U.S.C. §§ 6601 and 6621 from the date of assessment;

With respect to the assessment of October 15, 1990 for Form 941 taxes for the quarter ending March 31, 1989, in the amount of $307.97, along with interest pursuant to 26 U.S.C. §§ 6601 and 6621 from the date of assessment;

With respect to the assessment of July 29, 1991 for Form 941 taxes for the quarter ending June 30, 1989, in the amount of $1,571.17, along with interest pursuant to 26 U.S.C. §§ 6601 and 6621 from the date of assessment;

With respect to the assessment of November 12, 1990 for Form 941 taxes for the quarter ending September 30, 1989, in the amount of $2,388.45, along with interest pursuant to 26 U.S.C. §§ 6601 and 6621 from the date of assessment;

With respect to the assessment of July 29, 1991 for Form 941 taxes for the quarter ending December 31, 1989, in the amount of $2,007.57, along with interest pursuant to 26 U.S.C. §§ 6601 and 6621 from the date of assessment;

With respect to the assessment of September 24, 1990 for Form 941 taxes for the quarter ending March 31, 1990, in the amount of $971.81, along with interest pursuant to 26 U.S.C. §§ 6601 and 6621 from the date of assessment;

With respect to the assessment of September 24, 1990, for Form 941 taxes for the quarter ending June 30, 1990, in the amount of $996.63, along with interest

pursuant to 26 U.S.C. §§ 6601 and 6621 from the date of assessment;

With respect to the assessment of July 29, 1991 for Form 941 taxes for the quarter ending September 30, 1990, in the amount of $240.96, along with interest pursuant to 26 U.S.C. §§ 6601 and 6621 from the date of assessment;

With respect to the assessment of October 15, 1990 for Form 940 (Federal Unemployment Tax Act) taxes for the year ending December 31, 1988, in the amount of $115.23, along with interest pursuant to 26 U.S.C. §§ 6601 and 6621 from the date of assessment;

With respect to the assessment of October 15, 1990 for Form 940 taxes for the year ending December 31, 1989, in the amount of $725.36, along with interest pursuant to 26 U.S.C. §§ 6601 and 6621 from the date of assessment.

Dated this 21st day of August, 2002.

DONALD J. LEE

United States District Judge

¶2002-5405

Johnny SWANSON III, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 00-781 T, Aug. 28, 2002. Decision for Govt.

1. Court of Federal Claims jurisdiction—refunds; damages; liens and levies—constitutional claims. Pro se CEO's Court of Federal Claims action against govt. complaining of improper liens, levies, and collection was dismissed: to extent taxpayer challenged IRS's tax calculations and assessments, imposition of and failure to release liens, property seizure and sale, and failure to credit him with certain payments, jurisdiction lay with district court. Similarly, Court lacked jurisdiction over related constitutional claims. And, taxpayer had no claim for relief from govt.'s alleged improper seizures of other persons' properties or from its collection from him personally of corp.'s unpaid taxes; and generalized complaint didn't sufficiently state claim for refund. *Reference:* United States Tax Reporter ¶74,336.510(70); 74,335.01(7); 74,325.01; 74,225.01(3). IRC §7422; 7432; 7433.

Johnny Swanson III, Birmingham, Alabama, *pro se.*
Sheryl B. Flum, with whom were Acting Assistant Attorney General Claire Fallon, Mildred L. Seidman and David Gustafson, Washington, DC, for defendant.

United States Court of Federal Claims,

OPINION and ORDER

TURNER, Senior Judge.

This tax refund case stands on defendant's motion filed on May 7, 2001 to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

I

Plaintiff filed an 18 page complaint plus 20 supporting exhibits. Despite the volume of paper, plaintiff's complaint contains little substantive content regarding specifics of his refund claims. Defendant sought to definitize these claims in its motion to dismiss. We conclude that plaintiff intends to be asserting the claims listed in Part III below.

II

In addressing a motion to dismiss, we view the facts in the light most favorable to the non-movant. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Plaintiff Johnny Swanson III was the president and chief executive officer of a corporation known as The Swanson Group, Inc. (TSG). Compl. ¶ 1. TSG filed erroneous and delinquent returns regarding employment taxes for 1987 and 1988. *Id.* ¶ 13. Plaintiff alleges that the tax balances were corrected and that payment arrangements were made with the IRS. *Id.* ¶ 14. In 1995, plaintiff was indicted and later convicted on four counts of filing false corporate tax returns and one count of impeding the IRS. *Id.* ¶ 17–18. After his conviction, plaintiff began to file claims for refund or credit with the IRS, several

of which are attached as exhibits to his complaint. *Id.* Exh. 1-4. In 1999, plaintiff paid the IRS $20.00, representing the employment taxes due for one calendar quarter for one employee of TSG. *Id.* Exh. 1 at 1.21–1.22. Plaintiff filed the complaint initiating this case in December 2000.

III

Based on a review of the complaint and the motion to dismiss, as well as the briefing and exhibits filed to date in this case, we believe plaintiff to be asserting the following claims. We address the status of each claim as we identify it.

A

[1] Plaintiff alleges that the IRS charged excessive amounts of employer taxes and/or improperly calculated the tax assessment for the period ending 8812, and that these errors led to the placement of improper liens and the unlawful seizure and sale of plaintiff's property. We find that 28 U.S.C. § 1356 vests jurisdiction for cases involving governmental seizure of property in the United States district courts. Title 26 U.S.C. § 7433 also grants the district courts jurisdiction over unauthorized collection procedures by the IRS, while Section 6326 provides for an administrative appeal process regarding liens. Accordingly, to the extent the complaint alleges improper liens or seizure and sale of plaintiff's property resulting from erroneous tax calculations, this court lacks subject matter jurisdiction over this claim.

B

Plaintiff alleges that the IRS did not follow proper procedures in seizing plaintiff's property. Specifically, plaintiff states that an invalid writ and improper liens were issued. Plaintiff asserts that the IRS refused to release the liens after being requested to do so pursuant to 26 U.S.C. § 6325. Also, plaintiff claims that an improper writ allowed the IRS to enter plaintiff's property, which lead to the unlawful seizure and sale of his property. As above, we find that 28 U.S.C. § 1356 vests jurisdiction for seizure claims in the district courts. Additionally, 26 U.S.C. § 7433 vests jurisdiction over civil damages claims for unauthorized collection procedures in the district courts. Title 26 U.S.C. § 6326 provides for an administrative appeal process regarding liens, while § 7432 vests jurisdiction in the district courts for claims for civil damages for failure to release liens. Therefore, to the extent the complaint alleges improper collection procedures, including invalid writs and improper liens, and the failure to release liens, this court lacks subject matter jurisdiction over this claim.

C

Plaintiff alleges that the IRS failed to properly credit his tax records for payment of taxes made pursuant to an installment agreement. Additionally, plaintiff asserts that these improper records led to incorrect calculations regarding the period of his incarceration. Plaintiff petitions this court to compel the IRS to correct the "errors." However, 5 U.S.C. § 552a(g)(1) provides that district courts have jurisdiction over actions to compel correction of records of an agency. Accordingly, to the extent the complaint seeks an order compelling the IRS to change its records, this courts lack jurisdiction over this claim.

D

Plaintiff alleges that the IRS pursued him personally, placing liens and levies on properties held in his name personally when the correct taxpayer was TSG. However, plaintiff admitted in a letter to the IRS that he was a responsible party for TSG. Def. App. B at B228. According to *United States v. Pepperman*, 976 F.2d 123, 127 [70 AFTR 2d 92-5657] (3d Cir. 1992), it is proper for the IRS to pursue a "responsible person" for a corporate entity without first pursuing the entity itself. Therefore, to the extent that the complaint alleges the IRS wrongfully pursued him personally for tax liabilities owed by TSG, we find that plaintiff has failed to state a claim upon which relief can be granted.

E

Plaintiff asserts that the IRS placed liens and levies on, and seized and sold the property of others in addition to that of plaintiff. While 26 U.S.C. §§ 6326 and 7432 and 28 U.S.C. § 1356 clearly demon-

strate that this court lacks subject matter jurisdiction over this claim, we note also that to the extent plaintiff alleges wrongs to others, the complaint fails to state a claim upon which relief can be granted to *this* plaintiff.

F

The appendix to plaintiff's complaint contains copies of letters that plaintiff sent to the IRS claiming tax refunds, but the complaint does not specifically ask for a tax refund. Plaintiff's response to defendant's motion to dismiss characterizes his claims as "tax refund" claims. Based on the complaint, it is impossible to ascertain the amounts of and rationales for any refunds/credits that plaintiff seeks. Accordingly, we must agree with defendant that, to the extent the complaint seeks a tax refund or credit, as the complaint currently stands, plaintiff has failed to state a claim upon which relief can be granted.

G

Finally, plaintiff's complaint also alleges violation of the Fourth, Fifth, and Eighth Amendments to the United States Constitution without specifying how each was violated. We assume that the Fourth Amendment claim relates to allegedly improper seizure of plaintiff's property. As discussed above, this claim is outside the jurisdiction of this court. We assume that the Eighth Amendment allegation alludes to the fine and incarceration imposed for plaintiff's filing of false tax returns. Again, this claim is clearly outside the jurisdiction of this court. We assume that the Fifth Amendment claim alleges an unlawful taking of plaintiff's property through its seizure and sale by the IRS. For the reasons detailed above, this claim also lies outside the jurisdiction of this court.

IV

In summary, we conclude that plaintiff is entitled to dismissal of the complaint to the extent that it asserts claims based on any of the following alleged actions by the IRS: improper calculation of employment taxes, improper calculation of tax assessments, improper lien and/or levy placement, improper seizure and sale of plaintiff's property, following improper procedures in issuing liens and seizing plaintiff's property, refusal to release im-proper liens, use of improperly issued writ, failure to properly credit plaintiff's tax records for alleged payments, maintaining erroneous tax records in plaintiff's name, holding plaintiff responsible for tax liabili-ties of TSG, seizure and sale of property of persons other than plaintiff, or viola-tions of the Fourth, Fifth, and Eighth Amendments. We further conclude that to the extent that plaintiff's complaint alleges a claim for tax refund or credit, defendant has demonstrated that the complaint fails to state a claim upon which relief can be granted.

(We note in passing, and without additional ruling, that even if subject matter jurisdiction were not lacking with respect to most of these claims, plaintiff's assertion of them here would likely be barred under the doctrines of res judicata and issue preclusion, since he has already raised many of these same issues in a case filed in the federal district court for the District of Columbia which was dismissed with prejudice. See *Swanson v. United States*, No. 97-3057 [82 AFTR 2d 98-6046] (D. D.C. July 27, 1998), *aff'd*, No. 98-5431 (D.C. Cir. Jan. 21, 1999) (per curiam).)

V

Based on the foregoing, defendant's said motion filed May 7, 2001 to dismiss the complaint for lack of jurisdiction, or for failure to state a claim upon which relief can be granted, is GRANTED. Accordingly, judgment in favor of defendant shall be entered forthwith. Each party shall bear its own costs.

James T. Turner

Senior Judge

¶2002-5406

John Parks TROWBRIDGE, PLAINTIFF-APPELLANT v. INTERNAL REVENUE SERVICE, an Agency of the United States Government; Paul CORDOVA, District Director, DEFEND-

ANTS-APPELLEES. U.S. Court of Appeals, Fifth Circuit, (CA5) No. 01-21109 Aug. 23, 2002. District Court, (2001, DC TX) 88 AFTR 2d 2001-5861, affirmed per curiam. Decision for Govt.

1. Actions against IRS—mandamus—tax-status determination—failure to state claim for relief. District court properly dismissed for failure to state claim taxpayer's mandamus petition seeking order compelling IRS District Director to issue collection determination letter: taxpayer didn't support equal protection claim with any allegations of disparate treatment of similarly situated taxpayers; and didn't establish that he had any statutory right to, or that Director had any duty to issue, determination letter. Also, contract argument raised for 1st time on appeal wasn't considered. *Reference:* United States Tax Reporter ¶74,217.501(5). IRC §7421.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,

Appeal from the United States District Court for the Southern District of Texas USDC No. H-00-CV-4426

Before HIGGINBOTHAM, DAVIS, and PARKER, Circuit Judges.

PER CURIAM:*

[1] John Parks Trowbridge appeals the dismissal of his mandamus petition for failure to state a claim pursuant FED. R. CIV. P. 12(b) (6). Trowbridge argues that the failure of the Internal Revenue Service (IRS) and its District Director to issue a determination letter in response to his request constitutes a breach of contract, violates his right to equal protection of the law, and violates a mandatory duty under 26 C.F.R. §§ 601.201 (a) (1) and (a) (3). He seeks the issuance of an order compelling the District Director to comply with the IRS' regulations.

To the extent that Trowbridge argues that there has been a breach of contract, we do not address this issue because it is raised for the first time on appeal. See Leverette v. Louisville Ladder Co., 183 F.3d 339, 342 (5th Cir. 1999).

Trowbridge has not stated an equal protection claim because he does not allege that similarly situated people were subject to disparate treatment without a rational basis. See United States v. Abou-Kassem, 78 F.3d 161, 165 (5th Cir. 1996).

The district court did not err in dis-missing Trowbridge's request for manda-mus relief because he has not established a clear right to a determination letter or that the IRS or its District Director had a clear duty to issue such a letter. See 26 C.F.R. §§ 601.201 (a) (1), (a) (3), and (d).

AFFIRMED. MANDAMUS DENIED.

¶2002-5407

Charles VAUGHAN and Judy VAUGHAN, individually, and as Trustees for CJC Enterprise Trust, ELC Trust, Vaughn Trust, and CJC Personnel Trust, PETITIONERS v. UNITED STATES OF AMERICA, RESPONDENT. U.S. District Court, Eastern Dist. of North Carolina, (DC NC) NO. 5:02-CV-569-H(3), Aug. 20, 2002. Decision against Tax payers.

1. Third-party summons enforcement—petition to quash—compliance with administrative steps. Magistrate judge denied taxpayers' petition to quash IRS's 3d-party summonses: govt.'s purported failure to technically comply with all administrative steps wasn't grounds for quashing summonses absent any bad faith or prejudice to taxpayers. *Reference:* United States Tax Reporter ¶76,025.02(20). IRC §7602.

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION,

ORDER

WILLIAM A. WEBB UNITED STATES MAGISTRATE JUDGE

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] This Cause comes before the Court upon Petitioners' Petitioner to Quash Summons. On or about August 1, 2002, Internal Revenue Service (''IRS'') Agent Kathy Grimaldi issued several administrative summons upon third-party record keepers for the Petitioners. Petitioners now seek to quash these administrative summons on the grounds that they fail to strictly comply with the requirements of 26 U.S.C. § 7602, *et seq.*. Petitioners do not assert that these summons were issued in bad faith or for some improper purpose. *CF. Groder v. United States*, 816 F.2d 139, 142 [59 AFTR 2d 87-875] (4th Cir. 1987)(In order to prevail in a motion to quash summons a taxpayer must show that the government proceeded against him in bad faith). Rather Petitioners object only to the alleged administrative deficiencies of these summons.

For enforcement of a summons, the government must show, *inter alia*, that the administrative steps required by the Internal Revenue Code have been followed. *See Alphin v. United States*, 809 F.2d 236, 238 [59 AFTR 2d 87-456] (4thCir. 1987). However, failure to comply with such an administrative step does not necessarily preclude enforcement of a summons, absent prejudice to the taxpayer. *See Cook v. United States*, 104 F.3d 886, 889 [79 AFTR 2d 97-577] (6th Cir. 1997)(''[T]he district courts possess discretionary authority to excuse the Service's technical notice errors where the party in interest suffered no actual prejudice.''); *Sylvestre v. United States*, 978 F.2d 25, 27 [71 AFTR 2d 93-321] (1st Cir. 1992), *cert. denied*, 507 U.S. 994 (1993); *United States v. Texas Heart Inst.*, 755 F.2d 469, 477–78 [55 AFTR 2d 85-1219] (5th Cir. 1985), overruled in part on other grounds by *United States v. Barrett*, 837 F.2d 1341 [61 AFTR 2d 88-681] (5th Cir. 1988). (''[W]here the taxpayer has received every benefit of the administrative steps required by the Code, a failure by the IRS to meet the technical niceties of the statute will not bar enforcement of the summons.'').

Assuming *arguendo* that the Government has failed to comply with an administrative step, Petitioners have still failed to allege that they were prejudiced by these failures. Because Petitioners were not prejudiced by the IRS's alleged failure to strictly comply with the administrative steps for issuing a summons, and no bad faith has been alleged, the Court will not quash the summonses. *Cf. Groder*, 816 F.2d at 143 (''administration of the revenue laws is a function which by congressional direction and expertise belongs to IRS ... second-guessing a Revenue Agent's judgment should not become a routine chore for judges.'')

Accordingly, it is ORDERED AND ADJUDGED that the Petition is DENIED.

DONE AND ORDERED in Chambers at Raleigh, North Carolina this 20th day of August, 2002.

WILLIAM A. WEBB

UNITED STATES MAGISTRATE JUDGE

¶2002-5408

Michael HENRY v. UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE. U.S. District Court, Eastern Dist. of Louisiana, (DC LA) No. CIV.A. 02-968, Sept. 13, 2002. Year 1999. Decision for Govt.

1. Actions against U.S.—rewards to informants; mandamus—damages—jurisdiction. Taxpayer's claims for informant's reward and writ of mandamus compelling IRS to investigate alleged fraud of various individuals and co. in which he invested were dismissed. Neither IRC §7623 nor regs alone gave taxpayer right to reward, which was ultimately within IRS's discretion; and, even if taxpayer had right to reward, district court lacked juris-diction to order such where sum sought ex-ceeded 28 USC §1346's $10,000 maxi-mum. Also, mandamus relief didn't apply or extend to review of IRS's discretionary decision about prosecuting 3d parties. *Reference:* United States Tax Reporter ¶76,235.01(10); 74,217.501(5). IRC §7421; 7623.

United States District Court, E.D. Louisiana,

ORDER AND REASONS

ENGELHARDT, District J.

Before the Court is the Government's Motion to Dismiss Counts II through VII of plaintiff's complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), and for failure to state a claim pursuant to Rule 12(b)(6). Via complaint filed April 1, 2002, plaintiff seeks relief in the form of a tax fund for the year 1999 (Count I), rewards for reporting tax fraud (Counts II and III) and a writ of mandamus against the Internal Revenue Service (Counts IV through VII), requiring that the government agency(1) produce affirmative proof that it prosecuted allegations of tax fraud against various individuals and entities, (2) remove various employees from auditing positions in the agency, and (3) institute various procedures to monitor and track citizens' fraud reports, inter alia. Defendants contend that as a matter of law (1) plaintiff's claims for reward under Counts II and III should be dismissed for lack of subject matter jurisdiction and/or failure to state a claim and (2) Counts IV through VII seeking mandamus must be dismissed on account of both failure to state a claim and lack of mandamus jurisdiction. The plaintiff Michael Henry (''Henry'') filed a formal opposition memorandum, arguing that the Government has fundamentally misrepresented his claims in Counts II and III. Henry does not dispute authorities cited by the Government for the propositions that (1) a contract with the IRS is a necessary prerequisite for reward claim, and (2) such claims for amount greater than $10,000 need be filed in the Court of Claims. Henry simply denies that the citations of authority have any bearing on his brand of claims for reward. Without even attempting to address the serious jurisdictional issues raised by the Government, plaintiff submits that this Court has an obligation to review the entire IRS reward program to see if it complies with the Constitutional requirements of due process, and then assuming it finds such Constitutional requirements met, the Court should proceed to determine the course of action based upon the IRS' failure to follow its existing procedures (i.e., issue writ of mandamus to the IRS or grant him relief in the form of a reward despite the fact that he has no contract with the Government and notwithstanding his lack of standing and absence of subject matter jurisdiction). The Government's motion to dismiss is deemed submitted for determination without oral argument. For the following reasons, the motion is GRANTED.

I. Background

The following facts are undisputed: On March 9, 2001, plaintiff filed an amended federal income tax return for the 1999 tax year (i.e., a Form 1040X), seeking a deduction in the full amount of $2,000,000 pursuant to § 165(g) of the Internal Revenue Code (hereinafter ''the Code''). Plaintiff related the alleged $2,000,000 loss to worthless American MetroComm Corporation (''AMC'') securities. The plaintiff had many conversations with various employees regarding his request for a tax refund and provided the IRS with voluminous documents relating to the insolvency of AMC. Additionally, it is undisputed that the plaintiff provided the IRS with information regarding the alleged tax fraud by other taxpayers. Nevertheless, the plaintiff never requested a reward for information provided to the IRS.

The IRS denied plaintiff's requests for the refund. Plaintiff then filed the captioned lawsuit seeking a refund, a reward and issuance of a writ of mandamus addressed to the IRS commanding that they initiate an investigation with respect to the information provided by him, inter alia.

II. Standards of Review

A motion to dismiss filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges the subject matter jurisdiction of the federal district court. See Fed.R.Civ.P. 12(b)(1). A claim is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the

claim.[1] It is well-settled that federal courts are courts of limited jurisdiction, and absent jurisdiction conferred by statute, they lack the power to adjudicate claims.[2] The Fifth Circuit has observed that the court must always be mindful of "the first principle of federal jurisdiction which requires a federal court to dismiss an action whenever it appears that subject matter jurisdiction is lacking."[3] Indeed, "there is a presumption against subject matter jurisdiction that must be rebutted by the party bringing an action to federal court."[4] As the party asserting federal jurisdiction, Henry bears the burden of demonstrating that jurisdiction is proper.[5]

In the determination of a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, "a court may evaluate (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.[6] Thus, when examining a motion to dismiss for lack of subject matter jurisdiction, unlike a Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court is entitled to consider disputed facts as well as undisputed facts in the record.[7] Nevertheless, all uncontroverted allegations of the complaint must be accepted as true.[8]

A motion to dismiss under Rule 12(b)(6), while "viewed with disfavor and rarely granted,"[9] is nevertheless the proper vehicle to eliminate one or more claims when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[10] In ruling on a 12(b)(6) motion, (1) the court cannot look beyond the pleadings, (2) the complaint must be liberally construed in a light most favorable to the plaintiff, and (3) all well-pleaded facts must be accepted as true.[11] The ultimate question in a Rule 12(b)(6) motion is whether the complaint states a valid cause of action when it is viewed in a light most favorable to the plaintiff, and with every doubt resolved in favor of the plaintiff.[12]

III. Discussion

1. Sovereign Immunity

[1] It is elementary and a well-established principle of law that the United States may not be sued without its consent.[13] The doctrine of sovereign immunity operates to preclude lawsuits against the United States and its agencies absent a waiver that immunity.[14] When the United States consents to be sued, the terms of the waiver of sovereign immunity define the contours of the court's jurisdiction to en-

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1 See Home Builders Association of Mississippi, Inc. v. City of Madison, 143 F.3d 1006, 1010 (5th Cir.1998)(citing Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2nd Cir.1996)).

2 See e. g., Stockman v. Federal Election Commission, 138 F.3d 144, 151 (5th Cir.1998) (citing Veldhoen v. United States Coast Guard, 35 F.3d 222, 225 (5th Cir.1994)).

3 Stockman, 138 F.3d at 151 (internal quotation marks omitted); see also Telecommunications Research and Action Center v. FCC, 750 F.2d 70, 75 (D.C.Cir.1984)("Jurisdiction is, of necessity, the first issue for an Article III court.").

4 Coury v. Prot, 85 F.3d 244, 248 (5th Cir.1996)(citing Strain v. Harrelson Rubber Co., 742 F.2d 888, 889 (5th Cir.1984)).

5 Stockman, 138 F.3d at 151; see also St. Paul Reinsurance Co., Ltd. v. Greenberg, 134 F.3d 1250, 1253 (5th Cir.1998); Boudreau v. United States, 53 F.3d 81, 82 (5th Cir.1995), cert. denied, 516 U.S. 1071, 116 S.Ct. 771, 133 L.Ed.2d 724 (1996).

6 Den Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 424 (5th Cir.), cert. denied, 122 S.Ct. 1059, 151 L.Ed.2d 967 (2002); accord Barrera-Montenegro v. United States, 74 F.3d 657, 659 (5th Cir.1996).

7 See Clark v. Tarrant County, 798 F.2d 736, 741 (5th Cir.1986); Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.), cert. denied, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981).

8 Den Norske Stats Oljeselskap As, 241 F.3d at 424; Cloud v.. United States, 126 F.Supp.2d 1012, 1017 (S.D.Tex.2000), affirmed, 281 F.3d 158 (5th Cir.2001).

9 See Collins v. Morgan Stanley Dean Witter, 224 F.3d 496, 498 (5th Cir.2000); Lowrey v. Texas A & M University System, 117 F.3d 242, 247 (5th Cir.1997) (citing Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–02, 2 L.Ed.2d 80 (1957)).

10 Lowrey, 117 F.3d at 247.

11 Id.; Shipp v. McMahon, 234 F.3d 907, 911 (5th Cir.2000), cert. denied, 532 U.S. 1052, 121 S.Ct. 2193, 149 L.Ed.2d 1024 (2001); Baker v. Putnal, 75 F.3d 190, 196 (5th Cir.1996).

12 Lowrey, 117 F.3d at 247; see also Lewis v. Fresne, 252 F.3d 352, 357 (5th Cir.2001)("All questions of fact and any ambiguities in the current controlling substantive law must be resolved in the plaintiff's favor."); Indest v. Freeman Decorating, Inc., 164 F.3d 258, 261 (5th Cir.1999).

13 Jeanmarie v. United States, 242 F.3d 600, 602 (5th Cir.2001); Metropolitan Life Insurance Company v Adkins, 225 F.3d 510. 512 (2000); Simons v. Vinson, 394 F.2d 732, 735–36 (5th Cir.1968).

14 See United States v. Dalm, 494 U.S. 596 [65, 609 [AFTR 2d 90-1210], 110 S.Ct. 1361 [65 AFTR 2d 90-1210], 108 L.Ed.2d 548 (1990); Loeffler v. Frank, 486 U.S. 549, 554 (1988); PALA, Inc. Employees Profit Sharing Plan and Trust Agreement v. United States, 234 F.3d 873, 876 n. 7 [86 AFTR 2d 2000-7079] (5th Cir.2000); Truman v. United States, 26 F.3d 592, 594 (5th Cir.1994); Drake v. Panama Canal Commission, 907 F.2d 532, 534 (5th Cir.1990)(Immunity extends to the government's officers and agencies).

tertain such a suit.[15] A waiver of sovereign immunity must be unequivocally expressed in statutory text and will not be implied from a statute's legislative history.[16] A waiver of sovereign immunity must be strictly construed and not enlarged beyond that which the statute requires, and thus any ambiguities must be resolved in favor of immunity.[17] Thus, a court may not exercise subject matter jurisdiction over a claim against the federal government except as Congress allows, congressional consent being a prerequisite of federal jurisdiction.[18]

2. § 7623 Reward

The jurisdictional predicates for plaintiff's claims for reward in the amounts of $150,000 and $600,000 (Counts II and III) are apparently 28 U.S.C. §§ 1331 & 1346. Section 1331's broad provision of federal question jurisdiction, however, does not constitute a waiver of sovereign immunity.[19] Section 1346 equally is of no avail to the plaintiff. That section provides in pertinent part that:

> (a) That district courts shall have jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claims to have been collected without authority or any sum alleged to have been excessive or in any matter wrongfully collected under the internal-revenue laws.
>
> (2) Any other civil action against the United States not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of the executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, ...
>
> * * *
>
> (e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986).

28 U.S.C. § 1346(a)(1)–(2) and (e).

Jurisdiction to handle actions to recover "any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws," including interest, is conferred by 28 U.S.C. § 1346. At the outset the Court notes that the plaintiff has acknowledged that "there is no contract" with the Government in this case for reward and "does not disagree with the rulings cited by the IRS."[20] Plaintiff further does not dispute "the discretionary nature of the reward contained in the Treasury Regulations," but rather contends that they stand in violation of the congressional purposes behind the adoption of Section 7623 and contra due process, because the IRS has failed to establish guidelines as to how and when they will pay a "reward" when provided for by contract. Plaintiff all but admits that he lacks both standing to bring a claim for reward and that this Court lacks subject matter jurisdiction to hear and decide his claims pertaining to a reward.

Plaintiff's claim for a reward is apparently based upon § 7623 of the IRS Code,

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15 See Williamson v. United States Department of Agriculture, 815 F.2d 368, 374 (5th Cir.1987) (noting that the district courts' jurisdiction over the United States depends entirely upon the terms of the congressional waiver of sovereign immunity).

16 Lane v. Pena, 518 U.S. 187, 116 S.Ct. 2092, 2096–97 (1996); United States v. Nordic Village, Inc., 503 U.S. 30, 33–34 37 [69 AFTR 2d 92-687] (1992); Smith v. Booth, 823 F.2d 94, 96–97 [60 AFTR 2d 87-6110] (5th Cir.1987)(noting that there is no jurisdiction over cases against the government in the absence of explicit statutory consent to suit).

17 See United States v. Williams, 514 U.S. 527, 531 [75 AFTR 2d 95-1805], 115 S.Ct. 1611, 1613–14 [75 AFTR 2d 95-1805], 131 L.Ed.2d 608 [75 AFTR 2d 95-1805] (1995); Jeanmarie v. United States, 242 F.3d 600, 604 (5th Cir.2001); Linkous v. United States, 142 F.3d 271, 275 (5th Cir.1998); Shanbaum v. United States, 32 F.3d 180, 182 [74 AFTR 2d 94-6292] (5th Cir.1994).

18 See United States v. Mitchell, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983); United States v. Orleans, 425 U.S. 807, 814, 96 S.Ct. 1971, 48 L.Ed.2d 390 (1976); Armendariz-Mata v. United States Department of Justice, 82 F.3d 679, 682 (5th Cir), cert. denied, 519 U.S. 937, 117 S.Ct. 317 (1996); Wilkerson v. United States, 67 F.3d 112, 118 [76 AFTR 2d 95-6902] (5th Cir.1995).

19 See McCarty v. United States, 929 F.2d 1085, 1087 [68 AFTR 2d 91-5193] (5th Cir.1991); Garcia v. United States, 666 F.2d 960, 966 (5th Cir.), cert. denied, 459 U.S. 832, 103 S.Ct. 73, 74 L.Ed.2d 72 (1982).

20 See Plaintiff's Memorandum in Opposition, at pp. 2–3.

which authorizes the Secretary to pay such sums as he deems necessary for (1) detecting underpayments of tax, and (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at same. The IRS has broad discretion to de-cide whether to make an award and/or the amount of that award. See Stack v. United States, 25 Ct.Cl. 634, 637 (1992), affirmed, 983 F.2d 1088 (Fed.Cir.1992); Saracena v. Untied States, 508 F.2d 1333, 1336 [35 AFTR 2d 75-571] (1975). Neither 26 U.S.C. § 7623 nor 26 C.F.R. § 301.7623-1, standing alone, obligates the IRS to pay a reward to a tax informant.

In Merrick v. United States, No. 654-86 T (Cl.Ct. July 20, 1987), reversed and remanded, 846 F.2d 725 [61 AFTR 2d 88-1080] (Fed.Cir.1988), a tax informant (Merrick) provided the IRS with information regarding a tax shelter. The IRS informed Merrick that it recovered over $10 million in unpaid taxes from 1,585 shelter investors. Merrick filed a claim for reward with the IRS. Later, the acting district director orally informed Merrick that he would receive a reward and that the award would be calculated under paragraph 1 of IRS Publication No. 733 (July 1980). Merrick, 846 F.2d at 725 [61 AFTR 2d 88-1080]. The publication provided that such tax informants would be paid a specific percentage of the monies recovered. After the IRS paid Merrick a total of $31,000.00 for his information, he filed suit in the Claims Court. The Federal Circuit held that Merrick alleged facts sufficient to state a contract claim against the United States in contract. Id. at 726. The complaint alleged that the Acting District Director fixed the amount of the reward in February 1984 by establishing how the IRS would calculate it. Id. The Federal Circuit explained:

> [O]ur precedents establish that the subject statute and regulation amount to an indefinite reward offer that an informant may respond to by his conduct. See Lagermeier v. United States, 214 Ct.Cl. 758, 760 [40 AFTR 2d 77-5143], 566 F.2d 1188 (quoting Gordon v. United States, 36 F.Supp. 639, 640 [26 AFTR 539] (1941)). Because, however, the obstacle of indefiniteness may be removed by the subsequent conduct of the parties, an enforceable contract arises when the parties fix the reward amount ... They have done so here ....

Merrick, 846 F.2d at 726. Essentially, the IRS negotiated a specific reward amount when it stated that Revenue Publication No. 733, which mandated non-discretionary percentages in calculating rewards, would govern the reward.[21]

In Lagermeier v. United States, 214 Ct.Cl. 758, 760 [40 AFTR 2d 77-5143], 566 F.2d 1188 (1977), the plaintiff had no knowledge of what the IRS recovered in actuality, and sought to have the court measure the adequacy of his reward by determining what the IRS should have recovered. Id. The Lagermeier court explained:

> This is far too speculative and would involve the court in an unwarranted examination of the propriety of IRS investigations. Had the IRS actually recovered, from information furnished by the plaintiff, the $3 million which the plaintiff says it might have collected, this could be a very different case in view of a reward of only $200. But there is no such allegation in the petition, and no reason to think that such is the case .... It is therefore ordered and concluded that defendant's motion to dismiss is granted and the petition is dismissed.

Id.

In Krug v. United States, 168 F.3d 1307, 1309 [83 AFTR 2d 99-885] (Fed.Cir.1999), the Federal Circuit held that § 7623 and implementing legislation still does not more than described by Merrick, supra, to wit: "it floats an indefinite reward offer that an informant may respond to by conduct, but a binding contract does not arise until the Government brings the offer to ground by a specific award." Id. Citing the Administrative Pro-

[21] Merrick knew the total sum recovered from the tax shelter investors. Consequently, when the acting district director referenced Publication No. 733 as the basis for Merrick's reward, he could precisely calculate the amount due him.

cedures Act (APA), 5 U.S.C. § 701(a)(2) (1994), excluding the judicial review where "agency action is committed to agency discretion by law," and questioning the authority of even the Court of Federal Claims to review an agency's denial of a discretionary award, the Federal Circuit concluded that the review constituted at most harmless error because the lower court upheld the agency's decision. Krug, 168 F.3d at 1310.

In Doe v. United States, 100 F.3d 1576 (Fed.Cir.1996), the Federal Circuit discussed the court's jurisdiction under another reward statute, 19 U.S.C. § 1619. In that case, the Federal Circuit held that the statute, which sets out in detail the type of activities for which a person may receive an award of a minimum amount, required "the payment of some award to claimants who have met the statutory conditions of recovery," and that the Secretary of the Treasury's discretion was limited to determining the amount of the reward. Id. at 1581–82. Unlike § 1619, § 7623 provides only that the "Secretary ... is authorized to pay such sums ... as he may deem necessary ...." 26 U.S.C. § 7623. Treasury officials have "complete discretion in the first instance to determine whether an award should be made" pursuant to § 7623. Saracena, 508 F.2d at 1336. Even assuming arguendo that the plaintiff stated a valid claim for reward, this Court is without subject matter jurisdiction of his claims for rewards far exceeding the amount $10,000.00. See 28 U.S.C. § 1346(a)(2). Time and again, the Supreme Court has denounced the kind of "hypothetical" jurisdiction that the plaintiff urges. Such "hypothetical" jurisdiction begets nothing more than a "hypothetical" judgment and an advisory opinion, both of which have been disapproved.[22]

Based upon the express language of the Code and the foregoing authorities, it is clear that (1) this Court is without subject matter jurisdiction; and (2) in the alternative, the plaintiff has failed to state claim for reward in the case at bar and cannot now do so. Plaintiff admits that there is no contract for a reward with the IRS, so there is no possibility of stating a claim under a breach of contract theory, express or otherwise. Suffice it to say, plaintiff has not and cannot allege that the IRS promised, in negotiations or otherwise, to pay any sum certain.

Absent factual allegations that raise substantial doubts as to the integrity of the IRS procedure, plaintiff has no claim for abuse of discretion because the IRS is not obligated to pay a reward even to eligible applicants. Doe v. United States, 38 Ct.Cl 377, 378 [80 AFTR 97-5761] (1997). The mere fact that the IRS may have provided no reward does not, by itself, demonstrate an abuse of discretion. Id. at 378, 379.

3. Mandamus

Jurisdiction over the plaintiff's claims under the federal mandamus statute is absent. See 28 U.S.C. § 1361. Although the Fifth Circuit has held that § 1361 provides a limited waiver of sovereign immunity, that waiver is limited by the function of the mandamus statute. See McClain v. Panama Canal Commission, 834 F.2d 452, 454 (5th Cir.1987). A federal court exercising mandamus jurisdiction may order a federal agency or actor to perform a mandatory function or ministerial duty imposed by law, but may not dictate the result or alter a substantive decision. See Drake v. Panama Canal Commission, 907 F.2d 532, 534 (5th Cir.1990). "The legal duty [owed] must be set out in the Constitution or by statute, and its performance must be positively commanded and so plainly prescribed as to be free from doubt." Dunn-McCampbell Royalty Interest, Inc. v. National Park Service, 112 F.3d 1283, 1288 (5th Cir.1997) (citing Giddings v. Chandler, 979 F.2d 1104, 1108 (5th Cir.1992)).

To prevail under a writ of mandamus, a plaintiff must establish three elements, to wit: (1) the plaintiff must have a clear

[22] See e. g., Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 1016 (1998)(instructing that statutory and especially constitutional elements of jurisdiction (i.e., standing to sue--part of justiciability) are essential ingredients of separation and equilibrium of powers and that for a court to pronounce upon the meaning or constitutionality of a federal law, when it has no jurisdiction to do so, is by very definition for a court to act ultra vires).

right to the relief; (2) the defendant must have a clear duty to act; and (3) no other adequate relief must be available. See Davis v. Fechtel, 150 F.3d 486, 487 (5th Cir.1998); United States v. O'Neil, 767 F.2d 1111, 1112 (5th Cir.1985); McClain, 834 F.2d at 455. Whether to grant mandamus is within the discretion of the district court. United States v. Denson, 603 F.2d 1143, 1146 (5th Cir.1979). Mandamus, however, is not available to review discretionary acts of agency officials. Green v. Heckler, 742 F.2d 237, 241 (5th Cir.1984). Moreover, where such relief is available, it is granted only in extraordinary circumstances. See Denson, 603 F.2d at 1146.

In the instant case, Henry has failed to establish the elements necessary to seek mandamus relief. First, as the Government points out, Henry is not entitled as a matter of right to an award. Section 1361 "confers jurisdiction on a district court only when the defendant ... agency owes a specific duty to the plaintiff." Kirkland Masonry, Inc. v. Commissioner, 614 F.2d 532, 534 [45 AFTR 2d 80-1159] (5th Cir.1980)(emphasis added). Second, the right to prosecute taxpayers for tax fraud is within the exclusive jurisdiction of the Government.[23] Plaintiff has standing only to prosecute his own refund claim, and he fails to cite any authority which affords him the right to orchestrate the prosecution of another taxpayer. Finally, plaintiff has availed himself of the remedy available to him (i.e., refund pled in Count I of his complaint).

The Court's ruling dismissing the plaintiff's claims set forth in Counts II through VII is mindful of the liberal construction requirement and that leave to amend should be freely granted. However, plaintiff has not sought leave to amend. Additionally, it is absolutely clear that the deficiencies of the claims set forth in Counts II through VII (i.e., lack of subject matter jurisdiction), cannot be cured by amendment.

4. Conclusion

In summary, Counts II and III are subject to dismissal because they are not claims for recovery of internal revenue tax and this Court lacks jurisdiction to hear other claims against the United States seeking damages in excess of $10,000. Alternatively, the plaintiff has failed to state a claim for which relief may be granted. Mandamus jurisdiction is absent, plaintiff having failed to plead the necessary predicates for the imposition of this extraordinary remedy. Accordingly, for all of the above and foregoing reasons,

IT IS ORDERED that the Government's Motion to Dismiss Counts II through VII of the plaintiff's complaint is hereby GRANTED.

¶2002-5409

UNITED STATES OF AMERICA, v. Robert McDONALD, ET AL., DEFENDANTS. U.S. District Court, Eastern Dist. of New York, (DC NY) No. 01-CR-1168 (JS)(MLO), Aug. 6, 2002. Decision against Govt.

1. Tax crimes—preparing false returns; conspiracy—procedure—disqualification of attorney. Govt.'s renewed motion to disqualify attorney from representing 1 return preparer in his defense to IRC §7206 and conspiracy prosecution was denied: potential, unconfirmed conflict that could arise as result of attorney's prior representation of govt. witness and govt.'s plans to call attorney as witness didn't warrant disqualification. *Reference:* United States Tax Reporter ¶73,446.509(3). IRC §7206.

Joseph R. Conway, A.U.S.A., Office of the United States Attorney, Central Islip, for United States.
Thomas J. Fitzpatrick, Esq., Henry Putzel, III, Esq., New York, Francis J. Murray, Esq., Rockville Centre, Joseph W. Ryan, Jr., Esq., Uniondale, Kevin Keating, Esq., Garden City, Jeremy Hugh Temkin, Esq., Morvillo, Abramowitz, Gran, Iason & Silberberg, P.C., John R. Wing, Esq., Weil, Gotshal & Manges, LLP, William Cuozzi,

[23] See e. g., In re Marine Shale, 91 F.3d 16, 19 (5th Cir.1996) (affirming the district judge, denying Marine Shale's petition for writ of mandamus, and agreeing that the court lacked the authority to grant the wholly new species of coercive order sought against the EPA).

Esq., Kostelanetz & Fink, LLP, New York, for Defendants: John R. Blake, David J. Blake, William Pattison, Robert F. Friemann, Robert J. McDonald, William M. Blake, Albert E. Isernio, Michael Agoglia.

United States District Court, E.D. New York,

MEMORANDUM AND DECISION

SEYBERT, District J.

Pending before the Court is the government's renewed motion, filed on May 28, 2002, to disqualify Joseph W. Ryan, Jr., Esq. (''Ryan'') as counsel for defendant Robert F. Friemann (''Friemann''). On July 11, 2002, Friemann opposed the motion and on July 25, 2002, the parties appeared before the Court for oral argument. For the reasons discussed herein, the Court DENIES the motion in its entirety.

I. BACKGROUND

On March 29, 2002, the government filed its SI-2. At Counts 34 through 43, the government charged Friemann with preparing, filing, and aiding the filing of federal tax returns which contained materially false representations in violation of 26 U.S.C. § 7206(1)–(2). The government contends that it will present evidence which will show that Friemann was part of a conspiracy to defraud and, in furtherance thereof, he assisted in setting up two business entities, DJB and S & F, in order to funnel the alleged ''secret commissions'' to the defendants. The government will also seek to prove that Friemann filed, and caused to be filed federal tax returns for both DJB and S & F which falsely declared monies which flowed from Benefit Plan Administrators (''BPA'') to be ''consulting fees'' earned by S & F. See Gov't Ltr., dated Dec. 7, 2001, at 3.

II. DISCUSSION

A. Applicable Law

[1] The standard for disqualification of counsel begins with a ''presumption in favor of the accused's chosen counsel'' which may be overcome ''by a showing of an actual conflict or potentially serious conflict.'' United States v. Locasio, 6 F.3d 924, 931 (2d Cir.1993), cert. denied sub nom, Gotti v. United States, 511 U.S. 107, 114 S.Ct. 1645 (1994); Wheat v. United States, 486 U.S. 153, 160, 164, 108 S.Ct. 1692, 1698, 1700 (1988). If the court finds an actual or severe potential conflict--''such that no rational defendant would knowingly and intelligently desire the conflicted lawyer's representation''--it must disqualify the attorney. See United States v. Levy, 25 F.3d 146, 153 (2d Cir.1994). Where there is a potential, lesser conflict suitable to waiver, the Court should follow the procedures set forth in United States v. Curcio to allow the party opposing disqualification to make a ''knowing and intelligent'' waiver of any potential conflict. See United States v. Curcio, 680 F.2d 881, 888 (2d Cir.1982).

B. Asserted Grounds for Disqualification

1. Prior Representation of Ruth Schneider

The first ground raised in the government's renewed motion concerns a potential conflict raised by Ryan's prior representation of Ruth Schneider, who will testify for the government. The govern-ment has failed, however, to establish the existence of an actual conflict and does no more than speculate that a conflict might arise during the trial due to Ryan's limited prior representation of Mrs. Schneider several years ago.

Granting a motion to disqualify on these grounds, where the former client is not the moving party, is rarely warranted. See United States v. Cunningham, 672 F.2d 1064, 1072 (2d Cir.1982). Unlike the ''unusual facts'' noted by the Second Circuit in United States v. Schwarz, the government has failed to advance any facts to show that Ryan has a conflict which arises from self-interest so severe that Friemann cannot knowingly and intelligently waive it. See United States v. Schwarz, 283 F.3d 76, 81, 91–96 (2d Cir.2002) (concluding that defense counsel's $10 million retainer agreement with the Policeman's Benevolent Association presented an actual, severe and unwaivable conflict because although Schwarz had ''an obvious strategic interest in implicating another officer in the bath-

room assault from the moment he was charged,'' evidence to that effect would have provided support for the victim's claim of conspiracy against the PBA in a subsequently filed civil suit). Furthermore, the government has failed to show that Ryan's prior representation of Ruth Schneider will render him unable to impeach her testimony without undermining his own credibility (see Ciak v. United States, 59 F.3d 296, 304–05 (2d Cir.1995)) or that Ryan's own interest and that of his former and current clients are likely to '''diverge with respect to a material fact or issue''') (Winkler v. Keane, 7 F.3d 304, 307 (2d Cir.1993) (quoting Cuyler v. Sullivan, 446 U.S. 336, 356 n.3, 100 S.Ct. 1708, 1722 n. 3 (1980), cert. denied, 511 U.S. 1022, 114 S.Ct. 1407 (1994)). Consequently, just as it failed to sustain its burden on its prior motions to disqualify Ryan, the government again has failed to substantiate what it characterizes as an ''inherent unpredictability of potential conflict'' which will arise at trial. See Gov't Ltr., dated Dec. 7, 2001, at 11–12.

Moreover, both Ruth Schneider and defendant Friemann appeared before the Court on February 15, 2002 for a Curcio hearing at which time they made knowing and intelligent waivers of any potential conflict. See e.g., United States v. Friedman, 854 F.2d 535, 571 (2d Cir.1988), cert. denied, 490 U.S. 1004, 109 S.Ct. 1637 (1989). Because the Court finds that these waivers were both knowing and intelligent and in the absence of any facts or circumstances which demonstrate that there is an ''unwaivable conflict,'' the motion is denied on the first ground advanced by the government.

2. Compelling Ryan's Testimony

The government devotes the majority of its renewed motion to its contention that Ryan must be disqualified because he will be called as a witness to testify about checks drawn on S & F's account made payable to him for legal services. See Gov't Ltr., dated May 28, 2002, at 4–5, 7–9 (discussing check in the amount of $2,345 payable to Ryan in 1999, a ''pattern which continued in 2000 and 2001'' whereby S & F issued payment to Ryan in the amount of $6,928.98, ''apparently for legal services''). The government contends that Ryan will be called to testify about the receipt of funds from S & F which will be part of its case against Friemann as to Counts 34, 37 and 40. See id. at 5.

Without reference in its moving papers to the crime-fraud exception and in the absence of any proffer of evidence to show that any communications between Friemann and Ryan were made in furtherance of a fraud, the government nonetheless moves to disqualify based upon its plans to call Ryan as a witness. The government asserts that Ryan should be required to testify about his conversations and communications with his client regarding matters alleged in the indictment, including the legality of claiming deductions for legal expenses. See id. at 7–8 (emphasis added). During oral argument the government asserted for the first time that Ryan's testimony regarding these otherwise-privileged communications should be compelled under the crime-fraud exception.

In apparent disregard of its burden to come forward with evidence to show that confidential communications were made in furtherance of a fraud (United States v. Zolin, 491 U.S. 554, 573 [63 AFTR 2d 89-1483], 109 S.Ct. 2619, 2631 [63 AFTR 2d 89-1483] (1989) (noting that ''partial transcripts, or other evidence directly but incompletely reflecting the content of the contested communications, generally will be strong evidence of the subject matter of the communications themselves''), the government doggedly argues that Ryan must testify about confidential communications with his client simply because he received checks drawn from the S & F account after its formation. The Court finds two major flaws in the government's argument.

First, the government advances its argument that the crime-fraud exception applies without regard to its burden to identify a factual basis for the exception and its failure to offer legal or evidentiary support. See United States v. Jacobs, 117 F.3d 82, 87–88 (1997). Second, the government

fails to recognize the temporal nature of the exception and the narrow circumstances to which it applies. See id. at 88–89; see also In re Grand Jury Subpoena, 798 F.2d 32, 34 (2d Cir.1986) (noting the requisite ''temporal nexus'' between the alleged crimes and the privileged communications but finding that neither a prosecutor's affidavit nor the documents submitted for in camera review were sufficient to show that the communications were intended in some way to further the criminal activity); Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 281 (8th Cir.1984) (''Timing is critical, for the prima facie showing requires that the 'client was engaged in or planning a criminal fraudulent scheme when he sought the advice of counsel to further the scheme.'''), cert. dismissed, 472 U.S. 1022, 105 S.Ct. 3491 (1985)).

In the case at bar, by the time Friemann retained Ryan, Friemann was already the target of a criminal investigation. Not surprisingly, the government's motion is devoid of any reference to the nature of any confidential communications or the factual basis for its assertions that there were any communications between Friemann and Ryan which were made to facilitate the fraudulent scheme. In any event, the Court finds that it would be implausible to suggest that Friemann, a certified public accountant, retained a criminal defense attorney and then, for purposes of furthering the fraudulent scheme, consulted that attorney regarding the legality of matters concerning his preparation of tax returns.

3. Ryan as an Unsworn Witness

The government also contends that Ryan should be disqualified in order to avoid his becoming an ''unsworn witness.'' Disqualification of an attorney under the unsworn witness doctrine is a drastic remedy imposed only where there is a danger that continued representation will impair the factfinding process or prejudice the prosecution.

In order to prevail on this theory, the government cannot rely on mere allegations of the attorney's involvement (see Weil v. Long Island Savings Bank, 200 F.R.D. 164, 174 (E.D.N.Y.2001)) but rather, must show that the attorney has ''first-hand knowledge of the events presented at trial.'' See United States v. Locasio, 6 F.3d at 933. This may be done by showing that the attorney ''observed or participated in events giving rise to facts disputed at trial.'' Two's Co., Inc. v. Transamerica Ins. Co., 653 F.Supp. 255, 258 (S.D.N.Y.1986). In the Locasio case, the court disqualified attorney Bruce Cutler based upon evidence which showed that Cutler was present during taped conversations wherein the defendants discussed the crimes charged. See United States v. Locasio, 6 F.3d at 933. The court noted, however, that this was ''an unusual case, in that Cutler had allegedly entangled himself to an extraordinary degree in the activities of the Gambino Crime Family.'' Id.

Conversely, in this case, the government does not contend that Ryan was involved in the events charged or that he entangled himself in his client's business. Rather, the government seems to suggest that because Ryan received checks drawn on S & F accounts in payment of legal fees, he must have first- hand knowledge of his client's preparation and filing of false tax returns. Moreover, the government does not explain how, under the facts presented, Ryan's continued representation will impair the factfinding process or prejudice the prosecution. Consequently, the Court rejects the government's assertion that Ryan must be disqualified as an unsworn witness.

Finally, the Court notes that if the government calls Ryan as a witness, he may testify about his legal fees and services pursuant to Disciplinary Rules 5-102 and DR 5-101(B). Read together, the rules provide that an attorney may ''continue as an advocate'' and ''also testify'' about ''uncontested issue[s]'' or matters about which there is no reason to believe there will be opposition, or the ''nature and value of legal services.'' DR 5-102; DR 5-101(B)(1)–(3); see also Friemann Mot. at 47–48. Accordingly, should the government obtain authorization to call him as a witness, Ryan may testify as to the ''nature and

value of legal services rendered'' to his client without violating his ethical obligations and without cause for disqualification.

IV. CONCLUSION

For the reasons stated herein, the Court DENIES the government's renewed motion to disqualify Joseph W. Ryan, Esq. as counsel for defendant Robert F. Friemann in its entirety. In view of the additional tax counts charged in the SI-2, Friemann and all interested parties shall appear before the Court for a Curcio hearing on August 23, 2002 at 10 a.m.

SO ORDERED.

¶2002-5410

UNITED STATES OF AMERICA, PLAINTIFF v. Norman Hugh SMITH, DEFENDANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-30168; D.C. No. CR-00-00186-TSZ, Sept. 17, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—filing false returns—U.S. Sentencing Guidelines. Taxpayer's sentence for filing false individual and corp. tax returns was affirmed: record supported obstruction of justice enhancement under U.S.S.G. §3C1.1; and denying taxpayer acceptance of responsibility reduction was appropriate, based on his post-offense asset transfers and failure to offer sufficient statement of responsibility. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §7206.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the Western District of Washington Thomas S. Zilly, District Judge, Presiding.

Before HUG, O'SCANNLAIN and TASHIMA, Circuit Judges.

MEMORANDUM*

This case was not selected for publication in the Federal Reporter.

Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

[1] Norman Hugh Smith appeals his 36-month sentence imposed following his guilty plea conviction for two counts of making and subscribing a false individual tax return and two counts of making and subscribing a false corporate tax return, in violation of 26 U.S.C. § 7206(1). We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and we affirm.

Smith contends that the district court erred by increasing his offense level two points for obstructing justice pursuant to United States Sentencing Guidelines (''U.S.S.G.'') § 3C1.1. Reviewing for clear error, United States v. Lofton, 905 F.2d 1315, 1316 (9th Cir.1990), we are not persuaded. A review of the entire record demonstrates that the district court did not err in finding by a preponderance of the evidence that Smith obstructed justice by withholding documents. See United States v. Asagba, 77 F.3d 324, 326 (9th Cir.1996) (stating that ''[r]eview under the clearly erroneous standard is significantly deferential, requiring for reversal a definite and firm conviction that a mistake has been made. The standard does not entitle a reviewing court to reverse the finding of the trial court simply because the reviewing court might have decided differently.'') (citation omitted).

Smith's final contention is that the district court erred by refusing to allow the two point reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a). The district court did not commit clear error by finding that Smith's statement of responsibility was insufficient and his post-offense asset transfers were part of the scheme to defraud the government, and were inconsistent with an acceptance of responsibility. See United States v. Fellows, 157 F.3d 1197, 1202–03 (9th Cir.1998).

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

AFFIRMED.

¶2002-5411

Sterling G. PARKER, PETITIONER v. UNITED STATES OF AMERICA, and Internal Revenue Service, RESPONDENTS. U.S. District Court, Northern Dist. of Alabama, (DC AL) Case No. 02-RRA-1655-S, Aug. 23, 2002. Decision for Govt.

1. Third-party summons enforcement—petition to quash. Magistrate judge dismissed without prejudice taxpayer's petition to quash IRS's 3d-party summons. *Reference:* United States Tax Reporter ¶76,095.01(10). IRC §7609.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION,

ORDER

[1] Having considered the Respondents' Motion to Dismiss Petition to Quash Internal Revenue Service Third-Party Summons, the supporting memorandum of points and authorities, any opposition and reply thereto, and the entire record of this proceeding, it is by the Court hereby

ORDERED that the motion hereby is GRANTED; and it is further

ORDERED that this action be, and hereby is, DISMISSED WITHOUT PREJUDICE; and it is further

ORDERED that the Clerk shall dis-tribute copies of this Order to the parties in this case.

SO ORDERED this 22nd day of Aug, 2002.

/s/

UNITED STATES MAGISTRATE JUDGE

¶2002-5412

Thomas WALTHER, PLAINTIFF v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 2-293 T, Sept. 12, 2002. Year 1987. Decision for Govt.

1. Refund actions—limitations periods on filing suit—exceptions—equitable tolling. Refund complaint taxpayer's attorney's colleague filed on taxpayer's behalf after IRC §6532's 2-year period expired was dismissed as untimely: taxpayer's request to backdate filing/deem complaint timely under Court of Federal Claims' former Rule 3(b)(2) was rejected where doing so would effectively toll limitations period, which wasn't allowed by statute or case law; taxpayer didn't otherwise show good reason why complaint should "properly" be dated earlier than its actual filing date under Rule's general corrective provision; and Rule's incorrect-date-stamp and timely-mailing provisions didn't apply. Also, even acknowledging equities and fact that attorney's colleague's misadventures in trying to locate court house on eve of filing deadline caused taxpayer loss of substantial refund, he showed no good reason why filing was handed off to colleague in 1st place. *Reference:* United States Tax Reporter ¶65,325.01(3); 74,336.510(22); 74,225.05(45). IRC §6532; 7422.

Bruce D. Steiner, Philip S. Gross, New York, NY, for plaintiff.
Robert N. Dorosin, Washington, DC, with whom was Assistant Attorney General Eileen J. O'Connor, for defendant. Mildred L. Seidman, Chief, Court of Federal Claims Section and Steven I. Frahm, Assistant Chief, of counsel.

In the United States Court of Federal Claims,

ORDER

MILLER, Judge.

Taxes; tax refund; statute of limitations inI.R.C. § 6532(a); relief from late filing; RCFC 3(b)(2); RCFC 12(b)(1).

At issue in this case is whether plaintiff's claim for a tax refund is barred under the two-year statute of limitations set forth in § 6532(a)(1) of the Internal Revenue Code (the "I.R.C." or the "Code"), or whether Rule 3(b)(2) ("former rule 3(b)(2)") of the Rules of the United States Claims Court (the "RUSCC"), which were in effect at that time, allows an exception that could provide relief to plaintiff.[1]

FACTS

The plaintiff, Thomas Walther, sought recovery of federal income tax in the amount of $42,920.00 for the taxable year ending December 31, 1987. Plaintiff filed for a refund of income tax on or about March 31, 1998. The Commissioner of Internal Revenue denied plaintiff's request on April 5, 2000, issuing a statutory notice of claim disallowance.

Plaintiff then tried to contest the disallowance. Under I.R.C. § 6532(a)(1), which establishes a two-year limitation period, the filing deadline for a challenge to the disallowance was midnight on Friday, April 5, 2002. Plaintiff's attorney entrusted a colleague, Philip S. Gross, to file the complaint on that day. Plaintiff does not indicate why plaintiff's attorney did not file the complaint himself, stating only that Mr. Gross was in the Washington D.C. area for a "family occasion." Pl.'s Br. filed Jul. 11, 2002, at 2. Mr. Gross apparently waited until 10 p.m. on April 5, 2002, to attempt to file the complaint.

Mr. Gross attempted to deposit the complaint in the court's night mail drop, but he could not locate it. According to plaintiff's brief, Mr. Gross, his wife, and his parents spent more than two and one-half hours looking for the court. They allegedly asked at least 12 people for directions, including police officers, firemen, and security guards. They also attempted to locate the court using an Internet map resource, but to no avail.

Mr. Gross ultimately filed the complaint by Federal Express on Monday, April 8, 2002. He included a handwritten note with the complaint dated April 6, 2002, asking the clerk to pre-date the material April 5, 2002, and suggesting that the court put directions to the drop box on the Internet.

Defendant moved to dismiss for lack of jurisdiction pursuant to RCFC 12(b)(1).[2] Defendant contends that jurisdiction is lacking because the two-year statute of limitations in I.R.C. § 6532(a) bars plaintiff's tax claim. The Internal Revenue Service (the "I.R.S.") sent a notice of disallowance to plaintiff on April 5, 2000. Plaintiff's complaint was filed April 8, 2002, more than two years after the disallowance. Therefore, defendant argues that the filing of the complaint was untimely.

Plaintiff does not dispute that I.R.C. § 6532(a) applies to this case, or that the applicable statute of limitations expired on April 5, 2002. Plaintiff contends, however, that the court's rules provide him with relief. Plaintiff urges this court to use its authority under former rule 3(b)(2) to issue a corrective order deeming that the complaint was filed on the last date allowed under the statute of limitations.

DISCUSSION

[1] The Court of Federal Claims has jurisdiction to determine claims seeking refund of taxes paid, insofar as Congress has waived sovereign immunity in tax refund matters, pursuant to 28 U.S.C. § 1491(a).

In ruling on a motion to dismiss, the court assumes as true all allegations made by the non-moving party. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (overruled on different grounds by Davis v. Scherer, 468 U.S. 183, 191 (1984)). In this case the court will assume all plaintiff's allegations to be true. The burden of proving that the Court of Federal Claims has subject matter jurisdiction over a claim rests with the party seeking to invoke its jurisdiction. McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936).

[1] Although the court revised its rules in May 2002, the former rules of the court apply to this case because all relevant events took place before May 1, 2002. RCFC 86.

[2] All of plaintiff's averments concerning counsel's benighted attempt to file his complaint appear unsworn in plaintiff's brief. The court credits them for purposes of ruling on defendant's motion.

I.R.C. § 6532(a)(1) provides:

> (1) General Rule: No suit or proceeding under § 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun ... after the expiration of 2 years from the date of mailing ... by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

Plaintiff alleges that the notice of disallowance was mailed on April 5, 2000. Plaintiff admits that he did not file his complaint challenging the disallowance until April 8, 2002, notwithstanding the exhaustive effort by Mr. Gross and his family to file the claim on the night of April 5, 2002. In sum, plaintiff does not allege that he made a timely filing of his complaint and does not dispute that I.R.C. § 6532(a) applies to this case.

Plaintiff asks the court to amend the filing date of his complaint so that the complaint is deemed to have been filed on April 5, 2002, the last day before the statute of limitations ran on the claim. Plaintiff relies on former rule 3(b)(2) as authority for his motion to amend the filing date.

Former rule 3(b)(1) provides that the records of the clerk, including the date stamped on the complaint, shall be "final and conclusive evidence" of the date on which a complaint was filed, absent a motion under former rule 3(b)(2) to amend the filing date. "It is a well established rule of law that a petition is considered filed when it is delivered to the court." Charlson Realty Co. v. United States, 384 F.2d 434, 441 [20 AFTR 2d 5578], 181 Ct. Cl. 262, 272 [20 AFTR 2d 5578] (1967); see also Schultz v. United States, 132 F. Supp. 953, 955–56, 132 Ct. Cl. 618, 622 (1955). Former rule 3(b)(2) provides three exceptions to this rule that allow the court to issue a corrective order to deem a complaint filed earlier than its actual filing date. This court will address the three alternatives in turn.

First, former rule 3(b)(2)(B) provided that a party may move to amend a filing date if the motion is supported by "a proper showing that the clerk's records are factually incorrect." Plaintiff admits that he did not file the complaint until April 8, 2002. Plaintiff does not contend that the clerk's date stamp reflected the wrong date of the filing. The exception contained in former rule 3(b)(2)(B) therefore does not apply.

Second, former rule 3(b)(2)(C) applies to complaints filed by mail and allows the court, on motion by a party, to deem a complaint filed on the last date allowed by a statute of limitations, if the complaint was mailed in advance of that date. To qualify for this exception, plaintiff must satisfy all three elements set out in former rule 3(b)(2)(C). See Carter v. United States, 15 Cl. Ct. 753, 754 (1988). Former rule 3(b)(2)(C) requires a plaintiff to show 1) that the complaint was sent by registered or certified mail, properly addressed to the clerk of the court; 2) that the complaint was deposited in the mail sufficiently in advance of the last date allowed for filing to provide for receipt by the clerk on or before such date in the ordinary course of the mail; and 3) that the party plaintiff exercised no control over the mailing after it was deposited and before it was delivered to the court. Plaintiff does not meet the second element of the exception because he does not allege that he timely deposited the complaint in the mail; indeed, plaintiff admits that he mailed the complaint after the April 5 deadline. "Application of Rule 3(b)(2)(C) is appropriate only when the plaintiff has shown that the mailed complaint, in the ordinary course of mail delivery, should have arrived at the Court within the statutory time period." Ross v. United States, 16 Cl. Ct. 378, 382 (1989). Therefore, the exception contained in former rule 3(b)(2)(C) does not apply.

Third, former rule 3(b)(2)(A) contains a more general provision, allowing a party to seek a corrective order from the court if a party contends "that the effective date of the plaintiff's complaint should properly be a date earlier than that shown by the clerk's records." In deciding when a complaint should "properly" be dated earlier than its actual filing date, the court must

consider past treatment of such tax revenue claims.

The Supreme Court has held that I.R.C. § 6511 does not contain an equitable tolling exception to the statutory deadline for filing tax refund claims. See United States v. Brockamp, 519 U.S. 347, 354 [79 AFTR 2d 97-986] (1997). The Supreme Court held that because the statute set out its limitations in such a highly detailed manner, "linguistically speaking, [the statute] cannot easily be read as containing implicit exceptions." Id. at 350. The Court also noted that an implied equitable tolling exception would create a significant administrative burden for the I.R.S. Id. at 352. Correspondingly, the Federal Circuit has held that "26 U.S.C. 6532(a) does not contain an implied 'equitable' exception under the Supreme Court's analysis delineated in Brockamp." RHI Holdings, Inc. v. United States, 142 F.3d 1459, 1462 [81 AFTR 2d 98-1789] (Fed. Cir. 1998).

Statutes of limitations for tax refunds "are established to cut of rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered by the judiciary." Kavanagh v. Noble, 332 U.S. 535, 539 [36 AFTR 383] (1947). "Remedies for resulting inequities are to be provided by Congress, not the courts." Id. In his Charlson dissent, Judge Oscar Davis outlined the limits of the court's authority to extend statutes of limitations:

> [A] court's power to ease the effects of limitations period established by Congress for a suits against the sovereign is relatively narrow . . . . The Supreme Court "has consistently ruled that no federal judge or court possesses the power to extend the time for appeal beyond the statutory period by any form of judicial action" . . . Though we might, if we were legislators, prefer to change some of the existing statutory requirements, we cannot as judges absolve a petitioner from the consequences of his failure to pursue his existing remedies in a timely manner . . . Relief from these rigors of limitations, where it seems to run unfairly, should originate in Congress rather than the courts.

384 F.2d at 456, 181 Ct. Cl at 197–98 [20 AFTR 2d 5578] (internal citations ommited). "[W]e should continue to apply to the facts of this case the standards established by our prior decisions and the general judicial practice, and leave modifications to the legislature." Id. Judge Davis authored this formulation in 1967, and Congress has had ample time in the interim to amend the I.R.C. It has failed to do so. It is therefore beyond the powers of this court to find an exception for plaintiff in former rule 3(b)(2) that the Code plainly does not provide.

Strict application of the statute of limitations compels a harsh result in this case. Plaintiff stands to lose a potentially valid claim involving more than $40,000.00 in taxes. Denying plaintiff his day in court is a dire consequence. Mindful of this result, at least one judge has cautioned that "full compliance [with the court's rules] must not contravene the interests of justice." Ross, 16 Cl. Ct. at 383. Although this court cannot interpose equitable considerations to avoid the result mandated by statute as interpreted by the Supreme Court and the Federal Circuit, this court has scoured the briefs to find some factual predicate for relieving this plaintiff from the lapse of judgment of his counsel. The law, however, is adamant that a litigant be held to the acts of his attorney. Taylor v. Illinois, 484 U.S. 400, 418 (1988); see also Romala Corp.v. United States, 927 F.2d 1219, 1225 (Fed. Cir. 1991) (holding that a client is bound by the acts or omissions of his or her lawyer).

Even acknowledging the equities in this case, the court nevertheless can discern no ground on which to grant plaintiff relief. Plaintiff contends that the court should deem his complaint filed earlier than it was merely because plaintiff's attorney's agent tried earnestly, with two hours remaining in the limitations period, to file the complaint. Instead of mailing the complaint to the court house, which would all but have assured its timely filing, plaintiff's counsel of record gave the complaint to a colleague, Mr. Gross, to file. Plaintiff's brief does not give any reason for preferring Mr. Gross over the mail service, except that

Mr. Gross coincidentally would be in the Washington, D.C. area for personal reasons on the same date as the filing deadline. Perhaps most questionable of all is the fact that plaintiff's attorney entrusted the complaint, on the last day it could be filed, with a person whose priority in coming to the Washington, D.C. area was not to file the complaint, but to tend to personal affairs. In short, plaintiff's attorney used questionable judgment in entrusting Mr. Gross with the complaint.

A few simple steps would have saved plaintiff's complaint from a jurisdiction pitfall. Knowing that the filing window was small, plaintiff's attorney might have taken a some basic precautions to assure that the complaint was filed timely. Plaintiff's brief goes into extensive detail about how no policemen, fireman or security guards whom they encountered knew where the court was located and how even an Internet resource could not locate the court house. Failure by the city's finest to know the location of the court house is excusable. Failure by even a popular Internet cite to locate the court house is excusable. Failure by plaintiff's attorney to secure its location absolutely is not.

In short, the court agrees with defendant that plaintiff exhibited an "extraordinarily cavalier and indifferent attitude toward the obligation to file the complaint within the statutory period." Def. Br. filed Jul. 26, 2002, at 5. Plaintiff has given no valid justification for failing to comply with the court's filing rules. For these reasons the court cannot grant plaintiff relief.

CONCLUSION

Accordingly, based on the foregoing,

IT IS ORDERED, as follows:

1. Defendant's motion to dismiss for lack of jurisdiction is granted. The Clerk of the Court will dismiss the complaint without prejudice.

2. Plaintiff's motion to amend the filing date of the original complaint is denied.

Christine Odell Cook Miller

Judge

¶2002-5413

NATIONAL FEDERATION OF REPUBLICAN ASSEMBLIES, Alabama Republican Assembly, Mobile Republican Assembly, Howard Jarvis Taxpayers Association, Howard Jarvis Taxpayers Association Political Action Committee, Libertarian National Committee, and Paul Haughton, PLAINTIFFS v. UNITED STATES OF AMERICA, John D. ASHCROFT, in his official capacity as the United States Attorney General, Paul H. O'Neill, in his official capacity as the Secretary of the Treasury and David A. York, in his official capacity as the United States Attorney for the Southern District of Alabama, DEFENDANTS. U.S. District Court, Southern Dist. of Alabama, Southern Division, (DC AL) CIVIL ACTION NO. 1:00-0759-RV-C, Sept. 17, 2002. District Court, (2002, DC AL) 90 AFTR 2d 2002-6150, amended. Earlier proceeding at (2001, DC AL) 87 AFTR 2d 2001-2413, 148 F Supp 2d 1273, 2001-2 USTC ¶50456 [87 AFTR 2d 2001-2413]. Decision for Govt. in part.

1. Political orgs.—disclosure requirements—constitutionality—free speech; equal protection; 10th Amendment—standing. Govt. was granted request for amended judgment, clarifying district court's declaration that IRC §527(j) is constitutional only to the extent it requires disclosure of contributions connected to federal election advocacy, and unconstitutional in its requirement to disclose ex-penditures connected to federal electoral advocacy and with respect to disclosure requirement for both contributions and expenditures connected to state or local electoral advocacy. Also, govt. and its employees or agents were enjoined from enforcing those unconstitutional provisions against named plaintiffs. *Reference:* United States Tax Reporter ¶5275.01(3); 5275.01(17). IRC §527.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DIS-

TRICT OF ALABAMA SOUTHERN DIVISION,

ORDER

RICHARD W. VOLLMER, JR. SENIOR UNITED STATES DISTRICT JUDGE

This matter is before the court on the "Motion for Clarification of Judgment and/or Motion to Alter or Amend Judgment," (doc. 49), together with a supporting memorandum, (doc. 50), filed by defendants, in which they request the court to clarify its recent judgment. After due consideration, it is

[1] ORDERED that the motion for clarification and/or motion to alter or amend is GRANTED. The court's order and judgment only affect the parties to this litigation. However, as requested by the governmental defendants, the court will clarify this point by amending the declaratory judgment entered on August 28, 2002, (doc. 48), through the issuance of an amended declaratory judgment.

DONE this 17 day of September, 2002.

RICHARD W. VOLLMER, JR.

SENIOR UNITED STATES DISTRICT JUDGE

00-0759.3

AMENDED DECLARATORY JUDGMENT

RICHARD W. VOLLMER, JR. SENIOR UNITED STATES DISTRICT JUDGE

In accordance with the court's signed on August 27, 2002 (doc. 47), the court hereby DECLARES that Internal Revenue Code § 527(j) is:

(1) CONSTITUTIONAL TO THE EXTENT THAT it requires disclosure of contributions in connection with federal electoral advocacy;

(2) UNCONSTITUTIONAL TO THE EXTENT THAT it requires disclosure of expenditures in connection with federal electoral advocacy; and

(3) UNCONSTITUTIONAL TO THE EXTENT THAT it requires disclosure of contributions and expenditures in connection with state and/or local electoral advocacy.

Defendants, their employees, agents, and all persons acting at defendants' request or direction are hereby ENJOINED from enforcing the herein-declared unconstitutional portions of I.R.C. § 527(j) as to plaintiffs National Federation of Republican Assemblies, Alabama Republican Assembly, Mobile Republican Assembly, Howard Jarvis Taxpayers Association, Howard Jarvis Taxpayers Association Political Action Committee, and Libertarian National Committee.

DONE this 17 day of September, 2002.

RICHARD W. VOLLMER, JR.

SENIOR UNITED STATES DISTRICT JUDGE

00-0759.2

¶2002-5414

Peter G. SAM v. UNITED STATES OF AMERICA. U.S. District Court, Dist. of Maryland, (DC MD) Civil No. DKC-01-105, Aug. 27, 2002. Years 1992, 1993. Decision for Govt. in part.

1. Refund actions—summary judgment—administrative refund claim—limitations periods. Magistrate judge recommended granting govt.'s partial summary judgment motion to limit taxpayer's potential refund to original amount taxpayer requested in administrative claim: taxpayer offered no explanation or legal authority to increase claim. Also, limitations period barred recovery of amounts taxpayer paid more than 2 years before he filed claim; but govt.'s calculations of such amounts was partially incorrect. *Reference:* United States Tax Reporter ¶74,225.01(20); 74,225.05(40). IRC §7422.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND,

MEMORANDUM OPINION

(Magistrate Judge Jillyn K. Schulze)

Plaintiff Peter G. Sam brought this action pursuant to Section 7422 of the United States Tax Code seeking a refund of taxes, penalties, and interest paid. The parties consented to referral to a United States Magistrate Judge for all proceedings and final disposition. The United States' motion for partial summary judgment is pending and ready for resolution. No hearing is deemed necessary. Local Rule 105.6 (D. Md.). For the reasons set forth below, the motion will be granted in part.

1. Background.

In 1995, the United States assessed taxes against Mr. Sam for various quarters from 1992 through 1993, alleging that he employed truck drivers and neglected to pay employment taxes on Forms 940 and 941. Mr. Sam maintains that the drivers were sub-contractors, not employees, and therefore no Form 940 or 941 taxes were owed.

Starting in 1996, Mr. Sam began paying the taxes allegedly owed on a monthly basis. After paying the taxes, interest, and penalties as directed, Mr. Sam filed for a refund on March 24, 2000. When the United States denied the refund, Mr. Sam filed this action.

2. Summary Judgment Standard.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247–48 (1986); *Miller v. Leathers*, 913 F.2d 1085, 1987 (4th Cir. 1990). A genuine dispute exists if a reasonable factfinder could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 247–48. Only disputes over facts that might affect the outcome of the case under governing law will preclude summary judgment. *Id.* at 252; *Thompson Everett, Inc. v. National Cable Advertising*, 57 F.3d 1317, 1323 (4thCir. 1995).

The moving party bears the initial burden of demonstrating that there is no genuine issue as to any material fact. *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). The moving party may meet this burden by demonstrating the absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party then must, through affidavits or other kinds of evidentiary material listed in Rule 56(c), demonstrate specific facts showing that there is a genuine issue for trial. *Id.* at 324. The non-moving party cannot rely on "the mere pleading themselves," or simply set forth speculation, allegations, or denials to demonstrate genuine issues of fact. *Id.*

The court must not weigh the evidence. Rather, the court must determine whether enough evidence exists to enable a reasonable factfinder to find in favor of the non-moving party. *Anderson*, 477 U.S. at 252. The court must view all facts and inferences most favorably to the non-moving party, who is entitled to have the credibility of his evidence assumed, his version of events in dispute accepted, and internal conflicts resolved in his favor. *Charbonnages de France*, 597 F.2d at 414. However, the non-moving party is only entitled to inferences that "fall within the range of reasonable probability." *Thompson Everett*, 57 F.3d at 1323.

3. Discussion.

The United States seeks partial summary judgment on two separate grounds. First, it contends that Mr. Sam's claim is limited to the amount sought in the administrative claim for refund. Second, it contends that a portion of the amount sought is barred by the statute of limitations.

The Internal Revenue Code requires that an administrative claim be filed before any civil action for refund may be instituted. 26 U.S.C. § 7422(a). "The claim must set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof." 26 C.F.R. § 301.6402-2(b)(1). A taxpayer cannot present factual or legal issues in a refund suit that were not set forth in the claim for refund. *Real Estate Land Title & Trust Co. v. United States*, 309 U.S. 13, 17–18 [23

AFTR 816] (1940); *Beckwith Realty, Inc. v. United States*, 896 F.2d 860, 862–863 [65 AFTR 2d 90-757] (4th Cir. 1990); *Old Dominion Box Co. v. United States*, 477 F.2d 340, 345–47 [31 AFTR 2d 73-1185] (4th Cir. 1973); *Sappington v. United States*, 408 F.2d 817, 819–20 [24 AFTR 2d 69-6079] (4th Cir. 1969).

[1] Mr. Sam's administrative claims totaled $17,434.64,[1] but he now seeks $24,043.00, and does not respond to the United States' claim that he may not seek the larger amount here. He thus provides neither explanation nor legal authority to support the increase in his claim, and none is apparent. Accordingly, this court may award only the amount set forth in the claim for refund filed with the Internal Revenue Service.

The United States also asserts that a portion of the claim is barred by the statute of limitations. When, as here, no return was filed by the taxpayer, a request for refund must be filed within two years from the time the tax was paid. 26 U.S.C. § 6511(a). If the request for refund was not timely, the court has no jurisdiction to consider the refund suit. *Webb v. United States*, 66 F.3d 691, 693–694 [76 AFTR 2d 95-6696] (4th Cir. 1995). Therefore, Mr. Sam cannot recover any amounts paid more than two years before he filed the refund request.

The United States now claims that Mr. Sam filed his administrative claim with the Internal Revenue Service on April 10, 2000. However, the complaint alleges that the administrative claim for refund was filed on March 24, 2000, Paper No. 1 at ¶ 5, and the United States admitted this fact in its answer. Paper No. 6 at ¶ 5. Therefore, the date before which claims will be precluded by limitations is March 24, 1998, not April 10, 1998.[2]

The United States made an additional error in calculating the amounts that should be deducted from Mr. Sam's claim. After it reduced the claim to the amount sought administratively, the United States then subtracted all of the pre-limitations claims. However, some of the pre-limitations claims had already been subtracted because they were not included in the administrative claim. The United States is not entitled to subtract them twice.

After discounting claims not made administratively and those claims barred by limitations, Mr. Sam's potential recovery is $7369.26. This includes:

Taxes Paid for Period Ending	Form	Amount Allowed
March 31, 1993	941	140.61
June 30, 1993	941	1611.92
September 30, 1993	941	1583.73
December 31, 1993	941	1556.04
December 31, 1992	940	977.95
December 31, 1993	940	1499.01
TOTAL		7369.26

See Defendant's exhibits E–J; *see also* Defendant's exhibits 5 and 10.[3]

4. Conclusion.

The United States' motion for partial summary judgment will be granted, to the extent indicated in this opinion, limiting Mr. Sam's potential recovery to $7369.26, plus statutory interest.

Date: 8/27/02

JILLYN K. SCHULZE

United States Magistrate Judge

ORDER

(Magistrate Judge Jillyn K. Schulze)

For the reasons set out in the accompanying Memorandum, Mr. Sam's potential recovery in this case is $7369.26, plus statutory interest.

Date: 8/27/02

JILLYN K. SCHULZE

United States Magistrate Judge

[1] IRS Form 843 - Claim for Refund and Request for Abatement. *See*Defendant's exhibits A–J.

[2] Accordingly, the $900 payment made on April 2, 1998 will remain in the case.

[3] These amounts reflect the total refund sought for form 941 taxes for the second, third and fourth quarter of 1993, and that portion of the refund sought for form 941 taxes in the first quarter of 1993 which was paid after March 24, 1998. In addition, it includes the total refund sought for 1993 form 940 taxes paid and that portion of the amount sought for form 940 taxes that was paid after March 24, 1998.

¶2002-5415

Edwin J. BLAIR, PLAINTIFF-APPELLANT v. INTERNAL REVENUE SERVICE; Department of the Treasury; United States of America; James Freitas; Thomas Whatley, DEFENDANTS-APPELLEES. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 00-16010; D.C. No. CV-99-00470-DFL/DAD, Sept. 9, 2002. District Court affirmed in part and reversed and remanded in part. Decision for Taxpayer in part and for Govt. in part.

1. Actions against IRS and IRS agents—damages—Federal Tort Claims Act—presentation of claims. District court's jurisdictional dismissal of taxpayer's FTCA damages complaint, seeking lost wages and medical expenses that he incurred as result of injuries he suffered during arrest by IRS agents, was reversed and remanded in part. Taxpayer's lost wages claim for sum certain satisfied FTCA's presentation of claim rule and wasn't invalidated by inclusion of indeterminate medical expense claim; and govt.'s argument that sovereign immunity principles otherwise precluded allowance of partial claim was rejected. But, medical expense portion of claim was properly rejected where taxpayer's statement that medical expenses were "still being in-curred, with no end in sight," even when augmented by subsequent bills, didn't designate total sum claimed. *Reference:* United States Tax Reporter ¶76,557.53(12).

J. Chauncey Hayes, Sacramento, California, for the appellant.
Debora G. Luther and David T. Shelledy, Assistant U.S. Attorneys, Sacramento, California, for the appellee.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Appeal from the United States District Court for the Eastern District of California David F. Levi, District Judge, Presiding

Opinion by Judge Hug

Before: Procter Hug, Jr. and A. Wallace Tashima, Circuit Judges, and John Sedwick, District Judge.*

OPINION

HUG, Circuit Judge:

FOR PUBLICATION

This appeal involves a claim brought by Edwin Blair under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671–80, for injuries suffered from an arrest by Internal Revenue Service ("IRS") agents. The district court dismissed the claim for lack of subject matter jurisdiction because Blair had failed to present an adequate claim to the IRS prior to instituting suit as required by 28 U.S.C. § 2675(a). The court held that the claim was deficient because it failed to provide a sum certain in damages. Specifically, Blair's submission made a claim for a sum certain for wage loss resulting from the injury, but also provided that medical expenses were still being incurred and did not provide a sum certain for medical expenses. The issue in this case is the adequacy of the claim form to provide jurisdiction under the FTCA. We hold that the district court had jurisdiction to adjudicate the wage loss claim, for which a sum certain was provided, though it did not have jurisdiction to adjudicate the medical expenses claim for which no sum certain was provided. We affirm in part, reverse in part, and remand for further proceedings consistent with our opinion.

I.

Factual & Procedural History

Edwin Blair was arrested by IRS agents on April 15, 1996 for interfering with the seizure of his property. Following his arrest, Blair was handcuffed and transported by car to the United States Courthouse in downtown Sacramento. Blair alleges that he suffered significant injuries during the 45 minute car trip, primarily due to the tightness of the handcuffs on his wrists. As a result of these injuries, Blair claims that he has had to endure multiple surgeries to regain the normal use of his hands, and

* Honorable John Sedwick, United States District Judge for the District of Alaska, sitting by designation.

that he is no longer able to perform his work as a self-employed tree harvester.

Exactly two years after his arrest, Blair filed a claim with the IRS seeking compensation for his injuries. Blair filed his claim on a Standard Form 95 (''Form 95''), to which he attached several pages setting forth the details of his claim. This submission was uncontroversial in all respects but one.

The Form 95 gives a claimant the opportunity to provide, among other things, various dollar amounts related to the claim. Specifically, the Form 95 lists four boxes in which a claimant may enter a dollar amount--one each for property damage, personal injury, wrongful death, and the total value of the claim. A copy of the Form 95 as submitted by Blair is attached as Appendix A. In completing his Form 95, Blair did not list any dollar amounts on the actual form. See id. Rather, Blair left the boxes blank, with the exception of the personal injury box, in which he wrote ''please see attached.'' See id. In the documents attached to his Form 95, Blair provided the following information as to the amount of compensation he was seeking:

(1) Medical expenses are still being incurred, with no end presently in sight. Best estimates could perhaps be obtained by the IRS from the treating physicians listed in Item No. 11 above.

(2) Consequent lost income from claimant's self-employment is calculated from April, 1996 through April, 2018 (@ claimant's age 65 years). This figure is reached using the $200,000.00 net income figure for fiscal year 1995 and using a 10% annual increase factor, yielding a 20 year total loss of $17,499,436.00.

Thus, Blair provided a definite monetary figure for lost wages and no monetary figure for medical expenses.

Shortly after Blair filed his claim, the IRS informed him that it could not act on his request as long as the amount sought for medical expenses remained undetermined. Blair responded by providing the IRS with copies of existing medical records and bills. Subsequently, on September 11, 1998, the IRS denied Blair's request for relief.

Following the IRS' denial, Blair brought suit against the United States, the IRS, the Treasury Department, and the two IRS agents involved in his arrest. As part of this suit Blair sought relief under the FTCA, which, once a party meets certain jurisdictional requirements, generally provides a cause of action against the United States for torts committed by federal employees within the scope of their employment. See 28 U.S.C. § 1346(b). On motion of defendants, the district court dismissed the entire action. On appeal Blair challenges only dismissal of the FTCA claim.

As to Blair's FTCA claim, the Government argued that, on the basis of the claim presentation rule, the district court lacked subject matter jurisdiction. Under the claim presentation rule, a district court cannot exercise subject matter jurisdiction over an action brought pursuant to the FTCA unless the plaintiff ''shall have first presented the claim to the appropriate Federal agency . . . .'' 28 U.S.C. § 2675(a). A claim is deemed presented for purposes of § 2675(a) when a party files ''(1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim.'' Warren v. United States Dep't of Interior Bureau of Land Mgmt., 724 F.2d 776, 780 (9th Cir. 1984) (en banc).

The Government contended that Blair failed to comply with the claim presentation rule by failing to state a sum certain for his entire claim, and thus, that there was no adequate presentation of the claim and no subject matter jurisdiction. The district court granted the Government's motion to dismiss the FTCA claim for lack of subject matter jurisdiction because of the failure to present an adequate claim to the federal agency. Following the district court's decision, Blair filed this appeal, in which he challenges the dismissal of his FTCA claim.

II.

Jurisdiction & Standard of Review

The district court had jurisdiction under 28 U.S.C.§§ 1331 and 1346(b). We have jurisdiction pursuant to 28 U.S.C. § 1291. A district court's dismissal for lack of subject jurisdiction is reviewed de novo. See Sommatino v. United States, 255 F.3d 704, 707 (9th Cir. 2001).

III.

Statutory Requirements

In 1946 Congress passed the FTCA. Under the FTCA, as enacted in 1946, government agencies had no authority to settle claims over $2500. In 1966 the FTCA was amended to revise this procedure and provide greater opportunity for settlement before suit is filed. Our en banc decision in Warren traced the legislative history and the reasons for the change.

> Difficulties presented by the former claims process prompted Congress to amend [the FTCA]. Claimants formerly were required to first bring an action in district court against the government if their claims exceeded $2500. Only after filing could settlement be negotiated. The result was clogging of the courts with many claims that claimants and the government wanted to settle. Government agencies were forced to respond to court filings before engaging in settlement negotiations. Claimants, the courts and the agencies were forced to waste time and money because federal agencies lacked authority to consider settlement prior to court action. S.Rep. at 5–6, USCCAN at 2518.
>
> Under the amended versions of sections 2672 and 2675, all claims must be filed with the appropriate agencies before claimants can bring action in federal court. Congress articulated two purposes for amending the statutes. The first was "to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." S.Rep. at 2, USCCAN at 2516. Second, the amendments were thought to provide "for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government." S.Rep. at 2, USCCAN at 2515–16.

Id. at 778–79 (selected internal citations omitted).

Section 2672 authorizes the Attorney General to adopt regulations under which federal agencies could settle any claim for money damages. Id. at 778. These regulations are frequently referred to as the settlement regulations, and are found at 28 C.F.R. §§ 14.1–14.11. We held in Warren that these regulations are not a jurisdictional requirement and failure to comply with them does not pose a jurisdictional bar. Thus, though 28 C.F.R. § 14.2 is instructive as to the presentation of a claim, it is not jurisdictional in its requirement that a claim state a sum certain.[1] However, there is a jurisdictional requirement of a "sum certain" that comes from 28 U.S.C. § 2675.[2] The provision of § 2675(b) that requires that an action cannot be instituted for any sum in excess of the

[1] 28 C.F.R. § 14.2 provides in relevant part:

(a) For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident....

[2] Section 2675 states in full:

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

amount of the claim presented makes it apparent that the claim must state a sum certain. It is the statute itself that forms the basis for the jurisdictional requirement as we held in Warren.

We stated in Warren, "Thus, we hold that section 2675(a) requires the claimant or his legal representative to file (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim." Id. at 780.

IV.

Claim for Lost Wages

1

Blair submitted his claim on a Form 95 as suggested in the regulations. In completing item number 10, which pertains to a claim for personal injuries, he referenced an attachment that provided the requisite description of the nature and extent of his injuries. In item number 11, he also re-ferred to the attachment as providing the names of witnesses. Item number 12 is for the amount of the claim and provides four separate blocks, 12a for property damage, 12b for personal injury, 12c for wrongful death, and 12d for the total. Blair filled in only 12b for personal injury, referring again to his attachment. There was no need to fill in blocks for property damage or wrongful death since no claim was being made for them, and there was no need to fill in the total in 12d since the amount in 12b was obviously the total.

In the attachment Blair provided a sum certain for loss of wages, past and future, in the amount of $17,499,436, along with the details of how the amount was calculated. He also stated that medical expenses were still being incurred and did not specify a sum certain for his claim for past and future medical expenses.

It was conceded at oral argument that had Blair simply filled in block 12b with $17,499,436, without any further explanation, this would have fulfilled the jurisdictional requirement of providing a sum certain for his claim. The fact that the sum was stated in an attachment does not violate any statutory requirement, nor is it contrary to the regulation. Title 28 C.F.R. § 14.2 provides that the notification can be on a Form 95 "or other written notification."

Thus, the sole basis for contending that jurisdiction is lacking is because of the added material concerning his claim for medical expenses. We held in Warren that one of the two requirements of § 2675(a) was a prior submission to the federal agency of "a sum certain damage claim." Blair did submit to the IRS a sum certain damage claim for wage loss due to his injury. Having made a valid claim with a sum certain for wage loss, did the inclusion of material concerning medical expenses for which no sum certain was provided deprive the district court of jurisdiction to consider Blair's wage loss claim? We hold it did not.

Looking first at § 2675, it provides that a claim may not be instituted "unless the claimant shall have first presented the claim to the appropriate federal agency" and that an "[a]ction under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency." § 2675(a)–(b). Thus, from the language of the statute, it is apparent that the requirements are that the claim be first presented to the federal agency and that the amount sought in court cannot exceed the amount of that claim. The objective of the statute is met by the claim for wage loss of $17,499,436. This would be the limit of the amount that could be sought in the federal action. In the action brought by Blair, he seeks compensatory damage "according to proof." He would, of course, be limited in his proof to the $17 million figure for wage loss.[3]

In this case, Blair has stated a definite amount for wage loss, which does qualify as a "sum certain" for the wage loss, but has also included a statement about medical expenses that does not qualify as a

[3] Blair's action also included a claim for civil rights violation. The prayer, which asks for general and punitive damages, would pertain to that claim, which was dismissed and was not appealed.

claim for a sum certain. We conclude that the purpose of the statute is best met by considering the latter as surplusage. This is the most in line with the spirit of the statute. We have previously noted that in enacting the claim presentation rule, "Congress wanted to provide for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government." Shipek v. United States, 752 F.2d 1352, 1354 (9th Cir. 1985) (internal quotation marks omitted). It is fair and equitable to permit Blair to proceed with his claim for a sum certain in wage loss rather than mandating outright dismissal of a potentially meritorious claim because of an attachment that discusses medical expenses that do not qualify. This is best placed in focus when we consider that the claim would have qualified had Blair simply put the $17 million figure in box 12(b) with no explanation at all.

The Government contends that the requirement to state a sum certain in filing a claim with a federal agency has several important purposes. It notes that one of the purposes in enacting § 2675(a) was "to ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." Shipek, 752 F.2d at 1354 (internal quotation marks omitted). The Government contends that the requirement of a sum certain contributes to a realistic assessment of settlement possibilities. Frankly, it is difficult to see how placing a figure in block 12(b), which can be any figure, can contribute much to settlement without knowing the basis for the figure (as Blair sought to provide in his attachment). However, even assuming that is true, Blair did provide a sum certain for lost wages, which would be the limit of his claim in federal court. The Government also notes that the dollar amount offered pursuant to the sum certain requirement dictates (1) whether the claim may be settled by the agency without involving the Attorney General, see 28 U.S.C. § 2672 (providing that "any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee"); (2) whether any payment on the claim will come from the agency's budget, see id. (stating that amounts of $2,500 or less shall be paid out of the agency's budget, while amounts in excess of $2,500 are satisfied out of separate funds); and (3) the total amount that a plaintiff may sue for if the claim is denied by the agency, see 28 U.S.C. § 2675(b).

All of these objectives are met by our ruling in this case. The claim for wage loss exceeds the $25,000 requirement for Attorney General involvement and the $2,500 cap on awards from agency budgets. Blair is limited in his federal suit to the sum certain specified for his wage loss.

The Government also contends that to allow jurisdiction in this case would conflict with our Ninth Circuit precedent. On four previous occasions we have held that a plaintiff did not satisfy the sum certain requirement when he did not state a specific dollar amount for his claim. See Bailey v. United States, 642 F.2d 344 (9th Cir. 1981); Caidin v. United States, 564 F.2d 284 (9th Cir. 1977); Caton v. United States, 495 F.2d 635 (9th Cir. 1974); Avril v. United States, 461 F.2d 1090 (9th Cir. 1972). However, none of these cases involved a claimant who stated a sum certain for a claim that was applicable to that claimant. In Caton and Avril, the claimants did not provide any dollar amount for their claims. See Caton, 495 F.2d at 636; Avril, 461 F.2d at 1091. In Caidin, the claimant stated a specific dollar amount, but the dollar amount applied to a class of claimants, not the claimant himself. See Caidin, 564 F.2d at 286. Thus, the claimant in Caidin essentially omitted any statement of his own damages. See id. at 287. Finally, in Bailey the claimant submitted bills and wage statements in lieu of a sum certain. See Bailey, 642 F.2d at 345–47. Avril, Caton, Caidin, and Bailey are readily distinguishable from this case in which Blair did present a sum certain for his claim for wage loss.

The Government also argues that waivers of immunity are to be strictly construed

in favor of the government. See United States v. Williams, 514 U.S. 527, 531 [75 AFTR 2d 95-1805] (1995). However, it is also "well established that when the federal government waives its immunity, the scope of the waiver is construed to achieve its remedial purpose." In re Town & Country Home Nursing Servs., Inc., 963 F.2d 1146, 1151 (9th Cir. 1991). As the Supreme Court has previously noted, "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." Block v. Neal, 460 U.S. 289, 298 (1983) (internal quotation marks omitted).[4]

The recognized purpose of the FTCA is to provide compensation to those injured by the government's torts. See Richards v. United States, 369 U.S. 1, 6 (1962). The claim presentation requirement of the FTCA is designed to ensure that compensation is provided in a fair and equitable manner, "not to provide a basis for a regulatory checklist which, when not fully observed, permits the termination of claims regardless of their merits." Erxleben v. United States, 668 F.2d 268, 273 (7th Cir. 1981) (quoting Koziol v. United States, 507 F.Supp. 87, 91 (N.D.Ill. 1981)) (internal quotation marks omitted). In light of these statutory purposes and our duty to construe waivers of immunity in a way that meets their remedial goals, the Government "cannot carry the day by invoking general maxims of judicial policy." Town & Country, 963 F.2d at 1152. Thus, we reject the Government's argument that the principles of sovereign immunity require district courts to dismiss suits in which an agency was presented with a specific amount for a specific claim.

V.

Blair's Claim for Medical Expenses

Blair argues that he should be permitted to sue on his entire claim, including both his definite lost wages and his indefinite medical expenses. Blair suggests that, despite the indeterminate description of his medical expenses, he did state a specific amount for the total value of his claim. In support of this contention, Blair points to the medical bills and records he submitted to the IRS. In Blair's view, these records made the total claim certain because the cumulative amounts on the bills represent a definite sum in medical expenses, and one need only add this figure to the specific amount requested for lost wages to arrive at a concrete figure for the total value of the claim.

As we stated in Warren, "Thus, we hold that section 2675(a) requires the claimant or his legal representative to file (1) a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and (2) a sum certain damages claim." Id. at 780. Blair's Form 95 stated with regard to the medical expenses, "Medical expenses are still being incurred, with no end presently in sight." Even the medical bills later provided did not designate a total sum claimed. That claim did not meet the statutory requirement and is properly excluded as surplusage.

VI.

Conclusion

We hold that the district court has jurisdiction to consider Blair's wage loss claim, but his claim for medical expenses was not properly exhausted before the federal agency, and thus, is not properly before the district court. Each party to bear its own costs.

[4] The rules of construction announced in Town & Country and Block remain valid in the context of the FTCA, despite recent decisions from the Supreme Court emphasizing that strict, pro-government construction should be given to waivers of immunity. See Lane v. Pena, 518 U.S. 187, 192 (1996); Williams, 514 U.S. at 531; United States v. Nordic Village, Inc., 503 U.S. 30, 34 [69 AFTR 2d 92-687] (1992). This is so because the Supreme Court has also recently reaffirmed that exceptions to the waiver of sovereign immunity in the FTCA, like the claim presentation requirement, are to be narrowly construed, thereby leaving in tact, at least as to the exceptions of the FTCA, the principle that waivers of immunity should be read in a way that achieves the waiver's remedial purpose. See Nordic Village, 503 U.S. at 34.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

¶2002-5416

In Re: Christopher T. LAMBERT and Katherine D. LAMBERT, Debtors. Ronald R. STICKA, Chapter 7 Trustee, APPELLANT v. Christopher T. LAMBERT and Katherine D. LAMBERT, APPELLEES. U.S. Bankruptcy Appellate Panel, Ninth Circuit, (Bktcy CA9) No. 0R-02-1136-MORYK, 601-61015-FRA7, Aug. 26, 2002[1] . Bankruptcy Court, (2001, Bktcy Ct OR) 89 AFTR 2d 2002-754, 273 BR 887, 2002-1 USTC ¶50317, affirmed. Years 2000, 2001. Deci-sion for Taxpayers.

1. Tax claims in bankruptcy—bankruptcy estate property—postpetition property—tax rebate checks. Bankruptcy court properly determined that tax rebate/''relief'' check issued to Chap. 7 debtors under Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA) after they filed bankruptcy was advance refund of year 2001 taxes, and thus bankruptcy estate property only to extent attributable to prepetition portion of that year. Trustee's attempt to construe check as credit attributable to taxpayers' prepetition year 2000 taxes was belied by EGTRRA's clear ''advance refund'' language and use of year 2000 tax information only as template for year 2001 calculations. Also, advance refund finding was further supported by case law, legislative history and IRS's interpretation of EGTRRA. *Reference:* United States Tax Reporter ¶68,726.535; 68,726.52(3).

United States Bankruptcy Appellate Panel of the Ninth Circuit,

Appeal from the United States Bankruptcy Court for the District of Oregon. Honorable Frank R. Alley, III, Bankruptcy Judge, Presiding.

Before: MONTALI, RYAN and KLEIN, Bankruptcy Judges.

OPINION

MONTALI, Bankruptcy J.

After filing their voluntary Chapter 7 petition,[2] Christopher Todd Lambert and Katherine Dee Lambert (''Debtors'') received a $600.00 check from the United States Treasury pursuant to the Economic Growth and Tax Relief Reconciliation Act of 2001, 26 U.S.C. § 6428 (''the Act''). Appellant Ronald R. Sticka (''Trustee'') claimed that the check belonged to the estate, and upon his demand, Debtors surrendered it to him. Later, the bankruptcy court found that the $600.00 check was not, as Trustee claimed, attributable to pre- bankruptcy year-2000 taxes, but was instead either partly or entirely attributable to the post-petition period. It held that only the portion of the money attributable to the pre-petition part of the 2001 tax year belonged to the estate. Consequently, it ordered that the check be returned to Debtors with the instruction that they remit to Trustee the amount belonging to the estate after a determination of their year-2001 tax liability. Trustee appeals from the bankruptcy court's order. We AFFIRM.

I. FACTS

Debtors filed their voluntary Chapter 7 petition on February 22, 2001 (the ''Petition Date''). Subsequently, Congress en-acted the Act. On June 27, 2001, in anticipation that Debtors might receive a check under the Act, Trustee sent them a letter titled ''NOTICE FOR REBATE TURNOVER,'' demanding that they forward any such check (a ''Relief Check''). Later, Debtors received a Relief Check from the Treasury, dated September 21, 2001, in the sum of $600.00.

On October 18, 2001, Debtors filed a motion to compel Trustee to abandon their Relief Check. Debtors argued that because the Act was not enacted until three months after they had filed for bankruptcy, the $600.00 Relief Check was not property of

[1] Appellees did not filed a brief in this appeal and pursuant to a Conditional Order of Waiver issued by the Clerk of the Bankruptcy Appellate Panel, they accordingly waived their right to appear at oral argument.

[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

the estate under § 541(a) for, as of the Petition Date, they had no right, claim, or entitlement to the tax credit created by the Act. In the alternative, they argued that even if the bankruptcy court decided that the estate had some legitimate interest in the Relief Check, only a portion of it was attributable to the part of 2001 before the Petition Date. Debtors calculated that portion as 52/365 days or approximately 14.25%.[3]

Trustee filed an opposition to the motion, arguing that the Relief Check was a year-2000 tax refund in the form of a credit in 2001. Because entitlement to the Relief Check was based on Debtors' 2000 tax return, he claimed, "the amount of credit was identifiable by retroactive impact as of the commencement of this bankruptcy case," and therefore the entire Relief Check was estate property.[4] On or about November 14, 2001, before the bankruptcy court heard Debtors' motion to compel abandonment, Debtors delivered the Relief Check to Trustee.

After a hearing, the bankruptcy court issued a Memorandum Opinion on December 11, 2001, in which it ruled that the Relief Check was a 2001 benefit, calculated by using 2000's tax return only as a template.[5] It ruled that the Act had no retroactive effect on year-2000 tax liability and the Relief Check was intended to be an advance refund of Debtors' anticipated 2001 tax payments. If Debtors' 2001 tax liability ("2001 Tax Liability") turns out to be $600.00 or more, the bankruptcy court held that the entire $600.00 Relief Check would be an advance year-2001 tax refund. In that situation, because Debtors' Petition Date was in 2001, the $600.00 Relief Check would be estate property only to the extent attributable to the pre-petition part of the 2001 tax year. The bankruptcy court held that the estate's share would then be 14.25% of the Relief Check, which it calculated to be $84.00.[6]

Wilborn v. Gallagher. In re Wilborn), 205 B.R. 202, 206–07 (9th Cir. BAP1996).

On January 15, 2002, the bankruptcy court issued an order implementing the Memorandum Opinion. In relevant part, the order ruled that the $600.00 Relief Check "is property of the estate only to the extent of the portion attributable to that part of the 2001 tax year prior to February 22, 2001," and it directed Trustee to return the $600.00 Relief Check to Debtors.

Trustee subsequently filed a timely appeal. The bankruptcy court's order has been stayed pending appeal.

II. ISSUE

Did the bankruptcy court err in interpreting the Act as authorizing an advance refund of year-2001 taxes, rather than a payment attributable to the 2000 tax year?

III. STANDARDS OF REVIEW

Whether property is included in a bankruptcy estate is a question of law subject to de novo review. Moldo v. Clark (In re Clark), 266 B.R. 163, 168 (9th Cir.

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[3] As noted, Debtors have not appeared on this appeal, nor have they filed a cross-appeal from that portion of the bankruptcy court's order rejecting their argument that the Relief Check is entirely a post-petition benefit. Except for our general discussion of the Act's mean-ing, we do not reach that issue.

[4] Trustee argued in the alternative that even if the Relief Check were indeed a year-2001 tax refund, it should be prorated using a slightly different ratio than what Debtors suggested: 53/365 instead of 52/365. Trustee does not raise this issue on this appeal, and we assume without deciding that 52/365 is the correct ratio for any proration.

[5] The bankruptcy court's Memorandum Opinion has been published. In re Lambert, 273 B.R. 887 [89 AFTR 2d 2002-754] (Bankr.D.Or.2001).

[6] The bankruptcy court also held that if Debtors' 2001 Tax Liability turns out to be less than the Relief Check, then only that portion of the Relief Check which represents the 2001 tax refund should be prorated. Lambert, 273 F.2d 887. Further, in that situation, because according to the legislative history the difference between the Relief Check and the 2001 Tax Liability (the "Excess Amount") would not need to be repaid to the United States Treasury, the court characterized the Excess Amount as a "new benefit" created post-petition. The bankruptcy court held that because the Excess Amount is a benefit created post-petition and is not rooted in the pre-bankruptcy past, any such amount would belong to Debtors, citing Sliney v. Schmitz (In re Schmitz), 270 F.3d 1254 (9th Cir.2001) and Drewes v. Vote (In re Vote), 261 B.R. 439 (8th Cir. BAP2001), aff'd, 276 F.3d 1024 (8th Cir.2002). The bankruptcy court concluded that Trustee should return the Relief Check to Debtors, who should then calculate their tax liability and remit funds to the estate accordingly.

At oral argument the panel questioned Trustee (who was appearing as a pro se litigant) about the foregoing apparently unresolved issues--the need for further calculations, the lack of a specific dollar amount, and the stay of the order directing Trustee to turn over the Relief Check. Our questions were directed at whether the order is final or suitable for review. Trustee advised the panel that although he had not yet received a year-2001 tax return from Christopher Todd Lambert he has received one from Katherine Dee Lambert, and that return shows a liability of more than $600.00. Therefore, we need not address that portion of the Memorandum Opinion dealing with what happens if the 2001 Tax Liability is under $600.00. In addition, although Trustee challenges the appropriateness of pro-rating at all, he does not challenge the bankruptcy court's calculation of $84.00 as the amount if pro-ration applies.

Therefore, it appears the bankruptcy court's order is final. To the extent it is interlocutory, we grant leave to appeal.

BAP2001). Whether the Act contemplated a year-2000 or a year-2001 tax refund is a question of statutory interpretation, which we review de novo. Onink v. Cardelucci (In re Cardelucci), 285 F.3d 1231, 1233 (9th Cir.2002).

IV. DISCUSSION

[1] For married individuals filing jointly the Act reduced the income tax rate, effective after December 31, 2000, for the first $12,000 from 15% to 10%.[7] The effect of the reduction is that the tax imposed on the first $12,000.00 is reduced from $1,800.00 to $1,200.00, or by $600.00. See 26 U.S.C. § 1(i)(1)(B).

Trustee argues that the Act intended a refund of year-2000 taxes, rather than an advance of the anticipated refund of year-2001 taxes. We disagree.

First, the Act is entitled ''Acceleration of 10% income tax rate bracket benefit for 2001.'' 26 U.S.C. § 6428 (emphasis added). Second, subsection (a) of the Act provides for a ''credit'' against income taxes ''beginning in 2001'' in ''an amount equal to 5 percent'' of so much of the taxpayer's income as does not exceed an amount that, for Debtors, is $12,000.00. 26 U.S.C. § 6428(a) (emphasis added).[8] Third, subsection (e) of the Act provides:

> (e) Advance Refunds of Credit Based on Prior Year Data.
>
> (1) In General.--Each individual who was an eligible individual [as defined in subsection (c) of the Act] for such individual's first taxable year beginning in 2000 shall be treated as having made a payment against the tax imposed by chapter 1 [26 U.S.C. § 1, Normal Taxes and Surtaxes] for such first taxable year in an amount equal to the advance refund amount for such taxable year.
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> (2) Advance refund amount.--For purposes of paragraph (1), the advance refund amount is the amount that would have been allowed as a credit under this section for such first taxable year if this section (other than subsection (d) and this subsection) had applied to such taxable year.

26 U.S.C. § 6428(e) (emphasis added).[9]

26 U.S.C. § 6428(e) (as amended, March 9, 2002).

The title of subsection (e) indicates that the Act authorized an advance payment in year-2001 of anticipated tax refund based on year-2000's data. The refund is ''advance'' because, upon the Act's enactment, year-2001 taxes were not yet due.[10] Sections (e)(1) and (2) then proceed to lay out how the Relief Check amount is to be calculated. Section (e)(1) assumes that each eligible individual in year-2000 has paid his or her taxes, in an amount equal to the refund such individual would have received if the Act had applied in year-2000. Section (e)(2) then treats that year-2000 amount as the year-2001 advance refund amount. By saying that the advance refund

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[7] The first subsection of the Act states that ''there shall be allowed as a credit against the tax imposed by chapter 1 [26 U.S.C. § 1, Normal Taxes and Surtaxes] for the taxpayer's first taxable year beginning in 2001 an amount equal to 5 percent of so much of the taxpayer's taxable income as does not exceed the initial bracket amount (as defined in section 1(i)(1)(B)).'' 26 U.S.C. § 6428(a). The section last referred to states that the initial bracket amount for married couples filing jointly for taxable years beginning before January 1, 2008, is $12,000.00. See 26 U.S.C. § 1(i)(1)(B)(i). For unmarried individuals, the initial tax bracket amount is half that of married individuals filing jointly, therefore the 2001 tax credit will be $300.00. See 26 U.S.C. § 1(i)(1)(B)(iii).

[8] See footnote 7, supra.

[9] Section 6428(2)(e)(2), as quoted, was amended on March 9, 2002. See PL 107–147, 107th Cong., 2d Sess. (2002). The amendment included structural changes and the addition of subsection (2)(B). Because the added section only further details the process of calculating the advance refund amount based on 2000 data, it does not affect our analysis. The relevant amended section is quoted in full as follows:

> (e) Advance refunds of credit based on prior year data. -
>
> (1) In general.--Each individual who was an eligible individual for such individual's first taxable year beginning in 2000 shall be treated as having made a payment against the tax imposed by chapter 1 [26 U.S.C. § 1, Normal Taxes and Surtaxes] for such first taxable year in an amount equal to the advance refund amount for such taxable year.
>
> (2) Advance refund amount.--For purposes of paragraph (1), the advance refund amount is the amount that would have been allowed as a credit under this section for such first taxable year if - (A) this section (other than subsections (b) and (d) and this subsection) had applied to such taxable year, and (B) the credit for such taxable year were not allowed to exceed the excess (if any) if -
>
> (i) the sum of the regular tax liability (as defined in section 26(b)) plus the tax imposed by section 55, over
>
> (ii) the sum of the credits allowable under part IV of subchapter A of chapter 1 [26 U.S.C. § 21] (other than the credits allowable under subpart C thereof, relating to refundable credits).

[10] Congress authorized the Secretary of the Treasury to ''refund or credit such overpayment as rapidly as possible and, to the extent practicable, before October 1, 2001. No refund or credit shall be made or allowed under this subsection after December 31, 2001.'' 26 U.S.C. § 6428(e)(3).

amount is the amount that ''would have'' been allowed as a credit for tax year 2000 if the Act had applied then, Congress implied that the refund does not apply to tax year 2000. The year-2000 tax information is therefore only used as a way to calculate the year-2001 refund. Together, the two sections indicate that Congress intended to use an individual's year-2000 tax liability to calculate the amount of his or her Relief Check issued in 2001. Therefore, we agree with the bankruptcy court that Debtors' ''2000 tax year provides a template for calculating 2001 benefits, and nothing more.'' Lambert, 273 B.R. at 890. The Act indeed has no effect on the tax liability for year-2000. While the 5% tax reduction authorized by the Act created an anticipated overpayment of taxes in year-2001, it did not create any overpayment of year- 2000 taxes.

Trustee argues on this appeal, as he did before the bankruptcy court, that subsection (e)(1) of the Act defines the refund as one for year-2000 taxes. He argues that the reference in subsection (e)(1) to ''the advance refund amount for such taxable year'' can only mean for tax year 2000. 26 U.S.C. § 6428(e)(1) (emphasis added). We agree that ''such taxable year'' is tax year 2000, but that is beside the point. The ''advance refund amount'' is just that: an ''amount'' that is calculated by reference to year-2000, not an actual ''refund'' payable on account of year-2000. As stated above, the amount that ''would have'' been payable if the Act had applied to year-2000, and the corresponding amount that would have been refunded in that year, are simply used to calculate the amount of the Relief Check issued in anticipation of a year-2001 refund. 26 U.S.C. § 6428(e)(1) and (2).[11]

The bankruptcy court's interpretation of the Act, and our own, is consistent with the only case we have found on point. The court in In re Rivera, 2001 WL 1432286, 89 A.F.T.R.2d 2002-673 [89 AFTR 2d 2002-673], (Bankr.D.Colo.2001), held that the ''amount of the advance payment is based on the amount of tax liability for the year 2000'' but the funds distributed in the year 2001 ''represent a tax credit for the 2001 tax year.'' Id. That court recognized that the Relief Check therein was ''in reality an advance on the taxpayers' 2001 tax refund that would otherwise have been paid or credited to [them] in 2002 for [their] 2001 tax return.'' Id.

Our reading is also confirmed by the legislative history. The relevant Committee Report states that issuance of the Relief Checks operates ''in lieu of the new 10-percent income tax rate bracket for 2001.'' Comm. Rep. P.L. 107–16, 115 Stat. 38 (2001). The goal of the Relief Checks was to ''deliver economic stimulus to the economy more rapidly than would implementation of a new 10-percent rate bracket.'' Id. Clearly then, they were to take the place of a tax reduction in the 2001 tax year. In addition, consistent with the Act, the Committee Report also explained that ''the amount of the [Relief C]heck would be computed ... on the basis of tax returns filed for 2000 (instead of 2001).'' Id. Therefore, the legislative history indicates that the $600.00 Relief Check is not a refund of taxes withheld in 2000. Rather, it is an accelerated payment of the anticipated tax reduction for earnings made in 2001, based on tax information from 2000. See id.

Further, the Internal Revenue Service (''IRS'') has expressed an understanding of the Act consistent with our interpretation that the Relief Check is an advance refund of 2001 taxes.[12] The IRS's website states that, if the Relief Check amount is less than the taxpayer's entitled 2001 tax reduction, the taxpayer can claim the difference on his or her 2001 tax form and receive the entitled reduction. Id. In other words, the Relief Check is simply an advance payment of an anticipated tax refund for year-2001.

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[11] Trustee argues, in his brief on this appeal, that the bankruptcy court's rulings ''suggest[ ] confusion with the alternate eligibility for a credit based upon calculation on the 2001 return, so that those without earnings for 2000, or an advance credit refund claim, might still avail themselves of tax relief.'' Trustee does not explain what subsection of the Act allows an ''alternate'' eligibility for a Relief Check on account of year-2000. We find no such provision in the Act.

[12] Topic 609--Rate Reduction Credit, Tax Topics, available at www.irs.gov/businesses.

In short, the plain meaning of the Act, the only case on point, the legislative history, and the IRS all agree that the Relief Checks were intended to accelerate the year-2001 tax reduction by giving advance payments calculated by year-2000 tax information. We join that group. The bankruptcy court did not err in concluding that Debtors' Relief Check was intended to be an advance refund for the taxes anticipated for year-2001.

Trustee does not dispute that if, as we have held, the Act authorizes an advance refund of anticipated 2001 taxes, the Relief Check should be prorated under well-established caselaw, nor does he challenge the bankruptcy court's calculation of that proration.[13]

Because no party has challenged the bankruptcy court's method of pro-ration, we express no opinion whether it would make a difference if Debtors had no income in 2001 or had paid no taxes prior to the Petition Date. See, e.g., Christie v. Royal (In re Christie), 233 B.R. 110, 113 [83 AFTR 2d 99-2453] (10th Cir. BAP1999) (most important factor is whether refund was generated from pre-petition payments from what would otherwise have been property of estate). See also footnote 3, supra (we do not address whether Rebate Check was entirely a post-petition benefit); Rivera, 2001 WL 1432286 (holding that rebate check was not estate property).

V. CONCLUSION

Congress provided for an advance payment, in the form of the Relief Check, on account of taxpayers' anticipated refund for year-2001 taxes. Because Debtors' Petition Date is in 2001, the bankruptcy court properly held that the Relief Check amount should be prorated according to the Petition Date rather than paid to Trustee based on the tax year prior to bankruptcy. The bankruptcy court's order is, therefore, AFFIRMED.

¶2002-5417

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. James Dalton BELL, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-30303, Sept. 19, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—interstate stalking of IRS and other govt. agents—jury instructions—sentencing. Taxpayer's conviction and sentence for interstate stalking of IRS and other govt. agents was affirmed: district court's failure to give specific intent jury instruction was proper where doing so could have confused jury; erroneous failure to give "course of conduct" instruction was harmless where such was clearly shown by taxpayer's continuum of harassing activities; and upward sentence departure was warranted by taxpayer's 17-year history of harassment, increasingly threatening behavior, possession of dangerous chemical and nerve agents and paranoid belief of govt. conspiracy against him. Also, court's discretionary denial of request for new court-appointed counsel was upheld. *Reference:* United States Tax Reporter ¶73,446.514(5); 73,446.516(55).

Peggy Sue Juergens, Seattle, Washington, for the defendant-appellant.
Steven L. Lane, United States Department of Justice, Criminal Division, Appellate Section, Washington, D.C., for the plaintiff-appellee.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Appeal from the United States District Court for the Western District of Washington Jack E. Tanner, Senior Judge, Presiding

Opinion by Judge Hawkins

[13] See Segal v. Rochelle, 382 U.S. 375, 380 [17 AFTR 2d 163] (1966) (debtor's loss-carryback refund claim based on losses prior to the filing of bankruptcy held to be sufficiently rooted in pre-bankruptcy past that it belonged to estate; however, if any post-petition losses increased the amount of refund, the refund was to be prorated (superceded on other issues by enactment of the Bankruptcy Code, as stated in Rau v. Ryerson (In re Ryerson), 739 F.2d 1423, 1426 (9th Cir.1984)); Gabrielli v. Shults (In re Shults), 28 B.R. 395, 397 (9th Cir. BAP1983) (court held that debtors had not intentionally concealed tax refunds from the estate but, even if they had, "[b]ecause the bankruptcy was filed mid-year[,] only a fraction of that sum [would be the] property of the estate").

Before: Michael Daly Hawkins and Ronald M. Gould, Circuit Judges, and James Ware,* District Judge.

OPINION

HAWKINS, Circuit Judge:

FOR PUBLICATION

Defendant-Appellant James Dalton Bell ("Bell") appeals his jury trial conviction and ten-year sentence for interstate stalking and using the facilities of interstate commerce for interstate stalking in violation of 18 U.S.C. §§ 2261A and 2261A (2)(B)(i), alleging error in the handling of his efforts to obtain substitute counsel, the giving of certain jury instructions and sentencing. We have jurisdiction under 18 U.S.C. § 1291.

Facts & Procedural History

The proceedings at issue arise from Bell's long and troubled history with the government and in particular the Internal Revenue Service ("IRS"). Bell first came to the attention of authorities in 1996 in connection with his Internet posting of home addresses of IRS employees laced with veiled harassment threats and the activities of the Multnomah County Common Law Court ("MCCLC"), a group of citizens with grievances against government officials. At an MCCLC meeting in early 1997, Bell distributed an essay entitled "Assassination Politics" in which he proposed the development of a system to solicit the killing of government employees using encrypted Internet messages. Bell also posted the essay online.

Words turned to action following the February 1997 seizure of Bell's automobile for unpaid federal taxes. Bell responded by contaminating the Vancouver, Washington IRS office with a powerful, foul-smelling chemical, forcing a number of government workers to leave the premises. A subsequent search of Bell's living area in the basement of his parents' home produced a variety of dangerous chemicals, including acid, cyanide and a chemical variant of the dangerous nerve agent sarin—all apparently obtained through the use of false Social Security numbers. Bell's computers also contained the names and home addresses of dozens of IRS employees and messages indicating they were intended for "later targeting."

In July 1997, Bell entered a guilty plea to resulting charges of obstructing the administration of internal revenue laws and using false Social Security numbers. Sentenced to eleven months, Bell briefly exited federal custody in June 1998, only to quickly violate the terms of his supervised release and be returned to prison. In April 2000, shortly before he was released from custody, Bell told a reporter for an Internet magazine that he planned revenge on "the system that had imprisoned [him]." Upon his release from prison, Bell promptly began gathering information about government officials involved in his 1997 prosecution. His efforts included obtaining motor vehicle records under false pre-tenses, trespassing, and stealing mail.

On October 23, 2000, Bell left his residence in Washington and drove to Eagle Creek, Oregon, where he trespassed on the property of a man named Chris Groener. The property had previously belonged to ATF Agent Mike McNall. Bell then drove to Tulatin, Oregon. where he went to a house that he believed belonged to Treasury Special Agent Jeff Gordon, though in reality the house belonged to a different Jeff Gordon. He stole mail from the mailbox, including an item identifying Joshua Gordon as Jeff Gordon's son. Later that night, Bell posted an e-mail online threatening Joshua.[1] Two days later, Bell sent a threatening fax to IRS Agent Gordon.

A November 6, 2000, search of Bell's residence produced many of the same dangerous chemicals found three years earlier. Agents also placed a court-authorized tracking device on Bell's motor vehicle and monitored his movements.[2] When a newspaper article about the search ap-

* Honorable James Ware, United States District Judge for the Northern District of California, sitting by designation.

1 Bell obtained the address for the home from the motor vehicle information he had earlier obtained.

2 This surveillance revealed a return visit to the Groener property on November 6, 2000, during which Bell entered the garage and left notes on the vehicles.

peared, Bell confirmed that he had visited the homes of government agents to "let them know that surveillance can be done in both directions" and stated that "if you think this is going to stop me, baloney." Bell was arrested on November 17, 2000 and indicted twelve days later on two counts of interstate stalking. That indictment was superceded on January 25, 2001, charging a total of five counts regarding interstate stalking and related activity, including a violation of an amended version of 18 U.S.C. § 2261A.

Following a six-day jury trial, Bell was convicted on two of the five counts, the jury unable to reach a verdict on the remaining counts. At sentencing, the district court accepted the recommendation of the Probation Office and departed upward five levels, concluding that a number of factors took Bell's case outside the heartland of the charges of which he stood convicted. The district court then sentenced Bell to 60 months on each count of conviction, to be served consecutively.

Analysis

Substitute Counsel

Bell was initially represented by Wayne Fricke and then Robert Leen, his sixth and seventh court-appointed counsel since his 1997 prosecution.[3] Continuing his troubled history with counsel, Bell demanded that Leen pursue an investigation to establish the existence of a widespread government conspiracy against him. Leen refused and subsequently requested a hearing to discuss Bell's representation, suggesting that the court consider permitting Bell to represent himself. Bell responded with a letter to the district court stating that he did not want to proceed pro se, but wanted new counsel appointed. A hearing was held at which Bell spoke at length concerning his complaints about Leen's representation. Bell's presentation made clear that his problem with Leen was not one of communication or quality of representation, but Leen's refusal to pursue Bell's conspiracy theories. The district court elected to defer consideration of Bell's request for new counsel pending a determination of Bell's competence.

A second hearing was held one month later with the district court in possession of a report on Bell's competency to stand trial. After listening to and questioning Bell at length as to the reasons for dissatisfaction with Leen, and considering Bell's history with court-appointed counsel, the district court denied the request for new counsel. The court also offered Bell the option of representing himself or retaining counsel at his own expense, both of which he refused.

On the brink of trial, Leen moved to withdraw and to continue the trial to allow the appointment of new counsel. Taking these matters up on the first scheduled day of trial, the district court listened to the concerns of Bell and Leen, but concluded once again that the request was not based on Leen's ability to effectively represent Bell and denied the motion.[4]

[1] We review denial of the motion for substitution of counsel for an abuse of discretion. *See United States v. Smith*, 282 F.3d 758, 763 (9th Cir. 2002). Focusing on the adequacy of the court's inquiry and the nature of the alleged conflict between Bell and Leen, *see United States v. Corona-Garcia*, 210 F.3d 973, 976 (9th Cir. 2000), we are not persuaded that Bell was improperly denied new court-appointed counsel.[5] The record reveals that the district court carefully considered each such request, holding three separate hearings on the subject and concluding that any dissatisfaction arose from the refusal to accommodate demands to conduct a far reaching investigation into matters having nothing to do with the merits of the case. The district court also took care to monitor the proceedings throughout the trial to insure that Bell and his counsel were freely communicating and cooperating in an appropriate

[3] Bell was represented by five separate counsel in connection with his 1997 prosecution, appeal and supervised release revocation. Each of these attorneys wound up on Bell's Internet page as involved in a conspiracy to deny him his rights.

[4] Leen was permitted to withdraw at the conclusion of trial and sentencing.

[5] We also recognize that *Corona-Garcia* identifies timeliness as an additional factor, but the parties do not dispute that Bell's repeated raising of the counsel issue was timely.

manner. Neither Bell nor his counsel disputed the district court's on-the-record observations in this regard. We find no abuse of discretion here.

Jury Instructions

1. Intent

Bell contends that the district court failed to properly instruct the jury on the mens rea element on the convicted counts, interstate stalking and use of facilities of interstate commerce for stalking. Bell argues that the court failed to give a specific intent instruction. He also argues that the court should have provided a further definition of the particular statutory intent — for example, on Count III, using the words "knowingly acted with the intent and purpose" instead of "with the intent and purpose" as the instruction given read.

The district court gave the Ninth Circuit Model Instruction with respect to the convicted counts. Both the manual accompanying the Model Instructions and our case law discourage the use of generic specific intent instructions. *See Ninth Circuit Manual of Model Criminal Jury Instructions* 5.4 (1995); *United States v. Johnson*, 956 F.2d 197, 199–200 (9th Cir. 1992). The preferred practice, which the district court followed here, is the giving of an intent instruction that properly reflects the intent requirements of the charged offense. Further, a specific intent instruction might have confused the jury into believing that Bell must have intended to violate a specific law rather than committing an act with the intent to harass a particular government agent. The instructions given were properly tailored to the charged offense and the district court was not obligated to do more.

2. Course of Conduct

Bell contends that the instruction given on Count III (use of facilities of interstate commerce for interstate stalking) failed to include the "course of conduct" element of the charged offense. *See* 18 U.S.C. § 2261A(2)(B). Bell's precise argument is that the statute requires proof of use of interstate commerce facilities on more than one occasion.

Because Bell did not object to the form of the instruction given, we review for plain error; an error so clear as to affect substantial rights that is not only prejudicial, but one that seriously affects the fairness or integrity of the proceedings. *United States v. Dorri*, 15 F.3d 888, 891 (9th Cir. 1994). In conducting this analysis, we must consider all the circumstances of the trial including the strength of the evidence against the defendant. *United States v. Chambers*, 918 F.2d 1455, 1459 (9th Cir. 1990).

We agree that the omission of the course of conduct element from the instruction on Count III was error. *See United States v. Hove*, 52 F.3d 233, 236 (9th Cir.1995). The phrase is clearly present in the statute and is an element of the offense. *See* 18 U.S.C. § 2261A(2)(B) (2000). The omission substantially affected Bell's rights by permitting a conviction without the finding of a statutory element. *See United States v. Mendoza*, 11 F.3d 126 (9th Cir. 1993). But that does not end our inquiry—the failure to instruct on an element of an offense may be harmless where it is clear beyond a reasonable doubt that a rational jury would have convicted Bell absent the error. *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1197 (9th Cir. 2000) (en banc).

We agree that the 2000 amendments to 18 U.S.C. § 2261A define "course of conduct" to mean a pattern of conduct composed of two or more acts. The question is whether the sending of the fax to Agent Gordon on October 31, 2000—occurring after the effective date of the amended statute—can be combined with acts taking place before that date to enable a rational jury to find the required course of conduct. Bell is charged with knowledge of the amended statute as of its effective date, yet he continued his actions as part of a continuum that began with thinly veiled Internet threats and ended with the threatening fax to Agent Gordon. Context is everything in threat jurisprudence. *See Planned Parenthood of Columbia/Willam-ette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1071 (9th Cir. 2002) (en banc).

While we are not persuaded by the government's argument that the preparation and sending of the Gordon fax should be considered separate acts, we conclude that the context and scope of Bell's actions, culminating in the transmission of the threatening fax, meet the course of conduct requirement even though some acts oc-curred prior to the effective date of the statute and that a rational jury, properly instructed, would have so found.

Upward Departure

Relying on *United States v. Sablan*, 114 F.3d 913 (9th Cir. 1997) (en banc), Bell argues that the district court erred in failing to consider whether its stated additional reasons for departure are encouraged, discouraged, or forbidden by the Sentencing Guidelines. Bell does not contest the five bases detailed in the Presentence Report ("PSR") and expressly adopted by the district court (significant disruption of government function, property damage/loss not accounted for in offense level, commission of crimes not in offense level, long history of harassment of others, and obstructive behavior). What Bell does contest is the district court's embrace of the PSR's additional justification for the five-level upward departure: that past sanctions have not effectively curbed Bell's unlawful behavior—indeed his actions have progressed from nuisance to dangerous threat.

But *Sablan* does not require a precise, formulaic analysis of the relationship between factors relied upon for departure and their appearance in the Guidelines. It is sufficient that the district court has avoided "double counting"—repeating the use of a factor previously accounted for in the offense level or other departure factors. We conclude that the district court properly considered a factor fundamentally different from those already considered. Moreover, the additional factor is one specifically recognized in U.S.S.G. § 5K2.14 (significant danger to public health or safety). *See also United States v. Gayou*, 901 F.2d 746, 747–49 (9th Cir. 1990) (consideration of past or future endangerment proper). And, of course, under both *Sablan* and *Koon v. United States*, 518 U.S. 81 (1996), a district court may always take into consideration those factors that take a case out of the heartland of the specific offense.

This leads us to Bell's related argument that the upward departure was in any event unreasonable. We disagree. The specific factors relied upon by the district court for taking Bell's conduct outside the heartland of stalking offenses also provide ample support for the reasonableness of the departure: (1) A seventeen-year behavioral history; (2) done with increasing intensity; (3) without regard to sanctions; (4) accompanied by possession of deadly chemicals and nerve agents; (5) carried out pursuant to an intense fixation on particular victims; and (6) motivated by a delusional belief in a conspiracy against him. The upward departure was both proper and reasonable.

AFFIRMED.

¶2002-5418

James E. NORRIS, ET AL., PETITIONERS v. COMMISSIONER of Internal Revenue, RESPONDENT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 02-70038, Sept. 20, 2002. Tax Court, (2001) TC Memo 2001-152, RIA TC Memo ¶2001-152, 81 CCH TCM 1816 (opinion by Goldberg, *Sp.Tr.J.*), affirmed. Year 1995. Decision against Taxpayers.

1. Income exclusions—worker's compensation—disability benefits under Federal Employees Retirement System (FERS). Tax Court properly held that pro se taxpayer's FERS disability retirement payments weren't excludable from gross income under IRC §104(a)(1): even if disability were work-related, FERS wasn't qualified worker's compensation act where it didn't require that injury be incurred in course of employment; and taxpayers' remaining arguments were meritless. *Reference:* United States Tax Reporter ¶1045.01(3); 74,425.01(15). IRC §104; 7442.

United States Court of Appeals, Ninth Circuit,

On Petition for Review of an Order of the United States Tax Court.

Before HUG, O'SCANNLAIN, and TASHIMA, Circuit Judges.

MEMORANDUM*

[1] James E. Norris and Ruth L. Norris (collectively, the "Taxpayers") appeal pro se the tax court's decision upholding the Commissioner's deficiency determination for the tax year 1995 based on the Taxpayers' failure to include as gross income Mr. Norris's disability retirement payments. We have jurisdiction under 26 U.S.C. § 7482, and, after de novo review, Take v. Commissioner, 804 F.2d 553, 555 [58 AFTR 2d 86-6206] (9th Cir.1986), we affirm.

Under the Internal Revenue Code (the "Code"), certain amounts received under statutes in the nature of workmen's compensation acts are excludable from gross income. See 26 U.S.C. § 104(a)(1); 26 C.F.R. § 1.104-1(b). To qualify as a workmen's compensation act under the Code, "a statute must require, as a precondition to eligibility for benefits, that the injury be incurred in the course of employment." Take, 804 F.2d at 557. If the statute does not qualify as a workmen's compensation act, then it is irrelevant whether the underlying injury was work-related. See id. at 558.

The Federal Employees' Retirement System ("FERS") does not require that an injury be incurred in the course of employment. See 5 U.S.C. § 8451(a)(1)(B) (employee is disabled if he is "unable, because of disease or injury, to render useful and efficient service in the employee's position"). Therefore, the tax court correctly concluded that Mr. Norris's FERS disability retirement benefits were not excludable from the Taxpayers' gross income. See Take, 804 F.2d at 557–58.

The Taxpayers' remaining contentions lack merit.

AFFIRMED.

¶2002-5419

UNITED STATES OF AMERICA, PLAINTIFF v. Barry TRUPIN, DEFENDANT. U.S. District Court, Southern Dist. New York, (DC NY) No. 97 CR 97LMM, Sept. 20, 2002. Earlier proceeding at (1999, DC NY) 85 AFTR 2d 2000-998. Years 1980, 1981, 1982, 1983, 1984, 1985, 1986. Decision for Taxpayer in part.

1. Tax crimes—tax evasion—U.S. Sentencing Guidelines—tax loss computation; downward departure. District court rejected govt.'s proposed sentencing of convicted tax evader: govt.'s reliance on U.S.S.G. §2T1.1(c)(3)'s special instruction for computing tax loss on *willful failure to pay* conviction erroneously disregarded §2T1.1(c)(1)'s more applicable instruction. Taxpayer was clearly convicted under IRC §7201 for evasion, not IRC §7203's willful failure to pay provision; govt.'s argument that sentencing should be based more on taxpayer's nonfiling conduct rather than on offense charged and specific statute under which he was convicted wasn't born out by statute or legislative history; and policy considerations were for legislature, not judiciary to weigh. Also, govt.'s request to preclude taxpayer from developing or offering evidence supporting his application for downward departure based on wife's infirmities was denied; but, taxpayer was also denied request to offer his expert's testimony thereon unless he permitted govt.'s expert to also examine his wife. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §7201; 7203.

United States District Court, S.D. New York,

MEMORANDUM AND ORDER

MCKENNA, J.

1

Defendant was found guilty by a jury of both counts of a two count indictment, alleging the violation of 26 U.S.C. § 7201

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

(Count One) and 18 U.S.C. § 1001 (Count Two).

The parties have raised, and briefed at some length, a number of issues relating to sentencing, two of which are resolved in this Memorandum and Order.

2.

[1] With respect to Count One, the Revised Presentence Investigation Report dated October 5, 2001 (''PSR'') concludes that ''[t]he guideline for a violation of 26 U.S.C. § 7201 is found in [U.S.S.G.] § 2T1.1 which provides for a base offense level of 22 pursuant to § 2T4.1(Q) as the tax loss was more than $5 million but not more than $10 million.'' (PSR p 42.)[1]

It is undisputed that the Internal Revenue Service (''IRS'') in 1991 and 1992 assessed defendant in a total amount of $6,681,326 in relation to personal income taxes due for the years 1980–1986. If the correct amount for guidelines purposes, that amount would call for a base offense level of 22. See U.S.S.G. § 2T4.1(Q).[2]

The PSR, although it cites U.S.S.G. § 2T1.1 (PSR p 42), does not refer to any of the Special Instructions set forth in § 2T1.1(c) relating to the calculation of tax loss for purposes of that section. The parties, however, urge, respectively, that different Special Instructions apply.

Specifically, defendant argues that the PSR has erroneously failed to follow the Special Instruction that: ''If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).'' Id. § 2T1.1(c)(1). Use of that instruction, defendant contends, will, once the evidence is properly marshaled, result in a lower base offense level.

The government, on the other hand, contends that the appropriate Special Instruction in this case is id. § 2T1.1(c)(3): ''If the offense involved willful failure to pay tax, the tax loss is the amount of tax that the taxpayer owed and did not pay.''

Here, the offense charged in Count One, of which defendant was convicted, alleging the violation of 26 U.S.C. § 7201, certainly involved tax evasion, more specifically, evasion of payment.[3] See Indictment p 24 (''defendant, unlawfully, willfully, and knowingly did attempt to evade and defeat the payment of a large part of the income tax due and owing by him for the years 1980 through 1986''). Defendant was not charged under 26 U.S.C. § 7203, prohibiting the willful failure to pay tax. Considering U.S.S.G. § 2T1.1 on its face, it seems almost obvious that the Special Instruction of § 2T1.1(c)(1) should apply.

The government argues that the Special Instruction that it advocates, U.S.S.G. § 2T1.1(c)(3), is clarifying language, added by a 1993 amendment, U.S.S.G. Appendix C, Amendment 491 (effective November 1, 1993), and that case law under the pre-amendment guideline supports its position as to the present applicability of U.S.S.G. § 2T1.1(c)(3). That argument requires examination of the nature of the amendment.

Prior to the 1993 amendment, U.S.S.G. § 2T1.1 (1992), captioned ''Tax Evasion'' and giving as its sole statutory reference 26 U.S.C. § 7201, provided that ''[f]or purposes of this guideline, the 'tax loss' is the greater of: (A) the total amount of tax that the taxpayer evaded or attempted to

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[1] The PSR refers to the November 1, 1994 Guidelines Manual (see PSR p 39), and neither party has objected to that choice. The Court, therefore, unless otherwise noted, also refers to the 1994 Guidelines Manual.

[2] The Commentary to U.S.S.G. § 2T1.1, however, provides that: ''The tax loss does not include interest or penalties.'' U.S.S.G. § 2T1.1, Application Note 1. The government acknowledges that interest and penalties are included in the amount stated above, but represents that the underlying tax deficiencies nevertheless exceeded $5 million.

[3] 26 U.S.C. § 7201 ''includes the offense of willfully attempting to evade the assessment of a tax as well as the offense of willfully attempting to evade or defeat the payment of a tax.'' Sansone v. United States, 380 U.S. 343, 354 [15 AFTR 2d 611] (1965). There is no charge in the present case that defendant evaded assessment. It may be noted that, although the Sentencing Commission was presumably aware of this Supreme Court precedent noting the distinction between evasion of assessment and evasion of payment, nothing in U.S.S.G. § 2T1.1 refers to that distinction. In a 2001 amendment, U.S.S.G. Appendix C, Supplement, Amendment 617 (effective November 1, 2001), at 191, and in a resulting change in id. § 2T1.1, Application Note 1 (2001), the Sentencing Commission did recognize the distinction between evasion of payment and evasion of assessment. The parties, at the Court's request, have addressed the issue whether the 2001 amendment sheds any retrospective light on the question at issue. The Court concludes that it does not.

evade; and (B) the 'tax loss' defined in s 2T1.3.'' U.S.S.G. § 2T1.1(a)(1992).[4]

Prior to the 1993 amendment, the Guidelines also contained U.S.S.G. § 2T1.2, captioned ''Willful Failure To File Return, Supply Information, or Pay Tax'' and giving as its sole statutory reference 26 U.S. § 7203 (other than a willful violation of 26 U.S.C. § 6050I); that section provided that ''[f]or purposes of this guideline, 'tax loss' means the total amount of tax that the taxpayer owed and did not pay, but, in the event of a failure to file in any year, not less than 10 percent of the amount by which the taxpayer's gross income for that year exceeded $20,000.'' U.S.S.G. § 2T1.2(a)(1992).[5]

According to the Sentencing Commission, Amendment 491, as relevant here, ''consolidates §§ 2T1.1, 2T1.2, 2T1.3, and 2T1.5, thereby eliminating the confusion that has arisen in some cases regarding which guideline applies. In addition, by adopting a uniform definition of tax loss, this amendment eliminates the anomaly of using actual tax loss in some cases and an amount that differs from actual tax loss in others.'' U.S.S.G. Appendix C, Amendment 491, at 338.

The amended guideline itself states that it ''relies most heavily on the amount of loss that was the object of the offense.'' U.S.S.G. § 2T1.1, Background. In the case of a willful failure to pay tax, the loss intended is almost self-evidently ''the amount of tax that the taxpayer owed and did not pay,'' id. § 2T1.1(c)(3), and that provision, in substance, restates the pre-amendment definition applicable to cases under 26 U.S.C. § 7203 that '' 'tax loss' means the total amount of tax that the taxpayer owed and did not pay.'' U.S.S.G. § 2T1.2(a) (1992).

On the other hand, the post-amendment definition which defendant advocates--''[i]f the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed),'' U.S.S.G. § 2T1.1(c)(1)--does not restate the language of any pre-amendment provision of the guideline, although its reference to evasion strongly suggests that it replaces the pre-amendment U.S.S.G. § 2T1.1(a)(A) (''the total amount of tax that the taxpayer evaded or attempted to evade'').

Whether U.S.S.G. § 2T1.1(c)(3) is or is not a clarifying (as opposed to a substantive) amendment, however, begs the question in this case, which is not what that Special Instruction means, but rather whether the Court should follow it or the Special Instruction of id. § 2T1.1(c)(1).

The government argues that issue should be read in the light of the statement in the Introduction to the Guidelines that ''the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law forced the Commission to write guidelines that are descriptive of generic conduct rather than guidelines that track purely statutory language.'' U.S.S.G. Ch.1 Pt. A(4)(a). Against this background, the government urges, the Court should look, not at the statute which the jury found that defendant was guilty of violating, but rather at defendant's conduct, and, finding in that conduct a willful failure to pay tax, conclude that the offense ''involved'' a willful failure to pay tax, and thus choose, as the applicable guideline, U.S.S.G. § 2T1.1(c)(3).

That argument offers, at first blush, an appealingly simple way out of the issue,[6] but the Court finds it ultimately unpersuasive.

In the first place, nothing in the text of Amendment 491 or of U.S.S.G. § 2T1.1 explains the relationship of id. 2T1.1(c)(1) and id. § 2T1.1(c)(3) in the manner for which the government argues.

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[4] The reference in U.S.S.G. § 2T1.1(a)(B)(1992) to id. § 2T1.3 provides ''an alternative minimum standard for the tax loss,'' U.S.S.G. § 2T1.1 Application Note 4 (1992), and there is no contention that it is relevant here.

[5] The second part of the definition is an ''alternative measure . . . provided because of the potential difficulty of determining the amount of tax the taxpayer owed,'' U.S.S.G. § 2T1.2 Background (1992), and there is no contention that it is relevant here.

[6] The Court notes that 26 U.S.C. § 7203 can be considered a lesser included offense of id. § 7201.

Furthermore, U.S.S.G. § 1B1.2, which "provides the basic rules for determining the guidelines applicable to the offense conduct under Chapter Two (Offense Conduct)," U.S.S.G. § 1B1.2, Application Note 1, supports defendant's contention. Under that guideline, a court is to first "[d]etermine the offense guideline section in Chapter Two (Offense Conduct) most applicable to the offense of conviction (i.e., the offense conduct charged in the count of the indictment or information of which the defendant was convicted)." Id. § 1B1.2(a). "As a general rule, the court is to use the guideline section from Chapter Two most applicable to the count of conviction. The Statutory Index (Appendix A) provides a listing to assist in this determination." Id. § 1B1.2, Application Note 1.

In the Statutory Index, 26 U.S.C. § 7201 refers to U.S.S.G. § 2T1.1, but without specifying any of that guideline's Special Instructions. U.S.S.G. § 1B1.2, however, remains helpful in choosing between the Special Instructions. "When a particular statute proscribes a variety of conduct that might constitute the subject of different offense guidelines, the court will determine which guideline section applies based upon the nature of the offense conduct charged in the count of which the defendant was convicted." U.S.S.G. § 1B1.2, Application Note 1.

Under that instruction, it is clear that the Court, faced with a choice between U.S.S.G. § 2T1.1(c)(1) and id. § 2T1.1(c)(3), must opt for the former, the language of which clearly reflects the language both of the statute the violation of which is charged in the count of conviction, as well as the language of the indictment itself. See also United States v. McCall, 915 F.2d 811, 814 (2d Cir.1990) (Guidelines required court to select Guidelines section based on offense of conviction rather than section based on "real conduct").

The government also argues that, if the courts accepted defendant's position "that [U.S.S.G.] Section 2T1.1(c)(3) applies only to prosecutions brought under [26 U.S.C.] Section 7203, the result almost certainly would be to punish more harshly less serious conduct." (Gov't Letter Nov. 9, 2001, at 3.) It is Congress, however, that has, in 26 U.S.C. § 7201, made tax evasion a felony, and, in id. § 7203, willful failure to pay tax a misdemeanor (in most circumstances), and the Sentencing Commission that (with the approval of Congress) has promulgated the Guidelines, and it has certainly long ceased to be the case that it is up to courts on their own to determine the appropriate range of penalties for various sorts of criminal conduct.

The appropriate guideline in the case of Count One, then, is U.S.S.G. § 2T1.1(c)(1).[7]

3.

Defendant seeks a downward departure under U.S.S.G. § 5H1.6 on the ground that his wife, Anne-Marie Tahka, suffers psychological infirmities that require defendant's assistance. Defendant intends to call, as a witness in support of this departure application, Dr. Robert Sadoff, a psychiatrist who will offer his expert opinion (1) that he concurs with the previous diagnoses of Ms. Tahka by other medical professionals and (2) that Ms. Tahka is extremely dependent on Trupin for emotional, physical and financial support and the performance of significant life functions and that, in the absence of a caretaker for Ms. Tahka with the degree of familiarity and intimacy that marks the relationship between Trupin and Ms. Tahka, Trupin is essential to Ms. Tahka's daily existence.

[7] That being the case, the decisions in United States v. Brimberry, 961 F.2d 1286, 1292 [69 AFTR 2d 92-1153] (7th Cir.1992), and United States v. Clements, 73 F.3d 1330, 1338–39 [77 AFTR 2d 96-648] (5th Cir.1996), on which the government relies, are not to the point, as they apply the different provisions of U.S.S.G. §§ 2T1.1 and 2T1.3 prior to Amendment 491. The Court does not find the Clements footnote, 73 F.3d at 1339 n. 14, persuasive. The Court notes that in United States v. Gordon, 291 F.3d 181 [89 AFTR 2d 2002-2757] (2002), petition for cert. filed (No. 02-6163), in which the tax offenses of which the defendant had been found guilty were "tax evasion, conspiracy to impair, impede, and defeat the IRS, filing false tax returns, [and] filing false collection information statements," 291 F.3d at 184, the Second Circuit assumed, without discussion, that the relevant Special Instruction in U.S.S.G. § 2T1.1 (2000) was id. § 2T1.1(c)(1). 291 F.3d at 187. (Neither that Special Instruction nor id. § 2T1.1(c)(3) (2000) differs in any presently material way from the 1994 texts of those provisions.)

(Rubin Letter, Nov. 26, 2001, at 1.) The government asks that the Court disregard evidence already taken in support of the departure application, and preclude further such evidence, because defendant's wife has declined to be examined by a psychiatric expert retained by the government.

In United States v. McSherry, 226 F.3d 153 (2d Cir.2000), the Court of Appeals found that it was within the inherent powers of a district court to direct that a defendant, who had given notice of his intent to rely, at trial, on the testimony of a psychiatrist and a psychologist regarding his mental state at the time of the charged conduct, must undergo a mental examination by government doctors, or forgo his proposed testimony. 226 F.3d at 155–57. This Court perceives no reason why it does not have the same power here, although the context is sentencing, not trial, and the person to be examined is a witness, not the defendant. Recognizing that the matter is one of discretion, the Court notes that defendant has advanced no factual reason not to permit the government the examination of Ms. Tahka it seeks (beyond characterizing it as intrusive), but has relied only on legal argument to the effect that there is no authority compelling the Court to require the examination.

In such circumstances, the Court, as fairness appears clearly to dictate, will preclude Dr. Sadoff from testifying on behalf of defendant unless Ms. Tahka is submitted for examination by the government's expert. The Court will not, however, disregard evidence already taken in support of the departure application nor preclude further fact testimony in support of it.

4.

The government is to submit, within 15 days of the date hereof, its application of U.S.S.G. § 2T1.1(c)(1) to the facts of this case, to which the defendant may respond in a further 15 days.

Chambers will contact the parties to schedule any further witnesses regarding the departure application.

¶2002-5420

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Daniel M. EDGAR, J. Michael Ward, DEFENDANTS-APPELLANTS. U.S. Court of Appeals, Eleventh Circuit, (CA11) No. 00-14144, Sept. 12, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—tax evasion; conspiracy. Hospital CEOs' convictions for tax evasion, conspiracy and other offenses related to scheme to illegally convert hospital funds to their own benefit were affirmed based on record, and constitutional challenges to 18 USC §666 were rejected. *Reference:* United States Tax Reporter ¶72,015.03(5). IRC §7201.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT,

Appeal from the United States District Court for the Middle District of Florida

Before DUBINA and BARKETT, Circuit Judges, and HODGES* , District Judge.

BARKETT, Circuit Judge:

[PUBLISH]

Defendants-Appellants J. Michael Ward (''Ward'') and Daniel M. Edgar (''Edgar''), executive officers at Cape Coral Hospital (''the Hospital''), appeal their convictions and the sentences imposed for crimes arising out of various schemes whereby Ward and Edgar used their positions to illegally convert Hospital funds to their own benefit. Specifically, Ward appeals his total 87-month concurrent sentences and his conviction for the following: (1) conspiracy to defraud the United States, in violation of 18 U.S.C. § 371 (Count 1); (2) theft from an organization receiving government funds, in violation of 18 U.S.C. § 666 (Counts 2, 4, 23–25, 37 and 51); (3) money laundering, in violation of 18 U.S.C. § 1956(a)(1) (Counts 21 and 53); (4) bank fraud, in vio-

* Honorable Wm. Terrell Hodges, U.S. District Judge for the Middle District of Florida, sitting by designation.

lation of 18 U.S.C. § 1344 (Count 26); and (5) tax evasion, in violation of 26 U.S.C. § 7201 (Counts 55–59). Edgar appeals his total 87-month concurrent sentences and his conviction for the following: (1) conspiracy to defraud the United States, in violation of 18 U.S.C. § 371 (Count 1); (2) theft from an organization receiving government funds, in violation of 18 U.S.C. § 666 (Counts 3, 4, and 38); (3) money laundering, in violation of 18 U.S.C. § 1956(a)(1) (Counts 5–21 and 54); and (4) tax evasion, in violation of 26 U.S.C. § 7201 (Counts 60–63).

Ward and Edgar present multiple grounds for overturning their convictions and sentences. We have carefully considered these various arguments and have concluded that the district court did not commit reversible error in this case. The parties' arguments regarding the constitutionality of 18 U.S.C. § 666, however, merit some discussion. Edgar argues that 18 U.S.C. § 666 is facially unconstitutional because Congress lacks the power to enact criminal laws under the Spending Clause of the Constitution.[1] Edgar further asserts that if § 666 is void due to its constitutional infirmity, then his money laundering convictions cannot stand because the § 666 convictions were the predicate offenses alleged in the money laundering counts. Ward argues that the Indictment was "fatally flawed" because (1) § 666 is unconstitutionally vague; (2) § 666 is unconstitutional as applied because there is no continuing federal interest in the Medicare, Part A funds after their distribution to the Hospital; (3) the Indictment failed to allege that the exception found at § 666(c) was inapplicable; and (4) the Indictment failed to sufficiently allege facts establishing federal jurisdiction under § 666.

BACKGROUND

Ward served as the Hospital's President and Chief Executive Officer from 1976 through May 1994. Edgar joined the Hospital as Chief Operating Officer in 1978. Through a series of transactions spanning the years 1987 to 1994, Ward and Edgar misappropriated hundreds of thousands of dollars from the hospital for their own benefit. A detailed description of the schemes they carried out, however, is not necessary to the resolution of their constitutional claims. For the purpose of our discussion, the key fact is the hospital's participation in the Medicare, Part A program, which provides federal assistance payments to hospitals and other institutions.[2] Inasmuch as a slightly more detailed description of the conduct underlying Ward's conviction is required in resolving his contention that the statute is unconstitu-tionally vague, we set forth additional facts at the appropriate point in our discussion.

DISCUSSION

In fulfilling its legislative function, Congress may only act pursuant to an express grant of power or authority in Article I of the Constitution. Courts considering claims

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[1] 18 U.S.C. § 666, entitled "Theft or bribery concerning programs receiving Federal Funds," provides in pertinent part:

(1) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(1) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to use of any person other than the rightful owner or intentionally misapplies, property that—

(1) is valued at $5,000 or more, and

(2) is owned by, or is under the care, custody, or control of such organization, government or agency . . .

. . .

shall be fined under this title, imprisoned not more than 10 years, or both.

(2) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(3) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

[2] The Hospital received the following Medicare, Part A payments for each of its fiscal years ending June 30, 1987, through June 30, 1994: (1) $19,399,532 for 1987; (2) $18,237,393 for 1988; (3) $20,032,561 for 1989; (4) $22,622,558 for 1990; (5) $25,442,303 for 1991; (6) $29,886,106 for 1992; (7) $35,023,003 for 1993; and (8) $35,796,275 for 1994. Medicare, Part A payments accounted for approximately forty-five percent of the Hospital's net revenues. These figures come from the records of Mutual of Omaha, a fiscal intermediary which received funding from the United States to process and pay claims filed by Medicare, Part A beneficiaries.

involving 18 U.S.C. § 666 have concluded that Congress passed the statute pursuant to its powers under the Spending Clause. See, e.g., United States v. Zwick, 199 F.3d 672, 687 (3d Cir. 1999); United States v. Santopietro, 166 F.3d 88, 92–94 (2d Cir. 1999); United States v. McCormack, 31 F.Supp.2d 176, 186 n.18 (D. Mass. 1998) (collecting cases); see also United States v. Fischer, 529 U.S. 667, 689 n.3 (2000) (Thomas, J., dissenting); United States v. Suarez, 263 F.3d 468, 487 n.7 (6th Cir. 2001) (Boggs, J., dissenting in part). The Spending Clause of the Constitution empowers Congress ''to lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.'' Art. I, § 8, cl. 1.

[1] Edgar argues that Congress has no power to pass criminal laws under the Spending Clause. He maintains that courts have upheld conditional grants of funds to state and local governments on the theory that Congress is not enacting a law binding on those governments, but instead offering a contract which the governments may reject or accept subject to the conditions attached by Congress. It is this contract theory, Edgar asserts, that prevents such congressional actions from upsetting the balance of power between federal and state governments. Edgar contends that § 666, by contrast, is a federal criminal statute designed to punish conduct traditionally within the realm of state concerns, and that such legislative action extends beyond the scope of Congress's powers under the Spending Clause. Accordingly, Edgar contends that the district court should have granted his motion to dismiss the § 666 counts because § 666 is facially unconstitutional. After carefully considering the question, we now hold that § 666 is a valid exercise of Congress's powers under the Spending Clause.

1. The Supreme Court's Limiting Construction of § 666 in United States v. Fischer.

Our conclusion that § 666 is constitutional has as its first point of reference the Supreme Court's treatment of the statute. The first Supreme Court decision reviewing a § 666 prosecution stated that there was ''no serious doubt about the constitutionality'' of the statute's anti-bribery provision under the circumstances presented. See Salinas v. United States, 522 U.S. 52, 60 (1997) (citing Westfall v. United States, 274 U.S. 256 (1927)). In Fischer v. United States, 529 U.S. 667 (2000), the Court again upheld a § 666 conviction. The defendant in Fischer was a health care consultant who had been prosecuted under § 666 for fraud and bribery involving a municipal hospital agency which received more than $10,000 in federal funds. At issue was whether payments to the hospital agency under the federal Medicare program constituted ''benefits'' for purposes of § 666(b), a limiting provision which requires that the alleged offense conduct involve an ''organization, government, or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.''

Characterizing Medicare as ''a comprehensive federal assistance enterprise aimed at ensuring the availability of quality health care for the broader community,'' Fischer, 529 U.S. at 680, the Court held that Medicare payments to health care providers count as ''benefits'' under § 666(b) and not, as the defendant argued, simply as compensation for services rendered. Id. at 676–78. The Court thus upheld the health care consultant's conviction under the statute's misappropriation and bribery provisions. At the same time, the Court rejected the government's contention that any funds distributed from federal coffers would qualify as benefits for purposes of the limitation established by § 666(b). A seven-judge majority stated:

> Any receipt of federal funds can, at some level of generality, be characterized as a benefit. The statute does not employ this broad, almost limitless use of the term. Doing so would turn almost every act of fraud or bribery into a federal offense, upsetting the proper federal balance.

Id. at 681.[3] The Court went on to hold that the evaluation of whether particular federal receipts count as "benefits" turns on the relevant federal "program's structure, operation, and purpose," as well as the conditions under which an entity receives federal payments. Id. It reasoned that Medicare payments pass the requisite threshold, citing as relevant factors the program's comprehensive scheme of regulation and its broad aim of promoting the long-term stability of health-care providers.

We are persuaded that the Court's reference to "the proper federal balance" demonstrates its cognizance of potential constitutional limitations upon the application of § 666. Cf. United States v. Suarez, 263 F.3d 468, 486 (6th Cir. 2001) (Boggs, J., dissenting in part) (remarking that "the Fischer majority's language regarding the need to respect the proper balance between state and federal sovereigns makes clear their constitutional concerns with a broad reading of § 666"). The Court's rejection of the government's proposed construction of the term "benefits," on the basis of the threat it posed the proper federal balance, clearly implied a conclusion as to the soundness of the Court's own alternative construction. By requiring attention to a program's "structure, operation, and purpose" in determining whether federal monies constitute "benefits," the Court indicated that constitutional concerns implicated by the statute's language may be overcome through careful construction.

In this sense, the Court's approach to § 666 has validated the efforts of the Second and Third Circuits in several pre-Fischer decisions. Both courts had identified the same constitutional concern addressed by the Court in Fischer: the potential amenability of § 666 to interpretations that would render an exceedingly large class of traditional state offenses subject to federal prosecution. See United States v. Zwick, 199 F.3d 672, 682–83 (3d Cir. 1999) (noting that "most literal interpretation" of § 666 is "troubling from an interpretative standpoint in that it broadens the range of activity criminalized by the statute and alters the existing balance of federal and state powers"); United States v. Santopietro, 166 F.3d 88, 93 (2d Cir. 1999) (offering, as reductio ad absurdum, the federal prosecution of "a bribe paid to a city's meat inspector ... just because the city's parks department had received a federal grant of $10,000"). The solution endorsed by both circuits was the recognition of an offense element limiting the statute's application to conduct bearing a sufficient connection to the expenditure of federal funds or the integrity of federal programs. The Supreme Court's decision in Fischer has now confirmed the existence of the constitutional limits suspected by the Second and Third Circuits, while also clarifying that these limits are built into § 666(b)'s requirement that recipient entities receive at least $10,000 in federal "benefits" over the course of a year. After Fischer, it is clear that the term "benefits" encompasses only federal funds expended under sufficiently comprehensive programs. Application of this standard is to be guided by reference to a program's "structure, operation, and purpose," as well as the conditions under which recipient entities receive funds. This discussion of the relevant factors presages a broad enough inquiry to assure that applications of § 666 remain within constitutional bounds.

2. Congressional Authority To Enact § 666 As a Necessary and Proper Means of Preserving its Spending Power.

Although the Fischer majority did not expressly reference any constitutional provision, we are persuaded that a basis for the enactment of § 666 may be found in Congress's authority, under the Necessary and Proper Clause, to protect its capacity to fruitfully exercise the spending power. As a means of ensuring the efficacy of federal appropriations to comprehensive federal assistance programs, the anti-corruption enforcement mechanism strikes us as bearing a sufficient relationship to Congress's spending power to dispel any doubt as to its constitutionality.

[3] In a dissent joined by Justice Scalia, Justice Thomas likewise read the statute's use of the term "benefits" to require a limiting construction, differing with the majority only as to the test to be applied. See Fischer, 529 U.S. at 690–91 (Thomas, J., dissenting).

Article I of the Constitution gives Congress the authority to ''make all Laws which shall be necessary and proper for carrying into Execution'' its enumerated powers. Art. I, § 8, cl. 18. From the time of the Supreme Court's landmark decision in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 [4 AFTR 4491] (1819), it has been recognized that the Necessary and Proper Clause authorizes Congress, subject to other constraints imposed by the Constitution, to adopt measures that bear a rational connection to any of its enumerated powers. Therefore, § 666 may be upheld if the availability of federal criminal jurisdiction over the specified offense conduct bears a reasonable relationship to exercise of the Congressional spending power.

In Fischer, the Supreme Court's analysis at times bears inflections of this mode of analysis. The Court noted that ''the language of subsection (b) reveals Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs.'' Fischer, 529 U.S. at 678. This reference to ensuring integrity, as well as the identification of plural federal assistance programs, suggests a reading of § 666 as serving a Congressional meta-purpose: the creation of an enforcement mechanism sufficient to assure that disbursements meeting the § 666(b) threshold are in fact applied in furtherance of the purposes for which they are dispensed.

Further support for our reliance upon the Necessary and Proper Clause may be found in United States v. Lipscomb, No. 00-10461, 2002 WL 1539805 (5th Cir. July 12, 2002), despite the failure of a fractured panel in that case to resolve an as-applied challenge to § 666's constitutionality. Shifting majorities of the Lipscomb panel contributed to a judgment reversing a former Dallas City Council member's conviction under § 666 for ac-cepting bribes from a taxicab company. This judgment, however, did not depend on any conclusion as to § 666's constitu-tionality. Rather, each of the two opinions addressing the defendant's constitutional challenge appears to have viewed the en-actment of § 666 as within Congress's powers under the Necessary and Proper Clause. In one of the three opinions en-tered in the case, Judge Wiener applied a necessary-and-proper analysis as one ground on which the statute and the defen-dant's prosecution could be upheld. Judge Wiener found the rational connection stan-dard satisfied by two federal interests in criminal jurisdiction over corruption of the kind at bar. First was the absolute size of federal funds - $56 million - received by the city of Dallas. Lipscomb, 2002 WL 1539805, at 22. Second was the ''integrity *vel non* of federal programs and funds,'' id. at 23, by which Judge Wiener meant Congress's interest in ensuring ''the hon-esty of state and local officials who have federal funds in their purview or federal programs under their authority.'' Id.

In a separate opinion, Judge Smith outlined his opposing view that § 666 was unconstitutional as applied through the prosecution of the former council member's corrupt activities. Judge Smith's opinion nonetheless suggested that the Necessary and Proper Clause affords a sufficient basis for Congress's enactment of § 666. Distinguishing the ''federal interest in federally-funded programs'' from the ''federal government's generalized interest in everything that occurs within its borders,'' Lipscomb, 2002 WL 1539805 at 56, he reasoned that policing a taxicab company's bribery of a local legislator is ''necessary and proper'' only to the pursuit of the latter, generalized interest, and thus exceeds the bounds of Congress's Article I powers. Judge Smith therefore appears to have presumed that § 666 is necessary and proper inasmuch as it may be applied to safeguard substantial amounts of federal funding disbursed in connection with reasonably comprehensive federal assistance programs.

The opinions of both Judge Wiener and Judge Smith thus support our view that the Necessary and Proper Clause provides Congress with the requisite authority to enact § 666, even if some prosecutions under the statute may require reversal. Indeed, for Congress to exercise its spending power effectively, it must be assured that

the instrumentalities through which the federal government pursues comprehensive aims can be trusted to apply appropriated funds toward their intended objectives. The legislative history of § 666 provides evidence of exactly such an intent. According to a Senate Report accompanying the statute, the purpose of the law is ''to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program.'' S. Rep. No. 225, 98th Cong., 2d Sess. 369–70 (1984). The report also states that ''the Federal Government clearly retains a strong interest in assuring the integrity of . . . program funds.'' Id.

These statements indicate that through § 666, Congress sought to establish a safeguard to assure that federal benefits would be used for their intended purposes. § 666 provides such assurance by authorizing the federal prosecution of individuals who corrupt entities which receive (1) more than $10,000 in federal funds (2) in connection with programs defined by a sufficiently comprehensive ''structure, operation, and purpose'' to merit characterization of the funds as benefits under § 666(b). Fischer, 529 U.S. at 681. It is reasonable for Congress to conclude that any corruption of such recipient organizations, regardless of whether the corruption involves the misappropriation of specifically federal funds, endangers the comprehensive programs in which the organizations participate, and thus the effective exercise of the Congressional spending power as well.

Accordingly, we reject Edgar's facial challenge to the constitutionality of § 666 and find that the district court did not abuse its discretion in denying Edgar's motion to dismiss on this ground. Moreover, since Edgar has not demonstrated any constitutional infirmity in the enactment of § 666, the money-laundering convictions premised on his § 666 offenses must also stand.

III. Section 666 is Not Unconstitutionally Vague.

Ward raises two additional constitutional challenges to his conviction under § 666. The first focuses on an exception set forth in § 666(c), which precludes prosecution of alleged offense conduct involving only ''bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.'' Ward argues that § 666 is unconstitutionally vague because the phrase ''usual course of business'' is subject to two meanings: (1) the usual course of business of other businesses in an industry, or (2) the usual course of business of the entity at issue in a particular case. The district court concluded that this argument was meritless. We agree.

Absent a First Amendment claim, vagueness challenges must be evaluated in light of the facts of the individual case before the court; in other words, the statute is judged on an ''as applied'' basis. Maynard v. Cartwright, 486 U.S. 356, 361 (1988). Because ''objections to vagueness under the Due Process Clause rest on the lack of notice,'' an as-applied vagueness challenge ''may be overcome in any specific case where reasonable persons would know that their conduct is at risk.'' Id.

We agree with the district court's characterization of Ward's claim as ''meritless'' because any reasonable person would understand that the phrase ''usual course of business'' in § 666(c) would not bar prosecution for the conduct alleged in the § 666 counts in the Indictment. Among the transactions for which Ward was convicted were the following: converting hospital monies into unauthorized bonuses to himself; profiting from the Hospital's use of a warehouse that he, Edgar, and another officer in effect sold to the Hospital on two separate occasions; participating in the diversion of Hospital funds to himself and others through the use of fictional invoices; collecting a finder's fee from the Hospital in connection with an investment of the Hospital's parent company; using Hospital monies to pay premiums on insurance policies for which he was solely responsible;

and profiting from the Hospital's purchase, at an inflated price, of a real estate option from a partnership in which he held an undisclosed interest. Any reasonable person would understand that the funds involved in these transactions could not be construed as lawful payments or reimbursements made in the ''usual course of business.'' Moreover, under the ''as applied'' standard, the meaning of ''usual course of business'' must be viewed in light of Ward's knowledge and experience as a hospital president, CEO, and member of the Board of Directors. Surely Ward knew on the basis of this experience that neither Cape Coral nor any other hospital would permit a few of its executives to convert enormous sums of money for their personal benefit as part of the hospital's ''usual course of business.''

Because we agree with the district court that Ward's vagueness challenge is meritless, we conclude that the district court did not abuse its discretion in denying Ward's motion to dismiss on that ground.

4. Section 666 is Not Unconstitutional As Applied.

Ward also argues that the § 666 counts should have been dismissed because the absence of a continuing federal interest in the Medicare, Part A funds after their distribution to the Hospital makes his prosecution under § 666 unconstitutional. On Ward's view, § 666 requires the Government to prove that misappropriated funds themselves came either from a federal source or from a pool including federal funds committed to a specific federal purpose. Ward contends that no such federal purpose guided the use of funds he misappropriated because these monies were reimbursement to the hospital for its prior treatment of Medicare patients. Since the patients had already been treated, he maintains, it should be recognized that such funds lost ''their federal character'' upon disbursement to the hospital as compensation for the completed services. Ward Brief at 20.

As a matter of statutory interpretation, the Supreme Court's decision in Fischer forecloses Ward's argument. In Fischer, the Court reasoned that payments disbursed as reimbursement for the treatment of Medicare patients ''are made not simply to reimburse for treatment of qualifying patients but to assist the hospital in making available and maintaining a certain level and quality of medical care, all in the interest of both the hospital and the greater community.'' Fischer, 529 U.S. at 679–80. Hence the payments may be reimbursement, but they do more than compensate for services already provided - they sustain health care providers in their future operations and thereby ensure the continued availability of medical care for persons covered by the Medicare program. This broader purpose shows the federal government to have a continuing interest in the sound administration of Medicare reimbursement funds, long after any particular patient's course of treatment is completed.[4]

Since Ward challenges the constitutionality of the statute's application to his conduct, however, his argument ultimately rests on the assertion that this identification of a continuing federal interest in reim-bursement funds extends the reach of § 666 beyond the limits of Congress's spend-ing power. As discussed earlier in this opinion, however, this argument was im-plicitly rejected by the Supreme Court in Fischer. There, the Supreme Court held that the corruption of health care providers participating in the federal Medicare pro-gram affords a sufficient basis for prosecu-tion under § 666. The Supreme Court adopted this construction of the statute even as it manifested a cognizance of con-stitutional limits in remarking that alterna-tive interpretations could upset the ''proper federal balance.'' Fischer, 529 U.S. at 681. The Court's decision not to further probe the limits of permissible construction only indicates that Medicare-related prosecu-tions under § 666 remain well removed from the relevant constitutional boundaries. Cf. id. at 682 (''Other cases may present

[4] We reject Ward's effort to distinguish the Fischer case on the ground that it did not explicitly identify the funds in question as Medicare, Part A funds, the only type of payments at issue in this case. The Medicare program's bifurcation into a Part A and a Part B is irrelevant for our present purpose of determining whether a continuing federal interest exists in funds paid health care providers as reimbursement for services rendered.

questions requiring further examination and elaboration of the term 'benefits.'''). Whatever further elucidation may be required to identify the point at which § 666's application will transgress the outer boundary of Congress's spending power, Fischer clearly vindicated § 666's constitutionality as applied to the defrauding of entities funded under Medicare.

We therefore agree with the district court that the government could constitutionally prosecute Ward under § 666, and hold that the district court did not abuse its discretion in denying Ward's motion to dismiss on this ground. See Pielago, 135 F.3d at 707. Viewing all facts and infer-ences in favor of the government, we also find that the government adduced sufficient evidence of a ''federal interest'' in the stolen funds to merit submitting the § 666 charges to the jury. See Rule Crim. Proc. 29. Accordingly, we conclude that the district court did not err in denying Ward's motion for judgment of acquittal. See Hansen, 262 F.3d at 1236 (upholding denial of Rule 29 requires only a determination that ''a reasonable fact-finder could conclude that the evidence established the defendant's guilt beyond a reasonable doubt.'').

Because we conclude there is no merit to any of the arguments Edgar and Ward make in this appeal, we affirm their convictions.

AFFIRMED.

¶2002-5421

Floyd A. WRIGHT, PLAINTIFF-APPELLANT v. Jeffrey R. MEYER, ET AL., DEFENDANTS-APPELLEES. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-17563, Sept. 18, 2002. District Court, (2001, DC CA) 88 AFTR 2d 2001-5767, adopted (2001, DC CA) 88 AFTR 2d 2001-6335, reconsideration denied (2001, DC CA) 88 AFTR 2d 2001-6754 [88 AFTR 2d 2001-6335], affirmed. Years 1973, 1974, 1975, 1985, 1986, 1987, 1988, 1989. Decision against Taxpayer.

1. Actions against U.S.—sovereign immunity—constitutional claims—Federal Tort Claims Act—res judicata; collateral estoppel—reconsideration—frivolous appeal sanctions. District court properly dismissed pro se taxpayer's action alleging that federal and Nevada County officials violated his constitutional rights when evicting him from his property pursuant to foreclosure and sale order: taxpayer didn't show that U.S., U.S. Marshal Service or IRS waived sovereign immunity; and individual federal defendants were properly dismissed in their official capacities. Also, taxpayer's claims against Marshals individually and against Nevada officials who assisted Marshals in executing sale order, claims against attorneys who represented govt. in taxpayer's prior tax case, and claims seeking to relitigate merits of underlying liens and sale order which were previously fully litigated and affirmed on appeal, were properly dismissed. And, $1,500 frivolous appeal sanction was imposed. *Reference:* United States Tax Reporter ¶74,025.01(3); 74,336.506(25); 74,336.506(30); 74,215.05(5); 74,335.01(15); 76,557.53(12); 76,557.53(30); 74,337.503(75); 74,336.514(50). IRC §7402; 7421; 7433.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the Eastern District of California, William B. Shubb, District Judge, Presiding.

Before HUG, O'SCANNLAIN, and TASHIMA, Circuit Judges.

MEMORANDUM*

[1] Floyd A. Wright appeals pro se the district court's judgment dismissing his action alleging that Federal and Nevada County officials violated his constitutional rights by foreclosing tax liens against him and subsequently evicting him from his property pursuant to an order of judicial sale. We have jurisdiction pursuant to 28

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

U.S.C. § 1291. We review de novo dismissals for lack of subject matter jurisdiction, Montes v. United States, 37 F.3d 1347, 1351 (9th Cir.1994), as well as dismissals for failure to state a claim, Kimes v. Stone, 84 F.3d 1121, 1126 (9th Cir.1996). We affirm.

The district court properly dismissed Wright's claims against the United States, the United States Marshal Service, and the Internal Revenue Service (''IRS'') for lack of subject matter jurisdiction because Wright failed to show an explicit waiver of sovereign immunity. See Holloman v. Watt, 708 F.2d 1399, 1401–02 (9th Cir.1983) (per curiam). Likewise, the district court properly dismissed the individual federal defendants in their official capacities. See United States v. Dalm, 494 U.S. 596, 608 [65 AFTR 2d 90-1210] (1990).

The district court properly dismissed Wright's claims against the United States Marshals in their individual capacities, and against the Nevada County officials who assisted the Marshals, because those claims were based entirely on the defendants' role in executing a facially valid judicial order which had been affirmed by this court. See Coverdell v. Dep't of Social & Health Servs., 834 F.2d 758, 765 (9th Cir.1987).

The district court properly dismissed Wright's claims against attorneys Meyer and Duane because those claims were based entirely on their roles in representing the government in Wright's prior tax case. See Fry v. Melarango, 939 F.2d 832, 837 [68 AFTR 2d 91-5591] (9th Cir.1991).

The district court properly dismissed Wright's claims seeking to re-litigate the merits of the underlying tax lien and order of judicial sale which were previously fully litigated and affirmed on appeal. See United States IRS v. Palmer (In re Palmer), 207 F.3d 566, 568 [85 AFTR 2d 2000-1157] (9th Cir.2000).

Appellee's motion for sanctions is granted. Wright unsuccessfully appealed to this court the underlying tax matter and then brought this frivolous appeal to relitigate the prior matter. See Smith v. C.I.R., 800 F.2d 930, 936 [58 AFTR 2d 86-5856] (9th Cir.1986) (''An appeal is frivolous when the result is obvious or the appellant's arguments are wholly without merit.''). Accordingly, we impose a sanction of $1500.00 plus costs for the prosecution of this frivolous appeal. See Colton v. Gibbs, 902 F.2d 1462, 1464 [71A AFTR 2d 93-3621] (9th Cir.1990) (imposing sanctions on taxpayer with ''long history of tax-related litigation.'').

AFFIRMED.

¶2002-5422

In Re: Richard G. ROUSEY and Betty Jo ROUSEY, Debtors. Richard G. ROUSEY and Betty Jo ROUSEY, APPELLANTS v. Jill R. JACOWAY, APPELLEE. U.S. Bankruptcy Appellate Panel, Eighth Circuit, (Bktcy CA8) No. 02-6013WA, Sept. 13, 2002. Bankruptcy Court affirmed. Decision against Taxpayers.

1. Tax claims in bankruptcy—bankruptcy estate property—exemptions—IRAs. Bankruptcy court properly determined that Chap. 7 debtors' interests in IRAs funded solely with lump sum rollovers from their former employer's retirement plan weren't exempt from bankruptcy estate as ''similar plans'' to pension plans under 11 USC §522(d)(10)(E). Taxpayers' IRAs were more akin to non-exempt bank savings accounts where contributions thereto weren't made over time or from multiple contributors, taxpayers had unfettered access to funds subject only to 10% early withdrawal penalty, and payments weren't based on their life spans or length of service; and fact that funds were initially traceable to retirement plan funds wasn't dispositive since funds became taxpayers' own property once they terminated employment. Also, statute's reference to IRC §408 didn't prove Congress intended blanket exemption for all IRAs. *Reference:* United States Tax Reporter ¶68,726.52(32).

United States Bankruptcy Appellate Panel of the Eighth Circuit,

Appeal from the United States Bankruptcy Court for the Western District of Arkansas.

BEFORE: KRESSEL, SCHERMER and FEDERMAN, Bankruptcy Judges.

Schermer, J., filed concurring opinion.

Chapter 7 trustee objected to debtors' claim of exemptions in two individual retirement accounts (IRAs) and moved for turnover. The United States Bankruptcy Court for the Western District of Arkansas, Robert F. Fussell, J., 275 B.R. 307, sustained objection and granted turnover motion. Debtors appealed. The Bankruptcy Appellate Panel (BAP), Kressel, J., held that: (1) debtors' IRAs were not "similar plans or contracts" within meaning of the federal exemption for payments under a pension, annuity, or similar plan or contract, and (2) debtors' right to payment was not on account of illness, disability, death, age, or length of service, within meaning of the federal exemption.

Affirmed.

KRESSEL, Bankruptcy J.

Richard and Betty Jo Rousey appeal from the bankruptcy court[1] order denying exemption of portions of their Individual Retirement Accounts under 11 U.S.C. § 522(d)(10)(E). Because we think the bankruptcy court correctly applied Eighth Circuit precedents, we affirm.

BACKGROUND

The material facts are not in dispute. The debtors, Richard and Betty Jo Rousey, filed a voluntary joint Chapter 7 petition on April 27, 2001, appellee Jill R. Jacoway was appointed to serve as trustee in their case. The debtors elected to use the bankruptcy exemptions provided by 11 U.S.C. §U.S.C. § 522(b)(1)[2] and found in 11 U.S.C. § 522(d). Listed on the debtors' Schedule B were their ownership interests in two IRAs. Both debtors established their IRAs in the form of deposit accounts at the First National Bank of Berryville, Arkansas[3] from funds rolled over from their Northrop Grumman[4] Plans. Neither debtor, however, has deposited any further money into their IRA since the initial deposits that established their accounts. Both debtors have the unfettered ability to withdraw funds from their accounts.

The IRA owned by Richard Rousey totaled $42,915.32 at the time of bankruptcy filing. Mrs. Rousey's IRA totaled $12,118.16 at the time of filing. Their Schedule C claimed $5,033.00 of Richard Rousey's IRA exempt under 11 U.S.C. § 522(d)(5)[5] , and the remainder of $37,882.32 under 11 U.S.C. § 522(d)(10)(E). Betty Jo Rousey claimed as exempt $5,648.00 of her IRA under 11 U.S.C. § 522(d)(5) and the remainder of $6,470.16 under 11 U.S.C. § (d)(10)(E).

On August 3, 2001, the trustee filed an objection to the exemption claims and argued that the Rouseys are not entitled to claim exemptions of the IRAs pursuant to 11 U.S.C. § 522(d)(10)(E) in the total amount of $44,352.48. She asked that the non-exempt portions be turned over to her. The trustee does not object to the debtors' claimed exemption in the total amount of $10,681.00 pursuant to 11 U.S.C. § 522(d)(5). On February 13, 2002, the bankruptcy court entered its order sus-taining the trustee's objection and granting her motion. The court determined that the IRAs did not qualify as "similar plans or contracts" under 11 U.S.C. § 522(d)(10)(E) because the debtors had unfettered discretion to withdraw from the corpus. The court also determined that payments under the plans were not on account of illness, disability, death, age or length of service as required under that section. The debtors filed a timely appeal.

DISCUSSION

[1] The Honorable Robert F. Fussell, United States Bankruptcy Judge for the Eastern and Western Districts of Arkansas.

[2] 11 U.S.C. § 522(b) permits a debtor to choose between the bankruptcy exemptions provided in § 522(d) and the exemptions under state law, unless a state "vetoes" the debtor's option to choose the bankruptcy exemptions. Huebner v. Farmers State Bank, Grafton, Iowa (In re Huebner), 986 F.2d 1222, 1224 (8th Cir.1993).

[3] Mr. Rousey established his IRA account in March of 1999. Mrs. Rousey established her IRA account in April of 1999.

[4] Northrop Grumman is the debtors' former employer.

[5] 11 U.S.C. § 522(d)(5) allows the exemption of "any property" subject to the monetary limitations set out.

Standard of Review

''We review a bankruptcy court's conclusions of law de novo and its factual findings under the clearly erroneous standard.'' Merchants Nat'l Bank of Winona v. Moen (In re Moen), 238 B.R. 785, 790 (B.A.P. 8th Cir.1999) (quoting Sinclair Oil Co. v. Jones (In re Jones), 31 F.3d 659, 661 (8th Cir.1994)).

EXEMPTION UNDER 522(D)(10)(E)

Similar Plan or Contract

11 U.S.C. § 522(d)(10)(E) provides an exemption for:

> **[1]** a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless (i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose; (ii) such payment is on account of age or length of service; and (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

11 U.S.C. § 522(d)(10)(E). There are essentially three main requirements that a debtor must meet to properly claim as exempt payments from an investment plan/income stream: payments are exempt only if they (1) are received pursuant to a pension, annuity, or similar plan or contract; (2) are on account of illness, disability, death, age, or length of service; (3) are reasonably necessary for the debtor's support or for the support of a dependent of the debtor. Andersen v. Ries (In re Andersen), 259 B.R. 687, 691 (8th Cir.BAP2001). To help define what encompasses the generic phrase ''similar plan or contract'' the court in Eilbert v. Pelican[6] used the interpretive canons noscitur a sociis (a term is known from its associates) and ejusdem generis (general words in an enumeration are construed as similar to more specific words in the enumeration). Eilbert v. Pelican (In re Eilbert), 162 F.3d 523, 527 (8th Cir.1998). These canons are employed ''to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words.'' Id. at 527 (quoting Gustafson v.. Alloyd Co., 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995)).The court in Eilbert used the specific term ''pension'' as a touchstone to help define the general term ''annuity'' and the phrase ''similar plan or contract.'' As required by the Eighth Circuit we apply those interpretive canons here.

A pension is a retirement benefit paid regularly based on length of employment and amount of wages or salary, in other words, deferred compensation for services rendered. Id.; Blacks Law Dictionary 1134 (6th ed.1990). Since the word pension is the more specific word, it restricts the meaning of ''similar plan or contract'' under 11 U.S.C. § 522(d)(10)(E). Id. This catchall provision includes within the exemption other types of retirement plans or investments that are ''created to fill or supplement a wage or salary void.'' Id.; (quoting Matter of Pettit, 55 B.R. 394, 397–98 (Bankr.S.D.Iowa)), aff'd, 57 B.R. 362 (S.D.Iowa 1985). Congress described the federal exemption as exempting ''certain benefits that are akin to future earnings of the debtor.'' H.R.Rep. 95-595, at 362 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 6318. Thus, the purpose of exempting the right to payments under a pension, annuity, or similar plan is to protect payments which function as wage substitutes after retirement. Eilbert, 162 F.3d at 526–527. Under Eighth Circuit Court of Appeals precedent, the debtors' IRAs do not come within the purpose of the exemption provision and do not meet the definition of similar plan or contract because the payments from their IRA are not ''similar'' to pensions.

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[6] The Eighth Circuit B.A.P. in Elbert v. Pelican, was interpreting Iowa Code § 627.6(8)(e). This section provided an exemption for a debtor's interest in a ''payment or portion of a payment under a pension, annuity, or similar plan or contract on account of illness, disability, death, age or length of service.'' The Iowa Code section is very similar to the text in 11 U.S.C. § 522(d)(10)(E), and the Court's analysis of the Iowa Code section is useful in helping to interpret the similar text within § 522(d)(10)(E). Although the Iowa statute has now been changed, the analysis of its former language remains apropos.

We have listed a number of factors to help courts analyze this issue. First, in both Andersen and Eilbert, we stated that contributions made to an investment over time, rather than one lump sum, would make it more likely that the investment falls within the ambit of the statute. Andersen v. Ries (In re Andersen), 259 B.R. 687, 691 (8th Cir.BAP2001); Eilbert v. Pelican, 212 B.R. 954, 958–959 (8th Cir.BAP1997). Neither Richard Rousey nor his wife Betty contributed any money to the IRA accounts other than the initial lump sum contribution that established their accounts.

Second, in Andersen and Eilbert we held that contributions made by multiple contributors, rather than investments purchased in isolation and outside the context of workplace contributions, are more likely to qualify as exempt under 11 U.S.C. § 522(d)(10)(E). Andersen, 259 B.R. at 691; Eilbert, 212 B.R. at 959. Although the money deposited in the debtors' IRA accounts were initially traceable to funds rolled over from a plan established with their former employer Northrop Grumman, once the debtors' employment terminated, all funds received from the Northrop Grumman plan became the property of the debtors who were free to dispose of such funds in whatever way they chose. The debtors, instead of using the funds to buy a car or take a vacation, decided to deposit the money into an IRA that gave them unfettered discretion to the corpus. At the time they made the lump sum contribution to establish their IRAs, they were the only contributors because the funds deposited were solely their own. Thus, there were no multiple contributors to the debtors' IRAs. Moreover, their accounts were established outside the context of workplace contributions.

Third, in Andersen and Eilbert we looked at the return on investment. An investment that returns only the initial contribution of the debtor with earned interest or income, no more and no less, is more than likely not an exempt investment. Yet those investments that compute payments based on the participant's life span and terminate upon his death are more likely to be exempt under 11 U.S.C. § 522(d)(10)(E). Andersen, 259 B.R. at 691; Eilbert, 212 B.R. at 959. The only return on investment the debtors would likely receive are portions of the initial payment they made to establish their IRAs and any interest that may have accrued on that payment.

Finally, in Andersen and Eilbert we examined the amount of control the debtor exercises over the claimed asset. If the terms of the investment impose limitations[7] on the debtor's right to withdrawal, then it is more likely that the investment comes within the ambit of the statute. Yet if the debtor, at his discretion, is able to access the funds of his investment and designate the date of disbursement, subject only to contractual or tax penalties, then such an investment is less likely to be exempt under 11 U.S.C. § 522(d)(10)(E). Andersen, 259 B.R. at 691; Eilbert, 212 B.R. at 959. Both of the debtors admitted that their ability to access the funds of their IRAs were completely at their discretion and the only "limitation" on that access would be a ten percent tax penalty, which has not been regarded by the Eighth Circuit as a substantial limit to withdrawal. Eilbert v. Pelican, 162 F.3d 523, 528 (8th Cir.1998).

Reference to 26 U.S.C. § 408

11 U.S.C. § 522(d)(10)(E)(iii) makes reference to 26 U.S.C. § 408 which is the provision of the Internal Revenue Service Code that deals exclusively with IRAs. The debtors argue that by virtue of this reference their IRAs were intended to be included in the phrase "similar plan or contract" and thus exempt under 11 U.S.C. § 522(d)(10)(E). The debtors cite the case of Patterson v. Shumate, 504 U.S. 753, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992), among others, to support this argument.

The Supreme Court in Patterson stated that the "applicable non-bankruptcy law" text of 11 U.S.C. § 541(c)(2) applies to

[7] We have held that the tax and contractual penalties that are triggered when the IRA funds are withdrawn before age fifty nine and a half may not necessarily be regarded as a limit to withdrawal. Eilbert, 212 B.R. at 959.

federal and state law. Id. at 759. Moreover, the Court stated that ERISA-qualified trusts are excluded from the bankruptcy estate by virtue of ERISA's anti-alienation clause. Id. at 760. The Court, however, did not rule on the issue of whether investment plans qualifying for preferential tax treatment under 26 U.S.C. § 408 and established for the purpose of funding retirement income, but not specifically covered by ERISA's anti-alienation clause, would qualify for exemption under 11 U.S.C. § 522(d)(10)(E). What the Court stated in dicta, however, was that such investment plans could be exempted under 11 U.S.C. § 522(d)(10)(E) because that section of the Bankruptcy Code is broader than § 541(c)(2), and applies to more than merely ERISA-qualified plans containing alienation provisions. Id. at 762–763. Thus, the Supreme Court's statements in Patterson regarding exemption of IRAs is not very helpful to the debtors.

The debtors also cite Carmichael v. Osherow (In re Carmichael), 100 F.3d 375, 378 (5th Cir.1996), and Dettmann v. Brucher (In re Brucher), 243 F.3d 242, 243 (6th Cir.2001), among others[8] , to support their proposition that the internal reference to 26 U.S.C. § 408 in 11 U.S.C. § 522(d)(10)(E) implies that IRAs were intended to be included in the phrase "similar plan or contracts." The Sixth Circuit in In re Brucher, quoting the Fifth Circuit in In re Carmichael, 100 F.3d at 378, stated:

> § 522(d)(10)(E)(iii) specifically denies exemption to those "similar plans or contracts" that fail to qualify under s 408 of the Internal Revenue Code, a provision dealing exclusively with IRAs. This express Code-section reference to IRAs in the exception makes inescapable the conclusion that at least some--if not all--IRAs were intended to be included in the phrase "similar plan or contract." Were that not so, there would be no exempt § 408 plans or contracts from which non § 408 plans or contracts could be exceptions.

In re Brucher, 243 F.3d at 243. The rule adopted in these cases is often labeled the "Per Se Exemption"[9] and adoption of this rule requires expanding norms of statutory construction that many courts are unwilling to make. In re Billy R. Skipper, 274 B.R. 807, 817 (Bankr.W.D.Ark.2002). Courts that have adopted the Per Se Exemption argue that holding otherwise would render the mention of 26 U.S.C. § 408 in subparagraph (d)(10)(E)(iii) of 11 U.S.C. § 522 surplusage. Id. Adopting the Per Se Exemption of IRAs, however, would also render the "similar plan or contract" language of § 522(d)(10)(E) surplusage in cases involving IRAs. Id.

Contrary to the interpretation given by some courts, there is nothing explicit within the Bankruptcy Code, the legislative history, or 11 U.S.C. § 522(d)(10)(E) itself which manifests Congressional intent to exempt IRA retirement plans in toto. In interpreting 11 U.S.C. § 522(d)(10)(E), we are mindful of the principle that exemption statutes should be construed liberally in favor of the debtor. Wallerstedt v. Sosne (In re Wallerstedt), 930 F.2d 630, 631–632 (8th Cir.1991). The liberal construction of exemption statutes, however, is not a license to circumvent legislative intent. As the Supreme Court in Connecticut National Bank v. Germain stated, "a legislature says in a statute what it means and means in a statute what it says there." Connecticut National Bank v. Germain, 503 U.S. 249, 253–254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). When a statute's language is plain, the sole function of the courts is to enforce such language according to its terms, not to expand the statute's meaning. Hartford Underwriters Insurance Company v. Union Planters Bank, N.A., 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000); see also United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 [63 AFTR 2d 89-652], 109 S.Ct. 1026 [63 AFTR 2d 89-652], 103 L.Ed.2d 290 (1989) (stating where the statute's language is plain, "the sole function of the courts is to enforce it according to its terms.") (quoting Caminetti v. United

[8] The debtors also cite In re Dubroff, 119 F.3d 75 (2nd Cir.1997) and In re McKown, 203 F.3d 1188 (9th Cir.2000).

[9] It is hardly a "per se" rule. The opinion explicitly uses the word "some."

States, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917)). Thus IRA plans would still have to meet the requirements under 11 U.S.C. § 522(d)(10)(E) in order for IRA funds to be exempt under that provision.

The premise of the ''per se'' rule seems to be that an IRA could never meet the ''similar plan or contract'' or ''payable on account of'' tests so somehow those tests must not apply, otherwise the reference to § 408 would have no significance. We think this legal assumption and the statutory analysis are both wrong. The types of IRA investments that the debtors could have chosen is extremely broad. They could have chosen to use it to purchase annuities that limited their access and started payments to them when they reached a certain age. Instead they chose to put it into a bank account, to which they had unlimited access. Secondly, as a matter of statutory construction, 11 U.S.C. § 522(d)(10)(E)(iii) is a limitation on the right to claim an exemption. We have trouble elevating a limitation into a new per se exemption.

On Account of Illness, Disability, Death, Age or Length of Service

The bankruptcy court determined that the debtors' right to payment from their IRAs is not on account of illness, disability, death, age or length of service as required by the statute and Eighth Circuit precedents. For example, in In re Huebner, the Eighth Circuit Court of Appeals stated that because Huebner had complete access and control over the withdrawal and the timing of his annuity payments, that any payments received were not on account of his age or any other of the triggering events within the statute. Huebner v. Farmers State Bank, Grafton, Iowa (In re Huebner), 986 F.2d 1222, 1225 (8th Cir.1993). Similarly, in Eilbert v. Pelican, the Eighth Circuit Court of Appeals stated that because the debtor had unfettered discretion to withdraw the funds from her annuity before age fifty nine and a half, subject only to a relatively modest ten percent federal tax penalty, the debtor's control over her annuity was not substantially restricted and consequently the payments were not on account of her age. Eilbert v. Pelican, 162 F.3d 523, 527–528 (8th Cir.1998). The fact that the debtors in this case have complete discretion over the withdrawal of their IRA funds, subject only to a ten percent tax penalty, shows there is no substantial restriction to withdrawal and that payments of such funds are not on account of any factor listed in 11 U.S.C. § 522(d)(10)(E). The fact that the debtors have unfettered discretion to withdrawal causes their IRAs to look less like exempt retirement plans and more like non-exempt bank savings accounts with favorable tax treatment. Huebner v. Farmers State Bank, Grafton, Iowa (In re Huebner), 986 F.2d at 1225.

The debtors have argued that if we hold that their IRAs are not exempt under 11 U.S.C. § 522(d)(10)(E), we would be adopting a ''per se'' rule that all IRAs are not exempt under 11 U.S.C. § 522(d)(10)(E). This simply is not the case. As noted earlier not all IRAs are alike. While each case must be decided on its own facts, we do not think that either the bankruptcy court's ruling or our opinion constitutes a decision that an IRA could never be exempt.

CONCLUSION

The bankruptcy court correctly concluded that the debtors' Individual Retirement Accounts are not exempt under 11 U.S.C. § 522(d)(10)(E). The debtors' IRAs are not similar plans or contracts pursuant to the statute, nor are the payments under the IRAs on account of illness, disability, death, age or length of service. The judgment of the bankruptcy court is affirmed.

SCHERMER, Bankruptcy Judge concurring.

I concur in the holding that the debtors' Individual Retirement Accounts are not exempt under 11 U.S.C. § 522(d)(10)(E) based upon precedent of our Circuit. However, I would invite our Circuit to revisit this issue where, as here, the debtors' pensions would have been exempt had they filed their bankruptcy petition while employed by Northrop Grumman, but they

are not exempt where the debtors filed after their employment ceased and they rolled over the proceeds of their Northrop Grumman pensions into IRAs. Each Circuit which has examined the issue has held that IRAs may be exempt under Section 522(d)(10)(E). See In re Brucher, 243 F.3d 242 (6th Cir.2001); In re McKown, 203 F.3d 1188 (9th Cir.2000); In re Dubroff, 199 F.3d 75 (2nd Cir.1997); and In re Carmichael, 100 F.3d 375 (5th Cir.1996).

¶2002-5423

Hilary M. BECK, ET AL., PETITIONERS v. UNITED STATES OF AMERICA, RESPONDENT. U.S. District Court, Eastern Dist. of Kentucky, (DC KY) CIVIL ACTION NO. 2001-256, Sept. 11, 2002. Earlier proceeding at (2002, DC KY) 90 AFTR 2d 2002-5779. Decision for Govt.

1. Third party summonses—petition to quash—jurisdiction. Govt. was granted summary denial of taxpayers' petition to quash 6 3d-party summons IRS issued on banks and CPA: district court lacked jurisdiction over out-of-state banks and CPA; and taxpayers didn't file petition within 20 days of receipt of notice of summons on in-state bank. Also, taxpayers' motion to review magistrate's order was denied as moot. *Reference:* United States Tax Reporter ¶76,095.01(75). IRC §7609.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT COVINGTON,

OPINION AND ORDER

WILLIAM O. BERTELSMAN, JUDGE

This is a case in which the petitioners seek to quash the summonses issued by the Internal Revenue Service (IRS) to six third party record keepers. The matter is before the court on Petitioners' motion to review the Magistrate's order of July 22, 2002 (Doc.15) and the respondent's motion for summary denial of petition to quash summonses. (Doc. 16).

Jurisdiction

[1] The jurisdiction of a district court to hear a proceeding to quash a third-party record keeper summons is based on 26 U.S.C. §7609 (h) (1). Clay v. United States, 199 F.3d 876 [84 AFTR 2d 99-7438] (6th Cir. 1999). Section 7609 (h) (1) states: "The united states district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under subsection (b) (2), (f), or (g)." This statute is jurisdictional and not merely a venue statute. Pflum v. United States, 125 F.3d 862, 1997 WL 606909 [80 AFTR 97-6755] (10th Cir. 1997) (unpublished); Deal v. United States, 759 F.2d 442 [55 AFTR 2d 85-1471] (5th Cir. 1985).

In Clay, the Sixth Circuit indicated it would strictly construe the mandates of 26 U.S.C. § 7609 (h). It explained:

> "A proceeding to quash is, in effect, a civil suit against the United States. It is fundamental that the United States, as sovereign, is immune from suit without its consent. [cites omitted]. The 'terms of its consent to be sued in any court determine that court's jurisdiction to entertain suit, ... Moreover, any waiver of the United States' immunity from suit must be unequivocal. [cites omitted].
>
> Because any exercise of a court's jurisdiction over the United States depends on the United States' consent, the waiver of sovereign immunity in regard to 26 U.S.C. §7609 must be strictly construed. [cite omitted]. The wording of the statute is clear and unambiguous.'

Clay, 199 F.3d at 879.

Here, only one of the third party summonses were served in the Eastern District of Kentucky. Accordingly, the only summons over which this court has jurisdiction is the one issued to Heritage Bank at 1818 Florence Pike, Burlington, Kentucky 41005. (See exhibits to complaint and Declaration of Paul Valentine).

The court lacks subject matter jurisdiction over the summonses issued to Bank One of Cincinnati in Cincinnati, Ohio;

Huntington National Bank in Columbus, Ohio; Miami Savings & Loan in Harrison, Ohio; Merchants Bank & Trust in Harrison, Indiana; and Robert Sonntag, CPA located in Aurora Indiana. Therefore, these summonses are not properly before this district court and must be dismissed.

Statute of Limitations as to Heritage Summons

Section 7609(a) (1) requires that when a summons is issued to a third party record keeper, notice must be given to the person to whom the records pertain. 26 U.S.C. § 7609(a) (1). Any person entitled to notice of a third party summons is entitled to begin a proceeding to quash such summons not later than the 20th day after the day such notice is given. 26 U.S.C. § 7609 (b)(2)(A). Notice is sufficient if it is given within three days of the day on which service of the summons was made. 26 U.S.C. § 7609 (a) (1). Notice sent by certified mail on or before the third day after the summons is served is proper.

"Courts have determined that notice is 'given in the manner provided in subsection (a)(2)' on the date on which notice is mailed by certified or registered mail to the taxpayer under investigation." Clay v. United States, 199 F.3d 876 [84 AFTR 2d 99-7438] (6th Cir. 1999) (citing courts from the 10th and 11th Circuits and the Eastern District of Michigan). Thus, the taxpayer must begin proceedings to quash a summons to a third party record keeper within 20 days of the date notice was mailed to him by the IRS. Id. at 878.

In Clay, the petitioners filed a petition to quash summons twenty-two days after the IRS sent them notice of the summons. The Sixth Circuit held that the statute waiving the United States' sovereign immunity must be strictly construed. "The government's waiver of sovereign immunity ends - and thus jurisdiction ends-when the twenty-day limitation period has run." Id. (quoting Faber v. United States, 921 F.2d 1118 [71A AFTR 2d 93-3367] (10th Cir. 1990). Since the petitioners did not file within the twenty-day time period permitted by the statute, they did not fulfill the condition of the United States' waiver of sovereign immunity and the district court was without jurisdiction. Id.

In the case at bar, the respondent served the summons on Heritage Bank on December 6, 2001 and sent notice to petitioners by certified mail on the same day. (Declaration of Paul K. Valentine, ¶s 6, 13 and exhibit 4, p. 4). Petitioners had twenty days from December 6, 2001, or until December 26, 2001, to file their petition to quash. They did not file the petition until December 27, 2001. Similarly to Clay, petitioners did not fulfill the condition of the United States' waiver of immunity and the court lacks jurisdiction over the petition.

The court being sufficiently advised,

IT IS ORDERED:

1. The Respondents' motion for summary denial of petition to quash summonses (Doc. #16) be, and it is, hereby granted:

2. The motion to review the order of the Magistrate (Doc. 15) be, and it is, hereby denied as moot; and

3. That this matter be, and it is, hereby dismissed and stricken from the docket of this court.

This 11th day of September, 2002.

WILLIAM O. BERTELSMAN, JUDGE

JUDGMENT

WILLIAM O. BERTELSMAN, JUDGE

This matter is before the court on petitioners' motion to review the Magistrate's order of July 22, 2002 (Doc. 15) and the respondent's motion for summary denial of petition to quash summonses. (Doc. 16). For the reasons set forth in the Court's Opinion and Order filed contemporaneously with this judgment and the Court being otherwise sufficiently advised,

IT IS ORDERED AND ADJUDGED that respondent's motion for summary denial of petition to quash summonses (Doc. 16) be, and it is, hereby granted and that the petitioners' motion to review the Magistrate's order (Doc. #15) be, and it is, hereby denied as moot; and that this action

be, and it is, hereby dismissed and stricken from the docket of this court.

This 11th day of September, 2002.

WILLIAM O. BERTELSMAN, JUDGE

¶2002-5424

James Clay BOYD and Debra E. BOYD, PETITIONERS v. UNITED STATES OF AMERICA, RESPONDENT. U.S. District Court, Eastern Dist. of Kentucky, (DC KY) CIVIL ACTION NO. 01-472-JMH, Sept. 10, 2002. Earlier proceedings at (2002, DC KY) 90 AFTR 2d 2002-6212; and (2002, DC KY) 90 AFTR 2d 2002-5050. Decision for Govt.

1. Third-party summons enforcement—criminal investigations—procedure—notice. Taxpayers' motion to alter or amend judgment adopting magistrate judge's recommendation to deny taxpayers' petition to quash and enforce summonses IRS served on CPA or for new trial was denied: IRS's failure to provide taxpayers with notice of summonses issued to 2 insurance cos., chiropractor and automobile dealer wasn't ''newly discovered evidence'' warranting altered judgment where parties weren't IRC §7609(b)(2) 3d-party recordkeepers. *Reference:* United States Tax Reporter ¶76,095.01(30). IRC §7609.

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON,

MEMORANDUM OPINION AND ORDER

JOSEPH M. HOOD, JUDGE

[1] This action is before the Court on the petitioners' motion to alter or amend judgment or for a new trial [Record No. 25]. Respondent has responded [Record No. 28]. This matter is now ripe for decision.

Pursuant to the Federal Rules of Civil Procedure 59 and 60, Petitioners request that this Court alter or amend its judgment of August 13, 2002, in which this Court accepted the proposed findings of fact and recommendation as filed by the Magistrate Judge. At that time, the Magistrate Judge recognized the I.R.S.'s failure to issue summonses to the Petitioners in violation of 29 U.S.C. §7609 but determined it to be ''an insignificant, hyper-technical violation resulting in no prejudice to the petitioners.'' By its order, this Court declined to quash two Internal Revenue Service (''I.R.S.'') summonses issued to a certified public accountant in the course of a duly instituted Federal tax investigation.

Petitioners argue that new evidence of the I.R.S.'s failure to provide sufficient notice of third-party summons to the Petitioners on at least one additional occasion demonstrates a willingness of the I.R.S. to proceed with impunity, blatantly ignoring the mandatory notice requirement of §7609, and creating a situation where quashing the summonses would be an appropriate response to the situation.

The Internal Revenue Code provides the Commissioner with broad powers to summon any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax. 26 U.S.C. §7602(a)(2). However, a taxpayer is entitled to notice of the summons issued by the I.R.S. to a third-party where that party is a ''third-party recordkeeper''. *See Upton v. I.R.S.*, 104 F.3d 543, 546 [79 AFTR 2d 97-696] (2nd Cir. 1997). §7603(b)(2) provides a list of professionals and entities who are by definition ''third-party recordkeepers,'' including banks, credit unions, consumer reporting agencies, security brokers, attorneys, accountants, barter exchanges, regulated investment companies, enrolled agents, and developers of software source code. 26 U.S.C. §7603(b)(2).

This requirement of notice is limited as it applies only where the third-party records contain data about ''transactions between the taxpayer and parties other than the third-party record keeper.'' *See Rapp v. Commissioner*, 774 F.2d 932, 934 [56 AFTR 2d 85-6202] (9th Cir. 1985). The notice requirement does not apply where an administrative summons seeks records pertaining to transactions between the summoned recordkeeper and the taxpayer

under investigation. *See United States v. Bass*, 784 F.2d 1282, 1285–86 [57 AFTR 2d 86-1070] (5th Cir. 1986); *Ponsford v. United States*, 771 F.2d 1305, 1308 [56 AFTR 2d 85-5888] (9th Cir. 1985).

Petitioner asserts and Respondent does not dispute that notice was not provided to Petitioners with regard to the summonses issued to Fritts-Million Insurance, Inc. (engaged in the business of selling insurance products), L.D. Musson, D.C. (chiropractor), Allstate Insurance Company (engaged in the business of selling insurance products), and Murphy Auto and Boat Sales (engaged in the business of selling automobiles and boats). However, none of the parties listed were third-party recordkeepers according to the list provided in §7609. *See* 26 U.S.C. §7603(b)(2). It follows that Petitioners were not entitled to notice under §7609. *See* 26 U.S.C. §7609(c)(2)(E)(ii).

Petitioners have not produced any ''newly discovered evidence'' that would merit an alteration or amendment of the Court's judgment or a new trial. Accordingly, IT IS ORDERED:

(1) That Petitioners' motion to alter or amend judgment or for a new trial is DENIED;

(2) That Petitioners' motion to hold in abeyance the deadline in the judgment and order is DENIED AS MOOT.

This is the 10th day of September, 2002.

JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

ORDER

Joseph M. Hood, judge

Having granted the petitioners' motion for a stay pending appeal pursuant to Fed. R. App. P. 8(a)(1)(A), and being advised,

IT IS ORDERED herein as follows:

(1) That the Court's Order of even date assigning the above-styled action for hearing on the petitioners' motion for an injunction pending appeal under Fed. R. Civ. P. 62 be, and the same hereby is, SET ASIDE and HELD FOR NAUGHT.

(2) That the petitioners' motion for an injunction pending appeal under Fed. R. Civ. P. 62 be, and the same hereby is, DENIED.

This the 12th day of September, 2002.

Joseph M. Hood, judge

¶2002-5425

Christopher CONLIN, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Massachusetts, (DC MA) CIVIL ACTION NUMBER 01-11457-RGS, Sept. 4, 2002. Year 1989. Decision for Govt.

1. Refund actions—limitations periods—returns as claims. Taxpayer's action for refund of withheld taxes was dismissed for lack of jurisdiction: taxpayer's filing of Form 1040X over 2 years after tax was paid was invalid where he didn't file prior return; and submission of Form 1040 asserting overpayment plus IRS's letter explaining why original Form 1040X was returned to taxpayer, nearly 7 years after IRC §6511(a)'s limitations period expired, didn't meet IRC §7422's jurisdictional requirements. *Reference:* United States Tax Reporter ¶65,115.04(10); 74,225.01(20). IRC §6511; 7422.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS,

MEMORANDUM AND ORDER ON UNITED STATES' MOTION TO DISMISS

STEARNS, D.J.

[1] Plaintiff Christopher Conlin claims to have timely filed a 1989 federal income tax return for which a refund of $10,350.00 is owing along with interest and other damages. As Conlin has failed to meet the jurisdictional requirements for maintaining this action, his claim must be dismissed.

Title 26 § 7422 of the United States Code requires the filing of a valid and timely claim for a refund with the Internal Revenue Service before a taxpayer may

proceed with a suit in federal district court. See United States v. Dalm, 494 U.S. 596, 609–610 [65 AFTR 2d 90-1210] (1990); Little People's School, Inc. v. United States, 842 F.2d 570 [61 AFTR 2d 88-931], 572–573 (1st Cir. 1988). The claim must be filed within three years of the filing of the original return, or within two years of the date the tax was paid if no return was filed. See 26 U.S.C. § 6511(a). To constitute an original return, a document must: (1) be filed on the proper form; (2) purport to be a return; (3) contain sufficient data to calculate tax liability; (4) represent a reasonable attempt to satisfy the requirements of the tax law; and (5) be signed under penalties of perjury. See 26 U.S.C. § 6011; 26 C.F.R. § 1.6011-1(a); 26 C.F.R. § 1.6012-1(a)(6).

The only tax that Conlin claims to have paid, and, thus, the only tax giving rise to his claim of an overpayment is the sum withheld from his salary or wage payments during 1989. Since Conlin's return asserting an overpayment was first filed on April 6, 2000, it was too late, by nearly seven years, to affect any tax paid on or before April 15, 1990. While Conlin submitted a Form 1040X in 1992, that form was returned to him on July 10, 1992, with the explanation that Form 1040X can only be used to amend a prior filed return, and as Conlin had failed to file such a return, the Form 1040X filing was invalid. (Because the original Form 1040X was not processed by the IRS and was returned to the taxpayer, the government claims no knowledge as to its contents.) On April 6, 2000, Conlin submitted a form 1040 for the 1989 year, along with a copy of the July 10, 1992 letter. This did not meet Conlin's jurisdictional requirement (for better or worse) that a timely return be filed. See Kay v. United States 2000 WL 692160, 1 [85 AFTR 2d 2000-1993] (9th Cir. 2000) (''The rule is clear that if a refund claim does not comply with 26 U.S.C. § 7422(a) and the regulations, the suit must be dismissed.'') Accordingly, the United States' motion to dismiss must be ALLOWED.

SO ORDERED.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5426

UNITED STATES OF AMERICA, PLAINTIFF v. Melvin R. HASSELL, Nelda J. HASSELL, and Summit Christian Academy, DEFENDANTS. U.S. District Court, Northern Dist. of Texas, (DC TX) CIVIL NO. 3-02CV-0112G, Sept. 4, 2002. Earlier proceeding at (2002, DC TX) 89 AFTR 2d 2002-3091. Years 1980, 1981, 1982, 1983, 1984, 1992. Decision for Govt.

1. Actions to reduce assessments to judgment—foreclosure—fraudulent conveyances—default judgment. Govt. was granted default judgment against taxpayers in action to reduce their assessments to judgment in amounts stated plus interest, to set aside as fraudulent their transfer of residence to 3d party, and to foreclose liens and sell property. Also, to extent sale proceeds didn't satisfy stated tax liability, govt. was entitled to deficiency judgment for unpaid balance. *Reference:* United States Tax Reporter ¶74,035.01(30); 74,035.03(100). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION,

DEFAULT JUDGMENT

[1] Plaintiff United States of America has moved this Court to enter judgment by default against Defendants Melvin R. Hassell, Nelda J. Hassell, and Summit Christian Academy, to reduce to judgment the Hassells' federal income tax liability, to set aside a fraudulent transfer of the Hassells' residence to Summit Christian Academy, to foreclose the federal tax liens on this property that is described below, for judicial sale of the property, and to receive a deficiency judgment for any unpaid tax liability not satisfied by the sale of the property. Defendants are in default for failure to plead or otherwise defend in this action.

Based on the United States' written request and the record in this case, the Court is of the opinion that the United States' request for a default judgment should be granted. Therefore,

IT IS ORDERED, ADJUDGED AND DECREED that the Court finds that Defendants Melvin R. Hassell and Nelda J. Hassell are jointly and severally indebted to the United States in the amount of $804,558.41, for their unpaid federal income (1040) taxes for tax years 1980, 1981, 1982, 1983, 1984, and 1992, plus additional interest and statutory additions thereon as provided by law from October 5, 1998 until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parcel of real property described herein is owned by Defendants Melvin R. Hassell and Nelda J. Hassell, and Defendant Summit Christian Academy merely holds title to such property as a nominee of Defendants Melvin R. Hassell and Nelda J. Hassell, such property being located at 906 Kessler Parkway in Dallas, Texas, more particularly described as follows:

> Being LOT 1-A of PATTERSON'S RESUBDIVISION of a part of BLOCK 4700 int the G.S.C. LEONARD SURVEY, ABSTRACT 780, in the City of Dallas, Texas, according to the map thereof, approved by City Plan Commission of the City of Dallas, April 13, 1950, recorded in Volume 15, Page 279, Map Records of Dallas County, Texas.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Court hereby sets aside the fraudulent conveyance of the real property described above that was transferred by Defendants Melvin R. Hassell and Nelda J. Hassell to Defendant Summit Christian Academy, and Summit Christian Academy is divested of title to this property and title to this property is re-vested in Melvin R. Hassell and Nelda J. Hassell.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States has valid liens on the real property described above that is held in the name of Summit Christian Academy, nominee of Melvin R. Hassell and Nelda J. Hassell; the Court orders the foreclosure of such liens, that such property shall be sold by the United States Marshal in accordance with the law and practice of this Court, and that the net sales proceeds of such sale be distributed in accordance with rights of the United States of America.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above-described real property shall be sold and the net sales proceeds distributed in accordance with the interest of the United States of America and applied to the federal income tax liability of Defendants Melvin R. Hassell and Nelda J. Hassell that is reduced to judgment herein, after payment of reasonable costs of sale.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, to the extent that the net sales proceeds of the real property described above are insufficient to satisfy the Hassells' federal income tax liability that is reduced to judgment herein, the United States shall have a deficiency judgment against Defendants Melvin R. Hassell and Nelda J. Hassell for the unpaid balance of the tax liability owed by Defendants Melvin R. Hassell and Nelda J. Hassell to the United States.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court will enter further orders as necessary to implement this judgment.

SIGNED THIS 4 day of September, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5427

Cevin and Rosa PALMER, PLAINTIFFS v. COMMISSIONER of The Internal Revenue Service, DEFENDANT. U.S. District Court, Southern Dist. of Indiana, (DC IN) IP 02-304-C-B/S, Aug. 28, 2002. Years 1994, 1995. Decision for Govt.

1. Collection due process—review of administrative determination—refunds—frivolous return penalties—jurisdiction. Taxpayers' IRC §6330(d) complaint seeking redetermination of their tax liabilities, reversal of IRC §6702 penalty determination, or refund was dismissed for lack of jurisdiction: Tax Court had exclusive jurisdiction to review tax obligation portion of determination notice. Also, taxpayers didn't pay taxes before filing suit; and didn't allege that they paid 15% of IRC §6702 penalty within 30 days of determination notice or filed timely refund claim. And, taxpayers' 28 USC §1367(a) supplemental jurisdiction argument was rejected. *Reference:* United States Tax Reporter ¶63,305.01(10); 74,225.01(20); 67,025.01(7); 74,025.01(160). IRC §6330; 6702; 7402; 7422.

Cevin and Rosa Palmer 1441 Clay Drive Carmel, IN 46032
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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF INDIANA,

JUDGMENT

SARAH EVANS BARKER, Judge United States District Court

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that this cause of action is dismissed for lack of jurisdiction.

Date: 8/28/02

SARAH EVANS BARKER, Judge

United States District Court

ENTRY DISCUSSING UNITED STATES' MOTION TO DISMISS

Plaintiffs Cevin and Rosa Palmer of Carmel, Indiana, allege in their complaint that they filed federal tax returns for the tax years 1994 and 1995, that they then filed amended returns for those years, that over a period of years the Internal Revenue Service (IRS) refused to accord them due process in connection with a dispute regarding their tax liability for those years, and that the Internal Revenue Service then improperly assessed a penalty and initiated a collection action. Without success in dealing with the IRS at the administrative level, the plaintiffs brought this lawsuit pursuant to 26 U.S.C. §§ 6330(d)(1)(B) and 7422(a). The plaintiffs seek relief in the form of a redetermination of their tax liabilities, reversal of the penalty determination for the tax years 1994 and 1995, compliance by the IRS with full administrative procedural requirements or full refund for all years respectively and/or other relief which is deemed appropriate.

The United States has filed a motion to dismiss. The plaintiffs have responded, and the United States has replied.

Whereupon the court, having considered such complaint, motion, response, and reply, and being duly advised, finds that the United States' motion to dismiss must be granted. This disposition is based on the following facts and circumstances:

1. **[1]** Claims against the United States and its agencies are barred unless sovereign immunity has been "unequivocally" waived by a federal statute. *United States v. Mitchell,* 445 U.S. 535, 538 (1980); *United States v. King,* 395 U.S. 1, 4 [23 AFTR 2d 69-1358] (1969). "The United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of the consent to be sued in any court define the court's jurisdiction to entertain the suit." *United States v. Sherwood,* 312 U.S. 584, 586, 61 S. Ct. 767, 769–70 (1941) (citations omitted); *see also United States v. Testan,* 424 U.S. 392, 399 (1976). "When a statutory waiver of immunity exists, a plaintiff must strictly comply with the conditions to suit outlined by the statute or corresponding regulation." *Weisman v. Comm'r of IRS,* 103 F.Supp.2d 621, 626 [87 AFTR 2001-1897] (E.D.N.Y. 2000) (citing *Lane v. Pena,* 518 U.S. 187, 192 (1996)).

2. There is a specific statute, 28 U.S.C. § 1346(a)1), through which Congress has provided for suit in the federal district courts against the United States in any action for recovery of any internal revenue tax that is claimed to have been illegally or erroneously assessed or collected. *See United States v. Forma,* 42 F.3d 759, 763 [75 AFTR 2d 95-315] (2d Cir. 1994). Other statutory provisions and case law construing those statutes require, however, that as a condition of the waiver of sovereign immunity by the United States, a person seeking to recover taxes alleged to have been erroneously assessed and collected must satisfy certain procedural requirements, such as timely filing an administrative claim for a refund with the IRS. See 26 U.S.C. § 7422(a) (''No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected ... until a claim for refund has been duly filed with the Secretary.''); 26 U.S.C. § 6511(a)(setting time limit of three years from the time a tax return is filed and, if no return is filed, two years from when tax is paid, to file a claim for a refund, and precluding any credit or refund unless a claim is filed within the required time period); *United States v. Dalm,* 494 U.S. 596, 602 [65 AFTR 2d 90-1210] (1990) (''[U]nless a claim for a refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for a refund, regardless of whether the tax is alleged to have been erroneously, illegally or wrongfully collected, §§ 1346(a)(1), 7422(a), may not be maintained in any court.'') (internal citations and quotations omitted); *Forma,* 42 F.3d at 763.

3. Failure by the taxpayer to file a proper claim for a refund deprives the district court of subject matter jurisdiction. *See Dalm,* 494 U.S. at 602, 608–09; *Magnone v. United States,* 733 F.Supp. 613, 618–19 [71A AFTR 2d 93-4870] (S.D.N.Y. 1989), *aff'd,* 902 F.3d 192 [71A AFTR 2d 93-3615] (2d Cir. 1990). Moreover, ''[t]he taxpayer bears the burden of demonstrating compliance with the statutory procedural requirements.'' *Id.*

4. The United States' motion to dismiss is based on the following facts, which are evident from the complaint (including the many documents attached as exhibits to the complaint), and which are not disputed by the plaintiffs:

a. On November 2, 1998, the IRS assessed a 26 U.S.C. § 6207 frivolous return penalty in the amount of $500.00 with regard to the 1995 tax year. The IRS also determined that the plaintiffs have an unpaid tax liability for the tax years 1994 and 1995.

b. On February 21, 2002, the IRS issued a *Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330* to the plaintiffs.

c. The plaintiffs filed the present lawsuit on February 25, 2002. They did so without first paying the tax delinquency or penalty.

d. The underlying point of dispute between the parties is the plaintiffs' view that wages are not income, whereas the IRS takes a contrary view.

5. The United States argues that this court lacks subject matter jurisdiction over certain of the plaintiffs' claims. A defendant may challenge the subject-matter jurisdiction of a federal district court either facially or factually. *R.B. McMaster v. United States,* 177 F.3d 936, 940 (11th Cir. 1999) (citing *Lawrence v. Dunbar,* 919 F.2d 1525, 1528–29 (11th Cir. 1990). A facial attack is an attack on the adequacy of the complaint to allege a basis of federal subject-matter jurisdiction. *Id.* at 940. That is the type of attack mounted by the United States in its motion to dismiss.

6. Under 26 U.S.C. § 6331, if any person liable to pay any tax neglects or refuses to do so within ten days after notice and demand for payment, the IRS is authorized to collect such tax by levy upon property belonging to the taxpayer. Before proceeding with the collection by way of levy, however, the IRS must provide the taxpayer notice of the right to a hearing on the matter. 26 U.S.C. § 6330(a). The taxpayer has a right, within thirty days of the section 6330 notice, to request a hearing

with the IRS Office of Appeals. *Id.* § 6330(a)(3)(B). At the hearing, the taxpayer may raise any issue relevant to the unpaid tax and the proposed levy, including challenges to the propriety of the levy and offers of collection alternatives. *Id.* § 6330(c)(2). The impartial IRS Appeals Officer who conducts the hearing must then formulate his or her determination based on: (1) the verification that the requirements of any applicable law or administrative procedure have been met; (2) the issues raised by the taxpayer; and (3) the proper balance between the need for efficient tax collection and the legitimate concern that any collection action be no more intrusive than necessary. *See id.* § 6330(c)(3). Following the hearing, the Appeals Officer sends a Notice of Determination to the taxpayer that summarizes the matters raised during the hearing and responds to any offers or objections made by the taxpayer.

7. The *Notice Determination* issued by the IRS on February 21, 2002, related to the plaintiffs' federal income tax liability for the tax years 1994 and 1995, and was issued after the process described in paragraph 6 of this Entry. This is evident from the documents appended to the complaint and from the plaintiffs' allegations, which are treated as a part of the complaint. *See Hamilton v. O'Leary,* 976 F.2d 341 (7th Cir. 1992) (citing Fed.R.Civ.P. 10(c)). If the taxpayer is dissatisfied with the administrative determination, he may seek judicial review in the United States Tax Court within 30 days of receiving the Notice or, if the Tax Court does not have jurisdiction over the underlying tax liability, the appropriate United States District Court. 26 U.S.C. § 6330(d)(1).

8. Judicial review of an Appeals Officer's determination under 26 U.S.C. § 6330 that the IRS may levy against property to satisfy an outstanding federal tax obligation is proper in the district courts only if the Tax Court lacks jurisdiction over the underlying tax liability. 26 U.S.C. § 6330(d)(1)(A) & (B); *True v. Commissioner of Internal Revenue,* 108 F.Supp.2d 1361, 1364 [87 AFTR 2d 2001-2617] (M.D. Fla. 2000). ''The Tax Court exercises judicial, rather than executive, legislative, or administrative, power. It was established by Congress to interpret and apply the Internal Revenue Code in dis-putes between taxpayers and the Govern-ment. By resolving these disputes, the court exercises a portion of the judicial power of the United States.'' *Freytag v. Commissioner,* 501 U.S. 868, 890–91 [68 AFTR 2d 91-5025] (1991). Because the Tax Court has jurisdiction over levies to collect income taxes, it, rather than the dis-trict court, has exclusive jurisdiction to re-view the tax obligation portion of the IRS's *Notice of Determination* pursuant to § 6330(d)(1).

9. The plaintiffs include in their complaint a request for a refund of the 1994 and 1995 income taxes withheld by their employers. The United States is correct that, in general, a taxpayer challenging a tax assessment in federal district court must first pay the full amount of the tax assessed and then pursue a refund. *Flora v. United States,* 357 U.S. 63 [1 AFTR 2d 1925] (1958); *Curry v. United States,* 774 F.2d 852 [56 AFTR 2d 85-6187] (7th Cir. 1985); 28 U.S.C. § 1346(a)(1). The circumstances of this case do not trigger an exception to the general rule, and it is undisputed that the plaintiffs did not pay their tax liability for the years 1994 and 1995, as determined by the IRS, before filing this action.

10. The United States also argues that this court lacks jurisdiction over the plaintiffs' challenge to assessment of a frivolous filing penalty by the IRS. Pursuant to 26 U.S.C. § 6702, the IRS may assess a $500 civil penalty against an individual who files ''what purports to be'' a tax return when the return ''does not contain information on which the substantial correctness of the self-assessment may be judged'' and the filing of such a return is based on a frivolous position. *See Anderson v. United States,* 754 F.2d 1270, 1271 [55 AFTR 2d 85-1034] (5th Cir. 1985).

a. As described in paragraph 8 of this Entry, a suit for a refund of taxes cannot be maintained unless a claim for refund has been filed and the full tax liability has been paid.

b. In enacting 26 U.S.C. § 6703, Congress provided a narrow exception to this general rule for cases involving the imposition of a penalty under § 6702. The statute provides that (i) if payment of 15% of the penalty is made and a claim for refund is filed within 30 days of the day on which notice and demand of the penalty is made, and (ii) such claim is denied, then (iii) the taxpayer may bring a suit for refund in district court within 30 days from the day on which the claim was denied. 26 U.S.C. § 6703(c)(1).

c. If the requirements described above (in paragraph 10.b. of this Entry) are not satisfied, then the procedures authorizing judicial review authorized in § 6703(c)(1), ''shall cease to apply with respect to such penalty, effective on the day following the close of the applicable 30-day period referred to in this paragraph.'' 26 U.S.C. § 6703(c)(2). ''When a statutory waiver of immunity exists, a plaintiff must strictly comply with the conditions to suit outlined by the statute or corresponding regulation.'' *Weisman v. Comm'r of IRS,* 103 F.Supp.2d 621, 626 (E.D.N.Y. 2000) (citing *Lane v. Pena,* 518 U. S. 187, 192, 116 S. Ct. 2092, 2096 (1996)).

d. The plaintiffs do not allege that they paid 15% of the § 6702 penalty within thirty (30) days of the *Notice Determination* issued by the IRS on February 21, 2002. Furthermore, the plaintiffs do not allege that they filed a timely demand for a refund. Their having done so are necessary elements of this court's authority to review the frivolous filing penalty which was assessed against them. Therefore, this court is without subject matter jurisdiction to adjudicate the plaintiffs' challenge to the frivolous filing penalty, because the United States has not waived its sovereign immunity here where plaintiffs did not comply with the 30-day payment and claim requirement. *Roberts v. United States,* 1984 WL 3101 [54 AFTR 2d 84-6259] (E.D.Mich. 1984).

11. A district court possesses only the jurisdiction conferred by Congress. *See South Carolina v. Katzenbach,* 383 U.S. 301 (1966). ''A federal court may exercise jurisdiction where: 1) the requirements for diversity jurisdiction set forth in 28 U.S.C. § 1332 are met; or 2) the matter arises under the Constitution, laws, or treaties of the United States as provided in 28 U.S.C. § 1331.'' *Barringer-Willis v. Healthsource North Carolina,* 14 F.Supp. 2d 780, 781 (E.D.N.C. 1998). Each of the plaintiffs' claims lies outside the jurisdiction over this court under the circumstances of this case. This is shown by the documents appended to their complaint. *In the Matter of Wade,*969 F.2d 241, 249 (7th Cir. 1992) (''A plaintiff may plead himself out of court by attaching documents to the complaint that indicate that he or she is not entitled to judgment.'').

12. An action over which the court lacks jurisdiction must be dismissed. *Steel Co. v. Citizens for a Better Environment,* 118 S. Ct. 1003, 1012 (1998). Accordingly, the United States' motion to dismiss for lack of jurisdiction must be granted.

13. The plaintiffs' argument in reply that some or all of the their claims fall within the scope of the court's supplemental jurisdiction, conferred by 28 U.S.C. § 1367(a), is without merit. It has been persuasively explained:

> Section 1367(a), however, deals only with the federal courts' power to exercise subject matter jurisdiction over certain claims and does not operate as a waiver of the United States sovereign immunity. Sovereign immunity and subject matter jurisdiction are distinct doctrines. Section 1367(a) essentially codified the common law doctrine of pendant jurisdiction; *Baker v. Farmers Elec. Co-Op, Inc.,*34 F.3d 274 (5th Cir. 1994); which allows litigants in federal court to join state claims with their fed-eral claims where the claims are so re-lated that they ''form part of the same case or controversy under Article III of the United States Constitution.'' 28 U.S.C. § 1367(a). As we have previ-ously held, the doctrine of pendant juris-diction cannot be used to waive the United States' sovereign immunity un-less Congress specifically allows it. *Ware [v. United States,* 626 F.2d 1278,

1286 (5th Cir. 1980)] (quoting *Sanborn v. United States,* 453 F.Supp. 651, 655 & n. 5 (E.D.Cal. 1977)).

Wilkerson v. United States, 67 F.3d 112, 119 n.13 [76 AFTR 2d 95-6902] (5th Cir. 1995).

14. Judgment consistent with this Entry shall now issue.

IT IS SO ORDERED.

SARAH EVANS BARKER, Judge

United States District Court

Date: 8/28/02

¶2002-5428

David G. PFLUM, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANTS. U.S. District Court, Dist. of Kansas, (DC KS) Civil No. 99-4170-SAC, Sept. 10, 2002. Earlier proceedings at (2002, DC KS) 89 AFTR 2d 2002-2797, 2002-2 USTC ¶50492; and (2002, DC KS) 89 AFTR 2d 2002-1792, adopting (2002, DC KS) 89 AFTR 2d 2002-1140. Years 1994, 1995, 1996, 1997, 1998. Decision for Taxpayer in part and for Govt. in part.

1. District court procedure—deemed admissions; discovery—wrongful disclosure of return information. Magistrate judge denied taxpayer's motion to deem admitted averments in his supplemental damages complaint for wrongful disclosure of return information that govt. refused to answer: govt.'s non-response was appropriate where averments implicated information that was subject of ongoing grand jury investigation. Also, govt. was granted reinstatement of stay of proceedings until all pending criminal tax matters involving taxpayer were concluded; and taxpayer's request to compel discovery was denied to extent information sought pertained to underlying criminal proceedings. But, taxpayer was entitled to discovery of other information relating to internal IRS procedures. *Reference:* United States Tax Reporter ¶74,315.01; 74,025.01(3); 61,035.10(50). IRC §6103; 7402; 7431.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS,

ORDER

CATHERINE A. WALTER U.S. Magistrate Judge

[1] Presently pending before the court are three motions: (1) plaintiff's motion to "deem averments in supplemental complaint admitted due to United States failure to comply with Rule 8, Fed. R. Civ. P" (Doc. 60); (2) plaintiff's motion to compel discovery (Doc. 58); and (3) defendant's motion to reinstate a stay of proceedings (Doc. 61). Responses have been filed to each of the motions (Docs. 63, 64, and 67).

(1) Motion to Deem Averments in Supplemental Complaint Admitted (Doc. 60):

In his supplemental complaint (Doc. 53), plaintiff alleges Special Agents Schmidt and Herron made several unauthorized disclosures of tax return information while conducting a criminal investigation of plaintiff. In its response to the supplemental complaint (Doc. 55), defendant stated it could neither admit nor deny these allegations because the allegations concern a matter currently under investigation by a grand jury and Fed. R. Crim. P. 6(e) prohibits the disclosure of "matters occurring before the grand jury." Defendant further requested that the Court deem their failure to answer a general denial under Fed. R. Civ. P. 8(b). Plaintiff argues that a general denial is not authorized by Rule 8 under these circumstances and, therefore, the allegations within plaintiff's supplemental complaint should be deemed admitted.

A strict reading of Fed. R. Civ. P. 8(b) would only allow the assertion of a general denial if defendant intended to deny all of the allegations in the supplemental complaint. See In re Owens, 140 B.R. 280, 282 (D. Colo. 1992). Defendant's response to the supplemental complaint does not specifically deny all of plaintiff's allegations, but instead, asserts an inability to answer these allegations due to the grand jury se-

crecy requirements contained in Fed. R. Crim. P. 6(e)(2).

Faced with a rare procedural situation where ongoing grand jury proceedings preclude admission or denial of the allegations due to grand jury secrecy requirements, defendant's reliance upon a general denial pursuant to Fed. R. Civ. P. 8(b) is appropriate. Compare Fed. R. Civ. P. 8(f) (which requires that pleadings be construed so as "to do substantial justice") and 5 C. Wright & A. Miller, Federal Practice and Procedure § 1217 at 169 (commenting that "simplicity, flexibility, and the absence of legalistic technicality are the touchstones of a good procedural system").

Plaintiff's motion to "deem averments in supplemental complaint admitted due to United States failure to comply with Rule 8, Fed. R. Civ. P" (Doc. 60) is denied.

Motion to Stay (Doc. 61) and Motion to Compel Discovery (Doc. 58):

Defendant requests reinstatement of a stay of these proceedings until all pending federal criminal matters involving plaintiff have concluded. (Doc. 61). On March 19, 1999, plaintiff became the subject of a criminal investigation for allegedly failing to file federal income tax returns. Id. On November 15, 1999, plaintiff filed a civil complaint, alleging that investigators for the I.R.S. had made unlawful disclosures of his tax return information. (Doc. 1). On March 28, 2000, defendants filed a motion for protective order and stay in order to prevent plaintiff from discovering evidence obtained in the criminal investigation. (Doc. 11). Defendant was granted a stay until July 31, 2000. (Doc. 16). On July 26, 2000, defendant sought to extend the stay. (Doc. 22). This request was granted and the stay was extended for one year. (Doc. 26). On September 6, 2001, defendant again requested an extension of the stay. (Doc. 27). This request was granted and the stay was extended for three months, or until January 25, 2002. (Doc. 31).

In support of their present motion, defendant has provided, under seal, the declaration of T.J. Luedke. This declaration has assured the court that the grand jury investigation is proceeding in a timely manner and that there is an end in sight to the investigation.

Plaintiff's response in opposition to the motion to stay validates defendant's argument that plaintiff's requested discovery will result in the disclosure of information regarding the grand jury investigation. For instance, one of plaintiff's interrogatories seeks to discover all "memorandums of interview concerning the investigation of plaintiff ... [and] the names of the persons contacted." Disclosure of this information to plaintiff could seriously hinder the confidential nature of the grand jury investigation. In response to these concerns, plaintiff repeatedly suggests that the court review the discovery answers *in camera* and redact any improper disclosures. However, the extensive redaction required would mean that the discovery provided to plaintiff would be of little help to his case. Compare Roebuck v. U.S., 1999 WL 501003 [83 AFTR 2d 99-2947] (E.D.N.C. 1999) (in order to recover for unauthorized disclosures, plaintiff must specify "the circumstances surrounding the disclosures, the items disclosed, the dates of disclosure, and to whom the items were disclosed").

Thus, a stay of these proceedings shall continue and, in accordance with the stay, plaintiff is not entitled to an order compelling defendant to respond to discovery requests which seek information pertaining to the underlying criminal investigation. The court finds the following interrogatories and requests for production of documents seek information which would hinder the confidential nature of the grand jury investigation: interrogatories 1-12 and 18 and requests for production of documents 1-11 and 15.

The remaining discovery requests do not concern the pending investigation but, rather, address internal procedures and rules to be followed by IRS investigators. Since the motion to compel was filed during a period of time when the stay was not in effect and responses to those interrogatories and requests for production can be made without impinging upon the grand jury investigation, plaintiff's motion to

compel concerning discovery requests relating to general procedures and rules will be granted. Thus, plaintiff's motion to compel is granted with respect to interrogatories 13-17 and 19 and requests for production numbers 12-14 and 16.

In accordance with the foregoing, the court orders the following:

1. Plaintiff's motion to ''deem averments in supplemental complaint admitted due to United States failure to comply with Rule 8'' (Doc. 60) is denied.

2. Plaintiff's motion to compel discovery (Doc. 58) is granted with respect to interrogatories 13-17 and 19, and with respect to requests for production 12-14 and 16. The motion to compel is otherwise denied.

3. Defendant's motion to reinstate a stay of these proceedings (Doc. 61) is granted in part, with the exception of the pending discovery for which plaintiff's motion to compel has been granted. Otherwise, the stay shall be extended until December 2, 2002, unless a decision not to prosecute any conduct pertaining to tax years 1994–1998 is made prior to that date. Defendant is directed to immediately advise the court of any such decision.

IT IS SO ORDERED.

Dated this 10th day of September, 2002, at Topeka, Kansas.

CATHERINE A. WALTER

U.S. Magistrate Judge

¶2002-5429

UNITED STATES OF AMERICA, PLAINTIFF v. TATE & LYLE NORTH AMERICAN SUGARS, INC., DEFENDANT. U.S. District Court, Southern Dist. of New York, (DC NY) 97 Civ. 9113 (RMB), Aug. 29, 2002. Earlier proceedings at (2002, DC NY) 89 AFTR 2d 2002-1027; (2001, DC NY) 88 AFTR 2d 2001-5969, 162 F Supp 2d 236, 2001-2 USTC ¶50650 [88 AFTR 2d 2001-5969]; and *U.S. v. Domino Sugar Corp*, (1999, DC NY) 84 AFTR 2d 99-6322, 99-2 USTC ¶50873. Year 1989. Decision for Govt.

1. Recovery of erroneous refunds—payments vs. deposits—cash bonds—interest. Govt. was granted judgment on its complaint against corp. to recover erroneously refunded interest: underlying remittance on which interest was refunded was non-interest bearing cash bond, not interest-bearing tax payment. Facts proving remittance's bond nature included fact it was made well before any assessment for subject period was made, taxpayer's tax director's original designation of remittance as such, and IRS's clear treatment of it as cash bond. Also, whether taxpayer's tax director had authority to bind taxpayer was irrelevant in face of taxpayer's and its attorneys' ratification of his conduct. But, whether govt. was entitled to pre- or post-judgment interest on its recovery wasn't decided. *Reference:* United States Tax Reporter ¶74,055.01(20); 66,015.01(95). IRC §6601; 7405.

2. Limitations periods on suits—erroneous refunds—quasi-contract unjust enrichment claims. Govt.'s suit to recover erroneously refunded interest wasn't time-barred: 6-year limitations period for quasi-contractual unjust enrichment suits, not IRC §6532's 2-year period applied where underlying remittance on which interest was paid was remittance in nature of cash bond on which taxpayer clearly wasn't entitled to interest, which meant taxpayer was unjustly enriched by receipt of such interest and that suit was therefore quasi-contractual. *Reference:* United States Tax Reporter ¶65,325.03(15). IRC §6532.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Richard M. Berman, United States District Judge

I. Introduction

On or about December 10, 1997, plaintiff the United States of America (''Plaintiff'' or the ''IRS'' or the ''Government'')

commenced this action, "seek[ing] to recover a $1,526,100.60 interest payment it made to defendant Tate & Lyle North American Sugars, Inc., successor to Domino Sugar Corporation, formerly known as Amstar Sugar Corporations . . . , when the [IRS] returned a remittance that Amstar sent the IRS in December 1990."[1] Pre-Trial Memorandum of Law of Plaintiff United States ("Pl. Mem."), dated April 25, 2002, at 1–2; see also Complaint ("Compl.") ¶ 33. On December 14, 1990, Amstar remitted $6,497,710.00 to the IRS (the "December 1990 remittance"), which -- as a result of adjustments in the taxpayer's favor -- the IRS returned on September 28, 1993, with interest (the "September 1993 check"). The IRS contends that the September 1993 check mistakenly included the $1,526,100.60 which it now seeks; that the basis of the mistake was that the December 1990 remittance was a cash bond; and that "[i]t is well established that a taxpayer is not entitled to interest on a cash bond if it is returned by the IRS."[2] Pl. Mem. at 2. Defendants argue, among other things, that the IRS treated the December 1990 remittance as a payment of tax, Defendants' Pre-Trial Memorandum ("Def. Mem."), dated May 25, 2002, at 4; that "Amstar treated the [December 1990 remittance] as a payment of tax," Id.; that Amstar did not authorize anyone to designate the December 1990 remittance as a cash bond, Def. Mem. at 3; and that "Amstar did not want to give the [G]overnment an interest-free loan."[3] Def. Mem. at 10.

The central issue in this case it whether Amstar's December 1990 remittance was a cash bond or a payment of tax. The case was tried before the Court without a jury, commencing on June 18, 2002 and concluding on June 19, 2002. At trial, the parties presented stipulations of fact, written exhibits, and witness testimony (both oral and deposition). The Court had the opportunity to assess the demeanor and credibility of the witnesses which -- because the parties presented starkly different versions of what occurred and what was intended -- is crucial in this case.

The evidence presented during the trial established the following, among other things, by a preponderance of the evidence:

1. The December 1990 remittance was legally and factually a cash bond.

2. The December 1990 remittance was identified as a "cash bond" in the transmittal letter forwarding the check to the IRS.

3. The transmittal letter, dated December 14, 1990, was signed by Jared Twenty ("Twenty"), the Director of Taxes for TLI's U.S. subsidiaries and an employee of A.E. Staley Manufacturing Company ("Staley"), a "sister subsidiary" of Amstar.

4. Twenty testified that he was motivated in making the December 1990 remittance to stop interest from accruing (which is the function of a cash bond).

5. Twenty and his predecessor as Director of Taxes for TLI's U.S. subsidiaries, William Carnie ("Carnie"), specifically discussed making a deposit in the nature of a cash bond -- before the December 1990 remittance was actually made --with Carol Robbins ("Robbins"), a Revenue Agent for the IRS who was working on the Amstar account.

6. Robbins testified that she believes that Carnie clearly knew what a cash bond was and that he understood the implications of making a deposit in the nature of a cash bond. She also testified that she be-

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[1] The IRS returned the funds to Amstar Sugar Corporation ("Amstar"), which was succeeded by Domino Sugar Corporation ("Domino"). See Compl. ¶ 10; Answer ¶ 10. Domino has since changed its name to Tate & Lyle North American Sugars, Inc. See Answer ¶ 1. By Order dated March 31, 2000, the Court substituted Tate & Lyle North American Sugars, Inc. ("Defendant" or "Tate & Lyle") for Domino as the defendant in this action. Tate & Lyle, Inc. ("TLI") is the parent company of Tate & Lyle. See Answer ¶ 7.

[2] A cash bond is a remittance made by a taxpayer to the IRS "when no assessment [of tax liability] is then outstanding against the taxpayer." Rosenman v. United States, 323 U.S. 658, 662 [33 AFTR 314] (1945). A cash bond "stop[s] the running of interest on any amount subsequently assessed as a deficiency." Callaway v. Comm'r, 231 F.3d 106, 113 n.11 [86 AFTR 2d 2000-6148] (2d Cir. 2000) (citing Rev. Proc. 84-58, 1984-2 C.B. 501, 502–03). "Such a deposit is not subject to a claim for credit or refund as an overpayment; the taxpayer may request its return at any time before the IRS is entitled to assess the tax; and it will be returned without interest." Id.; see also Rev. Proc. 84-58 at § 5.04.

[3] A payment of tax is made by a taxpayer to the IRS "in satisfaction of a tax liability." Rev. Proc. 84-58 at § 2.03. A payment of tax, unlike a cash bond, is returned to the taxpayer with interest. See 26 U.S.C. § 6611.

lieves that, while Twenty may not have understood fully different technical options, he discussed the cash bond option with her and with others at Amstar and its related entities, or perhaps with attorneys from Burt, Maner & Miller ("BM&M") (outside counsel whom Twenty contacted daily for tax advice), before making the December 1990 remittance. Robbins also believed that Twenty certainly did understand that the December 1990 remittance would stop interest from accruing.

7. Robbins, on behalf of the IRS, treated, and intended to treat, the December 1990 remittance as a cash bond.

8. No one from the taxpayer side ever advised the IRS that the December 1990 remittance was not a cash bond or that Twenty was not authorized to characterize and make the December 1990 remittance as a cash bond until after the IRS advised the taxpayer that interest had been paid inadvertently on the cash bond and requested the return of the interest payment.

For the reasons set forth herein, judgment will be entered in favor of the Government against Tate & Lyle in the amount of $1,526,100.60.[4]

Pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 52(a), the Court's findings of fact and conclusions of law follow:

II. Findings of Fact

1. "On December 22, 1988, [Refined Sugars Incorporated ('RSI')] acquired all of the stock of Amstar." Stip. Facts ¶ 4.[5] "Immediately after the acquisition, RSI merged into Amstar, with Amstar as the surviving corporation." Id. at ¶ 7.

2. On August 16, 1989, Amstar became an affiliated company of TLI, the corporate parent (and owner) of several companies in the United States (collectively, the "Tate & Lyle Group" or the "TLI Affiliated Group") See id. At ¶s 6, 8.

3. June 15, 1990, Amstar filed a federal income tax return which included its taxable income for the period prior to affiliation with the Tate & Lyle Group, i.e., December 23, 1988 through August 16, 1989 (the "8908 return"). See id. at ¶s 10–11. "After the tax period ending August 16, 1989, Amstar filed its federal tax returns as part of the consolidated federal income tax returns for the TLI Affiliated Group." Id. at ¶ 12.

4. "In March 1990, the IRS Springfield, Illinois District Office issued an audit plan for the [Tate & Lyle Group's] consolidated income tax returns" for 1984, 1985, 1986, and 1987. Id. at ¶s 14, 18. "RSI was an affiliate of the Tate & Lyle [G]roup during the years covered by this audit . . . ." Id. at ¶ 15. "At the request of the Tate & Lyle [G]roup, the audits . . . were performed in Illinois by the IRS springfield District [O]ffice." Id. at ¶ 24. To carry out the audit, "[t]he TLI Affiliated Group provided the IRS with an office in the Decatur, Illinois building of TLI Affiliated Group member Staley." Id. at ¶ 25.

5. "Amstar's 8908 tax return was not included" in the March 1990 audit plan. Id. at ¶ 17. While investigating a "RSI net operating loss that was reported on the Tate & Lyle [G]roup return," id. at ¶ 28, the IRS "learned about the Amstar 8908 return and asked for a copy of it." Id. at ¶ 29.

6. Carnie was employed by Staley from 1977 through 1990. See deposition of William Carnie, dated March 8, 2000 ("Carnie Dep.") at 6:7–7:4. Carnie was the Director of Taxes for Staley until 1988, when TLI acquired Staley. See id. at 10:3–4. At that time, Carnie became the Director of Texas for the Tate & Lyle Group. See Id. at 10:4–11. Carnie testified at his deposition that "the Staley Tax Group then became . . . the tax group that worked for the Tate & Lyle U.S. Group," id. at 11:21–12:1, which, beginning August 16, 1989, included Amstar. See Stip. Facts ¶ 8. At trial, Carnie was described as "tax-

[4] See discussion infra pp. 30–31 regarding interest.

[5] References to "Stip. Facts" are to the stipulated facts contained in the Joint Consolidated Pre-Trial Order submitted by the parties on or about April 23, 2002; references to "Tr." are to the trial transcript; and references to "JE" are to the Joint Trial Exhibits submitted by the parties.

oriented'' and ''a tax professional.'' Tr. at 125:9–14.

7. Carnie and his assistant Martha Hoyt (''Hoyt'') were primarily responsible for coordinating audits of the Tate & Lyle Group (which included Amstar) with the IRS. See Carnie Dep. at 23:21–24:24; Stip. Facts ¶ 8. Carnie was ''responsible for ... dealing with the IRS. Whatever the IRS wanted done, his job was to get it fixed, plus deal with any issues that would have arisen, he and his staff.'' Deposition of John Hunter, dated March 23, 2000 (''Hunter Dep.'') at 72:6–9.

8. ''As of the fall of 1989, the Tate & Lyle [G]roup tax department was the focal point for communications with the IRS.'' Stip Facts ¶ 23. Joseph Kelly (''Kelly''), the Treasurer of Amstar from December 1988 to June 1998, see Tr. at 31:21–23, confirmed that ''Amstar relied on the Tate & Lyle tax group to communicate with the IRS ...'' Id. at 36:13–14. Indeed, the ''Tate & Lyle tax group ... in Decatur was the means for [Amstar] to communicate with the IRS on [its] audit issues.'' Id. at 34:19–22.

9. Robbins worked on the audit of the TLI Affiliated Group from June 1989 to September 1991. See Declaration of V. Carol Robbins, dated April 22, 2002 (''Robbins Decl.'') ¶ 1. During this time, Robbins became the IRS Team Coordinator for the audit and was primarily responsible ''to direct the other team members, conduct the examination and develop the issues that were identified by the IRS.'' Id.

10. Carnie and eRobbins spoke regularly about the audit, i.e., ''two or three times a week [when the IRS was] working in the Staley office building.'' Carnie Dep. at 35:19–20.

11. In August 1990, the IRS determined that Amstar's 8908 return showed that a deduction had been taken in the amount of $18,009,489.00, which represented an IRS net operating loss (''NOL''). See Stip. Facts ¶s 30–31. At the same time, ''the RSI net operating loss [already] had been utilized on the Tate & Lyle [Group] return or carried back to prior years' returns for the consolidated group [and] there was no loss available to carry forward onto other returns.'' Id. at ¶27. Thus, the RSI net operating loss was claimed erroneously by both the Tate & Lyle Group and Amstar on its 8908 return. See Robbins Decl. ¶ 6.

12. As soon as [Robbins] learned about the two deductions for the same loss, [she] brought them to ... Carnie's attention and told him that [she] thought that they presented a problem.' Id. at ¶ 7. Robbins and Carnie agreed 'that an error had been made,' id. at ¶ 8, and 'no one ever asserted that Amstar was entitled to the $18 million NOL deduction ....' Tr. at 209:22–23.

13. As a result of the error, Amstar Sugar Corporation believed it ''had a tax deficiency of more than $6 million.'' Def. Mem. at 2. Robbins and Carnie ''discussed the alternatives available to [Amstar]'' to resolve the problem, Robbins Decl. ¶ 9, and Carnie informed her ''that he was concerned about stopping the interest from running on any deficiency that might be created by the adjustment.'' Id. at ¶ 10. Robbins and Carnie ''had multiple discussions where [Carnie's] main concern was whether or not to let the adjustment sit there until the next [audit] cycle or whether or not to file an amended return.'' Tr. at 211:25–212:23. Robbins consulted with her supervisor, Donald Werner (''Werner''), see Robbins Decl. ¶ 11, and determined ''that, since [the IRS] had not issued a Revenue Agent's Report for Amstar's 8908 return or performed an audit, the IRS could accept a cash bond from the taxpayer which would ... stop interest from running.'' Id. at ¶ 12. Robbins suggested to Carnie two options: ''post[ing] a cash bond to stop the interest from running,'' Tr. at 212:4–5, or ''fil[ing] an amended return.'' Id. at 212:14. Robbins was persuaded that Carnie understood these options. See id. at 217:14–20. Robbins and Carnie had ''multiple conversations'' about a cash bond as one of Amstar's options. See id. at 213:6–15. During these conversations, Robbins learned that Carnie wanted to incorporate Amstar's New York tax people into the decision-making. See id. at 217:4–218:2. Carnie ''eventually [told Robbins that] he wanted

to post a cash bond,'' id. at 211:16–17, and to stop the interest from running. ''[I]t was [Robbins'] understanding that [Carnie] preferred to go ahead and just make a [deposit] in the form of a cash bond . . . .'' Id. at 214:13–15 (emphasis added).

14. ''On August 14, 1990, [Robbins] told . . . Carnie in writing that Amstar could file an amended tax return for the 8908 period or make a deposit in the nature of a cash bond.'' Robbins Decl. ¶ 13; see also JE 5a. The following day, ''[Robbins], along with other IRS team members, met with . . . Carnie and . . . Hoyt to discuss several matters, including the possible payment of a cash bond . . . .'' Robbins Decl. ¶14. The IRS's case visitation notes state, ''Robbins discussed the possible payment of a bond by [the taxpayer] to stop the interest. [The taxpayer] may be interested in doing so . . . .'' JE 6.

15. ''Based on [the IRS's] discussion with . . . Carnie, it was decided that the IRS would issue a notice of proposed adjustment for the 8908 year, the taxpayer would make a deposit [in the nature of a cash bond] to stop the interest from running,'' and the IRS would audit Amstar's 8908 return at a later time. See Robbins Decl. ¶ 15. At Carnie's request, Robbins issued a notice of proposed adjustment on August 27, 1990. See Tr. at 216:24–217:9; Robbins Decl. ¶ 17:JE 7.

16. In November 1990, Twenty succeeded Carnie as Director of Taxes for the Tate & Lyle Group and served in that capacity until September 1991. See Stip. Facts ¶s 46, 48; Tr. at 98:16–18. Like Carnie, Twenty was an employee of Staley, not of Amstar. See Stip. Facts ¶s 49, 50. John Hunter (''Hunter''), the Vice-President and Chief Financial Officer at Staley and a director of TLI, see Hunter Dep. at 15:21–16:16, brought Twenty to the Decatur, Illinois audit site and introduced Twenty to Robbins and other members of the IRS audit team. See Robbins Decl. ¶ 21. ''Hunter introduced . . . Twenty as the new Director of Tax, and told [the members of the IRS audit team] that [they] were to direct all matters to [Twenty].'' Id.

17. After Twenty was appointed Director of Taxes, ''he was [Robbins] primary contact, just as . . . Carnie was before him. [The IRS] audit team had the same kinds of interactions with . . . Twenty as the team had with . . . Carnie when he was the Tax Director.'' Id. at ¶ 25.

18. Twenty earned a bachelor's degree in marketing from Milken University in Decatur, Illinois and a masters of business administration (''MBA''), with a specialization in finance, from Northern Illinois University. See Tr. at 102:8–15.

19. Harvey Friedman, Esq. (''Friedman''), was hired by Amstar as Senior Tax Counsel in July 1989 and held that position until 1998 when he assumed the role of General Attorney at Domino.[6] See Friedman Dep. at 14:12–16:2; Tr. at 18:23–19:3. After Friedman joined Amstar, he had diminishing responsibility for tax matters because ''general tax responsibilities were transferred to Decatur[,] Illinois, the Staley tax department in Decatur . . . around 1991 . . . .'' Friedman Dep. at 16:16–17:6. Indeed, Friedman testified that ''Amstar [and] Domino . . . did not have any direct contact with the [Internal] Revenue Service. Everything was handled through the Staley people . . . [because] [t]hat was the administrative procedure that was set up by the company.'' Friedman Dep. at 72:22–73:15; see also Tr. at 24:18–25:6. According to Friedman, Twenty discussed Amstar tax issues directly with the IRS because Twenty ''was the representative of the company with the IRS, and he [supplied] information.'' Tr. at 26:16–17 (emphasis added); see also Friedman Dep. at 82:24–25; JE 19.

20. On November 9, 1990, Robbins (and other members of the IRS audit team) met with Twenty, Hoyt and attorneys from BM&M, including name partner Daniel Burt, Esq. (''Burt''), to discuss matters relating to the ongoing audit of the Tate & Lyle Group in Decatur, Illinois. See Robbins Decl. ¶ 22. Twenty consulted BM&M

[6] See deposition of Harvey Friedman, dated December 30, 1999 (''Friedman Dep.''), at 13:22–24 (''Domino Sugar Corporation was known as Amstar Sugar Corporation when I started and it was in July of 1989.'').

attorneys "daily" for advice on tax issues. See Stip. Facts ¶ 52. During the meeting, Burt informed Robbins and the other members of the IRS audit team that "Hunter and ... Twenty were in control" of the audit issues. See Robbins Decl. ¶ 22.

21. On December 11, 1990, Twenty, Hoyt, and two attorneys from BM&M met in the Staley offices in Decatur, Illinois to discuss, among other things, tax issues. See Stip. Facts ¶ 67. Friedman participated by telephone in those parts of the conference pertaining to Amstar. See id.

22. On December 12, 1990, Bruce Welikson ("Welikson"), an analyst in the Tate & Lyle Group tax department, sent Friedman calculations regarding the proposed adjustment for the RSI net operating loss. See id. at ¶ 69. To arrive at the amount to be paid to the IRS, Welikson multiplied the RSI net operating loss "by Amstar's 34% tax rate ... and then [added] interest for the period 6/15/90 through 12/14/90," resulting in the amount of $6,497,710.00. See id. at ¶ 70.

23. Twenty informed Robbins "in advance that he was going to have a check for [her] relating to the RSI net operating loss deduction, and that he would deliver the check on a particular day." Robbins Decl. ¶ 26. Robbins recalls that, in the course of conversations she had with Twenty after he was appointed Director of Taxes, he told her "they were going to go ahead and pay" the IRS in the form of a "cash bond." See Tr. at 218:17–219:6. Robbins believed that Twenty "had talked about [designating the December 1990 remittance as a cash bond] with somebody, because he was checking everything out .... he wasn't independently making all these decisions." Id. at 219:11–13.

24. Based on Twenty's representation, Robbins gave the IRS teller unit in Springfield, Illinois advance warning that the IRS would be receiving a check that would stop interest from running on the day the check was deposited. See Robbins Decl. ¶ 27; Stip. Facts ¶ 80.

25. On December 13, 1990, Kelly signed the notice of proposed adjustment relating to the RSI net operating loss and indicated his agreement by marking an "X" next to the word "Agreed" at the bottom of the form. See JE 16; Stip. Facts ¶ 76. That same day, "Amstar drew a check on its account in the amount of $6,497,710.00 made payable to the Internal Revenue Service." Stip. Facts ¶ 74. The stub attached to the check described the remittance as "Taxes due for Refined Sugars Inc. for short period return ending 8/22/89." JE 15; see also Stip. Facts ¶ 75.

26. "On December 14, 1990, at the Staley offices in Decatur, Illinois, Twenty gave Robbins the notice of proposed adjustment, the $6,497,710.00 check, and a letter dated December 14, 1990, addressed to Robbins and written on Staley letterhead, that Twenty had signed" (the "Twenty Letter"). Stip. Facts ¶ 81.

27. The Twenty Letter states, in pertinent part:

> Re: Amstar Sugar Corporation and Subsidiaries
>
> Notice of Proposed Adjustment #1
>
> Dear Ms. Robbins:
>
> Enclosed is the above referenced Notice of Proposed Adjustment, executed by an officer of Amstar Sugar Corporation. The taxpayer has agreed to this adjustment and herewith encloses a check in the amount of $6,497,710 in payment of the deficiency in tax, plus interest, resulting from this adjustment. The tax was computed using the 34% statutory rate, and interest has been calculated for the period from June 15, 1990 through December 14, 1990. We respectfully request that this deposit be identified as a cash bond in your records.

JE 19 (emphasis added); see also Stip. Facts ¶ 82.

28. Robbins "reviewed the documents .... [and] did not see anything wrong with the [Twenty Letter]." Robbins Decl. ¶ 28; see also Stip. Facts ¶ 83. She was not surprised that the remittance was identified as a cash bond because, among other things, Robbins and Carnie "had always

discussed it in the form of a cash bond.'' Tr. at 221:25–222:1.

29. ''As of December 14, 1990, the IRS had not assessed any deficiency in tax for Amstar's 8908 tax period, or mailed Amstar[] any notice(s) of deficiency for that tax period.'' Stip. Facts ¶ 93.

30. Based upon the foregoing, the Court concludes (finds) that Amstar (and the Tate & Lyle Group) intended the December 1990 remittance of $6,497,710.00 to be designated a cash bond in order to stop interest from running.

31. After receiving the executed notice of proposed adjustment, the Twenty Letter, and the $6,497,710.00 check, Robbins ''drove from Decatur, Illinois to Springfield, Illinois so that the check could be deposited that day.'' Robbins Decl. ¶ 28. Robbins testified that she was ''interested in getting [the check] posted to the taxpayer's account that very day, so that the interest stop[ped] running on December 14 when [the IRS] receive[d] the check.'' Tr. at 233:17–20.

32. Robbins instructed her secretary, Jan Babb (''Babb''), see Robbins Decl. ¶ 29, to ''call [the] collection [department] and find out how to have [the December 1990 remittance] posted as a cash bond.'' Tr. at 230:24–231:1.

33. Robbins intended the December 1990 remittance to be a cash bond, and she treated it as such. At trial, Robbins gave the following very credible testimony:

> Q. So obviously I guess it was your understanding at the time that [the December 1990 remittance] was intended to be [a cash bond].
>
> A. That was my understanding.
>
> Q. And did you implement measures to treat [the check] as if it were a cash bond?
>
> A. Well, it was my understanding that the paperwork was all initiated to reflect it as a cash bond.

Id. at 231:2–9.

34. The paperwork Babb prepared to process the December 1990 remittance contains indicia of both a cash bond and payment of tax. At the time Babb prepared the paperwork, she was new to her position in the Examination Division of the IRS. See Robbins Decl. ¶ 29.

35. ''Babb prepared a Document Transmittal form to the IRS Collection Division numbered 91-004 transmitting the $6,497,710.00 Amstar check.'' Stip. Facts ¶ 101. On the Document Transmittal form, Babb typed the following: ''Check in the amount of $6,497,710.00 for 1120/02 AMSTAR SUGAR CORP. AND SUBS. (Successor by merger to Refined Sugars, Inc.) EI #13-3366163 for tax period 8908. CASH BOND Send 316(C),'' Id. at ¶ 103; see also JE 20.

36. ''Babb prepared a Payment Posting Voucher form 3244-A.'' Id. at ¶ 112. On the Payment Posting Voucher, Babb typed ''Xs'' in the boxes next to the words ''Cash Bond'' and ''Send 316(C).'' See id. at ¶ 113. In the Transaction Data section of the Payment Posting Voucher, Babb typed the amount of the December 1990 remittance next to the words ''Code 670'' and ''Subsequent Payment.'' See id. at ¶ 114. ''The correct code for a deposit in the nature of a cash bond is 'Code 640,''' id. at ¶ 116, and ''[t]he correct code for a subsequent payment of tax is 'Code 670.'''' Id. at ¶ 117. A secondary ''Code 570'' is also required for a payment of tax. See id. at ¶ 118. ''On the Payment Posting Voucher prepared to record Amstar's [December 1990] remittance there is a zero entered on the line for transaction code 570.'' Id. at ¶ 115.

37. A 316(C) letter ''explains to a taxpayer the consequences of the IRS's treating [a] remittance as a deposit [in the nature of a cash bond].'' Id. at ¶ 104. In most cases, the 316(C) letter is computer-generated. See id. at ¶ 138.

38. Neither Plaintiff nor Defendant presented conclusive evidence that a 316(C) letter was sent by the IRS or not received by Amstar or the Tate & Lyle Group.

39. ''In the IRS's automated computer system, cash bonds are given a unique transaction code . . . .'' Id. at ¶ 132. ''IRS

personnel use these transaction codes to determine what has happened in the taxpayer's account." Id. at ¶ 120. "The transaction code 670 was recorded in the IRS's computer record of Amstar's transcript to identify Amstar's remittance." Id. at ¶ 119.

40. Cash bonds are also assigned a unique Document Locator Number ("DLN") in the IRS's automated computer system within the blocking series "999." See id. at ¶ 132. "The Payment Posting Voucher for Amstar's check was stamped with DLN number '3631734899900-0' ... [which] is within blocking series '999.'" Id. at ¶s 133–34 (emphasis added).

41. Though Twenty has an MBA and "specialized in finance," Tr. at 102:14–15, he testified that he "wasn't a tax person." Id. at 107:1. Twenty also testified that he, as well as Amstar, wanted to get the December 1990 remittance to the IRS as quickly as possible so that interest would not continue to run. See id. at 127:8–128:4, 129:14–20. Robbins testified that Twenty "knew that [Amstar was] paying this money to stop the interest from running ...." Id. at 219:25–220:1.

42. It may readily be inferred that someone at Amstar, the Tate & Lyle group, or (possibly) BM&M, advised Twenty to term the December 1990 remittance a "cash bond." Twenty asserted he did not know "[w]hat a cash bond payment is," id. at 130:6, and had never used the term "cash bond" before (or since) December 1990. See id. at 130:10–14. Twenty testified that he could not "have come to call [the December 1990 remittance] a cash bond unless somebody told [him] it was a cash bond." Id. at 130:23–25. He stated that he drafted the Twenty Letter "[w]ith a great deal of assistance," id. at 115:10, possibly from outside counsel, since Twenty consulted BM&M "on a regular basis." Id. at 107:14; see also Stip. Facts ¶ 52 ("Twenty used BM&M daily for tax advice.").

43. Twenty also testified that he believed he was "authorized to send [the Twenty Letter] to ... Robbins," id. at 122:11–12; that "it was accurate," id. at 122:14; and that "wherever [he] got the information from was a reliable source." Id. at 122:16–17. "[N]o one ever told [him] that the information in [the] letter was incorrect." Id. at 122:20–21 (emphasis added).

44. "Amstar never filed a Form 2848 Power of Attorney and Declaration of Representative with the IRS for ... Twenty at any time prior to December 14, 1990." Stip. Facts ¶ 204.

45. On December 14, 1990, Hoyt faxed a copy of the Twenty Letter to Friedman at Amstar and James Hagerty, Esq. at BM&M. See id. at ¶s 86, 91. And, Kelly had a copy of the Twenty Letter in his files at Amstar, see id. at ¶ 87, and "did not think there was anything unusual about the letter." Id. at ¶ 88.

46. After December 14, 1990, Robbins "had multiple communications with [Twenty] both orally and in writing .... Hunter never told [Robbins] that the [December 1990] remittance was not a cash bond, or that Twenty did not have authority to designate it as a cash bond." Robins Decl. ¶s 32, 33.

47. After December 1990, Robbins "continued to have many communications with the BM&M lawyers. No one from that firm ever told [her] that the [December 1990] remittance was not a cash bond, or that ... Twenty did not have authority to designate it as a cash bond." Id. at ¶ 35.

48. In July 1991, Ann Harris ("Harris") succeeded Twenty as the Director of Taxes of the Tate & Lyle Group. See Deposition of Ann Harris, dated March 29, 2000 ("Harris Dep.") at 6:8–9, 7:12–21; Stip. Facts ¶ 147. Like Carnie and Twenty, Harris was an employee of Staley. See Harris Dep. at 6:6–7. She does not believe that her duties were any different than those of Twenty. See id. at 8:12–14.

49. Amstar's 8908 return was not audited until in or about July 1992 (the "8908 Audit"). See JE 54.

50. In or about September 1993, the IRS concluded the 8908 Audit and found

"an overpayment of tax [by Amstar] in the amount of $173,336.00." Stip. Facts ¶ 156. In fact, Amstar "did not have a deficiency in tax for the 8908 tax period." Id. at ¶ 157.

51. In or about September 1993, the IRS issued a Revenue Agent's Report ("RAR") "showing income tax changes to Amstar's 8908 return that there were made after the conclusion of the IRS'[s] audit of the return." Declaration of Rosie L. Williams ("Williams"), dated April 24, 2002 ("Williams Decl."), ¶ 9; see also JE 31; Tr. at 250:15–24. Williams, a Team Manager for the IRS, see Williams Decl. ¶ 1, testified that, based on the Twenty Letter and the Payment Posting Voucher requesting cash bond treatment and indicating that a 316(C) letter should be sent, she "had every reason to think" that the December 1990 remittance was a cash bond. See Tr. at 254:5–15. In preparing the RAR, Williams, on behalf of the IRS, intended in her "evaluation or analysis of [December 1990 remittance] to treat it as a cash bond." Id. at 265:20–21.

52. On September 23, 1993, Lana Morell ("Morell"), a Restricted Interest Examiner with the IRS, see Stip. Facts ¶ 170, "prepared a Manual Refund Posting Voucher in connection with the Amstar 8908 return." Id. at ¶ 173. On September 28, 1993, "[t]he IRS issued a check in the amount of $8,240,206.34 payable to Amstar Sugar Corporation and subsidiaries ...." Id. at ¶ 184. The September 1993 check included: "(i) the $173,336.00 refund (minus $7,956.61, which was credited to tax liabilities owed by Amstar), together with interest in the amount of $51,016.35; and (ii) the $6,497,710.00 [December 1990] remittance together with interest thereon in the amount of $1,526,100.60." Compl. ¶ 31; see also JE 99. The IRS's books and records characterize the September 1993 check as a "Refund of Overpayment." See Stip. Facts ¶ 187.

53. In September 1995, Roland Neumann ("Neumann"), an IRS agent, reviewed the file for Amstar's 8908 return and discovered that the IRS had paid interest to Amstar on the December 1990 remittance which was improper because the December 1990 remittance was a cash bond. See id. at ¶ 191.

54. On January 25, 1996, Williams informed Harris "that the IRS had mistakenly paid interest on the $6,497,710.00 remittance." Id. at ¶ 192.

55. On March 14, 1996, Harris sent Williams a memorandum (the "Harris Memorandum") on Staley letterhead which stated: "We did not then, and we do not now, consider the September 1993 refund to be a return of the cash bond paid for the erroneous use of the NOL carryforward. We believe [the] refund resulted from ... favorable adjustments and [Amstar] is entitled to the interest it received." JE 101 (emphasis added). "The 'we' in the Harris [M]emorandum ... referred to the Tate & Lyle [G]roup and Amstar." Stip. Facts ¶ 198. Thus, Defendant continued to describe the December 1990 remittance as a "cash bond" more than five years after it was made.

56. The Government commenced this action against Tate and Lyle on December 10, 1997, see id. at ¶ 199, to recover the erroneous interest payment of $1,526,100.60 on the December 1990 remittance.

III. Conclusions of Law.

Jurisdiction and Venue

1. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1345 ("the district courts shall have original jurisdiction of all civil actions ... commenced by the United States ....") and 26 U.S.C. § 7402(a) ("[t]he district courts ... at the instance of the United States shall have such jurisdiction ... to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws."). Venue is proper in the Southern District of New York pursuant to 28 U.S.C. § 1391(b)–(c), because Defendant does business in this district. See Answer ¶ 4.

Burden of Proof

2. "[I]t is the government, rather than the taxpayer, that bears the burden of

proof,'' United States v. CSX Corp., 94 Civ. 773, 1995 WL 381537, at 3 [75 AFTR 2d 95-2434] (E.D. Va. May 8, 1995), by a preponderance of the evidence. See Addington v. Texas, 441 U.S. 418, 423 (1979). The Court need only find ''that the existence of [the] fact is more probable than its nonexistence.'' Brown v. Warden, Great Meadow Correctional Facility, 682 F.2d 348, 352 (2d Cir. 1982) (internal citations omitted).

The December 1990 Remittance

[1] 3. ''An advance payment which is not assessed will be treated as a deposit made in the nature of a cash bond for the payment of taxes thereafter found to be due.'' Rev. Proc. 64-13, 1964-1 C.B. 674; see also Rosenman, 323 U.S. at 662. A deposit in the nature of a cash bond stops ''the accrual of interest ... on [any] deficiency that [is] ultimately assessed ....'' Fier v. United States, 01 Civ. 2225 (JGK), 2002 WL 453177, at 5 [89 AFTR 2d 2002-1649] (S.D.N.Y. Mar. 25, 2002). Unlike a payment of tax, a deposit in the nature of a cash bond ''is not subject to a claim for credit or refund [and, if the taxpayer requests it be returned before an assessment,] will be returned to the taxpayer, without interest ....'' Rev. Proc. 84-58 at § 4.02(1).

4. The December 1990 remittance was a deposit in the nature of a cash bond. As a result, the IRS erroneously paid interest to Amstar on September 28, 1993 -- in the amount of $1,526,100.60 --when it returned the December 1990 remittance.

5. To determine whether a taxpayer remittance is a payment of a tax or a cash bond, the United States Court of Appeals for the Second Circuit has developed the ''facts and circumstances'' test, which requires analysis of three factors; ''(1) the timing of the assessment or definition of the tax liability; (2) the taxpayer's intent with respect to the remittance; and (3) the IRS's treatment of the remittance upon receiving it.'' Ertman v. United States, 165 F.3d 204, 207 [83 AFTR 2d 99-733] (2d Cir. 1999). The Court must take into account ''the unique facts and circumstances of each case.'' Crosby v. United States, 889 F. Supp. 148, 151 [79 AFTR 2d 97-1901] (D. Vt. 1995).

6. ''[A] taxpayer who makes a remittance before a tax liability has been ascertained [as here] is generally presumed to have intended to make a deposit.'' Malachinski v. Comm'r of Internal Revenue, No. 13501-94, 1999 WL 349342 [1999 RIA TC Memo ¶99,182] (T.C. June 1, 1999), aff'd, 268 F.3d 497 [88 AFTR 2d 2001-6169] (7th Cir. 2001).

Timing of the Assessment or Definition of Tax Liability

7. Assessments of tax liability generally occur in three ways: ''(1) automatically, after a return is filed showing a tax liability; (2) from a notice of deficiency; or (3) after an audit.'' Crosby, 889 F. Supp. at 151 n.5. In this case, Amstar's tax liability for the period covered by the 8908 return had not been assessed at the time of the December 1990 remittance. See Stip. Facts ¶ 93. The 8908 return did not show a tax liability. See JE 1, 14a. Amstar elected not to file an amended return after discovering that it had erroneously taken a deduction for the RSI net operating loss. See Robbins Decl. ¶s 15–16. On December 14, 1990 -- the date Twenty remitted the check identified as a ''cash bond'' to the IRS -- ''the IRS had not assessed any deficiency in tax for Amstar's 8908 tax period, or mailed Amstar any notice(s) of deficiency for that tax period.'' Stip. Facts ¶ 93. And, the IRS did not audit the 8908 return until approximately July 1992. See JE 54. Thus, the timing factor under Ertman weighs in favor of finding that the $6,497,710.00 remittance was a deposit in the nature of a cash bond. See Crosby, 889 F. Supp. at 151; see also Rev. Proc. 84-58 at § 4.02(1).

Amstar's Intent

8. The clearest indication of Amstar's intent is found in a series of factors including, but by no means limited to, the Twenty Letter accompanying the December 1990 remittance which states: ''We respectfully request that this deposit be identified as a cash bond in your records.'' JE 19. The record is replete with other indicia of Amstar's intent (both before and after

the December 1990 remittance) that the remittance was a cash bond, including: (i) the conversations between Robbins and Carnie (and later Robbins and Twenty) concerning the cash bond option and Amstar's and the Tate & Lyle Group's desire to stop interest from running on any tax liability that might result from the erroneous NOL deduction; (ii) the fact that no one at Amstar (or the Tate & Lyle Group) told the IRS after December 14, 1990 that Amstar did not want cash bond treatment, although Friedman, Amstar's Senior Tax Counsel, and BM&M (the Tate & Lyle Group's outside counsel whom Twenty consulted "daily" for tax advice) received a copy of the Twenty Letter on December 14, 1990. Kelly, an officer of Amstar, was also aware of the Twenty Letter and had a copy in his files;[7] and (iii) the fact that, even when Defendant refused to return the interest payment on March 14, 1996, Harris referred to the December 1990 remittance as "the cash bond" and did not dispute that the December 1990 remittance was intended to be a cash bond. See JE 101 ("We did not then, and we do not now, consider the September 1993 refund to be a return of the cash bond paid for the erroneous use of the NOL carryforward. We believe [the] refund resulted from ... favorable adjustments and [Amstar] is entitled to the interest it received.").

9. Twenty possessed the authority to bind Amstar, under one or more of the theories advanced by the Government: actual authority, apparent authority, and ratification. See Plaintiff's Post Trial Proposed Findings of Fact and Conclusions of Law ("Pl. Prop. Findings"), dated July 9, 2002, at 16. "The liability of the principal to a third person upon a transaction conducted by an agent, or the transfer of his interests by an agent, may be based upon the fact that: (a) the agent was authorized; (b) the agent was apparently authorized; or (c) the agent had a power arising from the agency relation and not dependent upon authority or apparent authority." Restatement (Second) of Agency § 140 (1958).

10. "Actual authority is created by direct manifestations from the principal to the agent ...." Peltz v. SHB Commodities, Inc., 115 F.3d 1082, 1088 (2d Cir. 1997) (internal quotation marks omitted); see also Restatement (Second) of Agency § 26 (1958) (actual "authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account.") Twenty, the Director of Taxes for the Tate & Lyle Group, testified that Amstar "authorized" him to "lia[ise] with the IRS," Tr. at 99:4–5, which authorization included, among other things, conferring with Robbins and sending the Twenty Letter and the December 1990 remittance to Robbins. See id. at 99:7–10, 122:10–18. Indeed, Twenty sought Amstar's "preapproval of anything that [he] did on [Amstar's] behalf with the IRS," id. at 104:3–4, and made "no decisions for Amstar." Id. at 104:8. Amstar conferred actual authority on Twenty to designate the December 1990 remittance as a cash bond, despite the fact that no power of attorney was signed by an officer of Amstar giving Twenty authority to act for Amstar. See Defendant's Post-Trial Proposed Findings of Fact and Conclusions of Law ("Def. Prop. Findings"), dated July 10, 2002, at 13; see also 26 C.F.R. § 601.502(c)(1990).

11. Rev. Proc. 84-58, which allows taxpayers to make deposits in the nature of a cash bond to toll the accrual of interest, is silent as to any specific procedures for making a cash bond and nowhere indicates that a power of attorney is required for a taxpayer representative to designate a remittance a cash bond. See Rev. Proc. 84-58.

12. And, even assuming arguendo that Twenty did not have actual authority, he had apparent authority. "[A]pparent authority depends on some conduct by the principal, communicated to a third party, which reasonably gives the appearance that the agent has authority to conduct a partic-

[7] If Amstar did not agree with information or explanations provided to the IRS by the Tate & Lyle Group tax department, Amstar would bring that this agreement to the attention of the Tate & Lyle Group tax department. See Stip. Facts ¶ 90. There is no evidence that occurred here.

ular transaction.'' Reiss v. Societe Centrale Du Groupe Des Assurances Nationales, 235 F.3d 738, 748 (2d Cir. 2000); see also Restatement (Second) of Agency § 27 (1958). ''[A] principal may be bound by a person's actions if the principal conducts himself in a manner that leads a third party to believe that the purported agent possesses authority.'' Reiss, 235 F.3d at 748. The IRS bears the burden of proving that ''(1) the principal was responsible for the appearance of authority in the agent to conduct the transaction in question, and (2) the third party reasonably relied on the representations of the agent.'' Herbert Constr. Co. v. Continental Ins. Co., 931 F.2d 989, 993–94 (2d Cir. 1991) (internal citations omitted). Amstar's and the Tate & Lyle Group's words and conduct gave Twenty the appearance of authority to deal on tax issues with the IRS. After Carnie left and Twenty was appointed Director of Taxes, Hunter informed the IRS that it should direct all audit issues to Twenty.[8] See Robbins Decl. ¶ 21. Robbins testified that Twenty was the IRS's primary contact, just as Carnie was before him, on behalf of Amstar and the other entities within the Tate & Lyle Group. See id. at ¶ 25. Friedman, Amstar's Senior Tax Counsel, confirmed that Amstar had no direct contact with the IRS and that the Tate & Lyle Group had decided that the Staley tax department would act as Amstar's representative with the IRS. See Friedman Dep. at 72:22–73:15. After Twenty became Director of Taxes, attorneys for BM&M informed the IRS that '''Hunter and ... Twenty were in control' of the audit issues.'' Robbins Decl. ¶ 22. After the December 1990 remittance was made, Robbins continued to communicate with Twenty, attorneys from BM&M, and Hoyt, see id. at ¶s 32, 35–36, and ''no one at Amstar ever told [Robbins] that the remittance was not a cash bond, or that ... Twenty did not have authority to designate it as a cash bond.'' Id. at ¶ 37.

13. And, assuming arguendo that Twenty possessed neither actual nor apparent authority, Defendant ratified Twenty's acts. ''Ratification is the express or implied adoption of acts of another by one for whom the other assumes to be acting but without authority.'' Prisco v. New York, 804 F. Supp. 518, 523 (S.D.N.Y. 1992). These acts are ''given effect as if originally authorized by [the principal].'' Restatement (Second) of Agency § 82 (1958). ''Ratification may be express, as by spoken or written words, or it may be implied from any act, words, or course of conduct on the part of the principal which reasonably tend to show an intention to ratify the unauthorized ... act.'' Capital Dist. Pysician's Health Plan v. O'Higgins, 951 F. Supp. 352, 361 (N.D.N.Y. 1997) (citation and internal quotation marks omitted). Amstar adopted Twenty's designation of the December 1990 remittance as a cash bond. On December 14, 1990, Hoyt faxed a copy of the Twenty Letter to Friedman, Amstar's senior tax counsel, and the attorneys at BM&M. See Stip. Facts ¶s 86, 91. A copy of the Twenty Letter was also found in the files of Kelly, Amstar's treasurer. See id. at ¶ 87. ''In the days and weeks after December 14, 1990, Twenty and the BM&M attorneys communicated with the IRS.'' Id. at ¶ 144. Yet, no one at Amstar (or the Tate & Lyle Group or BM&M) ever informed the IRS until after the IRS commenced this action that Amstar did not intend to submit a cash bond; that the Twenty Letter was incorrect; or that Twenty did not have the authority to designate the remittance a cash bond. The Harris Memorandum dated March 14, 1996 continues to refer to the December 14, 1990 remittance as ''the cash bond.'' See JE 101.

14. The effect of Amstar's acts, words, and course of conduct, by a preponderance of the evidence, is an intention to treat the December 1990 remittance as a cash bond, to stop interest from running, and to ratify

[8] Robbins had many conversations with Carnie, Twenty's predecessor as Director of Taxes, about the possibility of a cash bond deposit to stop interest from running and came to believe that Carnie, after consulting with Amstar, desired to remit a cash bond. See Tr. at 211:9–18, 213:6–15, 217:4–218:2.

Twenty's designation of the December 1990 remittance as a cash bond.[9]

IRS's Treatment of the December 1990 Remittance

15. The IRS and Robbins treated the December 1990 remittance as if it were a cash bond. Robbins discussed a cash bond with both Carnie and Twenty. Upon receiving the December 1990 remittance from Twenty, Robbins drove to Springfield, Illinois in order to get the check "posted to the taxpayer's account that very day, so that the interest stop[ped] running on December 14," Tr. at 233:18–19, which is the purpose of a cash bond. She also instructed her secretary to prepare a Payment Posting Voucher for the remittance as a cash bond the "very day" Robbins received the check. See id. at 232:17–25. Robbins testified (very credibly) that she intended the remittance be processed as a cash bond. See Tr. at 231:2–9. When Williams prepared the RAR, she treated the remittance as a cash bond. See id. at 265:19–266:22; see also JE 31. And, the IRS assigned the December 1990 remittance a DLN number within blocking series 999, indicating cash bond treatment. See Stip. Facts ¶s 133–34. Because the Payment Posting Voucher may be read to contain (limited) indicia of both a cash bond (i.e., the box checked "Send 316(C)") and payment of tax (i.e., use of the 670 transaction code), the voucher itself "supports either the payment or deposit interpretation, and accordingly it is not persuasive as to either." Malachinski, 1999 WL 349342, at n.4.

Statute of Limitations

[2] 16. A six year statute of limitations applies here, and the suit is timely. "The Government by appropriate action can recover funds which its agents have wrongfully, erroneously, or illegally paid. No statute is necessary to authorize the United States to sue in such a case. The right to sue is independent of statute." United States v. Wurts, 303 U.S. 414, 415 [20 AFTR 803] (1938) (citation and internal quotation marks omitted); see also Bechtel v. Pension Benefit Guar. Corp., 781 F.2d 906, 907 (D.C. Cir. 1985) ("The government's right to recoup funds owing to it is beyond dispute . . . ."). "The Government's right to recover funds, from a person who received them by mistake and without right, is not barred unless Congress has clearly manifested its intention to raise a statutory barrier." Wurts, 303 U.S. at 416 (internal quotation marks omitted).[10]

17. Because the Court has concluded that the December 1990 remittance was a deposit in the nature of a cash bond, and because it is well-settled that interest does not accrue on a cash bond, Amstar was unjustly enriched by the $1,526,100.60 interest payment. "Such an action for unjust enrichment is based on a quasi-contract, which is synonymous with a contract implied in law." United States v. Michigan, 851 F.2d 803, 810 (6th Cir. 1988) (citation and internal quotation marks omitted) (applying six-year statute of limitations to action brought by United States to recover state sales tax erroneously paid by federal credit unions); see also United States v. DeKalb County, 729 F.2d 738, 741 (11th Cir 1984) (holding that action by United States to recover taxes paid erroneously "sounded in quasi-contractus for the recovery of its treasury funds paid by mistake which resulted in the unjust enrichment of the county"); United States v. Limbs, 524 F.2d 799, 802 n.3 (9th Cir. 1975) (stating that Congress intended ¶ 2415(a) "to include quasi-contracts involving unjust enrichment wherein the debtor receives money from the Government to

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[9] This is evident notwithstanding Defendant's argument that Amstar "acted contrary to making a deposit in the nature of a cash bond on at least two occasions . . . [by] deduct[ing] the interest it paid on the remittance [and] fil[ing] a refund claim requesting return of its remittance." Def. Prop. Findings at 15.

[10] Defendant contends that this action is barred by the two-year statute of limitations set forth in 26 U.S.C. § 6532(b). See Def. Prop. Findings at 18. Section 6532(b), entitled "Suits by United States for recovery of erroneous refunds." provides, in pertinent part: "Recovery of an erroneous refund by suit under [26 U.S.C. § 7405] shall be allowed only if such suit is begun within 2 years after the making of such refund . . . ." 26 U.S.C. § 6532(b). The Government argues that this action is governed by the six-year statute of limitations established by 28 U.S.C. § 2415. See Pl. Prop. Findings at 19. Section 2415, entitled "Time for commencing actions brought by the United States," provides, in pertinent part: "[E]very action for money damages brought by the united States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues . . . ." 28 U.S.C. § 2415(a).

which he is not entitled, regardless of whether the payment is made pursuant to agreement or as a gratuity''). This action, seeking recovery of interest erroneously paid on a cash bond, is a quasi-contractual claim which the Government timely instituted within six years. See 28 U.S.C. § 2415(a).

IV. Interest

1. ''[W]hen a federal statute is silent concerning the availability of pre-judgment interest, a court may award prejudgment interest in accord with its equitable discretion.'' Rao v. New York City Health and Hosps. Corp., 882 F. Supp. 321, 325 (S.D.N.Y. 1995). Furthermore, ''[a] district court has wide discretion in determining a reasonable date from which to award prejudgment interest.'' Nat'l Communications Ass'n, Inc. v. Am. Tel. & Tel. Co., 92 Civ. 1735 (LEP), 1999 WL 258263, at 6 (S.D.N.Y. Apr. 29, 1999). A discretionary award of prejudgment interest is premised ''on the need for full compensation and fairness under the circumstances . . . .'' Wickham Contracting Co., Inc. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, AFL-CIO, 955 F.2d 831, 836 (2d Cir.), cert. denied, 506 U.S. 946 (1992); see also West Virginia v. United States, 479 U.S. 305, 310 n.2 (1987).

2. ''Postjudgment interest is designed to compensate the plaintiff for the delay it suffers from the time damages are reduced to an enforceable judgment to the time the defendant pays the judgment.'' Andrulonis v. United States, 26 F.3d 1224, 1230 (2d Cir. 1994).

3. The Court would like the parties to submit (short) supplemental letter briefs on the issue of interest, including whether it should be awarded and, if so, in what amount(s).

V. Conclusion and Order

For the foregoing reasons, the Court determines that the December 1990 remittance was a deposit in the nature of a cash bond. Prior to entry of judgment and on or before September 4, 2002, the parties are directed (simultaneously) to serve and file supplemental letter briefs (5 pages or less, double-spaced) on the issue(s) of interest, including, without limitation, whether it should be awarded and, if so, in what amount(s).

Dated: New York, New York

August 28, 2002

RICHARD M. BERMAN, U.S.D.J.

¶2002-5430

In Re: William D. WOODS, Debtor. William D. WOODS, PLAINTIFF v. INTERNAL REVENUE SERVICE, and Indiana Department of Revenue, DEFENDANTS. U.S. Bankruptcy Court, Southern Dist. of Indiana, (Bktcy Ct IN) Case No. 01-01694-JKC-7; Adv. Pro. No. 01-212, Aug. 30, 2002. Years 1988, 1989, 1990, 1991, 1992, 1993. Decision for Taxpayer in part.

1. Tax claims in bankruptcy—dischargeability—untimely filed returns—what constitutes returns. 11 USC §523(a)(1)(B) didn't except from discharge Chap. 7 debtor's tax debts, even though he didn't file Forms 1040 until after IRS prepared return substitutes and made involuntary assessments: taxpayer's late-filed forms qualified as returns for §523(a)(1)(B) purposes where their facial completeness and accuracy showed, in absence of any evidence to contrary, honest attempt to comply with tax laws. Bankruptcy court declined to follow 6th Cir. per se rule against allowing forms filed post-assessment, based on reasoning that accepting late-filed forms wasn't inconsistent with statute's goal of giving IRS sufficient collection time and that §523(a)(1)(C) made adequate provision for late-filers. *Reference:* United States Tax Reporter ¶68,726.52(27).

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF INDIANA INDIANAPOLIS DIVISION,

ORDER DENYING UNITED STATES' MOTION FOR SUMMARY JUDGMENT AND GRANTING PARTIAL SUM-

MARY JUDGMENT IN FAVOR OF DEBTOR

James K. Coachys, Judge United States Bankruptcy Court

William D. Woods (the "Debtor") commenced an adversary proceeding pursuant to Section 523 of the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.* (the "Code"), seeking a determination that certain state and federal income tax liabilities are dischargeable. In response, the United States moved for summary judgment and argued that the subject federal income taxes are excepted from discharge pursuant to 11 U.S.C. § 523(a)(1)(B)(i), which prohibits the discharge of taxes for which the debtor did not file a "return." The Debtor then filed a cross-motion for summary judgment, insisting that the Forms 1040 ("1040s") he filed with the Internal Revenue Code ("IRS"), while admittedly filed only after the IRS involuntarily assessed the taxes against him, constitute "returns" for purposes of Code § 523(a)(1)(B). The Court, having considered the parties' arguments, now grants partial summary judgment in favor of the Debtor and against the United States. It appears, however, that the United States is free to argue, if it so chooses, that the subject taxes are nondischarge under § 523(a)(1)(C). As such, the Court will issue an order scheduling this matter for further proceedings.

Facts

The operative facts are not in dispute. On November 14, 1994, the IRS prepared "substitutes for returns" ("SFRs"), for the years 1988 through 1993 pursuant to 26 U.S.C. § 6020(b). Thereafter, the IRS sent notice of the proposed deficiencies ("30-day Letters") to the Debtor, to which he failed to respond. The IRS then sent the Debtor formal notice of deficiency letters, ("90-day letters"). The Debtor did not timely file a petition with the United States Tax Court challenging the deficiencies and, on August 21, 1995, the IRS assessed the tax deficiencies against the Debtor after waiting the statutorily-prescribed period.

Following the involuntary assessments, the Debtor executed a tax collection waiver and entered into an installment agreement with the IRS. The, by letter dated April 25, 1997, the Debtor offered $8,000 to compromise his tax liabilities, an offer which the IRS rejected. Thereafter, on December 8, 1997, the Debtor filed 1040s for the tax years 1988 through 1993. The purported "returns" contained substantially the same information as the SFRs prepared by the IRS. However, two of the 1040s reported increases in the Debtor's tax liability, while two others reported decreases in the Debtor's liability. There appears to be no dispute that the Debtor signed the 1040s under penalty of perjury.

On February 12, 2001, the Debtor filed a voluntary petition under Chapter 7 of the Code and then commenced this adversary proceeding seeking, in part, a determination that his federal tax liabilities for the years 1988 through 1993 are dischargeable pursuant to Code §§ 523(a)(1)(B) and 727(a). As indicated above, both parties have moved for summary judgment. For the reasons stated below, the Court must conclude that the Debtor's federal tax liabilities are not excepted from dischargeable pursuant to § 523(a)(1)(B).

Discussion and Decision

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510–11, 91 L.Ed.2d 202 (1986). The mere existence of a factual dispute will not bar summary judgment unless "the disputed fact is outcome determinative under governing law." *Egger v. Phillips*, 710 F.2d 292, 296 (7thCir.1983), *cert. denied*, 464 U.S. 918 (1983). When a summary judgment motion is made and supported by accompanying affidavits, the party opposing summary judgment may not rely on the mere allega-

tions of his pleadings. Rather, ''the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.'' *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir.1994) (quoting Fed.R.Civ.P. 56(e).

In considering a motion for summary judgment, a court must review the record and draw all reasonable inferences in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255, 106 S.Ct. 2505; *Del Raso v. U.S.*, 244 F.3d 567, 570 (7thCir.2001). If the party opposing the motion does not present evidence that would permit the finder of fact to find in his favor on a material question, then the court must enter summary judgment against him. *Waldridge*, 24 F.3d at 920 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson*, 477 U.S. at 249–52).[1]

The party seeking to establish an exception to the discharge of a debt bears the burden of proof. *Selfreliance Fed. Credit Union v. Harasymiw (In re Harasymiw)*, 895 F.2d 1170, 1172 (7th Cir.1990). The United States Supreme Court has held that the burden of proof required to establish an exception to discharge is a preponderance of the evidence. *Grogan v. Garner*, 498 U.S. 279 [70 AFTR 2d 92-5639], 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). To further the policy of providing a debtor a fresh start in bankruptcy, ''exceptions to discharge are to be construed strictly against a creditor and liberally in favor of the debtor.'' *Goldberg Sec., Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 524 (7th Cir. 1992) (quoting In re *Zarzynski*, 771 F.2d 304, 306 (7th Cir. 1985)).

[1] Code § 523 enumerates specific exceptions to the dischargeability of debts. As it relates to the present case, § 523 provides:

> (a) A discharge under section 727 ... does not discharge an individual debtor from any debt—
>
> (1) for a tax or a customs duty—
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a return, if required—
>
> (i) was not filed; or
>
> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

11 U.S.C. § 523(a)(1). Under this provision, ''tax on or measured by income or gross receipts'' for the three years prior to the commencement of a bankruptcy case is not dischargeable. *See* 11 U.S.C. § 507(a)(8)(A). Furthermore, only taxes for which a ''required return'' was filed more than two years before the commencement of the bankruptcy case are dischargeable.

There is no question in this case that the tax liabilities in question arose more than three years before the commencement of the case and that the Debtor's 1040s were filed more than two years before the bankruptcy filing.[2] It would appear, then, that Debtor's federal tax liabilities are not excepted from discharge pursuant to § 523(a)(1)(B). However, the United States maintains that the 1040s filed by the Debtor do not constitute ''returns'' and that the taxes are therefore excepted from discharge pursuant to § 523(a)(1)(B)(i).

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[1] The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157.

[2] The Debtor only moved for declaratory relief under § 523 generally; he did not specify a particular subsection. However, the United States' motion for summary judgment argues that the subject taxes are excepted from discharge pursuant only to § 523(a)(1)(B); no argument under § 523(a)(1)(C) was presented. As indicated later in this opinion, the United States is not precluded from seeking a nondischargeability determination under § 523(a)(1)(C).

Neither the Bankruptcy Code nor Internal Revenue Code define ''return,'' and, as a result, a great deal of debate has been generated in the application of § 523(a)(1)(B). Unfortunately, the question raised by the parties' summary judgment motions has not been addressed by the Seventh Circuit, nor resolved by the Supreme Court. In the absence of any binding authority, the Court must choose between two basic lines of reasoning. *Compare, e.g., In re Hindenlang*, 164 F.3d 1029 [83 AFTR 2d 99-509] (6th Cir. 1999), *cert. denied*, 528 U.S. 810 (1999), *with In re Nunez*, 232 B.R. 778 [83 AFTR 2d 99-591] (BAP 9th Cir. 1999).

The United States urges the Court to follow the Sixth Circuit's decision in *Hindenlang*, 164 F.3d at 1029 [83 AFTR 2d 99-509]. As here, the debtors in that case filed Forms 1040 only after the IRS had prepared SFRs and assessed tax deficiencies against them. In determining whether the forms should be treated as ''returns,'' the Sixth Circuit utilized the four-part test articulated in *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd* 793 F.2d 139 [58 AFTR 2d 86-5290] (6th Cir. 1986).[3] Under this test, in order for a document to be a return, it must (1) purport to be a return; 2) be executed under penalty of perjury; (3) contain sufficient data to allow calculation of tax; and (4) represent an honest and reasonable attempt to satisfy the requirements of the tax law.

In applying the fourth prong of the test, the Sixth Circuit stated:

> A purported return filed too late to have any effect at all under the Internal Revenue Code cannot constitute ''an honest and reasonable attempt to satisfy the requirements of the tax law.'' Once the government shows that a Form 1040 submitted after an assessment can serve no purpose under the tax law, the government has met its burden [under § 523(a)(1)(B)(i)].

Id. at 1034. The Court further held that the United States was not required to introduce ''particularized evidence'' showing that a debtor did not file purported returns in good faith. Rather, the court concluded that ''when the debtor has failed to respond to both the thirty-day and the ninety-day deficiency letters sent by the IRS, and the government has assessed the deficiency, then the Forms 1040 serve no tax purpose, and the government thereby has met its burden . . . .'' *Id.* at 1034–35.[4]

Based primarily on principles of statutory construction, other courts have rejected the proposition that a Form 1040 filed after an involuntary assessment cannot constitute a ''return'' as a matter of law:

> The express language of § 523(a)(1)(B)(ii) does not distinguish between returns filed pre-assessment and those filed post-assessment. Congress easily could have conditioned discharge of tax debt on whether a return was filed prior to assessment . . . . Congress utilized assessment as a trigger for other time periods in the Bankruptcy Code. *See* 11 U.S.C. § 507(a)(8)(A)(ii) and (iii) (priority qualifications for certain allowed unsecured claims of governmental units). The Court disagrees with the unstated premise in *Hindenlang* that the case law, results and analysis under the Internal Revenue Code should, ipso facto, mandate the bankruptcy results for all debtor taxpayers who seek to fit within the limited protection of § 523(a)(1) . . . . To follow the [United States'] argument would undercut one of the principal policy considerations of the Bankruptcy Code to interpret exceptions to discharge narrowly and to provide the honest debtor with a fresh start.

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[3] As noted by the *Hindenlang*Court, the test in *Beard* was derived from two United States Supreme Court cases: *Germantown Trust Co. v. Commissioner*, 309 U.S. 304 [23 AFTR 1084], 60 S.Ct. 566, 84 L.Ed. 770 (1940) and *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 [14 AFTR 688], 55 S.Ct. 127, 79 L.Ed. 264 (1934).

[4] The court in *Hindenlang*left open the possibility that a Form 1040 submitted after an involuntary assessment might have a tax consequence if under the late return the debtor had a higher tax liability than under the substitute return. *Id.* at 1034, n.5. Here, the IRS concedes that the amounts set forth in the Debtor's 1040s in excess of the amount assessed by the IRS is dischargeable under § 523(a)(1)(B)(i). *See In re Hetzler*, 262 B.R. 47 [88 AFTR 2d 2001-6624] (Bankr.D.N.J. 2001)(debtor's tax liability is nondischargeable when ''return'' was filed only after IRS assessment; however, additional amount reported by late-filed return is dischargeable under § 523(a)(1)(B)(ii)). Given the Court's ruling, it need not decide whether this distinction is significant. However, the Court questions whether a Form 1040 can be deemed a ''return'' only as it relates to the additional tax liability stated therein. In this Court's opinion, it either is or is not a return.

In re Crawley, 244 B.R. 121, 127 [85 AFTR 2d 2000-1538] (Bankr.N.D.Ill.2000); *see also Nunez*, 232 B.R. at 778 [83 AFTR 2d 99-591] (1999) (''We will not read into Section 523(a)(1)(B) the requirement that a debtor must have filed a return prior to an assessment by the IRS); *In re Savage*, 218 B.R. 126, 132 [81 AFTR 2d 98-814] (BAP 10th Cir. 1998) (Section 523(a)(1)(B) 'creates a bright-line rule which says that if the debtor's return was filed less than two years pre-petition, the associated taxes are nondischargeable.').

According to these courts, the good faith inquiry under *Beard* should be rather limited: ''The good faith inquiry under Section 523(a)(1)(B) should focus on the debtor's intent at the time the returns are filed. This keeps the inquiry relevant to Section 523(a)(1)(B). A focus on the delay in filing, or the number of missed years is relevant instead to an inquiry under Section 523(a)(1)(C).'' *Nunez*, 232 B.R. at 783. In other words, the court's inquiry should be limited to whether the debtor's returns were filed in good faith ''on their face,'' *i.e.*, whether the proper forms were used, whether the forms are facially complete and whether the information contained therein is substantially accurate. *See id.; see also Crawley*, 244 B.R. at 128.[5]

Admittedly, the majority of courts that have examined this issue have ruled in favor of the United States and held that a return filed only after an involuntary assessment is no return at all. *See e.g., In re Olson,* 261 B.R. 752 [89 AFTR 2d 2002-800] (Bankr.M.D.Fla. 2001); *In re Sgarlat,*271 B.R. 688 [88 AFTR 2d 2001-6403] (Bankr.M.D.Fla. 2001); *In re Mickens*, 214 B.R. 976 [80 AFTR 2d 97-6773] (N.D.Ohio 1997), *aff'd*, 173 F.3d 855 [83 AFTR 2d 99-738] (6thCir.1999).[6] Nevertheless, this Court is not persuaded by these authorities. Rather, the Court is convinced that the ''good faith'' prong of the *Beard* test requires only a limited inquiry as to the completeness and accuracy of the subject tax forms. Assuming that the forms are, in fact, complete and accurate and that the other three prongs of the *Beard* test are met, then the subject forms constitute ''returns'' for purposes of Code § 523(a)(1)(B).

The relevant legislative history evidences that Code § 523(a)(1)(B), acting in concert with § 507,[7] was intended to balance several competing interests:

> The bill recognizes that the tax law places numerous restrictions on the collection of taxes. These limitations, which do not encumber private creditors, often complicate the collection of prepetition taxes. S.2266 also recognizes that tax collection rules for bankruptcy cases have a direct impact on the integrity of Federal, State and local tax systems. To the extent that debtors in bankruptcy are freed from paying their tax liabilities, the burden of making up the lost revenues must be shifted to other taxpayers.
>
> A three-way tension thus exists among (1) general creditors, who should not have the funds available for the payment of debts exhausted by an excessive accumulation of taxes for past years; (2) the debtor, whose ''fresh start'' should likewise not be burdened with such an

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[5] The United States argues that *Nunez* is no longer good law in light of the Ninth Circuit's opinion in *In re Hatton*, 220 F.3d 1057 [86 AFTR 2d 2000-5572] (9th Cir. 2000). In that case, the debtor failed to file a Form 1040 following an involuntary assessment, but instead entered into an installment agreement with the IRS. In finding that the subject taxes were not dischargeable, the court held that the debtor had failed to satisfy two prongs of the *Beard* test. First, he had never signed and filed his own Form 1040, nor had he signed the SFR prepared by the IRS. Second, the court found that he had not made an honest and reasonable attempt to comply with the tax laws; the evidence showed that he agreed to cooperate with the IRS only to avoid a wage garnishment and seizure of his property. Given that the debtor in *Hatton* had never filed a return, the Court fails to see how *Hatton* is necessarily inconsistent with *Nunez*. Furthermore, while the Ninth Circuit cited to *Hindenlang* for the *Beard* test, it does not explicitly adopt *Hindenlang's* bright-line test. As pointed out by one court, ''[h]ad the *Hatton* court adopted the *Hindenlang* Rule, it would not have needed to consider whether the Debtor had executed the submissions under penalty of perjury or the Debtor's subjective intent post assessment. The court would have simply determined that the debtor's post assessment submissions could not, as a matter of law, constitute returns under § 523(a)(1)(B).'' *In re Rushing*, 273 B.R. 223, 227 [88 AFTR 2d 2001-5348] (Bankr.D.Ariz.2001).

[6] The Court notes that at least one permutation of *Hindenlang's* bright-line test has been reported. In *Hetzler*, 262 B.R. at 54, the court stated that ''a debtor may successfully assert that he has made an honest and reasonable attempt to comply with the tax law, even after assessment, by providing sufficient facts to substantiate such an effort. For instance, the government's prima facie case could be defeated if the debtor shows that he was incapacitated for a period of time after a return was due, during which time an assessment by the IRS was made, and then attempted to comply as soon as he was able to do so.''

[7] Section 507 of the Code sets forth the relative priorities of various classes of expenses and claims, giving ''eighth'' priority to certain tax claims.

> accumulation; and (3) the tax collector, who should not lose taxes which he has not had reasonable time to collect or which the law has restrained him from collecting.

Staff of Senate Comm. on Finance, 95th Cong. Report on Bankruptcy Reform Act of 1978, (Comm. Print 1978). Even the *Hindenlang* court acknowledges that:

> [Section 523(a)(1)(B)] appears to serve two purposes: First the requirement of a two-year waiting period after filing a late return but before seeking discharge prevents a debtor who has ignored the filing requirements of the Internal Revenue Code from waiting until the eve of bankruptcy, filing a delayed but standard tax return form, and seeding discharge the next day. It is, in a sense, a provision affording notice and an opportunity to act, giving the IRS time to seek payment by levy or court proceeding. Second, § 523 forbids discharge when the debtor has acted fraudulently or in a manner calculated to evade or defeat a tax. This corresponds with the notion that ''good faith and candor are necessary prerequisites to obtaining a fresh start.''

Hindenlang, 164 F.3d at 1032 (quoting *Indudustrial Ins. Servs., Inc., v. Zick (In re Zick)*, 931 F.2d 1124, 1129 (6th Cir. 1991)).

Based on the foregoing, the Court must conclude that a definition of ''return'' that includes tax forms filed only after an involuntary assessment is consistent with the intent behind § 523(a)(1)(B)(i). The primary goal served by § 523(a)(1)(B)(i), *i.e.*, allowing the IRS sufficient time to collect the subject tax liabilities from a delinquent taxpayer debtor and possibly to better its position prepetition vis-à-vis the taxpayer's property, is met even when the returns are filed post-assessment (assuming that the requirement of § 523(a)(a)(B)(ii) are also met). To rule in favor of the United States in this instance would, however, significantly compromise § 523(a)(1)(B)'s other acknowledged goals.

Several of the courts which have ruled in favor of the United States on this issue have suggested that § 523(a)(1)(B) should not be interpreted to ''immunize non-reporting debtors who, once caught, seek to discharge their discovered tax obligations along with other debts in bankruptcy.'' *See, e.g., Mickens*, 214 B.R. at 978 (quoting *In re Haywood*, 62 B.R. 482, 486 (Bankr.N.D.Ill.1986)). This Court agrees that only the honest debtor should receive a fresh start in bankruptcy and that taxpayers should not be encouraged, through the benefits of bankruptcy, to frustrate the IRS (at great expense) by waiting until after assessment to file tax returns. However, there is nothing in the express language of § 523, nor in its legislation history, that suggests that § 523(a)(1)(B) was designed to address these concerns. In this Court's opinion, § 523(a)(1)(C) provides an adequate remedy for the United States in dealing with a taxpayer who fails to satisfy the tax laws by filing a timely return. As previously quoted herein, this section provides an exception to discharge for those taxes ''with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.''

This is not to say that the government will prevail in every ''late-filed return'' case brought under § 523(a)(1)(C). The court is required to look at the totality of the circumstances and, at least in this circuit, must find that the debtor (1) knew that he had a tax duty under the law, and (2) voluntarily and intentionally attempted to violate that duty. *In re Birkenstock*, 87 F.3d 947, 952 [78 AFTR 2d 96-5229] (7th Cir. 1996) (citing *In re Bruner*, 55 F.3d 195 [76 AFTR 2d 95-5024] (5th Cir. 1995)). Furthermore, there is some debate as to whether a taxpayer/debtor must engage in an ''affirmative'' act, or in other words, ''an act of commission'' to be found liable under § 523(a)(1)(C). In this circuit, however, there is support for the proposition that liability can be found even when the acts in question are acts of *omission*. For instance, in *Birkenstock*, the 7th Circuit cites approvingly to *In re Toti*, 24 F.3d 806 [73 AFTR 2d 94-2022] (6th Cir. 1994), in which the Sixth Circuit held that

acts of omission, *e.g.*, the nonpayment of taxes, coupled with a failure to file a return, can constitute a willful attempt to evade or defeat a tax. *See also Smith v. United States (In re Smith)*, 202 B.R. 277, 279 [78 AFTR 2d 96-5708] (S.D.Ind.1996)(''Section 523(a)(1)(C) does not require proof of affirmative act.) Based on these holdings, the United States can plausibly argue that a taxpayer/debtor who fails to file a tax return, wholly ignores the assessment process, and only begins to 'cooperate' with the IRS when the threat of collection is imminent can be held liable under § 523(a)(1)(C).[8]

In the present case, the undisputed evidence indicates that the Debtor filed the proper forms and that his 1040s were facially complete and accurate. In the absence of any other evidence, the Court must conclude that the Debtor's 1040s, on their face, constitute an honest and reasonable attempt to satisfy federal tax law. Since there is no dispute that the other three prongs of the *Beard* test have been met, the Court finds that the Debtor's 1040s for tax years 1988 through and including 1993 constitute ''returns'' for bankruptcy purposes and that his federal tax liabilities for those years are not excepted from discharge pursuant to § 523(a)(1)(B). Accordingly, the Court grants summary judgment to this extent in favor of the Debtor and against the United States. However, as previously noted, there is nothing to necessarily preclude the United States, if it so chooses, from proceeding against the Debtor under § 523(a)(1)(C). The Court will issue an order scheduling this matter for a status conference to discuss how the United States intends to proceed.

IT IS SO ORDERED.

Dated: AUG 30 2002

James K. Coachys, Judge

United States Bankruptcy Court

¶2002-5431

UNITED STATES OF AMERICA, PLAINTIFF v. William M. ARNOLD, Dorothy N. ARNOLD, Robert B. Arnold, DBA Marketing, INC., as successor in interest to Carnegie Multi International Corporation, DBA Marketing, Inc., as successor in interest to Carnegie Mortgage Securities, Inc., DBA Marketing, Inc., as successor in interest to Murtaugh Corporation, DBA Marketing, Inc., as successor in interest to Thoroughbred Sales, Inc., Nahama Limited Company, The Arnold Group, Inc., Multi-Housing of Florida, Inc., R.B. and Associates, Inc., The Chestertown Bank of Maryland, Barnett Bank of Marion County, N.A., and Colonial Bank, as successor to First Family Federal Savings & Loan Association, Regency Savings Bank, FSB, successor by assignment to Barnett Bank of Marion County, N.A., DEFENDANTS. U.S. District Court, Middle Dist. of Florida, (DC FL) CIVIL ACTION NO. 5:99-CV-161-OC-21GRJ, Aug. 23, 2002. Earlier proceedings at (2002, DC FL) 90 AFTR 2d 2002-6344; (2002, DC FL) 90 AFTR 2d 2002-6342; (2002, DC FL) 90 AFTR 2d 2002-6260; (2002, DC FL) 90 AFTR 2d 2002-5228; (2002, DC FL) 89 AFTR 2d 2002-2823; (2002, DC FL) 89 AFTR 2d 2002-2500; (2001, DC FL) 89 AFTR 2d 2002-1167, 2002-1 USTC ¶50300, amending (2001, DC FL) 88 AFTR 2d 2001-5867, 2001-2 USTC ¶50605; and (2001, DC FL) 88 AFTR 2d 2001-5284, 2001-2 USTC ¶50553. Decision for Govt.

1. Collection actions—sale of receivership estate property—''alternative amount'' withholding rule. Receiver's motion to confirm sale of receivership estate property was granted, authorizing receiver to proceed with private sale free and clear of any federal tax liens. Also, under Reg. §1.1445-2(d)(3)'s ''alternative amount'' withholding rule, taxpayer wouldn't realize any proceeds from sale,

[8] The Court notes that the willful failure to file a timely return is a misdemeanor under 26 U.S.C. § 7203. The late filing of a return or a document purporting to be a return does not alleviate liability. Failure to file a timely return also subjects a taxpayer to a 5% penalty per month up to a maximum of 25% of the taxes owed. 26 U.S.C. § 6651(a)(1).

so neither receiver nor purchaser were required to make any withholdings from proceeds. But, balance of proceeds after payment of fees and costs was to be paid over to govt. *Reference:* United States Tax Reporter ¶74,035.03(100); 14,455.01(10). IRC §1445; 7403.

IN THE UNITED STATES DISTRICT COURT OF THE MIDDLE DISTRICT OF FLORIDA OCALA DIVISION,

ORDER ON MOTION FOR CONFIRMATION OF SALE OF PROPERTY OF THE RECEIVERSHIP ESTATE (CHAMBERSBURG, FRANKLIN COUNTY, PENNSYLVANIA) TO JJG ENTERPRISES

RALPH W. NIMMONS, JR. UNITED STATES DISTRICT JUDGE

[1] Filed herein are the Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Chambersburg, Franklin County, Pennsylvania) to JJG Enterprises (Dkt. 309). A hearing to consider the Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Chambersburg, Franklin County, Pennsylvania) to JJG Enterprises (Dkt. 309) was held on August 23, 2002. In light of argument of counsel for the Receiver and the submissions of record, the Court finds that the sale of the property of the Receivership Estate consisting of the real property described in Exhibit ''A'' attached hereto to JJG Enterprises is in the best interest of the Receivership Estate and the Parties to this action.

The Receiver's submissions reflect that the competing offer received by the Receiver from Multilee, Inc. has been withdrawn and that Hillside Poultry Farms has not pursued it's initial interest in the Property. As a result, the offer of JJG Enterprises represents the best offer for the property.

The Receiver's submissions reflect that the owner of the Subject Property, Nahama, Ltd. (''Nahama''), is a foreign entity, subject to withholding tax upon the foreclosure sale of properties owned by them under I.R.S. Reg. §1.1445-2(d)(3). Under the special ''alternative amount'' withholding rules provided in I.R.S. Reg. §1.1445-2(d)(3), if this Court determines that the defendant will not realize any portion of the proceeds from the sale of the property, because the amount of the tax lien/judgment held by Plaintiff which is being foreclosed exceeds the amount of the proceeds to be realized from the sale otherwise due to the lien holder, then the ''alternative amount'' to be withheld is zero and no withholding of the sales proceeds is required. This Court entered a judgment against Nahama for $55,086,200.02, plus interest (Dkt. 251). As the tax lien judgment against Nahama exceeds the purchase price, it is clear that defendant would not realize any of the proceeds from the sale of the Subject Property.

Upon consideration thereof, it is hereby ORDERED:

1. The Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Chambersburg, Franklin County, Pennsylvania) (Dkt. 309), is GRANTED. The offer to purchase submitted by JJG Enterprises is APPROVED. The Receiver is authorized to execute the proposed Agreement of Purchase and Sale submitted by JJG Enterprises and to proceed with the sale of the Subject Property as fully described in Exhibit ''A'' attached hereto on the terms and conditions set forth in said agreement.

2. The private sale of the Subject Property known as Chambersburg, Franklin County, Pennsylvania, as fully described in Exhibit ''A'' attached hereto to JJG Enterprises is CONFIRMED.

3. The private sale of the Subject Property to JJG Enterprises shall be free and clear of any federal tax liens held by the United States of America.

4. The Court finds that under the special ''alternative amount'' withholding rule in I.R.S. Reg.§1.1445-2(d)(3), the Defendant, Nahama, will not realize any proceeds from the sale of the Subject Properties and therefore neither the Receiver nor JJG Enterprises is required to withhold any of the sale proceeds for the purpose of paying federal taxes on the sales.

5. The Receiver is authorized to satisfy any liens or encumbrances that are to be paid as a conditions of the sale, to pay all closing costs associated with the sale, including the Receiver's attorneys' fees and costs, and to pay the Receiver's commission pursuant to the provisions of the Order on Motion of Receiver for Approval of Receiver's Compensation Arrangements and for Authority to Pay the Receiver's Compensation and Expenses of the Receivership on a Monthly Basis (Dkt. 54). The Receiver shall disburse the balance of the sale proceeds to Plaintiff.

DONE AND ORDERED at Jacksonville, Florida this 23rdday of August, 2002.

RALPH W. NIMMONS, JR.

UNITED STATES DISTRICT JUDGE

¶2002-5432

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Curtis G. WENDELL, DEFENDANT-APPELLANT. U.S. Court of Appeals, Fourth Circuit, (CA4) No. 01-4994, Sept. 24, 2002. District Court affirmed per curiam. Decision against Taxpayer.

1. Tax crimes—tax evasion—U.S. Sentencing Guidelines. Taxpayer's sentence for tax evasion and mail fraud was affirmed per curiam: sentence imposed within properly calculated U.S.S.G. range was unreviewable on appeal. But, taxpayer had right to petition Supreme Court for further review. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §7201.

G. Ernest Skaggs, SKAGGS & SKAGGS, Fayettville, West Virginia, for Appellant. Kasey Warner, United States Attorney, Hunter P. Smith, Jr., Assistant United States Attorney, Charleston, West Virginia, for Appellee.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT,

Appeal from the United States District Court for the Southern District of West Virginia, at Beckley. (CR-01-165)

Charles H. Haden II, Chief District Judge.

Before WILKINS, MOTZ, and GREGORY, Circuit Judges.

OPINION

PER CURIAM:

UNPUBLISHED

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

[1] Curtis G. Wendell pled guilty to mail fraud, 18 U.S.C. § 1341 (2000), and tax evasion, 26 U.S.C. § 7201 (2000), and was sentenced to forty-three months of imprisonment. The district court arrived at this sentence based upon Wendell's undisputed Guideline range of thirty-seven to forty-six months. For the reasons that follow, we affirm.

On appeal, counsel has filed a brief under *Anders v. California*, 386 U.S. 738 (1967), alleging that there are no meritorious claims on appeal but raising one issue: whether the district court erred by not sentencing Wendell to the minimum sentence in his Guideline range. A sentence imposed within a properly calculated Guideline range, however, is unreviewable on appeal. *United States v. Jones*, 18 F.3d 1145, 1151 (4th Cir. 1994); *United States v. Porter*, 909 F.2d 789, 794 (4th Cir. 1990). Accordingly, this claim fails.

We have examined the entire record in this case, in accordance with the requirements of *Anders*, and find no meritorious issues for appeal. Accordingly, we affirm. This court requires that counsel inform his client, in writing, of his right to petition the Supreme Court of the United States for further review. If the client requests that a petition be filed, but counsel believes that such a petition would be frivolous, then counsel may move in this court for leave to withdraw from representation. Counsel's motion must state that a copy thereof was served on the client. We dispense with oral

argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

¶2002-5433

UNITED STATES OF AMERICA v. John FASSNACHT and Vincent Malanga. U.S. District Court, Northern Dist. of Illinois, (DC IL) No. 01 CR 0063, Sept. 20, 2002. Earlier proceedings at (2002, DC IL) 90 AFTR 2d 2002-5467; and (2002, DC IL) 89 AFTR 2d 2002-586. Year 1994. Decision against Taxpayers.

1. Tax crimes—obstruction of justice—bond pending appeal. Taxpayers were denied motion for bond pending appeal of their 18 USC §1503(a) convictions for obstruction of justice in connection with conspiracy to conceal $1.35 million from IRS: no ''close question'' about evidence of taxpayers' intent to obstruct justice existed where govt. showed that taxpayers lied to IRS, conspired with 3d party to corroborate their false statements and misled grand jury. Also, taxpayers were sufficiently apprised of charges against them where obstruction count tracked statutory language and incorporated by reference detailed allegations of their preparation of false documents, understanding with 3d party and other activities that they took in furtherance of scheme. *Reference:* United States Tax Reporter ¶72,125.01(15). IRC §7212.

United States District Court, N.D. Illinois, Eastern Division,

MEMORANDUM AND ORDER

MANNING, District Court J.

Defendants John Fassnacht and Vincent Malanga, pursuant to Federal Rule of Appellate Procedure 9(b) and the Bail Reform Act of 1984 (18 U.S.C. § 3143(b)), have moved this Court for bond pending appeal of their conviction for obstruction of justice. For the reasons set forth below, this Court DENIES Defendants' motions.

Because a complete summary of the indictment and the facts of this case are contained in this Court's July 18, 2002 Memorandum and Order denying Defendants' Motions for Judgment of Acquittal, the Court will only briefly review the facts here.

Defendants were charged with: (1) conspiring to commit tax evasion, in violation of 18 U.S.C. § 371 (Count 1); (2) tax evasion, in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2 (Counts 2 and 3); and (3) obstruction of justice, in violation of 18 U.S.C. § 1503(a) (Count 4). The Indictment also separately charged Fassnacht with making false statements to an Internal Revenue Service (''IRS'') agent, in violation of 18 U.S.C. § 1001 (Count 5). At the conclusion of the Government's case in chief, this Court granted Defendants' Motions for Judgment of Acquittal as to Counts 2 and 3 and denied the motions as to Counts 1, 4, and 5. After the jury found Defendants not guilty as to Counts 1 and 5 and guilty as to Count 4, Defendants moved this Court for a judgement of acquittal as to Count 4, which this Court denied. Defendants now come before the Court seeking bond pending appeal of their conviction of Count 4.

LEGAL STANDARD

The Bail Reform Act of 1984, 18 U.S.C. § 3143(b), governs the issue of release pending appeal by a defendant. The statute provides that a court may allow a convicted defendant to remain free on bond pending appeal if: (1) the defendant is not likely to flee or pose a danger to the community; (2) the appeal is not for the purpose of delay; and (3) the appeal raises a ''substantial question of law or fact likely to result in reversal, an order for a new trial, a sentence that does not include a term of imprisonment, or a sentence that reduces the term of imprisonment.'' 18 U.S.C. § 3143(b). See also United States v. Ashman, 964 F.2d 596, 598 (7th Cir.1992); United States v. Greenberg, 772 F.2d 340, 341 (7th Cir.1985).

Here, the first two inquiries--likelihood of flight and danger to the community--are not at issue. Thus, the sole contention is

whether Defendants have raised a substantial question of law or fact likely to result in reversal, an order for a new trial, or a reduced sentence.

Section 3143(b)(1)(B) places the burden on the defendant to show that: (1) the appeal presents a ''substantial'' issue; and (2) the substantial issue will ''likely'' affect the validity of the conviction. United States v. Shoffner, 791 F.2d 586, 588 (7th Cir.1986); United States v. Bilanzich, 771 F.2d 292, 298 (7th Cir.1985).

An issue is substantial if it presents ''a close question or one that very well could be decided the other way.'' Shoffner, 791 F.2d at 589. While ''[t]his standard does not require the district court to predict the outcome of the appeal[,]'' United States v. Hattermann, 853 F.2d 555, 557 n. 6 (7th Cir.1988), the court must find ''that the appeal could readily go either way, that it is a toss-up or nearly so.'' Greenberg, 772 F.2d at 341. This interpretation is based in part on the fact that Congress enacted section 3143(b) in part to reverse the presumption in favor of bail under the Bail Reform Act of 1966 and ''gives recognition to the basic principle that a conviction is presumed to be correct.'' Bilanzich, 771 F.2d at 298.

Next, the defendant must then demonstrate that the substantial issue will likely affect the validity of his conviction. See Shoffner, 791 F.2d at 588; Bilanzich, 771 F.2d at 298. The court therefore ''must determine whether a contrary appellate ruling is likely to require a reversal of the conviction or a new trial.'' Id. The defendant thus must do more than show that an error occurred at trial, the defendant must persuade the court that ''the appellate court is more likely than not to reverse the conviction or order a new trial on all counts for which imprisonment has been imposed.'' Bilanzich, 771 F.2d at 298.

Following these principles, the court must ''return its attention to its own analysis of these issues at earlier stages of the proceedings[,]'' Shoffner, 791 F.2d at 589, and provide a statement of its reasons for granting or denying the defendant's motion for bond pending appeal. See United States v. Swanquist, 125 F.3d 573, 575–76 (7th Cir.1997).

With these principles in mind, the Court now turns to the arguments raised in Defendants' Motions for Bond Pending Appeal.

ANALYSIS

[1] Defendants raise essentially the same arguments that were rejected by this Court in its July 18, 2002 Memorandum and Order denying Defendants Motions for Judgment of Acquittal. Essentially, Defendants contend they are entitled to bond because there is real possibility that the Seventh Circuit could find that: (I) the conduct proven at trial did not violate section 1503; or (II) Count 4 failed to adequately apprise Defendants of the charge of obstruction of justice. The Court will address each of these contentions in turn to determine if there is a substantial question of law or fact that is likely to result in a reversal or a new trial.

I. Obstruction of Justice Under Section 1503

Defendants contend that based on United States v. Schwartz, 283 F.3d 76 (2d Cir.2002) and United States v. Aguilar, 515 U.S. 593 (1995), the Seventh Circuit could find that the conduct proven at trial did not violate section 1503. While the Court believes that this issue was sufficiently addressed in its prior Memorandum and Order, the Court will nevertheless examine these cases and the Seventh Circuit's decision in United States v. Furkin, 119 F.3d 1276, 1282 [80 AFTR 2d 97-5352] (7th Cir.1997), which this Court relied on in denying the motions for judgment of acquittal, in determining whether Defendants have presented a ''substantial question of law or fact likely to result in reversal or a new trial.''

Before discussing these cases, however, the Court will briefly reiterate the history and purpose underlying the enactment of section 1503. Under section 1503(a) (the ''catch-all provision''), a defendant is guilty of obstruction of justice by ''corruptly or by threats or force, or by any threatening letter or communication, influ-

ences, obstructs, or impedes or endeavors to influence obstruct or impede, the due administration of law.'' 18 U.S.C. § 1503(a). Congress enacted the ''catch-all provision'' to ensure that criminal defendants could not ''circumvent the statute's purpose by devising novel and creative schemes that would interfere with the administration of justice but would nevertheless fall outside the scope of § 1503's specific prohibitions.'' United States v. Cueto, 151 F.3d 620, 630 (7th Cir.1998). In accordance with Congress' intent, courts interpret this provision to ''cover a broad spectrum of conduct'' so as ''to promote the administration of justice and to prevent the miscarriage of justice.'' Id. at 631. Consequently, courts hold that the defendant does not need to successfully obstruct the administration of justice to fall within the scope of section 1503. Id. at 633. See also United States v. Bucey, 876 F.2d 1297, 1314 (7th Cir.1989)('' the impossibility of accomplishing the goal of an obstruction of justice does not prevent a prosecution for the endeavor to accomplish the goal'').

Interpreting the ''catch-all provision,'' the Second Circuit, in Schwartz, 283 F.3d at 80, 110, overturned the conviction of several police officers for conspiracy to obstruct a federal grand jury by lying to investigators regarding the participation of one of the officers in an assault. In reversing the convictions, the Second Circuit found that the evidence at trial failed to show that when the defendants made the false statements to the investigators that they intended for the statements to be presented to a grand jury. Citing Aguilar, the Second Circuit held that to prove specific intent to obstruct justice, the government had to show that the defendants took the alleged actions knowing that they would have the ''natural and probable effect of obstructing'' the grand jury. Id. at 109.

The court found that the defendants did not know that their alleged false statements given to the federal investigators would be presented to a grand jury because the defendants had not been called to testify before the grand jury, the only subpoena issued was for one of the defendants' notebooks, and the investigators did not indicate that their statements would be repeated to the grand jury. Id. While the defendants might have ''hoped that [the false statements] would be provided to the grand jury, and surely there was that possibility,'' the court found that there was insufficient evidence for the jury to reasonably conclude that the defendants ''knew'' the statements would be submitted to the grand jury. Id. ''At best, the government proved that [the defendants], knowing of the grand jury investigation, lied to federal investigators regarding issues pertinent to the grand jury's investigation.'' Id.

In reaching its decision, the court in Schwartz relied on the Supreme Court's decision in Aguilar. In Aguilar, the Court held that ''if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct [justice under section 1503].'' 515 U.S. at 599. The defendant in Aguilar, a United States District Court Judge, was convicted under section 1503 for lying to FBI agents who were investigating an alleged conspiracy to influence the outcome of a habeas case. Id. at 600. The Court found the evidence offered by the government to be insufficient to support a conviction for obstruction because the government failed to show ''that [the defendant] knew that his false statement would be provided to the grand jury.'' Id. at 601. The evidence showed that the defendant lied to the investigating agent but before giving the false statement, asked the agent whether he was the target of a grand jury investigation. Id. The agent responded by stating ''[t]he is a grand jury meeting. Convening I guess that's the correct word. Um some evidence will be heard I'm ... I'm sure on this issue.'' Id. According to the Court, ''[s]uch conduct ... falls on the other side of the statutory line from that of one who delivers false documents or testimony to the grand jury itself.'' Id. at 601. The difference between these situations, according to the Court, lies in the fact that in the latter case, it is ''all but assure[d] that the grand jury will consider

the material in its deliberations,'' while the ''use [that] will be made of false testimony given to an investigating agent who has not been subpoenaed or otherwise directed to appear before the grand jury is far more speculative.'' Id. As a consequence, the Court concluded that the defendant's lying to the investigating agents ''cannot be said to have the natural and probable effect of interfering with the due administration of justice,'' and thus could not constitute grounds for a conviction of obstruction of justice. Id.

In contrast to Aguilar and Schwartz, the Seventh Circuit, in Furkin, 119 F.3d at 1283, affirmed a conviction for obstruction of justice under section 1503. Relying on Aguilar, the court noted that the knowledge and intent elements of section 1503 are interconnected in that to sustain a conviction, the government must show that defendant's alleged action ''must have [had] the natural and probable effect of interfering with the due administration of justice.'' Id. at 1282.

The defendant in Furkin was the owner of a company which was in the business of leasing amusement machines, e.g., pool tables and video game machines, to bars and restaurants. Id. at 1278. In addition, the defendant leased illegal gambling machines and failed to report the profits on these machines to the IRS. Id. At trial, the jury found that the defendant obstructed justice by having businesses who leased the gambling machines sign ''backdated'' leases and by continuing to split the profits on the machines with those businesses. Id. at 1282.

On appeal, the defendant argued that the government failed to show that he had the requisite intent because he never told the owners who signed the backdated leases ''to submit the false or backdated leases to the grand jury,'' and therefore, at most, he only intended the backdated leases to be used in an IRS investigation. Id. In re-jecting this argument, the court noted that the defendant's company was served with a grand jury subpoena, and therefore, the defendant was aware of the grand jury's investigation after that time. Id. The court also found that the evidence showed that at least one of defendant's customers testified at trial that the defendant told him that he was being investigated by the IRS and wanted the customer to ''lie to the grand jury about the lease.'' Id. Likewise, the evidence showed that the defendant persuaded other customers to sign backdated leases when he knew that they would be testifying before the grand jury. The court found that the defendant knew that the information regarding the leases was information sought by the grand jury, and therefore, even though the leases were given to the IRS, the defendant knew that they would wind up before the grand jury. Id. at 1282–83. Consequently, even though the witnesses never specifically testified that the purpose of the backdated leases was connected to the grand jury investigation, the court found that there was sufficient evidence to support a conviction under section 1503 because the defendant's actions had the ''natural and probable effect'' of interfering with the grand jury investigation. Id.

Here, based on the above authorities, Defendants contend that there was insufficient evidence presented at trial to show that they knew or should have been aware that the IRS agent they spoke to after LPM received the grand jury subpoena would testify or present evidence to the grand jury. While this might be one interpretation of the evidence, as this Court thoroughly discussed in its prior Memorandum and Order, evidence that Defendants lied to the IRS was not the sole basis of the Government's evidence that Defendants corruptly intended to endeavor to obstruct the grand jury. For example, a week after the search warrants were served at LPM's offices as part of the grand jury investigation, on April 1, 1996, the grand jury issued a subpoena to Fassnacht requiring him to provide documents related to LPM and ADIA. The same day on which the subpoena was issued, Fassnacht was interviewed by Agent Tice. Over the next couple of days, April 2–3, 1996, Malanga discussed the grand jury investigation with Fassnacht and Newell, in particular, the proposed false testimony which Ed Burke and Fassnacht

would present to the grand jury. In a conversation recorded by Newell on April 3, and played at the trial, Malanga specifically stated that Fassnacht's grand jury testimony was postponed. Newell testified that during a meeting between himself and Defendants, regarding the planning of the Burke story, the grand jury investigation was specifically discussed. Moreover, Fassnacht admitted, in a conversation taped by Newell, that he had not turned over all the documents requested in the grand jury subpoena.

Furthermore, the Government presented evidence showing that Malanga and Fassnacht conspired to ensure that Burke would "back-up" Defendants' story to the IRS. In exchange for providing the finders fee story, Burke was to receive ten to twenty percent of the funds from the Bermuda account. To corroborate Burke's story, Fassnacht stressed to Newell the importance of having Burke provide an invoice or "any other documentation" for the work he allegedly did for LPM in 1994. Likewise, Malanga told Newell that they would have to put together documents to support Burke's story. Subsequently, at Defendants' direction, Newell received a false invoice from Burke in Switzerland for $1.35 million for a finders fee he allegedly earned in 1993–94 for introducing ADIA and LPM. Additionally, Newell, at the direction of Defendants, created a false "itinerary" setting forth the chronology of the false finder's fee story.

Consequently, based on the totality of the evidence presented at trial, even applying a narrow reading of Aguilar and Schwartz, this Court finds that this case is closer to Furkin and that Defendants have failed to present a sufficient argument that there is "close question" regarding the sufficiency of the evidence as to Defendants' intent to obstruct justice under section 1503(a).

II. Sufficiency of Count 4

Defendants further contend that the Court should grant them bond on appeal because there is a realistic possibility that the Seventh Circuit could find that Count 4 failed to adequately apprise them of the charge of obstruction of justice and that this Court should have granted their pretrial motions for a bill of particulars.

As discussed in some detail in this Court's prior opinions, this Court finds that it is unlikely that the Seventh Circuit would find Count 4 was impermissibly vague. Count 4 tracks the language of section 1503 in alleging that from "approximately March 26, 1996 and continuing thereafter until in or about May 1996" Defendants "did corruptly endeavor to influence, obstruct and impede the due administration of justice namely, Federal Grand Jury investigation number 96 GJ 258 in the Northern District of Illinois." Count 4 incorporates by reference paragraphs 1–26, which further detail the obstruction of justice allegations against Defendants. Paragraphs 10–26 detail Defendants' scheme to concoct a plan to end the grand jury investigation. The plan called for Ed Burke to come forward and falsely state that the $1.35 million in the LPM Inc. account in Bermuda was a finder's fee which he earned for introducing LPM to ADIA. In exchange for this story, Burke was to be paid 10 to 20 percent of the $1.35 million. To corroborate Burke's story, Defendants conspired to prepare false documents including invoices, corporate records, and phone and travel records. In addition to the Indictment itself, the Government provided Defendants with the tapes and transcripts from Newell, which further detailed the obstruction of justice allegations. Consequently, this Court finds that there is not "a close question" as to whether Count 4 sufficiently apprised Defendants of the charges against, and therefore, Defendants' are not entitled to bond pending appeal.

CONCLUSION

For the forgoing reasons, this Court DENIES Defendants John Fassnacht and Vincent Malanga's Motions for Bond Pending Appeal [96-1 and 97-1]. It is so ordered.

¶2002-5434

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. James Robert McCAHILL, DEFENDANT-APPEL-

LANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 02-10045, Sept. 19, 2002. District Court vacated and remanded. Decision for Taxpayer.

1. Tax crimes—tax evasion—sentencing. Tax evader's sentence was vacated and remanded to allow district court to consider exercising its discretion to grant taxpayer 6-month downward departure to allow sentence to run concurrently with another undischarged federal sentence. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §7201.

United States Court of Appeals, Ninth Circuit.

Appeal from the United States District Court for the District of Arizona Paul G. Rosenblatt, District Judge, Presiding.

Before HUG, O'SCANNLAIN and TASHIMA, Circuit Judges.

MEMORANDUM*

[1] James Robert McCahill appeals his 15-month sentence imposed following his guilty plea conviction for two counts of attempted tax evasion, in violation of 26 U.S.C. § 7201. We review de novo a district court's determination that it lacked discretion to depart. United States v. Tucker, 133 F.3d 1208, 1214 [81 AFTR 2d 98-555] (9th Cir.1998). We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and we vacate and remand.

McCahill contends, and the government agrees, that the district court failed to recognize that it had the discretion under the sentencing guidelines to depart downward six months to allow the sentence in this matter to run fully concurrent with an undischarged federal sentence. We agree, and conclude that the district court did have that authority. See United States v. Kimble, 107 F.3d 712, 715 (9th Cir.1997) (stating that under U.S.S.G. § 5G1.3(c), a district court can impose a sentence "concurrent with or without credit for time served"); United States v. Sanchez-Rodriguez, 161 F.3d 556, 563–64 (9th Cir.1998) (en banc) (concluding that, under U.S.S.G. § 5K2.0, a district court can depart based on the lost opportunity to serve a greater portion of a state sentence concurrently with a federal sentence).

Accordingly, we vacate and remand to allow the district court to consider exercising its discretion to depart downward.

VACATED and REMANDED.

¶2002-5435

In Re: Morris D. KRUMHORN, Debtor. Morris D. KRUMHORN, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Illinois, (DC IL) No. 00 C 1585, Sept. 23, 2002. Bankruptcy Court reversed. Earlier proceedings at (2001, DC IL) 88 AFTR 2d 2001-6568, 2001-2 USTC ¶50701, affirming (2000, Bktcy Ct IL) 85 AFTR 2d 2000-907, 249 BR 295. Years 1979, 1981, 1982. Decision for Govt.

1. Review of bankruptcy court decision—jurisdiction—stay of enforcement pending appeal—Anti-Injunction Act. Bankruptcy court improperly granted Chap. 7 debtor stay pending appeal of judgment that his tax debts were excepted from discharge: stay violated AIA, which provided no exception for bankruptcy court actions; 11 USC §105's jurisdictional provisions didn't override AIA; and taxpayer couldn't show govt.'s inability to ultimately prevail on claim that it had already prevailed on in 2 prior rulings, or show that he would suffer irreparable harm and lacked alternative remedy. Also, govt.'s failure to request stay relief directly from bankruptcy court didn't preclude its claim since stay raised jurisdictional issue that could be raised at any time. *Reference:* United States Tax Reporter ¶74,215.05(5); 68,726.52(5). IRC §7421.

United States District Court, N.D. Illinois, Eastern Division,

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

MEMORANDUM AND ORDER

MANNING, District J.

This case was originally before the court on appeal from an order of Judge Barliant of the United States Bankruptcy Court for the Northern District of Illinois. The court affirmed the judgment of the bankruptcy court, concluding that: (1) Morris D. Krumhorn owed taxes to the Internal Revenue Service (the "IRS") for the tax years of 1978, 1981, and 1982; and (2) Krumhorn's tax debts to the IRS were excepted from any discharge granted under 11 U.S.C. § 727. See In re Krumhorn, No. 00 C 1221, 2001 WL 1155258 [88 AFTR 2d 2001-6568] (N.D.Ill. Sept. 28, 2001).

The government subsequently filed a motion to clarify or, alternatively, to lift any stay of enforcement of the judgment pending appeal because the court's prior opinion did not address the government's cross-appeal, which raised the stay issue. For the following reasons, the motion to clarify is granted, and the motion to lift any stay of enforcement of the judgment is granted. The stay order of the bankruptcy court is hereby reversed. This means that the IRS is free to seek enforcement of the bankruptcy court's judgment during Krumhorn's merits appeal, currently pending before the Seventh Circuit as Case No. 01-3763.

I. Background

The facts of this case were set forth in detail in the court's earlier opinion. See In re Krumhorn, No. 00 C 1221, 2001 WL 1155258 (N.D.Ill. Sept. 28, 2001). For purposes of this order, familiarity with this order is presumed, so the court will only briefly recap the relevant facts.

In 1997, after two unsuccessful challenges before the United States Tax Court, Krumhorn faced deficiency notices from the IRS totaling over $24 million. The deficiencies related to disallowed loss deductions from commodities transactions in 1978 that affected his tax returns for that year, and for the years 1981 through 1985. On May 8, 1998, Krumhorn filed a bankruptcy petition under Chapter 7 of the Bankruptcy Code. On August 27, 1998, the bankruptcy court issued an order discharging all of Krumhorn's dischargeable debts.

On September 2, 1998, Krumhorn filed an adversary proceeding in the bankruptcy court to determine the dischargeability of his tax liabilities for the years 1978, 1981, and 1982. After a trial on Krumhorn's adversary complaint, the bankruptcy court found that Krumhorn's tax liabilities were excepted from discharge. The bankruptcy court also concluded that Krumhorn was collaterally estopped from contesting the discharge issue because the tax court had already determined that he willfully attempted to evade or defeat his tax obligations.[1]

In response, Krumhorn filed a motion to alter or amend the judgment and to stay the court's order pending appeal. The bankruptcy court held a hearing on Krumhorn's motion and, on January 24, 2000, entered a minute order staying enforcement of its judgment until the completion of the appeals process. The government appeals from that order.

II. Discussion

As noted above, the bankruptcy court stayed enforcement of its order finding that Krumhorn's tax liabilities for the years 1978, 1981, and 1982 were excepted from discharge under 11 U.S.C. § 523(a)(1)(C) pending Krumhorn's appeal of that judgment. The government contends that the bankruptcy court lacked jurisdiction to stay enforcement of the judgment because such a stay amounts to a restraint on the collection of federal income tax and thus violates the Anti-Injunction Act, 26 U.S.C. § 7421(a). Alternatively, it asserts that, even if the bankruptcy court had the power to stay enforcement, it should have required Krumhorn to post a bond to protect its interests. In response, Krumhorn argues that the Anti-Injunction Act does not apply to the stay granted by the bankruptcy court. He further contends that to the extent the statute does apply, the government waived

[1] A debtor's willful attempt to evade or defeat his tax obligations renders his tax debts nondischargeable under Section 523(a)(1)(C) of the Bankruptcy Code.

this issue by failing to raise it in the bankruptcy court.

A. Jurisdiction

Proceedings relating to the enforcement of judgments are generally viewed as collateral and hence may be resolved by the district court even when a merits appeal is pending. See Peacock v.. Thomas, 516 U.S. 349, 350 (1996) (holding that a federal court has the authority to exercise supplementary jurisdiction to protect and enforce its judgments); see also Hasham v. California State Bd. of Equalization, No. 96 C 3326, 1998 WL 887083 1 (N.D.Ill.Dec. 11, 1998) (recognizing that the pendency of an appeal does not divest the district court of jurisdiction to consider other issues collateral to the appeal). Otherwise "[t]he judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended." Bank of United States v. Halstead, 23 U.S. 51, 53 (1825).

Alternatively, even if the stay issue is inextricably intertwined with the merits, jurisdiction is still proper. In that instance, Krumhorn's merits appeal would not have shifted jurisdiction to the appellate court because the appealed from order did not address all claims as to all parties. See, e.g., United States v. Ettrick Wood Prods., Inc., 916 F.2d 1211, 1216–17 (7th Cir.1990) (discussing finality of decisions disposing of fewer than all claims against all parties). Accordingly, the court will consider the merits of the stay issue.

B. Standard of Review

On an appeal from the bankruptcy court, the district court "may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instructions for further proceedings." Fed. R. Bankr.P. 8013. In reviewing the decision of a bankruptcy court, the district court is constrained to accept the bankruptcy court's findings of fact unless they are clearly erroneous. In the Matter of Salzer, 52 F.3d 708, 711 (7th Cir.1995); In the Matter of Excalibur Auto. Corp., 859 F.2d 454, 457 n. 3 (7th Cir.1988). However, there is no presumption of correctness as to the bankruptcy court's conclusions of law and, accordingly, the court reviews the issues of law in this case de novo. In the Matter of Salzer, 52 F.3d at 711; see also Telesphere Liquidating Trust v. Galesi, 246 B.R. 315, 317 (N.D.Ill. Mar. 16, 2000).

C. The Anti-Injunction Act

[1] The United States contends that the Anti-Injunction Act deprived the bankruptcy court of subject matter jurisdiction to issue the stay pending appeal. Krumhorn appears to be implicitly arguing that the government waived this argument by failing to present it to the bankruptcy court. Federal courts always have jurisdiction to determine their jurisdiction, Flores-Leon v. I.N.S, 272 F.3d 433, 437 (7th Cir.2001), and a party cannot waive subject matter jurisdiction, Weaver v. Hollywood Casino-Aurora, Inc., 255 F.3d 379, 381 (7th Cir.2001). Thus, the court must consider the applicability of the Anti-Injunction Act.

As a preliminary matter, the court notes that the government did not present its Anti-Injunction Act argument to the bankruptcy court. Generally, Bankruptcy Rule 8005 states that a motion for a stay of a judgment, order, or decree of the bankruptcy court must be made in the first instance in the bankruptcy court. Fed. R. Bankr.P. 8005. Nevertheless, the government may seek to modify or terminate the bankruptcy court's stay if it shows why it did not seek this relief from the bankruptcy court in the first instance. Id.

District courts and bankruptcy appellate panels have dismissed appeals from bankruptcy court orders based on an unexplained failure to apply first to the bankruptcy court. See, e.g., In re Zahn Farms, 206 B.R. 643, 644 (2d Cir. BAP1997); In re Duncan, 107 B.R. 758, 759 (W.D.Okla. Dec. 9, 1988); In re Wymer, 5 B.R. 802, 807–8 (9th Cir. BAP1980). As noted above, however, a challenge to the bankruptcy court's subject matter jurisdiction is proper at any time. See Weaver v. Hollywood Casino-Aurora, Inc., 255 F.3d at 381; see also Autuori v. Amann, No. 96 C 182, 1998 WL 704206 3 (N.D.Ill. Sept. 30, 1998) (noting that failure to challenge jurisdiction in the bankruptcy court does

not waive the argument on appeal because "subject matter jurisdiction . . . cannot be waived").

Here, the government concedes that it failed to request relief from the stay in the bankruptcy court but contends that it was not required to do so because the bankruptcy court lacked jurisdiction to enter the stay order in the first place. The basis of the government's argument is that the Anti-Injunction Act precluded the bankruptcy court from providing any injunctive relief. Thus, the initial question the court must resolve is whether the Anti-Injunction Act raises a question of subject matter jurisdiction. If it does not, the government has waived its right to raise the argument for the first time on appeal; if it does, the court may reach the merits of the government's argument.

The Anti-Injunction Act provides that, with certain limited exceptions, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). The Anti-Injunction Act withdraws jurisdiction from state and federal courts to hear suits requesting injunctions prohibiting the collection of federal taxes. See, e.g., Enochs v. Williams Packing Navigation Co., 370 U.S. 1, 5 [9 AFTR 2d 1594] (1962) (holding that "[t]he object of § 7421(a) is to withdraw jurisdiction from the . . . courts to entertain suits seeking injunctions prohibiting the collection of federal taxes"); see also In the Matter of LaSalle Rolling Mills, Inc., 832 F.2d 390, 392 [60 AFTR 2d 87-5724] (7th Cir.1987) (recognizing that "the Anti-Injunction statute itself withdraws jurisdiction").[2] Thus, it presents a subject matter jurisdiction issue which cannot be waived. Accordingly, the court will turn to the merits of the government's argument.

The Anti-Injunction Act prohibits suits in any court "for the purpose of re-straining the assessment or collection of any tax." 26 U.S.C. § 7421(a). The pur-pose of the statute is to protect "the Gov-ernment's need to assess and collect taxes as expeditiously as possible with a mini-mum of preenforcement judicial interfer-ence, and to require that the legal right to the disputed sums be determined in a suit for refund." Bob Jones Univ. v. Simon, 416 U.S. 725, 736 [33 AFTR 2d 74-1279] (1974), overruled on other grounds, South Carolina v. Regan, 465 U.S. at 379; ; see also Enochs v. Williams Packing Navigation Co., 370 U.S. at 7. While the Act's language is broad, there are several exceptions to the basic rule that the disputes over taxes must be determined in a refund suit. 26 U.S.C. § 7421(a). Unfortunately for Krumhorn, orders by the bankruptcy court to stay the enforcement of its judgments pending appeal are not among them.[3] See In the Matter of LaSalle Rolling Mills, Inc., 832 F.2d at 392.

Congress has not chosen to include bankruptcy court adjudications within the list of exceptions provided for in Section 7421(a). Although the Bankruptcy Code has been amended several times since its original enactment in 1954, there is no specific provision in the Code indicating

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[2] The doctrine enunciated in Enochs v. Williams Packing & Navigation Co. was partially modified by a subsequent Supreme Court case addressing the Anti-Injunction Act. See South Carolina v. Regan, 465 U.S. 367, 367–8 [53 AFTR 2d 84-732] (1984). South Carolina v. Regan is discussed infra, and any modification of the rule in Enochs is irrelevant for the purposes of this opinion. See In re Dore & Associates Contracting, Inc., 45 B.R. 758, 760–62 [55 AFTR 2d 85-1307] (Bankr.E.D.Mich.1985) (discussing the interplay of Enochs and Regan).

[3] Also unfortunate for Krumhorn is his apparent confusion as to the relief sought in the bankruptcy court. Krumhorn argues that the stay granted by Judge Barliant was a reinstatement of the automatic stay, pursuant to Section 362 of the Bankruptcy Code, which came into existence when Krumhorn filed his petition in that court. Krumhorn then focuses the better part of his brief on the differences between an automatic stay and other types of injunctions against governmental action. Not only is his argument confusing, it is plainly incorrect. Krumhorn's own motion seeking the stay of enforcement from the bankruptcy court cites Bankruptcy Rule 8005 as the basis for relief. Furthermore, the automatic stay under § 362 had been lifted when the bankruptcy court entered judgment in the adversary proceeding, nearly eighteen months prior to Krumhorn's motion. The request for a discretionary stay under Rule 8005 is not the same as a request for reinstatement of an automatic stay. In any event, Krumhorn's attempt at distinguishing an automatic stay is unpersuasive. The court sees no meaningful distinction between an automatic stay and a discretionary stay that would warrant different treatment under the Anti-Injunction Act. To hold that the Anti-Injunction Act prohibits a court from enjoining the IRS from collecting taxes pursuant to a discretionary stay, but does not prevent it from enjoining taxes pursuant to an automatic stay would promote neither the policies of the Anti-Injunction Act nor those of the Bankruptcy Code. See In the Matter of Universal Life Church, 191 B.R. 433, 439–40 [76 AFTR 2d 95-7478] (E.D.Cal. Nov. 6, 1995) (recognizing the extensive scope of the Anti-Injunction Act), affirmed in part and dismissed in part by 128 F.3d 1294 [80 AFTR 2d 97-6872] (9th Cir.1997). As discussed above, the underlying policy of the Anti-Injunction Act is to ensure the government's ability to assess and collect taxes without judicial intervention. See Bob Jones Univ. v. Simon, 416 U.S. at 736; see also Enochs v. Williams Packing Navigation Co., 370 U.S. at 7. This policy applies regardless of the form of the injunction.

that Congress intended to supercede the Anti-Injunction Act. Id. at 394. The only possible section provides that the bankruptcy court ''may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the [Bankruptcy Code].'' 11 U.S.C. § 105(a). The Third Circuit has held that using this section to create a judicially fashioned bankruptcy court exception to the Anti-Injunction Act would contravene clear congressional intent, In the Matter of Becker's Motor Trans. Inc., 632 F.2d 242, 246 [47 AFTR 2d 81-1262] (3d Cir.1980). This court sees no convincing reason to disagree.

In addition to the statutory exceptions to the Anti-Injunction Act, the Supreme Court has adopted two narrow judicial exceptions under which injunctive relief from the assessment or collection of taxes is allowed. Krumhorn does not contend that either exception applies, as his argument is limited to a claim that no exception applies since the statute itself does not apply. The court will nevertheless address the exceptions in the interests of completeness.

The first exception was articulated in Enochs v. Williams Packing Navigation Co., 370 U.S. at 7. Under this exception, an injunction may be obtained against the collection of tax if: (1) it is ''clear that under no circumstances could the Government ultimately prevail,'' and (2) equity jurisdiction otherwise exists to avoid irreparable injury. Id.; see also In the Matter of LaSalle Rolling Mills, Inc., 832 F.2d at 393.

The question of whether the government can ultimately prevail is factual. A suit seeking an injunction may only proceed where it is apparent, upon a review of the information available at the time of the suit, that the United States cannot establish its claim. Enochs v. Williams Packing Navigation Co., 370 U.S. at 7 (concluding that the ''most liberal view of the law and facts'' should be taken, requiring no more than good faith on the part of the government). Here, Krumhorn cannot establish that the United States could not prevail on the merits of the adversary claim, as the United States has already prevailed in proceedings in two separate courts. Specifically, after exhaustive litigation, the Tax Court conclusively found that Krumhorn was liable for the amount of taxes determined by the IRS. Furthermore, the Bankruptcy Court ruled that the tax liabilities are excepted from discharge, and found that Krumhorn willfully evaded his tax obligations.

Krumhorn also cannot establish that ''equity jurisdiction'' exists because he has failed to establish that he would suffer irreparable harm if the United States began to collect the tax liabilities due. This is because he failed to supply the transcript of the bankruptcy court hearing granting his motion for a stay (a likely place for the discussion of irreparable harm) and no other evidence on this issue is readily apparent in the record. It is well settled that a district court, sitting as an appellate court, is subject to the ordinary limitations on appellate tribunals. See, e. g., Standard Foundry Prod., Inc. v. State Bank of Pekin, No. 96 C 7230, 1998 WL 729586 2 (N.D.Ill. Oct. 15, 1998). It is not the court's duty to comb the record or search beyond it to seek support for an exception to the Anti-Injunction Act, especially where Krumhorn has not even attempted to make the argument in the first place. See United States v. Dweck, 913 F.2d 365, 372 (7th Cir.1990). The court thus turns to the second exception to the Anti-Injunction Act.

The Supreme Court developed this exception in South Carolina v. Regan, 465 U.S. at 367–8. In that case, the plaintiff challenged the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982. The defendant argued that the Anti-Injunction Act barred the plaintiff's suit since it was one to restrain the assessment and collection of taxes. The Court acknowledged the inequity of barring the plaintiff's suit when Congress had not provided the plaintiff with an alternative remedy to challenge the constitutionality of the statute. Id. As a result, the Court created a new exception to the Anti-Injunction Act to cover situations where a taxpayer has no alternative remedy to challenge the tax de-

termination. Id. (holding that Congress did not intend the Anti-Injunction Act to apply "to actions brought by aggrieved parties ... for whom [it] has not provided an alternative forum in which to litigate their claims").

This exception is clearly not applicable here. Krumhorn has already litigated his claim in two separate courts. Moreover, he remains entitled to file a suit for refund if the bankruptcy court's decision is ultimately reversed on appeal. See I.R.C. § 7422; see also In the Matter of LaSalle Rolling Mills, Inc., 832 F.2d 390, 393 [60 AFTR 2d 87-5724] (7th Cir.1987). Although Krumhorn may well prefer a stay pending the resolution of the appeals process, as opposed to being dunned by the IRS now, it is not necessary that the alternative "avenues of review are the best that can be devised." See Bob Jones Univ. v. Simon, 416 U.S. 725, 747 [33 AFTR 2d 74-1279] (1974); Wells v. United States, 98 B.R. 806, 809 n. 10 (N.D.Ill. Mar. 13, 1989). The exception in South Carolina v. Regan is, therefore, inapplicable.

Based on the above, the court finds that Krumhorn fails to meet any of the exceptions to the Anti-Injunction Act. It also finds that the Anti-Injunction Act proscribes the injunctive relief provided by the bankruptcy court. Because the court is lifting the stay, there is no need to address the government's alternative argument that Krumhorn should have been required to post a bond.

III. Conclusion

For the reasons specified above, the order of the bankruptcy court granting a stay of enforcement of its judgment pending appeal is REVERSED.

¶2002-5436

Gregg and Rose BENTLEY, PLAINTIFFS v. INTERNAL REVENUE SERVICE, ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of Ohio, (DC OH) CASE NO. 4:02 CV 1391, Sept. 10, 2002. Year 1999. Decision for Govt.

1. Collection due process—review of administrative determination—prior opportunity to contest deficiencies—frivolous return penalties. Pro se taxpayers' in forma pauperis petition to set aside IRS's administrative determination to proceed with collection of their frivolous return penalty and for damages was dismissed: petition didn't state claim or was frivolous under 28 USC §1915(e). Taxpayers weren't entitled to contest their underlying liability where they had received proper notice; delegation of authority argument was meritless; and certified assessment and payment transcripts established that all notice requirements were met. Also, taxpayers' offer to pay penalty on condition that Appeals Officer show them statutory basis for their underlying liability wasn't valid collection alternative; and jurisdiction was lacking to extent taxpayers were alleging procedural due process violations. *Reference:* United States Tax Reporter ¶63,305.01(15); 63,305.01(5). IRC §6330; 6702.

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO,

MEMORANDUM OF OPINION AND ORDER

JUDGE JAMES S. GWIN

On July 18, 2002, pro se plaintiffs Gregg and Rose Bentley ("the Bentleys") filed this in forma pauperis action against the Internal Revenue Service (IRS), United States Attorney General, United States Attorney and the United States of America. The Bentleys are seeking to set aside a Notice of Determination issued by the Internal Revenue Service (IRS) Appeals Office. Plaintiffs assert they are entitled to relief pursuant to 26 U.S.C. § 6330 because the Determination was issued in violation of law.

In 1999, the Bentleys filed an income tax return with the IRS wherein no income or expenses were claimed. The IRS subsequently determined that the Bentleys' income tax return was frivolous and assessed

a return penalty of $500.00 pursuant to 26 U.S.C. § 6702.[1]

The plaintiffs attached to their complaint a copy of the "Final Notice of Intent to Levy and Notice of Your Right to a Hearing" from the IRS, dated January 2, 2002, as Exhibit 2. In response to the Notice, they prepared a letter, dated January 24, 2001, to IRS agent Philip Hovanic requesting a Collection Due Process (CDP) hearing before an IRS Appeals Officer pursuant to 26 U.S.C. § 6330(b).[2] The Bentleys requested the hearing to deter-mine whether the United States "could le-gally seize Plaintiff's property pursuant to Internal Revenue Code Section 6331, in connection with a $500 frivolous 'penalty' which had been imposed by employees of the United States ... even though no court order, writ of garnishment or writ of attachment had ever been issued by any court of law with respect to Plaintiff's property." (Compl. at 2.) In the letter, the Bentleys requested that the IRS appeals officer provide the following information at the CDP hearing:

a. verification from the Secretary that the requirements of any applicable law or administrative procedure have been met as required by 6330(c)(1).

b. The documents which support imposition of the penalty or the signed document referenced in 26 U.S.C. §6751(b) which would reveal the names of the employees who imposed the "frivolous" penalty.

c. The federal identification numbers of the employees who imposed the "frivolous" penalty.

d. delegation orders from the Secretary delegating authority to those persons who imposed the "frivolous penalty"

e. The official job descriptions of the IRS employees who imposed the "frivolous" penalty.

f. a listing of Treasury Department regulations that allow IRS employees to impose "frivolous penalties".

(Compl. at 3.) The Bentleys also advised the hearing officer that they would challenge the "'existence of the underlying liability" of the tax that generated the 'frivolous penalty'" during the hearing (Compl. at 4.) In addition, the plaintiffs advised that they intended to audio record the entire hearing "to make an accurate record of what took place." (Compl. at 4.) They were advised by the appeals officer that they would not be permitted to audio record the hearing. The Bentleys then inquired whether this requirement was en-acted into law by Congress or entered into the Federal Register.

The requested CDP hearing was conducted before an IRS Appeals Officer on January 15, 2002. Plaintiffs complain that the appeals officer failed to provide any of the information they requested in their January 24, 2001 letter. In addition, they claim the appeals officer refused to accept their "'collection alternative' to pay the frivolous penalty if the officer would cite and produce the statue that established the 'underlying liability' for the tax." (Compl. at 5.) While the Bentleys contend that they furnished a copy of the Internal Revenue Code for the appeals officer to use, she refused to point out where "an income tax 'liability' was established by law." (Compl. at 6.)

The Bentleys assert that the appeals officer violated the law by failing to:

i. allow an audio recording or a transcript made by a court reporter

ii. provide proof that the notice sent to them regarding the CDP hearing was sent by someone delegated authority to do so by the Secretary

iii. provide verification from the Secretary as required by §6330(c)(1) & (c)(3)(A)

iv. provide a Notice and Demand for payment with regard to the taxes and penalties at issue

[1] Section 6702 provides that an individual shall pay a $500 penalty for filing a tax return that does not contain information on which the substantial correctness of the self-assessment may be judged.

[2] Section 6330 provides, in relevant part, that the IRS may not place a levy on any property of any person unless the Secretary of Treasury ("the Secretary") notifies the person in writing that he is entitled to a hearing before the levy is issued. 26 U.S.C. §6330(a)(1).

v. produce any statute requiring plaintiffs to pay a penalty or establishing an underlying income tax liability.

A Notice of Determination, dated June 20, 2002, was issued by the IRS Appeals Team Manager, Joseph Weiss, concluding that "[a] levy should be filed, since you have failed to pay penalty and interest due for the year 1999." (Ex. 1.) As an attachment to the Notice, Mr. Weiss provided a Discussion and Analysis that included "Relevant Issues Presented by the Taxpayer." In summarizing the issues raised by plaintiffs at the CDP hearing, Mr. Weiss noted "[y]ou questioned the validity of the underlying assessment based upon a perceived lack of a valid summary record of assessment." (Ex. 1 at 4.) Mr. Weiss noted that a Certified Transcript (Form 4340) was sent to the Bentleys for year 1999. The transcripts identify the taxpayer, type of tax, the tax periods, date of assessment, and the amount of assessment. He further noted that the five enumerated items fulfill the taxpayer information requirements set forth in Treasury Regulation section 301.6203-1. With regard to the plaintiffs' claim that they never received a notice and demand for payment of the $500 frivolous penalty, he added that a transcript of account for 1999 indicated that letters requesting payment were sent to the Bentleys.

[1] Based on the issuance of the Notice of Determination, the Bentleys now seek to declare the IRS Determination of June 20, 2002 invalid, order the government to reimburse them all of the costs in bringing this action and award them punitive damages for the "needless time, effort and money. Defendant's lawless actions compelled Plaintiff's [sic] to expend." (Compl. at 8.)

Although pro se pleadings are liberally construed, Boag v. MacDougall, 454 U.S. 364, 365 (1982) (per curiam); Haines v. Kerner, 404 U.S. 519, 520 (1972), the district court is required to dismiss an action under 28 U.S.C. §1915(e) if it fails to state a claim upon which relief can be granted, or if it lacks an arguable basis in law or fact.[3] Neitzke v. Williams, 490 U.S. 319 (1989); Lawler v. Marshall, 898 F.2d 1196 (6th Cir. 1990); Sistrunk v. City of Strongsville, 99 F.3d 194, 197 (6th Cir. 1996). For the reasons stated below, this action is dismissed pursuant to section 1915(e).

Under the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998), Pub.L. 105-206, sec. 3401, 112 Stat. 685, 746, Congress enacted section 6330 (pertaining to levies) to provide due process protection for taxpayers in tax collection matters. The relevant section addresses instances wherein the Secretary is authorized to collect taxes by levy upon property belonging to a person who is liable to pay a tax, but who neglects or refuses to pay such tax within 10 days after notice and demand for payment. 26 U.S.C. § 6331(a). Before proceeding with the collection by way of levy, however, the IRS must provide notice to the person of his or her right to a hearing on the matter. Id. § 6330(a). The individual has a right, within 30 days of the section 6330 notice, to request a collection due process hearing with the IRS Office of Appeals. Id. § 6330(a)(3)(B). During the due process hearing, the taxpayer may raise any issue relevant to the unpaid tax and the proposed levy, including challenges to the propriety of the levy and offers of collection alternatives. Id. § 6330(c)(2).

At the conclusion of a CDP hearing the Appeals Officer is tasked to formulate a determination based on: (1) the verification that the requirements of any applicable law or administrative procedure have been met; (2) the issues raised by the taxpayer; and (3) the proper balance between the need for efficient tax collection and the legitimate concern that any collection action be no more intrusive than necessary. See id. § 6330(c)(3). Following the hearing, the Appeals Officer sends a Notice of Determina-

[3] A claim may be dismissed sua sponte, without prior notice to the plaintiff and without service of process on the defendant, if the court explicitly states that it is invoking section 1915(e) [formerly 28 U.S.C. § 1915(d)] and is dismissing the claim for one of the reasons set forth in the statute. McGore v. Wrigglesworth, 114 F.3d 601, 608–09 (6th Cir. 1997); Spruytte v. Walters, 753 F.2d 498, 500 (6th Cir. 1985), cert. denied, 474 U.S. 1054 (1986); Harris v. Johnson, 784 F.2d 222, 224 (6th Cir. 1986); Brooks v. Seiter, 779 F.2d 1177, 1179 (6th Cir. 1985).

tion to the complainant that summarizes the matters raised during the hearing and responds to any offers or objections made by the complainant. If the individual is dissatisfied with the administrative determination, he or she has 30 days within which to appeal to ''the Tax Court (and the Tax Court shall have jurisdiction to hear such matter); or (B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.'' 26 U.S.C. §6330(d)(1). Any review of a determination is limited to matters actually raised at the administrative hearing. Temp. Treas. Reg. § 301.6330-IT(f) (2001).

Although section 6330 does not prescribe the standard of review a district court must apply in reviewing the Commissioner's administrative determinations, the legislative history indicates that the court should conduct a de novo review only ''where the validity of the tax liability was properly at issue at the administrative hearing.'' H. R. Conf. Rep. NO.105-599, at 266 (1998)(emphasis added).

An individual may raise any relevant issues relating to unpaid taxes or a proposed levy during the course of a CDP hearing, including spousal defenses to collection, challenges to the appropriateness of the Commissioner's intended collection action, and offers of alternative means of collection. 26 U.S.C. § 6330(c)(2)(A). The statute does, however, bar a person from contesting the existence or amount of the underlying taxes unless that individual did not receive a notice of deficiency for the taxes in question or did not otherwise have an earlier opportunity to dispute such tax liability. 26 U.S.C. § 6330(c)(2)(B).

While the Bentleys imply that they are challenging the validity of an underlying tax liability, a close analysis of the facts reveals that de novo review is not appropriate in this context. Clearly, the court is obligated to engage in a de novo review where the validity of the tax liability was properly at issue during the administrative hearing; however, the facts alleged indicate that the matter was not properly at issue during the CDP hearing. The statute is clear and unequivocal: a person is barred from contesting the existence or amount of the underlying taxes unless he or she did not receive a notice of deficiency for the taxes in question or did not otherwise have an earlier opportunity to dispute such tax liability. 26 U.S.C. § 6330(c)(2)(B).

In their January 24, 2001 letter to IRS Officer Phillip Hovanic, the Bentleys repeatedly maintained that they did not receive a ''statutory Notice and Demand for payment of taxes at issue as required by Code Sections 6203, 6321 and 6331.'' (Ex. 2, Bentley ltr. to Hovanic). This contention that they did not receive a particular form, which they deem ''the statutory form,'' is unavailing. The particular form on which a notice of assessment and demand for payment is made is irrelevant as long as it provides the taxpayer with all the information required under 26 U.S.C. § 6303(a). Elias v. Connett, 908 F.2d 521, 525 [66 AFTR 2d 90-5346] (9th Cir.1990). The Final Notice which plaintiffs attached to their complaint satisfies those requirements. Therefore, plaintiffs had no statutory basis for presenting a challenge to the underlying tax liability at the CDP.

Where the amount of the underlying tax liability is not properly part of the appeal, the court reviews a Notice of Determination for abuse of discretion. See Sego v. Comm'r of Internal Revenue, 114 T.C. 604, 609–10 (2000); Goza v. Comm'r of Internal Revenue, 114 T.C. 176, 179–80 (2000); see also MRCA Information Services v. United States, 145 F.Supp.2d 194, 199 [89 AFTR 2d 2002-694] (D.Conn. 2000) (holding that district court applies an abuse of discretion standard when reviewing an IRS Settlement Officer's determination under 26 U.S.C. § 6330). The Sixth Circuit has held that an administrative agency abuses its discretion where there is no evidence to support its decision, or the agency misapplies the law. See National Engineering & Contracting Co. v. Occupational Safety & Health Administration, 928 F.2d 762, 768 (6thCir.1991).

The IRS hearing officer did not abuse his discretion when he determined that the requirements of applicable law had been

met and that plaintiffs had been afforded statutorily-required administrative procedures. 26 U.S.C. § 6330(c)(1). The Bentleys did not address any of the statutorily-specified issues that may be raised at a collection due process hearing, such as spousal defenses, the appropriateness of an intended collection action, and possible alternative means of collection. 26 U.S.C. § 6330(c). Finally, the arguments that plaintiffs now raise in this court have been considered and rejected by other courts.

The Supreme Court has held that § 6331 authorizes the collection of federal taxes by levy on the property of any person who refuses or neglects to pay any tax. G.M. Leasing Corp. v. United States, 429 U.S. 338 [39 AFTR 2d 77-475] (1977). Further, any the claim that an IRS employee is not a ''delegate'' of the Secretary of the Treasury has been flatly rejected. Browder v. Commissioner, T.C. Memo 1990-408 [¶90,408 PH Memo TC], 1990 WL 108316.

In Hughes v. United States, 953 F.2d 531 [69 AFTR 2d 92-472] (9thCir.1993), an action brought by the taxpayers to enjoin the collection of income taxes, the Ninth Circuit rejected the argument that the IRS could not prevail because there was no evidence of any delegated authority from the Secretary of the Treasury to the various agents involved. The circuit court noted:

> Relevant statutes and regulations demonstrate ... that the Secretary does have the power to collect taxes, and that such power can be delegated to local IRS agents. 26 U.S.C. § 6301 provides that ''[t]he Secretary shall collect the taxes imposed by the internal revenue laws.'' The actual task of collecting taxes, however, has been delegated to local IRS directors. ''The taxes imposed by the internal revenue laws shall be collected by district directors of internal revenue.''26 C.F.R. § 301.6301-1. District directors in turn are authorized to redelegate the levy power to lower level officials such as collection officers. See IRS Delegation Order 191. The delegation of authority down the chain of command, from the Secretary, to the Commissioner of Internal Revenue, to local IRS employees constitutes a valid delegation by the Secretary to the Commissioner, and a redelegation by the Commissioner to the delegated officers and employees. See 36 C.F.R. § 301.7701-9.

Id. at 536.

To the extent the Bentleys are challenging the adequacy of the notice they received regarding the frivolous penalty, they have not set forth an adequate claim for relief. The appeals officer presented a Certified Transcript of Assessments and Payments for the plaintiffs' 1999 tax year reflecting, in part, the date and amount of assessment. In the absence of evidence to the contrary, these transcripts are sufficient evidence to establish compliance with Internal Revenue Code notice requirements. McCarty v. United States, 929 F.2d 1085, 1089 [68 AFTR 2d 91-5193] (5thCir.1991) (per curiam); see also United States v. Zolla, 724 F.2d 808, 810 [53 AFTR 2d 84-652] (9th Cir.1984)(in the absence of contrary evidence, IRS certificates are sufficient to establish that notices were properly made), cert. denied, 469 U.S. 830 (1984). Plaintiffs have not alleged any legal basis upon which they base their claim that the notice sent was insufficient. The statute only requires that the notice be 'sent by mail.' Courts have interpreted other provisions of the Internal Revenue Code requiring that a notice be mailed as not requiring that the taxpayer actually receive the notice. See, e.g., 26 U.S.C. §§ 6212(a) & 6213(a); Wiley v. U.S., 20 F.3d 222, 224 [73 AFTR 2d 94-1603] (6th Cir. 1994)(IRS is required to send notice of tax deficiency by certified or registered mail to taxpayer's last-known address before making assessment for delinquent taxes, but actual receipt of deficiency notice is not necessary); Guillen v. Barnes, 819 F.2d 975, 977 [60 AFTR 2d 87-5089] (10thCir.1987)(IRS must timely mail a deficiency notice to the taxpayer's last known address; it is not a requirement that the taxpayer actually receive that notice).

The Bentleys further alleges that the hearing officer erred because she refused

to accept the ''collection alternative'' they proposed which was that they would immediately pay the ''frivolous penalty'' if the appeals officer would merely cite and produce the statute that established the ''underlying liability'' for the tax. This allegation do not state a claim. The purpose of the provision for the consideration of collection alternatives described in Sections 6330(c)(2)(A) and 6330(c)(3)(C) is clearly intended to allow the taxpayer to propose a method of payment that will address payment of the underlying tax liability instead of satisfaction of a tax lien by a levy. The Bentleys allegation does not propose an ''alternative'' to collection by levy but rather proposes a condition to payment of the underlying liability. Therefore, this allegation does not state a claim upon which relief can be granted.

If the Bentleys are also seeking to assert a procedural due process claim, this court lacks jurisdiction. District courts have no jurisdiction over civil claims challenging taxes unless litigants first pay the assessed tax and then raise these claims in a refund suit. See 26 U.S.C. § 7421(a) (prohibiting suits to restrain assessment or collection of taxes); see also Flora v. United States, 362 U.S. 145, 148 [5 AFTR 2d 1046] (1960) (holding 28 U.S.C. § 1346(a), which gives district courts jurisdiction over civil suits challenging tax assessments, requires full payment of assessed tax prior to suit).

Based on the foregoing, the court find that the IRS appeals officer did not abuse his discretion in determining that a levy should be filed against plaintiffs for failing to pay penalties and interest due for the year 1999. Accordingly, plaintiffs' request to proceed in forma pauperis is granted and the complaint is dismissed pursuant § 1915(e). Further, the court certifies pursuant to 28 U.S.C. §1915(a)(3) that an appeal from this decision could not be taken in good faith.

IT IS SO ORDERED.

Dated: September 10, 2002

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE

ORDER

This court having contemporaneously filed its Memorandum of Opinion in this case, it is therefore ORDERED that this action is dismissed pursuant to28 U.S.C. § 1915(e). Further, the Court CERTIFIES pursuant to 28 U.S.C. §1915(a)(3) that an appeal from this decision could not be taken in good faith.

Dated: September 10, 2002

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE

¶2002-5437

Carl Duane OLDHAM, PETITIONER v. UNITED STATES OF AMERICA, RESPONDENT. U.S. District Court, Dist. of Oregon, (DC OR) No. CV-01-1717-HU, July 24, 2002. District Court adopted. Years 1998, 1999, 2000. Decision for Govt.

1. Third-party summons enforcement—petition to quash—jurisdiction. Magistrate judge's recommendation to grant govt. partial jurisdictional dismissal of taxpayer's amended petition to quash 3d-party summonses IRS issued on out-of-state financial institutions was adopted: institutions weren't ''found'' in district where petition was brought where they had no physical offices there and conducted no direct operations other than customer phone contact. *Reference:* United States Tax Reporter ¶76,095.01(75). IRC §7609.

2. Third-party summonses—petition to quash—legitimate purpose. Magistrate judge's recommendation to grant govt. summary enforcement of certain 3d-party IRS summonses issued on taxpayer's bank and other financial recordkeepers was adopted: IRS agent's declaration established prima facie enforcement case that all administrative steps were met and that summoned information was relevant to legitimate investigation into taxpayer's tax liabilities and wasn't already in IRS's possession; and taxpayer's meritless challenges to IRS's authority and failure to give affirmative notice that summonses weren't self-enforcing didn't rebut govt.'s

case. Also, taxpayer wasn't entitled to contest govt.'s admittedly defective service on certain 3d parties. *Reference:* United States Tax Reporter ¶76,095.01(10). IRC §7609.

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,

FINDINGS & RECOMMENDATION[1]

HUBEL, Magistrate Judge:

Petitioner Carl Duane Oldham, appearing pro se, seeks to quash eight summonses issued by the United States Internal Revenue Service (IRS) to various third-party record keepers pursuant to 26 U.S.C. § 7602. This court has jurisdiction under 26 U.S.C. §§ 7604(a) and 7609(h)(1).

Respondent moves for partial dismissal of petitioner's Amended Petition to Quash[2] and for summary enforcement of some of the summonses. For the reasons explained below, I recommend that respondent's motions for partial dismissal and for summary enforcement be granted.

BACKGROUND

Respondent is presently conducting an investigation into the tax liabilities of petitioner for the income tax periods of 1998, 1999, and 2000. McGeachy Declr. at ¶ 3. The purpose of the investigation is to determine petitioner's correct federal tax liabilities for those years. Id. In connection with the investigation, the IRS has issued several summonses to third parties which have control over certain financial records of petitioner's. The summonses are:

(1) On November 13, 2001, IRS Revenue Agent Michele McGeachy issued an IRS Form 2039 summons to West Coast Bank at 11675 S.W. Pacific Highway, Tigard, Oregon 97223-8672. Id. at ¶ 45. The summons was sent by certified mail. Id. at ¶ 44. Notice of the summons was sent to petitioner on November 13, 2001, via certified mail. Id. at ¶ 45.

(2) On December 19, 2001, IRS Revenue Agent Michele McGeachy reissued an IRS Form 2039 summons, previously issued on December 5, 2001, to Washington Mutual Bank, at 9401 Oakdale Avenue, Chatsforth, California, 91311. Id. at ¶s 4, 5. The summons was served by certified mail. Id. at ¶ 5. Notice of the summons was sent to petitioner on December 19, 2001, via certified mail. Id. at ¶ 6.

(3) On December 19, 2001, McGeachy reissued an IRS Form 2039 summons, previously issued on December 5, 2001, to West Coast Bank at 11675 SW Pacific Highway, Tigard, Oregon 97223-8672. Id. at ¶s 8, 9.[3] The summons was served by certified mail. Id. at ¶ 9. Notice of the summons was sent to petitioner on December 19, 2001, via certified mail. Id. at ¶ 10.

(4) On December 19, 2001, McGeachy reissued an IRS Form 2039 summons, previously issued December 5, 2001, to Greenpoint Mortgage Funding, Inc., at 2300 Brookstone Centre Parkway, Columbus, Georgia, 31904-4500. Id. at ¶s 12, 13. The summons was served by certified mail. Id. at ¶ 13. Notice of the summons was sent to petitioner on December 19, 2001, via certified mail. Id. at ¶ 14.

(5) On December 19, 2001, McGeachy reissued an IRS Form 2039 summons, previously issued on December 5 and 11,

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[1] Petitioner named the United States, the Internal Revenue Service, and two Internal Revenue Service agents as respondents. However, because the only proper respondent is the United States of America, Methvin v. United States, No. 98-1513-ST, 1999 WL 458976, at *2 (D. Or. June 21, 1999) (citing Deleeuw v. IRS, 681 F. Supp. 402, 403-04 (E.D. Mich.)), I substitute the United States of America as the sole respondent in this action.

[2] Petitioner initially filed his petition on November 29, 2001, seeking to quash one summons issued by respondent. On January 8, 2002, he filed an Amended Petition which challenged seven summonses issued by respondent. On January 28, 2002, I granted petitioner's motion to amend the Amended Petition by interlineation to add the summons challenged in his original Petition but which he inadvertently omitted from the Amended Petition. Thus, reference to the Amended Petition means the Amended Petition, further amended by interlineation, in which petitioner challenges eight summonses.

[3] This is a separate summons from the one issued November 13, 2001.

2001, to Trust Company of America at 7103 South Revere Parkway, Englewood, Colorado, 80112,3936. Id. at ¶ 16. The summons was served by certified mail. Id. at ¶ 17. Notice of the summons was sent to petitioner on December 19, 2001, via certified mail. Id. at ¶ 18.

(6) On December 19, 2001, McGeachy reissued an IRS Form 2039 summons, previously issued on December 5, 2001, to Franklin Templeton Trust Company at P.O. Box 7777, San Mateo, California, 94403-7777. Id. at ¶ 20. The summons was served by certified mail. Id. at ¶ 21. Notice of the summons was sent to petitioner on December 19, 2001, via certified mail. Id. at ¶ 22.

(7) On December 19, 2001, McGeachy reissued an IRS Form 2039 summons, previously issued on December 5, 2001, to Janus at 100 Filmore Street, Denver, Colorado, 80206-4928. Id. at ¶ 24. The summons was served by certified mail. Id. at ¶ 25. Notice of the summons was sent to petitioner on December 19, 2001, via certified mail. Id. at ¶ 26.

(8) On December 19, 2001, McGeachy reissued an IRS Form 2039 summons, previously issued on December 5, 2001, to Countrywide Home Loans at 2500 Park Grenada, Calabasas, California, 92302-1663, Id. at ¶ 28. The summons was served via certified mail. Id. at ¶ 29. Notice of the summons was sent to petitioner on December 19, 2001, via certified mail. Id. at ¶ 30.

Each summons directed the third-party record keeper to produce certain financial records pertaining to petitioner, for some or all of the relevant years. Id. at ¶s 4, 8, 12, 16, 20, 24, 28, 45; Exhs. A, D, G, J, M, P, S, AA to McGeachy Declr.

McGeachy originally issued all but the November 13, 2001 summons to West Coast Bank, on December 5, 2001, but copies were not sent at that time to all parties who were entitled to receive notice. Id. at ¶ 32. The summons to the Trust Company was returned as undeliverable and McGeachy reissued that summons on December 11, 2001. Id. at ¶ 33. Because copies of these seven summonses were not originally sent to all parties entitled to receive notice, McGeachy reissued all seven summonses on December 19, 2001. Id. at ¶ 32.

Pursuant to Federal Rule of Civil Procedure 12(b)(1), respondent moves to dismiss that part of the Amended Petition that seeks to quash the summonses issued to Trust Company, Janus, and Franklin Templeton Trust. Respondent asserts that the court lacks subject matter jurisdiction to adjudicate petitioner's challenges to these three summonses. Respondent also moves for summary enforcement of the summonses issued to Greenpoint Mortgage, West Coast Bank, and Washington Mutual Bank. Respondent does not seek summary enforcement of the summons issued to Countrywide Home Loans because, respondent concedes, service of that summons was improper. Resp's Opp. to Am. Pet., Mtn to Dismiss, and for Sum. Enfcmt. at p. 2. n. 2. Respondent indicates that it still ''opposes'' the Amended Petition with respect to that summons.

I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

A. Standards

Subject matter jurisdiction over a petition to quash an IRS summons lies in the ''United States district court for the district within which the person to be summoned resides or is found[.]'' 26 U.S.C. § 7609(h)(1). Petitioner has the burden of establishing that this court possesses the necessary subject matter jurisdiction. Association of Am. Med. Colls. v. United States, 217 F.3d 770, 778 (9th Cir. 2000).

When deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the court may consider affidavits and other evidence supporting or attacking a petitioner's jurisdictional allegations. See St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989).

B. Discussion

[1] As noted above, subject matter jurisdiction over petitioner's effort to quash the summonses is governed by 26 U.S.C. §

7609(h)(1) of the Internal Revenue Code. The Fifth Circuit has interpreted section 7609(h)(1) as limiting jurisdiction to the district where the summons is to be answered. Masat v. United States, 745 F.2d 985, 987 [54 AFTR 2d 84-6332] (5th Cir. 1984). This court has adopted the Masat analysis in recent cases. Terrie Oldham v. United States, No. CV-01-1410-HA, Opinion and Order at pp. 3–6 [89 AFTR 2d 2002-2095] (D.Or. Mar. 21, 2002); Daniel Oldham v. United States, No. CV-01-952-HU, Findings & Recommendation at pp. 4–6 [89 AFTR 2d 2002-1453] (D. Or. Feb. 28, 2002), adopted by Order of Judge Jones [90 AFTR 2d 2002-6345] (D. Or. Apr. 1, 2002); Cook v. United States, No. CV-01-951-BR, Opinion and Order at pp. 5–6 [89 AFTR 2d 2002-758] (D. Or. Jan. 9, 2002).

The undisputed evidence in this case is that Trust Company has no physical office in Oregon and its involvement with its Oregon customers is limited to the telephone. McGeachy Declr. at ¶ 41. Janus has no physical office in Oregon. Id. at ¶ 40. Franklin Templeton Trust also has no physical office in Oregon and does not directly sell securities in Oregon. Id. at ¶ 42. Given the undisputed evidence, none of these three companies can be considered to ''reside in'' or be ''found'' in Oregon within the meaning of section 7609(h)(1). Other judges in this district have reached the same conclusion in regard to these three companies. See Terrie Oldham, No. CV-01-1410-HA, at pp. 2–6; Carl Oldham v. United States, No. CV-01-1225-ST, Findings & Recommendation at pp. 5–6 (D. Or. Nov. 27, 2001), adopted by Order of Judge Haggerty (D. Or. Mar. 21, 2002).

I recommend that respondent's motion to dismiss the Amended Petition in regard to the summonses issued to the Trust Company, Janus, and Franklin Templeton Trust, be granted.

II. Motion for Summary Enforcement

A. Standards and Burden of Proof

The Internal Revenue Code allows the IRS to issue a summons for production of information relevant to ''determining the liability of any person for internal revenue tax.'' 26 U.S.C. § 7602(a). The taxpayer has the right to attempt to quash any such summons. 26 U.S.C. § 7609(b). The government, however, is entitled to enforcement of an IRS summons when it has established a prima facie case for enforcement and the taxpayer fails to show sufficient facts that indicate the existence of a defense to enforcement. United States v. Powell, 379 U.S. 48, 58 [14 AFTR 2d 5942] (1964).

To obtain judicial enforcement of a summons issued pursuant to section 7602, the IRS need show only that (1) the investigation will be conducted for a legitimate purpose; (2) the information sought is relevant to that purpose; (3) the information sought is not already in the government's possession; and (4) the administrative steps required by the Internal Revenue Code have been followed. Lidas, Inc. v. United States, 238 F.3d 1076, 1081–82 [87 AFTR 2d 2001-801] (9th Cir.) (citing Powell, 379 U.S. at 57–58), cert. denied, 121 S. Ct. 2245 (2001).

''The government's burden is a slight one and typically is satisfied by the introduction of the sworn declaration of the revenue agent who issued the summons that the Powell requirements have been met.'' Fortney v. United States, 59 F.3d 117, 120 [76 AFTR 2d 95-5398] (9th Cir. 1995) (internal quotation omitted). In an enforcement proceeding, after the government establishes a prima facie case, the burden shifts to the petitioner to show sufficient facts to establish a defense to the summons. See, e.g., Lidas, 238 F.3d at 1081–82.

B. Discussion

As noted above, the motion for summary enforcement is made in regard to both summonses issued to West Coast Bank, and the summonses issued to Greenpoint Mortgage, and Washington Mutual Bank. The summons issued to Countrywide Home Loans is discussed below.

1. Prima Facie Case - Powell Factors

[2] McGeachy's declaration establishes respondent's prima facie case. First,

the summonses were issued for a legitimate purpose under sections 7602(a) and 7602(b) of the Internal Revenue Code. See McGeachy Declr. at ¶ 3 (IRS is examining petitioner's federal tax liabilities for 1998–2000).

Second, the information sought is relevant. To assist in the determination of petitioner's tax liability, McGeachy sought information and documents about petitioner's banking and investment accounts, including deposits and withdrawals, various loans and loan applications, and trust and trust instruments. Exhs. A, D, G, J, M, P, S, AA to McGeachy Declr. The IRS can use these documents to determine the correct amount of petitioner's income and federal tax liabilities for the tax years 1998–2000. McGeachy Declr. at ¶ 35. The relevancy requirement is met. See United States v. Arthur Young & Co., 465 U.S. 805, 814 [53 AFTR 2d 84-866] (1984) (relevancy requirement is met when information ''might have thrown light upon the correctness of the return.'' (internal quotation omitted)).

Third, McGeachy states that the IRS does not yet have the information and documents sought by the summonses. McGeachy Declr. at ¶ 36. Fourth, respondent has complied with the administrative steps required by the Internal Revenue Code. See McGeachy Declr. at ¶s 5, 6, 9, 10, 13, 14, 17, 18, 21, 22, 25, 26, 29, 30, 44, 45 (indicating that copies of summonses were served on the third-party record keepers and notices of the summonses were sent to petitioner); see also McGeachy Declr. at ¶ 39 (stating that all administrative procedures required by the Internal Revenue Code for issuance of the summonses have been followed).

2. Petitioner's Burden

Once respondent has established its prima facie case for enforcement, a ''heavy'' burden is placed on the taxpayer to defeat enforcement by showing an ''abuse of process'' or the ''lack of institutional good faith.'' United States v. Dynavac, 6 F.3d 1407, 1414 [72 AFTR 2d 93-6305] (9th Cir. 1993); see also Lidas (after government establishes prima facie cases, burden shifts to petitioner to show sufficient facts to establish a defense to the summons).

Petitioner raises several frivolous arguments in support of the motion to quash. His primary argument is that the IRS summons authority is limited to activities covered by Title 27 of the United States Code and that the IRS cannot seek information regarding his income tax liability which arises under Title 26 of the United States Code. I, and other judges in this district, have previously rejected this, and all but one of petitioner's arguments. See Terrie Oldham, No. CV-01-1410-HA, Opinion and Order at pp. 6–8; Carl Oldham, No. CV-01-1225-ST, Findings & Recommendation at pp. 9–13; Daniel Oldham, No. CV-01-952-HU, Findings & Recommendation at pp. 8–12; Cook, No. CV-01-951-BR, Opinion and ORDER at pp. 10–11.

The only argument petitioner raises which appears not to have been previously addressed by this Court is that the IRS failed to notify the third parties from which it seeks documents and information that a Form 2039 is not self-enforcing and requires the IRS to seek enforcement from a federal district court. As with petitioner's other arguments, this argument is also frivolous.

Clearly, Form 2039 summonses are not self-enforcing. If a third-party chooses not to comply with a Form 2039 summons, the IRS may seek an enforcement order from the court. See United States v. Samuel, Kramer & Co., 712 F.2d 1342, 1343 [52 AFTR 2d 83-5760] (9th Cir. 1983) (''IRS summonses are not self-enforcing, so the government must seek enforcement from a federal district court if the person on whom a summons has been served refuses to comply.''). However, petitioner cites to no provision of the Internal Revenue Code, and I have found none, requiring an affirmative representation from the IRS to third parties that a Form 2039 summons is not self-enforcing. Thus, I reject petitioner's argument.

Petitioner fails to meet his burden in opposition to enforcement. Accordingly, I recommend that respondent's motion for

enforcement of the summonses issued to West Coast Bank, Greenpoint Mortgage, and Washington Mutual Bank, be granted.

III. Opposition to Amended Motion to Quash Summons Issued to Countrywide Home Loans

As noted above, while respondent seeks to dismiss, based on a lack of subject matter jurisdiction, the Amended Petition's challenge to three of the summonses, and seeks summary enforcement of four of the summonses, respondent simply seeks a denial of the Amended Petition to Quash the summons issued to Countrywide Home Loans.

Respondent concedes that service on Countrywide was improper. Petitioner, however, has not challenged, and cannot challenge, the validity of service of that summons. See Wright v. United States, 964 F. Supp. 336, 338 [79 AFTR 2d 97-1700] (M.D. Fla.) (right to challenge service of IRS summons on third-party record keeper belonged to third-party record keeper, not taxpayer), aff'd, 132 F.3d 1461 (11th Cir. 1997); King v. United States, 684 F. Supp. 1038 [61 AFTR 2d 88-550] (D. Neb. 1987) (defense that the third-party record keeper was not properly served cannot be raised by petitioner).

As addressed above, the arguments raised by petitioner in the Amended Petition to Quash and the Amended Affidavit in support of the Amended Petition, are unavailing. Petitioner's request to quash the Form 2039 summons issued to Countrywide Home Loans is denied.

CONCLUSION

I recommend that respondent's motion to dismiss the Amended Petition (#10) in regard to the summonses issued to the Trust Company, Janus, and Franklin Templeton Trust, be granted. I further recommend that respondent's motion for summary enforcement of the summonses issued to West Coast Bank, Greenpoint, and Washington Mutual Bank (#10), also be granted. Additionally, I recommend that the Amended Petition (#10) be denied as to the summons issued to Countrywide Home Loans.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due August 8, 2002. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

If objections are filed, a response to the objections is due August 22, 2002, and the review of the Findings and Recommendation will go under advisement on that date.

Dated this 24th day of July, 2002

Dennis James Hubel

United States Magistrate Judge

ORDER

JONES, Judge:

Magistrate Judge Dennis James Hubel filed Findings and Recommendation (#14) on July 24, 2002, in the above-entitled case. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). No objections have been timely filed. This relieves me of my obligation to give the factual findings de novo review. Britt v. Simi Valley Unified School Dist., 708 F.2d 452, 454 (9th Cir. 1983). Having reviewed the legal principles de novo, I find no error.

Accordingly, I ADOPT Magistrate Judge Hubel's Findings and Recommendation (#14) dated July 24, 2002, in its entirety. The respondent's motion (#10) to dismiss the amended petition in regard to the summonses issued to the Trust Company, Janus, and Franklin Templeton Trust, is granted. The respondent's motion (#10) for summary enforcement of the summonses issued to West Coast Bank, Greenpoint, and Washington Mutual Bank is also granted. Additionally, the amended petition (#10) is denied as to the summons issued to Countrywide Home Loans.

IT IS SO ORDERED.

DATED this 16th day of September, 2002.

ROBERT E. JONES

United States District Judge

JUDGMENT

JONES, District Judge.

Based on the Record,

IT IS ORDERED AND ADJUDGED that this Action is dismissed, with prejudice.

DATED this 18th day of September, 2002.

ROBERT E. JONES

United States District Judge

¶2002-5438

In Re: Thomas Jeffrey SANDERSON and Rose Mary SANDERSON, Debtors. U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) No. 02-4735-9P7, July 8, 2002. Decision against Taxpayers.

1. Tax claims in bankruptcy—exemptions—refunds—earned income credit (EIC). Chap. 7 debtors weren't entitled to exempt their income tax refunds from bankruptcy estate under Florida's statutory EIC exemption: statute clearly applied only to refunds traceable to EIC, not taxpayers' "plain vanilla" refunds. Also, ruling on trustee's objection to taxpayers' exemption claim for personal properties was deferred pending properties' appraisal. *Reference:* United States Tax Reporter ¶68,726.52(32).

United States Bankruptcy Court, M.D. Florida,

ORDER ON TRUSTEE'S OBJECTION TO CLAIM OF EXEMPTION

PASKAY, Bankruptcy J.

Trustee objected to exemption claimed by Chapter 7 debtors in federal income tax refunds. The Bankruptcy Court, Paskay, J., held that special Florida exemption for debtor's interest in refund or credit received or to be received, or in deposits traceable to debtor's interest in a refund or credit paid, pursuant to section 32 of the Internal Revenue Code, serves to immunize earned income credit (EIC) owing to eligible low income workers from claims of creditors, but did not exempt the plain vanilla income tax refunds due to debtors ineligible for any EIC.

Objection sustained; exemption disallowed.

On March 13, 2002, Thomas Jeffrey and Rose Mary Sanderson (Debtors) filed their voluntary Petition for Relief, under Chapter 7 of the Bankruptcy Code. The Petition was accompanied by all documents required pursuant to Federal Rule of Bankruptcy Procedure 1007, including Schedule C, in which the Debtors claim two income tax refund claims, one in the amount of $2,506 and the other in the amount of $3,443. Both claims of exemption are based on Florida Statute § 222.25.

In due course, Diane Jensen was appointed the Chapter 7 Trustee. She is in charge of the administration of the estate of the Debtors. On April 22, 2002, the Trustee filed Trustee's Objection to Claim of Exemption regarding the Debtors' personal property. In the Objection, she contends that the values of the properties claimed are in excess of the maximum claimable pursuant to Art. X, Sec. 4 of the Florida Constitution, which limits the maximum to $1,000. She also objects to the Debtors' exemption claim of the two income tax refunds. This Objection is based on the contention of the Trustee that no portion of the tax refund claim represents an earned income tax credit and the tax return claimed is not within the exemption provided for by Florida Statute § 222.25. The Debtors filed a Response to the Trustee's Objection. In the Response, the Debtors set forth an admission and some general denials without stating any specifics.

Both parties agreed that there are no disputed facts and the narrow issue, i.e., the Debtors' right to claim the tax refunds as exempt, could be determined by this Court as a matter of law. Also, the parties agreed that the claim of exemption could be resolved after the personal properties have been appraised.

Claim of Exemption of the Two Tax Refunds

[1] The Debtors' right to exempt properties from the administration by the

Trustee is governed in States which opted out of the Federal exemptions pursuant to 11 U.S.C. § 522(b)(1), by the laws of the State of a debtor's residence. Prior to June 1, 2001, refunds were claimed as exempt under Florida Statute § 222.11, on the theory that the claim for tax refunds were in fact wages, which are exempt under this section as earned but not received by head of the household from claims of creditors. In interpreting this Statute, courts uniformly held that tax refund claims were not wages but a chose of action, and the fact that the refund claim was based on excessive withholding from the wages of the debtor during the tax year in question was of no significance. Courts had no difficulty in arriving at this conclusion if for no other reason, the wages are due and paid by the employer of the debtor and a tax refund, if recognized, was paid by the government. Therefore, the claim is against the government and not against the debtor's employer. United States v. Michaels, 840 F.2d 901 [61 AFTR 2d 88-913] (11th Cir.1988); In re Moody, 241 B.R. 238 (Bankr.M.D.Fla.1999); In re Lancaster, 161 B.R. 308 (Bankr.S.D.Fla.1993); In re Truax, 104 B.R. 471 (Bankr.M.D.Fla.1989).

The claim under consideration is not claimed under Florida Statute § 222.11 but under Florida Statute § 222.25. Last year, SB 150, that is Senate Bill 150, substantially amended section 222.25 of the Florida Statutes. SB 150 became effective on June 1, 2001. Prior to the amendment, neither Federal nor State law provided exemption for earned income credit. It is clear that States, which opted out, were not precluded to provide for such exemption. According to the Senate Staff Analysis and Economic Impact Statement on SB 150, the very purpose of enacting SB 150 was to provide an exemption for earned income credit. The earned income credit is a special Federal refundable tax credit available for low income working taxpayers who meet the eligibility requirements for the credit. An eligible person may receive money back even if they do not owe any taxes provided that they file a tax return and document their income. This is a requirement to assure that their income did not exceed the statutory cap of $31,152. Earned income credit includes all taxable and non-taxable income from any source but does not include pensions, annuities, social security and railroad retirement benefits, alimony, child support, welfare benefits, workmen's compensation, non-taxable foster care payments, veterans' benefits, inmate earnings, workfare payments, or community property.

The Statement leaves no doubt that SB 150 was intended to immunize earned income credit due to eligible low income workers from claims of creditors regardless whether the credit has been received or commingled with a debtor's financial account, so long it is traceable. While the Statement explaining the amendment provides less than a clear explanation, this Court is satisfied that what it did not accomplish was to exempt plain vanilla income tax refund claims due to debtors who have nothing to do whatsoever with any earned income tax credit. This is so because there is no statutory cap placed on wages of head of household under Florida Statutes § 222.11, and clearly earned income credit cannot exceed $31,152.

This being the case, this Court is satisfied that the Trustee's Objection to the Debtors' claim of exemption of the two income tax refund claims is well taken.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Trustee's Objection to Claim of Exemption be, and the same is hereby, sustained as to the two income tax refund claims. It is further

ORDERED, ADJUDGED AND DECREED that the two income tax refund claims of the Debtors are subject to the administration by the Trustee and the claim of exemption to the same are hereby disallowed. It is further

ORDERED, ADJUDGED AND DECREED that the ruling on the Trustee's portion of the Objection concerning the personal properties claimed as exempt by the Debtors be, and the same is hereby, deferred pending receipt of the appraisal of

said property. If accepted by the Debtors and is compromised, the same shall be set for hearing to consider the entry of an appropriate Order.

¶2002-5439

Joseph ELFELT, Joan F. ELFELT, PLAINTIFFS-APPELLANTS v. UNITED STATES OF AMERICA, Roy James Palmer, Vicki Lynn Palmer, DEFENDANTS-APPELLEES. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 00-1593, Sept. 27, 2002. District Court reversed and remanded. Years 1986, 1987, 1990, 1991. Decision against Govt.

1. Actions to quiet title—redemption—limitations periods. District court improperly granted govt. summary judgment in action to quiet title to lien property that taxpayer purported to redeem within 6 months of return of service of redemption notice on U.S., but more than 6 months after return of service of notice on taxpayer: under applicable Michigan law, taxpayer's 6-month redemption period began to run as soon as there was return of service of redemption notice on him, notwithstanding lag in return of service on U.S., so redemption wasn't effective and govt.'s lien was extinguished. *Reference:* United States Tax Reporter ¶63,355.03(5); 74,336.507(60). IRC §6335.

United States Court of Appeals, Sixth Circuit,

On Appeal from the United States District Court for the Eastern District of Michigan.

Before NELSON and MOORE, Circuit Judges, and KATZ, District Judge.*

DAVID A. NELSON, Circuit Judge.

This is an appeal from a summary judgment for the United States in an action to quiet the title to a Michigan farm that had been sold for delinquent real estate taxes after becoming subject to a federal income tax lien. Within the five-year period spoken of in Mich. Comp. Laws § 211.73a, the holder of the tax deed had caused right- of-redemption notices to be served on both the delinquent taxpayer, as the last owner in the regular chain of title, and on the United States, as a lienholder. But the notice (the form of which was that prescribed by Mich. Comp. Laws § 211.73a[1] was not served on the United States until more than nine months after the return of service upon the delinquent taxpayer.

Subject to a possible question as to federal jurisdiction, the central issue in the appeal concerns the timeliness, under Mich. Comp. Laws § 211.73a, of an attempt by the taxpayer to redeem his farm by tendering the amount of money specified in the redemption notice. The tender was made within six months following the return of service of the notice on the United States, but more than six months after the return of service of the notice on the taxpayer. If the tender was good, the federal lien survived; if bad, the lien did not survive.

In November of 2001, pursuant to Rule 7.305(B) of the Michigan Court Rules of 1985, we certified to the Michigan Supreme Court the following question of law:

> "Did the enactment of M.C.L. § 211.73a abolish the principle of Michigan law that the six-month limitation period for exercising the tax sale redemption rights prescribed by M.C.L. §§ 211.140 and 211.141 begins to run as to any person entitled to notice of such rights only upon the filing of a return of service of notice upon all persons so entitled?"

In May of 2002 the Michigan Supreme Court entered an order declining to answer the certified question. If the Supreme Court had chosen to accept certification, we believe that the Court would have been constrained to answer the question "yes." It is our belief, in other words, that in the context of this case the Michigan Supreme

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* The Honorable David A. Katz, United States District Judge for the Northern District of Ohio, sitting by designation.

1 The redemption notice tells the recipient this, among other things:

"You are entitled to a reconveyance of this property within 6 months after return of service of this notice, upon payment to the treasurer of the county in which the property is located, of all sums paid for the tax sale purchase, together with 50% in addition, and the fees of the sheriff . . . ."

Court would have said that the six months given the delinquent taxpayer for the exercise of his right of redemption began to run as soon as there was a return of service of the redemption notice upon him, notwithstanding the nine-month lag in the return of service upon the United States. The summary judgment entered in favor of the United States will be reversed.

I

The real estate in question is an 80-acre farm located in Cheboygan County, Michigan. Defendant Roy James Palmer, who acquired the farm by inheritance, has lived there all his life.

Mr. Palmer was married for a time to defendant Vicki Lynn Palmer, but the marriage ended in a divorce that apparently terminated her interest in the property. (Mrs. Palmer failed to appear in the quiet title action, and a default was entered against her by the district court.)

Notices of federal tax liens against the property were filed by the United States to secure claims of unpaid federal income taxes for 1986, 1987, 1990, and 1991. The assessments giving rise to these liens have been reduced to judgment in the amount of $24,283.34.

Mr. Palmer failed to make timely payment of the 1989 and 1990 property taxes on the farm. In 1992, following a tax sale for the 1989 taxes, the State of Michigan issued a tax deed to Conifer, Inc. The tax deed was subsequently purchased by plaintiff Joseph Elfelt. (Mr. Elfelt presumably recovered his investment after December of 1996, when, as we shall see, Mr. Palmer redeemed the farm from the 1992 tax sale by a cash payment made to the county treasurer.)

A tax sale for the 1990 property taxes was conducted in 1993, and Conifer, Inc., obtained a tax deed in connection with this sale as well. This deed too was sold to Mr. Elfelt. Although Mr. Palmer apparently sought at one point to satisfy his delinquency on the 1990 taxes, the county treasurer applied the payment to 1991 taxes instead.

In October of 1996, at Mr. Elfelt's instance, a Cheboygan County deputy sheriff served Mr. Palmer with a notice advising him of his right to a reconveyance of the land "within 6 months after return of service of this notice" upon payment of $1,619.15 in respect of the 1989 taxes and $1,577.92 in respect of the 1990 taxes, together with sheriff's fees. (Pursuant to Mich. Comp. Laws § 211.141, which prescribes the formula embodied in the § 211.140 redemption notice, these figures included the amounts paid at the tax sales and an additional 50 percent.) A completed return of service was filed with the Cheboygan County Treasurer on November 5, 1996.

Mr. Palmer made the prescribed payment in respect of the 1989 taxes in December of 1996, within six months of the return of service on him. No corresponding payment was made for the 1990 taxes.

In August of 1997, more than nine months after service of the redemption notice on Mr. Palmer, a similar notice was served on the United States Internal Revenue Service by a Wayne County deputy sheriff. (Because Mr. Palmer had redeemed the farm from the first tax sale by this time, the notice to the Internal Revenue Service dealt only with the 1993 tax sale for 1990 taxes.) A completed return of service of the notice on the IRS was filed with the Cheboygan County Treasurer on August 25, 1997. The United States subsequently made a tender to the county treasurer in an amount equal to the 1990 taxes, but did not include the additional 50 percent called for by Mich. Comp. Laws § 211.141. The United States concedes that this tender was not effective.

On January 21, 1998--a date within six months after the filing of the return of service of the redemption notice upon the United States, but more than six months after the return of service of Mr. Palmer's notice--Mr. Palmer, through his accountant, mailed the Cheboygan County Treasurer a check for $5,377.02. This sum was intended to effect a redemption from the tax sale for the 1990 taxes and to cover arrearages for two subsequent years as well. The

county treasurer returned the check on the ground that Mr. Palmer's redemption period with respect to 1990 taxes had expired on May 5, 1997.

Mr. Elfelt and his wife subsequently filed the present quiet title action in federal district court, naming the Palmers and the United States as defendants.[2] Mr. Palmer appeared pro se, and he has relied largely on the United States to protect his interests. (If Mr. Palmer lost his right to redeem, the United States acknowledges that its tax lien was lost as well.)

Cross-motions for summary judgment were filed by the Elfelts and the United States. After hearing oral argument on the motions, the district court delivered a bench ruling in which the court declined to follow Halabu v. Behnke, 541 N.W.2d 285 (Mich.Ct.App.1995)--an opinion directly contrary to the position taken by the United States and Mr. Palmer in the case at bar--on the strength of a belief that if given the opportunity, the Michigan Supreme Court would reject Halabu. In March of 2000 the district court made an entry memorializing its bench ruling in a final judgment that granted the United States' motion for summary judgment, protected certain equitable rights of the Elfelts, and denied the Elfelts' summary judgment motion. The Elfelts perfected a timely appeal, and the case was argued before us in September of 2001. Certification to the Michigan Supreme Court followed. The Supreme Court having declined to accept certification, the matter is now ripe for decision by this court.

II

Prior to 1939, as all parties agree, the Michigan courts would have held that Mr. Palmer's six-month redemption period began to run only when there was a return of service of the redemption notice upon the United States, the last claimant to be served. A line of authority stretching back to White v. Shaw, 114 N.W. 210, 210–11 (Mich.1907), made it clear that statutory redemption rights could not be cut off ''piecemeal;'' not until the filing of proof of service on all parties entitled to notice of their redemption rights under Mich. Comp. Laws § 211.141, that is, did the six-month time limit on any individual party's right of redemption begin to run. See, e.g., G.F. Sanborn Co., v. Richter, 142 N.W. 755, 756 (Mich.1913); McVannel v. Pure Oil Co., 247 N.W. 735, 736 (Mich.1933); Brousseau v. Conklin, 3 N.W.2d 260 (Mich.1942).

[1] In 1939, however, Michigan's General Property Tax Act was amended by the addition of a new § 73a, the second sentence of the second paragraph of which read in part as follows:

> ''No person who has himself been properly served with such notice and failed to redeem from such sale in accordance with the provisions of the general tax law, within the period herein specified, shall thereafter be entitled to question or

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2 According to the complaint, federal jurisdiction was based on 28 U.S.C. § 1346 and 2410 and 26 U.S.C. § 7425. The government's appellate brief tells us that the district court had jurisdiction over the complaint by reason of 28 U.S.C. §s 1346(f) and 2410, and adds that jurisdiction over the government's subsequently-filed counterclaim existed under 26 U.S.C. § 7402(a) and 28 U.S.C. § 1345.

At first blush, we see no reason to question the government's assertion that the district court had jurisdiction with respect to the counterclaim; § 1345 provides that ''the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States,'' and the counterclaim may well be such a proceeding. As far as jurisdiction over the Elfelts' case is concerned, however, we are somewhat more dubious.

We find nothing in 28 U.S.C. § 1346 that gives the district court jurisdiction over the Elfelts' quiet title action. The subsection cited by the United States, § 1346(f), provides only that ''[t]he district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.'' The Elfelts' action is not an action under § 2409a, which allows the United States to be named as a defendant in a suit to adjudicate legal title to real property in which the United States claims an interest ''other than a security interest . . . .'' The lien is clearly a security interest.

Section 2410(a) provides that the United States may be named a party in any suit to quiet title to property on which the United States has or claims a lien. Most authorities, however, view this as a waiver of sovereign immunity, pure and simple, and not a positive grant of jurisdiction. See, e.g., McNeill v. Franke, 171 F.3d 561, 563 (8th Cir.1999); Harrell v. United States, 13 F.3d 232, 234 [73 AFTR 2d 94-630] (7th Cir.1993); Shaw v. United States, 331 F.2d 493, 496 [13 AFTR 2d 1263] (9th Cir.1964); and 14 Charles A. Wright, et al., Federal Practice and Procedure § 3656 (3d ed.1998). But cf. United States v. Morrison, 247 F.2d 285, 290 [52 AFTR 78] (5th Cir.1957), where the Fifth Circuit took the opposite view.

In Shaw, the Ninth Circuit held that the federal courts have jurisdiction over cases of this sort by reason of 28 U.S.C. § 1340, which gives the district court original jurisdiction over ''any civil action arising under any Act of Congress providing for internal revenue . . . .'' Our own circuit does not seem to have opined on the matter.

The jurisdictional issues have not been briefed here, and we are reluctant to attempt a definitive resolution at this point. Because jurisdiction probably exists as to the counterclaim, at a minimum, and because the case must be remanded in any event, we leave the jurisdictional nuances for the district court to address in first instance.

deny in any manner the sufficiency of such notice upon the ground that some other person or persons entitled to notice was not also served therewith . . . .'' Public Act 52, Michigan Public Acts of 1939.

With changes made by Public Act 385 of the Michigan Public Acts of 1976, the sentence, as codified in the second paragraph of Mich. Comp. Laws § 211.73a, now says this:

''A person who has himself been properly served with notice and failed to redeem from a sale in accordance with this act, within the period herein specified, shall not thereafter be entitled to question or deny in any manner the sufficiency of notice upon the ground that some other person or persons entitled to notice was not also served.''

How does this language apply to the facts of the case before us? For the most part, we believe, there is no possible room for dispute. Mr. Palmer was properly served with notice in October of 1996. The notice told him in plain English that he had six months after the return of service within which to redeem the property. A completed return of service was filed in November of 1996. Mr. Palmer ''failed to redeem from [the tax] sale'' within the six months that immediately followed the filing of the return of service. So if six months is ''the period herein specified,'' as that phrase is used in the statute, the statute makes it plain that the notice received by Mr. Palmer was sufficient to bar him from redeeming the property after the six months had run, notwithstanding the fact that the United States, which was also entitled to notice, was not served until after the expiration of Mr. Palmer's six months.

When § 73a of the General Property Tax Act refers to the period ''herein'' specified, the context of the word and the logic of the sentence make it fairly obvious, we believe, that what is being talked about is the period specified in the act for redeeming property from a sale. This is the six-month period specified in § 141 of the act--the same six-month period that a delinquent taxpayer is told about in the redemption notice prescribed by § 140 of the act.

There is another possibility, however. Section 73a of the act begins with a sentence which says, among other things, that the purchaser of a tax title will be barred by another claimant's adverse possession over a period of five years after the purchaser is entitled to a deed, and will also be barred by a failure to make a bona fide attempt to give notice of redemption rights within the five-year period. Several other sentences of § 73a also speak of the five-year period within which the purchaser of a tax title must act. It is conceivable, if unlikely, that when the second sentence of the second paragraph of § 73a refers to a delinquent taxpayer's failure ''to redeem from a sale in accordance with this act, within the period herein specified,'' it is referring to the five-year period in which § 73a says the purchaser of a tax title must act.

The question of which period is the one ''herein'' specified was squarely addressed by the Court of Appeals of Michigan in Halabu v.. Behnke, the case mentioned in our account of the disposition of the Elfelts' claim by the district court. By a vote of two to one, the Halabu court rejected the notion that ''the period herein specified'' for redemption by a person who has been served with notice is the five years mentioned elsewhere in § 73a. Citing the principle of construction that requires courts to ''give effect to every phrase, clause, and word'' in a statute, the majority held ''that 'the period herein specified' refers to the six-month period in § 140.'' Halabu, 541 N.W.2d at 287. The dissenting judge, citing the same canon of statutory construction, maintained that the phrase ''within the period herein specified'' should be construed as referring to the five-year period.

As the dissenting judge correctly noted, his construction is consistent with the holding in Andre v. Fink, 447 N.W.2d 808 (Mich.Ct.App.1989) (per curiam). The opinion in Andre contains no analysis of s 73a, however, and gives no reason for concluding that ''the period herein specified''

should be read as a reference to the five-year period and not to the six-month period. The opinion gives no indication, indeed, that the Andre panel was even aware of the existence of this issue.

The Michigan Supreme Court has never resolved the conflict between Halabu and Andre.[3] Post-Halabu decisions of the Michigan Court of Appeals, however, have uniformly followed Halabu. See Ottaco, Inc. v. Gauze, 574 N.W.2d 393, 397 (Mich.Ct.App.1997); Burkhardt v. Bailey, 2001 WL 1134634, No. 223706 (Mich.Ct.App.2001); Fognini v. Verellen, 2001 WL 1044805, No. 217791 (Mich.Ct.App.2001); and Walrath v. Trees, Inc., 2002 WL 482566, No. 225007 (Mich.Ct.App.2002).[4]

We can see no good reason why the Michigan Supreme Court would repudiate the result reached in Halabu in favor of the result advocated by the judge who dissented in that case. The dissent's construction of the critical sentence in § 73a--the sentence beginning ''A person who has himself been properly served with notice and failed to redeem from a sale in accordance with this act, within the period herein specified''--mixes apples and oranges, in our view. As a grammatical matter, the subject of the sentence is the ''person who has himself been properly served with notice,'' not the person who caused the notice to be served--and the five-year limitations period prescribed in the first paragraph of § 73a pertains to the latter, not the former.

It should make no difference, as far as we can see, that the six-month period in which the recipient of a statutory notice may redeem his property is specified in §§ 140 and 141 of the act and not in § 73a. The sentence we are construing, after all, places the words ''within the period herein specified'' immediately after the words ''this act''--and it seems perfectly reasonable to read ''herein specified'' as meaning ''specified in this act.''

Under the construction urged by the Halabu dissent, we should have to read the sentence as if it said this:

> ''A person who has himself been properly served with notice and failed to redeem from a sale in accordance with this act, within the period specified in this section of the act for various actions to be performed by the purchaser at a tax sale, shall not thereafter be entitled to question or deny in any manner the sufficiency of the notice upon the ground that some other person or persons entitled to notice was not also served.''

With respect, we are bound to say that such a construction strikes us as more than a little strained.

In defense of his position, the Halabu dissenter claims that the majority's construction turns the phrase ''within the period herein specified'' into surplusage. But does it?

Here is what the dissent says:

> ''The words 'in accordance with this act' refer to The General Property Tax Act, M.C.L. § 211.1 et seq.; M.S.A. § 7.1 et seq., which generally provides that the redemption period in a case such as this is six months. See § 140 M.C.L. § 211.140; M.S.A. § 7.198. Construing the immediately following 'within the period herein specified' as also meaning a six-month period renders this phrase itself surplusage.'' Halabu, 541 N.W.2d at 289 (Smolenski, J., dissenting).

This argument depends on the proposition that the words ''in accordance with this act'' relate not only to the action that

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[3] Geraldine v. Miller, 33 N.W.2d 672 (Mich.1948), contains language consistent with the result subsequently reached in Andre, but there is no discussion of § 73a in Geraldine and the end result in that case would have been the same whether or not § 73a had been deemed to revoke the anti-piecemeal rule. The opinion in St. Helen Resort Ass'n v. Hannan, 33 N.W.2d 74 (Mich.1948), says that the 1939 amendment ''did not change the statutory requirements of the service of the notice of redemption,'' id. at 78, but the question of whether the anti-piecemeal rule had been repealed was not at issue in that case.

Brousseau v. Conklin, 3 N.W.2d 260 (Mich.1942), reaffirmed the anti-piecemeal rule; although it was not decided until 1942, however, that case involved the General Property Tax Act as it stood prior to the 1939 amendment.

[4] Because of a Michigan Supreme Court Administrative Order issued in 1990, the published decision in Halabu is binding in subsequent appeals heard by intermediate appellate court panels anywhere in the state. See M.C.R. 7.215(I). The pre-1990 decision in Andre, by contrast, was not binding on the panel that decided Halabu.

must be taken to accomplish a redemption,[5] but also to the time period in which the redemption must take place.[6] To our minds, at least, it is far from self-evident that the drafters of § 73a intended thus to conflate the "how" of redemption with the "when" of redemption. It would certainly not astonish us to learn that the drafters intended their words to be understood as saying this:

> "A person who has himself been properly served with notice and failed to redeem from a sale in accordance with the provisions of this act for paying the county treasurer 150% of the tax sale purchase price, within the six-month period specified in this act for making such payment, shall not thereafter be entitled to question or deny in any manner the sufficiency of notice upon the ground that some other person or persons entitled to notice was not also served."

Such a construction, unlike the construction urged in the Halabu dissent, does not strike us as the least bit strained.

If we are correct in thinking that the Halabu majority's interpretation of the statute is a reasonable one, the federal courts are bound to follow it absent "persuasive data" that the Michigan Supreme Court would adopt another interpretation. As the United States Supreme Court declared in West v. American Telephone & Telegraph Co., 311 U.S. 223, 237 (1940),

> "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise."

See also Hicks v. Feiock, 485 U.S. 624, 630 n. 3 (1988), and Hampton v. United States, 191 F.3d 695, 702 (6th Cir.1999). We said in the latter case that a federal court "should presume the Michigan Supreme Court would agree [with a considered judgment of the Michigan Court of Appeals] unless it[']s clear the Michigan Supreme Court would likely disagree with the Michigan Court of Appeals." Hampton, 191 F.2d at 702 (emphasis supplied). The presumption should be particularly strong, we believe, where the Supreme Court was offered an opportunity to disagree with the intermediate appellate court and, as here, declined the offer.

Is there any persuasive datum which makes it "clear" that Halabu would probably be rejected if the Michigan Supreme Court were to determine the proper reading of the second sentence of the second paragraph of Mich. Comp. Laws § 211.73a? The only conceivable candidate is the pre-Halabu decision in Andre v. Fink. As we have seen, however, the Fink opinion never so much as mentions the second sentence of the second paragraph of Mich. Comp. Laws § 211.73a. For all we can tell from the opinion, to repeat, the Fink panel was unaware of the provision's existence.

The Halabu panel, by contrast, rested its considered judgment on a reasoned analysis of the relevant statutory language. Chief Judge Doctoroff, who wrote for the court in Halabu, went through an extensive exegesis of the pertinent statutory text (and one of the major canons of statutory construction) before stating the court's holding in this succinct passage:

> "In order to give meaning to the second sentence in the second paragraph in § 73a, and to differentiate between that sentence and the second sentence in the first paragraph, we hold that 'the period herein specified' refers to the six- month period in § 140."

Halabu, 541 N.W.2d at 287.

One may quarrel with Chief Judge Doctoroff's reasoning, but his conclusion as to the meaning of the statute is certainly no more problematic than the conclusion

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[5] See Mich. Comp. Laws § 211.141, which speaks of "[paying] the treasurer of the county in which the land is situated the amount paid for the purchase [at the tax sale], together with an additional 50%, and personal or substituted service fees ...."

[6] See Mich. Comp. Laws § 211.140, which provides that a writ of assistance for possession of property purchased at a tax sale shall not be issued until six months after the filing of a return of service of the statutory notice. Similarly, Mich. Comp. Laws § 211.141 provides that a person with an estate in the property is entitled to a release and quitclaim from the purchaser at the tax sale if the redemption payment is made within six months after the filing of the return of service.

reached by the dissenting judge. And the Halabu opinion sparkles as a model of clarity in comparison to the per curiam opinion in Fink, which leaves one wondering whether its anonymous author even understood what the statutory issue was. Fink, in our opinion, is simply not a persuasive indicator of how the Michigan Supreme Court would construe the second sentence of the second paragraph of Mich. Comp. Laws § 211.73a.

The judgment entered herein by the district court is REVERSED, and the case is REMANDED for further proceedings not inconsistent with this opinion.

CONCURRING OPINION

KAREN NELSON MOORE, Circuit Judge, concurring.

I join all of the majority opinion except for footnote two. I believe that we must determine whether federal subject matter jurisdiction exists before proceeding further. I would hold that the district court had jurisdiction over the complaint pursuant to 28 U.S.C. § 1340 and 2410(a).

¶2002-5440

Angel Ruiz RIVERA, ET AL, PLAINTIFFS v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Dist. of Puerto Rico, (DC PR) Civil No. 99-1012 (JAG), Sept. 24, 2002. Year 1995. Decision for Govt.

1. Actions against U.S.—damages—wrongful collection; failure to release liens; disclosure of return information—standing—sovereign immunity—supplemental jurisdiction. Taxpayer/Puerto Rican university pres.'s collection-related damages claims against U.S. were dismissed on summary judgment: taxpayer lacked standing under IRC §7433 and IRC §7431 to contest govt.'s collection actions against, and alleged disclosure of return information of, university since university, not pres., was ''taxpayer'' against which actions were taken. Similarly, taxpayer's real estate corp. lacked standing under IRC §7432 to contest IRS's failure to release lien filed against property transferred to corp. from university since corp. wasn't ''taxpayer'' to which lien related; and sovereign immunity barred taxpayer's constitutional and supplemental state law claims. *Reference:* United States Tax Reporter ¶74,335.01(15); 74,315.01; 74,325.01; 74,336.506(25); 74,025.01(160). IRC §7402; 7431; 7432; 7433.

Julio C. Morillo-Limardo, Hermanas Davila, Hugo Rodriguez-Diaz, Bayamon, PR, Julian R. Rivera-Aspinall, Angel Ruiz-Rivera, San Juan, PR, for Plaintiffs.
Beatriz T. Saiz, Christopher J. Kayser, Washington, DC, Isabel Munoz-Acosta, Torre Chardon, Hato Rey, PR, for Defendant.

United States District Court, D. Puerto Rico,

OPINION AND ORDER

GARCIA-GREGORY, District Judge.[1]

On August 5, 2002, defendant Internal Revenue Service (the ''IRS'') moved for summary judgment on plaintiff Angel Ruiz Rivera's (''Ruiz'') claims under the Internal Revenue Code, 26 U.S.C. §§ 7431–7433, the First, Fourth, and Fifth Amendments to the United States Constitution, as well as supplemental state law claims (Docket No. 54). On August 22, 2002, Ruiz filed an opposition (Docket No. 70). For the reasons discussed below, the Court grants the motion.

FACTUAL AND PROCEDURAL BACKGROUND

In 1981, Ruiz founded the Instituto de Educacion Universal (''IEU''), a private post-secondary technical and higher education institution. In 1982, Ruiz founded a real-estate holding company known as Compania de Inversiones Urayoan, Inc. (''CIU''),. Ruiz served as president of both corporations. In 1988, IEU purchased a building known as 404 Barbosa in Hato Rey, Puerto Rico.

[1] Alejandro J. Cepeda-Diaz, a third-year student at the University of Puerto Rico School of Law, assisted in the research and preparation of this opinion.

In 1995, IEU failed to pay its employment taxes for the periods ending on June 30, 1995, September 30, 1995, and December 31, 1995, respectively. The IRS assessed IEU approximately $700,000 for unpaid employment taxes. In April 1996, the IRS filed various notices of federal tax liens against IEU for the assessed amount.

On October 31, 1995, IEU sold the 404 Barbosa property to CIU. In 1997, CIU began negotiations with Rogena Kyles (''Kyles''), then president of Ramirez College, for the lease of the 404 Barbosa building. In order to protect its interests, Ramirez College hired Justo Garcia Iniguez, Inc. (''Garcia'') to conduct a title search on the 404 Barbosa property. On September 9, 1998, Garcia completed the title search, which revealed that a federal tax lien against IEU in the amount of $790,758.59 was attached to the 404 Barbosa property. Manuel Duran, an attorney for Ramirez College, met with an official from the Puerto Rico Registry of the Property, who informed him that the lien had been properly filed.

In October of 1998, Kyles contacted Moises Rodriguez (''Rodriguez'') of the IRS in order to ascertain the validity of the lien. Kyles identified herself to Rodriguez and explained the circumstances of her inquiry, identifying the property at issue and CIU as its owner. Rodriguez had no information on the lien and requested that Kyles fax him a copy of the title search. Without verifying the information, Rodriguez explained to Kyles the IRS's general policy regarding property liens when it had reason to believe that a property owner had transferred ownership to avoid tax liability. Approximately ten days later, Rodriguez and Kyles had a second conversation where Rodriguez explained that the IEU lien was valid and that he had no reason to believe that it was not. On December 2, 1998, Ramirez College informed CIU of its decision not to lease the 404 Barbosa property.

On January 8, 1999, Ruiz, appearing pro se, filed suit on his own behalf and on behalf of CIU (Docket No. 1). On June 21, 1999, attorneys Hugo Rodriguez-Diaz and Julian R. Rivera-Aspinall appeared on CIU's behalf (Docket No. 8). On March 31, 2000, CIU's attorneys filed a motion seeking the Court's permission to withdraw from the case (Docket No. 16). On March 11, 2000, the Court denied the motion until CIU announced new counsel (Docket No. 20).[2] CIU never complied. On February 7, 2001, after the case was reassigned to this Judge, the attorneys renewed the motion to withdraw (Docket No. 28). On March 26, 2001, the Court issued an order granting the motion to withdraw and ordering CIU to retain new counsel (Docket No. 30). On September 26, 2001, the Court ordered plaintiffs to show cause why they had failed to comply with the Court's previous order (Docket No. 31). On June 4, 2002, after allowing CIU several enlargements of time, the Court dismissed CIU's claims with prejudice for failure to comply with the Court's orders (Docket Nos. 47, 48).

DISCUSSION

A. Summary Judgment Standard

The court's discretion to grant summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56 states, where pertinent, that the court may grant summary judgment only if ''the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'' Fed.R.Civ.P. 56(c); See Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir.2000).

Summary judgment is appropriate if ''there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'' See Fed.R.Civ.P. 56(c). The party moving for summary judgment bears the burden of

[2] It is well settled that corporations can only be represented by licensed counsel. See generally In re K.M. A., Inc., 652 F.2d 398 (5th Cir.1981); B. Munoz, Inc. v. Productora Puertorriquena, 9 P.R. Offic. Trans. 1109, 109 D.P.R. 825 (1980). As a pro se litigant, Ruiz can only represent himself.

showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

Once a properly supported motion has been presented before the court, the opposing party has the burden of demonstrating that a trial worthy issue exists that would warrant the court's denial of the motion for summary judgment. For issues where the opposing party bears the ultimate burden of proof, that party cannot merely rely on the absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute. Suarez v. Pueblo Int'l, Inc., 229 F.3d 49 (1st Cir.2000).

In order for the factual controversy to prevent summary judgment, the contested fact must be ''material'' and the dispute over it must be ''genuine.'' ''Material'' means that a contested fact has the potential to change the outcome of the suit under the governing law. The issue is ''genuine'' when a reasonable jury could return a verdict for the nonmoving party based on the evidence. Anderson v.. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). It is well settled that ''[t]he mere existence of a scintilla of evidence'' is insufficient to defeat a properly supported motion for summary judgment.' Id. at 252. It is therefore necessary that 'a party opposing summary judgment must present definite, competent evidence to rebut the motion.' Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir.1994).

To make this assessment in a given case, the court ''must view the entire record in the light most hospitable to the party opposing summary judgment, indulging in all reasonable inferences in that party's favor.'' Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir.1990). When carrying out that task, the court may safely ignore ''conclusory allegations, improbable inferences, and unsupported speculation.'' See Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir.1990).

B. The IRS's motion for summary judgment

1. Ruiz's § 7433 claim

[1] The IRS argues that the Court must dismiss Ruiz's claim for damages resulting from collection actions for lack of standing. Section 7433 of the Internal Revenue Code provides that ''[i]f, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the [IRS] recklessly or intentionally disregards any provision of this title, or any regulation promulgated under the title, such taxpayer may bring a civil action for damages against the United States . . . . '' 26 U.S.C. § 7433(a). ''The plain language of § 7433 confers standing only on a taxpayer to sue for damages incurred in connection with the collection of his own taxes.'' Wittmann v. U.S., 869 F.Supp. 726, 731 [74 AFTR 2d 94-6266] (E.D.Mo.1994). The waiver of sovereign immunity under § 7433 is limited to claims by the direct taxpayer from whom the IRS collected the tax. See Ferrel v. Brown, 847 F.Supp. 1524, 1528 [72 AFTR 2d 93-6693] (W.D.Wash.1993). A ''taxpayer'' is defined as ''any person subject to any internal revenue tax.'' 26 U.S.C. § 7701(a)(14). A corporation is considered a person under the statute. See 26 U.S.C. § 7701(a)(1).

In this case, the IRS's collection actions were taken against IEU, not Ruiz. Therefore, IEU, not Ruiz, was the taxpayer with standing to file suit under § 7433. See Wittmann v. U.S., 869 F.Supp. at 731; Ferrel v. Brown, 847 F.Supp. at 1528. Accordingly, the Court will dismiss Ruiz's s 7433 claim for lack of standing.

2. Ruiz's § 7432 claim

Pursuant to § 7432, ''[i]f any officer or employee of the [IRS] knowingly, or by reason of negligence, fails to release a lien under section 6325 on property of the taxpayer, such taxpayer may bring a civil action for damages against the United States . . . . '' 26 U.S.C. § 7432(a). As discussed above, the language of the statute confers standing only on the taxpayer against whose property the IRS has attached the lien.

Although CIU was the owner of the 404 Barbosa property at the time the lien was filed, it nevertheless lacks standing to sue under § 7432. See Ibraham v. U.S., 123 F.Supp.2d 408, 410 [86 AFTR 2d 2000-6579] (S.D.Ohio 2000)(holding that the subsequent owner of real property was not the taxpayer under § 7432 where the lien to secure payment for tax liability owed by prior owners was filed after ownership was transferred).[3] CIU, as current owner of the 404 Barbosa property, would be the party with standing to sue under § 7426. Since CIU has been dismissed from the case, however, the Court need not go further. Therefore, the Court will dismiss Ruiz's § 7432 claim for lack of standing.

3. Ruiz's § 7431 claim

The Internal Revenue Code provides that, except as set forth in § 7432, § 7433 shall be the exclusive remedy for recovering damages resulting from collection actions. The IRS contends that, because the disclosure in this case occurred in relation to its collection activities, namely, the filing and existence of a federal tax lien, § 7433 precludes Ruiz from seeking a remedy under § 7431. See Shwarz v. U.S., 234 F.3d 428, 432 (9th Cir.2000).[4] Although the Court is inclined to agree with the IRS's argument, it will instead dismiss the claim on the ground that Ruiz lacks standing to sue under § 7431. Having found alternative grounds for dismissal, the Court need not decide whether § 7433 precludes an action under § 7431 in the context of disclosures related to collection actions.

Section 7431 provides that "[i]f any officer or employee of the United States knowingly, or by reason of negligence . . . discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States . . . ." 26 U.S.C. § 7431(a). Once again, the phrase "such taxpayer" indicates that only the taxpayer whose "return" or "return information" has been allegedly disclosed has standing to sue. In this case, IEU was the party with standing to raise this claim.[5] Therefore, the Court will dismiss Ruiz's § 7431 claim for lack of standing.

4. Ruiz's Constitutional claims

The IRS argues that Ruiz's constitutional claims must be dismissed because the U.S. has not waived its sovereign immunity. "[A] waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied. Moreover, a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign." Lane v. Pena, 518 U.S. 187, 192 (1996).

The actions allowed under §§ 7431, 7432, and 7433 of the Internal Revenue Code are limited waivers of sovereign immunity which do not allow for claims of constitutional violations.

> Defendant is subject to the constitutional claims of Plaintiff only to the extent that they may be brought under 26 U.S.C. § 7433; they cannot be brought under the [U.S.] Constitution. The [U.S.], therefore, has not waived sovereign immunity for constitutional violations. As a result, the sovereign immunity doctrine bars Plaintiff's claims against the [U.S.] for alleged constitutional violations.

Gonsalves v. U.S., 782 F.Supp. 164, 168 [69 AFTR 2d 92-763] (D.Me.1992)(footnotes omitted). Therefore, the Court will dismiss Ruiz's constitutional claims because they are barred by the doctrine of sovereign immunity.

5. Ruiz's Supplemental State Law Claims

Ruiz invokes the Court's supplemental jurisdiction over his claims for damages under Puerto Rico's general tort statute, 31 P.R. Laws Ann. § 5141, for libel and slander, 32 P.R. Laws Ann. § 3141, and for violation of his rights under Art. II § 8 of

[3] The claim should have been brought under § 7426, which provides the exclusive remedy for any person, other than the taxpayer, who claims an interest in the property upon which a levy has been made. See 26 U.S.C. § 7426(a).

[4] It should be noted that the Court in Shwarz specifically held that § 7431 remained the exclusive remedy for disclosures not made within the context of collection actions.

[5] The Court notes that the claim by IEU would have most likely been dismissed because the information disclosed by the IRS did not fall under the definitions of "return" and "return information" pursuant to 26 U.S.C. §§ 6103(b)(1) and (2).

the Puerto Rico Constitution to be free from attacks on his honor and reputation. Although the IRS does not refer to Ruiz's supplemental state law claims in its motion for summary judgment, the Court will dismiss them sua sponte because they are barred by the doctrine of sovereign immunity and the Court is therefore deprived of jurisdiction to entertain them.

It is well settled that "any suit seeking money damages from the U.S. Government, or an agency thereof, which would have to be satisfied out of general Treasury funds, is barred by the affirmative defense of sovereign immunity under the Eleventh Amendment." Turner v. U.S. Navy, 793 F.Supp. 679, 680 (E.D.Va.1992)(citing Selden Apartments v. U.S. Dep't of Hous. and Urban Dev., 785 F.2d 152, 156 (6th Cir.1986)). This Court is unaware of, and Ruiz has failed to identify, any statutory provision waiving sovereign immunity that would allow him to bring suit against the U.S. under the Constitution or laws of Puerto Rico. Therefore, the Court will dismiss Ruiz's supplemental state law claims.

CONCLUSION

For the foregoing reasons, the Court grants IRS's motion for summary judgment and dismisses Ruiz's complaint with prejudice. Judgment shall enter accordingly.

IT IS SO ORDERED.

¶2002-5441

In Re: Nan Beth ALT, Debtor. Nan Beth ALT, APPELLANT v. UNITED STATES OF AMERICA, APPELLEE. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 00-1708, Oct. 2, 2002. District Court, (2000, DC MI) 86 AFTR 2d 2000-5108, 251 BR 831, affirming Bankruptcy Court, affirmed. Years 1986, 1987, 1988, 1989, 1990. Decision for Govt.

1. Review of bankruptcy court decision—dismissal of petition—debt exceeding limitation for relief—proof—bad faith. Dismissal of taxpayer-psychiatrist's voluntary Chap. 13 petition was affirmed based on her bad faith: factors indicating bad faith included taxpayer's failure to schedule 1 year's tax debt and her "shocking" and potentially fraudulent contentions at deposition that she didn't know how much she worked or earned, that she never went to banks or used cash or checks, and that her confusion about her finances was due to fact she entrusted her finances to mentally ill sister. *Reference:* United States Tax Reporter ¶68,726.527(15).

ARGUED: Anita G. McIntyre, Grosse Pointe Park, Michigan, for Appellant. Marion E.M. Erickson, UNITED STATES DEPARTMENT OF JUSTICE, APPELLATE SECTION TAX DIVISION, Washington, D.C., for Appellee.
ON BRIEF: Anita G. McIntyre, Grosse Pointe Park, Michigan, for Appellant. Marion E.M. Erickson, David English Carmack, UNITED STATES DEPARTMENT OF JUSTICE, APPELLATE SECTION TAX DIVISION, Washington, D.C., for Appellee.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT,

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids. No. 99-00603

Wendell A. Miles, District Judge.

Before: DAUGHTREY and CLAY, Circuit Judges; WILLIAMS, District Judge.*

OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge.

The debtor, Nan Beth Alt, appeals from an order of the district court affirming the bankruptcy court's dismissal of her bankruptcy petition on the grounds that she is ineligible for Chapter 13 relief because the amount of her liquidated, non-contingent, unsecured debt exceeded the statutory limit, and because the record showed that her petition was not brought in good faith. The district court sustained the bankruptcy court's decision, focusing principally on

* The Honorable Glen M. Williams, United States District Judge for the Western District of Virginia, sitting by designation.

the issue of good faith. Alt challenges both aspects of the bankruptcy court's ruling. We find no error and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Nan Beth Alt is a licensed psychiatrist practicing in Michigan. For the past several years, Alt and members of her family have had a very contentious relationship with the Internal Revenue Service. In 1991, Alt's father, Dr. William Alt, and her sister, Karen Alt, were convicted by a jury of various federal income tax offenses. On direct appeal, this court reversed their convictions based upon an improper jury instruction and remanded the case for a new trial. See United States v. Alt, 996 F.2d 827 [72 AFTR 2d 93-5187] (6th Cir. 1993). Upon remand, William Alt pleaded guilty to a misdemeanor and was sentenced to time served. See United States v. Alt, 83 F.3d 779, 780 [77 AFTR 2d 96-2177] (6th Cir. 1996). During the pendency of the appeal, the government sued William Alt and other members of the Alt family in a civil action to collect back taxes arising from 1981 through 1989, along with interest and penalties. The district court's judgment requiring William Alt to pay $5,053,042.08 was affirmed by this court on appeal. Alt, 83 F.3d at 782–84.

The IRS asserts that Nan Beth Alt failed to file federal income tax returns for the years 1986 and 1987.[1] Moreover, IRS audits for the years 1984 and 1985 resulted in a combined tax deficiency for Alt in the amount of $22,596. The IRS also audited Alt for the years 1986 through 1989. Initially, the audits for these years were assigned to the IRS's criminal investigation division for criminal fraud, but they were later returned to the division for civil fraud.

In May 1996, Alt assigned her accountant, Earl Gemmen, to represent her before the IRS with respect to her tax liabilities for the years 1985 through 1996. In July 1996, Gemmen sent a letter to the local IRS office seeking "assistance in compiling totals for the tax liability" of Nan Alt and Alt's personal services corporation. Specifically, Gemmen wanted to know "as quickly as possible" the amount of Alt's "entire liability." One week later, an IRS revenue agent sent Gemmen copies of reports relating to Alt's liability, not including interest, that the IRS represented would give Gemmen "a reasonable figure to work with." Gemmen followed up on the IRS's letter by asking for "the interest calculations," or at least "the effective interest rates."

In June 1997, the IRS sent Alt a statutory notice of deficiency in the amount of $305,086 for the years 1986 through 1989. Several months before the issuance of that notice of deficiency, Alt had filed her initial petition for Chapter 13 relief in bankruptcy court. However, the bankruptcy court dismissed that petition when Alt's lawyer failed to appear at the scheduled confirmation hearing, and the petition had to be refiled after the deficiency notice was issued. In listing creditors holding un-secured, non-priority claims in the second petition, Alt indicated that the IRS had a claim arising from a tax assessment in the amount of $133,000. Alt did not indicate the taxable year or years to which this assessment related. She also listed two different law firms as holding unsecured non-priority claims for attorneys fees in the total amount of $15,000, and a $1 tax debt to the State of Michigan. Alt listed no other creditors.

In November 1997, the IRS filed a proof of claim in Alt's bankruptcy case, listing a secured claim for $104,735.76, an un-secured priority claim of $887.46, and an unsecured general claim for $4.34. The IRS's claim covered civil penalties from 1988 and 1989, as well as income tax lia-bility for 1985 and 1991. It did not include tax liabilities arising from the years 1986 through 1989, even though it had less than five months before issued a notice of deficiency for amounts due from those years.

In March 1999, the government took Alt's deposition pursuant to Federal Rule of Bankruptcy Procedure 2004. Alt's per-

[1] Alt testified at deposition that she did not "really recall" whether she filed a federal income tax return for 1986.

formance in the deposition was remarkable; beyond providing her full name at the outset of the deposition, she was either unable or unwilling to be responsive to the most basic questions posed by the government. For example, Alt stated that she was unaware of her street address and could not remember when she moved to her current residence. When asked for her telephone number, Alt stated, ''I can't tell you that one -- that either. I don't receive any calls there, as a rule.''

Further, even though Alt had -- less than one year before the deposition -- signed, as president, the 1997 corporate income tax return of Clinical Psychiatric Medicine, P.C., her deposition testimony demonstrated an incredible lack of knowledge about the company. Alt testified that she ''d[id] not know how many employees'' the company had, but that she ''believe[d]'' that four people worked there: Alt's sister Gretchen, brother-in-law, mother, and Alt herself. When asked what services Gretchen performed for the company, Alt responded, ''Oh, I couldn't tell you.'' Alt claimed not to know who owned the stock of the corporation or whether she had any ownership interest in it. Both Alt's attorney and her accountant were present during her deposition testimony.

Within a few weeks of the deposition, the government moved to dismiss Alt's Chapter 13 petition, attaching, among other exhibits, the transcript of Alt's deposition. The government argued that Alt did not qualify for Chapter 13 relief under 11 U.S.C. § 109(e) because: (1) she lacked ''regular income,'' and (2) as of the date she filed her petition, she owed to the IRS ''noncontingent, liquidated, unsecured debts'' greater than $250,000. The government argued that it was impossible to verify whether Alt had regular income because of her stone-walling during the deposition. With respect to the $250,000 noncontingent, liquidated, unsecured debt ceiling, the government represented that it had mailed Alt a notice of deficiency for the years 1986–1989 in the amount of $293,134 on June 30, 1997. This tax debt was not reflected in Alt's second petition. Finally, the government requested that ''[i]nsofar as the debtor's petition was not in good faith,'' it should ''be dismissed outright, without any option for conversion'' to a Chapter 11 petition.

In her short written response, Alt asked the court to deny the motion to dismiss on the grounds that the IRS had filed a proof of claim in the much smaller total amount of $105,627.56, and that the deadline to file claims in her case had long passed. According to Alt, the IRS should be ''barred from alleging its claim is not as filed.'' Alternatively, Alt argued that, should the court find her ineligible under Chapter 13, she be allowed to convert her petition to Chapter 11.

At a later hearing on the government's motion to dismiss, Alt's attorney told the bankruptcy judge that, at the time Alt filed her petition, ''[W]e - and I believed in good faith that the amount of the IRS debt was within the jurisdictional limits of Chapter 13 and, in fact, the IRS filed a claim in the amount of $105,000.'' In support of his assertion that Alt was proceeding in good faith, the lawyer represented that Alt had been making her payments consistently to the trustee. Further, he said that he ''d[id] not believe he [ever] saw'' the June 1997 notice of deficiency sent to Alt.

The bankruptcy court noted that it had reviewed Alt's deposition and ''was shocked.'' Counsel for the bankruptcy trustee agreed with the court's assessment of Alt's performance and noted further that the questions asked at deposition had still not been answered satisfactorily. The bankruptcy judge decided in open court that Alt's petition should be dismissed:

> Case dismissed. What the court has seen in this case is shocking. Here is an educated person who apparently for some reason chose to seek bankruptcy counsel without bringing to his attention the fact that a letter had been received from the IRS setting forth the amount of taxes which were owed which were clearly over the jurisdictional limit at the time. Then coming into the bankruptcy the debtor takes a -- submits to a deposition

in which the answers are laughable at best, fraudulent and criminal at worst, indicating information that is not available to her. She doesn't know her address, her phone number, where she lives, has never seen any checks being written. This is shocking -- and you may use my words -- shocking. This is not what bankruptcy is all about.

If the debtor has a dispute with the IRS then the dispute has to be met head-on, honestly and fairly. We do not -- bankruptcy is not a haven for tax protestors, it is for the honest but unfortunate debtor .... [E]verything this court has seen, including these adjournments to attempt to resolve this, just are unfortunate.

Now the court is aware that the debtor has made payments to the trustee, but making payments to the trustee under Chapter 13 is only one of the requirements. The other requirement is that the debtor has to submit, has to answer questions, has to be honest, forthcoming, truthful, and frank. And that has not happened in this case. It is not to be tolerated. We are not to set an example by allowing this.

Following the hearing, the court entered a written order stating that, "for good cause shown, the debtor's petition under Chapter 13 is dismissed for bad faith and lack of jurisdiction under 11 U.S.C. § 109(e)."

After getting a new lawyer, Alt appealed the dismissal order to the district court, asserting that she was a victim of IRS harassment and blaming her tax problems on her "mentally ill" sister, Karen Alt, with whom, she said, she had entrusted her finances. She argued that the bankruptcy court had erred in dismissing her petition because it had been filed in good faith. In making this argument, Alt claimed that neither she nor her lawyer remembered seeing the IRS's June 1997 notice of deficiency prior to filing her petition. Alt further argued that, as a legal matter, the debt set forth in that deficiency should not be included in determining her eligibility.

The district court affirmed the bankruptcy court, finding that in view of Alt's "shameful ... performance at her deposition, it was not clearly erroneous for the bankruptcy court to find that Alt's petition should be dismissed based on bad faith." The district court also rejected Alt's argument that the 1986–1989 tax deficiency should not be counted toward the Chapter 13 debt ceiling. Among other reasons for its conclusion, the district court found that even if Alt never received the June 1997 notice of deficiency, the record showed that she "had good reason to believe, at least a year before the [n]otice of [d]eficiency was issued, that [she] was facing additional tax liability for the years 1986 through 1989."

Alt appeals, raising before this court substantially the same arguments she made before the district court.

DISCUSSION

[1] On appeal, we review the decision of the bankruptcy court directly. See Barlow v. M.J. Waterman & Assoc., Inc. (In re M.J. Waterman & Assoc., Inc.), 227 F.3d 604, 607 (6th Cir. 2000). The bankruptcy court's conclusions of law are reviewed de novo, and its factual findings are reviewed for clear error. See id.

The bankruptcy court's order dismissing Alt's petition rests on two independent grounds: that Alt was ineligible for Chapter 13 relief under 11 U.S.C. § 109(e) and that her petition was filed in bad faith. Alt challenges both grounds on appeal. We find no reason to disturb the bankruptcy court's order on either basis. Specifically, we conclude that the bankruptcy judge's legal analysis was sound, but even if the order of dismissal could not be sustained on the basis of its legal analysis, we would still find it necessary to affirm the bankruptcy court on the finding that Alt's petition was filed in bad faith.

Despite the fact that there are no such reported decisions in this circuit, there is abundant authority for the notion that a bankruptcy court has the power to dismiss a Chapter 13 petition upon a finding that the debtor did not bring it in good faith.

See, e.g., In re Banks, 267 F.3d 875, 876 (8th Cir. 2001); In re Lilley, 91 F.3d 491, 496 [78 AFTR 2d 96-5884] (3d Cir. 1996); Eisen v. Curry (In re Eisen), 14 F.3d 469 (9th Cir. 1994); Gier v. Farmers State Bank of Lucas (In re Gier), 986 F.2d 1326, 1329 (10th Cir. 1993); In re Love, 957 F.2d 1350 (7th Cir. 1992). Most courts ascribe the basis for such a dismissal to 11 U.S.C. §1307(c), which --although it does not expressly address good faith -- permits a bankruptcy court to dismiss a Chapter 13 petition ''for cause.''(2) See 1 Keith M. Lundin, Chapter 13 Bankruptcy § 5-2 (3d ed. 2000). (''Although not mentioned in the Code as a condition for eligibility for Chapter 13, many reported decisions have considered a debtor's 'good faith' at the threshold of a Chapter 13 case, typically in the context of a motion to dismiss, as if good faith were a predicate to Chapter 13 relief.''); id. at §334.1 (noting that bad faith ''is the most often cited basis for dismissal'' under section 1307(c)). The key inquiry in such cases is whether the debtor is seeking to abuse the bankruptcy process.

Even though we have not spoken to the subject of what constitutes bad faith, we have announced standards for bankruptcy courts to follow in determining the debtor's good faith. As a starting point, the bankruptcy code requires that, in order to be confirmed, a debtor's plan must, among other things, be ''proposed in good faith.'' 11 U.S.C. §1325(a)(3). In that context, ''[o]ur circuit's good faith test requires consideration of the totality of circumstances.'' Society Nat'l Bank v. Barrett (In re Barrett), 964 F.2d 588, 591 (6th Cir. 1992) (citations omitted). Among the circumstances to be considered in determining whether a plan has been proposed in good faith are the following:

(1) the debtor's income;
(2) the debtor's living expenses;
(3) the debtor's attorney's fees;
(4) the expected duration of the Chapter 13 plan;
(5) the sincerity with which the debtor has petitioned for relief under Chapter 13;
(6) the debtor's potential for future earning;
(7) any special circumstances, such as unusually high medical expenses;
(8) the frequency with which the debtor has sought relief before in bankruptcy;
(9) the circumstances under which the debt was incurred;
(10) the amount of payment offered by debtor as indicative of the debtor's sincerity to repay the debt;
(11) the burden which administration would place on the trustee;
(12) the statutorily-mandated policy that bankruptcy provisions be construed liberally in favor of the debtor.

See id. at 592. We have also emphasized that good faith is a fact-specific and flexible determination. See Metro Employees Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah), 836 F.2d 1030, 1032–33 (6th Cir. 1988).

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(2) Section 1307 is entitled, ''Conversion or dismissal.'' and provides at subsection (c) in part that,

[A]fter notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including --

(1) unreasonable delay by the debtor that is prejudicial to creditors;
(2) nonpayment of any fees and charges required under chapter 123 of title 28;
(3) failure to file a plan timely under section 1321 of this title;
(4) failure to commence making timely payments under section 1326 of this title;
(5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
(6) material default by the debtor with respect to a term of a confirmed plan;
(7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;
(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;
(9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521; or
(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521.

11 U.S.C. § 1307 (emphasis added). The fact that the statute uses the word ''including'' demonstrates that the factors listed are not exclusive. See Lilley, 91 F.3d at 494.

In considering whether a petition has been brought in good faith, other circuits have recognized factors similar to those relevant in determining whether a plan has been proposed in good faith. See, e.g., Love, 957 F.2d at 1357 (noting that ''the same policy'' of protecting against an abuse of the provisions and spirit of Chapter 13 ''embodies the two good faith evaluations''); see also Eisen, 14 F.3d at 470 (''To determine if a petition has been filed in bad faith courts are guided by the standards used to evaluate whether a plan has been proposed in good faith.'') In Love, the Seventh Circuit adopted a ''totality of the circumstances'' test for determining whether a Chapter 13 petition was filed in good faith and set forth a ''nonexhaustive'' list of factors, which include ''the nature of the debt, including the question of whether the debt would be nondischargeable in a Chapter 7 proceeding; the timing of the petition; how the debt arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.'' 957 F.2d at 1357. See also Lilley, 91 F.3d at 496 (adopting totality-of-circumstances test); Eisen, 14 F.3d at 470 (''To determine bad faith a bankruptcy judge must review the totality of the circumstances.'') (internal quotations omitted). Where present, the factors set forth by this court in the plan confirmation context are properly considered as well. As the Seventh Circuit has noted, ''[T]here will often be substantial overlap between the two inquiries.'' Love, 957 F.2d at 1360. However, given the more severe consequences, the law also recognizes that ''the bankruptcy court should be more reluctant to dismiss a petition under Section 1307(c) for lack of good faith than to reject a plan for lack of good faith under Section 1325(a).'' Id. at 1356.

In the context of section 1307(c), the burden of showing the debtor's lack of good faith is borne by the party seeking dismissal. See Love 957 F.2d at 1335. Because the inquiry is one of fact rather than legal analysis, we review the bankruptcy court's finding of bad faith for clear error. See Barrett, 964 F.2d at 591; see also Eisen,14 F.3d at 470. In doing so, we must give ''great deference to the bankruptcy court, the trier of fact.'' Love, 957 F.2d at 1354. Compare Okoreeh-Baah, 836 F.2d at 1033 (holding that deciding whether a Chapter 13 plan has been proposed in good faith ''should be left to the bankruptcy court's common sense and judgment'').

Here, the bankruptcy judge's remarks at the hearing on the government's motion to dismiss make it plain that this finding was based in large part on Alt's performance at her deposition. In response to proper questioning regarding her financial condition, Alt claimed not to know how many hours she worked, the rate at which she was paid, or how much money she was paid by her employer, Clinical Psychiatric Medicine, in a given year. The following exchange between Alt and the lawyer for the Department of Justice shows what the bankruptcy court had in mind:

> Q: Where did you keep your financial information with respect to your 1991 work?
>
> A: I do not keep it. I don't know what you're referring to.
>
> Q: Who maintained your records in 1991?
>
> A: I do not recall.
>
> Q: Did anyone maintain your records in 1991?
>
> A: I do not recall.
>
> * * * * *
>
> Q: What personal property do you have? What cash do you have presently?
>
> A: None.
>
> Q: You have no cash presently?
>
> A: (Shaking head negatively.)
>
> Q: Do you have any checking accounts?
>
> A: Yes.
>
> Q: Are they in your name?

A: I have a personal checking account in my name, with my sister as the co-signer.

Q: Which sister would that be?

A: That would be Gretchen.

Q: And where is that kept?

A: What do you mean?

Q: Which bank?

A: I do not know the bank.

Q: Can you withdraw funds out of that with only your signature, or does it require two signatures?

A: I do not know.

Q: Do you ever withdraw funds out of that account?

A: I don't know what you mean exactly.

* * * * *

Q: Do you ever go to the bank and cash a check?

A: No.

Q: Do you ever go to a money machine and withdraw funds?

A: No.

Q: How is it that you get the cash that you have on your person at any time?

A: I don't have any cash on my person.

Q: Do you ever have any cash on your person?

A: Unh-uh (negative).

Q: What do you use to purchase food?

A: Check.

Q: And is that a check that you, then write?

A: Sometimes, yes.

Q: So do you have a checkbook in your -- with you today?

A: No.

Q: Do you use credit cards?

A: No.

Q: So the only form of currency that you use is a check?

A: (Nodding head in affirmative.)

* * * * *

Q: Where do you -- where are the checks kept?

A: In the checkbook. I mean, I don't --

Q: Where is the checkbook kept?

A: I don't know exactly where it is kept, actually.

Q: Do you have more than one checkbook?

A: Not to the best of my knowledge, no.

Q: Is it kept anywhere within your residence?

A: I don't know where it is kept, no.

As the bankruptcy court noted in dismissing Alt's case, Chapter 13 requires the debtor "to be honest, forthcoming, truthful, and frank." Whether the debtor has been forthcoming with the bankruptcy court and the creditors is properly considered in deciding whether dismissal for lack of good faith is appropriate. See Love, 957 F.2d at 1357. Here, the bankruptcy court found Alt's deposition performance to be "laughable at best, fraudulent and criminal at worst."

Obviously, Alt's failure to schedule the tax debt set forth in the June 1997 notice of deficiency bolsters the bankruptcy court's finding of bad faith. The court concluded that Alt was aware of this tax debt, which put her "clearly over the jurisdictional limit at the time" under 11 U.S.C. § 109(e) and simply chose to ignore it when completing her schedules. At the hearing, counsel for the trustee expressed concern that Alt's plan, including the omitted claim, would "far exceed 60 months" and was "not confirmable" under § 109(e).

Another factor bankruptcy courts may consider in this context is "how the debt arose." See Love, 957 F.2d at 1357. See also Barrett, 964 F.2d at 592 (listing "circumstances under which the debt was incurred" as a factor). Here, the debt at issue is an enormous federal income tax deficiency. Certainly not every debtor with substantial tax debt brings his petition in bad faith. However, the bankruptcy court noted after commenting upon Alt's deposi-

tion performance that "bankruptcy is not a haven for tax protestors." Indeed, many published cases regarding dismissal of Chapter 13 petitions for bad faith involve tax protestors. See, e.g., In re Burrell, 186 B.R. 230, 236 [76 AFTR 2d 95-6416] (Bankr. E.D. Tenn. 1995) (dismissing Chapter 13 petition as having been filed in bad faith in an effort to further debtor's tax protest); see also 4 Lundin, supra, at §334.1.

Alt vigorously disputes the court's characterization of her as a tax protestor. Rather, she contends, she is a victim both of IRS harassment and innocent, good faith reliance upon her "mentally ill" sister. Further, in her brief, Alt explains her deposition performance upon her inexperience as a witness, claiming she became "confused and flustered" by her "hostile" interrogator, who was apparently the same "prosecutor who had sent her father and sister to prison." This explanation, however, is neither supported by an affidavit from Alt, nor was it offered to the bankruptcy court in connection with the motion to dismiss. Although Alt may not be a "tax protestor" as that phrase is normally understood, that does not overcome the strong inference of bad faith and abuse of the bankruptcy process raised by her deposition performance and failure to schedule her tax debt.

A lower court's finding of fact "will only be clearly erroneous when, although there may be some evidence to support the finding, 'the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" United States v. Latouf, 132 F.3d 320, 331 (6th Cir. 1997) (quoting Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985)). Upon review of the totality of the circumstances in this record, we simply cannot say that the bankruptcy court's finding of bad faith was clearly erroneous.

CONCLUSION

We recognize that the dismissal of a Chapter 13 petition is a harsh measure. However, as the bankruptcy court pointed out, Chapter 13 relief is reserved for the "honest but unfortunate debtor." The court's conclusion that Alt's conduct demonstrated that she did not qualify as an "honest, forthcoming, truthful and frank" debtor is supported by the record and is subject to great deference on our part. Accordingly, we AFFIRM that court's order dismissing Alt's petition as lacking in good faith. It thus becomes unnecessary for us to deal at length with the bankruptcy court's additional ruling that Alt did not meet the eligibility requirements of § 109(e) in this case.

¶2002-5442

Orville MACKLIN, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Eastern Dist. of Wisconsin, (DC WI) Case No. 01-CV-548, Sept. 4, 2002. Decision for Govt.

1. District court procedure—summary judgment—motions in opposition—scheduling orders—action to quiet title. Govt. was granted extension of time to oppose 3d party/purported nominee's motion for summary judgment on his quiet title complaint: govt.'s attorney's declaration outlining discovery govt. needed to make in order to respond satisfied F.R.Civ.P. 56(f); motion was timely; and argument that govt. wasn't entitled to discovery on validity of its lien filing was rejected. Also, 1 scheduling order was modified. *Reference:* United States Tax Reporter ¶74,025.01(3); 74,336.507(60). IRC §7402.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN,

DECISION AND ORDER

HON. RUDOLPH T. RANDA Chief Judge

Pursuant to a stipulation dated March 15, 2002, the discovery deadline in the above-captioned quiet title action is September 20, 2002, and the dispositive motion deadline is September 27, 2002. However, on April 4, 2002, the plaintiff, Orville Macklin, filed a motion for partial summary judgment. A veritable barrage of motions ensued, including the defendant's Rule 56(f) Motion for an Extension of

Time to Oppose Plaintiff's Motion for Partial Summary Judgment. For the reasons stated below, the defendant's motion for an extension is granted. The Court will discuss the remaining motions when appropriate.

Background

Orville Macklin owns three contiguous parcels of property in Franklin, Wisconsin, Milwaukee County; 9824 W. St. Martins Road, 9745 W. Loomis Road and 9821 W. Loomis Road. On December 15, 2000, the defendant, through the Internal Revenue Service (IRS), filed and recorded three nominee liens against each parcel. According to the liens, Macklin was holding each parcel for the benefit of Gerald Macklin, Randy Greil, and Jan-9821, Inc. T/A "Illusions" (the "Taxpayers.") The complaint seeks relief under 28 U.S.C. § 2410, 26 U.S.C. § 7432, 28 U.S.C. § 2412(b), and Wis. Stats. §§ 814.025 and 706.13. Specifically, Orville Macklin seeks to quiet title and have the nominee liens removed pursuant to § 2410(a)(1), which provides: " . . . the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter . . . to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien." While § 2410 merely waives the defendant's sovereign immunity and does not provide an independent basis for jurisdiction, *see Harrell v. United States*, 13 F.3d 232, 234 [73 AFTR 2d 94-630] (7th Cir. 1993), the Court has jurisdiction pursuant to 28 U.S.C. § 1340.[1]

Nominee Liens

It is well-established that the government may collect a taxpayer's tax debts from the assets of the taxpayer's nominee, instrumentality or alter ego. *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 350–51 [39 AFTR 2d 77-475] (1977). By filing a "nominee lien" against Orville Macklin's property, the IRS seeks to recover tax debts from the Taxpayers under the theory that they have "engaged in a sort of legal fiction, for tax purposes, by placing legal title to property in the hands of another [Orville Macklin] while, in actuality, retaining all or some of the benefits of being the true owners." *Richards v. United States*, 231 B.R. 571, 578 [83 AFTR 2d 99-1138] (E.D. Pa. 1999). With regard to such liens, courts generally conduct a multi-factor analysis, which includes but is not limited to the following: (1) whether the taxpayer expended personal funds for the property; (2) whether the taxpayer enjoys the benefits of the property; (3) the close family relationship between the taxpayer and the titleholder; (4) whether the taxpayer exercises dominion and control over the property; and (5) whether the record titleholder interferes with the taxpayer's use of the property. *Simpson v. United States*, Nos. 87-526-CIV-J-12 and 87-837-CIV-J-12, 1989 WL 73212, at 6 [63 AFTR 2d 89-1132] (M.D. Fla. April 6, 1989).[2]

Rule 56(f)

[1] Now, to the merits of the government's motion. Fed. R. Civ. P. 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party *cannot for reasons stated present by affidavit facts essential to justify the party's opposition*, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Emphasis added. The government attempts to meet its burden through the Declaration of Mary Bielefeld, senior trial attorney in the Tax Division of the United States Department of Justice and attorney for the

[1] § 1340 provides: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue . . . ." As the Seventh Circuit recently observed in a related case, § 1340 is "a statute conferring original jurisdiction on the district courts in any action arising under the internal revenue laws of the United States," and "Federal law, specifically provisions of the federal Internal Revenue Code and its accompanying regulations, dictates the form and content of a federal tax lien." *Macklin v. United States*, No. 01-3489, 2002 WL 1837813, at 2 [90 AFTR 2d 2002-6052] (7th Cir. August 13, 2002).

[2] This analysis mirrors the "piercing the corporate veil" theory in corporations law. *See* William D. Elliot, "Nominee Liens and Alter Ego," Fed. Tax. Collect, Liens & Levies ¶ 9.10[2] (2001).

United States in this matter.[3] Bielefeld's Declaration outlines discovery which the government needs to take in order to respond to the plaintiff's motion. *See* Declaration, ¶ 7, A-I. Macklin argues that the government has not demonstrated an *inability* to oppose the motion because it does not justify why it was unable to complete this discovery in the months leading up to Macklin's April, 2002 motion. Cases do not exist in a vacuum. Other deadlines and obligations come into play, and government attorneys are no exception. Furthermore, the discovery deadline in this matter initially was set for June, 2002, but the parties stipulated to a three month extension. This stipulation was filed just weeks before Macklin's April, 2002 motion for partial summary judgment. The Court will not allow more time for discovery and then arbitrarily cut it off.

Macklin also argues that the government should not need discovery. According to Macklin, the "Defendant may not file Nominee Liens and, if an when the Plaintiff challenges those liens, *then* set about doing discovery to try to establish a good faith basis for filing those liens. That is the thrust and purpose of the Plaintiff's MOTION FOR SUMMARY JUDGMENT" (emphasis in original). Macklin continues: "Defendant's Rule 56(f) MOTION is an admission that it does not now and did not at the time it filed the Nominee Liens on December 15, 2000 have facts essential to justify the Defendant's opposition to Plaintiff's argument that the liens were filed without any basis in fact." Plaintiff's May 21, 2002 Brief in Opposition, p. 1. Macklin cites no legal authority for this novel proposition. Indeed, as noted above, it is certainly within the IRS's realm of power to file nominee liens. Whether they were properly filed is a matter for the courts to decide. The discovery phase is but one part of that process.[4]

Finally, Macklin argues that the government's motion should be stricken because it was filed four days late. However, the Court agrees with the government's interpretation of Local Rule 7.1(c), which provides: "On motions for summary judgment, *the opposing party must serve a response answering brief and affidavits or other documents within 30 days of service of the motion*" (emphasis added). In contrast, Local Rule 56.2(b) provides that "*Any materials in opposition to a motion filed under this rule must be filed within 30 days of the motion* . . ." (emphasis added). A Rule 56(f) motion is not a motion *in opposition* to a motion for summary judgment, as contemplated by Civil L.R. 56.2(b). Rather, it merely requests an extension of time to file a motion in opposition. Such a motion *can* be construed as a "response answering brief," as contemplated by Civil L.R. 7.1(c). Accordingly, because the government was served on April 3, 2002, it was only required to *serve* its Rule 56(f) motion on or before May 6, 2002[5] under Civil L.R. 7.1(c), not *file* the motion, as Macklin argues. The government served Macklin with its motion by mail on May 6, 2002, and accordingly, the motion is not untimely.

Rule 7.4 Motion to Modify Scheduling Order

The initial Scheduling Order in this matter, established by Judge Reynolds on December 13, 2001, provided that on or before April 26, 2002, the defendant shall disclose information concerning defendant's expert witnesses in accordance with Civil L.R. 26.1(a) and (b). On April 23, 2002, the parties stipulated that the deadline for disclosure by the United States of any experts be extended thirty days until May 26, 2002. Subsequently, on May 28, 2002, the government moved to modify the Scheduling Order again, such that the expert report deadline be scheduled for Octo-

[3] Macklin argues that the government's Rule 56(f) motion is in improper form, as it was not supported by "affidavits of a party opposing the motion" for summary judgment. However, Bielefeld's Declaration, signed under penalty of perjury pursuant to 28 U.S.C. § 1746, is a sufficient substitute. § 1746 provides: "[w]herever, under any law of the United States under any rule, regulation, order or requirement made pursuant to law, any matter is required . . . to be . . . *proved by the sworn . . . affidavit, in writing of the person making the same . . . such matter may, with like force and effect, be . . . proved by the unsworn declaration . . . in writing of such person which is subscribed by him, as true under penalty of perjury, and dated.*" Macklin also objects to the narrative form of Bielefeld's Declaration under Rule 56(e). Whatever the requirements of Rule 56(e), they are not applicable to the government's Rule 56(f) motion.

[4] Macklin can recover damages incurred as the result of an improperly filed tax lien under 26 U.S.C. § 7432.

[5] Three days are added for service by mail under Fed. R. Civ. P. 6(e).

ber 21, 2002, and the discovery deadline for expert witness depositions be scheduled for November 21, 2002. In response, Macklin expresses "substantial concern that the Defendant has seen that it can simply outlast the Plaintiff here because of his age (86)." June 6, 2002 Response to Motion to Modify Expert Report Deadline, ¶ 7. This argument is unavailing, as the government has not moved to postpone the trial date, set for February 25–27, 2003.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. Defendant's Rule 56(f) motion to extend time to respond to the plaintiff's Motion for Partial Summary Judgment [33-1] is GRANTED. The defendant shall file a response to Macklin's April 4, 2002 Motion for Partial Summary Judgment [23-1] on or before October 10, 2002;

2. Macklin's motion to strike the Declaration of Mary Bielefeld [36-1] is DENIED;

3. Macklin's motion to strike the Declaration of Mary Bielefeld, the Second Declaration of Mary Bielefeld, and for partial summary judgment [49-1] is DENIED;

4. Macklin's motion for partial summary judgment [36-2] is DENIED;

5. Defendant's Rule 7.4 Motion to Modify Scheduling Order [40-1] is GRANTED, such that the expert report deadline is October 21, 2002, and the discovery deadline for expert witness depositions is November 21, 2002;

6. In all other respects, the discovery deadline in this matter remains September 20, 2002, and the dispositive motion deadline remains September 27, 2002; and

7. The Court's March 20, 2002 Scheduling Order remains unmodified. Dated at Milwaukee, Wisconsin, this 4th day of September, 2002.

SO ORDERED,

HON. RUDOLPH T. RANDA

Chief Judge

¶2002-5443

UNITED STATES OF AMERICA, PLAINTIFF v. Joyce M. BANNISTER; William R. BANNISTER, individually, and as Trustee of the River Trust; Noble E. Kleven and G. Lu Verne Kleven, DEFENDANTS. U.S. District Court, Western Dist. of Wisconsin, (DC WI) 02-C-075-S, Aug. 7, 2002. Years 1989, 1990, 1991, 1992. Decision for Govt.

1. Actions to reduce assessments to judgment—foreclosure—property held by third parties—nominees. Nonfiling taxpayer's assessments were reduced to judgment, and liens were foreclosed against residence held in trust's name on summary judgment: unrefuted assessments based on Bureau of Labor Statistics and taxpayer's own admission that he earned income during years at issue were presumptively correct; and trust merely held residence as nominee of taxpayer, who continued to reside on and control property after transferring it after 3 years of no return filing and for no consideration. *Reference:* United States Tax Reporter ¶74,035.01(25); 74,035.03(80); 63,215.02(115). IRC §6321; 7403.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN,

MEMORANDUM AND ORDER

JOHN C. SHABAZ District Judge

Plaintiff United States of America commenced this civil action pursuant to 26 U.S.C. §§ 7401 and 7403 to reduce to judgment certain unpaid federal tax assessments against William R. Bannister and to foreclose federal tax liens on real property owned by the River Trust.

On May 1, 2002 and July 11, 2002 plaintiff filed motions for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, declarations and memoranda in support thereof. Defendant William R. Bannister responded

to both motions. No further briefing is required.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding plaintiff's motions for summary judgment the Court finds the following facts.

Defendant William R. Bannister is an adult resident of Rice Lake, Wisconsin who failed to file federal income tax returns or estimated tax payments in 1989, 1990, 1991 and 1992.

Internal Revenue Agent Kathy Mishler was assigned to secure federal income tax returns from defendant Bannister. She attempted to meet with him on October 25, 1993 but he refused to meet with her. Said defendant has admitted he received commission income during 1989, 1990, 1991 and 1992 from the sale of securities.

Because said defendant refused to meet with Mishler or provide her any documents she based the tax assessments against him on statistics compiled by the Bureau of Labor Statistics reflecting average income for two or more persons for each year. Because defendant William R. Bannister was married the agent allocated one-half of this average income amount to him and allowed an individual exemption for him and the standard deduction for married filing separately. He was also allowed a self-employment tax deduction for the years it was permitted, 1990–1992.

The following are the unpaid assessments owed by defendant William R. Bannister:

1989	$14,297.23
1990	$15,265.80
1991	$14,430.00
1992	$13,838.61
Total	$57,831.64

In 1972 defendant William R. Bannister and Joyce M. Bannister purchased the residential real property located at 2232 22nd Street, Rice Lake, Wisconsin 54868. The Bannisters transferred this property to Noble E. Kleven and G. Lu Verne Kleven on or about September 14, 1977. Despite this transfer the Bannisters continued to reside at the Rice Lake residence. They maintained the property and paid the utilities but did not pay rent to the Klevens. Although the Bannisters allegedly divorced in 1989 they continue to live together at the property.

On or about May 7, 1992 the Klevens transferred the Rice Lake Property to the River Trust. Defendant William R. Bannister is the Trustee and Beneficiary of this trust. The Wisconsin Real Estate Transfer Return for this transaction indicates that the transfer was not a sale. The Trust has the same address as the Rice Lake Property.

The Bannisters continue to reside at the Rice Lake Property and maintain it. The Trust has in no way interfered with the ability of the Bannisters to use the property.

Notices of Federal Tax Liens relating to the tax assessments against defendant William R. Bannister were recorded at the Barron County Register of Deeds on May

31, 1995. A Federal Tax Lien naming the River Trust as a nominee of William R. Bannister was recorded on July 30, 1996.

MEMORANDUM

[1] Plaintiff seeks to reduce to judgment the federal tax assessments made against William R. Bannister and foreclose the outstanding federal tax liens that have attached to the real property owned by defendant William R. Bannister or his nominee. Federal tax assessments are presumptively correct. Avco Delta Corp. Canada Ltd. v. United States, 540 F.2d 258, 262 [38 AFTR 2d 76-5489] (7th Cir. 1976). Once the United States has shown evidence of tax assessments the burden shifts to the taxpayer to refute the presumptively correct assessments. Id. The taxpayer must show the assessments are incorrect. Id.

In this case the United States has submitted copies of the Certified Transcripts of the assessments for the years at issue. When assessments are based upon income reconstructions they are entitled to a presumption of correctness as long as they are supported by a minimal factual foundation. The assessments against William R. Bannister were based on the Bureau of Labor Statistics and his admission that he earned income during the years in question. In addition said defendant refused to meet with the Internal Revenue Agent. The government's method of assessment was rationally based.

Defendant William R. Bannister has produced no evidence that these assessments are incorrect. As a matter of law the assessments made by the United States against defendant William R. Bannister are presumed correct. Plaintiff is entitled to judgment in its favor for the amount of the total assessments, $57,831.64.

Federal tax liens arose from the tax assessments against defendant William R. Bannister and attach to all property and rights to property belonging to him. This includes property held by a nominee or alter ego of a taxpayer. G.M. Leasing Corp. V. United States, 429 U.S. 338, 350–51 [39 AFTR 2d 77-475] (1977). The following factors are considered in determining whether property is held by a nominee: (1) whether the taxpayer exercises dominion and control over the property while the property is in the nominee's name; (2) whether the nominee paid little or no consideration for the property; (3) whether the taxpayer placed the property in the nominee's name in anticipation of a liability or lawsuit; (4) whether a close relationship exists between the taxpayer and the nominee and (5) whether the taxpayer continues to enjoy the benefits of the property while the property is in the nominee's name. United States v. Reed, 168 F. Supp. 2d 1266, 1268–69 [88 AFTR 2d 2001-5502] (D. Utah 2001).

Defendant William R. Bannister exercises dominion and control over the property. He continues to reside at the property, and the River Trust does not interfere with his use of the property. The River Trust did not pay any consideration for the property. Defendant William R. Bannister is the trustee and beneficiary of the trust and continues to enjoy the benefits of the property. Further, the transfer of the trust in 1992 occurred after said defendant had failed to file federal income tax returns for three years. Considering all these factors the Court finds that the Rice Lake property is held by a nominee of defendant William R. Bannister and the federal tax liens may be foreclosed against the property.

Plaintiff's motions for summary judgment will be granted. The Court will reduce to judgment defendant William R. Bannister's liability for taxes and penalties in the amount of $57,831.64 together with statutory additions and interest as provided by law. The outstanding federal tax liens will be foreclosed on the real property at 2232 22nd Street, Rice Lake, Wisconsin owned by the River Trust as a nominee for William R. Bannister.

ORDER

IT IS ORDERED that plaintiff's motions for summary judgment are GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of plaintiff against defendants in the amount of $57,831.64 together with statutory addi-

tions and interest as provided by law and foreclosure of real property located at 2232 22ndStreet, Rice Lake, Wisconsin.

Entered this 7th day of August 2002.

BY THE COURT:

JOHN C. SHABAZ

District Judge

¶2002-5444

Darrell D. BILLHEIMER, PLAINTIFF v. Michael LOUDERBACK, aka IRS, DEFENDANT. U.S. District Court, Southern Dist. of Ohio, (DC OH) Case No. C-3-00-574, Sept. 10, 2002. Earlier proceedings at (2001, DC OH) 88 AFTR 2d 2001-6447, denying reconsideration of district courts and adopting (2001, DC OH) 87 AFTR 2d 2001-1585; and (2001, DC OH) 87 AFTR 2d 2001-994, 2001-1 USTC ¶50299. Decision against Taxpayers.

1. Actions against IRS agents—proper parties—sovereign immunity—remand—reconsideration—motion for relief from judgment. Magistrate judge recommended denying taxpayer's motion for relief from judgment dismissing his collection-related case as barred by sovereign immunity: taxpayer didn't show that district court lacked jurisdiction over action or parties to action. Taxpayer's argument regarding lack of affidavit showing he owed any tax debt was rejected; and removal of case from state court to district court was proper. Also, taxpayer submitted himself to state court's personal jurisdiction by filing in that court, and jurisdiction carried over to district court upon removal; and govt. submitted itself to district court's personal jurisdiction by filing for removal. *Reference:* United States Tax Reporter ¶74,336.505(15); 74,336.506(25); 74,336.508(60).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON,

REPORT AND RECOMMENDATIONS

Chief Judge Walter Herbert Rice

Magistrate Judge Michael R. Merz

This case is before the Court on Motion for Relief from Judgment by Plaintiff Darrell D. Billheimer and his spouse, Joan Billheimer (Doc. No. 26).

Plaintiff[1] originally brought this action in the Montgomery County Common Pleas Court attempting to obtain relief from liens placed on his property by Internal Revenue Service Agent Defendant Michael Louderback. The United States removed the case to this Court and the Court denied Plaintiff's motion to remand, finding this Court had original jurisdiction of the claims. Eventually the Court dismissed the case as barred by the sovereign immunity of the United States (Doc. Nos. 23 & 24). Plaintiff took no appeal of that final judgment, which was entered September 12, 2001.

[1] Plaintiff now seeks to set aside the final judgment on the ground that it is void because the Court lacked jurisdiction of both the subject matter and the parties. However, Plaintiff makes no argument as to why that should be so. He recites the lack of an affidavit showing that he owed any debt to the Defendant, an argument paralleling one he has made in *United States v. Billheimer*, C-3-99-402, but it really has no application to this case. Removal of this case to federal court was proper because it was an action filed in state court against a federal officer acting in his official capacity. This Court had jurisdiction of the parties because the Plaintiff has submitted himself to the personal jurisdiction of the Common Pleas Court by filing in that court, and the jurisdiction carried over to this Court, which is the proper court to which to remove a removable action filed in the Montgomery County Common Pleas Court. Defendant, of course, submitted itself to the personal jurisdiction of this Court by filing the removal.

[1] Plaintiff's spouse, Joan Billheimer, has never been a party to this action and thus lacks standing to move to vacate the judgment. References hereinafter to Plaintiff are to Darrell Billheimer only.

The Motion for Relief from Judgment is without merit and should be DENIED. September 10, 2002.

Michael R. Merz

United States Magistrate Judge

¶2002-5445

Richard B. CLARK, APPELLANT v. INTERNAL REVENUE SERVICE and N.Y.S. Dept. Taxation, APPELLEES. U.S. District Court, Eastern Dist. of New York, (DC NY) CV-02-0469 (ERK), Oct. 3, 2002. Bankruptcy Court, (2001, Bktcy Ct NY) 89 AFTR 2d 2002-1092, 2002-1 USTC ¶50248, affirmed. Years 1991, 1992, 1993, 1994, 1995, 1996, 1997. Decision for Govt.

1. Bankruptcy court procedure—motion to vacate or modify order—limitations periods—post plan confirmation complaints. Bankruptcy court's order was affirmed without discussion. *Reference:* United States Tax Reporter ¶68,726.52(3); 68,726.52(47); 74,336.504(61).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK,

ORDER

Korman, Ch. J.,

[1] The order of the Bankruptcy Court, dated December 15, 2001, is affirmed.

SO ORDERED:

Brooklyn, New York

September 3, 2002

Edward R. Korman

United States Chief District Judge

¶2002-5446

Michael FLEMING, PLAINTIFF v. SEVEN RECORDS OF LIEN, DEFENDANTS. U.S. District Court, Middle Dist. of Florida, (DC FL) CASE NO. 8:02-CV-781-T-17TGW, Sept. 13, 2002. Earlier proceedings at (2002, DC FL) 90 AFTR 2d 2002-6263; and (2002, DC FL) 90 AFTR 2d 2002-5405. Decision against Taxpayer.

1. District court procedure—motions to consolidate appeal and to proceed in forma pauperis. Taxpayer's motions to consolidate appeal and to proceed in forma pauperis on appeal were denied: taxpayer was required to present motion to consolidate to 11th Cir.; and motion to proceed in forma pauperis was frivolous. *Reference:* United States Tax Reporter ¶74,025.01(132). IRC §7402.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION,

ORDER

ELIZABETH A. KOVACHEVICH United States District Judge

This cause is before the Court on the following:

Dkt. 29 Motion to Consolidate Appeal
Dkt. 30 Motion to Proceed IFP

[1] After consideration, the Court denies the Motion to Consolidate Appeal, because the motion should be presented to the Eleventh Circuit Court of Appeals. The Court denies the Motion Proceed IFP on appeal because the appeal is frivolous. Plaintiff may present that motion to the Eleventh Circuit Count of Appeals. Accordingly, it is

ORDERED that the Motion to Consolidate (Dkt. 29) and Motion to Proceed IFP (Dkt. 30) are denied.

DONE and ORDERED in Chambers, in Tampa, Florida on this 13th day of September, 2002.

ELIZABETH A. KOVACHEVICH

United States District Judge

Copies to:

All parties and counsel of record

¶2002-5447

SHARON GINSBURG v. UNITED STATES OF AMERICA. U.S. District Court, Dist. of Connecticut, (DC CT) CIV. NO. 3:02CV176 (WWE), Sept. 6, 2002. Year 1999. Decision for Govt.

1. Third-party summons enforcement—petition to quash—notice. Magistrate judge recommended dismissing for lack of jurisdiction account holder-wife's petition to quash IRS's 3d-party summons issued on financial services firm in aid of collection of husband's tax liabilities: appellate precedent showed IRC §7609(b)(2)'s notice provision didn't apply to IRC §7609(c)(2)(D) collection summonses; and case law wife cited was distinguishable. *Reference:* United States Tax Reporter ¶76,095.01(30). IRC §7609.

UNITED STATES DISTRICT COURT DISTRICT OF CONNECTICUT,

RECOMMENDED RULING ON DEFENDANT'S MOTION TO DISMISS

HOLLY B. FITZSIMMONS UNITED STATES MAGISTRATE JUDGE

Petitioner Sharon Ginsburg seeks to quash an IRS summons issued in connection with the federal tax liability of her husband, Robert Ginsburg. The collection summons served on Merrill Lynch seeks account information of the petitioner [Doc. #1]. The United States has moved to dismiss the petition [Doc. #6], on the grounds that the action is barred by the doctrine of sovereign immunity and that the Court lacks jurisdiction to entertain the proceeding.

Issue Presented

The issue presented is whether the IRS must notify the account holder if it attempts to collect an assessment by serving a collection summons on a third-party regarding the account of someone other than the taxpayer named in the assessment.

Facts

The following facts are accepted as true for purposes of this motion to dismiss. [Doc. #7 at 6].

The IRS summoned the Merrill Lynch account records of Sharon Ginsburg covering the time period from January 1, 1999, through August 31, 2001. [Pet. ¶1]. The IRS issued the summons in aid of the collection of 1999 liabilities owed by taxpayer Robert Ginsberg. [Pet. ¶6]. Robert Ginsberg is the petitioner's husband. [Pet. ¶6]. Petitioner Sharon Ginsberg owes no taxes to the IRS and is not the subject of the IRS investigation or the collection summons.

DISCUSSION

It is undisputed that the United States is immune from suit except where Congress has enacted legislation that waives such immunity. See United States Dept. of Energy v. Ohio, 503 U.S. 607, 615 (1992); United States v. Dalm, 494 U.S. 596, 608 [65 AFTR 2d 90-1210] (1990); United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Testan, 424 U.S. 392, 399 (1976); United States v. Sherwood, 312 U.S. 584, 586 (1941). ''An action to quash an IRS summons is a suit against the United States.'' Barmes v. United States, 199 F.3d 386, 388 [84 AFTR 2d 99-7130] (7th Cir. 1999).

''As a general rule, §7609 requires the IRS to serve anyone whose financial records are sought in a third-party summons with a notice copy of the summons.'' Id. (citing 26 U.S.C. §7609(a)(1)). Persons entitled to such notice may then petition a district court to quash the summons. 26 U.S.C. §7609(b)(2) (''any person who is entitled to notice of a summons under subsection (a) [of 26 U.S.C. §7609] shall have the right to begin a proceeding to quash such summons . . . .'')). Notice is not required when a third-party summons is ''issued in the aid of the collection of . . . an assessment made or judgment rendered against the person with respect to whose liability the summons is issued.'' 26 U.S.C §7609(c)(2)(D). ''[I]f notice is not mandated, neither is a petition to quash au-

thorized.'' Barmes, 199 F.3d at 388 (citing 26 U.S.C. §7609(b)(2)(A)).

[1] Petitioner Sharon Ginsburg argues that she was entitled to notice of the summons under §7609(a)(1) because the IRS issued the tax assessment and collection action against her husband, Robert Ginsberg, not against her individually. She asserts that the ''aid of the collection of an assessment,'' interpreted as broadly as the government contends, ''would mean the IRS could secretly obtain the records of anyone so long as it claimed it was seeking to collect taxes of a delinquent taxpayer . . .'' [Doc. #10 at 3].

The IRS argues, and the Court concludes, that ''§7609(b)(2) is inapplicable as the summons issued and served is a collection summons under §7609(c)(2)(D), and dismissal of the case is therefore required.'' [Doc. #7 at 3]. The Court finds that, because the summons served on Merrill Lynch was issued in aid of the collection of the Robert Ginsberg's tax liabilities under §7609(c)(2)(D), the Court lacks jurisdiction to hear her claims and petitioner cannot seek to quash the summons.

This Court is guided by the decisions in the Seventh and Tenth Circuits in reaching this conclusion. See Barmes v. United States, 199 F.3d 386, 389–09 [84 AFTR 2d 99-7130] (7th Cir. 1999) (summons of husband and wife's accounts with respect to efforts to collect partnership's tax liability); Davidson v. United States, 149 F.3d 1190, 1998 WL 339541, 2 [81 AFTR 2d 98-2238] (10th Cir. June 9, 1998) (summons of wife's bank accounts with respect to efforts to collect husband's tax liability) (unpublished); Jordan v. United States, No. Civ. A 96-M-7-H, 1997 WL 148560, 2 [79 AFTR 2d 97-2141] (W.D. Air. Mar. 20, 1997) (same); Seraing v. United States, No. C-81-1572-WAS, 1981 WL 1791 (N.D. Cal. Apr. 30, 1981) (same); see also Bancsi v. Bennington, 812 F. Supp. 759, 760 [70 AFTR 2d 92-6141] (N.D. Ohio 1992) (summons issued to TRW for Joseph Bancsi's credit report with respect to efforts to collect Bancsi & Bancsi Co. L.P.A.'s tax liability). ''[A]s long as the third-party summons is issued to aid in the collection of any assessed tax liability the notice exception applies.'' Barmes, 199 F. 3d at 390; see Davidson 1998 WL 339541, 2.

In Davidson ''the IRS was investigation whether a taxpayer fraudulently transferred funds to his wife.'' 1998 WL 339541, 2 The Tenth Circuit held that, ''the fact remains that the statute does not require the IRS to give notice when it issues a third-party record-keeper summons 'in aid of the collection of the liability of any person against whom an assessment has been made.''' Id. (citing 26 U.S.C. §7609(c) (2) (B) (I) (emphasis in original)). ''In other words, the identity of the taxpayer seeking to quash a summons is immaterial once it is decided that the summons qualifies as a collection summons under §7609(c) (2) (B) (I); even if the taxpayer owes no tax to the IRS and the records sought from a third party relate to her, she is nonetheless powerless to challenge the summons.'' Jordon, 1997 WL 148570, 2.

This Court declines to follow Ip v. United States, 205 F.3d 1168 [85 AFTR 2d 2000-1095] (9th Cir. 2000), relied on by petitioner, because it is factually distinguishable from the case here,[1] and because the Seventh and Tenth Circuits decisions provide more useful guidance.

CONCLUSION

Accordingly, defendant's Motion to Dismiss the Petition to Quash Summons [Doc. #6] is GRANTED for lack of subject matter jurisdiction, and, plaintiff's Motion to Quash IRS Summons [Doc. #1] is therefore DENIED.

Any objections to this recommended ruling must be filed with the Clerk of the Court within ten (10) days of the receipt of this order. Failure to object within ten (10)

[1] The Government asserts that Ip was wrongly decided, as the statutory language of the §7609(c) (2) (D) is clear and unambiguous.

Moreover, the facts in Ip are distinguishable. In Ip, the Court was asked to decide ''whether notice is required under 26 U.S.C. §7609(a) when the Internal Revenue Service summons a third-party record-keeper to produce financial records of a person who has no outstanding tax liability and who has no legal relationship with any person against whom a tax assessment has been made.'' 205 F.3d at 1169. The petitioner in Ip had no apparent legal relationship to the assessed taxpayer, even though she was the fiancé of the agent of the assessed taxpayer. The petitioner in this case is the wife of the taxpayer against whom the tax liability was assessed.

days may preclude appellate review. See 28 U.S.C. § 636(b) (1); Rules 72, 6(a) and 6(e) of the Federal Rules of Civil Procedure; Rule 2 of the Local Rules for United States Magistrates; Small v. Secretary of H.H.S., 892 F.2d 15 (2d Cir. 1989) (per curiam); F.D.I.C. v. Hillcrest Assoc., 66 F.3d 566, 569 (2d Cir. 1995).

SO ORDERED at Bridgeport this 6 day of September 2002.

HOLLY B. FITZSIMMONS

UNITED STATES MAGISTRATE JUDGE

¶2002-5448

Howard HILLMAN and Ada Joanne HILLMAN, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of South Dakota, (DC SD) CIV 01-4124, Sept. 11, 2002. Years 1992, 1993, 1994, 1995. Decision against Taxpayers.

1. Self-employment taxes—trade or business—farming—breeding vs. sales of heifers—limitations periods. Bull farmers were denied summary judgment on refund claim contesting IRS's self-employment treatment of their heifer sales: whether taxpayers held heifers for sale in ordinary course of business or merely for breeding was remaining material fact question. Taxpayers' proof that heifers were sold only if they didn't come up to standard indicated they were held primarily for breeding, but conflicting proof that they extensively advertised heifer sales and culled them only 1 month before annual yearling sale indicated that they were held for sale to customers. Also, taxpayers' limitations period defense was rejected where their duly executed consents to extend limitations periods for income tax assessments encompassed self-employment taxes. *Reference:* United States Tax Reporter ¶14,025.07(37); 65,015.19(10). IRC §1401; 1402; 6501.

UNITED STATES DISTRICT COURT DISTRICT OF SOUTH DAKOTA SOUTHERN DIVISION,

MEMORANDUM OPINION AND ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Lawrence L. Piersol Chief Judge

Plaintiffs, Howard Hillman and Ada Joanne Hillman (''the Hillmans''), brought suit against the defendant, the United States of America, seeking a refund of self-employment taxes and interest in the amount of $18,152.00, assessed against them by the Internal Revenue Service (''IRS'') for the tax years 1992, 1993, 1994 and 1995.

BACKGROUND

[1] The Hillmans own and operate Bon View Farms in Canova, South Dakota. They are in the business of selling Angus bulls, and one of the issues before the Court for purposes of this motion is whether the Hillmans are also in the business of selling heifers. There is no dispute that Bon View Farms held an annual spring yearling sale, selling approximately 120 bull calves and approximately 36 to 46 heifer calves during the years 1992, 1993, 1994 and 1995. Approximately one month before the spring sale, the Hillmans culled their heifers. Some of the culled heifers were not sold at the spring sale if they were deemed insufficient quality for their customers. Bon View Farms had approximately 2,000 sales catalogs professionally printed to advertise the spring sale. The catalogs separately listed each bull and heifer offered for sale. Additional advertising for the spring sale appeared in farm publications, newspapers, and on radio stations throughout South Dakota and into Nebraska. The income from the sale of heifers was reported as ordinary gains on Part 2 of IRS Form 4797 and, therefore, self-employment tax was not paid on the income.

On account of their 1992 tax return, the Hillmans paid $30,493.00 in income taxes and $5,931.00 in self-employment tax for 1992. On December 29, 1998, the Hillmans paid $2,712.00 of additional self-employment taxes plus interest that was assessed by the IRS for income earned in 1992. On or about January 15, 1995, the

Hillmans filed a Form 872, consenting to extend the time to assess taxes for the period ended December 31, 1992. On January 12, 1997, the Hillmans filed a Form 872-A, in which they consented to the extensions of time to assess income taxes for the year ended December 31, 1992.

The Hillmans paid $23,627.00 in income taxes and no self-employment taxes for 1993. On November 9, 1998, the Defendant assessed the Hillmans $7,217.00 of income and self-employment taxes plus interest for 1993, which was paid by the Hillmans of December 29, 1998. On January 12, 1997, the Hillmans filed a Form 872-A, in which they consented to the extension of time to assess income taxes for the year ended December 31, 1993.

Pursuant to their tax return for 1994, the Hillmans paid $21,037.00 in income taxes and no self-employment taxes. On December 29 1998, the Hillmans paid $6,069.00 of self-employment taxes plus interest that had been assessed by the IRS for 1994. On January 12, 1997, the Hillmans filed a Form 872-A, in which they consented to the extension of time to assess income taxes for the year ended December 31, 1994.

On June 24, 1996, the Hillmans filed a tax return for 1995. On account of the return, the Hillmans paid $196,089.00 in income taxes and no self-employment taxes. On December 7, 1998, the Defendant assessed the Hillmans $2,600.00 of self-employment taxes plus interest for 1995, which the Hillmans paid on December 29, 1998.

On June 4, 1999, the Hillmans filed a claim for refund with the IRS for the Hillmans' individual tax years 1992, 1993, 1994, and 1995. On August 16, 1999, the IRS denied the Hillmans' refund claims relating to calendar years 1992, 1994, and 1995. On June 14, 2000, the IRS denied the Hillmans' refund claims related to calendar years 1992, 1993, and 1994.

DISCUSSION

Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The Hillmans first argue that they did not consent to an extension of time for the IRS to assess self-employment taxes because the Form 872-A agreement does not specifically refer to self-employment taxes. The parties agree that this is legal issue. This Court agrees with Judge Kornmann's holding in Ambur v. United States, 206 F.Supp.2d 1021 [89 AFTR 2d 2002-3056] (D.S.D. 2002), that self-employment tax is "income tax" within the meaning of IRS 872-A consent to extend time for assessment agreements. The Hillmans' motion for summary judgment on this ground will be denied.

The Hillmans next contend that they are entitled to summary judgment because the facts show that they held the heifers primarily for breeding purposes. Self-employment tax is not imposed on the sale of property unless it is "property held primarily for sale to customers in the ordinary course of the trade or business." 26 U.S.C. § 1402(a)(3)(C). "The question of purpose for which an animal is held is essentially one of fact." McDonald v. Commissioner of Internal Revenue, 214 F.2d 341, 342 [45 AFTR 1733] (2nd Cir. 1954). Cf. Municipal Bond Corp. v. Commissioner of Internal Revenue, 341 F.2d 683, 689 [15 AFTR 2d 408] (8th Cir. 1965) (the purpose for which real estate is held is a question of fact).

Having reviewed the parties' submissions in this case and having considered factors used to determine the purpose for which an animal is held, see, e.g., McDonald, supra; A. Duda & Sons, Inc. v. United States, 560 F.2d 669, 680–682 [40 AFTR 2d 77-5904] (5th Cir. 1977), this Court cannot find as a matter of law that the Hillmans did not hold the heifers primarily for sale to customers in the ordinary course of their business. The fact that most of the heifers sold by the Hillmans were sold because they did not measure up to the Hillmans' standards suggests that they held the heifers primarily for breeding purposes. See A. Duda & Sons, 560 F.2d at 681. But the fact that the Hillmans culled the heifers

only one month before the yearly spring sale rather than as soon as the heifer evidenced undesirable characteristics, and the fact that the Hillmans extensively advertised the heifers for sale (the 1992 catalog referred to the heifers as their "best" heifers, and the 1993 catalog said the heifers ranked "at the top of the breed), raises genuine issues of material fact as to the Hillmans' purpose for holding the heifers. The Eighth Circuit has said that summary judgment is 'notoriously inappropriate' in cases which involve issues of intent or other subjective feelings. Pfizer, Inc. v. International Rectifier Corp., 538 F.2d 180, 185 (8th Cir. 1976). Assessing the credibility of witnesses is not a function for the court in ruling on a motion for summary judgment. See Oldham v. West, 47 F.3d 985, 988–89 (8th Cir.1995). Therefore, where there are witnesses whose testimony raises genuine issues of material fact, such as the Hillmans in this case, summary judgment is inappropriate. Accordingly.

IT IS ORDERED that Plaintiffs' Motion for Summary Judgment, Doc, 24, is denied.

Dated this 11th day of September, 2002.

BY THE COURT:

Lawrence L. Piersol

Chief Judge

ATTEST:

JOSEPH HAAS, CLERK

BY: /s/

(SEAL) DEPUTY

¶2002-5449

IES INDUSTRIES, INC. AND SUBSIDIARIES, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Iowa, (DC IA) Civil No. C 97-206-EJM, Aug. 15, 2002. Earlier proceedings at (2002, DC IA) 90 AFTR 2d 2002-5833, on remand from (2001, CA8) 87 AFTR 2d 2001-2492, 253 F 3d 350, 2001-2 USTC ¶50471, reversing and remanding (1999, DC IA) 84 AFTR 2d 99-6445, 2001-2 USTC ¶50470. Years 1991, 1992. Decision for Taxpayer in part and for Govt. in part.

1. Tax avoidance transactions—American depository receipt transactions—foreign tax credits—recoupment—time for claiming deductions— accrual method taxpayers—all events test—economic performance—Energy Policy Act. Final judgment was entered for corp. in accord with prior decision upholding govt.'s right to recover under equitable recoupment theory certain underpayments that, absent expiration of limitations periods, would have resulted concomitant with taxpayer's overpayments from reversal of IRS's adjustments. *Reference:* United States Tax Reporter ¶79,007.01(23); 9015.01(15); 64,025.23(10); 4615.16(7); 4615.41(25). IRC §451; 461; 901; 6402.

Seth G. Heald U.S. Department of Justice, Tax Division P.O. Box 7238 Washington, DC 20044 202-514-6508 Fax: 202-514-6770 Attorney for Defendant

Thomas C. Borders McDermont, Will & Emery 227 West Monroe Street Chicago, IL 60606-5096 312-984-7552 Fax: 312-984-2097 Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CEDAR RAPIDS DIVISION,

Final Judgment

[1] Based on the ruling of the United States Court of Appeals for the Eighth Circuit entered in this case and this Court's order dated July 22, 2002, the Court finds that the plaintiff has overpaid its federal corporation income taxes for the years in suit as follows:

Tax Year	Overpayment of Tax	Interest Previously Paid and Assessed	Total
1989	$ 26,033.00	$ 20,520.71	$ 46,553.71
1990	$25,976,839.00	$1,818,141.49	$27,794,980.49
1992	None	None	
Total	$26,002,872.00	$1,838,662.20	$27,841,534.20

The Court further finds that reversal of the IRS adjustments that were made based on the IRS's theory that the plaintiff's 1991 and 1992 ADR trades were shams, result not only in the above 1989 and 1990 overpayments, but also would have resulted in tax underpayments for 1991 and 1992 (had such amounts been timely assessed) as follows:

Tax Year	Equitable Recoupment Claim
1991	$ 8,431,051.00
1992	$ 5,511,099.00
Total	$13,942,150.00

Although the statute of limitations under 26 U.S.C. § 6501 for assessing additional 1991 and 1992 tax has expired, the Court finds that the United States is entitled, under its equitable recoupment claim, to recover the above 1991 and 1992 equitable recoupment claims from the tax year 1989 and 1990 overpayments.

Judgment is accordingly entered for the plaintiff in the total amount of $13,899,384.20 ($27,841,534.20 minus $13,942,150.00) plus interest according to law. This judgment does not take into account any adjustments to state income tax, which the Court understands will be taken into account by the plaintiff in the year which this judgment is entered.

August 15, 2002

/s/

United States District Judge

Approved as to form

(reserving all rights of appeal)

¶2002-5450

In Re: Robert C. JOHNSON, Debtor. Robert C. JOHNSON, PLAINTIFF v. COMMISSIONER of Internal Revenue, DEFENDANT. U.S. Bankruptcy Court, Dist. of South Carolina, (Bktcy Ct SC) C/A No. 92-75816-W; Adv. Pro. No. 02-80185-W, Sept. 6, 2002. Earlier proceedings at (2002, Bktcy Ct SC) 90 AFTR 2d 2002-6402; and (2002, Bktcy Ct SC) 90 AFTR 2d 2002-6106. Years 1981, 1982, 1984, 1985, 1986. Decision against Taxpayer.

1. Tax claims in bankruptcy—violation of automatic stay—discharge injunction violation—summary judgment—partnership items—limitations periods—suspension—motion to alter or amend judgment. Chap. 7 debtor was denied motion to alter or amend decision granting IRS summary judgment on his IRC §7433 damages claim for automatic stay and discharge injunction violations. And, issue of legality of disputed taxes, which was raised for 1st time in instant motion, could only be addressed in his pending Tax Court proceeding. *Reference:* United States Tax Reporter ¶68,726.52(10); 68,726.52(27); 74,335.01(7); 62,295.01(5). IRC §6229; 7433.

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA,

ORDER

Chapter 7

[1] THIS MATTER comes before the Court upon Robert C. Johnson's (''Plaintiff'') Motion to Alter or Amend Order and Judgment of August 26, 2002 (the ''Motion''). The Motion refers to the Order that

granted the Commissioner of Internal Revenue's (''Defendant'') motion for summary judgment on Plaintiff's causes of action for violation of the automatic stay, violation of the discharge injunction, and damages pursuant to I.R.C. §7433.

After reviewing its Order, the Court concludes that it reached the correct result and thereby denies Plaintiff's Motion to amend the Order. The Court also notes that Plaintiff's Motion argues that, pursuant to 11 U.S.C. §505, this Court must determine the legality of the taxes that the parties dispute; however, the Court did not consider this issue as Plaintiff indicated on the record that he was not pursuing the issue of the legality of the taxes. In fact, Plaintiff stated that all he wanted the Court to decide was the issue of whether the disputed taxes were discharged by his prior bankruptcy case. Accordingly, the Court decided the issues presented before it and did not address the legality of the taxes. As the Court previously noted, Plaintiff can address the issue of his tax liability in the pending Tax Court proceeding that is scheduled for hearing later this year. Plaintiff's Motion, therefore, is denied.

AND IT IS SO ORDERED.

/s/

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

September 6, 2002.

¶2002-5451

Lawrence Stephen MAXWELL, ET AL., PLAINTIFFS v. Paul O'NEILL, DEFENDANTS. U.S. District Court, Dist. of Columbia, (DC DC) Civil Action 00-01953 (HHK), Sept. 12, 2002. Years 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000. Decision for Govt. in part.

1. Disclosure of IRS records—FOIA—jurisdiction—return information—exhaustion of administrative remedies—tax protesters. IRS's motion to dismiss or for summary judgment with respect to taxpayers' requests for IRS records and return information was granted in part: although IRC §6103 superseded Privacy Act, case law showed that it wasn't independent jurisdictional basis of obtaining return information because it didn't supersede FOIA. Also, taxpayers' failures to properly address requests weren't fatal, but requests other than those seeking return information were ''pseudo requests'' where they were overly broad, burdensome and contained improper references to constitutional rights; so, IRS was only required to process requests for return information under its FOIA procedures where it neither denied nor forwarded requests to appropriate bureau, and taxpayers could appeal denial through administrative appeals process, with judicial review available once process was exhausted. And, remaining tax protester claims were frivolous. *Reference:* United States Tax Reporter ¶61,035.03(3); 76,556.502(75). IRC §6103.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,

MEMORANDUM OPINION

Henry H. Kennedy, Jr. United States District Judge

Plaintiff Lawrence Stephen Maxwell (''Maxwell'') and approximately 561 other similarly situated individuals and entities bring this action against defendant Secretary of the Treasury, Paul O'Neill.[1] Plaintiffs seek declaratory and injunctive relief under various statutory and constitutional provisions for defendant's alleged unlawful withholding and/or maintenance of certain tax records and defendant's alleged unlawful taxation of plaintiffs. Before the court is defendant's motion to dismiss or for summary judgment. Upon consideration of the motion, the opposition thereto, and the summary judgment record, the court concludes that defendant's motion must be granted in part and denied in part.

[1] This action is a consolidation of two separate lawsuits, Lawrence Stephen Maxwell, et al. v. Lawrence H. Summers, 00cv1953 and Wayne A. Paul, et al. v. Paul O'Neill, 01cv0246. At plaintiffs' request, the cases were consolidated on October 25, 2001.

I. FACTUAL BACKGROUND

On June 9, 2000, plaintiff Maxwell sent a ten-page letter to the Internal Revenue Service ("IRS") National Office of Disclosure seeking disclosure of tax-related information for the tax years 1987 to 2000. Maxwell sought disclosure of at least nineteen different types of information pertaining to him, including, but not limited to: (1) "return information;" (2) records "that determined that [Maxwell] was subject to the enforcement authority of the United States Department of the Treasury pursuant to some specific statute;" (3) records showing that Maxwell "ever received any income from ... any federal source;" (4) records showing that Maxwell is "a citizen of the United States;" and (5) records showing that Maxwell "resided or worked within one of the specified areas of federal jurisdiction of the United States government." Def.'s Mot. Ex. A. The letter was framed as a request under Section 6103 of the Internal Revenue Code, 26 U.S.C. § 6103 ("Section 6103" or "§ 6103"), which provides that "tax return information" "shall, upon written request, be open to inspection by or disclosure to" the individual who filed the return. 26 U.S.C. § 6103(e)(1)(A)(i).

The other plaintiffs to this action also sent letters to the IRS which were identical to Maxwell's in all relevant respects. *See* Wayne A. Paul, et al. v. Paul O'Neill, Second Am. Original Compl. ("Paul, Second Compl.") at 106. With regards to their request for "return information," plaintiffs cited the definition of "return information" provided in Section 6103 verbatim, *see id.* at (b)(1), (2), and also cited the D.C. Circuit's decision, *Lake v. Rubin*, 162 F. 3d 113 [82 AFTR 2d 98-7444] (D.C. Cir. 1998). Plaintiffs relied on *Lake* for the proposition that "individuals seeking 'return information' ... must do so pursuant to § 6103 ... rather than the Privacy Act." 162 F.3d at 116. In *Lake*, the plaintiffs alleged that the IRS violated the Privacy Act by failing to disclose certain tax information about the plaintiff class. Maxwell was a member of the class in *Lake* and actively participated in the litigation.

After sending their identical requests to the IRS, Maxwell and the other plaintiffs received identical responses from the agency. *See* Paul, Pls.' Resp. to Def.'s Mot. to Dismiss at 28 n. 2. In a letter to each plaintiff, the IRS stated that it was responding to "your Freedom of Information/Privacy Act" request and stated that "[c]onsidering the breadth of your request and the burden searches of this magnitude place on restricted IRS sources, you are required to follow our published procedures for making a request under the Privacy Act of 1974." Def.'s Mot. Ex. B at 1. The letter then directed each recipient to the provisions of the Code of Federal Regulations setting forth these procedures. In addition, the IRS noted that if the request sought documents concerning one's personal liability to pay federal income taxes, it would not constitute a request for existing documents but instead a "request for the creation of personalized statements regarding your tax liability." *Id.* Finally, the letter noted that the Sixteenth Amendment to the United States Constitution authorizes the collection of federal income taxes, and that the Freedom of Information Act is "not a vehicle that can be used to challenge these legal requirements." *Id.* at 2.

Symeria R. Roscoe, Program Analyst for the IRS Freedom of Information division, also responded to Maxwell's request in a letter sent July 21, 2000. Roscoe's letter stated that it was in response to Maxwell's "Freedom of Information Act request." The letter informed Maxwell that IRS headquarters did not maintain centralized files concerning taxpayers and that any records regarding IRS action taken in reference to Maxwell could be found at the IRS "Service Center or District Office in which such action took place or where you filed your income tax returns." Def.'s Ex. C. The letter then advised Maxwell that if he wished to obtain IRS documents relating to him, he should forward his request to the appropriate Service Center or District Office together with evidence of his

identity and a statement of his willingness to pay any fees. *See id.*

After receiving these responses from the IRS, plaintiffs filed suit in this court, seeking various forms of declarative and injunctive relief. Plaintiffs request that the court: (1) enjoin the IRS from withholding the tax records they seek and declare that such withholding violates Section 6103; (2) enjoin the IRS from maintaining other tax records and declare that the maintenance of such records violates the Privacy Act; (3) declare that plaintiffs are not citizens of the United States and do not reside or work therein; (4) declare that Texas is not a part of the United States; and (5) declare that the United States "is not a Republican form of government as required by the Constitution ... and must therefore be abolished." Pl.'s Compl. at 20; Paul, Second Compl. at 112–116.

Defendant now moves to dismiss or in the alternative for summary judgment. Defendant argues that the court lacks subject matter jurisdiction under Section 6103 to compel the disclosure of the information plaintiffs request, and that the information cannot be disclosed under the Freedom of Information Act, 5 U.S.C. § 552 ("FOIA") because plaintiffs failed to make a proper FOIA request and failed to exhaust their administrative remedies.

II. ANALYSIS

A. Standard of Review

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue of material fact in dispute and that the movant is entitled to judgment as a matter of law. Facts "that might affect the outcome of the suit under the governing law" are material, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The non-movant's opposition must consist of more than mere unsupported allegations or denials and must be supported by affidavits or other competent evidence setting forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56 (e); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The non-movant's evidence must be of a nature "that would permit a reasonable jury to find" in its favor. *Laningham v. Navy*, 813 F.2d 1236, 1242 (D.C. Cir. 1987). Evidence that is "merely colorable" or "not significantly probative" is not sufficient to sustain a grant of summary judgment. *Anderson*, 477 U.S. at 249–50.

B. Subject Matter Jurisdiction

[1] Defendant argues that § 6103 does not supersede the FOIA and therefore does not serve as an independent means of establishing this court's subject matter jurisdiction. Plaintiffs argue that § 6103 does provide jurisdiction as it is the sole vehicle for obtaining the kind of information they seek. Plaintiffs base this argument upon the D.C. Circuit's statement in *Lake* that § 6103 "represents the exclusive statutory route for taxpayers to gain access to their return information," 162 F.3d at 115–16, citing *Cheek v. IRS*, 703 F.2d 271, 271–272 [51 AFTR 2d 83-1010] (7th Cir. 1983), a proposition the court reiterated in *Gardner v. United States*, 213 F.3d 735, 741 [85 AFTR 2d 2000-2084] (D.C. Cir. 2000).

In *Lake*, the court held that the district court lacked subject matter jurisdiction to hear the plaintiffs' claim that the IRS violated the Privacy Act by failing to disclose their tax return information. The court found that because Section 6103 dealt "very precisely and comprehensively with the [IRS's] disclosure of tax return information," "the specific provisions of § 6103 rather than the general provisions of the Privacy Act govern the disclosure of the sort of tax information requested here." *Lake*, 162 F.3d at 115–16.

Although it is understandable that plaintiffs would rely on § 6103 after the court's decision in *Lake*, plaintiffs misconstrue the *Lake* court's statements as indicating that § 6103 represents the *only* statute applicable to their requests. *Lake*, *Gardner*, and *Cheek* involved claims brought solely under the Privacy Act, 5 U.S.C. § 552(a), and thus they addressed only the relationship between § 6103 and the Privacy Act. Therefore, the fact that the court held in

those cases that § 6103 displaces the Privacy Act does not answer the question of whether it also displaces the FOIA.

In fact, the D.C. Circuit held in a case prior to *Lake* and *Gardner* that it does not. In *Church of Scientology v. IRS*, 792 F.2d 146 [58 AFTR 2d 86-5039] (D.C. Cir. 1986), a case in which the plaintiff sought disclosure of tax information, the court held that "Section 6103 does not supersede FOIA but rather gives rise to an exemption under Exemption 3, 5 U.S.C. § 552(b)(3)." *Church of Scientology*, 792 F.2d at 150. In so ruling, the court rejected the IRS's argument, equivalent to the argument plaintiffs advance here, that § 6103 "totally supersedes the FOIA and provides the exclusive criteria for release of records affected by that section." *Id.* at 148.

Although the plaintiff's request in *Church of Scientology* did not expressly seek "return information," in reaching its decision, the court relied on two cases in which such information was requested, *Linsteadt v. IRS*, 729 F.2d 998 [53 AFTR 2d 84-1178] (5th Cir. 1984), and *Currie v. IRS*, 704 F.2d 523 [51 AFTR 2d 83-1225] (11th Cir. 1983). Moreover, in *Church of Scientology*, the court expressly declined to follow *King v. IRS*, 688 F.2d 488 [50 AFTR 2d 82-5711] (7th Cir. 1982), a Seventh Circuit decision holding that § 6103 overrides the FOIA with respect to return information. Both the *Linsteadt* and *Currie* courts held that § 6103 is not an independent means of obtaining return information, but rather operates as part of the larger FOIA framework. "[J]udicial review of the agency's nondisclosure [under § 6103] is governed by the Information Act." *Linsteadt*, 729 F.2d at 999.

Any remaining doubt as to *Church of Scientology*and *Lake's* reconcilability is removed by the fact that the latter decision cites the former favorably. In addition, as defendant notes, for the D.C. Circuit to have overruled *Church of Scientology* in *Lake*, it would have had to do so *en banc*. *See* Fed. R. App. P. 35(a); D.C. Circuit R. 35. Thus, while § 6103 may supersede the Privacy Act, it does not supersede the FOIA. Section 6103, therefore, cannot provide an independent basis for subject matter jurisdiction. Plaintiffs must therefore satisfy the requirements applicable under the FOIA for invoking the jurisdiction of this court.

C. FOIA Requirements

1. Validity of FOIA Request

In order to instigate disclosure under the FOIA, a party must make a proper FOIA request. The Treasury Department's published FOIA regulations list seven requirements for a proper FOIA request. *See* 31 C.F.R. § 1.5(b) (2002).[2] Defendant argues that plaintiffs' requests failed two of these requirements because (1) they did not send the request to the appropriate bureau, *see* 31 C.F.R. § 1.5(b)(3) (2002); and (2) they did not "reasonably describe the records" sought. *Id.*at § 1.5(b)(4). Defendant argues that due to these flaws, plaintiffs' suit is subject to dismissal for lack of subject matter jurisdiction. *See, e.g., Dettmann v. Dep't of Justice*, 802 F.2d 1472, 1477 (D.C. Cir. 1986).

Plaintiffs addressed their requests to the IRS National Office of Disclosure. Defendant contends that the requests were not addressed to the "appropriate bureau" because the National Office of Disclosure does not have jurisdiction over the records of individual taxpayers. Defendant further contends that its regulations require that requests for tax records be addressed to the district office where the person making the request resides, as plaintiffs were advised.

Assuming *arguendo* that plaintiffs did not send their requests to the proper address, the consequence of such a misstep is the tolling of the period in which the government is required to respond. *See* 31 C.F.R. § 1.5(a)(1), (c)(1) (2002). Defendant's regulations nonetheless require it to forward the request to the correct bureau. *See id.* at § 1.5(c)(1). Thus, for instance, because Maxwell resides in Texas, his request should have been forwarded to the IRS district office in Houston, Texas, and

[2] A person requesting information under the FOIA must follow a particular agency's regulations in making a request of that agency. *See* 5 U.S.C. 552 (a)(3)(A).

his failure to send it to that address does not appear fatal to the propriety of the request.

Second, defendants contend that plaintiffs' requests were faulty because, to be proper, a FOIA request must describe the records sought with sufficient detail to enable an agency employee to locate the records with reasonable effort. *See Goland v. CIA*, 607 F.2d 339 (D.C. Cir. 1978). While responding to FOIA requests, an agency is not required to perform legal research, create individualized records, or answer legal questions. *See, e.g., Tax Analysts v. IRS*, 1998 WL 419755 at 2 [81 AFTR 2d 98-1784] (D.D.C. May 1, 1998). In addition, the IRS Manual states that "requests for 'all records concerning me' or 'all records containing my name' are not specific enough to process and should be rejected as imperfect." Internal Revenue Manual 1 1.3.13.5.2(1) (April 5, 2002). Such requests are referred to as "pseudo requests." Pseudo requests are requests that exhibit one or more of the following characteristics:

1. Questions are frequently phrased in an accusatory or devious manner;
2. The letters may contain references to constitutional rights . . . ;
3. Any requests for records included in the correspondence are extremely extensive, poorly described, incorrectly addressed or otherwise written so as to make it difficult to respond.
4. Requesters may sometimes ask for all records concerning or serving as background materials for certain "decisions" or "determinations" concerning themselves. *See id.*

Plaintiffs' ten-page letter, containing nineteen separate requests, at times exhibits each of these tendencies. For instance, in his letter to the IRS, Maxwell requests "any and all records containing information about Lawrence Stephen Maxwell" and requests records the IRS used in determining that he is subject to federal income tax requirements. In addition, Maxwell and the other plaintiffs invoke various constitutional provisions which they claim shield them from tax liability.

Nevertheless, IRS guidelines do not allow for the wholesale rejection of such requests. Requests for "all records Concerning me" "should be thoroughly reviewed as they may contain minor references to records or enforcement actions that would help to identify the records requested." Internal Revenue Manual 11.3.13.5.2(2). The guidelines also state that "in order to make an appropriate response to a pseudo-request, it is necessary to clearly distinguish between those portions of the correspondence which constitute a valid FOIA request and those portions which consist of hyperbole and questions." *Id.* at 11.3.13.5.5(4). If records responsive to a portion of a request can be identified, that portion of the request should be processed.

The portion of plaintiffs' requests that seeks "return information" does not suffer from the same defects as the rest of their requests and should have been appropriately distinguished therefrom. Plaintiffs quoted verbatim the definition of "return information" contained in Section 6103, and defendant processes similar requests for such records on a daily basis. Thus, defendant should not have classified that portion of plaintiffs' requests as a "pseudo request." As defendant's FOIA regulations admonish, "the reasonable description requirement shall not be used by officers or employees of the Department of the Treasury to improperly withhold records from the public." 31 C.F.R. § 1.5(d).

2. Exhaustion of Administrative Remedies

Upon denial of a FOIA request, judicial review in this court is unavailable unless a party first exhausts his or her administrative remedies. Exhaustion of remedies gives the agency "an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision," and allows the agency to "correct mistakes made at lower levels and thereby obviat[ing] unnecessary judicial review." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990), citing *McKart v. United States*, 395 U.S. 185, 194 (1969). Defendant argues plaintiffs failed

to exhaust their administrative remedies by failing to follow the prescribed administrative appeals process within the agency.

Defendant's argument fails to acknowledge, however, the difference between a denial of a FOIA request and a determination that a FOIA request is deficient. According to defendant's regulations, "[a] determination that a request is deficient in any respect is not a denial of access, and such determinations are not subject to administrative appeal." 31 C.F.R. § 1.5(f) (2002). The letters defendant sent to plaintiffs in response to their requests nowhere stated that their requests were denied. Instead, the IRS informed plaintiffs that their requests did not comply with regulatory requirements and advised them how to cure the error. (This advice, incidentally, was inconsistent. While the letter sent to all plaintiffs advised plaintiffs they needed to follow Privacy Act procedures, the Roscoe letter sent to Maxwell told him he needed to address his request to the IRS district office pursuant to FOIA procedures.) The cases cited by defendant, *see, e.g., Oglesby*, 920 F.2d 57; *Taylor v. Appleton*, 30 F.3d 1365, 1369 [74 AFTR 2d 94-6303] (11th Cir. 1994), stand only for the principle that, upon denial, a party must file an administrative appeal before resorting to the courts, and are therefore inapposite. Here, the agency did not issue a denial, and therefore plaintiffs did not have the option of filing an administrative appeal.

The question that remains, then, is whether plaintiffs can obtain review in this court of defendant's determination that their requests were deficient when no agency review is available. We have unearthed only one case presenting a similar question, *Dickstein v. IRS*, 635 F. Supp. 1004 [57 AFTR 2d 86-1454] (D. Alaska 1986). In *Dickstein*, the plaintiffs filed a FOIA request for copies of tax assessments made under Sections 6203 and 6303 of the Internal Revenue Code ("IRC"). The IRS responded to the request by informing the plaintiffs that "[a]ssessment information is available under IRC § 6203; therefore, the [IRS] will not process such a request under the FOIA." *Dickstein*, 635 F. Supp. at 1006. The IRS forwarded the plaintiffs' requests to the proper bureau and also informed the plaintiffs as to how to remedy the defect in their requests. Rather than awaiting a response from the appropriate bureau or remedying the defect as instructed, the plaintiffs filed an administrative appeal. The IRS denied the appeal on the grounds that deficient requests are not eligible for appeals, and the plaintiffs then brought suit in federal court. The *Dickstein* court found that the IRS' response constituted a notice of deficiency rather than a denial. *Id.* The court dismissed the suit on the grounds that the IRS had properly processed the deficient request by forwarding it to the appropriate bureau and that the request could be processed with greater ease under section 6203 than under the FOIA.

In contrast, in the present case, defendant is not arguing that plaintiffs' requests could be more efficiently processed under a separate statutory scheme. In fact, defendant states that if plaintiffs had made a proper FOIA request, it would have pro-vided plaintiffs with all proper disclosures. Moreover, defendant did not forward plaintiffs' requests for return information to the appropriate bureau as it did in *Dickstein* and as it is required to do under its regulations. Thus, while in *Dickstein* the plaintiffs still had available to them recourse within the agency, plaintiffs' only recourse is to this court.

Under such circumstances we find it appropriate to review defendant's determination that plaintiffs' requests were deficient. As described above, we find that plaintiffs' requests were overly broad and burdensome except for the portion seeking disclosure of "return information." Thus, the court holds that the agency must process that portion of each plaintiffs' request under its FOIA procedures and determine whether to grant or deny it. If the requests are denied, plaintiffs may appeal the denial through the administrative appeals process, with judicial review available once that process is exhausted. The agency has no

obligation to respond further to the rest of plaintiffs' requests.

D. Other Relief

In addition to requests for injunctive and declaratory relief regarding defendant's withholding and/or maintenance of tax records, plaintiffs request various other forms of injunctive and declaratory relief. Plaintiffs seek, for instance, declarations that they do not live or work in the United States; that they are not United States citizens; that they are not subject to federal income tax; that Texas is not a part of the United States; and that the United States is not a Republican form of government and therefore is unconstitutional and must be abolished.

When faced with similar tax protest claims, courts have readily dismissed them as frivolous. *See, e.g., United States v. Mundt*, 29 F.3d 233 [74 AFTR 2d 94-5228] (6th Cir. 1994); *United States v. Collins*, 920 F.2d 619 [67 AFTR 2d 91-1037] (10th Cir. 1990). The court finds that plaintiffs' claims should meet the same fate. As it would be difficult to improve upon the reasoning of the Tenth Circuit in *United States v. Collins*, the relevant portion follows:

> [Defendant]'s motion to dismiss advanced the hackneyed tax protester refrain that federal criminal jurisdiction only extends to the District of Columbia, United States territorial possessions and ceded territories. [Defendant]'s memorandum blithely ignored 18 U.S.C. § 3231 which explicitly vests federal district courts with jurisdiction over "all offenses against the laws of the United States." [Defendant] also conveniently ignored article I, section 8 of the United States Constitution which empowers Congress to create, define and punish crimes irrespective of where they are committed. *See United States v. Worrall*, 2 U.S. (2 Dall.) 384, 393, 1 L.Ed. 426 (1798)(Chase J.). Article I, section 8 and the sixteenth amendment also empowers Congress to create and provide for the administration of an income tax; the statute under which defendant was charged and convicted, 26 U.S.C. § 7201, plainly falls within that authority. Efforts to argue that federal jurisdiction does not encompass prosecutions for federal tax evasion have been rejected as either "silly" or "frivolous" by a myriad of courts throughout the nation. In the face of this uniform authority, it defies credulity to argue that the district court lacked jurisdiction to adjudicate the government's case against defendant . . . .
>
> For seventy-five years, the Supreme Court has recognized that the sixteenth amendment authorizes a direct nonapportioned tax upon United States citizens throughout the nation, not just in federal enclaves, *See, Brushaber v. Union Pac. R.R.*, 240 U.S. 1 [3 AFTR 2926], 12–19, 36 S.Ct. 236, 239–242 [3 AFTR 2926], 60 L.Ed. 493 [3 AFTR 2926] (1916); efforts to argue otherwise have been sanctioned as frivolous . . . .

Id. at 629.

Maxwell's claim that Texas is not a part of the United States is likewise frivolous. "That Texas was the only state admitted by treaty is irrelevant; a treaty is a law to be given the same force and effect as any other law." *Hanson v. Town of Flower Mound*, 679 F.2d 497, 503 (5thCir. 1982) (citing *Whitney v. Robertson*, 124 U.S. 190, 193–94 (1888)).

III. CONCLUSION

For the foregoing reasons, the court concludes that defendant's motion to dismiss, or in the alternative for summary judgment, should be denied as to plaintiffs' request for "return information" and granted as to their remaining claims for relief. Accordingly, it is this 12th day of September, 2002, hereby:

ORDERED that defendant's motion to dismiss, or in the alternative for summary judgment, is denied as to plaintiffs' request for "return information"; and it is further

ORDERED that defendant's motion to dismiss, or in the alternative for summary judgment, is granted as to all of plaintiffs' other claims; and it is further

ORDERED that defendant must process that portion of each plaintiffs' request for ''return information'' under its FOIA procedures and determine whether to grant or deny it. If the requests are denied, plaintiffs may appeal the denial through the administrative appeals process, with judicial review available once that process is exhausted; and it is further

ORDERED that defendant shall make a status report to the Court every ninety days regarding plaintiffs' request for ''return information.'' The first such report is due ninety days from the date of docketing of this order.

Henry H. Kennedy, Jr.

United States District Judge

Date: 9/12/02

¶2002-5452

Leland Gail RIDENBAUGH, PLAINTIFF v. Bryan LONG, ET AL., DEFENDANTS. U.S. District Court, Southern Dist. of Ohio, (DC OH) CASE NO. 02-CV-98, Sept. 5, 2002. Decision for Govt.

1. Actions against U.S.—liens and levies—jurisdiction—sovereign immunity—removal and remand. Pro se taxpayer's action to declare federal tax lien invalid and enjoin its enforcement was denied: federal defendants were entitled to dismissal, in accord with taxpayer's consent or on sovereign immunity grounds; taxpayer wasn't entitled to remand case back to state court since underlying claim was based on federal lien law; and lien filing was valid under IRC §6323(f), which superceded Uniform Federal Lien Registration Act. *Reference:* United States Tax Reporter ¶74,336.506(25); 74,336.508(60); 63,235.11(10). IRC §6323.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION,

Magistrate Judge Norah McCann King

OPINION AND ORDER

JUDGE EDMUND A. SARGUS, JR.

This matter comes before the Court for consideration of the Motion to Dismiss of Defendants John Gallagher, United States of America, and Department of the Treasury (''Federal Defendants''), (Doc. # 6), and the Motion for Summary Judgment of the Licking County Recorder, Bryan Long (Doc.# 9). The Court exercises jurisdiction pursuant to 28 U.S.C. § 1331. For the reasons set forth below, the Federal Defendants' Motion is GRANTED and Defendant Long's Motion is GRANTED.

I. BACKGROUND

Pro se Plaintiff, Leland Gail Ridenbaugh, filed this case in state court seeking a declaratory judgment that a federal tax lien filed against him is invalid and seeking an injunction preventing enforcement of the lien. *Amended Complaint*, p. 2. The lien was filed on November 14, 2000, in Licking County, Ohio, for unpaid federal taxes. *Id.*Ex. C.

The essence of Plaintiff's complaint appears to be that the lien was not entitled to be filed because it violated the Uniform Federal Lien Registration Act and the Internal Revenue Code. *Id.* Ex. B. Plaintiff claims that the lien violated federal law because it was not ''certified.'' *Id.* Ex. B § 3.

Defendants removed the case to this Court pursuant to 28 U.S.C. §§ 1441(a),(b), 1442 and 1444. The Federal Defendants then moved to dismiss this action and Defendant Long moved for summary judgment. *Memorandum in Support of United States Defendants' Motion to Dismiss (''Federal Defendant's Memorandum in Support''); Memorandum in Support of Defendant Long's Motion for Summary Judgment (''Defendant Long's Memorandum in Support'').*

Plaintiff failed to properly file his either of his Memorandums in Opposition with the Court, faxing them to this Court's chambers. The Federal Defendants, however, replied to Plaintiff's Memorandum Contra. *United States' Reply to Plaintiff's Response to Motion to Dismiss.* Thus, there is clearly no prejudice to the Federal

Defendants if the Court deems this document filed. Defendant Long, although not replying to Plaintiff's response to his motion for summary judgement, is nonetheless not prejudiced by Plaintiff's improper filing based on the Court's granting of Long's motion. Thus, the Court will deem Plaintiff's Memorandum Contra Defendant Long's Motion for Summary Judgment as filed.

II. STANDARDS

The Federal Defendants move to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendant Long moves for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil.

A. The Federal Defendants' Motion to Dismiss

A motion to dismiss based on Rule 12(b)(1) for lack of subject matter jurisdiction must be considered before a motion brought under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Moir v. Greater Cleveland Regional Transit Authority*, 895 F.2d 266, 269 (6th Cir. 1990). A Rule 12(b)(6) motion may be decided only after establishing subject matter jurisdiction since the Rule 12(b)(6) challenge becomes moot if this Court lacks subject matter jurisdiction. *Id.* (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946) which asserts that a motion to dismiss for failure to state a cause of action may be decided only after establishing subject matter jurisdiction, since determination of the validity of the claim is, in itself, an exercise of jurisdiction).

The Sixth Circuit has distinguished between facial and factual attacks among motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). A facial challenge is an attack on the court's subject matter jurisdiction that takes the material allegations of the complaint as true and construes them in a light most favorable to the nonmoving party. *Singleton v. United States*, 277 F.3d 864, 870 n.4 (6th Cir. 2002) (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 [67 AFTR 2d 91-388] (6th Cir. 1990)). In contrast, a factual attack is "not a challenge to the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject matter jurisdiction." *United States v. Ritchie*, 15 F.3d 592, 598 [73 AFTR 2d 94-994] (6th Cir. 1994). Because Defendants do not dispute the sufficiency of the allegations in the pleadings, they present a factual challenge, as opposed to a facial challenge, to federal subject matter jurisdiction. *See generally RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134–35 (6th Cir. 1996).

B. Defendant Long's Motion for Summary Judgment

The procedure for considering whether summary judgment is appropriate is set forth in Federal Rule of Civil Procedure 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. Kress & Co.*, 398 U.S. 144, 158–59 (1970). Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that part's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Matsushita Electronic Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Sixth Circuit Court of Appeals has recognized that *Liberty Lobby*, *Celotex*, and *Matsushita*have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judg-

ments. *Street v. J.C. Bradford & Co.* 886 F.2d 1472, 1476 (6th Cir. 1989). The court in *Street* identifies a number of important principles in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Id.* at 1479.

In addition, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Id.* (quoting *Liberty Lobby*, 477 U.S. at 257). The nonmoving party must adduce more than a mere scintilla of evidence in order to overcome the summary judgment motion. *Id.* It is not sufficient for the nonmoving party to merely "'show that there is some metaphysical doubt as to the material facts.'" *Id.* (quoting *Matsushita*, 475 U.S. at 586). Moreover, "[t]he trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Id.* That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact.

III. ANALYSIS

[1] Initially, the Court notes that Plaintiff is proceeding *pro se*. The pleadings of a *pro se*litigant are held to "less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Williams v. Browman*, 981 F.2d 901, 903 (6th Cir. 1992). The Court has, therefore, viewed Plaintiff's claims pursuant to this less stringent standard.

The Court will address each of the defendants' motions in turn.

A. The Federal Defendants' Motion to Dismiss

The Federal Defendants move to dismiss this action on the basis of sovereign immunity. Plaintiff does not challenge the dismissal of the Federal Defendants from this case. Instead, Plaintiff wishes to dismiss the Federal Defendants. Plaintiff states that:

> The plaintiff seeks no relief against the United States as he is not a U.S. Citizen, and for this cause no claim for relief need be stated as the United States lacks jurisdiction to grant the relief requested from the state of Ohio . . . .

Plaintiff's Memorandum Contra the Federal Defendants' Motion to Dismiss, at 2. Plaintiff claims that when the Federal Defendants are voluntarily dismissed, the Court should remand the case to state court. In addition, Plaintiff expressed in the Rule 26(f) Report of the Parties that he "desires to dismiss the United States with prejudice and remand the action back to state court." (Doc. #7).

Based on Plaintiff's request, the Federal Defendants are hereby dismissed from this case.[1] The Court, however, denies Plaintiff's request that this case be remanded.

The Court would have the discretion to remand this case if the federal claim that formed the basis of this Court's federal question jurisdiction were to be dismissed. More specifically, the Court has discretion to determine whether or not to retain, remand,[2] or dismiss without prejudice the supplemental state law claims. *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 761 (6th Cir. 2000) (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988) and 28 U.S.C. § 1367(c)). But in this case, the federal claim that forms the basis of the Court's jurisdiction has not been dismissed. Plaintiff alleges violations of the

[1] The Court further notes that the Federal Defendants would likely be dismissed from this case whether or not Plaintiff voluntarily did so. It is well settled that under its sovereign immunity, the United States is ordinarily immune from suit, and that it may define the conditions under which it will permit actions against it. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Clay v. United States*, 199 F.3d. 876, 879 [84 AFTR 2d 99-7438] (6th Cir. 1999). It is the burden of the party who institutes a claim against the United States, here Plaintiff, to allege an act of Congress that authorizes the Court to entertain that specific claim. Malone v. Bowdoin, 369 U.S. 643, 645 (1962). Plaintiff has not attempted to show the Court what act of Congress authorizes this suit against the Untied States.

[2] Although it is preferable to remand rather than dismiss state claims after the federal claim is eliminated, the Court may evaluate the use of manipulative tactics, such as voluntarily dismissing all federal claims, to control the forum. *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988) ("If the plaintiff has attempted to manipulate the forum, the court should take this behavior into account in determining whether the balance of factors to be considered under the pendent jurisdiction doctrine support a remand in the case.")

Uniform Federal Lien Registration Act of 1978 and the Internal Revenue Code, 26 U.S.C. § 6065. *Complaint*, Exs. C and D. The Internal Revenue Code is a federal statute. Consequently, this Court retains federal question jurisdiction in this case under 42 U.S.C. § 1331.[3] Further, the effect of a tax lien in relation to provisions of federal law for collection of debts owing to the United States is always a federal question. *United States v Pioneer American Ins. Co.*, 374 U.S. 84, 88 n.7 [11 AFTR 2d 1610] (1963).

B. Defendant Long's Motion for Summary Judgment

Defendant Long moves for summary judgment arguing that the Uniform Federal Lien Registration Act ("UFLRA") does not apply to this action and that the controlling statute does not require certification of a notice of federal tax lien. Plaintiff argues that the tax lien filed against his property is a fraud and unenforceable because it is uncertified, as required by Section 3 of the UFLRA. *Complaint*, Ex. B.

Initially, the Court notes that Defendant is correct in his assertion that the UFLRA does not apply to this action. The UFLRA is a proposed uniform act and is not binding upon the states. The National Conference of Commissioners on Uniform State Laws prepared this 1978 proposed uniform act, which the various states are free to reject or adopt by action of the state legislature. The UFLRA itself shows that only thirty-eight states have adopted it, Ohio not being one of them. 7A Uniform Laws Annotated, at 449.

The controlling federal law, rather than being the UFLRA, is 26 U.S.C. § 6323 which in pertinent part provides:

> (f) Place for filing notice; form.
>
> (1) Place for filing. The notice referred to in subsection (a) shall be filed--
>
> (A) Under state laws.
>
> (i) Real property. In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated;
>
> . . .
>
> (3) Form. The form and content of the notice referred to in subsection (a) shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien.

26 U.S.C. § 6323 (emphasis added).

As evidenced by this statute, the tax lien filed against Plaintiff is valid, even if Ohio had adopted the UFLRA, and its requirement of certification, because 26 U.S.C. § 6323 supercedes state law. *See Larrew v. United States*, 2001 U.S. Dist. LEXIS 8905, 4, 2001-2 U.S. Tax Cas. (CCH) P50,514 [87 AFTR 2d 2001-2623] (N.D. Tex. 2001) (finding the tax lien properly filed 26 U.S.C. § 6323 even though it did not contain the requisite certification required by state law); *Bertelt v. United States*, 206 B.R. 579, 583 [79 AFTR 2d 97-381] (Bankr. M.D. Fla. 1996) (same). As the *Larrew* and *Bartlet* courts acknowledged, Revenue Ruling 71-466, interpreting 26 U.S.C. § 6323, accurately states the federal law:

> Acknowledgments are of statutory origin and are not essential to the validity of an instrument in the absence of specific statutory provisions. Acknowledgment of notices of tax liens, certificate of discharge, and other instruments mentioned above, would, therefore, not appear to be essential, inasmuch as there are no Federal statutory provisions specifically requiring acknowledgment of such instruments.
>
> Section 6323(a) of the Code, which provides that a notice of lien shall not be valid unless filed in the office in which its filing is authorized by State law, does not purport to give a State authority to do more than designate a place for filing the notice. Section 6323 (f) (3) of the Code, relating to the form and content of the notice, provides that the notice

[3] "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 42 U.S.C. § 1331.

shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien. Accordingly, general provisions of State laws requiring the recording of documents, or otherwise requiring the acknowledgment of instruments relating to title to real property are not applicable. Section 6323(f) of the Code should be construed as setting up a specific filing procedure which is complete in and of itself and which is not affected by general provisions of State laws relating to recording, filing, or title to property.

Revenue Ruling 71-466, 2 C.B. 409, 1971 I.R.B. Lexis 309 1–2, Rev. Rul. 71-466 (1971).

Accordingly, Plaintiff presents no genuine issue as to any material fact and Defendant Long is entitled to judgment as a matter of law.

IV. CONCLUSION

Based on the foregoing, the Federal Defendants' Motion to Dismiss is hereby GRANTED, (Doc. # 6), and Defendant Long's Motion for Summary Judgment is hereby GRANTED, (Doc. # 9). The Clerk is DIRECTED to enter judgment against Plaintiff and in favor of Defendants.

IT IS SO ORDERED.

9-3-2002

DATE

EDMUND A. SARGUS, JR.

UNITED STATES DISTRICT JUDGE

¶2002-5453

UNITED STATES OF AMERICA, PETITIONER v. Rocco BEATRICE, RESPONDENT. U.S. District Court, Dist. of Massachusetts, (DC MA) CIVIL ACTION NO. 01-MC-10380, Aug. 27, 2002. Decision for Govt.

1. Summons enforcement—petition to quash—Justice Dept. referral. Taxpayer's petition to quash 3d-party summons and stay further IRS investigation was dismissed as moot, and summons was enforced: taxpayer failed to set forth specific, credible allegations of bad faith on govt.'s part; and, even if he had, govt.'s affidavits showed that no Justice Dept. referral targeting taxpayer existed. Also, taxpayer was denied evidentiary hearing. *Reference:* United States Tax Reporter ¶76,025.04(25). IRC §7602; 7604.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS,

Memorandum and Order

I. Pending Matters

Now pending before the court are the matters associated with the following filings:

(1) Petition by the United States of America to Enforce IRS Summons (Docket No. 1, filed October 23, 2001);

(2) Memorandum by Rocco Beatrice in Opposition to Motion to Enforce IRS Summons (Docket No. 9, filed November 29, 2001);

(3) Memorandum of Law in Support of Petition to Enforce IRS Summonses (Docket No, 5, filed December 14, 2001);

(4) Response by Rocco Beatrice to Memorandum in Support of Petition to Enforce IRS Summonses (Docket No. 14, filed December 20, 2001);

(5) Supplemental Memorandum by Rocco Beatrice in Opposition to Motion to Enforce IRS Summons (Docket No. 8, filed March 14, 2002);

(6) Motion by Rocco Beatrice to Quash Summons and for Stay of Further IRS Investigation (Docket No. 10, filed July 17, 2002); and

(7) Memorandum in Opposition to Motion to Quash Summons and for Stay of Further IRS Investigation (Docket No. 11, filed July 31, 2002).

II. Procedural History

On October 23, 2001, the United States initiated this action by filing a petition to enforce IRS summons (Docket No. 1). On October 25, 2001, this court set a Show-Cause hearing for November 29, 2001, and ordered Respondent to file and serve a

written response to the petition within five days of his receipt of the Show-Cause order (Docket No. 2).

Respondent did not file a written response until the November 29, 2001 Show-Cause Hearing, when he filed his response and served it on counsel for the government in open court (Docket No. 9).

On December 20, 2001, the court held another hearing in this matter, and took the petition under advisement. At that hearing, the court gave the government permission to submit an affidavit of the Assistant United States Attorney who handled the grand jury that investigated the respondent. (Transcript of December 20, 2001 Hearing, Docket No. 12, p. 10, ln. 23–p. 11., ln. 11; p. 12, lns. 18–25).

The purpose of the affidavit was to assist the court in determining whether a Justice Department referral was in effect with respect to Respondent. The affidavit of Jeanne M. Kempthorne was filed on January 2, 2002, and placed under seal (Docket Nos. 6 & 7).

Respondent did not respond to the affidavit until March 14, 2002, when he filed a supplemental memorandum in opposition to the petition (Docket No. 8).

On July 17, 2002, Respondent filed a new motion asking the court to quash a set summonses issued to third parties and to stay further IRS investigation (Docket No. 10). The government filed its opposition to this motion on July 31, 2002 (Docket No. 11).

III. The Petition for Enforcement is Allowed

[1] Respondent's principal contention is that he is the subject of an ongoing federal grand jury investigation, the scope of which encompasses the materials requested in the administrative summonses at issue in this case. (Docket No. 9).

At the December 20, 2001 Hearing, I expressed my concerns about allowing the government's petition unless I was satisfied that there was no grand jury investigation or other Justice Department referral targeting Respondent (Transcript of December 20, 2001 Hearing, Docket No. 12, at 8–11). In response to those concerns, the government has now filed, under seal, the affidavit of Jeanne M. Kempthorne, the Assistant United States Attorney who previously investigated Respondent. AUSA Kempthorne attests that the investigation into Respondents's activities was closed in or about December 2000, and that no criminal investigation is pending against Respondent. (Docket No. 6).

Respondent attacks this affidavit as insufficient for the purposes for which it was offered, ambiguous, and suspicious, and requests an evidentiary hearing "on the circumstances of the affidavit's execution." (Docket No. 8).

In reviewing the decision of a district court to refuse to order enforcement of an IRS summons, the United States Court of Appeals for the First Circuit set forth the following framework:

> The IRS has broad authority to issue summonses under I.R.C. m§§ 7602 & 7604. Enforcement proceedings are designed to be summary, and the court's role is simply to ensure that the IRS is using its broad authority in good faith and in compliance with the law. Thus, when a challenge to a summons is lodged, the IRS must only satisfy the court that (1) its investigation is being conducted pursuant to a proper purpose, (2) the information sought in the summons is (or may be) relevant to that purpose, (3) the information is not already within the IRS's possession, and (4) all legally required administrative steps have been followed.

United States v. Gertner, 65 F.3d 963, 966 [76 AFTR 2d 95-6325] (1st Cir. 1995) (citations omitted).

In addition to including the legal memoranda and arguments of the parties presented in writing and orally at the two hearings held in this case, the record before me in this case includes the following:

- Affidavit of Revenue Agent Joseph J. Yancovitz, dated July 10, 2001, and

submitted as Exhibit A to Docket No. 1 on October 23, 2001;

- Two Summonses issued to Respondent dated May 16, 2001, submitted as Exhibits B & C to Docket No. 1 on October 23, 2001;
- Subpoena for Respondent to Testify Before Grand Jury, dated February 24, 2000 and submitted as Exhibit A to Docket No. 9 on November 29, 2001;
- Summons issued to Matthew A. Luz, then counsel for the respondent, dated May 8, 2001, and submitted as part of Exhibit B to Docket No. 9 on November 29, 2001;
- Affidavit of Matthew A. Luz, dated November 29, 2001, and submitted as part of Exhibit B to Docket No. 9 on November 29, 2001;
- Copy of Letter to Benjamin D. Entine, counsel for Respondent, from Marc L. Caine, Dept. of Treasury, dated October 15, 2001, and submitted as Exhibit C to Docket No. 9 on November 29, 2001;
- Affidavit of Revenue Agent Dennis Wlodyka, dated December 17, 2001, and submitted as Docket No. 3 on December 17, 2001;
- Supplemental Affidavit of IRS Agent Joseph J. Yancovitz, dated December 14, 2001, and submitted as Docket No. 4 on December 17, 2001;
- Affidavit of AUSA Jeanne M. Kempthorne, dated December 28, 2001, and submitted under seal as Docket No. 6 on January 2, 2002;
- Summons issued to Fleet Boston Financial, dated April 4, 2002, and submitted as an unmarked exhibit to Docket No. 10 on July 17, 2001;
- Summons issued to Verizon of New England, dated July 22, 2002, and submitted as Exhibit 1 to Docket No. 11 on July 31, 2002; and
- Affidavit of IRS Agent Joseph J. Yancovitz, dated July 29, 2002, and submitted as Exhibit 5 to Docket No. 11 on July 31, 2002.

I credit the affidavits presented by the government, and note that although I stated reservations at the December 20, 2001, hearing, I now conclude that the respondent has not met the "significant burden" of setting forth specific, credible allegations of bad faith on the part of the government. See id. at 967; Costa v. Immigration and Nat. Serv., 233 F.3d 31, 37 (1st Cir. 2000). Even if respondent had met that burden, the weight of the evidence supports the government's position that there no Justice Department referral targeting respondent has been shown to exist. Gertner, 65 F.3d at 967 ("If the taxpayer satisfies this burden of production, the third tier beckons. At this stage, the district court weighs the facts, draws inferences, and decides the issue.").

I conclude, based on this record, that the summons was properly issued and will be enforced. I am mindful of respondent's request for an evidentiary hearing, but I determine that no such hearing is required. See id. at 967, 969.

For these reasons the Order below allows the petition for enforcement.

The Order allowing the petition for enforcement makes respondent's motion to quash various third party summonses and to stay further investigation pending a final ruling in this case (Docket No. 10) moot, and the Order below therefore dismisses that motion.

ORDER

For the reasons stated above, it is ORDERED:

(1) Petition by the United States of America to Enforce IRS Summons (Docket No. 1, filed October 23, 2001) is ALLOWED;

(2) Motion by Rocco Beatrice to Quash Summons and for Stay of Further IRS Investigation (Docket No. 10, filed July 17, 2002) is DISMISSED as moot; and

(3) The clerk is directed to enter forthwith on a separate document a Final Judgment as Follows:

For the reasons explained in the Memorandum and Order of August 27, 2002, it is ORDERED:

Judgment for the Petitioner, with costs.

/s/

United States District Judge

Final Judgment

For the reasons explained in the Memorandum and Order of August 27, 2002, it is ORDERED:

Judgment for the Petitioner, with costs.

Approved:

/s/

United States District Judge

By the Court,

/s/

Craig Nicewicz, Deputy Clerk

¶2002-5454

ANTON NOLL, INC., Debtor. Andrew S. RICHARDSON, Chapter 7 Trustee of Anton Hall, Inc., PLAINTIFF/APPELLANT v. UNITED STATES OF AMERICA, Internal Revenue Service, DEFENDANT-APPELLEE. U.S. Bankruptcy Appellant Panel, First Circuit, (BAP1) BAP NO. RI 01-026; Bank-ruptcy Case No. 99-13744, May 16, 2002. Judgment entered in accord with (Bktcy Ct CA1) 89 AFTR 2d 2002-2672, 277 BR 875, affirming per curiam (Bktcy Ct RI) 87 AFTR 2d 2001-1606. Years 1995, 1996, 1997. Decision for Govt.

1. Tax claims in bankruptcy—avoidable transfers—initial transferee—good faith. Bankruptcy Appellate Panel entered judgment in accord with its separate opinion affirming bankruptcy court. *Reference:* United States Tax Reporter ¶68,726.53(10).

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT,

JUDGMENT

MANDATE

This cause came to be heard from the United States Bankruptcy Court for the District of Rhode Island.

[1] Upon consideration whereof, and in accordance with the Opinion entered on May 16, 2002, it is now here ORDERED AND ADJUDGED that the bankruptcy court's order is hereby AFFIRMED.

FOR THE PANEL:

Phoebe D. Morse

Clerk

DATED: May 16, 2002

¶2002-5455

Glen SILVER, PLAINTIFF v. Michael SMITH, Appeals Officer and Carl GARKOWSKI, Team Manager, DEFENDANTS. U.S. District Court, Western Dist. of New York, (DC NY) 01-CV-6193L, Sept. 5, 2002. Years 1995, 1996. Decision for Govt.

1. Collection due process—review of administrative determination—jurisdiction. IRS's administrative determination to proceed with collection against pro se taxpayer was upheld in part on summary judgment: U.S., which was real party in interest to suit against IRS employees in their official capacities, didn't waive sovereign immunity as to IRS's lien for unpaid taxes where Tax Court had exclusive jurisdiction to hear such appeal; and, taxpayer's claim that he was only challenging assessments' procedural regularity wasn't dispositive. *Reference:* United States Tax Reporter ¶63,305.01(10). IRC §6330.

2. Collection due process (CDP)—review of administrative determination—frivolous return penalties. IRS's administrative determination to proceed with collection of IRC §6702 penalty against pro se taxpayer was remanded for proper due process hearing pursuant to IRC §6330: govt. conceded that CDP hearing was deficient where appeals officer failed to allow taxpayer to raise penalty-related issues, and

made no findings concerning merits of imposing penalty as required by IRC §6330(c)(3)(B). *Reference:* United States Tax Reporter ¶63,305.01(5). IRC §6330; 6702.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK,

DECISION and ORDER

DAVID G. LARIMER CHIEF JUDGE
UNITED STATES DISTRICT COURT

Plaintiff, Glen Silver (''Silver''), commenced this action contesting two tax liens imposed against him by the Internal Revenue Service (''IRS''). The first of these liens addressed personal income taxes allegedly owed for the 1995 and 1996 tax years. The second lien was based on a civil penalty levied against Silver for filing a frivolous tax return during the 1996 tax year. Both liens were imposed by the IRS following a pre-levy collection due process hearing — a hearing now mandated by statute at 26 U.S.C. § 6330 and implemented by regulations at 26 CFR 301.6330-1. Silver claims that the liens should not have been imposed and that he was denied a proper due process hearing. The defendants move to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(1) & (6).

In his complaint, plaintiff has sued defendants Michael Smith and Carl Garkowski in their capacity as IRS employees. The complaint makes no claims against the defendants in their individual capacity. ''Suits against IRS employees are essentially suits against the Unites States.'' *Dubay v. Scott*, 1998 WL 1035429, at 2 [82 AFTR 98-6770] (D. Conn. Sept. 30, 1998). Because plaintiff is proceeding *pro se*, the Court will not dismiss his complaint, but will instead construe the complaint as one against the United States. *Id.*(*pro se* plaintiff's complaint will be construed liberally, pleading error is not dispositive). Thus, the United States is hereby substituted as the only party defendant in this action.

A. Subject Matter Jurisdiction over Lien for Unpaid Taxes

[1] The Government contends that this Court lacks subject matter jurisdiction over that part of the complaint relating to the lien imposed for unpaid income taxes for 1995 and 1996. I agree with the Government and, therefore, that part of the complaint is dismissed.[1]

A suit can be maintained against the Government only where the Government has expressly waived its immunity from suit and has consented to be sued. *Securities and Exchange Commission v. Credit Bancorp, Ltd.*, 297 F.3d 127, 136–137 [90 AFTR 2d 2002-5317] (2d Cir. 2002). Here, the IRS levied two separate liens against plaintiff pursuant to 26 U.S.C. § 6320. The review of such a determination is governed by 26 U.S.C. § 30(d)(1). That section provides that:

> The person may, within 30 days of a determination under this section, appeal such determination—
>
> (A) to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter); or
>
> (B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

Accordingly, the Government has waived its sovereign immunity but only as pro-vided in section 6330(d)(1). Thus the district court has jurisdiction only if the Tax Court does not.

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[1] The Court has treated the pending motions as cross-motions for summary judgment. Although the Government initially styled its motion as one to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), it submitted items outside the pleadings. Furthermore, plaintiff has moved for summary judgment in his favor and he characterizes the Government's motion as one for summary judgment. Because of the substantial submissions made by the parties, it is clear that both plaintiff and the Government have been ''given reasonable opportunity to present all material ... pertinent'' to a motion for summary judgment. Fed. R. Civ. P. 12(b). Therefore, the Government's motion is converted to a motion for summary judgment.

As a practical matter, it makes little difference whether the Court considers this a motion to dismiss or one for summary judgment. The Court may rely on matters outside the pleadings that are ''integral to, or explicitly referenced in the pleading,'' *Preston v. State of New York*, 2002 WL 1401877 at 4 (S.D.N.Y. June 27, 2002)(citing *I.Meyer Pincus & Assoc., Inc. v. Oppenheimer & Co., Inc.*, 936 F. 2d 759, 762 (2d. Cir. 1991)), on a motion to dismiss even if the Court elected not to formally convert the motion to one for summary judgment. Moreover, relative to a 12(b)(1) motion, ''[i]n resolving the question of jurisdiction, the district court can refer to evidence outsite the pleadings.'' *Luckett v. Bure*, 290 F.3d 493, 496–497 (2d Cir. 2002).

As discussed above, the first lien was imposed based on tax amounts assessed and unpaid for the tax years 1995 and 1996. Declaration of Bonni J. Perlin, Exs. A, B, G. The Tax Court has exclusive jurisdiction over income tax deficiencies. *Foster v. U.S.*, 2002 WL 1396772, at 1 [89 AFTR 2d 2002-2927] (D. Nev. May 10, 2002); *Danner v. U.S.*, 208 F.Supp.2d 1166, 1170 [89 AFTR 2d 2002-2632] (E.D. Wash. 2002). Because plaintiff's appeal relates to income tax deficiencies, it may only be heard in the Tax Court, and, therefore, this Court does not have jurisdiction.[2]

Silver claims that because he is challenging only "the procedural regularity of the alleged assessments" and not the "underlying liability," the Tax Court does not have jurisdiction over the action. Plaintiff's Response to Motion to Dismiss, p. 5. I disagree. In determining the jurisdictional question, Court's interpreting the phrase "underlying tax liability" in Section 6330(d)(1)(B) have consistently interpreted that phrase as including not only substantive issues of tax liability but also procedural ones as well. *See Sepp v. Tracy*, 2002 WL 741644, at 2 [89 AFTR 2002-1859] (D. Ariz. March 4, 2002)(collecting cases); *Bartschi v. Tracy*, 2001 WL 1338795, at 3 [88 AFTR 2d 2001-6223] (D. Ariz. Sept. 5, 2001)(jurisdiction is not dependent upon "whether the claims are characterized as procedural or substantiative").

Therefore, because Congress has pro-vided that the Tax Court has jurisdiction over such matters, this Court lacks jurisdiction over plaintiff's appeal of the lien imposed for failure to pay income taxes in 1995 and 1996.[3] This portion of Silver's complaint is hereby dismissed.

B. The Frivolous Return Penalty

The second lien was imposed for a failure to pay a civil penalty assessed against Silver for filing a frivolous tax return during the 1996 tax year. *See* 26 U.S.C. § 6702. In the case of a lien assessed as a result of a frivolous return penalty, "the district court is the proper reviewing court." *Reinhart v. I.R.S.*, 2002 WL 1095351, at 4 [90 AFTR 2d 2002-5506] (E.D.Cal. May 24, 2002)(citing *Van Es v. Commissioner*, 115 T.C. 324, 328 (2000)); *see also Foster*, 2002 WL 1396772, at 1. Thus, this Court has jurisdiction over plaintiff's claim.[4]

In his submission to this Court, plaintiff claims that he did not receive proper notice of the assessment and raises several issues with respect to the merits of the frivolous return penalty originally assessed by the IRS. *See* Plaintiff's Response to Motion to Dismiss, pp. 12–14. Plaintiff also demanded proof concerning the merits of the penalty at the collection due process hearing.[5] Pursuant to 26 U.S.C. § 6330(c)(2)(B), made applicable to section 6320 hearings (*see* 26 U.S.C. § 6320(c)), the underlying tax liability may be challenged "if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability."

The Government now concedes that the due process hearing before the appeals officer was deficient. The Government urges the Court to remand the matter for further administrative proceedings and for a proper due process hearing on the frivolous return assessment. The Government's motion is granted. The appeals officer erred in not allowing plaintiff to raise issues concerning the merits of the frivolous return penalty at

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[2] In fact, the Notice of Determination sent to plaintiff concerning this lien stated that if plaintiff chose to dispute the determination in court, he "must file a petition with the *United States Tax Court* for a redetermination within 30 days from the date of this letter." Declaration of Bonni J. Perlin, Ex. G (emphasis added).

[3] Contrary to plaintiff's contention, section 702 of the Administrative Procedure Act does not act to waive the Government's claim of sovereign immunity here. *See Humphreys v. U.S.*, 62 F.3d 667, 672 [76 AFTR 2d 95-6116] (5th Cir. 1995); *Lonsdale v. U.S.*, 919 F.2d 1440, 1444 [67 AFTR 2d 91-1049] (10th Cir. 1990).

[4] Here the Notice of Determination sent to plaintiff stated that if plaintiff chose to dispute the determination in court, he had "30 days from the date of this letter to file a complaint in the appropriate *United States District Court* for a redetermination. "Declaration of Bonni J. Perlin, Ex. F (emphasis added).

[5] The hearing itself was quite contentions. Silver requested a copy of the 4340 transcript, a document prepared from IRS records and frequently used to establish an underlying tax liability. The appeals officer did not have a copy of the 4340 transcript available. The majority of the hearing consisted of Silver demanding the transcript. The question of his liability for the frivolous return penalty was discussed only briefly. At one point during the hearing, Silver demanded the records relied on as proof of his liability for the frivolous return penalty. Declaration of Glen Silver, Ex. T, p. 9. He also requested a copy of the return alleged to have been frivolous, an explanation of how the return was frivolous, and a copy of a determination letter explaining how the return was frivolous.

the hearing. Moreover, the appeals officer made no findings whatsoever concerning the merits of imposing the frivolous return penalty, as required by Section 6330(c)(3)(B).

In light of the Government's concession of error, I agree that a remand would be appropriate here. Such an remand "will allow the [a]ppeals [o]fficer, the person charged by statute with the responsibility for making the determination in the first instance," to make an initial determination concerning the underlying merits of the frivolous return penalty. *Herycyk v. U.S.*, 2001 WL 1836194, at 3 [89 AFTR 2d 2002-1584] (N.D. Ohio Dec. 11, 2001)(also discussing generally the remand of actions brought pursuant to 26 U.S.C. § 6330).

CONCLUSION

The Government's motion to dismiss for lack of subject matter jurisdiction (Dkt. #8) is converted to a motion for summary judgment and that motion is granted and the Complaint is dismissed as to plaintiff's appeal of the tax lien based on income taxes allegedly due and owing for the 1995 and 1996 tax years.

That part of the Complaint concerning the tax lien imposed as a civil penalty for filing a frivolous return, pursuant to 26 U.S.C. § 6702, is hereby remanded to the Internal Revenue Service for a proper due process hearing pursuant to 26 U.S.C. § 6330.

Plaintiff's cross-motion for summary judgment is denied and this case is hereby closed.[6]

IT IS SO ORDERED.

DAVID G. LARIMER

CHIEF JUDGE

UNITED STATES DISTRICT COURT

Dated: Rochester, New York

September 5, 2002

¶2002-5456

BRAZORIA COUNTY STEWART FOOD MARKETS, INC., PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Fifth Circuit, (CA5) No. 01-60932, Sept. 16, 2002. Tax Court, (2001) TC Memo 2001-220, RIA TC Memo ¶2001-220, 82 CCH TCM 435 (opinion by Gerber, *J.*), affirmed in part, and vacated and remanded in part per curiam. Years 1991, 1992, 1994. Decision for Taxpayer in part and for Govt. in part.

1. Bad debt deductions—debt vs. capital contributions—advances to related corps.—intent. Tax Court properly denied solely owned grocery corp. bad debt deduction for unrepaid advances of its own loan proceeds to related corp.: advances were capital contributions, not loans. Taxpayer didn't report advances to its accountants, record them on its books and records as loans, or report any interest income on federal tax forms for years at issue; promissory notes weren't prepared contemporaneously with advances; advances were at risk of related corp.'s business; advances afforded individual owner full control of related corp.; advances were systematically subordinated in favor of other creditors; individual owner's larger initial monetary contribution to unrelated corp. was consistent with equity investment where other initial owners contributed valuable non-monetary assets, and many advances occurred after individual owner became sole owner; taxpayer didn't deal with related corp. on same terms as outside creditors; evidence showed that related corp. used advances in part to acquire capital assets; and advances were largely unrepaid on their purported due dates. *Reference:* United States Tax Reporter ¶1665.132(40). IRC §165.

2. Review of Tax Court decision—admissions. Tax Court improperly held that solely owned grocery corp.'s attorney conceded at trial that taxpayer wasn't entitled to *any* deduction for interest paid to related

[6] If unhappy with the ruling of the appeals officer, Silver is free to bring another action in district court.

corp.: attorney's statement that he agreed with IRS attorney that taxpayer wasn't ''currently relying on'' stated interest payment figure was ambiguous. *Reference:* United States Tax Reporter ¶74,825.04(40). IRC §7482.

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT,

Appeal from a Decision of the United States Tax Court USTC No. 1037-99

Before JONES, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM* :

Brazoria County Stewart Food Markets (''Brazoria'') appeals the tax court's judgment holding Brazoria liable for income tax deficiencies for the tax years 1991, 1992, and 1994. Brazoria raises two issues: (1) that the tax court erred in holding that advances it made to a related corporation represented capital contributions rather than debt and (2) that the tax court erred in finding that Brazoria conceded at trial that it was not entitled to an interest expense deduction, precluding it from asserting that theory in its post-trial brief.

Brazoria is a Texas corporation operating several grocery stores around Brazoria, Texas. Vernon Stewart is Brazoria's founder, CEO, and sole shareholder. Stewart, along with two other individuals, also formed another Texas corporation, Used Power Equipment (UPE). Each of the three shareholders of UPE owned one-third of the common stock. The shareholders' total aggregate capital contribution at UPE's start-up amounted to $1000. Brazoria maintained no ownership interest in UPE.

UPE's original business was the removal and sale of used machinery from industrial plants. In 1990, Stewart bought out UPE's other shareholders for a total of $75,000 and made himself president. Also in 1990, UPE decided to undertake what it characterized as a ''short-term venture'' in another area of business. UPE was awarded several contracts with Formosa Plastics Corporation to perform construction work related to the expansion of one of Formosa's plants. UPE lacked sufficient working capital to finance the work required at the plant prior to the receipt of progress payments from Formosa. Thus, in order to finance the construction work, Stewart directed Brazoria, his wholly owned company, to obtain three separate loans from a third-party lender, Grocers Supply Co. (''Grocers''). Brazoria then turned the money it received from Grocers over to UPE. Grocers advanced the loans to Brazoria with the knowledge that UPE would receive the proceeds. The loans from Grocers were secured by Brazoria's assets and personally guaranteed by Stewart. The total amount of the principal of these loans was $1,025,000.

In addition to the three loans advanced through Brazoria, UPE obtained a separate loan for $218,000 directly from Grocers which was personally guaranteed by Stewart and secured by a purchase money security interest in the equipment UPE purchased with the loan. All four loans bore interest rates of ten percent per year.

A dispute later arose between Formosa and UPE which led to UPE stopping work on the contracts. Formosa then terminated the contracts, and UPE sued for damages. Formosa settled out of court. UPE recovered a net amount of $227,114 from the settlement, which it transferred to Brazoria. At this point, UPE ceased operations. Brazoria determined that it could not recover anything more from UPE. It paid off the principal and interest remaining on its three loans from Grocers. Brazoria also paid off, out of its own funds, the $111,984.67 balance remaining on the loan made directly from Grocers to UPE.

On its 1994 tax return, Brazoria claimed a bad debt deduction of $1,352,433, representing interest and principal it was unable to recover from UPE plus the $111,984.67 it voluntarily paid on the loan made directly from Grocers to UPE. Brazoria then carried those losses back to its 1991 and 1992 tax years, resulting in net operating

* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

losses for those years. The Commissioner of Internal Revenue sent Brazoria a notice of deficiency disallowing the bad debt deduction and the resulting net operating loss deductions for 1991 and 1992. The notice stated that Brazoria had failed to show that the amounts deducted were bona fide bad debt and not contributions to capital.

Brazoria filed a petition with the tax court, contending that the advances to UPE were loans, not capital contributions. It argued in the alternative that, if the advances to UPE were not loans, it should be allowed to take an interest deduction for $463,559 in interest it paid to Grocers on the loans. At trial, the tax court held that Brazoria failed to prove that the advances to UPE were loans. It also held that statements by Brazoria's counsel at trial conceded that the interest-deduction theory was not viable, thus precluding Brazoria from raising that theory in its post-trial briefs.

I

[1] We review the decision of the tax court under the same standards that apply to district court decisions. Thus, issues of law are reviewed de novo, and findings of fact are reviewed for clear error. *Park v. Comm'r*, 25 F.3d 1289, 1291 [74 AFTR 2d 94-5231] (5th Cir. 1994). The characterization of an advance as either a debt or a contribution to capital presents primarily a question of law. *Texas Farm Bureau v. United States*, 732 F.2d 437, 438 [54 AFTR 2d 84-5095] (5th Cir. 1984).

We must first decide whether the advances to UPE from Brazoria were genuine loans. 26 U.S.C. § 166(a)(1) provides that, in the case of a corporation, ''[t]here shall be allowed as a deduction any debt which becomes worthless within the taxable year.'' Under Treasury Regulations, only ''bona fide'' bad debts qualify for the deduction. 26 C.F.R. 1.166-1(c) (''Only a bona fide debt qualifies for purposes of section 166.''). Loans enjoy more favorable tax treatment than equity investments. *Estate of Mixon v. United States*, 464 F.2d 394, 402 [30 AFTR 2d 72-5094] (5th Cir. 1974). For example, the Internal Revenue Code imposes a tax on a shareholder's dividend income, yet does not allow the corporation to take a corresponding deduction. *Id.* In contrast, when loan principal payments are made, the lender assumes no additional tax liability. The lender must report interest as income, but the Code permits the paying corporation to deduct the interest payments. *Id.* Moreover, if the corporation fails, the shareholder can sometimes write off loans as bad debt under § 166, whereas capital contributions do not provide a corresponding deduction. As a result, shareholders of closely held corporations sometimes make small stock investments coupled with large ''loans'' of additional funds. *Id.* The IRS has sought to ensure that such ''loans'' really are genuine loans and not efforts to disguise capital contributions in order to receive favorable tax treatment. *Id.* The same principle requires close scrutiny of alleged loans between affiliated closely held corporations. *Texas Farm Bureau*, 732 F.2d at 438.

Distinguishing true loans from capital contributions is difficult because debt and equity are not mutually exclusive categories. 14A William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 6970.39 (2000). Instead, ''pure debt and pure equity lie at different ends of a spectrum with any number of variations in between.'' *Id.*Any given investment may have characteristics of both debt and equity. It is not surprising, therefore, that in this case the government emphasized certain characteristics of the Brazoria-UPE transaction which were equity-like, while Brazoria emphasized those characteristics which were debt-like. In *Estate of Mixon*, we developed a thirteen-factor analysis to help evaluate whether a given investment should be treated as debt or as a capital contribution. *See Estate of Mixon*, 464 F.2d at 402. The factors are: (1) the names given the certificates evidencing the indebtedness; (2) the presence or absence of a fixed maturity date; (3) the source of the payments; (4) the right to enforce payment of principal and interest; (5) participation in management flowing as a result; (6) subordination; (7) the intent of the parties; (8) ''thin'' or adequate capitalization; (9) identity of interest between

creditor and stockholder; (10) payment of interest only out of dividend money, (11) the ability to obtain loans from outside lending institutions; (12) the extent to which the advance was used to acquire capital assets; and (13) the failure of the corporation to repay on the due date. *See generally Estate of Mixon*, 464 F.2d at 403–10; *Slappey Drive Indus. Park v. United States*, 561 F.2d 572, 582 [40 AFTR 2d 77-5940] (5th Cir. 1977).

In considering these factors, we do not give all of them equal weight. The goal of the inquiry is not to "count factors, but to evaluate them." *Slappey Drive*, 561 F.2d at 581 (quoting *Tyler v. Tomlinson*, 414 F.2d 844, 848 [24 AFTR 2d 69-5426] (5th Cir. 1969)). Each case turns on its own facts and "different circumstances may bring different factors to the fore." *Id.*

We now undertake to evaluate the *Mixon* factors as they apply to the facts found by the tax court in order to determine whether the advances were loans or capital contributions.

(1) The name given to the certificate.

In general, the issuance of a stock certificate indicates an equity investment, whereas the issuance of a bond, debenture, or promissory note indicates a debt investment. However, we look beyond the title that the parties choose for the document. Creating a debt requires more than making "corporate paper entrusted with the appropriate nomenclatural captions." *Tyler*, 414 F.2d at 876 [sic, 850]. Instead, the "real issue for tax purposes has long been held to be the extent to which the transaction complies with arm's length standards and normal business practice." *Estate of Mixon*, 464 F.2d at 403.

Here, the tax court found as a matter of fact that the "advances from petitioner to UPE were not contemporaneously memorialized in promissory notes." Although Brazoria challenges this finding, we see nothing in the record to indicate clear error. Normal business practice would generally require contemporaneous instruments recording a debt. An advance by a corporate shareholder (or an affiliated corporation) "without terms of repayment, interest, and consideration would undoubtedly indicate that the advances were equity bound and intended." *Estate of Mixon*, 464 F.2d at 403.

Brazoria did submit to the tax court copies of promissory notes. These notes were prepared for the purposes of litigation[1] and backdated. At trial, Stewart could not remember who prepared these backdated notes or under what circumstances. He also could not explain what happened to the alleged original notes. He thought that they might have been lost or perhaps destroyed in a fire at UPE's offices. Stewart testified that two of the reconstructed promissory notes had different interest rates than the corresponding original notes; the reconstructed notes had interest often percent instead of twelve percent. Here, the nonchalance with which Brazoria treated the promissory notes demonstrates the absence of arm's length business standards. In our view, an arm's length lender would have taken more care to safeguard the evidence of the indebtedness. It would not have entrusted the creditor with the only copies of the promissory notes, nor would it have been so cavalier about reducing interest rates.

Brazoria also never reported the advances to its accountants, did not record them on its books and records as loans, and failed to report any interest income on its federal income tax forms for the years in question. Overall, these facts indicate that the advances from Brazoria to UPE did not create anything resembling a business-like, arm's length creditor-debtor relationship. This first factor weighs heavily against Brazoria.

(2) Presence or absence of a fixed maturity date.

The presence of a fixed maturity date is a characteristic of a debt obligation, whereas the absence of a fixed maturity date indicates that "repayment was in some way tied to the fortunes of the business, indicative of an equity advance." *Id.*

[1] Presumably, the notes were prepared for the litigation against Formosa, not the litigation against the IRS.

at 404. Again, the tax court here found that no promissory notes were prepared contemporaneously with the advances. At least until the promissory notes were prepared, UPE was under no fixed obligation to repay the advances to Brazoria.

The promissory notes were prepared for the purposes of litigation against Formosa, after the Formosa contract had fallen through. By this time, it was already apparent that UPE would have difficulty repaying the loans. The creation of a backdated promissory note with a fixed maturity date, after it had become apparent that UPE could not repay the advances, does little to advance Brazoria's cause. This factor also weighs against classifying the advances as loans.

(3) The source of the payments.

In general, a lender expects to be paid regardless of whether the creditor's business does well or poorly. If repayment is possible only out of corporate earnings, the transaction is more likely to be an equity contribution. If repayment does not depend on earnings, but instead could be satisfied out of a companies's assets or capital, the transaction appears more like a loan to the corporation. *Id.* at 405, *see also Slappey Drive Indus. Park*, 561 F.2d at 581 (''Generally, shareholders place their money 'at the risk of the business' while lenders seek a more reliable return.'' (internal citations omitted)).

The record indicates that Brazoria's advances were at the risk of UPE's business. Unlike Grocers' loans to Brazoria, the advances from Brazoria to UPE were not secured by any of UPE's. assets. Brazoria claimed that UPE had a valuable inventory of salvaged industrial equipment from which it could satisfy the debts, but the tax court found that Brazoria's estimates of the value of this equipment were not credible. Brazoria claims that it expected repayment out of the progress payments made to UPE on the Formosa contracts. But, although UPE received almost $8 million in progress payments from Formosa, it was still unable to repay the debts. Moreover, UPE's inventory of industrial equipment, purportedly worth millions, was ultimately sold locally for scrap. On balance, this factor also weighs against characterizing the advances as loans.

(4) Right to enforce repayment.

The right to enforce repayment is evidence of a definite obligation to repay, and therefore a debt investment. The absence of the right to enforce repayment indicates an equity investment. *Estate of Mixon*, 464 F.2d at 405. Here, again, Brazoria and UPE did not execute any contemporaneous promissory notes that would have given Brazoria a right to demand repayment. Nor is there any other evidence in the record of a definite obligation to repay the advances, at least until the backdated notes were created. By that time, again, the prospects of any kind of repayment looked dim. This factor also weighs against Brazoria.

(5) Participation increase in management.

One of the advances included $75,000 earmarked for buying back the other two investors' shares in UPE. As a result of the stock buy-back, Stewart's ownership of UPE increased to 100%. Moreover, after he obtained 100% ownership, Stewart installed himself as president of UPE. This factor weighs heavily against classifying the advances as loans.

(6) Subordination.

The tax court found as a fact that ''petitioner's advances were purposefully and systematically. subordinated in favor of . . . other creditors.'' We see nothing in the record that would indicate that this finding was clearly erroneous. Brazoria points out that UPE was also not able to pay other creditors, especially Grocers, in full. It also points out that UPE did make some payments to Brazoria. Neither of these facts undermines the tax court's finding that on balance the purported debts to Brazoria were systematically given less priority than those to other creditors. This factor weighs slightly in favor of treating the advances as loans.

(7) Intent of the parties.

In *Estate of Mixon*, we explained that the subjective intent of the parties might be relevant if the objective factors are ambig-

uous. *Id.* at 407. The tax court made no specific findings as to the subjective intent of the parties. In this case, no finding as to subjective intent was required because the objective factors are not ambiguous. *See id.* (holding that a ''*subjective* intent on the part of an actor will not alter the relationship or duties created by an otherwise objectively indicated intent.''). Moreover, the evidence on this point is ambiguous. Although some checks from Brazoria to UPE bore the notation ''Loan to UPE,'' Brazoria did not report the advances to its accountants as loans and did not treat them as loans on its federal income tax returns. We conclude that this factor does not weigh on either side of the scale.

(8) Thin or adequate capitalization.

The tax court found as a matter of fact that UPE was thinly capitalized. UPE had only $1000 worth of paid-in capital and well over $1 million in loans. Brazoria, however, contends that this factor should not be given much importance because (1) there was no evidence that the parties expected the debt-equity ratio to increase and (2) because the advances were not used to buy capital assets or commence operations. In *Estate of Mixon*, we recognized the ''insignificance'' of the thin capitalization factor in the absence of these two circumstances. *Id.* at 408. The government failed to identify any evidence that the parties expected the debt-equity ratio to increase. The tax court made no specific fact finding on this point. In light of *Estate of Mixon*, we therefore do not place much weight on the thin capitalization of UPE. This factor weighs only slightly against Brazoria.

(9) Identity of interest between creditor and stockholder.

If stockholders advance funds to a corporation in proportion to their equity interests, then the advances reflect equity rather than debt investment.[2] In *Estate of Mixon*, the taxpayer contributed 80% of an alleged loan, but owned only 15.3% of the corporation's stock. *Id.* at 409. We held that the ''sharply disproportionate ratio between [the] stockholder's percentage interest in stock and debt'' indicated that the debt was bona fide. *Id.* An equity investor would ordinarily expect a return proportionate to his investment.

Here, Brazoria advanced some funds before Stewart became 100% owner of UPE, but the majority of funds were advanced after Stewart became sole owner. Ordinarily, this would indicate that the loans made before Stewart became full owner were debt and not equity investment and vice versa. However, the tax court explained that each of the other two original owners of UPE contributed something at the start-up of the corporation besides capital. Vernor, one of the other original shareholders, was a demolition expert who had been awarded a salvage contract by Dow Chemical Corporation. Vernor contributed this contract to UPE. The contract pro-vided UPE with an initial supply of salvaged equipment. Busch, the third original shareholder, was familiar with the salvaged equipment. He was charged with cataloging the equipment and finding buyers for it on the international market. Stewart's responsibility, in contrast, was simply to provide capital to the corporation. Given that the other two initial owners contributed valuable non-monetary assets to the corporation, it was not inconsistent with an equity investment for Stewart to make a larger initial monetary contribution. Moreover, as noted above, many of the advances took place after Stewart became sole owner. We therefore find that this factor weighs against Brazoria.

(10) Payment of interest only out of dividend money.

The *Mixon* court, in considering this factor, explained that the ''failure to insist on interest payments ordinarily indicates that the payors are not seriously expecting any substantial interest income, but are interested primarily in the future earnings of the corporation.'' *Id.* at 409. It went on to insist that ''a true lender is concerned with interest.'' *Id.*

Here, Brazoria obtained a secured loan from Grocers at a ten percent interest rate

[2] Although Brazoria was not itself a shareholder of UPE, affiliate company transactions are accorded the same kind of scrutiny as shareholder transactions. *Texas Farm Bureau v. United States*, 732 F.2d 437, 438 [54 AFTR 2d 84-5095] (5th Cir. 1984).

and "loaned" it to UPE on an unsecured basis at an identical ten percent interest rate. Although it was at least theoretically possible for Brazoria to make money on this scheme, the transaction hardly evidences the concern for interest payments that we would normally expect in an arm's length creditor-debtor relationship. Indeed, Brazoria itself explains the purposes of the loans at least in part as part of an effort to "build a relationship with UPE and ... position that company to be a source of financial assistance in the future." The focus on UPE's future success rather than on making a profit from the interest on the loan weighs heavily in favor of considering these advances equity and not debt.

(11) Ability to obtain loans from outside lending institutions.

The ability of a corporation to borrow funds from outside sources at the time that an advance is made gives the transaction "the appearance of a bona fide indebtedness." *Estate of Mixon*, 464 F.2d at 410. Here, UPE obtained some outside loans. It obtained one loan directly from Grocers, which was secured by a purchase money security interest in the equipment purchased with the loan. There is also at least some evidence that it secured another loan from the First State Bank of Sweeney.

But the real purpose of this factor is to determine "whether the shareholder contributor acted in the same manner toward their corporation as ordinary reasonable creditors would have acted." The one loan from Grocers was secured, whereas Brazoria's advances were all unsecured. And there is little evidence in the record as to the terms of the Sweeney loan. Although UPE may have been able to obtain one or two loans from outside sources, Brazoria has not shown that it has dealt with UPE on the same terms as outside "ordinary reasonable creditors."

(12) The extent to which the advance was used to acquire capital assets.

The tax court found that UPE used the advances in part to acquire capital assets, including equipment needed to perform the Formosa contracts. Moreover, the tax court found that initial 1987 advances from Brazoria were used in part to acquire capital assets. Brazoria now challenges these findings as clearly erroneous.

The record provides sufficient support for the tax court's findings. Brazoria stipulated that $318,000 of the advances was intended for the purchase of equipment, and Stewart himself testified that some of the initial advance money was used to acquire capital assets. This factor weighs in favor of considering the loans as equity.

(12) The failure of the corporation to repay on the due date.

Although UPE paid some money to Brazoria, it is undisputed that it failed to pay a large portion of the advances on their purported due dates, leading Brazoria to take the bad debt deductions at issue here.

All of the relevant factors here indicate that the advances were capital contributions and not genuine loans. Brazoria did not deal with UPE as an ordinary, arm's length creditor would. As such, we agree with the tax court that Brazoria was not entitled to take a bad debt deduction for the unpaid advances.

II

Brazoria claimed, in an amendment to its petition with the tax court, that, if it was not entitled to a bad debt deduction, it was nevertheless entitled to deduct $463,559 interest paid to Grocers on the loans. At trial, one of Brazoria's accountants, Anderson, acknowledged that this figure was incorrect. Anderson relied on numbers obtained from Brazoria and TUPE in arriving at the $463,559 figure. After discussing the interest payments with Grocers directly, she adjusted the figure to $228,560.13.

After Anderson's testimony, the following exchange took place among the attorneys and the tax court:

> The Court: All right. And Mr. Cummings, is the Respondent going to offer any witnesses?
>
> Mr. Cummings (for the Commissioner): No, Your Honor. And I was thinking that we might be able to keep Mr. Nel-

son's appearance very short, because I think now — *I don't think we now have a disagreement about the figures.* Since Ms. Anderson testified, I think the *Petitioner would agree that the $463,000 alternative position is not valid and that the figures she relied upon came from Grocers.* And they're in the exhibits, and I don't know that we have a dispute about that anymore.

The Court: What about that Mr. Grimsinger?

Mr. Grimsinger (for Brazoria): *I will agree that the $463,559 theory is not something that the Petitioner is currently relying on.* I believe that I communicated that to Respondent in discussions prior to this case. I'm sorry that we had to hash it out in the courtroom.

The tax court held that Mr. Grimsinger's statement amounted to an admission that Brazoria was not entitled *to any* interest deduction. Brazoria contends, however, that it admitted only that the $463,000 figure was wrong.

Only "'deliberate, clear and unequivocal' statements can constitute conclusive judicial admissions." *In re Corland Co.*, 967 F.2d 1069, 1074 (5th Cir. 1992). We review the tax court's finding that a litigant conceded an issue at trial for clear error. *See Sealy Power, Ltd. v. Comm'r*, 46 F.2d 382, 398 [75 AFTR 2d 95-1213] (5th Cir. 1995).

Here, we conclude that Grimslinger's statement cannot be construed as a "deliberate, clear and unequivocal" statement that he wished to waive the entire interest deduction argument. In context, it appears that Grimslinger was agreeing with Cummings's statement that "I don't think we now have a disagreement about the *figures.*" At the very least, Grimslinger's statement was ambiguous. As such, the tax court clearly erred in concluding that it constituted a concession of the interest deduction argument.

We therefore VACATE the tax court's conclusion as to the interest deduction theory. The Commissioner contends that there is insufficient evidence that interest payments to Grocers were in fact made, and that the amounts claimed to have been paid were actually consolidated into a new loan. The Commissioner is free to urge these arguments on the merits to the tax court on remand,

AFFIRMED IN PART, VACATED IN PART, and REMANDED for further proceedings not inconsistent with this opinion.

¶2002-5457

UNITED STATES OF AMERICA, PETITIONER v. TELEPHONE AND DATA SYSTEMS, INC. AND SUBSIDIARIES, RESPONDENT. U.S. District Court, Western Dist. of Wisconsin, (DC WI) 02-C-0030-C, Aug. 21, 2002. Earlier proceeding at (2002, DC WI) 90 AFTR 2d 2002-5828, 2002-2 USTC ¶50569. Years 1995, 1996. Decision against Taxpayer in part.

1. Third-party summons enforcement—petition to quash—attorney-client privilege; attorney work product—stay pending appeal. Taxpayer was denied stay pending appeal of judgment enforcing IRS summonses: taxpayer didn't show likelihood of prevailing on merits based on district court's failure to address nonbinding case law (case) where court applied 8-prong test cited therein in determining that attorney-client privilege didn't exist as to documents not constituting legal advice; case didn't mention work product doctrine; and taxpayer's work product argument failed because documents weren't produced in anticipation of litigation. Also, IRS's ability to use privileged information in determining taxpayer's tax liability outweighed potential harm caused by disclosure; taxpayer's speculation as to its own continuing cooperation with IRS was irrelevant as to statute of limitations pending appeal; "designated summons" argument was rejected; and public interest factor was neutral. *Reference:* United States Tax Reporter ¶76,025.07(15); 76,025.05(50). IRC §7602.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN,

OPINION AND ORDER

BARBARA B. CRABB District Judge

This is a civil action for injunctive relief brought pursuant to the Internal Revenue Code, 26 U.S.C. § 7401. Petitioner United States of America petitioned this court to enforce two Internal Revenue Service summonses, encompassing seven documents. Respondent argued that the documents were protected from disclosure by the attorney-client privilege and the work product doctrine. On July 16, 2002, after an in camera inspection, this court denied in part respondent's motion to quash the IRS summonses (and thus granted in part petitioner's petition to enforce the IRS summonses) as to four of the seven documents on the basis of attorney-client privilege only. The four documents are as follows: (1) the September 26, 1996 memorandum; (2) the November 8, 1996 letter to Arthur Andersen; (3) the December 2, 1997 letter from Arthur Andersen; and (4) the November 24, 1996 outline analysis. Because this determination concluded the proceedings, I directed the court of clerk to close the file. Judgment was entered on July 17, 2002.

Presently before the court is respondent's (1) motion for a stay of the judgment pending appeal pursuant to Fed. R. Civ. P. 62(c); and (2) respondent's motion for leave to file a reply to petitioner's response to its motion for a stay pending appeal.

Because respondent's brief in reply was received contemporaneously with its motion for leave to file the motion and does not affect the outcome, I will grant respondent's motion for leave to file a reply. However, because respondent fails to show that it meets the criteria necessary to issue a stay, I will deny its motion for stay of the judgment pending appeal.

OPINION

[1] The factors regulating the issuance of a stay under Fed. R. Civ. P. 62(c) are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Petitioner contends that respondent must meet all four criteria. See In re Power Recovery Systems, Inc. v. Dodge Chemical Co., 950 F.2d 798, 804 n.31 (1st Cir. 1991) ("Failure to meet even one of the criteria justifies denial."). Respondent contends that the four factors are not applied rigidly. See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991) ("These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together."); Goldstein v. Miller, 488 F. Supp. 156, 172 (D. Md. 1980) ("The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors."). Even assuming an interrelationship of factors, as respondent argues, the balance of factors does not weigh in favor of respondent.

1. Likelihood of success

Respondent argues that there is a substantial likelihood of succeeding on appeal because this court failed to address the holding in United States v. Kovel, 296 F.2d 918 [9 AFTR 2d 366] (2d Cir. 1961). In Kovel, the Court of Appeals for the Second Circuit held that the attorney-client privilege extends to communications made by a client to an accountant incident to legal advice. Id. at 922 ("What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer*.") (emphasis in original). The court held explicitly that "[i]f what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." Id. However, in Kovel, the court applied the same eight-prong Wigmore test, id. at 921–22, that is used by the Court of Appeals for the Seventh Circuit, see United States v. Evans, 113 F.3d 1457,

1461 (7th Cir. 1997), and that I used in determining that no attorney-client privilege existed as to four of the documents, see Order dated July 16, 2002, dkt. #23, at 3–4. Contrary to respondent's contention, the decision not to cite Koval (a 1961 case from a non-binding jurisdiction) does not mean that I failed to apply the Wigmore test or the law enunciated in Evans (a 1997 case from a binding jurisdiction). Rather, I concluded after an in camera inspection that the attorney-client privilege was inapplicable to four documents because the documents did not constitute legal advice. For example, respondent argued that the November 8, 1996 letter sent from respondent's tax manager to Arthur Andersen was legal advice because it had been written on the advice of counsel. Simply put, the fact that an attorney advises a client to seek tax advice does not cloak un-privileged tax advice in the shroud of privileged legal advice.

Respondent argues further that the work product doctrine is also supported by the principles enunciated in Koval. See Resp. Mot. for Stay, dkt. #25, at 3, ¶ 9. This is incorrect. Koval addressed the attorney-client privilege only and never mentioned the work product doctrine. See Koval, 296 F.2d at 918–24 [9 AFTR 2d 366]. Respondent's work product argument failed because the documents in question were not produced *in anticipation of litigation.* See Order dated July 16, 2002, dkt. #23, at 7–8. In addition, respondent argues that Hodges, Grant & Kaufmann v. United States, 768 F.2d 719, 722 [56 AFTR 2d 85-5777] (5th Cir. 1985), is applicable because that court stated that the work product doctrine ''may'' apply to documents produced ''in anticipation of an administrative dispute.'' Id. There are two obvious problems with Hodges. First, the court's comments are simply dicta. Second, even if the comments were not dicta, this court is not bound by Fifth Circuit rulings and, moreover, the Seventh Circuit has held to the contrary. Specifically, the Court of Appeals for the Seventh Circuit has held that ''a remote prospect of future litigation is not sufficient to invoke the work product doctrine.'' In re Special September 1978 Grand Jury (II), 640 F.2d 49, 65 (7th Cir. 1980) (''At most, the materials were prepared with an eye toward a possible administrative proceeding before the Internal Revenue Service.''); see also Velsicol Chemical Corp. v. Parsons, 561 F.2d 671 (7th Cir. 1977) (court refused to apply work product doctrine to documents prepared for *actual* administrative proceedings).

Accordingly, I find that respondent has failed to make even a minimal showing of likelihood of success on the merits. Thus, this factor weighs heavily in favor of petitioner.

2. Irreparable harm

Respondent relies heavily on this prong, arguing that it will be harmed irreparably and its appeal would be rendered moot if the court required disclosure of the contested documents. However, as petitioner points out, the Supreme Court has held that courts are able to fashion effective relief for taxpayers whose records are produced pursuant to an enforcement order that is later modified or reversed on appeal. See Church of Scientology of California v. United States, 506 U.S. 9, 12–13 [70 AFTR 2d 92-6055] (1992) (court may order records returned or destroyed). In its reply brief, respondent retreats from its mootness stance and instead focuses on the fact that the information will have been divulged to the IRS forever. In other words, respondent argues that if the stay is not issued the cat will be out of the bag forever. However, if the documents in this case were returned or destroyed, the IRS would not be able to use any information they may contain to determine respondent's federal tax liability, which appears to be the bottom line. This factor weighs slightly in favor of petitioner.

3. Harm to other interested persons

Respondent argues that a stay would not halt the IRS examination. Petitioner agrees. However, petitioner argues that if a stay were granted, it would be harmed because the statute of limitations would continue to run as to respondent's 1995 and 1996 tax years. Thus, petitioner argues, a stay would

halt a complete and accurate examination of respondent's 1995 and 1996 tax liability. Respondent argues that it has "cooperated with the IRS since the audit began in 1999—including extending the statute of limitations by agreement" and that petitioner "has presented no basis for assuming that [respondent] will not continue such cooperation throughout the close of the examination." Resp. Reply, at 4. However, all congenial gestures aside, respondent has not agreed to extend the statute of limitations pending appeal. Therefore, respondent's speculation as to its own continuing cooperation does not stop the statute of limitations clock from ticking.

In addition, petitioner argues that the statute of limitations can be tolled during judicial enforcement proceedings only if the IRS issues a "designated summons," 26 U.S.C. § 6503(j), or "third-party summons," 26 U.S.C. § 7609(e)(2), neither of which was issued in this case. Respondent argues (in its reply brief only) that if petitioner wanted to toll the statute of limitations, it could issue a designated summons. However, it is unclear whether the criteria necessary to issue a designated summons are present in this case at this juncture, see 26 U.S.C. § 6503(j)(2)(A)(i)–(iii). Other than this bald assertion, respondent fails to walk the court through each element. Moreover, after a cursory review of § 6503 of the tax code the answer to this question is not readily apparent. It is unreasonable for respondent to expect the court to cull through the tangled tax code on its own and determine whether the IRS could meet the applicable criteria to issue a designated summons. This factor weighs in petitioner's favor.

4. Public interest

Respondent argues that because there is a broad public interest in recognizing and preserving the role of the attorney-client privilege and work product doctrine, the public interest weighs in favor of issuing a stay. Petitioner argues that the public interest is not served by expanding the privileges beyond their established scope. Because I agree with both of these arguments, this factor is in equipoise.

In sum, three of the four factors weigh in favor of petitioner and the remaining factor is in balance. Moreover, the likelihood of success on the merits weighs heavily in favor of petitioner. Even assuming an interrelationship of the factors as respondent argues, the balance of factors does not come close to weighing in favor of respondent. Accordingly, respondent's motion for a stay pending appeal will be denied.

ORDER

IT IS ORDERED that

1. Respondent Telephone and Data Systems, Inc.'s motion for leave to file a reply brief in support of its motion for a stay pending appeal is GRANTED; and

2. Respondent's motion for a stay of the judgment pending appeal is DENIED.

Entered this 21st day of August, 2002.

BY THE COURT:

BARBARA B. CRABB

District Judge

¶2002-5458

TOWNSEND INDUSTRIES, INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of Iowa, (DC IA) Civil No. 4-01-CV-10176, Aug. 21, 2002. Earlier proceeding at (2002, DC IA) 89 AFTR 2d 2002-2913, 207 F Supp 2d 931, 2002-2 USTC ¶50518 [89 AFTR 2d 2002-2913]. Years 1996, 1997. Decision for Govt.

1. Employment taxes—wages—employer-provided fishing trips—working condition fringe benefits—business expenses—substantiation. Govt. was granted judgment on employment taxability of fishing trips taxpayer-employer provided employees in conjunction with annual sales meeting: costs were taxable wages, not excludible IRC §132 working condition fringe benefits where they didn't qualify as IRC §162 ordinary and necessary business expenses. Notably, lack of any organized or monitored business discussions during

trips, lax employee attendance and disconnect from sales meetings showed trips weren't ordinary or necessary; and fact that taxpayer's whole business philosophy wasn't ''ordinary'' wasn't dispositive. Also, taxpayer didn't show that principal character of basically fun fishing endeavors was active conduct of taxpayer's business under IRC §274(a); taxpayer's expectation to derive future benefit of improved employee comradery didn't alone meet statute's requirement; and trips were too far distanced temporally to be considered ''associated with'' sales discussions. And, even if all other requirements were met, taxpayer didn't offer sufficient documentation to meet IRC §274(d)'s strict substantiation rule. *Reference:* United States Tax Reporter ¶34,015.09(150); 1325.05(40); 1625.019(5); 2745.14(75). IRC §132; 162; 274; 3121; 3401.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION,

ORDER

Ronald E. Longstaff, Chief Judge

The Court held a bench trial July 23 through 25, 2002 after having previously denied defendant's motion for summary judgment by order of May 31, 2002.[1] The parties submitted post-trial briefs, and the matter is now fully submitted.

The Internal Revenue Service (''IRS'') asserts that the cost of employee fishing trips paid for by plaintiff, Townsend Industries, Inc. (''Townsend''), in 1996 and 1997 constituted wages upon which employment taxes should have been paid. The IRS assessed additional employment taxes for those years, and plaintiff asserts the employment tax deficiencies were improperly assessed. On June 16, 2000 plaintiff paid $100.00 of the assessed employment tax deficiency for the 1996 fishing trip, and filed the present lawsuit seeking a refund of this money on March 21, 2001. The government has since filed a counterclaim asserting it is owed the remaining tax deficiencies for 1996 and 1997.

I. FACTUAL FINDINGS

1. Plaintiff, Townsend Industries, was founded by Robert Townsend in the late 1950's. He is still the president and sole shareholder. Mr. Townsend invented the ''T-51'' printing press attachment, and the company manufactures and distributes several variations of this attachment.

2. The company is headquartered in Altoona, Iowa, where its factory is also located.

3. Townsend prides itself on being a different kind of company. Mr. Townsend terms it a ''me too'' company. Its business philosophy is to have employees choose to be a part of the company team, and not feel like they have to do certain things out of obligation. Townsend's goal is to treat its employees well and create an environment where employees will say ''me too'' when presented with opportunities to act in the company's interest.

4. The T-51 printing presses that Townsend manufactures are complex machines with approximately 800 different parts. *See* Plaintiff's Trial Exhibits 1 and 2 (brochures detailing the T-51 printing presses).

5. The attachments are distributed by both in-house sales personnel along with individuals from independent corporations. The sales personnel are located throughout the United States, and in Great Britain and Austrailia.

6. In June of every year since its inception, Townsend has held sales meetings at its Altoona headquarters. Domestic sales personnel travel into town over a weekend. The sales meetings are conducted on Monday and Tuesday, and follow the same basic schedule every year.

7. John Jorgenson, chief executive officer (''CEO'') of Townsend since 1990, along with Mr. Townsend and a few other select Townsend employees, meet with sales personnel for breakfast on Monday

[1] Insofar as relevant, the Court's discussion of applicable law in its prior summary judgment ruling is incorporated as a part of this Order.

morning. Jorgensen then instructs sales personnel to go to the factory and tour the plant. Sales personnel are encouraged to introduce themselves to workers at the plant, talk with them, and make themselves more familiar with the factory's operations.

8. At 9:30 a.m. on Monday morning, the factory workers take a regularly scheduled coffee break. At this time, the sales personnel introduce themselves to everyone and briefly discuss how things are going in their sales region. This coffee break lasts approximately one half hour.

9. At approximately 10:00 a.m. on Monday morning of every year, the actual sales meeting begins. Most factory workers don't attend, although a few may be called into the sales meeting for brief periods of time to discuss specific issues. The sales meeting is facilitated by Jorgensen, and attended by engineers, sales personnel, and factory and office department heads.

10. A variety of topics are addressed in the annual sales meeting. Testimony at trial indicated that sales personnel will commonly report on technical problems that they are having with the performance of the T-51 products, and potential solutions will be discussed. Other topics that are commonly addressed include advertising, trade shows, and relationships with the company's customers. Notes are taken throughout the meetings, and a final report is compiled by Jorgensen in the weeks following the meeting. *See, e.g.*, Plaintiff's Trial Exhibit 6A (includes agenda, notes, and report from 1996 sales meeting).

11. This same week, Townsend annually sponsors a fishing trip for sales personnel and employees that runs Wednesday through Saturday.

12. Mr. Townsend and Jorgensen consider the fishing trip to be a part of the overall ''me too'' philosophy of the company. They hope that by placing sales personnel and employees in a comfortable and pleasant setting, business discussions will be encouraged and employees motivated to perform better for the company upon their return

13. The event is held at a five star resort called Totem Lodge in Ontario, Canada.

14. All employees at the Townsend factory are invited to attend.[2] A sign-up sheet is posted months in advance of the trip, and employees are asked to indicate whether they are planning to attend and whether they plan to fish both days. *See, e.g.*, Plaintiff's Trial Exhibit 7 at pages 23–25 (1997 trip sign-up sheet).

15. The trip is not mandatory, but Mr. Townsend and Jorgensen encourage everyone to attend. Regularly more than half of the employees attend.

16. The trip is substantially the same every year. Wednesday is spent taking a 12 hour bus ride up to the resort, Thursday and Friday are primarily spent fishing,[3] and Saturday is a 12 hour bus ride back to Altoona, Iowa.

17. Wives and children of Townsend employees and sales personnel are not invited to attend the fishing trip.

18. Testimony by Townsend employees was that the trip is an enjoyable time, but that it is not simply a vacation. The employees view it as a part of their job, and they are paid regular wages while on the trip.

19. Sales personnel and Townsend employees indicated that one to four hours per day were spent discussing Townsend related business. These discussions took place on the bus trips, at meals, on boats, and in cabins. Jorgensen and Mr. Townsend attempt to encourage these discussions in cabins and on boats by assigning specific individuals to be together during these times, although such assignments are flexible and can be changed for any reason.

20. Many subjects discussed at the sales meeting earlier that week were also discussed on the fishing trip.

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[2] Jorgensen testified that Townsend used to have a plastics division and that its employees did attend some fishing trips, but neither of the trips in 1996 or 1997. The plastics division was operated at a different facility, and it was actually sold in 1997.

[3] For those who do not want to fish, other activities such as golf or hiking are available.

21. Employees testified that they gained an advantage in performing their job by attending the fishing trip.

22. While there was testimony at the trial indicating that specific problems were solved on the fishing trip, there was not sufficient evidence presented to indicate exactly what the business discussions entailed and whether the discussions noted actually occurred in 1996, 1997, or in some other identifiable year. The testimony at trial indicated that all of the fishing trips "run together" because so many of the participants have attended for many years.

23. The only planned meeting on the trip is a fishing awards banquet on Friday night, and afterwards Mr. Townsend and Jorgensen give a "state-of-the-company" and motivational speech before the return to Iowa on Saturday.

II. APPLICABLE LAW & DISCUSSION

A. Whether Fishing Trips Were Ordinary and Necessary

[1] Certain items an employer gives to its employees are to be excluded from employees' gross income calculations, or in other words not made a part of employee wages. *See* 26 U.S.C. § 132. One such item that is to be excluded from the wage calculation is anything an employee receives from his or her employer which qualifies as a "working condition fringe." 26 U.S.C. § 132(a)(3). A working condition fringe is "property or services pro-vided to an employee of the employer to the extent that, if the employee paid for such property or services, such payment would be allowable as a deduction under section 162 ...." 26 U.S.C. § 132(d). Under section 162, an "ordinary and nec-essary expense paid or incurred during the taxable year in carrying on any trade or business, including ... traveling expenses (including amount expended for meals and lodging other than amounts which are lav-ish or extravagant under the circumstances) while away from home in the pursuit of a trade or business" are deductible by the employee. 26 U.S.C. § 162(a)(2).

To analyze the present controversy, this Court must therefore initially assess whether Townsend's fishing trip expenses in 1996 and 1997 were ordinary and necessary. "Although the terms 'ordinary and necessary' have been repeatedly construed and applied, no definite standard can be formulated for determining whether a claimed deduction can qualify as an expense ordinary and necessary in the particular taxpayer's business." *Wells-Lee v. Comm'r of Internal Revenue*, 360 F.2d 665, 668–69 [17 AFTR 2d 964] (8th Cir. 1966) (citing *Welch v. Helvering*, 290 U.S. 111 [12 AFTR 1456] (1933) and *Iowa Southern Util. Co. v. Comm'r of Internal Revenue*, 333 F.2d 382 [14 AFTR 2d 5061] (8th Cir. 1964)). "In general, a business expense is tested by its normalcy and soundness considered in light of the nature of the taxpayer's trade or business, Byers v. Commissioner of Internal Revenue, 199 F.2d 273 [42 AFTR 687] (8th Cir. 1952), but the determination of whether an expense is ordinary and necessary and the taxpayer's purpose in making a particular payment are usually questions of fact." *Wells-Lee*, 360 F.2d at 669 (citing *General Bancshares Corp. v. Comm'r of Internal Revenue*, 326 F.2d 712 [13 AFTR 2d 549] (8th Cir. 1964)).

In this Court's previous summary judgment ruling it determined that material issues of fact remained for trial as it could not determine, based on the record that was then before it, whether the fishing trips were an ordinary and necessary expense under section 162. In particular, the Court found that evidence at trial relating to whether the trip was mandatory and whether it could properly be viewed as a continuance of the Monday and Tuesday sales meeting would be important in making such a determination.

The majority of Townsend employees are not a part of the actual sales meeting on Monday and Tuesday as their role is generally limited to introductions and brief conversations with the sales personnel before the start of the actual meeting. *See* Factual Findings ¶s 7–9. All Townsend employees were invited and encouraged to attend the fishing trip, and while many do go year after year, other employees don't

attend the trip. *See* Factual Findings ¶s 14–15. Business is certainly discussed on the fishing trip, but it is not done in an organized and monitored environment where Townsend's leaders are certain the sales meeting agenda is followed and discussions continued. *See* Factual Findings ¶s 19, 23. After evaluating the trial testimony, the Court concludes plaintiff's fishing trips were not an ordinary and necessary business expense in light of the lax attendance policy for the trip, and the disconnect between the sales meeting and the fishing trip.

In advancing its position, Townsend asserts that while the fishing trip may not be ordinary, neither is its whole business philosophy, *see* Factual Findings ¶s 3, 12, and that it should not be penalized for its ingenuity.[4] Townsend urges that the Eighth Circuit's decision in *Poletti v. Comm'r*, 330 F.2d 818 [13 AFTR 2d 1252] (8th Cir. 1964) supports its position. The Court in *Poletti* addressed the deductibility of business expenses under section 162 as ordinary and necessary. Plaintiff in that case ran an employment agency and gave free gifts, both to individuals who sought placement through it and to companies where it placed employees. Plaintiff sought to deduct such expenses as ordinary and necessary. *Id.* at 819–20. The Court described these gifts as "really nothing more than a form of promotional advertising to advance its business," and that the company should not be "penalized taxwise for business ingenuity in utilizing advertising techniques which do not conform to the practices of one whom he is naturally trying to surpass in profits." *Id.* at 821–22.

The case at hand is distinguishable from *Poletti*. The Court found no caselaw supporting classifying expenditures for a voluntary, company-wide, all-expenses-paid, employer-sponsored fishing trip with one brief business meeting as an ordinary and necessary business expense. Townsend also argues *Peoples Life Insurance Company v. United States*, 373 F.2d 924 [19 AFTR 2d 979] (Ct. Cl. 1967) supports its position, but in that case, the employer-paid-for-trip was for specific sales agents and it included two hour business meetings each day. The case made clear that the business meeting status of the event was not destroyed because pleasurable pursuits were also included, and the Court took stock in the fact that actual business meetings were held. *Id.* at 373 F.2d at 929. The fact that only a brief business meeting was held on the Townsend fishing trips is a factor in finding the trip was not an ordinary and necessary expense.

Now that the trial has been completed and this Court has made its factual findings, it finds that plaintiff's trips do not qualify as a working condition fringe exempt from employee wage calculations.

B. Whether Fishing Trip Expenses Were Directly Related To or Associated With the Active Conduct of Townsend's Business

Even if this Court assumes Townsend's fishing trip expenses were ordinary and necessary under section 162, Townsend has to show the expenses were directly related to or associated with the active conduct of its business pursuant to 26 U.S.C. section 274(a)(1)(A).[5]

> A. In general.—No deduction otherwise allowable under this chapter shall be allowed for any item —
>
> (A) Activity.—With respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, unless the taxpayer establishes that the item was directly related to, or, in the case of an item directly preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), that such item

[4] As this Court commented at trial, it has a deep respect for the plaintiff company, its founder Mr. Townsend, and their business philosophy. The company's success for over forty years dramatically reflects the legitimacy of the "me too" business philosophy espoused by Mr. Townsend and his wife since the company's inception. However, despite this Court's personal beliefs about the merits of Townsend's methods, including the value of the fishing trip to the business, Townsend simply is not exempt from the reach of the tax code and its regulations because it is an exemplary employer who genuinely cares about its employees and community.

[5] 26 U.S.C. section 274(e)(4) exempts an employer's recreational and social expenses from the reach of section 274 and its heightened requirements when those expenses are "primarily for the benefit of employees." However, as Townsend has asserted throughout this litigation that the expenses at issue in this case are ordinary and necessary business, and this Court is assuming for this stage of the analysis that the fishing trip expenses indeed do qualify as ordinary and necessary, the substantiation requirements of section 274(a) will be applied.

was associated with, the active conduct of the taxpayer's trade or business . . . .

In order to show the fishing trip expenses were directly related to the active conduct of its business, Townsend needed to show at trial all of the following: (i) it had "more than a general expectation of deriving some income or other specific trade or business benefit" from the fishing trips; (ii) that active business discussions were conducted on the fishing trips; (iii) that the "principal character or aspect" of the fishing trips was the active conduct of business, although it is not necessary that more time was devoted to business than to entertainment; and (iv) the expenditure was allocable to Townsend's employees conduct of business and the other people on the fishing trip with which business was conducted. *See* 26 C.F.R. § 1.274-2(c)(3)(i–iv) (requiring all four requirements be met in order to find the expense directly related). Additionally, "[t]he active conduct of trade or business is considered not to be the principal character or aspect of combined business and entertainment activity on hunting or fishing trips or on yachts and other pleasure boats unless the taxpayer clearly establishes to the contrary." *Id.* at §1.274-2(c)(3)(iii). Townsend did not meet this standard. It had an opportunity at trial to clearly estab-lish that the principal character of its fish-ing trips was the active conduct of its trade or business, and it failed to do so. The trip was not an integral part of Townsend employees' ability to perform their jobs, it was not a part or a continuation of a sales meeting, but rather was a relaxed and fun event where business was discussed as part of the background to the primary fishing endeavor. 26 C.F.R. § 1.274-2(c)(3)(iii). Additionally, the testimony of Mr. Townsend and Jorgensen made particularly clear at trial that Townsend basically held an expectation to derive uncertain future benefits, particularly in the way of improved comradery and relations among its employees and sales personnel, from the fishing trip. Under 26 C.F.R. section 1.274-2(c)(3)(iii), such an expectation is not enough to allow the trips to qualify as directly related under section 274(a).

Nor can Townsend demonstrate that its trips were associated with the active conduct of its business. In order for this test to be met, the entertainment expense at issue must have been conducted before or after a business discussion. 26 U.S.C. § 274(a). "For example, if the taxpayer conducts substantial negotiations with a group of business associates and that evening entertains that group and their wives at a restaurant, theater, concert or sporting event, such entertainment expenses, if *associated with* the active conduct of the taxpayer's business, will be deductible even though the purpose of the entertainment is merely to promote goodwill in such business." *Hippodrome Oldsmobile, Inc. v. United States*, 474 F.2d 959, 963 [31 AFTR 2d 73-851] (6th Cir. 1973) (discussing section 274 and related congressional reports); *see also St. Petersburg Bank & Trust Co. v. United States*, 362 F.Supp. 674, 679 [32 AFTR 2d 73-5679] (M.D. Fla. 1973) (clearly stating that the "associated with" test is a less-stringent test that requires the business discussions, literally, immediately precede or follow the entertainment expense). Simply put, the Townsend business discussions that occurred in Iowa on Monday and Tuesday were too far distanced temporally from the fishing trip that took place the following four days for this Court to find the "associated with" test met.

Additionally, even if this Court were to assume Townsend could clear the aforementioned hurdles, it still needed to provide adequate substantiation of the business purposes of the fishing trip expenses at trial.

(d) Substantiation required.—No deduction or credit shall be allowed—

(1) under section 162 . . . for any traveling expense (including meals and lodging while away from home),

(2) for any item with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such an activity,

. . .

unless the taxpayer substantiates by adequate records or by sufficient evidence corroborates the taxpayer's own statement (A) the amount of such expense or other item, (B) the time and place of the travel, entertainment, amusement, recreation, or use of the facility or property . . . , (C) *the business purpose of the expense or other item*, and (D) the business relationship to the taxpayer of persons entertained, using the facility or property . . . .

26 U.S.C. § 274(d) (emphasis added). In this Court's May 31, 2002 order denying defendant's motion for summary judgment, the Court concluded that Townsend would need to present adequate records to substantiate the business purpose of the fishing trip expenses. At trial, Townsend did not provide such evidence. Summarized, the testimony at trial consistently indicated that the many years of fishing trips ''ran together'' and while most every witness remembered having business conversations on the fishing trips, the testimony about the business purposes of the trip lacked the necessary specificity. *See*Factual Finding ¶ 22.

III. CONCLUSION

For the above stated reasons, the Court finds that under the tax code and its governing regulations, Townsend expenses in taking its employees to Canada for fishing trips do not qualify for exclusion from wages to its employees. Townsend is liable for the employment tax deficiencies assessed by the I.R.S., which the parties have indicated are $24,591.91 for 1996 and $33,906.55 for 1997. The Clerk of Court shall enter judgment against plaintiff and in favor of defendant.

IT IS SO ORDERED.

Dated this 21st day of August, 2002.

RONALD E. LONGSTAFF, CHIEF JUDGE

UNITED STATES DISTRICT COURT

JUDGMENT IN CIVIL CASE

___ JURY VERDICT. This action came before the Court for trial jury. The issues have been tried and the jury has rendered its verdict.

X DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: that judgment is entered in favor of defendant against the plaintiff in the amount of $24,591.91 for tax deficiences in the year 1996 and $33,906.55 for 1997.

Date: August 30, 2002

JAMES R. ROSENBAUM

Clerk

(By) Deputy Clerk/L. DeFrancisco

¶2002-5459

Michael BURT, PETITIONER v. UNITED STATES, through Internal Revenue Service, through Marc Baker, Special Agent, RESPONDENTS. U.S. District Court, Eastern Dist. of Michigan, (DC MI) Case No. 02X72705, Aug. 16, 2002. Decision for Govt.

1. Summons enforcement—petition to quash. Govt. was granted summary denial of taxpayer's petition to quash summons, and summons was enforced. *Reference:* United States Tax Reporter ¶76,025.04(25). IRC §7602.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION,

ORDER

ARTHUR J. TARNOW United States District Judge

[1] This matter having been submitted to the Court on the motion of the United States for summary denial of the petition to quash the summons in the above-captioned proceeding, and the Court having reviewed briefs of the parties and having further considered the matter at a hearing

on August 9, 2002, and for good cause shown and the reasons stated on the record in open court, it is hereby

ORDERED that the petition to quash the summons in the above-captioned proceeding is denied, and it is hereby

ORDERED that the summons which petitioner seeks to have quashed shall be enforced.

DONE and ORDERED at Detroit, Michigan, this 16th day of August, 2002.

ARTHUR J. TARNOW

United States District Judge

Dated: AUG 16 2002

¶2002-5460

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Dorothy R. HENDERSON, DEFENDANT-APPELLANT. UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. George HENDERSON, JR., DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-10171; 01-10173, Oct. 1, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—fraudulent tax scheme—search warrant—sentencing. Convictions and sentences of taxpayers involved in fraudulent tax scheme were affirmed: IRS agents' violation of Fed.R.Crim.P. 41(d) was harmless where no evidence seized after violation was introduced or used at trial; testimony regarding govt.'s efforts to verify that tax losses stemmed from activities related to taxpayers' fraudulent activities vs. unrelated sources supporting finding that losses were at least $10 million; and argument that district court should have required govt. to prove sentencing factors by clear and convincing evidence, raised for 1st time on appeal, was forfeited. *Reference:* United States Tax Reporter ¶73,446.516(55).

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the Eastern District of California Garland E. Burrell, District Judge, Presiding.

Before HALL, KOZINSKI and McKEOWN, Circuit Judges.

MEMORANDUM*

1. **[1]** IRS agents violated Fed.R.Crim.P. 41(d) when they failed to give the Hendersons a copy of the search warrant upon their return home while the search was still in progress. United States v. Gantt, 194 F.3d 987, 994 (9th Cir.1999). Nevertheless, the violation was harmless because none of the evidence seized after the Rule 41(d) violation--computer files in the Hendersons' computers--was introduced or otherwise used at trial. See Fed.R.Crim.P. 52(a); Neder v. United States, 527 U.S. 1, 7–8, 15–16 [83 AFTR 2d 99-2668] (1999).

2. In determining the Hendersons' sentences, the district court found that their fraudulent tax scheme cost the government at least $10 million in tax losses. This figure was "a reasonable estimate based on the available facts." USSG § 2T1.1 cmt. n. 1. The government made reasonable efforts to verify that the losses stemmed from activities related to the Hendersons' activities rather than from unrelated sources. It also offered extensive testimony before the district court to this effect. While the government's methodology might have overestimated the amount of tax losses in certain situations, it also produced known underestimates in others. The district court did not clearly err in finding that, after the various over- and under-estimates were taken into account, the total tax losses were at least $10 million. See United States v. Barnes, 125 F.3d 1287, 1290 (9th Cir.1997).

3. The Hendersons argue that, because the amount of tax losses has "an extremely disproportionate effect on the sentence relative to the offensive conviction," the district court should have required the government to prove the sentencing factors by clear and convincing evidence. This ar-

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

gument was forfeited because it was not raised before the district court. See United States v. Olano, 507 U.S. 725, 731–32 (1993). In any event, the district court did not err. See United States v. Johansson, 249 F.3d 848, 855 (9th Cir.2001) (''[D]ue process does not require the application of the clear and convincing standard when the extent of the conspiracy caused the tremendous increase in sentence.'' (internal quotation marks omitted)).

AFFIRMED.

¶2002-5461

Abdul HAFIZ; Rawnaq A. HAFIZ; Family Motels, Inc.; Abdul Hafiz, M.D., Inc., PLAINTIFFS--APPELLANTS v. UNITED STATES OF AMERICA, DEFENDANT--APPELLEE. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-3366, Sept. 17, 2002. District Court, (2001, DC OH) 87 AFTR 2d 2001-1558, 2001-1 USTC ¶50349, affirmed. Years 1989, 1990, 1991, 1992, 1993, 1994, 1995. Decision for Govt.

1. Actions against U.S.—wrongful collection—exhaustion of administrative remedies. District court's decision was affirmed without discussion. *Reference:* United States Tax Reporter ¶74,335.01(5). IRC §7433.

United States Court of Appeals, Sixth Circuit,

Before NORRIS and CLAY, Circuit Judges; and O'MEARA, District Judge.*

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION**

[1] This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is ORDERED that the judgment of the district court be, and it hereby is, AFFIRMED for reasons as stated on the record.

¶2002-5462

Eric TEST; Odelia BRAUN, PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-71283, Oct. 1, 2002. Tax Court, (2000) TC Memo 2000-362, RIA TC Memo ¶2000-362, 80 CCH TCM 766 (opinion by Gerber, *J.*), affirmed. Year 1994. Decision against Taxpayers.

1. Business deductions—legal expenses—origin of claim doctrine—accuracy-related negligence penalties—reliance on accountant. Tax Court properly determined that legal fees incurred by taxpayer-doctor/university employee were deductible only as unreimbursed employee business expenses: even if taxpayer wouldn't have contacted attorneys but for her concern for her Schedule C business, true origin of her legal claim wasn't in business, but in her activities as employee. *Reference:* United States Tax Reporter ¶1625.041(20); 66,625.01(10). IRC §162; 6662.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States Tax Court Joel Gerber, Tax Court Judge, Presiding.

Before KOZINSKI and KLEINFELD, Circuit Judges, and BEISTLINE,** District Judge.

MEMORANDUM*

Tax Court No. 4907-99

[1] Eric Test and Dr. Odelia Braun (hereinafter Dr. Braun) appeal the Tax

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* The Honorable John C. O'Meara, United States District Judge for the Eastern District of Michigan, sitting by designation.

** Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

** The Honorable Ralph R. Beistline, United States District Judge for the District of Alaska, sitting by designation.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Court's decision finding a $24,647 deficiency in their 1994 federal income tax. The Tax Court determined that certain legal fees incurred by Dr. Braun were deductible only as unreimbursed employee business expenses; i.e., below-the-line deductions. We affirm.

"The deductibility of legal fees depends on the origin and character of the claim for which the expenses were incurred and whether the claim bears a sufficient nexus to the taxpayer's business or income-producing activities." Test v. Comm'r, T.C.M.(RIA) 2000-362 (2001) (citing United States v. Gilmore, 372 U.S. 39 [11 AFTR 2d 758] (1963)) (emphasis added). Indeed, "the origin and character of the claim with respect to which an expense was incurred, rather than its potential consequences upon the fortunes of the taxpayer, is the controlling basic test of whether the expense was 'business' or 'personal' and hence whether it is deductible or not [as an above-the-line business expense]." Gilmore, 372 U.S. at 49 (emphasis added). The relevant "claim," for purposes of applying the "origin of the claim" standard, is the underlying event that gave rise to the legal expenses. Keller St. Dev. Co. v. Comm'r, 688 F.2d 675, 680 [50 AFTR 2d 82-5894] (9th Cir.1982).

Thus, the issue before the Tax Court was not whether Dr. Braun sought legal advice because she was a University of California at San Francisco (UCSF) employee or because she was a concerned Schedule C business owner. Instead, the Tax Court was required to look to the event that prompted Dr. Braun to seek legal services. Gilmore, 372 U.S. at 49. If the origin of those legal services was rooted in Dr. Braun's Schedule C business, she could have deducted the legal services on her Schedule C. The Tax Court concluded that it was not. We review this factual finding for clear error. Keller St. Dev. Co., 688 F.2d at 678.

While it may be true that Dr. Braun would not have contacted attorneys but for her concern for her Schedule C business, the Tax Court was required to look to the origin of the underlying claim, not the consequences. Gilmore, 372 U.S. at 47–49. It did exactly that.

The Tax Court found that, "[t]he origin of the claim herein was not in the [Schedule C] trade or business . . . but rather in [Dr. Braun's] activities as an employee of UCSF." Test v. Comm'r, T.C.M. (RIA) 2000-362 (2001) (emphasis added). This finding was not clearly erroneous in light of the evidence in the record. Therefore, the Tax Court was correct in concluding that Dr. Braun's legal fees were deductible as unreimbursed employee business expenses; i.e., below-the-line deductions.

AFFIRMED.

¶2002-5463

UNITED STATES OF AMERICA, APPELLEE v. Hans TSCHEBAUM, APPELLANT. U.S. Court of Appeals, Eighth Circuit, (CA8) No. 01-1797; 01-1802, Oct. 3, 2002. District Court affirmed in part, and vacated and remanded in part. Decision for Taxpayer in part.

1. Tax crimes—failure to file returns; making false statements to IRS—probation revocation—U.S. Sentencing Guidelines. District court properly revoked probation of taxpayer convicted for failure to file returns and making false statement to IRS: evidence showed that during probation, taxpayer made misrepresentations to his attorney and court about whether he was under home detention; created sham trust and corp. to evade taxes; and made unauthorized trips outside his district. But, 30-month imprisonment sentence was vacated and remanded to allow for consideration of U.S.S.G. Chap. 7 and 18 USC §3553(a)'s general sentencing considerations and for explanation of conclusion that taxpayer illegally obtained funds acquired during probation. *Reference:* United States Tax Reporter ¶73,446.519(10); 72,035.01(10). IRC §7203.

United States Court of Appeals, Eighth Circuit,

Appeal from the United States District Court for the Western District of Missouri.

Before HANSEN, Chief Judge, MORRIS SHEPPARD ARNOLD, Circuit Judge, and PRATT,[1] District Judge.

ARNOLD, Circuit J.

Hans Tschebaum appeals the judgment of the district court revoking his probation and ordering him to serve 30 months of imprisonment. We affirm the order revoking Mr. Tschebaum's probation, but we vacate the sentence and remand to the district court for further proceedings.

I.

Mr. Tschebaum entered into an agreement with the government under which he pleaded guilty to one count of making a false statement to the Internal Revenue Service, see 18 U.S.C. § 1001, and two counts of failing to file an income tax return, see 26 U.S.C. § 7203. Mr. Tschebaum's presentence investigation report indicated that his sentencing range under the United States Sentencing Guidelines was 15–21 months, but because of the assistance that he provided to the government the district court departed downward, see U.S.S.G. 5K1.1, and sentenced him to five years of probation, including six months of home detention.

After Mr. Tschebaum began serving his sentence of probation in California, he filed a motion in the sentencing court to terminate his home detention, claiming that he had been under home-detention restrictions for at least six months. The court granted the motion, but later, after it was told by the probation officer that Mr. Tschebaum had obtained the ruling through misrepresentations, the court ordered him to show cause why his probation should not be revoked. The government also moved to revoke Mr. Tschebaum's probation, alleging that he had, inter alia, misrepresented his income and expenditures in the monthly reports that he had filed with his supervising probation officer and had left his home jurisdiction without permission to travel to Nevada.

At the probation-revocation hearing, the government presented evidence that during the first six months of 2000 Mr. Tschebaum filed monthly supervision reports with his probation officer in which he significantly under-reported his expenditures and failed to report about $1.8 million in income. The evidence indicated that Mr. Tschebaum did not report as income some commissions that he placed in a trust account through a corporation. According to an accountant whose testimony Mr. Tschebaum offered at the hearing, the trust account and corporation appeared to have been created to avoid paying individual income taxes.

After finding that Mr. Tschebaum had violated his probation, the district court revoked his probation and sentenced him to 30 months of imprisonment on the § 1001 violation with a ten-month term for each of the two § 7203 violations to run concurrently. Mr. Tschebaum asserts on appeal that there was insufficient evidence to support the district court's decision to revoke his probation, and that the district court abused its discretion by sentencing him to 30 months imprisonment.

II.

[1] We review the district court's decision to revoke probation for an abuse of discretion. See United States v. Leigh, 276 F.3d 1011, 1012 (8th Cir.2000) (per curiam). In order to warrant the revocation of a sentence, a probation violation must be "substantial." Id.

The district court made several findings that are well supported in the record and that, in turn, support its decision to revoke Mr. Tschebaum's probation. First of all, the court found that Mr. Tschebaum made misrepresentations to his attorney and to the court about whether he was under home detention from the onset of his probation. With regard to financial matters, the court found that the corporation and the trust that Mr. Tschebaum created had no legitimate business purpose and "appear[ed] . . . to be a sham." The court further determined that Mr. Tschebaum set up these entities to avoid or perhaps to evade taxation, and also to mislead the

[1] The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

probation officer as to his income, and that he should have reported the corporate and trust income and expenditures on his monthly reports to his probation officer. The court then concluded that the government had established that Mr. Tschebaum had violated 28 U.S.C. § 1001, making a materially false report. After also finding that Mr. Tschebaum had traveled outside the district without authorization, the court revoked his probation.

We do not believe that the district court was required to accept Mr. Tschebaum's counsel's assertion that his client thought that $1.8 million in income and significant expenditures were properly omitted from his probation reports, that Mr. Tschebaum believed that he had completed six months of home detention, or that he did not need to obtain permission to stop in Las Vegas on his return trip from a court appearance in Missouri. We also note that Mr. Tschebaum did not deny that he traveled to Las Vegas on another occasion without authorization. We conclude that the evidence quite clearly supported a finding that Mr. Tschebaum committed substantial violations, and that the district court did not abuse its discretion by revoking his probation.

III.

We next address Mr. Tschebaum's contention that the district court erred when it sentenced him to 30 months of imprisonment. Under 18 U.S.C. § 3565(a), if a defendant violates probation, "the court may . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable," revoke the defendant's probation and "resentence" him or her "under subchapter A," i.e., 18 U.S.C. §§ 3551–3559.

In United States v. Iversen, 90 F.3d 1340, 1345 & n.6 (8th Cir.1996), we held that a district court has the power "to sentence a probation violator within the range of sentences available at the time of the initial sentence." Here the parties agree that Mr. Tschebaum's original guideline sentencing range was 15–21 months, but the district court did not refer to that range when sentencing Mr. Tschebaum. We believe, however, that neither Iversen nor § 3565(a) requires a court to sentence a defendant within the original sentencing range when his or her probation is revoked.

This reading of Iversen and of § 3565(a) is bolstered by the fact that an earlier version of this statute required a sentencing court after revoking probation to "impose any other sentence that was available under subchapter A at the time of the initial sentencing," 18 U.S.C. § 3565(a)(2) (1988). In 1994, however, Congress amended the statute to empower a court more generally to "resentence the defendant under subchapter A," see 18 U.S.C.A. § 3565(a)(2). "[S]ubchapter A," 18 U.S.C. §§ 3551–3559, contains the general statutory provisions for imposing a sentence, and we believe that in amending the statute Congress intended to broaden a sentencing court's power by allowing it simply to resentence probation violators under that subchapter. See United States v. Schaefer, 120 F.3d 505, 507 (4th Cir.1997) (§ 3565(a)(2) "plainly permits a district court to begin the sentencing process anew and to impose any sentence appropriate under the provisions of subchapter A"); see also United States v. Cook, 291 F.3d 1297, 1300 (11th Cir.2002) (per curiam); United States v. Hudson, 207 F.3d 852, 853 (6th Cir.2000), cert. denied, 531 U.S. 890 (2000); United States v. Pena, 125 F.3d 285, 287 (5th Cir.1997), cert. denied, 523 U.S. 1079 (1998).

With respect to probation violations, § 3565(a) refers a sentencing court both to subchapter A generally and specifically to § 3553(a), which is found in that sub-chapter. Section 3553(a), in turn, requires the court to consider, inter alia, the United States Sentencing Guidelines: "[I]n the case of a violation of probation," the court "shall consider" the applicable sentencing guidelines or policy statements. See 18 U.S.C. § 3553(a)(4)(B). The sentencing commission has chosen to issue policy statements dealing with sentences that follow probation violations, see U.S.S.G. Ch. 7, but no guidelines, and we have held that these policy statements are merely advi-

sory. See United States v. Brown, 203 F.3d 557, 558 (8th Cir.2000) (per curiam); U.S.S.G. Ch. 7, pt. A (1).

Because the commission has promulgated no guidelines addressing sentences following probation violations, we are of the view that when a defendant's probation is revoked a sentencing court should give attention to the policy statements found in chapter 7 of the sentencing guidelines and to the other considerations identified in § 3553(a), as applicable, and then sentence the defendant within the statutory limits for the original crime. Where, as here, there are no applicable sentencing guidelines, we will not overturn a sentence unless it is "contrary to law" or it is "plainly unreasonable." 18 U.S.C. § 3742(a)(1), (a)(4); see United States v. Teran, 98 F.3d 831, 836 (5th Cir.1996).

Here the district court plainly did "consider," 18 U.S.C. § 3553(a), the table of suggested sentencing ranges in the policy statements in chapter 7 of the sentencing guidelines. See U.S.S.G. § 7B1.4. These sentencing ranges are based on the "grade" (seriousness) of the defendant's probation violation and the defendant's criminal history category at the time that he or she was originally sentenced. See id.; see also U.S.S.G. § 7B1.1. The court first determined that Mr. Tschebaum's suggested sentencing range under this table was 4 to 10 months, a determination adequately supported by the record. The court then concluded that the suggested range did not adequately reflect the seriousness of Mr. Tschebaum's probation violation, and we note that in rejecting a sentence supported by the relevant table the court was "not required to make the explicit, detailed findings required when it departs upward from a binding guideline" because the policy statements in chapter 7 are only advisory. See United States v. Jones, 973 F.2d 605, 607–08 (8th Cir.1992); see also United States v. Shaw, 180 F.3d 920, 922–23 (8th Cir.1999) (per curiam).

But, as we have already said and Mr. Tschebaum argues, in sentencing him the district court was also required to take into account the general sentencing considerations set forth in § 3553(a), namely, "the nature and circumstance of the offense and the history and characteristics of the defendant"; the need for the sentence to reflect the crime's seriousness, promote respect for law, provide just punishment, provide deterrence, protect the public from the defendant's further crimes, and provide effective correctional treatment; "the kinds of sentences available"; the avoidance of disparities in sentences; and the need for restitution to the crime's victims. Although the court need not mechanically "list every consideration of § 3553(a) when it sentences a defendant," it is "important is that there is evidence that the court has considered the relevant matters, and that some reason is stated for the court's decision." See United States v. Adams, 104 F.3d 1028, 1031 (8th Cir.1997). It is not evident to us here that the court in fact considered all the "relevant matters" in § 3553(a). Cf. id. We therefore believe that it is necessary to remand this case to the district court for further proceedings.

We also believe that a remand is necessary here because it may be inferred from the record that in sentencing Mr. Tschebaum the court relied, in part, on its conclusion that Mr. Tschebaum illegally obtained the funds that he acquired during probation. But we have not located any support for this conclusion in the record. At resentencing, we therefore ask the court to refer to both chapter 7 of the guidelines and to the relevant considerations in § 3553(a), that it explain in greater detail the reasons for the sentence imposed, and, where necessary, that it explain where in the record support for these reasons may be found.

V.

Accordingly, we affirm the order revoking Mr. Tschebaum's probation, but we vacate the 30-month sentence and remand to the district court for further proceedings not inconsistent with this opinion.

¶2002-5464

Andrew M. PROFIT; Marilyn PROFIT, APPELLANTS v. Anabelle SAVAGE,

Chapter 13 Trustee, APPELLEE. In Re: Andrew M. PROFIT; Marilyn PROFIT, Debtors. U.S. Bankruptcy Appellate Panel, Ninth Circuit, (Bktcy CA9) No. NV-01-1526-MANRY; 96-30871, Sept. 17, 2002. Bankruptcy Court reversed. Years 1998, 1999. Decision for Taxpayers.

1. Appeals from bankruptcy court—jurisdiction—interlocutory confirmation orders. Debtors were granted leave to appeal from interlocutory Chap. 13 plan confirmation order: although bankruptcy court approved modification of plan on condition that value of debt forgiveness, as represented by proceeds from sale of California home used to purchase North Carolina home, would be determined to be nonexempt property and issue of homestead exemption was material to 11 USC §1325(a)(4) "best interest of creditors" analysis, resolution of §1325(a)(4) issue was unnecessary on appeal. *Reference:* United States Tax Reporter ¶68,726.527(30).

2. Tax claims in bankruptcy—motion to modify confirmed Chap. 13 plan—timeliness. Bankruptcy court properly held that trustee's motion to modify confirmed Chap. 13 plan was timely under 11 USC §1329(a): plan payments weren't completed at time motion was filed due to taxpayers' failure to remit prior year's tax refund. Confirmed plan treated returns as disposable income, and thus as part of intended plan payments; and case law in which trustee didn't attempt to compel turnover of refunds was distinguishable. *Reference:* United States Tax Reporter ¶68,726.52(3).

3. Tax claims in bankruptcy—modification of confirmed Chap. 13 plan. Bankruptcy court improperly granted trustee's motion to modify confirmed Chap. 13 plan: proposed modification plan lacked elements as set forth in 11 USC §1322(a) and exceeded maximum 60-month period. Trustee's motion indirectly asked for modification by requiring taxpayers to pay allowed unsecured claims value of debt forgiveness, as represented by nonexempt proceeds from sale of California home used to purchase North Carolina home; untimely modification order didn't specify how trustee would obtain proceeds or their value from taxpayers for distribution to unsecured creditors; trustee didn't provide written payment schedule or implementation detail; and taxpayers' homestead exemption claim remained unresolved. *Reference:* United States Tax Reporter ¶68,726.52(47).

4. Tax claims in bankruptcy—dischargeability—completed Chap. 13 plan. Chap. 13 debtors were entitled to discharge under 11 USC §1328(a): trustee's claim that timely motion to modify confirmed plan (motion) was made because proceeds from sale of taxpayers' California home were postpetition asset which changed liquidation analysis and were required to be distributed to unsecured creditors was rejected. Trustee didn't move to dismiss Chap. 13 case on grounds that taxpayers didn't turn over proceeds for distribution, but unconditionally accepted lump sum payment and tax refund from prior year in completion of plan payments without any reservation regarding outcome of motion to modify; and motion didn't satisfy plan requirements under §1329, §1322 and §1325. Also, in absence of confirmable modified plan, remaining issues were rendered moot. *Reference:* United States Tax Reporter ¶68,726.52(27).

Christopher P. Burke, Reno, NV, for Andrew and Marilyn.
Michael Lehners, Reno, NV, for Anabelle Savage, Ch. 13 Trustee.

United States Bankruptcy Appellate Panel of the Ninth Circuit,

Appeal from the United States Bankruptcy Court for the District of Nevada. Honorable Gregg W. Zive, Chief Bankruptcy Judge, Presiding.

Before MARLAR, NAUGLE[1] and RYAN, Bankruptcy Judges.

OPINION

MARLAR, Bankruptcy J.

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[1] Hon. David N. Naugle, Bankruptcy Judge for the Central District of California, sitting by designation.

INTRODUCTION

After the chapter 13[2] trustee (''Trustee'') learned that Andrew and Marilyn Profit (''Debtors'') had acquired, postconfirmation, potentially nonexempt residential real property, she filed a motion to compel them to amend their schedules and modify their confirmed plan to pay 100% of all allowed unsecured claims. The motion was filed in the plan's 54th month. The motion contained neither new plan provisions nor a method for recouping the asset's cash value, which had been transmuted into another alleged homestead.[3]

Notwithstanding these problems, the bankruptcy court granted Trustee's motion and issued its order after the 60-month plan duration had expired and all payments had been completed. Its decision was published at In re Profit, 269 B.R. 51 (Bankr.D.Nev.2001).

We conclude that plan modification contravened the requirements of §§ 1322(a) and 1329(c), which require certain plan content and prohibit a modified plan from exceeding 60 months in duration, and we REVERSE. Debtors are entitled to a discharge.

FACTS

The Chapter 13 Plan

Debtors filed a chapter 13 petition on May 9, 1996. They claimed a $125,000 homestead exemption in their Reno, Nevada home.

On May 16, 1996, Debtors filed a proposed 60-month plan in which they agreed to make a total of $26,000 in monthly plan payments. Debtors estimated the liquidation value of their bankruptcy estate as $4,000. The unsecured creditors, with listed debts totaling about $84,500, would receive approximately 4% of their allowed claims under chapter 7 liquidation. Thus, the plan amount exceeded the liquidation value, thereby meeting the ''best interests of creditors'' test, encoded in § 1325(a)(4).[4]

The chapter 13 plan was confirmed on October 22, 1996. The confirmation order provided that Debtors were to turn over their tax refunds to Trustee, in addition to making the disposable income plan payments.

Postconfirmation Events

From August, 1998 to July, 1999, Debtors lived in Palm Springs, California, where Mr. Profit worked for Mr. Gene Whitworth (''Whitworth''). Whitworth owned a house through a trust, which he controlled. Debtors lived in that house and were purchasing it by making payments to the trust pursuant to a personal note. Debtors neither sought nor obtained the bankruptcy court's approval to incur such debt.

When Whitworth died, his estate forgave Debtors' $150,000 indebtedness and transferred title of the house to them in October, 1999.[5] However, Debtors neither amended their bankruptcy schedules, nor did they, at that time, inform Trustee about the debt forgiveness or the Palm Springs house.

Debtors then sold the Palm Springs house in June, 2000, for about $168,000, and moved to North Carolina where, in August, 2000, they used some of the sale proceeds (the ''Proceeds'') to purchase an-

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2 Unless otherwise indicated, ''chapter,'' ''section,'' and ''Code'' references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and rule references are to the Federal Rules of Bankruptcy Procedure (''Fed. R. Bankr.P.''), Rules 1001-9036, which make applicable certain Federal Rules of Civil Procedure (''Fed. R. Civ.P.'').

3 In addition, Debtors objected that the motion was not properly noticed to all creditors and interested parties, and the bankruptcy court then ordered such notice. Debtors raised a notice issue in this appeal, but we do not reach it, based on our disposition reversing on other grounds.

4 Section 1325(a)(4) provides, in relevant part:

(a) [T]he court shall confirm a plan if--

. . . .

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

11 U.S.C. § 1325(a)(4).

5 Debtors listed this amount as ''income'' on their 1999 tax return, because forgiveness of debt operates as taxable income under the Internal Revenue Code. See 26 U.S.C. § 61(a)(12).

We have held that the Internal Revenue Code does not dictate the definition of ''income'' for purposes of ''disposable income'' in a chapter 13 case. See Hagel v. Drummond (In re Hagel), 184 B.R. 793, 797 n. 2 (9th Cir. BAP1995). See also The Cadle Co. v. King (In re King), 272 B.R. 281, 293 [89 AFTR 2d 2002-710] (Bankr.N.D.Okla.2002) (citing cases).

other house. Debtors also used some of the Proceeds to pay off their chapter 13 plan payments. On October 9, 2000, Debtors' attorney finally informed Trustee of the Proceeds in a letter, which stated, in pertinent part: "[T]he Debtors are requesting a payoff amount on their Chapter 13 Bankruptcy. They would like to pay the bankruptcy off with some inheritance money[6] they have received." (Letter from Kimberly Wilson, October 9, 2000.)

Trustee took no immediate action, other than accepting Debtors' lump sum plan payment in the amount of $8,850 on November 16, 2000. The projected plan payments of $26,000 were thereby completed, except that Debtors had not turned over an income tax refund for 1998.[7]

The Motion to Modify

On December 13, 2000, in the 54th month of the chapter 13 plan, Trustee filed a motion to modify the plan and to compel Debtors to amend their schedules to include the value of the debt forgiveness, which they had acquired postpetition. Trustee also alleged that Debtors received a tax refund for 1998, which had not been turned over.

Trustee did not include new plan provisions with the motion, but merely stated that the purpose of the modification was to enable the unsecured creditors to receive the value of the acquired asset.

Debtors objected to the motion to modify, asserting, among many arguments, that the motion was untimely, as plan payments had been completed, and that the outstanding tax refund was not a plan payment. They also argued that the debt forgiveness, represented by the Proceeds, was not property of the estate, but that if it was property of the estate, it was non-disposable income, which was not required in order to fulfill the plan. They also argued that the Proceeds, traced to the North Carolina property, were exempt under either Nevada or federal law.

On January 19, 2001, Debtors remitted the 1998 tax refund, which Trustee accepted without reservation. Debtors also amended their schedules to reflect their interest in the North Carolina property, in the amount of $140,000, and concurrently declared a $125,000 homestead exemption under Nevada law, but apparently they did not clarify the record by releasing their homestead exemption in the Reno house. Trustee objected to the claimed exemption, and separate proceedings were pending on that matter.

Following several hearings, the bankruptcy court entered its order on October 9, 2001.[8] Among the court's relevant findings and conclusions was its determination that the motion to modify was timely because all payments, including the tax refund, had not been made at the time the motion was filed. The court also determined that the "forgiveness of debt, as represented by the [Proceeds] of the Palm Springs property," was non-income property of the estate, which must be considered when confirming the modified plan. Profit, 269 B.R. at 59. Therefore, the court determined that § 1329(b)(1) required the application of the "best interests of creditors" test to be applied as of the effective date of plan modification. Under that test, the liquidation value of the estate, including the Proceeds, exceeded the amount of scheduled payments under the original plan. Therefore, the court concluded that, unless the Proceeds were exempt property, they must be turned over to Trustee for distribution to the unsecured creditors.

The court "conditionally granted" the motion to modify, subject to resolution of the objection to the claimed exemption in a future proceeding. Id. at 59.

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[6] Both parties have since agreed that the asset in question was not an inheritance, but a forgiveness of debt, which was represented by the Proceeds. See Profit, 269 B.R. at 54.

[7] In contravention of the plan terms, Debtors had applied the 1998 refund toward their 1999 tax liability. Subsequently, in 2001, Debtors learned that they were not entitled to a refund for 1999, but instead owed the IRS an additional $6,348.

[8] This order was a combined order and opinion, and not a separate judgment. See Fed. R. Bankr.P. 9021, incorporating Fed.R.Civ.P. 58 (stating that "every judgment shall be set forth on a separate document. A judgment is effective when entered [on the docket]." The purpose of the separate document rule is "to clarify when the time for an appeal begins to run." Woosley v. Edwards (In re Woosley), 117 B.R. 524, 528 (9th Cir. BAP1990). Neither party raised the separate document requirement, and therefore it has been deemed waived. Id. at 529.

Debtors timely appealed the court's order, and the BAP motions panel then granted Debtors' motion for leave to appeal.

ISSUES

1. Whether leave to appeal this interlocutory order is appropriate.
2. Whether Trustee's motion to modify the chapter 13 plan was timely filed before all plan payments had been completed, pursuant to § 1329(a).
3. Whether the motion to modify failed to comply with the requirements for plan contents and duration, pursuant to §§ 1322(a) and 1329(c), thereby rendering the remaining substantive issues moot.
4. Whether the Proceeds were distributable property of the chapter 13 bankruptcy estate.
5. Whether the "best interests of creditors" test of a modified plan was correctly calculated at the time of plan modification, rather than as of the effective date of the original plan.

STANDARDS OF REVIEW

We review findings of fact for clear error and conclusions of law de novo. United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1110 (9th Cir.1998). Chapter 13 plan confirmation issues requiring only statutory interpretation are reviewed de novo. Moen v. Hull (In re Hull), 251 B.R. 726, 730 (9th Cir. BAP2000).

The confirmation of a modified plan is reviewed for an abuse of discretion. Max Recovery, Inc. v. Than (In re Than), 215 B.R. 430, 433 (9th Cir. BAP1997). Under this standard, we will not reverse unless we have a definite and firm conviction that the court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors. Id.

DISCUSSION

A. Our Jurisdiction

[1] We determine, sua sponte, our proper jurisdiction. Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 133 n. 1 (1995). A final order is necessary to establish appellate jurisdiction. 28 U.S.C. § 158(d). Ordinarily, a chapter 13 plan confirmation order, whether or not a modification, is a final order. See Than, 215 B.R. at 435; 11 U.S.C. § 1327(a).

"A disposition is final if it contains 'a complete act of adjudication,' that is, a full adjudication of the issues at bar, and clearly evidences the judge's intention that it be the court's final act in the matter." Slimick v. Silva (In re Slimick), 928 F.2d 304, 307 (9th Cir.1990) (citations omitted) (emphasis in original).

In approving plan modification, the bankruptcy court determined that the Proceeds were property of the estate and also applied the "best interest of creditors" test under § 1325(a)(4). However, the Proceeds had already been reinvested in real property in North Carolina, and the Debtors then claimed a homestead exemption in that property. Trustee's objection to this exemption claim was pending at the time of these proceedings. Thus, the bankruptcy court approved the plan modification on the condition that the Proceeds/real property would be determined to be nonexempt property.

The exemption issue was material to the § 1325(a)(4) analysis. See McDonald v. Burgie (In re Burgie), 239 B.R. 406, 411 n. 8 (9th Cir. BAP1999) (stating that exempt property is not included in the § 1325(a)(4) calculation). The bankruptcy court could not finally apply the test until the exemption objection had been litigated. Therefore, the court's order was expressly nonfinal and, thus, interlocutory.

We have discretion to grant leave to appeal an interlocutory order. 28 U.S.C. § 158(a)(3); Fed. R. Bankr.P. 8003. Debtors filed a motion for leave to appeal, which was granted by the BAP motions panel in its order dated April 11, 2002. We adopt the motions panel's ruling because we do not need to reach the § 1325(a)(4) issue. Rather, our review will focus on the timeliness of the motion to modify, in light of the completed plan. Resolution of this appeal involves controverted legal questions and will materially advance the termination of this litigation. See Kashani v. Fulton (In

re Kashani), 190 B.R. 875, 882 (9th Cir. BAP1995).

B. Tax Refunds Were Plan Payments; The Motion to Modify Was Timely Filed Before Completion of Plan Payments-- s 1329(a)

[2] Section 1329 governs the modification of a confirmed chapter 13 plan. It provides that a plan may be modified upon the request of the debtor, the trustee or the holder of an unsecured claim. Modification may be granted for any of the following purposes:

> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; (2) extend or reduce the time for such payments; or (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan, to the extent necessary to take account of any payment of such claim other than under the plan.

11 U.S.C. § 1329(a).

The request for modification must be made "any time after confirmation of the plan but before the completion of payments under such plan." 11 U.S.C. § 1329(a); H.R.Rep. No. 595, 95th Cong., 1st Sess. 431 (1977).

Debtors contend that the motion to modify was untimely filed after all plan payments were completed, and that remittance of the 1998 tax refund was irrelevant because tax refunds are not plan "payments" for purposes of § 1329(a).

Under § 1329(a), a chapter 13 plan cannot be modified in any respect after payments are completed. Courts have disagreed as to the meaning of "before the completion of payments under such plan." 11 U.S.C. § 1329(a). It is generally held that the payments alluded to are the payments required to be made by the debtor under the plan terms. 8 Collier on Bankruptcy p 1329.07 at 1329-12 (Alan N. Resnick and Henry J. Sommer, eds., 15th ed. rev.2002).

When Trustee filed the motion to modify, on December 13, 2000, Debtors had completed paying the specified amount of payments (with a lump sum), but had not remitted the tax refund for 1998. The bankruptcy court carefully analyzed this issue, and we agree with its conclusion that the confirmed plan treated the tax returns as disposable income and, thus, as part of the intended plan payments.

"Disposable income," which is to be applied to make plan payments, is "all of the debtor's projected disposable income to be received in the [five-year] period beginning on the date that the first payment is due under the plan . . . ." 11 U.S.C. § 1325(b)(1)(B). We have held that the test for whether an asset is "disposable income" requires an inquiry into whether it is income or an income substitute, rather than whether the debtor receives it in a lump sum or "stream of payments." Burgie, 239 B.R. at 411.

In order to compel a debtor to turn over a tax refund, a chapter 13 trustee must prove that it constitutes income or an income substitute by projecting a certain amount of tax refund. See Anderson v. Satterlee (In re Anderson), 21 F.3d 355, 358 (9th Cir.1994); Itule v. Heath (In re Heath), 182 B.R. 557, 559–60 (9th Cir. BAP1995) (the trustee must show that the debtor may receive tax refunds during the plan term in order to require the debtor to commit such refunds to the plan); In re Kuehn, 177 B.R. 671, 673 & n. 1 (Bankr.D.Ariz.1995).

The bankruptcy court in the case at bar correctly distinguished Anderson from the facts of this case, because Trustee did not attempt to compel turnover of the refunds. Instead, Debtors were already bound by the final confirmation order to turn over the tax refunds as part of their plan payments. Great Lakes Higher Ed. Corp. v. Pardee (In re Pardee), 193 F.3d 1083, 1086 (9th Cir.1999). See also Freeman v. Schulman (In re Freeman), 86 F.3d 478, 481 [78 AFTR 2d 96-5131] (6th Cir.1996) (where debtor's plan provided that all tax refunds should go to the plan and made no argument that the funds were exempt, the income qualified as "projected disposable income"); In re Cochran, 141 B.R. 270, 272 (Bankr.M.D.Ga.1992) (debtor's plan

contained a provision providing for the turnover of tax refunds and court held that the United States was required to comply with the plan and pay over the refund to the Trustee).[9]

Therefore, the bankruptcy court correctly held that Trustee's motion was timely filed, pursuant to § 1329(a), because the plan payments had not been completed at the time the motion was filed due to Debtors' failure to remit the 1998 tax refund.

C. Proposed Modified Plan Lacked Plan Elements and Exceeded Maximum 60-Month Duration-- §§ 1322(a), 1329(c)

[3] A modified plan is essentially a new plan. See Powers v. Savage (In re Powers), 202 B.R. 618, 623 (9th Cir. BAP1996). Section 1329(b)(1) provides that the modified plan must meet some of the same criteria for the originally filed plan:

> Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

11 U.S.C. § 1329(b)(1).

Debtors contend that Trustee's motion to modify failed to comply with the Code because Trustee did not propose a new payment schedule, nor did Trustee file a proposed plan that contained each of the requirements for a chapter 13 plan, which are set forth in § 1322(a).

Section 1322(a) provides:

> (a) The plan shall--
>
> (1) provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;
>
> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim; and
>
> (3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

11 U.S.C. § 1322(a).

The legislative history makes clear that these are "mandatory plan provisions." S.Rep. No. 95-989, 95th Cong., 2d Sess. 141, reprinted in 1978 U.S.C.C.A.N. 5787, 5927; H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 429, reprinted in 1978 U.S.C.C.A.N. 5963, 6384. See also Chrysler Fin. Corp. v. Nolan (In re Nolan), 232 F.3d 528, 532 (6th Cir.2000); In re Harvey, 213 F.3d 318, 322–33 (7th Cir.2000); Foster v. Heitkamp (In re Foster), 670 F.2d 478, 483–84 (5th Cir.1982); Fernandez v. GE Capital Mortgage Servs., Inc. (In re Fernandez), 227 B.R. 174, 178 (9th Cir. BAP1998), aff'd mem., 208 F.3d 220 (9th Cir.2000) (stating that plan which did not provide for the submission of debtor's income to the trustee was "deficient"); Maloney v. Metro. Mortgage Corp. (In re Maloney), 25 B.R. 334, 336 (1st Cir. BAP1982).

Trustee's motion merely indirectly asked for a modification by way of an "order requiring the Debtors to pay the allowed unsecured claims the value of the non-exempt [Proceeds]." (Motion to Modify, December 13, 2000, at 2.) There was no modified plan form or specific provisions as to how this was to occur.

The full implications of these deficiencies, when combined with the plan length requirement of § 1329(c), were fatal to modified plan confirmation. Section 1329(c), like its counterpart § 1322(d), prohibits a modified plan from exceeding five years, or 60 months, in duration.[10]

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[9] Although it would not have mattered if Debtors had claimed the tax refund as exempt property, see Burgie, 239 B.R. at 409 (debtor may voluntarily use exempt property to make payments to creditors), they did not do so in this case.

[10] Section 1329(c) provides:

> (c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

11 U.S.C. § 1329(c).

The 60-month plan period of Debtors' plan had already expired when the October 9, 2001, modification order was entered. We have held that the 60-month period under § 1322(d) or § 1329(c) commences on the date the first plan payment was due pursuant to § 1326(a)(1), which provides that plan payments shall commence "within 30 days after the plan is filed." 11 U.S.C. § 1326(a)(1). See Nicholes v. Johnny Appleseed of Wash. (In re Nicholes), 184 B.R. 82, 87 & n. 5 (9th Cir. BAP1995); see also In re Collier, 193 B.R. 1, 3–4 (Bankr.D.Ariz.1996) (holding that 60-month period under § 1322(d) begins to run from the date the debtor is first obligated to make payments, viz., § 1326(a)(1), providing that the plan payments shall commence within 30 days after the plan is filed, and citing Nicholes). But see In re Serna, 193 B.R. 537, 539 (Bankr.D.Ariz.1996) (60-month period begins to run from the first payment due after plan confirmation, following United Cal. Sav. Bank v. Martin (In re Martin), 156 B.R. 47, 50 (9th Cir. BAP1993)). But see In re Gurr, 194 B.R. 474, 476–77 (Bankr.D.Ariz.1996) (stating that Martin's holding regarding the confirmation method of calculation was merely dicta).

Following Nicholes, the plan length began 30 days after May 16, 1996, or mid-June, 1996, and thus ended in June 2001. The order modifying the plan was not entered until October, 2001. Furthermore, the order did not specify how Trustee would obtain the Proceeds or their value from Debtors for distribution to the unsecured creditors. At the February 28, 2001 hearing, Trustee informed the court that about $70,000 more was needed to pay the unsecured claims in full, and orally proposed that this amount would be paid in four monthly cash payments of $15,000. However, no written payment schedule was presented, nor was any implementation detail provided.

Moreover, Trustee's oral proposal would have extended the plan beyond 60 months--to October 2001, presuming that the 60-month period ended in June 2001. Trustee erroneously considered that the five-year plan would end in October 2001--five years from the date the first plan payment was due after plan confirmation. (Transcript, February 28, 2001, at 22:19–22.) Assuming, arguendo, that Martin and Serna are still good law, the plan would have terminated in late October, 2001, and there still would not have been enough time for full payment by that date.

Although the record indicates that the bankruptcy court ruled that the modified plan could not exceed 60 months, it then abandoned its analysis of that issue. The court did not require Trustee to present a written payment schedule, nor did it explain in its order how the modified plan would comply with § 1329(c). Moreover, the court's order was conditional, pending resolution of the exemption matter.

It is clear from the transcripts and excerpts of record that Trustee had no idea how the money would be forthcoming. The Proceeds were tied up in the North Carolina property, and the exemption claim as to that property was still unresolved.

Therefore, the payment required under the modified plan could not be completed, either by June, 2001, or even by October, 2001, short of some stay or tolling mechanism.[11] Because the modified plan exceeded the 60-month limit, the bankruptcy court therefore abused its discretion in granting the modification.[12]

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[11] Like § 1322(d), § 1329(c) does not expressly contain a drop-dead date after which the case must be dismissed if payments extend beyond the 60 months. There is case authority for accepting a "cure" of plan payments within a reasonable time after the plan term has expired, in order to prevent the dismissal of the case. See 8 Collier on Bankruptcy, supra, p 1322.17[2] at 1322–55 (Section 1322(d) focuses on the payment provided for by the plan, and if the debtor is substantially complying with the plan, the court should allow the plan to be completed within a reasonable period of time); In re Black, 78 B.R. 840, 842 (Bankr.S.D.Ohio 1987) (§ 1322 has no provision for dismissal). Such circumstances are factually distinguishable from our case, however, which involved the confirmation of a modified plan to include a postpetition asset, payment of which would necessarily extend the plan beyond 60 months. Section 1322(d) expressly prohibits a court from confirming a plan that provides for payments over a period longer than five years.

[12] Even if the filing of the motion to modify somehow tolled the running of the plan term, a proposition for which we find no authority, this modified plan would not be confirmable because it was not feasible. Section 1325(a)(6) requires the court to find that "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). As discussed above, both Trustee's modification and the conditional confirmation order lacked any manner of paying over the Proceeds. It was likely that Debtors would first have to sell the North Carolina property. Indeed, such payments could not be authorized because the 60-month plan term had already expired.

D. Debtors Are Entitled to Discharge; Remaining Issues are Moot

[4] Trustee contends that a timely motion to modify was made because Debtors received a postpetition asset which changed the liquidation analysis, such that the Proceeds were required to be distributed to the unsecured creditors.[13]

However, Trustee did not move to dismiss Debtors' chapter 13 case on the grounds that they did not turn over the Proceeds for distribution. Instead, Trustee unconditionally accepted the lump sum payment and the 1998 tax refund in completion of the plan payments without any reservation concerning the outcome of the motion to modify.

We have already held that Trustee's motion to modify must not only be filed in a timely manner, but it must also satisfy the requirements for a plan under §§ 1329, 1322 and 1325. In this case it did not. Debtors completed their chapter 13 payments, and thus they are entitled to a discharge under § 1328(a). In the absence of a confirmable modified plan, the remaining issues (Nos. 4 and 5) are rendered moot.

CONCLUSION

Based on the foregoing analysis, we REVERSE the bankruptcy court's order conditionally confirming the modified plan, and direct the bankruptcy court to enter Debtors' discharge.

¶2002-5465

Bill Max OVERTON, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. Bill Max OVERTON, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA; Internal Revenue Service; Edythe Siekman; East District WA US Attorney; United States Fidelity and Guaranty Company; Carol Whalen; V. Willis, DEFENDANTS-APPELLEES. Bill Max OVERTON, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA; Carlos Sanchez, DEFENDANTS-APPELLEES. U.S. Court of Appeals, Tenth Circuit, (CA10) No. 01-6357; No. 01-6443; No. 01-6441. Oct. 4, 2002. District Courts, (2001, DC OK) 88 AFTR 2d 2001-6572, 2001-2 USTC ¶50728, (2001, DC OK) 88 AFTR 2d 2001-6483, and District Court, affirmed. Earlier proceeding at (1994, DC WA) 73 AFTR 2d 94-1480. Years 1975, 1977, 1978, 1979, 1981, 1989, 1990, 1997. Decision against Taxpayer.

1. Actions against U.S. and IRS employees—damages—unlawful levy; failure to release lien—res judicata—exhaustion of administrative remedies—refunds—summary judgment—proof—estoppel—sanctions. District courts properly granted govt. and IRS employees summary judgment on taxpayer's claims for refund and collection-related violations: taxpayer's alleged refund claim wasn't verified under penalties of perjury; conclusory statements and unauthenticated "evidence" raised no material fact issue supporting his lien challenges; and fact that judges ruled against him didn't establish bias. Also, prior dismissal of unlawful levy and seizure claims was res judicata as to instant action where claims arose out of same transactions; taxpayer had full and fair opportunity to litigate claims in prior actions; and he couldn't relitigate propriety of liens on his realty in new action against named parties or their privies. And, taxpayer was warned that any additional frivolous and repetitious filings could result in imposition of filing restrictions. *Reference:* United States Tax Reporter ¶74,225.01(20); 74,225.05(40); 74,337.503(75); 74,337.504(5); 74,335.01(10); 74,325.03(10). IRC §7422; 7432; 7433.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,

[13] We address Trustee's policy argument only to the extent that this case did not involve a postpetition disposable income asset, but rather a non-income producing asset. Even if the Proceeds were property of the estate and subject to disclosure, they were not distributable to creditors. Burgie, 239 B.R. at 410 (holding that only "disposable income" is used to fund a chapter 13 plan); 8 Collier on Bankruptcy, supra, p 1306.03, at 1306-6. Then, assuming that the "best interests of creditors" test is recalculated at the time of plan modification, Debtors' net disposable income would not have increased, the unsecured creditors would receive more from liquidation, and, thus, the modified plan was still unconfirmable.

Before MURPHY, ANDERSON, and HARTZ, Circuit Judges.

ORDER AND JUDGMENT[1]

Michael R. Murphy Circuit Judge

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

Plaintiff Bill Max Overton, appearing pro se, appeals the district court's judgments in favor of defendants in three related lawsuits. Because the district court correctly held that it lacked jurisdiction over one of plaintiff's claims; that defendants were entitled to summary judgment on the merits of two other claims; and that the remaining claims were barred by the doctrine of res judicata, we affirm. In addition, we caution plaintiff that his pattern of abusing the federal legal system through repetitious lawsuits may subject him to filing restrictions.

I. Plaintiff's Prior Cases

These appeals require us to consider a number of plaintiff's many lawsuits against the United States, its employees, and financial institutions, arising out of the assessment and collection of plaintiff's past tax liabilities. In 1983, plaintiff filed an action against the United States and several agents of the Internal Revenue Service (IRS) in the United States District Court for the Eastern District of Washington. Alleging that the IRS erred in determining his tax liability for the years 1975, 1977, 1978, 1979, and 1981, plaintiff sought a refund of his alleged overpayments, an injunction against future assessments and liens, a declaration that the IRS had erred, and damages. The case remained pending in the district court for many years while the parties engaged in extensive discovery, litigated numerous motions, and participated in an aborted jury trial. In May 1988, the IRS placed a lien on one of plaintiff's properties in New Mexico.

In 1990, plaintiff filed a tax return for the year 1989 in which he claimed a tax liability of $0, and withholding credits in the amount of $33,812. On this basis, the IRS issued a $33,812 payment to plaintiff. Plaintiff then filed a motion for summary judgment in the Eastern District of Washington case, claiming the IRS had acknowledged its error and issued a refund of the disputed amounts plus interest. Based on plaintiff's representation, the district court dismissed the lawsuit as moot. The Ninth Circuit affirmed in part, agreeing that a refund would moot plaintiff's refund claims, but holding that the damage claims would remain viable. See Overton v. United States, No. 90-35686, 1993 WL 285888, at 1 (9th Cir. July 29, 1993). The court noted that if the IRS attempted to revoke the alleged refund, plaintiff would be entitled to seek judicial review at that time. Id. In March 1994, the Eastern District of Washington court dismissed plaintiff's damage claims against the individual IRS agents for failure to state a claim.

In early 1993 the IRS concluded plaintiff was not entitled to the $33,812 in withholding credits he had claimed on his 1989 tax return, and demanded repayment of the credited amount with interest. The IRS also reexamined plaintiff's tax liability for 1989 and 1990 and determined that he owed additional taxes, penalties, and interest for those years. The IRS found that plaintiff owed an additional $30,519 in taxes and $14,392 in penalties for 1989, and an additional $11,561 in taxes and $2,890 in penalties for 1990.

Plaintiff challenged these determinations in the United States Tax Court in 1993. At some point during the pendency of the case, the Tax Court denied plaintiff's motion for a jury trial, and he appealed the denial to the Fifth Circuit Court of Appeals. The Fifth Circuit dismissed plaintiff's appeal on April 20, 1994. On February 14, 1996, the Tax Court dismissed

[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

plaintiff's petition for failure to prosecute and entered an order confirming that plaintiff owed the additional taxes and penalties described above for the years 1989 and 1990. On July 1, 1996, the IRS assessed the taxes and penalties determined by the Tax Court, with interest, and issued its demand for payment. On May 6, 1998, the IRS issued a notice of its intent to levy, and on June 11, 1998, it sent notices of levy to nine banks. On August 10, 1998, the IRS received $99,411.85 from plaintiff's retirement account at Safra National Bank. On September 18, 1998, the IRS placed another lien on plaintiff's real property in New Mexico.

On August 21, 1998, plaintiff brought an action against the United States in the district court for the District of New Mexico, seeking damages and injunctive relief stemming from the IRS' attempts to collect the 1989 withholding credits and the 1989 and 1990 tax deficiencies, penalties, and interest. In CIV-98-1012-JP, plaintiff made the following claims: (1) the IRS illegally seized plaintiff's funds while his case was pending in the Tax Court; (2) the IRS violated the law by demanding payment less than ninety days after issuing a notice of deficiency; (3) the IRS illegally demanded payment of a court-ordered refund; (4) the IRS illegally demanded a greater sum from plaintiff than authorized by law; (5) the IRS improperly seized plaintiff's retirement funds; (6) the IRS illegally sought records from third-party banks without notifying plaintiff; and (7) the IRS failed to give plaintiff the required thirty-day notice of intent to levy before seizing his bank account. On February 10, 1999, the district court dismissed some of plaintiff's claims and granted summary judgment in favor of defendants on the remaining claims.

In Overton v. United States, No. 99-2069, 2000 WL 14274 [85 AFTR 2d 2000-510] (10th Cir. Jan. 7, 2000), we affirmed the district court's judgment. After carefully considering each of plaintiff's claims, we held that (1) the district court lacked jurisdiction, based on the statute of limitations, over plaintiff's claims that the IRS sought repayment of a court ordered-refund and that it failed to wait the required period before demanding payment; (2) plaintiff's claims that he was not notified when the IRS sought financial records from third parties failed to state a claim; and (3) the district court was correct in granting summary judgment in favor of the United States on plaintiff's remaining claims.

Meanwhile, on May 25, 1999, plaintiff filed another lawsuit in the District of New Mexico regarding the assessment and collection of his 1989 and 1990 taxes. In that action, plaintiff sought damages from IRS Revenue Officer Carlos Sanchez. The district court dismissed the suit because individual IRS agents are not subject to damages actions for their conduct in assessing and collecting taxes. Overton v. Sanchez, No. CIV-99-0585-BB/RLP (D.N.M. Apr. 11, 2000) (attached to Aplee. Br. in No. 01-6443). On December 12, 2001, we dismissed plaintiff's appeal for failure to pay the filing fee or apply for in forma pauperis status. See Overton v. IRS, No. 00-2289, 2001 WL 1580910 [88 AFTR 2d 2001-7198] (10th Cir. Dec. 12, 2001).

Also in 1999, plaintiff filed an action against the Safra National Bank in the Southern District of New York, challenging the bank's conduct in honoring the IRS' levy. The district court granted judgment in favor of the bank, and the Second Circuit affirmed the judgment. See Overton v. Safra Nat'l Bank, No. 99-9513, 2000 WL 1552323 (2nd Cir. Oct. 17, 2000).

II. Plaintiff's Current Cases

Appeal No. 01-6357

On October 1, 1999, plaintiff filed case No. CIV-99-1518-L against the United States, this time in the Western District of Oklahoma. Plaintiff again challenged the assessment and collection of his 1989 and 1990 taxes, alleging that (1) the 1998 collection from Safra National Bank was illegal because his case was still pending in the Tax Court and because retirement funds are exempt from collection; (2) the 1993 demand was illegal because it was made less than ninety days after the notice of deficiency and because it involved a court-ordered refund; (3) an unidentified

revenue officer illegally demanded more taxes than allowed by law; (4) the 1998 requests for records from eight third-party banks were illegal because plaintiff was not given notice; (5) plaintiff was not given a thirty-day notice of intent to levy before his bank account was seized; (6) the IRS illegally filed a lien on plaintiff's New Mexico property in 1998 and then failed to release the lien; (7) the IRS illegally failed to release a 1988 lien on plaintiff's New Mexico property; and (8) he was due a $562.93 refund on his 1997 taxes.

Plaintiff also submitted numerous computer disks to the district court. Plaintiff attempted to use these disks both as discovery requests to defendants and as substantive evidence in support of his claims. The district court denied plaintiff's motions to compel discovery for failure to comply with the discovery rules, and struck the computer disks from the record because they contained unverified and un-authenticated information, and were not an acceptable form of evidence.

The district court granted judgment in favor of the United States, holding that it lacked jurisdiction over plaintiff's claim for a 1997 refund; that counts one through fifteen were barred by the doctrine of res judicata; and that plaintiff had not raised triable issues regarding the imposition of the liens on his property or the IRS' failure to release the liens. See Overton v. United States, No. CIV-99-1518-L, 2001 WL 1399379 (W.D. Okla. Sept. 14, 2001). Plaintiff appeals these rulings.

Appeal No. 01-6443

On May 26, 2000, plaintiff filed another lawsuit in the Western District of Oklahoma against the United States and IRS Agent Carlos Sanchez. In case No. CIV-00-973-L, plaintiff again challenged the assessment and collection of his 1989 and 1990 taxes, alleging that (1) the seizure of his retirement funds from the Safra National Bank was illegal because he did not owe the 1989 and 1990 tax amounts assessed against him, and it was collected while his case was still pending in the Tax Court; (2) the IRS' 1993 demand was illegal and violated plaintiff's due process rights; (3) defendants violated the law by failing to wait ninety days between the 1993 notice of deficiency and the demand for payment; (4) defendants illegally seized a court-ordered refund; (5) defendants demanded more than authorized by law and illegally seized plaintiff's retirement funds; (6) defendants illegally sought records from eight banks in 1998 without notifying plaintiff; (7) defendants improperly placed a lien on plaintiff's property in 1998; (8) defendants have attempted to recover a refund after the statute of limitations expired; (9) the IRS improperly audited plaintiff in two consecutive years; and (10) the assessment and collection of plaintiff's 1989 and 1990 taxes violated his Fourth and Fifth Amendment rights. Plaintiff again presented to the court numerous computer disks which he sought to use for discovery purposes. The district court struck the disks as not complying with discovery rules. On September 18, 2001, the district court dismissed all claims based on the doctrine of res judicata. Plaintiff appeals these rulings.

Appeal No. 01-6441

On June 12, 2000, plaintiff filed a motion to reopen his Eastern District of Washington case and to transfer venue to the Western District of Oklahoma.

The motion was granted, and on July 17, 2000, this case was docketed as No. 00-CIV-1266-L. Again, plaintiff argued that the IRS' 1998 seizure of his funds from the Safra National Bank was illegal because it was a seizure of a court-ordered refund. On September 18, 2001, the district court granted summary judgment in favor of defendants on the ground that there was no evidence to support plaintiff's claim that the seized funds constituted a "refund" resulting from the Eastern District of Washington case; that the court was not required to comb through the record to find evidentiary support for his claims; and that his challenge to the legality of the seizure was barred by the doctrine of res judicata. See Overton v. United States, No. CIV-00-1266-L, 2001 WL 1346668 (W.D. Okla. Sept. 18, 2001). On November 30, 2001, the district court denied plaintiff's

motion for reconsideration and motion for recusal. Plaintiff appeals these rulings.

III. Analysis

We review de novo the dismissal of plaintiff's refund claim for lack of subject matter jurisdiction. Angle v. United States, 996 F.2d 252, 253 [72 AFTR 2d 93-5314] (10th Cir. 1993). We also review de novo the district court's application of res judicata to the facts, viewed in the light most favorable to the nonmoving party. Plotner v. AT & T Corp., 224 F.3d 1161, 1168 (10th Cir. 2000). The district court's discovery and evidentiary rulings are reviewed for an abuse of discretion, as are its rulings regarding recusal. Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 659 (10th Cir. 2002) (recusal); Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1300 (10th Cir. 1999) (discovery rulings); Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc., 131 F.3d 874, 894 (10th Cir. 1997) (evidentiary rulings at summary judgment stage). Finally, we review a grant of summary judgment de novo, using the same standard as that used by the district court. McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1128 (10th Cir. 1998).

[1] In case No. CIV-99-1518-L, the district court correctly held that it lacked subject matter jurisdiction over plaintiff's claim for a refund of his 1997 taxes. Pursuant to 26 U.S.C. 7422(a), courts lack jurisdiction over tax refund claims unless the taxpayer has paid the challenged amount and filed an administrative claim that complies with the Secretary of the Treasury's implementing regulations. Angle, 996 F.2d at 253–54. Here, plaintiff's alleged refund claim was not "verified by a written declaration that it [was] made under the penalties of perjury," and thus it could not "be considered for any purpose as a claim for refund." 26 C.F.R. 301.6402-2(b)(1).

With regard to plaintiff's challenges to the liens placed on his New Mexico property in September 1998 and May 1988, we agree with the district court that plaintiff failed to submit admissible evidence raising a genuine issue of material fact. The district court did not abuse its discretion in rejecting plaintiff's conclusory statements and unauthenticated "evidence" as to these claims. Therefore, the district court correctly granted summary judgment in favor of defendants on these claims.

In all three of plaintiff's cases, we hold that the district court did not err in denying plaintiff's motions to recuse. The mere fact that the district court disagreed with plaintiff's arguments and ruled against him does not establish bias. Liteky v. United States, 510 U.S. 540, 555 (1994); United States v. Cooley, 1 F.3d 985, 993–94 (10th Cir. 1993). On appeal, plaintiff has not demonstrated that the district court judge was biased or that the proceedings were unfair in any way.

Most importantly, in all three of plaintiff's cases, we agree with the district court that the majority of plaintiff's claims were barred by the doctrine of res judicata. Res judicata requires that a plaintiff present all claims arising out of a transaction in a single suit. The doctrine applies to preclude a subsequent suit when the following requirements are met:

> (1) the prior suit must have ended with a judgment on the merits;
>
> (2) the parties must be identical or in privity; (3) the suit must be based on the same cause of action; and (4) the plaintiff must have had a full and fair opportunity to litigate the claim in the prior suit.

Plotner, 224 F.3d at 1168 (quotation omitted). The doctrine precludes not only the relitigation of claims that were actually raised in a prior action, but also all claims arising out of the transaction which could and should have been raised in that action. Id. at 1169–70. A party cannot circumvent the bar of res judicata by asserting a new legal theory or by seeking a different remedy. Id. at 1170.

Here, the transactions involved in plaintiff's prior suits were (1) the nature of the IRS' 1990 payment of $33,812 to plaintiff; (2) the IRS' 1993 determination that plaintiff was not entitled to the withholding credits he claimed and received for the year 1989; (3) the IRS' determination of

plaintiff's unpaid taxes, interest, and penalties for the 1989 and 1990 tax years; (4) the Tax Court's final judgment that plaintiff owed the assessed amounts; (5) the IRS' efforts to obtain the overpaid withholding credits and plaintiff's 1989 and 1990 tax liabilities, from 1993 through the August 1998 collection of funds from the Safra National Bank, including the 1998 requests for records from third-party financial institutions; and (6) IRS Agent Sanchez' personal liability for the above-listed occurrences.

Claims arising from these transactions were considered on their merits in Overton v. Safra Nat'l Bank, No. 99-9513, 2000 WL 1552323 (2nd Cir. Oct. 17, 2000); Overton v. United States, No. 99-2069, 2000 WL 14274 (10th Cir. Jan. 7, 2000); and Overton v. Sanchez, No. CIV-99-0585-BB/RLP (D.N.M. Apr. 11, 2000) (attached to Aplee. Br. in No. 01-6443), appeal dismissed, Overton v. IRS, No. 00-2289, 2001 WL 1580910 (10th Cir. Dec. 12, 2001). In addition, claims arising from the above-listed transactions were dismissed on their merits in an action filed by plaintiff after the lawsuits currently on appeal. See Overton v. United States, No. 02-6117, 2002 WL 1938599 [90 AFTR 2d 2002-6141] (10th Cir. Aug. 22, 2002) (affirming dismissal of action seeking damages for IRS' failure to notify plaintiff before requesting financial records and for allegedly excessive assessment of 1989 taxes).

The claims currently on appeal arose out of the same transactions. The current defendants were defendants in plaintiff's prior suits. Finally, plaintiff has had a full and fair opportunity to litigate his claims in his prior actions; he simply lost on the merits. Therefore, the district court was correct in holding that all claims arising out of the transactions listed above were barred by the doctrine of res judicata. The fact that plaintiff's current lawsuits might involve new theories or perceived injustices does not change this outcome; he was required to bring these claims in his prior actions and is now precluded from doing so. Further, because the propriety of the 1988 and 1998 liens on his New Mexico property have now been determined on their merits, plaintiff may not challenge them again in a new action against any of the named parties or their privies.

IV. Filing Restrictions

Plaintiff's many lawsuits regarding the assessment and collection of his 1989 and 1990 taxes are an abuse of the federal judicial system.[1] Federal courts have the inherent power to regulate the activities of abusive litigants by imposing carefully tailored restrictions under appropriate circumstances. See Judd v. Univ. of N.M., 204 F.3d 1041, 1043–45 (10th Cir. 2000); Tripati v. Beaman, 878 F.2d 351, 352 (10th Cir. 1989). Injunctions restricting further filings are appropriate where (1) the litigant's lengthy and abusive history is set forth; (2) the court provides guidelines as to what the litigant may do to obtain its permission to file an action; and (3) the litigant receives notice and an opportunity to oppose the court's order before it is implemented. See id. at 353–54. Because plaintiff's repetitive filings must come to an end, we warn him that any additional frivolous and repetitious filings may result in the imposition of filing restrictions.

The judgments of the United States District Courts for the Western District of Oklahoma are AFFIRMED. The mandate shall issue forthwith.

Entered for the Court

Michael R. Murphy

Circuit Judge

¶2002-5466

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. James H. WILLIAMS, DEFENDANT-APPELLANT. U.S. Court of Appeals, Fourth Circuit, (CA4) No. 02-4057, Oct. 4, 2002. District Court vacated and remanded per curiam. Decision for Taxpayer in part and for Govt in part.

[1] In addition to the lawsuits discussed in this decision, plaintiff has sought damages and attorney fees stemming from his tax-related litigation between 1981 and 1996. See Overton v. United States, No. 98-2185, 1999 WL 13006 [83 AFTR 2d 99-493] (10th Cir. Jan. 14, 1999).

1. Tax crimes—making and presenting false claims—sentencing—restitution. Pro se taxpayer's sentence for making and presenting false claims was vacated and remanded per curiam: although district court properly denied taxpayer additional 1-level reduction for acceptance of responsibility because he failed to show guilty plea was timely or that he timely provided complete information to authorities, facts supported 2-level obstruction of justice enhancement, and decision to depart downward was unreviewable, written judgment required correction to conform with oral restitution order. Also, taxpayer's remaining arguments were meritless. *Reference:* United States Tax Reporter ¶72,065.01(40). IRC §7206.

Ann Briks Walsh, Assistant Federal Public Defender, Charleston, South Carolina, for Appellant. J. Strom Thurmond, Jr., United States Attorney, John M. Barton, Assistant United States Attorney, Columbia, South Carolina, for Appellee.

United States Court of Appeals, Fourth Circuit,

Appeal from the United States District Court for the District of South Carolina, at Charleston. David C. Norton, District Judge. (CR-01-332).

Before LUTTIG and MOTZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Vacated and remanded by unpublished PER CURIAM opinion.

OPINION

PER CURIAM.

[1] James H. Williams pled guilty to two counts of making and presenting false claims on Internal Revenue Service Forms 1041 in violation of 18 U.S.C. §§ 247, 2 (2000). On appeal, Williams' counsel has filed a brief challenging: (1) the district court's failure to award an additional point for acceptance of responsibility; (2) the obstruction of justice enhancement to the offense level; and (3) the denial of his motion for a downward departure. Williams has moved for leave to file a pro se supplemental brief. We grant the motion for leave to file a pro se supplemental brief. In his pro se supplemental brief, Williams raises several non-meritorious issues. With respect to the issue of restitution, this Court vacates the judgment and remands to the district court for the limited purpose that it enter a judgment reflecting the amount of restitution imposed by the court orally at sentencing. In all other respects, we find no reversible error.

A district court's decision to deny a reduction to the offense level for acceptance of responsibility is reviewed for clear error. United States v. Pauley, 289 F.3d 254, 261 (4th Cir.2002). At sentencing, Williams has the burden of showing he was entitled to the additional one level reduction. United States v. Nale, 101 F.3d 1000, 1005 (4th Cir.1996). Because he failed to show his guilty plea was timely or that he timely provided complete information to authorities, the district court's failure to order an additional one level reduction was not clearly erroneous. See U.S. Sentencing Guidelines Manual § 3E1.1(b) (2000).

This Court reviews for clear error a district court's decision to increase the offense level for obstruction of justice. United States v. Sun, 278 F.3d 302, 313 (4th Cir.2002). Under U.S.S.G. § 3C1.1, a two level increase is warranted if the defendant:

> willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense.

We find the district court's factual findings were sufficient to authorize imposition of the increase to the offense level for obstruction of justice.

This Court does not have jurisdiction to review the district court's decision not to depart downward because it knew it had the authority to depart downward. United States v. Bayerle, 898 F.2d 28, 31 (4th Cir.1990).

With respect to Williams' pro se supplemental brief, the oral sentence as recorded in the transcript with respect to restitution differs from the restitution in the written judgment. The district court ordered restitution in the amount of $4100. The judgment indicates restitution in the amount of $6100. "[T]he sentences to be served ... are those pronounced in the defendant's presence in open court and not those set out in the written judgments of the court." Rakes v. United States, 309 F.2d 686, 687 (4th Cir.1962). The remedy is to vacate the judgment and remand to the district court for the purpose of correcting the written judgment to conform to the oral sentence. See id. at 688; see also United States v. Morse, 344 F.2d 27, 31 n. 1 (4th Cir.1965). Thus, the written judgment in the instant case should reflect the district court's oral pronouncement at sentencing. Because Williams committed a crime of fraud, restitution is mandatory. See 18 U.S.C.A. § 3663A(c)(1)(ii) (West 2000 & Supp.2002). The remaining issues raised in Williams' pro se supplemental brief are without merit.

Accordingly, we grant Williams' motion for leave to file a pro se supplemental brief and we vacate the court's judgment and remand for the limited purpose of having the district court re-enter a judgment con-forming to the oral sentence.* We dis-pense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

VACATED AND REMANDED.

¶2002-5467

CHURCHILL DOWNS, INCORPORATED AND SUBSIDIARIES, PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-1274, Oct. 8, 2002. Tax Court, (2000) 115 TC 279 (opinion by Laro, *J.*), affirmed. Years 1994, 1995. Decision against Tax-payer.

1. Deductions—entertainment expenses—"entertainment product"—goods provided to general public. Tax Court properly determined that horse track operators' deductions for costs of race related invitation-only parties, dinners and other events were limited by IRC §274(n)(1): events were entertainment, not entertainment product introduction events used to conduct taxpayer's business under Reg. §1.274-2(b)(1)(ii). Notably, no horse-racing business was conducted at events, which were simply social occasions held at venues other than track and not open to general gaming/wagering public that comprised bulk of taxpayers' customers. Also, whether IRC §274(n)(1) contained exception for entertainment events that were themselves product being sold was irrelevant since taxpayers were in racing, not party/event-planning business; reliance on IRC §274(e) was misplaced since events weren't "made available" to general public; and argument that event invitations and associated benefits were akin to deductible "comp" in *TAM 9641005* was rejected. *Reference:* United States Tax Reporter ¶2745.01(70); 2745.12(30). IRC §274.

ARGUED: Byron E. Leet, WYATT, TARRANT & COMBS, Louisville, Kentucky, for Appellants.

Karen D. Utiger, UNITED STATES DEPARTMENT OF JUSTICE, APPELLATE SECTION TAX DIVISION, Washington, D.C., for Appellee.

ON BRIEF: Byron E. Leet, C. Tyson Gorman, WYATT, TARRANT & COMBS, Louisville, Kentucky, for Appellants.

Karen D. Utiger, Richard Farber, UNITED STATES DEPARTMENT OF JUSTICE, APPELLATE SECTION TAX DIVISION, Washington, D.C., for Appellee.

United States Court of Appeals, Sixth Circuit,

* We recognize the transcript may contain a typographical error. In this case, the district court may re-enter a written judgment ordering $6100 in restitution.

On Appeal from the United States Tax Court. No. 8140-99--David Laro, Tax Court Judge.

Before: BOGGS, SILER, and MOORE, Circuit Judges.

OPINION

SILER, Circuit Judge.

Petitioner Churchill Downs, Incorporated and its subsidiaries (together "Churchill Downs") appeal the United States Tax Court's judgment that they were entitled to deduct only 50% of certain expenses they incurred in 1994 and 1995 because the expenses qualified as "entertainment" for purposes of Internal Revenue Code ("I.R.C.") § 274(n)(1)(B). For the reasons stated below, we AFFIRM.

I.

The facts of this case are not in dispute. Churchill Downs owns and operates the Churchill Downs race track in Louisville, Kentucky, and three other race tracks. Churchill Downs conducts horse races at these tracks, and earns revenues from wagering, admissions and seating charges, concession commissions, sponsorship revenues, licensing rights, and broadcast fees. Although Churchill Downs does not compete directly with other race tracks due to differences in the timing of race events, it competes for patrons with other sports, entertainment, and gaming operations.

Churchill Downs' biggest race is the Kentucky Derby, held each year on the first Saturday in May. Churchill Downs hosts the following events in connection with the race: (1) a "Sport of Kings" gala, (2) a brunch following the post position drawing for the race, (3) a week-long hospitality tent offering coffee, juice, and donuts to the press, and (4) the Kentucky Derby Winner's Party. The Sport of Kings Gala includes a press reception/cocktail party, dinner, and entertainment. The Kentucky Derby items and amounts at issue in this case are:

Item	1994 Expenditure	1995 Expenditure
Sport of Kings Gala	$14,375	$85,571
Press Hospitality Tent	0	$ 7,803
Derby Winner's Party	$17,500	0
Total	$31,875	$93,374

In 1994, Churchill Downs also agreed to host another race, the Breeders' Cup, at the Churchill Downs racetrack. Its contract with Breeders' Cup Limited ("BCL") obligated it to host certain promotional events designed to enhance the significance of the Breeders' Cup races as a national and international horse racing event. These events included: (1) a press reception cocktail party and dinner, (2) a brunch, and (3) a press breakfast. The Breeders' Cup items and amounts at issue in this case are:

Item	1994 Expenditure
Breeders' Cup Dinner	$116,000
Breeders' Cup Brunch	$ 21,885
Press Breakfast	$ 7,500
Total	$145,385

Finally, Churchill Downs hosted a number of miscellaneous dinners, receptions, cocktail parties and other events indirectly associated with one or both of these races, at an expense of $4,940 in 1994 and $21,619 in 1995.

Churchill Downs deducted the full amount of these Kentucky Derby and Breeders' Cup expenses on its 1994 and 1995 federal income tax returns as "ordinary and necessary business expenses" pursuant to I.R.C. § 162, 26 U.S.C. § 162(a). In a notice of tax deficiency, Re-

spondent, the Commissioner of Internal Revenue (''Commissioner''), rejected this treatment and concluded that Churchill Downs was entitled to deduct only 50% of these expenses. The Tax Court agreed with the Commissioner, and Churchill Downs now appeals the Tax Court's rejection of its petition for a redetermination of the deficiency.

II.

This court reviews the Tax Court's factual findings for clear error and its conclusions of law de novo. See Friedman v. Comm'r, 216 F.3d 537, 541 [85 AFTR 2d 2000-2210] (6th Cir.2000). In particular, this court reviews the Tax Court's interpretation of Internal Revenue Code provisions and related Treasury regulations de novo. See Wolpaw v. Comm'r, 47 F.3d 787, 790 [75 AFTR 2d 95-1110] (6th Cir.1995).

I.R.C. § 162(a) allows a taxpayer to deduct ''all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.'' 26 U.S.C. § 162(a). I.R.C. § 274(a) disallows certain deductions otherwise permitted by § 162, and provides that:

> No deduction otherwise allowable under this chapter shall be allowed for any item ... [w]ith respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, unless the taxpayer establishes that the item was directly related to, or, in the case of an item directly preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), that such item was associated with, the active conduct of the taxpayer's trade or business.

26 U.S.C. § 274(a). I.R.C. § 274(n) further limits deductions for entertainment expenses, providing that:

> The amount allowable as a deduction under this chapter for -
>
> (A) any expense for food or beverages, and
>
> (B) any item with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation, or with respect to a facility used in connection with such activity, shall not exceed 50 percent of the amount of such expense or item which would (but for this paragraph) be allowable as a deduction under this chapter.

26 U.S.C. § 274(n)(1). The Commissioner does not dispute that all of the expenses at issue qualify as ''ordinary and necessary'' business expenses ''directly related'' to the ''active conduct'' of Churchill Downs' business, and thus that some deduction of these expenses is allowed. However, he argues that § 274(n)(1) applies to limit deduction of these expenses because they qualify as items associated with activity generally considered entertainment.

I.R.C. § 274(o) gives the Commissioner the power to promulgate ''such regulations as he may deem necessary'' to enforce § 274. 26 U.S.C. § 274(o). Here the Commissioner has promulgated a regulation in connection with § 274(n), which provides that:

> An objective test shall be used to determine whether an activity is of a type generally considered to constitute entertainment. Thus, if an activity is generally considered to be entertainment, it will constitute entertainment for purposes of this section and section 274(a) regardless of whether the expenditure can also be described otherwise, and even though the expenditure relates to the taxpayer alone. This objective test precludes arguments such as that entertainment means only entertainment of others or that an expenditure for entertainment should be characterized as an expenditure for advertising or public relations. However, in applying this test the taxpayer's trade or business shall be considered. Thus, although attending a theatrical performance would generally be considered entertainment, it would not be so considered in the case of a professional theater critic, attending in his professional capacity. Similarly, if a manufacturer of dresses conducts a fashion show to introduce his products to a group of store buyers, the show would

not be generally considered to constitute entertainment. However, if an appliance distributor conducts a fashion show for the wives of his retailers, the fashion show would be generally considered to constitute entertainment.

26 C.F.R. § 1.274-2(b)(1)(ii) (emphasis in original). Each party relies on this language as support for its position. Churchill Downs argues that the Derby and Breeders' Cup expenses at issue should not be considered entertainment expenses because these pre- and post-race events ''showcased'' its ''entertainment product.'' Specifically, it contends that the Sport of Kings Gala and the other invitation-only events generated publicity and media attention which introduced its races to the public in the same manner that a dress designer's fashion show introduces its product to clothing buyers. In response, the Commissioner relies on § 1.274-2(b)(1)(ii)'s statement that an item generally considered to be entertainment is subject to the 50% limitation even where it may be otherwise characterized as an advertising or public relations expense. The Commissioner argues that the brunches, dinners, galas, and parties at issue qualify on their face as items ''generally considered entertainment'' and, following § 1.274-2(b)(1)(ii), that they are not saved from this classification by the fact that these amounts were spent to publicize Churchill Downs' racing events.

These arguments expose an inherent tension in § 1.274-2(b)(1)(ii). On the one hand, § 1.274-2(b)(1)(ii) states that an item generally considered to be entertainment is subject to the 50% limitation even if it may be described otherwise, in particular as advertising or public relations. At the same time, the regulation suggests that certain expenses generally considered entertainment but somehow instrumental to the conduct of a taxpayer's business do not qualify as ''entertainment'' for purposes of § 274(n). The regulation draws the line between pure publicity and entertainment events integral to the conduct of the taxpayer's business by providing the contrasting examples of a fashion show offered by a dress designer to store buyers (not entertainment) and a fashion show offered by an appliance manufacturer to the spouses of its buyers (entertainment). See 26 C.F.R. § 1.274-2(b)(1)(ii). In the first example, the event is attended by the taxpayer's primary customers, and the taxpayer's product is present at the event and is the focus of it. In contrast, the second example reflects a purely social event focused on something unrelated to the taxpayer's product, held to generate good will among selected third parties with the expectation that they will influence the taxpayer's primary customers into buying its product.

Here, as the Tax Court found, Churchill Downs is in the business of staging horse races and makes its money primarily from selling admission to the races and ac-cepting wagers on them. However, no horse racing was conducted at the dinners and other events at issue. Nor did the events, held away from the track at rented facilities, provide attendees with an oppor-tunity to learn more about the races--for example, the horses that would appear, the odds associated with each horse, the types of wagers available, track conditions, etc.--similar to the product information store buyers might acquire at a fashion show. Rather, Churchill Downs concedes that the events were planned simply as social occa-sions. Nor were the events open to the gaming public that attends Churchill Downs races and wagers on them. Instead, Churchill Downs invited selected dignita-ries and members of the media to these private receptions, not with the expectation that they would later consume significant amounts of its product, but rather in the hopes that they would influence its primary customer base, the general public, to do so, either through the example of their attend-ance or through favorable reporting. As Churchill Downs explained, the attendance of the celebrities at these pre-race events was ''essential'' because ''the presence of those individuals in Louisville for two or more days before the races gave rise to re-lated publicity and media attention that helped sustain and advance the glamor and prestige of the races.'' In other words, the

purpose of the galas and dinners was not to make Churchill Downs' product directly available to its customers or to provide them with specific information about it, but rather to create an aura of glamor in connection with the upcoming races and generally to arouse public interest in them. In this regard, the dinners, brunches, and receptions at issue most closely resemble the example given above of a fashion show held for the wives of appliance retailers, and are best characterized not as a product introduction event used to conduct the taxpayer's business, but as pure advertising or public relations expenses. Accordingly, we conclude that the Kentucky Derby and Breeders' Cup expenses at issue qualify as ''entertainment'' under § 1.274-2(b)(1)(ii)'s objective standard.

As an alternative argument, Churchill Downs contends that, under the objective test, an event generally considered entertainment should not be deemed ''entertainment'' for purposes of § 274 where the event itself is the product the taxpayer is selling. In support of this position, it relies on a statement in the legislative history of § 274(n)(1) that:

> The trade or business of the taxpayer will determine whether an activity is of the type generally considered to constitute entertainment . . . . For example, with respect to a taxpayer who is a professional hunter, a hunting trip would not generally be considered a recreation-type activity.

S.Rep. No. 87-1881 (1962), 1962 WL 4862, at 3330. Churchill Downs argues that its entertainment products, the Kentucky Derby and the Breeders' Cup, necessarily include the Sport of Kings Gala and the other brunches, dinners and receptions at issue as integral parts of a unified entertainment experience.

We disagree. Unlike the hunter in the example above, who earns his money by hosting recreational hunting trips, Churchill Downs did not make any money from hosting the Sport of Kings Gala or the other events for which it seeks a deduction. Indeed, these events are easily separable from Churchill Downs' business because its primary customers, the gaming public, were not permitted to attend them, either by purchasing tickets or otherwise. Instead, Churchill Downs offered the tickets free of charge to a select few it describes as ''members of the media, members of the horse industry, dignitaries, and celebrities'' in order to raise public awareness of a later event (the races) which the public could attend and from which Churchill Downs made its money. Although Churchill Downs argues, as any business that depends on advertising may, that it made money as a result of these publicity events, this does not change their nature as something distinct from what was actually sold. The Commissioner puts it succinctly: ''taxpayers were in the horse racing business, not the business of throwing parties.'' Accordingly, it is inappropriate to characterize these non-race events as Churchill Downs' ''product.'' Thus, even if § 274(n)(1)'s limitation could be read not to apply where an entertainment event is itself the product sold by the taxpayer, there is no reason to apply such an exception here. We therefore reject Churchill Downs' ''entertainment product'' argument.

Finally, Churchill Downs offers two additional rationales for allowing a full deduction of these items. I.R.C. § 274(e) provides that:

> [I.R.C. § 274(a)] shall not apply to-
>
> . . .
>
> (7) Items available to public.--Expenses for goods, services, and facilities made available by the taxpayer to the general public.
>
> (8) Entertainment sold to customers.--Expenses for goods or services (including the use of facilities) which are sold by the taxpayer in a bona fide transaction for an adequate and full consideration in money or money's worth.

26 U.S.C. § 274(e) (emphasis in original). Churchill Downs argues that the Gala expenses and other items at issue are exempt from § 274(a) pursuant to this section either because these events were available to the general public or because they qualify as entertainment sold to customers.

Churchill Downs does not dispute that these events were by invitation only, or that such invitations were offered only to a small number of individuals. However, it argues that amounts spent on these events meet the requirements of § 274(e)(7) because the expenditures were incurred to promote other events, the Kentucky Derby and Breeders' Cup races, which were open to the general public. We reject this argument. Regardless of whether Churchill Downs incurred these expenses in order to promote an upcoming event open to the public, the goods and services purchased with these expenditures were not ''made available'' to the general public, as § 274(e)(7) requires, but rather only to a few invited guests at pre- and post-race dining events and the Sport of Kings Gala.

Churchill Downs also relies on an Internal Revenue Service (''IRS'') technical advice memorandum holding that food, beverages, lodging, and entertainment offered free by a casino to ''high rollers'' qualified as ''items available to the public'' for purposes of I.R.C. § 274(e)(7). See Tech. Advice Mem. 9641005, 1996 WL 584428 (July 27, 1996) (''TAM''). The IRS reasoned that all of the benefits provided were items the casino routinely offered to the paying public as part of its stock in trade. As such, the IRS concluded, this practice of ''comping'' favored customers was akin to providing free product samples, a practice Congress previously had characterized as making goods available to the general public. The agency also concluded that the fact that a customer was required to engage in some amount of gaming activity in order to receive this benefit did not prevent it from being ''available to the public'' for purposes of § 274(e)(7). However, the IRS concluded that ''outside comps''--benefits offered to customers but produced by third parties and provided outside the taxpayer's premises--did not fall within this product sample rationale, and were not exempt under § 274(e)(7). Here Churchill Downs argues that invitations to the Sport of Kings Gala and the other non-race events were akin to the ''comps'' provided to favored customers at a casino.

We reject this argument. As an initial matter, written determinations like the TAM have no precedential value to parties other than the taxpayer they are issued to, and I.R.C. § 6110(k)(3) prohibits taxpayers from relying on them in proceedings before the agency. See 26 U.S.C. § 6110(k)(3); see also Liberty Nat'l Bank & Trust Co. v. United States, 867 F.2d 302, 304–05 [63 AFTR 2d 89-1550] (6th Cir.1989) (disallowing reliance on private letter rulings). Furthermore, unlike the ''comps'' offered to casino patrons, the dinners and galas at issue here are not the products that members of the general public routinely purchase from Churchill Downs, namely, admission to horse races or wagers. Indeed, Churchill Downs does not sell admission to these non-race dining events at all. Nor does the provision of these benefits appear to have been based on the recipient's attendance at the races, or as an inducement for future attendance. Rather, Churchill Downs acknowledges that the recipients were selectively chosen based on their ability to generate publicity for its races. Finally, as the Commissioner points out, the food, drink, and entertainment appear to have been provided largely by third parties at offsite locations, and thus more closely resemble the ''outside comping'' example which the agency concluded fell outside of § 274(e)(7). For all these reasons, the TAM does not support Churchill Downs' argument that these items should be exempted under § 274(e)(7) as ''items available to the public.''

In regards to its ''entertainment sold to customers'' argument, Churchill Downs concedes that those invited to the Sport of Kings Gala and the other occasions did not pay for the privilege of attending these events. Nevertheless, Churchill Downs once again argues that these dinners and brunches were integral parts of an encompassing entertainment event--the races--which members of the public did in fact pay to attend. For the reasons already discussed above, this argument is unpersuasive.

As a final matter, it would seem that, even if these events were deemed not to constitute "entertainment" for purposes of §§ 274(a) and (n)(1)(B), § 274(n)(1)(A) would preclude full deduction of many of the expenses at issue here. See 26 U.S.C. § 274(n)(1)(A). That section, read in conjunction with the rest of § 274(n)(1), provides that "[t]he amount allowable as a deduction under this chapter for ... any expense for food or beverages ... shall not exceed 50 percent of the amount of such expense or item which would (but for this paragraph) be allowable as a deduction under this chapter." Id. This limitation does not appear to be contingent on a classification of the expenses as "entertainment." Given that the events at issue are mainly dinners, brunches, breakfasts, and receptions, it seems likely that a significant portion of the expenses for which Churchill Downs seeks deduction are for food and beverages. However, we need not resolve this issue, which the parties have not briefed, because we conclude that the expenses associated with these events already are subject to the 50% limitation as items "generally considered entertainment."

AFFIRMED.

¶2002-5468

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Steven LINDSEY, DEFENDANT-APPELLANT, and Jack R. WESTERN; Paciencia WESTERN; Davis County; Boatmen's National Mortgage; First Security Bank of Utah, DEFENDANTS. U.S. Court of Appeals, Tenth Circuit, (CA10) No. 00-4096, Oct. 7, 2002. District Court affirmed. Years 1991, 1992, 1993. Decision against Taxpayer.

1. 100% penalty for failure to collect or pay over employment taxes—responsible person; willfulness—judgment as matter of law. District court properly denied taxpayer/50% shareholder/vice. pres.'s motion for judgment as matter of law that he wasn't liable under IRC §6672 for failure to pay his co.'s employment taxes: taxpayer's check-signing authority wasn't necessary predicate to assessing his penalty liability. Case law showed that no single factor was dispositive in determining extent of individual's authority over corp.'s financial affairs, and that statutory willfulness was determined by examining all relevant evidence; and case law taxpayer cited wasn't inapposite. *Reference:* United States Tax Reporter ¶66,725.02(30). IRC §6672.

United States Court of Appeals, Tenth Circuit,

Before HENRY, ANDERSON, and HARTZ, Circuit Judges.

ORDER AND JUDGMENT*

Robert H. Henry Circuit Judge

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R.App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Steven Lindsey appeals from an order denying his motion for judgment as a matter of law, made pursuant to Rule 50(b) of the Federal Rules of Civil Procedure. The motion was made after a jury found Mr. Lindsey personally liable under 26 U.S.C. § 6672 for the unpaid trust-fund portions of one of his company's federal employment taxes. Our jurisdiction is proper under 28 U.S.C. § 1291. Because we conclude that authority to sign corporate checks is not a necessary predicate to assessing personal liability under § 6672, we hold that the district court properly denied the motion.

I. Relevant facts

In summarizing the facts, we view the evidence and inferences to be drawn therefrom in a light most favorable to the United States, the prevailing party at trial.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

See Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1186 (10th Cir.1999). Mr. Lindsey was a founder and 50% shareholder of Transport Financial Services, Inc. ("TFS"), which leased truck drivers solely to Clearwater Trucking Company, also owned by Mr. Lindsey and his partner. Before TFS was created, all the truck drivers who became TFS employees were Clearwater employees. TFS operated rent-free out of Clearwater's facilities and had no financial obligations other than payroll and federal employment taxes. Mr. Lindsey was president of Clearwater, and authorized all employee lease payments to TFS, which were made through the two companies' common bookkeeper. By having total control over how much money Clearwater would pay to TFS, Mr. Lindsey had substantial financial control over TFS. He also authorized and decided whether federal employment tax deposits would be made into the trust account. In addition, Mr. Lindsey acted as vice-president and director of TFS for at least six months.

Although Mr. Lindsey had authority to sign checks on the Clearwater corporate account, he did not have authority to sign checks on the TFS account. During the period of time at issue, however, Mr. Lindsey always knew if federal employee taxes were being withheld and deposited in TFS's trust account for payment to the government. Clearwater had financial trouble in 1991 and 1992. On Mr. Lindsey's authority, it favored other creditors and stopped paying TFS the full amount necessary to pay both the truck drivers' wages and the employment taxes. Thereafter, TFS failed to remit its federal employee taxes for five out of six quarters from December 1991 through June 1993.

After a three-day jury trial, the jury determined on this evidence that "Mr. Lindsey was a responsible party who had willfully failed to remit withholding taxes owed by [TFS]." Aplt's App. at 86. In his motion for judgment as a matter of law, Mr. Lindsey argued that because he did not have authority to write checks on TFS's bank account, the jury was precluded from finding both that he was responsible for paying the employment taxes and that he failed to do so willfully. The district court denied the motion.

II. Discussion

[1] "We review the denial of judgment as a matter of law de novo and apply the same standard as the district court-that is, whether the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." Sanjuan v. IBP, Inc., 275 F.3d 1290, 1293 (10th Cir.2002) (quotation omitted). We review the district court's legal conclusions de novo. See Taylor v. IRS, 69 F.3d 411, 415 [76 AFTR 2d 95-7160] (10th Cir.1995) (holding that the ultimate determination of whether an individual is a "responsible person" within the meaning of 26 U.S.C. § 6672 involves an application of law to fact subject to de novo review on appeal to district court from bankruptcy court); Bradshaw v. United States, 83 F.3d 1175, 1178 [77 AFTR 2d 96-2181] (10th Cir.1995) (applying Taylor standard to review of district court judgment).

Mr. Lindsey's personal liability for the delinquent federal employment taxes is grounded on § 6672(a), which provides, in pertinent part:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

Mr. Lindsey raises a single issue on appeal: is check-signing authority on a corporate account a necessary predicate for demonstrating both personal responsibility and willfulness under this statute? We conclude that our circuit precedent dictates a negative answer. We start with the principle that "[c]ourts have generally given broad interpretation to the term 'responsible person' under section 6672," Denbo v. United

States, 988 F.2d 1029, 1032 [71 AFTR 2d 93-1317] (10th Cir.1993), recognizing the "importance of construing § 6672 in a manner to protect government revenue," Finley v. United States, 123 F.3d 1342, 1346 [80 AFTR 2d 97-6321] (10th Cir.1997). This court has held that

> [a] person is responsible within the meaning of [§ 6672] if that person is required to collect, truthfully account for or pay over any taxes withheld from the wages of a company's employees. The responsible person generally is, but need not be, a managing officer or employee, and there may be more than one responsible person. Indicia of responsibility include the holding of corporate office, control over financial affairs, the authority to disburse corporate funds, stock ownership, and the ability to hire and fire employees. Among other things, therefore, a corporate officer or employee is responsible if he or she has significant, though not necessarily exclusive, authority in the general management and fiscal decisionmaking of the corporation.

Denbo, 988 F.2d at 1032 (quotation and citations omitted). Further,

> [w]illfulness, in the context of section 6672, means a voluntary, conscious and intentional decision to prefer other creditors over the Government . . . . A responsible person's failure to investigate or to correct mismanagement after being notified that withholding taxes have not been paid satisfies the section 6672 willfulness requirement.

Id. at 1033 (quotations and citations omitted). In making the responsible-person determination under § 6672, "[t]he crucial inquiry is whether the person had the 'effective power' to pay the taxes-that is, whether he had the actual authority or ability, in view of his status within the corporation, to pay the taxes owed." Taylor, 69 F.3d at 416 (quoting Barnett v. IRS, 988 F.2d 1449, 1454 [71 AFTR 2d 93-1614] (5th Cir.1993)).

In Taylor, we stated that the list of factors set forth in Denbo is "non-exclusive," id., and we considered check-writing authority as "another indicia of responsibility in the total calculus of whether [an individual] constituted a 'responsible person' under § 6672." Id. at 416 n.4 (emphasis added). We held that a corporate officer may be a responsible person "regardless whether it was his specific job within the corporate structure to see that the taxes were paid over to the government," id. at 417, thus establishing that it is not necessary for the officer himself to write the check for payment of the taxes or to make the trust deposit, as long as the individual has significant authority and control over the corporation's finances. See also Denbo, 988 F.2d at 1033 (holding that individual was responsible person because he had "significant, as opposed to absolute, control of the corporation's finances") (quotation omitted); Barnett, 988 F.2d at 1455 (noting the list of factors to be considered in determining the extent of an individual's authority over a corporation's financial affairs, including authority to sign checks, and stating that, "[n]o single factor is dispositive").

We likewise have held that willfulness under § 6672 is determined by examining "all the relevant evidence in a particular case," to decide whether a responsible person has made reasonable efforts to protect employee-tax trust funds and whether those efforts were frustrated by circumstances outside the individual's control. Finley, 123 F.3d at 1348 (emphasis in original). We thus conclude that the district court did not err in denying Mr. Lindsey's motion for judgment as a matter of law.

The cases cited by Mr. Lindsey are not incongruent with our holding. Mr. Lindsey misrepresents the holding of United States v. Carrigan, 31 F.3d 130 [74 AFTR 2d 94-5425] (3d Cir.1994). Contrary to his statement that the Carrigan court noted that inability to draw a corporate check "alone could justify a finding of non-responsibility" under § 6672, Aplt. Br. at 9 (emphasis added), the court held that the existence of many facts weighed in favor of a finding of no responsibility, and that, "[b]ased on all the evidence of record . . . a rea-

sonable jury could find that [the individual] was not a responsible person,'' thus foreclosing summary judgment on the issue. 31 F.3d at 134. In Vinick v. United States, the court emphasized that ''[n]o single factor is determinative of responsibility'' under § 6672, and that the court ''must look at the totality of the circumstances when making the determination of responsibility.'' 205 F.3d 1, 7 [85 AFTR 2d 2000-1177] (1st Cir.2000). As to check-writing authority, the Vinick court stated that ''authority to sign checks, without more, is a weak pillar on which to rest a liability determination,'' and that ''the court must look at the check-signing authority in the context of financial control.'' Id. at 10 (quotation omitted).

The judgment of the United States District Court for the District of Utah is

AFFIRMED.

Entered for the Court

Robert H. Henry Circuit Judge

OCT 7 2002

¶2002-5469

In Re: William MILLER, Reorganized Debtor. William M. MILLER, Reorganized Debtor, APPELLANT/PLAINTIFF v. UNITED STATES OF AMERICA, through its Department of Treasury, Internal Revenue Service; and State of California, through its State Board of Equalization, DEFENDANTS. U.S. District Court, Northern Dist. of California, (DC CA) No. C-02-0521-SC, Oct. 2, 2002. Bankruptcy Court affirmed. Decision against Taxpayer.

1. Tax claims in bankruptcy—post-plan confirmation complaints—nondischargeable debts; gap interest—res judicata. Bankruptcy court properly allowed IRS's post-plan confirmation complaint to collect from Chap. 11 debtor postpetition, pre-plan confirmation interest (gap interest) on prepetition priority tax claim: res judicata didn't apply where plan's ambiguous references to discharge's scope and exceptions couldn't have conclusively resolved issue; and interpreting such ambiguity in IRS's favor was supported by its pre-confirmation statements of intent to collect gap interest. Also, IRS's position was supported by bankruptcy code and relevant language in 11 USC §507(a)(7), which described various types of *taxes*, not claims, so secured or unsecured nature of IRS's claim was irrelevant; and contrary case law wasn't followed. *Reference:* United States Tax Reporter ¶68,726.55(4); 68,726.52(47); 74,337.504(5).

United States District Court, N.D. California,

ORDER AFFIRMING BANKRUPTCY COURT'S RULING

CONTI, J.

I. INTRODUCTION

On December 20, 2001, the Bankruptcy Court denied William Miller's claim that the Internal Revenue Service (''IRS'') could not claim interest arising after Miller petitioned for bankruptcy but before his reorganization plan was approved. Miller (''Plaintiff'') now appeals this decision. For the following reasons, this Court affirms the Bankruptcy Court's ruling.

II. BACKGROUND

On December 20, 1989, Plaintiff filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. In January, 1994, Plaintiff submitted a reorganization plan, and in April of 1994 the Bankruptcy Court entered its Order Confirming Amended Plan as Modified. The IRS had asserted a claim against Plaintiff for unpaid trust fund taxes. Following confirmation, Plaintiff made his payments to the IRS in accordance with the plan.

In 1999, Plaintiff wrote to the IRS seeking release from any liens it had against him. In 2000, the IRS responded by asserting that Plaintiff still owed interest for the period between his petition for bankruptcy and confirmation of the reorganization plan (''gap interest''). Plaintiff argues that confirmation of the plan discharged any such claims.

Plaintiff originally brought his claim in Bankruptcy Court. In October 2000 and May 2001, the Bankruptcy Court rejected Defendant's motions for summary judgment. In re Miller, 253 B.R. 455 (Bkrtcy, N.D.Cal.2000); Order Re Cross Motions for Summary Judgment, Discovery, and Status Conference, Bankruptcy Case No. 3-89-04281-T, May 2, 2001. On December 5, 2001, the Bankruptcy Judge delivered oral findings and a decision in the IRS's favor, and on December 19 the Bankruptcy Court entered a written judgment. Plaintiff appealed to the Bankruptcy Appellate Panel, and in January, 2002, the United States filed its Notice of Election to Have Appeal Transferred to District Court.

Article XI of Plaintiff's reorganization plan specifically discusses discharge of claims. It states:

> Except as otherwise provided in the Confirmation Order or this Plan, the Confirmation Order will act as a discharge and termination, as of the Effective Date, of any and all liabilities and debts of, and claims against the Debtor that arose at any time before the Confirmation Order, including any interest accrued on such claims from and after the Petition Date or interest which would have accrued against the Debtor . . .
>
> Except as otherwise provided in this Plan, on the Effective Date, all entities shall be precluded from asserting against the Debtor any other or further debts or interests based upon any act, omission, transaction, or other activity of any kind that occurred prior to the Confirmation Date, all of which debts and interests shall be conclusively deemed released and discharged, as provided in 11 U.S.C. 524 and 1141, and such discharge shall void any judgment against the Debtor at any time obtained to the extent that it relates to a claim discharged.

First Amended Plan of Reorganization at 10–11.

Plaintiff asserts that this language discharges all claims, including the IRS's claim to GAP interest, and that the IRS is now prevented by res judicata from asserting its claim regardless of whether such claims are dischargeable under the Bankruptcy Code. In the alternative, Plaintiff asserts that this Court should follow the 10th Circuit's decision in United States v. Victor, 121 F.3d 1383 [80 AFTR 2d 97-5513] (1997), and should find that the plan discharged gap interest claims in accordance with the Bankruptcy Code. The IRS counters that, since the original plan was ambiguous with respect to the scope of the discharge, res judicata does not apply, and that this Court should follow the 11th Circuit in rejecting the Victor court's reasoning.

III. LEGAL STANDARD

A. Standard of Review

This Court reviews a bankruptcy court's conclusions of law de novo and its factual findings for clear error. In re Reaves, 285 F.3d 1152, 1155 (9th Cir.2002).

B. Res Judicata and Plan Confirmation

A court's confirmation of a reorganization plan is a final decision, and the resolution of issues therein has binding res judicata effect. Rein v. Providian Financial Corp., 270 F.3d 895, 898–99 (9th Cir.2001). This effect may exist even if the terms of the reorganization plan create a discharge not provided for by statute; if a creditor fails to object to a section of the plan, it cannot later assert that the section of the plan is invalid. In re Pardee, 193 F.3d 1083, 1085–86 (9th Cir.1999). In order for res judicata to have effect, however, there must be a final decision on the merits of the particular issue. Rein, 273 F.3d at 899. If the plan is ambiguous, then this Court cannot find that a claim is barred by res judicata until it unravels the ambiguity and determines how that claim was actually resolved. The ambiguity may also reflect the absence of any final decision on the merits of the particular issue at stake. In either case, the presence of ambiguity will require interpretation of the plan in a later proceeding, and in that proceeding a party may raise a claim contesting the meaning of the plan.

C. The Bankruptcy Code

The Bankruptcy Code generally allows an approved reorganization plan to discharge all other debts, leaving the debtor obligated in accordance with the terms of the plan but free from other claims. For some types of obligations, however, the Code allows no discharge. Tax claims, for example, are generally non-dischargeable. The Code thus strikes a balance between allowing the debtor a fresh start and protecting the government's ability to collect revenue. See In re Gurwitch, 794 F.2d 584, 585–86 [58 AFTR 2d 86-5473] (11th Cir.1986)

Specifically, Bankruptcy Code § 1141 provides that approval of a plan will discharge all other claims against the Debtor. 11 U.S.C. § 1141. Section 1141(d)(2), however, refers to Code § 523(a) for exceptions to this general rule. Among the exceptions are debts "for a tax ... of the kind and for the periods specified in section ... 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed." 11 U.S.C. § 523(a)(1)(A). Section 507 discusses the priority order for types of claims; § 507 ((a)(7) specifically refers to "allowed unsecured claims of government units" for several different types of taxes, which the subsection then describes in detail.

The Ninth Circuit has not yet considered the combined meaning of these statutory sections, but other Circuits currently are split. The 10th Circuit, in Victor, focused on the "allowed unsecured claims" language in § 507(a)(7). It held that the sections meant that only unsecured tax claims were non-dischargeable and that secured claims for taxes could be discharged by an approved reorganization plan. 121 F.3d at 1390. The 11th Circuit, in In re Gust, 197 F.3d 1112 [84 AFTR 2d 99-7208] (1999), rejected this reading of the statute. The 11th Circuit instead noted that Section 523(a) referred to "taxes of a kind," not "claims of a kind." It concluded that the relevant language in § 507(a)(7) thus was the description of various types of taxes, and that the language about unsecured claims was irrelevant to the meaning of § 523(a)(1)(A). Id. at 1114–15. Therefore, it held that none of the types of taxes described in § 507(a)(7) could be discharged regardless of whether the claims for those taxes were secured or unsecured. Id.

IV. DISCUSSION

[1] Because the reorganization plan was ambiguous with respect to gap interest, the doctrine of res judicata does not apply, and the IRS was free to assert its claim. Moreover, this Court concludes that In re Gust, not Victor, offers the better reading of the Bankruptcy Code, and that the IRS's claim was non-dischargeable regardless of whether it was secured or unsecured.

A. Res Judicata

For res judicata to prevent the IRS from asserting a claim for gap interest, the Bankruptcy Court must have reached a final decision that such claims were discharged. The Bankruptcy Court's order affirming the reorganization plan was a final order, but the plan was ambiguous with respect to gap interest. Once the Bankruptcy Court concluded, in its later proceeding, that the plan was ambiguous, it had no choice but to seek resolution of the ambiguity, and had ample reason to resolve the ambiguity in the IRS's favor.

The first paragraph of Section XI of the reorganization plan purports to discharge all other claims not provided for in the plan. At the outset of the paragraph, however, the plan states that this waiver is effective "except as otherwise provided in the Confirmation Order or this Plan," indicating that there might be some exceptions to this general discharge. The following paragraph implies such an exception. It states that all debts and interests not provided for by the plan will be discharged "as provided for in 11 U.S.C. 524 and 1141."

Plaintiff and the IRS dispute how these paragraphs should be read. The IRS, noting that § 1141(d)(2) provides that certain types of debts are non-dischargeable, argues that this language incorporates those limits on dischargeability into the reorganization plan. Plaintiff argues that the second

paragraph's general reference to § 1141 indicates a clear intent to invoke § 1141's general provision for dischargeability but not the specific exceptions created by § 1141(d)(2). The proper reading of the two paragraphs, Plaintiff asserts, is that all debts should be discharged subject to the procedures provided for in Sections 524 and 1141, not that debts should be discharged only to the extent provided for by those two sections.

Plaintiff's reading is plausible but by no means mandated by the plan's language. The plan's reference to § 1141 reasonably can be construed as a reference to the section in its entirety, and the section in its entirety necessarily includes the exceptions provided for by § 1141(d)(2). Thus, language that claims will be discharged "as provided for in U.S.C. 524 and 1141" appears to mean that claims will not be discharged if sections 52 and 1141 do not provide for such discharge.

Plaintiff also argues that reading the second paragraph to limit dischargeability based on § 1141(d)(2)'s exceptions would conflict with the broadly inclusive language of the first paragraph, violating the principle of contract construction that all language should be given effect. This argument overlooks the "except as otherwise provided" language of the first paragraph, however, which expressly contemplates the possibility of an exception to the general discharge. Accordingly, the Bankruptcy Court made no error in finding the plan ambiguous.

The Bankruptcy Court also did not err in resolving that ambiguity in the IRS's favor.[1] Most importantly, prior to plan approval the IRS drafted a letter indicating its intent to collect gap interest, and Plaintiff's attorney responded with a letter stating that obtaining gap interest was "outside the scope of the plan, as was discussed at our meeting in late February." Declaration of Jay R. Weill, Exhibits 8 and 9. While these letters are parol evidence, they are highly probative towards the meaning each party attached to the ambiguous terms, and thus are not only admissible but also sufficient to justify the Bankruptcy Court's interpretation of the plan. See In Re Bennett, 298 F.3d 1064 (9th Cir.2002). In addition, the Bankruptcy Court correctly noted that the interpretation urged by Plaintiff would effectively create a waiver of a statutory right, and that courts should only find such a waiver where the intent to waive is unequivocally clear. Cathay Bank v. Lee, 14 Cal.App.4th 1533, 1539 (1993). An ambiguous plan obviously cannot evince such clear intent, and the Bankruptcy Court appropriately construed the plan to avoid such a waiver.

B. Dischargeability

Even if the IRS is not barred by res judicata from asserting its gap interest claim, Plaintiff argues that this court should follow the 10th Circuit's holding in Victor and find that the plan discharged all secured claims. This Court rejects Victor's holding, however, and finds that In re Gust provides the better interpretation of the Bankruptcy Code.

As the IRS points out, the Victor court's reading of the Bankruptcy Code confuses taxes with claims. Section 523(a) states that certain types of debts cannot be discharged regardless of whether a claim is filed, and refers to § 507(a)(7)'s list of the types of taxes that fall within this category. The Victor court, however, citing language at the beginning of § 507(a)(7) referring to unsecured claims, held that § 523(a)'s exception only extended to unsecured claims for the listed types of taxes. The problem with this interpretation is that § 523(a) makes no reference to types of claims, and there is no reason to assume that it incorporates § 507(a)(7)'s preliminary language.

In addition, the Victor court's reading creates an unnecessary contradiction. Victor would effectively change § 523(a) to state that certain types of tax debts, for which an unsecured claim had been filed,

[1] In his reply brief, Plaintiff asserts that his res judicata argument challenges only the 2000 summary judgment order, in which the Bankruptcy Court found his reorganization plan to be ambiguous, and not the court's December 5, 2001 oral findings and decision. Plaintiff's opening brief, however, appears to be directed at both decisions, and the substance of his arguments includes attacks on the court's methodology in resolving the ambiguity as well as upon the initial finding of ambiguity. Accordingly, this Court considers Plaintiff's appeal to be a challenge to each of the Bankruptcy Court's rulings.

could not be discharged regardless of whether or not a claim had been filed. Such a reading is nonsensical. The far simpler and more sensible reading, provided by In re Gust, is that § 523(a), by referring to ''taxes of a kind'' provided in § 507(a)(7), simply incorporates the list of types of taxes provided in § 507(a)(7), and that § 507(a)(7)'s language about un-secured claims is irrelevant to § 323(a)'s meaning.

The parties do not dispute that the taxes here at issue are of a kind described by § 507(a)(7); Plaintiff's argument turns entirely on the construction of the statute and the secured or unsecured nature of his claim. Since this Court holds that the type of debt, not the type of claim, determines whether discharge is possible, whether the IRS's claim was secured or unsecured is irrelevant; the claim was not discharged.

V. CONCLUSION

For the foregoing reasons, the Bankruptcy Court's decision is affirmed.

IT IS SO ORDERED.

¶2002-5470

In Re: John Howard PAYNE, Debtor. John Howard PAYNE, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. Bankruptcy Court, Northern Dist. of Illinois, (Bktcy Ct IL) Bankruptcy No. 97 B 39766; Adversary No. 01 A 00342, Oct. 3, 2002. Year 1986. Decision against Govt.

1. Tax claims in bankruptcy—dischargeability—failure to timely file returns—what constitutes return. Govt. was denied summary judgment that Chap. 7 debtor's tax debts were excepted from discharge under 11 USC §523(a)(1)(B): IRS's inability to locate subject year's return amongst group of returns taxpayer sent at same time didn't rebut taxpayer's contention that he did in fact send it; and IRS's reliance on IRC §7502 for proposition that taxpayer could not have *filed* late return for bankruptcy purposes absent proof of registered or certified mailing was rejected. Also, return was potentially acceptable under §523(a)(1)(B) even if sent or filed post-assessment where it evinced prima facie intent to comply with tax laws, contained all necessary data, and could meet statute's narrow good faith requirement. *Reference:* United States Tax Reporter ¶68,726.52(27).

Attorney for Movant or Plaintiff: S. Ira Miller
Attorney for Respondent or Defendant: Mayer Y. Silber (Office of Chief Counsel, IRS); Mandee Rosler Rosenberg (U.S. Department of Justice, Tax Division)

UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION,

MEMORANDUM OPINION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Jack B. Schmetterer United States Bankruptcy Judge

Background/History

John Howard Payne (''Plaintiff or Payne'') is seeking a declaration that his liability for 1986 taxes due to the United States was discharged through his bankruptcy filing under Chapter 7. Payne filed his Petition on December 31, 1997. The United States Internal Revenue Service (''IRS or USA'') was a scheduled creditor for unpaid taxes for the years 1983 through 1991. Payne received a general discharge on April 17, 1998, and his case was closed that same month. However, he was granted leave to reopen his case on April 3, 2001, after the U.S. Internal Revenue Service notified him of its intent to levy on certain assets to collect the 1986 income tax. Payne then filed the instant adversary to determine dischargeability of the alleged tax debt. The USA responded by moving for summary judgment under § 523(a)(1)(B)(i) of the Bankruptcy Code, which excepts from discharge any tax for which the required return was not filed. For reasons discussed below, the motion for summary judgment is denied.

JURISDICTION

Jurisdiction over this matter lies pursuant to 28 U.S.C. § 1334(b) and this is a core proceeding under § 157(b)(2)(i). This matter is referred here under the standing referral of District Court Internal Operating Procedure 15(a). Venue is proper in this district under 28 U.S.C. § 1409(a).

DISCUSSION

Standards for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure, which is made applicable to bankruptcy by Fed.R.Bankr.P. 7056(c), provides that a motion for summary judgment may be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In deciding whether there is a triable dispute, the court must construe all reasonable inferences that can be drawn from the facts in favor of the nonmoving party. Bartman v. Allis-Chalmers Corp., 799 F.2d 311, 312 (7th Cir. 1986).

Undisputed Facts

Payne did not controvert the list of undisputed facts submitted by the USA in support of its motion for summary judgment. Therefore, pursuant to Local Rule 402 N(3)(b) the following facts are deemed admitted:

1. The IRS was properly notified of Payne's Chapter 7 bankruptcy case. The IRS never filed a claim against Payne's estate nor did it file an adversary to determine the dischargeability of any of the income taxes owed by Payne.

2. Payne was paid $155,604.77 in wages by RBH of Illinois, Inc. in 1986, from which $44,520 in federal income taxes and $3,003.00 in social security taxes was withheld.

3. The USA gave Payne credit for the $44,520 withheld from his wages on or about April 15, 1987.

4. Payne failed to file a tax return for 1986 on or before the required due date of April 15, 1987.

5. On or about November 6, 1989, the IRS filed a substitute return for Payne pursuant to 26 U.S.C. § 6020(b). That substitute return showed no income for 1986. The IRS then began to investigate to determine the proper tax liability owed by Payne.

6. On or about December 31, 1990, a delegate of the Secretary of Treasury made an assessment for unpaid income tax in the amount of $64,472.00, plus penalties and interest.

7. The IRS has no record that Payne ever filed a tax return for the 1986 tax year.

8. Payne says that he mailed several years of late returns in March of 1992, including the 1986 return. Payne's 402 N Statement. The IRS has acknowledged receiving the other returns, but says it never received the 1986 return. If Payne did file the 1986 return in March of 1992, that was more than two years prior to filing of his Bankruptcy Petition on December 31, 1997.

§ 523 Exceptions to Discharge

Section 523 of the Code which enumerates exceptions to discharge provides in relevant part:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt--
>
> (1) for a tax or a customs duty--
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a return, if required--
>
> (i) was not filed; or
>
> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or

(C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

11 U.S.C. § 523(a)(1)(a)(A)–(C).

Exceptions to discharge are narrowly construed in favor of providing the debtor with a fresh start. Goldberg Securities, Inc. v. Scalata, 979 F.2d 521, 524 (7th Cir. 1992) (citation omitted). However, Congress has evinced an intent to balance this policy with recognition of the need to encourage voluntary compliance with applicable tax law. *Collier on Bankruptcy*, ¶ 507.10[1][b] (15th ed. 2002). Thus, income tax debts have priority and are nondischargeable even if the taxing authority does not file a claim, unless the following criteria are met: (1) the debtor filed the required return and did not attempt to willfully avoid paying the tax (11 U.S.C. § 532(a)(1)(B)–(C)); (2) the taxes came due more than three-years prior to the debtor filing for bankruptcy, including any extensions (11 U.S.C. § 523(a)(1)(A)); (3) the taxes were not assessed within 240 days of filing the bankruptcy, including extensions (11 U.S.C. § 523(a)(1)(A)); and (4) the required return was filed more than two years before the debtor filed for bankruptcy (11 U.S.C. § 523(a)(1)(B)(ii)).

The USA's Argument against Discharge

[1] The USA raises a twofold argument in support of its claim that Payne is ineligible for discharge of his 1986 tax because he failed to file the required return. First, the Internal Revenue Service has no record that the return was ever received by it. Secondly, even if Payne mailed a 1040 Form to the IRS when he says he did, that form does not constitute a valid return for purposes of § 523 because it was mailed after the IRS had already assessed the tax. Each of these arguments will be taken in turn.

For Purpose of Considering the Motion for Summary Judgment, the IRS is Presumed to have Received Return

Payne has raised an unrebutted presumption for purpose of considering the motion for summary judgment that his 1986 tax return was received by the IRS along with his other returns for 1983–1991. His sworn affidavit states that he executed and mailed the 1986 return in 1992 along with his other returns. He attached a purported retained copy of the 1986 return. An unrebutted statement in an affidavit is sufficient to raise a presumption that Payne's return was delivered to the IRS. See Godfrey, 997 F.2d at 338. Particularly in light of the acknowledgment that other returns that were sent at the same time by Payne were received, the IRS's failure to locate the return in issue is insufficient to rebut for purposes of summary judgment a presumption that it was delivered. Nimz, 505 F.2d at 179 (failure of bankruptcy court clerk to locate proof of claims was insufficient to show claims were not received); Barnett v. Okeechobee Hospital, 283 F.3d 1232, 1241 (11th Cir. 2002) (same); Sorrentino v. United States of America, 199 F.Supp. 2d 1068, 1077 [89 AFTR 2d 2002-856] (D. Co. 2002) (same involving missing tax return). It is at least possible on the present record that the 1986 return was received by the IRS, which acknowledges receiving the other returns, and was subsequently misplaced. The USA has not offered any evidence to show that this did not happen except proof that its search has not turned up the return in issue.

As argued by the Government, mailing is not filing. United States v. Lombardo, 241 U.S. 73, 76 (1916). To file a required document with a governmental agency, it must be delivered to and received by the proper government official. Id. Congress has elaborated on this requirement with en-

actment of 26 U.S.C. § 7502[1] which allows a postmark to establish the filing date of a tax return which is mailed before the tax filing deadline.

Under Section 7502, a document is deemed delivered on the date it is postmarked if the document was: (1) properly placed in the U.S. mail prior to the filing deadline; and (2) delivered to the IRS after the deadline. 26 U.S.C. § 7502(a)(1)–(2). Documents sent via registered mail or certified mail constitutes prima facie evidence of delivery, provided the taxpayer has a postmarked receipt showing that the document was mailed before the filing deadline. 26 U.S.C. § 7502(c)(1)–(2). The Government argues that § 7502 abrogated the common law mailbox rule whereunder properly mailing of a document raises a rebuttable presumption that it was received. Matter of Nimz Transportation, 505 F.2d 177, 178 (7th Cir. 1974). Thus, it contends that Payne's inability to produce a registration showing that he mailed the return via certified or registered mail means that he cannot as a matter of law establish that the return was filed. See Reply Brief p. 3.

There is a split of authority on the issue of whether § 7502 abolished the mailbox rule applicable under earlier cited authority as to tax filings. See Carroll v. Commissioner, 71 F.3d 1228, 1232 [76 AFTR 2d 95-8115] (listing cases). The Eighth and Ninth Circuits have answered this question in the negative. See Anderson v. United States, 966 F.2d 487 [70 AFTR 2d 92-5010] (9th Cir. 1992); Estate of Wood v. Commissioner, 909 F.2d 1155 [66 AFTR 2d 90-5987] (8th Cir. 1990). According to those opinions, if Congress had intended to abrogate the mailbox rule it would have said so expressly. Estate of Wood, 909 F.2d at 1160. Wood concluded that there is nothing in § 7502 which indicates an intent to abolish the mailbox rule. Id. Hence, absent a clear manifestation of a contrary intent, § 7502 should be construed in harmony with prior existing law and judicial construction. Id. Therefore, it was reasoned that § 7502 created a ''safe harbor'' which does not exclude the presumption of delivery under the common law mailbox rule. Id. at 1161.

Conversely, the Second and Sixth Circuits have held that § 7502 is the exclusive means of establishing delivery or timeliness of tax documents mailed to the IRS. Miller v. United States, 784 F.2d 728 [57 AFTR 2d 86-928] (6th Cir. 1986); Deutsch v. Commissioner, 599 F.2d 44 [44 AFTR 2d 79-5063] (2nd Cir. 1979). However, neither opinion is persuasive. See Carroll, 71 F.3d at 1232 (expressing belief that it is time to revisit issue of whether § 7502 abolished mailbox rule). Both Miller and Deutsch held that a taxpayer must meet two conditions to qualify for the safe harbor under § 7502: (1) the return must be mailed within the prescribed period; and

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[1] Timely mailing treated as timely filing and paying

(a) General Rule.---

(1) Date of delivery.—If any return ... required to be made, ... on or before a prescribed date ... is, after such ... date, delivered by United States mail to the agency, ... or office with which such return, ... is required to be filed, ... the date of the United States postmark stamped on the cover in which such return ... is mailed shall be deemed to be the date of delivery ....

(2) Mailing requirements.---This subsection shall apply only if---

(A) the postmark date falls within the prescribed period or on or before the prescribed date---

(i) for the filing ... of the return ..., and ...

(B) the return ... was, within the time prescribed in subparagraph (A), deposited in the mail in the United States in an envelope or other appropriate wrapper, postage prepaid, properly addressed to the agency ... or office with which the return ... is required to be filed ....

...

(c) Registered and certified mailing.---

(1) Registered mail.---For purposes of this section, if any such return ... is sent by United States registered mail---

(A) such registration shall be prima facie evidence that the return ... was delivered to the agency ... or office to which addressed, and

(B) the date of registration shall be deemed the postmark date.

(2) Certified mail.---The Secretary is authorized to provide by regulations the extent to which the provisions of paragraph (1) of this subsection with respect to prima facie evidence of delivery and the postmark date shall apply to certified mail.

26 U.S.C. § 7502.

(2) the return must be received by the IRS. Miller and Deutsch stand for the proposition that § 7502 enumerates the only means through which the taxpayer can establish the presumption of delivery. This could lead to the absurd result that a taxpayer filing an untimely return, as here, would be barred from introducing any proof that the late return was mailed because the taxpayer could not satisfy the first element of § 7502 (filing of a timely return). The anomaly of reading the statute that way is illustrated by a taxpayer timely filing a return on the last day of the prescribed period by registered mail but the postmark was inadvertently set for the next day. The taxpayer could not offer a registered receipt with the correct date of mailing to establish the presumption that the return was received by the IRS. See Miller, 784 F.2d at 731 Fn. 4 (acknowledging the harsh and illogical result of strict application of § 7502). Clearly, Congress did not intend such a result when it enacted § 7502 to alleviate the inequities caused by disparate postal systems. Miller, 784 F.2d at 730 (§ 7502 is remedial statute).

Finally, nothing in § 7502 evinces a statutory holding that the IRS will never lose a filed tax return. Yet, that is the presumed result if one applies the reasoning of Miller and Deutsch. See BMC Bankcorp, Inc v. U.S. (unpublished opinion), 59 F.3d 170 [76 AFTR 2d 95-5137] (6th Cir. 1995) (panel constrained by Miller to reject claim that return was filed even though IRS acknowledged receiving two of three returns mailed by company).

There are no cases directly on point in this Circuit. See L & H Company, Inc. v. U.S., 761 F.Supp. 572, 574 [67 AFTR 2d 91-995] (N.D. Ill. 1991) (expressing support for Wood in dicta). However, an opinion of this Circuit has applied the mailbox rule to overturn a decision granting summary judgment for the IRS. Godfrey v. U.S., 997 F.2d 335, 338–40 [72 AFTR 2d 93-5320] (7th Cir. 1993). In Godfrey, a couple sought $6,580.50 in interest payments from the IRS for delaying payment of a refund check. Id. at 336. The Government claimed that the plaintiff's were not entitled to any interest because it mailed a refund check to the couple within the time allowed by statute. Id. However, the taxpayers claimed they never received the check. Eventually, the Government canceled the original check and issued a replacement check. Id. On appeal, the opinion stated that the Government was entitled to the presumption under the mailbox rule, but because the IRS failed to offer any evidence that the original check was ever mailed, it could not avail itself of the presumption. Id. at 338–40. Another Seventh Circuit opinion held that the IRS was not entitled to the presumption where it did not produce the return receipt for a deficiency notice which was alleged to have been sent by certified mail. See McPartlin v. Commissioner, 653 F.2d 1185, 1191 [48 AFTR 2d 81-5897] (7th Cir. 1981).

As decided in Wood, supra, there is nothing in § 7502 which shows that Congress intended to abolish the general mailbox rule. Further, it would be an anomaly to allow the IRS to invoke the mailbox rule, but to refuse application of the same to taxpayers. This is particularly true in the bankruptcy context where the intent of Congress to discharge taxes where a return was filed is clear.

Finally, the IRS's argument under § 7502(c) is unfounded because the express language of the statute states that it only applies to documents that are filed before the required deadline and provides a ''safe harbor'' to allow debtors to file timely and avoid penalties for late filing. Here, Payne alleges that he filed his 1986 return in March of 1992, well after the April 15, 1987, deadline for filing his income tax return. Thus, the safe harbor provision of § 7502 is unavailable to Payne to avoid penalties. But the IRS is arguing for an un-rebuttable presumption that Payne never filed his 1986 return and cannot get the tax debt discharged because he did not send it in by certified or registered mail. That po-sition is not supported by the Bankruptcy Code or § 7502(c).

A motion for summary judgment must be denied where a genuine issue of fact is unresolved. Fed.R.Bankr.P. 7056(c). Thus,

construing the facts here in the light most favorable to the non-movant, a triable dispute is found over whether Payne filed his 1986 return in March of 1992.

Payne's Return Satisfies § 523(a)(1)(B)

Alternatively, the Government argues that the 1040 Form allegedly mailed by Payne could not qualify as a return even if received, and therefore any filing of it in March of 1992 should be treated as a nonevent for purposes of § 523(a)(1)(B). It relies on In re Hindenlang, 164 F.3d 1029 [83 AFTR 2d 99-509] (6th Cir. 1999), where the opinion held: ''We conclude that if a document purporting to be a tax return serves no purpose at all under the Internal Revenue Code, such a document cannot as a matter of law, qualify as an honest and reasonable attempt to satisfy the requirements of tax law.'' Id. At 1035. The requirement that a purported return must represent an honest and reasonable attempt to comply with the tax code is drawn from cases which apply a four-part test to determine whether a document qualifies as a return: (1) the document must purport to be a return, (2) it must be executed under penalty of perjury, (3) it must contain sufficient data to allow computation of the tax, and (4) it must represent an honest and reasonable attempt to comply with tax law. This is the so-called ''Beard test'' which is derived from two earlier Supreme Court cases: Commissioner v. Lane-Wells Co., 321 U.S. 219, 223 [31 AFTR 970] (1944); and Zellerbach Paper Co. v. Helvering, 293 U.S. 172, 180 [14 AFTR 688] (1934). See Beard v. Commissioner of Internet Revenue, 82 T.C. 766, 775, 778 (1984).

The Sixth Circuit opinion in Hindenlang reasoned that a document purporting to be a return which is filed after an assessment has been made by the IRS has no tax purpose. Hindenlang, 164 F.3d at 1034–35. Hence, it reasoned that such documents are a nullity and therefore do not qualify as a tax return under § 523(a)(1)(B). Id. Applying that reasoning, the Government argues that its assessment on December 31, 1990, made it legally impossible for Payne to file a valid return in March of 1992.

Other authority has rejected the reasoning in Hindenlang which one BAP Panel says could lead to the absurd result that the IRS would be given a veto over the dischargeability of tax debts in bankruptcy. See In re Savage, 218 B.R. 126, 132 [81 AFTR 2d 98-814] (10thCir. BAP 1998) (noting that a debtor for whom the IRS prepared a tax return for purposes of assessment could never obtain a discharge of the tax debt). Another BAP Panel has stated that the view espoused in Hindenlang is unsupported by the plain language of § 523(a)(1)(B) and is contrary to the policy of narrowly interpreting exceptions to discharge. See In re Nunez, 232 B.R. 778, 783 [83 AFTR 2d 99-591] (9th Cir. BAP 1999) (good faith-prong of ''Beard test'' should be narrowly construed to favor discharge). The Seventh Circuit has not spoken to this issue. However, Judge Squires of this Bankruptcy Court has adopted the reasoning of Nunez and Savage and refused to apply non-bankruptcy authorities to define what constitutes a meaningful return under § 523(a)(1)(B)(i). See In re Crawley, 244 B.R. 121 [85 AFTR 2d 2000-1538] (Bankr. N.D. Ill. 2000).

Analysis in the latter opinions is more persuasive than that in Hindenlang. Obviously, the return filed by Payne met the first three prongs of the Beard test. Payne says that he executed the 1040 Form which he forwarded with intent that it serve as his 1986 tax form, and he now demonstrates prima facie a retained copy showing that he provided sufficient data to compute the tax. The only issue is whether he satisfied the good-faith requirement of the fourth prong of Beard. However, the inquiry into Payne's good-faith should focus on his intent, not on the timing of the return's utility to the IRS. The fact that the return was mailed after the IRS had made an assessment in no way reflects on whether Payne had a good-faith intent to provide accurate information on his untimely filed return. Given that the Bankruptcy Code already contains a good-faith test in § 523(a)(1)(c), it is inappropriate to impose a different good-faith requirement under non-bankruptcy law through the

fourth prong of the Beard test. As stated in Nunez, the good-faith test under Beard should be narrowly construed. Nunez, 232 B.R. at 783.

Analysis of ''good faith'' certainly must cover many issues, such as: whether a purported return is accurate and supported by documents; whether the IRS was hot on the trail of a debtor with collection efforts when a late return is filed[2] ; and whether the explanation for late filing is adequate. Those issues remain to be tried.

Thus, on the current record it appears that Payne must be given the opportunity to show that his belated 1040 Form if filed could have qualified as a good faith tax return.

CONCLUSION

For reasons discussed above, the United States has failed to show that there are no material issues for trial, and its motion for summary judgment will be denied by separate order.

ENTER:

Jack B. Schmetterer

United States Bankruptcy Judge

Entered this 3rd day of October 2002.

¶2002-5471

Wendel Robert WARDELL, JR., PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Tenth Circuit, (CA10) No. 01-9004, Oct. 9, 2002. Tax Court affirmed. Decision against Taxpayer.

1. Review of Tax Court decision—abuse of discretion—dismissal for failure to prosecute. Tax Court properly denied taxpayer's continuance motion and dismissed his petition for failure to prosecute: taxpayer didn't cooperate with IRS or appear at trial despite prior warnings that failure to do such could result in sanctions, including dismissal; even if he had appeared at trial, he wouldn't have been able to establish case; and taxpayer didn't show that he was unable to communicate with IRS before trial or address Court's rulings on appeal. *Reference:* United States Tax Reporter ¶74,825.02(67); 74,825.04(7). IRC §7482.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,

Before HENRY, ANDERSON, and HARTZ, Circuit Judges.

ORDER AND JUDGMENT[1]

Stephen H. Anderson Circuit Judge

(Tax Court No. 13738-99)

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[1] Petitioner Wendel R. Wardell appeals from two rulings by the Tax Court: denial of his Motion for a Continuance and grant of respondent's Motion to Dismiss. We have jurisdiction over this appeal by virtue of 26 U.S.C. § 7482. We review the Tax Court's rulings on these motions only for an abuse of discretion. See Colon v. Comm'r, 252 F.3d 662, 662 [87 AFTR 2d 2001-2470] (2d Cir. 2001) (failure to prosecute); Manzoli v. Comm'r, 904 F.2d 101, 103 [66 AFTR 2d 90-5030] (1st Cir. 1990) (continuance). Petitioner also seeks leave to proceed on appeal without prepayment of costs or fees, which is granted pursuant to 28 U.S.C. § 1915 (b)(1).

After careful consideration of the record on appeal and the arguments in the parties' briefs, we conclude that the Tax Court did not abuse its discretion in either of its rulings. The court denied the Motion for a Continuance and granted respondent's Motion to Dismiss, which was based on petitioner's alleged failure to prosecute, after

[2] See e.g. *In re Hatton*, 220 F.3d 1057, 1061 [86 AFTR 2d 2000-5572] (9th Cir. 2000).

[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

petitioner failed to communicate with the respondent before trial and failed to appear at trial. The Tax Court's scheduling notice and standing pre-trial order had previously warned petitioner that failure to cooperate with respondent or to appear at trial could result in sanctions, including dismissal. The court concluded that, even had petitioner appeared at trial, he would have been unable to establish a case. On appeal, petitioner has not demonstrated that he was unable to communicate with respondent at all times before the scheduled trial date, and has not addressed the basis of the Tax Court's rulings. The Tax Court was well within its discretion to both deny the Motion for a Continuance and dismiss petitioner's case.

The judgment of the United States Tax Court is AFFIRMED.

Entered for the Court

Stephen H. Anderson

Circuit Judge

¶2002-5472

Ahmed ABDELSAMED, PLAINTIFF v. UNITED STATES OF AMERICA, State of Colorado, El Paso County, Gregory John Hoch, Steven Taffet, Christine Jobin, and Jean Dubofsky, DEFENDANTS. U.S. District Court, Dist. of Colorado, (DC CO) Civil Action No. 01-N-1774, Sept. 17, 2002. District Court, (2002, DC CO) 90 AFTR 2d 2002-5963, adopted. Decision for Govt.

1. Actions against U.S.—sovereign immunity—conspiracy; damages; constitutional violations—refunds—motion for relief from judgment—limitations periods—equitable tolling. Magistrate judge's recommendation to dismiss taxpayer's action against U.S. and various defendants and for pre-filing sanctions order was adopted, and taxpayer's request to remove magistrate from case was denied. *Reference:* United States Tax Reporter ¶74,336.504(61); 74,336.506(25); 74,335.01(7); 74,225.01(20); 74,025.01(133); 74,336.504(40). IRC §7402; 7422; 7433.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

ORDER ACCEPTING MAGISTRATE JUDGE'S RECOMMENDATION

Judge Edward W. Nottingham

[1] This matter is before the court on the a recommendation of the assigned United States magistrate judge' filed July 23, 2002. After thoroughly analyzing the numerous pleadings and motions filed in this case, the magistrate judge has recommended that all defendants' motions to dismiss be granted and that plaintiff's dispositive motions be denied. In light of plaintiff's history as a litigant, the magis-trate judge has recommended that restric-tions be placed on plaintiff's ability to file future lawsuits.

Plaintiff has objected to the recommendation. I must therefore make a ''de novo determination of those portions of the report ... to which objection is made.'' *See* 28 U.S.C.A. § 636(b)(1) (West 2001); Fed. R. Civ. P. 72(b). ''When conducting de novo review, the district court makes its own determinations of disputed issues and does not decide whether the magistrate's proposed findings are clearly erroneous.'' *Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989). I have conducted the requisite *de novo* review of the issues, the record, and the recommendation. I have also reviewed plaintiff's objections. Based on this review, I have concluded that the recommendation is a correct application of the facts and the law. I have also concluded that plaintiff has stated no ground for removal of the assigned magistrate judge from the case. Finally, for the reasons stated by the magistrate judge, I agree that filing restrictions are appropriate. Accordingly, it is

ORDERED as follows:

1. The recommendation (#161) is ACCEPTED. The findings and conclusions set

forth therein are hereby adopted as the findings and conclusions of this court.

2. Defendants' motions to dismiss (## 95, 97, 101, 102, 104, 143, 146) are all GRANTED. Plaintiff's claims are hereby dismissed without prejudice for failure to comply with Fed. R. Civ. P. 8(a).

3. Plaintiff's motions for summary judgment or dismissal (## 73, 81, 82, 153) are all DENIED.

4. Plaintiff's motion to remove the magistrate judge (#167) is DENIED.

5. Plaintiff Abdelsamed is hereby ENJOINED from proceeding as a proponent of any claim in the United States District Court for the District of Colorado without the representation of an attorney licensed to practice in the State of Colorado and admitted to practice in this Court, unless Mr. Abdelsamed first has obtained leave of this Court to proceed pro se.

6. The Clerk of the Court shall not accept any pleadings submitted by Mr. Abdelsamed initiating a civil action unless Mr. Abdelsamed is represented by an attorney licensed to practice in the State of Colorado and admitted to practice in this Court, or unless Mr. Abdelsamed first has obtained leave of this Court to file the action pro se.

7. Any documents Mr. Abdelsamed wishes to submit for filing in this district shall be delivered to Room 145 of the Office of the Clerk, United States District Court, United States Courthouse, 1929 Stout Street, Denver, Colorado 80294. As a requisite to filing a *pro se* complaint or other paper, Mr. Abdelsamed must tender three documents:

(1) A petition titled, ''Petition Pursuant to Court Order Seeking Leave to File a *Pro Se* Action.'' Mr. Abdelsamed shall affix a copy of this order to the petition;

(2) An affidavit in proper legal form as directed below; and

(3) A copy of the complaint or other paper sought to be filed in this district or a copy of the claims sought to be filed in this district.

8. The Petition Pursuant to Court Order Seeking Leave to File a *Pro Se* Action must contain the following information:

(1) a statement advising the court whether any defendant to the lawsuit was a party to, or was any way involved in, any prior lawsuit involving Mr. Abdelsamed, and if so in what capacity;

(2) a list of all lawsuits in the United States District Court for the District of Colorado, the United States Court of Appeals for the Tenth Circuit, the United States Supreme Court, and state courts in which Mr. Abdelsamed was or is a party; the name and citation of each case, if applicable, including jurisdiction; Mr. Abdelsamed's involvement in each lawsuit; the status of each lawsuit; and the disposition;

(3) a list of all federal or state cases in which a judgment was rendered against Mr. Abdelsamed, if any; the name and citation of each case; the amount of judgment rendered against him, if any; the amount of the judgment that remains outstanding; and the reasons why the judgment remains outstanding;

(4) a list of all federal or state cases in which a judgment was rendered in favor of Mr. Abdelsamed, if any; the name and citation of each case; the amount of judgment rendered in favor of him, if any; the amount of the judgment that remains outstanding; and the reasons why the judgment remains outstanding; and

(5) a listing specifically identifying any procedural or monetary sanctions, assessment of attorneys' fees, contempt orders or jail sentences arising out of a civil prosecution, imposed against him by any court, including all appellate courts, if any; the name and citation of each case; a brief statement explaining the sanctions, attorneys' fees, contempt order, or jail sentence imposed, if any; the type or amount of sanctions; and the outstanding amount of monetary sanctions or attorneys' fees, if any; the status of the sanctions or contempt orders, if any; and their disposition.

9. Failure to satisfy monetary sanctions or the assessment of attorney fees imposed against Mr. Abdelsamed by a court may be

a consideration precluding approval of the petition seeking leave to file a *pro se* action.

10. The affidavit shall be in proper legal form, with appropriate jurat and notarization, and is to contain the following recitals:

(1) that the claim or claims Mr. Abdelsamed wishes to present never before have been raised by him and disposed of by any federal or state court;

(2) that to the best of Mr. Abdelsamed's knowledge the claim or claims are not frivolous or taken in bad faith; that the claim or claims are well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; that the lawsuit is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *See* Fed. R. Civ. P. 11; and

(3) that the claim or claims are not meant to harass any individual or entity.

11. The Court notes that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney fees reasonably incurred because of such conduct." *See* 28 U.S.C. § 1927 (1994).

12. The complaint or other paper sought to be filed in this district or claims sought to be filed in this district must comply with this order, Fed. R. Civ. P. 8, all other provisions contained in the Federal Rules of Civil Procedure, and the Local Rules of Practice for the United States District Court for the District of Colorado.

13. Whenever Mr. Abdelsamed submits a petition for leave to file a *pro se* action pursuant to this court order, the Clerk of the Court, or designated deputies, will accept the documents, mark them received, and immediately forward them to a Unitwed States District Judge. The District Judge shall order approval or disapproval of the petition. The District Judge shall consider the following:

(1) whether Mr. Abdelsamed has complied with this order in all particulars;

(2) whether Mr. Abdelsamed's complaint or other paper complies with the Federal Rules of Civil Procedure and the Local Rules of Practice for the United States District Court for the District of Colorado;

(3) whether the complaint or other paper is frivolous, abusive, harassing or malicious;

(4) whether the claims raised in Mr. Abdelsamed's complaint or other paper have been raised by him and disposed of by any federal or state court;

(5) whether there has been full compliance with Fed. R. Civ. P. 11, and all complaints or other papers and filings are not violative of 28 U.S.C. § 1927;

(6) whether the complaint or other paper alleges claims against individuals or entities that may have immunity from suit; and

(7) such other reasonable requirements established by the court or the District Judge.

14. In the discretion of the District Judge, the documents may be presented directly to a Magistrate Judge who shall pass on the petition, following the procedures set forth herein. The Magistrate Judge shall submit proposed findings and a recommendation as to disposition of the petition to the District Judge or his or her designees. Copies of the proposed findings and recommendations shall be mailed to the petitioner and all interested parties who shall have ten (10) days after service thereof to serve and file written, specific objections. If no such objections are timely filed, the Magistrate Judge's proposed findings and recommendations may be accepted by the District Judge or his or her designees and appropriate orders entered without further notice. *See* Fed. R. Civ. P. 72(a). No provision is made for oral presentations in support of the petition. *Tripati v. Beaman*, 878 F.2d 351, 354 (10th Cir. 1989).

15. Failure to comply with the procedures and principles mandated by this order shall be sufficient grounds for denying the petition for leave to file.

16. The District Judge may order disapproval of the petition upon false recitals in the documents. Upon false recitals in the documents, Mr. Abdelsamed may be considered in violation of this order, and he may be subject to other orders of the court, including appropriate sanctions. The provisions contained in Fed. R. Civ. P. 11 and 28 U.S.C. § 1927 are incorporated into this order.

17. If the Court enters an order granting the petition, the Clerk of the Court shall cause the complaint or other paper and materials to be filed *nunc pro tunc* to the date the documents were tendered. The assignment of the case shall be pursuant to the Local Rules of Practice for the United States District Court for the District of Colorado.

18. All filings in the matter shall be in strict conformity with the Federal Rules of Civil Procedure and the Local Rules of Practice for the United States District Court for the District of Colorado. This order shall not interfere in any way with pending actions, orders or judgments of any federal court involving Mr. Abdelsamed.

DATED this 17 day of September, 2002.

BY THE COURT:

EDWARD W. NOTTINGHAM

United States District Judge

¶2002-5473

UNITED STATES OF AMERICA, PLAINTIFF v. Kenneth T. ADAMS, ET AL., DEFENDANTS. U.S. District Court, Dist. of Utah, (DC UT) Case No. 2:00-CV-953K, July 18, 2002. District Court, (2002, DC UT) 90 AFTR 2d 2002-5098, amended. Years 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991. Decision for Govt.

1. Actions to reduce assessments to judgment—summary judgment—foreclosure. Judgment in govt.'s collection action was amended to grant govt.'s request to foreclose liens on 10 real properties identified in original complaint. *Reference:* United States Tax Reporter ¶74,035.01(25); 74,035.03(100). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION,

ORDER CORRECTING JUDGMENT

Judge Dale A. Kimball

[1] Pursuant to Rule 60(a) of the Federal Rules of Civil Procedure, the court corrects the order and judgment entered by this court on June 10, 2002. The order and judgment should have granted and are hereby corrected to grant the United States' requests to foreclose the statutory liens that arose as a result of the delinquent tax assessments against the ten parcels of real property in which Defendant Adams either owns or possesses an interest that were identified in the original Complaint.

DATED this 18th day of July, 2002.

BY THE COURT:

DALE A. KIMBALL

United States District Judge

AMENDED JUDGMENT IN A CIVIL CASE

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment be entered in favor of the plaintiff and against defendant Kenneth T. Adams for unpaid federal taxes, penalties, and interest for the tax periods ending December 31, 1982 through December 31, 1991, in the amount of $2,236,093.28, plus additional interest accruing from January 14, 2002, pursuant to 26 U.S.C. §§ 6601, 6621, 6622 and 28 U.S.C. § 1961(c); plaintiff to foreclose the statutory liens

against ten parcels of real property identified in the original Complaint.

July 22, 2002

Date

Markus B. Zimmer

Clerk

/s/

(By) Deputy Clerk

¶2002-5474

Robert L. ALLUM, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Montana, (DC MT) No. CV-02-12-BU-SEH, Aug. 28, 2002. Reconsideration of (2002, DC MT) 90 AFTR 2d 2002-5606, denied. Decision against Taxpayer.

1. Actions against U.S.—Declaratory Judgment Act—constitutional claims—jurisdiction—reconsideration. Taxpayer's request to reconsider or amend earlier judgment was denied without discussion. *Reference:* United States Tax Reporter ¶74,336.504(25); 74,336.504(10).

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA GREAT FALLS DIVISION,

ORDER

SAM E. HADDON

[1] Plaintiff's Motion to Reconsider, Alter, and Amend the Order Filed and Entered July 15, 2002,[1] is wDENIED.

DATED this 28th day of August, 2002.

SAM E. HADDON

United States District Judge

¶2002-5475

In Re: William C. BERETTA, Debtor. U.S. Bankruptcy Court, Dist. of Nevada, (DC NV) Bktcy. No. BK-N-02-50292-GWZ, Sept. 5, 2002. Decision for Govt.

1. Tax claims in bankruptcy—objection to proof of claim. Chap. 13 debtor's objection to IRS's proof of claim was denied, and claim was allowed as filed: record showed govt. had valid federal tax lien in amount listed on proof of claim against all of taxpayer's property and property rights. *Reference:* United States Tax Reporter ¶68,726.51(10).

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JOHN B. SNYDER, III Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 683 Ben Franklin Station Washington, D.C. 20044-0683 Telephone: (202) 307-6548

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEVADA,

ORDER DENYING DEBTOR'S OBJECTION TO PROOF OF CLAIM

GREGG W. ZIVE United States Bankruptcy Judge

CHAPTER 13

DATE: N/A

TIME: N/A

[1] This matter came before the Court on the debtor's objection to the proof of claim of the Internal Revenue Service, and after an evidentiary hearing on July 24, 2002, the Court finds that:

1. A valid federal tax lien, in the amount listed on the proof of claim of the Internal Revenue Service filed in this matter, exists in favor of the United States upon all the debtor's property and rights to property.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

1. The debtor's objection to the Internal Revenue Service's proof of claim is denied.

[1] Docket #18

2. The Internal Revenue Service's Proof of Claim is allowed as filed.

DATED this ___ day of SEP 05 2002, 200__.

GREGG W. ZIVE

United States Bankruptcy Judge

As to form: Approved/Disapproved

Cliff J. Young

¶2002-5476

Bruce D. BLANCHARD, Cathy L. BLANCHARD, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANTS. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-1083-KJD(RJJ), Aug. 1, 2002. Year 1998. Decision for Govt.

1. Collection due process (CDP)—review of administrative determination—frivolous return penalties—dismissal; summary judgment. Govt. was granted motion to dismiss or for summary judgment in action challenging IRS's determination to proceed with collection of frivolous return penalty against taxpayers who filed ''zero'' return: IRS met IRC §6330's procedural requirements where taxpayers received timely levy notice and CDP hearing; raised only frivolous arguments at hearing but no statutorily-recognized defenses or collection alternatives; and Appeals officer stated in final determination that all required statutory elements were considered. Also, delegation of authority argument was meritless; Form 4340 constituted proof that assessments were made; IRC §6702(a) authorized assessment of frivolous return penalty without any implementing regs; and district court lacked jurisdiction to consider taxpayers' income tax deficiencies. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(2); 63,305.01(10). IRC §6330; 6702.

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA,

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That judgement is entered for Defendants and against Plaintiff.

August 1, 2002

Date

LANCE S. WILSON

Clerk

/s/

(By) Deputy Clerk,

ORDER

Kent J. Dawson United States District Judge

This matter comes before the Court on Defendant's Motion To Dismiss Or In The Alternative For Summary Judgment (#5). Plaintiffs filed a response in opposition (# 15).

I. Factual and Procedural History

In their complaint, Plaintiffs allege that the IRS improperly determined that collection actions against them should not be restricted. Plaintiffs now seek to set aside the IRS's determination. The collection activity at issue stems from a frivolous return penalty the IRS assessed against Plaintiffs for a return they filed for the 1998 tax year. In April 1999, Plaintiffs jointly filed Form 1040, U.S. Individual Income Tax Return for the 1998 tax year. This return had zeroes on all lines which reflected amounts of income earned or taxes due. Plaintiffs also requested a refund of all taxes either withheld or paid for that tax year. Plaintiffs attached two 1998 Forms W-2 which showed Plaintiffs had earned $47,020.73 in wages, tips or other compensation. Finally, attached to the return was a two page document which set forth arguments as to why Plaintiffs did not believe that they owed federal income taxes for

1998. The IRS assessed a $500 civil penalty against Plaintiffs under 26 U.S.C. § 6702 for filing the above described tax return. Section 6702 assesses a civil penalty of $500 if an individual ''files what purports to be a return'' but which contains ''information that on its face indicates that the self-assessment is substantially incorrect'' and is due to ''a position which is frivolous.'' Plaintiffs' self assessment of their 1998 income tax liability was substantially incorrect in that they entered zeros for all income and tax information. According to the attached statement, Plaintiffs' self-assessment was based on their position that there is no statutory in-come tax liability that applies to them and that their wages do not constitute income. Courts have found this position to be frivolous and patently without merit. See Sisemore v. United States, 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir 1986); Olson v. United States, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985). Because Plaintiffs' self-assessment was on its face substantially incorrect and was based on a frivolous position, there is no doubt as to the validity of the penalty.

On August 7, 2000, the IRS sent Plaintiffs a ''Final Notice-Notice of Intent to Levy and Notice of Your Rights to a Hearing.'' This letter notified Plaintiffs of their right to appeal the IRS's levy within 30 days by requesting a Collection Due Process Hearing (''CDP Hearing''). Plaintiffs filed Form 12153 ''Request for a Collection Due Process Hearing'' which the IRS received on August 21, 2000. Plaintiff's CDP Hearing was held on June 11, 2001 in Las Vegas, Nevada before Appeals Officers Gerald Bowcut and Wiley Davis. Mr. Blanchard attended the hearing alone representing both himself and his wife. On August 20, 2001, the IRS Appeals Office sent Mr. Blanchard, by certified mail, a ''Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330.'' Mrs. Blanchard was sent a separate ''Notice of Determination'' on October 31, 2001. These letters informed Plaintiffs that the proposed collection action should be allowed to proceed unrestricted. The letters also informed Plaintiffs of their right to dispute the determination by filing a complaint in Federal District Court within 30 days. Plaintiffs jointly filed a timely complaint with this Court.[1] Defendant has now filed a motion to dismiss, or in the alternative, for summary judgment.

II. Standard of Review

A dismissal for failure to state a claim pursuant to Rule 12(b)(6) is a ruling on a question of law. See Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994). In reviewing a Rule 12(b)(6) motion, the Court ''must construe the complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true.'' Swarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000). Moreover, because Plaintiff in this action is proceeding pro se, the Court must liberally construe all arguments set forth in his complaint. See Boag v. MacDougall, 454 U.S. 364, 365 (1982). Review is limited to the contents of the complaint. See Sprewell v. Golden State Warriors, 231 F.3d 520, 527 (9th Cir. 2000). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45–46 (1957); Sprewell, 231 F.3d at 528. If matters outside the pleadings are considered, the court should treat the motion as one for summary judgment. See Fed. R. Civ. P. 12 (c).

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323. The burden then shifts to the non-

[1] On November 30, 2001, Plaintiffs filed an amendment to their original complaint. This Court cannot consider the ''amendment'' as it does not conform with local rules. See L.R. 15-1(a).

moving party to set forth specific facts demonstrating a genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Fed. R. Civ. P. 56(e). The evidence, as well as all justifiable inferences drawn from it, must be viewed in the light most favorable to the nonmoving party. See Matsushita, 475 U.S. at 587. Summary judgment shall be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." See Celotex, 477 U.S. at 322.

III. Analysis

[1] From what can be gleaned from it, Plaintiffs' complaint contains a barrage of meritless arguments which they insist this Court must address. The only genuine issue before this Court is whether the IRS Appeals Office met all requirements of applicable laws and administrative procedures when making its determination that the collection action against Plaintiffs should continue unrestricted. This issue will be addressed first, followed by a discussion of Plaintiffs' purely meritless arguments.

A. Collection Procedure

Procedures for administrative collection actions are found in 26 U.S.C. § 6330 which requires that: (1) the IRS give 30 days' written notice of the taxpayer's right to a CDP Hearing before making a levy; (2) a hearing be conducted by an officer or employee who has no prior involvement with the subject tax liability; (3) the Appeals Office obtain verification from the IRS that the requirements of any applicable law or administrative procedure have been met; (4) the taxpayer may raise any relevant issue relating to the unpaid tax or the proposed levy at the time of the CDP Hearing, including appropriate spousal defenses, challenges to the collection actions and offer of collection alternatives; (5) the taxpayer may challenge the existence of the underlying tax liability under some circumstances; and (6) the final determination by the Appeals Officer shall take into consideration (a) the verification that applicable law and administrative procedures have been met, (b) the issues raised by the taxpayer, and (c) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

A review of Plaintiffs' complaint illustrates that all of the above requirements have been met: (1) Plaintiffs received timely notice of levy and requested a CDP hearing; (2) Mr. Blanchard attended Plaintiffs' CDP Hearing on June 11, 2001 with Appeals Officers Gerald Bowcut and Wiley Davis, appeals officers who had no prior involvement with the subject tax liability; (3) the Appeals Office obtained Form 4340 from the IRS which serves as verification that the requirements of any applicable laws or administrative procedures were met; (4) Plaintiffs raised no relevant issues or appropriate defenses pertaining to the proposed collection action and offered not collection alternatives; (5) at the hearing, Plaintiffs challenged the liability for the penalty and whether the return they filed was frivolous, arguments determined to be frivolous by the appeals officer and (6) in the final determination, the appeals officer stated that they took into consideration all required statutory elements.

B. Plaintiffs' Arguments

1. Inadequacy of Notice

Plaintiffs repeatedly argue that letters and notices the IRS sent them are invalid because there is no evidence of any delegated authority from the Secretary of Treasury to the various IRS employees. Relevant statutes and regulations demonstrate, however, that the Secretary does have the power to collect taxes, and that such power can be delegated to local IRS agents. 26 U.S.C. § 6301 provides that "[t]he Secretary shall collect the taxes imposed by the internal revenue laws." The actual task of collecting the taxes, however, has been delegated to local IRS directors. See 26 C.F.R. § 301.6301-1 ("The taxes imposed by the internal revenue laws shall be col-

lected by district directors of internal revenue.''). The delegation of authority down the chain of command, from the Secretary, to the Commissioner of Internal Revenue, to local IRS employees constitutes a valid delegation by the Secretary to the Commissioner, and a re-delegation by the Commissioner to the delegated officers and employees. See 26 U.S.C. § 7701(a)(11)(A), (12)(A)(i); 26 C.F.R. § 301.7701–9; Hughes v. United States, 953 F.2d 531, 536 [69 AFTR 2d 92-472] (9th Cir. 1991).

2. Adequacy of Supporting Documentation

Plaintiffs contend the IRS has never produced a document supporting imposition of the penalties at issue. They do not believe that a computer transcript is adequate to verify an assessment. At their CDP Hearing, the Appeals Officer provided Mr. Blanchard with the Form 4340, ''Certificate of Assessments and Payments'' for the penalty assessment. The Ninth Circuit has held that a Form 4340 is sufficient evidence to support a grant of summary judgment on a claim that the IRS failed to issue notice of assessment and demand for payment. See Huff v. United States, 10 F.3d 1440, 1446–1447 [72 AFTR 2d 93-6682] (9th Cir. 1993); Hughes, 953 F.2d at 535. Official certificates, such as Form 4340, can constitute proof of the fact that the assessments actually were made. See Hughes, 953 F.2d at 535.

3. Regulation Requiring Plaintiffs to Pay Penalty

Plaintiffs contend that no Treasury Department regulation requires that they pay the penalties at issue and Defendant has not produced any such regulation. 26 U.S.C. § 6702(a), however, provides the statutory authority for assessing the penalty and does not require any implementing regulations. See Hoffman v. United States, No. C02-5023RJB, 2002 WL 1299991, at 5 [89 AFTR 2d 2002-2647] (W.D. Wash. May 3, 2002).

4. Underlying Liability for Income Tax

Plaintiffs contend that no statute establishes an underlying liability for the income tax to which the penalties relate, and the IRS has not identified any such statute. Plaintiffs' liability for tax deficiencies (what they owed in taxes for the year 1998) is not at issue in this case, although they consistently tried to make it so at the CDP Hearing and in the instant complaint. Plaintiffs' remedy with regard to the liability for tax deficiencies does not lie in this Court. This Court does not have jurisdiction to consider Plaintiffs' income tax deficiencies. See 26 U.S.C. § 6213(a); Moore v. Commissioner, 114 T.C. 171, 175 (2000).

III. Conclusion.

Plaintiffs' 1998 Form 1040 was clearly frivolous and the civil penalty was validly assessed. More importantly, for purposes of this action, the Defendant properly followed all requirements of applicable laws and administrative procedures when assessing the civil penalty and then determining the collection action should continue unrestricted. Moreover, the arguments that the Court could glean from Plaintiffs' disjunctive complaint and opposition to Defendant's motion are purely meritless. Finally, because Plaintiffs' complaint lacks any merit, had the Defendant moved for Rule 11 sanctions this Court would have freely granted such motion.

Accordingly, IT IS HEREBY ORDERED that Defendant's Motion To Dismiss Or In The Alternative For Summary Judgment (#5) is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' complaint is DISMISSED.

Dated this 31st day of July, 2002.

Kent J. Dawson

United States District Judge

¶2002-5477

BRANDAR MANAGEMENT TRUST, ETC., ET AL., PLAINTIFF(S) v. UNITED STATES OF AMERICA, ET AL., DEFENDANT(S). U.S. District Court, Dist. of Hawaii, (DC HI) Case: CIVIL NO. 02-00113 DAE-BMK; CIVIL NO. 02-00114 DAE-BMK, July 8, 2002. Judgment entered in accord with (2002, DC HI) 90 AFTR 2d 2002-5613. Earlier

proceeding at (2002, DC HI) 89 AFTR 2d 2002-1449, 2002-1 USTC ¶50308. Decision for Govt.

1. Actions against U.S.—abatement of taxes—foreclosure—res judicata—sovereign immunity. District court entered judgment dismissing taxpayers' complaints in accord with its separate opinion. *Reference:* United States Tax Reporter ¶74,337.501(40); 74,336.506(25).

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII,

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[✓] Decision by Court. This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

[1] IT IS ORDERED AND ADJUDGED that the Complaints are DISMISSED, pursuant to ''Order Granting Defendants' Motion to Dismiss'' filed on July 2, 2002.

July 8, 2002

Date

WALTER A.Y.H. CHINN

Clerk

Barbara Yamada

(By) Deputy Clerk

¶2002-5478

Robert A. BROWN, Elena BROWN, PLAINTIFF(S) v. UNITED STATES OF AMERICA, DEFENDANT(S). U.S. District Court, Dist. of Nevada, (DC NV) CV-S-02-0175-RLH (RJJ), Aug. 15, 2002. Year 1998. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties—summary judgment—damages. Govt. was granted summary judgment on taxpayers' complaint for damages and to set aside IRS's allegedly invalid determination to collect IRC §6702 penalty: Appeals officer properly relied on Forms 4340 and IRS computer transcripts in determining that assessment was proper and administrative procedures were met; IRC §6702 penalty was appropriate where taxpayers filed ''zero'' return and asserted universally rejected frivolous arguments that they weren't liable for income taxes; and sovereign immunity precluded unfounded punitive damages claim. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(2); 74,336.506(25). IRC §6330; 6702.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA,

ORDER

ROGER L. HUNT UNITED STATES DISTRICT JUDGE

Motion for Summary Judgment (#5)

Before the Court is Defendant United States' Motion for Summary Judgment (#5, filed March 19, 2002). Plaintiffs' Objection (#10) was filed May 7, 2002. However, there is no evidence that it was ever served on the defendant, which may explain why there is no reply filed thereto.

Plaintiffs did file a purported Affidavit of Service in connection with their Application for Default Judgment (#12, which the Court has denied in a separate order) in which it is claimed that an ''AFFIDAVIT OF Service of the Plaintiffs' Objection to Defendant's Motion to Dismiss or Summary Judgment is attached hereto as Exhibit 'A'.'' However, there was no ''Exhibit A'' attached as promised and there is no affidavit of service attached to the Plaintiffs' Objection.

The Court has reviewed the motion for summary judgment and the objection and finds merit in the former and none in the latter and thus will rule without waiting for service of the objection and a reply.

BACKGROUND

The complaint herein was filed February 6, 2002, and seeks damages and a request to set aside an allegedly ''invalid'' collection due process determination for a frivo-

lous return penalty issued pursuant to 26 U.S.C. §6630. The penalty in question was the result of plaintiffs' federal income tax return filed for the 1998 income tax year. The return had only zeroes on all the lines reflecting no income or tax due the government. The plaintiffs believe they do not owe federal income taxes.

On August 28, 2001, a collection due process hearing was held at plaintiffs' request, regarding the frivolous return penalty. At the hearing, the IRS appeals officer determined that all administrative procedures had been followed. Plaintiffs claim the appeals officer had not complied with the law and had failed to show them a statute or regulation making them liable for the penalty or a tax.

On January 8, 2002, the IRS sent plaintiffs, by certified mail, a Notice of Determination Concerning Collection Actions(s) Under Section 6320 and/or 6330 (''Notice of Determination''), informing plaintiffs that the proposed levy to collect the frivolous return penalty would not be restricted, stating reasons. The attachment to the Notice explained that the appeals officer determined that the IRS had complied with all applicable laws, regulations and administrative procedures.

DISCUSSION AND DECISION

Pursuant to Fed.R.Civ.P. 56(c), summary judgment is proper ''if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.''

The moving party for summary judgment has the initial burden of showing the absence of a genuine issue of material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). Once the movant's burden is met by presenting evidence which, if uncontroverted, would entitle the movant to a directed verdict at trial, the burden then shifts to the respondent to set forth specific facts demonstrating that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). If the factual context makes the respondent's claim implausible, that party must come forward with more persuasive evidence that would otherwise be necessary to show that there is a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *California Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), *cert. denied*, 484 U.S. 1006 (1988).

If the party seeking summary judgment meets its burden, then summary judgment will be granted unless there is significant probative evidence tending to support the opponent's legal theory. *First National Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968); *Commodity Futures Trading Commission v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979). Parties seeking to defeat summary judgment cannot stand on their pleadings once the movant has submitted affidavits or other similar materials. Affidavits that do not affirmatively demonstrate personal knowledge are insufficient. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Likewise, ''legal memoranda and oral argument are not evidence and they cannot by themselves create a factual dispute sufficient to defeat a summary judgment motion where no dispute otherwise exists.'' *British Airways Bd.*, 585 F.2d at 952.

A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *See S.E.C. v. Seaboard Corp.*, 677 F.2d 1289, 1293 (9th Cir. 1982); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1305–06 (9th Cir. 1982).

All facts and inferences drawn must be viewed in the light most favorable to the responding party when determining whether a genuine issue of material fact exists for summary judgment purposes. *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962). After drawing inferences favorable to the respondent, summary judgment will be granted only if all reasonable inferences

defeat the respondent's claims. *S.E.C. v. Seaboard Corp.*, 677 F.2d 1297, 1298 (9th Cir. 1982).

The Collection Due Process Hearing

In 1998, Congress enacted 26 U.S.C. §6630 as part of the IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206. The statute provides that, prior to the issuance of an administrative tax levy, the IRS must give the taxpayer notice of an opportunity for a Collection Due Process hearing before the IRS Office of Appeals. 26 U.S.C. § 6330(a), (b). Pursuant to 26 U.S.C. §6330(a)(2) and (a)(3)(B), a taxpayer must request a Collection Due Process hearing within 30 days of the date notice is given regarding his right to that hearing.

Section 6330(c)(2)(A) prescribes the matters that may properly be raised by a taxpayer at a Collection Due Process hearing. These matters include spousal defenses, the appropriateness of the Commissioner's intended collection action, and possible alternative means of collection. *See Goza v. Commissioner*, 114 T.C. 176, 180 (2000). A taxpayer may also raise arguments concerning the existence or amount of the underlying tax liability if he did not have a prior opportunity to contest the liability. 26 U.S.C. § 6330(c)(2)(B).

After the collection due process hearing, the taxpayer may appeal the IRS's determination to an appropriate court. *See* 26 U.S.C. § 6330(d). When, as in this case, the validity of the tax liability was properly at issue in the appeals hearing, the amount of the tax liability will be reviewed *de novo* by the reviewing court.

Plaintiffs' Arguments Regarding the Hearing are Frivolous

[1] Plaintiffs received notice of the IRS' proposed levy relative to the frivolous return penalty, along with notice of the right to a Collection Due Process Hearing, and made written demand for the hearing. At the hearing plaintiffs alleged frivolous claims (which they continue to assert in their complaint) including a claim that the appeals officer cannot rely on IRS records (including Forms 4340-Certificates of Assessments and Payments), certificates, computerized transcripts, etc., in determining whether appropriate administrative procedures have been met.

Courts have repeatedly recognized that Forms 4340 constitute presumptive proof of a valid assessment. *Huff v. United States*, 10 F.3d 1440, 1445 (9th Cir. 1993); *Hefti v. United States*, 8 F.3d 1169, 1172 (7th Cir. 1993); *Farr v. United States*, 990 F.2d 451, 454 (9th Cir. 1993). In this case the appeals officer determined that the assessment had been properly made and that the appropriate administrative procedures had been met. The appeals officer is entitled to rely on the Internal Revenue Service computer transcripts and Forms 4340 in making that decision.

Further, under 26 U.S.C. §6702, a frivolous return penalty is appropriate whenever two conditions are met. First, a taxpayer must file what purports to be a return but which either does not contain information on which the substantial correctness of the taxpayer's self-assessment may be judged or contains information that on its face indicates that the self-assessment is substantially incorrect. Second, the filing must be due to a frivolous position or a desire to delay or impede the administration of federal income tax laws.

Plaintiffs' claims and arguments made in this case have been considered by other courts and have been universally deemed to be frivolous. In *Sisemore v. United States*, 979 F.2d 268 (6th Cir. 1986), the Sixth Circuit upheld penalties in a case similar to this one. The *Sisemore* plaintiffs amended a joint tax return to deny their wages and salary were taxable "income." The court concluded that the amended return on its faced indicated the self-assessment was substantially incorrect and that the taxpayer's position that wages are not taxable income was frivolous. The Ninth Circuit has also repeatedly rejected the "wages are not income" argument as frivolous. *See, e.g., Olson v. United States*, 760 F.2d 1003, 1005 (9th Cir. 1985). Here, as plaintiffs' federal income tax return, its attachments, and their complaint demon-

strate, they are making the same frivolous argument that their wages are not income.

Finally, plaintiffs' claim for punitive damages has no statutory basis and the defendant's sovereign immunity precludes the claim.

After review of the IRS' administrative determination to proceed with a levy to effect the collection of taxes due from plaintiffs, the Court finds the determination and actions of the IRS to be within its proper authority and within the due process requirements of the Constitution.

IT IS THEREFORE ORDERED that the Internal Revenue Services's administrative determination at issue here is approved and sustained.

IT IS FURTHER ORDERED that Defendant United States' Motion for Summary Judgment (#5) is GRANTED.

Dated: August 15, 2002.

ROGER L. HUNT

UNITED STATES DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed. Judgment is entered in favor of defendant United States of America and against plaintiff Robert A. Brown and Elena Brown.

August 16, 2002

Date

LANCE S. WILSON

Clerk

/s/

(By) Deputy Clerk,

¶2002-5479

Betty R. BROWN, Michael J. BROWN, Philip A. Melrose, Beryl Rae and Raymond C. Sandler, as Co-Trustees of the marital trust created under the will of Willet H. Brown, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Central Dist. of California, (DC CA) Case No. CV-99-05437-GAF (JWJx), Aug. 28, 2002. District Court vacated. Earlier proceeding at (2001, DC CA) 88 AFTR 2d 2001-6665. Year of death 1993. Decision for Taxpayers.

1. Estate taxes—marital deductions; reduction—administration expenses allocated to principal vs. income—material limitations—interest—gross estate—deductions—professional fees—necessary and reasonable. Stipulated judgment was entered establishing amount of estate's overpayment plus interest, based on prior judgment; and, district court's order staying prior judgment pending resolution of appeals was vacated. *Reference:* USTR Estate & Gift Taxes ¶20,565.05(30); 20,565.04(35); 20,555.19(7); 20,555.12(25); 20,535.02(5). IRC §2053; 2055; 2056.

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GREGORY A. ROTH Assistant United States Attorney Attorneys for United States of America, Defendant
SANDLER AND ROSEN, LLP Charles L. Birke Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION,

STIPULATION OF RE AMOUNT OF OVERPAYMENT BY PLAINTIFF PURSUANT TO THE JUDGMENT ENTERED ON OCTOBER 26, 2001; AND ORDER THEREON

GARY A. FEESS, United States District Judge

[No Hearing Required]

[1] IT IS HEREBY STIPULATED by and between the plaintiffs and the defendant, by and through their attorneys of record, with the District Court's approval, as follows:

1. On October 26, 2001, the District Court entered a Judgment in the above-captioned case.

2. Plaintiff's Complaint contained three claims for relief.

3. On plaintiff's First Claim for Relief, the District Court ruled in the Judgment as follows:

> Judgment is granted in favor of Defendant and against Plaintiffs pursuant to the Court's Order Regarding Cross-Motions for Summary Judgment and Plaintiff's Motion for Order Pursuant to Federal Rule of Civil Procedure 54(1)), entered on June 28, 2000.

4. On plaintiffs' Second Claim for relief, the District Court ruled in the Judgment as follows:

> Judgment is granted in favor of Plaintiffs and against Defendant on Plaintiffs' Second Claim for Relief. With respect to the $1,644,077.19 in excess administrative expenses claimed by Plaintiffs which was charged to principal, the Court concludes that even if those expenses were deductible they would result in a dollar-for-dollar reduction in the marital deduction and would thus have no effect on the estate's tax liability. The Court concludes that the remaining $67,246.03 in excess administrative expenses charged to income were necessary and reasonable, are deductible on the estate tax return, and do not reduce the marital deduction.

Emphasis in original.

5. On plaintiff's Third Claim for Relief, the District Court ruled in the Judgment as follows:

> Judgment is granted in favor of Plaintiffs and against Defendant on Plaintiffs' Third Claim for Relief. Plaintiffs are entitled to a refund based upon the $630,446 in interest paid by the estate ($549,850 to the Internal Revenue Service and $80,596 to the State of California) which is deductible as an administrative expense on the estate tax return, and does not reduce the marital deduction.

6. In paragraph 4 of the Judgment, the District Court ordered as follows:

> Pursuant to the stipulation of the parties, Defendant shall forthwith calculate and pay to Plaintiffs the amount of the refund they are owed including any interest provided for by law.

7. Plaintiffs and defendant have calculated that based upon the District Court's Judgment entered on October 26, 2001, the amount of plaintiff's overpayment of tax and assessed interest paid is $678,177. Additionally, plaintiffs are entitled to interest on this overpayment from the date of payment as provided by law.

8. On January 31, 2002, plaintiffs filed an appeal with respect to the Judgment entered on October 26, 2001, and on February 4, 2002, defendant filed a cross-appeal with respect to the Judgment entered on October 26, 2001.

9. On February 6, 2002, the District Court filed an order granting defendant's motion to stay enforcement of the Judgment entered on October 26, 2001, pending appeal. Defendant has since voluntarily dismissed its cross-appeal.

10. In light of the voluntary dismissal of defendant's cross-appeal, the District Court's order filed on February 6, 2002, staying the District Court's Judgment pending resolution of the parties' appeals, shall be vacated.

11. Nothing herein shall prejudice plaintiffs' appeal from those portions of the District Court's Judgment from which plaintiffs have appealed. This stipulation,

and the order thereon, shall not be deemed to be a waiver of any rights plaintiffs may have with respect to those portions of the District Court's Judgment from which plaintiffs have appealed.

Respectfully submitted,

DEBRA W. YANG

United States Attorney

DATED: 8/27/02

ORDER

The above-recited stipulation of the parties is hereby APPROVED.

It is hereby ORDERED that:

1. Pursuant to the District Court's Judgment entered on October 26, 2001, the amount of plaintiff's overpayment is $678,177. Additionally, plaintiffs are entitled to interest thereon from the date of payment as provided by law.

2. Defendant shall forthwith pay to plaintiffs, pursuant to the District Court's judgment, the amounts set forth in paragraph 1 of this Order.

3. Notwithstanding paragraph 2 of this Order, if defendant contends that defendant is now legally entitled to offset or credit any other existing obligation arising under the Internal Revenue Code from the amounts set forth in paragraph 1 of this Order, defendant may move the Court for a modification of the Order. Said motion must be filed and served within 90 days from the date of entry of this Order. Nothing herein shall prejudice plaintiffs' right to object to any proposed modification of this Order by defendant.

4. The District Court's order filed on February 6, 2002, staying the District Court's Judgment pending resolution of the parties' appeals, shall be vacated.

IT IS SO ORDERED.

DATED: 8-28-02

GARY A. FEESS

United States District Judge

¶2002-5480

Denise COOK and THE UNITED STATES OF AMERICA, PLAINTIFFS v. Zeke LAYMAN, DEFENDANT. U.S. District Court, Eastern Dist. of California, (DC CA) CIV-F-00-6926 OWW SMS, Sept. 16, 2002. Earlier proceedings at (2002, DC CA) 89 AFTR 2d 2002-1822, 2002-1 USTC ¶50367; and (2001, DC CA) 87 AFTR 2d 2001-2537. Decision against Govt.

1. Actions by third-parties—sale of lien property—jurisdiction—release of liens—governmental approval. District court rejected prospective purchaser's/resident's and IRS's request to lift stay to allow purchase of lien property from 3d-party owner: although govt. consented to sale, it hadn't yet released liens and issued discharge certificate. But, owner's motion to dismiss complaint, which was originally filed in state court, was also denied where purchaser asserted valid, non-frivolous claims regarding liens' effect on ability to convey property; her alleged breach of sales contract was factual matter beyond scope of dismissal motion; and jurisdiction was proper, based on govt.'s asserted lien interest. *Reference:* United States Tax Reporter ¶63,255.01(85); 74,336.508(60). IRC §6325.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA,

MEMORANDUM DECISION AND ORDER RE: (1) DEFENDANT'S REQUEST FOR JUDICIAL NOTICE; (2) DEFENDANT'S MOTION TO DISMISS; (3) PLAINTIFF'S MOTION FOR RELIEF FROM STAY AND FOR ORDER PERMITTING SALE OF REAL PROPERTY

Oliver W. Wanger, UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

Denise Cook and the Internal Revenue Service (''Plaintiffs'')[1] move for relief from stay and for an order permitting the

[1] ''Plaintiff Cook'' or ''Plaintiff'' refers to Denise Cook as an individual party for purposes of referencing earlier pleadings, while ''Plaintiffs'' refer to Denise Cook and the I.R.S. collectively for this motion.

sale of real property commonly known as 550 Sunset Drive, County of Inyo, State of California (the "Property"). *See* Doc. 44, filed July 29, 2002. Zeke Layman ("Defendant") moves to dismiss Plaintiff Cook's Complaint ("Motion to Dismiss" Doc. 41, filed July 5, 2002) and opposes Plaintiffs' motion for the sale of property ("Opposition" filed August 28, 2002). Plaintiff I.R.S. (or "Government") submitted a notice of non-opposition to Plaintiff Cook's motion for order permitting the sale of real property ("Notice"). *See* Doc. 49, filed August 9, 2002.

II. BACKGROUND

On November 23, 1987, Irwin and Darline Ruth Koff transferred their interest in the subject real property to Defendant for consideration of $40.00 in silver. *See* Doc.19 at .3. The Koffs' transfer to Layman was not recorded until March 30, 1992. *See id.* On February 27, 1990, and on April 2, 1990, the IRS recorded liens for delinquent taxes resulting from the Koffs' failure to file income tax returns for the tax years 1982–1985. *See id.*

In 1996, plaintiff Denise Cook entered into an agreement to purchase the subject real property from Defendant Layman for $115,000.00. *See* Doc.20 at p.1; Doc.36 at Exh. A. The sale was not completed because of federal tax liens filed against Zeke Layman's predecessor in interest. *See*Doc.20 at p.1. On or about May of 1998, Denise Cook filed this action for specific performance in state court. *See*Doc.19 at p.3. The United States intervened in the specific performance action, and removed it to federal court. *See* Doc.20 at p.2. The Government's complaint in intervention seeks foreclosure on its liens. *See id.*

On January 11, 1999, Defendant brought a quiet title action against the Government. *See* Doc.20 at p.3; CIV-F-99-5239, Doc.1. On December 21, 1999, in CIV-F-99-5239, Magistrate Judge Snyder ruled that the tax lien attached to the land at issue and granted summary judgment in favor of the Government. *See id.* at p.4; Doc.33 at p.2:1–2; CIV-F-99-5239, Docs.32–33. On January 23, 2001, Defendant's motion for reconsideration was denied. *See* Doc.20 at p.4.

On February 26, 2001, Defendant filed a notice of appeal in the quiet title action. *See* Doc.20 at p.2. On March 21, 2001, the Ninth Circuit found the notice of appeal untimely. *See id.*, Exh. A. The Ninth Circuit limited review of the quiet title appeal to the order denying the motion for reconsideration. *See id.*, Ex. A. On May 15, 2001, this action was stayed for three months. *See* Doc.24. On December 28, 2001, the Ninth Circuit affirmed the ruling that the I.R.S. lien attached to the land at issue. *See*Doc.32 at p.2:2–3.

On January 31, 2002 Plaintiff filed a "Motion For Order Permitting the Sale of Real Property." *See* Docs. 27,29. The I.R.S. opposed Plaintiff's motion. *See*Doc. 32. Plaintiff's motion was denied on March 11, 2002. *See* Doc 38. Plaintiff Cook and the I.R.S. have reached agreement and jointly file a new "Motion For Order Permitting the Sale of Real Property."

Plaintiffs move for an order 1) lifting the stay and 2) permitting Plaintiff Cook to purchase the Property for $115,000.00.

III. LEGAL STANDARDS

A. Motion to Dismiss under Fed. R. Civ. P. 12(b) (1)

A motion to dismiss under Federal Rule of Civil Procedure 12(b) (1) addresses the court's subject matter jurisdiction, derived from the case or controversy clause of Article III of the U.S. Constitution. *See* Fed.R. Civ.P. 12(b)(1); U.S. Const. Art. III §1 (vesting the judicial power in "such inferior Courts as the Congress may from time to time ordain and establish"). Federal courts are limited in jurisdiction; it is presumed that a case lies outside the jurisdiction of the federal courts unless Plaintiff proves otherwise. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221 (9th Cir. 1993); *Thornhill Publishing Co. v. General Telephone & Electronics Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). "A motion to dismiss

for lack of subject matter jurisdiction may either attack the allegations of the complaint or may be made as a 'speaking motion' attacking the existence of subject matter jurisdiction in fact.'' *Id.* at 733.

In a facial attack on the complaint, ''the court must consider the allegations of the complaint as true.'' *Mortensen v. First Federal S&L Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977); *see also, NL Indus. Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The motion will be denied unless the allegations appear to be frivolous. *See Black v. Payne*, 591 F.2d 83, 86 n.1 (9th Cir.), *cert. denied*, 444 U.S. 867, 100 S.Ct. 139. 62 L.Ed.2d 90 (1979).

A 12(b) (1) motion may ''attack the existence of subject matter jurisdiction in fact, quite apart from any pleading,'' as a ''speaking motion.'' *Mortensen*, 549 F.2d at 891; *Thornhill Publishing*, 594 F.2d at 733, *FDIC v. Nicholas*, 885 F.2d 633, 635–36 (9th Cir. 1983). Defendant may ''rely on affidavits or any other evidence properly before the court.'' *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.) (citations omitted), *cert. denied*, 493 U.S. 993, 110 S.Ct. 541, 107 L.Ed.2d 539 (1989). ''It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction.'' *Id.*

> ... in a factual 12(b)(1) motion ..., *no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.*

Mortensen, 549 F.2d at 891 (emphasis added).

Although deference is given to a plaintiff's factual allegations in a 12(b) (6) motion, plaintiff's allegations need not be taken as true when considering a Rule 12(b)(1) motion. *See Thornhii1 Publishing*, 594 F.2d at 733 (''[N]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.''); *see also Trentacosta v. Frontier Pacific Aircraft Industries*. 813 F.2d 1553. 1557–58 (9th Cir. 1987).

Lack of subject matter jurisdiction can be raised at any time by any party. *Am. Fire & Cas. Co. v. Finn*. 341 U.S. 6. 17–18 (1951).

B. Standard For Summary Judgment

Summary judgment is appropriate only ''if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.'' Fed. R. Civ. P. 56(c); *see also Maffei v. Northern Ins. Co. of New York*. 12 F.3d 892, 899 (9th Cir. 1993). A genuine issue of fact exists when the non-moving party produces evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. *See Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252–56 (1986). The non-moving party cannot simply rest on its allegation without any significant probative evidence tending to support the complaint. *See U.A. Local 343 v. Nor-Cal Plumbing, Inc.*, 48 F.3d 1465, 1471 (9th Cir. 1995).

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be ''no genuine issue as to any material fact,'' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986).

The more implausible the claim or defense asserted by the opposing party, the more persuasive its evidence must be to avoid summary judgment. *See United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815 (9th Cir. 1996). Nevertheless, ''[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in its favor.'' *Liberty Lobby*, 477 U.S. at 255. A court's role on summary judgment, however, is not to weigh the evidence, *i.e.*, issue resolution, but rather to find genuine factual issues. *See Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir. 1996).

Evidence submitted in support of or in opposition to a motion for summary judgment must be admissible under the standard articulated in 56(e). *See Keenan v. Hall*, 83 F.3d 1083, 1090 n.1 (9th Cir. 1996); *Anheuser-Busch, Inc. v. Nat'l Beverage Distribs.*, 69 F.3d 337, 345 n.4 (9th Cir. 1995). Properly authenticated documents, including discovery documents, although such documents are not admissible in that form at trial, can be used in a motion for summary judgment if appropriately authenticated by affidavit or declaration. *See United States v. One Parcel of Real Property*, 904 F.2d 487, 491–492 (9th Cir. 1990). Supporting and opposing affidavits must be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. *See* Fed. R. Civ. P. 56(e); *Connor v. Sakai*, 15 F.3d 1463, 1470 (9th Cir. 1993), *rev'd on other grounds sub nom Sandin v. Connor*, 515 U.S. 472 (1995)

C. Discharge of Lien

United States Code section 6325(b)(3) provides:

Subject to such regulations as the Secretary may prescribe, the Secretary may issue a certificate of discharge of any part of the property subject to the lien if such part of the property is sold and, pursuant to an agreement with the Secretary, the proceeds of such sale are to be held, as a fund subject to the liens and claims of the United States, in the same manner and with the same priority as such liens and claims had with respect to the discharged property. 26 U.S.C. §6325(b)(3).

IV. ANALYSIS

A. REQUEST FOR JUDICIAL NOTICE

[1] Defendant requests judicial notice of the ''Real Estate Purchase Contract and Receipt For Deposit'' and the ''Sales Contract,'' respectively Exhibits ''A'' and ''B.''

Federal Rules of Evidence Rule 201(d) states that ''[a] court shall take judicial notice if requested by a party and supplied with the necessary information.'' To qualify for judicial notice an adjudicative fact must be either ''(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'' *See* Rule 201(b).

In this matter, the authenticity and accuracy of the two documents is not disputed and apparently have been verified by the parties. *See* materials attached as Exhibits on documents 44, 45, 47, & 50. Therefore, without any objection, judicial notice is taken of the existence and authenticity of the ''Real Estate Purchase Contract and Receipt For Deposit'' and the ''Sales Contract.''

B. DEFENDANT'S MOTION TO DISMISS

Defendant moves to dismiss Plaintiff Denise Cook's complaint for specific performance of the land sale contract on the grounds that (1) Plaintiff Cook breached the sales contract by failing to perform; (2) the court lacks jurisdiction to hear Plaintiffs' claim; and (3) Plaintiff Cook breached the Supplemental Agreement.

Defendant argues that Plaintiff Cook's alleged breach of contract disables Plaintiff's purchase of the property. Without identifying how Rules 12(b)(1) and 12(b)(6) are the proper mechanisms by which to challenge the rightful ownership of the property, Defendant argues that since Plaintiff Cook failed to obtain and

deposit sums totaling $114,000.00 and to close escrow within forty-five days, Plaintiff's default bars enforcement of the contract. These matters are outside the purview of Plaintiffs' Rule 12 motion which is limited to the face of the complaint and can only be addressed through a motion for summary judgment or cross-complaint.

Based on a 12(b)(1) facial attack on the complaint, ''the court must consider the allegations of the complaint as true.'' *Mortensen v. First Federal S&L Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977); *see also, NL Indus. Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The motion will be denied unless the allegations appear to be frivolous. *See Black v. Payne*, 591 F.2d 83, 86 n.1 (9th Cir.), *cert. denied*, 444 U.S. 867, 100 S.Ct. 139, 62 L.Ed.2d 90 (1979).

Allegations in Plaintiffs' complaint are considered true for purposes of analysis. Defendant argues Plaintiff Cooks' alleged default bars any purchase right. Assuming the truth of Plaintiff Cook's allegations, the I.R.S. liens encumber Plaintiffs' real property and prevent Defendant from conveying clear title. *See* Doc. 45, p.2. Plaintiffs' motion to settle the property is not frivolous.

Defendant offers *Weisberg v. Ashcroft*, a contract performance case, ''[i]f times are fixed for deposit of the purchase price . . . , each act must be performed on or before the times agreed upon.'' (223 Cal. App. 2d 793, 795 (1963)). Defendant argues that Plaintiff Cook was obligated to pay sums totaling $114,000.00 and not having done so lost any interest in the property. A review of the Contract reveals the terms and conditions of Sections 1(c) & (e) do not specify the time for deposit of these monies. *Ashcroft* notes that if matters are agreed upon by the parties for ''. . . deposit by the seller of sufficient instruments to convey title . . . ,'' it requires counter-performance by Defendant as seller that has not been fulfilled. *See Id.* Plaintiffs argue that Defendant's motion raises factual disputes whether Plaintiff Cook was able to perform the contract. Whether Plaintiff Cook breached the contract and lost any interest in the property is a matter of controversy that survives the motion to dismiss. Defendant's motion to dismiss the complaint on the ground that Plaintiff Cook breached the sales contract by failing to perform is DENIED.

Defendant's second argument is the court is without jurisdiction to hear Plaintiffs' claim. A 12(b) (1) motion attacks the existence of subject matter jurisdiction in fact, and here Defendant argues the Court is precluded from hearing this matter because terms of the contract mandate the use of mediation.

The Sales Contract reads in relevant part that: ''Buyers and Sellers agree to mediate any disputes or claim arising between them out of this contract or any resulting transaction before resorting to arbitration or court action.'' *See*Exhibit ''A,'' paragraph 33.

Though the contract specifies the use of mediation as a first resort, based on the plain meaning of the language the use of courts is not precluded. The Contract specifies the only penalty for using the courts is that ''. . . in the discretion of the . . . judge, [the moving party] . . . shall not be entitled to recover attorney's fees even if they would otherwise be available . . . '' This means that arbitration is not exclusive and the parties can resort to the courts, but may loose the right to recover attorney's fees for doing so at the judge's discretion. The Contract does not preclude the courts from asserting judicial jurisdiction over matters between parties to the Contract.

The court has jurisdiction over this case as the I.R.S. claims and interest in the disputed real property by virtue of its tax liens. Motions for 12(b) (1) require the party opposing the motion to present evidence to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. *See St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir.) (citations omitted), *cert. denied*, 493 U.S. 993, 110 S.Ct. 541, 107 L.Ed.2d 539 (1989). In this case, jurisdiction of the court is based upon the removal of the underlying civil action to federal court by the United states because of tax liens filed by the federal government against the real property that is

the subject of the specific performance suit. A complaint to enforce a claim of the United States to an interest in the real property is within the exclusive jurisdiction of the United States court under 28 U.S.C. § 1331.

Defendant also argues that because both Plaintiffs and Defendant have submitted affidavits to this court as evidence, Defendant's motion becomes a speaking motion and should be treated as a motion for summary judgment. *See Jackson v. American Bar Ass'n*, 538 F.2d 829 (1976). Assuming arguendo, that Defendant's motion to dismiss should be treated as a motion for summary judgment, Defendant's argument is without merit.

In addition to not giving notice that the motion was to be considered as one for summary judgement, summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c); *see also Maffei v. Northern Ins. Co. of New York*, 12 F.3d 892, 899 (9th Cir. 1993). A genuine issue of fact exists when the non-moving party produces evidence on which a reasonable trier of fact could find in its favor viewing the record as a whole in light of the evidentiary burden the law places on that party. *See Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995); *see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252–56 (1986).*

Here, disputed issued of material fact exist whether the contract was breached or whether Plaintiff Cook is entitled to complete the purchase of the property. Disputed facts show Plaintiff Cook has resided on the property since 1997, made substantial improvements to the property itself, and has continuously sought to complete the purchase of the property, such factual disputes cannot be decided on summary judgment. *See* Declaration, Doc. 45.

Defendant's motion to dismiss on the ground the court is without jurisdiction to hear Plaintiff's claim is DENIED. Defendant's third argument is that Plaintiffs breached the Supplemental Agreement by failing to pay taxes on the property. On September 2, 1997 Plaintiff Cook signed the Supplemental Agreement whereby "Denise Cook agree[d] to take responsibility and liability for the property as if she [were] the landlord." *See* Paragraph 2 of Exhibit B. Defendant explains that property taxes totaling over $11,000.00 are outstanding and argues that it was Plaintiff Cook's responsibility to pay the property taxes per the Supplemental Agreement. *See* Doc. 41, p. 9–10. Not having done so, Defendant argues, Plaintiff Cook breached the sales contract and forfeited her interest in the property. *See Id.* Defendant argues that without such an interest, Plaintiff Cook is without the authority to affect the sale of the property. *See Id.*

In a facial attack on the complaint, "the court must consider the allegations of the complaint as true." *Mortensen v. First Federal S&L Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977); *see also, NL Indus. Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The motion will be denied unless the allegations appear to be frivolous. *See Black v. Payne*, 591 F.2d 83, 86 n.1 (9th Cir.), *cert. denied*, 444 U.S. 867, 100 S.Ct. 139, 62 L.Ed.2d 90 (1979).

Defendant argues that without fulfilling its contractual obligations, Plaintiff Cook has no authority to enforce the sale of the property. *See* Doc. 47, p. 3. Assuming the truth of the allegations that Plaintiff Cook is the responsible party for affecting the sale of the property, whether Plaintiff Cook breached the contract by failing to pay property taxes is a contention unrelated to the underlying contract dispute. Furthermore, it is foreseeable that Plaintiff Cook will challenge the allegation that she has an obligation to pay the taxes on property Defendant was unable to sell and Plaintiff unable to purchase. Plaintiff Cook even declared that "Because I do not know if I will be obtaining/purchasing the real property . . . , I am unwilling to pay the property tax." *See* Doc. 45, p. 5. Defendant's motion to dismiss on the ground that Plaintiff Cook breached the supple-

mental agreement by failing to pay property taxes is DENIED.

C. PLAINTIFFS' MOTION FOR ORDER PERMITTING SALE OF REAL PROPERTY

Plaintiff Cook submits a "Motion For Order Permitting. The Sale of Real Property" pursuant to 26 U.S.C. § 6325(b) (3). Section 6325(b) (3) grants the Internal Revenue Service the authority to discharge property from a lien so that it may be sold and the liens reattach to the sale proceeds. However, the statutes provides relief only when the Government exercises its discretion by consent. *See United States v. Williams*, 514 U.S. 527, 537 [75 AFTR 2d 95-1805] (1995). To evidence its approval, the Government may issue a "certificate of discharge." *See* 26 U.S.C. § 6325(b) (3).

Plaintiff Cook's previous "Motion For Order Permitting the Sale Of Real Property" was denied by this Court on March 4th 2002. The Order explained the Government had not granted its approval necessary under section 6325(b) (3). *See* Doc. 38, p. 5:23–25. The Government opposed Plaintiff Cook's request on the grounds that the sale price proposed in the 1996 agreement no longer represented the fair market value of the property. *See* Doc. 38, p. 4:18–21. Now, however, Plaintiff Cook contends the Government stipulates to Plaintiff's request and now joins her motion for an order permitting sale of the property.

In its "Notice of Non-opposition to Plaintiff Cook's Motion For Order Permitting the Sale of Real Property," the Government consents to the sale of the property (the "Notice"). *See* Doc. 49, filed August 9, 2002. The Government has entered into an agreement with Plaintiff Cook to complete the sale, to have the liens released from the property, and to have the liens reattach to the proceeds from the sale. *See* Doc 43, p. 5 sect. (F). The property is to be sold to Plaintiff Cook at the agreed purchase price of $115,000.00 and the actual cost of sale will be determined when escrow is closed. *See* Doc 43, p. 5 number 6. Immediately following this Order the Government has agreed to issue a certificate of discharge confirming the sale.

Defendant opposes Plaintiffs' motion on the ground that Plaintiff Cook has not complied with the terms and conditions of either the Sales Contract or the Further Agreement. As discussed above, the enforceability of the land sale contract cannot be determined without a trial even if, pursuant to 26 U.S.C. § 6325(b) (3), the Government has agreed to the sale of the property and to place the proceeds in an interest-bearing account from which the liens can be satisfied.

V. CONCLUSION

Defendant's Request for Judicial Notice of Exhibits "A" and "B" is GRANTED, only as to their existence, accuracy and authenticity.

Defendant's motion to dismiss Plaintiff Denise Cook's complaint for specific performance on a contract for a sale of land is DENIED. Defendant's request for reimbursement of costs and attorney's fees is DENIED.

Plaintiffs' Motion For Relief from Stay and for Order Permitting the Sale of Real Property is DENIED.

The Government will issue a certificate of discharge immediately following this Order.

Within five (5) days following service of this decision, the Government shall lodge with the court a proposed order in conformity with this decision.

SO ORDERED.

DATED: September 16, 2002.

Oliver W. Wanger

UNITED STATES DISTRICT JUDGE

¶2002-5481

Willie R. DAVIDSON, PLAINTIFF v. COMMISSIONER of Internal Revenue, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-02-0108-RLH (LRL), Sept. 11, 2002. Years 1989, 1990, 1998. Decision for Govt.

1. Collection due process (CDP)—review of administrative determination—frivolous return penalties—summary judgment. IRS's administrative determination to proceed with collection of IRC §6702 penalty against taxpayer who filed ''zero'' returns was upheld on summary judgment: penalty was valid based on taxpayer's frivolous return positions that his substantial wages as shown on Forms W-2 weren't income, and that no IRC provision subjected him to income tax. Also, IRS Appeals officer verified that all legal and administrative requirements were met where taxpayer received CDP hearing notice, officer properly relied on Forms 4340 for such verification, and delegation of authority argument was frivolous; and taxpayer's requests for costs and damages weren't considered. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(2). IRC §6330; 6702.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA,

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed. Judgment is entered in favor of defendant Commissioner of Internal Revenue and against plaintiff Willie R. Davidson.

September 11, 2002

Date

LANCE S. WILSON

Clerk

/s/

(By) Deputy Clerk,

ORDER

ROGER L. HUNT United States District Judge

(Motion for Summary Judgment—#3)

Before the Court is Defendant Commissioner's Motion for Summary Judgment (#3), filed May 23, 2002. The Court has also considered Plaintiff's Objection (#6) filed June 20, 2002 and Plaintiff's Complaint (#1) filed January 24, 2002.

BACKGROUND

Plaintiff asks this court to grant three requests: 1) To ''declare invalid'' a collection due process determination made by the IRS against him; 2) To order reim-bursement by Defendant of Plaintiff's costs associated with bringing this action; and 3) To award punitive damages based on Defendant's conduct.

In 1999, Plaintiff filed Form 1040, U.S. Individual Income Tax Return, for the 1998 tax year. Plaintiff also filed amended tax returns for 1989 and I990. Although the included Form W-2 showed income received by the Plaintiff, the 1998 Return contained zeroes on all lines reflecting income earned or taxes due and had attached to it a two page, typewritten statement outlining reasons for his belief that he had no income to report and did not, therefor, owe federal income tax. According to Defendant's motion, and not refuted by Plaintiff, copies of Plaintiff's amended 1989 and 1990 returns are unavailable but were similarly filed with zeroes written on all appropriate lines.

On July 20, 1998, under 26 U.S.C. § 6702, the IRS assessed two $500 civil penalties on Plaintiff for filing the amended returns and, on March 26, 2001, assessed another $500 civil penalty for filing the 1998 tax return. After applying the balance of Plaintiff's overpaid taxes, the amount of assessed civil penalties totaled $1,083.99. Section 6702 assesses a $500 civil penalty if an individual ''files what purports to be a return'' but which contains ''information that on its face indicates that the self-assessment is substantially incorrect'' and is due to ''a position which is frivolous.''

The IRS posted a Notice of Federal Tax Lien for unpaid civil penalties pursuant to Internal Revenue Code §§ 6321, 6322, and 6323 on May 15, 2001 and informed

Plaintiff of the lien by certified mail in a letter dated May 22, 2001. Plaintiff then requested from defendant a collection due process hearing regarding the frivolous return penalties and collection alternatives which was held on October 9, 2001, a transcript of which is attached to Plaintiff's Complaint (#1).

Finally, on December 27, 2001, the IRS sent Plaintiff a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (Notice of Determination) informing Plaintiff that the proposed levy to collect the frivolous return penalty would not be restricted. Attached to the Notice of Determination was Attachment 3194 explaining that the decision was based on the determination that the IRS fully complied with all applicable laws, regulations, and administrative procedures. The Notice of Determination also informed Plaintiff that any dispute of the determination could be made within 30 days in the appropriate United States District Court. Plaintiff timely filed with this Court and Defendant now moves for summary judgment.

DISCUSSION

I. Summary Judgment Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only ''where the record before the court on the motion reveals the absence of any material issue of fact and [where] the moving party is entitled to judgment as a matter of law.'' *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982) (quoting *Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981)), *cert. denied*, 460 U.S. 1085 (1983). ''A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing version of the truth.'' *Sec. & Exch. Comm'n v. Seaboard Corp.*, 677 F.2d 1289, 1293 (9th Cir. 1982) (citation omitted).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view all facts and draw all inferences in the light most favorable to the responding party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). *See also Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983). Once this burden has been met, ''[t]he opposing party must then present specific facts demonstrating that there is a factual dispute about a material issue.'' *Zoslaw*, 693 F.2d at 883 (citation and internal quotes omitted).

II. Analysis

[1] Plaintiff first asks that the collection due process determination made against him by the IRS be declared invalid. Since the Tax Court does not have jurisdiction to consider frivolous return penalties, *See Van Es v. Commissioner*, 115 T.C. 324 (2000), the matter is appropriately before this court. 26 U.S.C. § 6320(c), 6330(d)(1)(B).

26 U.S.C. § 6702 assigns liability in the amount of five hundred dollars ($500) to a person filing a frivolous tax return. The Secretary of the Treasury or his delegate, such as the IRS,[1] assesses this penalty in the same manner as a tax, and any reference to a ''tax'' in Title 26 also includes this penalty. 26 U.S.C. § 6671. Section 6201 of the Code authorizes the Secretary to make any necessary tax assessments. In the case of a frivolous return penalty, the deficiency procedures of Title 26, Chapter 63, subchapter B, do not apply. 26 U.S.C. § 6703(b). The failure to pay the penalty results in a lien on the person's property. 26 U.S.C. § 6321. To ensure the validity of the lien, the Secretary files the lien with, in this case, the Clark County Recorder, 26 U.S.C. § 6323(f)(1)(A), and sends a notice of filing of the lien to the person, 26 U.S.C. § 6320(a). The Secretary must also inform the person of his right to a hearing at the same time. 26 U.S.C. § 6320(a)(3)(B). For the purposes of this Order, the procedures of the collection due

[1] The Court will use the collective term ''Secretary'' to refer to the Secretary of the Treasury and any delegates. *See* 26 U.S.C. § 7701(a)(11)(B). The Secretary of the Treasury may delegate much of his authority and responsibilities to others by prescribing rules and regulations, among other methods. 26 U.S.C. § 7805(a); *see also* 26 C.F.R. §§ 301.7701-9, 301.7701-10.

process hearing, 26 U.S.C. § 6330(c), apply to the lien hearing, 26 U.S.C. § 6320(c). If the person requests a hearing, the hearing officer must "obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." 26 U.S.C. § 6330(c)(1). At the hearing, the person may also raise any relevant issue, including spousal defenses, the appropriateness of the collection action, and any collection alternatives. 26 U.S.C. § 6330(c)(2)(A). The person "may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. § 6330(c)(2)(B).

The "underlying tax liability" in this case is the frivolous return penalty. *See* 26 U.S.C. § 6671; *see also* 26 C.F.R. 301.6321-1. Plaintiff properly challenged the validity of the frivolous return penalties at the collection due process hearing because the statutory deficiency procedures do not apply to frivolous return penalties, 26 U.S.C. § 6703(b), and thus Plaintiff had no prior opportunity to dispute the penalties. The validity of the income taxes that Plaintiff owes for 1989, 1990, and 1998 is not at issue in this action. On the other hand, the amended tax returns and tax return that Plaintiff filed for 1989, 1990, and 1998 are relevant because they determine whether assessment of the frivolous return penalty was proper.

Section 6330(d) is silent on the standard that the Court should use to review the determination of the collection hearing. However, the legislative history indicates that if the validity of the underlying tax liability was properly at issue, then review is *de novo.* H. Conf. Rep. 105–599 (1998); *see also Dogwood Forest Rest Home, Inc. v. United States,* 181 F. Supp. 2d 554, 559 [89 AFTR 2d 2002-728] (M.D.N.C. 2001); *MRCA Info. Servs. v. United States,* 145 F. Supp. 2d 194, 198–99 [89 AFTR 2d 2002-694] (D. Conn. 2000); *Sego v. Commissioner,* 114 T.C. 604, 610 (2000). The Court will use that standard of review.

There is no doubt as to the validity of the penalty. Plaintiff submitted Form 1040 for 1998 and apparently submitted Forms 1040X for 1989 and 1990 with zeros in the income section and Forms W-2 showing income considerably more than zero. Motion (#4), Exhibit A. He also attached an explanation of how no provisions of the Internal Revenue code make him liable for the income tax, how his wages are not income, and other matters. Wages are income, 26 U.S.C. § 61, upon which Plaintiff owes a tax, 26 U.S.C. § 1, and courts—including this one—have found arguments to the contrary to be tired and frivolous long before Plaintiff filed the tax returns at issue. *See,* e.g., *Sisemore v. United States,* 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir. 1986); *Coleman v. Commissioner,* 791 F.2d 68, 70 [57 AFTR 2d 86-1420] (7th Cir. 1986); *Sullivan v. United States,* 788 F.2d 813, 815 [57 AFTR 2d 86-1226] (1st Cir. 1986); *Olson v. United States,* 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985); *In re Hopkins,* 192 B.R. 760, 762–63 [76 AFTR 2d 95-7748] (D. Nev. 1995); and other cases too numerous to cite. On its face, Plaintiff's tax returns were substantially incorrect and frivolous, thus making Plaintiff liable for the frivolous return penalty. 26 U.S.C. § 6702. The assessments of the frivolous return penalties are valid.

No genuine issue of material fact exists over the verification of all legal and administrative requirements. Plaintiff states that the "Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC § 6320," Compl. (#1) Exhibit C-1, was sent by the Compliance Technical Support Manager, an official with the authority to send such a notice. *See* D.O. No. 196, 1982-2 C.B. 748 (1982). The Secretary of the Treasury delegated to the local Internal Revenue Service office collecting the penalty the responsibility of providing the verification to the hearing officer. 26

C.F.R. § 301.6320-1(e)(1).[2] The hearing officer properly relied on Forms 4340, Defendant's Motion (#3) Exhibit B, for such verification. *See Huff v. United States*, 10 F.3d 1440, 1446–47 [72 AFTR 2d 93-6682] (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994); *Hughes v. United States*, 953 F.2d 531, 538–40 [69 AFTR 2d 92-472] (9th Cir. 1992); *see also Davis v. Commissioner*, 115 T.C. 35, 41 (2000). The Forms 4340 show that the frivolous return penalty had been assessed, that notices had been mailed to Plaintiff, and that Plaintiff had requested a hearing. Because, as noted above, the tax returns are clearly frivolous, the hearing officer did not err in his verification that the requirements of any applicable law and administrative procedures had been met. Therefor, the collection due process determination is valid.

Without declaring defendant's collection due process determination invalid, the Court has no reason to reach Plaintiff's requests for costs or damages.

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (#3) is GRANTED.

Dated: September 6, 2002.

ROGER L. HUNT

United States District Judge

¶2002-5482

UNITED STATES OF AMERICA, PLAINTIFF v. Kent F. JOHNSON; Susan JOHNSON; Phyllis O. Sandberg, as Nominee of Kent F. and Susan Johnson, Bank One, Inc., and Utah State Tax Commission, DEFENDANTS. U.S. District Court, Dist. of Utah, (DC UT) Civil No. 2:00-cv-00920, Sept. 6, 2002. Years 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993. Decision for Govt.

1. 100% penalty for failure to pay over employment taxes—consent judgment. Consent judgment was entered granting govt. money judgment against taxpayer for unpaid employment and income taxes in amount stated, plus statutory interest, from assessment dates. *Reference:* United States Tax Reporter ¶66,725.06(5). IRC §6672.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION,

ORDER FOR (CONSENT) JUDGMENT

By consent of Kent F. Johnson, one the the defendants herein, it is hereby

[1] ORDERED and ADJUDGED that the United States of America have a money judgment against Kent F. Johnson (dba Rocky Mountain Signals) for unpaid employment taxes (Forms 941 for the fourth quarter of 1986 through the fourth quarter of 1991, inclusive; and Forms 940 for the years 1986 and 1991, inclusive); and unpaid income taxes (Forms 1040 for the years 1988 through 1993, inclusive) in the total sum of $86,189.55 plus statutory interest thereon from the date that each component part of the aforestated liabilities were assessed.

APPROVED AND CONSENTED TO BY:

KENT F. JOHNSON

Dated: May 20, 2002.

/s/

Judge

Dated: 9/6, 2002.

JUDGMENT entered this____day of___, 2002.

MARCUS B. ZIMMER

Clerk of the Court

By:

Deputy Clerk

¶2002-5483

Rodell JOHNSON, PLAINTIFF v. UNITED STATES OF AMERICA, DE-

[2] Plaintiff's repeated insistence that he see documents signed by the Secretary of the Treasury, or by a person with a delegation order signed by the Secretary of the Treasury, Compl. (#1), Exhibit B, at 4, is frivolous.

FENDANT. U.S. District Court, Dist. of Colorado, (DC CO) Civil Action No. 01-WY-1107-CB (PAC), Aug. 26, 2002. Earlier proceeding at (2002, DC CO) 90 AFTR 2d 2002-5662, 2002-2 USTC ¶50593. Year 1999. Decision for Govt.

1. Recovery of erroneous refunds—limitations periods—income exclusions—damages for personal injuries or sickness—Americans with Disabilities Act—amended judgment—interest. Govt. was granted motion to amend judgment regarding computation of interest on erroneous refund recovered on counterclaim: motion filed 12 days after entry of judgment was timely under F.R.Civ.P. 59(e) and 6(a); and taxpayer's remaining arguments were meritless. *Reference:* United States Tax Reporter ¶1045.02(15); 74,055.01(32). IRC §104; 6532; 6621; 7405.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

ORDER AMENDING JULY 12, 2002 JUDGMENT

CLARENCE A. BRIMMER, UNITED STATES DISTRICT JUDGE

[1] This case involves a disputed income tax refund originally claimed by Plaintiff on his 1999 tax return. The case is now before the Court on Defendant's Motion to Amend Judgment Re Computation of Interest. After reading the briefs and being fully advised of the premises, the Court FINDS and ORDERS as follows:

This Court entered an Order which granted Defendant's Motion for Summary Judgment as to its Counterclaim to Recover Erroneous Tax Refund and dismissed all of Plaintiff's claims with prejudice on July 3, 2002. Judgment was entered on July 12, 2002 which ordered Plaintiff to repay the erroneous tax refund in the amount of $84,211.61, to the IRS, plus interest accruing at 2.13% from the date that Plaintiff negotiated the refund check (on or about July 16, 2001) through the date of payment of the full amount. On July 25, 2002, Defendant filed a Motion to Amend Judgment Re Computation of Interest to provide for the correct rate of interest on the tax judgment. Plaintiff responded to Defendant's Motion with the argument that the Defendant's Motion was not timely as it was filed twelve calendar days after entry of judgment, and pursuant to Fed. R. Civ. P. 59(e), a motion to amend judgment must be filed no later than ten days after entry of judgment. However, the Court finds this objection to be misplaced, as Fed. R. Civ. P. 6(a), governing computation of time periods set forth in the Federal Rules of Civil Procedure, clearly says that when "the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." Fed. R. Civ. P. 6(a). Therefore, in accordance with Fed. R. Civ. P. 59(e) and 6(a), Defendant's Motion to Amend Judgment was timely. In accordance with the Court's ruling on the merits of Plaintiff's claims, Plaintiff's other protests to the amendment of judgment are without merit. The Court finds that interest shall be computed as set out in Defendant's Motion.

Therefore, Defendant's Motion to Amend Judgment Re Computation of Interest is HEREBY GRANTED. The July 12, 2002 Judgment in the above-entitled case SHALL BE AMENDED so that the principal amount of $84,211.61 owed by Plaintiff to the IRS shall bear interest in accordance with 26 U.S.C. § 6602 at the underpayment rate set forth in 26 U.S.C. § 6621(a)(2) from the date of the payment of the refund. The hearing on this matter previously scheduled on September 3, 2002 at 11 a.m. is VACATED, as the matter was decided on the briefs.

Dated this 26th day of August, 2002.

CLARENCE A. BRIMMER,

UNITED STATES DISTRICT JUDGE

¶2002-5484

In The Matter Of: Candace JOHNSTON, Debtor. UNITED STATES OF AMERICA, APPELLEE v. Candace JOHNSTON, APPELLANT. U.S. Court of Appeals, Fifth Circuit, (CA5) No. 01-

11361, Sept. 17, 2002. District Court, (2001, TX) 88 AFTR 2d 2001-5674, 267 BR 717, affirmed per curiam. Years 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1996, 1997. Decision for Govt.

1. Tax claims in bankruptcy—objection to proof of claim; amendments—post-plan confirmation complaints. Judgment of district court was affirmed based on its reasoning. *Reference:* United States Tax Reporter ¶68,726.51(5); 68,726.51(10); 68,726.52(47); 68,726.52(5).

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,

Appeal from the United States District Court for the Northern District of Texas (4:00-CV-397-Y)

Before REAVLEY, BARKSDALE, and CLEMENT, Circuit Judges.

PER CURIAM:*

[1] Having heard oral argument, and reviewed the briefs and pertinent parts of the record, the judgment is affirmed for essentially the reasons stated by the district court.

AFFIRMED

¶2002-5485

Paul P. LEMIEUX, ET AL., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-02-0274-RLH (PAL), Sept. 12, 2002. Years 1997, 1998. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties—summary judgment. IRS's administrative determination to proceed with collection of IRC §6702 penalty against tax protesters who filed "zero" returns was upheld on summary judgment: penalty assessments were clearly valid where Forms W-2 refuted taxpayers' return positions; taxpayers' protester-type challenges to tax were frivolous; Compliance Technical Support Manager had authority to issue lien notice; and, although IRS improperly referred to "unidentifiable" computer transcripts to verify assessments, instead of Forms 4340, proper verification was presumed where returns were clearly frivolous on their face. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(10). IRC §6330; 6702.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA,

JUDGMENT IN A CIVIL CASE

ROGER L. HUNT, United States District Judge

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed. Judgment is entered in favor of defendants United States of America and against plaintiffs Paul P. Lemieux and Catherine S. Lemieux.

September 13, 2002

Date

LANCE S. WILSON

Clerk

/s/

(By) Deputy Clerk,

ORDER

(Motion for Summary Judgment-#4)

Before the Court is Defendant's Motion for Summary Judgment (#4), filed June 28, 2002. The Court has also considered Plaintiff's Opposition (#6) filed July 11, 2002, Defendant's Reply (#8) filed June 26, 2002, and Plaintiff's Complaint (#1) filed February 28, 2002.

* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

BACKGROUND

Plaintiffs ask this court to 1) ''invalidate'' two collection due process determinations made by the IRS against them and 2) order reimbursement by Defendant of Plaintiff's costs associated with bringing this action.

Following a pattern of behavior the Court has yet to understand, Plaintiffs filed Form 1040, U.S. Individual Income Tax Return, for the 1997 and 1998 tax years. Although the included Forms W-2 showed income received by the Plaintiffs, both Returns contained zeroes on all lines reflecting income earned or taxes due and had attached statements outlining reasons for their belief that they had no income to report and did not, therefore, owe federal income tax.

Pursuant to Section 6702, the IRS assessed two $500 civil penalties on Plaintiffs for filing the stated returns. Section 6702 assesses a $500 civil penalty if an individual ''files what purports to be a return'' but which contains ''information that on its face indicates that the self-assessment is substantially incorrect'' and is due to ''a position which is frivolous.''

The IRS posted a Notice of Federal Tax Lien for unpaid civil penalties pursuant to Internal Revenue Code §§ 6321, 6322, and 6323 and informed Plaintiff of the lien by mail.[1] Plaintiffs then requested from defendant a collection due process hearing regarding the frivolous return penalties and collection alternatives which was held on November 7, 2001, a transcript of which is attached to Plaintiffs' Complaint (#1).

Finally, in separate letters dated January 24, 2001 and January 31, 2002, the IRS sent Plaintiffs a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (Notice of Determination) informing Plaintiff that the proposed levy to collect the frivolous return penalty would not be restricted. Attached to the Notice of Determination was Attachment 3194 explaining that the decision was based on the determination that the IRS fully complied with all applicable laws, regulations, and administrative procedures. The Notice of Determination also informed Plaintiff that any dispute of the determination could be made within 30 days in the appropriate United States District Court. Plaintiff timely filed with this Court and Defendant now moves for summary judgment.

DISCUSSION

I. Summary Judgment Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only ''where the record before the court on the motion reveals the absence of any material issue of fact and [where] the moving party is entitled to judgment as a matter of law.'' *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982) (quoting *Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981)), *cert. denied*, 460 U.S. 1085 (1983). ''A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing version of the truth.'' *Sec. & Exch. Comm'n v. Seaboard Corp.*, 677 F.2d 1289, 1293 (9th Cir. 1982) (citation omitted).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view all facts and draw all inferences in the light most favorable to the responding party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). *See also Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983). Once this burden has been met, ''[t]he opposing party must then present specific facts demonstrating that there is a factual dispute about a material issue.'' *Zoslaw*, 693 F.2d at 883 (citation and internal quotes omitted).

II. Analysis

[1] Plaintiff first asks that the collection due process determination made against him by the IRS be declared invalid. Since the Tax Court does not have juris-

[1] Compl. (#1), Exhibit F.

diction to consider frivolous return penalties, *See Van Es v. Commissioner*, 115 T.C. 324 (2000), the matter is appropriately before this court. 26 U.S.C. § 6320(c), 6330(d)(1)(B).

26 U.S.C. § 6702 assigns liability in the amount of five hundred dollars ($500) to a person filing a frivolous tax return. The Secretary of the Treasury or his delegate, such as the IRS,[2] assesses this penalty in the same manner as a tax, and any reference to a "tax" in Title 26 also includes this penalty. 26 U.S.C. § 6671. Section 6201 of the Code authorizes the Secretary to make any necessary tax assessments. In the case of a frivolous return penalty, the deficiency procedures of Title 26, Chapter 63, subchapter B, do not apply. 26 U.S.C. § 6703(b). The failure to pay the penalty results in a lien on the person's property. 26 U.S.C. § 6321. To ensure the validity of the lien, the Secretary files the lien with, in this case, the Clark County Recorder, 26 U.S.C. § 6323(f)(1)(A), and sends a notice of filing of the lien to the person, 26 U.S.C. § 6320(a). The Secretary must also inform the person of his right to a hearing at the same time. 26 U.S.C. § 6320(a)(3)(B). For the purposes of this Order, the procedures of the collection due process hearing, 26 U.S.C. § 6330(c), apply to the lien hearing, 26 U.S.C. § 6320(c). If the person requests a hearing, the hearing officer must "obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." 26 U.S.C. § 6330(c)(1). At the hearing, the person may also raise any relevant issue, including spousal defenses, the appropriateness of the collection action, and any collection alternatives. 26 U.S.C. § 6330(c)(2)(A). The person "may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. § 6330(c)(2)(B).

The "underlying tax liability" in this case is the frivolous return penalty. *See* 26 U.S.C. § 6671; *see also* 26 C.F.R. 301.6321-1. Plaintiffs properly challenged the validity of the frivolous return penalties at the collection due process hearing because the statutory deficiency procedures do not apply to frivolous return penalties, 26 U.S.C. § 6703(b), and thus Plaintiffs had no prior opportunity to dispute the penalties. The tax returns that Plaintiffs filed for 1997 and 1998 are relevant because they determine whether assessment of the frivolous return penalty was proper.

Section 6330(d) is silent on the standard that the Court should use to review the determination of the collection hearing. However, the legislative history indicates that if the validity of the underlying tax liability was properly at issue, then review is *de novo*. H. Conf. Rep. 105–599 (1998); *see also Dogwood Forest Rest Home, Inc. v. United States*, 181 F. Supp. 2d 554, 559 (M.D.N.C. 2001); *MRCA Info. Servs. v. United States*, 145 F. Supp. 2d 194, 198–99 (D. Conn. 2000); *Sego v. Commissioner*, 114 T.C. 604, 610 (2000). The Court will use that standard of review.

There is no doubt as to the validity of the penalty. Plaintiffs submitted Form 1040 for 1997 and 1998 with zeros in the income section and Forms W-2 showing income considerably more than zero. Motion (#4), Exhibits A and B. They also attached an already too familiar, boilerplate explanation of how no provisions of the Internal Revenue code make them liable for the income tax, how their wages are not income, and other matters. Wages are income, 26 U.S.C. § 61, upon which Plaintiffs owe a tax, 26 U.S.C. § 1, and courts—including this one—have found arguments to the contrary to be tired and frivolous long before Plaintiffs filed the tax returns at issue. *See*, e.g., *Sisemore v. United States*, 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir. 1986); *Coleman v. Commissioner*, 791 F.2d 68, 70 [57 AFTR 2d 86-1420] (7th Cir. 1986); *Sullivan v. United States*, 788 F.2d 813, 815 [57 AFTR 2d 86-1226]

[2] The Court will use the collective term "Secretary" to refer to the Secretary of the Treasury and any delegates. *See* 26 U.S.C. § 7701(a)(11)(B). The Secretary of the Treasury may delegate much of his authority and responsibilities to others by prescribing rules and regulations, among other methods. 26 U.S.C. § 7805(a); *see also* 26 C.F.R. §§ 301.7701-9, 301.7701-10.

(1st Cir. 1986); *Olson v. United States*, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985); *In re Hopkins*, 192 B.R. 760, 762–63 [76 AFTR 2d 95-7748] (D. Nev. 1995); and other cases too numerous to cite. On its face, Plaintiffs' tax returns were substantially incorrect and frivolous, thus making Plaintiffs liable for the frivolous return penalty. 26 U.S.C. § 6702. The assessments of the frivolous return penalties are valid.

No genuine issue of material fact exists over the verification of all legal and administrative requirements. Plaintiffs state that the "Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC § 6320," Compl. (#1) Exhibit F-2, was erroneously sent by the Compliance Technical Support Manager, but the Compliance Technical Support Manager is an official with the authority to send such a notice. *See* D.O. No. 196, 1982-2 C.B. 748 (1982). The Secretary of the Treasury delegated to the local Internal Revenue Service office collecting the penalty the responsibility of providing the verification to the hearing officer. 26 C.F.R. § 301.6320-1(e)(1).[3] The hearing officer relied on computerized printouts, Plaintiffs' Complaint (#1) Exhibits L and M, for such verification.

Courts have regularly ruled that such reliance on IRS Form 4340 is sufficient for the purpose of complying with section 6330(c)(1). *See Huff v. United States*, 10 F.3d 1440, 1446–47 [72 AFTR 2d 93-6682] (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994); *Hughes v. United States*, 953 F.2d 531, 538–40 [69 AFTR 2d 92-472] (9th Cir. 1992); *see also Davis v. Commissioner*, 115 T.C. 35, 41 (2000). But, the Forms to which Defendant directs the Court's attention do not appear to be Forms 4340 or to show that the frivolous return penalty had been assessed, that notices had been mailed to Plaintiff, and that Plaintiff had requested a hearing. And the Court urges Defendant in future actions of similar ilk to include easily identifiable and relevant Forms 4340 instead of merely referring to unidentifiable computer printouts.

However, because, as noted above, the tax returns are clearly frivolous, and, based on the exhibits included in Plaintiffs' complaint, the hearing officer was presumably able to verify assessment of the frivolous return penalty, that notices had been mailed to Plaintiff, and that Plaintiff had requested a hearing, the Court finds that the hearing officer did not err in his verification that the requirements of any applicable law and administrative procedures had been met. Therefore, the collection due process determination is valid.

Without declaring defendant's collection due process determination invalid, the Court has no reason to reach Plaintiff's requests for costs.

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (#4) is GRANTED.

Dated: September 12, 2002.

ROGER L. HUNT

United States District Judge

¶2002-5486

Robert C. MacELVAIN, PLAINTIFF v. UNITED STATES OF AMERICA and Revenue Officers of The United States of America, personally, and John Doe, personally, and Jane Doe, personally, Fran Keith, personally, DEFENDANTS. U.S. District Court, Middle Dist. of Alabama, (DC AL) CIVIL ACTION NO. 02-A-0102-N, Sept. 5, 2002. District Court, (2002, DC AL) 90 AFTR 2d 2002-6266, adopted. Earlier proceedings at (2002, DC AL) 90 AFTR 2d 2002-6084, adopting (2002, DC AL) 90 AFTR 2d 2002-5255. Years 1980, 1981, 1982, 1983, 1984, 1985, 1986. Decision for Govt.

1. Refund actions—jurisdiction—full payment—administrative refund

[3] Plaintiff's repeated insistence that he see documents signed by the Secretary of the Treasury, or by a person with a delegation order signed by the Secretary of the Treasury, Compl. (#1), Exhibit C, is frivolous.

claims—actions against U.S. and IRS officers—damages—unlawful collection—constitutional claims—collateral estoppel; res judicata. Magistrate judge's recommendation to grant govt.'s motion to dismiss, or in alternative for summary judgment, was adopted, and summary judgment was entered for govt. *Reference:* United States Tax Reporter ¶74,336.501(10); 74,225.01(5); 74,225.01(20); 74,337.504(5); 76,557.53(30); 74,336.504(40); 74,335.01(5); 74,335.01(30). IRC §7422; 7433.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION,

ORDER

[1] There being no objections filed to the Recommendation of the Magistrate Judge filed herein on 14 August 2002 (Doc. 33), said Recommendation is hereby adopted, and it is the

ORDER, JUDGMENT and DECREE of the court that the Defendant's Motion to Dismiss, Or in the Alternative, for Summary Judgment is GRANTED to the extent that summary judgment is entered for the defendants.

Done this 5th day of September, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5487

Charles E. DEHETRE, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-1006-JCM(LRL), Aug. 26, 2002. Decision for Govt.

1. Collection due process—procedure. Taxpayer's IRC §6330 petition was dismissed with prejudice as untimely where he didn't file it within statutory 30-day period. *Reference:* United States Tax Reporter ¶63,305.01(5). IRC §6330.

DANIEL BOGDEN United States Attorney Lloyd D. George Federal Courthouse Suite 5000 333 Las Vegas Blvd., South Las Vegas, NV 89101 Telephone: (702) 388-6336

JOHN B. SNYDER, III Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 683 Ben Franklin Station Washington, D.C. 20044-0683 Telephone: (202) 307-6548

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA,

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed. Judgment is entered in favor of defendants United States of America and against plaintiff Charles E. Dehetre.

August 26, 2002

Date

LANCE S. WILSON

Clerk

/s/

(By) Deputy Clerk,

ORDER GRANTING UNITED STATE'S MOTION TO DISMISS

[1] This matter having come before the Court on the United States' motion to dismiss, and after a hearing on August 14, 2002, the Court finds that the plaintiff's complaint was not filed within the 30-day period prescribed by 26 U.S.C. § 6330(d)(1).

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the plaintiff's complaint is dismissed with prejudice.

DATED this 23rd day of Aug., 2002.

/s/

United States District Judge

¶2002-5488

Joseph DeLILLO, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of Florida, (DC FL) CASE NO. 02-60745-CIV-DIMITROULEAS, Sept. 9, 2002. Year 1988. Decision against Taxpayer.

1. Actions against U.S.—malicious prosecution—tax crimes—making false statements—sentencing. Convicted taxpayer's civil complaint that he was erroneously indicted for making false statements on tax return was dismissed on summary judgment: if construed as 28 USC §2255 collateral attack, action was time-barred, even providing for tolling while intervening actions were pending; and law of case doctrine otherwise precluded what was merely successive attempt to challenge already appealed conviction. Also, even if construed as civil complaint for malicious prosecution, complaint still failed since criminal prosecution hadn't been terminated in taxpayer's favor and administrative remedies weren't exhausted; and no sentencing violation occurred. *Reference:* United States Tax Reporter ¶74,336.504(44); 73,446.517(30); 72,065.01(5). IRC §7206.

Mark Stier, Esq. U.S. Department of Justice P.O. Box 14198 Washington, DC 20044
Joseph DeLillo 4272 Royal Oak Drive Palm Beach Gardens, FL 33410

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA,

FINAL JUDGMENT AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

WILLIAM P. DIMITROULEAS United States District Judge

THIS CAUSE is before the Court on Defendant's July 24, 2002 Motion for Summary Judgment [DE-6], and the Court having considered Plaintiff's (DeLillo) September 5, 2002 Response and seeing no reason to wait for a reply, finds as follows:

Case No. 92-6158-CR-HURLEY

1. **[1]** DeLillo was indicted on October 19, 1992 and charged with making false statements on a tax return for the year 1988. [CR-DE-1]. On December 12, 1993, a superceding indictment was filed. [CR-DE-27]; it added a false statement to a bank charge. The false tax return charges carried a maximum penalty of three (3) years in prison. 26 U.S.C. § 7206(1).

2. On June 16, 1995, DeLillo was found guilty by a jury on both of the false tax return counts. [CR-DE-77]. He was acquitted on the false bank statement charge.

3. On March 26, 1996, DeLillo was sentenced to fifteen (15) months in prison to run concurrently on both counts. [CR-DE-98].

4. On July 28, 1998, the Eleventh Circuit Court of Appeals affirmed the judgment and sentence. United States v. DeLillo, 152 F.3d 933 (11th Cir. 1998). [CR-DE-118]. Mandate issued on August 27, 1998.

5. On July 21, 1999, DeLillo filed a Motion to Vacate Or For New Trial. [CR-DE-120]. Among the issued raised by DeLillo in this collateral attack was the contention that an expert witness, Ronald Wise, and Internal Revenue Service agent, had lied during the sentencing hearing. [pp 2–3]. On July 29, 1999, DeLillo's motion was denied. [CR-DE-122]. On May 22, 2000, the Eleventh Circuit Court of Appeal affirmed. United States v. DeLillo, 218 F.3d 747 (11th Cir. 2000). [CR-DE-129]. Mandate issued on July 3, 2002.

Instant Civil Action

6. In this collateral attack/civil complaint, filed on May 29, 2002, DeLillo's complains first; that his indictment was erroneous and unlawful; second, that his conviction was based upon false testimony; and third that his sentence was illegal.

7. Defendant's Motion for Summary Judgment contends: first, that DeLillo's complaints about his convictions are time-barred; second, that DeLillo cannot attack his convictions through a civil suit; and

third, that DeLillo has not exhausted administrative remedies prior to filing suit.

8. A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate when there exists no genuine issue as to any material fact and a decision may be rendered as a matter of law. Defendant, United States, as they party moving for summary judgment, has the burden of demonstrating that no genuine issue as to any material fact exists, and that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

9. Construing this complaint as a collateral attack under 28 U.S.C. § 2255, it is time-barred. DeLillo's conviction became final ninety (90) days[1] after mandate issued on his direct appeal, or on November 25, 1998. Tolling the approximately twelve (12) months that DeLillo's first collateral attack was pending, still results in thirty (30) months elapsing prior to this complaint being filed. Therefore, construing this petition as a collateral attack on a criminal conviction, it is time-barred.[2] Finally, matters raised previously on appeal or collateral attack are not the proper subject of another collateral attack under a different name. U.S. v. Nyhuis, 211 F.3d 1340, 1343 (11th Cir. 2000), cert. denied, 121 S. Ct. 892 (2001). The law of the case doctrine prevents subsequent appeals of the same issue. Coleman v. Calderon, 210 F.3d 1047, 1052 (9th Cir. 2000).

10. Even if this Court did not construe this complaint as an untimely, successive petition under 28 U.S.C. § 2255, this complaint would still be insufficient upon which to base any relief. Construing DeLillo's complaint as a complaint for malicious prosecution, it is insufficient in that the criminal prosecution was not terminated in his favor. Heck v. Humphrey, 512 U.S. 477, 484 (1984). A judgment in favor of DeLillo in this case would improperly imply the invalidity of his conviction and sentence. Spivey v. Board of Pardons, 279 F.3d 1301, 02 (11th Cir. 2002).

11. DeLillo did not exhaust any administrative channels for a remedy.

12. Any malicious prosecution complaints about his false statement to a bank charged are also time-barred as not having been filed by June 16, 1997.

13. No Apprendi v. New Jersey, 120 S. Ct. 2348 (2000) violation occurred where DeLillo was sentenced to less than the statutory maximum of three (3) years in prison. U.S. v. Sanchez, 269 F.3d 1250 (11th Cir. 2001).

WHEREFORE, Defendant's Motion for Summary Judgment is GRANTED.

The Clerk shall DENY any pending motions as MOOT.

The Clerk shall CLOSE THIS CASE.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 9 day of September, 2002.

WILLIAM P. DIMITROULEAS

United States District Judge

¶2002-5489

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Ronald G. JOHNSON, DEFENDANT-APPELLANT. U.S. Court of Appeals, Fourth Circuit, (CA4) No. 02-4018, Oct. 10, 2002. District Court affirmed per curiam. Decision against Taxpayer.

1. Tax crimes—preparing false claims against U.S.; aiding and abetting—indictments—evidence. Taxpayer's conviction for preparing, or aiding and abetting preparation of false claims against U.S. was affirmed: govt.'s discretionary decision to charge taxpayer under Title 18 rather than IRC wasn't erroneous; IRS agent's failure to specifically identify aiding and abetting statute to grand jury was irrelevant in light of testimony that clearly

[1] Kaufmann v. U.S., 282 F.3d 1336, 1337–38 (11th Cir. 2002); cert. filed (May 1, 2002).

[2] It is also a successive petition. Calling it by a different name does not change the reality of the motion. Martinez v. Texas Court of Criminal Appeals, 292 F.3d 417, 420 (5th Cir. 2002), cert. filed (May 22, 2002); Reeves v. Little, 120 F.3d 1136, 1138 (10thCir. 1997). Plaintiff cannot avoid the prohibition against successive petitions by filing a civil action instead. Gomez v. U.S. Dist. Ct., 112 S. Ct. 1652 (1992).

established probable cause for finding taxpayer acted both as principal and aider/abetter; and evidence sufficiently supported conviction. Also, taxpayer's jurisdictional challenge was meritless; Speedy Trial Act and 6th Amendment claims were rejected; discovery was properly conducted; jury instructions were adequate; and jury misconduct allegation wasn't supported. *Reference:* United States Tax Reporter ¶73,446.503(17); 73,447.507(5); 73,447.512(5).

Ronald G. Johnson, Appellant Pro Se. Ruth Elizabeth Plagenhoef, Assistant United States Attorney, Roanoke, Virginia, for Appellee.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT,

Appeal from the United States District Court for the Western District of Virginia, at Lynchburg. Norman K. Moon, District Judge. (CR-01-10019)

Before WILKINS, NIEMEYER, and WILLIAMS, Circuit Judges.

OPINION

PER CURIAM:

UNPUBLISHED

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

Ronald G. Johnson appeals his conviction after a jury trial of twenty counts of preparing or aiding and abetting the preparation of false claims against the United States, in violation of 18 U.S.C. §§ 2, 287 (2000). Finding no reversible error, we affirm.

[1] Johnson contends that the indictment was defective because he was accused of filing fraudulent tax returns and, therefore, he should have been charged under Title 26 rather than Title 18, United States Code. Johnson also asserts that the Government failed to present to the grand jury evidence that the aided or abetted the preparation of filing of false returns, which invalidates his indictment under 18 U.S.C. § 2.

Although the conduct alleged in the indictment arguably violated both 18 U.S.C. § 287 and 26 U.S.C. § 7206(2) (2000), the charging decision is committed to the discretion of the United States Attorney. *See United States v. Wilson*, 262 F.3d 306, 315 (4th Cir. 2001), *cert. denied*, ___ U.S. ___, 122 S. Ct. 1908 (2002). Johnson also argues that, because there was no mention of 18 U.S.C. § 2 before the grand jury and he was only convicted of aiding and abetting in violation of § 2, his convictions are invalid. We note that the jury verdict sheet does not indicate whether the jury found that Johnson acted as a principal or as an aider or abetter for any particular count of conviction.

A defendant bears an especially high burden in attacking an indictment after conviction. *See United States v. McDonald*, 61 F.3d 248, 252 (4th Cir. 1995). Our review of the portion of the grand jury transcript Johnson attached to his appeal convinces us that the grand jury was provided sufficient information to return an indictment of aiding and abetting the preparation of false tax returns against Johnson. Although the IRS agent did not specifically mention a citation to the aiding and abetting statute, his testimony before the grand jury established probable cause to believe that Johnson participated in the preparation and submission of false claims both as a principal and as an aider or abetter. Finally, any error in the presentation to the grand jury is harmless in light of the trial jury's finding that Johnson's guilt was established beyond a reasonable doubt. *See United States v. Mechanik*, 475 U.S. 66, 70 (1986).

In a related argument, Johnson asserts that his arrest was invalid under Fed. R. Crim. P. 40 and the charges against him should have been dismissed. Johnson argues that the was not provided a copy of the arrest warrant within ten days of his arrest, and that he was not arrested based upon the indictment or warrant, but on a handwritten piece of paper. The record, however, shows that a grand jury in the

Western District of Virginia returned an indictment charging Johnson, and an arrest warrant was issued based upon the indictment. Subsequently, certified copies of the indictment and arrest warrant were transmitted to the district court for the District of Delaware, where Johnson then resided, and Johnson was arrested pursuant to the warrant. Johnson was brought before a magistrate judge the same day he was arrested for an initial appearance and identity hearing. Contrary to Johnson's assertions, the arresting officer is not required to have the warrant at the time of arrest. *See* Fed. R. Crim. P. 4(d)(3); *United States v. Salliey*, 360 F.2d 699, 704 (4th Cir. 1966). We conclude that the Government complied with Rule 40 and that Johnson's arguments for a dismissal of the charges are without merit.

Johnson next asserts that, because the crime of filing false tax returns is not completed until the return is filed with the IRS, and the filing occurred in Philadelphia, no criminal act occurred in the Western District of Virginia. Therefore, the district court for the Western District of Virginia did not have jurisdiction to conduct his trial, and venue for his trial was proper only in Philadelphia. In support of this argument, he also asserts that, because the gravamen of his crime was a tax offense, he should have been given the benefit of the venue provision of 18 U.S.C. § 3237(b) to be tried in the district in which he resided, Delaware. Accordingly, he asserts that venue for his trial properly lay only in either Philadelphia or the district of Delaware, but not in the Western District of Virginia. We find these arguments without merit.

The jurisdiction of the district courts extends to "all offenses against the laws of the United States." 18 U.S.C. § 3231 (2000); *see generally United States v. Cotton*, ___ U.S. ___, 122 S. Ct. 1781, 1784–85 (2002) (discussing criminal jurisdiction of district courts). Because the indictment properly alleged an offense against the laws of the United States, the district court had jurisdiction over Johnson and the charged crimes.

Johnson's argument that venue was not proper in the Western District of Virginia has been rejected by this court. *See United States v. Blecker*, 657 F.2d 629, 632–33 (1981). In *Blecker*, the court rejected a venue challenge in a prosecution under 18 U.S.C. § 287, stating that "venue lies to prosecute a violator of this statute in either the district in which the claims were made or prepared, or the one in which they were presented to the government." *Id.* at 632 (internal citations omitted). Johnson's attempt to invoke the choice of venue provisions in 18 U.S.C. § 3237(b) is likewise meritless. As discussed above, the indictment validly charged Johnson with a violation of the false claims statute, not a violation of the Intern Revenue Code. Finally, the evidence produced at trial clearly established that Johnson prepared, or assisted the preparation of, false tax returns in Lynchburg, Virginia, satisfying the prosecution's burden to prove venue by a preponderance of the evidence. *See Blecker*, 657 F.2d at 320.

Johnson next alleges that his right to a speedy trial was violated, at least in part as a result of the district court assigning counsel to represent him. The Speedy Trial Act, 18 U.S.C. § 3161 (2000), requires that the trial of a defendant charged in an indictment commence within seventy days "from the date the defendant has appeared before a judicial officer of the court in which such charge is pending." 18 U.S.C. § 3161(c)(1). Johnson first appeared before a judicial officer in the Western District of Virginia on July 16, 2001. Without any periods of exclusion, then, Johnson's trial should have commenced on or before September 24, 2001.

The Act excludes from the time in which trial must commence periods of delay as a result of "any proceeding, including any examination, to determine the mental competency ... of the defendant," and "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." 18 U.S.C. § 3161(h)(1)(A), (F). On August 10, 2001, the district court granted the de-

fense's motion for a psychiatric examination of Johnson and a competency hearing. After the examination was completed, a competency hearing was held on November 14, 2001. Accordingly, the speedy trial deadline was extended for over three months, which extended the permissible trial date until December 24, 2001. Moreover, the plethora of pretrial motions filed by Johnson provided excludable periods of delay. *See Henderson v. United States*, 476 U.S. 321, 330 (1986); *United States v. Osteen*, 254 F.3d 521, 525 (4th Cir. 2001). As Johnson's trial commenced on December 19, 2001, we conclude that his right to a speedy trial was not violated.

Nor was Johnson's Sixth Amendment right to a speedy trial impaired. This court considers four factors to determine whether a defendant's Sixth Amendment speedy trial right has been violated: "whether the delay before trial was uncommonly long, whether the government or the defendant is more to blame for that delay, whether in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result." *United States v. Thomas*, 55 F.3d 144, 148 (4th Cir. 1995) (quoting *Doggett v. United States*, 505 U.S. 647, 651 (1992)).

The delay between Johnson's arrest and his trial, roughly eight months, was not uncommonly long. *See Doggett*, 505 U.S. at 652. We also conclude that Johnson is responsible for the majority of the delay in this case. The combination of Johnson's numerous pretrial motions and the requested psychiatric evaluation caused significant pretrial delay. The Government requested one continuance of slightly more than thirty days, which the district court granted after finding "that the ends of justice served by granting such continuance outweigh the best interest of the public and the defendant in a speedy trial pursuant to Title 18 U.S.C. Sections 3161(h)(7) and 3161(h)(8)(A)." Johnson clearly fulfills the third *Thomas* factor, as he voiced his desire for a speedy trial very early in the proceedings, prior to his transfer to the Western District of Virginia. We conclude, however, that Johnson cannot show that he suffered prejudice as a result of the delay. Johnson called no witnesses at his trial other than himself, and has not asserted that any witness he might have called became unavailable as a result of the delay in his trial. Moreover, this was in large part a "paper" case in which witness testimony served primarily to authenticate the documentary evidence and establish a link between Johnson and those documents. We conclude that Johnson's speedy trial rights under the Sixth Amendment were not violated.

Johnson next argues that the district court erred in denying his request for a bill of particulars and that the Government did not provide adequate pretrial discovery. The denial of a request for a bill of particulars is reviewed for an abuse of discretion. *See United States v. Jackson*, 757 F.2d 1486, 1491 (4th Cir. 1985). A bill of particulars is granted in order to allow the defense additional information to prepare for trial and avoid unfair surprise, but it "is not to be used to provide detailed disclosure of the government's evidence in advance of trial." *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 405 (4th Cir. 1985). Johnson's requests for a bill of particulars did not specify what information he sought that was not included in the indictment. Moreover, at his arraignment, Johnson acknowledged that he had received a copy of the indictment, and that he understood the charges against him. We therefore conclude that the district court did not err in denying Johnson's request for a bill of particulars.

With regard to Johnson's assertion that the Government did not provide required discovery to him, we find that this claim is belied by the record. At several points during his trial, Johnson objected to a Government witness or evidence on the grounds that he was not aware the witness would be called, the nature of the testimony, or the nature of the evidence offered. The Government replied, and Johnson often acknowledged, that he had been provided copies of witness statements and documentary evidence. This court has held that the decision whether to require an exchange of

witness lists under Fed. R. Crim. P. 16 is within the discretion of the trial court. *See United States v. Fletcher*, 74 F.3d 49, 54 (4th Cir. 1996). In this case, the joint discovery order was silent as to witness lists. Because Johnson had no right to a list of witnesses the Government intended to call, and he received the discovery to which he was entitled, his assertion of error is baseless.

Johnson asserts the district court improperly instructed the jury, in part by instructing the jury that his crimes were a "continualing [sic] offense." "This court reviews jury instructions in their entirely and as part of the whole trial" to determine "whether the court adequately instructed the jury on the elements of the offense and the accused's defenses." *United States v. Bostian*, 59 F.3d 474, 480 [76 AFTR 2d 95-5375] (4th Cir. 1995) (quoting *United States v. Fowler*, 932 F.2d 306, 317 (4th Cir. 1991)). Johnson asked the court to instruct the jury based upon case law he presented that purportedly supported his theories that he was charged under the incorrect section of the United States Code, that merely preparing false claims was not a crime, that the crime of presenting false claims was not completed until the claims were filed with the IRS, and because the filing occurred in Philadelphia, the district court had no jurisdiction over him. The district court rejected Johnson's legal theories and refused to allow him to present them to the jury, or to instruct the jury on these theories.

As discussed above, the district court had jurisdiction over Johnson and the crimes charged, and venue was proper in the Western District of Virginia. Moreover, the evidence clearly demonstrated that the claims in question were prepared in the Western District of Virginia and were in fact presented to the IRS. Our review of the record demonstrates that the instructions requested by Johnson were not correct statements of the law and were not supported by the facts. The district court properly rejected Johnson's proffered instructions. We also conclude that the instructions given by the district court correctly stated the elements of the offenses charged and were otherwise correct statements of the law applicable to this case. Finally, Johnson's contention that the district court instructed the jury that the charged crimes were a continuing offense is belied by the record.

Johnson asserts the evidence was insufficient to sustain his conviction. He also alleges error in the purported fact that one juror refused to sign the verdict sheet. A jury's verdict must be upheld on appeal if there is substantial evidence in the record to support it. *See Glasser v. United States*, 315 U.S. 60, 80 (1942). In determining whether the evidence in the record is substantial, this court views the evidence in the light most favorable to the government, and inquires whether there is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt. *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996) (en banc). We do not review the credibility of the witnesses, and we assume that the jury resolved all contradictions in the testimony in favor of the government. *See United States v. Romer*, 148 F.3d 359, 364 [82 AFTR 2d 98-5123] (4th Cir. 1998).

We have carefully reviewed the record, which included lengthy and detailed testimony against Johnson. We conclude that the evidence of Johnson's guilt was overwhelming. Johnson's contention that a juror refused to sign the verdict form is likewise baseless. The verdict sheet in this case was properly signed by the jury foreperson, the only person required to sign the verdict sheet. We also conclude that the district court did not err in di-recting the jury to return to the deliberation room when it was discovered that the verdict on Count Thirteen had not been marked on the verdict sheet. The jury retired, marked the verdict for Count Thirteen, and returned to the courtroom. Finally, the jury was polled at Johnson's request. We find no indication of any improper conduct by the jury, and conclude this argument is without merit.

We therefore deny Johnson's motion for dismissal, motion for a copy of his appeal, motion to expedite his appeal, and all other pending motions for general relief, and affirm his convictions and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

¶2002-5490

In Re: Angel Mario GARCIA and Margarita Lourdes Landron GARCIA. Deborah MENOTTE, as Chapter 7 Trustee for the Bankruptcy estate of Angel Mario Garcia and Margarita Lourdes Landron Garcia, PLAINTIFF v. UNITED STATES OF AMERICA, Angel Mario Garcia, Margarita Lourdes Landron Garcia, and Rafaela V. Landron, DEFENDANTS. U.S. District Court, Southern Dist. of Florida, (DC FL) CASE NO: 01-945-CIV-GOLD, Sept. 6, 2002. Years 1992, 1994, 1995, 1996. Decision for Govt.

1. Lien property—exemptions—homestead—lien priority—interpleader actions—attorney's fees and costs—bankruptcy. Govt. was granted judgment for balance of interpleaded proceeds from sale of bankrupt taxpayers' home: district court jurisdiction was proper where action involved federal tax lien and bankruptcy court's prior distribution order was void for lack of jurisdiction; Florida state homestead exemption didn't exempt property from federal tax lien or trump federal law, which contained no homestead exemption; and, although 3d party had valid, prior mortgage interest in property, such wasn't entitled to priority under IRC §6323(h) as security interest where 3d party obtained her interest with unrepaid loaned funds and had not parted with any money or money's worth. Also, interpleader/trustee was denied attorney's fees where awarding such would encroach on govt.'s recovery. *Reference:* United States Tax Reporter ¶63,315.03(100); 63,235.01(105); 63,215.04(145). IRC §6321; 6323; 6331; 6334.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA,

ENTRY OF FINAL JUDGMENT DISMISSING CASE

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

On September 3, 2002, the court granted the United States's motion for summary judgment in its entirety dismissing all of plaintiff's and co-defendants' claims against the United States. In accordance with Federal Rule of Civil Procedure 58 and the court's order granting the United States's motion for summary judgment, it is the judgment of the court that the United States is entitled to the interpled funds in the amount of $83,000 and the plaintiff and co-defendants Garcia, Garcia, and Landron shall take nothing in this case. The case is hereby dismissed and closed. The court reserves to consider fees and costs.

DONE AND ORDERED in Chambers at Miami, Florida, this 6 day of September, 2002.

THE HONORABLE ALAN S. GOLD

UNITED STATES DISTRICT JUDGE

ORDER GRANTING UNITED STATES'S MOTION FOR SUMMARY JUDGMENT

THE HONORABLE ALAN S. GOLD
UNITED STATES DISTRICT JUDGE

THIS CAUSE is before the court upon defendant United States's (''United States'') motion for summary judgment (D.E. #92). The plaintiff, Deborah Menotte (''Trustee''), has filed an interpleader complaint against the United States, Rafaela V. Landron (''Landron''), and Angel Mario Garcia and Margarita Lourdes Landron Garcia (''Garcias'') for Declaratory Relief. The Trustee, as stakeholder, seeks a declaratory judgment as to who is entitled to disputed funds in the amount of $83,000, calculated in a bankruptcy proceeding in the United States Bankruptcy Court for the

Southern District of Florida.[1] The Trustee also seeks an award of costs and attorney's fees. Co-defendants Landron and the Garcias have responded to the United States's motion, (DE #94) and (DE #95) respectively. The Trustee has also filed a limited opposition to the United States's motion with a cross-motion for summary judgment (DE #96). The court has subject matter jurisdiction pursuant to 28 U.S.C. § 1335 because this is an interpleader action with two or more claimants of diverse citizenship. The court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, and 28 U.S.C. § 1340 in so far as this matter involves claims that come under this court's federal question jurisdiction.

On August 30, 2002, the court heard oral argument on the United States's motion and the Trustee's cross-motion. After carefully considering the motions, evidence, and arguments of counsel, the court grants the United States's motion for summary judgment.

The Undisputed Facts[2]

On February 18, 1997, the Garcias filed a petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Florida. (U.S. Mot. SJ at 3). On April 17, 1997, the Garcias entered into a balloon mortgage agreement with Landron as mortgagee for one of the Garcias's real property at the time, a home at 2 Tahiti Beach Island Road, Coral Gables, Florida. (U.S. Ex. #3). The Garcias, in accordance with the mortgage agreement with Landron, were to pay Landron $69,000 by April 17, 1998. Landron had borrowed the funds loaned to the Garcias from a company in the Dominican Republic, which the borrowed funds directly to the Garcias. (Landron Depo. at 9). Landron has not made any payments to the lender in the Dominican Republic. (Landron Depo. at 16). When the Garcias failed to make any payment on the April 17, 1997 loan, a new mortgage was executed on April 17, 1998. (U.S. Ex. #1). This new mortgage was recorded on August 2, 1999. (U.S. Mot. SJ at 4). Landron denies any knowledge of the bankruptcy proceeding when she entered the agreement with the Garcias. (See Landron Resp. to Mot. SJ at 4).

On Schedule A of their bankruptcy schedules, the Garcias listed their interest in the property and on Schedule C of the bankruptcy schedules, claimed that the property was exempt from any tax liens under Article X, Section 4 of the Florida Constitution (homestead property). (U.S. Mot. SJ at 3). The Trustee objected to the exemption because the property was in a municipality and exceeded ½ acre. (U.S. Mot. SJ at 4). The bankruptcy court sustained the objection and calculated the monies owed to the Trustee and the Garcias and issued an order that the remaining funds ($83,000) from the proceeds of the sale of the property was due the Garcias. (U.S. Ex. 6). The court further ordered, however, that the amount due was subject to the satisfaction of the recorded lien by Landron.

On September 8, 2000, before the bankruptcy court's Order Determining Debtors' Interest in Sale Proceeds, the Internal Revenue Service of the United States had served a Notice of Levy on the Trustee. (U.S. Ex. 5). The Notice of Levy noticed the Trustee that the Garcias allegedly owed income taxes for the years 1992, 1994, 1995, and 1996, totaling over $200,000. The United States made a claim to the entire $83,000 allegedly due the Garcias based on the federal tax liabilities. Pursuant to the Notice of Levy, the Trustee requested that the bankruptcy court reconsider its September 26, 2000 Order. (U.S. Mot. SJ at 5). The bankruptcy court denied the motion to reconsider and directed the Trustee to either follow its Order or to file an interpleader action in this court if she wished to resolve the dispute over the

[1] *In re Angel Mario Garcia & Margarita Lourdes Landron Garcia*, Case No. 97-11159-BKC-RAM.

[2] In support of its motion for summary judgment, the United States has filed a statement of material facts pursuant to Southern District of Florida Local Rule 7.5. In addition, the United States has submitted several exhibits, including depositions and documentary evidence. The co-defendants dispute and/or supplement some of the allegations contained in the United States's statement with its own Local Rule 7.5, along with depositions and documentary evidence, including several pleadings and orders issued by the bankruptcy court in the Chapter 7 Proceedings. The following facts are derived from the United States's Local Rule 7.5 statement, and any factual disputes between the parties are noted.

$83,000, because the bankruptcy court lacked jurisdiction over the funds derived from exempt property. (U.S. Ex. 7).

Introduction

This matter involves a dispute over funds originally assessed in the bankruptcy court. The United States, citing *In re Wesche*, 178 B.R. 542 [75 AFTR 2d 95-1611] (Bankr. M.D. Fla. 1995) and *In re Graziadei*, 32 F.3d 1408 (9th Cir. 1994), argues that the bankruptcy court did not have jurisdiction to order the distribution of the disputed funds because the funds were exempt property no longer within the jurisdiction of the bankruptcy court. Based on a review of the applicable statutes and case law, this court concludes that the bankruptcy court did not have jurisdiction over the distribution of exempt property. *See Novak v. O'Neal*, 201 F.2d 227, 231 (5th Cir. 1953)("As to assets of the bankrupt exempt by State laws, the court of bankruptcy exercises jurisdiction only to the extent necessary to segregate and set aside the property or money as so exempt by the bankrupt .... [The] adjudication of claims thereto by creditors or lienees therefore can not be properly be made by the court of bankruptcy.").[3]

This court has jurisdiction over the matter because it involves a federal question, namely the priority of federal tax liens. The applicable provision is 28 U.S.C. § 1340, which provides that "district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue." The Eleventh Circuit has noted that once a federal tax lien arises, "federal law governs the priority of competing liens asserted against a taxpayer's property." *Griswold v. United States*, 59 F.3d 1571, 1575 [76 AFTR 2d 95-5832] (11th Cir. 1995). Accordingly, this court concludes that its subject matter jurisdiction over this matter has been established.

Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). The court's focus in reviewing a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). The moving party has the burden to establish the absence of a genuine issue as to any material fact. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608 (1970); *Tyson Foods, Inc.*, 121 F.3d at 646. Once the moving party has established the absence of a genuine issue of material fact, to which the nonmoving party bears the burden at trial, it is up to the nonmoving party to go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." *Celotex v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553 (1986). Issues of fact are genuine only if a reasonable jury, considering the evidence presented could find for the nonmoving party. *See Anderson*, 477 U.S. at 247–51, 106 S. Ct. at 2510–11. In determining whether to grant summary judgment, the district court must remember that, "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* 477 U.S. at 255, 106 S. Ct. at 2513.

Analysis

Three issues must be resolved in this case. First, this court must determine if the Garcias' property is exempt from the federal tax lien because of its classification as homestead property. Second, if the property is not exempt from the federal tax lien, then this court must rule on who has priority over the disputed funds, Landron or the United States. Finally, this court must decide if the Trustee is entitled to

[3] The Eleventh Circuit adopted as binding precedent all cases decided by the former Fifth Circuit prior to the close of business on September 30, 1981. *See Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

costs and attorney's fees for bringing this interpleader action.

A. Homestead Exemption and Federal Tax Liens

[1] The Garcias argue that their property and the sale proceeds that came from it should not be subject to a federal tax lien because, according to the Florida constitution, the property is homestead property. The United States argues, citing *United States v. Mitchell*, 403 U.S. 190 [27 AFTR 2d 71-1457] (1971) and *Weitzner v. United States*, 309 F.2d 45 [10 AFTR 2d 5950] (5th Cir. 1962), that federal tax liens preempt state exemption statutes. This court agrees with the United States that the law is clear, as discussed below, that the Florida state exemption statute for homestead property does not avoid a federal tax lien.

As noted in the United States's summary judgment motion, the applicable statute authorizing the United States to issue a levy is 26 U.S.C. § 6331.[4] Section 6331 indicates that 26 U.S.C. § 6334 outlines the circumstances under which certain property are exempt from a federal tax lien. Homestead state exempt property is not among the property listed as being exempt from levy. *See* 26 U.S.C. 6334. Additionally, in *United States v. Rodgers*, 461 U.S. 677, 683 [52 AFTR 2d 83-5042], 103 S.Ct. 2132, 2137 [52 AFTR 2d 83-5042] (1982), the U.S. Supreme Court noted that "it has long been an axiom of our tax collection scheme that, although the definition of underlying property interests is left to state law, the consequences that attach to those interests is a matter left to federal law." (citations omitted). In *Rodgers*, the Court held that the Texas homestead exemption did not exempt the disputed property from the federal tax lien. *See id.* at 701, 2146.

Other cases have made clear that homestead property is not exempt from federal tax liens. *See United States v. Estes*, 450 F.2d 62, 65 [28 AFTR 2d 71-5770] (5th Cir. 1971) ("Even though the homestead might be exempt under state law from the claims of private creditors, 'Lno provisions of a state law may exempt property or rights to property from levy for the collection of' federal taxes owed.") (citing Treas.Reg. on Proc. and Admin. § 301.6334-1(c) and *United States v. Bess*, 357 U.S. 51, 56–57 [1 AFTR 2d 1904], 78 S.Ct. 1054 [1 AFTR 2d 1904], 2 L.Ed.2d 1135 (1958)); *Weitzner*, 309 F.2d at 48 [10 AFTR 2d 5727] ("It follows that the tax liens of the United States were and are valid and enforceable against the property claimed as homestead."). These cases in conjunction with the applicable statute compels this court's conclusion that Florida's homestead exemption does not immunize homestead property from federal tax liens.

B. United States's Levy and Landron's Mortgage

1. Does Landron have a recognized interest?

The United States claims that it is entitled to the disputed funds because of the superiority of the federal tax lien to the Landron mortgage. Before reaching the federal inquiry regarding priority, however, this court must determine if Landron's mortgage is a valid interest in "property or rights to property." *Haas v. Internal Revenue Service*, 31 F.3d 1081, 1084 [74 AFTR 2d 94-6280] (llth Cir. 1994) (citations omitted). This determination is essential to this court's analysis because the federal statutes involved in this action do not create property rights; they simply define federal consequences to those rights. *See United States v. National Bank of Commerce*, 472 U.S. 713, 722 [56 AFTR 2d 85-5210], 105 S.Ct. 2919, 2925 [56 AFTR 2d 85-5210], 86 L.Ed.2d 565 [56 AFTR 2d 85-5210] (1985) (citing *Bess*, 357 U.S. at 55, 78 S.Ct. at 1057, 2 L.Ed.2d 1135 [1 AFTR 2d 1904]); *see also Mitchell*, 403 U.S. at 197, 91 S.Ct. at 1768 ("In the determination of ownership, state law controls. 'LThe state law creates legal interests but the federal statute determines when and

[4] "If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses o the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax." 26 U.S.C. § 6331(a).

how they shall be taxed.'''') (citations omitted). Technically, Landron's mortgage became presumptively protected by Florida law when it was recorded on August 2, 1999. *See* Fla. Stat. ch. 695.01; *see also People's Bank of Jacksonville v. Arbuckle*, 82 Fla. 479, 487, 90 So. 458, 460 (Fla. 1921) (''The due record of a mortgage is statutory notice of the contract lien, binding all who deal with reference to liens upon the property.''). The United States does not dispute whether Landron's mortgage is valid under Florida law; it questions the mortgage's validity as a security interest under federal law for tax lien purposes. Thus, this court concludes that Landron's mortgage is a valid property interest under Florida law, but as the cases cited above assert, federal law determines if it is a ''security interest'' for tax lien purposes.

A federal tax lien is created by operation of law pursuant to 26 U.S.C. § 6321,[5] and 26 U.S.C. § 6322 indicates that the lien is imposed at *the date of assessment:* ''Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the tax-payer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.'' Despite the fact that the United States's tax lien is assessed at the time liability is determined, Landron might have a protected security interest if she falls into a certain category and notice of the federal tax lien has not been filed.

26 U.S.C. § 6323(a) outlines the four circumstances under which the federal tax lien would not be effective against Landron:

> (a) Purchasers, holders of security interests, mechanic's lienors, and judgment lien creditors.--The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.

Based on the definition of each term in the above statute, Landron is not a purchaser, mechanic's lienor, or a judgment lien creditor. Thus, Landron's mortgage would most qualify as a holder of a security interest, which means ''any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time (A) if, at such time, the property is in existence and the interest has become protected under local law against subsequent judgement lien arising out of an unsecured obligation, and (B) to the extent that, at such time, the holder has parted with money or money's worth.'' 26 U.S.C. 6323(h)(1). Landron must establish all conditions of Section 6323(h)(1) in order to be protected by Section 6323(a). *See Haas*, 31 F.3d at 1085. The United States argues that Landron's interest does not qualify under the statute because she has not parted with money or with money's worth. Landron has stated during oral argument as well as in her deposition that she did not pay the Garcias the $69,000 directly, nor has she paid back the loan received from the company in the Dominican Republic (See Landron. Depo. at 16).

In holding that a bank had not parted with money or money's worth, the Fourth Circuit, quoting Treas.Reg. § 301.6323(h)-l(a)(3) (1989) [26 C.F.R.], defined money or money's worth as ''money, a security . . . , tangible or intangible property, services, and other consideration reducible to a money value. Money or money's worth also includes any consideration . . . which was parted with before the security interest would otherwise exist if, under local law, past consideration is sufficient to support an agreement giving rise to a security interest . . . . [A]ny other consideration not reducible to a money value [is not] consideration in money or money's worth.'' *United States v. 3809 Grain Ltd. P'ship*, 884 F.2d 138, 142 [64 AFTR 2d 89-5926]

[5] ''If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.''

(4th Cir. 1989). Based on the definition of money or money's worth, Landron has failed to provide any evidence that she has parted with money's worth and she has already admitted that she has not actually parted with money. In addition, she does not have any documentation of any agreement with the company in the Dominican Republic that sent the $69,000 to the Garcias.

Accordingly, this court concludes that Landron does not possess a security interest that may compete with the federal tax lien. The United States has filed a Declaration of Jacqueline Kelly, an employee of the Internal Revenue Service, which states that as of September 3, 2002, the Garcias owe over $200,000 in federal taxes. Therefore the United States is entitled to the full $83,000 of interpled funds pursuant to 26 U.S.C. § 6331(a), unless Landron has a priority over the United States or the Trustee is entitled to attorney's fees. As indicated below, neither situation applies. *See United States v. Ruff*, 99 F.3d 1559, 1563 [78 AFTR 2d 96-7274] (11th Cir. 1996) (''The IRS is empowered to levy on the property or rights to property of a delinquent taxpayer in the hands of a third party.'').

2. Does Landron's interest have a priority over the United States's interest?

If Landron had provided evidence that she had parted with money or money's worth with reference to the mortgage, the priority of liens would not be so clear. The United States argues that Landron's claim to the disputed funds is inferior to its claims because, citing 26 U.S.C. § 6321, Landron's interest in the property arose after the tax assessments because Landron's mortgage was not recorded until August, 2, 1999, while the Garcia tax liabilities date from November 1993 to September 1997. The United States is incorrect, however, with the dates it is using to determine the priority of interests in the Garcia property.

According to the Eleventh Circuit, in *Litton Industrial Automation Systems, Inc. v. Nationwide Power Corp.*, 106 F.3d 366, 368 [79 AFTR 2d 97-1356] (11th Cir. 1997), ''any 'security interest' which arises prior to the proper filing of a federal tax lien takes priority over the tax lien.'' (citing *United States v. McDermott*, 507 U.S. 447, 449 [71 AFTR 2d 93-1154], 113 S.Ct. 1526, 1528 [71 AFTR 2d 93-1154], 123 L.Ed.2d 128 [71 AFTR 2d 93-1154] (1993)). The *Litton* court also noted that federal law, as opposed to state law, governs a priority question between a security interest and a federal tax lien. *Id.* at 371 (citing *Haas*, 31 F.3d at 1084–85). Proper filing of notice of the federal tax lien is usually essential in the answer to a priority contest. Based on *Litton* and the applicable statute, the determining factor is the filing of notice, not the date that the federal tax liability was incurred or assessed, as the United States asserts, unless the dates coincide. The *Haas* court noted: ''The filing requirement is critical: even a holder of a security interest who has actual knowledge of an unfiled tax lien will prevail over the government.'' *Haas*, 31 F.3d at 1084. The United States has admitted during oral argument that no notice has been filed in the appropriate office in the state. The United States stated that they are relying solely on the statutory lien that automatically applies when tax liability is assessed. *See Texas Oil & Gas Corp. v. United States*, 466 F.2d 1040, 1052 [30 AFTR 2d 72-5488] (5th Cir. 1972) (citing 26 U.S.C.A. § 6322). This statutory lien may alert the individuals who owe federal taxes, but it fails to alert others who may have a security interest in property owned by the delinquent taxpayers.[6]

The relevant statue that outlines how the United States is supposed to file a proper notice is 26 U.S.C. § 6323(f). Section 6323(f)(1)(A)(i) indicates that the notice shall be filed according to state law an in ''the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated

[6] The *Litton* court further provided: Under the Internal Revenue Code, a tax lien arises at the time of assessment, 26 U.S.C. § 6322, on ''all property and rights of property, whether real or personal, belonging to'' a delinquent taxpayer, [26 U.S.C.] § 6321. The FTLA provides, however, that the tax lien ''shall not be valid as against any . . . holder of security interest . . . until notice thereof which meets the requirements of subsection (f) has been filed.'' (citing 26 U.S.C. § 6323(a).

by the laws of such State, in which the property subject to the lien is situated; and'' section 6323(f)(1)(B), in ''the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office which meets the requirements of subparagraph (A).'' Thus, according to the statute, the United States must make another step to protect itself against other security interest holders. *See Haas*, 31 F.3d at 1084 (''Thus, section 6323 mandates that notice of the taxing authority's lien 'shall be filed' in the public records before it operates as notice effective against any holder of a security interest as that term is defined by section 6323.'').

Because the United States has admitted to failing to file the proper notice as required by the applicable statute, the Landron's mortgage should prevail over the federal tax lien. The mortgage falls short of priority, however, because, as discussed above, it does not meet all four conditions of a security interest as defined by section 6323. All four conditions must be met before a security interest can be valid and therefore compete with a federal tax lien. *See Litton*, 106 F.3d at 368; *Haas*, 31 F.3d at 1085. This court therefore concludes that since Landron failed to meet all four requirements, the fact that the United States failed to properly record the federal tax lien is irrelevant; the United States prevails by default since it is not competing against a valid security interest and the federal tax lien is otherwise valid.

C. Trustee's Entitlement to Attorney's Fees

The United States argues that the trustee is not entitled to attorney's fees, citing *Cable Atlanta, Inc. v. Project, Inc. et al*, 749 F.2d 626 [55 AFTR 2d 85-552] (11th Cir. 1984) and *Spinks v. Jones*, 499 F.2d 339 [34 AFTR 2d 74-5745] (5th Cir. 1974), because the interpled funds are insufficient to cover the government's tax liens. The Trustee responds that she is entitled to attorney's fees because the interpled funds exceed the federal tax obligations by more than $20,000. In its reply, the United States points out that the federal tax liens actually total over $200,000. Based on Eleventh Circuit case law discussed below, this court concludes that the trustee is not entitled to attorney's fees in this case.

The Eleventh Circuit has noted that ''[n]ormally a stakeholder who brings an interpleader action to determine which of two claimants is entitled to a fund which it holds, but does not claim, is entitled to have attorneys fees it incurs in bringing the action paid out of the fund. No such fees can be paid from the fund, however, when it goes to satisfy a tax lien.'' *Cable Atlanta*, 749 F.2d at 626 [55 AFTR 2d 85-552].[7] Additionally, in *Katsaris v. United States*, 684 F.2d 758 (11th Cir. 1982), a sheriff brought an interpleader action as a disinterested stakeholder regarding seized money. The Eleventh Circuit in that case pointed out that ''Florida courts have found proper the award of reasonable attorney's fees and costs in an interpleader action where the party brining the action is disinterested in the stake held and has not acted to cause the conflicting claims.'' *Katsaris*, 684 F.2d at 763 (citing *Drummond Title Company v. Weinroth*, 77 So.2d 606 (Fla. 1955); *Ellison v. Riddle*, 166 So.2d 840 (Fla.App. 1964)). But the Eleventh Circuit further held that ''once the government is successful in establishing a federal tax lien upon the funds in question, the judicial prerogative to award fees must give way to the supremacy of the federal tax lien whenever a fee award would encroach upon the fund subject to the tax lien.'' *Katsaris*, 684 F.2d at 763 (citing *Spinks*).

The Trustee contended during oral argument that relevant Eleventh Circuit case law regarding attorney's fees for a plaintiff bringing an interpleader action always applied to debtors and not disinterested stakeholders, but *Katsaris* involves a sheriff who as in fact a disinterested stakeholder,

[7] The court went on to note: ''The rationale of this decision is that the provisions of the Internal Revenue Code which establishes the lien, 26 U.S.C.A. §§ 6321, 6322, prohibit an award of attorney's fees when the effect of such award would diminish the amount recovered by the United States under its prior tax lien.'' *Cable Atlanta*, 749 F.2d at 627.

and the court still held that attorney's fees could not be awarded if it would encroach on the amount of the federal tax lien. The United States has submitted documentation that the Garcias still owe more than $200,000 in federal taxes. Because an award of attorney's fees to the Trustee would encroach on the funds subject the tax lien (as only $83,000 are in dispute in this case), this court concludes that the Trustee is not entitled to attorney's fees.

Conclusion

This court concludes that the United States is entitled to the $83,000 of disputed funds because the Garcias' homestead property is not immune to a federal tax lien. In addition, Landron's mortgage, although a valid interest under Florida law, does not prevail over the federal tax lien because it fails to meet one of the requirements of a security interest (parting with money or money's worth) according to the applicable federal statute. Finally, the Trustee is not entitled to attorney's fees because the $83,000 of interpled funds do not satisfy fully the Garcias' federal tax liabilities.

It is hereby:

ORDERED AND ADJUDGED THAT:

1. The United States's motion for summary judgment [DE # 92] is GRANTED.
2. The Trustee's cross-motion for summary judgment [DE #96] is DENIED.
3. All pending motions are DENIED AS MOOT.
4. This case is hereby DISMISSED WITH PREJUDICE and CLOSED.

DONE AND ORDERED in Chambers at Miami, Florida, this 6 day of September, 2002.

THE HONORABLE ALAN S. GOLD

UNITED STATES DISTRICT JUDGE

¶2002-5491

Fenton GINGERICH and Eunice GINGERICH, ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 98-533 T, Sept. 18, 2002.

Years 1983, 1984, 1985, 1986. Decision for Govt.

1. Limitations periods on partnership assessments—settlements. Partners' limitations periods challenge to partnership-related assessments was rejected on summary judgment: IRS made assessments within 1 year of date it countersigned Forms 906; and taxpayers' reliance on their earlier submitted correspondence as binding, limitations period-triggering agreement was erroneous since that correspondence didn't mirror, and thus couldn't be acceptance of IRS's offer. Also, cited case law was distinguished. *Reference:* United States Tax Reporter ¶62,295.01(30); 71,215.02(3). IRC §6229; 7121.

Teresa J. Womack, Houston, TX, for plaintiffs.
Ellen C. Specker, with whom were Assistant Attorney General Loretta C. Argrett, Mildred L. Seidman, William K. Drew, Washington, DC, for defendant.

United States Court of Federal Claims,

OPINION and ORDER

TURNER, Senior Judge.

Plaintiffs, individual taxpayers who received partnership income and were assessed for income taxation thereon, seek refunds of federal income taxes paid pursuant to a tax settlement agreement arising from a partnership tax matter. The case stands on cross-motions for summary judgment, filed simultaneously on December 20, 1999, which essentially address the parties' differing positions concerning the proper date for commencement of the one-year period within which the Internal Revenue Service could have made a valid assessment of each plaintiff's individual tax liability. *See* 26 U.S.C. § 6229(f).

We conclude that a settlement agreement was reached for assessment purposes on September 22, 1993 when the relevant individual closing agreements (IRS Form 906) were finalized, and that the one-year

assessment period ran from that date. Accordingly, we further conclude that the relevant assessments made in 1994 were not barred by the one-year statute of limitation and, consequently, that plaintiffs are not entitled to refunds. It follows that defendant's motion for summary judgment should be granted and that plaintiffs' motion for summary judgment must be denied.

I

The material facts are undisputed. Plaintiffs Fenton and Eunice Gingerich, Seung C. and Young Ho Karl, Choong H. and Joung S. Kim, Eugene M. Rosol, Charles H. Scruggs, and Dae-Sob and Moon K. Yoon were all direct partners in General Information Associates Partnership (GIA). Def. Proposed Findings of Uncontroverted Fact (PFUF), ¶ 1. Plaintiffs Carl V. and Nelle D. Liebovich, Albert and Dorothy Liebovich, Joe and Belle Liebovich, Gregory A. and Gail Liebovich, Larry J. and Barbara J. Liebovich, and Samuel D. and Erna S. Liebovich were all indirect partners in GIA by virtue of their status as shareholders of LouBess, Inc., an S corporation which was a direct partner in GIA. Def. PFUF, ¶ 2.

After an examination of GIA, the Internal Revenue Service mailed on April 9, 1990, a notice of final partnership administrative adjustment (FPAA) to the Tax Matters Partner (TMP) of GIA for tax years 1983 through 1986. DX 1, App. B at B-001.[1] On August 16, 1990, Raymond and Irma Ziff, partners other than the TMP and not plaintiffs in this case, filed a petition for readjustment (i.e., contesting the FPAA) in the United States Tax Court pursuant to 26 U.S.C. § 6226(b). DX 2, App. B at B-012 to B-013. All named plaintiffs in this action filed a notice of election on February 19, 1991, permitting them to participate in the Tax Court proceeding. DX 2, App. B at B-014 to B-015.

On January 23, 1991, Thomas E. Redding, counsel for plaintiffs, contacted IRS District Counsel William H. Stoddard to inquire about any settlement that may have been proposed by other partners of GIA. DX 3, App B at B-019; PX 19 at 146 (letter from Redding to Stoddard, IRS, 1/23/91). Redding's letter contained a request for (a) a copy of any settlement agreement between the IRS and any other partner; (b) certain materials exchanged between the IRS and GIA; and (c) information regarding the person or entity who, on behalf of GIA, consented to an extension of the statute of limitations for assessment by the IRS. *Id.* The letter also expressed an interest in settling the case:

> Although I am interested in evaluating the concept of ... settlement ..., there are details that I would like to review with you. Specifically, I am extremely concerned that the final settlement documents comprehensively settle this case and include appropriate language to avoid recognition of "phantom" income in the future and potential forgiveness of indebtedness or gain relative to long term debt connected with the partnership relative to which the partners have not been accorded the losses in the early years.

DX 3, App. B at B-020; PX 19 at 147.

On behalf of the IRS District Counsel, Bruce Wilpon replied to Redding on January 31, 1991. DX 4, App. B at B-026; PX 18 at 142 (letter from Wilpon to Redding, 1/31/91). He proposed a settlement on the following terms:

1. For each partner's first year of investment in GIA, each partner could claim a loss of 60% of his verified out-of-pocket cash investment, less the amount of any partnership losses previously allowed. In addition, plaintiffs would be entitled to carry over the loss to immediately succeeding taxable years until exhausted, but could not include as a part of the investor's cash investment any interest paid on notes in favor of the partnership.

2. The government would concede the applicability of the additions to the tax pursuant to certain IRC provisions.

[1] References designated "PX" and "DX" are to exhibits in the parties' respective appendices to their motions for summary judgment filed on December 20, 1999.

3. Investors were to concede the applicability of an increased rate of interest pursuant to IRC section 6621(c).

4. Plaintiffs could not claim any further losses, investment interest expense, or other deductions attributable to the partnership.

DX 4, App. B at B-026 to B-027; PX 18 at 142 to 143.

The IRS letter also stated that "if all of the participating partners agree to the settlement contained in this letter, [Redding] should send proof of [each partner's] verified cash investment and the disposition of any closed prior years." *Id.*Wilpon also expressed the intent to apply the settlement contained in the letter to those partners who agreed to its terms and then planned to file a motion for entry of decision with the Tax Court. *Id.*

On February 12, 1991, Redding replied to the government's offer to settle by explaining that settlement negotiations were premature. DX 5, App. B at B-030; PX 16 at 137 (letter from Redding to Wilpon, 2/12/91). In a critical response to the government's letter, Redding stated that "a response [to your settlement offer] is extremely inappropriate when you have failed to respond to my discovery requests," and further stated that he planned to file a motion for summary judgment in the Tax Court proceeding regarding the validity of the statute of limitations extension. *Id.*

On March 11, 1991, the government responded to Redding by writing that "[t]here may come a time when we feel that settlement negotiations are no longer productive. At that time, we will inform you in writing that the settlement offer will be withdrawn as of a date we decide." PX 14 at 134.

Redding replied to the government on July 5, 1991, expressing confusion about the terms of the government's proposed settlement. Redding suggested alternative settlement terms with a draft closing agreement. DX 6, App. B at B-033; PX 12 at 81 (letter from Redding to IRS, 7/5/91). Plaintiffs' counsel further reiterated to the government that he intended to file a motion for partial summary judgment regarding application of the statute of limitations to certain tax assessments. *Id.*

The government rejected plaintiffs' settlement offer by letter on October 17, 1991. DX 7, App. B at B-052; PX 11 at 78 (letter from IRS to Redding, 10/17/91). However, the government (IRS) stated that it would leave its original offer open as long as the government was not required to call any witnesses for the Tax Court's determination of plaintiffs' motion for partial summary judgment. *Id.*

The Tax Court denied plaintiffs' motion for partial summary judgment on September 29, 1992. *Gen. Info. Assoc. P'ship v. Commissioner*, 64 T.C.M. (CCH) 957 [1992 RIA TC Memo ¶92,583] (1990). In light of this development, the government again wrote Redding on October 22, 1992: "Please inform us of your decision to accept or reject the settlement offer previously extended in this case on or before December 1, 1992." PX 10 at 76.

Redding responded to the government on November 13, 1992, enclosing a form acceptance letter for each partner to execute and requesting that district counsel review it to confirm that such a letter received "within the time specified would constitute a valid acceptance of the settlement." PX 9 at 73. Redding also suggested that "a Closing Agreement be used in order to resolve all issues that are not partnership items issues and therefore are not before the Court in [the Tax Court] proceeding." Plaintiffs' counsel also stated that a draft closing agreement would be forwarded and asked that government counsel advise "as quickly as possible whether or not this will be acceptable." *Id.*

On November 17, 1992, the government (IRS) responded by providing a revised closing agreement and granting plaintiffs extra time to respond to the settlement proposal. DX 8, App. B. at B-055 to B-057; PX 8 at 70–72 (letter from Wilpon to Redding, 11/17/92). The government response stated that "we agree with your outline of settlement terms set out in Draft Acceptance Form," and gave 30 days additional time to respond. *Id.* The govern-

ment wrote an additional letter to plaintiffs' counsel on December 18, 1992 concerning the settlement offer, stating that "although it is our intention to continue to make the settlement available to all the investors, we can neither accept nor process any investor settlements (*e.g.*, closing agreements) or enter a decision in this case (setting forth the settlement) until a new [TMP] is chosen for the partnership." PX 4 at 61 (letter from Maselli to MacLean, 12/18/92).

On December 30, 1992, Redding mailed to the district counsel a separate letter on behalf of each partner enclosing an acceptance form executed by the partner and a copy of the draft closing agreement that had originally been enclosed with Redding's November 13, 1992 letter. PX 7 at 68. Redding wrote in the letter, "I would appreciate it if you would countersign the copy of each of the acceptance letters and return them to me as soon as possible." PX 7 at 68 (letter from Redding to Wilpon, 12/30/92).

On January 26, 1993, the government sent closing agreements for plaintiffs who had provided verified proof of cash investments in GIA. DX 9, App. B at B-058; PX 6 at 67 (letter from IRS to Redding, 1/26/93). That letter also stated that, "[i]t should be understood that this settlement is subject to review and acceptance on behalf of the respondent." *Id.*

On February 18, 1993, the IRS contacted Redding again and informed him that "*no settlement occurs until closing agreements are signed by your clients and countersigned by the appropriate Service representative.*" DX 10 at B-059; PX 5 at 66 (letter from IRS to Redding, 2/18/93) (emphasis in original). The IRS representative Wilpon also indicated that he intended to file a motion with the Tax Court to enter a decision reflecting the "full disallowance of all losses claimed by GIA on its partnership returns." *Id.*

On March 17, 1993, Redding notified the IRS that he found two provisions of the closing agreement to be inconsistent with the terms of settlement set out in prior communications. DX 11, App. B at B-060; PX 3 at 57. Redding also wrote: "It was my understanding from your prior correspondence that proceeding with closing agreements was essentially on hold until a new tax matters partner was appointed for the partnership." *Id.* Redding also responded to the government's February 18, 1993 letter and stated that a settlement had already been entered, writing:

> [Y]ou state that "no settlement occurs until closing agreements are signed by my clients and countersigned by the appropriate service representative." If this is an attempt to repudiate the settlement that you offered and my clients accepted, I must disagree. I will in good faith make every effort to cooperate with you in implementing closing agreements which, as I indicated many times, I believe are essential to carry out the agreement entered into by my clients.

DX 11 at B-060; PX 3 at 58.

On June 7, 1993, plaintiffs' counsel contacted the government again. In this letter, Redding recanted his position that the closing agreements were inconsistent with the terms of the settlement agreement. DX 12 at B064; PX 161 at 2695. In that letter, he refers to the closing draft as "the discussion draft I had sent you for the basis of settlement acceptance form." *Id.* In its brief, the government notes that the final closing agreements contained two new matters, first ¶ 10 provided that "[t]he FPAA was issued timely to the tax matters partner of the Partnership for the taxable year 1983," and, more importantly, ¶ 3 provided that the partner has an "adjusted basis of zero as of December 31, 1983 for his/her interest in the Partnership." Def. Br. (12/20/99) at 20.

The Tax Court issued an order on September 7, 1993 requiring petitioners (plaintiffs in the present case) to select a new TMP. DX 23 at B-165 to B-166. The court noted that all "nonsettling partners" will be affected by the outcome of the case. *Id.* at B-166. In addition, the court defined "nonsettling partners" as "partners who have not executed a closing agreement reflecting the project settlement or, if they have executed the closing agreement, the

agreement has not yet been countersigned by an authorized representative of the respondent.'' *Id.*

On September 10, 1993, plaintiffs' counsel returned the closing agreements as signed by plaintiffs. DX 13 at B-065 to B-119; PX 2 at 2–56. In returning the letters to the IRS, plaintiffs' counsel noted, ''Please have the closing agreements countersigned and a copy of each sent to my office as soon as possible. Clearly, once they are countersigned and a copy returned to me, the settlement will become enforceable as to the years not before the court and the relevant affected items.'' DX 13 at B-065; PX 2 at 2. An authorized representative of the IRS signed these closing agreements on September 22, 1993. DX 14-19 at B-120 to B-145. Copies of the fully-executed closing agreements were mailed to Redding on September 24, 1993. DX 20 at B-146; PX 1 at 1 (Wilpon to Redding letter, 9/24/93).

On December 27, 1993, Redding filed a motion to dismiss the matter pending before the Tax Court. DX 26 at B-174 to B-175. On January 11, 1994, the court directed plaintiffs to submit copies of the executed settlement agreements. DX 27 at B-177 to B-178. Plaintiffs submitted copies of both the December 30, 1992 acceptance letters and the subsequent closing agreements. DX 28, at B-179. The government responded to plaintiffs' motion on February 17, 1994 with a ''Notice of No Objection'' stating that ''no settlement was reached with any of the movants until the closing agreements were signed by the movants and countersigned by an appropriate representative for the respondent.'' DX 29 at B-183 to B-184.

On February 23, 1994, the Tax Court dismissed the case against plaintiffs for lack of jurisdiction. DX 30 at B-189 to B-190. Two days later, the court dismissed the case with respect to the remaining partners for lack of prosecution. DX 31 at B-191 to B-195. Subsequently, on March 25, 1994, the government/respondent requested that the court set forth the date when each movant ceased to be a party to the proceeding. DX 32 at B-196 to B-204. The Tax Court, however, declined to supplement its order and did not state a date as of which the court no longer had jurisdiction over each plaintiff, stating only that as of the time of the 1994 order, it did not have jurisdiction over plaintiffs, because the plaintiffs had entered into settlement agreements by then (or prior to that date). DX 33 at B-209 to B-210.

The government subsequently filed assessments against the plaintiffs individually within a year from the date (September 22, 1993) that the closing agreements were signed by the IRS. Plaintiffs assert that their December 30, 1992 letter constitutes their acceptance of the government's offer of settlement and began the one-year period within which the IRS was required to make any resulting assessments.[2] Plaintiffs contend that the assessments were made after the one-year statutory limitation period and now seek a refund of the moneys paid. Lacking a genuine issue of material fact, this case is ripe for disposition upon summary judgment.

II

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). When the parties have filed cross-motions for summary judgment, the court must evaluate each motion on its own merits. *See Thermocor, Inc. v. United States*, 35 Fed. Cl. 480, 485 (1996). In deciding whether summary judgment is appropriate, it is not the court's function ''to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'' *Liberty Lobby*, 477 U.S. at 249. ''The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.'' *Id.* at 255; *see also United States v. Diebold, Inc.*, 369 U.S. 654 (1962).

[2] Plaintiff Rosol's closing agreement was countersigned by the IRS on March 16, 1993. Pl. Br. (12/20/99) at 16. The government assessed the tax contemplated in that closing agreement on January 3, 1994, Compl. at 66, plainly within one year of complete execution of the closing agreement.

However, ''the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.'' *Liberty Lobby*, 477 U.S. at 247–48.

[1] Here, taking all of plaintiffs' factual assertions as true, as well as all reasonable inferences from those facts in their favor, we find that the parties' tax settlement agreement was entered into on September 22, 1993. Because the individual assessments were made within one year of the dates on which partnership items of the partners converted to non-partnership items, plaintiffs are not entitled to a tax refund. Accordingly, summary judgment in favor of the United States is appropriate.

III

In enacting the Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-284, 96 Stat. 324, Congress decided ''that the tax treatment of certain partnership items -- such as income, loss, deductions, and credits -- would be determined at the partnership level in a unified way rather than in a separate proceeding by the partners.'' *Brookes v. United States*, 20 Cl. Ct. 733, 736 [66 AFTR 2d 90-5239] (1990) (citing H.R. Conf. Rep. No. 97-260, 97th Cong., 2d Sess. 600 (1982) and I.R.C. § 6221). Under this Act, the IRS may adjust the treatment of partnership items if it files a notice of Final Partnership Administrative Adjustment (FPAA). The FPAA is analogous to the notice of deficiency used to determine individual or corporate tax deficiencies. I.R.C. § 6212; *Clovis v. Commissioner*, 88 T.C. 980 (1987). The partnership's Tax Matters Partner (TMP) may then petition the Tax Court for a read-justment. *See* I.R.C. § 6226(a). If the Tax Matter Partner fails to file a petition within the statutory period, other partners may file a petition for readjustment. *See* I.R.C. § 6226(b).

The Act provides a narrow definition of partnership tax items. I.R.C. § 6231(a)(3). Most items, including settlements, are considered to be non-partnership items. *See* I.R.C. § 6231(b)(1)(C); *Monge v. United States*, 27 Fed. Cl. 720, 722 [71 AFTR 2d 93-1133] (1993). The distinction is important because the IRC's statute of repose differentiates periods of making assessments. Specifically,

> If before the expiration of the period otherwise provided in this section for assessing any tax imposed by subtitle A with respect to the partnership items of a partner for the partnership taxable year, such items become nonpartnership items by reason of 1 or more of the events described in subsection (b) of section 6231, the period for assessing any tax imposed by subtitle A which is attributable to such items (or any item affected by such items) shall not expire before the date which is 1 year after the date on which the items become nonpartnership items.

I.R.C. § 6229(f).

The parties disagree on whether the income tax assessments, made by the IRS in 1993, were timely, given the one-year limitations period set out in 26 U.S.C. § 6229(f). Both sides acknowledge that, under that statute, it is only a valid settlement agreement which commences the limitations period. They disagree, however, about when, on the facts of this case, such an enforceable agreement was reached. Plaintiffs argue that the December 30, 1992 letter to the IRS was the binding settlement which triggered the limitations period. In contrast, the IRS contends that the letter was not a contract and that only the countersigned September 1993 closing agreements are binding on the parties. Clearly, a finding on whether the December 1992 letter was intended to complete a binding agreement controls the resolution of this matter.

IV

Settlement agreements in tax cases are governed by general principles of contract law. *See Treaty Pines Inv. P'ship v. Commissioner*, 967 F.2d 206 [70 AFTR 2d 92-5435] (5th Cir. 1992). A tax settlement agreement may be binding even if it consists of only letters of offer and acceptance; no formal stipulation of settlement,

filed decisional document, or closing agreement is necessary. *Id.* at 211. Plaintiffs would have us look, however, merely to the fact of correspondence, not the substance of that correspondence, to divine some manifestation of mutual assent.

To create a binding agreement, a purported acceptance must mirror the terms of the offer. 1 Arthur Linton Corbin, Corbin on Contracts, § 3.28 (1993); Restatement (Second) of Contracts § 58 (1981). ''A communicated offer creates a power to accept the offer that is made and only that offer. Any expression of assent that changes the terms of the offer in any material respect may be operative as a counter-offer; but it is not an acceptance and consummates no contract.'' *Buesing v. United States*, 47 Fed. Cl. 621, 633 [86 AFTR 2d 2000-6009] (2000); 1 Arthur Linton Corbin, Corbin on Contracts § 3.28 (1993) (footnote omitted). A purported acceptance must be accurate in every material respect, as ''a variation in the substance of the offered terms is material, even though the variation is slight.'' *Id.* at § 3.32.

Settlement negotiations in this case began in January 1991 when defendant presented an offer of settlement to plaintiffs' counsel, Redding. This offer was rejected by plaintiffs, who then presented a counter-offer of settlement. When defendant rejected this counter-offer in October 1992, negotiations apparently broke down and did not resume until over one year later. During the interim, defendant left its original offer open; however, instead of manifesting assent to this offer, on November 13, 1992, plaintiffs again presented to the government their own offer of settlement -- in the form of draft acceptance letters -- and their own version of a closing agreement, having reached a consensus with the government that a closing agreement would be used to complete the settlement process.

The government's response, by letter dated November 17, 1992, was not a manifestation of assent to the plaintiffs' offer, but rather acted as a counter-offer, as the letter included a draft Form 906 closing agreement that differed materially from the plaintiffs' November 13, 1992 version of the closing agreement. Significantly, the December 30, 1992 letters claimed by plaintiffs to constitute acceptance of the government's offer did not mirror the terms of the government's November 17, 1992 counter-offer. Plaintiffs submitted executed acceptance letters, but sent copies of their November 13, 1992 version of the closing agreement which had been superseded by the government's November 17, 1992 closing agreement. Because plaintiffs' December 30, 1992 correspondence did not mirror the terms of the government's November 17, 1992 offer, it did not constitute an acceptance of that offer. From this sequence of events, we conclude that on December 30, 1992, the parties had not mutually assented to the material terms of a settlement agreement, and thus, no contract was created on that date.

Our conclusion that no settlement agreement was created on December 30, 1992, but rather when the Form 906 closing agreements were executed by both parties, is also supported by a careful comparison of the facts here to those in *Treaty Pines*, 967 F.2d 206 [70 AFTR 2d 92-5435] (5th Cir. 1992). First, the court in *Treaty Pines* had before it the taxpayer's letter purporting to accept the Commissioner's settlement offer and an IRS letter purporting to confirm that the taxpayer had ''accepted the original settlement offer.'' *Id.* at 209, 211. Here, plaintiffs contend their December 30, 1992 letter accepted the government's offer, but there is no corresponding letter from the IRS confirming the plaintiffs' acceptance. Second, in *Treaty Pines*, the court found a binding settlement agreement between the IRS and the taxpayer in letters of offer and acceptance the parties exchanged on the basis that nothing in the letter contemplated the execution of further, formal documents. *Id.* at 211 (citing *Haiduk v. Commissioner*, 60 T.C.M. (CCH) 864 [¶90,506 PH Memo TC] (1990)).

Here, the parties clearly contemplated the need to execute a closing agreement to finalize the settlement. It was plaintiffs who initiated discussions regarding the use

of a closing agreement in the case and submitted the first draft closing agreement exchanged between the parties. PX 9 at 73. Furthermore, on December 18, 1992, before the date of plaintiffs' purported acceptance, the government reiterated to plaintiffs' counsel that closing agreements were a condition precedent to settlement and that IRS approval was required to finalize settlement. PX 4 at 61 (letter from Maselli to MacLean, 12/18/92). Finally, the parties in *Treaty Pines* never executed a closing agreement, whereas here, the parties ultimately executed the Form 906 closing agreements on September 22, 1993. While we agree with the Fifth Circuit's conclusion on the facts of *Treaty Pines*, the situation addressed there differs substantially from this case.

Because no settlement agreement was concluded on December 30, 1992, and because the relevant settlement was not final until September 22, 1993, when a representative from the IRS signed the closing agreements, we conclude that the 1994 tax assessments are not time-barred under the applicable period of limitation. *See* 26 U.S.C. § 6229(f), and thus plaintiffs are not entitled to a tax refund.

V

Based on the foregoing, defendant's motion filed on December 20, 1999 for summary judgment is GRANTED, and plaintiffs' motion for summary judgment, also filed on December 20, 1999, is DENIED. Accordingly, judgment shall be entered in favor of defendant. Pursuant to RCFC 54(d), costs shall be allowed to defendant (''the prevailing party'').

James T. Turner

Senior Judge

¶2002-5492

Ryan K. HARRISON and Amy K. HARRISON, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-02-0143-LRH (LRL), Sept. 5, 2002. Years 1992, 1993, 1994, 1995, 1996, 1997, 1998. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalty—summary judgment. IRS's administrative determination to proceed with collection of IRC §6702 penalty for years taxpayers filed ''zero'' returns was upheld on summary judgment: taxpayers were liable for penalty where Forms W-2 refuted their return positions; and protester-type challenges to tax were frivolous. Also, conclusory allegation that CDP hearing wasn't conducted consistent with law was rejected; taxpayers raised no collection alternative or other statutorily-recognized collection defense; and delegation of authority argument and challenge to computer generated transcripts were meritless. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(2). IRC §6330; 6702.

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA,

ORDER

LARRY R. HICKS United States District Judge

On April 3, 2002, Defendant United States of America filed a motion to dismiss for insufficiency of service of process pursuant to Fed. R. Civ. P. 12(b)(5), a motion to dismiss for failure to state a claim pursuant to Fed R. Civ. P. 12(b)(6), or in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56. (Docket #2). Plaintiffs[1] responded with a motion for extension of time in which to respond to Defendant's motion to dismiss on April 10, 2002. (#3). That motion is granted for good cause shown and because of Defendant's non-opposition. Plaintiffs then filed their opposition to the motion to dismiss on May 7, 2002. (#5). Most recently, on August 29, 2002, the United States filed an unopposed motion for a protective order. (#7).

[1] Both Plaintiffs signed the Complaint but only one Plaintiff, Ryan K. Henderson, appears to have signed the motion for extension of time and opposition. Ordinarily, each pro se party needs to sign a pleading. Fed. R. Civ. P. 11(a). The Court will, however, overlook this omission in the interests of justice. Fed. R. Civ. P. 1.

I. Background

Plaintiffs Ryan K. Harrison and Amy M. Harrison filed a Complaint seeking damages and requesting that the Court set aside an invalid collection determination pursuant to 26 U.S.C. § 6330. In essence, the Complaint alleges that the "determination" issued by the Internal Revenue Service ("IRS") on January 3, 2002, after a Collection Due Process Hearing was invalid.

The Collection Due Process Hearing was held on November 8, 2001, pursuant to 26 U.S.C. §§ 6320(a), 6330(a) and (b) after Plaintiff had received a Notice of Federal Tax Lien. The Notice of Federal Tax Lien was allegedly sent to Plaintiffs because their 1992 through 1998 individual tax returns contained a row of zeros down the right hand column while Plaintiffs' respective W-2s for those years revealed income.

Plaintiffs' Complaint attaches numerous exhibits, but does not attach their tax returns on which the IRS sought to impose civil penalties. These income tax returns, however, are attached to the United States' motions and will be considered by the Court. Consequently, the motion to dismiss is converted to a motion for summary judgment. Fed. R. Civ. P. 12(b) (6).

II. Analysis

A. Standard of Review

[1] A motion for summary judgment terminates, without a trial, actions in which "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate "'specific facts showing that there is a genuine issue for trial.'" Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)). Thus, in order to preclude a grant of summary judgment, the non-moving party must set forth "'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The substantive law defines which facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). All justifiable inferences must be viewed in the light most favorable to the non-moving party. County of Tuolumne v. Sonora Cmty. Hosp., 236 F.3d 1148, 1154 (9th Cir. 2001) (citing Zenith Radio Corp., 475 U.S. at 587).

Section 6330(d) does not specify the standard of review a district court should apply to an appeal of a Notice of Determination. However, the legislative history indicates that the court should conduct a de novo review only "where the validity of the tax liability was properly at issue at the administrative hearing." H. Conf. Rept. 105-599, 105th Cong.2d Sess. 266 (1998). Where the amount of the underlying tax liability is not properly part of the appeal, the court reviews a Notice of Determination for abuse of discretion. See Sego v. Comm'r of Internal Revenue, 114 T.C. 604, 609–10 (2000).

B. Plaintiffs' Section 6330 Appeal

Plaintiffs raise many of the same issues before this Court that they raised at the November 9, 2001, hearing. First, they argue that they are not liable for income tax. The Supreme Court, however, has held early and often that it is lawful to impose a tax on "every person residing in the United States . . . upon the entire net income arising from all sources." S. Pacific Co. v. Lowe, 247 U.S. 330, 333–34 [3 AFTR 2989] (1918). "Income" is defined in its everyday usage meaning a monetary gain acquired from capital or labor or both combined. United States v. Richards, 723 F.2d 646, 648 [53 AFTR 2d 84-489] (8thCir. 1983) (internal citation omitted).

Second, Plaintiffs challenge the $500 frivolous return penalty imposed upon them as invalid. This Circuit found that a tax return containing zeros while attaching W-2s showing income amount to the filing a frivolous return that is subject to a penalty. See Olson v. United States, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985); Bradley v. United States, 817

F.2d 1400, 1403 [59 AFTR 2d 87-1162] (9th Cir. 1987).

Third, Plaintiff makes the conclusory allegation that the Collection Due Process Hearing was not in accordance with law. Such a conclusory allegation need not be accepted in the absence of facts. In actual fact, Plaintiff did not appear to raise any of the statutory-specified issues that may be raised at a Collection Due Process Hearing such as spousal defenses, the appropriateness of the intended collection action or the possibility of alternative means of collection. 26 U.S.C. § 6330(c).

Fourth, Plaintiff argues that the Notice of Determination is invalid because it was not sent by the Secretary of the Treasury. This argument, that IRS employees are not ''delegates'' of the Secretary of the Treasury has been previously rejected. Browder v. Commissioner, T.C. Memo 1990-408 [¶90,408 PH Memo TC], 1990 WL 108316.

Fifth, Plaintiff questions whether computer generated transcripts are valid to show notice and amounts owed. Again, this argument has been uniformly rejected. Davis v. Commissioner, 115 T.C. 35, 40 (2000).

III. Conclusion

In summary, Plaintiffs have failed to set forth a valid argument to support their claim that the Notice of Determination of October 16, 2001, should be vacated. Because Plaintiff fails to raise a disputed issue of material fact, Defendant's Motion for Summary Judgment (#2) is GRANTED. Defendant's Motion for an extension of time (#5) is GRANTED. The United States' motion for a protective order (#7) is DENIED as moot. The clerk is directed to close the file.

IT IS SO ORDERED.

DATED: September 5th, 2002.

LARRY R. HICKS

United States District Judge

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment (#2) is granted. Defendant's Motion for an extension of time (#5) is granted. Defendant's motion for protective order (#7) is denied as moot. Judgment is entered in favor of the Defendant and against the Plaintiff.

LANCE S. WILSON, CLERK

September 9, 2002

By: /s/

Deputy Clerk

¶2002-5493

Donnie MARZETTA, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Eastern Dist. of California, (DC CA) CIV-S-02-185 DFL PAN, July 26, 2002. Years 1981, 1982, 1987. Decision for Govt.

1. Joint returns—innocent spouse relief—refunds—effect of prior Tax Court petition—res judicata. Govt. was granted summary judgment on taxpayer's IRC §6015-based refund complaint: taxpayer wasn't entitled to IRC §6015 relief where all her tax liabilities were settled before statute's effective date by prior Tax Court decisions, and IRC §6015(g)(2)'s res judicata exception didn't apply. But, taxpayer was granted leave to amend complaint to assert wrongful levy. *Reference:* United States Tax Reporter ¶60,155.01(5); 74,225.04(5); 74,337.504(5). IRC §6015; 7422.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

MEMORANDUM OF OPINION AND ORDER

DAVID F. LEVI, United States District Judge

Plaintiff Donnie Marzetta (''Marzetta'') seeks a refund of over $390,000 in federal income taxes, accumulated interest, and penalties paid for the 1981, 1982, and 1987 tax years under the innocent spouse provisions of 26 U.S.C. § 6015. The government moves for summary judgment, arguing that § 6015 does not apply and that Marzetta's refund claim is therefore barred by prior Tax Court decisions determining her liability for the tax years at issue.

I.

This case centers on the joint federal tax return which the plaintiff and her now deceased husband (''the Marzettas'') filed in 1981, 1982, and 1987. In 1990, the IRS sent the Marzettas two notices of deficiency assessing substantial additional taxes and penalties for these tax years. (Def.'s Statement of Undisputed Facts (''SUF'') at ¶s 4, 7). The Marzettas subsequently petitioned the United States Tax Court to redetermine their deficiencies. (Id. at ¶ 5, 8). The Tax Court entered separate judgments on October 22, 1992 and May 28, 1993, holding the Marzettas jointly liable for over $87,000 in back taxes, based on stipulated agreements which the Marzettas had previously reached with the IRS. (Def.'s Exhs. I & M). The Marzettas did not appeal these judgments. (Def.'s SUF at ¶s 10, 14).

Beginning in 1996, after plaintiff's husband passed away, the IRS began to seize and levy plaintiff's property in order to satisfy the Marzettas' outstanding tax liabilities which had grown to almost $300,000 due to accumulating interest and penalty fees. (Id. at ¶ 19; Pl.'s SUF at ¶ 1; Marzetta Decl. at ¶ 10). In April 1998, plaintiff filed several refund claims with the IRS seeking innocent spouse relief. After her claims were denied, she filed this lawsuit in July 1999.

II.

[1] Generally, when a husband and wife file joint tax returns, they are jointly and severally liable for the full amount of taxes owed, or any deficiency due. See Grossman v. C.I.R., 182 F.3d 275, 278 [83 AFTR 2d 99-2999] (4th Cir. 1999). In order to mitigate the harsh effect of this rule, Congress enacted 26 U.S.C. § 6013(e) in 1971 to create an exception to joint liability for qualifying ''innocent spouses.'' See Mlay v. IRS, 168 F.Supp.2d 781, 785 [87 AFTR 2d 2001-971] (S.D. Ohio 2001). The 1998 Internal Revenue Service Restructuring and Reform Act (''1998 Act'') further revised this statutory innocent spouse exception, which is now codified at 26 U.S.C. § 6015, to provide even broader relief to qualifying spouses. See id. at 785; Flores v. United States, 51 Fed. Cl. 49, 51 [88 AFTR 2d 2001-7020] (2001).

For example, § 6015(g)(2) specifically limits the res judicata effect of prior judgments.[1] ''Before section 6015(g)(2) ... was enacted, if a court decision had become final as to a particular taxable year, the taxpayer could be barred under the doctrine of res judicata from seeking [innocent spouse] relief ... in a later proceeding'' regardless of whether innocent spouse relief had been at ''issue in the prior court proceeding.'' Ventrano v. C.I.R., 116 T.C. 272, 280 (2001).

However, § 6015 applies retroactively only to tax liabilities remaining unpaid as of July 22, 1998, the effective date of the 1998 Act. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, sec. 3201(g)(1), 112 Stat. 740; Grossman, 182 F.3d at 279. Plaintiff's counsel conceded at oral argument that plaintiff is not entitled to seek innocent spouse relief under § 6015, as all of her tax liabilities were settled prior to the effective date of the 1998 Act. (Def.'s SUF at § 20). Because § 6015(g)(2)'s res judicata exception does not apply, plaintiff is barred from relitigating her tax liability in this court by the final Tax Court decisions

[1] Section 6015(g)(2) states that in the case of any election under § 6015(b) or (c): ''if a decision of a court in any prior proceeding for the same taxable year has become final, such decision shall be conclusive expect with respect to the qualification of the individual for relief which was not an issue in such proceeding. The exception ... shall not apply if the court determines that individual participated meaningfully in the such prior proceedings.'' 26 U.S.C. § 6015(g)(2).

determining her tax liability for the 1981, 1982, and 1987 tax years. See, e.g., United States v. Shanbaum, 10 F.3d 305, 313–314 [73 AFTR 2d 94-571] (taxpayer is barred from seeking subsequent innocent spouse relief once the Tax Court issues a final decision establishing their tax liability for a particular tax year); United States v. Bryant, 15 F.3d 756, 758 [73 AFTR 2d 94-1223] (8th Cir. 1994) (same).

III.

The government's motion for summary judgment is therefore GRANTED. Plaintiff's request for leave to amend is also GRANTED. Plaintiff may amend her complaint to allege that the IRS wrongfully levied her property, potentially providing another basis for § 6015 relief.

IT IS SO ORDERED.

Dated: 26 July 2002

DAVID F. LEVI

United States District Judge

¶2002-5494

Maurice C. MOSES, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-1325-LRH(LRL), Aug. 22, 2002. Reconsideration of (2002, DC NV) 90 AFTR 2d 2002-5726, 2002-2 USTC ¶50587, denied. Years 1996, 1997, 1999. Decision against Taxpayer.

1. Collection due process—review of administrative determination—summary judgment—reconsideration. Taxpayer was denied reconsideration of order granting summary judgment in govt.'s favor: taxpayer merely reiterated same arguments rejected in earlier case. *Reference:* United States Tax Reporter ¶63,305.01(5). IRC §6330.

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA,

ORDER

LARRY R. HICKS United States District Judge

[1] On July 18, 2002, Plaintiff Maurice C. Moses filed a Motion to Reconsider this Court's Order granting of summary judgment in favor of the United States. (Docket #11).

"Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." School Dist. No. IJ, Multnomah County v. AcandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

Here, Plaintiff raises the same issues that he raised in his Opposition to the Motion for Summary Judgment. Consequently, the Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

DATED this 22nd day of August, 2002.

LARRY R. HICKS

United States District Judge

¶2002-5495

UNITED STATES OF AMERICA, PLAINTIFF v. Edward G. NOVOTNY, in his individual capacity, as Trustee of Midwest Limited, and as Trustee of Sunrise Investments, Etta B. Novotny, and State of Colorado, Department of Revenue, DEFENDANTS. U.S. District Court, Dist. of Colorado, (DC CO) Civil Action No. 99-RB-2196 (PAC), Aug. 27, 2002. Earlier proceedings at (2002, DC CO) 90 AFTR 2d 2002-5684; (2001, DC CO) 89 AFTR 2d 2002-338; (2001, DC CO) 88 AFTR 2d 2001-7194, granting in part and denying in part reconsideration of (2001, DC CO) 88 AFTR 2d 2001-6204, 2001-2 USTC ¶50719. Years 1989, 1990, 1991. Decision against Taxpayers.

1. Actions to enforce liens—foreclosure and sale—property held by trust—stay of collection. Taxpayer's request to stay collection proceedings was denied, liens were foreclosed, properties' sale was ordered, and govt. was authorized to access properties and take all actions necessary for their preservation. Also, sales would

proceed free and clear of taxpayers' and their trusts' interests; and proceeds' distribution order was set out. *Reference:* United States Tax Reporter ¶74,035.03(80); 74,035.03(100). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

MINUTE ORDER

Defendant's Petition for Stay of Proceedings [#295] filed August 26, 2002, is DENIED.

Dated: August 27, 2002

ORDER OF FORECLOSURE AND DECREE OF SALE

UNITED STATES OF AMERICA, Plaintiff, v. EDWARD G. NOVOTNY, in his individual capacity and as Trustee of MIDWEST LIMITED and SUNRISE INVESTMENTS; and ETTA B. NOVOTNY, in her individual capacity and as Trustee of MIDWEST LIMITED and SUNRISE INVESTMENTS and THE STATE OF COLORADO, Department of Revenue, Defendants.

[1] Pursuant to 28 U.S.C. §§2001 and 2002 and 26 U.S.C. §§7402 and 7403, the Court enters this Order of Foreclosure and Decree of Sale. IT IS HEREBY ORDERED THAT:

1. The United States' federal tax liens against Edward G. Novotny, arising out of the Internal Revenue Service assessment of Form 1040 federal income tax liabilities against him for the 1989, 1990, and 1991 tax years, and the United States' judgment lien against Edward G. Novotny, arising out of the United States' claim to reduce these same assessments to judgment in the above-captioned civil action, are foreclosed.

2. The Internal Revenue Service is authorized and directed under 28 U.S.C. §§2001 and 2002 to offer for public sale and sell the seven parcels of real property, including all improvements, buildings, and fixtures on the real property, described as follows (hereafter ''the real property''):

Parcel 1:

Commonly known as 710 and 720 N. Broadway, Cortez, Colorado (corner of Empire and Broadway Streets).

Minimum bid: $46,800.00

Deposit: $4,000.00

Legal description:

A tract of land in the Southwest Quarter of the Southwest Quarter (SW¼SW¼) of Section 23, Township 36 North, Range 16 West, N.M.P.M., described as follows:

Beginning at a point on the section line common to Sections 23 and 26 where the East R/W line of U.S. Highway 160 intersects said section line and whence the section Corner 22, 23, 26 and 27 bears westerly a distance of 597.0 feet, more or less; thence Northwesterly along the East R/W line of Highway 160, which is a curve of radius 1492.5 feet, a distance of 557.0 feet; thence Southeasterly a distance of 802.0 feet to a point on the section line common to sections 23 and 26, which is 440.0 feet East from the point of beginning; thence West along the Section line a distance of 440.0 feet to the point of beginning. EXCEPTING therefrom that portion of said tract dedicated for Empire Street in the amended plat filed in Plat Book 8, Page 43 of Montezuma County records.

Said tract is sometimes known as Tract T of Montview Addition to the City of Cortez, Colorado.

Parcel 2:

Commonly known as 483 and 485 N. Broadway, Cortez, Colorado.

Minimum bid: $56,400.00

Deposit: $5,000.00

Legal description:

A portion of the S½NW¼NW¼ of Section 26, Township 36 North, Range 16 West, N.M.P.M., described by metes and bounds as follows: Commencing at a

point on the West line of the S½NW¼NW¼ 75 feet South of the Northwest Corner of said S½NW¼NW¼, which is the point of beginning, thence East 150 feet, thence South 25 feet, thence East 205 feet, more or less to point of intersection of Westerly right of way line of U.S. Highway No. 666 (Formerly U.S. Highway No. 160) as now constructed. Thence Southwesterly along said westerly right of way to a point 175 feet due South of the North line of said S½NW¼NW¼, thence West 320 feet more or less to the West line of said S½NW¼NW¼of Section 26, Township 36 North, Range 16 West, thence North along the West line of said S½NW¼NW¼, 100 feet to the point of beginning. EXCEPT a tract as follows: Commencing at a point on the West line of the S½NW¼NW¼ of said Section 26, Township 36 North, Range 16 West, N.M.P.M., 175 South of the Northwest Corner of said S½NW¼NW¼, Section 26, Township 36 North, Range 16 West, N.M.P.M., thence East to a point of intersection with the West right of way line of U.S. Highway No. 666 as now constructed which is the point of beginning, thence West along last described line for 120 feet, thence North 65 feet, thence East to a point of intersection with the Westerly right of way line of U.S. Highway No. 666 as now constructed, thence Southwesterly along the Westerly right of way line of U.S. Highway 666 to the point of beginning.

AND

A tract of land situated in the NE¼NE¼ of Section 27, Township 36 North, Range 16 West, N.M.P.M., described as follows: Beginning at a point on the Section line; whence the Northeast Corner of Section 27 Township 36 North, Range 16 West, N.M.P.M., bears North 00°08.5' West a distance of 719.6 feet; thence South 89°52' West 35.0 feet to an iron R.B.Pin, ½ inch in diameter set in ground; thence South 00°08' East 115.0 feet to an iron R.B. Pin ½inch in diameter set in ground; thence North 89°52' East 35.0 feet to an iron R. B. Pin ½ inch in diameter set in ground on the Section line; thence North 00°08' West 115.0 feet to the point of beginning.

EXCEPT all oil, gas and minerals reserved by prior grantors.

Parcel 3:

Commonly known as 13106 U.S. Highway No. 666, Cortez, Colorado.

Minimum bid: $168,000.00

Deposit: $10,000.00

Legal description:

South One-Half of Southwest Quarter(S½SW¼), less that portion lying west of the East line of Highway No. 160, Northeast Quarter of Southwest Quarter (NE¼SW¼) and Northwest Quarter of Southeast Quarter (NW¼SE¼) of Section Four(4), Township Thirty-Six (36) North, Range Sixteen (16) West of the New Mexico Principal Meridian. Together with any and all water and ditch rights and rights of way therefor used for and in connection with irrigation of said premises. Containing 142 acres, more or less.

Parcel 4:

Commonly described as 23400 Road N, Cortez, Colorado.

Minimum bid: $20,280.00

Deposit: $2,000.00

Legal description:

A tract of Land in the NE¼NW¼of Section 9, Township 36 North, Range 16 West N.M.P.M., more particularly described as follows: Beginning at a point on the North line of said Section 9, said point also center line of County Road, whence the Northwest Corner of Section 9 bears South 88°46' West 1,854.29 feet; thence South 1°14' East 752.70 feet, thence North 79° 18' West 84.40 feet; thence North 64°09' West 111.20 feet to the North right-of-way line of U.S. Highway 666 (formerly No. 160) as now constructed; thence South 36°19' East 510.44 feet along said right-of-way line; thence North 59°01' 45;p2 East 756.86

feet to the East line of the NE¼NW¼ of said Section 9; thence North 00°01' West 727.06 feet along the East Line of the NE¼NW¼ said Section 9 to the center of the County Road; thence South 88°46' West 784.41 feet along said center line to the point of beginning.

Subject to a reservation by prior grantors of an easement 30 feet wide for road purposes described as: Beginning at a point on the North line of said Section 9, also being the center of a County Road, whence the Northwest Corner of above said Section 9 bears South 88°46' West 2,608.70 feet; thence South 00°01' East 744.41 feet; thence North 59°01'45;p2 East 34.98 feet; thence North 00°01' West 727.06 feet along the East line of NE¼NW¼ of said Section 9 to the North Quarter Corner being the center of County Road; thence South 88°46' West 30.0 feet along the center line of County Road to the point of beginning; said easement being reserved in Book 447 at Page 355 of Montezuma County records.

Subject to easements and rights of way visible and of record, and specifically subject to conveyance of access rights to the Department of Highways, State of Colorado and Montezuma Water Company.

Subject to prior reservation of all oil, gas, and minerals.

Parcel 5:

Commonly known as 112 North Street East, Cortez, Colorado.

Minimum bid: $21,600.00

Deposit: $2,000.00

Legal description:

That part of Lots 15, 16, 17 and 18 in Block 18, Town of Cortez, Colorado, described as follows: Beginning at a Point on the South Line of Lot 18 a distance of 47 feet and 8 inches West of the Southeast Corner of said Lot 18, thence North 100 feet to a point of the North Line of Lot 15, thence West along said North line of Lot 15 a distance of 47 feet and 8 inches to a point; thence South 100 feet to a point on the South line of Lot 18; thence East along the South line of said Lot 18 a distance of 47 feet and 8 inches to the point of beginning; all as per the plat of record in the Office of the Clerk and Recorder of Montezuma County, State of Colorado.

Parcel 6:

Commonly known as 27090 State Highway 145, Cortez, Colorado.

Minimum bid: $48,000.00

Deposit: $4,000.00

Legal description:

A tract of land in the East Half (E½) of Tract Forty One (41), Township Thirty Eight (38) North, Range Twelve (12) West, N.M.P.M., being more particularly described as follows:

Beginning at a point on the South Right of Way line of Colorado Highway 145 and on the East line of Tract 41, Township 38 North, Range 12 West, N.M.P.M., from which Point Angle Point 2 of Tract 40, Township 38 North, Range 12 West, N.M.P.M., bears North 0°01'00" West a distance of 108.45 feet; Thence South 00°01'00" East a distance of 1211.55 feet along the East line of said Tract 41 to the South line of said Tract 41; Thence South 89°59'00" West a distance of 1398.21 feet along the south line of said Tract 41 to the West line of the East Half of said Tract 41; Thence North 00°04'08" West a distance of 1105.70 feet along the West line of the East Half of said Tract 41 to the South Right of Way line of Colorado Highway 145; Thence North 85°39'25" East a distance of 1403.22 feet along the South Right of Way line of Colorado Highway 145 to the point of beginning, and conveying also to grantee a One Fourth (¼) interest in and to Dolores River Priority # 30; granting unto grantee the use of ditch and ditch rights appurtenant to said lands.

EXCEPTING AND RESERVING 100% of all oil, gas, and other minerals lying in, under and upon said lands.

EXCEPT Rights of Way and Easements visible and of record.

Parcel 7:

Commonly known as 29415 County Road U or 18052 County Road 28.

Minimum bid: $7,200.00

Deposit: $1,000.00

Legal description:

A tract of land in the NE¼ NW¼of Section 16, Township 37 Range 15, recorded in Book 123 at page 34 in Montezuma County, State of Colorado.

This Order of Foreclosure and Decree of Sale shall act as a special writ of execution and no further orders or process from the Court shall be required.

3. The Internal Revenue Service is authorized to have free access to the real property and to take all actions necessary to preserve the real property, including, without limitation, retaining a locksmith or other person to change or install locks or other security devices on any part of the real property, until the deeds of the real property are delivered to the ultimate purchaser(s).

4. The terms and conditions of sale are as follows:

a. The sale shall be free and clear of the interests of Edward G. Novotny, Etta B. Novotny, Midwest Limited, and Sunrise Investments.

b. The sale shall be subject to the building lines, if established, all laws, ordinances, governmental regulations (including building and zoning ordinances), affecting the premises, and easements and restrictions of record, if any.

c. The public sale of the real property shall be held either at the courthouse of the county, parish or city in which the real property is located, or on the premises of any of the parcels of real property.

d. The date and time of the public sale are to be announced by the Internal Revenue Service.

e. Notice of the public sale shall be published once a week for at least four (4) consecutive weeks before the public sale in at least one newspaper regularly issued and of general circulation in the county, state or judicial district of the United States where the real property is situated and, at the discretion of the Internal Revenue Service, by any other notice the Internal Revenue Service deems appropriate. The notice shall contain a description of the real property and shall contain the basic terms and conditions of sale as set forth in this Order.

f. A minimum bid as set forth in paragraph 2 above is set for each parcel of real property. If the minimum bid is not met or exceeded with respect to any and/or all of the parcels of real property, the Internal Revenue Service may, without permission of this Court, and under the terms and conditions in this Order of Foreclosure and Decree of Sale, hold a new public sale of the unsold parcel(s) with a reduction of the minimum bid(s).

g. The successful bidder(s), with the exception of the United States in the event it is a successful bidder, shall be required to deposit at the time of sale with the Internal Revenue Service a deposit in the form of a certified check, cashier's check, or cash in the amount set forth in paragraph 2 above with respect to each parcel of real property. Before being permitted to bid at sale, bidders, with the exception of the United States, shall display to the Internal Revenue Service proof that they are able to comply with this requirement. No bids on any parcel of real property will be received from any person who has not presented proof that, if they are the successful bidder(s), they can make the deposit(s) required by this Order with respect to the parcel(s) of real property.

h. The balance of the purchase price for the real property is to be paid to the Internal Revenue Service by certified check or cashier's check payable to the Internal Revenue Service within sixty (60) days after the date the bid is accepted. If a bidder fails to fulfill this requirement, that bidder's deposit shall be forfeited and shall be applied to cover the expenses of sale, with any remaining part retained by the United

States to be applied to the unpaid tax liabilities comprising the judgment against Edward G. Novotny in the above-captioned civil action, and that parcel of real property shall be again offered for sale under the terms and conditions of this Order. The United States may bid as a credit against its judgment, without tender of cash.

i. The sale of real property shall be subject to confirmation by this Court. On the confirmation of the sale and receipt of payment in full, the Internal Revenue Service shall execute and deliver a quit claim deed conveying the real property to the purchaser(s). On confirmation of the sale, the real property shall be discharged and free from all interests in, liens against, or claims to the realty that are held or asserted by plaintiff or any of the defendants in this action.

5. All persons occupying the real property shall permanently leave and vacate the real property within 30 days of the date this Order of Foreclosure and Decree of Sale is filed, or within 30 days of the date a copy of it mailed to them, whichever is later, each taking with them their personal property (but leaving all improvements, buildings, fixtures, and appurtenances to the real property). If any person occupying the real property fails or refuses to leave and vacate the real property by the time specified in this order, the U.S. Marshal and his deputies and/or the Internal Revenue Service are authorized and directed to take all actions that are reasonably necessary to bring about the ejectment of those persons without further process or authorization from this Court. If any person fails or refuses to remove his or her personal property from the real property by the time specified herein, the personal property remaining on the real property thereafter is deemed forfeited and abandoned, and the U.S. Marshal and his deputies and/or the Internal Revenue Service are authorized to remove it and dispose of it in any manner the U.S. Marshal and his deputies and/or the Internal Revenue Service sees fit, including sale, in which case the proceeds of the sale are to be first applied to the expenses of sale, then to the judgment in favor of the United States and against Edward G. Novotny in the above-captioned civil action, plus court ordered costs, and then to the judgment in favor of the Colorado Department of Revenue and against Edward G. Novotny in Montezuma County District Court Case No. 99-CV-202 for unpaid Colorado income taxes, penalties, and interest for 1989 and 1990, plus court ordered costs.

6. Until possession of the real property is obtained by the Internal Revenue Service, Edward G. Novotny and Etta B. Novotny shall take all reasonable steps necessary to preserve the real property (including all buildings, improvements, fixtures and appurtenances on the real property) in its current condition including without limitation, maintaining fire and casualty insurance policies on the real property. They shall not commit waste against the real property, nor shall they cause or permit anyone else to do so. They shall not do anything that tends to reduce the value or marketability of the real property, nor shall they cause or permit anyone else to do so.

7. The defendants shall not record any instruments or liens against the real property, publish any notice, or engage in any other action (such as running newspaper advertisements) that may directly or indirectly tend to adversely affect the value of the real property or that may tend to discourage potential bidders from participating in the public auction.

8. When the sale is confirmed by the Court, the Montezuma County Recorder shall permit transfer(s) of the real property to be reflected on that county's register of title.

9. After the sale is confirmed by the Court, the Internal Revenue Service shall distribute the total amount paid by the purchaser(s) as follows:

a. First, the Internal Revenue Service shall retain an amount sufficient to cover the expenses of the sale, including but not limited to an amount sufficient to reimburse the United States for the payment of any delinquent county property taxes; the

costs of advertising the public sale; and the expenses of any steps taken to secure or maintain the real property pending sale and confirmation by the Court.

b. Second, after payment of the expenses set forth in paragraph 9.a. above,

exactly one-half (50%) of the remaining funds shall be paid to Etta B. Novotny; and

exactly one-half (50%) of the remaining funds - the half not paid to Etta B. Novotny - shall first be paid to the United States of America to be applied to the unpaid federal income tax liabilities of Edward G. Novotny for the 1989, 1990, and 1991 tax years. The share paid to the United States to be applied to the federal income tax liabilities of Edward G. Novotny shall not exceed the amount necessary to satisfy the unpaid balance of the judgment entered against Edward G. Novotny and in favor of the United States in the above-captioned civil action, including the $380.00 of costs awarded to the United States on August 7, 2002, plus statutory additions.

c. Third, to the extent that any funds remain after the judgment in favor of the United States and against Edward G. Novotny in the above-captioned civil action has been satisfied, those remaining funds shall be paid to the Colorado Department of Revenue, not to exceed the amount necessary to satisfy the unpaid balance of the judgment against Edward G. Novotny and in favor of the Colorado Department of Revenue in Montezuma County District Court Case No. 99-CV-202 for unpaid Colorado income taxes, penalties, and interest for 1989 and 1990 and the $307.85 of costs awarded to the Colorado Department of Revenue on August 7, 2002 in the above-captioned civil action.

d. Fourth, any funds remaining after the judgment in favor of the Colorado Department of Revenue has been satisfied shall be paid to Edward G. Novotny.

DATED this 13th day of September, 2002.

BY THE COURT

ROBERT E. BLACKBURN
United States District Judge

¶2002-5496

Melvin WILSON and Delight WILSON, PLAINTIFFS v. UNITED STATES, DEFENDANT. U.S. District Court, Western Dist. of Washington, (DC WA) Case No. C02-5207FDB, Sept. 18, 2002. Decision for Govt. in part.

1. Third-party summonses—petition to quash—jurisdiction. Taxpayers' petition to quash IRS 3d-party summonses issued on 2 mortgage cos. was dismissed for lack of jurisdiction: taxpayers didn't file petition in judicial district where mortgage cos. resided. And taxpayers were ordered to show cause why petition with respect to 3d mortgage co. shouldn't be dismissed since court didn't have adequate evidence to determine either co.'s residence or location of summoned records. *Reference:* United States Tax Reporter ¶76,095.01(75). IRC §7609.

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON AT TACOMA,

ORDER GRANTING IN PART UNITED STATES' MOTION TO DISMISS PLAINTIFFS' PETITION TO QUASH ADMINISTRATIVE SUMMONSES

FRANKLIN D. BURGESS UNITED STATES DISTRICT JUDGE

[1] This matter is before the Court pursuant to Defendant United States' Motion to Dismiss Petition to Quash Administrative Summonses. In support of its motion, Defendant argues that Plaintiffs' Petition to Quash Summonses should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), for lack of jurisdic-tion over the subject matter at issue and failure to state a claim upon which relief may be granted, respectively.

Plaintiffs oppose Defendant's motion to dismiss. In support of their opposition

Plaintiffs argue: 1) they are beyond federal jurisdiction; 2) Defendant's summonses are unenforceable because they were not issued in the District of Columbia; 3) Defendant's summonses do not comply with the Administrative Procedures Act; 4) the summons power under 26 U.S.C. § 7602 applies exclusively to the Bureau of Alcohol, Tobacco and Firearms; and 5) the summons power articulated in the Internal Revenue Code acts as an unlawful bill of attainder which violates due process.

The Court has considered Defendant's Motion to Dismiss Petition to Quash Administrative Summonses (dkt. #6), Plaintiffs' Response to Defendant's Motion to Dismiss Petition to Quash Administrative Summonses (dkt. #8), Plaintiffs' Petition to Quash Administrative Summonses (dkt. #1), and the Balance of the record. For the reasons articulated herein, the Court hereby GRANTS Defendant's Motion to Dismiss Plaintiffs' Petition to Quash Summonses with respect to Defendant's summonses for Westar Mortgage Corporation and Midland Mortgage Company on the grounds that the Court lacks jurisdiction over said summonses pursuant to Fed. R. Civ. P. 12(b)(1).[1]

With respect to Defendant's summons for records held by First Nationwide Mortgage Corporation, the Court has insufficient evidence before it to determine either the place where the third-party recordkeeper (First Nationwide Mortgage Corporation) resides or the place where the summoned records are located. Therefore, Plaintiffs are ORDERED TO SHOW CAUSE why this Court should not GRANT Defendant's motion to dismiss Plaintiffs' Petition to Quash with respect to Defendant's First Nationwide Mortgage Corporation summons, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).[2]

ACCORDINGLY,

IT IS SO ORDERED:

1) Defendant United States' Motion to Dismiss Petition to Quash Administrative Summonses (dkt. #6) is GRANTED with respect to Defendant's Westar Mortgage Corporation summons and its Midland Mortgage Company summons;

2) Plaintiffs' Petition to Quash Administrative Summonses (dkt. #1) is DISMISSED with respect to Defendant's Westar Mortgage Corporation and Midland Mortgage Corporation summonses;

3) Plaintiffs are ordered to SHOW CAUSE as to why the Court should not GRANT Defendant's Motion to Dismiss Petition to Quash Administrative Summonses with respect to Defendant's First Nationwide Mortgage Corporation summons;

4) Plaintiffs shall have until Monday, October 21, 2002, to comply with this order.

DATED this 18 day of September, 2002.

FRANKLIN D. BURGESS

UNITED STATES DISTRICT JUDGE

¶2002-5497

Larry GILLETT, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Western Dist. of Michigan, (DC MI) Case No. 5:01-cv-104, Sept. 20, 2002. Years 1998, 1999. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties—jurisdiction—damages. IRS's administrative determination to proceed with collection of frivolous return penalties for years pro se taxpayer filed "zero" returns was upheld on summary judgment: taxpayer received timely

[1] Case law clearly establishes that a timely filed petition to quash a third-party summons filed in a district court other than the district court for the district in which the summoned recordkeeper resides (or is found) will be dismissed for lack of jurisdiction. See Masat v. United States, 745 F.2d 985 [54 AFTR 2d 84-6332] (5th Cir. 1984)(Fifth Circuit upheld S.D. of Texas dismissal of taxpayer's petition to quash Internal Revenue Service third-party summons which was directed to a corporation with its principal place of business in California, for records and documents located in California).

[2] Plaintiffs are ordered to provide the Court with evidence which is proof positive of both the location of First Nationwide Mortgage Corporation's offices, if any, and its principal place of business. In addition to the aforementioned information, the Court requests that Plaintiffs provide evidence of the location of the records (only those records which relate to the First Nationwide Mortgage Corporation summons) which Defendant has summoned and evidence of the place where First Nationwide Mortgage Corporation is incorporated. Failure to comply with the Court's order in its entirety will result in dismissal of Plaintiff's Petition to Quash Administrative Summonses.

hearing notice, was provided proper hearing and raised no collection alternative or other statutorily-recognized collection defense; protester-type contentions and delegation of authority argument were frivolous; and Appeals Officer wasn't required to provide him names of agents imposing penalties or regulatory basis therefor. Also, jurisdiction lay exclusively with Tax Court to extent taxpayer was contesting his tax liabilities; and sovereign immunity barred his monetary damages claim. *Reference:* United States Tax Reporter ¶63,305.01(5); 63,305.01(10); 67,025.01(2); 74,336.506(25). IRC §6330; 6702.

UNITED STATES OF AMERICA UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION,

MEMORANDUM OPINION

Honorable David W. McKeague

This is an action brought by a *pro se* plaintiff to challenge IRS penalties imposed upon him for filing an allegedly frivolous tax return and to challenge his obligation to pay federal income taxes. The IRS imposed the penalties pursuant to 26 U.S. C. § 6702 for frivolous tax returns for the 1998 and 1999 tax years. Plaintiff's complaint asks this court to declare the penalties ''invalid'' because the hearing officer failed to conduct a ''valid'' due-process hearing pursuant to 26 U.S.C. § 6330(c). Plaintiff asks the court to ''Order the government to reimburse plaintiff for all of (his) costs in bringing this action. Award Plaintiff such other punitive damages as equity relief dictates based on the needless time, effort and money Defendant's lawless actions compelled Plaintiff to expend.'' (Complaint at 5) (citing 26 U.S.C. § 7433).

The matter is before the court on defendant's motion for summary judgment. (docket # 5). Defendant seeks dismissal of plaintiff's claims on the basis that this court lacks subject-matter jurisdiction. Defendant asserts that the proper forum for plaintiff's lawsuit attempting to challenge his underlying tax liability is the United States Tax Court. (Def. Brief at 4). Defendant argues that this court does have ''jurisdiction to review the IRS's determination with respect to the frivolous return penalties assessed pursuant to 26 U.S.C. § 6702.'' (Def. Brief at 4 n.1) (citing *Van Es v. Commissioner*, 115 T.C. 324 (2000). Defendant seeks a court order affirming the decision of the appeals officer imposing sanctions against plaintiff for filing frivolous tax returns.

Plaintiff filed his response on February 21, 2002. (docket # 13). Plaintiff opposes defendant's motion for summary judgment on the basis that, ''Defendant's memorandum of law is nothing but a conglomeration of false and fraudulent claims designed to circumvent the law and deny plaintiff protection.'' (docket # 13, at 2). Plaintiff vehemently disagrees with the defendant's assertion that plaintiff's underlying ability to pay taxes was not at issue at the hearing. Plaintiff claims that he challenged his underlying liability to pay taxes at the hearing and states, ''it is an issue in this proceeding and is a contested issue of fact.'' (*Id.*). Plaintiff repeats this assertion on page 3 of his brief where he states, ''The issue of underlying liability is at issue in this proceeding and is a contested issue of fact.'' (Id. at 3). Plaintiff repeats these arguments on page 21 of his brief and in the declaration he attached in support of his brief.

Upon review, defendant's motion for summary judgment affirming the administrative decision imposing sanctions will be granted. Plaintiff's remaining claims will be dismissed because the court lacks subject-matter jurisdiction on those claims.

Applicable Standards

Defendant has filed a motion asking that the complaint against it be dismissed for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P 12(b)(1). The Sixth Circuit recognizes two types of 12(b)(1) motions: a ''facial'' attack challenging the sufficiency of the plaintiff's factual allegations, in which all well-pleaded factual allegations in the complaint are taken as true; and a ''factual'' attack challenging the actual fact of subject-matter jurisdic-

tion, which is analyzed under Fed. R. Civ. P 56 standards. *See Ohio Nat'l Life Ins. Co. v. United States*, 922 F.3d 320, 324 [67 AFTR 2d 91-388] (6th Cir. 1990); *Treglowne v. United States*, No. 99-cv-70323, 2000 WL 264677, at 3 [84 AFTR 2d 99-7520] (E.D. Mich. Jan. 21, 2000). The difference is often significant, because under a factual challenge the district court is empowered to weigh the evidence, and no presumptions apply as to the truthfulness of plaintiff's allegations. *United States v. A.D. Roe Co.*, 186 F.3d 717, 721–22 (6th Cir. 1999). The Sixth Circuit has clearly recognized that a district court is empowered consider evidence beyond the pleadings and to resolve factual disputes when necessary to resolve challenges to subject-matter jurisdiction under Rule 12(b)(1). *See Madison-Hughs v. Shalala*, 80 F.3d 1121, 1130 (6th Cir. 1996); *RMI Titanium Co. v. Westinghouse Elec. Co.*, 78 F.3d 1125, 1133–34 (6th Cir. 1996); *compare United States v. Bell South Telecommunications, Inc.*, 123 F.3d 935, 937 (6th Cir. 1997). Here, defendant presents a factual attack challenging this court's subject-matter jurisdiction.

Summary judgment is appropriate when the record reveals that there are no issues as to any material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Hiney Printing Co. v. Brantner*, 243 F.3d 956, 959 (6th Cir. 2001); *Redding v. St. Edward*, 241 F.3d 530, 532 (6th Cir. 2001); *Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1009 (6th Cir. 1997) (*en banc*). The standard for determining whether summary judgment is appropriate is whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986); *see Watkins v. City of Battle Creek*, 273 F.3d 682, 685 (6th Cir. 2001); *Groner v. Golden Gate Gardens Apts.*, 250 F.3d 1039, 1043 (6th Cir. 2001); *Strouss v. Michigan Dep't of Corr.*, 250 F.3d 336, 341 (6th Cir. 2001). The court must consider all pleadings, depositions, affidavits, and admissions on file, and draw all justifiable inferences in favor of the party opposing the motion. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Pride v. Bic Corp.*, 218 F.3d 566, 567 (6th Cir. 2000).

When the party without the burden of proof (generally the defendant) seeks summary judgment, that party bears the initial burden of pointing out to the district court an absence of evidence to support the nonmoving party's case, but need not support its motion with affidavits or other materials "negating" the opponent's claim. *Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 339 (6th Cir. 1993). Once the movant shows that "there is an absence of evidence to support the nonmoving party's case," the non-moving party has the burden of coming forward with evidence raising a triable issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). To sustain this burden, a plaintiff may not rest on the mere allegations of his pleadings. Fed. R. Civ. P. 56(e); *Dudley v. Eden*, 260 F.3d 722, 724 (6th Cir. 2001); *Braithwaite v. Timken Co.*, 258 F.3d 488, 493 (6th Cir. 2001); *Campbell v. Grand Trunk W.R.R.*, 238 F.3d 772, 775 (6th Cir. 2001). "A mere scintilla of evidence is insufficient." *March v. Levine*, 249 F.3d 462, 471 (6th Cir. 2001). Rather, a party with the burden of proof opposing a motion for summary judgment has the burden to come forth with requisite proof to support his legal claim, particularly where he has had an opportunity to conduct discovery. *See Cardamone v. Cohen*, 241 F.3d 520, 524 (6th Cir. 2001); *Noble v. Chrysler Motors Corp.*, 32 F.3d 997, 999 (6th Cir. 1994).

Facts

The following facts are beyond genuine issue. In September of 2000, the Internal Revenue Service received 1040 forms from plaintiff for the 1988 and 1999 tax years. Plaintiff had entered zeros in the spaces provided for his wages, total income and adjusted gross income. Plaintiff's W-2's showed the payment of wages, tips and other compensation. On the 1999 form, plaintiff claimed a refund in the amount of $16.80. At the bottom of page two plaintiff wrote, "I am not filing this voluntarily, but

I am filing this return in fear that if I didn't I would be prosecuted (illegally) for failing to do so.'' (docket # 8, Ex. A). In response, the IRS sent plaintiff the following letter:

> We have determined that the information you sent is frivolous and your position has no basis in law. Claims, such as yours, have been considered and rejected repeatedly as without merit by federal court, including the Supreme Court of the United States. Therefore, we will not respond to future correspondence concerning these issues.
>
> In answering your tax questions, we encourage you to seek advice from competent tax counsel or an attorney qualified to practice in your state.
>
> This is to inform you of the potential consequences of the position you have taken and to offer you and opportunity to correct your position within 30 days from the date of this letter.
>
> INTERNAL REVENUE CODE SECTION 6702 (FRIVOLOUS INCOME TAX RETURN) PROVIDES:
>
> (a) CIVIL PENALTY -if-
>
> (1) any individual files what purports to be a return of the tax imposed by subtitle A but which
>
> (A) does not contain information on which the substantial correctness of the self-assessment may be judged; or
> (B) contains information that on its face indicates that the self-assessment is substantially incorrect; and
>
> (2) the conduct referred to in paragraph (1) is due to -
>
> (A) a position which is frivolous, or
> (B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws, then such individuals shall pay a penalty of $500.
>
> (b) PENALTY IN ADDITION TO OTHER PENALTIES - The penalty imposed by subsection (a) shall be in addition to any other penalty provided by law.

On October 9, 2000, the IRS assessed the $500 penalty upon the 1998 and 1999 returns. The IRS issued a notice of assessment and demand for payment at that time. On February 8, 2001, the IRS issued a ''Final Notice-Notice of Intent to Levy and Notice of Your Right to a Hearing.'' This notice stated as follows:

> You have not paid your federal tax. We previously asked you to pay but we still haven't received full payment. This letter is your notice of our intent to levy under the Internal Revenue Code Section (IRC) 6331 and your notice of a right to receive Appeals consideration under the IRC 6330. PLEASE CALL US IMMEDIATELY at one of the telephone numbers shown above if you recently made payment or can't pay the amount you owe.

(docket # 8, Ex. B). The attached account summary showed civil penalties of $500 for each tax year and statutory additions of $18.55, for a total of $1037.10. (*Id.*).

Plaintiff requested a hearing. (Docket # 8, Ex. C). Plaintiff objected to the penalties imposed and stated the basis for his objection as follows:

> See attached Request for Due Process Hearing ''Frivolous Penalty'' as to the issues that I am challenging—among them is the validity of the frivolous penalties and your authority to assess it.

Plaintiff's attachment stated as follows:

> REQUEST FOR DUE PROCESS HEARING ''FRIVOLOUS'' PENALTY
> Please have at the hearing:
>
> 1) The name or names of the IRS employees who imposed the ''frivolous'' penalty along with their Federal ID number.
> 2) The delegation of authority from the Secretary authorizing such persons to impose a ''frivolous'' penalty.

3) The official job description(s) of those IRS employees who imposed the "frivolous" penalty.

4) Since Code Sections 6001 and 6011 (Code Sections specifically mentioned in the Privacy Act Notice in the 1040 booklet) advise the public that they need only "comply with the regulations," I am requesting that you also have at the hearing the Treasury regulation that allows IRS employees to impose the "frivolous" penalty, and the regulation that requires me to pay it.

5) Since I am "*challenging the existence of the underlying tax liability*," an issue Code Section 6330(c)(2)(B) specifically authorizes me to raise. Therefore, at the Due Process hearing I expect the appeals officer be able to identify the specific Code section that makes me "liable" for the income tax at issue. Since I did not get a DEFICIENCY NOTICE in connection with the $500 frivolous penalty, and since I never had an opportunity to dispute such tax liability' in connection with this penalty, the appeals officer *is required by law* (pursuant to Code Section 6330(c)(2)(B)) to establish such a 'liability'—especially since paragraph 1 of my alleged frivolous return claimed that I had no income tax 'liability' as a matter of law. And if that statement is correct, than my 1998 & 1999 returns could not be 'frivolous' just on that basis alone.

(Complaint, Ex. B).

On July 12, 2001, the Internal Revenue Service appeals officer conducted a collection due-process hearing. Pertinent portions of the transcript according to plaintiff are set forth below:

MF Ok ... um. Today is July 12, 2001. If you could state your name for the record, both of you please.

LG My name is Larry Gillet.

MC My name is Mary Jo Covell.

MF And I am Mary Jo Fedewa. I'm an appeals officer with the Internal Revenue Service. This is your Collection Due Process hearing with regard to the frivolous penalty that was assessed 1998 and 1999.

LG Right. Ok. My request is, when I filed this for Due Process Hearing I requested these documents ... that you have these documents on hand[:] they are the names of the employees who imposed this frivolous penalty, their delegation order from the secretary[,] the official job descriptions[,] and the code section regulation 6702.

MF I do not have names. I do not have job descriptions. Delegation orders are public information. You can look those up in your local library. As far as the code section, that's the frivolous return penalty section, we keep that copy, that allows us to assess a frivolous return of $500.00[.] If you file a return that does not contain information that allows us to ascertain that it[']s a substantially correct return.

* * *

MF Ok the reason the frivolous penalty was assessed you know the reason the frivolous penalty was assessed.

LG I filed.

MF You filed a tax return with all zeros.

LG Absolutely.

MF That is not a return that allows us to make a correct assessment of your taxes.

(Complaint, Ex. C).

On July 26, 2001, the IRS issued a Notice of Determination denying plaintiff's request for relief from the penalties. (Complaint, Ex. A). The Notice described the basis for the determination in these terms:

Type of Tax	Tax Period
Civil Penalty	1998
Civil Penalty	1999

Legal and Procedural Requirements

With the best information available, the requirements of various applicable laws or administrative procedures have been met. On 8-18-2000, you were sent a letter stating that the documents filed as returns were frivolous and a frivolous re-

turn penalty would be assessed if they were not corrected within 30 days. The penalty was assessed on October-9-2000 and notice of assessment and demand for payment was sent at the time.

Issues Relating to the Unpaid Liability

- You demanded that you be pro-vided with implementing regula-tions for code section 6702 and stated that the penalty was not valid without these regulations.
- You stated that the code did not define the word liability and did not state that you were liable for an income tax.
- You did not raise any other issues (other than demanding names and job descriptions of employees and demanding copies of regulations) and you did not raise any issues that Appeals has jurisdiction over.

Balancing efficient Tax Collection with Concern Regarding Intrusiveness

Because the t/p did not raise any issues, other than constitutional objections to the income tax laws, the proposed levy action balances the need for efficient tax collection with concern regarding the intrusiveness of the action.

(docket # 8, Ex. D). The Notice of Determination concluded with the statement, ''You did not raise any issue that Appeals has jurisdiction over. Your request for relief from the proposed levy is denied.'' (*Id.*). The notice stated, ''If you want to dispute this determination in court, you have 30 days from the date of this letter to file a complaint in the appropriate United States District Court for a redetermination.'' Plaintiff filed his complaint on August 24, 2001. (docket # 1).

Discussion

[1] The IRS is statutorily authorized to assess a civil penalty of $500 against any individual who files what purports to be a return of income tax where (1) the document filed either does not contain information on which the substantial correctness of the self-assessment may be judged or contains information that on its face indicates that the self-assessment is substantially incorrect; and (2) such conduct arises either from a position which is frivolous or from a desire which appears on the purported return to delay or impede the administration of federal income tax laws. 26 U.S.C. § 6702(a). The test for frivolousness under section 6702(a) is purely an objective one, and is met when the position taken by the individual has no basis in fact or law. *See Bradley v. United States*, 817 F.2d 1400, 1404 [59 AFTR 2d 87-1162] (9th Cir. 1987); *see also Klunder v. United States*, No. C99-542R, 2000 WL 555963, at 1 [85 AFTR 2d 2000-1424] (W.D. Wash. Feb. 25, 2000).

Numerous federal courts have upheld the imposition of the $500 sanction by the IRS pursuant to 26 U.S.C. § 6702(a), where, as here, a tax form is filed stating that an individual had no income, but the attached W-2 forms show wages, tips, or other compensation of greater than zero. *See Hoffman v. United States*, No. C02-50234JB, 209 F. Supp. 2d 1089, 1093 [89 AFTR 2d 2002-3092] (W.D.Wash. 2002); *Loofbourrow v. Commissioner*, 208 F. Supp. 2d 698, 709–10 [89 AFTR 2d 2002-2800] (S.D. Tex. 2002); *Carroll v. United States*, No. 01-2877-G/BRE, 2002 WL 1962944 [89 AFTR 2d 2002-3005] (W.D. Tenn. May 29, 2002); *Reinhardt v. Internal Revenue Service*, No. CIVS-1286GCDGGHPS, 2002 WL 1095351, at 5 [90 AFTR 2d 2002-5506] (E.D. Cal. May 24, 2002); *Light v. United States*, No. CV-S-01-923-LRH(RJJ), 2002 WL 1465963, at 3 [89 AFTR 2d 2002-2970] (D. Nev. May 15, 2002) (citing, among other cases, *Sizemore v. United States*, 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir. 1986)); *Montijo v. United States*, No. CV-S-01-1227-RLH(LRL), 2002 WL 1466096, at 3 [90 AFTR 2d 2002-5038] (D. Nev. May 14, 2002) (finding ''no doubt'' about the validity of the penalty)(collecting cases); *Baker v. United States*, No. CV-S-01-1187-RLH RJJ, 2002 WL 139612, at 3 [89 AFTR 2d 2002-2851] (D. Nev. May 10, 2002) (same).

The appeals officer's decision upholding sanctions against plaintiff took into consid-

eration: "(A) the verification presented under paragraph (1); (B) the issues raised under paragraph (2); and (C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." 26 U.S.C. § 6330(c). (Complaint, Ex. A).

Section 6330 (d) provides for judicial review after a CDP hearing, but fails to specify the standard of review or the court responsible for conducting that review. *Carroll*, 2002 WL 1962944, at 3.

(1) Judicial review of determination.--The person may, within 30 days of a determination under this section, appeal such determination--

(A) to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter); or

(B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States. If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court determination to file such appeal with the correct court.

26 U.S.C. § 6330(d). Many federal courts have held that because it is related to income taxes, judicial review under § 6330(d) of frivolous tax return penalties falls within the exclusive jurisdiction of the Tax Court and outside the jurisdiction of the United States District Courts. *See Steidel v. Evans*, No. C-02-5205 RJB, 2002 WL 1988174 [90 AFTR 2d 2002-5705] (W.D. Wash. July 22, 2002); *Cortes v. United States*, No. CV-S-01-940-RLH LRL, 2002 WL 1987469, at 2 [90 AFTR 2d 2002-5629] (D. Nev. July 10, 2002); *Tornichio v. United States*, No. 5:02-cv-351, 2002 WL 508325 [89 AFTR 2d 2002-1506] (N.D. Ohio Mar. 18, 2002); *Hart v. United States*, No. 1:02-cv-147, 2002 WL 507964 [89 AFTR 2d 2002-1503] (N.D. Ohio Mar. 2, 2002). The Tax Court has held that it does not have jurisdiction to consider frivolous return penalties. *See Van Es v. Commissioner*, 115 T.C. 324 (2000) *see also Johnson v. Commissioner*, 117 T.C. 204, 208 (2001); *Lunsford v. Commissioner*, 117 T. C. 159, 162 (2001). The federal appellate courts have not yet resolved whether review lies within the district courts or the Tax Court. The Sixth Circuit has held in an unpublished decision that a suit pursuant to 26 U.S.C. § 6330 attempting to challenge a hearing officer's decision concerning a plaintiff's underlying tax liability for particular years fell within the exclusive jurisdiction of the United States Tax Court. *See Diefenbaugh v. Weiss*, No. 00-3344, 2000 WL 1679510 [86 AFTR 2d 2000-6805] (6th Cir. Nov. 3, 2000). The Sixth Circuit affirmed a district court's *sua sponte* dismissal of the plaintiff's complaint. *Id.* At present, it is unclear whether the Sixth Circuit would correspondingly hold that review of the administrative decision to impose civil sanctions for filing a frivolous return fell within the exclusive jurisdiction of the United States Tax Court.

In the absence of controlling appellate authority, the court will assume for analytical purposes that this court does have subject-matter jurisdiction limited to review of the appropriateness of the frivolous tax return penalties imposed pursuant to 26 U.S.C. § 6330(d). In *Carroll v. United States*, the United States District Court for the Western District of Tennessee applied an abuse-of-discretion standard in conducting a section 6330(d) review. The court noted that in other contexts the Sixth Circuit had held that the appropriate standard of review of penalty determinations by administrative agencies should be the abuse-of-discretion standard. 2002 WL 1962944, at 3 (citing *Steeltech, Ltd. v. United States Environmental Protection Agency*, 273 F.3d 652, 655 (6th Cir. 2001) and *Schuck v. Frank*, 27 F.3d 194, 197 (6th Cir. 1994)). The court observed that lower courts within the Sixth Circuit had applied an abuse-of-discretion standard in this specific context, citing the legislative history of section 6330. 2002 WL 1962944, at 3 (citing *Bonfare v. United States*, No. C-2-00-1222, 2002 WL 373407 (S.D. Ohio Jan. 29, 2002) and *Geller v. United States*, No. C2-00-1116, 2001 1346669, at 2 [88 AFTR 2d 2001-6494]

(S.D. Ohio Sept. 25, 2001)). Other courts have also applied the abuse-of-discretion standard. ''[T]he legislative history indicates that a court should conduct a de novo review only 'where the validity of the tax liability was properly at issue at the administrative hearing.' H. Conf. Rept. 105-599, 105th Cong. 2d sess. 266 (1998). Where the amount of the underlying tax liability is not properly part of the appeal, the court reviews a Notice of Determination for abuse of discretion.'' *Pinsonneault v. United States*, No. CV-5-01-919-RLJRRJJ, 2002 WL 442275, at 3 [89 AFTR 2d 2002-1334] (D. Nev. Feb. 14, 2002); *see also Stanifird v. Wilcox*, No. CV-00-1954-PHX JAT, 2001 WL 758711, at 1 [87 AFTR 2d 2001-2585] (D. Ariz. June 12, 2001). Under an abuse-of-discretion standard, the administrative decision must be affirmed unless the court determines with a ''definite and firm conviction that a clear error of judgment has been committed.'' *Cincinnati Ins. Co, v. Byers*, 151 F.3d 574, 578 (6th Cir. 1998). Other courts have applied a *de novo* review standard. *See, e.g., Light*, 2002 WL 1465963, at 3. The courts applying a *de novo* review have limited judicial review ''to those issues raised during the CDP hearing.'' *Reinhardt*, 2002 WL 1095351, at 4. Regardless of whether the hearing officer's decision is reviewed *de novo*, or under an abuse-of-discretion standard, in the present case, the defendant is entitled to judgment in its favor as a matter of law upon the statutory sanctions imposed against plaintiff for filing frivolous returns.

Plaintiff clearly received notice and opportunity for a hearing prior to the IRS levy as required by 26 U.S.C. § 6330(a).[1] Plaintiff requested and received a CDP hearing pursuant to 26 U.S.C. § 6330(b) before a hearing officer.[2] At the hearing, plaintiff declined to challenge matters allowable under 26 U.S.C. § 6330(c)(2). Plaintiff did not challenge the appropriateness of the intended method of collection, offer an alternative means of collection, or raise a spousal defense. *Carroll*, 2002 WL 1962944, at 5. The statute provides that a person ''may also raise at the hearing challenges to the existence or amount of the underlying tax liability,'' if other requirements are met. 26 U.S.C. § 26 U.S.C. § 6330(c)(2)(B). In this context, the ''underlying tax liability'' referred to in 26 U.S.C. § 6330(b) is the frivolous return penalty, not the underlying liability to pay taxes for a particular year. *See Montijo*, 2002 WL 1466096, at 2; *Light*, 2002 WL 1465963, at 3. From the record presented, it is clear that plaintiff had an opportunity to contest his tax liability at the hearing. *See Reinhardt*, 2002 WL 1095351, at 5. In any event, plaintiff's arguments regarding why he was not obligated to pay taxes have been expressly rejected by the federal courts. The hearing officer was not required to respond to such well-worn and frivolous arguments. *Reinhardt*, 2002 WL 109351, at 6; *see also United States v. Mundt*, 29 F.3d 233, 237 [74 AFTR 2d 94-5228] (6th Cir. 1994) (reciting a litany of rejected arguments concerning the power of the United States government to collect income tax).

Plaintiff complains that the hearing officer refused to identify the IRS employees who imposed the penalties. ''The identity of the IRS employees who imposed the penalt[ies] is not relevant to whether the penalty was proper. Accordingly, this claim is without merit.'' *Reinhardt*, 2002 WL 1095351, at 5. Courts have likewise rejected as ''frivolous'' the argument that the IRS failed to offer proof that those who determined and imposed the penalties were authorized to do so. *Hoffman*, 209 F. Supp. 2d at 1094.

Plaintiff complains that the hearing officer failed to identify the regulations that required plaintiff to pay the penalty. ''According to the regulations, there is no re-

[1] ''The particular form on which a notice of assessment and demand for payment is made is irrelevant as long as it provides the taxpayer with all the information required under 26 U.S.C. § 6303(a).'' *Carroll*, 2002 WL 1962944, at 4.

[2] If plaintiff was attempting to assert a procedural due-process claim, this court lacks jurisdiction over such a claim. *See, e.g., Glass v. Internal Revenue Service*, No. 01-2112, 2001 WL 1356141 [88 AFTR 2d 2001-6700] (10th Cir. Nov. 5, 2001). ''District courts have no jurisdiction over civil claims challenging taxes unless litigants first pay the assessed tax and then raise these claims in a refund suit. *See* 26 U.S.C. § 7421(a) prohibiting suits to restrain assessment or collection of taxes); *see also Flora v. United States*, 362 U.S. 145 [5 AFTR 2d 1046] (1960) (holding that 28 U.S.C. § 1346(a), which gives district courts jurisdiction over suits challenging tax assessments, requires full payment of assessed tax prior to suit).'' *Tornichio*, 2002 WL 508325, at 3.

quirement that the hearing officer identify the regulations on which the penalty is based during the hearing.'' *Reinhardt*, 2002 WL 109351, at 5. In any event, the written notices that plaintiff received identified the statutory basis for the penalties imposed. Finally, plaintiff complains that he was not provided with the verification he had requested from the hearing officer. There is simply no requirement that the appeals officer provide a verification to the taxpayer. *Reinhardt*, 2002 WL 1095351, at 5. The penalty will therefore be affirmed.

To the extent plaintiff is attempting to challenge his tax liability for the 1998 and 1999 tax years, such claims must be dismissed for lack of jurisdiction. Such claims fall within the exclusive jurisdiction of the United States Tax Court. *See Diefenbaugh v. Weiss*, No. 00-3344, 2002 WL 1679510 (6th Cir. Nov. 3, 2000); *Pinsonneault v. United States*, 2002 WL 442275, at 2; *accord Steidel v. Evans*, 2002 WL 1988174, at 2; *Cortes v. United States*, No. CV-S-01-940-RLH LRL, 2002 WL 1987469, at 2 (D. Nev. July 10, 2002).

Finally, the United States is immune from suit under the doctrine of sovereign immunity. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). Plaintiff has the burden of establishing that the government has waived sovereign immunity and to identify the specific statutory provision containing the waiver. *See Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987). The waiver must be express and will not be implied. *Lane v. Pena*, 518 U.S. 187, 192 (1996). The scope of any waiver of sovereign immunity is to be strictly construed in favor of the sovereign. *See Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Plaintiff's claim for monetary damages against defendant is barred by sovereign immunity.

Conclusion

Plaintiff's claims seeking to challenge his underlying tax liability and seeking monetary damages against defendant will be dismissed for lack of subject-matter jurisdiction. The administrative decision imposing sanctions against plaintiff for filing frivolous returns will be affirmed.

Dated: September 20, 2002

David W. McKeague

United States District Judge

JUDGMENT

Honorable David W. McKeague

For the reasons set forth in the accompanying memorandum opinion:

IT IS ORDERED that defendant's motion for summary judgment (docket # 5) be and hereby is GRANTED. The administrative decision imposing sanctions against plaintiff is AFFIRMED.

IT IS FURTHER ORDERED that plaintiff's claims attempting to challenge his tax liability for the 1998 and 1999 tax years and for monetary damages against the United States are DISMISSED for lack of subject-matter jurisdiction.

Dated: September 20, 2002

David W. McKeague

United States District Judge

¶2002-5498

Donald WIECHENS; Gary and Deborah Wiechens, husband and wife; and Wiechens Properties Limited Partnership, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Arizona, (DC AZ) CIV 00-1858-PHX-SMM, Sept. 16, 2002. Year 1993. Decision for Govt.

1. Nonrecognition of gain—like-kind exchanges—water rights exchanged for fee interest. Partners improperly treated partnership's exchange of Colorado River water rights for farm land as IRC §1031 nontaxable exchange: although water rights constituted real property interest, properties weren't like-kind. Contract and other documents plus prior court decisions showed that water rights were limited in quantity, priority and to 50-year duration only; and such limited, non-perpetual rights simply weren't sufficiently similar to fee simple interest in land under IRC §1031. Also, taxpayers' attempt to analogize their water rights to limited, 30-year fee leasehold under Reg. §1.1031(a)-1(c) was rejected.

Reference: United States Tax Reporter ¶10,315.02(25). IRC §1031.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

ORDER

Stephen M. McNamee Chief United States District Judge

Pending before the Court are Plaintiffs' Motion for Partial Summary Judgment (Doc. #20) and Defendant's Cross-Motion for Summary Judgment (Doc. #22). After considering the arguments raised by the parties in their briefing and in oral argument, the Court now issues the following ruling.

BACKGROUND

Plaintiff Donald Wiechens, a single man, and Plaintiffs Gary and Deborah Wiechens, husband and wife (''Plaintiffs''), are partners in the Wiechens Properties Limited Partnership, an Arizona limited partnership (the ''Partnership''). (Compl. at ¶ 1.) The Partnership owns land within the boundaries of the Harquahala Valley Irrigation District (''HVID''). (Compl. at ¶ 9.) The HVID is an Arizona municipal corporation that was formed in 1964 for the purpose of establishing a local water distribution system in and about Harquahala Valley, Arizona. (Def.'s Mem. in Supp. of Mot. for Summ. J. at p.2)

Although Plaintiffs and Defendant United States of America (''Defendant'') disagree about the origin and duration, it is undisputed that the Partnership obtained the right to receive Colorado river water on an annual basis to irrigate its land that was located within the boundaries of the HVID (''water rights''). (Def.'s Resp. to Pls.' Mot. for Summ.J. at pp.4–5.) In December 1992, the HVID and the United States Department of Interior (''Department of Interior'') entered into a contract whereby the HVID landowners were allowed to sell their water rights back to the government without an accompanying sale of the land. (Pls.' Mot. for Partial Summ. J. at pp.1–2.)

The Partnership opted to retain its land within the boundaries of the HVID, but to exchange its water rights for an interest in farm land. (Id. at p.2.) The Partnership initially assigned its water rights to Yuma Title & Trust Company (''Yuma Title''). (Def.'s Mem. in Supp. of Mot. for Summ.J. at p.3.) Yuma Title, in turn, relinquished the Partnership's water rights to the HVID, which sold all the water rights it received from the HVID landowners to the Department of Interior. (Pls.' Mot. for Partial Summ. J. at p.2.) After paying expenses, HVID agreed to pay the district landowners approximately $24,000,000, prorated to the acreage owned by each, for their water rights. (Id. at p.2.)

The HVID paid Yuma Title $495,924.99 for the Partnership's relinquished water rights. (Def.'s Statement of Facts in Support of Motion for Summary Judgment (''Def.'s SOF'') at ¶s4–7.) The HVID also paid Donald Wiechens, the Partnership's general partner, $34,022.88 for the Partnership's relinquished water rights. (Def.'s SOF at ¶s 4–7.) Yuma Title then transferred the $495,924.99 to a third-party, Blohm's Farms, Inc., in exchange for the transfer of title to approximately 160 acres of certain farm land to the Partnership. (Def.'s SOF at ¶ 8; Pls.' Mot. for Partial Summ. J. at p.2.) The total consideration for conveyance of the Blohm's Farms land to the Partnership was $567,810. (Def.'s SOF at ¶ 9.) Plaintiffs maintain that they did not report any resulting income from the above transactions to the Internal Revenue Service (''IRS'') because they believed the transactions qualified for non-recognition tax treatment under 26 U.S.C. §1031. (Pls.' Mot. for Partial Summ. J. at p.2.)

On November 3, 1997, the IRS made assessments against Plaintiff Donald Wiechens, for tax in the amount of $101,395.00 and for interest in the amount of $37,277.64 with respect to the 1993 tax year. (Def.'s Mem. in Supp. of Mot. for Summ. J. at pp. 1–2.) On November 10, 1997, the IRS made assessments against Plaintiffs Gary and Deborah Wiechens for tax in the amount of $97,986.00 and for

interest in the amount of $36,255.80 with respect to the 1993 tax year. (Id.) Plaintiffs made payments with respect to their 1993 tax return. (Id.)

Plaintiffs initiated this tax refund action with a complaint filed in the United States District Court for the District of Arizona on September 28, 2000. Both Plaintiffs and Defendant have filed motions for summary judgment. Plaintiffs contend that its water rights constitute an interest in real property, that the properties exchanged were of "like-kind" and, therefore, that the exchange qualifies for non-recognition treatment and any gain realized is not taxable. (Pls.' Mot. for Partial Summ. J. at p.5.) Defendant claims that Plaintiffs' exchange of water rights for farm land was not an exchange of "like-kind" properties under 26 U.S.C. §1031 and, therefore, that Plaintiffs' transaction does not qualify for non-recognition treatment and is taxable. (Def.'s Mem. in Supp. of Mot. for Summ. J. at p.2.)

STANDARD OF REVIEW

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the nonmoving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c)(1995); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986); Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). Substantive law determines which facts are material. See Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986); see also Jesinger, 24 F.3d at 1130. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. The dispute must also be genuine, that is, the evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." Id.; see also Jesinger, 24 F.3d at 1130.

A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." Celotex, 477 U.S. at 323–24. Summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Id. at 322; see also Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir. 1994). The moving party need not disprove matters on which the opponent has the burden of proof at trial. See Celotex, 477 U.S. at 317. The party opposing summary judgment "may not rest upon the mere allegations or denials of [the party's] pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 585–88 (1986); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir. 1995).

DISCUSSION

I. The Partnership's water rights constitute an interest in real property.

[1] Plaintiffs, in their motion for partial summary judgment, assert that the facts of this case are undisputed and maintain that the only issue for the Court to resolve is if the Partnership's water rights constitute an interest in real property. Plaintiffs contend that the Partnership's water rights are an interest in real property and, as a result, argue that the exchange of its water rights for farm land qualifies as a "like-kind" exchange subject to non-recognition treatment under 26 U.S.C. §1031. For the purposes of the Motion for Summary Judgment, Defendant, does not dispute Plaintiffs' assertion that the Partnership's water rights constitute an interest in real property, but Defendant challenges Plaintiffs' argument that the exchanged water rights and farm land are "like-kind" property.

Plaintiffs argue that Arizona courts have concluded that water rights are interests in real property. Plaintiffs support this contention by citing Paloma Investment Limited Partnership v. Jenkins, 978 P.2d 110 (Ariz. App. 1998), in which the Arizona court stated "[I]n general, water rights are property rights. In the Matter of the Rights to the Use of the Gila River, 171 Ariz.

230, 235, 830 P.2d 442, 447 (1992). Those rights are interests in real property. *See* 93 C.J.S. Waters §1 (1956).'' The Court agrees with Plaintiff's assertion that based on the Paloma decision, as well as later Arizona decisions, the Partnership's water rights do constitute an interest in real property. However, further analysis is required to determine if the Partnership's exchange satisfies the requirements for non-recognition status under 26 U.S.C. §1031.

II. The Partnership's water rights originated with the November 18, 1983 water service subcontract and are limited.

Plaintiffs and Defendant dispute the origin and duration of the Partnership's water rights. Plaintiffs assert that the Partnership's water rights were perpetual, that the water rights originated from the United States Supreme Court decision in State of Arizona v. State of California, 373 U.S. 546 (1963), and that the water rights were definitively established by a later Department of Interior water allocation notice, 48 Fed.Reg. 12446 (Mar. 24, 1983). (Pls.' Resp. to Def.'s Mot. for Summ. J. at p.4.) Defendant, on the other hand, contends that neither the Supreme Court's decision in Arizona v. California, nor the March 24, 1983 Department of Interior water allocation notice entitled the Partnership or the other HVID landowners to perpetual water rights. Rather, Defendant argues that the HVID landowners became entitled to limited water rights by virtue of a November 18, 1983 water service subcontract (''Subcontract'') between the Department of Interior, the Central Arizona Project (''CAP'') Water District and the HVID. (Def.'s Corrected Reply to Pls.' Resp. to Def.'s Mot. for Summ. J. at p.2.)

The background and disposition of the HVID landowner's water rights were recently examined by the Tax Court in Gladden v. Commissioner, 112 T.C. 209 (1999). The Gladden court stated that the Arizona v. California decision entitled the State of Arizona, but not individual parties, to an annual claim of 2.8 million acre-feet of Colorado River water. Id at 210. Further, the court stated that the HVID was formed for the purpose of establishing a local water distribution system in and about the Harquahala Valley, and that irrigation districts may purchase or acquire water rights for irrigation purposes. Id. at 211. Additionally, the Gladden court determined that the March 24, 1983 Department of Interior notice initially allocated 7.67 percent of non-Indian agricultural lower Colorado River water for redistribution to the HVID, but not to individual landowners, for the purpose of irrigating farmland located within the geographic boundaries of the HVID water district. Id. at 211–12. The Gladden court further stated that a November 18, 1983 Subcontract between the Department of Interior, the CAP Water District and the HVID established delivery of allocated Colorado River water by the CAP Water District to the HVID for a 50-year period. Id. at 212. Notably, the Gladden court determined that individual landowners, such as the Partnership, although not named in the November 18, 1983 Subcontract, became entitled to receive an allocation of Colorado River water from the Subcontract only if the individual's land qualified as ''eligible land'' pursuant to the Subcontract. Id. at 212. Specifically, the Gladden court stated ''under the Subcontract, the [landowner] was entitled to receive each year from [the HVID] a specified quantity of Colorado River water.'' Id. Throughout the remainder of the Gladden court's opinion and discussion of the HVID landowners' water rights, the court refers to the HVID landowers' water rights as being derived from the Subcontract. See id. at 213–16, 222–23.

On appeal, the Ninth Circuit did not dispute the Gladden court's determination of the origin and duration of the HVID landowners' water rights. The Ninth Circuit stated ''[i]n 1983, [the HVID] obtained the right to take Colorado River water for redistribution within its boundaries and the [individual landowners] in turn obtained water rights from [the HVID].'' Gladden v. Commissioner, 262 F.3d 851, 852 [88 AFTR 2d 2001-5543] (9th Cir. 2001).

Although Plaintiffs claim that the March 24, 1983 Department of Interior notice established the Partnership's water rights, the

Court disagrees. First, the Court notes that when the Partnership acquired its interest in land, and thereafter until 1983, the Partnership did not have vested property rights in Colorado River water. In 1983, the Partnership acquired Colorado River water rights separately from any acquisition or sale of its ownership interest in the land.

Secondly, it is apparent to the Court that the Partnership's water rights originated from the November 18, 1983 Subcontract and that the rights were limited. The March 24, 1983 notice did not allocate water rights to individual landowners but, instead, specifically states that ''[a] final allocation of CAP water and a contract with the [Department of Interior] Secretary for delivery of water is required . . . .'' (1983 WL 133337 (F.R.) at p.12450.) The December 1, 1992, Master Agreement for the relinquishment of CAP water between the parties further supports the Court's view by stating, ''[u]nder a decision promulgated in . . . the Federal Register, dated March 24, 1983, the Secretary allocated to the HVID certain CAP water. Thereafter, the HVID executed the [November 18, 1983] Water Service Subcontract under which it is entitled to CAP water with an agricultural priority.'' (Master Agreement for the Relinquishment of Central Arizona Project Water at ¶ 3.3.)

The March 24, 1983 notice and the November 18, 1983 Subcontract also place many limitations on the water rights. For example, both documents limit the HVID to 7.67 percent of the total supply of agricultural water available for delivery from CAP. The documents provide that the CAP water may only be used for irrigation. The documents also stipulate that during water shortages, all municipal, industrial, and Indian uses of the water have priority over non-Indian irrigation uses. Finally, the November 18, 1983 Subcontract, under which the Partnership's water rights derived, is limited to a 50-year period. Based on these factors, the Court agrees with the finding of the Gladden Tax Court and the Ninth Circuit's affirmation that the water rights at issue originated from the November 18, 1983 Subcontract. Thus, the Partnership's water rights are limited in quantity, priority, and to a 50-year duration.

III. The Partnership's exchange of water rights for farm land was not an exchange of ''like-kind'' properties under 26 U.S.C. §1031.

Typically, taxpayers must recognize gain or loss upon the sale of exchange of property. 26 U.S.C. §1001. Therefore, as a general rule, a transfer of property in exchange for money or other property is taxable. An exception, however, provides that no gain or loss shall be recognized upon an exchange of like-kind properties. 26 U.S.C. §1031(a). Treasury Regulations explain the ''like-kind'' property requirement as follows:

> As used in §1031(a), the words ''like-kind'' have reference to the nature or character of the property and not to its grade or quality. One kind or class of property may not, under that section, be exchanged for property of a different kind or class.

Treas. Reg., 26 C.F.R. §1.1031(a)–1(b). The elements of proof to establish that a property transfer qualifies as a like-kind exchange are as follows: (1) there must be an exchange, (2) the properties exchanged must be of a like-kind, and (3) the property transferred and the property received must be held by the taxpayer either for use in a trade or business, or for investment. 26 U.S.C. §1031(a).

Plaintiffs contend that because the Partnership's water rights constitute an interest in real property, its exchange of the water rights for farm land qualifies as a like-kind exchange and is not taxable. However, Defendant counters that, ''not every exchange of real property interests meets the section 1031 like-kind requirement.'' Smalley v. Commissioner, 116 T.C. 450 (2001). Defendant contends that a 1955 IRS Revenue Ruling (Rev. Rul. 55-749) discussed the tax consequences of an exchange of water rights for a fee simple interest in land. Revenue Ruling 55-749 clearly advises that water rights of a limited amount or duration are not sufficiently similar under §1031 to a fee simple interest in land. The

Court is persuaded by the argument that an exchange of non-perpetual water rights, such as the Partnership's, for a fee simple interest in land does not satisfy §1031.

Plaintiffs also contend, however, that even if the Partnership's water rights are limited to a 50-year duration, the water rights should still be considered of a like-kind with the fee simple interest in the farm land. To support this argument, Plaintiffs reference Treasury Regulation §1.1031(a)–1(c), which sets forth examples of exchanges of properties that are of a like-kind. 26 C.F.R. §1.1031(a)–1(c). One example, on which Plaintiffs rely, is the exchange of a leasehold of a fee with 30 years or more to run for real estate. Id. Plaintiffs argue that the Partnership's water rights, which the Court views as limited to a 50-year duration, are equivalent to the leasehold of a fee for 30 years or more and, therefore, constitute a like-kind exchange.

The Court agrees with Defendant's argument that equating the Partnership's water rights to a leasehold of a fee for 30 years or more is inappropriate. As the Tax Court stated in Koch v. Commissioner, 71 T.C. 54, 65 (1978), application of §1031 "requires a comparison of the exchanged properties to ascertain whether the nature and character of the transferred rights in and to the respective properties are substantially alike." Factors to be considered in this analysis include "the respective interests in the physical properties, the nature of the title conveyed, the rights of the parties, [and] the duration [of the interests]." Id. The documentary evidence presented by the parties, as previously discussed, establish that the Partnership's water rights were narrowly restricted, unlike a fee simple interest in land. Although the Court agrees with Plaintiffs, that the Partnership's water rights constitute an interest in real property, the Court finds that the Partnership's water rights were limited in priority, quantity, and duration, and they were not sufficiently similar to the fee simple interest that it acquired in the Farm Land to qualify as like-kind property.

CONCLUSION

For the reasons stated in the foregoing discussion,

IT IS ORDERED that Plaintiffs' Motion for Partial Summary Judgment (Doc. #20) is DENIED,

IT IS FURTHER ORDERED that Defendant's Cross-Motion for Summary Judgment (Doc. #22) is GRANTED.

DATED this 11 day of Sept., 2002.

Stephen M. McNamee

Chief United States District Judge

¶2002-5499

UNITED STATES OF AMERICA, PLAINTIFF v. Gordon L. ORMESHER; Althea L. ORMESHER; Mildred E. Ormesher, individually and in her capacity as the personal representative of the estate of Louis L. Ormesher; Gilbert Properties, Inc.; and State of Idaho, State Tax Commission, DEFENDANTS. U.S. District Court, Dist. of Idaho, (DC ID) CV00-0486-N-EJL, July 24, 2002. Earlier proceedings at (2002, DC ID) 89 AFTR 2d 2002-2513; (2001, DC ID) 88 AFTR 2d 2001-5917; and (2001, DC ID) 88 AFTR 2d 2001-5834. Years 1986, 1987, 1988, 1990, 1991, 1992, 1993, 1994, 1995. Decision for Govt.

1. Collection actions—foreclosure sale. Govt.'s request for confirmation of foreclosure sale was granted; and proceeds' distribution to IRS and U.S. was ordered. *Reference:* United States Tax Reporter ¶74,035.03(100). IRC §7403.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO,

ORDER

Attorneys for the United States of America

[1] Pending before the Court is the United States' Motion for Confirmation of Sale. Having considered the motion and the relevant facts, the Court ORDERS that the motion is GRANTED and that the sale of the property is hereby APPROVED and CONFIRMED.

IT IS FURTHER ORDERED that a proper and legal conveyance of the property so sold be executed and delivered by the Internal Revenue Service to the purchaser, Maier Group Incorporated, upon receiving the full balance of the purchase price.

IT IS FURTHER ORDERED that the the balance of the proceeds of the sale of the property be distributed to the Internal Revenue Service for the expenses incurred and to the United States in satisfaction of the Judgment entered in this case on August 7, 2001.

IT IS FURTHER ORDERED that the Internal Revenue Service is discharged from any further responsibilities, liabilities, and duties.

Dated this 24th day of July, 2002.

/s/

UNITED STATES DISTRICT JUDGE

Respectfully submitted this 26th day of June, 2002.

THOMAS E. MOSS

United States Attorney

¶2002-5500

Donald P. PINSONNEAULT, PLAINTIFF(S) v. UNITED STATES OF AMERICA, DEFENDANT(S). U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-0919-RLH-(RJJ), Aug. 13, 2002. Reconsideration of (2002, DC ID) 89 AFTR 2d 2002-1334, 2002-1 USTC ¶50319, denied. Years 1993, 1994, 1995, 1996, 1997. Decision against Taxpayer.

1. Collection due process—review of administrative determination—district court jurisdiction—abuse of discretion—summary judgment—reconsideration. Taxpayer's motion for reconsideration of decision dismissing his action was denied: taxpayer's bare allegations of clear error and assertion of previously rejected arguments didn't establish grounds for reconsideration. *Reference:* United States Tax Reporter ¶63,305.01(10); 63,305.01(5). IRC §6330.

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA,

ORDER

ROGER L. HUNT UNITED STATES DISTRICT JUDGE

(Motion to Reconsider #13)

[1] Before the Court is Plaintiff's Motion for Reconsideration (#13, filed March 19, 2002).

Although not mentioned in any of the Federal Rules of Civil Procedure, motions for reconsideration may be brought under both Rules 59(e) and 60(b). "Under Rule 59(e), a motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *389 Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999). Under Rule 60(b), a court may relieve a party from a final judgment, order or proceeding only for: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied; or (6) any other reason justifying relief from the judgment. A motion for reconsideration is properly denied when it presents no arguments that were not already raised in its original motion. *See Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

Plaintiff does not reveal under which Rule he brings the motion, but the motion has merit under neither.

Plaintiff appears simply to claim that the Court committed clear error and attempts to reargue the issues presented by the parties and addressed by the Court in the consideration of the Defendant's Motion to Dismiss (#4) which was granted by Order (#10) dated February 15, 2002.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Reconsideration (#13) is DENIED.

Dated: August 13, 2002.

ROGER L. HUNT

UNITED STATES DISTRICT JUDGE

¶2002-5501

Dean Gordon POTTER; Unico Industrial Service Company & Subsidiary, a California corporation, PETITIONERS v. UNITED STATES OF AMERICA, RESPONDENT. U.S. District Court, Southern Dist. of California, (DC CA) CASE NO.02-CV-0632-H (POR), July 26, 2002. Years 1998, 1999. Decision for Taxpayers in part and for Govt. in part.

1. Third-party summons enforcement—petition to quash—legitimate purpose—attorney-client privilege. Taxpayer's amended petition to quash 3d-party IRS summonses was denied in part: taxpayer didn't rebut IRS's prima facie showing that summonses issued on attorney/business associate regarding financial information of transactions between him and taxpayer were properly issued for legitimate purpose, were relevant to investigation's purpose, and that records weren't already in IRS's possession. And, 10 out of 12 requested documents clearly fell outside both attorney-client privilege and attorney work product privilege; but disclosure of 2 documents that potentially contained privileged communications interwoven with non-privileged information wasn't required. Also, taxpayer offered no proof that summonses were overbroad, sought improper information or lacked appropriate precision. *Reference:* United States Tax Reporter ¶76,025.02(20); 76,095.01(10); 76,025.07(15). IRC §7602; 7609.

John Gigounas Simpson and Gigounas 100 Pine Street Suite 750 San Francisco, CA 94111

Traci L. Patterson US Department of Justice Tax Division P.O. Box 683 Ben Franklin Station Washington, DC 20044-0683

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA,

Order Granting in Part, Denying in Part Amended Petition to Quash Third Party IRS Summonses (Docket #3); Granting in Part, Denying in Part Amended Motion for Summary Enforcement of IRS Summonses Without Prejudice (Docket #5)

MARILYN L. HUFF, Chief Judge UNITED STATES DISTRICT COURT

On April 2, 2002, Petitioners Dean Gordon Potter (''Potter'') and Unico Industrial Service Co. & Subsidiary (''Unico'') filed a Petition to Quash IRS Summonses issued to third-party Michael G. Chatzky. On April 26, 2002, Petitioners amended the petition. On June 10, 2002, Respondent filed a Motion for Summary Enforcement of Internal Revenue Summonses and Opposition to Amended Petition to Quash. On July 3, 2002, Respondent filed an amended memorandum in support of its Motion. Petitioners filed their response on July 12, 2002.

The Court held a hearing on the matter on July 26, 2002. Edward Simpson appeared on behalf of Petitioners, and Traci Patterson appeared on behalf of Respondent.

BACKGROUND

This dispute stems from the issuance of third-party summonses by the Internal Revenue Services (''IRS'') to Michael G. Chatzky, President of Release Me, Inc. and President of Chatzky and Associates, a Law Corporation. The summonses were issued in association with the IRS investigation of Dean Gordon Potter (''Potter'') and

Unico Industrial Service Co. & Subsidiary (''Unico'').

I. The IRS Investigation

The IRS is investigating the individual income tax liability of Potter for the tax years ending December 31, 1998 and December 31, 1999, and the Federal tax liabilities of Unico for the taxable years ending June 30, 1998 and June 30, 1999. (Amend. Decl. of Rev. Agent Allen, ¶s 2,3.) There is no criminal investigation being conducted against Potter or Unico, and neither has been referred to the Department of Justice for criminal prosecution. (Id., ¶ 12.)

During the course of the IRS investigation, Revenue Agent Barbara Marie Allen (''Revenue Agent Allen'') learned that on January 1, 1998, Potter entered into an agreement with Pixley Services, Limited (''Pixley''), a Irish corporation. Under the agreement, Pixley acquired the exclusive rights to the worldwide services of Mr. Potter in exchange for $250,000 annually, plus bonuses. (Id., ¶ 14.)

Revenue Agent Allen also learned that on that same day, Pixley entered into an agreement with Release Me, Inc., a United States corporation. (Id., ¶ 15.) Michael Chatzky is the president of Release Me, Inc. Under the terms of this agreement, Release Me, Inc. obtained all rights to Mr. Potter's services from January 1, 1998 through December 31, 2004. (Id., ¶ 16.) Release Me., Inc. was given full rights to utilize and market the services of Mr. Potter, provided that such services are rendered solely within the United States. (Id.) Release Me, Inc. was to retain 5% of the gross paid to it for Mr. Potter's services and remit the remaining 95% to Pixley. (Id.) Revenue Agent Allen also learned that on January 1, 1998, Unico entered into a contract with Release Me, Inc. under which Unico acquired all rights to Mr. Potter's services from January 1, 1998 through December 31, 2004. (Id.) Under this agreement, Unico was to pay Release Me, Inc. a flat rate of $850,000 per calendar year plus an annual performance bonus. (Id.) Unico also agreed to pay Release Me, Inc. an ''incentive fee'' of $350,000 on or before June 1, 1998. Michael Chatzky signed the agreement on behalf of Release Me, Inc. and Mr. Potter signed the agreement on behalf of Unico. (Id.) Mr. Potter, together with Potter Omnibus Trust, controls 80% of Unico's voting stock. Mr. Chatzky is also a California attorney, practicing law as president of Chatzky and Associates, a law corporation. (Decl. of Michael Chatzky, ¶s 1,2.)

As part of the examination of Potter and Unico and pursuant to 26 U.S.C. § 7602, on April 8, 2002, Revenue Agent Allen reissued an administrative third-party summons, IRS form 2039, to Michael G. Chatzky, President of Chatzky & Associates, at 4250 Executive Square, #660, La Jolla, California. (Decl. of Rev. Agent Allen, ¶ 4.) The summons directed the representative of Chatzky & Associates to appear before her on May 22, 2002, to give testimony and to produce for examination certain books, records, papers, and other data. (Id.) Revenue Agent Allen served an attested copy of the summons by mailing a copy via certified mail. (Id., ¶ 5.)

Also as part of the examinations of Potter and Unico, on April 8, 2002, Revenue Agent Allen reissued an administrative third-party summons, IRS Form 2039, to Release Me, Inc., Attn: Michael G. Chatzky, President, 4250 Executive Square, #660, La Jolla, California, di-recting its representative to appear before her on May 22, 2002 to give testimony and to produce for examination certain books, records, papers, and other data. (Id., ¶ 6.) An attested copy of the IRS sum-mons was served by personal delivery on Release Me, Inc., at 12335 Sycamore Ridge Creek, San Diego, CA 92131. (Id., ¶ 7.)

Revenue Agent Allen also reissued an administrative third-party summons, IRS Form 2039, to Michael G. Chatzky, 12335 Sycamore Ridge Creek, San Diego, CA, directing Michael G. Chatzky to appear before her on May 22, 2002, to give testimony and produce for examination certain books, records, papers, and other data. (Id., ¶ 8.) An attested copy of the summons was served by personal delivery to the

front door of Chatzky's home, his last and usual place of abode, 12335 Sycamore Ridge Creek, San Diego, California. (Id., ¶ 9.)

Excluding an inventory of documents received during the course of the investigations, at the time of issuing the summonses, the IRS did not have any of the summoned documents in its possession. (Id.) Subsequent to the issuance of the summons, however, Chatzky has provided various documents requested by these summonses, excluding a group of documents on which he claims attorney-client privilege and attorney work product privilege. (Id.) The documents already produced are in Revenue Agent Allen's possession. (Id.)

II. The Parties Associated with the Disputed Documents

Alan Eber and Peter Double represented Petitioners for estate planning purposes, which included helping Petitioners enter into contracts with other entities for the purpose of asset protection. (See Decl. of Alan Eber, ¶s 2, 4.) In their capacity as Petitioners' attorneys, Eber and Double retained Michael Chatzky to assist in providing legal advise on the Potter and UNICO matters. (See id., ¶ 4.) The documents Petitioners claim are covered by attorney-client privilege were prepared by, provided to, or addressed to one of these attorneys or their agents. Ron Haikin is a paralegal in Alan Eber's office. (Id., ¶ 3.) Heidi K Scholz was an attorney employed by Chatzky and Associates from 1992 to 2002 who worked under Chatzky as a tax lawyer. (Decl. of Michael Chatzky, ¶s 3, 4.) Haiken and Scholz appear to have been engaged in providing assistance to Eber, Double, and Chatzky in their representation of Potter and UNICO.

DISCUSSION

I. Standards

[1] The Internal Revenue Code authorizes the IRS to issue summonses to third parties to testify and produce records for purposes of ascertaining the correctness of a tax return or determining the tax liability of any person. See §§ 26 U.S.C.A. 7602 and 7609; United States v. Derr, 968 F.2d 943, 945 [70 AFTR 2d 92-5148] (9th Cir. 1992). District courts have jurisdiction to review petitions to quash a summons and to order its enforcement. See 26 U.S.C.A. §§ 7604(a) and 7609(h)(1) (West 2000).

To enforce a summons, the IRS must establish a prima facie case: (1) that there is a legitimate purpose for the investigation; (2) that the material sought in the summons, is relevant to that purpose; (3) that the material sought is not already within the possession of the IRS; and (4) that those administrative steps which are required by the Internal Revenue Code have been taken. United States v. Powell, 379 U.S. 48, 57–58 [14 AFTR 2d 5942] (1964). This burden is typically satisfied "by the introduction of the sworn declaration of the revenue agent who issued the summons that the Powell requirements have been met." Fortney, 59 F.3d at 120 [76 AFTR 2d 95-5398]. Once the government establishes its prima facie case, the party moving to quash the summons carries the burden of disproving the existence of a valid purpose or that enforcement of the summons would be an abuse of the court's process. Powell, 379 U.S. at 58.

IRS summonses are "subject to the traditional privileges and limitations, including the attorney-client privilege." Upjohn Co. v. United States, 449 U.S. 383, 398 [47 AFTR 2d 81-523], 101 S.Ct. 677, 686 [47 AFTR 2d 81-523] (1981). The burden of proving the protection of the attorney-client privilege lies with the party attempting to invoke the privilege to resist enforcement of the summonses. Powell, 379 U.S. at 58.

II. The United States Has Established a Prima Facie Case

A. Legitimate Purpose

The government must first show that the summonses were issued for a legitimate purpose. Here, Revenue Agent Allen is conducting an investigation in order to determine Potter's individual income tax liability for the tax years ending December 31, 1998 and December 31, 1999, and in order to determine UNICO's Federal tax liabilities for the taxable years ending June

30, 1998 and June 30, 1999. This investigation is legitimate pursuant to 26 U.S.C. § 7602, which authorizes the IRS to summons such information as may be relevant or material to the determination of income. This information includes anything that might shed light on the question of income. See United States v. Harrington, 388 F.2d 520 [21 AFTR 2d 456] (2nd Cir. 1968).

B. Relevant to Purpose of Investigation

The United States must also show that the information sought by the summonses is relevant to the purpose of the investigation. The information sought is deemed relevant if it "might throw light upon the correctness of the taxpayer's return . . . ." Tedder v. United States, 77 F.3d 1166, 1168–69 [77 AFTR 2d 96-1148] (9th Cir. 1996); see also United States v. Arthur Young & Co., 465 U.S. 805, 813–814 [53 AFTR 2d 84-866] (1984). This standard requires the IRS to show that it has a "realistic expectation rather than an idle hope that something might be discovered" from the summoned information. Id. Here, the government seeks the testimony of Michael Chatzky. Mr. Chatzky is the president of Release Me, Inc., a corporation that on January 1, 1998, entered into a contract with Pixley for the right to the services of Dean Gordon Potter from January 1, 1998 through December 31, 2004. On that same day, Release Me, Inc. also entered into an agreement with UNICO under which UNICO acquired all rights to Mr. Potter's services for that same time period. Therefore, an interview of Mr. Chatzky, as a party to two of the contracts signed on January 1, 1998, which involved the two taxpayers the IRS is currently investigating, is relevant to the purpose of these investigations.

Furthermore, the three summonses at issue request only documents that are relevant to the IRS's investigation of Dean Gordon Potter and UNICO. In each, the request clearly states that all items requested are in reference to UNICO and Dean Gordon Potter, and consequently the request is not overly broad.

C. The IRS Does Not Possess This Information

The United States must show that the information and documents sought by the summonses are not already the Service's possession. Revenue Agent Allen declares that at the time the summonses were issued, the IRS did not possess any of the summoned documents. (Amend. Decl. of IRS Agent Allen, ¶ 10.) Subsequent to the issuance of the summonses, Mr. Chatzky provided some of the documents requested, excluding a group of documents he withheld as privileged. Mr. Chatzky has not appeared yet to be interviewed, however. Currently at issue are the documents that Mr. Chatzky has withheld as privileged, and therefore, the IRS does not possess the documents or information.

D. Administrative Steps Were Followed

Finally, Powell requires the government to show that administrative steps regarding the issuance and service of the summonses have been followed. Powell, 379 U.S. at 57–58. Revenue Agent Allen declares that "all the administrative steps required by the Internal Revenue Code" have been followed. (Amend. Decl. of IRS Agent Allen, ¶ 13.) Consequently, the government has met its burden and has established a prima facie case for enforcement of the issued summonses.

II. Because the Government Has Made a Prima Facie Case, the Burden Shifts to the Taxpayer

Petitioners base their petition to quash the summonses on the attorney-client privilege and/or the work product privilege. Petitioners also state in their petition that the summonses are "overbroad." The government contends that the documents being withheld by Chatzky are not privileged because they relate only to business transactions between Release Me, Inc. and Potter and/or UNICO.

A. Attorney-Client Privilege

Petitioners assert that Revenue Agent Allen has now been provided with all of the requested documents with the exception of 12 documents that Petitioners allege

are precluded from disclosure under the attorney-client privilege. The government argues that Chatzky was acting as a corporate officer in his relationship to Potter and UNICO, and therefore the attorney-client privilege does not apply to any of the documents it has requested of him.

The party seeking to invoke the privilege carries the burden of proving to a reasonable certainty that the elements of an attorney-client privilege exist. See Clarke v. American Commerce National Bank, 974 F.2d 127, 129 (9th Cir. 1992); United States v. Abrahams, 905 F.2d 1276, 1283 [66 AFTR 2d 90-5125] (9th Cir. 1990).

Federal common law governs whether information sought by the IRS is protected by the attorney-client privilege. See United States v. Blackman, 72 F.3d 1418, 1423 [77 AFTR 2d 96-313] (9th Cir. 1995); See also Clarke, 974 F.2d at 129 (''Issues concerning application of the attorney-client privilege in the adjudication of federal law are governed by federal common law.'') (citing United States v. Zolin, 491 U.S. 554, 562 [63 AFTR 2d 89-1483] (1989); Fed. R. Evid. 501).

The attorney-client privilege protects only communications made in the course of seeking legal advice from a professional legal adviser in his or her capacity as such. Olender v. United States, 210 F.2d 795, 806 [45 AFTR 393] (9th Cir. 1954). The purpose of the privilege is to encourage clients to make full disclosure to their attorneys. Fisher v. United States, 425 U.S. 391, 403 [37 AFTR 2d 76-1244] (1976). However, because the attorney-client privilege has the effect of withholding relevant information from the factfinder, it is applied only when necessary to achieve its limited purpose of encouraging full and frank disclosure by the client to his or her attorney. Id.; see also Tornay v. United States, 840 F.2d 1424, 1426 [61 AFTR 2d 88-701] (9th Cir. 1988).

''A client is entitled to hire a lawyer, and have his secrets kept, for legal advice regarding the client's business affairs.'' United States v. Chen, 99 F.3d 1495, 1501 (9th Cir. 1996). ''Where the general purpose concerns legal rights and obligations, a particular incidental transaction would receive protection, though in itself it were merely commercial in nature.'' Id. (citation omitted). Legal advice is not involved ''when the facts show that the lawyer was 'employed without reference to his knowledge and discretion in law.''' Id. (citation omitted). The attorney-client privilege still applies, however, where business advice is incorporated into legal advice. Western Trails, Inc. v. Camp Coast to Coast, 139 F.R.D. 4, 8 (D.D.C. 1991).

Blanket assertions of the attorney-client privilege are extremely disfavored. Clarke, 974 F.2d at 129. The privilege is ordinarily raised as to each record sought to allow the court to rule with specificity. Id.; see also United States v. Hodgson, 492 F.2d 1175, 1177 [33 AFTR 2d 74-929] (10th Cir. 1974) (noting that an attorney must raise attorney-client privilege as to each record sought and each question asked); United States v. El Paso Co., 682 F.2d 530, 541–42 [50 AFTR 2d 82-5530] (5th Cir. 1982) (attempt to invoke privilege rejected, due in part to the failure to ''particularize its assertion of the privilege'' with respect to each specific document), cert. denied, 466 U.S. 944 (1984). Further, a district court may conduct an in camera inspection of alleged confidential communications to determine whether the attorney-client privilege applies. See Kerr v. United States Dist. Ct. for N. Dist. of Cal., 426 U.S. 394, 404–405 (1976); see also Clarke, 974 F.2d at 129.

The privilege extends to cover both the substance of the client's confidential communications and the attorney's advice in response thereto. In re Fischel, 557 F.2d at 211. All other communications from the attorney to the client are protected if the attorney's communications would reveal confidential client communications. In re Sealed Case, 737 F.2d 94, 99 (D.C.Cir. 1984). Furthermore, confidential communications passing through persons acting as the attorney or client's agent are also covered by the privilege. United States v. Kovel, 296 F.2d 918, 921 [9 AFTR 2d 366] (2nd Cir. 1961). The privilege also covers papers prepared by the attorney or

by a third party at the attorney's request for the purpose of advising the client, insofar as the papers are based on and would tend to reveal the client's confidential communications. Id. (citing United States v. Judson, 322 F.2d 460 [12 AFTR 2d 5497] (9th Cir. 1963)).

Upon review of the supporting papers and the twelve documents at issue, the Court concludes that Documents G and I may fall within Chatzky's representation of Potter or UNICO for purposes of rendering legal advice and assistance in overseas investment and estate planning. However, Documents A, B, C, D, E, F, H, J, K and L do not fall within the attorney-client privilege and should be turned over to the IRS in response to the summonses.

1) Documents G, I May Be Privileged

Documents G and I appear to contain draft legal documents relating to the creation of legal relationships between Potter and/or UNICO and other corporations. Standing alone, the text of the legal documents appear to be non-privileged information relating to the clients's business dealings. However, the documents are in draft form, prepared by the clients' attorneys, and they are the subject of other attorneys' handwritten legal comments and advice. Consequently, at this point, the Court will not order the release of Documents G and I because privileged communications may be so interwoven with non-privileged information that disclosure of the latter would necessarily disclose the former. See In re Fischel, 557 F.2d 209, 212 (9th Cir. 1977). The Court denies Respondent's motion to compel these documents; however, the Court's denial of Respondent's motion is without prejudice to a renewal of the motion by the government establishing facts that the privilege has been waived or that the documents should be revealed because of the substantial business interactions between Chatzky and Potter.

2) Documents A, B, C, D, E, F, H, J, K, and L Must be Produced

The fact that Petitioners engaged in business dealings with Chatzky and his company Release Me, Inc. complicates the issue of whether Chatzky was providing legal advice or engaging in business dealings when communicating with Petitioners' lawyers. It is clear that Chatzky had a substantial business interest in the creation of Potter and UNICO's international tax planning. Yet, rather than electing to retain outside counsel the parties created a situation whereby Chatzky, served as both attorney and corporate officer for a business that benefited from its relationship with Potter and UNICO, making it difficult to believe their assertion that all documents passing through Chatzky retain the attorney-client privilege. After examining the documents, the Court concludes that Petitioners have not met their burden to show that Documents A, B, C, D, E, F, H, J, K, and L are protected under the attorney-client privilege, and therefore these documents must be produced pursuant to the IRS summonses.[1]

Document A is a letter dated March 21, 1998, from Peter Double to Heidi Scholz. Document B is a letter dated March 23, 1998, from Peter Double to Alan Eber. Both letters involve the implementation of the estate plan, with the primary purpose of sharing business advice. Neither letter appears to include confidential communications from the client to his attorneys; rather, the letters seem to involve business negotiations over funding and contracts. Therefore, the Court concludes that the privilege does not cover these documents.

Document C is a letter dated June 8, 1998, from Alan Eber to Heidi Scholz stating that he is enclosing three documents describing Potter's offshore life insurance program. This letter does not reveal any communications between Potter and his attorneys, and is not covered by the attorney-client privilege. Document D is an undated, unaddressed general memorandum with the subject listed as "International

[1] Documents C, F and J, although discoverable, contain information regarding another Eber client. The information concerning this other individual must be redacted as it does not fall under the scope of the IRS summonses because it is not related to Potter and/or UNICO.

Tax Planning.'' Nothing about the document suggests that it involves the confidential communications between Potter/UNICO and his attorneys; rather, the document appears to be a common handout provided to clients or associates who may be interested in creating international life insurance policies and, as such, is not privileged.

Document E is a fax dated April 24, 1998, from Chatzky to Peter Double regarding Potter's estate planning. The fax contains Chatzky's suggestions for changes to draft legal documents and shares his thoughts regarding the formation of other legal relationships. The Court sees nothing in the document, however, that might tend to reveal confidential client communications. Document F is a fax dated July 22, 1998, from Rod Haikin to Chatzky, Heidi Scholz, and Marion Holmes. The fax concerns only financial transactions between Potter and Release Me, Inc. and Pixley and addresses Chatzky in his role as an officer of Release Me, Inc. rather his role as a legal advisor. Document H is a fax dated June 4, 1998, from Haikin to Heidi Scholz. The fax appears to be related to business operational matters and transactions and does not have the purpose of providing legal advice.

Document J is a fax dated December 22, 1998 from Marion Holmes to ''Malin.'' Marion Holmes apparently works for Chatzky, however Petitioners have failed to provide information as to her status as an agent of any of the parties. Further, Petitioners do not provide any information regarding the addressee of the fax, ''Malin,'' other than noting that the fax was sent to a ''third party.'' (See Decl. of Alan Eber, ¶ 7.) Attorney-client communications in the presence of a third party not the agent of either are generally not protected by the privilege. Weatherford v. Bursey, 429 U.S. 545, n. 4 (1977) (citing 8 J. Wigmore, Evidence § 2311, pp. 601–602 (McNaughton rev. ed. 1961)). Even if the information contained in this fax revealed attorney-client communications, a fact that has not been determined, Petitioners have failed to show that this third party is or was an agent of the attorneys. Consequently, the privilege does not apply to Document J.

Document K is a fax dated April 28, 1998, from Peter Double to Heidi Scholz. In the fax, Double appears to be offering an updated contract page and requesting a change in Potter's fees under the contracts. Consequently, the Court concludes that the fax is more related to business dealings than to legal advice and is not covered by the privilege.

Document L is a fax dated May 6, 1998, from Peter Double to ''Heidi/Grace/Marion.'' As with Document J, Petitioners have not provided any information as to the status of ''Grace'' or ''Marion'' as agents of the client or the attorneys. Sharing attorney-client communications with a third party waives the attorney-client privilege. See Weatherford v. Bursey, 429 U.S. at n. 4. By failing to show that these additional individuals are agents, Petitioners have failed to meet their burden to show that the privilege applies to Document L.

Petitioners have not shown that Documents A, B, C, D, E, F, H, J, K and L are protected under attorney-client privilege. Consequently, these documents shall be produced pursuant to the summonses.

B. Attorney Work Product Privilege

Petitioners also state in their petition that the documents are protected by the attorney work-product privilege. However, Petitioners provide the Court with nothing more than a general allegation that the work-product privilege applies. Further, in subsequent supporting papers, Petitioners appear to abandon this argument.

The work product privilege covers material prepared for use at trial and is ''broader than the attorney-client privilege.'' U.S. v. Nobles, 422 U.S. 225, 238 n. 11 (1975). The work product rule protects all documents and tangible things prepared in anticipation of litigation or for trial. F.T.C. v. Grolier, Inc., 462 U.S. 19, 25 (1983). As with the attorney-client privilege, the person asserting the work product privilege cannot make a blanket assertion of the privilege, but must state document-by-document what information

the privilege applies. See United States v. Bornstein, 977 F.2d 112, 115 [70 AFTR 2d 92-5815] (4th Cir. 1992).

The Court concludes that the privilege log submitted by Petitioners is too general to allow the Court to form any meaningful conclusion as to whether any of the documents potentially claimed as work product are actually work product. Because Petitioners have not met their burden of showing that the work-product privilege applies to any of the documents, all of the documents not covered by the attorney-client privilege shall be produced.

C. Overbreadth

Petitioners argue that the summonses directed to Chatzky are "vastly overbroad." However, Petitioners provide no example of how the summonses seek improper information or lack appropriate precision, and after independent review, the Court sees nothing to suggest that the summonses are overbroad.

26 U.S.C. § 7602(a)(1) provides that the IRS can only examine books and records "which may be relevant or material" to the purpose for which the IRS is con-ducting the investigation. Information is relevant if it "might throw light upon the correctness of the taxpayer's return . . . ." Tedder, 77 F.3d at 1168–69. In the present case, the summons issued to Chatzky seeks all records or information pertaining to financial transactions of Potter and/or UNICO for approximately a three-year period. This information could throw light on the correctness of Potter's or UNICO's returns and identifies the requested documents with sufficient precision; thus, it is not overbroad.

CONCLUSION

For the reasons set forth above, the Court grants in part and denies in part Petitioners' Amended Petition to Quash Third Party IRS Summonses (Docket # 3). Additionally, the Court grants in part and denies in part Respondent's Amended Motion for Summary Enforcement of the IRS Summonses (Docket # 5).

IT IS SO ORDERED.

Dated: 7/26/02

MARILYN L. HUFF, Chief Judge

UNITED STATES DISTRICT COURT

¶2002-5502

RONALD MORGAN [sic MORAN] CADILLAC, INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. Dis-trict Court, Central Dist. of California, (DC CA) Case No. SA CV 01-752-GLT (MLGx), Aug. 26, 2002. Years 1991, 1992, 1994, 1995. Decision for Govt.

1. Refunds—net operating losses—mootness—alternative claims. Wholly-owned accrual method corp.'s '94 NOL carryback and refund claim wasn't mooted by govt.'s concession of alternative '95 NOL carryback: although '95 NOL was carried back to same year as '94 NOL would have been, taxpayer still had legally cognizable interest in resolving '94 claim since '94 NOL carryback could give rise to larger refund than '95 NOL did. *Reference:* United States Tax Reporter ¶74,225.05(15). IRC §7422.

2. Interest deductions—related party transactions—net operating losses—refunds. Wholly-owned accrual method corp.'s '94 NOL carryback and refund claim was denied to extent claim was based on deduction for interest that accrued on loan to taxpayer's owner that was later sold to unrelated third party: IRC §267's related-party restrictions clearly applied to all years note was outstanding to owner; and such restrictions, by statute's plain language and legislative history, weren't eliminated or retroactively abrogated by virtue of note's subsequent third-party/unrelated party sale. *Reference:* United States Tax Reporter ¶2675.16(35); 1635.035(5). IRC §163; 267.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION,

ORDER ON CROSS-MOTIONS FOR SUMMARY ADJUDICATION

GARY L. TAYLOR UNITED STATES DISTRICT JUDGE

CALENDAR ITEM # 14

Plaintiff's Motion for Summary Adjudication is DENIED. Defendant's Cross-Motion for Summary Adjudication is GRANTED.

I. BACKGROUND

This is an action for refund of income taxes pursuant to 26 U.S.C. § 7422. The parties do not dispute the facts giving rise to the action and have submitted a joint statement of uncontroverted facts. Plaintiff Ronald Morgan Cadillac, Inc. is the holder of a Cadillac franchise. Plaintiff is an accrual basis taxpayer.[1] Caesar Wackeen owns 100% of Plaintiff's stock. Mr. Wackeen is a cash basis taxpayer. Before 1994, Wackeen loaned and advanced Plaintiff a total of $2,339,929.00. The loans and accrued interest were recorded on a note on January 1, 1994. Plaintiff recorded all previously accrued interest due, but had not paid such interest to Wackeen. On September 20, 1994, Wackeen sold the notes to Torrance Management Company (''TMC''), who is unrelated to Plaintiff. Wackeen sold the principle along with all accrued, but unpaid, interest owed.

Plaintiff filed its 1994 tax return and reported a deduction totaling $1,049.657.00, claiming this deduction represented all the accrued, but unpaid, interest on the note Wackeen sold to TMC. The Plaintiff had been accruing the interest on the note but had never deducted such interest in its tax returns before 1994. The interest deduction included the accrued interest for 1994 as well as all interest accrued before 1994. Plaintiff alleges the $1,049,657.00 deduction created a net operating loss (''NOL'') of $810,267.00 in 1994. Plaintiff sought to have this NOL carry back to 1991 and 1992.

The IRS determined only the portion of accrued interest attributable to 1994, $261,663.00, was allowable as a deduction since it was not subject to the restrictions of 26 U.S.C. § 267(a)(2). The IRS allowed Plaintiff a deduction of $261,663.00 and disallowed $787,994.00, the interest accrued in the years before 1994. Because of the IRS's disallowance of $787,994.00 of the interest accruals, Plaintiff did not have a NOL carryback to offset its 1992 tax liabilities.

In its first claim for relief (''the 1994 Carryback Claim''), Plaintiff contends the entire amount of accrued interest up to 1994, $1,049,657.00, should be allowed as a deduction, and the NOL of $810,267.00 in 1994 should carry back to its 1992 tax liabilities. Alternatively, in Count Two of its Complaint (''the 1995 Carryback Claim''), Plaintiff contends it is entitled to a refund of the 1992 taxes and interest based upon a carryback of a NOL of $681,834.00 from 1995. The government agrees with the NOL carryback from 1995 and claims the IRS has credited the 1995 NOL to offset Plaintiff's 1992 liabilities and has abated all remaining interest accruals and penalties for 1992.

Both parties move for summary adjudication of Plaintiff's 1994 Carryback Claim.[2]

II. DISCUSSION

A. Summary Judgment/Adjudication Standard

Summary judgment is proper if ''there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.'' Fed. R. Civ. Proc. 56(c). A fact is material if it ''might affect the outcome of the suit under the governing law.'' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2509, 91 L.Ed.2d 202 (1986). A factual dispute is genuine ''if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'' Id.

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[1] An accrual basis taxpayer deducts an expense when the liability is accrued. See 26 U.S.C. § 461.

[2] While both parties entitle their motions ''motion for summary judgment,'' the parties do not seek the Court's determination of the 1995 Carryback Claim. As such, the Court only adjudicates the merits of Plaintiff's first claim for relief, the 1994 Carryback Claim. The Court accordingly treats both motions as motions for summary adjudication.

The moving party in a summary judgment motion bears the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). If the moving party makes this initial showing, the burden shifts to the nonmoving party to "designate specific facts showing that there is a genuine issue for trial." Id., 477 U.S. at 324, 106 S.Ct. at 2553 (citation omitted). In other words, the non-moving party must produce evidence that could cause reasonable jurors to disagree as to whether the facts claimed by the moving party are true.

In making a summary judgment determination, the Court must view the evidence presented in the light most favorable to the non-moving party, drawing "all justifiable inferences ... in his favor." Anderson, 477 U.S. at 255, 106 S.Ct. at 2513. If the non-mowing party fails to present a genuine issue of material fact, the Court must grant summary judgment. Celotex, 477 U.S. at 323–24, 106 S.Ct. at 2553.

B. Mootness

[1] The Government argues Plaintiff's first claim for relief is moot as a result of the Government's concession to the 1995 Carryback Claim. Defendant contends: "Since the government agrees with plaintiff's entitlement to a refund of the [1992 tax liabilities], plus interest, ... based on the grounds set forth in Count Two of the complaint ... there is no controversy that is justiciable as to a 1992 refund action." See Defendant's Cross-Motion at 5:14–19.

"A case is 'moot' when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." City of Erie v. Pap's A.M., 529 U.S. 277, 287 (2000). Plaintiff still has a legally cognizable interest in the outcome of the 1994 Carryback Claim because a successful determination on that claim would afford Plaintiff a greater refund in comparison to the 1995 Carryback Claim. Success on the 1994 Carryback Claim also avoids "failure to pay penalties" assessed under 26 U.S.C. § 6651(a)(3), while these penalties would still exist if the 1992 tax liabilities were refunded from a carryback of the 1995 NOL. The government offers no evidence to contradict these differing recoveries.

While Plaintiff's Complaint states the 1995 Carryback Claim is an "alternative" claim, this language does not foreclose Plaintiff from recovery under the 1994 Carryback Claim. Plaintiff is entitled to litigate the 1994 Carryback Claim and use the 1995 Carryback Claim as an alternative basis of recovery should the 1994 Car-ryback Claim fail.

C. The 1994 Carryback Claim

[2] While interest payments on loans are generally allowed as a deduction under 26 U.S.C. § 163(a), certain limitations exists. One such limitation can be found in 26 U.S.C. § 267(a)(2), providing, in pertinent part:

> (2) Matching of deduction and payee income item in the case of expenses and interest. If -
>
> (A) by reason of the method of accounting of the person to whom payment is to be made, the amount thereof is not (unless paid) includible in the gross income of such person, and
>
> (B) at the close of the taxable year of the taxpayer for which (but for this paragraph) the amount would be deductible under this chapter, both the taxpayer and the person to whom the payment is to be made are persons specified in any of the paragraphs of subsection (b), then any deduction allowable under this chapter with respect of such amount shall be allowable as of the day as of which such amount is includible in the gross income of the person to whom the payment is made (or, if later, as of the day on which it would be so allowable but for this paragraph).

26 U.S.C. § 267(a)(2) limits the deductibility of a business expense or interest payable to a related person, e.g. a family member or shareholder, if the amount is not currently included as gross income under the creditor's method of accounting. The congressional purpose underlying the enactment of the predecessor of § 267(a)(2)

was to prevent the use of differing methods of reporting income in order to obtain artificial deductions for business expenses. See Metzger v. Commissioner, 76 T.C. 42, 75 (1981); see also H.R. Rep. No. 1546., 75 Cong. 1st Sess (1937). Congress envisioned a situation where an individual or entity on the accrual basis could become indebted to a creditor with whom he enjoyed a special relationship, such as a family member or shareholder, and this creditor could report income on a cash basis. As interest became due on the debt, the debtor on the accrual method, without applicable restrictions, could report the interest as a deduction even though no actual payment was made. Since the creditor was on a cash method, he reported no income. The debtor would consequently gain the benefit of a current deduction, whereas the related creditor would defer income recognition until the year of receiving the actual payment. The interest payments could escape taxation altogether because the payment could be timed for a year in which the creditor had enough offsetting losses to avoid taxation. Metzger, 76 T.C. at 75; H.R. Rep. No. 1546, supra.

As a result of Wackeen being the sole shareholder in Plaintiff, the parties agree the creditor and debtor were "related parties" under § 267(b) and Plaintiff fell under the restrictions of § 267(a)(2) for all the years the note was outstanding before 1994. Plaintiff argues that, once Wackeen sold the note to TMC in 1994, thus eliminating the special relationship between creditor and debtor, the restrictions of § 267 no longer applied and all the accrued interest, including pre-1994 interest, is deductible. The Government contends that, once § 267 is applicable to a particular tax year, it continues to be applicable to that tax year and is not retroactively eliminated because the creditor/debtor relationship no longer triggers § 267. The Government therefore contends Plaintiff is not entitled to deduct the pre-1994 accrued interest until payment is made.

The Court finds the plain reading of the statute, the Temporary Treasury Regulation, and the congressional intent behind § 267(a)(2) all support the Government's interpretation. The direct terms of the statute make clear a determination of the applicability of § 267 is made "at the close of the taxable year of the taxpayer . . . ." See 26 U.S.C. § 267(a)(2). The statute further mandates that, once it is determined § 267 applies to the taxable year, the taxpayer is barred from deducting such expenses until "the day as of which such amount is includible in the gross income of the person to whom the payment is made." Id. This language indicates that, once § 267 applies to a particular taxable year, it continues to apply to that taxable year until such time as the expense is paid. The statute contains no language authorizing the type of retroactive relief sought by Plaintiff. Presumably, if Congress had intended the deductions previously disallowed by § 267 to become retroactively allowed by the termination of the related party status, it would have said so. Rather, the statute conditions the allowance of previously disallowed deductions on payment of the interest expenses.[3]

Temporary Treasury Regulation § 1.267-a2T(b) Question 5 further supports this reading.[4] Question 5 states:

> Q-5. If a deduction in respect to an otherwise deductible amount is deferred by Section 267(a)(2) and, prior to the time the amount is includible in the gross income of the person to whom payment is to be made, such person and the tax-

[3] Plaintiff argues this interpretation is inconsistent with the IRS's determination of Plaintiff's 1994 deductions. Wackeen sold the note to TMC on September 20, 1994, discontinuing the related party status between creditor and debtor. Plaintiff argues that, even though the parties were related from January 1, 1994, to September 20, 1994, the IRS found § 267(a)(2) did not apply to the entire 1994 taxable year and allowed a deduction of the interest accrued in all of 1994. This argument does not change the Court's determination. The IRS seems to have followed the plain language of § 267(a)(2) and determined the applicability of the statute "at the close of the taxable year of the taxpayer," i.e., on December 31, 1994. At the close of the 1994 taxable year, no related party status triggered § 267(a)(2) for that year and so the IRS allowed an interest deduction of $261,663.00, the amount of interest accrued during 1994. The IRS did not allow an interest deduction for accrued interest in pre-1994 years, presumably because at the end of these years it was determined § 267 (a) (2) did apply. There is no inconsistency between the IRS's determination and the Court's reading of the statute.

[4] Although this treasury regulation is temporary, treasury regulations are valid if they "implement the congressional mandate in some reasonable manner." Rowan Companies, Inc. v. United States, 452 U.S. 247, 252 [48 AFTR 2d 81-5115] (1981). A treasury regulation implements the congressional mandate where the regulation "harmonizes with the plain language of the statute, its origin, and its purpose." Id. The Court finds Temporary Treasury Regulation § 1.267-(a)2T(b) is properly considered in determining the reach of § 267.

payer cease to be persons specified in any of the paragraphs of Section 267 (b) . . . is the deduction allowable as of the day on which the relationship ceases?

A-5. No. The deduction is not allowable until the day as of which the amount is includible in the gross income of the person to whom payment of the amount is made, even though the relationship ceases to exist at an earlier time.

The Treasury Regulation makes clear a ''deferred'' deduction subject to § 267(a)(2) in that taxable year does not become allowable merely because the parties cease to be related under § 267(b). Rather, the debtor must wait until payment of the interest is made in order to claim the deduction.

The congressional intent giving rise to § 267(a)(2) further supports the Government's interpretation. The parties agree the congressional intent, and policy, behind enacting § 267 was to prevent tax avoidance schemes between related parties. As the 1937 House Report indicates, Congress was concerned with related parties taking advantage of differing methods of accounting in order to ''obtain artificial deductions for interest and business expenses.'' See H.R. Rep. No. 1546., 75 Cong. 1st Sess. (1937). Congress recognized this scheme would not work with an ordinary bona fide creditor because such a creditor would not permit his debtor to engage in such a practice. Id. Plaintiff is asking the Court to retroactively change the relationship of creditor and debtor in the pre-1994 accrual years in order to accomplish the very harm Congress sought to avoid -- an ''artificial deduction for interest.'' There is no statutory authorization to do this.[5] Until Plaintiff makes payment, and TMC includes the payment as gross income, the pre-1994 accrued interest deduction is not allowable. See 26 U.S.C. § 267(a)(2). As Congress recognized, if TMC was the ordinary bona fide creditor on Plaintiff's note pre-1994, it is doubtful such a practice would have been permitted.

III. DISPOSITION

While Plaintiff's 1994 Carryback Claim is not moot, Plaintiff's interpretation of § 267(a)(2) is unsupported by a plain reading of the statute, the treasury regulation, and congressional intent. Plaintiff is therefore not entitled to a 1994 NOL carryback under § 267(a)(2). Plaintiff's Motion for Summary Adjudication is DENIED. Defendant's Cross-Motion for Summary Adjudication is GRANTED.

DATED: August 26, 2002.

GARY L. TAYLOR

UNITED STATES DISTRICT JUDGE

¶2002-5503

Mark E. SAMLASKA, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) Case No. CV-S-01-1237-KJD-(PAL), July 31, 2002. Year 1998. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties—summary judgment. IRS's administrative determination to proceed with collection of IRC §6702 penalty against tax protester who filed ''zero'' return was upheld on summary judgment: IRS complied with all procedural requirements under IRC §6330. Also, taxpayer's delegation of authority argument was meritless; Appeals Officer's reliance on Forms 4340 satisfied IRC §6330's verification requirement; IRC §6702(a) provided authority for imposition of penalty; and district court didn't have jurisdiction to consider taxpayer's tax liability. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(2). IRC §6330; 6702.

2. Refund actions—jurisdiction—failure to exhaust administrative remedies. Taxpayer's refund action was dismissed for lack of jurisdiction: taxpayer didn't fully pay taxes owed; and his frivolous ''zero'' return wasn't valid administrative refund

[5] Plaintiff seems to argue the congressional amendment to 26 U.S.C. § 267(a) in 1984 shows Congress believed the former rule, disallowing a deduction when paid more than 2 ½ months after the close of the year, led to an unduly harsh result. Even if true, this amendment would not alter the Court's determination of § 267's application to the facts in this case.

claim. *Reference:* United States Tax Reporter ¶74,336.501(10); 74,225.01(20). IRC §7422.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA,

ORDER

Kent J. Dawson United States District Judge

This matter comes before the Court on Defendant's Motion To Dismiss Or In The Alternative, For Summary Judgment (#6). Plaintiff filed a response in opposition (#9).

I. Factual and Procedural History

Plaintiff commenced this action pursuant to 26 U.S.C. § 6330(d) challenging an IRS determination that collection actions against him should not be restricted. Additionally, Plaintiff seeks a refund of $3,125.00 plus 10% interest for income taxes which he ''erroneously'' paid in 1998. Defendant has now filed a motion to dismiss, or in the alternative, for summary judgment.

A. Collection Activity

The collection activity at issue stems from a frivolous return penalty the IRS assessed against Plaintiff for a return he filed in April 1999. The return had zeroes on all lines which reflected amounts of income earned or taxes due. Attached to the return was a 1998 Form W-2 showing that Plaintiff received wages of at least $1,690.25 and a 1998 Form 1099 showing that Plaintiff received at least $44,069.64 in ''non-employee compensation.'' Plaintiff also requested a refund of all taxes either withheld or paid during the 1998 tax year. Finally, attached to the 1998 return was a two page document which set forth arguments as to why Plaintiff did not believe that he owed federal income tax.

On July 17, 2000, the IRS assessed a $500 civil penalty against Plaintiff under 26 U.S.C. § 6702 for filing the above described tax return. Section 6702 states that a civil penalty of $500 will be assessed if an individual ''files what purports to be a return'' but which contains ''information that on its face indicates that the self-assessment is substantially incorrect'' and is due to ''a position which is frivolous.'' Plaintiff's self assessment of his 1998 income tax liability was substantially incorrect in that he entered zeros for all income and tax information. Plaintiff's self assessment was based on the argument that there is no statutory income tax liability applicable to him and that his wages do not constitute income. Courts, however, have found this argument to be frivolous and patently without merit. See Sisemore v. United States, 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir 1986); Olson v.United States, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985). Because Plaintiff's self assessment was on its face substantially incorrect and was based on a frivolous position, there is no doubt as to the validity of the penalty.

On October 12, 2000, IRS sent Plaintiff a ''Final Notice-Notice of Intent to Levy and Notice of Your Rights to a Hearing.'' This letter provided Plaintiff with notice of his right to file an appeal by requesting a Collection Due Process Hearing (''CDP Hearing'') within 30 days. Plaintiff timely filed Form 12153 ''Request for a Collection Due Process Hearing.'' Plaintiff's CDP Hearing was held on August 28, 2001 in Las Vegas, Nevada. On September 27, 2001, the IRS Appeals Office sent, by certified mail, a ''Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330.'' The letter informed Plaintiff that the proposed collection action would not be restricted. The letter also informed Plaintiff of his right to dispute the determination by filing a complaint in Federal District Court within 30 days. Plaintiff filed a timely complaint with this Court.

B. Refund Claim

After examining Plaintiff's 1998 tax return, the IRS determined there was a tax deficiency. In a letter dated December 16, 1999, the IRS informed Plaintiff that he owed $14,405.00 in self employment and other taxes as well as a $2,881.00 Civil Penalty and $1,061.62 in interest charges

for a total amount due of $18,347.62. On February 29, 2000, Plaintiff filed a Form 843 "Claim for Refund and Request for Abatement," requesting a refund of the $3,125.00 withheld from his 1998 taxable income. In a statement of his account dated July 24, 2000, which included a credit for the $3,125.00 Plaintiff requested as a refund, the IRS calculated the total amount due with interest to be $15,731.03. There is no information in Plaintiff's complaint which indicates he has made partial or full payment of this amount.

II. Standard of Review

A dismissal for failure to state a claim pursuant to Rule 12(b)(6) is a ruling on a question of law. See Clegg v. Cult Awareness Network, 18 F.3d 752, 754 (9th Cir. 1994). In reviewing a Rule 12(b)(6) motion, the Court "must construe the complaint in the light most favorable to the plaintiff and must accept all well-pleaded factual allegations as true." Swarz v. United States, 234 F.3d 428, 435 (9th Cir. 2000). Moreover, because Plaintiff in this action is proceeding pro se, the Court must liberally construe all arguments set forth in his complaint. See Boag v. MacDougall, 454 U.S. 364, 365 (1982). Review is limited to the contents of the complaint. See Sprewell v. Golden State Warriors, 231 F.3d 520, 527 (9th Cir. 2000). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45–46 (1957); Sprewell, 231 F.3d at 528. If matters outside the pleadings are considered, the court should treat the motion as one for summary judgment. See Fed. R. Civ. P. 12(c).

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Fed. R. Civ. P. 56(e). The evidence, as well as all justifiable inferences drawn from it, must be viewed in the light most favorable to the nonmoving party. See Matsushita, 475 U.S. at 587. Summary judgment shall be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

III. Analysis

Plaintiff's complaint contains a barrage of meritless arguments which he insists this Court must address. There are only two genuine issues before this Court. First, whether the IRS Appeals Office met all requirements of any applicable law or administrative procedure when making its determination that the collection action against Plaintiff should continue unrestricted. Second, whether this Court has jurisdiction to grant Plaintiff a tax refund. These issues will be addressed first, followed by a discussion of Plaintiff's purely meritless arguments.

A. Collection Procedure

[1] Procedures for administrative collection actions are found in 26 U.S.C. § 6330 which requires that: (1) the IRS give 30 days' written notice of the taxpayer's right to a CDP Hearing before making a levy; (2) a hearing be conducted by an officer or employee who has no prior involvement with the subject tax liability; (3) the Appeals Office obtains verification from the IRS that the requirements of any applicable law or administrative procedure have been met; (4) the taxpayer may raise any relevant issue relating to the unpaid tax or the proposed levy at the time of the CDP Hearing, including appropriate spousal defenses, challenges to the collection actions and offer of collection alterna-

tives; (5) the taxpayer may challenge the existence of the underlying tax liability under some circumstances; and (6) the final determination by the Appeals Officer shall take into consideration (a) the verification that any applicable law or administrative procedure has been met, (b) the is sues raised by the taxpayer, and (c) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

A review of Plaintiff's complaint illustrates that all of the above requirements have been met: (1) Plaintiff received timely notice of levy and requested a CDP hearing; (2) Plaintiff attended his CDP Hearing on August 28, 2001 with IRS Appeals Officers Julie Peterson and Tony Aguiar, who had no prior involvement with the subject tax liability; (3) the Appeals Office obtained Form 4340 from the IRS which serves as verification that the requirements of any applicable law or administrative procedure were met; (4) the only relevant issue raised by Plaintiff at the CDP hearing was a claim that he did not receive a proper statutory notice and demand for payment. The Appeals Team Manager reviewed the transcript and found it indicated that the Notice and Demand was sent to the Plaintiff's last known address. Plaintiff presented no evidence other than his testimony to dispute the fact that the Notice and Demand had been sent to his last known address; (5) Plaintiff did not challenge the validity of the underlying tax liability (the penalty); (6) the final determination of the Appeals Officer stated that he took into consideration all required statutory elements. Finally, attachment 3194 to the Notice of Determination noted that Plaintiff did not raise any non-frivolous arguments at the hearing.

B. Plaintiff's Refund

[2] A taxpayer may file a suit in a district court to recover any internal revenue tax alleged to have been excessive or in any manner wrongfully collected under internal revenue laws. See 28 U.S.C. § 1346(a)(1). Before a plaintiff may file in federal district court, he must satisfy the jurisdictional prerequisites of making a full payment of the tax deficiency and exhausting his administrative remedies by filing a refund claim with the IRS. See Flora v. United States, 362 U.S. 145, 146 [5 AFTR 2d 1046] (1960) (holding that a federal District Court has no jurisdiction under 28 U.S.C. § 1346(a)(1) over a suit by a taxpayer for the refund of income tax payments which did not discharge the entire amount of his assessment); Thomas v. United States, 755 F.2d 728, 729 [55 AFTR 2d 85-1094] (9th Cir. 1985) (stating that ordinarily, there is no jurisdiction in the district courts over suits for the refund of amounts paid until the taxpayer had paid the full amount of the contested assessment, and has filed a claim for refund which the IRS has either rejected or not acted upon in six months).[1] When subject matter jurisdiction is challenged under Rule 12(b)(1), as the Defendant does in the instant case, the plaintiff has the burden of proving jurisdiction in order to survive the motion. See Tosco Corp. v. Communities for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001).

Here, Plaintiff has failed to meet his burden. Plaintiff's only "claim" for his refund was the frivolous return he filed in April 1999 for the 1998 tax year. IRS records attached to Plaintiff's complaint indicate that Plaintiff has not made a full payment of the amount he owes for the year in question. Plaintiff does not claim that he has made full payment, only that he does not owe any taxes so the amount withheld should be refunded to him. Moreover, Plaintiff does not claim to have filed an administrative claim with the IRS seeking a refund. Absent full payment and exhaustion of his administrative remedies, Plaintiff's remedy lies in tax court. Accordingly, Plaintiff's refund claim must be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

[1] A taxpayer may, however, challenge a tax liability before paying the deficiency by filing a timely petition with the tax court. See Scar v. Comm'r, 814 F.2d 1363, 1366 [59 AFTR 2d 87-950] (9th Cir. 1987)

C. Plaintiff's Arguments

1. Inadequacy of Notice

Plaintiff repeatedly argues that letters and notices the IRS sent him are invalid because there is no evidence of any delegated authority from the Secretary of Treasury to the various IRS employees. Relevant statutes and regulations demonstrate, however, that the Secretary does have the power to collect taxes, and that such power can be delegated to local IRS agents. 26 U.S.C. § 6301 provides that "[t]he Secretary shall collect the taxes imposed by the internal revenue laws." The actual task of collecting the taxes, however, has been delegated to local IRS directors. See 26 C.F.R. § 301.6301-1 ("The taxes imposed by the internal revenue laws shall be collected by district directors of internal revenue."). The delegation of authority down the chain of command, from the Secretary, to the Commissioner of Internal Revenue, to local IRS employees, constitutes a valid delegation by the Secretary to the Commissioner, and a re-delegation by the Commissioner to the delegated officers and employees. See 26 U.S.C. § 7701(a)(11)(A), (12)(A)(i); 26 C.F.R. § 301.7701-9; Hughes v. United States, 953 F.2d 531, 536 [69 AFTR 2d 92-472] (9th Cir. 1991).

2. Adequacy of Supporting Documentation

Plaintiff contends the IRS has never produced a document supporting imposition of the penalties at issue. He does not believe that a computer transcript is adequate to verify an assessment. At his CDP Hearing, the appeals officer provided Plaintiff with the Form 4340, "Certificate of Assessments and Payments" for the penalty assessment. The Ninth Circuit has held that a Form 4340 is sufficient evidence to support a grant of summary judgment on a claim that the IRS failed to issue notice of assessment and demand for payment. See Huff v. United States, 10 F.3d 1440, 1446–1447 [72 AFTR 2d 93-6682] (9th Cir. 1993); Hughes, 953 F.2d at 535. Moreover, official certificates, such as Form 4340, can constitute proof of the fact that the assessments actually were made. See Hughes, 953 F.2d at 535.

3. Regulation Requiring Plaintiff to Pay Penalty

Plaintiff contends that no Treasury Department regulation requires him to pay the penalties at issue and that the Defendant has not produced any such regulation. 26 U.S.C. § 6702(a) provides the statutory authority for assessing the penalty and does not by its terms require any implementing regulations. See Hoffman v. United States, No. C02-5023RJB, 2002 WL 1299991, at 5 [89 AFTR 2002-2647] (W.D. Wash. May 3, 2002).

4. Underlying Liability-for Income Tax

Plaintiff contends that no statute establishes an underlying liability for the income tax to which the penalties relate, and the IRS has not identified any such statute. Plaintiff's liability for tax deficiencies (what he owed in taxes for 1998) is not at issue in this case, although he consistently tried to make it so at the CDP Hearing and in the instant complaint. As explained previously, Plaintiff's remedy with regard to the liability for tax deficiencies does not lie in this Court. This Court does not have jurisdiction to consider income tax deficiencies. See 26 U.S.C. § 6213(a); Moore v. Comm, 114 T.C. 171, 175 (2000).

III. Conclusion.

Plaintiff's 1998 Form 1040 was clearly frivolous and the civil penalty was validly assessed. More importantly, the Defendant properly followed all requirements of the applicable laws and administrative procedures when assessing the civil penalty and then determining the collection action should continue unrestricted. Furthermore, the Court lacks jurisdiction over Plaintiff's claim for a tax refund. The arguments that the Court could glean from Plaintiff's disjunctive complaint and opposition to Defendant's motion are purely meritless. Finally, because Plaintiff's complaint lacks any merit, had the Defendant moved for Rule 11 sanctions this Court would have freely granted such motion.

Accordingly, IT IS HEREBY ORDERED that Defendant's Motion to Dismiss Or In The Alternative, For Summary Judgment (#6) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's complaint is hereby DISMISSED.

Dated this 31st day of July, 2002.

Kent J. Dawson

United States District Judge

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That judgement is entered for Defendants and against Plaintiff.

August 1, 2002

Date

LANCE S. WILSON

Clerk

/s/

(By) Deputy Clerk,

¶2002-5504

SEQUOIA PROPERTY AND EQUIPMENT LIMITED PARTNERSHIP, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Eastern Dist. of California, (DC CA) CASE NO. CV-F-97-5044-LJO, Sept. 19, 2002. Earlier proceedings at (2002, DC CA) 89 AFTR 2d 2002-1435; (2001, DC CA) 87 AFTR 2d 2001-1421; (2000, DC CA) 86 AFTR 2d 2000-6714, 2000-2 USTC ¶50836; (1998, DC CA) 81 AFTR 2d 98-2143; (1998, DC CA) 81 AFTR 2d 98- 2136; (1997, DC CA) 80 AFTR 2d 97-6059, 97-2 USTC ¶50841; and *U.S. v. Crisp*, at (1999, DC CA) 85 AFTR 2d 2000-354, 2000-1 USTC ¶50130; and (1999, DC CA) 84 AFTR 2d 99-7106. Years 1988, 1989. Decision for Govt.

1. Limitations periods on assessment and collection—omissions in excess of 25% of gross income—suspensions. Magistrate judge determined that limitations periods didn't bar govt.'s assessment against taxpayers who omitted more than 25% of gross income from their returns: although made more than 6 years after taxpayers filed returns, assessments were still timely under IRC §6501(e) when accounting for extensions by IRC §6213 and IRC §6503. *Reference:* United States Tax Reporter ¶65,015.15(5). IRC §6213; 6501; 6503.

2. Collection actions—foreclosure—fraudulent transfers—nominees; alter egos—quiet title. Magistrate judge granted govt. judgment on its complaint to enforce liens against residential properties held by taxpayers' partnerships: partnerships were merely taxpayers' nominees or alter egos where transfers for no consideration were effected after IRS began audits for years taxpayers hadn't reported millions of dollars of income; and taxpayers continued to reside in residences, controlled partnerships, used partnership accounts to pay personal expenses, and didn't file returns. Also, taxpayers' failure to testify or appear at trial, along with their evasive deposition testimony, gave rise to adverse inference against them; and facts similarly indicated transfers were fraudulent under California law, particularly considering lack of consideration for transfers, close relationship between taxpayers and partnerships, and taxpayers' knowledge of audits at time of transfers. And, partnerships' quiet title claims were deemed abandoned. *Reference:* United States Tax Reporter ¶74,035.03(80); 63,215.02(255); 74,336.507(60). IRC §6321; 7403.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING COURT PHASE OF TRIAL

LAWRENCE J. O'NEILL UNITED STATES MAGISTRATE JUDGE

This Court issues its findings of fact and conclusions of law following the phase two, non-jury portion of trial of these consolidated actions.

BACKGROUND

The Parties

Wanda Jean Crisp is the mother of Gilbert Mark Crisp. Gilbert Mark and Rhonda Crisp are married and filed joint tax returns for 1988 and 1989. In 1988–1989, Wanda Jean Crisp and Gilbert Mark Crisp operated Crisp Construction Company (''Crisp Construction'') which was profitable and engaged in, among other things, installing and removing fuel tanks. In 1991, the Internal Revenue Service (''IRS'') began audits of Wanda Jean Crisp and Gilbert Mark and Rhonda Crisp (collectively the ''Crisps'') and Crisp Construction for 1988 and 1989 and determined Crisp Construction failed to report substantial gross income, the liability of which was assessed to the Crisps in that Crisp Construction was their alter ego.

After the Crisps' audits began, Hyper-Jean Property and Equipment Limited Partnership (''Hyper-Jean Property'') was formed for Wanda Jean Crisp and Sequoia Property and Equipment Limited Partnership (''Sequoia Property'') was formed for Gilbert Mark and Rhonda Crisp. By a grant deed recorded October 16, 1992, Wanda Jean Crisp transferred for no consideration to Hyper-Jean Property her residence at 3850 West Cherry Avenue, Visalia, California (''3850 West Cherry''). By a grant deed recorded October 20, 1992, Gilbert Mark and Rhonda Crisp transferred for no consideration to Sequoia Property their residence at 5036 West Oak, Visalia, California (''5036 West Oak''). Wanda Jean Crisp also transferred to Hyper-Jean Property 433 North Atwood, Visalia, California (''433 North Atwood'') which was later transferred to her daughter. Gilbert Mark and Rhonda Crisp also transferred to Sequoia Property 1245 North Gowdy Street, Visalia, California (''1245 North Gowdy'') which was later sold. The Crisps continued to use the properties after the transfers.

Wanda Jean Crisp, a general partner of Hyper-Jean Property, controlled and benefitted from Hyper-Jean Property. Although Wanda Jean Crisp declined to indicate the source of money to fund Hyper-Jean Property, records show that deposits to Hyper-Jean Property's bank account were from AGT Vault and Crisp Petroleum Environmental, Inc. (which is also known and will be referred to sometimes as ''CPEI'') which conducted fuel tank related work similar to Crisp Construction in 1988 and 1989. Wanda Jean Crisp paid her persona expenses through Hyper-Jean Property's bank account.

Gilbert Mark and Rhonda Crisp controlled and benefitted from Sequoia Property, which failed to keep records. Sequoia Property received monthly rents but filed no tax returns.

Crisp Construction stopped filing tax returns after its audit. Hyper-Jean Property and Sequoia Property (collectively the ''limited partnerships'') never filed tax returns. The Crisps stopped filing tax returns after the audits. The IRS filed ''nominee'' liens against the Crisps' 3850 West Cherry and 5036 West Oak residences, after concluding the limited partnerships did not exist separate from the Crisps.

The Consolidated Actions

In January 1997, Sequoia Property filed its action entitled *Sequoia Property and Equipment Limited Partnership v. United States of America*, Case No. 97-5044 OWW LJO (''Case No. 97-5044'') agains the United States of America (''Government'') to quiet title to Gilbert Mark and Rhonda Crisp's 5036 West Oak residence in favor of Sequoia Property. In January 1998, Hyper-Jean Property filed its action entitled *Hyper-Jean Property and Equipment Limited Partnership v. United States of America*, Case No. 98-5113 OWW SMS (''Case No. 98-5113'') against the Government to quiet title to Wanda Jean Crisp's 3850 West Cherry residence in favor of Hyper-Jean Property.

In October 1998, the Government filed its actions entitled *United States of America v. Wanda Jean Crisp, et al.*, Case No. 98-6176 OWW LJO (''Case No. 98-6176'') against Wanda Jean Crisp and Hyper-Jean Property and *United States of America v. Gilbert Mark Crisp, et al.*, Case No. 98-6188 OWW LJO (''Case No. 98-

6188'') against Gilbert Mark and Rhonda Crisp and Sequoia Property to reduce the 1988 and 1989 tax assessments to judgment and to foreclose tax liens on the Crisps' 3850 West Cherry and 5036 West Oak residences. The Government alleged the limited partnerships were the Crisps' nominees, alter egos and/or fraudulent transferees. The Crisps filed counterclaims to quiet title to miscellaneous personal property.

This Court's August 6, 1999 order consolidated Case Nos. 97-5044, 98-5113, 98-6176 and 98-6188. This Court's February 22, 2001 order bifurcated issues with an initial jury trial of the Government's tax assessment claims followed by a court trial on the equitable quiet title, tax lien foreclosure, fraudulent transfer and related claims. After a March 2001 trial, the jury returned verdicts favorable to the Government.

On December 20, 2001, January 17, 2002 and June 12, 2002, this Court conducted the second (non-jury) phase of trial on enforcement of the Government's tax liens against the Crisps' 3850 West Cherry and 5036 West Oak residences. The Crisps failed to appear during the second phase, and this Court found they were unavailable.

The Government seeks a judgment for taxes against the Crisps and to enforce the judgments by selling the Crisps' 3850 West Cherry and 5036 West Oak residences.

FINDINGS OF FACT

Crisp Construction And CPEI

1. Crisp Construction performed fuel tank-related construction. (Deposition of Gilbert Mark Crisp, January 10, 2001, page 43, line 22 to page 44, line 4.)

2. Crisp Construction's 1988 federal tax return reported: (a) more than $2.5 million in gross receipts; (b) total assets of $959,552; (c) the Crisps and Robin Crisp (Gilbert Mark Crisp's brother) were officers; and (d) a 3850 West Cherry address. (Exhibit PX-1.)

3. Crisp Construction's 1989 tax return reported: (a) more than $1.9 million in gross receipts; (b) total assets of $887,117; and (c) depreciation of a 1988 Lincoln automobile. (Exhibit PX-3.)

4. Crisp Construction operates as CPEI which is Crisp Petroleum Environmental, Inc. (Reporter's Transcript (''RT'') 5-69, 5-72, 5-90.)

5. Crisp Construction used the trade name of Crisp Tree Service. (Exhibits PX-5.)

6. John Chapa worked for Crisp Construction in the late 1980s with Gilbert Mark Crisp as his boss and installed and removed fuel tanks. (RT 5-67 – 5-68.)

7. Maria Vela (formerly Maria Molina) worked under Gilbert Mark Crisp at Crisp Construction and CPEI and her duties did not change. (RT 5-72, 6-6, 6-12 – 6-13.)

8. CPEI's office was located at 1718 North Shirk Road, Visalia, California (''1718 North Shirk'') where Wanda Jean Crisp was seen. (RT 5-73, 5-77.)

9. Citing the Fifth Amendment, Gilbert Mark Crisp failed to describe the property at 1718 North Shirk. (Deposition of Gilbert Mark Crisp, April 28, 1999, page 70, lines 23–25.)

10. Gilbert Mark Crisp declined to state whether he was doing construction business out of 1718 North Shirk. (Deposition of Gilbert Mark Crisp, January 10, 2001, page 85, lines 2–14.)

11. In 1988 and 1989, the Crisps operated Crisp Construction as a sham or alter ego to justify the IRS's disregarding the corporate form and taxing unreported corporate income to the Crisps. (Special Verdict Regarding Gilbert Mark Crisp and Rhonda J. Crisp, Question Nos. 1 and 2 (Doc. 299); Special Verdict Regarding Wanda Jean Crisp, Question Nos. 1 and 2 (Doc. 300).)

12. In 1988 and 1989, the Crisps operated Crisp Construction as a partnership. (Special Verdict Regarding Gilbert Mark Crisp and Rhonda J. Crisp, Question Nos. 3 and 4 (Doc. 299); Special Verdict Regarding Wanda Jean Crisp, Question Nos. 3 and 4 (Doc. 300).)

13. Prior to late 1991, IRS Revenue Agent Janet Appleton (''Agent Appleton'') commenced an audit regarding Crisp Construction for 1988 and 1989. (RT 5-91.)

14. The Crisps were aware of the Crisp Construction audit from its initiation. (RT 5-92.)

15. IRS Revenue Dennis Officer Stiffier's (''Officer Stiffler's'') investigation beginning in the mid-1990s revealed Crisp Construction did not currently file tax returns. (RT 6-57 – 6-59.)

16. Officer Stiffler's search of DMV records located no Crisp Construction assets which had been previously reported. (RT 6-59.)

Wanda Jean Crisp's Tax Assessments

17. On or about May 15, 1989, Wanda Jean Crisp filed a federal individual income tax return, IRS Form 1040, for the tax year ending December 31, 1988. (Exhibits PX-57:1152 and PX-75.)

18. On or about August 6, 1990, Wanda Jean Crisp filed a federal individual income tax return, IRS Form 1040, for the tax year ending December 31, 1989. (Exhibits PX-57 and PX-76.)

19. Wanda Jean Crisp failed to report taxable income of $1,398,000 for 1988. (Special Verdict Regarding Wanda Jean Crisp, Question No. 10 (Doc. 300).)

20. Wanda Jean Crisp failed to report taxable income of $1,167,000 for 1989.[1] (Special Verdict Regarding Wanda Jean Crisp, Question No. 12 (Doc. 300).)

21. Wanda Jean Crisp's 1988 and 1989 tax returns failed to report the income as determined by the Special Verdict Regarding Wanda Jean Crisp. (Doc. 300.)

22. In late 1991 after initiation of the Crisp Construction audit Agent Appleton commenced an audit of Wanda Jean Crisp for 1988 and 1989. (RT 5-91 - 5-93.)

23. On or about August 28, 1995, a delegate of the Secretary of Treasury made the following assessments against Wanda Jean Crisp for unpaid individual federal income taxes:

Tax Period	Type of Tax	Tax	Penalties	Costs
1988	1040	$401,954.00	100,489.00	40.00
1989	1040	$335,793.00	117,549.00	00.00

(Exhibit PX-57.)

24. The IRS made notice and demand on Wanda Jean Crisp for payment of the assessments. (Exhibit PX-57.)

25. Citing the Fifth Amendment, Wanda Jean Crisp failed to state whether she had filed or paid income taxes after the 1988 and 1989 taxes were assessed. (Deposition of Wanda Jean Crisp, January 23, 2001, page 54, lines 17–23.)

26. On January 16, 1996, the IRS filed with the Tulare County Recorder a Notice of Federal Tax Lien against Wanda Jean Crisp for the assessments described above. (Undisputed Fact No. 12, Pretrial Order, p. 5, lines 18–19 (Doc. 278).)

27. In 1996 when assigned to collect tax from Wanda Jean Crisp, Officer Stiffler could not locate Wanda Jean Crisp's current tax returns after he searched IRS records. (RT 6-55.)

Gilbert Mark And Rhonda Crisp's Tax Assessments

28. In 1988 and 1989, Crisp Construction deducted payments to Gilbert Mark Crisp for per diem, travel or entertainment expenses. (Special Verdict Regarding Gilbert Mark Crisp and Rhonda J. Crisp, Question Nos. 5 and 9 (Doc. 299).)

29. Gilbert Mark Crisp received per diem, travel or entertainment expenses of $15,600 in 1988 and $15,600 in 1989 for which he did not provide adequate records to establish the expenses as legitimate business expenses. (Special Verdict Regarding Gilbert Mark Crisp and Rhonda J. Crisp, Question Nos. 7 and 10 (Doc. 299).)

30. On or about April 15, 1989, Gilbert Mark and Rhonda Crisp filed a federal in-

[1] The 1989 unreported income as determined by the jury was reduced by this Court's June 18, 2001 decision.

dividual tax return, IRS Form 1040A, for the taxable year ending December 31, 1988. (Undisputed Fact No. 1, Pretrial Order, p. 4, lines 9–10 (Doc. 278); Exhibit PX-9.)

31. On or about April 15, 1990, Gilbert Mark and Rhonda Crisp filed a federal individual tax return, Form 1040A, for the taxable year ending December 31, 1989. (Undisputed Fact No. 2, Pretrial Order, p. 4, lines 11–12 (Doc. 278); Exhibit PX-10.)

32. Gilbert Mark and Rhonda Crisp failed to report taxable income of $1,361,600 for 1988. (Special Verdict Regarding Gilbert Mark Crisp and Rhonda J. Crisp, Question No. 12 (Doc. 299).)

33. Gilbert Mark and Rhonda Crisp failed to report taxable income in the amount of $1,093,600 for 1989. (Special Verdict Regarding Gilbert Mark Crisp and Rhonda J. Crisp, Question No. 14 (Doc. 299).)

34. Gilbert Mark and Rhonda Crisp's 1988 and 1989 tax returns failed to report income as determined by the Special Verdict Regarding Gilbert Mark Crisp and Rhonda J. Crisp. (Doc. 299.)

35. On or about April 6, 1995, the IRS mailed a statutory notice of deficiency for 1988 and 1989 to Gilbert Mark and Rhonda Crisp. (Undisputed Fact No. 3, Pretrial Order, page 4, lines 13–14 (Doc. 278); Exhibit PX-14.)

36. On or about August 28, 1995, a delegate of the Secretary of Treasury made the following assessments against Gilbert Mark and Rhonda Crisp for unpaid individual federal income taxes:

Tax Period	Type of Tax	Tax	Penalties	Costs
1988	1040	$381,574.00	95,394.00	378,803.00
1989	1040	$307,029.00	61,406.00	221,040.00

(Exhibits PX-72, PX-15 (calculation).)

37. The IRS made notice and demand for payment on Gilbert Mark and Rhonda Crisp for payment of the assessments. (Exhibits PX-72.)

38. On or about June 17, 1996 the IRS filed with the Tulare County Recorder a Notice of Federal Tax Lien against Gilbert Mark and Rhonda Crisp for the assessments. (Undisputed Fact No. 4, Pretrial Order, p. 4, lines 15–16 (Doc. 278).)

39. Gilbert Mark Crisp submitted a letter to the IRS in 1995 to suggest that citizens did not have to file individual income tax returns. (Exhibit PX-16 (1588); RT 4-26 - 4-27.)

40. In 1996 when assigned to collect tax from Gilbert Mark and Rhonda Crisp, Officer Stiffler could not locate Gilbert Mark and Rhonda Crisp's current tax returns after he searched IRS records. (RT 6-55.)

41. Citing the Fifth Amendment, Gilbert Mark Crisp failed to state whether he ceased filing personal individual federal income tax returns after the 1988 and 1989 audit. (Deposition of Gilbert Mark Crisp, April 28, 1999, page 68, lines 2–21.)

Transfers Of Wanda Jean Crisp's 3850 West Cherry Residence

42. Wanda Jean Crisp's 3850 West Cherry residence is more particularly described as:

> Lot 10 of Sunset West Subdivision, in the City of Visalia County of Tulare, State of California, according to the map thereof recorded in Book 26, Page 3 of Maps, Tulare County Records.
>
> APN 119-173-10.

(Undisputed Fact No. 8, Pretrial Order, page 5, lines 1–5 (Doc. 278).)

43. 3850 West Cherry was purchased by Jack R. and Wanda Jean Crisp as community property on or about August 6, 1979, and as of February 2001, was occupied by Wanda Jean Crisp as her personal residence. (Exhibit PX-79; Undisputed Fact No. 9, Pretrial Order, page 5, lines 6–8 (Doc. 278).)

44. Wanda Jean Crisp lived at 3850 West Cherry on and off for 20 years. (RT 4-53.)

45. Union Planters Bank is the successor in interest to Leader Federal Bank for

Savings, the assignee of the beneficial interest in a deed of trust recorded July 27, 1979 on 3850 West Cherry by assignment recorded January 18, 1996 as file number 96-003662 with the Tulare County Recorder. The deed of trust has priority over the federal tax liens. (Undisputed Fact No. 10, Pretrial Order, page 5, lines 9–13 (Doc. 278).)

46. Mid Valley Lenders, Inc. is the beneficiary of a deed of trust on 3850 West Cherry and recorded September 6, 1996 as file number 96-064379 with the Tulare County Recorder. The obligation secured by the deed of trust recorded September 6, 1996 has been paid. and Mid Valley Lenders, Inc. has filed a disclaimer in this action. (Undisputed Fact No. 11, Pretrial Order, page 5, lines 14–17 (Doc. 278).)

47. On April 14, 1981, Jack R. Crisp quit-claimed his interest in 3850 West Cherry to Wanda Jean Crisp. (Exhibit PX-79.)

48. By a grant deed recorded October 16, 1992, Wanda Jean Crisp transferred 3850 West Cherry to Hyper-Jean Property. (Exhibit PX-79.)

49. The grant deed recorded October 16, 1992 specifies that the documentary transfer tax is $0 and that the transfer was for "no consideration - family." (Exhibit PX-79.)

50. Wanda Jean Crisp received nothing in exchange for the transfer of 3850 West Cherry to Hyper-Jean Property. (Deposition of Wanda Jean Crisp, January 23, 2001, page 56, lines 1–8.)

51. As of February 12, 2001, the current claim for a homeowner's tax exemption listed Wanda Jean Crisp as the owner and occupant of 3850 West Cherry. (Exhibit PX-78; RT 6-96).

Use Of 3850 West Cherry

52. After 3850 West Cherry was transferred to Hyper-Jean Property, Wanda Jean Crisp did not know whether she was a tenant and called Gilbert Mark Crisp if repairs were needed. (Deposition of Wanda Jean Crisp, January 23, 2001, page 65, line 17 to page 67, line 7.)

53. Intending to make an investment, Wanda Jean Crisp borrowed $50,000 secured by 3850 West Cherry after its transfer to Hyper-Jean Property. (Deposition of Wanda Jean Crisp, January 23, 2001, page 120, line 18 to page 122, line 11.)

Hyper-Jean Property's Operation

54. Wanda Jean Crisp was a general partner of Hyper-Jean Property and had no limit on her authority to sign checks. (Deposition of Wanda Jean Crisp, January 23, 2001, page 59, lines 2–4.)

55. Citing the Fifth Amendment, Wanda Jean Crisp failed to identify the source of money deposited into Hyper-Jean Property's account. (Deposition of Wanda Jean Crisp, January 23, 2001, page 60, line 17 to page 61, line 25.)

56. Citing the Fifth Amendment, Wanda Jean Crisp failed to indicate whether Hyper-Jean Property filed tax returns. (Deposition of Wanda Jean Crisp, January 23, 2001, page 61, lines 1–25.)

57. Wanda Jean Crisp failed to inform the IRS that Hyper-Jean Property received rent but obtained an IRS letter stating that Hyper-Jean Property did not need to file tax returns. (Deposition of Wanda Jean Crisp, January 23, 2001, page 61, line 24 to page 63, line 2.)

Hyper-Jean Property's Bank Account

58. A bank account was opened for Hyper-Jean Property on October 23, 1992 with an initial address of 3850 West Cherry, later changed to 1718 North Shirk. (Exhibit PX-113.)

59. The address on the account's signature card for Wanda Jean Crisp was 1718 North Shirk. (Exhibit PX-98.)

60. Checks from CPEI, located at 1718 North Shirk, and signed by Wanda Jean Crisp and Rhonda Crisp were deposited into Hyper-Jean Property's account. (Exhibits PX-103, 105, 106, 108, and 110.)

61. Checks from AGT Vault, located at 1718 Shirk Road, and signed by Wanda Jean Crisp were deposited into Hyper-Jean Property's account. (Exhibits PX-111, 112.)

62. Wanda Jean Crisp paid from Hyper-Jean Property's account personal expenses, including:

a. A tithe to the Church of God 7th Day (Exhibit PX-101);
b. Leader Federal Bank mortgage (Exhibit PX-101);
c. Union Planters Bank mortgage (Exhibits PX-102, 105-107, 109, 110.112);
d. Utilities, such as electric, telephone, and cable bills (Exhibits PX-102 - 110, 112);
e. Reader's Digest subscription (Exhibit PX-111);
f. Department store shopping such as Mervyns and Gottschalks (Exhibits PX-103, 109, 111);
g. Medical expenses (Exhibits PX-109, 111, 112); and
h. Credit card payments (Exhibit PX-110).

63. Wanda Jean Crisp paid Department of Motor Vehicles fees for a dump truck from Hyper-Jean Property's account. (Exhibit PX-105.)

Transfer Of 433 North Atwood To Hyper-Jean Property

64. By quitclaim deed recorded April 14, 1981, Jack R. Crisp transferred to Wanda Jean Crisp property located at 433 North Atwood, Visalia, California (''433 North Atwood''). (Exhibit PX-81.)

65. There were Crisp Construction activities at 433 North Atwood which was sometimes used as Crisp Construction's mailing address. (RT 5-43.)

66. Crisp Construction and Crisp family members used 433 North Atwood. (Deposition of Wanda Jean Crisp, January 23, 2001, page 112, lines 6–20.)

67. By a grant deed recorded October 16, 1992, Wanda Jean Crisp transferred 433 North Atwood to Hyper-Jean Property for no consideration. (Exhibit PX-81.)

68. By a grant deed recorded February 21, 1996, Hyper-Jean Property, by Wanda Jean Crisp, transferred 433 North Atwood to Diana J. Sullivan, Wanda Jean Crisp's daughter. (Exhibit PX-81.)

Transfers Of Gilbert Mark And Rhonda Crisp's 5036 West Oak Residence

69. Gilbert Mark and Rhonda Crisp's 5036 West Oak residence is more particularly described as:

> Lot 45 of Tract No. 59, in the City of Visalia, County of Tulare, State of California, as per Map Recorded in Book 19, Page 204 of Maps in the Office of the County Recorder of said County.

APN 085-018-0-03. (Undisputed Fact No. 5, Pretrial Order, p. 4, lines 17–22 (Doc 278).)

70. Gilbert Mark and Rhonda Crisp occupied 5036 West Oak as their personal residence during 1992–2001. (Undisputed Fact No. 6, Pretrial Order, page 4, lines 23–24 (Doc. 278).)

71. Washington Mutual Bank, as the successor in interest to Great Western Bank, holds the beneficial interest in a deed of trust on 5036 West Oak and recorded March 4, 1992 with the Tulare County Recorder. The deed of trust has priority over the federal tax liens. (Undisputed Fact No. 7, Pretrial Order, page 4, lines 25–28 (Doc. 278).)

72. By a grant deed recorded March 4, 1992, Nora Gong, Rhonda Crisp's mother, transferred 5036 West Oak to Gilbert Mark and Rhonda Crisp. (Exhibit PX-80.)

73. By a grant deed recorded July 29, 1992, Gilbert Mark and Rhonda Crisp transferred 5036 West Oak to Nora Gong. (Exhibit PX-80.)

74. By a grant deed recorded October 16, 1992, Nora Gong again transferred 5036 West Oak to Gilbert Mark and Rhonda Crisp. (Exhibit PX-80.)

75. By a grant deed recorded October 20, 1992, Gilbert Mark and Rhonda Crisp transferred 5036 West Oak to the Sequoia Property. (Exhibit PX-80.)

76. The grant deed recorded October 20, 1992 specifies that the documentary transfer tax was $0 and that the transfer was for ''no consideration - family.'' (Exhibit PX-80.)

77. The IRS commenced its audit of Gilbert Mark and Rhonda Crisp prior to the transfer of 5036 West Oak to Sequoia Property. (RT 5-94.)

Transfer Of 1245 North Gowdy To Sequoia Property

78. By a grant deed recorded January 30, 1991, David and Donna Lee transferred 1245 North Gowdy Street, Visalia, California (''1245 North Gowdy'') to Gilbert Mark and Rhonda Crisp. (Exhibit PX-82.)

79. The documentary transfer tax of the grant deed recorded January 30, 1991 indicates the purchase price was reported as $48,000. (RT 6-92 – 6-95.)

80. By a grant deed recorded October 16, 1992, Gilbert Mark and Rhonda Crisp transferred 1245 North Gowdy to Sequoia Property. (Exhibit PX-82.)

81. The grant deed recorded October 16, 1992 specifies that the documentary transfer tax was $0 and that the transfer was for ''no consideration - family.'' (Exhibit PX-82.)

82. By a partnership grant deed recorded March 10, 1994, Sequoia Property transferred 1245 North Gowdy to Richard and Maria Molina. (Exhibit PX-82.)

83. Richard and Maria Molina purchased 1245 North Gowdy from Sequoia Property for $68,000–$69,000. (RT 6–7.)

84. The documentary transfer tax of the partnership grant deed recorded March 10, 1994 indicates the purchase price was reported as $70,000. (RT 6-92 – 6-95.)

85. Richard and Maria Molina owed $7,000 to Sequoia Property secured by a deed of trust on 1245 North Gowdy. (Exhibit PX-82.)

86. Gilbert Mark Crisp, acting for Sequoia Property, excused the repayment of the loan. (RT 6–17.)

Sequoia Property's Operation

87. The partners of Sequoia Property were all members of Gilbert Mark Crisp's family. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 31, lines 10–21.)

88. Gilbert Mark Crisp is the principal person who manages and controls Sequoia Property and he does not inform family members of Sequoia Property's received income. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 31, lines 10–21; page 32, lines 2–5.)

89. Sequoia Property's purpose is to distribute assets of Gilbert Mark and Rhonda Crisp to their children. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 41, lines 1–25.)

90. Gilbert Mark Crisp was aware of the audit of Jack R. Crisp and Crisp Construction at the time Gilbert Mark Crisp formed Sequoia Property. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 57, lines 3–15.)

91. Sequoia Property does not file tax returns as Gilbert Mark Crisp received a letter from the IRS stating that Sequoia Property was not required to file tax returns. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 12, lines 8–10; page 26, lines 7–21.)

92. Sequoia Property received monthly rents but Gilbert Mark Crisp did not tell the IRS that Sequoia Property would receive rents when asking the IRS whether filing was required. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 12, lines 15–19; page 13, lines 16–23; page 26, lines 7–21.)

93. Gilbert Mark Crisp does not believe that rent is reportable income. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 10, 2001, page 166, lines 1–25).

94. Sequoia Property has failed to furnish tax returns to its partners as required by its partnership agreement. (Deposition

of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 42, lines 1–9.)

95. Sequoia Property failed to keep records of its capital accounts and ceased using a bank account. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 43, lines 13–25.)

96. Gilbert Mark Crisp keeps his personal money and Sequoia Property money separate "in his head." (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 9, 2001, page 114, lines 1–23.)

97. Citing the Fifth Amendment, Gilbert Mark Crisp failed to explain his personal monies separate from Sequoia Property's monies. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 10, 2001, page 130, lines 7–24.)

98. Gilbert Mark Crisp discarded Sequoia Property bank records. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 9, 2001, page 54, lines 8–24.)

99. Sequoia Property invested in 1245 North Gowdy and did not report the gain on its investment on federal or state tax returns. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 47, lines 7–25 and page 50, lines 1–25.)

100. Gilbert Mark and Rhonda Crisp's minor children (who are Sequoia Property partners) have not filed tax returns. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 53, lines 6–20.)

101. Gilbert Mark and Rhonda Crisp's son Matthew Crisp worked on 5036 West Oak because of his filial duty. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 9, 2001, page 106, lines 2–25; page 107, lines 17–23.)

102. Matthew Crisp's Toyota Land Cruiser was property of Sequoia Property. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 9, 2001, page 108, line 23 to page 109, line 24.)

103. Rhonda Crisp's car is in Sequoia Property's name. (Deposition of Gilbert Mark Crisp, January 10, 2001, page 110, lines 14–20.)

Sequoia Property's Dodge Stealth

104. Crisp Construction reimbursed Gilbert Mark Crisp for the purchase of a Dodge Stealth with a license plate of "DUGEE," Gilbert Mark Crisp's nickname. (Deposition of Gilbert Mark Crisp, January 10, 2001, page 12, lines 5–18.)

105. The Dodge Stealth's title was in Crisp Construction and Gilbert Mark Crisp's names in 1994. (Exhibit PX-89.)

106. The Dodge Stealth was transferred to Gilbert Mark Crisp in 1994 with a mailing address of 433 North Atwood and later transferred to Sequoia Property. (Exhibit PX-91.)

107. Gilbert Mark Crisp was seen in the Dodge Stealth with the "DUGEE" license plate. (RT 5-78 – 5-79.)

AGT Vault

108. Sequoia Property owns 40 percent of AGT Vault. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 63, line 23 to page 66, line 25.)

109. Hyper-Jean Property and Jack Crisp Limited Partnership also own portions of AGT Vault. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 63, line 23 to page 66, line 25.)

110. AGT Vault is entirely controlled by Gilbert Mark Crisp's family. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited

Partnership, Gilbert Mark Crisp, January 13, 2000, page 71, lines 5–22.)

111. "AGT" refers to "above-ground tank," a fuel tank which Jack R. Crisp and Gilbert Mark Crisp invented and which Gilbert Mark Crisp tried to promote and sell. (RT 5-34, 5-36.)

112. AGT Vault manufactured a fuel tank to sell. (RT 6-20.)

113. AGT Vault makes payments to Gilbert Mark Crisp for the use of his patent and Gilbert Mark Crisp pays himself for use of the patent. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 72, lines 1–25; Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 10, 2001, page 136, lines 2–20; page 137, lines 4–25.)

114. CPEI sold AGT Vault tanks. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 10, 2001, page 166, line 24 to page 167, line 8.)

115. AGT Vault does not file tax returns. (Deposition of Person Most Knowledgeable Sequoia Property and Equipment Limited Partnership, Gilbert Mark Crisp, January 13, 2000, page 73, lines 8–9.)

116. Citing the Fifth Amendment, Gilbert Mark Crisp declined to answer whether AGT Vault filed tax returns. (Deposition of Gilbert Mark Crisp, January 10, 2001, page 79, lines 5–25.)

CONCLUSIONS OF LAW

Jurisdiction And Venue

117. This Court has jurisdiction over Case Nos. 98-6176 and 98-6188 pursuant to 28 U.S.C. §§ 1340 and 1345 and 26 U.S.C. §§ 7402 and 7403. This Court has jurisdiction over Case Nos. 97-5044 and 98-5113 pursuant to 28 U.S.C. § 2410 (quiet title).

119. Venue is proper in the Eastern District of California because the Crisps resided and the subject real property is located within this judicial district in Tulare County, California. 28 U.S.C. §§ 1391 and 1396.

Tax Collection Burden Of Proof

120. In an action to collect taxes, the Government bears the initial burden of proof. *Palmer v. Internal Revenue Service*, 116 F.3d 1309, 1312 [80 AFTR 2d 97-5100] (9th Cir. 1997); *United States v. Stonehill*, 702 F.2d 1288, 1293 [51 AFTR 2d 83-1152] (9th Cir. 1983), *cert. denied*, 465 U.S. 1079, 104 S.Ct. 1440 (1984). The IRS deficiency determinations and assessments for unpaid taxes are normally entitled to a presumption of correctness if they are supported by a minimal factual foundation. *Palmer*, 116 F.3d at 1312; *Stonehill*, 702 F.2d at 1293. The presumption shifts the burden of proof to the taxpayer to show that the determination is incorrect. *Palmer*, 116 F.3d at 1312; *Stonehill*, 702 F.2d at 1293; *Rapp v. Commissioner*, 774 F.2d 932, 935 [56 AFTR 2d 85-6202] (9th Cir. 1985). Once the IRS has introduced some evidence that a taxpayer received unreported income, the burden shifts to the taxpayer to prove by a preponderance of evidence that the deficiency determination is arbitrary or excessive. *Helvering v. Taylor*, 293 U.S. 507, 515 [14 AFTR 1194], 55 S.Ct. 287, 290 [14 AFTR 1194] (1935); *Edelson v. Commissioner of Internal Revenue Service*, 829 F.2d 828 [60 AFTR 2d 87-5700], 831 (9th Cir. 1987).

Statute Of Limitations

121. **[1]** The Government relied on the six-year limitations period of 26 U.S.C. § 6501(e)(1) which provides in pertinent part:

> If the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time within 6 years after the return was filed.

Comparing the income reported on the Crisps' tax returns and the unreported income found by the jury in their special verdicts, the Crisps omitted more than 25

percent of their gross income on their 1988 and 1989 tax returns. The six-year limitations period applies.

122. On April 6, 1995, the IRS mailed statutory notices of deficiency to the Crisps regarding tax year 1988. On August 28, 1995, the IRS assessed large tax liabilities against the Crisps, primarily relating to Crisp Construction. The assessments for 1988 were more than six years from the Crisps' filing of their 1988 tax returns. However, under 26 U.S.C. § 6503(a), the limitations period is suspended for the time an assessment is prohibited "and for 60 days thereafter." A restriction is placed on assessment under 26 U.S.C. § 6213 which provides within 90 days after the notice of deficiency is mailed, a taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Pursuant to 26 U.S.C. § 6213, "no assessment of a deficiency in respect of any tax imposed ... shall be made, begun or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day period..." Based on 26 U.S.C. §§ 6213 and 6503(a), the limitations period was suspended for 150 days from April 6, 1995 (when the notice of deficiency was mailed) to render the August 28, 1995 assessment within the extended period up to September 3, 1995.

The Government's Nominee Claims

123. **[2]** Property held by a nominee is subject to a tax lien attaching to property of the true owner. *See G.M. Leasing Corp. v. United States*, 429 U.S. 338, 351 [39 AFTR 2d 77-475], 97 S.Ct. 619 [39 AFTR 2d 77-475] (1977); *Baldassari v. United States*, 79 Cal.App.3d 267, 270–272, 144 Cal.Rptr. 741, 742–744 (1978). Federal tax liens against a taxpayer may be foreclosed against property held by a nominee or alter ego so long as the taxpayer is the equitable owner of the property. *United States v. Marsh*, 114 F.Supp.2d 1036, 1043 [86 AFTR 2d 2000-6067] (D. Hi. 2000). In such cases, courts have ignored that the property is in a third party's name and have upheld the Government's right to enforce its tax liens. *See G.M. Leasing Corp.*, 429 U.S. at 350–351, 97 S.Ct. 619 [39 AFTR 2d 77-475]; *LiButti v. United States*, 107 F.3d 110, 119 [79 AFTR 2d 97-1240] (2nd Cir. 1997); *Wolfe v. United States*, 798 F.2d 1241, 1245 [58 AFTR 2d 86-5678] (9th Cir. 1986), *cert. denied*, 482 U.S. 927, 107 S.Ct. 3210 (1987); *Towe Antique Ford Foundation v. I.R.S.*, 999 F.2d 1387, 1390 [72 AFTR 2d 93-5495] (9th Cir. 1993); *Horton Dairy, Inc. v. United States*, 986 F.2d 286 [71 AFTR 2d 93-1026], 290–291 (8th Cir. 1993); *Shades Ridge Holding Co., Inc. v. United States*, 888 F.2d 725, 728–729 [64 AFTR 2d 89-5426] (11th Cir. 1989), *cert. denied*, 494 U.S. 1027, 110 S.Ct. 1472 (1990) ("Property of the nominee or alter ego of a taxpayer is subject to the collection of the taxpayer's tax liability."); *Loving Saviour Church v. United States*, 728 F.2d 1085 [53 AFTR 2d 84-878] (8thCir. 1984). A taxpayer cannot, by the device of taking title in the name of a straw party, prevent tax liens from attaching to property. *See Towe Antique Ford*, 999 F.2d at 1393; *United States v. Code Prod. Corp.*, 216 F.Supp. 281, 284 [11 AFTR 2d 991] (E.D. Pa. 1963). "[A] person cannot place his property or the income thereof beyond the reach of his creditors so long as he himself retains the right to receive and use it..." *In re Camm's Estate*, 76 Cal.App.2d 104, 172 P.2d 547, 551 (1946).

124. The Government has the burden to prove by a preponderance of the evidence its nominee/alter ego claims. *United States v. Reed*, 168 F.Supp.2d 1266, 1268 [88 AFTR 2d 2001-5502] (D. Ut. 2001); *Marsh*, 114 F.Supp.2d at 1045. "Nominee status is determined by the degree to which a party exercises control over an entity and its assets." *Shades Ridge*, 888 F.2d at 729; *LiButti*, 107 F.3d at 119. Factors relevant to determination of nominee status are:

a. No consideration or inadequate consideration paid by the nominee;

b. Property placed in the nominee's name in anticipation of a suit or occurrence of liabilities while the transferor continues to exercise control over the property;

c. Close relationship between transferor and nominee;

d. Failure to record conveyance;

e. Retention of possession by the transferor; and

f. Continued enjoyment of the transferor of benefits of the transferred property.

Towe Antique Ford Foundation v. I.R.S., 791 F.Supp. 1450, 1454 (D. Mont. 1992), *aff'd*, 999 F.2d 1387 [72 AFTR 2d 93-5495] (9th Cir. 1993) (citing *United States v. Miller Bros. Constr. Co.*, 505 F.2d 1031 [34 AFTR 2d 74-6241] (10th Cir. 1974)); *United States v. Bell*, 27 F.Supp.2d 1191, 1195 [82 AFTR 2d 98-6624] (E.D. Cal. 1998); *United States v. Williams*, 581 F.Supp. 756, 759 [54 AFTR 2d 84-5592] (N.D. Ga. 1982); *United States v. Code Prod. Corp.*, 216 F.Supp. 281 [11 AFTR 2d 991] (E.D. Pa. 1963).

125. Applying the nominee factors, this Court finds that Hyper-Jean Property is a nominee of Wanda Jean Crisp and holds 3850 West Cherry residence for her benefit. Wanda Jean Crisp failed to report more than $2.5 million of taxable income for 1988 and 1989. After audit commencement, Wanda Jean Crisp transferred her 3850 West Cherry residence without consideration to Hyper-Jean Property, which she created and controlled. Such transfer was motivated to avoid tax collection. Wanda Jean Crisp retained control of her 3850 West Cherry residence after the transfer and continued to use the residence. She used 3850 West Cherry as security for an investment loan. The Hyper-Jean Property bank account expenditures were personal, including subscriptions, charitable contributions, monthly bills, medical bills, and a mortgage. Deposits to the Hyper-Jean Property bank account were from AGT Vault and CPEI but Wanda Jean Crisp would not explain the source of the funds. The evolution of Crisp Construction to Crisp Petroleum Environmental, Inc. to CPEI and AGT Vault suggests that the Crisps, without proper tax reporting, continued to operate Crisp Construction, the source of funds for the limited partnerships. Wanda Jean Crisp transferred for no consideration 433 North Atwood to Hyper-Jean Property which transferred the property to Wanda Jean Crisp's daughter to demonstrate property in Hyper-Jean Property was subject to Wanda Jean Crisp's personal control.

126. Further applying the nominee factors, this Court finds that Sequoia Property is a nominee of Gilbert Mark and Rhonda Crisp and that Sequoia Property holds 5036 West Oak for their benefit. Gilbert Mark and Rhonda Crisp failed to report more than $2.4 million of taxable income for 1988 and 1989. After audit commencement, Gilbert Mark and Rhonda Crisp transferred their 5036 West Oak residence without consideration to Sequoia Property, which they created and controlled. Such transfer was motivated to avoid tax collection. Gilbert Mark and Rhonda Crisp retained control of their 5036 West Oak residence after the transfer and continued to live there through 2001. Sequoia Property's purported purpose was to preserve Gilbert Mark and Rhonda Crisp's property for their children. Since their children were minors at the time of transfer, Gilbert Mark and Rhonda Crisp continued to retain control. Gilbert Mark and Rhonda Crisp failed to maintain a separate Sequoia Property entity with its own bank account and records. Gilbert Mark Crisp transferred his Dodge Stealth and 1245 North Gowdy to Sequoia Property without receiving consideration. Of particular concern, Sequoia Property incurred a gain on the 1245 North Gowdy sale but did not report the gain on tax returns as required by law. IRS letters which excused Sequoia Property from filing tax returns were obtained under false pretenses in that Gilbert Mark Crisp did not tell the IRS about partnership income.

127. The evidence shows transfers of assets for inadequate consideration to the Crisps' closely related limited partnerships. As such, the Crisps are held to a fuller, stricter proof of consideration and fairness of the transactions. *See Kirkland v. Risso*, 98 Cal.App.3d 971, 978–979, 159 Cal.Rptr. 798, 802 (1979); *Wood v. Kaplan*, 178 Cal.App.2d 227, 230–231, 2 Cal.Rptr. 917 (1960)

128. Stan Livesay testified for the limited partnerships regarding his estate planning and trusts advice he had given to the Crisps. Presumably such testimony was intended to show the Crisps were motivated by estate planning to transfer their assets. However, the Crisps formed limited partnerships, not trusts. Since the Crisps did not follow Stan Livesay's advice, his testimony is unavailing to determine the Crisps' motivation.

129. The Crisps' failure to appear and testify at the trial's second phase substantiates an adverse inference that if they had testified, their testimony would not have been credible. Moreover, Gilbert Mark Crisp and Wanda Jean Crisp's deposition testimony was evasive and their assertion of the Fifth Amendment justifies an adverse inference. The ''Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a *party to a civil cause.*''' *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551 (1976) (quoting 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961); emphasis in original.) This rule applies even if ''the government is a party to the action and would benefit from the drawing of the inference.'' *Libutti*, 107 F.3d at 121; *see United States v. Ianniello*, 824 F.2d 203,208 (2nd Cir. 1987) (holding an adverse inference may be drawn from assertion of Fifth Amendment privilege in civil RICO actions by the government). ''Silence is often evidence of the most persuasive character.'' *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153–154, 44 S.Ct. 54, 56 (1923). The Crisps' failure to explain the source of the limited partnerships' funds shows a lack of candor.

The Government's Alter Ego Claims

130. The alter ego doctrine is a judicially created theory to avoid injustice or fraud which would occur in situations where maintaining a separate fiction would defraud creditors. The alter ego doctrine's purpose is to thwart inequity and fraud. *See RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543, 546 (9th Cir. 1985); *Automotriz Del Golfo De California v. Resnick*, 47 Cal.2d 792, 797, 306 P.2d 1 (1957); 9 Witkin, Summary of Cal. Law (9th ed. 1989) Corporations, § 12, p. 524.

131. Under California law, the alter ego doctrine applies where (1) such a unity of interest and ownership exists that the personalities of the corporation (entity) and individual are no longer separate, and (2) an inequitable result will follow if the acts are treated as those of the corporation alone. *RXX Industries*, 772 F.2d at 545; *Automotriz*, 47 Cal.2d at 796, 306 P.2d at 3. A finding of bad faith is not a prerequisite to application of the alter ego doctrine under California law. *RRX Industries*, 772 F.2d at 546; *see, e.g., Automotriz*, 47 Cal.2d at 797, 306 P.2d at 4.

132. Courts have ignored the fiction of separateness and approved piercing a corporate veil when the corporate device frustrates clear intendment of the law. *Valley Finance, Inc. v. United States*, 629 F.2d 162, 171–172 [46 AFTR 2d 80-5424] (D.C. Cir. 1980), *cert. denied*, 451 U.S. 1018, 101 S.Ct. 3007 (1981); *Quinn v. Butz*, 510 F.2d 743, 757 (D.C. Cir. 1975). ''The Government's inability otherwise to satisfy legitimate tax debts clearly may form a sound basis for such disregard of corporate form.'' *Valley Finance*, 629 F.2d at 171–172; *see, e.g., Avco Delta Corp. Canada Ltd. v. United States*, 540 F.2d 258, 264 [38 AFTR 2d 76-5489] (7th Cir.), *cert. denied*, 429 U.S. 1040, 97 S.Ct. 739 (1976). ''Property held in the name of an entity which is the alter ego of a taxpayer may be levied on to satisfy the tax liabilities of the taxpayer.'' *F.P.P. Enterprises and D & S Trust v. United States*, 830 F.2d 114, 118 [60 AFTR 2d 87-5710] (8th Cir. 1987).

133. As noted above, Wanda Jean Crisp exercised extensive control of Hyper-Jean Property to reflect a unity of interest and ownership to render meaningless any distinction between her and Hyper-Jean Property. Wanda Jean Crisp had unlimited access and control over Hyper-Jean Property's monies and assets and used her 3850 West Cherry residential address for Hyper-Jean Property's address. Wanda

Jean Crisp used Hyper-Jean Property's bank account and, in turn, its assets to pay personal expenses. After transferring to Hyper-Jean Property her 3850 West Cherry residence and 433 North Atwood, Wanda Jean Crisp treated the properties as her own.

134. As further noted above, Gilbert Mark and Rhoda Crisp exercised extensive control of Sequoia Property to reflect a unity of interest and ownership to render meaningless any distinction between them and Sequoia Property. Gilbert Mark Crisp managed and controlled Sequoia Property's operation and assets and failed to provide mandatory tax returns to its partners. There is no demonstrable distinction between Gilbert Mark Crisp and Sequoia Property's monies as he discarded Sequoia Property bank records. After transferring to Sequoia Property their 5036 West Oak residence and 1245 North Gowdy, Gilbert Mark and Rhonda Crisp treated the properties as their own and failed to report income attributable to them. Vehicles transferred to Sequoia Property were treated and used as personal vehicles of Gilbert Mark and Rhoda Crisp.

135. A preponderance of the evidence establishes that Hyper-Jean Property is Wanda Jean Crisp's alter ego, and Sequoia Property is Gilbert Mark and Rhonda Crisp's alter ego.

The Government's Fraudulent Transfer Claims

136. "A tax deficiency exists from the date a return is due to be filed; that deficiency arises by operation of law under [26 U.S.C.] section 6151 (a) [pay tax with return] and 6072(a) [time to file return]." *United States v. Voorhies*, 658 F.2d 710, 714 [48 AFTR 2d 81-6012] (9th Cir. 1981); *see United States v. Northwestern Mutual Insurance Co.*, 315 F.2d 723, 725–726 [11 AFTR 2d 1258] (9thCir. 1963). Thus, Crisp Construction tax, for which the Crisps were obliged to pay, was due in April 1989 and 1990, long before the transfers of their 3850 West Cherry and 5036 West Oak residences.

137. The standard of proof in fraud cases is the preponderance of evidence standard. *Liodas v. Sahadi*, 19 Cal.3d 278, 287, 137 Cal.Rptr. 635, 641 (1977).

138. A debtor's transfer is fraudulent to a creditor, whether the creditor's claim arose before of after the transfer was made, if the debtor made the transfer with actual intent to hinder, delay or defraud the creditor. Cal. Civ. Code, § 3439.04; *see Reddy v. Gonzalez*, 8 Cal.App.4th 118, 122, 10 Cal.Rptr.2d 55 (1992); *Severance v. Knight-Counthan Co.*, 29 Cal.2d 561, 567, 177 P.2d 4 (1947). The real intent of the parties and the facts of a fraudulent transaction are peculiarly within the knowledge of those sought to be charged with fraud. *Menick v. Goldy*, 131 Cal.App.2d 542, 547, 280 P.2d 844 (1955). Direct proof of a transfer and of a fraudulent intent is often an impossibility. *Menick*, 131 Cal.App.2d at 547, 280 P.2d 844. Hence proof indicative of a transfer and of fraud may come by inference from circumstances surrounding the transaction and the relationship and interest of the parties. *Menick*, 131 Cal.App.2d at 547, 159 P.2d at 548; *Taylor Osborne-Fitzpatrick Fin. Co.*, 57 Cal.App.2d 656, 661, 135 P.2d 598 (1943); *Burns v. Radoicich*, 77 Cal.App.2d 697, 702, 176 P.2d 77 (1947).

139. A debtor's transfer is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor (1) did not receive reasonably equivalent value in exchange, and (2) was insolvent at that time or became insolvent as a result of the transfer. Cal. Civ. Code, § 3439.05. A debtor who is generally not paying his/her debts as they become due is presumed to be insolvent. Cal. Civ. Code, § 3439.02(c).

140. Badges of fraud include:

a. Whether the transfer was to an insider;

b. Whether the debtor retained possession or control of the property transferred after the transfer;

c. Whether the transfer was disclosed or concealed;

d. Whether the debtor was sued or threatened with suit before the transfer was made;

e. Whether the transfer was of substantially all the debtor's assets;

f. Whether the debtor has absconded;

g. Whether the debtor had removed or concealed assets;

h. Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred;

i. Whether the debtor was insolvent or became insolvent shortly after the transfer was made;

j. Whether the transfer had occurred shortly before or shortly after a substantial debt was incurred; and

k. Whether the debtor had transferred the essential assets of the business to a lienor who had transferred the assets to an insider of the debtor.

Wyzard v. Goller, 23 Cal.App.4th 1183, 1191, 28 Cal.Rptr.2d 608, 612 (1994).'

141. The inferences drawn from the evidence are the Crisps fraudulently trans-ferred their 3850 West Cherry and 5036 West Oak residences with actual intent to hinder, delay and defraud the IRS and its collection efforts. As a reminder, the Crisps operated Crisp Construction as a sham or alter ego. Wanda Jean Crisp failed to report more than $2.5 million of taxable income for 1998 and 1989. Gilbert Mark and Rhonda Crisp failed to report more than $2.4 million of taxable income for 1988 and 1989. Prior to late 1991, Agent Appleton commenced a Crisp Construction audit of which the Crisps were aware. In late 1991 after initiation of the Crisp Construction audit, Agent Appleton commenced an audit of Wanda Jean Crisp.

142. Wanda Jean Crisp transferred for no consideration her 3850 West Cherry residence to Hyper-Jean Property on October 16, 1992, after she failed to report substantial income and was aware of IRS audits. In 1992, Gilbert Mark and Rhonda Crisp transferred their 5036 West Oak residence to Rhonda Crisp's mother who less than three months later transferred the residence back to Gilbert Mark and Rhonda Crisp on October 16, 1992. Four days later (October 20, 1992), Gilbert Mark and Rhonda Crisp transferred their 5036 West Oak residence to Sequoia Property for no consideration and after initiation of an IRS audit of Gilbert Mark and Rhonda Crisp. Gilbert Mark Crisp was aware of audits of his father and Crisp Construction when he formed Sequoia Property. The Crisps continued to control and reside in the residences after the transfers to the limited partnerships.

143. There is no evidence the Crisps received reasonably equivalent value for their 3850 West Cherry and 5036 West Oak residences. At the time of the transfers, the Crisps' tax debts were substantial. The evidence indicates the Crisps' tax liabilities far exceeded their assets.

144. Although a partnership is not a taxable entity, each partnership must file an annual information return showing items of gross income and allowable deductions and such other information as the IRS may require to carry out the provisions of the law relating to the taxation of incomes from partnerships. 26 U.S.C. § 6031(a). The partnership information return must include the names and addresses of individuals entitled to share in the taxable income if distributed and the amount of the distributive share of each individual. 26 U.S.C. § 6031(a). A penalty is imposed for failing to file a partnership return. 26 U.S.C. § 6698. The failure to so file is evidence that a partnership is not operated for a legitimate purpose and supports this Court's nominee, alter ego and fraudulent transfer findings.

145. Pursuant to 26 U.S.C. §§6321 and 6322, tax liens arise in favor of the Government upon all property and rights to property, whether real or personal, belonging to taxpayers as of the dates of the assessments, after notice and demand and failure to pay. Where a tax liability exists, and a lien has attached to a taxpayer's property, that property may be sold to satisfy the debt. *United States v. Rodgers*, 461 U.S. 677, 683 [52 AFTR 2d 83-5042], 103 S.Ct. 2132 [52 AFTR 2d 83-5042] (1983); 26 U.S.C. § 7403. Property held by a nominee or alter ego is subject to a tax

lien attaching to the property of the true owner. *See G.M. Leasing Corp.*, 429 U.S. at 351, 97 S.Ct. 619 [39 AFTR 2d 77-475] (1977); *Baldassari*, 79 Cal.App.3d at 270–272, 144 Cal.Rptr. at 742–744 (1978). A preponderance of the evidence demonstrates transfers of the Crisps' 3850 West Cherry and 5036 West Oak residences to the limited partnerships were fraudulent to warrant to set them aside and available remedies under California Civil Code section 3439.07.

Quiet Title Claims

146. Since the Crisps failed to appear for the second phase of trial and to prosecute their quiet title claims, they have abandoned their affirmative claims against the Government to quiet title in their interests in the limited partnerships or other property. Judgment shall be entered in favor of the Government and against the Crisps on their quiet title claims asserted in these consolidated actions.

147. Because the Government prevails on its nominee, alter ego and fraudulent transfer claims, judgment shall be entered in favor of the Government on the limited partnerships' claims to quiet title in their favor to the 3850 West Cherry and 5036 West Oak residences.

Judgment Against Wanda Jean Crisp

149. Wanda Jean Crisp died February 20, 2002, prior to the conclusion of the trial's second phase. To the best of this Court's knowledge, no probate case has been opened for Wanda Jean Crisp and no personal representative has been appointed for her estate. This Court's June 3, 2002 order denied without prejudice the Government's motion to substitute Gilbert Mark Crisp for Wanda Jean Crisp pending his appointment as personal representative or evidence he is a distributee of her estate. Until a personal representative or distributee of Wanda Jean Crisp's estate is identified, judgment shall be entered against Wanda Jean Crisp. As soon as a personal representative or distributee is identified, the Government shall seek to substitute the representative or distributee as the judgment debtor. *See, e.g., Coffee v. Cutter Biological*, 809 F.2d 191, 193, n. 1 (2nd Cir. 1987); *Henkel v. Stratton*, 612 F.Supp. 190, 191, n. 1 (N.D. Ohio 1985).

CONCLUSION AND ORDER

The Government, no later than October 7, 2002, shall serve and lodge a proposed judgment in accordance with the above findings of fact and conclusions of law. The Government shall submit to the Court a copy of their proposed judgment on a 3.5-inch computed disc formatted in WordPerfect 8.0. Objections to the proposed judgment shall be filed and served no later than October 21, 2002 and shall be supported with sufficient facts, recitation to the record, and legal authority.

IT IS SO ORDERED.

DATED: Sept 19, 2002

LAWRENCE J. O'NEILL

UNITED STATES MAGISTRATE JUDGE

¶2002-5505

UNITED STATES, PLAINTIFF v. Marvin SIMMONS, ET AL., DEFENDANTS. U.S. District Court, Eastern Dist. of California, (DC CA) CV F 96-5948 AWI SMS, Aug. 13, 2002. Later proceeding at (2002, DC CA) 90 AFTR 2d 2002-2002-6746. Earlier proceedings at (2002, CA9) 90 AFTR 2d 2002-5560, affirming (2002, DC CA) 89 AFTR 2d 2002-2973, and (2001, DC CA) 88 AFTR 2d 2001-5809, which denied reconsideration of (2001, DC CA) 87 AFTR 2d 2001-2448, which denied reconsideration of (2000, DC CA) 86 AFTR 2d 2000-7112, reconsideration denied at (2000, DC CA) 87 AFTR 2d 2001-464; (2000, DC CA) 86 AFTR 2d 2000-6445, 2000-2 USTC ¶50801; (2000, DC CA) 86 AFTR 2d 2000-5563; (1999, CA9) 84 AFTR 2d 99-6458, 194 F3d 1319, 99-2 USTC ¶50894; (1998, DC CA) 81 AFTR 2d 98-2372; (1998, DC CA) 81 AFTR 2d 98-2371; (1998, DC CA) 81 AFTR 2d 98-2040, 98-1 USTC ¶50419; and (1998, DC CA) 81 AFTR 2d 98-2032, 98-1 USTC ¶50418. Years 1963, 1964, 1970, 1977, 1978, 1979, 1980, 1984, 1985, 1986, 1987. Decision against Taxpayers.

1. Collection actions—judicial sales—post-sale relief. Taxpayer was denied post-sale request for relief from auction sale of his real property that was admittedly conducted in accord with court order: fact that judicial sale order deviated from local rules' notice provisions was irrelevant where order did require some notice, such notice was given, and no federal rule required exact type of notice required by local rules. Similarly, court's deviation from local rules' requirement that sale be conducted by U.S. Marshal rather than IRS was appropriate where no federal procedural rule was violated. *Reference:* United States Tax Reporter ¶74,035.03(100). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

ORDER DENYING MOTION FOR RELIEF FROM AUCTION SALE

ANTHONY W. ISHII UNITED STATES DISTRICT JUDGE

On April 1, 1998, the court granted summary judgment to the United States. The same day, the court denied Simmons' motion to file an amended counterclaim. On May 5, 1998, the court filed an Order of Judicial Sale, which was amended by Order entered on April 27, 2000, respecting the sale of coins, and amended by Order entered on October 24, 2000, respecting the sale of real property. On July 2, 1998, Simmons filed a notice of appeal from the final judgment and the Order of Judicial Sale. The Ninth Circuit affirmed the court's grant of summary judgment and entry of judgment in favor of the United States. On September 14, 2001, Simmons filed a notice of appeal concerning the court's amendments to the Order of Judicial Sale. On July 29, 2002, the Ninth Circuit affirmed this court.

On April 12, 2002, Simmons filed an ex parte application for a stay of the auction sale of the real property pending appeal. On May 14, 2002, the court denied Simmons' motion to stay the auction sale without prejudice to Simmons paying a supersedeas bond or agreeing to alternative conditions as required by Rule 62 of the Federal Rules of Civil Procedure.

On May 22, 2002, the real property was sold by action.

On May 23, 2002, Simmons filed objections to the auction sale.

On June 3, 2002, the United States lodged a proposed order confirming the judicial sale. Accompanying the United States' proposed order was a report providing information about the auction sale of the real property.

On June 11, 2002, Simmons filed a motion for the court to give relief from the auction sale of May 22, 2002. Simmons contends that the auction sale was conducted in violation of the Local Rules. Simmons argues that he received improper notice and the sale was improperly conducted by the IRS.

On July 3, 2002, the United States filed on opposition. The United States contends that the auction sale was valid because it was conducted in accordance with the Order of Judicial Sale.

On July 23, 2002, Simmons filed a reply brief.

DISCUSSION

[1] Simmons' requests relief from the auction sale of real property. Simmons' motion does not contend that the auction sale was conducted in violation of the court's Order of Judicial Sale. Rather, Simmons' motion contends that the auction sale was conducted in violation of Local Rule A-570. Simmons argues that the sale did not conform to Local Rule A-570 because the IRS conducted the sale but Local Rule A-570 provides that the United States Marshal must conduct a judicial sale of real property. Simmons also argues that the sale did not conform to Local Rule A-570 because notice was not published daily for a period of four calendar days prior to the sale as required by Local Rule A-570.

Preliminarily, the court notes that because the parties agree the auction sale was conducted pursuant to the Order of Judicial Sale, the real issue before the court is

whether the Order of Judicial Sale contained improper terms. On September 18, 2002, the United States filed a motion to amend the order of judicial sale, and Simmons filed an opposition to the proposed amended order of judicial sale. On October 24, 2000, the court entered the Order of Judicial Sale at issue. Simmons filed challenges to the Order of Judicial Sale on June 27, 2001, and April 12, 2002. At no time did Simmons ever challenge the Order of Judicial Sale on the ground that it violated the Local Rules. Simmons never challenged the Order of Judicial Sale's notice provisions. While Simmons did challenge the Order of Judicial Sales's provision that the IRS instead of the Marshal conduct the auction sale and the court rejected Simmons' argument, Simmons challenge was on the grounds other than a violation of the Local Rules. Because Simmons was given the opportunity to file objections to the Order of Judicial Sale and Simmons did oppose various terms in the Order of Judicial Sale on several occasions it is questionable if Simmons can now challenge the Order of Judicial Sale's terms after the auction sale has already been completed. Nevertheless, Simmons' contention that the auction sale is invalid because it did not comply with the Local Rules is without merit.

Simmons is correct that Local Rule A-570 provides that notice is to be published for four calendar days prior to the sale instead of four times during the four weeks proceeding the sale as was done in this case. When describing how a sale of property is to be conducted, Local Rule A-570 names the United States Marshal as the individual who is to conduct the sale. Thus, Simmons is correct that the auction sale conducted in this case pursuant to the Order of Judicial Sale did not comply with all of Local Rule A-570's terms. However, the Local Rules also provide that by court order the court can deviate from the Local Rules. Local Rule 1-102(d) provides:

> Unless contrary to the Federal Rules of Civil and Criminal Procedure, the Court in its discretion may make such orders supplementary or contrary to the provisions of these rules as it may deem appropriate and in the interests of justice and case management under Fed. R. Civ. P. 16 or Fed.R. Crim. P. 17.1 in a special action circumstance.

Because notice was given in the four weeks proceeding the auction sale and the court has previously found sale by the IRS appropriate, under the circumstances of this case any departure from the Local Rules was "so slight and unimportant that the sensible treatment is to overlook [it]." Allen v. United States Fidelity & Guaranty Co., 342 F.2d 951, 954 (9th Cir.1965).[1] As discussed below, no Rule of Civil Procedure requires the exact notice procedure used in Local Rule A-570 and no Rule of Civil Procedure requires that an Order of Judicial Sale be conducted by the Marshal instead of the IRS. Thus, the court had the ability to prescribe conditions for the auction sale that differed from Local Rule A-570.

To the extent Simmons challenges the sale by the IRS instead of the Marshal, the court previously determined that the amendments to the Order of Judicial Sale, including the provision for sale by the IRS, fell within the court's broad discretion to set terms and conditions of judicial sales. See 28 U.S.C. § 2001(a); United States v. Branch Coal Corp., 390 F.2d 7, 10 (3d Cir.1968); United States v. Heasley, 283 F.2d 422, 426 [6 AFTR 2d 5704] (8th Cir.1960); Revere Copper & Brass, Inc. v. Adriance Machine Works, 68 F.2d 708, 709 (2d Cir. 1934). Because no Rule of Civil Procedure mandated sale by the Mar-

[1] The court does note that in Professional Programs Group v. Department of Commerce, 29 F.3d 1349 (9th Cir. 1994), the Ninth Circuit stated that Local rules have the "force of law" and are binding upon the parties and upon the court, and a departure from local rules that affects "substantial rights" requires reversal.' Id. at 1353. However, the Ninth Circuit's legal authority for this proposition was Martel v. County of Los Angeles, 21 F.3d 940, 946–47 (9th Cir.1994). After Professional Programs was issued, an en banc panel of the Ninth Circuit vacated Martel and in the en banc panel's opinion omits any reference to Local Rules having the force of law. See Martel v. County of Los Angeles, 56 F.3d 993 (9th Cir.1995) (en banc). Thus, the Ninth Circuit's statement in Martel and Professional Programs that Local Rules have the force of law is no longer binding authority. Regardless, the Ninth Circuit in Professional Programs recognized that a departure from Local Rules is justified 'if the effect is so slight and unimportant that the sensible treatment is to overlook it.' Professional Programs, 29 F.3d at 1353 (quoting Allen, 342 F.2d at 954). Because notice was given and because the court has already determined that a sale by the IRS instead of the United States Marshal is lawful, the court finds any difference between Local Rule A-570 and the Order of Judicial Sale can be overlooked within the meaning of Allen and Professional Programs.

shal, the court's Order of Judicial Sale's deviation from Local Rule A-570 was not improper. Thus, the auction sale by the IRS was not invalid despite the fact that it was not conducted by the Marshal.

Simmons bases much of his motion on alleged lack of notice. However, this is not a case where Simmons alleges he did not have any notice of the auction sale. Clearly Simmons had actual notice of the auction sale because he filed a motion to stay the auction sale on April 12, 2002. This is also not a case where the court's Order of Judicial Sale allowed for sale without any notice and the real property was sold at auction with no published notice. Notice was provided by publishing the sale for four weeks in the Fresno Business Journal. Simmons' disagreement is over the fact that notice was conducted differently than provided for by the Local Rules. However, as discussed above, such a deviation from Local Rule A-570 is allowed by Local Rule 1-102(d). There is no argument or authority that publishing notice for the four days proceeding a sale instead of four times in the four weeks proceeding a sale is mandated by the Rules of Civil Procedure. Further, Simmons was not prejudiced by the change. Notice over four weeks, as was done in this case, instead of notice for only four days arguably gives better notice. In addition, the Order of Judicial Sale gave Simmons knowledge of the way notice would be given in this case. Thus, the auction sale was not invalid despite the fact that notice was given in a way other than that provided for by Local Rule A-570.[2]

Accordingly, the court ORDERS that:

1. Simmons' June 11, 2002 motion for the court to give relief from the auction sale is DENIED;

2. The United States' request for an order confirming the judicial sale is GRANTED; and

3. An Order Confirming Judicial Sale accompanies this Order.

DATED: August 12, 2002

ANTHONY W. ISHII

UNITED STATES DISTRICT JUDGE

¶2002-5506

UNITED STATES OF AMERICA, PLAINTIFF v. Marvin W. SIMMONS, ET AL., DEFENDANTS, and related counterclaims. U.S. District Court, Eastern Dist. of California, (DC CA) Case No. CV-F-96-5948 AWI DLB, Aug. 13, 2002. Earlier proceedings at (2002, DC CA) 90 AFTR 2d 2002-6743; (2002, CA9) 90 AFTR 2d 2002-5560, affirming (2002, DC CA) 89 AFTR 2d 2002-2973, and (2001, DC CA) 88 AFTR 2d 2001-5809, which denied reconsideration of (2001, DC CA) 87 AFTR 2d 2001-2448, which denied reconsideration of (2000, DC CA) 86 AFTR 2d 2000-7112, reconsideration denied at (2000, DC CA) 87 AFTR 2d 2001-464; (2000, DC CA) 86 AFTR 2d 2000-6445, 2000-2 USTC ¶50801; (2000, DC CA) 86 AFTR 2d 2000-5563; (1999, CA9) 84 AFTR 2d 99-6458, 194 F3d 1319, 99-2 USTC ¶50894; (1998, DC CA) 81 AFTR 2d 98-2372; (1998, DC CA) 81 AFTR 2d 98-2371; (1998, DC CA) 81 AFTR 2d 98-2040, 98-1 USTC ¶50419; and (1998, DC CA) 81 AFTR 2d 98-2032, 98-1 USTC ¶50418. Years 1963, 1964, 1970, 1977, 1978, 1979, 1980, 1984, 1985, 1986, 1987. Decision for Govt.

1. Collection actions—judicial sales—confirmation. Judicial sale of taxpayer's real property was confirmed over taxpayer's objections: sale was properly noticed and otherwise properly conducted; and taxpayer's objections were previously rejected. *Reference:* United States Tax Reporter ¶74,035.03(100). IRC §7403.

JOHN K. VINCENT United States Attorney

G. PATRICK JENNINGS Trial Attorney, Tax Division U.S. Department of Justice

[2] In its opposition, the United States also discusses Simmons' argument in his objection to the auction sale that the notice was improper because it was in the Fresno Business Journal instead of the Fresno Bee. This argument was not made in Simmons' motion. Neither the Local Rules nor the court's Order of Judicial Sale required notice be in the Fresno Bee. Further, there is no evidence before the court that the Fresno Business Journal is not a newspaper of general circulation in Fresno County. Thus, any argument before the court that notice was insufficient because it was not in the Fresno Bee is without merit.

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

ORDER CONFIRMING JUDICIAL SALE OF RESIDENCE

Anthony W. Ishii, U.S. District Court Judge

A final judgment was entered by this Court in the above-entitled action, on May 6, 1998, ordering, inter alia, that federal tax liens be foreclosed and that the subject property, described below, be sold pursuant to 28 U.S.C. § 2001.

1. This action was commenced by the United States to enforce federal tax lien against real property located at located at 4237 North Wishon, Fresno, California, (hereinafter referred to as the ''Realty''), situated in the County of Fresno, State of California, and described as follows:

> The East 175 feet of Lot 181 of Forkner-Giffen Fig Gardens, Subdivision No. 1, according to map thereof recorded September 16, 1919, in Book 8 Page 59 of Plats, Fresno County Records.

2. For four weeks prior to May 22, 2002, the Notice of Sale describing the Realty and summarizing terms of sale was published in the Fresno Business Journal, a newspaper of general circulation in Fresno County, California.

3. On May 22, 2002, at 11:00 a.m., at the County Courthouse in Fresno County, California, at 11:00 Van Ness, Fresno, California, the United States offered the Realty for sale at public auction to the highest bidder. Eleven bidders attended the auction. The successful bidder, Terence Fraizer, bid $262,100 and paid a deposit of $26,210.01 to the United States Treasury Department.

4. **[1]** Dr. Simmons has filed two objections to the sale: (1) that the United States Marshal and not the IRS must sell the property, and (2) that the notice was not published in the Fresno Bee. This Court previously rejected the argument that the Marshal must perform the sale, and Dr. Simmons states no reason to reconsider that decision. The Amended Order of Judicial Sale did not require publication in the Fresno Bee. The Court finds that notice of the sale, as set forth in the Declaration of Karola Jenkins, was sufficient. Dr. Simmons' objections to the sale are overruled.

5. The balance of the purchase price for the Realty is to be paid to the Internal Revenue Service within sixty (60) days after the date the bid is accepted by a certified or cashier's check payable to the United States Treasury. On receipt of payment in full, the Internal Revenue Service is hereby ordered and authorized to execute and deliver a Certificate of Sale and Deed conveying all right, title and possession in the Realty to the purchaser, or to an entity designated by the purchaser.

6. On delivery of the Certificate of Sale and Deed, all interests in, liens against, or claims to, the Realty that are held or asserted by the plaintiff or any of the defendants in this action are discharged. On delivery of the Certificate of Sale and Deed, the Realty shall be free and clear of the interests of defendants Marvin W. Simmons, Universal Life Church, Inc., Leslie K. Jensen, Life Science Church North Fresno, and Universal Life Church, Ltd. of the Grand Cayman Islands.

7. Possession of the property sold shall be yielded to the purchaser upon the production of a copy of the Certificate of Sale and Deed; and if there is a refusal to so yield, a Writ of Assistance may, without further notice, be issued by the Clerk of this Court to compel delivery of the Realty to the purchaser.

8. The Internal Revenue Service shall distribute the amount paid by the purchaser according to the priority set forth in the Amended Order of Judicial Sale.

IT IS SO ORDERED.

Dated: August 12, 2002

Anthony W. Ishii,

U.S. District Court Judge

¶2002-5507

Steven R. SMITH, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) Case No. CV-S-01-1184-KJD-LRL, July 30, 2002. Year 1998. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties—summary judgment. IRS's administrative determination to proceed with collection of IRC §6702 penalty against tax protester who filed ''zero'' return was upheld on summary judgment: taxpayer's return was substantially incorrect where he failed to report W-2 wage income and took frivolous return position that no IRC section subjected him to income taxation; IRS properly observed all procedural requirements for administrative collection; and Appeals Officer's reliance on Form 4340 to verify assessment was proper. Also, taxpayer's other claims, that non-receipt of Form 17A was lack of notice and demand and that no regs authorized penalty's collection, were meritless; and Tax Court was proper venue to extent taxpayer contested his tax deficiency. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(10). IRC §6330; 6702.

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA,

ORDER

Kent J. Dawson United States District Judge

This matter comes before the Court on Defendant's Motion for Summary Judgment (#2). Plaintiff filed a response in opposition (#5), to which the Defendant replied (#6).

I. Factual and Procedural History

In his complaint, Plaintiff alleges that the IRS improperly determined that collection actions against him should not be restricted. Plaintiff now seeks to set aside the IRS's determination. The collection activity at issue stems from a frivolous return penalty the IRS assessed against Plaintiff for a return he filed for the 1998 tax year. In April 1999, Plaintiff filed Form 1040, U.S. Individual Income Tax Return for the 1998 tax year. This return had zeroes on all lines which reflected amounts of income earned or taxes due. Plaintiff also requested a refund of all taxes either withheld or paid for that tax year. Plaintiff attached his 1998 Form W-2 which showed Plaintiff had $32,745.07 in wages, tips or other compensation. Finally, at-tached to the return was a two page docu-ment which set forth arguments as to why Plaintiff did not believe that he owed fed-eral income taxes for 1998. On September 4, 2000, the IRS assessed a $500 civil penalty against Plaintiff under 26 U.S.C. § 6702 for filing the above described tax return. Section 6702 assesses a civil penalty of $500 if an individual ''files what purports to be a return'' but which contains ''information that on its face indicates that the self-assessment is substantially incorrect'' and is due to ''a position which is frivolous.'' Plaintiff's self assessment of his 1998 income tax liability was substantially incorrect in that he entered zeros for all income and tax information. According to the attached statement, Plaintiff's self-assessment was based on his positions that there is no statutory income tax liability that applies to him and that his wages do not constitute income. Because Plaintiff's self-assessment was on its face substantially incorrect and was based on frivolous positions[1] , there is no doubt as to the validity of the penalty.

On October 26, 2000, the IRS sent Plaintiff a ''Final Notice-Notice of Intent to Levy and Notice of Your Rights to a Hearing.'' This letter notified Plaintiff of his right to appeal the IRS's levy within 30 days by requesting a Collection Due Process Hearing (''CDP Hearing''). Plaintiff filed Form 12153 ''Request for a Collection Due Process Hearing'' which the IRS received on March 30, 2000. Plaintiff's

[1] Courts have found both of these positions to be frivolous and patently without merit. See Sisemore v. United States, 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir 1986); Olson v. United States, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985).

CDP Hearing was held on July 24, 2001 in Las Vegas, Nevada before Appeals Officer Patrick Wilcox, Plaintiff attended the hearing. On September 13, 2001, the IRS Appeals Office sent, by certified mail, a ''Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330.'' The letter informed Plaintiff that the proposed collection action should be allowed to proceed. The letter also informed Plaintiff of his right to dispute the determination by filing a complaint in Federal District Court within 30 days. Plaintiff filed a timely complaint with this Court. Defendant has now filed a motion for summary judgment.

II. Standard of Review

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Fed. R. Cir. P. 56(e). The evidence, as well as all justifiable inferences drawn from it, must be viewed in the light most favorable to the nonmoving party. See Matsushita, 475 U.S. at 587. Summary judgment shall be entered ''against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'' See Celotex, 477 U.S. at 322.

III. Analysis

[1] From what can be gleaned from it, Plaintiff's complaint contains a barrage of meritless arguments which he insists this Court must address. The only genuine issue before this Court is whether the IRS Appeals Office met all requirements of applicable laws and administrative procedures when making its determination that the collection action against Plaintiff should continue unrestricted. This issue will be addressed first, followed by a discussion of Plaintiff's purely meritless arguments.

A. Collection Procedure

[1] Procedures for administrative collection actions are found in 26 U.S.C. § 6330 which requires that: (1) the IRS give 30 days'R written notice of the taxpayer's right to a CDP Hearing before making a levy; (2) a hearing be conducted by an officer or employee who has no prior involvement with the subject tax liability; (3) the Appeals Office obtain verification from the IRS that the requirements of any applicable law or administrative procedure have been met; (4) the taxpayer may raise any relevant issue relating to the unpaid tax or the proposed levy at the time of the CDP Hearing, including appropriate spousal defenses, challenges to the collection actions and offer of collection alternatives; (5) the taxpayer may challenge the existence of the underlying tax liability under some circumstances; and (6) the final determination by the Appeals Officer shall take into consideration (a) the verification that applicable law and administrative procedures have been met, (b) the issues raised by the taxpayer, and (c) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

A review of Plaintiff's complaint illustrates that all of the above requirements have been met: (1) Plaintiff received timely notice of levy and requested a CDP hearing; (2) Plaintiff attended his CDP Hearing on July 24, 2001 with Patrick Wilcox, an appeals officer who had no prior involvement with the subject tax liability; (3) the Appeals Office obtained Form 4340 from the IRS which serves as verification that the requirements of any applicable laws or administrative procedures were met; (4) Plaintiff raised no relevant issues or appropriate defenses pertain-

ing to the proposed collection action and offered no collection alternatives; (5) at the hearing, Plaintiff challenged the liability for the penalty and whether the return he filed was frivolous, arguments determined to be frivolous by the appeals officer and (6) in the final determination, the appeals officer stated that he took into consideration all required statutory elements. Attachment 3194 to the Notice of Determination states that the Appeals Office reviewed the purported returns Plaintiff filed and concurred with the assessment of the frivolous return penalty under provisions of § 6702.

B. Plaintiff's Arguments

1. Inadequacy of Notice

Plaintiff repeatedly argues that letters and notices sent to him by the IRS are invalid because there is no evidence of any delegated authority from the Secretary of Treasury to the various IRS employees. Relevant statutes and regulations demonstrate, however, that the Secretary does have the power to collect taxes, and that such power can be delegated to local IRS agents. 26 U.S.C. § 6301 provides that "[t]he Secretary shall collect the taxes imposed by the internal revenue laws." The actual task of collecting the taxes, however, has been delegated to local IRS directors. See 26 C.F.R. § 301.6301-1 ("The taxes imposed by the internal revenue laws shall be collected by district directors of internal revenue."). The delegation of authority down the chain of command, from the Secretary, to the Commissioner of Internal Revenue, to local IRS employees constitutes a valid delegation by the Secretary to the Commissioner, and a re-delegation by the Commissioner to the delegated officers and employees. See 26 U.S.C. § 7701(a)(11)(A), (12)(A)(i); 26 C.F.R. § 301.7701-9; Hughes v. United States, 953 F.2d 531, 536 [69 AFTR 2d 92-472] (9th Cir. 1991).

2. Adequacy of Supporting Documentation

Plaintiff contends the IRS has never produced a document supporting imposition of the penalties at issue. He does not believe that a computer transcript is adequate to verify an assessment. At his CDP Hearing, the Appeals Officer provided Plaintiff with Form 4340, "Certificate of Assessments and Payments" for the penalty assessment. The Ninth Circuit has held that a Form 4340 is sufficient evidence to support a grant of summary judgment on a claim that the IRS failed to issue notice of assessment and demand for payment. See Huff v. United States, 10 F.3d 1440, 1446–1447 [72 AFTR 2d 93-6682] (9th Cir. 1993); Hughes, 953 F.2d at 535. In Hughes, the court held that official certificates, such as Form 4340, can constitute proof of the fact that the assessments actually were made. Hughes, 953 F.2d at 535.

3. Statutory Notice and Demand for Payment

Plaintiff contends that he was never sent the required Statutory Notice and Demand for payment with regard to the penalties at issue. Plaintiff received notice of the assessment and an opportunity to appeal that assessment. In his CDP Hearing affidavit, Plaintiff contends that he should have received a Form 17A, rather than the notice he received. Form 17A relates to assessment of unpaid income tax *not* a frivolous return penalty, which is the subject tax liability in this case. In addition, Notice and demand is not required to be sent on any particular form so long as the requisite information is included. See id. at 536.

4. Regulation Requiring Plaintiff to Pay Penalty

Plaintiff contends that no Treasury Department regulation requires that he pay the penalties at issue and Defendant has not produced any such regulation. 26 U.S.C. § 6702(a), however, provides the statutory authority for assessing the penalty and does not by its terms require any implementing regulations. See Hoffman v. United States, No. C02-5023RJB, 2002 WL 1299991, at 5 [89 AFTR 2d 2002-2647] (W.D. Wash. May 3, 2002).

5. Underlying Liability for Income Tax

Plaintiff contends that no statute establishes an underlying liability for the income tax to which the penalties relate, and the IRS has not identified any such statute. Plaintiff's liability for tax deficiencies

(what he owed in taxes for the year 1998) is not at issue in this case, although he consistently tried to make it so at the CDP Hearing and in the instant complaint. Plaintiff's remedy with regard to the liability for tax deficiencies does not lie in this Court. This Court does not have jurisdiction to consider Plaintiff's income tax deficiencies. See 26 U.S.C. § 6213(a); Moore v. Commissioner, 114 T.C. 171, 175 (2000).

III. Conclusion.

Plaintiff's 1998 Form 1040 was clearly frivolous and the civil penalty was validly assessed. More importantly, for purposes of this action, the Defendant properly followed all requirements of applicable laws and administrative procedures when assessing the civil penalty and then determining the collection action should continue unrestricted. Finally, the arguments that the Court could glean from Plaintiff's disjunctive complaint and opposition to Defendant's motion are purely meritless. Moreover, because Plaintiff's complaint lacks any merit, had the Defendant moved for Rule 11 sanctions this Court would have freely granted such motion.

Accordingly, IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (#2) is GRANTED.

Dated this 30th day of July, 2002.

Kent J. Dawson

United States District Judge

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That judgement is entered for Defendants and against Plaintiff.

August 1, 2002

Date

LANCE S. WILSON

Clerk

/s/

(By) Deputy Clerk,

¶2002-5508

Vern W. SORENSON and Olivene C. SORENSON, PLAINTIFFS v. Paul H. O'NEILL, ET AL., DEFENDANTS. U.S. District Court, District of Utah, (DC UT) Case Number: 2:02cv293B, Aug. 1, 2002. Decision for Govt.

1. Actions against IRS employees—damages—exhaustion of administrative remedies—Anti-Injunction Act—remand. Govt. was substituted as proper defendant in pro se taxpayers' action against Treas. Secy. and IRS employees for damages and cancellation of liens, and action was dismissed for lack of jurisdiction: taxpayers didn't exhaust administrative remedies before filing suit; AIA barred injunctive relief; and no exceptions applied. Also, taxpayers' request to "reverse and remand" matter to state court was denied. *Reference:* United States Tax Reporter ¶74,335.01(5); 74,215.05(5); 74,336.508(60). IRC §7421; 7433.

United States District Court Central Division for the District of Utah,

JUDGMENT IN A CIVIL CASE

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The Court GRANTS Defendants' motion to dismiss for lack of subject matter jurisdiction.

August 1, 2002

Date

Markus B. Zimmer

Clerk

/s/

(By) Deputy Clerk

ORDER

Judge Dee Benson

[1] Before the Court are defendants' Motions to Substitute the United States as the proper defendant and to Dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. Plaintiffs, proceeding pro se, initiated this action by filing a Complaint in March, 2002 that names three federal tax liens as the "in rem" subjects of the lawsuit and names the Secretary of the Treasury, Paul H. O'Neill, as well as IRS employees Dave Folkman, Jack B. Cheskaty, and Jane Trujillo as defendants. In their Complaint, plaintiffs essentially assert two allegations against the defendants, each of which relates to wrongful levying and collection of taxes. Specifically, the plaintiffs allege that (1) the liens are fraudulent and void because the defendants did not reveal the "... legitimate foundation for the foregoing alleged claim(s) of lien ..." and (2) the defendants committed a crime under Florida state law by filing allegedly fraudulent liens. Plaintiffs request that the Court provide injunctive relief by releasing or "cancelling" the federal tax liens. Plaintiffs also request that the Court order that the defendants pay an undetermined amount as a penalty pursuant to Florida law.

The basis of the suit is for actions taken by the defendants in their official capacities - namely the preparation and filing of Federal Tax Liens. Because a suit against a government employee acting in his official capacity is a suit against the government, the United States is the proper defendant. *See United Sates v. Shaw*, 309 U.S. 495, 500–501 (1940); *Weaver v. United States*, 98 F.3d 518, 520 (10th Cir. 1996). Additionally, the injunctive relief sought by the plaintiffs also indicates that the United States is the proper defendant because plaintiffs seek a determination of the validity of federal tax assessments and request release of IRS liens and cessation of IRS collection activity.

Defendants argue this case should be dismissed because the plaintiffs did not exhaust administrative remedies before filing this matter in district court and because the case violates the Anti-Injunction Act, 26 U.S.C. § 7421(a). Plaintiffs must pay the outstanding taxes and then file for a refund with the IRS before commencing a suit in District Court to recover the taxes. In addition, the Anti-Injunction Act states in part: "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." *Id.* There are limited exceptions to the Anti-Injunction Act, but none of them apply to plaintiffs. Therefore, plaintiffs' suit is improper at this time because "Congress has provided express methods by which proposed deficiencies, assessments, or collections of taxes may be challenged, and express prohibition in the Anti-Injunction Act, 26 U.S.C. § 7421(a) against suits brought for the purpose of restraining the assessment or collection of any tax except in the prescribed manner." Lonsdale v. United States, 919 F.2d 1440, [67 AFTR 91-1049] 1444 (10th Cir. 1990).

For the reasons stated above, the Court hereby GRANTS the defendants' Motion to Substitute the United States as the proper defendant and defendants' Motion to Dismiss for lack of subject matter jurisdiction. Accordingly, plaintiffs' request to "reverse and remand" this matter to the Fourth Judicial District Court, Utah County, Utah is DENIED.

DATED this 30th day of July, 2002.

Dee Benson

United States District Judge

¶2002-5509

Jerry W. STAMPS and Arvada B. STAMPS, PLAINTIFFS v. C. DIETER, Fred Fisher, and the Department of Revenue, Colorado, DEFENDANTS. Jerry W. STAMPS, Arvada B. STAMPS, PLAINTIFFS v. INTERNAL REVENUE DEPT. OF OGDEN, Utah and Fresno, California, DEFENDANTS. U.S. District Court, Dist. of Colorado, (DC CO) Civil Action No. 02-K-956; Civil Action No. 02-K-1510, Aug. 30, 2002. Decision for Govt.

1. Actions against U.S.—damages—tax protesters—frivolous constitutional objections to tax. Pro se tax protesters' actions against U.S. seeking "cease and desist" order against any further tax collection and damages were dismissed, in accord with binding case law foreclosing their frivolous protester-type constitutional objections to federal tax. *Reference:* United States Tax Reporter ¶79,007.852(61); 74,335.01(7). IRC §7433.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

ORDER DISMISSING CIVIL ACTIONS

Kane, J.

[1] In these related cases, Plaintiffs *pro se* Jerry and Arvada Stamps challenge the constitutionality of the federal and state "taxing system" to which they are subjected as residents of Colorado and citizens of the United States. The Stamps distinguish between "federal jurisdictional states" and "Sovereign state [sic] of the union," and purport to be "non-resident alien Americans residing in one of the 50 States of America" or "sovereign citizens" over whom state and federal taxing authorities have no jurisdiction. *C.f.* Compl., No. 02-K-956 at ¶s4–5, Compl., No. 02-K-1510 at § VI. They claim their "'compensation for labor' cannot [constitutionally] be taxed by [such] authorities.' *id.* and seek a 'case/desist' order against the State Department of Revenue for any collection actions pending against them, a ruling on the question of the Department's 'porported [sic] jurisdiction' over them, and $100,000 in damages in Civil Action No. 02-K-956 and $1.5 million in damages for unauthorized collection actions under 26 U.S.C. § 7433 in 02-K-1510.

The matter is before me on Defendants Motion to Dismiss in 02-K-956. Because the purpose of Plaintiff's actions, ultimately, is to protest the "unified" system of federal and state taxation generally and to restrain taxation authorities from levying and collecting income taxes against them, it is barred, among other reasons, under the Tenth Circuit's decision in *Lonsdale v. United States*, 919 F.2d 1440 [67 AFTR 2d 91-1049] (10th Cir. 1990) (listing frivolous tax-protester arguments, including claims that individuals are not subject to income tax and wages are not income). I am bound by the analysis and holdings in *Lonsdale*. Plaintiffs' random and capricious citations and miscitations to the Federal Criminal Code, 1954 Internal Revenue Code and various Supreme Court decisions that do not support the propositions for which they are cited provide no basis for distinguishing *Lonsdale*from the facts and arguments presented here.

The Complaint in Civil Action No. 02-K-956 is DISMISSED. Because *Lonsdale* applies equally to the Stamps' claims in 02-K-1510, the Court on its own motion, ORDERS the Complaint in that action DISMISSED as well.

Dated this 30 day of August, 2002.

BY THE COURT:

JOHN L. KANE, SENIOR JUDGE

UNITED STATES DISTRICT COURT

¶2002-5510

UNITED STATES OF AMERICA, PLAINTIFF v. Clyde W. STOCK, individually and in his capacity as the trustee of "The Dollar Trust" and as representative of Clyde W. Stock, Corporation Sole at Common Law, a Church, aka Clyde W. Stock, Corpora-tion Sole, and Rea B. Stock, DEFEND-ANTS. U.S. District Court, Dist. of Idaho, (DC ID) Case No. C01-92-E-BLW, Sept. 23, 2002. Earlier proceedings at (2002, DC ID) 89 AFTR 2d 2002-1787; and (2001, DC ID) 88 AFTR 2d 2001-5921. Years 1993, 1994, 1995, 1996. Deci-sion for Govt.

1. Collection actions—jury demand. Taxpayers' untimely demand for jury trial of govt.'s collection action was stricken: demand filed almost 5 months after counsel filed answer on taxpayers' behalf was clearly made outside requisite 10-day period; and request for leniency because tax-

payers initially appeared pro se was rejected. *Reference:* United States Tax Reporter ¶74,035.03(115). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO,

ORDER

B. LYNN WINMILL Chief Judge, United States District Court

The Court has before it Defendants' Jury Demand (Docket No. 72) and Plaintiff's Motion to Strike Defendants' Demand for Jury Trial (Docket No. 73). Under Federal Rule of Civil Procedure 38(b), a party may demand a trial by jury "by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue." Failure of a party "to serve and file a demand as required by [Rule 38] constitutes a waiver by the party of trial by jury." Fed. R. Civ. P. 38(d).

Defendants do not deny that their request for jury trial is untimely, but request that the Court allow them trial by jury because they were not previously represented by counsel. The Court notes, however, that Defendants have been represented since at least April 2002, when their counsel filed an answer in this action on Defendant's behalf. The Court finds the demand for jury trial, filed almost five months after Defendant's answer, to be untimely. The Court will therefore strike the Jury Demand.

NOW THEREFORE IT IS HEREBY ORDERED that Plaintiff's Motion to Strike Defendant's Demand for Jury Trial (Docket No. 73) is GRANTED. Defendant's Jury Demand (Docket No. 72) shall be stricken.

IT IS FURTHER ORDERED that the Court's Scheduling Order dated August 23, 2002, and entered on August 26, 2002, is AMENDED to reflect that trial will be a Court Trial rather than a Jury Trial. All other portions of the Scheduling Order remain in full force and effect.

DATED this 23rd day of September, 2002.

B. LYNN WINMILL

Chief Judge, United States District Court

¶2002-5511

TCS AUTO WHOLESALE, INC., ET AL., PLAINTIFFS v. Paul BEENE, Bette Kronbauer, and the United States of America, DEFENDANTS. U.S. District Court, Eastern Dist. of Washington, (DC WA) NO. CS-98-196-JLQ, Aug. 9, 2002. Earlier proceeding at (2002, DC WA) 90 AFTR 2d 2002-5279, 2002-2 USTC ¶50545. Decision against Taxpayer.

1. Attorney's fees and costs—substantial justification for IRS position—worker classification—reconsideration. Taxpayer was denied reconsideration of order denying them attorney's fees in connection with litigating IRS's failure to issue pre-assessment notification of worker classification under IRC §7436: IRS's position was substantially justified, despite its ultimate concession, where concession wasn't in itself dispositive; there was considerable confusion about statute's meaning and notice requirement when IRS 1st took its position; and IRS quickly made concession once precedential case was decided. *Reference:* United States Tax Reporter ¶74,305.01(25). IRC §7430; 7436.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WASHINGTON,

ORDER DENYING PLAINTIFFS' MOTION FOR ATTORNEY FEES

JUSTIN L. QUACKENBUSH SENIOR UNITED STATES DISTRICT JUDGE

Before the Court is Plaintiffs' Motion for Attorney Fees heard without oral argument on August 9, 2002. Robert E. Kovacevich represents Plaintiffs. W. Carl Hankla represents Defendants. Having reviewed the record and being fully advised in this matter, It Is Hereby Ordered that Plaintiffs' Motion for Attorney Fees is Denied for the following reasons.

1. Background

This case arose after an Internal Revenue Service (IRS) employment tax audit reclassified the workers of TCS Auto Wholesale, Inc. as employees. Terry C. Smith, the owner and president of TCS was not included in the reclassification although his dividends had been re-characterized as wages. The United States and the IRS in particular initially took the position that the IRS was not required to issue TCS a notice of determination relative to Smith before assessing employment taxes as to his wages.

After litigating the issues of the worker re-characterization in Tax Court, the Plaintiffs filed the above-entitled Complaint on May 12, 1998. The primary allegation in the Complaint was that the IRS should have issued a notice of determination relative to Smith's worker status. However, the Complaint also sought an accounting and damages.

On September 17, 1998, this court stayed this case in the interest of judicial economy to allow the related Tax Court litigation to proceed to a conclusion. The Tax Court litigation was fully settled on May 9, 2000, but the settlement did not settle the claims in this case.

On January 14, 2002, the United States moved for Summary Judgment requesting dismissal of all claims in the Plaintiffs' Complaint. Plaintiffs, in their response cited the case of *Veterinary Surgical Consultant, P.C. v. Commissioner*, 117 T.C. 141 (2001) indicating that Plaintiffs were correct in their claim that TCS should be been issued a notice of determination relative to Mr. Smith.

After reading the *Veterinary Surgical Consultant*case the United States conceded that Plaintiffs were correct on their claim concerning the notice of determination and abated the tax assessments previously assessed.

On June 20, 2002, this court entered its Order Granting in Part Defendants' Motion for Summary Judgment and Dismissing Remaining Claims as Moot. The court found that it lacked jurisdiction to hear the Plaintiffs' claim for an accounting of amounts paid to the IRS and Plaintiffs' claim for damages. The court also found that IRS officers Paul Beene and Bette Kronbauer were not proper Defendants.

The court found that Plaintiffs were the prevailing party as to their claim for a pre-assessment notice of determination and stated that Plaintiffs could seek the recovery of their attorney fees with an appropriate Application for Attorney Fees and Costs pursuant to 28 U.S.C. § 2412 and 26 U.S.C. 7430.

Plaintiffs timely filed their Motion for Attorney Fees contending that to date Plaintiffs' attorney fees totaled $14,778.45 and also sought an upward departure from the statutory rates. Plaintiffs have now withdrawn their request for upward departure.

2. Discussion

28 U.S.C. § 2412(B) provides:

> **[1]** A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney ... appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified is to be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. § 2412(B) (emphasis added).

26 U.S.C. § 7430 provides in pertinent part that a taxpayer may seek attorney fees from the Government if:

1. The taxpayer has substantially prevailed with respect to the most significant issue present. *26 U.S.C. § 7430(c)(4)(i)(II).*
2. The taxpayer meets certain net-worth requirements. *26 U.S.C. § 7430(c)(4)(A)(ii).*

However, as with 28 U.S.C. § 2412, under 26 U.S.C. 7430, if the Government's position was substantially justified, the taxpayer is not entitled to attorney fees. *26 U.S.C. § 7430(c)(4)(B)(i).*

It is not disputed that the issue of predetermination notice was the most significant issue in this case and clearly, the Plaintiff is the prevailing party as to that claim. However, Plaintiff's Motion for Attorney Fees makes no effort to distinguish between fees incurred for this issue as opposed to other issues, which is troubling but not dispositive of the issue before the court.

Plaintiff Smith has met the net-worth requirements of *§ 7430(c)4)(A)ii* with his affidavit filed with his reply brief stating that he personally has a net worth of less than $2,000,000.00 and that TCS Auto has a net worth of less than $7,000,000.00. Therefore, the only remaining issue is whether or not the Government's position concerning the pre-assessment notification issue was substantially justified. The court finds that the Government's position was substantially justified for the following reasons.

Plaintiffs' Motion for Attorney Fees states nothing about whether Defendants' position in this litigation was substantially justified. The issue was raised by the Defendants in their response. The Plaintiffs then disputed Defendants' position in their reply. However, whether or not the position of the United States was substantially justified is to be determined on the basis of the record in this case.

The Supreme Court has defined ''substantially justified'' as ''justified to a degree that could satisfy a reasonable person.'' *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). This definition creates a reasonable person standard, with a reasonable basis in law and fact. *Marlar, Inc. v. U.S.*, 151 F.3d 962 [82 AFTR 2d 98-5476] (9th Cir. 1998); *Lewis v. U.S.*, 144 F.3d 1220 [81 AFTR 2d 98-2098] (9th Cir. 1998). An incorrect position may be substantially justified, despite the fact it is later found to be wrong. *Pierce, supra*, at 487 n. 2. It can be justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565–66 and n. 2 (1988).

Therefore, the Government's concession that Mr. Smith was entitled to a Notice of Determination and consequent abatement of tax assessments does not in and of itself make its position unjustified. *Estate of Merchant v. Commissioner of Internal Revenue Service*, 947 F.2d 1390 [68 AFTR 2d 91-5803], 1395 (9th Cir. 1991) (The Government's decision to concede, rather than to litigate an arguable legal issue, does not in itself indicate that the Government's pre-settlement position was unreasonable).

This case, which Plaintiffs have stated is a case of first impression, arose from an employment tax audit of TCS conducted by Spokane I.R.S. agent Bette Kronbauer, not long after the effective date of section 7436 of the Internal Revenue Code. That statute was beneficial to taxpayers because it provided that judicial review can take place in the Tax Court on a prepayment basis, thus eliminating the need to pay a tax and then file a suit for refund in a federal district court or the Court of Federal Claims.

Ms. Kronbauer concluded that TCS was incorrectly treating four salesmen and a maintenance worker as independent contractors, and determined that they should be reclassified as employees. She also concluded that Mr. Smith should not be included in a notice of determination, even though she determined that the dividends he had received from TCS should be reclassified as wages.

After receiving Ms. Kronbauer's report, TCS filed an appeal with the IRS Office of Appeals. The Settlement Officer recommended denying the appeal finding that the issue relating to Terry Smith's wages can-

not be taken before the Tax Court and recommending that Mr. Smith should be assessed the employment taxes previously proposed.

On February 26, 1998, the Office of Appeals issued a notice of determination to TCS reclassifying workers other than Smith as employees. At about the same time, employment taxes relative to Mr. Smith were assessed against TCS without any notice of determination as to Mr. Smith. TCS then petitioned the notice of determination to the Tax Court. Mr. Smith separately petitioned the Tax Court based on a notice of deficiency in income tax for unreported income from TCS.

On May 12, 1998, TCS and Smith filed this Complaint primarily contending that under IRS section 7436(a), the IRS should have issued TCS a notice of determination allowing it to litigate Mr. Smith's worker status in Tax Court prior to the assessment of any employment taxes relative to Smith. In Plaintiffs' Status Conference Certificate, they stated that this case was ''probably a case of first impression under new law, section 7436''.

The IRS recommended that the Government should defend Plaintiff's §7436 claim, and the Government filed its Answer to Plaintiff's complaint on September 1, 1998, denying that TCS was entitled to a notice of determination relative to Mr. Smith. The Government also denied that TCS was entitled to recover on its claims for damages and an accounting. The Government also suggested that this court should stay this case in the interest of judicial economy to allow the related Tax Court litigation proceed to a conclusion, which this court did in the interest of judicial economy.

The Tax Court litigation was fully settled on May 9, 2000, but the settlement did not resolve the claims in this case. Mr. Smith's employment status was not addressed in either Tax Court decision document. Counsel for the Government unsuccessfully made attempts in 2000 and 2001 to negotiate a stipulation for a dismissal of this case with Plaintiffs' counsel.

On January 14, 2002, the United State moved for summary judgment, requesting dismissal of all claims in Plaintiffs' Complaint. Plaintiffs, in their response, cited to the case of *Veterinary Surgical Consultants, P.C. v. Commissioner*, 117 T.C. 141 (2001), which issued on October 15, 2001, indicating that Plaintiffs here were correct in their claim that TCS should have been issued a notice of determination relative to Mr. Smith. Within a few weeks, the Government conceded that TCS should have been issued a notice of determination relative to Mr. Smith and abated the taxes it had previously assessed.

Therefore, I find that the Government has established that there was considerable confusion over the meaning of section 7436 and the notice of termination requirement as to an owner such as Mr. Smith. While it took Plaintiffs to find the case of *Veterinary Surgical Consultants*, which does not reflect great diligence on the part of the Government, this alone does not rise to the level of unreasonable behavior. Until the case of *Veterinary Surgical Consultants*, there was no clear binding case law precedent on the issue. Once the Government learned of the case supporting Plaintiffs' position, the Government quickly conceded the issue, which clearly appears to be reasonable behavior with a reasonable basis in law and fact.

Whether the Government's position was substantially justified is within the court's discretion. *Bertolino v. Commissioner of the Internal Revenue Service*, 930 F.2d 759, 760 [67 AFTR 2d 91-905] (9th Cir. 1991). The position of the United States is formed only after a district court enters the picture. The actions of the IRS prior to a district court's involvement are irrelevant. *Id.* Once this court became involved in this case, the Government conceded the issue with reasonable dispatch. Once the case of first impression was decided by the Tax Court and brought to the Government's attention, the Government quickly conceded the issue and abated the tax assessments previously assessed. The court finds that until the case of *Veterinary Surgical Consultants, supra*, which issued on October

15, 2001, the Governments position was reasonable. Within a few weeks of learning of this case, the Government conceded its error and abated the assessments. Therefore this court finds that the Government's position prior to the *Veterinary Surgical Consultants* case was reasonable and that it responded timely with its concession after learning of its error.

Plaintiffs cite cases that are completely distinguishable from the instant case. For example *JJR, Inc. v. United States*, 36 F. Supp.2d 1259 [83 AFTR 2d 99-1207] (W.D. Wa. 1999) involved the treatment of dancers at adult entertainment establishments as independent contractors rather than employees, an issue which had previously been decided to the contrary of the Government's position prior to the lawsuit being filed. *Deja Vu-Lynnwood v. United States*, 88 A.F.T.R.2d 2001-6876, 2001-2 [88 AFTR 2d 2001-6876] U.S.T.C. 50, 738 (9th Cir. 2001) also involved treatment of dancers at adult entertainment establishment where the IRS had unsuccessfully litigated its position across the country, and offered no authority for its same position in the instant lawsuit. Plaintiff's citation of additional tax cases, such as *Van Camp & Bennion P.S. v. United States*, 78 A.F.T.R.2d 96-5843 [78 AFTR 2d 96-5843] and *Seeds Inc. v. United States*, 82 A.F.T.R.2d 98-6426 [82 AFTR 2d 98-6426] are equally distinguishable. *Mair, Camiel and Kovach*, 82 A.F.T.R.2d 98-5946 [82 AFTR 2d 98-5946] is also of little help as it addressed whether attorney fees may be awarded a member of a law firm representing the firm, or whether his work was *pro se*. All of these cases are silent as to the pre determination notice to an owner officer of a corporation, and thus, are not instructive as to whether the Government's position was substantially justified in this case.

Plaintiffs' claim that *Ding v. U.S.* 200 F.3d 587 [84 AFTR 2d 99-7517] (9th Cir. 1999) is controlling law is also without merit. In *Ding*, the court held that taxpayers were not entitled to deduct pass-through losses from Subchapter S corporations for purposes of calculating their self-employment tax liability. The case makes no mention of any right to a pre-assessment notice of determination as to an owner of a corporation like Mr. Smith. Likewise, Plaintiffs' attempt to invoke the doctrine of *res judicata* from cases in Tax Court is unpersuasive, as it the Government's position after this case was filed, not prior to that time that is at issue.

For the foregoing reasons, it is the finding of this court that the Government's position in this case was substantially justified, and that, therefore, Plaintiffs' Motion for Attorney Fees must be and is Denied.

It Is So Ordered. The Clerk is directed to enter this Order, forward copies to counsel, and to close this file.

Dated this 9th day of August, 2002

JUSTIN L. QUACKENBUSH

SENIOR UNITED STATES DISTRICT JUDGE

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION

JUSTIN L. QUACKENBUSH SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WASHINGTON TCS AUTO WHOLESALE, INC., And TERRY SMITH, Plaintiff, v. PAUL BEENE, District Director, Internal Revenue Service; BETTE KRONBAUER, Internal Revenue Auditor; and THE UNITED STATES OF AMERICA Defendant.

NO. CS-98-0196 JLQ

Before the Court is the Plaintiffs' Motion for Reconsideration of the court's August 9th Order Denying Plaintiffs' Motion for Attorneys fees. This motion is heard without oral argument. Plaintiffs are represented by Robert E. Kovacevich. The United States of America, the defendant, is represented by W. Carl Hankla.

It Is Hereby Ordered that Plaintiffs' Motion for Reconsideration is DENIED. The Plaintiffs' Motion raises no new legal or factual arguments which would warrant a reconsideration of the court's ruling. The court's August 9th order states with sufficiently compelling clarity the grounds for a

denial of attorneys fees. Consequently, the Motion for Reconsideration must be and is DENIED.

It is So Ordered. The Clerk is directed to enter this Order and forward copies to counsel.

Dated this 26th day of August, 2002

JUSTIN L. QUACKENBUSH

SENIOR UNITED STATES DISTRICT JUDGE

¶2002-5512

William WALLER, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANTS. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-1190-KJD(PAL), Aug. 7, 2002. Year 1998. Decision for Govt.

1. Collection due process (CDP)—review of administrative determination—frivolous return penalties—summary judgment—jurisdiction. IRS's administrative determination to proceed with collection of IRC §6702 penalty for year tax protester filed "zero" return was upheld on summary judgment: penalty assessment was valid where return was facially and substantially incorrect and frivolous; Appeals Officer's reliance on Forms 4340 satisfied IRC §6330(c)(1)'s verification requirement; and record otherwise showed all administrative prerequisites were met. Also, delegation of authority argument and challenge to IRS's failure to issue Form 17A were meritless; IRC §6702 provided statutory authority for penalty; 5 USC §500(d) didn't give taxpayer right to have self-styled "taxpayer representative" represent him at CDP hearing; and district court lacked jurisdiction to consider taxpayer's challenges to his tax deficiencies. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(10); 63,305.01(10). IRC §6330; 6702.

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA,

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That judgment is entered for Defendants and against Plaintiffs.

August 7, 2002

Date

LANCE S. WILSON

Clerk

(By) Deputy Clerk,

ORDER

Kent J. Dawson United States District Judge

This matter comes before the Court on Defendant's Motion for Summary Judgment (#3). Plaintiff filed a response in opposition (#10).

I. Factual and Procedural History

In his complaint, Plaintiff alleges that the IRS improperly determined that collection actions against him should not be restricted. Plaintiff now seeks to set aside the IRS's determination. The collection activity at issue stems from a frivolous return penalty the IRS assessed against Plaintiff for a return he filed for the 1998 tax year. In February of 2000, Plaintiff filed Form 1040, U.S. Individual Income Tax Return for the 1998 tax year. This return had zeroes on all lines which reflected amounts of income earned or taxes due. Attached to the return was a two page document which set forth arguments as to why Plaintiff did not believe that he owed federal income taxes for 1998. The IRS assessed a $500 civil penalty against Plaintiff under 26 U.S.C. § 6702 for filing the above described tax return. Section 6702 assesses a $500 civil penalty if an individual "files what purports to be a return" but which contains "information that on its face indicates that the self-assessment is substan-

tially incorrect'' and is due to ''a position which is frivolous.'' Plaintiff's self assessment of his 1998 income tax liability was substantially incorrect in that he entered zeros for all income and tax information. According to the attached statement, Plaintiff's self-assessment was based on the position that there is no statutory income tax liability that applies to him and that his wages do not constitute income. Courts have found both of these positions to be frivolous and patently without merit. See Sisemore v. United States, 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir 1986); Olson v.United States, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985). Because Plaintiff's self-assessment was on its face substantially incorrect and was based on frivolous positions, there is no doubt as to the validity of the penalty.

On November 30, 2000, the IRS sent Plaintiff a ''Final Notice-Notice of Intent to Levy and Notice of Your Rights to a Hearing.'' This letter notified Plaintiff of his right to appeal the IRS's levy within 30 days by requesting a Collection Due Process Hearing (''CDP Hearing''). Plaintiff filed Form 12153 ''Request for a Collection Due Process Hearing'' which the IRS received on December 21, 2000. Plaintiff's CDP Hearing was held on August 21,2001 in Las Vegas, Nevada before Appeals Team Manager Tom Aneau. Plaintiff attended the hearing with Cynthia Neun, his ''taxpayer representative.'' On Sept 20, 2001, the IRS Appeals Office sent, by certified mail, a ''Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330.'' The letter informed Plaintiff that the proposed collection action should be allowed to proceed. The letter also informed Plaintiff of his right to dispute the determination by filing a complaint in Federal District Court within 30 days. Plaintiff filed a timely complaint with this Court. Defendant has now filed a motion for summary judgment.

II. Standard of Review

Summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Fed. R. Civ. P. 56(e). The evidence, as well as all justifiable inferences drawn from it, must be viewed in the light most favorable to the nonmoving party. See Matsushita, 475 U.S. at 587. Summary judgment shall be entered ''against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'' See Celotex, 477 U.S. at 322.

III. Analysis

[1] From what can be gleaned from it, Plaintiff's complaint contains a barrage of meritless arguments which he insists this Court must address. The only genuine issue before this Court is whether the IRS Appeals Office met all requirements of applicable law and administrative procedures when making its determination that the collection action against Plaintiff should continue unrestricted. This issue will be addressed first, followed by a discussion of Plaintiff's purely meritless arguments.

A. Collection Procedure

Procedures for administrative collection actions are found in 26 U.S.C. § 6330 which requires that: (1) the IRS give 30 days' written notice of the taxpayer's right to a CDP Hearing before making a levy; (2) a hearing be conducted by an officer or employee who has no prior involvement with the subject tax liability; (3) the Appeals Office obtain verification from the IRS that the requirements of any applicable law or administrative procedure have been met; (4) the taxpayer may raise any relevant issue relating to the unpaid tax or the

proposed levy at the time of the CDP Hearing, including appropriate spousal defenses, challenges to the collection actions and offer of collection alternatives; (5) the taxpayer may challenge the existence of the underlying tax liability under some circumstances; and (6) the final determination by the Appeals Officer shall take into consideration (a) the verification that applicable law and administrative procedures have been met, (b) the issues raised by the taxpayer, and (c) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

A review of Plaintiff's complaint illustrates that all of the above requirements have been met: (1) Plaintiff received a timely notice of levy and then requested a CDP hearing; (2) Plaintiff attended his CDP Hearing on August 21, 2001 with Tom Aneau, the appeals team manager who had no prior involvement with the subject tax liability; (3) the Appeals Office obtained Form 4340 from the IRS which serves as verification that the requirements of any applicable laws or administrative procedures were met; (4) the only relevant issue raised by the Plaintiff at the appeals hearing was his claim that he did not receive a statutory notice and demand for payment (he raised no appropriate defenses pertaining to the proposed collection action and offered no collection alternatives); (5) At the hearing, Plaintiff challenged the liability for the penalty and whether the return he filed was frivolous, arguments determined to be frivolous by the appeals officer; and (6) in the final determination, the appeals officer stated that he took into consideration all required statutory elements.

B. Plaintiff's Arguments

1. Inadequacy of Notice

Plaintiff repeatedly argues that letters and notices sent to him by the IRS are invalid because there is no evidence of any delegated authority from the Secretary of Treasury to the various IRS employees. Relevant statutes and regulations demonstrate, however, that the Secretary does have the power to collect taxes, and that such power can be delegated to local IRS agents. 26 U.S.C. § 6301 provides that "[t]he Secretary shall collect the taxes imposed by the internal revenue laws." The actual task of collecting the taxes, however, has been delegated to local IRS directors. See 26 C.F.R. § 301.6301-1 ("The taxes imposed by the internal revenue laws shall be collected by district directors of internal revenue."). The delegation of authority down the chain of command, from the Secretary, to the Commissioner of Internal Revenue, to local IRS employees constitutes a valid delegation by the Secretary to the Commissioner, and a re-delegation by the Commissioner to the delegated officers and employees. See 26 U.S.C. § 7701(a)(11)(A), (12)(A)(i); 26 C.F.R. § 301.7701-9; Hughes v. United States, 953 F.2d 531, 536 [69 AFTR 2d 92-472] (9th Cir. 1991).

2. Adequacy of Supporting Documentation

Plaintiff contends the IRS has never produced a document supporting imposition of the penalties at issue. He does not believe that a computer transcript is adequate to verify an assessment. At his CDP Hearing, the Appeals Officer provided Plaintiff with Form 4340, "Certificate of Assessments and Payments" for the penalty assessment. The Ninth Circuit has held that a Form 4340 is sufficient evidence to support a grant of summary judgment on a claim that the IRS failed to issue notice of assessment and demand for payment. See Huff v. United States, 10 F.3d 1440, 1446–1447 [72 AFTR 2d 93-6682] (9th Cir. 1993); Hughes, 953 F.2d at 535. Official certificates, such as Form 4340, can constitute proof of the fact that the assessments actually were made. See Hughes, 953 F.2d at 535.

3. Statutory Notice and Demand for Payment

Plaintiff claims he never received the required Statutory Notice and Demand for payment with regard to the penalties at issue. Plaintiff received notice of the assess-

ment and an opportunity to appeal that assessment. In his affidavit presented to Appeals Team Manage Aneau at the CDP Hearing, Plaintiff contends that he should have received a Form 17A, rather than the notice he received. Form 17A relates to assessment of unpaid income tax *not* a frivolous return penalty, which is the subject tax liability in this case. In addition, Notice and demand is not required to be sent on any particular form so long as the requisite information is included. See id. at 536. The Notice of Intent to Levy, which Plaintiff received and which he includes in his complaint as exhibit B-4, satisfies the requirements to serve as Statutory Notice and Demand. See id.

4. Regulation Requiring Plaintiff to Pay Penalty

Plaintiff contends that no Treasury Department regulation requires that he pay the penalties at issue and Defendant has not produced any such regulation. 26 U.S.C. § 6702(a), however, provides the statutory authority for assessing the penalty and does not by its terms require any implementing regulations. See Hoffman v. United States, No. C02-5023RJB, 2002 WL 1299991, at 5 [89 AFTR 2d 2002-2647] (W.D. Wash. May 3, 2002).

5. Underlying Liability for Income Tax

Plaintiff contends that no statute establishes an underlying liability for the income tax to which the penalties relate, and the IRS has not identified any such statute. Plaintiff's liability for tax deficiencies (what he owed in taxes for the year 1998) is not at issue in this case, although he consistently tried to make it so at the CDP Hearing and in the instant complaint. Plaintiff's remedy with regard to the liability for tax deficiencies does not lie in this Court. This Court does not have jurisdiction to consider Plaintiff's income tax deficiencies. See 26 U.S.C. § 6213(a); Moore v. Commissioner, 114 T.C. 171, 175 (2000).

6. Denial of representation

Plaintiff contends that the appeal team manager prevented Cynthia Neun from representing him at the appeals hearing. Plaintiff contends that this violates 5 U.S.C. § 500(d). Section 500 governs who may practice before a federal agency. This section specifically allows licensed attorneys as well as certified public accountants to represent a person before the Internal Revenue Service. See 5 U.S.C. § 500(b), (c). Plaintiff contends that § 500(d)(1) allows any individual to represent another before a federal agency. Plaintiff is clearly mistaken. Section 500(d) states:

> (d) This Section does not—
>
> (1) grant or deny to an individual who is not qualified as provided by subsection (b) or (c) of this section the right to appear for or represent a person before an agency or in an agency proceeding;

Contrary to Plaintiff's position, § 500(d)(1) does not allow him to have anyone be his representative in an agency matter. Rather this section is neutral on representation not specifically provided in subsections (b) or (c). Plaintiff's claim that the appeal officer violated 5 U.S.C. § 500(d)(1) is meritless.

III. Conclusion.

Plaintiff's 1998 Form 1040 was clearly frivolous and the civil penalty was validly assessed. More importantly, for purposes of this action, the Defendant properly followed the requirements of all applicable laws and administrative procedures when assessing the civil penalty and then determining the collection action should continue unrestricted. Additionally, the arguments that the Court could glean from Plaintiff's disjunctive complaint and opposition to Defendant's motion are purely meritless. Finally, because Plaintiff's complaint lacks any merit, had the Defendant moved for Rule 11 sanctions this Court would have freely granted such motion.

Accordingly, IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (#3) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Complaint (#1) is DISMISSED.

Dated this 6th day of August, 2002.

Kent J. Dawson

United States District Judge

¶2002-5513

In the Matter of the Tax Indebtedness of Jeffrey K. TOWNLEY & Anne C. TOWNLEY. U.S. District Court, Eastern Dist. of Washington, (DC WA) NO. CS-01-0211-JLQ, Aug. 1, 2002. Earlier proceedings at (2002, DC WA) 89 AFTR 2d 2002-1075; and (2001, DC WA) 88 AFTR 2d 2001-6724. Decision against Taxpayers in part.

1. Actions against U.S.—libel—Federal Tort Claims Act. Pro se taxpayers' motion for judgment on counterclaim that IRS officer made libelous statements about them in connection with levy was reserved, pending taxpayers' submission of proof of jurisdictional basis for claim and effect thereon of FTCA's sovereign immunity bar to tax-related and libel suits against govt. *Reference:* United States Tax Reporter ¶76,557.53(12).

JAMES A. MCDEVITT United States Attorney 300 Thomas S. Foley U.S. Courthouse 920 West Riverside Spokane, Washington 99201-1008
ROBERT P. MCINTOSH Trial Attorney, Tax Division U.S. Department of Justice P. O. Box 683 Ben Franklin Station Washington, D.C. 20044-0683

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WASHINGTON,

ORDER TO SHOW CAUSE RE: JURISDICTION OVER COUNTERCLAIM

JUSTIN L. QUACKENBUSH SENIOR UNITED STATES DISTRICT JUDGE

[1] Before the court is a motion by Respondents Jeffrey Kent Townley and Anne Constance Townley for "Entry of Default and Judgment on Counterclaim Pursuant to Alleged FRCP 55" (C.R. 43). The Townleys are proceeding pro se. The United States of America is represented by James A. McDevitt, United States Attorney for the Eastern District of Washington, and Robert P. McIntosh, Trial Attorney, Tax Division, United States Department of Justice.

On October 9, 2001, this court entered an Order approving a petition by the United States under 26 U.S.C. § 6334 to levy on the Townleys' principal residence to satisfy part or all of their unpaid tax liabilities. (C.R. 19). The Townleys filed a timely Notice of Appeal to the Ninth Circuit Court of Appeals on March 11, 2002. (C.R. 37). The Townleys now seek to have a judgment of default entered against the United States in a counterclaim herein, not previously addressed by this court, in which the Townleys claim that a United States Revenue Officer perpetrated actions allegedly constituting "trespass on the case." (C.R. 10).

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment as to one or more but fewer than all the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order which adjudicates fewer than all the claims shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims. Fed. R. Civ. P. 54(b). Since this court's October 9, 2001 Order (C.R. 19) approving the levy petition did not adjudicate the Townleys' counterclaim, the Order has not terminated this action.

Where an order by the district court makes no mention of a counterclaim, and there has been no disposition thereof, the order does not comply with Rule 54(b) and is therefore not appealable. *Island Service Co. v. Perez*, 255 F.2d 559, 561 (9th Cir. 1957). While the filing of a notice of appeal normally divests the district court of those aspects involved in the appeal, *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982), only a judgment consistent with the requirements of Rule 54(b) may be appealed. Hence, in the case *sub judice*, this court may adjudicate the

outstanding counterclaim if there is an independent jurisdictional basis for it.

The federal courts have a duty to raise any jurisdictional defects not raised by the parties themselves. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908). The Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b) and §§ 2671–80, operates as a limited waiver of the sovereign immunity of the United States, a waiver which should not be extended beyond that which Congress intended. *United States v. Kubrick*, 444 U.S. 111, 117–19 (1979). The FTCA contains a list of exceptions at § 2680 as to which waiver of sovereign immunity has not been made. 28 U.S.C. § 2680. These exceptions include ''[a]ny claim arising in respect of the assessment or collection of any tax,'' § 2680(c); and ''[a]ny claim arising out of ... malicious prosecution, abuse of process, libel, slander, misrepresentation, [or] deceit,'' § 2680(h).

The Townleys' counterclaim alleges, *inter alia*, that a United States Revenue Officer made slanderous statements and published libelous writings to their detriment, thereby perpetrating ''an ongoing Trespass on the Case against Suitors.'' (C.R. 10 at 4). In light of 28 U.S.C. § 2680, the nature of the counterclaim raises serious questions as to whether this court has subject matter jurisdiction over the counterclaim.

Accordingly, IT IS HEREBY ORDERED that Respondents Jeffrey Kent Townley and Anne Constance Townley shall have 25 days from the date of this Order to file with the Clerk of the Court and serve on opposing counsel a memorandum setting forth the basis for this court's jurisdiction over their counterclaim.

IT IS FURTHER ORDERED that, in addition to filing their memorandum with the Clerk of the Court, Respondents shall also mail a copy of the memorandum, on or before the filing date, to the attorneys for the United States in this matter, as follows:

JAMES A. MCDEVITT

United States Attorney

300 Thomas S. Foley U.S. Courthouse

920 West Riverside

Spokane, Washington 99201-1008

ROBERT P. MCINTOSH

Trial Attorney, Tax Division

U.S. Department of Justice

P.O. Box 683

Ben Franklin Station

Washington, D.C. 20044-0683

If the Respondents do not file a responsive memorandum within 25 days of service of this Order, or if the responsive memorandum does not set forth valid grounds for the jurisdiction of this court over this matter, the Court will enter an ORDER DISMISSING THE RESPONDENTS' COUNTERCLAIM WITH PREJUDICE.

Respondents' Motion for Entry of Default and Judgment on Counterclaim Pursuant to Alleged FRCP 55 (C.R. 43) is RESERVED pending this court's ruling on jurisdiction of the counterclaim herein.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and forward copies to Jeffrey K. Townley and Anne C. Townley and to counsel for the Petitioner.

DATED this 1st day of August, 2002.

JUSTIN L. QUACKENBUSH

SENIOR UNITED STATES DISTRICT JUDGE

¶2002-5514

Joseph UVEGES, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-1348-RLH (LRL), Sept. 16, 2002. Years 1997, 1998. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties—summary judgment. IRS's administrative determination to proceed with collection of IRC §6702 penalty for years tax protester filed ''zero'' returns was upheld on summary judgment: taxpayer's liability for, and validity of IRS's

assessment of penalty was supported by fact returns were facially and substantially incorrect and frivolous; challenge to Compliance Technical Support Manager's authority to send lien notice was meritless; and Appeals Officer's reliance on Forms 4340 satisfied IRC §6330(c)(1)'s verification requirement. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(10). IRC §6330; 6702.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA,

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed. Judgment is entered in favor of defendants United States of America and against plaintiffs Joseph Uveges.

September 17, 2002

Date

LANCE S. WILSON

Clerk

/s/

(By) Deputy Clerk,

ORDER

ROGER L. HUNT United States District Judge

(Motion for Summary Judgment-#8)

Before the Court is Defendant's Motion for Summary Judgment (#8), filed June 14, 2002. The Court has also considered Plaintiff's Opposition (#11), filed July 25, 2002.

BACKGROUND

Plaintiff asks this court to grant three requests: 1) To ''declare invalid'' a collection due process determination made by the IRS against him; 2) To order reim-bursement by Defendant of Plaintiff's costs associated with bringing this action; and 3) To award punitive damages based on Defendant's conduct.

Following a pattern of behavior the Court has yet to understand, Plaintiff filed Form 1040, U.S. Individual Income Tax Return, for the 1997 and 1998 tax years. Although the included Forms W-2 showed income received by the Plaintiff, both Returns contained zeroes on all lines reflecting income earned or taxes due and had attached statements outlining reasons for their belief that they had no income to report and did not, therefore, owe federal income tax.

Pursuant to Section 6702, the IRS assessed two $500 civil penalties on Plaintiff for filing the stated returns. Section 6702 assess a $500 civil penalty if an individual ''files what purports to be a return'' but which contains ''information that on its face indicates that the self-assessment is substantially incorrect'' and is due to ''a position which is frivolous.''

The IRS posted a Notice of Federal Tax Lien for unpaid civil penalties pursuant to Internal Revenue Code §§ 6321, 6322, and 6323 and informed Plaintiff of the lien by certified mail on or around October 30, 2000. Plaintiff then requested from Defendant a collection due process hearing regarding the frivolous return penalties and collection alternatives which was held on September 24, 2001, a transcript of which is attached to Plaintiff's Complaint (#7).

Finally, on October 16, 2001, the IrS sent Plaintiff a Notice of Determination Concerning Collection Actions(s) Under Section 6320 an /or 6330 (Notice of Determination) informing Plaintiff that the proposed levy to collect the frivolous return penalty would not be restricted. Attached to the Notice of Determination was Attachment 3194 explaining that the decision was based on the determination that the IRS fully complied with all applicable laws, regulations, and administrative procedures. The Notice of Determination also informed Plaintiff that any dispute of the determination could be made within 30 days in the appropriate United States District Court. Plaintiff timely filed with this Court and

Defendant now moves for summary judgment.

DISCUSSION

I. Summary Judgment Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only "where the record before the court on the motion reveals the absence of any material issue of fact and [where] the moving party is entitled to judgment as a matter of law." *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982) (quoting *Portaland Retail Druggist Ass'n v. Kaiser Found. Health Plan*, 662 F.2d 641, 645 (9th Circ. 1981))f, *cert. denied*, 460 U.S. 1085 (1983). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing version of the truth." *Sec. & Exch. Comm'n v. Seaboard Corp.*, 677 F.2d 1289, 1293 (9th Cir. 1982) (citation omitted).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view all facts and draw all inferences in the light most favorable to the responding party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). *See also Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983). Once this burden has been met, "[t]he opposing party must then present specific facts demonstrating that there is a factual dispute about a material issue." *Zoslaw*, 693 F.2d at 883 (citation and internal quotes omitted).

II. Analysis

Plaintiff first asks that the collection due process determination made against him by the IRS be declared invalid. Since the Tax Court does not have jurisdiction to consider frivolous return penalties, *See Van Es v. Commissioner*, 115 T.C. 324 (2000), the matter is appropriately before this court. 26 U.S.C. § 6320(c), 6330(d)(1)(B).

26 U.S.C. § 6702 assigns liability in the amount of five hundred dollars ($500) to a person filing a frivolous tax return. The Secretary of the Treasury or his delegate, such as the IRS.[1] assesses this penalty in the same manner as a tax, and any reference to a "tax" in Title 26 also includes this penalty. 26 U.S.C. § 6671. Section 6201 of the Code authorizes the Secretary to make any necessary tax assessments. In the case of a frivolous return penalty, the deficiency procedures of Title 26, Chapter 63, subchapter B, do not apply, 26 U.S.C. § 6703(b). The failure to pay the penalty results in a lien on the person's property. 26 U.S.C. § 6321. To ensure the validity of the lien, the Secretary files the lien with, in this case, the Clark County Recorder, 26 U.S.C. § 6323(f)(1)(A), and sends a notice of filing of the lien to the person, 26 U.S.C. § 6320(a). The Secretary must also inform the person of his right to a hearing at the same time. 26 U.S.C. § 6320(a)(3)(B). For the purposes of this Order, the procedures of the collection due process hearing, 26 U.S.C. § 6330(c), apply to the lien hearing, 26 U.S.C. § 6320(c). If the person requests a hearing, the hearing officer must "obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." 26 U.S.C. § 6330(c)(1). At the hearing, the person may also raise any relevant issue, including spousal defenses, the appropriateness of the collection action, and any collection alternatives. 26 U.S.C. § 6330(c)(2)(A). The person "may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. § 6330(c)(2)(B).

The "underlying tax liability" in this case is the frivolous return penalty. *See* 26 U.S.C. § 6671; *see also* 26 C.F.R. 301.6321-1. Plaintiff properly challenged the validity of the frivolous return penalties

[1] The Court will use the collective term "Secretary" to refer to the Secretary of the Treasury and any delegates. *See* 26 U.S.C. § 7701(a)(11)(B). The Secretary of the Treasury may delegate much of his authority and responsibilities to others by prescribing rules and regulations, among other methods. 26 U.S.C. § 7805(a); *see also* 26 C.F.R. §§ 301.7701-9, 301.7701-10.

at the collection due process hearing because the statutory deficiency procedures do not apply to frivolous return penalties, 26 U.S.C. § 6703(b), and thus Plaintiff had no prior opportunity to dispute the penalties. The validity of the income taxes that Plaintiff owes for 1997 and 1998 is not at issue in this action. On the other hand, the tax returns that Plaintiff filed for are relevant because they determine whether assessment of the frivolous return penalty was proper.

Section 6330(d) is silent on the standard that the Court should use to review the determination of the collection hearing. However, the legislative history indicates that if the validity of the underlying tax liability was properly at issue, then review is *de novo*. H. Conf. Rep. 105–599 (1998); *see also Dogwood Forest Rest Home, Inc. v. United States*, 181 F. Supp. 2d 554, 559 [89 AFTR 2d 2002-728] (M.D.N.C. 2001); *MRCA Info. Servs. v. United States*, 145 F. Supp. 2d 194, 198–99 [89 AFTR 2d 2002-694] (D. Conn. 2000); *Sego v. Commissioner*, 114 T.C. 604, 610 (2000). The Court will use that standard of review.

There is no doubt as to the validity of the penalty. Plaintiff submitted Form 1040 for 1997 and 1998 with zeros in the income section and Forms W-2 showing income considerably more than zero. Motion (#8), Exhibits A and B. He also attached an explanation of how no provisions of the Internal Revenue code make him liable for the income tax, how his wages are not income, and other matters. Wages are income, 26 U.S.C. § 61, upon which Plaintiff owes a tax, 26 U.S.C. § 1, and courts—including this one—have found arguments to the contrary to be tired and frivolous long before Plaintiff filed the tax returns at issue. *See, e.g., Sisemore v. United States*, 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir. 1986); *Coleman v. Commissioner*, 791 F.2d 68, 70 [57 AFTR 2d 86-1420] (7th Cir. 1986); *Sullivan v. United States*, 788 F.2d 813, 815 [57 AFTR 2d 86-1226] (1st Cir. 1986); *Olson v. United States*, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985); *In re Hopkins*, 192 B.R. 760, 762–63 [76 AFTR 2d 95-7748] (D. Nev. 1995); and other cases too numerous to cite. On its face, Plaintiff's tax returns were substantially incorrect and frivolous, thus making Plaintiff liable for the frivolous return penalty. 26 U.S.C. § 6702. The assessments of the frivolous return penalties are valid.

No genuine issue of material fact exists over the verification of all legal and administrative requirements. Plaintiff states that the "Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC § 6320," Compl. (#1) Exhibit C-1, was sent by the Compliance Technical Support Manager, an official with the authority to send such a notice. *See* D.O. No. 196, 1982-2 C.B. 748 (1982). The Secretary of the Treasury delegated to the local Internal Revenue Service office collecting the penalty the responsibility of providing the verification to the hearing officer. 26 C.F.R. § 301.6320-1(e)(1).[2] The hearing officer properly relied on Forms 4340, Defendant's Motion (#3) Exhibit C, for such verification. *See Huff v. United States*, 10 F.3d 1440, 1446–47 [72 AFTR 2d 93-6682] (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994); *Hughes v. United States*, 953 F.2d 531, 538–40 [69 AFTR 2d 92-472] (9th Cir. 1992); *see also Davis v. Commissioner*, 115 T.C. 35, 41 (2000). The Forms 4340 show that the frivolous return penalty had been assessed, that notices had been mailed to Plaintiff, and that Plaintiff had requested a hearing. Because, as noted above, the tax returns are clearly frivolous, the hearing officer did not err in his verification that the requirements of any applicable law and administrative procedures had been met. Therefore, the collection due process determination is valid.

Without declaring defendant's collection due process determination invalid, the Court has no reason to reach Plaintiff's requests for costs or damages.

CONCLUSION

Accordingly, and for good cause appearing,

[2] Plaintiff's repeated insistence that he see documents signed by the Secretary of the Treasury, or by a person with a delegation order signed by the Secretary of the Treasury, Compl. (#7), Exhibit D, and Opp. (#11) is frivolous.

IT IS HEREBY ORDERED that Defendant's Motion for Summary Judgment (#8) is GRANTED.

Dated: September 16, 2002.

ROGER L. HUNT

United States District Judge

¶2002-5515

Rainer B. WAGNER and Sonja WAGNER, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) Case No.: CV-S-01-1232-RLH (RJJ), Aug. 15, 2002. Year 1997. Decision for Govt.

1. Collection due process—review of administrative determination—jurisdiction. Taxpayers' action to set aside allegedly invalid CDP determination to collect taxes and frivolous return penalty was dismissed for lack of jurisdiction: although court of limited jurisdiction, case precedent showed that Tax Court had primary jurisdiction over income tax disputes. But, taxpayers had 30 days to appeal to Tax Court. *Reference:* United States Tax Reporter ¶63,305.01(10). IRC §6330; 7422.

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA,

ORDER

ROGER L. HUNT United States District Judge

(Motion to Dismiss - #3)

Before the Court is Defendant's Motion to Dismiss (#3), filed May 8, 2002. The Court has also considered Plaintiff's Opposition (#5), filed May 17, 2002.

BACKGROUND

For the calendar year 1997 Plaintiffs attached a statement to their return indicating that they were not required to file a federal income tax return, that they had ''zero'' income and that there was no U.S. Code section which made them ''liable'' for any income tax. The Defendant Internal Revenue Service (''IRS'') assessed a penalty for filing a frivolous return.

On December 26, 2000, the IRS sent Plaintiffs, via certified mail, a notice informing them of their intent to levy to collect the outstanding income tax and civil penalties assessed against them for their 1997 tax year pursuant to 26 U.S.C § 6330. The collection activity with respect to the civil penalty assessments resulted from the federal income tax returns filed by Plaintiffs for their 1997 tax year.

Included with the notice of intent to levy was information notifying Plaintiffs of their right to request a Collection Due Process (''CDP'') hearing pursuant to 26 U.S.C. § 6330(a). On July 30, 2001, a CDP hearing was held. At the hearing, the appeals officer relied on IRS computer-generated documents that detailed the activity of the assessments made against Plaintiffs for the 1997 tax year.

On September 21, 2001 pursuant to 26 U.S.C. § 6330, Defendant then sent Plaintiffs a Notice of Determination concerning collection actions for the amount of unpaid income tax and civil penalties owed. In this Notice, Defendant informed Plaintiffs of their right to judicial review of the determination in the appropriate United States Tax Court. On October 19, 2001, Plaintiffs filed a complaint asking that this Court set aside the CDP determination as invalid. Defendant requests this Court to dismiss the complaint for lack of subject matter jurisdiction.

DISCUSSION

[1] Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for ''failure to state a claim upon which relief can be granted.'' ''[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'' *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see also Yamaguchi v. U.S. Dept of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). All factual allegations set forth in the complaint ''are taken as true and construed in the light most favorable to [p]laintiffs.'' *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.

1999). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proven consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

Under Fed. R. Civ. P. 12(b)(3), lack of subject matter jurisdiction, unlike many other objections to jurisdiction of a particular court, cannot be waived and can be raised at any time by a party to an action or by the court *sua sponte*. *Csibi v. Fustos*, 670 F.2d 134 (9th Cir. 1982).

[1] In general, the United States is immune from suit under the doctrine of sovereign immunity unless it explicitly waives such immunity. *United States v. Mitchell*, 445 U.S. 535, 538 (1980). The plaintiff has the burden of establishing that the government has waived sovereign immunity and to identify the specific statutory provision containing the waiver. *See Baker v. United States*, 817 F.2d 560, 562 (9th Cir. 1987). The waiver must be express and will not be implied. *Lane v. Pena*, 518 U.S. 187, 192 (1996). The scope of a waiver of sovereign immunity is to be strictly construed in favor of the sovereign. *Dep't of the Army v. Blue Vox, Inc.*, 525 U.S. 255, 261 (1999).

Title 26 U.S.C. § 6330(d) provides a limited waiver of sovereign immunity to taxpayers who disagree with the outcome of a CDP hearing. Pursuant to 26 U.S.C. § 6330(d)(1)(A), a person may, within 30 days of receiving a Notice of Determination, appeal such determination in a United States Tax Court, provided that the Tax Court has jurisdiction with respect to such matter. If the Tax Court does not have jurisdiction of the underlying tax liability, the appeal shall be made to a district court of the United States. 26 U.S.C. § 6330(d)(1)(B). If a court determines that the appeal was to an incorrect court, a person shall have 30 days after the court so determines, to file an appeal with the correct court. *Id.*

In their Opposition, Plaintiffs contest the jurisdiction of the Tax Court, stating that the Tax Court is barred from ruling on matters of law. The Supreme Court has held, however, that the Tax Court, which is an Article I court, is a "Court of Law" under the Appointments Clause. *Freytag v. Comm'r*, 501 U.S. 868, 888, 891 [68 AFTR 2d 91-5025] (1991); *see also Crawford v. C.I.R.*, 266 F.3d 1120, 1121 [88 AFTR 2d 2001-5962] (9th Cir. 2001)("The Tax Court is an Article I court created by Congress with limited jurisdiction to rule on deficiencies assessed by the government on taxpayers.").

Under 26 U.S.C. § 7442, the U.S. Tax Court has jurisdiction over matters of federal income tax. Treas. Reg. § 301.6330-1T(f)(2), Q-F3/A-F3 states that the Tax Court has jurisdiction over matters related to income tax, including levies imposed for the purpose of collecting taxes. *See Krugman v. Comm'r*, 112 T.C. 230, n.6 (1999) (noting that with respect to an underlying income tax liability, "the Tax Court has jurisdiction to review determinations under sec. 6330 relating to proposed levies").

Here, Defendant IRS sought to impose a levy on Plaintiffs for failing to pay income tax and the corresponding penalties. Although a court of limited jurisdiction, the Tax Court has primary jurisdiction over income tax disputes. Because the underlying issue set forth in the Notice of Determination involves income tax liability and related penalties, this Court lacks subject matter jurisdiction. Plaintiffs' failure to petition the proper court for review of the IRS's administrative determination is not fatal to their claim, since Section 6330(d) permits refiling in the correct court within 30 days after this Court's determination.

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#3) is GRANTED.

Dated: August 15, 2002.

ROGER I. HUNT

United States District Judge

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed. Judgment is entered in favor of defendant United States of America and against plaintiffs Rainer B. Wagner and Sonja Wagner.

August 21, 2002

Date

LANCE S. WILSON

Clerk

/s/

(By) Deputy Clerk,

¶2002-5516

Dennis E. WALKER, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of California, (DC CA) CASE NO. 01-CV-2058, Aug. 12, 2002. Years 1996, 1997. Decision for Govt.

1. Collection due process—review of administrative determination—prior opportunity to contest deficiencies. Govt. was granted motion to dismiss Count 1 of taxpayer's IRC §6330 complaint alleging IRS denied him due process in collecting his trust fund penalty liability: taxpayer couldn't dispute his underlying tax liability at CDP hearing where he received but failed to contest deficiency notice issued to him before statute's effective date. Case law showed that deficiency notice provided to taxpayers before statute's effective date met IRC §6330(c)(2)(B)'s ''opportunity to dispute'' requirement; taxpayer's good faith objections to liability and statutory compliance were irrelevant; his reliance on case law in which IRS failed to issue deficiency notice was misplaced; and claim that statute's legislative intent was to preclude ''bootstrapping'' of prior opportunities to dispute liability was rejected. *Reference:* United States Tax Reporter ¶63,305.01(15). IRC §6330.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA,

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNT 1

Napoleon A. Jones, Jr. US District Court Judge

This matter comes before the Court on Defendant United States of America's (''Defendant'') Motion to Dismiss Count 1. For the reasons set forth below, Defendant's motion is GRANTED.

I. BACKGROUND & PROCEDURE

Plaintiff Dennis E. Walker (''Plaintiff'') and Defendant stipulate to the facts as set forth in Defendant's Memorandum of Points and Authorities in Support of United States' Motion to Dismiss. (Plaintiff's Memorandum of Point and Authorities in Opposition to Motion to Dismiss at 3 (''Opposition'') (Docket No. 8)). Since the facts germane to this motion are undisputed, the Court adopts the following as findings of fact:

1. SBN, LLC, a telemarketing firm, was formed in 1996 and operated until filing for protection under the bankruptcy laws of the United States in January of 1998. (Complaint, ¶ 5-11).

2. SBN, LLC, failed to withhold and pay over to the United States income tax withholding and the employees' share of Medicare and FICA for the tax periods ending September 30, 1996, December 31, 1996, March 31, 1997, and September 30, 1997 (the ''trust fund taxes at issue''). (Complaint, ¶ 13).

3. The Internal Revenue Service (''IRS'') determined that Plaintiff was a responsible person who willfully failed to pay over to the United States the trust fund taxes at issue. On or about April 28, 1998, the IRS mailed to Plaintiff a Notice of Proposed Assessment pursuant to 26 U.S.C. § 6672, proposing to assess a Trust Fund Recovery Penalty against Plaintiff to recover

the trust fund taxes at issue. (Complaint, ¶ 14, Exhibit "A").

4. On April 28, 1998, the IRS mailed to Plaintiff, and Plaintiff received, a letter notifying him of the proposed assessment and collection, and notifying Plaintiff of his right to an administrative appeal and hearing to dispute the proposed assessment. (Complaint, ¶ 15, Exhibit "B").

5. Plaintiff did not file a protest and request for a hearing with the IRS Appeals Office. (Complaint, ¶ 15).

6. The Trust Fund Recovery Penalty relating to the tax liability at issue was assessed against Plaintiff on September 28, 1998. (Complaint, Exhibit "C").

7. 26 U.S.C. § 6330, granting new procedural rights to taxpayers subject to IRS collection, became effective for collection actions initiated after January 19, 1999. (Internal Revenue Service Restructuring and Reform Act of 1998, § 3401 (Pub. L. 105-206; 112 Stat. 685)).

8. On November 28, 2000, the IRS sent a Final Notice of Intent to Levy and Notice of Your Right to a Hearing to Plaintiff, informing him of his right to a collection due process hearing. (Declaration of G. Patrick Jennings ("Jennings Decl."), Exhibit "A" (Docket No. 8)).

9. On December 14, 2000, Plaintiff sent a timely request for a collection due process hearing. The only issue raised in the request was Plaintiff's contention that he is not liable for the Trust Fund Recovery Penalty. (Jennings Decl., Exhibit "B").

10. On or about April 15, 2001, Plaintiff's personal income tax refund in the amount of $33,716 was applied to the Trust Fund Recovery Penalty assessment pursuant to 26 U.S.C. § 6402(a). (Complaint, ¶ 24).

11. On July 16, 2001, Plaintiff appeared by counsel William P. Shannahan at the collection due process hearing before IRS Settlement Officer Cynthia Chadwell. (Complaint, ¶ 20). Officer Chadwell informed Mr. Shannahan that Plaintiff would not be allowed to dispute the existence or amount of the underlying tax liability because Plaintiff had previously been given such an opportunity. (Id.)

12. On October 12, 2001, the IRS issued its Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330, sustaining the proposed levy action. (Complaint, Exhibit "F").

13. On November 8, 2001, Plaintiff timely filed this Complaint seeking an order determining (1) that Plaintiff was denied due process rights, (2) that Plaintiff is not liable for a Trust Fund Recovery Penalty under 26 U.S.C. § 6672, and (3) that Plaintiff is entitled to a tax refund of monies applied to the Trust Fund Recovery Penalty.

II. DISCUSSION

A. Legal Standard

[1] 26 U.S.C. § 6330 ("Section 6330") states that the IRS may not levy any property of any person unless such person has been notified in writing of their right to a hearing before such levy is made. It also provides that at the hearing, the person may raise "challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. § 6330(c)(2)(B).

B. Analysis

Since the facts relevant to this motion are not in dispute, the narrow issue before this Court involves the applicability of Section 6330. Defendant contends that all requirements for Section 6330 were met by the IRS, and therefore Plaintiff should be precluded from challenging his tax liability. Conversely, Plaintiff argues that his "opportunity" to dispute tax liability was provided on April 28, 1998, and that Section 6330 did not take effect until January 19, 1999. Thus, Plaintiff concludes, "prior opportunities ... should not be bootstrapped to comply with the statute that wasn't even in existence when the alleged opportunity occurred." (Opposition at 9). Nevertheless, existing case law demon-

strates that application of Section 6330 is applicable in the instant case.

Defendant contends that Section 6330 requires only that Plaintiff be afforded an opportunity to dispute liability, regardless of whether such opportunity occurred before or after January 19, 1999 (the effective date of Section 6330). Defendant cites three cases similar to the present case, in which the opportunity for the taxpayer to dispute liability occurred before the effective date of Section 6330. In Goza v. Commissioner, 114 T.C. 176 (2000), the taxpayer was provided with a notice of deficiency on February 9, 1998, and notice of intent to levy was mailed on February 17, 1999. The Tax Court, relying on 26 U.S.C. § 6330(c)(2)(B), concluded that the taxpayer did not avail himself of the op-portunity to dispute the underlying taxes provided to him when he received the no-tice of deficiency, and was thus precluded from disputing the liability at the collection due process hearing before the Appeals Of-fice. Goza, 114 T.C. at 183. Similar con-clusions were reached in Sego v. Commissioner, 114 T.C. No. 37 (2000), and Konkel v. Commissioner, 2000 WL 1819417 [86 AFTR 2d 2000-6939] (M.D. Fla 2000) (taxpayer who receives notice of liability and right to hearing, but deliber-ately declines to avail himself of that right, is thereafter precluded from disputing the amount of tax liability at collections due process hearing).

Plaintiff attempts to distinguish the present case from the aforementioned cases by highlighting the frivolous conduct of the taxpayers in the other cases, and noting his good faith objections to the liability, and includes that Plaintiff is in compliance with the procedural requirements under Section 6330. Plaintiff asserts that ''Konkel, Goza, and Sego all erroneously conclude that the issuance of a notice for the opportunity of a hearing issued before not only the effective date of the legislation but the enactment date of legislation can comply with requirements of legislation that didn't exist.'' (Opposition at 15).

However, Plaintiff's assertion regarding the ''erroneous conclusions'' in the Goza, Sego, and Konkel decisions is groundless. Aside from the cases cited by Defendant, the Tax Court has determined on numerous occasions that a notice of deficiency provided to a taxpayer prior to the effective date of Section 6330 satisfies the ''opportunity to dispute'' requirement under Section 6330(c)(2)(B). See, e.g., Behling v. Commissioner, 118 T.C. No. 36 (2002); Baxter v. Commissioner, T.C. Memo 2001-300 [TC Memo 2001-300] (2001); Pierson v. Commissioner, 115 T.C. No. 39 (2000); Howard v. Commissioner, T.C. Memo 2000-319 [TC Memo 2000-319] (2000).

Furthermore, Plaintiff's reliance on Parker v. Commissioner, 117 T.C. No. 6 (2001), is misplaced. In Parker v. Commissioner, the Tax Court found that the IRS was bound to the conditions set forth in Section 6630 where a Notice of Intent to Levy was mailed to a taxpayer by the IRS after its effective date. However, Parker is distinct from the above-cited cases because the taxpayer in Parker was not provided with a notice of deficiency. Instead, the IRS filed tax liens against the taxpayer's property prior to the effective date of Section 6330, and subsequently sent a Notice of Intent to Levy after the effective date. The IRS argued that their levy action commenced prior to the effective date through the filing of the liens against the taxpayers property, but the court in Parker clearly distinguished liens from levies, noting that two different statutes apply to challenges to liens and levies. Parker, 117 T.C. at 3. The court ruled that the levy action by the IRS initiated after the effective date of Section 6330 and was therefore subject to its conditions. The ruling in Parker is clearly distinguishable from the instant case, where there is no dispute that Plaintiff was provided an opportunity to dispute the underlying tax liability through a notice of deficiency.

Finally, Plaintiff claims that the legislative intent of Section 6330 was to provide ''new taxpayer rights and new procedures'' to the taxpayer, and therefore prior opportunities to dispute liability cannot be ''bootstrapped'' to comply with the statute. (Opposition at 9). Plaintiff cites Strickland v. Commissioner, T.C. Memo 2001-312

[TC Memo 2001-312] (2001), in which Judge Laro discussed the passage of Section 6330 and other statutes in response to ''highly publicized criticisms of the agency's collection methods,'' which resulted in ''new taxpayer rights'' and ''formal procedures where the IRS seeks to collect taxes by levy.'' Id. at 3.

Nevertheless, it is evident from the cases cited above that the taxpayer rights pro-vided by Section 6330 ensure that a taxpayer is afforded an opportunity to dispute the underlying tax liability, regardless of whether that opportunity is given before or after the effective date of Section 6330. This position is solidified in Strickland, where after the discussion of the legislative intent of Section 6330, Judge Laro sustained the IRS's determination of levy, noting that ''it is well settled in this court that the taxpayer cannot challenge the amount and/or existence of an underlying tax liability where the taxpayer receives a notice of deficiency.'' Id. Ironically, the taxpayer in Strickland received a notice of deficiency on September 26, 1998, nearly four months prior to the effective date of Section 6330.

Similar to the taxpayer in Strickland, Plaintiff in the instant case was afforded an opportunity to dispute the underlying tax liability through a notice of deficiency mailed to him on April 28, 1998, and Plaintiff deliberately declined to avail himself of that opportunity. Holding Plaintiff responsible for declining that opportunity fully comports with the legislative intent of Section 6330 articulated in Strickland, regardless of whether such opportunity was provided before or after the effective date of Section 6330.

III. CONCLUSION

For the aforementioned reasons, Defendant's Motion to Dismiss Count 1 is GRANTED.

IT IS SO ORDERED:

DATE: 8-12-02

Napoleon A. Jones, Jr.

US District Court Judge

¶2002-5517

Alan R. MESSER; Drenda L. MESSER; Alta Holdings; Armi Enterprises Trust, Fred Salisbury, Trustee; Baker Holdings 1; Baker Holdings 2; Coffman Holdings; Coffman 2; Emery Holdings; Healer Trust, an association; Healer Trust, also known as Healer Investments Trust; Judson Holdings; Messer Chiropractic Center, P.C.; Mt. View Holdings; Terry Holdings; Wedgewood Holdings 1; Wedgewood Holdings 2; Wisconsin, Limited, PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Tenth Circuit, (CA10) Nos. 00-9013; 00-9014; 00-9015; 00-9016; 00-9017; 00-9018; 00-9019; 00-9020; 00-9021; 00-9022; 00-9023; 00-9024; 00-9025; 00-9026; 00-9027; 00-9028; 00-9029. Oct. 11, 2002. Tax Courts affirmed; and appeals from Tax Courts dismissed. Decision for Govt.

1. Appeals from Tax Court decisions—consent judgments—motion to reopen. 10th Cir. dismissed taxpayers' appeals from 14 of 17 Tax Court consent judgments in their favor: taxpayers conceded that they obtained findings in conformity with settlement agreement. And, remaining judgments were affirmed: taxpayers settled without reserving any rights to appeal; and case law holding that courts had discretion to consider issues raised for 1st time on appeal was distinguishable where no consent judgments were involved. *Reference:* United States Tax Reporter ¶74,815.01(30); 74,825.07(5). IRC §7481; 7482.

UNITED STATES COURT OF APPEALS TENTH CIRCUIT.

Before SEYMOUR, HENRY, and BRISCOE, Circuit Judges.

ORDER AND JUDGMENT[1]

Stephanie K. Seymour Circuit Judge

FILED

PATRICK FISHER

Clerk

(Tax Court Nos. 11882-99; 11883-99; 11884-99; 11885-99; 11886-99; 11887-99; 11888-99; 11889-99; 11890-99; 11891-99; 11892-99; 11893-99; 11894-99; 11895-99; 11896-99; 11897-99; 11898-99)

[1] This order and judgment deals with seventeen consolidated cases concerning redeterminations of deficiencies and penalties, all of which were settled shortly before trial in the Tax Court. The court entered stipulated decisions in each of the seventeen cases. These decisions were final orders that disposed of all claims of all parties. Petitioners consented to their entry, without reserving a right to appeal them, or making them in any way conditional. The petitioners filed no post-decision motions for a new trial or to vacate or revise any of the decisions, as they might have done under Rules 161 and 162 of the Tax Court Rules of Practice and Procedure.

Fourteen of the seventeen decisions gave petitioners all the relief they had sought, thus defeating appellate jurisdiction in those cases.[1] In the remaining three, we conclude that there is appellate jurisdiction to rule on these cases and we affirm the stipulated decisions entered by the tax court.

"[A] decree, which appears by the record to have been rendered by consent is always affirmed, without considering the merits of the cause." Swift & Co. v. United States, 276 U.S. 311, 324 (1928) (quoting Nashville, Chattanooga & St. Louis Ry. Co. v. United States, 113 U.S. 261, 266 (1885)); see also Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 526 (10th Cir. 1992). There are three exceptions to this general rule barring appeal of consent judgments. A party may appeal where he can establish he did not actually consent, where he can show fraud in the procurement, or where the court entering the judgment lacked subject matter jurisdiction over the case. Swift, 276 U.S. at 324. None of these exceptions apply to the cases before us.

Moreover, while one may reserve the right to appeal a consent decree, Mock, 971 F.2d at 5275, the parties did not do so here. Rather, they settled without expressing any reservations. As the Supreme Court has explained, a settlement is a compromise to end the litigation.

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is writ-

[1] After examining appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2) and 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, or collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] Petitioners in these cases (Nos. 00-9014 through 00-9020, 00-9022, 00-9023, and 00-9025 through 00-9029) have conceded that they "obtained [a] finding in conformity with the Settlement Agreement ... [and] do not opposedismissal of their respective appeals." Aplt's Resp. at 2, 3.

ten, and not as it might have been written had the plaintiff established his factual claims and legal theories in liti-gation.

United States v. Armour Co., 402 U.S. 673, 681–82 (1971) (emphasis added).

Notwithstanding they have settled the matter, petitioners nonetheless contend that after entering into the consent judgments, they discovered further information that would alter the calculation of the deficiencies owed. They argue that it would constitute a manifest injustice to prevent them from reopening the case to reassess these calculations. Aplt. Br. at 5. As support for this argument, petitioners rely on cases holding that a court has discretion to consider on appeal issues not raised in the court below. However, none of the cases cited by petitioners involved judgments ordered by consent; they are therefore all distinguishable from the cases at issue here. Petitioners have no right to appeal simply because they subsequently decided they could have reached a better outcome than the one to which they agreed.

Accordingly, as to the fourteen cases over which we do not have jurisdiction, we DISMISS the appeals. As to the three cases over which we do have jurisdiction, we AFFIRM the decisions of the Tax Court.

ENTERED FOR THE COURT

Stephanie K. Seymour

Circuit Judge

¶2002-5518

Joe Alfred IZEN, JR., PLAINTIFF v. Terrance CATALINA, ET AL., DEFENDANTS. U.S. District Court, Southern Dist. of Texas, (DC TX) Civil Action No. H-97-1568, Sept. 18, 2002. Years 1986, 1987, 1988. Decision for Govt.

1. Actions against IRS agents—damages—constitutional violations—immunity—Federal Tort Claims Act. Attorney's 2d amended damages complaint against IRS agents, alleging malicious or retaliatory prosecution and various torts relating to ultimately unfounded criminal tax and money laundering charges against him, was dismissed. Malicious prosecution claim failed where agents reasonably believed to fair probability that taxpayer committed money laundering, based on evidence of his involvement with offshore tax shelter and establishment of multiple offshore accounts; neither taxpayer's after-the-fact denials nor agents' alleged negligent failure to fully investigate exculpatory evidence were relevant; and retaliatory prosecution claim similarly failed for lack of proof. Also, agents were immune from suit where their actions even if wrongful were objectively reasonable; and taxpayer's FTCA claims against govt. failed both on merits and for failure to exhaust administrative remedies. *Reference:* United States Tax Reporter ¶74,336.504(44); 76,557.53(30); 74,336.506(30); 76,557.53(12).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION,

MEMORANDUM AND ORDER

NANCY F. ATLAS UNITED STATES DISTRICT JUDGE

This *Bivens* action is before the Court on Defendants' Motion to Dismiss or in the Alternative Motion for Summary Judgment After Remand [Doe. # 77] and the United States' Motion to Dismiss or for Summary Judgment After Remand [Doe. # 93] (collectively ''Defendants' Motions''). The matter has been fully briefed and is ripe for determination.[1] Having considered the parties' submissions, all matters of

[1] *See* Defendants' Supplement to Motion to Dismiss or for Summary Judgment After Remand [Doc. # 80]; Plaintiffs' Response to Motion to Dismiss or for Summary Judgment After Remand and Supplement [Doc. # 85]; Affidavit of Joe Alfred Izen, Jr. in Opposition to Defendants' Motion to Dismiss or For Summary Judgment After Remand (''Izen's Affidavit'') [Doc. # 84]; Reply by Defendants to Response to Motion to Dismiss or for Summary Judgment After Remand [Doc. # 86]; Plaintiffs' Supplemental Briefing on Malicious Prosecution and First Amendment Retaliation Claims [Doc. # 94]; Defendants' Response to Supplemental Briefing on Malicious Prosecution and First Amendment Retaliation Claims [Doc. # 96]; Plaintiffs' Response to United States' Motion to Dismiss or for Summary Judgment After Remand [Doc. # 101]; Defendants' Reply to Plaintiffs' Response to United States' Motion to Dismiss or for Summary Judgment After Remand [Doc. # 104].

record, and applicable legal authorities, the Court concludes that Defendants' Motions should be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

At all times relevant to this matter, Defendants Terry Catalina and Jim Climer were agents with the Criminal Investigation Division ("CID") of the Internal Revenue Service ("IRS"). Plaintiff Joe Alfred Izen, Jr. is a lawyer who lives in Bellaire, Texas and Plaintiff Karen Suter Izen is his wife. In August 1989, Catalina received a referral from the Waco, Texas IRS collection office alleging that Izen had not filed his 1986, 1987, and 1988 income tax returns and had not paid income taxes for those years. The referral contains allegations from a third-party informant that Izen was involved in money laundering, including allegations, among others, that Izen was personally involved in the failure of a private bank in Texas and held large sums of money in accounts in the Isle of Man. The referral also references Izen's deposition in divorce proceedings, in which he disclosed personal knowledge regarding a Bahamian tax shelter and its owner. Catalina, who knew nothing of Izen prior to receiving the referral, on October 16, 1989 accepted the referral for investigation of the charge of failure to file tax returns, but determined there was insufficient basis to begin a money laundering investigation at that time. Catalina explains that it was IRS policy to investigate individuals who had not filed tax returns but had an obligation to do so. Catalina thus believed he was following IRS policy when he recommended opening a criminal income tax investigation on Izen for the years 1986–88. Catalina and his supervisor also recommended including 1985 in the investigation, although a return had been filed.

Catalina recommended to the Department of Justice that the investigation be conducted through a grand jury. The United States Attorney was authorized to undertake a grand jury investigation in December 1989.

Meanwhile, Izen filed his 1986 return in September 1989, after Catalina received the referral from the Waco office, but Catalina states that he was unaware of that fact. Izen did not file his 1987 and 1988 returns until April, 1990. Izen received refunds for the 1987 and 1988 tax years in June, 1990.

In April 1990, Catalina reviewed various investigative reports on Nassau Life Insurance Company Limited ("NLIC"), a company with which Izen had an employment contract for full-time work in 1985, and persons and banks related to or doing business with that entity. Catalina also reviewed various people's tax records, offshore bank records, and other information on fugitives fleeing federal and state criminal convictions or charges. Catalina then decided to expand the investigation to include an undercover investigation of Izen's possible involvement in money laundering. Climer was the undercover agent assigned to the investigation. Climer posed as a client seeking to create a foreign trust in which to deposit proceeds of the sale of stolen oil. The investigation continued from April 1990 until January 1992. Climer tape recorded numerous conversations he had with Izen during the undercover investigation.

Catalina testified before the grand jury in May 1995. The grand jury returned a four-count indictment against Izen for conspiracy to commit money laundering and aiding and abetting or attempting money laundering.[2] Izen was not indicted for tax evasion. In May 1996, the United States moved to withdraw the presentment of the indictment and all criminal charges against Izen were dismissed.

Izen commenced this case on May 5, 1997, alleging various constitutional and nonconstitutional torts. The matter was referred to Magistrate Judge Calvin Botley. Based on Judge Botley's Memorandum and Recommendations, the Court dis-

[2] *See* Indictment, attached to Defendants Catalina's and Climer's Motion to Dismiss, or for Summary Judgment on Plaintiff's First Amended Complaint [Doc. # 43].

missed all of Izen's claims.[3] Izen appealed the dismissal of his malicious prosecution, Fifth Amendment, and retaliatory prosecution claims, the denial of his motion for disclosure of grand jury materials, and the summary judgment in favor of Defendants on their qualified immunity defense.

The Fifth Circuit affirmed the dismissal of the Fifth Amendment claim, but reversed the dismissal of the malicious prosecution and retaliatory prosecution claims and remanded the matter to this Court for further proceedings consistent with its opinion.[4] *See Izen v. Catalina*, 256 F.3d 324 (5th Cir. 2001).

After remand, the Court granted Izen leave to file a Second Amended Complaint to join his wife, Karen Suter Izen, as a Plaintiff and to add a Federal Tort Claims Act cause of action against the United States. Plaintiffs' Second Amended Complaint alleges the following causes of action: (1) Fourth Amendment malicious prosecution; (2) retaliatory prosecution proscribed by the First Amendment; (3) disparagement in violation of the First Amendment; (4) selective prosecution in violation of the First Amendment;[5] (5) interference with liberty interests in violation of the Fifth Amendment; and (6) Federal Tort Claims Act claim based on the state torts of malicious prosecution, false arrest, intentional infliction of emotional distress and negligence. Plaintiffs' third and fourth causes of action were dismissed by the Court prior to Izen's appeal. These rulings were not appealed, and they became final. Izen appealed the dismissal of Plaintiff's fifth cause of action, and the Fifth Circuit affirmed the district court in that respect. Thus, only Plaintiffs' malicious prosecution, retaliatory prosecution, and newly added Federal Tort Claims Act causes of action are currently before the Court.[6] The Court discusses additional facts below as necessary to its analysis of these claims.

II. SUMMARY JUDGMENT STANDARD

Defendants have styled their motions as Motions to Dismiss or for Summary Judgment. Thus, Plaintiffs were given notice in the original motions that Defendants were seeking summary judgment. In addition, this Court's Order issued September 9, 2002 [Doc. # 105] expressly gave Plaintiffs notice that the Court would treat the pending motions as motions for summary judgment. Plaintiffs have had ample opportunity to present evidence in response to Defendants' Motions, and have done so. The Court will consider Defendants' Motions under the standards governing summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure.

Rule 56 of the Federal Rules of Civil Procedure mandates entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *Baton Rouge Oil and Chemical Workers Union v. ExxonMobil Corp.*, 289 F.3d 373, 375 (5th Cir. 2002) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

In deciding a motion for summary judgment, the Court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

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[3] The Court dismissed Izen' s Federal Tort Claims Act cause of action against the United States in February 1999 on the grounds that he had not exhausted his administrative remedies as required by 28 U.S.C. § 2675. *See* Memorandum and Order entered February 24, 1999 [Doc. # 36]. Judge Botley subsequently denied Izen leave to amend his Complaint to reassert a FTCA claim and join his wife as a Plaintiff. *See* Order entered April 19, 1999 [Doc. # 45]. The Court dismissed the remaining claims in its Memorandum and Order entered September 28, 1999 [Doc. # 62].

[4] The Fifth Circuit also affirmed the denial of Izen's motion for grand jury materials. *Izen*, 256 F.3d at 329–30.

[5] Although labeled as a First Amendment claim, Plaintiff asserts that he was treated differently than other similarly situated individuals. This type of selective prosecution claim implicates ordinary equal protection standards. *See United States v. Jones*, 287 F.3d 325, 333 (5th Cir. 2002) ("The requirements for a selective prosecution claim draw on ordinary equal protection standards. The claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose."); *see Bryan v. City of Madison*, 213 F.3d 267, 277 and n.18 (5th Cir. 2001) (selective prosecution is a type of equal protection claim recognized in this circuit).

[6] The parties have not briefed any other purported causes of action.

judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Calbillo v. Cavender Oldsmobile, Inc.*, 288 F.3d 721, 725 (5th Cir. 2002). An issue is material if its resolution could affect the outcome of the action. *Terrebonne Parish School Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In deciding whether a fact issue has been created, the facts and the inferences to be drawn from them must be reviewed in the light most favorable to the nonmoving party. *Hotard v. State Farm Fire and Cas. Co.*, 286 F.3d 814, 817 (5th Cir. 2002). However, factual controversies are resolved in favor of the nonmovant "only when there is an actual controversy - that is, when both parties have submitted evidence of contradictory facts." *Olabishiomotoscho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999).

The party moving for summary judgment has the initial burden of demonstrating the absence of a material fact issue with respect to those issues on which the movant bears the burden of proof at trial. The movant meets this initial burden by showing that the "evidence in the record would not permit the nonmovant to carry its burden of proof at trial." *Smith v. Brenoettsy*, 158 F.3d 908, 911 (5th Cir. 1998). If the movant meets this burden, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001).

The nonmovant's burden is not met by mere reliance on the allegations or denials in the nonmovant's pleadings. *See Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998). Likewise, "unsubstantiated or conclusory assertions that a fact issue exists" do not meet this burden. *Id.* Instead, the nonmoving party must present specific facts which show "the existence of a 'genuine' issue concerning every essential component of its case." *Id.* A dispute about a material fact is genuine only if evidence is such that a reasonable jury could return a verdict for nonmoving party. *Littlefield*, 268 F.3d at 282. In the absence of any proof, the court will not assume that the nonmovant could or would prove the necessary facts. *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir. 1995), *revised on other grounds upon denial of reh'g*, 70 F.3d 26 (5th Cir. 1995); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citing *Lujan v. Nat'' Wildlife Fed'n*, 497 U.S. 871, 888 (1990)).

III. ANALYSIS

A. § 1983 Malicious Prosecution

[1] Izen asserts a cause of action for malicious prosecution in violation of the Fourth Amendment. The Fifth Circuit has identified the following as elements of a malicious prosecution cause of action:

(a) a criminal action was commenced against plaintiff;
(b) the prosecution was caused by defendant(s);
(c) the criminal action terminated in plaintiff's favor;
(d) plaintiff was innocent;
(e) defendant(s) acted without probable cause;
(f) defendant(s) acted with malice; and
(g) the prosecution damaged plaintiff.

Izen, 256 F.3d at 328 (citing *Taylor v. Gregg*, 36 F.3d 453, 455 (5th Cir. 1994)). This Court's initial dismissal of Izen's malicious prosecution claim was based solely on the Magistrate Judge's recommendation that the criminal action, in which the government voluntarily dismissed the charges against Izen before trial, did not as a matter of law terminate in Izen's "favor." The Fifth Circuit reversed that holding, and remanded this case "for consideration of whether the defendants had probable cause and acted with malice when prosecuting Izen." *Id.* at 328–29. In its opinion, the Fifth Circuit did not address any element of the cause of action other than whether the prosecution was terminated in plaintiff's favor.

Since deciding *Izen*, the Fifth Circuit has revisited the standards governing § 1983 malicious prosecution claims, stating: "It would be an understatement to say that this circuit's case law regarding so-called 'Fourth Amendment malicious prosecution' claims under § 1983 is both confused and confusing." *Gordy v. Burns*, 294 F.3d 722, 725 (5th Cir. 2002). The *Gordy* opinion notes that in most circuits, a § 1983 plaintiff who alleges malicious prosecution must prove a violation of his Fourth Amendment right to be free from unreasonable seizures in addition to certain elements of the common law tort of malicious prosecution. *Id.* at 726. "But in the Fifth Circuit, a plaintiff in a § 1983 malicious prosecution action need establish only the elements of common-law malicious prosecution. This circuit repeatedly has indicated — without explanation — that courts must look to the elements of a malicious prosecution claim under the law of the state where the offense was committed." *Id.* The Fifth Circuit concluded that while state law determines the elements of the claim, federal law determines the scope and meaning of those elements.[7] *Id.* at 726–27. The crux of this case, as it was in *Gordy*, is whether there was probable cause for the criminal proceedings against the plaintiff. In *Gordy*, the Fifth Circuit explained the probable cause inquiry in the context of a malicious prosecution claim:

> For purposes of malicious prosecution, probable cause means "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.

Id. at 728 (citing *Kerr v. Lyford*, 171 F.3d 330, 340 (5th Cir. 1999)). The Court further explained that 'prosecutor' refers to any person who initiates or procures a criminal proceeding, and that obtaining an indictment will not insulate state actors from a malicious prosecution claim if a grand jury's decision 'has been tainted by the malicious actions of the government officials.'[8] *Id.*

Under *Gordy*, the Court probable cause inquiry is "whether a reasonable officer would believe to a 'fair probability' that a crime had been committed." *Id.* "[T]he probable cause analysis only requires that

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[7] The Fifth Circuit expressed some dissatisfaction with this approach, noting that if the events had taken place in Texas, the plaintiff would have to prove that he was actually innocent of the charges, an element not required under Louisiana law. *Id.* at 727. The court observed: "[i]f malicious prosecution is in some sense a federal constitutional tort, the outcome of the case should not hinge on how a state defines and shapes the elements of a tort claim." *Id.*

[8] Defendants argue that the indictment by the grand jury proves probable cause as a matter of law. *See* Defendants' Motion, at 14–15 (citing *Rodriguez v. Ritchey*, 556 F.2d 1185, 1191 (5th Cir. 1977) (*en banc*), and *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir.), *cert. denied*, 459 U.S. 1005 (1982)). Izen contends that Defendants are not shielded from liability by the grand jury indictment because Catalina misled the grand jury into believing the Izen had not paid his taxes for 1986, 1987, and 1988. *See* Plaintiffs' Response, at 5–7. Izen's characterization of Catalina's grand jury testimony is dubious at best. The testimony relied upon by Izen is as follows:

Foreman: You targeted Izen, I believe you said at the beginning, because he had not paid taxes in '86, '87 and '88?

[Catalina]: We had a referral from our Collection Division, yes, that indicated that

Foreman: — that he had not filed his income tax returns for three years?

[Catalina]: That's correct, uh-huh.

Foreman: So, I mean, that would have had to be the reason that you targeted him, —

[Catalina]: That's right.

Foreman: — and that's the reason you targeted — you set up this string operation because, I assume, you probably suspected that maybe he had done some illegal activities in the past. You don't know that —

[Catalina]: Well, that's a good question. Well, now, he's legal counsel for a convicted felon who's helping other people commit crimes. So, we did make some — we had some beliefs there that he would be willing to do something like this.

Member: Why not get him on income tax evasion?

[Catalina]: Well, we could have.

Member: To me that would seem more logical.

[Catalina]: We probably could have, but I suspect we would have had trouble with getting the information from the clients and things. It may have been tougher —

Member: There's several hundred thousand attorneys that have ex-felons as —

[Catalina]: No, no, no. He's representing — he's legal counsel as far as trusts and things. I mean, he's not representing them necessarily in litigation. He's not representing them in a litigating-type situation here. When it has to do with the Nassau Life, he's saying, you know, these trusts are legal, they are valid. He is writing legal opinions that people are relying on to, in turn, use these trusts. I'm not saying because someone represents someone who is a criminal, that that makes them bad, no. But he's allowing this business to go on by the fact that he's associated with it.

Grand Jury Testimony of Catalina, May 3, 1995, at 72–73 (Exhibit A to Izen's Affidavit in response to Defendants' motion to dismiss or for summary judgment before remand [Doc. # 54]). There is nothing false or misleading about this testimony. Although Izen eventually paid his taxes, he had not done so at the time the investigation was begun, and he did not do so on time. Defendant's failure to clarify that Izen paid his 1986, 1987, and 1988 taxes did not impact materially on the grand jury's decision to indict him for money laundering. Nevertheless, the Court does not base its decision on this point. As explained in the text, the record establishes that there was probable cause to believe that Izen had aided in the commission or conspired to commit money laundering.

[the Court] find a basis for an officer to believe to a 'fair probability that a violation occurred.' *Id.* at 729. This analysis is conducted as of the time when criminal proceedings were instituted, *i.e.*, when criminal charges are actually filed, and based solely on the facts as the officers honestly and reasonably believed them to be at the time they institute the proceedings. The inquiry does not require a showing that the officer's belief was correct, nor that it was more likely true than false. *Id.* at 729.

Izen was indicted for aiding and abetting money laundering and conspiracy to launder money.[9] The crime of money laundering requires proof of the following:

(1) that the defendant knowingly conducted or attempted to conduct a financial transaction;

(2) that the financial transaction involved the proceeds, or property represented to be the proceeds, of a specified unlawful activity;

(3) that the defendant knew the property involved in the financial transaction represented the proceeds of some form of unlawful activity; and

(4) that the defendant either intended to promote the carrying on of the specified unlawful activity or knew that the transaction was designed to conceal or disguise the nature, location, source, ownership, or control o f the proceeds.[10]

The Fifth Circuit summarized the essence of the crime of money laundering in *United States v. Dobbs*, 63 F.3d 391, 397 (5th Cir. 1995):

> The government must prove that the specific transactions in question were designed, at least in part to launder money. It is necessary to show a desire to create the appearance of legitimate wealth or otherwise to conceal the nature of funds so that it might enter the economy as legitimate funds. The purpose of the money laundering statute is to reach commercial transactions intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds and that the proceeds used to make the purchase were obtained from illegal activities.

(internal citations omitted.).

In order to prove that Izen aided and abetted money laundering, the government would have had to prove that Izen ''associated himself with the unlawful financial manipulations, that he participated in them as something he wished to bring about, and that he sought, by his actions, to make the effort succeed.'' *Rivera*, 295 F.3d at 468. To be guilty of conspiracy to launder money, *see* 18 U.S.C. § 371, the following must be shown:

(1) that the defendant and at least one other person made an agreement to commit the crime of money laundering as charged in the indictment;

(2) that the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose; and

(3) that one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

See Rivera, 295 F.3d at 468; Fifth Circuit Pattern Jury Instructions, Conspiracy (18 U.S.C. § 371).

The Court must determine whether the information known to Defendants at the time of Izen's prosecution provided a basis for Defendants to believe to a ''fair probability'' that Izen committed the crimes of aiding and abetting and conspiracy to commit money laundering.

1. Catalina

The evidence establishes that Catalina initially began a criminal investigation of

[9] The IRS criminal investigation ultimately led to the investigation of another individual, Reinhold Sommerstedt, who was indicted for conspiring with Izen to launder money. Sommerstedt is not, and has never been, a party to this civil action.

[10] *See* Fifth Circuit Pattern Jury Instructions, Laundering of Monetary Instruments (18 U.S.C. §§ 1956(a)(1)(A)(I), 1956(a)(1)(B)(I), 1956(a)(3)(A), and 1956(a)(3)(B)); *United States v. Rivera*, 295 F.3d 461, 467 (5th Cir. 2002).

Izen in 1989 based on Catalina's understanding that Izen had failed to file tax returns for 1986, 1987 and 1988.[11] Although Catalina was aware at the outset of allegations by an informant that Izen was involved in money laundering, Catalina recognized that the informant might not be "ethically pure," and therefore sought corroborating evidence before expanding the investigation to include money laundering or a money laundering conspiracy.[12]

Over time, Catalina obtained other information on Izen that led Catalina to believe there was a "fair probability" that Izen was involved in some way in a money laundering scheme. This information included Izen's involvement with Nassau Life Insurance Company, Ltd. ("NLIC"), a tax shelter that operated out of the Bahamas. Catalina reviewed, *inter alia*, a December 1986 Summary Report regarding NLIC[13] that stated that the founder and president of NLIC, Robert Chappell, was a fugitive on a mail fraud conviction; Chappell was living in the Bahamas and was associated with several anti-government fugitives; Chappell assisted others to create "contractual companies" and trusts which the IRS believed were merely vehicles to avoid taxes by placing taxpayers' assets outside the United States and otherwise lack economic substance; NLIC utilized the services of Chilton Private Bank in Chilton, Texas; the IRS had opened 105 cases on taxpayers having some involvement with NLIC and had obtained numerous tax crime convictions; and that Izen had been representing NLIC since 1983, and had a full-time employment contract with that entity for at least a year. *Id.* The Summary Report was prepared well before Catalina received the referral from Waco containing the informant's allegations, and appears to have been compiled from internal IRS sources. There is no indication that any of this information contained in the Summary Report came from Easton, the allegedly untrustworthy informant.

Catalina also reviewed an undated Memo to the Assistant Regional Commissioner of the IRS drafted by the acting Assistant Commissioner.[14] This Memo described schemes perpetrated by NLIC involving transferring assets to a foreign business trust organization to protect them from seizure by the IRS and involving loans created to generate phony interest deductions. *Id.* Again, there is no indication that this information came from the allegedly untrustworthy informant.

Another memo reviewed by Catalina[15] indicates that a suspect interviewed during an Atlanta IRS District undercover operation related to NLIC described various schemes used by NLIC to launder money, including the use of Chilton Private Bank. The name of the informant has been redacted, but he is identified as a "Nassau Life promoter" and there is no indication that this information came from Easton. *Id.*

Catalina learned from an article in the *Waco Tribune Herald* published on June 9, 1987,[16] that the former Manager of the then-closed Chilton Private Bank was charged with attempting to defraud the IRS and opening a bank account using a fictitious name.[17]

Catalina learned that Izen had a March 25, 1985 employment contract to provide full-time legal services to NLIC under which Izen was to be paid a minimum of $300,000.[18] The employment contract states "you have pursued, and will continue to pursue the formation of a commercial bank with mutual clients and with your former clients." *Id.*

Catalina also considered suspicious several statements made by Izen himself in his

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11 Catalina, apparently later in 1989, learned Izen in fact had filed his 1986 return, but had not filed the 1987 or 1988 returns. Still later, Catalina became aware that Izen filed these latter two returns in April 1990.

12 Defendants have redacted the name of the informant from their evidence, but Plaintiffs contend that the informant was a man named Michael J. B. Easton. Defendants do not contest this identification.

13 Defendants' Exhibit 48.

14 Defendants' Exhibit 49.

15 Defendants' Exhibit 50.

16 Defendants' Exhibit 51.

17 The article also reported that the private bank had been closed and was to be liquidated after its owner, John Landa, was indicted for tax fraud and racketeering arising from other business activities.

18 *See* Defendants' Exhibit 43.

August 27, 1987 divorce deposition.[19] Among these statements were admissions that Izen attempted to set up offshore banks on at least four occasions in the Isle of Man, the Bahamas, the Turk & Caicos Islands or the Cayman Islands, and Guyana, and that he had traveled to the Republic of Guyana, the Turk & Caicos Islands, Saint Vincent, the Isle of Man, and the Bahamas. *Id.* In addition, the deposition reveals that Izen had a bank account in the Bahamas containing more than a hundred thousand dollars, which he did not reveal on his 1985 tax return. *Id.*[20]

Having reviewed all of the above information, Catalina (with his manager's concurrence) arranged for Izen to be contacted and asked if he would be willing to set up an offshore trust. Izen agreed. At this point, Catalina and his supervisor recommended, and obtained approval to conduct an undercover investigation of Izen. Climer (whom Catalina did not know prior to this time) was assigned to act as the undercover agent on the case. Climer posed as an investor seeking to set up a foreign trust in which to deposit the proceeds of an illegal scheme, the sale of allegedly stolen oil. Climer contacted Izen on numerous occasions. Transcripts of those conversations reveal that Climer told Izen that the funds were the proceeds of an illegal activity, *i.e.*, the sale of stolen oil, and that Izen nonetheless agreed to set up the off-shore trust.[21] Izen advised Climer on procedures for accessing the money by way of loans from the foreign trust, Izen further advised Climer that eventually Climer would have to report income from the trust on his tax returns. When Climer stated that he would rather not list the source of the income on his tax returns as proceeds from stolen oil, Izen informed him that he could identify the source simply as "other."

This collection of information amply suffices to satisfy as a matter of law the probable cause standard. Catalina had knowledge of sufficient matters to form a belief to a "fair probability" that Izen had engaged in, assisted in, or conspired in a money laundering scheme. *See Gordy*, 294 F.3d at 728.

Izen attempts to counter the above evidence of probable cause with his own Affidavit, in which he offers purportedly innocent explanations for the conduct deemed suspicious by Catalina. Izen asserts that, contrary to Easton's allegation that Izen was involved in large transfers of funds from Chilton Private Bank to offshore banks, the only contact Izen had with Chilton Private Bank was his representation of some depositors in tax proceedings. He further claims that the only ties he had with Robert Chappell was his representation of NLIC on legal matters. Izen further points out that setting up foreign trusts, attempting to set up foreign banks, having an offshore bank account, and traveling to "tax haven" countries, are not themselves illegal activities. Izen explains that he did not report money paid into his Bahama's account on his 1985 tax return because he understood the account to be an annuity which did not need to be reported until paid out, and he claims to have reported withdrawals from the account on his 1986 and 1987 returns. Izen points out that many of the IRS's 105 cases opened on taxpayers involved with NLIC did not result in convictions, and further denies that he personally ever took part in the schemes the IRS attributes to NLIC. Izen also denies any knowledge that two taxpayers utilized his law office as the address on their Cayman Island bank accounts. Izen attributes the late filing and payment of his 1986 tax returns to his bookkeeper absconding with his records, and claims his wife converted the funds from the Bahamas bank account for her own use.

Izen's Affidavit does not contradict any of the factual allegations relied upon by Catalina, but attempts to explain them

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19 *See* Defendants' Exhibit 44.

20 Catalina, further, was aware that Izen's bank account in the Bahamas was essentially drained in 1986–1987. The bank statement for the account, Defendants' Exhibit 45, indicates that the account had a balance of $122,375.44 on May 30, 1986, $41,748.44 on December 18, 1986, and $3,739.44 on March 10, 1987. According to an internal IRS document summarizing records of a Cayman Island Bank, Defendants' Exhibit 52, two additional accounts were established at the bank by other individuals using the address of Izen's law office in Houston, Texas.

21 *See* Izen's Affidavit, Exhibit D.

away. Izen's after-the-fact denials are not sufficient to negate Carolina's belief that probable cause existed. Probable cause is determined on the basis of the information "honestly and reasonably" believed by the government investigators (here, Catalina) at the time of the decision to prosecute. *See Gordy*, 294 F.2d at 728.[22] Izen's evidence does not raise a genuine issue of material fact as to the existence of probable cause.

Furthermore, Izen's arguments in opposition to summary judgment are unpersuasive. Izen argues that because he told Climer that income from the trust may eventually have to be reported on his tax returns, there is no evidence Izen intended to "conceal" the funds, and therefore no evidence of the crime of money laundering. Izen's isolated self-serving comment does not negate the crime of aiding and abetting or conspiring to commit money laundering established by his taped conversations with Climer, particularly when considered in context with other documentary and circumstantial information Catalina possessed. In response to Climer's inquiries, Izen described a mechanism whereby Climer could conceal and accumulate money in a foreign trust before distribution without paying taxes, with no limit on how long money could be accumulated. Climer made it clear from the beginning of his contact with Izen that his purpose and intent was to disguise the source of money illegally obtained from the sale of stolen oil. Izen explained to Climer how to repatriate the money through loans back to himself disguised as loans from foreign investors. Climer made it clear he and his partner did not want their names on the accounts because "that kills the wrote purpose of it." Izen told Climer that a loan from the trust would be through an application to the trustee, and that the trust would own the funds.[23] As Izen put it, "you have to give up something to get something." Izen insisted that in this way, a loan from the trust to Climer was not really a just loan to and from Climer himself. Izen knew at all times that he was setting up a financial transaction the purpose of which was to conceal the source of proceeds from an illegal activity. Izen arranged to make Climer and his unidentified partner beneficiaries for a trust in the Turks and Caicos Islands, and to facilitate repatriation of the money in the form of loans to Climer and his partner from the trust. Thus, even accounting for Izen's explanations, which is not required, Catalina had sufficient information to support a belief to a "fair probability" that Izen had aided and abetted, or had conspired to commit, if not personally had committed, money laundering.

Izen further argues that his malicious prosecution claim is supported by Defendants' failure to investigate certain exculpatory information. Izen's argument misses its mark. It is true that deliberately concealing or failing to disclose *known* exculpatory evidence can form the basis for an inference that a defendant acted with malice in initiating and maintaining a prosecution. *Sanders v. English*, 950 F.2d 1152, 1163 (5th Cir. 1992). However, Izen's allegations relate not to the government agents' withholding of exculpatory information, but rather Defendants' alleged failure to investigate adequately.[24] Izen cannot base his malicious prosecution claim on mere negligence by Defendants in their investigation. *Id.* at 1159. A malicious

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22 The Court does not rely on Defendants' theory that the grand jury's indictment insulates them from liability as a matter of law. Although the record contains only those portions of the Climer transcripts that *Izen* has submitted as evidence, and not portions of the transcripts Defendants believe support the grand jury's vote of indictment, the limited record is sufficient to defeat Izen's contentions on summary judgment and his legal claims pleaded in the Second Amended Complaint.

23 Although the United States has attested that complete and accurate tapes have been provided to Izen, Izen makes the conclusory and self-serving assertion that transcripts have been doctored. The only specific allegation Izen makes is that the December 26, 1991 transcript does not reflect an argument he recalls having with Climer regarding the ownership of trust funds. Izen does not submit the entire December 26, 1991 transcript or the tape for the Court's consideration. However, the substance of the allegedly omitted conversation is reflected in the September 5, 1991 transcript. Izen does not raise a genuine fact issue as to probable cause for the prosecution.

24 Izen cites *Dirienzo v. United States*, 690 F. Supp. 1149 (D. Conn. 1988). In that case, the plaintiff claimed that even if there was probable cause to institute the prosecution, there was no probable cause to continue the prosecution after further information and the opportunity to investigate became available. *Id.* at 1157–58. The court noted that "continued prosecution after facts sufficient to exonerate the accused have been provided may give rise to an action for malicious prosecution under New York law." *Id.* at 1158. Aside from being a statement of New York law, the principle expressed in *Dirienzo* is inapplicable here, since there is no evidence that Defendants knowingly withheld *exculpatory* information from the grand jury. Izen was not indicted for his activities with NLIC, nor for failure to file tax returns or other tax crimes. He was indicted for his conduct during the undercover operation.

prosecution claim evaluates the evidence as of the time charges are brought. *Gordy*, 294 F.3d at 728. Izen presents no evidence that he informed Defendants or any investigators, of any of his *post hoc* explanations.

In any event, in response to Catalina's detailed listing of information in support of probable cause, Izen presents only his own denials and assertions as to the existence of "exculpatory" evidence, *e.g.*, Chilton Bank records that allegedly would refute Easton's assertion that Izen transferred large sums of money from the bank. Izen does not address the bulk of the evidence Catalina considered. Even if Izen's interpretation of the Chilton Bank records is accurate, the evidence is not actually exculpatory. It merely reflects that Izen did not use Chilton Bank as Catalina may have initially suspected. Izen's alleged involvement with Chilton Bank represents only a small portion of the information Catalina had at the time of his initial decision to pursue a criminal investigation and later to request that criminal charges be brought against Izen. Izen's representations do nothing to negate the incriminating statements and the suspicious actions by Izen reflected in the transcripts of his conversations with Climer.

Applying the applicable legal standards governing money laundering (and aiding and abetting or conspiracy to launder money) as well as the Fifth Circuit's test for probable cause, the Court concludes that Catalina had sufficient information to establish probable cause as a matter of law for the commencement of criminal proceedings against Izen, without any reliance on the information provided by the allegedly unreliable informant, Easton. Izen has failed to present evidence that creates a genuine question of fact that Defendant Catalina lacked probable cause to pursue criminal charges against Izen, or that Catalina targeted Izen because of Izen's representation of alleged tax evaders before the IRS. Accordingly, Catalina is entitled to summary judgment on Izen's § 1983 Fourth Amendment malicious prosecution claim.

2. Climer

As to Defendant Climer, summary judgment is appropriate for the same reasons set forth above.

Climer also is entitled to judgment as a matter of law because there is no evidence that he in any way caused the prosecution of Izen. Climer's only role was to pose as an investor seeking to launder funds obtained from the illegal sale of oil and to record his conversations with Izen. Climer was not involved in the decision to investigate or prosecute Izen and did not testify before the grand jury.

Izen argues that the law of the case precludes summary judgment on this second ground because the Fifth Circuit remanded the case for consideration only of whether Defendants had probable cause and acted with malice when prosecuting Izen. This argument is rejected. The Fifth Circuit did not address the "caused the prosecution" element of malicious prosecution. The Fifth Circuit's opinion does not preclude summary judgment in favor of Climer on this basis. "The law of the case doctrine applies only to issues that were actually decided, rather than all questions in the case that might have been decided but were not." *Clifford v. Gibbs*, 298 F.3d 328, 331 (5th Cir. 2002). Summary judgment in favor of Climer is warranted on Izen's malicious prosecution claim.

B. § 1983 Retaliatory Prosecution

Izen asserts a cause of action for retaliatory prosecution in violation of his First Amendment rights. The Fifth Circuit has held that a prerequisite for a claim of retaliatory criminal prosecution in violation of the First Amendment is proof of the common law elements of malicious prosecution. *Keenan v. Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002). Because Izen has not adduced evidence sufficient to support his malicious prosecution claims, Izen similarly cannot meet his summary judgment burden on his retaliatory criminal prosecution claim.

Izen argues in support of his retaliatory prosecution claim that Defendants did not have probable cause to undertake the un-

dercover operation against him. Plaintiff has presented no authority for the proposition that a retaliatory prosecution claim may lie for an investigation undertaken without probable cause. Indeed, this assertion is contrary to law. The Fifth Circuit has held that government agents do not need even a reasonable suspicion[25] (let alone probable cause) to begin an undercover sting operation. *See United States v. Allibhai*, 939 F.2d 244, 249 (5th Cir. 1991). Courts have ''uniformly dismissed the notion that the government must have a pre-existing basis for suspecting criminal activity before targeting an individual in an investigation.'' *Id.* These decisions are based on the realization that ''a defendant has no constitutional right to be free from investigation.'' *Id; United States v. Collins*, 972 F.2d 1385, 1395 (5th Cir. 1992) (citing the holding in *Allibhai*). Thus, Izen's theory that Catalina's or Climer's involvement in the undercover operation constitutes retaliatory prosecution in violation of his First Amendment rights is without legal merit. Izen further fails to meet his burden to create a fact issue on the retaliatory motive element of his retaliatory prosecution claim. In *Izen*, the Fifth Circuit stated that a plaintiff alleging retaliatory prosecution in violation of the First Amendment must show that he was prosecuted *at least in part* to retaliate for constitutionally protected conduct, and that ''retaliation need not be the sole motive for prosecuting.'' 256 F.3d at 329 (emphasis added) (citing *Gates v. City of Dallas*, 729 F.2d 343, 346 (5th Cir. 1984)).[26]

The Fifth Circuit had occasion to refine the standards governing a retaliatory prosecution or investigation claim in the very recent *Keenan* case. 290 F.3d at 258. In *Keenan*, the Fifth Circuit endorsed the settled law of other circuits holding that to establish a First Amendment retaliation claim in a case that does not involve an employment or contractual relationship with the government, plaintiff must show that (1) he was engaged in constitutionally protected activity; (2) the defendant's actions caused the plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the defendant's adverse actions were *substantially motivated* against the plaintiff's exercise of constitutionally protected conduct. *Id.* at 258 (emphasis added). Although issued almost a year after *Izen*, the *Keenan* opinion does not cite *Izen* for the elements of a retaliatory prosecution claim. Instead, the Fifth Circuit based its holding on cases from the Eighth, Tenth, and Sixth Circuits: *Carroll v. Pfeffer*, 262 F.3d 847, 850 (8th Cir. 2001) (holding that the defendants' adverse actions must be ''*motivated in part*'' against the plaintiffs' exercise of constitutionally protected conduct); *Smith v. Plati*, 258 F.3d 1167, 1176 (10th Cir. 2001) (holding that the defendants' adverse actions must be ''*substantially motivated*'' against the plaintiff's exercise of constitutionally protected conduct); and *Lucas v. Monroe County*, 203 F.3d 964, 973 (6th Cir. 2000) (holding that the defendants' adverse actions must be ''*motivated at least in part*'' against the plaintiff's exercise of constitutionally protected conduct.).

The *Keenan* decision is consistent with the Fifth Circuit's earlier explanation of the ''at least in part'' standard in *Smith v. Hightower*, 693 F.2d 359, 367 (5th Cir. 1982), which standard had previously had been enunciated in *Wilson v. Thompson*, 593 F.2d 1375, 1387 (5th Cir. 1979). In *Smith* the prosecutor argued that the ''at least in part standard'' placed too low of a threshold on the plaintiff to make a case for retaliation because that standard, in effect, made any showing of retaliatory motive sufficient to meet the plaintiff's burden. The *Smith*court addressed this concern by explaining that the ''at least in part'' language must be read in conjunc-

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25 *See Terry v. Ohio*, 392 U.S. 1, 30 (1968); *United States v. Chavez*, 281 F.3d 479, 485 (5th Cir. 2002) (reasonable suspicion is a particularized and objective basis for suspecting criminal activity; it is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence.)

26 In *Gates*, the plaintiff challenged the City of Dallas's alleged practice of filing, upon probable cause, perjury charges against complainants who make false charges. 729 F.2d at 346. Plaintiff did not appeal, and thus waived, the ruling on her claim that the individual decision to prosecute her was motivated in part by the desire to retaliate for her allegedly constitutionally protected conduct. The Fifth Circuit's summary statement of the law on which the *Izen* court relied was thus *dicta*, and was made with no analysis. *See infra* analysis of the two cases cited in *Gates*.

tion with the clear holding in *Wilson* that the state may have many legitimate reasons for bringing a criminal prosecution and that it is only when the state's *primary* purpose is to retaliate for protected conduct that a plaintiff's rights are violated. *Smith*, 693 F.2d at 367 (emphasis added). Thus, the *Smith* court observed that "the *Wilson* Court contemplated that the plaintiff must prove retaliation was a *major motivating factor and played a prominent role* in the decision to prosecute." *Id.* (emphasis added).

Izen asserts in his retaliatory prosecution claim that his rights were violated because Defendants allegedly lacked probable cause to pursue criminal charges after the sting operation concluded. Independent of the fact that Izen has failed to meet his burden on the probable cause element, the focus for summary judgment is whether Izen has created a genuine question of material fact on the issue of whether Defendants' alleged desire to thwart Izen's exercise of a constitutionally protected right was a major motivating factor in Defendants' decision to seek criminal charges against him. The Court concludes that Izen has failed to meet his summary judgment burden here also. Izen completely fails to present any evidence, direct or circumstantial, that Catalina or Climer had *any*retaliatory motivation against him. In addition, Defendants' evidence clearly establishes legitimate and substantial reasons for the money laundering investigation and prosecution aside from any alleged retaliatory motive. Defendants thus have met their summary judgment burden to present evidence that establishes probable cause for the prosecution as a matter of law, and have adduced uncontradicted evidence that retaliation was not a major motivating factor in the decision to investigate. Izen has not presented probative admissible evidence that creates a genuine fact issue on this element.

Izen, alternatively, contends that the Fifth Circuit's ruling requires a trial on the retaliatory prosecution claim. The Court disagrees. The Fifth Circuit reversed the grant of summary judgment against Izen on this claim because "[b]ased on the record and the briefs, there is a genuine issue of material fact as to the reasons Izen was investigated and prosecuted." *Izen*, 256 F.3d at 329. Defendants' first motion for summary judgment and Plaintiff's response focused on whether Catalina's grand jury testimony was false and, therefore, constituted evidence of a retaliatory motive. *See supra* note 8 (quoting Catalina's grand jury testimony at issue). The Fifth Circuit's holding was expressly based on the limited record and briefs before that Court. The record was not complete as to the reasons Izen was investigated and prosecuted. Defendants now have submitted evidence to "explain the connection between Izen's late filing of tax returns and the agent's decision to begin an undercover sting operation to investigate possible money laundering through offshore trusts." *Izen*, 256 F.3d at 329. As noted above, Izen has not produced evidence sufficient to create a genuine fact issue on the retaliation claim. The law of the case does not preclude summary judgment under these circumstances. *See United States v. Becerra*, 155 F.3d 740, 752–53 (5th Cir. 1998) (the law of the case doctrine precludes reexamination of an issue of law or fact by the district court on remand *unless* the evidence on retrial is substantially different, controlling authority has since made a contrary decision on applicable law, or the decision was clearly erroneous).

Summary judgment is appropriate on Izen's retaliatory prosecution claim.

C. Qualified Immunity

Determination of qualified immunity requires a two-step inquiry. *Saucier v. Katz*, 533 U.S. 194 (2001). The Court must first determine whether plaintiff's allegations, if true, establish a constitutional violation. *Roe v. Texas Dept. of Protective & Regulatory Services*, 299 F.3d 395, 401 (5th Cir. 2002) (citing *Hope v. Pelzer*, 122 S. Ct. 2508 (2002)); *Keenan v. Tejeda*, 290 F.3d 252, 261 (5th Cir. 2002). The next question is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202; *see also Roe*,

299 F.3d at 401 (only if the Court decides that the defendants engaged in constitutionally impermissible conduct must it proceed to the second step, which is to determine whether defendant's actions "violated clearly established statutory or constitutional rights of which a reasonable person would have known.").

Having determined that Izen cannot prove his malicious prosecution or retaliatory prosecution claims, the Court concludes that Izen cannot prove a constitutional violation sufficient to overcome Defendants' qualified immunity.[27] However, even if Izen could show a constitutional violation, Defendants are entitled to qualified immunity under the second prong of the inquiry. The evidence and information against Izen was more than sufficient to make Catalina's and Climer's actions objectively reasonable.[28] Izen has failed to raise a genuine fact issue that it should have been clear to Defendants that investigation and prosecution of Izen for aiding and abetting money laundering and conspiracy to launder money would violate his constitutional rights. *See Saucier*, 533 U.S. at 202. Thus, Defendants Catalina and Climer are entitled to qualified immunity from Izen's § 1983 claims.

D. Tort Claims Against the United States

Izen asserts a cause of action against the United States under the Federal Tort Claims Act ("FTCA") based on the state torts of malicious prosecution, false arrest, intentional infliction of emotional distress and negligence. The FTCA acts as a waiver of the United States' sovereign immunity for certain torts committed by its employees. *See* 28 U.S.C. §§ 1346(b), 2674. The FTCA provides that "[t]he United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674.

An individual may bring a claim against the United States pursuant to the FTCA only to the extent he has presented the claim to the appropriate federal agency and his claim has been finally denied by the agency in writing, or until six months have passed without agency disposition. 28 U.S.C. § 2675. A litigant cannot base any part of a tort action against the United States on claims not presented to the appropriate administrative agency. *Rise v. United States*, 630 F.2d 1068, 1071 (5th Cir. 1980). "[A] Federal Tort Claims Act suit can be based on particular facts and theories of liability only when those facts and theories can be considered part of the plaintiff's administrative claim." *Id.* Facts and theories of liability can be considered part of a plaintiff's administrative claim "as long as a claim brings to the Government's attention facts sufficient to enable it thoroughly to investigate its potential liability and to conduct settlement negotiations with the claimant." *Id.*

In this case, Izen's administrative claim was based on his allegations that during the sting operation, Defendants attempted to utilize a Treasury disbarment proceeding to gather information and statements from Izen in violation of his Fifth Amendment right against self-incrimination, and that Catalina lied to the grand jury in May 1995 by testifying that Izen had not paid taxes for 1986, 1987, or 1988.[29] The ad-

[27] Defendants also argue, based on *Albright v. Oliver*, 510 U.S. 266 (1994), that there was no clearly established constitutional right to be free from malicious prosecution at the time of Izen's prosecution. It is not necessary to make such a ruling in this case because even if such a right existed, it clearly was not violated.

[28] Scattered throughout Plaintiffs' briefing are requests for additional discovery on the issue of Defendants' "good faith." *See, e.g.*, Plaintiffs' Response to Motion to Dismiss or for Summary Judgment After Remand and Supplement and Defendants' Position on Discovery After Remand [Doc. # 85], at 14. Izen claims that additional discovery is necessary as to the motive and intent behind Defendants' investigation and prosecution of Izen. Much information has already been disclosed to Izen. *See*Defendants' Position on Discovery After Remand [Doc. # 78]. Izen has in his possession all documents from his criminal case, including tapes and transcripts of his conversations with Climer. Izen also has been provided numerous IRS documents relating to the decision to investigate and prosecute him. *Id.* Izen has stated that he needs the identity of other IRS officials who have circulated the information provided by Easton, and the deposition of Easton and his attorney. Izen's discovery requests are futile and are rejected. Contrary to his characterization, the prosecution ultimately was not based solely, if at all, on information provided by Easton. The Court has found that sufficient information was available aside from the initial information from Easton to establish that probable cause existed.

Izen also requests disclosure of grand jury materials. The Court has previously denied this request. Order issued September 9, 2002 [Doc. # 105]. On reconsideration here, the Court again finds that Izen has shown no compelling need for disclosure of grand jury materials. As the Court has made clear, the decision to dismiss Plaintiffs' claims is not dependent on a finding about Catalina's testimony to the grand jury as to whether Izen had paid his taxes. Further discovery on this point is immaterial.

[29] The administrative claim actually says "taxable years 1996, 1997, and 1998," but the Court will assume for these purposes that the misidentification of years is merely a typographical error of which all parties were aware during the administrative process..

ministrative claim asserts that such actions violated Izen's constitutional rights, violated the Internal Revenue Code, subjected him to unlawful criminal investigation and prosecution, and caused him to suffer mental anguish. Izen sought $1,000,000 in damages for himself and $100,000 for loss of consortium damages for his wife. Plaintiffs' current FTCA claims go far beyond the scope of the administrative claim set forth above.[30] Thus, Izen's (and his wife's) FTCA claims fail for lack of exhaustion. Plaintiffs' FTCA claims also fail on their merits, as discussed below.

The United States is liable only to the extent its employees would be liable under state law. Because Defendants have established that probable cause existed for prosecution of Izen, Izen's FTCA claim based on malicious prosecution and false arrest[31] fail, and will be dismissed.[32]

Izen also seeks to assert an intentional infliction of emotional distress ("IIED") claim under Texas law.[33] A plaintiff must show for an IIED claim: (1) intentional or reckless acts by defendant; (2) that are extreme and outrageous; (3) causing the plaintiff emotional distress; (4) which emotional distress is severe. *Brewerton v. Dalrymple*, 997 S.W.2d 212, 215 (Tex. 1999) (citing *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993)). Extreme and outrageous conduct is conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Twyman*, 855 S.W.2d at 621. This Court's finding that probable cause existed for the prosecution negates the element of "extreme and outrageous conduct."[34]

Izen and his wife also appear to assert a negligence claim, although Plaintiffs' submissions fail to disclose exactly what actions by Defendants Plaintiffs contend were negligent. The Court construes Plaintiffs' negligence claim to be that Defendants were negligent in allegedly failing to investigate "exculpatory" evidence as to Izen. Plaintiff cannot overcome the defects in his claim for malicious prosecution or false arrest simply by casting the Defendants' actions as negligent. *Cf. McNeily v. United States*, 6 F.3d 343, 347 (5th Cir. 1993) ("a plaintiff cannot avoid the reach of § 2680(h) by framing his complaint in terms of negligent failure to prevent the excepted harm.")

Moreover, Plaintiffs' negligence claim is barred by the discretionary function exception to the FTCA. The discretionary function exception is found in 28 U.S.C. § 2680(a), which provides that the FTCA does not act as a waiver of sovereign immunity for any claim based upon "the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved can be abused." In *United States v. Gaubert*, 499 U.S. 315 (1991), the Supreme Court outlined a two-step test for applying the

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30 Prime allegations underlying Plaintiffs' FTCA claim in this Court are that Defendants relied on allegedly false information supplied by the informant Easton and Defendants failed to investigate what Izen characterizes as "exculpatory" evidence. These allegations were not included in the administrative claim. In addition to asserting materially new and different factual allegations, Plaintiffs' current claim seeks actual damages of $4,000,000 and mental anguish damages for Karen Izen of $1,000,000.

31 Probable cause in a malicious prosecution claim under Texas law closely follows the federal standard and is defined as "the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor [complainant] that the person charged was guilty of the crime for which he was prosecuted." *Brown v. Nationsbank Corp.*, 188 F.3d 579, 586 (5th Cir. 1999) (citing *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997)). False arrest claims under Texas law require proof of a willful detention of the person, against the person's consent, without authority of law. *Garza v. United States*, 881 F. Supp. 1103, 1107 (5th Cir. 1995); *Villegas v. Griffin Indus.*, 975 S.W.2d 745, 754 (Tex. App.—Corpus Christi 1998, pet. denied). The existence of probable cause provides authority to arrest.

32 Izen contends that the United States' failure to certify that Catalina and Climer were acting within the scope of their employment somehow is fatally defective to the United States' motion. This contention lacks merit. Certification is required in order to substitute the United States as the sole defendant in a tort claim based on acts by government employees committed in the course and scope of their employment. The United States is the named defendant to Plaintiffs' FTCA cause of action, and is not arguing in its defense that Catalina and Climer were acting outside the scope of their employment. The cases cited by Plaintiffs are wholly inapposite. *See Garcia v. United States*, 62 F.3d 126, 127 (5th Cir. 1995) (holding that certification of scope of employment under the Westfall Act is subject to judicial review and that whether a particular federal employee was or was not acting within the scope of his employment is controlled by state law where the conduct occurred); *Mitchell v. Carlson*, 896 F.2d 128, 131 (5th Cir. 1990) (the court is barred by § 1447(d) from reviewing on appeal or otherwise orders of remand for lack of jurisdiction in a Westfall Act case).

33 In an Order issued September 9, 2002 [Doc. # 105], the Court denied Plaintiffs' Motion for Leave to File Second Amended Complaint [Doc. # 99]. Plaintiffs' proposed Second Amended Complaint renamed the FTCA cause of action "State Tort Claims — Malicious Prosecution and False Arrest." It appears, therefore, that Plaintiffs intends to drop their FTCA claims based on negligence and intentional infliction of emotional distress. However, because the Court denied leave to amend, it addresses those claims here.

34 Plaintiffs have also presented no evidence that any emotional distress they suffered was severe.

"discretionary function" exception. First, the exception covers only acts involving "an element of judgment of choice," and not acts involving compliance with federal statutes, regulations, or policy. *Id.* at 322. Second, the exception applies only if the conduct is based on considerations of public policy. *Id.* at 323. Clearly, Defendants' decisions as to how to conduct the IRS criminal investigation fit both requirements of *Gaubert*.[35]

Plaintiffs cannot meet their burden of proof to create genuine issues of material fact on each required element of their FTCA claim, and thus all Plaintiffs' theories under that statute will be dismissed.

IV. CONCLUSION AND ORDER

Plaintiffs have failed to create a genuine issue of material fact as to the lack of probable cause for Defendants prosecution of Izen and thus cannot prove malicious prosecution. Plaintiffs also have not raised a genuine fact issue that Defendants' prosecution or investigation of Izen for aiding and abetting or conspiring to launder money violated Izen's First Amendments rights and constituted retaliatory prosecution. Thus, Defendants are entitled to summary judgment on Plaintiffs' malicious prosecution and retaliatory prosecution claims. The Court further finds that Defendants have qualified immunity from Plaintiffs' malicious prosecution and retaliatory prosecution claims. In addition, Plaintiffs' have not created a genuine issue of material fact as to the United States' liability under the Federal Tort Claims Act. It is therefore,

ORDERED that Defendants' Motion to Dismiss or For Summary Judgment After Remand [Doc. # 77] and United States' Motion to Dismiss or for Summary Judgment After Remand [Doc. # 93] are GRANTED. It is further

ORDERED that all Plaintiffs' claims are DISMISSED WITH PREJUDICE.

The Court will issue a separate final judgment.

SIGNED at Houston, Texas, this 18th day of September, 2002.

NANCY F. ATLAS

UNITED STATES DISTRICT JUDGE

¶2002-5519

K. Brent FISHER, PETITIONER v. INTERNAL REVENUE SERVICE, RESPONDENT. U.S. District Court, Eastern Dist. of California, (DC CA) No. MISC. S-02-0132 DFL DAD PS, Aug. 7, 2002. Decision for Govt.

1. Third-party summonses—petition to quash—jurisdiction. Magistrate judge's recommendation to dismiss for lack of jurisdiction pro se taxpayer's petition to quash 3d-party summons IRS issued on bank was adopted: bank had no offices or branches in district where petition was filed. *Reference:* United States Tax Reporter ¶76,095.01(75). IRC §7609.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

FINDINGS AND RECOMMENDATIONS

DALE A. DROZD UNITED STATES MAGISTRATE JUDGE

[1] This matter came before the court on August 2, 2002 for hearing on respondent's motion to dismiss. There was no appearance on behalf of petitioner, who is proceeding pro se.[1] Rex K. Lee appeared on behalf of respondent. Having considered all written materials submitted with respect to the motion, and after hearing

[35] Plaintiffs argue that the qualified immunity of law enforcement officers does not shield the United States from liability, citing *Garza v. United States*, 881 F. Supp. 1103, 1106 (S.D. Tex. 1995). However, unlike the *Garza* case, the United States is not relying on immunity here, but on the discretionary function exception to liability. *See id.* at 1106 n.3 ("The United States does not contend that the discretionary function exception [under § 2680(a)] would apply under the facts of this case."). The case at bar is also distinct from *Sutton v. United States*, 819 F.2d 1289, 1293–94 (5th Cir. 1987), in which the Fifth Circuit held that the United States could not rely on the discretionary function exception to trump the provision of § 2680(a) waiving sovereign immunity for the intentional tort of malicious prosecution in the case of law enforcement officers. Here, the discretionary function exception shields the United States from liability on the Plaintiffs' negligence claim.

[1] Prior to the hearing on the motion, petitioner filed a notice and affidavit of "conditional acceptance" indicating that he would accept dismissal of the action provided the government met 89 enumerated conditions. At the hearing, the government declined to agree to those conditions.

oral argument, the undersigned recommends that respondent's motion be granted and that this action be dismissed for lack of subject matter jurisdiction.

Federal Rule of Civil Procedure 12(b)(1) allows a party by motion to raise the defense that the court lacks ''jurisdiction over the subject matter'' of a claim. ''A motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of the complaint or may be made as a 'speaking motion' attacking the existence of subject matter jurisdiction in fact.'' Thornhill Publ'g Co. v. Gen. Tel. & Elecs., 594 F.2d 730, 733 (9th Cir. 1979) (citations omitted). In the latter instance, no presumption of truthfulness attaches to petitioner's allegations. Id. ''[T]he district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction.'' McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988) (citations omitted). The burden of proof on a Rule 12(b)(1) motion is on the party asserting jurisdiction. Thornhill Publ'g Co., 594 F.2d at 733.

Respondent seeks dismissal of petitioner's petition to quash a third party administrative summons issued by the Internal Revenue Service (''IRS'') to Heritage Bank of Nevada. A copy of the summons is attached to the petition to quash filed on April 30, 2002. However, as respondent has shown with the declaration of an Assistant Vice President of the bank, Heritage Bank is a Nevada Corporation, with its headquarters in Reno, Nevada and one branch in Carson City, Nevada. (See Decl. of Terry Parker filed June 12, 2002.) Heritage Bank has no offices or branches in California and is not otherwise found in California. (Id.) Therefore, jurisdiction lies in the United States District Court for the District of Nevada, not this district. See Fortney v. U.S., 59 F.3d 117, 119 [76 AFTR 2d 95-5398] (9th Cir. 1995) (''Jurisdiction over a petition to quash a summons lies in the 'United States district court for the district within which the person to be summoned resides or is found.''') (quoting 26 U.S.C. 7609(h)(1)); see also Masat v. U.S., 745 F.2d 985, 988 [54 AFTR 2d 84-6332] (5th Cir. 1984) (''Allowing jurisdiction to be determined by the location of the taxpayer ... would undercut both objectives of Section 7609.'')

Accordingly, IT IS HEREBY RECOMMENDED that respondent's motion to dismiss be granted and petitioner's action be dismissed for lack of subject matter jurisdiction.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within ten days after being served with these findings and recommendations, petitioner may file written objections with the court and serve a copy on all parties. Such a document should be captioned ''Objections to Magistrate Judge's Findings and Recommendations.'' Petitioner is advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATE: August 7, 2002.

DALE A. DROZD

UNITED STATES MAGISTRATE JUDGE

ORDER

Plaintiff, proceeding pro se, filed the above-entitled action. The matter was referred to a United States Magistrate Judge pursuant to Local Rule 72-302(c)(21).

On August 8, 2002, the magistrate judge filed findings and recommendations herein which were served on the parties and which contained notice to the parties that any objections to the findings and recommendations were to be filed within ten days. No objections to the findings and recommendations have been filed.

The court has reviewed the file and finds the findings and recommendations to be supported by the record and by the magistrate judge's analysis. Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations filed August 8, 2002, are adopted in full;

2. Respondent's motion to dismiss is granted; and

3. This action is dismissed for lack of subject matter jurisdiction.

DATED: 9/3/2002

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5520

UNITED STATES OF AMERICA, PLAINTIFF v. Lawrence G. FRANKLIN, individually and as Agent of P & L Trust; Patricia K. FRANKLIN; First Union National Bank, as successor in interest to Naples Federal Savings and Loan Association; Ray Riano, as Trustee of L and P Drywall Trust; A. J. Anderson, as Trustee of Trust #2436-0193; P & L Trust; and Nationsbank, N.A., as successor in interest to The First National Bank in Fort Myers, DEFENDANTS. U.S. District Court, Middle Dist. of Florida, (DC FL) Case No. 2:99-cv-1-FTM-29DNF, Sept. 10, 2002. Earlier proceedings at (2001, DC FL) 88 AFTR 2d 2001-6064 [88 AFTR 2d 2001-5557], 171 F Supp 2d 1319; (2001, DC FL) 88 AFTR 2d 2001-5557; (2001, DC FL) 87 AFTR 2d 2001-2360; (2001, DC FL) 87 AFTR 2d 2001-1216 [86 AFTR 2d 2000-7018], adopting (2000, DC FL) 86 AFTR 2d 2000-7018; and (2000, DC FL) 86 AFTR 2d 2000-6215. Years 1987, 1988, 1990. Decision for Govt.

1. Collection actions—foreclosure sales—confirmation. Govt. was granted order confirming and approving foreclosure sale of lien property. *Reference:* United States Tax Reporter ¶74,035.03(100). IRC §7403.

United States Marshal Suite 1-116 Fort Myers Federal Building & Courthouse 2110 First Street Fort Myers, Florida 33901
John J. Norton 2209 Treehaven Circle Fort Myers, Florida
Patricia K. Franklin 2436 Chandler Avenue Fort Myers, Florida 33907
Erin Collins Cullaro, Esquire Stephen D. Hurm, Esquire Echevarria & Associates, P.A. P.O. Box 25018 Tampa, Florida 33622-5018
Ray Riano 2430 Chandler Avenue For Myers, Florida 33907
A.J. Anderson 1809 Hough Street Fort Myers, Florida 33901
NationsBank, N.A. 2400 First Street Fort Myers, Florida 33901 Attn: Ruth Tilley, Banking Center Manager
Paul I. Perez, Esquire United States Attorney Suite 3-137 Fort Myers Federal Bldg. & Federal Courthouse 2110 First Street Fort Myers, Florida 33901 Attn: Civil Division
Marika Lancaster Carol Koehler Ide Trial Attorneys, Tax Division U.S. Department of Justice P.O. Box 14198 Ben Franklin Station Washington, D.C. 20044

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA FORT MYERS DIVISION,

ORDER CONFIRMING SALE

JOHN E. STEELE UNITED STATES DISTRICT JUDGE

[1] This cause came on to be heard on motion of the plaintiff, United States of America, for the confirmation of the foreclosure sale of the parcel of real property subject of this Federal tax lien foreclosure action, to wit:

> Lot 5, Block 29, FORT MYERS VILLAS, Unit 2-B, a subdivision according to the plat or map thereof as recorded in Plat Book 12 at Page 30, of the Public Records of Lee County, Florida.

It appearing that the United States Marshal has carried out his duties in accordance with the law (Title 28, United States Code, Sections 2001–2002), and it further appearing that John J. Norton was the highest bidder at the sale for the amount of $71,000, and the above-described property was sold to John J. Norton for that amount, and the said sum has been paid to the Marshal and deposited with the Clerk of this Court for handling and disburse-

ment, and the Court being fully advised in the premises, it is, therefore, hereby

ORDERED, that the public sale on July 17, 2002, of the following described parcel of real property subject of this Federal tax lien foreclosure action to John J. Norton be, and the same hereby is confirmed and approved:

Lot 5, Block 29, FORT MYERS VILLAS, Unit 2-B, a subdivision according to the plat or map thereof as recorded in Plat Book 12 at Page 30, of the Public Records of Lee County, Florida.

and it is hereby further

ORDERED, that the United States Marshal shall make, execute and deliver a Marshal's Deed to John J. Norton and Kathleen M. Norton, his wife, to the property set forth above, and it is hereby further

ORDERED, that the Marshal's fees and expenses in the amount of $45 are taxed and shall be paid and disbursed from the proceeds of the subject sale to the United States Marshal for the Middle District of Florida pursuant to Title 28, United States Code, Section 1920.

DONE AND ORDERED, at Fort Myers, Florida, this 10th day of September, 2002.

JOHN E. STEELE

UNITED STATES DISTRICT JUDGE

¶2002-5521

UNITED STATES, PLAINTIFF-APPELLEE v. Andrew D. TEMPELMAN; Priscilla TEMPELMAN, DEFENDANTS-APPELLANTS. U.S. Court of Appeals, First Circuit, (CA1) Nos. 01-2729; 02-1376, Oct. 10, 2002. District Court affirmed per curiam. Earlier proceedings at (2002, DC NH) 89 AFTR 2d 2002-1199; (2001, CA1) 87 AFTR 2d 2001-2619, 2001-2 USTC ¶50549, 12 Fed Appx 18, affirming per curiam (2000, DC NH) 86 AFTR 2d 2000-5033, 111 F Supp 2d 85, 2000-1 USTC ¶50364 [86 AFTR 2d 2000-5033]. Years 1983, 1984, 1985, 1990. Decision against Taxpayers.

1. Collection actions—foreclosure sales—confirmation—redemption—equity. District court properly confirmed foreclosure sale of pro se taxpayers' lien property and authorized proceeds' dis-bursement: taxpayers' challenges to sale were trivial, or involved events either caused by them or that had been properly disclosed to court and caused them no prejudice. Also, court properly rejected taxpayers' request for ''equitable redemp-tion'' where IRC §6337(b) didn't apply to judicial sales, New Hampshire redemption statute didn't apply to post-sale requests and taxpayers didn't have ''clean hands'' in action. *Reference:* United States Tax Reporter ¶74,035.03(100); 74,035.03(103). IRC §6335; 6337; 7403.

Andrew D. Tempelman and Priscilla Tempelman on brief pro se.
Eileen J. O'Connor, Assistant Attorney General, Thomas J. Clark and Patricia M. Bowman, Attorneys, Department of Justice, and Thomas P. Colantuono, United States Attorney, on brief for appellee.

United States Court of Appeals For the First Circuit,

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Paul J. Barbadoro, U.S. District Judge]

Before Selya, Lynch and Lipez, Circuit Judges.

Per Curiam.

[1] Last year, this court affirmed a pair of rulings in which the district court (1) concluded that the appellant taxpayers owed substantial amounts in unpaid federal income taxes and (2) authorized a foreclosure sale of their property. See United States v. Tempelman, 12 Fed. Appx. 18, 2001 WL 725370 (1st Cir. 2001) (per curiam), cert. denied, 122 S. Ct. 842 (2002). The property has since been sold at public auction pursuant to 28 U.S.C. § 2001(a). In the instant appeals, the taxpayers now challenge a trio of orders in which the district court (1) confirmed the sale, (2)

authorized the disbursement of the proceeds, and (3) denied their request for "equitable redemption." We affirm.[1]

None of the taxpayers' several assignments of error requires extended discussion. "It is well established that confirmation of a judicial sale rests in the sound discretion of the district court and will not be disturbed on appeal except for abuse." United States v. Peters, 777 F.2d 1294, 1298 n.6 (7th Cir. 1985). Such sales "enjoy a certain favor in the law" and will not be overturned "[i]n the absence of substantial grounds." Schwartz v. J.R. Cianchette & Sons Corp., 362 F.2d 500, 505 (1st Cir. 1966); accord, e.g., M.R.R. Traders, Inc. v. Cave Atlantique, Inc., 788 F.2d 816, 818 (1st Cir. 1986). No "substantial grounds" have been cited here. The taxpayers advance various objections to the manner in which the sale was conducted. Yet their complaints, in turn, involve events that were necessitate by their own conduct (the relocated auction site), or that operated to their benefit (the revised property tax arrangement), or that were trivial (the timing of the notices; the mistaken listing of the property's address; the involvement of government counsel at the auction). Furthermore, the government disclosed all such matters to the district court in its motion to confirm the sale. The taxpayers filed their opposition to that motion three days after a court-imposed deadline (and two days after the court's ruling). And neither in that opposition nor on appeal have they made a colorable showing of prejudice. Under these circumstances, it cannot be said that the court abused its discretion in confirming the sale.

We likewise perceive no error in the denial of the motion for equitable redemption. As the taxpayers concede, 28 U.S.C. § 2001(a) confers no redemption rights. Their reliance on 26 U.S.C. § 6337(b), which applies to property sold under a levy and distraint proceeding, is misplaced. See, e.g., United States v. Heasley, 283 F.2d 422, 427 [6 AFTR 2d 5704] (8th Cir. 1960); cf. United States v. Rodgers, 461 U.S. 677, 695–700 [52 AFTR 2d 83-5042] (1983) (explaining distinction between administrative levy and judicial forfeiture proceedings). Even if state law redemption rights could be invoked in this context--a proposition we need not decide--the timing of the taxpayers' motion would render the relevant New Hampshire statute inapplicable. See N.H. Rev. Stat. Ann. § 80:69 (permitting redemption "at any time before a deed ... is given by the collector"). And the taxpayers' lack of "clean hands"--as evidenced, inter alia, by their unauthorized refusal to vacate the premises as ordered--suffices to reject their appeal to general principles of equity.

Affirmed.

¶2002-5522

In Re: Bankruptcy of Donald & Debbie WILLYERD, Debtors. Donald & Debbie WILLYERD, PLAINTIFFS v. UNITED STATES OF AMERICA, and Internal Revenue Service, DEFENDANTS. U.S. Bankruptcy Court, Southern Dist. of Illinois, (Bktcy Ct IL) BK 01-33977; ADV 02-03027, Feb. 20, 2002. Year 1997. Decision for Taxpayers.

1. Tax claims in bankruptcy—dischargeability. Pursuant to agreement, Chap. 7 debtors' tax and related penalty and interest debts were dischargeable. *Reference:* United States Tax Reporter ¶68,726.52(27).

GREGORY J. MCKEE Debtors/Plaintiffs' Attorney
GERALD M. BURKE Assistant U.S. Attorney

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS,

[1] The government has suggested that, because the sale has occurred and the proceeds disbursed, one or both of the appeals are moot. Yet in contrast to cases such as Oakville Dev. Corp. v. F.D.I.C., 986 F.2d 611 (1st Cir. 1993), and Holloway v. United States, 789 F.2d 1372 [58 AFTR 2d 86-5001] (9th Cir. 1986), the relief sought by the taxpayers here includes more than just a request to prevent or overturn the sale. Their challenge to the district court's refusal to recognize a right of redemption, for example, presents an ongoing controversy.

ORDER

In Proceedings Under Chapter 7

[1] THIS MATTER coming on for hearing on Plaintiffs' Complaint to Determine Dischargeability of Federal Income Taxes Under Sections 507 and 523 of their 1997 Federal Income Tax debt (together with any subsequent interest and penalties), the Court finding Defendants are in agreement on this matter;

IT IS THEREFORE ORDERED:

That Plaintiffs' Federal Income Tax debt, together with any interest and penalties, for the year 1997 is dischargeable under the Federal Bankruptcy Code, and therefore, is discharged.

/s/

JUDGE

GREGORY J. MCKEE

¶2002-5523

In Re: Bankruptcy of Judy L. STEPHENS, Debtor. Judy L. STEPHENS, PLAINTIFF v. UNITED STATES OF AMERICA and Internal Revenue Service, DEFENDANTS. U.S. Bankruptcy Court, Southern Dist. of Illinois, (Bktcy Ct IL) BK 02-30317; ADV 02-3053, April 23, 2002. Year 1997. Decision for Taxpayer.

1. Tax claims in bankruptcy—dischargeability. Chap. 7 debtor's tax, interest and penalty debt for stated and prior years was dischargeable. *Reference:* United States Tax Reporter ¶68,726.52(27).

GREGORY J. MCKEE Debtor/Plaintiff's Attorney
GERALD M. BURKE Assistant U.S. Attorney

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS,

ORDER

Kenneth J. Meyers UNITED STATES BANKRUPTCY JUDGE

In Proceedings Under Chapter 7

[1] THIS MATTER coming before the Court on Plaintiff's Complaint to Determine Dischargeability of Federal Income Taxes Under Sections 507 and 523 of her 1997 and prior Federal Income Tax debt (together with any subsequent interest and penalties), the Court finding that the parties are in agreement on this matter;

IT IS THEREFORE ORDERED:

That Plaintiff's Federal Income Tax debt, together with any interest and penalties, for the years 1997 and prior is dischargeable under the Federal Bankruptcy Code, and therefore, is discharged.

ENTERED: April 23, 2002

Kenneth J. Meyers

UNITED STATES BANKRUPTCY JUDGE

GREGORY J. MCKEE

¶2002-5524

In Re: Jackie D. COTTRILL, Debtor. Jackie D. COTTRILL, PLAINTIFF; DEPARTMENT OF TREASURY INTERNAL REVENUE SERVICE, DEFENDANT. U.S. Bankruptcy Court, Southern Dist. of Illinois, (Bktcy Ct IL) BK No. 02-40636; ADV No. 02-4050, June 6, 2002. Years 1992, 1993. Decision for Taxpayer.

1. Tax claims in bankruptcy—dischargeability. Chap. 7 debtor's tax debts were dischargeable. *Reference:* United States Tax Reporter ¶68,726.52(27).

IN THE UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF ILLINOIS,

ORDER

Kenneth J. Meyers UNITED STATES BANKRUPTCY JUDGE

In Proceedings Under Chapter 7

[1] This matter comes before the Court on the Complaint to Determine Dischargeability of Debt filed by the Debtor. The Court, being advised in the premises, finds that the complaint is well-taken.

IT IS THEREFORE ORDERED that the Debtor's obligation to the United States Department of Treasury, Internal Revenue Service, for 1992 and 1993 federal income taxes is a dischargeable debt that will be discharged by an order of discharge entered in her chapter 7 case.

Counsel for the moving party shall serve a copy of this order by mail to all inter-ested parties who were not served electronically.

ENTERED: June 6, 2002

Kenneth J. Meyers

UNITED STATES BANKRUPTCY JUDGE

¶2002-5525

THE SHERWIN-WILLIAMS COMPANY EMPLOYEE HEALTH PLAN TRUST, Keybank, N.A., TRUSTEE-PLAINTIFF, v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Ohio, (DC OH) CASE NO. 1:01CV2091, Oct. 2, 2002. Years 1994, 1995, 1996. Decision for Govt.

1. Voluntary Employees' Beneficiary Association (VEBA)—unrelated business taxable income (UBTI)—corp. vs. trust tax rates—refunds. VEBA trust's refund claim that its UBTI from investments should have been taxed at corp. rather than trust rates was rejected on summary judgment: IRC §511(b) by its plain language, plus Reg. §1.511-2's express distinction between *orgs.* subject to corp. rates and *trusts* subject to trust rates, clearly dictated that taxpayer that chose to organize itself as trust had to be taxed as such on its non-exempt UBTI, regardless of its VEBA status. Taxpayer's interpretation of IRC §511(b) and reliance on Reg. §1.641(a)-0 for proposition that VEBA trusts were exempted from trust tax regime required non-contextual reading that ignored statutes' plain meanings. Also, mere fact that govt. applied corp. rates to substantially similar trust in Tax Court case didn't support taxpayer's alternate disparate treatment claim. *Reference:* United States Tax Reporter ¶5115.01(20); 6415.01(50). IRC §1; 11; 501; 511; 641.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION,

MEMORANDUM OF OPINION

JUDGE JOHN M. MANOS

On August 31, 2001, The Sherwin-Williams Company Employee Health Plan-Trust, Plaintiff, initiated the above-captioned action against the United States of America, Defendant, seeking a monetary judgment of $291,628 in overpaid federal income taxes. Specifically, Plaintiff claims that it mistakenly applied trust tax rates to unrelated business taxable income reported in returns filed for the taxable years ending December 31, 1994, 1995 and 1996. Plaintiff contends that corporate tax rates apply, entitling the Trust to a refund of $291,628 pursuant to amended returns filed with the Internal Revenue Service (hereinafter IRS). See 26 U.S.C. §511.

The United States denied that Plaintiff was entitled to refunds for the relevant taxable periods and, on July 22, 2002, filed a Motion for Summary Judgment (Docket No. 13). On August 5, 2002, Plaintiff filed a Brief in Opposition (Docket No. 14), and on August 26, 2002, Defendant replied. Plaintiff filed a Surreply on September 19, 2002 (Docket No. 19).

As this is a civil action against the United States of America for the recovery of internal revenue tax alleged to have been erroneously assessed, jurisdiction is properly predicated upon 28 U.S.C. §§1340, 1346. Plaintiff timely filed a refund claim with the Internal Revenue Service before pursuing the instant action giving this Court jurisdiction pursuant to 26 U.S.C. §7422.

The parties have fully briefed the issues. For the following reasons, the Defendant's motion for summary judgment is GRANTED.

I. FACTS

The facts are undisputed. Plaintiff is the Sherwin-Williams Company Employee

Health Plan Trust, Keybank, N.A., Trustee. The Trust reimburses health care claims and administrative expenditures of its current and retired employees and their dependants. Sherwin-Williams Company employees voluntarily participate in the Plan funded by employer and employee contributions and earnings on the Trust's corpus. The Internal Revenue Code (sometimes hereinafter, the Code) recognizes the Plaintiff as a Voluntary Employees' Beneficiary Association (''VEBA''), exempt from federal income tax pursuant to 26 U.S.C. §§501(a) and 501(c)(9)[1] .

As a VEBA tax exempt trust, Plaintiff is not taxed on its earnings. However, a tax exempt trust is still subject to taxation on its unrelated business taxable income (hereinafter UBTI) as dictated by Sections 511 and 512. Section 512 defines UBTI as, gross income derived from any unrelated trade or business activity regularly carried on by the entity in question. In the present case, the parties agree that the Trust's investment income is the source of its UBTI. The proper rate of tax applicable to Plaintiff's investment income is the sole issue before the Court.

The Trust originally filed its federal exempt organization business tax returns (Form 990T) with the IRS for the 1994, 1995 and 1996 tax years on August 14, 1995, May 6, 1996 and May 12, 1997, respectively (Complaint at ¶s 17, 26 and 35). The forms indicated respective tax liabilities for Plaintiff's unrelated business taxable income in the amounts of $864,057, $757,146 and $478,524. Plaintiff calculated the foregoing liabilities utilizing trust tax rates delineated in Section 1(e) of the Internal Revenue Code.

Plaintiff alleges that during an audit of an earlier tax period (1991 and 1992), an examining IRS agent suggested that the tax on the Trust's UBTI (the tax on its investment income) should be assessed at corporate rates provided for in Section 11, not trust rates associated with Section 1(e) (Plaintiff's Response and Memorandum in Opposition at p. 3). Plaintiff's tax counsel concurred with the agent's position. Accordingly, on May 13, 1998, the Trust filed amended tax returns with the IRS for the years ended December 31, 1994, 1995 and 1996 (Complaint at ¶s 21, 30, and 39). Applying a corporate tax schedule, Plaintiff calculated its UBTI tax liability as $743,615 for the tax year 1994, $651,840 for the tax year 1995 and $412,644 for the tax year 1996.

On March 2, 2002, the IRS denied Plaintiff's refund claims of $120,442, $105,306 and $65,880 (Complaint at ¶s 22, 31 and 40). These amounts represent the difference between the UBTI tax liability originally reported on Plaintiff's tax returns calculated according to Section 1(e) trust rates, and the amount of liability computed in the amended returns employing Section 11 corporate rates[2] .

Plaintiff alleges entitlement to tax refunds because it is not subject to Code sections imposing trust rates on its unrelated business income. Therefore, the Trust contends that it overpaid its tax obligations for the taxable years ended December 31, 1994, 1995 and 1996. Unable to resolve the issue with the Defendant, Plaintiff instituted the current action.

II. STANDARD OF REVIEW

Summary judgment Is appropriate ''if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'' Fed. R. Civ. P. 56(c).

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1 All section references are to Title 26 of the United States Code unless stated otherwise.

2 26 U.S.C. §1(e) provides the following rate schedule applicable to the taxable income of every estate and every trust: If taxable income is not over $1,500, the tax is 15%. If taxable income is over $1,500 but not over $3,500, the tax is $225, plus 28% of the excess over $1,500. If taxable income is over $3,500 but not over $5,500, the tax is $785, plus 31% of the excess over $3,500. If taxable income is over $5,500 but not over $7,500, the tax is $1,045, plus 36% of the excess over $5,500. If taxable income is over $7,500, the tax is $2125, plus 39.6% of the excess over $7,500.

26 U.S.C. §11 provides the following rate schedule applicable to the taxable income of every corporation. The amount of tax imposed shall be the sum of: 15% of so much of the taxable income as does not exceed $50,000, 25% of so much of the taxable income as exceeds $50,000 but does not exceed $75,000, 34% of so much of the taxable income as exceeds $75,000 but does not exceed $10,000,000, and 35% of so much of the taxable income as exceeds $10,000,000.

The schedules specified in the above Sections are identical to schedules in effect during the 1994, 1995 and 1996 taxable years.

The party moving for summary judgment bears the initial burden of production under Rule 56. The movant can satisfy the burden of production by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex, 47 U.S. at 322.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 256 (citing Adickes v. Kress & Co., 398 U.S. 144, 158–59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion [for summary judgment]." Anderson, 477 U.S. at 247–48

III. LAW & ANALYSIS

A. UBTI Taxation and the Internal Revenue Code

Subchapter F, Section 501 of the Internal Revenue Code, establishes federal income tax exemption for particular entities. Subsection (a) affords exempt status to "An organization described in subsection (c) . . ." Subsection 501(c) publishes a litany of exempt organizations and lists under 501(c)(9), "Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or designated beneficiaries . . ." That Plaintiff maintains its exempt status as a result of Section 501(c)(9) is undisputed.

Although the Sherwin-Williams Trust enjoys 501(a) exemption, it is still subject to federal taxation of its UBTI. The rate schedule applicable to a tax exempt entity's UBTI is prescribed by Internal Revenue Code Section 511. This section is divided into two subsections, each providing separate tax rates. Subsection (a) proclaims that the UBTI of organizations described in 511(a)(2)(A) is subject to "a tax computed as provided in section 11 [the corporate tax schedule]." The Section reads as follows: "(2) Organizations subject to tax.--(A) Organizations described in sections 401(a) and 501(c).--The tax imposed by paragraph (1) [Section 11/corporate tax] shall apply in the case of any organization (other than a trust described in subsection (b) . . .) which is exempt, except as provided in this part or part II (relating to private foundations), from taxation under this subtitle by reason of section 501(a)." Accordingly, tax exempt organizations described in 511(a)(2)(A), other than trusts described in 511(b), calculate UBTI tax liability pursuant to corporate rates.

The second part of Section 511, subsection (b), directs taxation of UBTI according to trust rates listed in Section 1(e). 511(b)(2) lists trusts subject to the rate and states, "The tax imposed by paragraph (1) [Section 1(e) trust rates] shall apply in the case of any trust which is exempt, except as provided in this part or part II (relating to private foundations), from taxation under this subtitle by reason of section 501(a) and which, if it were not for such an exemption, would be subject to subchapter J (sec. 641 and following, relating to estates, trusts, beneficiaries, and decedents)."[3] Therefore, any trust described in 511(b)(2) must apply Section 1(e) trust rates to its UBTI.

B. Plaintiff's Position

As a preliminary and general argument, the Sherwin-Williams Trust asserts that the

[3] Section 641(a) states "Applicability of tax.--The tax imposed by section 1(e) shall apply to the taxable income of estates or of any kind of property held in trust . . ."

Tax Code does not tax all entities formed as trusts according to the trust schedule prescribed in Section 1(e). Clayton v. United States, 33 Fed. Cl. 628, 640 [76 AFTR 2d 95-5197] (1995) (Court states that not all trusts and estates are subject to the same tax regime). Plaintiff points out that Congress has mandated by statute that some trusts, such as real estate investment trusts (REITs), grantor trusts and Individual Retirement Accounts (IRAs), be taxed at rates other than trust rates (Plaintiff's Response and Memorandum in Opposition at p. 9).

Specifically, Plaintiff employs a step-by-step analysis of the Internal Revenue Code to conclude that Section 11 corporate rates apply to its unrelated investment income. First, the Trust establishes its exempt status under Section 501. Next, it proceeds to a pivotal Section 511 to discern the appropriate UBTI tax rate. Plaintiff construes Section 511(a) as providing a general rule that the tax on an exempt organization's UBTI is taxed at the corporate rate, unless the organization is a trust described in Section 511(b). Section 511(b)(2) imposes trust rates on a tax exempt trust that, were it not for that trust's exempt status, would otherwise be subject to subchapter J of the Code (sections 641 et. seq. relating to estates, trusts, beneficiaries, and decedents).

Correctly, Plaintiff then asks whether the Trust would ordinarily be subject to subchapter J, were not an exempt entity. Beginning with Section 641(a), Subchapter J states "That the tax imposed by section 1(e) shall apply to the taxable income of estates or of any kind of property held in trust . . . " Plaintiff relies on correlative Treasury Regulation §1.641(a)-0, entitled, Scope of Subchapter J, for the proposition that as a VEBA Trust, it is not within the scope of subchapter J and thus, not subject to Section 1(e). "[T]he provisions of subchapter J do not apply to employee trusts subject to subchapters D and F, chapter 1 of the Code, and common trust funds subject to subchapter H chapter 1 of the Code." Treas. Reg. §1.641(a)-0.

Based on the language of Treasury Regulation §1.641(a)-0, Plaintiff contends that, as an employee trust subject to subchapter D (Code sections dealing with deferred compensation) and subchapter F (Section 501 et. seq. providing for exemption), it is not subject to subchapter J absent its 501(a) exempt status. Consequently, Plaintiff is not a trust described in Section 511(b)(2). Because Plaintiff is not a trust described in Section 511(b)(2), it is not subject to that Section's applicable trust rate, and is included in Section 511(a), instituting corporate tax rates for "any organization (other than a trust described in subsection b . . .)."

Plaintiff offers Treasury Regulation §1.511-2 as evidence that Congress intended to tax the unrelated income of VEBAs at corporate rates. The Trust points out that this Treasury Regulation, expounding upon Section 511, expressly includes VEBAs as organizations subject to a corporate taxation schedule. "In the case of an organization described in section 501(c)(4), (7), (8), (9), (10), (11), (12), (13), (14)(A), (15), (16), or (18), the tax imposed by section 511(a)(1) [the corporate rate] apply only for taxable years beginning after December 31, 1969." Treas. Reg. §1.511-2(a)(1)(ii).

Plaintiff then cites Treasury Regulation §511-2(b) as bolstering evidence that Congress means to impose corporate rates of taxation on a VEBA's UBTI. Treasury Regulation §511-2(b)(1) describes the types of entities subject to Internal Revenue Code trust rates. Plaintiff establishes that, unlike Treasury Regulation §511-2(a)(1)(ii), §511-2(b)(1) does not expressly include 501(c)(9) VEBAs.

According to the Trust, if Congress had intended 501(c)(9) VEBAs to be taxed as trusts, the IRS would have included 501(c)(9) in the description of entities taxable at trust rates under Regulation 1.511-2(b). Plaintiff deduces the foregoing from the common rule of statutory construction that, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Bates v. United

States, 522 U.S. 23, 29–30 (1997), (quoting; Russello v. United States, 464 U.S. 16, 23 (1983); Kondik v. United States, 81 F.3d 655, 657 [77 AFTR 2d 96-1857] (6th Cir. 1986)).

Finally, the Trust cites to a current action in the Tax Court to establish that it is entitled to use corporate rates on its UBTI, regardless of Congressional intent. In CP&L Employee Benefits Trust v. Commissioner, the government assessed corporate tax rates on the UBTI of a trust substantially similar to Plaintiff (Tax Court Petition, Docket No. 2273-01). Plaintiff claims that it is entitled to be treated the same as other similarly situated taxpayers, and therefore, may utilize the corporate schedule in assessing its UBTI tax obligations. Oshkosh Truck Corp. v. United States, 123 F.3d 1477 [80 AFTR 2d 97-6408] (Fed. Cir. 1997) (Unless there is a rational reason for different treatment, similarly-situated taxpayers should be treated the same).

A synopsis of Plaintiff's position is as follows: Step One-Plaintiff is exempt from federal income tax under Section 501. Step Two- Plaintiff is subject to taxation on its UBTI according to Section 511. Step Three- Section 511(a) offers corporate rates to organizations other than the trusts described in Section 511(b). Step Four-Section 511(b) applies trust rates to trusts that, absent their exemption under 501, are subject to subchapter J, the Code sections applicable to trusts. Step Five-Treasury Regulation §1.641(a)-0 excludes employee trusts from the scope of subchapter J. Step Six- Plaintiff is "not otherwise subject to subchapter J", and therefore, not subject to the trust rates in Section 511(b), but instead, is required to implement corporate rates in Section 511(a).

C. Government's Position

As a precipice to its position, Defendant relies on the logical notion that non-exempt income earned by trusts, is taxed according to trust rates. As authority, the government points to Section 641(a) providing that, "section 1(e) shall apply to the taxable income of estates or any kind of property held in trust . . ." Reverberating throughout Defendant's Motion for Summary Judgment, is the basic principle that entities organized as trusts, are taxable as trusts. Simply stated, it is Defendant's contention that if Plaintiff wished to utilize corporate rates, it should have organized as a corporation. The government undertakes to discredit Plaintiff's interpretation of specific Code sections and Treasury Regulations through reliance on the well-established principle of statutory interpretation that the law favors rational and sensible construction. American Tobacco Co. v. Patterson, 456 U.S. 63 (1982).

The government does not disagree with Plaintiff's contention that Congress has the statutory power to tax entities organized as trusts at rates other than those prescribed in Section 1(e). However, with regards to the UBTI of tax exempt VEBAs, Congress has expressly mandated the imposition of trust rates on Plaintiff's unrelated investment income.

Defendant argues that the Sherwin-Williams Employee Trust is described in Section 511(b)(2) and thus, is subject to the trust tax schedule provided therein. Defendant's contention is that the Trust, but for its tax exempt status, is subject to Code Sections governing trust taxation (in particular, Section 641(a)). The government correctly defines Plaintiff's UBTI as non-exempt income. In other words, the Trust's UBTI from investment activity is ordinary income upon which, the federal government imposes a tax. Here, the ordinary income is earned by a trust and rationally then, taxed according to trust rates pro-vided in the Code.

The government properly describes Section 511(b) as a test to determine whether the UBTI earned by a tax exempt trust is taxed at corporate or trust rates. At what rate would the Trust's income be taxed if it were not exempt from taxation under Section 501 is agreed to be the decisive inquiry. Stated differently, to determine the unrelated income tax on a trust VEBA, Section 511 looks to see how the entity would be taxed if it were not exempt, meaning if it were not subject to sub-chapter F of the Internal Revenue Code.

Employing this test, Defendant attacks the Trust's interpretation of Treasury Regulation §1.641(a)-0 as misleading and inconsistent with the language of the Code. The regulation states that trusts are excluded from section 641 (assessing trust rates to any kind of property held in trust) if they are subject to subchapter D and F. Subchapter D covers deferred compensation and subchapter F provides for income tax exemption, including and beginning with Section 501. According to the government, the language in Treas. Reg. §1.641(a)-0 is merely consistent with the fact that trusts subject to subchapters D and F are statutorily exempt from federal income tax. For purposes of determining UBTI however, a VEBA trust is presumed to lose its exemption status granted by Subchapter F, Section 501. Plaintiff cannot be subject to both subchapters D and F when, for the purposes of the tax rate test employed by Section 511(b), the Trust is not afforded the subchapter F exemption. Plaintiff is considered non-exempt and not subject to subchapter F for the limited purpose of determining its UBTI tax liability and thus, the government maintains that the Trust does not satisfy the provision in Treas. Reg. §1.641(a)-0 excluding trusts from subchapter J and the relatedly imposed trust rate.

The government declares that Plaintiff's reliance on Treas. Reg. §1.511-2(a)1(ii) to support its position is also misplaced. Treasury Regulation §1.511 explains the assignment of different tax rates to tax exempt entities formed as ''trusts'' and those otherwise ''organized.'' The government argues that Plaintiff's citation of Treas. Reg. §1.511-2(a)(ii), expressly including 501(c)(9) organizations as among those subject to corporate tax rates, requires an interpretation exactly opposite to the one Plaintiff proposes. Defendant attempts to demonstrate the Trust's myopic misinterpretation by quoting the first sentence of the Regulation, stating that §1.511-2(a), imposing corporate rates, applies to ''Organizations other than trusts and title holding companies.''

According to the Defendant, the plain reading of the entire Regulation clearly establishes that a VEBA's unrelated income is taxed according to its chosen organizational structure. In other words, the government argues that the inclusion of 501(c)(9) entities in §1.511-2(a) refers to VEBAs formed as corporations (''organizations''). §1.511-2(a) is entitled ''Organizations other than trusts and title holding companies'' and imposes corporate tax rates on UBTI accordingly. §1.511-2(b) is entitled ''Trusts'' and provides for UBTI taxation at trust rates. The government claims that this language, coupled with the conscientious integration of other Code sections, disallows Plaintiff's interpretation, and mandates trust rate taxation on UBTI of tax exempt entities organized in trust form.

Defendant responds to Plaintiff's argument, that it is entitled to use corporate tax rates because of the corporate rate assessed in CP & L Employee Benefit's Trust's Tax Court petition, by arguing that the relied on proceeding is an isolated circumstance. Defendant contends that plaintiff is similarly situated to all VEBAs in the country and therefore, should be taxed at trust rates according to Congressional intent as evidenced by the Internal Revenue Code. Even assuming arguendo, that corporate rates were applied in the liability of the taxpayer in the Tax Court litigation, that is no reason the error should be perpetuated. Wagner v. United States, 387 F.2d 966 [21 AFTR 2d 1585] (Ct.Cl. 1967); Sirbo Holdings v. C.I.R., 509 F2d. 1220 [35 AFTR 2d 75-568] (2nd Cir. 1975) (The making of an error in one case, if error it was, does not give other taxpayers a right to its perpetuation.).

Furthermore, Defendant asserts that Plaintiff is barred from raising the argument of disparate treatment. According to the doctrine of variance, the government argues that the Court lacks jurisdiction over these new claims advanced by the Trust. A taxpayer may not raise at trial a basis for recovery different from that set forth in the claim for refund, since the taxpayer must set forth in detail in his admin-

istrative claim each of the grounds upon which he relies, and must set forth facts as to each of those grounds sufficient to apprize the Commissioner of the exact nature of the claim. Treas. Reg. §301.6402-2(b); Angelus Milling Co. v. Commissioner, 325 U.S. 293 [33 AFTR 837] (1945); United States v. Felt & Tarrant Co., 283 U.S. 269 [9 AFTR 1416] (1931); Bird V. United States, 534 F.2d 1214 [37 AFTR 2d 76-1336] (6th Cir. 1976). Defendant claims that disparate treatment arguments were not raised in Plaintiff's refund claims and are therefore, barred by the doctrine of variance.

IV. DISCUSSION

A. Tax Refund Actions

[1] Plaintiff's action prays for the refund of federal income taxes previously paid. Accordingly, the Trust bears the burden that its position is correct and that the government's position is incorrect. Welch v. Helvering, 290 U.S. 111 [12 AFTR 1456] (1933). To prevail in an action for overpaid taxes, a plaintiff must "prove by substantial evidence the wrongfulness of the Commissioner's [IRS's] determination." Kraft v. United States, 30 Fed.Cl. 739, 757 [73 AFTR 2d 94-912] (1994). The Commissioner's tax liability determination is presumed correct. Welch, 290 U.S. at 115 (citing Wickwire v. Reinecke, 275 U.S. 101 [6 AFTR 7068](1927)). "[T]he presumption is that taxes paid are rightly collected upon assessments correctly made by the Commissioner, and in a suit to recover them the burden rests upon the taxpayer to prove all the facts necessary to establish the illegality of the collection." Niles Bement Pond Co. v. United States, 281 U.S. 357, 361 [8 AFTR 10895] (1930) (citing United States v. Anderson, 269 U.S. 422 [5 AFTR 5674] (1926)); Greer v. United States, 408 F.2d 631 [23 AFTR 2d 69-1004] (6th Cir. 1969).

B. Analysis

At issue is whether a §501(c)(9) VEBA, organized as a trust, should be taxed at trust or corporate rates on unrelated business taxable income under Internal Revenue Code Section 511. An informed reading of the Code, guided by dominating principles of statutory construction, establishes Congress' intent to impose Section 1(e) trust rates to the UBTI of a VEBA trust. Plaintiff's interpretation of the Code and correlative Treasury Regulations is misleading and inconsistent with meaningful statutory construction. Therefore, the Court finds that the Trust is taxable according to Internal Revenue Code Section 1(e) on its unrelated business taxable income earned during the taxable years ended December 31, 1994, 1995 and 1996. As a result, Plaintiff is not entitled to any refunds and Defendant's Motion for Summary Judgment is GRANTED.

Plaintiff has failed to carry the requisite burden of proof entitling it to income tax refunds. The Trust's myopic reading of the Code fails to overcome the strong presumption of correctness afforded to the Commissioner's tax liability determination. Niles Bement Pond Co., 281 U.S. 361. Plaintiff has simply not proven by substantial evidence the wrongfulness of the government's position, nor has it established the correctness of its own. Welch, 290 U.S. 111 [12 AFTR 1456]; Kraft, 30 Fed.Cl. 757.

Interpretation of Section 511 predominates the issue before the Court. Absent from the instant action are any material factual disputes. Where, as here, the parties are in agreement about the operative facts giving rise to their dispute, a motion for summary judgment is appropriate because the parties raise questions of law, the resolution of which does not involve disputed material facts. Edwards v. Aguillard, 482 U.S. 591 (1987).

When interpreting a statute, a District Court must first determine whether the language of the statute has a plain and unambiguous meaning applicable to the case. Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997). "In construing the tax law, as for any statute, the starting point is the words of the statute, taking the words in their ordinary meaning in the field of interest." Xerox Corp. v. United States, 41 F.3d 647, 658 [74 AFTR 2d 94-7097] (Fed. Cir. 1994) (citing Bread Political Ac-

tion Committee v. Federal Election Commission, 455 U.S. 577, 580 (1982), and Perrin v. United States, 444 U.S. 330,339 (1979)).

The Sherwin-Williams Employee Health Plan Trust is a trust described in Section 511(b) and therefore, is subject to trust rate UBTI taxation. For the limited purpose of determining taxation of the UBTI of exempt entities, Section 511(b) logically ignores the entity's exemption. In other words, non-exempt income is taxed as if it were earned by a non-exempt entity. UBTI is non-exempt income and it is taxed as such. Plaintiff is organized as a trust and the ordinary income in question is subject to federal income tax. Rationally then, this income should be taxed as income earned by a trust, according to a trust rate schedule. The law favors rational and sensible construction. American Tobacco Co., 456 U.S. 71 (''Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.'')

Plaintiff argues that Congress has statutorily mandated taxation of certain trusts (real estate investment trusts (REITs), grantor trusts and Individual Retirement Accounts (IRAs)) at rates other than those imposed by Section 1(e). That Congress has the power to tax entities organized as trusts at non-trust rates is not subject to debate. With regards to the UBTI of a tax exempt VEBA trust however, Congress has not chosen to do so. In fact, an inclusive examination of the relevant tax Code provisions, requires the Court to conclude that Congress intends to tax VEBA trusts according to the schedule delineated in Section 1(e).

Plaintiff's reliance on Treasury Regulation §1.641(a)-0 is out of context and the Trust's statutory progression is flawed. Treasury Regulation §1.641(a)-0 describes the scope of subchapter J and does expressly exclude VEBA trusts. However, the reason such trusts are excluded from subchapter J trust taxation is, in part, because of the exemption VEBAs enjoy as a result of Section 501. Plaintiff ignores the fact that Section 511(b) assesses tax liability on non-exempt UBTI as though the Trust were not an exempt entity. The Trust attempts to exploit wording in the Regulation that is inapplicable to the determination of UBTI tax rates. Plaintiff cannot be subject to subchapter J (exemption) when for the purpose of determining UBTI, the Trust is considered non-exempt. Accordingly, Plaintiff's reliance on the one sentence[4] in Treas. Reg. §1.641(a)-0 is out of context and misleading.

Section 511 dictates UBTI tax rates and must be given operative effect. United States v. Menasche, 348 U.S. 528, 539 (1955) (It is a Court's duty to give effect, if possible, to every word of a statute.); United States v. Nordic Village, Inc., 503, U.S. 30 [69 AFTR 2d 92-687] (1992). To interpret the Code as Plaintiff has, is to deprive Section 511(b) of any operative effect. The provision in Section 511(b) disregarding a trust's 501 exempt status for the purpose of UBTI rate assessment, prevents Plaintiff from satisfying the subchapter J exclusion in Treas. Reg. §1.641(a)-0.

An encompassing reading of the Code, considering each provision in its plain and ordinary meaning, evinces Congress' intent to tax UBTI of entities like the Trust at issue, under Section 1(e) trust rates. Section 511 and Treasury Regulation §1.511-2 demonstrate this intent. Regulation 1.511-2 distinguishes between ''organizations'' subject to corporate rates and ''trusts'' subject to trust rates. Regulation §1.511-2(a) is entitled ''Organizations other than trusts and title holding companies'' and provides for corporate rates. Included in subsection (ii) of this heading is an ''organization'' described in 501(c)(9). This Regulation unambiguously imposes Section 11 corporate rates on the UBTI of a 501(c)(9) ''organization'', other than a trust. Plaintiff is not a 501(c)(9) organization, rather it is a 501(c)(9) trust, and does not qualify for 1.511-2(a) corporate rate taxation.

As a 501(c)(9) trust, Plaintiff is expressly described in Treasury Regulation

[4] The relevant sentence reads, ''the provisions of subchapter J do not apply to employee trusts subject to subchapters D [deferred compensation] and F [exemption, including 501] . . . ''

§1.511-2(b) ''Trusts'', which imposes Section 1(e) rates on UBTI. Regulation 1.511-(b) reiterates the test employed in Internal Revenue Code Section 511(b). This test assesses the UBTI of a tax exempt trust as if the entity were not exempt, i.e. not subject to Section 501. The resulting rate is then imposed on the UBTI of an otherwise exempt entity. If the Sherwin-Williams Trust were non-exempt and not subject to 501, it would be taxed as any other trust generating taxable income. This test delineated in Section 501(b) takes into consideration that the UBTI of a tax exempt entity is equivalent to ordinary income earned by an identical, non-exempt entity. Thus, the income in question should be taxed according to rates applicable to non-exempt trusts.

Congress chose to use the terms ''organization'' and ''trust'' at different times and in different sections. The Court recognizes this differentiation to convey meaning and insight into Congress' intent in drafting relevant sections. Section 511 and the complimentary Treasury Regulations that aid in its interpretation, do not use ''organization'' and ''trust'' interchangeably. In fact, these terms are included in subsection headings, exclusive of one another, that provide for different tax rates.[5] Congress' choice to use these terms definitively, in headings directing taxpayers to apply different tax rates, cannot be disregarded by Plaintiff's nearsighted interpretation of the last sentence in Treas. Reg. §1.641(a)-0. ''[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'' Russello, 464 U.S. 23; United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972); Walton v. Hammons, 192 F.3d 590 (6th Cir. 1999).

It is a well established axiom that similarly-situated taxpayers should be treated similarly. Oshkosh Truck Corp., 123 F.3d 1477 [80 AFTR 2d 97-6408]; United States v. Kaiser, 363 U.S. 299, 308 [5 AFTR 2d 1611] (1960) ''The Commissioner cannot tax one and not tax another without some rational basis for the difference.'' Keasler v. United States, 766 F.2d 1277 [sic, 1227], [56 AFTR 2d 85-5490]1234 (8th Cir. 1984). Plaintiff points to a Tax Court petition where the government assessed corporate tax rates on the UBTI of a trust substantially similar to the Sherwin-Williams Employee Health Plan Trust (CP&L, Tax Court Petition, Docket No. 2273-01). The government in this case applied corporate tax rates to the UBTI of the Carolina Power and Light Employee Benefits Trust in calculating a deficiency.

The Court considers Plaintiff's argument despite Defendant's suggestion that it lacks jurisdiction pursuant to the doctrine of variance. Application of this doctrine to the argument of disparate treatment is unwarranted. The Trust interprets Section 511 to allow for corporate taxation. The argument proffered by the Plaintiff regarding disparate treatment does not represent grounds or facts other than those set forth in the claim for refund. Angelus Milling Co., 283 U.S. 269 [9 AFTR 1416]. The Commissioner was made well aware of Plaintiff's supporting arguments upon receipt of refund applications and various letters. Citing Tax Court litigation and mentioning the general principle that similar taxpayers are to be treated similarly, does not introduce new and different grounds for recovery, over which, this Court lacks jurisdiction.

This isolated Tax Court case does not however, conclusively establish that the UBTI of all VEBA trusts is taxed at corporate rates, nor does it require a finding that the Commissioner's determination in the present circumstance is clearly wrong. Providing one example in favor of Plaintiff's position in a deficiency proceeding (as opposed to a refund suit), does not amount to substantial evidence to overcome the presumption of correctness afforded the Commissioner's conclusions in the instant action. *See* Welch, 290 U.S. at 115; Niles Bement Pond Co., 281 U.S. at 361; Greer, 408 F.2d at 631 [23 AFTR 2d 69-1004].

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[5] Section 511(a) is entitled ''Charitable, etc., organizations taxable at corporation rates.'' Section 511(b) is entitled ''Tax on charitable, etc., trusts.'' Treasury Regulation §1.511-2(a) is captioned ''Organizations other than trusts and title holding companies'' and provides for corporate tax rates. Finally, Treasury Regulation §1.511-2(b), imposing trust rates, is entitled simply, ''Trusts.''

The standard for interpreting statutes which impose a tax directs liberal construction in favor of the taxpayer. Porter v. Commissioner, 288 U.S. 436 [12 AFTR 25] (1933); Weingarden v. Commissioner, 825 F.2d 1027, 1029 [60 AFTR 2d 87-5448] (6th Cir. 1987); Holmes Limestone Co. v. United States, 946 F.Supp. 1310, 1329 [sic, 1319] [78 AFTR 2d 96-7466] (N.D. Ohio 1996). ''[I]f doubt exists as to the construction of a taxing statute, doubt should be resolved in favor of the taxpayer.'' Xerox, 41 F.3d at 658. Although these principles inform Tax Code interpretation, they do not authorize fragmentary exploitation of any one section in the interest of tax liability reduction. The Court is without doubt in this case. The difficult task of deciphering the Internal Revenue Code requires expansive and cohesive construction. An inclusive reading of the relevant Internal Revenue Code sections permits only one conclusion; Section 511 imposes trust rates on the UBTI of a Vol-untary Employees' Beneficiary Association organized in the form of a trust.

Plaintiff fails to meet its burden in the instant action. The arguments Plaintiff advances in favor of corporate taxation[6] give way to the presumption of correctness bestowed upon the IRS's determination in this refund action. The Trust does not provide substantial evidence to establish that its position is correct and that the government's position is incorrect. Furthermore, the Trust's interpretation of the Code is simply incorrect, and Plaintiff properly employed Section 1(e) trust rates in its original UBTI tax liability calculations. Accordingly, Plaintiff is not entitled to any income tax refund.

V. CONCLUSION

For the foregoing reasons, the Motion for Summary Judgment of Defendant United States of America (Docket No. 13) is GRANTED. Plaintiff's claim is dismissed with prejudice each party to bear its own costs.

IT IS SO ORDERED.

Issued: October 2, 2002

/s/ John M. Manos

UNITED STATES DISTRICT JUDGE

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, Defendant's Motion for Summary Judgment (Docket No. 13) is GRANTED. Plaintiff's claim is dismissed with prejudice each party to bear its own costs.

IT IS SO ORDERED.

Issued: October 2, 2002

/s/ John M. Manos

UNITED STATES DISTRICT JUDGE

¶2002-5526

Lee Ronald DAHMER and Judith Ann DAHMER, PLAINTIFFS v. THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS. U.S. District Court, Western Dist. of Missouri, (DC MO) Case No. 02-5007-CV-SW-SWH-ECF, Oct. 1, 2002. Year 1987. Decision for Govt.

1. Actions against U.S.—damages—res judicata—previously litigated claims. Magistrate judge granted govt. summary judgment that res judicata barred taxpayers' repeat action for refund and unlawful collection: taxpayers' allegations that govt. issued time-barred deficiency notice and fraudulently backdated assessment were both previously litigated before district court, which specifically held that taxpayers were barred from raising limitations period defense and fully considered and rejected fraud claim. Also, taxpayers' requests to amend complaint and for preliminary collection injunction were denied. *Reference:* United States Tax Reporter ¶74,337.503(75); 74,337.503(40); 74,335.01(7). IRC §7433.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT

[6] Plaintiff also argues that Congress intends to tax VEBAs at the same rates as its sponsoring entity (Plaintiff's Response and Memorandum in Opposition at pp. 14–15). This argument is unsupported by any statutory language and Plaintiff advances no specific evidence of such Congressional intent. The Court's interpretation of the relevant Code sections renders this generalized statement unpersuasive.

OF MISSOURI SOUTHWESTERN DIVISION,

ORDER

SARAH W. HAYS, UNITED STATES MAGISTRATE JUDGE

On January 11, 2002, Lee Ronald Dahmer and Judith Ann Dahmer filed a Complaint for the Recovery of Unlawful Assessments and Collections and Claim for Damages for Lawless Conduct. In their Complaint, plaintiffs set forth the ''Nature of the Action'' as follows:

1. This is an action instituted pursuant to and jurisdiction arises under the provisions of Title 28 USC 1346(a)(1), which provides for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws.

2. This action also seeks damages under 26 USC 7433 incurred as a result of the reckless and/or intentional violation of provisions of the IRS Code and Regulations.

3. This action also seeks damages under 42 USC 1983 for injuries incurred in violation of federally protected rights by individuals acting under the color of federal law depriving Plaintiffs of their constitutional rights.

(Plaintiffs' Complaint at 1–2)(emphasis in original)

On March 8, 2002, the United States of America and Carl Tierney, the ''federal defendants,'' filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. Defendants make four arguments: (1) res judicata bars the relitigation of the plaintiffs' claims concerning their 1987 federal income tax liabilities; (2) plaintiffs have failed to exhaust their administrative remedies or to fully pay their 1987 income taxes and their suit must be dismissed for lack of jurisdiction; (3) this action is barred by the tax anti-injunction act and must be dismissed; and (4) the individual federal defendant is entitled to absolute immunity in this civil action.

On March 25, 2002, plaintiffs filed a Motion for Preliminary Injunction to prevent any seizure of property or levy upon plaintiffs' salaries, wages, other income or property pending the outcome of this case. Plaintiffs argue that they are entitled to a preliminary injunction because the government is trying to collect on assessments that are time-barred and fraudulent.

On April 30, 2002, plaintiffs filed a document entitled ''Plaintiffs' Reply to Federal Defendants' Reply Suggestions in the Alternative Request Permission to Amend or Supplement Complaint.'' Plaintiffs state that they believe that defendants' motion to dismiss is based upon procedural defects that plaintiffs may have made in preparing their complaint and not upon the factual evidence which plaintiffs have provided to the Court. Therefore, plaintiffs request permission to amend their complaint in order to correct any procedural defects.

I. DEFENDANTS' MOTION TO DISMISS OR MOTION FOR SUMMARY JUDGMENT

A. Standards For Evaluating A Motion For Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Summary judgment should be granted only where the evidence is such that no reasonable jury could return a verdict for the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Thus, the moving party must demonstrate that no genuine issues of material fact remain to be resolved. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In determining whether the moving party is entitled to summary judgment, the Court must resolve all controversies in favor of the non-moving party, take the nonmovant's evidence as true and draw all justifiable inferences in favor of that party. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). See

also Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000)(''the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence''); Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993)(''At the summary judgment stage, we resolve all disputed facts and draw all inferences in favor of the plaintiff.'') In opposing a motion for summary judgment, the nonmovant ''may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.'' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

B. Uncontroverted Material Facts

Although plaintiffs have filed objections to defendants' motion, plaintiffs have failed to dispute defendants' Statement of Material Facts as required by the Local Rules for the United States District Court for the Western District of Missouri.[1] Accordingly, the following facts are deemed admitted for purposes of this motion:

1. In a notice of deficiency dated April 30, 1992, the Commissioner of Internal Revenue notified the plaintiffs, Lee Ronald Dahmer and Judith Ann Dahmer (''plaintiffs'' or ''taxpayers''), of the deficiencies determined by the Internal Revenue Service in plaintiffs' federal income taxes for the 1986 and 1987 tax years.

2. The amounts of the deficiencies set forth in the statutory notice described above were $48,395 (1986) and $54,303 (1987).

3. One year later, on April 30, 1993, the taxpayers stipulated to the entry of a Decision by the United States Tax Court in the case entitled Lee Ronald Dahmer and Judith Ann Dahmer v. Commissioner of Internal Revenue, Docket No. 17017-92.

4. The Decision entered by the Tax Court on May 19, 1993, provided, in pertinent part, that ''there is a deficiency in income tax due from the petitioners for the taxable year 1987 in the amount of $54,303.00.''

5. As reflected on the IRS certificate of assessments and payments for the taxpayers for the 1987 tax year, additional federal income taxes in the amount of $54,303.00 were assessed against them on June 25, 1993.

6. A notice of federal tax lien was filed against the taxpayers with the Recorder of Deeds for Vernon County, Missouri, with respect to the tax assessment described in the preceding paragraph on November 21, 1994.

7. On December 12, 1997, the United States of America commenced a civil action against the taxpayers in the United States District Court for the Western District of Missouri to collect their unpaid 1987 federal income tax liabilities.

8. The civil action commenced on December 12, 1997, was captioned United States of America v. Lee Ronald Dahmer, Judith Ann Dahmer, Bluebird Trust, Cardinal Trust, and Citizens National Bank, Case No. 97-5122-CV-SW-8 (W.D. Missouri) (''the prior civil action''). The complaint was signed by Carl J. Tierney, a trial attorney in the Tax Division of the U.S. Department of Justice.

9. The prior civil action (United States v. Dahmer) sought to reduce the tax assessment made against the taxpayers for additional federal income taxes for the 1987 tax year to judgment, to set aside certain fraudulent transfers of real property made by the taxpayers to the Bluebird Trust and the Cardinal Trust, and to foreclose the tax liens of the United States against the taxpayers' real property located in Vernon County, Missouri.

10. Judge Fenner granted the Government's motions for partial summary judgment and summary judgment in an order entered in the prior civil action (United States v. Dahmer) on March 31, 1999. The Court entered judgment against the taxpayers for the unpaid balance of the assessments made against them for the 1987 tax year, set aside the fraudulent conveyances

[1] See Local Rule 56.1(a) (''All facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the opposing party.'')

of the taxpayers' real property to the Bluebird and Cardinal Trusts, and ordered the tax liens of the United States foreclosed as against the taxpayers' real property in Vernon County, Missouri. United States v. Dahmer, 1999 WL 357926 [83 AFTR 2d 99-2405] (W.D. Mo. Mar. 31, 1999), aff'd, 230 F.3d 1364 [86 AFTR 2d 2000-5579] (8th Cir. 2000).

11. The Order entered by this Court in the prior civil action (United States v. Dahmer) on March 31, 1999, provided, in pertinent part, as follows:

> III. Dahmers' Motion for Dismissal
>
> The Dahmers move for dismissal pursuant to Rule 12(b), Federal Rules of Civil Procedure arguing that the Secretary [of the Treasury] failed to make the requisite tax assessment of their federal income taxes for the year ending December 31, 1987 prior to the running of the three-year statute of limitations as required under 26 U.S.C. § 6501(a). As discussed in Section II, the Dahmers are barred from raising a statute of limitations defense because they failed to raise it in their earlier Tax Court proceedings. *Shades Ridge Holding Co., Inc. v. United States*[89-2 USTC ¶ 9472 [64 AFTR 2d 89-5426]], 880 F.2d 342, 344 [64 AFTR 2d 89-5426] (11th Cir. 1989)(affirmative defenses, such as statute of limitations, must be raised initially in tax court). Accordingly, the Dahmers' motion to dismiss will be denied.

United States v. Dahmer, 1999 WL 357926 at 4.

12. The Order entered in the prior civil action (United States v. Dahmer) also provided, in pertinent part, that:

> IV. Dahmers' Motion for Reconsideration
>
> The Dahmers move the Court to reconsider its September 28, 1998 Order in which the Court denied the Dahmers' motion to dismiss for lack of jurisdiction. The Dahmers state that the Court misconstrued the "'lack of jurisdiction' contention in [their] motion to dismiss" and that the "jurisdictional challenge was directed to the United States for violations of procedure by the IRS." Any procedural violations by the IRS could have and should have been raised by the Dahmers in their Tax Court proceedings and is barred by *res judicata* from relitigation in this Court.

United States v. Dahmer, 1999 WL 357926 at 4.

13. After the judgment entered by this Court in the prior civil action (United States v. Dahmer) was affirmed on appeal (230 F.3d 1364 [86 AFTR 2d 2000-5579]), the taxpayers filed their "Defendants' Request for a Bill of Review" on October 3, 2000.

14. On page 2 of the "Defendants' Request for a Bill of Review" in the prior civil action (United States v. Dahmer), the taxpayers alleged that they had "newly discovered evidence that substantiates allegations that the government committed both fraud upon the court and fraud upon the defendants when representing to the court that a timely and proper assessment had been made against the Dahmers."

15. On page 4 of the "Defendants' Request for a Bill of Review," the taxpayers allege that they contacted Victoria Osborn, a "Forensic Accountant," and asked her to "examine the transactions in their case."

16. On page 8 of the "Defendants' Request for a Bill of Review," the taxpayers alleged that "[t]he government ... did not have a legal and enforceable assessment" against them for the 1987 tax year.

17. On page 9 of the "Defendants' Request for a Bill of Review," the taxpayers asserted that the federal income tax assessment made against them for the 1987 tax year was made during the first week of November, 1993. The taxpayers also claimed that the assessment date set forth in the complaint in the prior civil action (United States v. Dahmer) and the IRS certified certificates of assessments and payments had been "backdated."

18. On October 20, 2000, the Government filed its response to the "Defendants' Request for a Bill of Review." The United States' Response to Defendants' Request to Reopen Case pointed out (on page 3) that

the taxpayers had failed to contest any of the material facts set forth in the Government's motion for summary judgment, including the date on which additional taxes were assessed against the taxpayers for the 1987 tax year (June 25, 1993).

19. On November 27, 2000, this Court entered an ''Order Denying Defendants' Request for a Bill of Review.''

20. On January 11, 2002, the taxpayers commenced the present civil action against the United States, trial attorney Carl J. Tierney, and certain ''John Does.''

21. The ''Complaint for the Recovery of Unlawful Assessments and Collections and Claim for Damages for Lawless Conduct'' in the present civil action alleges, in Count I, that ''[t]he Defendants made assessments of tax, in the amount of $53,553.00 plus statutory additions, against Plaintiffs, for tax period [ending] December 31, 1987, which assessments were time-barred and fraudulent because the assessments were made beyond the statute of limitations and the Defendants intentionally backdated the assessment date, in the master file record, to read June 25, 1993, instead of the actual date of October 18, 1993.''

22. Taxpayers further allege that ''[t]he Defendants' actions of failing to abate the tax in question, and of undertaking enforced collection action, have caused immediate and irreparable harm to the Plaintiff [sic], and is in violation of the deficiency procedures set out in the Inter-nal Revenue Code.''

23. In Count II of the complaint, titled ''Unlawful Acts of Collection Officers,'' the taxpayers allege that ''[t]he assessment and collection of the tax at issue is in disregard of the tax laws, as the assessment is time-barred because it was made beyond the statute of limitations and fraudulent because Defendants intentionally backdated the assessment date in the master file record, to read June 25, 1993, when the assessments were not made until October 18, 1993. The [sic] was intentionally done to conceal Defendants [sic] reckless and intentional conduct.''

24. In Count III of the complaint, the taxpayers claim that notices of federal tax lien were improperly filed against them with respect to the additional federal income taxes assessed against them for the 1987 tax year because those assessments were untimely made.

25. In Count IV of the complaint, the taxpayers allege that ''Defendants, through its agency the Internal Revenue Service, and John Doe and Jane Doe, employed by the IRS, have recklessly and intentionally violated the Plaintiffs [sic] Constitutional rights to due process, under the claim of federal authority.''

(Suggestions in Support of the Federal Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment at 3–10)

C. Discussion

[1] As set forth by Judge Fenner in United States v. Dahmer, 1999 WL 357926 (W.D. Mo. Mar. 31, 1999), aff'd, 230 F.3d 1364 [86 AFTR 2d 2000-5579], 2000 WL 1146323 (8th Cir. Aug. 15, 2000):

> Under the doctrine of *res judicata*, an issue litigated in front of a competent judicial forum cannot be relitigated in a separate proceeding. The parties and their privies are bound not only as to every matter presented to the court, but also as to every matter that might have been brought before the court. The doctrine of *res judicata*applies to all final orders issued by a court of competent jurisdiction including, of course, the United States Tax Court.

1999 WL 357926 at 3 (citations omitted). See also Montana v. United States, 440 U.S. 147, 153 (1979)(a ''right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties or their privies ....'')(quoting Southern Pacific R. Co. v. United States, 168 U.S. 1, 48–49 (1897)).

Plaintiffs' Complaint sets forth the following facts upon which plaintiffs base all of their claims in this lawsuit:

13. On January 27, 1991, the Plaintiffs and Defendants entered into a legal extension of the assessment statute expiration date, to equal December 31, 1991 . . . .

14. On April 30, 1992, Defendants willfully and intentionally issued a time-barred "Statutory Notice of Deficiency" for tax period 1986 and 1987. The notice of deficiency was time-barred because it was not issued before December 31, 1991, which is in violation of 26 USC 6501(c)(4) . . . .

15. Plaintiffs timely filed a petition for redetermination with the Tax Court in accordance with 26 USC 6213. On May 19, 1993, Tax Court Decision upheld the time-barred "Statutory Notice of Deficiency."

16. The Plaintiffs waived the restrictions provided by 26 USC 6213(a)(1) and 6503(a)(1) of the Code. As a result of the waiver, the new assessment statute expiration date is July 18, 1993. The Defendants were required to make the assessment by July 18, 1993 . . . .

17. On October 18, 1993, which was 90 days beyond the legal assessment date, the Defendants made a time-barred and fraudulent assessment. The Defendants backdated the assessment date to June 25, 1993, in the Plaintiffs' master file records, to conceal the fraudulent assessment. The Defendant illegally extended the assessment statute expiration date, from the legal date of July 18, 1993 to October 16, 1993, which allowed the computer to make the fraudulent assessment.

(Plaintiffs' Complaint at 4)

Plaintiffs' claims in this lawsuit boil down to two allegations of wrongdoing by defendants, i.e. that defendants issued a time-barred "Statutory Notice of Deficiency" and that defendants fraudulently backdated the assessment. Both allegations of wrongdoing raised by plaintiffs were before Judge Fenner in the previous litigation. With respect to plaintiffs' allegation that defendants issued a time-barred "Statutory Notice of Deficiency," the Dahmers moved for dismissal before Judge Fenner because the statute for assessment expired on December 31, 1991. See Claimants' Motion for Dismissal at 2, United States v. Dahmer, No. 97-5122-CV-SW-8 (Oct. 15, 1998). Judge Fenner ruled that the Dahmers were barred from raising a statute of limitations defense because they failed to raise it in their earlier Tax Court proceedings. See United States v. Dahmer, 1999 WL 357916, 4 (W.D. Mo. Mar. 31, 1999), aff'd, 230 F.3d 1364 [86 AFTR 2d 2000-5579], 2000 WL 1146323 (8th Cir. Aug. 15, 2000).

Plaintiffs presented their claim that defendants fraudulently backdated the assessment to Judge Fenner in a Request for a Bill of Review. Defendants' Request for a Bill of Review provides, "The Dahmers have newly discovered evidence that substantiates allegations that the Government committed both fraud upon the court and fraud upon the defendants when representing to the court that a timely and proper assessment had been made against the Dahmers." See Defendants' Request for a Bill of Review at 2, United States v. Dahmer, No. 97-5122-CV-SW-4 (Oct. 3, 2000). The "newly discovered evidence" was based upon Victoria Osborn's review of the Dahmers' master file. Id. at 4. In its Response to Defendants' Request to Reopen Case, the Government argued that the Dahmers' evidence that the June 25, 1993 assessment was entered into the IRS administrative computer records in October 1993 provided no evidence of fraud because an assessment occurs on the date an authorized official signs a summary record of assessment containing the taxpayer's assessment rather than the date the assessment is posted to the IRS computerized record system. See United States' Response to Defendants' Request to Reopen Case at 1–3, United States v. Dahmer, No. 97-5122-CV-SW-4 (Oct. 20, 2000). Judge Fenner ruled this issue by stating, "the Court . . . having fully considered Defendants' Request for a Bill of Review . . . in which [the Dahmers] request the reopening of this case on alleged newly discovered evidence of fraud, DENIES said request to reopen for all of the reasons stated in the United States' Response to Defendants' Request to Reopen Case." Order Denying Defendants' Request for a Bill of

Review, United States v. Dahmer, No. 97-5122-CV-SW-4 (Nov. 27, 2000).

The issues litigated before Judge Fenner cannot be relitigated in this proceeding. Defendants are, therefore, entitled to summary judgment on the basis of res judicata. Given the Court's finding that defendants are entitled to summary judgment based on the doctrine of res judicata, it is not necessary to examine defendants' other arguments for dismissal of this case.

II. PLAINTIFFS' REQUEST FOR PERMISSION TO AMEND COMPLAINT

In their Reply to Federal Defendants' Reply Suggestions [or] in the Alternative Request [for] Permission to Amend or Supplement Complaint, plaintiffs state that they believe that defendants' motion to dismiss is based upon procedural defects that plaintiffs may have made in preparing their complaint and not upon the factual evidence which plaintiffs have provided to the Court. Therefore, plaintiffs request permission to amend their complaint in order to correct any procedural defects. Given the Court's finding that defendants are entitled to summary judgment because the issues presented in plaintiffs' complaint have previously been litigated and not because of any defect in the way the issues were presented by plaintiffs in their complaint, plaintiffs' request for permission to amend or supplement their complaint is denied.

III. PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

In their Motion for Preliminary Injunction, plaintiffs argue that they are entitled to a preliminary injunction pending the outcome of this case because the government is trying to collect on assessments that are time-barred and fraudulent. Given the Court's finding that defendants are entitled to summary judgment, plaintiffs' motion for preliminary injunction is denied.

III. CONCLUSION

For the reasons set forth above, it is

ORDERED that the Federal Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment (doc #7) is granted. It is further

ORDERED that plaintiffs' Motion for Preliminary Injunction (doc #14) is denied. It is further

ORDERED that plaintiffs' Request [for] Permission to Amend or Supplement Complaint (doc #22) is denied.

SARAH W. HAYS

UNITED STATES MAGISTRATE JUDGE

JUDGMENT IN A CIVIL CASE

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

ORDERED that the Federal Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment (doc #7) is granted. It is further

ORDERED that plaintiff's Motion for Preliminary Injunction (doc #14) is denied. It is further

ORDERED that plaintiff's Request [for] Permission to Amend or Supplement Complaint (doc #22) is denied.

October 1, 2002

Date

¶2002-5527

UNITED STATES OF AMERICA, PETITIONER v. BDO SEIDMAN, LLP, ETC., RESPONDENT. U.S. District Court, N.D. Illinois, (DC IL) No. 02 C 4822, Oct. 10, 2002. Decision pending Magistrate Judge determination.

1. Summons enforcement—legitimate purpose; relevance—dual purpose summons—privileged communications—accountants. District court referred govt.'s summons enforcement action against accounting firm for potential liability for promoting abusive tax shelters to magistrate

judge for review of voluminous privilege logs firm tendered to support IRC §7525 privilege claim. Although govt. established prima facie enforcement case where ''dual purpose'' summonses validly sought information relevant to legitimate investigation of firm, documents were shown to have potential relevance to investigation, IRS agent's testimony refuted firm's claim that documents were already in IRS's possession, and firm's ''pejorative aspersions'' didn't show that IRS's investigation was in bad faith, court was unable to thoroughly review privilege logs due to calendar and other commitments. Also, court requested written submissions from both parties regarding potential crime-fraud exception issues. *Reference:* United States Tax Reporter ¶76,025.04(25); 76,025.07(30). IRC §7525; 7602.

AUSA, United States Attorney's Office, Chicago, John A. Lindquist, III, United States Department of Justice, Tax Division, Washington, DC, for Plaintiff.
Harold C. Hirshman, Tamara Lynn Meyer, Sonnenschein, Nath & Rosenthal, Chicago, Lawrence M. Hill, White & Case, New York, NY, for Defendants.

United States District Court, N.D. Illinois, Eastern Division,

MEMORANDUM ORDER

SHADUR, Senior District J.

This effort by the United States for enforcement of a group of summonses against accounting firm BDO Seidman, LLP (''BDO'') has generated, during its three months of existence, more than one bulky submission of paperwork from each side of the controversy. But while the situation in that respect does not fit the adage variously ascribed to a number of sources,[1] but perhaps best known in Horace's version--''the lab'ring mountain scarce brings forth a mouse''[2] -the situation is not nearly as complex as BDO attempts to portray it.

[1] What is at issue here is an investigation of BDO as to its potential liability under the Internal Revenue Code (''Code'')[3] for promoting potentially abusive tax shelters, which the government asserts the firm failed to disclose properly in accordance with statutory requirements. That investigation implicates a host of statutory provisions, including Code §§ 6111, 6112, 6694, 6700, 6701, 6707, 6708, 7407 and 7408 at a minimum. And for more than two decades this Court has looked to United States v. Kis, 658 F.2d 526 [48 AFTR 2d 81-5839] (7th Cir.1981) (which in turn drew on the seminal decision in United States v. Powell, 379 U.S. 48 [14 AFTR 2d 5942] (1964)) for the operative rules that govern judicial enforcement of such summonses.

Kis has similarly been reaffirmed and applied regularly by our Court of Appeals. As succinctly put in 2121 Arlington Heights Corp. v. IRS, 109 F.3d 1221, 1224 [79 AFTR 2d 97-1793] (7th Cir.1997) (citations, including those to Kis and Powell, omitted):

> First, the government must make a prima facie case that the IRS issued the summons in good faith. That isn't much of a hurdle. The government must only show: the investigation underlying the summons has a legitimate purpose; the information sought may be relevant to that purpose; the information is not already in the IRS's hands; and the IRS has followed the statutory steps for issuing a summons. The government typically makes that showing through the affidavit of the revenue agent conducting the audit.

In those terms this is not a difficult case. All four of those prima facie elements are indisputably present, even though BDO makes unpersuasive efforts to challenge each of them.

As for BDO's questioning the ''legitimate purpose'' factor, that fails utterly in the face (among other things) of the decision in Tiffany Fine Arts, Inc. v. United

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1 Bartlett's Familiar Quotations lists Aesop and Phaedrus as well as Horace.
2 In the original, ''parturient montes, nascetur ridiculos mus.''
3 All relevant Code provisions are identified here without repeating ''26 U.S.C.,'' the title that embodies the Code's provisions.

States, 469 U.S. 310 [55 AFTR 2d 85-491] (1985). That unanimous decision validated the use of ''dual purpose'' summonses, so long as the requested information is relevant to a legitimate investigation of a summoned taxpayer such as BDO--and that certainly applies here.

As for the relevance component (with its corollary requirement of no overbreadth), United States v. Arthur Young & Co., 465 U.S. 805, 814 [53 AFTR 2d 84-866] (1984) (emphasis in original) supplies definitive support for the government's position that the test is one requiring only ''even potential relevance to an ongoing investigation, without reference to its admissibility.'' And in addition to our Court of Appeals' like holding in reliance on Arthur Young in 2121 Arlington Heights, 109 F.3d at 1224, Government Mem. 7 n. 5 lines up a plethora of cases from other Courts of Appeals applying the same undemanding standard.

Next BDO throws up a really unsupported objection to the ''already in the IRS' possession'' factor. On that score the supplemental declaration of Revenue Agent Michael Friedman provides a compelling showing that the objection cannot and does not prevail.

Finally, BDO does not directly charge bad faith on the government's part--instead it casts a number of pejorative aspersions that might suggest such an evil motive. But this Court has already indicated, and it reconfirms here, that those aspersions do not begin to meet the government's persuasive showing of a good faith investigation stemming from information provided to it.

All of that, then, leaves only BDO's claim of privilege under Code § 7525 (the statutory equivalent for accountants of the common law attorney-client privilege). In that respect the United States is correct that BDO's original blanket assertion of that privilege must fail (see, e.g., United States v. Lawless, 709 F.2d 485, 487 [52 AFTR 2d 83-5818] (7th Cir.1983)). But nothing daunted, BDO has most recently threatened to overwhelm the court by tendering two massive privilege logs--one of 86 pages listing 826 documents, and the other of 42 pages listing 293 documents--that identify the documents for all of which it claims privileged status.

To be sure, that nearly mind-boggling presentation necessarily does violence to the whole notion that these summons enforcement proceedings are supposed to be ''summary'' in nature and capable of swift disposition, so that an investigation that has cleared all the hurdles can go forward promptly (see, e.g., Donaldson v. United States, 400 U.S. 517, 529 [27 AFTR 2d 71-482] (1971) and Kis, 658 F.2d at 536). But unless the United States can suggest otherwise, it appears that there is no alternative to a one-by-one examination of the documents themselves (which have not been delivered to this Court by BDO together with the privilege logs).

This Court is understandably not especially appreciative of the proffered opportunity to spend its time in that process (something that appears to be much the equivalent of the task imposed on the new law firm associate, whose only exposure to what is mislabeled the ''litigation practice'' is an assignment to rummage through files in a dusty warehouse, either in pursuit of or in response to discovery requests). In light of the demands imposed by its full-scale civil and criminal calendar, together with its commitment to sit by designation early next month with the Court of Appeals for the First Circuit, this Court reluctantly (and with all due apologies) refers the matter to Magistrate Judge Martin Ashman (to whose calendar this case is also assigned) for that purpose. BDO is ordered to deliver the privilege-claimed documents to the Magistrate Judge's chambers forthwith.

One last point has occurred to this Court--something that has not been addressed by either of the parties. Suppose that some of the documents for which BDO claims privilege could otherwise fit within the standards governing the attorney-client privilege (and hence the equivalent statutory accountant- client privilege), but that they relate to the types of ''abusive tax shelters'' that have triggered the congressional enactment at issue here.

In that event, would the utilization of such an "abusive tax shelter" by a taxpayer to whom BDO has given advice as to its use create the potential of criminal as well as civil liability on the taxpayer's part? And if so, would that trigger the application of the crime-fraud exception to the privilege? This Court requests prompt input from each party on this subject by written submissions delivered to this Court's chambers on or before November 18, 2002,[4] so that Magistrate Judge Ashman's document review may take place with that supplemental consideration in mind.

¶2002-5528

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Gina BEITLER, aka Gina Hainline, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-50418, Oct. 11, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—tax evasion—U.S. Sentencing Guidelines—restitution. District court's restitution order against convicted tax evader was affirmed: court had discretionary authority to order restitution; judgment expressly imposed restitution as probationary condition, and sentencing hearing was unambiguous as to court's order of monthly restitution payments during probation; and application of U.S.S.G. §5E1.1(g) was proper. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §7201.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the Central District of California, David O. Carter, District Judge, Presiding.

Before FERNANDEZ, GRABER, and GOULD, Circuit Judges.

MEMORANDUM*

[1] Gina Beitler appeals the imposition of restitution after pleading guilty to tax evasion, in violation of 26 U.S.C. § 7201. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742. We review for plain error, United States v. Zink, 107 F.3d 716, 718 (9th Cir.1997), and we affirm.

Beitler contends that the district court lacked statutory authority to order restitution to the Internal Revenue Service. We disagree. See 18 § 3563(b)(2) (giving the district court discretion to order restitution as a condition of probation).

To the extent that Beitler relies on the sequence of orders in the written judgment order to contend that restitution was not imposed as a condition of her probation, this contention is unavailing. First, the judgment expressly stated as a condition of her probation that Beiler must pay taxes owed for the years of conviction. Second, the sentencing hearing was unambiguous as to the district court's order that $800 monthly restitution payments were to be made during probation. See United States v. Bergmann, 836 F.2d 1220, 1222 (9th Cir.1988) (stating that a judge's oral sentence pronouncement, not the words of a judgment or commitment order, are controlling).

Finally, Beitler asserts that the court should not apply the express directive of U.S.S.G. § 5E1.1(g), which states that the earlier version of § 5E1.1 applies to offenses committed prior to November 1, 1997, because it would create uncertainty. Again we disagree, because the guideline is clear. See U.S.S.G. § 5E1.1(g); § 5E1.1 (1997).

AFFIRMED.

¶2002-5529

Robert PEACO and Mildred PEACO, APPELLANTS v. COMMISSIONER of

[4] Under the circumstances, of course, copies of those submissions should also be delivered to Magistrate Judge Ashman.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Internal Revenue. U.S. Court of Appeals, Third Circuit, (CA3) No. 00-2154, Sept. 27, 2002. Tax Court, TC Memo 2000-122, RIA TC Memo ¶2000-122 (opinion by Foley, *J.*), affirmed. Year 1995. Decision for Govt.

1. Income exclusions—settlement payments—age discrimination lawsuit. Tax Court properly held that settlement payment taxpayer received in age discrimination suit against her employer was taxable income: Supreme Court precedent clearly established that payment wasn't excludable from gross income as damages from personal injury; fact that settlement was executed before Supreme Court decision was filed was irrelevant where taxpayer didn't file return or pay taxes on settlement until year after decision's filing; and her alleged reliance on suspended revenue rulings was misplaced. Also, evidence showed that payment was for lost compensation and benefits, and that agreement's explicit pain-and-suffering allocation was strongly influenced by tax considerations rather than settlement realities; and argument that Court employed improper ''facts and circumstances'' analysis was meritless. *Reference:* United States Tax Reporter ¶1045.02(15); 1045.02(30). IRC §104.

United States Court of Appeals, Third Circuit,

On Appeal from the Decision of the United States Tax Court. Agency No. 99-08273. Tax Court Judge: The Honorable Maurice B. Foley.

Before BARRY, AMBRO, and COWEN, Circuit Judges.

OPINION

BARRY, Circuit Judge.

NOT PRECEDENTIAL

Appellants Robert and Mildred Peaco filed a petition in the United States Tax Court for a redetermination of a $218,903 tax deficiency assessed by the Internal Revenue Service (''IRS'') for the 1995 calendar year. The deficiency was based on appellants' failure to report $584,000 in income on their 1995 joint tax return. Mrs. Peaco received the sum in settlement of her age discrimination and retaliation claims against her employer, Chester County Intermediate Unit 24 (''CCIU''), under the Age Discrimination in Employment Act (''ADEA'') and Pennsylvania Human Relations Act (''PHRA''). Of the total, $84,000 represented attorney's fees and costs. After conducting a non-jury trial, the Tax Court entered a decision permitting appellants to exclude the award of attorney's fees from gross income but requiring them to report the remainder. The Court accordingly reduced the tax deficiency to $168,601. Mr. and Mrs. Peaco appealed. We have jurisdiction pursuant to 26 U.S.C. 7482 and will affirm.

[1] The question presented is whether Mrs. Peaco's settlement payment is excludable from gross income under 26 U.S.C. 104(a)(2) as damages received ''on account of personal injuries or sickness.'' It is not. The United States Supreme Court has definitively ruled that damages awarded under the ADEA, whether in the form of back pay or liquidated damages, are not the result of personal injury and must be included in gross income. Commissioner v. Schleier, 515 U.S. 323, 330–31, 332 [75 AFTR 2d 95-2675] (1995).

Appellants launch a variety of attacks on this simple and very clear conclusion. First, they argue that Schleier is inapplicable because the settlement agreement was executed before the decision was filed and payment was received on the same day the decision was filed. These facts are irrelevant. Taxes for the 1995 calendar year were not due until April 15, 1996, and appellants filed their joint income tax return on April 11, 1996. At the time the return was filed, Schleier had been in existence ten months. Appellants (and their professional tax accountants) clearly had advanced knowledge of and an obligation to follow Schleier.

Next, appellants attempt to avoid Schleier's effect by asserting that they reasonably and detrimentally relied on IRS Revenue Ruling 93-88, which held that compensatory damages, including back pay, received in satisfaction of gender,

race, or disability discrimination claims were excludable from gross income. This assertion also fails. The IRS suspended Revenue Ruling 93-88 by notice released August 3, 1995, many months before appellants filed their tax return. Moreover, the IRS's interpretive rulings may not be used to overturn the plain language of a statute. Schleier, 515 U.S. at 336 n. 8 (citations omitted). Any reliance on Revenue Ruling 93-88 was, therefore, misplaced.

Appellants also cite Revenue Ruling 96-65 as authority for the proposition that Schleier is inapplicable to damage awards received on or before June 14, 1995, the decision's filing date. Although appellants correctly observe that Revenue Ruling 96-65 provides that it will not apply to damages received or settlements brokered on or before June 14, 1995, the ruling does not state that Schleier will not apply to these awards. More importantly, Revenue Ruling 96-65 was published more than eight months after appellants filed their 1995 tax return. The ruling could not, therefore, have been a factor in appellants' decision to exclude the settlement amount from their gross income.

Even accepting that Schleier applies, Mr. and Mrs. Peaco maintain that the settlement proceeds were excludable from gross income because they were intended to compensate Mrs. Peaco for her pain and suffering under the PHRA and not for lost wages and benefits under the ADEA. The Tax Court found otherwise, concluding that the "realities of the settlement" reflected that CCIU paid the $500,000 to satisfy Mrs. Peaco's loss of compensation claim. We review the Tax Court's factual finding for clear error. Francisco v. United States, 267 F.3d 303, 321 [88 AFTR 2d 2001-6513] (3d Cir.2001). No such error occurred here.

In her complaints filed with the Pennsylvania Human Relations Commission and the Equal Employment Opportunity Commission, Mrs. Peaco alleged that CCIU fired her and refused to give her vacation credit because she was then 54 years old. The EEOC issued a letter determining that CCIU had violated the ADEA by firing Mrs. Peaco and had engaged in retaliation. After receiving the EEOC letter, Mrs. Peaco filed an action in federal court seeking damages, which included "back pay, front pay, benefits, pension benefits, attorney's fees, costs of this suit, compensatory damages, liquidated damages, punitive damages, interest and all other legal and equitable relief to which she is entitled for the denial of equal employment opportunity." App. at 215–16. Such "other" relief included damages for emotional distress under the PHRA. Mrs. Peaco's trial demand was $1.2 million; however, the parties eventually settled for $500,000. The settlement confirmation letter indicates that the $500,000 was paid "to fully and finally settle all claims of Mrs. Peaco." App. at 310. Based on these facts, the Tax Court was not clearly erroneous in concluding that the primary and overarching purpose of Mrs. Peaco's lawsuit was to recover lost wages and benefits caused by her termination and that the $500,000 was paid to do just that.

Appellants counter that the settlement agreement expressly allocated all damages to pain and suffering and, thus, the funds qualify for 104(a)(2)'s exception. The Tax Court acknowledged the agreement's explicit allocation but found that it did not reflect the realities of the settlement given the nature of the lawsuit and the parties' intent. The Court did not err by looking beyond the face of the agreement. "It is . . . well established that in cases in which the settlement agreement's allocation of damages does not reflect the true nature of the underlying award, the District Court [or in this case the Tax Court] has a duty to look behind the agreement of the parties to discern the true nature of the 'payor's intent' in settling claims." Francisco, 267 F.3d at 322. This is particularly so where the allocation of damages within the settlement agreement is "driven by tax considerations and [does] not reflect the true value of settled claims." Id. (citing Robinson v. Commissioner, 70 F.3d 34, 37–38 [76 AFTR 2d 95-7786] (5th Cir.1995)).

The Tax Court did not err in determining that the allocation here was influenced

more by tax considerations than the merits of the lawsuit. In a letter dated March 27, 1995, to CCIU's executive director, CCIU's attorney estimated CCIU's liability to Mrs. Peaco at $100,000 of back pay including benefits and $400,000 of front pay excluding benefits and salary increases. The attorney further noted the potential for pain and suffering, punitive, and double damages. Shortly thereafter, the parties agreed to settle for $500,000. Instead of allocating the sum to back pay and front pay, however, the parties, at Mrs. Peaco's insistence, allocated the entire amount to pain and suffering. A major factor for doing so was the ability to avoid federal income taxes on the money under 104(a)(2); indeed, at trial Mrs. Peaco was going only for the whole $500,000 as personal injury and not any portion thereof and fought to keep Exhibits 22R and 23R out of evidence. These circumstances sufficiently support the Tax Court's conclusion that, despite the settlement agreement's terms, CCIU paid Mrs. Peaco the $500,000 as compensation for lost wages and benefits.

Last, appellants contend that the Tax Court incorrectly applied a ''facts and circumstances'' rather than a ''cause and effect'' approach to analyze their petition. This argument is wholly unavailing. There is no indication whatsoever in the record that the Tax Court applied a ''facts and circumstances'' approach. As stated above, the Tax Court reasonably concluded that CCIU paid Mrs. Peaco the $500,000 to compensate her for lost wages caused by her wrongful termination. There was no need, therefore, for the Court to address whether Mrs. Peaco incurred damages on account of personal injury, i.e., emotional distress.

For the foregoing reasons, we will affirm the decision of the Tax Court.

¶2002-5530

UNITED STATES OF AMERICA, PLAINTIFF v. Darrell D. BILLHEIMER, ET AL., DEFENDANT. U.S. District Court, Southern Dist. of Ohio, (DC OH) Case No. C-3-99-402, Sept. 26, 2002. Earlier proceedings at (2002, DC OH) 90 AFTR 2d 2002-5492; (2002, DC OH) 89 AFTR 2d 2002-2241, 197 F Supp 2d 1051, 2002-1 USTC ¶50424 [89 AFTR 2d 2002-2241]; and (2000, DC OH) 86 AFTR 2d 2000-6328, 169 F Supp 2d 763, 2000-1 USTC ¶50138. Years 1992, 1993, 1994. Decision against Taxpayer.

1. Actions to reduce assessments to judgment—summary judgment—fraudulent conveyances—alter egos; nominees—foreclosure—discovery. Taxpayer's motion to extend time for pre-trial conference was denied: extension for 3-year old case wasn't warranted. *Reference:* United States Tax Reporter ¶74,035.01(25); 74,035.03(80); 63,215.04(9). IRC §6321; 7403.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON,

ORDER DENYING EXTENSION OF TIME FOR PRE-TRIAL CONFERENCE

District Judge Thomas M. Rose

Magistrate Judge Michael R. Merz

[1] This case is before the Court on Defendants' Motion for Extension of Time for the Pre-trial Conference in this case (Doc. #55). This case has been pending for more than three years, having been filed on August 18, 1999. Thus it is beyond the time presumptively set by the Civil Justice Reform Act of 1990 for the completion of all cases in Federal Court, including cases far more complex than this one. It is imperative, therefore, that the case be put on a tight schedule for completion of litigation.

Accordingly, Defendants' Motion for Extension of Time is DENIED.

September 26, 2002.

Michael R. Merz

United States Magistrate Judge

¶2002-5531

Michael BURT, PETITIONER v. UNITED STATES, DEFENDANT. U.S. District Court, Dist. of Michigan, (DC MI) Case No. 02-x-73131, Sept. 23, 2002. Decision for Taxpayer.

1. Third-party summonses—petition to quash—procedure. Taxpayer's motion to withdraw his petition to quash IRS's 3d-party summons was granted and case was closed. *Reference:* United States Tax Reporter ¶76,095.01(10). IRC §7609.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION,

ORDER GRANTING PETITIONER'S MOTION TO WITHDRAW HIS MOTION TO QUASH [8-1]

HONORABLE ARTHUR J. TARNOW UNITED STATES DISTRICT JUDGE

[1] On August 28, 2002, Petitioner Michael Burt filed a Motion to Withdraw his Motion to Quash Third-Party Summons. He also stated ''no other issue exists in this matter.''

IT IS ORDERED that Petitioner Burt's Motion to Withdraw his Motion to Quash Third-Party Summons is Granted [8-1]. Pursuant to Burt's representations that no other issues remain in this matter, the case is CLOSED.

Dated: Sep 23, 2002

HON. ARTHUR J. TARNOW

UNITED STATES DISTRICT JUDGE

ORDER GRANTING PETITIONER'S MOTION TO WITHDRAW HIS MOTION TO QUASH [6-1]

HONORABLE ARTHUR J. TARNOW UNITED STATES DISTRICT JUDGE

Case No. 02-x-73203

On August 28, 2002, Petitioner Michael Burt filed a Motion to Withdraw his Motion to Quash Third-Party Summons. He also stated ''no other issue exists in this matter.''

IT IS ORDERED that Petitioner Burt's Motion to Withdraw his Motion to Quash Third-Party Summons is GRANTED [6-1]. Pursuant to Burt's representations that no other issues remain in this matter, the case is CLOSED.

Dated: Sep 23, 2002

HON. ARTHUR J. TARNOW

UNITED STATES DISTRICT JUDGE

¶2002-5532

CAVE HILL INVESTMENT COMPANY, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Kentucky, (DC KY) Civil Action Number 3:00CV-623-J, Sept. 24, 2002. Year 1995. Decision for Govt.

1. Exempt orgs.—cemetery companies. Govt. was granted summary judgment in trustee's refund action that trust established for care of 2 family lots wasn't tax-exempt under IRC §501(c)(13): trust didn't qualify as statutory ''cemetery co.'' where it didn't hold real estate, open or close graves, or conduct funeral or memorial services. And, case law merely considering distinction between public and private cemeteries, not cemetery co. status, was distinguished. *Reference:* United States Tax Reporter ¶5015.22(25). IRC §501.

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE,

JUDGMENT

EDWARD H. JOHNSTONE, Senior Judge United States District Court

This matter having come before the Court on cross-motions for summary judgment, and the having entered its Memorandum Opinion and being advised,

IT IS ORDERED THAT:

1. The motion of plaintiff for summary judgment is denied.

2. The motion of the United States for summary judgment is granted.

3. This is a final and appealable order and there is no just cause for delay.

This 24th day of September, 2002

EDWARD H. JOHNSTONE, Senior Judge

United States District Court

MEMORANDUM OPINION

EDWARD H. JOHNSTONE, Senior Judge
United States District Court

[1] This case presents the plaintiff's claim for refund on grounds that the Thomas L. Barret Trust is exempt from federal taxation. The matter is before the Court on both parties' motions for summary judgment. After examining the materials of record, the arguments of the parties, and the applicable authorities, the Court is of the opinion that defendant is entitled to judgment as a matter of law.

The parties agree that Cave Hill Cemetery was established in 1848, by act of the Kentucky General Assembly. Basic preservation of cemetery grounds is provided through the Preservation Fund, established at the direction of the General Assembly in 1864. The Preservation Fund is exempt from federal income tax under 26 U.S.C. Sec. 501(c)(13), which provides for exemption for -

> Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for the purpose of the disposal of bodies by burial or cremation which is not permitted by its charter to engage in any business not necessarily incident to that purpose and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

The managers of the Cemetery Corporation also established a second trust fund, known as the Endowed Trust Fund. Contributors ''endow'' a lot or lots, and their contributions are placed in individual trust accounts. The type of additional services (beyond ''Preservation Fund'' services) provided depends on the amount contributed to the Trust. The funds in the trust accounts are commingled and income is periodically allocated; no portion of the principle can ever be used.

The particular trust involved in this case, the Thomas L. Barret or ''TLB'' Trust was established in 1940 for the care of two Barrett family lots. In accordance with the operation of the Endowed Trust Fund, plaintiff Cave Hill Investment Corporation is trustee for the TLB Trust, although no written instrument establishing the trust exists. The tax year involved in this case is 1995, when TLB Trust earned $182.32 in income, claimed a $100 exemption, and paid taxes on $82.32. The next year, $132.58 of the 1995 after tax income was used for maintenance of the Barrett lots, and the remaining $37.39 went to general cemetery overhead.

The question presented in this case is whether the trustee has established that the TLB Trust is entitled to exemption under 26 U.S.C. Sec. 501(c)(13). In the 1960s and 1970s, several cases addressed the question of availability of exemption for perpetual care entities. It is to those cases that we must look for guidance in this matter.

The plaintiff argues that 501(c)(13) actually provides three separate categories for exempt organizations. These it describes as (1) cemetery companies owned and operated exclusively for the benefit of their members, (2) cemetery companies not operated for profit, and (3) organizations chartered for the disposal of bodies. In support of its position that the Endowed Trust is exempt from income taxation, plaintiff cites Denver United States National Bank v. United States, 302 F.Supp. 801 [16 AFTR 2d 5263] (D.Col. 1965), in which the court held that each of three perpetual care trusts (operating much like the Endowed Trust in this case), irrevocable and with no benefit inuring to the corporation, its shareholders or any other private person, was a ''cemetery company'' within the meaning of Section 501(c)(13).

The Internal Revenue Service takes the position that in order to come within 501(c)(13)'s definition of ''cemetery company,'' an entity must show that it owns real estate for burial of the dead, sells lots

or mausoleums, performs funeral services, and otherwise acts in the ordinary sense of ''cemetery'' company. It relies on Mercantile Bank & Trust Co. v. United States, 441 F.2d 364, 366 [27 AFTR 2d 71-1085] (8th Cir. 1971), which held that a trust established exclusively for care and maintenance of specific mausoleums within the cemetery ''perform only a very small portion of the usual functions of a cemetery company,'' and are thus not entitled to exemption under 501(c)(13).

Plaintiff, however, suggests that each endowed lot (and its attendant trust fund) constitutes a ''private family cemetery,'' qualifying for exemption under 26 U.S.C. Sec. 501(c)(13). Plaintiff refers the court to John D. Rockefeller Family Cemetery Corporation v. Commissioner, 63 T.C. 355 (1974). The facts of that case showed a 1938 conveyance of land from Rockefeller to the corporation for the purpose of burial of family members; upon his death in 1960, Rockefeller bequeathed funds for the perpetual care of the cemetery. The Tax Court ruled that the Corporation was exempt under Section 501(c)(13), rejecting the Internal Revenue Service's argument that the exemption should not apply to ''private'' cemeteries.

The situation in this case is readily distinguishable from that in Rockefeller. The principle issue in that case concerned the difference between ''public'' and ''private'' cemeteries; however, there was no question that the corporation fit the ordinary definition of ''cemetery company'' - it held real estate and opened and closed graves. In this case, the TLB Trust does not hold any real estate, does not open and close graves, does not conduct funeral or memorial services; in short, it does not fit the ordinary definition of ''cemetery company.'' Accordingly, it is not entitled to exemption under 26 U.S.C. Sec. 501(c)(13).

An order in conformity has this day entered.

This 24th day of September, 2002

EDWARD H. JOHNSTONE, Senior Judge

United States District Court

¶2002-5533

In Re: Molly Jane COLEMAN, Debtor. Molly Jane COLEMAN, PLAINTIFF v. COMMUNITY TRUST BANK, ET AL., DEFENDANTS. U.S. Bankruptcy Court, Western Dist. of Virginia, (Bktcy Ct VA) CASE NO. 7-01-01199-WSB-11; NO. 7-01-00047, Sept. 20, 2002. Earlier proceeding at (2002, Bktcy Ct VA) 89 AFTR 2d 2002-2429. Year 1993. Decision for Taxpayer in part.

1. Tax claims in bankruptcy—prepetition transfers and obligations—avoidance—fraud. Chap. 11 debtor-in-possession/wife was granted partial avoidance under 11 USC §544(b) of deeds of trust against her home and other property that she had granted bank/husband's creditor to remove property from IRS's reach: taxpayer's testimony and surrounding evidence showed she granted deeds on previously unencumbered and valuable property solely to avoid IRS, and received no promise of forbearance or other consideration from bank. But, evidence also showed that bank still had valid business reasons for granting deeds, so taxpayer wasn't entitled to use avoidance powers to wholly negate deeds as between herself and bank, which meant avoidance was effective only to extent necessary to pay valid claims of IRS, taxpayer's other creditors and administrative expenses, and that deeds were otherwise left in effect for bank's benefit. *Reference:* United States Tax Reporter ¶68,726.53(10).

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF VIRGINIA ROANOKE DIVISION,

ORDER

William F. Stone, Jr. Bankruptcy Judge

CHAPTER 11

ADVERSARY PROCEEDING

In accordance with this Court's contemporaneous Memorandum Opinion in this adversary proceeding, it is

ORDERED

that the January 18, 1995 deeds of trust granted by Roger and Molly Jane Coleman for the benefit of Pikeville National Bank & Trust Co. (now Community Trust Bank) are hereby avoided to the extent, but only to the extent, that such avoidance is of benefit to the other creditors and the bankruptcy estate of the Debtor.

The Clerk shall mail copies of this Order and Memorandum Opinion to the Debtor, John M. Lamie, Esq., Mark L. Esposito, Esq., Charles H. Keen, Esq., and the U. S. Trustee.

ENTER this 17th day of September, 2002.

MEMORANDUM OPINION

William F. Stone, Jr. Bankruptcy Judge

CHAPTER 11

ADVERSARY PROCEEDING

In this adversary proceeding the Debtor, acting in her capacity as Debtor-in-Possession, seeks to avoid two deeds of trust which she and her husband, Roger Coleman, granted to the Defendant, Community Trust Bank (''the Bank''), to secure certain obligations of the husband and his business partner, Darrell Cook, on the ground that they were given to hinder and delay the collection efforts of the Internal Revenue Service. The Debtor has testified unequivocally that the only reason she signed the deeds of trust was to keep the properties they encumbered out of the hands of the IRS and claims that she was told by her husband that the attorney then representing the coal companies owned by Mr. Coleman and Mr. Cook in Chapter 11 bankruptcy cases had advised that such deeds of trust would be in fraud of creditors and could later be avoided. Determining whether these deeds of trust can be set aside in Mrs. Coleman's personal Chapter 11 case depends on the answer to a question made famous by Senator Howard Baker in a much more momentous context, ''What did he [in this case, the Bank's loan officer] know and when did he know it?''

UNDISPUTED FACTS

Roger Coleman and Darrell Cook were the equal owners of a number of coal companies which apparently for some years had been quite successful and provided a very comfortable standard of living for Roger and Mary Jane Coleman. Unfortunately, this success proved to be fleeting and by 1994 several of these companies were in trouble and in November of that year filed Chapter 11 bankruptcy petitions in this Court. Furthermore, the Colemans as well as Mr. and Mrs. Cook were financially embarrassed because one of their other companies, namely, Faith Coal, had earned a large profit in 1993 which had been used to subsidize losses incurred in two of the other companies rather than being distributed to its owners. Because this company was subject to a ''Subchapter S'' tax election, which meant that its profits were taxed directly to its shareholders rather than being subject to tax at the corporate level, the Colemans and the Cooks faced large personal tax liabilities for income which they had not actually received. As a result they were not in a financial position to pay the resulting tax liabilities. During the time period which is critical to the issues in contention in this adversary proceeding, Mr. Coleman and Mr. Cook had two principal concerns, (i) their need to seek accommodations from the Bank, which was the principal secured lender to their companies in bankruptcy and to which they were liable not only on the loans to or incurred jointly for the companies but also upon certain unsecured loans to each of them individually, and (ii) their large personal tax liabilities to the IRS which affected not only them but also their respective spouses as well. Mr. and Mrs. Coleman owned jointly and apparently as tenants by the entireties two valuable parcels of real estate, one being their residence property located in Buchanan County, Virginia, and the other being located on Holston Lake in Sullivan County, Tennessee. Both properties were unencumbered and were at risk of IRS tax liens being filed against them. Other than an automobile owned by Mrs. Coleman, these properties constituted the only assets of

substantial value in which she had an interest.

Although the financial skies were darkening for the Colemans and the Cooks as 1994 neared its end, they were not at all without hope that better times were around the corner. For one thing, Mr. Coleman and Mr. Cook believed that they could move coal mining equipment which served as collateral for the Bank's loans to other mines and soon return to profitability. To be able to do that they needed, or at the very least wanted, to get the Bank's consent to such proposal. For another thing, their companies' bankruptcy counsel had assisted them in securing new professional accounting and legal help with a view to filing consolidated tax returns for their companies so that losses could offset profits and amended returns could be filed which would relieve them of their personal tax liabilities. In short, both corporately and personally, they needed time to deal with their business and tax problems because they were not then in a position to meet either their companies' or their personal debt service obligations to the Bank or to pay the amounts currently owed to the IRS. A contemporaneous record pro-vides insight into the situation which they faced. A ''Call Report'' was prepared by Steve Belcher, the Bank's loan officer for the Coleman and Cook accounts, on November 17, 1994 concerning news which he had received that date from Mr. Cook and Mr. Coleman concerning the Chapter 11 bankruptcy filings of Big Fist Coal Company and its subsidiaries ''as a result of adverse business conditions and certain IRS tax liens.'' At that time Big Fist owed $263,704 to the Bank with a monthly payment obligation of $12,155. This loan was secured by equipment which had been appraised as being worth $614,500. A second loan to Coleman and Cook was in the amount of $707,890 and was secured by equipment which had been valued as being worth $1,615,400 in April of the preceding year and by the guaranty of Big Fist and Magic Mining, one of the former company's subsidiaries. In addition to these joint obligations Mr. Coleman had an unsecured loan from the Bank in the amount of $84,626 then owing and Mr. Cook had a similar unsecured loan having a then balance of $85,678. At that time the personal statements of Coleman and Cook on file with the Bank showed ''cash assets and a strong net worth.'' According to the Call Report, Coleman and Cook reported that all of their existing mines were profitable and that they intended ''that these accounts are to be maintained current.'' The Report stated that Coleman and Cook wanted to sell the equipment owned by Big Fist and pay the Bank and ''that their primary goal and concern is seeing that the bank is paid in full.'' The situation had changed somewhat, however, by December 7, 1994 when Mr. Belcher met at the Big Stone Gap Courthouse with Mr. Coleman, Mr. Cook, the companies' bankruptcy counsel, Mr. Copeland, and the Bank's attorney, Mr. Esposito. The parties did discuss again the sale of certain equipment, the proceeds of which would come to the Bank, but they also discussed Coleman's and Cook's wish to move certain equipment from ''the Appalachia Big Fist mines'' to certain other mines. According to the representations made at that meeting and recorded in a memo prepared by Mr. Belcher (which was dated December 9 rather than the actual date of the meeting), the planned asset sales would reduce the balance on the large Coleman and Cook loan from $707,890 to approximately $400,000, which Mr. Copeland ''stated that his clients would like to repay ... [in] monthly payments beginning February, 1995.'' Mr. Copeland ''also requested that the Bank consider re-amortizing the new balance over the remaining term of the note so as to reduce the payment structure.'' During this meeting the participants also discussed the IRS problems. Because of its importance to the issues raised in this adversary proceeding, the relevant passage of the memo will be quoted in full:

> Mr. Copeland expressed that the main reason for the filing of the Chapter 11 Bankruptcy by Big Fist Coal was to eliminate the pressure that the IRS was placing on his clients. Through the reorganization, as long as post taxes are paid, the companies will be flee to oper-

ate. Prior taxes that are due, hopefully, can be worked out and eliminated through the net operating loss carry forward from the previous companies. Mr. Copeland states that the IRS problem arose when one of the companies known as Faith Coal which was an S-corporation had profits in excess of $1,000,000.00. The profits from Faith Coal was expended to Big Fist and Raider to help start up and maintain their operations. When the IRS audited Faith and related companies, they said that this money was direct income to Coleman and Cook which resulted in both Coleman and Cook having tax liabilities in excess of $375,000 for the year. Mr. Copeland was confident that the filing of the Chapter 11 would allow the CPA firm (Management Accountant Solutions of Roanoke, VA) recently hired by Coleman and Cook to consolidate all of the companies under the heading of Big Fist Coal. Upon this consolidation, they would be able to utilize the net operating loss of Big Fist and Raider to offset prior taxes due.

The meeting also covered Coleman's and Cook's unsecured obligations to the Bank and they "expressed their willingness to maintain their personal obligations in a timely manner." At that point Mr. Esposito, Bank's counsel, "requested possible collateralization of the unsecured loans" as to which "all parties were agreeable". They specifically discussed a pledge of stock of Empire Coal, which was another company owned by Coleman and Cook and which was represented to have "in excess of $1.1 million in receivables from Big Fist, Raider and related companies." The memo does not record any conversation concerning any possible deeds of trust against the real estate owned by the Colemans and the Cooks. It did recite in detail the specifics of what equipment would be moved to which new locations and concluded with the mention that a motion would be made on December 14[1] to move the equipment from the Virginia mines to the Pike County, Kentucky locations and that upon the sale of that equipment, which was expected to be sold in the next week or so, "the money would be applied directly to the loan of Darrell Cook and Roger Coleman and the Big Fist loan". Mr. Copeland requested "that three payments be paid from the proceeds and the remaining be applied to principal."

On January 18, 1995 the Colemans signed and acknowledged the two deeds of trust now in issue. Both were under seal and were prepared by the Bank's law firm. The Virginia deed of trust was recorded on January 31, 1995. The recordation information as to the Tennessee deed of trust is not disclosed by the evidence. Prior to but around the same time that the Colemans signed their deeds of trust, Mr. and Mrs. Cook also granted two deeds of trust upon properties they owned in Virginia and Tennessee to secure Mr. Cook's obligations to the Bank. The IRS filed a notice of tax lien in Buchanan County against the Colemans' property in that jurisdiction on February 13, 1995. At all relevant times, Mr. and Mrs. Coleman have been and continue to be residents of Buchanan County, Virginia.

A hearing was held in this Bankruptcy Court on December 7, 1994 upon the motion filed by the corporate debtors owned by Mr. Coleman and Mr. Cook to obtain permission to move the mining equipment subject to the Bank's security interest. The Bank's counsel appeared at the hearing and expressed concerns about the Bank's security interest being protected in the equipment and that such equipment be insured against loss but indicated that the Bank was not opposed to the motion. Nothing was said about the Bank getting additional collateral as a condition of its consent. Subsequent to this hearing this Court entered an order on January 23, 1995 nunc pro tunc to December 2, 1994 which provided in part:

> 7. The authorization by the court is also granted, subject to the parties entering into agreements, which would provide adequate protection for the collateral of

[1] This appears to be incorrect as such motion was actually heard in Big Stone Gap on December 7, 1994, the same day as the meeting referenced in the memo.

each estate, such as insurance, payment of funds or other means necessary and the parties are ORDERED to meet and confer to determine what documentation is necessary to protect the interest of the parties in the equipment so that no party is prejudiced by this order.

The deeds of trust from the Colemans and the Cooks appear to be the only collateral obtained by the Bank for the individual notes of Mr. Coleman and Mr. Cook personally. The evidence does not indicate that there was any further discussion of the possible pledge of stock in Empire Coal which had been mentioned in Mr. Belcher's memo dated December 9, 1994. The Bank has filed as exhibits in this proceeding copies of the two proofs of claim it filed in the Roger Coleman bankruptcy case. These proofs of claim contain copies of the notes and security agreements covering the two large obligations which were already secured by coal mining equipment at the time the January 18, 1995 deeds of trust were granted. No proof of claim was filed for the previously unsecured note of Mr. Coleman and no testimony was offered at trial to indicate that any amount remains due upon such obligation.

Mrs. Coleman's bankruptcy petition asserts that the combined value of the Virginia and Tennessee properties owned as tenants by the entirety with Mr. Coleman was $745,000 on the date she signed her schedules, March 19, 2001. The amount of the Bank's claims, which were indicated to be disputed, against these properties was indicated to be $900,000. The amount of the IRS claim was indicated to be $260,000 and this was also listed as disputed. The IRS has filed a proof of claim in the amount of $571,569.63 and at this point no objection to the allowance of such claim has been filed. The only other proofs of claim which have been filed to date are five claims on behalf of Galen Med, Inc., t/a Clinch Valley Medical Center in the aggregate amount of $22,559.34. The only other creditor listed in the petition is Bank of America on a credit card debt of $7,877.10. Although it did not file a proof of claim prior to the bar date of December 11, 2001, Schedule F of the petition did not indicate this debt to be disputed, unliquidated or contingent.

The basis for the assertion that the IRS's claim is disputed is that Mrs. Coleman has sought and continued to seek relief from the 1993 joint tax liability on the ground that she is an "innocent spouse" entitled to take advantage of the provisions of 26 U.S.C. § 6015(f) adopted by Congress in 1998. Relief has been denied upon her application but special tax counsel has filed an appeal from this denial. No evidence was offered concerning the current status of this appeal but IRS counsel appeared and participated at trial in support of the Debtor-in-Possession's efforts to avoid the 1995 deeds of trust to the Bank.

DISPUTED FACTUAL CONTENTIONS

The Debtor contends that Steve Belcher, the Bank's loan officer, knew that the Colemans were granting the deeds of trust to give them time to work out their problems with the Internal Revenue Service. Paragraph #10 of the Complaint al-leges that the Bank "knew or should have known that the conveyance of said property to the bank was done with the actual intent to delay, hinder or defraud the Internal Revenue Service from collecting the joint tax liability due and owing from Roger and Janie Coleman, and any other creditors." Mr. Coleman testified that Mr. Belcher made a comment upon picking up the deeds of trust that now they wouldn't have to worry about the IRS. On the other hand, Mr. Belcher claimed in his testimony that he had no knowledge at the time that there was any tax claim against Mrs. Coleman at all and that he did not become aware of this until long after the fact when Mr. Coleman in his bankruptcy case tried to set aside the deeds of trust. Mrs. Coleman claims that she received no consideration of any kind from the Bank in exchange for conveying her interest in the Virginia and Tennessee properties. For its part, the Bank asserts that the Coleman household income was dependent upon Mr. Coleman's business activities and the Bank's willingness to work with Mr. Coleman and Mr. Cook and their businesses in

their companies' bankruptcy cases rather than taking a hard adversarial stance regarding the loans, such as demanding substantial adequate protection payments as a condition of not seeking relief from the stay, furnished ample consideration to both of the Colemans supporting the deeds of trust.

As evidence of the knowledge on the part of the Bank's loan officer, Mr. Belcher, of the Colemans' intent to hinder or delay the IRS's collection efforts, the Plaintiff has offered the following excerpt from Belcher's deposition testimony:

> Q. Do you recall what led to Mr. and Mrs. Coleman giving the deed of trust to the Bank?
>
> A. Yes.
>
> Q. What was that?
>
> A. There were several specific reasons.
>
> Q. Could you expand on what those were?
>
> A. During this time they were having financial problems, and they were in the process of desiring to move their equipment or relocate their equipment in different minesites or a minesite. And they requested the Bank for permission to move the equipment and to relocate its equipment. And mining equipment, especially when in use, has a high rate of deterioration or depreciation. And additional collateral was offered.
>
> Q. You say ''additional collateral was offered''. It was offered by whom?
>
> A. By Coleman and Cook.
>
> Q. And did you request the additional collateral before they could move the equipment, or did they just offer to give you the collateral on the loan?
>
> A. The equipment ... or the collateral was offered by Coleman and Cook.
>
> Q. Right. Did they just offer that as extra security on the loan?
>
> A. For permission to relocate the equipment, and then additional comments and requests were made. The I.R.S. was involved. And they were negotiating with the I.R.S. They had obtained tax counsel. They were refiling their taxes on the different companies. And they requested ... were asking for time between the I.R.S ... to file it. And so additional collateral was offered or as collateral to obtain the time to file the amended tax returns.
>
> Q. So they were giving you additional collateral, so they could file ... so they could have extra time to file tax returns?
>
> A. Yes.
>
> Q. And the Bank ... why were they giving collateral to the Bank and asking for time?
>
> A. Their property was unencumbered, and the I.R.S. would come in and levy on the property.
>
> ....
>
> Q. Was that all done at the same time? In other words, did they come to you and say, ''We need some extra time to file our taxes. We want to give you this land as collateral on the loan, and we want to move the equipment.''? Or did they just come and tell you they wanted to give you an interest in the land, and then later came to you at a different time and said, ''We need to move this equipment. Can you just use that land that we gave you earlier as extra collateral.''?
>
> A. They had multiple reasons, and they were given at basically the same time.

(Belcher deposition testimony, line 20, page 28, thru line 4, page 30, and line 19, page 30, thru line 2, page 31).

At trial Mr. Belcher claimed that this deposition testimony included knowledge that he later obtained from the allegations contained in the adversary proceeding filed by Mr. Coleman against the Bank and that he was unaware at the time of any intent on the Colemans' part to put their property out of the IRS's grasp. In its essentials, however, this testimony is consistent with that given by Mr. Copeland at trial concerning the discussions he had with Mr.

Coleman and Mr. Cook about the granting of the deeds of trust to the Bank:

Q. What was the specific problem faced by Roger and Darrell in regard to their tax situation in October or November of 1994?

A. They had paid . . . they had turned over, or the I.R.S. had seized (I am not sure which) ---. I believe that they voluntarily turned over all of their cash they all had on hand. And the I.R.S. was very aggressively going after Mr. Cook and his spouse and Mr. Coleman and his spouse for the income tax liability as a result of the failure to declare . . . . Mr. Coleman's and Mr. Cook's failure to declare the income.

Q. And did you meet with Mr. Cook and Mr. Coleman to discuss those issues?

A. I had met with them to discuss the Big Fist issues and the issue came up.

Q. And did they ask of you any . . . about that matter, as far as the legal rights and that kind of thing was concerned?

A. Mr. Cook had previously, and then Mr. Coleman asked in the meeting what Mr. Cook and I had discussed by telephone.

Q. And what did you tell Mr. Coleman?

A. Well, I told Mr. Coleman basically that he was between a rock and a hard spot, that I thought that Big Fist could get a better break from Pikeville National Bank if it had . . . if they would give Pikeville National Bank a deed of trust on their properties, the idea being that if banks have more secure collateral (not mining equipment), they could give better terms and better . . . you know, better terms to the company because they wouldn't be worried about depreciation and the equipment getting lost and damaged. And I also told Mr. Coleman about Section 548 of the Bankruptcy Code. I explained to him how that if they did transfer the assets and things didn't work out, that if they filed Bankruptcy within one year personally, they could file a complaint to recover the deed of trust.

Q. And that would be under what basis?

A. Fraudulent transfer.

(Copeland trial testimony, line 4, page 33 thru line 16, page 34).

Q. And as I understand it, you suggested to him that he pledge this real estate to the Bank to get more favorable terms, to induce the Bank to work with them in terms of restructuring the debt and making deferments and that kind of thing?

A. Yes, sir. It was the decision of who your friend was. You know, where . . . what is to the best interest of Big Fist. Where is Big Fist going to benefit? If you are going to lose your real estate, then you would obviously . . . it is better to have it in the hands of your lending . . . your senior lending bank that will then give you longer and better terms to refinance your . . . your debt.

Q. And I think you stated that the way to get that from a bank, the way to induce a bank to do that, is to give them collateral?

A. Yes, sir.

(Copeland trial testimony, lines 10-25, page 46)

LEGAL CONTENTIONS

Mrs. Coleman asserts that the deeds of trust are void pursuant to Va. Code § 55–80 and Tennessee Code § 66-3-101.[2] The former statute reads as follows:

Every gift, conveyance, assignment or transfer of, or charge upon, any estate,

[2] Tennessee has two fraudulent conveyance statutes dealing with transfers made with alleged intent to hinder, delay or defraud creditors. The one relied upon by the Plaintiff is the older of the two and is derived from British statutes that were adopted in North Carolina and continued in Tennessee when it became a separate state. The other is part of the Uniform Fraudulent Conveyance Act adopted by Tennessee in 1919. The latter is currently designated as Tennessee Code section 66-3-308 and reads: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud, either present or future creditors, is fraudulent as to both present and future creditors." *See In re Turner*, 78 B.R. 166, 169 (Bankr. E.D. Tenn. 1987); *M. & N. Freight Lines, Inc. v. Kimbel Lines, Inc.*, 180 Tenn. 1, 170 S.W.2d 186, 187 (1943).

> real or personal, every suit commenced or decree, judgment or execution suffered or obtained and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers or other persons of or from what they are or may be lawfully entitled to shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This section shall not affect the title of a purchaser for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate granter or of the fraud rendering void the title of such grantor.

Tennessee Code § 66-3-101 reads as follows:

> Every gift, grant, conveyance of lands, tenements, hereditaments, goods, or chattels, or of any rent, common or profit out of the same, by writing or otherwise, and every bond, suit, judgment, or execution, had or made and contrived, or malice, fraud, covin, collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, or to defraud or to deceive those who shall purchase the same lands, tenements, or hereditaments, or any rent, profit, or commodity out of them, shall be deemed and taken, only as against the persons, such person's heirs, successors, executors, administrators, assigns, whose debts, suits, demands, estates, or interest, by such guileful and covinous practices as aforementioned, shall or might be in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void; any pretense, color, feigned consideration, expressing of use, of any other matter or thing, to the contrary notwithstanding.

In addition to denying that the deeds of trust were granted with the intention of hindering, delaying or defrauding creditors or that the Bank had any notice or knowledge of any such intent, the Bank has urged that the bankruptcy case itself and this adversary proceeding have been filed with an improper purpose and in bad faith, namely, to allow the Debtor to assume the powers of a bankruptcy trustee to challenge for her own benefit a transaction after she and her husband have received the benefit from it and which outside of bankruptcy she would have no standing to challenge. In short, she seeks to benefit from claims of her own fraudulent (in law) conduct. The Court has previously denied the Bank's motion to dismiss the bankruptcy case in a separate opinion, to which the Bank has filed a timely motion for reconsideration.

CHOICE OF LAW

The parties are agreed that the applicable law governing deeds and encumbrances of real estate allegedly granted in fraud of creditors is the law of the jurisdiction where the real estate is located and this certainly appears to be the generally accepted rule. 37 Am. Jur. 2d 792, Fraudulent Conveyances § 110 (1968); *Robinson v. Queen*, 87 Tenn. 445, 11 S.W. 38 (1888); Annot. Conflict of Laws as Regards Validity of Fraudulent and Preferential Transfers and Assignments, 111 A.L.R. 787 at 811 (1937); *Irving Trust Co. v. Maryland Casualty Co.*, 83 F.2d 168 (2nd Cir. 1936) (L. Hand, J.); Restatement of the Law, Second, Conflict of Laws, § 223, comment f (1971). Accordingly, the validity of the Tennessee deed of trust is governed by the law of that state and the validity of the Virginia deed of trust is governed by the law of the Common-wealth. Similarly, the parties seem to be agreed that the evidentiary burden of proof to be met before a deed of trust can be set aside on state fraudulent conveyance law grounds is determined by the law of the respective state where the land is located, although they disagree on what that law is, at least in Tennessee. Although evidentiary matters are frequently determined to be procedural rather than substantive in nature and therefore controlled by the law of the forum court, where "the primary purpose of the relevant rule of the state of the otherwise applicable law is to affect decision of the issue rather than to regulate the conduct of the trial", the law of the otherwise applicable law will be applied. Restatement

of the Law, Second, Conflict of Laws, § 134 (1971). Accordingly, this Court will apply the burden of proof rule applicable to the jurisdiction in which a particular property is located. Tennessee law requires proof of an intent to hinder, delay or defraud creditors by a preponderance of the evidence, *United States v. Kent* [sic, Kerr], 470 F. Supp. 278, 281 [43 AFTR 2d 79-379] (E.D. Tenn. 1978); *In re Hicks*, 176 B.R. 466, 470 (Bankr. W.D. Tenn. 1995); *James v. Joseph*, 156 Tenn. 417, 424–26, 1 S.W.2d 1017 (1928), while Virginia requires that such proof meet the higher "clear and convincing" standard *Armstrong v. United States*, 7 F.Supp.2d 758, 764 [82 AFTR 2d 98-5008] (W.D. Va. 1998); *In re Decker*, 295 F. Supp. 501, 507–08 (W.D. Va. 1969); *Hutcheson v. Savings Bank*, 129 Va. 281, 105 S.E. 677, 680 (1921). *In re Yost*, 47 B.R. 697, 699 (Bankr. W.D. Va. 1985) citing *Colonial Investment Co. v. Cherrydale*, 194 Va. 454, 73 S.E.2d 419 (1952).

APPLICABLE VIRGINIA LAW

As early as 1826 the Supreme Court of Virginia (then the Supreme Court of Appeals of Virginia) dealt with the situation of a creditor participating in a transaction intended by his debtor to hinder, delay or defraud his other creditors but where the creditor was only striving to protect his own interest in attempting to recover from the debtor. The reporter's headnote to the Court's opinion in the case of *Garland v. Rives*, 4 Rand. (25 Va.) 282, 15 Am. Dec. 756, 1826 WL 1069 (1826) reads in part as follows:

> So ... if the grantee be privy to a fraudulent intent on the part of the grantor, and takes a deed to secure his own debt, with provisions to delay, hinder, or defraud other creditors, the deed will be void, although his only motive was, to secure his own debt, and the other provisions were forced on him by the grantor, as the only means of having his own debt secured. Such a grantee will not be considered as a bona fide purchaser.

The opinion itself similarly states as follows:

> Without the bona fides on the part of the grantee, the valuable consideration has no effect in rescuing the transaction from the literal terms and spirit of the Statute. If Wingfield and Coleman could be considered as bona fide creditors for $13,000, and had aimed only at securing or getting payment of the debt, they would have been protected by the proviso of the Statute, no matter what had been the fraudulent intent of the grantor. But, at the moment they passed this line, and mixed with this object, that of delaying, hindering, or defrauding creditors, any conveyance made in furtherance of this compound object, was absolutely void, and they were left (as they were before they attempted the fraud) creditors without a security.

1826 WL 1069 at 12. More recently Justice Compton on behalf of the Supreme Court of Virginia enunciated a concise but comprehensive summary of the Virginia law on this subject in the following passage:

> At common law and under Code § 55-80 ... an insolvent debtor may generally make a valid transfer of a portion or the whole of his assets to a bona fide creditor on account of an existing indebtedness, if that is the sole purpose of the debtor and the transfer is for full value. [citation omitted] This is true even though such transfer is intended by the debtor and creditor to give such creditor a preference to the exclusion of others in the distribution of the debtor's assets .... But if the purpose to make a bona fide preference is merely incidental to the transaction and is used as a cloak for some other purpose which is fraudulent in actual intent, the transfer is invalid.
>
> In order to set aside a preference, the plaintiff must not only prove that the debtor intended to delay, hinder or defraud his other creditors, he must also show that the preferred creditor had notice of such intent. [citation omitted] Under the last sentence of the statute ... the transfer to an innocent grantee who has given value will be sustained.

> But proof of actual knowledge of the debtor-grantor's fraudulent intent is not necessary, it being sufficient to show that the grantee had ''knowledge of such facts and circumstances as would have excited the suspicion of a man of ordinary care and prudence, and put him upon such inquiry as to the bona fides of the transaction as would necessarily have led to the discovery of the fraud of the grantor . . . . '' [citation omitted]

Bank of Commerce v. Rosemary and Thyme, Inc., 218 Va. 781, 784, 239 S.E.2d 909, 912 (1978).

Several years earlier Judge Dalton of the District Court of this District held that good faith on the part of a preferred creditor ''cannot be said to be lacking unless the transferee knowingly participated in the debtor-transferor's purpose to defeat other creditors or lacked good faith in valuing the property exchanged.'' *In re Decker*, 295 F. Supp. 501, 516 (W.D. Va. 1969), *aff'd, Woodson v. Gilmer*, 420 F.2d 378 (4th Cir. 1970). The Supreme Court of Virginia stated in the case of *Willis v. The Blue Ridge Bank*, 153 Va. 392, 149 S.E. 624 (1929) that ''the burden of showing value is upon the grantees when the grantor's fraudulent purpose has been made to appear.'' 153 Va. at 403. *See also Baldwin & Brown v. Winfree's Adm'r*, 116 Va. 16, 81 S.E. 36 (1914)(''when a prima facie case of fraud has been shown, the burden shifts, and the defendant must establish the bona fides of the transaction.'' 81 S.E. at 37, quoting from *Shoemaker v. Chapman Drug Co.*, 112 Va. 612, 72 S.E. 121); *accord, Hutcheson v. Savings Bank*; *supra*, 105 S.E. at 681. An intent to ''hinder'' or ''delay'' a creditor is sufficient to come within the statute although there is no intent ultimately to defraud the creditor. *Darden v. George G. Lee Co.*, 204 Va. 108, 129 S.E.2d 897 (1963); 9A Michie's Jurisprudence 16, Fraudulent and Voluntary Conveyances § 12 (1991).

APPLICABLE TENNESSEE LAW

The exceeding fineness of the distinction between the right of a debtor to prefer one creditor over others, even if the inevitable effect of such preference is to delay or hinder other creditors, even when such consequence is known to both the debtor and the preferred creditor, and the right of a creditor to set aside a transfer which was intended to hinder or delay creditors when such intent was known to both the debtor and the preferred creditor, is illustrated by the following passage from a 1932 decision of the Court of Appeals of Tennessee quoting from a decision of the Supreme Court of Missouri, *Cole v. Cole*, 231 Mo. 236, 132 S.W. 734 (1910):

> [A] wife may freely contract with her husband. That, if she be a bona fide creditor, her debt stands on as sure as that of any one else, he may prefer her, since those acts, as before, by securing her debts to the exclusion of others, existing or subsequent, notwithstanding she may have known of his indebtedness and insolvency, notwithstanding she knew that the fact of her preference would have the ultimate effect of hindering and delaying his other creditors, and notwithstanding the husband intended to hinder and delay his creditors; all this, so long as (and provided always) she keep her hands clean by not participating in or becoming a party to his fraudulent intent. There is thin ice there, and one who walks thereon has need of great care.

Hartnett v. Doyle, 16 Tenn. App. 302, 64 S.W.2d 227, 231 (1932). A subsequent decision of the Supreme Court of Tennessee established the principle that even if there is no intention ultimately to defraud other creditors, an intent to hinder or delay them in the enforcement of their fights ''is sufficient to avoid the mortgage.'' *M. & N. Freight Lines v. Kimbel Lines*, 180 Tenn. 1, 170 S.W.2d 186, 186–7 (1943).[3] *Accord, Klein v. Rossi*, 251 F. Supp. 1 (E.D.N.Y. 1966) (New York Law).

On the other hand it has been held that the words ''hinder'' and ''delay'' must be ''taken in their legal or technical, and not their literal sense'', which means ''an im-

[3] While this decision construed Tenn. Code section 7277 (now 66-3-308) rather than the statute relied on by the plaintiff in this case (66-3-301), the same principle would certainly be applicable as well to the latter statute.

proper or illegal hindrance or delay-not such as is reasonable and fair in the exercise of the well established right to prefer creditors.'' *Hefner v. Metcalf*, 38 Tenn. 577, 1858 WL 2963 at 2 (1858).

In Tennessee, as in Virginia, it is necessary to avoid a fraudulent conveyance to establish that the grantee was apprised of the grantor's wrongful intent. ''However fraudulent the purpose was, if the *cestui que trust* had no knowledge of it, and consequent participation in it, he could not be affected by it.'' *Trotter v. Watson*, 25 Tenn. 509, 514, 1846 Tenn. LEXIS 31, 6 Hum. 509 (1846). If the grantee be affected with that knowledge, however, even the payment of ''a full price'' will not save the transaction from being avoided for the benefit of the prejudiced creditor(s). 25 Tenn. at 512. *Accord, Gemignani v. Partee*, 42 Tenn. App. 358, 302 S.W.2d 821, 828 (Tenn. App. 1956).

FINDINGS OF FACT

The Court has had some difficulty in determining to its satisfaction the critical aspects of what occurred between the Colemans and the Bank leading up to the granting of the January 18, 1995 deeds of trust. Mr. and Mrs. Coleman, as well as Mr. Belcher, are vitally interested in the outcome of the proceeding. Although Mr. Copeland is not interested in the same sense, he was not actually privy to the conversations between Mr. Coleman and Mr. Cook, on the one hand, and Mr. Belcher, on the other, regarding the offer of the deeds of trust to the Bank. Neither party introduced testimony from either Darrell Clark or his wife although they also granted deeds of trust to the Bank at the same general time as did the Colemans. Accordingly, the Court has reviewed carefully the trial transcript and all of the admitted exhibits in its effort to make the correct findings of fact and conclusions of law in a very close case.

The Court finds that the plaintiff, Molly Jane Coleman, did grant the deeds of trust to the Bank for the purpose of hindering the collection efforts of the IRS against unencumbered properties which she jointly owned with her husband and which, without some action on their part, would have been easy and tempting targets for such creditor. Her testimony on this point is uncontradicted and the Court, after hearing her testify and considering her demeanor, has found no reason to reject her claim. Indeed there is no testimony or other evidence to the effect that she personally had knowledge of the Bank's request for additional collateral or of any effort to induce any action or forbearance on its part. Mr. Belcher affirmatively testified that he had no conversation with her whatsoever. The Court further finds that the IRS was a creditor of Mr. and Mrs. Coleman at the time the deeds of trust were granted and remains a creditor of at least Mrs. Coleman.

Mrs. Coleman was never personally obligated to the Bank and her personal assumption of liability upon her husband's debts to the Bank was not requested by the Bank or offered by her. Just as she was unaware of the Bank's concerns and its understanding of the existing circumstances, the Bank was not privy to the nature of the arguments made to her by Mr. Coleman to induce her signature to the deeds of trust. No wording of the deeds of trust gave notice to Mrs. Coleman that the Bank was going to rely upon the security of the deeds of trust to grant any consideration to her husband which otherwise it would have been unwilling to provide. On their face such deeds of trust only purported to secure existing loans which the Bank had previously extended to her husband without her involvement ''together with any and all other indebtedness of Grantor [define as both Mr. and Mrs. Coleman] to Beneficiary'' under the Virginia deed of trust and ''of the Grantors [again defined as Mr. and Mrs. Coleman] to Pikeville National Bank & Trust Company'', under the Tennessee deed of trust. In short, then, the deeds of trust were given to secure Mr. Coleman's prior liabilities and any joint indebtedness of the Colemans to the Bank, although there has been no suggestion otherwise in the evidence that the Colemans had any joint indebtedness to the Bank at that time or contemplated incurring any in the future. There was no other agreement

reached between the Bank *and Mrs. Colemanin* which the former agreed to grant extensions of payment to her husband or agreed not to seek adequate protection payments or relief from the stay in the pending bankruptcy cases involving the companies owned by Mr. Coleman and Mr. Cook.

The Bank had requested collateral from Coleman and Cook to secure their previously unsecured lines of credit. There is no evidence that the Bank requested additional collateral for their existing secured obligations to induce its cooperation in the difficult circumstances which Mr. Coleman and Mr. Cook and their companies then found themselves. While the Bank may well have been more cooperative with Coleman and Cook in the bankruptcy cases as a result of having the benefit of the very good collateral which it presumed it had gained by virtue of the Colemans' and the Cooks' deeds of trust, the evidence did not disclose any specific act which it took or failed to take or consented to in specific reliance upon such deeds of trust. Furthermore, the Court has not discerned any evidence to the effect that the previously unsecured line of credit from the Bank to Mr. Coleman for which it did request collateral remains still owing to the Bank; no testimony to such effect was offered and the only proofs of claim filed by the Bank in Mr. Coleman's bankruptcy case related to the other two loans secured by the mining equipment. There appearing to the Court no particular reason why the Bank would file proofs of claim upon two of its secured claims and not upon a third, in the absence of any evidence that such third claim remains outstanding, the Court must presume and therefore find that it has been satisfied.

Despite Mr. Belcher's contentions at trial that he was unaware when the deeds of trust were granted that the Colemans, or either of them, had any motivation to hinder the collection efforts of the IRS, the Court concludes that the combination of the statements contained in his December 9, 1994 memo, his responses to some very effective cross-examination conducted by Mr. Charles Keen, IRS counsel, at trial (T. 93–99), the apparent candor of his discovery deposition testimony, and the Court's own perception of his demeanor at trial, including seeming variations in his testimony there, causes it to find that he was aware that one of the motivating reasons for the granting of the January 18, 1995 deeds of trust was to hinder and/or delay the IRS's collection efforts to give the parties time to file amended tax returns and perhaps negotiate with the IRS, because otherwise "the I.R.S. would come in and levy on the property." (T. 30) Because Mr. Belcher was an officer of the Bank and its designated responsible person for the supervision of the Coleman and Cook loans, his knowledge must be deemed the knowledge of the Bank itself. Furthermore, the Court finds that the facts known to Mr. Belcher at the time, specifically, his knowledge of the Colemans' and Cooks' substantial personal tax liabilities, their joint and essentially contemporaneous offer to grant the Bank deeds of trust upon all of their unencumbered and valuable real estate, including but not limited to their personal residences, collateral which was far more desirable than the pledge of coal company stock which had previously been discussed by the parties, were sufficient to apprise an experienced banker such as Mr. Belcher that his customers wanted to protect themselves and their properties from the IRS. The Court further finds, however, that the Bank had its own legitimate business reasons for desiring and accepting additional collateral, that it was unaware that Mrs. Coleman's sole motivation was to put the property beyond the IRS's reach, and that it had no reason to doubt that the Colemans, given the time to file amended tax returns for the companies and take other actions as might be recommended to them, would ultimately be able to resolve their tax problems. The Court further finds that the Bank did not accept the deeds of trust simply to accommodate their customers to provide "safe keeping" for their unencumbered properties and thereby keep the IRS at bay. In short, the Court accepts the deposition testimony of Mr. Belcher that he understood that the Colemans had

several reasons for offering the deeds of trust, one being "for permission to relocate the equipment" and another to keep the IRS from "levy[ing] on the property." (T. 29–30) Because the choice for the Court in making this finding of fact of Mr. Belcher's knowledge of the Colemans' intent to hinder and delay the IRS's collection efforts was whether to credit his deposition testimony as given or to accept his trial contention that his deposition testimony was based not just on what he knew at the time but also on what he later learned from the adversary proceeding filed against the Bank by Mr. Coleman, a contention which the Court did not find credible, the Court believes that such finding is justified under either the "preponderance of the evidence" standard or the higher "clear and convincing evidence" standard.

CONCLUSIONS OF LAW

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. This is a "core proceeding" pursuant to 28 U.S.C. § 157(b)(2)(H).

[1] The law in both Tennessee and Virginia appears to be in accord with the general principle stated in 37 Am. Jur. 2d 698, Fraudulent Conveyances § 7 (1968):

> If ... the intention to hinder and delay creditors is not only present in the mind of the debtor, but is also the object and constitutes a part of the cause for the execution of the conveyance, the transaction is void. Furthermore, this intention need not be the debtor's primary, active, controlling purpose; it is enough if it is one of the purposes which was entertained, either directly or as incidental to a more active purpose.

This quoted language was carried over from the original edition of American Jurisprudence (24 Am. Jur. 17) and was quoted with approval by the Supreme Court of Tennessee in the case of *M. & N. Freight Lines v. Kimbel Lines, Inc., supra*, 170 S.W.2d at 188. While the Court has not found a Virginia decision quoting this exact language, the Supreme Court of Virginia's decisions in the *Garland v. Rives, supra*, and *Bank of Commerce v. Rosemary and Thyme, Inc., supra*, cases certainly appear to be in accord with it. Therefore, based on the Court's finding of fact that the Bank, through its responsible officer, Mr. Belcher, was aware that one of the motivating reasons that caused the Colemans to offer the deeds of trust upon their valuable, unencumbered real property was to protect the same from IRS levy, it does not qualify as a bona fide purchaser and the deeds of trust are void as to the IRS. Because the Plaintiff as Debtor-in-Possession is entitled to exercise the rights of a bankruptcy trustee to enforce the rights of an actual creditor of the debtor by virtue of 11 U.S.C. § 544(b), the deeds of trust must be avoided for the benefit of the bankruptcy estate. 11 U.S.C. §§ 1107(a), 1106(a)(1), 704(2) and 541(a)(3); *Wellman v. Wellman*, 933 F.2d 215 (4th Cir. 1991).

Although both the Virginia and Tennessee statutes and the cases interpreting and applying them are quite clear that conveyances given to "hinder, delay or defraud creditors" and accepted with knowledge or notice of such intent are "void" as to the creditor(s) hindered, delayed or defrauded, they are not void as to the grantors thereof. The Virginia statute reads that such conveyances "shall, as to such creditors ... be void." The Tennessee statute reads that such conveyances "shall be deemed and taken, only as against the person ... whose debts, suits, demands, estates, or interest, by such guileful and covinous practices as aforementioned, shall or might be in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void". These provisions are in accord with the general, if not indeed universally accepted, principle that "[t]he fact that a conveyance or transfer of property may be fraudulent as to creditors of the transfers or as to third persons does not affect its validity as between the parties to the transaction." 37 Am Jur. 2d 792, Fraudulent Conveyances § 111 (1968). "Thus, as between a fraudulent grantor and fraudulent grantee, it is the fraudulent grantee who is entitled

to any excess in the property over and above the amount necessary to satisfy the creditors.'' 37 Am. Jur. 2d at 792–93. *See also* 9A Michie's Jurisprudence 61–63, Fraudulent and Voluntary Conveyances § 43 (1991). Virginia's policy on this point is so strong that its highest court rejected a grantor's claim of his homestead exemption in property which he had conveyed in fraud of the rights of a jilted fiancee and while her breach of promise to marry suit was pending. *Burton v. Mill*, 78 Va. 468, 481–83 (1884). It is instructive to note that this same principle (*i.e.*, that fraudulent conveyances are upheld as between the parties) is demonstrated in the Bankruptcy Code. Specifically, 11 U.S.C. § 522(g) permits a debtor to exempt property which the Trustee recovers under various sections of the Code, including § 550, to the same extent as if such property had not been transferred if ''such transfer was not a voluntary transfer of such property by the debtor''. Section 522(h) permits a debtor to avoid to the extent of his claimable exemption a transfer avoidable by the Trustee under § 544 (among other sections) even if the Trustee brings no avoidance action, provided that the debtor could have claimed the exemption under 11 U.S.C. § 522(g)(1), *i.e.*, the ''transfer was not a voluntary transfer'' and ''the debtor did not conceal the property''. In short, as applicable to the present controversy, a debtor will not be allowed to claim an exemption in bankruptcy in property which he attempted to transfer in fraud of his creditors. *See* 4 Collier on Bankruptcy § 522.08[1]–[3] at pages 522–36 thru -40 (15th edition revised).

It is clear that the Debtor-in-Possession exercising the powers of a trustee in bankruptcy has to rely upon the existence of the IRS as the creditor whose collection efforts were hindered by the granting and recording of the two deeds of trust in order to challenge the deeds of trust. If that claim did not exist, there would be no right under the Virginia and Tennessee statutes relied upon by the Plaintiff to avoid such deeds of trust. Given the existence of that creditor, however, the transactions, once avoided, are avoided for the benefit of all creditors of the estate. *Moore v. Bay*, 231 U.S. 62 (1931) (Holmes, J.); *In re Moore*, 11 F.2d 62 (4th Cir. 1926)(Parker, J.); *Matter of Leonard*, 125 F.3d 543 (7th Cir. 1997); 9 Collier on Bankruptcy § 544.09[5] at page 544–21 (15th ed. rev.).

The Court also concludes that for fraudulent conveyance purposes no consideration passed from the Bank to Mrs. Coleman. This does not result from the fact that she was not liable on her husband's debts to the Bank, because the Bank's bargained-for-agreement to extend the time for her husband's repayment obligations clearly would have been sufficient consideration to support her conveyances had they otherwise been free from challenge. *See* 17A Am. Jur. 2d 139, 142–44, 171–72, Contracts §§ 125, 128 and 156 (1991). The problem is that ''[n]othing is consideration for a contract that is not accepted or regarded as such by both parties.'' 17A Am. Jur.2d 140, Contracts § 126 (1991). Under the evidence in this case, the Bank did not promise to Mrs. Coleman that it would do anything or forbear taking any action in exchange for her signing the deeds of trust. No such agreement was set forth in the documents themselves and no other evidence was offered to establish that the Bank reached any understanding with Mrs. Coleman which induced her to sign the deeds of trust. Even so, even if Mrs. Coleman had not granted the deeds of trust with the illegal intent to ''hinder, delay or defraud creditors'', she could not have successfully challenged the Virginia deed of trust at any rate because it was under seal, which *as between the parties* conclusively imports consideration with no evidence to the contrary being admissible in law or equity. *Hopkins v. Griffin*, 241 Va. 307, 402 S.E.2d 11, 13 (1991).

This brings the Court to perhaps the most difficult issue posed by this adversary proceeding and indeed by the principal motivation of the bankruptcy case itself, that is to ''save'' the Debtor's property insofar as possible for her personal benefit free of the encumbrance which she reluctantly but ultimately willingly granted in 1995. There is not a great deal of authority

dealing with the issue of transfers avoided pursuant to § 544(b) of the Code which have value in excess of the obligations to creditors, very likely because bankruptcy cases which pay the creditors in full are infrequent occurrences, but there are some pertinent cases, one of the most prominent of which is from the Court of Appeals of this (Fourth) Circuit. This opinion will undertake to review that authority.

The preeminent general bankruptcy treatise, Collier on Bankruptcy, introduces the issue of the extent to which a transfer avoidable under § 544(b) is avoided with the following sentence, ''as under *Moore v. Bay*, the entire transfer is avoided *to the extent necessary to benefit the estate.*'' 5 Collier on Bankruptcy § 544.09[5] at page 544–21, *supra*, (emphasis added). Support for this proposition is suggested first in chronological terms by an opinion authored by Judge Chase of the Second Circuit on behalf of a stellar panel of that court consisting of himself, Judge Learned Hand and Judge Augustus Hand in the following passage:

> A debtor in possession holds its powers in trust for the benefit of the creditors .... If in the unlikely event that, after creditors have been satisfied accordingly, some of the mortgaged property should be left unaffected by the plan and some part of the debt due the partnership should remain as an obligation of the debtor, whatever security the partnership may have under the mortgage is left for determination when, and if, that question may be presented.

In re Martin Custom Made Tires Corporation, 108 F.2d 172, 173 (2nd Cir. 1939). The principle foreshadowed by that passage was made explicit in a later Second Circuit opinion authored by Judge Augustus Hand dealing with a situation where a reorganized debtor-in-possession which had reached agreement with its creditors sought to avoid a creditor's lien through use of the trustee's ''strong arm powers'':

> The debtor never contributed or offered to contribute this value to the plan and now seeks to obtain it purely for its own benefit. This we think it cannot do. In our opinion the bank, *which had a good secured claim as against the debtor*, can still hold it where the petition to avoid the sale is not in the interest of the general creditors. (emphasis added)

Whiteford Plastics Co. v. Chase National Bank, 179 F.2d 582, 584 (2nd Cir. 1950). This same principle was emphatically reaffirmed by the Second Circuit in the case of *Matter of Vintero Corporation*, 735 F.2d 740 (2nd) Cir. 1984):

> Vintero was given the right to avoid CVF's security interest in order to protect such third parties, not to create a windfall for Vintero itself .... To the extent that other creditors of Vintero are not affected adversely by enforcement of GVF's security interest, there is no reason why such security interest should not be enforced.

735 F.2d at 742.

In a 1991 opinion the Fourth Circuit Court dealt with a novel situation where an individual debtor-in-possession had reached agreement with all of his creditors to satisfy their claims substantially with cash and partly with some non-recourse notes aggregating $600,000 which were payable solely out of the proceeds of a fraudulent conveyance adversary proceeding he brought and over which he maintained essentially full control. After reaching this settlement over $2 million in excess funds were distributed from the bankruptcy estate to the debtor personally. The Court held that ''a debtor-in-posses-sion of a bankruptcy estate cannot maintain an avoidance action under § 548 unless the estate would be benefitted by a recovery of the transferred property.'' *Wellman v. Wellman*, 933 F.2d 215, 218 (4th Cir. 1999). Although creditors would have received $600,000 from a successful suit, the Court concluded that the creditors would have accepted the cash alone in settlement of their claims and affirmed the District Court's ruling that the debtor had ''executed the non-recourse notes to the creditors in an attempt to create a claim in the estate so that he could obtain a 'massive surplus recovery' for himself in addition to the surplus distributed to him.'' 933 F.2d

at 219. As a result, the adversary proceeding was dismissed.

Although the Fourth Circuit does not appear to have revisited the issue, two opinions of the Bankruptcy Court for the District of Maryland have. These opinions have taken a more liberal approach and appear to attempt to limit the *Wellman*decision to its particular facts and holding. Specifically, *In re Greenbelt Co-Op, Inc.*, 124 B.R. 465 (Bankr. D. Md. 1991) held that creditors need not be directly benefitted by a lien avoidance action where they will receive some benefit, such as improvement of the debtor's financial health and therefore its ability to meet its obligations under the confirmed plan. 124 B.R. at 472–74. Accordingly, the lien was entirely avoided and the continuing reorganized debtor was enabled to retain the property free and clear of the avoided lien. This approach was upheld in the subsequent opinion of *In re Glanz*, 205 B.R. 750 (Bankr. D. Md. 1997). Although that opinion held that the facts of its case came with the *Greenbelt Co-Op* ruling, it also held that the *Wellman* opinion applies only to actions under Code § 550 to recover an avoided transfer "for the benefit of the estate" and not to situations where the avoidance of a transfer is effective on its own without having to file an action to recover under § 550, 205 B.R. at 757–58. While such a distinction, if proper, would be applicable to the facts of this case where avoiding the liens of the deeds of trust under § 544(b) would simply eliminate the encumbrances upon the title to the properties which the Colemans continue to retain without the necessity of having to utilize the recovery remedy of § 550, this Court questions the validity of such distinction because it would apply the *Wellman* decision to an absolute deed in fraud of creditors but not to a deed of trust given with the same intent. On policy and consistency grounds at least, such a difference in result seems to lack merit. Indeed, the *Glanz* opinion itself gives evidence of backing away from the implications of such a distinction by going on to recognize that equitable principles "may be applied to bar a lien avoidance action when the avoidance does not accrue to the benefit of creditors but instead creates a windfall for the debtor." 205 B.R. at 758. While each of the *Wellman, Greenbelt Co-Op* and *Glanz* opinions either bars the avoidance action absolutely or permits its enforcement fully despite collateral benefits to the debtor, the Court does not believe they preclude the possibility in a proper case of a partial avoidance of a transfer insofar as it may be necessary to benefit the bankruptcy estate in accordance with the Second Circuit line of authority.

The final case discovered by the Court on this general theme is *In re Cybergenics Corporation*, 226 F.3d 237 (3d Cir. 2000), authored by Circuit Judge Rendell, who the Court understands to be a former bankruptcy judge. That case considered a complaint brought on behalf of the bankruptcy estate by the unsecured creditors committee alleging that certain transfers made and obligations incurred in connection with a leveraged buyout were constructively fraudulent. This District Court had dismissed the complaint on the ground that the fraudulent conveyance action had passed to a third party when it bought all of the debtor's assets. The Third Circuit reversed in an opinion which carefully examined the purpose and intended scope of avoidance actions authorized by the Bankruptcy Code. It specifically held that a § 544(b) avoidance action is an asset of the bankruptcy estate for the benefit of the creditors and not an asset of the debtor personally. The following language is pertinent to consideration of the issues presented in the case before this Court:

> The power to avoid the debtor's prepetition transfers and obligations . . . is no more an asset of . . . [the] debtor in possession that it would be the personal asset of a trustee, had one been appointed in this case. Much like a public official has certain powers upon taking office as a means to carry out the functions bestowed by virtue of the office or public trust, the debtor in possession is similarly endowed to bring certain claims on behalf of, and for the benefit of, all creditors.

. . . .

> Rather than improving the debtor's own bottom line, empowering the trustee or debtor in possession to avoid a transaction by pursuing an individual creditor's cause of action is a method of forcing that creditor to share its valuable right with other unsecured creditors.

226 F.3d at 243–44.

> The trustee's power to assert a creditor's state law fraudulent transfer action through section 544(b) stands in sharp contrast to other statutory entitlements in the Bankruptcy Code that do work to the direct benefit of the debtor, not the creditors. One prime example is section 522(f) of the Bankruptcy Code, which permits an individual debtor to avoid certain liens on household goods to the extent that they impair the debtor's property exemption. While debtor protection is the express goal of provisions such as section 522(f), bolstering creditors' rights is the primary objective of avoidance powers such as section 544(b). *See* Thomas H. Jackson, Avoiding Powers in Bankruptcy, 36 STAN. L. REV. 725, 730 n. 16 (1984).

226 F.3d at 244, n.9.

The Court concludes that the 1995 deeds of trust should be avoided to the extent necessary to pay the valid claims of the IRS and Mrs. Coleman's other creditors as well as any deficiency in the bankruptcy estate to pay the administrative expenses of the estate, including such fees as may be allowed by the Court to counsel for the Debtor-in-Possession for his services of benefit to the estate and its creditors, but that they (*i.e.*, the deeds of trust) should otherwise be left in effect for the benefit of the Bank as to any remaining surplus value of the properties they encumber. The Court believes that this result most effectively upholds the policies and specific statutory provisions of the Bankruptcy Code and the laws of Virginia and Tennessee to avoid voluntary fraudulent transfers where the rights of third parties are concerned, but to uphold and enforce them as between the parties themselves.

An order in accordance with this memorandum opinion shall be entered contemporaneously with the signing hereof below. In a separate opinion the Court will grant the Bank's motion to reconsider its order of March 21, 2002 confirming the Debtor's Plan and will rescind such order and deny confirmation of such Plan which would have permitted the Debtor under certain circumstances to retain her properties free and clear of the 1995 deeds of trust which she willingly granted.

The Clerk is directed to send copies of this Memorandum Opinion to the Debtor, counsel for the parties and the Office of the United States Trustee.

This 17th day of September, 2002.

William F. Stone, Jr.

Bankruptcy Judge

¶2002-5534

E. W. SCRIPPS CO., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of Ohio, (DC OH) Case No. C-1-01-434, Sept. 16, 2002. Year 1986. Decision against Govt.

1. Interest on overpayments—recovery from U.S.—jurisdiction—sovereign immunity—time-value of money. Govt. was denied jurisdictional dismissal of taxpayer's suit to recover overpayment interest: interest fell within scope of 28 USC §1346(a)(1)'s and IRC §7422's sovereign immunity waiver where, under time-value of money reasoning, interest was integral and inseparable part of already refunded overpayment; and contrary case law wasn't followed. *Reference:* United States Tax Reporter ¶66,115.09(3); 74,336.501(10); 74,225.01(75). IRC §6611; 7422.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION,

ORDER DENYING MOTION TO DISMISS

District Judge Susan J. Dlott

This matter comes before the Court on United States' Motion to Dismiss. (Doc. #9.) Plaintiff E. W. Scripps Company (''Scripps'') filed suit against Defendant United States of America, claiming that it is entitled to interest accrued on its overpayment of taxes for the 1986 tax year. The United States moves to dismiss under Federal Rule of Civil Procedure 12(b) on the ground that the Court lacks subject-matter jurisdiction over Scripps's claim because the United States has not waived its sovereign immunity.[1] For the reasons set forth below, Defendant's motion is DENIED.

I. APPLICABLE LEGAL STANDARDS

''The doctrine of sovereign immunity removes subject matter jurisdiction in lawsuits against the United States unless the government has consented to suit.'' Beamon v. Brown, 125 F.3d 965, 967 (6th Cir. 1997). The Supreme Court has long held that ''limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.'' Lehmen v. Nakshian, 453 U.S. 156, 161 (1981). Furthermore, on a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the plaintiff bears the burden of proving that the court does in fact have jurisdiction. RMI Titanium Co. v. Westinghouse Elec. Corp., 78 F.3d 1125, 1134–34 (6th Cir. 1996).

II. FACTUAL BACKGROUND[2]

Scripps timely filed its tax return for the 1986 tax year. In 1988, Scripps reached an agreement with the Internal Revenue Service to change from the cash accounting method to the accrual method for tax reporting purposes. Scripps believed that this change would result in significant additional tax liability for the 1985 and 1986 tax years. Therefore, on December 31, 1990, Scripps made a payment of $7,000,000 to the IRS to satisfy its potential additional liability. In the letter accompanying this payment, Scripps stated that $3,500,000 of the payment should be allocated to the additional liability for each tax year. At that time, the IRS had not yet determined the exact amount Scripps owed. The IRS later ascertained that the change in accounting methods had not resulted in any additional liability for the 1986 tax year. On September 8, 1997, Scripps received a $3,500,000 refund from the IRS for overpayment of its tax liability for the 1986 tax year. Scripps filed a claim with the IRS for the refund of interest that had accrued on the $3,5000,000 overpayment. The IRS disallowed this claim on November 6, 2000. Scripps subsequently filed suit and demanded $2,245,212 in interest, either as an additional refund or as damages on a claim of equitable estoppel. (Doc. #6.)

III. ANALYSIS

[1] 26 U.S.C. § 6611(a) provides that ''[i]nterest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the overpayment rate established under section 6621.'' Interest collectible under section 6611(a) is referred to as ''statutory interest.'' Scripps argues that the Court has subject matter jurisdiction of a suit for statutory interest pursuant to 28 U.S.C. §§ 1331, 1340, and 1346(a)(1). Section 1331 provides the district courts with ''original jurisdiction of all actions arising under the Constitution, law, and treaties of the United States.'' Section 1340 grants original jurisdiction to the district courts of ''any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade.'' However, neither of these general grants of jurisdiction, standing alone, waives sovereign immunity in actions for

[1] While Defendant's motion is fashioned as one under Federal Rule of Civil Procedure 12(b)(6), it more appropriately falls under the purview of Rule 12(b)(1) and will therefore be addressed as if it had been so styled.

[2] On a motion to dismiss under Rule 12(b)(1), ''[a]ll factual allegations in the complaint are accepted as true and construed in the light most favorable to the plaintiff.'' United States ex rel. McKenzie v. Bell South Telecomm., Inc., 123 F.3d 935, 938 (6th Cir. 1997).

damages against the United States.[3] See Reed v. Reno, 146 F.3d 392, 397–98 (6th Cir. 1998) (section 1331); Carelli v. Internal Revenue Serv., 668 F.2d 902, 904 [49 AFTR 2d 82-529] (6th Cir. 1982) (sections 1331 and 1340).

The issue therefore is whether 28 U.S.C. § 1346(a)(1) waives sovereign immunity in a suit solely for statutory interest. This question has not yet been answered by the Sixth Circuit, or any other court of appeals. Section 1346(a) reads in relevant part:

> The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.

As the United States concedes, section 1346(a)(1), together with 26 U.S.C. § 7422(a),[4] waives sovereign immunity with respect to refund suits by taxpayers to recover internal revenue taxes alleged to have been erroneously or illegally assessed. Miller v. United States, 784 F.2d 728, 731 [57 AFTR 2d 86-928] (6th Cir. 1986).

The United States argues that this waiver does not extend to suits exclusively for statutory interest. Specifically, Defendant distinguishes statutory interest from interest assessed by the government on tax that is said to be unpaid, called "deficiency interest." According to Defendant, statutory interest is neither "assessed" nor "collected" and does not fall within the purview of section 1346(a)(1), while deficiency interest is assessed and collected and may be recovered in a suit under 1346(a)(1). This distinction finds some support in caselaw. See Alexander Proudfoot Co. v. United States, 454 F.2d 1379, 1378, 1383, 1384 [29 AFTR 2d 72-543] (Cl. 1972) (while "deficiency interest has been so closely braided to principal that it has been deemed an integral part of the tax[,] ... Congress did not provide that statutory interest to be paid by the United States is to be fully assimilated in treatment to the principal amount of the tax"); Amoco Prod. Co. v. United States, No. 87 C 8811, 1988 WL 9112 [61 AFTR 2d 88-750] (S.D. Ill. Feb. 5, 1988) (finding that waiver of sovereign immunity in section 1346(a)(1) does not encompass statutory interest). These cases do not control here, however, and the Court, as explained in more detail below, does not agree with their holdings.

Scripps contends that statutory interest is part and parcel of the original overpayment. In other words, a suit for statutory interest is indistinguishable from a traditional suit to recover an overpayment in that both seek recovery of an "internal-revenue tax alleged to have been erroneously ... collected." 28 U.S.C. § 1346(a)(1). Plaintiff's argument finds support in a pair of cases from the District of Connecticut, Triangle Corp. v. United States, 592 F. Supp. 1316 [54 AFTR 2d 84-6394], on reconsideration, 597 F. Supp. 507 [55 AFTR 2d 85-432] (1984), and Trustees of the Bulkeley School v. United States, 628 F. Supp. 802 [57 AFTR 2d 86-1027] (1986). In Triangle, the court held that section 1346(a)(1) waives sovereign immunity with respect to suits solely for statutory interest. The court reasoned that to hold otherwise would eliminate any forum in which a party could vindicate the substantive right established in section 6611. Triangle, 592 F. Supp. at 1317. The Bulkeley School court reaffirmed the Triangle holding and reiterated the reasoning

[3] Scripps also contends that 28 U.S.C. § 1340, together with 26 U.S.C. § 6611, provides the Court with jurisdiction and waives sovereign immunity. Section 6611 provides an explicit exception to the rule put forth in Library of Congress v. Shaw, 478 U.S. 310 (1986), that "[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award." 478 U.S. at 314. However, neither the language of 28 U.S.C. § 1340 and 26 U.S.C. § 6611 nor the cases cited by Scripps clearly dictate that those two sections constitute a waiver of sovereign immunity with respect to a suit solely for interest under section 6611. The Court need not decide this issue, though, because sections 1346(a)(1) and 7422(a) waive sovereign immunity from the instant suit.

[4] Section 7422(a) dictates that no suit under section 1346(a)(1) shall be maintained in federal court until a claim for refund has been duly filed with the IRS.

of the prior decision. It also provided an alternate basis for its holding, concluding that statutory interest is effectively part of the overpayment:

> It is clear that the plaintiff is seeking to recover an "internal revenue tax alleged to have been erroneously or illegally assessed or collected" as is permitted by Section 1346(a)(1) .... A taxpayer has not received a full refund of "erroneously ... collected" taxes until he has recovered not only the nominal amount of the collection but also an amount of interest that will compensate him for the loss of the use of his money between the time that he paid the tax and the time that he received the refund.

Bulkeley School, 628 F. Supp. at 803.

The United States argues that Triangle and Bulkeley School were wrongly decided. The Court agrees, but only in part. As Defendant points out, 28 U.S.C. § 1491(a)(1) grants jurisdiction to the United States Court of Federal Claims of a suit for statutory interest. Therefore, the reasoning put forth in Triangle and restated in Bulkeley School is flawed. Even if a court may imply a waiver of sovereign immunity in order to preserve a forum for the vindication of a right created by federal statute,[5] it is clearly unnecessary to do so here because a forum other than the district court exists for the collection of statutory interest. This does not end the inquiry, however, as the Court finds the alternate reasoning in Bulkeley School to be persuasive.

Money is valuable only to the extent that it may be used to accrue more money or purchase things that are themselves valuable. Money which stagnates for a period of time thus wastes some of its value. Congress implicitly recognized this principle by requiring in section 6611 that the government pay interest on tax overpayments. See Bulkeley School, 628 F. Supp. at 803. Following this principle, because Scripps lost the opportunity to use the $3,500,000 it overpaid in taxes between the time it made the overpayment and when that money was refunded, the $3,500,000 that the government returned to Scripps in 1997 was worth less to it than the $3,500,000 that Scripps gave to the government in 1990. If Plaintiff had held onto the money, it presumably would have accrued value. The statutory interest compensates for that lost value and therefore should not be considered a sum separate from the initial overpayment. Consequently, an overpayment is not fully refunded until the statutory interest accrued during the time the government held the money has been disgorged by the government.[6]

This view of statutory interest finds support in United States v. $515,060.42 in United States Currency, 152 F.3d 491 (6th Cir. 1998). In that case, the Sixth Circuit held that sovereign immunity does not bar an award of interest to claimants in an unsuccessful forfeiture action. While an award of prejudgment interest is generally barred by sovereign immunity, see Library of Congress v. Shaw, 478 U.S. 310, 311, 315 (1986), the court held that interest actually or constructively accrued on improperly seized funds "become[s] part of the *res*, to be returned with the *res* to the claimants." $515,060.42, 152 F.3d at 505. For instance, if the government seized a pregnant cow, and then, after the cow had given birth, the government was found not to be entitled to the cow, it would be unfair to allow the government to return the cow but keep the calf. Id. In the case of improperly seized funds, just as the cow gave birth to a calf, "[t]he Government obtained a tangible and calculable financial benefit from the retention of the seized funds at issue." Id. Thus, like the calf must be returned with the cow, the additional financial benefit "must also be returned as an aspect of the seized *res*." Id.

[5] The Court is somewhat skeptical of whether a court may so conjure a waiver of sovereign immunity, particularly in light of the Supreme Court's admonitions on the subject. See, e.g., Lehmen, 453 U.S. at 161.

[6] This interpretation also avoids the peculiar situation in which a party could sue the United States in district court for the return of an overpayment and statutory interest, only to have the court deprived of jurisdiction and the suit dismissed when the government returns only the original amount of the overpayment. Such inefficiency would run counter to the intent of Congress, as expressed in section 6611, that "[i]nterest shall be allowed and paid upon any overpayment."

The situation here is similar. Scripps alleges that it overpaid its taxes for the 1986 tax year in the amount of $3,500,000. The government refunded the overpayment in 1997, but did not refund any interest on the overpayment. The interest, which represents the time value of the alleged erroneously collected funds, is an integral and inseparable part of the original overpayment and therefore falls within the scope of the waiver of sovereign immunity effected by 28 U.S.C. § 1346(a)(1) and 26 U.S.C. § 7422(a). Here, too, the government may not return the cow, but keep the calf.

IV. CONCLUSION

As set forth above, the Court DENIES United States' Motion to Dismiss. (Doc. #9.)

IT IS SO ORDERED.

Susan J. Dlott

United States District Judge

¶2002-5535

Van STAFFORD; Lois STAFFORD, PLAINTIFFS-APPELLANTS v. CIMARRON ELEVATOR, INC., an Oklahoma corporation, DEFENDANT-APPELLEE. U.S. Court of Appeals, Tenth Circuit, (CA10) No. 02-6143, Oct. 8, 2002. Appeal from District Court dismissed. Decision against Taxpayers.

1. Appeals to Courts of Appeals—sanctions—injunction against filing future actions or appeals. Pro se tax protesters' appeal from district court suit, in which they sought to collaterally attack another judgment entered against them in tax-related matter, was dismissed: taxpayers, who had long history of filing frivolous suits and appeals, were enjoined by earlier order from filing any further such appeals until they fully paid all previously imposed sanctions. *Reference:* United States Tax Reporter ¶74,336.511(39).

UNITED STATES COURT OF APPEALS TENTH CIRCUIT,

Before SEYMOUR, HENRY and BRISCOE, Circuit Judges.

ORDER AND JUDGMENT[1]

Mary Beck Briscoe Circuit Judge

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[1] Plaintiffs Van and Lois Stafford, appearing pro se, seek to appeal the district court's dismissal of their complaint. Because the Staffords have failed to comply with our previously-imposed restrictions on their appellate filings, we dismiss the appeal.

In Stafford v. United States, 208 F.3d 1177 [85 AFTR 2d 2000-1255] (10th Cir. 2000), we recounted the Staffords' history of filing legally frivolous complaints and appeals in an attempt to avoid paying federal income taxes, and noted we repeatedly had sanctioned them for their conduct. Because we concluded that our sanctions had not reduced their "frivolous and vexatious litigation" efforts, we found it necessary to "impose ... filing restrictions using our inherent power to regulate federal dockets, promote judicial efficiency, and deter frivolous filings." Id. at 1179. In particular, we "enjoined [the Staffords] from filing any further appeals or original actions in this court involving related tax matters until all previously-imposed sanctions have been paid in full." Id.

The Staffords now seek to appeal the dismissal of a complaint they filed in the Western District of Oklahoma collaterally attacking a 1987 judgment entered against them in a tax-related matter. Because the Staffords have not fully paid the sanctions previously imposed against them by this court, they are enjoined from pursuing this appeal.

[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

The appeal is DISMISSED.

Entered for the Court

Mary Beck Briscoe

Circuit Judge

¶2002-5536

Frank HEATLEY and Betty HEATLEY, PLAINTIFFS v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Middle Dist. of Florida, (DC FL) Case No. 6:01-cv-1044-Orl-22DAB, Sept. 19, 2002. Year 2000. Decision for Taxpayers in part and for Govt. in part.

1. Capital gains—rate of tax—calculations—refunds. Magistrate judge recommended granting in part summary judgment in action to determine pro se taxpayers' long-term capital gains tax lia-bility and refund: although taxpayers' as-sertion that, because they otherwise fell in 15% tax bracket, they were entitled to tax full amount of gain on stock sale at lowest 10% gains rate, was incorrect, taxpayers were concededly entitled to some refund; and govt. didn't explain how it arrived at tax liability it ultimately imposed. *Reference:* United States Tax Reporter ¶12,235.07(130); 74,225.05(40). IRC §1223; 7422.

United States District Court Middle District of Florida Orlando Division,

Report And Recommendation

DAVID A. BAKER UNITED STATES MAGISTRATE JUDGE

TO THE UNITED STATES DISTRICT COURT

This cause came on for consideration without oral argument on the following motions filed herein:

MOTION: MOTION FOR SUMMARY JUDGMENT BY THE UNITED STATES (Doc. No. 19)

FILED: July 30, 2002

THEREON it is RECOMMENDED that the motion be GRANTED in part and DENIED in part.

MOTION: MOTION FOR SUMMARY JUDGMENT BY THE PLAINTIFFS (Doc. No. 24)

FILED: August 14, 2002

THEREON it is RECOMMENDED that the motion be GRANTED in part and DENIED in part.

Both the United States and Plaintiffs move for summary judgment with respect to Plaintiffs' claim for a refund of alleged overpayment of income tax for the year 2000. This case involves the application of the capital gains tax provisions of the Internal Revenue Code. Both sides agree that Plaintiffs are entitled to a refund, though they differ as to the amount. For the reasons set forth herein, it is respectfully recommended that the motions be GRANTED with respect to Plaintiffs' entitlement to a refund and DENIED with respect to the determination of the exact amount of that refund.

Summary Judgment Standard

A party is entitled to judgment as a matter of law when the party can show that there is no genuine issue as to any material fact. Fed. R. Civ. Pro. 56(c). The substantive law applicable to the case determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the burden of proving that no genuine issue of material fact exists. *Id.* at 323. In determining whether the moving party has satisfied its burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255.

Facts

The parties do not dispute most of the relevant facts. Plaintiffs, Mr. and Mrs. Heatley, appearing *pro se*, filed this lawsuit

with respect to their 2000 federal income tax return. Plaintiff Frank Heatley purchased 200 shares of common stock in the Walt Disney Corporation on July 9, 1979, for $7,047.81 (Deposition of Heatley, at 11–13).[1] Through dividend reinvestment and several stock splits, Mr. Heatley's 200 shares grew to 11,088 shares. (*Id.* at 12). Including dividend reinvestment, Mr. Heatley paid $10,764.37 total for the shares. (*Id.*, Exhibit #2, p. 3). On August 3, 2000, Mr. Heatley sold all of these shares for a total of $442,827.00, realizing a net gain of $432,062.32. (*Id.* at 23, 25).

According to the government, during calendar year 2000, Plaintiffs made four estimated tax payments of $800.00 to the Internal Revenue Service ("the IRS"), an additional payment of $43,204.26 on August 24, 2000, and another payment of $43,204.26 on September 28, 2000. *Certified Literal Transcript of Assessments and Payments*, Doc. No. 21. As explained by Mr. Heatley:

> When I sold the stock in August 2000 I did not know what percentage was to be paid to the IRS as I did not know my taxable income on my 1040 form for the year 2000. Naturally, it was in August. I thought I would remain in the fifteen percent bracket, so I made out a check to the IRS of $43,204.26 on August 22, 2000, which was approximately 10 percent. After reviewing my records I concluded that I may fall into the twenty percent bracket long term, so I made another check out of forty three thousand two hundred four twenty six on September 22, 2000. I sent this to the IRS thinking it would be a fair estimate, fair figure. I did enclose a letter with the second check to the IRS stating that I did not know my status at that time of capital gains, and it would be—and when I do they will be informed.

(Deposition of Heatley, at 31, quoting the Complaint.)

In February 2001, Mr. Heatley completed a Form 1040, listing taxable income of $37,512. (Deposition, Exhibit 4). Mr. Heatley calculated a tax of $5,629.00 and an amount owed of $209, which payment was included with the return. The Heatleys did not complete or return a schedule with respect to the Capital Gain. The IRS assessed the reported tax liability of $5,629 on April 30, 2001, and wrote the Heatleys that they were due a refund of $86,408.52. (Deposition, Exhibit 5). As stated by Mr. Heatley in his Complaint, "This was an obvious error as I did owe them at least $43,204.26 for my Capital Gains."

The IRS requested that Plaintiffs complete and return an Amended U.S. Individual Income Tax return, Form 1040X, claim for refund. (Deposition, Exhibit 2). Mr. Heatley completed Parts I and II of Schedule D of the Form, reporting a long-term gain of $432,062.63, but did not complete Parts III and IV.

Mr. Heatley will be 80 years old on October 2, 2002. (*Id.* at 7). He prepared and filed Plaintiffs' 2000 tax return without the assistance of an accountant or other tax professional (*Id.* at 40–41).

According to the government's brief,[2] the IRS:

> corrected the return for what was considered a mathematical error and computed the plaintiff's liability anew. The IRS included the capital gain of $432,062 as income and thus calculated the plaintiffs' adjusted gross income to be $484,224.63. The IRS reduced the plaintiffs' exemptions to $0, applying the phase-out provisions of 26 U.S.C. § 151(d)(3)(C). The IRS computed the plaintiffs' federal income tax liability to be $92,808.26. (Brief, at 3).

The IRS determined that the Plaintiffs owed an additional $792.18 (including $21.70 interest), which the Plaintiffs paid on September 4, 2001, along with their claim for refund. (Doc. No. 21).

Plaintiffs assert that due to the amount of non-capital gains income they reported in tax year 2000, they are in the 15% tax

[1] As only one deposition was filed in this matter, the Court refers to the deposition of Mr. Heatley as "Deposition."

[2] Although the Brief cites to "Ex. C" for these assertions, the Court was unable to locate an "Ex. C" to either the brief or the Deposition. As such, these assertions are without record support, save for the ultimate conclusion of tax owed found in the Literal Transcript.

bracket and thus, the capital gain should have been taxed at a 10% rate, and not at the 20% rate applied by the IRS. Plaintiffs claim a refund of $43,206.26. While originally denying that Plaintiffs were due any refund, the government now asserts, without citation to the record, that "the IRS incorrectly calculated ... the plaintiffs' liability for tax year 2000" and acknowledges that Plaintiffs[3] are due a refund of $1.00, plus applicable interest. (Brief at 8).

Analysis

[1] The basic issue in this case is the correct interpretation of the provisions of the Internal Revenue Code dealing with the taxation of long-term capital gains for tax year 2000. This provision, charitably called "highly technical" by the government in its brief, reads:

h) Maximum capital gains rate.—

(1) In general.— If a taxpayer has a net capital gain for any taxable year, the tax imposed by this section for such taxable year shall not exceed the sum of—

(A) a tax computed at the rates and in the same manner as if this subsection had not been enacted on the greater of—

(i) taxable income reduced by the net capital gain; or

(ii) the lesser of—

(I) the amount of taxable income taxed at a rate below 28 percent; or

(II) taxable income reduced by the adjusted net capital gain;

(B) 10 percent of so much of the adjusted net capital gain (or, if less, taxable income) as does not exceed the excess (if any) of—

(i) the amount of taxable income which would (without regard to this paragraph) be taxed at a rate below 28 percent, over

(ii) the taxable income reduced by the adjusted net capital gain;

(C) 20 percent of the adjusted net capital gain (or, if less, taxable income) in excess of the amount on which a tax is determined under subparagraph (B);

(D) 25 percent of the excess (if any) of—

(i) the unrecaptured section 1250 gain (or, if less, the net capital gain), over

(ii) the excess (if any) of—

(I) the sum of the amount on which tax is determined under subparagraph (A) plus the net capital gain, over

(II) taxable income; and

(E) 28 percent of the amount of taxable income in excess of the sum of the amounts on which tax is determined under the preceding subparagraphs of this paragraph.

26 USCA § 1(h).

In somewhat plainer English, with certain exceptions not applicable here, under the Taxpayer Relief Act of 1997, any net long-term capital gain which would otherwise be taxed at 15 percent is taxed at 10 percent. Individuals in higher tax brackets pay tax at a maximum rate of 20 percent on net capital gains. *See Corpus Juris Secundum*: Internal Revenue § 115 (2002 edition). There is no question that *but for* the sale of the Disney stock, Plaintiffs would remain within the 15% tax bracket. *See* Internal Revenue Code § 1(a). There is also no question that if the monies received from the sale of the stock are credited as income to the Plaintiffs, Plaintiffs move into the 39.6% marginal tax bracket.

Plaintiffs argue that the gains should be taxed at 10%, as Plaintiffs are otherwise in the 15% tax bracket. The government contends that most of the gains should be taxed at the maximum rate of 20%, as Plaintiffs are in the higher tax bracket. Contrary to Plaintiffs' arguments, having total noncapital gain income within the 15% bracket does not allow a taxpayer to

[3] Unaccountably, the government, in making this concession, refers to the Plaintiffs as "Debtor." (Doc. No. 19 at 8).

take advantage of the 10% capital gain rate for an unlimited amount of capital gains.[4]

Section 61 (a) of the Code states that gross income includes "all income from whatever source derived" (unless otherwise provided), and section 61(a)(3) expressly provides that gross income includes gains derived from dealings in property. Thus, as argued by the government, one must first include the gain as income, in order to carry out the calculations applicable to the capital gains portion of total income. Though the Court agrees with this aspect of the government's argument, the computation of Plaintiffs' actual tax liability and payment credits is not adequately supported on this record so as to allow entry of summary judgment.

Commentators have noted that the calculation of capital gains liability involves a complex series of netting and layering. *See, e.g.*, West Federal Taxation-Individual Income Taxes, Chapter 16, Doc. 5 (2001 edition) (available online at 2001 WL 423759). According to the commentators, after computing tax on ordinary taxable income using the regular tax rates, a taxpayer is to compute tax on the capital gain by calculating the portion of the 10%/20% capital gain that is taxed at 10% (available only if ordinary taxable income plus 25% and 28% capital gain layers do not put taxpayer above the 15% bracket; 10% rate is no longer available once income including the portion of the gain taxed at 10% puts taxpayer out of the 15% bracket) plus the 20% long term capital gain (remaining portion of 10%/20% capital gain.) *Id.* Translated, this means that Plaintiffs' tax liability is computed by computing the tax on their ordinary taxable income *plus* the portion of their capital gain that is taxed at 10% *up until* that amount exceeds the 15% tax bracket, plus the remaining amount of the capital gain taxed at 20%. Thus, the applicable rate is not necessarily 10% or 20%, but will be a combination of the two. Because the 10% rate for capital gains lasts only to the point where the taxpayer continues to be in the 15% tax bracket, to the extent Plaintiffs contend that the entire capital gain of $432,062 should be taxed at 10%, this contention cannot stand.

Although it is plain that Plaintiffs are not entitled to a 10% capital tax rate on the full amount of the capital gain, the government has not met its burden of proof with respect to the correct amount to be refunded to Plaintiffs. The government relies on the calculations set forth in Part IV of Schedule D, attached as Exhibit 7 to the Deposition, as evidence of the correct application of the Code. Unfortunately, however, the calculations in the exhibit are not properly before this Court as *evidence* as they have not been authenticated in any way. During the deposition of Mr. Heatley, defense counsel "introduced" the exhibit:

> Q. [by defense counsel] Just so—that's where we're coming from. I'm not going to read you section 1(h) or anything like that. What I will do is I'm going to put in this document as Defendant's Exhibit No. 7, okay? What this is, what the IRS did is they took—just for demonstrative purposes, just to demonstrate one way at arriving at figures, what they did is went ahead and completed the second page, which you said it doesn't apply to income.
>
> * * *
>
> They went ahead and filled that out and arrived at the total on the bottom, and that's where the IRS—this like demonstrates how the IRS arrived at the figure.

(Deposition, pp. 50–51.)

There is no indication when some unnamed IRS employee completed the form, nor is there any indication that the form was used in order to determine Plaintiffs' R tax liability. In fact, the conclusion of tax owed that appears on the form is *different* than the tax liability the IRS actually assessed, according to the government's brief. Thus, there is no evidence in the record of *how* the IRS arrived at the tax lia-

[4] Having a larger gross income also reduces or eliminates the availability of other tax advantages, such as deductions, exemptions and eligibility for various tax deferral accounts. This feature of the progressive tax system has grown considerably in complexity in recent years, well beyond applying higher marginal rates to higher income individuals. The potential unfairness created by recognizing all of a truly long term capital gain in a single year is a topic that tax theorists have debated for years. Ameliorating this effect is one justification for creating lower capital gains tax rates.

bility they ultimately imposed. Moreover, the government admits in its papers that the IRS miscalculated the tax liability of Plaintiffs and that Plaintiffs are owed a refund. Thus, while the Court concludes that there is no genuine issue of material fact that Plaintiffs are due a refund (due to the government's apparent stipulation as to this issue), there is no evidence sufficient to support a finding of the mount of that refund.

A final word is in order. The tax code consists of more than 5.5 million words contained in over eight thousand pages in the United States Code. The provisions dealing with the appropriate taxation of capital gains are particularly complicated for the average taxpayer and, apparently, for the IRS itself. A tax system that makes it difficult for taxpayers in fairly ordinary circumstances to determine their liability is justifiably subject to criticism. While some of the complex maneuverings that are part of modern economic life may necessitate some degree of complexity in the tax code,[5] the byzantine interaction of the various provisions devised by Congress and implemented by the IRS make calculation and payment of required taxes an onerous and uncertain chore, quite apart from the taxes themselves. As a result, it is difficult for even reasonably astute individual taxpayers (without professional advisors) to conduct their financial lives so as to be confident of the net tax impact of their conduct and circumstances.

Plaintiffs in this case prepared their own tax returns and have represented themselves in this litigation. Doubtless, they would have been better off financially had they consulted with an attorney, accountant or financial planner is deciding how to deal with the appreciation in stock value created by their timely, patient and pre-scient investment strategy. While this state of affairs may be a sad commentary on the vagaries of the legislative process, the parties and the Court must deal with the Internal Revenue Code as they find it.

As the record stands in this case, the proper amount of Plaintiffs' refund cannot be determined. If the parties continue to be unable to agree[6] on the proper computation, a trial, with witnesses competent to apply the Code and do the necessary computations (including, if applicable, interest charges or credits), is the appropriate vehicle for resolving this issue.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Recommended in Orlando, Florida this 18th day of September, 2002.

DAVID A. BAKER

UNITED STATES MAGISTRATE JUDGE

¶2002-5537

Delmore D. HOLMSTROM d/b/a Cornerstone Enterprise, PETITIONER v. UNITED STATES, Internal Revenue Service, and Robert Sullivan, Revenue Agent, RESPONDENTS. U.S. District Court, Middle Dist. of Florida, (DC FL) CASE NO. 8:02-MC-34-T-24MAP, Sept. 16, 2002. Earlier proceeding at (2002, DC FL) 90 AFTR 2d 2002-6083. Decision for Govt.

1. Third-party summons enforcement—petition to quash—jurisdiction—timely intervention—proof. Magistrate judge dismissed as untimely taxpayer's petition to quash 7 IRS 3d-party summonses: IRS's proof of notice showed it sent taxpayer proper notice more than 20 days before he filed petition. *Reference:* United States Tax Reporter ¶76,095.01(10); 76,095.01(30). IRC §7609.

Petitioner Delmore D. Holmstrom

[5] *See* Michelle Arnopol Cecil, *Toward Adding Further Complexity to the Internal Revenue Code: A New Paradigm for the Deductibility of Capital Losses*, 99 U. Ill. L. Rev. 1083 (1999), citing numerous references, including congressional statements and commentators critical of the complexity of the Code.

[6] The Court may wish to consider directing the parties to engage in further mediation after action on this Report and Recommendation.

Counsel of Record The Honorable Susan C. Bucklew

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION,

ORDER

Mark A. Pizzo United States Magistrate Judge

THIS CAUSE came before the Court on Petitioner's Motion to Quash Third Party Summons (doc. 1) and Respondents' Motion to Dismiss (doc. 5.)[1] The Internal Revenue Service (''IRS'') issued seven administrative summons to third-party recordkeepers in its investigation of Delmore Holmstrom's tax liabilities.[2] The United States claims the IRS mailed the seven administrative summons on February 1, 2002 (2 summons), February 4, 2002 (3 summons), and February 7, 2002 (2 summons), respectively. On March 25, 2002, Petitioner filed his motion to quash the summons.

[1] When the IRS serves a summons on a third-party recordkeeper it must also give notice to the person to whom the records pertain.[3] A taxpayer may sue the United States to quash a summons within twenty days after the IRS gives notice to the taxpayer. 26 U.S.C. § 7609(b)(2)(A). The IRS is considered to have given notice on the date it mails the notice. *See Callahan v. Schultz*, 783 F.2d 1543, 1545 [57 AFTR 2d 86-985] (11th Cir. 1986). In this case, the IRS has filed proof of the dates it mailed the notices (see doc. 14), and the notices were mailed more than 20 days prior to the Petitioner filing his motion to quash. Therefore, Respondents' motion to dismiss (doc. 5) is granted. Accordingly, it is hereby

ORDERED:

1. Respondents' Motion to Dismiss (doc. 5) is GRANTED.

2. Petitioner's Motion to Quash (doc. 1) is DISMISSED. The clerk of the court is directed to (1) close the file and (2) terminate all pending motions.

DONE and ORDERED in chambers at Tampa, Florida on this 16 day of September, 2002.

Mark A. Pizzo

United States Magistrate Judge

¶2002-5538

ESTATE OF Melvine B. ATKINSON, De-ceased, Christopher J. MacQuarrie, Ex-ecutor, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue RESPONDENT-APPELLEE. U.S. Court of Appeals, Eleventh Circuit, (CA11) No. 01-16536, Oct. 16, 2002. Tax Court, (2000) 115 TC 26 (opinion by Gerber, *J.*), affirmed. Date of death 11-7-93. Decision against Taxpayer.

1. Estate tax deductions—charitable remainder interests—charitable remainder annuity trust (CRAT)—qualification. Tax Court properly denied estate deduction for charitable remainder interest in purported CRAT: statute's plain language foreclosed taxpayer's argument that, because none of contingent non-charitable beneficiaries fulfilled contingency, no interest ''passed'' under IRC §2055(e)(2) sufficient to bring trust within CRAT rules. So, trust was required to strictly comply with CRAT rules throughout its existence, not just at formation, in order to qualify for deduction, which it failed to do when it failed to make requisite annual annuity payments; and fact that substantial donation would ultimately flow to charity was irrelevant. *Reference:* United States Tax Reporter ¶6645.01(5). USTR Estate & Gift Taxes ¶20,555.01(10). IRC §664; 2055.

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[1] Pursuant to 28 U.S.C. § 636(b)(1)(A), Petitioner's Motion to Quash Third Party Summons (doc. 1) and Respondents' Motion to Dismiss (doc. 5) have been referred to the undersign for disposition by United States District Judge Susan C. Bucklew (see doc. 11).

[2] These third-party recordkeepers include First Union Bank, Fifth Third Bank, American Express Centurion Bank, SunTrust Bank, Bank of America, Providian National Bank, and Huntington National Bank. Originally, the IRS mailed eight administrative summons. However, the Petitioner's Motion to Quash as it relates to the administrative summons issued by the IRS on March 11, 2002, to GMAC Mortgage Corporation was dismissed (see doc. 12).

[3] Notice of an administrative summons must be accompanied by a copy of the summons which has been served on the third-party recordkeeper and must contain an explanation of the taxpayer's right to bring a proceeding to quash the summons. 26 U.S.C. § 7609(a)(1).

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT,

Appeal from a Decision of the United States Tax Court

Before BIRCH and COX, Circuit Judges, and GEORGE[1] , District Judge.

U.S. Tax Ct. No. 20968-97

In this tax appeal, we determine whether the failure of an estate to comply with tax regulations regarding annual disbursements from a charitable remainder annuity trust results in the complete denial of a charitable deduction, even when a substantial amount of money would flow to charity. The Tax Court held that no charitable deduction was allowable. Because the law is clear, we AFFIRM.

I. BACKGROUND

Melvine B. Atkinson, an extraordinarily charitable woman, intended to create an estate plan that first provided for chosen beneficiaries for their lifetimes and then donated the remainder of the estate to several charitable organizations. On 9 August 1991, in pursuit of this goal, Atkinson signed a will and created two trusts: the Melvine B. Atkinson Charitable Remainder Annuity Trust (''the annuity trust'') and the Melvine B. Atkinson Irrevocable Trust (''the administrative trust''). The annuity trust, funded with stock worth approximately $4 million, would provide a lifetime annuity of $200,000 to Atkinson and, at her death, would divide a similar annuity between four beneficiaries for the terms of their lives, provided that those beneficiaries agreed to pay their share of any estate taxes due at Atkinson's death. After the death of the last beneficiary, any amount remaining in the annuity trust would be donated to certain charitable groups. The administrative trust, funded with stock worth approximately $1 million, existed to pay the funeral expenses of Atkinson, any outstanding claims against her estate at the time of her death, and any applicable estate taxes.

The Tax Court found that no annuity payments were ever actually made to Atkinson from the assets of the annuity trust. The estate continues to claim that checks were sent to Atkinson, but that Atkinson saw no need to cash them because her material needs were amply met by non-trust assets. However, this claim is undercut by the fact that the estate produced no copies of these checks or the cover letters that supposedly accompanied the checks to Atkinson, nor did the annuity trust's ledger reflect any outgoing annuity payments to Atkinson during her lifetime. Upon Atkinson's death, the non-charitable beneficiaries next in line to the annuity trust's assets were compelled to make an election. Either they could accept the annuity and pay their share of Atkinson's estate taxes according to the terms of the annuity trust, or they could refuse Atkinson's gift. None of these non-charitable beneficiaries elected to accept the annuity under the terms of the trust. One potential beneficiary, Atkinson's caretaker Mary Birchfield, citing a putative inter vivos promise by Atkinson that Birchfield would not be held liable for any estate taxes resulting from her annuity from the trust, instigated litigation against the estate. Eventually, the trustee paid a settlement of $667,000 to Birchfield in satisfaction of all her claims against the estate and also resumed annuity payments to Birchfield in the amount set by the trust, which payments continued until Birchfield's death in 1997. Birchfield never paid her share of the estate taxes due on the money she received.

Before the settlement of Birchfield's claim, the estate was required to file its federal estate tax return. The taxable gross estate, according to the executor, consisted of Atkinson's annuity rights under the trust ($366,334.92) as well as the date-of-death value of both the annuity and administrative trusts ($4,284,308 and $1,484,854, respectively). The estate claimed a charitable deduction in the amount of $3,894,535, representing the present value of the remainder interest in the annuity trust as of the date of Atkinson's death, measured

[1] Honorable Lloyd D. George, U. S. District Judge for the District of Nevada, sitting by designation.

under the assumption that Birchfield, whose claim against the estate had not been settled at that time, would prevail on that claim and be entitled to an annuity from the trust for the balance of her lifetime and, correlatively, that the charities would not take their remainder interest in the trust until Birchfield's death.

The Internal Revenue Service ("IRS") selected the estate's tax return for audit, and found that the estate was not entitled to take any charitable deduction because the annuity trust failed to comply with certain statutory procedures applicable to the deductibility of charitable remainders. With the disallowance of the charitable deduction, the IRS determined that the estate owed $2,654,976 in taxes. Because the administrative trust and the balance of other estate assets would not be sufficient to satisfy this tax liability, it became apparent that the remaining amount due would be paid by the annuity trust. The estate challenged the IRS's decision in the United States Tax Court, which agreed with the IRS that a charitable deduction was not appropriate. See Atkinson v. Comm'r, 115 T.C. 26, 32 (2000).

II. DISCUSSION[2]

A. Standards of Review

The Tax Court's factual findings are reviewed for clear error, and its legal conclusions are reviewed de novo. Davenport Recycling Assocs. v. Comm'r, 220 F.3d 1255, 1258–59 [86 AFTR 2d 2000-5535] (11th Cir. 2000).

B. Deductibility of Charitable Remainders

[1] A federal estate tax is imposed on "the transfer of the taxable estate of every decedent who is a citizen or resident of the United States." I.R.C. § 2001(a) (West 2002). A deduction is generally available for that portion of the estate that is directly devised to charitable organizations. Id. § 2055(a)(2). When property or money is given directly to the charity at the death of the decedent, then the amount of a charitable deduction that may be taken by the estate is easily calculated. However, when a decedent donates a remainder interest in property to charity, the valuation of the charitable deduction becomes more difficult. The estate tax return might be filed before the charity's interest in the property becomes possessory and can be conclusively valued for purposes of claiming a charitable deduction. This temporal disconnect provides an avenue by which unscrupulous estates may claim a large charitable deduction, then manage the split-interest property in such a way that the benefit to the non-charitable beneficiaries is maximized, with the charity ultimately receiving much less value than that claimed as a deduction on the estate tax return.

Recognizing this problem, Congress strictly limited the deductibility of charitable remainders by requiring that such an interest must pass to the charity in the context of a "charitable remainder annuity trust" ("CRAT"), a "charitable remainder unitrust," or a "pooled income fund." Id. §2055(e)(2)(A). The trust in this case was established as a CRAT and does not fit the definition for the other two options. A CRAT, by statutory definition, is a trust

(A) from which a sum certain (which is not less than 5 percent of the initial net fair market value of all property placed in trust) is to be paid, not less often than annually, to one or more persons (at least one of which is not a [charitable organization] and, in the case of individuals, only to an individual who is living at the time of the creation of the trust) for a term of years (not in excess of 20 years) or for the life or lives of such individual or individuals,

(B) from which no amount other than the payments described in subparagraph (A) may be paid to or for the use of any person other than [a charitable organization],

(C) following the termination of the payments referred to in subparagraph (A), the remainder interest in the trust is to be

[2] To the extent that additional arguments are raised by the estate and not discussed in the body of this opinion, we find that those arguments are without merit and deserve no substantial discussion. In addition, since we decide that the trust was not a CRAT because of its failure to pay Atkinson a lifetime annuity, we do not reach the issue of whether the trust additionally failed due to its exposure to estate tax liability.

transferred to, or for the use of, [a charitable organization] or is to be retained by the trust for such a use.

Id. § 664(d)(1) (West 1986) (amended 1997).[3]

Paragraph ''(A)'' of the CRAT requirements limits the interest of the non-charitable beneficiaries to a yearly sum certain based on the initial fair market value of the trust's assets. This fixed interest eliminates the impetus for investments that maximize the non-charitable beneficiaries' interests, and, accordingly, prevents the redirection of trust assets away from the charitable remaindermen. As noted by the Tax Court, this requirement also ensures that the trust does not accumulate untaxed wealth for charities, which would sidestep the income distribution requirements for private foundations. See Atkinson, 115 T.C. at 32. The CRAT is required to pay the non-charitable annuity from the first year of its existence. Treas. Reg. § 1.664-2(a)(5) (as amended in 2001).[4]

Paragraph ''(B)'' prohibits any disbursement of trust assets beyond the fixed annuity interests and the charitable remainder, again buttressing the charitable remainder and the correlative deduction. Should the trust leave open the possibility of making other payments beyond the annuity, it is disqualified as a CRAT. Treas. Reg. § 1.664-1(a)(6) (Example 3) (as amended in 2001). Each of these requirements attempts to make the valuation of the charitable remainder at the death of the grantor conform more closely to the actual interest that will one day pass to charity.

To preserve the estate's ability to claim a charitable deduction for a remainder interest in property, the trust must not only be set up as a CRAT, but it must also comply with the CRAT statutory requirements from its formation to the final disposition of the trust's assets. Treas. Reg. § 1.664-1(a)(4) (as amended in 2001). As noted by the IRS in this litigation, ''without the limitations . . . , the intent of Congress in enacting [the CRAT rules] could be defeated by the creation of CRATs that have their documents in order but that fail to function as CRATs after their creation.'' Appellee's Brief, at 32.

C. Atkinson Annuity Trust's Compliance with CRAT Regulations

1. Applicability of CRAT Regulations

The estate argues that the CRAT rules have no application where, as here, none of the non-charitable beneficiaries ever qualified under the terms of the trust. According to the estate, the failure of the non-charitable beneficiaries to qualify means that no interest ''passed,'' within the meaning of § 2055(e)(2),[5] both to these non-charitable beneficiaries and to the charities so as to invoke the CRAT rules. The IRS regulations refute the estate's argument. According to Treas. Reg. § 20.2056(c)-1(a)(5) (as amended in 1994), property interests transferred during the life of the decedent are immediately considered to have ''passed'' from the decedent to the

[3] This statement of the CRAT definition was the one in force when Atkinson established her annuity trust in 1991. In 1997, Congress amended the CRAT definition, see I.R.C. § 664(d)(1) (West Supp. 2001), but those amendments are not retroactively applicable to the trust at issue in this case.

[4] We defer to administrative regulations as long as they implement a Congressional mandate in a reasonable manner. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845, 104 S. Ct. 2778, 2783 (1984). As noted by this court in RJR Nabisco, Inc. v. United States, 955 F.2d 1457, 1464 [69 AFTR 2d 92-968] (11th Cir. 1992):

> The Supreme Court has been particularly deferential in the area of tax laws because it is ''not in the business of administering the tax laws of the Nation. Congress has delegated that task to the Secretary of the Treasury, 26 U.S.C. § 7805(a), and regulations promulgated under this authority, if found to 'implement the congressional mandate in some reasonable manner must be upheld.'''

Cartwright, 411 U.S. at 550 [31 AFTR 2d 73-1461], 93 S. Ct. at 1716 (citing United States v. Correll, 389 U.S. 299, 307, 88 S. Ct. 445, 449 [20 AFTR 2d 5845], 19 L.Ed.2d 537 [20 AFTR 2d 5845] (1967)).

[5] The relevant text of § 2055(e)(2) reads as follows:

> Where an interest in property (other than an interest described in section 170(f)(3)(B)) passes or has passed from the decedent to a [charitable use or beneficiary], and an interest (other than an interest which is extinguished upon the decedent's death) in the same property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to a [non-charitable use or beneficiary], no deduction shall be allowed under this section for the interest which passes or has passed to [the charitable use or beneficiary] unless-
>
> (A) in the case of a remainder interest, such interest is in a trust which is a charitable remainder annuity trust or a charitable remainder unitrust . . . or a pooled income fund . . . , or
>
> (B) in the case of any other interest, such interest is in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly).

recipient for purposes of § 2055(e)(2).[6] Though these interests may be contingent, the contingency does not mean that the interests do not immediately ''pass'' unless the possibility of the contingency occurring is so remote as to be negligible. Treas. Reg. § 20.2055-2(e)(1)(i) (as amended in 2001). The non-charitable beneficiaries each received a property interest, contingent on their acceptance of their share of the estate's tax burden, in the trust upon its establishment. The possibility of at least one beneficiary accepting the trust's terms and fulfilling the contingency cannot be said to be remote; therefore, their interests immediately ''passed'' under § 2055(e)(2) when the trust was established. From that moment on, the trust was required to operate as a CRAT in order to preserve its ability to qualify for a deduction of the charitable remainder.

2. Adherence to Regulations

The documents that establish the Atkinson annuity trust track the CRAT requirements to the letter. However, the Atkinson annuity trust failed to comply with the CRAT rules throughout its existence. Yearly annuity payments to Atkinson were not made during her lifetime. Accordingly, since the CRAT regulations were not scrupulously followed through the life of the trust, a charitable deduction is not appropriate.

The estate complains that this stringent focus on the CRAT rules amount to a denial of a substantial charitable deduction because of what amounts to a ''foot fault,'' or a minor mistake. However, the scheme established by Congress is specifically designed to combat the problems associated with the donation of charitable remainders. In exchange for the significant benefits of allowing a present charitable deduction, even when the actual charitable donation is not to occur until the remainder interest in the property becomes possessory, and in allowing the assets of the trust to grow tax-free, the Code requires adherence to the CRAT rules. It is not sufficient to establish a trust under the CRAT rules, then completely ignore the rules during the trust's administration, thereby defeating the policy interests advanced by Congress in enacting the rules themselves. Despite the certain charitable donation in this case, the countervailing Congressional concerns surrounding the deductibility of charitable remainders in general counsel strict adherence to the Code, and, barring such adherence, mandate a complete denial of the charitable deduction.[7]

III. CONCLUSION

From our review of the record and the parties' briefs, we find no reversible error. Because the annuity trust did not adhere to the CRAT regulations throughout its existence, the charitable remainder interest does not qualify as a charitable deduction.

AFFIRMED.

¶2002-5539

Michael HENRY v. UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE. U.S. District Court, Eastern Dist. of Louisiana, (DC LA) NO. 02-968, Sept. 27, 2002. Earlier proceeding at (2002, DC LA) 90 AFTR 2d 2002-6421. Year 1999. Decision for Govt.

1. Refund claim—summary judgment—res judicata; collateral estoppel. Pro se taxpayer was denied summary judgment on his loss-based refund complaint: taxpayer didn't properly support motion with any competent evidence of his underlying claim for worthless stock loss; and prior decision in unrelated tort case, to which govt. wasn't party and which didn't determine stock's worthlessness under IRC, had no preclusive effect. *Reference:* United States Tax Reporter ¶74,225.05(40); 74,337.501(40). IRC §7422.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA,

[6] The regulations under § 2055(e)(2) point to corresponding regulations under § 2056(c) for purposes of determining whether an interest has ''passed,'' thus the citation to these regulations in the text.

[7] We note that no argument was made by the estate that the trust could be reformed under § 2055(e)(3) to comply with the Code's requirements and, thus, that the estate would be entitled to a charitable deduction. Thus, we express no opinion on that matter.

ENGELHARDT, J.

CIVIL ACTION

KURT D. ENGELHARDT UNITED STATES DISTRICT JUDGE

SECTION "N" (1)

Before the Court is a Motion for Partial Summary Judgment file by *pro se* plaintiff Michael Henry ("Henry"). Plaintiff submits that there are no issues of material fact, and thus he is entitled to judgment as a matter of law on count I (*i.e.*, his claim for a tax refund for the Tax Year 1999). The Government filed formal opposition noting that: (1) the plaintiff's motion is premature; (2) there are material issues of facts in dispute; and (2) the ruling issued by Judge Zainey dismissing the plaintiff's damage claims against Cisco Systems, Inc. for fraudulent inducement as time-barred can have no *res judicata* effect as to his claims against the Government, since it was not a party in any capacity in the fraud case. The matter was noticed for hearing on October 2, 2002, but is deemed submitted for determination without oral argument. For the following reasons, the plaintiff's Motion for Partial Summary Judgment is DENIED.

I. Background

This case is in its infancy and no formal discover has occurred to date. The plaintiff's entitlement to deduction for his alleged worthless investment in AMC, and concomitantly, his claim for a tax refund claim for the 1999 tax year, hinges upon the determination of a factual issue *i.e.*, whether or not certain American MetroComm Company ("AMC") stock became "worthless" in the tax year of 1999. The plaintiff relies on a decision issued in another case, by another section of court, and which involved Henry's damage claims for fraudulent inducement against a different party, Cisco Systems, Inc. *See* Minute Entry Order signed and filed on August 27, 2002 in *Michael Henry v. Cisco Systems, Inc.*, E.D. La. Docket No. 00-3519 "A" (granting partial summary judgment in favor Cisco Systems dis-missing the plaintiff's claims for fraudulent inducement on the basis of prescription) [Henry Exhibit "1"].

Judge Zainey's August 27th Order does not purport to establish the date upon which the plaintiff's AMC stock became "worthless" within the meaning of the law applicable to plaintiff's claim for tax refund. Judge Zainey's ruling rather addresses the viability of plaintiff's tort claims. Based on the rationle that the damage was complete when the plaintiff invested in AMC in September of 1999, the court rejected the plaintiff's argument that the doctrine of continuing tort operated to suspend prescription as to his fraudulent inducement claims against Cisco Systems. It is not disputed that the Government was not a party to or represented in any capacity in the plaintiff's lawsuit against Cisco Systems.

II. Summary Judgment Standard

[1] "Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." *Kee v. City of Rowlett, Texas*, 247 F.3d 206, 210 (5th Cir.) (internal quotation marks omitted), *cert. denied*, 122 S.Ct. 210 (2001). The moving party bears the burden of showing that there is an absence of evidence to support the nonmoving party's case. If the moving party meets this burden, the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Kee*, 247 F.3d at 210. The substantive law applicable to the plaintiff's claims determines which facts are material. *Id.* at 211.

The Government has requested a Rule 56(f) continuance, suggesting that the case is in its infancy, and plaintiff's motion is premature. Rule 56(f) authorizes a court to grant a continuance when the nonmovant has not had an opportunity to conduct discovery that is essential to his opposition to

a motion for summary judgment.[1] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 3242, 250 n. 5 (1986).

In order to obtain a continuance of a motion for summary judgment for discover purposes, a party must set forth some statement to the court indicating why additional discovery is necessary and how additional discovery will create a genuine issue of material fact. *Canady v. Bossier Parish School Board*, 240 F.3d 437, 445 (5th Cir. 2001) (*citing Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 28 F.3d 1388, 1395 (5th Cir. 1994)); *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518, 535 (5th Cir. 1999) (''[I]t is not enough to rely on vague assertions that discovery will produce needed, but unspecified, facts,'' but rather the nonmovant ''must demonstrate how discovery will lead to a genuine issue of fact'').

Rule 56(f) is an important ingredient of the federal summary judgment scheme, and provides a mechanism for dealing with the problem of premature summary judgment motions. *Celotex v. Catrett*, 477 U.S. 317, 326 (1986). Requests pursuant to Rule 56(f) ''are generally favored and should be liberally granted.'' *Beattie v. Madison County School District*, 254 F.3d 595, 606 (5th Cir. 2001) (*citing Stearns Airport Equipment Co.*, 170 F.3d at 535.

III. Analysis

Plaintiff has failed to properly support his motion as required by Rule 56 with affidavits, deposition testimony, or other competent evidence, and thus has failed to demonstrate that there are no materials issues of fact in dispute. Plaintiff's motion for summary disposition of his tax refund claim is not predicated on the absence of any genuine issue of material fact, but rather on a ruling which can have no *res judicata* or collateral estoppel effect in the captioned case. The Government was not a party or represented in any capacity in the plaintiff's lawsuit against Cisco Systems. In any event, Judge Zainey's August 27th Minute Entry Order does not purport to determine the contested issue in this case (i.e., the date upon which the plaintiff's AMC stock became ''worthless'' within the meaning of the law governing the plaintiff's tax refund claim against the IRS). As previously explained, the substantive law determines the materiality of facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Plaintiff does not begin to discuss the law applicable to his claim. Accordingly and for all of the foregoing reasons,

IT IS ORDERED that the plaintiff's Motion for Summary Judgment [Rec. Doc. No. 10] is hereby DENIED.

KURT D. ENGELHARDT

UNITED STATES DISTRICT JUDGE

¶2002-5540

Richard T. BURKS, III, PETITIONER v. UNITED STATES OF AMERICA and Internal Revenue Service, RESPONDENTS. U.S. District Court, Eastern Dist. of Kentucky, (DC KY) Case No. 5:01-408-HRW, Sept. 17, 2002. Decision for Govt.

1. Third-party summons—petition to quash—dismissal. Pro se taxpayer's petition to quash 3d-party IRS summons was dismissed with prejudice, based on govt.'s motion and declaration in support thereof. *Reference:* United States Tax Reporter ¶76,025.04(25). IRC §7602.

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AMERICAN EXPRESS 200 Vesey Street New York, New York 10285 Attn: Subpoena Compliance Department

[1] Rule 56(f) provides: ''Should it appear form the affidavits of a party opposing the motion [for summary judgment] that a party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.'' Fed. R. Civ. P. 56(f).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY LEXINGTON DIVISION,

ORDER

[1] Having considered respondent United States' motion for dismissal of petition to quash Internal Revenue Service third-party summons, together with the memorandum and declaration in support thereof, the Court concludes that the motion ought to be granted. Accordingly, it is this 17th day of September, 2002, at Lexington, Kentucky,

ORDERED that respondent United States' motion for dismissal of petition to quash Internal Revenue Service third-party summons be and is GRANTED;

ORDERED that the petition to quash summons be and is DISMISSED with prejudice; and it is further

ORDERED that the Clerk shall DISTRIBUTE conformed copies of this order to the representatives of the parties and the summoned parties listed below.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5541

In Re: McDERMOTT, Robert H. and McDERMOTT, Joan T., Debtors. UNITED STATES OF AMERICA, APPELLANT v. MCDERMOTT, Robert H. and McDERMOTT, Joan T., APPELLEES. U.S. District Court, Middle Dist. of Florida, (DC GA) Case No. 3:01-CV-1387-J-20, Sept. 10, 2002. Bankruptcy Court, (2001, Bktcy Ct FL) 88 AFTR 2d 2001-7075, reversed and remanded. Year 1996. Decision for Govt.

1. Tax claims in bankruptcy—dischargeability—validity of filing extension—estoppel. Bankruptcy court improperly denied govt.'s request for 11 USC §523(a)(1) discharge exception against taxpayers who filed bankruptcy within 3 years of return's extended filing deadline: taxpayers' argument that operative date for lookback period purposes was date they timely filed return rather than extended deadline, and that extension was void, was rejected. 11 USC §523(a)(1) clearly stated that 3-year lookback period started on date return was ''last due, including extensions,'' not actual filing date; extension, which was automatic and which govt. approved, wasn't otherwise voided merely by fact taxpayers listed incorrect estimate of tax due; and reliance on case law involving govt.'s rather than taxpayer's disapprobation of extensions was misplaced. Also, taxpayers were estopped from asserting extension's invalidity where, even if they didn't benefit from extension itself, they would benefit from its invalidation. *Reference:* United States Tax Reporter ¶68,726.52(27); 68,726.52(3).

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION,

OPINION AND ORDER

HARVEY E. SCHLESINGER United States District Judge

The United States is appealing the Bankruptcy Court's Order determining that the McDermotts' 1996 income tax obligation was discharged by their bankruptcy. Before the Court is Appellant United States of America's Initial Brief (Doc. No. 5, filed on January 14, 2002) and the Appellees' Answer Brief filed by Robert H. McDermott and Joan T. McDermott) Doc. No. 9, filed on February 14, 2002.

I. Jurisdiction and Standard of Appellate Review

This Court has jurisdiction pursuant to 28 U.S.C. § 158(a). The standard of review with respect to issues of law is de novo. In re Goerg, 930 F.2d 1563, 1566 (11th Cir. 1991). The Bankruptcy Court's findings of fact will only be set aside if clearly erroneous. Id.; accord In re Arndt, 201 B.R. 853, 857 [78 AFTR 2d 96-6295] (M.D. Fla. 1996).

II. Discussion

[1] The McDermotts filed three things with the Internal Revenue Service (IRS) on April 15, 1997, an Application for Auto-

matic Extension of Time, their tax return for 1996, and $1,000. A first application for an extension to file a return is *automatically* granted for four months provided the application meets certain requirements (including use of the tax Form 4868, the time and place for filing the Form, and a proper estimate of the full amount of tax due) 26 CFR 1.6081-4(a)(2)–(4). The automatically extended due date for filing then became August 15, 1997. Although the debtors' Application for Extension represented that no (0) taxes were due, their tax return, which was filed simultaneously, showed a tax liability of $65,472. The McDermotts filed a Petition for Bankruptcy on May 4, 2000 (i.e., three years and two weeks after filing their tax returns), but less than three years before the automatically extended filing deadline. They then filed an adversary proceeding in their Chapter 7 Bankruptcy to determine the dischargeability of their 1996 taxes.

The McDermotts claim that the Application for Extension was moot because their tax return was filed timely. They also argue that the application was not valid since it did not accurately identify the amount due. They further argue that the ''due date'' was the date the return was filed on April 15th since the extension turned out to be unnecessary. They contend here that more than three years had passed between the ''due date'' of April 15, 1997 and the filing of their bankruptcy on May 4, 2000, which they claim properly resulted in a discharge of their tax liability.

The Bankruptcy Court agreed, holding that:

1) The McDermotts' Application for Extension was moot and void because the extension was unnecessary since the return was timely filed;

2) The McDermotts' Application for Extension was also invalid because it failed to accurately set forth the amount of taxes due; and

3) The McDermotts were not estopped from asserting that the extension was invalid because they received no benefit from it.

McDermott v. United States of America, 2001 WL 1589617 (Bankr. M.D.Fla.). The United States of America appeals from the Bankruptcy Court's final judgment, which discharged the debtors' 1996 income tax obligation.

First, the Bankruptcy Judgment improperly relies upon the fact that the tax return was ''filed'' timely in order to conclude that the Application for Extension was moot and void as unnecessary. Pursuant to Section 523(a)(1) of the Bankruptcy Code, taxes are excepted from discharge if they are ''for a taxable year ending on or before the date of filing of the petition for which a return, if required, is *last due, including extensions*, after three years before the date of the filing of the petition.''(Emphasis added.) For purposes of §§ 523(a)(1)(A), ''the due date of the return is dispositive and the date the return is actually filed is immaterial'' in determining whether a debtor's tax obligation is dischargeable. In re Wood, 78 B.R. 316, 320 (M.D. Fla. 1987)(Judge George L. Proctor), *aff'd* 866 F.2d 1367 [63 AFTR 2d 89-851] (11th Cir. 1989). The clear statutory language includes extensions without any qualifying terms for the type of extensions. It does not include only valid extensions, nor only fully used extensions, nor only necessary extensions, nor only extensions that the taxpayer benefitted from. The clear statutory language provides that the ''lookback'' period commences on the date the tax is ''last due, including extensions''-not the date the return is filed if the extension was not used. The mere fact that an extension is not used does not make it void. Therefore, the three year ''lookback'' period for the dischargeability of a tax commenced on the date the tax return was ''last due, including extensions'' which was August 15,1997[1] and not the filing date of April 15, 1997.

Second, the Bankruptcy Court relied upon three cases for its conclusion that the

[1] The record is unclear as to whether one or two extensions were granted (extending the filing deadlines to August 15, 1997 and to October 15, 1997), but the parties agree that it makes no difference since both extensions fall inside the three year lookback period (falling between May 4, 1997 and May 4, 2000, the bankruptcy filing date).

debtors' Application for Extension was invalid for failing to properly set forth an estimate of taxes due. Phillips v. United States, 843 F.2d 438, 442–43 [63 AFTR 2d 89-753] (11th Cir. 1988); Crocker v. Commissioner, 92 T.C. 899, 907 (1989); Healy v. Commissioner, T.C., Memo 1996-260 (1996). However, all three cases are distinguished from the instant case in that they all involve the IRS having taken affirmative steps to deny the taxpayers' extensions. See Hermann v. United States,, 221 B.R. 944, 948 (Bankr. N.D. Okla. 1998)(distinguishing Crocker); accord, In re Viego, 224 B.R. 570 [80 AFTR 2d 97-5994] (Bankr. N.C. 1997)(distinguishing Crocker to explain that in the context of a bankruptcy matter, even if the taxpayer did not comply with requirements of filing for extension, the IRS can still grant the extension). The *government*, not the taxpayer, in all three cases was asserting that the extensions *were invalid* and/or *void* to support its position that the taxpayers were liable for delinquency penalties. Phillips, 843 F.2d 438 [63 AFTR 2d 89-753] (involving indictment for tax evasion, where taxpayer had not obtained, and government did not contend that they had obtained, an automatic extension); Crocker, 92 T.C. 899 (finding by Tax Court that government can properly void previously granted automatic extension where application was invalid for grossly failing to properly estimate tax liability); Healy v. Commissioner, T.C., Memo 1996-260 (holding that, as government had contended, taxpayer's applications for extension for 3 years were all invalid for failing to make bona fide attempt to base estimate on information reasonably available); see also Kimball v. United States [87 AFTR 2d 2001-981], 2001 WL 260078 1–2 (Bankr. D. Mass. 2001)(recognizing that Crocker ''offers little guidance'' since it ''was silent as to the *taxpayer's* ability to void an extension [since it was] the IRS, not the taxpayer, [that] sought to void the extensions'' in the case)(numerous citations omitted).

In Kimball, a very similar case where the extension gave an inaccurate estimate of no taxes due (when $42,000 was actually due), the bankruptcy court concluded that ''only the IRS has the option to declare an extension void.'' Id. at 1 (numerous citations omitted). The court in Kimball dismissed the debtors' assertions that the extension had been invalid, that the tax liability fell outside the three year period, and that it was therefore dischargeable in bankruptcy.

In another very similar case, Judge Proctor held that even though the debtors' application for extension did not provide reasonable estimates of their tax liability, the IRS had never notified them that their extension was invalid, so the extension was not void, the ''plaintiffs [debtors] cannot invalidate such extension'' and the taxes, interest and penalties are nondischargeable. Gidley v. United States, 138 B.R. 298 (Bankr. M.D. Fla. 1992). Here, the government never notified the McDermotts that their extension was invalid, nor has it ever asserted that the automatic extension is void/terminated/revoked, so the debtors cannot invalidate the extension. Id.

Moreover, the ''mere fact that petitioners [taxpayers] underestimated their . . . tax liabilities, standing alone, does not cause their applications to be invalid and the automatic extensions to be void.'' Crocker, 92 T.C. 899; accord Healy, Memo 1996-260 (''The mere fact that a taxpayer underestimates his or her tax liability does not invalidate a Form 4868 or void an automatic extension.''). So, even if a *court* considers the debtors' first *Application* for Extension to be *voidable* due to a failure to make a bona fide attempt at estimating the tax liability based on information reasonably available at the time of the application, it is only the *government* that may (or may not) at its discretion consider the automatically granted extension as ultimately *void, terminated* or *revoked.* Contrary to the Bankruptcy Court's holding, therefore, this Court concludes that the extension, which was automatically granted, and which the government continues to approve, is not invalid nor voided by the mere fact that the debtors' application inaccurately estimated their tax liability.

Third, the Bankruptcy Court concluded that the debtors are not estopped from

challenging the validity of the extension because they did not "benefit" from it, since their return was filed timely on the same day. The Bankruptcy Court distinguished Gidley v. United States, 138 B.R. 298 (Bankr. M.D. Fla. 1992) on the basis that the debtors in the case benefitted from the extension, whereas the debtors here did not benefit from it. Even if the extension turned out to be unnecessary and they did not benefit from the *extension* itself, this Court finds that the debtors would benefit considerably now from a declaration that their sham *application* for extension was invalid for not complying with the proper estimate requirement. Brustman v. United States, 217 B.R. 828 [83 AFTR 2d 99-1428] (Bankr. C.D. Cal. 1997)(holding taxpayer could not raise his own noncompliance wit requirements for obtaining extension in order to assert that extension granted was void, to attempt to discharge tax liability through bankruptcy). It would be unfair to allow them to benefit from circumstances driven by their own blatant noncompliance with the IRS regulations for seeking extensions.

A "taxpayer cannot now step forward to make the self-serving admission of a fraud in estimating his tax liability, and thereby void the automatic extension [and] ... under IRS regulations, the application for extension is terminable, not void, at the discretion of the IRS, not the taxpayer." Kimball, 2001 WL 260078 (citations omitted). "It would be inequitable to allow a taxpayer to estimate a tax liability in order to obtain an extension and then claim that the extension was wrong for the self-serving purpose of discharging liability." Id.

Accordingly, based on all three conclusions of law which differ from the Bankruptcy Court's conclusions, the Bankruptcy Court's final judgment that determined that the debtors' 1996 income tax obligation was discharged in bankruptcy is REVERSED. This case is REMANDED for further proceedings consistent with this Opinion. The Clerk is directed to close this file.

DONE AND ORDERED at Jacksonville, Florida this 10th day of September, 2002.

HARVEY E. SCHLESINGER

United States District Judge

¶2002-5542

UNITED STATES OF AMERICA, PLAINTIFF v. Kiersten MISHLER and Jerry D. MISHLER, JR., DEFENDANTS. U.S. District Court, Middle Dist. of Florida, (DC FL) Civil No. 98-1094-Civ-Orl-28A, Oct. 18, 2002. Earlier proceeding at (2000, DC FL) 87 AFTR 2d 2001-2148. Years 1985, 1986, 1987, 1994, 1995. Decision for Govt.

1. Actions to enforce liens—foreclosure and sale. Judgment was entered for govt. in amount stated on taxpayer's tax, penalty and interest debts for 5 years, plus additional interest. *Reference:* United States Tax Reporter ¶74,035.03(100). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION,

JUDGMENT

This matter having come before the Court upon the motion by plaintiff United States for entry of a deficiency judgment, it is hereby

ORDERED, ADJUDGED and DECREED

[1] That the plaintiff, United States of America, recover of the defendant, Jerry D. Mishler, Jr., the sum of $143,662.01, for federal income tax, penalties and interest for the years 1985, 1986, 1987, 1994 and 1995, plus statutory additions accruing after July 15, 2002, until paid.

Done and Ordered this 17 day of September, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5543

Michael I. MONUS, APPELLANT v. Thomas D. LAMBROS, ET AL., APPELLEES. U.S. District Court, Northern Dist. of Ohio, (DC OH) CASE NO. 4:01CV211; BNK. CASE NO. 92-41883, Sept. 17, 2002. Bankruptcy Court, (2000, Bktcy Ct OH) 86 AFTR 2d 2000-6988, affirmed; and appeal dismissed. Years 1990, 1991. Decision for Govt.

1. Tax claims in bankruptcy—priority claims—settlements—appeals—standing. Pro se debtor's appeal from bankruptcy court judgment upholding agreed settlement between IRS and Chap. 7 trustee allowing IRS's amended proof of claim was dismissed, and judgment was affirmed: taxpayer lacked standing to appeal where he couldn't have been ''person aggrieved'' by judgment that explicitly preserved his rights under non-bankruptcy law; and, even if he had standing, his argument that 3d party's alleged perjured testimony somehow affected IRS's claim was rejected. Also, taxpayer offered no proof that court failed to compare settlement terms with litigation's ''likely rewards'' or that settlement wasn't fair, equitable and in estate's best interests. *Reference:* United States Tax Reporter ¶68,726.54; 68,726.527(25).

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO,

MEMORANDUM OPINION AND ORDER

JUDGE PETER C. ECONOMUS

This matter is an Appeal by the Debtor, *pro se*, from a final judgment of the United States Bankruptcy Court for the Northern District of Ohio entered by the Honorable William T. Bodoh on October 30, 2000, in Bankruptcy Case No. 92-41883, and captioned the ''Agreed Order Allowing the Internal Revenue Service's ('I.R.S.') Pre-Petition Claims'' (''Agreed Settlement Order'')(Dkt. #963-1).

The Debtor states in his Brief that, ''That issue on appeal is based upon Judge Bodoh not making a timely referral of the alleged perjury of Pat Finn that impacts the administration of the bankruptcy case and all other priority creditors behind the I.R.S.'' Brief at p. 1. The Debtor asks this Court to vacate the Agreed Settlement Order between the Trustee, Thomas D. Lambros, and the United States, and to remand this matter to the Bankruptcy Court in order that Judge Bodoh may: (1) refer the Debtor's allegations of perjury against Pat Finn to the United States Attorneys Office pursuant to 18 U.S.C. §3057; (2) allow the proper 2004 exams necessary to complete the Debtor's objection to the I.R.S. claims; and (3) conduct a formal hearing concerning the Debtor's objections to the I.R.S. claim.

This Court has jurisdiction pursuant to 28 U.S.C. § 158(a). The Court reviews the Bankruptcy Court's findings of fact using the clearly erroneous standard and its conclusions of law *de novo*. Industrial Equipment Co. v. Emerson Co., 554 F.2d 276 (6th Cir. 1977).

Procedural History

On September 25, 1992, the Debtor commenced a bankruptcy case by filing a petition under Chapter 11 of the Bankruptcy Code (11 U.S.C.) *See* Bankr. Docket Entry No. 1. The case was converted to a case under Chapter 7 of the Bankruptcy Code on June 14, 1995. *See* Bankr. Docket Entry No. 507. Lambros was then appointed as the Chapter 7 trustee (''the Trustee''). *See* Bankr. Docket Entry No. 512.

On February 4, 1997, the Debtor filed a Motion for Examination of Patric Finn, the former Chief Financial Officer of PharMor and a cooperating government witness in his criminal trial, under Bankruptcy Rule 2004. *See* Bankr. Docket Entry No. 725. On February 19, 1997, the Bankruptcy Court granted the Debtor's motion, and the examination was ultimately scheduled for March 17, 1997. *See* Bankr. Docket Entry Nos. 735, 741. According to the Debtor, Finn's examination lasted approximately one day, and, then, on March 25, 1997, the Debtor filed a Motion to Compel Finn's attendance at the previ-

ously-ordered examination. Two days later, the Bankruptcy Court entered an Order Temporarily Denying the Debtor's Motion to Compel. *See* Bankr. Docket Entry No. 750.

In preparation for the 2004 examination at issue, the Debtor claims that he received, for the first time, documents in Finn's own handwriting from the records room at Phar-Mor and also from the United States Attorney's Office. The Debtor contends that the documents reveal that Finn's testimony in the 2004 exam was untruthful, and that this testimony impacted the administration of the Debtor's estate as it relates to substantial priority I.R.S. tax claims.

As a result, on July 14, 1997, the Debtor filed his Motion to Suspend and Stay All Actions with the Exception of Those Actions that concern Administrative Expenses of both the Chapter 11 and 7 Bankruptcy (''the motion to stay''). *See*Bankr. Docket Entry No. 781. In the motion to stay, the Debtor moved the Court for an Order permitting him to continue the examination of Finn as well as an Order appointing special counsel to investigate Finn's alleged perjury at the first day of the exam.

At a hearing on the motion, conducted on December 16, 1997, the Court stated:

> The purpose of this proceeding is to consider the motion of [the Debtor] to suspend and stay actions in this Chapter 7 proceeding with the exception of actions that concern administrative expenses in both the converted Chapter 11 and the Chapter 7 bankruptcy. Specifically, [the Debtor] asks two things.
>
> First, that the actions be stayed until such time as the court, I take it, reverses its prior ruling to permit the Debtor to continue Rule 2004 examinations with respect to the administration of the estate, and there is a request of [the Debtor] to appoint special counsel to investigate certain claims of perjury.
>
> I have reviewed first of all, 18 U.S.C. §1621. That it the general perjury statute. The appointment of special counsel to investigate criminal actions is outside the authority of this Court; however, 18 U.S.C. §3057[1] specifically mandates that any judge having reasonable grounds for believing that there are violations of Chapter 9 of Title 18 or other laws of the United States with respect to cases before it—and I'm now quoting the statute—''shall report to the appropriate United States Attorney all the facts of the case.''
>
> And Section B of 18 U.S.C. §3057 then says, the United States Attorney thereupon shall inquire into the facts and report to the judge. And if it appears that an offense has been committed, shall, without delay, present the matter to the grand jury, et cetera.
>
> On the second leg of [the Debtor's] Motion, then asking me to appoint a special counsel, taking his Motion as a Motion to invoke 18 U.S.C. §3057, I think [the Debtor's] Motion is well taken and it is sustained.
>
> The Court shall promptly, after the conclusion of proceedings today, report to the United States Attorney for this district the facts related in [the Debtor's] motion and the exhibits, and suggest to the United States Attorney that they investigate whether a violation of 18 U.S.C. §1621 has been committed.
>
> Mr. Monus, I take it in sustaining your motion and doing what is incumbent upon me by law to do that, that gets to the specific point that you sought

---

[1] 18 U.S.C. §3057 states, in its entirety:

(a) Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title or other laws of the United States relating to insolvent debtors, receiverships or reorganization plans has been committed, or hat an investigation should be had in connection therewith, shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.

(b) the United States attorney thereupon shall inquire into the facts and report thereon to the judge, and if it appears probable that any such offense has been committed, shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of public justice do not require investigation or prosecution, in which case he shall report the facts to the Attorney General for his direction.

18 U.S.C. §3057 (1978).

to raise in the second part of your motion.

Transcript of 12/16/97 Hearing at pp. 2–3. However, the Bankruptcy Court denied the first leg of the Debtor's motion, that is, his request to continue the 2004 examination of Finn.

On February 28, 2000, pursuant to 11 U.S.C. §502, the I.R.S. filed an proof of claim, as amended, in the amount of $3,865,019.94. *See* Bankr. Docket Entry No. 953, Gov. Exh. 1. The proof of claim involved the debtor's 1988, 1990, and 1991 federal taxes. The claims for the 1990 and 1991 years were based upon notices of deficiency (*See* 26 U.S.C. § 6213) issued by the I.R.S. *See* Bankr. Docket Entry No. 953, Gov. Exhs. 2 and 3.

The Debtor wrote a letter to Judge Bodoh, dated August 4, 2000, requesting an update concerning the referral to the Justice Department, since this information would be used in the Debtor's objections to the I.R.S. claims. On August 8, 2002, the Trustee filed a limited objection to the allowance of the United States' proof of claim based upon the adequacy of the government's documentation of the claim (the ''Trustee's Objection''). *See* Bankr. Docket Entry No. 948. The Trustee served the ''Notice Of Objection To Claim'' on the Debtor and all creditors. *See* Bankr. Docket Entry No. 948. On September 6, 2000, the United States filed an opposition to the Trustee's Objection. *See* Bankr. Docket Entry No. 953.

On September 14, 2000, the Clerk of the Bankruptcy Court issued a ''Noticed Of Hearing'' for the Trustee's Objection. *See* Bankr. Marginal Docket Entry for 09/14/00. The hearing was scheduled for October 25, 2000. *See*Bankr. Marginal Docket Entry for 09/14/00. According to the Debtor, his wife was informed by the bankruptcy Court that the letter would be used as the Debtor's objection.

Just prior the October 25th hearing, however, the government provided additional documentation to the Trustee in support of the I.R.S. claim, and, consequently, the Trustee conceded that the United States' proof of claim, as amended, should be allowed under 11 U.S.C. §502. The parties informed the Clerk that they had resolved the Trustee's Objection. The Bankruptcy Court held a telephone hearing on October 23, 2000, during which the Bankruptcy Court approved of the Trustee's concession and instructed the parties to submit an agreed judgement entry. During the telephone hearing, Judge Bodoh informed the parties that the court had received a letter from the Debtor requesting guidance, and that the agreed judgment entry should state that it did not prejudice the rights of the debtor, as those rights exist under applicable non-bankruptcy law.

The Debtor provides the following summary of the hearing conducted on October 25, 2000:

1. Judge Bodoh informed Debtor that the IRS and the Trustee had settled the part of the claim that had to do with the assets of the estate of the Debtor;

2. Judge Bodoh indicated he no longer had jurisdiction since the Trustee settled with the IRS;

3. He said my objection was now mute [sic];

4. He indicated he would now (some three years later) refer to the U.S. Attorney's Office the possibility of perjury committed by Pat Finn;

5. Debtor reiterated the facts as he knew them;

6. Debtor said he would appeal the settlement as soon as he received it;

7. The Attorney for the Trustee and the IRS were not present at the hearing for Debtor;

8. Judge Bodoh ended the hearing by saying again he would refer to the U.S. Attorney's Office the matter of Patrick Finn's testimony.

Brief at p. 4.

Pursuant to the October 23rd telephone hearing, the Trustee and the government submitted the agreed judgment entry. On October 30, 2000, the Bankruptcy Court entered the Agreed Settlement Order.

Bankr. Docket Entry No. 963. The judgment allowed the United State' proof of claim, as amended, and found that the ''basis of the Trustee's objection was a lack of documentation as to the portion of the claim which represents the 1990 and 1991 tax periods,'' but that the United States ''supplied the Trustee with documentation to support its claim regarding the 1990 and 1991 tax periods.'' The judgment also included the following paragraph:

> Notice was given to all parties in interest of the Trustee's objection to the Internal Revenue Service's claim and the Internal Revenue Service filed an opposition. Other parties in interest had thirty (30) days in which to file an opposition to the objection and request a hearing. Mr. Michael I. Monus (the ''Debtor'') wrote a letter to the Court requesting guidance regarding this matter. This Agreed Order does not prejudice the right of the Debtor, as those rights exist under applicable non-bankruptcy law.

Bankr. Docket Entry No. 963, pp.1–2.

In this *pro se* appeal, the Debtor contends that Judge Bodoh's failure to refer the Finn allegations to the Justice Department prevented him from asserting a successful objection to the I.R.S. claim.

Standing

[1] As an initial matter, the Appellees argues that the Debtor does not have standing to challenge the Agreed Settlement Order. Appellate standing in bankruptcy cases is more limited than Article III standing or the prudential requirements associated therewith. In re Troutman Enterprises, Inc., 286 F.3d 359, 364 (6th Cir. 2002)(*Citing* In re PWS Holding Corp., 228 F.3d 224, 248 (3d Cir.2002)). In order to appeal a bankruptcy court's order, a litigant must qualify as a ''person aggrieved'' by the order. Morgenstern v. Revco D.S., Inc., 898 F.2d 498, 499 (6th Cir. 1990)

A ''person aggrieved'' by a bankruptcy order must demonstrate that the order diminishes the person's property, increases the person's burdens, or impairs the person's rights. Fidelity Bank v. M.M. Group, Inc., 77 F.3d 880, 882 (6th Cir. 1996). Only those persons who are directly and adversely affected pecuniarily by an order of the bankruptcy court have been held to have standing to appeal that order. Id. at 882.

''Debtors, particularly Chapter 7 debtors, rarely have such a pecuniary interest because no matter how the estate's assets are disbursed by the trustee, no assets will revert to the debtor.'' In re Cult Awareness Network, Inc., 151 F.3d 605, 607 (7th Cir.1998). Therefore, a debtor is not a person aggrieved by a bankruptcy court order affecting the administration of the estate ''[u]nless the estate is solvent and excess will eventually go to the debtor or unless the matter involves rights unique to the debtor.'' In re Weston, 18 F.3d 860, 863–64 (10th Cir. 1994) (the debtor lacked standing to appeal an order upholding the election of a Chapter 7 trustee). The second exception would include orders that affected ''the terms, conditions and extend of a debtor's discharge.'' In re El San Juan Hotel, 809 F.2d at 155 n.6; *See also* Weston, 18 F.3d at 864 n. 3.

The Debtor points out in his Reply brief that, in the case *sub judice*, the I.R.S. claim is for taxes related to income. Therefore, the taxes are subject to exception from the bankruptcy discharge. 11 U.S.C. §523(a)(1). In Abel v. Campbell, 334 F.2d 339, 341 [14 AFTR 2d 5150] (5th Cir.1964), the Fifth Circuit held that a debtor had standing to challenge the merits of his liability for certain taxes because he would remain liable for those taxes after the bankruptcy proceeding. Similarly in Menick v. Hoffman, 205 F.2d 365, 366–67 [44 AFTR 74] (9th Cir.1953), the Ninth Circuit allowed a debtor to seek review of the bankruptcy court's decision to refuse an untimely filed I.R.S. claim which, if not settled during the bankruptcy proceeding, would become the debtor's responsibility post-bankruptcy.

However, as the Appellee's point out in their Briefs, the Agreed Settlement Order contains a provision which states that, ''This Agreed Order does not prejudice the right of the Debtor, as those rights exist

under applicable non-bankruptcy law.'' Insofar as the Order allows the Debtor to challenge the tax assessment outside of the Chapter 11 proceedings, it is the opinion of this Court that the Debtor is not a ''person aggrieved'' as that term is defined in relevant Sixth Circuit law, and, therefore, does not have standing to appeal the Agreed Settlement Order.

Finn's Testimony

However, even assuming *arguendo* that the Debtor has standing to appeal the Agreed Settlement Order, it is the opinion of this Court that Judge Bodoh's failure to refer the Finn allegations to the Justice Department after the December 16, 1997 hearing did not impair the Debtor's ability to challenge the I.R.S. claim.

At the hearing on his motion to stay, the Debtor based his allegations of perjury against Finn on a three page memo, dated April 4, 1988, from Finn to Charity Imbray in which Finn calculates the Debtor's salary for 1988 and 1989. The Debtor contends that these calculations reveal that Finn was capable of calculating the Debtor's salary without relying on the company prospectus. According to the Debtor, because Finn testified that the prospectus was the only tool upon which Finn could rely to calculate the Debtor's salary, Finn perjured himself at both the 2004 examination and the criminal trial:

> I want to make you privy to one thing, previous to you going to the U.S. Attorney's office so that you understand fully what I'm talking about here . . . I had not seen Exhibit B. *I had not seen Page 1, 2, and Page 3.* I had seen the other pages, and were also—the next—the 4,5,6 and 7 were exhibits that I used in—were exhibits that I used in my criminal—my second criminal trial . . .
>
> Obviously, there was, at a minimum, written communication between Charity Embray [sic] and Pat Finn on April 4, 1998 . . . of which the second page of this then determines my salary compensation . . .
>
> The 6/5 date is either the date of the board meeting or the day before the Phar-Mor board meeting. That's the significance of this date. So the—so all of the testimony that has come in relative to [Finn] saying the only way he knew what my salary was was by the prospectus for what was an after fact thing and that he would have no conversation or contact either with the board or Charity Embray [sic] who was the secretary of the board and general counsel for Pharmor is absolutely nonsense. But I didn't have a record all the way through previous to that to show that . . . So if you would start from the beginning all the way back to 1988, you can clearly see that on the salary portion of my entire compensation package [Finn] was involved in every transaction and was in contact with (inaudible) from §88 all the way through a minimum of1991 . . .
>
> [M]y salary was determined by the board of directors. Finn was aware of it when it was determined. And we have this record that says, well, no one knew what it was. So the only way we could determine it is by looking at the prospectus . . .
>
> And that's where the testimony comes from. In addition to that, although probably back (inaudible) that the only way he knew what my salary was was to look at the prospectus and that he also states that hi did know that I had an employment agreement, which you can see in the motion that I—that everyone knew that I operate under that employment agreement and what the terms and conditions of that employment agreement was.
>
> And if I can take the right people through the right testimony, which may have to also include myself on this issue, you can see that when it was determined to—the embezzlement was a manner in which I was paid my salary compensation reimbursement, et cetera, since I started my—since I started in my business career at the Tamarkin Company in 1969. And it didn't change until I was terminated.
>
> And we have testimony here that does not state the truthful facts. And in the

> limited testimony with [Finn] when we keep trying to ask him, as you can see in this deposition, did you ever talk to—did you ever talk to counsel about making (inaudible) continued to say the only way I could answer that question is as it related to the prospectus.

Transcript of December 16, 1997 hearing at pp. 27–32 (Emphasis added).

Regardless of whether Finn was guilty of perjury at the 2004 examination, it is clear from the transcript of the 2004 examination that the Debtor's salaries for the years 1988 and 1989 were properly calculated, both at the criminal trial and at the 2004 examination. Attached to the Debtor's motion to stay is the affidavit of the Debtor's father and Giant Eagle Board member, Nathan Monus. According to the affidavit, Nathan Monus confirms that the Debtor's salary was $275,000 in 1988 and $325,000 in 1989.

Insofar as the Debtor's salary was properly calculated, the Debtor cannot support the argument that Finn's testimony, perjured or otherwise, would affect, in any way, the propriety of the I.R.S. claim. In an obvious effort to re-try his criminal case in bankruptcy court, the Debtor must ultimately rely on the maxim, "*Falsus in uno, falsus in omnibus*" to argue that Finn's testimony (in lieu of the three-page memo) somehow establishes that the I.R.S. claims are invalid because, the funds which he took from the Company were, in fact, funds owed to him through his compensation package. Transcript of December 16, 1997 Hearing at p. 31 ("And if I can take the right people through the right testimony, which may have to also include myself on this issue, you will see that when it was determined to—the embezzlement was a manner in which I was paid my salary compensation reimbursement, *et cetera*, since I started my—since I started in my business career at the Tamarkin Company in 1969. And it didn't change until I was terminated.")

Consequently, it is the opinion of this Court that the Debtor's ability to challenge the I.R.S. claim was not impaired by Judge Bodo's decision not to refer the Finn allegations to the Justice Department.

The Settlement

Under Bankruptcy Rule 9019(a), the bankruptcy court may approve a compromise or settlement "[o]n motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustee . . . ." In conducting a hearing under Rule 9019(a), the bankruptcy court is to determine whether the proposed compromise is fair and equitable, Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968), and in the best interests of the bankruptcy estate, In re American Reserve Corp., 841 F.2d 159, 161, (7th Cir.1987). In making this determination, a bankruptcy judge is required to apprise himself "of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." TMT Trailer Ferry, Inc., 390 U.S. at 424, 88 S.Ct. at 1163; *See also* American Reserve Corp., 841 F.2d at 161.

To this end, the bankruptcy judge should:

> [F]orm an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgement which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of the litigation.

TMT Trailer Ferry, Inc., 390 U.S. at 424–25, 88 S.Ct. at 1163.

When considering a compromise settlement, courts have applied various factors to ensure that the settlement is fair, equitable, and in the best interest of the estate and creditors. The Fifth Circuit has applied the following three-part test:

(1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law,

(2) the complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and

(3) all other factors bearing on the wisdom of the compromise.

Matter of Jackson Brewing Co., 624 F.2d 599, 609 (5th Cir. 1980). The Fifth Circuit stated in Matter of Texas Extrusion Corp., 844 F.2d 1142,1159 (5th Cir.), *cert. denied*, 488 U.S. 926, 109 S.Ct. 311, 102 L.Ed.2d 330 (1988), that "in the bankruptcy context, the interests of the creditors not the debtors are paramount." (Emphasis added).

The Fifth Circuit's three-part test was derived from the four-part test first announced in Drexel v. Loomis, 35 F.2d 800, 806 (8th Cir. 1929) (articulating the factors as "(a) the probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of creditors and a proper deference to their reasonable views in the premises.").[2]

The Trustee, in his brief, states that he, based upon the facts and circumstances surrounding the I.R.S. claims, found that it would be necessary to re-litigate all of the Debtor's underlying criminal convictions. Trustee's brief at p. 9. In light of the affimance of the Debtor's conviction in United States v. Monus, 128 F.3d 367 (6th Cir. 1998), the Trustee concluded that relitigation of the claims was fruitless. Moreover, the expense and delay of such an undertaking, particularly considering the likely outcome, was considerable:

> In this case, the Trustee determined that the litigation with the United States over the underlying basis of the I.R.S. Claim related to the Debtor's alleged income would far outweigh any possible benefit. The Trustee determined that even if he was successful at the Bankruptcy Court level, he would need to litigate appeals at least to the Sixth Circuit Court of Appeals, if not a writ of *certiorari* to the United States Supreme Court. The Trustee considers that the cost associated with continued litigation regarding the I.R.S. Claim would include preparing and filing a brief and reply brief, preparing for oral argument, and, then, if successful, possibly preparing for and participating [in] more appeals. All these costs must be expensed with absolutely no guarantee of success. The Trustee is unwilling to take this risk and impose it upon creditors of this Estate to whom he owes fiduciary obligations. As a result, the Trustee believed that the potential fees and costs for undertaking the litigation outweighed any benefit to the creditors.

Trustee's Brief at p. 12.

"A Trustee has a duty to conserve the assets of the estate to the extent possible where, as here, there are finite assets available to fund the cost of litigation". In re Lee Way Holding Co., 120 Bankr. 881, 890 (Bankr. S.D.Ohio 1990). Based upon the foregoing, the Court finds that the Trustee, in entering into the Agreed Settlement Order, exercised his discretion to settle the I.R.S. claim, rather than continue to incur time and expense in what "was best an uncertain prospect of success." Trustee's Brief at p. 13. The complexity of the litigation coupled with the probability of success clearly indicated that entering a settlement was in the best interest of the estate.

Moreover, insofar as the settlement was fair, equitable, and in the best interest of the estate, the Bankruptcy Court's approval of the settlement should not be disturbed. The Debtor has not produced any evidence that the Bankruptcy Judge failed to "compare the terms of the compromise with the likely rewards of litigation." TMT Trailer Ferry, 390 U.S. 425. Accordingly, the final judgment of the Bankruptcy Court approving the Agreed Settlement Order is AFFIRMED, and this matter is DISMISSED.

[2] For discussion of the Loomis test, *see* Jackson Brewing Co., 624 F.2d at 609. For application of the four-part test, *see* In re Justice Oaks II, Ltd., 898 F.2d 1544, 1544, 1549 (11th Cir.), *cert. denied* 498 U.S. 959, 111 S.Ct. 387, 112 L.Ed.2d 398 (1990); In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir.), *cert. denied* 479 U.S. 854, 107 S.Ct. 189, 93 L.Ed.2d 122 (1986).

IT IS SO ORDERED.

PETER C. ECONOMUS

UNITED STATES DISTRICT JUDGE

¶2002-5544

Leslie NEMETH and Charles Engelmann, PLAINTIFFS v. Theodore G. ENGELMANN, individually and as trustee of The Theodore G. Engelmann Revocable Living Trust, and Cheryl Engelmann, Stone, Biber & O'Toole, P.C., United States of America, Department of Treasury, Internal Revenue Service, and State of Michigan, Department of Treasury, Collections Division, DEFENDANTS. U.S. District Court, Eastern Dist. of Michigan, (DC MI) CASE NO. 02-CV-10073-BC Sept. 25, 2002. Decision for Govt.

1. Tax liens—priority of competing claims—secured claims—summary judgment. Magistrate judge recommended denying taxpayer's law firm's summary judgment motion seeking to uphold priority of firm's alleged security interest in, and to extinguish competing tax liens against, 1/3 of proceeds from land contracts' sale: whether prior, pre-lien, recorded assignment to firm of taxpayer's 1/3 interest in contracts actually secured any valid underlying choate debt to firm was remaining material fact question. Firm offered no affidavit from taxpayer that it had provided him legal services, offered no time sheets or billing invoices reflecting such, and didn't otherwise rebut govt.'s contention that assignment was merely for future services. *Reference:* United States Tax Reporter ¶63,215.04(135). IRC §6321.

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Honorable David M. Lawson, United States District Judge

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN NORTHERN DIVISION,

DISTRICT JUDGE DAVID M. LAWSON

MAGISTRATE JUDGE CHARLES E. BINDER

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON DEFENDANT/COUNTER-PLAINTIFF STONE, BIBER & O'TOOLE, P.C.'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO EXTINGUISH COMPETING CLAIMS OF PRIORITY TO SALE PROCEEDS (Dkt. 10)

CHARLES E. BINDER United States Magistrate Judge

I. RECOMMENDATION

IT IS RECOMMENDED that the above-entitled motion be DENIED.

II. INTRODUCTION AND FACTS

Pending, pursuant to an Order of Reference from United States District Judge David Lawson, is the above-entitled motion. Plaintiffs Leslie Nemeth and Charles Engelmann, along with Theodore Engelmann, purchased by means of land contracts two parcels of land located in Roscommon County, Michigan. (Mot., Dkt. 10 at Exs. A & B.) Nemeth and the Engelmanns each held an undivided one-third interest in these properties. On February 6, 1989, Theodore Engelmann assigned his one-third interest in one of the properties to the Theodore Engelmann Revocable Living Trust. (*Id.* at Ex. C.)

On December 1, 1989, The Theodore Engelmann Trust assigned its one-third interest in these properties to the Stone, Biber & O'Toole Law Firm (''Stone, Bi-

ber'') as security for a debt of $42,835.50 owed by Engelmann to the law firm. The document used to assign the interest is entitled an ''Assignment of Land Contract and Mortgage.'' It states:

> In consideration of the sum of $42,835.50, simultaneously herewith loaned by Assignee to Theodore G. Engelmann as Individual and Trustee, the receipt whereof is hereby acknowledged, which indebtedness is evidenced by the Promissory Note executed and delivered by Theodore Engelmann, to Assignee bearing even date ....

(*Id.* at Exs. E & F.) Stone, Biber recorded its interest in the properties on March 3, 1993. At some point during the same year, Theodore Engelmann stopped making payments on his one-third interest on the land contracts.

On January 3, 1994, the Internal Revenue Service assessed a penalty against Theodore Engelmann in the amount of $200,469.85. (Resp., Dkt. 16 at Ex. A.) On January 31, 1994, Plaintiffs Leslie Nemeth and Charles Engelmann paid the remaining amounts due and owing on the two properties and obtained warranty deeds for them. (Mot., Dkt. 10 at Exs. G & H.)

In 1995, Theodore Engelmann and Cheryl Engelmann filed Chapter VII bankruptcy in this Court. (Case No. 95-50953.) In 1996 and 1997, the Internal Revenue Service recorded liens against Theodore Engelmann. (Mot., Dkt. 10 at Exs. I & J.) The State of Michigan also recorded tax liens against Theodore Engelmann on May 5, 1998. (*Id.* at Ex. K.)

On July 16, 2001, Bankruptcy Judge Walter Shapero entered a stipulated order abandoning property of the estate. (*Id.* at Ex. M.) The order stated that Engelmann's bankruptcy trustee had abandoned any interest that the estate might have in Engelmann's interest in these properties because the debtor's share of the property was worth only about $23,000, and there were numerous other parties who claimed entitlement to the share of the property, including the Stone, Biber Law Firm, the State of Michigan, and the Internal Revenue Service.

Plaintiffs' ''Complaint for Partition and Sale'' was originally filed in the Roscommon County Circuit Court in Roscommon, Michigan, in October 2001. On March 18, 2002, the United States removed the case to this Court pursuant to 28 U.S.C. §§ 1442, 1444, and 2410(a)(3). On August 16, 2002, I entered a stipulated order approving the sale of the real property at issue in this case. (Dkt. 14.) The order recites the agreement of the parties that the parcels at issue be sold and that the proceeds be deposited into an interest bearing account to be released only upon order of the Court. The instant motion was filed July 19, 2002, and the United States filed its opposition to the motion on August 30, 2002. (Dkt. 16.) Oral argument was heard on September 5, 2002, and this motion is now ready for Report and Recommendation.

III. LAW AND ANALYSIS

A. Arguments of the Parties

[1] Stone, Biber claims that it is entitled to one-third of the proceeds from the sale of the parcels of land at issue pursuant to the earlier described December 1, 1992, assignments which were recorded in March 1993. Stone, Biber argues that Theodore Engelmann's December 1992 assignments to the law firm are superior over all other liens since the assignments were the first recorded. Stone, Biber therefore seeks an order extinguishing all competing claims to the one-third of the proceeds from the sale.

The United States argues that since no underlying promissory note has been produced, no affidavit from Theodore Engelmann, nor any billing or time sheets from Stone, Biber Law Firm showing that Theodore Engelmann actually owes the firm legal fees, summary judgment should be denied. The United States contends that as to Stone, Biber, there is a material issue of disputed fact as to whether the Assignments of Land Contract and Mortgage executed by Theodore Engelmann, assigning his interest in the properties to the Stone, Biber Law Firm, in fact secure a choate debt.

The United States points to *Ginsberg v. Capital City Wrecking*, 2 N.W.2d 892 (Mich. 1942), for the proposition that a mortgage instrument itself without any evidence of the debt allegedly secured by the mortgage, does not create a valid incumbrance upon property. At oral argument, Stone, Biber continued to maintain that its recorded assignments take precedence over all other competing interests as to Engelmann's one-third share.

B. Motion Standards

A motion for summary judgment will be granted under Rule 56(c) where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). All facts and inferences must be viewed in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The moving party has the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989) (citing *Celotex Corp. v Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). In determining whether the moving party has met its considerable burden, a court may consider the plausibility of the moving party's evidence. *See Matsushita*, 475 U.S. at 587–88. The Court of Appeals for the Sixth Circuit has stated that a

> District Court may grant a motion for summary judgment only if it finds from the whole record before it that there are no material facts which are in dispute. It may not make findings of disputed facts on a motion for summary judgment. The movant has the burden of showing conclusively that there exists no genuine issue as to a material fact and that the evidence together with all inferences to be drawn therefrom must be considered in the light most favorable to the party opposing the motion. The movant's papers are to be closely scrutinized while those of the opponent are to be viewed indulgently.

Watkins v. Northwestern Ohio Tractor Pullers Assn., 630 F.2d 1155, 1158 (6th Cir. 1980) (citations omitted). *See also, Ghandi v. Police Dept. of Detroit*, 747 F.2d 338 (6th Cir. 1984).

Summary judgment is proper when the moving party shows that the non-moving party is unable to meet its burden of proof. *See Celotex*, 477 U.S. at 326. However, to defeat the motion, the non-moving party cannot rest merely on the pleadings alone. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 191 L. Ed. 2d 202 (1986). The non-moving party has an obligation to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *See Celotex*, 477 U.S. at 324.

Not every issue of fact or conflicting inference presents a genuine issue of material fact requiring the denial of summary judgment. "The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Anderson*, 477 U.S. at 247–48. Irrelevant and unnecessary facts should have no bearing on a trial court's determination on a motion for summary judgment. *See id.* at 248. Accordingly, only germane facts that go to the heart of the party's suit deserve consideration. The courts will not entertain metaphysical doubts as material facts to defeat the motion. *See Matsushita*, 475 U.S. at 586.

C. Conclusions

The United States correctly points out that the Internal Revenue Code gives the federal government broad authority to levy against an attached property interest in order to secure the payment of income tax indebtedness to the United States. 26 U.S.C. § 6321. At oral argument, counsel for the United States conceded that the nature of those property interests are, however, to be determined by state law.

In *Ginsberg*, *supra*, the Michigan Supreme Court discussed the nature of mortgages under Michigan law and the effect their assignment has upon other interests. Plaintiff in that case assigned a note and a

mortgage to the Bank of Lansing, which had previously loaned a sum of money to the defendant. The defendant in *Ginsberg* subsequently filed a claim of lien for amounts it claimed were due for materials furnished for the construction of a house. Shortly thereafter, the bank assigned the mortgage to defendant. The parties ultimately disputed who had priority. The Michigan Supreme Court first noted that in the case of *Ladue v. Detroit & Milwaukee R.R. Co.*, 13 Mich. 380 (1865), it was established

> that a mortgage, being a mere security for the debt or liability secured by it, the debt or liability secured is the principal and the mortgage but an incident or accessory; that anything which transfers the debt, transfers the mortgage with it; that an assignment of the mortgage without the debt is a mere nullity; and that payment, release, or anything which extinguishes the debt, extinguishes the mortgage. We there said:
>
> "These propositions, being established, the necessary result is, that the mortgage instrument, without any debt, liability or obligation secured by it, can have no present legal effect as a mortgage or an incumbrance upon the land. It is but a shadow without a substance, an incident without a principal; and it can make no difference in the result whether there has once been a debt or liability which has been satisfied, or whether the debt or liability to be secured has not yet been created * * * ."

Ginsberg, 2 N.W.2d at 894 (quoting *Ladue*).

No Michigan precedent to the contrary is cited by Stone, Biber. Furthermore, Stone, Biber has not presented any actual evidence of the indebtedness said to underlie the assignments. The promissory notes referenced in the assignments have not been presented. No affidavit from Theodore Engelmann has been presented which could lend corroboration to Stone, Biber's assertion that it performed services for Theodore Engelmann. Nor has Stone, Biber produced any time sheets, billing invoices, or similar corroborative documentation. In fact the United States suggests the possibility that these assignments were to secure future legal services. Stone, Biber has produced nothing to either confirm or refute that possibility.

I therefore suggest that in the absence of evidence to substantiate the actual existence of indebtedness between Theodore Engelmann and the Stone, Biber Law Firm, the Government's assertions carry the day, and there is a material issue of disputed fact as to whether or not the recorded assignments to Stone, Biber are in fact superior to the Government's recorded tax liens.

IV. REVIEW

The parties to this action may object to and seek review of this Report and Recommendation within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1). Failure to file specific objections constitutes a waiver of any further right of appeal. *See Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981). The parties are advised that making some objections, but failing to raise others, will not preserve all the objections a party may have to this Report and Recommendation. *See Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

CHARLES E. BINDER

United States Magistrate Judge

DATED: September 25, 2002

¶2002-5545

In Re: John P. LANDI and Phllyis LANDI, Debtors. John P. LANDI and Phyllis LANDI, PLAINTIFFS v. UNITED STATES OF AMERICA and

State of New York, DEFENDANTS. U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) Case No. 01-00526-9p7; Adv. Proc. No. 01-62, Sept. 24, 2002. Years 1990, 1991, 1993, 1994, 1995, 1996. Decision for Govt.

1. Tax claims in bankruptcy—dischargeability. Final judgment was entered for govt. on nondischargeability under 11 USC §523(a)(1)(C) of taxpayers' tax debts. *Reference:* United States Tax Reporter ¶68,726.52(27).

UNITED STATES BANKRUPTCY COURT MIDDLE DISTRICT OF FLORIDA FT. MYERS DIVISION,

FINAL JUDGMENT

ALEXANDER L. PASKAY United States Bankruptcy Judge

[1] THIS CAUSE came on for consideration upon the Court's own Motion for the purpose of entering a Final Judgment in the above-captioned adversary proceeding. The Court has considered the record and finds that this Court has entered Findings of Fact, Conclusions of Law, and Memorandum Opinion. Therefore, it appears appropriate to enter this Final Judgment.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that Final Judgment be, and the same is hereby, entered in favor of the Defendant, United States of America, Department of Treasury, Internal Revenue Service and against Plaintiffs, John P. and Phyllis Landi, with respect to Count I of the Complaint. It is further

ORDERED, ADJUDGED AND DECREED that the following income tax obligations owed to the Government for 1040 taxes for the following years: 1990, 1991, 1993, 1994, 1995, and 1996 are not protected by the general bankruptcy discharge and are within the exception set forth in 11 U.S.C. § 523(a)(1)(C).

DONE at Tampa, Florida, on SEP 24, 2002.

ALEXANDER L. PASKAY United States Bankruptcy Judge

¶2002-5546

In Re: Ronald D. NUTT, Debtor. U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) Case No. 00-6627-6B1, Sept. 23, 2002. On remand from District Court, (2002, DC FL) 90 AFTR 2d 2002-5159, remanding (2001, Bktcy Ct FL) 88 AFTR 2d 2001-5613, 271 BR 896, 2001-2 USTC ¶50613. Year 1995. Decision for Taxpayer.

1. Tax claims in bankruptcy—100% penalty for failure to pay over trust fund taxes—objection to proof of claim—willfulness. On remand, bankruptcy court reaffirmed its earlier decision sustaining Chap. 11 debtor/business owner's objection to IRS's proof of claim for unpaid payroll taxes: admitted evidence didn't show that taxpayer's lack of knowledge of tax debts was due to reckless disregard of obvious risk; and colleagues' potentially relevant testimonies or letters weren't admissible. *Reference:* United States Tax Reporter ¶68,726.52(15); 66,725.04(60); 68,726.51(10). IRC §6672.

UNITED STATES BANKRUPTCY COURT MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION,

ORDER

ARTHUR B. BRISKMAN United States Bankruptcy Judge

This case came for hearing on August 14, 2000 on order from the United States District Court for the Middle District of Florida (''Remand Order'') (Doc. No. 89) remanding the decision sustaining Ronald D. Nutt's (''Nutt'') objection to the allowance of Claim No. 3 of the Internal Revenue Service (''IRS'') entered on August 2, 2001. Considering the responses to the Remand Order filed by Nutt (Doc. No. 92), the IRS (Doc. No. 93), and the trial record, the following findings of fact and conclusions of law are made.

FINDINGS OF FACT

Nutt filed a voluntary petition under Chapter 11 on August 24, 2000. Findings of Fact and Conclusions of Law on the Objection to Allowance of the Internal Revenue Service's Claim and an Order Sustaining Nutt's Objection to Claim was entered August 2, 2001 (Doc. No. 51 & 52). No circumstances were found which caused Nutt to notice the 941 payroll taxes of Hallmark were unpaid. Nutt did not have actual knowledge of the 941 payroll tax liability until October 31, 1995. *In re Nutt*, 271 B.R. 896, 898 [88 AFTR 2d 2001-5613] (Bankr. M.D. Fla.).

The Remand Order focused on whether Nutt's failure to know taxes were not being paid was due to a reckless disregard or of a known or obvious risk of non-payment in light of the Eleventh Circuit's decision in *Malloy v. United States*, 17 F. 3d 329, 332 [73 AFTR 2d 94-1569] (11th Cir. 1994). The deposition testimony of former Hallmark president John Conner was reviewed. Conner testified regarding a letter by Michael A. Storey, a former Hallmark employee, dated June 7, 1996. (J. Conner Dep., pg. 98). Storey alleged Hallmark had a history of misappropriating funds and failing to pay taxes.

[1] The United States District Court, in light of the Storey letter, discussed if conceivably a different view existed as to whether Nutt acted with reckless disregard of a known or obvious risk of non-payment of the payroll taxes. The factual underpinnings of Conner's deposition testimony and Storey's letter could not be reached since neither was offered or received into evidence. *See* Tr. pg. 164–175. Their testimonies would have been subject to a hearsay objection. *See* Fed R. Evid. 802–804.

The Findings of Fact and Conclusions of Law on the Objection to Allowance of the Internal Revenue Service's Claim (Doc. No. 51) and the Order Sustaining the Objection to Allowance of the Internal Revenue Service's Claim (Doc. No. 52) are reaffirmed and this Order is transmitted to the United States District Court for the Middle District of Florida. Dated this 23rd day of September, 2002.

ARTHUR B. BRISKMAN

United States Bankruptcy Judge

¶2002-5547

In Re: William BARSTOW,III, APPELLANT v. UNITED STATES INTERNAL REVENUE SERVICE, APPELLEE. Bankruptcy Estate of Markair, Inc., Debtor. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-35819, Oct. 21, 2002. District Court, (2001, DC AK) 88 AFTR 2d 2001-5816, 272 BR 710, affirmed. Year 1992. Decision for Govt.

1. Tax claims in bankruptcy—subordination of tax liens. 9th Cir. affirmed decision that IRS's judicial lien against converted Chap. 7 debtor's funds wasn't subject to subordination under 11 USC §724(b): statute applied only to statutory tax liens, not judicial lien securing underlying tax obligation. Statute's limited application was reflected by facts "tax lien" by its common meaning referred to statutory liens; predecessor provision to §724(b) was limited in application to statutory liens; legislative history showed no Congressional intent to expand that application to non-statutory liens; and case law involving converted statutory liens was distinguishable. Also, conclusion that statute subordinated only some liens securing tax claims was reasonable and in line with both statute's specific goals and overall bankruptcy scheme. *Reference:* United States Tax Reporter ¶68,726.52(3).

John C. Siemers, Burr, Pease & Kurtz, Anchorage, Alaska, for the appellant.
Theresa J. Clark, Tax Division, United States Department of Justice, Washington, D.C., for the appellee.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Appeal from the United States District Court for the District of Alaska James K. Singleton, Chief Judge, Presiding

Opinion by Judge Graber

Before: Betty B. Fletcher, Arthur L. Alarcón, and Susan P. Graber, Circuit Judges.

OPINION

GRABER, Circuit Judge:

FOR PUBLICATION

William Barstow, Trustee of the bankruptcy estate of MarkAir, Inc. (MarkAir), seeks to subordinate the proceeds of a judicial lien securing taxes owed to the United States Internal Revenue Service (IRS). The Trustee relies on § 724(b) of the Bankruptcy Code, 11 U.S.C. § 724(b), which subordinates tax liens to the claims of certain priority unsecured creditors. The bankruptcy court denied the Trustee's request to subordinate, and the district court affirmed. The Trustee appeals and we, too, affirm. We hold that the term "tax lien" in § 724(b) means a statutory tax lien and that the term does not embrace a judicial lien securing an underlying tax obligation.

FACTUAL AND PROCEDURAL HISTORY

In June of 1992, MarkAir filed for bankruptcy under Chapter 11. When the company filed its petition, it had an outstanding liability for air transportation excise taxes. However, the IRS had not yet filed a Notice of Federal Tax Lien with respect to this liability and, accordingly, had no statutory tax lien.

Thereafter, MarkAir concluded that it had overpaid certain taxes and requested a refund. The IRS asserted a right to offset the amount of the overpayment against the outstanding tax liabilities of MarkAir and its parent corporation.

MarkAir moved for an order in the bankruptcy court allowing it to use the overpayment to secure its obligations to the Airline Reporting Corporation (ARC), a ticket clearinghouse used by travel agents. ARC had threatened to stop clearing MarkAir's tickets—which essentially would have shut down the airline's business—unless MarkAir posted a letter of credit in the amount of $1.8 million.

To avoid an immediate shutdown of MarkAir's operations, the IRS and MarkAir compromised their positions and entered into an agreement with ARC. The IRS agreed to forego its offset claim and to allow a portion of the overpayment, $1.8 million, to be deposited with the bankruptcy court as the ARC collateral. MarkAir agreed that the balance of the overpayment, approximately $1.3 million, would be paid immediately to the IRS. Further, it agreed that any amount of the collateral remaining upon termination of the agreement with ARC would be paid to the IRS.

Under the agreement, ARC was given a "first judicial lien position" against the collateral, and the IRS was given a "second place judicial lien position." The bankruptcy court approved the compromise between the IRS and MarkAir and ordered that the "protections" afforded to the IRS under the court's order "shall remain in full force and effect in the event that [MarkAir's] case is converted to another chapter under the . . . Code (or reconverted to Chapter 11) or any subsequent case is filed by or against [MarkAir] under the Code."

MarkAir failed to meet its obligations under the confirmed bankruptcy plan and, in April 1995, filed a second Chapter 11 petition. MarkAir soon ceased operations and, in November 1995, the case was converted to one under Chapter 7. ARC then released its claim against the collateral, and the IRS moved for distribution of the collateral pursuant to the parties' agreement. The Trustee opposed the request. Pursuant to 11 U.S.C. § 724(b), he sought to subordinate the IRS's lien so that he could pay administrative expenses and the claims of other priority creditors.

The bankruptcy court concluded that subordination under § 724(b) was intended to apply to "statutory" tax liens, but not to the "contractual type of lien involved in this case." The court first held that the text of the statute was sufficiently ambiguous to permit the court to explore legislative history for guidance as to Congress' intent. Based on its analysis of the statute's legislative history and text, the court then held that the subordination of tax liens in §

724(b) applies only to statutory liens. Accordingly, the IRS was entitled to recover the full amount of its collateral, namely, the $1.8 million deposit and accrued interest.

The Trustee appealed, arguing that because the IRS's "judicial lien ... secures an allowed claim for tax, it is a 'lien' within the meaning of § 724(b) and is subject to tax lien subordination." The district court rejected the Trustee's argument and affirmed for the reasons stated in the bankruptcy court's decision. The Trustee filed a timely notice of appeal.

STANDARDS OF REVIEW

We review de novo the district court's decision on an appeal from a bankruptcy court. *Neilson v. Chang (In re First T.D. & Inv., Inc.)*, 253 F.3d 520, 526 (9th Cir. 2001). We review the bankruptcy court's conclusions of law de novo and its factual findings for clear error. *Id.* We review de novo questions of statutory construction. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 819 (9th Cir. 2001).

DISCUSSION

A. Text of § 724(b)

[1] The parties' dispute centers around § 724(b) of the Bankruptcy Code, a provision that partially subordinates tax liens to the claims of a number of other parties, including some priority unsecured claimants. That subsection provides:

> Property in which the estate has an interest and that is *subject to a lien* that is not avoidable under this title and *that secures an allowed claim for a tax*, or proceeds of such property, shall be distributed—
>
> (1) first, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is senior to *such tax lien*;
>
> (2) second, to any holder of a claim of a kind specified in section 507(a)(1), 507(a)(2), 507(a)(3), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, to the extent of the amount of such allowed tax claim that is secured by *such tax lien*;
>
> (3) third, to the holder of *such tax lien*, to any extent that such holder's allowed tax claim that is secured by *such tax lien* exceeds any amount distributed under paragraph (2) of this subsection;
>
> (4) fourth, to any holder of an allowed claim secured by a lien on such property that is not avoidable under this title and that is junior to *such tax lien*;
>
> (5) fifth, to the holder of *such tax lien*, to the extent that such holder's allowed claim secured by *such tax lien* is not paid under paragraph (3) of this subsection; and
>
> (6) sixth, to the estate.

11 U.S.C. § 724(b) (emphasis added).

The parties agree that the IRS's lien on the ARC collateral is a "judicial lien," which is defined in the Bankruptcy Code as a "lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding." 11 U.S.C. § 101(36). We also agree with this characterization because the IRS's lien arose as a result of a legal proceeding.

However, the Trustee and the IRS advance markedly different views as to the significance of this characterization. The IRS argues that § 724(b) applies only to statutory tax liens and, therefore, that the statute does not require subordination of the IRS's claim. *Id.* § 101(53). By contrast, the Trustee argues that the statute applies to any kind of lien that secures an allowed claim for tax. Accordingly, he claims that the IRS's lien is subordinated to unsecured priority claimants pursuant to § 724(b)(2).

The Trustee and the IRS assert that their respective interpretations of § 724(b) are mandated by the "plain meaning" of the statute's text. *See FDIC v. County of Orange (In re County of Orange)*, 262 F.3d 1014, 1018 (9th Cir. 2001) ("In construing a statute, we first consider its text." (citation and internal quotation marks omitted)). Neither party is correct. Although the text of the statute provides some support for the Trustee's interpretation, Congress'

frequent use of the term ''tax lien'' in § 724(b) interjects ambiguity.

1. Widely Acknowledged Meaning of ''Tax Lien''

The term ''tax lien'' appears seven times in § 724(b). The statute does not define it. When a term is undefined, we usually apply its common meaning. *See Romine v. Diversified Collection Servs., Inc.*, 155 F.3d.1142, 1145 (9th Cir. 1998) (''In the absence of statutory definition, a statutory term will be accorded its ordinary meaning.''). Further, ''[w]ords with a fixed legal or judicially settled meaning, where the context so requires, must be presumed to have been used in that sense.'' *Huffman v. Commissioner*, 978 F.2d 1139, 1145 [70 AFTR 2d 92-6016] (9th Cir. 1992). The IRS argues that the phrase ''tax lien'' is a term of art with a widely accepted meaning in tax and bankruptcy law—a statutory tax lien—and that Congress must be deemed to be familiar with the established meaning.

The term ''tax lien'' does, in general, refer to statutory tax liens. The weight of the relevant case law so holds. *See, e.g., In re Khoe*, 255 B.R. 581, 588 [86 AFTR 2d 2000-6285] (Bankr. E.D. Cal. 2000) (''A federal tax lien is neither a judicial lien nor a nonpossessory, nonpurchase money security interest.''); *Filipovits v. IRS [76 AFTR 2d 95-6934] (In re Filipovits)*, No. 94-5-8134-SD, 1995 WL 724520, at 1 (Bankr. D. Md. Sept. 20, 1995) (''A tax lien is a statutory lien; and it is not a judicial lien.''); *Robinson v. United States (In re Carolina Resort Motels, Inc.)*, 51 B.R. 447, 450 [56 AFTR 2d 85-5830] (Bankr. D.S.C. 1985) (''[T]he legislative history clearly indicates that tax liens are statutory liens.'').

Similarly, a number of prominent secondary authorities note that the typical statutory lien is the tax lien. *See, e.g.*, 2 Collier on Bankruptcy ¶ 101.53, at 101–48 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2002) (''Good examples of statutory liens are tax liens . . . .''); 1 Robert E. Ginsberg & Robert D. Martin, Ginsberg and Martin on Bankruptcy § 6.02[D][2], at 6–30 (4th ed. 2001) (''Typical statutory liens are mechanics' liens and tax liens.''). Black's Law Dictionary 1459 (6th ed. 1990) defines a ''tax lien'' generally as:

> A statutory lien, existing in favor of the state or municipality, upon the lands of a person charged with taxes, binding the same either for the taxes assessed upon the specific tract of land or (in some jurisdictions) for all the taxes due from the individual, and which may be foreclosed for non-payment, by judgment of a court or sale of the land.

Finally, the Bankruptcy Deskbook notes that ''[a] federal tax lien is not a judicial lien.'' 1 William C. Hillman & Margaret M. Crouch, Practising Law Institute: Bankruptcy Deskbook § 1:4.2, at 1–11 n.28 (3d ed. 2001).

If Congress intended to adopt the common meaning of ''tax lien'' when it en-acted § 724(b), then, ''tax lien'' would re-fer only to statutory liens, not judicial liens.

2. Context and Structure of the Bankruptcy Code

The Trustee responds by arguing that it is irrelevant that the term ''tax lien'' commonly refers to a statutory tax lien; the only relevant question is how *Congress* intended the term to be used in § 724(b). The Trustee is correct in stating that, when Congress defines a term, courts are to apply that definition in interpreting the meaning of the statute. *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) (''When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.''); *United States v. Yochum (In re Yochum)*, 89 F.3d 661, 666 [78 AFTR 2d 96-5539] (9th Cir. 1996) (''[I]n statutes that contain statutory definition sections, it is commonly understood that such definitions establish meaning wherever the terms appear in the same Act.'').

As noted, however, Congress failed to define ''tax lien'' in the statute, even though § 101 of the Bankruptcy Code defines a number of related terms. For example, § 101 defines a ''lien'' generally as a ''charge against or interest in property to

secure payment of a debt or performance of an obligation.'' 11 U.S.C. § 101(37). A ''statutory lien'' is defined as a

> lien arising solely by force of a statute on specified circumstances or conditions, or lien of distress for rent, whether or not statutory, but does not include security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

Id. § 101(53). A ''judicial lien'' means a ''lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.'' *Id.* § 101(36). Finally, a ''security interest'' is defined as a ''lien created by an agreement.'' *Id.* § 101(51). These definitions do not tell us directly what Congress meant when it used the term ''tax lien.''

The Trustee acknowledges that the term ''tax lien'' appears seven times in § 724(b) but points out that in each instance ''tax lien'' is preceded by the word ''such.'' He asserts that ''such'' amounts to a reference throughout § 724(b) to the complete antecedent in subsection (b), namely, ''a lien that is not avoidable under this title and that secures an allowed claim for a tax.'' 11 U.S.C. § 724(b). The foregoing phrase refers only to a ''lien,'' which can include either a statutory lien or a judicial lien. Thus, he argues, Congress intended the phrase ''such tax lien'' to be defined by reference to subsection (b) and § 101(37) and thereby intended to supplant the traditional meaning of ''tax lien'' in § 724(b).

Although the Trustee's parsing of the section is logical, the word ''such'' will not bear so much weight in this context. In 11 U.S.C. § 724(b)(3), for example, the third payout is to the holder of the tax lien, ''to any extent that such holder's allowed tax claim that is *secured by such tax lien* exceeds any amount distributed under paragraph (2) of this subsection.'' (Emphasis added.) If the Trustee's interpretation were correct, the emphasized phrase ''such tax lien'' instead would read simply ''a lien''; otherwise the repetition of ''tax'' is redundant. *See United States v. Handy*, 761 F.2d 1279, 1280 (9th Cir. 1985) (''A statute should be construed so as to avoid making any word superfluous.''). In the context of this subsection, at least, Congress appears to have used the term ''tax lien'' to mean a subset of the larger term ''lien.''

Additionally, § 724(d) of the Bankruptcy Code states: ''A statutory lien the priority of which is determined in the same manner as the priority of a tax lien under section 6323 of the Internal Revenue Code of 1986 shall be treated under subsection (b) of this section the same as if such lien were a tax lien.'' 11 U.S.C. § 724(d). In other words, statutory liens whose priority is established in the same manner as the priority of a tax lien under § 6323 are treated as if they are tax liens. In subsection (d), the phrase ''tax lien'' at the end of the sentence refers back to ''a tax lien under section 6323 of the Internal Revenue Code of 1986''—a statutory tax lien. Ordinarily, ''such'' refers to an antecedent phrase. In § 724, however, only subsection (d) explains fully what a ''tax lien'' might mean. Although it is unusual grammatically, Congress may have used ''such tax lien'' in § 724(b) to refer to the kind of ''tax lien'' identified fully in § 724(d).

Because neither party's reading of ''tax lien'' is obviously correct, the statute is ambiguous. When a statute's text is ambiguous, we look to legislative history as an aid to discerning congressional intent. *See Merkel v. Commissioner*, 192 F.3d 844, 848 [84 AFTR 2d 99-6119] (9th Cir. 1999) (''[I]f the statute is ambiguous, we consult the legislative history, to the extent that it is of value, to aid in our interpreta-tion.'' (citation and internal quotation marks omitted)); *N.W. Forest Res. Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996) (''Where a statute is ambiguous, we may look to legislative history to ascertain its purpose.''). We turn next, then, to legis-lative history.

B. Legislative History of § 724(b)

Unfortunately, the legislative history of § 724(b) is not entirely clear. On balance, however, it supports the IRS's interpretation of the statute.

Section § 724(b) was added to the Bankruptcy Code in 1978. The relevant portion of its predecessor provision, § 67c of the Chandler Act, provided:

> *Every tax lien* on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this Title. Where *such a tax lien* is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived from the sale of the personal property to which the *tax lien*attaches, less the actual cost of that sale, of an amount not in excess of the *tax lien*, to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this Title. If the amount realized from the sale exceeds the total of such debts, after allowing for prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision (a) of section 104 of this Title and the amount of the *tax lien*, is to be paid to the holder of the *tax lien*.

11 U.S.C. § 107(c)(3) (codifying § 67c) (superseded by § 724(b) in 1978) (emphasis added).

The legislative history of § 67c of the Chandler Act demonstrates that, when Congress used the term "tax lien" in the statute, it intended the term to mean only statutory liens. The report of the Senate Committee on the Judiciary stated that "the effect of section 67c is limited to statutory liens and does not include consensual liens." S. Rep. No. 89-1159 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2456, 2460. Further, Congress noted that "new section 67c establishes more effective standards for the treatment of statutory liens." *Id.* at 2462. As the leading bankruptcy treatise explained the legislative history of the Act, "[n]onstatutory tax liens [were] not affected by § 67c." 4 Collier on Bankruptcy ¶ 67.27, at 377 (Lawrence P. King ed., 14th ed. 1978). Thus, the provision of the statute that § 724(b) replaced had *no*subordinating effect on judicial liens or on contractual liens ("security agreements" under the current code), even when those types of liens secured an allowed claim for tax.

The committee reports produced in the drafting and enactment of § 724(b) suggest that this result is unchanged under the new code. As the report of the House Committee on the Judiciary explains, § 724(b) "governs tax liens. It is derived from section 67c(3) of the Bankruptcy Act, *without substantial modification in result.*" H.R. Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6338 (emphasis added). Similarly, the report states: "Tax liens are also included in the definition of *statutory lien.*" *Id.* at 6271 (emphasis added). The report also explains that "[t]he House amendment modifies present law by requiring the subordination of tax liens." *Id.* at 6501. These passages in the legislative history show that Congress intended the term "tax lien" in § 724(b), like in § 67c(3) of the Chandler Act, to refer only to statutory liens.

While the Trustee correctly counters that the legislative history of § 724(b) demonstrates that the reach of that section is broader than that of its predecessor, § 67c, nothing in that history suggests that the particular ways in which § 724(b) is broader than § 67c have anything to do with the distinction between statutory and other types of tax liens. Rather, § 724(b) appears simply to expand the *types of property* to which a subordinated tax lien may be attached:

> The House amendment modifies present law by requiring the subordination of tax liens on both real and personal property to the payment of claims having a priority. This means that assets are to be distributed from the debtor's estate to pay higher priority claims before the tax claims are paid, even though the tax claims are properly secured. Under present law and the Senate amendment only tax liens on personal property, but not on real property, are subordinated to the payment of claims having a priority above the priority for tax claims.

H.R. Rep. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6570. As Collier notes:

> Section 724(b) is considerably broader, however, than was section 67c(3). Section 67c(3) applied only to tax liens on personal property unaccompanied by a change of possession. It did not apply to tax liens on real property nor did it apply to tax liens on personal property where the lienholder obtained possession of the property prior to bankruptcy. In contrast, section 724(b) applies to all types of property and is not dependent on possession.

6 Collier on Bankruptcy ¶ 724LH[2], at 724-19 to -20.

In summary, the better reading of the legislative history is that Congress intended to confine the application of § 724(b) to statutory liens. Nonetheless, because the text, context, and legislative history do not provide a definitive answer, we next consider cases interpreting § 724(b) and the public policy considerations underlying Congress' enactment of the statute.

C. Cases

The Trustee and the IRS cite a number of cases in support of their respective interpretations. However, the parties' citations and our own research have not uncovered any decision addressing the same issue that we face.

The Trustee argues that two cases discussing the validity of cash collateral orders support his position. *In re Bino's Inc.*, 182 B.R. 784 (Bankr. N.D. Ill. 1995); *In re Life Imaging Corp.*, 131 B.R. 174 (Bankr. D. Colo. 1991). Although those cases contain isolated passages favoring the Trustee, neither is entirely on point because the IRS in both cases already had a *statutory* lien on the property in question, which was converted to a judicial lien by agreement of the parties. The courts in those cases thus focused on the fact that, by compromising the tax claim, the trustee was "bargain[ing] away the tax lien subordination provisions of § 724(b)" and attempting to "override the subordination provisions of § 724(b)." *Bino's*, 182 B.R. at 787–88.

In the present case, however, the IRS did not have a statutory lien on the ARC collateral but, instead, had actual possession of the funds. Therefore, in the absence of the parties' agreement, there would have been *no* lien to subordinate pursuant to § 724(b). Accordingly, the parties cannot be said to have been "bargaining away" or "overriding" § 724(b), and *Life Imaging* and *Bino's* are inapposite.

Moreover, those two decisions do not represent the only approach adopted by courts in cash collateral order cases. For example, in *In re Buzzworm, Inc.*, 178 B.R. 503, 505 (Bankr. D. Colo. 1994), the court concluded that enforcement of a cash collateral agreement need not violate the statute: "[A] tax lien creditor, under the right circumstances, may avoid, by agreement, the distribution scheme under Section 724(b) . . . ." The court's rejection of the approach adopted in *Bino's* and *Life Imaging* is well reasoned and relies on the text of the statute, its legislative history, and public policy considerations. *Id.* at 509–12. Thus, contrary to the Trustee's claims, the cash collateral cases do not necessarily support his interpretation of § 724(b).

Other cases discussing § 724(b) are of little help in determining whether the statute applies to judicial liens. Accordingly, we move to our final consideration: the policies underlying Congress' enactment of the statute and the policy consequences of adopting each party's construction of § 724(b).

D. Policy

When one considers Congress' primary purpose in enacting § 724(b), the IRS's construction might, at first glance, seem illogical. As both parties properly concede, an important purpose of § 724(b) is to offer some protection to certain priority claimants—such as spouses, dependent children, farmers, fishers, consumers, and employees—from tax claims that otherwise would consume most or all of the bankruptcy estate. *See Gouveia v. IRS (In re Quality Health Care)*, 215 B.R. 543, 557 [80 AFTR 2d 97-5879] (Bankr. N.D. Ind. 1997); *see also N. Slope Borough v.*

Barstow, No. 01-35892, ___ F.3d ___, ___ (9th Cir. 2002) (decided this date) (op. at 16) (holding that the language of § 724(b) unambiguously establishes partial subordination of tax liens to the interests of priority unsecured creditors). If the purpose of the statute is truly to protect priority claimants and to ensure that they are paid before the taxing authorities are, it seems implausible that Congress intended to distinguish among different types of liens.

On the other hand, when viewed from another perspective, the IRS's construction of the statute is entirely reasonable. Congress enacted § 67c of the Chandler Act in response to similar concerns about protection of administrative and wage claimants yet, as discussed above, Congress clearly chose to limit the application of subordination to only statutory claims. In balancing the competing interests of tax lienholders and priority unsecured claimants, Congress easily could have concluded that the fairest course of action was to subordinate some, but not all, liens securing claims for tax.

Further, the policy consequences of adopting the IRS's view are more consonant with the overall bankruptcy scheme. The IRS had MarkAir's tax refund in its possession, and the IRS's potential right to retain the refund did not arise pursuant to any type of lien. That is, under either party's view of the statute, the IRS's claim to the refund was not originally subject to subordination under § 724(b). Only when the refund was offered to MarkAir for use in the company's reorganization did the IRS's claim become secured with a judicial lien. In that circumstance, the IRS was acting in its capacity as an "ordinary" creditor, not in its capacity as a tax collector.

Under the Trustee's interpretation, the IRS's claim to the refund was transformed into a subordinated claim simply because the IRS entered into an agreement with the company for release of the refund for use in reorganization. That reading of the law would discourage taxing authorities from releasing any funds that otherwise could be used to resurrect a failing company. This concern was a significant factor motivating the *Buzzworm* court to hold that cash collateral orders may modify the operation of § 724(b):

> [T]here are strong practical and policy reasons for enforcing such Chapter 11 agreements [protecting tax claimants from the operation of § 724(b)] against a Chapter 7 trustee. Enforcing such agreements will encourage lien creditors to better cooperate with a reorganizing debtor and reduce pressure, early in the case, to litigate and, perhaps, prematurely "pull the plug" on a debtor.

Buzzworm, 178 B.R. at 509.

We think that Congress intended to encourage the kind of behavior that the IRS exhibited in this case; it left money in the estate when it was not required to do so, in the hope of assisting MarkAir to survive. That behavior furthers the over-all purpose of the Bankruptcy Code.

E. Conclusion

The text of § 724(b) is ambiguous. Its context, structure, legislative history, and purpose convince us that Congress intended the phrase "tax lien" to refer to statutory tax liens and not to judicial liens securing the payment of taxes. Accordingly, we affirm the decision of the bankruptcy court and the district court.

AFFIRMED.

¶2002-5548

UNITED STATES OF AMERICA, PLAINTIFF v. Jeffrey B. PETERSON, ET AL., DEFENDANTS. U.S. District Court, Southern Dist. of Ohio, (DC OH) Civil Action 2:00-CV-1092, Oct. 18, 2002. Decision for Taxpayer in part and for Govt. in part.

1. Collection actions—third-party claims—defenses—sanctions—discovery. Govt. was granted dismissal of pro se taxpayer's 3d-party claims against former business partners and counsel who allegedly conspired with IRS to buy taxpayer's interest in business at less than fair value: 3d parties' liability to taxpayer wasn't derivative of his tax liability to govt. where business property underlying

those claims wasn't subject of instant collection complaint. But, govt.'s motion to strike taxpayer's affirmative defense about govt.'s alleged efforts to ''suppress [taxpayer's] opportunities to maximize value'' from asset sales was denied where defense wasn't necessarily irrelevant to govt.'s complaint. Also, taxpayer's request to extend discovery was granted; govt.'s request to sanction taxpayer for cost of canceled deposition was denied; summary judgment motion was left unresolved; and taxpayer's wife's motion to compel was denied for failure to comply with F.R.Civ.P. 37. *Reference:* United States Tax Reporter ¶74,035.01(100); 74,336.511(34); 74,025.01(3). IRC §7402; 7403.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION,

Magistrate Judge King

OPINION AND ORDER

Norah McCann King United States Magistrate Judge

This is an action under 26 U.S.C. §§7401, 7403, to reduce to judgment the personal tax liability of defendant Jeffrey Peterson, to establish the validity of liens on his property and to foreclose those liens on certain real property. Defendant Teresa Peterson asks that her 50 percent equitable interest in the property be recognized.

Defendant Jeffrey Peterson [''Peterson''], proceeding *pro se*, has filed third-party claims against Preston O. Ford and Randall K. Kratzer, his former partners in a general contracting business known as Columbus Pro Services, Inc., as well as the attorney and law firm representing those partners at the time the business was closed. Peterson alleges that the third-party defendants ''conspired to suppress Peterson's equity in Columbus Pro Services, Inc.'' and that an officer of the Internal Revenue Service ''auctioned off Peterson's equity [in the business] to Ford and Kratzer, at a much lower value than Peterson could have received in the open market.'' *Answer and Cross-Claim of Defendant Jeffrey B. Peterson*, at ¶s 43–44. This matter is now before the Court on various motions of the parties.

I. PLAINTIFF'S MOTION FOR SANCTIONS.

[1] On November 9, 2001, the United States filed a motion seeking the imposition of sanctions pursuant to F.R. Civ. P. 37 in connection with Peterson's failure to appear at his deposition. Peterson's deposition was noticed on October 23, 2001, to be held on October 29, 2001. Notice of the deposition was sent to Peterson by ordinary mail and by facsimile. *Certificate of Service* (October 23, 2001). In an unverified statement, counsel for the United States asserts that he arrived from Washington, D.C., on the evening of Sunday, October 28, 2001, in anticipation of the deposition. On the morning of the deposition, he received a voice message left by Peterson earlier that morning, indicating that Peterson was unavailable for the deposition. Plaintiff seeks recovery of the costs associated with the scheduled deposition, including its counsel's airline fares, hotel bills, cab fares and court reporter and attorney's fees.

Peterson was given, at most, four business days'R notice of a deposition which was not, apparently, scheduled in consultation with him. All litigants, including those proceeding without the assistance of counsel, are expected to treat even their adversaries with courtesy, including such notice as is necessary to minimize unnecessary litigation costs. Nevertheless, because the deposition was scheduled on short notice and without prior consultation with the deponent, the Court DENIES the plaintiff's motion for sanctions.

II. MOTION OF THE UNITED STATES TO DISMISS THE THIRD-PARTY CLAIMS AND TO STRIKE DEFENDANT PETERSON'S SIXTH AFFIRMATIVE DEFENSE.

The United States also moves to dismiss the third-party complaint against Peterson's former partners and their counsel on the basis that joinder of those claims in this action is not authorized by the Federal Rules of Civil Procedure. This Court

agrees. Under F.R. Civ. P. 14, a defendant may assert a third-party claim "for all or part of the plaintiff's claim against the third-party plaintiff." A third-party action is appropriate only where the third-party plaintiff seeks indemnity or contribution, or similar form of derivative relief, in connection with the primary claim asserted in the complaint. *See Tate v. Frey*, 735 F.2d 986 (6th Cir. 1984).

The third-party claims asserted in this action seek recovery in connection with alleged misconduct surrounding an administrative sale of property by the Internal Revenue Service. That property and sale, however, appear to be wholly unrelated to the property involved in the claims asserted in this action. The liability of the third-party defendants to defendant Peterson, if any, is simply not derivative of defendant Peterson's personal tax liability to the United States.

In his memorandum *contra*, Peterson contends that the claims asserted in the complaint and in the third-party complaint are "intertwined": "But for the unconscionable actions of the Plaintiff and third party defendants, Peterson's purported tax liability would not be as high as alleged by Plaintiff." *Memorandum contra of Defendant Jeffrey B. Peterson to Plaintiff's Motion to Dismiss, etc.*, at 2. However, the mere fact that the claims asserted in the third-party complaint are, as Peterson characterizes them, "intertwined," does not satisfy the standard for third-party practice under Rule 14. It is not sufficient that the claims asserted in the third-party complaint merely arise from the same transaction or occurrence as the underlying suit:

> Impleader ... is narrower. It must involve an attempt to pass on to the third-party all or part of the liability asserted against the defendant. Thus, it must be an assertion of the third-party defendant's derivative liability to the third-party plaintiff.

3 Moore's Federal Practice, §14.04[3] [a] (Matthew Bender 3rd ed.) [emphasis in the original]. Derivative liability may take the form of a right to indemnification. It does not appear, and Peterson alleges no facts, that would give rise to a right of indemnification from any of the third-party defendants. Moreover, contribution among joint tortfeasors, another basis of derivative liability, is wholly inapplicable to these claims.[1] Because it does not appear that the claims asserted in the third-party complaint (erroneously characterized by Peterson as a cross-claim) were properly asserted in this action, plaintiff's motion to dismiss those third-party claims is GRANTED.

In light of the foregoing, the motions to dismiss or for summary judgment filed on behalf of the third-party defendants are DENIED as moot.

The United States also seeks to strike the sixth affirmative defense asserted in Peterson's answer: "Plaintiff's claims are barred as it acted in concert with business associates of Defendant in suppressing Plaintiff's opportunities to maximize value from sale of owned assets." *Answer*, at ¶35. Plaintiff argues, "Whether the third-party defendants were engaged in some tortious type conduct that harmed Peterson has no relevance to whether Peterson is liable for his personal income taxes and subsequently whether the United States can foreclose its tax liens on property involved in this case." *United States' Motion and Supporting Memorandum of Law to Dismiss ... and to Strike, etc.*, at 6.

Under F.R. Civ. P. 12(f), the Court may order stricken from any pleading "any insufficient defense." It is not clear to the Court, at this juncture, to what extent plaintiff's claims will require a calculation of amounts credited to Peterson's tax liability for the years in question, if any, nor is it clear to what Peterson alludes in his sixth affirmative defense when he alleges that the plaintiff "acted in concert with business associates of Defendant in suppressing Plaintiff's opportunities to maximize value from sale of owned assets."

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[1] Impleader may also be appropriate where the third-party defendant's derivative liability is based upon a right of subrogation by the third-party plaintiff against the third-party defendant, or on a breach of an express or implied warranty. *See 3 Moore's Federal Practice*, §14.04[3][b]. Neither circumstance appears to apply in this action.

The Court is therefore unable, at this juncture, to conclude that Peterson's sixth affirmative defense is deficient as a matter of law.[2] Accordingly, plaintiff's motion to strike the sixth affirmative defense is DENIED.

III. MOTION TO COMPEL BY DEFENDANT TERESA PETERSON.

On January 3, 2002, defendant Teresa Peterson filed a motion to compel the production of documents by defendant Jeffrey Peterson. It appears, however, that the motion is in fact the initial discovery request. In any event, defendant Teresa Peterson has not attached to the motion the certification of counsel required by F.R. Civ. P. 37(a)(2), *i.e.*, "that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." Accordingly, defendant Teresa Peterson's January 3, 2002 motion for production of documents is DENIED.

IV. MOTION FOR EXTENSION OF DISCOVERY COMPLETION DEADLINE.

Peterson's motion to extend the discovery completion deadline is GRANTED. All discovery shall be completed no later than October 31, 2002. There will be no extension of this date.

V. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT.

Remaining pending and unresolved is the motion of the United States for summary judgment against Peterson. Peterson may have until November 15, 2002 to respond. There will likewise be no extension of this date.

WHEREUPON plaintiff's November 9, 2001 motion for sanctions against defendant Jeffrey Peterson is DENIED. Plaintiff's motion to dismiss the third-party claims and to strike the sixth affirmative defense asserted by defendant Jeffrey Peterson is GRANTED in part and DENIED in part. The third-party claims asserted by defendant Jeffrey Peterson are DISMISSED. Third-party defendants Preston O. Ford, Randall K. Kratzer, David C. Watson, Jr., and Hill, Hill & Allison are hereby DISMISSED from this action. The motions for summary judgment or to dismiss, filed by the third-party defendants are hereby DENIED as moot. Defendant Teresa Peterson's January 3, 2002, motion for production of documents is DENIED for failure to comply with the provisions of F.R. Civ. P. 37. Defendant Jeffrey Peterson's motion to extend the discovery completion date is GRANTED. All discovery shall be completed no later than October 31, 2002. Defendant Jeffrey Peterson may have until November I5, 2002, to respond to plaintiff'S July 31, 2002, motion for summary judgment. There will be no extension of these dates.

Plaintiff's motion for summary judgment remains pending and unresolved.

Norah McCann King

United States Magistrate Judge

¶2002-5549

ST. DAVID'S HEALTH CARE SYSTEM, INC. v. UNITED STATES OF AMERICA. U.S. District Court, Western Dist. of Texas, (DC TX) CIVIL NO. A-01-CA-046 JN, Sept. 20, 2002. Earlier proceedings at (2002, DC TX) 90 AFTR 2d 2002-5415, amending (2002, DC TX) 89 AFTR 2d 2002-2998, 2002-1 USTC ¶50452, accepting in part and rejecting in part (2002, DC TX) 89 AFTR 2d 2002-2909. Years 1996, 1997, 1998, 1999, 2000. Decision for Taxpayer.

1. Litigation costs—substantial justification for IRS's position—exempt orgs.—charitable purposes. Non-profit health care co.'s motion for litigation costs incurred defending IRS's revocation of its exempt status was granted: IRS's position wasn't substantially justified where taxpayer's exempt status was clear under settled law; and fact that some issues may

[2] This conclusion is not inconsistent with the Court's earlier conclusion that Peterson's third-party complaint was improper under F.R. Civ. P. 14. Although Peterson's third-party claims are not derivative of his personal tax liability to the United States, evidence relating to the issue of whether the United States has properly credited Peterson for all payments made towards that tax liability may be relevant to the resolution of plaintiff's claims against him.

have held hint of novelty didn't justify IRS's conclusion to contrary. *Reference:* United States Tax Reporter ¶74,305.01(25). IRC §7430.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS AUSTIN DIVISION,

ORDER

JAMES R. NOWLIN CHIEF UNITED STATES DISTRICT JUDGE

[1] Before the Court is Plaintiff's Application for Litigation Costs (Clerk's Doc. No. 90); United States' Response in Opposition to Plaintiff's Application for Litigation Costs Under 26 U.S.C. § 7430 (Clerk's Doc. No. 99); Parties' Report as to Conference on Plaintiff's Application for Litigation Costs (Clerk's Doc. No. 100); and Plaintiff's Reply to the United States' Response in Opposition to Plaintiff's Application for Litigation Costs Under 26 U.S.C. § 7430 (Clerk's Doc. No. 102). Based on these documents, the applicable legal authority and the entire case file, the Court enters the following Order.

This Court entered summary judgment in Plaintiff's favor on June 7, 2002. The relevant facts are stated in that Order (Clerk's Doc. No. 84). Plaintiff now seeks to recover litigation costs pursuant to 26 U.S.C. § 7430. The United States opposes that attempt, arguing that its position was substantially justified. If the position taken by the United States was substantially justified, then Plaintiff is not technically the prevailing party due to the definition given in 26 U.S.C. § 7430(c)(4)(B).

The Court's language in its order granting Plaintiff's motion for summary judgment sheds light on whether the United States' position was substantially justified. As to whether St. David's has a charitable purpose, the Court said, "There is therefore absolutely no issue as to whether St. David's has a charitable purpose, and any argument to the contrary appears at least mildly disingenuous." *See* Clerk's Doc. No. 84, p. 6. The order is replete with references to the inability of a reasonable person to contend that the hospital's board is structured in a manner that insulates it from charitable considerations. The Court concluded the body of its order by stating that "it is *clear* that St. David's was exempt from federal income taxes." *Id.*, p. 14 (emphasis added).

Finally, the United States argues that, since this case involved novel issues, it is more likely that its position was substantially justified. While it is true that some of the specific issues that a hint of novelty to them, that does not mean that any position taken on those issues is reasonable. To the extent that there were novel issues in this case, settled law clearly applied and disposed of those issues.

The Court finds that the United States' position in this case was not substantially justified, and therefore that Plaintiff is entitled to reasonable litigation costs pursuant to 26 U.S.C. § 7430, subject to limitations contained in that statute. Upon examination of the reports of costs submitted to the Court, the Court finds that an award of attorneys fees in the total amount of $803,284.00, together with expert witness expenses in the amount of $74,851.03, and other expenses in the amount of $73,434.80 is justified.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Application for Litigation Costs (Clerk's Doc. No. 90) is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States pay to St. David's reasonable litigation costs in the total amount of $951,569.83.

SIGNED AND ENTERED this 19th day of September, 2002.

JAMES R. NOWLIN

CHIEF UNITED STATES DISTRICT JUDGE

¶2002-5550

IN THE MATTER OF THE TAX LIABILITIES OF: John DOES, United States taxpayers who, during the years ended December 31, 1998 through De-

cember 31, 2001, had signature authority over MASTERCARD payment cards issued by, through, or on behalf of banks or other financial institutions in Antigua and Barbuda, Bahamas, and Cayman Islands, or issued to persons or entities in Antigua and Barbuda, Bahamas, and Cayman Islands. U.S. District Court, Dist. of Georgia, (DC GA) 1:02mi00254, Aug. 30, 2002. Years 1998, 1999, 2000, 2001. Decision for Govt.

1. Third-party summonses—"John Doe" summonses—legitimate purpose—proof. Govt. was granted leave to serve, through authorized IRS employee, "John Doe" summonses on 3d-party corps.: govt. showed that summonses, seeking information relating to transactions on offshore credit card accounts over which unidentified taxpayers had signatory authority, related to investigation of those ostensible taxpayers; that govt. reasonably believed those taxpayers may not have complied with IRC; and that information was unavailable from other sources. *Reference:* United States Tax Reporter ¶76,095.01(50). IRC §7609.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA,

ORDER

[1] THIS MATTER is before the Court upon the United States of America's Ex Parte Petition for Leave to Serve John Doe Summonses. Based upon a review of the Petition and exhibits thereto, the Court has determined that the "John Doe" summonses to be issued by the Internal Revenue Service to BellSouth Corporation, ChoicePoint, Inc., Delta Air Lines, Inc., EarthLink, Inc., Rapid Link Communications, Inc., RegSoft.com,Inc., and Six Continents Hotels, Inc., relate to the investigation of an ascertainable group or class of persons, that there is a reasonable basis for believing that such group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and that the information sought to be obtained from the examination of the records or testimony (and the identities of the persons with respect to whose liability the summonses are issued) are not readily available from other sources. It is therefore

ORDERED AND ADJUDGED that the Internal Revenue Service, through Revenue Agent Joseph C. West or any other authorized officer or agent, may serve Internal Revenue Service "John Doe" summonses upon BellSouth Corporation, ChoicePoint, Inc., Delta Air Lines, Inc., EarthLink, Inc., Rapid Link Communications, Inc., RegSoft.com, Inc., and Six Continents Hotels, Inc., in substantially the forms as attached to the Declaration of Revenue Agent West at Tabs 2(a) through (e), respectively, and including the schedules setting forth the account numbers for the MasterCard payment cards used with each merchant. A copy of this Order shall be served together with the summonses.

DONE AND ORDERED this 30 day of August 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5551

T. Whitney STRICKLAND, JR., PLAINTIFF v. Virginia DAIRE and The United States of America on behalf of the Department of the Treasury, Internal Revenue Service, DEFENDANTS. U.S. District Court, Northern Dist. of Florida, (DC FL) Case No.: 4:01cv1 53/RV, Sept. 30, 2002. Years 1989, 1991, 1993, 1995, 1996, 1997. Decision for Govt. in part and against Govt. in part.

1. Lien property—interpleader—escrowed fund—escrow fees—stakeholder's fees and costs. Govt. was denied summary judgment on priority of its tax lien over escrow agent/interpleader's competing claims to interpleaded escrow fund: govt.'s argument that entire escrowed amount, which resulted from taxpayer's lawsuit settlement with 3d party, was property right of taxpayer to which tax lien attached was rejected where escrow agreement gave escrow agent clear priority contractual right to recover his escrow fees from fund, so taxpayer had no interest to

which govt.'s lien could attach with respect to portion of fund representing escrow fees claim. Similarly, agent's explicit contractual right to recover attorney's fees and costs from fund further precluded govt.'s lien from attaching to fund until those costs were paid. *Reference:* United States Tax Reporter ¶63,215.04(82); 63,215.04(200). IRC §6321.

2. Lien property—interpleader—escrowed fund—superpriorities—attorney's lien—attorney's fees and costs. Govt. was denied in part summary judgment on priority of its tax lien over taxpayer's attorney's competing claims to interpleaded escrow fund that arose from taxpayer's lawsuit settlement with 3d party: whether taxpayer's attorney's claim for fee of creating fund had IRC §6323 superiority over govt.'s tax lien was remaining material fact issue requiring investigation into possibility that her non-standard retainer letter gave her enforceable contract right to payment from underlying settlement. But, to extent her IRC §6323 claim failed, govt. was entitled to summary judgment that attorney had no basis for recovering fee of defending instant action. *Reference:* United States Tax Reporter ¶63,235.16(40); 74,305.01(40). IRC §6323; 7430.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

ORDER

ROGER VINSON Chief United States District Judge

Defendant United States of America has moved for summary judgment (doc. 69).

Plaintiff filed this interpleader action pursuant to Title 28, United States Code, Section 2410. Defendants Daire and United States of America have conflicting claims over the funds being held in escrow by plaintiff Strickland, who also claims fees and costs from those escrowed funds. Except as otherwise stated, the parties agree that the following material facts are not disputed.

I. BACKGROUND

By December 18, 2000, the Internal Revenue Service (''IRS'') had assessed tax liabilities against O.C. Allen (''Allen'') in the total amount of $87,074.06 for unpaid taxes in eight different tax years going back to 1989.[1] This case involves $73,244.19 held in escrow by plaintiff Strickland. After the IRS attempted to levy on the funds, Strickland brought this interpleader action and deposited the funds into the registry of this Court.

The funds held in escrow resulted from the settlement of a lawsuit brought by Allen in 1998 against Michael J. Read and John D. Hallstrom in the Circuit Court of Leon County, Florida. Defendant Daire was Allen's attorney in that state court action, and Allen agreed to pay Daire's fees at a rate of $200 per hour, with ''payment in full upon the conclusion of this matter.'' On October 7, 1999, after mediation, Allen, Read, and Hallstrom reached a contingent settlement of their lawsuit, which required Read and Hallstrom to place $70,000, into an escrow account. This ''Contingent Settlement Agreement'' acknowledged that the IRS had filed a notice of levy against Allen, and payment of the escrow fund was contingent upon Allen settling with the IRS for $30,000, ''or such other amount as [Allen] negotiates.''

On October 12, 1999, after the contingent settlement was reached, Daire presented Allen with a bill for $41,920 in attorney's fees and costs. The contingency upon which the ''Contingent Settlement Agreement'' was based - - - settlement of the amount due the IRS by Allen - - - was

[1] On November 19, 1990, the IRS assessed tax liabilities against defendant Allen in the amount of $29,151.18 for tax year 1989. A tax liability in the amount of $22,462.39 was assessed on November 30, 1992, for tax year 1991. A lien in the amount of $347.80 was assessed on December 5, 1994, for tax year 1993. A tax liability in the amount of $7,623.75 was assessed on November 25, 1996, for tax year 1995. A tax liability in the amount of $6,081.00 was assessed on November 24, 1997 for tax year 1996. A tax liability in the amount of $2,435.40 was assessed on November 23, 1998, for tax year 1997. A tax liability in the amount of $8,137.64 was assessed on September 20, 1999, for tax year 1998. A tax liability in the amount of $10,834.90 was assessed on December 18, 2000, for tax year 1999. The total of $87,074.06 does not include further interest and statutory additions that may have accrued subsequent to the dates of assessment. Notices of the federal tax liens were filed as follows: On September 17, 1991, for 1989 liabilities; on November 9, 1993 for the 1989 liabilities, and 1991 liabilities; on July 31, 1997, for the 1995 tax liabilities; on August 3, 1998, for the 1993 and 1996 tax liabilities; and on May 6, 1999 for the 1997 tax liabilities. Apparently, no notices were filed for the 1998 and 1999 tax years.

not timely resolved, so on December 30, 1999, the parties to the state court litigation entered into an ''Amendment to Settlement Agreement and Escrow Agreement.'' This second agreement names plaintiff Strickland as escrow agent and calls for dismissal of the case upon payment by Reed and Hallstrom of $70,000 into the escrow account ''to or for the benefit of [Allen].'' The agreement also sets out a strict limitation upon payment of the escrow fund by the escrow agent:

> 2. Payment of Escrow Fund. Upon written notification from the IRS that all Notices of Levy including that certain Notice of Levy dated July 7, 1999, a copy of which is attached hereto as Exhibit ''A'', and associated tax lien have been fully satisfied, the Escrow Agent shall disburse the Escrow Fund to the IRS, and then to O.C. Allen, to the extent payment of the tax lien to the iRS does not exhaust the escrow fund.

Under this agreement, which remains in effect, the escrow agent cannot disburse funds to either the IRS or to Allen until the escrow agent first receives written notification from the IRS of full satisfaction of all Notices of Levy and associated tax liens of Allen's. In paragraph (3), the amended agreement specifically provides for the escrow agent's fees to be paid first from any interest accrued on the escrow fund, and then from the escrow fund itself. The second agreement also provides for the reimbursement of any expenses, including attorney's fees and costs, that the escrow agent may incur in any litigation, and paragraph (5) expressly authorizes the escrow agent to file an interpleader action to be fully indemnified for all costs of such an action, including reasonable attorney's fees. Pursuant to this amended agreement, the state court ordered the parties to comply with the settlement agreements and dismissed the action with prejudice on February 9, 2000. On August 15, 2000, Daire filed a verified petition in state court for an attorney's charging lien against the escrow funds n the amount of $41,920.

On February 27, 2001, the IRS served Strickland with a ''Notice of Levy,'' asserting a lien against the escrow funds, as well as a ''Release of Levy'' as to $30,000 to be paid to Daire (apparently as a part of a negotiated settlement of her fee), and a request that Strickland pay the remaining $40,000 and accrued interest to the IRS. An accompanying letter from the IRS's Compliance Group Manager, Dennis L. Lister, indicated that all prior notices of levy were released. The letter made no reference to Strickland's fees as escrow agent. Strickland attempted to negotiate with the IRS regarding his fee and the IRS's payment instructions, but was unsuccessful. Strickland then filed this interpleader action on April 27, 2001, and deposited the escrow funds into the registry of this Court. The IRS, through the United States, now moves for summary judgment, contending that it has priority over *all*of the funds.

Il. DISCUSSION

A. Summary Judgment Standard

The Rules of Civil Procedure make it plain that a motion for summary judgment should be granted when ''the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.'' Rule 56(c), Fed. R. Civ. P. As the Supreme Court of the United States has instructed, ''the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'' Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2553, 91 L. Ed.2d 265, 273 (1986). See also Morisky v. Broward County, 80 F.3d 445, 447 (11th Cir. 1996).

However, summary judgment is improper ''[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine 1995). An issue is 'material' if it might af-

fect the outcome of the case under the governing law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202, 211 (1986). It is 'genuine' if the record taken as a whole could lead a rational trier of fact to find for the nonmoving party. See id.; see also Matsushita Electronic Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 552 (1986).

The moving party bears the initial burden of ''informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,'R which it believes demonstrate the absence of a genuine issue of material fact.' Celotex Corp., supra, 477 U.S. at 323, 106 S. Ct. at 2552, 91 L. Ed. 2d at 274 (1986).

On a summary judgment motion, the record and all inferences that can be drawn from it must be viewed in the light most favorable to the nonmoving party. See Evans v. McClain of Georgia, Inc., 131 F.3d 957, 961 (11th Cir. 1997). However, conclusory allegations based on subjective beliefs are insufficient to create a genuine issue of material fact. See Leigh v. Warner Bros., Inc., 212 F.3d 1219, 1217 (11th Cir. 2000); Ramsey v. Leath, 706 F.2d 1166, 1170(11th Cir. 1983). The nonmoving party must provide more than a mere ''scintilla'' of evidence supporting his position, for if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. Anderson, supra, 477 U.S. at 249–50, 106 S.Ct. at 2510–11, 91 L. Ed 2d at 212; Johnson v. Fleet Finance, Inc., 4 F.3d 946 949 (11th Cir. 1993). Although the nonmoving party must designate ''specific facts showing that there is a genuine issue for trial,'' the court must also consider the entire record in the case, not just those pieces of evidence which have been singled out for attention by the parties. See Hargett v. Valley Fed. Sav. Bank, 60 F.3d 754, 763 n.9 (11th Cir. 1995) (quoting Celotex Corp., supra, 477 U.S. at 324, 106 S. Ct. at 2553, 91 L. Ed. 2d at 274, (1986)); Clinkscales v. Chevron USA, Inc., 831 F.2d 1565, 1570 (11th Cir. 1987). ''Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.''' Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. at 587, 106 S. Ct. 1356, 89 L. Ed. 2d at 552.

B. Analysis

[1] When a taxpayer is delinquent in paying taxes, Section 6321 of the Internal Revenue Code places the government in the position of a secured creditor and empowers it to impose a tax lien on ''all property and rights to property'' belonging to the taxpayer.[2] Section 6323(a) requires that ''any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights to property'' to the Secretary. The threshold question in such a case is whether and to what extent the taxpayer has ''property'' or ''rights to property'' to which the tax lien could attach. Aquilino v. United States, 363 U.S. 509, 512, 80 S. Ct. 1277 [5 AFTR 2d 1698], 4 L. Ed. 2d 1365, 1368 (1960). State law governs the inquiry into the taxpayer's property or rights to property.[3] Id.; United States v. Rodgers, 461 U.S. 677, 683 [52 AFTR 2d 83-5042], 103 S. Ct. 2132 [52 AFTR 2d 83-5042], 76 L. Ed. 2d 236, 246–47 (1983). Once it is established that a cognizable property interest exists, federal law then determines the priority of all existing liens. Aquilino, supra, 363 U.S. at 513–14, 80 S. Ct. 1277 [5 AFTR 2d 1698], 4 L. Ed. 2d at 1368–69.

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[2] Section 6321 of the Internal Revenue Code provides:

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereof) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

[3] As the Eleventh Circuit explained in United States v. Ruff, 99 F.3d 1559, 1563 [78 AFTR 2d 96-7274] (11th Cir. 1996):

A court assessing a levy on a taxpayer's intangible interest in property held by third parties must determine first the nature of the taxpayer's interest in the property. This is a question of state law . . . . Once the court has determined that a delinquent taxpayer has rights to property, federal law determines whether the custodian of the property is obligated to surrender the property to the IRS.

quoting United States v. Metropolitan Life Ins., 874 F.2d 1497, 1500 [64 AFTR 2d 89-5058] (11th Cir. 1989)).

(1) Priority of the United States with respect to plaintiff Strickland. Plaintiff Strickland, the escrow agent, contends that he is entitled to his fees as escrow agent, as well as to his attorney's fees and costs for bringing this interpleader action. The United States argues that it has priority over Strickland because Strickland did not perfect a lien prior to the perfection of the tax lien and cannot claim superiority with an attorney charging lien under Section 6323(b)(8) of the Internal Revenue Code. However, the Government's analysis of Strickland's rights to the escrow funds prematurely examines Strickland's rights under federal law. Before such an inquiry can take place, state law must be examined to determine Allen's rights to the escrow funds.

A federal tax lien under Section 6321 of the Internal Revenue Code ''cannot extend beyond the property interests held by the delinquent taxpayer.'' Rodgers, supra, 461 U.S. at 690–91, 103 S. Ct. 2132 [52 AFTR 2d 83-5042], 76 L. Ed. 2d at 251. If ''a delinquent taxpayer shares his ownership interest in property jointly with other persons, rather than being the sole owner, his 'property' and 'rights to property' to which the federal tax lien attaches under [Section] 6321, and on which federal levy may be had under [Section] 7403(a), involve only *his* interest in the property, and not the entire property.'' Id. at 690, 103 S. Ct. 2132 [52 AFTR 2d 83-5042], 76 L. Ed. 2d at 251 (quoting United States v. Rogers, 649 F.2d 1117, 1125 [48 AFTR 2d 81-5526] (5th Cir. Unit A 1981)) (emphasis added) (internal citations omitted). The position of the United States is that the entire amount held in escrow constitutes ''property and rights to property'' of Allen. Strickland, on the other hand, contends that he has a priority contractual right to his escrow fees from the escrow fund that cannot be abridged. The briefs of the parties regarding this matter are not particularly helpful, but this is understandable considering the lack of relevant law.[4] Nevertheless, property interests are created and defined by state law, so state law must be examined. Butner v. United States, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136, 142 (1979).

For purposes of federal tax liens, the Government must step into the shoes of Allen, the taxpayer, and its rights to property can go no further than Allen's. Rodgers, supra, 461 U. S. at 690, 103 S. Ct. 2132 [52 AFTR 2d 83-5042], 76 L. Ed. 2d at 251. The Government's claim to the entire escrow fund would be stronger if it could be clearly established that Allen was entitled to all of the money in escrow.[5] However, the escrow is created by contract, and the funds held in escrow, including Allen's rights to the funds, are controlled by the contractual provisions of the escrow agreement. The contingent settlement agreement and its amendment appear to be valid and enforceable contracts under Florida law, and the state court appears to have ongoing jurisdiction to enforce the settlement agreement. The Government can levy upon the escrow funds only to the extent that Allen has a contractual property right in that fund, with all of its limitations.

The terms of the escrow agreement provide Allen with an interest in the escrow funds after Strickland is paid his escrow fees.[6] The United States dismisses this notion, arguing that the ''Amendment to Settlement Agreement and Escrow Agreement provides that the *full amount of the payment,* $70,000, was to be paid 'to or

[4] After extensively researching the issue, I have found no cases directly on point. There are a few cases involving a tax levy upon escrowed funds in which the escrow agent's fees were denied because the escrow agreement failed to provide for such compensation. See, e.g., United States v. J.H.W. & Gitlitz Deli & Bar, Inc., 499 F. Supp. 1010, 1016 [46 AFTR 2d 80-6056] (S.D.N.Y. 1980) (''Because the escrow agreement under which [the escrow agent] held the fund provided only for payments to [the grantee], [the escrow agent] has no right to draw upon the fund to compensate him for his escrow services''). Here, the document establishing the escrow fund plainly provides for such fees, as well as for costs and attorney's fees involved in interpleader.

[5] Of course, even if Allen was entitled to all of the funds held in escrow, the IRS cannot simply levy on the funds held in escrow because of the provisions of the escrow agreement. Placing funds in escrow indicates that the transfer of ownership of the funds to the promisee cannot occur until the happening of a conditional event. See Mizuna, Ltd. v. Crossland Fed. Savings Bank, 90 F.3d 650, 659 (2d Cir. 1996). While the IRS may have priority over Allen's *interest* in those escrow funds, Allen does not have ''property or rights to property'' with respect to the escrow fund until the escrow's conditions are met. If the conditions that allow the funds to be distributed never occurs, Allen's interest in those funds will never vest and the IRS will not be able to levy upon those funds. See note 7, infra.

[6] The agreement plainly gives priority in payment from the escrow fund to the agent's fees and costs. Without such priority, no reasonable person would assume the responsibilities of escrow agent under the circumstances known to exist when the escrow was established.

for the benefit of O.C. Allen''' through the escrow agent. (emphasis added) However, this ignores all of the other detailed provisions and misconstrues this provision. All of the terms of the contract must be considered. The settlement agreement explicitly provides that Strickland ''shall be entitled to a fee for its services hereunder, to be paid for from any interest accrued on the Escrow Fund and then from the Escrow Fund, if necessary ....'' The escrow fund is created by the agreement and is subject to its complete conditions. Obviously, Allen cannot have rights to the ''full amount of the payment,'' as the Government contends, if the escrow agreement provides that Strickland is first to be paid from the escrow fund for his services as an escrow agent. The terms of the agreement give Strickland a fee; if Allen cannot receive the Strickland fee portion of the escrow fund for himself, then the tax lien cannot be applied against it. Ze I v. Cobb, 566 So. 2d 806, 809 (Fla. 3d DCA 1990) (until the happening of the event that would allow the amount held in escrow to be delivered to the promissee, the instrument deposited in escrow does not take effect as a fully executed contract). See Miller v. Alamo, 975 F.2d 547, 552 [71A AFTR 2d 93-4586] (8th Cir. 1992) (''Miller I'') (as government lien can only attach to property in which the delinquent taxpayer had an ownership interest, tax lien cannot attach where state law does not grant the taxpayer an ownership interest). Cf. United States v. Bess, 357 U.S. 51, 55–56 [1 AFTR 2d 1904], 78 S. Ct. 1054 [1 AFTR 2d 1904], 2 L. Ed. 2d 1135, 1141 (1958) (tax lien cannot attach to proceeds of a life insurance policy insuring the life of a taxpayer, beyond its cash surrender value, because the taxpayer could not receive the proceeds himself, even though he possessed the right to direct to whom the proceeds would be paid).

The contract requires that Strickland be paid first, and Allen has no property interest in that portion of the fund necessary to pay Strickland's fees and costs.[7] See Miller I, supra, 975 F.2d at 552 (federal law would not permit a lien to be placed on funds where taxpayer had no rights to the funds, could not direct where they were paid, and could not expect to receive any part of the funds). That portion of the fund necessary to pay Strickland belongs to Strickland, not Allen, and the IRS, standing in Allen's shoes, cannot levy upon property in which Allen has no interest.

(2) Strickland's rights to attorney's fees and costs. The Government's argument that Strickland is not entitled to attorney's fees for bringing this action also must fail. The Government correctly points out that a stakeholder who brings an interpleader action is normally entitled to attorney's fees and costs for bringing the action, to be paid out of the fund, *unless* such an award would diminish the amount due on a tax lien. Cable Atlanta, Inc. v. Protect, Inc., 749 F.2d 626, 627 [55 AFTR 2d 85-552] (11th Cir. 1984); Millers Mutual Ins. Ass'n of Illinois v. Wassall, 738 F.2d 302, 303 [54 AFTR 2d 84-5454] (8th Cir. 1984) (''It is well established that the Internal Revenue Code ... prohibits an award of attorney fees where the effect of such an award would be to diminish the amount recovered by the United States under a prior [in time] federal tax lien''); Spinks v. Jones, 499 F.2d 339, 340 [34 AFTR 2d 74-5745] (5th Cir. 1974) (''The judicial prerogative to award stakeholders their attorney's fees must give way to the supremacy of the federal tax lien law whenever an award would invade the amount subject to tax lien''); United States v. State Nat'l Bank of Connecticut, 421 F.2d 519, 521 [25 AFTR 2d 70-708] (2d Cir. 1970) (''a disinterested bank-stake-

[7] Reading the terms of the settlement agreement literally, it is not entirely clear whether the IRS has *any* claim to the amount held in escrow. As it stands, Allen has no right to the funds held in escrow because the terms of the original contingent settlement agreement provided that the settlement creating the res is made ''provided that the Internal Revenue Service (IRS) agrees to resolve its tax notice levy regarding plaintiff within $30,000, or such other amount as plaintiff negotiates with the IRS,'' *i.e.*, no settlement unless the condition is met. The amendment to the settlement agreement removes that condition to the settlement, but creates another (apparently unintended) condition to any payment from the fund: that payment of the escrow fund may not commence until the tax liens ''have been fully satisfied.'' Thus, under these specific contractual terms, Allen has no right to the funds held in escrow until the tax levies and liens are first satisfied. If the IRS cannot first satisfy its tax lien against Allen, then no funds may be disbursed to either the IRS or Allen, and Allen's (and the IRS's) rights to the funds held in escrow will not vest. Theoretically, it appears that Strickland could hold the funds in escrow indefinitely, and simply apply the interest earned periodically to his fees.

holder is not entitled to attorney's fees from a fund when the total amount in the fund is insufficient to satisfy prior federal tax liens''). In the absence of some agreement, the law authorizes the escrow agent to let a court decide his entitlement, as well as his attorney's fees and costs for having to do so. However, in this case, there is no stakeholder seeking an ''award'' of attorney's fees by virtue of bringing an interpleader action. Instead, the contract which creates the fund and sets conditions for rights to the fund by its terms authorizes the interpleader and expressly provides that Strickland is entitled to reimbursement for his attorney's fees and costs. Just as Strickland has a property right to his fee to be paid from the escrow account, he has a similar priority entitlement to his attorney's fees and costs, even if it reduces the amount available to Allen and the IRS under the federal tax lien - - - the contractual provisions determine Allen's interest (and derivatively, the IRS's). It appears that Strickland had a legal reason to bring this interpleader in accordance with the terms of the escrow agreement. Therefore, Strickland is also entitled to reasonable attorney's fees and costs for bringing this action, to be paid out of the escrow fund before Allen's interest can vest.

(3) Priority of the United States with respect to defendant Daire. To the extent that Allen has a cognizable property interest in the escrow fund after deducting amounts due Strickland for his services as escrow agent, federal law must be examined to determine the priority of all existing liens on Allen's property interest. Defendant Daire contends that her fee as the attorney creating the fund has superiority over the Government's tax liens. The Government argues that Daire did not timely perfect her attorney's charging lien. However, the Code does not necessarily require a charging lien before attorney's fees may be given superiority.

Section 6321 of the Internal Revenue Code creates a lien in favor of the Government over the ''property and rights to property'' owned by a delinquent taxpayer. The relative priority of such a tax lien as opposed to competing liens is determined under federal law. Litton Indus. Automation Systems, Inc. v. Nationwide Power Corp., 106 F.3d 366, 371 [79 AFTR 2d 97-1356] (11th Cir. 1997). Generally, a ''first in time - - - first in right'' rule applies when determining the priority of competing liens under federal law. Capuano v. United States, 955 F.2d 1427, 1433 [69 AFTR 2d 92-1034] (11th Cir. 1992). However, Section 6323 provides that a tax lien imposed by Section 6321 is not valid ''[w]ith respect to a judgment or other amount in settlement of a claim or of a cause of action, as against an attorney who, under local law, holds a lien upon *or a contract enforceable against such judgment or amount*, to the extent of his reasonable compensation for obtaining such judgment or procuring such settlement . . . .'' 26 U.S.C. § 6323(b)(8) (emphasis added). Section 6321 provides such a superiority because an attorney who procures such a judgment or settlement amount which benefits the taxpayer ultimately provides a benefit to the IRS.

A ''contract enforceable against such judgment or amount'' ordinarily would apply to any contract which would allow the attorney to enforce payment against the ultimate recovery under state law. See, e.g., Warner v. United States, 1995 WL 693188 (E.D. Ark. September 19, 1995). Daire and Allen reached an oral agreement regarding Daire's representation of Allen, and the essential terms of this agreement were set out in a retaining letter on March 24, 1998, signed by both Daire and Allen. This is the contract applicable here. It provided that Daire would bill $200 per hour for her services in the litigation against ''Mr. Hallstrom and Mr. Reed'' [sic], and that Allen would pay that hourly fee. It specifically provided for ''payment in full upon the conclusion of this matter.''

Several things about the contract between Daire and Allen are important. First, the retaining letter was not a general retainer - - - instead, it only applied to Allen's litigation against Hallstrom and Read. The letter also referenced the fact that the

hourly fees were to be paid "in full upon the conclusion of this matter." This is unusual because fees billed on an hourly basis are normally paid throughout the course of the litigation, not at the conclusion of the matter. Additionally, at the time of this agreement, the IRS had already assessed numerous tax liabilities against Allen, indicating that Allen was probably not financially able to pay his attorney during the course of the litigation. Daire was undoubtedly aware of all this. Daire was being paid an hourly fee and not on a contingent basis. Therefore, Allen would be obligated to pay Daire, regardless of whether Allen ultimately prevailed in the litigation. For that reason, it would appear that the letter did not specifically provide that payment would be from the recovery - - - to do so would foreclose Daire's right to payment if Allen should lose - - - but there is evidence in the record which sup-ports the conclusion that the parties in-tended for Daire's fees to be paid from any recovery *if* there was a recovery. Such an agreement would give Daire superiority over the Government pursuant to Section 6323 by virtue of an enforceable contract.[8] This creates a genuine issue of material fact, precluding summary judgment.

(3) Daire's claim for attorney's fees and costs in this interpleader. Finally, the Government argues that Daire is not entitled to attorney's fees or costs for defending this interpleader action. The Government argues that the "American Rule" applies in this case, that there is no statutory authority to permit an entitlement of fees in this action, and that a statutory award of attorney's fees cannot reduce the amount to be recovered by the IRS under a federal tax lien.

The traditional "American Rule" provides that attorney's fees are not awardable to the prevailing party in an action - - - each party must bear its own costs and attorney's fees. Marek v. Chesny, 473 U.S. 1, 8, 105 S. Ct. 3012, 87 L. Ed. 2d 1, 8 (1985). However, Section 7430 of the Internal Revenue Code acts as an exception to the American Rule and provides for an award of attorney's fees to a "prevailing party" "[i]n any administrative or court proceeding which is brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under this title . . . ." 26 U.S.C. § 7430(a). A "prevailing party" is "any party in any proceeding to which subsection (a) applies (other than the United States or *any creditor of the taxpayer involved*) . . . ." 26 U.S.C. § 7430(c)(4)(A) (emphasis added). The Government respond that Daire cannot collect under Section 7430 because she is a "creditor of the taxpayer." To the extent that her fee is not entitled to exemption under Section 6328(b)(8), it appears that the Government is correct. Similarly, it appears that in the absence of a contractual authorization of such fees and costs from the escrow fund (and I find none with respect to Daire), there is no other authority entitling her to fees and costs for this litigation. Therefore, the United States is entitled to summary judgment on this issue.[9]

III. CONCLUSION

For the foregoing reasons, defendant United States of America's motion for summary judgment (doc. 69) is GRANTED only with respect to Daire's claim for attorney's fees and costs for defending this interpleader action; it is otherwise DENIED.

DONE AND ORDERED this 30th day of September, 2002.

ROGER VINSON

Chief United States District Judge

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[8] The Government argues that Daire did not have the understanding that her fees would come directly from the recovery in the case. The Government cites to a deposition where Daire stated that she understood that she would be paid regardless of whether Allen "achieved anything from this at all" and from "whatever source of funds he had." However, this testimony does not necessarily mean that Daire did not expect to be paid from the recovery, if there was one. Payment in full upon "conclusion" necessarily implies that the payment will be made from the recovery at the conclusion of the case, if there was a recovery. However, if there was no recovery, Allen would still be required to pay Daire from whatever source of funds he may have.

[9] Daire also seeks to hold the IRS to its written agreement to have her fee to the extent of $30,000 paid to her. It is clear that the IRS did so agree and it does not deny it. Instead, it simply asserts the principle that equitable estoppel cannot be applied against the Government in its sovereign capacity. This order does not address that issue, which is reserved for trial. I do note that the Government's failure to stand by its agreement now exposes it to the full amount of Daire's fees and costs ($41,920), plus interest, as well as Strickland's fees and costs - - - which may leave nothing for the IRS.

¶2002-5552

TRUCKS, INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFEDANT. U.S. District Court, Northern Dist. of Georgia, (DC GA) CIVIL ACTION NO. 1:96-CV-0800-CC, Sept. 24, 2002. Earlier proceedings at (2002, DC GA) 89 AFTR 2d 2002-2552; and (2000, CA11) 86 AFTR 2d 2000-7180, 234 F 3d 1340, 2001-1 USTC ¶50116, reversing and remanding (1997, DC GA) 80 AFTR 2d 97-6625, 987 F Supp 1475, 97-2 USTC ¶50707. Years 1991, 1992, 1993. Decision for Taxpayer in part.

1. Attorney's fees and costs—substantial justification for IRS's position—reasonable costs—bill of costs. Trucking corp. was granted in part motion for attorney's fees and costs of defending its position on employee reimbursements: taxpayer was entitled only to reasonable fees and costs it incurred after it made qualified offer to IRS. Substantial justification for IRS's position before offer date was shown by highly factual nature of dispute and taxpayer's failure to offer sufficient details about its reimbursement practices; and attorneys' expertise in itself wasn't special factor warranting taxpayer's request for extra-statutory rate. Also, govt. was granted request to re-tax costs, including subpoena service costs, that didn't fall under 28 USC §1920. *Reference:* United States Tax Reporter ¶74,305.01(25); 74,305.01(10); 74,336.511(27). IRC §7430.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION,

ORDER

CLARENCE COOPER UNITED STATES DISTRICT JUDGE

[1] Pending before the Court is Plaintiff Trucks, Inc.'s (''Plaintiff'' or ''Trucks'') Motion for Award of Reasonable Administrative and Litigation Costs Including Attorneys' Fees [103-1], and Defendant United States of America's (''Defendant'' or ''the Government'') Mo-tion to Re-Tax Costs [108-1].

I. Defendant's Motion to Re-Tax Costs

In its motion, the Government argues that certain of the costs taxed by the Clerk of Court do not fall within the purview of 28 U.S.C. § 1920. This court agrees. The fees of Plaintiff's expert may be awarded pursuant to 26 U.S.C. § 7430, which the court addresses in Section II below, but are not taxable as costs pursuant to § 1920. In addition, the cost of preparing charts for use at trial are not taxable as costs under §1920. Arcadian Fertilizer, L.P. v. MPW Indus. Services, Inc., 249 F.3d 1293, 1297 (11th Cir. 2001). Further, Trucks is not entitled to recover its costs in attempting to serve a subpoena on J. Michael Golden in Jefferson City, Missouri, which is more than 100 miles from this court. *See* Fed.R.Civ.P. 45(b)(2), Accordingly, Defendant's motion to re-tax costs [108-1] is GRANTED, and the Clerk is DIRECTED to tax costs as follows:

Fees of the Clerk:	
Complaint fee:	$ 150.00
Fees for filing Notice of Appeal:	$ 105.00
Fees of the court reporter:	
Therese Vesel:	$ 90.00
Rufus Hixon:	$ 140.00
Fees for exemplification and copying:	
United States District Court:	$ 250.00
United States Court of Appeals:	$ 100.00
Document Technologies:	$1,548.04
Docket fees:	$ 8.50

Other costs:	
Deposition costs (Brown Reporting):	$2,449.00[1]
TOTAL:	$4,840.54

[1] The Government has not specifically challenged these deposition costs, and the court finds that these costs are recoverable under § 1920(2). See also, U.S. E.E.O.C. v. W & O, Inc., 213 F.3d 600, 620 (11[th] Cir. 2000).

II. Plaintiff's Motion for Award of Reasonable Administrative and Litigation Costs Including Attorneys' Fees[2]

Pursuant to 26 U.S.C. § 7430, Trucks seeks the costs and attorneys' fees it incurred during the course of this action in an amount in excess of $704,000.[3] Under § 7430, a taxpayer may be entitled to an award of attorneys' fees and expenses if three conditions are met: (1) the taxpayer has exhausted all of his administrative remedies; (2) the taxpayer is a prevailing party; and (3) the amount requested constitutes reasonable litigation or administrative costs. §§ 7430(a), (b) and (c); Cooper v. United States, 60 F.3d 1529, 1530–31 [76 AFTR 2d 95-5913] (11th Cir. 1995). While the Government concedes that Trucks has exhausted its administrative remedies and that Trucks is entitled to reasonable costs from the date of Trucks' qualified offer forward,[4] it contends that Trucks is not entitled to costs and fees during the time periods when the Government's position was substantially justified, and further, it also disputes that the amount of costs and fees sought by Trucks is reasonable.

A. Substantial justification

To qualify as a prevailing party, Trucks must show that the Government's position during this proceeding was not substantially justified.[5] § 7430(c)(4)(A)(i) (under the statute in effect at the time the action was filed); *see also*, Cooper, 60 F.3d at 1531. The Government argues that its position before and after the remand by the Court of Appeals was substantially justified, and thus Trucks should not be awarded the fees and costs incurred during these periods.

Based upon the evidence before it, the court cannot say that the Government's position was not substantially justified before Trucks' qualified offer. The Court specifically notes here that on summary judgment, Trucks did not offer the testimony of its general manager, William Myles,[6] or of its expert, Robert Tynes, but instead relied solely on the testimony of its president, Helen Willis, who did not provide the details provided by its other witnesses regarding Trucks' reimbursement practices. Trucks also did not offer the affidavits of its drivers. In light of the evidence that was before the Government, including evidence demonstrating that Trucks' drivers received different reimbursement amounts for trips covering the same distances and evidence that Trucks' lacked information regarding the number of nights its drivers incurred lodging expenses, as well as inadequately explained evidence regarding the factors that were taken into account by Trucks with respect to load revenue, this court cannot say that the Government's position was not substantially justified before the remand by the Court of Appeals,[7] or before the additional discovery that was conducted after the remand prior to the qualified offer being made by Trucks on

[2] The parties are well aware of the procedural history of this case, and as such, said history will not be restated here.

[3] In the alternative, Trucks seeks $334,330.00 in costs and attorneys' fees incurred since the date of its qualified offer to the Government on October 2, 2001.

[4] The Government also does not dispute that Trucks meets the net worth requirement under § 7430(c)(4)(A)(ii) (redesignated as § 7430(c)(4)(A)(iii)).

[5] Substantial justification means "'justified to a degree that could satisfy a reasonable person,' or that has a 'reasonable basis both in law and fact.'" In re Rasbury, 24 F.3d 159, 168 [74 AFTR 2d 94-5200] (11th Cir. 1994) (quoting Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490 (1988)).

[6] Myles was not identified by Plaintiff in its mandatory disclosures or in response to the Government's interrogatories or at any other time during discovery.

[7] The court also notes here that on appeal, the Eleventh Circuit did not find that Trucks was entitled to judgment as a matter of law, but instead found that the reasonableness of Trucks' reimbursement plan was a factual question for the jury to decide. *See* 234 F.3d 1340 [86 AFTR 2d 2000-7180] (11th Cir. 2000).

October 2, 2001.[8] As such, the court finds that Trucks is only entitled to its reasonable litigation costs and fees after October 2, 2001. *See* §§ 7430(c)(4)(E) and (g).

B. Calculation of fees

Having concluded that Trucks is entitled to costs and attorneys' fees after its qualified offer was made on October 2, 2001, the court next addresses whether the amount of costs and fees sought by Trucks is reasonable. Trucks seeks to recover fees at its attorneys' billing rates. However, § 7430 places a cap on the hourly rate that may be recovered unless certain conditions are met. Specifically, under § 7430, reasonable litigation costs include "the reasonable fees paid or incurred for the services of attorneys in connection with the court proceeding, except that such fees shall not be in excess of $125 per hour unless the court determines that a special factor, such as the limited availability of qualified attorneys for such proceeding, the difficulty of the issues presented in the case, or the local availability of tax exper-tise justifies a higher rate." 7430(c)(1)(B)(iii).[9]

While Trucks has submitted affidavits regarding its attorneys' considerable experience and qualifications to handle this action, the court concludes that no special factor exists in the present case to warrant a higher rate. *See, e.g.*, Es-tate of Cervin v. C.I.R., 200 F.3d 351 [85 AFTR 2d 2000-567] (5th Cir. 2000) (attor-ney's expertise in tax law and Texas com-munity property and insurance laws did not constitute a special factor sufficient to jus-tify a fee enhancement). Accordingly, for attorney hours billed in 2001, the rate will be $140 per hour, and for hours billed in 2002, the rate will be $150 per hour.

Following an exhaustive and painstaking review of the record, the court has determined that, between October 3, 2001 and January 25, 2002 (the date that the trial of this action concluded), the following fees and expenses were incurred by Trucks:

Fees charged by the law firm of Chamberlain, Hrdlicka, White, Williams and Martini[10] :

2001			
482.4 attorney hours x $140.00	=	$67,536.00	
79.2 paralegal hours x $90.00	=	$ 7,128.00	
1 research librarian hour x $50.00	=	$ 50.00	
		$74,714.00	
2002			
497.45 attorney hours x $150.00	=	$74,617.50	
117.5 paralegal hours x $100.00	=	$11,750.00	
		$86,367.50	
TOTAL ATTORNEYS' FEES:			$161,081.50
Expert Witness Fees:		$17,750.00	
Trial Graphix:		$ 6,584.78	
Copying costs & other expenses:[11]			
2001:		$ 4,104.08	
2002:		$ 5,207.59	

[8] The court concludes that it has discretion to consider the Government's position before the trial. *See, e.g.*, Harman v. United States, [89 AFTR 2d 2002-1819] 2002 WL 1759543, 3 (N.D.Ga.) (court concluded that government's position was not substantially justified only after the relevant revenue procedure was issued because the plaintiff had not shown that the government's position was unjustified prior to that time).

[9] In 2001, the flat rate was increased to $140 per hour pursuant to the cost of living adjustment required under § 7430(c)(1), and the rate was adjusted to $150 per hour in 2002.

[10] The various attorneys at the Chamberlain firm who worked on this case charged rates of between $135 per hour and $400 per hour during 2001 and 2002 depending upon their level of experience. The flat rates set forth above will be applied to all the attorney hours billed regardless of the specific attorney at the firm who performed the tasks. The hours billed by the firm's paralegal, Nicole Zalenski, will be charged at her rate of $90 per hour in 2001 and $100 per hour in 2002 because the court is satisfied that Ms. Zalenski's work was more than clerical in nature as contended by the Government. Hours of the research librarians will be charged at their rate of $50 per hour.

Further, insofar as the billing records submitted by the firm of Bovis, Kyle & Burch, Trucks' corporate counsel, do not indicate the amount of time spent on various tasks, nor do they indicate the specific attorney at the firm who performed these tasks, and further, as the work performed by this firm after the date of Trucks' qualified offer is duplicative of the work performed by the Chamberlain firm, the fees charged by the Bovis firm are disallowed.

TOTAL COPYING COSTS & OTHER EXPENSES, EXPERT WITNESS FEES, & TRIAL GRAPHIX: $ 33,646.45

[11] Truck concedes that its costs for secretarial overtime, working meals, and the advance paid to the Government's expert are not recoverable, and these costs are not included in the totals reflected here. The court notes here, however, that the Government's calculation of the secretarial overtime included in the Chamberlain firm's billing records is understated. By way of example, on its Exhibit F, the Government has omitted secretary overtime charges on December 12, 2001 and January 14, 2002. Under the court's calculation, the amount to be excluded for secretary overtime charges since October 2, 2001 is $2,303.08. In addition, the $215.00 fee paid to the National Institute of Trial Advocacy regarding persuasive expert testimony has not been included in the total amount recoverable, and further, because they have already been taxed as costs under 28 U.S.C. § 1920 in Section I above, the deposition costs of Brown Reporting and copying costs charged by Document Technologies have not been included here.

For the reasons discussed above, Trucks' motion for an award of its reasonable administrative and litigation costs including attorneys' fees [103-1] is GRANTED in part, DENIED in part. Trucks will be awarded its reasonable costs and attorneys' fees since the date of its qualified offer to the Government on October 2, 2001. The Clerk is DIRECTED to enter judgment for Plaintiff and against Defendant for attorneys' fees in the amount of $161,081.50, and for costs and expenses in the amount of $33,646.45.

SO ORDERED this 24th day of September, 2002.

CLARENCE COOPER

UNITED STATES DISTRICT JUDGE

JUDGMENT

This action having come before the court, Honorable Clarence Cooper, United States District Judge, for consideration of plaintiff's motion for award of reasonable administrative and litigation costs and attorney's fees, and the court having granted said motion, it is

Ordered and Adjudged that judgment be entered for Plaintiff and against Defendant for attorney's fees in the amount of $161,081.50 and for costs and expenses in the amount of $33,646.45.

Dated at Atlanta, Georgia, this 26th day of September, 2002.

LUTHER D. THOMAS

CLERK OF COURT

By: /s/

Deputy Clerk

¶2002-5553

Ginna MCCORMICK-COLEMAN, PETITIONER v. UNITED STATES OF AMERICA, RESPONDENT. U.S. District Court, Northern Dist. of Illinois, (DC IL) No. 02 C 2390, Oct. 16, 2002. Decision against Taxpayer.

1. Tax crimes—tax evasion—sentencing—ineffective assistance of counsel. Taxpayer's 28 USC §2255 motion to vacate her tax evasion and mail fraud sentence on grounds of ineffective assistance of counsel was denied: although taxpayer's procedural error in not bringing ineffective assistance claim on direct appeal was excusable, claim failed on merits. Significantly, taxpayer showed no prejudice from counsel's failure to object to biased juror's participation; showed no objective need for testimonies of certain "important" witnesses, such as her sister and tax expert, whom counsel failed to call; and was blatantly wrong in her contention that counsel hadn't properly objected to pre-sentencing report. Also, taxpayer's 6th Amendment and other claims were procedurally barred since counsel's strategic decision not to appeal was reasonable and taxpayer couldn't otherwise show any excuse for not bringing those claims directly. *Reference:* United States Tax Reporter ¶73,446.516(5); 73,447.511(10). IRC §7201.

United States District Court, N.D. Illinois, Eastern Division.

MEMORANDUM OPINION AND ORDER

BUCKLO, J.

The petitioner, Ginna McCormick-Coleman, filed a motion under 28 U.S.C. § 2255. She has not shown error and prejudice on the part of her trial counsel sufficient to sustain a claim for ineffective assistance of counsel. Her other claims are procedurally waived. The motion to vacate, set aside, or correct sentence is DENIED.

I.

Ms. McCormick-Coleman befriended Richard Rice in the early 1990s. Rice approached Ms. McCormick-Coleman about starting a business partnership in industrial and asbestos removal supplies. Rice would use his industry contacts to get the supplies and arrange for their delivery, and Ms. McCormick-Coleman would handle the administrative end of the business. Rice and Ms. McCormick-Coleman actually defrauded Rice's employer, Uno-Ven, out of more than a million dollars. Ms. McCormick-Coleman's company, Just Industrial, billed Uno-Ven for goods that were never delivered. Ms. McCormick-Coleman made hundreds of thousands of dollars from processing paperwork, and she gave half of the income from Uno-Ven to Rice. A jury convicted her of three of the four charges of tax evasion and one count of mail fraud.

Ms. McCormick-Coleman was represented at trial by Gerrardo Guttierez. On the second day of trial, one of the already-impaneled jurors sent a note to me in which he sought to be excused from jury duty because he had a "significant amount of work" to do and had clients depending on him, and that "this may cause [him] to have a bias that would not allow the defendant to have a fair trial." Tr. 5/16/00 at 204. I took this matter up with counsel, and concluded that this was a transparent attempt to get out of jury service. The day before, the juror had stated on the record that he believed he could be fair, though he said that he had negative views about the IRS and that he did not want to serve on such a long trial. Ms. McCormick-Coleman's attorney stated that "[o]n behalf of Ginna McCormick, I would like to keep these jurors." Tr. 5/16/00 at 13.

After the verdict, the same juror indicated that the court security officer ("CSO") assigned to the jury during the trial had made some remarks to him. The juror, who was an accountant, alleged that the CSO told him there were IRS agents in the courtroom who were watching him, and said that he took this as a "veiled threat" that the IRS could ruin him as a CPA. He also claimed that the CSO told him at one point that "99 percent of the time the government is correct." I held a hearing on this matter, including testimony from both the juror and the CSO. Ms. McCormick-Coleman filed a motion for a new trial on this basis, and I held a second hearing with testimony from another juror. After hearing arguments from counsel, I denied the motion for a new trial, see Minute Order of 11/09/01, and I denied Ms. McCormick-Coleman's motion to reconsider, finding that the juror "did not make any comment supposedly related to him by the CSO to any other juror," and concluding that there was no possibility that any of the alleged comments by the CSO had a reasonable probability of influencing the jury, see Minute Order of 11/21/01.

Prior to sentencing, Ms. McCormick-Coleman's attorney, Mr. Guttierez, filed objections to the presentence investigation report ("PSI") and motions for downward departure. Before the date scheduled for her sentencing in December 2000, however, Ms. McCormick-Coleman filed a pro se motion to postpone her sentencing, and then moved to substitute counsel. I appointed Kent Carlson of the Federal Defender's office to represent her, and after several status hearings, he filed supplemental objections to the PSI. In July 2001, a month before her sentencing, Ms. McCormick-Coleman was arrested for a state narcotics offense and her federal bond was revoked.

On August 2, 2001, I sentenced Ms. McCormick-Coleman to 28 months imprisonment, three years of supervised release, and ordered her to pay $18,740 in restitution. Over the government's objection, I

grouped the tax and fraud offenses, which reduced the length of her sentence, but I denied her motion for a downward departure based on extraordinary family circumstances.

Ms. McCormick-Coleman did not appeal her conviction or her sentence. Her co-defendant, John Macchione, appealed but withdrew his appeal when the government filed a cross-appeal on the issue of grouping the tax and fraud counts for sentencing purposes. She brings this motion to vacate her sentence under 28 § 2255, claiming that (1) her Sixth Amendment right to an impartial jury was violated by the impaneling of a biased juror and by the alleged improper contact between the CSO and the jury; (2) her Fifth Amendment right to due process was violated by the "ostrich" instruction, which she claims relieved the government of its burden to prove her knowledge beyond a reasonable doubt; and (3) her Fifth Amendment right to freedom from restraint was violated because the government did not prove certain sentencing factors by clear and convincing evidence. She also claims that (4) she was denied effective assistance of counsel because her counsel (a) failed to object to the impaneling of a biased juror; (b) failed to call important witnesses (including a tax expert, her prior attorney, and her sister); (c) failed to object to the ostrich instruction; (d) failed to fully respond and object to the PSI; and (e) failed to present relevant issues at sentencing.

II.

[1] A § 2255 petition is not a substitute for a direct appeal. Fountain v. United States, 211 F.3d 429, 433 (7th Cir.2000). Thus claims not raised on direct review are barred from collateral review unless the petitioner can demonstrate cause and prejudice for the failure to raise the claims on direct appeal. Bond v. United States, 1 F.3d 631, 634 (7th Cir.1993). Ms. McCormick-Coleman raises two types of claims: claims based on ineffective assistance of trial counsel (claim 4), and claims that are not based on ineffective assistance of counsel (claims 1 through 3).

An exception to the general rule of procedural default is a claim of ineffective assistance of trial counsel. Such a claim has little chance of success on direct appeal because it usually depends on evidence outside the trial record. See Guinan v. United States, 6 F.3d 468, 471 (7th Cir.1993). Nonetheless, "if a defendant postpones raising the issue of ineffective assistance of counsel until the collateral stage he must have a valid reason for the postponement." Id. at 472. The Seventh Circuit has noted three valid reasons: (1) that the defendant was represented by the same counsel at trial and on appeal; (2) that the claim could not be developed with facts outside the trial record; or (3) "that at the time of taking the appeal it had reasonably appeared that new evidence might be necessary, though it has since become apparent that the trial record itself was the only evidence that could be presented in support of the claim." Id. So long as at least one of the petitioner's claims meets one of these requirements, he is entitled to wait and bring all of his ineffective assistance of trial counsel claims together in one collateral proceeding. Id. at 473. Ms. McCormick-Coleman claims that her trial counsel was ineffective and also argues that her separately appointed post-trial counsel was ineffective during sentencing. Because she could not expect her post-trial counsel to raise the issue of his own ineffectiveness, her procedural default for all of her ineffective assistance of counsel claims is excused. See id.

To overcome procedural default of her three non-ineffective assistance claims (1 through 3), Ms. McCormick-Coleman must show "both good cause for and actual prejudice resulting from the failure to raise [them]." Mankarious v. United States, 282 F.3d 940, 943 (7th Cir.2002). "To show cause, the petitioner must show that some 'external impediment, whether it be governmental interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim.'" Holleman v. Cotton, No. 00-3791, 2002 WL 1895341, at 6 (7th Cir. Aug. 19, 2002). Claims 1 through 3 do not depend on any evidence that was

unavailable to Ms. McCormick-Coleman at the conclusion of her trial and sentencing, and she does not allege any governmental interference. Nonetheless, ''ineffective assistance can constitute sufficient cause for the failure to raise an issue.'' Kelly v. United States, 29 F.3d 1107, 1112 (7th Cir.1994). Ms. McCormick-Coleman may overcome her procedural default if she demonstrates that her post-trial attorney was ineffective for failing to file a direct appeal.

A petitioner claiming that her counsel was constitutionally ineffective must ''demonstrate that h[er] counsel's performance fell below an objective standard of reasonableness,'' and ''that [s]he was prejudiced by the deficient performance.'' Hough v. Anderson, 272 F.3d 878, 890 (7th Cir.2001) (citing Strickland v.. Washington, 466 U.S. 668 (1984)). Reasonableness is measured according to prevailing professional norms and under the totality of the circumstances, and ''to prevail, the [petitioner] must overcome the presumption that the challenged act or omission might have been considered sound trial strategy.'' Id. at 890–91.

The showing for prejudice to overcome procedural default is essentially the same as the showing required for a substantive ineffective assistance claim, which requires a petitioner to ''show that there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different.'' Id. at 891. If the petitioner makes an insufficient showing on either prong of the test, I need not consider the other prong. Id. at 890.

According to the affidavit of Kent Carlson filed by the government, Mr. Carlson advised Ms. McCormick-Coleman that, based on a review of the trial evidence and the post-trial proceedings, her conviction was unlikely to be reversed and her sentence was unlikely to be reduced. Carlson Aff. p 17. Furthermore, he advised her that, if she pursued an appeal, there was a strong possibility that the government would cross-appeal on the issue of grouping the tax and fraud counts under the Sentencing Guidelines, and that she might face an increased sentence on remand. Id. Ms. McCormick-Coleman indicated to Mr. Carlson that she agreed with his advice and that she would not file an appeal. To demonstrate ineffective assistance to overcome the failure to raise her claims on direct appeal, Ms. McCormick-Coleman must show that her attorney's advice not to appeal was unreasonable.

Mr. Macchione filed an appeal, but voluntarily dismissed it on advice of counsel when the government appealed on the sentencing grouping issue, so I have already had occasion to consider whether the advice of counsel not to appeal in light of the threat of a higher sentence on remand was reasonable. See Macchione v. United States, 205 F.Supp.2d 888, 892–94 [89 AFTR 2d 2002-2678] (N.D.Ill.2002).

At sentencing, I concurred with the recommendations of the PSI, in which the probation officer recommended grouping the tax evasion counts, under U.S.S.G. § 2T1.1, and the mail fraud count, under U.S.S.G. § 2F1.1, pursuant to U.S.S.G. § 3D1.2(c). At the time of Ms. McCormick-Coleman's sentencing, there was a split of authority on the propriety of grouping tax evasion and mail fraud counts under U.S.S.G. § 3D1.2, which provides for grouping of ''[a]ll counts involving substantially the same harm.'' The PSI recommended grouping the tax and fraud offenses under § 3D1.2(c) because the fraud count served as a specific offense characteristic in the guideline applicable to the tax evasion counts. The Seventh Circuit had not addressed the grouping of tax evasion and fraud offenses under § 3D1.2(c), although it had expressed disapproval of grouping under § 3D1.2(a), see United States v. Johnson, 117 F.3d 1010, 1014 [80 AFTR 2d 97-5222] (7th Cir.1997) (''[T]he primary victims were different in the two cases . . . . Mail fraud and tax evasion would seem in most cases to involve different harms . . . . ''), and § 3D1.2(d), see United States v. Dantuma, 165 F.3d 33, 1998 WL 567939, at 5 (7th Cir. Aug. 18, 1998) (unpublished order) (''While it is true that [defendant's] bankruptcy [fraud] and tax [evasion] counts are of the same

general type because the offense level for each 'is determined largely on the basis of the total amount of the loss,' [defendant's] offenses do not 'otherwise meet the criteria for grouping'' because they ''involve different victims.''). Although there was no clear Seventh Circuit authority, two other circuits had specifically rejected grouping of mail fraud and tax evasion counts under § 3D1.2(c) on the grounds that it effectively eliminates any punishment for tax evasion. See United States v. Vitale, 159 F.3d 810, 814 [82 AFTR 2d 98-7098] (3d Cir.1998); Weinberger v. United States, 268 F.3d 346, 354–55 [88 AFTR 2d 2001-7226] (6th Cir.2001). See also United States v. Morris, 229 F.3d 1145 [86 AFTR 2d 2000-5986], 2000 WL 1260162, at 1 (4th Cir. Sept. 6, 2000) (unpublished order) (citing Vitale). One count in this district had rejected the Third Circuit approach and followed the Sentencing Commission's recommendation that tax evasion always be grouped with the under-lying offense. See United States v. Mc-Candless, NO. 90 CR 87-15, 1992 WL 332304, at 3 (N.D.Ill. Nov. 6, 1992) (Wil-liams, J).

As I concluded in Macchione, ''[t]here is at least room for reasonable minds to differ on the propriety of grouping the tax evasion and mail fraud counts, so advising that the government had a good chance of winning [a] cross-appeal, even if erroneous (and I do not decide here that it was), was not unreasonable in light of case law in this or other circuits.'' 205 F.Supp.2d at 894. It is not deficient performance to decide not to appeal where there is a ''threat of a sentence-enhancing remand that might make the risks of an appeal outweigh its potential benefits.'' Howard v. Gramley, 225 F.3d 784, 791 (7th Cir.2000). These considerations were communicated to Ms. McCormick-Coleman by Mr. Carlson, and Ms. McCormick-Coleman agreed that it was not worth pursuing an appeal. Because there is evidence that this was a considered, strategic decision, the advice not to appeal was not deficient performance, see Hall v. Washington, 106 F.3d 742, 749 (7th Cir.1997) (holding that ''legitimate, strategic decision-making'' is not deficient performance), so I need not determine whether Ms. McCormick-Coleman was prejudiced in order to conclude that she cannot demonstrate ineffective assistance of counsel. Because she offers no other cause for her failure to appeal, she cannot excuse her procedural default of her claims 1 through 3.

III.

As Ms. McCormick-Coleman's waiver of her ineffective assistance of counsel claim is excused, I will now address the merits of that claim. § 2255 review of ineffective assistance of counsel claims is governed by the two-pronged test outlined in Strickland v. Washington, 466 U.S. 668 (1984). Under this test, to show that he received ineffective assistance, a convicted defendant must demonstrate that: (1) counsel's representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Id. at 687–88. This test is to be applied in a highly deferential manner; the defendant must overcome the reviewing court's strong presumption that his attorney's actions fall somewhere within the wide range of reasonable trial strategy. Id. at 689. None of the alleged errors Ms. McCormick-Coleman points to meet this test.

Ms. McCormick-Coleman's first claim is that her counsel erred in failing to object to the participation of a biased juror. However, the question of that juror's possible impact on the fairness of the trial was addressed in the hearing following the defendant's motion for a new trial and resolved in my order denying the motion. See Minute Order of 11/21/01. As this juror's ultimate inclusion did not impair the trial's fairness, defense counsel's failure to object to his impanelment cannot meet the prejudice prong of the Strickland test.

Ms. McCormick-Coleman also complains that her attorney erred in failing to call important witnesses in her defense, including her business advisor, Carey Cosentino, her sister Jennifer, and a tax expert. ''A lawyer's decision to call or not to call

a witness is a strategic decision generally not subject to review.'' U.S. v. Williams, 106 F.3d 1362, 1367. None of these uncalled witnesses was so obviously crucial to Ms. McCormick-Coleman's defense that failure to call them rendered her counsel's performance constitutionally deficient. Ms. McCormick-Coleman states that Mr. Cosentino was a crucial witness because she retained him for advice on proper legal practices. However, she does not say what testimony Mr. Cosentino would have offered, and thus I can hardly conclude that defense counsel was objectively unreasonable in choosing not to offer this testimony, as required by the performance prong of the Strickland test. The decision not to call Ms. McCormick-Coleman's sister was likewise a reasonable trial strategy, ''because family members can be easily impeached for bias.'' Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir.1995). Finally, defense counsel's failure to call a tax expert to demonstrate ''details and evidence'' regarding Ms. McCormick-Coleman's accounting practices is not objectively unreasonable. In her brief, Ms. McCormick-Coleman does not offer any reasons why the testimony of a tax expert was so obviously necessary to her defense that the usual deference to her attorney's decision is inappropriate in this instance.

Ms. McCormick-Coleman has recanted her accusation that her counsel failed to object to the ''ostrich instruction,'' so her final remaining complaint is that her counsel failed to file objections to the pre-sentencing report. This argument is factually incorrect; counsel for Ms. McCormick-Coleman did in fact file objections to the PSI, copies of which the government has submitted with its brief.

IV.

Ms. McCormick-Coleman has not shown error and prejudice on the part of her trial counsel sufficient to sustain a claim for ineffective assistance of counsel. Her other claims are procedurally waived. The motion to vacate, set aside, or correct sentence is DENIED.

¶2002-5554

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE/CROSS-APPELLANT v. Joe SABINO; Daniel K. Stewart, Donna G. Stewart, DEFENDANTS-APPELLANTS/CROSS-APPELLEES. U.S. Court of Appeals, Sixth Circuit, (CA6) Nos. 99-3745; 99-3785; 99-3786; 99-3863, Oct. 16, 2002. Court of Appeals, (2001, CA6) 88 AFTR 2d 2001-7245, 274 F 3d 1053, 2002-1 USTC ¶50137, amended on rehearing; and District Court remanded. Years 1990, 1991, 1992, 1993, 1994. Decision for Govt.

1. Tax crimes—tax evasion; conspiracy to defraud U.S.—U.S. Sentencing Guidelines—evidence; jury instructions—reconstructed income; net worth method. 6th Cir. amended in part its decision on applicability to tax evaders' conspiracy sentence of obstruction of justice enhancement: enhancement, based on taxpayers' giving false grand jury testimony, wouldn't result in impermissible double counting even though such testimony was already treated as part of conspiracy count where enhancement didn't rely on ''precisely same aspect'' of taxpayers' conduct as did conspiracy count. Also, nothing in U.S.S.G. precluded enhancement's application; but, whether false testimony rose to level of material misrepresentations sufficient to support obstruction enhancement in 1st place wasn't determinable from record, so case was again remanded to district court. *Reference:* United States Tax Reporter ¶73,446.516(55); 72,015.06(80); 72,015.03(5); 73,446.514(25); 72,015.12(15). IRC §7201.

United States Court of Appeals, Sixth Circuit,

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 96-00046--Herman J. Weber, District Judge.

Before DAUGHTREY and GILMAN, Circuit Judges; COHN, Senior District Judge.*

AMENDED OPINION

MARTHA CRAIG DAUGHTREY, Circuit Judge.

Defendants were convicted in the United States District Court for the Southern District of Ohio, Herman J. Weber, J., of conspiracy to defraud the United States by obstructing the functions of Internal Revenue Service (IRS), and two of three defendants were additionally convicted of tax evasion. Defendants appealed, and government cross-appealed. The Court of Appeals affirmed in part, reversed in part, and remanded for resentencing, 274 F.3d. 1053 [88 AFTR 2d 2001-7245]. On government's petition for rehearing, the Court of Appeals, Daughtrey, Circuit Judge, held that obstruction enhancement for giving false testimony to grand jury would not have amounted to impermissible double counting to defendants' sentence for conspiracy to defraud IRS based on their role in scheme to evade federal income taxes.

Petition granted.

Cohn, Senior District Judge, sitting by designation, dissented.

As cross-appellant, the government has filed a petition requesting a rehearing by the original panel in this case on the issue presented in Section II.G.3 of the opinion released on December 19, 2001. See United States v. Sabino, 274 F.3d 1053, 1076–77 [88 AFTR 2d 2001-7245] (6th Cir.2001). Specifically, the government argues that we erred in affirming the district court's decision not to apply an enhancement for obstruction of justice in sentencing defendants Joe Sabino and Donna Stewart. Having had the benefit of the government's briefing on this issue and the cross-appellees' response, a majority of the panel concludes that the government's position has merit. We therefore order publication of the attached revision of a portion of our prior opinion.

[1] The government's petition to rehear is GRANTED and, as a result, the panel's opinion is amended as reflected in the attached revision. Judge Cohn dissents from this order and would adhere to the position taken in our original opinion. The remaining petition for rehearing by the panel, filed on behalf of Joe Sabino, is DENIED.

II. DISCUSSION

G. Sentencing Determinations

3. Enhancement for Obstruction of Justice

The government argues that the district court's failure to apply an obstruction-of-justice enhancement in sentencing Joe Sabino and Donna Stewart constituted error. The sentencing guidelines provide that "[i]f . . . the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense of conviction . . . increase the offense level by 2 levels." U.S. Sentencing Guidelines Manual § 3C1.1 (1998). Our review of the district court's legal interpretation of the sentencing guidelines is reviewed de novo. United States v. Jones, 107 F.3d 1147, 1161 (6th Cir.1997). However, we may not reject the district court's factual findings unless they are clearly erroneous. United States v. Pruitt, 156 F.3d 638, 647 (6th Cir.1998).

The presentence report prepared by the probation office prior to Mrs. Stewart's sentencing included the following recommendation:

> Evidence produced at trial indicated [that] . . . Donna Stewart appeared before a Federal Grand Jury, and testified she did not know an individual named Sam Spine. At best, she testified she may have heard of the name, but did not know Sam Spine personally or have any relationship with him. At trial, the defense presented evidence the Stewarts entered into a contractual relationship with Spine for Spine to purchase Danco Transmission. Sam Spine was also

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

named as trustee of a couple of created ''trusts.'' Donna Stewart was also in possession of a Sam Spine signature stamp she used to sign and endorse checks. Therefore, Stewart impeded the course of the investigation by lying to the Federal Grand Jury, and an upward adjustment is warranted.

Nevertheless, at Donna Stewart's sentencing hearing, the district judge explained that he would not impose the enhancement because--although the judge seemed to believe that Stewart's testimony may have been obstructive--he concluded that relying upon it to enhance her sentence would amount to double counting:

> This Court has relied heavily on ... the testimony before this grand jury, by individuals as evidence of the agreement and as evidence of the overt acts that were necessary to establish this conspiracy. If I say that these were not acts in relationship to the conspiracy but rather were for the purposes of obstructing the administration of justice, then I am going to have to in some measure reevaluate my firm conviction that the verdict of the guilt--the verdict of guilty by the jury is correct in regards to the conspiracy charge.
>
> Therefore, I conclude that the testimony of these individuals before the grand jury were the statements of co-conspirators; that they were made during the conspiracy; that they were made in furtherance of the conspiracy; and that they are adequately dealt with and taken into consideration by the Sentencing Guidelines in the major offense criteria and that they therefore are considered and included in the general category, and that the specific enhancement for obstruction of justice should not be applied in this case.
>
> The Court would in its opinion find it to be unnecessary to vindicate the purposes of 18 United States Code Section I think it'§ 3553, and it would be in a sense in the opinion of this Court double counting under the facts of this particular case.
>
> I emphasize that I agree that these were statements that misled, that obstructed the ability of the ... Internal Revenue Service to collect, assess, or collect, assess, or defeat taxes and that that was their purpose. However, I agree that having so found, that they were part of the conspiracy and made in furtherance of the objective--object of the conspiracy; that I would be--it would be unnecessary and improper for me to double count and impose an additional two percent--or two-level enhancement for the obstruction or impeding of the administration of justice. They were done specifically for the purpose of obstructing or impeding or defeating the assessment, collection of income taxes.
>
> So then I will definitive [sic] rule, definitive [sic] rule in Mrs. Stewart's case that the two-point enhancement will be denied--.

The presentence report for Joe Sabino also recommended an obstruction of justice enhancement based upon false grand jury testimony:

> Information supplied by the Department of Justice trial attorney handling this case indicates that in sworn [testimony] before the Grand Jury for the Southern District of Ohio looking into this matter, Joe Sabino perjured himself on a number of occasions thereby attempting to impede or obstruct justice by not telling the truth as to his relationship with the Stewarts and who controlled the several ''trusts'' he was named as ''trustee'' before the Grand Jury.

However, at Sabino's sentencing hearing the district court declined to impose the enhancement, apparently not only because of the perceived problem with double counting, but also because the court concluded Sabino's testimony did not amount to obstruction of justice:

> The Court on the issue of the enhancement pursuant to 3C1.1 ... finds that under the circumstances that have been presented in the evidence in this case, that is the letter to Tom ... Roberts requesting return of his papers, that the

sum and total of his testimony to the grand jury do not rise to the level of obstruction of justice as an enhancement, particularly in this case when the specific charge with which he is dealing is an obstruction charge; and that the obstruction, if any, is a consideration at sentencing but it should not be an additional enhancement.

This Court cannot say in the modern context of testimony to a grand jury that the statements contained in his grand jury testimony was obstruction of justice.

. . . . . .

The Court would also find that the enhancement of two points for obstruction of justice would be inappropriate in this case primarily because the element of obstruction of justice, obstruction of the usual functions of the government is an element of the offense of conviction and that the activities of this defendant did not exceed that element so that it would require an additional enhancement to create a fundamentally fair sentence.

The law in this circuit is well-settled that a sentencing court must apply the enhancement if a defendant provides a materially false statement to a grand jury. See United States v. Mahaffey, 53 F.3d 128, 133–34 (6th Cir.1995). The government now argues that the district court declined to apply § 3C1.1 in part because it erroneously determined that obstruction of the lawful operation of the United States is the essence of a § 371 conspiracy and, therefore, that any obstruction of justice by the defendants had already been taken into account under the guidelines. The government also argues that the district court erred in finding that Joe Sabino's and Donna Stewart's false statements before the grand jury were not material misrepresentations.

Contrary to the district court's ruling, we conclude as a legal matter that imposing an obstruction enhancement in this case would not amount to impermissible double-counting. First, as the district court acknowledged, nothing in the sentencing guidelines prohibits the application of a s 3C1.1 enhancement to a defendant convicted of a Klein conspiracy under 18 U.S.C. § 371. Second, the ''established rule'' in this circuit is that ''impermissible 'double counting' occurs when precisely the same aspect of a defendant's conduct factors into his sentence in two separate ways.'' United States v. Farrow, 198 F.3d 179 (6th Cir.1999) (citing United States v. Perkins, 89 F.3d 303, 310 (6th Cir.1996)).

Our decision in United States v. Talley, 164 F.3d 989, 1004 (6th Cir.1999), is illustrative. There, we held that an ''official victim'' enhancement under U.S. Sentencing Guidelines Manual § 3A1.2 did not constitute double counting even though the underlying offense was soliciting the murder of a federal agent in violation of 18 U.S.C. § 1114. We observed that the commentary to § 3A1.2 provides that the official victim enhancement ''should not apply if the offense guideline specifically incorporates the factor of the victim being an official.'' Id. (emphasis added). Because the offense-level guideline for the crime of solicitation (§ 2A1.5) did not take into con-sideration the victim's offense status--al-though the statutory offense did--the court held that ''no double counting has oc-curred.'' Id.

Turning to the case at hand, it is clear that application of the obstruction of justice enhancement to Donna Stewart and Joe Sabino would not have amounted to impermissible double counting. They were convicted of conspiracy to defraud the government under § 371, which provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371. The object of the defendants' Klein conspiracy was, quite simply, to evade taxes. The offense level for the conspiracy count was determined for each

pursuant to U.S. Sentencing Guidelines Manual § 2T1.9, which applies to conspira-cies under § 371 that are designed to ''de-fraud the United States by impeding, im-pairing, obstructing, and defeating ... the collection of revenue.'' U.S. Sentencing Guidelines Manual § 2T1.9, cmt. n. 1 (1998) (citation omitted). We see no reason to conclude that this guideline takes into consideration a defendant's obstruction of the administration of justice in furtherance of the fraudulent scheme, such as giving false testimony before the grand jury or bribing a witness.

There is no dispute that the defendants' false grand jury testimony was treated by the government at trial as part of the Klein conspiracy--four of the 115 overt acts listed in the indictment involved false testimony to the grand jury, and the government called the grand jury reporter to testify at some point during the 32-day trial to read portions of the false grand jury testimony. However, the relevant inquiry for purposes of identifying whether impermissible double counting would result from enhancing the defendants' sentences for obstruction of justice is whether ''precisely the same aspect'' of the defendants' conduct, Farrow, 198 F.3d at 193 (emphasis added), would be relied upon to determine the defendants' respective base offense levels, and to support the sentencing enhancement. See Perkins, 89 F.3d at 310 (finding no impermissible double counting where ''one increase focuses solely on the defendant's conduct and the other increase focuses on the nature and degree of harm caused by the defendant's conduct'').

The answer here is surely ''no.'' To be sure, the district court did not err in concluding that the false grand jury testimony was related to the defendants' complex scheme to obstruct the collection of revenue by the IRS, which scheme is punishable under § 2T1.9. However, a qualitatively different aspect of that same conduct is its tendency to obstruct or impede the admin-istration of justice in the courts. This latter harm is separate and distinct from the harm arising from the obstruction of the collection of revenue, and, if it rises to the level of obstruction of justice within the meaning of the guidelines, it may justify a sentencing enhancement under § 3C1.1.

Given that the obstruction enhancement would not have amounted to impermissible double counting, the question becomes whether the district court's refusal to impose the enhancement can be affirmed on any other basis. It appears from the district court's remarks at sentencing that it believed that Donna Stewart's grand jury testimony may have risen to the level of obstruction of justice, but that Joe Sabino's did not. Although the government argues that the district court's view of Sabino's testimony underestimates its obstructive effect, we are not persuaded that the district court's conclusion is clearly erroneous. The question is more difficult with respect to Donna Stewart, whose testimony was clearly more troubling to the district court. On remand, the district court should consider the applicability of the obstruction enhancement to Donna Stewart without regard to considerations of impermissible double counting.

¶2002-5555

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Keith Lamar ORANGE, DEFENDANT-APPELLANT. U.S. Court of Appeals, Tenth Circuit, (CA10) No. 02-6112, Oct. 18, 2002. Appeal from District Court dismissed. Decision against Taxpayer in part.

1. Tax crimes—conspiring to file and filing false refund claims—constitutional claims; sufficiency of indictment; ineffective assistance of counsel. 10th Cir. denied pro se taxpayer's renewed request for certificate of appealability, and dismissed his appeal from conviction for conspiring to file and filing false refund claims: although allowed to proceed in forma pauperis, taxpayer's facial challenge to jury selection and challenge to jury's racial composition were rejected; res judicata barred relitigation of claim that prosecutor used coconspirators' illegal plea agreements against him; challenges to 18 USC §286 and §287 were rejected where stat-

utes were necessary and proper exercise of Congress's power to tax and spend for general welfare; argument that indictment was insufficient for failure to use statutory wording was frivolous; and attorney's failure to raise meritless issues at trial or on appeal didn't support ineffective assistance of counsel claim. *Reference:* United States Tax Reporter ¶72,065.01(40); 73,446.517(30); 73,446.503(40); 73,447.511(10). IRC §7206.

United States Court of Appeals, Tenth Circuit,

Before EBEL, LUCERO and O'BRIEN, Circuit Judges.

ORDER AND JUDGMENT*

David M. Ebel Circuit Judge

A jury convicted Defendant-Appellant Keith Lamar Orange of conspiring to file and filing false claims for income tax refunds with the Internal Revenue Service, in violation of 18 U.S.C. §§ 286–287. (Slip Op. at 1.) Orange committed those crimes while incarcerated in Oklahoma; the crimes involved fellow inmates and others who were not incarcerated. (Slip Op. at 1–2.) His convictions and sentences were affirmed on direct appeal. See United States v. Orange, No. 99-6009, 2000 U.S.App. LEXIS 13706 (10th Cir. June 12, 2000), cert. denied, 531 U.S. 939 (2000).

[1] Orange then filed a pro se motion under 28 U.S.C. § 2255 to "Vacate, Set Aside, or Correct Sentence" on five grounds: 1) that minorities were unconstitutionally excluded from his jury venire and petit jury; 2) that the prosecutor used illegal plea agreements from co-conspirators against him; 3) that the statutes under which he was convicted were unconstitutional; 4) that his indictment was insufficient; and 5) that his trial and appellate counsel provided ineffective assistance. (Slip Op. at 1, 2.) The district court rejected all five of his grounds for relief. (Slip Op. at 1.) Orange then filed a notice of appeal with this Court and a motion to proceed in forma pauperis. Because the district court failed to address whether Orange's claims merited the issuance of a certificate of appealability (COA), see 18 U.S.C. 2253(c)(1)(B), we will construe his notice of appeal as a renewed request for a COA. See Hoxie v. Kerby, 108 F.3d 1239, 1241 (10th Cir.1997). And because we believe that Orange raises nonfrivolous claims on appeal, see McIntosh v. United States Parole Comm'n, 115 F.3d 809, 812–13 (10th Cir.1997), we GRANT his request to proceed in forma pauperis. However, we DENY Orange's application for a COA and DISMISS his appeal for failure to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Orange challenges both facially and as-applied the selection of jurors in his case. He bases his arguments on the Fifth Amendment, the Sixth Amendment, and the Jury Service and Selection Act of 1968, 28 U.S.C. § 1861-78. (Slip Op. at 3; Aplt. Br. at 3.) With respect to his facial challenge, Orange complains that the Western District of Oklahoma's policy of drawing jury venires from voter registration lists leads to the unconstitutional under-representation of minorities. He argues that the Western District should follow the Northern District of Oklahoma's lead and supplement its jury venire list with a driver's license list, which would lead to greater minority representation. (Slip Op. at 4.) To bring an effective facial challenge in this context, Orange would have to show that the use of voter registration lists "systematically exclud[es] a distinct, cognizable class of persons from jury service." United States v. Rising, 867 F.2d 1255, 1260 (10th Cir.1989). This Orange has failed to do. Moreover, federal courts have generally upheld the use the use of voter registration lists to select jury venires. See, e.g., id.;

United States v. Gault, 141 F.3d 1399, 1403 (10th Cir.1998); Truesdale v. Moore,

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* After examining appellant's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R.App. P. 34(a)(2) and 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

142 F.3d 749, 755–56 (4th Cir.1998). We thus reject Orange's facial challenge to the Western District's system for selecting jury venires.

Orange bases his as-applied challenge solely on the allegation that all of the members of his own jury venire and petit jury were white. (Slip Op. at 3.) But "[t]his circuit and others have repeatedly emphasized that ... evidence of a discrepancy on a single venire panel ... is insufficient to demonstrate systematic exclusion." United States v. Hill, 197 F.3d 436, 445 (10th Cir.1995) (citing cases). Because Orange has failed to bring forth more substantial evidence to support his as-applied challenge, we reject his challenge to the composition of his jury venire and petit jury.

Orange's second ground for relief-his allegation that the prosecutor used an illegal plea agreement with coconspirators against him-was rejected by this Court on direct appeal. See Orange, 2000 U.S.App. LEXIS 13706, at 4–5. The district court correctly ruled that Orange's reinvocation of this claim on collateral attack is barred by res judicata, see United States v. Warner, 23 F.3d 287, 291 (10th Cir.1994) (Slip Op. at 2); we thus decline to review it here.

Orange rests his third ground for relief on a challenge to the constitutionality of the statutes under which he was convicted, 18 U.S.C. §§ 286–287. He claims that under United States v. Lopez, 514 U.S. 549 (1995), those statutes-which respectively prohibit conspiracy to defraud the United States government by filing false claims and the actual filing of such claims-exceeded the scope of Congress's powers under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3. The district court did not address the merits of Orange's commerce clause argument; rather, it held that the Necessary and Proper Clause of Article 1, § 8, cl. 18, provided an independent source of congressional authority to enact the statutes in question. That decision was incorrect. The Necessary and Proper Clause is not itself a source of congressional power; rather, the Clause must be coupled with some other congressional power, as its text makes clear: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art I, § 8, cl. 18 (emphasis added). We do not here address the merits of Orange's Commerce Clause claim, as we find a sufficient source of power for the challenged statutes elsewhere in the Constitution-thus rendering irrelevant to Orange's case any Commerce Clause challenge to those statutes. Because the statutes he challenges prohibit the defrauding of the federal government-which obtains its money through taxes-they are a necessary and proper exercise of Congress's power to tax and spend for the general welfare. U.S. Const., art I, § 8, cl. 1. They are thus a valid exercise of congressional power. We reject this basis for Orange's claim for relief.

Orange's fourth ground for relief is that Count 1 of his indictment stated that he and others "agreed, combined and conspired" to defraud the United States, whereas 18 U.S.C. § 286 prohibits a person from "entering into any agreement, combination, or conspiracy to defraud the United States." Orange argues that by using words different from those in the statute, the indictment was insufficient. We agree with the district court that this argument is frivolous and reject it. (Slip Op. at 5.)

Orange's fifth and final claim for relief-ineffective assistance of counsel-is based solely on his attorney's failure to raise the foregoing four issues at trial or on appeal. Because we find no merit in any of those claims, counsel was not ineffective for failing to raise them. We thus reject Orange's ineffective assistance claim.

For the foregoing reasons, we GRANT Orange's application to proceed in forma pauperis on appeal, but we DENY Orange's request for a COA and DISMISS his appeal.

ENTERED FOR THE COURT

David M. Ebel Circuit Judge

OCT 18 2002

¶2002-5556

UNITED STATES OF AMERICA, APPELLEE v. Norman J. GALLANT, DEFENDANT-APPELLANT. United States Court of Appeals, First Circuit, (CA1) No. 01-2679, Oct. 15, 2002. District Court affirmed in part and remanded in part. Years 1995, 1996, 1997, 1998, 1999. Decision for Taxpayer in part and for Govt. in part.

1. Tax crimes—tax evasion—U.S. Sentencing Guidelines—downward departure—restitution. Taxpayer's sentence for tax evasion and other offenses relating to his fraudulent receipt of Social Security and other govt. funds over 10-year period was remanded: district court's denial of additional acceptance of responsibility reduction was improper where court had clearly found, in granting him 2-level reduction, that he had accepted responsibility; and record showed he complied with conditions for 3d-level reduction. Also, taxpayer's failure to timely object to court's decision didn't result in waiver where he had continually asserted his eligibility for additional reduction throughout trial; nothing in govt.'s litigation position put him on notice that he might receive only 2-level reduction; issue arose only after court ruled contrary to *both* parties' trial positions; and nothing in F.R.Crim.P. required post-sentence objections. But, order requiring that taxpayer sell his assets to make restitution as part of supervised release was proper. *Reference:* United States Tax Reporter ¶73,446.516(3); 73,446.516(55).

Jane Elizabeth Lee for appellant.
Karen L. Goodwin, Assistant U.S. Attorney, with whom Michael J. Sullivan, U.S. Attorney, was on brief, for appellee.

United States Court of Appeals, First Circuit,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Michael A. Ponsor, U.S. District Judge]

Before BOUDIN, Chief Judge, TORRUELLA and LYNCH, Circuit Judges.

LYNCH, Circuit Judge.

[1] Defendant pleaded guilty to mail fraud, fraudulent receipt of Social Security benefits, and tax evasion, and was sentenced by the United States District Court for the District of Massachusetts, Michael A. Ponsor, J., and he appealed sentence. The Court of Appeals, Lynch, Circuit Judge, held that: (1) district court lacked discretion to deny an additional one-level reduction where the defendant was found to have accepted responsibility, so as to be entitled to a two-level reduction, and had complied with the conditions specified in the guideline for the additional one-level reduction; (2) defendant did not forfeit his objection to failure to give him an additional one-level reduction; and (3) condition of supervised release, that defendant sell such of his assets as necessary to permit restitution was not improper as being effectively an asset forfeiture without compliance with the procedures for obtaining a forfeiture order.

Remanded for resentencing.

The principal issue in this case is whether the plaintiff forfeited his objection to an error that might but need not have resulted in a shorter sentence. On appeal, the defendant, Norman Gallant, objects to the denial of an additional one-level downward adjustment for acceptance of responsibility under § 3E1.1(b) of the United States Sentencing Guidelines, after the district court had granted a two-level downward adjustment. The government concedes that the court erred, but nonetheless argues that there should be no relief because the issue was not preserved. Forfeited sentencing objections are reviewed for plain error and there is no plain error, the government argues, because Gallant's 24-month sentence falls within the guidelines sentencing range that would have applied had the district court given Gallant the additional one-level adjustment.

Though the government's reasoning is not implausible, we find that Gallant did not forfeit his objection. The defendant

consistently argued that he was entitled to a three-level reduction, the government warned the district court against its eventual ruling, the ruling was contrary to both parties' positions, and the sentencing judge did not invite further arguments.

Gallant also challenges the imposition of an order that, as a special condition of supervised release, he transfer to the government all property necessary to make restitution. Gallant argues that there was no criminal forfeiture provision in the information or indictment, and that the court's order is best characterized as requiring forfeiture. This argument fails. The order does not amount to an order of forfeiture. Rather, it was a reasonable use of the court's authority to effectuate restitution.

I.

Norman Gallant bilked the U.S. government out of roughly $300,000 over a decade. He waived indictment on May 21, 2001, and was charged by information. He timely pled guilty on two counts of mail fraud, 18 U.S.C. § 1341 (2000), one count of fraudulent receipt of Social Security benefits, 42 U.S.C. § 408(a)(4) (2000), and one count of tax evasion, 26 U.S.C. § 7201 (2000). Between August 1992 and October 2000, Gallant fraudulently obtained $29,130 in Section 8 rental subsidies from the Department of Housing and Urban Development. Between January 1995 and April 2001, he fraudulently secured $102,021 in Medicaid funds for a personal care attendant. Between July 1992 and February 2001, he fraudulently obtained $162,000 in Social Security disability benefits. The information had charged Gallant with cheating on his 1999 income taxes by a sum in excess of $11,000; Gallant pled guilty to committing tax fraud totaling between $23,500 and $40,000 over tax years 1995 to 1999. As part of the plea, the parties agreed that the total loss to the government was between $200,000 and $350,000.

In the plea agreement the government agreed to recommend a three-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1 (2002),[1] provided defendant met five conditions, three of which are pertinent here. Conditions (3), (4), and (5) stated that Gallant:

> (3) acknowledges that he is the sole effective owner and has sole effective control of the assets owned by the Macantosh Realty Trust, the Serenity Equity Trust and the Serenity Equity Trust II, and that all such assets are available for restitution; (4) takes all necessary steps to make such assets available for restitution as the Court may order; and (5) makes an initial payment of $15,000 in restitution to the clerk of the court prior to sentencing.

The Pre-Sentence Report (PSR) originally recommended that Gallant receive a three-level reduction if he complied with the government's conditions. The government responded to the PSR, objecting that no three-level reduction should be granted for acceptance of responsibility because Gallant had not yet satisfied the terms of the agreement. Gallant had no objection, of course, to the recommended three-level reduction.

After reviewing the government's objections, the probation officer prepared an Addendum to the PSR revising his recommendations as follows:

> (25) The defendant admitted his involvement in the instant offense and is being granted acceptance of responsibility. The offense level is reduced two (2) levels per U.S.S.G. § 3E1.1(a) as he has clearly demonstrated acceptance of responsibility for his offense.

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[1] U.S.S.G. § 3E1.1 provides:

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

(1) timely providing complete information to the government concerning his own involvement in the offense; or

(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense level by 1 additional level.

(25a) Per U.S.S.G. § 3E1.1(b), if the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps: (1) Timely providing complete information to the government concerning his own involvement in the offense; or (2) Timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the Court to allocate its resources efficiently, decrease the offense level by 1 additional level. As of this date, the defendant has not satisfied this criteria.

(emphasis added).

Although the PSR correctly stated that there are two alternate conditions for a further one-level reduction under U.S.S.G. § 3E1.1(b), it also said that "this criteria" had not been met. The PSR was incorrect--there has never been any question that Gallant had met the second condition it described,[2] and the government never argued that defendant had not "timely notified the authorities of his intention to enter a plea of guilty." The PSR Adden-dum did not alert the court to the relation-ship between the granting of a two-level reduction and the granting of the third level.

Gallant's subsequent Sentencing Memorandum to the district court argued that he was entitled to a three-level reduction.[3] The government's position was that Gallant was not entitled to any reduction for acceptance of responsibility. If he was not entitled to a two-level reduction because he had not assisted the authorities, then he was ineligible for a third-level reduction. No party focused on the possibility that the court would deny a third-level reduction if the Court granted a two-level reduction. It simply was not an issue.

That was the posture in which the parties entered the sentencing hearing, and which they articulated at the hearing. The government continued to press its position that Gallant should receive no reduction for acceptance of responsibility. Its basis was that Gallant had not assisted the government: he had not disclosed all trust assets (he claimed a boat allegedly owned by one of the trusts had been sold to another party) and he had been unwilling to sell immediately the condominiums not occupied by himself or his sons to meet his restitution obligation. Nonetheless, the government raised the issue of a third-level reduction. The government's position at sentencing was that the defendant "may well have satisfied the timeliness and the timely plea, which you need for the third point, but he hasn't satisfied what he needs to do for the first two points." Gallant responded that he had satisfied the conditions necessary for the first two points. He added that he was willing to make restitution, but did not think his assets should all be liquidated immediately.

The court stated that Gallant's assets were ill-gotten and should be liquidated immediately, so that restitution could be made promptly, rather than being drawn out through the probation period. Concerned by Gallant's temporizing about restitution, the court said:

> I'm puzzled ... about whether it's appropriate for me to give somebody the benefit of acceptance of responsibility when there isn't an acknowledgment that there is any immediate obligation to return or pay back or reimburse monies which were wrongfully obtained and that's the struggle that I'm having.

At the end of the hearing the court then solved its puzzling dilemma with a compromise: the court granted two levels for acceptance of responsibility but denied a third. The court explained:

> As far as the three-level reduction goes, I think it is somewhat artificial but I think that a two point, not a three point,

[2] It is possible the PSR was worded clumsily and meant only to say the first criterion was not met.

[3] In his sentencing memorandum, Gallant argued he had made "timely admission of the relevant conduct underlying his conviction." This is not quite the same as saying he had timely notified the prosecutor of his intent to plead guilty under U.S.S.G. § 3E1.1(b)(2). Cf. United States v. Hines, 196 F.3d 270, 273 (1st Cir.1999) (absent unusual circumstances or an agreement stating otherwise, defendant who communicates intent to plead guilty does not normally qualify for one-level reduction under U.S.S.G. § 3E1.1(b)(2) unless he intends to plead unconditionally to all counts of the indictment). But there was no real dispute on the point. In this sense Gallant replied to the PSR Addendum.

reduction is appropriate. I think the level 16 offense level is where this case should be.

I recognize in doing that I'm acknowledging the somewhat unusual facts of this case, but I do not think that the defendant has made the sort of recognition of fault and the intent to correct that fault which is within his power that would justify the full three-level reduction.

I have considered and frankly come close to the decision of not allowing any reduction whatsoever for acceptance of responsibility. But I have in mind that the defendant did offer his pleas of guilty, did save the government the necessity of going to trial with this case and is entitled to some benefit for having done that, even though what I would call the moral aspect of acceptance of responsibility seems to me to be lacking to some degree here.

Then the court promptly moved on to the next sentencing issue without entertaining any objections to its ruling. Neither party interrupted the court to ask it to revisit its denial of the third point on the grounds that, by its decision to give Gallant two points, the court had inherently determined that Gallant must receive three points. It is this "if two levels, then necessarily three levels" rationale which Gallant argues on appeal.

The court also ordered Gallant to pay a $50,000 fine and to make restitution in the amounts of $29,130 to HUD, $102,021 to Medicaid, and $162,000 to the Social Security Administration. The court ordered the restitution payable "immediately or according to a court-ordered repayment schedule." Along with the standard conditions of supervised release, the court ordered, as a special condition, that the condominium units be surrendered to the government and sold for cash during the period of supervised release. The court ordered Gallant to pay the balance of the restitution according to a court-ordered repayment schedule, and stated:

[T]he defendant will execute all necessary papers permitting the timely sale of properties that are owned by him either directly or through others to permit restitution.

The execution of these papers will include execution of any papers necessary to transfer the sailboat referred to in the pre-sentence report to the government for sale as part of the restitution.

The defendant takes the position that the sailboat no longer belongs to him, but to the extent it's necessary for him to execute any documents to assist the government in obtaining that sailboat if it is available, he will do so.

The court also found that the properties held in the three trusts (the Macantosh Realty Trust, the Serenity Equity Trust, and the Serenity Equity Trust II) all belonged to the defendant, so the government was free to place liens on the properties.

II.

Acceptance of Responsibility Reductions

A district court lacks discretion to deny the additional one-level reduction if the defendant is found to have accepted responsibility under U.S.S.G. § 3E1.1(a) and has complied with the conditions specified in U.S.S.G. § 3E1.1(b)(2). United States v. Marroquin, 136 F.3d 220, 223 (1st Cir.1998). The government concedes it was error not to give a three-level reduction, because the court found Gallant was entitled to a two-level reduction and he had satisfied the criteria for the third level. The government, however, argues that Gallant has forfeited the issue by failing to raise it in the trial court. As a result, the government contends, this court should apply a plain error test, and Gallant does not meet the test.[4]

[4] In United States v. Olano, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), and Johnson v. United States, 520 U.S. 461, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997), the Supreme Court set forth a now-familiar four-step analysis to determine whether a mistake constitutes plain error under Fed.R.Crim.P. 52(b). "[T]here must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Johnson, 520 U.S. at 467 (internal quotations omitted); see Olano, 507 U.S. at 732. See generally United States v. Gandia-Maysonet, 227 F.3d 1, 5 (1st Cir.2000) (contrasting the harmless error test, which prevails when an issue has been preserved for appeal, with the plain error test, which applies when an issue has been forfeited).

The defendant argues he did not forfeit the issue. In the alternative, he says, his substantial rights were affected because he was given a total offense level of 16, with a GSR of 21 to 27 months imprisonment. The 24-month sentence he received was within the GSR of 18 to 24 months that would have applied if the court had granted the additional one-level reduction. We do not consider this alternative "plain error" argument because Gallant did not forfeit his objection.

The issue of when a forfeiture of an objection occurs comes up in many different contexts. The issue is bounded on both ends by clear and firm rules in particular settings. If a defendant, for example, fails to timely object to a question put to a witness, then he has forfeited his evidentiary objection. If he objects and states the nature of his evidentiary objection, he has preserved it. Between these clear poles, the matter of what constitutes forfeiture is more one of degree and judgment by the appellate court.

The nature of the issue on review influences the outcome of the forfeiture analysis. For example, this circuit is notably rigorous in requiring a party unhappy with a trial court's jury instruction to promptly state the precise objection after the instruction has been given. See Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 944 (1st Cir.1995) (a party must not only identify the error in the jury instruction but also explain how the judge can correct it); Cyr v. B. Offen & Co., 501 F.2d 1145, 1155 (1st Cir.1974) (quoting Palmer v. Hoffman, 318 U.S. 109, 119, 63 S.Ct. 477, 87 L.Ed. 645 (1943)) (objection to the jury instruction "must be sufficiently specific to bring into focus the precise nature of the alleged error"). The requirement for a post-instruction objection is set forth in the federal rules, Fed.R.Crim.P. 30, and counsel are on clear notice of the requirement. Counsel must make the post-instruction objection even if she has objected earlier. This rule gives the trial court an opportunity to rectify any error in the instruction before the jury begins to deliberate. See Golden v. United States, 318 F.2d 357, 360 (1st Cir.1963).

There is no such equivalent requirement for counsel to make an objection after an evidentiary ruling when an earlier timely objection was made. Nor is there a requirement that an objection be made before the grounds for the objection reasonably should have been known to the objector: the defense is "not required to anticipate the government's line of questioning in order for an objection to be timely." U.S. v. Meserve, 271 F.3d 314, 323 (1st Cir.2001). Indeed, under Fed.R.Evid. 103(a)(1) a party may oppose the admission of testimony through either a timely objection or a motion to strike. The operative principle is that the objection need not be made before the grounds are reasonably known.

Our case concerns neither jury instructions nor evidentiary issues. It concerns sentencing and whether the continued insistence of Gallant's counsel that Gallant was entitled to a three-level reduction was sufficient, although Gallant's counsel did not present the precise argument made here. Context is important. This is not a situation in which the government took the position contrary to defendant on the precise argument and the defendant failed to protest. To the contrary, the government said that if Gallant was entitled to the two-level reduction, most likely he was entitled to a third level. Gallant obviously would not object to this part of the government's position. Nothing in the government's position at any time put defendant on notice that he might receive two levels but not three. Although the Addendum to the PSR may be thought to have provided some notice, neither party adopted its legal conclusions and both argued implicitly against them.[5] Further, Gallant consistently had said he was entitled to a three-level reduction. Gallant had no real reason to think this was at issue until after the court ruled. We generally do not require objections to

[5] The district judge may rely on factual assertions in a PSR that are not rebutted by the defendant, United States v. Torres-Otero, 232 F.3d 24, 32–33 (1st Cir.2000), but we would be reluctant to permit such reliance on legal conclusions, particularly ones that neither party endorses. Fed.R.Crim.P. 32(b)(6)(D) provides only that the district court may, absent objection, adopt the findings of fact in the PSR, as did occur here.

be made to hypothetical outcomes which neither party anticipated.

To support its forfeiture argument, the government relies heavily on United States v. Keppler, 2 F.3d 21 (2nd Cir.1993). That case is easily distinguished. Far from conveying that the sentencing reduction for acceptance of responsibility was an all-or-nothing proposition, the government there argued at the sentencing hearing that the court should deny "all or part" of the three-level reduction. Id. at 22–23 (emphasis added). Moreover, when the court granted a two but not a three-level reduction, the court specifically asked for objections and defense counsel had none.[6] Id. at 23.

The government also points to our case law saying that a defendant cannot present one legal argument at the trial court and another on appeal. See United States v. Lilly, 13 F.3d 15, 17–18 (1st Cir.1994). That is quite so, but even that doctrine has its limits. The doctrine has not been applied where the defendant could not reasonably have anticipated the issue would arise until after the court had ruled in a way contrary to both parties' positions.

The government's argument that Gallant forfeited the issue then depends on the premise that a criminal defendant must state objections to the imposition of a particular sentence after the sentence has been announced by the court--even when the ruling has not been advocated by any of the parties and the court does not invite further arguments. Here, both parties had together argued a position before sentencing which would, if followed, have obviated the error.

The government's argument that a post-sentence objection is required is not implausible. If defense counsel had been quick enough after the ruling to object, even absent any invitation from the court, this problem might have been avoided.[7] Considerations of judicial economy may be thought to support a requirement of objection after a sentence is given, even to unanticipated issues. But judicial economy works two ways. There is also a need for finality and few trial judges would warm to a rule which requires continued argument after the court gives its sentence. Further, unlike other areas, there is no Federal Rule of Criminal Procedure giving advance notice to counsel of a requirement to make post-sentence objections. Indeed, Fed.R.Crim.P. 32(c)(3) provides that the court entertain argument from both defendant's counsel and the government "before imposing sentence." There is also the interest, expressed in other contexts, of avoiding judicial proceedings conducted through surprise, sometimes called "trial by ambush." Lawyers should have fair notice and an opportunity to prepare.[8] On balance, given the facts here, we think it simply would be unfair and unwise as a matter of policy to hold that Gallant forfeited the argument. Accordingly, we will remand to the district court for resentencing in light of the error.

To its credit, the government has simplified matters by agreeing that there would be no claim by it on remand that the defendant is not entitled to any credit or acceptance of responsibility. See generally United States v. Ticchiarelli, 171 F.3d 24, 29–30 (1st Cir.1999). The district court is free on remand to determine where within the applicable GSR the defendant should be resentenced. It is not a foregone conclusion that on remand the appropriate sentence will be 21 months rather than 24 months.

Restitution

Gallant also challenges the order requiring, as a special condition of supervised release, that he sell such of his assets as

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6 It is also unclear whether defendant in that case requested a three-point reduction prior to or during the sentencing hearing. See Keppler, 2 F.3d at 22–23.

7 Counsel could also have sought a correction of the sentence under Fed.R.Crim.P. 35(c).

8 Burns v. United States, 501 U.S. 129, 111 S.Ct. 2182, 115 L.Ed.2d 123 (1991), and its First Circuit progeny affirm the crucial importance of providing notice of otherwise unexpected sentencing rulings. Burns states, "Congress did not intend district courts to depart from the [Sentencing] Guidelines sua sponte without first affording notice to the parties." Id. at 136. United States v. Walker, 234 F.3d 780 (1st Cir.2000), reconciles Burns and a case distinguishing Burns, United States v. Canada, 960 F.2d 263 (1st Cir.1992), by observing that "[b]oth are premised on defendant's having adequate notice of the facts and the law." Walker, 234 F.3d at 786. Indeed, First Circuit cases limiting Burns consistently involve fact patterns where the defendant had constructive notice. See United States v. Sharpton, 252 F.3d 536, 543 & n. 8 (1st Cir.2001); United States v. Brown, 235 F.3d 2, 4–5 (1st Cir.2000); Canada, 960 F.2d at 266–67 & n. 4.

necessary to permit restitution. Gallant argues that this was effectively an asset forfeiture and that the government complied with none of the procedures for obtaining a forfeiture order. See Fed.R.Crim.P. 7(c)(2), 32.2(a); see also United States v. Loe, 248 F.3d 449, 464 [87 AFTR 2d 2001-1739] (5th Cir.2001).

This argument mischaracterizes the order. The order merely effectuates the court's power to order restitution under 18 U.S.C. §§ 3663–3664 and U.S.S.G. § 5D1.3(a)(6). It is true that Gallant's assets are to be surrendered to the government and sold for cash. The government here wears two hats. Several agencies of the government were defrauded by Gallant and are entitled to restitution. Another branch of government, the prosecution, has been authorized to sell the assets in order to make that restitution. This is not a case of asset forfeiture at all and the order was well within the district court's discretion over conditions of supervised release. See United States v. Phaneuf, 91 F.3d 255, 262–63 (1st Cir.1996). We bypass the government's contention that this argument was not preserved either, and affirm the restitution order on the merits.

For the reasons stated above, we remand for resentencing proceedings consistent with this opinion. So ordered.

¶2002-5557

Richard PINTO, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Illinois, (DC IL) No. 01 C 5308, Oct. 16, 2002. Years 1991, 1993, 1994. Decision for Govt.

1. 100% penalty for failure to pay over trust fund taxes—amount of liability—payment allocation—IRS's reallocation authority. Pres./owner's liability for amount of remaining IRC §6672 penalty for his solely owned corp.'s unpaid trust fund taxes was upheld on summary judgment: govt.'s reallocation of *undesignated* payments taxpayer's related S corp. made on delinquent corp.'s trust fund liabilities was proper, even though reallocation effectively reinstated taxpayer's liability after IRS had already reduced his account to zero. Case precedent established govt.'s right to allocate and reallocate undesignated payments; IRS's reducing of taxpayer's account to zero didn't amount to extinguishment of his liability; and reallocation didn't affect or change taxpayer's total liability. Also, detrimental reliance claim was rejected. *Reference:* United States Tax Reporter ¶66,725.01(100). IRC §6672.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION,

MEMORANDUM OPINION AND ORDER

Elaine E. Bucklo United States District Judge

Richard Pinto was the owner of Pinto Brothers Construction, Inc. (''Pinto Brothers''). Pinto Brothers failed to pay employment taxes out of money withheld from employee wages and was assessed hundreds of thousands of dollars in trust fund tax penalties by the Internal Revenue Service (''IRS''). Richard Pinto was assessed personal liability as a ''responsible person'' for the trust fund tax penalty under 26 U.S.C. § 6672 in the amount of $214,702.77. Mr. Pinto is also the 60 percent owner of a company called Pinto Construction Group, Inc. (''Pinto Construction''), which has made payments on the trust fund liability of Pinto Brothers. Believing that he has overpaid on his individual trust fund liability, Mr. Pinto sues the United States for an accounting and a refund of an unspecified amount. The United States filed an answer and counterclaim for a trust fund liability balance of $39,464.11. The United States moves for summary judgment, and Mr. Pinto filed a cross-motion for summary judgment. I grant the government's motion and deny Mr. Pinto's motion.

I.

[1] Both the government and Mr. Pinto move for summary judgment, which

is proper only when the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. 'Fed. R. Civ. P. 56(c). In determining whether a genuine issue of material fact exists, I must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). On cross-motions for summary judgment, I give separate consideration to the evidence of each party and the inferences to be drawn from it. *See Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 692 (7th Cir. 1998).

However, I dispose of Mr. Pinto's motion without reaching its merits. Local General Rule 56.1(a) requires any party moving for summary judgment to submit "a statement of material facts as to which the moving party contends there is no genuine issue and that entitle the moving party to a judgment as a matter of law." The statement of material facts "shall consist of short numbered paragraphs, including within each paragraph specific references to the affidavits, parts of the record, and other supporting materials relied upon to support the facts set forth in that paragraph. Failure to submit such a statement constitutes grounds for denial of the motion." *Id.* Failure to comply with the local rules is not merely a "harmless technicality," but can be a "fatal" mistake. *See Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 924 (7th Cir. 1994). The Seventh Circuit has repeatedly upheld the strict application of Local Rule 56.1. *See Servin v. GATX Logistics, Inc.*, 187 F.R.D. 561, 562–63. (N.D. Ill. 1999) (Gettleman, J.) (citing cases).

Although Mr. Pinto includes a statement of facts in his motion that consists of numbered paragraphs, and he attaches evidence to it, he does not provide any citations to the record in the statement of facts. The Rule 56.1(a) statement is a "roadmap" to these facts, without which I "should not have to proceed further, regardless of how readily [I] might be able to distill the relevant information from the record on [my] own." *Waldridge*, 24 F.3d at 923. Mr. Pinto's statement of facts does not comply with Rule 56.1, so his motion is denied. *See Servin*, 187 F.R.D. at 563; *see also Prudential Ins. Co. of America v. Tomaszek*, No. 90 C 6892, 1992 WL 26734, at 2 (N.D. Ill. Feb. 7, 1992) (Shadur, J.) (noting that predecessor to Rule 56.1(a) "expressly permits the *denial* of a summary judgment motion for non-compliance with its terms").

II.

Employers are required to withhold federal taxes from employee wages in trust for the United States government. 26 U.S.C §§ 3102(a), 3402(a). These taxes are commonly referred to as "trust fund taxes." *See United States v. Energy Resources Co., Inc.*, 495 U.S. 545, 546–47 [65 AFTR 2d 90-1078] (1990). If an employer fails to pay trust fund taxes, § 6672 of the Internal Revenue Code, known as the "responsible person penalty provision," *see Buffalow v. United States*, 109 F.3d 570, 573 [79 AFTR 2d 97-1540] (9th Cir. 1997), allows the government to collect a sum equal to the amount owed "directly from the officers or employees of the employer who are responsible for collecting the tax." *Energy Resources*, 495 U.S. at 547; 26 U.S.C. § 6672(a).

Richard Pinto was the president and 100 percent owner of Pinto Brothers. Pinto Brothers failed to pay trust fund taxes for, *inter alia*, the second quarter of 1991 and all four quarters of 1994. When Pinto Brothers went out of business, it assigned its assets for the benefit of its creditors. Eight days before the scheduled sale of assets in June 1994, Mr. Pinto formed a new business, Pinto Construction, of which he is a 60 percent owner and his wife, Doris Pinto, is a 40 percent owner. The government says that the assets of Pinto Brothers were assigned to Pinto Construction, based on a statement of intent to assign the assets to Mrs. Pinto in an IRS report. Mr. Pinto denies that Pinto Construction is the assignee of Pinto Brothers (though he pro-

vides no evidence to support the denial),[1] but any dispute is immaterial for reasons I explain below.

On August 6, 1995, Mr. Pinto was assessed personal liability in the amount of $214,702.77[2] for the trust fund tax penalties of Pinto Brothers from the third and fourth quarters of 1993 as a "responsible person" under § 6672. Beginning in August 1994, Pinto Construction made monthly payments of $5,000 toward the trust fund tax liability of Pinto Brothers. Each check from Pinto Construction bore the following endorsement:

> We hereby tender payment of $5,000.00 and specifically demand that such funds be applied to the trust fund tax liability of Pinto Bros. Construction, Inc., FEIN #36-3641466.

Def. Ex. 5. None of the $5,000 payments was designated for a particular quarter of trust fund tax liability. Pinto Construction made a total of thirty-seven monthly payments of $5,000.[3] The IRS allocated these payments among all four quarters of tax liability for 1993. Mr. Pinto's civil penalty account, for his personal liability, received cross-reference credit for the twenty-nine monthly payments made after his assessment on April 6, 1995. A total of $124,500 of the monthly payments were originally allocated to the third and fourth quarters of 1993. Def. Ex. 5, ¶ 14.

Mr. Pinto also made payments personally, both voluntarily and in response to a levy, against his civil liability in the amount of $143,238.66. Def. Ex. 5, ¶ 10. The government does not say whether Mr. Pinto specifically designated any of his individual payments, but all of them were allocated to the trust fund tax liability for the fourth quarter of 1993, and Mr. Pinto does not object to this allocation.

As a result of the individual payments by Mr. Pinto and the cross-referenced payments by Pinto Construction, the balance of Mr. Pinto's individual civil liability was reduced to zero. *Id.* ¶ 15. Mr. Pinto claims that he has overpaid his personal civil liability and seeks a refund. The government admits that, when the IRS assessed the $214,702.77 penalty on Mr. Pinto on April 6, 1995, it failed to account for $32,000 of payments toward the liability for the third and fourth quarters of 1993 made by Pinto Construction before the individual assessment. Thus the government says that the assessment of personal liability on April 6, 1995, ought to have been for $182,702.71.[4]

The total payments by Mr. Pinto (his individual payments and the cross-referenced payments as originally allocated) amount to $267,738.66--$53,035.89 more than the original assessment of $214,702.77 and $85,035.95 more than the corrected assessment of $182,702.71.

Pinto Construction stopped making the $5,000 monthly payments after Mr. Pinto's individual civil liability was reduced to zero. The government claims that it is entitled now to reallocate the undesignated monthly payments to Pinto Brothers' trust fund liability to the first two quarters of 1993, for which Mr. Pinto was not assessed a civil penalty, to maximize the collectibility of the trust fund tax liability. By the government's calculations, then, if the $124,500 originally allocated to the third and fourth quarters of 1993 is reallocated to the first and second quarters of 1993, the total payments against Mr. Pinto's individual civil liability are $143,238.66, leaving a $39,464.05[5] shortfall in Mr. Pinto's civil liability for the third and fourth quarters of 1993.

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[1] The failure to point to evidence in the record to support a denial of the defendant's statement of fact is deemed an admission. *See Waldridge*, 24 F.3d at 922; Local Rule 56.1(b)(3)(B).

[2] The original notice of proposed assessment was for $223,539.58 $8,836.81 for the second quarter of 1991, $137,043.18 for the third quarter of 1994, and $77,659.59 (the government mistakenly transcribes this amount as $77,959.59 in its statement of facts, ¶ 1) for the fourth quarter of 1994--but the 1991 penalty was immediately abated because it had been paid in full. *See* Gov't Ex. 1.

[3] The chart attached to the government's motion for summary judgment showed only thirty-six payments, but that appears to have been the result of a photocopying error that cut off the last line of the page omitted check # 11152. In reply, the government submits a complete copy of the chart, which shows thirty-seven payments and accounts for check # 11152.

[4] Actually, the assessment ought to have been for $182,702.77, or $32,000 less than $214,702.77, which was the original amount assessed. Because I draw inferences against the government on its motion, I give Mr. Pinto the benefit of the $.06 discrepancy.

[5] The government claims that the shortfall is $39,464.11, but as I noted above, I give Mr. Pinto the benefit of the government's error in calculation.

III.

Section 6672 expresses a congressional intent to allow collection of trust fund taxes, and the IRS has a judicially sanctioned policy of maximizing collection. *See United States v. Schroeder*, 900 F.2d 1144, 1146 n.1 [65 AFTR 2d 90-998] (7th Cir. 1990). When a taxpayer submits a voluntary payment, he may designate the particular liability to which the payment should be applied, *Davis v. United States*, 961 F.2d 867, 878 [69 AFTR 2d 92-1136] (9th Cir. 1992), but when a taxpayer does not designate the particular liability, the IRS may allocate the payment as it sees fit, *id.*; *Schroeder*, 900 F.2d AT 1149; *Sotir v. United States*, 978 F.2d 29, 30 [71 AFTR 2d 93-314] (1st Cir. 1992).

In *Davis*, the plaintiff was the president and major shareholder of a company that owed both trust fund taxes and non-trust fund taxes. The company began to pay the delinquent taxes on an installment basis, but did not designate to which quarter of liability the payments should apply. 961 F.2d at 870. Davis was assessed an individual civil penalty for the trust fund taxes, but prior to the assessment, the IRS discovered that the company lacked any assets to satisfy the non-trust fund liability. *Id.* The IRS reallocated funds that were originally applied to the trust fund taxes to cover the company's non-trust fund liability. *Id.* The effect of the reallocation was to increase the amount of the trust fund civil penalty assessed against Davis from $3,000 to nearly $19,000. *Id.* at 871.

The Ninth Circuit held that the reallocation was permissible, holding that "straitjacketing the IRS into its initial allocation decisions would be inconsistent with the goal of maximizing tax revenues .... Adjustments of allocations should be permitted as new information comes to the IRS." 961 F.2d at 879. The court noted that Davis could not show that he was injured by the re-allocation because, "had the IRS originally allocated the payments along their current lines, his penalty would have been identical to what it is now. The reallocation thus has not increased his penalty beyond that for which he was eligible in the first instance." *Id.* Finally, the court held that Davis could not demonstrate detrimental reliance because he waived any interest in how the payments were allocated by failing to designate them. *Id.* In a similar case, another court has held that the IRS may subsequently reallocate undesignated payments to a different quarter even though it has the effect of increasing the individual trust fund liability of a § 6672 "responsible person." *See Thomas v. United States*, No. 96-1488, 1998 WL 892617, at 4–6 (C.D. Ill. Sept. 16, 1998) (Mihm, C.J.). In *Thomas*, a third party made payments against a corporation's trust fund liability, but did not designate to which quarters the payments should apply. *Id.* at 6. The court held that because "the solvency of the debtors and the total tax liability changed in the present case, the IRS should have been free to alter its initial allocation to maximize its revenues and increase the collectibility of [the § 6672 responsible person's] debts." *Id.* Because a third party made the payments, the court held that it was reasonable to reallocate them to quarters in which the third party did not share liability with the § 6672 responsible person. *Id.*

Mr. Pinto attempts to distinguish *Davis* and *Thomas* by claiming that Pinto Construction was not an assignee of Pinto Brothers. He does not support this claim with any evidence, but any dispute on this question is immaterial. The issue in both *Thomas* and *Davis* was the reallocation of undesignated payments made against a company's liability generally to increase the amount that could be collected from a § 6672 responsible person; the identity of the payor was irrelevant. Mr. Pinto also argues that there was no new information about collectibility here, as there was in *Thomas* and *Davis*. However, Pinto Construction stopped making monthly payments against the trust fund liability of Pinto Brothers once Mr. Pinto believed that his personal liability was extinguished; even construing this fact most favorably to Mr. Pinto, this is new information about the ability to collect on Pinto Brothers' liability for the first two quarters of 1993, for

which Mr. Pinto did not share § 6672 individual liability.

Relying in part on a provision of the Internal Revenue Manual, Mr. Pinto argues that the IRS ought to have allocated Pinto Brothers' federal tax deposits "pro rata" between trust fund tax liability and non-trust fund tax liability, and that he would have been assessed approximately $30,000 less in trust fund liability if the IRS had done so. There is no evidence in the record that any payments or federal tax deposits were applied to any non-trust fund liability. In fact, there is no evidence of federal tax deposits at all, and Mr. Pinto admits that all thirty-seven undesignated monthly payments were allocated to the trust fund liability of Pinto Brothers. *See* Gov't Ex. 5, ¶ 16 (Pinto Brothers' first and second quarter liability for 1993 was trust fund liability). Even if there had been such an allocation, there is no support for *mandatory* pro-rata apportionment. *Cf. Neier v. United States*, 127 B.R. 669, 673 [68 AFTR 2d 91-5122] (D. Kan. 1991) (noting that the parties agreed that payroll tax deposits should be allocated proportionally to trust fund and non-trust fund taxes); *Notaro v. United States*, No. 92 C 0429, 1992 WL 396444, at 2 [71 AFTR 2d 93-659] (N.D. Ill. Dec. 23, 1992) (Hart, J.) ("[P]rovisions of the IRM [Internal Revenue Manual] are not enforceable against the government."). Finally, Mr. Pinto provides no documentation to support his claim that his assessment would have been lower by $30,000. Nonetheless, the government admits that its original assessment of $214,702.77 was off by $32,000 because it failed to account for payments by Pinto Construction prior to the date of the assessment against Mr. Pinto. Mr. Pinto admits that $182,702.71 is the proper adjusted calculation. See Pl's Reply at 9.

Mr. Pinto acknowledges that the government has broad power to reallocate undesignated payments, and he admits that the monthly $5,000 payments by Pinto Construction were undesignated. He argues, however, that the IRS could not reallocate payments *after* Mr. Pinto had paid his personal liability in full and the tax lien against him had been released. In a footnote in *Davis*, the Ninth Circuit stated that it "need not decide whether limits on the IRS's reallocation authority would be appropriate where the taxpayer's voluntary payment completely satisfies an existing tax liability, as opposed to simply reducing it." *Davis*, 961 F.2d at 879 n.4 (citing *Kelley v. United States*, 30 F.2d 193 [7 AFTR 8412] (9th Cir. 1929); *Brookhurst, Inc. v. United States*, 931 F.2d 554 [67 AFTR 2d 91-1012] (9th Cir. 1991))[6] Mr. Pinto argues that this is such a case, and that I must decide the limits of the IRS's reallocation power left open by the Ninth Circuit's footnote. I need not reach the particular question posed by the Ninth Circuit, however, because Mr. Pinto admits that the payments that he made personally against his civil liability were both voluntary and involuntary, in response to a levy. *See* Gov't Ex. 5, ¶ 10.

In any event, I do not find that it is beyond the limits of the government's authority to reallocate undesignated payments to allow the reallocation here. First, it is the taxpayer's designation that extinguishes an assessment, not the government's allocation. *See Thomas*, 1998 WL 892617, at 4; *Buffalow*, 109 F.3d at 574. Although Mr. Pinto may have designated the payments he made personally, there is no question that the payments made by Pinto Construction that were cross-referenced to his personal liability were not designated to a particular quarter of liability. Mr. Pinto argues that, because Pinto Construction was an S-corporation, in which tax liability "passes through" the corporation to the individual, the payments by Pinto Construction were "in effect, the equivalent of a payment directly from Richard Pinto personally." Pl's Mem. at 8. However, even if the thirty-seven monthly payments by Pinto Construction effectively came out of Mr. Pinto's pocket, they were not clearly

[6] Neither case cited by the Ninth Circuit is directly on point here. In *Kelley*, the court said that "[w]hen once paid, a tax is gone, and a refund of the money does not restore it." 30 F.2d at 193 [7 AFTR 8412]. The issue there was whether there was a cause of action in equity for government recovery of an unauthorized refund; the court held that there was not, but held that there was a cause of action at law. *Id.* at 193–194. In *Brookhurst*, the question was "whether the government may *reassess* a taxpayer's tax liability, thus creating a new tax obligation," in order to recover a wrongful refund. 931 F.2d at 556 (emphasis in original).

directed to his personal liability. Mr. Pinto admits that the endorsement on each check from Pinto Construction directed that the "funds be applied to the trust fund tax liability of Pinto Bros. Construction, Inc., FEIN #36-3641446." The payments did not bear Mr. Pinto's individual Social Security number, which was the number for his personal civil liability account. *Compare* Gov't Ex. 2 (Mr. Pinto's civil liability account, identified by Social Security Number 332-60-0645) *with* Gov't Ex. 3 and 4 (trust fund liability of Pinto Brothers, identified by Federal Employer Identification Number 36-3641446). Regardless of who made the thirty-seven monthly payments, they were indisputably directed at the liability of Pinto Brothers, not of Mr. Pinto personally. Although the government admits that the balance of Mr. Pinto's personal account was reduced to zero, his personal liability was not extinguished because the payments by Pinto Construction were not designated to satisfy his personal liability.

Second as in *Davis* and *Thomas*, the reallocation does not affect Mr. Pinto's total personal liability. Because the government could originally have allocated the undesignated payments to the first and second quarters of 1993, for which Mr. Pinto was not liable, Mr. Pinto is not injured by a reallocation now. *See Davis*, 961 F.2d at 879. The total assessment against him is $182,702.71, and he is liable for the entire amount. *See* 26 U.S.C. § 6672 (allowing for penalty against individual for 100% of employer's trust fund liability). This is true regardless of Mr. Pinto's belief that he had satisfied his personal liability with a combination of personal payments and cross-reference credit for the undesignated payments by Pinto Construction.

Mr. Pinto raises for the first time in reply the argument that he relied detrimentally on the government's representation that he had satisfied his personal liability. Arguments raised for the first time in reply are waived. *See United States v. Matchopatow*, 259 F.3d 847, 851 (7th Cir. 2001). Even if I considered the argument, however, Mr. Pinto comes forward with no evidence that he actually relied to his detriment on the notion that he had paid his personal liability in full. Mr. Pinto waived any interest in the allocation of the monthly payments by Pinto Construction when he failed to designate them for the quarters on which he owed personally. *See Davis*, 961 F.2d at 879. The reallocation is proper.

IV.

Mr. Pinto's motion for summary judgment is Denied. Even if I had considered it on its merits, I conclude that, even viewing the evidence in the light most favorable to Mr. Pinto, as I have done on the government's motion, he cannot prevail. The government's motion for summary judgment is Granted. The original assessment against Mr. Pinto is reduced from $214,702.77 to $182,702.71, and the thirty-seven monthly payments by Pinto Construction have been reallocated to Pinto Brothers' trust fund liability for the first and second quarters of 1993. Mr. Pinto's remaining individual liability for the third and fourth quarters of 1993 is $39,464.05, and judgment is entered for the government in that amount. The motion to strike the affidavit of Cary R. Rosenthal is Denied as moot.

ENTER ORDER:

Elaine E. Bucklo

United States District Judge

Dated: October 16, 2002

¶2002-5558

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Danny SMITH and Harry D. Lowe, DEFENDANTS-APPELLANTS. U.S. Court of Appeals, Seventh Circuit, (CA7) No. 00-4184; 00-4214, Oct. 16, 2002. District Court affirmed. Years 1995, 1996. Decision against Taxpayers.

1. Tax crimes—failure to file returns; false statements—evidence—sentencing. Car lot owner's IRC §7206(1) conviction relating to his failure to report income from drug trafficking conspiracy was affirmed: denial of his motion to sever tax

charges from drug charges was appropriate where underlying evidence of his lavish lifestyle and receipt of substantial income exceeding that expected from car lot business was "mutually admissible" for, and probative of both tax and drug charges. Also, fact that govt. dismissed most of its original tax charges against him was simply reasonable response to taxpayer's failure to produce essential financial documents, not reflective of any intent to misuse tax charges simply to get tax-payer's asset information before jury; and remaining evidentiary and sentencing chal-lenges relating to proof of drug charges were rejected. *Reference:* United States Tax Reporter ¶72,065.01(47). IRC §7206.

United States Court of Appeals, Seventh Circuit,

Appeals from the United States District Court for the Northern District of Illinois, Western Division. No. 99 CR 50022--Philip G. Reinhard, Judge.

Before HARLINGTON WOOD, Jr., CUDAHY, and KANNE, Circuit Judges.

CUDAHY, Circuit J.

Following jury trial, defendants were convicted in the United States District Court for the Northern District of Illinois, Philip G. Reinhard, J., of conspiracy to possess with intent to distribute marijuana. One defendant was also convicted of possession with intent to distribute marijuana, distribution of marijuana, and willfully failing to file timely tax returns. Defendants appealed. The Court of Appeals, Cudahy, Circuit Judge, held that: (1) defendant charged with tax offenses was not entitled to severance of those charges; (2) limits on cross-examination did not infringe Sixth Amendment rights; (3) jury could determine drug quantity within designated ranges, rather than agreeing on precise amount; (4) court could determine drug quantity at sentencing by a preponderance of the evidence; (5) district court's findings as to quantity at sentencing were not clearly erroneous; (6) firearm enhancement was warranted; and (7) court properly calculated criminal history points.

Affirmed.

Harry Lowe and Danny Smith were convicted by a jury of several counts of conspiracy and possession of marijuana with intent to distribute, in violation of 21 U.S.C. §§ 841, 846. During the tax years in question, Lowe had substantial income, presumably from drug trafficking, which he failed to report as income, in violation of 36 U.S.C. § 7203. The defendants appeal on several grounds related to whether they were given a fair trial and whether the district court erred in determining their criminal sentences. We affirm.

I.

This appeal involves two criminal defendants and numerous alleged errors by the district court. Therefore, we must discuss the facts of the case in some detail. This narrative follows a simple chronology: the drug transactions leading to Harry Lowe's arrest, the events leading authorities to Danny Smith, the seizure of a large amount of cash from Lowe's residence (which forms the subject of his tax crimes) and the subsequent trial and sentencing proceedings.

A.

The conspiracy charges against defendants Lowe and Smith arise from several drug transactions that took place from the early to the late 1990s. They can be separated into four episodes: (1) the purchase of marijuana from Jose Rubalcava; (2) the purchase of marijuana from Gerardo Rivera via co-conspirator Edwin Rivas; (3) the purchase of marijuana in a deal Rivas brokered with suppliers in Texas and Mexico and (4) the purchase of marijuana from a supplier in Arizona.

1. Marijuana from Rubalcava.

In the early 1990s, a home remodeler named Stuart Swick, a co-conspirator and eventual prosecution witness, was working at the home of his friend Harry Lowe, a.k.a. Wayne Lowe, the owner of a used car lot. Swick and Lowe discussed one of Swick's other clients, Jose Rubalcava. Swick had observed Rubalcava moving garbage bags from the trunk of his car into his home, and Swick inferred that Rubal-

cava was trafficking in marijuana. This piqued Lowe's interest, and he asked Swick to find out if Rubalcava would be willing to sell him several pounds of marijuana, and if so, at what price. According to testimony at trial, a deal was struck for five pounds of marijuana (approximately 2.3 kilograms) for $5,000. Several weeks later, Lowe gave Swick $10,000 to arrange another deal with Rubalcava, this time for ten pounds of marijuana (about 4.6 kilograms).

During 1992, Lowe and Swick continued to make purchases from Rubalcava. Swick observed that some of the cash supplied by Lowe came from a safe buried in the dirt floor of Lowe's basement. In the summer of 1992, Lowe enlisted his cousin, Tom Lones, in a plan to make a $50,000 "down payment" on 300 pounds (140 kilograms) of marijuana from Rubalcava, never intending to pay the balance. The plan failed when Rubalcava delivered the first 90 pounds but refused to deliver any more until he was paid. Apparently, the buyers ceased dealing with Rubalcava from that time forward.

2. Marijuana purchased from Rivera.

Lowe had another opportunity to traffic in large quantities of marijuana in 1994. According to testimony at trial, the business manager for Lowe's car lot, Greg Fitzgerald, met a customer named Edwin Rivas. Fitzgerald found out that Rivas had acquaintances in the drug importation business and set up a meeting between Lowe and Rivas. At the meeting, Lowe asked Rivas if he knew of any sources for marijuana or cocaine, and Rivas contacted Gerardo Rivera on Lowe's behalf. Thereafter, Rivas acted as a courier for Lowe, exchanging large amounts of cash for marijuana. The first transaction was for 50 pounds (or 23 kilograms) at $35,000, and Rivas was usually given $300 to $400 for his efforts.

3. Marijuana from Texas and Mexico.

In the summer of 1994, Lowe asked Rivas to go to Laredo, Texas, and negotiate a deal with a Spanish-speaking marijuana source. Rivas agreed. Once in Laredo, Rivas met with two individuals and negotiated a deal to acquire 50 kilograms of marijuana for $475 per kilogram. Rivas contacted Lowe, who accepted the deal. Rivas then returned to Rockford, picked up $23,000 from Lowe, and brought it to Texas. The first shipment of marijuana arrived in Rockford a short time later.

Following this transaction, Rivas traveled to Laredo again, this time accompanied by Lowe. They were taken to Mexico and introduced to a person called "Rogilo" with whom they negotiated new terms. The deal made at that meeting set up a regular shipment of 300 pounds (about 140 kilograms) of marijuana to Rockford at $275 per pound ($605 per kilogram, or about $82,000 per shipment). According to testimony at trial, this arrangement resulted in approximately ten 300-pound shipments of marijuana to Rockford between 1994 and 1996.

The marijuana was transported by sealing it in the gasoline tanks of pick-up trucks. The trucks were driven to Rockford, where the drivers would stay at a local hotel. Lowe would drive the trucks from the hotel to his dealership or to an auto body shop owned by his friend (and co-defendant) Danny Smith. They would remove the gas tanks and cut them open to access the marijuana. Containers filled with payments of $100,000 or more were then welded inside new tanks, which in turn were installed on the trucks and returned to the drivers. Danny Smith's business partner at the body shop, James Petrow, who subsequently testified at trial, witnessed this activity several times, and once assisted Smith in dividing marijuana into smaller units and packaging it in bags. The bags were kept in a freezer at the rear of the body shop, and buyers would periodically stop by to pick up marijuana and drop off money.

4. Marijuana from Arizona.

In November of 1995, Rivas bought a van from Lowe's lot. A few months later, Lowe asked Rivas to drive the van to Arizona to pick up some marijuana. Rivas again agreed. He drove the van to a hotel in Tucson, where Lowe's contact picked

up the van to load it with drugs. The van was returned the next day and Rivas was shown how marijuana had been hidden behind the van's interior rear panels. On the return trip, the Nebraska State Police stopped Rivas. Rivas consented to a search, and a trooper found 115 pounds of marijuana (about 50 kilograms). Rivas was then placed under arrest.

Rivas agreed to cooperate with DEA officials. The DEA sent Rivas on a controlled delivery to Lowe's car lot, using recording and surveillance equipment. Rivas pulled into the garage of Lowe's facility, showed Lowe how the marijuana could be accessed, and asked to receive one pound of marijuana in partial payment of his $5,000 courier fee. Rivas then borrowed a car from Lowe and drove a short distance, where he turned over the marijuana and a recording device to DEA agents. Shortly thereafter, Lowe left the car lot. However, because he was driving very fast, DEA agents were unable to follow. Lowe's vehicle was subsequently found outside Danny Smith's auto body shop, but when Lowe left the lot, he once again drove too fast for authorities to maintain surveillance. That evening, Lowe was finally arrested as he left a tavern owned and operated by his father. A search warrant was obtained to search Lowe's car lot facilities. The search recovered 63 packages suspected of containing drugs, 52 of which were chemically tested and determined to contain marijuana weighing 35 kilograms (about 75 pounds). A loaded shotgun was on the premises and accessible at the time of the search.

B.

Lowe was released on bond shortly thereafter. Smith and Lowe still possessed large amounts of marijuana, which Smith placed in the trunk of a Saab at the body shop. The auto body shop had purchased the Saab from Lowe's car lot. One week after Lowe's arrest and release, Lowe asked Swick to do him a favor and to get instructions from Smith. Smith directed Swick to pick up the Saab at the auto body shop and to lock it in Swick's garage. Eventually, Smith also directed Swick to remove a marijuana-filled duffle bag from the trunk of the Saab and to lock it in a freezer that was also located inside the garage. Periodically over the next year, Lowe would direct Swick to transport quantities of this marijuana to Smith's body shop. On one occasion in March of 1997, Swick delivered nine pounds to Smith.

In April 1997, the police department of Loves Park, Illinois, received a tip that Swick was storing a large quantity of marijuana in a freezer at his residence. The police then visited Swick's home, and Swick voluntarily agreed to a search. Both Swick and Tom Lones, who was Lowe's cousin and the owner of Swick's rented home, disclaimed ownership of the locked freezer in the garage. The authorities impounded the freezer and transported it to State Police headquarters. It was then opened and found to contain almost 18 pounds of marijuana. A fingerprint examiner inspected the packages of marijuana, finding Lowe's fingerprints on one and Smith's on another.

C.

On December 3, 1997, a search warrant was executed at Lowe's residence, simultaneously with the execution of a seizure warrant based on a civil forfeiture complaint. Several documents were seized, including some items that were improperly catalogued.[1] In addition to numerous firearms, Police seized a safe buried in the basement floor, of which Lowe denied knowledge. The safe contained more than $100,000 in cash. Although Lowe had earned income during 1995 and 1996, he did not file tax returns for those years until December 12, 1997, shortly after the search and seizure.

According to testimony at trial, Lowe approached Vincent Lloyd, an accountant, in March of 1998 for his assistance in reviewing and correcting his tax returns as far back as 1993. The Government asserts that because this review and correction took place so soon after the search and seizure, they raise a legitimate suspicion

[1] The apparent lack of orderly police procedure with respect to certain documents seized from Lowe's home forms the basis for Lowe's unsuccessful "chain of custody" argument discussed in Section II.A.3, infra.

that Lowe was trying to protect some of his assets from forfeiture.

D.

Smith and Lowe were indicted by a federal grand jury in June 1999. Count 1 charged both Smith and Lowe with conspiring to distribute in excess of one hundred kilograms of marijuana, a Schedule I Controlled Substance, in violation of 21 U.S.C. § 841(a)(1). Counts 2 and 3 charged Lowe with conspiracy to distribute "approximately fifty-two kilograms" and "approximately 1038 grams" of marijuana, respectively. Counts 4, 5 and 6 charged Lowe with making false statements on his tax returns for 1994, 1995 and 1996, in violation of 26 U.S.C. § 7606(1).[2] Counts 7 and 8 charged Lowe with willful failure to file timely tax returns for 1995 and 1996, in violation of 26 U.S.C. § 7206(1). A jury trial followed.

Before the government commenced its case, Lowe objected to joinder of the tax and drug charges. Lowe argued that these charges were unrelated and should be severed to avoid unfair prejudice. The district court denied the motion for severance and the trial went forward.[3] After the government presented its case-in-chief against Lowe but before Lowe began his defense case, the district court informed counsel for Smith that any cross examination by him of Lowe's defense witnesses would be limited to matters that pertained to his client, Danny Smith. The district court judge said that he wanted to avoid jury confusion by limiting the possibility that counsel for Smith would attempt to develop his own case during the cross examination of Lowe's defense witnesses. Instead, counsel for Smith was instructed that he could explore a broader line of inquiry if he called these witnesses for direct examination during his client's defense. Counsel for Smith then consented to this procedure.

Testifying in his own defense, Lowe stated that his trip to Texas with Rivas was merely to repossess a car he had sold, and that his sponsorship of Rivas' trip to Arizona was merely a gesture intended to benefit Rivas. Upon Rivas' return to Rockford, Lowe testified that Rivas left his van at the car lot for repair. Lowe also denied any drug trafficking with Swick and claimed that the red Saab in fact belonged to Danny Smith's auto body shop and was used primarily by James Petrow. Lowe also testified that he failed to file returns for 1995 and 1996 because he had fallen behind in the early 1990s, was afraid of the consequences and did not know how to correct the situation. Danny Smith subsequently testified that James Petrow was his business partner in the auto body shop business from October 1993 to March 1997. At that time, Petrow's irresponsibility with money had caused the business to struggle. According to Smith, Petrow withdrew business funds for personal use, thus putting the shop itself in a precarious financial situation. When the business partnership ended, Smith changed the locks at the body shop. Smith also testified that he had never engaged in drug trafficking, that he had never seen Edwin Rivas before trial and that he had never seen pickup trucks with marijuana in the gas tanks at his body shop. Smith did admit that he, with Lowe and Lones, once passed around one-pound packages of marijuana at Swick's house. Smith also conceded that he had smoked marijuana with Lowe and Lones, but he denied any involvement with or knowledge of the marijuana found in Swick's freezer.

Swick testified as well, and claimed that a written statement made by him and furnished to the authorities was based entirely on his own recollection and was written in his own words. Lowe attempted to impeach Swick by pointing out that the introductory paragraph of Swick's statement was substantially similar to a statement written by an investigating agent. The trial court refused to allow that line of questioning on cross, but evidence that the two statements were similar was introduced, with the agent admitting that the language was "boiler-plate."

At one point during Petrow's testimony, the government asked if he remembered

[2] On the government's motion, Count 4 was dismissed prior to trial, and Counts 5 and 6 were dismissed during trial.

[3] As the government points out, Lowe did not renew his objection at the close of evidence.

Lowe's arrest, referring to the arrest for the charges in the present case. Petrow's answer referred to an arrest in Kentucky. The district court immediately ordered that the reference to Kentucky be stricken from the record, and the trial went on, notwithstanding a motion by Lowe for a mistrial.

On August 8, 2000, the jury convicted Smith and Lowe of conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. § 846. Lowe was also convicted of possession with intent to distribute marijuana, and distribution of marijuana, in violation of 21 U.S.C. § 841(a), and of willfully failing to file timely tax returns for 1995 and 1996, in violation of 26 U.S.C. § 7206(1). The jury also completed a special verdict form, which asked them to find the quantity of marijuana involved by selecting a weight range. The ranges on the form coincided with the ranges contained in 21 U.S.C. § 841(b)(1).[4] The jury selected 50 to 100 kilograms of marijuana for Lowe, and less than 50 for Smith. The indictment, how-ever, specified marijuana amounts in ex-cess of 1200 kilograms for Lowe and in excess of 100 kilograms for Smith.

At sentencing, the trial court found that Lowe's relevant conduct involved 528 kilograms of marijuana, and Smith's relevant conduct involved more than 100 kilograms. The court also made several findings that aggravated Lowe's sentence. U.S.S.G. §§ 2D1.1(b)(1) (presence of firearm), 3B1.1(a) (leadership role), 3C1.1 (obstruction), 4A1.1 (criminal history). Both defendants were sentenced at the statutory maximum for the applicable drug range under § 841(b)(1). Smith was sentenced to 60 months in prison, which is the statutory maximum for an amount of marijuana less than 50 kilograms, § 841(b)(1)(D), and Lowe received 240 months, which is the statutory maximum for an amount of marijuana between 50 and 100 kilograms, § 841(b)(1)(C). The cases were consolidated into the matter now before the court. This appeal follows.

II.

Lowe and Smith make several claims on appeal with Lowe presenting eight issues and Smith presenting two. Since many of these issues are related, we have once again organized our discussion chronologically. We first turn to both defendants' appeals from the district court's actions at trial, and then to issues related specifically to sentencing.

A.

[1] Lowe argues that the district court made the following errors at trial. First, he claims that the tax charges should have been severed from the conspiracy charges and tried separately. Second, he asserts that he should have been allowed to cross-examine Stuart Swick by demonstrating the similarity between his statement and an affidavit of Agent White. Third, he challenges the sufficiency of the chain of custody for documents seized pursuant to the search warrant, and questions whether they can be properly admitted into evidence. Fourth, he claims that a mistrial was necessary because James Petrow testified that Lowe was arrested in Kentucky. Finally, Lowe argues that the jury instructions created an impermissible risk that the jury's decision was not unanimous. Smith's only issue arising from the trial is his claim that the district court improperly hindered his right to cross-examine Lowe and other witnesses who were testifying during Lowe's case-in-chief.

1. Motion to sever.

Lowe claims that the district court erred in denying his motion to sever the tax counts. We review for abuse of discretion the district court's decision to deny a motion to sever the counts of an indictment. See United States v. Stokes, 211 F.3d 1039, 1042 (7th Cir.2000).

Before trial, Lowe moved to sever the tax charges from the conspiracy charges, claiming that the evidence used to support the tax counts would unfairly prejudice the jury with respect to the drug charges. The

[4] 21 U.S.C. § 841(b)(1) varies the sentence for violation of § 841(a) according to the type and amount of the drugs involved in the violation. For marijuana, the ranges are: (A) 10 years to life for over 1000kg; (B) 5 to 40 years for 100 to 1000kg; (C) 20 years or less for 50 to 100kg and (D) five years or less for less than 50kg.

trial court denied the motion, and Lowe did not renew his objection at the close of evidence. Citing case law that addresses the issue of severing criminal co-defendants, the government argues that Lowe waived any right he may have had to severance by failing to renew his motion to the district court. See, e.g., United States v. Phillips, 239 F.3d 829, 838 (7th Cir.2001) (stating that, in the context of co-defendants, ''a motion for severance is typically waived if it is not renewed at the close of evidence, primarily because it is then that any prejudice which may have resulted from the joint trial would be ascertainable'') (quotations omitted); United States v. Cooper, 942 F.2d 1200, 1205 (7th Cir.1991) (same); United States v. Caudill, 915 F.2d 294, 298 (7th Cir.1990) (same). Lowe maintains, however, that unlike a motion for severance of defendants, where the actual content and effect of testimony is largely unknown until it is presented, the documentary evidence that formed the basis for the tax counts could be fully assessed prior to trial. Therefore, a renewal of his original objection was unnecessary. Although Lowe fails to cite any authority to support his position, his reasoning is at least plausible.

Nevertheless, we need not squarely address this issue because Lowe's substantive argument on severance clearly fails on the merits. Under Rule 14 of the Federal Rules of Criminal Procedure, a district court has discretion to order separate trials if it appears that a defendant will be prejudiced by trying the offenses together. Several factors reduce or eliminate the prejudicial effect of evidence, including the mutual admissibility and weight of the evidence at issue. See, e.g., United States v. Traeger, 289 F.3d 461, 473 (7th Cir.2002) (ruling that ''mutually admissible'' evidence--i.e., evidence that is admissible for either charge--is not prejudicial) (citing United States v. Dijan, 37 F.3d 398, 402 (8th Cir.1994)); United States v. Freeland, 141 F.3d 1223, 1227 (7th Cir.2000) (ruling that potential inference of criminal personality is not unfairly prejudicial when there is sufficient evidence to support all counts and the jury is instructed to consider the counts separately). In the interest of preserving judicial resources, a motion to sever should be granted only when there is a serious risk of unfair prejudice that deprives the defendant of a fair trial. Stokes, 211 F.3d at 1042; United States v. Archer, 843 F.2d 1019, 1021 (7th Cir.1988); Fed.R.Crim.P. 14 (giving district court discretion to sever in order to avoid unfair prejudice to the defendant). We give ''great deference'' to the district court's decision as to the hazards of a joint trial. Phillips, 239 F.3d at 838; see also United States v. Moore, 115 F.3d 1348, 1361–62 (7th Cir.1997) (stating that defendant bears ''an extremely difficult burden'' in showing that a district court abused its discretion when denying a Rule 14 motion to sever) (quoting United States v. Moya-Gomez, 860 F.2d 706, 754 (7th Cir.1988)).

The evidence presented in Lowe's case is not prejudicial because it was ''mutually admissible'' for either the tax or drug charges. See United States v. Quilling, 261 F.3d 707, 715 (7th Cir.2001) (holding that '''prejudice requiring severance is not shown if evidence on the severed counts would be admissible in the trial of the remaining counts''') (quoting United States v. Rogers, 475 F.2d 821, 828 (7th Cir.1973)); accord United States v. Windom, 19 F.3d 1190, 1198 (7th Cir.1994). Here, in an effort to prove that Lowe had unreported income, the government offered evidence of Lowe's assets amounting to an estimated $2.6 million, including cars, boats, real estate, recreational vehicles, home improvements and cash. The value of his assets and his lifestyle exceeded what might be achievable from Lowe's legitimate income from the used car lot. Lowe claims that the evidence of his wealth, presented to support the tax charges, would lead the jury to impermissibly consider it as evidence of a propensity for trafficking in drugs.

But it is well settled in this circuit that evidence of an unexplained, lavish lifestyle is probative of the existence of income derived from a drug conspiracy. See United States v. Penny, 60 F.3d 1257, 1263 (7th

Cir.1995) (ruling that ''evidence of unexplained wealth is probative and therefore admissible if it creates a reasonable inference of the defendant's involvement in the drug conspiracy or trafficking'') (internal quotations omitted); Hogan, 886 F.2d at 1507 (ruling that jury decides whether a defendant's wealth came from a legitimate income or criminal activity and that tax count can be joined with the criminal conduct count involving the source of the wealth). Even if the evidence might also suggest to a jury something adverse about Lowe's character, this evidence is admissible; it is circumstantially admissible to support an inference that Lowe had income from drug trafficking. The disputed tax evidence here was ''mutually admissible,'' or overlapping, in that the government could have presented evidence of Lowe's extravagant lifestyle to support the drug conspiracy charges. Therefore, the denial of severance was not unfairly prejudicial nor an abuse of discretion.

Finally, the government voluntarily dismissed several of the tax-related counts after providing the evidence to support them. Lowe argues that this maneuver by the government gives weight to the thesis that the prosecution of the tax counts was a mere pretense or ruse to get Lowe's assets before the jury. But the government had a legitimate reason for dismissing some of the tax charges: it would have been difficult to pursue them because Lowe failed to produce essential documents in a timely fashion. Lowe cannot claim that the tax charges were a sham when he made a contribution to the need to dismiss them. The district court did not abuse its discretion in denying the motion for severance.

2. Cross examination of Swick.

Lowe argues that the district court abused its discretion when it refused to let Lowe's counsel use an officer's affidavit to impeach Stuart Swick during cross examination. In this case, an affidavit by law enforcement agent John White had a first paragraph that was virtually identical to an affidavit made by Swick, purportedly from memory. At trial, Swick testified that he created his statement entirely from his own recollection, and in his own words, and that he did not use any notes or other materials to compose his statement. Lowe's counsel wanted to impeach Swick with the White affidavit to demonstrate that Swick was being untruthful about the originality of his statement. The larger point he was attempting to make was that Swick, a member of the drug conspiracy, was motivated to lie about the conduct of other defendants in order to obtain a more favorable plea bargain.

Ordinarily, a district court's evidentiary rulings are reviewed for abuse of discretion. United States v. Aldaco, 201 F.3d 979, 985 (7th Cir.2000). However, when the restriction implicates the criminal defendant's Sixth Amendment right to confront witnesses against him, which Lowe alleges here, the standard of review becomes de novo. United States v. Cavender, 228 F.3d 792, 798 (7th Cir.2000); United States v. Sasson, 62 F.3d 874, 882 (7th Cir.1995).

In general, the district court has wide latitude to impose limitations on cross examination. Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); Sasson, 62 F.3d at 882. Limitations on cross examination rise to the level of a Sixth Amendment violation when they prevent the exposure of a witness's bias and motivation to lie. Van Arsdall, 475 U.S. at 678–79. So long as the accused is given the opportunity to expose bias, further cross examination is at the discretion of the district court. Sasson, 62 F.3d at 882 (stating that a core goal of cross examination is to expose bias); United States v. Nelson, 39 F.3d 705, 708 (7th Cir.1994) (stating that if the defendant is given the opportunity during cross examination ''to expose a motive to lie, it is of peripheral concern to the Sixth Amendment how much opportunity defense counsel gets to hammer that point home to the jury''); United States v. Robinson, 832 F.2d 366, 373 (7th Cir.1987) (ruling that district court may preclude ''cumulative and confusing cross examination into areas already sufficiently explored to permit the defense to argue personal bias and testimo-

nial unreliability''); see also Cavender, 228 F.3d at 798 (ruling that the district court can limit cross examination to prevent, among other things, repetitive or marginally relevant interrogation).

Here, Lowe was given ample opportunity to expose bias. Swick repeatedly testified that his written statement was entirely his own. During Lowe's defense case, Lowe was able to call Agent White to the stand and elicit from him that, except for names, the same ''boilerplate'' language that Swick claimed as his own was included in Rivas' May 18, 1999, statement, Petrow's grand jury statement and Agent White's December 1997 affidavit. The court also permitted Lowe to argue to the jury that Swick lied about the preparation of the statement. Because Lowe was given ample opportunity to present issues of credibility and potential bias to the jury, further cross examination of Swick on the content of Agent White's affidavit was unnecessary. Further, the point of similarity applied only to the introductory paragraph of the two statements, not to its remaining substance. Hence, it was of only marginal significance. The district court's ruling is sustainable on either a de novo or an abuse of discretion standard.

3. Chain of custody.

Lowe next asserts that the chain of custody for documents seized at his residence during the execution of the search warrant was so imperfect as to require denial of their admission into evidence. The thrust of Lowe's argument here is that these documents, which include self-authenticating receipts and communications, were not properly catalogued and could not be identified by the agents who conducted the search. Therefore, he believes that he is entitled to a new trial. We note at the outset that a district court's evidentiary rulings, including matters pertaining to the chain of custody, are reviewed for abuse of discretion. United States v. Scott, 19 F.3d 1238, 1244 (7th Cir.1994).

Despite Lowe's protestations to the contrary, we believe that the defects pointed to by Lowe are relatively minor and do not raise serious issues of reliability. The general standard for admissibility of evidence is that it be ''in substantially the same condition as when the crime was committed.'' United States v. Aviles, 623 F.2d 1192, 1197 (7th Cir.1980). A perfect chain of custody is not a prerequisite to admission. See United States v. Brown, 136 F.3d 1176, 1181 (7th Cir.1998) (ruling that ''lack of proof regarding a chain of custody does not render [audio]tapes inadmissible''); United States v. Lott, 854 F.2d 244, 250 (7th Cir.1988) (ruling that ''the government need not prove a perfect chain of custody for evidence to be admitted at trial''). Unless the defendant can point to evidence that specifically raises the issue of tampering, a presumption of regularity attaches to evidence that has at all times been kept in official custody, and any gaps in the chain of custody go to the weight of the evidence, not to its admissibility. See United States v. Rivera, 153 F.3d 809, 812 (7th Cir.1998); Brown, 136 F.3d at 1181 (''[M]erely raising the possibility (however hypothetical) of tampering is not sufficient to render evidence inadmissible.''). The documents in question here were in official custody at all times, and Lowe does not argue that they were no longer in their original condition, nor that they had been tampered with or were otherwise tainted. Therefore, the presumption of regularity attaches. The district court's chain of custody ruling is affirmed.

4. Motion for a Mistrial.

Lowe argues that the district court erred when it refused to grant him a new trial after Petrow made a reference to Lowe's arrest in an unrelated matter. During the trial, the government asked Petrow if he remembered Lowe's arrest in February of 1996, referring to the arrest in Rockford. Petrow responded that Lowe ''was arrested in Kentucky a while back.'' Although the district court immediately ordered that this statement be stricken from the record, Lowe moved for a mistrial. The district court denied the motion, but admonished the jury to disregard the testimony and to refrain from speculation on its meaning since it had no relevance to the current charges. We review the denial of a motion

for mistrial for abuse of discretion. See United States v. Wilson, 237 F.3d 827, 836 (7th Cir.2001).

At the outset, we note that jurors are presumed to follow limiting and curative instructions unless the matter improperly before them is so powerfully incriminating that they cannot reasonably be expected to put it out of their minds. See Richardson v. Marsh, 481 U.S. 200, 207–08, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). In Richardson, the Court focused on the extent to which the improper testimony criminally implicated the defendant and the likelihood that the jury would disregard the curative instruction. Id. Here, it is reasonable to believe that the jury could place the Kentucky arrest out of their minds, especially since it was unrelated to any of the other testimony at trial and was unadorned with additional details. This is not the type of striking testimony that would be engraved in the mind of the jury. The testimony is also insufficient to overcome the presumption that the jurors obeyed their curative instructions. The district court did not err in denying the motion for a mistrial.

5. The special verdict for quantity of marijuana.

Lowe claims the district court abused its discretion when it asked the jury to determine the amount of marijuana by range rather than specifying an exact amount. Decisions by the district court regarding jury instructions are reviewed for an abuse of discretion. United States v. Reed, 227 F.3d 763, 770–71 (7th Cir.2000). However, when the instructions are based on an error of law, we review de novo. Savino v. C.P. Hall Co., 199 F.3d 925, 934 (7th Cir.1999) (stating that jury instructions are reviewed de novo "to determine whether they provide fair and accurate summaries of the law").

Here, the district court, at the request of the government, provided jury instructions and verdict forms that required the jury to make special findings regarding the quantity of marijuana involved in the conspiracy count. This procedure is a byproduct of United States v. Apprendi, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), which held that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be proven beyond a reasonable doubt." Id. at 476. Because § 841(b) specifies four ranges of drug amounts that carry four different statutory maximum sentences, see note 4, supra, this court has mandated that "the trier of fact must be instructed to find, both the elements of the offense, as listed in § 841(a), and the drug amounts listed in § 841(b) that the prosecutor relies on to establish the maximum [statutory] penalty." United States v. Trennell, 290 F.3d 881, 887 (7th Cir.2002); see also United States v. Rodgers, 245 F.3d 961, 965 (7th Cir.2001) ("In the wake of Apprendi, it is clear that any finding as to a drug quantity that has the effect of increasing the statutory maximum prison term must be charged and submitted to the jury.").

While we believe that the district court's jury instructions complied with the requirements of Apprendi, the critique presented here is slightly different. Lowe claims that the quantity of drugs involved, under § 841(b)(1). is an element of the offense, and as such, the jury must unanimously agree on the precise amount of the drugs at issue. Lowe claims that the district court impermissibly provided in its instructions four ranges of drug amounts, which correspond to the four subsections of § 841(b)(1). Lowe argues that the district court erred when it rejected his special verdict form requiring the jury to agree on the specific amount of marijuana Lowe conspired to possess. According to Lowe, the jury could have been divided over the occurrence of particular transactions involving different quantities of drugs. The jury instructions regarding range rather than specific drug amounts could have therefore resulted in a compromise verdict, with the jury divided over which transactions formed the basis of the conviction.

Although Lowe does not frame his argument in this way, he is essentially trying to advance two related, but ultimately discrete, legal theses: (1) that drug quantity is an element of a § 841 offense, and (2) that

the jury must unanimously agree on the precise amount of drugs, rather than a range.

In this circuit, the answer to the first question is clear. Drug quantity is not an element of a § 841 drug offense. See, e.g., United States v. Trennell, 290 F.3d 881, 887 (7th Cir.2002) (stating that ''drug quantity is not an element of the offense under § 841''); United States v. Bjorkman, 270 F.3d 482, 490–91 (7th Cir.2001) (same); United States v. Brough, 243 F.3d 1078, 1080 (7th Cir.2001) (same). An ''element'' of a criminal offense is ultimately a fact that must be charged in an indictment and proven beyond a reasonable doubt to support a conviction. See Bjorkman, 270 F.3d at 492; see also Richardson v. United States, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999) (''Calling a particular kind of fact an 'element' carries certain legal consequences .... [A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element.'') (citation omitted). However, in the instance of § 841, if the jury instructions do not adequately address the amount of drugs the defendant conspired to possess with the intent to distribute, Apprendi limits the sentencing court to a period of incarceration at or below the default statutory maximum. See United States v. Mietus, 237 F.3d 866, 874 (7th Cir.2001) (holding that Apprendi limited sentencing court to the default statutory maximum of five years, 21 U.S.C. § 841(b)(1)(D), when jury was instructed only to find whether the defendant possessed and conspired to possess a ''measurable amount'' of marijuana); United States v. Westmoreland, 240 F.3d 618, 632 (7th Cir.2001) (same). If drug amount were a true element of § 841, then a failure by the jury to agree on the drug amount would mean that ''there is no offense at all.'' Bjorkman, 270 F.3d at 492 (emphasis in original).

Lowe's second argument regarding range is integrally tied in with the requirements of Apprendi. In the present case, the indictment specified an amount of marijuana in the vicinity of 1200 kilograms. In addition, the special verdict revealed that the jury unanimously agreed that Lowe ''conspired to possess with the intent to distribute more than 50 kilograms of marijuana, but less than 100 kilograms of marijuana.'' The statutory maximum sentence for this quantity of drugs is 20 years. See 18 U.S.C. § 841(b)(1)(C). We do not believe that, under Apprendi, the district court was required to take the additional step of asking the jury to return a specific finding of drug amount, which would ostensibly reflect the jury's agreement on the occurrence of specific drug transactions.

In this context, we believe that a precise drug amount in relation to a statutory range is analogous to the circumstance in which the jury unanimously agrees on the presence of a particular element but disagrees as to the method or means by which it arose. For example, in Richardson, the Court observed that ''a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element.'' 526 U.S. at 817. The Court then provided the following lucid example:

> Where, for example, an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat of force; others might conclude that he used a gun. But that disagreement--a disagreement about means--would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.

Id.

If a simple robbery conviction can brook a modicum of disagreement as to means or method by which force was applied or threatened, so too can a conviction on a federal drug conspiracy that involved two defendants and numerous alleged transactions over a period of four years allow for some disagreement over the particular transactions that the conspiracy encompassed. Further, a ruling to the contrary would inevitably hamstring the government in its ability to effectively prosecute more complex drug conspiracies in which the al-

leged wrongdoings span decades and include thousands of discrete drug transactions. See, e.g., United States v. Patterson, 215 F.3d 776, 778 (7th Cir.2000) (fifteen defendants in a decade-long conspiracy that grossed $40,000 a day), vacated in part, 531 U.S. 1033, 121 S.Ct. 621, 148 L.Ed.2d 531 (2000); United States v. Boyd, 208 F.3d 638, 640–41 (7th Cir.2000) (five defendants in a "continuing and wide-ranging [narcotics] conspiracy reaching back to the mid-1960s"), vacated, 531 U.S. 1135, 121 S.Ct. 1072, 148 L.Ed.2d 949 (2001).

In any event, Lowe's logic is fundamentally flawed in advancing the proposition that jury agreement on a specific amount of drugs would necessarily guarantee jury agreement about the particular transactions encompassed by the conspiracy. Juror A might be convinced of the occurrence of Transaction M, involving 2 kilos, Transaction N, involving 3 kilos and Transaction O, involving 4 kilos, for a total of 9 kilos. Juror B, on the other hand, might have in mind Transaction P, involving 5 kilos and Transaction O, involving 4 kilos, again for a total of 9 kilos. That in each case the specific amount of drugs totaled 9 kilos would not assure jury unanimity on the specific transactions supporting the conviction. For all the reasons stated above, we hold that the district court's special verdict form, reflecting ranges of drug amounts under § 841(b)(1), was in accordance with law and not an abuse of discretion.

6. Limits on Smith's cross examination of Lowe's defense witnesses.

Smith alleges that the district court improperly precluded him from cross-examining any of Lowe's witnesses, including Lowe, who presented testimony potentially adverse to Smith. As we noted earlier in connection with the limitations of Lowe's cross examination of Swick, a district court's evidentiary rulings are reviewed for abuse of discretion, Aldaco, 201 F.3d at 985, but the standard of review becomes de novo when an adverse evidentiary ruling implicates the defendant's Sixth Amendment right to confront witnesses, Cavender, 228 F.3d at 798.

Although resolution of this issue is quite straightforward, the following context is necessary to an understanding of Smith's meritless claim. Because this case involved a joint trial of Lowe and Smith, Lowe presented his defense before Smith. Before Lowe began his defense, the government inquired about the order of cross examination as between itself and Smith. The district court stated, "Well, [counsel for Smith] may cross as to anything related to his client, but otherwise he really is going to have to call him .... I think it's better to do it that way. Then the jurors will have it straight who is being called by whom." During this exchange, Smith's lawyer commented, "I understand, Judge. That's fine."

The next day, counsel for Lowe presented impeachment evidence that suggested Swick might have observed large quantities of marijuana at Smith's body shop. Counsel for Smith requested a limiting instruction because the impeachment evidence should not be admitted against Smith on the conspiracy charges. The district court replied, "I understand that. The reason I limited you before is because I think you wanted to get out evidence that you thought might be helpful to your client, and I thought it was better to separate it from the other defendants. But if there's something that comes out that you think is adverse, I'll let you cross-examine." During the same exchange, Smith's counsel acknowledged that the inconsistency of statements made by Lowe's first two witnesses had been of minor importance and could be effectively addressed during his own direct examination. Smith's counsel then expressed concern about Lowe's subsequent witnesses, including Lowe himself. Yet, Smith's counsel did not request an opportunity to cross-examine either Lowe or his two remaining character witnesses.

Thus, as is apparent from the record, the major problem with Smith's argument is that counsel for Smith explicitly agreed to the court's handling of some of the witnesses and failed to assert his right to cross-examine others, despite the court's ruling that he "[might] cross as to any-

thing related to his client.'' Cast in the light most favorable to Smith, any claim that the prescribed cross examination procedure infringed upon Smith's Sixth Amendment rights has either been waived or forfeited or some combination of the two. See Penny, 60 F.3d at 1261 (stating that constitutional prohibition against double jeopardy is waived ''when there is the 'intentional relinquishment or abandonment of a known right''' and that ''the simple failure to assert a right-forfeiture-is distinct from an intentional act-waiver'') (quoting United States v. Olano, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

Waiver of a personally-held constitutional right ''is not reviewable,'' whereas forfeiture of that same right may be reviewed for plain error. Penny, 60 F.3d at 1261. In that respect, ''[o]nly those errors that affect substantial rights and 'seriously affect the fairness, integrity, or public reputation of judicial proceedings' ... amount to plain error warranting reversal.'' United States v. Haywood, 70 F.3d 507, 511 (7th Cir.1995) (quoting Olano, 507 U.S. at 732). Smith fails to point to a single example of how his substantial rights were harmed by the cross examination procedure prescribed by the court. Based on our review of the record, the district court's handling of witnesses appears to have been quite sensitive to Smith's procedural and substantive rights. The district court did not err in this issue.

B.

Lowe raises three issues on appeal as to sentencing, and Smith raises one. Both defendants challenge the method of the district court's fact-finding at sentencing. Lowe further alleges that the district court erred in finding the presence of a firearm, which raised his offense level. Finally, Lowe argues that the district court erred in determining his criminal history.

1. Preponderance of the evidence standard at sentencing.

Lowe alleges that the trial court improperly applied the preponderance of evidence standard when determining the applicable amount of drugs under the Sentencing Guidelines. Lowe argues that a more demanding evidentiary standard was warranted because the district court's relevant conduct determination drastically increased his sentence beyond what he would have received if his sentence had been calculated using the smaller quantity of drugs found by the jury. Further, Lowe claims that Apprendi limits the trial court to finding the amount of drugs specified by the jury in the special verdict. When reviewing sentencing determinations under the Guidelines, we review the district court's legal conclusions de novo and its findings of fact for clear error. United States v. Parolin, 239 F.3d 922, 927–28 (7th Cir.2000).

At the outset, we note that Lowe conflates the jury's factfinding role during trial with the district court's factfinding role during sentencing. To put it simply, the two fact finders make separate findings of fact for two distinct purposes. The adjudication of guilt is concluded once the jury finds the defendant guilty beyond a reasonable doubt. Then, during the sentencing phase, the judge assesses the facts under the relevant provisions of the Sentencing Guidelines and employs a preponderance of the evidence standard. United States v. Zehm, 217 F.3d 506, 511 (7th Cir.2000); Talbott v. Indiana, 226 F.3d 866, 869 (7th Cir.2000); U.S.S.G. § 6A1.3, cmt. (discussing preponderance of the evidence as the recommended standard). Here, Lowe claims that there were special circumstances that required the district court to depart from this usual framework. First, Lowe argues that a more exacting standard than preponderance must be applied when the court's factual findings as to drug amount markedly exceed the findings of the jury, thereby producing a much more severe sentence under the Sentencing Guidelines. Second, Lowe contends that Apprendi effectively caps the district court's findings as to the drug amount at the level determined by the jury.

Here, the jury found, by special verdict, that Lowe conspired to possess and distribute 50 to 100 kilograms of marijuana.

Under U.S.S.G. § 2D1.1, this amount would produce a base offense level of 24.[5] Under a preponderance of the evidence standard, the district court found that Lowe conspired to possess and distribute 528 kilograms of marijuana, setting the base offense level at 28. U.S.S.G. § 2D1.1(6). Both of these base offense levels would then be increased by adding 8 points relating to several adjustments, including presence of a firearm, obstruction of justice and Lowe's leadership role.[6] The smaller quantity of drugs (the jury determination) therefore results in a 32 offense level, which in turn produces a sentencing range of 151 to 188 months, given Lowe's Category III criminal history.[7] However, the district court relied on the larger drug amount to reach a 36 offense level, which produced a sentence of 240 months.

Lowe claims that the district court must apply a clear and convincing standard of proof when its findings of fact lead to a disproportionately large increase in a defendant's sentence (in this case, 52 months). To support his argument, Lowe directs our attention to United States v. Rodriguez, 67 F.3d 1312 (7th Cir.1995), where we stated in dicta that a case might require a higher standard of proof when the finding at sentencing becomes "'the tail that wags the dog of the substantive offense.'" Id. at 1322 (quoting McMillan v. Pennsylvania, 477 U.S. 79, 84, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986); see also United States v. Hardin, 209 F.3d 652, 654 (7th Cir.2000) (stating in dicta that "perhaps in extreme circumstances ... clear and convincing evidence would be the standard of proof for sentencing factors"), vacated, Sallis v. United States, 531 U.S. 1135, 121 S.Ct. 1071, 148 L.Ed.2d 948 (2001). However, in the seven years since we decided Rodriguez, we have yet to find a sentencing disparity that warrants this heightened evidentiary standard. And certainly, there is nothing about Lowe's sentence that would cause us to break new ground today. See, e.g., Rodriguez, 67 F.3d at 1322–23 (finding preponderance of evidence appropriate for relevant conduct determination that extends sentence from 51–63 months to life in prison); United States v. Masters, 978 F.2d 281, 283–85 (same for sentence increase from 33–41 months to 40 years). Thus, although the principle of Rodriguez remains viable, it has no application to the case before us.

Lowe's Apprendi argument is also meritless. Under Apprendi, when a sentence was increased above the statutory maximum, the facts underlying it had to be submitted to the jury and proven beyond a reasonable doubt. 530 U.S. at 490; United States v.. Wallace, 276 F.3d 360, 369 (7th Cir.2002) ("[T]o the extent that a drug quantity affects a defendant's statutory maximum sentence, it is an aspect of the crime that ... must be proven beyond a reasonable doubt") (emphasis added); Brough, 243 F.3d at 1079–80 (same); United States v. Nance, 236 F.3d 820, 825 (7th Cir.2000) (same). Here, through the use of the special verdict form, the jury unanimously determined that Lowe conspired to distribute 50–100 kilograms of marijuana. Under § 841(b)(1)(C), the statutory maximum for that quantity of drugs is 20 years, which is the precise sentence (240 months) imposed here by the district court. Therefore, since the drug amount as determined by the district court did not push the sentence beyond the statutory maximum, the district court correctly relied upon a preponderance of the evidence standard when making its sentencing determinations.

2. Quantity of drugs attributed to Smith.

Smith claims the district court's drug quantity finding at sentencing was clearly erroneous. A district court's finding as to drug quantity for sentencing purposes is reviewed for clear error. See Westmoreland,

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[5] The categories under 21 U.S.C. § 841(b)(1) and U.S.S.G. § 2D1.1 do not directly coincide. A finding of 50–100 kg. of marijuana fits § 841(b)(1)(C) precisely, but spans three separate U.S.S.G. ranges: § 2D1.1(1) (40–60 kilograms); § 2D1.1(9) (60–80 kilograms) and § 2D1.1(8) (80–100 kilograms), resulting in a base offense level of 24. The district court acknowledged it would use the 80–100 kilogram category if it were to adopt the jury's finding.

[6] The preponderance of the evidence standard is not an issue for these offense level adjustments. Lowe does challenge the firearm finding on different grounds. This issue is addressed below.

[7] Lowe challenges his criminal history, which is also addressed as a separate issue below.

240 F.3d at 629–30; United States v. Bacallo, 149 F.3d 717, 719 (7th Cir.1998).

The thrust of Smith's argument is both simple and without merit. Smith asserts that the government put on evidence suggesting that he conspired to distribute several hundred kilograms of marijuana, yet the jury convicted him of an amount less than 50 kilograms. Smith maintains that this disparity between the amount alleged by the government and the amount found by the jury was inescapably a product of the jury having significantly discounting the credibility of Rivas, Petrow and Swick, who testified against Smith at trial. Since the district court's finding of 100 kilograms of marijuana rejected the collective wisdom of the jury and its implied credibility findings, Smith concludes that the district court committed clear error.[8]

However, as noted earlier, the district court's relevant conduct findings for sentencing purposes, including drug quantities, are governed by a less demanding evidentiary standard than are determinations by the jury. This is a fact of federal criminal procedure that Smith (unlike Lowe) does not contest. Nonetheless, he contends that even under this more lenient standard, the testimony of the government's three witnesses simply cannot support a drug quantity finding larger than 50 kilograms because this is what the jury found. But credibility determinations by the district court using the preponderance standard cannot be challenged on appeal unless the court credited testimony that was essen-tially unbelievable as a matter of law. See United States v. Ray, 238 F.3d 828, 834 (7th Cir.2001). We give exceptional defer-ence to district courts on issues of credibil-ity in sentencing. See Amadeo v. Zant, 486 U.S. 214, 227, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988); accord United States v. Johnson, 227 F.3d 807, 813 (7th Cir.2000).

Smith fails to identify any factor in the record that would render the testimony of the government witnesses essentially unbelievable. While he does point out that some of this testimony was internally conflicting, the mere presence of such conflicts does not in itself amount to essential unbelievability nor support a finding of clear error. Deference to the finder of fact, with the opportunity to observe the witnesses, supports credibility findings even in the face of some internal conflicts. Thus, applying the preponderance standard, the findings of the district court, on which the sentence is based, are not clearly erroneous.

3. Presence of a firearm in connection with the offense.

Lowe argues that the district court erred when it imposed a 2-level enhancement for possession of a firearm in connection with the crime of conviction. See U.S.S.G. § 2D.1(b)(1). The possession of a firearm for sentencing purposes is a question of fact reviewed for clear error. See Nance, 236 F.3d at 826; United States v. Berthimaume, 233 F.3d 1000, 1002 (7th Cir.2000). Further, one of the application notes to § 2D1.1 states that an enhancement for a firearm "should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense." § 2D.11 , cmt. n.3 added) (giving example of a hunting rifle as an unrelated firearm). Once the government proves that a gun was present in the commission of an offense, the burden shifts to the defendant to show that it was clearly improbable that the gun was connected with the offense. See Berthimaume, 233 F.3d at 1004.

Here, a judge could reasonably conclude that several of the firearms confiscated by police were connected with the drug conspiracy. Police found several firearms at Lowe's residence, where he kept more than $100,000, which was likely the product of the illegal drug trade. When police executed the search warrant for Lowe's used car lot, which was used as the drop-off location for a van filled with approximately 115 pounds of marijuana, they

[8] As in the case of Lowe, the district court's factual findings as to drug amount resulted in a sentence that was at the statutory maximum for a violation of 21 U.S.C. § 841(b)(1)(D) (specifying a maximum sentence of five years for engaging in a conspiracy to distribute 50 kilograms or less of marijuana). This provision corresponds, in terms of drug quantity, to the jury's findings on the special verdict form.

found a loaded shotgun in the bathroom of the garage. Lowe testified at trial that the shotgun belonged to his mechanic and that he was unaware it was on the premises. However, this assertion does not demonstrate a sufficient improbability that the gun was connected to drug trafficking. In any event, Lowe's testimony does not establish an innocent explanation for the presence of the guns found at his residence, where he kept more than $100,000 in cash, presumably derived, at least in part, from drug trafficking. The district court's ruling on the § 2D1.1(b)(1) enhancement was not clearly erroneous.

4. Lowe's criminal history points.

The final issue in this appeal is whether the district court correctly calculated Lowe's criminal history points. Lowe insists that, under the Sentencing Guidelines, the district court erroneously included two sentences of court supervision, one following a guilty plea and the other following a stipulation of facts. In the sentencing context, we review the district court's legal conclusions de novo and its findings of fact for clear error. See Parolin, 239 F.3d at 927–28.

Lowe had two prior Illinois offenses that resulted in sentences of supervision for one year or more. One of the sentences, eighteen months of supervision for unlawful use of a firearm and possession of cannabis, was the product of a guilty plea. The other sentence was one year for disorderly conduct, to which Lowe had made a stipulation of fact. Both orders of supervision provided that upon successful completion of supervision without further offense, the charges would be dismissed. When calculating criminal history points under the Guidelines, the district court must consider prior offenses that have led to a sentence of one year or more upon adjudication of guilt. U.S.S.G. § 4A1.2(a). The district court assigned four points for the firearm/cannabis sentence and one point for the disorderly conduct sentence, placing Lowe in a Category III criminal history. Lowe contends that because he pleaded guilty or stipulated to the facts, and because the sentences were for "supervision," they did not result from an adjudication of guilt, nor should they qualify as "prior history."

Under the Sentencing Guidelines, a "prior sentence" is included in a criminal history only if it was "imposed upon adjudication of guilt." U.S.S.G. § 4A1.2(a). The definition of a "prior sentence" includes sentences of probation and sentences that were totally suspended or stayed, all of which must be counted as part of a defendant's prior criminal history. U.S.S.G. § 4A1.2(a)(3); see also United States v. Burke, 148 F.3d 832, 839 (7th Cir.1998) (treating supervision under Illinois law as the equivalent of probation and counting one year of supervision as part of criminal history even though the charges were eventually dismissed); United States v. Binford, 108 F.3d 723, 727 (7th Cir.1997) (ruling that Illinois sentence of one-year court supervision is properly a prior sentence for Guideline purposes). It is immaterial that the sentence results from a guilty plea or from a stipulation of facts because both count for criminal history purposes. See United States v. Smith, 223 F.3d 554, 578–79 (7th Cir.2000) (holding that the practical effects of stipulation are similar enough to those resulting from a plea of nolo contendere to qualify as prior history for sentencing purposes).

Here, there was no error. The points assigned to the firearm/cannabis sentence were appropriate because a guilty plea is an adjudication of guilt under Illinois law. Moreover, the supervisory sentence was equivalent to more than one year of probation, and the eventual dismissal of the charge is immaterial for sentencing purposes. The four points attributable to the firearm/cannabis sentence are sufficient to place Lowe in Category III; hence, any error in attributing one pont to the disorderly conduct sentence is harmless. Even so, the disorderly conduct offense also appears to satisfy the requirements of § 4A1.2(a). It was therefore appropriate to include both sentences as part of the criminal history calculation.

III.

In summary, all the issues pertaining to the trial of Danny Smith and Harry Lowe

are unavailing. The district court did not abuse its discretion when it (1) denied Lowe's Rule 14 motion to sever, (2) denied his motion for a new trial based on alleged defects in the chain of evidence and (3) denied his motion for a new trial based on Petrow's mention of a prior arrest in Kentucky. Under a more stringent de novo standard of review, the district court also did not err when it (4) prohibited Lowe's attorney from cross-examining Swick with agent White's affidavit, (5) narrowed the scope of Smith's cross examination of Lowe's defense witnesses and (6) gave jury instructions that permitted jurors to agree on a range of drug amounts that corresponded to the various drug amount ranges in § 841(b)(1) rather than a precise drug amount.

All the sentencing issues raised by the defendants also fail. The district court did not commit clear error when it (1) found that Smith conspired to distribute 100 kilograms of marijuana and (2) imposed a 2-level enhancement to Lowe's base offense level for possession of a firearm related to the charge of conviction. The district court also did not err when it (3) applied the preponderance of evidence standard to determine the amount of marijuana Lowe conspired to distribute and (4) calculated Lowe's criminal history points.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

¶2002-5559

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Larry T. TARWATER, DEFENDANT-APPELLANT. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-5962, Oct. 16, 2002. District Court affirmed. Years 1992, 1993, 1994. Decision against Taxpayer.

1. Tax crimes—making false statements to IRS—unreported income—evidence—jury instructions. IRC §7206(1) conviction was affirmed against CPA/hospital auditor for making false statements to IRS about monies hospital paid to him with intent that he pass them on to 3d-party consultant, but which he retained for personal use: taxpayer's belief that returns on which he didn't report subject income were correct was sufficiently refuted by IRS examining agent's credible testimony; bank records reflecting his failure to pay monies over to 3d party; and his failure to document transactions, which by virtue of his training he clearly should have known he had duty to do. Also, jury instruction that govt. wasn't "required to prove nonexistence of" taxpayer's nonpayment to 3d party was proper and didn't impermissibly shift burden of proof; taxpayer's proposed good faith and other instructions were properly rejected; any error in prosecutor's closing statements was harmless; and taxpayer's argument about admissibility of examining agent's testimony of his underreporting and other evidentiary challenges were rejected. *Reference:* United States Tax Reporter ¶72,065.01(47); 73,446.514(10). IRC §7206.

2. Tax crimes—making false statements to IRS—sentencing. CPA/hospital auditor's sentence for making false statements to IRS about monies hospital paid to him with intent that he pass them on to 3d-party consultant, but which he retained for personal use, was affirmed: taxpayer's constitutional challenge was rejected where sentence was well below statutory maximum; and record belied his argument that district court summarily adopted presentence report without making requisite independent factual findings on tax loss amount and adjustments for illegal activity and abuse of trust. *Reference:* United States Tax Reporter ¶72,065.01(50). IRC §7206.

ARGUED: David S. Wigler, Knoxville, Tennessee, for Appellant. Jimmie Baxter, Assistant United States Attorney, Knoxville, Tennessee, for Appellee. ON BRIEF: David S. Wigler, Herbert S. Moncier, Knoxville, Tennessee, for Appellant. Jimmie Baxter, Assistant United States Attorney, Knoxville, Tennessee, for Appellee.

United States Court of Appeals, Sixth Circuit,

Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville. No. 00-00008--R. Leon Jordan, District Judge.

Before MOORE and SILER, Circuit Judges; STAFFORD, District Judge.*

OPINION

STAFFORD, District Judge.

Appellant, Larry T. Tarwater (''Tarwater''), appeals his conviction and sentence for making false statements to the Internal Revenue Service (''IRS''). We affirm.

I. THE EVIDENCE

In 1987, Tarwater, a certified public accountant, was retained by Jefferson Memorial Hospital (''JMH'') to perform its annual audit and to prepare its annual Medicare and Medicaid cost reports. At the time, JMH was using a consultant, Willie Davis, to review the hospital's cost reports. Hired on a contingency fee basis, Davis was paid for his work if it resulted in additional Medicare and Medicaid reimbursements to the hospital. To obtain his fee, Davis submitted itemized invoices to JMH's Chief Financial Officer, Karen Bradley Chambers (''Chambers''), explaining what amount of money the hospital would be receiving back from Medicare and/or Medicaid. The cost reports reviewed by Davis for the years after 1986 were prepared by Tarwater.

In 1988, Tarwater and Craig Peters (''Peters'') formed the Peters, Tarwater & Associates accounting partnership. The partnership maintained its only bank account at the Home Federal Bank in Knoxville, Tennessee, where the partners were supposed to deposit all business receipts. The Peters, Tarwater partnership lasted through 1991. Tarwater practiced accounting as a sole proprietor from January, 1992, until August 18, 1992. On August 19, 1992, Tarwater formed a corporation, Tarwater, Hines & Company, P.C. with another certified public accountant, Jenny Hines (''Hines''). The corporation maintained its business account at the Third National Bank where all business receipts were supposed to be deposited. Tarwater practiced with Hines until 1998.

In or about June of 1988, Barnett Bank of Florida notified Chambers that Davis had pledged his JMH fee receivables as security for a loan. Barnett Bank requested that any monies due Davis be made payable to both the bank and to Davis. Chambers agreed and thereafter wrote a check jointly to Davis and Barnett Bank in the amount of $26,852.75. Soon after she gave Davis the check, Chambers was notified by the bank that Davis had attempted--unsuccessfully--to cash the check. In fact, Davis had altered the check, removing Barnett Bank's name as a payee. Angered by Davis's action, and concerned that, if Davis would alter a check, he might do other unacceptable things as well, Chambers stopped payment on the check. She then told Robert Foster, the hospital's administrator, about Davis's conduct. Chambers explained to Foster that she was unwilling to work with Davis any longer, and she recommended that his contract with the hospital be terminated.

Soon after her meeting with Foster, Chambers was advised that, while Davis's contract was not being terminated, Davis would thereafter work through, and be paid through, Tarwater. Foster approved the Tarwater-to-Davis payment arrangement. Two checks totaling $26,852.75, the exact amount of the check from which Davis removed Barnett Bank's name, were soon after made payable to Tarwater for Davis.

Bettye King (''King''), the JMH bookkeeper, prepared all checks for the hospital but had no signatory authority. Two administrative officers, usually Foster and Chambers, had to sign the checks. Tarwater routinely gave King invoices to document his auditing and cost report work, and, based on those invoices, King prepared checks payable to Tarwater's accounting firm. Beginning in August of 1988, King made the ''Willie Davis'' checks payable to Tarwater individually. Although Davis had previously submitted itemized invoices when JMH paid him di-

* The Honorable William Stafford, United States District Judge for the Northern District of Florida, sitting by designation.

rectly for his work, no such invoices or statements were submitted after Tarwater became the conduit for payments to Davis. Initially, King wrote the ''Willie Davis'' checks to Tarwater at the direction of Chambers or Foster. Later, Tarwater simply told King what amounts were to be paid to him on behalf of Davis. According to King, she did not question the absence of documentation because Tarwater was the hospital's auditor.

After learning about the Tarwater-to-Davis payment arrangement, Chambers attempted to institute an audit review process to determine the correctness and propriety of the hospital's payments to Davis through Tarwater. Shortly after she started the process, however, she was instructed by Foster to cease the work and to accept the payment requests presented by Tarwater. Chambers complained about the absence of an audit trail, but to no avail. According to Chambers, Tarwater decided when, and for how much, checks were to be issued to him for Davis. Although it was her normal practice, as well as the hospital's, to insist on documentation to support any payment of monies, Chambers signed the undocumented checks to Tarwater because ''Tarwater was hired by the Board of Directors [and] he could tell [her] what to do.'' J.A. at 375. Foster likewise signed the checks without insisting on documentation because he trusted Tarwater, knew that the checks were prepared under the direction of the chief financial officer, and had no reason to doubt that Davis was entitled to payment.

On October 27, 1994, the JMH Board of Directors (the ''Board'') held a meeting at which Tarwater was asked about Davis. Tarwater explained who Davis was, what he did for the hospital, and why monies intended for Davis were passed through Tarwater. As reflected in the minutes of the meeting, the Board learned that:

> The reason these checks are made out to Mr. Tarwater is because Mr. Davis will call [Tarwater] from Florida and state[ ] he needs payment; so instead of [Tarwater] making a trip to Jefferson City, [Tarwater] will pay Mr. Davis's firm [him]self and then get reimbursed from the hospital next time [he is] up here. If checks were made out to the Tarwater firm for Mr. Davis's services, then it would cost his firm 11% off the top for professional liability.

J.A. at 899. After expressing concern about the hospital's failure to issue 1099 forms to either Tarwater or Davis for the amounts paid to Tarwater on Davis's behalf, the Board decided to stop all payments to Davis pending the Board's review of proper documentation, including proof of Medicaid/Medicare reimbursements. The Board also decided that, if any monies were thereafter owed to Davis, the hospital would pay Davis directly.

Following the October 27th Board meeting, Tarwater's services to JMH were terminated and an investigation was begun. In November of 1994, the Board retained an accounting firm, Morgan, Newman & Davenport, P.C., to review all payments that were made by the hospital to outside consultants. As part of this review, Ralph Erwin Newman, Jr., CPA (''Newman''), interviewed Tarwater. Tarwater explained (1) that he did not make a nickel from his arrangement with Davis, that all monies intended for Davis were passed on to Davis; (2) that he could document all payments that went to Davis; (3) that he sometimes advanced Davis money out of his own funds, reimbursing himself when JMH issued a check; and (4) that he cashed checks for Davis--sending Davis either the cash, a wire transfer, or a cashier's check--on the not-infrequent occasions when JMH issued him two checks at a time.

Beginning in 1995, the IRS began an investigation of Tarwater's tax returns for the years 1991 through 1994. When Tarwater both declined to discuss any tax matters with the revenue agent and also refused to turn over his personal and corporate records, a summons was issued to Tarwater's bank and accounting firm. Over Tarwater's motion to quash, the records were ultimately obtained by court order in the year 2000. Review of those records resulted in Tarwater's indictment on three counts of filing false tax returns--for the

years 1992, 1993, and 1994--in violation of 26 U.S.C. § 7206(1).

Tarwater's case was tried before a jury for five days beginning on April 30, 2001. Through the testimony of two IRS agents, Mary Barton (''Barton'') and Karen Jackson (''Jackson''), the government presented evidence that Tarwater deposited the monies he received from JMH into four separate accounts at Third National Bank in Knoxville. The first account, the Peters, Tarwater & Associates Account, was used by Tarwater for his accounting business receipts during the early parts of 1992. The name of that account was changed in August, 1992, to the Tarwater, Hines & Company Account. The remaining three accounts were (1) the Larry T. Tarwater, CPA, Account; (2) the Larry T. or Janie C. Tarwater Account; and (4) the Larry T. or Janie C. Tarwater Construction Account.

In 1992, JMH issued Tarwater twelve checks for a total of $73,460 for work allegedly performed by Davis. Of those twelve checks, Tarwater received one check on each of two different dates, and he received two checks on each of five separate occasions. Of the total 1992 checks intended for Davis, Tarwater deposited $45,010 in his partnership accounts at Third National Bank. The remaining $28,450 was deposited into his Tarwater, CPA, Account. Contrary to what Tarwater had told Newman, none of the twelve checks was cashed or endorsed over to Davis.

In 1993, JMH issued Tarwater fifteen checks for a total of $90,650 for Davis's work. While seven of the checks were issued singly on seven different dates, eight of the checks were issued in pairs, two each on four separate occasions. Tarwater deposited $28,000 of the Davis checks in the Tarwater, Hines & Company Account, $14,900 in the Tarwater CPA, Account, and the balance--$47,750--in the Larry T. or Janie C. Tarwater Construction Account, an account used for the 1993 construction of Tarwater's $385,000 home. Again, none of the checks was cashed or endorsed over to Davis.

In 1994, JMH issued Tarwater twenty-four checks for a total of $158,500 for work purportedly performed by Davis. The checks were issued two at a time on each of twelve occasions. Of the $158,500, $15,000 was deposited into the Tarwater, Hines & Company Account. The remaining $143,500 was deposited into the Larry T. or Janie C. Tarwater Construction Account.

During the years 1992 to 1994, Tarwater sent Davis a total of eleven checks, three drawn on the Tarwater, CPA, Account and eight drawn on the Larry T. or Janie C. Tarwater Construction Account. In 1992, he sent Davis three checks, each in the amount of $500.00. In 1993, he gave Davis four checks totaling $7,700, one each in the amounts of $200, $2000, $2,500 and $3,000. In the memo section on the $3000 check, Tarwater wrote the word ''loan.'' In 1994, Tarwater sent Davis four checks for a total of $16,000, one each in the amount of $2000, $3000, $5000, and $6000. In the memo section on the $2000 and $3000 checks, Tarwater wrote the word ''loan.'' On the $5000 check, he wrote the word ''advance.'' Also in 1994, Tarwater sent Davis six Western Union wire transfers totaling $6,555. The IRS found no other evidence of payments from Tarwater to Davis.

For each of the relevant tax years, Jackson reviewed both the monies deposited into as well as the monies drawn out of each of Tarwater's bank accounts. Jackson found that, for each year, Tarwater deposited a great deal more of the monies allegedly intended for Davis than he paid out through checks written to Davis. Even when Jackson added Tarwater's cash withdrawals and cash taken out of deposits to the checks written to Davis, giving Tarwater the benefit of an assumption that the cash was sent to Davis, Jackson still found that the monies taken in for Davis exceeded the monies sent out to Davis. According to Jackson, the excess of monies taken in for Davis over monies distributed out to Davis should have been retained in Tarwater's accounts if those monies were, in fact, meant as income for

Davis. Tarwater's monthly ending bank balances demonstrated, however, that Tarwater did not retain the undistributed monies intended for Davis but, instead, spent those monies.

The government's expert witness, Barton, opined that Tarwater did not state the true amount of either his gross receipts or his net income for the years 1992 through 1994. Specifically, as to income, she said that: (1) in 1992, Tarwater understated his income by $52,233; (2) in 1993, he understated his income by $35,950; and (3) in 1994, he understated his income by $120,945. In 1992, Tarwater's understatement of income was in part explained by his failure to report over $30,000 in gross receipts for the eight months that he operated as a sole proprietorship. Barton explained that a correct report of gross receipts and income is necessary to a correct computation of tax liability and that a false report of income is capable of influencing the IRS in the audit of tax returns.

Peters, Tarwater's business partner during the first three and a half years of the JMH-to-Tarwater-to-Davis payment arrangement, testified that Tarwater never told him that he received money from JMH on behalf of Willie Davis. Hines, Tarwater's business associate during the last years of the pass-through arrangement, said that Tarwater did not tell her about his arrangement with Davis until sometime in 1995, after JMH hired Newman to investigate and after JHM filed suit against Tarwater. According to Hines, Tarwater then explained to her that, years earlier, the hospital administrator had asked him to be the conduit for payments to Davis in order to help Davis avoid seizure of his assets by creditors.

Tarwater neither testified nor presented any expert testimony at trial. He did, however, call several lay witnesses.[1] One of those witnesses was Carl Curtis (''Curtis''), the contractor who built Tarwater's house. Curtis testified that Tarwater borrowed money from him on five or six occasions. According to Curtis, on each of two of those occasions, Tarwater borrowed $15,000 from him for Willie Davis. Curtis said that, although he did not know Davis, he was willing to lend Tarwater the money for Davis because he trusted Tarwater. The money, Curtis said, was repaid.

Tarwater also called his nephew, Michael Joe Tarwater (''Michael''), who testified that he worked part-time in his uncle's office for about seven months while he was in school. Michael said that his uncle frequently asked him to wire money to Davis. Indeed, according to Michael, Tarwater would send Michael to wire Davis money a couple of times a week, each time giving him cash, or checks made out to Tarwater which Michael would cash, normally around $2000 at a time, although sometimes it would be as much as $4000 or $5000. Michael said that $112,000 would be a conservative estimate of the total amount he wired to Davis during the months--apparently in 1994--that he worked for his uncle.

The jury convicted Tarwater on all three counts. At a sentencing hearing on July 12, 2001, the district court found that Tarwater was responsible for a tax loss exceeding $60,000, resulting in a base offense level of 13. To the base offense level, the court applied a two-level enhancement pursuant to U.S.S.G. § 3B1.3 for use of a special skill. Based on an adjusted offense level of 15, the court sentenced Tarwater to eighteen months imprisonment, one year of supervised release, and restitution in the amount of $45,116 to be paid to the IRS in a lump sum.

II. SUFFICIENCY OF THE EVIDENCE

[1] Tarwater contends that the evidence was insufficient to convict him of the charged offenses. Tarwater preserved his right to appeal this issue by both moving for a judgment of acquittal at the conclusion of the government's case as well as renewing the motion at the conclusion of all the evidence.

[1] Both the government and Tarwater subpoenaed Davis--who was present in the witness room throughout the trial--but neither elected to call him to testify.

In reviewing a claim of insufficiency of the evidence, this court looks at all of the evidence to determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443, U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We must view the evidence in the light most favorable to the prosecution, and "[c]ircumstantial evidence alone, if substantial and competent, may support a verdict and need not remove every reasonable hypothesis except that of guilt." United States v. Humphrey, 279 F.3d 372, 378 (6th Cir.2002).

Tarwater was convicted of three counts of violating 26 U.S.C. § 7206(1), which provides that "[a]ny person who ... willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter ... shall be guilty of a felony." Section 7206 is a perjury statute that criminalizes lying on any document filed with the IRS. It does not require the prosecution to prove the existence of a tax deficiency, exact amounts of unreported receipts or income, or an intent to evade taxes. See, e.g., United States v. Taylor, 574 F.2d 232, 234 [42 AFTR 2d 78-5129] (5th Cir.1978). Under the statute, the government need only prove that a defendant willfully made and subscribed a return, that the return contained a written declaration that it was made under penalties of perjury, and that the defendant did not believe the return to be true and correct as to every material matter. United States v. Bishop, 412 U.S. 346, 350 [32 AFTR 2d 73-5018], 93 S.Ct. 2008 [32 AFTR 2d 73-5018], 36 L.Ed.2d 941 (1973); United States v. Ristovski, 211 F.3d 1271, 2000 WL 491513, at 2 [85 AFTR 2d 2000-1393] (6th Cir. Apr. 18, 2000).

A matter is "material" if it has a natural tendency to influence, or is capable of influencing or affecting, the ability of the IRS to audit or verify the accuracy of a tax return. Neder v. United States, 527 U.S. 1, 16 [83 AFTR 2d 99-2668], 119 S.Ct. 1827 [83 AFTR 2d 99-2668], 144 L.Ed.2d 35 (1999) (quoting United States v. Gaudin, 515 U.S. 506, 509, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)). In a prosecution under § 7206(1), "any failure to report income is material." United States v. Holland, 880 F.2d 1091, 1096 (9th Cir.1989). Here, materiality was established by Barton's testimony that Tarwater's failure to report sizeable amounts of income was capable of influencing the IRS in the audit of Tarwater's tax returns.

Tarwater does not dispute that he willfully made and subscribed a return containing a written declaration that it was made under penalties of perjury. He also does not dispute that a sizeable amount of the monies he received from JMH were not reported as gross income on his tax returns. What he does dispute is the government's evidence, or lack thereof, that the "Willie Davis" monies constituted gross income that he should have reported on his tax return. He suggests, in other words, that he did not report the Willie Davis monies because he did not believe those monies constituted income to him. He thus challenges the jury's finding that he did not believe his returns to be true and correct.

Tarwater attacks the testimony of the government's expert witness, IRS Revenue Agent Barton, by arguing that Barton did not examine all of Tarwater's ledgers and accounts, that she made mistakes in her computations, and that her opinion as to Tarwater's understatement of income was unreliable because the opinion she gave at trial differed from the one she gave at a pre-trial hearing. Likewise, Tarwater attacks Agent Jackson's testimony, arguing that, because her review of Tarwater's financial records was incomplete, her conclusions were unreliable. At trial, however, defense counsel extensively cross-examined both agents, questioning the thoroughness of their review, their computations, and their conclusion that Tarwater understated his income by sizeable amounts in each of the relevant tax years. The jurors were able to assess the credibil-

ity of the agents, and--by their verdict--the jurors made clear that they believed the agents' testimony. It is not for us to second-guess the jurors' assessment of a witness's credibility; nor is it for us to reweigh any of the evidence.

Tarwater also argues that the evidence was insufficient because--he says--the government failed to prove that he did not make substantial cash payments to or on behalf of Davis. To be sure, the agents admitted that, if Tarwater made cash payments to or on behalf of Davis and if those payments were reasonably susceptible of being checked, those amounts would not be taxable to Tarwater. In fact, however, the agents said they found no evidence that Tarwater actually passed on the bulk of the JMH monies allegedly intended for Davis. Indeed, Tarwater's bank records--with their trail of deposits, withdrawals, and ending balances--suggested that Tarwater did not pass on most of the ''Willie Davis'' monies but, instead, used those monies for his own purposes. In addition, although Tarwater told Newman that he cashed one check for Davis on each of the frequent occasions that he received two checks from the hospital on the same day, Tarwater's bank records established that all such checks were instead deposited into one of Tarwater's several bank accounts.

Moreover, Tarwater was a certified public accountant who knew very well the importance of documenting transactions and creating an audit trail. He nonetheless failed to provide the hospital with invoices for Davis's work, failed to segregate the ''Willie Davis'' monies in a single account separate from his own personal and/or business accounts, failed to keep receipts for his purported cash payments to Davis, failed to advise his business partners about his arrangement with Davis, failed to keep receipts for most of the twice-weekly wire transfers about which his nephew testified, and otherwise failed to provide the IRS agents with the kind of documentation that accountants are known to handle on a daily basis, the kind of documentation that is reasonably susceptible of being checked.

Mindful that section 7206(1) is a perjury statute, requiring the government to prove that a defendant did not believe his or her tax return to be true and correct, several courts have determined that evidence of a defendant's attempts to avoid making records, to conceal assets, or to mislead others is probative of the did-not-believe-the-return-to-be-true element of a section 7206(1) offense. For example, in United States v. Scott, 660 F.2d 1145, 1160 [49 AFTR 2d 82-1279] (7th Cir.1981), cert. denied, 455 U.S. 907, 102 S.Ct. 1252, 71 L.Ed.2d 445 (1982), the court determined that the jury had a sufficient basis from which to infer that the defendant did not believe his tax return to be true and correct where the evidence demonstrated (1) that the defendant was a lawyer and an experienced banker who typically invested most of his money derived from ordinary and legitimate sources in high yield interest bearing securities or certificates of deposit; (2) that the defendant secreted large amounts of cash in safe deposit boxes, which was very much out of character for a man who so carefully invested and earned interest on his other funds; (3) that the defendant failed to keep records of his living and travel expenses; and (4) that the defendant made statements to the Tax Division of the Department of Justice which ''the jury could have believed ... to be false exculpatory statements, evidencing an intent to mislead or conceal.'' Scott, 660 F.2d at 1160. See also United States v. Kaatz, 705 F.2d 1237, 1246 [51 AFTR 2d 83-743] (10th Cir.1983) (explaining that the jury could infer willfulness from evidence that the defendants ''handled their affairs so as to avoid making the records usual to the businesses which they operated, and they did not disclose to their accountant the receipts which they diverted''). In both Scott and Kaatz, the courts cited the Supreme Court's decision in Spies v. United States, 317 U.S. 492, 499 [30 AFTR 378], 63 S.Ct. 364 [30 AFTR 378], 87 L.Ed. 418 (1943), a tax evasion case wherein the Court explained that, where a criminal tax statute makes ''willfulness'' an element of the offense, willfulness may be inferred ''from conduct such as keeping a double

set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal.''

Here, the jury (1) heard two IRS agents testify that Tarwater understated his income by sizeable amounts; (2) heard several witnesses testify about Tarwater's very unusual and virtually undocumented handling of the ''Willie Davis'' monies; (3) heard testimony revealing that Tarwater was a certified public accountant, one who by training understood the importance of documenting transactions, segregating funds, and maintaining an audit trail yet did none of those things in regard to the ''Willie Davis'' monies; and (4) heard testimony demonstrating that Tarwater gave a false explanation to the accountant who began the initial investigation into Tarwater's handling of the ''Willie Davis'' monies. We think such testimony/evidence pro-vided a sufficient basis from which the jury could infer that Tarwater knew very well that his tax returns for the years 1992 through 1994 were not true and correct as to every material matter.

III. JURY INSTRUCTIONS

A.

Tarwater contends that the district court impermissibly shifted the burden of proof when it instructed the jury that ''the government is not required to prove the nonexistence of alleged payments by [Tarwater] to or on behalf of Mr. Davis.'' J.A. at 558. As Tarwater correctly suggests, the government carries the burden of proving each and every element of a criminal offense beyond a reasonable doubt, and any jury instruction that shifts that burden to a defendant constitutes a violation of due process. Carella v. California, 491 U.S. 263, 265, 109 S.Ct. 2419, 105 L.Ed.2d 218 (1989); Sandstrom v. Montana, 442 U.S. 510, 521, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Whether a jury instruction violates a defendant's due process rights is reviewed de novo. United States v. Amparo, 68 F.3d 1222, 1224 (9th Cir.1995).

Tarwater does not suggest that the district court failed to accurately instruct the jury as to the elements of a section 7206(1) offense. Indeed, the district court instructed the jury that the government had the burden of proving, beyond a reasonable doubt, that Tarwater made and subscribed the three tax returns described in the indictment, that the returns contained a written declaration that they were made under penalty of perjury, that Tarwater knew the returns contained information that was material and false, and that Tarwater willfully filed the returns with the IRS. J.A. at 556. In defining the term ''willfully,'' the district court said that ''[Tarwater] must have acted voluntarily and intentionally and with the specific intent to do something he knew the law prohibited, that is to say, with intent either to disobey or to disregard the law.'' J.A. at 557. The district court also repeatedly instructed the jury that Tarwater had no obligation to present any evidence at all, that it was the government's burden to prove beyond a reasonable doubt every element of the crime charged. In the district court's words:

> [Tarwater] starts out with a clean slate, with no evidence at all against him, and the law presumes that he is innocent. This presumption of innocence stays with him unless the government presents evidence here in court that overcomes that presumption, and convinces you beyond a reasonable doubt that he is guilty.
>
> This means that [Tarwater] has no obligation to present any evidence at all, or to prove to you in any way that he is innocent. It is up to the government to prove that he is guilty, and this burden stays on the government from the start to the finish . . . .
>
> The government must prove every element of the crime charged beyond a reasonable doubt . . . .
>
> . . . .
>
> You are not to apply a different burden of proof in this case because [Tarwater]

is an accountant. The government must prove to you beyond a reasonable doubt that [Tarwater] willfully failed to report income on his Internal Revenue Service Tax Return.

. . . .

. . . . For each violation, you must decide whether the government has presented proof beyond a reasonable doubt that [Tarwater] is guilty of that particular violation.

. . . .

While the government has the burden to prove beyond a reasonable doubt that the defendant understated the amount of gross receipts or total income reported on his 1992 Federal Income Tax Return and the amount of his total income reported on his 1993 and 1994 Federal Income Tax Returns, the government is not required to prove the non-existence of alleged payments by [Tarwater] to or on behalf of Mr. Davis.

. . . . Do not return a guilty verdict unless the government proves the crimes charged beyond a reasonable doubt.

J.A. at 552–560.

We do not agree that the district court impermissibly shifted the burden of proof when it instructed the jury that "the government is not required to prove the non-existence of alleged payments by [Tarwater] to or on behalf of Mr. Davis." J.A. at 558. Indeed, our review of the relevant case law convinces us that the district court's instruction was a correct statement of the law.

In United States v. Ballard, 535 F.2d 400 [37 AFTR 2d 76-1340] (8th Cir.), cert. denied, 429 U.S. 918, 97 S.Ct. 310, 50 L.Ed.2d 283 (1976), the Eighth Circuit considered the burden placed on the government in a section 7206(1) criminal prosecution. In that case, the government presented evidence of Ballard's having deposited monies that were not reported as gross business receipts on his tax returns. Charged with willfully making and subscribing false income tax returns for two years, Ballard testified on his own behalf at trial, stating that fires had destroyed his business records, that he had--in fact--sustained a loss in his businesses during the two years in question, and that he had spent all of the cash he had received in operating his businesses. On appeal of his convictions, Ballard argued that the government could not establish its case by mere proof of gross receipts but was required to demonstrate Ballard's receipt of income, measured by gross receipts less expenses. The Eighth Circuit disagreed, stating:

> The Government's burden [in a section 7206(1)] case is less than in a tax evasion case. In the latter, the prosecution must show taxpayer's receipt of taxable income . . . . The prosecution's burden here is similar to that in a failure to file case in which evidence of unexplained receipts shifts to the taxpayer the burden of coming forward with the amount of offsetting expenses . . . . Thus, the evidence of unexplained receipts here established a prima facie case of taxpayer's failure to disclose substantial amounts of gross income.

Ballard, 535 F.2d at 405. Other courts have similarly suggested that, while the government bears the burden of proof throughout any criminal tax case, the government is not required to negate every possible source of nontaxable income, to track down all possible expenses, or to prove the absence any off-setting costs or deductions. See Davis v. United States, 226 F.2d 331, 335–336 [47 AFTR 2016] (6th Cir.1955) (explaining that "evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income, and it is then incumbent on [the taxpayer] to overcome the logical inferences to be drawn from such proof"), cert. denied, 350 U.S. 965, 76 S.Ct. 432, 100 L.Ed. 838 (1956); United States v. Orlowski, 808 F.2d 1283 [59 AFTR 2d 87-416] (8th Cir.1986) (rejecting the defendant's argument that, in a section 7206(1) case, the government was required to prove the non-existence of alleged expenses), cert. denied, 482 U.S. 927, 107 S.Ct. 3210, 96

L.Ed.2d 697 (1987); United States v. Stein, 437 F.2d 775 [27 AFTR 2d 71-639] (7th Cir.1971) (rejecting the defendant's suggestion that, in a tax evasion case, the government was required to eliminate all non-income items from its bank deposit proof); Siravo v. United States, 377 F.2d 469, 473–474 [19 AFTR 2d 1469] (1st Cir.1967) (explaining that, in a section 7206(1) case, ''evidence of unexplained receipts shifts to the taxpayer the burden of coming forward with evidence as to the amount of offsetting expenses, if any'').

In Holland v. United States, 348 U.S. 121, 135–136 [46 AFTR 943], 75 S.Ct. 127 [46 AFTR 943], 99 L.Ed. 150 (1954), the Supreme Court held that, in a net worth case, a case built ''solely on the approximations and circumstantial inferences of a net worth computation,'' the government makes out a prima facie case of tax evasion when it has proved the existence of a likely source of taxable income sufficient to account for a taxpayer's net worth increases and has also investigated all ''relevant leads furnished by the taxpayer--leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence.'' In so limiting the government's investigative responsibilities, the Supreme Court stated:

> Any other rule would burden the Government with investigating the many possible nontaxable sources of income, each of which is as unlikely as it is difficult to disprove. This is not to say that the Government may disregard explanations of the defendant reasonably susceptible of being checked. But where relevant leads are not forthcoming, the Government is not required to negate every possible source of nontaxable income, a matter peculiarly within the knowledge of the defendant.

Holland, 348 U.S. at 138; cf. United States v. Lawhon, 499 F.2d 352, 356–57 [34 AFTR 2d 74-5713] (5th Cir.1974) (explaining that in a case where the government bases its proof on specific items, the ''leads doctrine'' applicable in circumstantial evidence--or net worth--cases does not apply; in such a case, the government does not bear the burden of trying to discover and exclude all possible non-income items from its evidence of taxable income), cert. denied, 419 U.S. 1121, 95 S.Ct. 804, 42 L.Ed.2d 820 (1975).

In this case, the district court correctly instructed the jury that Tarwater had no obligation to present any evidence at all, that he was presumed innocent unless and until the government proved, beyond a reasonable doubt, the elements of the section 7206(1) charges against Tarwater. The court correctly defined those elements and cautioned the jury that government had the burden of proving every element of the crimes charged beyond a reasonable doubt. As suggested in numerous cases, including Ballard, Davis, Orlowski, and Holland, the government was not required to prove the absence of pass-through payments to Davis, particularly where, as here, Tarwater provided the government no help in identifying the form or source of those payments. We accordingly conclude that the district court in no way shifted the burden of proof when it instructed the jury that ''the government is not required to prove the non-existence of alleged payments by [Tarwater] to or on behalf of Mr. Davis.'' J.A. at 558. The district court correctly stated the law, and there was no violation of Tarwater's due process rights.

B.

Tarwater also argues that the district court erred by not giving a good faith instruction and by not giving Tarwater's proposed instruction that ''a transferor of funds does not have any reporting requirements under the Internal Revenue Code.'' J.A. at 274. We review for abuse of discretion the district court's choice of instructions. United States v. Prince, 214 F.3d 740, 760–761 (6th Cir.2000). We must consider the instructions as a whole to determine whether they fairly and adequately submitted the issues and applicable law to the jury. United States v. Khalil, 279 F.3d 358, 364 (6th Cir.2002). Generally, a defendant is entitled to an instruction on defense theories that are supported by law and raised by the evidence presented. United States v. Duncan, 850 F.2d 1104,

1118 [62 AFTR 2d 88-5069] (6th Cir.1988). However, we will reverse a district court's refusal to give a requested instruction only when (1) the requested instruction is a correct statement of the law; (2) the requested instruction is not substantially covered by other instructions actually delivered; and (3) the failure to give the requested instruction impairs the defendant's theory of the case. United States v. Chesney, 86 F.3d 564, 573 (6th Cir.1996).

Initially, we question whether Tarwater presented any evidence to support his good faith defense. Assuming arguendo that he did, however, we nonetheless find that the instructions, viewed as a whole, adequately encompassed his theory of defense. The district court instructed the jury on the specific intent required for a conviction for filing false tax returns by stating:

> The word ''willfully,'' as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he knew the law prohibited, that is to say, with intent either to disobey or to disregard the law. Negligent conduct is not sufficient to constitute willfulness.

J.A. at 557. The jury's conclusion that Tarwater acted willfully would necessarily negate any possibility of ''good faith'' in filing false tax returns. See United States v. Pomponio, 429 U.S. 10, 12–13 [38 AFTR 2d 76-5905], 97 S.Ct. 22 [38 AFTR 2d 76-5905], 50 L.Ed.2d 12 (1976) (explaining that where a district court instructs the jury that the term ''willful'' as used in section 7206 means ''a voluntary, intentional violation of a known legal duty, ... [a]n additional instruction on good faith [i]s unnecessary''); United States v. Ervasti, 201 F.3d 1029, 1041 [85 AFTR 2d 2000-541] (8th Cir.2000) (holding that the district court did not abuse its discretion in refusing the defendant's request for a good faith instruction where the court instructed the jury that ''[a]n act is done willfully if it is done voluntarily and intentionally with the purpose of violating a known legal duty'').

In support of his proposed transferor instruction, Tarwater cites Marlar, Inc. v. United States, 151 F.3d 962 [82 AFTR 2d 98-5476] (9th Cir.1998). In Marlar, the court held that a club which transferred monies from its customers to the club's dancers did not make ''payments'' triggering a Form 1099 reporting requirement on the part of the club. We are unconvinced that Marlar supports Tarwater's argument that the district court abused its discretion in refusing to instruct the jury in this section 7206(1) case that ''a transferor of funds does not have any reporting requirements under the Internal Revenue Code.'' Indeed, we find no such abuse.

IV. PROSECUTORIAL MISCONDUCT

Tarwater contends that the district court erred by denying his motion for a mistrial based on improper statements made by the government's counsel during closing arguments. Whether the government's closing argument constitutes prosecutorial misconduct presents a mixed question of law and fact that we review de novo. United States v. Emuegbunam, 268 F.3d 377, 394 (6th Cir.2001), cert. denied, 122 S.Ct. 1450 (2002); United States v. Clark, 982 F.2d 965, 968 (6th Cir.1993). When reviewing claims of prosecutorial misconduct, we determine first whether the statements were improper. United States v. Krebs, 788 F.2d 1166, 1177 (6th Cir.1986). If they appear improper, we then look to see if they were flagrant and warrant reversal. United States v. Carroll, 26 F.3d 1380, 1388 (6th Cir.1994). To determine flagrancy, we consider: 1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused. United States v. Monus, 128 F.3d 376, 394 [80 AFTR 2d 97-7329] (6th Cir.1997) (citing United States v. Cobleigh, 75 F.3d 242, 247 (6th Cir.1996)).

Tarwater contends that, during closing arguments, the prosecutor improperly commented on Tarwater's post-Miranda right

to silence. Specifically, Tarwater complains about four statements, two made by AUSA Weddle and two made by AUSA Baxter in their rebuttal closing. Weddle said: (1) ''Mr. Tarwater declined to discuss any tax matters with the Revenue Agent;'' and (2) ''No one in the courtroom knows whether money went to Willie Davis; well, maybe there is one other person in this courtroom who knows.'' J.A. at 541, 543. Baxter said: (1) ''[Defense counsel] could have brought Willie Davis before this jury just like the government;'' and (2) ''Now, from a criminal defense point of view, justice means one thing. It means: 'Acquit my client.' I mean, there is no other explanation or definition for justice for a criminal defense lawyer.'' J.A. at 544–546. Defense counsel objected to each of these statements, albeit without elaboration. According to Tarwater, because Miranda warnings had been given to him before he exercised his right to silence when he was questioned by the IRS agent, the prosecutors violated his rights under Miranda by referring to his silence or failure to call witnesses.

The Fifth Amendment states: ''No person ... shall be compelled in any criminal case to be a witness against himself ....'' U.S. Const. amend. V. The Supreme Court, in Miranda v. Arizona, stated that ''it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that [the defendant] stood mute or claimed his privilege in the face of accusation.'' Miranda v. Arizona, 384 U.S. 436, 468 n. 37, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Consistent with Miranda, prosecutors may not comment on a defendant's post-arrest silence in their case in chief, on cross-examination, or in closing arguments. Doyle v. Ohio, 426 U.S. 610, 619–20, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Such proscription, however, does not extend to a defendant's failure to call a witness or to otherwise present exculpatory evidence so long as the prosecutor does not tax the exercise of the defendant's right to remain silent. See, e.g., United States v. Cabrera, 201 F.3d 1243, 1250 (9th Cir.2000); United States v. Sblendorio, 830 F.2d 1382, 1391 (7th Cir. Ordinarily, we review prosecutorial comments about a defendant's post-Miranda silence under a harmless error standard. See, e.g., United States v. Moreno, 185 F.3d 465, 472 (5th Cir.1999).

Before the prosecutors made the challenged statements in their rebuttal arguments, defense counsel argued to the jury:

> You haven't heard why Willie Davis isn't before this jury. You haven't heard that, have you? No. Where is Willie Davis? The government didn't call Willie Davis; [the IRS agent] didn't talk to Mr. Willie Davis, and the government has the burden of proof.

J.A. at 539–540. AUSA Baxter responded to this argument by saying: ''[D]efense counsel] could have brought Willie Davis before this jury just like the government.'' J.A. at 544. Baxter's comment was proper and did not run afoul of Tarwater's Fifth Amendment rights.

To the extent, if any, AUSA Weddle improperly commented about Tarwater's failure to discuss any tax matters with the revenue agents, we find his comments harmless. As Weddle himself pointed out to the jury, Tarwater himself put into evi-dence an exhibit which twice stated that Tarwater declined to discuss any tax mat-ters with the revenue agent. J.A. at 541, 1038.

Finally, we do not find Baxter's comment about defense counsel's view of justice so flagrant as to warrant reversal.

V. EVIDENTIARY ISSUES

A.

Tarwater argues that the district court should not have admitted Agent Barton's expert opinion testimony that Tarwater under-reported his income. According to Tarwater, Barton's opinion was unreliable ''because it was based upon facts or assumptions about which she had no knowledge, let alone the 'specialized knowledge' required by Rule 702.'' Def.'s Br. at 41. Tarwater suggests that the magistrate judge

who conducted the Daubert hearing ''focused on Barton's qualifications and expressly abandoned the gate keeping function of Daubert.'' Id. We review a district court's decision to admit expert testimony for abuse of discretion. United States v. Langan, 263 F.3d 613, 620 (6th Cir.2001).

The magistrate judge held a Daubert hearing on January 18, 2001. Based on the evidence and argument presented, the judge ruled that Barton's testimony was ''both relevant and reliable pursuant to Rule 702, Federal Rules of Evidence, and should be admissible at trial.'' J.A. at 187. In particular, the magistrate judge found that it was ''clear from the evidence presented during the Daubert hearing that Ms. Barton is qualified to express an expert opinion on whether defendant understated his taxable income for the years 1991–1994.'' J.A. at 179. In concluding its twenty-five page memorandum and order, the court wrote:

> Ms. Barton is a qualified expert in her field who possesses technical knowledge that will assist the trier of fact to understand and determine the issues in this case. Her testimony is based upon sufficient facts and/or data, the testimony is the product of reliable principles and methods, and it appears that Ms. Barton has applied the principles and methods reliably to the facts of this case.

J.A. at 187. After reviewing the magistrate judge's memorandum and order, the transcript of the Daubert hearing, and the pleadings filed by the parties, the district court overruled Tarwater's objections and appeal of the magistrate judge's ruling on the admissibility of Barton's opinions. J.A. at 210–213.

In Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S 759, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), the Supreme Court held that Federal Rule of Evidence 702 requires district courts to ensure that an expert's scientific testimony ''both rests on a reliable foundation and is relevant to the task at hand.'' Daubert, 509 U.S. at 597. The Court suggested a non-exclusive list of factors for courts to consider when deciding whether proposed scientific expert testimony is sufficiently ''reliable.'' Such factors include: (1) whether a theory or technique has been or can be tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) whether the technique has been accepted by a relevant scientific community. Daubert, 509 U.S. at 593–594.

In Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), the Court extended Daubert to include any expert testimony based on ''technical'' and ''other specialized knowledge.'' Kumho Tire Co., 526 U.S. at 152. With respect to the individual factors enumerated in Daubert, the Kumho Court held that, while trial courts may consider such factors when assessing the reliability of all types of expert testimony, ''Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case.'' Kumho, 526 U.S. at 141. ''[W]hether Daubert's specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.'' Kumho, 526 U.S. at 153.

After reviewing Barton's trial testimony, we cannot say that the district court abused its discretion by allowing her to testify as an expert witness. We find no merit to Tarwater's argument that the district court abandoned its Daubert gate-keeping function by failing to consider the Daubert factors. To be sure, the court concluded--and we agree--that the Daubert factors were of limited value here, but the court nonetheless carefully considered whether Barton's testimony was reliable and relevant. The court summarized its findings as follows:

> Ms. Barton's testimony is the product of well-established principles of bookkeeping and accounting as those areas of expertise are applied to the Internal Revenue Code. Ms. Barton demonstrated an understanding of the rules and regulations of the IRS Code that require the reporting of all taxable income. The methods employed by Ms. Barton in reaching her expert opinion were the application of her education, training,

knowledge and experience to analyze defendant's tax returns and business records to determine whether the defendant complied with the requirements of the Internal Revenue Code to report all his income.

J.A. at 182. Given such findings, we are confident that the district court had an adequate basis for concluding that Barton's testimony was both reliable and relevant.

Moreover, we reject Tarwater's assertion that Barton's testimony was unreliable because "based upon facts or assumptions about which she had no knowledge." Def.'s Br. at 41. Indeed, the record refutes any such assertion. As stated by the district court:

> Ms. Barton testified that her computations were based upon Defendant's bank records and business records, and her expert opinion that Defendant under reported his income is based upon her examination of Defendant's record, her ability to trace the flow of income and the disbursement of same as viewed by a Revenue Agent with twenty-five years of experience and training, and from her analysis of Defendant's bank records and business records. It appears to the Court that Ms. Barton has applied the principles and methods of her technical expertise to the facts of this case.

J.A. at 183. At trial, Barton reiterated that her opinions were based upon her review of Tarwater's records--books, bank statements, and checks--and tax returns. Tarwater's suggestion that Barton's opinion involved a determination of the credibility of two non-testifying taxpayers is without merit.

B.

As an expert witness, Agent Barton was permitted to testify--over Tarwater's objection--regarding her opinion that Tarwater understated his income for the years 1992–1994. On direct examination, the government elicited testimony from Barton regarding her review of the documentary evidence, including Tarwater's personal and business financial records, income tax returns, bank records, and JMH records. On cross-examination, defense counsel asked Barton whether she had talked with Willie Davis (she had not), whether she knew if Tarwater had made any cash payments to Willie Davis (she knew only what was recorded in the books and records), and whether she did or did not answer "yes" when she was asked in the earlier Daubert hearing if she would want to talk with Willie Davis to determine whether cash payments were made to him (she answered "yes"). Tarwater contends that, by opining that Tarwater understated his income, Barton necessarily communicated her opinion that Tarwater did not make sufficient payments to or on behalf of Willie Davis. He contends that Barton thus improperly "vouched" for the credibility of Davis's alleged out-of-court statement to the effect that he had not received any cash payments from Tarwater.

We are not persuaded by Tarwater's "vouching" argument. Barton was asked by the government to review the documentary evidence, and she rendered an opinion about the accuracy of Tarwater's tax returns based on that evidence. The jury was capable of determining that, if Tarwater failed to document the alleged cash transfers to Davis, those cash transfers would not be reflected in Barton's calculations. That she did not consider undocumented transfers in no way suggests that she "vouched" for an alleged out-of-court statement by Davis that he did not receive any cash payments from Tarwater.

C.

On September 15, 2000, approximately seven months before trial, the government provided Tarwater with a written summary of Agent Barton's proposed testimony. As required by Federal Rule of Criminal Procedure 16(a)(1)(E), the summary described Barton's opinions, the bases and reasons for those opinions, and Barton's qualifications. The summary also disclosed that Barton's opinions were based on her examination of Tarwater's income tax returns, bank records, business records, and records from JMH. J.A. at 73–75. The government supplemented Barton's summary on September 20, 2000, disclosing to Tarwater

that Barton would also testify that a taxpayer's failure to include all income on a tax return can influence the correct computation of tax liability and can impede the IRS's verification and/or audit of the tax return. J.A. at 79–80.

On October 3, 2000, in response to Tarwater's motion to strike Barton's testimony, the government again supplemented Barton's summary, disclosing to Tarwater the specific details of Barton's computations. J.A. at 110–120. The magistrate judge denied Tarwater's motion to strike Barton's testimony on January 4, 2001, ruling that the government's disclosures were sufficient and did not constitute a violation of Rule 16(a)(1)(E).

On January 18, 2001, at the Daubert hearing, Barton testified as to Tarwater's understatement of income for the years 1991 through 1994, giving complete details of her computations. Following the Daubert hearing, the magistrate denied Tarwater's renewed motion to strike Barton's testimony, again ruling that the government had complied with Rule 16(a)(1)(E). The court stated:

> The ''summary'' required by Rule 16(a)(1)(E) is only required to describe the witness' opinions, the bases and the reasons for those opinions, and the witness' qualifications. It does not require the expert to set forth a detailed justification for her expert opinion. That is an area which may be explored by counsel on cross-examination at trial.

J.A. at 185.

The evening before Barton was scheduled to testify at trial, the government produced a report entitled ''Explanation of Items.'' Prepared by Barton, the report revealed that, at an early stage in her investigation, Barton estimated that Tarwater was entitled to credits of $3,276.00 per year for payments to rental car companies on behalf of Davis. Barton later eliminated those credits from her computations.

Also the evening before Barton was scheduled to testify, the government produced a copy of Barton's revised computations of Tarwater's understatement of income. Interestingly, the revisions in Barton's computations represented a net effect of approximately $18,000 in Tarwater's favor.

Based on the government's last minute production of Barton's ''Explanation of Items'' and revised reports, Tarwater moved to strike Barton's testimony. Claiming Brady and Rule 16(a)(1)(E) violations, Tarwater also moved to dismiss or to continue trial. The district court denied Tarwater's motions.

Tarwater now contends that the district court erred by denying Tarwater's motions to strike and/or to dismiss. This court reviews a district court's rulings on Rule 16(a)(1)(E) issues for abuse of discretion. United States v. Azad, 809 F.2d 291, 294 (6th Cir.1986), cert. denied, 481 U.S. 1004, 107 S.Ct. 1626, 95 L.Ed.2d 200 (1987). We review de novo the issue of whether evidence withheld by the prosecution constitutes Brady material. United States v. Phillip, 948 F.2d 241, 250 (6th Cir.1991). A district court's denial of a Brady claim is reviewed by this court de novo to determine whether the suppressed Brady evidence undermines confidence in the outcome of the defendant's trial. United States v. Miller, 161 F.3d 977, 987 (6th Cir.1998).

To establish a violation under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), a defendant has the burden of establishing that the prosecutor suppressed evidence that was unknown to the defendant. See United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976) (explaining that the Brady rule applies to ''the discovery, after trial, of information which had been known to the prosecution but unknown to the defense''); United States v. Mullins, 22 F.3d 1365, 1371 (6th Cir.1994) (explaining that ''Brady is concerned only with cases in which the government possesses information which the defendant does not''); Coe v. Bell, 161 F.3d 320, 344 (6th Cir.1998) (explaining that there is no Brady violation if the defendant knew or should have known the essential facts permitting him to take advantage of the infor-

mation in question, or it the information was available to him from another source).

Tarwater claims that the government violated Brady when it disclosed--before Barton testified--that Barton at one time gave him credit for car rental payments that Tarwater himself supposedly made on behalf of Davis. Obviously, Tarwater knew whether he did or did not make such payments on behalf of Davis. Because the information about which he complains was not unknown to him, and because the information was disclosed to him before Barton testified, permitting him to take advantage of the information during his cross-examination of Barton, we find no Brady violation whatsoever.

Furthermore, we find that the district court did not abuse its discretion when it denied Tarwater's motion to dismiss and/or strike on the grounds that the government violated Rule 16(a)(1)(E) by producing Barton's revised reports the day before Barton testified. Tarwater's counsel was able to review the revised reports before extensively cross-examining Barton about the changes reflected in those reports. As explained by Barton at trial, the changes were necessitated by information that Barton acquired from Tarwater's own records not long before trial. The changes, moreover, were largely in Tarwater's favor. For example, the revised reports reflected no change in the understatement of income for 1992, a $19,000 reduction in the understatement of income for 1993, and an $810 increase in the understatement of income for 1994. Because Tarwater did not suffer any surprise and because he does not suggest how the outcome of the case would have been different if he had learned about Barton's revised computations earlier, we will not disturb the decision of the district court.

D.

Tarwater contends that the district court abused its discretion by permitting the government to use summary charts at trial that were not disclosed to him in advance of trial. The charts, however, were not admitted into evidence, were not submitted to the jury during deliberations, and were not used in lieu of the bank records upon which the summary charts were based. In contrast, Tarwater's bank records were admitted into evidence, were disclosed to Tarwater long before trial, and were given to the jury to review during their deliberations. Moreover, the district court instructed the jury that the summary charts were not evidence and should be disregarded if they did not correctly reflect the facts or figures shown by the evidence. Under the circumstances, we find Tarwater's claim regarding the summary charts to be frivolous.

E.

Tarwater complains that the trial court abused its discretion in admitting evidence of crimes for which he was not on trial--namely Medicare and Medicaid fraud--in violation of Rule 404(b). In particular, Tarwater contends that the district court abused its discretion when it refused to exclude testimony concerning the circumstances surrounding his receipt of the "Willie Davis" checks. For example, the court refused to exclude evidence about whether the hospital received invoices for the checks written to Tarwater personally, whether the hospital verified Medicare or Medicaid receipts before signing checks to Tarwater, whether Chambers was instructed to cease work on a review of the correctness and propriety of making payments to Davis and Tarwater, and whether it was a customary practice in Tarwater's and Peters' accounting practices to send invoices to clients for payment. Tarwater contends that this testimony may have suggested to the jury that he received funds unlawfully or fraudulently from JMH.

In denying Tarwater's pre-trial motion to exclude this evidence, the district court found that, because the challenged evidence was inextricably intertwined with evidence of the crimes charged, Rule 404(b) was not implicated. See United States v. Everett, 270 F.3d 986, 992 (6th Cir.2001) (explaining that "Rule 404(b) is not applicable where the challenged evidence is 'inextricably intertwined' with evidence of the crime charged"). We agree that the challenged evidence was inextrica-

bly intertwined with the evidence of the crimes charged, and we accordingly find no abuse of discretion on the part of the district court in refusing to exclude the evidence.

VI. SENTENCING ISSUES

A.

[2] Tarwater first challenges the constitutionality of the United States Sentencing Guidelines (''Guidelines''). He contends that, contrary to what the Guidelines permit, a jury should decide, beyond a reasonable doubt, all facts that are used to increase a defendant's Guidelines sentencing range. In this case, a tax case, the Guidelines provide a base offense level of 6, with a corresponding sentencing range of zero to six months. Tarwater argues that, by permitting the court to adjust his offense level above a level of 6 based upon the court's preponderance-of-the-evidence factual findings, the Guidelines unconstitutionally removed from the jury the assessment of facts that increased the prescribed range of penalties for his offense. We review constitutional challenges de novo. United States v. Beavers, 206 F.3d 706, 708 (6th Cir.2000). We also review questions of law concerning the application of the Guidelines de novo. United States v. Canestraro, 282 F.3d 427, 431 (6th Cir.2002).

In Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the Supreme Court held that ''[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'' Recently, in Harris v. United States, 122 S.Ct. 2406 (2002), five members of the Court agreed that facts increasing the range of punishment below the statutory maximum may be determined by the judge and need not be found beyond a reasonable doubt by a jury. Among other things, the Harris Court recognized the continuing vitality of McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), a case wherein the Court held constitutional a state statute that permitted a sentencing court, rather than a jury, to find facts that raised the mandatory minimum sentence. McMillan, 477 U.S. at 88. Together, Harris, Apprendi, and McMillan foreclose Tarwater's constitutional challenge to the Guidelines.

Tarwater was convicted of violating 26 U.S.C. § 7206(1), which provides that any person convicted of violating that statute ''shall be fined not more than $100,000 . . . or imprisoned not more than 3 years, or both.'' Tarwater was sentenced to eighteen (18) months imprisonment, well below the statutory maximum. Because no factual determinations made at Tarwater's sentencing increased his penalty beyond the statutory maximum, we find no merit to his argument that his sentence was constitutionally infirm.

B.

Tarwater contends that the district court did not make independent factual findings for each contested matter in the presentence report in violation of Federal Rule of Criminal Procedure 32(c)(1). Such rule provides that ''[a]t the sentencing hearing . . . [f]or each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing.'' Fed. R. Cr. P. 32(c)(1). Because the purpose of the rule is to ensure that sentencing is based on reliable facts found by the court itself after deliberation, a court may not merely summarily adopt the factual findings in the presentence report or simply declare that the facts are supported by a preponderance of the evidence. United States v. Corrado, 227 F.3d 528, 540 (6th Cir.2000); United States v. Tackett, 113 F.3d 603, 613 (6th Cir.1997). We require ''literal compliance'' with Rule 32(c)(1) because it ''helps to ensure that defendants are sentenced on the basis of accurate information and provides a clear record for appellate courts, prison officials, and administrative agencies who may later be involved in the case. Tackett, 113 F.3d at 613–614.

Tarwater made three factual objections to the presentence report. Specifically, he objected to: (1) the amount of the tax loss and restitution; (2) the adjustment for illegal activity pursuant to U.S.S.G. § 2T1.1(b)(1); and (3) the adjustment for abuse of a position of trust pursuant to U.S.S.G. § 3B1.3. The district court held a lengthy sentencing hearing on July 12, 2001, at which time the lawyers presented evidence and argument concerning Tarwater's objections. From the partial transcript included in the record before us, it appears that the court first considered Tarwater's objection to the amount of the tax loss. On page eight of the transcript, defense counsel stated: "[A]t this time, we would take up the calculation of the amount of the tax loss and the related issue, of course, of the calculation of restitution." J.A. at 676. On page twenty-nine of the transcript, the next page to be included in the record, the court stated:

> What the defense is trying to suggest to the court is that anything that the government could not prove that he should receive a credit for, the defendant should receive credit. As I understand the burden of proof for the government in this case, is the government had to show that the defendant received "X" dollars in funds and that of those funds he failed to report it on his income tax return.
>
> The government was able to show and trace most of these funds to the defendant's checking account, various checking accounts, and from that I think the proof was clear beyond a reasonable doubt that these funds were used for his benefit. The jury was so convinced and I am so convinced.

J.A. at 677. On page forty-six of the transcript, the next page to be included in the record, the district court agreed to reduce the probation officer's estimate of Tarwater's 1994 understatement of income by $48,000. J.A. at 678. On page sixty-seven of the transcript, the court stated: "[C]oncerning the amount, I have calculated the amount, which is now $218,936, multiplied by 28%, will give a tax loss of $61,302.08." J.A. at 680. Although we cannot determine what the district court may have said or heard on the missing pages of the transcript, the few pages that we have reviewed clearly reveal that the district court did not merely summarily adopt the amount of loss presented in the presentence report.

That the district court understood its responsibility to make independent factual findings was made crystal clear when the judge stated at the sentencing hearing: "The Sixth Circuit has held that the district court must make specific findings of fact, as required by Rule 32(c)(1) of the Federal Rules of Criminal Procedure, and must not rely on the presentence report." J.A. at 681. After making this statement, the district court set out its independent factual findings as to Tarwater's remaining two objections, those regarding the adjustments for illegal activity and for abuse of a position of trust. J.A. at 680–684. These findings, along with what we know about the district court's treatment of the amount of loss, satisfy the requirements of Rule 32(c)(1).

VII. CONCLUSION

Having found no merit to any of Tarwater's arguments on appeal, we AFFIRM.

KAREN NELSON MOORE, Circuit Judge, dissenting.

DISSENT

I agree with the majority as to all issues except the jury instructions regarding the burden of proof and the determination at sentencing of the amount of loss atrributable to Tarwater. Because the jury instructions erroneously shifted the burden of proof to the defendant and this error cannot be considered harmless, and because the district court did not make sufficient findings of fact with respect to the amount of loss, I respectfully dissent.

I. JURY INSTRUCTIONS

A.

Tarwater argues that the district court's jury instructions erroneously shifted the government's burden of proof, requiring

Tarwater to prove affirmatively that he did not violate 26 U.S.C. § 7206(1). There are two elements essential to showing a violation of the statute: (1) signing a tax return under penalty of perjury; (2) in the knowledge that, ''at the time of signing, the return was materially incorrect or in violation of existing tax laws.'' United States v. Morris, 20 F.3d 1111, 1115 [73 AFTR 2d 94-2111] (11th Cir.1994); see also United States v. Bishop, 412 U.S. 346, 350 [32 AFTR 2d 73-5018] (1973) (noting that the defendant also must willfully make and subscribe a tax return). ''The prosecution bears the burden of proving all elements of the offense charged, and must persuade the factfinder beyond a reasonable doubt of the facts necessary to establish each of those elements.'' Sullivan v. Louisiana, 508 U.S. 275, 277–78 (1993) (quotation and citations omitted). Jury instructions relieving the prosecution of its obligation to prove each element of an offense violate a defendant's due process rights. Carella v. California, 491 U.S. 263, 265 (1989); Sandstrom v. Montana, 442 U.S. 510, 521–24 (1979). Therefore, to describe correctly the government's burden of proof, the instructions in this case would have to convey the prosecution's obligation to prove beyond a reasonable doubt both that Tarwater signed a tax return under penalty of perjury and that he knew the return was materially incorrect or in violation of existing tax law at the time he signed it.

The district court's jury instructions stated that the government would have to overcome the presumption of Tarwater's innocence with proof beyond a reasonable doubt and further emphasized that the ''burden stays on the government from the start to the finish.'' Joint Appendix (''J.A.'') at 552. However, the instructions also explained that, ''[w]hile the government has the burden to prove beyond a reasonable doubt that the defendant understated the amount of gross receipts or total income reported on his 1992 federal income tax return and the amount of his total income reported on his 1993 and 1994 federal income tax returns, the government is not required to prove the non-existence of alleged payments by the defendant to or on behalf of Mr. Davis.'' J.A. at 558. This instruction ignores the fact that, as a logical matter, the government could not prove beyond a reasonable doubt that Tarwater filed tax returns knowing they were materially incorrect without showing that Tarwater did not pass the payments in question through to Davis.

The instruction at issue had the effect of negating the government's burden to prove the second element of § 7206(1). As the district court acknowledged in a jury instruction, income under the Internal Revenue Code includes ''all increases in wealth, clearly realized, and over which a person has complete control. A gain constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily recognizable economic value from it.'' J.A. at 558. Tarwater contends, and the testimony of an IRS agent confirms, that: (1) the payments from Jefferson Memorial Hospital (''JMH'') were income reportable either to Tarwater or Davis, but not both; and (2) if Tarwater passed through to Davis the payments by JMH for Davis, those payments were not income to Tarwater. Thus, if the payments were passed through, Tarwater did not knowingly file materially incorrect or illegal tax returns. In a similar situation, where the characterization of an increase in wealth as income was disputed, we held that, ''[i]f the money were truly a loan, [the defendant] would have been under no duty to report it as income, and he would not be guilty of the predicate offense of filing a false tax return.'' United States v.. Parrott, 148 F.3d 629, 634 [82 AFTR 2d 98-5085] (6th Cir.1998). Because the existence of Tarwater's alleged payments to Davis was a fact necessary to establish whether Tarwater knowingly submitted false returns for 1992, 1993, and 1994, the government was required to prove beyond a reasonable doubt that he did not pass through to Davis payments by JMH for Davis.

In other words, the government was required to prove beyond a reasonable doubt that the payments by JMH were income to Tarwater. If the payments by JMH were

for Davis and were passed through Tarwater to Davis, however, they were not income to Tarwater. The majority suggests that Tarwater's payments to Davis are analogous to offsetting expenses, relying on cases stating that the government need not come forward with evidence negating all possible offsetting expenses and nontaxable gains to make a case that a taxpayer failed to report his gross income. In the instant case, however, Tarwater does not argue that the government should have a burden to produce this evidence. Rather, in claiming that the jury instruction shifted the government's burden of proof, Tarwater rightly asserts that the government had a burden to show that the only alleged source of income in this case--payments from JMH--actually constituted income to Tarwater. By concluding that the government does not have this burden, the majority improperly extends the law of other circuits to suggest that the government is not only excused from producing evidence to negate all possible offsetting expenses or nontaxable gains, but that the government is further excused from proving beyond a reasonable doubt that a defendant received income that he knowingly failed to report. Therefore, the jury instruction at issue impermissibly shifted the burden of proof from the government to the taxpayer.

B.

It is well settled that jury instructions that relieve the prosecution of proving beyond a reasonable doubt every fact necessary to each element of the offense charged violate a defendant's due process rights and therefore constitute constitutional error. See Sandstrom v. Montana, 442 U.S. 510, 520 (1979) (relying on In re Winship, 397 U.S. 358, 364 (1970)). Because the jury instruction at issue negated the government's burden of proving beyond a reasonable doubt a fact necessary to an element of the charged offense, the determination of whether Tarwater's conviction should be vacated and the case remanded for a new trial should turn on "whether the error here is subject to harmless-error analysis and, if so, whether the error was harmless." Neder v. United States, 527 U.S. 1, 8 [83 AFTR 2d 99-2668] (1999).

Pursuant to Federal Rule of Criminal Procedure 52(a), "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." According to the Supreme Court, however, "a limited class of fundamental constitutional errors ... 'defy analysis by "harmless error" standards'" because they include "'defect[s] affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.'" Id. at 7, 8 (quoting Arizona v. Fulminante, 499 U.S. 279 (1991)). These errors are intrinsically harmful because they "'infect the entire trial process,' and 'necessarily render a trial fundamentally unfair.'" Neder, 527 U.S. at 8 (internal citations omitted).

The erroneous jury instruction at issue in this case should not be subject to harmless-error analysis. The Supreme Court has held that a jury instruction that misdescribes or omits an element of an offense is subject to harmless error review. See Neder, 527 U.S. at 9–10. In Sullivan, though, the Court held that a jury instruction that "consists of a misdescription of the burden of proof, which vitiates all the jury's findings" is a structural error, and, as such, it could not be subject to harmless-error analysis. Sullivan, 508 U.S. at 281 (emphasis in the original). The instruction in Sullivan generally misdescribed the reasonable doubt standard, as opposed to misdescribing the burden of proof for just one element of the offense. However, inasmuch as the constitutionally erroneous jury instruction in this case involved the only element at issue in Tarwater's trial--and one of only two elements of the offense itself--the misdescription of the burden of proof in this case has the same effect as the general misdescription of the burden of proof in Sullivan. I recognize that the Court in its subsequent decision in Neder limited Sullivan to jury-instruction errors that "vitiat[e] all the jury's findings," thereby exempting those erroneous instructions that just "prevent[ ] the jury from rendering a 'complete verdict' on every element of the offense."

Neder, 527 U.S. at 11 (quoting Sullivan, 508 U.S. at 281) (emphasis in the original). Nevertheless, because the existence of the pass-through payments to Davis was the essential fact to the only element at issue in this case, the erroneous jury instruction does vitiate all the jury's findings and, therefore, we should not subject the instruction to harmless-error analysis.

Even if harmless error analysis were appropriate in this case, the erroneous instruction at issue clearly would not be harmless. The Supreme Court in Neder explained that, for a constitutional error to be harmless, it must appear "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Neder, 527 U.S. at 15 (quoting Chapman v. California, 386 U.S. 18, 24 (1967)). Under harmless error review, "the government bears the burden of showing that the error had no effect on a defendant['s] substantial rights." United States v. Stewart, --- F.3d ----, No. 99-5615 et al., 2002 WL 31010856, at 17 (6th Cir. Sept. 10, 2002) (citing United States v. Vonn, 122 S.Ct. 1043, 1048 (2002)). Had the jury found that Tarwater passed through to Davis the payments by JMH for Davis, the jury would have had to conclude that Tarwater did not knowingly under-report his income. Therefore, it seems impossible that a jury instruction stating that the government did not have to prove the nonexistence of such payments did not contribute to the verdict. See United States v. Alt, 996 F.2d 827, 829 [72 AFTR 2d 93-5187] (6th Cir.1993), cert. denied, 519 U.S. 872 (1996) (holding in a tax evasion case that a jury instruction shifting the burden of proof regarding a taxpayer's knowledge of the tax code was not harmless error).

Because the jury instruction shifted the government's burden of proof to Tarwater as to a fact going to the only element at issue in the case, the error is structural and therefore mandates that we vacate the conviction and remand to the district court.

II. SUFFICIENCY OF FACTUAL FINDINGS IN ASSESSING ATTRIBUTABLE LOSS

The district court failed to make sufficiently independent findings of fact in assessing the total amount of tax loss attributable to Tarwater at his sentencing hearing, as required by Federal Rule of Criminal Procedure 32(c)(1). Pursuant to Rule 32(c)(1), for each matter controverted at a sentencing hearing, "the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing." Fed.R.Crim.P. 32(c)(1). This court has recognized that "[t]he primary purpose for this rule is to ensure that sentencing is based on reliable facts found by the court itself after deliberation, not on the delegation of the fact-finding process to the probation officer or the prosecution." United States v. Parrott, 148 F.3d 629, 633 [82 AFTR 2d 98-5085] (6th Cir.1998); see United States v. Bennett, 291 F.3d 888, 899 (6th Cir.2002). This court requires "literal compliance" with Rule 32(c). See Bennett, 291 F.3d at 899 (citing United States v. Tackett, 113 F.3d 603, 613–14 (6th Cir.1997), cert. denied, 522 U.S. 1089 (1998)). Contrary to the majority's conclusion that the district court satisfied the requirements of Rule 32(c)(1) with respect to the amount of loss, I believe that the district court did not make specific findings as to controverted facts.

At the sentencing hearing, the district court heard Tarwater's specific factual objections to the amount of loss, but only announced its finding as to the total amount of loss. The sentencing judge did not resolve specific controverted facts in determining the amount of loss. The court announced only the following finding with respect to the amount of loss: "I'm prepared to rule on the issues that are before the court at this time; that is, concerning the amount, I have calculated the amount, which is now $218,936, multiplied by 28%, will give a tax loss of $61,302.02." J.A. at 680. Because the court neither discussed nor resolved any specific factual

disputes, it did not comply with Rule 32(c)(1). See United States v. Monus, 128 F.3d 376, 396 [80 AFTR 2d 97-7329] (6th Cir.1997), cert. denied, 525 U.S. 823 (1998) (holding that a court failed to comply with Rule 32(c)(1) where it only "made an oral finding regarding the contested calculation of enhancement levels based on the value of loss resulting from defendant's offense").

We vacate a defendant's sentence and remand for resentencing where a district court does not "explain how it calculated the amount of loss or respond to the defendant's specific factual objections to the methods of calculation included in the PSI." Id. at 397; see United States v. Osborne, 291 F.3d 908, 912 (6th Cir.2002); United States v. Orlando, 281 F.3d 586, 601 [89 AFTR 2d 2002-1668] (6th Cir.2002); United States v. Corrado, 227 F.3d 528, 541 (6th Cir.2000). Even where resentencing may not change a defendant's sentence, we have required a district court to "issue written findings of fact that respond to the defendant's objections to the PSI" and "publish the resolution of contested factual matters that formed the basis of its calculation" upon remand. Monus, 128 F.3d at 397. Therefore, I would vacate Tarwater's sentence and remand for resentencing so that the district court can resolve contested facts and explain its calculation of the amount of loss attributable to Tarwater under the Sentencing Guidelines.

¶2002-5560

GLOBE LIFE AND ACCIDENT INSURANCE COMPANY, PLAINTIFF v. UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 99-747T, Oct. 9, 2002. Year 1986. Decision for Govt.

1. Amortization deductions—intangible assets—loss of contractual relationships—useful life—loss deductions—proof. Ins. co. wasn't entitled to amortization deductions for loss of contractual relationships with its "agency force": taxpayer couldn't give reasonably accurate estimate under IRC §167 of agency force's useful life where agency force was constantly changing entity comprised of varied individuals whose employment du-ration depended on multiple human factors, unknown success of taxpayer's efforts to grow co. and individual agent attrition rates. Also, unique nature of ins. industry further reflected difficulty of objectively quantifying agents' length of service for any 1 co.; taxpayer's expert erroneously relied on non-specific, industry-based data for his termination rate projections; taxpayer's effort to distinguish its case from case law involving *employee* workforce was rejected; and reliance on Reg. §1.167(a)-1(b) was misplaced since reg applied only to cos. with inadequate experience to provide reliable data, not experienced co. with unreliable data. And, taxpayer's alternative IRC §165 loss de-duction claim was denied for similar lack of reliable data. *Reference:* United States Tax Reporter ¶1675.014(5); 1675.022(115); 1655.0601(80). IRC §165; 167.

Peter H. Winslow, Scribner, Hall & Thompson, LLP, Washington, D.C., for the plaintiff. Thomas D. Sykes, Scribner, Hall & Thompson, LLP, Washington, D.C., of counsel.
Charles J. Crueger, Tax Division; Mildred L. Seidman, Chief, Court of Federal Claims Section; and Eileen J. O'Connor, Assistant Attorney General, United States Department of Justice, for defendant.

United States Court of Federal Claims,

OPINION

HORN, J.

The plaintiff in the above captioned suit, Globe Life and Accident Insurance Company (Globe), brought this action for the recovery of federal income taxes and related interest allegedly assessed erroneously and collected by the United States for the taxable year ending December 31, 1986. Globe asserts that it is entitled to amortization deductions for the loss of intangible assets pursuant to Internal Reve-

nue Code (I.R.C.) § 167 (1980).[1] More specifically, Globe claims deductions relating to the loss of certain contractual relationships between it and its agents, collectively referred to by the plaintiff as the "agency force." Following trial, the court finds that Globe is not entitled to the amortization deductions claimed because it has failed to provide a reasonably accurate estimate of the useful life of its "agency force."

FINDINGS OF FACT

The plaintiff was originally named NG Life Insurance of Delaware (NG Life). NG Life was formed in 1979 by Liberty Holding, a wholly owned subsidiary of Liberty National Life Insurance Company, for the purpose of acquiring the stock of a third corporation, Globe Life and Accident Insurance Company (Old Globe). Old Globe, a company distinct from the plaintiff in the instant case, was incorporated in 1951. On January 16, 1980, Liberty National Life Insurance Company entered into an agreement and plan of merger with Old Globe whereby NG Life would acquire Old Globe. By July 31, 1980, NG Life had acquired all of the outstanding stock of Old Globe. On December 31, 1980, Old Globe distributed all of its property to NG Life in a tax free liquidation under I.R.C. §§ 332 and 334. Immediately thereafter, NG Life changed its name to Globe Life and Accident Insurance Company, the current plaintiff.

At plaintiff's request, the Internal Revenue Service (IRS) issued a private letter ruling stating that, for federal income tax purposes, NG Life's acquisition and liquidation of Old Globe was to be treated as a purchase of Old Globe's property under I.R.C. § 334(b)(2). The purchase price for all of the stock of Old Globe acquired by NG Life was $201,852,497.00, the liabilities assumed were $212,152,675.00 and the interim earnings and profit with respect to the transaction were $17,985,031.00. Thus, for federal income tax purposes, the total amount to be allocated to the basis of Old Globe's property, as of December 31, 1980, was $431,990,203.00.

Plaintiff, in its original and amended federal income tax returns for the 1980 through 1986 tax years, elected to use the residual method in allocating basis under I.R.C. § 334(b)(2). Of the $431,990,203.00 to be allocated to the various assets acquired in connection with the stock acquisition and liquidation transactions, plaintiff initially allocated $246,623,491.00 to Old Globe's insurance-in-force (including a component for reserves under I.R.C. § 818(c)), and $185,366,712.00 to the basis of the assets listed on Old Globe's balance sheet. Plaintiff did not allocate any amount to Old Globe's trade name, goodwill, "agency force" or other intangible assets.

Based on its claim that the insurance-in-force asset had a basis of $246,623,491.00 as of December 31, 1980, plaintiff claimed deductions pursuant to I.R.C. § 167 in its federal income tax returns for amortization of the insurance-in-force asset. After auditing the returns, the IRS partially disallowed the insurance-in-force amortization deductions and, by letter dated November 8, 1995, proposed to assess a deficiency against the plaintiff. Plaintiff challenged the disallowance and proposed deficiency to the IRS Appeals Office.

Following the appeal, the plaintiff and the IRS reached an agreement which was memorialized in a Form 870-AD. In the Form 870-AD, the plaintiff and the IRS agreed that the proper basis to be allocated to the insurance-in-force asset was $221,671,200.00, including the premium paid for the I.R.C. § 818(c) reserves, and the accident and health reserves. As a result of the agreement on the basis of the insurance-in-force asset, $24,952,291.00 of the purchase price remained unallocated, reflecting the difference between the total purchase price and the agreed upon value of Old Globe's assets, including the insurance-in-force. The IRS maintained that the $24,952,291.00 was properly allocable to goodwill, while plaintiff contended that the amount was properly allocable to an

[1] Unless otherwise noted, all citations to the Internal Revenue Code or Treasury Regulations are to those laws and regulations in effect in 1980.

"agency force" asset. This issue was not resolved in the appeals process and plaintiff reserved the right to seek a refund or credit on the grounds that plaintiff was entitled to allocate a portion of the purchase price of the stock to the "agency force" asset and that plaintiff was entitled to amortize, deduct or otherwise recover the basis allocable to the "agency force" asset over its useful life, or as the relationships were terminated. Consequently, plaintiff filed a claim in this court.

Plaintiff alleges that: "Each of Globe's relationships with its agents is a separate intangible asset." The plaintiff states that "[t]he aggregation of these relationships is referred to as Globe's 'agency force.'" As of December 31, 1980, there were at least 804, and according to the plaintiff, as many as 941,[2] sales agents who were under contract to market Old Globe insurance products and who had previously sold at least one policy for Old Globe. The bulk of the agents were a part of Old Globe's Branch Office System. Fewer than 150 of those agents were under contract with Employee Benefits, a nation-wide general agent of Old Globe. Finally, approximately six of the general agents were under contract with Norm Huxman, another nationwide general agent of Old Globe. Plaintiff's claim, however, concerns only the agents who were a part of Old Globe's Branch Office System and those who were under contract with Employee Benefits. It does not claim any amortization deductions for employees involved in the direct mail operations or for agents who sold insurance through the Customer Benefits Program.

In 1980, the Branch Office System covered thirty-seven states and consisted of fifty-four branch offices grouped geographically under the direction of five regional offices. Although some life insurance was sold through the branch offices, the main product sold was accident and health insurance, targeting elderly people above age sixty-five and rural, self-employed workers, such as farmers. Old Globe's Branch Office System was overseen by Old Globe's home office in Oklahoma City, Oklahoma, and all life, accident, and health insurance policies sold through that the Branch Office System were subject to home office approval. The home office's agency division, which supported the field sales effort, employed four to six people, not including regional managers and trainers.

The Branch Office System covered five regions, each headed by a regional manager who was hired by the home office. The regional manager was responsible for the sales effort of the branch offices within the region, including the administrative duties necessary to support those activities. The regional manager monitored the sales effort of the various branches, had sole authority to open new branch offices within the region, to hire or remove branch managers, and to assist branch managers in recruiting and training sales agents. Although they were authorized to do so, regional managers did not, typically, sell policies. Each regional manager could employ up to three trainers to assist branch managers in training new agents. Overall, Old Globe employed eight to ten trainers at any given time during 1980.

Each of-Old Globe's fifty-four branch offices was headed by a branch manager. A branch manager's main responsibility was the sales effort of the branch office, including the recruiting, training and supervision of sales agents, the full development of an agent's sales territory, and the administrative duties necessary to support those activities. Similar to regional managers, branch managers typically did not sell policies, although they were licensed and authorized to do so. Branch managers signed independent agent or career agent contracts setting forth the commissions they would receive for any policy they sold.

A branch office was normally divided into units, a typical unit having four to ten full time sales agents headed by a unit manager. The unit manager assisted the

[2] The parties have not been able to agree on the total number of agents under contract to market Old Globe insurance products as of December 31, 1980. The trial did not produce evidence as to an exact number.

branch manager in the recruiting, training and supervising of sales agents and monitored the day-to-day sales effort. Unit managers signed independent agent contracts and also had an agreement with Old Globe that entitled them to overwrite (or override) commissions for each policy sold by an agent in their unit.

The sales agents in the Branch Office System were independent contractors compensated only on a commission basis. Sales personnel who elected to sell insurance exclusively for Old Globe as full-time agents signed an independent agent's contract or, before 1975, a career agent's contract. Old Globe's full time agents were not permitted to sell insurance for other insurance companies. The sales agents in the Branch Office System were responsible for finding customers. Old Globe did not use an institutional advertising strategy. Sales agents used door-to-door canvassing, telephone solicitation, and review of voter rolls and other public records, for example, to find customers. The branch offices also used a County Enrollment Program in which a branch or unit manager would select a locality to take advantage of its "economic peak," such as a wheat-producing area following a wheat harvest. The branch office would then run an advertisement in a local area newspaper shortly before a team of agents would arrive in the locality. The team of sales agents, known as a "mobile unit," would spend a period of time in the locality selling Old Globe's insurance products. The agents paid their own expenses for the sales effort.

The second group of agents claimed by Globe as a part of its "agency force" involved an agreement between Old Globe and a partnership, Employee Benefits. In 1977, Old Globe entered into a General Agency Agreement with Employee Benefits whereby Employee Benefits would represent Old Globe exclusively in the federal civil service market to procure life insurance applications insuring the lives of regular, full time civil service workers employed by the federal government and members of their families. Under the General Agency Agreement, Old Globe paid Employee Benefits 115 percent of the first year premium, 15 percent of the second year premium, and progressively decreasing amounts thereafter. Employee Benefits had the exclusive right to sell Old Globe's product in the target market. As of December 31, 1980, Employee Benefits had contracts with approximately 100 to 150 agents to procure life insurance applications. Employee Benefits recruited and trained these agents who were compensated on a commission only basis.

DISCUSSION

[1] In a filing with the court following trial, the plaintiff concedes that: "Globe does not contend that the burden of proof shifted to defendant at any part in the proceedings." Pursuant to I.R.C. § 167(a), a taxpayer is "allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)--(1) of property used in the trade or business, or (2) of property held for the production of income." Treasury Regulation § 1.167(a)-3, as in effect at the time of NG Life's acquisition of Old Globe,[3] explained I.R.C. § 167 to include intangible objects:

> If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to goodwill.

[3] The addition of I.R.C. § 197, which was enacted by Congress in the Omnibus Budget Reconciliation Act of 1993, Pub.L. No. 103-66, § 13261(a), 104 Stat. 1388, would appear to facilitate the resolution of disputes similar to the one currently before the court for intangible assets acquired after August 10, 1993, by permitting amortization deductions for "section 197 intangibles," including, among other assets, goodwill, going concern and workforce-in-place.

Treas. Reg. § 1.167(a)-3. Previously, cases often focused on whether a certain intangible asset was goodwill, defined as the expectancy of continued patronage. See Newark Morning Ledger Co. v. United States, 507 U.S. 546, 554–55 [71 AFTR 2d 93-1380], 113 S.Ct. 1670 [71 AFTR 2d 93-1380], 123 L.Ed.2d 288 (1993) (quoting Houston Chronicle Publishing Co. v. United States, 481 F.2d 1240, 1247 [32 AFTR 2d 73-5312] (5th Cir.1973), cert. denied, 414 U.S. 1129, 94 S.Ct. 867, 38 L.Ed.2d 754 (1974)). In Newark Morning Ledger Co. v. United States, however, the United States Supreme Court majority opinion held that:

> [;I]f a taxpayer can prove with reasonable accuracy that an asset used in the trade or business or held for the production of income has a value that wastes over an ascertainable period of time, that asset is depreciable under § 167, regardless of the fact that its value is related to the expectancy of continued patronage. The significant question for purposes of depreciation is not whether the asset falls "within the core of the concept of goodwill," . . . but whether the asset is capable of being valued and whether that value diminishes over time.

507 U.S. at 566. The Court noted, however, that "we do not mean to imply that the taxpayer's burden of proof is insignificant. On the contrary, that burden often will prove too great to bear." Id. This is so even though the plaintiff need only prove the useful life and value of the asset in question with "reasonable accuracy." Id.

In determining whether an intangible asset had a limited life, the Newark Morning Ledger Court also referred to the mass-asset rule, which provides that:

> [C]ertain kinds of intangible assets are properly grouped and considered as a single entity; even though the individual components of the asset may expire or terminate over time, they are replaced by new components, thereby causing only minimal fluctuations and no measurable loss in the value of the whole . . . . The mass-asset rule prohibits the depreciation of certain customer-based intangibles because they constitute self-regenerating assets that may change but never waste.

507 U.S. at 557–58.

The determination of whether the taxpayer has proven that an intangible may be amortized is a question of fact. Id. at 564. Thus, to succeed on a claim for amortization deductions related to an intangible asset, the plaintiff must prove: (1) that the asset wastes over time, including that the asset is not a regenerating mass asset; (2) a reasonably accurate estimate of the period in which the asset wastes, meaning the asset's useful life; and (3) a reasonably accurate estimate of the value of the asset over its useful life. A taxpayer's failure to prove any of the three prongs is fatal to its claim.

The plaintiff argues that, through the evidence offered at trial, "Globe has met its burden to establish a reasonable approximation of the fair market value and the useful life of its agency force." Primarily, plaintiff bases its assertion that it has established the useful life and fair market value on the testimony and report of its expert witness, Richard Stebbins Miller. Plaintiff also alleges that the "agency force is not a 'mass asset' because [Old] Globe's relationships with its agents were maintained only through the substantial efforts of, and cost to, [Old] Globe."

The defendant presents a number of arguments in opposition to the plaintiff's claim. First, defendant argues that Mr. Miller is unqualified under Federal Rule of Evidence 702 to testify about the value of Old Globe's "agency force" and that the court should exclude his testimony. Second, defendant contends that the intangible assets that the plaintiff acquired from Old Globe are the actual contracts with the individual agents and managers, not some "nebulous 'relationship,'" and that the "aggregate of those individual contracts with these managers and sales agents is the in-place branch office sales force, not some abstract notion of 'agency force.' Plaintiff's failure to value, or even claim deductions for, the in-place branch office sales force is fatal to its claim . . . ." (em-

phasis in original). Third, defendant challenges Mr. Miller's valuation of the "agency force" and his determination of the useful life of the "agency force." Fourth, plaintiff argues that the contracts with the individual agents have no useful life and, therefore, are non-depreciable. Finally, defendant asserts that the branch office sales force is a non- depreciable mass asset having no ascertainable useful life.

Based on the discussion which follows, the court finds that the plaintiff has failed to provide a reasonably accurate estimate of the useful life of its "agency force." Because the plaintiff's failure to prove a reasonably accurate estimate of the useful life of its "agency force" precludes recovery, the court need not address whether the "agency force" is a regenerating mass asset or whether the plaintiff has proven the value of the "agency force" over its useful life with reasonable accuracy.[4]

In Newark Morning Ledger, the United States Supreme Court stated that, "'the primary purpose' of an annual depreciation deduction is 'to further the integrity of periodic income statements by making a meaningful allocation of the cost entailed in the use (excluding maintenance expense) of the asset to the periods to which it contributes.'" Id. at 553 (quoting Massey Motors, Inc. v. United States, 364 U.S. 92 [5 AFTR 2d 1780] (1960)). In this respect, the taxpayer must prove that the asset in question had a "limited useful life, the duration of which could be ascertained with reasonable accuracy." Id. at 560 (discussing Richard S. Miller & Sons, Inc. v. United States, 210 Ct.Cl. 431 [38 AFTR 2d 76-5247], 537 F.2d 446 (1976)).

The asset in question in the Newark Morning Ledger case consisted of 460,000 identified subscribers to eight newspapers the plaintiff had acquired in a merger. Id. at 550. The subscriptions were terminable at will. Id. at 550 n. 4. The plaintiff valued the subscribers at $67,000,000.00, based on the expected future profits to be derived from the subscribers, most of whom were expected to continue to subscribe to the newspapers following the merger. Id. at 550. The plaintiff presented evidence estimating the useful life of the subscribers based on an actuarial analysis, which the government did not contest. Id. at 551. The government argued that the subscribers represented non-depreciable goodwill. Id. The majority ruled that because the taxpayer had proven the useful life and ascertainable value of the asset in question, and that the asset was not a regenerating mass asset, the asset qualified for the depreciation allowance under the Tax Code. Id. at 570.

The dissenting opinion in Newark Morning Ledger, written by Justice Souter and joined in by three other Justices, however, found it necessary to examine the proof presented by the plaintiff and carefully described the difficulties in estimating the future life of an intangible asset following a merger or acquisition. Id. at 571. Although the majority opinion did not consider it necessary to examine the evidence because of the government's failure to contest that the plaintiff had provided a reasonably accurate assessment of the asset's useful life, the majority acknowledged that "[t]he dissent skillfully demonstrates certain vulnerabilities in petitioner's proof . . . ." Id. at 568 n. 14.

The dissent in Newark Morning Ledger highlighted a crucial assumption of the plaintiff's expert's analysis of the asset following the acquisition of the newspapers, that the level of the paper's subscriptions would remain the same following the acquisition. Id. at 579. The dissent stated:

> The assumption was thus a surrogate for the supposition that the new owners would not rock the boat and would succeed in acting intelligently to keep the paper, if not exactly as it had always been, at least as relatively attractive as it had been in relation to its various competitors on the date of the sale.

Id. at 579–80. The dissent continued its probe into the reliability of the expert's

[4] The court also notes that because the plaintiff's estimate of the value of Old Globe's "agency force" is based, in part, on its estimate of the useful life of the "agency force," the court's rejection of plaintiff's estimate of useful life leads the court also to reject its valuation of the asset in question.

prediction of future events, by pointing out that:

> No matter how much presale satisfaction subscribers have, it seems intuitively obvious that a high enough level of postsale dissatisfaction with a paper would drive subscribers away, as might other postsale events, such as successful competition and demographic changes.
>
> * * *
>
> Ledger's statistician, in effect, made an assumption regarding Ledger's ability to manage the innumerable factors that keep current customers coming back for more, as well as its ability to attract new customers as the old ones leave. Such discretionary decisions may turn out to be foolish or wise: if foolish, the subscriber base as of the date of sale could be destroyed rapidly; if wise, it would be maintained.

Id. at 580 n. 8.

The views of the dissent in Newark Morning Ledger were echoed by the United States Court of Appeals for the Fourth Circuit in Ithaca Industries, Inc. v. Commissioner, 17 F.3d 684 [73 AFTR 2d 94-1323] (4th Cir.1994), in which the court explained the difficulties in arriving at a reasonably accurate estimate of the useful life of an asset involving characteristics similar to the one currently before the court. The taxpayer in Ithaca Industries was a company that manufactured hosiery, undergarments and polo shirts. 17 F.3d at 686. The asset in question in Ithaca Industries was an assembled workforce of 5,153 hourly production workers and 212 staff employees. Id. The court began with:

> [T]he prosaic observation that every asset declines in some manner, and thus, in theory, every asset could be amortized. This observation is set forth more or less in Section 167(a) of the Internal Revenue Code. At the time of Ithaca's merger, that section stated: "there shall be as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear ... of property used in the trade or business, or ... of property held for the production of income." I.R.C. § 167(a) (1983). Things become a good deal more complicated, however, when we seek in practical terms to quantify "exhaustion" and "wear and tear" for the purposes of assigning depreciation deductions to specific assets.

Id. at 687 (footnote omitted).

After determining that the asset in question was not a mass asset because the regeneration of the plaintiff's workforce was accomplished only through Ithaca's "substantial efforts," the court turned to the taxpayer's estimate of the useful life of the asset. Id. at 689. While the court stated, "we do not doubt that Ithaca's workforce, as constituted on the day of the merger, began to decline in size and value with the first resignation, termination, or death in that workforce, and that it continued to decline due to these and other factors[,]" the court found that there could be no "defensible estimation of the duration of any one person's employment, nor of the useful life of the workforce of which he or she is a part." Id. (footnote omitted).

First, the court in Ithaca Industries noted that the task of evaluating the useful life of the workforce asset before it was more difficult than evaluating the subscriptions in Newark Morning Ledger because of the different circumstances which impact the consistency of a workforce. Id. at 690. The Ithaca Industries court stated:

> An employee is not a subscription; indeed, a workforce consisting of human beings perhaps could be no better described than as "composed of constantly fluctuating components." We note in this regard that the record discloses no predetermined limits of any sort, contractual or otherwise, upon the relationship between Ithaca and its employees. This means that in contrast to a subscription, which is susceptible mainly to the influences affecting one actor, the subscriber, a single employment relationship is susceptible to changing influences affecting two actors, the employer and the employee.

Id. at 690. Ithaca's statistical expert attempted to overcome these variables by analyzing the employment history of the ac-

quired company over a four year period and among four job classifications. Id. The court conceded that, with a large enough sample size and a test period of sufficient length, actuarial analysis, commonly used in the insurance industry, could control for the numerous variables and could identify a useful life. Id. The court found, however, that ''we are far from being able to perform such feats reliably with a sample size of roughly 5,000 different people, over only a four-year period, and with only four classifications by job type.'' Id. The court concluded that: ''[t]he revenue consequences are simply too serious to tolerate this level of imprecision, and we cannot now envision an approach to a workforce such as Ithaca's that would not suffer from the same shortcomings as Ithaca's statistical method.'' Id.

The plaintiff argues that the circumstances impacting the useful life of the workforce in Ithaca Industries are not present in the instant case. First, the plaintiff attempts to contrast an employee workforce with an ''agency force.'' The plaintiff states: ''It is more difficult to obtain credible lifing data for an employee workforce than for an agency force. For this reason, Globe has not claimed an amortization deduction for its employee workforce.'' Regardless of whether the asset in question is an employee workforce or an ''agency force,'' however, the life of the asset is still determined by the duration of an employment relationship and affected by the same variables. In Ithaca Industries, the court noted that the estimation of one person's employment, and the useful life of the workforce of which he or she is a part, is determined by the resignation, termination or death of that employee. See id. at 689. Likewise, the plaintiff admits that ''in the case of Globe's relationship with an agent, that period [the useful life] begins when the agent becomes authorized to sell Globe's insurance policies, and ends when the authority is terminated, which can occur at the death or disability of the agent or when either Globe or the agent terminates their relationship.'' Thus, the useful life of the asset in Ithaca Industries, the employee workforce, and the asset in the instant case, Old Globe's alleged asset described by plaintiff as the ''agency force,'' are both determined by estimating the average termination of the relationship between the employee and the employer or the agent and the principal. In both cases the workforce suffers from the same variables that impact all human relations. The Ithaca Industries court wrote:

> A workforce is an unusual asset because it is not only affected by human decisionmaking, but [is] actually composed of multiple human actors. As such, [it is] directly affected by the complex interactions of its employees, and by any number of other influences operating upon these actors both in and out of the workplace. This substantial human element injects vagaries into the useful life analysis . . . .

Id. at 690 n. 15.

Although neither the dissenting opinion in Newark Morning Ledger nor the Fourth Circuit's opinion in Ithaca Industries is binding on the case currently before the court, the court believes that the comments on the difficulties of ascertaining the useful life of an intangible asset inextricably tied to human relations due to the high number of variables involved are correct. The evidence in the record establishes that Old Globe's ''agency force'' was vulnerable to a number of particular variables outside of those that normally would occur in a work force. Moreover, the evidence in the record also establishes that there are particular difficulties in accounting for variables in estimating the useful life of the life insurance company's ''agency force.''

Charles Hudson, the CEO and Chairman of Torchmark Corporation, the parent corporation of Globe, as well as Old Globe's Chief Actuary, testified that Old Globe was continuously increasing the size of its ''agency force.'' Mr. Hudson also stated, however, that the process of growing its ''agency force'' was difficult, and the success and duration of certain offices was sporadic: ''Every year, we would open new offices. Unfortunately, we would have to close offices almost every year, so it was a continuing process.'' Moreover, Mr.

Hudson stated that it was difficult to determine whether a particular agent would be successful, and, consequently, how long that agent would stay affiliated with the company. In this regard, Mr. Hudson stated:

> It's just difficult for an agent to be really successful in the business. It's a difficult business. I can't recall the numbers, but it might be that out of ten people who were recruited, you might get one outstanding agent. Not that many of the others wouldn't survive in the business, but being an outstanding, successful agent was difficult.

James E. Narrel, a Regional Manager with Old Globe for thirty-three and a half years, also testified to Old Globe's constant efforts to recruit and retain agents. In this regard, Mr. Narrel stated that efforts to train agents were directly related to whether an agent would remain affiliated with Old Globe. Mr. Narrel stated:

> [I]f you recruited the people and didn't give them good training, then they wouldn't make a living. They wouldn't be able to.
>
> Q. And if the don't make a living?
>
> A. Then they go. They find another job.

In addition, Mr. Narrel stated that it was very difficult to determine whether an agent would be successful, and thus, how long that agent would remain on the job. Finally, Mr. Narrel testified that the attrition rate among agents was very high:

> Because the agents would be hired to pay their own expenses and to work on straight commissions. And they couldn't make--since they had no renewals, it was hard for them to make a good living on just commissions. And to stay long enough that the renewals would kick in. Now, the renewals kicked in mostly on the second year. And, if they could last a couple of years, then you had a much lower attrition rate. But the people who failed, most of them failed quickly because they didn't have a lot of money to back them up until they could make enough to get by.

Thus, according to Mr. Narrel, whether an agent would remain with the company depended on the agent's own economic stability.

The testimony of Mr. Hudson and of Mr. Narrel demonstrates that Old Globe's "agency force" was constantly changing due to the company's attempts to grow. In addition, the testimony also demonstrates that the success of an agent, and, thus, the probability that an agent would remain contracted to Old Globe, was directly related to that agent's training, so that Old Globe's recruiting programs must be accounted for when determining the useful life of Old Globe's "agency force."

Nonetheless, the plaintiff argues that Old Globe's relationships with its agents were guaranteed a certain amount of stability because they were "governed by written contracts setting forth in detail the terms of the agency relationships." More specifically, plaintiff argues that the contractual provisions provided that "[a]gents know if they remain with Globe, they will be entitled to renewal commissions, and if they remain long enough, the renewal commissions will 'vest' so that commissions will be paid to the agent after the agent retires." Plaintiff's proffered expert, Mr. Miller, testified that the contractual arrangements respecting renewal premiums was "some glue" that would hold the agent to the company.

The plaintiff's argument assumes that Old Globe's agents would remain with the company long enough for the renewal commissions to vest. In this regard, plaintiff overlooks the evidence its own witnesses proffered regarding the difficulty of hiring and retaining agents. Mr. Hudson testified that it was difficult for an agent to be successful. In addition, Mr. Narrel testified that he had to hire ten agents to keep one. Furthermore, Mr. Narrel testified that the extent to which an agent could remain with Old Globe long enough for his or her renewals to vest was largely determined by that agent's own financial outlook. Thus, few agents would stay with the company for a significant period of time, making it unlikely that the renewal commissions

would vest. To the extent that there was "some glue," that glue apparently did not bind a large number of agents.

Plaintiff attempted to argue that the "skill set" possessed by experienced agents, as compared to the hourly production workers discussed in Ithaca Industries, distinguishes its asset from the one discussed in Ithaca Industries. Plaintiff states that "an agent who leaves Globe is seldom replaceable," however, plaintiff does not explain how the skill set of its agents insulates them from the fluctuating variables described in Ithaca Industries. The plaintiff also fails to consider the analysis in Ithaca Industries in which the court concluded that Ithaca's workers were not replaceable without "substantial efforts." Id. at 689. Thus, plaintiff's alleged factual distinction is not persuasive.

Evidence in the record also indicates that the variables that concerned the dissenters in Newark Morning Ledger and the Fourth Circuit in Ithaca Industries are present in the attempt to estimate the useful life of a life insurance company's "agency force." Mr. Miller, plaintiff's expert witness on the life insurance industry and as an actuary, stated that it is very difficult to determine an identifiable time when a life insurance agent's relationship with the company can be said to have terminated. According to Mr. Miller, the easiest circumstance occurs when an agent dies. Mr. Miller testified that in other circumstances, the break is not as clear:

> Most typical is when he [a life insurance agent] quits, which isn't always clear. He may, for all practical purposes, have quit and that shows up as termination of new business. And unfortunately, the dating on the contract termination would not occur until after the agency department had clearly satisfied itself that the could never recover this item.

In addition, a study produced by the Life Insurance Marketing and Research Association (LIMRA),[5] evaluating the termination rates of agents in 1978, indicated that variation in the performance results of an agent "may be due not only to experience acquired on the job but also to differences present at the time of hiring. For example, agents recruited in one year may have been exposed to a different training program[6] than those recruited in another year." As Mr. Narrel explained, the training and performance of an agent is directly related to that agent's likelihood of survival.

Moreover, an article entitled "The Value of an Agent," published by the Life Insurance Sales Research Bureau and introduced into evidence by the plaintiff, explained that an insurance agent's length of service can vary significantly depending on the quality of the agent. The article separated a selection of agents into three groups according to their ability and tried to calculate the group's survival rates. The study found that the better quality agents were much more likely to have extended service with their parent company. The article noted that "[t]he wide differences in these three survival rates are, as we ourselves can testify, somewhat astonishing--but it should be remembered that they reflect the accumulative effect, over a considerable number of years, of differences in the annual rates of termination." Consequently, the article concluded: "In so far as length of service, taken by itself, is important, [the study's results] throw great emphasis upon the potential betterment which can accrue from improved selection and training, as well as improvement in the other activities which influence turnover."

This court is mindful that even the court in Ithaca Industries did not prescribe a per se heightened burden of proof applicable to all assets involving human relations. The standard should remain one of "reasonable accuracy." See Newark Morning Ledger Co. v. United States, 507 U.S. at 566. What the dissent in Newark Morning Ledger and the opinion in Ithaca Industries state, however, is that the ability of a tax-

[5] According to Mr. Miller, LIMRA is the "principal marketing type statistical gathering service associated with the life insurance industry."

[6] This factor may have impacted Old Globe even more severely considering that its training was performed by numerous, individual branch managers rather than a single training program, thus leading to possible discrepancies in training quality.

payer to estimate the useful life of an intangible asset involving human relationships with reasonable accuracy is severely hampered by the variables inherent in the asset itself. In addition, the testimony at trial from Globe's representatives indicated that there are additional variables to take into account which are particular to Old Globe's ''agency force,'' such as the quality of recruiting and training, the quality of the agent and the economic status of the agent.

One key issue is whether the plaintiff's estimate is based on data of sufficient size and reliability to account for the variables which are present. The plaintiff's expert, Richard Miller, is a consulting actuary to the actuarial consulting firm Tillinghast--Towers Perrin, from which he retired in 1995. While the defendant has challenged Mr. Miller as an expert on valuing ''agency force,'' it admits that Mr. Miller is a qualified actuary and an expert in the life insurance industry. Mr. Miller prepared two expert reports for the plaintiff, both of which were entered into evidence. In his first report, Mr. Miller based his estimate of the useful life of the ''agency force'' on a census of the agents employed at the time the plaintiff acquired Old Globe and decrement assumptions regarding the agent survival rates. The census data described the total number of agents employed by Old Globe at the time of the acquisition and broke down the distribution of those agents into six different experience classes. The decrement assumptions used assumed survival rates to project the numbers of existing agents who would survive into each future calendar year. According to Mr. Miller, ''[t]he average number of years of survival of the 'agency force' is an easy calculation after the calculations'' of the agent survival rates. Mr. Miller does not describe the steps needed to make this allegedly ''easy calculation'' in his reports; nor do the work papers, which were provided without explanation and are replete with unexplained abbreviations and acronyms, provide the court with an explanation of this calculation.

Mr. Miller's first report estimated the useful life of the ''agency force'' acquired in the merger at 8.35 years. After Mr. Miller reviewed the report of the defendant's expert, Robert F. Reilly, who was qualified at the trial as an expert in valuing intangible assets and ''agency force,'' the transcript of the deposition of Mr. Reilly, and the transcript of his own deposition, Mr. Miller drafted a supplement to his first report. According to Mr. Miller's second report, the useful life estimate of 8.35 years in the first report was incorrect. The 8.35 estimate represented the average life of the most experienced group of agents at Old Globe, not the average useful life of the complete ''agency force.'' According to the second report, the correct useful life, using the data relied upon in the first report, should be 6.34 years. Mr. Miller's supplemental report, however, also responded to criticism from Mr. Reilly by using a different set of termination rates. Using the second set of termination rates, Mr. Miller arrived at a useful life of 6.1 years.

The termination rates used by Mr. Miller in both his first report and in his supplemental report, however, were problematic. The origin of Mr. Miller's analytical problems was the data provided to him. According to Mr. Miller's first report, while the annual statements provided by Globe were reliable, ''in the course of the assignment questions arose concerning the validity of some other underlying data. This is particularly the case with the agent production profile and agent termination dates.'' Mr. Miller testified that, although he would have preferred to use actual termination rates, the data possessed by Globe was unreliable. Mr. Miller stated:

> The data that entered into the computer listing was not useful for termination determination. The termination dates listed clearly they were--they were--agents were not terminated until all commissions payable under the agency contract were paid, which means that they were making payments to people characterized as ''estate of'' or ''administrator

for.'' These were clearly terminated agents as far as I'm concerned.

Thus, initially, Mr. Miller turned to a report prepared by Paul Campbell, the chief actuary of LIMRA. The Campbell report estimated the value of the Old Globe ''agency force'' as of December 31, 1980 at $25,200,000.00. While the Campbell report did include a set of termination rates for Old Globe agents, those rates were based on a single year of data, 1980. In addition, Mr. Miller could not verify Mr. Campbell's results because he did not have Mr. Campbell's work papers or data. Therefore, Mr. Miller had chosen not to rely on the Campbell data in his first report.

Instead, Mr. Miller relied on industry-wide termination data collected by LIMRA in separate reports for the years 1978, 1979 and 1980. Although life insurance companies of varying sizes contributed to the report, Old Globe did not contribute to the data. Mr. Miller testified that it was ''highly probable that there were very few companies that contributed who were as small as [Old] Globe.'' Mr. Miller's report indicates that he was comfortable using the LIMRA data because the survival and production profiles used by Mr. Campbell were similar to the LIMRA values. Mr. Miller qualified this statement at the trial, noting that he believed that the LIMRA retention rate data was similar to the Campbell data for years two through six plus. Mr. Miller did not testify, however, that he believed the first year data to be similar. Indeed, the Campbell data is significantly different from the LIMRA data for year one. Mr. Campbell estimated the first year survival rate of Old Globe agents in 1980 at thirty percent, while the LIMRA data estimated that, industry-wide, the survival rate of agents from 1978 through 1980 was seventy percent. Using the LIMRA data described above, together with an acknowledged mathematical error injected by Mr. Miller, Mr. Miller's first report estimated the useful life of the ''agency force'' at 8.35 years. In the second report, Mr. Miller corrected for the mathematical error and estimated that the useful life using the LIMRA data would be 6.34 years.

In addition to correcting the useful life calculation as noted in the first report, the second report also addressed a criticism of the first report made by Mr. Reilly concerning the use of LIMRA termination rates. In Mr. Reilly's deposition, he was questioned why Mr. Miller used the LIMRA data. Mr. Reilly suggested that ''if Mr. Campbell had access to actual contemporaneous data and he performed what appears to be a competent lifing analysis I don't know why, I guess I simply would try to reconstruct data that can only be inaccurate when, in fact, we have accurate data from a contemporaneous period of time, frankly.'' In response, Mr. Miller's second report stated:

> LIMRA data was used because [Old] Globe's actual data, that would have been available in 1980, no longer exists. LIMRA data is the natural choice when company specific data is unavailable, when LIMRA data enjoys considerable credibility within the insurance industry and Mr. Campbell stated that the expected rates of [Old] Globe agent survival were consistent with LIMRA average survival rates for the life insurance industry. Mr. Campbell's report was based on actual [Old] Globe experience. Based on my personal knowledge of Mr. Campbell's work, I have a high degree of confidence in Mr. Campbell's statements. I agree with Mr. Reilly that it is also reasonable under the circumstances to rely on the rates determined by Mr. Campbell.

Thus, using the termination rates in Mr. Campbell's report, in his second report, Mr. Miller arrived at a useful life of 6.1 years.

Neither the LIMRA termination rates nor the Campbell rates, however, are of sufficient breadth to account for the numerous variables to be considered. First, the Campbell data was not compiled over a wlong enough period of time for it to be reliable. Mr. Miller testified that he would need five years of data on agent terminations to produce an accurate termination

rate to ensure that no one year was an aberration. The Campbell termination rates were calculated, however, over a single year period, 1980, which led Mr. Miller to reject the Campbell data in the first place. Moreover, the LIMRA report which Mr. Miller eventually relied upon indicates the dangers in relying on a single year of data. The reports included a projected four-year retention rate based on the survival rates of four groups of agents for a single survey year. The report warned:

> [S]ince [the four-year retention rate] is based on a single year's observation, it may be influenced by events that occur only in that year if they affect all agents equally. The reader is cautioned that for an individual company, one or more of the four survival rates in the projection could be quite unstable because of the number of cases on which it is based .... Obviously, wide year-to-year variation in the rates will affect the projections.

In addition, the court notes that in Ithaca Industries, the Fourth Circuit rejected a sampling taken over four years. Ithaca Indus., Inc. v. Commissioner, 17 F.3d at 690. Finally, Mr. Miller, described the Campbell termination data for the first two class years as "completely unreliable." Therefore, pursuant to Mr. Miller's own expressly described standards, the one year of Campbell data cannot provide a reliable sample.

Having rejected the Campbell termination rates, the court turns to Mr. Miller's reliance on the data supplied in the LIMRA reports. The plaintiff argues that it is entitled to rely on the LIMRA data pursuant to Treasury Regulation § 1.167(a)-1(b), which states: "If the taxpayer's experience is inadequate, the general experience in the industry may be used until such time as the taxpayer's own experience forms an adequate basis for making the determination." Plaintiff's reliance on Treasury Regulation § 1.167(a)-1(b) is misplaced. The regulation applies when a company has not had sufficient time in which to acquire the data necessary to perform a useful life analysis, not when the company simply loses data or has unreliable data. (Treasury Regulation § 1.167(a)-1(b) may only be invoked until such time as the taxpayer has sufficient experience, which is indicative of the fact that the regulation applies to inexperienced companies. Moreover, expanding the regulation to allow a taxpayer to rely on industry information whenever it does not have sufficient data would be to expand the regulation to an infinite and illogical degree; for example, a taxpayer would be allowed to rely on industry data simply because it had not bothered to keep adequate records. In the instant case, Old Globe had over thirty years of data on which it could have relied. The data that Old Globe collected, however, was either corrupted or lost.

Moreover, if Treasury Regulation § 1.167(a)-1(b) does apply, it merely opens the door to the use of industry data, it does not speak to the reliability of that industry data. The LIMRA termination data was collected over a three year period. Therefore, according to Mr. Miller's own standards, neither the Campbell data (collected over one year), nor the LIMRA data were collected over a sufficient period of time to account for variances in any single year. Similarly, as noted above, the LIMRA report itself warns of relying on limited samples due to "wide year-to-year" variation in the rates at issue. Plaintiff has not demonstrated that the three year sample size of LIMRA data can account for the numerous variables involved in the calculation of termination rates.

Further, the LIMRA data Mr. Miller used is not a reliable substitute for Old Globe's actual termination rates. The importance of company specific data was discussed in the LIMRA report. The report warned the reader to be careful when comparing company specific data to the rates provided in the report because "specific company situations may affect the results." The LIMRA termination rates were derived from data compiled from surveys submitted by multiple life insurance companies of different sizes. These companies were divided into three categories: Size A companies with ten billion dollars or more

ordinary life insurance-in-force at the beginning of the reporting year; Size B companies with two to ten billion dollars ordinary life insurance-in-force at the beginning of the reporting year; and Size C companies with less than two billion dollars ordinary life insurance-in-force at the beginning of the reporting year. As noted above, Old Globe did not contribute to the LIMRA study. In addition, Mr. Miller testified that it was ''highly probable that there were very few companies that contributed who were as small as [Old] Globe.'' There also is nothing in the record to indicate that the quality of the recruiting and training programs used by the companies that contributed to the LIMRA data were similar to the training employed by Old Globe, two variables particularly important in calculating an agent's survival rate. Therefore, there is little indication, aside from Mr. Miller's unsubstantiated assumption, that the LIMRA data was representative of Old Globe's actual termination rate.

Based on the above discussion, the court finds that plaintiff cannot rely on the LIMRA termination reports in estimating the useful life of Old Globe's ''agency force.'' First, the LIMRA data was based on only three years of data, smaller than the five year standard set by Mr. Miller and the four year projection rejected by the Fourth Circuit in Ithaca Industries. In addition, the industry wide data does not account for particular variances between individual companies. Therefore, the court concludes that the LIMRA termination rates cannot account for the vast number of elements which affect human relationships, or the particular variables involved in predicting the useful life of Old Globe's ''agency force.''

Finally, the court notes that Mr. Miller's reversal regarding which data to rely on also is indicative of the unreliable nature of the Campbell and LIMRA termination rates. Mr. Miller testified that he initially decided not to rely on the Campbell termination rates. Therefore, Mr. Miller chose to rely on the LIMRA data. In his supplemental report, however, despite the fact that he acknowledged that the first two years of the Campbell termination rates were completely unreliable, Mr. Miller decided ''that it is also reasonable'' to use the Campbell data. Thus, while Mr. Miller chose to perform his valuation in the second report using the Campbell data, he did not reject the LIMRA termination rates.

Mr. Miller's supplemental report attempted to reconcile his initial rejection of the Campbell rates and his decision to use the LIMRA rates in his first report with his revised opinion in his supplemental report that the Campbell rates were also reasonable by arguing that the LIMRA rates are similar to the Campbell rates. At trial, however, Mr. Miller qualified his opinion by stating that the LIMRA rates are similar to the Campbell rates only for years two through six. Mr. Miller's testimony was more accurate than his supplemental report. A comparison of the Campbell rates to the LIMRA dates shows significant inconsistency in the first year data:

Calendar Year of Service	LIMRA Rate of Survival (1978)	LIMRA Rate of Survival (1979)	LIMRA Rate of Survival (1980)	Campbell Rate of Survival (1980)
1	70	69	71	30
2	46	47	47	45
3	63	62	61	65
4	73	73	73	75
5 - 9	84	83	81	5 only - 80
6+				90

It is unclear how Mr. Miller can find that both the LIMRA data and the Campbell data are reasonable when the two sets of termination rates are different and result in inconsistent estimates of the useful life of Old Globe's "agency force." The court hopes that Mr. Miller's sudden acceptance of the Campbell termination rates was not prompted by litigation strategy on his part. In response to criticism by the defendant's expert[7] suggesting that his reliance on the LIMRA data was incorrect, Mr. Miller chose to present two estimates of useful life to the court, each based on different termination rates, apparently in the hope that the court would choose at least one.

In its complaint, the plaintiff also asserts an alternative claim for deduction under I.R.C. § 165 for losses sustained in the years 1981 through 1986 with respect to contractual relationships with agents that were lost. In its Memorandum of Contentions of Fact and Law submitted to the court prior to the pretrial conference, it appears that the plaintiff has narrowed the scope of its alternative claim to losses arising out of the bankruptcy of the Employee Benefits partnership, which occurred during the performance period of Old Globe's contract with Employee Benefits. According to the Memorandum of Contentions of Fact and Law, plaintiff's alternative argument was presented in the event that "defendant prevails in its argument that the intangible asset owned by [Old] Globe was its contract with the Employee Benefits partnership . . . ." In its post-trial brief, the plaintiff did not include its alternative claim in its list of the questions presented at trial. The defendant, in its post-trial brief, noted the plaintiff's failure to present an argument on its alternative claim following the trial. Moreover, the defendant argued that Mr. Miller assigned no value to the contract between Employee Benefits and Old Globe. The plaintiff, again, failed to address the alternative claim in its reply to defendant's response.

Although the plaintiff has failed to present post-trial argument on its alternative I.R.C. § 165 loss claim, because the claim is present in the complaint and plaintiff has not expressly dropped the claim, the court will address it. Section 165 of the I.R.C. states: "There shall be allowed as a deduction any loss sustained during the taxable year and not compensated by insurance or otherwise." Treasury Regulation § 1.165-1(d)(1) provides:

> A loss shall be allowed as a deduction under section 165(a) only for the taxable year in which the loss is sustained. For this purpose, a loss shall be treated as sustained during the taxable year in which the loss occurs as evidenced by closed and completed transactions and as fixed by identifiable events occurring in such taxable year.

Treasury Regulation § 1.165-2(a) further provides:

> A loss incurred in a business or in a transaction entered into for profit and arising from the sudden termination of the usefulness in such business or transaction of any nondepreciable property,

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[7] Plaintiff attempts to use Mr. Reilly's criticism of the LIMRA data to show that Mr. Reilly accepted the Campbell termination rates as reasonable. The plaintiff first cites to Mr. Reilly's deposition testimony, which was read into the record, in which Mr. Reilly stated:

> If Mr. Campbell has contemporaneous company-specific lifing data and he reaches a lifing conclusion I think that's reasonable because he has contemporaneous good data. I would be inclined to use Mr. Campbell's results. Why would I ever then go and use industry data if I had reason to believe Mr. Campbell did it right? I mean it just honestly it doesn't make any sense too me to say, "Well, I have reason to believe the other guy did it right and his conclusion was right. Therefore, I am going to ignore what he did in his conclusion and use industry data because it kind of is like industry data."
>
> * * *
>
> Why would you ever take that last step? Why would you just say, "I can see what Campbell did, I can see his data sources?"

Mr. Reilly's deposition is prefaced by two important assumptions.The first assumption was that Mr. Campbell had contemporaneous data and the second assumption was that Mr. Campbell's data was available for review. Neither of these assumptions is correct. The plaintiff also cites to a portion of Mr. Reilly's trial testimony to argue that Mr. Reilly "does not dispute that fact that the average remaining useful life of the agency force is six years." Mr. Reilly's testimony was in response to a rather vague question from plaintiff's counsel as to what the six years mentioned in Mr. Miller's report related to:

> I can understand that because if six years is the correct life, then the amortization period would be six years, and the tax yield would be calculated based on six years.
>
> Q. So you've got no problem with that?
>
> A. Well, assuming six years is the correct life.

Mr. Reilly assumed that six years was the correct life for the purpose of the question, his testimony did not accept six years as the useful life of Old Globe's "agency force."

in a case where such business or transaction is discounted or where such property is permanently discarded from use therein, shall be allowed as a deduction under section 165(a) for the taxable year in which the loss is actually sustained.

The plaintiff claims that value of the Employee Benefits contracts, and, thus, the amount of the loss it is entitled to, is equal to the value of the agents who worked under the supervision of the partnership. Plaintiff points to a table in Mr. Miller's supplemental report which states that, of the $29,203,000.00 Mr. Miller estimated as the value of Old Globe's "agency force," $6,284,000.00 is allocable to the value of the agents in the Employee Benefits Operation. At trial, however, Mr. Miller expressly denied having valued the general agency contract with Employee Benefits. Moreover, the valuation of the Employee Benefits agents is based upon a period of useful life derived from the same, defective data used by Mr. Miller in an attempt to ascertain the useful life of Old Globe's "agency force." Therefore, the court finds that plaintiff has failed to provide sufficient evidence to support its claim for loss deductions under I.R.C. § 165.

CONCLUSION

Plaintiff has failed to provide the court with a reasonably accurate estimate of the useful life of the asset in question.

Therefore, plaintiff's claim must fail. Plaintiff's claim under I.R.C. § 165 also is denied. The Clerk's Office shall enter JUDGMENT for the defendant.

IT IS SO ORDERED.

¶2002-5561

THE PEOPLE OF COLORADO, ex rel Dennis W. BROWN, Citizen in Party PLAINTIFF v. DISTRICT DIRECTOR, Security, Colorado, Internal Revenue Service, in his official capacity, and Does I-XX, DEFENDANTS. U.S. District Court, Dist. of Colorado, (DC CO) Civil Action No. 01-D-1625 (CBS), July 22, 2002. Judgment entered in accord with (2002, DC CO) 90 AFTR 2d 2002-5822, adopting (2002, DC CO) 90 AFTR 2d 2002-5073. Decision for Govt.

1. Actions against IRS officers—damages—jurisdiction—Anti-Injunction, Declaratory Judgment, and Federal Tort Claims Acts. Judgment was entered in accord with prior order dismissing taxpayer's complaint against IRS District Director and anonymous Does. *Reference:* United States Tax Reporter ¶74,336.508(60); 74,215.05(5); 74,217.502(5); 76,557.53(12); 74,335.01(7). IRC §7421; 7433.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

JUDGMENT

Judge Wiley Y. Daniel

[1] Pursuant to and in accordance with the Order Adopting and Affirming Magistrate Judge's Recommendation filed on July 15, 2002 by the Honorable Wiley Y. Daniel, United States District Judge, and incorporated herein by reference as if fully set forth, it is

ORDERED that judgment is hereby entered in favor of defendants. District Director, Security, Colorado, Internal Revenue Service, in his individual capacity and Does I-XX, and against plaintiff, The People of Colorado, ex rel Dennis W. Brown, Citizen in Party, on Defendants' Motion to Dismiss. It is

FURTHER ORDERED that plaintiff's complaint and action are dismissed with prejudice. It is

FURTHER ORDERED that each party shall bear its own costs and attorney's fees.

DATED at Denver, Colorado this 22nd day of July, 2002.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

By:

Stephen P. Ehrlich

Chief Deputy Clerk

¶2002-5562

UNITED STATES OF AMERICA, PLAINTIFF v. Carl R. THONEN, DEFENDANT. U.S. District Court, Eastern Dist. of Texas, (DC TX) CIVIL NO. 4:02-CV-00187, Sept. 23, 2002. Years 1987, 1989. Decision for Govt.

1. 100% penalty for failure to pay over employment taxes—default judgment. Taxpayer's IRC §6672 penalty liability for failure to pay over 2 corps.' employment taxes was upheld on default judgment in amounts stated plus interest. *Reference:* United States Tax Reporter ¶66,725.02(40). IRC §6672.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS SHERMAN DIVISION,

ORDER GRANTING THE UNITED STATES' MOTION FOR DEFAULT JUDGMENT

LEONARD DAVIS UNITED STATES DISTRICT JUDGE

[1] The plaintiff, United States of America, under Rule 55 (b) of the Federal Rules of Civil Procedure, has moved this Court to enter judgment by default in favor of the United States and against defendant Carl R. Thonen. The Court finds that on August 5, 2002, defendant Carl R. Thonen was personally served with the summons and a copy of the complaint. The Court also finds that defendant's answer was due to be served on August 26, 2002, and that defendant has failed to file an answer, motion or otherwise defend in this action. Because of the failure of defendant to timely plead or otherwise defend in this action, his is in default. This Court is of the opinion that the United States' Motion be granted and judgment by default should be entered against Carl R. Thonen.

It is therefore ORDERED, ADJUDGED AND DECREED that:

1. Carl R. Thonen is indebted to the United States for the penalty under 26 U.S.C. § 6672 employment taxes of Thonen Industries, Inc., assessed against Thonen for the tax period ending September 30, 1989, in the amount of $371,900.96, as of March 31, 2002, plus interest and other additions to tax allowed by law accruing thereafter under 26 U.S.C. §§ 6601, 6621, and 28 U.S.C. § 1961 until paid;

B: Carl R. Thonen is indebted to the United States for the penalty under 26 U.S.C. § 6672 employment taxes for Wheeling Heating Company assessed against Thonen for the tax period ending March 31, 1987, in the amount of $15,080.96, as of March 31, 2002, plus interest and other additions to tax allowed by law accruing thereafter under 26 U.S.C. §§ 6601, 6621, and 28 U.S.C. § 1961 until paid;

3. The United States is entitled to recover costs in this action against Carl R. Thonen.

SIGNED September 23, 2002.

LEONARD DAVIS

UNITED STATES DISTRICT JUDGE

¶2002-5563

In The Matter Of The Tax Liabilities Of: John DOES, United States taxpayers who, during the years ended December 31, 1998 through December 31, 2001, had signature authority over Mastercard payment cards issued by, or through, or on behalf of banks or other financial institutions in Antigua and Barbuda, Bahamas, and Caymen Islands, or issued to persons or entities in Antigua and Barbuda, Bahamas, and Cayman Islands. U.S. District Court, Dist. of Texas, (DC TX) No. 3:02-CV-1854-L, Sept. 30, 2002. Years 1998, 1999, 2000, 2001. Decision for Govt.

1. Third-party summonses—"John Doe" summonses—legitimate purpose—proof. Magistrate judge recommended granting govt.'s ex-parte petition for leave for IRS to serve "John Doe" summonses on 3d-party corps.: govt. showed that summonses, seeking information relating to

transactions on offshore credit card accounts over which unidentified taxpayers had signatory authority, related to investigation of those ostensible taxpayers; that govt. reasonably believed those taxpayers may not have complied with IRC; and that information was unavailable from other sources. *Reference:* United States Tax Reporter ¶76,095.01(50). IRC §7609.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION,

PAUL D. STICKNEY UNITED STATES MAGISTRATE JUDGECONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

[1] Pursuant to the provisions of 28 U.S.C. § 636(b) and an Order of the United States District Court for the Northern District of Texas, the United States of America's ''*Ex Parte* Petition for Leave to Serve John Doe Summonses'' has been referred to the United States Magistrate Judge for recommendation. The Court has reviewed the Petition, exhibits, Memorandum, notice and Declaration. The Court concludes that the ''John Doe'' summonses to be issued by the Internal Revenue Service to Accor Lodging North America, AMR Corporation, Bulloch, Seger Weaver & Company, PLLC, CI Host, Inc., International Airline Passengers Association, Mannatech, Inc., Mary Kay, In., Omni Hotels, Sabre, Inc., Southwest Airlines Co., and Wyndham International, Inc., relate to the investigation of an ascertainable group or class of persons, that there is a reasonable basis for believing that such group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and that the information sought to be obtained from the examination of the records or testimony (and the identities of the persons with respect to whose liability the summonses are issued) are not readily available from other sources. The Court can grant the petition and issue the summons without notice to any person or entity and no other filings are permitted from other persons or entities. 26 U.S.C. § 7609(h). Therefore, the usual notice and ten-day waiting period for adopting this recommendation are not applicable here.

RECOMMENDATION

The Court recommends that the *Ex Parte* Petition for ''John Doe'' Summonses be issued at the Court's earliest opportunity.

Signed September 30, 2002.

PAUL D. STICKNEY

UNITED STATES MAGISTRATE JUDGE

¶2002-5564

GROESBECK INVESTMENTS, INC., PLAINTIFF v. Alvina L. SMITH, Michigan National Bank, United States, State of Michigan, Michigan Employment Security Commission, and Roseville Transmission Parts, DEFENDANTS. U.S. District Court, Eastern Dist. of Michigan, (DC MI) Case No: 02-70058, Sept. 30, 2002. Decision for Taxpayer.

1. Actions against U.S.—quiet title—removal and remand—sovereign immunity. Investment co.'s motion to remand quiet title action against govt. to state court was granted: govt.'s removal of action within 30 days of taxpayer's amended complaint's filing, but more than 30 days after original complaint's filing, failed 28 USC §1446(b)'s requirement that removal be made within 30 days of *initial pleading.* Govt.'s argument, that original complaint's failure to specifically establish sovereign immunity waiver under 28 USC §2410 was pleading defect that rendered case un-removable until such defect was cured, was rejected where govt. clearly knew from ''quiet title'' caption statutory basis for taxpayer's claims when it received original complaint. Also, govt.'s subse-quent actions further showed it knew ac-tion was removable as of original com-plaint's filing; and case law to contrary wasn't followed. *Reference:* United States Tax Reporter ¶74,336.508(60).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION,

OPINION AND ORDER GRANTING PLAINTIFF'S MOTION TO REMAND AND ORDER REMANDING THIS ACTION TO THE MACOMB COUNTY CIRCUIT COURT

Hon. Gerald E. Rosen

I. INTRODUCTION

This matter is presently before the Court on Plaintiff Groesbeck Nine Investment, Inc.'s Motion to Remand. In this Motion, Plaintiff contends that Defendant United States did not timely remove the case to this Court in compliance with 28 U.S.C. § 1446(b) which requires that a notice of removal be filed within thirty days after the defendant receives a copy of the initial pleading setting forth the claim for relief upon which the action is based. The Government has responded to Plaintiff's Motion countering that its removal of this action was timely because it was filed within 30 days of the filing of Plaintiff's *amended* complaint which it claims was the first pleading that ''place[d] the Government under the jurisdiction of a court.'' Having reviewed and considered Plaintiff's Motion, the Government's Response thereto, and the entire file of this matter, the Court has determined that oral argument is not necessary. Therefore, pursuant to Eastern District of Michigan Local Rule 7.1(e)(2), this matter will be decided on the briefs. This Opinion and Order sets forth the Court's ruling.

II. PERTINENT FACTS

Groesbeck Nine Investment, Inc. (''Groesbeck'') filed a Complaint to quiet title and for possession of real property in Macomb County Circuit Court on May 2, 2001. The subject property is located at 22755 Groesbeck Highway in Warren, Michigan. In its Complaint, Plaintiff alleged that it has title to the property because it had acquired one or more tax deeds that had been issued with respect to the property and complied with state law provisions for giving interested persons notice that such a deed had been acquired and an opportunity to redeem. Plaintiff named the United States of America and five other persons/entities, Alvina Smith, Michigan National Bank, the State of Michigan, the Michigan Employment Security Commission, and Roseville Transmission Parts, as party-defendants. Plaintiff alleged that each of these Defendants ''appear[s] to claim an interest in said property,'' and that ''Defendant's claims to said property constitutes [sic] a cloud upon the Plaintiff's title which diminishes its value and adversely affects its sale.'' [*See* Plaintiff's Complaint, ¶s 5–6.]

The United States was served with a copy of Plaintiff's Complaint on May 21, 2001.[1] Then, after appearing in the state court for a Settlement Conference on August 24, 2001, the Government filed its Answer to the Complaint on September 7, 2001.

In its September 7, 2001 Answer to Plaintiff's Complaint, the Government admitted that it has tax liens on the property that is the subject of this action. [*See* Answer of the United States of America, First Defense, Second Defense, and Fourth Defense, ¶ 4.] It also asserted an affirmative defense to the suit, i.e., that sovereign immunity had not been waived. [*See* Answer of the United States of America, Third Defense.][2] Then, a month later, on October 15, 2001, the Government filed a ''Motion to Dismiss and Intervene'' on this same ground.

In its Motion to Dismiss and Intervene, the United States acknowledged that it had been properly served with a copy of Plaintiff's Complaint, and once again acknowledged that it holds tax liens on the subject

[1] A copy of the summons and complaint were served upon the Attorney General of the United States in Washington, D.C. on May 11, 2001 and upon the United States Attorney for the Eastern District of Michigan on May 21, 2001. [*See* Plaintiff's Motion to Remand, p. 2. *See also*, Government's Ex. A, p. 4 (acknowledging that the United States was correctly served with a copy of the complaint.)

[2] Specifically, in its third affirmative defense, the Government stated:

> Sovereign immunity has not been waived under 28 U.S.C. § 2410 (which provides for a waiver of sovereign immunity under some circumstances), because the Plaintiff's complaint does not ''set forth with particularity the nature of the interest or lien of the United States.''

[*See* Answer of the United States, Third Defense.]

property. [*See* Government Ex. A, p. 4.][3] However, the Government argued for dismissal of the Complaint contending that Plaintiff had not complied with 28 U.S.C. § 2410, which specifies the conditions under which the Government will be deemed to have waived sovereign immunity for purposes of a quiet title action. Specifically, pursuant to Section 2410(b), for a quiet title plaintiff to proceed against the United States, "the complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States," and in actions involving federal tax liens, "the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien is filed, the identify of the internal revenue office which filed the notice, and the date and place such notice of lien was file." Because Plaintiff's Complaint did not identify the United States' liens with particularity, the Government claimed that Plaintiff could not sue the United States and, therefore, it should be dismissed from the action.

Additionally, the Government argued that once it was dismissed from the action, it should be granted leave to intervene pursuant to 26 U.S.C. § 7424 which provides that the United States may intervene in any action in which it is not already a party to assert a tax lien it holds on the property that is the subject of the suit. [*See* Government's Ex. A, § B, pp. 8–10.][4] With respect to its purpose for seeking dismissal and then asking that after its dismissal it be allowed to intervene and re-enter the action, the Government stated:

> Following the entry of an order of dismissal and an entry of an order allowing intervention, a new 30-day period in which to remove to federal court pursuant to 28 U.S.C. § 1444 and 1446 would commence. The United States intends to remove the action upon allowance of its motion to intervene.

Id. at p. 3, n. 1.

In response to the Motion to Dismiss and Intervene, Groesbeck moved for leave to amend its Complaint. The motion to amend was granted and Plaintiff filed its Amended Complaint on December 13, 2001. The United States then withdrew its motion to dismiss and intervene on mootness ground and, on January 7, 2002, and removed the case to this Court. On January 30, 2002, Groesbeck timely filed the instant motion to remand arguing that the Government's removal of this action was not timely under the provisions of 28 U.S.C. § 1446(b).

III. DISCUSSION

[1] 28 U.S.C. § 1446(b) sets forth the time limits for removing an action from state court to federal court. It provides in pertinent part:

> [A] notice of removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . .
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable . . . .

It is well-settled that the removal statutes are to be construed restrictively and any doubts as to removability are resolved

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[3] In it Motion to Dismiss and to Intervene, the Government stated:

> Though not stated in the Complaint, the United States has liens that attach to the property and rights to property of Alvina L. Smith, who as far as we can tell, appears to be one of the record title owners of the Property. These liens arise from unpaid income and employment taxes from various tax periods from 1989 through 1999. The total unpaid amount of the liabilities are in excess of $300,000. Notices of Federal Tax Lien have been filed for most, if not all, of the liabilities with the Macomb County Register of Deeds. (Some of the notices were filed years ago, on three separate dates from 1994 through 1996. The IRS appears to have initiated, within the past couple of weeks, the process to have notices recorded for additional periods; we do not know whether such notices have been recorded yet.)

[4] 26 U.S.C. § 7424 provides:

> If the United States is not a party to a civil action or suit, the United States may intervene in such action or suit to assert any lien arising under this title on the property which is the subject of such action or suit. The provisions of section 2410 of title 28 of the United States Code (except subsection (b)) and of section 1444 of title 28 of the United States Code shall apply in any case in which the United States intervenes as if the United States had originally been named a defendant in such action or suit . . . .

in favor of remanding the case to state court. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–109, 61 S.Ct. 868, 872 (1941); *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 339 (6th Cir. 1989); *Messick v. Toyota Motor Mfg., Kentucky, Inc.*, 45 F.Supp.2d 578, 580 (E.D. Ky. 1999); *Hardy v. Square D Co.*, 199 F. Supp. 2d 676 (N.D. Ohio (2002). A defendant's failure to comply with the thirty-day limitation set forth in Section 1446(b) is an absolute bar to removal regardless of whether the removal would have been proper if timely filed. *Green v. Clark Refining & Marketing, Inc.*, 972 F.Supp. 423, 424 (E.D. Mich. 1997); *McCraw v. Lyons*, 863 F.Supp. 430, 434 (W.D.Ky.1994); *Sanborn Plastics v. St. Paul Fire and Marine Ins.*, 753 F.Supp. 660, 664 (N.D.Ohio 1990). The burden is on the defendant of showing that it has complied with the procedural requirements for removal. *Parker v. Brown*, 570 F. Supp. 640, 642 (S.D. Ohio 1983); *Messick v. Toyota Motor Mfg.*, 45 F.Supp.2d 578, 580 (E.D. Ky. 1999); *Schwartz v. FHP International Corp.*, 947 F. Supp. 1354, 1360 (D. Ariz. 1993).

The Court finds that the Government has not carried its burden in this case.

Although the Government argues that its notice of removal was timely filed within 30 days of Plaintiff's filing of his amended complaint, the plain language of Section 1446 makes it clear that a defendant may only rely upon an amended pleading to trigger the 30-day removal period "if the case stated by the initial pleading is not removable." Defendant argues that the initial pleading in this case, Plaintiff's original Complaint, was not removable because Plaintiff failed to set forth the grounds for establishing waiver of sovereign immunity required under 28 U.S.C. § 2410. However, neither § 2410, § 1444, or any other statute requires that sovereign immunity must first be waived in order for a case to become removable by the United States.

28 U.S.C. § 2410 merely sets forth the provisions governing waiver of sovereign immunity in real property actions. In relevant part, Section 2410 provides as follows:

> (a) Under the circumstances prescribed in this section and section 1444[5] of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any state court having jurisdiction of the subject matter--
>
> (1) to quiet title to,
>
> (2) to foreclose a mortgage or other lien upon,
>
> (3) to partition,
>
> (4) to condemn, or
>
> (5) of interpleader or in the nature of interpleader with respect to

real or personal property in which the United States has or claims a mortgage or other lien.

> (b) The complaint or pleading shall set forth with particularity the nature of the interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien, and if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed . . . .

28 U.S.C. § 2410(a),(b) (emphasis added).

The Government's argument is that because Plaintiff's original complaint failed to comply with Section 2410, it was not subject to the jurisdiction of *any* court, state or federal. Therefore, the Government argues the action was not removable until the waiver of sovereign immunity was properly pled.

In support of this contention, the Government relies upon *Harmony Homes v. United States*, 890 F. Supp. 1032

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[5] 28 U.S.C. § 1444 provides for removal of § 2410 actions brought against the United States in state court. It reads as follows:

Any action brought under section 2410 of this title against the United States in any state court may be removed by the United States to the District court of the United States for the district and division in which the action is pending.

(M.D.Fla. 1995). In *Harmony Homes*, the plaintiff, a mortgagee, sued the United States in state court to foreclose two mortgages on real property owned by the Government. *Id.* at 1034. The plaintiff's initial and first amended complaints did not allege a federal question nor did it allege any waiver of sovereign immunity. The United States filed answers to both the original complaint and the amended complaint and asserted in its answer to the amended complaint the defense of sovereign immunity. This ultimately led to the plaintiff's filing of a second amended complaint which asserted waiver of sovereign immunity under the Small Business Act, 15 U.S.C. § 634(b)(1), and contained sufficient allegations to comply with the waiver provisions. *Id.* The United States then filed a Notice of Removal contending that it was only upon receipt of Harmony Homes' second amended complaint that removal was first ascertainable.

Harmony Homes subsequently moved to remand. The court denied the motion to remand, and stated that the ''defendant had no basis upon which to remove the case to federal court'' until the second amended pleading was filed.

In arguing for remand, the plaintiff posited that a fair reading of the initial complaint adequately put the Government on notice that the case could be removed. 890 F.Supp. at 1034. In support of its argument, Harmony Homes relied on *Lee v. Altamil Corp.*, 457 F. Supp. 979 (M.D. Fla. 1978). *Lee* was a case which involved diversity of citizenship jurisdiction and the issue of satisfaction of the amount in controversy requirement. In that case, the plaintiff's complaint failed to allege damages in excess of $10,000 (which, was the amount in controversy requirement at the time). However, the complaint did allege ''serious permanent injury,'' ''substantial medical expenses,'' ''great pain and suffering,'' and ''a substantial loss of income.'' The *Lee* court found that a reasonable reading of the complaint indicated that the amount in controversy exceeded $10,000 and, therefore, held that the defendant could have ascertained from the face of the complaint that the case was removable.

The court in *Harmony Homes* declined to adopt the *Lee* court's reasoning, finding *Lee*distinguishable because it involved diversity jurisdiction, not federal question jurisdiction, which was the issue in *Harmony Homes*. The court explained:

> This case, however, does not involve federal diversity jurisdiction. Therefore, federal question jurisdiction is required. This Court is unwilling to extend the holding in *Lee* to this case by requiring the Defendant to infer the appropriate statute. To do so would circumvent the ''well-pleaded complaint rule,'' which ''provides that federal question jurisdiction exists only when a federal question is presented *on the fact of the plaintiff's properly pleaded complaint.*'' *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S.Ct. 2425, 2429, 96 L.Ed.2d 318 (1987) (emphasis added). No federal question appeared on the face of the Plaintiff's initial complaint or first amended complaint. The pleadings indicated only that the Plaintiff sought to foreclose two mortgages on real property owned by the Defendant. (Pl.'s Compl. ¶s 1, 12; Pl.'s Am. Compl. ¶s 1, 10.) Therefore, the Defendant had no basis upon which to remove the case to federal court.
>
> *Id.*

This Court declines to follow the hypertechnical distinction made by the *Harmony Homes* court between diversity and federal question jurisdiction for purposes of determining whether removability of an action is ascertainable from a plaintiff's initial pleading. As the court found in *Mielke v. Allstate Insurance Company*, 472 F.Supp. 851 (E.D.Mich. 1979), ''there is no reason to allow a defendant additional time if the presence of grounds for removal are unambiguous in light of the defendant's knowledge and the claims made in the initial complaint.'' *Id.* at 853. This is precisely the case presented here.

Plaintiff's original Complaint in this action alleged that the United States claimed

an interest it the subject property. Furthermore, the Complaint was captioned as a "Complaint to Quiet Title." The Government clearly cannot claim that it had insufficient knowledge at the time it received Plintiff's original complaint as to the basis of the Plaintiff's claims regarding the interest of the United States. Indeed, the Government specifically acknowledged in its September 7, 2001 Answer to the Complaint -- i.e., four months before it filed its Notice of Removal -- that it held tax liens on the subject property. It further specifically asserted in its Answer the Plaintiff's failure to establish waiver of sovereign immunity under 28 U.S.C. § 2410 -- the statute authorizing suits to quiet title against the Government -- as an affirmative defense. Thus, this is not a case like *Harmony Homes* where the Government would have had "to infer the appropriate statute" providing federal question jurisdiction. Here, the Government clearly *knew* which statute was involved long before it received Plaintiff's Amended Complaint on December 13, 2001.

Furthermore, the Government can hardly claim that it did not know that the case was removable prior to receiving Plaintiff's Amended Complaint when it specifically requested in October 2001 that Plaintiff's original complaint against it be dismissed and that after dismissal it be permitted to intervene *for the express purpose of being entitled to a new 30-day removal period.*[6] Unfortunately for the Government, the state court did not order that it be dismissed from the action (and, thus, the court never addressed the Government's request to re-enter the case as an inter-venor), but rather granted the Plaintiff leave to file an amended complaint. Thus, the Government never obtained the new 30-day removal period it had hoped to acquire through its dismissal/intervention strategy.

It is easily seen from these actions that the Government knew, at least as of October 15, 2001, that Plaintiff's Complaint was removable and that it had missed the opportunity to timely remove the action. Its dismissal/intervention strategy was an attempt to cure its mistake in not timely removing the action by obtaining a new 30-day removal period.

For all of these reasons, the Court declines to follow *Harmony Homes* and, instead, adopts the reasoning of Judge Joiner in *Mielke, supra*: There is no reason to allow the Government additional time to remove where, as here, the presence of grounds for removal are unambiguous in light of the Government's knowledge and the claims made in the Plaintiff's initial complaint.

However, even if the Court were to accept the reasoning of the *Harmony Homes* court, the continued viability of that decision is doubtful in light of the 1996 amendments to the removal statutes, because now the statutes provide a much broader basis for removal of actions against the United States than they did at the time that the *Harmony Homes*matter was decided.

At the time of the *Harmony Homes* decision, 28 U.S.C. § 1444 was the only statute specifically providing for removal of actions brought against the United States, and, as indicated, this statute covers only actions brought under 28 U.S.C. § 2410. *Harmony Homes* involved a foreclosure action, not under Section 2410 but rather, under the Small Business Act, 15 U.S.C. § 634(b)(1). Therefore, there is some merit in *Harmon Homes* court's concern that federal question jurisdiction was not ascertainable from Plaintiff's initial pleadings.

However, in 1996, Congress amended the removal statutes and specifically made *all* civil actions against the United States removable by virtue of its amendment to 28 U.S.C. § 1442(a)(1). Prior to the 1996 amendment, Section 1442 only provided for the removability of civil actions commenced in a state court against *officers or agencies* of the United States. *See* 28

[6] Arguably, the Government's filing of its motion to dismiss in state court constituted an affirmative use of the state court process which constitutes a waiver of its right to remove. *See Schotz v. RDV Sports, Inc.* 821 F.Supp. 1469 (MD FL 1993); *Heafitz v. Interfirst, Bank of Dallas* 711 F.Supp. 92, 96 (SD NY 1989); Schwarzer, Tashima & Wagstaffe, CAL. PRAC. GUIDE:FED.CIV.PRO.BEFORE TRIAL ¶s2:872-2:892 (The Rutter Group 2002).

U.S.C.A. § 1442 (West 1994). In 1996, § 1442 was amended, and it now provides:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) The United States or any agency thereof or any officer of the United States or any agency thereof . . . .

When removal is sought under this statute, the removing party does not have to establish that the federal court had original diversity or federal question jurisdiction. *Jefferson County, Alabama v. Acker*, 527 U.S. 423, 430–31 (1991). Thus, any action brought against the United States, regardless of the basis for the suit, is removable to federal court. All that is required is that the action be brought "against the United States." Plaintiff's initial Complaint clearly meets this requirement. Therefore, removability of the action was readily ascertainable upon the Government's receipt of Plaintiff's original Complaint in May 2001.

The Court further rejects the Government's specious argument that it could not have removed this case until the Plaintiff had complied with the pleading requirements pertaining to waiver of sovereign immunity. As indicated, neither § 2410, § 1444, or any other statute requires that sovereign immunity must first be waived in order for a case to become removable by the United States. Indeed, in case after case, the Government routinely removes actions from state court -- including quiet title actions involving federal tax liens -- and then, after removal, asserts the plaintiff's failure to establish waiver of sovereign immunity and moves to dismiss the complaint on that basis. *See e.g. Stanton v. United States*, 434 F.2d 1273 (5th Cir. 1970) (case removed and then dismissed on Government's motion for failure to establish waiver of sovereign immunity under Section 2410); *Ringer v. Basile*, 645 F.Supp. 1517 [59 AFTR 2d 87-588] (D. Colo. 1986) (same); *Sanders v. United States*, 34 Fed. Cl. 38 [76 AFTR 2d 95-5981] (1995)(same); *Floyd v. United States*, 241 F. Supp. 996 [16 AFTR 2d 5046] (W.D.S.C. 1965)(same). *See also, Raisig v. United States*, 34 F. Supp. 2d 1053 (W.D. Mich. 1998) (case removed and then dismissed on Government's motion for failure of the plaintiff to establish satisfaction of the prerequisites for finding waiver of immunity under the Federal Tort Claims Act); *Harper v. Lockheed Martin Energy Systems, Inc.*, 73 F. Supp. 2d 917 (E.D. Tenn. 1999)(same); *Wilder v. United States*, E.D. Mich. No. 00-CV-74470-DT (June 27, 2002)(same). Therefore, the Court finds no merit in the Government's argument that it could not remove this case until the Plaintiff filed an amended complaint complying with waiver of sovereign immunity requirements of 28 U.S.C. § 2410.

CONCLUSION

For all of the foregoing reasons, the Court finds that the Government's removal of this case was not timely. The failure to comply with the time limitation set forth in 28 U.S.C. § 1446(b) is an absolute bar to removal regardless of whether the removal would have been proper if timely filed. *Green v. Clark Refining & Marketing, Inc.*, 972 F.Supp. 423, 424 (E.D. Mich. 1997). Therefore,

IT IS HEREBY ORDERED that the Plaintiff's Motion to Remand is GRANTED. Accordingly,

IT IS FURTHER ORDERED that this case shall be REMANDED to the Macomb County Circuit Court.

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on 30 Sep 2002

PRESENT: Honorable Gerald E. Rosen
United States District Judge

Gerald R. Rosen

United States District Judge

¶2002-5565

UNITED STATES OF AMERICA, PLAINTIFF v. GRIFFITH CONSTRUCTION CO., a/k/a Griffith

Construction Co., Inc., a Texas Corporation, Jay Griffith and Cindy Griffith, DEFENDANTS. U.S. District Court, Eastern Dist. of Texas, (DC TX) Case No. 4:02CV299, Sept. 27, 2002. De-cision for Govt.

1. Recovery of erroneous refunds—temporary restraining order—irreparable harm. Govt. was granted TRO preventing taxpayers from cashing allegedly erroneous refund check and requiring them to surrender proceeds to govt.: govt. was likely to prevail on merits and faced irreparable harm, both from costs it would have to expend to recover funds as well as in terms of negative effect of taxpayers' use of check to further promote tax avoidance scheme through which they gained refund in 1st instance. Also, taxpayers wouldn't be irreparably harmed since they likely weren't entitled to funds; and check's recovery would protect public from being misled about success of taxpayers' scheme. *Reference:* United States Tax Reporter ¶74,055.01(32). IRC §7405.

UNITED STATES DISTRICT COURT EASTER DISTRICT OF TEXAS SHERMAN DIVISION,

Judge BrownTEMPORARY RE-STRAINING ORDER

UPON HEARING, notice of which had been given to all parties, the Court has determined that substantial evidence exists to support the government's assertion that, on or about July 15, 2001, the Secretary of Treasury, on behalf of the Internal Revenue Service, erroneously issued a refund check of $474,266.70 to defendants, which, to date, has not been negotiated. Additionally, the evidence shows that the check has been displayed on the website located at www.nite.org, known to the IRS to be operated by Thurston Bell, a promoter of the practice used by GCC in attempting to avoid the payment of taxes.

[1] In light of this evidence, the Court finds that it is likely that the government will prevail on the merits of the underling case. The Court further finds that there will be irreparable harm to the plaintiff if injunctive relief is not granted: The government will incur the time and expense of recovering the proceeds of the check if it is negotiated by the defendants, and further, irreparable harm will result to the Government if the check is displayed over the world wide web or any other media for promotion of this illegal scheme to avoid the reporting and payment of payroll taxes. On the other hand, restraining defendants from negotiating the check and requiring defendants to turn over the check to counsel for the United States will not cause irreparable harm: it appears none of these defendants were entitled to the funds at issue, and, should adjudication of the governments' complaint reveal otherwise, the check can be returned. Finally, the public interest lies in the collection of tax refunds erroneously made. Also, the relief sought by the United States will promote public interest, as seizure of the check will prevent its further use of promoting an illegal tax avoidance practice and scheme.

Accordingly, it is therefore ORDERED that:

1. Defendants refrain from cashing or otherwise negotiating the erroneous refund check issued by the Secretary of Treasury on or about July 15, 2001.

2. Defendants turn over to counsel for the United States, no later than 4:00 p.m., Monday, September 30, 2002, the erroneous refund check.

3. Counsel for the United States shall hold the check in safekeeping until otherwise ordered by this Court.

4. In the event that defendants negotiate the erroneous refund check before receiving notice of this Order, defendants shall refrain from dissipating the proceeds and further shall turn over the proceeds, whether in cash or property, of the erroneous refund check to counsel for the United States, no later than 4:00 p.m., Monday, September 30, 2002. Counsel for the United States shall hold such proceeds in safekeeping until otherwise ordered by this Court.

Dated: September 27, 2002 and entered at 4:08 P.M.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5566

UNITED STATES OF AMERICA, PLAINTIFF v. Norman LINDSEY and Estate of Ida L. Lindsey (deceased), Norlette Dancer, ADMINISTRATOR DEFENDANTS. U.S. District Court, Northern Dist. of Texas, (DC TX) CIVIL NO. 402-CV-0495-Y, Sept. 30, 2002. Years 1991, 1993, 1994, 1995. Decision for Govt.

1. Actions to reduce assessments to judgment—default judgment. Govt. was granted default judgment against taxpayers, establishing their liabilities for outstanding taxes for 4 years in amounts stated, plus interest, penalties and costs. *Reference:* United States Tax Reporter ¶74,035.01(30). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS FORT WORTH DIVISION,

DEFAULT JUDGMENT

TERRY R. MEANS UNITED STATES DISTRICT JUDGE

[1] The plaintiff, United States of America, under Rule 55(b) of the Federal Rules of Civil Procedure, Local Rule 55.2 and Northern District of Texas Miscellaneous Order No. 25, has moved this Court to enter judgment by default in favor of the United States and against defendant Norman Lindsey. The Court finds that on July 11, 2002, defendant Norman Lindsey was served with the summons and a copy of the complaint. On July 11, 2002, Harold Lindsey agreed to and accepted service of the summons and a copy of complaint for his father, defendant Norman Lindsey, at defendant's usual place of abode. The Court also finds that defendant's answer was due on July 31, 2002, and that defendant Norman Lindsey has failed to file an answer, motion or otherwise defend in this action. Because of the failure of defendant Norman Lindsey to timely plead or otherwise defend in this action, he is in default. This Court is of the opinion that judgment by default should be entered against Norman Lindsey.

It is therefore ORDERED, ADJUDGED AND DECREED that the United States of America have and recover judgment:

1. against Norman Lindsey for the unpaid federal income tax assessment for year 1991 in the amount of $12,231.86, as of May 22, 2002, plus interest and other additions to tax allowed by law accruing thereafter under 26 U.S.C. §§ 6601, 6621, and 28 U.S.C. § 1961 until paid;

2. against Norman Lindsey for the unpaid federal income tax assessment for year 1993 in the amount of $18,255.39, as of May 22, 2002, plus interest and other additions to tax allowed by law accruing thereafter under 26 U.S.C. §§ 6601, 6621, and 28 U.S.C. § 1961 until paid;

3. against Norman Lindsey for the unpaid federal income tax assessment for year 1994 in the amount of $16,658.97, as of May 22, 2002, plus interest and other additions to tax allowed by law accruing thereafter under 26 U.S.C. §§ 6601, 6621, and 28 U.S.C. § 1961 until paid;

4. against Norman Lindsey for the unpaid federal income tax assessment for year 1995 in the amount of $24,470.76, as of May 22, 2002, plus interest and other additions to tax allowed by law accruing thereafter under 26 U.S.C. §§ 6601, 6621, and 28 U.S.C. § 1961 until paid; and

5. against Norman Lindsey for its costs in this action.

SIGNED September 30, 2002.

TERRY R. MEANS

UNITED STATES DISTRICT JUDGE

¶2002-5567

Donald Wayne EASTMAN, ET AL., PLAINTIFFS v. SECRETARY OF TREASURY, ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of Texas, (DC TX) Civil Action No. 3:02-

CV-498-N, Sept. 25, 2002. Decision for Govt.

1. Actions against IRS employees—damages—sovereign immunity—Anti-Injunction Act; Federal Tort Claims Act—constitutional claims. Taxpayers-trustees' injunction and damages claims against Treas. Secy. and individual IRS employees for collection-related trespass, fraud, and due process violations were dismissed: U.S., which was proper defendant, didn't waive sovereign immunity under FTCA to collection-related tort claims; *Bivens* relief wasn't available; and AIA barred injunctive relief. *Reference:* United States Tax Reporter ¶76,557.53(12); 74,335.01(7); 74,215.05(5). IRC §7421; 7433.

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION,

ORDER

David C. Godbey United States District Judge

[1] Before the Court is Defendants' Motion to Dismiss. For the reasons stated below that Motion to Dismiss is GRANTED IN ITS ENTIRETY.

Plaintiffs, Donald Wayne Eastman and Andrew Wayne Winston, filed suit against the Secretary of the Treasury, Paul O'Neill, and two revenue agents for the Internal Revenue Service, Henry Crawford and Linda Short, alleging trespass, fraud and due process violations and seeking injunctive relief. Plaintiffs' claims involve the Internal Revenue Service's collection of taxes from plaintiff Eastman that were owed by the Christian Trust, of which Eastman was trustee.

Defendants assert that the United States government, not the named individuals, is the proper defendant in this case. The crucial test for determining whether a suit is against an employee or the sovereign itself is which entity will provide the relief sought. *Larson v. Domestic & Foreign Commerce Corp.*, 69 S.Ct. 1457, 1460 (1949). Although Plaintiffs allege the suit is against Secretary O'Neill and Agents Crawford and Short individually, the relief sought - monetary damages and injunctive relief - would be provided by the United States government, not by the named individuals. Therefore, the proper defendant in this case is the United States government.

Because the United States is the proper defendant in this suit, sovereign immunity bars Plaintiffs' tort claims. *See e.g., U.S. v. Nordic Village Inc.*, 112 S.Ct. 1011, 1014 [69 AFTR 2d 92-687] (1992). Plaintiff Winston alleges that Defendants committed trespass and fraud against him by applying his personal income tax return to the Christian Trust's tax debt. The Federal Tort Claims Act provides a limited waiver of sovereign immunity for some tort claims. 28 U.S.C. § 2675 (1994). But tort claims involving the assessment or collection of taxes are barred under the Federal Tort Claims Act, so this Court lacks subject matter jurisdiction over the claim. 28 U.S.C. §2680(c) (1994).[1]

To the extent Plaintiffs are asserting a *Bivens*[2] due process claim, Congress provided a substitute for recovery directly under the Constitution in tax cases. 26 U.S.C. § 7433 (2002). Therefore, Plaintiffs fail to state a claim upon which relief can be granted. *See Carlson v. Green*, 446 U.S. 14, 18 (1980).

Finally, Plaintiffs' claim for injunctive relief is barred by the Anti-Injunction Act. 26 U.S.C. §7421(a) (2002). *See Bob Jones Univ. v. Simon*, 94 S.Ct. 2038, 2044 [33 AFTR 2d 74-1279] (1974). This court lacks subject-matter jurisdiction over Plaintiffs' claim because Plaintiffs seek to enjoin the Internal Revenue Service from collecting taxes, which falls squarely within

[1] Moreover, Plaintiff failed to present and have his claim denied by the Internal Revenue Service in writing before bringing the tort claim as required by 28 U.S.C. § 2675(a) (1994). *See McNeill v. U.S.*, 113 S.Ct. 1980 (1993). Thus, for this additional reason, this Court lacks subject matter jurisdiction to hear his tort claims. *See Townsend v. U.S. Dep't of Justice I.N.S.*, 799 F.2d 179 (5th Cir. 1986).

[2] *Bivens v. Six Unknown Named Agents for the Federal Bureau of Investigation*, 403 U.S. 388 (1971).

the purview of the Anti-Injunction Act.[3] 26 U.S.C. §7421(a) (2002).

Because Plaintiffs fail to state a cause of action over which the court has subject matter jurisdiction or upon which relief can be granted, this court GRANTS Defendant's Motion to Dismiss Plaintiffs' complaint in accordance with Federal Rule of Civil Procedure 12(b)(1) & (6).

SIGNED this 25 day of September, 2002.

David C. Godbey

United States District Judge

¶2002-5568

UNITED STATES OF AMERICA v. Jessie HALL and Mildred HALL. U.S. District Court, Eastern Dist. of Louisiana, (DC LA) No. Civ.A. 01-3699, Oct. 18, 2002. Years 1984, 1985, 1986, 1988, 1991, 1992, 1993, 1994, 1995, 1996. Decision for Govt.

1. Actions to reduce assessments to judgment—summary judgment. Taxpayers' assessments were reduced to judgment on summary judgment: taxpayers didn't rebut assessments' validity or contest govt.'s calculations. *Reference:* United States Tax Reporter ¶74,035.01(25). IRC §7403.

United States District Court, E.D. Louisiana,

ORDER AND REASONS

VANCE, J.

Before the Court is plaintiff's motion for summary judgment, to which defendants have filed no opposition. For the following reasons, the Court grants plaintiff's motion.

I. Legal Standard

Summary judgment is appropriate when there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 2551 (1986). The court must be satisfied that no reasonable trier of fact could find for the nonmoving party or, in other words, "that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict in her favor." Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir.1990); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). The moving party bears the burden of establishing that there are no genuine issues of material fact. Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1445 (5th Cir.1993). A factual dispute precludes a grant of summary judgment if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. See Hunt v. Rapides Healthcare System, LLC, 2001 WL 1650961 (5th Cir.2001) (citations omitted).

II. Discussion

[1] Plaintiff seeks to reduce to judgment the federal income tax liability of defendants, Jessie Hall and Mildred Hall, for the years 1984 through 1986, 1988, and 1991 through 1996. It is well established that the United States of America is entitled to such relief if it comes forward with evidence that an assessment of deficiency was made against the taxpayer. Portillo v. Commissioner of Internal Revenue, 932 F.2d 1128, 1133 [67 AFTR 2d 91-1149] (5th Cir.1991). Such an assessment is "generally afforded a presumption of correctness." Id. Then, the burden shifts to the taxpayer to prove that the determination of deficiency is arbitrary or erroneous. Yoon v. Commissioner of Internal Revenue, 135 F.3d 1007, 1012 [81 AFTR 2d 98-938] (5th Cir.1998).

Plaintiff has come forward with evidence that assessments have been made for unpaid federal income taxes, penalties, and interest for the 1984 through 1986, 1988, and 1991 through 1996 tax years. (Pl.'s Mot. for Summ. J., Ex. A and Ex. B, p 2.) Plaintiff no longer seeks to recover tax liability for the tax year 1997, as defendants, since the filing of the complaint, filed an

[3] To the extent that Plaintiffs seek declaratory relief, the claim is barred under the Declaratory Judgment Act, 28 U.S.C. §2201(a) (1994).

amended tax return indicating an overpayment of federal income tax for the 1997 tax year. As to the other years, however, plaintiff has produced evidence that, as of August 30, 2002, defendants owed a total of $30,820.00. (Pl.'s Mot. for Summ. J., Ex. B, p 6.) This figure incorporates defendants' overpayment for the 1997 tax year. (Id.) Although plaintiff duly made demand for payment, defendants have not paid this outstanding amount. (Id. p 7.) Defendants have made no showing that this deficiency assessment is either arbitrary or erroneous. Indeed, in failing to oppose plaintiff's motion, defendants have failed to create any issue of material fact. Accordingly, the Court grants plaintiff's motion for summary judgment.

¶2002-5569

Dale I. DIRKES, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-2415, Oct. 21, 2001. Tax Court, (2001) TC Memo 2001-98, RIA TC Memo ¶2001-098, 81 CCH TCM 1541 (opinion by Dawson, *J.*), affirmed. Year 1993. Decision against Taxpayer.

1. Unreported income—proof—summary judgment. Tax Court properly granted IRS summary judgment on its deficiency determination for year incarcerated taxpayer didn't file return or report taxable income: record supported determination, as modified, that IRS based on available records and using married filing separate filing status; and taxpayer's belatedly raised motion to amend petition to challenge filing status was properly denied where he had ample prior notice of assumptions underlying IRS's determination and granting his request would have caused undue delay. *Reference:* United States Tax Reporter ¶615.047(10). IRC §61.

United States Court of Appeals, Sixth Circuit,

Before BATCHELDER, COLE, and GIBBONS, Circuit Judges.

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION*

Dale I. Dirkes appeals pro se the tax court's decision granting summary judgment to the Respondent. This court has jurisdiction to review final orders of the tax court under 26 U.S.C. § 7482. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

In April 1998, the Commissioner of Internal Revenue (Commissioner) mailed a notice of deficiency to Dirkes indicating that he owed income taxes and penalties for the taxable year 1993. The Commissioner determined that Dirkes had not filed a return for 1993 and owed taxes, interest, and penalties based upon capital gains and other income. In July 1998, Dirkes, who was imprisoned in Kentucky at the time, filed a petition for redetermination of deficiencies in the tax court. See 26 U.S.C. § 6213. Dirkes contested the capital gains tax, interest, and penalties but not his filing status. After a period of discovery, the Commissioner moved for summary judgment. The Commissioner conceded that Dirkes owed no capital gains taxes or penalties and gave him credit for itemized deductions of over $10,000. Dirkes responded to the Commissioner's motion and filed a motion to amend his petition to contest his filing status, the number of exemptions, and the amount of his itemized deductions. The tax court granted summary judgment to the Commissioner based upon the Commissioner's motion and Dirkes's original petition. The court determined that Dirkes owed $6,969 for taxable year 1993.

[1] In his timely appeal, Dirkes argues that: (1) the tax court incorrectly decided that Dirkes underpaid his 1993 federal income tax liability; (2) the tax court erroneously computed Dirkes's 1993 federal income tax liability by applying tax

* Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

treatment of a common law state to a resident of a community property state for the year in dispute; and (3) the tax court erred in denying Dirkes an opportunity to amend his petition.

This court reviews de novo questions of law decided by the tax court. *Estate of Schnack v. Commissioner*, 848 F.2d 933, 935 [61 AFTR 2d 88-1386] (9th Cir.1988). Under the Tax Court Rules of Practice and Procedure, summary judgment may be granted with respect to all or any part of the legal issues in controversy "if the pleadings, answers to interrogatories, depositions, admissions, and any other acceptable materials, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a decision may be rendered as a matter of law." Tax Court Rule 121(b); *Sundstrand Corp. of Consol. Subsidiaries v. Commissioner*, 98 T.C. 518, 520 (1992), *aff'd*, 17 F.3d 965 [73 AFTR 2d 94-1198] (7th Cir.1994); *Zaentz v. Commissioner*, 90 T.C. 753, 754 (1988).

Upon review, we conclude that the tax court properly granted summary judgment to the Commissioner. The Commissioner notified Dirkes of his tax deficiency in April 1998. The deficiency notice listed income from wages, sale of stock, and other sources, and indicated that Dirkes owed over $50,000 in taxes and additional amounts in penalties for failing to file a return and for failing to pay estimated taxes. The Commissioner calculated Dirkes's deficiency by using "married filing separate return" tax rates and assuming a standard deduction. Dirkes's July 1998 petition for redetermination contested the amount of income attributed to him and the assessment of penalties and interest. Dirkes did not challenge, however, his filing status or the use of the standard deduction. An IRS officer met with Dirkes in November 1998. Dirkes provided information about his sale of stocks and his deductions. In the motion for summary judgment, the Commissioner conceded that Dirkes owed no capital gains taxes or penalties and gave him credit for itemized deductions of over $10,000.

The Commissioner was entitled to a judgment as a matter of law. The pleadings in this case closed on September 3, 1998, when the Commissioner filed an answer to Dirkes's petition. Although the Commissioner later made concessions in Dirkes's favor, Dirkes did not place any evidence in the record to dispute the Commissioner's conclusions about his tax liability. Dirkes did not object to his filing status until October 1999 when he filed his response to the Commissioner's motion for summary judgment and filed a motion to amend his petition. Based upon the pleadings before the tax court, the court properly granted summary judgment to the Commissioner.

Dirkes's argument that the tax court should have granted his motion to amend his petition is without merit. Dirkes had ample opportunity to raise the issue of his filing status before the Commissioner moved for summary judgment. He was on notice of the assumptions underlying the Commissioner's calculations and knew that "married filing jointly" status would reduce his tax liability, but he did not attempt to file such a return until after the Commissioner's motion. Because Dirkes's motion to amend would have caused undue delay to the proceedings and undue prejudice to the Commissioner, the tax court did not abuse its discretion by denying his motion. *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Long v. Commissioner*, 757 F.2d 957, 959 [55 AFTR 2d 85-1138] (8th Cir.1985).

Finally, Dirkes's argument that the tax court erred by applying tax treatment of a common law state to a resident of a community property state is inapposite. Dirkes has not explained the significance of this distinction. To the extent that he is restating his argument that he should have been allowed to claim "married filing jointly" status, that issue has been addressed already.

For the foregoing reasons, we affirm the tax court's grant of summary judgment to the Commissioner. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

¶2002-5570

SEGGERMAN FARMS, INCORPORATED, Craig Seggerman, Linda Seggerman, Michael Seggerman, Ronald Seggerman, and Sally Seggerman, PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Seventh Circuit, (CA7) No. 01-3638, Oct. 24, 2002. Tax Court, (2001) TC Memo 2001-99, RIA TC Memo ¶2001-099, 81 CCH TCM 1543 (opinion by Cohen, *J.*), affirmed. Years 1993, 1994, 1995. Decision against Taxpayers.

1. Corporate reorgs.—assumption of liabilities—liabilities in excess of basis—computation of recognized gain. Tax Court properly determined that owners of family farm had to recognize gain under IRC §357 on their IRC §351 asset transfers to newly incorporated family farm to extent that transfers were made subject to liabilities in excess of taxpayers' adjusted bases: taxpayers' continuing personal guaranties of assumed debt didn't remove transactions from IRC §357's plain language. Also, taxpayers' argument that controlling case precedent was outdated, or should otherwise be disregarded in favor of "emerging equitable" statutory interpretation, wasn't supported by case law or otherwise; and any undue hardship resulting from facially unambiguous statute's application was for legislature, not judiciary to correct. *Reference:* United States Tax Reporter ¶3575.03(20). IRC §357.

United States Court of Appeals, Seventh Circuit,

Appeal from the United States Tax Court. Nos. 16269-99, 16271-99, 16272-99, 16273-99--Mary Ann Cohen, Judge.

Before BAUER, ROVNER, and EVANS, Circuit Judges.

BAUER, Circuit J.

Petitioners-Appellants Ronald and Sally Seggerman, Craig and Linda Seggerman, and Michael Seggerman (collectively, "the Seggermans") appeal from deficiency judgments entered against them in the United States Tax Court upholding the deficiency determinations of Respondent-Appellee Commissioner of Internal Revenue ("Commissioner") for the taxable years 1993 and 1994. The Seggermans challenge the Commissioner's recognition of certain transfers of property to Petitioner-Appellant Seggerman Farms, Inc. (hereinafter, "the Corporation"), as taxable gains under 26 U.S.C. § 357(c),[1] where such transfers were made subject to liabilities in excess of the taxpayer's basis in the property. Specifically, the Seggermans argue that no gain should be recognized where they personally guarantied the debts to which the transferred property was subject. We disagree and affirm the Tax Court's deficiency judgment.

BACKGROUND

Ronald and Sally Seggerman, their sons, Craig Seggerman and Michael Seggerman, and Craig's wife, Linda Seggerman, are grain and cattle farmers residing in Illinois. In March 1993, at the behest of the Seggermans' secured creditors, Ronald Seggerman incorporated Seggerman Farms, Inc., an Illinois corporation, which the family previously operated as a joint venture in Minonk, Illinois.[2] The stock of the Corporation was distributed as follows: 100 preferred shares and 38 common shares to Ronald Seggerman; 4 common shares to Sally Seggerman; 30 common shares to Craig Seggerman; 3 common shares to Linda Seggerman; and 25 common shares to Michael Seggerman. In exchange for the stock they received in the Corporation, Ronald, Craig and Michael Seggerman each transferred assets to the Corporation subject to liabilities. The Corporation also assumed various farm-related

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[1] We refer, hereinafter, to Title XXVI of the United States Code as the Internal Revenue Code, or I.R.C.

[2] The Seggermans' creditors, the Federal Land Bank and the Minonk State Bank, conditioned the extension of additional credit for the following crop year upon incorporation of their farming operation. The banks also wanted to ensure that the family's farm loans met government loan guarantee requirements.

liabilities of the three men.[3] In each case, the dollar amount of liabilities transferred to the Corporation exceeded the transferor's adjusted basis in transferred assets. The amount by which Ronald's transferred liabilities exceeded his adjusted basis in transferred assets totaled $332,702. For Craig, this excess amount equaled $91,394; for Michael, it amounted to $82,594.

Some time thereafter, the Corporation refinanced a portion of the transferred debt, incurring debts totaling $330,000, and the Corporation, with the Seggermans as comakers, borrowed an additional $407,000.

Though no family member ever directly received any loan proceed disbursements, the Seggermans remained secondarily liable as guarantors on all of the transferred debt. Specifically, Ronald executed a commercial guaranty and Sally, Craig, Linda and Michael executed unlimited, continuing personal guaranties of the Corporation's debt.

In July 1999, the Commissioner issued notices of deficiency of federal income tax to the Corporation and to the Seggermans for the taxable years 1993 and 1994. The deficiencies resulted, in part, from the Seggermans' failure to report as income on their federal tax returns the amount by which liabilities transferred to the Corporation exceeded the adjusted basis in the transferred assets. In October 1999, the Seggermans filed Petitions in the United States Tax Court for a redetermination of the deficiencies. The Seggermans argued that, as guarantors of the Corporation's debt, they were not relieved personally from any debt that the Corporation assumed or to which the transferred property was subject or that was refinanced pursuant to restructuring of corporate debt, and therefore they should not have to recognize any gain on the amount of the liabilities that exceeds the adjusted basis of the transferred assets. The Tax Court, after consolidating the Petitions, upheld the Commissioner's determinations of deficiency, concluding that the Seggermans must recognize a gain on the transfer of assets to the Corporation under I.R.C. § 357(c). *Seggerman Farms, Inc. v. Comm'r*, T.C. Memo 2001-99 [TC Memo 2001-99] (2001). The Seggermans now appeal from the decision of the Tax Court.

ANALYSIS

This Court retains exclusive jurisdiction to review decisions of the Tax Court pursuant to I.R.C. § 7482(a)(1). The parties submitted this case fully stipulated to the Tax Court for adjudication without a formal trial pursuant to Rule 122 of Practice and Procedure of the United States Tax Courts, and the facts are not in dispute. The Tax Court's determination that I.R.C. § 357(c) requires the Seggermans to recognize a gain on the transfer of property to the Corporation involves a question of law, subject to *de novo* review. *Eyler v.. Comm'r*, 88 F.3d 445, 448 [78 AFTR 2d 96-5207] (7th Cir.1996). As we have noted repeatedly, ''we owe no special deference to the Tax Court on a legal question, but when we consider the application of the legal principle to the facts we will reject the Tax Court decision only if it is clearly erroneous.'' *Whittle v. Comm'r*, 994 F.2d 379, 381 [71 AFTR 2d 93-2202] (7th Cir.1993). *See also Gunther v. Comm'r*, 909 F.2d 291, 294 [66 AFTR 2d 90-5375] (7th Cir.1990); *Prussner v. United States*, 896 F.2d 218, 224 [65 AFTR 2d 90-1222] (7th Cir.1990).

[1] As a general rule, ''[n]o gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in such corporation and immediately after the exchange such person or persons are in control (as defined in [I.R.C.] section 368(c))[4] of the corporation.'' I.R.C. § 351(a). However, I.R.C. § 357(c)(1) pro-

[3] Although neither Sally nor Linda Seggerman transferred any assets or liabilities to the Corporation, the facts indicate that for the taxable years 1993 and 1994, Ronald and Sally, as well as Craig and Linda, filed joint federal income tax returns.

[4] I.R.C. § 368(c) defines 'control' as 'the ownership of stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote and at least 80 percent of the total number of shares of all other classes of stock of the corporation.' Notwithstanding the distribution of shares in the Corporation to individual Seggerman family members, the Seggermans' collective ownership and control of the Corporation clearly satisfy the 80 percent control requirement of § 368(c).

vides the following exception to the nonrecognition provision of § 351(a):

> [I]f the sum of the amount of the liabilities assumed exceeds the total of the adjusted basis of the property transferred pursuant to [a § 351] exchange, then such excess shall be considered as a gain from the sale or exchange of a capital asset or of property which is not a capital asset, as the case may be. I.R.C. § 357(c)(1).

The Seggermans' theory can be summarized as follows: Because they remained liable as guarantors on the debts assumed by the Corporation or debts to which property transferred to the Corporation was subject, the amount by which the transferred liabilities exceeded transferred assets should not be recognized as taxable gain. The Seggermans acknowledge that § 357(c) pro-vides on its face that the excess amount must be recognized as a gain and that the case law in this jurisdiction favors such recognition. Nevertheless, they contend that the Tax Court erred in reaching a re-sult that is entirely consistent with both statutory and case law. They urge this Court to disregard a long line of control-ling precedent because, though it has not been overruled, it is somehow "outdated." They analogize to cases which are factu-ally distinguishable from this one and then suggest that it was reversible error for the Tax Court "mechanically [to have] distin-guished away" those precedents. Finally, the Seggermans argue, in the alternative, that this Court should exercise its equitable power to craft a judicial exception to the plain statutory language of § 357(c). These arguments are unavailing.

The Seggermans first contend that the Tax Court's reliance on *Rosen v. Commissioner*, 62 T.C. 11 (1974), and *Testor v. Commissioner*, 327 F.2d 788 [13 AFTR 2d 674] (7th Cir.1964), was misplaced because the "strict" and "mechanical" interpretations of the *Rosen* and *Testor*courts reflect "outdated" precedent. In *Rosen*, the Tax Court stated that "there is no requirement in section 357(c)(1) that the transferor be relieved of liability" for a gain to be recognized in a transfer of liabilities in excess of assets, noting that the provision "may produce a harsh result [and] ... may even result in the realization of a gain for tax purposes where none in fact exists." *Rosen*, 62 T.C. at 18, 19. In *Testor*, this Court held "that both the language and the legislative history indicate that § 357(c) is meant to apply wherever liabilities are assumed or property is transferred subject to liability." *Testor*, 327 F.2d at 790. That the interpretations adopted in *Rosen* and *Testor* were either restrictive[5] or mechanical takes nothing away from their precedential value. After all, statutory interpretation is precisely the business of the judiciary. It is well within the ambit of this (or any other) Court to interpret statutory language as restrictively or mechanically as it deems appropriate, so long as it respects the bounds of controlling precedent and the Constitution. Nor does the age of the *Rosen* and *Testor* holdings diminish their precedential weight, contrary to the Seggermans' assertion that the Tax Court relied on "outdated Court of Appeals decisions, including a 1964 case from this Seventh Circuit Court of Appeals." There is simply no merit to the proposition that precedent somehow becomes less binding solely with the passage of time.[6] In short, the Seggermans provide no controlling case law that overrules *Rosen* and *Testor*, and the Tax Court properly relied on that precedent in reaching its decision.

The Seggermans urge this Court to depart from the law of this jurisdiction in favor of what they term "the emerging equitable interpretation of section 357(c)." They rely on *Lessinger v. Commissioner*, 872 F.2d 519 [63 AFTR 2d 89-1055] (2nd Cir.1989), and *Peracchi v. Commissioner*, 143 F.3d 487 [81 AFTR 2d 98-1754] (9th

[5] With respect to *Testor*, the Seggermans' conclusion that this Court's interpretation of § 357(c) was too restrictive is simply wrong. In fact, this Court stated in response to the petitioner's argument in that case that "[w]e cannot agree that 357(c) should be given such a restrictive interpretation." 327 F.2d at 790. Thus, our interpretation was *less*-- rather than more-- restrictive than that suggested by the petitioner.

[6] Such flawed logic flies in the face of not only the basic principle of stare decisis, but also our common law tradition generally, and calls into question the well-established authority of such landmark but decades-old Supreme Court decisions as *Marbury v.. Madison*, 5 U.S. 137 (1803), and *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), solely on the basis of their ages.

Cir.1998), cases in which taxpayers were permitted to avoid § 357(c)(1) gain recognition despite liabilities transferred in excess of assets, as illustrative of this so-called emerging equitable interpretation.

In *Lessinger*, a loan receivable owed by the taxpayer equal in amount to the excess of liabilities transferred over assets was recorded on the corporate books of the transferee corporation. *Lessinger*, 872 F.2d at 521. The Second Circuit held that the loan receivable represented a genuine debt, and thus the taxpayer realized no gain on the transfer under § 357 because liabilities transferred equaled assets transferred. *Id.* at 524–28. In *Peracchi*, a taxpayer transferred encumbered real property to his wholly-owned corporation, and liabilities trans-ferred exceeded his adjusted bases in the transferred property by $566,807. *Peracchi*, 143 F.3d at 488. The taxpayer also contributed a $1,060,000 note to the corporation. *Id.* at 489. The Ninth Circuit held that the taxpayer had a basis of $1,060,000 in the note, that the note represented genuine indebtedness, and that, therefore, the aggregated basis of transferred property exceeded transferred liabilities. *Id.* at 494–95.[7] Therefore, no taxable gain was recognized on the transfer.

In the instant case, the Seggermans assert that the personal liabilities they retained as guarantors of the Corporation's debt are analogous to the loan receivable and promissory note involved in *Lessinger* and *Peracchi*, respectively. The Tax Court disagreed, and so do we. As the Tax Court explained, the Seggermans' ''personal guaranties of corporate debt are not the same as incurring indebtedness to the corporation because a guaranty is merely a promise to pay in the future if certain events should occur. [Their] guaranties do not constitute economic outlays.'' *Seg-german*, T.C. Memo.2001-99 at 11 (citing *Estate of Leavitt v. Comm'r*, 875 F.2d 420, 422 [63 AFTR 2d 89-1437] (4th Cir.1989) (holding that taxpayers experienced no call as guarantors, engaged in no economic outlay, and suffered no cost), *aff'g. Leavitt*, 90 T.C. 206 (1988); *Brown v. Comm'r*, 706 F.2d 755, 756 [52 AFTR 2d 83-5080] (6th Cir.1983) (''the courts have consistently required some economic outlay by the guarantor in order to convert a mere loan guaranty into an investment''), *aff'g. Brown*, 42 T.C.M. (CCH) 1460 [¶81,608 PH Memo TC] (1981)). Thus, to the extent that any such ''emerging equitable interpretation'' can be gleaned from the cases upon which the Seggermans rely, those cases are entirely distinguishable from this one. Accordingly, we hold that where a taxpayer retains liability as a guarantor on debts transferred pursuant to I.R.C. § 351, the plain language of § 357(c) nonetheless requires that the amount by which transferred liabilities exceed the taxpayer's basis in the transferred assets be recognized as taxable gain.

Lastly, we are unpersuaded by the Seggermans' suggestion that this Court ought to exercise its general equitable power to fashion a case-specific exception to the clear and unambiguous provisions of § 357(c). While we recognize that the practical effects of § 357 subject the Seggermans to harsh tax consequences--indeed, consequences that they may not have contemplated in the planning stages of the incorporation and property transfer transactions--we decline to disregard the plain language of the tax code. For this Court to ''aid the legislative amendment process by pointing out the unjust dilemma facing the Petitioners [by] reversing the Tax Court in this case,'' as the Seggermans would have us do, would be to exceed the scope of our judicial function. Absent any ambiguity on the face of a statute, it is the province of the legislative branch, rather than the judiciary, to safeguard the taxpayer from undue hardship resulting from its application.[8] Thus, the Tax Court correctly applied I.R.C. § 357(c) to the Seggermans' transfers of property to the Corporation.

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[7] The $1,060,000 note offset the $566,807 excess liabilities, resulting in an aggregate transfer of assets to the corporation in excess of liabilities in the amount of $493,193. *Ibid.*

[8] An intrusion by the judiciary into what is constitutionally a function within the exclusive scope of the legislature would raise serious issues relating to the separation of powers. For that reason we are, as was the *Rosen* court, ''loath to find that the result[ing recognition of gain] exceeds the constitutional powers to tax vested in Congress.'' *Rosen*, 62 T.C. at 19.

CONCLUSION

The Tax Court correctly upheld the deficiency determinations of the Commissioner for unreported recognizable gain related to the Seggermans' transfers of property to the Corporation. We therefore AFFIRM the decision of the Tax Court.

¶2002-5571

Raymond JACKSON, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-1977, Oct. 22, 2002. Tax Court affirmed. Year 1997. Decision against Taxpayer.

1. Review of Tax Court decision—motion for continuance—business expenses—accuracy related negligence penalties—frivolous claims sanctions. Tax Court properly upheld deficiencies, accuracy-related negligence penalty and IRC §6673 sanction against pro se taxpayer/sole proprietor for year he claimed erroneous business expenses: taxpayer offered nothing more than bare check copies to support excessive deduction claims; his failure to keep any records supported negligence finding; and imposition of $500 sanction for filing frivolous petition was supported by taxpayer's admitted lack of substantiating evidence and groundless allegations of IRS fraud. Also, taxpayer's motion for continuance to hire counsel was properly denied where he had but didn't take ample opportunity to hire counsel earlier. *Reference:* United States Tax Reporter ¶1625.019(5); 66,625.01(10); 66,735.01(5); 74,825.04(7). IRC §162; 6662; 6673; 7482.

United States Court of Appeals, Sixth Circuit,

Before BOGGS, SUHRHEINRICH, and CLAY, Circuit Judges.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION*

Raymond Jackson, proceeding pro se, appeals a tax court judgment determining that he is liable for a federal income tax deficiency in the amount of $2,740 for the taxable year 1997, for an accuracy related penalty under 26 U.S.C. § 6662 in the amount of $548, and for a $500 penalty pursuant to 26 U.S.C. § 6673(a) for maintaining a frivolous or groundless position. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

This case involves deductions that Jackson claimed on Schedule C of his 1997 tax return as business expenses. Jackson represented the business as a sole proprietorship called Jackson Associates, but did not describe the principal business of the enterprise. Jackson reported no gross receipts or sales from the business, but reported business deductions totaling $18,242, and a corresponding loss in that amount.

The Commissioner disallowed Jackson's deductions and determined that Jackson was liable for a deficiency of $2,740 in tax and $548 because the underpayment of tax was attributable to negligence or a substantial understatement of income tax. On March 3, 2000, the Commissioner sent Jackson a notice of deficiency. The notice of deficiency provided that the deductions had been disallowed because Jackson had not established that he paid or incurred the expenses during 1997, and had not established that the expenses were ordinary and necessary to his business. Jackson challenged the Commissioner's determination. In light of Jackson's challenge, the tax court set the case for trial on March 12, 2001. Twenty-eight days before trial, Jackson moved the tax court to continue the trial. The tax court denied the motion, and the case was tried as scheduled on March 12, 2001. At the conclusion of the trial, the tax court upheld the Commissioner's deficiency and penalty determinations and imposed a penalty of $500 against Jackson

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* Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

pursuant to 26 U.S.C. § 6673(a) for maintaining a frivolous or groundless position. Jackson appeals that judgment.

[1] On appeal, Jackson argues that: 1) the tax court abused its discretion in denying his motion for a continuance; 2) the tax court improperly denied his motion to dismiss the notice of deficiency; 3) the tax court improperly determined that he failed to provide evidence sufficient to substantiate his business expense deductions and that the resulting underpayment was due to negligence; and 4) the tax court abused its discretion in imposing a $500 penalty against him for making frivolous or groundless claims.

This court reviews the tax court's legal conclusions de novo and its factual findings under the ''clearly erroneous'' standard. *MTS Int'l, Inc. v. Comm'r*, 169 F.3d 1018, 1021 [83 AFTR 2d 99-973] (6th Cir.1999). These standards of review are evaluated against the backdrop of each party's burden of proof in the tax court. The Commissioner's determination that a tax deficiency exists is generally presumed to be correct. *Kearns v. Comm'r*, 979 F.2d 1176, 1178 [70 AFTR 2d 92-6129] (6th Cir.1992). Consequently, a taxpayer bears the burden of proving that the Commissioner's finding of a deficiency is erroneous or arbitrary by a preponderance of the evidence. *Id.*

The tax court did not abuse its discretion in denying Jackson's motion for a continuance. This court reviews the denial of a motion for a continuance for an abuse of discretion. *See United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir.), *amended by*, 764 F.2d 675 (9th Cir.1985). Jackson claims that he was unable to retain counsel and that the tax court abused its discretion in denying his motion for a continuance. The record reveals that Jackson had approximately eight months in which to secure representation. During a teleconference the tax court conducted with respect to Jackson's motion, Jackson offered no explanation for his failure to hire counsel. Moreover, even if counsel had been retained or substituted at the last moment, employment of new counsel ordinarily will not be grounds for continuance. *United States v. Studley*, 783 F.2d 934, 938–39 [57 AFTR 2d 86-888] (9th Cir.1986). In addition, the tax court observed that the case primarily involved the substantiation of business deductions and did not require elaborate trial preparation. In light of Jackson not offering any reason for his inability to retain counsel, the tax court did not abuse its discretion in denying the motion for continuance.

The tax court did not err in denying Jackson's motion to dismiss the notice of deficiency. At trial, Jackson moved the tax court to dismiss the notice of deficiency. In support of his motion, Jackson merely claimed that the deficiency was false and fraudulent. The Commissioner's determination that a tax deficiency exists is generally presumed to be correct. *Kearns*, 979 F.2d at 1178. Jackson offered no evidence of fraud or bad faith on the part of the revenue service or its agents. Thus, Jackson provided no justification for looking behind the notice of deficiency. *See Pasternak v. Comm'r*, 990 F.2d 893, 898 [71 AFTR 2d 93-1469] (6th Cir.1993).

The tax court did not clearly err in determining that Jackson failed to produce sufficient evidence to substantiate his business expense deductions and that the resulting underpayment was due to negligence. Deductions are a matter of legislative grace and are narrowly con-strued; a particular deduction will be al-lowed only when there is a clear provision authorizing it. *Nichols v. United States*, 260 F.3d 637, 653 [88 AFTR 2d 2001-5446] (6th Cir.2001). A taxpayer seeking a deduction must point to an applicable stat-ute and demonstrate that he or she comes within the statute's terms. *Bishop v. Comm'r*, 342 F.2d 757, 759 [15 AFTR 2d 620] (6th Cir.1965). The taxpayer bears the burden of proving a deduction and the amount of it. *Id.* The tax court may disre-gard uncontradicted testimony by a tax-payer where it finds that testimony lacking in credibility, or finds the testimony to be improbable, unreasonable or questionable. *Conti v. Comm'r*, 39 F.3d 658, 664 [74 AFTR 2d 94-6867] (6th Cir.1994).

In support of his claimed deductions, Jackson attached to his return photocopies of the fronts of hundreds of checks. He did not include explanatory notations or testimony indicating a business purpose for the checks. In fact, Jackson conceded that he had no other records to substantiate the expenses, and that he could not remember for what items or services any of the checks were used to pay. Title 26 U.S.C. § 162(a) allows a deduction for all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. To qualify as an allowable deduction under § 162(a), an item must (1) be paid or incurred during the taxable year, (2) be for carrying on any trade or business, (3) be an expense, (4) be a necessary expense, and (5) be an ordinary expense. *Comm'r v. Lincoln Sav. & Loan Ass'n*, 403 U.S. 345, 352 [27 AFTR 2d 71-1542] (1971). However, the taxpayer is required to substantiate the deduction. *See e.g.*, 26 U.S.C. § 274(d); 26 C.F.R. § 1.274(d)(2) (substantiation by adequate records requires a taxpayer ''to maintain an account book, diary, log, statement of expense, trip sheets, or similar record'' that is made ''at or near the time of the expenditure or use''). Jackson clearly failed to satisfy the substantiation requirements. Thus, Jackson did not bear his burden of proving the deductions and the amount of them. Moreover, inasmuch as Jackson did not comply with the record keeping requirements for claiming such deductions, the tax court did not err in finding that Jackson's underpayment of tax was due to negligence. An assessment of a negligence penalty is presumptively correct. *Leuhsler v. Comm'r*, 963 F.2d 907, 910 [69 AFTR 2d 92-1289] (6th Cir.1992). Negligence is defined as a lack of due care or the failure to do what a reasonable and ordinarily prudent person would do. *Id.* Nothing in the record or pleadings shows that Jackson exercised due care in claiming the deductions without any documentation. Therefore, the finding that he should be assessed a penalty for negligence is not clearly erroneous.

Finally, the tax court did not abuse its discretion in imposing a $500 penalty against Jackson. At the conclusion of the trial, the tax court upheld the Commissioner's deficiency and penalty determinations and imposed a penalty of $500 against Jackson pursuant to 26 U.S.C. § 6673(a) for maintaining a frivolous or groundless position. In light of Jackson's admitted lack of evidence to support his claimed deductions, and the groundless nature of his claim that the IRS and one of its agents committed fraud, the $500 penalty does not constitute an abuse of the tax court's discretion.

Accordingly, we hereby affirm the tax court's judgment pursuant to Rule 34(j)(2)(C), Rules of the Sixth Circuit.

¶2002-5572

ROGER W. E. COLE, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Western Dist. of Michigan, (DC MI) Case No. 1:02-CV-137, Oct. 21, 2002. Years 1999, 2000. Decision for Govt.

1. Collection due process—damages—compensatory relief—jurisdiction—sovereign immunity—Federal Tort Claims Act. District court lacked jurisdiction over taxpayer's claims for damages arising from IRS's alleged failure to provide him valid CDP hearing: IRC §7433's sovereign immunity waiver for collection-related damages claims didn't apply since CDP hearing and levy notice were predicates to, not actual collection activity; and taxpayer alleged no other basis for suit. Similarly, taxpayer's FTCA-based claim for compensatory relief was also barred by sovereign immunity. *Reference:* United States Tax Reporter ¶63,305.01(10); 74,335.01(15); 76,557.53(12). IRC §6330; 7433.

2. Collection due process—review of administrative determination—frivolous return penalty—summary judgment. IRS's administrative determination to proceed with collection of frivolous return penalty for years taxpayer filed ''zero'' returns was upheld on summary judgment: taxpayer received adequate penalty and hearing notices; delegation of authority argument was meritless; Appeals Officer appropriately refused to entertain his frivo-

lous challenges to penalty's imposition and other irrelevant arguments; record showed that all administrative requirements were met; and taxpayer had no right to discovery of publicly available documents or research materials. Also, taxpayer's conditional offer to pay wasn't valid collection alternative that Appeals Officer would be required to consider; and determination letter reflected proper balancing between taxpayer's rights and govt.'s collection interests. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(10). IRC §6330; 6702.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION,

OPINION

HON. RICHARD ALAN ENSLEN

This matter is before the Court on Defendant United States' Motion for Summary Judgment. The Court will grant Defendant's Motion.

I. Background

For the tax years 1999 and 2000, Plaintiff submitted two separate U.S. Individual Income Tax Returns (Form 1040), each filled out with his name, address, and the number zero inserted into the lines for wages, total income, and adjusted gross income. The 1999 Form 1040 requested a refund from the IRS in the amount of $5,056.92 for the tax year 1999. Plaintiff's submission did not include a W-2. Plaintiff included a statement indicating Plaintiff did not believe that the Internal Revenue Code established an income tax liability with both his 1999 and 2000 submissions. On or about August 30, 2000, the IRS assessed Plaintiff a penalty for filing a frivolous income tax return for the tax year 1999.[1] On February 1, 2001, the IRS issued a Form 1058 Final Notice -Notice of Intent to. Levy and Notice of Your Right to a Hearing to Plaintiff. On or about February 8, 2001, Plaintiff filed a request for a collection due process hearing (''CDP''). Plaintiff attached a request for names, federal identification numbers, and job descriptions of the IRS employees who imposed the frivolous return penalty, the delegation of authority from the Secretary authorizing such persons to impose the penalties, and the Treasury regulations al-lowing IRS employees to impose the frivo-lous return penalty.[2]

On May 4, 2001, the IRS sent Plaintiff a letter notifying him that his submission for tax year 2000 was frivolous and that he had thirty days in which to correct his position. On October 14, 2001, the IRS sent Plaintiff a Form 1058 Final Notice - Notice of Intent to Levy and Notice of Your Right to a Hearing. On or about October 20, 2001, the IRS assessed a penalty for filing a frivolous income tax return for the tax year 2000 against Plaintiff. Plaintiff again requested a CDP Hearing with the same requests for information mentioned above attached, which the IRS received on November 5, 2001. Plaintiff attended a CDP Hearing regarding the assessment of frivolous return penalties for tax years 1999 and 2000 on December 21, 2001.

Following the hearing, the IRS sent Plaintiff a Notice of Determination on February 5, 2002. This mailing included a Summary of Determination by the IRS Appeals Officer, and an Attachment-3194,

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[1] The IRS acted pursuant to 26 U.S.C. § 6702 which states: a civil penalty will be imposed If--

(1) any individual files what purports to be a return of the tax imposed by subtitle A but which-

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or
(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to--

(A) a position which is frivolous, or
(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws, then such individual shall pay a penalty of $500.

[2] The Court notes that, while Plaintiff does not challenge the IRS's determination that his submissions for 1999 and 2000 were frivolous, the Sixth Circuit Court of Appeals has held that filings similar to Plaintiff's are frivolous. *Schoffner v. C.I.R.*, 812 F.2d 292, 293 [59 AFTR 2d 87-692] (6th Cir. 1987).

which indicated the matters considered at the CDP Hearing and the conclusions of the Appeals. Office. The summary stated that, because Plaintiff had not raised relevant issues at the appeal, the proposed levy action "balances the need for efficient collection of taxes with the concern as to the intrusiveness of the action." On February 27, 2002, Plaintiff brought this action seeking a declaratory judgment that the IRS's February 5, 2002 Determination was invalid because no legitimate CDP Hearing was held. Plaintiff also seeks an award of costs and punitive damages resulting from this action.

Plaintiff claims the following:

1. United States cannot legally seize Plaintiff's property pursuant to 26 U.S.C. § 6331 because no writ of garnishment or writ of attachment has been issued.

2. Penalty is not supported by any testimony or documented evidence.

3. Hearing was not conducted in accordance with 26 U.S.C. § 6330 or 26 C.F.R. § 301.6330-1.

4. Appeals Officer did not provide verification from Secretary pursuant to 26 U.S.C. § 6330(c).

5. IRS did not provide verification that the requirements of any applicable procedural requirements had been met pursuant to 26 C.F.R. 301.6330-1.

6. Appeals Officer did not provide documentation signed by an IRS employee supporting imposition of penalty.

7. Appeals Officer did not produce documentation of delegation of authority.

8. Appeals Officer did not provide regulation authorizing IRS employees to impose penalty or requiring Plaintiff to pay penalty.

9. Appeals Officer did not produce statute establishing Plaintiff's liability for tax.

10. Appeals Officer refused to accept Plaintiff's collection alternative.

11. Appeals Officer did not provide proof that the Secretary authorized collection of the penalty pursuant to 26 U.S.C. § 7401.

II. Standard of Review and Applicable Federal Rules

Under the language of Federal Rule of Civil Procedure, Rule 56(c), the initial burden, in a summary judgment motion, is on the movant to specify the basis upon which summary judgment should be granted and to identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The burden then shifts to the non-movant to come forward with specific facts, supported by the evidence in the record, upon which a reasonable jury could find there to be a genuine fact issue for trial. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in the non-movant's favor. *Celotex Corp.*, 477 U.S. at 323 (quoting *Anderson*, 477 U.S. at 255); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). It is the function of the Court to decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52. The question is "whether a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented." *Id.* at 252. If, after adequate time for discovery on material matters at issue, the non-movant fails to make a showing sufficient to establish the existence of a material disputed fact, summary judgment is appropriate. *Celotex Corp.*, 477 U.S. at 323.

Rule 56 limits the materials the Court may consider in deciding a motion under the rule: "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits." Federal Rule of Civil Procedure 56(c). Moreover, affidavits must meet certain requirements:

> [A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to

> in an affidavit shall be attached thereto or served therewith.

Fed. R. Civ. P. 56(e). The Sixth Circuit has held "that documents submitted in support of a motion for summary judgment must satisfy the requirements of Rule 56(e); otherwise, they must be disregarded." *Moore v. Holbrook*, 2 F.3d 697, 699 (6th Cir. 1993) (citations omitted). Thus, in resolving a motion for summary judgment, the Court should not consider unsworn or uncertified documents, *Id.*; unsworn statements, *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 968–969 (6th Cir. 1991); inadmissible expert testimony, *North American Specialty Ins. Co. v. Myers*, 111 F.3d 1273, 1280 (6th Cir. 1997); or hearsay evidence, *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996); *Wiley v. United States*, 20 F.3d 222, 225–26 [73 AFTR 2d 94-1603] (6th Cir. 1994).

III. Analysis

A. Court's Jurisdiction Over Plaintiff's Damages Claim

1. Plaintiff's 26 U.S.C. § 7433 Claim for Damages

[1] Plaintiff asserts a claim for punitive damages for the time and effort he expended to respond to the IRS's actions regarding his filings. Plaintiff does not cite a source for this claim, but the Court presumes Plaintiff intended to bring this claim pursuant to 26 U.S.C. § 7433. Section 7433 permits taxpayers to bring a civil action for damages if, in connection with any collection of Federal tax, an IRS employee or officer "recklessly or intentionally, or by reason of negligence disregards any provision of this title, or any regulation promulgated under this title." Before bringing such an action, however, the taxpayer must exhaust all administrative remedies available. 26 U.S.C. § 7433(d)(1). A collection action is defined in the regulations as follows:

> A collection action generally includes any action taken by the Internal Revenue Service to collect a tax (or any interest, additional amount, addition to tax, or penalty, together with any costs in addition to the tax) or any action taken by a taxpayer in response to the Internal Revenue Service's act or failure to act in connection with the collection of a tax (including any interest, additional amount, addition to tax, or penalty, together with any costs in addition to the tax). For example, a collection action for purposes of section 7430 and this section includes any action taken by the Internal Revenue Service under Chapter 64 of Subtitle F to collect a tax. Collection actions also include those actions taken by a taxpayer to remedy the Internal Revenue Service's failure to release a lien under section 6325 and to remedy any unauthorized collection action as defined by section 7433. However, an action or procedure directly relating to a claim for refund. filed with the Service Center's Collection Branch or District Director's Collection Division after payment of an assessed tax is not a collection action.'

26 C.F.R. § 301.7430-3(b).

Plaintiff's challenge in this case is to the validity of the CDP Hearing, which took place after issuance of a Notice of Levy. Neither a hearing nor a Notice of Levy is a collection action implicating the remedies available under § 7433. Rather, both are predicates to action and together may result in a decision by the IRS not to take any collection action.

Since § 7433 does not apply, Plaintiff must demonstrate another source for his action because the United States enjoys immunity from suit under the principles of sovereign immunity. This immunity may be pierced only by express waiver. *United States v. Dalm*, 494 U.S. 596, 608 [65 AFTR 2d 90-1210] (1990). In the instant case, Plaintiff has failed to demonstrate that the United States has waived its sovereign immunity and opened itself to damage suits based on a challenge to the validity of a CDP Hearing. *Whittle v. United States*, 7 F.3d 1259, 1262 (6th Cir. 1993) (finding plaintiff has burden of establishing subject matter jurisdiction over claim). Plaintiff cannot rely on the waiver in § 7433 because no collection action has occurred.

In light of the above, Plaintiff's claim for punitive damages must be dismissed for lack of jurisdiction.

2. Court lacks jurisdiction over Plaintiff's claims for compensatory relief

Plaintiff seeks reimbursement from the Government for his costs in bringing this action. Presumably, Plaintiff relies on the Federal Tort Claims Act (''FTCA''), 28 U.S.C. § 1346(b)(1), to bring this claim. The FTCA permits civil actions against the United States for money ''for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'' However, this provision is limited by 28 U.S.C. § 2680, which states that § 1346(b) ''shall not apply to . . . (c) Any claim arising in respect of the assessment or collection of any tax.'' *See also Carlyle v. United States Dep't of the Army*, 674 F.2d 554, 556 (6th Cir. 1982) (finding that § 2680 limits the jurisdiction of federal courts and prohibits pleading matters that clearly fall within its exceptions). Since Plaintiff's claim relates to possible assessment and collection of taxes, it falls within the exceptions of § 2680 and this Court does not have jurisdiction to hear it.

B. IRS Did Not Abuse Its Discretion

1. Standard of Review

[2] In reviewing the Notice of Determination the Court applies an abuse of discretion standard. The standard of review is dependent on whether the merits of the underlying tax liability were properly at issue in the CDP Hearing. Where the underlying tax liability is at issue, the Court reviews the Commissioner's determination *de novo*, otherwise the Court reviews for abuse of discretion. *MRCA Info. v. United States*, 145 F. Supp. 2d 194, 199 [89 AFTR 2d 2002-694] (D. Conn. 2000) (''In the instant case, the validity of the underlying tax liability is not at issue. Accordingly, the court concludes that an abuse of discretion standard of review is appropriate when a district court reviews a determination of an IRS appeals officer's determination pursuant to 26 U.S.C. § 6330.''); *Geller v. United States*, 2001 WL 1346669, 2 [88 AFTR 2d 2001-6494] (S.D. Ohio Sept. 26, 2001); *Goza v. Commissioner*, 114 T.C. 176, 181–182 (2000). Although Plaintiff could have addressed the merits of the underlying tax liability at the CDP Hearing, he did not.[3] Therefore, the Court reviews the Appeals Officer's determination for an abuse of discretion. Because Plaintiff did not raise the issue of his underlying tax liability at the CDP Hearing, he cannot raise that issue on appeal. 26 C.F.R. § 301.6330 -1(f).

2. Adequacy of Procedure Followed by IRS

Plaintiff challenges the form of the notice before levy which he received as not adhering to statutory requirements. 26 U.S.C. § 6330 requires notice by the Secretary of a person's right to a hearing before a levy on any property is made. The notice must contain, in simple and nontechnical terms, the amount of the unpaid tax, the right of the person to request a hearing within thirty days, the proposed action by the Secretary, and the rights of the person with respect to such action. 26 U.S.C. § 6330(a)(3). More than one court has held that the form of the notice does not matter as long as the required contents are contained within the notice. *Hoffman v. United States*, 209 F. Supp. 2d 1089, 1094 [89 AFTR 2d 2002-3092] (W.D. Wash. 2000) (citing *Hughes v. United States*, 953 F.2d 531, 536 [69 AFTR 2d 92-472] (9th Cir. 1992); *Kelly v. United States*, 209 F. Supp. 2d 981, 991 [89 AFTR 2d 2002-2523] (E.D. Mo. 2002) (*citing United States v. Roccio*, 981 F.2d 587, 591 [71 AFTR 2d 93-409] (1st Cir. 1992); *Carroll v. United States*, 2002 WL 1962944 [89 AFTR 2002-3005] (W.D.

[3] Because the IRS did not issue a Notice of Deficiency regarding the frivolous return penalties, Plaintiff was not given a separate opportunity to dispute the underlying tax liabilities. Therefore, under § 6330(c)(2)(B), Plaintiff could have challenged the existence or amount of the underlying tax liability.

Tenn. May 29, 2002). It appears from the submitted documents that Plaintiff's notice was adequate and contained all of the requisite information.

Plaintiff also complains that the notice was not signed by the Secretary, but by the Chief of the Automated Collection Branch. Section 6330 requires notification by the Secretary, which in this case means the Secretary or his delegate. 26 U.S.C. § 7701(a)(11)(B). An employee of the IRS is an appropriate delegate of the Secretary with the authority to sign a notice to levy. *Id.* at (12)(A)(i). Plaintiff's Notice of Levy was signed by the Chief of the Automation Branch, an IRS employee, which satisfies the requirements of § 6330(a)(1). *Nestor v. Comm'r of Internal Revenue*, 118 T.C. 162, 165 (2002).

Plaintiff complains that the CDP Hearing was not conducted in accordance with § 6330(c) because he raised relevant issues that the Appeals Officer ignored. According to § 6330(c), Plaintiff may raise "any relevant issue relating to the unpaid tax or the proposed levy." Section 6330 lists "appropriate spousal defenses; challenges to the appropriateness of collections actions; and offers of collection alternatives" as relevant issues to raise at the CDP Hearing. As mentioned above, the existence or amount of the underlying tax liability may be addressed if the person did not receive a notice of deficiency or otherwise have an opportunity to dispute the tax liability previously. Plaintiff did not raise any of these issues. Rather, the only issues Plaintiff raised were those considered outside the scope of a CDP Hearing, such as the statutory authority establishing Plaintiff's liability for taxes, the Appeals Officer's access to verification that all applicable statutory and regulatory requirements had been met and verification that she had the authority to hold the hearing and impose the penalty. These questions were frivolous and irrelevant to imposition of the penalty, which was the subject of the CDP Hearing. Plaintiff's tax forms were frivolous under the statute and therefore subject to a penalty. *Nelson v. United States*, 796 F.2d 164, 167 [58 AFTR 2d 86-5439] (6th Cir. 1986) (stating that person of ordinary common sense could understand what is prohibited by § 6702); *Heitman v. United States*, 753 F.2d 33, 34 [55 AFTR 2d 85-733] (6th Cir. 1984) (finding that failure to provide financial information on tax forms warranted fine for frivolous filing). Imposition of the penalty has nothing to do with whether Plaintiff has any tax liability. Plaintiff's failure to raise relevant issues at the CDP Hearing does not translate into an invalid proceeding.

With respect to Plaintiff's complaint that the Appeals Officer did not provide verification from the Secretary that the requirements of any applicable law or administrative procedure have been met pursuant to § 6330(c)(1), the Court finds it is sufficient that the Appeals Officer attested to satisfaction of all applicable law and administrative procedure. 26 U.S.C. § 6330(3)(A); 26 C.F.R. § 301.6330 -1(e)(1); *Hoffman*, 209 F. Supp. 2d at 1095; *Kelly*, 209 F. Supp. 2d at 988–89. The record shows that Plaintiff received the proper notice, was given a CDP Hearing upon his request, and was allowed to raise any relevant issues at the Hearing. Plaintiff received a Notice of Determination and was adequately informed of his right to appeal. The Court finds that the IRS complied with all requirements of § 6330 and its related regulations.

The Government argues that Plaintiff's other requests for documentation are requests for legal research and beyond the scope of the Freedom of Information Act ("FOIA"). FOIA does not require agencies to provide explanations or answers in response to questions disguised as FOIA requests or to create documents or opinions in response to an individual's request for information. *Hudgins v. Internal Revenue Service*, 620 F. Supp. 19, 21 [56 AFTR 2d 85-5793] (D.D.C. 1985). FOIA also does not require agencies to do parties' legal research. *Yon v. Internal Revenue Service*, 671 F. Supp. 1344, 1347 [60 AFTR 2d 87-5425] (S.D. Fla. 1987). Even if the Court considered Plaintiff's requests to be discovery motions, the IRS would not be re-

quired to respond. There is no right to discovery at a CDP Hearing. *Kelly*, 209 F. Supp. 2d at 988–89. Additionally, the materials Plaintiff requested are either irrelevant or readily available to the public. *Id.* Therefore, whether considered FOIA requests or discovery requests, the IRS was not wrong in failing to provide Plaintiff with the materials he requested.

The Court finds there is no legal foundation for Plaintiff's claim that the hearing should be held invalid because the Appeals Officer failed to provide documentation authorizing imposition of a penalty. Plaintiff was sent two notices notifying him of his failure to pay his taxes, his liability for a penalty under 26 U.S.C. § 6702, and the amount of that penalty, as well as his right to request a CDP Hearing. This information satisfies the requirements of 26 U.S.C. § 6751(b), which requires notice of a penalty to include the name of the penalty, the source of the penalty, and the amount of the penalty. No approval of the assessment by an immediate supervisor is required because this is an automatic penalty for a fixed amount. 26 U.S.C. §§ 6751(b)(2)(B) and 6702. Furthermore, the notification Plaintiff received is sufficient proof of the adequacy and propriety of the assessment. "Certificates of assessments and payments are generally regarded as being sufficient proof, in the absence of evidence to the contrary, of the adequacy and propriety of notices and assessments that have been made." *Gentry v. United States*, 962 F.2d 555, 557 [69 AFTR 2d 92-1158] (6th Cir. 1992). The parties who signed the documents Plaintiff received were appropriate delegates of the Secretary with authority to impose the penalty pursuant to § 7401 and § 7701. *Herip v. United States*, 2002 WL 31002855, 6 [90 AFTR 2002-5770] (N.D. Ohio July 25, 2002).

Plaintiff argues that the IRS did not comply with the requirements of § 6331. However, § 6331 does not apply since no collection occurred and the CDP Hearing was not about Plaintiff's failure to pay taxes. Plaintiff also claims that the Appeals Officer ignored his collection alternative. Section 6330 suggests the following as collection alternatives: posting bond; substitution of other assets; an installment agreement; or an offer in compromise. Plaintiff did not offer a valid collection alternative but rather a challenge to the Appeals Officer which she did not need to address. Plaintiff offered to write a check if the Appeals Officer could show him the regulation allowing the Officer to impose the penalty. This is not a collection alternative as that term is used in § 6330. The Appeals Officer's refusal to entertain that offer was not an abuse of discretion.

C. No Abuse of Discretion by IRS Appeals Office With Respect to Determination Letter

Pursuant to § 6330(c)(3), the determination by the Appeals Officer after the CDP Hearing should consider verification that all requirements of any applicable law or regulation have been met; any issues raised at the hearing; and whether "the proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary." As indicated above, there was adequate verification of compliance with applicable laws and regulations in the No-tice of Determination. Plaintiff did not raise any relevant issues at the CDP Hear-ing which the Appeals Officer had to consider. Plaintiff does not dispute that he was permitted to raise issues at the CDP Hearing. It was his choice to raise matters irrelevant to the proceeding. The Appeals Officer correctly balanced the competing interests in finding the Notice of Levy appropriate. Plaintiff received due process and adequate information. This Court finds the IRS Appeals Office did not abuse its discretion in issuing the Notice of Determination as it did.

IV. Conclusion

Therefore, the Court will grant Defendant's Motion. A judgment consistent with this opinion will be entered.

DATED in Kalamazoo, MI:

October 21, 2002

RICHARD ALAN ENSLEN

United States District Judge

JUDGMENT

HON. RICHARD ALAN ENSLEN

In accordance with an Opinion filed this day,

IT IS HEREBY ORDERED that Defendant United States' Motion for Summary Judgment (Dkt. No. 9) is GRANTED.

DATED in Kalamazoo, MI:

October 21, 2002

RICHARD ALAN ENSLEN

United States District Judge

¶2002-5573

Paul JEAN and George Jean, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Massachusetts, (DC MA) CIVIL ACTION NO. 00-11296-DPW, Oct. 23, 2002. Year 1992. Decision for Taxpayer in part.

1. 100% penalty for failure to pay over employment taxes—responsible person; willfulness—summary judgment. Bookkeeper's motion for summary judgment on his IRC §6672 penalty liability was granted in part: taxpayer's non-responsibility for period for which he had no tax payment authority was clear; but his responsible person status for majority of period was material fact issue where non-responsibility factors such as his non-officer, non-shareholder position were countered by facts that he was active in corp.'s daily management and may, by virtue of his limited check-writing and payment authority and participation in financial discussion, have been significantly involved in corp.'s financial operations. Also, his willfulness for that period was, if not proved, at least indicated by his admission that wages and other payments were made while tax liabilities accrued. *Reference:* United States Tax Reporter ¶66,725.02(25); 66,725.05(10). IRC §6672.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS,

MEMORANDUM AND ORDER

DOUGLAS P. WOODLOCK UNITED STATES DISTRICT JUDGE

Plaintiffs Paul and George Jean commenced this action against the United States pursuant to 28 U.S.C. § 7422(a). Plaintiffs contend that the Internal Revenue Service incorrectly determined that they were ''responsible persons'' for the failure of Focus Financial Services, Inc. to pay employment taxes for the calendar quarters beginning March 31, 1992 and ending September 30, 1992. The United States answered with a counterclaim against the Jeans seeking $18,078.55 from George Jean and $13,683.04 from Paul Jean.

Following the close of discovery, plaintiff Paul Jean submitted the instant motion for summary judgment. George Jean and the United States have not chosen to file dispositive motions.

FACTS[1]

Beginning in 1987, Paul Jean was employed as a bookkeeper at Focus, a company that also employed his father, George Jean, and Michael Pottle.[2] As bookkeeper, Paul logged and kept track of bills as they were received and then filed them;

[1] The United States has failed, in contravention of Local Rule 56.1, to submit a statement of material facts as to which it contends that there exists a genuine issue to be tried. Under Local Rule 56.1, an opposition statement must contain a concise statement of the material facts of record as to which it is contended that there exists a genuine issue to be tried with page references to affidavits, depositions and other documentation. Id. The failure to comply adequately with Local Rule 56.1 may constitute grounds for a determination that the moving party's statement of facts is admitted. See Moore v. Marty Gilman, Inc., 965 F. Supp. 203, 207 n. 1 (D. Mass. 1997) (plaintiff's statement of material facts deemed to be admitted where defendant failed to submit opposing statement); L.R. 56.1.

In its opposition memorandum, the United States has listed facts and has attached the depositions of the Jeans and Michael Pottle in their entirety with page references. Having wide latitude in determining how rigorously to enforce the local rules of this Court, see Airline Pilots Ass'n v. Precision Valley Aviation, Inc., 26 F.3d 220, 224 (1st Cir. 1994), I will treat pages 4 and 5 of the opposition memorandum as the United States' opposition statement. I note only that it is not too much to expect of the defendant United States, the most frequent litigant in this Court, that it will fully comply with the Local Rules.

[2] Neither party has included certain of the background information in their statements of facts. Because this information can be found in the depositions relied on by both parties and is thus part of the record, I have probed and reviewed that record to determine if any genuine dispute of material facts exists. See Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922, 930 (1st Cir. 1983) (stating that Rule 56(c) expressly provides that the district court should consider depositions, among other record items, in deciding whether the moving party has carried its burden of proving that no genuine issue of material fact exists even if not referred to by a party). I note in this connection that there does not appear to be any dispute about this background information.

he prepared invoices and wrote checks; he kept track of amounts owed to and owed by clients and filed payroll statements. During the time period at issue, Paul was a signatory on Focus' bank accounts. Paul Jean did not serve as an officer or director or own shares of Focus. Nor did Paul have the authority to hire or fire employees.

During the relevant period, Focus experienced financial difficulties. George and Paul Jean and Michael Pottle conducted frequent meetings to discuss the financial obligations of the company. During this period, Paul was aware that tax liabilities were accruing against the company and that the salary and wages of Focus employees, as well as the invoices of other creditors, were paid while the tax liabilities were not.

In his affidavit, Paul states that he did not have the authority at Focus to determine which creditors were to be paid. The United States, however, points to Paul's deposition testimony that he could pay certain invoices based on the amount involved. Sometime in the summer of 1992, Paul sent a letter to at least one of Focus' banks to revoke his check-writing authority there, and that authority was revoked beginning August 3, 1992.

ANALYSIS

I. SUMMARY JUDGMENT STANDARD

A movant is entitled to summary judgment under Rule 56 when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 322 (1986). A ''genuine'' issue of material fact exists when ''the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); accord McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995) (same). A fact is material if it might affect the outcome of the suit under governing law. Anderson, 477 U.S. at 248.

II. THE LIABILITY OF PAUL JEAN UNDER SECTION 6672

[1] The Internal Revenue Code requires employers to withhold social security and federal income taxes from employees' wages. 26 U.S.C. §§ 3102, 3402. The amounts collected from employees' wages are considered to be held in trust for the United States and must be paid over quarterly. 26 U.S.C. § 7501; 26 C.F.R. § 31.6011(a) -1(a)(1) & § 31.6011(a)-4; see Slodov v. United States, 436 U.S. 238, 243 [42 AFTR 2d 78-5011] (1978). The funds may not be used by the employer for any other obligation. See Slodov, 436 U.S. at 243–44.

If an employer does not remit withheld payroll taxes, a trust fund recovery penalty may be imposed. Section 6672 provides, in part, that:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or wilfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted and paid over.

26 U.S.C. § 6672. Liability under section 6672 requires a determination that (1) a person is ''responsible'' for collecting, accounting for, and paying over the taxes; and (2) that he acted ''willfully'' in failing to do so. Vinick v. United States, 205 F.3d 1, 3–4 [85 AFTR 2d 2000-1177] (1st Cir. 2000); see 26 U.S.C. § 6672.

A. AT A MINIMUM, WHETHER PAUL JEAN WAS A ''RESPONSIBLE PERSON'' UNDER SECTION 6672 FROM MARCH 31, 1992 TO AUGUST 2, 1992 IS A GENUINE ISSUE OF MATERIAL FACT

Analysis of the term ''responsible person'' has been defined in this circuit as including seven non-exclusive factors. Vinick, 205 F.3d at 7. The analysis focuses on whether the party:

(1) is an officer or member of the board of directors, (2) owns or possesses an entrepreneurial stake in the company, (3) is active in the management of day-to-day affairs of the company, (4) has the ability to hire and fire employees, (5) makes decisions regarding which, when and in what order outstanding debts or taxes will be paid, (6) exercises control over daily bank accounts and disbursement records, and (7) has check-signing authority.

Id. (citations omitted). No single factor is determinative of responsibility, and the examining court must look at the "totality of the circumstances" in making a responsibility determination. Id. (citations omitted). The crux of the inquiry is whether the person had the "actual authority or ability, in view of his status within the corporation, to pay the taxes owed." Id. at 8.

1. Paul Jean's "Status" at Focus (Factors One and Two)

The first two factors outlined in Vinick refer to the taxpayer's status within the corporate structure. Id. at 8. Responsible persons under section 6672 can include individuals who are not officers of the corporation. Caterino v. United States, 794 F.2d 1, 6 n.1 [58 AFTR 2d 86-5158] (1st Cir. 1986). Based on the parties' respective statements of facts and my own probe of the record, I find that Paul Jean was clearly not an officer or a member of the board of directors of Focus during the relevant time period and did not possess an entrepreneurial stake in the company.

2. Paul Jean's Involvement in the Operation of Focus (Factors Three and Four)

The third and fourth factors focus on the taxpayer's involvement in the operation of the company. Vinick, 205 F.3d at 8. The parties appear to agree that factor four, the ability to hire or fire employees, was not part of Paul Jean's duties.

Factor three, which concerns the party's involvement in the day-to-day management of the corporation, anticipates frequent and substantial, not occasional, engagement with the company's business affairs in order to provide a basis for responsibility. Vinick, 205 F.3d at 8–9. Here, the United States refers to Paul Jean's deposition testimony that he participated in daily meetings with his father and Michael Pottle to discuss the financial obligations of the company. Paul Jean also testified that he logged and kept track of bills as they were received and filed them, prepared invoices and disbursed corporate checks signed by him in payment of certain bills and expenses, and kept track of amounts owed to and owed by clients.[3] Based on these facts, I find that Paul Jean was actively engaged in substantial aspects of the management of the day-to-day affairs of Focus.

3. Paul Jean's Involvement in Focus' Financial Operations (Factors Five through Seven)

The final three factors assess involvement in the financial operations of the company. The First Circuit in Vinick referred to these factors as the "heart of the matter" because they "identif[y] most readily the person who could have paid the taxes, but chose not to do so." Vinick, 205 F.3d at 9 (citations omitted). Of the three factors, the Vinick court identified factor five, the decision-making authority to determine which, when, and in what order outstanding debts or taxes will be paid, as the "most important" in determining whether liability exists. Id. (citations omitted).

On the surface, it appears that the parties dispute whether Paul Jean had any decision-making authority over the payment of creditors. Paul Jean has submitted an affidavit in which he asserts that he "did not have the authority at Focus to determine which creditors were to be paid" and refers to Michael Pottle's deposition testi-

[3] Plaintiff asserts in his statement of undisputed facts that Focus was controlled by Michael Pottle and that Paul "did not have the actual ability to establish financial policies or procedures." Even assuming that both of these contentions are true, they do not prevent a finding that Paul was involved in the day-to-day management of Focus. See Keohan v. United States, 138 F. Supp. 2d 62, 75 [89 AFTR 2d 2002-615] (D. Mass. 2001) (stating that fact that another individual may be more responsible or have more authority over firm's financial affairs does not make one any less responsible under § 6672) (citing Harrington v. United States, 504 F.2d 1306, 1312 [34 AFTR 2d 74-6082] (1st Cir. 1974)).

mony that Paul was a part-time employee who did not have "independent" authority to sign checks. The defendant points to Paul's deposition testimony that for certain "everyday" obligations, Paul did not have to seek prior approval in order to effect payment. Paul also testified that during the relevant period, he met frequently with his father and Michael Tottle to discuss the financial affairs of the company.

As a preliminary matter, it must be emphasized that a party cannot create a material issue of disputed fact through a self-serving affidavit that conflicts with his deposition testimony without explaining the reason for the discrepancy. See Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1, 4–5 (1st Cir. 1994) (party attempted to resist summary judgment with affidavit that contradicted deposition testimony). Here, the contested portion of Paul's affidavit is at odds with his deposition testimony and no explanation has been provided for this discrepancy. Therefore, I will disregard paragraph two of Paul's affidavit and consider only the Pottle deposition testimony.

Michael Pottle's testimony may be read to suggest that Pottle had the authority to override Paul's decisions on certain financial matters, but this fact does not diminish Paul's own significant role in the everyday financial affairs of Focus. See Finley v. United States, 839 F. Supp. 1484, 1487 [73 AFTR 2d 94-768] (D. Kan. 1993).

A party need not have the "final word as to which creditors should be paid in order to be subject to liability"; it is sufficient that he had "significant control" over disbursements. Hochstein v. United States, 900 F.2d 543, 547–548 [65 AFTR 2d 90-937] (2d Cir. 1990).[4] That Paul Jean had sufficient decision-making authority over the payment of creditors is demonstrated by the fact that he could issue small checks without either George Jean's or Michael Tottle's approval on a number of occasions. See Howard v. United States, 711 F.2d 729, 734 [52 AFTR 2d 83-5777] (5th Cir. 1983); see also Gustin v. United States, 876 F.2d 485 [64 AFTR 2d 89-5163], (5th Cir. 1989) (§ 6672 does not require employees to pay over taxes when they do not have the actual authority to do so, but the law does impose a duty on employees "not to dissipate the trust by paying other creditors with money owed to the government"); Keohan v. United States, 138 F. Supp. 2d 62, 74 (D. Mass. 2001) (stating that "[e]ven the discretion to issue smaller checks without the approval of a superior may demonstrate one's authority to pay the employer's withholding taxes to the IRS") (citations omitted). Therefore, it appears that Paul did have sufficient decision-making authority to determine which, when, and in what order, certain debts were to be paid.

Neither party disputes that Paul Jean had check-signing authority and that he exercised that authority until August 3, 1992.

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[4] In his memorandum, Paul asserts that there is a split in authority among the circuits (the Fourth, Ninth and Federal as against the remaining circuits) concerning whether the authority to distinguish between creditors must be "actual and exercised" as opposed to "potential" authority. He further argues that the First Circuit adopted an "actual, exercised authority" standard in Vinick. I find both the presentation of the purported conflict and the characterization of the First Circuit's opposition to be overdrawn.

The cases cited by plaintiff do not support the assertion that there is a split in circuit authority. Rather they stand for the proposition that substance (actual circumstances) rather than form (mere titular authority) is most relevant in determining whether a party is a "responsible person." See, e.g., Purcell v. United States, 1 F.3d 932, 937 [72 AFTR 2d 93-5821] (9th Cir. 1993) (concluding that an individual may be held to be responsible if he had the authority required to exercise significant control over the corporation's financial affairs "regardless of whether he exercised such control in fact") (emphasis added); O'Connor v. United States, 956 F.2d 48, 51 [69 AFTR 2d 92-659] (4th Cir. 1992) (titular authority is not sufficient; substance of circumstances must demonstrate that officer exercises and uses authority over financial affairs or management or is under a duty to do so); Godfrey v. United States, 748 F.2d 1568, 1576 [55 AFTR 2d 85-409] (Fed. Cir. 1984) (determination of "duty" under § 6672 is a test of substance, not form). This holding is consistent with decisions from this and other circuits. See, e.g., Caterino v. United States, 794 F.2d 1, 5 [58 AFTR 2d 86-5158] (1st Cir. 1986) (liability under § 6672 not limited to one individual but may be imposed upon all individuals who have "significant" control over disbursement of funds); Hochstein v. United States, 900 F.2d 543, 546 [65 AFTR 2d 90-937] (2d Cir. 1990) (central question is individual's "degree of control" over enterprise's finances); accord Denbo v. United States, 988 F.2d 1029, 1032 [71 AFTR 2d 93-1317] (10th Cir. 1993) (same); Bowlen v. United States, 956 F.2d 723, 728 [69 AFTR 2d 92-783] (7th Cir. 1992) (same); Donelan Phelps & Co., Inc. v. United States, 876 F.2d 1373, 1376 [64 AFTR 2d 89-5049] (8th Cir. 1989) (same); Gustin v. United States, 876 F.2d 485, 491–492 [64 AFTR 2d 89-5163] (5th Cir. 1989) (same); United States v. Vespe, 868 F.2d 1328, 1332 [63 AFTR 2d 89-837] (3d Cir. 1989) (same); Gephart v. United States, 818 F.2d 469, 473 [59 AFTR 2d 87-1099] (6th Cir. 1987) (same).

The First Circuit reference in Vinick to "actual, exercised authority" does not create any conflict of authority. The First Circuit noted that titular authority is insufficient to create liability and that the issue is whether there is "significant control." See Vinick, 205 F.3d at 8. Finally, although plaintiff attempts to present a conflict by citing a Fifth Circuit decision, Barnett v. IRS, 988 F.2d 1449 [71 AFTR 2d 93-1614] (5th Cir. 1993) as creating a "potential" authority standard, I note that the First Circuit actually relied on Barnett. Vinick, 205 F.3d at 8 (stating that crucial inquiry is whether person had "effective power" to pay taxes, whether he had actual authority or ability to pay the taxes owed).

Check-writing authority, however, is significant only if it demonstrates financial control. Vinick, 205 F.3d at 12. Here, Paul Jean had the authority to make small payments to creditors and participated in frequent discussions about the financial obligations of Focus. There is raised in this record a genuine issue of material fact about the significance of Paul's responsi-bilities to the financial activity of the com-pany.

4. Conclusion

Because there are genuine issues of material fact in dispute regarding whether Paul Jean was a ''responsible person'' within the meaning of Section 6672 from March 31, 1992 through August 2, 1992, his motion for summary judgment must be denied.

B. PAUL JEAN WAS NOT A ''RESPONSIBLE PERSON'' UNDER SECTION 6672 AFTER AUGUST 2, 1992

By contrast, there can be no genuine issue of material fact that Paul's relinquishment of check-signing authority in August 1992 rendered him not a ''responsible person'' after that time because he was not in a position to exercise authority to direct payment of taxes. See Vinick, 205 F.3d at 12 (taxpayer not responsible where he did not have access to checkbook during applicable period).

C. AT A MINIMUM, WHETHER PAUL JEAN'S ACTIONS WERE WILLFUL UNDER SECTION 6672 IS A GENUINE ISSUE OF MATERIAL FACT

In addition to requiring a finding of responsibility, Section 6672 imposes a finding of willfulness in failing to pay over the withheld taxes. To act ''willfully'' within the meaning of Section 6672 does not require the responsible person to have acted with a bad motive or intent to defraud. Thomsen v. United States, 887 F.2d 12, 17 [64 AFTR 2d 89-5752] (1st Cir. 1989). Instead, a ''voluntary, conscious and intentional'' act to prefer other creditors over the United States is sufficient. Id. Evidence that the responsible person had ''knowledge of payments to other creditors after he was aware of the failure to pay withholding tax is sufficient for summary judgment on the question of willfulness,'' Howard, 711 F.2d at 735, or if the responsible person ''clearly ought to have known'' that ''there was a grave risk that withholding taxes were not being paid'' and if he was in a position to determine whether they were or not. Thomsen, 887 F.2d at 18 (citation omitted).

Here, Paul Jean acknowledged in his deposition that tax liabilities were accruing against the company and that salary and wages were paid, whereas the accruing tax liabilities were not. There consequently appears to be at a minimum a genuine issue of material fact whether Paul Jean ''willfully'' failed to pay over withheld taxes for the period of March 31, 1992 through August 2, 1992. See Thomsen, 887 F.2d at 18; Howard, 711 F.2d at 735.

CONCLUSION

For the reasons set forth more fully above, plaintiff Paul Jean's motion for summary judgment is denied as to the time period of March 31, 1992 through August 2, 1992 and granted as the time period August 3, 1992 to September 30, 1992.

This case shall be set for pre-trial conference.

DOUGLAS P. WOODLOCK

UNITED STATES DISTRICT JUDGE

¶2002-5574

Hirsch FRIEDMAN, PLAINTIFF v. THE UNITED STATES OF AMERICA and unnamed officers and employees of the United States, DEFENDANTS. U.S. District Court, Northern Dist. of Georgia, (DC GA) CIVIL ACTION NO. 1:02-CV-2461-BBM, Sept. 24, 2002. Years 1986, 1987, 1988, 1990. Decision for Govt.

1. Jeopardy assessments—reasonableness—failure to report income. Govt.'s imposition of jeopardy levy on funds due taxpayer/disbarred attorney was upheld as reasonable: sufficient basis for IRS's determination that collection was in jeopardy was found in taxpayer's 17-year history of nonfiling and making no or only minimal

payments during years he made significant income, his present lack of readily available assets, and his and his attorney's statements reflecting substantial unreported income and possible concealment of assets. *Reference:* United States Tax Reporter ¶74,295.01(10). IRC §7429.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION,

ORDER

BEVERLY B. MARTIN United States District Judge

This action is before the court on the plaintiff's motion [Doc. No. 3-1] for a determination as to the reasonableness of the imposition by the United States Internal Revenue Service (hereinafter the "IRS") of a jeopardy levy on funds payable to the plaintiff.

Findings of Fact

On or about July 25, 2002, Neil S. Richman (hereinafter "Mr. Richman"), Deputy Assistant General Counsel for the U.S. Department of Veterans Affairs (hereinafter the "DVA") sent Hirsch Friedman (hereinafter "Mr. Friedman" or the "plaintiff") a letter (hereinafter the "July 25, 2002 Letter") which stated, in relevant part, as follows:

> This office has received from the Department of the Treasury, Internal Revenue Service (IRS), "Notices of Federal Tax Lien" filed against you in an amount totaling $230,983.12. The Notices were accompanied by a demand that the check representing the proceeds of your Federal Tort Claims Act claim settlement be forwarded to the Atlanta, Georgia, office of the IRS for disposition. Accordingly, U.S. Treasury check No. 2049 14545612 in the amount of $200,000 payable to you has been sent to [the] IRS at P.O. Box 901, Stop 1000-D, Atlanta, Georgia, 30370.

Approximately two weeks later, on or about August 7, 2002, Robert A. Stack, a revenue officer of the IRS (hereinafter "Mr. Stack"), sought internal approval for a jeopardy levy against the check described in Mr. Richman's letter (hereinafter the "Check"). In a memorandum dated August 7, 2002 (the "Memorandum") supporting his request for such levy (hereinafter the "Levy"), Mr. Stack described Mr. Friedman's circumstances as follows:

> The [DVA] owes [Mr. Friedman] $200,000.00. They [sic] have recently been in touch with Willard N. Timm, Jr[.], Associate Area Counsel ([Small Business / Self-Employed Division]) regarding liens filed by [the] IRS and subsequently sent a remittance made payable to the taxpayer for $200,000.00. We are returning this check to the [DVA] with [a] Notice of Levy and Pattern Letter 2438.

Assessed tax, penalty and interest		Total balance clue as of 8-6-2002
[1986 tax year]	[$]34,579.55	[$] 70,885.53
[1987 tax year]	[$]29,828.64	[$] 61,434.75
[1988 tax year]	[$]12,528.75	[$] 26,001.81[1]
[1990 tax year]	[$]85,167.48	[$]157,887.96
		Total [$]316,210.05

[1] The United States has supplied the court with a copy of the decision of the United States Tax Court deciding, as of April 26, 1994, that Mr. Friedman owed $17,719.00 in deficiencies and additions for the 1986 tax year, $16,719.00 for the 1987 tax year, and $8,051.24 for the 1988 tax year (such decision being referred to hereinafter as the "Tax Court Decision")

> Based on information from Willard K. Timm, Jr.[,] the taxpayer in a disbarred attorney who has a tax haven off the coast of Australia; has no other funds to pay and if these funds are paid directly to the taxpayer there is little likelihood that he will pay it over to the IRS. The taxpayer[']s filing record is as follows:
>
> 1985 - Original tax on a filed return was assessed on 12-01-1986 for [$]4,673.00.

This was subsequently paid and a small refund issued. On 5-19-1993 an audit deficiency plus additions was assessed for $141,303.45. Additional interest and penalties were assessed and on 10-25-1999 the account was closed via TC 400 (account transferred out) for $181,300.79. No payments were made on the deficiencies.

1986 - Original return posted 02-26-1990 showing [$0].00 tax. Audit deficiencies plus additions were assessed 08-01-1994 for [$]34,559.55. No payments have been made.

1987 - Original return posted 02-26-1990 showing [$0].00 tax. Audit deficiencies plus additions were assessed 08-01-1994 for [$]29,828.64. No payments have been made.

1988 - Original return posted 02-26-1990 showing tax of [$]2,114.21. A subsequent payment was made 6-01-1989 for [$]5,000.00 and a refund issued for the net overpayment after charging the additions. Audit deficiencies plus additions were assessed 08-01-1994 for [$]12,528.75. No payments have been made.

1989 - A return was posted 11-26-1990 showing [$0].00 tax.

1990 - A return was posted 09-21-1992 showing tax of [$]5,264.00. Of that, [$]264.00 was paid with the return. Additional penalties and interest were billed 9-21-92. Audit deficiencies plus additions were assessed 12-21-1995 for [$]78,111.38. Effective 4-15-92 [$]423.00 was offset from 1991 and applied to this period. No other payments were made other [than] the [$]264.00 and the [$]423.00.

1991 - A return was posted 09-21-1992 showing tax of [$]1316.00 due, [$]500.00 was paid on 4-15-1992. Due to withhold[ing] of income tax and payment, the tax was overpaid by [$]423.00 which was offset to the 1990 year.

1992 - A return was posted 10-04-1993 showing tax due of [$]1564.00. A payment was made with the return for $1315.00 and a payment was made 4-15-1993 for [$]250.00. Subsequent interest and penalty was billed for [$]57.68 that was paid 10-28-1993. The account balance due is [$0].00.

1993 - An extension was filed extending the due date to 8-15-1994. No return has been filed.

1994 - An extension was filed extending the due date to 8-15-1995. A payment was made 4-15-1995 for [$]250.00. No return has been filed.

1995 - Extensions were filed to 10-[15]-1996. A payment was made 4-15-1996 for [$]5,000.00. No return has been filed.

1996 - A return was posted 9-21-1997 showing tax of [$]4681.00. Payments have been made on 4-15-1997 for [$]2,500.00; 8-18-1997 for [$]2430.00 and 10-03-1997 for [$]110.22 to pay all the tax and additions.

1997 - An extension was filed extending the due date to 8-15-1998. A payment was made 4-15-1998 for [$]2,500.00. No return has been filed.

1998 - An extension was filed extending the due date to 8-15-1999. No return has been filed.

1999 - An extension was filed extending the due date to 8-15-2000. No return has been filed.

2000 - No return filed.

2001 - No return filed.

As the above record reflects, only nominal payments have been made during these last 17 years. Nominee liens have also been filed.[2]

On or about the same date, Mr. Stack (1) returned the Check to the DVA, together with a notice of levy (hereinafter the "DVA Notice") signed by the IRS's acting territory manager (the "ATM"), and

[2] The United States has provided the court with IRS records indicating that tax liens have been filed against Mr. Friedman in the office of the Clerk of Superior Court, Fulton County, Georgia, for $181,569.63 as to the 1985 tax year; $34,559.55 as to the 1986 tax year; $29,828.64 as to the 1987 tax year; $12,528.75 as to the 1988 tax year; and $7,056.10 as to the 1990 tax year (such liens being referred to hereinafter as the "Tax Liens").

(2) mailed to Mr. Friedman a "Notice of Jeopardy Levy and Right of Appeal" (the "Taxpayer Notice"), also signed by the ATM. The Taxpayer Notice states, in relevant part, that Mr. Stack had "found that your [i.e., Mr. Friedman's] financial solvency is or appears to be imperiled, thereby putting [the IRS's] collection of the income tax you owe for the tax period(s) 1986, 1987, 1988 and 1990 in jeopardy." The Taxpayer Notice also advises Mr Friedman of his various rights to hearing and review under the Internal Revenue Code (hereinafter the "IRC" or the "Code").

On or about August 12, 2002, Mr. Friedman sent the IRS a three-page letter "protesting" the Levy (hereinafter the "August 12, 2002 Letter").[3] Such letter, which does not in fact request administrative review of the Levy, purports to "compl[y] with the protest requirements of IRC 7429," but for the most part consists of accounts of Mr. Friedman's early law practice, his services at that time as an informant to various law enforcement agencies and his injuries resulting from a car bomb explosion in 1982, as well as his subsequent legal actions against the U.S. Federal Bureau of Investigation and the DVA. The August 12, 2002 Letter concludes by accusing "an old adversary with the IRS" of having "diverted [the Check] from the mail," dismisses the Levy as a "sham," questions the IRS's authority to impose the Levy and threatens the IRS with legal action for its "malicious interference."

On or about August 14, 2002, Mr. Friedman delivered by hand or caused to be delivered by hand to an IRS office a two-page letter (hereinafter the "August 14, 2002 Letter"), which is described as "part of the annexed Form 12153 entitled 'Request for a Collection Due process Hearing.'" Such letter, which indicates that it was accompanied by "a copy of a US District Court Complaint arising under the 4th and 5th Amendments of the Constitution, Bivens and the US Code,"[4] asserts that the Levy is "wholly without legal authority and appears to be part of a criminal scheme," that "employees of the I.R.S. conspired to violate the law" and committed other "misconduct," and that the Levy is a "connivance" of certain unnamed "individuals ... acting illegally." Like the August 12, 2002 Letter, the August 14, 2002 Letter concludes by threatening legal action against the United States as well as "a few attorneys with the I.R.S."

On September 5, 2002, Mr. Friedman filled his complaint in the instant action, together with a "Motion for Hearing for Injunction and Rule Nisi Pursuant to 26 U.S.C. § 7429 and Local Rule 5.3." On September 10, 2002, the court noticed a hearing pursuant to Mr. Friedman's motion for September 19, 2002. On September 18, 2002, the United States provided the court a copy of its "Memorandum of Points and Authorities" regarding Mr. Friedman's motion. Attached as exhibits to such memorandum were, among other things, copies of (1) a letter dated February 27, 1998 from Chandler B. Sharma, J.D., C.P.A. (hereinafter "Mr. Sharma") to a Mr. K. Denabandhu of the Nauru Agency Corporation, together with three attached pages entitled "Hirsch Friedman Net Worth Statement" (collectively referred to herder as the "February 27, 1998 Letter"), (2) a letter dated September 17, 2001 from Eric High, Accountant, of AWS, Incorporated to William M. Thigpen, Regional Counsel of the DVA (hereinafter the "September 17, 2001 Letter"); and (3) a letter dated September 18, 2001 from Mr. Friedman to W.M. Thigpen, Regional Counsel of the DVA (hereinafter the "September 18, 2001 Letter").

The February 27, 1998 Letter from Mr. Sharma to Mr. Denabandhu states, in relevant part, as follows:

> I have been requested by Hirsch Friedman to assemble a balance sheet as of January 31, 1998. Pursuant to a limited engagement, Mr. Friedman has elected to omit the disclosure of all as-

[3] Mr. Friedman has provided the court with an unsigned copy of the August 12, 2002 Letter.

[4] No such document was attached to the copy of the August 14, 2002 Letter provided by Mr. Friedman to the court.

sets, however, to provide a showing of net income to, or in excess of the minimum standards required by the laws of the Republic of Nauru.

In accordance with the limited engagement we have made a limited verification of the assets and liabilities and believe that the representations made in the attached financial statement are reasonable.

The ''Hirsch Friedman Net Worth Statement'' attached to such letter reflects ''Cash on Hand and Banks'' in an amount equal $282,729.52; ''Securities'' in an amount equal to $1,203,240.68; ''Notes Receivable'' in an amount equal to $35,268.53; and ''Accrued income taxes payable'' in an amount equal to $181,519.63; thereby resulting in a ''Net Worth'' in an amount equal to $1,339,719.10.

The September 17, 2001 Letter from Mr. High to Mr. Thigpen states, in relevant part, as follows:

I have reviewed the income records for Mr. Hirsch Friedman and have personally known him since 1996. I have previously provided an audited financial statement in relation to Mr. Friedman becoming a director of a bank. Based upon my review of Mr. Friedman's records and being aware of a number of his financial activities I am able to render an opinion as to the amount of disposable income received by Mr. Friedman during 1996 through 1998. I am personally aware that at the end of 1998 Mr. Friedman had a heart attack and that later in 1999 he was ill to the extent that he was unable to work. Finally after his open-heart surgery in 1999 to the present date I am aware that he does not appear to be able to perform regular business duties and had not earned any money since the end of 1998.

By reason of the above facts I am of the opinion that Mr. Friedman's average net income for said period was approximately $200,000.00 per year. In 1997 Mr. Friedman had an exceptionally good year due to the sale of certain property. However, [t]he above is an average.

The September 18, 2001 Letter from Mr. Friedman to Mr. Thigpen states, in relevant part, as follows:

Mr. Eric High, a former CPA, has provided an opinion letter relative to my average annual income prior to the injuries I sustained at the V.A. Medical Center in Atlanta, which is the basis for my claim. Mr. High was a CPA that had provided some services for me within the period of disability and had access to some records for a few years prior. His letter is enclosed.

1997 creates a bit of a problem in that during that year there was an extraordinary gain as a result of the sale of property that had previously been purchased from the Resolution Trust Corporation (RTC). However, considering averages from prior years my median income should be approximately $200,000 per year. Adding 1997 income to the equation and averaging for ten years, I would have earned $266,000, annually, and over five years, $332,000, annually. Although I had intentions of making large real estate transactions in future years to consider same might be speculative, therefore, a $200,000 net figure would be a reasonable estimate for the purposes of settlement . . .

The only income I have at present is $510.00 per month from V.A. disability benefits. I have no other type of pension benefit other than the minimal amount that may be available when I am able to draw social security. We have absolutely no money left and we are living from day to day on the little my wife is able to make, the disability payments I receive, and trying desperately to collect some old, and long past due accounts . . .

My wife, as the record may indicate suffers from Multiple Sclerosis. Stress is one of the last things she needs to endure. However she suffers from it daily considering the way our finances have declined . . . . Considering that I indi-

cated what should be expected relative to income I hope that you would be ready to make an offer within the next few days. Mr. Chandler Sharma, an attorney and CPA also has personal knowledge of my income and has had for about twenty years. He is available to provide what Mr. High already has, in the event it is required.

On September 19, 2002, the court held the above-referenced hearing pursuant to Mr. Friedman's motion. At the hearing, the court heard testimony from Mr. Stack regarding the Tax Liens; Memorandum; DVA Notice, Taxpayer Notice; Levy; February 27, 1998 Letter; September 17, 2001 Letter; and September 18, 2001 Letter. Copies of such documents, as well as a copy of the Tax Court Decision, were moved into evidence by the United States. On the one hand, Mr. Stack testified that Mr. Friedman's outstanding tax deficiencies; his repeated failure to file returns, or to pay the taxes assessed against him; the statements made by Mr. Friedman in the latter portions of the September 18, 2001 Letter; and the IRS's inability to locate any assets in Mr. Friedman's name would lead him to conclude that Mr. Friedman is insolvent. On the other hand, and in the alternative, Mr. Stack testified that the February 27, 1998 Letter[5] ; the September 17, 2001 Letter; the statements made in the earlier portions of the September 18, 2001 Letter; and the IRS's inability to locate any assets in Mr. Friedman's name would lead him to conclude that Mr. Friedman may have received unreported income, and that he may have been transferring his assets beyond the reach of the IRS. Mr. Stack testified that either conclusion would lead him to determine that the collection of taxes assessed against Mr. Friedman is in jeopardy.

The court also heard testimony from Mr. Friedman regarding the July 25, 2002 Letter; the August 12, 2002 Letter and the August 14, 2002 Letter, copies of which he moved into evidence for the court's consideration. While the greater part of Mr. Friedman's testimony related to his action against and dealings with the DVA, he also testified as to his financial position. Generally speaking, Mr. Friedman testified that he had a number of sources of income, and that, contrary to Mr. Stack's conclusion as stated in the Taxpayer Notice, his "solvency" was not "imperiled."

The court, having considered Mr. Friedman's pleadings and the United States' memorandum, as well as their evidence, testimony and arguments of counsel presented at the hearing on September 19, 2002, makes the following conclusions of law: Conclusions of Law

[1] Under § 6331(a) of the Code,

> [i]f the Secretary [of the Treasury] makes a finding that the collection of [any] tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period [allowed for notice and demand] provided in this section.

26 U.S.C. § 6331(a). The Code further provides that no such levy may be made "less than 30 days after notice and demand for payment is made, unless the Chief Counsel for the Internal Revenue Service (or such Counsel's delegate) personally approves (in writing) such . . . levy." 26 U.S.C. § 7429(a)(1)(A). The IRS is required within five days after such levy is imposed to provide the taxpayer against whom it is directed a "written statement of the information upon which the Secretary relied in making such . . . levy." 26

[5] In its "Memorandum of Points and Authorities," and pursuant to Mr. Stack's testimony, the United States suggests that the February 27, 1998 Letter indicates that Mr. Friedman is secreting his assets in a bank in Nauru, a remote, 8 square-mile island in the Pacific Ocean. Mr. Friedman asserts that the activities alluded to in Mr. Sharma's letter were undertaken on behalf of his then clients. (Mr. Friedman was disbarred by the Supreme Court of Georgia on September 14, 1998 for reasons unrelated to the present action.)

U.S.C. § 7429(a)(1)(B).[6] The taxpayer may within 30 days after such statement is furnished request that the Secretary review the levy, and, no earlier than 16 days after such request is made, file an action in a district court seeking review of such levy. 26 U.S.C. § 7429(a)(2), (b)(1) and (b)(2).

It is in this posture that the current action is before the court. Within 20 days of the action's filing, unless the taxpayer requests an extension of such period, the court is obligated to determine ''whether or not the levy [imposed by the Secretary pursuant to § 6331(a)] is reasonable under the circumstances.'' 26 U.S.C. § 7429(b)(3) and (c). The court's determination in this regard is ''final and conclusive and shall not be reviewed by any other court,'' 26 U.S.C. § 7429(f); accord, Vicknair v. United States, 617 F.2d 1129 [46 AFTR 2d 80-5013] (5th Cir. 1980) (dismissing appeal)[7] This court has previously noted:

> The jeopardy assessment[8] procedures can be used only in circumstances which indicate that the collection of taxes would be. adversely affected by the delay inherent in normal deficiency collection procedures. The collection of tax is of the very highest priority to any government. The importance of revenue collection justifies the extraordinary procedures Congress has provided for in sections 6861 [regarding jeopardy as-sessments] and 7429 of the [Code]. The statutory procedures available in the case of a jeopardy assessment are constitu-tionally valid.

Fidelity Equip. Leasing Corp. v. United States, 462 F. Supp. 845, 850 [43 AFTR 2d 79-1211] (N.D Ga. 1978) (citing Haskin, 444 F.Supp.299). The constitutionality of the seizure of property by jeopardy levy is well-established. French v. United States, No. 79-149-C, 1979 WL 1430, at 3 [44 AFTR 2d 79-5653] (E.D. Okla. July 31, 1979) (citing Commissioner v. Shapiro, 424 U.S. 614, 629–33 [37 AFTR 2d 76-959] (1976)).

The Code contemplates that an action under § 7429 be a ''summary proceeding.'' Haskin v. United States, 444 F.Supp.299, 304 [41 AFTR 2d 78-780] (C.D. Cal. 1977); accord, Lindsey v. United States, No. 1:91-CV-459-MHS, 1992 WL, 179067, at 4 [70 AFTR 2d 92-5181] (N.D. Ga. May 26, 1992); French, 1979 WL 1430, at 3; McAvoy v. United States, 475 F.Supp. 297, 298 [44 AFTR 2d 79-5337] (W.D. Mich. 1979). The United States bears the burden of proof in establishing the reasonableness of the levy imposed. 26 U.S.C. § 7429(g)(1). The evidentiary standard required to meet such burden is ''something more than 'not arbitrary or capricious,' and something less than 'supported by substantial evidence.''' Loretto v. United States, 440 F.Supp. 1168, 1172 [41 AFTR 2d 78-301] (E.D. Pa. 1977); accord, Magluta v. United States, 952 F. Supp. 798, 801 [79 AFTR 2d 97-465] (S.D. Fla. 1996); DeLauri v. United States, 492 F.Supp. 442, 445 [46 AFTR 2d 80-5345] (W.D. Tex. 1980). But see Johnson v. Commissioner, 468 F.Supp. 461, 463 [43 AFTR 2d 79-861] (''[T]he Service has failed to show by a *preponderance of the evidence* that the plaintiffs' solvency is presently imperiled.'') (emphasis added).[9] In making its determination, the court ''is to take into account not only

[6] Mr. Friedman asserts that the Taxpayer Notice was inadequate in this regard. This court has previously noted, however, that

> the Government's failure to satisfy the notice requirement of section 7429 will not serve to invalidate these proceedings ... Through the process of discovery the taxpayers have been informed of the information relied upon by the Government. Any deficiency in the notice issued by the Government is now immaterial. The plaintiffs were not prejudiced by the lack of information contained in the notification letters.

Fidelity Equip. Leasing Corp. v. United States, 462 F. Supp. 845, 848 [43 AFTR 2d 79-1211] (N.D. Ga. 1978); accord, DeLauri v. United States, 492 F. Supp. 442, 444 [46 AFTR 2d 80-5345] (W.D. Tex. 1980). Given that the United States has, in its memorandum and in the hearing, disclosed the specific information it relied upon or would rely upon in imposing the Levy, the court finds a similar lack of prejudice to Mr. Friedman in this instance.

[7] Decisions of the United States Court of Appeals for the Fifth Circuit which were decided prior to October 1, 1981 are binding as precedent for the Court of Appeals, district courts and bankruptcy courts in the Eleventh Circuit. Bonner v. City of Pritchard, 661 F.2d 1206, 1209–11 (11th Cir. 1981).

[8] The standards for determining whether a jeopardy levy under § 7429 is reasonable are the same as those for determining the reasonableness of a jeopardy assessment under such provision. Lindsey v. United States, No. 1:91-CV-459-MHS, 1992 WL 179067, at 3 (N.D. Ga. May 26, 1992).

[9] The court's determination set forth infra is the same whether the majority evidentiary standard or the ''preponderance of the evidence'' standard applies.

information available to the [IRS] on the [date of the levy], but also any other information which bears on the issues before it.'' Loretto, 440 F.Supp. at 1173 (citing S. Rep. No. 94-938 (part I), at 365 (1976), reprinted in 1976 U.S.C.C.A.N. 3439, 3794); accord, Magluta, 952 F. Supp. at 801; United States v. Vicknair, 452 F.Supp. 470, 470 [42 AFTR 2d 78-6294] (S.D. Fla. 1978). Evidence which might otherwise be considered inadmissible is admissible if it might be relied upon by the IRS. Crosby v. United States, No. CIV. A. 99-3634, 2000 WL 723866, at 2 [86 AFTR 2d 2000-5257] (E.D. Pa. May 31, 2000); Magluta, 952 F. Supp. at 801; Harvey v. United States, 730 F. Supp. 1097, 1104 [65 AFTR 2d 90-825] (S.D. Fla. 1990).

According to IRS standards endorsed by Congress upon the enactment of § 7429, a jeopardy levy is warranted under the following circumstances:

1. The taxpayer is or appears to be designing quickly to depart from the United States or to conceal himself;

2. The taxpayer is or appears to be designing quickly to place his property beyond the reach of the Government either by removing it from the United States, or by concealing it, or by transferring it to other persons, or by dissipating it; or

3. The taxpayer's financial solvency appears to be imperiled.

Lindsey, 1992 WL 179067, at 4; accord, Crosby, 2000 WL 723866, at 2; Henderson v. United States, 949 F. Supp. 473, 475 [80 AFTR 2d 97-7894] (W.D. Tex. 1996). ''Furthermore, in determining the reasonableness of the use of jeopardy procedures, the reviewing court may, and should, consider any other appropriate factors.'' Lindsey, 1992 WL 179067, at 4.

Mr. Stack's conclusion that Mr. Friedman had repeatedly failed to file income tax returns over the previous 17 years, and had made only nominal payments towards his outstanding liabilities during such period, provides a sufficient basis for the IRS to have found that the collection of Mr. Friedman's tax liability was in jeopardy. Accord, Lindsey, 1992 WL 179067, at 6; Loretto, 440 F. Supp. at 1171; Haskin, 444 F. Supp. at 301. Cf. Henderson, 949 F. Supp. at 476 (finding a levy unreasonable where plaintiffs appeared ''willing to comply with their tax obligations''). This finding was additionally supported by Mr. Stack's determination that no assets of Mr. Friedman were readily available to satisfy such liability, accord, Crosby, 2000 WL 723866, at 3; Magluta, 952 F. Supp. at 802; Loretto, 440 F. Supp. at 1171; and by Mr. Friedman's statement (in the September 18, 2001 Letter) that he and his wife ''have absolutely no money left.'' Accord, Fidelity, 462 F. Supp. at 850 (''the potential insolvency of the plaintiffs could jeopardize the collection of taxes'').[10]

Even were Mr. Stack's conclusions erroneous, the IRS still had a reasonable alternative basis to find that the collection of Mr. Friedman's tax liabilities was in jeopardy. In the September 18, 2001 Letter, Mr. Friedman himself stated that his income was at least $200,000 per year in the years preceding his 1998 surgery at the DVA hospital, even as IRS records indicate (1) that he filed tax returns for only six of the ten years preceding such date; (2) that the returns he did file during such period showed total tax due of only $14,939.21 (on approximately $2 million in income, in his estimate); and (3) that the IRS assessed taxes for such period in an amount of at least $90,640.13; (4) in satisfaction of which Mr. Friedman has made payments of no more than $16,414.90. In the September 18, 2001 Letter, Mr. Friedman described his income during such period as being in excess of what his filing history would indicate, and also alluded to the existence of additional real estate unknown to the IRS. Mr. Friedman's statements in this regard relied upon and were buttressed by those of Mr. High. In addition, Mr. Sharma, who represented himself as an attorney acting on Mr. Friedman's

[10] While it is apparently improper for the IRS to consider a taxpayer's tax liabilities in making the determination whether or not the taxpayer is insolvent, see, e.g., Johnson, 468 F. Supp. at 462, Mr. Stack's determination that there were no assets in Mr. Friedman's name and Mr. Friedman's statement that he had ''absolutely no money left'' provide an alternative reasonable basis for Mr. Stack's conclusion that Mr. Friedman's ''financial solvency is or appears to be imperiled.''

behalf (a statement affirmed by Mr. Friedman in his September 18, 2001 Letter), described Mr. Friedman's net worth, as of 1998, as being much higher than what one would expect of an individual with no known assets in his name, and directed such figures to an agent at an address in a known offshore tax haven. Based on such facts, it would not have been unreasonable for the IRS to conclude that Mr. Friedman had been receiving substantial income he was not reporting to the IRS and had been or was attempting to secrete his assets out of reach of the IRS. Accord, Swegles v. United States, No. 86-5514, 1987 WL 16950 [60 AFTR 2d 87-5458] (C.D. Cal. Feb. 27, 1987); French, 1979 WL 1430, at 2.

Summary

For the reasons set forth above, it is hereby DETERMINED AND ADJUDGED that the imposition by the IRS pursuant to 26 U.S.C. § 6331(a) of a jeopardy levy on U.S. Treasury check No. 2049 14545612 in the amount of $200,000.00 is ''reasonable under the circumstances.''

SO ORDERED, this 24 day of September, 2002.

BEVERLY B. MARTIN

United States District Judge

JUDGMENT

This action having come before the court, Honorable Beverly B. Martin, United States District Judge for review of the plaintiff's motion for a determination as to the reasonableness of the imposition by the United States Internal Revenue Service of a jeopardy levy on funds payable to plaintiff, it is

Determined and Adjudged that the imposition by the IRS pursuant to 26 U.S.C. §6331(a) of a jeopardy levy on U.S. Treasury check No. 2049 14545612 in the amount of $200,000.00 is ''reasonable under the circumstances''.

Dated at Atlanta, Georgia this 24th day of September, 2002.

LUTHER D. THOMAS

CLERK OF COURT

By:

A.A. Querrard, Deputy Clerk

¶2002-5575

Coburn T. NORFLEET, PETITIONER-APPELLANT v. UNITED STATES OF AMERICA, RESPONDENT-APPELLEE. U.S. Court of Appeals, Fourth Circuit, (CA4) No. 02-1686, Oct. 25, 2002. District Court, (2002, DC NC) 89 AFTR 2d 2002-2879, affirmed per curiam. Decision against Taxpayer.

1. Third-party summons enforcement—petition to quash—jurisdiction—service. Dismissal of pro se taxpayer's petition to quash 6 IRS summonses was affirmed per curiam based on district court's reasoning. *Reference:* United States Tax Reporter ¶76,095.01(13); 76,095.01(75). IRC §7609.

Coburn T. Norfleet, Appellant Pro Se. John A. Dudeck, Jr., Jonathan D. Carroll, United States Department of Justice, Washington, DC, for Appellee.

United States Court of Appeals, Fourth Circuit,

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. W. Earl Britt, Senior District Judge. (CA-02-57-BR).

Before WILLIAMS and KING, Circuit Judges, and HAMILTON, Senior Circuit Judge.

PER CURIAM.

This case was not selected for publication in the Federal Reporter.

UNPUBLISHED

Please use FIND to look at the applicable circuit court rule before citing this opinion. Fourth Circuit Rule 36(c). (FIND CTA4 Rule 36(c).)

Affirmed by unpublished PER CURIAM opinion.

[1] Coburn T. Norfleet appeals the district court's order dismissing his petition to quash six administrative summonses

pursuant to 26 U.S.C. § 7609 (2000). Our review of the record and the district court's opinion discloses no reversible error. Accordingly, we affirm on the reasoning of the district court. *See Norfleet v. United States*, No. CA-02-57-BR (E.D.N.C. May 22, 2002). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

¶2002-5576

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Loyd Dean STANLEY, aka Dean Stanley, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-50734, Oct. 29, 2002. District Court affirmed. Decision against Taxpayer.

1. Tax crimes—filing false returns; conspiracy—sentencing—restitution. District court properly ordered on remand that defense contractor employee pay maximum amount of restitution for filing false return and conspiring to provide and receive kickbacks on Navy contracts: maximum restitution cap served merely to limit taxpayer's exposure to stated amount, but didn't figure into total restitution calculation and wasn't reduced by amount of co-defendant's restitution payments. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §7206.

Gregory D. Obenauer, San Diego, CA, for the defendant-appellant.
Patrick K. O'Toole, United States Attorney, Bruce R. Castetter, Assistant United States Attorney, and George D. Hardy, Assistant United States Attorney, San Diego, CA, for the plaintiff-appellee.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the Southern District of California Rudi M. Brewster, District Judge, Presiding. D.C. No. CR-96-01928-B.

Before STEPHEN REINHARDT, STEPHEN S. TROTT and BARRY G. SILVERMAN, Circuit Judges.

OPINION

SILVERMAN, Circuit Judge.

PacShip Repair and Fabrication Inc., the victim of a kickback scheme, suffered a loss of over $900,000. Because of an error at the time of defendant Loyd Stanley's plea, his restitution liability was capped at $500,000. Stanley's co-defendants paid over $300,000 in restitution, reducing PacShip's loss to nearly $600,000. In this appeal, Stanley maintains that the co-defendants' payments should have been deducted from his $500,000 restitution cap, thus reducing his restitution exposure to less than $200,000. We agree with the district court that the restitution paid by the co-defendants only reduced the victim's loss; it did not reduce Stanley's restitution ceiling. Because PacShip's loss still exceeded $500,000 even after the co-defendants's payments were credited, the district court did not err in ordering Stanley to pay restitution of $500,000.

I. Background

Stanley was an employee of PacShip, which had a contract with the Navy to perform repairs on aircraft carriers. Gamma Tech Industries, Inc. and Tidelands Testing, Inc., were two of PacShip's subcontractors, and Michael Gallegos was a principal of Gamma Tech and Tidelands. Stanley, who was in charge of overseeing PacShip's contracts with both the subcon-tractors and the Navy, conspired with Gamma Tech, Tidelands and Gallegos, to receive kickbacks in return for selecting them to perform work on the carriers. Stanley plead guilty to conspiracy to pro-vide and receive kickbacks on Navy con-tracts in violation of 18 U.S.C. § 371, and filing a false income tax return in violation of 26 U.S.C. § 7206. Gamma Tech, Tide-lands and Gallegos also plead guilty to the kickback conspiracy. Stanley was sen-tenced to fifteen months imprisonment and three years of supervised release, and was ordered to pay restitution of $913,820.50

for which he and his co-defendants were jointly and severally liable.

In a previous appeal, we vacated Stanley's restitution order because, at the time he plead guilty, he had not been adequately advised that he could be ordered to pay restitution in that amount. *United States v. Gamma Tech Indus., Inc.*,265 F.3d 917 (9th Cir.2001). However, because Stanley had been advised that he could be fined up to $500,000, we noted that "[t]he error would be rendered harmless if the district court resentenced Stanley and Gallegos to an amount of restitution that doesn't exceed the maximum fines of which they were advised." *Id.* at 931.

At resentencing, the government urged the district court to reduce the amount of Stanley's restitution order to $500,000. Stanley agreed that the restitution order could not exceed $500,000, but argued that pursuant to 18 U.S.C. § 3664(j)(2), the $500,000 ceiling should be reduced by $318,000--the amount that Gamma Tech, Tideland, and Gallegos paid to PacShip in settlement of a related civil case. By Stanley's reckoning, his restitution obligation should have been reduced to no more than $182,000--that is, $500,000 minus $318,000. The district court declined to follow that approach. Instead, it subtracted the amount of the co-defendants' payments ($318,600) from PacShip's total loss ($913,820.50), leaving an uncompensated loss of $595,220.50. The district ordered Stanley to pay restitution of $500,000.

II. Jurisdiction and Standard of Review

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we review the legality of a restitution order de novo. *United States v. Follet,* 269 F.3d 996, 998 (9th Cir.2001).

III. Discussion

[1] 18 U.S.C. § 3664 provides, in part, as follows:

> (f)(1)(A) In each order of restitution, the court shall order restitution to each victim *in the full amount of each victim's losses* as determined by the court and without consideration of the economic circumstances of the defendant.
>
> (B) In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.
>
> * * *
>
> (j)(2) Any amount paid to a victim under an order of restitution shall be reduced by any amount later recovered as compensatory damages for the same loss by the victim in--
>
> (A) any Federal civil proceeding; and
>
> (B) any State civil proceeding, to the extent provided by the law of the State.

(emphasis added).

In other words, when other parties have paid civil damages for the same loss for which a defendant is liable, the calculation of the amount of restitution remaining is a two-step process. First, the court ascertains the full amount of the victim's loss. In this case, that was determined to be $913,820.50. The court then subtracts the amount paid by the other parties. Here, that was $318,625. What is left is the unpaid portion of the victim's loss, in this case, $595,195.50. The amount of a restitution cap does not figure into the equation.

The purpose of § 3664(j)(2) is to prevent double recovery by a victim. *See United States v. Cloud,*872 F.2d 846, 854 n. 10 (9th Cir.1989); *United States v. All Star Indus.,* 962 F.2d 465, 477 (5th Cir.1992). To prevent double recovery, payments such as those made by Stanley's co-defendants are subtracted from the amount of the victim's loss. To that extent, Stanley may benefit from them. However, such payments have nothing to do with the cap on restitution that resulted from the error at the time of the plea that served to limit the defendant's maximum exposure to no more than a certain amount. There is no question of double recovery here. Accordingly, the district court correctly subtracted the co-defendants' payments from PacShip's loss, but not from the restitution

cap. The $500,000 restitution order imposed on Stanley neither exceeded the restitution ceiling nor authorized a double recovery for the victim.

AFFIRMED.

¶2002-5577

Thurston P. BELL, PLAINTIFF v. Charles ROSSOTTI, ET AL., DEFENDANTS. U.S. District Court, Middle Dist. of Pennsylvania, (DC PA) No. CIV.A. 1:CV-01-1725, Sept. 30, 2002. Decision for Govt.

1. Actions against IRS employees—constitutional claims—damages—Anti-Injunction and Declaratory Judgment Acts. Pro se taxpayer's complaint against IRS employees to enjoin them from investigating his potentially abusive tax website and keep them from physically approaching him or his family was dismissed: AIA barred injunctive relief where investigation and any IRS employee contact with taxpayer related to potential tax assessment or collection; and investigation implicated no deprivation of property leading to any irreparable harm. Similarly, DJA barred taxpayer's request for declaration that 1st Amendment protected his tax law pronouncements since 1st Amendment argument was inextricably intertwined with tax law claims. And, taxpayer's related damages claims failed where employees couldn't be sued in their official capacities and *Bivens* relief from their alleged individual constitutional violations wasn't available. *Reference:* United States Tax Reporter ¶74,215.05(5); 74,217.502(5); 74,335.01(7); 76,557.53(30). IRC §7421; 7433.

United States District Court, M.D. Pennsylvania,

MEMORANDUM AND ORDER

KANE, District J.

Before this Court is Defendants' motion to dismiss and/or for summary judgment (Doc. No. 12). The motion has been fully briefed, and is ripe for disposition. For the reasons that follow, the motion will be granted.

I. Background

On September 10, 2001, Plaintiff Thurston Bell, proceeding pro se, filed a complaint against IRS Commissioner Charles Rossotti in his official capacity, and IRS agents Chris Roginsky and Kathleen Lennon in their official and individual capacities. In his suit, Bell seeks (1) a declaratory judgment that his websites and their content are protected by the First Amendment to the United States Constitution, (2) an injunction against Defendants preventing them from approaching him and his family, and (3) compensatory damages in the amount of $30,000 and punitive damages of $1,000,000 from each of the Defendants sued in their individual capacities for violations of his First Amendment rights.

Bell founded the National Institute for Taxation Education (''NITE'') in November, 1997. Through NITE, Plaintiff owns and maintains two websites which expound Plaintiff's views of tax law: http://www.nite.org and http://www.tax-gate.com. Plaintiff asserts that the content on these websites is protected by the First Amendment. In addition to providing the information on the websites, Plaintiff assists NITE members by drafting letters on their behalf and attending meetings with IRS personnel.

Ultimately, Plaintiff's complaint alleges that an IRS investigation of his websites violates his First Amendment rights. However, the complaint first details a number of alleged wrongs to others that have heightened Plaintiff's fear of imminent IRS action against him.[1] These events include raiding the business office of Plaintiff's former associate, Nick Jesson, and the investigation of Plaintiff's associates Darlow Thomas Madge and Hal Hearn. Plaintiff offers these events as evidence of his fear that the IRS will undertake similar actions against him.

[1] Indeed, the Untied States has filed suit against Mr. Bell, Docket No. 1:CV-01-2159.

On September 4, 2001, Plaintiff received a letter from the IRS stating that he and his websites were under investigation for possible violation of 26 U.S.C. §§ 6700[2] and 7408.[3] The letter stated that a possible consequence of the investigation would be an injunction. Furthermore, the letter notified Plaintiff that he was required to cooperate with the investigation. Plaintiff asserts that the IRS investigative activity violates his First Amendment right to free speech.

II. Discussion

A. Standard of Review

The Court will consider the pending motion as a motion to dismiss. Defendants move to dismiss Plaintiff's complaint under Fed.R.Civ.P. 12(b)(1) and 12(b)(6). A Rule 12(b)(1) motion may be treated either as a facial or factual challenge to the court's subject matter jurisdiction. Gould Electronics, Inc. v. United States, 220 F.3d 169, 177 (3d Cir.2000). When reviewing a facial attack, the Court considers only the allegations in the complaint, documents referenced therein, and documents attached thereto. Id. These must be read in the light most favorable to the plaintiff. Id. Only when reviewing a factual attack may the court consider evidence outside the pleadings. Id.

As with a Rule 12(b)(1) facial attack, when considering a Rule 12(b)(6) motion to dismiss, the Court considers only the allegations within the complaint, any documents referred to in the complaint, and documents attached to the complaint. "A motion to dismiss pursuant to Rule 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir.1997) (internal citation omitted). Therefore, when analyzing Defendants' Motion to Dismiss, this Court construes all facts alleged in the complaint as true, and draws all reasonable inferences in the plaintiff's favor. Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 140 F.3d 478 (3d Cir.1998). This Court will only grant Defendants' Motion to Dismiss if there is clearly no remedy available for the Plaintiff's claim, or if Plaintiff has no right or power to assert the claim. Melo-Sonics Corp. v. Cropp, 342 F.2d 856, 859 (3d Cir.1965).

B. Injunction

[1] On the face of his complaint, Plaintiff seeks to enjoin the IRS investigation of whether his websites violate United States law. Plaintiff also seeks an injunction prohibiting Defendant Commissioner and all of his agents (defined as those executing the orders of Defendant Commissioner or operating in any form of cooperation or collusion) from physically approaching Plaintiff, His Family, and the Offices of NITE, at a distance of less than 300 feet, without prior approval from Plaintiff or non ex parte order of this Court. Compl, p. 3.

The Tax Anti-injunction Act, however, states, with certain exceptions not applicable here, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). Information gathering that may lead to the assessment or collection of taxes falls within this tax anti-injunction provision. Linn v.

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2 Section 6700 of the Revenue Code, captioned "Promoting Abusive Tax Shelters, Etc.," provides in pertinent part:

Any person who -

(1)(A) organizes (or assists in the organization of)--

(ii) a partnership or other entity,

(ii) any investment plan or arrangement, or (ii) any other plan or arrangement, or

(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and

(2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale)--

(B) a statement with respect to the allowability of any deduction or credit, the excludability or any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or

(B) a gross valuation statement as to any material matter,

shall pay, with respect to each activity described in paragraph (1), a penalty equal to $1,000 or, if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity . . . .

3 Section 7408 of the Revenue Code gives the United States the authority to seek to enjoin a person from "further engaging in conduct subject to penalty under section 6700 . . . ." 26 U.S.C. § 7408.

Chivatero, 714 F.2d 1278, 1281–82 [52 AFTR 2d 83-6052] (5th Cir.1983). Since the IRS investigation into Plaintiff's websites may ultimately lead to the assessment and collection of taxes from individuals using Plaintiff's methods, the investigation falls under this anti-injunction provision. This Court is prohibited from entering any injunction against the IRS and its agents for allegedly harassing activities when those activities fall within the scope of a valid investigation. Black v. United States, 534 F.2d 524, 526–27 [37 AFTR 2d 76-1312] (2d Cir.1976); Graham v. United States, 528 F.Supp. 933 [50 AFTR 2d 82-5007] (E.D.Pa.1981).

Plaintiff argues that his case fits into a narrow, judicially recognized, exception to the anti-injunction provision. A court may enter an injunction against the collection of any tax already assessed if (1) it is clear that under no circumstances could the government ultimately prevail and (2) the taxpayer shows that "'equity jurisdiction' otherwise exists, i.e., the taxpayer shows that he would otherwise suffer irreparable injury." C.I.R. v. Shapiro, 424 U.S. 614, 627 [37 AFTR 2d 76-959] (1976); Sokolow v. United States, 169 F.3d 663 [83 AFTR 2d 99-1062] (9th Cir.1999). To show irreparable injury, the taxpayer must "plead and prove facts establishing that his remedy in the Tax Court or in a refund suit is inadequate to repair any injury that might be caused by an erroneous assessment or collection of an asserted tax liability." Id. at 628. This extremely narrow exception to the Tax Anti-injunction act is applicable to situations where irreparable injury may result from a deprivation of property pending final adjudication of the rights of the parties. Id. The exception was created because the "Due Process Clause requires that the party whose property is taken be given an opportunity for some kind of predeprivation or prompt post-deprivation hearing at which some showing of the probable validity of the deprivation must be made." Id.

Plaintiff, however, does not present a scenario where this narrow exception would apply since the government has not assessed a tax penalty against the Plaintiff and therefore has nothing to collect. Plaintiff is attempting to enjoin the IRS from an investigation that may lead to the assessment or collection of taxes from him or from others using the information Plaintiff provides on his websites and to NITE members. He is not requesting an injunction to prevent the collection of taxes already assessed. Plaintiff, therefore, can not plead the irreparable harm created by the depravation of property the exception requires since there has been no attempt to collect any taxes in this case.

It is clear that the anti-injunction provision of the Internal Revenue Code applies here. Where the Anti-injunction Act applies, and the cause of action does not fall into one of the statutory or judicially recognized exceptions, the claim must be dismissed for lack of subject matter jurisdiction. Sokolow, 109 F.3d at 665. Therefore, Plaintiff's claim for injunctive relief will be dismissed pursuant to Fed.R.Civ.P. 12(b)(1).

C. Declaratory Judgment

Plaintiff asks this Court to declare "that his individual speech as well as forms thereof posted on [his websites] is protected by the First Amendment to the United States Constitution guaranty of Free Speech and does not violate any provisions of the Internal Revenue Code or Treasury Regulations ...." Compl., p. 2. However, this Court does not have jurisdiction over Plaintiff's request for declaratory judgment. The Declaratory Judgment Act grants federal courts jurisdiction to hear declaratory judgment actions:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judg-

ment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (emphasis added). It is clear from the face of the statute that this Court cannot enter judgment with respect to Plaintiff's assertions of tax law as they appear on his websites. Gattuso v. Pecorella, 733 F.2d 709 [54 AFTR 2d 84-5146] (9th Cir.1984) (discussing inapplicability of Declaratory Judgment Act to actions relating to federal taxes).

Plaintiff is also ostensibly seeking declaratory judgment with respect to his First Amendment claims. However, this is not the proper forum for this claim. The question of whether the content of Plaintiff's website is protected by the First Amendment is inextricably intertwined with the question of whether Plaintiff's website and the services it advertises violate the Internal Revenue Code. While not deciding the nature of Plaintiff's speech here, the Court notes that the First Amendment does not protect "commercial speech which promotes an illegal activity or transaction." United States v. White, 769 F.2d 511, 516 [56 AFTR 2d 85-6430] (8th Cir.1985); United States v. Kaun, 827 F.2d 1144, 1165 [60 AFTR 2d 87-5623] (5th Cir.1985); Nat'l Commodity and Barter Ass'n v. United States, 843 F.Supp. 655, 665 [73 AFTR 2d 94-1388] (D.Col.1993) aff'd, 42 F.3d 1406 [74 AFTR 2d 94-7385] (10th Cir.1994). Accordingly, if the tax advice posted Plaintiff's websites is legal, he may be entitled to First Amendment protections. If, however, the tax advice posted on Plaintiff's websites is commercial speech advocating actions that violate the Internal Revenue Code, he would not enjoy the protections of the First Amendment. Plaintiff's First Amendment claims are, therefore, inextricably intertwined with his tax law claims, and this Court cannot decide the issues separately. Any declaratory judgment in this case would amount to a judgment "with respect to Federal Taxes" and is therefore barred by the Declaratory Judgment Act.[4] 28 U.S.C. § 2201(a).

Plaintiff's claim for declaratory judgment with respect to his assertion of tax law is barred by the Declaratory Judgement Act. Furthermore, Plaintiff's request for declaratory judgment on his First Amendment claim is inextricably intertwined with the Plaintiff's assertion of his tax law claims and cannot be decided separately. Therefore, the Court will dismiss Plaintiff's claims for declaratory judgment pursuant to Fed.R.Civ.P. 12(b)(1).

D. Compensatory and Punitive Damages

1. Claims against Defendants in their official capacities

"It is axiomatic that the United Sates may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212 (1983). Sovereign immunity is not defeated by the act of naming officers and employees of the United States as defendants in a suit that properly is against the United States. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 688 (1949); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 [56 AFTR 2d 85-5567] (9th Cir.1985). It is well-settled that "a suit against IRS employees in their official capacity is essentially a suit against the United States." Gilbert, 756 F.2d at 1458. Absent express statutory consent to sue, this Court must dismiss the claims barred by sovereign immunity. Id.; see also United States v. Shaw, 309 U.S. 495, 500–01 (1940); Radin v.. United States, 699 F.2d 681, 684 (4th Cir.1983). There is no applicable express statutory consent to sue for Plaintiff's claims. Accordingly, this Court has no jurisdiction over Defendants in their official capacities. The Court, therefore, will dismiss the claims brought against Defendants in their official capacities pursuant to Fed.R.Civ.P. 12(b)(1).

2. Claims against Roginsky and Lennon in their individual capacities

Plaintiff has also sued Roginsky and Lennon in their individual capacities for

[4] This does not preclude this Court from addressing Plaintiff's First Amendment claims altogether. Plaintiff will have the opportunity to adjudicate his First Amendment claims fully and fairly in the Government's case, at which time the Court will determine the nature of Plaintiff's websites and whether the content is protected by the First Amendment.

violations of his First Amendment right through their investigation of his websites under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics. 403 U.S. 388 (1971). Federal officers, operating under the color of federal law, can be sued for monetary damages for violations of constitutional rights. See Bivens, 403 U.S. 388 (1971).

Plaintiff, however, has failed to state a Bivens claim for damages. A Bivens action "should not be inferred to permit suits against IRS agents accused of violating a taxpayer's constitutional rights in the course of making a tax assessment." Shreiber v. Mastrogiovanni, 214 F.3d 148, 153 [85 AFTR 2d 2000-1958] (3d Cir.2000).[5] The reasoning behind these cases flows directly from Bivens and its progeny. In Bivens, the Supreme Court held that an individual alleging violation of Fourth Amendment rights could sustain a complaint for money damages against police officers. Bivens, 403 U.S. at 397. The Supreme Court has stated that one of the factors to consider when determining whether to permit a Bivens action is whether Congress provided an alternative remedy. Schweiker v. Chilicky, 487 U.S. 412, 420 (1988). "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional Bivens remedies." Id. at 423. In the tax arena, Congress has pro-vided meaningful safeguards and remedies. As the Third Circuit explained:

> Congress chose to provide certain remedies, and not others, as part of the complex statutory scheme which regulates the relationship between the IRS and taxpayers. We will not create a remedy where Congress has chosen not to.

Shreiber, 214 F.3d at 152–53.

Therefore, no Bivens action should be implied against agents of the IRS in the course of investigating and making tax assessments. Shreiber, 214 F.3d at 152–53 (3d Cir.2000).

Plaintiff argues that a Bivens action should exist since the remedial mechanisms provided by tax law are inadequate remedies for his First Amendment claims. The Third Circuit has addressed this concern. In Shreiber, the Third Circuit noted that in even in a case where a plaintiff cannot recover completely absent a Bivens claim, the Supreme Court has explained that:

> where Congress has provided meaningful remedies we should exercise extreme caution in creating additional relief. As with the administration of welfare benefits, the organization of the tax system, and the balancing of governmental efficiency and individual rights, is best left to Congress.

Schweiker v. Chilicky, 487 U.S. 412 at 429).

Since it is clear that a Bivens action for alleged violations of constitutional rights should not be inferred against IRS agents, Plaintiff has failed to state a Bivens claim. The Court will, therefore, dismiss his claims pursuant to Fed.R.Civ.P. 12(b)(6).

III. ORDER

AND NOW, therefore, IT IS ORDERED THAT Defendant's motion to dismiss (Doc. No. 12) is GRANTED. All other pending motions are DENIED as moot. The Clerk of Court shall close the file.

¶2002-5578

William H. JOHNSON, JR., Dorothy Battle Johnson, Executrix, PLAINTIFF v. THE UNITED STATES, DEFENDANT. United States Court of Federal Claims, (Ct Fed Cl) No. 99-936T, Oct. 25, 2002. Year 1986. Decision for Govt.

1. Actions against U.S.—contract claims—account stated—refunds—limi-

[5] see also Fishburn v. Brown, 125 F.3d 979, 982–83 [80 AFTR 2d 97-6722] (6th Cir.1997); Nat'l Commodity & Barter Ass'n. v. Archer, 31 F.3d 1521, 1532 [74 AFTR 2d 94-5709] (10th Cir.1994); Vennes v. Unknown Number of Unidentified Agents, 26 F.3d 1448, 1453–54 [74 AFTR 2d 94-5144] (8th Cir.1994); McMillen v. U.S. Dept. of Treasury, 960 F.2d 187, 190–91 [69 AFTR 2d 92-1067] (1st Cir.1991) (dicta) (per curiam); Wages v. I.R.S., 915 F.2d 1230, 1235 (9th Cir.1990); Cameron v. I.R.S., 773 F.2d 126, 129–30 [56 AFTR 2d 85-5851].

tations periods. Executrix's Court of Federal Claims contract complaint against govt. to recover decedent's time-barred income tax refund was dismissed: IRC §6511's time bar applied to contract claim just as it did to refund claim since contract claim was also tax-based; and IRS Assoc. Chief of Appeals' letter stating that ''refund claim was allowed in full'' wasn't binding since Appeals Officer, although authorized to enter agreement on IRS's behalf, had no authority to approve refund that was already time-barred. Also, apparent harshness of decision was irrelevant; account stated claim failed on same reasoning; equitable tolling didn't apply where law was clear; and taxpayers' reliance on pending IRC §6511(h) legislation was misplaced. *Reference:* United States Tax Reporter ¶65,115.04(60); 65,115.04(75); 74,336.510(5). IRC §6511.

Ronald E. Krieger, New York, New York, attorney of record for plaintiff.
Mary M. Abate, Washington, D.C., with whom was Assistant Attorney General Eileen J. O'Connor, for defendant.

United States Court of Federal Claims,

OPINION

GIBSON, Senior J.

INTRODUCTION

This case is before the court on cross-motions for summary judgment. Plaintiff is the executrix of the taxpayer, William H. Johnson, Jr., and alleges that an implied-in-fact contract arose when the IRS informed her by letter that--''Your [income tax refund] claim has been allowed in full.'' The undisputed amount at issue, approximately $30,000, collected by the government from William H. Johnson, Jr. between August 31, 1990 and December 2, 1991, was held to have been time-barred under a tax refund claim in the U.S. District Court for the Southern District of New York,[1] pursuant to 26 U.S.C. § 6511(b)(2)(B).[2] Although plaintiff's claim is here before us on a contract the-ory, any recovery thereupon must also be constrained by the time-limiting statutes governing tax refund claims given that the very subject matter of the alleged contract is, in fact, a tax refund.[3]

Based upon the foregoing, and for reasons discussed in detail below, plaintiff's motion for summary judgment is hereby DENIED, and her contract claim is dismissed for failure to state a claim upon which relief can be granted. Defendant's cross-motion for summary judgment is hereby GRANTED.

JURISDICTION

The Court of Federal Claims has jurisdiction, pursuant to 28 U.S.C. § 1491(a)(1), to hear claims against the United States that are founded upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States. Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071, 1078 (Fed.Cir.2001).

FACTUAL BACKGROUND

This case comes before us by way of transfer, pursuant to 28 U.S.C. § 1631, from the U.S. District Court for the Southern District of New York, where Judge Stein best characterized the facts herein as being ''both largely undisputed and relatively convoluted.''[4] That court commendably charted the operative course of events and the cause of action before it. We shall endeavor to do likewise.

The taxpayer, William H. Johnson, Jr., was a retired New York City police officer who failed to timely file a federal individual income tax return Form 1040 for the 1986 tax year. As a result, in November 1989, the Internal Revenue Service (''IRS'') prepared a ''substitute'' 1986 tax

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[1] The district court dismissed plaintiff's tax refund claim for periods preceding December 3, 1991, for lack of jurisdiction under 28 U.S.C. § 1346, finding that said period was time-barred by 26 U.S.C. § 6511.

[2] ''Limit where claim not filed within 3-year period.If the claim was not filed within such 3-year period [from the time the return was filed], the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.'' 26 U.S.C. § 6511(b)(2)(B).

[3] See Carver v. United States, 27 F.Supp. 608, 614 [23 AFTR 508] (Ct.Cl.1939).

[4] Johnson v. United States, 1999 WL 493341, at 1 (S.D.N.Y.1999).

return on behalf of Mr. Johnson based upon his estimated income.[5] In March 1990, the IRS issued a notice of deficiency reflecting a total tax liability of $47,249.63 based upon its calculations in the substitute tax return.[6] To satisfy said deficiency, the IRS began collecting payments in equal installments of $499.68 from the taxpayer, Mr. Johnson, where some sixty-one (61) installment payments and three (3) levies were collected in all between 1988 and 1995, aggregating $60,652.63.[7]

Apparently Mr. Johnson had been ill for several years before his death in November 1994, and never filed on his own behalf a 1986 tax return. In January 1996, plaintiff, Dorothy Battle Johnson, his spouse and executrix, caused a 1986 Form 1040 individual tax return to be filed on Mr. Johnson's behalf, which claimed a total tax liability of $3,086 for subject tax year, and was duly accepted by the IRS.[8] Notwithstanding Mr. Johnson's prior failure to timely file a 1986 tax return, he purportedly did file an administrative refund claim on or about December 3, 1993, in the amount of $46,500.72.[9] That refund claim remained outstanding until May 28, 1996, when the IRS informed plaintiff by letter that it had disallowed the claim on the grounds that said claim had not been timely filed.

In June 1996, plaintiff appealed the IRS decision to disallow the taxpayer's December 1993 claim. Therein, the plaintiff relied upon the equitable tolling doctrine[10] as the legal basis for the appeal. The Manhattan appeals division, in turn, based its decision to allow plaintiff's claim "in full" upon said doctrine. Evidently, the decision, by memorandum dated November 6, 1997, was recommended by the appeals officer, Phyllis Cayenne (signed and dated by her on October 20, 1997), and approved by the associate chief, Howard Kahn (signed and dated by him on October 21, 1997). Following thereon, an IRS Form Letter 913(RO), dated November 6, 1997, was sent to plaintiff notifying her that the December 1993 claim (i.e., the subject of the appeal) "has been allowed in full."

Subsequent to that November 1997 decision to allow plaintiff's claim in full, the Appeals Division at some point reversed its decision.[11] For reasons not stated, the

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5 "When a taxpayer fails to file a return and refuses [or otherwise fails] to disclose relevant information to the IRS [respecting a given taxable year], the Internal Revenue Code authorizes the agency to make and execute a substitute return for the taxpayer which 'shall be prima facie good and sufficient for all legal purposes.'" United States v. Silkman, 220 F.3d 935, 936 [86 AFTR 2d 2000-5330] (8th Cir.2000) (citing 26 U.S.C. § 6020(b)(2)). The IRS thereby estimated the taxpayer's gross income to be $77,039, of which $58,233 was attributed to the selling price of two mutual funds (without any adjustment for cost bases).

6 The $47,249.63 sum was comprised of $24,589 in taxes owed for 1986 plus $22,660.63 in interest and penalties.

7 Sixty-one (61) installment payments of $499.68 totaled $30,480.48, and three (3) levies at $657.69, $21,358.71 and $8,155.75 amounted to $30,172.15.

8 This (late) return reflected that the gross proceeds from the two (2) mutual funds sold at $13,956 and $44,277, had corresponding cost bases of $13,008 and $41,773, respectively, thereby significantly reducing the taxpayer's 1986 tax liability from $24,589 as estimated by the IRS in the 1989 substitute tax return. Accepting that the taxpayer's true tax liability for 1986 was in fact $3,086, the IRS added $1,917 in interest and penalties for a total obligation of $5,003. The government then applied $4,996.80 (representing the first ten (10) installment payments collected from July 5, 1988 to July 31, 1990) and a tax withholding credit for the 1986 year of $99, to satisfy in full the taxpayer's 1986 account. Remaining thereafter was a total of $55,655.83 in excess payments which had been collected by the IRS for the 1986 tax year.

9 The amount of this initial claim comprises monies collected from July 5, 1988 through November 4, 1993. The difference between the total amount collected ($60,652.63) and the amount of the initial refund claim ($46,500.72), which is not in dispute ($14,151.91), was by all indications transferred/credited to the taxpayer's 1987 tax year. Between July 5, 1988 and June 29, 1989, five (5) payments of $499.68 were (collected by the IRS and) credited to the taxpayer's 1986 liability account prior to the March 1990 IRS deficiency notice. Because the taxpayer's pre-1986 tax records were unavailable (i.e., lost by the government), it is unclear why those collections occurred prior to the deficiency notice. Those payments have been described by plaintiff as "illegal seizures," as they were allegedly obtained before any assessment of tax liability had been ascribed to the taxpayer for 1986. Defendant postulates that those payments were made in conjunction with a pre-existing payment agreement with the taxpayer, possibly for a previous tax year (e.g., 1975). We do not find the question raised by the plaintiff respecting those five (5) payments to be material or probative.

10 The equitable tolling doctrine, as applicable to the tax code, is described in pertinent part as follows: "Running of periods of limitation suspended while taxpayer is unable to manage financial affairs due to a disability.-

(1) In general.In the case of an individual, the running of the periods specified in subsections (a), (b), and (c) shall be suspended during any period of such individual's life that such individual is financially disabled.

(2) Financially disabled.-

(A) In general.For purposes of paragraph (1), an individual is financially disabled if such individual is unable to manage his financial affairs by reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. An individual shall not be considered to have such an impairment unless proof of the existence thereof is furnished in such form and manner as the Secretary may require.'

26 U.S.C. § 6511(h) (Supp.1998 – 2002).

11 It did so, presumably, because it realized that certain amounts inclusive in the claim period were outside of the statute of limitations. See 28 U.S.C. § 6511(a).

government's apparent reversal was unbeknownst to plaintiff until some six (6) months later when plaintiff's counsel inquired of the appeals officer, Ms. Cayenne, about the alleged anticipated "full" payment. Only then did Ms. Cayenne, or any IRS representative, explicitly inform plaintiff's counsel that no such payment "in full" would be forthcoming pursuant to the November 1997 decision and letter.

Immediately acting thereupon, plaintiff filed suit in the U.S. District Court for the Southern District of New York, on May 4, 1998, "for a refund of moneys taken pursuant to 28 U.S.C. Section 1346, whereby federal district courts assert jurisdiction to recover any Internal Revenue tax alleged to have been erroneously or illegally assessed." Pl. Compl. (dist.ct.) at 1. Plaintiff further averred, in the initial complaint filed in the U.S. District Court for the Southern District of New York, that "[o]nce the Appeals officer submits her findings to the Associate Chief and he signs off on the case, the Associate Chief has bound the IRS to a settlement of the issue." Pl. Comp. (dist.ct.) at 5 (citing Gardner v. Commissioner, 75 T.C. 475 (1980)) (emphasis added).

In a Statement of Account dated May 25, 1998, defendant (IRS) advised plaintiff that $4,996 plus statutory interest was due to plaintiff, representing in part the amounts paid within three years of the January 1996 filing of the 1986 delinquent tax return/claim for refund. For reasons not in dispute before this court, the aforementioned amount plus an additional $9,156 (the balance of payments made during that three-year period) was subsequently transferred from the taxpayer's 1986 account and credited to the taxpayer's 1987 tax year. Then, following a pre-trial conference before Magistrate Judge Buchwald, defendant decided that the period within two years of the December 1993 administrative refund claim was also refundable to the taxpayer, and therefore issue a refund check in the amount of $18,041.93 to plaintiff.[12]

Given the foregoing, the District Court determined that the only amount remaining before it, approximately $30,000,[13] was collected by the government during periods prior to December 3, 1991. That court held said period to be outside of the statute of limitations (26 U.S.C. § 6511(b)(2)(B)), thereby depriving that court of subject matter jurisdiction. For that reason, the District Court dismissed the balance of the refund claim. Finding that plaintiff's claim partly sounded in contract, the District Court transferred the case to this court, pursuant to 28 U.S.C. § 1631, "in the interest of justice."

DISCUSSION

Standard of Review

[1] Summary judgment is proper, pursuant to RCFC 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." On summary judgment, the inferences to be drawn from the underlying facts contained in such materials must be viewed in a light most favorable to the party opposing the motion. Id.

The trial judge's primary function then is not to weigh the evidence and determine the truth of the matter, but rather it is to determine whether there are genuine issues of material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). The substantive law determines which facts are material, such that only those operative facts that could affect the outcome of a suit can properly preclude summary judgment. Id. at 248.

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12 On or about January 21, 1999, the IRS issued a refund check in the amount of $18,041.93, whereby $11,492.64 depicted overpaid taxes, and $6,549.29 represented statutory interest.

13 To retrace the flow of funds: $60,652.63 was collected from the taxpayer between 1988 and 1995; $4,996.80 (collected between July 5, 1988 and July 31, 1990) was applied to the taxpayer's 1986 tax year according to the tax return filed in January 1996; $11,492.64 (collected between December 2, 1991 and November 4, 1993) was refunded to plaintiff executrix, by check dated January 21, 1999; $14,151.91 (collected between December 3, 1993 and December 8, 1995) was transferred/credited to the taxpayer's 1987 tax year; thus leaving a remaining (un-refunded) balance of $30,011.28 (collected by the IRS between August 31, 1990 and December 2, 1991) which was allegedly transferred to the IRS's excess collections account.

The Merits

As stated above, plaintiff brings her cause of action in this court under a contract theory after being time-barred pursuant to 26 U.S.C. § 6511 in U.S. District Court for the Southern District of New York, on a tax refund claim. Notwithstanding plaintiff's alternative theory of recovery, the contract claim here at bar must also be dismissed (for failure to state a clam upon which relief can be granted). The reason for such result is that the same statute of limitation (i.e., § 6511) that proved fatal to plaintiff's ''full'' refund claim in the District Court also applies in this court due to the tax-based subject matter of the alleged contract claim.

Neither the amount of contract damages that plaintiff seeks, nor the time period during which the claim arose is disputed. Plaintiff effectively stipulates to both operative facts, to wit, that approximately $30,000 was collected by the IRS between August 31, 1990 and December 2, 1991, the latter being the more critical fact. Pl. Mtn. at 27. Finding, therefore, that no genuine issues of material fact are present, we proceed to determine which party, if either, is entitled to summary judgment as a matter of law.

This case, at the threshold, is about the basic rules of contracting with the government. The pivotal question here is--whether the government in fact can be bound in contract when a government agent, having the requisite authority to bind the government, enters into an agreement in contravention to relevant operating statutes and/or regulations. We answer that question in the negative.

Plaintiff contends that an implied-in-fact contract was formed with the IRS when Associate Chief Kahn signed and issued IRS Form Letter 913(RO) indicating that: ''Your claim has been allowed in full.'' In proof of its position, plaintiff sets forth the basic elements of (implied-in-fact) contract formation, and avers that they have been met. Alternatively, plaintiff posits that the subject letter serves as an ''account stated,'' having equal binding authority on the Government to perform a promise. Although the foregoing contract theories are for all intents and purposes mutually inclusive, we will consider each one separately.

Implied-in-Fact Contract

To establish an implied-in-fact contract with the government, there must be: (1) mutuality of intent to contract, (2) consideration, (3) lack of ambiguity of an offer and acceptance, and (4) actual authority of the government agent to bind the government. City of El Centro v. United States, 922 F.2d 816, 820 (Fed.Cir.1990). Determining the existence of the first three elements, while disputed by the parties, is all but secondary to the more critical fourth element, to wit, whether the government agent had actual authority to bind the government. Without the existence of actual authority to bind the government, irrefutably, establishing the other three elements would be a mere exercise in futility. We therefore begin this analysis by examining the fourth element, first.

While the government agent here is an associate chief appeals officer in the hierarchy of the IRS, we look, nevertheless, to the operative federal tax statutes and/or regulations to find authority to bind the government in contract. Pursuant to 26 C.F.R. § 601.106(a)(1)(ii), the [IRS] Appeals Division has the final and exclusive jurisdiction to bind the government to its decision; and both the chief and associate chief have the authority to approve final settlements. See Gardner v. Commissioner, 75 T.C. 475, 478–79 (1980). Based upon the foregoing, the office or rank of associate chief undoubtedly holds the requisite authority to bind the government, but that is not the end of our analysis. The next inquiry is whether the associate chief in light of the facts in this case had the actual authority to bind the government.

Federal Crop Ins. Corp. v. Merrill[14] states an all important, if not paramount, rule regarding contracting with the government:

[14] 332 U.S. 380, 384 (1947) (emphasis added).

> ''Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority . . . . And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.''

In Federal Crop, the respondents were farmers who sought to insure their wheat crop through a government-owned crop insurance corporation created by the Federal Crop Insurance Act. Acting as an agent for the insurance corporation, the local agricultural committee advised the farmers that their spring wheat reseeded on winter wheat acreage was insurable. Upon later filing a claim that their wheat crop had been destroyed by drought, the respondents' claim was denied because the governing regulations precluded coverage of reseeded wheat. The respondents argued that they had no actual knowledge of the regulations, and that they reasonably relied upon the representations made by the government agent.

The U.S. Supreme Court reversed the decision of the Idaho State Supreme court, finding:

> ''If the Federal Crop Insurance Act had by explicit language prohibited the insurance of spring wheat which is reseeded on winter wheat acreage, the ignorance of such a restriction, either by the respondents or the Corporation's agent, would be immaterial and recovery could not be had against the Corporation for loss of such reseeded wheat.''

Id. at 384.

> ''Accordingly, the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance.''

Id. at 385.

In the case at bar, plaintiff alleges that a binding implied-in-fact contract was formed when the IRS Associate Chief of the Appeals Division informed plaintiff that her ''claim has been allowed in full,'' even though the tax refund claim period is plainly outside of the limitations period(s) permitted by statute. The operative statute here is 26 U.S.C. § 6511-Limitations on credit or refund, which states in pertinent part:

> ''(a) Period of limitation on filing claim.-
>
> Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.'
>
> ''(b) Limitation on allowance of credits and refunds.-
>
> (1) Filing of claim within prescribed period.No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.
>
> (2) Limit on amount of credit or refund.-
>
> (A) Limit where claim filed within 3-year period.If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return.
>
> (B) Limit where claim not filed within 3-year period.If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.'

It is interesting to note how the IRS applied 26 U.S.C. § 6511 to the two claims for refund filed with respect to the 1986 taxable year in determining the amounts it previously refunded. First, with respect to the claim for refund filed in January 1996 (treating the delinquently-filed 1986 return also as a claim for refund), the IRS applied § 6511(b)(2)(A) to find that the three-year period from January 1993 through January 1996 was refundable to the taxpayer, and therefore returned $14,151.91 in the form of a transfer/credit to the taxpayer's 1987 tax year.[15]

Next, it reconsidered the December 1993 administrative refund claim pursuant to s 6511(b)(2)(B), and refunded another $11,492.64 plus $6,549.29 in interest, representing the two-year period immediately preceding that claim, to wit, the amount collected between December 3, 1991 and December 3, 1993.

The IRS's total collections from the taxpayer respecting the 1986 taxable year was approximately $60,652.63. At this posture, the total amount refunded/credited to the taxpayer is only $30,641.35. Now, the operative issue is--whether the remaining $30,011.28, which was collected by the IRS between August 31, 1990 and December 2, 1991, falls outside of any allowable refund period pursuant to § 6511. As admitted by plaintiff, and concluded by the U.S. District Court for the Southern District of New York, it does.[16]

To be sure, a plain reading of § 6511(a) clearly delineates the parameters for the timely filing of refund claims which provides for recovery under two prongs only: "[i] within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or [ii] if no return was filed by the taxpayer, within 2 years from the time the tax was paid." (emphasis added). When a claim for refund comes under the purview of the first prong, subsection 6511(b)(2)(A) is applied to ascertain the proper amount of recovery. And, systematically, if a refund claim is filed pursuant to the second prong, subsection 6511(b)(2)(B) correspondingly conveys the appropriate recoverable amount.

As explained supra, the IRS refunded/credited monies for the benefit of the taxpayer under both prongs of § 6511(a) (in correlation with the corresponding subsections for recovery amounts). That is to say, the later of the periods in the first prong--three years from the filing of the delinquent 1986 tax return in January 1996, as well as the two-year period immediately preceding the December 1993 administrative claim in the second prong, have been repaid. Therefore, having returned, refunded, or otherwise credited all said funds pursuant to § 6511(a), subsection 6511(b) indisputably states that: "No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection [6511](a)." Stated differently, plaintiff (ergo, the estate of the taxpayer) has fully recovered any and all monies permitted by § 6511(a)--the operative limiting statute for refund claims.

Plaintiff here at bar, like the respondents in Federal Crop, is arguing effectual reliance upon the representations made by a government agent, rather than a lawful entitlement pursuant to the tax code. And again, in the case before us, just as in Federal Crop, the government agent, although having the apparent authority to enter into agreements (on behalf of the government), exceeded the scope of that authority when he ostensibly granted approval for the refund of monies when some portion of said refund was clearly time-barred as a matter of law pursuant to § 6511.

Plaintiff would have this court to find that the ordinary authority given to the associate chief operates to transcend all relevant laws and regulations insofar as making determinations regarding tax refund claims. No law, however, brought to our attention, supports plaintiff's assertion.

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[15] The totality of the amount transferred, $14,151.91, occurred in separate installments whereby the record indicates that $4,996 was credited per the May 1998 Statement of Account, and an additional $9,156 was credited per the IRS transcript of the taxpayer's 1986 account. (Note: The $4,996 described herein is not the same as the $4,996.80 that was previously applied to the taxpayer's actual 1986 tax liability. See supra text accompanying note 13).

[16] Johnson, 1999 WL 493341, at 3.

Instead, we must follow the Federal Circuit's holding in Total Medical Management, Inc. v. United States[17] that the government ''is not bound by its agents acting beyond their authority and contrary to regulation.''[18] There, an agent for the Army (having the authority to contract) en-tered into memoranda of understanding (MOUs) with the plaintiff to provide medi-cal services to civilian dependants of mem-bers of the uniformed services. According to the payment terms of the agreements, the Army was to reimburse plaintiff at a higher rate than was permitted by the applicable regulations controlling said form of reimbursements. The Federal Circuit found that the MOUs were ''plainly illegal,'' and therefore ''void ab initio.''[19] Hence, the plaintiff in Total Medical could not recover amounts in excess of that permissible by law.

Unquestionably, the facts in Total Medical, supra, are analogous to those in the case at bar. Assuming arguendo that an implied contract could result from the IRS Form letter, the government cannot be ''bound by its agents acting beyond their authority and contrary to [law].'' It is clear that the IRS based its decision to allow the refund claim on the equitable tolling doctrine, that is, § 6511(h)[20] of the tax code. It is also clear that that law was non-existent at the time of the November 1997 decision wherein the associate chief appeals officer advised plaintiff that the ''claim has been allowed in full.'' Moreover, when s 6511(h) became law in July 1998, it was effective prospectively and clearly not retroactively. Prior to the enactment of s 6511(h), the law was abundantly clear--''Congress did not intend the 'equitable tolling' doctrine to apply to § 6511's time limitations.'' United States v. Brockamp, 519 U.S. 347, 354 [79 AFTR 2d 97-986] (1997).

Plaintiff insists that the weight of a combination of facts, that is, (1) the language of the November 6, 1997 IRS letter stating that the ''claim has been allowed in full,'' (2) the associate chief's binding authority, (3) the IRS's mission to settle claims without litigation, and (4) the President's charge to Congress to create legislation permitting equitable tolling in the tax code, all coalesce to entitle plaintiff to recovery under the theory espoused herein. We find that they do not.

This court recognizes that the forfeiture of roughly $30,000 is a harsh result on these facts, just as the Federal Crop Court acknowledged that ''innocent ignorance'' of governing regulations can produce hardship. But the obligation of courts goes beyond the hopes and/or disappointments of individual litigants--courts must uphold the law consistent with the intent of Congress.

The U.S. Supreme Court, in Office of Personnel Management v. Richmond, 496 U.S. 414, 428 (1990), held steadfastly that an agency's unauthorized statements to citizens cannot obligate the Treasury for the payment of funds. Such principle ''assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the in-dividual favor of Government agents or the individual pleas of litigants.'' Id. Therefore, a ''duty [is imposed upon] all courts to observe the conditions defined by Congress for charging the public treasury.'' Federal Crop, 332 U.S. at 385.

Given the foregoing line of decisions, the IRS form letter, if it can be construed as an implied-in-fact contract, is undoubtedly ''plainly illegal,'' and thus, void ab

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17 104 F.3d 1314 (Fed.Cir.1997).

18 Id. at 1321 (citing Urban Data Sys., Inc. v. United States, 699 F.2d 1147, 1153 (Fed.Cir.1983) (quoting Yosemite Park & Curry Co. v. United Sates, 217 Ct. Cl. 360, 582 F.2d 552, 558 (1978))); see also Logan County v. United States, 169 U.S. 255, 257–58 [3 AFTR 2657] (1898) (stating that ''[T]he act of the Commissioner of Internal Revenue and the Secretary of the Treasury in approving the claim may be assumed to be prima facie evidence that the amount so approved by them was due the claimant from the Government, and the burden therefore rest[s] upon the Government of showing that the allowance of the amount claimed in this proceeding was made through a mistake on the part of those officials.'').

19 Total Medical, 104 F.3d at 1321.

20 Enacted July 22, 1998.

initio.[21] Therefore, on the asserted contract theory of recovery, the court is constrained to dismiss this action for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(6).[22] Although the plaintiffs in Total Medical were entitled to some recovery (as prescribed by law), here at bar, plaintiff has already received that portion of its total initial claim that the law allows, and the only portion before this court is that which is time-barred, ergo, "plainly illegal."

Since the subject matter of plaintiff's contract claim is unlawful, i.e., a refund of tax payments collected during a period outside of the operative statute of limitations, a valid enforceable contract could not be formed. Therefore, any further analysis of the remaining elements of contract formation becomes moot, thus, we hold that no implied-in-fact contract exists.

Account Stated

Alternatively, plaintiff argues that IRS Form Letter 913(RO) is an "account stated." Unlike the formal elements of a common law contract, an account stated only requires that "the Government must have agreed with the taxpayer that he has overpaid his taxes in a definite amount, and must have communicated to him its intention to repay." West Publ'g Co. Employees' Preferred Stock Ass'n v. United States, 198 Ct. Cl. 668, 675 [30 AFTR 2d 72-5007] (1972). See also Shipley Constr. & Supply Co. v. United States, 7 F.Supp. 492, 495–96 [14 AFTR 134] (Ct.Cl.1934) ("[W]here a fixed sum is admitted by one party to be due the other, and there is a promise express or implied for the payment of this amount, an account stated is rendered.").

Notwithstanding the apparent less formal strictures for establishing an account stated, we need not decide whether IRS Form Letter 913(RO) can be so construed. Indeed plaintiff's alternative recovery theory is one of form over substance inasmuch as any recovery thereupon is still irrefutably subject to § 6511. Hence, the same analysis supra applies to this recovery theory as well. The Court of Claims, our predecessor court, has long ruled on the matter of an account stated and the threshold affect of statutory refund claim limitations:

> "Conceding arguendo that the certificate of overpayment constituted an account stated in favor of the plaintiff, it is nevertheless governed by statutory provisions. As was said in Goodenough, Trustee v. United States, 19 F.Supp. 254 [19 AFTR 725], 85 Ct. Cl. 258, 299 [1937], an account stated gives rise to an implied promise to pay the indebtedness set forth, but 'recovery on this implied promise may be barred by lapse of time' and it may also be barred by an express statutory provision . . . ."

Carver v. United States, 27 F.Supp. at 615. See also Blue Jay Lumber Co. v. United States, 27 F.Supp. 707 [23 AFTR 529] (Ct.Cl.1939) (Although an account stated can be found, damages are still limited by operative refund claim statute.); Marshall v. United States, 88 Ct. Cl. 393 [22 AFTR 750], 26 F.Supp. 474, 479 (1939).[23]

Plaintiff in Carver petitioned that court to cause the defendant IRS to issue a $3,814.27 refund of overpaid taxes respecting his 1917 tax year. In 1928, by order and later by certificate of over-assessment, the Board of Tax Appeals agreed that plaintiff had overpaid his taxes for 1917. But the Carver court nevertheless upheld the defendant's position that plaintiff's claim for refund had not been timely filed. Plaintiff there contended that his claim was

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[21] The letter itself is merely a non-binding notice of the government's willingness to allow plaintiff's full claim subject to mandatory statutory limits. See Yosemite Park & Curry Co., 582 F.2d at 560 (standing for the proposition that the government is entitled to correct its own error).

[22] "[T]he law is clear that, for the Court of Federal Claims to have jurisdiction, a valid contract must only be pleaded, not ultimately proven. Spruill v. Merit Sys. Protection Bd., 978 F.2d 679, 686 (Fed.Cir.1992); Gould, Inc. v. United States, 67 F.3d 925, 929 (Fed.Cir.1995). There is no question that [plaintiff] pleaded the existence of a valid contract here. The proper question . . . is one of the merits: whether [plaintiff] failed to state a claim upon which relief can be granted." Total Medical, 104 F.3d at 1319.

[23] "[T]he Commissioner erred in his construction of the California statute and he was equally unfortunate in giving the reasons for his final conclusion. But this does not affect the determination of the case which must be decided in accordance with legal principles . . . . The Commissioner was not bound to adhere to his original ruling if he subsequently found it was not in accordance with the law as applied to the facts in the case." (Emphasis added).

brought within six years of the decision by the Board of Tax Appeals pursuant to that court's subject matter jurisdiction. The Court of Claims ruled that "the right to sue for the overpayment in such cases depends upon section 284(e) of the act of 1926, as amended,[the operative statute of limitations predating § 6511], being the provision heretofore set out, and that it is governed thereby 'and not by the provision of section 156 of the Judicial Code (28 U.S.C.A. § 262) as for suits upon claims against the United States.'" Id. at 614 (citing National Fire Ins. Co. v. United States, 72 Ct. Cl. 663, 669 [10 AFTR 528], 52 F.2d 1011, 1013 [10 AFTR 528] (1931)).

The Carver court made it clear that it is not enough to merely bring a contract claim within the court's six-year jurisdictional statute of limitations when the subject matter of the alleged contract, to wit, a tax refund, is also subject to a separate and overriding time-limiting statute for recovery, i.e., § 6511. Undoubtedly, the right to bring such a two-fold claim is a contingent one -

> "[W]here the Board of Tax Appeals determines an overpayment and no question of credits is involved, and the refund of the overpayment was not barred by the statute of limitations at the time of the decision of the board, suit might be brought within six years from the date of the board's decision."

Carver, 27 F.Supp. at 614 (citing Ohio Steel Foundry Co. v. United States[24] and Arthur Curtiss James v. United States[25]) (emphasis added).

Of the three (3) conditions-precedent enumerated by the Carver court for raising a sustainable cause of action based upon an alleged account stated, both the Carver plaintiff and the plaintiff before us only satisfied the first two--that (i) the IRS determined that there was an overpayment and (ii) there was no issue of credits. Each plaintiff, however, failed to meet the third (and perhaps dispositive) condition--that "the refund of the overpayment was not barred by the statute of limitations [of the tax code] at the time of the decision of the board." Id. The facts in both cases are identical on this point. That is to say, at the time of the Board decision in Carver and the Appeals Division decision in the case at bar, the operative statutory time period for bringing a refund claim for the proclaimed overpayment had run.

Unquestionably, in November 1997 when Associate Chief Kahn made the decision to ostensibly allow the claim in full, a portion of that claim, which is presently at issue, $30,000, was in fact time-barred pursuant to § 6511. Our analysis of the claims provisions of § 6511(a), supra, revealed that only two prongs for recovery are possible thereunder: (i) 3 years from the time a return was filed or (ii) if no return was filed, 2 years from the time the tax was paid. It is undisputed that the IRS previously refunded monies under the first prong for the period of January 1993 to January 1996 ($14,151.91), and the second prong for the period of December 3, 1991 to December 3, 1993 ($11,492.64). Hence, the $30,000 collected between August 31, 1990 and December 2, 1991, clearly falls outside of any reachable refund claim period, leaving no available recovery to plaintiff, and heretofore rendering untenable plaintiff's account stated theory.

Equitable Tolling

We have now twice come full-circle in examining plaintiff's contract recovery theories only to arrive each time at § 6511, which further illuminates plaintiff's reason for urging this court to apply the equitable tolling doctrine. In so doing, plaintiff in effect is arguing that we should apply pending legislation in favor of plaintiff, to wit, the then impending promulgation of s 6511(h), and find that such was a viable basis for the Associate Chief's November 1997 decision. We decline. Pending legislation is not law. Perhaps it can be useful where there is no current law, but that is not the case here at bar where a current statute existed, i.e., § 6511 (absent subsection (h)), and the Brockamp decision was good law.

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[24] 69 Ct. Cl. 158 [8 AFTR 10137], 38 F.2d 144 (1930).

[25] 69 Ct. Cl. 215 [8 AFTR 10133], 38 F.2d 140 (1930).

Plaintiff contends that the law was in flux. We disagree. The law was clear, and "th[is] court must decide [cases before it] according to [relevant and] existing laws [at the time the claim first accrued]." United States v. Schooner Peggy, 5 U.S. 103, 110 (1801). Undeniably, Congress was in the process of making new law, which, by intent of Congress, was not to have retroactive effect.[26]

Plaintiff posits that "[t]he Brockamp decision is not to be interpreted to undermine government procedures and settlement authority." Pl. motion at 6. This perplexing argument by plaintiff--that the legal basis for the decision reached by the associate chief is somehow insulated from legitimate scrutiny--strains credulity. The Appeals Case Memorandum of November 6, 1997 (which was prepared by the appeals officer and approved by the associate chief) read in pertinent part:

> "In Irwin v. Veterans Admin., 111 S.Ct. 453, 457 (1990), the Supreme Court held that the same equitable tolling principles applicable to suits between private parties should also apply to suits against the government, and provided a basis for the findings in the previously cited cases.
>
> * * *
>
> It is logical to assume that a demonstrated physical incompetency may also be a basis for tolling of the statute of limitations, especially when such physical incompetency results in death, as occurred in the case at issue. Therefore, issuance of the previously determined refund is recommended.'

Def. Cross-motion at 20.

Fundamentally, the associate chief's reliance upon Irwin must fail because it was not current law at the time of his decision. Rather Brockamp was the law of the land. Brockamp unequivocally addressed equitable tolling in the context of the operative tax statute and "conclude[d] that Congress did not intend the 'equitable tolling' doctrine to apply to § 6511's time limitations."[27] Plaintiff, for obvious reasons, would have us embrace Irwin, an inapposite U.S. Supreme Court decision, and arbitrarily reject Brockamp, a case on all fours. We must decline.

Plaintiff further relies on Bonwit Teller & Co. v. United States[28] for the assertion that "[n]o statute provides for review of the Commissioner's determinations in favor of taxpayers when made within the scope of his authority. Such rulings are entitled to much weight." Pl. motion at 6. By placing more emphasis on the latter statement that "such rulings are entitled much weight," plaintiff all but ignores the pivotal former clause "within the scope of his authority." As we have thoroughly discussed supra, the associate chief was not operating within the scope of his authority when he proposed to allow "in full" plaintiff's refund claim in contravention to § 6511--the operative statute. For that reason, the Bonwit case is ineffectual to resuscitate plaintiff's failed contract claim.

CONCLUSION

Based upon all of the foregoing, plaintiff's motion for summary judgment is hereby DENIED, and the contract cause of action is dismissed for failure to state a claim upon which relief can be granted, pursuant to RCFC 12(b)(6); and defendant's cross-motion for summary judgment is hereby GRANTED. No costs. The Clerk shall enter judgment accordingly.

IT IS SO ORDERED.

¶2002-5579

Andrew M. and Linda J. D'AVANZO, PLAINTIFFS, v. THE UNITED STATES, DEFENDANT. United States Court of Federal Claims, (Ct Fed Cl) No.

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[26] See Historical and Statutory Notes for 26 U.S.C. § 6511(h) - "Effective and Applicability Provisions:

1998 Acts. Section 3202(b) of Pub.L. 105-206 provides: "The amendment made by subsection (a) [amending this section] shall apply to periods of disability before, on, or after the date of the enactment of this Act [July 22, 1998] but shall not apply to any claim for credit or refund which (without regard to such amendment) is barred by the operation of any law or rule of law (including res judicata) as of the date of the enactment of this Act [July 22, 1998]."'

[27] 519 U.S. 347, 354 [79 AFTR 2d 97-986] (1997).

[28] 283 U.S. 258, 264 [9 AFTR 1421] (1931).

00-7761, Oct. 23, 2002. Year 1994. Decision against Taxpayers.

1. Refund actions—refund claims—summary judgment—conceded issues—administrative remand. Taxpayers were denied summary judgment on their refund complaint: IRS's concession in accord with TD 8932 of administrative claim's timeliness wasn't concession of case merits or taxpayers' underlying overpayment allegation. Also, taxpayers' alternative request to remand case to IRS for administrative reconsideration was denied since case wasn't 1 for which administrative record was binding or otherwise warranting remand. *Reference:* United States Tax Reporter ¶74,225.05(40). IRC §7422.

Andrew M. D'Avanzo and Linda J. D'Avanzo, pro se, Wellesley, Massachusetts, for the plaintiffs.
Elizabeth D. Seward, Tax Division, United States Department of Justice, Washington, D.C., with whom on the brief were, Eileen J. O'Conner, Assistant Attorney General, Mildred L. Seidman, and David Gustafson.

United States Court of Federal Claims,

OPINION

MARGOLIS, Senior J.

This tax refund action is before the Court on plaintiffs' motions for summary judgment or, in the alternative, to remand to the Internal Revenue Service ([IRS]). Plaintiffs seek to recover an overpayment of money allegedly held by the United States acting through the IRS. Defendant argues that, as the United States Court of Federal Claims reviews tax refund suits *de novo*, the plaintiffs have the burden to prove that money is owed by the IRS. The defendant, therefore, opposes both the motion for summary judgment and the motion for remand. After consideration of the briefs filed by the parties, the Court DENIES both the motion for summary judgment and the motion for remand.

FACTS

Plaintiffs, Andrew and Linda D'Avanzo, appearing *pro se*, seek a refund of $9,185.84 from their 1994 income taxes. After receiving several extensions, plaintiffs mailed their joint federal income tax return on the last day of their extension for filing their joint tax return, postmarked October 15, 1998. The IRS received plaintiffs' tax return on October 19, 1998. On December 24, 1998, the IRS disallowed plaintiffs' tax return on the procedural ground that it was filed four days late and was, therefore, untimely. The IRS denied plaintiffs' administrative appeal on May 3, 1999. Plaintiffs' request for reconsideration was denied in April 19, 2000. The IRS informed plaintiffs that if they wanted to contest the IRS's decision, they would have two years from December 24, 1998, the date plaintiffs received their claim disallowance letter, in which to file their action in federal court. Throughout this process, the IRS did not consider the merits of plaintiffs' tax return claim. On December 26, 2000, plaintiffs filed this action in this Court seeking their tax refund.

After this case was filed, the United States Court of Appeals for the Second Circuit held that a claim for a tax refund, incorporated in a tax return, was to be deemed filed on the date it was postmarked. *Weisbart v. United States*, 222 F.3d 93, 97 [86 AFTR 2d 2000-5524] (2nd Cir.2000) (applying the mailbox rule to tax refund claims). On November 13, 2000, the IRS accepted the *Weisbart* ruling and announced that timely mailing of a tax refund claim equals a timely filing of that claim. The Government now acknowledges that plaintiffs' 1994 tax refund claim was timely filed.

On January 11, 2001, the IRS issued Treasury Decision 8932, which amended 26 C.F.R. part 301, holding that the timely mailing of tax returns results in their timely filing with the IRS. T.D. 8932 explains the new procedure for reconsideration of refund claims that were denied on untimeliness grounds, but would have been timely if the IRS had originally adopted the mailbox rule. T.D. 8932 explained:

> [T]he IRS will attempt to identify as many claims as possible that were filed on untimely original individual income tax returns and that were previously dis-

allowed based on the Government's position in Weisbart. In these cases, the IRS intends to issue a refund, or credit the overpayment against a liability as provided in section 6402, without the need for the taxpayer to contact the IRS. Such automatic reconsideration of the claim will generally occur if the claim was filed on an individual income tax return for 1995 or a subsequent calendar year. Claims filed on other types of original returns will not receive automatic reconsideration under this program, e.g., individual returns for years prior to 1995.

Because the IRS will be undertaking the automatic reconsideration program described above and intends to complete the program by June 30, 2001, taxpayers who have filed income tax refund claims for tax year 1995 and later years that qualify under § 301.7502-1(f) need not contact the IRS regarding their claims unless the two-year period for filing a refund suit under section 6532(a) for their denied claim will expire prior to June 30, 2001. In such cases, taxpayers are advised to file a request for reconsideration with the appropriate IRS Service Center. Such a request should include a notation on the top of the first page that it is a "Weisbart Claim.] Such taxpayers are also advised to file a refund suit to protect their legal rights with respect to the claim. The IRS will respond to the requests for reconsideration after the IRS has finished identifying eligible claims under the automatic reconsideration program and paying those refunds. Taxpayers whose two-year period for filing a refund suit under section 6532(a) does not expire until after June 30, 2001, and who have not received a refund by that date, are advised to file a request for reconsideration with the appropriate IRS Service Center at that time.

Timely Mailing Treated as Timely Filing/Electronic Postmark, T.D. 8932, 66 FR 2257-01, 2258 (2001) (section explaining revisions).

DISCUSSION

Plaintiffs' Motion for Summary Judgment

[1] Plaintiffs have filed a motion for summary judgment, pursuant to RCFC 56(c). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). A fact is material if it might significantly affect the outcome of the suit under the governing law, which would make summary judgment improper. *Id.* at 248. The role of the Court in determining a motion for summary judgment is not to weigh the evidence; rather, the Court determines questions of law based upon undisputed facts. *LFAM Corp. v. United States*, 42 Fed. Cl. 698, 701 [83 AFTR 2d 99-578] (1999).

Plaintiffs argue that, as defendant has conceded that the 1994 tax return was filed timely, there is no longer an issue for the Court to consider. They assert that the IRS should simply review their claim as if the timeliness dispute had never occurred. The only reason given by the IRS to plaintiffs regarding the initial rejection of the tax return involved the procedural question of whether plaintiffs had filed timely. Plaintiffs believe that after defendant conceded the timeliness issue, there was no longer a genuine issue of material fact in the case. Therefore, plaintiffs claim that summary judgment should be granted in their favor. While plaintiffs' argument appears to be based on common sense, efficient, and arguably effective, the law speaks otherwise as the nature of this Court's jurisdiction over plaintiffs' claim is distinct from the procedures afforded by the IRS.

The Little Tucker Act confers the Court of Federal Claims with jurisdiction, concurrent with the U.S. district courts, over certain tax matters, primarily tax refund cases. It states that

> (a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:
>
> (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been errone-

ously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws . . . .

28 U.S.C. § 1346(a). Any such case is considered a tax refund case. On December 26, 2000, plaintiff filed a civil action against the United States in the Court of Federal Claims for the recovery of allegedly erroneously collected internal revenue taxes. That filing of that complaint commenced this tax refund suit, over which the Court has proper jurisdiction under the Little Tucker Act.

Plaintiffs filed the complaint only after exhausting all administrative remedies that were available to them. The IRS initially rejected the claim because it believed that the income tax return was not timely filed. Plaintiffs went through two levels of administrative appeals within the IRS; each time the initial decision was upheld. Never during any of those proceedings did the IRS consider the merits of plaintiffs' claim. The IRS advised plaintiffs that the only further avenue of relief available was through a federal court and, therefore, plaintiffs commenced this action. In the defendant's answer to the amended complaint, the very next time plaintiffs heard from defendant, defendant conceded that the tax return was timely filed. Plaintiffs were, therefore, left in the very confusing position of having initiated a suit to contest a position that was immediately conceded. It is understandable that they now believe that there is no further issue, that the Court should not be involved, and that the IRS should simply process the claim as if all of the intervening steps revolving around the timeliness issue had not occurred. It is not, however, quite that simple.

The IRS denied this claim and all of the possible administrative appeals resulting from it. Therefore, the IRS has concluded its administrative decision-making process. Plaintiffs have filed a suit in the Court of Federal Claims to contest that decision by the IRS. This Court is a separate and distinct forum from the IRS. When a taxpayer seeking relief files a tax refund suit in this Court, the taxpayer is initiating a separate proceeding whereby the taxpayer is asking for an independent legal remedy from that received from the IRS. As a separate forum, this Court follows a different procedural structure when determining whether plaintiffs are entitled to a tax refund than does the IRS. The procedures set forth in T.D. 8932 govern internal administrative actions of the IRS; they do not affect the procedural posture of a claim filed in a court. Plaintiffs are exercising their legal rights, but now through this Court and, therefore, it is the procedures of this forum, not those of the IRS, that are to be followed.

[It is well-settled that a tax refund suit in the Court of Federal Claims "is a *de novo* [a new] proceeding, in which the plaintiff bears the burden of proof" with respect to each and every element of its claim.] *International Paper Co. v. United States*, 36 Fed. Cl. 313, 322 [78 AFTR 2d 96-6075] (1996) (quoting *Sara Lee Corp. v. United States*, 29 Fed. Cl. 330, 334 [72 AFTR 2d 93-6421] (1993)). It is not an appellate review of the administrative decision that was made by the IRS; instead, the Court must make an independent decision as to whether the taxpayer is due a refund. *Id.* When making this determination, the Court is to give [no weight . . . to subsidiary factual findings made by the [IRS] in its internal administrative proceedings.] *Cook v. United States*, 46 Fed. Cl. 110, 113 [85 AFTR 2d 2000-1017] (2000).

Summary judgment is not appropriate where any issues of material fact remain. RCFC 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Plaintiffs contend that no issue of material fact presently exists because defendant has conceded the timeliness issue. The central issue of this case is whether plaintiffs overpaid their 1994 taxes and are, there-fore, entitled to a refund. Plaintiffs claim that they have; defendant claims that they have not. This is an issue of fact. It is ma-terial. Therefore, there is a genuine issue of material fact, and the motion for sum-mary judgment must be denied.

Plaintiffs assert that, as defendant has not provided any evidence to prove that plaintiffs are not entitled to their refund, there is no dispute. This is not the case. There has been no evidence put forth by either side with regard to this issue, and it is plaintiffs who bear the burden of proof in this proceeding. *International Paper Co.*, 36 Fed. Cl. at 322; *Sara Lee*, 29 Fed. Cl. at 334. Regardless of internal IRS procedures, in this forum it is the plaintiffs' responsibility to prove that they are entitled to a refund; it is not the responsibility of the IRS to prove that they are not. This burden is one [of production as well as persuasion.] *International Paper Co.*, 36 Fed. Cl. at 322. It is plaintiffs' burden to affirmatively show that they have overpaid their taxes. *Id.* Until they have produced evidence and persuaded the court that what they are alleging is correct, the plaintiffs have not met that burden. *Id.*

Plaintiffs cite *Weisbart v. United States*, 222 F.3d 93 [86 AFTR 2d 2000-5524] (2d Cir.2000), for the proposition that this case can be disposed of on this motion for summary judgment. The facts in *Weisbart* are, however, inapposite to the instant case. The plaintiff in *Weisbart* had mailed his tax return on the date of the filing deadline, as did the plaintiffs in the instant case. *Id.* at 94. The IRS had denied Weisbart's refund and subsequent appeals, taking the position that the filing was untimely. *Id.* The Second Circuit held that the mailbox rule applied to this type of situation and thus the refund claim was actually filed timely. *Id.*at 97. The Second Circuit remanded the case to the district court, and the plaintiff received his refund without the need to prove the merits of their case. *Id.* at 99. The plaintiffs in the instant case assert that they are in the same position as was the plaintiff in *Weisbart* and that, therefore, they are entitled to similar treatment. There is, however, an important distinction between the two cases. In *Weisbart*, the defendant had [admitt[ed] that if Weisbart's refund claim [was] deemed to have been filed on [the deadline date], he would have been entitled to his refund . . . .] *Id.* at 96. In this case, no such admission has been made. In contrast to *Weisbart*, the question of whether the plaintiffs are entitled to a tax refund is a remaining issue of material fact that must be decided by this court.

Plaintiffs' Motion to Remand Case to IRS

Plaintiffs have also filed a motion to remand the case to the IRS for reconsideration of their tax refund claim. They contend that because the IRS acquiesced with regard to the timeliness issue, this Court should simply remand the case to the IRS for a determination on the basis of T.D. 8932.

Congress has declared that [[i]n any case within its jurisdiction, the [Court of Federal Claims] shall have the power to remand *appropriate matters*to any administrative or executive body or official with such direction as it may deem proper and just.] 28 U.S.C. § 1491 (emphasis added); *see also* RCFC 56.2(a)(1). The objective of the remand power is not to force administrative agencies to review claims that they have already denied, but [to make it unnecessary for the parties to go to another court after the [Court of Federal Claims] made its decision, to obtain the rights which follow from the decision.] *Hoopa Valley Tribe v. United States*, 596 F.2d 435, 447 (Ct.Cl.1979). When adding this provision, Congress contemplated that this power would be used the by the Court to expedite litigation by allowing the Court to control the amount of time taken by an administrative agency after the Court has ordered the agency to fill in gaps in the administrative record so that the Court can make a decision based on the record. S. REP. NO 92-1066 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3116, 3117–18. In particular, the remedy was to apply primarily where [suits are filed on a money claim by a Government employee who alleges that he was illegally discharged] and to cases involving military personnel. *Id.* The legislation was passed as a response to a decision by the Supreme Court in which it declared that, in certain types of appeals, the Court is [bound by the administrative record as to findings of fact . . . .] *Id.* (citing *United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966)).

This is not a wrongful discharge case, nor does it involve military personnel. Nor is this a case in which the Court is bound by the administrative record. Rather, the Court is to conduct a *de novo* review in which the record from the IRS should play no role. *See International Paper Co.*, 36 Fed. Cl. at 322; *Cook*, 46 Fed. Cl. at 113. Therefore, this is not a situation in which Congress meant for the remand power to be used; further review by the IRS would not be proper at this point.

It is true that the IRS now has internal regulations that would provide for automatic reconsideration of claims that were denied for the same reason as was plaintiffs' refund claim. That provision, as plaintiffs acknowledge, does not apply to this action. Plaintiffs have followed the IRS's recommendation and have preserved their rights by filing this suit in this Court. But it is in this forum where they will have the opportunity to litigate concerning what those rights are; they have already exhausted all of the administrative remedies of the IRS. Therefore, this Court does not believe that this matter would be an "appropriate] one to remand.

CONCLUSION

For the reasons stated herein, this Court DENIES plaintiffs' motion for summary judgment and motion to remand.

¶2002-5580

CONSOLIDATION COAL COMPANY, ET AL., PLAINTIFF v. THE UNITED STATES, DEFENDANT. RAPOCA ENERGY COMPANY, PLAINTIFF v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 01-254C; 01-442C, Aug. 14, 2002. Decision for Govt.

1. Excise taxes—coal exports—constitutional claims—Surface Mining Control and Reclamation Act—Court of Federal Claims jurisdiction. Coal exporters' Court of Federal Claims refund and constitutional complaint against reclamation fee imposed on exported coal under SMCRA regs was dismissed for lack of jurisdiction: action was barred by SMCRA's 60-day rule that action be brought *in district court* by only those taxpayers who participated in rulemaking, which taxpayers didn't do. Time bar applied just as well to constitutional claims as to any other claims; taxpayers could have foreseen at time of rule's enactment that fee would be imposed on exports; and taxpayers' attempt to circumvent jurisdictional bar with contentions that they were challenging only rule's application, not rule itself, and that rule could be non-substantively altered or corrected to specifically exclude exports were rejected. *Reference:* United States Tax Reporter ¶74,336.510(70); 74,225.01(75). USTR Excise Taxes ¶41,215.01(30). IRC §4121; 7422.

Steven Harlan Becker, New York, N.Y., attorney of record for plaintiff Consolidation Coal Company, et al. and Paul A. Horowitz and Charles H. Critchlow, of counsel, New York, N.Y.
John Y. Merrell, Jr., McLean, Virginia, attorney of record for plaintiff Rapoca Energy Company and John Y. Merrell, of counsel.
Michael M. Duclos, Department of Justice, Washington, D.C., with whom was Assistant Attorney General Robert D. McCallum, Jr., for defendant. David M. Cohen, Director, and Jeanne E. Davidson, Deputy Director.

United States Court of Federal Claims,

OPINION

FUTEY, J.

This Fifth Amendment takings case comes before the court on defendant's motion to dismiss and plaintiffs' motion for summary judgment. Plaintiffs are producers, sellers and exporters of coal. Pursuant to 30 U.S.C. § 1232 (2000) and 30 C.F.R. § 870.12 (2001), plaintiffs have paid a reclamation fee on coal which they have extracted from mines in the United States and which is then sold for export. Plaintiffs' argue that payment of this reclamation fee amounts to a tax on exports and is therefore in violation of the Export Clause of the United States Constitution which

prohibits any tax or duty on exports during the course of exportation. Furthermore, plaintiffs contend that the unconstitutional imposition of the reclamation fee results in a compensable taking of plaintiffs' property under the Fifth Amendment. Defendant counters that this court lacks jurisdiction to entertain plaintiffs' challenge to the regulatory scheme and even if it had jurisdiction, the challenge is untimely. In addition, defendant states that the reclamation fee is imposed pursuant to Congress' commerce power and therefore does not implicate the Export Clause. Finally, defendant argues that even if the reclamation did violate the Export Clause, plaintiffs would not have a compensable takings claim because the action on the part of the government would be considered unauthorized for purposes of takings law.

Factual Background

In 1977, Congress enacted the Surface Mining Control and Reclamation Act (SMCRA) (presently codified at 30 U.S.C. §§ 1200-1328 (2000)) in order to protect the population and the environment from the possible negative side effects of surface coal mining. In order to accomplish this goal, Congress established the Abandoned Mine Reclamation Fund, a trust fund used for the purpose of restoring various natural resources that had been damaged due to mining. 30 U.S.C. § 1231(a). Congress determined that the burden for paying for the restoration of mining lands should be borne by the coal industry. 1977 U.S.C.C.A.N. 593, 668. SMCRA specifically states:

> All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation fee of 35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 10 cents per ton, whichever is less.

30 U.S.C. § 1232(a).

The Department of the Interior subsequently promulgated regulations implementing the SMCRA. The regulation that addresses the value of the coal states:

> (b) The fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator. (1) The initial bona fide sale, transfer of ownership, or use shall be determined by the first transaction or use of the coal by the operator immediately after it is severed, or removed from the reclaimed coal refuse deposit.

30 C.F.R. § 870.12(b)(1).

Plaintiffs pay this reclamation fee on all coal that they mine. Some of that coal, they allege, is destined for export. Plaintiffs enter into contracts with foreign customers. Pursuant to those contracts, plaintiffs mine coal, after which the coal is moved to raw coal storage areas for temporary storage and then fed into a preparation plant where the coal is processed to comply with the foreign customers' requests. After the coal is processed, the coal is either loaded directly onto rail cars that will transport the coal to the export terminal, or the coal is stored temporarily while awaiting arrival of the rail cars. Some of the plaintiffs use trucks and or barges to transport the coal to the export terminal in lieu of rail cars, and some use all three methods of shipment. If plaintiffs' coal is transported to an export terminal that has storage facilities, the coal can be either moved directly onto the vessel, or stored temporarily before being placed on the vessel.

Plaintiffs do not use for their own consumption any of the coal that is loaded for shipment to the export terminal or foreign customer. All plaintiffs, except Pacific Coast Coal Company, make some export sales pursuant to contracts between themselves and third-party brokers who then contract with foreign customers. Regardless of whether plaintiffs contract directly with the foreign customers, or use an intermediary third party, plaintiffs state that af-

ter their coal is loaded onto rail cars, it is bound for the export terminal and is not diverted for domestic sale. Although the terms of the export sales contracts vary by foreign customer or broker, plaintiffs allege that title never transfers before the processed coal is loaded onto the rail cars or trucks at the mine or loadout facility for transport to the export terminal. Plaintiffs argue, therefore, that the reclamation amounts to a tax on goods that are bound for export in violation of the United States Constitution. The Export Clause states, "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5.

Plaintiffs filed their complaint on April 27, 2001. Defendant filed its motion to dismiss pursuant to RCFC 12(b)(1), lack of jurisdiction over subject matter, and 12(b)(4),[1] for failure to state a claim upon which relief can be granted, on August 15, 2001. Plaintiffs' Brief In Opposition To Defendant's Motion To Dismiss And In Support of Plaintiffs' Cross-Motion For Summary Judgment was filed on January 15, 2002. All briefing was completed on June 13, 2002.

Discussion

[1] The court will first address defendant's motion to dismiss. In ruling on a motion to dismiss for lack of jurisdiction under RCFC 12(b)(1), the court must accept as true the complaint's undisputed factual allegations and construe the facts in the light most favorable to plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); see also Hamlet v. United States, 873 F.2d 1414, 1416 (Fed.Cir.1989); Farmers Grain Co. v. United States, 29 Fed. Cl. 684, 686 (1993). A plaintiff must make only a prima facie showing of jurisdictional facts through the submitted material in order to defeat a motion to dismiss. Raymark Indus. v. United States, 15 Cl.Ct. 334, 338 [62 AFTR 2d 88-5409] (1988) (citing Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d 1280, 1285 (9th Cir.1977)). If the undisputed facts reveal any possible basis on which the non-moving party might prevail, the court must deny the motion. Scheuer, 416 U.S. at 236; see also Lewis v. United States, 32 Fed. Cl. 59, 62 (1994). If, however, the motion challenges the truth of the jurisdictional facts alleged in the complaint, the court may consider relevant evidence in order to resolve the factual dispute. Rocovich v. United States, 933 F.2d 991, 994 [67 AFTR 2d 91-1210] (Fed.Cir.1991); see also Lewis, 32 Fed. Cl. at 62.

Defendant has also brought a motion to dismiss pursuant to RCFC 12(b)(6), for failure to state a claim upon which relief may be granted. The court will grant such a motion only if it appears beyond a doubt that plaintiff has failed to allege facts sufficient to support his claim. Conley v. Gibson, 355 U.S. 41, 45–46 (1957); Mostowy v. United States, 966 F.2d 668, 672 [70 AFTR 2d 92-5027] (Fed.Cir.1992). In ruling on an RCFC 12(b)(6) motion to dismiss, the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to plaintiff. Papasan v. Allain, 478 U.S. 265, 283 (1986) (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed.Cir.1991)). Nevertheless, "conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir.1981), aff'd, 460 U.S. 325 (1983). "[L]egal conclusions, deductions, or opinions couched as factual allegations are not given a presumption of truthfulness." Blaze Constr., Inc. v. United States, 27 Fed. Cl. 646, 650 (1993) (internal quotations omitted).

Defendant argues that the court lacks jurisdiction over this claim because plaintiffs are challenging the regulation promulgated by the Department of the Interior. Defendant contends that, therefore, any review of plaintiffs' claim falls within the exclusive jurisdiction of the United States District Court of the District of Columbia (D.C. District Court). In support of its argument, defendant cites SMCRA, which states:

[1] It should be noted that pursuant to the change in the court's rules, as of May 1, 2002, a motion to dismiss for failure to state a claim upon which relief may be granted is now made pursuant to RCFC 12(b)(6) not 12(b)(4).

> Any action by the Secretary promulgating national rules or regulations including standards pursuant to sections 1251, 1265, 1266, and 1273 of this title shall be subject to judicial review in the United States District Court for the District of Columbia Circuit .... A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

30 U.S.C. § 1276(a)(1).

Plaintiffs make two main arguments in support of their contention that the court has jurisdiction over their claims. First, plaintiffs argue that if the court does not accept jurisdiction, they, and other plaintiffs similarly situated, would be precluded from ever raising a constitutional challenge to the implementation of the regulation. According to plaintiffs, defendant's interpretation of section 1276(a)(1) would "result[] in the absurdity that companies that were not even in existence when the regulation was adopted would be time-barred from raising this constitutional claim because they did not participate in the rulemaking process."[2]

Secondly, plaintiffs argue that they are not challenging the regulation itself, but are instead challenging the agency's application of the regulation. According to plaintiffs, it is the application of the regulation that is in violation of the Export Clause of the Constitution, not the regulation per se. Plaintiffs contend that the regulation would not have to be changed if it were found to violate the Constitution because the agency could, by issuing an internal notice, simply begin treating export sales as nontaxable sales.

Plaintiffs' first argument is unavailing. The reasoning underlying the argument that barring their constitutional challenge now would be "absurd," is not supported by the law. Defendant correctly points out that constitutional claims can be time barred just like any other claim. Block v. North Dakota, 461 U.S. 273, 292 (1983). Plaintiffs next argue that neither they, nor the companies in existence at the time of the promulgation of the regulation, could have foreseen that the tax would be imposed on exports. Defendant replies, again correctly, that the regulation was clear at the time of its enactment. It stated that the fee would be assessed at the time of initial bona fide sale, and made no exception for coal that was bound for export. 30 C.F.R. § 837.12 (1978).[3] In that regard, the regulation has not changed since its issuance. In fact, Congress specifically carved out exceptions to the tax, but coal bound for export was not one of those exceptions. 30 C.F.R. § 837.11 (1978). Coal producers could have and should have foreseen, therefore, that the fee would apply to all coal extracted, even coal that would eventually be sold for export.

In advancing their second main argument, plaintiffs rely heavily on Arch Mineral Corp. v. Bruce Babbitt, 104 F.3d 660 (1997), to support their claim that they are not challenging the regulation itself, but are instead challenging the implementation of the regulation by the Office of Surface Mining (OSM). In Arch Mineral, the United States Court of Appeals for the Fourth Circuit (Fourth Circuit) held that the United States District Court for the Southern District of West Virginia had jurisdiction to entertain an attack on OSM's implementation of a SMCRA regulation. In that case, OSM was imposing penalties on the plaintiff pursuant to OSM's ownership and control rule found in the SMCRA regulations. The plaintiff invoked a statute of limitations defense pursuant to a code section which imposed a five-year statute of limitations on agency enforcement actions. The defendant argued that only the D.C.

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2 Plaintiffs' Cross-Motion For Summary Judgment at 9.

3 The numbering of the regulation was changed in October of 1978. At that time, 30 C.F.R. § 837 was changed to 30 C.F.R. § 870, but the substance of the regulation was not changed. 43 Fed.Reg. 49940 (October 25, 1978).

District Court could hear such an attack on the SMCRA regulations. The plaintiff countered that it was not attacking the regulation per se, but simply stating that due to the statute of limitations, enough time had elapsed so OSM could not apply the rule to the plaintiff. The Fourth Circuit held that:

> Arch did not try to override existing regulatory language, read language into or out of a regulation. Rather, Arch simply sought a ruling on whether the five-year statute of limitations at 28 U.S.C. § 2462 applied to OSM's action .... Arch's invocation of the statute of limitations as an affirmative defense suggests that the OSM regulations themselves are not the problem.

Arch Mineral, 104 F.3d at 665. Furthermore, in holding that the United States District Court for the Southern District of West Virginia did, in fact, have jurisdiction to review plaintiffs' challenge to OSM's enforcement proceeding, the Fourth Circuit stated that, ''[a]pplications of the statute of limitations by other district courts does not require content evaluation of the regulations and does not present a threat to continuity of regulatory enforcement.'' Id.

Plaintiffs also refer the court to the recent actions taken by the Internal Revenue Service (IRS) in connection with the Black Lung Excise Tax. In Ranger Fuel Corporation v. United States, 33 F.Supp.2d 466 [83 AFTR 2d 99-375] (1998), the United States District Court for the Eastern District of Virginia held that section 4121 of the Internal Revenue Code, 26 U.S.C. § 4121, which imposed an excise tax on all coal, violated the Export Clause of the Constitution when it was applied to coal that was sold for export. This particular tax had been enacted to finance the Black Lung Disability Trust Fund. The case does not address the jurisdictional issue raised by defendant. Plaintiffs argue, however, that it is instructive as an example of how an agency can change its actions with respect to the taxation of exported coal, but not have to change the actual wording of a statute. Plaintiffs argue that in the case of the Black Lung Excise Tax, the IRS simply issued an internal notice, IRS Notice 2000-28, that explained its new policy exempting coal sold for export. Plaintiffs argue that the IRS did not amend its regulation and therefore, OSM could do the same thing in the present case.

In response to plaintiffs' arguments, defendant cites Amerikohl Mining, Inc. v. United States, 899 F.2d 1210 (Fed.Cir.1990). In the Amerikohl case, plaintiffs challenged an assessment of reclamation fees under 30 U.S.C. § 1232(a) and 30 C.F.R. § 870.12(b). The Amerikohl plaintiffs sought reimbursement for fees paid to the government under regulations in effect prior to 1988 that did not allow for the deduction of impurities in the coal when weighing the coal to determine the amount of the fee assessed. In other words, plaintiffs argued that, in essence, the government had been taxing substances other than coal, e.g., the impurities attached to it, and that, they argued, was beyond the authority of the Secretary of the Interior to tax.

In upholding the decision of the United States Court of Federal Claims in Amerikohl, the United States Court of Appeals for the Federal Circuit (Federal Circuit) stated, ''[t]he only issue is whether the District Court for the District of Columbia has exclusive jurisdiction to hear challenges to rules and regulations promulgated under the SMCRA.'' Amerikohl Mining, Inc., 899 F.2d at 1212. The plaintiff in that case attempted to draw a distinction between preenforcement proceedings and enforcement proceedings. The plaintiff explained that Congress could not have intended § 1276(a)(1) to mean that the D.C. District Court has exclusive jurisdic-tion over the review of challenges to the validity of the SMCRA provisions because that would bar claims initiated by parties who had not participated in the administra-tive proceedings. According to the Amer-ikohl plaintiffs, preenforcement proceed-ings were those initial administrative proceedings in which parties could partici-pate. In contrast, plaintiffs defined enforce-ment proceedings as proceedings involving parties, like themselves, who could not

have participated in the original administrative process, but who were later affected by the enforcement of the regulation.

The plaintiffs in Amerikohl, therefore, employed the same reasoning as plaintiffs use here. The Federal Circuit rejected this argument, stating:

> the alleged distinction between "pre-enforcement and enforcement" proceedings cannot be found by reading the plain language of section 1276(a)(1), nor is the distinction suggested by legislative history. In fact, such a distinction, which permits a suit challenging the SMCRA to be brought in any court, at any time, by any aggrieved party is contrary to legislative intent.

Id. at 1214. Citing legislative intent the court said:

> 30 U.S.C. § 1276(a)(1) (1982), and not 28 U.S.C. § 1491 (1982) or 5 U.S.C. § 703 (1988), creates the right of judicial review of regulations promulgated under SMCRA .... Where "Congress specifically designates a forum for judicial review of administrative action, such a forum is exclusive, and this result does not depend on the use of the word 'exclusive' in the statute providing for a forum for judicial review."

Id. at 1215 (citing Getty Oil Co. v. Ruckelshaus, 467 F.2d 349, 356 (3rd Cir.1972), cert. denied, 409 U.S. 1125 (1973) (internal citations omitted). Thus the Federal Circuit determined, "regardless of how Amerikohl characterizes the present action, Amerikohl is precluded from challenging the validity of regulations promulgated under section 1276(a)(1) because it is in the wrong court and because it did not participate in the administrative proceedings." Id.

The United States Court of Federal Claims is bound by rulings of the Federal Circuit. Although plaintiffs repeatedly insist that they are not challenging the substance of the regulation, but instead, the application of it, the court is not persuaded. The court interprets the issue in this case to be analogous to the issue faced by the Federal Circuit in Amerikohl. Plaintiffs' argument based on Arch Mineral is unavailing. A challenge based on a statute of limitations defense, such as the challenge made by plaintiff in Arch Mineral, is not akin to the challenge made here by plaintiffs. Plaintiffs here are challenging the substance of the regulation.

Similarly, plaintiffs' arguments based on Ranger Fuel are also unpersuasive. They argue that the regulations themselves would not have to be altered substantively in order to stop the enforcement of the regulations to coal bound for export, instead, they aver, the agency could simply alter its actions based on an internal notice or memorandum. The court views that as a distinction without a difference. According to the regulation as written, all coal is weighed at the time of sale and taxed. No exception is made for coal bound for export. Language would have to either be read into or out of the current regulations to carve out an exception for the application of the regulations to coal that is bound for export.

Congress specifically reserved the review of this type of challenge to these regulations for the United States District Court for the District of Columbia. As the Federal Circuit observed in Amerikohl, plaintiff "may still attempt to obtain the requested refund by petitioning the Director of the Office of Surface Mining Reclamation and Enforcement ('Director') under 30 U.S.C. § 1211(g)(1982) to amend or repeal the ... regulation ...." Amerikohl, 899 F.2d at 1215.

This case is being dismissed for lack of subject matter jurisdiction, and therefore the court will not address the other substantive issues presented by plaintiffs.

Conclusion

For the above-stated reasons, Defendant's Motion to Dismiss is GRANTED. Plaintiffs' Cross-Motion For Summary Judgment is DENIED. The Clerk is directed to dismiss the complaint. No costs.

IT IS SO ORDERED.

¶2002-5581

James L. DeMARCO, PETITIONER v. UNITED STATES DEPT. OF TREASURY, RESPONDENT. U.S. District Court, Northern Dist. of Ohio, (DC OH) Case No. 1:02MC0052, Sept. 23, 2002. Decision against Taxpayer.

1. Third-party summons enforcement—petition to quash. Taxpayer's petition to quash 3d-party summons IRS issued on bank was denied, and summons was enforced. *Reference:* United States Tax Reporter ¶76,095.01(10). IRC §7609.

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION,

MEMORANDUM & ORDER

JUDGE O'MALLEY

[1] On March 18, 2002, Petitioner, James DeMarco, filed a motion to quash a subpoena issued by the Internal Revenue Service to third-party First Merit Bank. Having reviewed the papers, and for the reasons stated in the Government's opposition brief to Petitioner's motion to quash, the Court DENIES Petitioner's motion. The Government's cross motion to enforce its subpoena is GRANTED. All documents responsive to the Government's subpoena are to be produced to the Government within fourteen (14) days of the date of this order. The Government shall serve notice of this order upon First Merit Bank, to whom its subpoena is directed.

IT IS SO ORDERED.

KATHLEEN McDONALD O'MALLEY

UNITED STATES DISTRICT JUDGE

¶2002-5582

E.G. ALFORD, JR., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Texas, (DC TX) No. 3:02-CV-1719-M, Oct. 22, 2002. District Court adopted. Years 1996, 1997, 1998, 1999, 2000. Decision against Taxpayer.

1. Summons enforcement—petition to quash. Magistrate judge's recommendation, to deny taxpayer's motion to reconsider denial of his petition to quash IRS summons, was adopted: taxpayer's argument that summons should be quashed because same IRS agent both issued and served summons was meritless; and whether Form 1040 lacked OMB control number in violation of Paperwork Reduction Act was irrelevant. *Reference:* United States Tax Reporter ¶76,025.04(25). IRC §7602.

United States District Court, N.D. Texas, Dallas Division,

ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

LYNN, J.

The Court has under consideration the Findings, Conclusions, and Recommendation of United States Magistrate Judge Paul D. Stickney on Plaintiff's Objection to Finding of Magistrate Judge and Demand for Reconsideration, filed September 19, 2002. Objections were filed, and the District Court has made a de novo review of those portions of the proposed Findings, Conclusions, and Recommendation to which objection was made. The objections are overruled, and the Court accepts the Findings, Conclusions, and Recommendation of the United States Magistrate Judge.

Plaintiff's Objection to Finding of Magistrate Judge and Demand for Reconsideration is DENIED.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

STICKNEY, Magistrate J.

[1] Pursuant to the District Court's Order Referring Motion, entered September 30, 2002, Plaintiff's "Objection to Finding of Magistrate Judge and Demand for Reconsideration," filed September 19, 2002, is before this Court for hearing, if necessary, and for recommendation. For

the following reasons, the motion should be DENIED.

On August 13, 2002, Plaintiff E.G. Alford, Jr., (''Alford'') filed a petition to quash an Internal Revenue Service (''IRS'') summons. The summons required Alford to appear before an IRS revenue officer and to produce ''documents and records'' regarding taxable income for the years 1996 through 2000. On August 28, 2002, this Court denied Alford's petition as without merit. On September 19, 2002, Alford filed the instant motion for reconsideration, in which he contends that the summons should be quashed because: (1) the summons was issued and served by the same IRS revenue officer and (2) IRS Form 1040 does not have a valid Office of Management and Budget (''OMB'') control number in violation of 44 U.S.C. § 3512 (''Paperwork Reduction Act'').

With respect to issuance and service of the summons, it is not disputed that IRS Revenue Officer Kelvin R. Rogue (''Rogue'') both issued and served the summons on Alford. Nonetheless, it is well established that a single IRS revenue officer may both issue and serve a summons pursuant to 26 U.S.C. §§ 7602 and 7603. United States v. Crum, 288 F.3d 332, 333, 334 [89 AFTR 2d 2002-2315] (7th Cir.2002) (noting that the same IRS revenue officer both issued and served summonses); United States v. Derr, 968 F.2d 943, 946–47 [70 AFTR 2d 92-5148] (9th Cir.1992) (noting that the same IRS revenue agent both issued and served a summons); United States v. McCoy, 954 F.2d 1000, 1001 (5th Cir.1992) (noting that the same IRS revenue officer both issued and served a summons); United States v. Bichara, 826 F.2d 1037, 1038 [60 AFTR 2d 87-5646] (11th Cir.1987) (noting that the same IRS revenue officer both issued and served a summons); United States v. Howard, 360 F.2d 373, 375 [17 AFTR 2d 900] (3d Cir.1966) (noting that the same IRS special agent both issued and served a summons and reversing on other grounds). As such, Alford's first contention that the summons should be quashed because Rogue both issued and served the summons is without merit.

With respect to the alleged lack of an OMB control number on IRS Form 1040, Alford's contention is entirely irrelevant to the issue of whether the summons should be quashed. First, the summons itself was issued on IRS Form 2039, not on IRS Form 1040. Furthermore, the summons does not require Alford to file an IRS Form 1040, but rather it requires Alford to appear and to produce ''[a]ll documents and records in [his] possession or control reflecting the receipt of taxable income by [Alford] for the year(s) 1996 thru 2000.'' Finally, even if IRS Form 1040 lacks an OMB control number, and even if the instant summons were to initiate an investigation that eventually led to Alford's conviction for failure to file an income tax return, any such conviction would not be prohibited by the Paperwork Reduction Act. United States v. Kerwin, 945 F.2d [68 AFTR 2d 91-5753]92, 92 (5th Cir.1991) (''[T]he Paperwork Reduction Act does not apply to the statutory requirement that a taxpayer must file a return.''). As such, Alford's second and final contention that the summons should be quashed because IRS Form 1040 allegedly lacks an OMB control number is without merit.

Accordingly, the Court RECOMMENDS that Alford's ''Objection to Finding of Magistrate Judge and Demand for Reconsideration'' be DENIED.

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/ OBJECT

Pursuant to Title 28, United States Code, Section 636(b)(1), any party who desires to object to these findings, conclusions, and recommendation must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings, conclusions, or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. A party's failure to file such written objections to these proposed findings, conclusions, and recommendation shall bar that party from a

de novo determination by the District Court. See Thomas v. Arn, 474 U.S. 140, 150 (1985), Perales v. Casillas, 950 F.2d 1066, 1070 (5th Cir.1992). Additionally, any failure to file written objections to the proposed findings, conclusions, and recommendation within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. Douglass v. United Servs. Auto. Ass'n, 79 F.3d 1415, 1428–29 (5th Cir.1996) (en banc).

¶2002-5583

Hellene L. HEATH v. INTERNAL REVENUE SERVICE. U.S. District Court, Northern Dist. of Texas, (DC TX) No. 3-02-CV-1518-H, Sept. 16, 2002. Decision against Taxpayer.

1. District court procedure—in forma pauperis—filing fee—refund actions. Magistrate judge's recommendation to deny pro se taxpayer's motion to proceed in forma pauperis in refund suit was adopted: affidavits showing taxpayer had $81,000 in savings plus multiple assets refuted claim that she couldn't afford $150 filing fee. *Reference:* United States Tax Reporter ¶74,025.01(3); 74,225.01(75). IRC §7402; 7422.

United States District Court, N.D. Texas, Dallas Division,

ORDER

SANDERS, J.

[1] Taxpayer brought pro se action against the Internal Revenue Service for refund of taxes. On taxpayer's motion to proceed in forma pauperis, the District Court, Sanders, J., adopting report and recommendation of William T. Sanderson, Jr., United States Magistrate Judge, held that taxpayer, who had, inter alia, $ 81,000 in savings, could not proceed in forma pauperis.

Motion denied.

Federal Civil Procedure k2734

170Ak2734

Taxpayer could not proceed in forma pauperis in her action against the Internal Revenue Service for refund of taxes, where taxpayer received disability compensation of $1,995 per month, she had savings totalling $ 81,000, she owned a home valued at $ 49,000, and other real estate valued at $ 2,000, as well as vehicle valued at $ 7,000.28 U.S.C.A. § 1915(a).

After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge, I am of the opinion that the findings and conclusions of the Magistrate Judge are correct and they are adopted as the findings and conclusions of the Court.

IT IS, THEREFORE, ORDERED that the findings, conclusions and recommendation of the United States Magistrate Judge are adopted.

IT IS FURTHER ORDERED that Plaintiff's motion to proceed in forma pauperis is denied and the petition will be dismissed without prejudice, unless within thirty days of the date of this order Plaintiff tenders the $150.00 filing fee made payable to the United States District Clerk.

FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of 28 U.S.C. § 636(b), and an order of the District Court, this cause has been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge, as evidenced by his signature thereto, are as follows:

FINDINGS AND CONCLUSIONS:

Type of Case: This is a pro se civil action for refund of taxes.

Parties: Plaintiff is a resident of Dallas, Texas. Defendant is the Internal Revenue Service. The court has not issued process in this case.

Statement of the Case: On July 17, 2002, Plaintiff filed the complaint in this action along with a motion to proceed in forma pauperis to establish that she is unable to pay the $150.00 filing fee. On August 22, 2002, Plaintiff submitted an affidavit in support of her request to proceed in forma pauperis providing additional financial information as required by this court's order filed on July 23, 2002.

Findings and Conclusions: The statute authorizing the court to grant in forma pauperis status to an indigent litigant states that:

> Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such [person] possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

28 U.S.C. § 1915(a)(1).

The mere execution of an affidavit of indigence does not automatically entitle a litigant to proceed in forma pauperis. Rather, the court enjoys limited discretion to grant or deny a motion for leave to proceed in forma pauperis based upon the financial statement set forth within the applicant's affidavit. Adkins v. E.I. Du Pont De Nemours & Co., Inc., 335 U.S. 331, 337, 69 S.Ct. 85, 88, 93 L.Ed. 43 (1948); Green v. Estelle, 649 F.2d 298, 302 (5th Cir. Unit A June 1981); 28 U.S.C. § 1915(a).

A review of the financial information, submitted in the affidavit in support of the request to proceed in forma pauperis, reflects that Plaintiff is presently receiving disability compensation in the amount of $1,995 per month. (See Affidavit in support of request to proceed in forma pauperis at pp 3 and 12). In addition to the above, Plaintiff has savings totaling $81,000; she owns a home valued at $49,000, other real estate valued at $2,000, and a 1990 Mercedes valued at $7,000. (Id. pp 4 and 5). Her savings alone constitute sufficient funds to pay the $150.00 filing fee in this case. Accordingly, Plaintiff's motion to proceed in forma pauperis should be denied.

RECOMMENDATION:

For the foregoing reasons, it is recommended that the District Court enter its order denying Plaintiff's request to proceed in forma pauperis.

It is further recommended that the District Court inform Plaintiff that her complaint will be subject to dismissal without notice, unless Plaintiff tenders the $150.00 filing within thirty (30) days of the District Court's order.

The Clerk will mail a copy of this recommendation to Plaintiff.

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten days after being served with a copy of this recommendation. Pursuant to Douglass v. United Servs. Auto Ass'n, 79 F.3d 1415 (5th Cir.1996) (en banc), a party's failure to file written objections to these proposed findings of fact and conclusions of law within such ten day period may bar a de novo determination by the district judge of any finding of fact or conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court.

¶2002-5584

UNITED STATES OF AMERICA, APPELLEE v. Eileen LAINE, APPELLANT. U.S. Court of Appeals, Third Circuit, (CA3) No. 02-1274, Oct. 29, 2002. District Court affirmed. Decision against Taxpayer.

1. Tax crimes—tax evasion; conspiracy—sentencing. Taxpayer's conviction and sentence for tax evasion, conspiracy

and other offenses related to ins. fraud scheme were affirmed: district court's loss calculation was proper since it was based on comprehensive pre-sentence report; and denial of minor role adjustment was appropriate where mere fact that taxpayer took lesser share of conspiracy profits than her co-conspirators didn't necessarily make her role minor. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §7201.

United States Court of Appeals, Third Circuit,

On Appeal from the United States District Court for the District of New Jersey. (D.C.Crim. No. 98-00707). Honorable William G. Bassler, District Judge.

Before ROTH and GREENBERG, Circuit Judges, and WARD, District Judge.*

OPINION OF THE COURT

GREENBERG, Circuit Judge.

This case was not selected for publication in the Federal Reporter.

NOT PRECEDENTIAL*

[1] This matter comes on before this court on Eileen Laine's appeal from the sentencing component of a judgment of conviction and sentence entered on January 18, 2002. The United States Attorney filed an information against Laine charging her in five counts as follows: count 1, conspiracy to commit insurance fraud in violation of 18 U.S.C. 371; count 2, conspiracy to commit tax offenses in violation of 18 U.S.C. 371; count 3, tax evasion in violation of 26 U.S.C. 7201; count 4, money laundering in violation of 18 U.S.C. 1956(a)(1)(B)(i) and 2; count 5, money laundering in violation of 18 U.S.C. 1956(a)(1)(B)(i) and 2. Inasmuch as Laine cooperated with the government the United States Attorney filed a motion for a downward departure pursuant to U.S.S.G. 5K1.1. The district court calculated her guideline range as 78 to 97 months predicated on a total offense level of 28 and a criminal history category of I but granted the government's motion and departed downward 9 levels to a total offense level of 19 which established her sentencing range as 30 to 37 months. The court then sentenced Laine to five concurrent 30-month custodial terms to be followed by five concurrent three-year terms of supervised release. Laine appeals, asserting that the district court made two errors. First, she contends that the court "erred in attributing the entire loss amount to [her] without first examining the scope of her agreement to participate in the fraud and whether the actions of the others were reasonably foreseeable in light of that agreement." Second, she argues that the "court erred in denying [her] a minor role adjustment based on her integral role in the conspiracy rather than her relative culpability." We have jurisdiction under 18 U.S.C. 3742.

The parties appear to be in some disagreement with respect to the appropriate standard of review to apply here. Laine asserts that we are concerned with "interpretation and application of the sentencing guidelines" and the "proper analysis under the sentencing guidelines" and thus our review is de novo, citing United States v. Isaza-Zapata, 148 F.3d 236, 237 (3d Cir.1998), and United States v. Georgiadis, 933 F.2d 1219, 1222 (3d Cir.1991). While the government does not quarrel with Laine's statement of the law, it believes that there is a factual as well as a legal component in the guidelines calculations and that we review the factual component on a clear error basis, citing Isaza-Zapata, 148 F.3d at 237, and United States v. Fuentes, 954 F.2d 151, 152–53 (3d Cir.1992). We are of the view that there are to a degree factual disputes here and thus we exercise both deferential and plenary review on this appeal.

We are satisfied that the district court's conclusions as to the amount of the loss attributed to Laine were fully justified. The record supports the court's finding that

* Honorable Robert J. Ward, Senior Judge of the United States District Court for the Southern District of New York, sitting by designation.

* Please use FIND to look at the applicable circuit court rule before citing this opinion. Third Circuit Local Appellate Rule 28.3(a) and Internal Operating Procedure 5.3. (FIND CTA3 Rule 28.0 and CTA3 IOP APP I 5.3.)

Laine "was personally involved in almost every aspect of the securities fraud." App. at 114. In this regard, the district court relied on the presentence report which it characterized as being "very thorough." Id. We, too, have examined the presentence report and find it to be exceptionally comprehensive. We also reject Laine's contention that she was entitled to a minor role adjustment. In this regard we recognize that Laine's share of the profits of the conspiracy was less than that of other conspirators. This circumstance, however, does not in itself make her role "minor." See United States v. Moore, 991 F.2d 409, 413–14 (7th Cir.1993).

The judgment of conviction and sentence entered January 18, 2002, will be affirmed.

¶2002-5585

Tae M. KIM; Young J. KIM, PETITIONERS--APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT--APPELLEE. U.S. Court of Appeals, Fourth Circuit, (CA4) No. 02-1697, Oct. 30, 2002. Tax Court, (2002) TC Memo 2002-49, RIA TC Memo ¶2002-049 (opinion by Chiechi, *J.*), af-firmed per curiam. Earlier proceedings at (2000, CA4) 87 AFTR 2d 2001-808, 215 F3d 1319, 2000-1 USTC ¶50524, af-firming per curiam (1999) TC Memo 1999-261 [1999 RIA TC Memo ¶99,261], RIA TC Memo ¶99261, 78 CCH TCM 237 [1999 RIA TC Memo ¶99,261]. Deci-sion against Taxpayers.

1. Administrative costs—res judicata—untimely claim. Tax Court orders granting IRS summary judgment on taxpayers' administrative costs request and denying taxpayers' motion for reconsideration were affirmed per curiam based on Court's reasoning. *Reference:* United States Tax Reporter ¶74,305.01(75). IRC §7430.

Tae M. Kim, Young J. Kim, Appellants Pro Se. Jonathan Samuel Cohen, Anthony Thomas Sheehan, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

United States Court of Appeals, Fourth Circuit,

Appeal from the United States Tax Court. (Tax Ct. No. 01-1448)

Before WIDENER, MICHAEL, and MOTZ, Circuit Judges.

PER CURIAM:

[1] Tae M. Kim and Young J. Kim appeal from the tax court's orders: (1) granting summary judgment to the Commissioner on the Kims' action seeking recovery of administrative costs under 26 U.S.C. § 7430(f)(2) (2000) and (2) denying their motion for reconsideration. Our review of the record and the tax court's opinions discloses no reversible error. Accordingly, we affirm on the reasoning of the tax court. *See Kim v. Commissioner*, Tax Ct. No. 01-1448 (U.S. Tax Ct. Feb. 21, 2002; Mar. 26, 2002). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. *AFFIRMED*

¶2002-5586

In Re: Thomas and Jodie BRADSHAW, Debtors. U.S. Bankruptcy Court, Dist. of Massachusetts, (Bktcy Ct MA) CASE NO. 00-42999-JBR, Oct. 22, 2002. Decision against Taxpayers.

1. Tax claims in bankruptcy—secured status—objection to IRS's proof of claim—jurisdiction—pending appeals. Chap. 13 debtors' motion to determine secured status under 11 USC §506(a) and their related objections to IRS's and Massachusetts's proofs of claim were dismissed for lack of jurisdiction: motion and objections raised same issues as those implicated in pending appeal of earlier decision involving same underlying issues of valuation and lien stripping. Also, objections were untimely filed.

Reference: United States Tax Reporter ¶68,726.51(10); 68,726.52(5).

UNITED STATES BANKRUPTCY COURT DISTRICT OF MASSACHUSETTS,

MEMORANDUM OF DECISION ON (1) DEBTORS' MOTION TO DETERMINE SECURED STATUS PURSUANT TO 11 U.S.C. SECTION 506(a); (2) DEBTORS' OBJECTION TO PROOF OF CLAIM FILED BY THE COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF REVENUE; AND (3)DEBTORS' OBJECTION TO PROOF OF CLAIM FILED BY THE INTERNAL REVENUE SERVICE

Joel B. Rosenthal United States Bankruptcy Judge

Chapter 13

This matter came before the Court for hearing on three separate but related pleadings filed by the Debtors: (1) Motion to Determine Secured Status Pursuant to 11 U.S.C. Section 506(a); (2) Objection to Proof of Claim Filed by the Commonwealth of Massachusetts Department of Revenue (''DOR''); and (3) Objection to Proof of Claim Filed by the Internal Revenue Service (''IRS''). These pleadings are the latest in a series of the Debtors' unsuccessful attempts to avoid the tax liens of the IRS and the DOR. For the reasons set forth herein the Court lacks jurisdiction to act on the Motion to Determine the Secured Status and the Objections to the Proofs of Claim of the IRS and the DOR until final resolution of the Debtors' pending appeal.

BACKGROUND

The Debtors filed for relief pursuant to Chapter 13 of the United States Bankruptcy Code on May 26, 2000. On June 9, 2000 they filed their schedules in which they listed the value of their primary residence as $85,000. Schedule D indicates that the residence was encumbered by a first mortgage in the amount of $72,600, tax liens of the IRS in the amount of $67,031.82, and the DOR in the amount of $5,000. Schedule A bears the notation that these tax liens are ''to be avoided.'' Schedule B lists $6,020.00 of personal property including two cars, some jewelry and tools, aggregating to $2,700. Schedule B describes the cars, jewelry, and tools as encumbered by a lien in favor of the IRS in the amount of $67,031.82 and each is followed by an identical notation: ''Lien to be avoided''.

On June 9, 2000 the Debtors also filed their Chapter 13 Plan which provided for the treatment of the secured claims as follows:

A) CLAIMS TO BE PAID THROUGH THE PLAN (INCLUDING ARREARS):

Creditor	Description of claim	Amount of Claim
Plymouth Mortgage Co.	Pre-petition arrears	$ 3440.00
Internal Revenue Service	Tax Lien-to be avoided	$67031.82
Mass DOR	Tax Lien-to be avoided	$ 5000.00
Total amount of secured claims to be paid though the Plan		$75471.82

The Plan was confirmed on August 24, 2000, Subsequently both the IRS and the DOR filed proofs of claim. In its proof of claim the IRS asserted a secured claim of $71,088.75; a priority unsecured claim of $9,356.79; and general unsecured claim of $751.66. The DOR's proof of claim states that the DOR holds a secured claim in the amount of $18,326.32; an unsecured priority claim in the amount of $624.29; and a general unsecured claim in the amount of $917.87. The tax liens arise statutorily and both liens are against the Debtors' real and personal property.[1] There is no challenge to the perfection of these liens.

[1] Although the Debtors' Schedules do not reflect the DOR lien against their personalty, M.G.L. ch. 62C, § 50 expressly states that the DOR's statutory lien encumbers ''all property and rights to property, whether real or personal . . . .''

The Debtors took no action to avoid the liens or otherwise object to the tax claims. Consequently in February 2002, more than a year and a half after the Debtors filed their Plan, the Chapter 13 Trustee moved to dismiss because the Plan, as confirmed, was no longer feasible in light of the Debtors' failure to successfully challenge the tax claims.[2] On March 19, 2002 the Debtors responded by filing a motion to avoid the tax liens on the grounds that the liens had been avoided under the Plan and thus the doctrine of *res judicata* barred the IRS and the DOR from asserting their liens. Both taxing authorities objected and on April 18, 2002 this Court entered an order denying the motion because the Plan did not unambiguously, clearly, and unequivocally put the IRS or the DOR on notice that their rights were being affected by the Plan.

The Debtors then faxed a motion seeking an extension of time until May 6, 2002 in which to file a motion for reconsideration or a notice of appeal. The Court granted the extension and on May 6, 2002 the Debtors filed a Motion for Reconsideration (the "First Reconsideration Motion"). For the first time they asserted that no party objected to the property values listed in the Schedules and therefore, pursuant to Section 506(a) of the Bankruptcy Code, the IRS is undersecured and the DOR is wholly unsecured.[3] On May 13, 2002 they further supplemented their request for reconsideration in their Supplemental Motion for Reconsideration (the "Second Reconsideration Motion"). The Second Reconsideration Motion is identical to the First except for the addition of one paragraph in which the Debtors set forth their scheduled valuation of their residence, and the amount of the encumbrances on that property. In essence they show the mathematical calculations by which they arrive at their conclusion that the IRS holds a secured claim of $9,087.68 while the DOR's claim is unsecured.[4] This Court denied the Reconsideration Motions on May 20, 2002. The Debtors next filed notices of appeal from the orders of April 18 and May 20 and a motion for leave to appeal. The Bankruptcy Appellate Panel held that the two orders were final and thus denied the motion for leave to appeal as moot. The Panel then dismissed the appeal of the April 18 order because the facsimile transmission was received by the Bankruptcy Clerk's office after 4:30 p.m. on April 28 and under M.L.B.R. 5001-2(b), it was deemed filed on April 29. It was, therefore, untimely and the BAP lacked jurisdiction to hear the appeal of the April 18 order. The BAP, however, noted that the appeal from the May 20 order denying reconsideration was timely and could "proceed as a discrete question, unconnected to the order of April 18, 2002." *Bradshaw v. United States of America (In re Bradshaw)*, 2002 WL 31309329, 4 (1st Cir. BAP Aug. 30, 2002).

Apparently unsatisfied with the status of the remaining appeal, on September 16, 2002 the Debtors came back to this Court and filed their Motion to Determine Secured Status Pursuant to 11 U.S.C. Section 506(a) (the "Motion to Determine Secured Status"). This Motion is identical in substance to the Second Reconsideration Motion except the Debtors' valuation of the IRS's secured claim has been adjusted upward to $26,362.50 apparently as a result of the addition of the value of the personalty, an unexplained $10,000 increase to the value of the real estate, and an unexplained decrease in the amount of the mortgage.[5] On October 3, 2002 the Debtors followed the Motion to Determine Secured Status with objections to the IRS's and the DOR's claims. The objections do nothing more than reiterate the substance of the Motion to Determine Secured Sta-

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2 The Chapter 13 Trustee also moved for dismissal because the Debtors missed one Plan payment.

3 The DOR alleges that it was the first to assess the Debtors tax liabilities. If the DOR is correct, then the Debtors have incorrectly prioritized the taxing liens based on a "first to record" rule. Priorities between the IRS and the DOR follow the "cardinal rule" first articulated by the Supreme Court in *Rankin & Schatzell v. Scott*, 12 Wheat. (25 U.S.) 177, 179, 6 L.Ed 592 (1827). That rule, namely that a "prior lien gives a prior claim", in this case requires an examination of whether the DOR's lien was "'choate' enough to prime a later and equally general federal tax lien." *United States v. State of Vermont*, 377 U.S. 351, 354, 84 S.Ct. 1267, 1269, 12 L.Ed.2d 370 [13 AFTR 2d 1599] (1964) (citation omitted). Generally the answer is that the DOR's is sufficiently choate and thus a "first to assess" rule governs.

4 The Debtors did not include the value of any personalty in their calculations.

5 The Debtors state that all of these values are as of the petition date. The value of the residence and the amount of the mortgage, differ from the amounts listed in the Debtors' Schedules and the Second Reconsideration Motion.

tus. Only the DOR filed an opposition to the Motion to Determine Secured Status. In its opposition the DOR challenges the procedure by which the Debtors seek a determination of the validity of the tax liens, the valuation of the real estate and the outstanding amount of the mortgage, and the Debtors' right to bifurcate and cram down the tax claims under *Nobleman v. American Savings Bank*, 508 U.S. 324, 113 S.Ct. 2106 (1993).

DISCUSSION

[1] Although no party has raised the issue of this Court's jurisdiction to hear the Motion to Determine Secured Status, it is the Court's responsibility to do so. Given that the Debtors have an appeal currently pending before the BAP, the Court must examine the propriety of ruling on a motion, and indeed the objections, that raise as their only argument one which is identical to the argument set forth in the Reconsideration Motions currently on appeal.

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982) (per curiam). "The rule is well established that the taking of an appeal transfers jurisdiction from the Bankruptcy Court to the Appellate Court with regard to matters involved in the appeal and divest the Bankruptcy Court of jurisdiction to pro-ceed further with such matters." *In re Kendrick Equipment Corporation*, 60 B.R. 356, 358 (Bankr. W.D.Va. 1986) (citations omitted). "This is so because a bankruptcy judge does not have concurrent jurisdiction with the district court [or BAP] over the subject matter of an appeal . . . . Once a notice of appeal is filed 'no lower court should be able to vacate or even modify an order under appeal, not even a bankruptcy court attempting to eliminate the need for a particular appeal.' . . . The rationale for this rule is the avoidance of confusion and waste of time that might result from putting the same issues before two courts at the same time." *In re Emergency Beacon Corporation*, 58 B.R. 399, 402 (S.D.N.Y. 1986). The question thus becomes whether the pending appeal of the May 20 order denying reconsideration has put before the BAP the same matters which the Debtors now ask this Court to address.

Motions for reconsideration are not recognized under the Federal Rules of Bankruptcy Procedure or under the Federal rules of Civil Procedure. *In re Good*, 281 B.R. 689, 698 (10th Cir. BAP 2002). The term is a misnomer and is used as a form of shorthand to refer to a variety of motions pursuant to Fed. R. Civ. P. 59, made applicable to bankruptcy cases by Fed. R. Bankr. P. 9023,or Fed. R. Civ. P. 60, made applicable to bankruptcy cases by Fed. R. Bankr. P. 9024. In general "the purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985) *cert denied*, 476 U.S. 1171 (1986) (citations omitted). This Court ruled in its May 20 order denying the Debtors' Reconsideration Motions that the Debtors failed to meet this standard with the assertion of a new legal argument seeking to limit the amount of the IRS's and the DOR's liens pursuant to Section 506(a). Because the Court found that the Debtors failed to meet the test for reconsideration, it did not rule on the merits of their new argument. But it does not necessarily follow that the BAP's review will be limited to the narrow question of whether this Court abused its discretion in denying the Reconsideration Motions without any examination of the Section 506(a) argument. For example, it is possible that if the BAP reverses the denial of the Reconsideration Motions, it could remand with instructions as to how this Court should resolve the myriad of issues raised by the Debtors' Section 506(a) argu-

ment.[6] Therefore this Court concludes that the matters now before it are the same as the matter before the BAP and thus this Court lacks jurisdiction to rule on them. Moreover, even if the appeal did not divest this Court of jurisdiction to hear the Motion to Determine Secured Status, a premature ruling by this Court has the potential to lead to a decision potentially at odds with the decision of the BAP. The result is no different with the claims objections; each objection emanates from the Debtors' Section 506(a) argument.[7]

CONCLUSION

This Court lacks jurisdiction to rule on the Motion to Determine Secured Status and the objections. A separate order will issue.

Dated: October 22, 2002

Joel B. Rosenthal

United States Bankruptcy Judge

¶2002-5587

Charles F. CONCES and Mary E. CONCES, PLAINTIFFS v. Dan MYERS, DEFENDANT. U.S. District Court, Western Dist. of Michigan, (DC MI) Case No. 4:02-cv-41, Oct. 3, 2002. Decision against Govt.

1. Actions against IRS employees—constitutional claims—service. Govt.'s motion to dismiss pro se taxpayers' constitutional and fraud claims against IRS employee was denied without prejudice: action was against employee individually, not U.S., to extent he wasn't named in his official capacity; but, taxpayers didn't show that they served employee properly pursuant to F.R.Civ.P. 4(e). *Reference:* United States Tax Reporter ¶74,336.505(10).

UNITED STATES OF AMERICA UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION,

MEMORANDUM OPINION

Honorable David W. McKeague

[1] This is a civil action brought *pro se* by plaintiffs naming Dan Myers, an employee of the United States, as the defendant. Plaintiffs filed their complaint on March 19, 2002. Dan Myers is the Director of the Cincinnati Service Center, Internal Revenue Service, United States Department of Treasury. Plaintiffs' complaint seeks to hold defendant liable for monetary damages under several theories: (1) violation of plaintiffs' Fourth Amendment rights through failure to accede to plaintiffs' assertions that they did not owe taxes; (2) a Fifth Amendment due process violation in threatening to seize plaintiffs' property in order to satisfy their tax debts; (3) criminal violations through use of the United States mail, 18 U.S.C. §§ 41, 47, 63; (4) extortion under color of law in violation of 18 U.S.C. § 872; (5) violation of "administrative due process;" and (6) attempt to commit fraud. Plaintiffs did not proceed *in forma pauperis*. Therefore, plaintiffs' complaint was not subject to initial screening.

On April 10, 2002, the United States filed a motion to dismiss the complaint on the basis of lack of subject matter jurisdiction, insufficiency of service of process, sovereign immunity, and failure to state a

[6] The issues raised are numerous. For example, the DOR has asserted that the attack on the amount of the secured tax claims is procedurally defective as such a determination can only be made in the context of an adversary proceeding. *See* Fed. R. Bankr. P. 7001(2). Judge Boroff, in *McDonough v. Plaistow Cooperative Bank (In re McDonough)*, 166 B.R. 9, 14 (Bankr. D. Mass. 1994), however, addressed the issue of lienstripping in a Chapter 13 case and determined that it is not intended to survive if the case is subsequently converted to a Chapter 7 proceeding. Consequently he held that "lienstripping should only be accomplished through the Plan itself, which does not provide a benefit to the Debtor *until* the Debtor obtains a discharge under 11 U.S.C. § 1328, and it is certain that the case will be neither dismissed or converted." *Id. But see Wright v. Commercial Credit Corporation*, 178 703, 705 (E.D. Va 1995), appeal dismissed *In re Wright*, 77 F.3d 472 (4th Cir. 1996) (table decision). The DOR also notes inconsistencies in the Debtors' valuations, including their December 2000 opposition to a motion for relief in which they acknowledged that the value of their residence was $125,000, and argues that the property should be valued as of the effective date of the Plan, not the petition date.

This Court also notes a more fundamental issue raised by the Debtors' request, namely, whether lienstripping of tax claims is permissible in this case, and if so at what point in the case such stripping is permissible. *See generally McDonough*, 166 B.R. 11–13, *see also In re Thompson*, 224 B.R. 360 (Bankr. N.D. Tex. 1998). Moreover, the Debtors assume that if they are successful in stripping the liens, then the unsecured portion give rise to only general unsecured claims. This may not be true; some portion of the tax liabilities may become priority unsecured claims which would need to be dealt with in any plan.

[7] The Court also notes that the objections were filed well after the deadline for such objections had passed. MLBR 13-13(b). Contrary to the Debtors' argument that their delay was occasioned solely because the Court only recently undercut the *res judicata* effect of the confirmation order in the April 18 order, the Debtors' own draftmenship lead to their current predicament.

claim upon which relief can be granted. (docket # 3). The position of the United States is unorthodox and procedurally flawed. Only Dan Myers, and not the United States, has been named as a defendant. The United States has never filed a motion or any of the supporting documents necessary to have itself substituted as the named defendant in this lawsuit pursuant to 28 U.S.C. § 2679(d). The United States nevertheless asserts that it is the only proper defendant because the complaint is against defendant Myers in his official capacity. (Brief of United States at 4, docket # 4). A suit against this defendant in his official capacity is in effect a suit against the United States. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991). This, however, is a strained reading of the complaint. Furthermore, in their response to the motion to dismiss, plaintiffs disavowed any claim against defendant Myers in his official capacity, and made it clear that they were suing Mr. Myers only in his individual or personal capacity. (Objection By Plaintiffs to Unverified United States' Motion to Dismiss By Non Party to This Action, ¶ 8, docket # 6). In such circumstances, the Sixth Circuit considers the action as one against the defendant in his personal capacity. *See Moore v. City of Harriman*, 272 F.3d 769, 772 (6th Cir. 2001).

The United States is not and never was a party to this lawsuit. Although the United States is free to provide counsel to Mr. Myers, it was not free to inject itself into this action on the *ipse dixit* that it is the ''only proper defendant.'' Unless and until the court so rules, or the United States properly invokes the provisions of the federal Tort Claims Act, 28 U.S.C. § 2679(d)(1), the only party defendant is Dan Myers.

Plaintiffs filed this lawsuit against defendant Myers on March 19, 2002. Under Rule 4(m) of the Federal Rules of Civil Procedure, plaintiff had 120 days after filing of the complaint within which to effect service of process upon Mr. Myers. The summons expired on July 17, 2002. On April 30, 2002, plaintiffs filed a ''proof of service'' with the court indicating that they served Mr. Myers with the summons and complaint by certified mail. (docket # 8). The certified mail receipt plaintiffs attached to their proof of service shows that delivery was not restricted to Mr. Myers. The receipt is stamped but not signed. Rule 4(e) of the Federal Rules of Civil Procedure identifies the available means of achieving service upon an individual. Plaintiffs did not attempt service by any means authorized by Rule 4(e)(2). Rule 4(e)(1) authorizes service ''pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon a defendant in an action brought in the courts of general jurisdiction of the State.'' Michigan's court rules require that delivery by certified mail be restricted to the addressee and that the receipt be signed by the defendant. Mich. Ct. R. 2.105(A)(2). Rule 4.1(A) of the Ohio Rules of Civil Procedure (the state of service) expressly requires that when service is attempted by certified mail, the return receipt must be ''signed'' by a person. Plaintiffs have not provided proof that they have achieved service upon Mr. Myers such that he could properly be considered in default. The September 11, 2002 order (docket # 18) denying plaintiffs' motion for entry of default will be modified to reflect that plaintiffs' motion has been denied by the court on the basis of lack of service of process.

Consequently, the only named defendant, Dan Myers, has never been served and has not appeared. Plaintiffs are expressly advised that if they fail to achieve service of the complaint and a viable summons upon defendant by means authorized under the Federal Rules of Civil Procedure and file proof of such service to the court on or before November 1, 2002, plaintiffs' complaint will be dismissed.

Dated: October 3, 2002

David W. McKeague

United States District Judge

ORDER

David W. McKeague United States District Judge

In accordance with the memorandum opinion issued herewith:

IT IS ORDERED that the motion to dismiss by the United States (docket # 3) is DENIED WITHOUT PREJUDICE.

IT IS FURTHER ORDERED that the court's order of September 11, 2002 (docket # 18), be and hereby is modified to reflect that plaintiffs' motion for entry of default (docket # 12) has been denied by the court on the basis of lack of service of process upon defendant. Plaintiffs are hereby advised that if they fail to achieve service of the complaint and a viable summons upon defendant Myers by means authorized under the Federal Rules of Civil Procedure and file proof of such service to the court on or before November 1, 2002, plaintiffs' complaint will be dismissed pursuant to Fed. R. Civ. P. 4(m).

Dated: October 3, 2002

David W. McKeague

United States District Judge

¶2002-5588

Jon P. HELLAND, PLAINTIFF v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 96-433 T, Oct. 15, 2002. Years 1989, 1990, 1991. Decision for Govt.

1. Employment taxes—liability—partnerships; partner liability. Taxpayer-partner was liable for pizza franchise partnerships' employment tax debts: taxpayer's attempt to avoid liability with inconsistent contentions that partnerships were never validly formed, that he was merely lender rather than co-partner, or that his transfer of his partnership interests to his wholly owned S corps. removed him from liability or dissolved partnerships were rejected. Proof that taxpayer was actual partner and not mere lender included facts that he intended to own part of pizza businesses, shared in profits, reported his share of partnership income on returns, drafted and signed partnership agreement, and held himself out as partner; fact other partners operated businesses was irrelevant; and reliance on IRC §6672's "responsible person" provision was misplaced. Also, taxpayer's liability wasn't affected by his transferring partnership interests to corps. since he couldn't unilaterally transfer partnership debts or dissolve partnerships under state law, which also mandated that his liability continued until winding up of partnership affairs was complete, which didn't occur until after subject taxes accrued. *Reference:* United States Tax Reporter ¶35,095.01(10); 7045.09(10). IRC §704; 3401; 3509; 6672.

Charles L. Abrahams, San Diego, CA., for plaintiff.

Robert Stoddart, Senior Trial Attorney, Court of Federal Claims section, Tax Division, Department of Justice, Washington, D.C., for the United States. With him on briefs *Eileen J. O'Connor*, Assistant Attorney General, *Mildred L. Seidman*, Chief, Court of Federal Claims Section, and David *Gustafson*, of counsel.

In The United States Court of Federal Claims,

ORDER

MOODY R. TIDWELL Senior Judge

"NOT FOR PUBLICATION"

In the above named case, plaintiff. Jon P. Helland, filed the instant claim for refund of employment taxes, penalties and interest assessed against and collected from plaintiff by defendant, the United States. Defendant counterclaimed for additional unpaid employment taxes assessed against plaintiff. A trial was held in San Diego, California. For the reasons set forth below, the court finds in favor of defendant.

BACKGROUND

I. The Partnerships and Corporate Entities

A. Style Seven Partnership

On May 16, 1985, plaintiff entered into an agreement with Donna Byers[1] for the operation of a Domino's Pizza Franchise in San Pablo, California. The contract was

[1] Donna Byers was formerly known as Donna Dillon at the time of the relevant events in this proceeding; i.e., all business transactions with plaintiff relevant to the case at bar were recorded and occurred in the name of Donna Dillon.

entitled ''Partnership Agreement for Style Seven,'' Style Seven being the name of the alleged partnership. The contract listed the agreement between Mr. Helland and Ms. Byers as a ''General Partnership'' and the stated purpose was for the ''acquiring, owning, managing, exploiting, improving, and operating the franchise for Dominos Pizza on 12972 San Pablo, Richmond, CA.''

On May 01, 1986, Mr. Helland purports to have assigned his ''general partnership interest'' in the Style Seven partnership to San Pablo Pizza, Inc. (hereinafter referred to as ''Corp. I''), a wholly owned California corporation. Plaintiff owned all of the shares of stock, was the corporation's initial agent, president, chairman and chief financial officer for Corp I. Corp. I was incorporated in the State of California on November 12, 1985 with the stated purpose of ''engaging in any lawful act or activity for which a corporation may be organized . . . ''

B. Bucks County Pizza Partnership I & II

In 1989, Mr. Helland formed two agreements with John Snyder for the operation of a two Domino's Pizza Franchises in Pennsylvania. The principal office for the partnership was in Salt Lake City, Utah. Both agreements, entitled Partnership Agreement for Bucks County Pizza and Partnership Agreement for Bucks County Pizza II (together hereinafter referred to as ''BCP I & II''), are, in relevant part, identical to each other and identical to the Style Seven agreement. The only major difference between the Style Seven agreement and the BCP I & II agreements were the names of the partners, i.e., Ms. Byers and Mr. Snyder, respectively. Like the Style Seven agreement, the BCP I & II agreements were termed ''general partnership'' agreements and included the same terms for ownership, transfer and dissolution as included in the Style Seven agreement. The franchise agreement included the same interest transfer limitations provisions.

On June 19, 1986, Mr. Helland purported to transfer his ''general partnership'' interest in BCP I & II to Bucks County Pizza, Inc. (hereinafter referred to as ''Corp. II''). Corp. II was incorporated by Mr. Helland on June 19, 1986 in the State of Nevada, with its principle place of business in Glenbrook, Nevada. In relevant part, Corp. I and Corp. II are identical in content, including named officers, ownership of shares and stated purpose of the corporations. The only major departure between the two corporations is the state where each corporation was formed.

C. The Partnership and Employee Taxes

During the first few years of both the Style Seven and BCP I & II partnerships, Mr. Helland received daily business and financial reports of the businesses from Ms. Byers and Mr. Snyder Allegedly, Mr. Helland was in constant contact with Ms. Byers and Mr. Snyder regarding their business affairs. Mr. Helland also allegedly visited the restaurants on several occasions to observe the operations in person. After some apparent conflict between plaintiff and his partners, these financial reports stopped being delivered to Mr. Helland. Accommodations were made so the businesses could continue to operate.

In 1986, Ms. Byers brought suit against Mr. Helland[2] in order to force dissolution of the partnership and an accounting of the business. In Mr. Helland's answer to the complaint, in 1987, he admitted that the partnership with Ms. Byers existed under a general partnership agreement, even though plaintiff alleged in his deposition for the instant case that he only intended this agreement to be a loan arrangement. He further alleged that he did not read the agreement prior to signing, nor sought legal advice in the matter. In response to Ms. Byer's complaint, plaintiff filed a cross-complaint for the dissolution and accounting of the partnership.

In 1991, Ms. Byers filed for bankruptcy and, in 1992, her Bankruptcy Court Trustee informed the California Superior Court that he did not intend to pursue the *Dillon*

[2] Dillon v. Helland and Does One through Fifty, No. 287127 (Cal. Super. Ct. 1986).

v. Helland litigation. As a result her suit was dismissed. Thereafter, the Style Seven store was closed. Ms. Byers believes that Mr. Helland entered the closed store and took possession of the ovens and equipment without her knowledge or consent, and contrary to the partnership dissolution and distribution of assets clauses. Defendant alleges that Mr. Helland did not have a UCC filing securing SPP's interest in the equipment owned by Style Seven.

During the general period between 1989 and 1991, neither partnership paid employment taxes stemming from the restaurants' business. As result, from 1989 through 1991, the Internal Revenue Service (hereinafter "IRS") assessed and attempted to collected these unpaid taxes against the Style Seven and BCP I & II[3] partnerships. No assessments were made against Corp. I or Corp. II. at any time. The IRS did, however, assess plaintiff, as general partner in both the Style Seven and BCP I & II partnerships, for these unpaid employment taxes. In 1993, Mr. Helland paid $145,273.34 against the unpaid taxes. At the end of 1993, plaintiff filed claims for refund, in which he sought repayment of the amounts paid to the IRS. In 1994, the Director of the IRS Fresno Service Center informed Mr. Helland that his claims were denied.

II. Claims at Bar

Plaintiff filed his complaint in the instant case on July 19, 1996, claiming that he was entitled to a refund from the IRS for the employment tax assessments made against him. He claims that the Style Seven and BCP I & II partnerships should have been assessed for these unpaid taxes. He asserts that, because he transferred his interests in the partnerships, plaintiff was wrongfully compelled by the IRS to pay the taxes. Further, Mr. Helland contends that Corp. I and Corp. II were partners of the Style Seven and BCP I & II partnerships, not Mr. Helland individually. Corp. I and Corp. II, he argues, however, were not partners of Ms. Byers or Mr. Snyder during the accruement of the employment taxes at issue. The partnerships, he alleges, were, instead, terminated prior to this accruement. Thus, plaintiff contends that neither he, as an individual, nor Corp. I and Corp. II, are liable for the accrued employment taxes at issue.

Mr. Helland further contends that he was not a partner with either Ms. Byers or Mr. Snyder, despite the written agreement, because it was their understanding that the relationship was that of lender-borrower, and not of a partnership nature. If the court finds him to be a partner, he also argues that he should only be deemed a limited partner because of the lender-borrower relationship and the alleged fact that he was not the "employer" who accrued the employment taxes; rather, Ms. Byers and Mr. Snyder were the employers and he was merely the business lender.

Defendant responded by filing a cross-complaint against plaintiff for the assessment of additional unpaid employment taxes accrued during 1991, amounting to $16,914.26, plus statutory interest computed from November 15, 1999. Defendant argues that Mr. Helland was still liable at law as a general partner. Defendant further contends that the partnership, pursuant to both the Style Seven and BCP I & II partnership agreements, and the franchise agreements, were not dissolved or terminated prior to the accruement of the employment taxes. Defendant argues that Mr. Helland was still liable, as a general partner, at law. Furthermore, defendant contends that because limited liability is purely a creature of statute, Mr. Helland could not have been a limited liability partner because he never filed as such pursuant to state law.

The federal courts look to state law when determining the existence of a partnership. Under both California and Utah laws, as well as Pennsylvania law, partnerships are generally governed by partnership agreements unless otherwise provided for at law. *See* Cal. Corp. Code § 16103; Car Doctor, Inc. v. Belmont, 635 P.2d 82, 84 (Utah 1981) (court looked to partnership agreement to determine certain terms of

[3] The IRS purported to assess against "Bucks County Pizza Dominos Pizza."

partnership); and Harasym v. Harasym, 418 Pa. Super. 486, 493 (Pa. Super Ct. 1992) (citing McCabe v. McCabe, 525 Pa. 25 (1990) (partnership agreement is preeminent factor in deciding terms of partnership). Hence, defendant alleges that Mr. Helland could not have transferred his interest in these partnerships without the prior written consent of the other partners or franchiser, pursuant to the signed agreements with those third parties. If the court finds that plaintiff did successfully transfer his interests to the corporations though, defendant argues that Mr. Helland may not hide behind his corporations in the interest of justice, contending that these corporations are merely the alter ego of Mr. Helland in his individual capacity. Defendant asserts that Mr. Helland is the sole share holder and controlling officers in both Corp. I and Corp. II. and, therefore, should be held liable in the interest of justice for the taxes at issue.

Defendant further contends that Mr. Helland is barred by the doctrine of variance because he stated, in his claim to the IRS, that the partnership did exist and, therefore, he may not now assert that it did not. Additionally, defendant argues that Mr. Helland is judicially estopped from now arguing that the partnership did not exist during the time of the accrued taxes, because he is bound by his judicial admission in his complaint that the partnership did exist during the relevant time period. Specifically, defendant points to various places in the complaint filed by Mr. Helland in the instant suit where he alleged that each and every partnership return filed by the partnerships after the purported transfer of his general partnership interests reflected the corporation as partner, not plaintiff. He also alleged that the majority partners continued to operate the partnerships, and that under their management, the employment taxes went unpaid. Finally, plaintiff specifically incorporated the averments in his claims for refund as allegations in his Complaint, which claims stated that the partnerships existed during the years in which the employment taxes went unpaid. Thus, defendant argues that these statements amount to judicial admissions of the existence of the partnerships during the relevant periods.

DISCUSSION

[1] The Internal Revenue Code requires an employer to withhold and pay certain federal taxes incurred by its employees. An ''employer'' is a person for whom an individual performs a service as an employee (Code § 3401 (d)), and a partnership can be a ''person'' for this purpose (§ 77011(a)(1)-both in Appendix, infra). If an employer fails to withhold and pay the taxes, it becomes liable for them itself. *See, e.g.*Remington v. United States, 210 F.3d 281, 283 [85 AFTR 2d 2000-1344] (5th Cir. 2000) (citing and discussing Code provisions). Because Helland's partnership failed to withhold and pay the taxes in question, the partners are liable for them under state law.

Helland therefore argues that the pizza businesses were not partnerships and that he was not a partner. Helland asserts that partnerships never existed, that he merely lent money to the businesses, and that he held no ownership interest. Before the IRS, however, Helland made the following representations, and that he held no ownership interest: he claimed to have transferred his interest in what he now says were nonexistent entities-'along with any and all of his notes or accounts receivable . . . . ''. If Helland were a mere lender and not a partner, it is hard to imagine what Helland transferred to his corporations ''along with'' his notes receivable. His old argument that he transferred something varies substantially from his new argument that he transferred nothing. From the facts before it, the IRS could only conclude that Helland did have an interest in Style Seven and Bucks County Pizza that was in addition to his interest as a creditor. Helland has not revealed what that interest could have been if it was not a partnership interest.

Furthermore, Helland never conveyed to the IRS that his partnerships were limited partnerships. On the contrary, he frequently asserted that they were general partnerships. He also asserted that his corporation became ''minority general partners'' after

he transferred his partnership interests to them.

A. Helland was a partner in Style Seven and the Bucks County Pizza Partnerships.

Helland had partnership agreements drafted and he subjected the agreements to California or Utah law, which both provide that a partnership is an association of two or more persons to carry on as co-owners of a business for profit.' Cal. Corp. Code § 15006 (1) (West 1991); Utah Code § 48 1-3(a) (1998). 'The ultimate test of the existence of a partnership is the intention of the parties to carry on a definite business as co-owners. Such intention may be determined from the terms the parties' agreement or from the surrounding circumstances.' Green v. Brooks, 45 Cal. Rptr. 99, 102 (Dist. Ct. App. 1965).

Helland intended to own 49% of three pizza businesses. He was therefore a partner even if he specifically intended to avoid all the other incidents of partnership, including joint liability for debts. *See, e.g.*, Streeter & Riddell v. Bacon, 193 P. 285 (Cal. Dist Ct. App. 120). Co-owners remain partners even if they make loans to their partnerships, and Helland cannot claim to be a mere investor simply because he made loans. *See, e.g.*, San Joaquin Light & Power Corp. v. Costaloupes, 274 P. 84, 88 (Cal. Dist. Ct. App. 1929). Helland also shared the profits, and ''the sharing of profits is prima facie evidence of the existence of a partnership.'' Id. at 89. Most obviously, Helland signed as ''partner'' three documents captioned ''Partnership Agreement.'' It is black letter law that ''[t]he best evidence for the existence of a partnership ... is written partnership agreement designating the parties as partners.'' 59 Am Jur. 2d Partnership § 96 (1987), Appendix, *infra*. Helland drafted these agreements and cannot argue that they mean something other than what they say. *See, e.g.*, Moreno v. Jessup Buena Vista Dairy, 123 Cal. Rptr. 393, 397 (Ct. App. 1975) (partnership agreement is strictly construed against the drafter). To support a contrary conclusion, Helland offers no real evidence.

Helland argues that Style Seven and Bucks County cannot be partnerships because Helland did not share control of their daily operations. Helland is wrong. In the partnership agreements that he drafted, Helland chose to delegate operational control to his partners. This delegation itself demonstrates Helland's right to control the businesses. *See*, e.g., Dillis v. Delira Corp., 302 P.2d 397, 402 (Ca. Dist. Ct. App. 1956) (original emphasis) (''agreement to relinquish control is itself an exercise of the. requisite right to control''); Associated Piping & Eng'g Co, v. Jones, 61 P.2d 536, 538 (Cal. Dist. Ct. App. 1936) (''the fact that by agreement between the parties on or more of them is given management authority does not prevent a partnership from arising''); Singleton v. Fuller 259 P.2d 687, 691 (Cal. Dist. Ct. App. 1953) (''by agreement, one partner may be given the duty of management of the enterprise or any part thereof''); *see also* Mud Control Labs. v. Covey, 269 P.2d 854, 859 (Utah 1954).

Helland's actions also demonstrate that he was a partner. In addition to receiving profits. Helland offered business advice and even after purporting to transfer his partnership interests to a corporation he signed at least one document as ''general partner''. All of these facts are ''significant indicia of a partnership.'' Orders Distrib. Co., Inc. v. Newsome Carpets & Wallcovering, 418 S.E.2d 550, 552 (S.C. 1992).

Helland claims that he was a mere lender. Lenders are not liable for the torts of borrowers, and yet Helland transferred his partnership interests to corporations because he feared liability for the torts of the. businesses. Helland also increased his taxable income by reporting on his own income tax returns the profits of both Style Seven and Bucks county Pizza (as passed through his S corporations). Lenders do not pay taxes on the business profits earned by their borrowers. On the other hand, partners do report their partnerships' income on their individual returns. *See* Code § 701, Appendix, infra.

Although he denies that Style Seven and Bucks County ever existed as partnerships, Helland also suggests that they were limited partnerships if they did exist. Helland is wrong. The statutes of California and Utah require filing of a certificate of limited partnership. *See* Cal. Corp. Code § 15502; Utah Code Ann. § 48-2a-206, Appendix, *infra*. There are no common-law limited partnerships. *See, e.g.*, Dwinell's Central Neon v. Cosmopolitan Chinook Hotel, 587 P.2d 191, 194 (Wash. Ct, App. 1978). Style Seven and the Bucks County pizza partnerships never filed certificates of limited partnerships. They remained general partnerships.

B. Helland remained liable as a partner until the partnerships dissolved.

Under the state statutes applicable to Helland's partnerships, parmers are jointly liable non-tort debts and obligations of the partnership like employment taxes. *See* Cal. Corp. Code § 15015(b); Utah Code Ann § 48-1-12(l)(b), Appendix, infra. "Accordingly, under [state] law, the IRS is entitled to collect the trust fund tax liability, indisputably a partnership debt, from one of the general partners .... The partnership is the primary obligor and its partners are jointly and severally liable on its debts." Remindton, 210 F.3d at 283 (applying Texas law).

Helland argues that his partnerships are not liable to pay employment taxes because the operating partners were the partnerships' agents for this purpose. He notes that the Seventh Circuit found a third party liable for a partnership's employment taxes when it acted as the partnership's operating agent. Id. at 6–7 (citing Kittlaus v. United States, 41 F.3d 327 [74 AFTR 2d 94-7297] (7th Cir. 1994). Helland argues that because his partners were solely responsible for operating the pizza businesses, they are solely responsible for the employment taxes. Helland ignores the difference between third parties and partners. When partners act as a partnership's agents, their actions bind all the other partners. If Helland's partners became liable for employment taxes during their conduct of partnership business, then Helland is liable for the taxes too.

Helland also seems to argue that Code § 6672 is the only way to collect employment taxes from persons not directly involved with the employees of a business. To be liable for the tax under § 6672, such persons must be "responsible" for collecting and paying it. Helland claims not to have been "responsible" because he was an investment partner and not a managing partner. These arguments miss the point. Helland assumes that Code § 6672 preeempts state law. It does not "Like the other courts that have considered this argument, we find it to be wholly without merit." Remington, 210 F.3d at 283. Regardless of how partners may divide their responsibilities, all partners are liable for partnership debts, including the debt for federal employment taxes. *See, e.g.*, In re McManis, 70 B.R. 171, 174–785 [61 AFTR 2d 88-1078] (Bankr. E.D. Ky. 1986).

Defendant has demonstrated that Helland'R s businesses began as partnerships. "A partnership once shown to exist is presumed to continue until the contrary is shown, and the burden of proof is upon him who asserts its termination." Asamen v. Thompson, 131 P.2d 841, 846 (Cal. Dist. Cot. App. 1942) (citation omitted). Helland fails to show that his partnerships dissolved before the taxes accrued. The partnership agreements provide that the partnerships will operate pizza businesses and last for ten years "unless terminated prior thereto, by law or by action of the partners under this Agreement ....". The partnerships could be dissolved only by the unanimous written consent of the the partners, the death, incapacity, or bankruptcy of either partner; the dissolution of the partnership by judicial decree or operation of law; or by the expiration of the ten-year term.

Helland sought a judicial decree to terminate Style Seven in the lawsuit with Donna Dillon; the suit lasted until March 16, 1992. Style Seven, however, dissolved on September 4, 1991, when Dillon declared bankruptcy. Helland executed an

unanimous written consent to terminate Bucks County Pizza with Snyder on January 4, 1989 but the agreement never became effective since Snyder was unable to obtain financing, and the agreement was conditioned on Synder's ability to obtain financing. The Bucks County pizza businesses ended in 1991 but by law the partnerships continued to exist until their terms expired in 1994. These are the events of dissolution specified by the partnership agreements; none of which occurred before the employment taxes accrued.

Style Seven dissolved on September 4, 1991, but part of its tax liability was assessed on November 4, 1991, when it filed its last employment tax return; and in 1994 and 1995, when the IRS assessed additional tax, penalty, and interest with respect to partnership liabilities for the third quarter of 1991. After dissolution, however, ''the partnership is not terminated, but continues until the winding up of partnership affairs is completed.'' Cal Corp. Code § 15030, Appendix, *infra*. One partner's acts continue to bind other partners ''so far as may be necessary to wind up partnership affairs or complete transactions begun but not then finished . . . .' Id. § 15033, Appendix, *infra*. *See, e.g.*, Security First Nat'l Bank v. Whittaker, 50 Cal. Rptr. 652, 653 (Dist. Ct. App. 1966) (bankruptcy dissolves partnership but does not terminate it absent specific agreement). Furthermore, the partners of a dissolved partnership remain liable for all obligations existing on the date of dissolution even if the obligations are merely contingent. *See, e.g.*, Thompson ex rel. Thompson v. Gilmore, 888 S.W.2d 715, 716 (Mo. Ct. App. 1994). Therefore, after Style Seven dissolved Helland remained liable for all taxes and penalties assessed with respect to work performed before dissolution and during the process of winding up partnership affairs.

State law does permit transfer of a ''partnership interest,'' but that interest is only the partners share of the business's profits. *See* Cal. Corp. Code §§ 15026, 15027; Utah Code Ann. §§ 48-1-23, 48-1-24, Appendix, infra; *see also* Balaban v. Bank of Nevada, 477 P.2d 860, 864–65 (Nev. 1970). Helland argues that the partnerships dissolved in 1986 when he manifested the intent to end his contractual responsibilities and then when he unilaterally transferred his ''interests'' in the agreement to a corporation which he formed solely for this purpose. This is not possible. The partnerships did not terminate. Helland cites two cases for the proposition that a partner always has the right to dissolve a partnership by manifesting such an intention, See Lunt v. VanGorden, 278 N.W. 631 (Iowa 1938) and Pawley v. Glasscock, 34 S.W.2d 729 (Ky. 1931). Helland's argument relies upon superseded authority.

When the UPA differs from the common law, it displaces the common law. *See* Cal. Corp. Code § 15004(1); Utah Code Ann. § 68-3-2, Appendix, *infra*; *see also* Jacobson v. Wikholm, 172 P.2d 878, 880–81 (Cal. 1946). The applicable section of the Uniform Partnership Act (Cal Corp. Code § 15031(1)(b); Utah Code Ann. § 48-1-28(1)(b), Appendix, *infra*) provides that a partnership may only be dissolved by ''the express will of any partner when no definite term or particular undertaking is specified.'' During a specified term of existence or in the midst of a particular undertaking, a partnership may only be dissolved by a mutual agreement which settles the rights and obligations of the partners inter se, or by judicial decree which determines such rights and obligations.

Federal income tax is not a partnership debt; partnerships are not liable for income tax. *See* Code § 701, Appendix, *infra*. A partner can usually transfer his individual federal income-tax-liability for partnership income whether or not the other partners consent to that transfer, but under state taw partners are liable for employment taxes. *See, e.g.*, Remington, 210 F.3d at 283; Livingston v. United States, 793 F.Supp. 251, 252–54 [69 AFTR 2d 92-807] (D. Idaho 1992) (citing cases). Helland may have transferred and passes his partnership income and loss to his S-corporations, which then passed the income and loss to him. *See* Code § 1366(a) & (b), Appendix,

infra. Helland, however, could not transfer his partnership liabilities unilaterally. Thus, Helland remained liable for accruing liabilities as long as the partnerships existed.

Helland purported to assign to corporations all his ''right, title, and interest'' in Style Seven and the Bucks County Pizza partnerships. By law, however, ''No person can become a member of a partnership without the consent of all the partners.'' Cal. Corp. Code § 15018(g); Utah Code Ann § 48-1-15(7), both in Appendix, *infra.* Dillion and Synder never accepted Helland's corporations as their new partners. Helland therefore remained a partner even if he transferred his ''partnership interests'' to corporations. *See*, e.g., Rapoport v. 55 Perry- Co., 376 N.Y.S.2d 147, 150–51 (App. Div. 1975); Rodgers v. RAB Investments, Ltd., 816 S.W.2d 543, 547 (Tex. Ct. App. 1991); *see also* Karanek v. Gadlex Assocs., 496 N.Y.S.2d 253, 254 (App. Div. 1985).

CONCLUSION

For the foregoing reasons, the court finds in favor of defendant. The clerk of court is directed to dismiss the complaint. Costs to defendant.

IT IS SO ORDERED.

MOODY R. TIDWELL

Senior Judge

¶2002-5589

Jacob P. CUKJATI, PLAINTIFF v. ONE RECORD OF LIEN, Book 4251, Page 1192, Internal Revenue Service Executive in Charge, DEFENDANT. U.S. District Court, Northern Dist. of Florida, (DC FL) Case No. 3:02cv276/LAC, Oct. 10, 2002. Decision for Govt.

1. Actions against U.S.—sovereign immunity—discharge of liens. Pro se taxpayer's action seeking discharge of federal tax liens was dismissed for lack of jurisdiction: U.S. didn't expressly waive its sovereign immunity to suit. *Reference:* United States Tax Reporter ¶74,336.506(25).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION,

ORDER

Lacey A. Collier United States District Judge

[1] THIS CAUSE comes before the Court on a motion to dismiss filed by The United States of America on behalf of the named Defendant (Doc. 12), pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff has not filed a response.[1]

Plaintiff, proceeding pro se, filed an action in state court entitled ''Complaint To Show Cause Pursuant To F.S. 713.21(4)'' against Defendant One Record of Lien on June 21, 2002 (Doc. 1). Plaintiff alleges that on April 30, 1998, a Notice of Federal Tax Lien was filed against him by the Internal Revenue Service (IRS) in Escambia County, resulting in a cloud upon his title to property. Plaintiff challenges the validity of the lien on grounds that tax lien judgments filed against him in various United States District Courts do not exist, that the imposition of the lien did not comply with Florida law, that the lien is ''outside the territorial jurisdiction of Congress,'' and that no lawful foundation for the lien has been provided. As relief, Plaintiff requests that the lien be ''canceled of record forthwith.''

Florida Statutes Section 713.21, upon which Plaintiff bases his complaint, concerns the discharge and duration of construction liens in Florida. Although the named Defendant is ''One Record Lien,'' it is clear that the action should be treated as against the United States. *See Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 1006, 10 L.Ed.2d 15 (1963). Under the doctrine of sovereign immunity, the United States is immune from suit unless it expressly and unequivocally waives its im-

[1] Notwithstanding this Court's local rule providing that ''failure to file a responsive memorandum may be sufficient cause to grant the motion,'' the Court considers Defendant's motion on the merits. *See* N.D. Fla. Loc. R. 7.1 (C)(1).

munity and consents to be sued. *See United States v. Nordic Village, Inc.*, 503 U.S. 30 [69 AFTR 2d 92-687], 112 S.Ct. 1011, 1013–14, 117 L.Ed.2d 181 [69 AFTR 2d 92-687] (1992); *United States v. Dalm*, 494 U.S. 596 [65 AFTR 2d 90-1210], 110 S.Ct. 1361, 1368, 108 L.Ed.2d 548 [65 AFTR 2d 90-1210] (1990). Absent such a waiver, the action should be dismissed for lack of jurisdiction. *See United States v. Mitchell*, 445 U.S. 535, 538–39, 1013 S.Ct. 1349, 1351–52, 63 L.Ed.2d 607 (1980) It is well established that the United States has not waived its sovereign immunity over lawsuits regarding the assessment and collection of taxes by the IRS. *See*) 28 U.S.C. § 2680(c) (the Federal Tort Claims Act's waiver of sovereign immunity does not apply to '''a'ny claim arising in respect of the assessment or collection of any tax''); *see also Perkins v. United States*, 55 F.3d 910, 913 [75 AFTR 2d 95-1830] (4th Cir. 1995); *Crisp v. United States*, 966 F. Supp. 973, 975 [80 AFTR 2d 97-5034] (E.D. Cal. 1997); *Rosado v. Curtis*, 885 F. Supp. 1538, 1542 [75 AFTR 2d 95-1564] (M.D. Fla. 1995), *aff'd*, 84 F.3d 437 (11th Cir. 1996), *cert. denied*, 519 U.S. 1058, 117 S.Ct. 689, 136 L.Ed.2d 612 (1997).

Accordingly, the Court's ruling in this matter may be summarized as follows, and IT IS HEREBY ORDERED:

1. Defendant's motion to dismiss (Doc. 12) is GRANTED.

2. This cause is dismissed with prejudice pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

ORDERED on this 10th day of October, 2002.

Lacey A. Collier

United States District Judge

¶2002-5590

Towner LEEPER; La Fonne LEEPER, PLAINTIFFS-APPELLANTS v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Fifth Circuit, (CA5) No. 01-50839 Oct. 9, 2002. District Court, (2001, DC TX) 88 AFTR 2d 2001-5388, affirmed per curiam. Year 1995. Decision for Govt.

1. Actions against U.S.—damages—unlawful collection—sale of seized property; notice—proof—administrative and litigation costs; prevailing party. District court properly granted govt. summary judgment on married taxpayers' IRC §7433 claim: IRS's failure to give husband's attorney-in-fact proper notice of seizure and sale of lawsuit judgment under IRC §6335 wasn't basis for suit where husband himself received actual notice; and wife wasn't damaged by IRS's failure to give her proper notice since she deferred decisions surrounding judgment's sale to husband. Also, taxpayers weren't entitled to administrative and ligation costs as they weren't prevailing party. And, wife didn't show why she should be credited for withheld taxes or otherwise support her argument that her liability for 1 year was incorrectly calculated. *Reference:* United States Tax Reporter ¶74,335.01(10); 74,335.01(20); 63,355.01(5); 74,305.01(40). IRC §6335; 7430; 7433.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,

Appeal from the United States District Court For the Western District of Texas (No. EP-98-CV-229-H)

Before GARWOOD and CLEMENT, Circuit Judges, and RESTANI, Judge.*

PER CURIAM.**

The district court's findings of fact were not clearly erroneous and it correctly granted summary judgment. We therefore AFFIRM.

[1] The I.R.S. must give a representative, such as Mr. Leeper's attorney-in-fact, notice of seizures and sales. 26 U.S.C. § 6335; 26 CFR § 601.506(a). Nevertheless,

* Judge of the United States Court of International Trade, sitting by designation.

** Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

''[f]ailure to give notice or other written communication to the recognized representative of a taxpayer will not affect the validity of any notice or the written communication delivered to the taxpayer. 26 CFR § 601.506(a)(3). The district court found Mr. Leeper received the notice required by § 6335. Mr. Leeper points to no other statutory or regulatory violation to serve as a basis for his § 7433 claim; he has no valid claim for damages, heart attack or otherwise.

The I.R.S. admitted violating § 6335 with regards to Ms. Leeper. Nevertheless, the district court held Ms. Leeper was not damaged as a ''proximate result'' of the lack of notice of sale for the Brown judgment, as she deferred decisions regarding the Brown judgment to her husband, Mr. Leeper. The Leepers attempt to bolster the importance of § 6335 notice, and somehow avoid the language of § 7433, by pointing to a pre-§ 7433 case, Reece v. Scoggins, 506 F.2d 967 [35 AFTR 2d 75-620] (5th Cir. 1975). This argument is unpersuasive. The dangers and policy articulated in Reece may well have been the motivating factor for the initial enactment of § 7433 by Congress in 1988. In any event, the district court's finding on the ''proximate results'' issue is not clearly erroneous.

The Leepers seek administrative and litigation costs under § 7430, which awards these costs to the prevailing party. § 7430(a). The Leepers concede they are not a prevailing party under the district court's final judgment, and § 7430 does not afford them recovery.[1]

Ms. Leeper complains the district court erroneously determined her 1995 tax liability. Ms. Leeper failed to produce any evidence why she was entitled to a tax credit for the taxes withheld by Towner Leeper Attorney P.C.

AFFIRMED.

¶2002-5591

In Re: John P. LANDI; Phyllis LANDI, Debtor(s). John P. LANDI; Phyllis LANDI, PLAINTIFF(S) v. DEPARTMENT OF TREASURY, INTERNAL REVENUE SERVICE, State of NY DEFENDANT(S). U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) Case 01-00526-9P7; Adv. No. 01-00062, Oct. 10, 2002. Reconsideration of (2002, Bktcy Ct FL) 90 AFTR 2d 2002-6866 denied. Years 1990, 1991, 1993, 1994, 1995, 1996. Decision against Taxpayers.

1. Tax claims in bankruptcy—dischargeability. Chap. 7 debtor's meritless motion for reconsideration of final judgment in govt.'s favor was denied. *Reference:* United States Tax Reporter ¶68,726.52(27).

UNITED STATES BANKRUPTCY COURT MIDDLE DISTRICT OF FLORIDA FT. MYERS DIVISION,

ORDER DENYING MOTION FOR REHEARING OR RECONSIDERATION

Alexander L. Paskay United States Bankruptcy Judge

Chapter 7 Case

[1] THIS CAUSE came on for consideration, ex parte, upon a Motion for Rehearing or Reconsideration, of this Court's Order titled Final Judgment filed by John P. & Phyllis Landi, Plaintiffs in the above-captioned case. The Court has considered the Motion, together with the record, and finds that it is without merit and, therefore, should be denied.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the Motion, for Rehearing or Reconsideration filed by John P. & Phyllis Landi, Plaintiffs be, and the same hereby is, denied.

DONE AND ORDERED at Tampa, Florida on OCT 10 2002

[1] The Leepers waived their entitlement to the costs of the action under § 7433(b)(2) by failing to appeal it. Green v. State Bar of Texas, 27 F.3d 1083, 1089 (5th Cir. 1994).

Alexander L. Paskay

United States Bankruptcy Judge

¶2002-5592

William D. HUBBARD, PLAINTIFF v. DEPARTMENT OF THE TREASURY, Internal Revenue Service, DEFENDANT. U.S. District Court, Northern Dist. of Texas, (DC TX) NO. 3-02-CV-1974-D, Oct. 8, 2002. Decision for Govt.

1. Actions against U.S.—refunds; damages—failure to state claim—sanctions. Magistrate judge ordered taxpayer to file written response to govt.'s motions to dismiss his 22nd action against U.S. and for pre-filing sanctions order: taxpayer, who had been repeatedly warned against filing more frivolous complaints, stated nothing in complaint other than that he objected to tax and wanted govt. to pay him $22.5 million damages. *Reference:* United States Tax Reporter ¶74,335.01(7); 74,336.511(80). IRC §7422; 7433.

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION,

ORDER

JEFF KAPLAN UNITED STATES MAGISTRATE JUDGE

[1] Defendant Department of the Treasury, Internal Revenue Service has filed a motion to dismiss this case pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In his *pro se* complaint, plaintiff merely states that he objects to paying his taxes and demands $22.5 million in damages. Defendant maintains that this allegation "wholly fails to meet even the most generous standards for notice pleading" and seeks dismissal on that basis. Defendant also points out that plaintiff has filed 21 other cases in this district and has been threatened with sanctions "if he files frivolous lawsuits in the future." Since that warning, plaintiff has filed seven more lawsuits, all of which have been dismissed or unfiled. Defendant therefore urges the court to enjoin plaintiff from filing any future lawsuits without first obtaining leave of court. Plaintiff shall file a written response to the motion to dismiss by October 28, 2002. A reply is neither required nor desired. The court will rule on the motion after plaintiff files his response.

SO ORDERED.

DATED: October 8, 2002.

JEFF KAPLAN

UNITED STATES MAGISTRATE JUDGE

¶2002-5593

In Re: Alvon P. CROSSLIN and Billie CROSSLIN, Debtors. Alvon P. CROSSLIN and Billie CROSSLIN, PLAINTIFFS v. THE UNITED STATES OF AMERICA, (Internal Revenue Service), DEFENDANT. U.S. Bankruptcy Court, Eastern Dist. of Oklahoma, (Bktcy Ct OK) Case No. 02-71633; Adv. No. 02-07077, Oct. 25, 2002. Years 1989, 1990, 1991, 1992, 1993. Decision for Taxpayers in part and for Govt. in part.

1. Tax claims in bankruptcy—dischargeability. Pursuant to stipulation, taxpayers' tax debts for all years were dischargeable; but IRS's properly noticed liens for 2 years continued to attach to all their prepetition property and property rights. *Reference:* United States Tax Reporter ¶68,726.52(27).

IN THE UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF OKLAHOMA,

JUDGMENT

Chapter 7

[1] THIS MATTER comes before the Court upon plaintiffs' Complaint to Determine Dischargeability of Debt filed on July 22, 2002, in which plaintiffs requests the Court to determine the dischargeability of plaintiffs' federal income tax liabilities.

WHEREFORE it appearing to the Court that plaintiffs and the United States of America are in agreement as to the disposition of the above-captioned adversary

proceeding as to them pursuant to the joint stipulation filed herewith, it is

ORDERED AND ADJUDGED that the stipulation between plaintiffs and the United States of America is hereby APPROVED and ADOPTED by the Court, and it is

FURTHER ORDERED as follows:

1. The plaintiffs filed a Chapter 7 petition in bankruptcy on May 14, 2002.

2. On July 22, 2002, the plaintiffs filed the above-captioned adversary action seeking a determination of the dischargeability of federal income tax liabilities owed to the United States.

3. The plaintiffs' federal income tax liabilities relating to the 1989 through 1993 tax years are properly subject to discharge, pursuant to 11 U.S.C. Section 523, if an when a discharge is entered in this case.

4. The pre-petition Notice of Federal Tax Liens have been filed in connection with the plaintiffs' 1991 and 1992 federal income taxes. The IRS liens attach to all existing property and rights to property, including exempt property, belonging to the debtors on and prior to the date of the filing of the Chapter 7 petition, and continues to attach to all such property which survives bankruptcy. See 11 U.S.C. Section 522(c)(2)(B) and 26 U.S.C.

5. The parties shall each bear their own litigation expenses, including costs and attorneys fees.

IT IS SO ORDERED this 24th day of Sept. 2002.

/s/

UNITED STATES BANKRUPTCY JUDGE

¶2002-5594

In The Matter Of The Tax Liabilities Of: John DOES, United States taxpayers who, during the years ended December 31, 1998 through December 31, 2001, had signature authority over Mastercard payment cards issued by, through, or on behalf of banks or other financial institutions in Antigua and Barbuda, Bahamas, and Cayman Islands, or issued to persons or entities in Antigua and Barbuda, Bahamas, and Cayman Islands. U.S. District Court, Southern Dist. of New York, (DC NY) M-18-304, Oct. 16, 2002. Years 1998, 1999, 2000, 2001. Decision for Govt.

1. Third-party summons enforcement—John Doe summonses. Govt. was granted leave to serve, through authorized IRS employee, John Doe summonses on 3d-party corps.: govt. showed that summonses, seeking information relating to transactions on offshore credit card accounts over which unidentified taxpayers had signatory authority, related to investigation of those ostensible taxpayers; that govt. reasonably believed those taxpayers may not have complied with IRC; and that information was unavailable from other sources. *Reference:* United States Tax Reporter ¶76,095.01(50). IRC §7609.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK,

ORDER

Honorable Richard M. Berman UNITES STATES DISTRICT JUDGE

[1] This matter is before the Court upon the United States of America's Ex Parte Petition for Leave to Serve John Doe Summonses. Based upon a review of the Petition and exhibits thereto, the Court has determined that the ''John Doe'' summonses issued by the Internal Revenue Service to BarnesandNoble.com, BMG Entertainment, British Airways, PLC, CD Now, Inc., The College Board, Deutche Lufthansa AG, Columbia House Co., Foot Locker, Inc., Helmsley Hotels, J & R Electronics, Inc., Jetro Cash and Carry Enterprises, Le Meridien Hotels and Resorts, Loews Hotels Holding Corp., Royalton Hotel, Starwood Hotels & Resorts Worldwide, Inc., and Tiffany & Co., relate to the investigation of an ascertainable group or class of persons, that there is a reasonable basis for believing that such group or class of persons may fail or may have failed to comply with any provision of any internal

revenue law, and that the information sought to be obtained from the examination of the records or testimony (and the identities of the persons with respect to whose liability the summonses are issued) are not readily available from other sources.

IT IS HEREBY ORDERED that the Internal Revenue Service, through Revenue Agent Joseph C. West or any other authorized officer or agent, may serve Internal Revenue Service "John Doe" summonses upon BarnesandNoble.com, BMG Entertainment, British Airways, PLC, CD Now, Inc., The College Board, Co., Deutche Lufthansa AG, Foot Locker, Inc., Helmsley Hotels, J & R Electronics, Inc., Jetro Cash and Carry Enterprises, Le Meridien Hotels and Resorts, Loews Hotels Holding Corp., Royalton Hotel, Startwood Hotels & Resorts Worldwide, Inc., and Tiffany & Co., in substantially the forms as attached to the Exhibits Appendix to the Declaration of Revenue Agent West at Tab 2(a) through (p), respectively, and including the schedules setting forth the account numbers for the MasterCard payment cards used with each merchant. A copy of this Order shall be served together with the summonses.

SO ORDERED this 16th day of October, 2002.

Honorable Richard M. Berman

UNITES STATES DISTRICT JUDGE

¶2002-5595

Richard Edward HOFF, PLAINTIFF v. Sharon ARMIJO, Clerk of the County of Catron, New Mexico, and Board of County Commissioners of Catron County, DEFENDANTS, UNITED STATES OF AMERICA, INTER-VENOR. U.S. District Court, Dist. of New Mexico, (DC NM) No. CIV 02-262 LH/LFG-ACE, June 26, 2002. Decision for Govt.

1. Tax liens—validity of notice—summary judgment. Taxpayer's action seeking to strike federal tax lien from county records because lien notice didn't comply with state requirements was dismissed on summary judgment: taxpayer conceded that he couldn't present good faith argument to govt.'s position that his case failed as matter of law under Supremacy Clause, IRC and regs., under which IRS's recording of Form 668 was proper. *Reference:* United States Tax Reporter ¶63,215.01(18). IRC §6321.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO,

FINAL JUDGMENT

THIS MATTER came before the Court on United States of America's Motion for Summary Judgment, which the Court granted. Plaintiff's case was, accordingly, dismissed with prejudice.

This final judgment adjudicates all rights and liabilities between the parties in this matter.

IT IS SO ORDERED.

/s/

UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION AND ORDER

RICHARD EDWARD HOFF, Plaintiff, vs. SHARON ARMIJO, Clerk of the County of Catron, New Mexico, and BOARD OF COUNTY COMMISSIONERS OF CATRON COUNTY, Defendants,[1] UNITED STATES OF AMERICA, Intervenor.

THIS MATTER comes before the Court on United States of America's Motion for Summary Judgment (Docket No. 19), filed June 26, 2002. The Court, having considered the briefs submitted by the parties, and otherwise being fully advised, finds that the United States' motion is well-taken and should be granted.

[1] In an Order dated June 12, 2002 (Docket No. 18), this Court granted Plaintiff's Countermotion [sic] to Defendants' Motion to Dismiss, both filed in state court before removal. The Court granted Plaintiff's petition to join the Board of County Commissioners of Catron County as defendants. The style of the case is changed accordingly.

Plaintiff originally filed this action against the County Clerk of Catron County, New Mexico, in state court, seeking a declaration striking a federal tax lien from the county records because the Notice of federal tax lien allegedly did not comply with state statutory requirements.[2] The United States intervened and removed the case to this Court. This Court has subject matter jurisdiction under 28 U.S.C. §§1331 and 1340.

[1] The United States has moved for summary judgment, arguing that Plaintiff presents no factual disputes and that his case fails, as a matter of law, under the Internal Revenue Code, federal regulations, and the Supremacy Clause. (United States of America's Motion for Summary Judgment and Brief at 3–5). Plaintiff responds that he does not dispute any facts, acknowledges that he cannot present a good faith argument in opposition to the United States' position, and consents to entry of judgment. (Reply [sic] to United States of America's Motion for Summary Judgment and Brief).

Plaintiff's consent to entry of judgment notwithstanding, summary judgment is appropriate where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Plaintiff does not dispute that the Notice at issue in this case was filed on an IRS Form 668, or that that form contains the taxpayer's name, identifies the tax liability giving rise to the lien and indicates the date the tax was assessed. (*Id.*; United States of America's Motion for Summary Judgment and Brief, Exhibit A).

Under the Supremacy Clause, Congress regulates the creation of federal tax liens and the requirements for the filing of such liens. *United States v. Union Central Life Ins. Co.*, 368 U.S. 291, 293–94 [8 AFTR 2d 5971] (1961). Title 26 U.S.C. §6323(f)(3) (2000) states:

> The form and content of the notice [of federal tax lien] shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of the notice of lien.

Additionally, Treasury regulations have determined that a notice that identifies the taxpayer, the tax liability giving rise to the lien, and the assessment date creates a valid tax lien, "regardless of the method used to file the notice of Federal tax lien." 26 C.F.R. §301.6323(f) -1(d)(1&2). The Court concludes that the IRS Form 668 recorded in this case complied with the federal regulation. Any lack of compliance with statutes does not affect the Notice's validity, and the tax lien should not be stricken from the records of the Clerk of Catron County.

IT IS, THEREFORE, ORDERED that the Unied States of America's Motion for Summary Judgment is granted, and this case is dismissed with prejudice. In accordance with Federal Rule of Civil Procedure 58, a Final Judgment will be filed contemporaneously with this order.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5596

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Charles E. BOTEFUHR, DEFENDANT-APPELLANT, and The Estate of Birnie DAVENPORT; Patricia L. Vestal, individually and as Personal Representative of the Estate of Birnie Davenport; Gordon E. Davenport, DEFENDANTS. UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Patricia L. VESTAL, individually and as Personal Representative of the Estate of Birnie Davenport, DEFENDANT-APPELLANT, and Charles E. BOTEFUHR; The Estate of Birnie Davenport; Gordon E. Davenport, DEFENDANTS. UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Gordon E. DAVENPORT, DEFENDANT-APPELLANT, and The Es-

[2] Plaintiff argues that N.M. Stat Ann. §48-1-2 (1995) requires that notices of tax liens must be certified N.M. Stat. Ann §48-1-2 is the New Mexico version of the Uniform Federal Lien Registration Act ("UFLRA"), which courts in other jurisdictions have determined does not impose a certification requirement on federal tax liens.

tate of Birnie M. DAVENPORT; Patricia L. Vestal, individually and as Personal Representative of the Estate of Birnie Davenport; Charles E. Botefuhr, DEFENDANTS. U.S. Court of Appeals, Tenth Circuit, (CA10) No. 01-5133; No. 01-5139; No. 01-5145, Oct. 31, 2002. District Court, affirmed in part, and reversed and remanded in part. Date of death 2-6-91. Year 1980. Decision for Taxpayer in part and for Govt. in part.

1. Gift taxes—donee liability—jurisdiction. District court erroneously retained jurisdiction of IRS's IRC §6324-based gift tax collection claim against 2 of 3 of estate's co-personal representatives/donees who didn't live in district where suit was filed: IRS's voluntary pretrial withdrawal of its 31 USC §3713 claim negated jurisdictional "anchor" for suing those 2 donees and left them with no minimum contacts to forum state. *Reference:* USTR Estate & Gift Taxes ¶74,025.01(5). IRC §7402.

2. Gift taxes—donee liability—limitations periods on assessments and collection. District court properly determined that IRC §6324(b)'s 10-year lien provision didn't bar govt.'s gift tax collection complaint against 1 donee of decedent's lifetime stock gifts: lien provision, which had already lapsed, was independent of and didn't affect statute's separate provision for personal donee liability, which could be collected as long as time for suit against donor remained open under IRC §6501 and IRC §6502; and taxpayer's legislative history argument to contrary was rejected. Also, taxpayer's arguments regarding date limitations period was triggered and that IRS was on notice of gifts more than 10 years before it tried to collect taxes couldn't be raised for 1st time on appeal; and argument that court's invocation of IRC §6502 changed nature of IRC §6324 claim was meritless. *Reference:* USTR Estate & Gift Taxes ¶63,245.02(5). IRC §6324; 6501; 6502.

3. Gift taxes—valuation—stock transfers—effect of prior stipulation-donee liability. District court improperly determined that donee against whom govt. asserted personal lability for decedent's unpaid gift taxes was bound by estate's stipulation in earlier Tax Court suit to gifted stock's value: stipulation that was explicitly limited to that Tax Court case didn't result in actual litigation of valuation issue or manifest any intent of parties to be bound by it in later proceedings. *Reference:* United States Tax Reporter ¶74,337.504(85). USTR Estate & Gift Taxes ¶74,635.01(25). IRC §7463.

John N. Hermes, McAfee & Taft, A Professional Corporation, Oklahoma City, Oklahoma (William R. Cook II, Oklahoma City, Oklahoma, and J. Scott Morris, Austin, Texas, with him on the reply brief), for Defendant-Appellant Charles E. Botefuhr.

Susan L. Gates, Hall, Estill, Hardwick, Gable, Golden, & Nelson, P.C., Tulsa, Oklahoma, for Defendant-Appellant Patricia L. Vestal.

Gordon E. Davenport, Jr., Davenport Law Firm, Alvin, Texas (James L. Kincaid and Gary C. Clark, Crowe & Dunlevy, Tulsa, Oklahoma, with him on the briefs) for Defendant-Appellant Gordon E. Davenport.

Laurie N. Snyder, Attorney, Tax Division, United States Department of Justice, Washington, D.C. (David E. O'Meila, United States Attorney, Of Counsel, Eileen J. O'Connor, Assistant Attorney General, Jonathan S. Cohen, Attorney, Tax Division, United States Department of Justice, Washington, D.C., with her on the brief), appeared for the Plaintiff-Appellee.

UNITED STATES COURT OF APPEALS TENTH CIRCUIT,

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 00-CV-92-K(J))

Before EBEL and McKAY, Circuit Judges, and SAM,* Senior District Judge.

EBEL, Circuit Judge.

PUBLISH

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* The Honorable David Sam, Senior District Judge, United States District Court for the District of Utah, sitting by designation.

Defendants-Appellants Patricia A. Vestal, Gordon E. Davenport, and Charles E. Botefuhr appeal a summary judgment order by the United States District Court for the Northern District of Oklahoma granting summary judgment upholding the Internal Revenue Service's (IRS) right to collect gift taxes from them under § 6324(b) of the Internal Revenue Code (IRC). See 26 U.S.C. § 6324(b). On appeal, the Appellants raise three issues: first, whether the district court had personal jurisdiction over Botefuhr and Davenport; second, whether the statute of limitations for collecting taxes under § 6324(b) has expired;[1] and third, whether, based upon a stipulation in a prior, related case, the Appellants are precluded from litigating the value of the Hondo stock in the present action. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we REVERSE the district court on the personal jurisdiction question, AFFIRM on the statute of limitations question, and REVERSE on the valuation question.

I. BACKGROUND

In July 1980, Birnie Davenport, Botefuhr's, Davenport's, and Vestal's aunt, gave a total of 1,620 shares of Hondo Drilling Company, Inc. (Hondo) stock to Botefuhr, Davenport, and Vestal, but she effectuated these transfers in two different ways. She entered into sales agreements with Davenport and Vestal, whereby she agreed to sell Vestal 536 shares of Hondo stock and Davenport 537 shares. See Estate of Davenport v. United States, 184 F.3d 1176, 1179 [84 AFTR 2d 99-5144] (10th Cir. 1999). The sales agreements valued the shares at $804 per share. As consideration for the stock, Birnie Davenport received $1,000.00 in cash from Davenport and Vestal, and Davenport and Vestal executed promissory notes in which they agreed to pay Birnie Davenport $449,175.50 and $448,353.50, respectively, in twenty annual installments, beginning in July 1986; the agreements also required Vestal and Davenport to pay ''six percent interest annually on the unpaid principal.'' Estate of Davenport, 184 F.3d at 1179.

Less than two years after the sale and over four years before Davenport and Vestal were to commence paying their promissory notes, Birnie Davenport forgave the balances remaining on the notes.[2] Id. at 1180. On March 31, 1983, Birnie Davenport filed a United States Gift Tax Return in which she reported forgiving the promissory notes and, after applying various discount rates, reported and paid $71,911.00 in gift tax liability.

Birnie Davenport transferred the Hondo stock to Botefuhr in a different manner. Instead of entering a sales agreement, as she had with Davenport and Vestal, Birnie Davenport executed a deed of gift transferring to him 537 shares of Hondo stock. Id. In the fall 1980, Botefuhr, Davenport, and Vestal signed an agreement in which Botefuhr ''agreed to file any required gift tax returns and pay any gift taxes due with respect to the Hondo stock he received from Birnie [Davenport.]'' Id. Botefuhr, however, never filed a gift tax return for this gift.

In 1991, Birnie Davenport passed away. Her last will and testament were admitted to probate in Tulsa, Oklahoma, and Botefuhr, Davenport, and Vestal, ''were appointed by the probate court to act as co-personal representatives'' of Birnie Davenport's estate (the Estate). While preparing tax returns for the Estate, Corinne Childs, who had prepared tax returns for Birnie Davenport since 1965, uncovered Botefuhr's failure to file a gift tax return for his shares of Hondo stock. Consequently, on November 7, 1991, Childs filed a gift tax return for the 1980 gift to Botefuhr, which both Vestal and Davenport signed, but which Botefuhr did not. Id. at at 1180–81. The return valued the Hondo stock at $804 per share and reported a tax liability of $95,322.00, which the Estate paid. Id.

[1] All references to ''Davenport'' are to Gordon E. Davenport. Birnie M. Davenport, the Appellants' aunt and the donor of the disputed gifts, is referred to as ''Birnie Davenport.''

[2] Vestal claims that she and Davenport each paid approximately $40,000.00 in interest on the unpaid principal before Birnie Davenport forgave the notes.

The IRS subsequently audited this 1991 gift tax return and in the process concluded that the gift tax return underreported the value of Hondo stock. In the process, the IRS also concluded that the shares Birnie Davenport sold to Davenport and Vestal were also gifts, apparently because they were sold at a discounted price. Consequently, on September 20, 1994, the IRS sent the Estate a notice of deficiency indicating a "gift tax deficiency of $1,422,154.00 and an addition to the tax of $355,538.00." 184 F.3d at 1181. On December 12, 1994, the Estate, through Vestal, filed timely petitions in the United States Tax Court challenging this deficiency determination. In the ensuing court proceedings, the Estate (again represented by Vestal) stipulated that "for the purposes of th[at] case[]" "the fair market value of the Hondo stock which was transferred by Birnie Davenport to Patricia Vestal, Gordon Davenport, and Charles Botefuhr was $2,000.00 per share." (Vestal App. at 219.) After holding a bench trial, the tax court concluded that the Estate "owed a federal gift tax deficiency in the amount of $822,653 and a penalty of $205,663." 184 F.3d at 1180. The Estate then appealed this finding to this court, and we affirmed. See id. at 1188.

On March 2, 1998, the IRS made an assessment against the Estate for the gift tax deficiency and demanded payment.[3] The Estate, however, did not pay the assessment. As of 1999, the Estate owed $5,283,283.07 in gift tax liability, penalties, and interest. Prompted by the Estate's failure to pay, the IRS brought (on February 2, 2000) the present action against the Estate and also against Botefuhr, Davenport, and Vestal in their representative and individual capacities. The underlying complaint contained three counts. Count I sought to reduce to judgment the unpaid assessment levied against the Estate. The remaining counts, however, sought to collect at least some of the outstanding gift tax liability from Botefuhr, Davenport, and Vestal. Count II, for example, asserted that Botefuhr, Davenport, and Vestal could be held liable for the unpaid gift tax as donees under 26 U.S.C. § 6324(b). Similarly, Count III alleged that, as personal representatives of the Estate, Botefuhr, Davenport, and Vestal could be held responsible under 31 U.S.C. § 3713 for having distributed the Estate's assets prior to paying the gift tax liability, thereby "render[ing] the Estate insolvent and unable to pay the federal gift tax liability."[4]

In the spring 2000, Botefuhr and Davenport, both residents of Texas, each filed motions pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure arguing that the suits against them should be dismissed because the district court lacked personal jurisdiction, an argument the court eventually rejected a year later.

On February 9, 2001, while the personal jurisdiction motion was still pending before the district court, the IRS filed a motion seeking summary judgment on Count I (estate liability) and Count II (individual donee liability under 26 U.S.C. § 6324), but declining to seek summary judgment on Count III (liability as estate representatives). In its motion, the IRS also argued that the Appellants were precluded from litigating the value of the gift. In particular, the IRS argued that Botefuhr's, Davenport's, and Vestal's individual tax liability should be determined using the $2,000.00 per share figure stipulated by the Estate (via Vestal) in the prior litigation involving the estate. Botefuhr, Davenport, and Vestal responded by filing a joint motion that sought summary judgment on Count II (donee liability) and Count III (representative liability), but that conceded liability on Count I (estate liability). They also argued that they were not bound by the Estate's $2,000.00 per share stipulation. In replying to the Appellants' joint cross motion for summary judgment, the IRS expressly abandoned Count III, thus reducing the re-

[3] According to the IRS, an assessment, which "is essentially an internal bookkeeping procedure, whereby the amount of a taxpayer's tax liability is recorded in the records of the IRS," "permits the IRS to begin collecting the tax using summary administrative collection methods . . . , or by proceeding in court and serves as a benchmark for computing the timeliness of such collection methods." (Aple. B. at 20–21, citing § 6502(a).)

[4] Section 3713 makes representatives of an estate personally liable for paying "any part of a debt of the person or estate before paying a claim of the Government." 31 U.S.C. § 3713(b).

maining issues in the case to one overarching substantive question—whether Botefuhr, Davenport, and Vestal, as donees, could be held personally liable for the gift tax deficiency under 26 U.S.C. § 6324(b)—and a subsidiary question—whether Botefuhr, Davenport, and Vestal were bound by the $2,000.00 per share stipulation made by the Estate before the tax court.

The district court concluded that the Appellants could be held liable under § 6324(b) and that they were bound by the $2,000.00 per share valuation. Accordingly, the district court found Botefuhr's liability to be "536 shares multiplied by [$2,000.00 per share], or $1,072,000.00." United States v. Estate of Davenport, 159 F. Supp. 2d 1330, 1336 (N.D. Okla. 2001). The court calculated Davenport's and Vestal's liability in a similar manner, but then reduced their total liability by "the amount [they] paid for the stock ($804 per share)." Id. Thus, the court concluded that Davenport, who received 537 shares, owed $642,252.00, and that Vestal, who was given 536 shares, owed $641,056.00.[5] Id. This appeal followed.

II. STANDARD OF REVIEW

We review a grant of summary judgment de novo and "apply the same legal standard as the district court. Summary judgment is proper if the movant shows 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' Fed. R. Civ. P. 56(c). When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." Mitchell v. City of Moore, 218 F.3d 1190, 1197 (10th Cir. 2000) (other internal quotation marks and citations omitted). "We review the district court's jurisdictional ruling de novo and resolve all factual disputes in favor of [the] plaintiff." Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc., 205 F.3d 1244, 1247 (10th Cir. 2000).

III. PERSONAL JURISDICTION

[1] We turn first to the threshold question of whether the district court erred in asserting personal jurisdiction over Botefuhr and Davenport. In rejecting Botefuhr's and Davenport's motions to dismiss, the district court relied heavily upon Count III of the IRS's complaint, which asserted that Botefuhr and Davenport violated 31 U.S.C. § 3713 by depleting Birnie Davenport's Estate "of all its assets without satisfying the gift tax liability." (March 29, 2001 Order at 1.) The district court concluded that because Botefuhr and Davenport had been appointed representatives of Birnie Davenport's estate, they could easily anticipate being sued for a violation of § 3713 in Oklahoma for their conduct concerning the Estate.[6] The court, however, found jurisdiction over the IRS's donee liability claim under 26 U.S.C. § 6324 in Count II "far more problematic." Nonetheless, the district court reasoned that if it possessed jurisdiction over the § 3713 claim (Count III), which went to Botefuhr's and Davenport's personal liability for their actions as representatives of the Estate, it also possessed jurisdiction over the § 6324 claim (Count II), which concerned Botefuhr's and Davenport's liability as gift recipients, or donees. (Id. at 5, citing Nelson v. R. Greenspan & Co., 613 F. Supp. 342, 346 (E.D. Mo. 1985).) After making this finding, however, the court announced that it would "reserve[] the right to review the basis for jurisdiction" in later proceedings.

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[5] A portion of these sums included interest assessed on the unpaid tax liability. The parties do not specifically challenge the assessment of interest on this appeal. In any event, under established precedent, a donee may be held liable for interest associated with a donor's gift tax liability. See, e.g., Poiner v. Commissioner, 858 F.2d 917, 922 [62 AFTR 2d 88-6006] (3d Cir. 1988) ("Donees are liable for one type of interest: interest calculated from the day the gift tax is due until it is paid."); Francis M. Dougherty, Annotation, Federal Gift Tax: Donee's Liability for Gift Tax or Interest on Gift Tax, 99 A.L.R. Fed. 447 § 2(a) at 450 (1990) ("[T]he donee may also be liable for any interest that arises from the failure of the donor to pay the gift tax fully.").

[6] The district court, applying factors identified by the Supreme Court in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), found that five reasons justified finding personal jurisdiction in this case over the § 3713 claim: first, because Botefuhr and Davenport were representatives of the Estate, they could not be "complete[ly] surprise[d] by the suit"; second, because Birnie Davenport lived in Oklahoma and had her estate probated in Oklahoma, Oklahoma was the "most logical" forum for pursuing a suit related to the Estate; third, the government should not be burdened by traveling to Botefuhr's and Davenport's home districts when they had agreed to serve as representatives of the Estate; fourth, it would be a better use of judicial resources to hear the cases in a common court; and fifth, exercising jurisdiction "would further the substantive social policies of judicial efficiency and accountability of estate representatives." (March 29, 2001 Order at 3–4.)

Less than two weeks after this ruling, the government dropped the § 3713 count. Estate of Birnie Davenport, 159 F. Supp. 2d at 1332. Consequently, the court dismissed this claim; however, in that order the court refused to reexamine its personal jurisdiction ruling over the § 6324 claim, and observed that because Botefuhr and Davenport had not presented any "additional evidence" negating its previous ruling that the government "had made out a prima facie case of personal jurisdiction," it would "decline[] to dismiss Count II for lack of personal jurisdiction." Id. at 1335–36. For the reasons discussed below, we conclude the district court committed reversible error.

A. General Legal Background

Unless Congress specifically indicates otherwise, there are two limits on a federal court's ability to assert personal jurisdiction. First, a federal district court may only exercise personal jurisdiction over a defendant "who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(1)(A). Second, in addition to satisfying this state law requirement, the exercise of personal jurisdiction must "not offend the due process clause of the Fourteenth Amendment." Far West Capital, Inc. v. Towne, 46 F.3d 1071, 1074 (10th Cir. 1995). Because this case comes from the United States District Court for the Northern District of Oklahoma, we must apply Oklahoma law. Oklahoma, however, "permits the exercise of any jurisdiction that is consistent with the United States Constitution." Intercon, Inc., 205 F.3d at 1247. Consequently, whether the district court properly exercised personal jurisdiction over Botefuhr and Davenport, "collapses into a single due process analysis" under the Constitution. Rambo v. Americans Ins. Co., 839 F.2d 1415, 1416 (10th Cir. 1988).

"The Due Process Clause permits the exercise of personal jurisdiction over a nonresident defendant 'so long as there exist minimum contacts between the defendant and the forum State.'" Intercon, Inc., 205 F.3d at 1247 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980)). Depending on the level of contact, personal jurisdiction may be either specific, in which case personal jurisdiction is based on specific activities or contacts the defendant had with the forum state, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472–73 (1985), or it may be general, in which case jurisdiction is based upon "continuous or systematic contacts" between the defendant and the forum state. Rambo, 839 F.2d at 1418. Under either theory of jurisdiction, the defendant's contacts must be substantial enough so that exercising personal jurisdiction "does not offend traditional notions of fair play and substantial justice." Far West Capital, 46 F.3d at 1074 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)). This requirement will be satisfied where, after reviewing the defendant's interactions and connections with the forum state, a court can conclude that the defendant has "'purposefully availed' [himself] of the protection and benefits of the laws of the forum state." Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop., 17 F.3d 1302, 1305 (10th Cir. 1994) (quoting Burger King Corp., 471 U.S. at 473–76).

The IRS does not claim that Oklahoma courts possess "general jurisdiction" over Botefuhr and Davenport. Nor does the government ever suggest that Botefuhr and Davenport, in their capacities as donees, reached out to Oklahoma or otherwise availed themselves of the state's laws. Instead, it argues, as it did below, only that because the district court had jurisdiction over Botefuhr and Davenport for the alleged § 3713 violation in their capacity as representatives of the estate, it also had jurisdiction over the § 6324 claim, which it argues "arose out of the same core facts."

B. Pendent Personal Jurisdiction

Thus, the central jurisdictional issue in this case is one of "pendent personal jurisdiction." Pendent personal jurisdiction, like its better known cousin, supplemental subject matter jurisdiction, exists when a court possesses personal jurisdiction over a defendant for one claim, lacks an independent basis for personal jurisdiction over the

defendant for another claim that arises out of the same nucleus of operative fact, and then, because it possesses personal jurisdiction over the first claim, asserts personal jurisdiction over the second claim. See, generally, 4A Charles Alan Wright & Arthur A. Miller, Federal Practice & Procedure § 1069.7 (3d ed. 2002); Linda Sandstrom Simard, Exploring the Limits of Specific Personal Jurisdiction, 62 Ohio St. L. J. 1619, 1622–27 (2001). In essence, once a district court has personal jurisdiction over a defendant for one claim, it may ''piggyback'' onto that claim other claims over which it lacks independent personal jurisdiction, provided that all the claims arise from the same facts as the claim over which it has proper personal jurisdiction. Anderson v. Century Prods. Co., 943 F. Supp. 137, 145 (D.N.H. 1996).

The concept of pendent personal jurisdiction traces its origins to ''federal question cases where state law claims were tacked onto federal causes of action under pendent [or supplemental] subject matter jurisdiction.''[7] Id. at 144. Though originally a court-created concept, Congress later endorsed and codified the concept of supplemental subject matter jurisdiction. See 28 U.S.C. § 1367(a) (''[T]he district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.''). By contrast, pendent personal jurisdiction is not explicitly authorized by statute and remains, at least in the view of most commentators, ''a federal common law doctrine.'' 4A Miller & Wright, supra, § 1069.7, at 227 (arguing that § 1367 cannot be read as authorizing pendent personal jurisdiction and explaining that the concept ''must be properly understood to be a federal common law doctrine'').

However, the majority of federal district courts and every circuit court of appeals to address the question have upheld the application of pendent personal jurisdiction, and we see no reason why, in certain situations, the assertion of pendent personal jurisdiction would be inappropriate. See Starlight Int'l, Inc. v. Herlihy, 13 F. Supp. 2d 1178, 1185 (D. Kan. 1998) (explaining that ''every circuit court confronting the issue has ... upheld the principle of pendent personal jurisdiction''); 4A Wright & Miller, supra, § 1069.7, at 228 (explaining that ''most federal courts that have dealt with the subject'' have adopted the pendent personal jurisdiction doctrine); Simard, supra, at 1625–26 & nn. 24–26 (collecting cases and explaining how the majority of federal courts have upheld pendent personal jurisdiction); see also Robinson Eng'g Co. Ltd. Pension Plan & Trust v. George, 223 F.3d 445, 449 (7th Cir. 2000) (explaining that a district court properly invoked pendent personal jurisdiction over a RICO claim that arose ''out of the same nucleus of operative fact'' as a federal securities claim); ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 628–29 (4th Cir. 1997) (analogizing to supplemental subject matter jurisdiction and adopting the doctrine of pendent personal jurisdiction); IUE AFL-CIO Pension Fund v. Herrman, 9 F.3d 1049, 1056 (2d Cir. 1993) (explaining that pendent personal jurisdiction may be invoked for related state law claims ''even if personal jurisdiction is not otherwise available''); Oetiker v. Jurid Werke, G.m.b.H., 556 F.2d 1, 127–28 & n.10 (D.C. Cir. 1977) (collecting cases and adopting pendent personal jurisdiction); Clapsaddle v. Telscape Int'l, Inc., 50 F. Supp. 2d 1086, 1090 (D.N.M. 1998) (applying pendent personal jurisdiction principles). Like these courts and commentators, we agree that where claims ''arise from the same common nucleus of operative fact'' ''the inconvenience to a defendant ... is not [necessarily] sufficient to dismiss ... for lack of personal jurisdiction.'' 4A Wright & Miller, supra, § 1069.7, at 228.

Of course, even where a court could legally exercise pendent personal jurisdiction

[7] We adopt the modern approach of referring to ''pendent subject matter jurisdiction'' as ''supplemental subject matter jurisdiction.'' Because, however, pendent personal jurisdiction remains a court-created creature that has not yet been sanctioned by Congress, we will use the term pendent when referring to it. See 4A Wright & Miller, supra, § 1069.7, at 227 (referring to pendent personal jurisdiction and supplemental subject matter jurisdiction because only the latter has been statutorily authorized).

over a claim, a district court retains discretion. See Oetiker, 556 F.2d at 5 (explaining that a district court has discretion over whether to "exercise jurisdiction over the personal pendent jurisdiction claims"); 4A Wright & Miller, supra, § 1069.7, at 235–36 (explaining that courts have "the discretion to decline to exercise pendent personal jurisdiction"). Generally, when a district court dismisses the federal claims, leaving only supplemented state claims, "the most common response . . . has been to dismiss the state claim or claims without prejudice." Ball v. Renner, 54 F.3d 664, 669 (10th Cir. 1995). Indeed, while we have suggested that it is appropriate, perhaps even advisable, for a district court to retain supplemented state claims after dismissing all federal questions when the parties have already expended a great deal of time and energy on the state law claims, see Anglemyer v. Hamilton County Hosp., 58 F.3d 533, 541 (10th Cir. 1995), we have held that, absent such a showing, a district court should normally dismiss supplemental state law claims after all federal claims have been dismissed, particularly when the federal claims are dismissed before trial. See Ball, 54 F.3d at 669; Sawyer v. County of Creek, 908 F.2d 663, 668 (10th Cir. 1990) ("Because we dismiss the federal causes of action prior to trial, we hold that the state claims should be dismissed for lack of pendent jurisdiction."). These holdings draw support from Supreme Court precedent. See, e.g., Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 & n.7 (1988) (explaining that in the "usual case" a district court will or should dismiss state claims when "federal-law claims have dropped out of the lawsuit in its early stages"); United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").

We need not resolve the precise contours of pendent personal jurisdiction in this case. Even if we assume (1) that the § 3713 count was a proper anchor claim and (2) that the § 3713 and § 6324 claim arose from a common nucleus of operative facts, we hold that the district court abused its discretion by retaining jurisdiction over the § 6324 claims after its pretrial dismissal of the § 3713 count.

First, it is important to note that the district court considered its assertion of personal jurisdiction over the § 6324 claim "problematic" from the start and only justified its decision to assert jurisdiction on the fact that it possessed personal jurisdiction over Botefuhr and Davenport on the § 3713 count. Moreover, even after reaching this conclusion, the district court reserved the right "to review the basis for jurisdiction, particularly as to Count II." Second, the anchor count, the alleged violation of § 3713, dropped out of this litigation before trial, Estate of Davenport, 159 F. Supp. 2d at 1332 (explaining that the IRS withdrew Count III during summary judgment proceedings), and less than two weeks after the district court made its personal jurisdiction ruling. Also importantly, this count disappeared from the litigation not because the district court found it to be without legal merit, but because the IRS—the party asserting the claim—voluntarily withdrew it within days of the court using it as a basis for asserting personal jurisdiction. See also Olin Corp. v. Fisons PLC, 47 F. Supp. 2d 151, 155 (D. Mass. 1999) (dismissing pendent personal jurisdiction claims after dismissing anchor claims). Third, neither the district court nor the IRS have identified any persuasive reason for retaining personal jurisdiction following the dismissal of the § 3713 count. Indeed, the IRS merely reasserts that because the district court had personal jurisdiction over the § 3713 claim, it also had jurisdiction over the § 6324 claim, never discussing whether or how the legal analysis changed once the § 3713 count dropped out of the litigation. Similarly, the district court simply held that because no "additional evidence" had been presented on the personal jurisdiction question, it retained jurisdiction over the § 6324 claim, even following the IRS's withdrawal of the § 3713 claim. Estate of Davenport, 159 F. Supp. 2d at 1335. This conclusion, however, ignores the fact that once the § 3713 count disappeared, there was no

claim before the district court for which it could be said Botefuhr and Davenport had "minimum contacts" with Oklahoma.

Consequently, we reverse the district court's conclusion that it had personal jurisdiction over Botefuhr and Davenport.[8]

IV. LIABILITY UNDER § 6324

[2] Because we conclude that the district court lacked personal jurisdiction over Botefuhr and Davenport, we do not address the other arguments they raised on appeal. Therefore, the remaining question in this case is whether Vestal can be held liable under § 6324 for the Estate's gift tax deficiency. Before the district court, Botefuhr, Davenport, and Vestal filed a joint brief in which they argued that § 6324(b)'s personal liability provision has, like the lien provision, a ten-year limitation period, which has long since expired. Alternatively, they contended that if § 6324(b)'s personal liability provision was not subject to a ten-year limitations period, it was governed by another provision of the IRC, § 6901, whose statute of limitations period has also lapsed. The district court rejected both arguments and concluded that a different provision of the IRC, § 6502, established the statute of limitations for holding donees personally liable for the gift tax. Estate of Davenport, 159 F. Supp. 2d at 1334–35. In addition to reasserting these arguments, Vestal argues for the first time on appeal that the statute of limitations for bringing an action under § 6324 has lapsed because returns filed by Birnie Davenport in the early 1980s placed the IRS on notice of the gifts. Given the posture of this case, we disagree. Vestal argues, among other reasons, that the IRS is prohibited from collecting the deficiency under § 6324 because the relevant statute of limitations for bringing such an action has lapsed and because it would be inequitable. We disagree.

A. General Legal Background

Subject to various qualifications, the IRC imposes tax liability "on transfers of property by gift," Estate of Davenport, 184 F.3d at 1181; see 26 U.S.C. §§ 2501–54, and defines gifts as including transfers of property for "less than an adequate and full consideration in money or money's worth." Id. § 2512(b). Generally speaking, the party that makes the gift, the donor, bears primary responsibility for paying any tax liability associated with the gift. See 26 U.S.C. § 2502(c) ("The tax imposed by § 2501 shall be paid by the donor."); Fletcher Trust Co. v. Commissioner, 141 F.2d 36, 39 [32 AFTR 229] (7th Cir. 1944) ("The provisions of the Act . . . make plain . . . that the liability of the donor is primary . . . .").

Where, however, the donor completely fails to pay or only partially satisfies the federal gift tax, the recipient of the gift, the donee, can be held liable for the donor's tax deficiency, "at least to the extent of the value of the gift." Dougherty, supra note 5, § 2(a), at 450; see generally Gregory A. Byron, Transferee Liability Under Section 6324: Defining the Extent of a Transferee's Liability for Interest, 32 Idaho L. Rev. 383 (1996). Section 6324 of the IRC expressly establishes this "transferee" or "donee" liability for gift tax, Mississippi Valley Trust Co. v. Commissioner, 147 F.2d 186, 187 [33 AFTR 635] (8th Cir. 1945); Fletcher, 141 F.2d at 39, and provides in relevant part:

> [U]nless the gift tax . . . is sooner paid in full or becomes unenforceable by reason of lapse of time, such tax shall be a lien upon all gifts made during the period for which the return was filed, for 10 years from the date the gifts are made. If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift.

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[8] In its brief, the IRS requested that in the event we concluded that the district court lacked personal jurisdiction over Botefuhr and Davenport, we remand with instructions that the district court transfer this case "to the district court[s] in which the action[s] should have been brought." Under 28 U.S.C. § 1631, a court "shall" transfer actions over which it lacks jurisdiction, if it concludes that a transfer "is in the interest of justice." Courts have construed this language as giving district courts considerable discretion in deciding whether a § 1631 transfer would be appropriate. Phillips v. Seiter, 173 F.3d 609, 610 (7th Cir. 1999) (collecting cases and explaining that because "the term 'interest of justice' is vague, district courts have a good deal of discretion in deciding whether to transfer a case"). Therefore, the district court can consider the appropriateness of a transfer on remand, but we refrain from ordering a transfer.

26 U.S.C. § 6324(b) (emphasis added).[9]

Thus, § 6324 provides both for a ten-year lien and it also makes a donee personally liable for any gift tax deficiency. Courts have emphasized that this liability arises the instant the donor fails to pay the tax. See Poinier v. Commissioner, 858 F.2d 917, 920 [62 AFTR 2d 88-6006] (3d Cir. 1988) (''Since a gift tax was due and unpaid, the donees are liable for its payment''); Mississippi Valley Trust, 147 F.2d at 187–88 (''If the donor fails to pay the automatically imposed tax when due, in accordance with the statute, no matter what the reason for his failure, there is an immediate and direct liability on the donee for the legally-owed tax, to the extent of the value of the gift.''); Fletcher Trust, 141 F.2d at 39. Moreover, the donee's liability, though derivative in the sense that it arises only after the donor fails to pay the gift tax when due, exists regardless of whether the donor is solvent. La Fortune v. Commissioner, 263 F.2d 186, 194 [3 AFTR 2d 1770] (10th Cir. 1958) (''Solvency or insolvency of the donor is immaterial . . . . ''); Baur v. Commissioner, 145 F.2d 338, 340 [32 AFTR 1472] (3d Cir. 1944) (''[I]t is wholly immaterial to the enforcement of the legal liability whether the transfers rendered the donor insolvent or whether he remained solvent during the period of his enforceable liability for the tax.''). Indeed, once the donor fails to the pay the underlying gift tax, the IRS may elect to collect the tax from either the donor or the donee, and need not take any direct action against the donor before pursuing the donee. La Fortune, 263 F.2d at 194 (''[A]ssertion of a deficiency against a donor is not required.''); see also Mississippi Valley Trust, 147 F.2d at 188 (explaining that the donee's liability is not ''contingent or dependent upon a formal determination of deficiency against the donor or upon any other steps to collect from him''); Fletcher Trust, 141 F.2d at 39 (''Neither do we think that notice to the donor is essential in order to maintain a proceeding against transferees . . . . '').

Courts have also held that under § 6324, a donee is liable, to the extent of the value of that donee's gift, for any gift tax in-curred by the donor during the year in which the donee received a gift, regardless of whether that individual donee's gift ac-tually contributed to the donor's gift tax deficiency. As this court explained years ago, ''The statute clearly imposes liability on any donee gift during the year and hence the fact that the deficiency exists be-cause of a gift to another makes no differ-ence.'' La Fortune, 263 F.2d at 194; see also Want v. Commissioner, 280 F.2d 777, 781 [6 AFTR 2d 6101] (2d Cir. 1960) (Friendly, J.) (explaining that a donee is liable ''not only for the tax owing on the gift to him but also for the tax due on all other gifts made by the donor during the calendar year''); Baur, 145 F.2d at 339 (same); see also Dougherty, supra note 5, at 451 (''[T]he donor may also be held liable for the tax on gifts made by the donor in the same calendar year.'').

B. Section 6324's Ten-Year Lien Limit as Statute of Limitations

Vestal initially argues that the IRS cannot pursue its action against her because the period for bringing a § 6324 action has lapsed. In particular, Vestal contends that the ten-year limit on § 6324's special lien also applies to § 6324's personal liability provision. As the IRS concedes, the time period for enforcing § 6324's lien has lapsed. See Estate of Birnie Davenport, 159 F. Supp. 2d at 1333. Contrary to Vestal's suggestions, we do not believe that the lapsing of § 6324's lien provision prevents the IRS from collecting tax deficiencies under the section's personal liability provision.

Section 6324(b) draws a clear distinction between the special lien imposed on the gift received by the donee and the donee's personal liability for gift tax incurred by

[9] Section 6324(a) of the IRC creates a parallel lien against transferees for any unpaid estate tax and also makes such ''transferees'' personally liable. 26 U.S.C. § 6324(a)(1)–(2). Courts have held that the gift tax and estate tax provisions ''are in pari materia and must be construed together.'' Estate of Sanford v. Commissioner, 308 U.S. 39, 44 [23 AFTR 756] (1939); see also New England Acceptance Corp. v United States, 35 F. Supp. 2d 53, 56 n.4 [80 AFTR 2d 97-6759] (D.N.H. 1997); Estate of Mandels v. Commissioner, 64 T.C. 61, 74 n.6 (1975) (both explaining how the two provisions are interpreted in pari materia). Consequently, our discussion of donee liability will refer to cases arising under both §§ 6324(a) and 6324(b).

the donor. The statute, for instance, creates in one sentence the ten-year special lien on the gifted property and then states in the following sentence: ''If the tax is not paid when due, the donee of any gift shall be personally liable for such tax to the extent of the value of such gift.'' 26 U.S.C. § 6324(b). As outlined above, courts interpreting this provision have routinely analyzed the personal liability prong of § 6324 independent from and without reference to the lien provision. See, e.g., La Fortune, 263 F.3d at 194; Mississippi Valley Trust, 147 F.2d at 187–88; Baur, 145 F.2d at 339; see also Tilton v. Commissioner, 88 T.C. 590, 594 (1987) (''It will be observed that [the language of 6324(b)] imposes a lien upon any gift to secure payment of the tax and, if the tax is not paid when due, personal liability on the donee to the extent of the value of such gift.'' (internal quotation marks deleted and emphasis added).)

This distinction is significant, because § 6324(b) does not explicitly state a statute of limitations for a donee's personal liability. Morever, the relatively few cases to have considered the issue suggest that the statute of limitations for the donee's liability depends upon the statute of limitations for the donor's liability: so long as the government could bring a timely action against the donor, its action against the donee will be considered timely. Cf. United States v. Wright, 57 F.3d 561, 564 [75 AFTR 2d 95-2738] (7th Cir. 1995) (explaining that ''suits against persons derivatively liable for taxes are timely, or not, according to the rules for timeliness against taxpayers''). The few courts that have considered this issue directly in the context of § 6324 have looked at the generally applicable statutes of limitations created under § 6501 and § 6502 of the IRC, and they have reasoned that if the suit would be timely brought against the donor under these provisions, it will be considered timely against the donee or transferee. See United States v. DeGroft, 539 F. Supp. 42, 44 [49 AFTR 2d 82-1443] (D. Md. 1981) (holding that § 6502 established the statute of limitations for holding a transferee personally liable, not § 6324's lien provision); see also United States v. Geniviva, Civ. A. No. 92-1045, 1993 WL 597442, at 2–3 (W.D. Pa. Apr. 14, 1993) (same), aff'd, 16 F.3d 522 [73 AFTR 2d 94-2341] (3d Cir. 1994); United States v. Warner [56 AFTR 2d 85-6583], No. 83 CIV 3717 (LBS), 1985 WL 2575, at 5 (S.D.N.Y. Sept. 18, 1985); United States v. Russell [34 AFTR 2d 74-6340], Civ. A. No. KC-2953, 1974 WL 727, at 3 (D. Kan. Oct. 17, 1974) (holding that § 6502 ''is the applicable statute of limitations to actions brought under § 6324(a)(2), and that an action timely brought against a transferor would be timely against the transferee), aff'd, 532 F.2d 175, 176 [37 AFTR 2d 76-1578] (10th Cir. 1976) (acknowledging district court's holding but noting that that holding was not at issue on appeal); cf. United States v. Updike, 281 U.S. 489, 494 [8 AFTR 10916] (1930) (holding that if the 'period of limitation runs in favor of the [transferor],' it has also 'run in favor of the transferees'); see also Walter D. Schwidetzky, Heirs May Face Open-Ended Liability, 54 Tax'n for Acct. 208, 210 (1995) ('The Service must bring an action to collect the tax liability arising under § 6324(a) within the . . . collection period specified in § 6502.').

In pertinent part, § 6501 of the IRC provides that the IRS must assess a taxpayer ''within three years after the return was filed.'' 26 U.S.C. § 6501(a). Section 6502, in turn, provides that the IRS must collect any assessed tax ''by levy or by a proceeding in court'' commenced ''within ten years after the assessment of that tax.'' Id. § 6502(a)(1).

In this case the parties concede, or at least have failed to contest, that the IRS made a timely assessment against Birnie Davenport's estate on March 2, 1998. Estate of Davenport, 159 F. Supp. 2d at 1334–35. As a result, the IRS had until March 2, 2008, to commence a court proceeding to collect the gift tax liability from the Estate, 26 U.S.C. § 6502(a). In fact, the Estate conceded its liability for the gift

tax before the district court.[10] Id. at 1332. Therefore, because the IRS is acting within the time period in which it could act against the donor, Birnie Davenport, its case against Vestal as a donee is timely.[11]

Vestal's only significant response is to argue that legislative history suggests that Congress "intended, through its ten-year lien provision, to provide a statute of limitations for the collection of taxes due on unpaid estate and gift taxes." In making this argument, she quotes the following from a 1966 Senate Report:

> In general terms, these modifications are intended to represent a reasonable accommodation of the interests of the Government in collecting the taxes of delinquent taxpayers with the rights of taxpayers and third parties. The modifications are concerned with the procedures for levying upon property of a delinquent taxpayer, the liability of lenders, sureties, etc., for withholding taxes, the running of statutes of limita-tions in the case of delinquent tax liabil-ities, procedures arising out of, or with respect to the sale of property of delinquent taxpayers, the court procedures to be followed with respect to tax liens, and provision for the redemption of real property by the United States, where it is sold by a creditor with a higher priority.
>
> . . . .
>
> The bill amends the provisions relating to the special liens for estate and gift taxes, first, to make it clear that these special liens are extinguished after the running of the period of limitations on the collection of the underlying estate or gift tax liability and, second, to extend to additional categories of interests the same protection against the special estate and gift tax liens which these interests are accorded by the bill in the case of the general tax lien.

S. Rep. No. 89-1708 (1966), reprinted in 1966 U.S.C.C.A.N. 3722, 3724, 3735.

We find Vestal's argument unpersuasive. As a general matter, we will not invoke legislative history absent ambiguity in the text of a statute. In re Geneva Steel Co., 281 F.3d 1173, 1178 (10th Cir. 2002). Yet even if we delve into the legislative history cited by Vestal, we find her argument unconvincing for at least three reasons. First, courts that have examined § 6324's legislative history have noted that it is "of little aid" in construing the statute. United States v. Cleavenger, 517 F.2d 230, 232 [36 AFTR 2d 75-6421] (7th Cir. 1975). Second, the legislative history Vestal refers to—indeed even the cases she refers to—discuss § 6324's lien provision and make few, if any, references to the personal liability provision, much less the applicable statutes of limitations for that liability. See United States v. Davis, 52 F.3d 781, 782 [75 AFTR 2d 95-1817] (8th Cir. 1995) (focusing on lien provision); Cleavenger, 517 F.2d at 233 (same). Third, the language in the legislative history and statutory text that Vestal emphasizes in her opening brief—language referring to the fact that the ten-year lien expires if the underlying gift tax "becomes unenforceable by reason of lapse of time," 26 U.S.C. § 2634(b)—does not bolster her claim that the ten-year-lien period created an across-the-board limitations period. All this clause suggests is that if the underlying tax liability becomes unenforceable, the special lien's duration is shortened. United States v. Potemken, 841 F.2d 97, 100 [61 AFTR 2d 88-1341] (4th Cir. 1988). Accordingly, we reject Vestal's legislative history argument.

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[10] To the extent Vestal attempts to argue that the assessment against the Estate was untimely with regard to the gifts made to her and Davenport because the IRS learned of the gift in the 1983 gift tax return, we address that claim, raised for the first time on appeal, below.

[11] We appreciate Vestal's frustration at being held liable for gifts made many years ago. Yet many of her arguments are essentially policy-based attacks on the IRC and the IRS, which should be left to the IRS or Congress for resolution, not the courts. See, e.g., Genivia, 16 F.3d at 525 (expressing "compassion for the equitable position" of transferees, but holding that they must appeal to the executive or legislative branches for relief). Moreover, our holding is in accordance not only with those cases that have considered the issue but also with the general idea that "[s]tatutes of limitation barring the assessment and collection of taxes justly due and unpaid receive a strict construction in favor of the Government, and limitations in such cases will not be presumed in the absence of clear legislation to the contrary." Mertens, Federal Law of Income Taxation, § 57:03 (2002).

C. Notice Concerning Gift to Vestal

Vestal also devotes a substantial portion of her briefs to arguing that the IRS is time-barred from collecting gift taxes because its assessment of liability against the Estate was untimely, at least in regard to her gifts. She argues that "the filing of the gift tax return [by Birnie Davenport] on March 31, 1983 ... was sufficient to begin the running of the statute of limitations with respect to any additional taxes that might be owed and resulting" from the stock given to them individually. In essence, Vestal asserts that because Birnie Davenport filed a gift tax return in 1983 reflecting the fact that she had forgiven the promissory notes Vestal and Davenport gave to her for the 1980 sale of Hondo stock, the IRS was also on notice of the gifts predicated on the undervaluation of the Hondo stock at the time of the sale and should not have sat "idly by when it ha[d] the necessary facts ... to collect [the] unpaid taxes."

Vestal is correct that we have recognized that "once [a] taxpayer has evinced an honest and genuine effort to satisfy the law by filing such a return, the § 6501(a) period begins to run." Dowell v. Commissioner, 614 F.2d 1263 [45 AFTR 2d 80-855], 1265 (10th Cir. 1980); see also Lucia v. United States, 474 F.2d 565, 570 [31 AFTR 2d 73-733] (5th Cir. 1973) (noting that the statute of limitations for collecting deficient taxes might begin to run when the IRS "has been informed by the taxpayer that there is, or might be, tax liability"). Vestal, however, is not entitled to assert this argument on appeal, because she never raised the argument below. See Sac & Fox Nation v. Hanson, 47 F.3d 1061, 1063 (10th Cir. 1995) (explaining that issues not raised before the district court will not be considered on appeal "except for the most manifest error"). Indeed, in this case, the district court expressly noted that the parties had not challenged the timeliness of the IRS's assessment against the Estate and that in previous rulings, the tax court had found the assessment timely.[12] Estate of Davenport, 159 F. Supp. 2d at 1134–35.

Vestal would nonetheless have us exercise our discretion and address the issue she explicitly failed to raise below. See Colorado Interstate Corp. v. CIT Group/Equip. Fin., Inc., 993 F.2d 743, 751 (10th Cir. 1993). Vestal attempts to overcome her default by arguing that the district court's order "unilaterally" applied § 6502's statute of limitations provision to this case, despite the fact that the IRS never identified the statute of limitation period for bringing a personal liability action under § 6324(b).

We are not convinced by this argument. In the joint brief filed with the district court, Botefuhr, Davenport, and Vestal argued at length that the IRS was time-barred from holding them personally liable for Birnie Davenport's gift tax deficiencies. Clearly, the claim that the IRS knew in 1983 about the gifts of Hondo stock but failed to act upon that knowledge until the 1990s, as Vestal and Davenport now claim, could and should have been raised below, regardless of the § 6502 issue. Additionally, we find unconvincing Vestal's claim that the district court's invocation of § 6502 changed the nature of this case, given that § 6502 is a general statute of limitation provision and that prior courts have

[12] The application of this rule seems particularly appropriate in this case. Vestal's attorney during oral argument expressly claimed that the gift tax return filed in 1983 discussed Hondo stock. Our review of the documents contained in the record (which we reviewed out of an abundance of caution) show no reference to Hondo stock in this return. In fact, the installment note that allegedly accompanied the return only states that Vestal agreed to make payments to Birnie Davenport "[f]or value received." It does not reference Hondo stock. We are also puzzled by Vestal's repeated suggestion that the 1982 gift tax return even dealt with the 1980 gifts of stock. Part of the 1980 gifts—the gifts at issue in this case-arose because Birnie Davenport sold Vestal (and Davenport) Hondo stock at a discounted rate. Estate of Davenport, 184 F.3d at 1187–88; Estate of Davenport, 74 T.C.M. (CCH) 405 [1997 RIA TC Memo ¶97,390], 1997 Tax Ct. Memo LEXIS 468, at 32 (Aug. 25, 1997). Vestal herself acknowledges that the IRS treated the forgiveness of the promissory note in 1982 and the 1980 sales agreement as separate gift transactions. In her opening brief, for instance, Vestal asserts that "nine years after the 1982 gift tax return was filed by Mr. Davenport, the IRS claimed that the Hondo stock had been undervalued, that the sale of the stock to Vestal and Davenport had been for less than adequate consideration, and that a gift had also been made to Vestal and Davenport in 1980, as well as in 1982." Moreover, in assessing Vestal's liability, the district court specifically reduced her liability by the amount she "paid for the stock ($804.00)." 159 F. Supp. 2d at 1336. Thus, by Vestal's own admission, it appears that she may have received two gifts from Birnie Davenport. First, she received a gift in 1980—when she "bought" the Hondo stock at a discounted rate. Second, she received a second gift in 1982—when Birnie Davenport forgave the promissory note (which reflected the discounted purchase price). We need not resolve this issue, however, because Vestal failed to preserve this claim below.

applied § 6502 in the § 6324 context.[13] Moreover, as a representative of Birnie Davenport's Estate, Vestal would, or at least should, have had every incentive to argue that the gift tax return filed by Birnie Davenport in 1983 triggered the statute of limitations provisions under § 6501 and § 6502 for bringing a claim against the Estate[14]. (Vestal, along with Botefuhr and Davenport, after all, conceded the Estate's liability.)

Vestal also argues for the first time on appeal that she cannot be held liable for any gift tax deficiencies because Birnie Davenport paid some gift tax in 1983, and "if the donor has paid the tax, even if deficient, the donee no longer has any liability." For the reasons outlined above, this argument fails because it is asserted for the first time on appeal. Even if we were to address the claim, however, we would reject it. A straightforward reading of § 6324 indicates that a donee is liable when a donor fails to pay the full gift tax owed, even if the donor has made a partial, yet deficient, payment or filed a tax return claiming that no tax is owed, as precedent establishes. Breliant [sic, Berliant] v. Commissioner, 729 F.2d 496, 497–98, 502 [53 AFTR 2d 84-1619] (7th Cir. 1984) (upholding transferees' liability for estate tax where estate filed an initial return, but IRS subsequently concluded that return undervalued estate's assets); Moore v. Commissioner, 146 F.2d 824, 824 [33 AFTR 445] (2d cir. 1945) (upholding donee liability where donor made deficient payment); Wilkes v. United States, 50 F. Supp. 2d 1281, [83 AFTR 2d 99-1573] 1282 (M.D. Fla. 1999) (explaining that "if the estate tax is not paid in full when due . . . , then . . . transferees 'shall be personally liable for such tax'").

In summary, the district court properly concluded that the ten-year lien provision in § 6324(b) does not create a statute of limitations for collecting gift taxes from a donee under § 6324(b). Instead, case law supports the conclusion reached by the district court, that if an action could be timely commenced against a donor under the provisions of § 6501 and § 6502, an action against the donee under § 6324(b) will be considered timely.

V. VALUE OF HONDO STOCK

[3] At its core, this issue centers around whether Vestal is bound by the Estate's stipulation during the tax court proceedings that the market value of Hondo stock in 1980 was $2,000.00 per share. See Estate Davenport, 184 F.3d at 1179 n.2; Estate Davenport, 1997 Tax Ct. Memo LEXIS 468, at 24 n.7. As discussed above, the value of Hondo stock at the time of the transfer is important to Botefuhr's, Davenport's, and Vestal's case, because, generally speaking, a donee's liability for a donor's gift tax is capped by the value of the gift received. When determining Vestal's tax liability, the district court used the $2,000.00 per share figure. See Estate of Davenport, 159 F. Supp. 2d at 1335–36 ("Based on the parties' stipulation and the Tax Court's ruling in previous litigation, this Court adopts the value of the stock gifted by Birnie Davenport at $2,000.00 per share.").

On appeal, Vestal advances various arguments for why she is not bound by this figure. In particular, she contends that the stipulation was limited to the tax court proceeding only and does not preclude litigation of that issue in this case. We agree.

As an initial matter, we note some confusion over whether the district court invoked the doctrine of claim preclusion or issue preclusion when concluding that the stock should be valued at $2,000.00 per share. Ultimately, however, we conclude that this matter must be evaluated as an assertion of issue preclusion, rather than

[13] Even if this court were to conclude that the district court's invocation of § 6502 entitles Vestal to argue that the IRS learned of their stock gifts in 1983, she would not be entitled to the full relief she seeks. Vestal would still be liable for taxes associated with the gifts made to Botefuhr. La Fortune, 263 F.2d at 194 (noting that a donee is liable for any gift tax incurred by the donor during the year in which he gave to the donee).

[14] Vestal argues for the first time in her reply brief that Birnie Davenport's 1982 income tax return gave the IRS notice about the 1980 gifts, and she attempts to supplement the record with information supporting this claim. This claim differs from the new argument Vestal introduced in her opening brief-that Birnie Davenport's allegedly good faith paying of the gift tax in 1983 relieved Vestal of any gift tax liability. "This court does not ordinarily review issues raised for the first time in a reply brief." Stump v. Gates, 211 F.3d 527, 533 (10th Cir. 2000) (internal citations omitted). We therefore decline to consider that argument.

claim preclusion. Claim preclusion is inapplicable to the situation here presented.

Issue preclusion is designed to prevent needless relitigation and bring about some finality to litigation. Under the doctrine, "[w]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in my future lawsuit." Ashe v. Swenson, 397 U.S. 436, 443 (1970). Four elements must be demonstrated in order to trigger issue preclusion: "(1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been fully adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." Dodge v. Cotter Corp., 203 F.3d 1190, 1197 (10th Cir. 2000); see also Orijas v. Stevenson, 31 F.3d 995, 1010 (10th Cir. 1994) (identifying elements for issue preclusion).

The critical issue is whether the prior stipulation in the estate proceeding on the value of Hondo stock constitutes an "adjudication on the merits." In the issue preclusion context, the underlying issue must have been adjudicated on the merits. See Jones v. United States, 466 F.2d 131, 133 [30 AFTR 2d 72-5400] (10th Cir. 1972) (explaining that issue preclusion "is only applicable when an issue identical to that presented in the second suit has been raised and fully adjudicated under identical and inseparable relevant facts"). "Generally speaking, when a particular fact is established not by judicial resolution but by stipulation of the parties, that fact has not been 'actually litigated' and thus is not a proper candidate for issue preclusion." Otherson v. Dep't of Justice, 711 F.2d 267, 274 (D.C. Cir. 1983); see also Kane v. Town of Harpswell, 254 F.3d 325, 329 (1st Cir. 2001). This is particularly so when the stipulation does not "manifest an intent to be bound in a subsequent action." Red Lake Band v. United States, 607 F.2d 930, 934 (Ct. Cl. 1979). As the Restatement (Second) of Judgments states:

> A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action.
>
> . . . .
>
> An issue is not actually litigated if the defendant might have interposed it as an affirmative defense but failed to do so; nor is it actually litigated if it is raised by a material allegation of a party's pleading but is admitted (explicitly or by virtue of a failure to deny) in a responsive pleading; nor it is actually litigated if it is raised in an allegation by one party and is admitted by the other before evidence on the issue is adduced at trial; nor is it actually litigated if it is the subject of a stipulation between the parties. A stipulation may, however, be binding in a subsequent action between the parties if the parties have manifested an intention to that effect.

Restatement (Second) of Judgments § 27 cmt. e at 256–57 (1982) (emphasis added); see 18A Charles Alan Wright et al., Federal Practice & Procedure § 4443, at 252–53 (2d ed. 2002) ("Stipulation of individual issues is treated much as a consent judgment. A stipulation or admission may be binding in later stages of a continuing proceeding. But issue preclusion ordinarily does not attach unless it is clearly shown that the parties intended that the issue be foreclosed in other litigation.") (footnotes omitted); see also id. at § 4442 at 236 (explaining that procedural default might warrant claim preclusion but does not normally warrant issue preclusion); id. at § 4443 at 251 (explaining that consent judgments will justify claim preclusion but not issue preclusion). The Supreme Court has also recognized that stipulations in one tax proceeding generally do not amount to an adjudication on the merits for issue preclusion purposes. See United States v. Int'l Bldg. Co., 345 U.S. 502, 506 [43 AFTR 396] (1953).

Applying these principles to this case, it is clear that the parties never adjudicated

the value of Hondo stock. The tax court's decision, for example, noted, "For purposes of this case, if we find that Birnie Davenport did transfer the stock in question, the parties have stipulated the fair market value of such stock was $2,000 per share at the time of the transfer." Estate of Davenport, 1997 Tax Ct. Memo LEXIS 468, at 24 n.7. Likewise, in the prior appeal to this court, we observed, "The parties stipulated that the fair market values of Hondo stock in the third quarter of 1980 was $2,000 per share." 184 F.3d at 1179 n.2. Such stipulations do not "manifest an intent to be bound" in subsequent litigation against a donee. Red Lake Band, 607 F.2d at 935, and, therefore, we reverse the district court's application to the contrary.

In summary, we hold that the district court erred in holding that the parties were precluded from relitigating the value of Hondo stock.[15]

VI. CONCLUSION

We REVERSE the district court's conclusion that it had personal jurisdiction over Botefuhr and Davenport. We AFFIRM the district court's conclusion that the IRS timely commenced its collection actions against Botefuhr, Davenport, and Vestal. Finally, we REVERSE the district court's conclusion that the parties were barred from litigating the value of Hondo stock. Accordingly, this case is REMANDED to the district court for proceedings consistent with this opinion.

¶2002-5597

UNITED STATES OF AMERICA, PLAINTIFF v. Robert D. LOWRANCE, ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of Oklahoma, (DC OK) Case No. 00-CV-0236K (M), Sept. 18, 2002. Year 1994. Decision for Govt.

1. Collection actions—reducing assessments to judgment; foreclosure—summary judgment. Govt. was granted summary judgment on its complaint to reduce taxpayer's assessments to judgment and foreclose liens against 3 commodity trading accounts in which he denied having any ownership interest: taxpayer offered no affidavits or supporting documentation to support his non-interest defense, which directly contradicted his prior assertions to contrary in bankruptcy filings and check record of 1 account transaction; and taxpayer didn't otherwise oppose govt.'s motion. *Reference:* United States Tax Reporter ¶74,035.03(134); 74,035.01(25). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA,

ORDER

TERRY C. KERN, Chief UNITED STATES DISTRICT JUDGE

Before the Court is the Motion of the Plaintiff for Summary Judgment against Defendant Robert D. Lowrance (dkt #73).

Background Facts and Procedures

On or about December 4, 1995, Defendant filed his federal income tax return for the year 1994. The return showed a self-assessed balance of tax due of $2,390,074. While Defendant has made some payments to the Internal Revenue Service ("IRS"), he continues to be indebted to the United States. As of April 30, 2002, the IRS calculated the balance due on this 1994 account as $5,909,129.99.

On August 9, 1996, Defendant filed for Chapter 11 Bankruptcy in the Northern District of Oklahoma, Case No. 96-03124-M. Defendant and the IRS litigated Defendant's 1994 federal income tax liability during his bankruptcy and reached a settlement. The bankruptcy court dismissed the case on March 13, 2000.

In the present action, Plaintiff filed its Complaint in this Court on March 20, 2000, naming Robert D. Lowrance and Bruce Johnson as defendants in order to reduce a federal tax assessment against Robert D. Lowrance to judgment and to

[15] All other arguments raised by the parties are rejected, either as without merit or as unnecessary to our decision. Appellant's Motion for Leave to File Supplemental Appendix to Reply Brief of Appellant, Patricia Vestal, is granted.

foreclose federal tax liens against personal property allegedly held in a bank account and three commodities accounts (''Packers Trading Accounts''). By a Revised Agreed Order issued' on June 26, 2000, the funds in the aforementioned bank account were paid to the United States. On September 10, 2002, the case against Bruce Johnson was dismissed with prejudice based on stipulation of the parties.

Plaintiff filed this Motion for Summary Judgment against Defendant Robert D. Lowrance to determine that Defendant is liable for unpaid federal income taxes, interest and penalties for 1994, and to foreclose Defendant's interest in the Packers Trading Accounts. In Defendant's Response to the Plaintiff's Motion for Summary Judgment, Defendant ''admits the facts set forth in the United States' Memorandum of Law in Support of its Motion for Summary Judgment,'' but ''claims no interest in the 'Packers Trading Accounts''' (dkt #90).

Summary Judgment Standard

Summary judgment is appropriate if ''there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.'' Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494, (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party must go beyond the pleadings and identify specific facts that demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494.

Discussion

[1] As Defendant ''admits the facts set forth in the United States' Memorandum of Law in Support of its Motion for Summary Judgment,'' he offers no substantive objection to summary judgment and the only remaining issue is whether Defendant has an interest in the Packers Trading Accounts on which Plaintiff could foreclose. Plaintiff alleges that Defendant owns a 50 percent interest in Packers Trading Accounts numbers 30-03003 and 30-0365 and a 100 percent interest in Packers Trading Account number 30-03054. Defendant simply ''claims no interest'' in said accounts, but his statement of such is not in the form of an affidavit and he provides no documentation in support of his statement.

The Packers Trading Accounts are mentioned throughout the record, with no objection or disclaimer by the Defendant until now. Beginning with Defendant's own Third Amended Disclosure submitted to the bankruptcy court on September 28, 1999, and signed by Defendant's attorney, Defendant claims 1) that he ''owns commodities trading account No. 30 03054 at Packers Trading Company .... subject to an IRS tax lien in the amount of $2,463,552.33,'' and 2) that he ''is 1/2 owner of Packers Trading Company commodities trading account No. 30 03003 ... subject to the IRS federal tax lien in the amount of $2,463,552.33'' (Exhibit C to dkt #3). There is no mention of Packers Trading Account number 30-0365 in Defendant's Third Amended Disclosure.

In the Complaint filed in the present action, Plaintiff alleged Defendant's ownership in all three Packers Trading Accounts and its right to foreclose on such (dkt #1). Defendant responded to such allegations in his Answer by stating that he lacked sufficient information to admit or deny the allegations, but stated as his First Affirmative Defense that it was ''not necessary to foreclose on the [three Packers Trading Accounts and the bank account] identified in the Complaint. Mr. Lowrance will voluntarily assign or turn over his interest in these accounts to the Plaintiff at any time and opposing counsel has been so advised'' (dkt #13). This Court issued a Temporary Restraining Order (dkt #10) and an Agreed Order Granting Injunction (dkt #15) dealing with the three Packers Trading Accounts. Defendant agreed to the entry of both orders.

There is also a photocopy of a check written by Defendant and made out to "Packers Trading Co." in the amount of $10,000.00 in Exhibit B to the Plaintiff's Motion for Turnover of Funds (dkt #20). Defendant's ownership of the three Packers Trading Accounts is also mentioned in Defendant Bruce Johnson's Response to United States' Motion for Turnover of Funds (dkt #32), Plaintiff's Memorandum of Law in Support of its Motion for Leave to File an Amended Complaint (dkt #44), and the Plaintiff's First Amended Complaint (dkt #47). Defendant did not oppose any of the aforesaid documents with a contention that he has no interest in the Packers Trading Accounts.

Because Defendant has offered no evidence to negate any of the above detailed documents (on the contrary, Defendant provided evidence in support of his ownership in his Third Amended Disclosure submitted to the bankruptcy court), has pro-vided no documentation to support his current conclusory contention that he has no interest in the Packers Trading Ac-counts, and his current statement is not in the form of an affidavit, summary judg-ment is appropriate as to Defendant's own-ership in the three Packers Trading Ac-counts.

IT IS THEREFORE ORDERED that the motion of the Plaintiff for summary judgment is hereby GRANTED as to the Plaintiff's claim that Defendant is liable for unpaid federal taxes, interest and penalties for 1994, and foreclosing Defendant's interest in Packers Trading Account numbers 30-03003, 30-0365, and 30-03054.

ORDERED this 18 day of September, 2002.

TERRY C. KERN, Chief

UNITED STATES DISTRICT JUDGE

¶2002-5598

UNITED STATES OF AMERICA, PLAINTIFF v. David J. RYALS and Maria ALBRIGHT-RYALS, DEFENDANTS. U.S. District Court, Eastern Dist. of Louisiana, (DC LA) Civil No. Case No. 01-1788, Jan. 24, 2002. Years 1989, 1990, 1995. Decision for Govt.

1. Collection actions—default judgment—100% penalty for failure to pay over trust fund taxes. Govt. was granted default judgment against taxpayers for their unpaid joint income tax debts, plus interest and statutory additions, and against husband for his unpaid IRC §6672 penalty. *Reference:* United States Tax Reporter ¶74,025.01(95); 66,725.02(40). IRC §6672; 7402; 7403.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA,

DEFAULT JUDGMENT

STANWOOD R. DUVAL, JR. UNITED STATES DISTRICT JUDGE

Sec. K, Mag. 1

[1] This Court, upon Motion of the Plaintiff, United States of America, and default having been entered against the Defendants, Maria Albright Ryals and David J. Ryals, hereby ORDERS, ADJUDGES, and DECREES as follows:

1. The defendants, Maria Albright Ryals and David J. Ryals, are indebted to the United States for unpaid federal income taxes for the tax years 1990 and 1995 in the total amount of $16,927.92 as of December 11, 2001, plus further interest and statutory additions as allowed by law.

2. The defendants, David J. Ryals, is indebted to the United States for a trust fund recovery penalty assessed for the tax period ending December 31, 1989, pursuant to 26 U.S.C. § 6672, as a person required to collect, truthfully account for, and pay over employment tax for Royal Commercial Interior Corporation who willfully failed to collect such tax, or truthfully account for and pay over such tax, or willfully attempted in any manner to evade or defeat such tax or the payment thereof, in the total amount of $46,634.71 as of December 11, 2001, plus further interest and statutory additions as allowed by law.

Done New Orleans, Louisiana, this 24th day of January, 2001.

STANWOOD R. DUVAL, JR.

UNITED STATES DISTRICT JUDGE

¶2002-5599

UNITED STATES OF AMERICA, PLAINTIFF v. Louis W. RATFIELD and LWR Financial Services Trust, DEFENDANTS. U.S. District Court, Southern Dist. of Florida, (DC FL) Case No. 01-8816-CIV-FERGUSON, Sept. 29, 2002. Years 1997, 1998, 2000. Decision for Govt.

1. Abusive tax shelter promotion—injunctions—interference with tax law enforcement. Return preparers were preliminarily enjoined from participating in organization, promotion, and sale of ''pure'' or ''common-law'' trusts, making false statements about clients' entitlement to deductions or credits, and other similar conduct: govt. showed that subject trusts were similar to other abusive trusts preparers created and that their conduct could be subject to penalty under IRC §6694, IRC §6695, IRC §6700, and IRC §6701 if it were shown to interfere with tax laws' enforcement. *Reference:* United States Tax Reporter ¶74,085.01(50); 74,075; 74,025.01(11). IRC §6694; 6695; 6700; 6701; 7402; 7407; 7408.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA,

ORDER GRANTING PRELIMINARY INJUNCTION

WILKIE D. FERGUSON, JR. UNITED STATES DISTRICT JUDGE

THIS CAUSE is before the Court on the United State's Motion for Preliminary Injunction [D.E. 11] and the United States' Renewed Motion for Preliminary Injunction [D.E.30]. There has been no written opposition to the motions. The matter came on for hearing before the Court on August 12 and August 13, 2002. Having considered the motions, affidavits, arguments made during the hearing, and pertinent portions of the record, the Court GRANTED the motions [D.E.11 and D.E.30] *ore lenus* at the conclusion of the hearing. The issues having been duly heard and a decision having been duly rendered, the Court hereby supplements its *ore lenus* ruling and states as follows:

This is a civil action brought by the United States of America (the ''Government'') pursuant to Sections 7402(a), 7407 and 7408 of the Internal Revenue Code, 26 U.S.C. §§ 7402(a), 7407, 7405, to restrain and enjoin the defendants, Louis W. Ratfield (''Ratfield'') and LWR Financial Services Trust (''LWR''), and all those in active concert or participation with them, from organizing, promoting and selling ''pure'' or ''common-law'' trusts, from acting as federal income tax return preparers, and from engaging in the other conduct in violation of tax laws pending a trial on the merits.

Facts

It is alleged and shown by the evidence that defendants Ratfield and LWR market trust arrangements which involve transferring individual taxpayers' businesses to ''pure'' or ''common law'' trusts created by defendants. After the taxpayer's business has been transferred to one of the defendants' trusts, the income and expenses of the taxpayer's business are reported on a Schedule C (Profit or Loss from Business) attached to a U.S. Income Tax Return for Estates and Trusts (Form 1041) prepared by Ratfield as a tax accountant.[1]

The Government further contends that the net profit from the taxpayer's business is reported as the ''business income'' of the trust, and improperly eliminated by the ''Other deductions not subject to the 2% floor'' claimed on line 15a of the Form

[1] According to IRS Revenue Agent Patricia L. Grimes, Ratfield was employed by the IRS from January 29, 1968 to February 8, 1969 as an economist for the Assistant Commissioner (Planning & Research), Statistics Division, Income, Finance and Wealth Branch. Ratfield was also employed by the IRS from December 8, 1969 to December 14, 1973 as an economist for the Assistant Commissioner (Planning & Research), Statistics Division, Operations Branch, Methods and Procedure Section, and later as a statistician in the same division and branch until December 30, 1977. Ratfield told Revenue Agent Grimes that he has worked in the tax area since January 4, 1978. He operated a sole proprietorship from 1978 to 1996, when he first began to operate as a business trust. Ratfield admitted to Revenue Agent Grimes that he has over a thousand total clients. Those clients, according to Ratfield, reside in seventeen (17) states.

1041. A statement prepared by Ratfield and attached to the Form 1041 itemizes the allegedly improper deductions claimed on line 15a. Those deductions include, but are not limited to, the ''Trust Headquarters'' (the individual taxpayer's nondeductible personal living expenses, such as groceries, utility bills and mortgage principal payments); ''medical'' (the individual taxpayer's nondeductible medical bills); ''pension'' (the individual taxpayer's contributions to a private pension plan); and ''insurance'' (the individual taxpayer's disability and life insurance premiums).

Federal income and self-employment tax liabilities of the individual taxpayers who purchase a trust from Ratfield, according to the Government, are artificially reduced by employing the trust purchaser as the ''General Manager'' of the trust, which pays the individual taxpayer a yearly salary of approximately $12,000 in lieu of the income which he or she previously received from the business. A significant understatement of the individual taxpayers' federal tax liabilities results from the challenged trust arrangement. Ratfield promotes the purported transfer of individual taxpayers' personal and business assets into a series of trusts which he refers to as ''pure'' trusts, ''common-law'' trusts, ''Constitutional'' trusts and/or Massachusetts trusts. Ratfield creates the trusts by securing an Employer Identification Number (''EIN'') from the Internal Revenue Service (''IRS'') and filling out a standard form called the ''Declaration and Contract of Trust''.

According to the Government, a ''business trust'' is then created for the individual taxpayer's principal business activity to operate the business and make a profit. The assets of the business are exchanged for ''Certificates of Capital Units'' of ''indeterminate value.'' The previous business owner then contracts with the trust he has purchased from Ratfield to be the ''General Manager'' of the trust for approximately $12, 000 per year. The individual taxpayer's relationship (as the ''Exchanger'') to his or her property does not change before or after the formation of the trust. Although beneficiaries are named (usually children of the ''General Manager''), no economic interest in the business or property purportedly transferred to the trust passes to them. If a client of Ratfield does not have any suitable individuals to designate as the ''trustee'' of his or her trust, Ratfield allegedly provides trustees. The ''trustees'' furnished by Ratfield - usually Robbie J. Self, Kathleen R. Lewis, Adam Jacobs or Sandra Perry - play no role in the management of the ''trusts'' created by Ratfield for his customers, according to the Government's filings in this case.

Ratfield's customers use all of the purported trust properties as their own, and have sole signature authority and control over the bank accounts of the trusts. The personal living expenses of the taxpayers who purchase trusts from Ratfield are then deducted by the trusts on line 15a of the U.S. Income Tax Return for Estates and Trusts (Form 1041), along with all of the costs for maintaining the individual taxpayers' personal residences. In some cases, by this manipulation of taxable income the individual taxpayers qualified for Earned Income Tax Credits (''EITC'') or a tax refund.

The Government has presented evidence that Ratfield prepared and sold ''trusts,'' virtually identical to his own ''LWR Financial Services Trust,'' to numerous other individuals living in Florida and throughout the United States. Through its affidavits and evidence presented during the hearing, the Government showed thai the following individuals had purchased ''trusts'' from the defendants:

(A) Raphael (''Ray'') Levy (''U.S. Benefit Services Trust'' and ''First R & R Trust'');

(B) Ronalee Levy Orlick (''M&M Associates Irrevocable Trust'');

(C) Robert B. Rabeck (''Regency Heritage Trust'' and ''United Fidelity Trust'');

(D) Adam Jacobs and Sandra Perry (''Superior Management Consultants Trust'');

(E) Steven J. Oshinsky (''RAM Capital Management Trust''); and

(F) Richard J. Porcelli (''A.J. Madison Investment Group Trust'').

The ''trusts'' described above were similar to the ''LWR Financial Services Trust'' which Ratfield created for himself. They operated in the same manner. Ratfield has admitted to IRS agents to selling over 100 trust packages. The basic cost of the trust packages, according to Ratfield, was $2,995 in 1997, $3,500 in 1998 and $5,995 in 2000. Additional fees were changed by Ratfield and/or LWR for each holding trust in excess of five, for the use of Ratfield's professional settlor and trustees, and for preparation of federal income tax returns for the trust and the individual taxpayer who purchased the trust.

Injunctive Relief

[1] Pursuant to 26 U.S.C. § 7407, a Court may award injunctive relief prohibiting specific conduct if the Court finds that a tax preparer has:

(A) engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by this title,

(B) misrepresented his eligibility to practice before the Internal Revenue Service, or otherwise misrepresented his experience, or education as an income tax preparer,

(C) guaranteed the payment of any tax refund or the allowance of any tax credit, or

(D) engaged in arty other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and [the Court finds]

(2) that injunctive relief is appropriate to prevent the recurrence of such conduct.

§ 7407,

A willful understatement of tax liability can also include an intentional disregard of rules and regulations. For example, an income tax return preparer who deducts all era taxpayer's medical expenses, intentionally disregarding the percent of adjusted gross income limitation, may have both intentionally disregarded rules and regulations and willfully understated tax liability.

United States v. Ernst & Whinney, 735 F.2d 1296, 1304 [54 AFTR 2d 84-5472] (11th Cir. 1984) (citation omitted).

Section 7407 further provides that ''if the court finds that an income tax return preparer has continually or repeatedly engaged in any conduct described in subparagraphs (A) through (D) of this subsection and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, the court may enjoin such person from acting as an income tax return preparer.'' Id. Section 7407 vests jurisdiction upon this district court ''pursuant to the jurisdictional grant contained in § 7402(a) and specifically states that an action under § 7407 is 'separate and apart from' any other action brought by the IRS against the preparer in question.'' Ernst & Whinney, 735 F.2d at 1302. ''It is not necessary for the Court to address directly the common law requisites for injunctive relief since Congress, in legislatively granting injunctive powers, has already taken these requirements into account.'' U.S. v. Bailey, 759 F. Supp. 788, 812 (N.D. Tex. 1992). Accord U.S. v. Estate Preservation-Servs., 202 F.3d 1093, 1098 [85 AFTR 2d 2000-603] (9th Cir. 2000). Therefore, it is

ORDERED AND ADJUDGED that the United State's Motion for Preliminary Injunction [D.E.11] and the United States' Renewed Motion for Preliminary Injunction [D.E.30] are GRANTED. Accordingly, it is

ORDERED AND ADJUDGED that a preliminary injunction is hereby issued pursuant to Federal Rule of Civil Procedure 65(a) barring defendants from organizing, promoting and selling ''pure'' or ''common-law'' trusts, and from acting as federal income tax return preparers pending a final determination on the merits.

The defendants, Louis W. Ratfield (''Ratfield'') and LWR Financial Services Trust (''LWR''), and all those in active concert or participation with them, are hereby prohibited and enjoined from:

(a) further acting as a federal income tax return preparer until there has been complete compliance with statutory disclosure requirements to the satisfaction of the IRS or the Court;

(b) organizing or selling abusive tax shelters, plans, or arrangements that advise or encourage taxpayers to attempt to evade the assessment or collection of their correct federal tax;

(c) making false statements about the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by the reason of participating in such tax shelters, plans, or arrangements;

(d) assisting in the preparation of or preparing tax returns that they know will result in the understatement of any tax liability;

(e) understating taxpayers' liabilities as prohibited by I.R.C. § 6694;

(f) engaging in any other activity subject to penalty under I.R.C. §§ 6694, 6695, 6700, or 6701;

DONE and ORDERED in Chambers at Fort Lauderdale, Florida, this 29th day of September, 2002.

WILKIE D. FERGUSON, JR.

UNITED STATES DISTRICT JUDGE

¶2002-5600

Arturo REYNOSO, ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA, ET AL., DEFENDANTS. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-01-1219-JCM-(PAL), Sept. 30, 2002. Year 1998. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties. IRS's administrative determination to proceed with collection of frivolous return penalty against tax pro-tester who filed ''zero'' return was upheld on summary judgment: penalty was warranted where taxpayer intentionally took frivolous position that wages weren't taxable; computer generated certificate of assessments indicated that he received proper notice and demand letter prior to penalty's assessment; delegation of authority argument was meritless; and taxpayer didn't raise any statutorily recognized collection defense. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(2). IRC §6330; 6702.

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA,

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

JAMES C. MAHAN UNITED STATES DISTRICT JUDGE

Date: N/A

Time: N/A

Presently before this court is defendant's motion for summary judgment (#2). Plaintiff filed an opposition to defendant's summary judgment motion that he entitled a reply to defendant's motion to dismiss (#7). Defendant filed a reply in further support of its motion for summary judgment (#8).

A motion for summary judgment is a procedure which terminates, without a trial, actions in which there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A summary judgment motion may be made in reliance on the ''pleadings, depositions, answers to interrogatories; and admissions on file, together with the affidavits, if any.'' *Id.*

The movant is entitled to summary judgment if the non-moving party, who bears the burden of persuasion, fails to designate ''specific facts showing that there is a genuine issue for trial.'' *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (quoting Fed. R. Civ. P. 56(e)). Thus, in order to preclude a grant of summary judgment, the non-moving party must set forth ''specific facts showing that there is a genuine issue

for trial.'' *Matsushita Elec. Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The substantive law defines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All justifiable inferences must be viewed in the light most favorable to the non-moving party. *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001) (citing *Zenith Radio Corp.*, 475 U.S. at 587).

Although the non-moving party has the burden of persuasion, the party moving for summary judgment bears the initial burden of showing the absence of a genuine issue of material fact. *Metro Indust., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996). That burden is met by showing an absence of evidence to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325. The burden then shifts to the non-moving party to set forth specific facts demonstrating that there is a genuine issue for trial. *Liberty Lobby, Inc.*, 477 U.S. at 250. In meeting this burden, the non-moving party must go ''beyond the pleadings and by its own evidence present specific facts showing that there is a genuine issue for trial.'' *Far Out Prod. v. Oskar*, 247 F.3d 986, 997 (9th Cir. 2001) (citing *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996)) (quotations omitted).

[1] Plaintiff, Arturo Reynoso, filed a tax return in 1998 that had zeroes on all lines which reflected income and tax due to the government. Plaintiff did not attach a W-2 or 1099 form but instead attached a two-page explanation of why he had no tax liability. As part of his explanation plaintiff indicated that he ''had no earning in 1998, that would have been taxable as income, under the Corporation Excise. Tax Act of 1901.'' Plaintiff did not deny having any income, but instead contended his earnings were not taxable.

The Internal Revenue Service assessed a frivolous return penalty pursuant to 26 U.S.C. § 6702. Upon receiving a notice of intent to levy, plaintiff requested a collection due process hearing. After the hearing, the appeals officer determined that the penalty was valid. Pursuant to 26 U.S.C. § 6330(d), plaintiff filed this action con-testing the validity of the assessed penalty and the notice of determination.

28 U.S.C. § 6702 provides that a frivolous return penalty of $500 shall be assessed if: a filed tax return does not contain information on which the substantial correctness of the self-assessment may be judged, or contains information that on its face indicates that the self-assessment is substantially incorrect; and (2) the conduct referred to is due to a position which is frivolous, or a desire to delay or impede that administration of Federal income tax laws. In the case at bar, the penalty is appropriate. Plaintiff filed an income tax return showing an income of zero. However, in the explanation attached to his return plaintiff indicated he had earnings but contend they were not taxable. It is clear from the record that the plaintiff intentionally did not provide the proper information to the IRS on his return and in so doing took a frivolous position.

Plaintiff contends a penalty-cannot be assessed because he did not receive the proper notice and a demand letter. However, computer records indicate otherwise. The United States has produced a computer generated certificate of assessments, payments, and other specified matters that indicates plaintiff received the appropriate notice. The notice and demand letter in question, may be left at the dwelling or usual place of business or sent by mail to the individual's last known address. 26 U.S.C. § 6303(a). Furthermore, the existence of notices sent after the notice and demand letter, constitute a presumption that the required initial notice and demand letter were sent. *U.S. v. Comer*, 222 B.R. 555 [81 AFTR 2d 98-1439] (E.D. Mich 1998), *See also*, *Nassar v. U.S.*, 792 F. Supp. 1040, 1042–43, n. 4–5 [70 AFTR 2d 92-5020] (E.D. Mich 1992); *U.S. v. Morgan*, 781 F. Supp. 1219, 1221 (E.D. Mich 1991)(''A certificate of assessment and payment which lists 'First Notice' dates for each assessment constitutes presumptive proof that the IRS gave notice of the assessment and demand for payment.'')

Likewise, plaintiff cannot prevail on his argument that there is no evidence of delegated authority from the Secretary of Treasury. Penalties may be assessed by the Secretary of the Treasury or any delegate. 26 C.F.R. 301.6201-1(a), *see also, Tibbetts v. Secretary*, 577 F.Supp. 911, 915 [53 AFTR 2d 84-700] (W.D.N.C. 1984), *McCullough v. Secretary*, 621 F.Supp. 750 [56 AFTR 2d 85-6138], 7–52 (N.D.Miss. 1985). ''The delegation of authority down the chain of command, from the Secretary, to the Commissioner of Internal Revenue, to local IRS employees constitutes a valid delegation by the Commissioner to the delegated officers and employees.'' *Robison v. United States of America*, [90 AFTR 2d 2002-6004] 2002 U.S. Dist. LEXIS 16408, at 10 (D. Nev. July 17, 2002). Based on the delegation of authority, the agents involved in processing plaintiff's claim were acting within their authority.

Plaintiff also questions the conduct of the appeals officer at the hearing. However, at the hearing plaintiff attempted to discuss matters beyond those permitted by statute. Relevant issues relating to the unpaid tax or the proposed levy can be discussed at the hearing including: ''(i) appropriate spousal defenses; (ii) challenges to the appropriateness of collection actions; and (iii) offers of collection alternative, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-incom-promise.'' 26 U.S.C. § 6330(c)(2). Plaintiff chose to focus instead on the procedural arguments regarding notice and delegation of authority.

Plaintiff, did not try to discuss in a constructive manner any of the topics provided for by statute. Rather, he found the hearing a further opportunity to raise the same frivolous arguments that were included with his tax return. As a result of the hearing, the appeals officer determined that the penalty was valid, and this court agrees. The issues that plaintiff attempted to raise before the appeals officer and that he argued here are without merit. Plaintiff has not set forth any specific facts showing that there is a genuine issue for trial in this case. Therefore summary judgment is appropriate.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant's motion for summary judgment (#2) is GRANTED.

DATED Sept 30, 2002

JAMES C. MAHAN

UNITED STATES DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That judgement is entered for Defendants & against Plaintiff.

September 30, 2002

Date

LANCE S. WILSON

Clerk

¶2002-5601

UNITED STATES OF AMERICA, PLAINTIFF v. Billy Joe TORRENCE, Norma Ruth JONES-TORRENCE, Steven Kelly Torrence, and Caroline Torrence Morris Rodden, DEFENDANTS. U.S. District Court, Eastern Dist. of Texas, (DC TX) 6:02cv204, Oct. 7, 2002. Earlier proceeding at (2002, DC TX) 90 AFTR 2d 2002-6097. Years 1994, 1995, 1996, 1997, 1998, 1999, 2000. Decision for Govt.

1. Collection actions—foreclosure—funds held by third party—default judgment. Govt. was granted default judgment against taxpayer's sister to set aside as fraudulent his transfer of funds to her, foreclose liens against funds, and apply them to taxpayer's outstanding tax debts: sister didn't appear or otherwise properly respond to complaint.

Reference: United States Tax Reporter ¶74,035.03(135). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION,

ORDER

Came on this day to be considered the *United States' Motion for Judgment by Default Against Caroline Torrence Morris Rodden Only, and Supporting Brief* (Docket No. 46). After careful consideration, the Court is of the opinion that the following Order should issue.

Background

On January 8, 2000, Mr. Torrence purchased a winning Texas lottery ticket with a cash value of $3.9 million, at a time when the Torrences were legally divorced but residing together. Mr. Torrence gave the ticket to Mrs. Torrence, and on January 9, 2000, she alone claimed all of the lottery winnings in her name, in an attempt to defeat the IRS's right to collect Mr. Torrence's delinquent income taxes.

After income tax of $1,013,356.00 was withheld from the lottery winnings, the remaining amount of $2,604,559.42 was wire-transferred to a bank account in the name of Norma Torrence. On the following day, she transferred the entire amount to a newly opened joint account in the names of Billy and Norma Torrence. Subsequently, Mrs. Torrence filed a 2000 federal income tax return with the IRS as a single person, reported the lottery winnings as her own income, and paid the correct amount of income tax on them.

In March 2000, Mr. Torrence allegedly became dissatisfied because Mrs. Torrence permitted third parties to draft the joint bank account. Without Mrs. Torrence's consent, he transferred the remaining $2,019,038.15 into a bank account in his name only. Mr. Torrence then began a fairly lavish lifestyle, buying expensive jewelry, a number of automobiles, motorcycles, and other property.

On March 20, 2002, the jury in the Torrences' divorce case found that, on January 8, 2000, the day Mr. Torrence won the lottery, the Torrences had a common law marriage, and that Mr. Torrence made a gift to Mrs. Torrence of one-half of the proceeds from the winning lottery ticket.

Procedural History

On May 8, 2002, the United States filed a Verified Complaint in order to reduce Mr. Torrence's $855,340.01 federal income tax liability to judgment, to foreclose federal tax liens on personal property, and to order the property sold in partial satisfaction of Mr. Torrence's tax liability. On June 24, 2002, the United States filed its amended complaint in this case, joining as additional defendants Steven Kelly Torrence and Caroline Torrence Morris Rodden. As indicated by the return of service on the back of the summons filed with this Court, Caroline Torrence Morris Rodden was served with summons and a copy of the amended complaint on July 10, 2002, through her husband, at their ''place of employment,'' in accordance with the Federal Rule of Civil Procedure 4(e)(2). Further, according to the return of service on the back of the summons filed on August 9, 2002, Caroline Torrence Morris Rodden was personally served with summons and a copy of the amended complaint on August 9, 2002.

Through the *United States' Verified Amended Complaint* (Docket No. 22), the United States seeks to obtain a judgment against Defendant Caroline Torrence Morris Rodden setting aside a fraudulent transfer of $350,000 to her by her brother, Defendant Billy Joe Torrence, to foreclose the federal tax liens on these funds, to obtain a judgment against Caroline Torrence Morris Rodden for $350,000 to apply to the 1994–2000 federal income tax liability of Defendant Billy Joe Torrence, and other appropriate relief.

Although properly served, Caroline Torrence Morris Rodden has failed to appear or otherwise respond to the complaint within the time prescribed by Rule 12(a)(1)(A) of the Federal Rules of Civil Procedure. Caroline Torrence Morris Rod-

den's answer or response was due on August 29, 2002. *United States' Motion for Clerk's Entry of Default Against Defendant Caroline Torrence Morris Rodden Only* (Docket No. 44) was filed on September 9, 2002. The *Clerk's Entry of Default* (Docket No. 45) was also filed on September 9, 2002.

Default Judgment

Rule 55 of the Federal Rules of Civil Procedure permits entry of default as the consequence of failure to comply with Rule 12 of the Federal Rules of Civil Procedure requiring an answer within twenty days after service of the summons and complaint. Not only did Caroline Torrence Morris Rodden fail to respond within twenty days after service of process, but she also has failed to respond at all in this action. Thus, the Clerk's entry of default was proper.

The Court notes that the entry of default judgment is committed to the discretion of the district judge. *Mason v. Lister*, 562 F.2d 343, 345 (5th Cir. 1977). Default judgments are not favored by the law because courts encourage trials on the merits. *See* 10A Wright and Miller, Federal Practice and Procedure §§ 2692–93 (1998). The Fifth Circuit has held that a "party is not entitled to a default judgment as a matter of right, even where the defendant is technically in default." *Ganther v. Ingle*, 75 F.3d 207, 212 (5th Cir. 1996). In fact, "[d]efault judgments are a drastic remedy, not favored by the Federal Rules and resorted to by courts only in extreme situations." *Lewis v. Lynn*, 236 F.3d 766, 767 (5th Cir. 2001). However, it is well established that the district court has the authority to dismiss or to enter default judgment, depending on which party is at fault, for failure to prosecute with reasonable diligence or to comply with its orders or rules of procedure. *See Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1336, 8 L.Ed.2d 734 (1962), *affirming* 7th Cir., 291 F.2d 542; *Unites States v. Proctor & Gamble Co.*, 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958). The Fifth Circuit has also followed suit by holding that "there is ample authority to uphold a district court's power to order entry of default for failure to comply with court orders or rules of procedure." *McGrady v. D'Andrea Electric, Inc.*, 434 F.2d 1000, 1001 (5th Cir. 1970).

[1] Caroline Torrence Morris Rodden clearly has failed to comply with the Federal Rules of Civil Procedure. This Court can only assume that she knew of the instant suit, yet willfully failed to answer. When "the court finds an intentional failure of responsive pleadings there need be no other findings." *Dierschke v. O'Cheskey*, 975 F.2d 181, 184 (5th Cir. 1992). Therefore, this Court will exercise its discretion and grant the default judgment against Caroline Torrence Morris Rodden. It is therefore

ORDERED that the *United States' Motion for Judgment by Default Against Caroline Torrence Morris Rodden Only, and Supporting Brief* (Docket No. 46) is GRANTED. SIGNED this 7th day of October, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5602

David L. SAGER, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Western Dist. of Pennsylvania, (DC PA) CIVIL ACTION NO. 01-2220, Oct. 10, 2002. Years 1996, 1998, 1999. Decision for Govt.

1. Collection due process—review of administrative determination—jurisdiction—Anti-Injunction Act. Taxpayer's district court petition for review of administrative determination to proceed with collection of his tax liabilities was dismissed for lack of jurisdiction: IRC §6330(d)(1)(B) divested district court of jurisdiction over CDP appeal that fell within Tax Court's jurisdiction. Also, AIA barred taxpayer's request for injunctive relief from collection. *Reference:* United States Tax Reporter ¶63,305.01(10); 74,215.05(5). IRC §6330; 7421.

David L. Sager 318 Vine Street New Bethlehem, PA 16242
D. Brian Simpson U. S. Department of Justice P. O. Box 227 Washington, D.C. 20044

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA,

OPINION

CERCONE, D.J.

Plaintiff commenced this action seeking redress for defendant's alleged failure to produce certain requested material in conjunction with a collection due process (''CDP'') hearing held pursuant to 26 U.S.C. § 6330. Presently before the court is defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Plaintiff has filed two briefs in opposition to the motion, and the matter is ripe for disposition. For the reasons set forth below, the motion will be granted.

On March 29, 2001, the Internal Revenue Service (''IRS'') issued to plaintiff a ''Notice of Intent to Levy'' under 26 U.S.C. § 6331(d) for income taxes assessed for years 1996, 1998 and 1999. See Plaintiff's Verified Complaint at ¶ 1; exhibit C to Declaration of Settlement Officer Mark A. Kennedy attached to defendant's memorandum of law in support of its motion to dismiss (Doc. 15). The notice also advised plaintiff of his right under 26 U.S.C. § 6330 to a CDP hearing before an officer of defendant's appeals office. Plaintiff's complaint at ¶ 2; exhibit C to Kennedy declaration. On April 23, 2001, plaintiff requested a CDP hearing and asked the appointed settlement officer to produce specific information and supporting legal authority at the hearing. Plaintiff's complaint at ¶ 3; exhibit D to Kennedy declaration. In response the settlement officer produced ''a computerized printout of'' the applicable tax assessments and identified the statutes and federal regulations authorizing (1), the assessment, (2) notice and demand and (3) lien and levy supporting defendant's collection actions. Plaintiff's complaint at ¶s 4 & 5; Kennedy declaration at ¶ 8. Plaintiff elected not to appear at the scheduled CDP hearing and instead submitted a ''Declaration of Truth'' in support of his position. Exhibit G and ¶s 10 & 11 of Kennedy declaration. As permitted under 26 U.S.C. § 6330(c)(2)(A)(ii), plaintiff raised various challenges to the appropriateness of the collection action initiated by defendant. See exhibit G to Kennedy declaration. After considering plaintiff's submission, settlement officer Kennedy certified that all applicable legal and procedural requirements for defen-dant's proposed collection action had been met as required by 26 U.S.C. §§ 6320(c) & 6330(c)(1). Plaintiff's complaint at ¶ 7; Kennedy declaration at ¶ 12. Settlement officer Kennedy further concluded that plaintiff's submission did not raise a meritorious challenge to the correctness or amount of the tax liability in question and further determined that the notice of federal tax lien filed by defendant adequately balanced the need for efficient collection of federal taxes with the public policy that defendant's collection actions be no more intrusive than necessary. Kennedy declaration at ¶s 15 & 16. On October 26, 2001, settlement officer Kennedy forwarded to plaintiff a ''Notice of Determination Concerning Collection Action(s) under Section 6320 and/or 6330'' and advised plaintiff that if he disputed the determination set forth therein, he was required to ''file a petition with the United States Tax Court for a redetermination within 30 (thirty) days from the date of this letter.'' Exhibit H to Kennedy declaration. Plaintiff filed the instant action in this court on November 26, 2001.

[1] In its motion to dismiss, defendant contends this court is without jurisdiction to hear plaintiff's appeal from the determination made at the CDP hearing, and any further relief sought by plaintiff is barred by the Anti-Injunction Act codified at 26

U.S.C. § 7421.[1] Defendant specifically asserts that 26 U.S.C. § 6330(d)(1) vests jurisdiction over plaintiff's appeal in the United States Tax Court, and as a result this court is without jurisdiction to act on plaintiff's complaint. Plaintiff argues in his briefs in opposition to defendant's motion that (A) the Anti-Injunction Act does not apply where "all regulations were not properly followed by the IRS" and (B) his appeal to this court is proper because he has raised various challenges to the legal authority under which defendant has acted and the regulatory actions which defendant has undertaken to implement that legal authority. See, e.g., Plaintiff's First Brief in Opposition (Doc. 11) at p. 2; exhibit G to Kennedy declaration.

This court's jurisdiction over the proceedings below is governed by 26 U.S.C. § 6330, which provides in pertinent part:

(1) Judicial review of determination. - The person may, within 30 days of a determination under this section, appeal such determination-

(A) To the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter); or

(B) If the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

26 U.S.C. § 6330(d)(1). Thus, under this statutory scheme the court has jurisdiction to review the proceedings below only if the United States Tax Court does not have jurisdiction over the "underlying tax liability." 26 U.S.C. § 6330(d); Hickey v. United States, [89 AFTR 2d 2002-1376] 2002 WL 471789 (D. Nev., February 14, 2002); Accord True v. Commissioner of Internal Revenue, 108 F.Supp. 2d 1361 [87 AFTR 2d 2001-2617] (M. D. Fla. 2000) ("a claimant is required to bring a Section 6330 appeal in the Tax Court, as along as the Tax Court has jurisdiction of the underlying tax liability").

The United States Tax Court is an Article I court with limited jurisdiction to "rule on deficiencies assessed by the government on taxpayers." Crawford v. Commissioner of Internal Revenue, 266 F.3d 1120, 1122 [88 AFTR 2d 2001-5962] (9th Cir. 2001); 26 U.S.C. § 7441. Not withstanding its limited jurisdiction, the Tax Court exercises federal judicial authority in a manner similar to the federal district courts and it may address issues raising statutory/regulatory and constitutional claims. Crawford, 266 F.3d at 1123 ("we have previously held that Tax Courts, which are Article I courts, have jurisdiction to consider constitutional questions in the context of deciding deficiencies."); Rager v. Commission of Internal Revenue, 775 F.2d 1081, 1083 [56 AFTR 2d 85-6374] (9th Cir. 1985) (same).

The Tax Court has jurisdiction to hear plaintiff's appeal, and therefore, this court lacks jurisdiction by operation of § 6330(d)(1)(B). Plaintiff's complaint seeks relief as a result of a § 6330 CDP hearing held in conjunction with a proposed levy by the IRS. The collection process was initiated as a consequence of alleged income tax deficiencies on plaintiff's prior federal returns. Plaintiff concedes that at least part of the alleged deficiencies constitute income tax liability. See Plaintiff's First Brief in Opposition (Doc. 11) at p. 1. "This is precisely the kind of claim over which the Tax Court has jurisdiction." Hickey, surpa, at p.2 (citing Krugman v. Commissioner of Internal Revenue, 112 T.C. 230, 236 n.6 (1999) ("the Tax Court has jurisdiction to review determinations under sec. 6330 relating to proposed levies.")); Lunsford v. Commissioner of Internal Revenue, 117 T.C. 159, 161 (2001) (recognizing the jurisdiction of the Tax Court over § 6330 determination arising from proposed levy to collect unpaid income taxes); Moore v. Commissioner of Internal Revenue, 114 T.C. 171, 175 (2000) (same). Accordingly, this court lacks statutory jurisdiction to entertain

[1] The Anti-Injunction Act provides in pertinent part:
Except as provided in [specified sections of the Internal Revenue Code] no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed. 26 U.S.C. § 7421(a).

plaintiff's request for relief from the proceedings below.

The relief sought by plaintiff also is barred the Anti-Injunction Act. Plaintiff in effect requests this court to enter an order that essentially would enjoin the IRS from assessing or collecting the alleged deficiencies from plaintiff. The Act prohibits the maintenance of a "suit for the purpose of restraining the assessment or collection of any tax", and the statutory bar "equally [is] applicable to activities which are intended or may culminate in the assessment or collection of taxes." Dickens v. United States, 671 F.2d 969, 971 [49 AFTR 2d 82-1238] (6th Cir. 1982). In passing the Act Congress sought to withdraw jurisdiction from state and federal courts to entertain suits seeking orders that essentially would prohibit the collection of federal taxes. As a practical consequence, the "Act thus insulates the collection of taxes in most cases from judicial intervention, and requires that the legal right to disputed sums be determined in a suit for refund." Flynn v. United States, 786 F.2d 586, 588 [57 AFTR 2d 86-1022] (3d Cir. 1986).

Plaintiff seeks an order that prevents defendant from taking "further collection actions against" plaintiff unless defendant provides certain requested forms and identifies supporting "legislative regulations." Plaintiff's verified complaint at p.3. The relief sought by plaintiff in his verified complaint thus clearly falls within the purview of the Act. Under these circumstances further proceedings on plaintiff's complaint are barred by § 6330(d)(1) and the Anti-Injunction Act.[2]

Notwithstanding this court's lack of jurisdiction over plaintiff's complaint, plaintiff has an adequate remedy available to him even at this juncture because § 6330 provides that if the Court determines that an appeal has been filed in the wrong forum, the taxpayer has-30 (thirty) days after that determination to file the appeal in the correct court. 26 U.S.C. § 6330(d)(1).

For the reasons set forth above, defendant's motion to dismiss will be granted. An appropriate order will follow.

David Stewart Cercone

United States District Judge

Date: October 10, 2002

ORDER

David Stewart Cercone United States District Court

AND NOW, this 10th day of October, 2002, for the reasons set forth in the opinion filed this day, it is ORDERED that defendant's motion to dismiss (document 14) be, and the same hereby is, GRANTED;

IT FURTHER IS ORDERED that the Clerk of Court shall close this case.

David Stewart Cercone

United States District Court

Date: October 10, 2002

¶2002-5603

UNITED STATES OF AMERICA, PLAINTIFF v. Louise M. VITO, D-J's Kennel, Inc., Revenue Commissioner, Mobile County, Monfort, Inc., and state of Alabama, DEFENDANTS. U.S. District Court, Southern Dist. of Alabama, (DC AL) Civil No. 99-0630-RV-S, Oct. 8, 2002. Earlier proceeding at (2002, DC AL) 89 AFTR 2d 2002-2346. Years 1988, 1989, 1990, 1991, 1992, 1993. Decision for Govt.

1. Collection actions—order of distribution—nominees. Deficiency judgment was entered against taxpayer in stated amount for 6 years plus interest. *Reference:* United States Tax Reporter ¶74,035.01(30). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA,

[2] The record likewise fails to contain any basis to warrant equitable jurisdiction under the judicially-created exception to the Anti-Injunction Act recognized in Enochs v. Williams Packing and Navigation Co., 370 U.S. 1 [9 AFTR 2d 1594] (1962). A taxpayer must meet two independent requirements before injunctive relief can be pursued under the exception. First, the facts and law when examined in the light most favorable to the government must indicate that the government can not prevail on the merits. Flynn, 786 F.2d at 589. Second, because Williams Packing did not alter the prerequisite for equitable relief, the record must contain an independent basis for the court to exercise its jurisdiction over the matter. Id. Plaintiff's complaint fails to contain facts that would satisfy either requirement.

JUDGMENT

RICHARD W. VOLLMER, JR. UNITED STATES DISTRICT JUDGE

[1] Upon motion of the plaintiff, United States of America, for entry of a deficiency judgment against the defendant Louise M. Vito, it is hereby.

ORDERED, ADJUDGED AND DECREED that the United States of America recover of the defendant Louse M. vito, in the amount of $798,490.75 for unpaid federal income taxes for the tax years 1988 through 1993 as of July 1, 2002, plus further interest thereafter, at the underpayment rate set by the Secretary of the Treasury, compounded daily, pursuant to 26 U.S.C. §§ 6601(a) and (e), 6621, 6622, to the date of payment.

DONE AND ORDERED in the Southern District of Alabama, this 8th day of October, 2002.

RICHARD W. VOLLMER, JR.

UNITED STATES DISTRICT JUDGE

¶2002-5604

Jerry L. TURNER, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Southern Dist. of Alabama, (DC AL) CIVIL ACTION NO. 02-0650-CG-C, Oct. 8, 2002. Decision for Govt.

1. Actions against IRS—wrongful collection—sovereign immunity; Declaratory Judgment Act; Anti-Injunction Act. Taxpayer's action against IRS for declaratory and injunctive relief from alleged erroneous collection of employment and unemployment taxes was dismissed for failure to state claim: U.S., not IRS, was proper party to action; and DJA and AIA barred both declaratory and injunctive relief in tax-related actions against U.S. *Reference:* United States Tax Reporter ¶74,215.05(5); 74,217.502(5); 74,335.01(7). IRC §7421; 7433.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION,

ORDER

CALLIE V. S. GRANADE UNITED STATES DISTRICT JUDGE

This action is before the court on the motion of the defendant, the Internal Revenue Service (''IRS''), to dismiss (Doc. 5) and plaintiff's response thereto (Doc. 10). The court finds that neither the IRS nor the United States are proper parties to this action. Therefore, the motion to dismiss is due to be granted.

FACTS

The plaintiff, Jerry L. Turner, filed this action alleging that the IRS assessed an erroneous and excessive amount of employment and unemployment taxes against him. Plaintiff seeks a declaratory judgment determining the amount of his tax liability and an injunction prohibiting the IRS from collecting the taxes during the pendency of the suit.

LEGAL ANALYSIS

[1] A motion to dismiss should not be granted '''unless the plaintiff can prove no set of facts which would entitle him to relief.''' Martinez v. American Airlines, Inc., 74 F.3d 247, 248 (11th Cir. 1996) (quoting Peterson v. Atlanta Housing Authority, 998 F.2d 904, 912 (11th Cir.1993)). In making this determination, the court must ''take all the allegations in the complaint as true, and view that complaint in the light most favorable to the plaintiff.'' Id.

The IRS asserts, and this court agrees, that it is not a proper party to this action. ''The IRS cannot be sued in its own name because it is not an agency permitted by Congress to be sued eo nomine.'' Price v. I.R.S., [89 AFTR 2d 2002-2448] 2002 WL 1058154, (S.D. Ala. April 11, 2002) (citing Castleberry v. Alcohol Tobacco and Firearms Division of Treasury Dept. of U.S., 530 F.2d 672, 673 n. 3 (5th Cir. 1976) (''Congress has not constituted the Treasury Department or any of its subdivisions or bureaus as a body corporate and has not authorized either or any of them to be sued eo nomine'')).

Even if the court were to treat this action as a case against the United States, plaintiff would still not have stated a claim upon which relief could be granted because the United States is also not a proper party to this action. The United States may be sued only to the extent that it has expressly and unambiguously consented to being sued. United States v. Dalm, 494 U.S. 596, 608 [65 AFTR 2d 90-1210] (1990); Preserve Endangered Areas of Cobb's History, Inc. v. United States Army Corps. of Engineers, 87 F.3d 1242, 1249 (11th Cir. 1996). Declaratory judgments are not available in federal tax cases, except in limited circumstances not applicable here. The Declaratory Judgment Act, which authorizes federal courts to provide declaratory relief, provides, in relevant part:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201(a). Section 7428 of the Internal Revenue Code of 1986 involves the tax-exempt status of charitable organizations and has no application in this case. Courts have determined that the purpose of this prohibition is to insulate the determination, assessment, and collection of taxes from pre-enforcement judicial interference. See, e.g., Gattuso v. Pecorella, 733 F.2d 709–10 [54 AFTR 2d 84-5146] (9th Cir. 1984) (district court lacked jurisdiction under the Declaratory Judgment Act to "abate the findings" that taxpayers had taxable income for the years in question); Melton v. Kurtz, 575 F.2d 547, 548 [42 AFTR 2d 78-5274] (5th Cir. 1978) (since both the Declaratory Judgment Act and the Internal Revenue Code's anti-injunction statute bar declaratory and injunctive relief in actions involving federal taxes, neither injunctive nor declaratory relief were available to taxpayer, who sought such relief with respect to collection and assessment of federal taxes). "Any statutory provisions allowing suits against the United States must be construed strictly." Preserve Endangered Areas of Cobb's History, Inc., 87 F.3d at 1249 (citing Ruckelshaus v. Sierra Club, 463 U.S. 680, 685–86 (1983)). Therefore, by the express terms of the Declaratory Judgment Act, declaratory relief is not available in this case involving federal taxes. Because the United States has not waived its sovereign immunity, this court lacks jurisdiction over plaintiff's claim for declaratory relief.

The only other relief sought in the complaint was for injunctive relief, prohibiting the IRS "from taking any further action for levy or collection until such as this Court has made its determination of said tax liability." (Doc. 1, emphasis added). Having determined that the claim for declaratory relief is due to be dismissed, the claim for injunctive relief is also due to be dismissed.

CONCLUSION

Upon consideration, the motion of defendant, the Internal Revenue Service, to dismiss (Doc. 5) is GRANTED. It is hereby ORDERED that this action is DISMISSED pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

DONE and ORDERED this 8th day of October, 2002.

CALLIE V. S. GRANADE

UNITED STATES DISTRICT JUDGE

¶2002-5605

TRUCKS, INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Georgia, (DC GA) CIVIL ACTION NO. 1:96-CV-0800-CC, Oct. 8, 2002. District Court, (2002, DC GA) 90 AFTR 2d 2002-6888, vacated. Earlier proceedings at (2002, DC GA) 89 AFTR 2d 2002-2552; and (2000, CA11) 86 AFTR 2d 2000-7180, 234 F 3d 1340, 2001-1 USTC ¶50116, reversing and remanding (1997, DC GA) 80 AFTR 2d 97-6625, 987

F Supp 1475, 97-2 USTC ¶50707. Years 1991, 1992, 1993. Decision for Taxpayer.

1. Attorney's fees and costs—motion to vacate. Taxpayer's unopposed motion to vacate order awarding attorney's fees and costs was granted: parties' stipulation as to such costs was approved under separate order. *Reference:* United States Tax Reporter ¶74,305.01(25); 74,305.01(10); 74,336.511(27). IRC §7430.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION,

ORDER

CLARENCE COOPER UNITED STATES DISTRICT JUDGE

[1] Plaintiff's Unopposed Motion to Vacate Order Dated September 24, 2002 and Judgment Entered September 26, 2002[1] Awarding Attorneys' Fees an Costs [125-1] is GRANTED. The Order dated September 24, 2002 and the corresponding Judgement entered on September 25, 2002 are hereby VACATED. The parties' stipulation respecting attorneys' fees and costs in this matter has been approved under separate order.

SO ORDERED this 8th day of October, 2002.

CLARENCE COOPER

UNITED STATES DISTRICT JUDGE

¶2002-5606

TOWNSEND INDUSTRIES, INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Southern Dist. of Iowa, (DC IA) CIVIL NO. 4-01-CV-10176, Sept. 30, 2002. District Court, (2002, DC IA) 90 AFTR 2d 2002-6588, 2002-2 USTC ¶50697, vacated. Earlier proceeding at (2002, DC IA) 89 AFTR 2d 2002-2913, 207 F Supp 2d 931, 2002-2 USTC ¶50518 [89 AFTR 2d 2002-2913]. Years 1996, 1997. Decision for Govt.

1. Employment taxes—wages—employer-provided fishing trips—working condition fringe benefits—business expenses—substantiation. Govt.'s unopposed motion to correct or amend judgment was granted, and new judgment was entered against taxpayer/corp. in stated amounts for 2 years plus pre- and post-judgment interest. *Reference:* United States Tax Reporter ¶34,015.09(150); 1325.05(40); 1625.019(5); 2745.14(75). IRC §132; 162; 274; 3121; 3401.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION,

ORDER

RONALD E. LONGSTAFF, CIVIL JUDGE United States District Court

[1] THE COURT HAS BEFORE IT the United States' morion to correct or amend judgment, filed September 12, 2002. Townsend Industries, Inc. does not resist the motion. Accordingly, the United States' motion is granted. IT IS ORDERED that the judgment entered on August 30, 2002 is vacated. The Clerk of Court is directed to enter a new judgment in favor of the United States of America and against Townsend Industries, Inc. in the amount of $33,566.33, representing income tax withholding deficiencies and assessed interest for the quarter ending June 30, 1996; plus $24,932.13, representing income tax withholding deficiencies and assessed interest for the quarter ending September 30, 1997, for a total amount of $58,498.46. In addition, townsend shall pay to the United States pre-judgment interest from the date of assessment through August 30, 2002, to be calculated according to the method set out at 26 U.S.C. §6621. Post-judgment interest shall accrue at the statutory rate from August 31, 2002.

Dated this 30th day of September, 2002.

RONALD E. LONGSTAFF, CIVIL JUDGE

United States District Court

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[1] According to the docket, the Judgment was entered on September 25, 2002.

JUDGMENT IN CIVIL CASE

___ JURY VERDICT. This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

✓ DECISION BY COURT. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: Amended judgment. New judgment in favor of the United States of America and against Townsend Industries for the total amount of $58,498.46

DATED THIS 30th DAY OF September 2002.

James Rosenbaum, Clerk

U.S. District Court

¶2002-5607

Karen Rae KINSMAN-CHAPMAN, Executor for Ray R. Kinsman Estate, injured party, and COMPLAINTANT-PLAINTIFF v. ONE (1) RECORD OF LIEN, filed into The Washington County Official Records Dept. as Tax Lien Index Document #2000076264, IRS Seriel #910095784, Subject "in rem"; Connie Howard, Agent, Fidelity National Title Company of Oregon; Paul H. O'Neill, The Office of the Secretary of the Treasury of the United States; John Doe, (signature unreadable) signing for; (Irene E. Scaniffio), Delegate of the Secretary, DEFENDANTS. U.S. District Court, Dist. of Oregon, (DC OR) Civil No. 02-937-KI, Oct. 25, 2002. Decision for Govt.

1. Actions against U.S.—removal of liens—quiet title—failure to state claim for relief. Govt. was granted dismissal of action challenging IRS's tax lien filing against deceased taxpayer's property: petitioner didn't comply with court order to amend 11 page, vague complaint to clarify whether she was bringing such in her individual capacity or as executrix, to specifically identify what liens she was challenging and what property was at issue, and to establish her interest therein. *Reference:* United States Tax Reporter ¶63,215.02(16); 74,336.507(3). IRC §6321.

Karen Rae Kinsman Chapman 871 N. E. Birchaire Lane Hillsboro, Oregon 97124-2439 Pro Se Plaintiff

Michael W. Mosman United States Attorney District of Oregon 1000 S. W. Third Avenue, Suite 600 Portland, Oregon 97204-2902

Jeremy N. Hendon Trial Attorney, Tax Division U. S. Department of Justice Ben Franklin Station P. O. Box 683 Washington, D. C. 20044

Susan T. Alterman Holland & Knight, LLP 111 S. W. Fifth Avenue, Suite 2300 Portland, Oregon 97204 Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON,

OPINION AND ORDER

KING, Judge:

Plaintiff Karen Rae Kinsman Chapman filed this action after a Notice of Federal Tax Lien was filed against property in Hillsboro, Oregon, owned by Ray Kinsman, who is apparently deceased. Before the court is the Named Federal Defendants' and United States' Motion for More Definite Statement (#7).

DISCUSSION

[1] The named federal defendants and the United States (collectively, "defendants") contend that Chapman's complaint is so vague and ambiguous that they cannot reasonably form a responsive pleading. Thus, defendants move for a more definite statement under Fed. R. Civ. P. 12(e).

I must agree with defendants. Chapman's Complaint is eleven pages long, discusses Idaho and Florida law although the real property is located in Oregon, has what is termed a criminal portion, and contains long sections which appear to be borrowed from other documents and may or may not be relevant to the problem Chapman is attempting to bring to court for res-

olution. The federal rules require a complaint to be written in simple, concise, and direct language. Fed. R. Civ. P. 8(e). I grant defendants' motion and require Chapman to file an Amended Complaint which states the relevant facts in a simple fashion, the legal claims being made, and ties the facts and claims to the particular defendants the claims are alleged against.

Defendants note three particular areas in which the Complaint's lack of clarity causes particular confusion. To correct the problems, Chapman must do the following in the Amended Complaint.

First, Chapman must clearly state whether she brings the action in her individual capacity or as the executor of the Estate of Ray R. Kinsman. If she brings the action as the executor, she must identify the court which is administering the Estate and how she became executor.

Second, Chapman must clearly state which liens she is challenging and attach all Notices of Federal Tax Liens which she is challenging.

Third, if Chapman intends to bring a quiet title action, she must clearly identify which real and/or personal property is at issue. If real property is at issue, she must state the nature of her interest in the property and how she acquired the interest. If personal property is at issue, Chapman must state the name and address of the taxpayer whose liability created the lien, the identify of the internal revenue office which filed the Notice of Federal Tax Lien, and the date and place the Notice of Federal Tax Lien was filed.

Chapman is also instructed that as an individual, she does not have the authority to bring a criminal complaint so allegations of criminal conduct should be deleted.

CONCLUSION

The Named Federal Defendants' and United States' Motion for More Definite Statement (#7) is granted. Chapman must file an amended complaint by October 21, 2002, or this action will be dismissed.

IT IS SO ORDERED.

DATED this 1st day of October, 2002.

GARR M. KING

United States District Court Judge

ORDER

KING, Judge:

On October 2, 2002, I granted the federal defendants' Motion for a More Definite Statement, dismissed the Complaint, and ordered plaintiff to file an Amended Complaint by October 21, 2002, in accordance with my instructions explaining the deficiencies in the original Complaint or I would dismiss the action. Plaintiff has filed nothing further. Accordingly, this action is dismissed without prejudice.

IT IS SO ORDERED.

DATED this 25th day of October, 2002.

GARR M. KING

United States District Court Judge

¶2002-5608

Susan S. ROCKWELL, Esquire, PLAINTIFF v. ROMAN CATHOLIC ARCHDIOCESE OF BOSTON, MASSACHUSETTS; Roman Catholic Diocese of Manchester, New Hampshire; United States Conference of Catholic Bishops; and Charles O. Rissotti, Commissioner, Internal Revenue Service, DEFENDANTS. U.S. District Court, Dist. of New Hampshire, (DC NH) No. 02-239-M, Oct. 30, 2002. Decision for Govt.

1. Exempt orgs.—exempt status—standing—constitutional claims. Magistrate judge's recommendation to dismiss attorney's challenge to Catholic Church's tax exempt status and related constitutional claims was adopted, and case was closed: attorney had no standing to argue that Church's refusal to ordain her as priest was unconstitutional discriminatory practice disqualifying it from exempt status since she showed no connection between tax exemption and church's non-ordination practice for women or how exemption's revocation would redress her injury. Also, constitutional and statutory discrimination claims failed where attorney didn't allege that Church's constitutional violations were taken in concert with federal officials or

otherwise state viable causes of action. *Reference:* United States Tax Reporter ¶5015.01(17); 76,557.53(30). IRC §501.

United States District Court, D. New Hampshire,

ORDER

MCAULIFFE, J.

1 Attorney Susan Rockwell, proceeding pro se, brings this action against various entities within the Roman Catholic Church (the ''Church defendants''), as well as the Commissioner of the Internal Revenue Service, claiming that defendants have deprived her of various statutory and constitutional rights by, among other things, refusing to ordain her as a Roman Catholic priest. She seeks declaratory and injunctive relief, including: (1) a declaration that the Church defendants do not qualify for tax exempt status because they discriminate against women; (2) a permanent injunction against the Commissioner, barring him from continuing the tax exempt status of the Church defendants; and (3) a permanent injunction against the Church defendants, barring them from ''prohibiting free speech regarding ordination of women in the Church.'' Complaint at 23. She claims that, unless the ''Commissioner revokes the tax exempt status and charitable deduction status of [the Church defendants], ... she will be denied free exercise of her religion, free speech and civil rights in employment as a priest in her Church.'' *Id.* at para. 95.

On August 5, 2002, the Magistrate Judge conducted a preliminary review of plaintiff's complaint to determine whether it properly invokes this court's subject matter jurisdiction. In the wake of that review, the Magistrate Judge concluded that the complaint fails to state a prima facie claim under 42 U.S.C. § 1983 (or *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971)) against defendants for having violated her federally protected rights. He also concluded that plaintiff lacks standing to challenge the Church defendants' tax exempt status. Accordingly, the Magistrate Judge recommended that the court dismiss plaintiff's ''First Amendment, tax and companion state [statutory and constitutional] claims.'' Report and Recommendation (document no. 3) at 11. The Magistrate Judge did, however, recommend that plaintiff's remaining claims--those under Title VII and New Hampshire's Law Against Discrimination--be served on defendants.[1] Plaintiff filed an objection to the Report and Recommendation, which is presently before the court.

Discussion

I. The Report and Recommendation.

[1] As to those counts in plaintiff's complaint challenging the Church defendants' tax exempt status, the Magistrate Judge correctly concluded that plaintiff lacks standing. Among other things, he noted that plaintiff has ''drawn no factual nexus between the grant of tax exempt status and the decision not to allow women to become priests'' and she ''does not even attempt to address in her complaint how revocation of the Church's tax exempt status would redress the injury she complains of and allow her to become a priest.'' Report and Recommendation at 11. *See generally Allen v. Wright,*468 U.S. 737 [54 AFTR 2d 84-5361] (1984) (holding that, for a plaintiff to have standing, his or her alleged injury must be ''fairly traceable'' to the challenged action, and relief from the injury must be ''likely'' to follow from a favorable decision). *See also Fulani v. Brady,* 935 F.2d 1324 [67 AFTR 2d 91-1139] (D.C.Cir.1991) (holding that political candidate lacked standing to challenge the tax exempt status of non-profit sponsor of political debates). Because plaintiff lacks standing to challenge the Church defendants' tax exempt status (counts 1, 3, and 4), there is no case or controversy over which the court may properly exercise its subject matter jurisdiction.

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[1] Although he recommended that plaintiff's gender-based discrimination claims be served on defendants (because those claims properly invoke the court's subject matter jurisdiction), the Magistrate Judge observed that, in light of the ''ministerial exception'' to anti-discrimination laws, plaintiff could not prevail on the merits. Report and Recommendation at 6 n. 2.

2 As to those counts in which plaintiff alleges that the Church defendants have violated her constitutionally protected rights (e.g., free speech, free exercise of religion, equal protection, etc.), the Magistrate correctly concluded that plaintiff's complaint fails to allege the requisite "state action." *See generally Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 461 (1952) (holding that the First Amendment "appl[ies] to and restrict[s] only the Federal Government and not private persons"). *See also Mass. Universalist Convention v. Hildreth & Rogers Co.*, 183 F.2d 497, 501 (1st Cir.1950) ("Plaintiff has argued that on the allegations of the complaint, it has a cause of action for the violation of its right to freedom of speech and freedom of religion under the First Amendment to the Constitution. But this Amendment limits only the action of Congress or of agencies of the federal government and not private corporations such as defendant here."); *National A-1 Advertising v. Network Solutions, Inc.*, 121 F.Supp.2d 156, 165–66 (D.N.H.2000) ("By its very terms, the [First] Amendment proscribes governmental conduct, not conduct undertaken by private citizens."). Accordingly, counts 5, 6, 7, and 8 do not state viable causes of action and fail to invoke this court's subject matter jurisdiction. The same is true of the corresponding state constitutional claims (i.e., counts 11 through 14).[2]

In light of the foregoing, the court approves and adopts the Magistrate Judge's Report and Recommendation (document no. 3) to the extent it recommends that counts 1, 3–8, and 11–14 be dismissed for, among other things, failing to invoke this court's subject matter jurisdiction.

II. Plaintiff's Remaining Claims.

Plaintiff's remaining claims generally allege that the Church defendants unlawfully discriminate against women in general, and plaintiff in particular. In count 2, plaintiff seeks a judicial declaration that, among other things, the "teaching that the Church does not have the authority to ordain women as priests and deacons is not a 'sincerely held religious belief,'" and the "all male priesthood violates public policy, the social norm and social conscience in that it endorses an exclusively male society of seminaries, all male hierarchy, clergy, ... and altar servers." Complaint at paras. 107 and 113. In the remaining two counts of her complaint, plaintiff alleges that, by refusing to allow women to become priests, the Church defendants (with the support of the Commissioner, through his continued recognition of their tax exempt status) violate the provisions of Title VII (count 9) and New Hampshire's Law Against Discrimination, N.H.Rev.Stat. Ann. 354-A (count 10).

As plaintiff herself appears to acknowledge, however, in order to prevail on her gender discrimination claims and the related declaratory judgment claim, this court would be required to depart substantially from widely accepted law (as well as circuit precedent) in this area. *See* Plaintiff's objection (document no. 6) at 9 (arguing for the reversal or modification of existing precedent). Specifically, for plaintiff to proceed with her discrimination claims (arising out of the Church defendants' refusal to ordain her as a priest), this court would have to disregard the so-called "ministerial exception" which, generally speaking, provides that state and federal anti-discrimination laws are not applicable to the employment relationship between a church and its ministers or clergy. *See McClure v. Salvation Army*, 460 F.2d 553, 560 (5th Cir.1972) ("the application of the provisions of Title VII to the employment relationship existing between ... a church

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2 In her objection (document no. 6) plaintiff attempts to undermine the Magistrate Judge's reasoning by asserting that she has *not* pled any claims under 42 U.S.C. § 1983 or *Bivens*. *See* Plaintiff's objection at 3. Instead, she seems to believe that the court may exercise subject matter jurisdiction over her claims simply because she seeks relief under the Declaratory Judgment Act, 28 U.S.C. § 2201, et seq. Importantly, however, the Declaratory Judgment Act does not provide courts with an independent basis for subject matter jurisdiction. *See, e.g., Progressive Consumers Fed. Credit Union v. United States*, 79 F.3d 1228, 1230 [77 AFTR 2d 96-1419] (1st Cir.1996) (holding thatthe Declaratory Judgment Act "neither provides nor denies a jurisdictional basis for actions under federal law, but merely defines the scope of available declaratory relief."). So, it is not enough for plaintiff to simply claim that an individual or entity is "violating her constitutional rights." She must also allege a viable foundation upon which the court may base its exercise of subject matter jurisdiction over that claim. As to counts 5, 6, and 7, however, she has failed to do so. Only count 2, in which plaintiff seeks a judicial declaration that the Church defendants "discriminate against the civil and Constitutional rights of Plaintiff and other women," complaint at para. 111, arguably provides the court with such a jurisdictional foundation: Title VII of the Civil Rights Act.

and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.'').

3 The ''ministerial exception'' has been expressly adopted by the Court of Appeals for the First Circuit. *See Natal v. Christian and Missionary Alliance,* 878 F.2d 1575, 1577 (1st Cir.1989) (''Howsoever a suit may be labeled, once a court is called upon to probe into a religious body's selection and retention of clergymen, the First Amendment is implicated.'') (citing *McClure, supra*). It has also been adopted by several other circuit courts of appeals. *See, e.g., EEOC v. Catholic Univ. of America,* 83 F.3d 455, 461 (D.C.Cir.1996) (''[T]his circuit and a number of others have long held that the Free Exercise Clause exempts the selection of clergy from Title VII and similar statutes and, as a consequence, precludes civil courts from adjudicating employment discrimination suits by ministers against the church or religious institution employing them.''); *Young v. N. Ill. Conf. of United Methodist Church,* 21 F.3d 184, 187 (7th Cir.1994) (holding that ''the Free Exercise Clause of the First Amendment forbids a review of a church's procedures when it makes employment decisions affecting its clergy.''); *Rayburn v. General Conf. of Seventh-Day Adventists,* 772 F.2d 1164, 1169 (4th Cir.1985) (''[I]ntroduction of government standards to the selection of spiritual leaders would significantly, and perniciously, rearrange the relationship between church and state.'').[3]

In sum, plaintiff can only prevail on her gender-based discrimination claims if this court ignores not only a substantial and persuasive body of developed law, but specifically applicable circuit precedent as well. That, it cannot do. Consequently, even construing the factual allegations set forth in the complaint in the light most favorable to plaintiff, the court is com-pelled to conclude that, as a matter of law, her gender-based discrimination claims (counts 2, 9, and 10) fail to state viable causes of action. And, because it is ''crystal clear that the plaintiff cannot prevail and that amending the complaint would be futile,'' *Chute v. Walker,* 281 F.3d 314, 319 (1st Cir.2002) (citation and quotation marks omitted), those counts are dismissed. *See generally Gonzalez-Gonzalez v. United States,*257 F.3d 31, 37 (1st Cir.2001) (holding that sua sponte dismissal is appropriate when ''the allegations contained in the complaint, taken in the light most favorable to the plaintiff, are patently meritless and beyond all hope of redemption.'').

Conclusion

For the foregoing reasons, the court accepts and adopts the Report and Recommendation of the Magistrate Judge dated August 5, 2002, to the extent it recommends dismissal of counts 1, 3–8, and 11–14. As to the remaining counts in plaintiff's complaint--counts 2, 9, and 10--they too are dismissed, sua sponte, for failure to state a viable cause of action in light of the well-recognized and plainly applicable ''ministerial exception'' to state and federal anti-discrimination law. The Clerk of Court shall close the case.

SO ORDERED.

REPORT AND RECOMMENDATION

MUIRHEAD, Magistrate J.

Susan S. ROCKWELL, Esq. v. ROMAN CATHOLIC ARCHDIOCESE OF BOSTON, Massachusetts, et al.

No. CIV.02-239-M.

Aug. 5, 2002.

1 Before the court is the complaint of *pro se*plaintiff Susan Rockwell. Rockwell has filed suit against the Roman Catholic Archdiocese of Boston, Massachusetts, the Roman Catholic Diocese of Manchester, New Hampshire (''Diocese''), the United States Conference of Catholic Bishops (''Conference''), (collectively, the ''church

[3] Parenthetically, the court notes that at least three circuit courts of appeals have held that the ''ministerial exception'' survives the Supreme Court's opinion in *Employ't Div., Dep't of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990) (holding that the Free Exercise Clause of the First Amendment does not relieve an individual from the obligation to comply with neutral laws of general applicability). *See Catholic Univ. of America, supra; Combs v. Central Texas Annual Conf. of United Methodist Church,* 173 F.3d 343 (5th Cir.1999); *Gellington v. Christian Methodist Episcopal Church, Inc.,* 203 F.3d 1299 (11th Cir.2000).

defendants''), and Charles O. Rossotti, Commissioner of the Internal Revenue Service of the United States. Rockwell complains that the defendants have violated, *inter alia,* Title VII, 42 U.S.C. § 2002e, the First and Fourteenth Amendments to the United States Constitution, and the Internal Revenue Code, as well as New Hampshire state law and the New Hampshire Constitution. Because the plaintiff is *pro se* and has paid her filing fee, the complaint is before me for preliminary review to determine whether this Court's subject matter jurisdiction has been invoked. *See* United States District Court for the District of New Hampshire Local Rules (''LR'') 4.3(d)(1)(A). For the reasons discussed herein, I recommend that all of the claims except the Title VII claim and companion state law claim against the church defendants, be dismissed for lack of subject matter jurisdiction.[1]

Standard of Review

In reviewing a *pro se* complaint, the court is obliged to construe the pleading liberally. *See Ayala Serrano v. Lebron Gonzales,* 909 F.2d 8, 15 (1st Cir.1990) (following *Estelle v. Gamble,* 429 U.S. 97, 106 (1976) to construe *pro se* pleadings liberally in favor of the *pro se* party). At this preliminary stage of review, all factual assertions made by the plaintiff and inferences reasonably drawn therefrom must be accepted as true. *See Aulson v. Blanchard,* 83 F.3d 1, 3 (1st Cir.1996) (stating the ''failure to state a claim'' standard of review and explaining that all ''well-pleaded factual averments,'' not bald assertions, must be accepted as true). This review ensures that *pro se* pleadings are given fair and meaningful consideration. *See Eveland v. Dir. of C.I.A.,* 843 F.2d 46, 49 (1st Cir.1988).

Background

Susan Rockwell is a fifty-five year old Catholic woman. She is also a New Hampshire resident and a Vermont attorney. Since 1975, Rockwell has believed that she was ''called'' to be a Roman Catholic priest. Rockwell sought to act on this calling despite the fact that she is aware that by the dictates of tradition and church doctrine, women cannot currently become Roman Catholic priests.

On February 29, 1996, Rockwell wrote to Rev. Leo O'Neill at the Diocese to apply for admission to study for the priesthood. On March 11, 1996, Rev. O'Neill wrote back to Rockwell, rejecting her application because she is a woman and the Catholic Church (''Church'') only permits men to be priests. On May 28, 1998, Pope John Paul II issued an edict threatening excommunication from the church by those who reject definitive positions of the Church, including the Church's position that only men may become priests. During 1998, Rockwell was specifically advised by a priest representing the Diocese that her vocal opposition to the all-male priesthood was objectionable as it violated the Pope's restriction of discussion on the subject. In January of 2000, Rockwell wrote to the Pope advocating the ordination of women as priests in the Catholic Church. Rockwell sent copies of her letter to the Diocese and the Conference. She has received no replies to her letter.

2 Rockwell alleges that the Church's silencing of her advocacy for the ordination of women as priests violates her First Amendment rights to free speech and to the free exercise of her religion as well as rights guaranteed to her by the New Hampshire Constitution. She alleges that the Church's policy excluding women from the priesthood discriminates against her on the basis of gender in violation of state and federal law. Further, Rockwell alleges that the tax exempt status granted to the Catholic Church by Rossotti, the Commissioner of the Internal Revenue Service violates the Internal Revenue Code because of the Church's discriminatory practices.

Discussion

1. Subject Matter Jurisdiction

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 377 (1994).

[1] In an Order issued simultaneously with this Report and Recommendation, I order the Title VII claim and corresponding state law claim served on the church defendants.

The presumption is that a federal court lacks jurisdiction. *Id.* Consequently, the burden is on the plaintiff who claims jurisdiction to affirmatively allege jurisdiction and prove it. *Id.; see also Bender v. Williamsport Sch. Dist.,* 475 U.S. 534, 541 (1986). To bring a civil action within the court's subect matter jurisdiction, the plaintiff must allege that her action either involves a federal question, or involves citizens form different states and an amount in contoversy in excess of $75,000. *See* 28 U.S.C. §§ 1331 & 1332. If it appears that the court lacks subject matter jurisdiction, the court is required to dismiss the action. Fed.R.Civ.P. 12(h)(3).

2. Gender Discrimination Claim

Rockwell's complaint that she was denied access to study, and ultimately employment, as a priest asserts a claim based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* (1994). As a general rule "religious controversies are not the proper subject of civil court inquiry." *Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 714 (1976); *see also Natal v. Christian and Missionary Alliance,* 878 F.2d 1575, 1576 (1st Cir.1989) ("Civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice."). This Court, however, does not necessarily lack jurisdiction over a case against the hierarchy of a church. Certain suits against churches that do not involve judicial interpretation of religious doctrine may be properly brought in this Court. *See Smith v. O'Connell,* 986 F.Supp. 73, 77 (D.R.I.1997) (citing *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church,* 393 U.S. 440, 449 (1969)). Therefore, although this case may ultimately prove not to be justiciable on its merits, I find that by alleging a Title VII action,[2] Rockwell has invoked this Court's subject matter jurisdiction for her gender discrimination claim and, in an Order issued simultaneously with this Report and Recommendation, I will order both the Title VII claim and the gender discrimination claim based on New Hampshire Rev. Stat. Ann. 354-A:6[3] to be served on the church defendants.

3. First Amendment Claims

3 Rockwell claims that the church defendants have violated her First Amendment rights to free speech and free expression of religion by silencing or attempting to silence her advocacy for women being allowed to become priests. Although the plaintiff is protected from having her First Amendment rights violated by a state actor by 42 U.S.C. § 1983[4] , the United States Constitution "erects no shield against merely private conduct, however discriminatory or wrongful." *Blum v. Yarketsky,* 457 U.S. 991, 1002 (1981). A plaintiff claiming an infringement of his civil rights by individual defendants must establish that (i) the defendants deprived plaintiff of a right secured by the Constitution or laws of the United States, and that (ii) the defendants acted under "color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia." 42 U.S.C. § 1983. There are, additionally, rare occasions in which private citizens may be deemed to have acted under color of state law by virtue of having conspired or otherwise acted in concert with state actors. *See, e.g., Roche v. John Hancock Mut. Life Ins. Co.,* 81 F.3d 249,

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2 "Title VII applies without a constitutionally compelled exception where ... [a] church is neither exercising its constitutionally protected prerogative to choose its ministers nor embracing the behavior at issue as a constitutionally protected religious practice." *Bollard v. Cal. Province of the Soc'y of Jesus,* 196 F.3d 940, 944 (9th Cir.1999). Where, as here, however, the issue before the Court is a church's selection of its ministers, the "ministerial exception" to Title VII would prohibit this Court from entertaining that gender discrimination action, as well as any such action based on state law. Id. at 950. The exception, however, does not deprive this Court of subject matter jurisdiction and the claim therefore survives this Court's preliminary review, but it is apparent that the complaint fails to state a cause of action as a result of the exception. *Id.* at 951.

Plaintiff in this matter is an attorney. As such, she is presumed to be aware of Fed.R.Civ.P. 11(b)(2) requiring that she believe her claims to be nonfrivolous and warranted by existing law, as well as Fed.R.Civ.P. 11(c) authorizing sanctions to be imposed for a violation of Rule 11(b)(2).

3 N.H.Rev.Stat. Ann. 354-A:6 states in relevant part that "[t]he opportunity to obtain employment without discrimination because of age, sex, race, creed, color, marital status, physical or mental disability or national origin is hereby recognized and declared to be a civil right."

4 The statute provides in relevant part: Every person who, under color of any [state law] ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to that party injured in any action at law, ...

253–54 (1st Cir.1996) (''Since § 1983 is aimed at state action and state actors, . . . persons victimized by the tortious conduct of private parties must ordinarily explore other avenues of redress. To be sure, the rule is not absolute: private actors may align themselves so closely with either state action or state actors that the undertow pulls them inexorably into the grasp of 1983'') (internal citations omitted). Rockwell has not stated a *prima facie* case that the church defendants are acting under color of state law in engaging in the wrongful conduct she alleges, or that they are private actors so closely aligned with state action as to be amenable to a § 1983 suit. As Rockwell has not included in her complaint sufficient facts to allege the elements of a § 1983 action, I find that she has not properly invoked the subject matter jurisdiction of this Court for her First Amendment claims and recommend that these claims, along with the state law actions for free speech and free exercise of religion, be dismissed.

If Rockwell brought this claim against the church defendants as private defendants acting in concert with federal officers, she has attempted an action under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971), which creates a cause of action against federal officers, acting in their individual capacities, for constitutional violations. Rockwell has not alleged any facts which indicate that the constitutional violations complained of were taken in concert with federal governmental actors and has thus not invoked the subject matter jurisdiction of this Court for such a claim.

4. Claim Challenging Tax Exempt Status

Rockwell alleges that defendant Rossotti, acting in his individual capacity as a federal officer, has improperly granted tax exempt status to the Catholic church. In so doing, Rockwell alleges, Rossotti ''enables, supports and subsidizes'' the church defendants in their allegedly discriminatory practices. Rockwell alleges that the grant of tax exempt status violates the Internal Revenue Code. Rockwell seeks the revocation of the Catholic church's religious tax exemption.

4 If a plaintiff lacks standing to bring a suit, a court has no subject matter jurisdiction over the case. *United States Catholic Conference, et al. v. Baker,* 885 F.2d 1020, 1023 [65 AFTR 2d 90-430] (2dCir.1989), *cert. den.* 495 U.S. 918 (1990) (citing *Allen v. Wright,* 468 U.S. 737 [54 AFTR 2d 84-5361] (1984)). In order to establish standing, a plaintiff must plead each prong of a three-pronged test established by the Supreme Court in *Allen v. Wright. Id.* at 1024. First, the plaintiff must show that she suffered actual and concrete injury particularized to her. *Allen,* 468 U.S. at 755. Second, the injury must be traceable to the conduct of the defendant. *Id.* at 757. Third, the injury must be redressable by the removal of the defendants' conduct. *Id.* at 758–59.

Turning to the case at hand, it is clear that scrutinizing the complaint, Rockwell has failed to allege standing to challenge the Church's tax exempt status. Even if Rockwell has satisfied the first prong by alleging she has been injured by the refusal of the church defendants to allow her to join the priesthood, she has not stated facts sufficient to allege the other two prongs of the test. Aside from alleging that the Catholic church's tax exempt status generally supports and enables the behavior she complains of, Rockwell has drawn no factual nexus between the grant of tax exempt status and the decision not to allow women to become priests. Furthermore, she does not even attempt to address in her complaint how revocation of the Church's tax exempt status would redress the injury she complains of and allow her to become a priest. Accordingly, I find that Rockwell is without standing to challenge the Church's tax exempt status. Accordingly, Rockwell has failed to invoke this Court's subject matter jurisdiction for this claim and I recommend it be dismissed.

Conclusion

I recommend that the First Amendment, tax and companion state claims be dismissed from this action. *See* LR 4.3(d)(1)(A).

Any objections to this Report and Recommendation must be filed within ten (10) days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal the district court's order. *See Unauthorized Practice of Law Comm. v. Gordon,* 979 F.2d 11, 13–14 (1st Cir.1992); *United States v. Valencia-Copete,* 792 F.2d 4, 6 (1st Cir.1986).

¶2002-5609

Joy F. GRIFFITHS, PLAINTIFF v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 99-87T, Oct. 29, 2002. Year 1991. Decision for Govt.

1. Claim of right refunds—unrestricted right to funds—subsequent restriction—business expenses. Govt. was granted summary judgment on taxpayer/former pres.'s complaint for claim of right refund of payment she made to family-owned corp. pursuant to lawsuit settlement of corp.'s claims about her unauthorized transfer of corp. funds to son: taxpayer's argument that settlement was restriction on her right to, and repayment of, consulting income she earlier received from corp. was rejected. Although taxpayer had unrestricted right to earlier-reported consulting income, settlement didn't effect any subsequent restriction thereon where it related only to events having nothing to do with consulting contract. Also, settlement wasn't deductible IRC §162 business expense since it arose out of transactions entered for taxpayer's son's personal benefit, not corp.'s business. *Reference:* United States Tax Reporter ¶13,415.01(60); 1625.019(5); 74,225.01(75). IRC §162; 1341; 7422.

Duncan D. Aukland, Worthington, OH, for plaintiff.
David Gustafson and Robert N. Dorosin, Washington, DC, for defendant.

United States Court of Federal Claims,

OPINION

WILSON, J.

This tax refund case is before the Court on cross-motions for summary judgment, pursuant to Rule 56 of the United States Court of Federal Claims (''RCFC''). The Court holds as a matter of law that plaintiff is not entitled to a business expense deduction and refund pursuant to the claim of right doctrine for a payment made in settlement of a state court action. Consequently, plaintiff's motion for summary judgment is DENIED, and defendant's motion for summary judgment is GRANTED.

BACKGROUND

The relevant facts are not in dispute. Plaintiff is the former president and chief executive officer of Fairchild Buick-Cadillac-Pontiac, Inc. (''Fairchild''), a family-owned automobile dealership located in Ashland, Kentucky. As president, plaintiff owned 75 percent of Fairchild's outstanding stock. Plaintiff's daughter, Teresa Runyon, initially served as the vice president and general manager of Fairchild and owned 25 percent of its outstanding stock. Fairchild purchased its new car inventory from General Motors Corporation (''GM'') and financed these new vehicles through General Motors Acceptance Corporation (''GMAC''), GM's financing subsidiary, under the ''floor plan'' method.[1]

Fairchild experienced a period of slow sales during 1987 and 1988, and failed to remit payments to GMAC in a timely manner. In early 1988, as a result of its failure to remit payments, Fairchild fell into an ''out-of-trust''[2] financial situation and was indebted to GMAC in the amount of $327,000. GMAC warned Fairchild of the possibility of franchise termination and confiscation of its vehicles if payment was not forthcoming. Plaintiff borrowed $125,000, which she remitted to GMAC, thereby satisfying her personal liability to

[1] Under ''floor plan'' financing, GMAC pays the vehicle invoice price to GM as a loan to Fairchild, and retains title or ownership of the vehicle as security. Each time Fairchild sold a vehicle, GMAC would give the dealership a certificate of title to give to the customer. In turn, Fairchild would remit the invoice price, plus interest, to GMAC. Although payment was due simultaneously with each sale, in practice, GMAC allowed Fairchild a grace period of five to ten days for the repayment of the invoice price, plus interest.

[2] ''Out-of-trust'' refers to the delinquent financial position of an automobile dealership when it has sold vehicles but has not remitted the payments on its floor plan financing to the financial institution within the required time period, i.e., date of sale or the end of the grace period. When the dealership moves into an ''out-of-trust'' status, the financing institution has the right to terminate a dealership franchise.

Fairchild in the amount of $69,000 and creating a debt to the plaintiff in the amount of $56,000. Plaintiff's daughter sought further financial assistance for Fairchild from her father, Morris L. Griffiths, plaintiff's ex-husband, to pay the remaining amount owed by Fairchild to GMAC. Mr. Griffiths loaned the money to Fairchild to satisfy its remaining GMAC debt on the condition that Ms. Runyon obtain a controlling stock interest in the company.

On April 10, 1988, plaintiff and Ms. Runyon executed a Sales Agreement under which plaintiff sold her majority interest in Fairchild to her daughter for $5,000. Fairchild agreed to pay plaintiff an annual consulting fee of $48,000 payable in equal monthly installments for a ten-year term, as well as furnish plaintiff with a demonstration car every year and provide her with health insurance coverage.[3] Plaintiff agreed to resign as an officer and director, relinquish her signatory duties, and be bound by a covenant not to compete for twelve years.

In November 1988, Fairchild filed suit against plaintiff's son, James Michael Kilgore, and subsequently added plaintiff and Mr. Kilgore's corporation Miccan, Inc. as defendants. The lawsuit alleged that plaintiff was negligent and breached her fiduciary duty to Fairchild by authorizing expenditures during her tenure as its president and CEO to Mr. Kilgore and Miccan, Inc., without securing Mr. Kil-gore's assets to protect Fairchild in the event of default. Fairchild also alleged that these expenditures provided no financial benefit to the dealership and that Fairchild was never reimbursed. In August 1989, the parties agreed to settle the litigation, and on November 10, 1989, the Boyd County Circuit Court entered judgment enforcing the terms of the settlement agreement.

On November 14, 1989, defendants in the Fairchild litigation (plaintiff, Mr. Kilgore, and Miccan, Inc.) moved the Circuit Court to vacate the Court's judgment, or in the alternative, grant them relief from the judgment. The Circuit Court denied the motion, and defendants appealed to the Court of Appeals of Kentucky. The Court of Appeals affirmed the November 10, 1989 judgment in June 1991.

In August 1991, plaintiff, Ms. Runyon, Mr. Kilgore, Mr. Griffiths, Fairchild, Miccan, and Fairhill Estates, Inc.[4] entered into an "Agreement of Mutual Confirmation and Mutual Release" (hereinafter, the "release agreement"). Among other things, the release agreement modified the 1988 Sales Agreement between plaintiff and her daughter. Effective August 15, 1991, Fairchild agreed to pay plaintiff semi-monthly consulting fees of $2,000 for a two-year period; commencing August 15, 1993, plaintiff's semi-monthly consulting fee would be reduced to $1,245 for the remaining five-year period of the consulting agreement. On December 11, 1992, plaintiff and Ms. Runyon further modified the sales agreement and release agreement, which resulted in Fairchild making a lump sum payment in the amount of $100,000 to plaintiff. In addition to the $100,000 lump payment, plaintiff was given a GM automobile, in exchange for releasing Fairchild from any future obligations.

For tax year 1991, plaintiff included Fairchild consulting fees in her gross income in the amount of $50,000 ($44,000 for cash and $6,000 as garnished payments). During 1991, she paid Fairchild $173,000 in cash and kind, pursuant to the Boyd Circuit Court judgment. Subsequently, in June 1994, Griffiths filed an amended return for the 1991 tax year, reporting the $173,000, less the $50,000 consulting fees for 1991, for a balance of $123,000 as miscellaneous deductions. Plaintiff sought a reduction of tax under the claim of right doctrine, contending that her payment of $173,000 to Fairchild in 1991 represented a restoration of $123,000 of consulting income that she had received under the sales agreement from 1988 through 1990.

[3] From 1988 through 1990, Griffiths received consulting fees, together with the use of a demonstrator vehicle, totaling $129,300 for the three year period.

[4] Fairhill Estates, Inc., a company wholly-owned by plaintiff, was joined to the Fairchild litigation as part of the suit's settlement. As part of the settlement agreement, Fairhill conveyed two acres of land to Fairchild.

In June 1997, the Internal Revenue Service determined that plaintiff had not established that any payments made pursuant to the 1991 release agreement qualified under the claim of right doctrine. As a result, plaintiff initiated this action. She seeks an alleged income tax overpayment of $17,634, plus statutory interest.

DISCUSSION

[1] Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RCFC 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). A material fact is one which will affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–252 (1986). The movant for summary judgment bears the initial burden of demonstrating that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. at 325. A cross-motion for summary judgment is a party's assertion that it, alone, is entitled to summary judgment. *A Olympic Forwarder, Inc. v. United States,* 33 Fed. Cl. 514, 518 (1995). The parties agree that there are no material facts in dispute. Therefore, they are entitled to a decision as a matter of law and summary judgment is appropriate.

The critical issues in this case are whether plaintiff's payment of $173,000 made pursuant to the 1991 release agreement in the state court negligence action (less the $50,000 of 1991 consulting income) (1) qualifies under the claim of right doctrine, codified at 26 U.S.C. § 1341 (1986)[5] , and (2) constituted an ordinary and necessary business expense pursuant to § 162, thereby entitling plaintiff to a deduction and tax refund. The Court holds that plaintiff does not qualify for the deduction as a matter of law, and therefore is not entitled to a refund.

The claim of right doctrine codified by Section 1341[6] provides relief to a taxpayer who in one tax year includes an item as gross income and pays tax on that income, and then in a subsequent year is compelled to return the item, and thus to pay back the previously reported income or a portion thereof.[7] *See Culley v. United States,*222 F.3d 1331, 1334 [86 AFTR 2d 2000-5628] (Fed.Cir.2000). In order for plaintiff to invoke the claim of right doctrine and qualify for a deduction under § 1341, she bears the burden of proving that an item was included in her gross income for prior tax years because of an apparent unrestricted right to such item. § 1341(a)(1); *Indus. Aggregate Co. v. United States,* 284 F.2d 639, 644 [6 AFTR 2d 5959] (8th Cir.1960) (the taxpayer has the burden of proving it has overpaid taxes, and has a right to a refund); *See also United States v. Janis,* 428 U.S. 433, 440–41 [38 AFTR 2d 76-5378] (1976). Once an apparent claim of right is established, plaintiff must show that in a later tax year, she no longer had an unrestricted right to that item and the amount of deduction ex-

5 Further references to the "section" or "§" in this opinion refer to title 26 of the United States Code.

6 Section 1341, provides in pertinent part:

(a) General rule. -If-

(1) an item was included in gross income for a prior taxable year (or years) because it appeared that the taxpayer had an unrestricted right to such item;

(2) a deduction is allowable for the taxable year because it was established after the close of such prior taxable year (or years) that the taxpayer did not have an unrestricted right to such item or to a portion of such item; and

(3) the amount of such deduction exceeds $3,000, then the tax imposed by this chapter for the taxable year shall be the lesser of the following:

(4) the tax for the taxable year computed with such deduction; or (5) an amount equal to-

(A) the tax for the taxable year computed without such deduction, minus

(B) the decrease in tax under this chapter ... for the prior taxable year (or years) which would result solely from the exclusion of such item (or portion thereof) from gross income for such prior taxable year (or years).

7 In *North Am. Oil Consol. v. Burnet,* 286 U.S. 417, 424 [11 AFTR 16] (1932), the Supreme Court held that "[i]f a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." If it is later determined that the taxpayer did not have an unrestricted claim of right to the funds, she would be entitled to a deduction in the year of repayment, but taxes due in prior year(s) would remain unchanged. *Id.*

ceeds $3,000. § 1341(a)(2)–(3). To receive the benefit of § 1341, however, plaintiff must be entitled to a deduction under some other provision of the Code. Treas. Reg. § 1.1341-1(a)(1). Section 1341 does not independently create a deduction. *United States v. Skelly Oil Co.,* 394 U.S. 678, 683 [23 AFTR 2d 69-1186].

Pursuant to the 1988 Sales Agreement, Fairchild paid plaintiff consulting fees, which she included in her gross income in the following manner: $18,000 in 1988; $55,820 in 1989; $55,480 in 1990; and $50,000 in 1991. The reporting of the consulting income on her tax returns supports the finding that plaintiff believed that she had an unrestricted right to the consulting fee. *Healy v. Comm'r,* 345 U.S. 278, 282 [43 AFTR 382] (1952) (''There is a claim of right when funds are received and treated by a taxpayer as belonging to him.'') Both parties agree that plaintiff treated the consulting fees, received from 1988 through 1991, as her own, satisfying the first part of the claim of right analysis.

The second inquiry is whether plaintiff was entitled to a deduction because she established, in a subsequent tax year, that she did not have an unrestricted right to such item or to a portion thereof. Courts have ruled that there must be a ''substantive nexus between the right to the income at the time of receipt and the subsequent circumstances necessitating a refund.'' *Dominion Res., Inc. v. United States,* 48 F.Supp.2d 527 [83 AFTR 2d 99-1350], 540 (E.D.Va.1999), *aff'd,* 219 F.3d 359 [86 AFTR 2d 2000-5443] (4th Cir.2000). In other words, the obligation to repay the money must arise from the ''same circumstances, terms and conditions of the transaction whereby the amount was included in income.'' *Kraft v. United States,* 991 F.2d 292, 295 [71 AFTR 2d 93-1493] (6th Cir.1993). In *Kraft,* a physician remitted $160,000 to his insurance company as a result of a plea agreement to settle a false claims charge. He then sought a tax refund under § 1341, but the U.S. Court of Appeals for the Sixth Circuit affirmed the denial of his claim on the ground that the remittance resulting from the plea agreement was not substantially related to his salary. Similarly, in *Bailey v. Comm'r,* 756 F.2d 44 [55 AFTR 2d 85-995] (6th Cir.1985), the Sixth Circuit held that a taxpayer's payment of a civil penalty for violation of a consent order was not a repayment of his salary from the employer corporation and, therefore, § 1341 was inapplicable.

In this case, the state court litigation and resulting release agreement have no connection to plaintiff's role as a consultant. The Fairchild litigation arose from plaintiff's alleged negligence and breach of fiduciary duty as former President and CEO of Fairchild. The actions giving rise to the suit occurred prior to the April 1988 sales agreement, in which she agreed to resign as officer and director. (Def.'s App. B at B-67.) As plaintiff's counsel reinforced during oral argument, ''the actions undertaken that were complained of in the litigation were actions undertaken prior to the sale of the stock in the corporation [i.e., the sales agreement].'' (Tr. at 37:1–4.) Thus, the connection between the sales agreement and release agreement is incidental rather than direct. The fact that the sales agreement obligated Fairchild to compensate the plaintiff and the release agreement subsequently obligated plaintiff to Fairchild (for similar amounts) is not sufficient to entitle her to a refund under § 1341. As in *Bailey* and *Kraft,* plaintiff has failed to demonstrate a substantive nexus between her entitlement to the income from Fairchild due to the sales agreement and her later remittance to Fairchild as a result of the release agreement.

Plaintiff asserts that her alleged duty to return the consulting fees to Fairchild arose from two clauses of the sales agreement: 1) the ''contingency clause,'' which made the sales agreement contingent upon GM's approval of Ms. Runyon as the new franchise dealer (Def.'s App. B at B-63); and 2) the ''guaranty clause'' which prevented plaintiff's release from any personal loan guarantees she made on behalf of Fairchild until the dealership had sufficient capital and equity funds to meet GM standards and requirements (Def.'s App. B at B-62). On the basis of these two clauses,

plaintiff contends her fiduciary duties to Fairchild continued past the April 1988 sales agreement date, therefore linking the release agreement with the sales agreement.

However, plaintiff's assertion that she actively participated in Fairchild's business dealings as an officer or director after 1989 is unsupported. (Tr. at 36:1–3.) According to plaintiff, the purpose of the contingency clause was to protect Fairchild in case Ms. Runyon was not approved to be a GM dealer. (Def.'s App. C at C-188.) The need to obtain approval from GM to become a certified dealer, however, is a standard GM requirement and not unique to Fairchild. (Def.'s App. C at C-139–140.) In addition, although plaintiff personally guaranteed several Fairchild loans, the personal guaranty did not extend her obligations as a Fairchild officer. It is indisputable that the sales agreement terminated her official responsibilities. (Def.'s App. C at C-137–139.) Therefore, the Court rejects plaintiff's contention that the sales agreement clauses are sufficiently tied to her unrestricted right to the consulting fees to warrant a deduction under § 1341.

Moreover, the Court is not persuaded by plaintiff's argument that her payment of $173,000 in settlement of the state court judgment is deductible as an ''ordinary and necessary'' business expense under § 162. Section 162 allows a deduction for ''all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.'' § 162(a). Plaintiff contends that the payment of $173,000 arose from her activities as a corporate officer, and that being a corporate officer is a ''trade or business.'' *Conti v. Comm'r,* 31 T.C.M. (CCH) 348 [¶72,089 PH Memo TC] (T.C.1972) (preservation and protection of one's business reputation in order to enable the taxpayer to continue to carry on such activities may be deemed a business expense). Although it is true that plaintiff, prior to April 1988, was the CEO of Fairchild, the Court does not adopt the view that an expenditure is automatically deemed a § 162 business expense merely because it was made by an officer of the company. In order for a repayment to a corporation to be deemed a business expense under § 162, there must be some ''business benefit'' or the repayment must be ''ordinary and necessary'' to the taxpayer's position as a corporate director or officer. *Blanton v. Commissioner,* 46 T.C. 527, 530–31 (1966). *See also Iowa Southern Utilities Co. v. C.I.R.,* 333 F.2d 382 [14 AFTR 2d 5061] (8th Cir.1964); *Silberman v. United States,* 40 Fed. Cl. 895 [81 AFTR 2d 98-2226] (1998). Plaintiff's payment of $173,000 to Fairchild did not result solely from ''the taxpayer's profit-seeking activities.'' *United States v. Gilmore,* 372 U.S. 39, 48 [11 AFTR 2d 758] (1963). In evaluating whether plaintiff's payment to Fairchild as a result of the release agreement was a personal or business expense, ''it is the origin of the liability out of which the expense accrues'' or ''the kind of transaction out of which the obligation arose . . . which [are] crucial and controlling.'' *Id.* (quoting *Deputy v. DuPont,* 308 U.S. 488, 496 [23 AFTR 808] (1940)).

Plaintiff unsuccessfully relies on *Great Island Holding Corp. v.. Comm'r,* 5 T.C. 150 (1945), in which preferred shareholders sued for damages against the principal officer of the corporation for alleged mismanagement of corporate affairs. The tax court granted the taxpayer a deduction for the payment made in settlement of that dispute. *Id.* at 163. However, *Great Island Holding Corp.* is distinguishable on the ground that the shareholders were con-testing an officer's decision to sacrifice their interests in an attempt to recoup losses by entering into a highly speculative venture that, if realized, would be econom-ically beneficial to the shareholders. *Id.* In contrast, plaintiff's payments to Fairchild arose out of transactions for the benefit of her son, Mr. Kilgore, and his business, Miccan, Inc, and not primarily for the benefit of Fairchild.

Even if plaintiff's transactions with Mr. Kilgore and Miccan had business elements and partially served Fairchild's interest, the personal purpose served by the payments was more substantial. Courts have held

that where transactions have both business and personal elements, the personal element takes precedence for tax purposes. *Bodzin v. Comm'r,* 509 F.2d 679, 681 [35 AFTR 2d 75-618] (4th Cir.1975) (if an item can be deemed a business and personal expense, § 161 indicates that § 262 takes precedence over § 162); *Heineman v. Comm'r,* 82 T.C. 538, 542 (1984) (when both § 162 and § 262 may be applicable, § 262's ''personal, living, and family expense'' takes precedence over § 162's ''ordinary and necessary business expense''). The Fairchild litigation resulted from transactions and loans for the benefit of Griffiths' son. Consequently, plaintiff's resulting liability to the company consituted a nondeductible § 262 personal expense.

In sum, although it is undisputed that plaintiff had an unrestricted right to the consulting fees from 1988 through 1991, which she reported as income, she has failed to demonstrate that in a later year she did not have an unrestricted right to those fees and was required to return them to Fairchild. The lawsuit and subsequent release agreement that created plaintiff's liability to Fairchild resulted from actions taken prior to the sales agreement and independent from her consulting fees. Furthermore, plaintiff's payment of $173,000 to Fairchild as part of the release agreement was not an ''ordinary and necessary'' business expense warranting a deduction under § 162. Consequently, plaintiff may not benefit from the claim of right doctrine under § 1341 and is not entitled to a refund of $17,634.

For the foregoing reasons, plaintiff's motion for summary judgment is denied and defendant's motion for summary judgment is granted.

The Clerk of Court is directed to enter judgment for the defendant. Each party shall bear its own costs.

IT IS SO ORDERED.

¶2002-5610

Beverly M. PARKER, PLAINTIFF v. UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE, DEFENDANTS. U.S. District Court, Eastern Dist. of Virginia, (DC VA) 02-MC-33, Oct. 3, 2002. Years 1997, 1998, 1999, 2000, 2001. Decision for Govt.

1. Summons enforcement—petition to quash—withdrawn summonses; mootness. Pro se taxpayer's petition to quash IRS 3d-party summons issued on bank was dismissed as moot: taxpayer hadn't suffered any harm where IRS withdrew summons in response to petition and returned requested records unread and uncopied. Also, no reasonable likelihood existed that IRS would repeat alleged errors specific to instant summons if it issued additional summons; and summons withdrawal completely eradicated effects of alleged violation. *Reference:* United States Tax Reporter ¶76,025.04(25). IRC §7602.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division,

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) Defendant's Motion to Dismiss is GRANTED;

(2) Should Plaintiff wish to appeal, she shall file her notice of appeal within sixty (60) days of the date of entry of this Order; and

(3) the Clerk of the Court shall forward copies of this Order to all counsel of record and Plaintiff pro se.

October 3th, 2002

Alexandria, Virginia

/s/

UNITED STATES DISTRICT COURT JUDGE

MEMORANDUM OPINION

This case is before the Court on Defendant's Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

I. Background

On June 14, 2002, Revenue Agent Alan Turner (''Turner''), of the Internal Revenue Service (IRS), issued a summons to Navy Federal Credit Union (''Navy Federal'') in connection with an investigation of the federal income tax liabilities of Beverly Parker (''Petitioner'') for the years 1997 through 2001. Navy Federal was ordered to meet with Turner on July 10, 2002, and to bring certain records regarding Petitioner's accounts. Navy Federal did so.

On July 22, 2002, Petitioner filed the instant Petition to Quash Internal Revenue Service Third Party Summons. On August 22, 2002, in response to Petitioner's Petition, Turner withdrew the summons, and returned the records that Navy Federal had produced to Navy Federal, without having reviewed or copied them. On September 5, 2002, the Defendant filed this Motion to Dismiss the Petition to Quash Internal Revenue Service Third-Party Summons on the ground that the case is moot. Petitioner has not filed an opposition.

II. Analysis

[1] Federal courts lack jurisdiction to decide moot cases because their constitutional authority is limited by the Article III case or controversy requirement. Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 70 (1983). For a case to be judicable, a litigant must have suffered some actual injury that can be redressed by judicial decision. Id. Where, however, the case is rendered moot due to some action by the defendant, the defendant faces a heavy burden to establish mootness because otherwise it would simply be free to resume the allegedly unlawful conduct once the threat of the lawsuit passed. Id. at 72 (citing United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953)). In cases where defendants voluntarily discontinue the action so as to render the lawsuit moot, they must demonstrate (1) that there is ''no reasonable expectation'' that the alleged violation will reoccur; and (2) that interim relief or events have ''completely and irrevocably eradicated the effects of the alleged violation.'' County of Los Angeles v. Davis, 440 U.S. 625, 633 (1979).

In this case, the IRS summons was withdrawn, and the record returned unread and uncopied. Accordingly, the case is moot because Plaintiff has not suffered any harm that a decision of this Court could redress. See Iron Arrow, 464 U.S. at 70. Because, however, the mootness was caused by the Government's withdrawal of the summons, the Court must be satisfied that there is no reasonable likelihood that the wrong will be repeated. See County of Los Angeles, 440 U.S. at 633.

Plaintiff's Petition is based on the allegation that the legal requirements for issuance of a summons under the Internal Revenue Code were not followed. (Petition p. 1–2). Because the petition to quash is based on alleged errors specific to the summons that was issued on June 14, 2002, the Court does not find that there is a reasonable likelihood that should the IRS decide to issue another summons that the alleged errors would be repeated. Furthermore, the Court is satisfied that withdrawal of the summons completely eradicated the effects of the alleged violation. The IRS returned the records that had been produced by Navy Federal, without having reviewed the records or made any copies of their contents. As such, the Government did not benefit from, and Petitioner was not harmed by Navy Federal's compliance with the allegedly defective summons. Therefore, the Court concludes that the case is moot, and, accordingly, will dismiss the Petition pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

III. Conclusion

For the foregoing reasons, the Court will grant Defendant's Motion to Dismiss Petition to Quash Internal Revenue Service Third-Party Summons. An appropriate Order will issue.

October 3th, 2002

Alexandria, Virginia

/s/

UNITED STATES DISTRICT COURT JUDGE

¶2002-5611

In Re: Jerry Lee GILLEY, d/b/a Gilley Farms; D&G Farms, Debtor. U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) Case No. 96-16913-8G2, Oct. 8, 2002. Year 1996. Decision for Taxpayer.

1. Tax claims in bankruptcy—proof of claim—untimely claims—equity. IRS's untimely proof of claim against Chap. 12 debtor was disallowed in part: to extent claim asserted additional liability for year not included in original, timely proof of claim, IRS was attempting to assert new claim, not just amendment, which didn't relate back to original. Also, taxpayer's allegedly inequitable conduct, including his failure to report disputed income and to comply with initial audit, didn't amount to extraordinary conduct warranting equitable relief, particularly where IRS was aware of such conduct before claims bar date but did nothing to secure filing extension. *Reference:* United States Tax Reporter ¶68,726.51(15).

UNITED STATES BANKRUPTCY COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION,

ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT BY JERRY GILLEY

PAUL M. GLENN United States Bankruptcy Judge

Chapter 12

THIS CASE came before the Court for hearing on the Motion for Partial Summary Judgment by Jerry Gilley, and the Opposition by Claimant United States of America to Motion for Partial Summary Judgment by Jerry Gilley.

The Debtor filed a petition under chapter 12 of the Bankruptcy Code on December 9, 1996.

On April 30, 1997, the Internal Revenue Service filed a proof of claim (#6). The claim is for income taxes for the years 1990 through 1995, and is in the total amount of $22,944.31. On April 13, 1998, the Internal Revenue Service filed a proof of claim (#7), which states that it amends claim #6. The claim is for income taxes for the years 1992 through 1995, and is in the total amount of $120,580.26. On June 16, 1999, the Internal Revenue Service filed a proof of claim (#9), which states that it amends claim #6. This claim is for income taxes for 1994 and also for the tax period of January 1, 1996, to December 9, 1996, and the claim is in the total amount of $190,432.51.

Motion for Partial Summary Judgment

Rule 56(c), Federal Rules of Civil Procedure, applicable to this contested matter through Rules 9014 and 7056, Federal Rules of Bankruptcy Procedure, states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

As the party moving for summary judgment, the Debtor has the burden of demonstrating that there in no genuine issue as to any material fact. The dates that the proofs of claim were filed, and the contents of the proofs of claims, are not in dispute. It is appropriate to consider the Debtor's Motion for Partial Summary Judgment.

Discussion

[1] In his Motion for Partial Summary Judgment, the Debtor contends that the portion of claim #9 filed by the Internal Revenue Service for income taxes for the stated period in 1996 in the amount of $186,439.00 is untimely and should be disallowed. He contends that the claim for 1996 taxes does not relate back to the timely filed tax claim (Claim #6) because the 1996 income taxes are a new liability that was not claimed by the United States in its timely filed claims.

Section 502(b)(9) of the Bankruptcy Code provides that a claim of a governmental unit shall not be allowed over the objection of a party in interest if proof of

such claim is not filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure provide.

Rule 3002(c) of the Federal Rule of Bankruptcy Procedure addresses the period in which a governmental unit must file a proof of claim: Rule 3002. Filing Proof of Claim or Interest

(c) TIME FOR FILING. In a chapter 7 liquidation, chapter 12 family farmer's debt adjustment, or chapter 13 individual's debt adjustment case, a proof of claim is timely filed if it is filed not later than 90 days after the first date set for the meeting of creditors called under §341(a) of the Code, except as follows:

(1) A proof of claim filed by a governmental unit is timely filed if it is filed not later than 180 days after the date of the order for relief. On motion of a governmental unit before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the governmental unit.

Rule 9006(b) provides that this time period can be extended only on the conditions stated in Rule 3002(c); that is, only on motion filed before the expiration of the period, and only for cause shown. The United States did not file a motion to extend the time for filing a claim in this case.

Accordingly, the question before the Court is whether the claim for 1996 income taxes, which was included in the proof of claim filed subsequent to the time provided by Fed. R. Bankr. P. 3002(c), is a new claim and therefore time barred, or is an appropriate amendment to the original proof of claim (#6) that was filed timely by the IRS.

A study of the case law that governs this question in the Eleventh Circuit begins with United States v. International Horizons, Inc. (In re International Horizons, Inc.), 751 F.2d 1213 [55 AFTR 2d 85-1038] (11th Cir. 1985). In that Chapter 11 case, the IRS had filed timely proofs of claim for 1980 and 1981 federal withholding taxes and federal unemployment taxes. However, subsequent to the bar date, the IRS served a notice of deficiency for over $15,000,000 in disputed corporate income taxes for 1974 and 1975 tax years. The bankruptcy court disallowed amendment to the timely filed proof of claim by the IRS for the 1974 and 1975 corporate income taxes, and the district court affirmed. The Eleventh Circuit also affirmed, noting that while amendment to a claim is "freely allowed where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim," it is essential that there is "no attempt to file a new claim under the guise of amendment." Id. at 1216.

In Hillsborough Holdings Corp. v. United States (In re Hillsborough Holdings Corp.), 1995 WL 312026 [75 AFTR 2d 95-1248] (M.D. Fla. 1995), the district court affirmed the bankruptcy court's holding that an amendment to a proof of claim for two different years of coal royalties was actually a new claim that should be disallowed. In that case the Government had timely filed claims for coal royalties for the years 1985–1987, as well as timely filed claims for corporate tax liability for the years of 1983 and 1984. In the claim filed subsequent to the Chapter 11 bar date, the Government added coal royalty claims for 1983 and 1984. The District Court concluded that the claim for coal royalties for 1983 and 1984 was a new claim, even though the Government had timely filed a claim for income taxes for those years, and even though the Government had timely filed a claim for coal royalties for other years.

In addition to this background from the Eleventh Circuit and the Middle District of Florida, several bankruptcy courts have addressed the issue raised by an amendment to add additional tax years to timely filed proofs of claim by the United States or a state or local taxing authority. Proofs of claim that attempt to add tax liability for additional time periods have usually been disallowed by bankruptcy courts.

In occasional instances, such an additional claim has been allowed. For example, in In re Simms, 40 B.R. 186 (Bankr. N.D. Ga. 1984), Judge Drake considered two different aspects of an untimely filed claim by the IRS in that Chapter 13 case. A timely filed proof of claim by the IRS contained amounts for 1973, 1974, and 1976 individual income tax liability. Amendments to the claim filed after the bar date added claimed amounts for 1977, 1978, 1979, and 1980 taxes. (The debtor's petition was filed in December, 1981.) In addition, a 100% penalty assessed in 1975 for nonpayment of federal employment and withholding taxes of a defunct corporation associated with the debtor was added to the amended claim after the bar date. Although at that time the Eleventh Circuit had not determined the International Horizons case, supra, Judge Drake's decision in International Horizons to disallow an amendment to a proof of claim by the IRS for a different type of tax liability had been affirmed by the United States District Court. In the International Horizons case, the IRS had argued that the "transaction" between the debtor and the IRS encompassed the entirety of their debtor-creditor relationship. This view would have allowed the IRS to freely amend a timely proof of claim for different tax years, different tax liabilities, or substantially greater amounts than the original proof of claim. This broad view was rejected in International Horizons and in In re Simms, 40 B.R. 186, 189 (Bankr. N.D. Ga. 1984). Judge Drake, noting that the debtor did not file a tax return for the years 1977 through 1980 until late in 1981, did hold that the amendment to the timely filed proof of claim by the IRS for the post-1976 tax amounts should relate back to the time original proof of claim was filed. However, the penalty related to the debtor's defunct corporation for federal employment and withholding taxes was disallowed.

The bankruptcy court for the Central District of California allowed an IRS amendment to a proof of claim for 1990 income taxes in a Chapter 13 case when the original timely filed proof of claim listed only taxes for the years 1985–1989. In re Osborne, 159 B.R. 570, 577 (Bankr. C.D. Cal. 1993), *aff'd*, 167 B.R. 698 [73 AFTR 2d 94-1855] (B.A.P. 9th Cir. 1994) (unpublished table decision), *aff'd*, 76 F.3d 306 [77 AFTR 2d 96-965] (9th Cir. 1996). Relying on the Simms decision, supra, the bankruptcy court allowed the late filed claim of the IRS listing the subsequent tax year of 1990. However, the bankruptcy court disallowed the amended claim of the IRS for payroll taxes, since the original timely filed proof of claim contained only amounts for income taxes. The IRS appealed the decision to the Ninth Circuit Bankruptcy Appellate Panel, which affirmed the lower court's opinion. The debtors had scheduled income taxes for 1989 and 1990 in their petition as priority un-secured debt, and the debtors did not ap-peal the decision by the bankruptcy court to allow the IRS proof of claim, as amended, to include 1990 income taxes. The Ninth Circuit Court of Appeals held that the IRS' claim for payroll taxes was properly disallowed as untimely; the issue of allowing the untimely filed claim for 1990 income taxes as an amendment to the original timely filed claim for 1985–1989 taxes by the IRS was not addressed beyond the bankruptcy court. The bankruptcy court's decision in Osborne is one of the few decisions that allowed an IRS amend-ment to add liability for a different tax year than originally claimed.

Chief Judge Hershner of the bankruptcy court for the Middle District of Georgia, distinguished In re Simms, supra, on the basis of the failure of the debtor in that case to file his individual income tax returns. In re Appling, 162 B.R. 43, 45 [73 AFTR 2d 94-713] (Bankr. M.D. Ga. 1993). In Appling, Chief Judge Hershner, citing two cases from the Seventh Circuit Court of Appeals (In re Unroe, 937 F.2d 346 (7th Cir. 1991); In re Stavriotis, 977 F.2d 1202 [70 AFTR 2d 92-6169] (7th Cir. 1991)), held that an amendment to a claim by the IRS for a tax year which was not the subject of the original, timely filed proof of claim should be disallowed. In re Appling at 46.

In the two Seventh Circuit cases cited above, amendments to claims by the IRS included tax liabilities for years not included in the original timely filed claims. The Seventh Circuit stated in the Chapter 13 case of In re Unroe, 937 F.2d 346, 349 (7th Cir. 1991), ''Separate years imply separate tax claims under Bankr. R. 7015. Examples of amendments permitted under Bankr. R. 7015 would include correcting the amount of tax, penalties or interest claimed in a timely filed claim.'' Citing an Internal Revenue manual and Unroe, supra, the Court made it clear in In re Stavriotis, 977 F.2d 1202, 1206, n.4 [70 AFTR 2d 92-6169] (7th Cir. 1991), that an amended claim for 1982 taxes would not relate back to an original timely filed claim for 1981 and 1984 taxes in that Chapter 11 case.

There are numerous Chapter 13 cases where the court disallowed an amendment to a proof of claim filed by the IRS which attempted to add different tax years to the original claim. See United States v. Owens, 84 B.R. 361 (E.D. Pa. 1988); In re Baker, 129 B.R. 607 (E.D. Mo. 1991); In re Rains, 139 B.R. 158 (Bankr. D. Md. 1992); In re Roberson 188 B.R. 364 [76 AFTR 2d 95-6643] (D. Md. 1995); In re Jagours, 236 B.R. 616 (Bankr. E.D. Tex. 1999); and In re Chavis, 47 F.3d 818 [75 AFTR 2d 95-1168] (6th Cir. 1995).

With regard to the threshold issue of whether an amendment to a proof of claim to add a different tax period can relate back to the originally filed claim, the majority of courts conclude that different years give rise to different tax claims. Since a claim for a separate tax period is a separate claim, if a proof of claim is not timely filed then the claim cannot be added to a timely filed proof of claim by amendment to the timely filed claim.

The Court concludes that the subsequent claim of the United States for 1996 taxes in this case is not an appropriate amendment to the timely filed proof of claim for years 1990 through 1995 under the standards for amendment act forth by the Eleventh Circuit in International Horizons. (''Thus, in a bankruptcy case, amendment to a claim is freely allowed where the purpose is to cure a defect in the claim as originally filed, to describe the claim with greater particularity or to plead a new theory of recovery on the facts set forth in the original claim.'' United States v. International Horizons, Inc. (In re International Horizons), 751 F.2d 1213, 1216 [55 AFTR 2d 85-1038] (11th Cir. 1985).)

As the basis for allowing the claim on equitable grounds, the Internal Revenue Service cites its difficulty in obtaining information from the Debtor. This difficulty began prior to the claims bar date. Rule 9006 provides that the time for filing claims may be extended for cause on motion filed before the expiration of the period for filing claims; however, the Internal Revenue Service did not file such a motion.

Certain cases are instructive as to whether equitable considerations should override the fact that the amendment of the claim for 1996 taxes does not relate back to the original timely filed claim.

In In re Faust, 180 B.R. 432 [75 AFTR 2d 95-409] (Bankr. D. S.C. 1994) the debtors failed to mail their 1991 income tax return to the local IRS office which handled taxpayers in bankruptcy, as the government had requested. The IRS did not file a timely claim for 1991 income taxes in the case. However, the bankruptcy court found that it would be inequitable to deny the claim when the debtor was in essence ''playing hide and seek'' with the United States over existing, but inadequately disclosed, tax debts. Id. at 437.

The United States cites In re Kolstad, 928 F.2d 171 [67 AFTR 2d 91-829] (5th Cir. 1991), reh'g en banc denied, 936 F.2d 571 (5th Cir. 1991), *cert. denied*, 502 U.S. 958 (1991). In Kolstad, although the IRS did not file a claim timely in the bankruptcy case, the debtor filed a claim on behalf of the IRS pursuant to Fed. R. Bankr. P. 3004. The IRS later sought to amend the claim filed by the debtor, to correct the amount of the claim. The Fifth Circuit Court of Appeals held that the bankruptcy court had discretion to permit the IRS' amendment to the debtor's proof of claim for federal taxes. Id. at 175. The Fifth Cir-

cuit did not view the amendment as a new claim, but simply as an amendment to a filed claim to assert a higher amount. Kolstad is very different from the case before the Court.

In a Chapter 13 case where a secured creditor filed a motion to allow late-filed proof of claim, In re Kelley, 259 B.R. 580, 585 (Bankr. E.D. Tex. 2001), the bankruptcy court declined to use the equitable power recognized by the Fifth Circuit in Kolstad, since the secured claim (unlike the one filed by the debtor in Kolstad) was clearly subject to attack on the basis of untimeliness.

There are a few Chapter 12 cases that deal with the issue of a late-filed claim by a creditor. The bankruptcy court in In re Boudinot, 237 B.R. 413, 417–18 (Bankr. S.D. Ohio 1999) determined that in a Chapter 12 case, an unsecured creditor must file a timely proof of claim in order to participate in the debtor's plan of reorganization; that the court was ''prohibited'' from allowing the creditor's tardily-filed proof of claim. The Court of Appeals for the Seventh circuit considered a Chapter 12 case where a creditor sought to file late proofs of claim in In re Greenig, 152 F.3d 631 (7th Cir. 1998). The Court answered the question posed in In re Unroe, 937 F.2d 346 (7th Cir. 1991), of whether a court has equitable powers to allow a late-filed proof of claim outside the exceptions contained in Fed. R. Bankr. P. 3002(c). The Court found that equitable considerations could not circumvent the date by which a creditor must file a proof of claim. Greenig at 636.

The Ninth Circuit Court of Appeals considered a unique issue in the context of the 180-day period for governmental units to file a proof of claim. In re Gardenhire, 209 F.3d 1145 [85 AFTR 2d 2000-1464] (9th Cir. 2000). In this Chapter 13 case, the case was erroneously dismissed for a period of 79 days prior to reinstatement. The IRS proof of claim as filed 191 days after the petition was filed. Upon objection by the debtors to the IRS claim as untimely, the IRS argued that the 180-day filing period was suspended for 79 days due to the erroneous dismissal. The bankruptcy court overruled the debtor's objection to the IRS claim without opinion, and the Bankruptcy Appellate Panel affirmed, based on the ''equitable tolling'' argument of the IRS. The Ninth Circuit Court of Appeals reversed, concluding

> . . . application of equitable tolling to the 180-day period for governmental units to file proofs of claim pursuant to §502(b)(9) of the Bankruptcy Code is inconsistent with the plain meaning of the Bankruptcy Code and Rules, applicable Ninth Circuit precedent, and the weight of authority from other jurisdictions. Equitable tolling cannot be applied to extend the filing period of §502(b)(9) . . .

Id. at 1152.

See, also, In re Bennett, 2001 WL 1841442, 1 (Bankr. M.D. Tenn. 2001)(Chapter 13 case in which the court stated ''equitable considerations may not override the clear language in the statute and rules requiring the timely filing of claims'') and In re King, 90 B.R. 155, 158 (Bankr. E.D. N.C. 1988)(Chapter 12 case which found despite ''equities of this situation . . . The bar dates for filing claims are strictly construed.'')

In In re Miller 90 B.R. 317, 323 (Bankr. E.D. Tenn. 1988), the bankruptcy court found that an amendment by the IRS to a timely filed proof of claim did not ''relate back,'' and then analyzed the debtor's conduct in the context of an audit to determine if some ''extraordinary ground'' existed to allow the amendment. Although the court stated that it did not know whether the debtor was intentionally trying to mislead the IRS, the court noted that he did not ''go out of his way to help the IRS.'' Id. at 324. However, such conduct did not give rise to an ''extraordinary ground'' to allow such amendment to the IRS proof of claim.

With regard to the Debtor's situation, the United States characterizes the Debtor's conduct as filing a federal income tax return for 1996 knowingly omitting income of $541,872.58 and failing to cooper-

ate with the initial audit of his 1996 return. The United States argues that equity requires the claim for 1996 taxes be allowed such that Debtor is required to pay his unpaid federal income taxes for 1996 through this Chapter 12 case. The difficulties between the Internal Revenue Service and the Debtor began before the bar date, however, but the IRS did not file a request to extend the bar date. Additionally, the weight of the most recent judicial authority persuades the Court that the equitable considerations raised by the Internal Revenue Service are not grounds for allowing a late-filed claim for the Debtor's 1996 taxes.

In this case, the Debtor has objected to the allowance of his federal income tax liability for 1996 as an amendment to the original proof of claim that was timely filed by the IRS. The Court does not find that it is appropriate to justify the allowance of the new, late-filed claim by the United States for 1996 federal income taxes of the Debtor through the "equities" of the situation.

Conclusion

In accordance with Eleventh Circuit precedent and the weight of authority from other jurisdictions, the Court determines that the claim for the income tax liability for 1996 specified in Claim #9 by the Internal Revenue Service (which amends Claim #6) should be disallowed since the claim for 1996 taxes does not relate back to the original timely filed claim. In addition, the Court determines that it is not appropriate to allow the claim based on the equitable considerations raised by the Internal Revenue Service. Therefore, it is appropriate to grant the Debtor's motion for partial summary judgment.

Accordingly:

It IS ORDERED that:

1. The Motion for Partial Summary Judgment filed by the Debtor, Jerry Lee Gilley, is granted.

2. The Claim of the Internal Revenue Service for 1996 taxes as specified in Claim #9 is disallowed.

DATED this 8 day of October, 2002.

BY THE COURT

PAUL M. GLENN

United States Bankruptcy Judge

¶2002-5612

UNITED STATES OF AMERICA, PLAINTIFF v. Dale C. COMSTOCK, SR., ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of West Virginia, (DC WV) Civil No. 3:01cv76, Oct. 16, 2002. Years 1991, 1997, 1998, 1999. Decision for Govt.

1. Collection actions—reducing assessments to judgment—default judgment. Default judgment was entered against taxpayer for his unpaid IRC §6672 penalty and income, employment and unemployment taxes in amount stated plus interest. *Reference:* United States Tax Reporter ¶74,035.01(30). IRC §6672; 7403.

PAT S. GENIS Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 227 Washington, D.C. 20044
DALE C. COMSTOCK, SR. Rt. 2, Box 180 Kearneysville, WV 25430
D. FRANK HILL, III, ESQUIRE Post Office Box A Shepherdstown, WV 25443
JAMES SALTER, ESQUIRE Suite 105 Old Town Center 17 West Jefferson Street Rockville, MD 20850
JOY M. BOLLING, ESQUIRE Assistant Attorney General Attorney General's Office Building 1, Room W-435 Charleston, WV 25305

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA,

ORDER

[1] Having considered the United States' motion for entry of default judgment and declaration in support thereof, and any opposition thereto, the Court concludes that the motion ought to be granted. Accordingly, it is this 16th day OCTOBER, 2002, at Martinsburg, West Virginia,

ORDERED that the United States' motion for entry of default judgment be and is GRANTED;

ORDERED that the Clerk shall ENTER judgment in favor of the United States and against defendant in substantially the following form:

This action came on for consideration by the Court on the United States' motion for entry of default judgment, and the Court having considered the arguments and declaration in support thereof, It is Ordered and Adjudged

That the plaintiff, the UNITED STATES OF AMERICA, recover of the defendant, DALE C. COMSTOCK, SR., unpaid Federal trust fund recovery penalties for the quarterly taxable periods ending December 31, 1991, Form 941 taxes for calendar quarters ending March 31, 1998, September 30, 1998 through June 30, 1999, Form 940 taxes for calendar years 1997–1999 and 1040 taxes for calendar years 1998 and 1999, the sum of $197,920.87, plus interest accruing as of October 15, 2002, until paid, at the rates established by 26 U.S.C. § 6621.

and it is further

ORDERED that the Clerk shall dis-tribute copies of this Order to the represen-tative of the party and the party listed below.

DATED: October 16, 2002

/s/

U.S. District Court Judge

¶2002-5613

Ward DEAN, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Florida, (DC FL) Case No. 3:01-cv-430/LAC, Oct. 23, 2002. Year 1997. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties—summary judgment. IRS's administrative determination to proceed with collection of frivolous return penalty for year tax protester filed "zero" return was upheld on summary judgment: penalty was warranted where Forms W-2 and 1099-R showed taxpayer had significant taxable income for year at issue; taxpayer defended his no-tax position with nothing but frivolous protester-type arguments; regular deficiency procedures didn't apply to penalty assessment; and computer generated certificate of assessments indicated that taxpayer received proper notice and demand letter. Also, IRC §6330(c)(1)'s verification requirement was met; determination letter reflected proper balancing between taxpayer's rights and govt.'s collection interests; and taxpayer, who wasn't entitled to challenge his liability for underlying deficiency, raised no valid collection alternative or any other statutorily recognized collection defense. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(2). IRC §6330; 6702.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION,

ORDER GRANTING SUMMARY JUDGMENT

Lacey A. Collier United States District Judge

Pending before the Court is Defendant UNITED STATES OF AMERICA's Motion for Summary Judgment and documents in support thereof (Docs. 12, 13). Plaintiff WARD DEAN filed a memorandum and evidentiary materials in opposition[1] (Docs. 17, 18). The Court has taken summary judgment under advisement (Doc. 14) and is now prepared to rule on Defendant's motion. For the reasons stated

[1] As to Plaintiff's Statement of Material Facts (Doc. 18), Plaintiff has failed to comply with Local Rule 56.1(A). Plaintiff did not reference any supporting material (such as affidavits, admissions, etc.) "or other detail sufficient to permit the court to readily locate and check the source." Loc. R. 56.1(A) (1999). In light of Plaintiff's *pro se* status, Plaintiff's Statement of Material Facts will be admitted under Local Rule 56.1(A), since Plaintiff's Statement is practically identical to Defendant's Statement of Material Facts (which is supported by appropriate references). However, admitting or denying Plaintiff's Statement will not affect the Court's determination of the current motion, because summary judgment for the Defendant is warranted either way.

below, the motion for summary judgment is GRANTED, and Plaintiff's request for a *sua sponte* grant of summary judgment in Plaintiff's favor (Doc. 17, p. 7) is DENIED.

I. Statement of the Case

A. Background

For the purposes of ruling on Defendant's Motion for Summary Judgment (Doc. 12), the following facts are either undisputed or viewed in the light most favorable to the Plaintiff.[2] On or about April 20, 1999, Plaintiff filed a 1997 federal income tax return, Form 1040EZ (Docs. 13, ¶ 1; 18, ¶ 1). On that return, Plaintiff stated that: (1) the total amount of wages, salaries, and tips comprising the gross income that he received for the 1997 tax year was $0.00; (2) the adjusted gross income was $0.00; (3) his taxable income for the 1997 tax year was $0.00; and (4) the amount of tax owed by him for the 1997 tax year was $0.00 (Docs. 13, ¶s 2–5; 18, ¶ 2–5). Plaintiff then signed the tax return, under penalty of perjury, declaring that the return was true and correct (Docs. 13, ¶ 6; 18, ¶ 6). Beneath the signature line, Plaintiff wrote "signed and submitted under duress" (Docs. 13, ¶ 7; 18, ¶ 7).

Along with the tax return, Plaintiff submitted a couple of IRS forms and a typed letter. Plaintiff's Form W-2 showed that Plaintiff had earned $109,264.16 in wages, tips, and other compensation in 1997 with $10,394.28 in federal withholdings (Docs. 13, ¶ 8; 18, ¶ 8). Plaintiff's Form 1099-R, entitled "Distributions from Pensions, Annuities, Retirement or Profit Sharing Plans, IRSAs, Insurance Contracts, Etc.," shows that Plaintiff had received (for the 1997 taxable year) a gross distribution of $37,236.00 with $1,657.26 in federal income tax withheld (Docs. 13, ¶s 9–10; 18, ¶s 9–10). In addition to the two forms, Plaintiff also submitted a letter (dated March 27, 1999) to the Department of Treasury. Plaintiff's letter argued that: (1) Plaintiff was not required to file an income tax return, (2) filing an income tax return violated his Fifth Amendment rights, (3) he was claiming a refund of withheld funds, and (4) the IRS may not change his return (Docs. 13, ¶ 11; 18, ¶ 11).

On April 3, 2000, the Internal Revenue Service ("IRS") assessed a $500.00 frivolous filing penalty against Plaintiff, pursuant to 26 U.S.C. § 6702 (Docs. 13, ¶ 12; 18, ¶ 12). There is an issue of whether or not Plaintiff received proper notice of this assessment under the Tax Code. Defendant maintains that notice of the assessment of the frivolous filing penalty and demand for payment was made by the IRS on April 3, 2000 (Doc. 13, ¶ 13). Plaintiff argues that the IRS did not make notice of the assessment or demand by using Form 17 (which plaintiff claims is the only form duty authorized as a notice and demand for payment) (Doc. 18; ¶ 13).

On July 1, 2000, the IRS issued to Plaintiff a Final Notice of Intent to Levy and Notice of Your Right to Hearing, and this "Final Notice" advised the Plaintiff of the IRS's intent to levy upon (or file a lien against) Plaintiff's property and rights to property (Docs. 13, ¶ 14; 18, ¶ 15). Five days later, Plaintiff requested a Collection Due Process Hearing pursuant to 26 U.S.C. § 6330 (Docs. 13, ¶ 15; 18, ¶ 16). On August 29, 2001, as part of the Collection Due Process Hearing, the IRS provided Plaintiff a conference with an Appeals Officer (Daniel Shirah) (Docs. 13, ¶ 16–17; 18, ¶ 17). During the Collection Due Process Hearing, Plaintiff challenged the validity of the assessment of the frivolous penalty for the 1997 tax year (Docs. 13, ¶ 17; 18, ¶ 18). Plaintiff presented no concerns that the collection action (*i.e.*, levy) was more intrusive than necessary (Doc. 13, ¶ 19):

When considering the validity of the frivolous filing penalty, Mr. Shirah considered the following: (1) Certificates of Assessment and Payments, (2) Plaintiff's 1997 federal income tax return, (3) and transcripts of Plaintiff's accounts (Docs.

[2] Some of the facts are construed according to Local Rule 56.1(A). Where the Court cites to the Defendant's statement of facts (Doc. 13, ¶ X), Plaintiff has failed to controvert that specific fact, and it is therefore deemed admitted for the limited purpose of ruling on Defendant's motion for summary judgment.

13, ¶ 20; 18, ¶ 20).[3] In reaching his determination, Mr. Shirah considered all matters set forth in the Notice of Determination and attachment thereto (Docs. 13, ¶ 21; 13, Ex. 6, ¶ 13; 18, ¶ 22).[4] On October 10, 2001, Mr. Shirah issued the Notice of Determination to Plaintiff concluding that: (1) collection by levy of the frivolous filing penalty was appropriate, (2) the IRS had satisfied all legal and procedural requirements, (3) there were no spousal defenses relevant to the issue, (4) there were no collection alternatives to be considered, and (5) the frivolous filing penalty was correct (Docs. 13, ¶ 22; 18, ¶ 23).

B. Procedural History

On July 1, 2000, a Final Notice of Intent to Levy and Notice of Your Right to Hearing was issued to Plaintiff by the IRS, and then on August 29, 2001, Plaintiff met with Appeals Officer Shirah as part of the Collection Due Process Hearing that was requested by Plaintiff (Docs. 13, ¶ 14–16; 18, ¶ 15–17). On October 10, 2001, Mr. Shirah upheld the assessment of the penalty and determined collection by levy to be appropriate (Docs. 13, ¶ 22; 18, ¶ 23). On November 8, 2001, Plaintiff (who is *pro se*) then filed the current appeal for judicial review of Mr. Shirah's determinations in this case (Doc. 1, ¶ 1). On May 9, 2002, after the expiration of discovery, Defendant filed the current Motion for Summary Judgment (Doc. 12) and Statement of Material Facts (Doc. 13). Then on May 28, 2002, Plaintiff filed Plaintiff's Memorandum in Opposition to the Defendant's Motion for Summary Judgment (Doc. 17) and a Statement of Material Facts (Doc. 18).

II. MOTION FOR SUMMARY JUDGMENT

A. Standard

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). The substantive law will identify which facts are material and which are irrelevant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). An issue of fact is material if it is a legal element of the claim under the applicable substantive law which might affect the outcome of the case. *See id.* at 248, 106 S. Ct. at 2510.

At the summary judgment stage, a court's function is not to weigh the evidence to determine the truth of the matter, but to determine whether a genuine issue of fact exists for trial. *See id.* at 249, 106 S. Ct. at 2510–11. A genuine issue exists only if sufficient evidence is presented favoring the nonmoving party for a jury to return a verdict for that party. *See id.* "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992) (citing *Mercantile Bank & Trust Co. v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985)).

When assessing the sufficiency of the evidence in favor of the nonmoving party, the court must view all the evidence, and all factual inferences reasonably drawn from the evidence, in the light most favorable to the nonmoving party. *See Hairston v. Gainesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993). The court is not obliged, however, to deny summary judgment for the moving party when the evidence favoring the nonmoving party is merely colorable or is not significantly probative. *See Anderson*, 477 U.S. at 249–50, 106 S. Ct. at 2511. A mere scintilla of evidence in support of the nonmoving

[3] In addition, Plaintiff argues that "Appeals Officer Shirah did not review any documents which stated the basis of the determination, or the reason for the finding by the individual who made the determination, thus failing to obtain verification from the Secretary [of the Treasury] that the determination was procedurally correct" (Doc. 18, ¶s 20–21).

[4] Plaintiff also argues that "the Notice of Determination and attachments thereto ... did not include any documentation from the individual who made the initial determination that Plaintiff's return was frivolous" (Doc. 18, ¶ 22). Furthermore, Plaintiff (citing Mr. Shirah's notes) claims that "Appeals Officer Shirah himself questioned the validity of the determination in light of the assessment of $0.00 in taxes for Plaintiff (Doc. 18, ¶ 22).

party's position will not suffice to demonstrate a material issue of genuine fact that precludes summary judgment. *See Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

B. Discussion

[1] For the reasons stated below, Defendant has satisfied its burden of demonstrating to the Court that there is an absence of a genuine issue of material fact in the current case. Once that burden is satisfied, Plaintiff then has the burden to show that there is a genuine issue of material fact necessary for trial. Plaintiff has not come forward with any genuine issues of material fact that would necessitate a trial on the merits. Therefore, the Court will dispose of this case based upon relevant law.

1. Statutory Scheme

Title 26, United States Code, Section 6331(a) provides, in relevant part: "[i]f any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax . . . by levy upon all property and rights to property . . . belonging to such person . . ." 26 U.S.C. § 6331(a) (2002).[5] The IRS must provide taxpayers with notice of an intent to levy and the availability of administrative appeals. *See* 26 U.S.C. § 6331(d) (2002). A levy "may not be made on any property or right to property of any person unless the Secretary [of the Treasury] has notified such person in writing of their right to a hearing . . . before such levy is made." 26 U.S.C. § 6330(a) (2002). The hearing referred to in § 6330(a) is called a Collection Due Process Hearing. The Hearing does not have to be an in person meeting between an Appeals Officer and a taxpayer (but it can be). *See* Treas. Reg. § 301.6330-1(d)(2) Q&A-D6 (2002). It can consist of any written correspondence between the parties regarding the substantive issues. *See id.*

At the Collection Due Process Hearing, an IRS Appeals Officer must verify that any and all requirements of the applicable law or the administrative procedures have been met. *See* 26 U.S.C. § 6330(c)(1) (2002). The taxpayer may raise "any relevant issue relating to the unpaid tax or the proposed levy, including[:] (i) appropriate spousal defenses; (ii) challenges to the appropriateness of the collection actions; and (iii) offers of collection alternatives . . . ." 26 U.S.C. § 6330(c)(2)(A) (2002). In addition, the taxpayer "may also raise . . . challenges to the existence or the amount of the underlying tax liability for any period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. § 6330(c)(2)(B) (2002). If the taxpayer does not agree with the Appeals Officer's written determination, the taxpayer can appeal the determination to the Tax Court or to a United States District Court (if the Tax Court does not have jurisdiction over the underlying tax liability). *See* 26 U.S.C. § 6330(d)(1) (2002).[6]

2. Standard of Review on Appeal

For appeals from Collection Due Process Hearing determinations, the Court reviews the validity of the tax assessments *de nevo*. *See Konkel v. Commissioner*, 2000 WL 1819417, 3 [86 AFTR 2d 2000-6939] (M.D. Fla. 2000) (citing *Davis v. Commissioner*, 115 T.C.35, 39 (2000)); *See also* H.R. Rep. No 599 (1998). "When the underlying tax liability is not in issue, the court reviews the decision of an appeals officer using an abuse of discretion standard of review." *See Konkel v. Commissioner*, 2000 WL 1819417, 3 (M.D. Fla. 2000) (citing *Davis v. Commissioner*, 115 T.C.35, 39 (2000)); *See also*H.R. Rep. No 599 (1998). As a result, the validity of the frivolous assessment against Plaintiff is reviewed *de novo*, while the determination that collection by levy was appropriate is reviewed under an abuse of discretion standard. Judicial review is limited to those is-

[5] The frivolous filing penalty (pursuant to 26 U.S.C. § 6702) at issue in the present case is a tax, even though it is called a "penalty." *See* 26 U.S.C. §§ 6671, 6702 (2002).

[6] The Tax Court has jurisdiction to redetermine the amount of some tax deficiencies. *See* 26 U.S.C. § 6214(a) (2002). Deficiency procedures do not apply to frivolous filing penalties. *See* 26 U.S.C. § 6703(b) (2002). Therefore, since Plaintiff is appealing a determination involving a frivolous filing penalty, Plaintiff was required to bring his appeal before this Court.

sues properly raised during the Collection Due Process Hearing. *See* Treas. Reg. § 301.6330-1(f), Q-F5 (2002).[7]

3. Validity of Assessment

Title 26, United States Code, Section 6702 provides, in relevant part:

(a) Civil penalty.-If-

(1) any individual files what purports to be a return of the tax imposed by subtitle A but which-

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to-

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws,

then such individual shall pay a penalty of $500.

26 U.S.C. § 6702(a) (2002) (emphasis added).

Under 26 U.S.C. § 6703, the burden of proving that a taxpayer is liable for a frivolous filing penalty shall be on the Secretary of the Treasury (*i.e.*, the United States). *See* 26 U.S.C. § 6703(a) (2002). In the present case, Defendant has met its burden of proof. While Plaintiff's Form W-2 and Form 1099-R indicated taxable income of roughly $146,500 (for the 1997 tax year), Plaintiff did not include any of this income on Plaintiff's Form 1040EZ. Thus, Plaintiff's self-assessment or $0.00 gross and taxable income was obviously incorrect.

Furthermore, the incorrect information was due to Plaintiff's frivolous justifications. First, Plaintiff claimed that the Internal Revenue Code did not require him to submit an income tax return (Doc. 13, Ex. 4). Plaintiff's argument is without merit. "The . . . obligation to file [a] federal income tax returns is governed by the requirements of [26 U.S.C. § 6012 of] the Internal Revenue Code." *In re Bradford*, 1994 WL 680987, 2 (E.D. Va. 1994) (citing 26 U.S.C. § 6012)). Thus, the Internal Revenue Code itself explicitly states who is required to file an income tax return, and the Plaintiff so qualifies as a person required to make returns of income under 26 U.S.C. § 6012.

Second, Plaintiff argued that he should not have to file a tax return because doing so would violate his Fifth Amendment right against self-incrimination (*Id.*). The Court rejects Plaintiff's claim that the Fifth Amendment entitles him to refuse to file adequate returns. Plaintiff has "not demonstrated any 'real danger' of self-incrimination, nor is such danger readily apparent." *Davis v. U.S. Government*, 742 F. 2d 171, 172 [54 AFTR 2d 84-6084] (5th Cir. 1984) (citing *Steinbrecher v. CIR*, 712 F. 2d 195 [52 AFTR 2d 83-5801] 197–98 (5th Cir. 1983)); *See also Ricket v. United States*, 773 F. 2d 1214, 1215 [56 AFTR 2d 85-6152] (11th Cir. 1985); *Turner v. Secretary of the Treasury and United States of America*, 1984 WL 3077, 6 (S.D. Ind. 1984).

Third, at the hearing, Plaintiff argued that the IRS did not provide him adequate notice and demand for a § 6702 penalty (Doc. 1, Attach., p. 21–22). Plaintiff maintained that § 6331 requires that a notice of deficiency be made before assessment, and since the IRS had not so notified Plaintiff prior to the assessment in this case, Plaintiff argued that the assessment was contrary to the law (*Id.*). Under 26 U.S.C. § 6703, deficiency procedures (such as those

[7] Plaintiff argues that the Court should follow "generally accepted standards for review of agency actions," or in other words, the "arbitrary and capricious" standard of review under the Administrative Procedure Act (Doc. 17, p. 6). Such argument is without merit. Not only have the proper standards been determined in prior case law, but, in the House of Representatives Conference Report on § 6330, Congress *explicitly* intended the standards of review that the Court has described above apply when reviewing Collection Due Process Hearings. *See Konkel v. Commissioner*, 2000 WL 1819417, 3 (M.D. Fla. 2000); *Davis v. Commissioner*, 115 T.C. 35, 39 (2000); *Goza v. Commissioner*, 114 T.C. 176, 181–182 (2000); H.R. Rep. No. 599 (1988). Assuming *arguendo* that the standard of review were arbitrary and capricious, the Defendant would still prevail.

in § 6331) do not apply with respect to the assessment or the collection of penalties provided by § 6702. *See* 26 U.S.C. § 6703(b) (2002); *See Turner v. Secretary of the Treasury and United States of America*, 1984 WL 3077, 4 (S.D. Ind. 1984).[8] For a § 6702 penalty, the IRS does not have to provide a statutory notice of deficiency prior to assessment of the penalty.

Fourth, Plaintiff argues that Mr. Shirah must obtain verification from the Secretary of the Treasury that any applicable laws or administrative procedures have been met in regards to the assessment of the penalty in the current case (Doc. 1, Attach., pp. 26–30). Basically, Plaintiff argued that, since Mr. Shirah did not have a separate verification form issued by the Secretary personally, the assessed penalty is not valid. "Literal transcripts" (such as TXMODA and Forms 4340 used by Mr. Shirah) are a valid verification that the requirements of any applicable law or administrative procedure have been met. *See Standifird v. Commissioner of Internal Revenue*, 2002 WL 31151194, T.C. Memo. 2002-245 [TC Memo 2002-245] (U.S. Tax Ct. 2002).[9]

Plaintiff's arguments against the validity of the assessment are without merit. Defendant has satisfied its burden of proof as to the Plaintiff's violation of § 6702. As a result, the assessment of the $500.00 frivolous filing penalty against Plaintiff with respect to the 1997 tax year was valid.

4. Collection Due Process Hearing Determination

Title 26, United States Code, Section 6330 provides, in relevant part:

(c) Matters considered at hearing.--In the case of any hearing conducted under this section--

(1) Requirement of investigation.--The appeals officer shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.

(2) Issues at hearing.--

(A) In general.--The person may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy, including--

(i) appropriate spousal defenses;

(ii) challenges to the appropriateness of collection actions; and,

(iii) offers of collection alternatives, which may include the posting of a bond, the substitution of other assets, an installment agreement, or an offer-in-compromise.

(B) Underlying liability.--The person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.

(3) Basis for the determination.--The determination by an appeals officer under this subsection shall take into consideration--

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[8] This Court would like to address a comment made by Plaintiff during the Collection Due Process Hearing. Mr. Shirah attempted to explain to Plaintiff that *Turner* and § 6703 specifically give the IRS the ability to assess the frivolous filing penalty without prior notification (Doc 1., Attach., p.21). In response, Plaintiff said: "Well, Code Section 6001 says that I have to comply with rules and regulations, it does not say anything about me having to comply with court cases" (Doc. 1, Attach., p. 22). Plaintiff then said: "Your own regulation here, 601-106F says that the appeals representative shall hue to the law, it doesn't say that you shall hue to court cases, it says you shall hue to the law" (Doc. 1, Attach., p. 23). Later in the hearing, Mr. Shirah tried again to explain to Plaintiff that, regardless of *Turner*, § 6702 still gave the IRS the authority to assess the penalty against Plaintiff (Doc. 1, Attach., p. 46). Plaintiff responded: "But I'm supposed to comply with regulations" (Doc. 1, Attach., p. 46).

First of all, court cases are law, too. Second, legislators write statutory laws, which are later interpreted by the courts when those statutes are challenged. That interpretation is then used by citizens and government officials to conform their conduct accordingly (and by other courts in subsequent cases). Third, regulations are agency interpretations of statutory laws, and those regulations are subject to judicial review as well. [So in reality, Plaintiff needs to be more concerned about complying with statutory and case law rather than looking for an agency regulation to follow]. As a result, Plaintiff's arguments (quoted above) are without merit.

[9] Plaintiff argues that use of a transcript during a collection due process hearing in invalid (*i.e.*, inadmissible without proper foundation) (Doc. 17, p. 6). In support of this proposition, Plaintiff cites two cases, *Huffy v. United States and United States v. Buford*. In *Huff*, the Court stated that the IRS could not rely solely on Forms 4340 in order to prove that the tax at issue in that case was valid. *See Huff v. United States*, 10 F. 3d 1440, 1446 [72 AFTR 2d 93-6682] (9th Cir. 1993). In the present case, Mr. Shirah relied on more than just a Form 4340; Mr. Shirah also relied on transcripts and the actual 1997 income tax return in question. In *Buford*, the issue involved was whether or not an Individual Master File (also called an IMF) was discoverable by the taxpayer and whether the trial court had committed error by not conducting an *in camera* inspection of the IMF. *See United States v. Buford*, 889 F. 2d 1406,1408 [65 AFTR 2d 90-479] (5thCir. 1989). *Buford* in no way stands for Plaintiff's asserted proposition.

(A) the verification presented under paragraph (1);

(B) the issues raised under paragraph (2); and

(C) whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.

(4) Certain issues precluded.--An issue may not be raised at the hearing if--

(A) the issue was raised and considered at a previous hearing under section 6320 or in any other previous administrative or judicial proceeding; and

(B) the person seeking to raise the issue participated meaningfully in such hearing or proceeding.

This paragraph shall not apply to any issue with respect to which subsection (d)(2)(B) applies.

Thus, there are certain issues that an IRS Appeals Officer must consider when making his/her determination.

During Plaintiff's Collection Due Process Hearing, Mr. Shirah complied with the above provision of the Tax Code when making his determination that a levy was appropriate to collect Plaintiff's frivolous filing penalty. The validity of the underlying tax (*i.e.*, the penalty) was verified through a review of the tax return, transcripts, and a Certificate of Assessment and Payment. Said Certificate demonstrated that: (1) there was an assessment, (2) post-assessment notice to the taxpayer, and (3) Plaintiff failed to pay the outstanding tax (*i.e.*, penalty). In addition, Mr. Shirah verified that notice and demand for payment was made on April 3, 2000.[10]

At the hearing, Plaintiff attempted to challenge the validity of the underlying tax by making meritless arguments about the applicability of the law to his case. Plaintiff did not assert a spousal defense nor did Plaintiff offer a realistic collection alternative. Plaintiff offered, with checkbook in-hand, to pay the $500.00 penalty to Mr. Shirah if Mr. Shirah would identify any Code section that made Plaintiff liable for the tax (Doc. 1, Attach., p. 41). Mr. Shirah attempted to explain § 6702 and relevant case law to Plaintiff, but Plaintiff would not accept the validity of Mr. Shirah's statements (which were accurate) (*Id.* at p. 43). Such an attempt by Plaintiff was not a realistic collection alternative, because, based on Plaintiff's position on the law as well as his demeanor, Plaintiff would not have accepted anything that Mr. Shirah had to say (unless of course Mr. Shirah had agreed with Plaintiff's position).

In addition, Mr. Shirah balanced the efficient collection of the tax against the intrusiveness of a collection action against Plaintiff. Based on the facts and circumstances of the case, Mr. Shirah weighed the interests involved and concluded that levy was necessary in order for the IRS to collect the outstanding tax. Thus, at conclusion of the hearing, the penalty had been assessed, the IRS had made notice and demand, Plaintiff had raised no meritorious arguments, and Plaintiff had not paid the tax. Therefore, Mr. Shirah made a proper determination that the IRS had complied with all applicable laws and procedures, and Mr. Shirah's decision as to the appropriateness of the levy was not an abuse of discretion (based on the facts and circumstances of this case).

Defendant has satisfied its burden of demonstrating to the Court that there is an absence of a genuine issue of material fact in the current case. Plaintiff has not come forward with any genuine issues of material fact that would necessitate a trial on the merits. After considering the relevant, applicable law, Defendant's Motion for Summary Judgment (Doc. 12) is hereby GRANTED, and Plaintiff's request for a *sua sponte* grant of summary judgment in Plaintiff's favor (Doc. 17, p. 7) is hereby DENIED.

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[10] Such post-assessment notice was made pursuant to 26 U.S.C. § 6303(a) within the required 60 days after assessment.

III. Summary

The Court's ruling in this matter may be summarized as follows, and IT IS HEREBY ORDERED:

1. Defendant's Motion for Summary Judgment (Doc. 12) is hereby GRANTED.

2. Plaintiff's request for a *sua sponte* grant of summary judgment in favor of the Plaintiff (Doc. 17, p. 7) is hereby DENIED.

3. Consistent with this order, the Clerk of Court is directed to enter summary judgment in favor of Defendant. Plaintiff shall take nothing by this action and goes without day.

ORDERED on this 23rd day of October 2002.

Lacey A. Collier

United States District Judge

JUDGMENT

This action came before the Honorable Lacey A. Collier and a decision has been rendered.

Judgment is hereby entered in favor of Defendant, UNITED STATES OF AMERICA. Plaintiff, WARD DEAN, shall take nothing by this action and goes without day.

WILLIAM McCOOL, CLERK OF COURT

Deputy Clerk: Lynn Uhl

October 24, 2002

DATE

¶2002-5614

Elvin GUZMAN, Pro Se PLAINTIFF, v. COMMISSIONER of Internal Revenue, DEFENDANT. U.S. District Court, Southern Dist. of Florida, (DC FL) CASE NO. 02-60754-CIV-ZLOCH, Oct. 17, 2002. Years 1995, 1996. Decision for Govt.

1. Actions against IRS—sovereign immunity—liens. Pro se taxpayer's action against IRS seeking review of federal tax lien and damages was dismissed for lack of jurisdiction: U.S., which was proper party, was immune from suit where IRC §7429's limited immunity waiver didn't apply to lien challenge brought under IRC §6321, IRC §6322, and IRC §6323; and taxpayer didn't allege any other jurisdictional basis for suit. Also, IRC §6320 gave taxpayer statutory avenue for seeking judicial review *in Tax Court* of lien filing. *Reference:* United States Tax Reporter ¶74,295.01(5); 74,336.506(25). IRC §6320; 6321; 6322; 6323; 7429.

Elvin Guzman, Pro Se 856 Savannah Falls Drive Weston, FL 33327
Mark Stier, Esq. For Defendant

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA,

ORDER

WILLIAM J. ZLOCH Chief United States District Judge

THIS MATTER is before the Court upon Defendant, Commissioner of Internal Revenue's Motion To Dismiss (DE 9). The Court has carefully reviewed said Motion, the entire court file and is otherwise fully advised in the premises.

The Plaintiff, Elvin Guzman, commenced the above-styled cause by filing a Complaint (DE 1) seeking judicial review of a federal tax lien filed against Plaintiff's property and $1,000,000 in damages stemming from filing of the tax lien. The Court notes that on April 16, 2002 the Internal Revenue Service filed a federal tax lien on Plaintiff's property pursuant to sections 6321, 6322 and 6323 of the Internal Revenue Code. This tax lien was based on Plaintiff's failure to file federal income taxes in 1995 and 1996. (Compl. Addendum B.) Plaintiff alleges that this Court has jurisdiction to review the factual basis of the federal tax lien pursuant to 26 U.S.C. §7429(b). (Compl. ¶ 2.) In the instant Motion the Defendant asserts that this Court lacks subject matter jurisdiction over the instant action. (Def.'s Mot. To Dismiss p. 3–4.) Additionally, Defendant argues that Plaintiff has not exhausted his administrative remedies, has not pursued an appeal of an administrative determination in the appropriate court, and has not stated a

claim upon which relief can be granted. (Id. pp. 4–10.)

The Court notes that Plaintiff did not file a response to the instant Motion. Moreover, on August 27, 2002 the Court issued an Order (DE 10) requiring Plaintiff to file a response to the instant Motion on or before September 3, 2002. As of the date of this Order, Plaintiff has not filed a response to the instant Motion or the August 27, 2002 Order of this Court.

I. Motion To Dismiss Standard

The Court notes that only a generalized statement of facts needs to be set out to comply with the liberal pleading requirements of the liberal pleading requirements of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 8(a). A classic formulation of the test often applied to determine the sufficiency of a complaint was set out by the United States Supreme Court in Conley v. Gibson, 355 U.S. 41, 45–46 (1957), wherein the Court stated:

> ... In appraising the sufficiency of the Complaint we follow ... the accepted rule that a Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

The Court adds that a complaint may not be dismissed because the plaintiff's claim does not support the legal theory he relies on since the court must determine if the allegations provide relief on any possible theory. See Robertson v. Johnston, 376 F.2d 43 (5th Cir. 1967).

II. Discussion

[1] Plaintiff's claim seeks to prevent the collection of federal income taxes and to collect damages from an agency of the federal government resulting from the filing of a federal tax lien on his property. The Court finds that any judgment would "interfere with public administration" and "expend itself on the public treasury;" therefore, this action must be treated as an action against the United States. Dugan v. Rank, 372 U.S. 609, 620 (1963).

Under the doctrine of sovereign immunity, the United States is immune from suit except to the extent it has explicitly waived such immunity. United States v. Mitchell, 445 U.S. 535, 538 (1980). Where the United States has not waived immunity a court lacks subject matter jurisdiction over the case. United States v. Sherwood, 312 U.S. 584, 586 (1941). Regarding tax collection and assessments the United States has waived sovereign immunity in the limited circumstances outlined in 26 U.S.C. § 7421(a).

Plaintiff asserts that this Court has subject matter jurisdiction over his Complaint pursuant to 26 U.S.C. §7429(b). Section 7429 is included in the waiver of immunity set forth in section 7421, however, section 7429 applies to tax assessments made under sections 6851(a), 6852(a), 6861(a) or 6862 of the Internal Revenue Code. 26 U.S.C. § 7429(a). Section 7429 does not provide this Court jurisdiction to review tax liens brought pursuant to sections 6321, 6322 and 6323 of the Internal Revenue Code as Plaintiff seeks in his Complaint. Plaintiff has not alleged any other ground upon which this Court has subject matter jurisdiction over his Complaint. Moreover, the Court finds that the facts alleged in Plaintiff's Complaint do not support any other ground for subject matter jurisdiction. Thus, the Court lacks subject matter jurisdiction over the above-styled cause.

The Court notes that review of the filing of a federal tax lien is possible. Pursuant to 26 U.S.C. § 6320, the subject of a federal tax lien may seek administrative review. The Court also notes that Defendant acknowledges that judicial review of an administrative determination is then possible under the jurisdiction of the United States Tax Court. (Def. Mot. To Dismiss p. 5 n. 3.)

Accordingly, after due consideration, it is ORDERED AND ADJUDGED as follows:

1. Defendant, Commissioner of Internal Revenue's Motion To Dismiss (DE 9) be and the same is hereby GRANTED;

2. The Plaintiff, Elvin Guzman's Complaint (DE 1) be and the same is hereby DISMISSED with prejudice; and

3. To the extent not otherwise disposed of herein, all pending Motions are hereby DENIED as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 17th day of October, 2002.

WILLIAM J. ZLOCH

Chief United States District Judge

¶2002-5615

In Re: Alfred A. Munoz, Debtor Alfred A. MUNOZ, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT U.S. Bankruptcy Court, Southern Dist. of New York (Bktcy Ct NY) Adversary Proceeding No. 99/8069A, Aug. 15, 2001. Year 1986. Decision for Taxpayer in part and for Govt. in part.

1. Tax claims in bankruptcy—prepetition liens—secured claims. Pursuant to settlement of Chap. 13 debtor's adversary complaint to extinguish govt.'s tax lien, govt.'s secured claims were reclassified as general unsecured claim and parties agreed that liens remained in effect. But, taxpayer retained right to seek discharge therefrom of mortgaged property in which he allegedly had no equity. *Reference:* United States Tax Reporter ¶68,726.52(3); 68,726.53(2). IRC §6321; 6325.

James Guy 125 Wolf Road, Suite 306 Albany, New York 12205 Telephone: (518) 482-2177, Attorney for Plaintiff-Debtor Sean C. Cenawood, Assistant United States Attorney, 100 Church Street - 19th Floor New York, New York 10007 Telephone: (212) 637-2705 Facsimile: (212) 637-2825, Attorney for Defendant United States Department of Treasury - Internal Revenue Service

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK,

BLACKSHEER, United States Bankruptcy Judge

STIPULATION AND ORDER OF SETTLEMENT

Chapter 13

98 B 43490 (CB)

[1] WHEREAS, in May 1998, plaintiff-debtor Alfred A. Munoz (the ''debtor'') filed a voluntary petition for relief under Chapter 13, Title 11 of the United States Code (the ''Bankruptcy Code''); and WHEREAS, prior to debtor's Chapter 13 filing, the United States Department of the Treasury - Internal Revenue Service (the ''IRS'') filed a Notice of Federal Tax Lien against debtor for unpaid income taxes, penalties and interest; and

WHEREAS, by virtue of the federal tax lien, defendant the United States of America (the ''Government'') -- sued herein as the Internal Revenue Service -- has a statutory lien for unpaid income taxes, penalties and interest on all real and personal property in the debtor's bankruptcy estate; and

WHEREAS, debtor's pre-petition liability to the IRS for unpaid tax liabilities totaled $142,135.14;

WHEREAS, the Government has filed a Proof of Claim for $142,135.14, of which $42,874.94 is secured by the Notice of Federal Tax Lien; and

WHEREAS, the secured portion of the Government's Proof of Claim relates to income taxes owed for tax year 1986; and

WHEREAS, the bankruptcy estate includes certain real property located at 3263 Hull Avenue, Bronx, New York (the ''Hull Avenue Property''); and

WHEREAS, debtor has provided evidence that the fair market value of the Hull Avenue Property is approximately $190,000;

WHEREAS, debtor has represented to the Government and to the Court that the Hull Avenue Property is encumbered by: (i) a first mortgage held by EMC Mortgage Corporation in the principle amount of $162,671.48, plus an additional $135,855

for items such as interest, late charges and attorneys' fees; and (ii) a second mortgage held by CitiBank;

WHEREAS debtor filed the instant adversary proceeding seeking to void and extinguish the Government's federal tax lien in its entirety on the ground that debtor lacks equity in the Hull Avenue Property; and

WHEREAS, the debtor and the Government have agreed to settle the adversary proceeding on the terms set forth below;

IT IS HEREBY STIPULATED AND ORDERED that:

1. The instant adversary proceeding is dismissed with prejudice.

2. The Government's secured claim of $42,874.94 against debtor shall be re-classified as a general unsecured claim. The Government will thus have a total claim against debtor of $142,135.14, of which $36,986.51 will be an unsecured priority claim and the remaining $105,148.63 will be an unsecured general claim. Such reclassification does not in any way void or extinguish the federal tax lien.

3. Pursuant to Sections 6321 and 6325 of the Internal Revenue Code, the Government's federal tax lien shall remain in effect against all of debtor's property and rights to property to the extent of the value of said property and rights to property until it is paid in full.

4. Nothing herein shall be construed to prohibit debtor or his representative from seeking from the IRS a certificate of discharge of the Hull Avenue Property from the federal tax lien.

5. This Stipulation and each of its terms and conditions is subject to the approval of the Bankruptcy Court. In the event that the Court declines to approve it, this Stipulation shall be null and void, with no force or effect.

Dated: August 15, 2001 JAMES GUY, ESQ. (JG-2845)

New York, New York

/s/ James Guy

125 Wolf Road, Suite 306

Albany, New York 12205

Telephone: (518) 482-2177

Attorney for Plaintiff-Debtor

Alfred Munoz

Dated: August 15, 2001 MARY JO WHITE

New York, New York United States Attorney for the Southern District of New York

By: /s/ Sean C. Cenawood

SEAN C. CENAWOOD (SC-1952)

Assistant United States Attorney

100 Church Street - 19th Floor

New York, New York 10007

Telephone: (212) 637-2705

Facsimile: (212) 637-2825

Attorney for Defendant United

States Department of Treasury - Internal Revenue Service

Dated: August 15, 2001 SO ORDERED

New York, New York

Honorable Cornelius Blackshear

United States Bankruptcy Judge

¶2002-5616

William A. FABRICIUS, ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Eastern Dist. of California, (DC CA) CV-F-02-5597 REC/DLB, Oct. 21, 2002. Decision for Govt.

1. Collection due process—review of administrative determination—jurisdiction—equivalent hearings—refunds. Pro se taxpayers' IRC §6330 petition to set aside IRS's collection determination was dismissed for lack of jurisdiction: taxpayers, who didn't timely request CDP hearing, had no right to judicial review of determination letter that IRS issued pursuant to non-statutory equivalent hearing; or, even if determination were reviewable, jurisdiction was still lacking where taxpayers didn't file petition within statutory period or in proper court. Also, to extent taxpayers were asserting due process-based re-

fund claims, jurisdiction was also lacking absent their fully paying tax and filing proper refund claim. *Reference:* United States Tax Reporter ¶63,305.01(30); 63,305.01(10); 74,225.01(5). IRC §6330; 7422.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA,

JUDGMENT IN A CIVIL ACTION

DECISION BY COURT: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Defendant's motion to dismiss is GRANTED. This action is DISMISSED. JUDGMENT IS ENTERED for Defendant.

DATED: 10/21/02

JACK L. WAGNER, Clerk

By: /s/

Deputy Clerk

ORDER GRANTING MOTION TO DISMISS.

ROBERT E. COYLE UNITED STATES DISTRICT JUDGE

On September 23, 2002, the court heard defendant's Motion to Dismiss. Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants the motion to dismiss as set forth below.

I. BACKGROUND INFORMATION

On May 21, 2002, Plaintiffs William Fabricius and Catherine Fabricius (together "Fabricius"), proceeding in pro per, filed in this Court their "Complaint for Damages and Request That This Court Set Aside an Invalid Collection Due Process 'Determination' Lawlessly Issue Pursuant to 26 USC 6330." The United States subsequently filed a motion to dismiss for lack of subject-matter jurisdiction on July 24, 2002. Plaintiffs filed a "motion" for the court not to dismiss along with their opposition brief on September 4, 2002.[1] The United States Reply Memorandum was filed on September 12, 2002. This motion was heard on September 23, 2002. The plaintiffs filed on October 16, 2002 a "Reply Memorandum." Such a filing is neither appropriate nor timely under Local Rule 78-230 and will not be considered by the court.

II. LEGAL STANDARD

The United States may only be sued to the extent it has consented to suit. United States v. Dalm, 494 U.S. 596 [65 AFTR 2d 90-1210] (1990). Any waiver by the United States of its sovereign immunity cannot be implied but must be unequivocally expressed, and such waivers must be strictly construed in favor of the sovereign. Library of Congress v. Shaw, 478 U.S. 310, 318 (1986). Where there is a lack of consent to suit by the United States, dismissal of the action for lack of subject-matter jurisdiction is required. See United States v. Mitchell, 463 U.S. 206 (1983); Gilbert v. Da Grossa, 756 F.2d 1455 [56 AFTR 2d 85-5567] (9th Cir. 1985).

III. ANALYSIS

[1] The plaintiffs' arguments are unclear and difficult to follow, both in the complaint and opposition memorandum. They describe their claim as follows: "The entire claim in Plaintiff's [sic] Compliant [sic] against the Internal Revenue Service (IRS) of the United States Government with regards to the tax at issue, [sic] is that the IRS did not follow Applicable Law and Administrative Procedures in open violation of the law that the IRS is required to follow in accordance with IRC 6330(c)(1)." It appears that the plaintiffs are challenging both the procedures used by the IRS during this process as well as the result of the hearing. For the reasons described below, this Court does not have jurisdiction over such a challenge and therefore the case must be dismissed.

I.R.C. § 6331(a) provides that if any person fails to pay a tax liability within 10 days after notice and demand for payment, the Secretary of the Treasury is authorized

[1] This is clearly not a motion, but rather an opposition to the motion, and will be treated as such.

to collect such tax by way of a levy upon the person's property. Section 6331(d) provides that at least 30 days prior to proceeding with enforced collection by way of a levy on a person's property, the Secretary is obliged to provide the person with a final notice of intent to levy, including notice of the administrative appeals available to the person.

In the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. 105-206, sec. 3401, 112 Stat. 685, 746, Congress enacted new sections 6320 (pertaining to liens) and 6330 (pertaining to levies) to provide protections for taxpayers in tax collection matters. Section 6330 generally provides that the Commissioner cannot proceed with enforced collection by way of levy until the taxpayer has been given notice of and the opportunity for an administrative review of the matter (in the form of an Appeals Office hearing) and, if dissatisfied, the taxpayer may seek judicial review of the administrative determination. See Davis v. Commissioner, 115 T.C. 35, 37 (2000); Goza v. Commissioner, 114 T.C. 176, 179 (2000).

Section 6330(a) provides in pertinent part that the Secretary shall notify a person in writing of his or her right to an Appeals Office hearing regarding a notice of intent to levy by mailing such notice by certified or registered mail, return receipt requested, to such person's last known address. Section 6330(a)(2) provides that the prescribed notice shall be provided not less than 30 days before the day of the first levy with respect to the amount of the unpaid tax for the taxable period. Further, section 6330(a)(3)(B) provides that the prescribed notice shall explain that the person has the right to request an Appeals Office hearing during the 30-day period under paragraph (2).

Section 6330(c) prescribes the matters that may be raised by a taxpayer at an Appeals Office hearing. In sum, section 6330(c) provides that a taxpayer may raise collection issues such as spousal defenses, the appropriateness of the Commissioner's intended collection action, and possible alternative means of collection, such as an offer-in-compromise. Section 6330(c)(2)(B) provides that the existence and amount of the underlying tax liability can be contested at an Appeals Office hearing only if the taxpayer did not receive a notice of deficiency for the taxes in question or did not otherwise have an earlier opportunity to dispute such tax liability. See Sego v. Commissioner, 114 T.C. 604, 609 (2000); Goza v. Commissioner, 114 T.C. 176, 179 (2000).

The IRS issued a Notice of Intent to Levy to plaintiffs on August 24, 2001. This notice also informed plaintiffs that they had the right to request a Collection Due Process hearing (''CDP'') within 30 days of the date of the letter. 26 C.F.R. 301.6330-1(c). The 30-day period ended on September 23, 2001. Because this was a Sunday, the regulations consider that a CPD request dated the next day, Monday, September 24, 2001 would have been timely. Plaintiffs request was not until September 25, 2001, however, 32 days after the notice. As a consequence of petitioner's failure to make a timely request for an Appeals Office hearing, the Appeals Office was not obliged to conduct the administrative hearing contemplated under section 6330(b). See id. In lieu of the CDP, the IRS granted plaintiffs a so-called ''equivalent hearing'' on January 23, 2002, as provided under the regulations. 26 C.F.R. 301.6330-1(i). Although a CDP determination may be appealed under I.R.C. § 6330(d), the regulations state that ''equivalent'' hearings cannot be appealed in court. 26 C.F.R. 301.6330-1(i), Q-I5/A-I5. See also Moorhous v. Commissioner; 116 T.C. 263 (2001), Kennedy v. Commissioner, 116 T.C. 255 (2001). Thus there is no jurisdiction for this Court to hear an appeal of the Decision Letter issued as a result of the ''equivalent'' hearing.[2] Furthermore, because plaintiffs are contesting the underlying income tax liability, even if the Code permitted an appeal, it could only

[2] The IRS issued its Decision Letter on April 10, 2002. Even if this had been a CDP hearing, the appeal, which must be filed within 30 days of the determination, likely would not have been timely because plaintiffs' complaint was not filed until May 21, 2002. See I.R.C. § 6330(d)(1).

have been made to the United States Tax Court. See I.R.C. § 6330(d)(1) (appeal must be to Tax Court unless the Tax court does not have jurisdiction over the underlying tax liability).[3]

Other courts addressing similar cases, often by pro se plaintiffs, have reached the same result, dismissing for lack of subject matter jurisdiction, generally in unpublished opinions. See, e.g. Van Gaasbeck v. United States, CV-S-01-1004-KJD (PAL), 2002 U.S. Dist. LEXIS 7693 [89 AFTR 2d 2002-1493] (D. Nev. February 15, 2002); Steidel v. Evans, CV-S-01-1004-KJD (PAL), 2002 U.S. Dist. LEXIS 16000 [90 AFTR 2d 2002-5705] (W.D. Wa. July 22, 2002); Tornichio v. United States, No. 5:02 CV 0351, 2002 U.S. Dist. LEXIS 7363 [89 AFTR 2d 2002-1506] (N.D. Ohio March 18, 2002). The Ninth Circuit affirmed a similar ruling, holding that "[t]he district court also correctly concluded that the tax court had exclusive jurisdiction over [plaintiff's] appeal from the adverse ruling in his collection proceedings [under I.R.C. §6330]." Beech v. Commissioner, No. 01-16986, 2002 U.S. App. LEXIS 11738 [89 AFTR 2d 2002-2979] (9th Cir. June 13, 2002).

Plaintiffs also raise some other claims which appear to be allegations of due process violations regarding the notice they received and the counting method utilized by the I.R.C. and Treasury Regulations. There is no jurisdiction over these claims. See, e.g. Tornichio v. United States, No. 5:02 CV 0351, 2002 U.S. Dist. LEXIS 7363, at 8 (N.D. Ohio March 18, 2002) ("If [plaintiff] is also seeking to assert a procedural due process claim, this court nonetheless lacks jurisdiction. District courts have no jurisdiction over civil claims challenging taxes unless litigants first pay the assessed tax and then raise these claims in a refund suit."); See also Flora v. United States, 362 U.S. 145 [5 AFTR 2d 1046] (1960) (holding 28 U.S.C. § 1346(a), which gives district courts jurisdiction over civil suits challenging tax assessments, requires full payment of assessed tax prior to suit).

Thus the United States motion to dismiss for lack of subject matter jurisdiction is granted. As described above, the plaintiffs cannot get relief in any court because they filed their request for a CDP too late. Furthermore, even if they had filed on time, only the U.S. Tax Court would have jurisdiction over the case.

ACCORDINGLY, the defendant's motion to dismiss is granted and the plaintiffs' cause of action is dismissed.

Dated: Oct 18, 2002

ROBERT E. COYLE

UNITED STATES DISTRICT JUDGE

¶2002-5617

UNITED STATES OF AMERICA v. Jessie HALL and Mildred HALL. U.S. District Court, Eastern Dist. of Louisiana, (DC LA) CIVIL ACTION NO. 01-3699, Oct. 23, 2002. Judgment entered in accord with (2002, DC LA) 90 AFTR 2d 2002-6978. Years 1984, 1985, 1986, 1988, 1991, 1992, 1993, 1994, 1995, 1996. Decision for Govt.

1. Actions to reduce assessments to judgment—summary judgment. District court entered judgment against taxpayers in accord with its separate opinion. *Reference:* United States Tax Reporter ¶74,035.01(25). IRC §7403.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA,

JUDGMENT

SARAH S. VANCE UNITED STATES DISTRICT JUDGE

SECTION "R"

[1] Considering the Court's order and reasons on file herein,

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered

[3] A plaintiff who timely files in U.S. District Court instead of Tax Court is allowed to file in the Tax Court after dismissal by the District Court. I.R.C. § 6330(d)(1). This does not appear to help the plaintiffs, however, because they filed in this Court after the applicable 30-day period had ended, therefore a case in the Tax Court would likewise be untimely. Furthermore, this does not apply anyway because plaintiffs have no right to appeal the results of an "equivalent" hearing. See id.

in favor of the Government and against the defendants, Jessie and Mildred Hall.

New Orleans, Louisiana this 23rd day of October, 2002.

SARAH S. VANCE

UNITED STATES DISTRICT JUDGE

¶2002-5618

UNITED STATES OF AMERICA, PLAINTIFF v. (1) Thomas James MARTIN, and (2) Joseph Paul Biernat, DEFENDANTS. U.S. District Court, Dist. of Minnesota, (DC MN) Criminal No. 02-127 ADM/AJB, Nov. 1, 2002. Year 1999. Decision for Taxpayers in part and for Govt. in part.

1. Tax crimes—conspiracy—indictments—evidence. Taxpayer was granted severance from other conspiracy related counts of late-raised mail fraud count that govt. based on his tax return filing: although no prosecutorial vindictiveness was shown, untimely raised count implicated tax issues for which taxpayer hadn't been given adequate time to prepare defense. Also, court deferred ruling on related evidentiary motions or co-defendant's contention that late-raised mail fraud count wasn't sufficiently related to underlying conspiracy, which was already complete before subject return was mailed; and various procedural issues were decided. *Reference:* United States Tax Reporter ¶73,446.503(55).

Mark D. Larsen, Esq., Assistant United States Attorney, on behalf of Plaintiff.
Robert G. Malone, Esq., on behalf of Defendant Thomas James Martin.
Janice M. Symchych, Esq., on behalf of Defendant Joseph Paul Biernat.

UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA,

MEMORANDUM OPINION AND ORDER

ANN D. MONTGOMERY UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

On October 29, 2002, Defendant Thomas James Martin's ("Martin") Motion to Dismiss Count 8 for Multiplicity [Docket No. 167] and Motion to Dismiss Count 8 for Failure to State an Offense Against the United States of America [Docket No. 166] were argued before the undersigned United States District Judge. Defendant Joseph Paul Biernat's ("Biernat") Motion to Dismiss Counts 5–8 of the Second Superseding Indictment [Docket No. 169], and Motion in Limine to Exclude Purported 404(b) Evidence [Docket No. 170], and Plaintiff United States of America's (the "Government") Motion for Production of Defendant Biernat's Witness List and Exhibit List [Docket No. 174], were also argued. Additionally before the Court are other pre-trial motions not the subject of oral argument. The factual background for this matter is adequately set forth in the September 16, 2002, Report and Recommendation ("R&R") of Magistrate Judge Arthur J. Boylan [Docket Nos. 134 & 135], and is incorporated by reference for the purposes of the parties' present motions.

II. DISCUSSION

A. Biernat's Motion to Sever Counts

[1] Biernat seeks severance of Count 8. The Court finds that the addition of Count 8 at a time so close to the commencement of trial is tardy. The Second Superseding Indictment adding Count 8 was filed on October 16, 2002. Count 8 alleges mail fraud premised upon Biernat's mailing of his tax return on April 11, 2000. Biernat argues that the Government's allegation related to Biernat's tax statement is problematic because it calls into question the propriety of the inclusions/exclusions contained on Biernat's 1999 federal income tax return, implicating an otherwise unnecessary tax law analysis. Biernat argues he has had inadequate notice of tax-related allegations and has had no meaningful opportunity to prepare his defense accordingly.

At the time the Second Superseding Indictment was filed the trial was scheduled

to begin on November 4, 2002, giving the defense only two and a half weeks of notice to prepare to defend Count 8. The Government had previously been prepared to proceed to trial on two occasions prior to October 16 without ever raising the need for a new charge implicating tax issues. The lateness of the added charge and the different character of evidence that might become relevant to the new charge requires the severance of Count 8. Biernat's Motion is granted.[1] The severance of this count is meant in no way to lend any credence to Biernat's suggestion that Count 8 was added due to prosecutorial vindictiveness. The Court finds Biernat's argument of vindictive prosecution to be entirely without merit.

B. Martin's Motion to Dismiss Count 8 for Multiplicity

Martin argues Count 8 is multiplicitous. Multiplicity is the improper charging of the same offense in several counts of the indictment, which violates the constitutional protection against double jeopardy. Black's Law Dictionary 1036 (7th ed. 1999); Gerberding v. United States, 471 F.2d 55, 58 (8th Cir. 1973). Martin offers no argument supporting this assertion, but presumably claims that because Counts 5–7 are mail fraud counts, Count 8 improperly recharges the same offense in a different count. However, each of counts 5–8 specify different overt acts allegedly constituting the offense. As such, Count 8 appropriately asserted. Martin's Motion is denied.

C. Martin's Motion to Dismiss Count 8 for Failure to State an Offense Against the United States of America

Martin asserts that Count 8 alleges Martin committed mail fraud arising out of co-defendant Biernat's mailing of his tax return after the alleged scheme to defraud had been completed. Martin argues that a mailing occurring after the object of a scheme is completed is not sufficiently related to the scheme to support a mail fraud charge. 18 U.S.C. § 1341; United States v. Maze, 414 U.S. 395, 400 (1974) (holding that to come within the federal mail fraud statute a mailing must be "for the purpose of executing the scheme"); United States v. Taylor, 789 F.2d 618, 620 (8th Cir. 1986) (stating that the Government must prove "the use of the mails was for the purpose of executing the scheme"); Taylor, 789 F.3d at 620 (stating that generally the "use of the mails after a scheme reaches fruition will not constitute grounds for a conviction"). In light of the severance of Count 8, Martin's Motion to Dismiss Count 8 will be considered prior to his trial but after the conclusion of the Biernat trial on the non-severed counts of the Second Superseding Indictment.

D. Biernat's Motion to Dismiss Counts 5–8 of the Second Superseding Indictment

As a result of the severance of Count 8, consideration of Biernat's Motion to Dismiss Count 8 will be deferred.

Biernat's Motion on the remaining mail fraud counts, Counts 5–7 of the Second Superseding Indictment, is that the charges suffer from duplicity. Duplicity is the joining of two or more offenses in the same count of an indictment. Black's Law Dictionary 519 (7th ed. 1999); United States v. Nattier, 127 F.3d 655, 657 (8th Cir. 1997). The vice of double pleading is that a jury may convict a defendant "without unanimous agreement on the defendant's guilt with respect to a particular offense." Nattier, 127 F.3d at 657 (citation omitted). Here, the mail fraud counts do not join two offenses in any one count. Rather, the mail fraud counts suggest two distinct schemes for the deprivation of honest services, either one of which, if committed, would constitute mail fraud. Biernat argues that by alleging two separate schemes within the same count, a jury might not unanimously agree as to which scheme was committed while still convicting under the language of the count, thereby implicating a risk similar to that of double pleading. This risk is cured, however, "by a limiting instruction requiring the jury to unanimously find the defendant guilty of at least one distinct act." Id. An instruction can be drafted to make clear to the jury the

[1] Arraignment of Biernat on Count 8 will take place on November 4, 2002.

need for unanimity on a particular offense. Martin joins in this Motion [Docket No. 179], and both Motions are deferred with respect to Count 8 and denied with respect to Counts 5–7.

E. Biernat's Motion in Limine to Exclude Purported 404(b) Evidence Regarding Tax Evasion or Tax-related Wrongdoing

Biernat argues that the 404(b) evidence related to Biernat's tax statement raises issues which are not relevant to the remaining counts of the Indictment. This danger is largely obviated by the severance of Count 8. Any remaining Rule 404(b) evidentiary considerations are better addressed during the trial when the context of the allegations are better developed.

Likewise, Martin's Motion in Limine to Preclude the Government from Introduction of Any Evidence Under the Purview of Rule 404(b) [Docket No. 144] and Martin's Motion in Limine Precluding the Government from Introduction of Evidence of the 1993 Transaction at co-Defendant Biernat's House [Docket No. 145] will be deferred to the context of trial.

F. The Government's Motion for Production of Defendant Biernat's Witness List and Exhibit List

The Government has been directed to provide its witness and exhibit lists to both Defendants. Likewise, Biernat is hereby directed to provide a witness list and an exhibit list to the Government by Noon on November 1, 2002. The Court has reviewed the Biernat witness and exhibit lists and finds no prejudice arises by the Government's access to these materials at this time. The Government's Motion is granted.

G. Biernat's Motion to Dismiss Counts I and II for Failure to State an Offense Against the United States

Judge Boylan's September 16, 2002, R&R recommended denying this Motion, and his recommendation was not objected to by either Defendant. Accordingly, this Motion is denied.

H. The Government's Motion to Admit Evidence Regarding Prior Bad Acts (1993 Construction Work).

The admissibility of Rule 404(b) evidence relating to 1993 construction work will be addressed at trial. The Government is required to first offer evidence relating to the conduct which forms the basis for the counts in the Indictment on trial. After the Court has heard this evidence, the issues will be more appropriately framed, and the context developed. At such time the balancing of the probative and prejudicial aspects of the proffered evidence can be more appropriately assessed.

Government counsel is cautioned to approach the bench outside the presence of the jury to secure an admissibility ruling prior to eliciting testimony relating to the 1993 construction work. Neither counsel may allude to such evidence during opening statements.

I. Martin and Biernat's Motion for Pretrial Questionnaire of Venire

This issue was previously addressed in this Court's October 29, 2002, Order, but the Defendants' Motion remains. As discussed in the Order, Section II(B)(5), this Court will use a juror questionnaire of its own design. No questionnaires will be mailed to potential jurors before trial. This Motion is granted in part.

J. The Government's Motion for Protective Order Regarding Witness Statements

This Motion is granted with respect to the following four documents:

1. The CAP Audit/Investigative Plan for Plumbers Union Local 15, for Audit Year Ending Date of December 31, 1999.
2. The Pre-Audit Checklist for Plumbers Union Local 15, for year ending date of December 31, 1999.
3. The Zero File Review for Plumbers Union Local 15 dated April 19, 2000.
4. The Report of Investigation dated December 8, 2000.

Copies of these four documents shall not be made by the defense, and the substance of these four documents shall not be dis-

closed by the defense to any third party, absent an Order of this Court following a showing of good cause. All copies of these four documents shall be returned to the Government at the close of evidence in the trial of this case.

K. Biernat's Motion in Limine Requesting Measures to Protect Fair Trial Rights

As discussed with Counsel on the record, this Motion is granted in part as follows:

- The publication of trial evidence by the prosecution or defense before presentation in open court is prohibited.
- Counsel for all parties have stipulated to refraining from discussing the case with the media during the pendency of the trial.
- Subpoenaed witnesses are to be advised by Counsel not to discuss anticipated testimony with the media before appearing in open court.
- Consistent with this Court's customary practice, a cautionary instruction will be given to the jury regarding media coverage during the case.
- The Court will consider whether jury sequestration is required by the circumstances at the appropriate time during trial.
- A change of venue prior to the attachment of jeopardy will be considered by the Court at the appropriate time in the event the results of the juror questionnaires and voir dire indicate the inability to empanel an impartial jury.

L. Biernat's Motion in Limine Requesting the Court to Take Judicial Notice

Biernat seeks for the Court to take judicial notice of issues relating to (1) United States v. Czichray, Crim. No. 01-307, 2002 WL 54504 (D. Minn. Jan. 7, 2002), (2) United States v. Erhart, Crim. No. 01-300(1) (D. Minn. Dec. 13, 2001), (3) United States v. Sabri, Crim. No. 01-246 (D. Minn. Oct. 5, 2001), and (4) excerpts from the Physician's Desk Reference pertaining to the use and side effects of Cipro. Biernat's Motion is denied, but may be renewed at trial upon a showing by the defense establishing the relevance of any of these materials to issues remaining for trial.

As discussed previously with respect to the Government's proffered 404(b) evidence, counsel must secure an evidentiary ruling prior to the mention of any of these items.

M. Remaining Motions

All remaining Motions, including the Government's Motion for Order Excluding Evidence Regarding Confessions Given in Other Cases [Docket No. 149], Biernat's Motion in Limine for Admission of 404(b) Evidence Against Government Witness, Special Agent Sean Boylan [Docket No. 151], and Biernat's Motion for Discovery Evidence Relating to Misconduct & Discipline of SA Boylan [Docket No. 152], will be argued on November 4, 2002, or at a later appropriate time.

III. CONCLUSION

Based upon the foregoing, and all of the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1. Biernat's Motion to Sever Counts [Docket No. 161] is GRANTED and Count 8 of the Second Superseding Indictment is severed.

2. Martin's Motion to Dismiss Count 8 for Multiplicity [Docket No. 167] is DENIED,

3. Martin's Motion to Dismiss Count 8 for Failure to State an Offense Against the United States of America [Docket No. 166] is DEFERRED,

4. Biernat and Martin's Motions to Dismiss Counts 5–8 of the Second Superseding Indictment [Docket Nos. 169 & 179] are DEFERRED as to Count 8 and DENIED as to Counts 5–7,

5. Biernat's Motion in Limine to Exclude Purported 404(b) Evidence [Docket No. 170] regarding tax-related wrongdoing is DEFERRED,

6. Martin's Motion in Limine to Preclude the Government from Introduction of

Any Evidence Under the Purview of Rule 404(b) [Docket No. 144] is DEFERRED,

7. Martin's Motion in Limine Precluding the Government from Introduction of Evidence of the 1993 Transaction at co-Defendant Biernat's House [Docket No. 145] is DEFERRED,

8. The Government's Motion for Production of Defendant Biernat's Witness List and Exhibit List [Docket No. 174] is GRANTED,

9. Biernat's Motion to Dismiss Counts I and II for Failure to State an Offense Against the United States [Docket No. 70] is DENIED,

10. The Government's Motion to Admit Evidence Regarding Prior Bad Acts (1993 Construction Work) [Docket No. 138] is DEFERRED,

11. Martin and Biernat's Motion for Pretrial Questionnaire of Venire [Docket No. 140] is GRANTED IN PART,

12. The Government's Motion for Protective Order Regarding Witness Statements [Docket No. 141] is GRANTED,

13. Biernat's Motion in Limine Requesting Measures to Protect Fair Trial Rights [Docket No. 154] is GRANTED IN PART, and

14. Biernat's Motion in Limine Requesting the Court to Take Judicial Notice [Docket No. 156] is DENIED without prejudice and may be renewed at trial.

BY THE COURT:

ANN D. MONTGOMERY

UNITED STATES DISTRICT JUDGE

Date: November 1, 2002.

¶2002-5619

In Re: Wesley A BOYD, Debtor. U.S. Bankruptcy Court, Western Dist. of Kentucky, (Bktcy Ct KY) Case No. 02-10591, Sept. 6, 2002. Year 2001. Decision for Govt.

1. Bankruptcy court procedure—return filing. Chap. 13 debtor was ordered to file return for prepetition year or prove that he already did so, and to file return and pay taxes for postpetition years as they came due. Also, taxpayer was warned that any noncompliance would result in case's dismissal without further notice or hearing. *Reference:* United States Tax Reporter ¶68,726.52(3).

UNITED STATES BANKRUPTCY COURT WESTERN DISTRICT OF KENTUCKY AT BOWLING GREEN,

ORDER

Joan L. Cooper United States Bankruptcy Judge

Chapter 13

WHEREAS, the debtor commenced a voluntary case under Chapter 13 of the Bankruptcy Code on March 28, 2002; and

WHEREAS, the records of the IRS show that the debtor has not filed the federal tax return Form 1040 for the pre-petition taxable period ending 12/31/01.

[1] IT IS HEREBY ORDERED that on or before 9/20/02, the debtor shall file federal tax return Form 1040 for the pre-petition taxable period ending 12/31/01 with the Internal Revenue Service, Insolvency Section II, P.O. Box 1706, Stop 510, Louisville, Kentucky 40201 or furnish to the IRS at the same address information establishing that the tax returns have already been filed or that no returns are due to be filed with respect to the subject tax period;

That the debtor shall timely file any and all post-petition federal income tax returns and any tax shown as due thereon during the pendency of the instant bankruptcy case; and

That in the event that the debtor fails to comply with the pre-petition and post-petition federal tax return filing conditions as specified in this Order, upon proper notice of the debtor's default to the Court by the United States, the Court will dismiss the instant bankruptcy proceeding without further notice and hearing.

Joan L. Cooper

United States Bankruptcy Judge

September 6, 2002

¶2002-5620

Stuart E. GLASS, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Texas, (DC TX) Civil Action No. 3:00-CV-1543-L, Oct. 16, 2002. Earlier proceeding at (2002, DC TX) 90 AFTR 2d 2002-5180, 2002-2 USTC ¶50538. Years 1994, 1995, 1996. Decision for Taxpayer.

1. 100% penalty for failure to pay over trust fund taxes—responsible person—refund claims—litigation costs. Taxpayer was granted refund of payment he made on subject periods' IRC §6672 penalty assessment in accord with earlier finding that he wasn't responsible person for corp.'s unpaid trust fund taxes for those periods. Also, taxpayer was entitled to reasonable litigation costs and fees to extent allowable under IRC §7430 and F.R.Civ.P. 54. *Reference:* United States Tax Reporter ¶66,725.02(30); 66,725.01(62); 74,305.01(10). IRC §6672; 7430.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION,

JUDGMENT

Sam A. Lindsay United States District Judge

[1] The parties tried this action to a jury from October 8–10, 2002, and the jury returned a verdict in favor of Plaintiff Stuart E. Glass (''Glass'') on October 10, 2002. The court issues this judgment pursuant to its Memorandum Opinion and Order, filed July 2, 2002, the jury's verdict, and Defendant United States of America's (''the United States'') agreement that if Glass was found not to be a responsible person, he would be entitled to his $100 refund claim. In response to Question No. 1, the jury found that Glass was not a responsible person with respect to the failure of Stolar Clinics, Inc. (''Stolar'') to timely account for, collect, or pay over to the United States taxes withheld from employee at Stolar for the quarters in question.

It is therefore ORDERED, ADJUDGED and DECREED that Glass recover from the United States the sum of $100 for his refund, plus prejudgment interest as pro-vided by law on the refund; that Glass is entitled to all allowable and reasonable costs to the extent permitted under Fed. R. Civ. P. 54(d) and 26 U.S.C. § 7430; that Glass is not personally liable for the final penalty assessment made by the United States on April 4, 1999, regarding the quarters ending December 31, 1994, De-cember 31, 1995, June 30, 1996, and Sep-tember 30, 1996; that any amount awarded to Glass shall accrue postjudgment interest at the applicable federal rate from the date of entry of judgment until paid in full; and that any request by Glass for attorney's fees and related costs must be made in accordance with Fed. R. Civ. P. 54 (d)(2).

Signed this 16th day of October, 2002.

Sam A. Lindsay

United States District Judge

¶2002-5621

Stephen R. SUTTON, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Middle Dist. of Georgia, (DC GA) 5:02-CV-113-3 (CAR), Oct. 21, 2002. Decision for Govt.

1. Collection due process—review of administrative determination—failure to comply with discovery orders—sanctions. Taxpayer's IRC §6330 petition was dismissed with prejudice under F.R.Civ.P. 37(b) for his failures to comply with pretrial scheduling and discovery orders: taxpayer's complete failure to respond to or comply with multiple court orders and IRS requests showed willful disregard warranting dismissal. *Reference:* United States Tax Reporter ¶74,336.511(34); 63,305.01(5). IRC §6330.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA MACON DIVISION,

ORDER DISMISSING PLAINTIFF'S CLAIMS

C. ASHLEY ROYAL United States District Judge

On July 19, 2002, this Court issued an Order for Plaintiff to show cause why his case should not be dismissed for his failure to participate in preparing the Rules 16 and 26(f) joint discovery order [Tab 13]. No Response has been filed by Plaintiff. Accordingly, Plaintiff's Claims are HEREBY DISMISSED with PREJUDICE, pursuant to Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure.

FACTUAL AND PROCEDURAL HISTORY

On April 1, 2002, Plaintiff filed this claim against Defendant United States of America pursuant to 26 U.S.C. §6330(d)(1)(A) to set aside a determination by the Internal Revenue Service [Tab 1]. Defendant filed an answer [Tab 2] and this Court issued an Order for both parties to produce a joint proposed scheduling and discovery order no later than July 22, 2002.

On June 13, 2002, Defendant filed a Motion for Summary Judgment [Tab 4], and Plaintiff was given until July 8, 2002 to respond. Plaintiff never filed a Response. Thereafter, on July 18, 2002, Defendant filed both a Proposed Scheduling and Discovery Order [Tab 12] and a Notice of Plaintiff's Failure to Participate in Preparing this Order [Tab 11].

Defendant's Notice contends that on June 17, 2002 a draft of a proposed Scheduling and Discovery Order was sent to Plaintiff and that an enclosed letter requested that Plaintiff review the draft and then telephone Defendant to discuss it. However, Plaintiff never contacted Defendant. Thereafter, Defendant telephoned Plaintiff and left messages on his answering machine on July 3rd and again on July 8th. Plaintiff did not return Defendant's phone calls. In a final effort to confer with Plaintiff, on July 8th Defendant sent a letter to Plaintiff by Federal Express requesting his cooperation. The letter requested that the Plaintiff contact Defendant by telephone or facsimile by July 15, 2002. Again, Plaintiff failed to respond in any manner. Therefore, on July 18, 2002 Defendant finally filed the proposed joint/scheduling order prepared solely by Defendant. Plaintiff did not respond to either Defendant's filing of the proposed order or its Notice of his failure to comply with this Court's Order to cooperate in its preparation.

As a result, on September 27, 2002, the Court issued a Show Cause Order requiring Plaintiff to show cause why his case should not be dismissed for failure to participate in preparing the Rules 16 and 26 joint discovery order, as directed by this Court [Tab 13]. Plaintiff was given ten days to respond. As of this date, no response has been filed.

DISCUSSION

[1] The district court has broad authority under Rule 37 to control discovery, including dismissal as the most severe sanction. Gratton v. Great American Communications, 178 F.3d 1373, 1374 (11th Cir. 1999), As stated by Rule 37(b)(2)(C), if a party fails to obey an order to provide or permit discovery, including an order entered under Rule 26, the court in which the action is pending may make such orders in regard to the failure as are just, including an order dismissing the action.

Dismissal with prejudice is the most severe Rule 37 sanction and is not favored; however, if "there is a clear record of delay or willful contempt and a finding that lesser sanctions would not suffice," the Court may dismiss the action with prejudice pursuant to either Rule 41(b) or Rule 16(f) of the Federal Rules of Civil Procedure. Goforth v. Owens, 766 F.2d 1533, 1535 (11th Cir. 1985) (internal quotations and citations omitted); see also Phipps v. Blakeney, 8 F.3d 788, 790 (11th Cir. 1993); BankAtlantic v. Blythe Eastman Paine Webber, Inc. 12 F.3d 1045, 1049 (11th Cir. 1994). In contrast, violation of a discovery order caused by simple negligence, misunderstanding, or inability

to comply will not justify a Rule 37 dismissal. Id.

In this case, Plaintiff was ordered to confer, develop a proposed Rules 16(b) and 26(f) scheduling and discovery order, and submit such order to the Court. Thereafter, Defendant asked Plaintiff to confer and participate in preparing a Rules 16 and 26 joint discovery order by various methods and on numerous occasions. Plaintiff made no effort to confer with Defendant. Plaintiff has never contacted Defendant, did not return Defendant's phone calls, and failed to respond to letters Defendant sent by Federal Express.

Plaintiff was also ordered to show cause why his case should not be dismissed with prejudice as a result of his failure to comply. Yet Plaintiff again refused to respond to this Court's Order. Accordingly, the Court finds that Plaintiff's failure to comply is not a result of simple negligence, a misunderstanding, or an inability to comply. Rather, the Court finds that Plaintiff's disregard of this Court's numerous requests amounts to an intentional, willful and bad faith failure to comply with the Court's Orders. Moreover, given Plaintiff's complete failure to respond to Defendant's Motion, scheduling and discovery requests, Notice of non-compliance, and this Court's multiple Orders, the Court finds that any lesser sanction than dismissal would not suffice.

CONCLUSION

Therefore, pursuant to this Court's Order of September 27, 2002 and Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure, Plaintiff's claims are HEREBY DISMISSED with PREJUDICE. In light of the Court's dismissal of Plaintiff's claims, Defendant's Motion for Summary Judgment [Tab 4] is also DISMISSED as MOOT.

SO ORDERED this 21st day of October, 2002.

C. ASHLEY ROYAL

United States District Judge

JUDGMENT

Pursuant to the Order of this Court filed October 21, 2002, and for the reasons stated therein, JUDGMENT is hereby entered dismissing case WITH prejudice. Plaintiff shall recover nothing from Defendant. Defendant is also entitled to recover its costs of this action.

This 22nd day of October, 2002.

Gregory J. Leonard, Clerk

By:

H. McCarra, U.S. Deputy Clerk

¶2002-5622

IN Re: PATRICIA L. SIMONE, Debtor. U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) Case No. 02-03283-8B3, Oct. 11, 2002. Years 1998, 1999, 2000, 2001. Decision against Taxpayer.

1. Tax claims in bankruptcy—objection to proof of claim—premature claims. Chap. 13 debtor's objection to IRS's proof of claim was overruled as premature where she hadn't yet filed returns for subject years. *Reference:* United States Tax Reporter ¶68,726.51(10).

UNITED STATES BANKRUPTCY COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION,

ORDER ON DEBTOR'S OBJECTION TO PROOF OF CLAIM OF INTERNAL REVENUE SERVICE

THOMAS BAYNES, JR. Chief Bankruptcy Judge

Chapter 13

[1] THIS CAUSE came on for consideration upon the Debtor's Objection to Proof of Claim of Internal Revenue Service. It appears from the Court's review of the Objection, the Response by the United States of America, and the claims file, that the Debtor has not filed federal income tax returns (Form 1040) for the years 1998, 1999, 2000 and 2001. On March 11, 2002, this Court entered an order requiring the Debtor to file all required federal and state

tax returns within thirty (30) days. Because it appears that Debtor has failed to comply with that Order, the Objection should be overruled without prejudice.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that Debtor's Objection to Proof of Claim of Internal Revenue Service is overruled as premature in that Debtor has not filed the appropriate tax returns.

DONE AND ORDERED at Tampa, Florida on OCT 11 2002.

THOMAS BAYNES, JR.

Chief Bankruptcy Judge

¶2002-5623

UNITED STATES OF AMERICA, PLAINTIFF v. Raul H. ORTIZ and Lucia R. ORTIZ, DEFENDANTS. U.S. District Court, Western Dist. of Texas, (DC TX) CIVIL NO. EP02CA0377, Oct. 16, 2002. Years 1988, 1989, 1990, 1993, 1994, 1996, 1997, 1999, 2000. Decision for Govt.

1. Collection actions—reducing assessments to judgment; foreclosure; sale. Pursuant to stipulation, final judgment was entered against taxpayers for their outstanding income tax and IRC §6672 penalty liabilities in amounts stated plus interest, liens were foreclosed, and residential property's sale was authorized. *Reference:* United States Tax Reporter ¶74,035.01(30); 74,035.03(100). IRC §7403.

JOHNNY K. SUTTON United States Attorney
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS EL PASO DIVISION,

AGREED FINAL JUDGMENT

The parties have filed a Stipulation for Entry of Agreed Final Judgment. The Court finds that the Agreed Final Judgment should be entered as set out in the Stipulation.

It is therefore ORDERED, ADJUDGED AND DECREED:

1. **[1]** that the United States have judgment against Raul H. and Lucia R. Ortiz for income taxes for years 1988, 1989, 1990, 1993, 1994, 1996, 1997, 1999 and 2000 tax years in the unpaid balance of the assessments, plus accruals, of $203,524.33, as of February 4, 2002, plus interest and other additions to tax allowed by law accruing thereafter until paid at the rate provided for by Section 6621, Title 26, United States Code;

2. that the United States have judgment against Raul H. Ortiz for the trust fund recovery penalty imposed under 26 U.S.C. Section 6672 with respect to Gio Grande Millworks, Inc., in the unpaid balance of the assessments, plus accruals, of $135,180.26 as of February 4, 2002, plus interest and other statutory additions accruing thereafter until paid at the rate pro-vided for by Section 6621, Title 26, United States Code;

3. that the United States have judgment against Raul H. Ortiz as a responsible person for Sunburst Export and Import Co. for the trust fund recovery penalties in the unpaid balance of the assessments, plus accruals, of $14,706.15 as of February 4, 2002, plus interest and other statutory additions accruing thereafter until paid at the rate provided for by Section 6621, Page 2 of 3 Title 26, United States Code;

4. that the federal tax liens of the United States are foreclosed against, and the sale is authorized of, the residence with improvements thereon located at 4938

Vista Grande, El Paso, Texas (''the real property''), to secure the settlement among the parties evidenced by the Department of Justice acceptance letter dated August 16, 2002, in the event of a default in payment. The real property is more particularly described, as follows:

Lot 19, Block 1, VISTA GRANDE ESTATES, an addition to the City of El Paso, El Paso County, Texas according to the plat thereof on file in Volume 50 Page 30 Real Property Records, El Paso County Texas.

5. the judgment to be entered will provide that the parties will bear their respective costs, including any possible attorneys' fees or other expenses of litigation.

SIGNED October 16, 2002.

/s/

UNITED STATES DISTRICT JUDGE

AGREED AS TO FORM AND SUBSTANCE:

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PRO-SE DEFENDANT

¶2002-5624

Charles N. HENRY, III, PLAINTIFF v. Bruce BRONSTEIN, ET AL., DEFENDANTS. U.S. District Court, Dist. of Maryland, (DC MD) Civil Action No.: L-02-2790, Sept. 12, 2002. Year 1997. Decision against Taxpayer.

1. Collection due process—review of administrative determination—right to hearing—due process. Taxpayer's 5th Amendment due process claim against IRS Appeals Officer for failing to give him statutory CDP hearing before issuing collection determination letter was dismissed: taxpayer effectively waived his hearing right when he tried, in knowing violation of IRS rules, to tape hearing. Also, taxpayer's underlying protester-type challenges to constitutionality of tax were frivolous. *Reference:* United States Tax Reporter ¶63,305.01(5). IRC §6330.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND,

ORDER

Benson Everett Legg United States District Court

For the reasons stated in the foregoing Memorandum it is this 12th day of September, 2002 hereby ORDERED that:

1. The complaint is DISMISSED;

2. the Clerk is directed to MAIL a copy of the foregoing Memorandum and a copy of this Order to Plaintiff; and

3. The Clerk is further directed to CLOSE this file.

Benson Everett Legg

United States District Court

MEMORANDUM

Benson Everett Legg United States District Judge

[1] Plaintiff Charles Henry filed the instant case on August 22, 2002 seeking to challenge actions taken by individual Internal Revenue Service Appeals Officers in reaching a determination that he is liable for federal income taxes owed for the year 1997. Paper No. 1. Plaintiff alleges that he was deprived of his right to due process of the law under the Fifth Amendment when he was denied a hearing by Mr. Bronstein and when a subsequent decision was issued sustaining the IRS's decision to file a Notice of Levy against Mr. Henry. *Id.*

Plaintiff has attached to his complaint a copy of the determination letter which includes the details of the decision made by Mr. Bronstein. *See Id.* at Ex. E. It appears that Mr. Henry refused to go forward with the hearing he requested pursuant to 26 U.S.C. § 6330 because he was informed that he could not tape record the hearing. *Id.* As a result of his refusal, Bronstein determined that Mr. Henry had waived his right to a hearing. *Id.* at Ex. E, p. 3. Plaintiff does not deny that the hearing was terminated when he insisted that the hearing be recorded. Paper No. 1 at p. 6. In additions, the letter of determination clarifies Mr. Henry's basis for challenging the tax liability as follows:

> The taxpayer has challenged the constitutionality of the statutory rules requiring individuals to file federal income tax returns and the federal governments' right to assess and enforce collection of income taxes through the filing of a Notice of Levy. The taxpayer's arguments are frivolous and without merit.

id. at Ex. E, p. 2.

Under the provisions of 28 U.S.C. § 1915(e)(2) as case "shall be dismissed at any time if the court determines that—(A) the allegation of poverty is untrue; or (B) the action or appeal—(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief." The Constitution of the United States grants Congress the power to tax under Art. I, § 8, cl. 1 (Congress "shall have power to lay and collect taxes"); and under the Sixteenth amendment (Congress "shall have power to lay and collect taxes on incomes, from whatever source derived . . ."). Congress has lawfully delegated the power to tax to the IRS. *See* 26 U.S.C. § 6201 *et seq.*. The IRS has the authority as well as the affirmative duty to assess and enforce taxes. 26 U.S.C. §§ 6201, 7601(a). Mr. Henry's assertions regarding the constitutionality of the government's authority to assess and enforce income taxes are frivolous and his assertion that he was denied a due process hearing is without merit.[1] Mr. Henry admits that he refused to comply with the procedural rules in place for the hearing prohibiting tape recording. Refusal to comply with the rules for the hearing is tantamount to a waiver of his request for that hearing. In short, Mr. Henry can not assert that his rights to due process were denied when the hearing which he claims he was entitled to was waived.

A separate Order follows dismissing this case.

Sept. 12, 2002

Date

Benson Everett Legg

United States District Judge

¶2002-5625

In Re: Clayton B. HILLS and Diane C. HILLS, Debtors. U.S. Bankruptcy Court, Dist. of Arizona, (Bktcy Ct AZ) No. 97-05759-PHX-JMM, Sept. 25, 2002. Years 1992, 1993. Decision against Govt. in part.

1. Tax claims in bankruptcy—bankruptcy estate property—refunds. Chap. 7 trustee's motion for payment of debtors' refund was resolved by stipulation, establishing trustee's right to recover amount stated, but nothing more, on any overpayment claims of debtors for subject years. *Reference:* United States Tax Reporter ¶68,726.52(3).

[1] This Court notes that Mr. Henry does not seek to challenge the "alleged taxes" that were the subject of the IRS proceeding. The fact that Mr. Henry's due process claim hinges on his opportunity to be heard on a frivolous assertion cannot, however, be ignored.

EDWIN P. LEE Law Office of Edwin Lee, P.C. 21639 North 12th Avenue Suite 204 Phoenix, Arizona 85027 Telephone: (623) 582-0606 Attorney for Trustee
PAUL K. CHARLTON United States Attorney District of Arizona Two Renaissance Square 40 North Central, Suite 1200 Phoenix, Arizona 85004-4408
JENNIFER A. GIAIMO Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 683 Ben Franklin Station Washington, D.C. 20044-0683 Telephone: (202) 307-6572 Attorneys for United States of America

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA,

STIPULATED MOTION FOR ENTRY OF ORDER RESOLVING TRUSTEE'S MOTION FOR DETERMINATION AND PAYMENT OF TAX REFUND

Chapter 7

[1] The Chapter 7 Trustee, Maureen Gaughan, (''Trustee'') and the United States of America (the ''United States''), by and through their respective undersigned counsel, hereby stipulate to and jointly move the Court to enter the attached stipulated Order Resolving Trustee's Motion for Determination and Payment of Tax Refund in the above-captioned bankruptcy proceeding subject to notice as required by Fed. R. Bankr. P. 9019. In support of this joint request, the parties respectfully submit as follows:

1. On February 26, 2002, the Trustee filed her Motion for Determination and Payment of Tax Refund.

2. The Trustee and the United States have agreed that, subject to this Court's approval, the Trustee's motion should be resolved according to the following terms:

(a) The Trustee will accept payment of a refund in the amount of $9,853.00 plus interest calculated in the manner and amount as provided by law, on refunds arising from a carryback of a net operating loss, in settlement of the Trustee's claim for refunds in the above-referenced bankruptcy proceeding.

(b) The Trustee agrees that the payment described in paragraph (a) above shall constitute the full and final amount of recovery to which the Trustee is entitled for any and all overpayments of income taxes by the Debtors Clayton B. Hills and Diane C. Hills for the years 1992 and 1993.

(c) Except to the extent that the Trustee shall be entitled to the payment set forth in paragraph (a) above, any and all relief requested in the Trustee's motion shall be denied.

(d) Each party shall bear their own attorney's fees and costs.

3. Based on the parties' settlement as set forth above, the parties request this Court to approve the settlement by entering the proposed Order Resolving Trustee's Motion for Determination and Payment of Tax Refund, which is submitted herewith.

WHEREFORE, the parties stipulate to the entry of the proposed Order submitted herewith. Respectfully submitted this 17 day of September, 2002.

By:

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ORDER RESOLVING TRUSTEE'S MOTION FOR DETERMINATION AND PAYMENT OF TAX REFUND

HONORABLE JAMES M. MARLAR
United States Bankruptcy Judge

Pending before the Court is the Stipulated Motion for Entry of Order Resolving Trustee's Motion for Determination and Payment of Tax Refund filed by Chapter 7 Trustee, Maureen Gaughan, (''Trustee'') and the United States of America (the ''United States''). Having considered the stipulated motion, the submissions, and the applicable law, the Court

Orders that the Stipulated Motion for Entry of Order Resolving Trustee's Motion for Determination and Payment of Tax Refund is GRANTED.

In accordance with the parties' settlement agreement, the Court further ORDERS the following:

(a) The Trustee shall accept payment of a refund in the amount of $9,853.00 plus interest calculated in the manner and amount as provided by law, on refunds arising from a carryback of a net operating loss, in settlement of the Trustee's claim for refunds in the above-referenced bankruptcy proceeding.

(b) The payment described in paragraph (a) above shall constitute the full and final amount of recovery to which the Trustee is entitled for any and all overpayments of income taxes by the Debtors Clayton B. Hills and Diane C. Hills for the years 1992 and 1993.

(c) Except to the extent that the Trustee shall be entitled to the payment set forth in paragraph (a) above, any and all relief requested in the Trustee's motion is denied.

(d) Each party shall bear their own attorney's fees and costs.

This is a FINAL JUDGMENT.

Dated this ___ day of SEP 25 2002, 2002.

HONORABLE JAMES M. MARLAR

United States Bankruptcy Judge

¶2002-5626

Scott THOMSON, PLAINTIFF-APPELLANT v. INTERNAL REVENUE SERVICE, DEFENDANT-APPELLEE. U.S. Court of Appeals, Eleventh Circuit, (CA11) No. 02-11192, Oct. 15, 2002. District Court, (2001, DC FL) 88 AFTR 2d 2001-5620, 2001-2 USTC ¶50614, affirmed per curiam. Year 1994. Decision for Govt.

1. Actions against U.S.—damages—failure to release lien; wrongful collection—sovereign immunity—exhaustion of administrative remedies. District court properly granted govt. jurisdictional dismissal of taxpayer's action seeking damages from allegedly illegal lien: taxpayer's bare, unsupported facial jurisdictional allegation that he had exhausted his administrative remedies under IRC §7432 and IRC §7433 didn't prove that he actually did so. *Reference:* United States Tax Reporter ¶74,325.03(10); 74,335.01(5). IRC §7432; 7433.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT,

Appeal from the United States District Court for the Southern District of Florida

Before BLACK, MARCUS, and GODBOLD, Circuit Judges.

PER CURIAM:

[DO NOT PUBLISH]

[1] Plaintiff Scott Thomson filed this action against the United States seeking an injunction and two million dollars in damages as a result of a federal tax lien imposed upon his property for purposes of collecting a tax penalty assessed against him pursuant to 26 U.S.C. § 6672 of the Internal Revenue Code (''IRC''), based on the failure of the company for which he worked to submit payroll withholding taxes.[1] He based his claims upon sections 7432, 7425, 6320, and 6330, alleging the lien was imposed in violation of IRS rules

[1] All statutory references herein are to the Internal Revenue Code of 1986, 26 U.S.C.

and regulations and that it should have been released because it was legally unenforceable.[2]

The United States moved to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on grounds that the Plaintiff had not exhausted all administrative remedies available to him. The district court granted the government's motion and denied the plaintiff's motion for reconsideration. We affirm.

We review de novo a district court's order granting a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). Chaney v. Tennessee Valley Authority, 264 F.3d 1325 (11th Cir. 2001). The issue is whether the district court erred in dismissing plaintiff's complaint where the plaintiff has alleged the existence of subject matter jurisdiction on the face of his complaint.[3]

The plaintiff maintains he was denied the opportunity to put forth evidence on the merits of his case which, when done, would also prove the existence of subject matter jurisdiction. He reasoned that his complaint comports with the liberal pleading requirements of the Federal Rules of Civil Procedure and that the allegations of the complaint were sufficient to establish the propriety of the court's jurisdiction. We disagree.

There are two forms of attacking jurisdiction under Fed. R. Civ. P. 12(b)(1). The first is a ''facial attack'' on the complaint itself. Lawrence v. Dunbar, 919 F.2d 1525, 1528–29 (11th Cir. 1990), citing, Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1981), cert. denied, 449 U.S. 953 (1980). This form requires the court ''merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction.'' Id. The facts alleged by the plaintiff are given the same presumption of truthfulness as they would receive under a 12(b)(6) motion, i.e. that they are true. Barnett v. Okeechobee Hospital, 283 F.3d 1232, 1237 (11th Cir. 2002); Lawrence, 919 F.2d at 1529, citing Williamson v. Tucker, 645 F.2d 404, 412 (5th Cir. 1980), cert. denied, 454 U.S. 897 (1981).

The second form of attack is a ''factual attack.'' This form questions the existence of subject matter jurisdiction in fact, without regard to the allegations of the complaint. Lawrence, 919 F.2d at 1528–29. There is no presumption that the allegations are true. Additionally, the existence of disputed facts will not preclude the trial court's determination of the merits of the jurisdictional claim. Barnett, 283 F.3d at 1238 (citation omitted). The court is free to consider matters outside the pleadings such as testimony and affidavits. Id. at 1529. The plaintiff may not rest on bare allegations of the complaint but must come forward with evidence to satisfy the court that it does in fact have jurisdiction to hear the case. In this case, the plaintiff was faced with a factual attack upon the district court's jurisdiction.

The United States, as a sovereign, may not be sued unless there exists express consent to be sued. Mid-South Holding Co. v. United States, 225 F.3d 1201, 1203 (11th Cir. 2000) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). The United States has consented to be sued for damages pursuant to strictures of §§ 7432 and 7433 of the IRC. Section 7432 provides that a taxpayer may bring a civil action for damages against the United States if the IRS knowingly or negligently fails to release a lien under section 6325 of the Internal Revenue Code. 26 U.S.C. § 7432(a). Section 7433 provides that a taxpayer may bring a civil action for damages against the United States if the IRS recklessly or intentionally disregards any provision of the Internal Revenue Code with regard to collection of taxes. To bring a claim for damages pursuant to either, a taxpayer must

[2] Plaintiff asserted in his complaint that subject matter jurisdiction was proper under § 7432. In his motion in opposition of the government's motion to dismiss, plaintiff for the first time raised § 7433 as a basis for the district court's jurisdiction. The district court treated plaintiff's latter assertion as though an amended complaint had been filed; therefore, we also address the issue of jurisdiction under section 7433.

[3] There are a number of other issues raised on appeal that are without merit and need not be discussed.

first exhaust all his or her administrative remedies.[4]

Exhaustion of administrative remedies is a jurisdictional prerequisite to suit in federal court. The Plaintiff alleged on the face of his complaint that he exhausted all of his administrative remedies but no evidence was put forth to establish the truth of those allegations. Bare allegations of jurisdictional requirements are insufficient to overcome the doctrine of sovereign immunity without more.

The district court did not err in dis-missing Thomson's complaint for lack of subject matter jurisdiction.

AFFIRMED.

¶2002-5627

In Re: Mark D. PALUMBO, SSN: 027-44-3349, and Patricia A. PALUMBO, SSN: 016-50-7864. Debtors. Mark D. PALUMBO and Patricia A. PALUMBO, PLAINTIFFS v. UNITED STATES OF AMERICA, Internal Revenue Service, DEFENDANT. U.S. Bankruptcy Court, Dist. of Arizona, (Bktcy Ct AZ) Case No. 01-04495-PHX-RTB; Adv. No. 01-776, Aug. 8, 2002. Year 1988. Decision for Taxpayer and for Govt.

1. Tax claims in bankruptcy—100% penalty for failure to pay over trust fund taxes—limitations periods. Pursuant to stipulation, date that limitations periods on collection of Chap. 7 debtors' IRC §6672 penalty debts expired was established. *Reference:* United States Tax Reporter ¶68,726.52(15).

IN THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA,

ORDER OF DISMISSAL

HONORABLE REDFIELD T. BAUM
United States Bankruptcy Judge

Chapter 7

Upon consideration of the Stipulation for Dismissal and good cause appearing, THE COURT FINDS THAT:

[1] 1. The statute of limitations for collection of the Trust Fund Recovery Penalty Taxes assessed by the IRS against Mark D. Palumbo on February 6, 1989 for the quarterly tax period ending September 30, 1988 expired on May 16, 2002;

2. The statute of limitations for collection of the Trust Fund Recovery Penalty Taxes assessed by the IRS against Patricia A. Palumbo on May 8, 1989 for the quarterly tax period ending September 30, 1988 expired on August 14, 2002;

FURTHER, THE COURT HEREBY ORDERS THAT:

3. Each party shall bear its own fees and costs; and

4. This adversary proceeding is dismissed with prejudice.

Dated this ___ day of OCT 08 2002, 2002.

HONORABLE REDFIELD T. BAUM

United States Bankruptcy Judge

¶2002-5628

Ronald J. HAZE and Donna D. HAZE, PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Arizona, (DC AZ) No. CIV 02-0742-PHX-EHC, Sept. 30, 2002. Year 1992. Decision for Govt.

1. Limitations periods on refunds—untimely suit—effect of second claim. Taxpayers' refund complaint was dismissed as untimely: taxpayers filed suit more than 8 years after IRS mailed 1st disallowance notice; and taxpayers' subsequently filed claim was irrelevant for IRC §6532 purposes where it merely duplicated original. *Reference:* United States Tax Reporter ¶65,325.01(15); 74,225.01(20). IRC §6532; 7422.

[4] Treasury regulations specify the administrative remedies to exhaust. Administrative remedies for section 7432 are set forth in Title 26 C.F.R. § 301.7432-1(e) and (f)(1) and provide that a taxpayer must file a written claim for damages with the district director before filing a suit for damages in the district court for failure to release a tax lien. Remedies for section 7433 are set forth in Title 26 C.F.R. § 301.74331(d) and (e) which contains a similar procedure for filing an administrative claim prior to instituting an action in district court. Both regulations apply to "civil actions ... filed in federal district court after January 30, 1992."

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

ORDER

Earl H. Carroll United States District Judge

Pending before the Court is the United States' Motion to Dismiss[1] [Dkt. 7], filed August 9, 2002.

BACKGROUND:

Plaintiffs filed their 1992 income tax return with the Internal Revenue Service (the "IRS") on April 15, 1993. [Dkt. 9, Exh. A]. The IRS received Plaintiffs' amended tax return and administrative claim for refund on June 14, 1993. [Dkt. 9, Exh. A]. The IRS issued a refund to Plaintiffs based on their original return but subsequently disallowed their administrative claim on January 24, 1994. [Dkt. 1, Exh. 2].

Plaintiffs attempted to file a second administrative claim for refund on April 4, 2000. [Dkt. 1, Exh. 2]. The IRS disallowed this claim on April 20, 2000 after determining it duplicated the earlier administrative claim for refund filed on June 14, 1993. [Dkt. 1, Exh. 2]. On April 22, 2002, Plaintiffs filed this action, requesting a refund of $3,772.00 plus interest as well as litigation costs and fees. [Dkt. 1, ¶s 17, 24].

UNITED STATES' MOTION TO DISMISS:

[1] The Supreme Court held a taxpayer must comply with Internal Revenue Code Sections 6511(a) and 7422(a) to maintain a refund suit. United States v. Dalm, 494 U.S. 596, 602 [65 AFTR 2d 90-1210], 110 S.Ct. 1361, 1365 [65 AFTR 2d 90-1210] (1990). Taxpayers are not permitted to sue for a tax refund in any court until they have filed an administrative claim for refund with the Secretary of Treasury. 26 U.S.C. § 7422(a). The taxpayer must file this administrative claim within three years of filing a return or two years of paying the tax, whichever expires later. 26 U.S.C. § 6511(a). Unless the administrative claim is timely filed, no tax refund is permissible after the deadlines provided in 26 U.S.C. § 6511(a). 26 U.S.C. § 6511(b)(1). Additionally, the taxpayer must file any refund suit within two years after the IRS mails a notice of disallowance regarding the administrative claim. 26 U.S.C. § 6532(a).

The IRS disallowed Plaintiffs' first administrative claim refund on January 24, 1994. [Dkt. 9, Ex A]. This refund suit, dated April 22, 2002 [Dkt. 1], was filed more than two years after the IRS mailed its notice of disallowance regarding Plaintiffs' administrative claim. Plaintiffs' second administrative claim [Dkt. 1, Exh 2], which merely duplicated their prior administrative claim, does not extend the two years statute of limitations prescribed by 26 U.S.C. § 6532(a)(1). Huettl v. United States, 675 F.2d 239, 241 [49 AFTR 2d 82-1404] (9th Cir. 1982). Plaintiffs' refund suit is therefore untimely, and the Court lacks jurisdiction to review the matter.

Accordingly,

IT IS ORDERED that United States' Motion to Dismiss [Dkt. 7] is GRANTED, the action is DISMISSED, and the Clerk of Court shall enter judgment accordingly.

DATED this 30 day of September, 2002.

Earl H. Carroll

United States District Judge

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT DISTRICT OF ARIZONA

Ronald J. Haze and Donna, D. Haze, Plaintiff(s), v. United States of America, Defendant(s).

CIV 02-742 PHX-EHC

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

[1] Plaintiffs have not filed a Response to United States' Motion to Dismiss.

IT IS ORDERED AND ADJUDGED per the Court's order of October 1, 2002, granting the Defendant's motion to dismiss this case is closed. Plaintiff to take nothing.

October 1, 2002

Date

RICHARD H. WEARE

District Court

Executive/Clerk

/s/

(By) Deputy Clerk

¶2002-5629

UNITED STATES OF AMERICA, PLAINTIFF v. Robert L. HENKELL, ET AL., DEFENDANTS. U.S. District Court, Eastern Dist. of California, (DC CA) Case No.: S-99-cv-2311-MLS-GGH, Sept. 27, 2002. Decision for Govt.

1. Collection actions—sale of assets. Pursuant to stipulation, govt. was granted summary judgment on its collection complaint to force sale of securities and other assets held in trust account and apply proceeds to taxpayer's outstanding tax debts. *Reference:* United States Tax Reporter ¶74,035.03(100). IRC §7403.

JOHN K. VINCENT United States Attorney
NORMA J. SCHROCK Trial Attorney, Tax Division U.S. Department of Justice PO Box 683 Ben Franklin Station Washington DC 20044-0683 (202) 305-0868 Attorney for the United States of America

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA,

ORDER

MILTON L. SCHWARTZ United States District Court Judge

[1] Upon consideration of the United States' Motion for Summary Judgment, the Stipulation filed August 14, 2002, (whereby Geraldine L. Henkell and Robert L. Henkell withdraw any and all objection to the motion), and all other relevant matters, it is hereby ORDERED that

1. The United States' Motion for Summary Judgment is GRANTED;

2. Judgment shall be entered against defendants Robert L. Henkell and Geraldine L. Henkell, and in favor of plaintiff, United States of America.

3. The Charles Schwab Co., Inc., shall sell all stock, securities and other assets held in account number 3519-0871, in the name of Stan N. Capito and William L. Sefton, as trustees of the G-Force Irrevocable Trust, and remit all proceeds (less transaction costs), together with any cash assets in the account, to the United States Treasury at the following address:

Department of Justice
Tax Division, CTS-Western
Room 7907
PO Box 683
Ben Franklin Station
Washington, DC 20044

4. The United States shall apply the proceeds derived from the sale of property referenced above (net of any costs and taxes resulting from the sale) towards the tax liabilities of Robert L. Henkell, defendant in this case.

5. The sale of the stock referenced above shall be completed within thirty days from the date of this Order.

9/27/02

Date

MILTON L. SCHWARTZ

United States District Court Judge

Submitted this 19th day September, 2002

NORMA J. SCHROCK

Trial Attorney, Tax Division

U.S. Department of Justice

Post Office Box 683

Ben Franklin Station

Washington, D.C. 20044

Telephone: (202) 305-0868

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing [PROPOSED] ORDER has been made this 19th day of September, 2002 by personal delivery:

Robert L. Henkell

Geraldine L. Henkell

2931 Camino Heights Drive

Camino, California 95709

NORMA J. SCHROCK

Trial Attorney, Tax Division

U.S. Department of Justice

JUDGMENT IN A CIVIL CASE

XX -- Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered as to defendants Robert L. Henkell and Geraldine L. Henkell.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH COURT'S ORDER OF SEPTEMBER 27, 2002.

Jack L. Wagner,

Clerk of the Court

Entered October 8, 2002

¶2002-5630

UNITED STATES OF AMERICA, PLAINTIFF v. Gordon L. ORMESHER, ET AL., DEFENDANTS. U.S. District Court, Dist. of Idaho, (DC ID) CV00-0486-N-EJL, Sept. 17, 2002. Earlier proceedings at (2002, DC ID) 90 AFTR 2d 2002-6710; (2002, DC ID) 89 AFTR 2d 2002-2513; (2001, DC ID) 88 AFTR 2d 2001-5917; and (2001, DC ID) 88 AFTR 2d 2001-5834. Years 1986, 1987, 1988, 1990, 1991, 1992, 1993, 1994, 1995. Decision for Govt.

1. Collection actions—parties. Dismissal of 1 party from collection action was ordered pursuant to govt.'s request, and case was closed. *Reference:* United States Tax Reporter ¶74,035.03(60). IRC §7403.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO,

ORDER

[1] Pending before the Court is the United States' Request to Dismiss Althea L. Ormesher. Having considered the request and the relevant facts, the Court ORDERS that the request is GRANTED and that the case is hereby closed.

Dated this 27th day of September, 2002.

/s/

UNITED STATES DISTRICT JUDGE

Respectfully submitted this 17th day of September, 2002.

THOMAS E. MOSS

United States Attorney

DAVID CHENG

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¶2002-5631

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Barrie Leslie KONICOV, DEFENDANT-APPELLANT. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-2492, Nov. 1, 2002. District Court affirmed per curiam. Years 1994, 1995, 1996. Decision for Govt.

1. Tax crimes—willful failure to file returns; conspiracy to defraud U.S.—sentencing—evidence. Tax protester's conviction and sentence for willful failure to file returns and conspiracy to defraud U.S. were affirmed: district court properly ordered taxpayer's removal from court for 1 hour due to his "obstreperous behavior" after he refused to rise for judge's entrance, ignored instructions not to testify during opening statements, and continued pointless debate about court's jurisdiction. Also, taxpayer wasn't deprived of fair trial by prosecutor's unflattering description of him as tax cheat and con man during opening statements or by introduction of evidence about his divorce and his "De-Tax America" program where descriptive statements were supported by evidence; marital status information was directly relevant to his return filing obligations; and De-Tax America program was part of underlying fraud scheme. *Reference:* United States Tax Reporter ¶72,035.04(5). IRC §7203.

United States Court of Appeals, Sixth Circuit,

Before SILER and DAUGHTREY, Circuit Judges; and ALDRICH, District Judge.*

ORDER

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION*

This is an appeal from a judgment and commitment order in a criminal prosecution. The parties have agreed to waive oral argument and, upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

In 2001, Barrie Leslie Konicov was named in a five-count indictment in connection with an elaborate scheme of tax fraud and failure to file tax returns. Konikov was subsequently tried to a jury and convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and willful failure to file an individual income tax return (three counts), in violation of 26 U.S.C. § 7203. The district court sentenced Konicov to a total of eighty-seven months in prison and a three-year period of supervised release.

Konicov was prosecuted for his failure to file personal income tax returns from 1994 through 1996 and for his role in devising and promoting a tax-evasion and credit card fraud scheme. Konicov insisted on representing himself, with stand-by counsel appointed by the district court, and apparently participated in various pre-trial proceedings without incident. Konicov's behavior, however, changed dramatically when he appeared before the empaneled jury on the first day of his trial. A review of the transcript first shows that the district court admonished Konicov for his failure to rise when the judge entered the courtroom, even though this had not even an issue during pre-trial. The government presented its opening statement, then Konicov was given his chance to make an opening statement to the jury. Konicov's statement eventually dissolved into attempts to present testimony to the jury over the court's express prohibition. Konicov then repeatedly began demanding of the district court the source of its jurisdiction, specifically whether the court had jurisdiction under the common law or under admiralty or maritime law. The court repeatedly asked, instructed, and begged Konicov to abandon his line of "tax protestor garbage" and, in response, Konicov accused the court "of threatening a federal witness in a federal case." After Konicov engaged in several minutes of his deliberate, obstreperous behavior, the court ordered Konicov's removal at 1:40 p.m. while Konicov's stand-by counsel remained. The government introduced three witnesses who produced foundation testimony for the admission of documentary exhibits, the veracity or relevancy of which has never been questioned. The court recessed and Konicov was readmitted to trial, where he remained without further in-

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* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

* Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

cident for the ensuing four and one-half days of trial.

The government put on evidence of Konicov's failure to file income taxes for the years in question, of his role in developing and marketing a scheme to defraud the United States (a "De-Tax America" program of sham trusts), and of his scheme to defraud credit card companies by satisfying debt with worthless money orders. Konicov listened to the introduction of this without significant objections. The case went to the jury and Konicov was found guilty of four counts of the indictment.

[1] On appeal, counsel for Konicov does not challenge the quantity or quality of the evidence adduced against his client. Counsel, instead, charges that the district court erred in removing Konicov for one hour and eight minutes the first day of trial and that the prosecutor made improper remarks during its case in chief.

A defendant may be removed from the courtroom during his own trial when he "engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial." Illinois v. Allen, 397 U.S. 337, 338 (1970). "It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated." Id. at 343. The Court set forth three constitutionally permissible ways for a trial court to exercise its discretion in dealing with such a situation: 1) binding and gagging the defendant; 2) citing him for contempt; and 3) expelling him from the courtroom. Id. at 344.

The district court did not make a mistake by ordering Konicov's removal from his trial for slightly more than one hour. The record plainly shows that Konicov opened his jury trial by refusing to acknowledge the dignity of the district court by 1) remaining seated when asked to rise for the entrance of the judge, 2) by ignoring repeated instructions not to testify during his opening statement, and 3) by engaging in a pointless debate with the district court over the court's jurisdiction after making his record and repeatedly be-ing asked to desist. The evidence admitted during Konicov's absence consisted mainly of documents, the veracity or relevancy of which has not been challenged. Finally, the duration of Konicov's absence was just over one hour, and he was promptly readmitted when he complied with the district court's behavior guidelines. Counsel for Konicov cannot cite this court to any analogous facts in which the district court was found to be in error in ordering a similar limited, well-deserved, absence and no such case has been located. This assigned error lacks merit.

Konicov also contends that he was deprived of a fair trial by the cumulative effect of several comments made by the prosecutor during opening and closing statements and by the admission into evidence of Konicov's divorce, details of his "De-Tax America" and other bad acts. In this case, however, because Konicov made no objection to the allegedly improper conduct and statements at trial, this court will review for plain error only. See Fed.R.Crim.P. 52(b); United States v. Wiedyk, 71 F.3d 602, 609–11 (6th Cir. 1995). Under the plain error standard, the remarks are reviewed for their effect on the trial's underlying fairness. United States v. Olano, 507 U.S. 725, 735–37 (1993); see also United States v. Leon, 534 F.2d 667, 679 (6th Cir.1976). If this court finds a remark to be improper, the remark then is judged for its flagrancy, that is, as assessment of 1) the degree to which the remarks might mislead the jury and prejudice the accused, including whether a cautionary instruction was given to the jury; 2) whether the remarks were isolated or permeated the trial; 3) whether the remarks were deliberately or accidentally made; and 4) the strength of the evidence against the accused. United States v. Dakota, 197 F. 3d 821, 828 [84 AFTR 2d 99-7427] (6th Cir.1999).

An examination of the record and law under the rigorous foregoing standard shows that this assigned error lacks merit.

Konicov highlights comments made in opening statement comparing Konicov to a ''tax cheat'' and ''con man,'' unflattering characterizations to be sure, but characterization that were completely supported by the proofs. One could fairly say that the government was merely setting forth the evidence it would present in its case and what it would demonstrate. The government must be given leeway to argue reasonable inferences from the evidence. United States v. Collins, 78 F.3d 1021, 1040 [77 AFTR 2d 96-1274] (6th Cir.1996). Indeed, has referred to himself as a tax ''tax protestor'' in two billboards during an unsuccessful campaign for a seat in the United States House of Representatives and he admits to having attempted to ''withdraw'' from the obligations of the Social Security System while still collecting benefits under that System. Evidence of Konicov's marital status was directly relevant to his obligation to file income tax returns and the details of his ''De-Tax America'' scheme were part of the body of the fraud being charged. The evidence against Konicov was overwhelming and his decision to represent himself did not entitle him to greater rights than a litigant represented by counsel. United States v. Merrill, 746 F.2d 458, 465 (9th Cir.1984). This appeal lacks merit.

Accordingly, the district court's judgment is affirmed.

¶2002-5632

In Re: James W. TAYLOR, JR. and Christina K. TAYLOR, Debtors. U.S. Bankruptcy Court, Western Dist. of Kentucky, (Bktcy Ct KY) Case No. 02-11159, Oct. 25, 2002. Year 1997. Decision for Govt.

1. Bankruptcy court procedure—return filing. Chap. 13 debtors agreed to file income tax return for prepetition year or show that one was already filed or wasn't required, to file any postpetition returns and pay any tax due while case was pending, and that any failure to comply would result in case's dismissal. *Reference:* United States Tax Reporter ¶68,726.52(3).

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UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF KENTUCKY,

AGREED ORDER

Joan L. Cooper United States Bankruptcy Judge

Chapter 13

[1] WHEREAS, the debtors commenced a voluntary case under Chapter 13 of the Bankruptcy Code on June 24, 2002; and

WHEREAS, the records of the IRS show that debtors have not filed a federal income tax return 1040 for the prepetition taxable period ending December 31, 1997;

IT IS AGREED AND ORDERED that on or before December 21, 2002 the debtors shall file the federal income tax return 1040 for the prepetition taxable period ending December 31, 1997 with the Internal Revenue Service, Insolvency Section II, P.O. Box 1706, Stop 510, Louisville, Kentucky 40201 or furnish to the IRS at the same address information establishing that this tax return has already been filed or that no return is due to be filed with respect to the subject tax period;

That the debtors shall timely file any and all postpetition federal income tax returns and pay any tax shown as due thereon during the pendency of the instant bankruptcy case; and

That in the event that the debtors fail to comply with the prepetition federal tax return filing conditions as specified in this Agreed Order, or fails to timely file and

pay any postpetition federal taxes due the IRS during the pendency of this case, upon proper notice of the debtors' default to the Court by the United States, the Court will dismiss the instant bankruptcy proceeding without further notice and hearing.

October 25, 2002

Joan L. Cooper

United States Bankruptcy Judge

STEPHEN B. PENCE

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Dated: 10/22/2002

¶2002-5633

UNITED STATES OF AMERICA, PLAINTIFF v. Edward G. NOVOTNY, in his individual capacity and as Trustee of Midwest Limited and Sunrise Investment; Etta B. Novotny, in her individual capacity and as Trustee of Midwest Limited and Sunrise Investments; and The State of Colorado, Department of Revenue, DEFENDANTS. U.S. District Court, Dist. of Colorado, (DC CO) Civil Action No. 99-RB-2196 (PAC), Sept. 24, 2002. Earlier proceedings at (2002, DC CO) 90 AFTR 2d 2002-6690; (2002, DC CO) 90 AFTR 2d 2002-5684; (2001, DC CO) 89 AFTR 2d 2002-338; and (2001, DC CO) 88 AFTR 2d 2001-7194, granting in part and denying in part reconsideration of (2001, DC CO) 88 AFTR 2d 2001-6204, 184 F Supp 2d 1071, 2001-2 USTC ¶50719 [88 AFTR 2d 2001-6204]. Decision for Taxpayer.

1. Actions to enforce liens—foreclosure and sale—property held by trust—stay of collection. Taxpayer was granted stay of earlier foreclosure and sale order pending resolution of his appeal. *Reference:* United States Tax Reporter ¶74,035.03(80); 74,035.03(100). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

Judge Robert E. Blackburn

ORDER STAYING ORDER OF FORECLOSURE AND DECREE OF SALE

Blackburn, J.

[1] This matter is before the court on defendant Edward Novotny's Motion to Stay Order of Foreclosure and Decree of Sale, filed September 23, 2002. The court entered and Order of Foreclosure and Decree of Sale [# 302] on Monday, September 16, 2002. Novotny had filed a Notice of Appeal [# 300] the previous Friday, September 13, 2002.

The Order of Foreclosure and Decree of Sale permits the plaintiff to enforce the judgment previously entered against the defendants in this case. Enforcement of the court's judgment should be stayed pending resolution of Novotny's appeal of the judgment.

THEREFORE IT IS ORDERED that, under Fed. R. Civ. P. 8(a), the court's Order of Foreclosure and Decree of Sale [# 302], filed September 16, 2002, is STAYED pending resolution of the appeal filed by defendant Edward G. Novotny.

DATED: September 24, 2002.

BY THE COURT:

Robert E. Blackburn

United States District Judge

¶2002-5634

Jerome SPADE, PLAINTIFF v. STAR BANK, ET AL., DEFENDANTS. U.S. District Court, Eastern Dist. of Penn-sylvania, (DC PA) CIVIL ACTION NO. 01-3349, Nov. 6, 2002. Year 1993. Deci-sion against Taxpayer.

1. 100% penalty for failure to pay over trust fund taxes—liability—contribution—responsible person; willfulness. Taxpayer/CFO's claims for contribution to his IRC §6672 liability from various outside parties/non-corp. officers were dismissed on summary judgment: taxpayer didn't prove that either temp. agency, which initially found taxpayer his employment with corp., or outside investment advisor or self-employed financial consultant were ''responsible persons'' for paying corp.'s trust fund taxes. Notably, taxpayer didn't show that any of defendants had any significant control over corp.'s finances, check signing or bill paying authority, or other significant involvement for IRC §6672 purposes; and failed to otherwise prove that their failures to pay were willful disregard of known tax debt. *Reference:* United States Tax Reporter ¶66,725.05(20); 66,725.05(10). IRC §6672.

2. 100% penalty for failure to pay over trust fund taxes—liability—contribution—state law claims—limitations periods. Taxpayer/CFO was time-barred from asserting Pennsylvania law negligence and misrepresentation claims against outside parties/non-corp. officers who allegedly precipitated corp.'s failure to pay over trust fund taxes and taxpayer's consequent IRC §6672 liability: taxpayer filed suit more than 2 years after he should have been able to ascertain defendants' alleged negligence or misrepresentations surrounding tax payments. Similarly, taxpayer's contract claim, that IRC §6672 liability was employee expense for which he had employment contract right to reimbursement, was untimely filed more than 4 years after claim arose, which at latest was over 5 years earlier when taxpayer received tax notice from IRS. *Reference:* United States Tax Reporter ¶66,725.01(65). IRC §6672.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

MEMORANDUM

Robert F. Kelly, Sr. J.

Before this Court are three Motions for Summary Judgment filed by Defendants Donald C. Molton, Jr. (''Molton''), Robert Half International, Inc. (''RHI'') and Clifford Crowley (''Crowley''). Plaintiff, Jerome Spade (''Spade''), brought this action pursuant to 26 U.S.C. § 6672(d), seeking contribution from the Defendants for payment of a tax penalty assessed against him. Spade's lawsuit also includes state law claims for breach of employer's duty of care, negligence, misrepresentation and breach of contract. For the following reasons, the Motions are granted.

I. Factual Background[1]

Spade was employed as an accountant temp for RHI, a temporary employment agency. In April 1993, RHI placed Spade at Heintz Corporation (''Heintz''). While Spade was acting as Heintz's Chief Financial Officer (''CFO''), Heintz failed to make its payroll tax payments. At the end of July 1993, RHI terminated Spade's employment because of Heintz's failure to pay RHI for its services. At this time, Spade was hired as a full-time employee for Heintz. On or about August 4, 1993, Heintz filed for Chapter 11 bankruptcy. Spade ceased being Heintz's CFO in September 1995.

By letter dated September 28, 1996, the Internal Revenue Service (''IRS'') informed Spade that he was being assessed for the 1993 unpaid payroll taxes by Heintz. The IRS was legally allowed to

[1] The Complaint fails to include a fact section. As a result, the Court has taken the following facts from the exhibits attached to Defendants' Summary Judgment Motions and Plaintiff's Responses to said Motions. For purposes of these Motions for Summary Judgment, the Court must accept the ''evidence in the light most favorable to the non-movant, giving that party the benefit of all reasonable inferences derived from the evidence.'' Waldron v. SL Indus., Inc., 56 F.3d 491, 496 (3d Cir. 1995)(citation omitted).

seek payment from Spade in accordance with 26 U.S.C. § 6672(a). Section 6672(a) provides that individuals who were required to collect, account for, and pay taxes for a business may be personally liable for a penalty if the business fails to pay the owed taxes. 26 U.S.C. § 6672(a). According to the IRS, the amount of Heintz's unpaid taxes was $ 25,999.86, however, due to accrued penalties and interest, the assessment against Spade amounted to $ 123,826.01.[2] Spade contested his responsibility for the assessment against him. Following litigation, Spade and the IRS reached a settlement on March 16, 2000. The general terms of the settlement required Spade to pay $12,500 according to a payment plan concluding with a final payment to be paid in August 2000. Under the terms of the plan, Spade would be severely penalized for any missed payments. In August 2000, Spade successfully paid off the $12,500 without any penalties. In connection with the IRS litigation and settlement, Spade states that he has paid an additional $10,500 in attorney's fees.

On or about March 16, 2001, Spade filed suit in the Philadelphia Municipal Court for $10,000 against Star Bank, N.A. (''Star Bank''), Ralph D. Ketchum, Molton and Phillip Rice. Spade dismissed the action. On July 2, 2001, Spade filed the instant action against the aforementioned adding the following as defendants: RHI, Heintz, James Doyle, Empire Management Group, Inc. (''Empire Management''), Crowley and Grisanti, Galef & Goldress, Inc. (''GGG Inc.'').[3] An arbitration hearing on this case was held on June 5, 2002. On June 6, 2002, an arbitration award was entered.

Spade requested a trial de novo on July 1, 2002. On this same date, Spade filed a Motion for Summary Judgment Against RHI. RHI's response to Spade's motion included a Cross-Motion for Summary Judgment. Spade's Motion for Summary Judgment Against RHI was denied on September 11, 2002. The Court is currently addressing RHI's Cross-Motion for Summary Judgment. In addition, the Court is also addressing the Motions for Summary Judgment filed by Molton and Crowley.

II. Legal Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper ''if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'' Fed. R. Civ. P. 56(c). Essentially, the inquiry is ''whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.'' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–252 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249. A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present ''specific facts showing that there is a genuine issue for trial.'' Fed. R. Civ. P. 56(e). Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325 (1986)). Further, the non-moving party has the burden of producing evidence to establish *prima facie* each element of its claim. Celotex, 477 U.S. at 322–23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of ma-

[2] The final IRS assessment of $ 25,999.86 related to Heintz's unpaid payroll taxes for the last week of June 30, 1993 and the first week of July 1993.

[3] On February 8, 2002, the Court issued an Order dismissing Heintz, Empire Management and GGG Inc. due to Spade's lack of prosecution for failure to make service of complaint. (Dkt. No. 29 (Court Order)).

terial fact, then summary judgment is proper. Id. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

III. DISCUSSION

A. 26 U.S.C. § 6672[4]

By law, employers must regularly withhold federal income and Social Security taxes from their employees' wages. Luce v. Luce, 119 F. Supp.2d 779, 783 [86 AFTR 2d 2000-6977] (S.D. Ohio 2000)(citing 26 U.S.C. §§ 3101–02, 3402). The taxes withheld from each employee's wages constitute a special fund held in trust under the Internal Revenue Code (''IRC'') for the exclusive use of the United States. See 26 U.S.C. § 7501. On a quarterly basis, these taxes are collected from employers. Luce, 119 F. Supp.2d at 783. ''The withholding taxes are not a mere debt, but 'are part of the wages of the employee, held by the employer in trust for the government.''' Id. (quoting Gephart v. United States, 818 F.2d 469, 472 [59 AFTR 2d 87-1099] (6th Cir. 1987); 26 U.S.C. § 7501(a)). If these taxes are not paid at the end of each quarter, the government does not have any recourse against individual taxpaying employees. Id. However, ''if these taxes are not paid at the end of each quarter, federal law imposes a 100 % penalty tax on any person who willfully fails to collect, truthfully account for, and pay over these taxes.'' Id. (citing 26 U.S.C. § 6672)(footnote omitted).

According to 26 U.S.C. § 6672(a), ''[t]he IRS is authorized to assess and collect a trust fund recovery penalty from any officer or employee of any corporation who is responsible for collecting, accounting for, and paying over any tax imposed by the Internal Revenue Code and who willfully fails to do so.'' United States v. Bisbee, 245 F.3d 1001, 1005 [87 AFTR 2d 2001-1611] (8th Cir. 2001)(citing 26 U.S.C. §§ 6671(b) and 6672). Section 6672(a) of the IRC provides:

> Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a). Thus, Section 6672(a) allows a 100 percent assessment of a penalty against any person responsible for the payment of payroll taxes who willfully fails to pay such taxes. Id. After payment of the penalty, the statute allows the ''responsible person'' to seek contribution from any other responsible party who would be liable for the unpaid tax. See 26 U.S.C. § 6672(d). Specifically, Section 6672(d) provides, in part:

> If more than 1 person is liable for the penalty under subsection (a) with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty.

26 U.S.C. § 6672(d). Thus, if more than one person is liable for the penalty for unpaid withholding taxes, Section 6672(d) provides a federal right to contribution or indemnification. Id.

1. Contribution Pursuant to 26 U.S.C. § 6672

[1] Under Section 6672, ''[p]ersonal liability ... properly is imposed upon the person or persons who were: '(1) responsible for collecting, accounting for, and remitting payroll taxes, and (2) who willfully failed to do so.''' In re Sheppard, 253 B.R. 397, 403 [85 AFTR 2d 2000-1825] (Bkrtcy. D.S.C. 2000)(quoting Plett v. United States, 185 F.3d 216, 218 [84 AFTR 2d 99-5403] (4th Cir. 1999); 26

[4] 26 U.S.C. § 6672, the ''Trust Fund Recovery Penalty'' provision, is a collection device designed to ensure that unpaid trust fund taxes are paid, if not by the defaulting corporate employer, then by those persons responsible for the default. Smith v. United States, 894 F.2d 1549, 1553 [71A AFTR 2d 93-3456] (11th Cir. 1990).

U.S.C. § 6672))(citations omitted); see also Quattrone Accountants, Inc. v. I.R.S., 895 F.2d 921, 927 [65 AFTR 2d 90-580] (3d Cir. 1989). Thus, in order to set forth a claim for contribution against others, a person must show that the others are (1) a "responsible person," and (2) they "willfully failed to collect or truthfully account for and pay over" the payroll taxes. Quattrone, 895 F.2d at 927 (citation omitted).

a. "Responsible Person" Under Section 6672

For purposes of Section 6672(a), a "responsible person" is defined as an individual "who is 'required to collect, truthfully account for or pay over any tax due to the United States.'" Greenberg v. United States, 46 F.3d 239, 242–43 [74 AFTR 2d 94-7343] (3d Cir. 1994)(quoting United States v. Carrigan, 31 F.3d 130, 133 [74 AFTR 2d 94-5425] (3d Cir. 1994)). "'Responsibility is a matter of status, duty, or authority, not knowledge.' While a responsible person must have significant control over the corporation's finances, exclusive control is not necessary." Id. at 243 (quoting Brounstein v. United States, 979 F.2d 952, 954 [71 AFTR 2d 93-1714] (3d Cir. 1992))(quotation marks and citation omitted). It is not required that the responsible person be a corporate officer. Quattrone, 895 F.2d at 927 (citation omitted). "A person is responsible if the person has significant, though not necessarily exclusive, control over the employer's finances." Id. (citation omitted). "A person has signifi-cant control if he has the final or signifi-cant word over which bills or creditors get paid." Id. (citation omitted). It is important to note that "[t]here can be more than one responsible person for a given employer." Id. at 926 (citation omitted). "That another person also may be liable under Section 6672 does not affect the liability of the person presently subject to suit." Id. (citation omitted). When determining whether an individual is a responsible person, courts also consider the following factors:

> (1) contents of the corporate bylaws, (2) ability to sign checks on the company's bank account, (3) signature on the employer's federal quarterly and other tax returns, (4) payment of other creditors in lieu of the United States, (5) identity of officers, directors, and principal stockholders in the firm, (6) identity of individuals in charge of hiring and discharging employees, and (7) identity of individuals in charge of the firm's finan-cial affairs.

Brounstein, 979 F.2d at 954–55 (citation omitted).

b. "Willfulness" Under Section 6672

In order for liability to attach under Section 6672, once it is proven that an individual is a responsible person, there next must be a showing that the responsible person "willfully" failed to collect, account for or pay over the withheld taxes. 26 U.S.C. § 6672(a). "[U]nder section 6672(a), willfulness is 'a voluntary, conscious and intentional decision to prefer other creditors over the Government.' A responsible person acts willfully when he pays other creditors in preference to the IRS knowing that taxes are due, or with reckless disregard for whether taxes have been paid." Greenberg, 46 F.3d at 244 (quoting Brounstein, 979 F.2d at 955–56)(citations omitted). "In order for the failure to turn over withholding taxes to be willful, a responsible person need only know that the taxes are due or act in reckless disregard of this fact when he fails to remit to IRS." Id. "Reckless disregard includes failure to investigate or correct mismanagement after being notified that withholding taxes have not been paid." Id. (citations omitted). "The taxpayer need not act with an evil motive or bad purpose for his action or inaction to be willful." Id. (citing Hochstein v. United States, 900 F.2d 543, 548 [65 AFTR 2d 90-937] (2d Cir. 1990)). A willful failure to pay taxes includes "[a]ny payment to other creditors, including the payment of net wages to the corporation's employees, with knowledge that the employment taxes are due and owing to the Government." Id. (citation omitted).

2. Analysis of Section 6672 Regarding Molton, RHI and Crowley

a. Molton

[2] Molton's Motion for Summary Judgment is based, in part, upon the argument that Spade cannot seek contribution from him because he cannot establish that Molton is ''liable for the penalty'' under Section 6672(a). (26 U.S.C. § 6672(d); Molton's Mot. Summ. J.). Molton argues that he was not a ''responsible person'' and never ''wilfully fail[ed]'' to remit Heintz's payroll taxes. (Molton's Mem. Law Supp. Mot. Summ. J. at 5–8). Spade counters Molton's argument with the contention that Molton was a ''responsible person,'' however, he fails to address Molton's argument that he never ''willfully fail[ed]'' to remit Heintz's payroll taxes. (Spade's Mem. Law Ans. Molton's Mot. Summ. J.). For the following reasons, the Court concludes that Spade cannot seek contribution from Molton pursuant to Section 6672(d) because he has not shown that Molton is a ''responsible person'' who ''willfully failed to collect or truthfully account for and pay over'' Heintz's payroll taxes. 26 U.S.C. §§ 6672(a) and (d).

In 1993, Molton was a Vice President of Key Equity Capital (''Key Equity''). Key Equity had invested in RDK Aerospace Inc. (''RDK''), which, in turn, had invested in Heintz. (Molton's Mem. Law Supp. Mot. Summ. J. at 2, Ex. A (Molton's Decl.)). On behalf of Key Equity, Molton's involvement with Heintz was to monitor Key Equity's investment in Heintz. (Id. at 3). In connection with this role, Molton attended periodic meetings with the officers of RDK and consultants retained to manage subsidiary companies. (Id.). The purpose of these meetings was to monitor the performance of the business, discuss and evaluate the viability of the company, and review options to maximize the value of Key Equity's investment, including the possibility of selling various assets. (Id.).

Molton was not a stockholder, director, officer, or employee of Heintz and was not involved in its day-to-day operations. (Id. at 2–3). Molton states that he did not, and could not, sign checks, pay bills, or transfer funds for Heintz, and he did not know, and could not decide, which bills would be paid. (Id. at 3). Molton neither handled payroll nor did he prepare, sign or file tax returns for Heintz. (Id.). Molton admits that he was aware that Heintz was experiencing financial difficulty, but he states that he did not know, and he had no reason to believe, that the payroll taxes were not being paid. (Id. at 8). Molton states that he was unaware of Heintz's failure to pay its taxes until Spade sued him in the Philadelphia Municipal Court. (Id. at 3). Accordingly, Molton argues Spade cannot seek contribution from him because he is unable to show that Molton was a ''responsible person'' who ''willfully fail[ed]'' to pay taxes pursuant to Section 6672(a). 26 U.S.C. § 6672(a).

Spade counters Molton's argument with the assertion that Molton was, in fact, a ''responsible person.'' (Spade's Mem. Law Ans. Molton's Mot. Summ. J.). Relying upon his own affidavit and exhibits, Spade argues that Molton was more involved in Heintz's operations than he admits.[5] (Id.). In support of his argument, Spade's affidavit states ''[t]o the best of my knowledge, Donald C. Molton, Jr. was involved in some of the [] day to day operations of Heintz Corp.'' (Id., Ex. A, ¶ 2 (Spade's Decl.)). As for Spade's exhibits, they include three memoranda showing that Molton was involved in negotiating a management agreement and eventual purchase and sale agreement with Empire Management. (Id., Exs. B, C and D).

Based on the aforementioned, the Court concludes that Spade has failed to show that Molton is a ''responsible person'' who ''wilfully fail[ed]'' to remit Heintz's payroll taxes. Regarding the ''responsible person'' prong of the Section 6672(a) analysis, Spade does not provide any evidence that Molton was a ''responsible person'' as

[5] Molton argues that Spade's affidavit and exhibits do not comport with the evidentiary standards of Federal Rule of Civil Procedure 56(e). (Molton's Reply Br. Supp. Mot. Summ. J.). Regarding Spade's affidavit, Molton argues that Spade's affidavit does not ''show affirmatively that the affiant is competent to testify . . . .'' (Id. at 2)(citing Fed. R. Civ. P. 56(e)). As for Spade's other exhibits, Molton argues that they are not ''admissible in evidence,'' but are, instead, inadmissible hearsay. (Id.)(citing Fed. R. Evid. 801, 802). Regardless of the admissibility of Spade's exhibits, the Court finds that his Section 6672(d) claim against Molton is dismissed. That is, even if the Court considers the exhibits, it finds that Spade is unable to state a Section 6672(d) claim for contribution.

defined by Section 6672(a). Spade fails to offer any evidence to rebut Molton's assertions that ''[h]e was nothing more than an observer, advisor, and participant in discussions regarding the future of Heintz Corporation.'' (Molton's Mem. Law Supp. Mot. Summ. J. at 7). Spade fails to offer any evidence showing or creating any genuine issue of material fact that Molton was a person who had significant control over Heintz's finances who had the final, or significant, word over which bills or creditors got paid. Quattrone, 895 F.2d at 927. Spade has offered nothing but speculation and conjecture in alleging that Molton is accountable for contribution under Section 6672. However, Spade cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in order to survive this summary judgment motion. Williams, 891 F.2d at 460. Since Spade does not provide any evidence to show that Molton was an individual ''who [was] required to collect, truthfully account for or pay over any tax due to the United States,'' he has failed to prove that Molton was a ''responsible person'' under Section 6672(a). Since Section 6672 requires a showing of ''responsibility,'' Spade is unable to seek contribution from Molton pursuant to Section 6672(d). Although, the Court's conclusion that Spade has failed to show that Molton was a ''responsible person'' ends its Section 6672(a) inquiry, the Court takes this opportunity to note that Spade has not presented any evidence whatsoever showing that Molton ''willfully fail[ed'' to remit Heintz's payroll taxes. Although Molton argues that he never ''willfully fail[ed]'' to pay over any payroll taxes, Spade does not address Molton's argument. As a result, the Court concludes that Spade has failed to offer any evidence regarding the ''willfulness'' element of liability under Section 6672. Since Spade has not offered any evidence showing that Molton was a ''responsible person'' who ''willfully failed'' to pay Heintz's taxes, Molton is entitled to summary judgment regarding Spade's Section 6672(d) claim for contribution.

b. RHI

RHI's Cross-Motion for Summary Judgment claims that Spade is unable to establish that RHI is ''liable for the penalty'' under Section 6672(d). (RHI's Cross-Mot. for Summ. J.). Specifically, RHI argues that is not a ''responsible person'' who ''willfully failed'' to pay the delinquent Heintz taxes under Section 6672(a). (Id.). RHI contends that ''there is no evidence of record that RHI was anything more than a temporary employment agency who pro-vided Spade with the opportunity to work at defendant Heintz as a temporary employee.'' (Id. at 5). Regarding the ''responsible person'' element of Section 6672, RHI argues that there is no evidence that RHI was a member of Heintz's Board of Directors, RHI had any day-to-day management responsibility at Heintz, RHI participated in decisions concerning which bills of Heintz would be paid or that RHI had any signature power over Heintz's checks. (Id.). In addition to the aforementioned argument, RHI further argues that Spade cannot prove liability pursuant to Section 6672 because he cannot prove that RHI ''willfully fail[ed]'' to remit Heintz's payroll taxes. (Id.). Relying upon its status as a temporary employment agency, RHI states that it ''could not have willfully failed to collect or remit the delinquent taxes to the IRS because there is no evidence of record that it had any contractual or other duty to do so.'' (Id. at 6). Spade's peculiar response to RHI's argument is that RHI has not provided a sufficient cross-motion, but has merely provided a responsive memorandum of law to his earlier Motion for Summary Judgment against RHI. (Spade's Answ. RHI's Cross-Mot. Summ. J.). The Court disagrees with Spade's assertion and finds that RHI's Cross-Motion is procedurally proper. For the following reasons, the Court concludes that Spade cannot seek contribution pursuant to Section 6672(d) from RHI because he has not shown that it is a ''responsible person'' who ''willfully failed to collect or truthfully account for and pay over'' Heintz's payroll taxes. 26 U.S.C. §§ 6672(a) and (d).

Spade has failed to address RHI's argument regarding contribution under Section 6672. After examining the record, the Court concludes that RHI was not a ''responsible person'' under Section 6672. There is no evidence whatsoever to show any genuine issue of material fact regarding whether RHI was a ''responsible person'' who ''willfully failed to collect or truthfully account for and pay over'' Heintz's payroll taxes pursuant to Section 6672. The record is silent as to any hint that RHI was in anyway required to collect, truthfully account for or pay over any tax due to the United States on behalf of Heintz. Likewise, there is no evidence that RHI willfully failed to remit the delinquent taxes through reckless disregard or by making a voluntary, conscious and intentional decision to prefer other creditors over the Government. As a result, Spade has provided nothing but speculation and conjecture to support his allegation that RHI is accountable for contribution under Section 6672. However, Spade cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in order to survive this summary judgment motion. Williams, 891 F.2d at 460. Accordingly, the Court will grant RHI's motion for summary judgment on Spade's Section 6672 claim.

c. Crowley

Similar to the Motions for Summary Judgment by Molton and RHI, Crowley's Motion for Summary Judgment is based on the argument that Spade cannot prove liability in accordance with Section 6672. (Crowley's Mem. Law Supp. Mot. Summ. J.). Pursuant to Section 6672, Crowley argues that he was not a ''responsible person'' who ''wilfully fail[ed]'' to pay Heintz's withholding taxes. (Id. at 4–8). Spade counters Crowley's argument by asserting that Crowley is a ''responsible person,'' however, Spade fails to address Crowley's argument regarding ''willfulness'' under Section 6672. (Spade's Answ. Crowley's Mot. Summ. J.). For the following reasons, the Court concludes that Spade cannot seek contribution pursuant to Section 6672(d) from Crowley because he has not shown that Crowley is a ''responsible person'' who ''willfully failed to collect or truthfully account for and pay over'' Heintz's payroll taxes. 26 U.S.C. §§ 6672(a) and (d).

Crowley is a self-employed financial consultant specializing in evaluating and assisting companies with troubled manufacturing facilities. (Crowley's Mem. Law Supp. Mot. Summ. J., Ex. F, ¶ 2 (Crowley's Decl)). In 1993, Crowley was employed as a consultant with GGG Inc. (Id. at 1). In March 1993, GGG Inc. agreed to assist Heintz in an attempt to improve the operating performance of the company. (Id.). At that time, Crowley was assigned as contract President of Heintz. (Id. at 2). Crowley hired Spade as Heintz's CFO in April 1993. (Id.). GGG Inc.'s contract with Heintz was terminated on June 9, 1993. (Id. at 2). From June 9, 1993 through June 25, 1993, GGG Inc. and Crowley were replaced by Empire Management. (Id.). Subsequent to the termination of GGG Inc. and Crowley, an auditor from Star Bank determined that certain trust fund taxes had not actually been paid. (Id.). As mentioned earlier, the entire final assessment against Spade related to the unpaid trust fund payments for the last week of June 30, 1993 and the first week of July 1993, a period when Crowley had no involvement with Heintz. (Id.). Crowley and GGG Inc. were re-engaged as consultants for Heintz for the period of July 12, 1993 through September 15, 1993. (Id.). During this re-engagement, Crowley was hired to reassess whether Heintz could be reopened. (Id. at 2–3). Crowley states that, at this time, he had no involvement in the day-to-day operations of Heintz and had no ability to direct disbursements. (Id. at 3). On August 4, 1993, a Chapter 11 Petition was filed on behalf of Heintz. (Id.).

Based upon the timing of both the delinquent tax payments and Crowley's intermittent termination, Crowley argues that he is not a ''responsible party'' who ''willfully failed to collect or truthfully account for and pay over'' Heintz's payroll taxes. (Id. at 4–8)(citing 26 U.S.C. §§ 6672(a) and (d)). That is, Crowley argues that dur-

ing the applicable two week time period, the last week of June and the first week of July in 1993, he was not in a control position with Heintz because he and his employer had been replaced by Empire Management. (Id. at 6). During this time, Crowley states that he "had no knowledge of the failure to pay and no involvement in deciding whether the withholding taxes were paid." (Id. at 8). Spade counters Crowley's argument by claiming that Crowley was aware of the delinquent tax payments and that he had authority over the payments at issue. (Spade's Answ. Crowley's Mot. Summ. J.). Spade goes on to assert that Crowley was acting as "President of Heintz Corporation at the time taxes were not paid" and that certainly a "president of a corporation has decision making power in the day to day operation of the business. (Id. at 8).

Pursuant to Section 6672, the Court concludes that Spade has failed to prove that Crowley is a "responsible person" who "willfully fail[ed]" to remit Heintz's payroll taxes. Spade relies on Crowley's status as contract president of Heintz to argue that Crowley is a "responsible person," however, he fails to offer any evidence to show or create any genuine issue of material fact that Crowley was an individual who, in actuality, "[was] required to collect, truthfully account for or pay over any tax due to the United States." Greenberg, 46 F.3d at 243. Furthermore, Spade completely fails to offer any evidence that Crowley willfully failed to remit the delinquent taxes through reckless disregard or by making "a voluntary, conscious and intentional decision to prefer other creditors over the Government." Id. at 244. As a result, the Court concludes that Spade's assertion that Crowley is accountable for contribution under Section 6672 is based upon speculation and conjecture. However, as stated earlier, Spade cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in order to survive this summary judgment motion. Williams, 891 F.2d at 460. Accordingly, the Court will grant summary judgment on Crowley's Motion for Summary Judgment on Spade's Section 6672 claim.

B. State Law Claims[6]

Spade's state law claims include the following: liability for negligence; liability for misrepresentation and liability for breach of contract.[7] (Compl., ¶s 25–51). Molton, RHI and Crowley argue that Spade's state law claims are time-barred because none of the claims were filed within the prescribed statute of limitations period. Appearing to rely upon the "discovery rule," Spade argues that his state law claims are not time-barred by the applicable statute of limitations because he "could not initiate this suit until he was aware of his damages." (Spade's Mem. Law Supp. Ans. Molton's Mot. Summ. J. at 14). Relying upon this argument, Spade states that "[h]e was not aware of the total amount of his damages until August of 2000 when the final payment [of the IRS settlement] was made." (Id.). Accordingly, Spade argues, "since the total amount of his expenses were not known until the date of his final payment, he could not pursue his common law claims before then." (Id. at 3).

1. Discovery Rule

"As a general rule, the statute of limitations begins to run when the plaintiff's cause of action accrues." New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1124 (3d Cir. 1997)(quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1385 (3d Cir. 1994))(internal quotation marks omitted). Under Pennsylvania law, the discovery rule is a judicially created exception to the general rule that the statute of limitations starts to run as soon as the underlying cause of action accrues. See Bohus v. Beloff, 950 F.2d 919, 924 (3d Cir. 1991). Under the discovery rule, the statute of limitations period begins to run when "the plaintiff has discovered or, by exercising

[6] The parties agree that Pennsylvania law applies to Spade's state law claims.

[7] Count II of Spade's Complaint is entitled "Liability for Breach of Employer's Duty of Care." (Compl., ¶s 25–33). The Court is unaware of any such claim within Pennsylvania law. Upon reading of this claim, it appears that it is substantively similar to Spade's "Liability for Negligence" claim. As a result, the Court will address Spade's claim for negligence and will dismiss Count II of the Complaint.

reasonable diligence, should have discovered (1) that he or she has been injured, and (2) that this injury has been caused by another party's conduct.'' New Castle County, 111 F.3d at 1124 (citation omitted). ''Once the plaintiff has discovered the injury, the statutory limitations period begins to run and the plaintiff is entitled to the full limitations period.'' Id. at 1124–25 (citation omitted). The discovery rule is a ''narrow exception'' and should be applied in ''only the most limited circumstances.'' Tohan v. Owens-Corning Fiberglass Corp., 696 A.2d 1195, 1201 n. 4 (Pa. Super. 1997); Dalrymple v. Brown, 701 A.2d 164, 171 (Pa. 1997). Under the discovery rule, ''[t]he standard of reasonable diligence is objective, not subjective.'' Dalrymple, 701 A.2d at 224. ''The statute is tolled only if a reasonable person in plaintiff's position would not have been aware of the salient facts.'' Pitts v. N. Telecom, Inc., 24 F. Supp.2d 437, 441 (E.D. Pa. 1998)(citation omitted). ''The 'polestar' of the discovery rule is not the plaintiff's actual knowledge, but rather 'whether the knowledge was known, or through the exercise of diligence, knowable to [the] plaintiff.''' Bohus, 950 F.2d at 925 (citations omitted). It is important to note that according to the discovery rule, ''lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations.'' Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983)(citations omitted). The Third Circuit has recognized that when applying the discovery rule, ''there are very few facts which cannot be discovered through the exercise of reasonable diligence.'' Pitts, 24 F. Supp.2d at 441 (citing Vernau v. Vic's Market, Inc., 896 F.2d 43, 46 (3d Cir. 1990); Urland v. Merrell-Dow Pharm., Inc., 822 F.2d 1268, 1273 (3d Cir. 1987)). ''Once plaintiff is aware of the salient facts, his failure to investigate or to exercise reasonable diligence in the investigation will not prevent the statute of limitations from running.'' Id. (citing O'Brien v. Eli Lilly & Co., 668 F.2d 704, 710 (3d Cir. 1981)). Generally, the point of time at which the plaintiff should reasonably be aware that he or she has suffered an injury is an issue of fact to be determined by the jury. Sadtler v. Jackson-Cross Co., 587 A.2d 727, 732 (Pa. Super. 1991)(citations omitted). However, ''[w]hen the only reasonable conclusion from the competent evidence of record construed most favorably to the plaintiff is that the time it took for the plaintiff to file suit was unreasonable, summary judgment should be granted.'' Pitts, 24 F. Supp.2d at 441 (citations omitted); see also Kingston Coal Co. v. Felton Min. Co., Inc., 690 A.2d 284, 288 (Pa. Super. 1997)(stating that the commencement of the limitations period may be determined as a matter of law ''where the facts are so clear that reasonable minds cannot differ as to whether the plaintiff should reasonably be aware that he suffered an injury.'').

a. Application of Discovery Rule

Spade admits that the statute of limitations for an action for negligence or misrepresentation in Pennsylvania is two years. 42 Pa.C.S.A. §§ 5524(2) and (7). Likewise, Spade concedes that his breach of contract claim is subject to a four year statute of limitations. 42 Pa.C.S.A. § 5525. Without explicitly referring to the discovery rule, or any case law whatsoever, Spade argues that his state law claims are not barred by the applicable statutes of limitations because he did not suffer any injury until he made his final payment to the IRS for Heintz's delinquent taxes under the settlement agreement. (Spade's Mem. Law Supp. Answ. Molton's Mot. Summ. J.; Spade's Mem. Law Supp. Answ. Crowley's Mot. Summ. J.). In other words, Spade argues that his injury did not occur until August 2000, the date of his final payment under the settlement agreement. (Spade's Mem. Law Supp. Answ. Molton's Mot. Summ. J. at 2–3). The Court disagrees with Spade's assertions and finds that his state law claims are time-barred.

''The discovery rule operates to delay the running of the statute of limitations if a plaintiff exercising reasonable diligence could not know that an injury occurred.'' Charowsky v. Kurtz, 2000 WL 1052986, at 3 (E.D. Pa. July 31, 2000)(citing Baumgart v. Keene Bldg. Prods. Corp., 666 A.2d

238, 241 (Pa. 1995)). ''The discovery rule does not, however, delay the running of the statute of limitations if a plaintiff knows [h]e was injured but does not know the full extent of the injury.'' Id. (citing Home Indem. Co. v. Alexander & Alexander, Inc., Civ. A. No. 89-7715, 1990 WL 181467, at 4 (E.D. Pa. Nov. 20, 1990)(stating that applying the discovery rule to delay the running of the statute of limitations until the full extent of the injury is known ''would be to bend the discovery rule completely out of its original design''); Jones v. Philpott, 713 F. Supp. 844, 845, 847 (W.D. Pa. 1989)(answering ''no'' to the question ''does the discovery rule suspend the running of the statute of limitations if the plaintiff is aware of an injury caused by the defendant's conduct but is unaware of the full extent of that injury''); Cardone v. Pathmark Supermarket, 658 F. Supp. 38, 40 (E.D. Pa. 1987)(recognizing that the statute of limitations is not tolled if a plaintiff has knowledge of an injury but is ignorant of the severity of that injury); Sterling v. St. Michael's Sch. for Boys, 660 A.2d 64, 66 (Pa. Super. 1995)(''A plaintiff need not know the precise extent of her injuries before the statutory period begins to run.' Bradley v. Ragheb, 633 A.2d 192, 196 (Pa. Super. 1993).''). Thus, ''Pennsylvania law focuses on the happening of the breach and the injured party's awareness of that breach, not knowledge of damage resulting from the breach.'' Hunter v. Jacoby & Meyers Law Offices, Civ. A. No. 94-5200, 1996 WL 221759, at 3 (E.D. Pa. Apr. 26, 1996), see also Spillman v. Wallen, Civ. A. No. 95-750, 1996 WL 379553, at 7 (E.D. Pa. June 28, 1996), aff'd, 111 F.3d 127 (3d Cir. 1997)(stating that the ''the discovery rule tolls the statute of limitations until the plaintiff knows or reasonably should know that the defendant breached a duty. It does not toll the statute until the plaintiff knows or reasonably should know that he has sustained damages.'').

Based on the aforementioned, the Court is not convinced by Spade's argument that he could not pursue his state law claims until he made his final payment to the IRS in August 2000. Besides failing to cite to any authority, Spade does not individually address each state law claim and show why he was unable, through the exercise of reasonable diligence, to become aware of the salient facts of each claim within the prescribed limitations period. Although Spade argues that he was unable to be fully aware of his *damages* until August 2000, he is silent regarding the relevant inquiry of when he discovered or, by exercising reasonable diligence, should have discovered that he had been *injured*, and that this *injury* has been caused by another party's conduct. New Castle County, 111 F.3d at 1124. The Court notes that it is the plaintiff, who is arguing the applicability of the discovery rule, who bears the burden of proving that he is entitled to the discovery rule exception. Cochran v. GAF Corp., 666 A.2d 245, 249 (Pa. 1995).

In determining whether the plaintiff has met his burden, the court is required, before applying the exception of the rule, to ''address the ability of the damaged party, exercising reasonable diligence, to ascertain the fact of a cause of action.'' Pocono, 468 A.2d at 471. With regard to Spade's state law claims, this Court will determine whether Spade is entitled to the discovery rule exception by individually addressing Spade's ability, exercising reasonable diligence, to ascertain the fact of each cause of action.

1. Negligence Claim

Under Pennsylvania law, Spade's negligence claim is subject to a two year statute of limitations. See 42 Pa.C.S.A. § 5524(2). The statute of limitations period begins to run when the alleged breach of duty occurs. Bigansky v. Thomas Jefferson Univ. Hosp., 658 A.2d 423, 426 (Pa. Super. 1995). Spade's negligence claim is based on the ground that ''Defendant(s), as employers and masters of plaintiff, owed plaintiff a duty of care to insure that [he] would not be injured or harmed by their failure to follow established business practices of depositing employee withholding trust fund liability taxes with the Internal Revenue Service.'' (Compl, ¶ 36). Spade argues that Defendants ''breached that duty by failing to follow established business

practices and subjecting the plaintiff to liability and damages while he was acting as their controller.'' (Id.). In support of his argument, Spade avers that, as an accounting department employee, he is owed a ''safe work environment'' which imports the duty of ''insuring that all of the payroll tax liabilities of the company are being paid.'' (Spade's Mem. Law Supp. Ans. Crowley's Mot. Summ. J. at 13). Spade goes on to state that ''[h]aving employees perform accounting functions in faltering corporations is equivalent to assigning them to a hazardous work environment.'' (Id.). Upon reading the Complaint and review of the record, Spade's negligence claim arose when the Defendants allegedly breached their duty by failing to pay the payroll taxes to the IRS while Spade was Heintz's CFO in 1993. In his affidavit, Spade admits that he became aware that Heintz's federal payroll taxes had not been paid in 1993. (Spade's Answ. Crowley's Mot. Summ. J., Ex. A (Spade's Aff.)). Therefore, it was in 1993, that Spade first became aware that the Defendants allegedly breached their duty of care by failing to pay the payroll taxes to the IRS. As of November 1996, Spade was fully aware of the alleged breach when he received the letter from the IRS assessing a penalty against him for Heintz's unpaid payroll taxes.

As a result of the aforementioned, exercising reasonable diligence, Spade had the ability to ascertain that he had a cause of action for negligence in 1993 and 1996. Applying Pennsylvania's two year statute of limitations to either the 1993 or 1996 dates, the Court concludes that Spade's negligence claim should have been brought in 1995 or, at the very latest, in 1998. 42 Pa.C.S.A. § 5524(2). Spade filed his action on July 3, 2001. As a result, Spade's negligence claim is time-barred. Accordingly, Spade's state law claim of negligence is dismissed.[8]

2. Misrepresentation Claim

Similar to his negligence claim, Spade's misrepresentation claim is subject to a two year statute of limitations. See 42 Pa.C.S.A. § 5524(7). ''A cause of action arises when plaintiff knew or should have known of the misrepresentation.'' Tolbert by and Through Cravins v. W. Atlee Burpee Co., 1991 WL 32827, at 3 (E.D. Pa. Mar. 8, 1991)(citations omitted). Spade's misrepresentation claim is based on the grounds that in order to induce Plaintiff into entering into the employment obligations with Defendants, ''defendant's [sic] made express and/or implied representations to Plaintiff that they would comply with the statutory provisions of the Internal Revenue Code and not place him at risk for their failure to pay employee withholding tax ....'' (Compl., ¶ 40). Spade contends that as a result of these alleged misrepresentations, he ''has been damaged and is entitled to damages.'' (Id., ¶ 43). Relying again on his unsafe working environment theory, Spade argues that he has been a victim of fraud because employers should make employees fully aware of the extent of their exposure when they ''have them working at a job without explaining that conventional employment practices do not apply.'' (Spade's Mem. Law Supp. Ans. Crowley's Mot. Summ. J. at 13).

Upon review of the record, Spade's claim is based upon alleged misrepresentations made to Spade in order to induce him into employment. Since Spade began working at Heintz in April 1993, the alleged misrepresentations must have been made sometime during or prior to April 1993. Spade was aware of the alleged misrepresentations that the Defendants ''would comply with the statutory provisions of the Internal Revenue Code and not place him at risk for their failure to pay employee withholding tax'' as of June 1993, when he knew that the taxes had not been paid. As of November 1996, Spade was fully cognizant of his misrepresentation claim when he received the letter from the IRS

[8] Furthermore, in Pennsylvania, the proof required for a *prima facie case* of negligence is (1) that a duty was owed and (2) breached, and (3) that the breach was the cause of the injury (4) resulting in damages to the plaintiff. Watkins v. Hosp. of Univ. of Pennsylvania, 737 A.2d 263, 265–66 (Pa. Super. 1999). In this case, Spade fails to offer any evidence whatsoever showing a *prima facie case* of negligence.

regarding nonpayment of the taxes and his presumed liability.

As a result, exercising reasonable diligence, Spade had the ability to ascertain the fact that he had a cause of action for misrepresentation in 1993 and 1996. Applying Pennsylvania's two year statute of limitations to either the 1993 or 1996 dates, the Court concludes that Spade's misrepresentation claim should have been brought in 1995 or, at the very latest, in 1998. 42 Pa.C.S.A. § 5524(7). Spade filed his action on July 3, 2001. As a result, Spade's misrepresentation claim is time-barred. Accordingly, Spade's state law claim of misrepresentation is dismissed.[9]

3. Breach of Contract Claim

As for Spade's contract claim, it is subject to the four year statute of limitations found in 42 Pa. Cons. Stat. Ann. § 5525. 42 Pa.C.S.A. § 5525. The statute of limitations period begins to run from the time of the breach of contract. Romeo and Sons, Inc. v. P.C. Yezbak & Son, Inc., 652 A.2d 830, 832 (Pa. 1995)(citations omitted). Spade's contract claim is premised on the allegation that the actions alleged in the Complaint constitute a breach of contract claim. (Compl., ¶ 47). Specifically, Spade contends that "[t]he Defendant(s) actions ... constitute a violation of the implied covenant of good faith and fair dealing." (Id., ¶ 49). In support of his contract claim, Spade states that there is "an implied condition of employment that an employer will reimburse an employee for expenses and liabilities they incur while working at that job following the legal directions of their employer." (Spade's Mem. Law Supp. Ans. Crowley's Mot. Summ. J. at 15). Upon reading the Complaint and reviewing the record, Spade does not provide any evidence of a contract, either express or implied. Relying upon the record and his other state law claims, Spade's contract claim is based on his employment at Heintz. Spade's employment with Heintz concluded in 1993, therefore, the alleged breach of contract must have occurred in 1993. By his own admission, Spade acknowledges that he was aware that the employee withholding taxes had not been paid in June 1993. At the latest, Spade was cognizant of his breach of contract claim in November 1996, when he received the letter from the IRS regarding nonpayment of the taxes and his presumed liability.

As a result, exercising reasonable diligence, Spade had the ability to ascertain the fact that he had a cause of action for breach of contract in either 1993 or 1996. Applying Pennsylvania's four year statute of limitations to either the 1993 or 1996 dates, the Court concludes that Spade's breach of contract claim should have been brought in 1997, and at the very latest, in 2000. 42 Pa.C.S.A. § 5525. Spade filed his action on July 3, 2001. As a result, Spade's breach of contract claim is time-barred. Accordingly, Spade's state law claim for breach of contract is dismissed.[10]

IV. Conclusion

Spade fails to make the required showing that Molton, RHI and Crowley were responsible for collecting, accounting for, and remitting Heintz's payroll taxes, and that they willfully failed to do so. See 26 U.S.C. §§ 6672(a) and (d). As a result, Spade's claims for contribution against Molton, RHI and Crowley pursuant to Section 6672 are dismissed. Likewise, Spade's state law claims are also dismissed. Count II of Spade's Complaint, entitled "Liability for Breach of Employer's Duty of Care," is dismissed because the Court can-

[9] Furthermore, under Pennsylvania law, in order "for a plaintiff to prevail on claims for fraud (or intentional misrepresentation) and negligent misrepresentation ..., he or she must prove justifiable reliance upon the misrepresentation at issue." Benevento v. Life USA Holding, Inc., 61 F. Supp.2d 407, 416 (E.D. Pa. 1999)(footnote omitted). In this case, Spade has not specifically pointed to any misrepresentations. Moreover, Spade has not provided any evidence showing justifiable reliance upon any such misrepresentations. Accordingly, Spade fails to offer any evidence whatsoever proving a *prima facie case* of misrepresentation.

[10] Furthermore, under Pennsylvania law, in order to prove a breach of contract claim "a plaintiff must show: (1) the existence of a valid and binding contract to which the plaintiff and defendants were parties; (2) the contract's essential terms; (3) that plaintiff complied with the contract's terms; (4) that the defendant breached a duty imposed by the contract; and (5) damages resulting from the breach." Nowosad v. Villanova Univ., 1999 WL 322486, at 6 (E.D. Pa. May 19, 1999)(citing Gundlach v. Reinstein, 924 F. Supp. 684, 688 (E.D. Pa.1996)(listing elements required in breach of contract case between university and student), aff'd without op., 114 F.3d 1172 (3d Cir. 1997)). In this case, Spade fails to provide any evidence of an existing valid and binding contract. Consequently, Spade has neither provided any evidence that he complied with any contract terms, nor shown that Defendants breached any duty imposed by a contract. As a result, Spade fails to offer any evidence whatsoever showing a *prima facie case* of breach of contract.

not find any such claim within Pennsylvania law and the claim is substantively similar to Spade's Count III, entitled "Liability for Negligence." Spade's negligence claim, Count III, is also dismissed. Spade has failed to properly file his action within the prescribed statute of limitations period. Additionally, Spade has failed to establish a *prima facie case*of negligence. Likewise, Spade's misrepresentation claim, Count IV, is dismissed. Spade has failed to properly file his action within the prescribed statute of limitations period. In addition, Spade has failed to establish a *prima facie case*of misrepresentation. As for Spade's breach of contract claim, Count V, it is also dismissed. Spade has failed to properly file his contract claim within the prescribed statute of limitations period. Moreover, Spade has failed to establish a *prima facie case* of breach of contract. Thus, the Motions for Summary Judgment filed by Molton, RHI and Crowley are granted.

An appropriate Order follows.

ORDER

AND NOW, this 6 th day of November, upon consideration of the Motions for Summary Judgment filed by Defendants Donald C. Molton, Jr. (Dkt. No. 34), Robert Half International, Inc. (Dkt. No. 40) and Clifford Crowley (Dkt. No. 43), and the Responses and Replies thereto, it is hereby ORDERED that:

1. the Motions for Summary Judgment are GRANTED.

2. Defendants Donald C. Molton, Jr., Robert Half International, Inc. and Clifford Crowley are DISMISSED from this action.

3. Spade's state law claims are DISMISSED.

4. The remaining parties, Spade, Star Bank, Ralph D. Ketchum, Philip Rice and James Doyle, shall file their Joint Pretrial Order within fourteen (14) days from the date of this Order.

BY THE COURT:

Robert F. Kelly, Sr. J.

¶2002-5635

Marjorie Cathey MILLER, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEES. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 00-71285, July 16, 2002. Tax Court, (2000) TC Memo 2000-196, RIA TC Memo ¶2000-196, 79 CCH TCM 2213 (opinion by Cohen, *J.*), affirmed. Years 1984, 1985, 1986. Decision for Govt.

1. Interest abatements—abuse of discretion—judicial review—jurisdiction. Tax Court properly asserted jurisdiction over IRS's decision not to abate interest on beauty salon owner's employment tax liabilities: IRC §6404(h) explicitly granted Tax Court jurisdiction to review interest abatement decisions; and such jurisdiction extended to abatements requested before but not actually decided until after statute's effective date. Also, appellate court's review was established under IRC §7482. *Reference:* United States Tax Reporter ¶64,045.01(3); 74,825.02(5). IRC §6404; 7482.

2. Interest abatements—abuse of discretion—employment taxes. Tax Court properly upheld IRS's decision not to abate interest on beauty salon owner's employment tax liabilities: IRS's position, as reflected in Reg. §301.6404-2(a)(1)(i)'s restricted "deficiency" language and interpretation of IRC §6404(e) as not ex-tending interest abatement authority to employment taxes, was reasonable. So, even though taxpayer's expansive, non-limiting interpretation of statute was also reasonable, IRS's interpretation was entitled to due deference absent plain inconsistency with statutes or Congressional intent. *Reference:* United States Tax Reporter ¶64,045.01(30). IRC §6404.

Charles H. Hammer, Spokane, Washington, for the petitioner-appellant.
Annette M. Wietecha, Department of Justice, Tax Division, Washington, D.C., for the respondent-appellee.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Appeal from a Decision of the United States Tax Court

Before: Thomas M. Reavley,** A. Wallace Tashima, and Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Tashima

OPINION

TASHIMA, Circuit Judge:

FOR PUBLICATION

Marjorie Cathey Miller appeals a decision of the United States Tax Court, granting summary judgment in favor of the Commissioner of Internal Revenue. Miller contends that the tax court erred in concluding that she was not entitled to an abatement of interest on employment taxes under 26 U.S.C. § 6404(e). We affirm.

BACKGROUND

In 1984, 1985, and 1986, Miller operated a beauty salon in the State of Washington. Miller leased out individual spaces in the salon to individual beauticians and treated the lessees as independent contractors rather than employees for tax purposes. In 1987, the Commissioner conducted an examination of Miller's business and concluded that the individuals should have been treated as employees rather than independent contractors. The Commissioner accordingly prepared Form 4666, Summary of Employment Tax Examination, and concluded that Miller owed $31,671.43 in employment taxes and penalties for the three tax years in question.

On December 12, 1988, Miller signed two Forms 2504, Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment, consenting to the assessment and collection of $31,671.43 in taxes and penalties. Miller tendered a check to the Internal Revenue Service ("IRS") in the amount of $31,671.43 on December 16, 1988, thinking that she had paid the full amount due. The IRS, however, applied her payment to taxes, penalties, and *interest* for some of the portions of the tax years in question, leaving $10,296.56 in taxes and penalties still due.

In 1993, the Commissioner contacted Miller and informed her that she still had unpaid liabilities stemming from the 1987 examination. The revenue officer assigned to the case attempted to abate the interest; however, the IRS denied the request on the basis that Internal Revenue Code ("I.R.C.") § 6404(e), the provision al-lowing abatement of interest, does not authorize abatement of interest assessed on employment taxes. In May 1994, Miller submitted a check to the IRS in the amount of $21,706.47, thus paying in full the taxes, penalties, and interest she owed.

In May 1996, Miller submitted Form 843, Claim for Refund and Request for Abatement, seeking abatement of the interest assessed on the employment tax liabilities pursuant to § 6404(e), which provides for the abatement of interest attributable to unreasonable errors and delays by the IRS. The IRS denied Miller's claim on the ground that § 6404(e) does not apply to employment taxes. Miller then filed this petition in United States Tax Court, seeking reconsideration of the Commissioner's decision.

The tax court granted summary judgment in favor of the Commissioner, reasoning that its decision in *Woodral v. Comm'r*, 112 T.C. 19 (1999), was dispositive. In *Woodral*, the court held that the Commissioner lacks authority to abate interest assessed on employment taxes; accordingly, that the decision not to abate such interest could not constitute an abuse of discretion. *Id.* at 25. Miller filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

We review our own jurisdiction de novo. *Prof'l Programs Group v. Dep't of Commerce*, 29 F.3d 1349, 1352 (9th Cir. 1994). The tax court's grant of summary judgment is subject to de novo review. *Talley Indus., Inc. v. Comm'r*, 116 F.3d

** The Honorable Thomas M. Reavley, United States Circuit Judge for the Fifth Circuit, sitting by designation.

382, 385 [79 AFTR 2d 97-3096] (9th Cir. 1997).

II. Jurisdiction

[1] During the tax years in question, I.R.C. § 6404(e)(1) provided:

> In the case of any assessment of interest on—
>
> (A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, or
>
> (B) any payment of any tax described in section 6212(a) to the extent that any error or delay in such payment is attributable to such an officer or employee being erroneous or dilatory in performing a ministerial act,
>
> the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

26 U.S.C. § 6404(e)(1) (1989).[1]

Prior to 1996, § 6404 did not contain any provision for judicial review of IRS decisions regarding the abatement of interest. In *Argabright v. United States*, 35 F.3d 472 [74 AFTR 2d 94-6350] (9th Cir. 1994), therefore, we stated that § 6404(e)(1) "gives the Commissioner complete discretion to determine whether or not to abate interest in situations in which all or part of the interest owed by the taxpayer is due to delay caused by IRS personnel." *Id.* at 474–75. We accordingly held that, pursuant to the Administrative Procedure Act, 5 U.S.C. § 701(a), which bars judicial review if precluded by statute or if agency action is committed to agency discretion by law, judicial review "is not available for agency action taken pursuant to 26 U.S.C. § 6404(e)(1)." *Id.* at 475–76.[2]

In 1996, however, Congress amended the statute, adding what is now § 6404(h), granting the tax court jurisdiction to determine whether the Secretary's failure to abate interest constituted an abuse of discretion.[3] Pub. L. No. 104-168, § 302, 110 Stat. 1452, 1457–58 (1996). The legislative history indicates that then-current law did not give federal courts jurisdiction to review the IRS' refusal to abate interest, but that Congress decided it was appropriate for the tax court to review such decisions. H.R. Rep. No. 104-168, at 28 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1143, 1151.

The tax court therefore now has jurisdiction to determine whether the IRS' denial of a request to abate interest is an abuse of discretion pursuant to § 6404(h). Our jurisdiction to review decisions of the tax court rests on I.R.C. § 7482(a), which, we conclude, includes decisions regarding the IRS' refusal to abate interest. *Cf. Estate of Kunze v. Comm'r*, 233 F.3d 948, 950 [86 AFTR 2d 2000-6920] (7th Cir. 2000) (stating that the court had jurisdiction over an appeal of the tax court's review of a denial of an abatement under § 7482(a)).[4] *Argabright*'s holding that judicial review is not available for IRS decisions pursuant to § 6404(e)(1) consequently has been undermined by subsequent legislation and, to that extent, is no longer good law. *See United States v. Gonzalez-Torres*, 273 F.3d

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[1] In 1996, the statute was amended by adding the word "unreasonable" before "error" and the words "or managerial" after "ministerial." Pub. L. No. 104-168, § 301(a), 110 Stat. 1452, 1457 (1996).

[2] Other courts had similarly construed the statute. *See, e.g., Carlson v. United States (In re Carlson)*, 126 F.3d 915, 920 [80 AFTR 2d 97-6558] (7th Cir. 1997) (holding that an abatement of interest under § 6404(e)(1) is within the sole authority of the Secretary of the Treasury, "and as such it is beyond the scope of judicial review"); *Speers v. United States*, 38 Fed. Cl. 197, 202 [79 AFTR 2d 97-3158] (1997) (reasoning that the IRS' decision whether to abate interest on employment taxes is solely within the agency's discretion and is therefore nonjusticiable); *Brahms v. United States*, 18 Cl. Ct. 471, 475–76 [64 AFTR 2d 89-5813] (1989) (holding that § 6404(e)(1) does not permit judicial review because the IRS' decision to abate interest is purely discretionary).

[3] The statute provides, in pertinent part, that "[t]he Tax Court shall have jurisdiction over any action brought by a taxpayer ... to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion." 26 U.S.C. § 6404(h)(1) (2002).

[4] In *United States v. Calif. East. Line, Inc.*, 348 U.S. 351, 354–55 [48 AFTR 241] (1955), the Court noted the distinction under the Renegotiation Act between tax court determinations which the statute made final and nonreviewable and tax court determinations under that act which were not in that category. The statute here does not purport to make the tax court's determination nonreviewable by the court of appeals.

1181, 1187 (9th Cir. 2001) (reasoning that we are not bound by the decision of a prior three-judge panel if subsequent legislation has undermined that decision); *see also Benny v. United States Parole Comm'n*, 295 F.3d 977, 983 (9th Cir. 2002) (''We are bound by decisions of prior panels unless an en banc decision, Supreme Court decision or subsequent legislation undermines those decisions.'').

One further wrinkle, however, is that the amendment granting jurisdiction to the tax court applies to requests for abatement made after the date of its enactment, which was July 30, 1996. Pub. L. No. 104-168, § 302(b), 110 Stat. at 1458. Miller's request for abatement was made in May 1996 and was denied in November 1998.

In *Banat v. Comm'r*, 109 T.C. 92 (1997), the tax court addressed whether judicial review was available for a request for abatement of interest that was submitted prior to the effective date of the amendment but was not denied until after July 31, 1996. The court noted that the amendment clearly did not apply to requests for abatement made and denied prior to July 31, 1996, citing its decision in *White v. Comm'r*, 109 T.C. 96 (1997). *Banat*, 109 T.C. at 94–95. It reasoned, however, that the purpose of the amendment was to provide increased protection of taxpayer rights and that it would be inconsistent with that intent to ''deny judicial review to taxpayers whose requests are continuing, considered, and denied after the date of enactment.'' *Id.* at 95. It therefore held that the denial of a request that was pending with the IRS after July 30, 1996 was subject to judicial review. *Id.*

We agree with the reasoning of *Banat* and therefore conclude that the amendment granting jurisdiction to the tax court applies to Miller's request for abatement, which was submitted in May 1996, but was not denied until November 1998. The tax court therefore properly exercised jurisdiction over Miller's petition and we have jurisdiction to review the tax court's decision under 26 U.S.C. § 7482(a).

III. Merits

[2] Section 6404(e) permits the abatement of interest assessed on ''any deficiency,'' or on the payment of any tax pursuant to I.R.C. § 6212, that is attributable to IRS error. 26 U.S.C. § 6404(e)(1). In *Woodral*, the tax court looked to the definition of ''deficiency'' in I.R.C. § 6211 to determine whether § 6404(e) permits the abatement of interest assessed on employment taxes. *Woodral*, 112 T.C. at 25. The court reasoned that §§ 6211 and 6212 cover taxes such as those on income, estate, gift, and public charities, but not employment taxes, and that the Commissioner therefore lacks authority to abate assessments of interest on employment taxes under § 6404(e). *Id.*; *see also Speers*, 38 Fed. Cl. at 201–02 (concluding that § 6404(e)(1) does not authorize the IRS to abate interest relating to employment taxes).

Similarly, the regulation implementing § 6404(e)(1) states that the Commissioner may abate the interest on any deficiency ''as defined in section 6211(a), relating to income, estate, gift, generation-skipping, and certain excise taxes.''[5] Treas. Reg. § 301.6404-2(a)(1)(i). Employment taxes are not included. *Id.*

Miller argues that *Woodral* failed to note the distinction between § 6404(e)(1)(A) and (B). She correctly notes that, while subsection (B) is specifically limited to the ''payment of any tax described in section 6212(a),'' subsection (A) contains no such limiting language. *See* I.R.C. § 6404(e)(1). Rather, subsection (A) states that it applies to ''any deficiency.'' *See id.*

Miller also points out that the definition of ''deficiency'' in § 6211 does not state that the term is limited to income, estate, gift, and excise taxes imposed by subtitle A or B. Rather, the statute defines the term ''[f]or purposes of this title *in the case of*'' taxes imposed by subtitle A and B. I.R.C. § 6211(a) (emphasis added). Section 6211(a) thus defines ''deficiency'' in the context of income, estate, gift, and excise

[5] I.R.C. § 6211(a) defines a deficiency ''[f]or purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44.'' Employment taxes are imposed by subtitle C.

taxes, but it does not state that the term cannot apply to any other kinds of taxes.

We recognize that there is much force in Miller's argument that § 6404(e)(1)(A) does not contain language limiting the provision to certain types of taxes, whereas § 6404(e)(1)(B) specifically does. And, were we writing on a clean slate, we might well agree with her argument. We are required, however, to "defer to an agency's construction of the statute it administers," where that interpretation is not contrary to congressional intent. *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1014 (9th Cir. 2000); *see also, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (noting the principle that "courts generally will defer to an agency's construction of the statute it is charged with implementing"); *Chevron U.S.A. Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (stating that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"). Here, we conclude that the Commissioner's interpretation of § 6404(e) as not applying to employment taxes is entitled to deference.

This interpretation is consistent with § 301.6404-2(a)(1)(i), the Secretary of the Treasury's implementation of the statute, limiting § 6404(e)(1)'s application to only income, estate, gift, generation-skipping, and certain excise taxes. *See* Treas. Reg. § 301.6404-2(a)(1). We must give this Treasury Regulation "'substantial deference,' since 'presumably [the agency] has brought its expertise to bear in formulating the regulation.'" *Mt. Diablo Hosp. v. Shalala*, 3 F.3d 1226, 1232 (9th Cir. 1993) (quoting *Am. Hosp. Mgmt. Corp. v. Harris*, 638 F.2d 1208, 1212 (9th Cir. 1981)) (alteration in original); *see also Comm'r v. Portland Cement Co.*, 450 U.S. 156, 169 [47 AFTR 2d 81-855] (1981) (stating that courts "must defer to Treasury Regulations that 'implement the congressional mandate in some reasonable manner'") (quoting *United States v. Correll*, 389 U.S. 299, 307 [20 AFTR 2d 5845] (1967)). The regulation's use of the definition of "deficiency" found in § 6211 is neither "unreasonable" nor "plainly inconsistent with the revenue statutes" and, accordingly, must be sustained. *See Portland Cement Co.*, 450 U.S. at 169 ("Treasury Regulations 'must be sustained unless unreasonable and plainly inconsistent with the revenue statutes.'") (quoting *Comm'r v. S. Tex. Lumber Co.*, 333 U.S. 496, 501 [36 AFTR 604] (1948)).

CONCLUSION

The statutory amendment granting jurisdiction to the tax court to review the IRS' decisions regarding abatement of interest is a change in legislation that undermines *Argabright*. Furthermore, we agree with the tax court's reasoning in *Banat* that judicial review is available where the request for abatement is pending after July 30, 1996. Accordingly, we conclude that the tax court properly exercised jurisdiction over Miller's petition and that we have jurisdiction to review the tax court's decision.

The regulation implementing I.R.C. § 6404(e)(1) indicates the intent of the Secretary of the Treasury to limit the abatement of interest to "income, estate, gift, generation-skipping, and certain excise taxes." Treas. Reg. § 301.6404-2(a)(1)(i). This interpretation is not unreasonable or plainly inconsistent with the statute. For the foregoing reasons, the decision of the tax court is

AFFIRMED.

¶2002-5636

UNITED STATES OF AMERICA, PLAINTIFF--APPELLEE v. Donald S. FLETCHER, DEFENDANT--APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 02-30006, Nov. 8, 2002. District Court affirmed. Decision against Taxpayer.

1. Tax crimes—tax evasion—U.S. Sentencing Guidelines—departures. Taxpayer's tax evasion sentence was affirmed: district court's 2-level upward departure in criminal history category wasn't abuse of discretion where court wasn't confined by U.S.S.G. to 1-level departure; and its analysis was reasonably spelled out and properly based on taxpayer's prior civil fraud

verdicts. Also, sophisticated means enhancement was supported by proof taxpayer used public tax seminars to instruct less educated taxpayers on how to ''legally'' evade taxes, concealed assets, claimed false deductions and falsified documents; and record otherwise supported tax loss calculations and court's reliance on govt.'s uncontroverted evidence thereof. *Reference:* United States Tax Reporter ¶73,446.516(3).

Appeal from the United States District Court for the District of Montana, Richard F. Cebull, District Judge, Presiding.

United States Court of Appeals, Ninth Circuit,

Before TROTT, NELSON, and THOMAS, Circuit Judges.

MEMORANDUM*

Donald S. Fletcher, a federal prisoner, appeals the sentence entered by the district court. We affirm. Because the parties are familiar with the factual and procedural history of this case, we will not recount it here.

I

[1] The district court did not abuse its discretion in upwardly departing from the United States Sentencing Guidelines. The record reflects that the district court properly complied with the departure analysis as set forth in United States v. Sablan, 114 F.3d 913, 916–17 (9th Cir.1997) (en banc).

The district court did not abuse its discretion by imposing a two-level upward departure in the criminal history category. Neither the Sentencing Guidelines nor case law confines a district court to a one-level departure. See U.S.S.G. § 4A1.3; United States v. Richison, 901 F.2d 778, 781 (9th Cir.1990) (per curiam). In addition, the district court's analysis of the methodology it was using to depart upward two levels was sufficient for us to ascertain why the district court departed upward two levels rather than one level, even though the district court did not explicitly explain why it did not enhance by only one level. See United States v. Starr, 971 F.2d 357, 363 n. 7 (9th Cir.1992).

The district court did not abuse its discretion by relying upon prior civil verdicts when departing upward with respect to Fletcher's criminal history. See U.S.S.G. § 4A1.3 (providing for a trial court to weigh ''(c) prior similar misconduct established by a civil adjudication . . .,'' ''(d) . . . pending trial or sentencing on another charge at the time of the instant offense,'' and ''(e) prior similar adult criminal conduct not resulting in a criminal conviction.''); United States v. Connelly, 156 F.3d 978, 983 (9th Cir.1998) (''An upward departure may be warranted when the defendant has committed crimes or conduct that the criminal history calculation instructions fail specifically to consider.'') (internal quotation marks and citation omitted).

II

The district court did not err in imposing an upward sentencing adjustment based on Fletcher's use of sophisticated means to conceal his tax evasion. The record shows that Fletcher conducted regular public tax seminars to facilitate fraud, solicited two other principals to assist in his scheme, and financially profited from his conduct. He created false documentation, failed to sign tax statements that he prepared, and encouraged taxpayers to hide assets in trusts for illegal purposes, claim personal expenses as business deductions, and when audited, encourage them to create false records to substantiate the inflated claims. Fletcher targeted a population that was less sophisticated with respect to tax law, represented that his advice was legal, and withheld information from his clients that other taxpayers in Ohio and California who had followed his advice had been subjected to audits, fines, and back-interest and that he himself had been found civilly liable for fraud for dispensing such advice. These facts provide a sufficient basis for the court to impose the upward adjustment.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

See United States v.. Aragbaye, 234 F.3d 1101, 1107–08 [86 AFTR 2d 2000-7343] (9th Cir.2000); United States v. Lewis, 93 F.3d 1075, 1082–83 [78 AFTR 2d 96-6361] (2d Cir.1996).

III

The district court neither clearly erred in determining the amount of loss nor abused its discretion in evaluating the reliability of the evidence presented. See United States v. Scrivener, 189 F.3d 944, 949 (9th Cir.1999) (discussing standard of review). The evidence that the government tendered at sentencing as to the intended loss is sufficient to sustain the district court's determination, especially given the absence of any contrary reliable evidence submitted by the defendant.

AFFIRMED.

¶2002-5637

Gilbert LAU, PLAINTIFF-APPELLANT v. UNITED STATES, DEFENDANT-APPELLEE. U.S. Court of Appeals, Federal Circuit, (CA Fed Cir) No. 02-5098, Nov. 6, 2002. Court of Federal Claims, (2002, Ct Fed Cl) 89 AFTR 2d 2002-1632, affirmed per curiam. Year 1994. Decision for Govt.

1. Limitations periods on refunds and credits—overpayments—recovery of forged refund check. Dismissal of taxpayer's action for re-issuance of forged refund check was affirmed: taxpayer didn't request replacement check within 31 USC §3702's 1-year period; and IRS communications with taxpayer weren't effective to revive or toll period where communications were made after period expired. *Reference:* United States Tax Reporter ¶65,115.04(70); 64,025.24(50); 74,225.05(15). IRC §6402; 6511; 7422.

United States Court of Appeals, Federal Circuit,

Before CLEVENGER, SCHALL, and LINN, Circuit Judges.

DECISION

PER CURIAM.

NOTE: Pursuant to Fed.Cir.R. 47.6, this order is not citable as precedent. It is public record.

Gilbert Lau appeals from the decision of the United States Court of Federal Claims that dismissed his complaint for lack of jurisdiction. Lau v. United States, No. 01-150T (Fed.Cl. Feb. 22, 2002) (unpublished). In his suit, Mr. Lau sought to recover from the United States the sum of $354.00. Mr. Lau alleged that he was entitled to this sum because it represented a tax refund payment which was mailed to him but which he never received because the check representing the payment was stolen and cashed after his endorsement on the check was forged. The Court of Federal Claims held that it lacked jurisdiction because Mr. Lau had failed to request a replacement check from the Internal Revenue Service ("IRS") within one year from the date on which the IRS issued the refund check, as required by 31 U.S.C. § 3702(c)(1). We affirm.

DISCUSSION

I.

[1] The pertinent facts are not in dispute. Mr. Lau filed his 1994 federal income tax return in February of 1995. On his return, he claimed a refund in the amount of $354.00. On March 24, 1995, the Department of the Treasury mailed a $354.00 refund check to Mr. Lau at the address listed on his return. Mr. Lau alleges that on August 5, 1997, he discovered that his refund check had been stolen, that his endorsement on the check had been forged, and that the check had been cashed by a person with whom he worked and whose address he had used as his mailing address on his tax return. On September 5, and November 12, 1997, Mr. Lau submitted forms to the IRS stating that he had not received his tax refund and requesting a replacement check. The IRS denied the request, and on March 16, 2001, Mr. Lau filed suit in the Court of Federal Claims seeking a replacement check.

As noted above, the Court of Federal Claims dismissed Mr. Lau's suit for lack of jurisdiction. It did so on the ground that his request for a replacement check from the IRS was untimely under 31 U.S.C. § 3702(c)(1) because it was submitted on September 5, 1997, more than one year after March 24, 1995, the date his refund check was issued.

Section 3702(c)(1) provides in relevant part as follows:

> Any claim on account of a Treasury check shall be barred unless it is presented to the agency that authorized the issuance of such check within 1 year after the date of issuance of the check . . . .

31 U.S.C. § 3702(c)(1). In its decision, the Court of Federal Claims noted that, by regulation, the requirement that a taxpayer present a claim for a replacement check within one year after the issuance of the original check applies even when "the original check has been negotiated and paid on a forged or unauthorized endorsement." 31 C.F.R. § 245-1(b).

Mr. Lau has timely appealed the court's dismissal. We have jurisdiction pursuant to 28 U.S.C.§s 1295(a)(3). We review de novo the trial court's dismissal for lack of jurisdiction. Massie v. United States, 166 F.3d 1184, 1187 (Fed.Cir.1999).

II.

Mr. Lau submitted his claim for a replacement refund check more than 17 months after his original refund check was issued. His claim thus fell squarely within the language of section 3702(c)(1) that any such claim is barred "unless it is presented to the agency that authorized the issuance of [the original] check within 1 year after the date of issuance of the check . . . ." Under these circumstances, the Court of Federal Claims did not err in dismissing Mr. Lau's complaint for lack of jurisdiction. A suit may not be maintained against the United States unless it is brought in exact compliance with the terms of the statute under which the United States has consented to be sued. Inter- Coastal Xpress, Inc. v. United States, 296 F.3d 1357, 1373 (Fed.Cir.2002). Because Mr. Lau did not submit his claim for a replacement check within the time period set forth in section 3702(c)(1), he did not comply with the statute that, in this case, forms the basis for the consent of the United States to be sued.

Mr. Lau argues that communications he allegedly had with the IRS had the effect of tolling the one-year limitations period. This argument is unavailing, however. The communications to which Mr. Lau refers occurred on November 5, 1997, and September 3, 1998, after the limitations period already had run. As the Court of Federal Claims pointed out, "[a]ny written or oral communication to a taxpayer, after the statute of limitations has run and not explicitly tolling the statute of limitations, cannot revive or toll the statute of limitations." Lau, slip op. at 8 (unpublished); see United States v. Marcinkowsky, 206 F.3d 1419 [85 AFTR 2d 2000-1237] (Fed.Cir.2000) (two-year period for filing a refund suit had passed before the IRS wrote to the taxpayer).

For the foregoing reasons, the decision of the Court of Federal Claims dismissing Mr. Lau's complaint for lack of jurisdiction is affirmed.

¶2002-5638

In Re: NERLAND OIL, INC., Debtor. SUPERPUMPER, INC., PLAINTIFF v. NERLAND OIL, INC. and The United States of America through the Internal Revenue Service, DEFENDANTS. U.S. Bankruptcy Court, Dist. of North Dakota, (Bktcy Ct ND) Bankruptcy No. 99-31826; Adversary No. 00-7021, Oct. 20, 2000. Affirmed by District Court, (2001, DC ND) 88 AFTR 2d 2001-6079, which was affirmed at (2002, CA8) 90 AFTR 2d 2002-6334. Years 1993, 1994. Decision for Govt.

1. Bankruptcy court procedure—lien priority—state-created setoff rights. IRS was granted summary judgment that its federal tax liens had priority over 3d-party creditor's state-created right to setoff payments it owed bankrupt taxpayer

against credit card receivables due from taxpayer: creditor had no prior, non-bankruptcy setoff right to assert under 11 USC §553 where IRS's tax liens were choate before setoff rights arose; and state court decision upholding creditor's rights wasn't binding on IRS since IRS wasn't party to that decision. Also, creditor's IRC §6323 ''implied''security interest argument was rejected where any such interest wasn't made pursuant to security agreement and extended only to its non-liened interest in credit card receivables, not payment obligations that were subject of tax liens. *Reference:* United States Tax Reporter ¶68,726.52(3); 63,215.04(50); 63,235.06(62). IRC §6321; 6323.

Kip M. Kaler, Fargo, ND, Bankruptcy Trustee for the Estate of Nerland Oil.
Jay D. Carlson, Fargo, ND, for Nerland Oil.
John Petrik, Minot, ND, for Superpumper, Inc.
Daniel Conrad, Washington, DC, for USA/IRS.

United States Bankruptcy Court, D. North Dakota,

MEMORANDUM OPINION AND ORDER

WILLIAM A. HILL, Bankruptcy Judge.

Creditor brought adversary proceeding to set off its debt to Chapter 7 debtor under promissory note against debt for unpaid credit card receivables that debtor owed creditor. On creditor's motion for summary judgment, the Bankruptcy Court, William A. Hill, J., held that: (1) state court arbitration decision could not be accorded any weight as to rights of Internal Revenue Service (IRS) pursuant to its federal tax liens; (2) creditor's right of setoff was inferior to tax liens of IRS; and (3) creditor did not qualify as holder of security interest in promissory note payments.

Motion denied.

By the complaint filed April 20, 2000, Superpumper, Inc. (''Superpumper'') seeks to setoff its debt to Debtor Nerland Oil, Inc. (''Nerland Oil'') under a promissory note dated June 29, 1995, against a debt for unpaid credit card receivables that Nerland Oil owes Superpumper. As of October 31, 1996, Superpumper owed Nerland Oil $359,790.18 under the promissory note, and Nerland Oil owed Superpumper $348,856.26 for unpaid credit card receivables. This issue was at the heart of a state court arbitration decision awarding setoff of the debts described above. Superpumper has filed a motion for summary judgment asking this Court to adopt the arbitration decision in toto. The chapter 7 trustee for Nerland Oil opposes summary judgment and rejects the decision of the arbitration panel, arguing that setoff is improper because the debts at issue lack ''mutuality'' as that term is defined in the context of section 553(a) of the Bankruptcy Code. Also responding is the Internal Revenue Service (''IRS''), which claims an interest in the promissory note dated June 29, 1995, on the basis of several prior tax liens assessed against Nerland Oil. Although the IRS was not a party to the state court arbitration proceeding, it has filed a cross-motion for summary judgment which does not contest any of the factual determinations made by the arbitration panel. The IRS does, however, take issue with the arbitration panel's decision to award setoff, asserting that its interest in Nerland Oil's right to receive payments under the promissory note is superior to any right of setoff held by Superpumper. As it was not a party in the arbitration proceeding, the IRS argues that it is not bound by the arbitration panel's ultimate decision regarding setoff.

1. Procedural History

On January 28, 1997, Superpumper commenced a lawsuit against Nerland Oil in state court seeking, inter alia, to setoff its debt to Nerland Oil under a promissory note against Nerland Oil's alleged debt to Superpumper for unpaid credit card receivables. Central to the dispute were three contracts, two of which contained arbitration clauses. Due to the interrelationship of the subject contracts, the state court ordered that the entire dispute be submitted to arbitration.

Superpumper appealed the order mandating arbitration to the Supreme Court of North Dakota. The appeal was subsequently denied, and the dispute went to arbitration. The arbitration proceeding was conducted on June 2 and 3, 1999, before a three-member arbitration panel of respected attorneys. The panel heard two full days of testimony and received numerous exhibits. On August 18, 1999, the arbitration panel issued its memorandum opinion granting Superpumper's request for setoff. The memorandum decision included detailed findings of fact and conclusions of law similar to what a court might have rendered. As to setoff, the arbitration decision states:

> The balance owed on the Superpumper, Inc. promissory note dated June 29, 1995, which is secured by the Dakota Fuel Stop Mortgage, is the sum of $10,933.92, plus interest accrued after October 31, 1996, at the rate of eight and one-half percent per annum. This promissory note is now due and payable in full. This amount is net of all offsets between the parties, including West Fargo Truck Stop, Inc.

Superpumper submitted a proposed judgment to the state district court and moved for confirmation of the arbitration decision. The state court issued an order confirming the arbitration decision, and this order is the subject of Nerland Oil's pending appeal to the Supreme Court of North Dakota.

Nerland Oil filed its chapter 7 bankruptcy petition on November 5, 1999. In recognition of the automatic stay, the state court denied Superpumper's request for a judgment to be entered on the arbitration award.[1] Nevertheless, Superpumper initiated the instant adversary proceeding in Nerland Oil's bankruptcy case. Superpumper and the IRS then submitted the instant motions for summary judgment. On September 19, 2000, after all the parties filed their respective summary judgment briefs, supporting affidavits, and exhibits, the Court conducted a hearing with respect to the competing summary judgment motions. At the hearing, both Superpumper and the IRS conceded that the state court arbitration proceeding had resolved all the material factual issues. The chapter 7 trustee, while disagreeing with the arbitration decision as to setoff and opposing Superpumper's motion for summary judgment, did not propose to offer any significant evidence at trial beyond what is already before the Court.[2] Specifically, in addition to the parties' respective briefs and affidavits, the following exhibits have been submitted for the Court's consideration in conjunction with the instant summary judgment motions:

1. Superpumper Exhibit A: the state court arbitration memorandum decision of August 18, 1999.

2. Superpumper Exhibit B: excerpts from a deposition of Brent Nerland, President of Nerland Oil.

3. Superpumper Exhibit C: the cover page and table of contents of a brief to the Supreme Court of North Dakota appealing the state court order that confirmed the arbitration decision.

4. Superpumper Exhibit D: the Assignment of Mortgage dated November 27, 1995, executed on behalf of Nerland Oil in favor of the IRS. This mortgage secured the Dakota Fuel Stop promissory note that Superpumper gave Nerland Oil pursuant to the Dakota Fuel Stop sale.

5. Superpumper Exhibit E: the October 28, 1996, letter and enclosures 276 Superpumper sent to Nerland Oil, which terminated Nerland Oil's ''jobber'' relationship with Superpumper at the Dakota Fuel Stop.

6. Superpumper Exhibit F: the state court Summons and Complaint filed by Superpumper on January 28, 1997, against Nerland Oil.

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[1] Superpumper's complaint in this matter indicates that its proposed judgment was signed and ''filed'' by the Clerk of Court in state court. The complaint also indicates that this was a mistake that occurred by reason of clerical error.

[2] The only new evidence the chapter 7 trustee proposed to present at trial was testimony from Brent Nerland to the effect that Superpumper was aware of Nerland Oil's financial difficulties with the IRS when it entered two contracts with West Fargo Truck Stop, Inc., another company operated by Brent Nerland. As will be discussed later in the opinion, such testimony is not determinative as to the outcome of this case.

7. Superpumper Exhibit G: Notices of Federal Tax Liens that the IRS filed with the Cass County Register of Deeds on September 21 and 22, 1998.

8. Trustee Exhibit H: a letter dated May 19, 1995, from Jay Carlson, counsel for Nerland Oil, to Dean Rindy, counsel for Superpumper, discussing the terms of the Dakota Fuel Stop sale.

9. Trustee Exhibit I: a document calculating the present value of the stream of payments West Fargo Truck Stop, Inc. was to receive under the two contracts it had with Superpumper regarding the purchase and transportation of fuel products.

10. Trustee Exhibit J: the offer to purchase the Dakota Fuel Stop signed by Brent Nerland on May 26, 1995.

11. Trustee Exhibit Y: the Freight Agreement between Superpumper and West Fargo Truck Stop, Inc. dated June 29, 1995, regarding delivery of fuel products to Superpumper's Amoco station in Belfield, North Dakota, and other locations in the Red River valley.

12. Trustee Exhibit Z: the Exclusive Requirements, Supply and Freight Agreement between Superpumper and West Fargo Truck Stop, Inc. dated June 29, 1995, regarding the supply and delivery of fuel products to Superpumper's Dakota Fuel Stop station in Jamestown, North Dakota.

13. IRS Exhibit No. 1: a certified copy of Nerland Oil's Transcript of Account with the IRS regarding taxes.

14. IRS Exhibit No. 2: the Proof of Claim filed by the IRS on March 10, 2000.

15. IRS Exhibit No. 3: the June 29, 1995, promissory note executed on behalf of Superpumper in favor of Nerland Oil pursuant to the sale of the Dakota Fuel Stop.

The record before the Court, as detailed above, reveals the following material facts.

2. Material Facts

[1] Brent Nerland established Nerland Oil, Inc. in the mid-1970's. In addition to marketing petroleum products on a wholesale basis, Nerland Oil was a Conoco "jobber," meaning that it had a contract with Conoco to distribute Conoco fuel products to the Conoco retail stations that it serviced. According to industry practice, Nerland Oil, in its role as jobber, also acted as the conduit through which Conoco would forward credit card receivables to retail stations after the transactions had been processed by Conoco. Over the years, Nerland Oil acquired ownership of several convenience stores. One of those stores was a Conoco retail station and convenience store known as the Dakota Fuel Stop in Jamestown, North Dakota.

In June of 1995, Superpumper, a company in the business of owning and operating convenience stores, purchased the Dakota Fuel Stop from Nerland Oil. In partial payment of the purchase price, Superpumper executed a promissory note in favor of Nerland Oil in the amount of $350,000.00 secured by a second mortgage on the Dakota Fuel Stop. The annual rate of interest on the note was nine percent, and beginning on September 30, 1995, Superpumper was required to make quarterly payments of $7,545.00. The balance of the note was to be paid on September 30, 2000, or at such time as Superpumper sold the Dakota Fuel Stop.

The "offer to purchase" signed by Nerland Oil and Superpumper stated that the sale would be subject to a supply and freight agreement to be executed by Superpumper in a form acceptable to Nerland Oil. Shortly after the sale, Superpumper entered two contracts related to the sale of the Dakota Fuel Stop. On the basis of these contracts, Superpumper was credited with $579,332.00 toward the purchase price of the Dakota Fuel Stop. The other party to these contracts was West Fargo Truck Stop, Inc. ("WFTS"), a company established by Brent Nerland which owns a truck stop in West Fargo and Big Jim's Cafe in Jamestown, North Dakota. In the first agreement, Superpumper contracted with WFTS for the purchase and delivery of 100 percent of the Dakota Fuel Stop's Conoco brand

fuel requirements.[3] The second contract was merely a freight agreement. Superpumper hired WFTS to haul fuel products to its Amoco station in Belfield, North Dakota, and to other Superpumper locations in the Red River valley. Both of these contracts contained clauses requiring that disputes be submitted to binding arbitration.

Neither of the two contracts discussed above expressly established Nerland Oil as the Conoco jobber that would service the Dakota Fuel Stop. However, it is undisputed that Nerland Oil was a Conoco jobber and that Nerland Oil acted in that capacity in dealing with Superpumper and the Dakota Fuel Stop. Most significantly, Nerland Oil was the conduit through which Conoco forwarded to Superpumper the credit card receivables generated by the Dakota Fuel Stop. There was no express contract between Superpumper and Nerland Oil regarding the forwarding of credit card receivables because the practice is so well known in the industry that written agreements addressing the issue are rare.

By the spring of 1996, however, Nerland Oil had fallen behind on remitting the Dakota Fuel Stop credit card receivables from Conoco to Superpumper. The amount of this arrearage continued to grow over the course of the year. On October 28, 1996, Superpumper terminated its jobber relationship with Nerland Oil and demanded satisfaction of the mortgage securing the $350,000 promissory note, asserting that the outstanding balance of credit card receivables should be applied against the amount due under the promissory note and mortgage held by Nerland Oil. Nerland Oil refused Superpumper's demand to satisfy the note and mortgage. As of October 31, 1996, Nerland Oil owed Superpumper $348,856.26 in credit card receivables, and Superpumper owed Nerland Oil $359,790.18 under the promissory note and mortgage.

Meanwhile, in the early 1990's, Nerland Oil failed to pay certain federal excise and employment taxes. The United States, through the Internal Revenue Service, made assessments for unpaid taxes against Nerland Oil on the following dates: August 9, 1993; August 30, 1993; September 20, 1993; December 27, 1993; January 3, 1994; December 9, 1996; December 31, 1996; November 3, 1997; December 22, 1997; and September 20, 1999. Notice and demand for payment of the tax assessments was sent to Nerland Oil, but Nerland Oil failed to pay them. The United States filed proper notice of its federal tax liens against Nerland Oil on September 21 and 22, 1998. At the time its bankruptcy petition was filed, Nerland Oil owed the IRS $1,693,979.57 on the basis of the unpaid tax assessments. Of this amount, $566,227.16 is attributable to the tax assessments from 1993 and 1994 which occurred prior to the sale of the Dakota Fuel Stop to Superpumper.

3. Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure applies in adversary proceedings. Fed. R. Bankr.P. 7056. Summary judgment is appropriate if, "assuming all reasonable inferences favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." In re Cochrane, 124 F.3d 978, 981–82 (8th Cir.1997) (citations omitted). Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. Id. at 982 (citing Crain v. Board of Police Comm'rs, 920 F.2d 1402, 1405–06 (8th Cir.1990)). Only factual disputes which may affect the outcome of a suit are sufficient to preclude summary judgment. Ries v. Wintz Properties, Inc. (In re Wintz Companies), 230 B.R. 848, 858 (8th Cir. BAP 1999) (citations omitted).

In this case, the parties concede that there are no material factual issues that remain to be tried and that there is essentially no new evidence to be offered if a trial is held. Accordingly, the resolution of this case turns primarily on legal rather than factual issues, and summary judgment

[3] Curiously, WFTS was not a Conoco jobber authorized to sell the Conoco fuel products that the Dakota Fuel Stop required; nor did it have any trucks that could haul fuel.

is appropriate based on the detailed findings of fact rendered by the arbitration panel as augmented by the exhibits submitted in conjunction with the instant motions.

4. The Impact of the Arbitration Decision

Superpumper asks this Court to adopt the August 18, 1999, arbitration decision in toto. An arbitration decision may be admitted into evidence and accorded such weight as the court deems appropriate. Alexander v. Gardner-Denver Co., 415 U.S. 36, 60, 94 S.Ct. 1011, 1025, 39 L.Ed.2d 147 (1974); In re Litwok, 246 B.R. 1, 8 (E.D.N.Y.2000). The question of how much weight to give an arbitration decision lies within the court's discretion upon consideration of the facts and circumstances of the case. Alexander, 415 U.S. at 60, n. 21, 94 S.Ct. at 1025, n. 21. Great weight may be accorded an arbitration decision where "the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." Id.

In this case, the arbitration panel made factual findings detailing the business dealings between Superpumper and Nerland Oil. These factual issues were specifically addressed by the parties at the arbitration proceeding and were decided by the arbitration panel on the basis of an adequate record. Thus, the Court is inclined to give the arbitration decision great weight insofar as it determined what occurred between Superpumper and Nerland Oil during the period relevant to this dispute. However, the IRS was not a party to the arbitration proceeding. Furthermore, it is apparent from the arbitration panel's memorandum decision that the panel failed to adjudicate, consider, or determine the impact of the IRS tax liens on Superpumper's right of setoff. This issue was not addressed by the parties during the arbitration proceeding and was not decided by the arbitration panel. Therefore, the arbitration panel's memorandum decision can be accorded no weight on the issue.

5. Setoff Under 11 U.S.C. § 553

Superpumper asserts a right of setoff under section 553 of the Bankruptcy Code, which provides:

> [T]his title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . .

11 U.S.C. § 553(a). Accordingly, the following three elements must be established in order to effect a setoff in the context of bankruptcy:

1. The creditor is liable to the debtor on a prepetition debt;
2. The creditor has a claim against the debtor that arose prepetition; and
3. The debt and the claim are mutual obligations.

See In re Sauer, 223 B.R. 715, 724 (Bankr.D.N.D.1998) (quoting United States v. Gerth, 991 F.2d 1428, 1431 (8th Cir.1993)). However, the Bankruptcy Code does not create a federal right of setoff. Sauer, 223 B.R. at 724 (citing Citizens Bank of Md. v. Strumpf, 516 U.S. 16, 18, 116 S.Ct. 286, 289, 133 L.Ed.2d 258 (1995)). Rather, section 553(a) merely preserves a right of setoff that otherwise exists under applicable nonbankruptcy law. Id. Thus, whether a creditor has an existing right of setoff under applicable nonbankruptcy law is a threshold issue that must be satisfied in order to invoke section 553(a). In this case, any right of setoff Superpumper may assert against the Dakota Fuel Stop promissory note is inferior to the United States' tax liens against that promissory note.

A federal tax lien arises on the date it is assessed and continues until the assessed tax liability is paid or unenforceable due to lapse of time. 26 U.S.C. § 6322; State of Minnesota, Department of Revenue v. United States, 184 F.3d 725, 728 [84 AFTR 2d 99-5030] (8th Cir.1999). The tax lien extends to all of the delinquent tax-

payer's property interests and attaches to interests that are acquired while the lien is in force. 26 U.S.C. §§ 6321, 6322; Glass City Bank of Jeanette, Pa. v. United States, 326 U.S. 265, 267–69 [34 AFTR 1], 66 S.Ct. 108 [34 AFTR 1], 90 L.Ed. 56 (1945). Federal law governs the priority accorded to liens competing with federal tax liens. State of Minnesota, Department of Revenue v. United States, 184 F.3d 725, 728 [84 AFTR 2d 99-5030] (8th Cir.1999) (citing Aquilino v. United States, 363 U.S. 509, 513–14, 80 S.Ct. 1277, 4 [5 AFTR 2d 1698] L.Ed.2d 1365 (1960)). '''Under federal law, the priority of a lien depends on the time the lien attached to the property in question and became choate.''' Id. (quoting Cannon Valley Woodwork, Inc. v. Malton Construction Co., 866 F.Supp. 1248, 1250 [79 AFTR 2d 97-1887] (D.Minn.1994)). ''Absent provision to the contrary, priority for purposes of federal law is governed by the common- law principle that 'the first in time is the first in right.''' Id. (quoting United States v. McDermott, 507 U.S. 447, 449 [71 AFTR 2d 93-1154], 113 S.Ct. 1526 [71 AFTR 2d 93-1154], 123 L.Ed.2d 128 (1993)).

Although it is not a lien, a state-created right of setoff is subject to the federal choateness requirement. See Horton Dairy, Inc. v. United States, 986 F.2d 286, 291 [71 AFTR 2d 93-1026] (8th Cir.1993); United States v. Central Bank of Denver, 843 F.2d 1300, 1310 [61 AFTR 2d 88-936] (10th Cir.1988). A right of setoff becomes choate when it is exercised. Horton Dairy, Inc., 986 F.2d at 291 (citing Central Bank of Denver, 843 F.2d at 1310). A federal tax lien arises and is choate when unpaid taxes are assessed against the delinquent taxpayer. United States v. Leventhal, 316 F.2d 341, 343 [11 AFTR 2d 534] (D.C.Cir.1963); Eskanos v. Alpha 76, Inc., 712 F.Supp. 819, 821 [64 AFTR 2d 89-5500] (D.Colo.1989); In re May Reporting Services, Inc., 115 B.R. 652, 656 [71A AFTR 2d 93-3881] (Bankr.D.S.D.1990). Thus, in order to prime a federal tax lien, a setoff must be exercised prior to the date the federal tax lien was assessed.

In this case, several tax liens were assessed against Nerland Oil in 1993 and 1994. Thus, several tax liens had become choate well before Superpumper bought the Dakota Fuel Stop from Nerland Oil in June 1995. Any right of setoff held by Superpumper cannot logically predate the June 1995 sale. Thus, Superpumper's right of setoff cannot prime the federal tax liens that were assessed in 1993 and 1994 which, as of the petition date in this case, amounted to $566,227.16-well in excess of the amount remaining due under the $350,000 promissory note that Superpumper gave Nerland Oil pursuant to the Dakota Fuel Stop sale. Since the federal tax liens from 1993 and 1994 totaling $566,227.16 are superior to any right of setoff that Superpumper may assert, setoff is inappropriate. See Horton Dairy, Inc., 986 F.2d at 291 (setoff is improper where IRS tax lien granted the United States an interest in the delinquent taxpayer's bank account that was superior to the bank's inchoate right of setoff); see also Clark v. Sullivan, 3 N.D. 280, 55 N.W. 733, 736 (1893) (''To the extent that the setting off of one judgment against another would affect the rights of third persons-rights which have equitable claim to superiority-the court will refuse to compel the payment of one of these judgments with the other.''). In short, Superpumper has no enforceable right of setoff under applicable nonbankruptcy law and, therefore, cannot invoke section 553(a) of the Bankruptcy Code.

6. Inapplicability of 26 U.S.C. § 6323

Nevertheless, Superpumper asserts that its claimed right of setoff is similar to a security interest. According to section 6323(a) of the Internal Revenue Code, ''[t]he lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof which meets the requirements of subsection (f) has been filed by the Secretary.'' 26 U.S.C. § 6323(a) (emphasis added). Within the context of section 6323, however, ''security interest'' is defined as follows:

> The term ''security interest'' means any interest in property acquired by contract for the purpose of securing payment or performance of an obligation or indemnifying against loss or liability. A security interest exists at any time
>
> (A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation, and
>
> (B) to the extent that, at such time, the holder has parted with money or money's worth.

26 U.S.C. § 6323(h)(1). Thus, Superpumper's claimed right of setoff must qualify as a security interest under the above definition before Superpumper may invoke 26 U.S.C. § 6323(a).

In this case, Superpumper argues that it has a security interest in the credit card receivables that Nerland Oil unlawfully retained. Superpumper concedes that its security agreement does not arise from an express contract. Instead, Superpumper claims that its security agreement arises from an implied contract based on industry custom and practice where the ''jobber'' is responsible for remitting credit card receivables to the retailer after they have been processed by Conoco. Superpumper claims an implied security interest in the subject credit card receivables for the purpose of securing performance of Nerland Oil's obligation to remit those receivables to Superpumper. Superpumper asserts that it exercised its right of setoff by means of the October 28, 1996, letter it sent to Nerland Oil, which predates the notice of federal tax liens filed by the United States on September 21, 1998. In this manner, Superpumper argues that its alleged security interest has priority over the United States' tax liens.

However, Superpumper's argument is fatally flawed. First, Superpumper claims a security interest in the wrong asset. Superpumper alleges a security interest in credit card receivables wrongfully retained by Nerland Oil. However, the property in contention is the right to receive payments under the Dakota Fuel Stop promissory note. Superpumper does not contend that its alleged security interest extends to the promissory note. Thus, by virtue of its failure to claim an interest in the Dakota Fuel Stop promissory note payments at issue, Superpumper cannot qualify as the holder of a security interest in those payments.

Second, Superpumper's alleged implied contract with Nerland Oil regarding credit card receivables cannot be characterized as a security agreement. At best, all that can be implied from industry custom and practice in this case is an obligation on the part of Nerland Oil to remit credit card receivables to Superpumper after they have been processed by Conoco. That Nerland Oil failed to remit these receivables and therefore owed Superpumper $348,856.26 as of October 31, 1996, is undisputed. That Superpumper owed Nerland Oil $359,790.18 under the Dakota Fuel Stop promissory note as of October 31, 1996, is likewise undisputed. However, there is no basis upon which to conclude that the existence of these debts ''reflected a desire by the parties to secure each other's obligations.'' In the Matter of Elcona Homes Corp., 863 F.2d 483, 486 (7th Cir.1988). Superpumper simply has no security agreement covering the right to receive payment under the promissory note. Accordingly, Superpumper does not qualify as the ''holder of a security interest'' in the promissory note payments, and its argument under 26 U.S.C. § 6323(a) must fail.

7. Conclusion

The state court arbitration decision can be accorded no weight as to the rights of the IRS pursuant to its federal tax liens. Moreover, the IRS holds at least $566,227.16 in federal tax liens against Nerland Oil that (1) attached to the Dakota Fuel Stop promissory note at the time it was made, (2) are superior to any right of setoff that subsequently arose in favor of Superpumper with respect to the note, and (3) exceed the amount remaining due under the note. Under these circumstances, the right of setoff claimed by Superpumper is not enforceable under applicable nonbankruptcy law, and therefore,

Superpumper may not invoke section 553(a) of the Bankruptcy Code. Accordingly, the Court need not address the chapter 7 trustee's contention that the debts at issue between Superpumper and Nerland Oil lack mutuality within the meaning of 11 U.S.C. § 553(a). Based on the foregoing, the motion for summary judgment filed by Superpumper on June 30, 2000, is hereby DENIED, and the cross-motion for summary judgment filed by the IRS on August 1, 2000, is hereby GRANTED. Judgment shall be entered in favor of defendant IRS dismissing the complaint in this adversary proceeding with prejudice.

JUDGMENT MAY BE ENTERED ACCORDINGLY.

SO ORDERED.

ORDER UNDER F.R. CIV. P. RULE 54(b) CERTIFYING THE OCTOBER 20, 2000 JUDGMENT

HEREIN TO BE FINAL

The Honorable William A. Hill, United States Bankruptcy Judge, having duly considered Plaintiff Superpumper, Inc.'s Motion to Certify Entry of Final Judgment,

The Court expressly determines that there is no just reason for delay in making the October 20, 2000, Judgment herein final.

IT IS EXPRESSLY ORDERED that the Judgment dated and entered herein on October 20, 2000, be certified as a final judgment.

¶2002-5639

John BROWN, PETITIONER v. UNITED STATES OF AMERICA, RESPONDENT. U.S. District Court, Southern Dist. of New York, (DC NY) Nos. 99 CR. 348(AGS); 02 Civ. 647(AGS), Nov. 7, 2002. Decision against Taxpayer.

1. Tax crimes—aiding and assisting in preparation of false returns—sentencing—post-conviction motion to vacate. Taxpayer's untimely 28 USC §2255 petition to vacate his sentence for assisting in preparation of false returns was denied: taxpayer didn't file petition within year after his conviction became final, so substantive arguments that court miscalculated both his criminal history category and tax loss, and that he received ineffective assistance of counsel, weren't addressed. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §7206.

United States District Court, S.D. New York,

MEMORANDUM ORDER

SCHWARTZ, J.

This action is before the Court on the petition of John Brown (''petitioner'') pursuant to 28 U.S.C. § 2255. Brown seeks to vacate his sentence, claiming that: (i) the Court improperly calculated his criminal history category in determining the appropriate sentencing guideline range; (ii) the Court improperly calculated the tax loss attributable to defendant's conduct; and (iii) that he received ineffective assistance of counsel. For the reasons set forth below, the petition is denied.

Factual and Procedural Background

On October 20, 1999, petitioner was charged, in a thirteen count superseding indictment, with violating 26 U.S.C. § 7206(2) (willfully aiding in the preparation of a materially false tax return). On March 27, 2000, the day petitioner's trial was scheduled to begin, he pled guilty to the indictment without a written or verbal agreement with the government.

In determining Brown's sentence, the Court agreed with the Probation Department's determination that the tax loss to be applied in computing Brown's offense level was $185,000. (See Presentence Report (''PSR'') pp 25, 32). Because Brown was in the business of preparing tax returns, the Court increased petitioner's offense level by two levels pursuant to U.S. Sentencing Guidelines § 2T1.4(b)(1)(B). The Court granted petitioner a two-level reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a), resulting in a total offense level of 15. Based upon Brown's prior sentence of 3 years' probation, and the fact that he had committed

the offenses charged in the indictment while on probation, the Court determined that petitioner was in Criminal History Category II. (See Transcript of Proceedings, September 26, 2000 (''Sentencing Tr.'') at 19–20). Accordingly, the Court sentenced petitioner to 21 months of incarceration, the low end of the applicable guidelines range (21 to 27 months). The Court also determined that upon release from imprisonment, petitioner shall be on supervised release for a term of one year for each count of conviction (to run concurrently). Finally, the Court ordered petitioner to pay special assessments totaling $650.

Brown filed the instant petition on January 2, 2002. In it he argues that: (i) he should not have been placed in Criminal History Category II; (ii) he was entitled to an additional one-level decrease in his offense level under U.S.S.G. § 3E1.1(b)(2) because he timely notified the government of his intention to plead guilty and thus permitted the government to avoid the expense of trial preparation; (iii) the government violated an oral plea agreement by arguing that the applicable tax loss for sentencing purposes should include uncharged conduct; (iv) he is entitled to a downward departure on the grounds that his Criminal History Category overepresents the seriousness of his past criminal conduct, and on the grounds that uncharged conduct was improperly considered in the calculation of his offense level; and (v) he was denied effective assistance of counsel at the time he entered his guilty plea and at sentencing.[1]

Discussion

[1] A petition under 28 U.S.C. § 2255 must be filed within one year of the date on which the judgment of conviction becomes final. See 28 U.S.C. § 2255.[2] The parties dispute whether the instant petition was timely filed and thus before addressing the merits of the petition, the Court must determine whether the petition was filed within the statutory time limit.

As an initial matter, the Court notes that although the petition was not received by the Pro Se Office of the Court until January 7, 2002, the petition itself is dated January 2, 2002. And because petitioner is currently incarcerated, the Court deems the petition to have been filed on January 2, 2002. See Torres v. Irvin, 33 F.Supp.2d 257, 270 (S.D.N.Y.1998) (noting that pro se prisoners' papers are considered filed when they are handed over to prison officials for forwarding to the court and citing Houston v. Lack, 487 U.S. 266, 270 (1988) and Dory v. Ryan, 999 F.2d 679, 681–82 (2d Cir.1993)); see also Hunter v. Kuhlman, 97 Civ. 4692, 1998 WL 182441 at 1 n. 2 (S.D.N.Y. April 17, 1998) (absent evidence to the contrary, the Court assumed that petitioner gave his petition to prison officials for mailing on the date he signed it).

Brown was sentenced on September 26, 2000. Under Fed.R.App.P. 4(b)(1)(A), a notice of appeal in a criminal case ''must be filed ... within 10 days after the ... entry of judgment.'' Fed.R.App. 4(b)(1)(A). Brown never filed a notice of appeal and thus his conviction became final on October 11, 2000, one day after the ten-day period in which he could have appealed his conviction. See Fed.R.Cr.P. 45 (''When a period of time prescribed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded.''); see also Siminou v. United States, 2001 WL 936224 at 7 (S.D.N.Y. August 17, 2001). A timely claim for relief under 28 U.S.C. § 2255 would have to have been filed by October 11, 2001, but as discussed supra, the instant petition was

[1] By notice of motion dated June 10, 2002, Brown filed a ''Motion In Request for Summary Judgment.'' Such motion, which was submitted without an accompanying memorandum of law and without any supporting documentation, requests that the Court ''change the sentence that has been imposed on this petitioner.'' Because petitioner's summary judgment motion does not raise any issues not already addressed in the original petition, the Court does not separately address that motion in deciding the instant petition.

[2] Under certain circumstances, petitions filed under 28 U.S.C. § 2255 may be filed more than a year after a conviction. See 28 U.S.C. § 2255. However, petitioner does not assert that any of those circumstances exist here.

filed on January 2, 2002. Accordingly, petitioner's claim is time-barred.[3]

Because the Court finds that Brown's petition was not timely filed, the Court denies the petition without addressing the substance of his claim.

Conclusion

For the reasons set forth above, the petition is denied. As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. See 28 U.S.C. § 2253, as amended by the Antiterrorism and Effective Death Penalty Act of 1996. See generally Lozada v. United States, 107 F.3d 1011 (2d Cir.), vacated on other grounds, United States v. Perez, 129 F.3d 255, 260 (2d Cir.1997). The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith. See Coppedge v. United States, 369 U.S. 438 (1962). The Clerk of the Court is directed to close the file in this case.

SO ORDERED.

¶2002-5640

Richard S. RAMOS, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of California, (DC CA) Docket No. C 01-21148-RS, Nov. 1, 2002. Decision against Govt.

1. Actions against U.S.—wrongful levy—damages—limitations periods—equitable tolling—motion to dismiss—procedures. Govt.'s limitations period-based F.R.Civ.P. 12b(1) jurisdictional motion to dismiss taxpayer's IRC §7433 damages complaint was denied: under Supreme Court and 9th Cir. precedent, limitations period wasn't jurisdictional issue to be decided on Rule 12(b)(1) motion if subject limitations period was subject to equitable tolling, which IRC §7433 presumptively was absent explicit Congressional intent to contrary. Also, even construed as brought under Rule 12(b)(6), motion still failed where plaintiff's allegations were sufficient to state claim and bring limitations period issue into question. *Reference:* United States Tax Reporter ¶74,335.01(30); 74,025.01(145). IRC §7402; 7433.

United States District Court, N.D. California,

ORDER DENYING DEFENDANT'S MOTION TO DISMISS (Doc. 11)

SEEBORG, Magistrate J.

I. INTRODUCTION

Defendant United States moves to dismiss the complaint of Richard S. Ramos for lack of subject matter jurisdiction. The complaint was filed December 11, 2001, seeking damages pursuant to 26 U.S.C. § 7433. Defendant claims that the Court is without subject matter jurisdiction to hear this claim because the statute of limitations has expired. The parties fully briefed the motion and appeared for oral argument on July 24, 2002. The parties filed post-argument supplemental briefs to address questions raised at oral argument. For the reasons set forth below, defendant's motion to dismiss is denied.

II. BACKGROUND

On January 28, 1998, plaintiff filed a complaint in District Court to quiet title to allegedly improper levies filed by the Internal Revenue Service (''IRS''). At trial in that action, held December 15–17, 1998, the government admitted that four IRS seizures were in fact illegal. Those four seizures totaled $1710.08. In the findings of fact and conclusions of law issued July 15, 1999, the presiding judge ruled that ''the return of those illegally seized monies cannot be had in a quiet title action. Recourse is pursuant to 26 U.S.C.

[3] Brown argues that his conviction did not become final until January 4 2001, i.e. 100 days after his sentencing date. (See Memorandum in Support of the Petition at 1–2). He arrives at this number by adding the 10 days allowed to file a notice of appeal to the 90 days permitted to seek a writ of certiorari from the Supreme Court, and cites several cases in which courts have held that judgments of conviction were not final until the time to seek certiorari had expired. (Id.) However, unlike the petitioners in the cited cases, Brown never pursued a direct appeal in the Court of Appeals for the Second Circuit. Thus, he could not have filed a petition for a writ of certiorari and the time limit applicable to the filing of such a petition has no bearing on whether Brown's petition was timely filed.

section 7433.'' On December 11, 2001, plaintiff filed a complaint seeking the return of this money pursuant to 26 U.S.C. § 7433. Defendant now moves to dismiss the complaint for lack of subject matter jurisdiction.

III. STANDARDS

A. Lack of Subject Matter Jurisdiction under Fed.R.Civ.P. 12(b)(1)

On a motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1), the plaintiff must prove jurisdiction in order to survive the motion. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir.1989). ''When considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction.'' McCarthy v. United States, 850 F.2d 558, 560 (9th Cir.1998). ''A district court may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question prior to trial, if the jurisdictional facts are not intertwined with the merits. In such circumstances, no presumption of truthfulness attaches to the plaintiff's allegations.'' Rosales v. United States, 824 F.2d 799, 803 (9th Cir.1987) (citations omitted).

B. Failure to State a Claim under Fed.R.Civ.P. 12(b)(6)

On a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, all facts alleged in the complaint are taken as true in the light most favorable to the plaintiff. Epstein v. Washington Energy Co., 83 F.3d 1136, 1140 (9th Cir.1996). The Court must ''draw all reasonable inferences in favor of the nonmoving party.'' Salim v. Lee, 202 F.Supp.2d 1122, 1125 (C.D.Cal.2002). Dismissal is proper ''only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'' Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). ''A district court is not entirely limited to considering facts in the complaint. Facts subject to judicial notice may be considered on a motion to dismiss.'' Biagro Western Sales, Inc. v. Helena Chem. Co., 160 F.Supp.2d 1136, 1140 (E.D.Cal.2001). ''Where the Plaintiff is a pro se litigant, the court is particularly liberal in construing the complaint in his favor.'' Moore v. United States, 193 F.R.D. 647, 651 (N.D.Cal.2000) (citation omitted).

IV. ANALYSIS

[1] A. Rule 12(b)(1) does not Apply to Statutes which Permit Equitable Tolling

Defendant characterizes its motion as one to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). Defendant argues that ''[u]nder settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued ... and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. A statute of limitations requiring that a suit against the government be brought within a certain time period is one of those terms.'' (Def.'s Mot. to Dismiss at 3) (citations omitted) (internal quotations omitted). Defendant argues that as a matter of law that the statute of limitations in this case has run, and therefore the Court is without jurisdiction to hear plaintiff's claim. As more fully explained below, however, recent Supreme Court and Ninth Circuit decisions cast doubt on the proposition that statutes waiving sovereign immunity and setting forth limitations to bring suit implicate jurisdictional concerns at the motion to dismiss stage when the statute is subject to equitable tolling.

In the Supreme Court case of Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), Chief Justice Rehnquist announced ''a more general rule to govern the applicability of equitable tolling in suits against the Government.'' Id. at 95. The Court held that ''the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so.'' Id. at 95–96. The Ninth Circuit interprets Irwin to

mean that "federal statutory time limitations on suits against the government are not jurisdictional in nature." Washington v. Garrett, 10 F.3d 1421, 1437 (9th Cir.1993). In Supermail Cargo v. United States, 68 F.3d 1204 [76 AFTR 2d 95-7085] (9th Cir.1995), the court ruled that the district court erred when dismissing a non-taxpayer claim against the IRS filed pursuant to 26 U.S.C. § 7426, which autho-rizes a third party to bring suit against the government for wrongful levy. The Court of Appeals ruled that the question of whether the statute of limitations had run was not a jurisdictional issue, and "should have been raised through a Rule 12(b)(6) motion to dismiss for failure to state a claim, not a Rule 12(b)(1) motion to dis-miss for lack of jurisdiction." Id. at 1206 n. 3. The general principle to be divined from Irwin and its progeny is straight for-ward: if a statute of limitations on a claim against the government is subject to equita-ble tolling, the statute of limitations issue cannot be resolved on a 12(b)(1) motion. See Supermail Cargo v. United States, 68 F.3d 1204 [76 AFTR 2d 95-7085] (9th Cir.1995); Hughes v. United States, 263 F.3d 272 (3d Cir.2001) (ruling that because the statute of limitations under the Federal Tort Claims Act is not jurisdictional, the district court, when considering matters outside of the pleadings, should have used the summary judgment standard instead of resolving the motion under Rule 12(b)(1)). However, when equitable tolling of a stat-ute of limitations is not permitted because of the highly technical nature of the claims process under the statute, a court may de-cide the statute of limitations issue under Rule 12(b)(1). See Jordan Hosp., Inc. v. Shalala, 276 F.3d 72 (1st Cir.2002) (ruling that the district court properly dismissed a claim under the Medicare Act pursuant to Rule 12(b)(1) where the Act did not permit equitable tolling).

B. 26 U.S.C. § 7433 Permits Equitable Tolling

In United States v. Brockamp, 519 U.S. 347 [79 AFTR 2d 97-986] (1997), the Supreme Court refined the doctrine announced in Irwin, that equitable tolling is presumed unless otherwise stated by Congress, and ruled that equitable tolling is not permitted when a statute "uses language that is not simple . . . . [and] sets forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions." Id. at 350. To characterize properly defendant's motion under this principle, the Court must determine whether equitable tolling of 26 U.S.C. § 7433 is permitted in light of Brockamp and Irwin. The time period to bring a claim as set forth by Congress under Section 7433(d)(3) is uncomplicated: "an action . . . may be brought only within 2 years after the date the right of action accrues." This limitations period is more akin to the statute of limitations found in Irwin than the complicated statutory scheme found in Brockamp. Although the regulations underlying Section 7433(d)(3) provide a detailed procedure for filing a claim,[1] these regulations do not evince an intent on the part of Congress to alter its waiver of sovereign immunity. As the Irwin Court held: "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States. Congress, of course, may provide otherwise if it wishes to do so." Irwin, 498 U.S. at 95–96 (emphasis added). The text of Section 7433(d)(3) does not indicate that Congress otherwise provided against the presumption that equitable tolling is allowed. Post- Irwin decisions permit equitable tolling under Section 7433(d)(3). See United States v. Mansour, 1997 U.S. Dist. LEXIS 15003, at 11 [80 AFTR 2d 97-6690] (D.Conn.1997). The only post-Brockamp decision to address squarely whether Section 7433(d)(3) permits equitable tolling answered the question in the affirmative. See United States v. Marsh, 89 F. Supp 2d 1171, 1177 [85 AFTR 2d 2000-1474] (D. Hawaii 2000); see also Wise v. Commissioner, 168 F.Supp.2d 649, 653 [87 AFTR 2d 2001-1322] (S.D.Tex.2001) (leaving open the general question of whether equitable tolling is allowed under Section 7433

[1] See 26 C.F.R. § 301.7433-1(d).

and ruling that even if tolling were available, the facts did not warrant application of the doctrine). Section 7433(d)(3), therefore, is subject to equitable tolling and a complaint alleging violation of that section cannot be resolved on a motion to dismiss pursuant to Rule 12(b)(1).[2] The Court treats defendant's motion as one to dismiss pursuant to Rule 12(b)(6).[3]

C. Rule 12(b)(6) Analysis of Plaintiff's Complaint

Plaintiff brings suit pursuant to 26 U.S.C. § 7433 alleging the impropriety of four IRS seizures totaling $1710.08. These seizures took place between December of 1995 and August of 1996. Plaintiff alleges that he first discovered the improper seizures when an attorney for the government admitted in open court that the monies were improperly seized. This admission indisputably occurred on December 15 or 17, 1998.[4] On August 9, 1999, plaintiff filed a claim for refund with the IRS seeking return of the improperly seized money. Plaintiff alleges that this administrative claim was denied on September 28, 2001.

"A motion to dismiss based on the running of the statute of limitations period may be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled. In fact, a complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." Supermail Cargo v. United States, 68 F.3d 1204, 1206–07 [76 AFTR 2d 95-7085] (9th Cir.1995) (internal quotation omitted) (citations omitted). In this case, plaintiff may well be able to prove that in the course of his administrative claim, the government made representations which would permit tolling of the statute of limitations. Given the liberal notice pleading requirements of Rule 8(a)(2), plaintiff is not required to set forth facts affirmatively related to equitable tolling. The sole inquiry is whether the complaint sets forth a set of facts which could bear the application of equitable tolling. Plaintiff has met this pleading burden. Defendant has not demonstrated as a matter of law that the complaint fails to state a claim because the statute of limitations has run.

Accordingly, it is, hereby,

ORDERED:

(1) Defendant's Motion to Dismiss is DENIED.

(2) The parties shall appear for a Case Management Conference on December 4, 2002 at 1:30 P.M. The parties are further ordered to file a Joint Case Management Conference Statement no later than November 27, 2002.

IT IS SO ORDERED.

¶2002-5641

UNITED STATES OF AMERICA, PLAINTIFF v. Malcolm MacGREGOR and Joanne MacGREGOR, DEFENDANTS. U.S. District Court, Dist.of Oregon, (DC OR) Docket No. CIV-02-4590ST, Sept. 27, 2002. Years 1978, 1979, 1980. Decision for Taxpayers in part and for Govt. in part.

1. District court procedure—dischargeability—jurisdiction—actions to reduce assessments to judgment—bankruptcy. Govt's district court request for determination that certain assessments weren't covered by discharge order in taxpayers' re-opened Chap. 7 bankruptcy case was referred to bankruptcy court: although discharge issue was interconnected to

[2] The government argues that allowing equitable tolling of Section 7433 "could open the floodgates to countless suits brought by disgruntled taxpayers many years after the expiration of the time limitation set forth in Section 7433(d)(3)." As the Irwin Court instructs, however, should such a consequence ensue, Congress, not the judiciary, has the power to stop any flood of litigation by amending the statute to abrogate tolling.

[3] The parties have submitted materials outside of the pleadings. When such matters are presented, but not excluded by the court, a Rule 12(b)(6) motion shall be treated as one for summary judgment. Fed.R.Civ.P. 12(b). In this instance, to afford the parties an opportunity to make a more developed motion for summary judgment, the Court excludes all matters outside of the pleadings and decides this motion pursuant to Rule 12(b)(6).

[4] Plaintiff alleges that the admission took place in April or May of 1999 during the trial of his previous quiet title action. (Compl. at 2:13.) Plaintiff's allegation of the timing of this admission appears to be an inadvertent misstatement. The Court takes judicial notice, pursuant to Fed.R.Evid. 201(c), that plaintiff's quiet title trial took place between December 15–17, 1998. Case No. C-98-20082, Docket Nos. 22, 23.

govt.'s collection claim to reduce those assessments to judgment, broad local rule giving bankruptcy court jurisdiction over all Title 11 cases and related proceedings in which it had expertise clearly covered discharge issues; and, by severing and staying collection claim, possibility of inconsistent rulings was avoided and kept collection issue with appropriate court. Also, forum non conveniens argument failed where no geographical hardship would result in moving case to bankruptcy court offices 4 blocks away. *Reference:* United States Tax Reporter ¶74,025.01(42); 68,726.52(5). IRC §7402.

United States District Court, D. Oregon,

OPINION AND ORDER

STEWART, Magistrate J.

INTRODUCTION

This action to "Determine Dischargeability of Taxes and to Reduce Assessments to Judgment" was filed on April 8, 2002, by plaintiff, the United States of America, against defendants, Malcolm MacGregor and JoAnn MacGregor. The Complaint alleges two counts. Count One seeks a determination of whether certain income taxes assessed for tax years 1978, 1979, and 1980 were discharged during the course of a voluntary Chapter 7 bankruptcy action defendants filed in 1994, In re: Malcolm D. MacGregor and Melba Joanne MacGregor, Bankruptcy Petition No. 394-36714 ("the bankruptcy proceeding"). Complaint, pp 6–44. If the income tax liabilities were not discharged, Count Two seeks to reduce those assessments to judgment. Id, pp 45–55.

The MacGregors have now filed a Motion to Enforce Reference of Action to Bankruptcy Court (docket # 5), seeking to have this case referred to the Bankruptcy Court pursuant to Local Rule 2100-1 which refers to the Bankruptcy Court "all cases under Title 11 and all proceedings arising under Title 11 or arising in or related to cases under Title 11." For the reasons that follow, the motion is granted as to Count One and denied as to Count Two. All further proceedings concerning Count Two are stayed pending resolution of Count One by the Bankruptcy Court.

ANALYSIS

[1] In 1991, the Internal Revenue Service ("IRS") assessed income taxes against the MacGregors for tax years 1978–80. Plaintiff asserts that those assessments have not been paid and that it is entitled to a determination that the assessments were not discharged during the course of the bankruptcy proceeding. The Complaint details a series of property transactions which plaintiff asserts the MacGregors used in order to obscure their ownership interest in assets and hide their interests from their creditors. Plaintiff alleges that the MacGregors used those transactions and failed to fully disclose their assets in the bankruptcy proceeding in order to evade or defeat their tax liabilities.

After an Order of Discharge was entered March 2, 1995, the bankruptcy proceeding was administratively closed. Subsequently, the IRS learned new information which caused it to question the MacGregors about their ownership interest in certain assets at the time they filed their bankruptcy petition. Thereafter, on December 1, 1997, the MacGregors reopened the bankruptcy proceeding to amend their schedules and allow the Chapter 7 trustee to administer additional assets. The bankruptcy proceeding is still open and has not been closed.

Despite the broad language of Local Rule 2100-1, plaintiff argues that this case should not be referred to the Bankruptcy Court for three reasons. However, none of those reasons is persuasive.

First, plaintiff contends that the Bankruptcy Court does not have jurisdiction over Count Two. However, a determination under Count One whether plaintiff's claim was discharged is inextricably tied to a determination under Count Two whether plaintiff is entitled to a judgment. If it is determined that the tax assessments were in fact discharged during the course of the bankruptcy proceeding, then Count Two will be moot. If the tax assessment were not discharged, then the MacGregors are willing to stipulate that any determination

by the Bankruptcy Court as to the dischargeability of the claim and related matters can be automatically entered as a judgment in this court, if plaintiff so desires. Rather than ousting the Bankruptcy Court of its rightful role of determining issues "in or related to" bankruptcy matters, the more appropriate course is for this court to stay its hand and allow the Bankruptcy Court to rule on the dischargeability issue. In the interim, this court can stay Count Two.

Second, if the MacGregors bring an adversary proceeding in the bankruptcy court seeking declaratory relief to determine property of the bankruptcy estate, as is their stated intent, plaintiff argues that they are unlikely to have standing. According to plaintiff, the only person entitled to bring this type of claim is the bankruptcy trustee under Section 704(a) of the Bankruptcy Code which authorizes and obligates the trustee to collect and reduce to money the property of the estate. Thus, plaintiff argues, it is likely that the claim brought by the MacGregors will be dismissed by the Bankruptcy Court. This argument fails for two reasons. First, whether or not the action filed by the MacGregors in the bankruptcy proceeding should be dismissed is clearly an issue that must and will be decided by the Bankruptcy Court. In the event that this court proceeds to rule on Count One and the Bankruptcy Court later disagrees that the MacGregors' claim in the bankruptcy proceeding should be dismissed, the parties may face inconsistent rulings on whether the tax assessments were discharged. Second, even if the Bankruptcy Court does not rule on the merits of the issue raised by the MacGregors, it can and should rule on the issues raised in Count One. The point of the Local Rule is to refer to the Bankruptcy Court those matters in which it has the most experience and expertise. Whether or not certain tax assessments were or were not discharged by an Order of Discharge is clearly such a matter.

Finally, plaintiff argues that its choice of forum should be accorded "great deference," analogous to an issue of forum non conveniens. However, forum non conveniens is typically invoked when there is some geographical hardship to hearing the case in plaintiff's chosen forum. Given that the offices of the Bankruptcy Court where the bankruptcy proceeding is pending are only four blocks away from this court, the analogy fails.

ORDER

For the reasons stated above, defendants' Motion to Enforce Reference of Action to Bankruptcy Court is GRANTED as to Count One and DENIED as to Count Two. The Clerk shall refer Count One to the Bankruptcy Court. All further proceedings concerning Count Two are STAYED pending resolution of Count One by the Bankruptcy Court.

It is further ordered that defendants file a written status report with this court every 60 days, with the first report due on December 1, 2002.

¶2002-5642

Scott Gerald McCANDLESS, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of California, (DC CA) Docket No. C-02-2573 EDL, Nov. 1, 2002. Years 1997, 1998, 1999. Decision for Govt.

1. Collection due process—review of administrative determination—jurisdiction—equivalent hearings—prior opportunity to contest tax. Taxpayer's district court IRC §6330 petition for review of administrative determination to proceed with collection of his liabilities for 2 of 3 years was dismissed for lack of jurisdiction: although govt.'s issuance of statutory IRC §6330 determination letter effectively waived taxpayer's failure to timely request CDP hearing and provided basis for judicial review of what otherwise would have been non-statutory determination letter and equivalent hearing, jurisdiction was still lacking since those years were properly subject of Tax Court jurisdiction; and taxpayer's contention that he was deprived of opportunity to contest his liabilities in Tax

Court because deficiency notices were invalid was meritless. *Reference:* United States Tax Reporter ¶63,305.01(30); 63,305.01(10); 63,305.01(15). IRC §6330.

2. Collection due process—review of administrative determination—frivolous return penalties—summary judgment. IRS's administrative determination to proceed with collection of frivolous return and other penalties for years tax protester filed "zero" returns was upheld on summary judgment: Appeals Officer's reliance on Forms 4340 satisfied IRC §6330(c)(1)'s verification requirement; IRC §6702 penalty's imposition was supported by facts taxpayer advanced only frivolous protester-type arguments for his no-tax position and contention that compensation reflected on his Forms W-2 and 1099 wasn't income; and Appeals Officer's refusal to entertain such frivolous issues at CDP hearing was proper. Also, IRC §6065 argument was meritless; and taxpayer offered no valid collection alternative. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(2). IRC §6330; 6702.

United States District Court, N.D. California,

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

LAPORTE, Magistrate J.

I. INTRODUCTION

On May 10, 1999, plaintiff filed individual income tax returns for 1997 and 1998, upon which he reported that he had no wages, other income, or any tax liabilities, and in which he claimed refunds consisting of the amount of taxes withheld from his wages during such years. (Kingston Dec. in support of Motion for Summary Judgment ("SJ Dec."), Exs. A, B, C, and D.) On April 15, 2000, plaintiff filed a individual income tax return for taxable year 1999, upon which he reported that he had no wages, other income, or any tax liabilities for such year. (SJ Dec., Exs. E and F.) Plaintiff attached a document to each of these returns in which he explained that he reported zero income on his tax returns because he had no earnings that would have been taxable as income. (SJ Dec., Exs. A, B, and E.) However, the W-2 and 1099 Forms submitted by plaintiff's employers reflected that plaintiff received taxable income of $25,266 in 1997, $7,788 in 1998, and $15,627.18 in 1999. (SJ Dec., Exs. G, H and I.) The IRS assessed frivolous return penalties under 26 U.S.C. § 6702 against plaintiff in the amount of $500 for each taxable year. (SJ Dec., Exs. J, K and L.)

On March 7, 2000, the IRS issued statutory notices of deficiency to plaintiff for taxable years 1997 and 1998, determining tax deficiencies of $2,771 and $126 respectively; penalties of $100 for each year under § 6651(a)(1); penalties of $26.26 and $508 respectively under § 6651(a)(2); and penalties of $82.02 and $22.56 respectively under § 6662(a). (Kingston Dec. in support of Motion to Partially Dismiss ("Dismiss Dec."), Exs. G and H.) The notices ad-vised plaintiff that, if he wanted to contest the deficiencies in court before making payment, he had to file a petition with the United States Tax Court on or before June 5, 2000, for a redetermination of the defi-ciencies. (Dismiss Dec., Exs. G and H.) On July 3, 2000, the IRS assessed a false information penalty against plaintiff for taxable year 1999 under 26 U.S.C. § 6682 in the amount of $500. (SJ Dec., Ex. L.) On September 4, 2000, the IRS made as-sessments of the above-mentioned income tax deficiencies and penalties, including in-terest thereon. (Dismiss Dec., Exs. C and D.)

On November 24, 2000, the IRS issued to plaintiff a notice of intent to levy pursuant to 26 U.S.C. § 6331, which requested full payment of the penalties assessed against him for taxable year 1999, advised him that the IRS would levy upon his property if he did not pay, and informed him of his right to a Collection Due Process ("CDP") hearing. (SJ Dec., Ex. M.) In a letter dated December 18, 2000, and postmarked Dec. 22, 2000, plaintiff sent the IRS a request for a CDP hearing for taxable year 1999. (SJ Dec., Ex. N.)

On March 9, 2001, the IRS issued a notice of intent to levy with respect to the penalties assessed against plaintiff for 1997 and 1998. (SJ Dec., Ex. O.) In a letter dated April 4, 2001, and postmarked April 9, 2001, plaintiff sent the IRS a request for a CDP hearing for taxable years 1997 and 1998. (SJ Dec., Ex. P.)

On April 5, 2002, a CDP hearing occurred. On April 30, 2002, the Appeals Officer sent plaintiff two "Notices of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330," in which he upheld the proposed levy actions to collect plaintiff's unpaid tax liabilities. (SJ Dec., Exs. R and S.)[1]

On May 29, 2002, plaintiff filed a complaint alleging that the two DCP hearing determinations were illegally issued pursuant to 26 U.S.C. § 6330, and requesting the Court to set the determinations aside. On September 17, 2002, the United States moved to dismiss that portion of plaintiff's Complaint that seeks judicial review of the Internal Revenue Service ("IRS") Appeals Officer's CDP determination on the basis of lack of subject matter jurisdiction ("Motion to Dismiss"). In the alternative, the United States seeks summary judgment pursuant to Fed.R.Civ.P. 56(c) ("Motion for SJ"). On October 8, 2002, plaintiff filed an Opposition to defendant's motions. ("Opposition.") On October 15, 2002, the United States filed a Reply to plaintiff's Opposition ("Reply").

II. DISCUSSION

A. MOTION TO DISMISS

1. Legal Standard

A motion to dismiss for lack of subject matter jurisdiction may be brought as a speaking motion, attacking the existence of jurisdiction rather than the allegations of the complaint. Thornhill Pub. v. General Tel. & Elec. Corp., 594 F.2d 730, 733 (9th Cir.1979). Because the court's power to hear the case is at issue, the court may weigh extrinsic evidence and determine the facts in order to satisfy itself as to its power to hear the case. Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir.1987). "It is to be presumed that a cause lies outside [the federal court's] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994).

2. Collection Due Process Hearing

[1] If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful

> for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.

26 U.S.C. § 6331(d). Before proceeding with collection by levy, however, the Secretary must provide the taxpayer with notice of his right to request a CDP hearing before the IRS Office of Appeals. 26 U.S.C. § 6330(a)(1). A taxpayer must request a CDP hearing within thirty days of the date notice of the right to a hearing is given. 26 U.S.C. §§ 6330(a)(2) and (a)(3)(B).

If the taxpayer does not request a CDP hearing with Appeals within the 30-day period commencing the day after the date of the CDP

> Notice, the taxpayer will forego the right to a CDP hearing under section 6330 with respect to the unpaid tax and tax periods shown on the CDP Notice. The taxpayer may, however, request an equivalent hearing.

Treas. Reg. § 301.6330-1(c)(2), A-C7.

The "equivalent hearing" is provided for by regulation, but is not mandated by section 6330. While the same issues can be

> considered by the IRS at the equivalent hearing, a taxpayer's request for such a hearing does not suspend the proposed

[1] One of the Notices of Determination pertains to taxable years 1997 and 1998, (SJ Dec., Ex. R) and the other pertains to taxable year 1999. (SJ Dec., Ex. S.)

> levy. Moreover, there is no statutory provision for judicial review of an equivalent hearing. Accordingly, a taxpayer generally cannot challenge the IRS equivalent hearing Decision Letter in court.

Johnson v. Commissioner of Internal Revenue and Teresa Kelley, 2000 WL 1041191, 2 [86 AFTR 2d 2000-5225] (D.Or.2000) (citing Treasury Regs. § 301.6330-1T(I), Q-13/A-13; Q- 15/A-15).

As discussed above, the IRS issued a notice of intent to levy on March 9, 2001, advising plaintiff that he must submit a request for a CDP hearing within thirty days. (Dismiss Dec., Ex. I.) Plaintiff's request for a CDP hearing was dated April 4, 2001, but postmarked April 9, 2001, and thus plaintiff mailed the letter one day after the thirty-day period had expired. (Dismiss Dec., Ex. J.)

Defendant argues that, having failed to timely file a request for a CDP hearing, plaintiff was only entitled to an equivalent hearing. In Offiler v. Commissioner, 114 T.C. 492, 498 (2000), the court held that jurisdiction ''under section 6330(d) is dependent on the issuance of a valid notice of determination and a timely petition for review. It therefore follows that the absence of an Appeals determination under section 6330 is grounds for dismissal of a petition that purports to be based on section 6330.'' See also Kennedy v. Commissioner, 116 T.C. 255, 263 (2001); Lopez v. Commissioner, T.C. Memo 2001-228 [TC Memo 2001-228]. In Offiler, Kennedy, and Lopez, however, the IRS did not issue letters of determination pursuant to section 6330. Offiler, 114 T.C. at 495; Kennedy, 116 T.C. at 261; Lopez, T.C. Memo 2001-228 [TC Memo 2001-228].

By contrast, here, the Appeals Officer sent plaintiff ''Notice[s] of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330,'' dated April 30, 2002, which state that plaintiff ''was granted a[CDP] Hearing.'' (SJ Dec., Exs. R and S) (emphasis added). Moreover, Officer Lawrence Dorr started out the hearing by stating, ''[t]his is a Collection Due Process Hearing for taxpayer Scott McCandless.'' (Opposition, Ex. H.) Lastly, the notices of determination provide plaintiff with the option of disputing the determination in court (SJ Dec., Exs. R and S), a challenge that is only allowed when a CDP hearing has occurred. Johnson, 2000 WL 1041191 at 2 (holding that ''a taxpayer generally cannot challenge the IRS equivalent hearing Decision Letter in court.'') Thus, while defendant is correct that plaintiff was only entitled to an equivalent hearing, plaintiff was in fact given a CDP hearing. Thus, plaintiff is not barred by his one day delay in requesting the hearing. Nonetheless, as discussed below, the Tax Court is the correct forum for plaintiff's challenge to the CDP hearing determination.

2. The Tax Court has Exclusive Jurisdiction

Section 6330(d) provides for the following judicial review of CDP determinations:

> (1) The person may, within 30 days of a determination under this section, appeal such determination -
>
> (A) To the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter); or
>
> (B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

26 U.S.C. § 6330(d). Thus, ''when the IRS's proposed levy involves an underlying tax liability, judicial review over any determination made in a Collection Due Process hearing lies in the United States Tax Court, not the district court.'' Johnson, 2000 WL 1041191 at 3. ''Only if the Tax Court does not have jurisdiction over the underlying tax liability does a United States District Court have jurisdiction.'' Hickey v. United States, 2002 WL 4717189 at 2 [89 AFTR 2d 2002-1376] (D.Nev.2002). Here, like in Hickey, ''plaintiff's claims involve a dispute over a proposed levy by the Internal Revenue Service in response to an alleged income tax liability. This is precisely the kind of claim over which the Tax Court has jurisdiction.'' Hickey, 2002 WL 471789 at 2.

Plaintiff failed to file a petition for redetermination with the Tax Court, and thus that court would not have jurisdiction to redetermine the existence or amount of the underlying tax liabilities. Goza v. Commissioner, 115 [sic, 114] T.C. 176, 182 (2000). However, actual jurisdiction over the underlying tax is unnecessary for the Tax Court to exercise jurisdiction over the CDP determination. Id. (holding that ''despite the fact that petitioner failed to invoke the Court's deficiency jurisdiction by filing a petition for redetermination contesting the notice of deficiency ... we hold that section 6330(d) vests the Court with jurisdiction to review respondent's administrative determination to proceed with a levy to effect the collection of the taxes due from petitioner for those years.'')

The Tax Court has jurisdiction over plaintiff's request for review of the CDP determination with respect to the collection of the income tax deficiencies, interest, and penalties, and therefore this Court cannot hear those claims and they must be dismissed. Under section 6330(d)(1), plaintiff will have thirty days from the date of the dismissal in which to bring his claim in the Tax Court. True v. Commissioner, 109 F.Supp.2d 1361, 1364 [SIC, 108 F. Supp. 2d 1361] [87 AFTR 2d 2001-2617] (M.D.Fla.2000).

3. Validity of the Statutory Deficiency Notices

Plaintiff argues that this Court has jurisdiction to review the CDP determination because the notices of deficiency he received were invalid, and, thus, he was deprived of the opportunity to challenge the underlying tax liabilities in Tax Court. According to plaintiff, the deficiency notices were invalid because they were sent by the Director of the Service Center, and not the Secretary. 26 U.S.C. section 6212 states that: ''If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.'' However, 26 U.S.C. § 7701(a)(11)(B) defines the term ''Secretary'' as the Secretary of the Treasury or his delegate. 26 U.S.C. § 7701(a)(12)(A)(I) defines the term ''delegate,'' when used with reference to the Secretary of the Treasury, to mean ''any officer, employee, or agency of the Treasury Department duly authorized by the Secretary of the Treasury directly, or indirectly by one or more redelegations of authority, to perform the function mentioned or described in the context.'' Here, the Secretary's authority to issue notices of deficiency was delegated to the Director of the Service Center. (Dismiss Dec., Ex. M.) Thus, plaintiff received valid, statutory deficiency notices.

B. SUMMARY JUDGMENT MOTION

1. Legal Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment ''shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'' Fed.R.Civ.P. 56(c). A dispute as to a material fact is ''genuine'' if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The nonmoving party's evidence must be believed and ''all justifiable inferences must be drawn in [the nonmovant's] favor.'' United Steelworkers of America v. Phelps Dodge Corp., 865 F.2d 1539, 1542 (9th Cir.1989) (en banc) (citing Liberty Lobby, 477 U.S. at 255.)

The moving party bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, interrogatory answers, admissions, and affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Where the nonmoving party will bear the burden of proof at trial, the moving party's burden is discharged when it shows the court that there is an absence of evidence to support the

nonmoving party's case. Id. at 325. A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of [that] party's pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P 56(e); Liberty Lobby, 477 U.S. at 250.

2. The Appeals Officer Complied with 26 U.S.C. § 6330

If a taxpayer requests a CDP Hearing, the Appeals Officer must: (1) verify that the requirements of any applicable law or administrative procedure with respect to the underlying taxes have been met, 26 U.S.C. § 6330(c)(1); (2) consider any issues raised by the taxpayer at the hearing, including appropriate spousal defenses, challenges to the appropriateness of the collection actions, offers of collection alternatives, and challenges to the existence or amount of the underlying tax liability (if appropriate), 26 U.S.C. § 6330(c)(2); and (3) determine whether the proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that any collection action be no more intrusive than necessary, 26 U.S.C. § 6330(c)(3)(C).

a. Adequate Verification that the Legal and Administrative Requirements were Met

Plaintiff alleges that the Appeals Officer conducting the hearing failed to provide him with documents verifying that the legal and administrative requirements of section 6330(c)(1) had been met. Specifically, plaintiff contends that the Appeals Officer did not provide him with a Summary Record of Assessment (Form 23C), produce a return from which the assessments were made, or identify a statute that establishes the underlying liability. The Appeals Officer, however, is not required to provide the plaintiff with documentation or testimony under oath. Reinhert v. Internal Revenue Service, 2002 WL 1095351, 5 [90 AFTR 2d 2002-5506] (E.D.Cal.2002); Davis v. Commissioner, 115 T.C. 35, 41–42 (2000); Katz v. Commissioner, 115 T.C. 329 (2000).

The Appeals Officer provided plaintiff with Certificates of Assessments and Payments, (Forms 4340) for each of the penalties assessed against him. (SJ Dec., Ex. Q at H-1:26–27; H-2:1.) These forms verify the dates of the assessments, that statutory notices of the assessments and demands for payment were made on the dates of the assessments, and the dates that statutory notices of intent to levy were issued to plaintiff. (SJ Dec., Ex. L.) The Appeals Officer advised plaintiff that he believed that such certificates established the legal validity of the assessments and that the proper notices and demands were issued. (SJ Dec., Ex. Q at H-23:13–14.)

"Generally, courts have held that Form 4340 provides at least presumptive evidence that a tax has been validly assessed under section 6203." Davis, 115 T.C. at 40. Unless the taxpayer can point to evidence of an irregularity in the assessment process, the presumption of a valid assessment remains intact. Nicklaus v. Commissioner, 117 T.C. 117, 121 (2001); Davis, 115 T.C. at 41 (holding that "it was not an abuse of discretion for Appeals to rely on a Form 4340 ... for the purpose of complying with section 6330(c)(1)."); Guthrie v. Sawyer, 970 F.2d 733, 737 [70 AFTR 2d 92-5390] (10th Cir.1992) (explaining that "[c]ertificates of Assessments and Payments are 'routinely used to prove that tax assessment has in fact been made.' They are 'presumptive proof of a valid assessment.'") (quoting Geiselman v. United States, 961 F.2d 1, 6 [69 AFTR 2d 92-1093] (1st Cir.1992)). Plaintiff has not rebutted this presumption. Thus, the 4340 Forms constitute legal evidence of plaintiff's liability for the penalties assessed against him.

Plaintiff argues that, by failing to provide him with documentation or testimony under oath to establish verification, the Appeals Officer has violated plaintiff's Fourth Amendment rights. However, "it is well established that the IRS may collect an assessment of tax liability by levy without a prior judicial hearing, and that the seizure of property pursuant to a valid administrative levy does not violate the

Fourth Amendment.'' Pursell v. United States, 1995 WL 273175, 6 [75 AFTR 2d 95-1514] (E.D.Cal.1995) (citing Maisano v. United States, 940 F.2d 499, 501–02 [68 AFTR 2d 91-5330] (9th Cir.1991), cert. denied 112 S.Ct. 1957 (1992)).

[2] Plaintiff asserts that his returns were not frivolous and that the frivolous return penalties were improperly imposed. However, plaintiff submitted tax returns for the years 1997, 1998, and 1999 with zeros in the income section, despite the fact that he received taxable income during such years. (SJ Dec., Exs. G, H, and I.) The Ninth Circuit ''has repeatedly rejected the argument that wages are not income as frivolous.'' Olsen v. United States, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir.1985). A person who files a frivolous tax return is liable for a penalty of five hundred dollars ($500.00). 26 U.S.C. § 6702. ''[Such] ... penalties and liabilities ... shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes.'' 26 U.S.C. § 6671. Plaintiff does not demon-strate any irregularity in the Appeals Of-ficer's assessment procedure, and thus the presumption of a valid assessment remains intact. Because plaintiff filed frivolous re-turns, he is liable for the frivolous return penalties assessed against him. 26 U.S.C. § 6702.

Plaintiff argues that the only legally valid assessment made was his original Form 1040, in which he inserted zeros as his income for 1997, 1998, and 1999. However, as reflected in plaintiff's W-2 and 1099 Forms, he earned taxable income during each of those years. (SJ Dec., Exs. G, H, and I.) Plaintiff contends that his place of work inaccurately described the money he was paid as ''wages,'' when in fact the money he received in exchange for his work was ''compensation.'' He argues further that, under Eisner v. Macomber, 252 U.S. 189, 207 [3 AFTR 3020] (1920). his ''compensation'' does not constitute income under the Supreme Court's definition of income as ''a gain derived from property.'' The Eisner Court observed that ''[i]ncome may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets.'' Id. The statutory definition of income includes, ''all income from whatever source derived, including (but not limited to) ... [c]ompensation for services.'' 26 U.S.C. § 61(a). Treasury Regulation § 1.61-2(a) provides that compensation for services constitutes income to the recipient. Thus, whether the money Plaintiff received is called ''wages'' or ''compensation,'' as ''gain derived from ... labor,'' it constitutes income.

26 U.S.C. § 6065 provides that ''any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury.'' Plaintiff argues that none of the correspondence, forms, or letters he has received from the IRS have had any such oath by an IRS employee. (Opposition at 2.) However, ''the verifica-tion requirement in 26 U.S.C. § 6065 ap-plies to taxpayers, not the IRS.'' Pursell, 1995 WL 273175 6 (citing Borgeson v. United States, 757 F.2d 1071, 1073 [55 AFTR 2d 85-1120] (10th Cir.1985.)

b. Consideration of Issues Raised by Taxpayer

Plaintiff repeated throughout the hearing that there are no provisions that establish that wages are income or that individuals are required to pay taxes and that the payment of taxes is voluntary. (SJ Dec., Ex. Q at H.6:8–11; H.7:25–26; H.8:1–5, 7–9; H.10:11–14; H .14:13–21; H.22:1–4.) The Appeals Officer advised plaintiff that such issues were not proper issues to raise at a CDP hearing. (SJ Dec., Ex. Q at H.6:18–20; H.8:11–12; H.10:15–18.) ''[P]laintiff's argument regarding why he is not obligated to pay taxes, i.e. taxes are voluntary, is legally frivolous. Therefore, this argument was not relevant to the matters discussed at the CDP hearing. The hearing officer's alleged refusal to permit plaintiff to raise this argument was proper.'' Reinhert, 2002 WL 1095351 at 6.

A ''person may [only] raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.'' 26 U.S.C. § 6330(c)(2)(B). As discussed above, plaintiff received valid notices of deficiency issued by the Director of the Service Center who was delegated the authority to issue such notices, and thus plaintiff did not have the right to raise challenges to the existence or amount of the underlying tax liability at the CDP hearing. Thus, plaintiff failed to raise any non-frivolous issues at the CDP hearing.

c. Efficient, yet Unintrusive Collection of Taxes

Defendant contends that plaintiff has never offered to pay the penalties or provided alternatives to the levy. Instead, plaintiff insists that his returns are not frivolous. Thus, according to defendant, the Appeals Officer had no alternative but to conclude that the imposition of a levy to collect the outstanding penalties from Plaintiff was the only method by which payment could be obtained.

Defendant has demonstrated that there is no genuine issue as to any material fact regarding the CDP Appeals Officer's compliance with the requirements of 26 U.S.C. § 6330. Thus, defendant is entitled to judgment as a matter of law.

III. CONCLUSION

Defendant's motion to dismiss that portion of plaintiff's complaint that seeks judicial review of the Internal Revenue Service Appeals Officer's CDP hearing determination with respect to proposed collection of income tax deficiencies, interest, and penalties for taxable years 1997 and 1998 (docket number 14) is GRANTED.

Defendant's motion for summary judgment (docket number 12) is GRANTED.

The clerk shall close the file.

IT IS SO ORDERED.

¶2002-5643

James A. ANDREWS, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Dist. of Columbia, (DC Dist Col) Civ. Action Docket No. 00-2702 (TPJ), Oct. 10, 2002. Years 1990, 1991. Decision for Govt.

1. FOIA—exemptions—third-party return information—deceased individuals—inspections by persons with material interest. Taxpayer's FOIA complaint for disclosure of his deceased uncle's and wife's audit information relating to 3 certificates of deposit (CDs) that uncle purchased jointly with wife and taxpayer was dismissed on summary judgment: information was indisputably 3d-party return information protected under Exemption 3 and IRC §6103; and taxpayer's reliance on IRC §6103(e)(3)(B)'s deceased individuals exception for persons with ''material interest'' was misplaced where IRS's prior determination that taxpayer had interest in Form 1099 information about subject CDs was limited only to that information and didn't give him material interest in or right to all their return information. Also, taxpayer's request for partial findings of fact was denied. *Reference:* United States Tax Reporter ¶61,035.08(25); 76,556.502(10). IRC §6103.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,

ORDER

Thomas Penfield Jackson U.S. District Judge

For the reasons stated in the accompanying Memorandum Opinion, it is ORDERED that defendant's motion for summary judgment [# 9] is GRANTED; it is

FURTHER ORDERED that plaintiff's motion for partial findings of fact [# 8] is DENIED; it is

FURTHER ORDERED that plaintiff's motion to compel discovery [# 15] is DENIED as moot; and it is

FURTHER ORDERED that judgment is entered for defendant and this case is DISMISSED. This is a final appealable Order.

DATE: 10/10/02

Thomas Penfield Jackson

U.S. District Judge

MEMORANDUM OPINION

In this *pro se* action brought under the Freedom of Information Act ("FOIA"), 5 US.C. § 552, plaintiff requested from the Internal Revenue Service "audit information" pertaining to three certificates of deposit and "[a]ny new claim numbers assigned to my two claims by the [Criminal Investigation Division, Kansas City Service Center]. Complaint, Exhibit A. Pending before the Court is Defendant's Motion for Summary Judgment and Opposition to Plaintiff's Motion for Partial Findings of Fact. Upon consideration of the parties' submissions and the entire record, and for the following reasons, the Court will grant defendant's motion for summary judgment and deny plaintiff's motion for partial findings of fact.[1]

[1] 1. Plaintiff's Motion for Partial Findings of Fact

Plaintiff asks the Court to find the following: (1) "[that] he is entitled to disclosure as to the 1991 joint Form 1040 of George and Katherine Diamantes," (2) "[t]hat an audit was conducted on this tax return by the IRS, probably in late 1996, and specifically with regard to the three certificates of deposit," and (3) "[t]hat this audit file, separately from the disclosure file, is located at, and is regularly located at the IRS Kansas City Campus (Service Center)." Motion at 3–4. Those facts go to the ultimate question of whether the IRS properly withheld information under the FOIA. Because the facts are disputed, they are properly resolved by consideration of the pending summary judgment motion and plaintiff's opposition thereto. Accordingly, plaintiff's motion for partial findings of fact is denied.

2. Defendant's Motion for Summary Judgment

The FOIA requires a government agency to disclose all responsive records requested by anyone unless the information sought falls within one of nine statutory exemptions listed in § 552 (b). In an action seeking review of an agency's response to a FOIA request, the Court is required to "determine the matter de novo" and "has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld. . . ." The agency bears the burden of proof. 5 U.S.C. § 552 (a)(4)(B).

Summary judgment is appropriate when there is "no genuine issue as to any material fact and [ ] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In a FOIA action, the Court may award summary judgment solely on the basis of information provided in affidavits or declarations when the affidavits or declarations describe "the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith." Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981); see also Vaughn v. Rosen, 484 F.2d 820, 826 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). An agency must prove that "each document that falls within the class requested either has been produced, is unidentifiable, or is wholly exempt from the Act's inspection requirements." Goland v. Central Intelligence Agency, 607 F.2d 339, 352 (D.C. Cir. 1978), cert. denied, 445 U.S. 927 (1980) (internal citation and quotation omitted). When, as here, records are not located, summary judgment is appropriate if defendant shows "beyond material doubt [ ] that it has conducted a search reasonably calculated to uncover all relevant documents." Weisberg v. United States Department of

[1] Also pending is plaintiff's /motion to compel discovery. In his opposition to the motion for summary judgment, plaintiff states that he received the document requested and acknowledges that the discovery motion is moot. The Court will summarily deny the motion to compel discovery.

Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

Neither the complaint nor the FOIA request from which this action stems is the model of clarity. Defendant characterized and presumably conducted a search for "information regarding two Applications for Reward [plaintiff] filed with the Service relating to two specific taxpayers and three certificates of deposit he claims were negotiated through forgery." Government's Exhibit 1, Declaration of Brad Koplinski ("Koplinski Decl.") ¶ 3. Defendant's search for the reward applications yielded no responsive records. Government's Exhibit 2. Declaration of Renae Elliott ("Elliott Decl.") ¶s 5–6. Plaintiff does not dispute defendant's claim that it conducted an adequate search for those records and therefore concedes that issue. Plaintiff maintains that he is "interested in audit information that dealt with three certificates of deposit." Plaintiff's Statement of Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's Opposition") at 2.

Defendant avers that plaintiff's request for audit information "relates to the possible existence of audit information of third party taxpayers."[2] Koplinski Decl. ¶ 11. As a result, defendant invokes FOIA Exemption 3, averring that "[t]he Service may not admit or deny the existence of any activity taken by [it], such as an audit, with regard to any taxpayer." Koplinski Decl. ¶ 11. FOIA Exemption 3 protects records that are "specifically exempted from disclosure by statute . . . provided that such statute (A) [requires withholding] in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552 (b)(3). Defendant asserts correctly that 26 U.S.C. § 6103 prohibits the disclosure of taxpayer return information. As a general rule, "[r]eturns and return information shall be confidential. [] except as authorized by this title. . . ." 26 U.S.C. § 6103 (a). "That § 6103 is the sort of non disclosure statute contemplated by FOIA exemption 3 is beyond dispute." Tax Analysts v. Internal Revenue Service, 117 F.3d 607, 611 [80 AFTR 2d 97-5152] (D.C. Cir. 1997).

Plaintiff does not dispute defendant's claim that the information he seeks falls under the tax code's definition of return information. See 26 U.S.C. § 6103 (b)(2); Landmark Legal Foundation v. Internal Revenue Service, 267 F.3d 1132, 1135 [88 AFTR 2d 2001-6350] (D.C. Cir. 2001) ("This definition of 'return information' has, in the words of some commentators, 'evolved to include virtually any information collected by the Internal Revenue Service regarding a person's tax liability.'") (citation omitted). Rather, plaintiff argues that he is entitled to disclosure of any of the Diamantes' tax return information under the following statutory exception. Subsection (e) of § 6103 provides in relevant part:

> Deceased individuals.--The return of a decedent shall, upon written request, be open to inspection by or disclosure to--
>
> (B) any heir at law, next of kin, or beneficiary under the will, of such decedent, or a donee of property, but only if the Secretary finds that such heir at law, next of kin, beneficiary, or donee has a material interest which will be affected by information contained therein.

26 U.S.C. § 6103 (e)(3)(B). According to plaintiff, sometime in the 1980s, his uncle purchased three certificates of deposit "with the account title of George Diamantes or Katherine Diamantes or James A. Andrews, joint tenants with the right of survivorship. . . ." Complaint at 2. His uncle died in February 1991. Plaintiff alleges that "[i]n July, 1991, . . . [his aunt Katherine] cashed [the certificates] and she apparently forged my signature in order to do so." Id. Apparently, because of plaintiff's ownership interest in the three certificates of deposit, the IRS determined in 1995 that plaintiff was a person with "a material [financial] interest in the information relating to the [Form] 1099 issued by First Illinois

[2] Plaintiff confirms defendant's view by stating in various papers that he is seeking the 1991 joint Form 1040 return of his deceased uncle. George Diamantes, and his widow, Katherine, and related audit information. See Motion for Partial Findings of Fact at 3 ¶ A; Plaintiff's Opposition ¶ 9; Complaint ¶ C. 3.

Bank of Evanston to George Diamantes [the deceased] for the 1990 tax years [sic] as reported on the IRMF Payee Request Transcript.'' Complaint, Exhibit D. The IRS therefore provided plaintiff ''a sanitized copy of the transcript.'' Id.

Plaintiff appears to argue that the IRS' determination in 1995 gave him unlimited access to the Diamantes' tax return information. He is wrong. The tax code authorizes disclosure under the circumstances presented ''only if the Secretary finds that such [individual] has a material interest which will be affected by information contained therein.'' 26 U.S.C. § 6103 (e)(3)(B). The Secretary's determination as to plaintiff's interest was limited to the Form 1099 for the 1990 tax year, which plaintiff apparently received. Plaintiff has not established that he is entitled to any other return information. The Court therefore finds that defendant properly justified its response to plaintiff's FOIA request under Exemption 3.

There being no genuine issue of material fact on the claims presented, the Court concludes that defendant is entitled to judgment and accordingly grants defendant's motion. A separate Order of dismissal accompanies this Memorandum Opinion.

DATE: 10/10/02

Thomas Penfield Jackson

U.S. District Judge

¶2002-5644

IN THE MATTER OF THE TAX LIABILITIES OF: JOHN DOES, United States taxpayers who, during the years ended December 31, 1998 through December 31, 2001, had signature authority over MasterCard payment cards issued by, through, or on behalf of banks or other financial institutions in Antigua and Barbuda, Bahamas, and Cayman Islands, or issued to persons or entities in Antigua and Barbuda, Bahamas, and Cayman Islands. U.S. District Court, Middle Dist. of Florida, (DC FL) Docket No. 6:02-mc-100-ORL-22JGG, Oct. 17, 2002. Years 1998, 1999, 2000, 2001. Decision for Govt.

1. Third-party summons enforcement—John Doe summonses. Govt. was granted leave to serve, through authorized IRS employee, John Doe summonses on 3d-party corps.: govt. showed that summonses, seeking information relating to transactions on offshore credit card accounts over which unidentified taxpayers had signatory authority, related to investigation of those ostensible taxpayers; that govt. reasonably believed those taxpayers may not have complied with IRC; and that information was unavailable from other sources. *Reference:* United States Tax Reporter ¶76,095.01(50). IRC §7609.

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA ORLANDO DIVISION,

ORDER

[1] THIS MATTER is before the Court upon the United States of America's *Ex Parte* Petition for Leave to Serve John Doe Summonses. Based upon a review of the Petition and exhibits thereto, the Court has determined that the ''John Doe'' summonses to be issued by the Internal Revenue Service to AirTran Holdings, Inc., Budget Group, Inc., Central Florida Investments, Inc., Central Florida Motor Sales, Inc., Embry-Riddle Aeronautical University, Inc., Orange Lake Country Club, Inc., and Southeast Power Systems, Inc. relate to the investigation of an ascertainable group or class of persons, that there is a reasonable basis for believing that such group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and that the information sought to be obtained from the examination of the records or testimony (and the identities of the persons with respect to whose liability the summonses are issued) are not readily available from other sources. It is therefore—

ORDERED AND ADJUDGED that the Internal Revenue Service, through Revenue Agent Joseph C. West or any other authorized officer or agent, may serve Internal

Revenue Service "John Doe" summonses upon AirTran Holdings, Inc., Budget Group, Inc., Central Florida Investments, Inc., Central Florida Motor Sales, Inc., Embry-Riddle Aeronautical University, Inc., Orange Lake Country Club, Inc., and Southeast Power Systems, Inc. in substantially the form as attached to the Declaration of Revenue Agent West at Tabs 2(a) through (g), respectively, and including the schedules setting forth the account numbers for the MasterCard payment cards used with each merchant. A copy of this Order shall be served together with the summonses.

DONE AND ORDERED this 17th day of October, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5645

IN RE: Ronald R. KRONENBERGER, DEBTOR. Ronald R. KRONENBERGER, PLAINTIFF v UNITED STATES OF AMERICA, DEFENDANT. U.S. Bankruptcy Court, Southern Dist. of Ohio, (Bktcy Ct OH) Case No. 95-31577, Oct. 9, 2002. Years 1995, 1996, 1997. Decision for Taxpayers.

1. Tax claims in bankruptcy—postpetition tax debts—determination of tax liability; dischargeability. Pursuant to agreed order, IRS would abate all additional tax, interest and penalties assessed against Chap. 7 debtors in connection with IRS's erroneous additional income determinations for postpetition years, and would release any liens or levies for those years. *Reference:* United States Tax Reporter ¶68,726.52(3); 68,726.52(27).

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UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF OHIO WESTERN DIVISION,

AGREED ORDER RESOLVING COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

Judge Thomas F. Waldron

Chapter 7

Adv. No. 00-3195

THE COURT FINDS that the parties have resolved their dispute regarding the Complaint to Determine Dischargeability of Debt consistent with the terms of this Order as set forth below.

UPON AGREEMENT OF THE PARTIES, the Court hereby determines and Orders the following:

THE COURT FINDS THAT the plaintiff is not chargeable with receipt of or tax liability for the following amounts of income:

Tax year		
	1995	
	Amount	Payor
A.	$385,169.00	Mathews, Click, Bauman
B.	116,947.00	Consolidated Stores, Park East
C.	84,674.00	Consolidated Stores, Marion Meadows
D.	11,190.00	Pizza Hut
E.	1,800.00	National City Bank
	$599,780.00	

	1996	
A.	145,030.00	Mathews, Click, Bauman
B.	114,322.00	Consolidated Stores, Marion Meadows
	$259,352.00	

	1997	
A.	135,811.00	Consolidated Stores, Marion Meadows
B.	33,484.00	Mathews, Click, Bauman
	$169,295.00	

THE COURT FURTHER FINDS that the plaintiff was assessed additional income tax, interest and penalties for taxable years 1995, 1996 and 1997 based on the plaintiff's alleged receipt of the foregoing income as reported by the payors thereof.

[1] THE COURT FURTHER FINDS that, based on the substantiation submitted by or on behalf of the plaintiff, the IRS will abate in full the additional tax, interest and penalties which have been assessed against the plaintiff, and that no additional interest or penalties based on these assessments will accrue or be assessed.

THE COURT FURTHER FINDS THAT the debts in question, being income tax liabilities for taxable years 1995, 1996 and 1997, are postpetition debts that were not subjected to discharge under Section 727(b), but that the parties by consent have conducted this proceeding as one to determine the plaintiff's tax liabilities for these years.

THEREFORE, THE COURT ORDERS that the Internal Revenue Service shall effectuate the terms of the parties;ap agreement and this Order by abating all additional tax and resulting interest and penalties arising from the plaintiff's al-leged receipt of income identified above for taxable years 1995, 1996 and 1997 and releasing any tax lien or levy for these years.

THE COURT FURTHER ORDERS that the parties shall each bear their own costs of this action, and that neither shall have any claim against the other for attorneys fees or litigation costs in this proceeding.

SO ORDERED:

Date:

HONORABLE THOMAS F. WALDRON
UNITED STATES BANKRUPTCY JUDGE

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¶2002-5646

Bobby Don VANCE, PLAINTIFF v. THE UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Western Dist. of Oklahoma, (DC OK) Case No. CIV-02-1327-C, Oct. 17, 2002. Decision for Govt.

1. Actions against U.S.—fraud—preliminary injunction—res judicata—Declaratory Judgment Act; Anti-Injunction Act. Taxpayer's complaint against U.S. to set aside prior deficiency judgment as fraudulent and preliminarily enjoin any ensuing judgment sale was dismissed: taxpayer's allegations that govt.'s counsel fabricated proof on which judgment and

underlying assessments relied was really just impermissible request for declaratory or injunctive relief from back taxes, barred by DJA and AIA, or impermissible collateral attack on what was final judgment on merits of claims that taxpayer already had full and fair opportunity to litigate. Also, complaint otherwise failed under F.R.Civ.P. 60(b) where it was filed well over year after underlying judgment was entered and didn't clearly and convincingly show fraud. *Reference:* United States Tax Reporter ¶74,215.05(5); 74,217.502(5); 74,337.504(5). IRC §7421.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA,

ORDER OF DISMISSAL

ROBIN J. CAUTHRON CHIEF UNITED STATES DISTRICT JUDGE

[1] Plaintiff filed this action for injunctive relief on September 24, 2002. Although the documents filed by Plaintiff indicate he served Defendant on that date, the Court notes there are substantial questions regarding whether Defendant was properly served. Nevertheless, on October 11, 2002, Defendant filed its Response and a Motion to Dismiss. On October 15, 2002, Plaintiff filed a Response to the Motion to Dismiss. These matters are now at issue.

Plaintiff alleges Defendant obtained a judgment against him by fraud and that the U.S. Marshal will conduct a sale to satisfy that judgment. Plaintiff requests the Court quash any sale and quiet title to the property in his name. In response Defendant argues: 1) that Plaintiff's request is barred by the doctrine of res judicata; 2) the Anti-Injunction Act and/or the Declaratory Judgment Act deprive the Court of subject matter jurisdiction to hear Plaintiff's claims; or 3) that Plaintiff's present motion is not brought within the parameters of Fed. R. Civ. P. 60(b). Defendant requests that Plaintiff's motion for preliminary injunction be denied and Plaintiff's claims be dismissed.

Prior to receipt of Defendant's Response, the Court had set this matter for hearing so that evidence could be received on the propriety of issuing an order preventing the sale of Plaintiff's land. Because Defendant's Response raises substantial questions regarding Plaintiff's likelihood of success and whether Plaintiff has stated a claim for relief, the Court struck the hearing. This matter may be resolved on the pleadings before the Court.

Plaintiff's Response argues the 1999 judgment was procured by fraud and is therefore void and must be set aside. According to Plaintiff, the proof on which the underlying judgment relies was fabricated by counsel for Defendant. Plaintiff argues that Defendant's counsel defrauded the Court by this fabrication of evidence and by attempting to collect taxes past the limitations period. Finally, Plaintiff argues that there are no tax assessments, only fabricated papers showing alleged assessments.

Plaintiff's action clearly asks for declaratory relief from the United States's claim for past due taxes. As such, it violates the plain language of the Declaratory Judgment Act, 28 U.S.C. § 2201, which states:

> In a case of actual controversy within its jurisdiction, except with reject to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S,C. § 2201(a). Plaintiff's claims are also barred by the language of the Anti-Injunction Act, 26 U.S.C. § 7421, which states:

> Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(c), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court

> by any person, whether or not such person is the person against whom such tax was assessed.

26 U.S.C. § 7421. Faced with similar claims, the Tenth Circuit affirmed a district court reaching this conclusion;

> Any controversy growing out of the allegations of the complaint could relate only to federal taxes and the liability therefor. It is not sufficient to say that the controversy relates only to procedure in the method of collection when the decree prayed for would not only affect, but would prevent, the collection of federal taxes which the collector claims are due and owing. The action is, therefore, one ''with respect to Federal taxes'' as contemplated by the Declaratory Judgments Statute.

Taylor v. Allan, 204 F.2d 485, 486 [43 AFTR 940] (10thth Cir. 1953).

Plaintiff's arguments are also without merit, as they fail to satisfy the requirements of Fed. R. Civ. P., 60(b), To the extent Plaintiff argues the judgment was fraudulent under 60(b)(3), his claim fails for two reasons. First, it is properly brought only in the case that gave rise to the judgment sought to be set aside. Second, the rule states: ''[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.'' Fed.R.Civ.P. 60(b). Here, Plaintiff filed this action September 24, 2002, and the final judgment was entered August 17, 1999. Clearly more than a year had passed. To the extent Plaintiff argues the underlying judgment was reached by fraud on the Court, he is not bound by the one-year limitation. ''When alleging a claim of fraud on the court, the plaintiff must show by clear and convincing evidence that there was fraud on the court, and all doubts must be resolved in favor of the finality of the judgment.'' Weese v. Schukman, 98 F.3d 542, 552 (10th Cir. 1996). The conclusory allegations in Plaintiff's Complaint fall well short of meeting this requirement.

Finally, Plaintiff's claims are nothing more than a collateral challenge to the underlying judgment and so are barred by *res judicata.*

> Res judicata requires the satisfaction of four elements: (1) the prior suit must have ended with a judgment on the merits; (2) the parties must be identical or in privity; (3) the suit must be based on the same cause of action; and (4) the plaintiff must have had a full and fair opportunity to litigate the claim in the prior suit.

Nwosun v. General Mills Restaurants, Inc., 124 F.3d 1255, 1257 (10th Cir. 1997). As for the first element, it was noted above that judgment against Plaintiff was entered August 17, 1999. The second and third elements are satisfied, as the parties in the two actions are identical and both suits are based on the same taxes owed by Plaintiff. As for the fourth element, Plaintiff appeared and defended in the earlier case and ultimately appealed the judgment against him to the Tenth Circuit which affirmed this Court. Without question Plaintiff had a full and fair opportunity to litigate his claims in the prior suit. Consequently, Plaintiff's present claims are barred by the doctrine of *res judicata.*

For the reasons set forth herein, Bobby Don Vance's 28 U.S.C. § 2284 Motion for Injunctive Relief Preliminary to this Court's Ruling on a Motion to Vacate/ Mandatory Judicial Notices, Federal Rules of Evidence Rule 201 is DENIED. Defendant's Motion to Dismiss is GRANTED. A separate judgment will enter.

IT IS SO ORDERED this 17 day of October, 2002.

ROBIN J. CAUTHRON

CHIEF UNITED STATES DISTRICT JUDGE

¶2002-5647

IN RE: Jerrie S. COLISH, DEBTOR. Jerrie S. COLISH, PLAINTIFF v. UNITED STATES OF AMERICA, DEPARTMENT OF TREASURY INTERNAL REVENUE SERVICE, DEFEN-

DANT. UNITED STATES OF AMERICA, THIRD-PARTY PLAINTIFF. v. Jerrie S. COLISH, THIRD-PARTY DEFENDANT. U.S. Bankruptcy Court, Eastern Dist. of New York, (Bktcy Ct NY) Case No.: 197-14664-608; Adv. Proc. No. 197-1399-608; Adv. Proc. No. 00-01633-608, Oct. 23, 2002. Years 1987, 1988, 1989, 1990, 1991, 1992. Decision for Govt.

1. Tax claims in bankruptcy—dischargeability—willful attempt to evade tax. Chap. 7 debtor-attorney's tax debts were excepted from discharge under 11 USC §523(a)(1)(C)'s willful evasion provision: proof that taxpayer, who had LLM in tax and significant practice experience, willfully attempted to evade tax included his 13-year nonpayment history; persistent late return filings; use of serial, unrealistic offers in compromise to delay collection; failure to report trust interest on bankruptcy schedules; failure to disclose or use to pay taxes subsequent trust distributions that totaled over $700,000 and equalled almost 9 times amount of back taxes; and claims that he couldn't use those distributions for back taxes because of future obligations or because he thought taxes were already paid weren't credible. Also, taxpayer could have used money spent on such discretionary expenses as extra child support and children's private school education to pay taxes as they became due; and fact that he used funds for children rather than himself and that he felt obligated by his religion to send them to private school wasn't excuse for ignoring tax debts. *Reference:* United States Tax Reporter ¶68,726.52(27).

2. Tax claims in bankruptcy—discharged debts—revocation of discharge—lien property—spendthrift trusts—pre-bankruptcy liens. Govt.'s 11 USC §727(d)(2) complaint to revoke debtor-tax attorney's Chap. 7 discharge was granted: taxpayer's vested remainder interest in trust (''interest'') was bankruptcy estate property that he should have, but fraudulently failed to, report on bankruptcy schedules. Fact that taxpayer's interest was subject to special power of appointment didn't render it too remote or speculative as to be non-bankruptcy estate property, particularly where taxpayer was named beneficiary and entitled to 50% distribution on life tenant's death; spendthrift provision, although valid, didn't otherwise render interest excludable from estate since prepetition liens attached to *all* taxpayer's property; and fraudulent nature of taxpayer's not reporting was reflected in his express denial of trust interest that he had known about for years before filing bankruptcy. Also, fraud was further inferred from taxpayer's adverse history with IRS and non-payment and late filing patterns; and his alleged reliance on counsel wasn't excuse where he was well-educated himself in tax issues, didn't give counsel all necessary information, and tried to conceal large trust distributions through convoluted transfers and contribution to newly-formed partnership. *Reference:* United States Tax Reporter ¶68,726.53(2); 68,735.01(2); 63,215.03(20). IRC §6321; 6873.

Wendy J. Kisch, Esq. Batholomew Cirenza, Esq. Department of Justice Tax Division P.O. Box 55 Washington, D.C. 20044

Gary C. Fischoff, Esq. Fischoff and Associates 600 Old Country Road Suite 410 Garden City, New York 11530 Attorney for Debtor, Plaintiff and Third-Party Defendant

CARLA E. CRAIG United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT EASTERN DISTRICT OF NEW YORK,

DECISION AND ORDER

CARLA E. CRAIG United States Bankruptcy Judge

Chapter 7

This matter comes before the Court on the complaint of Jerrie S. Colish (''Colish'' or ''Debtor'') to have his debt to the Internal Revenue Service (''Government'') for his assessed federal income tax liabilities for years 1987 through 1992 declared dischargeable under 11 U.S.C. § 523(a)(1) and, additionally, on the complaint of Gov-

ernment seeking a determination that Debtor's Chapter 7 discharge should be revoked pursuant to 11 U.S.C. § 727(d)(2).

Procedural History

On April 29, 1997, Debtor filed a voluntary petition under Chapter 7 of the United States Bankruptcy Code (11 U.S.C.) and was granted a discharge of all dischargeable debts on August 19, 1997.

On August 8, 1997, Colish filed a complaint (Govt. Ex. R1.) to commence an adversary proceeding, wherein he requested that the Court issue an order declaring his assessed federal income tax liabilities for years 1986 through 1993 dischargeable under 11 U.S.C. § 523(a)(1). On September 30, 1999, the Honorable Laura Taylor Swain, to whom this case was then assigned, determined that Debtor's 1993 assessed federal income tax liabilities were non-dischargeable priority liabilities pursuant to 11 U.S.C. §507(a)(8)(A)(ii). In the Matter of Jerrie S. Colish, 239 B.R. 670 [84 AFTR 2d 99-6528] (Bankr. E.D.N.Y. 1999). Hence, the only years for which dischargeability is still in dispute are tax years 1987 through 1992.

Subsequently, on October 26, 2000, the Government commenced an adversary proceeding seeking the revocation of Debtor's Chapter 7 discharge pursuant to 11 U.S.C. § 727(d)(2) on the grounds that Debtor failed to disclose on Schedule B of the bankruptcy petition his remainder interest in a trust established by his father and that Debtor, additionally, failed to disclose and surrender to the Chapter 7 Trustee cash and other property distributions he received from the trust upon the maturing of his remainder interest. (Govt. Ex. S1.) On January 17, 2001, the Court denied the Government's motion to consolidate both adversary proceedings, but ordered that the two adversary proceedings be tried jointly. Consequently, on September 4 and 5 of 2001 and November 20, 2001, the above-entitled adversary proceedings were tried simultaneously. At the conclusion of the trial, the Court directed the parties to file post-trial briefs.

This Court has considered thoroughly all submissions, evidence, and arguments relating to this matter, and the decision rendered herein reflects such consideration.

Jurisdiction

This Court has jurisdiction over these proceedings pursuant to 28 U.S.C. §§ 151, 157 and 1334, and both these adversary proceedings are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(I) and (b)(2)(J).

Facts

Debtor's Work Experience and Education

Debtor is an attorney who holds a Juris Doctor (J.D.) degree from the University of Miami Law School and Masters of Law (LL.M.) degree in taxation from the University of Miami Law School. (T1 63.)[1] In addition to his legal education, Debtor has a "Series 7" license to sell variable securities and a license to sell life insurance products. (JPTO[2] ¶5 (4).)

Debtor has substantial work experience in both private legal practice and in the sale of securities. From 1979 through October of 1985, Debtor practiced law, advising clients on federal tax issues and corporate and partnership formations. (JPTO ¶7.) Later, from 1985 to 1987, Debtor was hired by Equityline Securities as its vice president and general counsel, and worked in sales, marketing, analysis, due diligence and wholesaling. (JPTO ¶9.)

After an extensive period of time working as an independent wholesaler of securities, from October of 1987 through November 1994 (JPTO ¶10.), Debtor was employed by a Wall Street securities firm, D.H. Blair, as a retail sales broker, from late 1994 to late 1996. (JPTO ¶10.) Subsequently, starting in late 1996 and through the time of trial, Debtor has worked with a venture capital firm, Spencer Trask. (T1 at 67.)

At the time of trial, Debtor resided in a rented 4-bedroom apartment in Brooklyn,

[1] References to T1 refer to the September 4, 2001 transcript. References to T2 refer to the September 5, 2001 transcript. References to T3 and T4 refer to the morning and afternoon transcripts from November 30, 2001.

[2] References to "JPTO" are to the Joint Pre-Triai Order approved by the Court on September 4, 2001.

New York and had resided there since June 1993. (JPTO ¶32) From 1988 to 1993, Debtor resided in a rented apartment in Pennsylvania. Debtor leased a 1986 Buick Skylark from 1986 to 1991. (JPTO ¶31.)

Debtor's Expenses and Lifestyle

From 1986 to 1998, other than normal living expenses, Debtor's expenses mainly consisted of: 1) child support payments pursuant to a marriage settlement agreement, 2) tuition payments for private school education for his four children, and 3) charitable contributions and gifts made to his ex-wife and friends.

Pursuant to a marriage settlement agreement (''Agreement''), dated March 28, 1988, Debtor and his wife became legally separated. Debtor has four children. Under the terms of the Agreement, Debtor agreed to pay $375 per month, per child as support. (Debtor's Ex. 2 ¶7.) The Agreement further provides increases in the amount of support annually in the amount of ''one-half of the excess of his net income from all sources over Sixty-Thousand ($60,000) Dollars'' and that child support in no instance shall exceed $600 per month per child. (Debtor's Ex. 2 ¶7.) However, the $600 maximum allowance per month per child apparently could be modified ''provided that the needs of the children . . . require more.'' Furthermore, pursuant to ¶ 8 of the Agreement, Debtor was to pay for his children's college expenses provided that he was financially able to do so.[3] Nothing in the Agreement required the Debtor to fund the cost of private elementary or secondary school education.

Nevertheless, beginning in 1986 and continuing on through 1999, Debtor paid for his children's private school education. (T1 at 113, 124.) Although all four children graduated from Abrams Hebrew Academy in Yardley, Pennsylvania, one daughter attended boarding school (T2 at 45, 76) and one son went to public high school for two years. (T1 at 124.) The tuition at the private schools amounted to $16,000 in 1986, and steadily rose throughout the period at issue, reaching $33,000 in 1992. The tuition remained relatively constant from 1992 to 1997 at $33,000, before increasing substantially in 1998 to $48,500 due to one of Debtor's children attending college.[4]

Furthermore, commencing in 1989 and continuing through 1998, Debtor made charitable contributions. (T2 at 20–21.) The contributions varied significantly from year to year, ranging from a low of $1,774 in 1997 to a high of $15,962 in 1993. (Govt. Ex. D3 through D12.)

In addition, Debtor gave substantial sums of money to close friends and his ex-wife. In 1998, Debtor gave his ex-wife $12,500. (Govt. Ex. PP; T2 93.) It was initially given as a loan, but later the Debtor forgave the loan, and it became a gift. (T2 at 93.) Debtor also felt responsible for the losses incurred by three friends who had invested and lost money on Debtor's advice. (T1 at 182–183.) As a result, Debtor gave three $20,000 nonrecourse loans each to the three friends.[5] Repayment was solely conditioned on the successful investment of the loans. (T1 at 182–183.)

Tax Return Filings: 1987–1998

On October 12, 1988, Debtor filed late his federal income tax return for the 1987 tax year in which he made a payment of $2,302 through employer withholding. (Govt. Ex. A1–A2.) His return reflected that he owed tax in the amount of $11,675, inclusive of interest and penalties, thus leaving a deficiency of $9,373. Id.

On April 15, 1989, Debtor timely filed his federal income tax return for the 1988 tax year in which he failed to make any payment. His return reflected that he owed tax in the amount of $6,579, inclusive of

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[3] Debtor and his former wife agreed:

to contribute to the reasonable cost of undergraduate college education . . . debtor's obligation is conditioned on: 1) his being consulted with respect to the choice of educational institutions . . . , and 2) upon the children making application for any financial aid [Debtor] deems appropriate, and 3) upon [debtor's] financial ability to pay.

Paragraph 8, Marriage Settlement Agreement, Debtor's Exhibit 2, at 6.

[4] In 1998, Debtor's oldest daughter began attending Philadelphia College of Science and Textiles, a private school in Philadelphia, Pennsylvania. See Trial Transcript (9/5/01) at 42.

[5] One $20,000 check was returned.

interest and penalties, thus leaving a deficiency in such amount. Id.

On March 18, 1991, Debtor filed late his federal income tax return for the 1989 tax year in which he made estimated payments of $3,250. His return reflected that he owed tax in the amount of $27,315, inclusive of penalties and interest, leaving a deficiency of $24,065. Id.

On June 3, 1991, Debtor timely filed his federal income tax return for the preceding year in which he made estimated payment of $100. His return reflected that he owed tax in the amount of $25,050, inclusive of interest and penalties, leaving a deficiency of $24,950. Id.

On April 10, 1992, Debtor timely filed his federal income tax return for the preceding year in which he did not make any payments. His return reflected that he owed tax in the amount of $16,207, inclusive of interest and penalties, leaving a deficiency in such amount. Id.

On April 15, 1993, Debtor timely filed his federal income tax return for the preceding year in which he made an estimated payment of $11,310. His return reflected that he owed tax in the amount of $27,042, leaving a deficiency of $15,732. Id.

On April 15, 1994, Debtor timely filed his federal income tax return for the preceding year in which he failed to make any payment. His return reflected that he owed tax in the amount of $38,913. Id.

On April 15, 1995, Debtor timely filed his federal income tax return for the preceding year in which he made an estimated payment of $9,250. His return reflected that he owed tax in the amount of $25,462, inclusive of interest and penalties, leaving a deficiency of $16,212. Id.

On April 15, 1996, Debtor timely filed his federal income tax return for the preceding year, and made a payment of $28,936 through employer withholding. His return reflected that he owed tax in the amount of $26,611, inclusive of interest and penalties, leaving an overpayment of $2,770, which was credited to his 1986 tax liability. Id.

On April 27, 1997, Debtor timely filed his federal income tax return for the preceding year, and made a payment of $27,009 through employer withholding. His return reflected tax in the amount of $12,516, inclusive of interest and penalties, leaving an overpayment of $14,493, which was credited to his 1986 tax liability. Id.

On June 25, 1998, Debtor filed late his federal income tax return for the preceding year, and made a payment of $20,826, through employer withholding. His return reflected tax in the amount of $12,324, inclusive of interest and penalties, leaving an overpayment of $8,502. Id.

On October 19, 1999, Debtor filed late his federal income tax return for the preceding year reporting no tax liability. On February 1, 2000, Debtor filed an Amended Return and made a $8,671 estimated payment as well as a $573 payment through employer withholding. His return reflected that he owed tax in the amount of $88,028, leaving a deficiency of $84,744. Id.

Serial Offers in Compromise

On April 30, 1992, Debtor submitted his first offer-in-compromise to the Government wherein he sought to compromise his tax liabilities for years 1986 through 1991, totaling $78,319, plus interest and penalties based on "doubt as to collectability" by offering to make future estimated tax payments and by paying $12,500. (Govt. Ex. F1.) The offer was amended on June 10, 1992 and again on April 5, 1993. (Govt. Ex. F2.) Under the revised offer, Debtor offered to pay $12,916 to compromise total reported tax liabilities of $85,241 for tax years 1987 through 1992. (Govt. Ex. F2.) On December 2, 1993, the Government rejected Debtor's first offer, as amended, based on Debtor's statement to the Government that the funds were no longer available. (Govt. Ex. F4.)

On April 20, 1994, Debtor submitted his second offer-in-compromise, seeking to pay only $12,500 for his total reported unpaid liabilities of $123,464 for tax years 1987 through 1993. (Govt. Ex. C.) The Debtor was, in effect, submitting the same

amount as previously offered but attempting to satisfy an additional tax year as well. The Government determined that the Debtor actually had over $119,447 in net equity from which to collect outstanding tax liabilities of $130,780. (See attachment to Govt. Ex. G3.) As a result, the Government formally rejected that offer on August 19, 1994, after determining that a much larger amount was collectible by the it. (Govt. Ex. G2.)

On September 15, 1994, Debtor submitted his third offer-in-compromise, which was amended on May 18, 1995. (Govt. Ex. H1.) As amended, Debtor offered to pay $20,000 to compromise total reported liabilities of $147,64. (Govt. Ex. H2.) The Government rejected Debtor's offer by letter dated June 22, 1995, and afforded him the opportunity to protest the decision. Debtor's final offer was rejected by letter on May 14, 1997 because a larger amount was deemed collectible. (Govt. Ex. H6.)

The Mannie S. Colish Trust

Mannie S. Colish, Debtor's father, established the Mannie S. Colish Trust (''Trust'') on October 25, 1979. (Govt. Ex. W, X1, X2, Y.) The Trust provided a life estate interest to Lorraine S. Colish, Debtor's mother, and equal vested remainder interests to Debtor and his sister, Julie Colish. Mannie Colish died on January 11, 1981. (T1 at 140.) Upon his father's death, Debtor learned that he was a beneficiary of the Trust. (Govt. Ex. W, X1, X2, Y.) The Trust provided that Lorraine Colish had a testamentary power of appointment, which permitted her, by her last Will and Testament, to divest either remainder interest in the Trust. (Govt. Ex. W, X1, X2, Y.)

At the time of filing the bankruptcy petition, Debtor failed to disclose his remainder interest in the Trust in schedules filed with this Court. (Govt. Ex. P, Sch. ''B'', lines 18, 19; T1 at 145.) The Government contends that it only became aware of Debtor's interest in the Trust during settlement negotiations with the Debtor for adversary proceeding no. 97-1399, after which it commenced an adversary proceeding to revoke Debtor's discharge pursuant to 11 U.S.C. §727(d)(2). (T4 at 18–19.)

On December 20, 1997, Lorraine Colish died and the Debtor became entitled to collect his remainder interest. (T1 at 140–141; Ex. AA.) Subsequently, from January 1998 through June 1998, Debtor received cash and other property distributions from the Trust, totaling $718,000. (T1 at 142.) As part of the distributions, Debtor received $479,631 from a land contract held by the Trust. (T1 at 165-1661; Govt. Ex. OO.) On January 13, 1998, Debtor wire-transferred his share of these proceeds from his Citizens Bank account in Flint, Michigan to an account he maintained with Chase Bank in New York. (T1 at 169.) Next, Debtor transferred $450,000 from the Chase account to a savings account opened at Citibank. (Id.) On January 27, 1998 Debtor transferred $200,000 from the Citibank savings account into Citibank checking account and $245,335 into a 7-day CD. (T1 at 170.) Debtor then trans-ferred $100,000 of the $200,000 in the Citibank checking account to a personal account at Spencer Trask (held by Schroeder Bank). (T1 at 184.)

On March 23, 1998, Debtor created a Nevada Limited Partnership, Phoenix Samson Associates, L.P. in which Debtor was named a general partner and limited partner, holding a 96% interest of the partnership and the Jerrie Saul Colish Irrevocable Children's Trust (''Irrevocable Trust''), a limited partner, holding the other 4% interest. (Govt. Ex. J; T1 at 180.) Debtor funded the partnership with cash and property valued at $740,625, including his Spencer Trask account, his newly opened Citibank accounts, numerous stock warrants, various general and limited partnership interests acquired from the Trust and extensive personal property.[6] Of the contributed funds, Debtor treated $711,000 (96% interest in partnership) as coming from himself and the other $29,625 coming from the Irrevocable Trust. However, the entire amount clearly came from

[6] The debtor contributed several items of personal property, including furniture, household items, clothing, furs, jewelry, musical instruments, silverware, china, crystal, paintings, books, collectibles, electronic audio and video equipment, computers, appliances and other property. (T1 at 157–180, Ex. J.)

Debtor's interest in the Trust. (T1 at 160–161.)

Discussion

[1] Pursuant to 11 U.S.C. § 523(a)(1)(C), Debtor's 1987 through 1992 Assessed Federal Income Tax Liabilities Are Non-Dischargeable

A discharge in bankruptcy does not discharge debtor of all debts. § 523(a)(1)(C) provides in relevant part:

> Section 523. Exceptions to Discharge
>
> (a) A discharge under §§ 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual Debtor from any debt-
>
> (1) for a tax or customs duty-
>
> (C) with respect to which Debtor made a fraudulent return or willfully attempted *in any manner* [italics to highlight] to evade or defeat such tax.

The two exceptions to dischargeability in § 523(a)(1)(C) are to be read in the disjunctive. "Nondischargeability under [§ 523(a)(1)(C) is not limited to finding a fraudulent return." In re Fernandez, 112 B.R. 888, 891 (Bankr. N.D. Ohio 1990); In re Tudisco, 183 F.3d 133 [84 AFTR 2d 99-5265] (2d Cir. 1999). Therefore, in order to prevail, the Government must prove that the Debtor either made a fraudulent return or the Debtor willfully attempted to evade or defeat payment of taxes. In re Lilley, 152 B.R. 715, 720 [72 AFTR 2d 93-5076] (Bankr. E.D.Pa. 1993); In re Griffith, 161 B.R. 727 [73 AFTR 2d 94-755] (Bankr. S.D.Fla. 1993).

At issue in Adversary Proceeding No. 197-1399 is whether Debtor willfully attempted in any manner to evade or defeat payment of taxes for tax years 1987 through 1992. The Second Circuit has recently held that the "willfulness exception consists of a conduct element (an attempt to evade or defeat taxes) and a mens rea requirement (willfulness)." In re Tudisco, 183 F.3d 133, 136 [84 AFTR 2d 99-5265] (2d Cir. 1999).

The burden of proof is the ordinary civil standard; the government must show by a preponderance of the evidence that the claim should be excepted from discharge. Grogan v. Garner, 498 U.S. 279 [70 AFTR 2d 92-5639] (1991); Langlois v. United States, 155 B.R. 818, 820 [71 AFTR 2d 93-1781] (N.D.N.Y. 1993). We also bear in mind that exceptions to discharge are construed in favor of the Debtor. In re Birkenstock, 87 F.3d 947, 951 [78 AFTR 2d 96-5229] (7th Cir. 1996).

The Second Circuit has recently declined to decide whether more than a simple nonpayment of taxes is required to satisfy § 523(a)(1)(C)'s conduct requirement or whether § 523(a)(1)(C) "encompasses both acts of commission as well as culpable omissions." In re Tudisco, 183 F.3d at 137 (quoting Bruner v. United States (In re Bruner), 55 F.3d 195, 200 [76 AFTR 2d 95-5024] (5th Cir. 1995) (holding that §523(a)(1)(C) "encompasses both acts of commission as well as culpable omissions")). However, the Second Circuit, in Tudisco, has joined the majority of the courts in holding that a failure to pay a known tax duty is, at a minimum, "relevant evidence which a court should consider in the totality of conduct to determine whether . . . the debtor willfully attempted to evade or defeat taxes." Dalton v. IRS, 77 F.3d 1297, 1301 [77 AFTR 2d 96-1487] (10th Cir. 1996). Nonpayment of tax coupled with concealment of assets or income, or a pattern of failure to file returns is sufficient to establish conduct aimed at "evading or defeating taxes." See, e.g., In re Tudisco, 183 F.3d 133 [84 AFTR 2d 99-5265] (nonpayment of tax, failure to file and submission of false affidavit to employer intended to establish exemption from withholding), In re Birkenstock, 87 F.3d 947 [78 AFTR 2d 96-5229] (nonpayment of tax, failure to file, creation of shell trust); Dalton v. Internal Revenue Service, 77 F.3d 1297 [77 AFTR 2d 96-1487] (concealing assets and underestimating ownership interest in property on bankruptcy schedule).

The Second Circuit has interpreted "willfully" for purposes of § 523(a)(1)(C) to require that debtor's attempts to avoid his tax liability be undertaken "voluntarily,

consciously or knowingly, and intentionally.'' In re Tudisco, 183 F.3d 133, 137 [84 AFTR 2d 99-5265] (2d Cir. 1999) (quoting Dalton, 77 F.3d at 1302).

Because direct proof of intent is rarely found, courts look to circumstantial evidence to determine debtor's intent. Such evidence may include evidence outside the tax years in question, ''if sufficiently related in time and character to be probative.'' In re Birkenstock, 87 F.3d at 951 (quoting United States v. Birkenstock, 823 F.2d 1026, 1028 [60 AFTR 2d 87-5209] (7th Cir. 1987).

In the case at bar, there are a number of facts which, when taken together, show that the Debtor intended to evade or defeat taxes. Debtor, an attorney with an LL.M. in tax, despite the knowledge that he was required to pay estimated taxes and to fully pay his tax liabilities by April 15th of each year (T1 at 137), did not pay his federal income taxes for thirteen years, except to the extent tax was withheld by his employers, and his tax obligation has accumulated over this period, resulting in total tax liabilities to date of $228,277.60. (Govt. Ex. A1-A2.) Debtor failed to fully pay his tax liabilities for tax years 1986 through 1998, with the exception of tax years 1995 through 1997 when his employer was withholding taxes from his wages. (Govt. Ex. C, D9-D11; T1 at 131–32.)

Second, Debtor failed to timely file returns for tax years 1986, 1987, 1989, 1996, 1997 and 1998. It was only from tax years 1990 through 1995 that Debtor timely filed his tax returns. However, during this period, Debtor was negotiating three separate offers-in-compromise with the IRS and was required to comply with Internal Revenue Service Regulations, which included timely filing returns as a condition of acceptance of the offers-in-compromise. Moreover, Debtor attempted to thwart or at the very least delay the collection of his tax liabilities by filing serial offers-in-compromise from 1990 to 1995. In re Meyeres, 216 B.R. 402 [81 AFTR 2d 98-635] (6th Cir. 1998) (finding that § 523(a)(1)(C)'s modifying phrase ''in any manner'' is ''broad enough to encompass attempts to thwart the payment of taxes''). The undisputed evidence shows that Debtor, an intelligent, highly educated tax attorney who was familiar with the offer-in-compromise process, succeeded in delaying the Government's collection efforts for more than five years by submitting offers which were clearly too low in relation to the tax obligations owed.[7] In addition, Debtor knew that, while the offers were pending, he could forestall collection of all tax liabilities under consideration, which permitted him to delay filing bankruptcy and seeking discharge of his taxes. (Govt. Ex. F1-G1 (¶4), H1, H2 (¶7(d).)

Third, Debtor, aware of his remainder interest at the time of filing the bankruptcy petition, failed to disclose this interest to this Court despite the fact that Schedule B explicitly asked whether Debtor had any contingent or future interests at the commencement of the case. Debtor's failure to list his remainder interest in the Trust prevented the Government from asserting a secured claim position based on tax liens that had attached to all of Debtor's property.

As the Government pointed out at trial, had the Debtor reported his remainder interest in the bankruptcy schedules, even if he had reported the value as zero, the Trustee and the Government would have had an opportunity to inquire as to its value and the Government would have asserted a secured claim on this interest, permitting the Government to receive the value of the remainder interest at the time the interest matured post-petition. (T3 at 47–54.) As a general matter, federal tax liens survive bankruptcy and, to the extent that they are secured by the liened property, they remain enforceable against the liened property, despite the fact that the underlying obligations are dischargeable. See, e.g., In re Isom, 901 F.2d 744 [67 AFTR 2d 91-314] (9th Cir. 1990); In re Dillard, 118 B.R. 89 (Bankr. N.D.Ill. 1990); U.S. v. Alfano, 34 F.Supp.2d 827

[7] Under Debtor's offer, as revised, he was to pay only $12,916 to compromise total reported unpaid liabilities of $85,241 for the tax years 1987 through 1992 (Govt. Ex. C). Based on Debtor's reported income, this was not a legitimate offer.

[84 AFTR 2d 99-6336] (E.D.N.Y. 1999). The omission further enabled the Debtor to receive $718,000 in distributions, which he channeled to various accounts and ultimately a limited partnership in Nevada in an attempt to conceal his assets from the Government and thwart the collection of his tax obligations.

Fourth, Debtor did not even fully pay his $88,000 tax liability for the 1998 tax year when he received over $718,000 in distributions from the Trust, nor did he even make any effort to pay his tax obligations owed for prior years.

Debtor argues that an inference of intent to evade or defeat taxes should not be drawn from these facts, for the following reasons.

First, Debtor contends that he did not pay his 1998 tax obligations because he had future obligations, and because he was attempting to reach a settlement with the Government on prior taxes. (T1 at 114–115, and at 118–119.) The existence of future obligations is no excuse not to pay current tax obligations, In re Haesloop, 2000 WL 1607316 [86 AFTR 2d 2000-6380] (Bankr. E.D.N.Y. 2000), and it is not clear how a desire to reach a settlement on prior taxes would preclude payment of current taxes. Additionally, Debtor argues that the reason he did not pay his prior tax obligations when he received the Trust distributions was that he thought these prior taxes were discharged already. However, this is a weak argument, as Debtor knew that his 1994 tax liability was a priority tax liability and did not attempt to challenge it in his complaint for Adversary Proceeding No. 197-1399. (Govt. Ex. R1.)

Second, Debtor argues that the reason he did not pay his taxes each year was because, by the time April 15 came around each year, he did not have enough money on hand to pay his taxes. (T1 at 9, 102, 109–110.) This argument fails to convince this Court. Debtor did have the funds to pay his tax liabilities. The evidence shows that Debtor could have easily paid his tax obligations had he spent less money on tuition payments, gifts, charitable contributions and child support payments in excess of his obligations under the court-ordered arrangement with his ex-wife. From 1986 to 1999, Debtor spent $420,000 on tuition payments, spent approximately $62,725 on excess child support payments, made charitable contributions in the amount of $68,389, gave gifts to his ex-wife and close friends totaling $72,500 and made highly speculative investments in which he lost $269,000. In comparison, Debtor accumulated total tax liabilities of $288,277.60 of which a significant portion, if not all, could have been paid within a reasonable amount of time had Debtor refrained from spending all his money on the above-listed discretionary expenses. In a recent case, under a similar set of facts, the Debtor, an attorney, channeled money that could have been used for his tax liabilities to personal expenses, such as paying his daughter's "Ivy League" education, maintaining a country house and paying his wife's tax liabilities. In re Haesloop, 2000 WL 1607316 (Bankr. E.D.N.Y. 2000). In that case, the court found that had debtor made reasonable adjustments to his standard of living he could have easily paid his tax debt in full and held that the debtor willfully attempted to evade or defeat his tax obligations within the meaning of § 523(a)(1)(C). The fact that the debtor's income, in Haesloop, was $275,000 per year and Debtor's income, on average during the relevant period, was $67,000 per year, makes no difference. Had Debtor refrained from spending more than half his income on discretionary expenses such as private education and excess child support payments, he would have easily been able to pay his tax obligations within a reasonable period of time.

Furthermore, this Court rejects Debtor's related argument that he led a frugal modest lifestyle and that he was faced with "Hobson's Choice" between payments of his tax obligations on the one hand, and financial contributions and support to his family on the other. (Debtor's Post-Trial Memorandum of Law, at 5.) Courts have held that a debtor has willfully evaded his taxes under § 523(a)(1)(C) where he had the wherewithal to pay his tax obligations

but chose to apply his income to discretionary expenses such as private education for his children and financial support to his family members. In re Haesloop, 2000 WL 1607316, In re Wright, 191 B.R. 291, 295 (S.D.N.Y. 1995) (debtor spent ''thousands of dollars'' on tuition payment for Ivy League education for his children, paid substantial credit card charges of wife and daughter, and helped support his brother and mother); In re Eleazar, 271 B.R. 766 [89 AFTR 2d 2002-744] (Bankr. D.N.J. 2001) (debtor paid substantial credit card debt of his family member). Debtors do not owe a duty to supply their children with nonessential luxuries such as private education absent some evidence that the debtor's children would not be served by a public school education. In Re Griffith, 209 B.R. 823, 828 (Bankr. N.D.N.Y. 1996).

Debtor claims that as an Orthodox Jew he has an obligation to send his children to Jewish day schools. (T1 at 113.) While there is no case directly addressing whether a debtor has a constitutional right to send his children to religious school, courts have held that a debtor does not have a constitutional right to make charitable contributions under the free exercise clause of the First Amendment. In re Griffith, 209 B.R. 823, 828 (Bankr. N.D.N.Y. 1996), Church of Lukumi Babalu Aye., Inc. v. Hialeah, 508 U.S. 520 (1993). This Court sees no basis for finding a right, constitutional or otherwise, to pay religious school tuition in preference to tax obligations.

If this Court were to permit every debtor to receive a discharge of his or her tax liabilities every time a debtor decided to spend income on discretionary personal expenses at the expense of tax obligations, claiming that he or she was faced with conflicting monetary obligations, then § 523(a)(1)(C) would be meaningless. In this case, Debtor had the wherewithal to pay his taxes had he not spent most of his income on discretionary expenses and taken affirmative steps, after receipt of distributions from his father's trust, to place his assets beyond the reach of creditors.

This is not a case where Debtor was ignorant of his tax obligations. Indeed, like the debtors in Haesloop and Wright, Debtor, an intelligent attorney with an LL.M. in tax, clearly knew he had a duty to pay his tax obligations and voluntarily and consciously chose to ignore these obligations. At trial, the Debtor testified that ''the IRS came at the bottom of his list along with three or four hundred thousand worth of other creditors'' (T3 at 24) because they didn't ''scream loud enough'' (T3 at 24) and that he would pay ''whichever creditors were yelling the loudest'' (T2 at 16) and that his ''landlord, car payments and child support payments'' were timely made so that his ''ex-wife wouldn't yell at me.'' (T2 at 16.)

Section 523(a)(1)(C) renders nondischargeable attempts in any manner to evade or defeat a tax. The totality of the Debtor's conduct here constitutes a scheme of willful evasion and conduct to defeat the payment of his tax liabilities.

In conclusion, the Court, having considered the totality of Debtor's conduct, finds that Plaintiff willfully attempted to evade or defeat his tax obligations within the meaning of §523(a)(1)(C) of the U.S. Bankruptcy Code. Accordingly, the principal amount of Debtor's outstanding tax debt and the interest and penalties hereon, for each of the tax years in dispute, 1987 through 1992, are non-dischargeable.

[2] Pursuant to 11 U.S.C. § 727(d)(2), Debtor's Discharge Should Be Revoked

Section 727(d)(2) of the United States Bankruptcy Code (11 U.S.C.) provides in pertinent part:

> (d) On request of the trustee, a creditor, or the United States trustee, and after notice and hearing, the court shall revoke a discharge granted under subsection (a) of this section if-
>
> > (2) the debtor acquired property that is property of the estate, or became entitled to acquire property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to de-

liver or surrender such property to the trustee.

The burden of proof under § 727(d)(2) is preponderance of the evidence, and not, as Debtor's counsel argues, the clear and convincing standard. Although this Court, in In re Kirschner, 46 B.R. 583 (Bankr. E.D.N.Y. 1985), held that the appropriate standard in a § 727(d)(1) case was clear and convincing evidence, the U.S. Supreme Court in Grogan v. Garner, 498 U.S. 279 [70 AFTR 2d 92-5639] (1991), applied the preponderance of evidence standard to dischargeability issues under 11 U.S.C. § 523. Several other courts have subsequently applied the preponderance of evidence standard to discharge revocation proceedings under 11 U.S.C. § 727 because similar considerations of intent are involved in both provisions. See, e.g., In re Serafini, 938 F.2d 1156 (10th Cir. 1991); In re Bowman, 173 B.R. 922 (9th Cir. BAP 1994); In re Sylvia, 214 B.R. 437, 440 (Bankr. D.Conn. 1997); In re Barr, 207 B.R. 168 (Bankr. N.D. Ill. 1997); In re Frost, 164 B.R. 740 (W.D. Bankr. Mich. 1994); In re Wolfson, 139 B.R. 279 (Bankr. S.D.N.Y. 1992).

The Government contends that Debtor's remainder interest in the Trust was property of the estate at the time of the filing of the petition, and should have been disclosed on Schedule "B". (Plaintiff's Post-Trial Brief, at 40.) In addition, the Government asserts that Debtor failed to report acquisitions of cash from and maturing of Debtor's remainder interest to the Court or the Trustee. (Plaintiff's Post-Trial Brief, at 40.) In response, Debtor advances two arguments. First, he contends that his interest in the Trust was both subject to a discretionary power of appointment by the income beneficiary, Lorraine Colish, and also non-assignable and thus was not property of the estate. (Debtor's Post-Trial Memorandum of Law, at 10–14.) Second, he argues that he relied on his attorney's advice in not listing his remainder interest in the Trust in the schedules of his bankruptcy petition, and therefore that his failure to disclose the interest in his bankruptcy filing was not "knowing and fraudulent". (Debtor's Post-Trial Memo-randum of Law, at 10–14.)

Both Debtor's counsel and the Government agree that the scope of property of the estate under § 541 of the U.S. Bankruptcy Code includes "all legal or equitable interests of the debtor in property as of the commencement of the case". 11 U.S.C. § 541. This provision has been broadly construed. In re Yonikus, 996 F.2d 866, 869 (7th Cir. 1993) ("every conceivable interest of the debtor, future, nonpossessory, contingent, speculative, and derivative, is within the reach of § 541"). Although § 541 defines the scope of the property of the estate, applicable state law determines the issue of whether debtor has a legal or equitable interest in property. Butner v. United States, 440 U.S. 48, 54 (1979).

Both parties also agree that since the Trust was established in Michigan, Michigan law applies. Under Michigan law, the trustee holds legal title to the corpus and the beneficiaries hold the equitable interest. In re Page, 239 B.R. 755, 763 (Bankr. W.D. Mich. 1999). In the case at bar, the Trust provided that testator's wife, Lorraine Colish, would be the income beneficiary of the Trust assets during her life, and Debtor and his sister, Julie Colish, had remainder interests in the trust assets which would mature on the death of Lorraine Colish. The Trust contained two provisions which are of particular importance in this case. First, Section 5B.3(d) of the Trust provides that Lorraine Colish had a special power to appoint, only by specific reference in her Will, the trust assets to any of testator's children or their descendants as she would determine in her sole discretion[8] . Second, Section 7.4 of the Trust contains a clause which essentially prevents the assignment or transfer of the beneficiary's interest in the trust's principal and income to his beneficiaries unless the

[8] Section 5B.3(d) of the trust states: "Spouse's Special Power. My spouse shall have a special testamentary power of appointment to appoint outright, in a trust or otherwise, with such estates, powers, limitations or conditions as she shall determine, to any one or more of my children or to their descendants (. . .) such amounts as my spouse, in my spouse's sole discretion shall determine, provided this power shall not be exercised for the purpose of discharging my spouse's legal obligations. (. . .) This power shall only be exercisable only by specific reference thereto in my spouse's will."

trustee determines that such transfer is in the best interest of the beneficiary.

Debtor relies on two cases, In re Knight, 164 B.R. 372 (Bankr. S.D. Fla. 1994), and In re Hicks, 22 B.R. 243 (Bankr. N.D. Ga. 1982), for the proposition that where an interest is subject to a testamentary special power of appointment, the potential beneficiary does not have an interest that would be property of the estate. (Debtor's Post-Trial Memorandum of Law, at 10–13.) In Knight, the debtor scheduled certain property as contingent unvested interests in trusts and the issue was whether these trust interests were included as property of the estate. Debtor's parents established two separate trusts, the Dorothy Trust and the Charles Trust, which was later divided into Charles A trust and Charles B Trust. The Dorothy Trust provided that upon the death of Dorothy, the life beneficiary, the trust principal would be distributed equally to debtor and his sister, if they were alive. The Charles A Trust provided that Dorothy would receive all her income from this trust during her life and also permitted Dorothy, by power of appointment exercisable by Dorothy alone and in her sole discretion, to name debtor or his sister as beneficiaries. The court held that debtor's interest in the Charles A Trust was too remote to have value and did not constitute property of the estate. In re Knight, 164 B.R. at 376. However, the debtor's interest in the Dorothy Trust was held to be property of the debtor's estate, despite the existence of contingencies, which the court acknowledged reduced the actual value of the interest.

In Hicks, the debtor alleged that he had a vested remainder interest in his father's trust. Debtor's father died ten years prior to debtor's filing of his bankruptcy petition and debtor's mother was given a life estate in the residuary trust as well as a power of appointment, which enabled her to direct the trustee to turn over the trust assets to any descendant of her late husband. As of the bankruptcy filing date, the mother had not exercised her power of appointment and was still alive. The court held that debtor's interest would only vest upon the occurrence of two contingencies: 1) the mother's exercise of the power of appointment naming debtor as beneficiary and 2) the debtor surviving his mother. The court reasoned that it could not compel debtor's mother to exercise her power of appointment naming him as beneficiary and further that under Georgia law, the debtor's interest would only vest on the death of the mother, the life tenant. In re Hicks, 22 B.R. at 245.

The case at bar is distinguishable from the above cases. First, unlike Knight, the debtor in this case was actually named as a beneficiary under the Trust and was to receive 50% of the trust assets upon the death of the life beneficiary, Lorraine Colish. (Govt. Ex. W, X1, X2, Z1 and Z2.) In contrast, in Knight, the Charles A Trust did not provide that debtor was to receive the principal or income upon the death of the life beneficiary (unlike the Charles Part B Trust and the Dorothy Trust, which were held to be property of the estate), but merely permitted the life beneficiary to name any descendant of the testator upon her death, pursuant to the power of appointment. Second, Lorraine Colish, unlike the life beneficiaries in both Knight and Hicks, actually did exercise her power of appointment in her Last Will, prior to the filing of the bankruptcy petition. On January 8, 1985, Lorraine Colish executed a Last Will and Testament under ITEM XVII in which she refrained from exercising any power of appointment that she may have had at the time of her death. (Govt. Ex. CC1.) Further, on October 29, 1997, she executed a First Codicil to her Last Will and Testament in which she did not change ITEM XVII in the Last Will. (Govt. Ex. CC2.) Consequently, the Debtor's argument that the Court could not compel the life tenant to refrain from divesting Debtor of his interest in the Trust or to name him as beneficiary is unavailing: in this case there was no need to do so. Third, the court in Hicks placed emphasis on the fact that under Georgia law, the debtor's interest would only vest on the death of the life tenant, who happened to be still alive at the time of the filing of the bankruptcy petition. Here, in contrast, al-

though the life beneficiary was still alive at the time of the bankruptcy filing, the Debtor's interest had already vested, because under Michigan law, as the Government properly notes, a remainderman's interest vests at the time of the death of the testator, not the life tenant. (United States Post-Trial Brief, at 43.) In re Hurd's Estate, 6 N.W. 2d 758, 760 (Mich. 1942) (listing cases in support of the long-standing preference for vested estates); In re Childress Trust, 486 N.W. 2d 141, 143 (Mich. 1992).

For these reasons, this Court concludes that Debtor's interest in the Trust was not too remote or speculative to not be included in the property of the estate. Furthermore, although subject to possible divestment by the life beneficiary, Debtor's interest was a vested remainder interest. Even if Debtor's interest was found to be a contingent remainder interest, this alone would not preclude it from being property of the estate, provided the interest was not circumscribed by a spendthrift provision. See, e.g., In re Neuton, 922 F.2d 1379 (9th Cir. 1990) (fact that debtor's interest in trust was contingent on surviving life tenant did not preclude it from being property of estate); In re Dias, 37 B.R. 584, 586–587 (Bankr. D. Idaho 1984) (a beneficial interest is an equitable interest under § 541(a)(1) despite the fact that at the time of filing petition it was contingent).

Debtor further argues that pursuant to both Section 7.4 of the Trust and § 541(c)(2) of the U.S. Bankruptcy Code, his interest in the Trust was non-assignable and not reachable by his creditors and thus should not be included in the property of the estate.[9]

Michigan law recognizes the validity of restrictions on the transfer of beneficial interests in spendthrift trusts. In re Edgan Estate, 137 Mich. App. 419, 357 N.W. 2d 867 (1984). The United States Supreme Court has ruled that in accordance with the plain meaning of § 541(c)(2), property is excluded from the estate when 1) debtor has a beneficial interest in a trust, 2) there is restriction on the transfer of such interest, and 3) the restriction is enforceable under applicable nonbankruptcy law. Patterson v. Shumate, 504 U.S. 753, 757–758, (1992).

This Court finds that the spendthrift provision in the Trust constitutes a valid spendthrift provision. Under Michigan law, the provisions of the trust instrument must demonstrate grantor's intent to ''provide a fund for the maintenance of the beneficiary and at the same time to secure the fund against his improvidence or incapacity.'' In re Barnes, 2001 WL 815360 (Bankr. E.D. Mich. 2001) (quoting Black's Law Dic-tionary). In the case at bar, the main pur-pose of the spendthrift clause was to pro-vide a source of income for the testator's wife, Lorraine, and secure the fund against any improvidence or incapacity of the wife or other beneficiaries by delegating com-plete control over the distribution of the funds to the trustee.[10] As a result, in the case at bar, Debtor's vested remainder in-terest in the spendthrift trust would be ex-cluded from the estate pursuant to § 541(c)(2), were it not for the effect of fed-eral tax law.

The Bankruptcy Code recognizes federal tax law as ''applicable nonbankruptcy law'' for purposes of enforcing a § 541(c)(2) exemption. Patterson, 504 U.S. at 758–759 (''Plainly read, the provision encompasses any relevant nonbankruptcy law, including federal law''); United States v. Dallas National Bank, 152 F.2d 582, 585 [34 AFTR 623] (5th Cir. 1945) (holding that Internal Revenue statutes are federal laws). It is well-settled that courts draw from ''Federal tax lien law as a source of 'applicable nonbankruptcy' law that overrides any state law restriction on the Government's reaching the debtor's

9 § 541(c)(2) states in relevant part:

(c)(1) Except as provided in paragraph (2) of thus subsection, an interest of the debtor in property becomes property of the estate ... notwithstanding any provision in any agreement, transfer instrument, or applicable nonbankruptcy law

(c)(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

10 The spendthrift clause clearly states that the principal and income of the trust are to be free from interference of the creditors of any beneficiary and not subject to assignment or anticipation by any beneficiary unless the trustee determines this to be in the best interest of the beneficiary. See Section 7.4 of the Trust (Creditor's Clause).

rights.'' In re Lyons, 148 B.R. 88, 93 (Bankr. D.D.C. 1992); see, e.g., Bank One v. United States, 80 F.3d 173, 176 [77 AFTR 2d 96-1579] (6th Cir. 1996) (''Under the great weight of federal authority, however, such restraints on alienation [referring to spendthrift provisions in a trust] are not effective to prevent a federal tax lien from attaching under 26 U.S.C. § 6321.'') Section 6321 of the Internal Revenue Code (26U.S.C.) provides that ''if any person liable to pay a tax neglects or refuses to pay the same after demand, the amount shall be a lien in favor of the United States upon *all* property and rights to property, whether real or personal, belonging to such person.'' 26 U.S.C. § 6321; United States v. National Bank of Commerce, 472 U.S. 713, 719–20 [56 AFTR 2d 85-5210] (1985) (the language of § 6321 is broad and is reflective of a congressional intent to ''reach every interest in property that a taxpayer may have''). Thus, although the spendthrift clause prevented creditors of the Debtor from reaching his remainder interest in the Trust, the United States' federal tax lien can be satisfied against any income distributions of the Trust provided that the liens attached to Debtor's property prior to the Debtor's bankruptcy filing, the liens were properly filed federal tax liens and Debtor's remainder interest constitutes a legal or equitable right defined as ''property'' or ''rights to property'' subject to attachment under federal law. Jones v. Internal Revenue Service, 206 B.R. 614, 621 [79 AFTR 2d 97-2028] (Bankr. D.D.C. 1997) (observing that certain property has ''a split personality by remaining property of the estate for purposes of federal tax claims even though it is not property of the estate for purposes of other creditors' claims''); In the Matter of Orr, 180 F.3d 656 [84 AFTR 2d 99-5390] (5th Cir. 1999) (holding that federal tax liens attached to future distributions from the spendthrift trust at the time of the creation of the lien, which predated and survived the bankruptcy, and not at the time that each distribution was made).

In this case, the United States filed Notices of Federal Tax Liens for each of the years 1987 through 1993, thereby making each of those liabilities secured claims in the Chapter 7 case. (Govt. Ex. A1, A2.); 11 U.S.C. §506(a). Generally, the federal tax lien arises at the time the assessment is made and continues until the liability is satisfied or becomes unenforceable by reason of lapse of time. 26 U.S.C. § 6332; United States v. City of New Britain, 347 U.S. 81 [44 AFTR 798] (1954) (describing federal tax lien as general lien when attached at the time of assessment to all of the taxpayer's property, was thus perfected). Furthermore, under Michigan law, a debtor's interest in a spendthrift trust, be it contingent or remainder, is ''property'' or ''rights to property'' under 26 U.S.C. § 6321. Bank One v. United States, 80 F.3d at 175. In addition, the Government's lien on the property of the taxpayer, when taxpayer fails to pay taxes after assessment, notice and demand, attaches to all property and rights to taxpayer's property, including property subsequently acquired by taxpayer. 26 U.S.C.A. §§ 6321, 6322.

As a result, the federal tax liens attached to Debtor's vested remainder interest in the Trust at the time of the creation of the liens, which predated the bankruptcy, and the liens attached to Debtor's after-acquired property, namely the maturing of Debtor's remainder interest and the resulting distributions from the Trust post-discharge.

The only question remaining before this Court is whether Debtor knowingly and fraudulently failed to report to the Court or surrender to the Chapter 7 Trustee his remainder interest in the Trust and the cash and other property distributions he received from the maturing of his remainder interest pursuant to § 727(d)(2) of the U.S. Bankruptcy Code.[11]

[11] Although there is disagreement whether Section 727(d)(2) applies only to post-petition entitlement or receipt of property or whether it applies to both pre-petition property and post-petition property, this issue does not affect this Court's analysis because the debtor's pre-petition reminder interest in the Mannie S. Colish Trust actually matured, and the proceeds of the trust were distributed to him, after his discharge in bankruptcy. Compare In re Argiannis, 183 B.R. 307 (Bankr. M.D. Fla. 1995), In re Puente, 49 B.R. 966, 968 (Bankr. W.D.N.Y. 1985) (holding that Section 727(d)(2) applies only to entitlement or acquisition of post-petition property) with In re Barr, 207 B.R. 168 (Bankr. N.D. Ill. 1997) (holding that § 727(d)(2), by its plain reading, is not limited to property acquired post-petition, but extends to property acquired pre-petition).

To find the requisite degree of fraudulent intent under § 727(d)(2), the court must find the debtor knowingly intended to defraud, or engaged in such reckless behavior as to justify the finding of fraud. In re Puente, 49 B.R. 966, 969 (Bankr. W.D.N.Y. 1985). The requisite fraudulent intent or recklessness may be proven by evidence of the debtor's awareness of the omitted asset and by showing that the debtor knew that failure to list the asset could seriously mislead the trustee or creditors or that the debtor acted so recklessly in not reporting the asset that fraud is implied. 4 Collier on Bankruptcy ¶ 727.15[4] (1992). As direct evidence of the debtor's intent can rarely be found, the courts have relied on the inferences drawn from a course of conduct and all surrounding circumstances in finding fraudulent intent. Matter of Reed, 700 F.2d 986, 991 (5th Cir. 1983) (debtor's whole pattern of conduct supports the court's finding of fraudulent intent); In re Kindorf, 105 B.R. 685, 689 (Bankr. M.D. Fla. 1989) (in determining debtor's actual intent, court considered all circumstances, including debtor's systematic transfer of excess of $143,000 to his wife, comprising his salary, income from partnership interest and gifts from parents, as well as debtor's failure to disclose the existence of a Swiss bank account in his schedules in which he held a substantial sum), In re Yonikus, 974 F.2d 901, 905 (7th Cir. 1992).

In the case at bar, Debtor became aware of his remainder interest in his father's estate soon after his father's death on January 11, 1981. (T1 at 140.) On December 20, 1997, Debtor's mother, Lorraine Colish, died. Despite knowledge of his remainder interest in the trust, debtor failed to disclose his interest in the schedules filed with this Court. Rather, Debtor, on Schedule "B" of the bankruptcy petition, expressly denied possessing any "future" interest or any "contingent and non contingent interests in estate of a decedent . . . or trust." (Gov. Ex. P. Declaration Concerning Debtor's Schedules.) Debtor testified that he "didn't read the particular item[s] concerning future interest, life estates, contingent and noncontingent interest in estates" and that "had [he] read that, [he] would have never signed this petition." (T1 at 147.) Furthermore, Debtor claims that he told his attorney, William Bryk, about his interest in the Trust and that he decided not to disclose such interest on Schedule B of the bankruptcy petition upon advice of counsel. (T1 at 148.) These explanations are not credible and, in addition, lack merit.

It is well established that the advice of counsel is a complete defense to a charge of fraud where a full and fair disclosure of the facts is made. Jones v. Gertz, 121 F.2d 782, 784 (10th Cir. 1941); In re Topper, 229 F.2d 691 (3rd Cir. 1956); In re Stone, 52 F.2d 639 (D.N.H. 1931). However, the reliance must be in good faith and any protection based on reliance on debtor's counsel will only act as a protection to the extent the reliance was reasonable. In re Weber, 99 B.R. 1001, 1018 (Bankr. D. Utah 1989).

In Jones, the debtor was to provide architectural services on certain public construction contracts but later filed bankruptcy because he did not have sufficient funds to pay his necessary travel expenses to supervise the work. Debtor was owed a small sum from Adams County and the City of Walden ($461 and $95 respectively), which he assigned to a bank and a finance corporation. Debtor relied on his attorney who did not list the sums on his schedules because he thought the "assignments conclusive" and the debtor had no interest in the fund. The court held that debtor failed to list the fund because he honestly believed that there was nothing "coming to him from the assignments" rather than because he wanted to defraud the creditors. Jones v. Gertz, 121 F.2d at 784. In Topper, the debtor had no assets at the time he filed bankruptcy or after his discharge was denied. In re Topper, 229 F.2d at 692. Although debtor owed money to a few retail accounts, and two small loan companies, he only listed the debt owed to his landlord. As explanation, debtor said he only wished to discharge the debt to the landlord but that he intended to pay his other creditors. The court found

that debtor had little to gain from the omission because debtor did not have any assets, and held that there was an absence of fraudulent intent necessary for denial of discharge due to false oath under Title 18 U.S.C.A. Section 152. In a more recent case, the debtor's attorney failed to list certain debts on the bankruptcy petition because he was either confused about the questions, or because he considered the debts to be family-related and of no value. In re Ellingson, 63 B.R. 271, 275--276 (Bankr. N.D. Iowa 1986). However, debtor and his attorney promptly amended the schedules after they learned of their errors at the first creditors meeting. Id. at 276. The court held that creditors had failed to show that material omissions from the schedules were made with fraudulent intent pursuant to 11 U.S.C. Section 727.

The case at bar is clearly distinguishable from the above cases. Unlike the debtor in Topper, who had no assets before and after the discharge, Colish concealed his interest in the Trust despite the near certainty that he would eventually come into possession of large monetary distributions. Similarly, the sums owed to the debtor in Jones pale in comparison to the distributions from the Trust, and, in addition, the debtor in Jones had actually assigned his interest in these funds to other entities, unlike Colish. Had the Debtor taken a similar approach to the debtor in Ellingson and voluntarily divulged his remainder interest in the Trust subsequent to his discharge, and prior to dissipating the Trust proceeds, this Court might have been more sympathetic to Debtor's pleas of mistake and reliance on counsel. However, the Government only became aware of Debtor's interest in the Trust during settlement negotiations with the Debtor for Adversary Proceeding No. 97-1399. (T4 at 18–19.) At trial, Debtor and his attorney, Mr. Bryk, submitted conflicting testimony concerning whether Debtor's trust interest was divulged to Mr. Bryk. Debtor testified that he disclosed his remainder interest to Mr. Bryk and Mr. Bryk told him he did not need to report such interest. (T1 at 148.) In contrast, Debtor's attorney, Mr. Bryk, testified that he never discussed a family trust nor did he remember the debtor informing him about any interest in a trust (T2 at 99–101 and T2 at 102, 103.) Attorney Bryk further testified that he typically made inquiries concerning items 18 and 19 of Schedule "B" (concerning future interests and interests in trusts). (T2 at 100.) It is unlikely that an attorney who considers himself a specialist in consumer bankruptcy law, and who has represented debtors in over one hundred cases (some involving substantial tax liabilities) would expose himself to malpractice liability by not listing Debtor's interest in a trust in the petition. (T2 at 103.) Given the conflicting testimony, this Court chooses to give credence to Mr. Bryk's testimony, especially in light of Debtor's conduct subsequent to receiving distributions from the Trust in January.

On January 13, 1998, Debtor received nearly $500,000 from the sale of land pertaining to the Trust and immediately thereafter engaged in a series of unexplained transfers and reallocation of these funds to several banks and accounts. (T1 at 169.) From January 1998 through December 1998, Debtor received distributions from the Trust totaling approximately $713,000. In addition, in March, 1998, Debtor created a Nevada Limited Partnership which he named Phoenix Samson Associates, L.P. and into which he transferred his Spencer Trask account, his newly opened Citibank accounts, various partnership interests in his father's Trust as well as practically all his personal property, all totaling $740,625.[12] (Govt. Ex. J.) When asked at trial why he created this partnership in Nevada and why he transferred virtually all his property into it, Debtor replied that he was concerned about potential suits from clients. (T1 at 155.) This explanation is dubious at best. The Debtor's testimony in this regard was glib and lacking in credibility. Moreover, given the Debtor's history with the Internal Revenue Service, detailed above, any assertion that this

[12] His personal property included: "All furniture, household items, clothing, furs jewelry, musical instruments, silverware, china, crystal, paintings, antiques, books, collectibles, electronic audio and video equipment, computers, telephones, appliances, and all other personal property . . ." (T1 157–180, Govt. Ex. J.)

convoluted series of transfers was not motivated in substantial measure by an intent to frustrate the Government's collection efforts defies credulity. In addition, the fact that Debtor did not pay his pending taxes for prior years nor even fully pay his 1998 taxes, when he received the distributions from the Colish Trust, provides additional support for an inference of fraudulent intent. Debtor's claims that he did not read the schedules carefully, and relied on his attorney's advice are ultimately not credible in light of Debtor's conduct and the fact that Debtor is an attorney, with an LL.M. in tax, and a sophisticated businessman.

Based on all the circumstances described above, this Court finds that the Government has carried its burden of proof under the preponderance of evidence standard enunciated in Grogan v. Garner and that Debtor knowingly and fraudulently failed to report to the Court or surrender the Chapter 7 Trustee his remainder interest in the Trust and the cash and other property distributions he received from the maturing of his remainder interest pursuant to § 727(d)(2) of the U.S. Bankruptcy Code.

Conclusion

For all of the foregoing reasons, the United States has sustained its objection to the Debtor's discharge pursuant to § 727(d)(2). Accordingly, Debtor's discharge is REVOKED. Furthermore, the United States has sustained its objection to the dischargeability of Debtor's outstanding tax debt for each of the tax years in dispute, 1987 through 1992, pursuant to § 523(a)(1)(C). Accordingly, Debtor's outstanding tax debt, and interest and penalties thereon, for the tax years 1987 through 1992, are non-dischargeable.

IT IS SO ORDERED.

CARLA E. CRAIG

United States Bankruptcy Judge

Dated: Brooklyn, NY

October 23, 2002

¶2002-5648

Henry L. MATTHIES, Jerry E. BURRIGHT, Diane BURRIGHT, Edward H. BLOME and Shirley A. BLOME, PLAINTIFFS, v. Tony NAVE, ET AL., DEFENDANTS and THIRD-PARTY PLAINTIFF v. UNITED STATES OF AMERICA, THIRD-PARTY DEFENDANT. U.S. District Court, Dist of Montana, (DC MT) Docket Nos. CV-02-107-BLG-RFC; CV-02-108-BLG-RFC; CV-02-109-BLG-RFC, Oct. 16, 2002. Decision for Govt.

1. Liens and levies—lien notice—proper form—federal vs. state law. Taxpayers' complaint that IRS's tax lien filings were invalid because lien notices didn't have abstract of judgment attached and weren't certified by Treas. Secy. in accord with Montana law was dismissed: Montana's certification requirement directly conflicted with and was superseded by IRC §6323, which contained no such requirement and under which lien notices were valid. *Reference:* United States Tax Reporter ¶63,235.11(10). IRC §6323.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA BILLINGS DIVISION,

ORDER

Richard F. Cebull UNITED STATES DISTRICT JUDGE

Consolidated Cases

Tony Nave (''Nave'') is the Yellowstone County Clerk and Recorder. On June 7, 2001, the United States presented Nave with a notice of federal tax lien with the name Henry L. Matthies (''Matthies) and requested that Nave file the notice. Nave filed the tax lien notice, and on May 23, 2002, Matthies sent a letter to Nave in which he requested that the be removed. Matthies asserted that Nave erred in filing the notice because it was not certified by the Secretary of the United States Treasury, and further that there wasn't an abstract of judgment attached to the notice.

On April 25, 2002, the United States presented Nave with a notice of federal tax lien which named Edward H. Blome and Shirley A. Blome (''Blomes''). Nave filed the notice, and on June 14, 2002, Nave received a letter from the Blomes asserting the same arguments as those contained in the Matthies' letter of May 23, 2002.

On March 14, 2000, the United States presented Nave with a notice of federal tax lien which named Jerry E. Burright and Diane Burright (''Burrights''). Nave filed the notice, and on May 29, 2002, Nave received a letter from the Burrights asserting the same arguments as those contained in the Matthies' letter of May 23, 2002.

All three parties filed separate cases in the State Court in the Thirteenth Judicial District. The cases were removed by the United States to the United States District Court for the District of Montana. The three cases were consolidated pursuant to this Court's order on August 27, 2002.

ARGUMENTS

Nave argues that federal law supercedes state law as to notices of federal tax liens. He contends that when state law and federal law conflict, federal law controls. Nave asserts that M.C.A. § 71-3-203 requires that the Secretary of the United States Treasury certify a notice of a federal tax lien before it is filed. However, Nave points out that the Montana statute conflicts with, and is therefore superceded by the Internal Revenue Code and certain Revenue Rulings on the subject. Nave argues that federal law governs the filing of these notices, and he complied with the requirements of federal law, and therefore he is entitled to a judgment on the pleadings.

The United States of America (''the government'') puts forth arguments that are similar in nature to those of Defendant Nave. They also argue that because the federal tax lien is a federal creation, federal law controls the form and content required for a sufficient notice.

ANALYSIS

[1] The Defendant filed his motion pursuant to Rule 12(c) Fed. R. Civ. P. Rule 12 states the following:

> (c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Judgment on the pleadings may be granted only when ''. . . it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'' Enron v. Walbrook Ins. Co. Ltd., 132 F.3d 526, 529 (9th Cir. 1997). In other words, a motion for judgment on the pleadings should be granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law. Fajardo v. County of Los Angeles, 179 F.3d 698, 699 (9th Cir. 1999).

The Plaintiffs point to M.C.A. § 71-3-203 as ammunition for their argument that the lien notices filed in this case were invalid. M.C.A. § 71-3-203 states the following:

> Execution of notices and certificates. Certification by the secretary of the treasury of the United States or his delegate, or by any official or entity of the United States responsible for filing or certifying of notice of any lien, of notices of liens, certificates, or other notices affecting federal liens entitles them to be filed. No other attestation, certification, or acknowledgment is necessary.

While the Montana statute provides that the tax lien notice should be certified by the Secretary of the United States Treasury, the federal rules do not contain such a provision. 26 U.S.C. § 6323 contains the following provisions:

(3) Form.—The form and content of the notice referred to in subsection (a)[1] shall be prescribed by the Secretary. Such notice shall be valid notwithstanding any other provision of law regarding the form or content of a notice of lien.

This statute clearly evinces an intent by the secretary of the United States Treasury to supersede any state laws concerning the form and content of tax lien notices. Because the federal tax lien is wholly a creature of federal statute, federal law establishes the content of a sufficient filing. United States v. Brosnan, 363 U.S. 237, 240 [5 AFTR 2d 1635] (1960). The proper form of filing for a tax lien is left up to the Secretary of the Treasury by 26 U.S.C. § 6323(f)(3). United States v. Polk, 822 F.2d 871, 873 [60 AFTR 2d 87-5339] (9th Cir. 1987).

The federal regulations governing this area further bolster the conclusion that federal law supercedes state law in this area. 26 C.F.R. § 301.6323(f) -(1)(d) states the following:

(d) *Form*—(1) *In general.* The notice referred to in § 301.6323(a)-1 shall be filed on Form 668, "Notice of Federal Tax Lien Under Internal Revenue Laws." Such notice is valid notwithstanding any other provision of law regarding the form or content of a notice of a lien. For example, omission from the notice of lien of a description of the property subject to the lien does not affect the validity thereof even though State law may require that the notice contain a description of the property subject to the lien.

From the foregoing discussion it is obvious that Montana law conflicts with federal law as to the form and content of the tax lien notices. In such a case, federal law supersedes Montana law. Because federal law does not require the Defendant to have the notice certified by the Secretary of the United States Treasury, or attach an abstract of judgment, the tax lien notice is clearly valid. Both Defendants have established that on the face of the pleadings, there is no material issue of fact that remains to be resolved, and the Defendants are entitled to judgment as a matter of law.

Accordingly pursuant to Rule 12(c) Fed. R. Civ. P. IT IS HEREBY ORDERED that:

1. Defendant Nave's Motion for Judgment on the Pleadings is GRANTED. (Doc. #38).

2. Defendant United States of America's Motion for Judgment on the Pleadings is GRANTED. (Doc.# 43).

3. The above-entitled consolidated action is DISMISSED with prejudice.

The Clerk of Court is directed to notify the parties of the making of this Order.

Dated this 16th day of October, 2002.

Richard F. Cebull

UNITED STATES DISTRICT JUDGE

JUDGMENT

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xxx Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Defendant Nave's Motion for Judgment on the Pleadings is granted & Defendant USA's Motion for Judgment on the Pleadings is granted and the above entitled consolidated action is dismissed with prejudice.

October 16, 2002

Patrick Duffy

CLERK

(By) DEPUTY CLERK

[1] This refers to § 6321 which states the following: If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

¶2002-5649

ESTATE OF Elizabeth Paramore O'NEAL, deceased, Elizabeth O'Neal SHANNON, Emmet O'NEAL II and Emmet O'NEAL, III, Personal Representatives, PLAINTIFFS, v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Alabama, (DC AL) CASE NO. CV-97-J-2189-S, Oct. 29, 2002. Earlier proceedings at (2002, DC AL) 90 AFTR 2d 2002-6280, on remand from (2001, CA11) 88 AFTR 2d 2001-5245, 258 F 3d 1265, affirming in part, and vacating and remanding in part (1999, DC AL) 84 AFTR 2d 99-7088, 81 F Supp 2d 1205. Year 1987. Date of death 7-23-94. Decision for Taxpayer in part.

1. Litigation costs and fees—estate and gift taxes—substantial justification for IRS's position. Estate was granted litigation costs of contesting IRS's zero-valuation of its deduction for donees' claims against it for gift tax liability reimbursement, but only to extent those costs were incurred *after* 11th Cir. upheld taxpayer's right to deduction in 1st instance and remanded as to amount. Before remand, IRS's zero valuation was substantially justified where valuation was issue of 1st impression in 11th Cir. and there was split among other circuits; but IRS's post-remand insistence on its zero value position wasn't substantially justified in light of 11th Cir.'s explicit holding that there was "no dispute" about taxpayer's entitlement to some deduction. *Reference:* USTR Estate & Gift Taxes ¶74,305.01(10).United States Tax Reporter ¶74,305.01(25). IRC §7430.

2. Litigation costs and fees—estate and gift taxes—special factors. Estate was granted attorney's fees of defending its entitlement to deduction for donees' claims against it for gift tax liability reimbursement at extra-statuary rate of $250/hour, based on special factors including novelty of issue; 8-year span of litigation; attorneys' expertise and education; and facts that rate was in line with prevailing local rate for complex legal matters and that counsel waived all fees other than those of lead attorneys. But, taxpayer's costs award was adjusted for unreasonable PACER charges and airfare charged twice. *Reference:* USTR Estate & Gift Taxes ¶74,305.01(15).United States Tax Reporter ¶74,305.01(15). IRC §7430.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION,

ORDER

Pending before the court are the plaintiffs' motion for award of reasonable litigation costs, including attorneys' fees (doc. 125), brief and documentation in support thereof (doc. 126), the defendant's opposition to said motion (doc. 132), the plaintiffs' reply brief in support of its motion, and the defendant's motion to supplement its opposition to plaintiffs' motion for award of reasonable litigation costs, including attorneys' fees (doc. 140), which the court granted (doc. 146). While the motion for award of reasonable litigation costs was pending, the parties entered a stipulation that the amount of costs to be taxed under Rule 54(d)(1), Federal Rules of Civil Procedure was $15,651.33 (doc. 134) and the court entered an Order taxing that amount to the defendant (doc. 135). The court thereafter ordered the plaintiffs to submit their billing documents from July 27, 2001 to July 31, 2002 to the court in camera, in an unredacted form (doc. 139). The plaintiffs complied (doc. 142). The plaintiffs also filed a motion to avoid duplication of reasonable litigation costs (doc. 141). In said motion, the plaintiffs state that the amounts in their Bill of Costs (doc. 127) were also included in their motion for litigation costs (doc. 125). The court having considered the motion to avoid duplication, and being of the opinion said motion is due to be granted;

It is therefore ORDERED by the court that said motion (doc. 141) be and hereby is GRANTED.[1]

Factual Background

This case began in 1997 when the plaintiffs filed this lawsuit to obtain a refund of $1,883,762.00 in federal estate taxes and interest collected from the Estate of Elizabeth P. O'Neal, deceased. The refund action was based upon claims made against plaintiffs for transferee gift tax and generation-skipping transfer tax liabilities asserted against the donees of certain gifts made by Elizabeth P. O'Neal ("Mrs. O'Neal"). The facts of the case were not disputed, and have previously been sent forth by this court and the Eleventh Circuit Court of Appeals. *Estate of O'Neal v. U.S.*, 81 F.Supp.2d 1205 (N.D.Ala.1999); *O'Neal v. U.S.*, 258 F.3d 1265 [88 AFTR 2d 2001-5245] (11th Cir.2001).

Upon cross-motions for summary judgment, this court made the following rulings:

1) on the issue of whether the estate was entitled to a deduction of $563,314.00, the amount awarded the donees as claims against the estate in probate court, the court entered judgment in favor of the plaintiffs and against the United States and allowed the estate a deduction in the amount of $563,314.00;

2) on the issue of whether attorney fees paid to the law firm of Chamberlain, Hrdlicka, White, Williams & Martin, in the amount of $74,485, were allowable as a deduction to the estate; the court held in favor of the U.S. and against the plaintiffs, denying the deduction in full;

3) on the issue of whether the estate was allowed a deduction for $114,022.23 paid to the Chamberlain firm before Mrs. O'Neal's death by Emmet O'Neal acting under a durable power of attorney, the court ordered that the estate be increased by $114,022.00, ruling in favor of the U.S. and against the plaintiffs; and

4) on the issue of whether the IRS was entitled to revalue the gifts of stock to increase the Adjusted Taxable Gifts for 1987 and thus increase the amount of Gift Tax Payable from the estate, the court held that 28 U.S.C. § 2504(c) did not preclude the revaluation of gifts made during the decedent's lifetime and therefore increased the adjustable taxable gifts made by the decedent by $904,026.00, and also increased the amount of gift tax due on such gifts. *See Estate of O'Neal*, 81 F.Supp.2d at 1227–28. Of these four rulings, the plaintiffs were the prevailing parties on the first one only. Both parties appealed to the Eleventh Circuit Court of Appeals.

The Eleventh Circuit affirmed this court on all but the first ruling. *O'Neal*, 258 F.3d at 1276–77. In remanding the case to this court, the Eleventh Circuit stated "[t]his estate tax claim for refund case presented an issue of first impression in this circuit. It also spotlights the distinct split among the circuits on this issue." *Id.*, at 1266. The Court determined that "there is no dispute that the estate is entitled to a deduction with respect to claims against the estate by the nine heirs for reimbursement of their transferee gift tax liability on the 1987 gifts of stock by Mrs. O'Neal." *Id.*, at 1271. In a footnote, the Court states that the government moved for and was granted a voluntary dismissal of its notice of appeal on the issue that the estate was not entitled to the $536,314.00 deduction. The court held "[b]y this action the government appears to have abandoned its earlier argument that the amount of the deduction should be zero." *Id.*, at 1271 n. 20. The Eleventh Circuit examined the split among the circuits and stated its preference for those circuits that follow *Ithaca Trust Co. v. United States*, 279 U.S. 151 [7 AFTR 8856], 49 S.Ct. 291, 73 L.Ed. 647 (1929). *O'Neal*, 258 F.3d at 1273. Based on an analysis of cases that adopted the *Ithaca Trust* reasoning, the Eleventh Circuit stated:

> We conclude that the Section 2053(a)(3) deduction should be the value at Mrs. O'Neal's date of death. We still, however, do not know what that value is. As

[1] Said motion to avoid duplication does not specify which costs included in the Bill of Costs were also included in the motion for litigation costs.

in *Estate of Smith*, it is not necessarily the amount of the demand being made by the government at Mrs.. O'Neal's death. Like the Fifth Circuit, we must remand this case to the district court for a recalculation of the deduction (citations omitted) . . . .

[W]e find that no case holds that the value at the date of death is the demand amount, $9,407,226, being made here by the government at the date of death (citation omitted). We therefore vacate the opinion of the district court on this issue and remand for evidentiary hearing on valuation.

On remand, the district court is instructed neither to admit nor consider evidence of post-death occurrences when determining the date of death value of the Section 2053(a)(3) deduction (citation omitted). It will be incumbent on each party to supply the district court with relevant evidence of pre-death facts and occurrences supporting the date of death value of the deduction as advocated by that party . . . .

O'Neal, 258 F.3d at 1275.

With those instructions, this court held an evidentiary hearing on the value of the deduction as of the date of Mrs. O'Neal's death and thereafter entered an Order finding the value of those claims to be $5,835,000.00. Because this amount exceeded the value of the estate, the court limited the amount under 26 U.S.C. § 2053(c)(2) to $5,303,744.00 and found the deduction for the claims of the decedent's children and grandchildren reduced the amount of the taxable estate to zero. *See* Order of July 31, 2002 (doc. 124). Therefore, the defendant was ordered to refund to the plaintiff estate $1,883,762.00 as the full amount of estate taxes paid by the estate, and $191,129.99 as the full amount of interest paid by the estate on such estate taxes.

To recover their fees and costs, the plaintiffs must establish that:

1) The estate was worth less than $2 million as of July 23, 1994. 26 U.S.C. 7430(c)(4)(D), applying 28 U.S.C. § 2412(d)(2)(B).

2) The estate exhausted all administrative remedies prior to filing this action. 28 U.S.C. § 7430(b)(1).

3) The plaintiffs did not unreasonably protract the proceedings. 26 U.S.C. § 7430(b)(3).

4) The plaintiffs are the prevailing party. 26 U.S.C. §§ 7430(a) and (c)(4)(A)(i).

5) The United States' position was not substantially justified. 26 U.S.C. § 7430(c)(4)(B).

6) The costs and fees incurred by the plaintiffs in this action are allocable entirely to the defendant. 26 U.S.C. § 7430(b)(2).

Attorney Fees

[1] The plaintiffs seek $845,444.50 in litigation costs. Affidavit of Bruce Rogers, at ¶ 13. In considering the motion for litigation costs, including reasonable attorneys' fees now pending before the court, the court has already determined that the net value of the decedent's estate was zero after the claims of the donees were included. *See* Order of July 31, 2002 (doc. 124). As such, the court must conclude that the value of the estate was worth less than $2,000,000.00. The parties do not contest that the plaintiffs exhausted their administrative remedies. The court finds no evidence that the plaintiffs unreasonably protracted these proceedings. Likewise, the court finds the costs and fees incurred by the plaintiffs were allocable entirely to the defendants. Additionally, the defendant does not seriously dispute that the plaintiffs were ultimately the prevailing party.

The substantial justification of the government in the position it argues is disputed by the parties. Only if the government's position was not substantially justified are the plaintiffs entitled to re-cover attorneys' fees. *See*26 U.S.C. §

7430.[2] The plaintiffs assert that at no time during this litigation has the defendant's position been justified. Plaintiffs' brief in support, at 5. The defendant argues that, should the Eleventh Circuit adopt this court's position upon remand, at most the defendant's position before this court after remand was not substantially justified. This court agrees. Of the four issues presented to this court originally, the court held in favor of the defendant on three of them. The court rulings on these issues, detailed above, were affirmed upon appeal. The only possible conclusion regarding these issues is that the government's position was justified.

As to the fourth issue, the amount of the deduction due the estate, the Court of Appeals noted that it was an ''issue of first impression in this circuit.'' *O'Neal*, 258 F.3d at 1266. The Eleventh Circuit rejected the defendant's valuation of the deduction at zero, the plaintiff's valuation of the deduction at $9,407,226, and this court's original valuation of the deduction at $563,314, for which the parties settled in tax court. Therefore, this court cannot conclude that the plaintiff was the prevailing party or that the defendant's position was not substantially justified at any time through the date the Eleventh Circuit's opinion remanding the case to this court for evidentiary hearing to value the deduction at the date of death issued, that being July 26, 2001.[3] *See* 26 U.S.C. § 7430(c)(4)(A)–(B).

However, since remanded to this court, the defendant's position cannot be considered as substantially justified. That term has been defined to mean, ''justified to a degree that could satisfy a reasonable person'' and having a ''reasonable basis both in law and fact.'' *Estate of Cervin v. Commissioner of Internal Revenue*, 111 F.3d 1252, 1261 [79 AFTR 2d 97-2487] (5th Cir. 1997); citing *Nalle v. Commissioner*, 55 F.3d 189, 191 [76 AFTR 2d 95-5018] (5th Cir.1995) (quoting *Pierce v. Underwood*, 487 U.S, 552, 565, 108 S.Ct. 2541, 2550, 101 L.Ed.2d 490 (1988). This court must examine whether the defendant ''knew or should have known that [its] position was invalid at the onset of the litigation (citations omitted).'' *Cervin*, 111 F.3d at 1261–62.

In spite of the Eleventh Circuit's pronouncement that ''the estate is entitled to a deduction with respect to claims against the estate by the nine heirs for reimbursement of their transferee gift tax liability on the 1987 gifts of stock by Mrs. O'Neal,'' *O'Neal* at 1271, the defendant has repeatedly argued that the value of that deduction was zero. On March 14, 2002, the plaintiffs filed a motion for partial summary judgment, requesting this court order that the defendant was foreclosed from arguing that the value of the claims of the donees was zero. Plaintiffs' motion for partial summary judgment (doc. 81), at ¶ 2. This court ordered that ''the defendant may not allege that the estate of Mrs. O'Neal is not entitled to any deduction for the value of the claims of the donees.'' Order of April 2, 2002 (doc. 87), at 2.

On April 3, 2002, the defendant filed a motion requesting this court hold the motion for partial summary judgment in abeyance pending discovery on the issue of ''the value, if any, of the donees' claims as of July 23, 1994'' (doc. 89). The court found this motion to be moot on April 4, 2002 (doc. 95). On April 11, 2002, the defendant filed a motion asking this court to reconsider its granting of the plaintiffs' motion for partial summary judgment (doc. 93). The court denied that motion, stating its April 2, 2002 Order merely required the parties to comply with the instructions from the Eleventh Circuit regarding the issues on remand. Court Order of April 11, 2002 (doc. 94), at 2. The court, by footnote, stated:

> ''the court notes that the plaintiffs filed that motion [for partial summary judgment] due to a concern that the defendant would argue that the plaintiffs were estopped from claiming the estate was

[2] 26 U.S.C. § 7430(c)(4)(B) states: ''A party shall not be treated as the prevailing party in a proceeding to which subsection (a) applied if the United States establishes that the position of the United States in the proceeding was substantially justified.''

[3] July 26, 2001 was the date of the Eleventh Circuit's opinion. That decision did not issue as a mandate until October 18, 2001 (doc. 75).

> entitled to any deduction. As the Eleventh Circuit stated that 'there is no dispute that the estate is entitled to a deduction . . . ' this court will not allow the defendant to argue otherwise, whether before, during, or after discovery is completed.''

Order of April 11, 2002, at n. 1. In its trial brief, the defendant again argued that, because the court could not consider post-death events, the value of the deduction for the donees' claims would be zero. Trial brief of defendant United States (doc. 121), at 14–15. The defendant then argues in that brief that ''[e]xcepting (sic), arguendo, that the plaintiffs' reading of *Smith* is correct, the valuations performed by the plaintiffs' (sic) indicate that the deduction for the donees' claims as of July 23, 1994 is zero (citation omitted) . . . . As a consequence, no deduction for the donees' claims can be permitted under Treas. Reg. § 20.2053-1(b)(3).'' Trial brief of defendant United States, at 19–20. In its conclusion, the United States argued, ''Applying a strict interpretation of the Eleventh Circuit's Opinion in this case, the amount of the deduction for the donees' claims as of July 23, 1994 is zero because no cause of action had accrued at the time of Mrs. O'Neal's death.'' *Id.*at 24–25.

At the evidentiary hearing, which commenced June 6, 2002, the court stated it was ''concerned about . . . the government's argument that the plaintiffs are entitled to zero deduction, because I think the Eleventh Circuit closed that out.'' *See* Tab 11 to plaintiffs' evidentiary submission (doc. 126). The government responded:

> Let me explain . . . . This is the way we're interpreting. We're not saying that that restitution claim would not be entitled to a deduction (sic). What we are saying is is the value would be zero, because the Eleventh Circuit said, what you will go back and do, is you will value the deduction.
>
> It's the same thing as if, on July 23rd, 1994 you were valuing stock and it was determined to be worthless . . . . But we're not saying that there's — there is a difference between they are not entitled to a deduction — we're not saying that, Your Honor. What we're saying is is the value as of July 23rd, 1994, based on those facts, you have to assign it as — we're using zero as, in effect, worthless.

Id. This court has repeatedly found this position of the United States to be irreconcilable with the Eleventh Circuit's finding that ''that there is no dispute that the estate is entitled to a deduction with respect to claims against the estate by the nine heirs for reimbursement of their transferee gift tax liability on the 1987 gifts of stock by Mrs. O'Neal.'' *O'Neal, supra*, at 1271. As such, the court finds that the government ''should have known that [its] position was invalid'' from the time this case was remanded by the Eleventh Circuit. *See Cervin*, 111 F.3d at 1262; *see also In re Rasbury*, 24 F.3d 159, 168 [74 AFTR 2d 94-5210] (11th Cir. 1994).

Having considered the foregoing, the court is of the opinion the plaintiffs are entitled to recover reasonable litigation costs, including attorney fees, solely for costs and fees incurred after July 26, 2001.[4] *See Powers v. Commissioner of Internal Revenue*, 51 F.3d 34, 35 [75 AFTR 2d 95-1883] (5th Cir. 1995) (approving award of 1/3 of fees for prevailing on 1/3 of issues). The court having reviewed those and fees submitted by the plaintiffs in unredacted form *in camera*, the court finds those fees to be reasonable,[5] except as follows:

---

[4] In their evidentiary submissions in support of the motion for award of reasonable litigation costs (doc. 126), the plaintiffs refer to this time period as ''Stage III.'' *See* affidavit of Roy Crawford at ¶s 15–20.

[5] Although included in the time records submitted to the court, the plaintiffs' motion for reasonable litigation costs did not include time spent on a petition for rehearing to the Eleventh Circuit, or any time spent by any counsel or assistant other than the three lead counsel, C. Fred Daniels, Roy Crawford, and Phillip Walker. *See*Affidavit of Roy Crawford at ¶ 15, Plaintiffs' brief in support, at 16. Thus, much of the time defendant objects to is time for which plaintiffs do not seek reimbursement. *See e.g.*, time recorded but not sought from 9/5/2001 to 9/18/01 (Attachment IV to affidavit of Roy Crawford, at 8–10. Similarly, work to which the dependant objected on 11/2/2001, 11/4/2001 and 11/5/2001 was time for which the plaintiffs did not seek reimbursement. *See* defendant's opposition at Exhibit B, p. 13. The court finds it unnecessary to list all time to which the defendant objected for which the plaintiffs do not seek reimbursement as the court has independently reviewed the hours for which plaintiffs seek reimbursement and eliminated those the court believes improperly charged.

03/04/2002	RJC	REVIEW AND REVISE MOTION FOR STATUS CONFERENCE AND DISCUSS WITH CFD; REVIEW PRECLUSION MEMO AND CASES	2.90
04/29/2002	CFD	FOLLOW-UP ON LETTER TO COURT RE WITNESS SCHEDULE; WORK ON NOTICE FOR SUMMARY JUDGMENT AND BRIEF	4.60
04/29/2002	PBW	CONFERENCE WITH FRED DANIELS RE MOTION FOR SUMMARY JUDGMENT STRATEGY; ORGANIZE AND REVIEW DEPOSITION EXHIBITS; PREPARE MOTION FOR SUMMARY JUDGMENT; LEGAL RESEARCH RE MOTION FOR SUMMARY JUDGMENT IN A VALUATION CASE; PREPARE EXHIBITS TO MOTION FOR SUMMARY JUDGMENT; CONFERENCE WITH FRED DANIELS RE MOTION FOR SUMMARY JUDGMENT; PREPARE MOTION FOR SUMMARY JUDGMENT	4.30
4/30/2002	RJC	REVIEW DRAFT OF MOTION FOR SUMMARY JUDGMENT	.50
04/30/2002	CFD	WORK ON BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT	1.20
05/02/2002	CFD	WORK ON MOTION TO COMPEL, AND MOTION TO SHORTEN TIME	3.00

The court having independently added the allowable hours of counsel, finds reasonable attorney fees for the time period July 27, 2001 through July 31, 2002, to be as follows:

C. Fred Daniels:	834.50 hours @ $250.00 per hour	=	$208,625.00
Roy J. Crawford:	347.00 hours @ $250.00 per hour	=	$ 86,750.00
Phillip B. Walker:	560.20 hours @ $140.00 per hour	=	$ 78,428.00
			$373,803.00

26 U.S.C. § 7430(c)(1)(B)(iii) imposes a statutory cap of $125.00 per hour "unless the court determines that a special factor, such as the . . . difficulty of the issue presented in the case, or the local availability of tax expertise, justifies a higher rate." The $125.00 is further required to be adjusted for inflation. *Id.* Such adjustments resulted in a rate of $140.00 per hour in 2001 and $150.00 per hour in 2002. Section 3, Part I, .26 Rev.Proc. 2001-12, 2001-1 .C.B. 337; Section 3.28 of Rev. Proc. 2001-52 I.R.B. 1. The court finds that the facts of the instant case presented a difficult as well as novel issue. This is evident from the Eleventh Circuit noting this case presented an issue of first impression, as well as the fact that the issue of the deduction to which the estate was entitled has been in litigation for eight years. The court further finds that plaintiffs' counsel have expertise in tax litigation beyond that which is found in the vast majority of attorneys within the Birmingham area. Furthermore, the court finds $250.00 an hour is in line with the prevailing rate in this community for complex legal matters. Both Mr. Daniels and Mr. Crawford represented to the court that they have Masters of Law (in Taxation). Plaintiffs' brief in support, at 19. All of these factors combined justify an award of $250.00 per hour for counsel Fred Daniels and Roy Crawford.[6]

Costs

[2] The court finds the plaintiffs' costs for this time period to be reasonable except for the PACER charges of $914.38. The court notes this service is .07 cents per page. Thus, the amount charged is for 13,062 pages. The court can not consider

[6] The court further finds these fees to be reasonable in light of the fact that counsel waived all fees accumulated by their firm other than those of the three lead attorneys in this case. *See* plaintiffs' brief in support, at 16.

this reasonable, as the entire court file is not that many pages. Additionally, the court disallows one charge of the $612.00 for airfare which was charged twice, once on April 25, 2002 and again on June 18, 2002, both for the same April 25, 2002 flight. Thus, the court subtracts $1,526.38 from the costs sought by plaintiffs. The court, having added the costs sought by plaintiffs, finds them to be $239,240.63.[7] Subtracting $1,526.38 from this amount results in costs of $237,714.25.

Additionally, although the plaintiffs represent to this court that the proper amount to be deducted from their claim of costs due to the parties' stipulation is $15,651.33, the court finds the proper amount to be that originally claimed by the plaintiffs as costs, namely $19,562.10. *See* Plaintiffs' Bill of Costs (doc. 127). The plaintiffs and defendant agreed that the amount to which the plaintiffs were due for these costs was $15,651.33.[8] The plaintiffs represented to the court that the amounts included in the Bill of Costs were also included in the motion now before the court. *See* Motion to Avoid Duplication of Reasonable Litigation Costs, at ¶ 3 (doc. 141). Therefore, the court finds the costs to which plaintiffs are entitled to be $218,152.15.

Conclusion

Having considered the foregoing, and the court being of the opinion that the plaintiffs' motion for award of reasonable litigation costs, including attorney fees, is due to be granted in part;

It is therefore ORDERED by the court that said motion is GRANTED IN PART. The plaintiffs are awarded the sum of $373,803.00 in attorney fees and $218,152.15 in costs.

DONE and ORDERED this the 29 day of October, 2002.

UNITED STATES DISTRICT JUDGE

INGE P. JOHNSON

¶2002-5650

IN RE: Alfred WILLIAMSON, DEBTOR. Alfred WILLIAMSON, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. Bankruptcy Court, Middle Dist. of Florida, (Bktcy Ct FL) Case No. 02-09938-8W7; Adv. No. 02-530, Oct. 21, 2002. Year 1998. Decision for Govt.

1. Tax claims in bankruptcy—dischargeability—limitations periods; tolling—automatic tolling rule—equity. Govt. was granted summary judgment that Chap. 7 debtor's tax liabilities for 1 year weren't dischargeable: although subject year's return was due 3 years and 36 days before taxpayer filed instant bankruptcy, 11 USC §507(a)(8)(A)(i)'s 3-year lookback period was equitably tolled during 167 day pendency of taxpayer's previous Chap. 13 case, bringing liabilities well within 3-year period and §523(a)(1)(A)'s discharge exception. *Reference:* United States Tax Reporter ¶68,726.52(27); 68,726.54; 65,035.03(10). IRC §6503.

Paul I. Perez United States Attorney Middle District of Florida 400 North Tampa Street, Suite 3200 Tampa, FL 33602 Scott M. Grossman Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 14198 Washington, D.C. 20044 Perry G. Gruman 3400 W. Kennedy Blvd. Tampa, FL 33609

UNITED STATES BANKRUPTCY COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION,

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

MICHAEL G. WILLIAMSON United States Bankruptcy Judge

[1] This matter came before the Court for heating on October 11, 2002, upon the Motion to Dismiss filed by the United

[7] This amount is reached as follows: $7,500.00 retainer for Harold Apolinsky, $155,221.12 in expenses from Attachment IV, $29,311.07 in expenses from Attachment V, and $47,208.44 in expert witness fees not reflected in the above amounts.

[8] In other words, deducting only the $15,651.33 to which the plaintiffs stipulated, leaves the plaintiffs with a windfall of the difference between this amount and the total amount they sought in their Bill of Costs, as that amount is included in the motion for reasonable litigation costs as well. Allowing such a windfall eliminates any motivation for an opposing party to stipulate to costs.

States of America. Scott M. Grossman, counsel for the defendant, appeared by video conference. No one entered an appearance on behalf of the plaintiff.

The plaintiff filed an adversary proceeding seeking a determination that his assessed, unpaid 1998 federal income tax liability was dischargeable. The defendant filed a Motion to Dismiss, which the Court will treat as a motion for summary judgment under Federal Rule of Civil Procedure 12(b) and Federal Rule of Bankruptcy Procedure 7012(b), because matters outside the pleading were presented to and not excluded by the Court. Specifically, the Court takes judicial notice of the fact that on February 28, 2000, the plaintiff filed a bankruptcy petition under Chapter 13 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Nebraska, Case No. 00-40372; that on August 14, 2000 the case was dismissed; and that this previous bankruptcy case was pending for 167 days.

Ordinarily, Alfred Williamson's assessed unpaid federal income tax liabilities for 1998, the return for which was due to be filed on April 15, 1999, would be dischargeable if Williamson had filed his bankruptcy petition after April 15, 2002. 11 U.S.C. § 523(a)(1)(A); 507(a)(8)(A)(i). In this case, however, these tax liabilities are not dischargeable under Young v. United States, 122 S. Ct. 1036 [89 AFTR 2d 2002-1258] (2002), because the three-year look-back period of section 507(a)(8)(A)(i) is tolled during the 167 days of Williamson's previous Chapter 13 bankruptcy case in the District of Nebraska.

Williamson filed his present Chapter 7 petition on May 21, 2002. When the 167 days which have been tolled are added to the three years set forth in section 507(a)(8)(A)(i), the relevant look-back period becomes three years and 167 days. Here, Williamson filed his petition only three years and 36 days after his 1998 federal income tax return was due. This liability is therefore not dischargeable under Young and Bankruptcy Code sections 523(a)(1)(A) and 507(a)(8)(A)(i). It is therefore

ORDERED:

1. The defendant's motion to dismiss, which shall be treated as a motion for summary judgment, is GRANTED.

2. The plaintiff's assessed, unpaid federal income tax liability for 1998 is excepted from the discharge granted the plaintiff under 11 U.S.C. § 727.

DONE and ORDERED this 21st day of October, 2002, in Tampa, Florida.

MICHAEL G. WILLIAMSON

United States Bankruptcy Judge

Copies to:

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¶2002-5651

UNITED STATES OF AMERICA, PLAINTIFF v. Beckham S. PRATHER, JR., ET AL., DEFENDANTS. U.S. District Court, Southern Dist. of Ohio, (DC OH) CASE NO. C-1-00-982, Oct. 17, 2002. Years 1988, 1989, 1990, 1991, 1992, 1993. Decision for Govt.

1. Collection actions—reducing assessments to judgment—foreclosure—property held by third parties—nominees; alter ego—summary judgment. Magistrate judge recommended granting govt. summary judgment on its complaint to reduce nonfiling taxpayer's assessments to judgment and foreclose liens against property titled to trust: unrefuted assessments

were presumptively correct; and taxpayer, who transferred properties to trust for protection during earlier divorce proceedings, didn't prove trust was validly formed, that it gave adequate consideration for transferred properties, or otherwise rebut inference that it was merely his nominee or alter ego. *Reference:* United States Tax Reporter ¶74,035.01(25); 74,035.03(80); 63,215.02(115). IRC §6321; 7403.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION,

REPORT AND RECOMMENDATION

BECKWITH, J.

HOGAN, M.J.

Before the Court is Plaintiff's Motion for Summary Judgment (Doc. 26). The Motion was filed in March, 2002 and is unopposed. Plaintiff's Motion should be granted.

BACKGROUND INFORMATION

Plaintiff seeks to accomplish four things by the pending Motion: (1) reduce to judgment unpaid federal income tax assessments for the years 1988–1993, (2) establish that tax liens attach to the property of Defendant, (3) declare that the B.S.P. Holding Trust is the alter ego of Defendant, and (4) foreclose upon the federal tax liens.

FEDERAL INCOME TAX ASSESSMENTS

[1] Exhibit I, attached to Plaintiff's Motion, are the federal income tax assessments for 1988–1993. The first assessment is for 1988 in the amount of $83,953.00, exclusive of penalties and interest. Defendant filed no return and paid no taxes for the year, 1988, but had a taxable income of $270.050.00 and self-employment income of $45,000. The second assessment is for 1989 in the amount of $95,202.00, exclusive of penalties and interest. Defendant filed no return and paid no taxes for the year, 1989, but had a taxable income of $308,502.00 and self-employment income of $48,000. The third assessment is for 1990 in the amount of $89,829.00, exclusive of penalties and interest. Defendant filed no return and paid no taxes for the year, 1990, but had a taxable income of $283,204.00 and a self-employment income of $51,300.00. The fourth assessment is for 1991 in the amount of $84,986.00, exclusive of penalties and interest. Defendant filed no return for 1991, but had a taxable income of $252,196.00 and self-employment income of $53,400.00. The fifth assessment is for 1992 in the amount of $91,198.00, exclusive of penalties and interest. Defendant filed no return for 1992, but had a taxable income of $271,499.00 and self-employment income of $55,500.00. The sixth and last assessment is for 1993 in the amount of $82,365.00, exclusive of penalties and interest. Defendant filed no return for 1993, but had a taxable income of $235,911.00 and self-employment income of $57,600.00. It is Defendant's burden to show that these tax assessments are incorrect because IRS assessments are presumed to be correct. (See *Kearns v. Commissioner*, 979 F.2d 1176 [70 AFTR 2d 92-6129] (6th Cir. 1992). Defendant has not done so.

FEDERAL TAX LIENS

The Internal Revenue Service filed a total of eight (8) Notices of Federal Tax Liens for unpaid income taxes for the years 1988–1993 with the County Recorders of Brown and Clermont Counties. These liens were directed to certain properties located in Brown and Clermont Counties. (See Exhibit 2) These properties were owned either by Beckham S. Prather Jr., individually or by Beckham S. Prather, Jr., Trustee of the B.S.P. Holding Trust. The affidavit of Joan Flach, Revenue Office Advisor with IRS, establishes that total indebtedness is $1,659,919.40. (See Exhibit 3) Section 6321 of the Internal Revenue Code states that unpaid tax assessments plus interest and penalties are liens in favor of the United States upon all property belonging to the taxpayer. Because of our conclusion that the B.S.P. Holding Trust is the alter ego of Defendant, the tax liens should attach to all properties titled in the name of the Trust.

B.S.P. HOLDING TRUST IS THE ALTER EGO OF BECKHAM S. PRATHER

Property held for a taxpayer in the name of a third party in a nominal capacity may be subject to federal tax liens. (See *United States v. O'Brien*, 1999 WL 358724 [83 AFTR 2d 99-2533] (S.D. Ohio, 1999) *and Nantucket Village Dev. Co. v. Alex*, 2001 WL 169316 [87 AFTR 2d 2001-743] (N.D. Ohio, 2001). Courts have considered six (6) factors in determining whether an individual is the nominee or alter ego of the taxpayer: (1) whether inadequate consideration was paid by the nominee, (2) whether the property was placed in the name of the nominee in anticipation of suit, while the transferor continues to exercise control over the property, (3) whether there is a close relationship between the transferor and the nominee, (4) whether the transferor retains possession, (5) whether transferor continues to enjoy the benefits of the transferred property, and (6) whether the conveyance to the transferee was recorded. (See Horton Dairy v. United States, 986 F.2d 286 [71 AFTR 2d 93-1026] (8th Cir. 1993).

The General Warranty deed executed by Beckham S. Prather to Rhonda Lowery as Trustee of the B.S.P. Holding Trust indicates that Ms. Lowery paid consideration in the amount of $1.00 for the property. Although the deed indicates that ''other good and valuable considerations'' were delivered, Defendant does not produce any proof that any other consideration was paid. Neither deed for the transfer of 2303 Tucker Road or 2281 Tucker Road to the B.S.P. Holding Trust by Ray and Phyllis Redmon, indicates that anything other than the standard ''for valuable consideration paid'' was, in fact, paid. The deed for the property at 6455 State Route 132 indicates that ''$1.00 and other good and valuable consideration'' was paid by Beckham S. Prather, Trustee, to acquire the property. The consideration paid for the property on State Route 132 was $125,000, according to the Clermont County Auditor's records, and the B.S.P. Holding Trust has no known source of income.

Defendant's deposition was taken in January, 2002. Defendant testified that he was audited in 1996 and received a notice of levy from the IRS during that year. Defendant was divorced in 1993, established the B.C.P. Holding Trust in 1994, and testified during his deposition that he transferred everything that he owned into the Trust. (Prather Depo, Pg. 74) The purpose of the Trust was to protect his assets. Defendant testified as follows: ''Now, after the divorce, which was over the 12th of November in 93, and I had given the house to her, the car, I decided in early, early 94 that anything that I still had as a result of the divorce, I was going to see to it that nobody could ever take it away from me.'' (Prather Depo., Pg. 60).

Defendant refused to identify any other Trustees of the B.C.P. Holding Trust with the sole exception of his daughter, Rhonda, who Defendant testified is no longer a Trustee. (Prather Depo. Pg. 95). Defendant entered into land contracts as Trustee in reference to the two properties on Tucker Road and attempted to evict the land contract vendors, thereby establishing himself as the sole managing entity on behalf of the Trust. Real estate tax bills were addressed to Defendant individually. Defendant received the payment of the land contract vendees and continued to reside at 6455 State Route 132 after the creation of the Trust. Defendant's business, Beck's Auto Transport, also uses the same State Route 132 address.

Defendant refuses to produce the Trust instrument; however the real estate transactions entered into by the B.C.P. Holding Trust were recorded. The Trust instrument was not recorded.

The Government argues that according to the six factors previously identified, all but the last one support the argument that the B.C.P. Holding Trust is the nominee or alter ego of Defendant. In addition, the Government argues that it is entitled to the adverse inferences flowing from Defendant's refusal to answer questions during his deposition, his refusal to produce documents, most importantly the Trust instrument itself, and his assertion of a Fifth

Amendment privilege in this civil case. The inference that the Government suggests is the inference that the B.C.P. Trust is the nominee or alter ego of Defendant. Defendant has provided us with no reason not to make the suggested inference. Therefore, the federal tax liens should attach to properties held in the name of the B.C.P. Holding Trust.

THE TAX LIENS SHOULD BE REDUCED TO JUDGMENT AND FORECLOSED UPON

Section 7403 of the Internal Revenue Code authorizes the United States to bring suit to enforce its lien and the Court to decree a sale and distribute the proceeds according to the interests of the parties. There is no question that the tax assessments are valid, that the liens attached by operation of law to the four properties owned by the B.C.P. Holding Trust, that notice of the liens was provided and that a demand for payment of the unpaid taxes was made.

IT IS THEREFORE RECOMMENDED THAT:

Plaintiff's Motion for Summary Judgment should be GRANTED.

October 17, 2002

Timothy S. Hogan

United States Magistrate Judge

¶2002-5652

William M. OMUNA, PLAINTIFF v. Charles ROSSOTTI, ET AL., DEFENDANTS. U.S. District Court, Middle Dist. of Georgia, (DC GA) Docket No. 6:02-CV-12 (WLS), Oct. 23, 2002. Years 1996, 2001. Decision for Govt.

1. Refund actions—jurisdiction—administrative refund claims—limitations periods—replacement checks—tax rebates. Pro se taxpayer's complaint to recover refund check for 1 year was dismissed for lack of jurisdiction: to extent seeking to assert his underlying right to refund, taxpayer didn't show he met IRC §7422's jurisdictional administrative claim and limitations periods prerequisites to suit; or, to extent seeking to recover allegedly lost refund check for subject year, his failure to show he had made timely claim under 31 USC §3702 otherwise barred relief. Similarly, taxpayer's request for $600 rebate under 2001 Economic Growth and Tax Relief Reconciliation Act (EGTRRA) was jurisdictionally deficient where he failed to allege he had met statute's year 2000 return filing prerequisite. *Reference:* United States Tax Reporter ¶74,225.01(20); 65,325.01(75); 65,115.04(70). IRC §6511; 6532; 7422.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA THOMASVILLE DIVISION.

ORDER

W. Louis Sands, Chief Judge United States District Court

Presently pending before the Court is Defendants' motion to dismiss Plaintiff's complaint. (Tab 8). For the following reasons, Defendants' motion to dismiss is GRANTED.

DISCUSSION

[1] William Omuna, a pro se plaintiff, filed the instant complaint against Defendant Charles Rossotti, the commissioner of the Internal Revenue Service, to recover a refund he alleges is owed to him from the 1996 tax year and to recover a $600 rebate check under the Economic Growth and Tax Relief Reconciliation Act of 2001. Defendant has filed a motion to dismiss based on several grounds. (Tab 8). Defendant alleges that this Court lacks subject matter jurisdiction and that Plaintiff has failed to state a claim for which relief can be granted.

Defendant argues that suits against federal employees in their official capacity are suits against the United States. Therefore, the complaint should be dismissed for failure to name the proper party. It is well settled that the United States may be sued only to the extent that it has consented to suit by statute. United States v. Dalm, 494 U.S. 596, 608 [65 AFTR 2d 90-1210]

(1990). Where there is lack of consent to suit by the United States, dismissal of the suit for lack of subject matter jurisdiction is required. United States v. Mitchell, 445 U.S. 535, 538 (1980). The Plaintiff bears the burden of pleading the specific provision of the United States Code waiving the sovereign immunity of the United States. Malone v. Bowden, 369 U.S. 643 (1962).

In this case, Plaintiff has asserted that this Court has jurisdiction over his claims pursuant to 26 U.S.C. § 7422. Section 7422 provides in pertinent part:

> (a) No suit prior to filing claim for refund.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

26 U.S.C. § 7422.

In Count I, Plaintiff allegedly is seeking a refund for certain tax years. Before the Court has jurisdiction to decide a tax refund case, the Plaintiff must pay the income taxes assessed and file an administrative claim for a refund with the IRS. Vintilla v. United States, 931 F.2d 1444, 1445 [67 AFTR 2d 91-1077] (11th Cir. 1991); 26 U.S.C. § 7422. If the administra-tive claim is denied, the taxpayer may then file a tax refund suit in the district court within the time constraints provided by 26 U.S.C. § 6532(a)(1). Compliance with these requirements is jurisdictionally re-quired of the taxpayer before initiating suit.

In the instant case, the complaint fails to state any facts to meet the jurisdictional requirements of the statute. Plaintiff does not assert that he has filed a timely claim for a refund or that he has complied with the time constraints set forth in 26 U.S.C. § 6532(a)(1). To the extent that Count I can be construed as a refund action, this Court lacks subject matter jurisdiction to decide the claim.

A close reading of the complaint, however, reveals that Plaintiff is not seeking a refund as defined by the statute but a replacement check that had somehow been lost. As with a refund action, the Code sets forth certain administrative actions that the taxpayer must comply with before the taxpayer may sue to recover a replacement check from the IRS. Title 31 § 3702(c)(1) provides that "[a]ny claim on account of a Treasury check shall be barred unless it is presented to the agency that authorized the issuance of such check within 1 year after the date of issuance of the check . . . ." 31 U.S.C. § 3702(c)(1). Thus, Plaintiff had one year from the date the check was issued, or until September 11, 1999, to make a claim for the lost check. Plaintiff did not make any allegations in his complaint, or in his response to the IRS's motion to dismiss, that he met this jurisdictional prerequisite. Therefore, this Court lacks jurisdiction over Count I.

Count II of the complaint is similarly defective. In Count II, Plaintiff alleges that he is entitled to a $600 refund as a result of the passage of the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub.L. No. 107-16, 115 Stat. 38 (hereinafter the "Act"). Essentially, the Act reduced the amount of tax owed on the first $12,000 made in 2001 by $600 and entitled the taxpayer to receive the refund prior to filing his 2001 return. But as a prerequisite, the taxpayer had to file a return for the tax year 2000. See In re Lambert, 273 B.R. 887, 889 [89 AFTR 2d 2002-754] (Bankr. D. Or. 2001).

In order for Plaintiff to be eligible for the $600 refund he must have filed and paid taxes in 2000. Neither in his complaint, nor his response to the motion to dismiss did Plaintiff allege that he filed a return or paid taxes in the year 2000. Therefore, Plaintiff has failed to state a claim for which relief can be granted. In addition, as with Count I, Plaintiff has failed to plead sufficient facts to show that

he has met his jurisdictional requirements for filing a tax refund suit.

For the foregoing reasons, the Government's motion to dismiss (Tab 8) is GRANTED. In addition, Plaintiff's remaining motions (Tabs 7, 12, 15, 16, & 18) are DENIED as moot. Plaintiff's motion to extend time to answer Defendant's motion to dismiss (Tab 11) is GRANTED NUNC PRO TUNC to July 1, 2002. Therefore, the case is DISMISSED.

SO ORDERED, this 17th day of October, 2002.

W. Louis Sands, Chief Judge

United States District Court

JUDGMENT

Pursuant to this court's ORDER dated October 17, 2002, and for the reasons stated therein, JUDGMENT is hereby entered in favor of the Defendants. Plaintiff shall recover nothing from Defendants. Defendants are also entitled to recover their costs of this action.

This the 23rd day of October, 2002.

GREGORY J. LEONARD, CLERK

BY: Sandra DeCesare

U. S. Deputy Clerk

¶2002-5653

IN RE: Ronald L. KEPNER, DEBTOR. Ronald L. KEPNER, OBJECTANT v. UNITED STATES OF AMERICA, DEPARTMENT of the TREASURY, INTERNAL REVENUE SERVICE, RESPONDENT. U.S. Bankruptcy Court, Middle Dist. of Pennsylvania, (Bktcy Ct PA) Case No.: 1-99-03355, Oct. 16, 2002. Decision for Taxpayer.

1. Tax claims in bankruptcy—objection to proof of claim—interest—overlapping cases—automatic stay—bad faith. Proof of claim IRS filed in debtor's 2d Chap. 13 case was disallowed to extent it sought prepetition interest and penalties that accumulated while his 1st bankruptcy was still pending: 2d case wasn't filed in bad faith or otherwise so improper as to nullify automatic stay imposed by 1st case. Nothing in Bankruptcy Code or case law necessarily precluded taxpayer's maintenance of simultaneous overlapping bankruptcy cases; his stated purpose of using cases to create automatic stay, buy time for paying tax debts and stave off loss of assets wasn't in itself impermissible or proof of bad faith; and facts that he duly made payments to trustee during 1st case until he became incapacitated by illness, and filed 2d suit only to re-implement automatic stay that would be lost on 1st case's dismissal, otherwise refuted any bad faith inference. *Reference:* United States Tax Reporter ¶68,726.52(10); 68,726.51(10).

For the Debtors: Lawrence G. Frank, Esquire

For the Respondent: Anne Fiorenza, Esquire

D. Brian Simpson, Esquire

UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA,

MEMORANDUM[1]

JOHN J. THOMAS Chief United States Bankruptcy Judge

Chapter 13

Before me is an objection to a proof of claim filed by the IRS in the second of two cases filed by a single Debtor. Ronald L. Kepner (Kepner) filed his first Chapter 13 Petition on April 28, 1997, and his Plan was confirmed. The Internal Revenue Service (IRS) filed a proof of claim in the amount of $17,216.08. From Kepner's Plan payments, the Chapter 13 Trustee (Trustee) paid the IRS $7,010.63 on its claim. However, due to an illness, Kepner became unable to make Plan payments. This provided grounds for the Trustee to move to dismiss his case.[2] Instead, Kepner himself voluntarily dismissed his case on October 14,

[1] Drafted with the assistance of John Kelly, Law Clerk.

[2] On September 14, 1998, before such Motion was filed, Kepner and the Trustee entered a Stipulation regarding dismissal. On May 17, 1999, the Trustee filed a certificate of default on the terms of the Stipulation. Kepner objected to the certificate. A conference was held on July 8, 1999, at which the parties agreed to file a further stipulation as to the matter. The exact terms that were to be contained in that stipulation are not of record. No stipulation was ever filed.

1999, with the sum of $10,205.45 still due the IRS.

Meanwhile, on August 3, 1999, Kepner had filed his second Chapter 13 Petition. The IRS filed a proof of claim in the second case, which included interest and penalties that had accrued up to August 3, 1999.

To this claim Kepner objected, citing 11 U.S.C. § 502(b) (2), which precludes from inclusion in a claim interest and penalties that have not matured as of the date of the Petition. Kepner argued that the interest and penalties sought by the IRS had not matured because of the stay imposed by his first bankruptcy filing. The IRS countered that the stay imposed by the first bankruptcy filing was nullified by the second filing because a debtor cannot maintain two bankruptcy cases at the same time.

A conference was held on this objection to claim and briefs have been filed. The matter is ripe. I have jurisdiction over this matter, which is core in nature, pursuant to 28 U.S.C. § 157(b) (2) (A), (B) and (O).

Discussion

[1] Under 11 U.S.C. § 502(b) (2), interest on a claim stops accruing interest on the date of filing of a bankruptcy Petition. In *United States v. Saper, 336 U.S. 328 [38 AFTR 491] (1949)*, this rule was specifically applied to the accrual of interest on tax claims.

In reliance on that rule, the Court in *In re Lottman, 87 B.R. 32 (Bankr.N.D.Ohio 1988)* prohibited the IRS from assessing interest and penalties on debtors who had voluntarily dismissed a Chapter 13 Petition and immediately filed a second Chapter 13. The *Lottman* court, citing dicta from *Nicholas v. United States, 384 U.S. 687 [17 AFTR 2d 1194](1966)*, held that allowing the IRS to assess interest up to the date of the filing of the second case "would essentially penalize the Debtors for invoking the continued protection of the United States bankruptcy laws." *Lottman, at 35.*

The *Lottman* decision was, however, specifically rejected in a factually similar case, *In re Whitmore, 154 B.R. 314 (Bankr.D.Nev. 1993).* The *Whitmore* court asserted that *Lottman* ignored 11 U.S.C. § 349(b), which was intended to "restore all property rights to the position in which they were found at the commencement of the case." *Whitmore, at 316, quoting, In re Nash, 765 F.2d 1410, 1414 (9th Cir. 1985).*

Both *Lottman* and *Whitmore* can, however, be distinguished from the instant case because the Petitions in the instant case overlap. The question to be examined, then, is whether a debtor may maintain two cases that overlap in time within Chapter 13. The United States Supreme Court and several Bankruptcy Courts have made rulings that would answer that question affirmatively, and the Federal Rules of Bankruptcy Procedure contains a provision that supports that answer.

The Supreme Court has held that the Code contains no bar to simultaneous cases where a Chapter 13 is filed after a Chapter 7 discharge is entered but before the case is closed. *Johnson v. Home State Bank, 501 U.S. 78 (1991).* Fed.R.Bankr.P. 1015 appears to explicitly contemplate the simultaneous existence of two cases by the same debtor, stating: "[i]f two or more petitions are pending in the same court by or against the same debtor, the court may order consolidation of the cases." Fed.R.Bankr. P. 1015(a).

Several Courts have recognized the ability of debtors to maintain simultaneous Chapter 13 cases under certain circumstances. "Debtors are not statutorily prohibited from filing a petition for relief while another case is pending. However, the filings must be reviewed together giving consideration to the results that would be achieved by both filings and whether the statutory requirements for filing have been met." *In re Wayne E. Whitmore, 225 B.R. 199, 202 (Bankr. D.Idaho 1998), citing, In re Grimes, 117 B.R. 531 (9th Cir. BAP 1990), In re Ross, 1995 WL 224561 (Bankr. D. Idaho 1995).* In *Wayne E. Whitmore*, the Court held that the mere fact that, for a few days after debtors filed their second Chapter 13 petition, their case was pending simultaneously with a prior

case did not warrant entry of an order dismissing the debtors' second case.

Finally, at least one respected bankruptcy authority has observed that "[n]othing in the Bankruptcy Code or Bankruptcy Rules prohibits a debtor from having more than one pending bankruptcy case. In fact, Bankruptcy Rule 1015(a) contemplates the possibility that a debtor may have more than one case pending." *Norton on Bankruptcy Law and Practice 2nd, Section 115:6 (2001).*

In contrast, the Court in *In re Fulks, 93 B.R. 274 (Bankr.M.D.Fla. 1988)* extolled the need for a blanket prohibition against simultaneously administered petitions of any kind. The *Fulks* Court reasoned:

> If debtors are permitted to maintain their second petition while a prior case is pending, an easy avenue for abuse of the bankruptcy system would be sanctioned. It is conceivable that debtors could undertake numerous simultaneous filings when events in one case take a turn to their disliking. There is simply no rule of law which would allow debtors to have two cases pending at the same time.

Id., at 276. See also, In re Turner, 207 B.R. 373 (2nd Cir.BAP 1997) (majority of courts have read *Freshman v. Atkins, 269 U.S. 121, 46 S. Ct. 41, 70 L.Ed. 193 (1925)*, to be strict bar to simultaneous cases); *In re Heywood, 39 B.R. 910 (Bankr.W.D. N.Y. 1984)* (debtor has but one estate for purposes of trusteeship).

The focus of the above courts and commentators has been on whether the second filing was a result of bad faith. In the matter now before me, the IRS asserts that Kepner's second Petition was filed in bad faith because he intentionally used the Bankruptcy Code to prevent the accumulation of the interest and penalties which accrued after the first petition was filed. I do not see how that kind of use of the Code differs from other common instances where the filing of a Petition is used, in good faith, to thwart the loss of assets.

The facts of the instant cases do not support a conclusion that the brief existence of two simultaneous open Chapter 13 Petitions would result in the kind of abuse of the Code with which courts such as *Fulks, supra,* appear to be concerned. The absence of abuse is clearly demonstrated in a brief synopsis of the facts. Kepner filed his first Petition in order to "buy time" in which to pay off his IRS debt. Such a purpose is permissible. He duly made payments to the Trustee while he was able. An illness precluded him from completing these payments. Obviously, there is no bad faith in suffering misfortune. His case was not immediately dismissed, however, and in the interim, he became able to work again. Knowing that his first Petition could be dismissed due to his inability to pay, he filed a second Petition to again implement the automatic stay. Again, as I have observed, the filing of a Petition to create an automatic stay in order to thwart the loss of assets is not conclusive proof of bad faith or an abusive purpose in the filing of that Petition.

For these reasons, I conclude that Kepner's filing of a second bankruptcy case was not in bad faith. The Code did not prohibit its filing, and its filing had no nullifying effect against the first case. Therefore, interest on the IRS claim did not accrue while the stay imposed by the first case existed. Accordingly, the IRS proof of claim in the second case cannot include interest accumulating up to the date of filing of the second case.

An appropriate Order will follow.

BY THE COURT

JOHN J. THOMAS

Chief United States Bankruptcy Judge

HARRISBURG, PENNSYLVANIA

DATED: Oct. 16, 2002

ORDER

JOHN J. THOMAS Chief United States Bankruptcy Judge

For those reasons indicated in the Opinion filed this date, IT IS HEREBY

ORDERED that the claims of the Internal Revenue Service in the above-captioned case is hereby disallowed to the ex-

tent that it includes interest and penalties which might otherwise have accumulated prior to the filing of the Debtor's second Chapter 13 Petition and during the pendency of the first Petition.

Dated, this 16th day of October, 2002.

BY THE COURT

JOHN J. THOMAS

Chief United States Bankruptcy Judge

HARRISBURG, PENNSYLVANIA

¶2002-5654

IN RE: Kenneth L. SMYTHE and Susan K. SMYTHE, DEBTORS. U.S. Bankruptcy Court, Northern Dist. of Ohio, (Bktcy Ct OH) CASE NO. 02-60242, Oct. 11, 2002. Years 1995, 1996, 2001. Decision against Taxpayers in part and against Govt. in part.

1. Tax claims in bankruptcy—objection to IRS's proof of claim—jurisdiction—service—determination of tax liability. Govt.'s motion to vacate order that sustained Chap. 13 debtors' objection to, and disallowed IRS's claim for 2 of 3 years was denied: govt.'s argument that it wasn't properly served with objection was belied by taxpayers' supplemental service certificate and their counsel's documentation from stamps.com website, showing service was made on all necessary parties to invoke jurisdiction over IRS. But, taxpayers' motion for tax liability determination was denied as moot since earlier order resolved their liability for 2 years and denied their objection for remaining year. *Reference:* United States Tax Reporter ¶68,726.51(10); 68,726.52(3).

UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION,

ORDER DENYING MOTION TO VACATE AND DENYING MOTION TO DETERMINE TAX LIABILITY

JUDGE RUSS KENDIG

CHAPTER 13

This matter is before the court upon the motion to vacate the July 18, 2002 order sustaining debtors' objection to claim filed by the United States on behalf of the Internal Revenue Service (hereafter "IRS") and the response thereto filed by Kenneth L. Smythe and Susan K. Smythe (hereafter "Debtors") and upon Debtors' motion to determine tax liability and the response thereto of IRS.

I. Facts and Arguments

Debtors commenced their Chapter 13 case on January 22, 2002. On March 19, 2002, IRS filed a proof of claim. On April 26, 2002, Debtors filed an objection to the proof of claim and filed a motion to determine tax liability. The certificate of service attached to both the objection and the motion listed James L. Bickett, Assistant U.S. Attorney, 2 South Main Street, Floor 2, Akron, Ohio 44308, as the only representative of IRS who had been served. However, on April 29, 2002, Debtors filed a supplemental certificate of service listing additional parties on which their counsel had served copies of the objection and motion. Debtors' counsel certified the following parties were served:

Internal Revenue Service

Collection Division - Insolvency Group

P.O. Box 99183

Cleveland, Ohio 44199

Office of the United States Attorney

1800 Bank One Center

600 Superior Avenue, East

Cleveland, Ohio 44114-2600

Attorney General of the United States

U.S. Department of Justice Tax Division

Civil Trial Section, Northern Region

P.O. Box 55, Ben Franklin Station

Washington, D.C. 20044

Both the objection and motion were set for hearing on June 26, 2002. Again, Debtors served notice of this hearing on IRS by serving James Bickett, the Internal Revenue Service, and the Attorney General of the United States at the aforementioned ad-

dresses. IRS did not respond to either pleading.

On June 26, 2002, the court called the matters for hearing. IRS was not present. The court granted Debtors' objection to claim and requested Debtors' counsel submit an order. An order sustaining Debtors' objection to claim was entered on July 18, 2002 which disallowed the claim of IRS except as to tax year 2001.

On September 12, 2002, IRS filed its motion to vacate the July 18, 2002 order arguing the judgment was void because Debtors' failure to serve IRS according to the service requirements of the Federal Rules of Bankruptcy Procedures deprived the court of jurisdiction over IRS. Specifically, IRS argued Rules 9014 and 7004, read in conjunction, require service on IRS to be effected by mailing a copy of the pleading to the office of the United States attorney for the district in which the action is brought, by mailing a copy of the pleading to the Attorney General of the United States, and by mailing a copy of the pleading to the local IRS office.

Debtors responded by arguing their supplemental certificate of service with additional parties listed demonstrated they had sufficiently complied with the Rules and jurisdiction over IRS had been invoked. As verification of the parties served, Debtors' counsel attached a copy of the postage history of his postage provider. The postage history reflected Debtors' counsel's service of the objection and motion on the additional parties listed in the certificate of service filed April 29, 2002.

IRS then filed a response to Debtors' motion to determine tax liability arguing Debtors' motion should be dismissed. IRS argued if the court denies the motion to vacate filed by IRS, then Debtors' motion to determine tax liability should be denied as moot with respect to all tax years but 2001. Alternatively, if the court grants the motion to vacate filed by IRS, then the court should deny Debtors' motion because it lacks merit as to tax year 2001.

II. Discussion

[1] Debtors have effected good service upon IRS. IRS is correct in its assertion that Federal Rule of Bankruptcy Procedure 9014 treats the allowance of a claim as a contested matter and requires the matter to be served in accordance with Rule 7004. However, the court cannot find fault with Debtors' counsel's service of the objection to claim of IRS. Even if any doubt existed as to the veracity of Debtors' supplemental certificate of service filed April 29, 2002, the filing of Debtors' counsel's postage account history clearly evidences service of both the objection to claim and motion to determine tax liability on the parties IRS argues needed to be served to invoke jurisdiction. A perusal of the stamps.com website indicates there are two ways in which one can obtain postage. One is to input an address and then print both the address and postage directly onto an envelope. The other is to print postage to be used later called netstamps. Debtors' counsel must have used the first service as the court's investigation into the availability of netstamps indicates they did not become available until mid-July 2002. Therefore, Debtors' counsel's certification of service and proof in the form of documentation from stamps.com must be taken as accurate. The motion to vacate filed by IRS is DENIED.

The argument IRS makes that if the court denies its motion to vacate, then this renders the motion to determine tax liability of Debtors moot is with merit. The order sustaining Debtors' objection to claim disallows all claims except those for tax year 2001. This effectively resolves the determination of Debtors' tax liability and moots the motion. Therefore, Debtors' motion to determine tax liability is DENIED. The court does not reach the issue of whether overpayments, if any, for 1995 and 1996 tax years offset Debtors' 2001 federal income tax liability. The objection to the 2001 federal income tax portion of the claim was not sustained.

It is so ordered.

RUSS KENDIG

U.S. BANKRUPTCY JUDGE

¶2002-5655

UNITED STATES OF AMERICA, PLAINTIFF v. THE JOY FOUNDATION, a purported trust; Jack L. MALONE, individually and as trustee of THE JOY FOUNDATION; Yvonne M. MALONE; and Robert LAWRENCE, DEFENDANTS. U.S. District Court, Central Dist. of Illinois, (DC IL) CIVIL NO. 02-1069, Oct. 21, 2002. Decision for Govt.

1. Abusive tax shelter promotion—injunction against tax protesters—default judgment. Default judgment and permanent injunction were entered against promoters of abusive tax shelters and their foundation, prohibiting them from further organizing and selling abusive tax shelters, making false statements about entitlement to deductions or credits or excludability of income, advising taxpayers not to file returns or pay taxes, and engaging in conduct prohibited by IRC §6700 or that otherwise interfered with tax law administration and enforcement: govt. showed that promoters would continue abusive conduct absent injunction; govt. would suffer irreparable harm both from revenue losses and time and resources spent detecting losses; govt. was likely to prevail on merits; govt.'s injury out-weighed any injury injunction would cause; and public interest was served in stopping spread of such schemes. Also, promoters and foundations were ordered to mail injunction to all persons who pur-chased their shelters and to display injunc-tion on their web site. *Reference:* United States Tax Reporter ¶74,025.01(11); 74,085.01(50). IRC §6700; 7402; 7408.

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS PEORIA DIVISION,

DEFAULT JUDGMENT AND PERMANENT INJUNCTION AGAINST YVONNE M. MALONE

Upon motion by Plaintiff, the United States of America, the Court makes the following findings of fact and conclusions of law and enters this injunction.

Standards for Injunction

[1] To obtain an injunction under 26 U.S.C. (IRC) § 7408, the United States must show that Yvonne Malone engaged in conduct subject to penalty under §§ 6700 or 6701, and that injunctive relief is appropriate to prevent the recurrence of such conduct. To obtain an injunction under IRC § 7402, the United States must show that Malone engaged in conduct that interferes with the administration and enforcement of the Internal Revenue laws, and that injunctive relief is appropriate to prevent the recurrence of such conduct pursuant to the Court's inherent equity powers.

Factual Findings

Based on the evidence, the Court finds as follows:

1. Yvonne Malone promotes and organizes abusive tax shelters, plans or arrangements, recommending the misuse of trusts, and advising customers to violate the Internal Revenue laws.

2. In promoting these illegal schemes, Malone has made false statements about the internal revenue laws, including but not limited to the following:

- Wages are not taxable income;
- The federal income tax is unconstitutional as a direct tax not apportioned among the states;
- The Internal Revenue Service is not legally authorized to collect taxes;
- Filing tax returns and paying taxes, including income taxes, are voluntary;
- The federal tax laws apply only to foreign earned income;.

3. Absent this injunction, Malone will continue to promote these abusive tax schemes.

4. If this injunction is not granted, the United States will suffer irreparable harm because Malone's conduct is causing and will continue to cause substantial revenue losses to the United States Treasury, much

of which may not be recoverable. The IRS will have to devote substantial time and resources examining customers' returns, and may be unable to detect all of them.

5. Malone's positions regarding the taxability of wages and other income, and the use of trusts to thwart IRS collection efforts are meritless. The Government, therefore, will likely prevail on the merits.

6. The injury to the United States caused by Malone's conduct outweighs any injury an injunction might cause.

7. The public is served by granting this injunction. If an injunction is granted, it will help to stem the spread of these abusive tax schemes.

Conclusions of Law

Based on the evidence presented, the Court finds that Yvonne Malone engaged in conduct subject to penalty under IRC §§ 6700 and that injunctive relief under IRC § 7408 is appropriate to prevent the recurrence of that conduct. The Court further finds that Malone engaged in conduct with interferes with the administration and enforcement of the Internal Revenue laws and that injunctive relief is appropriate to prevent the recurrence of such conduct under the Court's inherent equity powers as provided in IRC § 7402(a).

Order

Following the above Findings of Fact and Conclusions of Law, it is hereby ORDERED that defendant Yvonne Malone is restrained and enjoined from directly or indirectly:

(a) Organizing or selling abusive tax shelters, plans, programs or arrangements that advise or encourage taxpayers to attempt to evade the assessment or collection of their correct federal tax;

(b) Making false statements about the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by the reason of participating in such tax shelters, plans, programs, or arrangements;

(c) Instructing or advising taxpayers to not file tax returns, not pay taxes, and/or to understate their federal income tax liabilities in connection with the marketing of trusts or other programs;

(d) Engaging in any other activity subject to penalty under I.R.C. § 6700;

(e) Engaging in other similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

It is further

ORDERED, that Yvonne Malone provide within 10 days a complete list of clients (including names, addresses, phone numbers, and social security numbers or employer identification numbers) who have purchased *The Reliance Offense*, or a *UBTO*, or who have obtained any services from the Joy Foundation; it is further

ORDERED, that Malone is required to mail a copy of the Complaint in this action and this Court's Order of Permanent Injunction to:

a. All persons who purchased *The Reliance Offense*, a *UBTO*, or any other materials or trust packages from Malone or her agents or designees;

b. All persons who conducted any transactions with the Joy Foundation since January 1, 1995; and

c. All Joy Foundation members since January 1, 1995.

Malone shall do this within 20 days of the date of this order and shall, within 25 days of the date of this order, file with the Court and serve on Government counsel a list of the names and addresses of all persons who have been so notified; it is further ORDERED, that the United States may engage in post-judgment discovery to monitor the defendant's compliance with this injunction.

SO ORDERED this 18th day of October 2002.

/s/

UNITED STATES DISTRICT JUDGE

DEFAULT JUDGMENT AND PERMANENT INJUNCTION AGAINST JACK L. MALONE AND THE JOY FOUNDATION

Upon motion by Plaintiff, the United States of America, the Court makes the following findings of fact and conclusions of law and enters this injunction.

Standards for Injunction

To obtain an injunction under 26 U.S.C. (IRC) § 7408, the United States must show that Jack Malone and the Joy Foundation engaged in conduct subject to penalty under §§ 6700 or 6701, and that injunctive relief is appropriate to prevent the recurrence of such conduct. To obtain an injunction under IRC § 7402, the United States must show that Jack Malone and the Joy Foundation engaged in conduct that interferes with the administration and enforcement of the Internal Revenue laws, and that injunctive relief is appropriate to prevent the recurrence of such conduct pursuant to the Court's inherent equity powers.

Factual Findings

Based on the evidence, the Court finds as follows:

1. Jack Malone and the Joy Foundation promote and organize abusive tax shelters, plans or arrangements, recommending the misuse of masts, and advising customers to violate the Internal Revenue laws.

2. In promoting these illegal schemes, Jack Malone and the Joy Foundation have made false statements about the internal revenue laws, including but not limited to the following:

- Wages are not taxable income;
- The federal income tax is unconstitutional as a direct tax not apportioned among the states;
- The Internal Revenue Service is not legally authorized to collect taxes;
- Filing tax returns and paying taxes, including income taxes, are voluntary;
- The federal tax laws apply only to foreign earned income;.

3. Absent this injunction, Jack Malone and the Joy Foundation will continue to promote these abusive tax schemes.

4. If this injunction is not granted, the United States will suffer irreparable harm because Jack Malone and the Joy Foundation's conduct is causing and will continue to cause substantial revenue losses to the United States Treasury, much of which may not be recoverable. The IRS will have to devote substantial time and resources examining customers' returns, and may be unable to detect all of them.

5. Jack Malone and the Joy Foundation's positions regarding the taxability of wages and other income, and the use of trusts to thwart IRS collection efforts are meritless. The Government, therefore, will likely prevail on the merits.

6. The injury to the United States caused by Jack Malone and the Joy Foundation's conduct outweighs any injury an injunction might cause.

7. The public is served by granting this injunction. If an injunction is granted, it will help to stem the spread of these abusive tax schemes.

Conclusions of Law

Based on the evidence presented, the Court finds that Jack Malone and the Joy Foundation engaged in conduct subject to penalty under IRC §§ 6700 and that injunctive relief under IRC § 7408 is appropriate to prevent the recurrence of that conduct. The Court further finds that Malone and the Joy Foundation engaged in conduct that interferes with the administration and enforcement of the Internal Revenue laws and that injunctive relief is appropriate to prevent the recurrence of such conduct under the Court's inherent equity powers as provided in IRC § 7402(a).

Order

Following the above Findings of Fact and Conclusions of Law, it is hereby ORDERED that defendants Jack Malone and the Joy Foundation are restrained and enjoined from directly or indirectly:

(a) Organizing or selling abusive tax shelters, plans, programs or arrangements

that advise or encourage taxpayers to attempt to evade the assessment or collection of their correct federal tax:

(b) Making false statements about the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by the reason of participating in such tax shelters, plans, programs, or arrangements;

(c) Instructing or advising taxpayers to not file tax returns, not pay taxes, and/or to understate their federal income tax liabilities in connection with the marketing of trusts or other programs;

(d) Engaging in any other activity subject to penalty under I.R.C. § 6700;

(e) Engaging in other similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

It is further

ORDERED, that Jack Malone and the Joy Foundation provide, within ten days of the date of this order, a complete list of clients, members, and customers, (including names, addresses, phone numbers, and social security numbers or employer identification numbers) who have purchased *The Reliance Offense*, or a *UBTO*, or who have obtained any other products or services from Jack Malone or the Joy Foundation; it is further

ORDERED, that Jack Malone and the Joy Foundation are required to mail a copy of the Complaint in this action and this Court's Order of Permanent Injunction to:

a. All persons who purchased *The Reliance Offense*, a *UBTO*, or any other materials or trust packages from Jack Malone or the Joy Foundation or their agents or designees;

b. All persons who conducted any transactions with the Joy Foundation since January 1, 1995; and

c. All Joy Foundation members since January 1, 1995.

Jack Malone and the Joy Foundation shall do this within 20 days of the date of this order and shall, within 25 days of the date of this order, file with the Court and serve on Government counsel a list of the names and addresses of all persons who have been so notified; it is further

ORDERED, that Jack Malone and the Joy Foundation maintain their website, www.joyfoundation.com, for one year and display prominently on the first page of that website a copy of the Court's injunction; it is further

ORDERED, that the United States may engage in post-judgment discovery to monitor the defendants' compliance with this injunction.

SO ORDERED this 18th day of October 2002.

/s/

UNITED STATES DISTRICT JUDGE

JUDGMENT IN A CIVIL CASE

✓ DECISION BY THE COURT. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Default Judgment and Permanent Injunction are entered in favor of the Plaintiff and against the Defendants.

ENTER this 21st day of October, 2002

JOHN M. WATERS, CLERK

/s/

BY: DEPUTY CLERK

¶2002-5656

UNITED STATES OF AMERICA, PLAINTIFF v. Jose H. HERNANDEZ and Alice B. HERNANDEZ, DEFENDANTS. U.S. District Court, Southern Dist. of Texas, (DC TX) CIVIL NO. H-02-2927, Oct. 31, 2002. Years 1991, 1993, 1994, 1998. Decision for Govt.

1. Collection actions—default judgment. Govt. was granted default judgment against taxpayer for outstanding tax assessments in amounts stated, plus interest: taxpayer didn't answer or defend

govt.'s complaint. *Reference:* United States Tax Reporter ¶74,035.01(30). IRC §7402; 7403.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION,

ORDER GRANTING UNITED STATES' MOTION DEFAULT JUDGMENT

[1] The plaintiff, United States of America, under Rule 55 (b) of the Federal Rules of Civil Procedure. has moved this Court to enter judgment by default in favor of the United States and against defendant Alice B. Hernandez. The Court finds that on August 23, 2002, defendant Alice B. Hernandez was personally served with the summons and a copy of the complaint. The Court also finds that defendant Alice B. Hernandez's answer was due on September 12, 2002, and that she has failed to file an answer, motion or otherwise defend in this action. Because of the failure of defendant Alice B. Hernandez to timely plead or otherwise defend in this action, she is in default. This Court is of the opinion that judgment by default should be entered against Alice B. Hernandez.

It is therefor ORDERED, ADJUDGED AND DECREED that the United States of America have and recover judgment:

1. against Alice B. Hernandez for the unpaid federal income tax assessment for the year 1991 in the amount of $51,625.95, as of June 21, 2002, plus interest and other additions to tax allowed by law accruing thereafter under 26 U.S.C. §§ 6601, 6621, and 28 U.S.C. § 1961 until paid;

2. against Alice B. Hernandez for the unpaid federal income tax assessment for the year 1993 in the amount of $54,891.03, as of June 21, 2002, plus interest and other additions to tax allowed by law accruing thereafter under 26 U.S.C. §§ 6601, 6621, and 28 U.S.C. § 1961 until paid;

3. against Alice B. Hernandez for the unpaid federal income tax assessment for the year 1994 in the amount of $12,726.33, as of June 21, 2002, plus interest and other additions to tax allowed by law accruing thereafter under 26 U.S.C. §§ 6601, 6621, and 28 U.S.C. § 1961 until paid; and

4. against Alice B. Hernandez for the unpaid federal income tax assessment for the year 1998 in the amount of $2,903.65, as of June 21, 2002, plus interest and other additions to tax allowed by law accruing thereafter under 26 U.S.C. §§ 6601, 6621, and 28 U.S.C. § 1961 until paid.

SIGNED Oct 31, 2002.

UNITED STATES DISTRICT JUDGE

¶2002-5657

UNITED STATES OF AMERICA, PLAINTIFF v. Anna PATEJ, DEFENDANT. U.S. District Court, Eastern Dist. of Michigan, (DC MI) Case No. 00-71944, Oct. 17, 2002. Earlier proceeding at (2000, DC MI) 86 AFTR 2d 2000-6335. Years 1993, 1994, 1995. Decision for Govt.

1. Collection actions—foreclosure—fraudulent conveyances—jointly owned property—summary judgment—attorney-client privilege. Govt. was granted summary judgment on its complaint to foreclose liens against home titled to taxpayer's ex-wife: taxpayer's post-assessment conveyance to ex-wife of property they formerly held as tenants by entireties was fraudulent attempt to avoid taxes under Michigan law. Fraud proof included facts taxpayer was expressly seeking legal advice on how to avoid tax and render himself "uncollectible" to IRS at time he originally bought home, used land contract method of purchase to keep IRS from detecting purchase, and simultaneously transferred almost $1 million to Swiss bank account; and his alleged intent to support ex-wife through home's purchase didn't negate his fraudulent tax evasion intent. Also, ex-wife lacked standing to assert attorney-client privilege for letter taxpayer sent attorney for tax avoidance advice; and fact that conveyance was incident to divorce was irrelevant since lien had already at-

tached. *Reference:* United States Tax Reporter ¶74,035.03(80); 63,215.02(150). IRC §6321; 7403.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION,

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Honorable Nancy G. Edmunds

This matter comes before the Court on the United States' motion for summary judgment. The United States' brought this collection action against Anna Patej, based on her ownership of property that once belonged to her and her husband, Salah Gouda, as tenants by the entirety. The United States maintains that Mr. Gouda fraudulently conveyed the property to Ms. Patej to evade significant outstanding tax liabilities; that the Court should disregard the conveyance; and that the Court should recognize and enforce the tax lien on the property. For the reasons stated below, the Court agrees with each of these propositions and GRANTS the United States' motion for summary judgment.

I. Facts

On December 5, 1996, two significant events occurred. Salah Gouda wrote a letter to attorney David Walter seeking tax planning advice. Specifically, he wrote that he faced an ''end of the year tax crisis,'' and that his objectives were to pay no taxes or pay minimum taxes, and to render himself as uncollectible as possible ''especially to the IRS''. Plaintiff's Ex. 4. At the time Gouda wrote the letter, he had already filed tax returns reporting a total of $118,082 in outstanding federal tax liabilities for the years 1993, 1994 and 1995.

Also on December 5, 1996, Salah Gouda and Anna Patej, his wife, signed a sales agreement for the purchase of property known as 2158 Haverford. The Goudas offered to pay $620,000 in cash for the Haverford property, by land contract. Mr. Gouda paid a $340,000 down payment on the property, and then made periodic payments, eventually paying off the balance on March 16, 1998. The down payment and all subsequent payments were paid out of his own accounts which he kept in his name only. On April 1, 1998, the sellers conveyed by warranty deed title to the Haverford property to Salah A. Gouda and Anna Patej-Gouda, his wife, as tenants by the entireties.

On June 22, 1998, the IRS made jeopardy tax assessments against Salah Gouda totaling $1,101,213.35 for the tax years 1993, 1994, 1995 and 1996. On August 5, 1998, the IRS recorded a Notice of Federal Tax Lien against Salah Gouda with the Oakland County Register of Deeds in that amount.

Mr. Gouda was a medical doctor licensed to practice medicine in Michigan. In December 1998, after an 18 month undercover investigation by the DEA, Mr. Gouda's medical license was suspended and he faced both federal and state criminal charges for improperly writing medical prescriptions. In April 1998, he fled the United States and is believed to be in Egypt.

On June 22, 1999, Anna Patej obtained a Default Judgment of Divorce from Salah Gouda. The judgment awarded her title to the Haverford property, and the next day she quit claimed the deed to herself in her maiden name.

II. Procedural Background

On April 27, 2000, The United States filed a collection action against Anna Patej. The United States is seeking to collect the unpaid jeopardy federal income tax assessments against Salah Gouda by setting aside the purchase of the Haverford property and foreclosing upon on the property. On August 24, 2000, this Court denied Salah Gouda's motion to intervene as a party. On July 8, 2002, the United States moved for summary judgment because (1) Salah Gouda's use of personal funds to create a tenancy by the entirety in the Haverford property was a fraudulent conveyance, (2) the United States' liens arose and attached to Gouda's 100% interest in the property prior to the divorce judgment, and therefore (3) the transfer was made

subject to the United States' liens and the liens should be foreclosed thereon.

III. Standard for Summary Judgment

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The movant has an initial burden of showing "the absence of a genuine issue of material fact." *Id.* at 323. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. *See Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate even where state of mind is an issue. To demonstrate a genuine issue, the non-movant must present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. *See Liberty Lobby*, 477 U.S. at 252.

The court must believe the non-movant's evidence and draw "all justifiable infer-ences" in the non-movant's favor. *See id.* at 255. Yet, respondent must satisfy "any heightened burden of proof required by the substantive law for an element of the respondent's case." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). The inquiry is whether the evidence presented is such that a jury applying the relevant evidentiary standard could "reasonably find for either the plaintiff or the defendant." *See id.*

IV. Analysis

A. Fraudulent Conveyance

[1] The United States asserts that the conveyance of the Haverford property was fraudulent under the Michigan Fraudulent Conveyance Act ("MFCA"). M.C.L.A. § 566.17, the controlling statute at all times pertinent to this action, provided that "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay or defraud either present or future creditors, is fraudulent as to both present and future creditors."

The United States must show the following four elements to establish a fraudulent conveyance under the statute: (1) that Salah Gouda is a person under the MFCA; (2) that he made a conveyance; (3) that he did so with the actual intent to hinder, delay or defraud creditors; and (4) that the United States is a creditor under the MFCA. *See Kelley v. Thomas Solvent Co.*, 725 F. Supp. 1446 (W.D. Mich. 1988). Only the third element, requiring actual intent to defraud, is contested by the parties.

The conveyance in question satisfies the "actual intent" element if Mr. Gouda wholly *or only in part* was motivated by fraudulent intentions. *Kelley*, 725 F. Supp. at 1455. The intent may be proven by inferences drawn from surrounding facts and circumstances. Direct evidence is not required. *United States v. Campbell*, No. 90-CV-71775-DT, 1991 WL 53243, 5 [71A AFTR 2d 93-4146] (E.D. Mich. 1991). Strong "badges of fraud" are when the conveyance leaves the defendant insolvent, the conveyance is to a family member, and the conveyance reserves a life use in the property to the grantor. *Bentley v. Caille*, 289 Mich. 74 (1939). In addition, "it is not necessary that the grantee be an actual party to the fraud in order that a conveyance may be set aside as fraudulent." *Spencer v. Miller*, 271 N.W. 731, 733 (Mich. 1937). Finally, the intent to defraud must be shown by clear and convincing evidence. *Lackawanna Pants Mfg. Co. v. Wiseman*, 133 F.2d 482 (6th Cir. 1943).

In a motion for summary judgment, the "movant must meet the initial burden showing 'the absence of a genuine issue of

material fact' as to an essential element of the non-movant's case.'' *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). The question before the Court is whether the Government has met its initial burden of showing Mr. Gouda's actual intent to defraud.

Several factors, taken as a whole, show Mr. Gouda's intent to defraud. On December 5, 1996, Mr. Gouda sent a handwritten letter to attorney David Waiters, in which Mr. Gouda seeks Mr. Walter's representation in tax planning. In the letter, Mr. Gouda lists as his objectives: ''(1) Like anybody dreams of, pay no taxes!! (2) failing this paying minimal taxes . . . (4) hopefully rendering myself as uncollectible as possible (specifically from the I.R.S.) . . . ''

On the same day Mr. Gouda sent the letter, he entered into a contract to purchase the Haverford property by land contract, and to have title pass to him and Ms. Patej as tenants by the entirety at the end of the contract period. By entering into the contract, Mr. Gouda transferred money in his personal accounts into property held as tenants by the entirety, which added layers of complexity, and possibly prohibited, the I.R.S.'s ability to collect those funds. Furthermore, the land contract method of purchase meant that title would not pass to his name until his final payment on April 1, 1998, making it difficult for the I.R.S. to detect his interest in the property. The United States also points to Mr. Gouda's transfer of almost one million dollars to a Swiss bank in April of 1997 as evidence of his intent to defraud the I.R.S.

Defendant maintains that the letter and the purchase of the Haverford property do not show fraudulent intent. She believes that Mr. Gouda's letter to David Walters simply requested advice on tax planning and does not demonstrate his intent to cheat the I.R.S. Defendant argues that the term ''uncollectible,'' which Mr. Gouda wrote in his letter to attorney David Waiters, does not, in layman's terms, refer to insolvency. Even so, at the time Mr. Gouda wrote the letter, he had an outstanding tax liability of $118,082 from the preceding three years. Therefore, when he used the term ''uncollectible'', he may not have meant ''insolvent'', but he was clearly seeking advice on how to shield his money from the I.R.S.

Additionally, Defendant declares in her affidavit that Mr. Gouda bought the house at her insistence (because the first house he bought in his own name only was too shabby). Her affidavit states that she asked Mr. Gouda to purchase the property. She further asserts that the conveyance was not fraudulent because Defendant was entitled to part of his income earned during the marriage. She did not work, at his insistence, and Mr. Gouda signed an affidavit swearing to support Defendant when he brought her to the United States. In essence, she contends that Mr. Gouda *owed* her the home, so the conveyance to her was not fraudulent. However, he could have had mixed-motives and the conveyance is still fraudulent. Fraudulent intent is shown even if fraud was only a part of the motivation. *Thomas Solvent*, 725 F. Supp. at 1455. Therefore, he could have been partly motivated to provide Defendant with a nice home, and still possessed the requisite fraudulent intent.

B. Admissibility of the Letter from Salah Gouda to David Walters

Defendant argues that the letter the government heavily relies on to show intent to defraud is ''clearly inadmissible as evidence in this matter under the attorney client privilege.'' Resp. at 4. The United States contends that the letter is not privileged because it falls withing the crime-fraud exception to the attorney-client privilege, and also that the issue of privilege can only be raised by Salah Gouda, the person holding the privilege.

The Court may consider only admissible evidence in ruling on a motion for summary judgment. *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993). Mr. Gouda's letter is not inadmissible because Defendant lacks standing to assert an attorney-client privilege as to the letter. Only a party to the attorney-client relationship may assert the privilege. *See United States v. Production Plated Plastics, Inc.*, 129 F. Supp. 2d 1099, 1106 [86 AFTR 2d 2000-7298] (W.D.

Mich. 2000); *Compulit v. Banctec, Inc.*, 177 F.R.D. 410 (W.D. Mich. 1997); People v. Lobaito, 351 N.W.2d 233 (Mich. Ct. App. 1984); *United States v. Juarez*, 573 F.2d 267, 276 (5th Cir. 1978).[1] Accordingly, Defendant lacks standing to assert the attorney-client privilege as to the letter from Mr. Gouda to Mr. Walters.

C. Transfer of Property to Defendant Pursuant to Her Divorce Was Subject to the Tax Lien

Defendant argues that her separate property is not subject to levy by the United States. However, a creditor who shows that the debtor made a fraudulent conveyance can have a court "disregard the conveyance and attach or levy execution upon the property conveyed." M.C.L.A. § 566.19(1)(b); *Dpe v. Ewing*, 517 N.W.2d 849, 850 (Mich. Ct. App. 1994). Under 26 U.S.C. § 6321, a federal lien includes "all property and rights to property, whether real or personal" belonging to a delinquent taxpayer. Furthermore, the lien arises when the tax liability is assessed and does not end until the tax liability is satisfied or it is barred by the statute of limitations. 26 U.S.C. § 6322.

Therefore, the tax lien arose against Mr. Gouda's property on June 22, 1998, when the I.R.S. made jeopardy tax assessments against him for $1,101,213.35. Since the Court finds that the conveyance of the Haverford property was fraudulent, Mr. Gouda had sole ownership of it and the I.R.S.' lien attached to it on June 22, 1998. Since Ms. Patej obtained the property after the federal lien attached, she took subject to that lien. 26 U.S.C. 6323.

V. Conclusion

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above, the Court hereby orders that Plaintiff's motion for summary judgment is GRANTED. The government should move for any further proceeding necessary for the Court to grant the relief requested in the complaint against Ms. Patej.

Nancy G. Edmunds

U. S. District Judge

Dated: OCT 2002

¶2002-5658

UNITED STATES OF AMERICA, PLAINTIFF v. Robert D. LOWRANCE, ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of Oklahoma, (DC OK) Case No. 00-CV-0236-K (M), Oct. 17, 2002. Earlier proceeding at (2002, DC OK) 90 AFTR 2d 2002-7073. Year 1994. Decision against Govt.

1. Collection actions—reducing assessments to judgment; foreclosure—property held by third parties—conversion. Govt.'s motion for summary judgment on its claim that taxpayer's son was liable under Oklahoma law for tortious conversion of lien funds was denied: although tax liens indisputably attached to funds that taxpayer improperly withdrew from court-established "separately-segregated account" and transferred to son without requisite IRS consent or court approval, and although son may have exercised dominion over funds by his receipt and subsequent negotiation thereof, evidence didn't summarily prove son actually knew about liens or that his conversion was wrongful. *Reference:* United States Tax Reporter ¶74,035.03(80). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA,

ORDER

TERRY C. KERN, Chief UNITED STATES DISTRICT JUDGE

Before the Court is the Motion of the Plaintiff for Summary Judgment against Defendant Mark Lowrance.

[1] There is some case law suggesting that the court may, on its own motion, decide that privileged material should be protected. *See State v. Macumber*, 544 P.2d 1084 (Ariz. 1976). A leading evidence hornbook argues against courts asserting privileges on their own motions. *McCormick on Evidence* § 73.1(a).

Background Facts and Procedures

On or about December 4, 1995, Defendant's father, Robert Lowrance, filed his federal income tax return for the year 1994. The return showed a sell-assessed balance of tax due of $2,390,074. The United States made several assessments against Robert Lowrance for taxes or interest due. On the date of each assessment, a federal tax lien arose pursuant to 26 U.S.C. §§ 6321 and 6322 and attached to all property and rights to property belonging to Robert Lowrance. Plaintiff filed notices of federal tax liens in Washington, Nowata, and Rogers Counties in Oklahoma and Ellis and Finney Counties in Kansas.

On August 9, 1996, Robert Lowrance filed for Chapter 11 Bankruptcy in the Northern District of Oklahoma, Case No. 96-03124-M. During bankruptcy, the bankruptcy court authorized the sale of several parcels of real property and stock on which the United States had federal tax liens. The federal tax liens attached to the proceeds of these sales. The bankruptcy court orders authorizing the sale of these assets required Robert Lowrance to deposit the proceeds into a separately-segregated account, and the bankruptcy court ordered Robert Lowrance not to withdraw any funds from the separately-segregated account without the consent of the Internal Revenue Service (''IRS'') or by court order. The bankruptcy court orally granted Robert Lowrance's motion to dismiss his bankruptcy case on February 29, 2000, conditioned on the fact that the dismissal would not affect the liens attached to the proceeds from the sale of the aforementioned assets. The bankruptcy court signed the Order dismissing the case on March 13, 2000.

On March 1, 2000, Robert Lowrance wrote a check for $700,000 out of the separately-segregated account and deposited it into his debtor-in-possession account. On March 14, 2000, Robert Lowrance wrote cheek number 3350 worth $125,000 out of his debtor-in-possession account and deposited it into his Lowrance Trading Account. On March 30, 2000, Robert Lowrance used check number 1022 on his Lowrance Trading Account to purchase Official Check number 341315458, Bank of Oklahoma, dated March 30, 2000, payable to his son, Defendant Mark Lowrance. This Official Check is the subject of this action against Defendant Mark Lowrance.

Defendant received the Official Check for $40,000 on or about March 30, 2000, and he understood that the check was from his father. Defendant deposited the check into his personal account at Farm Credit of Southwest Kansas. At the direction of Robert Lowrance, Defendant then wrote a check on his Farm Credit account in the amount of $40,000 to the law firm of Eagleton, Eagleton and Harris (''E, E & H'') for its representation of Robert Lowrance in this lawsuit. As of January 1, 2000, Defendant knew that his father, Robert Lowrance, had tax problems, but he ''did not know the exact nature or extent of his problems'' (Exhibit C to dkt #91).

In the present action, Plaintiff filed its Complaint in this Court on March 20, 2000, naming Robert D. Lowrance and Bruce Johnson as defendants in order to reduce a federal tax assessment against Robert D. Lowrance to judgment and to foreclose federal tax liens against personal property. Plaintiff added Defendant Mark Lowrance as a defendant on July 23, 2001, alleging conversion by Defendant. Plaintiff filed this Motion for Summary Judgment against Defendant to determine that Defendant is liable to the United States for tortious conversion of $40,000.

Summary Judgment Standard

Summary judgment is appropriate if ''there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.'' Fed. R. Civ. P. 56(c). The Court must view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–52 (1986); *Mares v. ConAgra Poultry Co.*, 971 F.2d 492, 494 (10th Cir. 1992). Where the nonmoving party will bear the burden of proof at trial, that party, must go beyond the pleadings

and identify specific facts that demonstrate the existence of an issue to be tried by the jury. *See Mares*, 971 F.2d at 494.

Discussion

[1] In Oklahoma, the elements of the tort of conversion are "(1) that the plaintiff own certain property at the time of its conversion; (2) that defendant [] converted plaintiff's property by a wrongful act of disposition of the property; and (3) that damages are suffered by the plaintiff." *Atwall v. Stifel, Nicolaus & Co.*, Inc., No. CIV-91-107-C, 1991 U.S. Dist. LEXIS 20043, at *6 (W.D. Okla. Apr. 15, 1991). *See also Continental Oil Co. v. Berry*, 103 P.2d 69, 72 (Okla. 1940); *White v. Webber-Workman Co.*, 591 P.2d 348, 350 (Okla. Ct. App. 1979).

As to element one, Defendant does not dispute that because of 26 U.S.C. § 6321 (2002) and the order office bankruptcy court made pursuant to 11 U.S.C. § 349 (2002), the federal tax liens were attached to the funds paid to Defendant by Robert Lowrance. Element two requires that Defendant converted Plaintiff's property by a wrongful act of disposition of the property. Defendant essentially argues that he could not have converted the property because be was not the "owner" of the property. Defendant cites *Dennis v. United States*, 372 F. Supp. 563 [33 AFTR 2d 74-1012] (E.D. Va. 1974), for the proposition that the crucial question in the case at bar is one of ownership. *Dennis*, however, involved a plaintiff who gave to the defendant a "right to possess" funds in order for the defendant to transfer the funds to a charity. *Id.* at 567. The defendant, however, kept the funds for himself and was convicted of fraud for such. *Id.* at 565. Thereafter the IRS filed a tax lien against the defendant and filed a notice of levy against the funds, *Id.* The court found that the "uncontested issue" in *Dennis* was of the taxability of the ill-gotten gains, that is whether the United States could levy against the funds in the first place because in the context of a government lien for failure to pay taxes, the taxpayer must be the owner of the property to which the lien will attach before the government can levy against it. *Id.* at 566. *See also* 26 U.S.C. § 6321. It was in deciding *this* issue that the court found the crucial question to be one of ownership. *Dennis*, 372 F. Supp. at 566. "Before the issue of conversion can be decided, ownership of the money must be established." *Brown v. Oklahoma State Bank & Trust Co. of Vinita*, 860 P.2d 230, 233 (Okla. 1993). In the case at bar, however, ownership of the money is not contested. Therefore *Dennis* is not controlling authority as to the issue in this case.

In 1987, the Oklahoma Supreme Court defined conversion as "any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Steenbergen v. First Fed. Sav. & Loan of Chicasha*, 753 P.2d 1330, 1332 (Okla. 1987) (citation omitted). *See also Atwall*, 1991 U.S. Dist. LEXIS at *6–7. The facts in the case at bar show that Defendant may have exercised the requisite dominion over the funds. In Defendant's Response to Plaintiff's Motion for Summary and Supporting Brief (dkt #91) and in Defendant's attached Affidavit (Exhibit A to dkt #91), Defendant states: "On April 3, 2000, I received official check no. 341315458 issued by Bank of Oklahoma . . . I deposited Bank of Oklahoma official check number 341315458 into my account . . . I wrote draft number 2149 on my account . . . to the law firm of [E, E & H]." However, conversion requires an act of dominion that is *wrongfully* exerted over the property of another. *See Steenbergen*, 753 P.2d at 1332. Therefore the intent of the Defendant becomes an issue.

The Court recognizes that there are Oklahoma Supreme Court cases that have found no notice or knowledge required in a conversion claim. *See Wilson v. Holmes*, 50 P.2d 1081 (Okla. 1935); *Clark v. Whiteus*, 171 P. 746 (Okla. 1918). However, a more recent Oklahoma Supreme Court case did require notice, and the federal court "'must apply the most recent statement of state law by the state's highest court.'" *Cooper v. Central & Southwest Svcs.*, 271 F.3d 1247, 1251 (10th Cir. 2001) (citation omitted). In *Installment Fi-*

nance Corp. v. Hudiburg Chevrolet, Inc., 794 P.2d 751 (Okla. 1990), Hudiburg purchased a car with a facially clear certificate of title and then sold the car. Unbeknownst to Hudiburg, this clear title had been fraudulently obtained by a third party. In fact, Plaintiff had a lien on the car. The court found, "Being without any notice of the interest, Hudiburg innocently purchased the vehicle and sold it without committing any wrongful act. There being no evidence of wrongful dominion over the property, we find that Hudiburg did not tortiously convert the property." *Id.* at 753. The Restatement (Second) of Torts also includes intent and good faith among the factors that help determine the seriousness of the interference with the property.

> (2) In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:
>
> (a) the extent and duration of the actor's exercise of dominion or control;
>
> (b) the actor's intent to assert a right in fact inconsistent with the other's right of control;
>
> (c) the actor's good faith;
>
> (d) the extent and duration of the resulting interference with the other's right of control;
>
> (e) the harm done to the chattel;
>
> (f) the inconvenience and expense caused to the other.

Restatement (Second) of Torts § 222A(2).

Here, the Plaintiff contends that Defendant did not need actual notice of the tax liens, but instead constructive notice was sufficient. Plaintiff also argues that the filing of the tax lien by the IRS constituted this constructive notice. However, the cases cited by the Plaintiff involve a bank or some other business that had constructive notice because of a filed security interest or filed mortgage. *See First Nat'l Bank of Bethany v. American Gen. Fire and Cas. Co.*, 927 F.2d 1126 (10th Cir. 1991); *United States Zinc Co. v. Colburn*, 255 P. 688 (Okla. 1927). The Court finds that an individual, such as Defendant, is different from a business because unlike an individual, the business has a legal obligation to search for liens or security interests on property that it receives. The Court is not aware of any cases finding constructive notice on an individual because of a filed financing statement or filed tax lien. The only other evidence Plaintiff offers of Defendant's knowledge or notice is Defendant's statement that he knew that his father had tax problems, but he "did not know the exact nature or extent of his problems." The Court finds that this statement is not enough for the Court to summarily find that Defendant had notice of the tax liens or had the requisite intent to have *wrongfully* converted the funds. Therefore a factual issue remains as to the second element of conversion, that is, whether Defendant converted Plaintiff's property by a wrongful act of disposition of the property. Because the Plaintiff has not met its burden to prove this second element of conversion, the Court does not reach the issue of damages.

Conclusion

Because factual issues remain, summary judgment is inappropriate.

IT IS THEREFORE ORDERED that the Motion for Summary Judgment of the United States of America (#77) is DENIED.

ORDERED this 17 day of OCTOBER, 2002.

TERRY C. KERN, Chief

UNITED STATES DISTRICT JUDGE

¶2002-5659

Lorenzo WILSON, PLAINTIFF v. Jo-Renee Hunter WILSON DEFENDANT. David FINDLING, COURT-APPOINTED RECEIVER, THIRD-PARTY PLAINTIFF v. Coranza WILSON and Rosie Wilson, Ann Marie Wilson, UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE STATE OF MICHIGAN, DEPARTMENT OF THE TREASURY, THIRD-PARTY DE-

FENDANTS. U.S. District Court, Eastern Dist. of Michigan, (DC MI), CASE NO. 02-CV-70833, Oct. 21, 2002. Earlier proceeding at (2002, DC MI) 90 AFTR 2d 2002-5501. Years 1989, 1990, 1991, 1992. Decision for Govt. in part.

1. Collection actions—foreclosure; sale—property held jointly with third parties—lien priority—receiverships. Govt. was granted summary judgment in part on its claim to foreclose liens against and sell residential property that taxpayer's parents bought with his money and then transferred to him and ex-wife as joint tenants with rights of survivorship: properly noticed liens validly attached to property regardless of whether initial purchase was fraudulent conveyance making taxpayer sole owner or whether joint ownership was valid, since liens arose before property's initial purchase and subsequent transfers. And, foreclosure was appropriate where sale of part of property would prejudice govt; parents had record notice of tax liens and wouldn't be displaced since they never lived on property; and even if receiver's pending 3d-party fraudulent conveyance complaint were denied and parents were found to hold valid joint interest, interest wasn't sufficient to preclude forced sale. But, govt. wasn't entitled to distribution order before fraudulent conveyance claim was resolved. *Reference:* United States Tax Reporter ¶74,035.03(80); 63,215.04(9). IRC §6321; 7403.

2. Lien priority—receiverships—first-in-time—superpriorities—attorney's liens. Govt.'s tax liens had priority over receiver's administrative expense claim to proceeds of sale of mortgaged lien property titled jointly to taxpayer and parents: liens predated interest of receiver, who was appointed to enforce taxpayers' subsequent divorce judgment; and, even if receiver's interest qualified as attorney's lien, IRC §6323(b)(8) superpriority was unavailing where applicable Michigan law expressly required that taxes be paid first. Also, govt. conceded that its rights were junior to those of mortgage co.; and rights of other potential parties weren't considered. *Reference:* United States Tax Reporter ¶63,215.04(200); 63,235.16(40). IRC §6321; 6323.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION,

OPINION AND ORDER

HON. LAWRENCE P. ZATKOFF

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on 21 OCT 2002

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF CHIEF UNITED STATES DISTRICT JUDGE

I. INTRODUCTION

This matter is before the Court on Third Party Defendant/Counter-Plaintiff United States' Motion for Summary Judgment on its counter-claim. Third Party Plaintiff and Court-Appointed Receiver David Findling has filed a response, and Plaintiff Lorenzo Wilson, Third Party Defendants Coranzo and Rosie Wilson, and Ann Marie Wilson have filed a separate response. The United States has replied. The Court finds that the parties have adequately set forth the relevant law and facts, and that oral argument would not aid in the disposition of this motion. *See* E.D. Mich. LR 7.1(c)(2). Accordingly, the Court ORDERS that this motion be decided on the briefs submitted. For the reasons set forth below, Third-Party Defendant United States's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART.

II. BACKGROUND

On October 13, 1992, Lorenzo Wilson (hereinafter ''Lorenzo'') filed his 1989, 1990, and 1991 federal income tax returns as married filing separately, reporting balances due in the amounts of $2,231.00, $1,789.00, and $2,573.00, respectively. On November 4, 1994, Lorenzo filed his 1992 federal income tax return as married separately, reporting a balance due in the amount of $4,395.00. Also on November 4, 1994, Lorenzo and Ann Marie Wilson (hereinafter ''Ann Marie'') filed a joint 1993 federal income tax return, reporting a

balance due in the amount of $4,992.00. These amounts were not paid.

On November 23, 1992, Lorenzo was assessed for his 1989, 1990, and 1991 taxes, on November 28, 1994 Lorenzo and Ann Marie were assessed for their 1992 taxes, and on December 5, 1994, Lorenzo was assessed for his 1993 taxes. According to the Internal Revenue Service (hereinafter ''IRS''), despite appropriate notice and demand, these amounts were not paid. *See*Declaration of Richard Hannum, ¶s 6 & 8. On December 15, 1994, the IRS filed a Notice of Federal Tax Lien with the Register of Deeds for Wayne County against Lorenzo and Ann Marie for 1989, 1990, 1991, and 1993, and on January 30, 1995, the IRS filed a Notice of Federal Tax Lien for 1992.[1]

On October 17, 1996, Lorenzo signed a Gift Letter, providing $8,000.00 to his parents, Coranza and Rosie Wilson (hereinafter ''Lorenzo's parents'' or ''Coranza and Rosie''), purportedly to assist his parents in the purchase of a home. On November 6, 1996, Lorenzo's parents purchased a home, commonly known as 16140-42 Princeton, Detroit, Wayne County, Michigan. The seller conveyed a warranty deed to Coranza and Rosie L. Wilson, husband and wife, which was recorded on December 2, 1996. GMAC Mortgage Corporation largely financed the purchase, and retains a purchase money mortgage on the Princeton property.[2] *See* Payoff Statement of March 19, 2002.

On January 13, 1997, Coranza and Rosie, husband and wife, conveyed by quit claim deed the recently purchased Princeton property to ''Coranza Wilson, Rosie L. Wilson, Lorenzo Wilson, and Ann Marie Wilson as Joint Tenants With Rights of Survivorship.'' *See* Quit Claim Deed of January 13, 1997. The parties recorded the quit claim deed the same day. On June 23, 1997, Ann Marie then conveyed by quit claim deed any interest she had in the Princeton Property to ''Coranza Wilson, Rosie L. Wilson, and Lorenzo Wilson, as joint tenants with rights of survivorship.'' *See* Quit Claim Deed of June 23, 1997. This quit claim deed was recorded on July 22, 1997.

Lorenzo and Jo-Renee Hunter Wilson (hereinafter ''Jo-Renee'') were divorced in Wayne County Circuit Court on December 14, 2001.[3] On January 25, 2002, Wayne County Circuit Court Judge Lucas issued an order appointing David Findling (hereinafter ''Receiver Findling'') as receiver of the real and personal property of Lorenzo in order to ensure satisfaction of the Divorce Judgment. Pursuant to his duties, Receiver Findling filed a Third Party Complaint against Coranza and Rosie, Ann Marie, the United States, the IRS, and the Department of Treasury of the State of Michigan seeking to establish his rights to the Princeton property.

The Third Party Complaint contained two counts: Fraudulent Conveyance (Count I) and Declaratory Relief (Count II). Count I alleged that Lorenzo fraudulently conveyed the Princeton property to his parents Coranza and Rosie by having his parents ''purchase'' the Princeton property on November 6, 1996, in violation of Michigan's Uniform Fraudulent Transfer Act in an effort to avoid his creditors and tax liabilities. *See* Third-Party Complaint ¶s 27–30. *See also* Mich. Comp. Laws §§ 566.31-43. Count II sought declaratory relief and a determination of Receiver Findling's rights regarding the Princeton property with respect to Lorenzo's unpaid tax liabilities. *See* Third Party Complaint ¶ 33. *See also* Mich. Ct. R. 2.605.

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[1] In his response to the United States' motion for summary judgment, Third Party Plaintiff David Findling asserts that as of November 6, 1996, the IRS and the State of Michigan had recorded two additional liens: (1) a United States Tax Lien filed on October 15, 1992, in the amount of $7,565.82; and (2) a Michigan State Tax Lien filed on August 27, 1993, in the amount of $1,863.90. *See* Receiver Findling's Response to Motion for Summary Judgment ¶ 8. These assertions, however, are not supported by documentation. Nor has the State of Michigan sought to enforce its lien in the present proceedings.

[2] As of March 19 2002, the principal of the GMAC mortgage was $55,339.77. *See* Payoff Statement of March 19, 2002.

[3] It has not been made clear to the Court the relationship, if any, between Ann Marie Wilson and Jo-Renee Hunter Wilson. The Third-Party Complaint seems to assert that they are the same person. It appears that either Ann Marie is Jo-Renee Hunter, or sometime between 1997 and 2001 Lorenzo Wilson divorced Ann Marie Wilson and married Jo-Renee Hunter Wilson.

The United States removed to this Court on March 6, 2002.[4] With its Answer to the Third-Party Complaint, the United States filed a counterclaim, seeking to foreclose on its liens on the Princeton Property pursuant to § 7401 of the United States Code. *See* 26 U.S.C. § 7401. *See also* 26 U.S.C. §§ 6321 & 6322. On July 11, 2002, the United States filed the instant Motion for Summary Judgment.

The United States argues that, pursuant to § 6321 of the United States Code, the tax liens against Lorenzo and Ann Marie that resulted from the unpaid 1989, 1990, 1991, 1992 and 1993 taxes attached by operation of law to all of Lorenzo's and Ann Marie's real and personal property. When Coranza and Rosie conveyed an interest in the Princeton property to Lorenzo and Ann Marie, Lorenzo and Ann Marie acquired a fifty percent ownership interest in the property and the IRS obtained a valid federal tax lien on that fifty percent. Since the IRS liens were filed and recorded, the United States claims priority over all other interests in the Princeton property except the GMAC mortgage.[5] The United States seeks to foreclose on the Princeton property and apply fifty percent of the proceeds, (the fifty percent representing Lorenzo's and Ann Marie's interest), after GMAC has been paid, to Lorenzo's and Ann Marie's outstanding tax liabilities, with the balance placed in escrow with the Court pending a determination of the interests of all parties in the Princeton property.

Receiver Findling concurs in large part with the United States's position. Findling agrees that the IRS has valid tax liens as to at least fifty percent of the Princeton property, and that these liens should be foreclosed upon, the property sold, and fifty percent of the net proceeds used to pay Lorenzo's and Ann Marie's outstanding tax liabilities. Findling also agrees that the remaining fifty percent should be placed in escrow, pending a determination of the fraudulent conveyance claim. If the fraudulent conveyance claim is successful, then the IRS lien would attach to the entire Princeton property. It is Findling's position, however, that as Receiver, his fees and costs are entitled to priority over all liens under equitable principles, including IRS liens, as administrative expenses.

The United States replies to Findling's assertions by arguing that Findling's claim to the proceeds do not meet the superiority requirements of § 6323(b)(8) of the Code. *See*26 U.S.C. § 6323(b)(8). Under the statute, Findling's claim is not entitled to priority over the IRS lien.

Plaintiff Lorenzo Wilson, and Third-Party Defendants Coranza and Rosie Wilson and Ann Marie Wilson (collectively hereinafter "Wilsons") have filed a response to the United States' motion for summary judgment. The Wilsons deny that the purchase and subsequent conveyances of the Princeton property were fraudulent conveyances. Accordingly, the Wilsons argue that summary judgment would be inappropriate because there is a genuine issue of material fact as to the ownership of the Princeton property and as to whether there was any fraudulent intent to defraud creditors. In addition, summary judgment would be inappropriate because Lorenzo has made a compromise offer to the IRS.

The United States replies to the Wilson's arguments by pointing out that the Wilsons contest issues of fact that are not material to the instant motion. Once the IRS lien attached to Lorenzo's and Ann Marie's interest in the Princeton property, no subsequent conveyance could discharge those liens, and even if the purchase of the Princeton property was not a fraudulent conveyance, then Lorenzo still had an interest to be foreclosed upon. Finally, the United States points out that the IRS no longer has jurisdiction to consider Lorenzo's offer of compromise.[6]

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[4] On July 16, 2002, this Court issued an Order denying Third-Party Plaintiff Findling's Motion for Order Setting Aside Removal. *See Wilson v. Wilson*, Case No. 02-70833, 2002 U.S. Dist. LEXIS 14460 [90 AFTR 2d 2002-5501] (E.D. Mich. July 16, 2002).

[5] The United States did not make GMAC a party to its Counterclaim because the United States concedes that GMAC has priority over any subsequently arising IRS lien.

[6] Since this case has been referred to the Department of Justice (hereinafter "DOJ") for "prosecution or defense," the IRS lacks authority to bind the Government. The DOJ has exclusive authority to settle Lorenzo's claim. *See* 26 U.S.C. § 7122(a). *See also Faust v. United States*, 101 F.3d 675, 676 [78 AFTR 2d 96-7372] (Fed. Cir. 1996).

III. LEGAL STANDARD

Summary judgment is appropriate only if the answers to the interrogatories, depositions, admissions, and pleadings combined with the affidavits in support show that no genuine issue as to any material fact remains and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when there is "sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (citations omitted). In application of this summary judgment standard, the Court must view all materials supplied, including all pleadings, in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgment may not be granted." *Anderson*, 477 U.S. at 249–50 (citations omitted).

The moving party bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the record that establish the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324. The non-moving party must do more than show that there is some metaphysical doubt as to the material facts. It must present significant probative evidence in support of its opposition to the motion for summary judgment in order to defeat the motion for summary judgment. *See Moore v. Phillip Morris Co.*, 8 F.3d 335, 339–40 (6th Cir. 1993).

IV. ANALYSIS

[1] The United States seeks to force a sale of the Princeton property by enforcing its lien on the property created pursuant to § 6321 of the Internal Revenue Code (hereinafter "IRC"). *See* 26 U.S.C. § 6321. *See also* 26 U.S.C. § 7403. Section 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount ... shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

26 U.S.C. § 6321. This lien shall arise "at the time the assessment is made and shall continue until the liability for the amount so assessed ... is satisfied or becomes unenforceable by reason of lapse of time." 26 U.S.C. § 6322. Section 7403 of the IRC allows the United States to enforce its § 6321 lien and foreclose on property owned by the taxpayer. *See* 26 U.S.C. § 7403(a). Section 7403 provides:

> § 7403. Action to enforce lien or to subject property to payment of tax.
>
> (a) Filing. In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title or interest, to the payment of such tax or liability ....
>
> (b) Parties. All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.
>
> (c) Adjudication and decree. The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property ... and a distribution of the proceeds of such sales according to the

findings of the court in respect to the interests of the parties and of the United States . . . .

26 U.S.C. § 7403.

In order to foreclose on the Government's lien, sell the Princeton property, and distribute the proceeds, this Court must make several determinations. First, this Court must find that the Government has a lien on the property to be sold. This requires that the delinquent taxpayer have had at one time an ownership interest in the property. This Court must then decide whether the property should in fact be sold. This requires the Court to apply the factors described in *United States v. Rodgers*, 461 U.S. 677 [52 AFTR 2d 83-5042] (1982). And finally, if this Court decides the property should be sold, the Court must determine both the relative interests in the property of the parties involved and the priority of the parties' interests to any proceeds.

A. IRS Lien on Princeton Property

A Government lien under § 6321 cannot extend further than the interests of the delinquent taxpayer. *See United States v. Rodgers*, 461 U.S. 677, 690 [52 AFTR 2d 83-5042] (1982). *See also* 26 U.S.C. § 6321. A § 6321 lien, however, "is broad and reveals that Congress meant to reach every interest in property that a taxpayer might have." *Drye v. United States*, 528 U.S. 49, 56 [84 AFTR 2d 99-7160] (1999) (citing *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 719–20 [56 AFTR 2d 85-5210] (1985)). The Government's lien will encumber property acquired by the taxpayer after the imposition of the lien, *see United States v. McDermott*, 507 U.S. 447, 553–55 [71 AFTR 2d 93-1154] (1993), and remain attached to property subsequently transferred by the taxpayer to third parties. *See Rodgers*, 461 U.S. at 691 n.16.

In the present case, the United States seeks to foreclose on the Princeton property and use the proceeds to pay Lorenzo's and Ann Marie's outstanding tax liabilities. Lorenzo was assessed for his 1989, 1990, and 1991 taxes on November 23, 1992. On November 28, 1994, Lorenzo and Ann Marie were assessed for their 1993 taxes, and on December 5, 1994, Lorenzo was assessed for his 1992 taxes. Pursuant to § 6323 of the Code, appropriate Notices of Federal Tax Liens were filed against Lorenzo and Ann Marie with the Wayne County Register of Deeds on December 15, 1994, and on January 30, 1995. In addition, Receiver Findling's Third Party Complaint has two potential outcomes: it will either be unsuccessful, and Lorenzo and Ann Maire will be considered to have acquired an ownership interest in the Princeton property on January 13, 1997, holding title as joint tenants with right of survivorship along with Coranza and Rosie; or it will be successful and Lorenzo will have purchased the property on November 6, 1996.[7] Therefore, IRS liens attached, at the latest, to Lorenzo's and Ann Marie's interest in the Princeton property on January 13, 1997.

The success or failure of Receiver Findling's Third-Party Complaint will not affect this Court's determination that the IRS holds a lien on the Princeton property as of January 13, 1997. Even if the original purchase of the home on November 6, 1996, by Coranza and Rosie is considered a fraudulent conveyance by Lorenzo to Coranza and Rosie, and fee simple title is vested in Lorenzo, then Lorenzo's ownership interest would still remain and the IRS lien on his interest would still be valid. Whether the IRS lien would have attached on January 13, 1997, or November 6, 1996, does not have to be presently decided. Accordingly, regardless of the outcome of the Third Party Complaint, the United States may proceed under § 7403.

The Court finds that the IRS has a lien on the Princeton property arising from its assessments and Notices of Federal Tax Liens filed against Lorenzo. The Court must now determine whether foreclosure is appropriate.

[7] The Court notes that the amount of the IRS liens does not depend on Ann Marie having possessed an interest in the Princeton property. Her liability arises from the joint 1993 federal income tax return, for which Lorenzo is also liable.

B. Foreclosure

Once a court determines that a delinquent taxpayer has an interest in property, and that a lien has attached, § 7403 requires the court to sell the property and distribute the proceeds, even if nondelinquent third parties retain an ownership interest or state law otherwise prohibits partition of the property. *See United States v. Craft*, 122 S.Ct. 1414 [89 AFTR 2d 2002-2005] (2002), *rev'g*, 233 F.3d 358 [86 AFTR 2d 2000-6996] (6th Cir. 2000); *Drye v. United States*, 528 U.S. 49, 61 [84 AFTR 2d 99-7160] (1999); *Rodgers*, 461 U.S. at 712. A court is afforded, however, a limited amount of equitable discretion in determining whether to force a sale of property where innocent third parties retain an ownership interest. This discretion takes into account the "Government's interest in prompt and certain collection of delinquent taxes and the possibility that innocent third parties will be unduly harmed by that effort." *Rodgers*, 461 U.S. at 709. The Supreme Court in Rodgers indicated that there are four factors which a court may take into consideration, though warned against the factors being used as a "mechanical checklist." *See id.* at 711. These factors are:

(1) the extent to which the Government's financial interests would be prejudiced if it were relegated to a forced sale of the partial interest actually liable for the delinquent taxes;

(2) whether the third party with a nonliable separate interest in the property would, in the normal course of events, have a legally recognized expectation that the separate property would not be subject to forced sale by the delinquent taxpayer or his or her creditors;

(3) the likely prejudice to the third party, both in personal dislocation costs and in the sort of practical undercompensation resulting from a forced sale;

(4) the relative character and value of the nonliable and liable interests held by the property.

See Rodgers, 461 U.S. at 710–11. Although the interest of the delinquent taxpayer is to be given little, if any, weight, a forced sale could "be temporarily postponed or made subject to an upset price, in order to do justice." *See Rodgers*, 461 U.S. at 709, 710 n.39.

Application of the preceding factors to the present estate is complicated by the nature of the parties' interest in the Princeton property. Coranza and Rosie originally purchased the property on November 6, 1996, as husband and wife. On January 13, 1997, Coranza and Rosie conveyed by quit claim deed their interest to Coranza and Rosie, Lorenzo, and Ann Marie as joint tenants with rights of survivorship. Less than six months later, on June 23, 1997. Ann Marie conveyed by quit claim deed her interest in the Princeton property to Coranza and Rosie, and Lorenzo as joint tenants with rights of survivorship. But while the January 13, 1997, conveyance transferred the entire estate, the June 23, 1997, conveyance only transferred Ann Marie's interest, to be held by the remaining three as joint tenants with full rights of survivorship.

Furthermore, in Michigan, a conveyance that transfers an estate to be held by the transferees as "joint tenants with right of survivorship" creates a joint tenancy with an indestructible right of survivorship held by each joint tenant. *See Albro v. Allen*, 454 N.W.2d 85 (Mich. 1990). In effect, the estate held by each tenant is a joint life estate with a contingent remainder dependent upon the tenant outliving the other joint tenants. *See Albro*, 454 N.W.2d at 93. Under Michigan law, such an estate prevents one joint tenant from affecting the survivorship interest of the other joint tenants. *See id.* at 90 ("[T]he Legislature has decreed that the contingent remainder following the joint life estate may not be destroyed by alienation of the precedent estate, nor by any act of the owner of the precedent estate.").

While these complications do not affect this Court's *power* under § 7403 to foreclose on the instant property, they make application of the *Rodgers*factors a precarious endeavor. *See Craft*, 122 S.Ct. at 1425–26 (holding that federal tax lien stat-

ute applied to property held by husband and wife as tenants by the entirety, which, under Michigan law, was not subject to levy under execution on judgment rendered against the husband or wife alone). It is difficult to take into consideration an innocent third parties' interest until the full extent of that interest is known to the Court. This Court notes, however, that even if the Third Party Complaint is eventually successful, and fee simple in the Princeton property is vested in Lorenzo, then there would be no reason not to foreclose on the property. *See Rodgers*, 461 U.S. at 709. If the Third Party Complaint is unsuccessful, then this Court would have to take into consideration how Coranza's and Rosie's interests would be affected by a forced sale. If these interests do not outweigh the Government's interest in "prompt and certain collection of delinquent taxes," then the property should be sold. Therefore, for the purposes of considering the *Rodgers* factors, the Court will assume that the Third Party Complaint will be unsuccessful and that Coranza and Rosie are innocent third parties. After consideration of the *Rodgers* factors, and a balancing of the relative interests, this Court determines that foreclosure is appropriate.

First, the Government would be prejudiced if the Princeton property were not sold as a whole. The sale of a partial estate, sold separately and still subject to the survivorship interest of the innocent third parties, would be worth considerably less than Lorenzo's and Ann Marie's percentage share of a sale of the whole estate.

Second, there is some indication that the Wilsons may have thought that under Michigan law, a joint tenancy with right of survivorship is inseverable, and that Lorenzo's and Ann Marie's interests in the property could not be reached by their creditors. The IRS, however, filed Notices of Federal Tax Liens against Lorenzo and Ann Marie well before Coranza and Rosie made the conveyance on January 13, 1997. Coranza and Rosie, therefore, at least, had record notice of the possibility that the IRS would seek to enforce its liens.

Third, the Wilsons concede that Coranza and Rosie will not suffer any displacement costs because they have never even lived in the Princeton property. *See* Wilsons's Answer to Counter-Claim Filed by United States of America, Department of Treasury ¶ 44.

Finally, after a practical consideration of all factors and circumstance, this Court finds that, regardless of the outcome of Receiver Findling's Third Party Complaint, the relative character of Coranza and Rosie's interest in the property will not be significant enough to tip the balance against foreclosure. The Princeton property should be foreclosed upon.

Accordingly, the United States's motion is GRANTED to the extent it requests foreclosure on the IRS liens.

C. Relative Interests in the Princeton Property

The Third Party Complaint is an action to quiet title on the Princeton property. It alleges a fraudulent conveyance between Lorenzo and Coranza and Rosie. Under Michigan law, the issue of fraud is a question of fact to be determined by the fact finder. *See In re Otis & Edwards, P.C.*, 115 B.R. 900 (Bankr. E.D. Mich. 1990) ("Fraudulent intent is a question of fact, not law, and as such is a question for this court to determine based on the relevant evidence provided by the parties.") (citations omitted). In the present case, Lorenzo denies any fraudulent intent. Accordingly, a determination by the Court of the relative interests of the parties to the Princeton property is inappropriate for this motion.

D. Priority

The Court may, however, determine the relative priority of competing interests to the Princeton property. Once it is determined that a lien has attached to a taxpayer's property, and a court has decided to force a sale of the property pursuant to § 7403 of the IRC, federal law determines the priority of competing interests in that property. *See Aquilino v. United States*, 363 U.S. 509, 513–14 [5 AFTR 2d 1698] (1960). The validity and priority of a § 6321 lien as against third parties is gov-

erned by § 6323. *See* 26 U.S.C. § 6323. *See also United States v. Rodgers*, 461 U.S. 677, 682 n.2 [52 AFTR 2d 83-5042] (1983). Section 6323 requires a lien to be recorded according to the applicable state law where the real property is located. *See* 26 U.S.C. § 6323 (a) & (f).

Once recorded, a Government lien does not automatically have priority over all other liens. *See McDermott*, 507 U.S. at 449. "Absent provision to the contrary, priority for purposes of federal law is governed by the common-law principle that 'the first in time is the first in right.'" *Id.* (quoting *United States v. Britain*, 347 U.S. 81, 85 [44 AFTR 798] (1827)). "A properly filed federal tax lien has priority over a competing state-created lien unless the competing lien has 'attached' to the property in question and is 'choate' prior to the perfection of the federal tax lien." *Redondo Constr. Corp. v. United States*, 157 F.3d 1060, 1062 [82 AFTR 2d 98-6675] (6th Cir. 1998). Furthermore, a Government lien on a taxpayer's property cannot attach until the taxpayer has acquired an interest in the property and will not be "perfected" until that time. *See McDermott*, 507 U.S. at 452.

The United States concedes that GMAC Mortgage Corporation retains a lien against the Princeton property superior in priority to the IRS liens. *See* Memorandum of Law in Support of United States Motion for Summary Judgment ¶ 16. This is a necessary position for the United States to take because GMAC Mortgage Corporation is not party to the United States' counterclaim. *See* 26 U.S.C. § 7403(b) (requiring all persons having an interest in the property to be made a party to the proceedings). In addition, it has been recognized that a purchase money mortgage is entitled to priority over a competing IRS Lien. *See First Interstate Bank of Utah, N.A. v. Internal Revenue Service*, 930 F.2d 1521, 1523 [67 AFTR 2d 91-935] (10th Cir. 1991) ("[A] security interest based on the extension of purchase money defeats a previously filed federal tax lien.").

The United States, however, does claim priority as to any competing interest of Receiver Findling. While Receiver Findling concedes that the IRS lien is first in time, he argues that applying the law and equitable principles,[8] his "fees and costs, as administrative expenses, take priority over *all* Lien-holders," including the United States. *See* Receiver Findling's Response to Motion for Summary Judgment p.5 ¶ 1 (emphasis added).

As stated previously, federal law establishes the priority of liens competing with the IRS. *See Rodgers*, 461 U.S. at 682 n.2; *Aquilino*, 363 U.S. at 513–14. Yet Findling's position finds no support in the Federal Tax Lien Act. Section 6323(b) of the Federal Tax Lien Act provides the limited circumstances where a lien will be entitled to priority over a Government lien regardless of when filed.[9] The only subsection applicable in this instance, § 6323(b)(8), allow certain attorney's liens to be entitled to such "superpriority." *See* 26 U.S.C. § 2363(b)(8). These liens "should be protected as to their reasonable fees to the extent that the fees are protected under local law." *United States v. First Nat'l Bank of Memphis*, 458 F.2d 550, 567 [29 AFTR 2d 72-933] (6th Cir. 1972) (detailing history of Federal Tax Lien Act). The state court judge that appointed Receiver Findling ordered "that the Receiver [was] . . . granted all powers and authority conferred by statutes and case law, including but not limited to MCL 600.5201 et seq . . . ." *See* Amended Order Appointing Receiver, January 25, 2002, p.2. Section 600.5201 of the Michigan Compiled Laws addresses an assignment for the benefit of creditors. *See* Revised Judicature Act of 1961, Assignments for the Benefit of Creditors, Mich. Comp. Laws § 600.5201 *et seq.*. Under the section dealing with priority of claims, an assignee's cost of administration is inferior to an IRS tax lien.

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[8] Receiver Findling was appointed by the State court and granted powers pursuant to Mich. Comp. Laws § 600.5201 *et seq.*. Under the statute, such a proceeding is equitable in nature. *See* Mich. Comp. Laws § 600.5265.

[9] This "superpriority" category includes real property tax and special assessment liens. *See* 26 U.S.C. § 6323(b)(6). The nature of the alleged State of Michigan tax lien, however, has not been presented to the Court, and the State of Michigan has not submitted any briefs. Whether any Michigan tax liens would qualify for "superpriority" status under § 6323(b)(6) cannot be determined.

See Mich. Comp. Laws § 600.5251. Funds available for disbursement are to be paid first to cover "[a]ll taxes legally due and owing by the assignor to the United States, state, county or municipality . . ." and second "[t]he cost of administration." Mich. Comp. Laws § 600.5251(1)(a) & (b). So even if Receiver Findling's costs of administration were considered an attorney's lien for the purposes of the Federal Tax Lien Act, that lien would not be entitled to priority over the IRS liens.

In addition, Findling relies upon a series of cases decided prior to the enactment of the Federal Tax Lien Act, except for *Meyerson v. Council Bluffs Sav. Bank*, 824 F.Supp 173 (S.D. Iowa 1991). His reliance on *Meyerson*, however, is misplaced. In *Meyerson*, the applicable Iowa statute required court costs and administrative costs to be paid prior to other debts and taxes, and the United States had agreed to be bound by that order of priorities. *See Meyerson*, 824 F. Supp. at 175–76 (citing Iowa Code § 633.425). The applicable Michigan statute, however, as previously discussed, requires taxes to be paid prior to administrative costs. *See* Mich. Comp. Laws §600.5251(1)(a) & (b). *Meyerson*, therefore, provides Findling with no relief.

The state court judge appointed Receiver Findling to enforce a judgment of divorce entered on December 14, 2001. In doing so, this Court agrees that the state court "pledged its faith that all of the authorized obligations of the receivership shall be paid or at least secured by proper liens upon the property in its custody." *Gardner v. Grand Beach Co.*, 48 F.2d 491, 492 (6th Cir. 1931). The statute under which Findling derives his powers, however, provides that this "lien" shall be inferior to the IRS lien. *See* Mich. Comp. Laws § 600.5251(1)(a) & (b).

Accordingly, since Michigan law requires taxes be paid prior to administrative costs, and since Receiver Findling's position fails to find support in the FTLA, this Court sees no reason to improve the Receiver's position by virtue of being removed to this Court. Accordingly, the Court finds that the relative priorities of the competing interests to any proceeds from a decree of sale fall in the following order: (1) GMAC Mortgage Corporation; (2) IRS liens filed against Lorenzo and Ann Marie prior to the Judgment of Divorce; and (3) Receiver's administrative costs. This Court makes no determination as to the relative priority of interests other than GMAC, the IRS, or Receiver Findling.

V. CONCLUSION

Accordingly, for the reasons set forth above, the Court finds that IRS tax liens properly attached to the property described as 16140-42 Princeton, Detroit, Wayne County, Michigan, and that state of said property should be allowed, with proceeds of such sale to be held in escrow with the Court pending a determination of the Third Party Complaint.

Therefore, Third Party Defendant United State's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART. To the extent the United States request foreclosure on the Princeton property, its motion is GRANTED and the United States's liens are entitled to priority over Receiver Findling's interest in the property. To the extent the United States requests distribution of the proceeds prior to a final determination on the merits of the Third Party Complaint its motion is DENIED.

IT IS SO ORDERED.

Dated: 21 OCT 2002

HON. LAWRENCE P. ZATKOFF

CHIEF UNITED STATES DISTRICT JUDGE

¶2002-5660

Nanette HARTER and Neil RHOADS, PLAINTIFFS v. INTERNAL REVENUE SERVICE, DEPARTMENT OF TREASURY, and DEPARTMENT OF JUSTICE, DEFENDANTS. U.S. District Court, Dist. of Hawaii, (DC HI) CIV. NO. 02-00325 SOM/KSC, Oct. 16, 2002. Decision for Govt.

1. FOIA—exemptions—legal research; agency records—Privacy Act. Govt. was granted partial summary judgment on 16 of taxpayers' outstanding FOIA requests: 13 requests were really just impermissible attempts to get IRS to do legal research for taxpayers and provide them copies of statutes and regs., disclosure of which wasn't required under FOIA. Also, govt. wasn't required to comply with request for OMB control number assigned to Reg. §1.1-1 absent any proof that §1.1-1 was required to have control number; and remaining 2 Privacy Act requests for documents that weren't already existing or maintained in IRS's system of records fell outside Act's disclosure provision, which only gave taxpayers right to existing records, not to have records created for them. And, motion to strike defenses was denied. *Reference:* United States Tax Reporter ¶76,556.502(50); 76,556.504.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII,

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION TO STRIKE DEFENSES

SUSAN OKI MOLLWAY UNITED STATES DISTRICT JUDGE

ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION TO STRIKE DEFENSES

I. INTRODUCTION.

On May 28, 2002, Plaintiffs Nanette Harter (''Harter'') and Neil Rhoads (''Rhoads'') (collectively, ''Plaintiffs'') filed a complaint asking this court to order the Internal Revenue Service (''IRS''), the Department of Treasury, and the Department of Justice (collectively, ''Defendants'') to respond to forty-six requests made by Plaintiffs under the Freedom of Information Act (''FOIA''), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Plaintiffs also ask for costs and, although they are proceeding pro se, attorney's fees.

On July 31, 2002, Defendants filed an answer listing their defenses to Plaintiffs' claims. Plaintiffs filed a Response to Motion to Dismiss on August 13, 2002, which this court has deemed a motion to strike defenses. Defendants have moved for partial judgment on the pleadings with respect to sixteen of the forty-six requests made by Plaintiffs. Plaintiffs' Second Affidavits contain copies of the letters Plaintiffs wrote to the IRS requesting information under the FOIA and the Privacy Act. Because the court accepts the affidavits, Defendants' motion is treated as one for partial summary judgment.

Defendants' motion for partial summary judgment is GRANTED. Plaintiffs' motion to strike defenses is DENIED.

II. BACKGROUND FACTS.

During the period from March 30, 2001, to October 30, 2001, Plaintiffs allegedly sent sixty-five FOIA and Privacy Act requests to the IRS. Harter mailed thirty-three requests, and Rhoads mailed thirty-two requests. Plaintiffs claim that forty-six of their requests are ''unfulfilled.'' Compl. ¶ 10. Of those forty-six requests, Defendants have moved for judgment on the pleadings with respect to sixteen, identified as H5, H8, H9, H10, H19, H20, H21, H23, R7, R10, R15, R17, R19, R20, R21, and R32.

In letter H5, Harter requested ''a copy of the document that fully clarifies and includes every item that is included in the complete definition of 'United States' in 26 U.S.C. § 7701'' and ''a copy of the document that fully clarifies and includes every item that is included in the complete definition of 'States' in 26 U.S.C. § 7701.''

In letter H8, Harter requested ''a copy of the Public Law amending [Internal Revenue Code of 1939 Section 54(3)] to extend the tax to citizens of the United States of America . . . . '' In response to the IRS's reply asking Harter to perfect her request, Harter wrote a second letter (H8a), requesting ''documents identifying the sec-

tion(s) of the current IRC that have been derived in whole or in part from § 54 of the IRC of 1939'' and ''documents showing [those sections'] full derivation from 1939 to present.''

In letter H9, Harter requested ''copies of documents specifying the authority of the [IRS] to seize and sell property for nonpayment of Title 26 Subtitle A and Title 26 Subtitle C taxes.'' The IRS responded with an excerpt from the Internal Revenue Manual (''IR Manual'') listing the statutory and administrative bases for that authority. Second Aff. of Harter at H9-5. Harter then wrote to the IRS, stating that the provided excerpt ''is not evidence of authority'' and specifying that she sought copies of ''statute[s], regulation[s],'' or similar documents.

In letter H10, Harter requested ''copies of the statutes and/or regulations conferring authority on the Secretary or his/her delegates to levy under IRC § 6331 the property of a natural person who is not a person as identified in § 6331(a).'' The IRS responded with an excerpt from the IR Manual, to which Harter objected because she had requested ''statues [sic] and/or regulations.'' Second Aff. of Harter at H10-6

In letter H19, Harter requested ''a document or documents showing the full and complete definition of 'individual' applicable in 26 CFR § 1.'' She specified in a related letter that she was ''asking for the definition from the regulations.'' Second Aff. of Harter at H19-7.

In letter H20, Harter made a Privacy Act request for a ''certified document that identifies the specific taxable source of income for which I have a liability pursuant to 26 CFR § 1.861-8(f)(1) for the year 1999.'' After having received eighty-seven pages of documents in response to this request, Harter wrote to the IRS, ''I could not find a certified document in the attached 87 pages. My original request has not been fulfilled.'' Second Aff. of Harter at H20-13.

In letter H21, Harter requested ''a copy of the regulation(s) authorizing notices of [deficiency, levy, lien, and seizure] applicable to the American people at large for Subtitle A and Subtitle C cases.''

In letter H23, Harter wrote, ''The Paperwork Reduction Act of 1980 and the Paperwork Reduction Reauthorization Act of 1986 require that agencies display control numbers assigned by the Office of Management and Budget (OMB) to regulations that solicit or obtain information from the public. Please provide the OMB control number currently assigned to CFR § 1.1-1.''

In letter R7, Rhoads requested a ''copy of the specific pages in the Federal Register which make [26 USC §§ 6001 and 6011(a)] applicable to a natural person who is a citizen of the United States of America.'' In a subsequent letter related to the same request, Rhoads stated, ''I ask only to be directed to or be provided with a copy of the appropriate pages in the Federal Register.''

In letter R10, Rhoads requested ''a copy of the documents showing the date of repeal of Chapters 1 and 2 and Section 3801 of the Internal Revenue Code of 1939.''

In letter R15, Rhoads requested ''a document showing the full list of administrative remedies available within the Internal Revenue Service as referred to in 26 USC § 7433(d) (1).''

In letter R17, Rhoads requested ''a document or documents showing the full and complete definition of 'State' applicable in 26 CFR § 31.3401 [and] 26 USC § 3404.''

In letter R19, Rhoads requested ''a copy of the statute barring witnesses from attending administrative due process hearings'' and ''a copy of the statute barring the use of recording devices at administrative due process hearings.''

In letter R20, Rhoads made a Privacy Act request for ''a certified document that identifies the specific taxable sources of income for which I have a liability pursuant to 26 CFR § 1.861-8(f) (1) for the year 1998.''

In letter R21, Rhoads requested ''a copy of the [statute(s) and regulation(s)] giving

the [IRS] authority to begin collection activities in the absence of an assessment.''

In letter R32, Rhoads requested ''a document showing the date of passage [of section 6331 of the Internal Revenue Code]. This request may be satisfied by document(s) identifying the Public Law(s) from which section 6331 is derived, together with documents showing the date of passage of those Public Laws.''

III. STANDARD OF REVIEW.

A. Standard of Review on Motion for Judgment on the Pleadings.

Rule 12(c) states:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Fed. R. Civ. P. 12(c). The standard governing a Rule 12(c) motion for judgment on the pleadings is essentially the same as that governing a Rule 12(b) (6) motion. For a Rule 12(c) motion, the allegations of the nonmoving party must be accepted as true, while the allegations of the moving party that have been denied are assumed to be false. Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1550 (9th Cir. 1990) (citation omitted). The motion will be granted if, accepting as true all material allegations contained in the nonmoving party's pleadings, the moving party is entitled to judgment as a matter of law. Torbet v. United Airlines, Inc., 298 F.3d 1087, 1089 (9th Cir. 2002). Judgment on the pleadings is improper when the district court goes beyond the pleadings to resolve an issue; such a proceeding must properly be treated as a motion for summary judgment. Fed. R. Civ. P. 12(c). See also Hal Roach Studios, 896 F.2d at 1550.

Because the court chooses to accept the affidavits of Harter and Rhoads, the court treats Defendants' motion for partial judgment on the pleadings as a motion for partial summary judgment. Even if, however, the court were to exclude those affidavits and treat Defendants' motion as a Rule 12(c) motion for partial judgment on the pleadings, Defendants' motion would be granted, as the parties are in agreement regarding the content of the letters sent by Harter and Rhoads to the IRS, and the relevant portions of those letters are included in the Complaint.

B. Standard of Review on Motion for Summary Judgment.

Summary judgment is granted when there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). One of the principal purposes of summary judgment is to identify and dispose of factually unsupported claims and defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986). Summary judgment must be granted against a party ''who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'' Id. at 322. A moving party without the ultimate burden of persuasion at trial--usually, but not always, the defendant--has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment. Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102 (9th Cir. 2000).

On a motion for summary judgment, all evidence and inferences must be construed in the light most favorable to the nonmoving party. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987). Inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. Id. When ''direct evidence'' produced by the moving party conflicts with ''direct evidence'' produced by the party opposing summary judgment, ''the judge must assume the truth of the evi-

dence set forth by the nonmoving party with respect to that fact." Id.

C. Standard of Review on Motion to Strike.

Rule 12(f) states that a court may strike from the pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. Fed. R. Civ. P. 12(f). Generally, motions to strike insufficient defenses are disfavored, and, "even when technically appropriate and well-founded, they often are not granted in the absence of a showing of prejudice to the moving party." 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1381 (2d ed. 1990). "In sum, a motion to strike will not be granted if the insufficiency of the defense is not clearly apparent, or if it raises factual issues that should be determined on a hearing on the merits." Id.

IV. ANALYSIS.

[1] A. Defendants Are Entitled to Judgment as a Matter of Law With Respect to the Sixteen Letters Challenged in Their Motion for Partial Summary Judgment.

Under the FOIA, the IRS must respond to "any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed" by making the requested records "promptly available to such person." 5 U.S.C. § 552(a) (3). Certain agency records, however, are required to be published in the Federal Register or made "available for public inspection and copying." 5 U.S.C. § 552(a) (1) and (2). Those records that are published pursuant to § 552(a) (1) or publicly available pursuant to § 552(a) (2) need not be provided to a person who requests them from the agency under § 552(a) (3). 5 U.S.C. § 552(a) (3).

The FOIA "only requires disclosure of certain documents which the law requires the agency to prepare or which the agency has decided for its own reasons to create." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 162 (1975). "Under FOIA an individual may only obtain access to records 'written or transcribed to perpetuate knowledge or events.' Therefore, FOIA neither requires an agency to answer questions disguised as a FOIA request, or to create documents or opinions in response to an individual's request for information . . . . FOIA creates only a right of access to records, not a right to personal services." Hudgins v. IRS, 620 F. Supp. 19, 21 [56 AFTR 2d 85-5793] (D.D.C. 1985), aff'd, 808 F.2d 137 (D.C. Cir.), cert. denied, 484 U.S. 803 (1987) (internal citations omitted). Courts decline to order agencies to comply with FOIA requests that "seem to be nothing more than an effort to secure legal research regarding the Internal Revenue Code from the IRS." Id.

Thirteen of the sixteen letters challenged by the government in its motion (letters H5, H8, H9, H10, H19, H21, R7, R10, R15, R17, R19, R21, and R32) appear to be nothing more than efforts to secure legal research from the IRS using the FOIA. Moreover, in most of those letters, Plaintiffs ask for copies of statutes or regulations that are not covered by the FOIA provision covering individual requests for agency records. 5 U.S.C. § 552(a). At the hearing, Plaintiffs conceded that FOIA does not require the IRS to provide them with copies of statutes or regulations.

One of Harter's FOIA requests, letter H23, asks the IRS to provide the Office of Management and Budget ("OMB") control number currently assigned to 26 C.F.R. § 1.1 -1. Under the Paperwork Reduction Act of 1980 ("PRA") and the regulations promulgated under the PRA, information collection requests by agencies must display OMB control numbers. 44 U.S.C. § 3504(c) (3) (A). While the IRS is generally subject to the PRA and must display control numbers on its tax return forms and regulations when required by the PRA, United States v. Hicks, 947 F.2d 1356, 1359 [68 AFTR 2d 91-5762] (9th Cir. 1991), Plaintiffs have not shown that 26 C.F.R. § 1.1-1, which covers the deter-

mination of individual tax liability, is required to have a control number.[1]

Two requests, letters H20 and R20, were made under the Privacy Act, 5 U.S.C. § 552a. The Privacy Act provides that an individual requesting access to "his record or to any information pertaining to him which is contained in the system [of records maintained by an agency]" shall be permitted to "review the record and have a copy made of all or any portion thereof in a form comprehensible to him." 5 U.S.C. § 552a(d) (1). The provision covering individual access to records does not require that the agency create a record or document in response to an individual request. Id.

Plaintiffs do not have a Privacy Act right to the "documents" sought in letters H20 and R20. Each of those letters requests "a certified document that identifies the specific taxable sources of income for which I have a liability pursuant to 26 CFR § 1.861-8(f) (1)" for a given year. The IRS responded to both letters H20 and R20 with copies of records pertaining to the requesting individual. Harter and Rhoads claim that their requests remain unfulfilled because the documents sent to them did not contain the "certified document" described in their requests. Harter and Rhoads have not, however, claimed that such documents should be or are contained in a system of records maintained by the IRS. As the Privacy Act does not require that the IRS create records in response to individual requests, judgment on the pleadings is granted with respect to letters H20 and R20.[2]

B. Plaintiffs' Motion to Strike Defenses Is Denied.

At the hearing, Harter and Rhoads narrowed their motion to strike. They now seek to have the court strike only the first, seventh, and eighth defenses in Defendants' Answer. As the parties have agreed that letter R9, the subject of the seventh defense, is not in issue, the seventh defense is moot. Therefore, the court need not strike the seventh defense. Plaintiffs have not shown that either the first defense (failure to state a claim) or the eighth defense (objection to the filing of Plaintiffs' Memorandum of Law) is clearly insufficient. Accordingly, the court denies Plaintiffs' motion to strike with respect to the first and eighth defenses as well.

V. CONCLUSION.

For the foregoing reasons, the court grants Defendants' motion for partial summary judgment. The court denies Plaintiffs' motion to strike defenses.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, October 16, 2002.

SUSAN OKI MOLLWAY

UNITED STATES DISTRICT JUDGE

Harter et al. v. Internal Revenue Service et al., Civ. No. 02-00325 SOM/KSC, Order Granting Defendants' Motion for Partial Summary Judgment and Denying Plaintiffs' Motion to Strike Defenses.

¶2002-5661

UNITED STATES OF AMERICA, PLAINTIFF v. Robert L. FOSTER, DEFENDANT. U.S. District Court, Eastern Dist. of Virginia, (DC VA) Civil Action Number 3:02CV133, Oct. 18, 2002. Decision for Govt.

1. Return preparer penalties—injunctions. Return preparer was permanently enjoined under IRC §7407 and IRC §7402 from preparing or assisting in preparation of returns that claimed fabricated tax credits for slavery reparations or other comparably frivolous items: IRC §7407's

[1] At the hearing, Harter urged the court to accept the proposition that the PRA requires that 26 C.F.R. § 1-1.1 have an OMB control number. While the court must draw factual inferences in favor of the nonmoving party, the court need not defer to any party's legal conclusions. Accordingly, the court does not defer to Plaintiffs' assertion that 26 C.F.R. § 1-1.1 must, as a matter of law, have an OMB control number.

[2] In certain cases, individuals making requests under the Privacy Act may be entitled to obtain records under the FOIA even when those records would be exempt from disclosure under the Privacy Act. "No agency shall rely on any exemption [in the Privacy Act] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of [the FOIA]." 5 U.S.C. § 552a(t) (2). As discussed above, however, the FOIA, like the Privacy Act, does not require that agencies create documents. Therefore, the "documents" requested in letters H20 and R20 would not be available under the FOIA.

injunction prerequisites were met where preparer's preparation of at least 13 false credit claims for which there was no statutory basis, and thus no possibility of being sustained on merits, was both conduct punishable under IRC §6694 and fraudulent or deceptive conduct that substantially interfered with tax law administration; and preparer repeatedly engaged in such offensive conduct. Also, injunctive relief was "appropriate" under both IRC §7407 and IRC §7402, considering that preparer's conduct caused govt. considerable harm, public had strong interest in preventing further false claims, and harm to preparer would be minimal. But, govt.'s request to extend injunction to prohibit preparer from *all* return preparation activity was denied since limited injunction was sufficient to prevent him from interfering with tax law administration and blanket injunction taking away his livelihood would cause significant harm. *Reference:* United States Tax Reporter ¶74,075; 74,025.01(11). IRC §6694; 6701; 7402; 7407.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA,

MEMORANDUM OPINION

Richard L. Williams SENIOR UNITED STATES DISTRICT JUDGE

Richmond Division

This matter is before the Court on the government's motion for summary judgment. The motion was filed by the government on August 30, 2002. The government's complaint and motion for summary judgment seek a permanent injunction against Mr. Foster, preventing him from acting as a tax return preparer and from preparing returns that contain claims for fabricated tax credits. A preliminary injunction was entered on July 31, 2002. The preliminary injunction did not prohibit Mr. Foster from all tax preparing activity; it only prevented him from preparing returns that made claims for credits for slavery reparations or other fabricated credits not provided for in the Internal Revenue Code. The defendant did not dispute entry of the preliminary injunction. The defendant did not file an opposition to the government's motion for summary judgment. Instead, on October 4, 2002, more than one month after the government filed its motion for summary judgment and past the time period allowed for a response, the defendant filed a response stating that he is in default and that he recognizes that the government's motion for summary judgment will be granted. While the defendant is not in default because he filed an answer on May 23, 2002, the defendant failed to file a response to the motion for summary judgment setting forth specific facts showing a genuine issue for trial. Rule 56(e) provides that where an adverse party does not so respond, "summary judgment, if appropriate, shall be entered against the adverse party." Therefore, the government's motion is ripe for evaluation by the Court.

[1] Summary judgment should be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Since there is no opposition by the defendant, there is no evidence before the Court that creates a genuine issue as to any material fact, and the only question is whether the government establishes its claim as a matter of law.

Section 7407 of the Internal Revenue Code provides in relevant part:

> [I]f the court finds—
>
> (1) that an income tax return preparer has—
>
> (A) engaged in any conduct subject to penalty under section 6694 or 6695, or subject to any criminal penalty provided by this title, . . . or
>
> (D) engaged in any other fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws, and
>
> (2) that injunctive relief is appropriate to prevent the recurrence of such conduct,

the court may enjoin such person from further engaging in such conduct. If the court

finds that an income tax return preparer has continually or repeatedly engaged in any conduct described in subparagraphs (A) through (D) of this subsection and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of this title, the court may enjoin such person from acting as an income tax return preparer.

26 U.S.C. § 7407(b).

The documents filed in support of the government's motion for summary judgment establish that Mr. Foster prepares income tax returns for compensation and is therefore an "income tax return preparer" as that term is defined by Section 7701(a)(36) of the Internal Revenue Code.

The government's evidence also shows that Mr. Foster engaged in conduct subject to penalty under Section 6694(a) of the Internal Revenue Code. That section establishes a penalty if an understatement of liability or a claim for refund is "due to a position for which there was not a realistic possibility of being sustained on its merits." 26 U.S.C. § 6694(a). Mr. Foster prepared or assisted in preparing at least thirteen tax returns claiming false tax credits for slavery reparations, which were identified on the tax claims as tax credits for "undistributed long-term capital gains." No provision of the Internal Revenue Code provides for a tax credit for slavery reparations. Therefore, these claims for refunds made by Mr. Foster were based on a position for which there was no realistic possibility of being sustained on the merits. Additionally, attempts by taxpayers to fabricate tax credits or to exempt them-selves from the operation of the Internal Revenue Code are frivolous and routinely rejected by the courts. See, e.g. McKee v. United States, 781 F.2d 1043 [57 AFTR 2d 86-646] (4th Cir. 1986). Mr. Foster's con-duct is of the type covered by Section 7407(b)(1)(A).

Additionally, Mr. Foster's conduct amounted to "fraudulent or deceptive conduct which substantially interferes with the proper administration of the Internal Revenue laws," as described in Section 7407(b)(1)(D). Mr. Foster knew that the Internal Revenue Code does not provide tax credits for slavery reparations, and despite that knowledge, he prepared tax returns claiming credits to which his clients were not entitled. Such returns are false and create a substantial burden on the Internal Revenue Service.

Furthermore, the Court finds that injunctive relief is appropriate to prevent the recurrence of Mr. Foster's misconduct. Five factors are relevant to determining the likelihood of recurrence of particular misconduct: 1) the gravity of the harm caused by the offense, 2) the extent of the defendant's participation and his degree of scienter, 3) the isolated or recurrent nature of the infraction and the likelihood that the defendant's customary business activities might again involve him in such transactions, 4) the defendant's recognition of his own culpability, and 5) the sincerity of the defendant's assurances against future violations. See United States v. Raymond, 228 F.3d 804, 813 [86 AFTR 2d 2000-6196] (7th Cir. 2000). Here, Mr. Foster's claims for refunds caused a burden on the Internal Revenue Service in its processing of the claims, identifying, and denying improperly asserted claims for refunds. Mr. Foster knows and knew at the time he made the claims that the Internal Revenue Code does not provide for refunds for slavery reparations, Mr. Foster regularly prepares returns and claimed the false refunds on multiple occasions, and he continues to assert that he feels the claims are justified. Therefore, Mr. Foster's conduct is of a recurrent nature and an injunction is an appropriate form of remedy.

Because the government's evidence shows that Mr. Foster's conduct is of the type specified in Section 7407 and because injunctive relief is appropriate to prevent the recurrence of such conduct, Section 7407 provides that the Court may enjoin Mr. Foster from further engaging in the offensive conduct. The government's complaint and motion for summary judgment ask the Court to go further and permanently enjoin Mr. Foster from acting as an income tax preparer, not simply to cease

the particular conduct of making false claims. Section 7407 allows the Court to do this if the Court finds first, that Mr. Foster ''continually or repeatedly'' engaged in the conduct described in Section 7407, which, in this case is making false claims for credits or refunds, and second, that an injunction prohibiting only that conduct would be insufficient to prevent Mr. Foster's interference with the proper administration of the Internal Revenue laws. In addition to Section 7407, Section 7402(a) gives district courts power to issue injunctions ''as may be necessary or appropriate for the enforcement of the internal revenue laws.'' The statute provides that this remedy is ''in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.'' 26 U.S.C. § 7402(a).

In determining whether to enter an injunction, the Court must consider: 1) the likelihood of irreparable harm to the plaintiff without the injunction, 2) the likelihood of harm to the defendant with the injunction, 3) the plaintiff's likelihood of success on the merits, and 4) the public interest. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1054 (4th Cir. 1985); Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Mfg. Co., Inc., 550 F.2d 189, 193 (4th Cir. 1977). Here, Mr. Foster's false claims have been made repeatedly, his conduct causes the Internal Revenue Service and the government considerable harm on each occasion, the government has successfully shown that Mr. Foster's conduct in making false claims is in violation of the Internal Revenue Code, and the public has a strong interest in minimizing the number of false claims for refunds that are made and in ensuring that tax preparers follow the law in the preparation and submission of tax returns. All of these factors weigh in favor of granting an injunction in this case. Mr. Foster may suffer significant harm if he is enjoined from acting as a tax preparer in any capacity, particularly if that is his method of earning a livelihood. On the other hand, there is a very limited risk of harm to Mr. Foster, if any, from an injunction that merely prohibits him from making false claims for tax credits and requires him to abide by the existing Internal Revenue laws in preparing tax returns.

The Court finds that an injunction is necessary and appropriate in this case. While the Court finds that Mr. Foster disregarded the Internal Revenue laws and caused a substantial burden on the government in doing so, and that such conduct, if continued, would seriously impair the proper administration of the Internal Revenue laws, the Court does not find that an injunction prohibiting only the offensive conduct would be insufficient to prevent Mr. Foster from interfering with the proper administration of the Internal Revenue laws. Therefore, the Court will grant the government's motion for summary judgment and will enter an injunction against Mr. Foster, but only to the extent that it prohibits Mr. Foster from preparing or assisting in the preparation of claiming refunds based on fabricated tax credits for slavery reparations or other comparable frivolous grounds.

An appropriate Order shall enter.

DATE OCT 18 2002

Richard L. Williams

SENIOR UNITED STATES DISTRICT JUDGE

FINAL ORDER

Richard L. Williams SENIOR UNITED STATES DISTRICT JUDGE

This matter is before the Court on the government's motion for summary judgment. For reasons stated in the accompanying Memorandum Opinion, the motion is GRANTED. The defendant and anyone acting in concert with him are PERMANENTLY ENJOINED from:

1. Preparing returns, amended returns, and/or other documents to be submitted to the Internal Revenue Service claiming or supporting claims for refunds based on fabricated tax credits for reparations for slavery, segregation, or treatment as second-class citizens, or any other comparable grounds, as well as any other fabricated tax credit;

2. Providing any samples of returns, amended returns, and/or other documents to third parties to be copied and submitted to the Internal Revenue Service claiming or supporting claims for refunds based on fabricated tax credits for reparations for slavery, segregation, treatment as second-class citizens, or any other comparable grounds, as well as any other fabricated tax credit;

3. Representing, advertising, or promoting the frivolous position that an individual may claim a tax credit for reparations for slavery, segregation, or treatment as second-class citizens, or any other comparable grounds;

4. Engaging in any conduct subject to penalty under Section 6701 of the Internal Revenue Code, such as assisting others in the preparation of any tax forms or other documents to be used in connection with any material matter arising under the internal revenue laws and which he knows will, if so used, result in the understatement of income tax liability;

5. Engaging in any conduct subject to penalty under Section 6694 of the Internal Revenue Code, such as preparing any part of a return or claim for refund that includes an unrealistic position;

6. Engaging in any other similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws;

7. Inducing, aiding, or abetting any person to engage in any of the above-identified conduct.

Finally, the Court DIRECTS that Mr. Foster shall contact:

(A) all persons to whom he gave, sold, or distributed any materials espousing his fabricated tax credit for slavery reparations;

(B) all persons on whose behalf he prepared or assisted in the preparation of any federal income tax return containing a fabricated tax credit for slavery reparations; and

(C) all persons who contacted him regarding his fabricated tax credit for slavery reparations (in correspondence, through personal or telephone conversations, or through electronic means)

and inform those persons of the Court's findings concerning the falsity of his fabricated tax credit for slavery reparations, the falsity of the returns he prepared containing the fabricated tax credit, the possibility of the imposition of frivolous-return penalties against them, the possibility that the United States may seek to recover any erroneous payment they may have received, and the fact that a permanent injunction has been entered against him.

It is so ORDERED.

Let the Clerk send a copy of this Final Order and the accompanying Memorandum Opinion to all counsel of record.

DATE OCT 18 2002

Richard L. Williams

SENIOR UNITED STATES DISTRICT JUDGE

¶2002-5662

UNITED STATES OF AMERICA, PLAINTIFF v. Howard I. GREEN, DEFENDANT. U.S. District Court, Eastern Dist. of Pennsylvania, (DC PA) CIVIL ACTION NO. 01-CV-3849, Oct. 22, 2002. Years 1979, 1980, 1981. Decision for Govt.

1. Collection actions—reducing assessments to judgment—summary judgment—res judicata—limitations periods. Taxpayer's remaining assessments for years that were already subject of prior collection action were reduced to judgment on summary judgment: res judicata didn't preclude govt. from pursuing instant claim where prior suit, which was based on fraudulent conveyance claim, was separate and distinct from current action, premised on different recovery theory and reliant on different facts and evidence. Also, New Jersey law's "entire controversy doctrine" didn't apply; suit was timely brought within IRC §6502(a)'s 10-year limitations period; and taxpayer offered no proof to

rebut assessments' presumptive validity. *Reference:* United States Tax Reporter ¶74,035.01(25); 74,337.504(5); 65,025.03(5). IRC §6502; 7403.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

MEMORANDUM

BUCKWALTER, J.

Presently before the Court are Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment. For the reasons stated below, Plaintiff's Motion for Summary Judgment is GRANTED, and Defendant's Cross-Motion for Summary Judgment is DENIED.

I. BACKGROUND

This present action (Green II) stems from Howard I. Green's ("Green") continual effort to avoid paying the taxes he owes. In the late 1970s and early 1980s, Green was president and chairman of the board of Fidelity American Financial Corporation and its three subsidiaries. Green substantially under-reported his federal income tax liabilities in the tax years 1979, 1980 and 1981.[1]

On October 9, 1991, the United States made an assessment against Green for unpaid income taxes, fraud penalties, and interest for the 1979–1981 tax period. The assessment was made pursuant to a Form 870-AD, executed by Green and his wife on June 25, 1991. The Form 870-AD provides that Green consented to the assessment and collection of the deficiencies with interest as provided by law. [Pl's Ex. 1].

In Green I, the United States sought to set aside as fraudulent a transfer of Green's interest in his residency to his wife in 1981 and to foreclose its tax liens against the property. See Green, 1998 WL 167278, at 1. The Eastern District of Pennsylvania held that the "transfer of the [p]roperty from Howard Green to himself and Mary Green shall be set aside as fraudulent and is invalid against the claims of the United States." Id. at 12. On appeal, the Third Circuit Court of Appeals affirmed the district court's finding that the conveyance of property was fraudulent. See Green, 201 F.3d at 251 [85 AFTR 2d 2000-431].

In order to prove its case in Green I, the United States submitted, *inter alia*, evidence of the 1991 assessments against Green in order to prove the existence of Green's tax liability. Green, however, did not challenge the validity of these assessments before the district court, nor did Green raise the issue on appeal. Additionally, the district court in Green I made the factual finding that by signing the Form 870-AD, Green "agreed to the amount of the assessments ... and waived [his] right to challenge them." Green, 1998 WL 167278, at 6.

On October 9, 1998, this Court entered an order for the sale of the Green's residence by the United States Marshal for the Eastern District of Pennsylvania to satisfy outstanding federal tax liens. See United States v. Green, No. 96-CV-7275, 1998 U.S. Dist. LEXIS 16180, at 2 (E.D. Pa. Oct. 9, 1998). The Court ordered that the proceeds of the sale should be distributed to the United States to satisfy federal tax liens in the amount of the then-current balance of $662,139.83. See id. at 8. Though the sale of the Green's residence did not bring in sufficient funds to satisfy all lienholders, this Court did grant the United States $16,714.89, "which amount represents a portion of Howard Green's outstanding tax liability for unpaid income taxes for the years 1979, 1980 and 1981." United States v. Green, No. 96-CV-7275, 2001 U.S. Dist. LEXIS 10313, at 2 [88 AFTR 2d 2001-5181] (E.D. Pa. July 13, 2001).

On July 30, 2001, the United States filed this present action ("Green II") seeking to reduce to judgment Green's remaining outstanding tax liabilities for 1979–1981. The United States filed a motion for summary judgment. Green also filed a motion for

[1] A more detailed look at Green's machinations and troubles with the law can be found in United States v. Green, No. 96-7275, 1998 WL 167278 (E.D. Pa. Apr. 10, 1998) ("Green I") and United States v. Green, 201 F.3d 251 [85 AFTR 2d 2000-431] (3d. Cir. 2000).

summary judgment, arguing that the United State's claims are barred by the principal of *res judicata* because ''[a]ll actions should have been consolidated . . . instead of commencing a new suit on the same cause of action that was litigated originally.'' [Def's Mot. Summ. J.].

II. ANALYSIS[2]

A. Res Judicata

[1] Green argues that the United States' present action should be barred by the principles of *res judicata*, or claim preclusion. Green's position is that the United States could have brought this lawsuit as part of the suit to set aside the conveyance of Green's residence as fraudulent (Green I), and because it did not, the United States is now foreclosed under the principles of *res judicata* from bringing this suit (Green II) to reduce the assessments to judgment.

''Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'' New Hampshire v. Maine, 121 S.Ct. 1808, 1814 (2001). ''[*R*]*es judicata* or claim preclusion is designed to avoid piecemeal litigation of claims arising from the same events.'' General Elec. Co. v. Deutz Ag., 270 F.3d 144, 157–58 (3d Cir. 2001). ''[C]laim preclusion prohibits litigants from pursuing a matter that has not previously been litigated but which should have advanced in an earlier suit.'' Id. at 157–58 n.5.

Application of *res judicata* requires ''(1) a final judgment on the merits of the prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same causes of action.'' United States v. Athlone Indus., Inc., 746 F.2d 977, 983 (3d Cir. 1984). Claim preclusion does not apply in the present case. Even though the first and second elements are not disputed, the third element is missing. Green II is not based on the same cause of action as Green I.

Two separate causes of action are deemed to be the same when ''an essential similarity of the underlying events giving rise to the various legal claims'' exists. Id. at 984. When determining whether two causes of actions are the same, courts will consider ''(1) whether the acts complained of and the demand for relief are the same (that is, whether the wrong for which redress is sought is the same in both actions); (2) whether the theory of recovery is the same; (3) whether the witnesses and documents necessary at trial are the same (that is, whether the same evidence necessary to maintain the second action would have been sufficient to support the first); and (4) whether the *material* facts alleged are the same.'' Id. (citations omitted).

Green I and Green II clearly are two separate causes of action, premised on different theories of recovery and each demanding a different form of relief. Green I involved a suit to set aside as fraudulent an April 1981 conveyance from Howard Green to Howard and Mary Green. In Green II, however, the United States seeks to reduce the outstanding tax assessments against Howard Green to judgment. As noted in the United States' opposition to Green's motion for summary judgment, the theory of recovery in Green I was premised on 26 U.S.C. § 7403, which governs actions to subject property to the payment of tax, and the actual fraud provisions of the Pennsylvania Uniform Fraudulent Conveyances Act. In contrast, Green II is premised on 26.U.S.C. § 7402, which grants federal district courts the authority to enter judgment on account of unpaid tax liabilities. [Pl's Compl. at ¶3].

Additionally, both the evidence and material facts of Green I and Green II are different. In Green I, the United States introduced evidence of the conveyance of Green's home and evidence that the conveyance was not made in accordance with the Greens' antenuptial agreement. See Green, 1998 WL 167278, at 1. This evidence supported the material facts alleged in Green I that Green transferred his home

[2] In defendant's brief in support of his motion for summary judgment, Green sets forth four separate ''defenses.'' Two of the ''defenses,'' specifically, the third and the fourth defense, are incomprehensible and are no defense at all. As a result, the Court will address Green's remaining arguments of *res judicata*, the entire controversy doctrine, and the statute of limitations.

to his wife for nominal consideration in an attempt to evade the payment of taxes. In contrast, the evidence and the material facts in Green II relate solely to Green's remaining tax liability. The United States relies on both a Certified Form 4340, which is the Certificate of Assessment and Payments for Green for the periods 1979–1981, and a Form 870-AD, which is the Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and of Acceptance of Overassessment, as evidence of Green's tax liability.

In short, the United States' present cause of action is not barred by the principles of *res judicata* because the present suit is not based on the same cause of action as Green I.

B. New Jersey's "Entire Controversy Doctrine"

Defendant also argues that New Jersey's "entire controversy doctrine" should apply to this case. The Court will not entertain this argument as New Jersey law does not apply to this case.

C. Statute of Limitations

Without citing any authority, Green also argues that the United States' action is barred by the statute of limitations. 26 U.S.C. § 6502(a), which governs collection after assessment, provides that a proper tax assessment "may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun within 10 years after the assessment of the tax." 26 U.S.C. § 6502(a). The assessment was made on October 9, 1991, and the present suit was brought on July 27, 2001. Thus, the actions falls within the applicable ten year time frame, and, as a result, the action is not time barred.

D. Green's continuing obligation to pay taxes

Also before the Court is the United States' motion for summary judgment regarding Green's liability for the taxes at issue. For the following reasons, Plaintiff's motion is granted.

In tax law, an assessment is entitled to a legal presumption of correctness. United States v. Fior D'Italia, Inc., 122 S.Ct. 2117, 2122 [89 AFTR 2d 2002-2883] (2002). The United States levied an assessment against Green on October 9, 1991 for unpaid income taxes, fraud penalties, and interest. The assessment was made pursuant to a Form 870-AD, executed by Green and his wife on June 25, 1991. The Form 870-AD provides that the Greens consented to the assessment and collection of the deficiencies with interest as provided by law. [Pl's Ex. 1]. Additionally, the district court in Green I made the factual finding that by signing the Form 870-AD, Green "agreed to the amount of the assessments ... and waived [his] right to challenge them." Green, 1998 WL 167278, at 6.

The burden of correctness allows the United States to establish its prima facie case of tax liability by offering into evidence the Commissioner's assessment. See Psaty v. United States, 442 F.2d 1154, 1159 [27 AFTR 2d 71-1184] (3d Cir. 1971); Sadowski v. United States, 687 F. Supp. 966, 972 [62 AFTR 2d 88-5343] (E.D. Pa. 1988). Here, the United States has submitted both the Form 4340 and the Form 870-AD as evidence of Green's tax liability.

The burden of producing evidence to rebut the presumption of correctness is then on the taxpayer. Resyn Corp. v. United States, 851 F.2d 660, 663 [63 AFTR 2d 89-757] (3d Cir. 1988). Green, however, fails to offer any evidence contradicting the correctness of the tax assessment against him. As such, there is no genuine issue of fact regarding the sum due to the United States.

III. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Summary Judgment is granted and Defendant's Motion for Summary Judgment is denied.

An appropriate order follows.

ORDER

RONALD L. BUCKWALTER, J

AND NOW, this 22nd day of October 2002, upon consideration of Plaintiff's Mo-

tion for Summary Judgment (Docket No. 7), Defendant's Cross-Motion for Summary Judgment (Docket No. 8), Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment (Docket No. 12), and Defendant's response thereto (Docket No. 17), it is hereby ORDERED that Plaintiff's Motion for Summary Judgment is GRANTED and Defendant's Motion for Summary Judgment is DENIED. Judgment is entered for Plaintiff United States of America and against Defendant Green.

This case is CLOSED.

BY THE COURT:

RONALD L. BUCKWALTER, J.

¶2002-5663

IN RE: Gerald Joseph FONDREN, DEBTOR. Gerald Joseph FONDREN, PLAINTIFF v. UNITED STATES OF AMERICA (INTERNAL REVENUE SERVICE), DEFENDANT. U.S. Bankruptcy Court, Middle Dist. of Alabama, (Bktcy Ct AL) Case No. 01-6575-DHW; Adv. Pro. No. 01-274-DHW, July 31, 2002. Years 1996, 1997. Decision for Taxpayer in part and for Govt. in part.

1. Tax claims in bankruptcy—dischargeability—failure to file returns—zero returns. Chap. 7 debtor's tax debt for year he filed "zero return" wasn't dischargeable under 11 USC §523(a)(1)(B)(i): zero return containing no financial data and accompanied by protest-type arguments wasn't valid return for §523(a)(1)(B)(i) purposes. But, govt. conceded dishchargeability of other year's taxes. *Reference:* United States Tax Reporter ¶68,726.52(27).

UNITED STATES BANKRUPTCY COURT MIDDLE DISTRICT OF ALABAMA,

ORDER ON COMPLAINT TO DETERMINE DISCHARGEABILITY

Dwight H. Williams, Jr. United States Bankruptcy Judge

Chapter 7

In accordance with the Opinion entered this day, it is hereby

ORDERED that the income tax debt owed by Gerald Joseph Fondren to the United States of America, Internal Revenue Service, for tax year 1996, as currently assessed, is not excepted from discharge under 11 U.S.C. § 523(a)(1), and that debt is hereby declared to be DISCHARGEABLE. It is

FURTHER ORDERED that the income tax debt owed by Gerald Joseph Fondren to the United States of America, Internal Revenue Service, for tax year 1997 is excepted from discharge under 11 U.S.C. § 523(a)(1), and that debt is hereby declared to be NONDISCHARGEABLE.

Done this 31st day of July, 2002.

/s/ Dwight H. Williams, Jr.

United States Bankruptcy Judge

c: C. H. Espy, Jr., Attorney for Plaintiff

Patricia Allen Conover, Attorney for Defendant

OPINION ON COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

Dwight H. Williams, Jr. United States Bankruptcy Judge

[1] The debtor, Gerald Joseph Fondren, filed a complaint under 11 U.S.C. § 523(a)(1) to determine the dischargeability of his income tax liability to the United States for years 1996 and 1997.

The United States filed an answer conceding that the income tax liability for 1996, as currently assessed, is dischargeable. However, the United States contends that the debtor's income tax liability for 1997 is not dischargeable because the debtor failed to file a return for that tax year.

The debtor contends that he did file a return as reflected by the 1997 Form 1040 filed on February 10, 1998.

The debtor filed a partial motion for summary judgment on that issue, and the United States filed a cross motion for summary judgment. The parties submitted the issue to the court on briefs of counsel.

The relevant facts are not in dispute. The debtor filed a Form 1040 on February 10, 1998 for tax year 1997. The form reports zero income: the debtor placed a zero on each line corresponding to each type of income. The debtor also placed zeros on the lines corresponding to tax computation, credits, and other taxes. The form reports withholdings in the amount of $3,434.61 and claims a refund for that amount. Attached to the form is a two-page document listing several reasons why the debtor is not required to list items of income on the form.

Under 11 U.S.C. § 523(a)(1)(B)(i), an individual is not discharged from any debt "with respect to which a return, if required . . . was not filed."

The parties dispute whether the Form 1040 filed by the debtor is sufficient to constitute a "return" within the meaning of 11 U.S.C. § 523(a)(1)(B)(i).

The Fifth Circuit construed the effect of a similar Form 1040 in *United States v. Smith*, 618 F.2d 280 [46 AFTR 2d 80-5071] (5th Cir. 1980). In *Smith*, the criminal defendant was convicted of failing to file income tax returns for years 1974 and 1975:

> The bare act of filing a form 1040 does not constitute a tax "return" under section 7203 [of the Internal Revenue Code] . . . . The statute requires disclosure of "information relating to the taxpayer's income from which the tax can be computed." Smith's 1974 and 1975 "returns" which contained nothing but zeros and constitutional objections, plainly did not even purport to disclose the required information. Smith was thus properly charged with failure to file for those years.

Smith, 618 F.2d at 281 (citations omitted). The Eleventh Circuit adopted the decisions of the former Fifth Circuit as binding precedent. *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). *See also United States v. Pilcher*, 672 F.2d 875 [50 AFTR 2d 82-5392] (11th Cir. 1982):

> The law is reasonably clear. Every income earner is required to file an income tax return. A taxpayer cannot assert a Fifth Amendment privilege against compulsory self-incrimination to justify the failure to file any return at all. Protest documents duplicating in part U. S. individual income tax return form 1040's but containing no financial data are not tax "returns" for the purposes of section 7203. United States v. Booher, 641 F.2d 218, 219 [47 AFTR 2d 81-1385] (5th Cir. 1981); United States v. Smith, 618 F.2d 280, 281 [46 AFTR 2d 80-5071] (5thCir. 1980); United States v. Johnson, 577 F.2d 1304, 1311 [42 AFTR 2d 78-5624] (5th Cir. 1978). Although the source of income might be privileged, the amount must be reported. The failure to provide amounts on income tax returns cannot be justified out of a political disagreement with the tax laws or in protest against the policies of the Government.

Pilcher, 672 F.2d at 877 (most citations omitted).

Based on the above authority, the court concludes that the Form 1040 filed by the debtor in the instant case for tax year 1997 did not constitute a "return." Therefore, the income tax liability of the debtor for tax year 1997 is excepted from discharge under 11 U.S.C. § 523(a)(1)(B)(i).

A separate order will enter consistent with this opinion.

Done this 31st day of July, 2002.

/s/ Dwight H. Williams, Jr.

United States Bankruptcy Judge

c: C. H. Espy, Jr., Attorney for Debtor

Patricia Allen Conover, Attorney for Defendant

¶2002-5664

IN THE MATTER OF THE TAX LIABILITIES OF: JOHN DOES, United States taxpayers who, during the years ended December 31, 1998 through December 31, 2001, had signature authority over MASTERCARD payment cards issued by, through, or on behalf of banks other financial institutions in An-

tigua and Barbuda, Bahamas, and Cayman Islands, or issued to persons or entities in Antigua and Barbuda, Bahamas, and Cayman Islands. U.S. District Court, Northern Dist. of Texas, (DC TX) Civil Action No. 3:-02-CV-1854-L, Oct. 25, 2002. District Court, (2002, DC TX) 90 AFTR 2d 2002-6967, adopted. Decision for Govt.

1. Third-party summonses—"John Doe" summonses—legitimate purpose—proof. Magistrate judge's recommendation to grant govt.'s ex-parte petition for leave for IRS to serve "John Doe" summonses on 3d-party corps. was adopted, based on judge's reasoning. *Reference:* United States Tax Reporter ¶76,095.01(50). IRC §7609.

ORDER

Sam A. Lindsay, United States District Judge

[1] Pursuant to 28 U.S.C. § 636(b), and an order of the court in implementation thereof, the United States of America's *Ex Parte* Petition for Leave to Serve "John Doe" Summonses, filed August 29, 2002, was referred to the United States magistrate judge for proposed findings and recommendation. On September 30, 2002, the Findings, Conclusions and Recommendation of the United States Magistrate Judge ("Report") were filed. Pursuant to 26 U.S.C. § 7609(h)(2), the court must determine *ex parte* based solely on the petition and supporting affidavits whether to allow John Doe summonses to issue. As such, the court may rule on the government's petition without notice to any person or entity that may be affected by this order.

After making an independent review of the pleadings, file and record in this case, and the findings and conclusions of the magistrate judge, the court determines that the magistrate judge's findings and conclusions are correct, and hereby accepts them as the findings and conclusions of the court. Accordingly, for the reasons stated by the magistrate judge in his Report, the government's *Ex Parte* Petition for Leave to Serve "John Doe" Summonses is granted. The Internal Revenue Service, through Revenue Agent Joseph C. West or any other authorized officer or agent, is hereby authorized to serve John Doe summonses upon Accor Lodging North America, AMR Corporation, Bulloch, Seger Weaver & Company, PLLC, CI Host, Inc., International Airline Passengers Association, Mannatech, Inc., Mary Kay, Inc., Omni Hotels, Sabre, Inc., Southwest Airlines Co., and Wyndham International, Inc., in substantially the forms attached as exhibits to the Declaration of Revenue Agent West at Tabs 2(A) through (K), respectively, and including the schedules setting forth the account numbers for the MasterCard payment cards used with each merchant.

A copy of this order and the Findings, Conclusions and Recommendation of the United States Magistrate Judge shall be served together with the John Doe summonses.

It is so ordered this 25th day of October, 2002.

Sam A. Lindsay

United States District Judge

¶2002-5665

IN RE: MEDNET AMBULANCE SERVICE, DEBTOR. Steven G. HIRSHFIELD, PLAINTIFF v. UNITED STATES OF AMERICA, on behalf of its agency, the INTERNAL REVENUE SERVICE, DEFENDANT. U.S. Bankruptcy Court, Dist. of New Mexico, (Bktcy Ct NM) Docket No. 11-01-16031 MA; Adversary No. 02-01030M, Oct. 17, 2002. Years 1999, 2000. Decision for Govt.

1. Bankruptcy court jurisdiction—100% penalty for failure to pay over trust fund taxes—Anti-Injunction Act. Pres./sole shareholder's bankruptcy court suit to enjoin IRS from collecting bankrupt co.'s unpaid payroll taxes from him personally was dismissed: even if court had jurisdiction over suit, AIA barred relief absent any proof that govt. couldn't ultimately prevail on its right to collect pre-

sumptively valid IRC §6672 penalty assessments. *Reference:* United States Tax Reporter ¶74,215.05(5); 68,726.52(5); 66,725.02(35). IRC §6672; 7421.

Michael Daniels P.O. Box 1640 Albuquerque, NM 87103
Jonathan R. Williams Attorney, Tax Division Department of Justice Maxus Energy Tower 717 N. Harwood, Suite 400 Dallas, TX 75201

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW MEXICO,

JUDGMENT

MARK B. McFEELEY, UNITED STATES BANKRUPTCY JUDGE

THIS MATTER came before the Court on an Application for Preliminary and Permanent Injunction (hereinafter ''Complaint'') by Plaintiff, Steven G. Hirshfield (''Hirshfield''). In his Complaint, Hirshfield asks this Court to enter a preliminary injunction and subsequently a permanent injunction to prevent the IRS from collecting payroll taxes from Hirshfield personally. In response, the Defendant, the United States of America on behalf of the Internal Revenue Service, (hereinafter ''IRS''), filed a Motion for Summary Judgment (''Motion''). The IRS contends that summary judgment is appropriate for the following reasons: 1) there are no material facts in dispute; 2) this Court does not have subject matter jurisdiction over Hirshfield's Complaint; and 3) the Anti-Injunction Act, 26 U.S.C. § 7321 prohibits this Court from issuing an injunction against the IRS. After considering the arguments of counsel, reviewing the documents in the case file, and being otherwise fully informed, the Court FINDS:

1. **[1]** Mednet Ambulance Service, Inc. (''Mednet), a New Mexico Corporation, filed a petition under Chapter 11 of the Bankruptcy Code on September 4, 2001.

2. Hirshfield is Mednet's president, director, and only shareholder. Hirshfield manages Mednet's daily operations and financial policies.

3. The IRS filed a proof of claim of approximately $254,992.72 in Mednet's bankruptcy proceedings seeking payment of Mednet's employment taxes, plus interest, and penalties. The IRS's claim is comprised of the following: 1) a secured claim of $173,512,92 for withheld income and FICA taxes for the second, third, and fourth quarters of 1999 and the first quarter of 2000; 2) a priority claim of $64,326.57 for withheld income and FICA taxes for the first, second, and third quarters of 2000 and for corporate income taxes for the year 1999; and 3) a general unsecured claim of $17,153.23 for penalties and interest on the priority claim.

4. Mednet's Second Amended and Restated Chapter 11 Plan of Reorganization (''Plan'') was confirmed by an Order entered April 19, 2002. The Plan provides that all of the IRS's claims will be paid in full as follows: the secured claim will be paid over a ten-year period, the priority claim over a six-year period, and the unsecured claim over a period not to exceed ten years.

5. On August 5, 2002, Mednet made a first payment of $3,228.43 to the IRS under its confirmed Chapter 11 plan.

6. On May 14, 2001, the IRS assessed against Hirshfield the trust fund recovery penalty in the amount of $85,020.48 for the trust fund portion of Mednet's unpaid payroll taxes.

7. As provided in 26 U.S.C. § 6672(a), the trust fund recovery penalty against Hirshfield is his separate liability as a corporate officer. See also Bradshaw v. U.S., 83 F.3d 1175, 1178 [77 AFTR 2d 96-2181] (10thCir. 1995).

8. On February 27, 2002, Hirshfield filed his Complaint in this Court asking for a preliminary and subsequent permanent injunction that would prohibit the IRS from collecting the trust fund recovery penalty assessed against him pursuant to 26 U.S.C. § 6672(a).

9. ''Actions to enjoin the assessment and collection of taxes by the IRS are narrowly limited by the Anti-Injunction Act.'' Elias v. Connett, 908 F.2d 521, 523 [66 AFTR 2d 90-5346] (9thCir. 1990). In perti-

nent part, the Anti-Injuction Act provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U.S.C. § 7421(a). Unless either a statutory or judicial exception applies, under the Anti-Injunction Act, no court may enjoin the IRS from assessing or collecting taxes.

10. There are two statutory exceptions to the Anti-Injunction Act. A taxpayer may claim an exception when the IRS assesses a deficiency before a deficiency notice is mailed or when the IRS assesses, levies, or collects any deficiencies during the ninety-day period after the notice is set. 26 U.S.C. 6212(a).

11. If one of the statutory exceptions applies, the court may issue an injunction; the taxpayer is not required to demonstrate that there is no adequate remedy at law. Guthrie v. Sawyer, 970 F.2d 733, at 736–37 [70 AFTR 2d 92-5390] (10thCir. 1992) (disagreeing with the 9th Circuit's conclusion in Elias, 908 F.2d at 523, that before either statutory exception applies, the taxpayer must also allege sufficient grounds to warrant equitable relief).

12. Hirshfield has not set forth facts to support either of the statutory exceptions to the Anti-Injunction Act.[1]

13. There is one judicial exception to the Anti-Injunction Act. A taxpayer may claim the judicial exception when the taxpayer establishes the following: 1) under no circumstances can the government ultimately prevail on the merits; and 2) the taxpayer will suffer irreparable injury without injunctive relief. Elias, 908 F.2d at 525. The taxpayer bears the burden of pleading and proving the facts to establish both prongs of the test. See Id.

14. While Hirshfield has claimed that he will be irreparably injured if the IRS proceeds against him, he has alleged no facts that would establish the first prong of this test. Both prongs must be satisfied before the exception will apply.

15. Assuming that this Court has subject matter jurisdiction, under the Anti-Injunction Act this Court does not have the power to issue the injunction requested by Hirshfield.

THE COURT, THEREFORE, CONCLUDES that in this proceeding it is barred by the Anti-Injunction Act from granting the relief requested in Hirshfield's Complaint.

Judgment is hereby entered in favor of Defendants and against Plaintiff Steven G. Hirshfield.

Defendant's Motion for Summary Judgment is granted and the Plaintiffs Application for Preliminary and Permanent Injunctions is denied.

MARK B. McFEELEY

UNITED STATES BANKRUPTCY JUDGE

cc:

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Jonathan R. Williams

Attorney, Tax Division

Department of Justice

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Dallas, TX 75201

I hereby certify that a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties, on the date file-stamped above.

Shannon Noya Naim

¶2002-5666

William D. HUBBARD, PLAINTIFF v. DEPARTMENT OF THE TREASURY,

[1] It appears from the Complaint that Hirshfield might be claiming that the he does fit within one of the exceptions on the grounds that IRS did not provide proper notice to him of the assessment of the trust fund recovery penalty. However, both statutory exceptions are established only when the IRS assesses the tax before providing notice. Hirshfield has alleged no facts within these parameters.

INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Northern Dist. of Texas, (DC TX) Docket No. 3-02-CV-1974-D, Oct. 29, 2002. Earlier proceeding at (2002, DC TX) 90 AFTR 2d 2002-7055. Decision for Govt.

1. Actions against U.S.—refunds; damages—failure to state claim—sovereign immunity—sanctions. Magistrate judge recommended dismissing pro se taxpayer's 22nd meritless suit against U.S.: taxpayer's vague complaint for $22.5 million damages for IRS's "reluctance to pay refunds" failed to allege that he had met prerequisites to refund suit, that he qualified for IRC §7433's sovereign immunity waiver or to otherwise state claim for relief. Also, $500 sanction and pre-filing sanctions order were recommended, based on taxpayer's history of frivolous filings and refusal to abide by prior warnings against making such filings. *Reference:* United States Tax Reporter ¶74,225.01(3); 74,335.01(7); 74,336.511(80). IRC §7422; 7433.

THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION,

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

JEFF KAPLAN, UNITED STATES MAGISTRATE JUDGE

Defendant Department of the Treasury, Internal Revenue Service has filed a motion to dismiss this *pro se* civil action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated herein, the motion should be granted. In addition, plaintiff should be sanctioned in the amount of $500 and barred from filing any other lawsuits in federal court without first obtaining leave from a district or magistrate judge.

I.

[1] Plaintiff William D. Hubbard has sued the Department of the Treasury for $22.5 million due to "a reluctance to pay tax refunds." (Plf. Compl. at 1).[1] His one-page complaint alleges no facts and cites no statute or regulation in support of this outrageous demand. This pleading deficiency prompted defendant to file a motion to dismiss for failure to state a claim upon which relief can be granted. Plaintiff filed a response to the motion on October 18, 2002. The response states, in full:

> I want the $22.5 million via publication 526 of the Department of the Treasury, I.R.S. Plus all cost and fees assessed to the agency. I want the motions by the Defendants dropped sighting ongoing hostile acts levied on their behalf. I seek immediate enforcement of the Special Order submitted on my behalf plus the relief in its' entirety: Constitution of the United States of America; Amendment 1; Full Congress.

(Plf. Resp. at 1).[2] The motion to dismiss is now ripe for determination.

II.

A motion to dismiss under Rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Lowrey v. Texas A&M University System*, 117 F.3d 242, 247 (5th Cir. 1997), *quoting Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 729 (1983). The complaint must be liberally construed in favor of the plaintiff and all facts pleaded therein must be taken as true. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164, 113 S.Ct. 1160, 1161, 122 L.Ed.2d 517 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). Dismissal is warranted only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–02, 2 L.Ed.2d 80 (1957); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995).

The court has little difficulty in concluding that plaintiff can prove no set of facts

[1] Plaintiff brings this action in his putative capacity as "United States President."

[2] By separate filing, plaintiff has submitted a pleading entitled "Special Order" which is equally unintelligible.

in support of his $22.5 million claim against defendant. To the extent that plaintiff seeks a tax refund, there is no allegation that he has made full payment of his tax liability and filed an administrative claim for a refund with the IRS. *See Flora v. United States*, 362 U.S. 145, 177 [5 AFTR 2d 1046], 80 S.Ct. 630, 647 [5 AFTR 2d 1046], 4 L.Ed.2d 623 [5 AFTR 2d 1046] (1960); *Humphreys v. United States*, 62 F.3d 667, 672 [76 AFTR 2d 95-6116] (5th Cir. 1995). *See also Gustin v. Internal Revenue Service*, 876 F.2d 485, 488 [64 AFTR 2d 89-5163] (5th Cir. 1989) (''Failure to file a claim for a refund deprives the court of subject matter jurisdiction.''). Any claim for monetary damages against defendant likely is barred by sovereign immunity. Accordingly, defendant's motion to dismiss should be granted.

III.

The court has an obligation to protect the orderly administration of justice. *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C. Cir. 1985). Sanctions are appropriate when a *pro se* litigant has a history of submitting multiple frivolous claims. *See* Fed. R. Civ. P. 11; *In re Green*, 669 F.2d 779, 787 (D.C. Cir. 1981). Litigants who abuse the judicial process are ''not entitled to sue and appeal without paying the normal filing fees--indeed, are not entitled to sue and appeal, period.'' *Free v. United States*, 879 F.2d 1535, 1536 (7th Cir. 1989).

Plaintiff is no stranger to the civil justice system. In fact, he has filed 22 different lawsuits since 1997. This litigiousness prompted at least one judge in this district to admonish plaintiff that ''if he files frivolous lawsuits in the future, he will subject himself not only to dismissal of the suits but to monetary sanctions and to orders precluding him from filing any further litigation in this court without first securing leave of court.'' *Hubbard v. Full Congress*, No. 3-98-CV-0597-D, order at 2 (N.D. Tex. Apr. 20, 1998) (Fitzwater, J.). Since that warning, plaintiff has filed eight more cases in the Northern District of Texas. All those cases have been either dismissed or ordered unfiled.

The court finds that plaintiff should be sanctioned in the amount of $500 to punish his conduct and deter him from filing frivolous lawsuits. Plaintiff should be ordered to pay this sanction to the district clerk within 30 days from the date these findings are adopted by the district judge. Additionally, plaintiff should be barred from filing any other lawsuits in federal court without first obtaining leave from a district or magistrate judge.

RECOMMENDATION

Defendant's motion to dismiss should be granted. In addition, plaintiff should be sanctioned in the amount of $500 and barred from filing any other lawsuits in federal court without first obtaining leave from a district or magistrate judge.

DATED: October 29, 2002.

JEFF KAPLAN

UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO OBJECT

JEFF KAPLAN, UNITED STATES MAGISTRATE JUDGE

On this date the United States magistrate judge made written findings and a recommended disposition of defendant's motion to dismiss in the above styled and numbered cause. The United States district clerk shall serve a copy of these findings and recommendations on all parties by certified mail, return receipt requested. Pursuant to 28 U.S.C. § 636(b)(1), any party who desires to object to these findings and recommendations must file and serve written objections within ten (10) days after being served with a copy. A party filing objections must specifically identify those findings and recommendations to which objections are being made. The district court need not consider frivolous, conclusory or general objections. The failure to file such written objections to these proposed findings and recommendations shall bar that party from obtaining a *de novo*determination by the district court. *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. 1982). *See also Thomas v. Arn*,

474 U.S. 140, 150 (1985). Additionally, the failure to file written objections to proposed findings and recommendations within ten (10) days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error or manifest injustice. *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

DATED: October 29, 2002.

JEFF KAPLAN

UNITED STATES MAGISTRATE JUDGE

¶2002-5667

Mary A. ROBERT, PETITIONER v. UNITED STATES OF AMERICA, ET AL., RESPONDENTS. U.S. District Court, Eastern Dist. of Missouri, (DC MO) Case No. 4:02-CV-386 CAS, Oct. 21, 2002. Years 1998, 1999. Decision against Govt. in part.

1. Third-party summonses—procedure—motion to strike. Taxpayer's and govt.'s arguments surrounding govt.'s notice of motion for summary judgment on validity and enforceability of 3d-party IRS summonses weren't decided, pending govt.'s filing of actual motion. *Reference:* United States Tax Reporter ¶76,095.01(10). IRC §7609.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION,

MEMORANDUM AND ORDER

CHARLES A. SHAW UNITED STATES DISTRICT JUDGE

[1] This matter is before the Court on the motion of petitioner to strike the United States's notice of motion for summary judgment, or in the alternative, to enlarge time to respond to the motion for summary judgment (Doc. 16). On March 14, 2002, petitioner Mary Robert filed four petitions under 26 U.S.C. § 7609(b)(2) to quash third-party summonses issued by the United States Internal Revenue Service (IRS) to Siegel-Robert, Inc., Robert Robison, Halvor Anderson, and Robert Bowren. The summonses were issued in connection with an IRS examination into the tax gift liability of petitioner for the years 1998 and 1999, which was found to be approximately $34 million and $233,000 respectively. The petitions allege that the summonses were not issued in good faith due to alleged improper ex parte communications in the liability appeals process, and that the summonses were issued for the improper purpose of preparing the case for litigation. The four cases were consolidated on May 14, 2002.

On June 10, 2002, the United States filed a notice of motion for summary judgment (motion for summary enforcement). The United States also filed a counterclaim for enforcement of the summonses. Petitioner asserts that the motion for summary judgment is premature and that she cannot properly respond to it without conducting discovery into the alleged improper ex parte communications. Without seeing the basis for the motion for summary judgment, the Court cannot determine whether petitioner's request to strike the motion, or to grant her time for discovery before being required to respond to the motion, is valid.

Accordingly,

IT IS HEREBY ORDERED that the United States shall file its motion for summary judgment with the Court within ten (10) days of the date of this order.

CHARLES A. SHAW

UNITED STATES DISTRICT JUDGE

Dated this 21st day of October, 2002.

¶2002-5668

UNITED STATES OF AMERICA, PLAINTIFF v. Dale C. COMSTOCK, SR., ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of West Virginia, (DC WV) Case Number: 3:01CV76, Oct. 25, 2002. District Court, (2002, DC WV) 90 AFTR 2d 2002-7110, amended.

Years 1991, 1997, 1998, 1999. Decision for Govt.

1. Collection actions—reducing assessments to judgment—default judgment. Amended final default judgment was entered against taxpayer for his unpaid IRC §6672 penalty and income, employment and unemployment taxes in amount stated plus interest. *Reference:* United States Tax Reporter ¶74,035.01(30). IRC §6672; 7403.

PAT S. GENIS Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 227 Washington, D.C. 20044
DALE C. COMSTOCK, SR. Rt. 2, Box 180 Kearneysville, WV 25430
D. FRANK HILL, III, ESQUIRE Post Office Box A Shepherdstown, WV 25443
JAMES SALTER, ESQUIRE Suite 105 Old Town Center 17 West Jefferson Street Rockville, MD 20850
JOY M. BOLLING, ESQUIRE Assistant Attorney General Attorney General's Office Building 1, Room W-435 Charleston, WV 25305

United States District Court NORTHERN DISTRICT OF WEST VIRGINIA,

JUDGMENT IN A CIVIL CASE

[1] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

ORDERED: that the United States' motion for entry of default judgment be and is GRANTED;

ORDERED: that the Clerk shall ENTER final judgment in favor of the United States and against defendant in substantially the following form:

> This action came on for consideration by the Court on the United States' motion for entry of default judgment, and the Court having considered the arguments and declaration in support thereof,

It is Ordered and Adjudged

> That the plaintiff, the UNITED STATES OF AMERICA, recover of the defendant, DALE C. COMSTOCK, SR., unpaid Federal trust fund recovery penalties for the quarterly taxable periods ending December 31, 1991, Form 941 taxes for calendar quarters ending March 31, 1998, September 30, 1998 through June 30, 1999, Form 940 taxes for calendar years 1997–1999 and 1040 taxes for calendar years 1998 and 1999, the sum of $97,920.87, plus interest accruing as of October 15, 2002, until paid, at the rates established by 16 U.S.C. 6621.

October 28, 2002

Date

WALLY EDGELL, PH.D.

Clerk

/s/

(By) Deputy Clerk

AMENDED ORDER

Having considered the United States' motion for entry of default judgment and declaration in support thereof, and any opposition thereto, the Court concludes that the motion ought to be granted.

The Court finds that there is no just reason to delay entry of final judgment against Dale C. Comstock, Sr. on Count 1 of the United States' complaint, which is a count to reduce federal tax liabilities to judgment

Accordingly, it is this 25th day OCTOBER, 2002, at MARTINSBURG, West Virginia,

ORDERED that the United States' motion for entry of default judgment be and is GRANTED;

ORDERED that the Clerk shall ENTER final judgment in favor of the United States and against defendant in substantially the following form:

> This action came on for consideration by the Court on the United States' mo-

tion for entry of default judgment, and the Court having considered the arguments and declaration in support thereof, It is Ordered and Adjudged

That the plaintiff, the UNITED STATES OF AMERICA, recover of the defendant, DALE C. COMSTOCK, SR., unpaid Federal trust fund recovery penalties for the quarterly taxable periods ending December 31, 1991, Form 941 taxes for calendar quarters ending March 31, 1998, September 30, 1998 through June 30, 1999, Form 940 taxes for calendar years 1997–1999 and 1040 taxes for calendar years 1998 and 1999, the sum of $97,920.87, plus interest accruing as of October 15, 2002, until paid, at the rates established by 26 U.S.C. § 6621.

and it is further

ORDERED that the Clerk shall distribute copies of this Order to the representative of the party and the party listed below.

Copies to:

PAT S. GENIS

Trial Attorney, Tax Division

U.S. Department of Justice

P.O. Box 227

Washington, D.C. 20044

DALE C. COMSTOCK, SR.

Rt. 2, Box 180

Kearneysville, WV 25430

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Rockville, MD 20850

JOY M. BOLLING, ESQUIRE

Assistant Attorney General

Attorney General's Office

Building 1, Room W-435

Charleston, WV 25305

/s/

U.S. District Judge

DATED: October 25, 2002

¶2002-5669

In Re: Donald SNYDER, Debtor. Donald SNYDER, DEBTOR/APPELLANT v. UNITED STATES OF AMERICA, Internal Revenue Service, CREDITOR/APPELLEE. U.S. District Court, Northern Dist. of California, (DC CA) No. 4:01-CV-02501; 98-71761ING, March 14, 2002. Bankruptcy Court affirmed. Decision for Govt.

1. Tax claims in bankruptcy—bankruptcy estate property—ERISA-qualified pension plans—secured claims. District court affirmed that Chap. 13 debtor's interest in ERISA-qualified retirement plan was *included* in bankruptcy estate property for limited purpose of securing IRS's tax claim, despite fact that ERISA's anti-alienation provisions brought plan squarely within 11 USC §541(c)(2)'s exclusion for interests subject to substantial transfer restrictions under ''applicable nonbankruptcy law.'' Exclusion didn't apply with respect to IRS since federal tax lien and levy law was also applicable nonbankruptcy law, which trumped ERISA and under which ERISA anti-alienation restrictions couldn't be enforced against IRS. Also, court distinguished Supreme Court case and its progeny to contrary on grounds that those cases dictated only that ERISA anti-alienation provisions rendered plans ''generally'' excludable as to ''ordinary'' creditors, not IRS. *Reference:* United States Tax Reporter ¶68,726.52(28).

United States District Court, N.D. California,

ORDER AFFIRMING DECISION OF BANKRUPTCY COURT

WILKEN, District J.

Chapter 13 debtor objected to proof of secured claim filed by the Internal Revenue Service (IRS). The United States

Bankruptcy Court for the Northern District of California entered order allowing claim, and debtor appealed. The District Court, Wilken, J., held that debtor's interest in ERISA-qualified employee retirement plan was included in property of the estate, for limited purpose of securing federal tax claim.

Affirmed.

Debtor/Appellant Donald Snyder appeals the bankruptcy court's decision allowing Creditor/Appellee Internal Revenue Service's (IRS) secured claim. This appeal presents the question of whether the bankruptcy court erred in ruling that Snyder's interest in his ERISA[1] -qualified pension plan may be used to secure the IRS's federal income tax claim in the amount of $145,664.48 in Snyder's Chapter 13 bankruptcy case. Having considered all of the papers filed by the parties, the Court AFFIRMS the order of the bankruptcy court.

BACKGROUND

I. Statement of Facts

The facts in this case are not in dispute. (Excerpt of Record, hereinafter "ER," 46–51). At all relevant times, Snyder was a vested participant in the Contra Costa County Electrical Worker's Union Retirement Plan (the Plan). (ER 46–47). The Plan was duly qualified under ERISA's provisions at 26 U.S.C. § 401, et seq. (ER 256–57) and 29 U.S.C. § 1001, et seq. (ER 256–57). The Plan contained an anti-alienation provision as required by 26 U.S.C. § 401(a)(13) and 29 U.S.C. § 1056(d)(1). (ER 255).

All contributions to the Plan were made by the various employers of the participants and were pooled into one common fund with other participants and thereafter allocated to separate individual accounts for each participant for ERISA-required accounting and reporting purposes. (ER 47–48). The balance of Snyder's allocated individual account as of December 31, 1998 was $180,477. (ER 48).

Plan participants have no right, title or interest in the trust assets or separate individual accounts, except at the time or times and upon the terms and conditions provided in the Plan. (ER 227, 254). Plan benefits are payments to which participants and beneficiaries are or may become entitled under the Plan. (ER 48). The benefits provided by the Plan are: (1) normal retirement benefit payments payable at age 60; (2) early retirement at age 55 through 59 in an amount up to one-half the normal retirement benefits; (3) a lump sum payment in the event of total disability; or (4) payments to a surviving spouse or designated beneficiary in the event the participant dies before complete distribution of Plan benefits. (ER 48). Snyder was forty-four years of age as of December 7, 1998. (ER 46).

II. Procedural History

On December 7, 1998, Snyder filed a Chapter 13 bankruptcy petition and scheduled the IRS as an unsecured creditor in the amount of $158,228, of which $134,363 was scheduled as a general unsecured claim and $24,085 was scheduled as a priority claim. (ER 1–29, 49). In his Schedule B-Personal Property, Snyder listed his interest in the Plan with a balance of $171,443 as of June 30, 1998 and indicated, "ERISA-qualified, cannot be withdrawn." (ER 5). Snyder listed the current value of his interest in the Plan as zero. (ER 5, 48). Snyder's Chapter 13 plan was confirmed on January 21, 1999. (ER 30).

On February 28, 1999, the IRS filed a proof of claim in the amount of $158,228.11, of which $145,664.48 was claimed as secured, $11,581.04 was claimed as priority, and $982.59 was claimed as general unsecured. The IRS had duly filed Notices of Federal Tax Liens as set forth in its proof of claim. (ER 31–32, 49).

On April 23, 1999, Snyder objected to the secured portion of the IRS's claim. (ER 33–34). On April 27, 1999, the IRS filed a timely response to Snyder's objection. (ER 35–36).

On November 6, 2000, the bankruptcy court held a hearing on Snyder's objection

[1] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq.; 26 U.S.C. § 401 et seq.

to the IRS's claim. (ER 125–212). At the conclusion of the hearing, the bankruptcy court held that for purposes of a federal tax lien, Snyder's interest in the ERISA-qualified retirement plan was property of the Chapter 13 estate (ER 209:2–12), that Snyder's objection to the IRS's claim was overruled, and that the IRS's claim was allowed as secured. (ER 209:19–21).

On December 7, 2000, Snyder filed a motion for reconsideration. (ER 83–90). On December 20, 2000, the IRS filed an opposition thereto (ER 91–97), and Snyder replied on January 5, 2001. (ER 98–107). On January 11, 2001, after oral argument, the bankruptcy court reversed itself in part, holding that Snyder's interest in the ERISA- qualified retirement plan was not property of his Chapter 13 estate, but left standing its prior ruling that Snyder's objection was overruled and the IRS's claim must be paid as a secured claim. (ER 317).

On April 30, 2001, the IRS filed a request for order of the court or instructions and conference to resolve the apparent inconsistency between the bankruptcy court's decision on November 6, 2000 and its conclusion on January 11, 2001. (ER 116–24). On April 26, 2001, Snyder filed his response. (ER 108–15). On May 23, 2001, the bankruptcy court entered its Order Allowing Claim holding that for purposes of the IRS's federal tax lien, Snyder's interest in his ERISA-qualified retirement plan was property of his Chapter 13 bankruptcy estate and thus the IRS's claim was allowed as a secured claim. (ER 320–21).

On June 1, 2001, Snyder filed a timely notice of appeal. (ER 322–23).

JURISDICTION AND STANDARD OF REVIEW

A district court has jurisdiction to hear appeals from a bankruptcy court pursuant to 28 U.S.C. § 158(a). The district court reviews the bankruptcy court's findings of fact for clear error and conclusions of law de novo. Fed. R. Bankr.P. 8013; In re Lockard, 884 F.2d 1171, 1174 (9th Cir.1989). In the instant case, the bankruptcy court's findings of fact are not in dispute, and this Court therefore conducts a de novo review.

DISCUSSION

[1] Snyder argues that the bankruptcy court erred in finding that his interest in the Plan could be used to secure the IRS's claim. Specifically, Snyder contends that because his interest in the Plan would ordinarily be excluded from the bankruptcy estate and could not be used to secure the claims of other creditors, it should not have a ''split personality'' by being deemed property of the estate to secure the IRS's claim. Appellant's Opening Brief at 11. The IRS argues that a debtor's interest in a beneficial trust, such as Snyder's interest in the Plan, is property of the estate for purposes of determining the IRS's secured claim even if that interest would be excluded from the bankruptcy estate with respect to other creditors.

For an allowed claim to be ''secured'' under the Bankruptcy Code, it must be secured by a lien on property in which the estate has an interest.[2] 11 U.S.C. § 506(a). The bankruptcy estate is comprised of ''all legal and equitable interests of the debtor in property as of the commencement of the case.'' 11 U.S.C. § 541(a)(1). Section 541(c)(2) provides the following exclusion from the definition of property of the estate: ''A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.'' 11 U.S.C. § 541(c)(2). In Patterson v. Shumate, 504 U.S. 753, 759, 112 S.Ct. 2242, 119 L.Ed.2d 519 (1992), the Supreme Court held that ERISA plans are generally excluded from the property of the bankruptcy estate under § 541(c)(2).

[2] In general, secured creditors receive more favorable treatment in bankruptcy. For example, a secured creditor is entitled to priority payment out of its collateral. 11 U.S.C. § 1123(b)(5). Additionally, a secured creditor may be entitled to ''adequate protection'' in the form of payments or other relief if the trustee's continued use of the secured creditor's collateral during the pendency of the case threatens the value of the collateral. 11 U.S.C. §§ 361, 363(e); see also United States v. Whiting Pools, Inc., 462 U.S. 198, 204 [52 AFTR 2d 83-5121], 103 S.Ct. 2309 [52 AFTR 2d 83-5121], 76 L.Ed.2d 515 (1983). Secured creditors may also be entitled to relief from automatic stay to enforce nonbankruptcy rights against their collateral if the requirements of § 362(d) are met. 11 U.S.C. § 362(d). And, absent consent, a plan may not be confirmed if the special requirements of §§ 1129(b)(2)(A), 1225(a)(5) or 1335(a)(5) applicable to secured claims are not satisfied. 11 U.S.C. §§ 1129(b)(2)(A), 1225(a)(5), 1335(a)(5).

Before Patterson, courts treated the phrase ''applicable nonbankruptcy law'' in § 541(c)(2) as limited to traditional spendthrift trusts under State law. Because § 541(c)(2)'s exclusion did not apply to ERISA, debtors' interests in ERISA plans were deemed to be property of the bankruptcy estate.

In Patterson, however, the Supreme Court obliterated this narrow interpretation of the exclusion and held that the phrase ''applicable nonbankruptcy law'' in § 541(c)(2) ''encompasses any relevant nonbankruptcy law, including federal law such as ERISA.'' Id. at 759. In reaching the conclusion that interests in State spendthrift trusts were not the only interests contemplated by § 541(c)(2), the Court relied on the plain language of the Bankruptcy Code and ERISA. ''The natural reading of [§ 541(c)(2)] entitles a debtor to exclude from property of the estate any interest in a plan or trust that contains a transfer restriction enforceable under any relevant nonbankruptcy law. Nothing in § 541 suggests that the phrase 'applicable nonbankruptcy law' refers, as petitioner contends, exclusively to state law.'' Id. at 758. Next, the Court viewed the plain language of § 206(d)(1) of ERISA: ''Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.'' 29 U.S.C. § 1056(d)(1). The Court noted that this language ''clearly imposes a 'restriction on the transfer' of a debtor's 'beneficial interest' in the trust.'' Patterson, 504 U.S. at 759 (citing also transfer restrictions in 26 U.S.C. § 401(a)(13) and 26 C.F.R. § 1.401(a)-13(b)(1)). Therefore, the Court concluded, ''The anti-alienation provision required for ERISA-qualification and contained in the Plan at issue in this case thus constitutes an enforceable transfer restriction for purposes of section 541(c)(2)'s exclusion of property from the bankruptcy estate.'' Id. at 760. The law is thus settled that an interest in a qualified ERISA plan is not property of the bankruptcy estate for the purposes of securing the claims of ordinary creditors. Id.

In cases where the creditor is not the IRS, the Ninth Circuit has consistently decided that the debtor's interest in an ERISA plan was excluded from the property of the bankruptcy estate and was thus unable to secure a claim. See e.g., In re Reuter, 11 F.3d 850, 852 (9th Cir.1993); Pitrat v. Garlikov, 992 F.2d 224, 225–26 (9th Cir.1993). However, courts are split over the application of § 541(c)(2)'s exclusion in cases where the IRS, not a private creditor, asserts that its claim is secured by the debtor's interest in an ERISA plan. The Ninth Circuit has not decided whether the debtor's interest in an ERISA plan can be deemed property of the debtor's estate for purposes of securing an IRS claim.

Federal tax liens are governed by § 6321 of the Internal Revenue Code (IRC),[3] which provides: ''If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount ... shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.'' 26 U.S.C. § 6321. ''A federal tax lien, however, is not self-executing. Affirmative action by the IRS is required to enforce collection of the unpaid taxes.'' United States v. National Bank of Commerce, 472 U.S. 713, 720 [56 AFTR 2d 85-5210], 105 S.Ct. 2919 [56 AFTR 2d 85-5210], 86 L.Ed.2d 565 (1985).

One of the tools for execution of the lien and collection of the unpaid tax is a levy. ''The levy is a provisional remedy'' that results in the seizure of assets and is governed by § 6331(a) of the IRC. Id. Section 6331 provides: ''If any person liable to pay any tax neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the Secretary to collect such tax ... by levy upon all property and rights to property (except such property as is exempt under § 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.'' 26 U.S.C. § 6331(a). The only property exempt from the IRS's power of levy is that included in the list of exemptions in § 6334(a). ''Not-

[3] The Internal Revenue Code is contained at 26 U.S.C. §§ 1-9833.

withstanding any other law of the United States ... no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).'' 26 U.S.C. § 6334(c).

Snyder relies on a line of case law that stands for the proposition that a debtor's interest in an ERISA plan does not become property of the estate and therefore cannot serve as property to secure an IRS tax lien. For example, in In re Wilson, 206 B.R. 808, 810 [79 AFTR 2d 97-820] (Bankr.W.D.N.C.1996), the court relied on Patterson to conclude that an interest in a retirement plan was not property of the estate under § 541(c)(2). The court explained, ''The IRS does have a lien on that property, but as the asset itself never became property of this estate, the IRS does not hold a secured claim against this estate. Section 506(a) provides that to be a secured claim in the case, the creditor must be secured by a 'lien on property in which the estate has an interest.''' Id. (emphasis in original); see also In re Persky, 1998 WL 695311 [82 AFTR 2d 98-6664] (E.D.Pa.1998) (same). And, in In re Keyes, 255 B.R. 819, 822 [87 AFTR 2d 2001-448] (Bankr.E.D.Va.2000), the court provided, ''While it is clear that an asset of the debtor is subject to the IRS lien as provided for by statute, there is simply no statutory authority for granting it a 'split personality' to include it in the bankruptcy estate simply for purposes of securing the IRS's lien.''

Snyder also relies on the Ninth Circuit Bankruptcy Appellate Panel's (BAP) decision In re Anderson, 149 B.R. 591 (B.A.P. 9th Cir.1992), where a Chapter 13 debtor filed a complaint to determine the nature and extent of the IRS's federal tax lien against his property. The BAP held that the debtor's interest in an ERISA plan was not property of his bankruptcy estate pursuant to § 541(c)(2). Id. at 593–94 (relying on Patterson). However, the panel also held that the tax lien properly attached to the debtor's interest in an ERISA plan. Id. at 595. Snyder is incorrect when he states that Anderson dictates that because the Plan is not property of the estate, it cannot secure the IRS's claim. ''The [Anderson] opinion is silent on the question of whether the attachment of the federal tax lien to Mr. Anderson's pension gave the IRS a secured claim in his bankruptcy proceeding, in spite of the exclusion of the pension from the estate. As a result, the bankruptcy consequences of the BAP's determination of the nature and extent of the federal tax lien on the debtor's property are unclear.''[4] Michael A. Urban, Revisiting the Scope and Implications of Patterson v. Shumate in Light of In re Lyons, 3 Am. Bankr.Inst. L.Rev. 379, 398 (1995). And, as the IRS points out, Anderson was decided in a different posture. Unlike Snyder, who objects to the IRS's secured claim, the debtor in Anderson filed a complaint to determine the nature and extent of an IRS tax lien against his ERISA plan.

The opposite line of case law stands for the proposition that a debtor's interest in an ERISA plan will be excluded from the bankruptcy estate for the purposes of general creditors, but may be used to secure IRS claims. This approach was utilized by the court in In re Lyons, 148 B.R. 88 (Bankr.D.D.C.1992), which concluded that a debtor's interest in a spendthrift trust was property of the Chapter 13 estate to secure an IRS claim even though it would be excluded from the estate for purposes of securing the claims of general creditors. Applying Patterson, the court explained, ''[I]t is not only state spendthrift trust law that is the 'applicable nonbankruptcy law' for purposes of § 541(c)(2): Federal tax lien law is also an applicable nonbankruptcy law as well.'' Id. at 93. Therefore, the court reasoned, federal tax lien law may render a plan's transfer restriction unenforceable in a tax context, thus pulling the plan outside of § 541(c)(2)'s exclusion. Id. The court indicated that policy considerations favored its conclusion as well: ''Outside bankruptcy, the IRS would have

[4] Moreover, two courts have interpreted Anderson to imply that even if a pension plan is excluded from the bankruptcy estate, a tax lien can be properly attached in order to make the IRS's claim ''secured.'' See In re Carlson, 180 B.R. 593, 594 [75 AFTR 2d 95-937] (Bankr.E.D.Cal.1995) (''Debtor has a beneficial interest in a ... pension plan. This right to receive payments ... is a property interest to which the [IRS] may attach a lien. Therefore, Debtor's objection of the [IRS]'s secured status is without merit and must be overruled''); In re Fuller, 204 B.R. 894, 900–02 (Bankr.W.D.Pa.1997) (same).

an enforceable lien against the debtor's vested right to receive a future stream of pension income despite spendthrift provisions in the pension plans. There is no evidence that in enacting § 541(c)(2) Congress intended the intervention of bankruptcy to alter the IRS's powers as a tax creditor.'' Id. Therefore, the court held that if a fed-eral tax lien could attach to a debtor's in-terest in the plan in a nonbankruptcy con-text, the plan would become property of the bankruptcy estate under § 541. Id.

In Jones v. IRS, 206 B.R. 614 [79 AFTR 2d 97-2028] (Bankr.D.D.C.1997), the court examined whether a federal tax lien would attach to a debtor's interest in a thrift savings plan (TSP), notwithstanding the fact that the TSP's anti-alienation provision would normally render it excluded from the estate under § 541(c)(2). The court held that a tax lien attached to the interest in the TSP at least to the extent of preserving the right of levy. Id. at 617. The court relied on the fact that interests in ERISA plans and other trusts ''are subject to seizure by levy under 26 U.S.C. § 6331(a) because 26 U.S.C. § 6334(c) provides that no properties other than those specifically listed in § 6334(a) shall be exempt from levy 'notwithstanding any other law of the United States.''' Id.; see also Shanbaum v. United States, 32 F.3d 180, 183 [74 AFTR 2d 94-6292] (5th Cir.1994) (plain language of § 6334(c) demonstrates that ERISA pension benefits are subject to IRS levy despite ERISA's requirement that pension plan contain anti-alienation clause); 26 C.F.R. § 1.401(a)-13 (IRS has right to enforce against ERISA plan by means of levy under § 6331). The plan at issue in Jones was not included in the list of thirteen types of property exempted from levy under § 6334(a). Therefore, the Jones court concluded that the IRS's claim was secured by the thrift savings plan because the tax lien would be enforceable outside of the bankruptcy context. Jones, 206 B.R. at 617.

A similar analysis was followed in In re Perkins, 134 B.R. 408 (Bankr.E.D.Cal.1991). In Perkins, the debtors argued that their interest in an ERISA plan was excluded from the property of the estate, and therefore, the IRS should not be allowed to use it to secure its claim. The court responded, ''Fatal to [debtors'] analysis is its failure to deal with the special status of a federal tax lien.'' Id. at 411. First, the court noted that ''the government's rights to levy on property subject to a tax lien are extremely broad and limited only by those property interests specifically enumerated by statute--which do not include the type of pension benefit at issue in this case.'' Id. at 411 (citing United States v. Nat'l Bank of Commerce, 472 U.S. 713, 720–21 [56 AFTR 2d 85-5210], 105 S.Ct. 2919 [56 AFTR 2d 85-5210], 86 L.Ed.2d 565 (1985)). The court explained that the Ninth Circuit has held that ''while a spendthrift clause may be effective to shield attachment and levy by general creditors against a beneficiary's interest in a trust, such shield is unavailing to attachment and levy of a federal tax lien.'' Id. (citing Leuschner v. First Western Bank and Trust Co., 261 F.2d 705 [2 AFTR 2d 5295] (9th Cir.1958)). The court concluded that the debtor's ''technical 'property of the estate' argument los[t] its foundational premise'' because under § 541(c)(2), applicable nonbankruptcy law included federal tax lien law which does not restrict the transfer of a beneficial interest of the debtor in a trust, regardless of ERISA's anti-alienation provisions. Id.

In In re McIver, 255 B.R. 281, 284 [86 AFTR 2d 2000-5909] (D.Md.2000), the court followed the approach utilized by Lyons, Jones and Perkins, and provided the following summary: ''In other words, a debtor's beneficial interest in a trust is property of the estate to the extent that, under federal tax lien law, the IRS could reach the interest outside of bankruptcy, even if the interest would be excluded from the bankruptcy estate under § 541(c)(2) with respect to other creditors.''

This Court finds the Lyons, Jones, Perkins and McIver line of cases persuasive and consistent with the language and policy of ERISA, the Bankruptcy Code and the Internal Revenue Code. In Patterson, the Supreme Court concluded that the term

''applicable nonbankruptcy law'' in § 541(c)(2) referred to ''any'' other federal or State law, including ERISA. 504 U.S. at 759. Federal tax lien and levy law is ''applicable nonbankruptcy law'' that trumps ERISA provisions. Not only can tax liens be enforced ''notwithstanding any other law of the United States,'' IRC § 6334, but ERISA shall not be ''construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States.'' 29 U.S.C. § 1144(d). Therefore, where the anti-alienation provisions of an ERISA plan could not be enforced against the IRS in a nonbankruptcy context, they cannot be enforced in bankruptcy and the § 541(c)(2) exclusion is not available.

In the instant case, Snyder concedes that a tax lien properly attached to his interest in the Plan,[5] but argues that because the Plan is not yet in pay status, the IRS would not be able to enforce the lien through a levy outside of the bankruptcy context. Snyder is incorrect. As mentioned earlier, the IRS has the right to enforce liens against interests in ERISA pensions by means of levy, as long as the interest in the plan does not fit an exemption under 26 U.S.C. § 6334. See 26 C.F.R. § 1.401(a)-13(b)(2); In re McIntyre, 222 F.3d 665,660 [86 AFTR 2d 2000-5348] (9th Cir.2000) (''ERISA's anti-alienation clause cannot prevent the IRS from undertaking what would otherwise be a valid exercise of its levy authority under 26 U.S.C. § 6331''). This broad right to levy is applicable to unmatured ERISA plans, because the vested right to a future payment is ''property'' subject to levy and amenable to present valuation. See Perkins, 134 B.R. at 411–12; In re Schaffer, 1997 Bankr.LEXIS 841, 7 [80 AFTR 2d 97-5012] (Bankr.D.Id.1997); Jones, 206 B.R. at 617. Even if the levy power has not been exercised, an federal tax lien is enforceable outside of the bankruptcy context in order to ensure priority of the potential exercise of the IRS' right to levy. Jones, 206 B.R. at 617. Snyder does not argue that his interest in the Plan is exempt from levy under § 6334(a). Therefore, Snyder's argument that the IRS is not a secured creditor because it could not levy his interest in the Plan is meritless.

Because the IRS could reach Snyder's interest in the Plan in a nonbankruptcy context, the anti-alienation provisions of the Plan are not enforceable against the IRS. Therefore, the § 541(c)(2) exclusion does not apply and Snyder's interest in the Plan is property of his Chapter 13 estate for the purposes of securing the IRS's tax claim. The bankruptcy court did not err in allowing the IRS's secured claim.

CONCLUSION

For the foregoing reasons, the order of the bankruptcy court is AFFIRMED. IT IS SO ORDERED.

¶2002-5670

COUNTY OF WAYNE, PLAINTIFF v. THE BANK OF BLOOMFIELD HILLS, n/k/a The Private Bank, and The United States of America, DEFENDANTS. U.S. District Court, Eastern Dist. of Michigan, (DC MI) Case Number: 02-CV-72766-DT, Oct. 18, 2002. Decision for Govt.

1. District court jurisdiction—abstention—parallel state court case—interpleader—lien priority—condemnation award. Bank was denied dismissal of federal interpleader suit that county filed against it and U.S. for determination of lien priority to fund awarded bank in earlier state court condemnation suit: ''Colorado River'' abstention doctrine didn't apply where instant action wasn't parallel to state court suit that IRS hadn't been party to and which only decided bank's vs. taxpayer's ownership to underlying property. Similarly, doctrine precluding district court review of state court decisions didn't apply since instant suit wasn't reviewing or deciding state court's ownership decision.

[5] See e.g., In re Raihl, 152 B.R. 615, 618 [71 AFTR 2d 93-1653] (B.A.P. 9th Cir.1993), where the court held that a federal tax lien attached to an unmatured ERISA plan regardless of whether the plan was excluded from the bankruptcy estate. ''The inalienability of the pension interests does not destroy their character as property or immunize the interest from the attachment of a federal tax lien.'' Id.

Reference: United States Tax Reporter ¶74,025.01(170); 63,215.02(55). IRC §6321; 7402.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION.

ORDER DENYING DEFENDANT THE BANK OF BLOOMFIELD HILLS' MOTION TO DISMISS INTERPLEADER COMPLAINT

HON. GEORGE E. WOODS

This matter having come before the Court on Defendant The Bank of Bloomfield Hills' motion to dismiss the interpleader complaint (Doc. No. 4);

The Court having reviewed the pleadings submitted herein, and being otherwise fully informed in the matter;

IT IS HEREBY ORDERED that Defendant The Bank of Bloomfield Hills' motion to dismiss shall be, and hereby is, DENIED.

I. BACKGROUND

On June 6, 2002, Plaintiff, County of Wayne (''Wayne''), brought this interpleader action in Wayne County Circuit Court against Defendants, The Bank of Bloomfield Hills (''the Bank'') and the United States (United States). At issue is whether the Bank or the United States has priority to the $980,000 the County deposited as the Estimated Just Compensation (''EJC'') in connection with a November 20, 2001, condemnation lawsuit filed by the County against the then landowners of the subject property, along with the Bank, as the landowners' mortgagee, and the United States, as the holder of a federal tax lien.[1] The United States removed this action to this Court pursuant to 28 U.S.C. §§ 1441 and 1442.[2]

Currently before the Court is the Bank's motion to dismiss. The Bank contends that this interpleader action involves the same issues and parties as the November 2001 Wayne County Circuit Court condemnation case. The United States disagrees, asserting that it was not a party to the condemnation proceeding, and the import of the federal tax lien and second notice of levy was not adjudicated in the condemnation proceeding.

II. STANDARD OF REVIEW

Defendant seeks dismissal pursuant to Fed.R.Civ.P. 12(b)(6). When considering a Rule 12(b)(6) motion to dismiss, this Court must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45–46 (1957); Jackson v. City of Columbus, 194 F.3d 737, 745 (6th Cir. 1999); Weiner v. Klais & Co., 108 F.3d 86, 88 (6th Cir. 1997). The Court does not consider matters outside of the pleadings in ruling on a Rule 12(b)(6) motion to dismiss. Weiner, 108 F.3d at 89. Nor does this Court weigh evidence or evaluate the credibility of witnesses. See Miller v. Currie, 50 F.3d 373, 377 (6th Cir. 1995).

Although this Court may not grant a Rule 12(b)(6) motion based on disbelief of a complaint's factual allegations, In re Sofamor Danek Group, Inc., 123 F.3d 394, 400 (6th Cir. 1997), cert. denied sub nom, 523 U.S. 1106 (1998), the Court ''need not accept as true legal conclusions or unwarranted factual inferences.'' Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987). As the Sixth Circuit counsels: ''The Admonishment to liberally construe plaintiff's claim ... does not relieve a plaintiff of his obligation to satisfy federal notice pleading requirements and allege more than bare assertions of legal conclusions.'' Lewis v. ACB Bus. Servs., Inc., 135 F.3d 389, 405 (6th Cir. 1998) (citation omitted). Consequently, a complaint will not be dismissed pursuant to Rule

[1] The condemnation case, brought in Wayne County Circuit Court, was captioned: County of Wayne v. Wendell Flynn et. al., Wayne County Circuit Case No. 01-139784-CC.

[2] The United States was not required to acquire the consent of the Bank in order to remove this action; 28 U.S.C. § 1442(a)(1) sets forth a statutory exception allowing the United States to remove a case to federal court without obligating it to seek the consent of any other defendant.

12(b)(6) unless there is no law to support the claim made, the facts alleged are insufficient to state a claim, or there is an insurmountable bar on the face of the complaint.

III. DISCUSSION

A. Colorado River Abstention

[1] The Bank first contends that this Court should dismiss this interpleader action on the basis of the Colorado River abstention doctrine. See Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).[3] The United States counters that the abstention doctrine is inapplicable in the instant case because of the absence of a parallel state proceeding.

Federal Courts have universally expressed that: ''[a]bstention from the exercise of federal jurisdiction is the exception, not the rule ... because federal courts have 'a virtually unflagging obligation ... to exercise the jurisdiction given them.''' PaineWebber, Inc. v. Cohen, 276 F.3d 197, 206 (6th Cir. 2002)(quoting Supreme Court cases). When considering a request to abstain based on Colorado River, the Court's discretion is guided by eight factors, none of which is dispositive. See, e.g., United States v. Commonwealth of Kentucky, 252 F.3d 816, 827 (6th Cir. 2001). These factors are:

> (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation; ... (4) the order in which jurisdiction was obtained [;] ... (5) whether the source of governing law is state or federal; (6) the adequacy of the state court action to protect the federal plaintiff's rights; (7) the relative progress of the state and federal proceedings; and (8) the presence or absence of concurrent jurisdiction.

PaineWebber, 276 F.3d at 206 (citation omitted) (alteration in original). The Sixth Circuit counsels that before the Colorado River doctrine can be applied, the district court must first determine that the concurrent state and federal actions are actually parallel. See Romine v. Compuserve Corp., 160 F.3d 337, 339 (6th Cir. 1998) (citation omitted).

Although the Internal Revenue Service (''IRS'') was originally named as a defendant in the state court condemnation proceeding, the IRS was voluntarily dismissed because it is not an entity subject to suit. See January 28, 2002, Notice of Voluntary Dismissal. Subsequently, on May 2, 2002, the United States filed an emergency motion to intervene in the state proceeding. On May 20, 2002, the state court denied the United States' motion to intervene and ordered disbursement of the EJC to the Bank. It is undisputed that the Department of Treasury-IRS has issued two Notices of Levy to Wayne County: (1) A January 14, 2002, Notice of Levy for $1,226,366.07;[4] and (2) a May 22, 2002, Second Notice of Levy for $1,243,804.92.[5] Wayne County has not disbursed the EJC funds to the bank. Instead, Wayne County filed the instant interpleader complaint.

The parties do not dispute that the United States was not a party to the underlying state court condemnation proceeding. The state court condemnation proceeding determined that the Bank, and not the landowners, was the true owner of the property that Wayne County sought for condemnation. By contrast, in the present litigation, Wayne County requests this Court to determine whether the federal tax lien and second notice of levy create a superior interest for the United States in the

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[3] The Colorado River Court held that, in exceptional circumstances, a federal district court may properly abstain from exercising its subject matter jurisdiction based on considerations of ''[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'' Colorado River, 424 U.S. at 817 (internal quotation marks and citation omitted).

[4] The first notice of levy specifies: ''THIS LEVY ATTACHES TO ANY AND ALL INTEREST THAT WENDELL & MARGARET FLYNN HAVE IN WAYNE COUNTY CIRCUIT COURT CASE #01-139784-CC.''

[5] The second notice of levy states: ''THIS LEVY ATTACHES TO ANY AND ALL PROPERTY AND RIGHTS TO PROPERTY BELONGING TO WENDELL & MARGARET FLYNN OR ON WHICH THERE IS A LIEN WITH RESPECT TO TAXES OWED BY WENDELL & MARGARET FLYNN, SPECIFICALLY, INCLUDING THE $980,000.00 IN CONDEMNATION PROCEEDINGS AWARDED IN THE CASE OF COUNTY OF WAYNE VS. BANK OF BLOOMFIELD HILLS, ET. AL., NO. 01-139784-CC (WAYNE COUNTY CIRCUIT COURT) WITH RESPECT TO PARCEL 171 IN PLAINTIFF'S COMPLAINT, AND ANY FURTHER OR ADDITIONAL AWARD OF PROCEEDS WITH RESPECT TO THIS PARCEL IN THE COURSE OF THIS ACTION.''

property. Thus, it is beyond cavil that the two lawsuits do not allege the same claims against identical parties in both state and federal court. The Court finds that because the state and federal actions are not parallel, the Colorado River abstention doctrine cannot be applied in the present case. See Romine, 160 F.3d at 339.[6]

B. Rooker-Feldman Doctrine

The Bank alternatively contends that this action should be dismissed on the basis of the Rooker-Feldman doctrine. The United States argues that this doctrine is inapplicable because the United States was not a party to the state court condemnation proceeding.

Under the Supreme Court's decisions in Rooker v. Fidelity Trust Co., 263 U.S. 413, 415–16 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 486–87 (1983), and their progeny, inferior federal courts lack the authority to conduct an appellate review of state court decisions. Rather, "[a] party raising a federal question must appeal a state court decision through the state system and then directly to the Supreme Court of the United States." United States v. Owens, 54 F.3d 271, 274 (6th Cir. 1995). Thus, when this Court is presented with claims that raise issues which were the subject of, or inextricably intertwined with, state court decisions, this Court must apply the Rooker-Feldman doctrine and dismiss the claims. See Rooker, supra at 415–416; Feldman, supra at 476, 486–87; Blanton v. United States, 94 F.3d 227, 233–34 (6th Cir. 1996). Nevertheless, "[t]he Rooker-Feldman doctrine does not apply to bar a suit in federal court brought by a party that was not a party in the preceding action in state court." United States v. County of Muskegon, 298 F.3d 569, 579 (6th Cir. 2002) (internal citation omitted).

As the Court noted above, it is undisputed that the United States was not a party to the state court condemnation proceeding. Further, as the United States emphasizes in its response, it is not challenging the state court's ruling that the Bank, not the landowners, was entitled to the title to the property. Rather, the current litigation will resolve the validity and effect of the second notice of levy, as well as the effect of the federal tax lien on the dis-bursement of the EJC. Because the instant interpleader action does not require this Court to review the determinations made by the state court in the condemnation proceeding, the Rooker-Feldman doctrine is inapplicable to this case.

IV. CONCLUSION

For the reasons stated above, Defendant The Bank of Bloomfield Hills' motion to dismiss is DENIED.

IT IS SO ORDERED.

GEORGE E. WOODS

UNITED STATES DISTRICT JUDGE

Dated: October 18th, 2002

Detroit, Michigan

¶2002-5671

In Re: Richard O. BARE and Carol BARE, Debtors. U.S. Bankruptcy Court, Northern Dist. of Illinois, (Bktcy Ct IL) No. 02 B 03767, Nov. 12, 2002. Years 1993, 1995, 2001. Decision for Govt.

1. Tax claims in bankruptcy—post plan confirmation complaints—IRS's right to setoff—prepetition tax debts—res judicata—automatic stay. IRS's post plan confirmation motion to lift stay and setoff Chap. 13 debtors' refund against their prepetition tax liabilities was granted: following majority case law, 11 USC §553(a)'s setoff preservation language trumped §1327's and §1141's mandate that confirmed plan bound all creditors; and IRS's failure to object to confirmation was irrelevant, particularly where it was secured claimant not bound by filing time limits imposed on unsecured creditors, overpayment wasn't scheduled as asset, and plan merely employed pro forma language. Also, equitable considerations further militated against interfering with IRS's setoff rights; and res judicata didn't other-

[6] Because the Bank has failed to meet the threshold requirement that the state and federal actions are parallel, this Court is not required to proceed any further.

wise bar relief since plan's improper omission of IRS's priority claims invalidated plan with respect thereto. *Reference:* United States Tax Reporter ¶68,726.52(20); 68,726.52(10); 68,726.52(47); 74,337.501(10).

United States Bankruptcy Court, N.D. Illinois, Eastern Division,

MEMORANDUM OPINION

SQUIRES, Bankruptcy J.

Federal government moved for relief from stay to allow it to apply Chapter 13 debtors' income tax overpayment against their prepetition tax liabilities, and debtors resisted on theory that government was barred from exercising right of setoff based on preclusive effect of debtors' confirmed debt adjustment plan. The Bankruptcy Court, John H. Squires, J., held that: (1) confirmation of debtors' Chapter 13 plan did not extinguish prepetition setoff rights possessed by federal government against tax refund owing to debtors, regardless of whether government had asserted any right of setoff prior to confirmation; and (2) court was not constrained either by bankruptcy statute describing preclusive effects of confirmed plan or by doctrine of res judicata from revisiting debtors' confirmed plan for limited purpose of ruling on any provisions of plan that proved to be invalid under the Bankruptcy Code.

Motion granted.

This matter comes before the Court on the motion of the United States of America, Department of the Treasury, Internal Revenue Service (the "IRS") to lift the automatic stay pursuant to 11 U.S.C. § 362(d) to allow it to apply Richard O. Bare and Carol Bare's (the "Debtors") 2001 income tax overpayment against their pre-petition tax liabilities. For the reasons set forth below, the Court hereby grants the motion to lift the automatic stay to allow the IRS to apply the Debtors' 2001 income tax overpayment against their pre-petition tax liabilities.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(G).

II. FACTS AND BACKGROUND

The Debtors filed a Chapter 13 bankruptcy petition on January 30, 2002. The IRS was listed as an unsecured priority creditor by virtue of the Debtors' unpaid income tax liability for the years 1993 and 1995. The Debtors' Schedule E listed a federal tax liability as a priority claim in the amount of $1,031.00. On February 25, 2002, the Debtors filed their 2001 tax return, claiming a refund due. The IRS has determined that there is a $3,742.00 overpayment available in the Debtors' account for that year. The Debtors did not indicate that they were owed any tax refund in their schedules. The Debtors filed a modified plan on April 10, 2002, in which they continued to treat the tax liability as a priority claim, and provided no indication of the overpayment.

The Court confirmed the Debtors' amended plan on April 24, 2002 without objection by the IRS. Neither the original nor the modified plan made any specific reference to the priority tax claim of the IRS. Both plan iterations merely employed the Court's model plan format language in section E.6, which provides: "Allowed priority claims other than those of the debtor's attorney. Payable in full, without interest, on a pro rata basis. The total of all payments on non-attorney priority claims to be made by the trustee under the plan is estimated to be $1,031 . . . ."

It is significant that the model plan format language only provides for pro rata treatment of allowed priority claims to be paid in full on an estimated basis. Thus, no definitive fixing of the correct final amount of such claim is made under the model plan format. Moreover, the confirmation order entered by the Court only confirmed the plan iteration at bar and provided that

the Debtors were to pay the trustee $600.00 per month for 48 months, up to a maximum of 60 months, so that all allowed unsecured general claims without priority would be paid a 10% dividend.

On May 29, 2002, the IRS filed the instant motion to lift the automatic stay to apply the overpayment to the Debtors' prepetition income tax liability, which the IRS asserts to exceed $3,000.00. In conjunction with its motion to lift the automatic stay the IRS filed a second proof of claim on July 9, 2002, in the amount of $3,110.21 plus interest and penalties, claiming security in the 2001 tax overpayment by Debtors, which the IRS seeks to setoff and apply to the unpaid tax claims for tax years 1993 and 1995.

The Debtors object to the IRS' motion and assert that the right to setoff was lost by the IRS because it waited until after confirmation. The Debtors argue, alternatively, that the setoff right should be limited to the amount of the scheduled claim, as referenced in the confirmed plan, thereby binding the IRS, which did not object to its treatment prior to confirmation under the provisions of the confirmed plan.

III. DISCUSSION

A. Did the IRS' setoff rights survive confirmation of the Debtors' Chapter 13 plan in light of 11 U.S.C. § 553?

[1] The IRS mounts a three-point argument in support of its right to exercise a setoff after confirmation of the Debtors' Chapter 13 plan. First, the application of a tax overpayment to reduce prepetition debts to the IRS is not a setoff within the meaning of the Bankruptcy Code, but instead a netting, permitted under the Internal Revenue Code § 6402, and under In re Midway Indus. Contractors, Inc., 178 B.R. 734, 737 (N.D.Ill.1995), citing Pettibone Corp. v. United States, 34 F.3d 536, 539 [74 AFTR 2d 94-6214] (7th Cir.1994). Second, if the above-referenced application were a setoff, the IRS' setoff rights are preserved by 11 U.S.C. § 553, which provides that, with limited exceptions, Title 11 does not extinguish the right of setoff, as noted in United States v. Munson, 248 B.R. 343 [85 AFTR 2d 2000-1912] (C.D.Ill.2000). And third, IRS setoffs are protected by sovereign immunity and other special government rights. In light of the Court's finding on the question of preservation of setoff rights in this case under § 553, it need not rule on the IRS' arguments pertaining to the issues of netting and sovereign immunity.

Indeed, the IRS' most compelling argument is that its right of setoff is not controlled by the Debtor's confirmed plan. The longstanding common law right of setoff enables a creditor to offset debt owed to a debtor as long as there is mutuality between the parties. Soo Line R. Co. v. Escanaba & Lake Superior R. Co., 840 F.2d 546, 551 (7th Cir.1988). ''The Bankruptcy Code neither expands nor constricts the common law right of setoff. Rather, it preserves, with exceptions not relevant here, whatever right exists outside bankruptcy.'' United States v. Maxwell 157 F.3d 1099, 1102 (7th Cir.1998), citing Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 18, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995), and In re Bennett Funding Group, Inc., 146 F.3d 136, 138–39 (2d Cir.1998). The IRS submits that § 553's language preserving a creditor's right of setoff (specifically, ''this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor ... against a claim of such creditor against the debtor''), takes precedence over §§ 1327 and 1141, which establish that confirmation binds all creditors and discharges pre-petition debts, vesting all property of the estate in the debtor. 11 U.S.C. § 1327; 11 U.S.C. § 1141; 11 U.S.C. § 553(a). The proper reconciliation of these provisions, dubbed by some courts as a ''plan v. setoff'' debate, is undecided in this circuit, and each side finds ample support for its position in the case law.

The Debtor relies on the holding in In re Continental Airlines, 134 F.3d 536 (3d Cir.1998), cert. denied sub nom, 525 U.S. 929, 119 S.Ct. 336, 142 L.Ed.2d 277 (1998), where the Third Circuit held that confirmation of the debtor's Chapter 11 plan extinguished the government's right

of setoff. The Continental Airlines court reaffirmed its earlier holding in United States v. Norton, 717 F.2d 767 [52 AFTR 2d 83-5923] (3d Cir.1983)(setoff is not permitted after confirmation), ruling: ''We recognize that a right of set-off is preserved under § 553 in a bankruptcy proceeding but we believe that the right must be exercised by the creditor in timely fashion and appropriately asserted in accordance with other provisions of the Bankruptcy Code.'' Continental Airlines, 134 F.3d at 541. The Continental Airlines court's analysis focused chiefly on the fact that the IRS did not claim its setoff right prior to confirmation: ''we are not persuaded by the cases relied on by the Government that § 1141 may be disregarded when a set-off is asserted ... the right of a creditor to set-off in a bankruptcy reorganization proceeding must be duly exercised in the bankruptcy court before the plan of reorganization is confirmed.'' Id. at 541–42. The Continental Airlines court reasoned that a holding favoring setoff rights could undermine the objectives of the Bankruptcy Code, first in treating an unsecured claim as secured to the disadvantage of other general creditors, and second by potentially disrupting the confirmed plan and protracting the bankruptcy proceedings. Id. at 541.

There is a split among the circuits on this issue, and the IRS cited to In re De Laurentiis Entertainment Group Inc., 963 F.2d 1269 (9th Cir.1992), cert. denied, 506 U.S. 918, 113 S.Ct. 330, 121 L.Ed.2d 249 (1992), where the Ninth Circuit ruled that a right of setoff survives even if the claimant fails to file an objection prior to plan confirmation. The De Laurentiis court ascribed supremacy to the language and structure of § 553, as well as the precedence given the setoff provision under the Bankruptcy Act, and found that ''[the language of § 553] seems intended to control notwithstanding any other provision of the Bankruptcy Code. To give section 1141 precedence would be to ignore this language.'' Id. at 1276–1277. It noted that if the other provisions were interpreted to take precedence over § 553, setoffs would be allowed in bankruptcy only if they were included in a plan of reorganization, and such a result would render § 553 superfluous since a setoff could be added to a reorganization plan even without § 553. Id. at 1277. The De Laurentiis court also reviewed equitable considerations, noting that if not for the right of setoff, some creditors would find themselves in the unenviable position of having to pay their debts to the debtor in full, but only receiving a small fraction of the money owed to them by the debtor. Id.

Similarly, in In re Davidovich, 901 F.2d 1533, 1539 (10th Cir.1990), the Tenth Circuit reasoned that a creditor's right to setoff is a universally recognized right grounded in principles of fairness. On this basis it declined to adopt a posture that would unfairly ''deny a creditor the right to recover an established obligation while requiring the creditor to fully satisfy a debt to a debtor.'' Id. It thus concluded that the filing of a proof of claim is not a prerequisite to asserting setoff rights, and further that a discharged debt may be setoff upon compliance with § 553. Id. The Central District of Illinois favored § 553 as well, in United States v. Munson, 248 B.R. 343, 346 [85 AFTR 2d 2000-1912] (C.D.Ill.2000), where it was compelled by the tenor of the Seven Circuit's analysis of setoff rights in bankruptcy generally, along with equitable considerations and the strength of the majority line of opinions.

The Court follows Munson in adopting the majority approach to this issue. The clear ambit of § 553 does not lend itself to the Continental Airlines holding, which seizes upon the government's failure to object to the plan, to the detriment of a plain reading of the statute. Section 553 provides that ''this title does not affect any right of a creditor to offset a mutual debt'', and the words ''this title'' necessarily implicate § 1327 and § 1141. 11 U.S.C. § 553(a). Because § 1327 and § 1141 are thus restrained from facilitating the elimination of setoff rights, the IRS' failure to enter an objection must bear no relevance to the Court's determination of their setoff rights after confirmation. This conclusion is especially applicable here, as the confirmed

plan's terms only referenced the Debtors' estimate of the allowed property claims. The Court made no independent adjudication of the IRS' allowed claim at the time of confirmation, and the confirmation order merely tracked the statutory requirement of 11 U.S.C. § 1322(a)(2) to provide for full payment in deferred cash payments of all claims entitled to priority under § 507, unless the holder agrees to a different treatment of such claim. No such agreement was made by the IRS, and the Court will not infer such an agreement based on the IRS' failure to object to the modified plan prior to confirmation, in as much as the IRS was not merely an unsecured priority creditor, owed the unpaid 1993 and 1995 income taxes from the Debtors, but was a secured claimant by virtue of the 2001 tax overpayment by the Debtors. The Debtors did not schedule the overpayment as an asset, and secured claimants are not subject to the time limits imposed upon unsecured creditors under Federal Rule of Bankruptcy Procedure 3002(c)(1). Indeed, secured creditors are not subject to the time limits of the Rule and may file their claims at any time or opt not to file any claim if they do not seek payment from the trustee on their allowed secured claims.

Moreover, the Court concurs with the Munson court's impression that while the Seventh Circuit has not addressed the immediate issue, its approach toward related issues suggests a deep reservation against bankruptcy court interference with setoff rights. The Seventh Circuit has held that "[w]hatever equitable discretion the bankruptcy courts may enjoy when considering the right of setoff, it does not extend to the blanket abolition of the right for whole classes of creditors." Maxwell, 157 F.3d at 1102. In another case it admonished: "as Judge Friendly has reminded us 'the rule allowing setoff, both before and after bankruptcy, is not one that courts are free to ignore when they think application would be unjust.'" In re Elcona Homes Corp., 863 F.2d 483, 488 (7th Cir.1988), citing In re Applied Logic Corp., 576 F.2d 952, 957 (2d Cir.1978). Such language does not invite a diminutive interpretation of § 553. Accordingly, this Court finds that, pursuant to § 553, and subject to the limited exceptions contained within that provision, confirmation of a debtor's plan of reorganization does not extinguish prepetition setoff rights, especially of secured creditors where the plan does not specifically treat those setoff rights, irrespective of whether any given holder of the right fails to assert it prior to confirmation.

B. Is the IRS barred from pursuing its setoff rights after confirmation of the Debtors' Chapter 13 plan under the doctrine of res judicata?

Finally, as the IRS points out, Seventh Circuit precedent suggests that the principles of res judicata do not apply to any provision of a confirmation order that fails to comply with the Bankruptcy Code. Pursuant to the doctrine of res judicata, a party must prove three elements: (1) an identity of parties or their privies; (2) an identity of the causes of action; and (3) a final judgment on the merits. Andersen v. Chrysler Corp., 99 F.3d 846, 852 (7th Cir.1996), citing Kratville v. Runyon, 90 F.3d 195, 197 (7th Cir.1996). Res judicata bars not only matters determined in a prior suit, but matters which could have been determined in that suit but were not raised. Brzostowski v. Laidlaw Waste Sys., Inc., 49 F.3d 337, 338 (7th Cir.1995). The doctrine does not bar litigation of an issue when a party did not have a full and fair opportunity to litigate the issue in the original case. The party invoking res judicata bears the burden of proving its applicability. Rooding v. Peters, 92 F.3d 578, 580 (7th Cir.1996) (citing Illinois law).

According to the Bankruptcy Code, "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted or has rejected the plan." 11 U.S.C. § 1327(a). Section 1327(a) thus creates a res judicata effect that prevents bankruptcy courts from reconsidering matters that were disposed of by a confirmed plan. Strong v. I.R.S., 203 B.R. 105, 113 [78 AFTR 2d 96-7667] (Bankr.N.D.Ill.1996). The Sev-

enth Circuit has instructed that, "[a]s a general rule the failure to raise an objection at the confirmation hearing or to appeal from the order of confirmation should preclude attack on the plan or any provision therein as illegal in a subsequent proceeding." In re Chappell, 984 F.2d 775, 782 (7th Cir.1993) (internal quotation marks omitted). The Seventh Circuit has aimed firmly towards preserving finality in this context, opting, for example, "not to follow those cases allowing post-confirmation objections to proofs of claims to be filed even though the proof of claim itself was filed sufficiently in advance of the confirmation hearing." Adair v. Sherman, 230 F.3d 890, 895 (7th Cir.2000).

In In re Escobedo, 28 F.3d 34 [74 AFTR 2d 94-5132] (7th Cir.1994), however, the Seventh Circuit considered specifically the status of a validly confirmed plan that failed to provide for the full payment of priority claims mandated by 11 U.S.C. § 1322(a)(2). It noted that under 11 U.S.C. § 1325(a)(1), "[a] bankruptcy court lacks the authority to confirm any plan unless it complies with the provision of this chapter and with the other applicable provisions of this title." Id. at 35. Escobedo held that in light of the plan's failure to comply with mandatory requirements, the confirmation was invalid in that respect and therefore had "no res judicata effect as to the omitted priority claims." Id. Under Escobedo, then, the Court finds that it is not constrained by § 1327(a) or the doctrine of res judicata in revisiting the Debtors' confirmed plan for the limited purpose of ruling on any provisions of the plan that prove to be invalid under the Bankruptcy Code. See also In re Puckett, 193 B.R. 842, 849–850 (Bankr.N.D.Ill.1996) (examining Escobedo).

IV. CONCLUSION

For the foregoing reasons, the IRS' motion to lift the automatic stay is granted.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ORDER

For the reasons set forth in a Memorandum Opinion dated the 12th day of November, 2002, the Courts grants the motion of the United States of America, Department of the Treasury, Internal Revenue Service to lift the automatic stay under 11 U.S.C. § 362 to allow it to apply the Debtors' 2001 income tax overpayment against their pre-petition tax liability.

¶2002-5672

Ford T. JOHNSON, JR., PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Fourth Circuit, (CA4) No. 02-1240, Nov. 6, 2002. District Court, (2002, DC MD) 89 AFTR 2d 2002-1000, 203 F Supp 2d 416, 2002-1 USTC ¶50267 [89 AFTR 2d 2002-1000], affirmed per curiam. Years 1994, 1995. Decision against Taxpayer.

1. 100% penalty for failure to pay over trust fund taxes—responsible person; willfulness—bankruptcy—summary judgment. Order granting govt. summary judgment on taxpayer's IRC §6672 refund complaint and upholding its counterclaim for remainder of penalty was affirmed, based on district court's reasoning and finding that taxpayer's failure to pay was clearly willful. *Reference:* United States Tax Reporter ¶66,725.03(50); 66,725.04(5); 66,725.01(37). IRC §6672.

Ernest P. Francis, ERNEST P. FRANCIS, LTD., Arlington, Virginia, for Appellant. Eileen J. O'Connor, Assistant Attorney General, Kenneth L. Greene, Karen D. Utiger, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

United States Court of Appeals, Fourth Circuit,

Appeal from the United States District Court for the District of Maryland, at Bal-

timore. Frederic N. Smalkin, Chief District Judge. (CA-98-3050-S)

Before WILLIAMS and TRAXLER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

OPINION

PER CURIAM:

[1] Ford T. Johnson, Jr., appeals from the district court's order granting summary judgment to the United States on Johnson's claim for refund of the 100% penalty assessed against him under 26 U.S.C. § 6672 (2000), and the United States' counterclaim for the remainder of the penalty, for the third and fourth quarters of 1994 and the first quarter of 1995. We have reviewed the record, including the district court's opinion, as well as the parties' briefs and find no reversible error. The evidence before the district court established that Johnson "willfully" failed to pay over the payroll taxes at issue, within the meaning of § 6672. See Plett v. United States, 185 F.3d 216 [84 AFTR 2d 99-5403] (4th Cir.1999). To the extent that Johnson challenges the government's alleged attempts to double-collect the unpaid taxes at issue, the district court's opinion clearly states that "no double recovery ... shall be permitted."

Accordingly, we affirm on the reasoning of the district court. See Johnson v. United States, No. CA-98-3050-S (D.Md. Jan. 29, 2002). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

¶2002-5673

UNITED STATES OF AMERICA, PLAINTIFF v. Athena STAVROS, as personal representative of the Estate of Steve O. Stavros, Julie Lynn Stavros, Kimberly Sue Schmitz, Kelly Leigh Stavros, and New Century Mortgage Corp., DEFENDANTS. U.S. District Court, Northern Dist. of Illinois, (DC IL) No. 02 C 3509, Nov. 13, 2002. Years 1979, 1980, 1981, 1982, 1983. Decision for Taxpayers in part and for Govt. in part.

1. Collection actions—reducing assessments to judgment—claims against estates—jurisdiction—capacity to be sued. Govt.'s collection claim against estate to reduce decedent's outstanding income tax assessments to judgment was dismissed: estate lacked capacity to be sued under Illinois law where no will had been admitted to probate and no estate had been opened. Also, widow's signing of small estate affidavit was irrelevant since small estate administration was extra-judicial process; and mere act of her filing earlier Tax Court case on estate's behalf wasn't otherwise sufficient to confer jurisdiction over estate in instant suit. *Reference:* United States Tax Reporter ¶74,035.01(100). USTR Estate & Gift Taxes ¶74,025.01(5). IRC §7402; 7403.

2. Limitations periods on collection—fraudulent conveyances. Limitations periods didn't bar govt.'s fraudulent conveyance claim to set aside deceased taxpayer's transfers of properties to daughters: 10-year period of IRC §6502(a), under which action was timely, and not Illinois Uniform Fraudulent Transfer Act governed; and case law to contrary wasn't followed. *Reference:* United States Tax Reporter ¶65,025.01(32); 74,035.03(90). IRC §6502; 7403.

3. Collection actions—motion to dismiss—foreclosure—transferee liability—unjust enrichment. Daughters' F.R.Civ.P. 12(b)(6) motion to dismiss govt.'s claims to foreclose liens for taxpayer-deceased father's outstanding income taxes on properties transferred to daughters was denied: motion was improperly based on ownership theory that wasn't contained in original complaint and thus couldn't be considered. Similarly, daughters' Rule 12(b)(6) challenge to govt.'s transferee liability claim improperly relied on matters outside pleadings; and their contention that govt.'s alternate unjust enrichment claim couldn't exist as stand-alone claim was re-

jected. *Reference:* United States Tax Reporter ¶74,035.03(80); 74,025.01(145); 69,015.03(65). IRC §6901; 7402; 7403.

United States District Court, N.D. Illinois, Eastern Division,

MEMORANDUM OPINION AND ORDER

LINDBERG, Senior J.

Defendants have moved pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) to dismiss plaintiff's complaint. For the reasons stated below, the motion to dismiss is granted in part and denied in part.

The following facts are taken from the complaint. On January 8, 1988, the Internal Revenue Service notified spouses Steve and Athena Stavros of proposed adjustments to their federal tax liability for the years 1979 through 1983, based the disallowance of claimed investment tax credits. Twelve days later, Steve and Athena Stavros transferred their interests in a condominium unit and their personal residence to their daughters, defendants Julie Lynn Stavros, Kelly Leigh Stavros, and Kimberly Sue Schmitz. These transfers were made for no consideration, or inadequate consideration. Steve Stavros continued to live in his personal residence after the transfer.

On May 31, 1988, Steve Stavros died. Following Steve Stavros's death, Athena Stavros filed a Small Estate Affidavit, which listed a trust valued at $3,500 as the sole asset of the estate.

On September 28, 1990, the Commissioner of Internal Revenue issued a notice of deficiency to Athena Stavros and the Estate of Steve O. Stavros, asserting a $21,065 income tax deficiency for the years 1979 through 1983. In response to the notice of deficiency, Athena Stavros filed a petition with the United States Tax Court, under the caption ''Estate of Stavros, et al v. Commissioner.'' The parties in that case eventually entered into a Stipulation of Settlement, which affirmed the disallowance of investment tax credits with respect to the Estate of Steve O. Stavros. The settlement acknowledged that Athena Stavros qualified as an innocent spouse under 26 U.S.C. § 6013(e), and that she was not liable for the deficiency. On January 23, 1992, the Tax Court sustained the deficiencies against the Estate of Steve O. Stavros. On May 26, 1992 and June 17, 1992, a delegate of the Secretary of the Treasury made assessments against the Estate of Steve O. Stavros pursuant to the Tax Court decision, and sent notice of the assessment and demand for payment to the estate. No payments were made. According to the complaint, as of February 28, 2002, the accrued tax liabilities, penalties, and interest owed totaled $178,851.11.

On May 15, 2002, the federal government filed this action, seeking to reduce the 1992 assessments to a judgment against the Estate of Steve O. Stavros; declare that Steve and Athena Stavros's transfer of properties to their daughters was fraudulent; foreclose federal tax liens on the properties transferred to the daughters; hold that the daughters are liable for the tax deficiency to the extent of the value of the properties they received; and hold that the daughters were unjustly enriched to the detriment of the United States as a result of the property transfers. Defendants have moved to dismiss the complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

[1] The court first reviews defendants' charge that the court lacks subject matter jurisdiction. In considering a motion to dismiss for lack of jurisdiction under Fed.R.Civ.P. 12(b)(1), the court must accept the complaint's well-pleaded factual allegations as true and draw reasonable inferences from those allegations in the plaintiff's favor. Transit Exp., Inc. v. Ettinger, 246 F.3d 1018, 1023 (7th Cir.2001). The court may properly consider material outside the pleadings on a motion to dismiss for lack of jurisdiction. See Sapperstein v. Hager, 188 F.3d 852, 855 (7th Cir.1999). When the court's jurisdiction has been challenged, ''[t]he plaintiff has

the obligation to establish jurisdiction by competent proof.'' Id.

Defendants contend that the court lacks jurisdiction to enter judgment against the Estate of Steve O. Stavros because the estate does not have the capacity to be sued. In support of their contention, they state that after Steve Stavros died, no probate estate was opened and a personal representative was not appointed to act on behalf of his estate. Accordingly, they argue, under Illinois law, no estate exists to be sued and the court does not have jurisdiction to decide a claim made against the estate.

Federal Rule of Civil Procedure 17(b) provides that the capacity to be sued of an individual acting in a representative capacity is determined by the law of the state in which the district court is held. Under Illinois law, a court lacks the authority to adjudicate claims made against a decedent's estate until the decedent's will is admitted to probate, or, in the case of intestacy, until letters of administration issue. Estate of Gebis, 710 N.E.2d 385, 389 (Ill.1999). This procedure serves the purpose of preserving the schedule establishing the priority in which claims against an estate must be paid; a contrary result would permit a claimant to circumvent the priority schedule. See id. at 389.

Here, the government offers no evidence that Steve Stavros's will was admitted to probate.[1] Instead, the government argues that because Athena Stavros signed a small estate affidavit and filed an action in Tax Court on behalf of the estate, the estate may be subject to suit. The court disagrees. The administration of small estates through the use of the small estate affidavit takes place outside the judicial process. See 755 ILCS 5/25-1. Thus, as in other circumstances in which a creditor wishes to pursue a claim against an estate where no estate has been opened, the creditor must petition the court for admission of the decedent's will to probate.[2] See 755 ILCS 5/6-2. Moreover, Athena Stavros could not confer on the court jurisdiction over the estate through her act of filing suit in Tax Court in the name of the estate. Accordingly, the court concludes that it does not have the authority to grant relief against the Estate of Steve O. Stavros, and dismisses Count I of the complaint.

[2] The court next considers defendants' arguments that the remaining claims should be dismissed under Rule 12(b)(6). When ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must consider ''whether relief is possible under any set of facts consistent with the allegations of the plaintiff's complaint.'' Pokuta v. Trans World Airlines, Inc., 191 F.3d 834, 839 (7th Cir.1999). That is, if it is possible to hypothesize a set of facts that would entitle the plaintiff to relief, consistent with the allegations in the complaint, dismissal under Rule 12(b)(6) is inappropriate. Graehling v. Village of Lombard, 58 F.3d 295, 297 (7th Cir.1995).

Defendants contend that the government's fraudulent conveyance claim in Count II of the complaint is barred by the four-year limitations period provided in the Illinois Uniform Fraudulent Transfer Act (''UFTA''). See 740 ILCS 160/10. The government responds that the timeliness of actions brought by the United States is not governed by state statutes of limitations.[3] As the United States Supreme Court has long held, ''[w]hen the United States becomes entitled to a claim, acting in its governmental capacity and asserts its claim in that right, it cannot be deemed to have abdicated its governmental authority so as to become subject to a state statute putting a time limit upon enforcement.'' United States v. Summerlin, 310 U.S. 414, 417 (1940). The government argues that since there is no express congressional directive subjecting the United States to a state stat-

[1] The mere act of filing a will does not open an estate. See 755 ILCS 5/6-2.

[2] Alternatively, a creditor may be able to seek recovery against the affiant of the small estate affidavit. See 755 ILCS 5/25-1(c) (''[t]he affiant signing the small estate affidavit ... shall indemnify and hold harmless all creditors and heirs of the decedent and other persons relying upon the affidavit who incur loss because of such reliance'').

[3] The government also argues that the UFTA, which went into effect in 1990, does not apply retroactively to the 1988 transfers at issue here. Given the court's conclusion that the UFTA's limitations period would not apply to an action filed by the federal government in any event, the court need not reach this argument.

ute of limitations, the ten-year limitations period prescribed by 26 U.S.C. § 6502(a)(1) should apply.

Defendants' position relies in part on the commentary to the Uniform Laws Annotated version of the UFTA, which states that the purpose of the limitations provision "is to make clear that lapse of the statutory periods prescribed by the section bars the right and not merely the remedy. The section rejects the rule applied in United States v. Gleneagles Inv. Co., 565 F.Supp. 556, 583 (M.D.Pa.1983) (state statute of limitations held not to apply to action by United States based on Uniform Fraudulent Conveyance Act)." Unif. Fraudulent Transfer Act § 9, comment (1) (citations omitted).

In further support of their position, defendants cite an opinion from the District of Hawaii, in which the district court examined Hawaii's version of the UFTA, which contains a limitations provision that is identical to Illinois' version. See United States v. Vellalos, 780 F.Supp. 705 [69 AFTR 2d 92-643] (D. Hawaii 1992). The Vellalos court read Summerlin to stand for the limited proposition that states may not limit the federal government's common law right to collect a debt through a statute of limitations. Id. at 707. However, the court concluded, Summerlin does not limit a state's right to extinguish a statutory cause of action through a statute of repose following the expiration of a prescribed time period, even with respect to rights held by the United States. Id. The court concluded that Hawaii's UFTA extinguished the cause of action sought to be brought by the federal government. Id. at 708.

Defendants urge the court to follow the reasoning of the Vellalos court, and hold that the rule set forth in Summerlin does not apply to the Illinois UFTA because the limitations provision is a statute of repose. The court declines defendants' invitation. Numerous other courts, including one in this district, have rejected the distinction between common law actions and statutory actions made by the Vellalos court, in the context of analyzing their states' versions of the UFTA. See, e.g., United States v. Hatfield, No. 94-50397, 1996 WL 153686, at 3 [77 AFTR 2d 96-1969] (N.D.Ill. Apr. 2, 1996) (Reinhard, J.); United States v. Zuhone, No. 96-1078, 1996 WL 437509, at 3 [78 AFTR 2d 96-5106] (C.D.Ill. May 29, 1996); Stoecklin v. United States, 858 F.Supp. 167, 168 [73 AFTR 2d 94-2083] (M.D.Fla.1994), aff'd, 120 F.3d 273 (11th Cir.1997); Flake v. United States, No. 93-0306, 1995 WL 735740, at 3–4 [76 AFTR 2d 95-6957] (D.Ariz. Sept. 29, 1995); see also United States v. Bantau, 907 F.Supp. 988, 991 [76 AFTR 2d 95-6883] (N.D.Tex.1995) (rejecting application of UFTA limitations period in tax case brought by federal government, without reference to Vellalos distinction). The court agrees with the reasoning of these courts, and finds that the UFTA's limitations period does not apply in this case, and that the government's fraudulent conveyance claim is timely under the ten-year statute of limitations imposed by 26 U.S.C. § 6502(a)(1). Accordingly, defendants' motion to dismiss Count II is denied.

[3] Defendants next argue that Count III, which seeks to foreclose federal tax liens against property transferred by Steve Stavros to his daughters, should be dismissed. Defendants contend that if these transfers were held to have been fraudulent, title in the properties would then revert to the original status held prior to the transfers. According to defendants, title in the Stavros personal residence had been held by Steve and Athena Stavros as joint tenants, and title in the condominium had been held by Steve Stavros, Athena Stavros, and her mother as joint tenants, prior to the transfers. Thus, if the transfers were set aside, the properties would then pass by operation of law to Athena Stavros and her mother upon the death of Steve Stavros, where they would be beyond the government's reach.

The manner in which Steve Stavros held title in the properties at issue prior to their transfer is not alleged in the complaint. Rather, defendants offer this information in their brief in support of their motion to dismiss. The court may not consider infor-

mation outside the complaint on a motion to dismiss under Rule 12(b)(6). Wilkow v. Forbes, Inc., 241 F.3d 552, 555 (7th Cir.2001). The court therefore cannot consider defendants' allegation that the properties at issue were held in joint tenancy without converting the motion to a motion for summary judgment, see Fed.R.Civ.P. 12(b)(6), an action the court declines to take. Defendants' motion to dismiss Count III is denied

The portion of defendants' motion to dismiss attacking Count IV, which alleges transferee liability, suffers from a similar flaw. Defendants argue that they cannot be held liable as transferees for the tax deficiencies because no transferor party exists against which the tax assessments could be reduced to judgment. This argument is based on defendants' allegation in their motion to dismiss that no estate was opened following the death of Steve Stavros. While the court could properly consider this information outside the pleadings in the context of evaluating a motion to dismiss for lack of jurisdiction under Rule 12(b)(1), the court may not consider this information in the context of evaluating a motion to dismiss for failure to state a claim upon which relief could be granted under Rule 12(b)(6). Therefore, defendants' motion to dismiss Count IV is denied.

Finally, although they present no argument on the issue, defendants move to dismiss the unjust enrichment in Count V, because it is "based on the viability of Counts I through IV." Unjust enrichment can be pleaded as a separate cause of action under Illinois law. See Scholes v. Ames, 850 F.Supp. 707, 711–12 (N.D.Ill.1994), aff'd, 56 F.3d 750 (7th Cir.1995); Scholes v. African Enter., Inc., 838 F.Supp. 349, 357 (N.D.Ill.1993) (citing HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc., 545 N.E.2d 672 (Ill.1989)), aff'd, 56 F.3d 750 (7th Cir.1995). Defendants' motion to dismiss Count V is denied.

ORDERED: The motion to dismiss is granted in part and denied in part. 2002 WL 31545918 (N.D.Ill.)

¶2002-5674

UNITED STATES OF AMERICA, PETITIONER v. Ricardo ELIAN, RESPONDENT. U.S. District Court, Northern Dist. of Texas, (DC TX) No. 3-02-CV-1918-G, Oct. 17, 2002. Years 1996, 1997, 1998, 1999, 2000. Decision for Govt.

1. Summons enforcement—taxpayer's failure to appear or comply. Govt.'s motion to enforce IRS summons issued on taxpayer was granted: prima facie enforcement case was established by IRS officer's testimony that all administrative requirements were met, no Justice Dept. referral had been made, and summoned information not already in IRS's possession was relevant to legitimate investigation into taxpayer's tax debts; and taxpayer, who didn't appear at scheduled summons hearing or subsequent show cause hearing, didn't allege any bad faith or abuse of process by govt. *Reference:* United States Tax Reporter ¶76,025.04(25). IRC §7602.

United States District Court, N.D. Texas,

MEMORANDUM ORDER

KAPLAN, Magistrate J.

Petitioner United States of America has filed a petition to enforce an Internal Revenue Service summons served on Respondent Ricardo Elian. For the reasons stated herein, the petition is granted.

I.

On March 13, 2002, the IRS served a summons on respondent as part of an investigation into his income tax liability for the years 1996, 1997, 1998, 1999, and 2000.[1] Respondent was directed to appear before Revenue Officer Kelvin R. Roque and produce certain books, records, papers, and data on March 28, 2002 at 9:00 a.m. Respondent failed to appear as

[1] Revenue Officer Kelvin R. Roque attempted to personally serve respondent with the summons on March 13, 2002. When no one answered the door, Roque attached the summons to the front door of respondent's residence at 4141 Horizon North Parkway, # 825, Dallas, Texas.

required. The government filed this action to enforce the summons on September 5, 2002.

A show cause hearing was scheduled for October 17, 2002 at 8:30 a.m. Respondent was personally served with a copy of the show cause order on October 2, 2002, but failed to appear at the hearing. Assistant United States Attorney Frank Able appeared for the government and announced ready to proceed. After considering the evidence and the written submissions of the parties,[2] the court determines that the summons should be enforced.

II.

[1] A federal district court may enforce an IRS summons if the respondent fails to appear and produce records that are relevant to a legitimate tax inquiry. 28 U.S.C. § 7604; United States v. Wyatt, 637 F.2d 293, 299–300 [47 AFTR 2d 81-789] (5th Cir.1981). The government must prove that: (1) the investigation is being conducted for a legitimate purpose; (2) the summons is relevant to that purpose; (3) the information sought is not already in the possession of the IRS; and (4) all proper administrative procedures have been followed. United States v. Powell, 379 U.S. 48, 57–58 [14 AFTR 2d 5942], 85 S.Ct. 248, 254–55 [14 AFTR 2d 5942], 13 L.Ed.2d 112 [14 AFTR 2d 5942] (1964); Barquero v. United States, 18 F.3d 1311, 1316 [73 AFTR 2d 94-1769] (5th Cir.1994). The burden then shifts to the taxpayer to challenge the summons on any "appropriate ground." Powell, 85 S.Ct. at 255; Barquero, 18 F.3d at 1316–17. These grounds are limited to cases involving harassment, abuse of process, and other acts of bad faith. See United States v. Stuart, 489 U.S. 353, 360 [63 AFTR 2d 89-681], 109 S.Ct. 1183, 1188 [63 AFTR 2d 89-681], 103 L.Ed.2d 388 [63 AFTR 2d 89-681] (1989).

Revenue Officer Kelvin R. Roque testified at the hearing. He said that respondent has not filed any tax returns for the years 1996, 1997, 1998, 1999, and 2000. According to Roque, the financial information requested in the summons is necessary to determine the amount of respondent's tax liability for those years. Roque further testified that the IRS has followed all applicable statutes and administrative procedures and that there is no Justice Department referral in effect with respect to this matter.

The court finds that the IRS summons is valid and should be enforced. The government has established that the investigation is being conducted for a legitimate purpose, the summons is relevant to that purpose, the information sought is not already in the possession of the IRS, and the proper administrative procedures have been followed. Respondent has failed to demonstrate bad faith or an abuse of process on the part of the government.

CONCLUSION

For these reasons, the petition to enforce the IRS summons is granted. Respondent Ricardo Elian is ordered to testify and produce all books, records, papers, and other documents specified in the summons attached as Exhibit "A" to the government's petition filed on September 5, 2002. Respondent is ordered to appear with these materials before Revenue Officer Kelvin R. Roque, or any other officer of the Internal Revenue Service, at 1100 Commerce Street, Room 9B20, Dallas, Texas 75242, on November 8, 2002 at 10:00 a.m.

A copy of this order shall be sent by certified mail, return receipt requested, and by regular mail to Ricardo Elian, 4141 Horizon North Parkway, # 825, Dallas, Texas 75287.

SO ORDERED.

¶2002-5675

UNITED STATES OF AMERICA v. John MIKUTOWICZ. U.S. District Court, Dist. of Massachusetts, (DC MA) No. CR.A. 01-10321-RWZ, Nov. 13, 2002.

[2] Respondent submitted various documents prior to the show cause hearing which the court will liberally construe as a response to the petition. It appears that respondent objects to paying taxes and producing his tax records to the IRS because he is a citizen of the Republic of Texas. Of course, the Republic of Texas ceased to exist when Texas became the 28th state of the United States of America in 1845. See McLaren v. United States Incorporated, 2 F.Supp.2d 48, 51 (D.D.C.1998), citing Texas v. White, 74 U.S. (7 Wall.), 700, 19 L.Ed. 227 (1868). Accordingly, respondent's objection is overruled as frivolous.

Years 1995, 1996, 1997, 1998. Decision for Govt.

1. Tax crimes—tax evasion; filing false returns—restitution—calculations—time for reporting income—constructive receipt. Taxpayer's restitution for tax evasion and filing false returns was set according to govt.'s calculation of amount of income generated during each indictment year, less any amount already paid on tax due in those years: taxpayer's constructive receipt argument that portion of subject years' income wasn't taxable until post-indictment years when it was deposited in his account was rejected. Because subject funds arose from improper deductions for payments to sham corp., they were disregarded and couldn't be used to reduce amount of income realized in indictment years; and date of income's deposit was irrelevant to time it was realized. Also, to extent taxpayer's calculations resulted in overpayments for post-indictment years, he could always file corrected returns. *Reference:* United States Tax Reporter ¶72,065.01(50); 73,446.516(55); 615.054(5). IRC §61; 451; 7201; 7206.

United States District Court, D. Massachusetts,

MEMORANDUM CONCERNING RESTITUTION

ZOBEL, J.

[1] A jury convicted defendant John Mikutowicz of evading income taxes in each of the years 1995 through and including 1998, and of filing false returns on behalf of AGM Marine, Inc. for the same years, and of Felix Management for 1998. At the sentencing hearing, a question arose about the amount of the unpaid taxes for those years and the amount of restitution to be ordered in the judgment.

The restitution amount is muddy for two reasons. First, defendant has filed amended returns for the years 1998, 1999 and 2000 and, using the "constructive receipt doctrine," he declared in those years some of the income generated in the indictment years. The government insists that the deductions taken by AGM Marine, Inc., for payments and land and equipment transactions involving Ellis Engineering Ltd., an offshore company created for the purpose, were taxable immediately because Ellis Engineering lacked any economic substance. Second, defendant established an offshore bank account to receive the monies that resulted from the improper deductions. Again, contrary to the government's view, defendant asserts that income generated in the indictment years which was ultimately deposited in the offshore account is not taxable until it was in fact so deposited.

I agree with the government on both issues. Implicit in the jury's verdict is a finding that Ellis Engineering was created and used solely for the purpose of syphoning income out of AGM Marine. That being so, the deductions taken by AGM Marine for payments to Ellis were improper, and the entire income, including the reductions of income created by the Ellis payments is correctly recognized in the year in which the income was created. Similarly, the date of deposit in the offshore account of such income is irrelevant.

Accordingly, the correct amount of restitution shall be based on the government's calculation of the amount of the income that was generated during each year covered by the indictment, less any amounts heretofore paid on account of the tax due in those years. To the extent that defendant, by following a different methodology, may have overpaid taxes for post-indictment years, this judgment does not prevent him from filing amended returns to reflect the correct tax due for those years.

¶2002-5676

WORLDWIDE LABOR SUPPORT OF MISSISSIPPI, INC., PLAINTIFF-COUNTER DEFENDANT-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-COUNTER CLAIMANT-APPELLEE. U.S. Court of Appeals, Fifth Circuit, (CA5) No. 01-60535, Nov. 15, 2002. District Court, (2001, DC MS) 87 AFTR 2d 2001-2401, 2001-2 USTC

¶50463, vacated and remanded. Year 1995. Decision for Taxpayer in part.

1. Withholding—wages—reimbursed employee expenses; accountable plans—business connection. District court improperly determined on summary judgment that temporary employment corp.'s hourly per diem travel expense payments to non-local employees didn't qualify as Reg. §1.62-2 accountable plan: according to prevailing law, whether payments met reg business connection test and were reasonably calculated to reimburse actual or anticipated expenses raised factual issues surrounding taxpayer's state of mind that were more appropriate for jury to decide, not to be determined summarily. Notably, travel reimbursement arrangement based on number of regular and overtime hours worked wasn't automatically unreasonable; and case law to contrary that involved plan designed primarily for tax avoidance was distinguished. But, govt. was correct in that per diem was treated as ''meals only'' per diem allowance under *Rev Proc 94-77*, 1994-2 CB 825, and was deemed substantiated only up to federal rate for Reg. §1.62-2(e) purposes; and taxpayer's attempt to invalidate rev proc as contrary to regs was rejected. *Reference:* United States Tax Reporter ¶625.01(10); 34,015.03(5). IRC §62; 3401.

Robert J. Branman (argued), Bruce Raleigh Ellisen, U.S. Dept. of Justice, Tax Div., Washington, DC, for U.S.

United States Court of Appeals, Fifth Circuit,

Appeal from the United States District Court for the Southern District of Mississippi.

Before KING, Chief Judge, and HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

Taxpayer, a provider of temporary skilled labor, sued for refund of federal employment taxes assessed against non-local employee's hourly per diem travel expense reimbursements. The United States District Court for the Southern District of Mississippi, 2001 WL 710604, Barbour Jr., J., granted summary judgment to government on its counterclaim and awarded government just under $3 million in unpaid taxes and interest, and taxpayer appealed. The Court of Appeals, Higginbotham, Circuit Judge, held that: (1) fact issue existed as to whether taxpayer had reasonably anticipated and calculated its employees' travel expenses in course of developing reimbursement arrangement; (2) travel reimbursement arrangement based on number of regular and overtime hours worked was not automatically unreasonable; and (3) reimbursement arrangement would be treated as ''meals only'' under applicable Revenue Procedure.

Vacated and remanded.

E.M. Garza, Circuit Judge, filed dissenting opinion.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Worldwide Labor Support of Mississippi, Inc. appeals the district court's grant of summary judgment to the government in the amount of $2,019,888.77 for employment taxes, accruals of interest, and statutory additions. The district court held that the hourly per diem travel expense reimbursements made by Worldwide to its non-local employees were taxable wages. We vacate the summary judgment and remand for further proceedings.

I

Worldwide provides temporary skilled labor to industrial and commercial businesses, including Caterpillar, Inc. Facing labor difficulties, Caterpillar from July 1994 through December 1995 leased workers from Worldwide.

Many of the workers remained at the Caterpillar job site in Aurora, Illinois seven days a week. In addition to an hourly wage, Worldwide paid an additional amount per hour to employees who lived more than 100 miles from the Caterpillar site as reimbursement for lodging, meals, and incidental expenses. While non-local employees received two fifty-cent increases in their hourly per diem after each of their

first two months on the job, local employees to whom no per diem was paid instead received fifty-cent raises in their salaries. The per diem paid to non-local employees was computed on both regular hours and overtime hours. As a result, employees who were away from home for the same amount of time received different per diem payments because some worked more hours than others. No employment, unemployment, or income tax was paid on the amounts of these reimbursements.

The government audited the 1995 federal employment tax returns of Worldwide, determining that Worldwide was required to pay tax on the amounts of the per diem payments and assessing additional employment taxes. Worldwide paid $4,798.21, the amount assessed in each quarter for one of its employees and filed a claim for a refund of the amounts paid. The government denied the refund.

On March 2, 2000, Worldwide filed a claim in federal district court requesting a refund of the $4,798.21. The government counterclaimed for the unpaid balance of the assessments as to all of the Worldwide employees who were paid travel expense reimbursements in the four quarters of 1995. The district court granted the government's motion for summary judgment and entered final judgment awarding the government $2,991,925.76. Worldwide timely appealed.

II

[1] The central question here is whether the monies paid on a hourly per diem basis by Worldwide to its non-local employees as reimbursed travel expenses count as ''wages'' which are subject to employment taxes. These payments are not subject to employment taxes if the payments are made subject to an ''accountable plan'' pursuant to 26 U.S.C. §§ 62(a)(2)(A) and 62(c), as defined by Treas. Reg. § 1.62-2(c).[1] A plan is ''accountable'' when (1) it covers only expenses with a business connection;[2] (2) all expenses are substantiated to the employer;[3] and (3) the employee is required to return to the employer any amount paid in excess of substantiated expenses.[4] If a plan does not meet these criteria, it is considered ''nonaccountable'' and is subject to withholding and employment taxes.[5]

The regulations also specify how per diem arrangements such as Worldwide's can meet these requirements. A per diem allowance for travel expenses can meet the business connection requirement if it is ''computed on a basis similar to that used in computing the employee's wages or other compensation (e.g. *the number of hours worked,* miles traveled, or pieces produced)'' as long as ''a per diem allowance computed on that basis was commonly used in the industry in which the employee is employed'' on December 12, 1989.[6]

The substantiation requirement under the facts of this case is governed by rules promulgated in Rev. Proc. 94-77, which allow the reimbursement of travel expenses under a per diem plan in lieu of the substantiation of each expense as would otherwise be required. The rules provide that the amount of a per diem allowance deemed substantiated for each calendar day ''is equal to the lesser of the per diem allowance for such day or the amount computed at the Federal per diem rate for the locality of travel for such day.''[7]

Under Rev. Proc. 94-77, the returning amounts in excess of expenses requirement is satisfied under a per diem arrangement as long as employees are required to return allowances that ''relate[] to days of travel not substantiated ... even though the arrangement does not require the employee to return the portion of such an allowance that ... exceeds the amount of the em-

1 *See* Treas. Reg. § 1.62-2(h)(1).
2 *Id.* at 1.62-2(d).
3 *Id.* at 1.62-2(e).
4 *Id.* at 1.62-2(f).
5 *Id.* §§ 1.62-2(c)(3)(i) & 1.62-2(c)(5).
6 *Id.* § 1.62-2(d)(3)(ii) (emphasis added).
7 Rev. Proc. 94-77, 1994-2 C.B. 825, § 4.01.

ployee's expenses deemed substantiated.''[8]

III

This court reviews a grant of summary judgment *de novo,* applying the same standard as the district court.[9] The district court granted the government's motion for summary judgment because it concluded that the hourly per diem amounts paid by Worldwide were not made with the reasonable expectation that the employees would actually incur travel expenses in the amounts paid as an hourly per diem. Worldwide argues that there is a genuine issue of material fact as to whether its plan was reasonably calculated not to exceed the amount of expenses incurred by its employees. As the government argues, however, under Worldwide's arrangement, employees who should have been expected to incur similar travel expenses received dramatically different reimbursements because they worked more hours in the same number of days. Employees, particularly those who worked overtime, would inevitably receive reimbursements in excess of their reasonably anticipated expenses under Worldwide's scheme.

Worldwide relies on the Eleventh Circuit's decision in *Trucks, Inc. v. United States.*[10] In *Trucks,* a trucking company reimbursed truckers for expenses on a per diem rate based on the ''load revenue,'' which was calculated ''primarily by the number of miles driven, but is modified to account for weather, unloading and reloading, and road conditions in the particular area.''[11] Because the truck drivers were not required to turn in receipts and received the per diem even if they slept in their trucks instead of paying for lodging, reimbursement amounts could greatly exceed expenses.

In *Trucks,* as here, the appeal turned ''on the question of whether Trucks, Inc. reasonably anticipated and calculated the drivers' expenses before reimbursing them.''[12] Reversing the district court, the Eleventh Circuit concluded that ''the focus of the business connection test is on the employer's reasonable expectations, not the drivers' actual expenditures. These questions of reliability and state of mind fall within the purview of the jury.''[13] Applying that analysis to the trucking company at issue in that case, the *Trucks* court held that ''[t]he reasonableness of both Trucks's calculations and anticipations is a jury question and not appropriate for summary judgment because Trucks has produced some evidence that its plan met the IRS requirements at the time.''[14]

We find this reasoning persuasive. We conclude that whether the employer reasonably anticipated and calculated its employees' travel expenses in the course of developing its reimbursement arrangement is essentially one of state of mind and that, so long as the employer produces summary judgment evidence that amounts to more than '''conclusory allegations, improbable inferences, and unsupported speculation,''' the issues of reasonableness and state of mind are proper questions for the jury and should not be decided on summary judgment.[15]

It is of no moment that *Trucks* and the other cases cited by the parties applying Treas. Reg. § 1.62-2 all involve the transportation industry, particularly truck drivers and messengers and couriers. Section 1.62-2 explicitly allows hourly per diem plans to qualify, under certain circumstances, as accountable plans without limitation as to the industry involved, despite the government's claim at oral argument that section 1.62-2's provisions are intended for application only to truck drivers, pilots, and messengers. Moreover, there is no dispute in this case that it was the custom in Worldwide's industry-the

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8 *Id.* § 7.02; *see also id.* § 2.07.

9 *Holtzclaw v. DSC Communications Corp.,* 255 F.3d 254, 257 (5th Cir.2001).

10 234 F.3d 1340 [86 AFTR 2d 2000-7180] (11th Cir.2000).

11 *Id.* at 1340.

12 *Id.* at 1343.

13 *Id.* at 1343–44 (citation omitted).

14 *Id.*at 1344.

15 *Int'l Shortstop, Inc. v. Rally's, Inc.,* 939 F.2d 1257, 1265 (5th Cir.1991) (quoting *Medina-Munoz v. R.J. Reynolds Tobacco Co.,*896 F.2d 5, 8 (1st Cir.1990)).

skilled temporary labor industry-on December 12, 1989 to use hourly per diem travel reimbursement arrangements.

Applying the reasoning of *Trucks,* we observe that Worldwide produced considerable summary judgment evidence of research it undertook to determine its per diem rates. In particular, Worldwide provided testimony by its president in his deposition, which describes the investigation Worldwide undertook before setting its rates. We leave to the jury the question of whether Worldwide's reimbursements were reasonably calculated not to exceed the amount of the expenses incurred by its employees.

However, the government argues that, even if Worldwide had the expectation that its payments were calculated to meet and not exceed expenses, this expectation was not reasonable as a matter of law. This is essentially what the district court found, and is the argument urged by the dissent. It is the central issue in this case. Worldwide attempts to answer this argument by pointing to a compilation of 1995 travel expense reimbursement records in the summary judgment evidence demonstrating that only 7.3% of its weekly reimbursements exceeded the federal weekly per diem rate and, in the aggregate for the year, its 1995 hourly per diem payments only varied from the federal weekly per diem rate aggregated over the same number of weeks by .76%.[16]

As the government and the dissent point out, the problem with Worldwide's argument is that the federal weekly per diem rate is not a reasonable guide because Worldwide's own research showed that the expenses its employees would likely incur for lodging and meals at local establishments was significantly less than that provided for by the federal weekly per diem rate for the locality. Specifically, the government argues that the federal lodging per diem for the locality is $40 per day and the meals and incidental expenses per diem is $26 per day, but Worldwide's research showed (according to an information sheet it provided to new hires) that its employees could find motel rooms for $21.00 to $32.50 per night with up to $26 per day for meals and incidental expenses. As such, the government argues that Worldwide's plan fails to meet the requirements of section 1.62-2 based on Worldwide's own research.

We are not persuaded, however, that judgment as a matter of law was appropriate. A jury could find that Worldwide reasonably anticipated each employee would generally receive either $48, $52, or $56 per day in travel reimbursements for working an eight-hour day.[17] This is only slightly more than the $47 per day that Worldwide's research showed that one of its employees would be required to spend if he stayed at the least expensive hotel in a double-occupancy room, is slightly less than the $58.50 per day in travel expenses Worldwide's research showed its employee would incur if he stayed at the most expensive hotel in a single-occupancy room, and is considerably less than the $66 per day the federal government reimburses its employees working away from home in the same locality. Thus based on the summary judgment evidence relied upon by the government, a jury could find that Worldwide's reimbursement payments are reasonably calculated not to exceed the amount of its employees' anticipated expenses. Moreover, the extent to which Worldwide's expectation was not reasonable because Worldwide knew or should have known that some or even many of its non-local employees would work overtime is quintessentially a fact issue as to reasonableness and state of mind for the jury to decide based on its assessment of the witness testimony and evidence presented to it.

The government and the dissent urge that a daily per diem plan would better meet the requirements of Treas. Reg. § 1.62-2, as would an hourly per diem plan which did not reimburse based on overtime hours worked. The question before us, however, is not what plan Worldwide

[16] This $462 rate is based on a seven-day week, so it corresponds to a $66 daily rate.

[17] These rates are based upon an eight-hour day at a $6.00, $6.50, or $7.00 hourly per diem rate.

might have used but the conformity of the plan it did use. Any hourly per diem arrangement will not bear a strict logical relation to anticipated expenses that are incurred on a daily and not hourly basis. Yet the government's own regulations in Treas. Reg. § 1.62-2 and Rev. Proc. 94-77 explicitly allow for hourly per diem arrangements to qualify as accountable plans under section 1.62-2.[18] This argument seems to whistle past the government's own regulations.

The dissent disputes this point, arguing that flight attendants and truck drivers incur expenses that are proportional to the number of hours worked, but Worldwide employees did not. This is not the case. A flight attendant who works eight hours a day pays the same price for a hotel room as a flight attendant who works for ten hours. Insofar as some expenses are in-curred on a daily-as opposed to hourly-ba-sis, an hourly per diem arrangement will not perfectly correspond with these ex-penses. Given that the regulations permit hourly per diem arrangements, the question cannot be whether the per diem perfectly corresponds to the expenses incurred but rather whether it is reasonably calculated to reimburse employees for their expenses. We believe that there is enough summary judgment evidence here to permit the jury to determine that question.

The case relied upon by the government and the dissent, the Ninth Circuit's decision in *Shotgun Delivery, Inc. v. United States,*[19] can be distinguished from the case before us. In *Shotgun,* a messenger and courier service employed drivers who used their own vehicles to make pick-ups and deliveries. Shotgun billed its customers based primarily on the mileage from the pick-up to the delivery location, which did not necessarily reflect the actual driving distance because drivers often "doubled up," carrying more than one customer's package at a time.[20] Shotgun also charged surcharges for waiting time, rush delivery, and excessive weight, further weakening any direct relationship between delivery charges and miles driven in making the deliveries.[21]

Shotgun paid its drivers a commission basis, amounting to 40% of the delivery charges for the jobs they completed, but issued two checks in order to avoid employment taxes:

> The first check (the "wage check") compensated the drivers, at the minimum wage, for the hours they worked. Shotgun withheld the appropriate employment taxes from the wage checks. The second check (the "mileage check") was issued in an amount equal to 40% of the receivables on that drivers' deliveries less the amount paid via the wage check. In other words, the two checks together always amounted to 40% of the delivery charges attributable to that driver.[22]

Shotgun did not deduct employment taxes from the mileage checks or pay employment taxes on these amounts because it argued its reimbursement arrangement was an accountable plan under section 1.62-2.

The Ninth Circuit distinguished *Trucks,* noting that "Trucks, Inc. allotted a uniform 6% of revenues on each load to reimburse driver expenses, whereas the percentage Shotgun paid as reimbursement fluctuated, with its 40% commission going first to cover wages (paid at the minimum allowed by law), and then to a variable remainder (i.e. as much as possible) paid as reimbursement."[23] The court concluded that "the evidence suggests that the plan's primary purpose was to treat the least amount possible of the drivers' 40% commission as taxable wages."[24]

Like *Trucks,* the instant case is distinguishable from *Shotgun.* Although there were variations among the per diem reim-

18 *See, e.g.,* Treas. Reg. § 1.62-2(d)(3)(ii); *see also* Rev. Proc. 94-77, 1994-2 C.B. 825.
19 269 F.3d 969 [88 AFTR 2d 2001-6391] (9th Cir.2001).
20 *Id.* at 970.
21 *Id.*
22 *Id.* at 971.
23 *Id.* at 972-73 (citation omitted).
24 *Id.*

bursements received by individual Worldwide employees on any given day of nonlocal work, particularly for those who worked overtime, Worldwide's arrangement did not admit of such a wide variance as Shotgun's system plainly condoned. In *Shotgun*, there was evidence that Shotgun's arrangement was designed primarily to hide taxable wages, a central target of section 1.62-2. The government makes no contention that Worldwide's plan was designed primarily for tax avoidance.

IV

The government argues alternatively that a portion of the payments under Worldwide's arrangement fails to meet the deemed substantiated requirements of Rev. Proc. 94-77 for another reason: Because Worldwide computed its per diem payments on the basis of hours worked, under section 4.02(5) of Rev. Proc. 94-77 the per diem is treated as a ''meals only'' per diem allowance and can be deemed substantiated only up to the amount of the Federal M & IE rate, which was $26 per day during 1995 in Aurora, Illinois. Thus, the government argues that, even if Worldwide's plan were to survive the other tests, only $26 per day could be deemed substantiated in satisfaction of Treas. Reg. § 1.62-2(e) for which Worldwide would not owe employment taxes. Worldwide responds that the government misreads section 4.02 of Rev. Proc. 94-77 because reading it to require all hourly per diem arrangements to be limited to ''meals only'' would render the industry custom exception in section 3.03(2) of Rev. Proc. 94-77 for hourly per diem plans void. We agree with the government.

First, the government does not contend that Worldwide's arrangement did not qualify as an accountable plan simply because some of the employees' reimbursements exceeded those available under the federal rate. Nor could it make such a claim given the express provisions of Treas. Reg. § 1.62-2.[25] Worldwide will owe employment taxes on those amounts which exceed the federal rate, but this will not undermine a finding in favor of Worldwide as to the entire arrangement's eligibility as an accountable plan.[26]

Second, as a matter of a plain reading of Rev. Proc. 94-77, the government has the better of this argument. Treas. Reg. § 1.62-2(c) requires that the business connection test,[27] substantiation requirement,[28] and return of amounts in excess of expense requirement[29] be met for a plan to qualify under § 162.2. An hourly per diem plan can satisfy the business connection test ''only if, on December 12, 1989, . . . a per diem allowance computed on that basis was commonly used in the industry in which the employee is employed.''[30] The Commissioner has authority to prescribe rules to determine to what extent an hourly per diem plan satisfies the substantiation and return of excess requirements.[31]

In exercising this power, the Commissioner promulgated Rev. Proc. 94-77. Section 3.03(2) provides that a plan which is computed on a basis such as hours worked is not a ''per diem allowance'' unless it meets the industry custom exception. As stated above, this is already a requirement under Treas. Reg. § 1.62-2(d)(3)(ii) for such a plan to meet the business connection test.

In addition, Section 4 of Rev. Proc. 94-77 then more specifically provides the rules under which reimbursements under a per diem plan can be deemed substantiated to meet the substantiation requirement of sections 1.62-2(e). Section 4.02 specifically limits per diem arrangements that are ''computed on a basis similar to that used in computing the employee's wages or other compensation (e.g., the number of hours worked, miles traveled, or pieces produced)'' to a ''meals only per diem al-

25 *See* Treas. Reg. §§ 1.62-2(c)(1), 1.62-2(d)(2), 1.62-2(i).

26 *See id.* § 1.62-2(h)(2)(i)(B); Rev. Proc. 94-77, 1994-2 C.B. 825, § 8.01.

27 Treas. Reg. § 1.62-2(d).

28 Treas. Reg. § 1.62-2(e).

29 Treas. Reg. § 1.62-2(f).

30 Treas. Reg. § 1.62-2(d)(3)(ii).

31 Treas. Reg. §§ 1.62-2(e)(2), 1.62-2(f)(2).

lowance.'' A meals only per diem allowance is capped at the Federal M & IE rate by section 4.02.

In so doing, the revenue procedure is not contrary to any express provision of or allowance under Treas. Reg. § 1.62-2.[32] Section 1.62-2 imposes several requirements for hourly per diem plans to be *eligible* for accountable plan status, including the business connection test which can be satisfied by the industry custom exception under section 1.62-2(d)(3)(ii). But § 1.62-2 leaves to the Commissioner how such plans may be excepted from the usual substantiation and returning amounts in excess of expenses requirements.

Section 3.03(2) simply incorporates the additional requirement of Treas. Reg. § 1.62-2(d)(3)(ii) for all three prongs of the accountable plan test as it applies to hourly per diem plans. That section 3.03(2)(b) also includes the industry custom exception to meet this requirement does not mean that section 3.03(2)(b) excludes the meals only limitation of section 4.02(5) from any hourly per diem plan that meets the industry custom exception. That exception may be used to meet a threshold requirement under section 3.03(2), not as a free pass to obtaining accountable plan status when the hourly per diem plan does not otherwise meet the provisions of Treas. Reg. §§ 1.62-2(e) and 1.62-2(f) requiring substantiation and returning amounts in excess of expenses, both of which Worldwide's employees admittedly did not do. Indeed, Worldwide's reading would render section 4.02(5) of Rev. Proc. 94-77 void, because the substantiation and returning amounts in excess of expenses requirements do not even come into play for any hourly per diem plan that does not first meet the threshold requirement of Treas. Reg. § 1.62-2(d)(3)(ii) and section 3.03(2) of Rev. Proc. 94-77.[33]

In sum, if an hourly per diem plan can meet the requirements of Treas. Reg. §§ 1.62-2(e) and 1.62-2(f) without resort to the excepting provisions of Rev. Proc. 94-77, the plan can qualify as an accountable plan while reimbursing lodging as well as meals and incidental expenses. The Commissioner, by promulgating Rev. Proc. 94-77, has not contradicted Treas. Reg. § 1.62-2 by limiting the exceptions to the usual substantiation and returning amounts in excess of expenses requirements therein--which he is permitted to provide by rule--to per diem plans covering only meals and incidental expenses.

Worldwide argues, in the alternative, that section 4.02(5) of Rev. Proc. 94-77 is not binding on this court. We reject this argument on two grounds. First, Worldwide could not satisfy the substantiation and returning amounts in excess of expenses requirements without the provisions of Rev. Proc. 94-77. Second, the revenue procedure is not contrary to the governing regulation, as we have just discussed, and so is not rendered non-binding under the facts of this case by virtue of section 1.62-2. In short, Worldwide must accept Rev. Proc. 94-77 and its limitations in its entirety or fail altogether in its quest for tax-exempt status for its travel expense reimbursement payments.

The government urges that we remand to the district court for consideration of what portion of Worldwide's payments qualified under Treas. Reg. § 1.62-2(e) and Rev. Proc. 94-77, presumably on summary judgment, along with two additional charges against certain portions of Worldwide's payments. We conclude, however, that consideration of these matters are proper for the district court to address pretrial, to the extent they may be resolved as a matter of law, or by the jury at trial. We will not, however, without more, remand with instructions that these issues be addressed on a hypothetical motion for summary judgment.

V

We vacate the district court's grant of summary judgment to the government and

[32] *See Clark v. Modern Group Ltd.*, 9 F.3d 321, 335 (3d Cir.1993) (''Treasury regulations take precedence over contrary revenue procedures because the latter are intended primarily as a guide to taxpayers.'') (citing cases).

[33] It is worth noting that the only hourly per diem described in Rev. Proc. 94-77 is a meals only per diem allowance. *See* Rev. Proc. 94-77, 1994-2 C.B. 825, § 3.03(1).

remand for further proceedings consistent with this opinion.[34]

VACATED AND REMANDED.

EMILIO M. GARZA, Circuit Judge, dissenting:

This case requires us to determine whether the purported reimbursement payments made by Worldwide Labor Support Services ("Worldwide") to its temporary employees for meals, lodging and other incidental expenses constituted wages for which federal employment taxes must be paid. In order to avoid the imposition of employment taxes, Worldwide's reimbursement plan must qualify as an "accountable plan" pursuant to the requirements of 26 C.F.R. § 1.62 -2(d)--(f). As the majority opinion clearly explains, the process of determining whether a plan meets these requirements is complex, involving several distinct inquiries. For purposes of this appeal, however, the critical issue is whether Worldwide's plan was reasonably calculated not to exceed the amount of expenses or anticipated expenses actually incurred by its employees. The majority opinion concludes that Worldwide has established a genuine issue of material fact as to whether its plan was reasonably calculated to reimburse actual or anticipated expenses. In contrast to the majority opinion, I believe Worldwide has failed to make such a showing because their reimbursement scheme bears no logical relationship to the actual or anticipated expenses of Worldwide's employees.[1]

Worldwide's method of calculating reimbursement expenses resulted in differing amounts of compensation to employees who were working on the same site and likely incurring similar expenses. Worldwide's reimbursement plan for the Caterpillar site initially compensated temporary employees living more than 100 miles from the plant $6.00 per hour worked for meals, lodging and other incidental expenses. In determining the reimbursement amount for each employee, Worldwide included both regular and overtime hours. In addition, an employee who worked at the Caterpillar site for more than one month received a fifty-cent increase in hourly reimbursements. After two months at the site, Worldwide gave its employees an additional fifty-cent increase, raising the hourly reimbursement rate to $7.00. Thus, two employees working at the Caterpillar site could receive substantially different reimbursement amounts depending on the total number of hours each employee worked during the week, as well as the amount of time they had been on the site. As a result, Worldwide reimbursed many employees for amounts greater than their own research indicated was the maximum amount of anticipated expenses each employee would incur. Given this fact, no rational jury could find that Worldwide's plan was reasonably calculated not to reimburse its employees for amounts in excess of actual or anticipated expenses.

Worldwide has not presented any evidence that these disparities reflected differences in the *actual expenses* of its employees at the Caterpillar site. Instead, the evidence suggests that employees incurred similar lodging and meal expenses regardless of the number of hours worked. Worldwide's employees paid for lodging by night, not by hour. Thus, an employee who worked forty hours per week, but stayed in a hotel for six nights, would incur identical costs as an employee who worked sixty hours that week, but stayed in the same hotel for six nights. As such, I do not believe that any rational trier of fact could have found that Worldwide's plan was reasonably calculated not to exceed the actual expenses of its employees.

Worldwide's employment records indicate that the actual amounts Worldwide reimbursed frequently exceeded the amount of expenses Worldwide *anticipated* each employee would incur. Worldwide estimated that its employees would spend a

[34] With our decision to vacate the district court's judgment, we need not address Worldwide's challenge to the penalty assessed against it.

[1] It is important to note that even though this case comes to us on summary judgment and therefore the record must be viewed in the light most favorable to the non-movant, Worldwide, as a taxpayer, still bears the burden of proof as to whether the government's tax assessment was erroneous, as well as the amount of the refund due from the government. *Brown v. United States*, 890 F.3d 1329, 1334 [65 AFTR 2d 90-448] (5th Cir.1989).

maximum of $58.50 per day or $409.50 per week on meals and lodging. Worldwide's payment records for the period ending August 6, 1995, reveal that it paid sixty-six workers more than the amount their research suggested was the maximum weekly expenses of their employees. Thus, under Worldwide's plan, in one pay period, about one-quarter of their workforce was reimbursed for more than what Worldwide anticipated was the maximum amount of weekly expenses. Moreover, several of Worldwide's employees received reim-bursement payments that far exceeded Worldwide's maximum estimates of $409.50 per week. For instance, Quentin Lee received $609.00 in reimbursements during the August 6 pay period and Danny McGhee received $563.50. Again, given this evidence, no reasonable jury could find that Worldwide's plan was reasonably calculated to compensate its employees for their anticipated expenses.[2]

The majority opinion attempts to counter this evidence by pointing out that an employee working eight hours per day would be reimbursed for an amount within Worldwide's anticipated expense range, regardless of whether that employee was paid $6.00, $6.50, or $7.00 per hour. Thus, they contend that a rational jury could find that Worldwide's plan was reasonably calculated to reimburse its employees' anticipated expenses. The majority opinion is correct that a jury could find that reim-bursement payments paid to employees who did not work any overtime hours fell within Worldwide's anticipated expense range. The problem with the majority's argument, however, is that many of Worldwide's employees regularly worked overtime, exceeding the maximum amount of meals and lodging expenses Worldwide anticipated its employees would incur as a result. Because Worldwide's employees regularly worked overtime hours, the fact that any payments fell within Worldwide's anticipated expense range was merely coincidental. A rational jury could not ignore these additional overtime reimbursement payments in determining whether Worldwide's plan was reasonably calculated to reimburse actual or anticipated expenses. Moreover, the rational jury could not ignore the fact that Worldwide regularly reimbursed its employees for more than what its own research indicated was the maximum amount of expenses per week because it included overtime hours in those reimbursement calculations.

The majority opinion finds that, if it were to accept the government's argument, no hourly per diem reimbursement arrangement could qualify as an accountable plan under the regulations. This result seems unacceptable, since the regulations explicitly authorize such arrangements. The majority opinion, however, misinterprets the government's position. The government does not argue, as the majority contends, that an hourly per diem reimbursement method must exactly reimburse employees for expenses. Instead, the government merely contends that such an arrangement must be *reasonably calculated* to reimburse employees only for actual or anticipated expenses. In other words, the plan need not always reimburse employees for the expenses they actually incurred, but it must be structured in such a way so that there is some probability that it will do so.

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[2] Worldwide relies heavily on the fact that only seven percent of its reimbursement payments exceeded the federal per diem rate of $66. As the majority opinion concedes, however, Worldwide's reliance on the federal rate is not availing because its own research indicated that the anticipated expenses of its employees would be below the federal rate for the locality. Revenue Procedure 94-77, which defines a "per diem allowance" provides:

> The term "per diem allowance" means a payment under a reimbursement or other expense allowance arrangement that meets the requirements specified in § 1.62-2(c)(1) and that is
>
> (1) paid with respect to ordinary and necessary business expenses incurred, or which the payor reasonably anticipates will be incurred, by an employee for lodging, meal, and/or incidental expenses for travel away from home in connection with the performance of services as an employee of the employer,
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> (2) reasonably calculated not to exceed the amount of the expenses or the anticipated expenses, and
>
> (3) paid at the applicable Federal per diem rate, a flat rate or stated schedule, or in accordance with any other Service-specified rate or schedule. Rev. Proc. 94-77 § 3.01. Under this regulation, the reimbursement payment must be reasonably calculated not to exceed actual or anticipated expenses *and* must be paid at the federal per diem rate or at a flat rate or stated schedule. Thus, even if Worldwide reimbursed its employees at the applicable federal rate, because its research indicated that its employee's actual and anticipated expenses were significantly lower, its payments would not be reasonably calculated to reimburse the amount of its employees' expenses or anticipated expenses under the regulations.

In certain contexts, an hourly per diem plan such as Worldwide's could be reasonably calculated to reimburse only actual or anticipated expenses. For instance, the I.R.S.'s revenue procedures cite the example of a pilot or flight attendant who is traveling away from home. *See* Rev. Proc. 94-77 § 3.03(1). In that context, it is reasonable to conclude that the more hours a flight attendant or pilot works, the longer they will be away from home, and the more reimbursable expenses they will incur for lodging and meals. Thus, there is a logical relationship between the number of hours worked by a pilot or flight attendant and the amount of expenses incurred.[3]

In contrast, Worldwide has not established any relationship between the hours worked by its employees and the expenses they incurred. As the majority opinion concedes, Worldwide's plan resulted in employees who were away from home for the same amount of time receiving different per diem payments. Because Worldwide's employees were away from home for the same period of time, regardless of whether they worked eight, ten, or twelve hours a day, they incurred roughly the same amount of reimbursable expenses. Nevertheless, they received different reimbursement amounts. Thus, Worldwide's plan, unlike the hourly per diem payments to pilots or flight attendants, was not reasonably calculated to reimburse Worldwide's employees for the expenses they incurred.

The preceding point is critical because the majority opinion relies heavily on the Eleventh Circuit's decision in *Trucks, Inc. v. United States,* 234 F.3d 1340 [86 AFTR 2d 2000-7180] (11th Cir.2000), to support its decision. In *Trucks,* the plan at issue reimbursed truckers for their expenses on a per diem rate based on the "load revenue" the drivers earned. The load revenue was calculated primarily by the number of miles driven, but also took additional factors such as weather, unloading and reloading time, and road conditions into account. *Id.* at 1341. Thus, load revenue roughly approximated the amount of time a truck driver would be driving. The greater the load revenue earned by a truck driver, the more time he would be away from home and the more expenses for meals and lodging he would incur. Given this fact, the court concluded that Trucks had provided sufficient evidence that its plan was reasonably calculated not to exceed the anticipated expenses of its employees to preclude summary judgment.

Worldwide's reimbursement scheme, however, is distinct from the one the court dealt with in *Trucks* because Worldwide's employees' expenses did not increase with each additional hour worked. Rather, I find the Ninth Circuit's decision in *Shotgun Delivery, Inc. v. United States,* 269 F.3d 969 [88 AFTR 2d 2001-6391] (9th Cir.2001), persuasive in this instance. *Shotgun* involved a messenger company whose drivers used their own vehicles to make pick-ups and deliveries. Shotgun's reimbursement scheme paid its drivers a forty percent commission on each delivery in two checks. The first check compensated the drivers for the number of hours they worked. The amount paid for hourly wages then was deducted from the forty percent commission and the remainder was included in a second check which purported to cover mileage expenses. As a result of this plan, the lesser number of hours each employee worked to make his or her deliveries resulted in a greater amount of tax-free compensation. The court concluded that Shotgun's plan did not qualify as an "accountable plan" because the "key determinant driving the [reimbursement] allocations [was] hours worked, a factor that [bore] little, if any, correlation with mileage expenses." *Id.* at 973. The court went on to state that "Shotgun drivers doing identical routes with identical delivery charges could receive additional compensation distributions

[3] The majority opinion attempts to undermine this reasoning by pointing out that "[a] flight attendant who works eight hours a day pays the same price for a hotel room as a flight attendant who works for ten hours." Thus, the flight attendants' hourly per diem arrange-ment will "not perfectly correspond" to the employees' expenses. The majority opinion appears to overlook that the regulations do not re-quire a perfect correlation. They require only that an employer's reimbursement system be *reasonably calculated* not to exceed an em-ployee's expenses. In the majority opinion's hypothetical, the two flight attendants might incur the same expenses for lodging, but would not necessarily incur the same charges for meals. As a result, it might make sense to reimburse them differently. There is certainly a reason-able relationship between the flight attendants' hours and reimbursable expenses.

that differed according to driving time.'' *Id.*

Similar to Shotgun's plan, Worldwide's method of reimbursing employees bears little, if any, correlation to the actual expenses its employees incurred.[4] Moreover, underlying the *Shotgun* decision was evidence that Shotgun was attempting to encourage certain types of employee behavior at the expense of the government. In essence, a Shotgun employee who made faster deliveries, thereby working fewer hours, would receive a greater portion of his or her check tax free. Here, Worldwide's workers have a similar incentive to work more overtime hours so as to receive larger, tax-free reimbursements. Because these amounts often exceed their anticipated daily expenses, Worldwide's employees essentially receive a tax-free bonus if they work overtime. Thus, Worldwide's particular reimbursement method, like the one in *Shotgun*, encourages its employees to engage in conduct beneficial to the company.

Given the evidence presented, no rational jury could find that Worldwide's plan was reasonably calculated to reimbursement its employees for their actual or anticipated expenses. Thus, I believe the district court correctly found that Worldwide's reimbursement plan did not qualify as ''accountable plan'' under the regulations. For the foregoing reasons, I would AFFIRM the judgment of the district court.

¶2002-5677

USIBELLI COAL MINE, PLAINTIFF v. THE UNITED STATES, DEFENDANT. JIM WALTER RESOURCES, INC., PLAINTIFF v. THE UNITED STATES, DEFENDANT. CHAFIN BRANCH COAL CO., INC. and Hampden Coal Co., Inc., PLAINTIFFS v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 99-267T, 99-516T, 00-551T, Nov. 8, 2002. Decision for Govt.

1. Interest—prejudgment interest—sovereign immunity—refunds vs. money damages—recovery of unconstitutional excise tax. Coal producers weren't entitled to prejudgment interest under 28 USC §2411 on judgment awarding them recovery of unconstitutional excise taxes under Export Clause's stand-alone monetary relief provision, not as refund. According to established case law, plain language of IRC §7422's refund provision and §2411's similar interest provision, and sovereign immunity principles against allowing any interest suits against govt. other than those expressly allowed by statute, Export Clause claim *for money damages* necessarily fell outside IRC §7422(a)'s provision *for* overpayment refund, and thus also outside 28 USC §2411's narrow interest provision *for* overpayments. So, facts that overpayment underlay and gave rise to taxpayers' judgment, that §2411 used less specific, overpayment language than that contained in IRC §7422, and that other case law allowed for broader construction of §2411, weren't dispositive. Also, any inequity in statutory scheme was for Congress, not judiciary to remedy. *Reference:* United States Tax Reporter ¶66,115.01(3); 74,336.510(40). IRC §6611.

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Robert Stoddart, U.S. Department of Justice, with whom were Assistant Attorney General Eileen J. O'Connor, Mildred L.

[4] The majority opinion asserts that *Shotgun* is distinguishable from this case because Worldwide's arrangement ''did not admit of such a wide variance as Shotgun's system plainly condoned.'' Yet, Worldwide's employment records establish that some employees received more than double the amount of reimbursement payments of other similarly situated employees. Moreover, Worldwide paid several employ-ees in excess of one hundred dollars per week over the sum they calculated to be the maximum amount of weekly expenses. Given these facts, it seems difficult to believe that Worldwide's plan did not condone as wide of a variance in reimbursement payments as the one at issue in *Shotgun*.

Seidman, and David Gustafson, counsel for defendant.

United States Court of Federal Claims,

OPINION

ALLEGRA, J.

This case presents an important issue of first impression. In its ground-breaking decision in Cyprus Amax Coal Co., Inc. v. United States, 205 F.3d 1369 [85 AFTR 2d 2000-1151] (Fed.Cir.2000), cert. denied, 532 U.S. 1065 (2001), the Federal Circuit held that this court had jurisdiction under the Tucker Act, 28 U.S.C. § 1491, over a suit filed by a taxpayer seeking monetary damages stemming from its payment of an excise tax found violative of the Export Clause of the Constitution, art. I, § 9, cl. 5. In so opining, the court held that such a suit for damages could proceed even though the taxpayer had not complied with the provisions of the Internal Revenue Code of 1986 (26 U.S.C.)[1] requiring it to exhaust various administrative remedies as a precondition to filing a tax refund suit. At issue in this case is whether a plaintiff obtaining a money judgment in such a case is entitled to prejudgment interest under section 2411 of Title 28.[2] The case is before the court on the parties cross-motions for partial summary judgment. For the reasons that follow, the court grants defendant's motion and concludes that plaintiffs are not entitled to prejudgment interest in these actions.

I. FACTS

Neither party disputes the facts at issue here, which briefly are as follows:

Plaintiffs are domestic coal producers seeking a refund of excise taxes paid on exported coal under the Black Lung Excise Tax, 26 U.S.C. § 4121 (the Coal Tax).[3] They argue, and the Internal Revenue Service (IRS) has conceded, that the Coal Tax is unconstitutional when imposed on exported coal. See I.R. S. Notice 2000-28, 2000-21 I.R.B. 1116 (May 22, 2000) (citing United States v. I.B.M., 517 U.S. 843 [77 AFTR 2d 96-2412] (1996) and Ranger Fuel Corp. v. United States, 33 F.Supp.2d 466 [83 AFTR 2d 99-375] (E.D.Va.1998)). Accordingly, the IRS has begun, and in some instances, completed, processing plaintiffs' claims for a refund under this theory. The IRS has indicated that plaintiffs also are entitled to interest on "overpayments" refunded via the administrative refund process. See I.R.S. Notice 2000-28, 2000-21 I.R.B. 1116–17 (May 22, 2000); 26 U.S.C. § 6611.

The current motions, however, involve claims regarding the Coal Tax that are not covered by plaintiffs' administrative refund claims. That plaintiffs may proceed in this court under the Tucker Act, 28 U.S.C. § 1491(a), on claims for which they have not complied with the administrative tax refund statute is now established. See Cyprus Amax, supra. The subject of the cross-motions for partial summary judgment filed by plaintiffs and defendant simultaneously on October 23, 2001, is whether plaintiffs may recover prejudgment interest on judgments rendered on these Export Clause claims.[4]

II. DISCUSSION

[1] Summary judgment is appropriate when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. RCFC 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). As noted, the facts material to the motions are essentially undisputed. Based on those facts, the court concludes, as a matter of law, that defendant is entitled to partial summary judgment.

As said, at issue is whether plaintiffs are entitled to interest on any recovery herein under section 2411 of Title 28 of the U.S.Code. On this count, the court's task is to discern the "unequivocally expressed"

[1] All "Code" references are to the Internal Revenue Code of 1986 (26 U.S.C.), as amended, unless otherwise noted.

[2] Post-judgment interest under section 2411 is also sought; however, such interest appears to be available, even if not authorized by section 2411. See 28 U.S.C. § 1961. Accordingly, in framing the issue herein, the court generally will refer to prejudgment interest.

[3] Chafin Branch Coal Co., Inc., et al., and Hampden Coal Co., Inc. filed its complaint on September 11, 2000; Jim Walter Resources, Inc. filed its complaint on July 28, 1999; and Usibelli Coal Mine, Inc. filed its complaint on April 30, 1999.

[4] Joint status reports indicate that the parties have entered settlement negotiations regarding the principal amounts claimed by plaintiffs which fall outside the three-year administrative statute of limitations, but are within the six-year statute of limitations applicable to claims under the Tucker Act.

intent of Congress, construing ambiguities in favor of immunity. United States v. Nordic Village, Inc., 503 U.S. 30, 33 [69 AFTR 2d 92-687] (1992) (internal quotation marks omitted); see also United States v. Williams, 514 U.S. 527, 531 [75 AFTR 2d 95-1805] (1995).[5] To fathom Congress' intent as to section 2411, we must first consider several Code sections that supply the statutory context for this provision. The court will then consider what Cyprus Amax teaches regarding those provisions.

A. Statutory Framework

We begin our quest at the outer curtain with some basic propositions. The statute generally defining subject matter jurisdiction for this court is the Tucker Act, which provides, in pertinent part, ''[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department ....'' 28 U.S.C. § 1491(a). This statute overlaps 28 U.S.C. § 1346(a)(1), which, in deceptively simple terms, affords the federal district courts, concurrent with this court, jurisdiction over ''[a]ny civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected ... or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.''[6] The Supreme Court has called the latter jurisdictional provision the ''keystone in a carefully articulated and quite complicated structure of tax laws.'' Flora v. United States (Flora II), 362 U.S. 145, 157 [5 AFTR 2d 1046] (1960); see also Williams, 514 U.S. at 542.[7]

Anyone seeking to invoke either the Tucker Act or section 1346(a)(1) must pass through the portcullis of section 7422(a) of the Code, which provides, in haec verba, that ''[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected ... or of any sum alleged to have been excessive or in any manner wrongfully collected ... until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard.'' See Flora v. United States (Flora I), 357 U.S. 63, 69 [1 AFTR 2d 1925] (1958); Alexander Proudfoot Co. v. United States, 454 F.2d 1379, 1380 [29 AFTR 2d 72-543] (Ct.Cl.1972). The ''provisions of law'' referenced in this section include section 6511 of the Code, which, inter alia, sets a period of limitations on the filing of such a claim.[8] ''Read together,'' the Supreme Court has stated, ''the import of these sections [ss 1346(a)(1), 7422(a), 6511(a)] is clear: unless a claim for refund of a tax has been filed within the time limits imposed by s 6511(a), a suit for refund, regardless of whether the tax is alleged to have been 'erroneously,' 'illegally,' or 'wrongfully collected,' ... may not be maintained in any court.'' United States v. Dalm, 494 U.S. 596, 602 [65 AFTR 2d 90-1210] (1990); see also Williams, 514 U.S. at 542; Wertz v. United States, 51 Fed. Cl. 443, 446 [89 AFTR 2d 2002-491] (2002).

The traditional refund suit has additional batters and glacis that warrant a few words of elaboration. As recently noted by the Supreme Court, ''[t]he broad language of §

5 Of course, the Supreme Court has also stated that '''[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.''' United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 383 (1949) (quoting Anderson v. Hayes Constr. Co., 243 N.Y. 140, 147, 153 N.E. 28, 29–30 (1926) (Cardozo, J.)).

6 Although this court is mentioned in section 1346(a)(1), early cases suggest that this is merely a cross-reference to the Tucker Act and that this court's refund jurisdiction derives from the latter provision. See, e.g., New England Mut. Life Ins. Co. v. United States, 52 F.2d 1006, 1008 [10 AFTR 523] (Ct.Cl.1931).

7 An excellent and much more detailed review of these provisions may be found in M. Carr Ferguson, Jurisdictional Problems in Federal Tax Controversies, 48 Iowa L.Rev. 312 (1963) (hereinafter ''Ferguson'').

8 Section 6511(a) of the Code provides, in part, that a ''[c]laim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid.'' Relatedly, section 6532(a) of the Code, which imposes a period of limitations on suits for refunds in court, states that ''[n]o suit or proceeding under section 7422(a) ... shall be begun before the expiration of 6 months from the date of filing the claim required under such section ..., nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance.''

1346 (a)(1) mirrors the broad common-law remedy the statute displaced: actions of assumpsit for money had and received, once brought against the tax collector personally rather than against the United States.'' Williams, 514 U.S. at 532; see also Carter v. Campbell, 264 F.2d 930, 937 [3 AFTR 2d 907] (5th Cir.1959). Indebitatus assumpsit, indeed, afforded a remedy to those who had paid tax dollars they did not owe. See Ferguson, supra, at 327–28. Attributes of this common law action survived the passage of the Tucker Act in 1887, Act of March 3, 1887, ch. 359, 24 Stat. 505, and inhere in the modern tax refund suit, in which the claimant's onus probandi is to show that the United States has money which belongs to it.[9]

Viewed in terms of the twin types of claims that can arise under the Tucker Act, such refund suits fit snugly within the category of so-called ''illegal exaction cases,'' defined by the Court of Claims in its seminal decision in Eastport Steamship Corp. v. United States, 372 F.2d 1002, 1007 (Ct.Cl. 1967), as ''those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum.'' Indeed, Eastport and other cases specifically classify refund suits as involving such illegal exaction claims. 372 F.2d at 1007 (noting ''tax refund suits'' are among ''those in which 'the Government has the citizens's money in its pocket''').[10] Comparatively, then, both in its common law origins, as well as under Tucker Act jurisprudence, a tax refund suit does not involve a demand for damages based on the existence of some money-mandating statute or Constitutional provision. See Economy Plumbing & Heating Co., Inc. v. United States, 470 F.2d 585, 587–88 [31 AFTR 2d 73-993] (Ct.Cl.1972). The latter type of 'money-mandating' case, of course, involves the second major category of claim that can arise under the Tucker Act, those in which a 'particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum.' Eastport, 372 F.2d at 1007.

But is prejudgment interest awardable in such damage cases? It is axiomatic that ''interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest.'' Library of Congress v. Shaw, 478 U.S. 310, 311 (1986); see also Applegate v. United States, 52 Fed. Cl. 751, 770 (2002). In looking for such a waiver, plaintiffs train their collective eye on section 2411 of Title 28, which provides:

> In any judgment of any court rendered ... for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days ... 28 U.S.C. § 2411. This section continues--''[t]he Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final ... and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor.''[11]

Whether this provision applies here is dispositive--no other statutory provision supplies the prejudgment interest plaintiffs seek. See 28 U.S.C. § 2516(a); Brazos

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[9] Stone v. White, 301 U.S. 532, 534 [19 AFTR 503] (1937); Lewis v. Reynolds, 284 U.S. 281, 383 [10 AFTR 773] (1932); Missouri Pacific Railroad Co. v. United States, 338 F.2d 668, 670–71 [14 AFTR 2d 5948] (Ct.Cl.1964); cf. The Collector v. Hubbard, 79 U.S. 1, 11–12 [2 AFTR 2264] (1870). See also Ferguson, supra, at 329–31.

[10] See also Improvement Co. v. Slack, 100 U.S. 648, 654 [2 AFTR 2399] (1879) (''Moneys involuntarily paid for internal-revenue taxes illegally exacted may be recovered back from the collector in an action of assumpsit); American Association of Commodity Traders v. Dept. of Treasury, 598 F.3d 1233, 1235 (1st Cir.1979); see generally, United States v. Emery, Bird, Thayer Realty Co., 237 U.S. 28, 31–32 [3 AFTR 2920] (1915); H.R.Rep. No. 659, 83d Cong., 1st Sess. 2 (1953) (noting that a refund suit seeks to 'recover the amount claimed to have been illegally exacted').

[11] In so providing, section 2411 tracks the provision which authorizes the IRS to award similar interest to individuals it determines are owed an administrative refund of taxes. See section 6611(a) of the Code.

Elec. Power Coop., Inc. v. United States, 52 Fed. Cl. 121, 133–34 (2002).[12]

The case sub judice involves two types of claims relating to the Coal Tax--those for which plaintiffs filed a refund claim, awaited the appropriate time and then filed suit; and those for which plaintiffs did not file a refund claim and instead immediately proceeded to court. The latter claims relate back six years under the Tucker Act's general statute of limitations. 28 U.S.C. § 2501. As will be discussed below, in Cyprus Amax, the Federal Circuit held that, notwithstanding section 7422(a) of the Code, this court has jurisdiction over the latter type of claim. 205 F.3d at 1369 [85 AFTR 2d 2000-1151]. At issue in this case is whether a plaintiff prevailing as to such a claim is entitled to interest under section 2411. In other words, the question is whether plaintiffs' suits are not ''for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected'' under section 7422(a) and yet still are ''for an[] overpayment in respect of any internal revenue tax'' under section 2411. Before answering that question, a more complete understanding of the holding and rationale of Cyprus Amax is required. To that inner curtain, the court now pushes on.

B. Cyprus Amax

In Cyprus Amax, supra, a group of producers, sellers, and exporters of coal brought action in this court seeking return of Coal Tax payments. 205 F.3d at 1371. They alleged that the tax violated the Export Clause, as well as the Fifth Amendment's Takings Clause. The plaintiffs in Cyprus comprised two subgroups that seemingly ran afoul of section 7422(a) of the Code: (i) those who did not file a claim for refund with the IRS; and (ii) those who filed a claim for refund but failed to wait the requisite period before commencing suit, see 26 U.S.C. § 6532 (a). This court, in fact, treated both subgroups as having failed to comply with the Code's prerequisites for filing a proper tax refund suit and dismissed their complaint for lack of jurisdiction, stating: [The] language [of Section 7422(a)] does not permit an exception for cases in which taxpayers may believe that they are entitled to a refund because the statute on which the tax is based is unconstitutional. For that reason, we must hold that those of plaintiffs' claims that have not been submitted to the appropriate agency pursuant to [the] statute are barred. Cyprus Amax Coal Co. v. United States, Nos. 97-68T, 97-310T, 97-311T, 97-317T, 97-521T, 97-522T [83 AFTR 2d 99-609] (Fed.Cl. Feb. 2, 1999). Subsequently, this court dismissed the action, with prejudice. The plaintiffs appealed.

The Federal Circuit began its opinion recounting several familiar axioms concerning the Tucker Act, among them that a claim under that act generally must be based on a so-called money-mandating provision. In this vein, it explained:

The Tucker Act is a purely jurisdictional statute; on its own predicate, it does not enable a party to recover monetary damages from the United States. See United States v. Testan, 424 U.S. 392, 398 ... (1976); New York Life Ins. Co. v. United States, 118 F.3d 1553, 1555–56 [80 AFTR 2d 97-5117] (Fed.Cir.1997); Eastport S. S. Corp. v. United States, 178 Ct. Cl. 599, 372 F.2d 1002, 1007 (1967). Thus, to invoke jurisdiction under the Tucker Act, a party must point to a complementary substantive right found in another source of federal law, such as the Constitution, federal statutes, or executive regulations. See Mitchell, 463 U.S. [206] at 216 ... [1983].

In addition, that substantive right must be fairly interpreted as mandating compensation by the Federal Government for the damages sustained.

205 F.3d at 1373. Building on this framework, the court indicated that ''[t]his appeal therefore turns on whether the Export Clause, when fairly interpreted, af-

[12] Plaintiffs also argue that prejudgment interest is required by the Export Clause itself, much as has been held by courts construing the Fifth Amendment's taking clause. See Smyth v. United States, 302 U.S. 329, 353–54 (1937). However, since the filing of plaintiffs' original briefs, the Federal Circuit has expressly rejected this contention. See Hohenberg Bros. Co. v. United States, 301 F.3d 1299, 1306 [90 AFTR 2d 2002-6065] (Fed.Cir.2002); U.S. Shoe Corp. v. United States, 296 F.3d 1378, 1382–83 [90 AFTR 2d 2002-5376] (Fed.Cir.2002).

fords an independent cause of action for monetary remedies.'' Id. It answered the latter question affirmatively, stating:

The necessary implication of the Export Clause's unqualified proscription is that the remedy for its violation entails a return of money unlawfully exacted. Indeed, just as Congress's power to lay taxes enables it to collect money, see U.S. Const. art. I, 8, cl. 1, the Export Clause's restriction on taxing power requires Congress to refund money obtained in contravention of the clause .... Thus, given a fair textual interpretation, the language of the Export Clause leads to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy.

Id. The court found support for this conclusion in the Constitutional debates and in the Supreme Court's decision in United States v. United States Shoe Corp., 523 U.S. 360 [81 AFTR 2d 98-1256] (1998), which in its view, made ''clear that the Export Clause includes a correlative right to money damages as a remedy for its violation.'' 205 F.3d at 1374. Accordingly, the Federal Circuit held that the Export Clause was, like the Takings Clause and the Compensation Clause, a rare breed, to wit, a money-mandating constitutional provision, invocation of which gives rise to jurisdiction under the Tucker Act.

The court next turned to the question whether, absent compliance with the refund claim provisions, such a suit for monetary damages was prohibited by section 7422(a) of the Code. It found that such a suit need not comply with the refund provisions, stating, ''the cause of action based on the Export Clause is self-executing; that is, similar to the Compensation Clause, a party can recover for payment of taxes under the Export Clause independent of the tax refund statute.'' Id. In so concluding, the court relied on Hatter v. United States, 953 F.2d 626, 627 [69 AFTR 2d 92-1418] (Fed.Cir.1992), in which it found that the plaintiffs could seek to recover social security taxes collected by the IRS allegedly in violation of the Compensation Clause without having to file a claim for refund. The court indicated that the refund provisions were not implicated in Hatter because ''the Compensation Clause's mandatory and unconditional language presuppose[s] damages as the remedy for a governmental act violating the compensation clause.'' 205 F.3d at 1374. Summarizing the application of Hatter to the case at hand, the court surmised: ''Thus, like the plaintiffs in Hatter, Cyprus was not required to pursue an administrative refund claim before filing suit because the Export Clause provides a self-executing cause of action that is not subject to compliance with the tax refund statute. Put differently, Cyprus had two alternative avenues through which to obtain relief--a tax refund action or a cause of action based on the Export Clause--and either one is sufficient to invoke the Court of Federal Claims jurisdiction under the Tucker Act.'' 205 F.3d at 1375.

The court went on to reject various arguments made by the United States, among them the observation that neither United States Shoe nor Hatter involved the recovery of a tax payment. Finding that this assertion was ''superficially appealing,'' but could not ''withstand close scrutiny,'' the Federal Circuit instead ruled that ''[t]he significance of U.S. Shoe lies not in the fact that the case involved a duty rather than a tax, but in its affirmance of the Export Clause as providing a cause of action for money damages.'' 205 F.3d at 1376. On this head, it similarly rejected defendant's interpretation of Hatter, observing that ''regardless of whether a constitutional provision refers to compensation, duty, or tax, the pertinent inquiry is whether that provision contemplates money damages as a remedy for its violation.'' Id. Citing Mitchell, 463 U.S. at 217, the court reemphasized the money-mandating nature of its analysis, stating that ''the touchstone of our analysis in Hatter and in this case is that the constitutional provision relied on by plaintiffs provides for money damages,'' concluding further that ''given that both the Compensation Clause and the Export Clause provide for money damages, there is no principled reason why a plaintiff challenging an IRS collection may sue independently of the tax refund statutes if

proceeding under the Compensation Clause but is bound to follow those statutes if proceeding under the Export Clause.'' Id.

Several important points may be distilled from this case. First, it is apparent that the Federal Circuit viewed the Export Clause as a money-mandating provision that authorized the award of money damages, thereby allowing a claimant to file an action based directly on that clause. Second, relatedly, the court viewed such a damages action as distinct from a tax refund suit, and thus divorced from the illegal exaction doctrine described in Eastport. That the court's opinion, on several occasions, referred to the Coal Tax as an ''illegal exaction'' does not suggest otherwise. Per contra. The overall methodology employed by the court, liberally spiced with references to Testan, supra, and Mitchell, supra, manifestly is that typically employed in identifying money-mandating provisions in the law. Third, the court concluded that a claimant filing such a damages action need not comply with the provisions for filing a refund action and, based on this analysis, reversed this court's finding that the suits in question were prohibited by section 7422(a). See also Hatter, 953 F.2d at 629–30.[13] The court thus essentially concluded that an independent money-mandating type claim for money damages based upon the Export Clause does not, in the words of section 7422 (a), involve the ''recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected ... or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws.'' As will be seen, this last observation proves pivotal in this case.

Having reached the inner ward, it remains to determine whether such a lawsuit, that is, one involving a money-mandating type claim for damages, is covered by section 2411. Like a contortionist, plaintiffs contend that while its suit is not subject to section 7422(a), it is ''for an[] overpayment in respect of any internal revenue tax'' within the meaning of section 2411. Defendant, however, rejects such interpretative gymnastics, essentially asserting that if this case does not involve the ''recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected'' within the meaning of section 7422(a), a fortiori, it is also outside the confines of the interest provisions of section 2411. Resolving these contentions requires the court to examine the language, context and legislative history of the relevant provisions, a task to which it now turns.

C. Exegesis

As the court mounts its final assault on the bailey, it now comes face to face with the language of section 2411 itself. In construing that language, particularly as it relates to section 7422 of the Code, the court must first look to whether the statutory language is plain and unambiguous. See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 [63 AFTR 2d 89-652] (1989); Chevron U. S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842–43 (1984). In performing this task, the court is guided by the ''fundamental canon of statutory construction'' that, ''unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'' Perrin v. United States, 444 U.S. 37, 42 (1979). This rule is no less applicable in Federal tax cases. See United States v. Goodyear Tire & Rubber Co., 493 U.S. 132, 138 [64 AFTR 2d 89-5841] (1989); Nat'l Data Corp. v. United States, 50 Fed. Cl. 24, 28 [88 AFTR 2d 2001-5226] (2001), aff'd, 291 F. 3d 1381 [89 AFTR 2d 2002-2756] (Fed.Cir.2002).

The cynosure here is the phrase ''for any overpayment in respect of any internal revenue tax'' in section 2411. Defendant does not seriously contest that the Coal Tax, which is contained in the Code, is an

[13] In Hatter, supra, the Federal Circuit concluded that a damage action under the Tucker Act predicated on the Compensation Clause was not subject to the limitations of section 7422(a), explaining - The Federal Rules of Civil Procedure permit parties to pursue their claim on any viable legal theory. Fed.R.Civ.P. 8(e)(2). In this case, plaintiffs could have pursued a tax refund. If they had, as the Claims Court noted, title 26 would have required a prior administrative claim. See 26 U.S.C. § 7422(a). Plaintiffs, however, did not pursue a tax refund. Instead they sought damages for violation of Article III, § 1--an action which is within the Tucker Act jurisdiction of the Claims Court. Hatter, 953 F.2d at 629. The court concluded that ''[i]n sum, plaintiffs do not seek tax refunds, but compensation to ensure compliance with Article III, § 1. The Tucker Act provides the Claims Court jurisdiction to adjudicate this action.'' Id. at 630.

''internal revenue tax.'' See Int'l Bus. Mach. Corp. (IBM) v. United States, 201 F.3d 1367, 1371–72 [85 AFTR 2d 2000-518] (Fed.Cir.2000), cert. denied, 121 S.Ct. 1167 (2001). Nor does there appear to be much doubt that plaintiffs' payments of the Coal Tax resulted in ''overpayments'' once that tax was determined to be unconstitutional, as applied to plaintiffs, under the Export Clause.[14] And, it is even relatively clear that such an overpayment is ''in respect of'' an internal revenue tax. This leaves us with the innocent little three-letter word that, in the court's view, causes most of the mischief here--the treacherous preposition ''for.'' In other words, the issue here boils down to whether a suit that under Cyprus Amax is viewed as seeking money damages, so as to avoid the sweeping limitations of section 7422(a), is one ''for'' an overpayment.

The American Heritage Dictionary and other familiar lexicons are not particularly helpful on this count, as they offer literally dozens of definitions, and variations thereof, for the word ''for.''[15] To be sure, it is not far-fetched for plaintiffs to argue that the word ''for'' should be given the broader meaning ''in connection with'' and to assert that this lawsuit is thus ''for an overpayment'' because an overpayment gave rise to the suit and the monetary damages awardable are obviously tied, at least in part, to the amount of that overpayment. See Rex v. Hunter, 20 N.J. 489, 140 A.2d 753, 754 (N.J.1958). But, it is just as logical to view the same language in section 2411 as more confining, applying only to suits whose object is the actual recovery of an illegal exaction--where the government has the plaintiff's money in its pocket and the claimant wants it back. Under this more limited reading of the statute, the case sub judice is not ''for'' an overpayment, but rather ''for'' damages in lieu of an overpayment. On account of this pesky preposition, then, the statutory language is susceptible of several constructions. In choosing among these, several interpretative guides are useful.

First, the more limited reading of section 2411 offered by defendant is consistent with the doctrine of sovereign immunity. Thus, in dealing with an analogous interest claim, the Supreme Court observed - [T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute . . . to permit the recovery of interest suffice where the intent is not translated into affirmative statutory . . . terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

United States v. New York Rayon Imp. Co., 329 U.S. 654, 659 (1947); see also Brookfield Const. Co., Inc. v. United States, 661 F.2d 159, 165 (Ct.Cl.1981).[16] The Federal Circuit recently put it more succinctly in stating that, as to the payment of interest, ''Congressional consent must be unambiguous.'' IBM, 201 F.3d at 1370, see also U.S. Shoe Corp., 296 F.3d at 1381–82 (applying this principle in denying interest to exporters seeking to recover a tax violative of Export Clause). Such is not the case here, as explicit statutory language authorizing the payment of interest is certainly lacking. At best, while plaintiffs have a textual argument in support of recovery, the language of the statute just as clearly can be read restrictively, so as to foreclose the payment of interest. Under a strict application of the rules for construing waivers of sovereign immunity, plaintiffs then lose.

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[14] Neither the Code nor the Treasury regulations contain an all-inclusive definition of the term ''overpayment.'' See Estate of Baumgardner v. Commissioner, 85 T.C. 445, 449 (1985). The Supreme Court, however, has construed that term on several occasions, each time applying the broad common meaning thereof. For example, in construing the statute of limitations on filing a refund claim, the Court defined that term as - any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment. Jones v. Liberty Glass Co., 332 U.S. 524, 531 [36 AFTR 377] (1947). Later, in Dalm, 494 U.S. at 609 n. 6, the Supreme Court stated that ''[t]he commonsense interpretation is that a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all.''

[15] Among the alternative definitions in The American Heritage Dictionary of the English Language 686 (4th ed.2000), ranked in order of usage, are ''[u]sed to indicate the object, aim, or purpose of an action or activity;'' ''[u]sed to indicate the object of a desire, intention or perception;'' ''[u]sed to indicate equivalency or equality,'' ''[a]s a result of; because of;'' and ''[a]s regards, concerning.''

[16] The roots of this principle run deep. See, e.g., United States ex rel. Angarica v. Bayard, 127 U.S. 251, 260 [4 AFTR 4628] (1888); Tillson v. United States, 100 U.S. 43, 47 (1879).

The latter view draws support from various cases that have concluded that section 2411 is inapplicable where the judgment does not require a refund of taxes, but rather some other form of damages. For example, in Steiner v. Nelson, 199 F.Supp. 441 [8 AFTR 2d 5884] (E.D.Wisc.1961), aff'd, 309 F.2d 19 [10 AFTR 2d 5908] (7th Cir.1962), the court determined that there was an illegal levy and granted only the relief asked for; namely, an injunction against future illegal levies and return of the money already obtained on an illegal assessment. It held that the taxpayer involved was not entitled to interest under section 2411, finding that such a suit for injunctive relief and damages was not a suit for an "overpayment." Id. at 441–42. Other cases are to similar effect. See, e.g., Craft v. United States, 233 F.3d 358, 373–74 [86 AFTR 2d 2000-6996] (6th Cir.2000), rev'd on other grounds, 535 U.S. 274 [89 AFTR 2d 2002-2005] (2002) (no interest allowed under section 2411 in quiet title action brought by wife of delinquent taxpayer to recover proceeds from the illegal sale of entireties property); Economic Plumbing & Heating Co. v. United States, 470 F.2d 585, 589–92 [31 AFTR 2d 73-993] (Ct.Cl.1972). By comparison, no case has been cited or found wherein it was held that a plaintiff/taxpayer is entitled to interest under section 2411 in a proceeding analogous to this.

Not true, protest plaintiffs. In their brief, they argue that the Federal Circuit, in IBM, supra, suggested that section 2411 was broad enough to encompasses lawsuits under the Tucker Act based upon the money-mandating language of the Export Clause. They rely, in particular, on that part of the court's opinion which states--"Furthermore, we accept appellee's contention that the language of § 2411 is broad enough and has been so construed, as to cover the case before us." 201 F.3d at 1372. This argument fails for at least three reasons.

First, read in context, it appears that in the quoted language, the Federal Circuit merely assumed, for the sake of argument, that this contention was true, without deciding as much. Indication of this lies in the paragraph immediately preceding the quoted language, which begins--"[f]or purposes of analysis, we accept the argument of appellee and the holding of the Court of Internal Trade that payment of the [Harbor Maintenance Tax (HMT), 26 U.S.C. § 4662] by exporters is an 'internal revenue tax' within the meaning of § 2411." Id. at 1371. Further consistent with this view, there is no discussion of this complicated issue, or any of the authorities bearing on it, in the court's opinion. Second, the court's holding in IBM was based on specific language in the HMT which provided that it was not to be treated as a tax for certain purposes, thereby rendering section 2411 inapplicable. Id. at 1372–1374.[17] To reach this conclusion, the court did not need to consider the language or applicability of section 2411, which was not, in any way, determinative. Accordingly, the sentence quoted by plaintiffs is, at best, obiter dicta. Finally, plaintiffs' assertion overlooks an obvious distinction--IBM preceded Cyprus Amex and did not involve a damage action under the Tucker Act predicated upon the money-mandating language of the Export Clause, but rather a suit filed in the Court of International Trade under its residual jurisdictional statute, 28 U.S.C. § 1581(i). As such, the court in IBM was not called upon to consider whether a suit for damages under the Tucker Act that falls outside the ambit of section 7422(a) is, nonetheless, covered by section 2411. Contrary to plaintiffs' importunings, then, IBM simply does not resolve the issue presented.

The last of the three observations made above suggests that another way of approaching this case is to compare the language of section 2411 with that of section 7422(a).[18] Both sections employ the word "for"--the former to suits "for" an

[17] See also U.S. Shoe, 296 F. 3d at 1382 ("IBM held that the Harbor Maintenance Tax statute ... expressly prohibited the application of section 2411 because it is a tax law, and not a customs law."); BMW Mfg. Corp. v. United States, 241 F.3d 1357, 1361–62 [87 AFTR 2d 2001-1086] (Fed.Cir. 2001) (same).

[18] Almost seventy years ago, Dean Roscoe Pound wrote in his book The Interpretations of Legal History that "[a]ll interpretations go on analogies. We seek to understand one thing by comparing it with another." Roscoe Pound, Interpretations of Legal History 151 (1923).

overpayment; the latter to suits ''for'' the recovery of any ''internal revenue tax alleged to have been erroneously or illegally assessed or collected, ... or of any sum alleged to have been excessive or in any manner wrongfully collected.'' Given the similarity between these provisions--indeed, they clearly are in pari materia--it is reasonable to assume that the word ''for'' has the same scope in both provisions.[19] Our inquiry thus returns to whether one can have an ''overpayment'' of tax that somehow does not involve the erroneous, illegal or wrongful assessment or collection of tax or any other sum. The latter phrase appears to be extraordinarily broad, a fact confirmed by the case law.[20] Logic, indeed, suggests that the latter phrase is at least coextensive with the first--after all, it is difficult to envision how an overpayment could result if it did not, in the first instance, involve the assessment or collection of a tax that, in the second instance, proved erroneous, illegal or wrongful. Certainly, if nothing else, the overpayment here resulted from the collection of tax that proved to be illegal.

These observations, though perhaps splinters of logic in the first instance, take on sturdier proportions when buttressed by the legislative history of section 2411.[21] The substance of that section has long been a part of federal statutory law, with a pedigree that can be traced back to 1911, when section 177 of the Judicial Code was enacted. 36 Stat. 1141 (1911). As amended by the Revenue Act of 1921 (c. 136, § 1324(b), 42 Stat. 227), and the Revenue Act of 1926 (ch.27, § 1117, 44 Stat. 9), this provision of the Judicial Code had language essentially identical to that in section 7422(a) of the Code, to wit -

(a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

(b) In any judgment of any court rendered after the enactment of the Revenue Act of 1926 (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any internal-revenue tax erroneously or illegally assessed or collected, or for any penalty collected without authority or for any sum which was excessive or in any manner wrongfully collected, under the internal-revenue laws, interest shall be allowed at the rate of 6 per centum per annum upon the amount of such tax, penalty, or sum, from the date of the payment or collection thereof to the date of entry of such judgment or, if such judgment is reviewed by an appellate court, to the date of entry of final judgment.

Sec. 177 (emphasis added); see also Bulova Watch Co. v. United States, 365 U.S. 753, 758 n. 7 [7 AFTR 2d 1164] (1961) (discussing the derivation of this provision). Accordingly, for seven years early in its existence (1921–1928), the predecessor of section 2411 contained precisely the same language now found in section 7422(a). In 1928, that language was deleted in favor of the shorter phrase ''for any overpayment in respect of any internal-revenue tax.'' See Revenue Act of 1928 (ch. 852, § 614–15, 45 Stat. 791, 876–77). The legislative history, however, appears to attribute no significance whatsoever to this shift in language.[22]

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19 Notably, some of the cited provisions originated not only the same acts, but in the same sections, only later to be separated. See, e.g., section 1324 of the Revenue Act of 1921, 42 Stat. 316 (1921), allowing interest on both claims for refunds as well as prejudgment in-terest. Accordingly, these provisions could not be closer cousins.

20 See, e.g., Brennan v. Southwest Airlines Co., 134 F.3d 1405, 1410 [81 AFTR 2d 98-566] (9th Cir.1998); Clement v. United States, 472 F.2d 776, 778–79 [31 AFTR 2d 73-675] (1st Cir.) (noting this provision's ''broad coverage''), cert. denied, 414 U.S. 864 (1973); Alexander Proudfoot, 454 F.2d 1379, 1380 n. 2 [29 AFTR 2d 72-543] (Ct.Cl.1972); Nemours Corp. v. United States, 188 F.2d 745, 750 [40 AFTR 485] (3d Cir.), cert. denied, 342 U.S. 834 (1951) (describing this provision's ''broad and strict rule''); Schiff v. United States, 24 Cl. Ct. 249, 252 [68 AFTR 2d 91-5626] (1991). The Supreme Court has also broadly construed the comparable language of section 1346(a)(1). See Williams, 514 U.S. at 531.

21 In the court's view, there certainly is enough ambiguity in the language of section 2411 to warrant reference to the statute's legislative history. See Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997).

22 The accompanying reports highlight only a single change, which involved the calculation of interest and not the coverage of the provision. See H.R.Rep. No. 2, 70th Cong., 1st Sess. 35 (1927); S.Rep. No. 960, 70th Cong., 1st Sess. 43 (1928).

Later, when Title 28 of the U.S.Code was enacted into positive law on June 25, 1948, ch. 646, 62 Stat. 869, section 2411 of that title provided only for post-judgment interest. Nonetheless, it is revealing that this provision essentially reverted back to its 1926 form, indicating that such interest applied in suits "instituted under [28 U.S.C.] § 1346," which section, in turn, applied, as it does today, to "any internal-revenue tax . . . erroneously or illegally assessed or collected . . ." See §§ 1346, 2411 62 Stat. 933, 973 (1948); see General Motors Corp. v. United States, 292 F.2d 502, 504 n. 2 [8 AFTR 2d 6107] (Ct.Cl.1961). Thus, in 1948, the predecessor of the current section 2411 once again incorporated essentially the same language as current section 7422(a). As was true in 1928, there is no indication in the legislative history of the 1948 Act that the Congress thought that the return to this language was significant.[23] Nor is there indication that Congress thought it was making a substantive change when pre-judgment interest was restored and the "overpayment" language reinserted via section 120 of the Act of May 24, 1949, 63 Stat. 89, 106.[24] Though amended sev-eral times since 1949, section 2411 has es-sentially remained unchanged insofar as relevant here.

Although plaintiffs undoubtedly would have this court see significance in Congress' ultimate deletion of the "erroneously or illegally assessed or collected" language in favor of the reference to "overpayment," this court is mindful of the Supreme Court's instruction that it "not presume that [a] revision worked a change in the underlying substantive law 'unless an intent to make such [a] chang[e] is clearly expressed.'" Keene Corp. v. United States, 508 U.S. 200, 209 (1993) (quoting Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 227 (1957) (footnote omitted)); see also Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 831, n. 4 (1989); Tidewater Oil Co. v. United States, 409 U.S. 151, 162 (1972). Here, there is no such clear expression evidenced in the oscillation from one version of this language to another, suggesting no substantive change, but merely a repeated shift in phraseology.

One looking for further evidence of this need only trace the operations and history of several other statutory provisions relating to refund claims, refund suits and interest on such claims and suits. Today, most of those provisions use the "overpayment" language (e.g., Code sections 6402 (authority to pay a refund claim), 6511 (requirements for filing a refund claim) and 6611 (interest on a refund claim)), but a few still employ versions of the longer formulation typified by section 7422(a) (e.g., Code section 6532 (statute of limitations for filing suit after a refund claim is filed) and 28 U.S.C. § 1346(a)(1) (jurisdiction)). Yet, while differently phrased, these provisions are operatively interwoven, feeding into and interacting with each other.[25] For example, one cannot file suit under section 7422(a) until one complies with the refund claim requirements of section 6511; likewise, the triggering of the statute of limitations under section 6532 occurs generally when a claim filed under section 6511 is denied.[26]

Like section 2411, many of the Code sections currently using the "overpayment" language originally employed the longer formulation. Yet, there is no pattern to when and how they changed; some shifts in closely-related provisions occurred

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[23] See H.R.Rep. No. 308, 80th Cong., 2d Sess. (1947) ("Reviser's Notes"), reprinted in 1948 United States Code Congressional Service 1917.

[24] See H.R. Rep. No. 352, 81st Cong., 2d Sess. (1949) ("Section Explanation of Bill"), reprinted in 1949 United States Code Congressional Service 1273.

[25] For judicial confirmation of this see, e.g., Rosenman v. United States, 323 U.S. 658, 661–63 [33 AFTR 314] (1945) (discussing the relationship between the statute of limitations and interest provisions of the Code).

[26] A further, albeit complicated, example of this phenomenon may be found in section 6512 of the Code. Under section 6512(a), the district courts have no jurisdiction over a refund suit under section 1346(a)(1) brought by a taxpayer who has previously petitioned the Tax Court until such time as the Tax Court's decision is final. Under section 6512(b)(1), the Tax Court has jurisdiction, under certain circumstances, to determine whether there is an "overpayment of income tax." In construing these provisions, the Tax Court has held that the scope of the prohibition in paragraph (a), which hinges on section 1346 and, therefore, incorporates the "erroneously or illegally assessed or collected" language, is symmetrical with the scope of the Tax Court's "overpayment" jurisdiction under paragraph (b). See Estate of Baumgardner, 85 T.C. at 450–51. In this regard, the Tax Court reasoned "[t]he 'overpayment' determined by the Tax Court should be synonymous with that determined by a district court." Id. at 452.

decades apart and, as reflected in the accompanying legislative reports, without the slightest indication that Congress intended anything more than housekeeping.[27] Sometimes, Congress simultaneously adopted two or more provisions dealing with exactly the same subject, but with different language. For example, as part of the Internal Revenue Code of 1939, Congress enacted several statutes of limitation governing various tax refund claims; but each provision used a different phrase to refer to the amount sought by the taxpayer.[28] That same Code authorized the Commissioner to issue refunds to taxpayers utilizing the lengthy ''erroneously or illegally assessed or collected'' language, § 3770, 53 Stat. 464 (1939), but provided for interest on those same claims using the ''overpayment'' language, § 3771, 53 Stat. 465 (1939).[29] In short, based on the foregoing, the court simply cannot attach talismanic significance to the fact that the Congress at one point or another used the word ''overpayment'' versus the language currently found in section 7422(a). A stroll through the pages of history reveals no such recondite distinction, but instead suggests that Congress believed that the two phrases were either synonymous or, at least, not significantly different.

Confirmation of this may be found in the Supreme Court's decision in Jones v. Liberty Glass Co., 332 U.S. 524 [36 AFTR 377] (1948). That case involved the period of limitations applicable to the filing of claims for refund of federal income taxes. The taxpayer had filed its income and excess profits tax return in 1939 and had paid an additional assessment of $6,640.81 on March 8, 1941. Over three years later, on March 30, 1944, the taxpayer filed a claim for refund of $1,053.49. 332 U.S. at 525–26. The government argued that the claim was untimely because it was not filed within two years after payment of the tax under section 322(b)(1) of the Internal Revenue Code of 1939, which involved claims for refund of income tax ''overpayments.'' Id. at 526–27. The plaintiff, however, argued that it had four years after payment of the tax within which to file its claim pursuant to section 3313 of the Code, which applied to ''[a]ll claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected ... or of any sum alleged to have been excessive or in any manner wrongfully collected ...'' Id. at 527. The latter provisions applied ''except as otherwise provided by law in the case of income, war profits, excess-profits, estate, and gift taxes.'' Id.

Resolving this issue, the Court first traced the histories of these provisions, thereby verifying that Congress intended section 3313 not to apply where other special provisions controlled. The Court found that section 322(b) was such a provision, thereby requiring plaintiff to have filed its claim within two years of the relevant payment. 332 U.S. at 531–35. Plaintiff, however, argued that the two provisions did not overlap, pointing out that section 322(b)(1) dealt with income tax ''overpayments,'' while section 3313 dealt with income taxes ''erroneously or illegally assessed or collected.'' Attempting to distinguish the two, plaintiff asserted that overpayments referred ''solely to excess

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27 For example, while the provision providing for interest on a refund claim (the predecessor of section 6611(a) of the Code) was changed to refer to an ''overpayment'' in 1928, Revenue Act of 1928, § 614, 45 Stat. 876 (1928), the provision authorizing the Commissioner to pay refunds based upon the same claims (currently found at section 6402 of the Code) was not changed until 1954, 68A Stat. 791 (1954). The legislative history of the 1954 Code, which catalogues differences between that code and prior law, does not mention this change. See, e.g., Joint Comm. on Tax'n, Summary of the New Provisions of the Internal Revenue Code of 1954, p. 129–31 (1955). A further indication that Congress painted with a broad brush in dealing with these provisions is the fact that, from 1866 through 1954, there were a number of variations of the ''erroneously or illegally assessed or collected ...'' language. Compare § 44, 13 Stat. 223 (1864) with § 9, 14 Stat. 11 (1866); § 19, 14 Stat. 152 (1866); § 44, 17 Stat. 257 (1872); 26 U.S.C. § 3770 (1952).

28 See § 3313, Stat. 400 (1939) (covering, with just a few exceptions, ''[a]ll claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected''); § 910, 53 Stat. 138 (1939) (governing estate taxes ''erroneously or illegally assessed or collected''); §§ 321–22, 53 Stat. 91 (1939) (governing income tax ''overpayments''). Likewise, in the 1939 Code, the provisions generally authorizing refunds used the longer formulation, while the provision authorizing gift tax refunds used the ''overpayment'' language. Compare § 3770, 53 Stat. 464 (1939) (income tax refunds), with § 1027, 53 Stat. 156 (1939) (gift tax refunds).

29 Thus, according to plaintiffs' interpretation of the word ''overpayment,'' under the 1939 Code, the Commissioner would have been authorized to award interest on claims on which he was not authorized to grant a refund. Despite the passage of tax legislation in 1946, 1948, 1949 and 1952, Congress did not conform the language in these two provisions until it adopted the 1954 Code. See § 6402, 68A Stat. 791 (1954); § 6611, 68A Stat. 819 (1954).

payments resulting from errors by taxpayers in the preparation of their returns or in related activities, while erroneous or illegal assessments and collections are claimed to relate to various kinds of errors on the part of revenue agents.'' 332 U.S. at 531. As such, according to plaintiff, its situation, which involved an alleged erroneously assessed tax, was controlled by section 3313, rather than section 322(b).[30]

The Court made short shrift of this argument, first noting that ''[i]n the absence of some contrary indication, we must assume that the framers of these statutory provisions intended to convey the ordinary meaning which is attached to the language they used.'' 332 U.S. at 531. ''Hence,'' the court reasoned, ''we read the word 'overpayment' in its usual sense, as meaning any payment in excess of that which is properly due.'' Id. ''Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law,'' the court found, and ''the error may be committed by the taxpayer or by the revenue agents.'' Id. The Court believed that the legislative history of section 322(b)(1) made it ''quite evident'' that the ordinary meaning of the term overpayment was the one intended by the drafters. In this regard, the court noted that an earlier version of section 322(b)(1) had included the language ''in excess of that properly due'' with the ''expressed intention of including claims growing out of illegal assessments.'' 332 U.S. at 532. Based on this, the Court found that -

There was not the slightest indication that the substitution of the word ''overpayment'' was designed to narrow the scope of § 281.

It apparently was a mere simplification in phraseology. But it does make clear the sense in which the word was first used in this context. The generic character of the word was emphasized from the start. And we see no basis for making it over into a word of art at this late date.

332 U.S. 532 (footnote omitted). The Court concluded that it would ''be doing unwarranted violence'' to the demarcation between section 322(b) and 3313 were it to construe the term ''overpayment'' as not being essentially coextensive with the phrase taxes allegedly ''erroneously or illegally assessed or collected.'' Id. at 532–33. It, therefore, held that plaintiff's claim for refund was subject to the two-year statute of limitations of section 332(b)(1) and, as such, untimely. Id. at 533–35.

Following the Supreme Court's lead, various cases have concluded that an ''overpayment'' occurs when a tax is erroneously, illegally, wrongfully assessed or collected. Thus, in Kavanagh v. Noble, 332 U.S. 535 [36 AFTR 383] (1947), decided the same day as Jones, the Supreme Court indicated that ''[t]he overpayment which brings § 332(b)(1) into operation occurs whenever the taxpayer has paid an amount over and above his true liability,'' including within this definition a situation where an assessment and collection were ''without legal authority'' or ''illegal.'' Id. at 538. Summarizing the law on this point, the court in Southern California First National Bank v. United States, 298 F.Supp. 1249, 1252 [24 AFTR 2d 69-6083] (S.D.Cal. 1969), construed the word ''overpayment'' as used in section 6511(a), thusly -

The United States Supreme Court has held that the predecessor section to § 6511 in the 1939 Code governed even where the tax had been illegally assessed and collected. Taxes illegally collected are, in law, ''overpayments.''

In similar vein runs Dubuque Packing Co. v. United States, 126 F.Supp. 796, 801 [46 AFTR 1797] (N.D.Iowa 1954), where the court noted that, prior to Jones, lower courts had drawn a distinction between the term ''overpayment'' and the ''erroneously or illegally assessed or collected'' language. That court held that Jones had ''refused to recognize a distinction based on this change in language and overruled those cases making such a distinction,'' and concluded itself that ''Congress apparently must have considered the terminol-

[30] This argument had been adopted by several lower courts. See United States v. Lederer Terminal Warehouse Co., 139 F.2d 679, 681 [31 AFTR 1120] (6th Cir.1943); Huntley v. Southern Oregon Sales, Inc., 102 F.2d 538, 543 [22 AFTR 911] (9th Cir.1939).

ogy synonymous.'' Id.; see also Binder v. United States, 590 F.2d 68, 70–71 [43 AFTR 2d 79-358] (3d Cir.1978); Taylor v. United States, 18 Cl.Ct. 713, 716–17 [64 AFTR 2d 89-5791] (1989) (Rader, J.) (holding that the word ''overpayment'' in section 6511(a) ''applies to claims where IRS erroneously or illegally assesses or collects taxes''); Boyd v. United States, 439 F.Supp. 907, 909 [40 AFTR 2d 77-5447] (E.D.Pa. 1977) (funds collected pursuant to an invalid termination assessment held ''overpayments'' within the meaning of section 6402(a)); cf. Wilson v. United States, 246 F.Supp. 613, 619–20 [15 AFTR 2d 1091] (N.D.Cal.1965). Jones, and its progeny thus indicate that, despite the differences in language, the concepts embedded in sections 2411 and 7422(a) are, at least in the case of a payment or assessment of a tax, essentially synonymous.

Several observations inexorably flow from this conclusion. First, if the language in section 2411 is essentially coterminous with, or encompassed by, that in section 7422(a), then when the Federal Circuit held that cases of the sort sub judice are outside section 7422(a), it necessarily suggested that such suits must also be outside section 2411. A contrary conclusion would require this court to find that the word ''for'' is more limiting in section 7422(a) than in section 2411. Given the similarities between the structure and purposes of these provisions, such a Janus-faced rendering of the word ''for'' simply makes no logical or practical sense. In the court's view, the conclusion thus is inescapable that a suit for damages arising out of the violation of the Export Clause is not a suit for an overpayment within the meaning of the interest provisions of section 2411.

Now, one might reasonably ask--and plaintiffs expressly do ask--how can defendant have the use of their funds, collected like any other tax, and yet not be required to pay compensation for the time value of that money in the form of interest. After all, ''[t]he purpose of the interest provisions in tax law is to remove the factor of the time value of money from tax procedures, in fairness to the public and to the public fisc.'' Mnopf Trustees Ltd. v. United States, 123 F.3d 1460, 1465 [80 AFTR 2d 97-6117] (Fed.Cir.1997).[31] But, this claim, whether equitable under the circumstances or not, simply does not resonate in a judicial world where the doc-trine of sovereign immunity is alive and well. Rather, as noted previously, ''[i]n the absence of express congressional consent to the award of interest separate from a general waiver of immunity to suit, the United States is immune from an interest award.'' Shaw, 478 U.S. at 314. Accord-ingly, absent a specific statutory authoriza-tion, interest on claims against the United States simply does not automatically fol-low upon a judgment, even where there has been some associated delay. Because there is no such provision here, plaintiffs are not entitled to the prejudgment interest they claim. Plaintiffs' claim for additional relief lies with Congress, not this court. See Kavanagh, 332 U.S. at 539; IBM, 201 F.3d at 1374–75.

Indeed, all the equities here do not flow plaintiffs' way, as becomes apparent if one considers the consequences of accepting their argument. For one thing, if plaintiffs are correct, then Congress created a form of prejudgment interest that is recoverable only by suing and obtaining a judgment under the Tucker Act. The provisions concerning the payment of interest administratively under the Code would not authorize the payment of such interest absent the filing of a timely refund claim; and such a claim, of course, would be timely, under section 6511(a), only if filed within 3 years from the time the return was filed or 2 years from the time the tax was paid. Thus, a taxpayer could not obtain administratively interest on taxes paid six years ago under the Code--rather, such interest would only be recoupable in this court under the Tucker Act. This approach is a bete noire, counter to the entire construct of the Code's refund provisions, which are designed to afford the IRS an opportunity to investigate tax claims and resolve them

[31] See also Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 540 (1981); Heather M. Pichelman, It's Pay-Up Time for the Government on the Harbor Maintenance Tax: Exporters are Receiving their Tax Refunds, but What About Interest?, 11 Fed. Circuit B.J. 427 (2002).

without the time and expense of litigation. See United States v. Felt & Tarrant Mfg. Co., 283 U.S. 269, 272 [9 AFTR 1416] (1931); see also Brennan, 134 F.3d at 1411; Union Pacific R.R. Co. v. United States, 389 F.2d 437, 442 [21 AFTR 2d 478] (Ct.Cl.1968); Alexander Proudfoot, 454 F.2d at 1383–84; Ferguson, supra, at 336 (explaining that "[t]his requirement is to assure an adequate opportunity for administrative review prior to the necessity of filing suit"); see generally Oliver Wendell Holmes, The Common Law 96 (1881) (noting that the law generally disfavors engaging the "cumbersome and expensive machinery" of the courts).

Moreover, while plaintiffs in this case filed claims for refund as to some of the taxes owed, their theory is not dependent upon this. Rather, under their view of the law, they could just as easily wait a full six years before filing suit, thereby never filing a refund claim and never providing the IRS the opportunity to refund taxes illegally collected administratively so as to stop the running of interest. In such circumstances, particularly where the illegality of a tax is admitted by the IRS, taxpayers might simply compare the rate of interest available under the Code with other investment opportunities, and, if higher, opt for the former.[32] In the court's view, it is highly unlikely that in passing section 2411, Congress intended to create such an investment opportunity--one, of course, that comes at the expense of the Treasury.

At all events, the result reached here is unaffected by these policy considerations and driven instead by the text of section 2411, its legislative history and statutory context, particularly the impact of section 7422(a). All of these indicia, when viewed through the prism of sovereign immunity, foreclose the construction of section 2411 urged by plaintiffs.

III. CONCLUSION

This court need go no further. Like the Carrollian Jabberwock, plaintiffs' version of a lawsuit that avoids the limitations of section 7422(a), yet triggers prejudgment interest under section 2411, ultimately proves a fiction. Rather, for the reasons stated, this court concludes that no prejudgment interest is owed on any judgments in these cases under section 2411. Defendant's motion for partial summary judgment is GRANTED and plaintiffs' motions for partial summary judgment are DENIED.[33]

¶2002-5678

Mark Christopher CORCORAN; Nancy Louise CORCORAN, PETITIONERS--APPELLANTS v. COMMISSIONER OF INTERNAL REVENUE, RESPONDENT--APPELLEE. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 02-71577, Nov. 12, 2002. Tax Court, (2002) TC Memo 2002-18, RIA TC Memo ¶2002-018, 83 CCH TCM 1107 (opinion by Wolfe, *Sp. Tr. J.*), affirmed. Year 1998. Decision against Taxpayers.

1. Unreported income—tax protesters—deficiency notice—burden of proof and production—accuracy-related negligence penalties—disregard of rules and regulations—frivolous claim sanctions. Tax Court properly upheld deficiencies, penalties and frivolous claims sanctions against tax protesters: taxpayers raised only frivolous protester-type arguments about income's taxability or deficiency notice's validity. *Reference:* United States Tax Reporter ¶615.047(5); 62,125.02(72); 74,915.01(5); 66,625.01(23); 74,915.01(20); 66,735.01(5).

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[32] Under section 6621(a)(1), the overpayment rate beginning October 1, 2002, is the sum of the federal short-term rate plus 3 percentage points (2 percentage points in the case of a corporation), except the rate for the portion of a corporate overpayment of tax exceeding $10,000 for a taxable period is the sum of the federal short-term rate plus 0.5 of a percentage point for interest computations made after December 31, 1994. The rate of interest determined under this section for the calendar quarter beginning October 1, 2002, is 6 percent for overpayments (5 percent in the case of a corporation), and 3.5 percent for corporate overpayments exceeding $10,000. Rev. Rul. 2002-59, 2002 I.R.B. 557. During some of the periods at issue here (e.g., the last three quarters of 2000), the rate for corporate overpayments exceeding $10,000 was 6.5 percent. Id.

[33] Also pending before the court are two other motions filed by the government: (i) a motion to dismiss several of the claims in the complaint in case No. 00-551T, filed on December 20, 2001; and (ii) a motion for summary judgment in all the cases, filed on October 31, 2002. The court will resolve those motions by separate order.

IRC §61; 861; 6212; 6662; 6673; 7491.

United States Court of Appeals, Sixth Circuit,

Appeal from a Decision of the United States Tax Court, Norman H. Wolfe, Special Trial Judge, Presiding.

Before SNEED, SKOPIL and FARRIS, Circuit Judges.

MEMORANDUM*

WOLFE, Special Trial Judge:

Submitted September 20, 2002**

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION

[1] The Corcorans appeal the Tax Court's determination of an income tax deficiency and the imposition of penalties and sanctions. They argue that income earned by United States citizens within the United States is not ''gross income'' subject to federal taxation. Specifically, they contend that wages, unemployment compensation, and interest that they received are not sources of taxable income. Such an argument has no basis in the tax code and is legally frivolous. Gross income is defined ''very broadly as 'all income from whatever source derived.''' See Coady v. Commissioner, 213 F.3d 1187, 1190 [85 AFTR 2d 2000-2049] (9th Cir.2000) (quoting 26 U.S.C. § 61(a)).

There is also no merit to taxpayers' contentions that they were denied their administrative due process rights or that their notice of deficiency is invalid. See Wilcox v. Commissioner, 848 F.2d 1007, 1008 [61 AFTR 2d 88-1299] (9th Cir.1988) (''[F]ailing to provide a taxpayer with an administrative fact finding hearing does not violate due process.''); Kantor v. Commissioner, 998 F.2d 1514, 1521 [72 AFTR 2d 93-5476] (9th Cir.1993) (''[W]e will not look behind a deficiency notice to question the ... procedures leading to a determination.'') (internal quotation omitted).

Finally, we affirm the imposition of sanctions. The Tax Court is entitled to ''impose a penalty on a taxpayer for maintaining a proceeding primarily for delay or for bringing an action which is frivolous and groundless.'' See Larsen v. Commissioner, 765 F.2d 939, 941 [56 AFTR 2d 85-5487] (9th Cir.1985).

AFFIRMED.

¶2002-5679

John J. TIGUE, Jr., Morvillio, Abramowitz, Grand, Iason & Silberberg, P.C., PLAINTIFFS-APPELLANTS v. UNITED STATES DEPARTMENT OF JUSTICE, Internal Revenue Service, DEFENDANTS-APPELLEES. U.S. Court of Appeals, Second Circuit, (CA2) Docket No. 01-6243, Nov. 15, 2002. District Court affirmed. Decision for Govt.

1. FOIA—exemptions—deliberative process privilege—what constitutes inter-agency information—consultants. District court properly rejected lawyer's and his law firm's FOIA complaint for access to memorandum that Assistant United States Attorney (AUSA) sent to public commission recommending how IRS should conduct criminal tax investigations: memo fell under Exemption 5's deliberative process privilege. Although commission wasn't itself govt. agency, it was still considered part of IRS and memo was still considered inter-agency communication for Exemption 5 purposes where commission was acting as consultant to IRS when it solicited memo from AUSA; and AUSA clearly worked for governmental agency. So, facts that commission was interposed between 2 agencies, that memo wasn't given directly to IRS and that commission may not have intended to keep its recommendations or findings confidential were irrelevant. Also, memo was, despite govt.'s failure to identify any specific decision made in reliance thereon, predecisional; and neither commission's minor cites to memo in its published report nor AUSA's foreknowledge that commission would make final report public waived privilege. *Reference:* United States Tax Reporter ¶76,556.502(20).

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P.34(a)(2). Accordingly, appellants' request for oral argument is denied.

2. FOIA—exempt information—segregation; partial disclosure—factual findings vs. evaluative and policy discussions. Lawyer's and law firm's alternative FOIA request for partial disclo-sure of purely factual information con-tained in exempt inter-agency memo's rec-ommendations on how IRS should conduct criminal investigations was properly denied: in camera review of documents showed that information was primarily evaluative and policy-based, and that any factual information was too intertwined therewith to allow disclosure. *Reference:* United States Tax Reporter ¶76,556.502(75).

John J. Tigue, Jr., Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C., New York, NY, (Daniel B. Kosove, on the brief) for Plaintiffs-Appellants.
Daniel S. Alter, Assistant United States Attorney, (James Comey, United States Attorney for the Southern District of New York, Gideon A. Schor, Assistant United States Attorney, on the brief) for Defendants Appellees.

Appeal from orders of the United States District Court for the Southern District of New York (Hellerstein, J.) granting defendants' motion for summary judgment and denying plaintiffs' cross-motion for summary judgment under the Freedom of Information Act, 5 U.S.C. § 552. Affirmed.

United States Court of Appeals, Second Circuit,

Before: CABRANES, SOTOMAYOR, Circuit Judges, and GLEESON, District Judge.

SOTOMAYOR, Circuit Judge.

Law Firm that represented individuals in connection with federal grand jury tax investigations and Internal Revenue Service (IRS) administrative investigations, enforcement actions, and prosecutions brought action under the Freedom of Information Act (FOIA) against Department of Justice (DOJ) and IRS, seeking access to a memorandum prepared by an Assistant United States Attorney (AUSA) and sent to public commission created by IRS. The United States District Court for the Southern District of New York, Hellerstein, J., granted summary judgment in favor of defendants. Law firm appealed. The Court of Appeals, Sotomayor, Circuit Judge, held that: (1) memorandum was "inter-agency document," under FOIA; (2) memorandum was a "predecisional document," supporting its exemption from disclosure requirements of FOIA; and (3) disclosure of limited factual information contained in memorandum was not warranted.

Affirmed.

This appeal was brought by a lawyer and his law firm seeking access under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b), to a memorandum ("the Neiman Memorandum" or "Memorandum") prepared by an assistant United States Attorney in the Southern District of New York ("Southern District") and sent to a public commission. The Neiman Memorandum outlines the Southern District's opinions and recommendations as to how the Internal Revenue Service ("IRS") should conduct criminal tax investigations. The Memorandum was written for, and forwarded to, the Criminal Investigation Division Review Task Force headed by Judge William Webster ("the Webster Commission"), which was established by the IRS to gather information and make suggestions on how to reform its Criminal Investigations Department ("CID"). The district court held that the government did not have to produce the Neiman Memorandum because it was shielded by the FOIA's exemption for documents reflecting an agency's deliberative processes, relying on 5 U.S.C. § 552(b)(5).

On appeal, plaintiffs claim that the Neiman Memorandum was not an intra- or inter-agency document as required for exemption under § 552(b)(5) because it was provided to the Webster Commission, an independent task force that intended to issue a public report of its findings, and that it is not privileged as material of an agency consultant. Plaintiffs also contend that the Neiman Memorandum is not "predecisional" because it was prepared to

assist the Webster Commission rather than the IRS and does not relate to a sufficiently specific agency decision. They further argue that even if the deliberative process exemption applies, the government waived that protection by reproducing a quotation from the memorandum in the report published by the Webster Commission (''Webster Report'' or ''Report''). Finally, they argue that if the document is protected, any purely factual sections should be made available. We disagree. We hold that (1) the Webster Commission was a consultant to the IRS that was charged with assisting the agency in developing its policy, rendering a memorandum sent from the Southern District to the Webster Commission an inter-agency document; (2) because the IRS created the Webster Commission in order to help it decide whether and how to reform the CID, the document is predecisional; (3) because the Webster Commission's Report was not a final decision, the government did not waive executive privilege; and (4) after *in camera* review, the district court properly found that there were no reasonably segregable parts of the Neiman Memorandum subject to disclosure.

BACKGROUND

During his confirmation hearings before the Senate in the fall of 1997, IRS Commissioner Charles Rossotti made a commitment to improving the quality of service provided by each of the major components of the agency. To that end, in July 1998, Rossotti asked Judge William Webster, former director of both the FBI and the CIA, to establish a task force to conduct an ''independent review'' of the IRS's CID to ''determine [CID's] effectiveness in accomplishing its mission, and make recommendations for improvement.'' Judge Webster recruited a number of experts with extensive experience in criminal investigations, law enforcement and federal prosecution to serve on the Webster Commission.

The Webster Commission spent nine months reviewing ''countless'' documents and interviewing over 600 people, including a number of law enforcement officials. The Webster Commission specifically requested the opinions of the Southern District because it handled more tax investigations than any other district. Then-Deputy U.S. Attorney Shirah Neiman wrote a sixteen-page memorandum expressing the views of the Southern District on ''the various agency components involved in criminal tax enforcement; . . . the then existing focus of tax investigations and prosecutions and the deployment of IRS resources; . . . the difference[s] between [the Southern District's] position on various issues and that of other agency components; . . . and [the Southern District's] recommendations to ensure the continuation of vigorous criminal tax enforcement.'' According to Neiman, the Neiman Memorandum expressed the views of the Southern District and not those of the Department of Justice as a whole or Neiman as an individual, and her expectation that the memorandum would remain confidential contributed to her willingness to express the Southern District's opinions and policies about tax investigations.

The Webster Commission released its Report on April 9, 1999 to significant media attention. The 113-page Report includes both a factual inquiry into the practices of the CID and a set of recommendations about how the CID should be improved. Included in the Re-port is a letter from Commissioner Rossoti stating that the Report ''will guide us to improve the work of this critically impor-tant component of tax administration for many years to come'' and that the IRS concurred with the specific recommenda-tions in the Report, although noting that ''some of the recommendations, particu-larly those concerning organization struc-ture, need further analysis and design work in coordination with our other organiza-tional changes.''

The Neiman Memorandum is mentioned twice in the Report. First, the Neiman Memorandum is referenced in a footnote as representing an opposing view to the position held by the leadership of the Department of Justice Criminal Division, most United States Attorneys, and other

important figures in criminal enforcement, all of whom apparently believe that the CID should continue to investigate money laundering and narcotics cases. Later in the Report, it is quoted as criticizing the use of administrative investigations and IRS summons because they are slower than grand jury subpoenas: "[s]ervice of an administrative summons simply does not convey the urgency of a grand jury subpoena, and is not as readily enforceable as a subpoena, and represented subjects of administrative investigations often succeed in dragging out these investigations for unimaginably long periods."

Plaintiff John Tigue, an attorney whose law firm, Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C., often represents individuals in connection with federal grand jury tax investigations and IRS administrative investigations, enforcement actions, and prosecutions, obtained a copy of the Report and noticed the references to the Neiman Memorandum. Believing that review of the Neiman Memorandum would improve his understanding of Southern District policy and thus allow him to represent his clients better, Tigue and his law firm ("plaintiffs") submitted a FOIA request for the Neiman Memorandum on August 18, 1999. Following a period of delay in which the Department of Justice ("DOJ") and the IRS attempted to discern which agency should respond to the FOIA request, the DOJ denied the application on April 28, 2000, and, on September 28, 2000, denied the appeal, citing 5 U.S.C. § 552(b)(5), which protects the so-called "deliberative process privilege."

On February 14, 2001, plaintiffs filed suit against the IRS and the DOJ in the United States District Court for the Southern District of New York. The parties cross-moved for summary judgment. Following oral argument on October 23, 2001, Judge Hellerstein ruled that the Neiman Memorandum met the requirements of § 552(b)(5) and was therefore exempt from production under the FOIA, and that the government had not waived the privilege by citing to and quoting from the Neiman Memorandum in the published Report. At that time the court also requested that the government review the Neiman Memorandum to determine whether any sections of the document could be produced as purely factual. On October 29, 2001, after *in camera* review of a marked copy of the Neiman Memorandum, the district court issued an order finding that the Memorandum was "predominantly evaluative, evaluating both policies and procedures of the United States Attorney for the Southern District of New York in criminal investigations involving tax matters and those of the Internal Revenue Service, and recommending procedures for the Internal Revenue Service." The district court also found that "[t]here is no factual material in the report that is not inextricably intertwined with evaluations and recommendations of policy" and thus denied plaintiffs' alternative request for partial production of the Neiman Memorandum.

Plaintiffs appeal both the October 23, 2001 and October 29, 2001 rulings.

DISCUSSION

This Court reviews *de novo* a district court's grant of summary judgment in FOIA litigation. *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir.1999). This Court also reviews de novo a district court's decisions whether to require partial production of documents following in camera review, in keeping with the spirit and the text of the FOIA and its presumption in favor of disclosure. *Grand Cent. P'ship, Inc. v. Cuomo*, 166 F.3d 473, 478 n. 2 (2d Cir.1999).

The FOIA, 5 U.S.C. § 552, was enacted to ensure public access to information created by the government in order "to hold the governors accountable to the governed." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978). Thus, "[u]pon request, FOIA mandates disclosure of records held by a federal agency unless the documents fall within enumerated exemptions." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7, 121 S.Ct. 1060, 149 L.Ed.2d 87 (2001) (internal citations omitted). The Supreme Court has counseled that these exceptions

are to be interpreted narrowly in the face of the overriding legislative intention to make records public. *See id.* at 7–8.

At issue here is FOIA Exemption 5, which protects from disclosure ''inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.'' 5 U.S.C. § 552(b)(5). ''Stated simply, agency documents which would not be obtainable by a private litigant in an action against the agency under normal discovery rules (*e.g.*, attorney-client, work-product, executive privilege) are protected from disclosure under Exemption 5.''[1] *Grand Cent. P'ship*, 166 F.3d at 481 (internal quotation marks and citation omitted).

Specifically, the government claims that the deliberative process privilege, a subspecies of work-product privilege that ''covers 'documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated,''' *Klamath*, 532 U.S. at 8 (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975)), permits withholding of the Neiman Memorandum. The rationale behind this privilege is ''the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance 'the quality of agency decisions,' by protecting open and frank discussion among those who make them within the Government.'' *Id.* at 8–9 (quoting *Sears*, 421 U.S. at 151); *accord Coastal States*, 617 F.2d at 866 (''The [deliberative process] privilege has a number of purposes: it serves to assure that subordinates within an agency will feel free to provide the decisionmaker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism; to protect against premature disclosure of proposed policies before they have been finally formulated or adopted; and to protect against confusing the issues and misleading the public by dissemination of documents suggesting reasons and rationales for a course of action which were not in fact the ultimate reasons for the agency's action.'').

In order for a document to be protected by deliberative process privilege, it must be: (1) an inter-agency or intra-agency document; (2) ''predecisional''; and (3) deliberative. *See Klamath*, 532 U.S. at 8 (discussing the agency-origin requirement); *Local 3, Int'l Bhd. of Elec. Workers v. NLRB*, 845 F.2d 1177, 1180 (2d Cir.1988) (enumerating the predecisional and deliberative requirements); *Lead Indus. Ass'n, Inc. v. OSHA*, 610 F.2d 70, 83 (2d Cir.1979) (same). Plaintiffs concede that the Neiman Memorandum is, at least in part, deliberative, but challenge the government's right to withhold the Memorandum on the other two grounds.

I. Intra- and inter-agency communications

[1] As noted above, Exemption 5 protects only ''intra-agency'' or ''inter-agency'' communications. While ''intra-agency'' documents are those that remain inside a single agency, and ''inter-agency'' documents are those that go from one governmental agency to another, they are treated identically by courts interpreting FOIA. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 188, 95 S.Ct. 1491, 44 L.Ed.2d 57 (1975) (''Exemption 5 does not distinguish between inter-agency and intra- agency memoranda.''). The question at issue regarding the intra- or inter-agency requirement is whether the document either originated from or was provided to an entity that is not a federal government agency, in which case the document is not protected by the exemption.

The Supreme Court has cautioned that the term ''intra-agency'' is not ''just a label to be placed on any document the Government would find it valuable to keep confidential.'' *Klamath*, 532 U.S. at 12. By

[1] ''This discovery standard can only serve as a rough guide to the courts, since decisions as to discovery are usually based on a balancing of the relative need of the parties, and standards vary according to the kind of litigation involved. Furthermore, the most fundamental discovery and evidentiary principle, relevance to the issues being litigated, plays no part in FOIA cases.'' *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C.Cir.1980) (internal citations and quotation marks omitted); *accord EPA v. Mink*, 410 U.S. 73, 86, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973).

statutory definition, "'agency' means each authority of the Government of the United States," with certain exemptions not relevant here. 5 U.S.C. § 551(1). It is undisputed that the Webster Commission was not an "agency." *See Meyer v. Bush*, 981 F.2d 1288, 1298 (D.C.Cir.1993) (holding that a task force created by the President to study regulatory relief is not an "agency" under the FOIA). From this uncontested point, plaintiffs reason that Exemption 5 cannot apply. The government, in turn, contends that because the Webster Commission acted as a consultant to the IRS, an agency, in soliciting the NeimanMemorandum, and relied on the Neiman Memorandum in preparing the Webster Report for the IRS, the district court properly concluded that the Neiman Memorandum was an intra- agency communication. The government also argues that the Neiman Memorandum could be deemed an inter-agency communication because it was provided by the Southern District for use in the IRS decision-making process. For the reasons that follow, we conclude that because the Webster Commission was acting as a consultant to the IRS when it solicited the Neiman Memorandum, and the Neiman Memorandum was prepared by the Southern District, an agency, to assist the IRS with determining how best to reform the CID, the Neiman Memorandum is an inter-agency communication.

In considering the scope of Exemption 5, this Circuit has recognized that agencies may require assistance from outside consultants in formulating policy, and has held that "nothing turns on the point that ... reports were prepared by outside consultants ... rather than agency staff." *Lead Indus.*, 610 F.2d at 83 (citing *Soucie v. David*, 448 F.2d 1067, 1078 n. 44 (D.C.Cir.1971)); *accord Ryan v. Dep't of Justice*, 617 F.2d 781, 790 (D.C.Cir.1980) ("When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an 'intra-agency' memorandum for purposes of determining the applicability of Exemption 5."). [2] Instead, "[w]hether a particular document is exempt under (b)(5) depends not only on the intrinsic character of the document itself, but also on the role it played in the administrative process." *Lead Indus.*, 610 F.2d at 80.

Plaintiffs acknowledge that this Court has held that communications with consultants may be considered intra-agency, but argue, relying heavily on the D.C. Circuit's opinion in *Dow Jones & Co. v. Dep't of Justice*, 917 F.2d 571, 574 (D.C.Cir.1990), that because the memorandum was prepared to assist the Webster Commission with its decisionmaking and was never reviewed by any IRS decisionmaker, the consultant principle is inapposite. In *Dow Jones*, the government had argued that documents provided by the Department of Justice to Congress were protected as inter-agency documents. The D.C. Circuit rejected that position on the grounds that documents prepared to assist with Congress's deliberative process could not be entitled to Exemption 5 privilege because Congress was not an agency for FOIA purposes. *Id.* Here, in contrast, the Webster Commission was not acting on its own behalf in requesting the Neiman Memorandum from the Southern District--rather, it was acting as a consultant to the IRS, an agency, to assist that agency with developing policy recommendations regarding the CID. Plaintiffs recognize, as they must, that the privilege would have been maintained had Neiman given her memorandum directly to the IRS. *Renegotiation Bd.*, 421

[2] In *Klamath*, the Supreme Court recently considered claims that documents submitted by various Indian tribes to the Department of the Interior expressing the tribes' positions on a water allocation project were "intra-agency" documents entitled to protection under Exemption 5. *Klamath*, 532 U.S. at 7–16. In rejecting that argument, the Court observed that "[a]lthough neither the terms of the exemption nor the statutory definitions say anything about communications with outsiders, some Courts of Appeals have held that in some circumstances a document prepared outside the Government may nevertheless qualify as an 'intra- agency' memorandum under Exemption 5." *Id.* at 9 (citing *Hoover v. U.S. Dep't of Interior*, 611 F.2d 1132, 1137-38 (5th Cir.1980); *Lead Indus.*, 610 F.2d at 83; *Soucie*, 448 F.2d at 1067). While the Supreme Court declined to rule on the validity of this "consultant corollary," it distinguished the tribes from consultants, noting that the latter typically "have not been communicating with the Government in their own interest or on behalf of any person or group whose interest might be affected by the Government action addressed by the consultant [and thus] may be enough like the agency's own personnel to justify calling their communications 'intra-agency.'" *Klamath*, 532 U.S. at 11, 12. Unlike in *Klamath*, plaintiffs in this case do not argue that the Webster Commission is an interested party.

U.S. at 188 (''By including inter-agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency.''). The fact that Neiman transmitted it to the Webster Commission for use in the Commission's recommendations on IRS policy does not alter our view of the matter.

Plaintiffs also contend that an agency consultant's source material cannot be withheld under Exemption 5 where the author had no reasonable expectation that her material would be kept confidential. According to plaintiffs, ''[w]here there is no fear of publicity, there is no basis in policy for extending Exemption 5 to consultants' work, especially where the statutory language does not provide for such a result.'' The issue here, however, is not whether the Webster Commission's public Report is exempt, but rather, whether the Commission may be considered a part of the IRS for purposes of determining whether the Neiman Memorandum falls within the scope of Exemption 5 as an inter-agency communication. Although the Webster Commission may have had no intention to keep private *its* findings and recommendations, this has no bearing on the Southern District's expectation that its opinions would be kept confidential by the Webster Commission and the IRS. In fact, this Court has held that editorial decisions such as determining which parts, if any, of a confidential document to include in a public record are precisely the type of internal agency decisions that Exemption 5 was designed to protect. *See Lead Indus.*, 610 F.2d at 86 (''If the segment appeared in the final version, it is already on the public record and need not be disclosed. If the segment did not appear in the final version, its omission reveals an agency deliberative process: for some reason, the agency decided not to rely on that fact or argument after having been invited to do so.'').[3]

Just as predecisional documents prepared by the Webster Commission for the IRS would be deemed *intra*-agency communications, *see id.* at 83, otherwise privileged communications by another agency intended to assist the Commission with its ultimate responsibilities to the IRS are, for purposes of the FOIA, *inter*-agency communications with the IRS. *Cf. Dow Jones*, 917 F.2d at 575 (''Exemption 5 permits an agency to protect the confidentiality of communications from outside the agency so long as those communications are part and parcel of *the agency's* deliberative process.''). The Webster Commission was acting as a consultant to the IRS when it solicited the Memorandum. It was charged with assisting the IRS with determining how best to reform the CID, and the Commission's Report proposed solutions to specific problems within the CID based on the information conveyed to the Commission by the Southern District, among its other sources.[4] To conclude that the deliberative process privilege does not apply when an outside consultant to an agency receives information from another agency effectively would condition the use of consultants on both agencies' willingness to disclose any information the consultant reviews in the process of its work and would unreasonably hamper agencies in their decision-making process.

Insofar as the communications were between the Southern District and a consultant for the IRS, the Neiman Memorandum is more properly considered an inter-agency document than an intra-agency document, in that it was prepared by one governmental agency for use by another

[3] To the extent that plaintiffs argue that the publication of the Report with a reference to the Neiman Memorandum suggests that there is no basis to protect the Memorandum as a consultant's source material, that argument is addressed in greater detail below in the discussion of waiver.

[4] Although plaintiffs state that the Webster Commission ''essentially functioned as a watchdog, providing some measure of public oversight over the IRS,'' they acknowledge that part of the Commission's assignment included evaluating CID policies and making recommendations for improvement.

agency.[5] The interposition of the Webster Commission between the two agencies does not alter this result. We therefore find the Neiman Memorandum eligible for protection under the first prong of Exemption 5.

II. Predecisional

"A document is predecisional when it is prepared in order to assist an agency decisionmaker in arriving at his decision." *Grand Cent. P'ship*, 166 F.3d at 482 (internal quotation marks and citations omitted). Protected by this privilege are "recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.* (internal quotation marks and citations omitted). However, "the privilege does not protect a document which is merely peripheral to actual policy formation; the record must bear on the formulation or exercise of policy-oriented judgment." *Id.* (quoting *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir.1994) (internal quotation marks omitted)).

Plaintiffs argue that because the Neiman Memorandum was provided to the Webster Commission, rather than to the IRS, it cannot be deemed predecisional, as it was never relied upon by any IRS decisionmaker. As source material for the Webster Report, however, the Neiman Memorandum was prepared for the Commission in order to assist the IRS in its decisionmaking regarding the future of the CID. This decisionmaking is precisely the type contemplated by *Grand Central Partnership.*

Plaintiffs further contend, citing *Maricopa Audubon Society v. United States Forest Service*, 108 F.3d 1089, 1094 (9th Cir.1997), that the district court erred in failing to identify any specific decision connected to the Memorandum. In *Maricopa*, the government had argued that "because agencies are involved in a continual process of self-examination, [they] need not identify a specific decision in which [documents claimed to be protected under Exemption 5] will culminate in order for those materials to be 'predecisional.'" *Id.* The Ninth Circuit disagreed, holding that while an agency need not actually demonstrate that a specific decision was made in reliance on the allegedly predecisional material, the government must show that the material was prepared to assist the agency in the formulation of some specific decision. *Id.* In other words, while the agency need not show ex post that a decision was made, it must be able to demonstrate that, *ex ante*, the document for which executive privilege is claimed related to a specific decision facing the agency. *See Sears*, 421 U.S. at 151 n. 18. The Neiman Memorandum, however, meets the criteria established in *Maricopa*, as it is "not merely part of a routine and ongoing process of agency self-evaluation," *Maricopa*, 108 F.3d at 1094, but rather was specifically prepared for use by the Webster Commission in advising the IRS on its future policy with respect to the CID. As in Maricopa, the fact that the government does not point to a specific decision made by the IRS in reliance on the Neiman Memorandum does not alter the fact that the Memorandum was prepared to assist IRS decisionmaking on a specific issue.

We therefore conclude that the district court did not err in holding that the Neiman Memorandum falls within the Exemption 5 privilege.

III. Waiver

Even though protected by Exemption 5, the government nonetheless may be required to disclose the Neiman Memorandum if it waived the deliberative process privilege. Consistent with 5 U.S.C. § 552(a)(2), which requires disclosure of *final* agency decisions, the Supreme Court held in *Sears* that production of ostensibly predecisional material may be compelled where "an agency chooses expressly to adopt or incorporate by reference an intra-agency memorandum previously covered by Exemption 5 in what would otherwise

[5] Alternatively, as a document prepared for use by a consultant to an agency, the Neiman Memorandum perhaps could also be viewed as an intra- agency document, as the district court concluded. Because we find that the Memorandum is an inter-agency document, we do not decide that issue.

be a final opinion.'' *Sears*, 421 U.S. at 161. In so concluding, the Supreme Court reasoned that:

> [t]he probability that an agency employee will be inhibited from freely advising a decisionmaker for fear that his advice, if adopted, will become public is slight. First, when adopted, the reasoning becomes that of the agency and becomes its responsibility to defend. Second, agency employees will generally be encouraged rather than discouraged by public knowledge that their policy suggestions have been adopted by the agency. Moreover, the public interest in knowing the reasons for a policy actually adopted by an agency supports the District Court's decision below.
>
> Id.

Plaintiffs contend that the citation to and publication of an excerpt of the Neiman Memorandum in the Webster Report, which was ultimately made public, was a waiver of the privilege provided by Exemption 5. Under the circumstances here, however, the minor references to the Neiman Memorandum cannot be said to be an express adoption or incorporation. *See Access Reports v. Dep't of Justice*, 926 F.2d 1192, 1197 (D.C.Cir.1991) (distinguishing between ''reference to a report's conclusions [and] adoption of its reasoning,'' and noting that ''it is the latter that destroys the privilege''); *Common Cause v. IRS*, 646 F.2d 656, 660 [47 AFTR 2d 81-966] (D.C.Cir.1981) (holding that a ''casual allusion in a post-decisional document to subject matter discussed in some pre-decisional, intra-agency memoranda'' does not waive Exemption 5).[6] Accordingly, we conclude that the government did not waive its right to assert the deliberative process privilege as to the Neiman Memorandum.

We also reject plaintiffs' position that Neiman's knowledge that the Webster Commission would issue a published report constitutes a waiver of the deliberative process privilege. Even if Neiman could have been expected to know that a report would be published, we find no reason to doubt that she expected that her Memorandum would remain confidential. As previously noted, she prepared the Memorandum to give the Southern District's recommendations, based on its experience, to the IRS, for use in the IRS's internal evaluation through the Webster Commis-sion. In choosing to reveal the existence of the Memorandum and to publish a very brief excerpt, the Commission exercised its discretion by revealing only information that it determined should be made public and withholding the rest. *Cf. Rockwell Int'l Corp. v. Dep't of Justice*, 235 F.3d 598, 603-04 (D.C.Cir.2001) (rejecting claim that partial publication of a docu-ment waived the attorney-client privilege as to the remainder of that document). Al-though the fact that the agency in *Rockwell International* took additional steps to ensure confidentiality also factored into the D.C. Circuit's finding that the at-torney-client privilege had not been waived in that case, we conclude that, for purposes of the deliberative process privilege, the incorporation of one sentence from the Neiman Memorandum in the published Re-port is not inconsistent with the IRS's or the Southern District's ''desire to keep the rest secret.'' *Id.* at 605.

IV. In camera review

[2] Finally, plaintiffs urge us to release any portions of the Neiman Memorandum that contain purely factual information. The FOIA requires that ''[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.'' 5 U.S.C. § 552(b).

At oral argument, we requested that the government provide a redacted version of the Neiman Memorandum indicating what factual information, if any, was within the public domain. The government complied, but continued to maintain that this infor-

[6] We also note that this ''waiver by incorporation'' doctrine applies only where the agency expressly adopts or incorporates an inter-agency memorandum ''*in what otherwise would be a final opinion.*'' *Sears*, 421 U.S. at 161 (emphasis added). Arguably, as the Webster Report was not drafted by IRS decisionmakers, and it was prepared to aid the IRS in making its decision about internal reforms, it was not a ''final opinion.''

mation should be withheld because it was intertwined with and provided insight into privileged material. After *de novo in camera* review of the original and redacted memoranda, we conclude that the district court properly found that "the document is predominantly evaluative, evaluating both policies and procedures of the United States Attorney for the Southern District of New York in criminal investigations involving tax matters and those of the Internal Revenue Service, and recommending procedures for the Internal Revenue Service." We also conclude that even the limited factual material admittedly in the public domain is too intertwined with evaluative and policy discussions to require disclosure. *See Lead Indus.*, 610 F.2d at 85.

CONCLUSION

For the foregoing reasons, we affirm the orders of the district court granting defendants' motion for summary judgment and denying plaintiffs' cross motion for summary judgment.

¶2002-5680

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Donald D. BAILEY, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-10667, Nov. 4, 2002. District Court affirmed. Decision against Taxpayer.

1. Tax crimes—filing false returns—withdrawal of guilty plea—ineffective assistance of counsel. Taxpayer's IRC §7206(1) conviction for filing false return was affirmed: taxpayer's motion to withdraw his guilty plea on grounds he was really innocent or that fee dispute between his attorneys adversely affected his representation was properly denied as unsupported. *Reference:* United States Tax Reporter ¶72,065.01(5); 73,446.505(10). IRC §7206.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the District of Arizona, Frank R. Zapata, District Judge, Presiding.

Before TASHIMA, THOMAS, and PAEZ, Circuit Judges.

MEMORANDUM*

[1] Donald D. Bailey appeals his conviction following a guilty plea, pursuant to a plea agreement, to one count of filing a false tax return in violation of 26 U.S.C. § 7206(1). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Bailey contends that, because he is actually innocent, the district court erred in denying his motion to withdraw his guilty plea before sentencing. We review the district court's decision to deny a defendant's motion to withdraw a guilty plea for abuse of discretion. United States v. Rios-Ortiz, 830 F.2d 1067, 1069 (9th Cir.1987). A district court may permit withdrawal of a guilty plea prior to sentencing upon a showing by the defendant of any fair and just reason. Fed. R. Crim P. 32(d). A defendant has no absolute right to withdraw his guilty plea. United States v. Signori, 844 F.2d 635, 637 (9th Cir.1988). Rather, a motion to withdraw is committed to the sound discretion of the district court. Id. Although Bailey testified at the evidentiary hearing on the motion that he was actually innocent, the district court found his testimony not credible. Because the district court found the facts against Bailey, and those findings are not clearly erroneous, we conclude that the district court did not abuse its discretion in denying Bailey's motion to withdraw his guilty plea based on a claim of actual innocence. See United States v. Snider, 976 F.2d 1249, 1251 (9th Cir.1992) (reviewing credibility determinations for clear error); Rios-Ortiz, 830 F.2d at 1070 ("[T]his court has not overturned a denial of a motion to withdraw a guilty plea absent something more than the defendant's change of mind.").

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Bailey also contends that the district court erred in rejecting his claim that a fee dispute with his attorneys created a conflict of interest and resulted in ineffective assistance of counsel. We review ineffective assistance of counsel claims de novo. United States v. Sager, 227 F.3d 1138, 1149 (9th Cir.2000). When a defendant claims ineffective assistance based on a conflict of interest, the defendant must establish that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). Bailey presented no evidence that his attorneys were not prepared to defend Bailey vigorously at trial. We conclude that Bailey has not carried his burden of showing that the fee dispute with his attorneys adversely affected his representation. See Mickens v. Taylor, 122 S.Ct. 1237, 1244 n. 5 (2002) ("An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance."). The district court's denial of Bailey's motion to withdraw his guilty plea was not an abuse of discretion.

The judgment of conviction is

AFFIRMED.

¶2002-5681

AMMEX, INC., PLAINTIFF v. UNITED STATES and Internal Revenue Service, DEFENDANTS. U.S. District Court, Eastern Dist. of Michigan, (DC MI) Case No. 00-CV-73388, Oct. 22, 2002. Years 1994, 1995, 1996, 1997, 1998. Decision against Taxpayer.

1. Excise taxes—liability for tax—refunds—motor fuel purchased solely for export—reconsideration. Duty free store operator was denied reconsideration of order denying its IRC §6421(c) claim for gasoline excise tax refund: even ignoring *Rev Rul. 69-150*, 1969-1 CB 286's non-export characterization, taxpayer's claim still failed since its gas, having been previously taxed and not authorized by Customs to be sold duty free, wasn't sold for export within IRC §6421(c)'s meaning. *Reference:* USTR Excise Taxes ¶42,215.04(30); 42,215.04(5); 64,215.04; 64,215.07. IRC §4221; 6421.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION,

ORDER DENYING MOTION FOR RECONSIDERATION

HON. GEORGE CARAM STEEH United States District Judge

On July 31, 2002, this court entered an Opinion denying Ammex's claim for repayment of federal gasoline excise taxes. Plaintiff Ammex filed the instant motion for reconsideration of that portion of the court's Opinion and Order which denied Ammex's claim for repayment under Internal Revenue Code § 6421(c). For the reasons stated below, plaintiff's motion for reconsideration is DENIED.

Local Rule 7.1(g)(3) of the Local Rules of the United States District Court for the Eastern District of Michigan provides:

> [M]otions for rehearing or reconsideration which merely present the same issues ruled upon by the court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

In its motion, plaintiff maintains that the court's holding conflicts with the Sixth Circuit's recent decision in The Limited Inc. v. Commissioner, 286 F.3d [89 AFTR 2d 2002-1924] (6th Cir. 2002). The decision was issued after briefing and oral argument in this case, and was not brought to the attention of the court prior to rendering its decision on summary judgment.

The central issue for purposes of this motion for reconsideration is the impact of Revenue Ruling 69-150, in which the IRS opined that gasoline is not exported with the meaning of § 4221(a)(2) where a producer sells gasoline that is delivered into the fuel tank of an automobile driven directly into Canada. Rather, the Revenue

Ruling concluded that such gasoline becomes part of the vehicle. This court gave Revenue Ruling 69-150 precedential value based on the Supreme Court's ruling in United States v. Mead, 12 S.Ct. 2164 (2001). This court then concluded that the sale of gasoline by Ammex was not an export, and thus Ammex was not entitled to a refund under § 6421(c).

Ammex argues that Revenue Ruling 69-150 should not have been applied in this case under new Sixth Circuit precedent. The Limited decision made two holdings that are relevant to this case. First, the Sixth Circuit held that revenue rulings are not binding on the courts:

> [R]evenue rulings are typically the IRS's response to a hypothetical situation and as such are authoritative and binding on the IRS .... Although binding on the IRS, revenue rulings are interpretive rulings by an administrative agency that do not require notice and comment and consequently are not binding on courts.

Id. at 337. The Sixth Circuit proceeded to recognize that because revenue rulings are the informed opinion of a specialized agency, they have been treated as having persuasive authority. Id. From this premise, the Court made its second relevant holding to Ammex's motion for reconsideration: "because revenue rulings often provide the IRS's interpretation of a hypothetical set of facts, courts should not extend the scope of a revenue ruling beyond the hypothetical situation presented." Id. at 338.

Ammex argues that the holding in The Limited is not inconsistent with the Supreme Court's holding in Mead. In Mead the Supreme Court held that where an agency action is not entitled to Chevron deference, "[t]he weight [accorded] to an administrative judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." Mead, 533 U.S. at 228 (quoting Skidmore v. Swift & Co., 323 U.S. 134 (1944)). According to Ammex, the Sixth Circuit clarified this standard in The Limited, by holding that a revenue ruling does not apply in a situation that is factually distinct from the hypothetical described in the ruling.

According to Ammex, Revenue Ruling 69-150 fails to consider both the issue of exportation in the duty-free context and the impact of Customs laws upon the application of sections 6421(c) and 4221(a)(2). Inherent in the operation of a duty-free sales enterprise is the statutory precept that merchandise sold by a duty-free store must be and is sold exclusively for export. Ammex argues that it is indisputable that Revenue Ruling 69-150 never contemplated either 19 U.S.C. § 1555 (merchandise purchased at a duty-free store by a United States resident is treated, upon the resident's return to the U.S., as "an article acquired abroad as an incident of the journey from which the resident is returning" for purposes of determining eligibility for an exemption from duty) or the sale of gasoline by a duty-free sales enterprise.

[1] Even if Revenue Ruling 69-150 is not considered, however, there will not be a different disposition of the case as required by Local Rule 7.1(g)(3). First, the goods must be conditionally duty-free goods before they can be deemed to be sold on a duty-free basis or to be exported for purposes of the customs statutes. This court previously found that the gasoline that plaintiff sold was not conditionally duty-free merchandise in that it had been previously taxed (July 31, 2002 Opinion p. 11–13, and Customs Service Revocation of Ruling Letter p. 7). In addition, for the quarters in question, the Customs Service had not given the plaintiff permission to sell gasoline duty-free. Therefore, plaintiff's sales of gasoline must be considered under the generally applicable legal principles with respect to exportation. Section 6421(c) provides for a refund or payment to a person who sold gasoline for any tax-exempt purpose, including "for export." The court previously concluded that the gasoline sold by plaintiff was not exported.

Plaintiff's motion for reconsideration is DENIED for the reason that correcting the defect in this court's July 31, 2002 Order does not change the result reached therein.

So ordered.

GEORGE CARAM STEEH

United States District Judge

Dated: 22 OCT 2002

Detroit, Michigan.

¶2002-5682

TRIAD MICROSYSTEMS, INC., ET AL., PLAINTIFFS, v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Eastern Dist. of Virginia, (DC VA) Civil Action No. 02-206-A, Oct. 31, 2002. Years 1987, 1988. Decision for Govt.

1. Collection due process—review of administrative determination—prior opportunity to contest liabilities—summary judgment. IRS's administrative determination to levy taxpayer-defense contractor's funds that were held by Treas. Dept.'s Financial Management Service was upheld on summary judgment: taxpayer's challenge to amount due was really impermissible attempt to litigate its underlying liability, which it had prior opportunity to but didn't contest in earlier bankruptcy case; and Appeals Officer's refusal to seek formal accounting from Defense Dept. as to what other funds may have been due taxpayer and available for offset under offset agreement with IRS was appropriate since that agreement had been invalidated by taxpayer's earlier default. Also, Appeals Officer already went beyond IRC §6330(c)(1)'s verification requirements by verifying from various federal entities that taxpayer was owed no money on any outstanding govt. contracts; and taxpayer offered no proof that IRS hadn't properly credited it with all payments already made on its behalf. *Reference:* United States Tax Reporter ¶63,305.01(15); 63,305.01(5). IRC §6630.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION,

MEMORANDUM ORDER

Gerald Bruce Lee United States District Judge

THIS MATTER is before the Court on Plaintiffs Triad Microsystems, Inc., et al.'s (''Triad'') and Defendant United States of America's (the ''Government'') motions for summary judgment. This case concerns Plaintiffs' claim that the Internal Revenue Service (the ''IRS'') Appeals Officer abused her discretion under 26 U.S.C. § 6330 by (1) failing to collect and credit to Triad large sums of money which certain Department of Defense (''DoD'') agencies may have withheld from Triad and (2) by failing to compel the DoD to provide the IRS with an accounting of the funds which should have been transferred to the IRS.

The issue before the Court is whether there is a genuine issue of material fact regarding the appeals officer's decision that a levy by the IRS against Triad's funds held by the Department of Treasury was proper. If there are no genuine issues of material fact, then the Court shall determine which party is entitled to judgment as a matter of law.

For the reasons stated below, the Court finds that there are no genuine issues of material fact regarding the appeals officer's decision, and the Government is entitled to judgment as a matter of law because the appeals officer did not abuse her discretion. From the record before it, the Court concludes that the appeals officer considered all relevant evidence before her, that she applied the appropriate standard in her decision, and that she properly applied that standard to the facts before her.

I. BACKGROUND

On or about April 1, 1988, Triad entered into a Guaranteed Offset Agreement with the IRS and the DoD under which funds owing to Triad by the DoD would be paid directly to the IRS to satisfy Triad's tax obligations. (Administrative R. at 86–92.) Triad did not perform all of its obligations under the Offset Agreement. (R. at 75, Plts.' Mem. Supp. Summ. J. at 2.) On May 11, 1988, Triad filed a petition for bankruptcy protection in the Central District of

California. (R. at 78.) In that proceeding, Triad entered into a confirmed plan under which it would pay the IRS a total of $1,637,530 of back taxes, including the periods in question in this case (employment taxes for the fourth quarter of 1987 and the first two quarters of 1988, and income taxes for 1987). (*Id.*) Triad did not object to the IRS claims, not did it file an adversary proceeding to challenge or otherwise dispute the claims. (*Id.*)

After the bankruptcy, Triad continued to litigate before the Armed Services Board of Contract Appeals (''ASBCA'') its claims to recover the value of certain inventory the Department of the Army took from Triad after terminating a contract in 1988. (R. at 79.) The ASBCA entered a consent judgment in favor of Triad and against the United States. (*Id.*) After all of the offsets by the DoD were taken into account, the amount payable to Triad under that judgment was $808,816.45. (*Id.*) The funds were transferred to the Financial Management Service of the Department of the Treasury. (R. at 74–75.)

On May 11, 1999, the IRS issued to Triad a Letter 1058, Final Notice-Notice of Intent to Levy under Internal Revenue Code (''IRC'') Section 6331 (26 U.S.C. § 6331) and Notice of Your Right to a Hearing under IRC § 6330. (Def.'s Mot. Summ. J. Ex. 1.) The notice covered employment taxes owed for the last quarter of 1987 (198712) and the first two quarters of 1988 (198803 and 199806) and income taxes owed for 1987. (*Id.*) The total levy amount, at that time, was $1,558,966.85. (*Id.*) The IRS seeks to levy on funds ($808,816.45) held by the Financial Management Service on Triad's behalf. (Declaration of Kathleen Flatau ¶ 5.)

On June 10, 1999, Triad requested a Collection Due Process Hearing pursuant to 26 U.S.C. § 6330 to determine the appropriateness of the Notice of Intent to Levy. (Def.'s Ex. 2.) Appeals Officer Kathleen Flatau was assigned to conduct the due process hearing: she had not been involved with Triad's outstanding tax liabilities that were the subject of the proposed levy. (R. at 80.) Triad submitted documents relating to prior tax liabilities, the IRS's Notice of Intent to levy, the Guaranteed Contract Offset agreement, contracts and litigations between Triad and the Department of the Army, Department of the Air Force, and Department of the Navy. (R. at 76–77.)

Based on information provided by the Department of the Army, the Department of the Navy, and the Department of the Air Force, the appeals officer concluded that no funds were owed to Triad or available for levy, aside from the $808,816.45 held by the Financial Management Service. (R. at 76, 79–80, 307–366, 1924– 27.) The appeals officer determined that the proposed levy balances the need for the efficient collection of federal taxes with Triad's concern that the IRS's collection actions not be more intrusive than necessary. (R. at 84–85.) The appeals officer concluded that the proposed levy on the funds held by the Financial Management Service was an appropriate collection action. (R. at 85.) On January 10, 2002, the IRS issued a Notice of Determination Concerning Collection Action under Section 6320 and/or 6330 to Triad. (Plts.' Mem. Supp. Summ. J. at 3–4.)

II. DISCUSSION

A. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, the Court must grant summary judgment if the moving party demonstrates that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, the Court views the facts in a light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *See id.* at 586–87. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that

there be no *genuine* issue of *material* fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). ''Rule 56(e) requires the nonmoving party to go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.''' *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Section 6330 of the IRC provides collection due process rights to taxpayers against whom the IRS has issued a Notice of Intent to Levy. Taxpayers are entitled to written notification of the IRS's intent to levy, an opportunity for an independent hearing by the IRS appeals officer, and judicial review of the appeals officer's decision. 26 U.S.C. § 6330. The Court reviews the appeals officer's decision under an abuse of discretion standard.[1] *Dogwood Forest Rest Home, Inc. v. United States*, 181 F. Supp. 2d 554, 559 [89 AFTR 2d 2002-728] (M.D.N.C. 2001); *MCRA [sic, MRCA] Information Services v. United States*, 145 F. Supp. 2d 194, 199 [89 AFTR 2d 2002-694] (D. Conn. 2000); *Sego v. Commissioner of Internal Revenue*, 114 T.C. 604, 610 (2002); *Goza v. Commissioner of Internal Revenue*, 114 T.C. 176 (2000). In its review of the appeals officer's discretion, the Court is limited to the administrative record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

B. Analysis

[1] 1. Triad May Not Question the Tax Liability If it Had a Previous Opportunity to Do so

Under Section 6330, a taxpayer ''may raise at the hearing any relevant issue relating to the unpaid tax or the proposed levy . . . .'' 26 U.S.C. § 6330(c)(2)(A). The statute further provides, however, that ''[t]he person may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period *if the person did not receive any statutory notice of deficiency for such tax liability* or *did not otherwise have an opportunity to dispute such tax liability.*'' 26 U.S.C. § 6330(c)(2)(B) (emphasis added). Triad argues that it is not con-testing the underlying tax liability, but rather, the amount due. Triad contends that the appeals officer failed to properly credit its tax liability with payments received or due from various government contracts. The Court, however, fails to see how ques-tioning the overall amount due is different than questioning the liability as a whole. Triad had an opportunity, in its bankruptcy proceeding, to question the validity of the tax liability. From the record, the Court concludes that Triad acknowledged the ex-istence of its tax liability and the amount of the assessment by entering into the bankruptcy plan whereby Triad agreed to pay the IRS $1,650,000.00.

2. The IRS Appeals Officer Did Not Abuse Her Discretion by Limiting Her Inquiry into Triad's Claim That it Was Owed Money by the Department of Defense

The Government is entitled to judgment as a matter of law because the appeals officer did not abuse her discretion in her recommendation that the funds held by the Financial Management Service be offset against the bankruptcy judgment and that the levy be sustained against all remaining amounts. Upon review of the record, the Court concludes that the appeals officer fulfilled all the statutory requirements.

Triad claims that the appeals officer did not seek an accounting from the DoD as to what funds were available for payment to the IRS at various times. Triad argues that the appeals officer should have accounted for all the funds that the Government owed Triad and then offset those funds against its tax liability. This argument would be valid if the Guaranteed Offset agreement were effective; however, Triad defaulted

[1] Although the statute does not specifically set out the appropriate standard of review the courts should employ in reviewing the IRS's actions, the legislative history clearly provides the standard to be used:

> The determination of the appeals officer may be appealed to the Tax Court or, where applicable, the Federal district court . . . . Where the validity of the tax liability is not properly part of the appeal, the taxpayer may challenge the determination of the appeals officer for an abuse of discretion. In such cases, the appeals officer's determination as to the appropriateness of the collection activity will be reviewed using an abuse of discretion standard of review.

H.R. Conf. Rep. No. 5999, 105th Cong., 2d Sess. 266 (1998).

on that agreement. The DoD is not obligated to immediately forward to the IRS all amounts due to Triad. Nor does the statute, 26 U.S.C. § 6330, provide that such an accounting is a mandatory undertaking at the hearing: the statute provides that the appeals officer "shall at the hearing obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met." 26 U.S.C. § 6330(c)(1).

The appeals officer went above and beyond this verification and entertained Triad's requests to investigate whether any department within the DoD owed Triad any money that could be used to offset the tax liability. She contacted the Defense Contract Management Agency, DoD ("DCMA") and the Defense Finance Administration Service ("DFAS"); both agencies determined that no funds were pending. The appeals officer further contacted the individual contracting agencies within the Departments of the Army, Air Force, and Navy. The complaints against the Army had been dismissed. In May 1997, the Air Force was awarded $78,954.00 as a final determination. The Navy stated that it did not owe Triad any money. The appeals officer concluded that no funds were either owed to Triad by the DoD or available for levy, aside from the $808,816.45 currently held by the Financial Management Service. Triad cites no authority to establish that an appeals officer has a duty to require agencies to provide the IRS with various accountings. The appeals officer was not under any statutory obligation to engage in this accounting, and she did not abuse her discretion by limiting her inquiry.

The Court finds that it is Triad's burden to inquire into its own accounting. Triad is responsible for paying its tax liability and for submitting evidence that it has paid its obligations; the appeals officer is not statutorily obligated to determine how much money the DoD owes Triad.

3. The IRS Properly Credited All Payments Received

Triad contends that the appeals officer failed to properly credit their tax account with funds that the IRS received previously from Triad or its members. However, the appeals officer explained to Triad's representative at the hearing that previously received payments were credited to previous tax liabilities and that no payments had been received with respect to the three periods in question before her. (Flatau Decl. ¶s 17–18.)

Triad questioned the application of certain payments and whether payments had been credited to the periods in dispute. The appeals officer explained that Triad provided no evidence to verify that "any payments for these periods were not credited to the periods." (R. at 81.) The appeals officer also explained to Triad why the two checks it proffered were not applied to the periods in dispute: one check was made before any of the periods in question, the other check was made payable to Security Pacific and not the IRS. (R. at 1095–97.) The appeals officer further explained to Triad that any funds received from the sale of the residences in 1990 and 1991 would be applied against Triad's earliest outstanding tax periods. (R. at 81–82.) After reviewing all the evidence and considering all matters raised by Triad, the appeals officer determined that Triad had not presented any evidence to establish that payments for the periods at issue were received by the IRS and not properly credited to Triad's tax accounts. (*Id.*)

III. CONCLUSION

The Court finds that the appeals officer complied with all the requirements of 26 U.S.C. § 6330. The appeals officer determined that the Government did not owe Triad any further funds than those held by the Financial Management Service. She applied the proper standard by ensuring that she complied with the statutory requirements. She investigated Triad's claims, and she concluded that Triad had not presented any evidence to refute the IRS's assertion that the tax liability was accurate. Furthermore, she went above and beyond her statutory duties and ensured, from various federal entities, that Triad was not owed any funds on outstanding government contracts. The appeals officer applied the statutory

standard correctly, and she determined that the IRS's intended levy against the funds held by the Financial Management Service was an appropriate collection action. The Court finds that the appeals officer did not abuse her discretion and that the Government is entitled to judgment as a matter of law.

The Court also notes that Triad has used the hearing as an opportunity to investigate the possibility that additional funds are available to Triad. A 26 U.S.C. § 6330 hearing offers an aggrieved taxpayer the opportunity to question the appropriateness of a collection action; its purpose is not to offer the taxpayer an opportunity to engage in a fishing expedition for funds that are due to the taxpayer.

From the foregoing, it is hereby

ORDERED that Plaintiffs Triad Microsystems, Inc., et al.'s motion for summary judgment is DENIED and Defendant the United States of America's motion for summary judgment is GRANTED.

Therefore, the Court enters JUDGMENT in favor of the United States of America and against Triad Microsystems, Inc., a Virginia corporation, and Triad Microsystems, Inc., a California corporation. The Court DIRECTS the Department of Treasury, Financial Management Service, to levy on the funds seized from Triad Microsystems, Inc.: $808,816.45. The Court further DIRECTS the Department of Treasury, Financial Management Service, to pay these funds to the Internal Revenue Service on behalf of Triad Microsystems, Inc.'s outstanding tax liability. The Clerk is DIRECTED to ENTER JUDGMENT pursuant to Federal Rule of Civil Procedure 58.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 31st day of October, 2002.

Gerald Bruce Lee

United States District Judge

Alexandria, Virginia

10/31/02

JUDGMENT

THIS MATTER is before the Court on Plaintiffs Triad Microsystems, Inc., et al.'s (''Triad'') and Defendant United States of America's (the ''Government'') motions for summary judgment. In its previous Memorandum Order of October 31, 2002, the Court denied Plaintiffs Triad Microsystems, Inc., et al.'s motion for summary judgment and granted Defendant the United States of America's motion for summary judgment. Based on the October 31, 2002 Memorandum Order, it is hereby

ORDERED that JUDGMENT is ENTERED in favor of the United States of America and against Triad Microsystems, Inc., a Virginia corporation, and Triad Microsystems, Inc., a California corporation.

The Department of Treasury, Financial Management Service, is DIRECTED to levy on the funds seized from Triad Microsystems, Inc.: $808,816.45. The Department of Treasury, Financial Management Service, is further DIRECTED to pay these funds to the Internal Revenue Service on behalf of Triad Microsystems, Inc.'s outstanding tax liability.

The Clerk is DIRECTED to ENTER JUDGMENT pursuant to Federal Rule of Civil Procedure 58.

The Clerk is directed to forward a copy of this Order to counsel.

Entered this 31st day of October, 2002.

Gerald Bruce Lee

United States District Judge

Alexandria, Virginia

10/31/02

¶2002-5683

In Re: Ronald SCHLESINGER, Debtor. Ronald SCHLESINGER, PLAINTIFF v.

UNITED STATES[1] , DEFENDANT. U.S. Bankruptcy Court, Eastern Dist. of Pennsylvania, (Bktcy Ct PA) Bankruptcy No. 00-35288F; Adversary No. 01-0088, Oct. 31, 2002. Year 1992. Decision for Taxpayer.

1. Tax claims in bankruptcy—dischargeability—willful attempt to evade taxes—proof—erroneous returns. Govt.'s attempt to except mortgage broker's prepetition tax debts from discharge under 11 USC §523(a)(1)(C) was rejected: govt. didn't prove that taxpayer's reporting of erroneous, almost $1 million investment loss reflected fraud or any willful attempt to evade tax. Govt.'s unsupported suppositions about taxpayer's motivation and knowledge of reporting error were effectively rebutted by govt.'s own concession that taxpayer was entitled to at least some loss, plus taxpayer's and accountant's credible testimony that they reasonably believed at time return was filed that he was entitled to loss in amount and character reported; and neither taxpayer's high level of education and experience, nor his sloppiness or negligence in his business affairs, were in themselves dispositive. *Reference:* United States Tax Reporter ¶68,726.52(27).

UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

MEMORANDUM

By BRUCE FOX, Chief Bankruptcy Judge:

Chapter 7

The plaintiff, Ronald Schlesinger, filed a voluntary petition in bankruptcy under chapter 7. He has now filed an adversary proceeding seeking a determination that his pre-bankruptcy federal tax obligation to the United States, in the amount of $473,000.00, is dischargeable. The United States opposes this relief. It argues that the tax debt is non-dischargeable pursuant to 11 U.S.C. § 523(a)(1)(C).

Trial on this proceeding has taken place, and both parties have submitted thoughtful post-trial memoranda. This proceeding is now ripe for determination.

I.

Upon consideration of all of the evidence presented, I make the following findings of fact:

1. Mr. Schlesinger holds a Bachelor of Science degree from Drexel University. N.T. at 42. He graduated in 1972. Ex. G-30 at 33.

2. In 1967, Mr. Schlesinger began working for Colonial Mortgage Services Corporation, the predecessor in interest to his current employer, GMAC Mortgage Corporation. N.T. at 42; Ex. G-30 at 32–33.

3. By the early 1980's, the debtor had become a mortgage loan officer for GMAC. N.T. at 16, 42–43. He concentrated his sales efforts on large local home builders, who would then refer their customers to GMAC for loans. Although he initiated the loans, the debtor was not involved with loan underwriting decisions. N.T. at 43–44; Ex. G-30 at 34.

4. By 1983, Mr. Schlesinger was earning annual commissions in excess of $250,000.00. Ex. G-30 at 36.

5. In 1989 or 1990 through 1997, he was engaged by GMAC to travel to its other branch offices to train loan officers in obtaining new mortgage business. N.T. at 44; Ex. G-30 at 37–38. During that time period, he earned between $150,000.00 and $275,000.00 annually. Ex. G-30 at 38.

6. In 1982, the debtor became friends with David Betesch. N.T. at 5; Ex. G-30 at 14. David Betesch, along with his brother Martin Betesch, owned a video rental store in Southwest Philadelphia and urged Mr. Schlesinger to invest in their business. N.T. at 5; Ex. G-30 at 12, 14, 17. Eventu-

[1] The debtor named the "U.S. Department of the Treasury Internal Revenue Service" as the defendant in this proceeding. In its post-trial brief, the defendant notes that the "United States" is the proper party defendant and should be substituted as such. Defendant's brief at 3. See e.g., Blach v. Butcher, 221 F.3d 896, 909 (6th Cir. 2000), cert. denied, 532 U.S. 994 (2001); In re Smith, 205 B.R. 226, 227 n.1 (9th Cir. BAP 1997) ("It is a well settled principle that the IRS cannot be sued and the proper party in actions involving federal taxes is the United States of America.") (citations omitted); In re Campbell, 186 B.R. 731, 732 n.1 (Bankr. N.D. FLA 1995). Therefore, as the defendant requests, the "United States"has been substituted as the defendant. See, e.g., id.

ally, in 1987, he agreed to do so, Ex. G-30 at 16. His accountant may have advised against this investment. N.T. at 119.

7. On or about December 1987, Mr. Schlesinger and the Betesch brothers formed a Subchapter S corporation known as Chooney Juice, Inc. N.T. at 5; Ex. G-9A. The debtor was a shareholder, officer and director of this corporation. N.T. at 52; Ex. G-30 at 63; Ex. G-23. He also engaged and paid attorneys to incorporate this video rental business. Ex. G-22.

8. Mr. Schlesinger testified that, after this corporation was formed, he retained his full-time position with GMAC Mortgage Corp., and his wife briefly became an employee of the business. At no time did he perform any duties for Chooney Juice. N.T. at 6–7, 16. He did, however, receive a letter from U.S.A. Video offering to purchase the business of Chooney Juice, Ex, G-24, which offer was not accepted by the corporation.

9. The Betesch brothers decided that Chooney Juice needed to expand its store locations. They convinced Mr. Schlesinger that if the number of stores increased, the new business entity would be able to sell its ''chain'' of stores to a larger chain such as West Coast Video. N.T. at 7–8; see also Ex. G-24.

10. At the time Chooney Juice was formed, Mr. Schlesinger had substantial savings and was earning a salary in excess of $100,000.00 per year. N.T. at 8, 58.

11. The debtor agreed with the Betesch brothers to provide the needed financial backing to increase the number of stores. Ultimately, the corporation owned approximately eight stores in the Philadelphia area. N.T. at 62. The video rental stores were operated under the name of Budget Video. N.T. at 71; Ex. G-24.

12. The debtor testified that each of the Chooney Juice stores obtained its capital in the same fashion. The debtor withdrew from his savings 25% of the total cost to establish the store. The corporation borrowed the remaining 75% from Bell Savings and Loan Association (''Bell Savings''), with Mr. Schlesinger serving as one of a number of guarantors. N.T. at 54, 56–57; see also Ex. G-12A.

13. For example, the first new store opened by Chooney Juice cost $300,000.00. The debtor invested $75,000.00, and the corporation borrowed $225,000.00. N.T. at 58.

14. The debtor testified that he trusted the Betesch brothers and never saw any financial reports from Chooney Juice after the corporation was formed. N.T. at 7.

15. Chooney Juice engaged an accounting firm and filed federal S Corporation tax returns for calendar years 1987 and 1988. Exs. G-9A, G-9B.

16. Chooney Juice did not file any federal tax returns thereafter. N.T. at 118.

17. Chooney Juice sent to the debtor K-1 schedules for calendar years 1987 and 1988.[2] N.T. at 9. It did not file or send the debtor any K-1 schedules thereafter. N.T. at 9–10, 92.

18. 18. By 1989 or 1990, Chooney Juice was operating at a loss and was not repaying its bank loans. See Ex. G-26. Bell Savings brought suit against the debtor, his wife, Chooney Juice, the Betesch brothers and the predecessor corporation on delinquent promissory notes. Ex. G-10B. Mr. Schlesinger and his wife were represented by counsel during that litigation. Ex. G-10C.

19. Bell Savings prevailed in its lawsuit and issued two writs of execution in the amounts of $37,868.43 and $182,749.14 respectively. Exs. G-11A, G-12A.

20. The debtor testified that he satisfied these judgments, in part, through garnishment of his bank accounts. N.T. at 81–82.

21. By 1991, Bell Savings was taken over by the Resolution Trust Corporation (''RTC''). Ex. G-10B. The debtor testified that he did not know how to obtain bank records to support his investment claim after this takeover. N.T. at 30.

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[2] For federal tax purposes, an S Corporation does not pay federal taxes. Instead, its income is passed on to its shareholders who report their pro rata shares on their individual returns. See Durando v. United States, 70 F.3d 548, 550 n.2 [76 AFTR 2d 95-7464] (9th Cir. 1995). The corporation files an informational return with the IRS and sends completed schedule K-1 forms to each shareholder to notify him of his proportionate share of corporate income and expenses. See In re Sholdra, 270 B.R. 64, 66 n.6 (Bankr. N.D. Tex. 2001).

22. In 1992, Mr. Schlesinger was told by the Betesch brothers that Chooney Juice was out of business and that a fire had destroyed the location where the business records were located. N.T. at 27–28. Furthermore, he was told that all inventory of the corporation had been sold. N.T. at 37.

23. In preparation for his 1992 federal income tax return, Mr. Schlesinger informed his accountant, Art Cohn, that his investment in Chooney Juice, Inc. was completely lost. N.T. at 5–6.

24. Mr. Cohn was a partner with the accounting firm of Goldenberg, Rosenthal and Friedlander, LLP in Philadelphia. N.T. at 10, 90. This firm had prepared the debtor's federal tax returns for many years, including tax years preceeding his investment in Chooney Juice. N.T. at 12, 66.

25. Mr. Cohn attempted to gain financial information, including a schedule K-1, from the accountants for Chooney Juice (Isdaner & Co.) without success. He was informed that the corporation had not paid for accounting services and no tax schedules would be prepared. N.T. at 92. The debtor informed Mr. Cohn that Bell Savings was out of existence, and they both decided that the loan documents were unavailable to them.[3] N.T. at 111, 114.

26. The debtor provided to Mr. Cohn some information regarding his investment in Chooney Juice, including some canceled checks and loan documents. N.T. at 11, 35, 93. The debtor testified that his own personal records, which were stored at his office with GMAC, had been lost or discarded. N.T. at 60–61.

27. Based upon information provided to him by the debtor, Mr. Cohn determined that the debtor had lost $998,502.00 in Chooney Juice and assisted Mr. Schles-inger in preparing his 1992 tax return to that effect. N.T. at 94, 107; Ex. G-4A.

28. Mr. Cohn helped prepare, and the debtor signed, a form 1040 federal income tax return for 1992 reporting his lost investment as a loss deduction against ordinary income. N.T. at 91; Ex. G-4A. Because he had no corroborating information from the S Corporation, the debtor included with his tax return a completed Form 8082: ''Notice of Inconsistent Treatment or Amended Return,'' which form was prepared by his accountant. N.T. at 94; Ex. G-4A.

29. As an attachment to Form 8082, Mr. Cohn, on behalf of the debtor,. had typed an explanation for the deduction of the Chooney Juice investment. Ex. G-4A.

30. In addition to taking a deduction against earned income on his 1992 return, Mr. Schlesinger (on the advice of Mr. Cohn) treated the unused portion of the $998,502.00 loss as a net loss carryback and carryforward. Ex. G-31 at 20–21. He filed amended tax returns for the years 1989 through 1991 and reduced his taxable income from 1992 through 1995 with this net operating loss. He also obtained a tax refund for that period in excess of $135,000.00. Amended Joint Pretrial Statement at 2.

31. In 1996, the IRS challenged the debtor's asserted Chooney Juice deductions on his tax returns from 1989 to 1995. The debtor's accountants prepared a response. Ex. G-26.

32. Ultimately, on October 15, 1999, the IRS District Counsel explained the government's position. The debtor could substantiate only $258,076.00 of investment loss associated with Chooney Juice. N.T. at 134; Ex. P-1. Furthermore, the proven loss could only be treated ''as short-term capital loss under I.R.C. section 166'' and not as ordinary loss against earned income. N.T. at 139; Ex. P-1.

33. As a result, the IRS asserted that the debtor was not entitled to any loss carrybacks or carryforwards and was limited in his deduction for 1992. N.T. at 134; Ex. P-1.

34. Although the debtor had challenged the IRS's determination by filing suit in the United States Tax Court on December 21, 1999, he entered into a consent judgment agreeing with the IRS's position. Ex. G-17. As a result, his total tax deficiencies were determined to be $473,000.00. Ex. G-

[3] The debtor also testified that, in 1991, Bell Savings consolidated all of the outstanding loans into one loan for $479,000.00 and that he might have discarded the prior loan documents at that time. N.T. at 69, 74.

17. On February 22, 2000, the IRS assessed the debtor's tax liability. Amended Joint Pretrial Statement of Uncontested Facts at 3. He filed the instant chapter 7 bankruptcy petition on December 8, 2000.

35. At no time did the IRS assert that the debtor had committed civil tax fraud. N.T. at 134.

36. In April 2002, Mr. Schlesinger wrote a summary of his losses associated with Chooney Juice and estimated that total at $970,000.00. Ex. G-27.

37. The debtor testified that he was foolish and naive in his investment with Chooney Juice. Not only did he lose his investment, but he lost his home, his wife filed for divorce, and he became severely depressed as a result. He also saw his position with GMAC reduced, both in salary and responsibilities. N.T. at 13–14, 15:

38. At the time of the hearing, the debtor was taking anti-depressant medication. N.T. at 40–41.

39. The debtor also invested in ''tax shelter'' partnerships, N.T. at 24, 26, which investments were also disallowed as a loss in the approximate amount of $27,000.00. N.T. at 26, 79–80. That deduction was repaid in full, with interest and penalties, after the debtor's various appeals were unsuccessful. N.T. at 80.

40. The debtor testified that he was ''stupid'' in not overseeing his investment in Chooney Juice, N.T. at 70, and neglectful in not maintaining supporting documents, but he also stated that he actually lost almost $1 million of his money in these video stores. N.T. at 79.

II.

[1] Based upon these facts, I reach the following legal conclusions:

1. This bankruptcy court has subject matter jurisdiction over this adversary proceeding pursuant to 28 wU.S.C. §§ 157(b)(2)(I), 1334(b).

2. The plaintiff seeks a determination that his prepetition federal tax obligation is dischargeable. As this obligation falls outside the scope of 11 U.S.C. § 507(a)(8)(A), it is a non-priority debt which will be discharged unless the provisions of 11 U.S.C. § 523(a)(1)(C) apply.

3. The defendant, the United States, has the burden of persuasion to demonstrate the applicability of section 523(a)(1)(C) by a preponderance of the evidence.

4. The defendant has attempted to demonstrate that the plaintiff's 1992 federal income tax return was either fraudulent or was a willful attempt to evade the plaintiff's federal income tax liabilities.

5. The defendant has not met its burden of persuasion under section 523(a)(1)(C).

6. Accordingly, the plaintiff's prepetition tax obligation to the United States is dischargeable.

III.

As noted at the outset of this case, the only issue before me is the dischargeability of the debtor's pre-bankruptcy federal tax obligations, arising in calendar years 1989 through 1995. Prior to his bankruptcy filing, the debtor agreed to the entry of judgment against him in the United States Tax Court. Ex. G-17. The debtor has also agreed that his prepetition tax liability is $473,000.00. Amended Joint Pretrial Statement at 3.

Mr. Schlesinger filed his bankruptcy petition in December 2000. As a general bankruptcy principle, tax obligations which were incurred more than three years before the date of the bankruptcy filing are typically dischargeable under section 523. See, e.g., McKay v. United States, 957 F.2d 689, 691 [69 AFTR 2d 92-793] (9th Cir. 1992); In re Kramer, 215 B.R. 87, 88 [80 AFTR 2d 97-5443] (S.D. Fla. 1997). Among the exceptions to this general principle are the provisions of section 523(a)(1)(C). This subsection provides:

> (a) A discharge under section 727 ... of this title does not discharge an individual debtor from any debt--
>
> (1) for a tax or a customs duty--
>
> * * *
>
> (C) with respect to which the debtor made a fraudulent return or willfully at-

> tempted in any manner to evade or defeat such tax. . . .

There is no limitations period on this exception; any tax liability involving a "fraudulent return" or a "willful attempt to evade or defeat" payment of the tax liability is nondischargeable, whenever it arose. See, e.g., United States v. Weiss, 2000 WL 1708802, at *5 [86 AFTR 2d 2000-7130] (E.D. Pa. 2000), aff'd, ___ F.3d ___ (Table), 2002 WL 397717 (3d Cir. 2002); accord Matter of Brackin, 148 B.R. 953, 956 [71A AFTR 2d 93-3156] (Bankr. N.D. Ala. 1992). The United States has the burden to prove, by a preponderance of the evidence, the non-dischargeability of the debt. See, e.g., In re Fretz, 244 F.3d 1323, 1327 [87 AFTR 2d 2001-1380] (11th Cir. 2001); Berkery v. C.I.R., 192 B.R. 835, 840 [77 AFTR 2d 96-1374] (E.D. Pa. 1996), aff'd, 111 F.3d 125 [79 AFTR 2d 97-1995] (3d Cir. 1997) (Table), and cert. denied, 522 U.S. 881 (1997). Accordingly, if the United States establishes by the preponderance standard that Mr. Schlesinger either made a fraudulent tax return or willfully attempted to evade or defeat his tax obligations, then his pre-bankruptcy tax liabilities will not be discharged. See, e.g., In re Fegeley, 118 F.3d 979, 983 [80 AFTR 2d 97-5268] (3d Cir. 1997). Conversely, if that burden is not met, then the debtor is entitled to relief in this proceeding. As with other exceptions to discharge, the provisions of section 523(a)1)(C) "are to be strictly construed in favor of the debtor." Id.

"In construing the fraud prong under § 523(a)(1)(C), Courts have analogized it to the civil fraud penalty under the Internal Revenue Code, 26 U.S.C. § 6663." Berkery v. C.I.R., 192 B.R. at 841. In order to demonstrate that a debtor filed a "fraudulent return," the United States must demonstrate under section 523(a)(1)(C) (and also under section 6663 of the IRC): (1) knowledge of the falsehood of the return; (2) an intent to evade taxes; and (3) an underpayment of the taxes. See, e.g., Matter of Brackin, 148 B.R. at 956; In re Hopkins, 133 B.R. at 106; In re Kirk, 98 B.R. 51, 54 (Bankr. M.D. Fla. 1989); see also Dunham & Shimkus, Tax Claims in Bankruptcy, 67 Am. Bankr. L.J. 343, 387 (1993). "[W]here the debtor signed a return which he knew was false, and which resulted in underpayment of tax, fraud is committed." Id. (citing In re Hopkins, 133 B.R. at 107). Conversely, when the debtor is unaware of his tax liability when his return is filed, there is no fraudulently filed return. Id. (citing In re Gathwright, 102 B.R. 211 [63 AFTR 2d 89-1185] (Bankr. D. Or. 1989)).

In order to determine whether the elements of a fraudulent return have been established, one must consider the entire evidentiary record with particular regard for circumstantial evidence. Berkery v. C.I.R., 192 B.R. at 841. To assist in this analysis, some courts have enumerated the following non-exclusive list of circumstances which may lead to the inference that the debtor/taxpayer filed a fraudulent tax return: (1) large understatements of income made consistently over time; (2) failure to keep adequate records; (3) failure to file tax returns; (4) implausible or inconsistent behavior by the taxpayer; (5) concealing assets; (6) failure to cooperate with taxing authorities; (7) the illegality of the activity generating the additional unreported income; and (8) the relative sophistication of the debtor. Id. at 841 (citations omitted).

Conduct by a taxpayer which would constitute a "willful" evasion of taxes for purposes of section 523(a)(1)(C) has been analogized to the standard applicable in IRC § 6672:

> a debtor will be considered to have willfully attempted to evade a tax if he acted voluntarily, consciously or intentionally or with reckless disregard for whether the tax has been paid. With respect to § 523(a)(1)(C), a debtor acts with reckless disregard if he knew or should have known that the tax was due and did not pay the tax.

In re Irvine, 163 B.R. 983, 987 [73 AFTR 2d 94-1063] (Bankr. E.D. Pa. 1994); accord Berkery v. C.I.R., 192 B.R. at 843; In re Fuller, 189 B.R. 352, 356 [76 AFTR 2d 95-7171] (Bankr. W.D. Pa. 1995).

The Third Circuit Court of Appeals restated this interpretation by borrowing from the Seventh Circuit:

> "The plain language of the second part of § 523(a)(1)(C) comprises both a conduct requirement (that the debtor sought 'in any manner to evade or defeat' his tax liability) and a mental state requirement (that the debtor did so 'willfully')."

In re Fegeley, 118 F.3d at 983 (quoting In re Birkenstock, 87 F.3d 947, 951 [78 AFTR 2d 96-5229] (7th Cir. 1996)); accord In re Tudisco, 183 F.3d 133, 136 [84 AFTR 2d 99-5265] (2d Cir. 1999) ("The willfulness exception consists of a conduct element (an attempt to evade or defeat taxes) and a mens rea requirement (willfulness).").

Again, courts consider circumstantial evidence in determining "willfulness." See, e.g., In re Fegeley, 118 F.3d at 983; In re Irvine, 163 B.R. at 987. Such circumstantial evidence may include the debtor's conduct over a period a time, which period may extend beyond the due date of the tax liability. See United States v. Weiss, 2000 WL 1708802, at *3. The debtor's failure to pay all required taxes does not, by itself, establish "willfulness." In re Fegeley, 118 F.3d at 983;[4] accord In re Tudisco, 183 F.3d at 136.

I now consider whether the United States has demonstrated either of the two bases for non-dischargeability under section 523(a)(1)(C).[5]

IV.

A.

The positions of the parties, in applying the facts of this dispute to the relevant legal standards, may be stated in the following manner:

The United States contends that Mr. Schlesinger filed "a fraudulent [tax] return and willfully attempted to avoid the assessment and payment of his [tax] liabilities . . . ." Defendant's Post-Trial Brief at 2. It emphasizes the following facts: the debtor's inability to corroborate the amount of his extensive 1992 tax deduction due to his failure to retain or obtain business records; his inability to justify the legal nature of that deduction even if the amount had been corroborated; his persistent appeals and Tax Court lawsuit; and his bankruptcy filing timed just beyond 240 days after his taxes were assessed.[6]

In support of its position, the government argues that it is incredible for Mr. Schlesinger to have lost almost $1 million in a business venture and have minimal records to support this contention. He is a college graduate, a successful businessman and a long time employee of a lending entity. He had invested in businesses before, including tax shelters.

Had this loss actually occurred, the government reasons, the debtor would have had some business records, canceled checks or loan documents to corroborate his loss. The absence of such corroboration for such a large loss occurring over a number of years makes it likely to the defendant that the claimed loss was in fact fictitious and that the debtor knew it when he filed his return.

In further support of its position that Mr. Schlesinger knowingly falsified his claimed 1992 deduction, the United States refers to the debtor's inconsistent statements regarding the precise amount of invested money borrowed versus the amount taken from existing savings, his officer position with Chooney Juice, Inc. and his failure to attempt to obtain bank records from the RTC during the course of state court litigation.

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[4] In Fegeley, the Third Circuit instructed that a debtor's "intentional failure to file his tax returns, together with his failure to pay taxes when he had the resources to do so, was sufficient to prove that he attempted to evade or defeat his tax liabilities for the tax years at issue." In re Fegeley, 118 F.3d at 984. Moreover, a debtor's knowledge of his duty to file tax returns and his voluntary and intentional failure to do so would constitute "willfulness." Id.

[5] The statute is written in the disjunctive, so one must consider both components. Clearly, when the taxpayer/debtor never filed any return, he cannot be found to have made a "fraudulent return." Only the issue of willful evasion would be germane. When, however, a tax return has been filed - as in this dispute - I have noted previously that the two elements of section 523(a)(1)(C) may overlap. In re Graham, 1994 WL 777359, at *5 [74 AFTR 2d 94-5887] (Bankr. E.D. Pa. 1994).

[6] Under 11 U.S.C. § 507(a)(8)(A)(ii), federal income taxes assessed within 240 days of a debtor's bankruptcy filing are entitled to priority treatment in bankruptcy cases. See generally In re de Jesus, 268 B.R. 185 [88 AFTR 2d 2001-6599] (Bankr. D. Minn. 2001). Under section 523(a)(1)(A), tax liabilities entitled to priority treatment are not discharged in chapter 7 cases. See, e.g., In re Lewis, 199 F.3d 249, 251 (5th Cir. 2000).

Finally, the government notes that Mr. Schlesinger's improper attempts to use tax shelters, his continued litigation which delayed any tax assessment and his timing of this bankruptcy filing beyond the 240 day reach-back period suggests that the debtor is an intelligent individual who has exhibited a pattern of tax avoidance.

Thus, the government maintains that the debtor's filed 1992 tax return (with its loss carrybacks and carryforwards) was both fraudulent and a willful attempt by him to evade his proper tax liabilities.

The debtor's counter-position is that he may have been foolish and careless in handling his own business affairs, but he neither acted willfully nor fraudulently when he claimed his disallowed tax loss in 1992.

He suggests that a combination of events - i.e., the closing of Bell Savings; his mental depression, caused by the faithlessness of his business partners, his loss of money and his marital breakup; his habit of storing documents haphazardly at his office; his movement down the ranks of his employer - when joined with his foolishness and carelessness have left him without the corroboration needed to justify his claim to the IRS. Nonetheless, he contends that his testimony about his investment in Chooney Juice and the loss of that investment was truthful.

He notes that the IRS ultimately agreed that he had invested almost $300,000.00 in that failed business venture and accentuates the government's failure to seek any fraud penalties against him as support for his position. He also emphasizes that he filed his 1992 federal tax return and took the challenged tax deduction after consultation with an experienced accountant. This accountant testified that Mr. Schlesinger acted upon professional advice and without any fraudulent or willful intent; moreover, his 1992 federal income tax return contained an additional tax form which made no attempt to hide from the IRS the nature of his deduction or his difficulties in corroborating the amount claimed to be lost.

Furthermore, the debtor emphasizes that his prepetition tax obligation was fixed by the IRS without any reference to civil fraud. Instead, the IRS determined - and the debtor ultimately agreed - that he could not meet his burden under the Internal Revenue Code to substantiate his claimed deduction and that he did not establish a proper statutory basis for that deduction. Neither finding, in the debtor's view, supports the government's position in this proceeding.

B.

As can be observed from these two summaries, both parties either explicitly or implicitly focus upon the credibility of Mr. Schlesinger concerning both the existence of his business investment and the reasons he is unable to corroborate the total amount lost. To the extent his testimony is deemed credible, the defendant may be unable to meet its burden to demonstrate a fraudulent return or willful attempt to evade taxes. See, e.g., In re Frosch, 261 B.R. 181, 185–86 [89 AFTR 2d 2002-688] (Bankr. E.D. Pa. 2001) (although the debtor wrongfully claimed mortgage interest and home business deductions on property he did not own, credible testimony precluded a finding of non-dischargeability under section 523(a)(1)(C)); In re Rigney, 216 B.R. 65, 69 [80 AFTR 2d 97-6226] (Bankr. N.D. Ala. 1997) (''Because the Court found the testimony of [the debtor and his company's bookkeeper] to be credible and the explanations offered by each of them for the allegedly incorrect items on the returns to be consistent and entirely reasonable, the Court concludes that [the debtor] did not knowingly file a false return in an effort to evade his taxes.''). Conversely, if the debtor's testimony is not found credible, then the government may meet the statutory standard for non-dischargeability. See In re Rivers, 178 B.R. 9, 12 [74 AFTR 2d 94-7228] (S.D. Ala. 1994) (''The bankruptcy court did not err in finding that [the debtor's] testimony carried little weight in comparison to the competent written and oral evidence of fraud presented by the United States.'').

In so resolving the issue of the debtor's credibility (and that of his former accountant), I must analyze whether the United States has demonstrated by a preponderance of the evidence, viewing all the facts, that it is more likely than not that Mr. Schlesinger knew when he filed his 1992 return that the tax deduction contained therein had no real basis in fact or law and that it was claimed wrongfully either to avoid payment of his lawful tax liabilities or to obtain an improper tax refund. See United States v. Weiss, 2000 WL 1708802, at *2 (knowingly filing inaccurate and understated estimated tax returns may demonstrate a "willful[] attempt[] . . . to evade or defeat" tax obligations within the meaning of section 523(a)(1)(C)); In re Rigney, 216 B.R. at 68 (a tax return which understated income by wrongfully claiming that payments from a closely held corporation were "loans" would fall outside the scope of section 523(a)(1)(C) unless the debtor "knowingly filed a false return with the intention of evading taxes"); In re Miller, 176 B.R. 266, 268 [74 AFTR 2d 94-6673] (Bankr. M.D. Fla. 1994) ("[T]ax obligations should be non-dischargeable when there is evidence that the taxpayer's actions were neither unintentional nor accidental or due to misunderstanding or mere oversight.").

Resolution of the credibility issue in this proceeding is not simple. As noted above, both parties may fairly point to certain facts which support their respective positions. In analyzing the evidence offered, however, I afford little importance to the failure of the IRS pre-bankruptcy to raise any issue of civil fraud. See, e.g., Levinson v. United States, 969 F.2d 260, 263 [70 AFTR 2d 92-5303] (7th Cir. 1992), cert. denied, 506 U.S. 989 (1992); In re Fernandez, 112 B.R. 888, 891 (Bankr. N.D. Ohio 1990). I also discount the government's complaint about the debtor's Tax Court litigation or the timing of his bankruptcy petition. There is a "venerable distinction between tax avoidance and tax evasion." In re Kramer, 215 B.R. 87, 89 [80 AFTR 2d 97-5443] (S.D. Fla. 1997). To the extent that a debtor employs legally permissible methods to avoid paying taxes, such conduct does not constitute improper tax evasion.

C.

As I referenced above, the United States must do more in this proceeding than prove that Mr. Schlesinger incurred an unpaid prepetition tax liability. It must demonstrate by a preponderance of the evidence that this obligation arose either from a fraudulent return or from a willful attempt to evade his tax obligation. Upon careful consideration of the evidence presented, including the demeanor of the witnesses who testified, I conclude that the government has not met its burden under section 523(a)(1)(C).

Even the United States concedes that Mr. Schlesinger invested money in a business venture known as Chooney Juice, Inc. and that he was entitled to a significant capital loss deduction. The government acknowledged pre-bankruptcy that the debtor substantiated $258,076.00 of his claimed loss. There is also no doubt that Mr. Schlesinger guaranteed corporate loans made to Chooney Juice by Bell Savings Bank. There are documents proving that he was sued by this lender (and later by the RTC) to recover on the unpaid loans.

Thus, in 1992, when Chooney Juice ceased operations, Mr. Schlesinger was entitled to take some deduction for his losses.

I recognize that, under federal tax law, Mr. Schlesinger took a deduction in an amount larger than that to which he was entitled because he failed to meet his burden to corroborate the amount claimed. See, e.g., Henry Schwartz Corp. v. Commissioner of Internal Revenue, 60 T.C. 728, 745–46 (1973). I further appreciate that he apparently mis-classified his deduction under relevant federal tax law. See generally Klein v. Commissioner of Internal Revenue, 75 T.C. 298 (1980).

Nonetheless, in applying section 523(a)(1)(C), courts have held that a tax obligation arising from improper tax deductions will be dischargeable if the impropriety of the deduction was unknown to the debtor when his return was filed. See Matter of Brackin, 148 B.R. at 958

(''From the evidence presented, the Court cannot find that Brackin intentionally took illegal business deductions or had knowledge of the falsehood of his returns.''). This holding has occurred in circumstances where the disallowance of the deduction was based upon a failure of substantiation. In re Gathwright, 102 B.R. 211, 214 [63 AFTR 2d 89-1185] (Bankr. D. Or. 1989); see also Matter of Howard, 167 B.R. 684, 689 [73 AFTR 2d 94-2107] (Bankr. M.D. Fla. 1994). A similar conclusion was reached in circumstances where a debtor improperly claimed corporate distributions as ''loans'' rather than as ''income.'' In re Rigney, 216 B.R. at 68–69.

If Mr. Schlesinger intentionally claimed improper deductions on his 1992 tax return, his prepetition federal tax obligation would be non-dischargeable. See In re Rivers, 178 B.R. at 12. But after listening to the testimony of the debtor and that of his former accountant, Mr. Cohn, and upon review of the exhibits, I find their testimony credible on the issues of fraud and willful intent. Mr. Schlesinger believed that he had lost more than $998,000.00 in Chooney Juice; Mr. Cohn also believed that the debtor's losses equaled or exceeded that amount. Both these individuals also believed that they could persuade the IRS of the veracity of this loss, given what they considered to be unusual circumstances. I further accept that the debtor was advised in good faith by Mr. Cohn that the loss could be claimed as a deduction against ordinary income.

That the debtor's belief and Mr. Cohn's advice were wrong does not render the 1992 filed federal tax return fraudulent; nor does it render Mr. Schlesinger's conduct in filing the return willfully attempting to evade his tax liability.

In reaching this conclusion, I have considered Mr. Schlesinger's educational and employment backgrounds in assessing the credibility of his testimony. I note that, in Gathwright, the debtor was a former IRS agent and was a certified public accountant who failed to file timely tax returns, failed to report all income and improperly claimed tax deductions. Nevertheless, the bankruptcy court held that his tax obligation was dischargeable because his failures and errors were only ''negligent'' and his ''business affairs'' were conducted in a ''sloppy manner.'' Gaithwright, 102 B.R. at 216. No fraud or willful evasiveness were proven.

Similarly, I view Mr. Schlesinger's behavior concerning his business investment as careless and negligent, but not fraudulent or willfully evasive. See Matter of Brackin, 148 B.R. 953, 958 [71A AFTR 2d 93-3156] (Bankr. N.D. Ala. 1992); see also generally In re Blaker, 205 B.R. 326, 329 [78 AFTR 2d 96-7330] (Bankr. M.D. Fla. 1996) (government did not prove that taxpayer filed a fraudulent tax return when the evidence disclosed that the debtor was unaware that his return contained false information).

Therefore, an order shall be entered in favor of the plaintiff determining his tax liability to the defendant to be dischargeable.

ORDER

AND NOW, this 31st day of October, 2002, for the reasons stated in the accompanying memorandum, it is hereby ordered that judgment is entered in favor of the plaintiff and, as a result, plaintiff's tax liability to the defendant is dischargeable.

BRUCE FOX

Chief Bankruptcy Judge

IN RE:

RONALD SCHLESINGER

Ronald Schlesinger

v.

U.S. Department of Treasury

Internal Revenue Service

Chapter 7

Bankruptcy No. 00-35288F

Adversary No. 01-0088

Copies of the Chief Bankruptcy Judge's Memorandum and Order dated October 31, 2002, were mailed on said date to the following:

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¶2002-5684

Billy Ray DALE, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Dist. of Columbia, (DC Dist Col) Civil Action No. 01 - 0885 (JDB), Nov. 20, 2002. Years 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001. Decision for Govt.

1. FOIA—failure to exhaust administrative remedies—search fees; waivers. Taxpayer's FOIA complaint for release of all IRS records relating to allegedly politically-motivated audits of him was dismissed: taxpayer didn't exhaust his administrative remedies where vague request that asked only for any records referencing him, with no description of specific agency conduct or identification of specific regional IRS office(s), wasn't reasonably detailed under Reg. §601.702(c)(7). And, fact that IRS was able ultimately to identify some responsive documents didn't cure defect, particularly where neither taxpayer nor Judicial Watch, which acted as his counsel and to which he authorized records' release, ever made any meaningful effort to correct request's facial deficiencies. Also, taxpayer didn't make requisite firm commitment to pay search fees or submit proper waiver application; and application stating why Judicial Watch should receive waiver wasn't effective since it wasn't FOIA "requester." *Reference:* United States Tax Reporter ¶76,556.502(75); 76,556.502(65).

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,

MEMORANDUM OPINION

JOHN D. BATES United States District Judge

Plaintiff Billy Ray Dale ("Dale") brings this action against defendant Internal Revenue Service ("IRS") under the Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552. Dale asserts that he was subjected to retaliatory audits by the IRS during President Clinton's administration from January 20, 1993 through January 19, 2001, and seeks access to any documents in the possession of the IRS that he believes will establish the political nature of these actions. Compl. ¶ 6. The IRS moves to dismiss Dale's complaint for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), claiming that Dale failed to comply with certain administrative requirements of FOIA and the implementing IRS regulations.[1]

This case is a prime example of how the unwillingness of the parties and counsel to a lawsuit to work together in managing the case may lead to an unnecessary expenditure of time and effort by the parties and hence by the federal judiciary. In this case, the fault seems to lie primarily, although perhaps not exclusively, with the plaintiff, or more accurately with Judicial Watch, the public interest legal organization that represents plaintiff. Had Judicial Watch responded timely to defendant's communications and proposals, the issues now before the Court likely would have been resolved long ago, without requiring briefing and judicial attention, and perhaps plaintiff's FOIA request would already have been processed and documents produced. Unfor-

[1] The IRS withdrew its argument that Dale failed to exhaust his administrative remedies when he did not file an administrative appeal from the IRS letter he received on August 27, 2000. See Notice of Withdrawal of Argument (August 10, 2001).

tunately, that was not to be, and the Court must therefore deal with the parties' respective positions as they now stand, even though modest compromise would appear to have been much the preferable, and more efficient, option. Be that as it may, for the reasons stated below, the motion of defendant IRS to dismiss is granted.

BACKGROUND

Dale filed his FOIA request with the IRS on July 13, 2000. Compl. ¶ 5; see Compl., Ex. 1 (letter from Dale to IRS dated July 13, 2000). In his request, Dale sought access to "[a]ny and all documents, including but not limited to files, that refer or relate in any way to Billy Ray Dale." Id. Dale stated that his request included "all Internal Revenue Service offices, departments, detachments, bureaus, operating locations, field offices, agencies, divisions, directorates, center headquarters, and/or other Internal Revenue Service organizations and entities." Id. Dale requested that the documents be sent to his attorney, Larry Klayman, General Counsel of Judicial Watch, a non-profit public interest law firm. Compl., Ex. 1.

Dale did not commit to pay the fees incurred in searching for and copying the responsive documents, nor did he request a waiver of those fees. The IRS received Dale's request on July 18, 2000, and on August 27, 2000, the IRS wrote back, informing Dale of several problems that needed to be corrected before the IRS could conduct a search. Compl. ¶ 7. The IRS letter stated. in part:

> A request for "all records pertaining to you" is too broad to meet the FOIA requirement to adequately describe the records sought. Please provide some additional guidance on what information you are seeking, what Internal Revenue Service function might have documents responsive to your request, what types of issues are involved, what year or time frame might be appropriate to help us focus the search.

Answer, Ex. A (letter from Summerlin to Dale dated August 27, 2000). The IRS informed Dale that in order to bring his request into compliance with FOIA and applicable IRS regulations, he would have to: 1) provide specific authorization for the IRS to release his tax records to Judicial Watch, 2) make his request for disclosure in a separate document containing his identity information and the type of information to be disclosed, 3) reasonably describe the information requested and its location within IRS with more specificity, and 4) make a firm commitment to pay the fees for search and duplication, or provide justification for waiving or reducing such fees. Answer, Ex. A pp. 1–2. The IRS provided Dale with Form 8821, a tax information authorization form that when properly completed would authorize release of Dale's IRS documents to Judicial Watch. Id. at p. 2.

Dale did not respond to the IRS letter. Eight months later, on April 24, 2001, claiming that he had "received no substantive response to his FOIA request from the IRS," Dale brought suit against the IRS. Compl. ¶ 7. On May 9, 2001, Judicial Watch's Klayman held a conference call with Department of Justice lawyers in an attempt to address the deficiencies in Dale's FOIA request, and the parties apparently agreed to take steps to avoid litigation. Id. As a result of the conference call, Klayman agreed to provide - within one week - a properly completed Form 8821, a request from Dale for a fee waiver and a firm commitment to pay such fees if the waiver were denied, and clarifications of Dale's search requests. The following day, counsel for the IRS memorialized this agreement in a three-page letter to Klayman. See Def. Reply, Ex. A (letter from Hubbert to Klayman dated May 10, 2001). However, Judicial Watch did not supply the agreed-upon information by May 16, 2001, and on June 5, 2001, the IRS sent Judicial Watch another letter seeking the information. See Def. Reply, Ex. B (letter from Hubbert to Klayman dated June 5, 2001). On June 11, 2001, Judicial Watch submitted a completed Form 8821 authorization and a lengthy justification of why Judicial Watch, as opposed to Dale (the plaintiff and FOIA requester), deserved a fee waiver. See Pl. Opp., Ex. 1

(letter from Farrell to Gibson dated June 11, 2001). Notwithstanding this communication, the IRS determined that this additional information still did not comply with IRS and FOIA requirements or with the parties' May 9 agreement, and hence sent another letter on July 24, 2001, detailing the deficiencies in the information pro-vided. See Def. Reply, Ex. C (letter from Gibson to Klayman dated July 24, 2001). That letter proposed a specific settlement of the case and stated that a motion to dismiss for lack of jurisdiction would be filed if the IRS did not hear from Judicial Watch by July 27, 2001. Id. at pp. 3–4. Having received no response, on August 2, 2001, the IRS filed its motion to dismiss, claiming that Dale had failed to comply with the administrative requirements of FOIA and had failed to exhaust his administrative remedies.

DISCUSSION

[1] The Freedom of Information Act requires the requester to exhaust administrative remedies before filing suit. Summers v. Dep't of Justice, 140 F.3d 1077, 1080 (D.C.Cir. 1998); Stebbins v. Nationwide Mutual Ins. Co., 757 F.2d 364, 366 (D.C.Cir.1985) (''[e]xhaustion of [administrative] remedies is required under the Freedom of Information Act before a party can seek judicial review''); Judicial Watch, Inc. v. United States Naval Observatory, 160 F.Supp.2d. 111, 112 (D.D.C.2001) (''It is well settled that full and timely exhaustion of administrative remedies is a prerequisite to judicial review under FOIA.''). Failure to exhaust administrative remedies subjects a FOIA requester's suit to dismissal for lack of subject matter jurisdiction. Dettmann v. Dep't of Justice, 802 F.2d 1472, 1477 (D.C. Cir.1986); Trueblood v. Dep't of Treasury, 943 F.Supp. 64, 68–69 [78 AFTR 2d 96-7438] (D.D.C.1996). Compliance with both FOIA and agency requirements is necessary before the agency can release the requested documents. 5 U.S.C. § 552(a)(3); 26 C.F.R. § 601.702(c)(5). Failure to comply with agency FOIA regulations amounts to a failure to exhaust administrative remedies, which warrants dismissal. See Gillin v. IRS, 980 F.2d 819 [71 AFTR 2d 93-1718] (1 st Cir. 1992); Voinche v. Dep't of Air Force, 983 F.2d 667, 669 n. 5 (5 th Cir. 1993). An agency's obligations commence upon receipt of a valid request; failure to file a perfected request therefore constitutes failure to exhaust administrative remedies. See Crooker v. CIA, 577 F.Supp. 1225 (D.D.C. 1984); Lilienthal v. Parks, 574 F.Supp. 14, 17 [52 AFTR 2d 83-5432] (E.D. Ark. 1983).

The requirements under FOIA are minimal: a request need only (i) ''reasonably'' describe the records sought and (ii) comply with any ''published rules stating the time, place, fees (if any), and procedures to be followed.'' 5 U.S.C. § 552(a)(3)(A). Pursuant to the Act, the IRS has promulgated regulations that detail the rules and procedures that must be followed by persons requesting IRS records. See 5 U.S.C. § 552(a)(2). The IRS's obligation under FOIA begins only upon receipt of a valid request - that is, one that complies with all of the requirements set out in 26 C.F.R. § 601.702(c)(3)(i) - (viii). See 26 C.F.R. § 601.702(c)(5); see also Brumley v. Dep't of Labor, 767 F.2d 444, 445 (8th Cir. 1985) (response by an agency is required when ''any request ... is made in accordance with such rules'') (quoting 5 U.S.C. § 552(a)(3)).

Here, the IRS claims that Dale has failed to exhaust his administrative remedies because.2 Dale's submission of a Form 8821 on June 11, 2001, has apparently resolved the question of authorization for the IRS to disclose Dale's tax records to Judicial Watch. he has not filed a proper request. Dale responds that in the May 9, 2001, conference call the parties agreed to ''take steps to avoid having to litigate serious procedural questions involving subject matter jurisdiction.'' See Def. Reply, Ex. B (letter from Gibson to Klayman dated June 5, 2001). Dale maintains that he complied with the requirements outlined in this agreement when Judicial Watch submitted its June 11, 2001, letter and Dale's Form 8821. Pl. Opp., Ex. A (letter from Farrell to Gibson). The IRS counters that the June 11, 2001, letter still failed in some respects

to meet Dale's commitments in the agreement and under IRS regulations. Def. Reply at 4. In particular, the IRS contends that Dale did not "provide an adequate description of what records he seeks, for what types of taxes, for what years, and where the records might be located," and that he has failed to justify why he, as the actual requester of agency records concerning his own taxes - and not Judicial Watch - is entitled to a fee waiver. Id. at 5.[2]

A. Failure to Reasonably Describe the Records Sought

Over the course of nearly a year, and after four letters from the IRS explaining what information it needed in order to conduct Dale's FOIA search, neither Dale nor Judicial Watch ever fully supplied to the IRS the information it contends is needed to comply with FOIA and IRS regulations. Under those regulations, the initial determination whether a particular request is valid is made solely by the Director of the Office of Disclosure or his delegate. 26 C.F.R. § 601.702(c)(7). The agency's regulations require that FOIA requests must be reasonably detailed:

> The request for records must describe the records in reasonably sufficient detail to enable the Internal Revenue Service employees who are familiar with the subject area of the request to locate the records without placing an unreasonable burden upon the Internal Revenue Service. While no specific formula for a reasonable description of a record can be established, the requirement will generally be satisfied if the requester gives the name, subject matter, location, and years at issue, of the requested records.

26 C.F.R. § 601.702 (c)(4)(i)(A).

Accordingly, the IRS is under no obligation to release records that have not been reasonably described. The linchpin inquiry is whether "the agency is able to determine precisely what records are being requested." Tax Analysts v. IRS, 117 F.3d 607, 610 [80 AFTR 2d 97-5152] (D.C. Cir. 1997) (quoting Yeager v. DEA, 678 F.2d 315, 326 (D.C. Cir. 1982)). A description "would be sufficient if it enabled a professional employee of the agency who was familiar with the subject area of the request to locate the record with a reasonable amount of effort." Marks v. United States, 578 F.2d 261, 263 (9th Cir.1978). Broad, sweeping requests lacking specificity are not sufficient. American Fed. of Gov't Employees v. Dep't of Commerce, 632 F.Supp. 1272, 1277 (D.D.C. 1986).

Consequently, courts have found that FOIA requests for all documents concerning a requester are too broad. See Mason v. Callaway, 554 F.2d 129, 131 [40 AFTR 2d 77-5750] (4th Cir.1977) (request for "all correspondence, documents, memoranda, tape recordings, notes, and any other material pertaining to the atrocities committed against plaintiffs, ... including, but not limited to, the files of [various government offices] ... typifies the lack of specificity that Congress sought to preclude in the requirement of 5 U.S.C. § 552(a)(3) that records sought be reasonably described"); Hunt v. Commodity Futures Trading Comm'n, 484 F.Supp. 47, 51 (D.D.C. 1979) (request for all documents concerning requester too broad); Keese v. United States, 632 F.Supp. 85, 91 [57 AFTR 2d 86-848] (S.D.Tex.1985) ("Requests for all documents containing a requester's name are not reasonably specific as required by the FOIA."). "[T]he rationale for this rule is that FOIA was not intended to reduce government agencies to full-time investigators on behalf of requesters." Assassination Archives & Research Ctr. v. CIA, 720 F.Supp. 217, 219 (D.D.C. 1989).

Dale's FOIA request was for "any and all documents, including but not limited to files, that refer or relate in any way to Billy Ray Dale." Compl., Ex. 1 (letter from Dale to IRS dated July 13, 2000) (emphasis added). Such a request does not describe the records sought with "reasonably sufficient detail" in light of both statutory guidance and case law. Notwithstanding the IRS's initial August 27, 2000, letter

[2] Dale's submission of a Form 8821 on June 11, 2001, has apparently resolved the question of authorization for the IRS to disclose Dale's tax records to Judicial Watch.

explaining the additional information needed, Dale did not provide the necessary reasonably specific information to perfect his FOIA request. See 26 C.F.R. § 601.702(c)(4)(i)(A). Nor did he direct his search requests to specific regional offices from which he sought records. Dale's broad request would not permit an IRS employee to locate the records with a "reasonable amount of effort," since his FOIA request does not specify what records he seeks, for what years, and located at which office of the IRS. Absent some description of the actions the agency may have taken against him (investigation, audit, revocation of tax exempt status, etc.), the particular records sought, and any relevant dates and locations, agency employees would not know where to begin searching.[3] On its face, then, Dale's request was deficient, and no effort was made to cure the deficiencies.

Nonetheless, some semblance of common sense should prevail here. There is little doubt that, at least during the course of post-lawsuit negotiations with Dale and Judicial Watch, the IRS itself determined the thrust of Dale's FOIA request and what responsive records the IRS possessed. Indeed, in its July 24, 2001, letter, the IRS went so far as to state:

> Please note that, according to a check of the IRS's computerized database, Mr. Dale has not been the subject of any audit, collection or other IRS activity for any of the years 1988–2000, except for the two years 1991 and 1992. The IRS records show that Mr. Dale's 1991 and 1992 federal income tax returns were audited, and that the audit resulted in no change to the tax liabilities he reported.

Def. Reply, Ex. C at p. 3. On that basis, the IRS indicated it would "view favorably" a settlement whereby non-exempt records of those audit files, including the reasons for opening the audit, would be released to Dale. Id. Granted, Judicial Watch and Dale never responded to this or most other IRS communications, but the fact remains that at some point there was little continuing mystery about the scope and focus of Dale's request - i.e., the IRS itself supplied the necessary specificity of description to enable location of responsive records.

Hence, concluding at this point that this action should be dismissed because Dale did not reasonably describe the records sought in his request would run the risk of elevating form over substance given the history of this matter. On the other hand, to do otherwise might reward Judicial Watch for its failure to engage in meaningful and reasonable discussions with the IRS in an attempt to resolve issues concerning the scope and specificity of Dale's request. And there is no doubt that the request on its face fails to comply with the requirements of FOIA and applicable IRS regulations, and that Dale and his counsel never undertook to correct that failure despite repeated IRS requests to do so. Simply put, Dale's search request amounted to an all-encompassing fishing expedition of files at IRS offices across the country, at taxpayer expense. Hence, Dale's FOIA request did not comply with IRS regulations either before or after he filed suit, and certainly did not comply with the parties' May 9, 2001, agreement. The complaint is thus fairly subject to dismissal on that basis notwithstanding the later success of the IRS search efforts, given that it remains uncertain to this date what precisely the requester seeks and from what locations within the IRS. There is, however, another independent basis upon which Dale's complaint must be dismissed.

B. Failure to Commit to Pay Search and Duplication Fees or to Justify Waiver

In addition to failing to reasonably describe the records he sought, Dale made no mention in his request of whether he intended to pay for the searches and copies,

[3] In the May 9, 2001, conference call, Dale apparently agreed to submit separate requests directly to those IRS regional offices he wanted searched. Instead, Judicial Watch's June 11, 2001, letter stated that "we believe that the IRS regional service center[] [supporting Dale's filing address] would contain additional responsive documents." Pl. Opp., Ex. A at p. 4. As the IRS repeatedly stated, it does not have a centralized filing system of tax documents, and its regulations require a FOIA requester to mail a FOIA request directly to the specific district office to be searched or to the district office in which the requester resides. Def. Reply, Ex. C at p. 2 (Gibson letter to Klayman dated July 24, 2001); see also 26 C.F.R. § 601.702(c)(3)(iii) and (g) (listing regional offices and addresses). Neither Dale nor Judicial Watch ever complied with this requirement.

or whether he was seeking a fee waiver. Pursuant to IRS regulations, an initial FOIA request must:

> State the firm agreement of the requester to pay the fees for search and duplication ultimately determined in accordance with paragraph (f) of this section, or request that such fees be reduced or waived and state the justification for such request.

26 C.F.R. § 601.702(c)(3)(viii).

To obtain a fee waiver, a requester seeking access to records must demonstrate that release of the information sought is in the public interest. Oglesby v. Dep't of the Army, 920 F.2d 57, 66 n.11, 71 (D.C. Cir. 1990). ''[D]isclosure of the information is in the public interest [if] it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.'' 5 U.S.C. § 552(a)(4)(A)(iii). Thus, as this Circuit has noted, there is essentially a two-pronged test to determine whether a FOIA requester is entitled to a fee waiver. First, the requester must not have a commercial interest in the disclosure of the information sought. Larson v. CIA, 843 F.2d 1481, 1483 (D.C. Cir.1988) (citing MESS v. Carlucci, 835 F.2d 1282, 1285 (9 th Cir. 1987)). Second, the disclosure of the information must be ''likely to contribute significantly to public understanding of the operations or activities of the government.'' Larson, 843 F.2d at 1483 (quoting 5 U.S.C. § 552(a)(4)(A)(iii)). Courts should liberally apply the fee waiver provision of the FOIA. MESS, 835 F.2d 1284.

In Dale's initial FOIA request filed on July 13, 2000, he made no mention of any commitment - let alone a ''firm commitment'' - to pay for searches and copies, and he did not seek a fee waiver. Now, however, Dale contends that the June 11, 2001, letter to the IRS, which included Dale's completed Form 8821, contained sufficient justification to grant the fee waiver to Judicial Watch. Pl. Opp. at pp. 1–2. The IRS responds that Dale must justify why he, as the FOIA requester - not Judicial Watch - is entitled to a fee waiver. The statutory language suggests that it is the requester, and not his or her legal representative, who must either firmly commit to payment of the fees or request a fee waiver. The applicable IRS FOIA regulation commands that the initial request for records must ''state the firm commitment of the requester to pay the fees for search and duplication ultimately determined in accordance with paragraph (f) of this section, or request that such fees be reduced or waived and state the justification for such request.'' 26 C.F.R. § 601.702(c)(3)(viii) (emphasis added).

Judicial Watch has developed a cottage industry of FOIA litigation, and in fact has sought fee waivers in many cases (generally without success) when it was the requester of records under FOIA. See, e.g., Judicial Watch v. Dep't of Energy, 191 F.Supp.2d 138 (D.D.C. 2002); Judicial Watch v. FBI, 190 F.Supp.2d 29 (D.D.C. 2002); Judicial Watch v. Dep't of Justice, 185 F.Supp.2d 54 (D.D.C. 2002); Judicial Watch v. Rossotti, 2002 WL 535803 [89 AFTR 2d 2002-1627] (D.D.C. 2002); Judicial Watch of Florida v. Dep't of Justice, 159 F.Supp.2d 763 (D.D.C. 2001); Judicial Watch v. Dep't of Justice, 133 F.Supp.2d 52 (D.D.C. 2000).[4] Here, however, the parties do not dispute that Dale himself is the FOIA requester. The initial request of July 13, 2000, although typed on Judicial Watch stationery, was signed by Dale. Dale's completed Form 8821 - submitted June 11, 2001, roughly a year after his initial request - is signed by Dale as the taxpayer. Indeed, the parties agreed in their May 9, 2001, conference call that Judicial Watch would provide ''a request from each FOIA requester for a fee waiver, and a firm commitment to pay such fees,'' as memorialized in the IRS letter to Klayman the following day. See Def. Reply, Ex. A (letter from Hubbert to Klayman dated May 10, 2001) (emphasis added).[5] This agreement was reiterated in letters from the IRS to Judicial Watch on June 5, 2001 and July 24, 2001, with no apparent objection

[4] The Court does not need to reach in this case the issue whether Judicial Watch itself is entitled to a fee waiver.

[5] The May 9, 2001, conference call concerned separate FOIA requests from six of Judicial Watch's clients, of which Dale was one.

from Judicial Watch. In its letter to Klayman on July 24, 2001, the IRS again explained that Dale, not Judicial Watch, must personally seek the fee waiver: ''Your letter did not explain why Mr. Dale, as the requester, is entitled to a fee waiver.'' Def. Reply, Ex. C at p. 2. Finally, this case was filed by Dale, not Judicial Watch, as plaintiff, and asserts that Dale filed the FOIA request with the IRS. See Compl. 5. Judicial Watch is identified only as ''Attorney for Plaintiff.''

A party's counsel is not the ''requester'' for purposes of a fee waiver. Judicial Watch has not cited, and this Court has not found, any authority suggesting otherwise. Therefore, Judicial Watch cannot prevail on its position that Dale is entitled to a fee waiver because his legal representative, Judicial Watch, may be so entitled. The insistence of Dale and Judicial Watch to seek a fee waiver only as to counsel in this case, not as to the plaintiff and FOIA requester, limits the issue before the Court. Accordingly, as there is no claim that Dale himself is entitled to a fee waiver, nor any evidence to support such a claim, the Court does not reach that question. The complaint is therefore subject to dismissal for the failure to claim, or establish, that plaintiff Dale is entitled to a fee waiver, or alternatively to commit to payment of search and duplication fees.

CONCLUSION

Because Dale failed to comply with the administrative requirements of the Freedom of Information Act, he did not exhaust his administrative remedies. As the IRS repeatedly explained, he did not comply with the IRS requirement that the records sought be ''reasonably'' described. Moreover, as the actual requester of information, Dale did not make a ''firm commitment'' to pay the fees associated with his FOIA search, nor did he justify why the fees should be reduced or waived. For these reasons, the Court is without jurisdiction over this action. Accordingly, the IRS's motion to dismiss is granted.

A separate order will be issued on this date.

Signed this 20th day of November, 2002.

/s/ John D. Bates

JOHN D. BATES

United States District Judge

ORDER

Upon consideration of defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), the memoranda and supporting materials of the parties, and the entire record herein, it is this 20th day of November, 2002, hereby

ORDERED that the defendant's motion to dismiss is hereby GRANTED; and it is further

ORDERED that plaintiff Dale's action against the Internal Revenue Service under the Freedom of Information Act, 5 U.S.C. § 552, is DISMISSED.

/s/ John D. Bates

JOHN D. BATES

United States District Judge

¶2002-5685

Gerald F. KARLHEIM, PLAINTIFF v. UNKNOWN AGENTS OF THE INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Western Dist. of Pennsylvania, (DC PA) Civil Action No. 02-114J, Oct. 30, 2002. Years 1988, 1989, 1990, 1991. Decision for Govt.

1. Unauthorized collection actions—exhaustion of administrative remedies. Pro se taxpayer's IRC §7433 complaint contesting validity of various IRS liens and levies was dismissed: taxpayer failed to exhaust his administrative remedies before filing suit. *Reference:* United States Tax Reporter ¶74,335.01(5). IRC §7433.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA,

ORDER OF COURT

[1] Plaintiff, acting pro se, filed this complaint to contest the validity of certain Internal Revenue Service liens and levies upon his property. These levies pertain to the 1988, 1989, 1990 and 1991 tax years. Defendants have filed a motion to dismiss. The motion is granted.

Congress has provided for a federal cause of action for a taxpayer to contest the collection of federal taxes. See 26 U.S.C. § 7433. Section 7433 is the exclusive remedy for a taxpayer to redress an improper federal tax. Shreiber v. Mastrogiovanni, 214 F.3d 148, 152 [85 AFTR 2d 2000-1958] (3d Cir. 2000). Before bringing a section 7433 action in district court, however, plaintiff must first exhaust his administrative remedies and the failure to do so precludes the court from entertaining the claim. See Venen v. United States, 38 F.3d 100, 103 [74 AFTR 2d 94-6680] (3d Cir. 1994).

Because plaintiff has failed to exhaust his administrative remedies in this case, defendants' motion for judgment on the pleadings is granted. The Clerk of Court is directed to mark this case closed.

BY THE COURT.

Dated: October 30, 2002

¶2002-5686

In Re: Michael J. MORONEY, Debtor. Michael J. MORONEY, APPELLANT v. UNITED STATES OF AMERICA, APPELLEE. U.S. District Court, Eastern Dist. of Virgina, (DC VA) Civil Action No. 02-1062-A, Oct. 30, 2002. Bankruptcy Court, (2002, Bktcy Ct VA) 90 AFTR 2d 2002-5116, affirmed. Years 1990, 1992. Decision against Taxpayer.

1. Tax claims in bankruptcy—dischargeability—summary judgment—what constitutes return. Bankruptcy court properly determined that Chap. 7 debtor's tax debts for 2 years weren't dischargeable under 11 USC §523(a)(1)(B)(i): taxpayer's late filed, post-assessment returns didn't qualify as returns for §523(a)(1)(B)(i) purposes. Following 6th Cir. test, taxpayer's hectic schedule and simple failure to "get around to" filing showed lack of any honest or good faith attempt to comply with tax laws. *Reference:* United States Tax Reporter ¶68,726.52(27).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Alexandria Division,

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

1) the decision of the Bankruptcy Court for the Eastern District of Virginia is AFFIRMED;

2) the Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

October 30th, 2002

Alexandria, Virginia

UNITED STATES DISTRICT COURT JUDGE

MEMORANDUM OPINION

This matter is before the Court on appeal from the United States Bankruptcy Court for the Eastern District of Virginia.

I. Background

On March 20, 2000, debtor Michael J. Moroney ("Moroney") filed a voluntary petition for bankruptcy. Subsequently, on June 28, 2000, the bankruptcy court granted Moroney a general discharge of his debts, thereby closing the bankruptcy case. However, on July 16, 2001, Moroney moved to re-open his bankruptcy case to determine the dischargeability of his 1990 and 1992 income tax returns.

Indeed, for tax year 1990 Moroney did not timely file a tax return. Rather, the Internal Revenue Service ("IRS") posted a substitute for return on October 3, 1994. On July 10, 1995, the IRS assessed taxes in the amount of $23,197.00 for tax year

1990 against Moroney, inclusive of interest and penalties. Similarly, on October 3, 1994, the IRS filed a substitute for return on behalf of Moroney for tax year 1992, because Moroney did not timely file a tax return. Likewise, on July 17, 1995, the IRS assessed taxes in the amount of $45,567.00 for tax year 1992, inclusive of interest and penalties. Finally, on November 16, 1998, Moroney filed his 1990 and 1992 tax forms and in response to those forms, the IRS eventually abated some of Moroney's tax liability.

In re-opening his bankruptcy case, Moroney sought determination that despite the tardiness of his 1990 and 1992 tax returns, those liabilities should be discharged under the Bankruptcy Code. The United States, however, disagreed, claiming that because Moroney was delinquent in filing a return for those tax years, the discharge was inapplicable.

Consequently, because the issue before the bankruptcy court was purely a question of law, it heard cross-motions for summary judgment between the parties. Ultimately, the bankruptcy court granted the United States' motion for summary judgment. Specifically, the bankruptcy court agreed with the United States that the belated tax returns did not qualify for discharge under section 523 of the Bankruptcy Code. In response, Moroney brings this appeal.

II. Standard of Review

A district court has jurisdiction over an appeal from a bankruptcy court pursuant to 28 U.S.C. § 158(a). Educ. Credit Mgmt. Corp. v. Buchanan, 276 B.R. 744, 749 (N.D.W. Va. 2002). A bankruptcy court's conclusions of fact are reviewed for clear error, while its conclusions of law are reviewed de novo. See id. (citing In re Deutchman, 192 F.3d 457, 459 [84 AFTR 2d 99-6314] (4th Cir. 1999)). Whether a party is entitled to summary judgment is a question of law, and is therefore reviewed de novo. See Commerce Funding Corp. v. Worldwide Sec. Servs. Corp., 249 F.3d 204, 209 (4th Cir. 2001).

III. Analysis

[1] In general, a debtor filing for protection under Chapter 7 of the Bankruptcy Code is discharged from all pre-petition debt, subject to the exemptions set forth in section 523. See 11 U.S.C. § 727(b). One such exemption from dischargeability provides that "[a] discharge under section 727 . . . of this title does not discharge an individual debtor from any debt - (1) for a tax or customs duty . . . (B) with respect to which a return, if required - (i) was not filed." 11 U.S.C. § 523(a)(1)(B)(i).

At issue between the parties in this action is whether Moroney's late-filed tax returns satisfy the section 523(A)(1)(B)(i) exception and are therefore dischargeable. The Bankruptcy Code does not define a "tax return" under section 523. Moreover, the issue of what constitutes a tax return for section 523 dischargeability purposes is one of first impression in the Fourth Circuit.

However, two Circuits have addressed this definitional issue and have agreed on a four-part test to determine what constitutes a tax return for purposes of dischargeability under section 523. Specifically,

> [i]n order for a document to qualify as a return: (1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.

In re Hindenlang, 164 F.3d 1029, 1033 [83 AFTR 2d 99-509] (6th Cir. 1999) (internal quotations and citations omitted); see also In re Hatton, 220 F.3d 1057, 1060–1061 [86 AFTR 2d 2000-5572] (9th Cir. 2000) (adopting Hindenlang). The Hindenlang test is a re-tooled amalgamation of widely accepted rulings of both the Supreme Court and the Sixth Circuit defining the term "tax return" under the Internal Revenue Code. See, e.g., Germantown Trust Co. v. Commissioner, 309 U.S. 304 [23 AFTR 1084] (1940); Zellerbach Paper Co. v. Helvering, 293 U.S. 172 [14 AFTR 688]

(1934); and Beard v. Commissioner, 82 T.C. 766, 1984 WL 15573 (1984 aff'd 793 F.2d 139 [58 AFTR 2d 86-5290] (6th Cir. 1986).

Although the Hindenlang decision itself is not universally accepted, its four-part test is not seriously questioned.[1] See In re Nunez, 232 B.R. 778, 782–83 [83 AFTR 2d 99-591] (B.A.P. 9th Cir. 1999). But some lower courts have questioned and ultimately rejected the application of the Hindenlang test and the particular result reached by the Sixth Circuit. See In re Crawley, 244 B.R. 121, 126–28 [85 AFTR 2d 2000-1538] (Bankr. N.D. Ill. 2000); see also In re Rushing, 273 B.R. 223, 226–28 [88 AFTR 2d 2001-5348] (Bankr. D. Ariz. 2001); In re Nunez, 232 B.R. at 782.[2]

The specific concern - both in the instant case and in the conflicting results reached by various courts that have addressed this issue - is the application of the fourth element of the Hindenlang test that a return be "an honest and reasonable attempt to comply with the tax law." In re Hindenlang, 164 F.3d at 1034. In particular, the Hindenlang court concluded

> as a matter of law that a Form 1040 is not a return if it no longer serves any tax purpose or has any effect under the Internal Revenue Code. A purported return filed too late to have any effect at all under the Internal Revenue Code cannot constitute "an honest and reasonable attempt to satisfy the requirements of the tax law."

In re Hindenlang, 164 F.3d at 1034.

In contrast, some courts have declined to follow this construction of the fourth prong of the Hindenlang test because it "read[s] into § 523(a)(1)(B)(i) the requirement that a debtor must have filed a return prior to an assessment by the IRS." In re Crawley, 244 B.R. at 127 (citing In re Nunez, 232 B.R. at 782). In fact, these courts state that this "requirement" has no basis in any statutory language in the Bankruptcy Code and does not adhere to the "principal policy considerations of the Bankruptcy Code to interpret exceptions to discharge narrowly and to provide the honest debtor with a fresh start." In re Crawley, 244 B.R. at 128; see also In re Rushing, 273 B.R. at 226–28.

In rejecting what they consider to be the strict rule established in Hindenlang, disciples of the Nunez decision assert that "[t]he good faith inquiry under § 523(a)(1)(B) should focus on a debtor's intent at the time the returns are filed." In re Crawley, 244 B.R. at 128. Furthermore, the court held that this fourth prong is satisfied only when the government can show that the debtor "lacked good faith or possessed a fraudulent intent when the tax returns were filed." Id.

After carefully reviewing the briefs submitted in this matter as well as the divergent opinions offered by various courts in ruling on similar matters, this Court determines that the Hindenlang approach is most appropriate. In doing so, the Court notes that contrary to the reading taken by the courts in Nunez and its progeny, the Hindenlang decision does not establish a per se rule mandating that once the IRS files a substituted return, any taxpayer provided return is unreasonable and therefore not a return within the meaning of section 523(a)(1)(B).[3] Compare In re Hindenlang, 164 F.3d at 1034 with In re Crawley, 244 B.R. at 127. In fact, if the Sixth Circuit in interpreting, or for that matter Congress in drafting, the Bankruptcy Code intended to create a per se rule that any tax return filed after an IRS substitute for return does not qualify as a "tax return," then they certainly could have done so in unambiguous language. Cf. In re Walsh, 260 B.R. at 151

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[1] Only the Bankruptcy Court for the District of Minnesota has strayed from the four-pronged test espoused in Hindenlang. See In re Walsh, 260 B.R. 142, 151 [87 AFTR 2d 2001-1922] (Bankr. D. Minn. 2001). However, no other courts have turned to or adopted the Walsh court's pointed analysis establishing a per se rule that late-filed returns can never qualify as "tax returns" under section 523(a)(1)(B)(i).

[2] The Ninth Circuit Bankruptcy Appellate Panel's decision in In re Nunez relied heavily on its prior decision in In re Hatton, 216 B.R. 278 (B.A.P. 9th Cir. 1997). See In re Nunez, 232 B.R. at 781–83. However, the Hatton decision was later overturned by the Ninth Circuit. See, In re Hatton, 220 F.3d at 1061. ("Hatton II"). The effect of the Hatton II decision is unsettled. While some courts have held that the Ninth Circuit implicitly overruled Nunez in its Hatton II decision, see In re Hetzler, 262 B.R. 47, 53 [88 AFTR 2d 2001-6624] (Bankr. D.N.J. 2001), other courts have disagreed and hold that Nunez is still good law, see In re Rushing 273 B.R. at 227.

[3] The bankruptcy court in this action agrees that "perhaps there is no absolute per se rule" emerging from Hindenlang. (June 4, 2002 Hrg. Tr. 20:11–12).

(establishing a per se rule as follows: ''Once an involuntary government-made assessment is final, then, the taxpayer no longer can use the perfunctory expedient of filing belated voluntary returns to subject a now-stale tax claim to discharge in bankruptcy.'').

In contrast, Hindenlang stands for the proposition that in order for a return to be an honest and reasonable attempt to comply with the tax law, and therefore qualify as a return within the meaning of section 523(a)(1)(B), the return must be of some tax consequence. See In re Hindenlang, 164 F.3d at 1034 (''Once the government shows that a Form 1040 submitted after an assessment *can serve no purpose under the tax law*, the government has met its burden.'' (Emphasis added)).

In fact, the Hindenlang rule more closely parallels the requirement that the tax return be an ''honest and reasonable attempt to comply with the tax laws'' than does the rule set forth in Crawley that the court ''focus on a debtor's intent at the time the returns are filed.'' In re Crawley, 244 B.R. at 128. Whereas the rule in Crawley focuses solely on the honesty requirement of a tax return, the rule in Hindenlang focuses both on the honesty requirement and the requirement that the document reflect a reasonable attempt to comply with the law. Indeed, by evaluating whether the tax return filed has any consequence, the Hindenlang test imposes a dictate of reason upon the recalcitrant taxpayer/debtor.

Applying the Hindenlang test to the instant case, neither party disputes that the return filed by Moroney meets the first three prongs of the Hindenlang test for a return. Of course, it is application of the fourth prong that brings the parties before this Court. In applying the fourth prong of the Hindenlang test, two inquiries must be made: (1) did the debtor make a good faith effort to comply with the tax law; and (2) was that good faith effort reasonable.

Turning first to the debtor's good faith, the Bankruptcy Code does not define the term ''good faith.'' Similarly, the leading cases on this issue - Hindenlang and Nunez - apply the term without defining it.[4] The dictionary defines good faith as ''[c]ompliance with the standards of decency and honesty.'' American Heritage Dictionary of the English Language 780 (3d ed. 1992). In comparison, Black's Law Dictionary defines good faith as ''[a] state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage.'' Black's Law Dictionary (7th ed. 1999).

Both of these definitions indicate that the requirement of good faith on the taxpayer/debtor mandates that the debtor have an honest intention to comply with his duty to obey the law by filing his tax return. In this case, Moroney's attorney Mr. DeCaro admitted that the record was devoid of any reason for Moroney's tardiness in filing his returns. The following colloquy between the Court and Mr. DeCaro, however, illuminates the situation:

> The Court: What was his reason for filing late?
>
> Mr. DeCaro: Well, he was - he has asked me not to go into specifics, but he was The Court: Just tell me what the record shows.
>
> Mr. DeCaro: The record does not show any reason why he filed late. It doesn't show any reason.
>
> The Court: Just tell me what you are authorized to say if anything.
>
> Mr. DeCaro: Well, he was extremely busy. He was managing a large enterprise at the behest of the United States Government. As a matter of fact, he was a government contractor during those years, and he was just totally involved in what he was doing. And he was not, he just didn't get around to filing his tax returns. He had them prepared. He even had them prepared, if you look at the

[4] Additionally, most judicial constructions of this rather amorphous term limit their definition to the factual circumstance at hand. See, e.g., Deans v. O'Donnell, 692 F.2d 968, 972 (4th Cir. 1982).

dates, several years or a period of time before he actually filed them, and it was just something that got pushed to the back burner.

Oct. 11, 2002 Hrg.

The Court is obligated to make its decision based on the record before it in this case. Consequently, because the record contains no reason for the debtor's delay in filing his tax returns, the Court is unable to find any basis to support the notion that the debtor has proceeded with an honest intention to obey his duty under the law, when in filing his tax returns he did so in an extraordinarily delinquent manner.

Moreover, even if the reasons proffered by Mr. DeCaro were supported by the record in this case, this Court cannot equate Moroney's claim of a hectic schedule with an honest intention to comply with his obligations under the tax law. In fact, the only explanation this Court was given for Moroney's compliance with his duty under the law at all was that he did finally "get around to filing his tax returns."Such nonchalance does not measure up to any standard or definition of good faith.

In sum, Moroney cannot satisfy the first requirement of the forth prong of the Hindenlang test that he make an ''honest ... attempt to satisfy the requirements of the tax law.'' Hindenlang, 164 F.3d at 1033.[5] Indeed, because Moroney cannot satisfy all four prongs of the Hindenlang test, the Court determines that he did not file a ''tax return'' within the meaning of section 523(a)(1)(B)(i). Consequently, Moroney's 1990 and 1992 tax returns are non-dischargeable under section 523 of the Bankruptcy Code.

IV. Conclusion

For the above stated reasons, the Court concludes that Moroney's 1990 and 1992 tax returns are non-dischargeable.

Therefore, the decision of the bankruptcy court will be affirmed.

An appropriate Order will issue.

October 30th, 2002

Alexandria, Virginia

/s/

UNITED STATES DISTRICT COURT JUDGE

¶2002-5687

Lavina Rae JOHNSON v. COMMISSIONER of Internal Revenue. U.S. District Court, Western Dist. of Washington, (DC WA) CASE NUMBER: C01-5489RJB, Nov. 4, 2002. Years 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000. Decision for Govt.

1. FOIA—failure to exhaust administrative remedies—exemptions—third-party return information; investigatory information. Pro se taxpayer's FOIA complaint against IRS was dismissed on summary judgment: taxpayer failed to exhaust her administrative remedies as to those requests to which IRS had already responded and for which she had requested no administrative appeal before she filed suit; IRS released or found no responsive documents to certain other requests; and release of other responsive documents was properly upheld pending taxpayer's payment of requisite fees. Also, IRS properly withheld husband's return information as protected 3d-party return information; and information identifying 3d parties and witnesses contacted during IRS investigations was exempt where those persons' strong privacy interests outweighed any countervailing public interest in disclosure. *Reference:* United States Tax Reporter ¶76,556.502(75); 76,556.502(10); 61,035.04(5); 76,556.502(60). IRC §6103.

2. FOIA—Privacy Act—damages—estoppel. District court lacked jurisdiction over taxpayer's FOIA-based claim for return of seized property and argument that IRS maintained records system ''to fabricate, falsify and fraudulently represent returns and return information'': taxpayer's claim was really impermissible attempt to

[5] Incidentally, the Court notes that Moroney's lack of good faith in filing his return likely would have failed a Nunez analysis as well, because ''the debtor's intent at the time the returns were filed'' was the simply to complete a task placed on ''the back burner,'' which remained unfulfilled for an extensive period of time, and therefore his delinquent return ''lacked good faith.'' In re Crawley, 244 B.R. at 128.

attack judgment in earlier IRS action against her; and neither FOIA nor PA provided money damages for claim involving access to IRS records. *Reference:* United States Tax Reporter ¶76,556.502(70); 76,556.504; 74,337.504(5).

3. FOIA—Privacy Act—costs—substantially prevailed—proper parties—discovery. Taxpayer wasn't entitled to recover costs of bringing FOIA and PA action against IRS: taxpayer didn't substantially prevail where action provided minimal benefit to public; wasn't necessary to obtain release of requested documents, which were either nonexistent, already released, duplicative of those already released, or exempt from disclosure; and should not have even brought in 1st instance with respect to those requests for which taxpayer hadn't properly exhausted her administrative remedies under FOIA. Also, taxpayer's attempt to amend complaint on ground IRS was improper party was rejected since IRS was clearly agency that allegedly violated FOIA, and thus agency over which FOIA granted jurisdiction; and her request for continuance to conduct additional discovery was denied. *Reference:* United States Tax Reporter ¶76,556.502(72); 76,556.502(80).

United States District Court WESTERN DISTRICT OF WASHINGTON,

JUDGMENT IN A CIVIL CASE

ROBERT J. BRYAN United States District Judge

[ ] Decision by Court. This action came under consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That the Internal Revenue Service's Motion for summary Judgment is GRANTED. Plaintiff's Rule 56(f) Motion to Postpone Consideration of Defendant's Motion for Summary Judgment is DENIED. The case is DISMISSED.

Nov 4, 2002

Date

ORDER GRANTING INTERNAL REVENUE SERVICE'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING CASE

This matter comes before the court on the Internal Revenue Service's Motion for Summary Judgment (Dkt. 54) and on Plaintiff's Rule 56(f) Motion to Postpone Consideration of Defendant's Motion for Summary Judgment (Dkt. 61). The court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

FACTUAL BACKGROUND

Plaintiff filed several Freedom of Information Act (FOIA) and Privacy Act (PA) requests with the Internal Revenue Service (IRS), requesting a variety of documents and records.

1. Plaintiff contends that, on June 24, 1998 (Count 12 of the Third Amended Complaint), she filed a request for a Document filed under DLN 91277-049-00000-8. The Ogden Campus Disclosure Office has no record of having received this FOIA/PA from plaintiff. Kenneth Wilder, the Disclosure Specialist at the Ogden Campus Disclosure Office, determined that the Ogden Campus Disclosure Office received a duplicate FOIA request from plaintiff seeking the document corresponding to the same DLN. Mr. Wilder determined that the IRS had no documents that corresponded to the DLN requested. On August 2, 2001, Mr. Wilder sent a letter notifying plaintiff that there were no documents responsive to her request.

2. On June 25, 1998 (Count 13 of the Third Amended Complaint), plaintiff requested a Document filed under DLN 91277-029-77500-8. The Ogden Campus Disclosure Office received the request on July 7, 1998. The Ogden Campus Disclosure Office determined that it did not possess any documents or records corresponding to the requested DLN, and notified plaintiff of the same on July 20, 1998.

3. On July 28, 2000 (Count 2 of the Third Amended Complaint), plaintiff requested the Collection Case file pertaining to her 1993, 1994, and 1995 personal in-

come taxes. The Ogden Campus Disclosure Office received the request on August 1, 2000. On August 3, 2000, the Ogden Campus Disclosure Office notified plaintiff that her request had been forwarded to the Seattle Disclosure Office because it pertained to collection activities. The August 3, 2000 letter also notified plaintiff that the twenty workday statutory period for responding to a FOIA request would not begin to run until the FOIA/PA request was received by the Seattle Disclosure Office.

On August 8, 2000, the Seattle Disclosure Office received the FOIA/PA request. Sheila Walters, a Disclosure Specialist at the Seattle Disclosure Office, interpreted the FOIA/PA request to mean that plaintiff was seeking any records associated with collection activity for the three years stated in her request. Because Ms. Walters determined that additional time would be required to gather the responsive documents and to make the necessary redactions, Ms. Walters sent plaintiff letters on September 20, 2000, November 9, 2000, December 21, 2000, January 22, 2001, and March 14, 2001, seeking additional time to process the FOIA/PA request. Ms. Walters directed the disclosure clerk to contact the Federal Documents Center to obtain a copy of the collections case file, which consisted of 329 pages. Ms. Walters reviewed the responsive documents to determine whether the IRS needed to redact any information, then redacted 155 pages in full and fifteen pages in part because they contained the return information of a person or persons other than plaintiff. The redacted and withheld pages were withheld pursuant to FOIA, 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(a), and 5 U.S.C. § 552(b)(7)(C). Ms. Walters also withheld five pages in full under 5 U.S.C. § 552(b)(5) because they contained correspondence reflecting the IRS' deliberative process. These five pages consisted of a memorandum from Chief Counsel to the Special Procedures Advisor in Seattle, providing legal advice regarding pending collection activities. Ms. Walters withheld fifteen pages in part and one page in full under 5 U.S.C. § 552(b)(7)(A) on the basis that those documents pertained to an ongoing law enforcement investigation and could interfere with the investigation. Ms. Walters also withheld these pages under 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(e)(7), on the basis that release of these pages would impair federal tax administration. On November 29, 2001, the Seattle Disclosure Office provided plaintiff with 208 pages responsive to her request. The November 29, 2001 letter accompanying the released records described the redactions made and cited to the applicable FOIA subsections underlying those redactions. Ms. Walters enclosed a Form 393 in the November 29, 2001 response letter, setting forth plaintiff's appeal rights. There is nothing in the record to suggest that plaintiff filed an administrative appeal of this determination.

After plaintiff filed this lawsuit, Melinda K. Fisher, an attorney in the Office of General Counsel of the IRS, reviewed the documents responsive to plaintiff's July 28, 2000 FOIA/PA request that had been withheld from disclosure, and determined that some of the responsive information was exempt from disclosure and some could be released. Ms. Fisher's determinations were as follows:

Material withheld in full pursuant to 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(a), and 5 U.S.C. § 552(b)7(C). Ms. Fisher concluded that of the 115 pages previously withheld in full pursuant to 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(a), and 5 U.S.C. § 552(b)(7)(C): (a) the IRS should continue to withhold 110 pages in full because these pages included personal return information and internal correspondence related to an individual or individuals other than plaintiff; (b) the IRS should continue to withhold under 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(a), two pages in full of database transcripts calculating the income tax liability for a business taxpayer or taxpayers other than plaintiff; (c) the IRS should redact and withhold in part the remaining three pages previously withheld in full, with portions of these pages redacted pursuant to 5 U.S.C. § 552(b)(3), in conjunction with

I.R.C. § 6103(a), and 5 U.S.C. § 552(b)(7)(C), on the basis that the withheld portions consisted of information related to a taxpayer or taxpayers other than plaintiff.

Material previously withheld in full pursuant to 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(a), and 5 U.S.C. § 552(b)(7)C). Ms. Fisher concluded that of the fifteen pages previously withheld in part pursuant to 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(a), and 5 U.S.C. § 552(b)(7)C), (a) the IRS should continue to withhold the redacted portions of eleven pages because the information redacted related to a taxpayer or taxpayers other than plaintiff, and that release of this information would not serve the public interest by shedding light on the IRS' performance of its statutory duties; (b) the IRS should continue to withhold some portions of the documents while other portions previously withheld should be released because the information consisted of Inventory Control System transcripts and memoranda related to a taxpayer or taxpayers other than plaintiff, and that release of this information would not serve the public interest by shedding light on the IRS' performance of its statutory duties; and (c) the IRS should continue to withhold Business Master File data pursuant to I.R.C. § 6103(b)(2), of a taxpayer or taxpayers other than plaintiff on the basis that this material is exempt from disclosure pursuant to 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(a).

Material previously withheld in full pursuant to 5 U.S.C. § 552(b)(5). The five pages previously withheld in full, pursuant to 5 U.S.C. § 552(b)(5), consisted of a memorandum by the IRS District Counsel to IRS personnel assigned to investigate plaintiff's tax liability. On review, Ms. Fisher determined that two of these pages should be released in full; those pages contained legal analysis regarding the placement of a nominee lien. Ms. Fisher determined that this information regarding a pending investigation should be released because the information no longer posed harm to the IRS's investigation. Ms. Fisher also determined that the IRS should continue to withhold the remaining three pages in part, pursuant to 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(a), and 5 U.S.C. § 552(b)(7)(C), because the documents contained information on a taxpayer or taxpayers other than plaintiff; because release of this information would not serve the public interest by shedding light on the IRS' performance of his statutory duties; and because the privacy interest of the taxpayer or taxpayers in protecting personal tax information outweighed the pubic interest.

Material previously withheld in part pursuant to 5 U.S.C. § 552(b)(7(A). Of the fifteen pages previously withheld in part pursuant to 5 U.S.C. § 552(b)(7)(A), on review, Ms. Fisher determined that the IRS should release the information on fourteen pages but that the IRS should continue to withhold the remaining page in part, pursuant to 5 U.S.C. § 552(b)(7)(A) because the information described the size and scope of a pending IRS investigation, disclosure of which could reasonably be expected to interfere with that investigation.

Material previously withheld in full pursuant to 5 U.S.C. § 552(b)(7)(A). Ms. Fisher determined that the one page previously withheld in full, pursuant to 5 U.S.C. § 552(b)(7)(A), should be released.

Material previously withheld in full pursuant to 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(e)(7). The IRS released in part the three pages previously withheld in full, pursuant to 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(e)(7). These pages consisted of investigation notes handwritten by the Revenue Officer investigating plaintiff. On review, Ms. Fisher determined that selected portions of these pages should be withheld in part, pursuant to 5 U.S.C § 552(b)(3), in conjunction with I.R.C. § 6103(a), and 5 U.S.C. § 552(b)(7)C), because these portions contained information of a taxpayer or taxpayers other than plaintiff. In addition, Ms. Fisher determined that release of this information would not serve the public interest by shedding light on the IRS' performance of its statutory duties, that the privacy interests of the taxpayer or taxpay-

ers in protecting personal tax information outweighed the public interest in this information, and that the information was exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(C).

Additional material on one page, consisting of the contact information for potential third-party witnesses, has been withheld pursuant to 5 U.S.C. § 552(b)(7)(C). Ms. Fisher determined that release of this information was exempt from disclosure pursuant to 5 U.S.C. § 552(b)(7)(C), because release would not serve the public interest by shedding light on the IRS' performance of its statutory duties, and the privacy interests of the taxpayer or taxpayers in protecting personal contact information outweighed the public interest, if any, in this information.

On September 13, 2002, the Office of Assistant Chief Counsel (Disclosure and Privacy Law) notified plaintiff of Ms. Fisher's review of the documents withheld in response to her July 28, 2000 FOIA request. The Office of Chief Counsel also provided plaintiff with copies of the documents Ms. Fisher had determined were available for release.

4. On October 19, 2000 (Count 1 of the Third Amended Complaint), plaintiff requested Non-Master file assessment voucher 5734 and comments field maintained in a system of records known as the Integrated Data Retrieval System/IRS 34.018 pertaining to plaintiff. This request was received by the Seattle Disclosure Office on October 25, 2000. In November of 2000, Ms. Walters called the Ogden Campus Disclosure office to determine whether that office had processed a similar FOIA/PA request. Peggy London, a Senior Disclosure Specialist, advised Ms Walters that a search for non-master file documents pertaining to 1993, 1994, and 1995 had already been performed and that the Ogden Campus Disclosure Office had notified plaintiff that the documents did not exist. On November 29, 2000, the Seattle Disclosure Office informed plaintiff that there were no documents responsive to her request for non-master file documents. The Seattle Disclosure Office requested additional time to search for documents responsive to the portion of plaintiff's request seeking documents from the Integrated Data Retrieval System/IRS 34.018. Ms. Walters enclosed with the letter a Notice 393, which set forth plaintiff's appeal rights.

Due to uncertainty as to how to properly search for documents responsive to the request seeking documents from the Integrated Data Retrieval System/IRS 34.018, Ms. Walters' manager requested guidance from the headquarters office in Washington, D.C. While waiting for a response from headquarters, Ms. Walters mailed three letters to plaintiff requesting additional time to process her FOIA/PA request. These letters were dated January 29, 2001, March 14, 200l, and May 14, 2001. Ms. Walters provided contact information in each letter as well as in the November 29, 2000 letter in case plaintiff wished to inquire as to the status of her request. On June 25, 2001, Ms. Walters received a letter from plaintiff consenting to the time extensions.

In August of 2001, a Disclosure Specialist in the Ogden Campus Disclosure Office advised the Seattle Disclosure Office that the non-master file comments field was not maintained in the system of records known as Treasury/IRS 34.018. On August 21, 2001, Ms. Walters contacted Denise Higley in the Ogden Campus Disclosure Office to conduct another search for any non-master file records. On August 22, 2001, Ms. Higley reaffirmed that the records did not exit. On August 27, 2001, the Seattle Disclosure Office notified plaintiff that no comments fields are maintained in the system of records Treasury/IRS 34.018 and that there were no documents responsive to that portion of her request. Ms. Walters enclosed a Form 393 with the August 27, 2001 letter.

5. On June 22, 2001 (Count 6 of the Third Amended Complaint), plaintiff requested Form 23C records of assessment voucher for the years 1993, 1994 and 1995. The Ogden Disclosure Office received the request on July 30, 2001. Mr. Wilder contacted the IRS Accounting Office in Ogden, which is responsible for

maintaining records of the assessments made against individuals who reside in the region covered by the IRS' Ogden Campus, including Washington state. On August 29, 2001, the Ogden Disclosure Office informed plaintiff that the IRS needed additional time to process her request. On September 27, 2001, the Ogden Disclosure Office provided plaintiff with copies of the five pages responsive to her request; these documents consisted of RACS 006 transcripts, which would include any assessments made against plaintiff in 1994. The IRS did not withhold any documents or information responsive to plaintiff's June 22, 2001 FOIA/PA request.

6. On July 30, 2001, the Ogden Campus Disclosure Office received three FOIA/PA requests from plaintiff, dated June 27, 2001 (Count 7 of the Third Amended Complaint), June 30, 2001 (Count 8 of the Third Amended Complaint), and July 4, 2001 (Count 9 of the Third Amended Complaint). These requests sought copies of documents corresponding to DLNs 29247-450- 70019-8, 29247-647-10037-7, and 29247-450-70021-8, respectively. Mr. Wilder reviewed plaintiff's account information and determined that these DLNs corresponded to documents included in the examination files maintained by the IRS' Seattle Office. By reviewing the online listing of FOIA/PA requests filed by plaintiff, Mr. Wilder determined that plaintiff had already submitted a FOIA/PA request to the Seattle office, seeking a copy of the examination file, which would include documents corresponding to these DLNs. By three letters dated October 12, 2001, the Ogden Campus Disclosure Office notified plaintiff that her requests duplicated the requests received by the Seattle Disclosure Office and that the Seattle office would be responding to these requests. Mr. Wilder enclosed a Notice 393 in each of the three letters dated October 12, 2001.

In the Seattle Disclosure Office, Ms. Walters verified that the documents corresponding to the requested DLNs pertained to examination file documents and that plaintiff had requested a copy of the examination file in a FOIA/PA request received by the Seattle Disclosure Office in 1998. Plaintiff's 1998 request for the examination file and proof that the IRS had responded to her request had been destroyed in accordance with the IRS' record retention policies. As a result, Ms. Walters decided to process plaintiff's three FOIA/PA requests received by the Ogden Disclosure Office on July 30, 2001. The examination files, consisting of 1706 pages, were received by the Seattle Disclosure office on August 13, 2002. Upon review, Ms. Walters determined that of the 1,706 pages, 702 pages should be withheld in full pursuant to 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(a), and 5 U.S.C. § 552(b)(7)(C), because the documents consisted of personal return information of a taxpayer or taxpayers other than plaintiff, and information about third-party witnesses in an investigation of a taxpayer or taxpayers other than plaintiff. Ms. Walters also determined that release of this information would constitute an unwarranted invasion of personal privacy if released.

Of the 1,004 remaining pages, the Seattle Disclosure Office withheld in part 178 pages pursuant to 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(a), and 5 U.S.C. § 552(b)(7)(C), because the documents contained return information of a taxpayer or taxpayers other than plaintiff. Ms. Walters also determined that release of this information would constitute an unwarranted invasion of personal privacy if released.

On September 13, 2002, the Seattle Disclosure Office notified plaintiff that the 1,004 pages to be released in full or in part would be mailed to her upon receipt of payment for the costs incurred in copying the requested documents. In accordance with 26 C.F.R. 601.702(f) and the Seattle Disclosure office's regular operating procedure, Ms. Walters did not charge plaintiff for copies of the first 100 pages, and charged her $.20 for each of the remaining 904 pages. The total cost for the copies was determined to be $180.80. The IRS contends that, upon receipt of payment, Ms. Walters will mail the 1,004 pages to plaintiff.

7. On July 5, 2001 (Count 4 of the Third Amended Complaint), plaintiff requested tax module documents pertaining to plaintiff for the years 1992–95. The Ogden Disclosure Office received this request on July 30, 2001. Mr. Wilder located seventeen pages of documents responsive to plaintiff's request. On September 5, 2001, the Ogden Disclosure Office sent copies of the seventeen pages to plaintiff. The IRS did not withhold any documents or information responsive to plaintiff's July 5, 2001 request.

8. On July 6, 2001 (Count 3 of the Third Amended Complaint), plaintiff requested AMDISA documents pertaining to plaintiff for the tax years 1995 through 1997. The Ogden Campus Disclosure Office received the request on July 30, 2001. Mr. Wilder checked the Integrated Data Retrieval System to determine whether such information existed, and determined that the IRS did not possess any documents responsive to plaintiff's request. On August 30, 2001, the Ogden Campus Disclosure Office notified plaintiff that the IRS did not locate any documents responsive to her request. Mr. Wilder enclosed a Notice 393 with the August 30, 2001 letter.

9. On July 7, 2001 (Count 5 of the Third Amended Complaint), plaintiff requested copies of the Individual Master File transcript pertaining to her account for the years 1998 to 2000. The Ogden Campus Disclosure Office received the request on July 31, 2001. Mr. Wilder accessed plaintiff's account information and found no documents responsive to the request. On August 27, 2001, the Ogden Campus Disclosure Office notified plaintiff that the IRS was unable to locate any documents responsive to her July 7, 2001 request.

10. On July 13, 2001 (Count 10 of the Third Amended Complaint), plaintiff requested copies of documents pertaining to James T. Aurand, a revenue officer employed by the IRS. Because Mr. Aurand was an employee in the IRS' Seattle offices, plaintiff's request was under the jurisdiction of the Seattle Disclosure Office. On August 15, 2001, the Ogden Campus Disclosure Office notified plaintiff that any documents responsive to her request would be under the control of the Seattle Disclosure Office and that the request had been forwarded to that office for processing.

The Seattle Disclosure Office received plaintiff's July 13, 2001 request on July 30, 2001. On January 2, 2002, the Seattle Disclosure Office partially responded to plaintiff's request by informing her that delegation orders are generally issued by position or title, not by individual employee, and by providing her with copies of IRS-wide delegation orders. On January 23, 2002, the Seattle Disclosure Office sent plaintiff a copy of Mr. Aurand's oath of office, and informed her that any additional responsive material regarding Mr. Aurand was not available according to the Office of Personnel Management (OPM) regulations and under 5 U.S.C. § 552(b)(6). The January 23, 2002 letter notified plaintiff that she could file an administrative appeal of this FOIA determination with OPM as permitted under 5 C.F.R. 294.110. Ms. Walters then closed the Seattle Disclosure Office's file on plaintiff's July 13, 2001 FOIA request. OPM has no record of receiving a FOIA appeal from plaintiff.

11. On August 10, 2001, the Ogden Campus Disclosure Office received three FOIA/PA requests from plaintiff, dated July 14, 2001 (Count 11 of the Third Amended Complaint), July 15, 2001 (Count 14 of the Third Amended Complaint), and July 18, 2001 (Count 15 of the Third Amended Complaint). Mr. Wilder consolidated the three requests for processing because they were identical in format and were received by the Ogden Campus Disclosure Office on the same day.

Part (a) of each request sought the identity of the assessment officers who had authorized any assessments made against plaintiff between 1993 and 1995. Mr. Wilder contacted the IRS' Accounting Office in Ogden regarding this request and discovered that assessment officers Shar Code and Michael Keefer had authorized assessments against plaintiff. Mr. Wilder then obtained the appointment affidavits for

each assessment officer. On January 4, 2002, the Ogden Campus Disclosure Office provided plaintiff with a copy of these documents, consisting of two pages. The IRS did not withhold any information or records related to this request.

Part (b) of each request sought the delegation orders pertaining to the assessment officers. Mr. Wilder verified with the IRS' Accounting Office that the IRS was not in possession of the delegation orders requested. In the January 4, 2002 response letter to plaintiff, the Ogden Campus Disclosure Office notified plaintiff that the only applicable delegation orders were those delegation orders that are publicly available in the Internal Revenue Manual. The letter further provided plaintiff with the mailing address and costs for requesting copies of these publicly available documents from the IRS' FOIA reading Room.

Parts (c) and (d) of plaintiff's requests sought copies of Forms 9984 Examining Officer's Activity Record and 5600 Statutory Notice Worksheet for any assessments made against her between 1993 and 1995. If such documents had been created, they would have been included in the examination administrative file, which was in the possession and control of the IRS' Seattle Disclosure Office. Mr. Wilder verified that plaintiff had previously submitted a FOIA request to the Seattle Disclosure Office seeking a copy of the examination administrative file. In the January 4, 2002 response letter, plaintiff was notified that the Seattle Disclosure Office would be responding to items (c) and (d) of her request. Mr. Walters verified that in 1998 the Seattle Disclosure Office received a FOIA/PA request from plaintiff for a copy of the examination file. Plaintiff's 1998 request for the examination file and proof that the IRS had responded to her request had been destroyed in accordance with the IRS' retention policies. As a result, Ms. Walters in the Seattle Disclosure Office agreed to process plaintiff's three FOIA/PA requests that had been received by the Ogden Campus Disclosure Office. After searching for the files, the Seattle Disclosure Office received the examination files on August 13, 2002. These files contained the same documents that were responsive to plaintiff's June 27, 2001, June 30, 2001, and July 4, 2001 requests. As described above in the description of the IRS' response to plaintiff's requests of June 27, 2001, June 30, 2001, and July 4, 2001, Ms. Walters determined that 1,004 pages responsive to plaintiff's three FOIA/PA requests could be released in full or in part. On September 13, 2001, the IRS notified plaintiff that these pages would be released to her upon receipt of payment for the costs incurred in copying the requested documents.

Parts (e) and (f) of plaintiff's requests sought copies of Form 4340 Certificate of Assessments and Payments and 813 Document Register pertaining to any assessments made against plaintiff between 1993 and 1995. If such documents had been created, they would have been listed in the taxpayer's account. Mr. Wilder reviewed plaintiff's account information for the relevant tax years and found that the IRS was not in possession of any documents responsive to her requests. In the January 4, 2002 response letter, the Ogden Campus Disclosure Office notified plaintiff that the IRS was not in possession of any documents or information responsive to parts (e) and (f) of her request.

Part (g) of plaintiff's request sought copies of the Form 23C Summary Record of Assessment for any assessments made against her between 1993 and 1995. In response, the Ogden Campus Disclosure Office provided plaintiff with twenty-two pages of documents consisting of the Summary Record for the requested years. The Ogden Campus Disclosure Office did not withhold any information responsive to plaintiff's request for Forms 23C. In addition, the Ogden Campus Disclosure Office had previously provided plaintiff with a copy of the Summary Record of Assessment for the same period in response to her June 22, 2001 FOIA request.

On August 30, 2001, plaintiff filed this action, alleging that the IRS improperly withheld or concealed records, delayed in responding to her requests for documents or failed to respond to requests for records,

and maintained inaccurate records which were used to take an adverse action against her. *See*Third Amended Complaint.

The IRS has now filed a motion for summary judgment.

MOTION FOR SUMMARY JUDGMENT

The IRS filed a motion for summary judgment, contending that (1) the court lacks subject matter jurisdiction over the requests filed June 24, 1998 (Count 12 of the Third Amended Complaint), June 25, 1998 (Count 13), July 28, 2000 (Count 2), October 19, 2000 (Count 1), and July 7, 2001 (Count 5) because plaintiff did not exhaust her administrative remedies; (2) plaintiff fails to state a claim upon which relief may be granted because the IRS has not withheld and is not improperly withholding any documents responsive to her FOIA/PA requests that were dated October 19, 2000 (Count 1), July 6, 2001 (Count 3), July 5, 2001 (Count 4), July 7, 2001 (Count 5), June 22, 2001 (Count 6), June 27, 2001 (Count 7), June 30, 2001 (Count 8), July 4. 2001 (Count 9), July 13, 2001 (Count 10), July 14, 2001 (Count 11), June 24, 1998 (Count 12), June 25, 1998 (Count 13), July 15, 2001 (Count 14), and July 18, 2001 (Count 15); (3) plaintiff is not entitled to monetary damages under the FOIA or the Privacy Act; (4) plaintiff is not entitled to attorney's fees or costs; and (5) the Commissioner of Internal Revenue is not the proper party defendant in this lawsuit.

In response to the motion for summary judgment, plaintiff responded to the merits of the IRS' summary judgment motion, and also requested that the court delay consideration of this motion for summary judgment for sixty days, pursuant to Fed.R.Civ.P. 56(f), so that plaintiff may conduct the discovery necessary to respond to this morion for summary judgment.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply ''some metaphysical doubt.''). *See also*Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial --e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra).* Conclusory, non specific statements in affidavits are not sufficient, and ''missing facts'' will not be ''presumed.'' *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888–89 (1990).

DISCUSSION

[1] 1. Failure to exhaust administrative remedies with regard to requests relating to Count 1 (October 19, 2000), Count

2 (July 28, 2000), Count 5 (July 7, 2001), Count 12 (June 24, 1998), and Count 13 (June 25, 1998). The IRS contends that because plaintiff failed to exhaust her administrative remedies by filing administrative appeals with regard to the responses to these requests, the claims regarding these requests should be dismissed.

In a FOIA action, a plaintiff must exhaust administrative remedies prior to seeking judicial review. *See American Fed'n of Gov't Employees v. Department of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990); *Spannnaus v. Department of Justice*, 824 F.2d 52, 58 (D.C. Cir. 1987); *United States v. Steele*, 799 F.2d 461, 466 (9th Cir. 1986); *United States v. United States District Court*, 717 F.2d 478, 480 (9th Cir. 1983). Where a FOIA plaintiff attempts to obtain judicial review without first exhausting administrative remedies, the lawsuit is subject to dismissal for lack of subject matter jurisdiction. *See Hymen v. Merit Sys. Protection Bd.*, 799 F.2d 1421, 1423 (9th Cir. 1986)(*overruled on other grounds by Capital Tracing, Inc. v. United States*, 63 F.3d 859 [76 AFTR 2d 95-5993] (9th Cir. 1995) and *Williams Scaife v. Department of Defense Dependent Schools*, 925 F.2d 346 (9th Cir. 1991)).

The FOIA requires that the agency respond to a request for documents within twenty workdays after the receipt of the request. *See* 5 U.S.C. § 552(a)(6)(A)(ii). If an agency fails to respond to the requester within the twenty workday period, but provides a response before the requester files suit, the requester must pursue administrative remedies prior to filing a complaint in the district court. *See Ogelsby v. U.S. Department of Army*, 920 F.2d 57, 61 (D.C. Cir. 1990); Taylor v. Appleton, 30 F.3d 1365, 1369 [74 AFTR 2d 94-6303] (11th Cir. 1994); *Soghomonian v. U.S.*, 82 F.Supp.2d 1134, 1148 [85 AFTR 2d 2000-368] (E.D.Cal. 1999).

At the time plaintiff filed this suit in federal district court, the IRS had responded to plaintiff's requests of October 19, 2000 (Count 1), July 28, 2000 (Count 2), July 7, 2001 (Count 5), June 24, 1998 (Count 12), and June 25, 1998 (Count 13). Plaintiff was required to file an appeal of the IRS determinations regarding these requests before filing a FOIA/PA action in federal court. Plaintiff has not shown that she filed such appeals. These claims should be dismissed.

After plaintiff filed this action, Ms. Fisher reviewed the documents responsive to plaintiff's July 28, 2000 request. Following that review, additional documents and portions of documents were released to plaintiff. The review by Ms. Fisher did not relieve plaintiff of the requirement to file an administrative appeal on the November 29, 2001 decision of the IRS in response to the July 28, 2000 request.

2. Improper withholding of documents related to requests in Count 1 (October 19, 2000), Count 3 (July 6, 2001), Count 4 (July 5, 2001), Count 5 (July 7, 2001), Count 6 (June 22, 2001, Count 7 (June 27, 2001), Count 8 (June 30, 2001), Count 9 (July 4, 2001), Count 10 (July 13, 2001), Count 11 (July 14, 2001), Count 12 (June 24, 1998), Count 13 (June 25, 1998), Count 14 (July 15, 2001), and Count 15 (July 18, 2001). Although Counts 1, 5, 12, and 13 are dismissed by this order for failure to exhaust administrative remedies, these claims will be addressed here on an alternate basis.

In order to prevail on a motion for summary judgment in a FOIA action, an agency must show that a reasonable search for responsive records was conducted. *See Patterson v. IRS*, 56 F.3d 832, 841 [75 AFTR 2d 95-2707] (7th Cir. 1995); *Oglesby v. United States Dep't of the Army*, 920 F.2d at 68. In a FOIA action, the court may enjoin an agency where the agency has (1) improperly (2) withheld (3) agency records. *See* 5 U.S.C. § 552(a)(4)(B); *Kissinger v. Reporter's Comm. For Freedom of the Press*, 445 U.S. 136, 150 (1980). Each of these three criteria must be met before a district court may formulate remedies and force an agency to comply with a FOIA request. *See United States Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 142 [63 AFTR 2d 89-1492] (1989). A court may also enjoin

an agency where the agency has refused to comply with an individual request for agency documents pursuant to the Privacy Act. *See* 5 U.S.C. § 552a(g)(1). If, upon the initiation of a lawsuit, it is determined that all documents found responsive to the underlying request have been released in full to the requester, the litigation should be dismissed on the grounds of mootness because there is no justiciable controversy. *See Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987); *Carter v. V.A.*, 780 F.2d 1479, 1481 (9th Cir. 1986); *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982).

Plaintiff contends that the IRS failed to respond to her requests and failed to produce the documents she had requested. The record shows that the IRS did not withhold any documents which were responsive to plaintiff's FOIA/PA requests underlying Counts 1, 3, 4, 5, 6, 12, and 13; and Counts 11, 14, and 15, parts(a), (b), (e), (f) and (g). *See* Factual Background above. For each of these requests, the IRS either provided plaintiff with the requested documents or was unable to locate any responsive documents. The IRS is awaiting payment for copies from plaintiff before sending the responsive documents re-quested in Counts 7, 8, and 9; and Counts 11, 14, and 15, parts (c) and (d).

With regard to Plaintiff's FOIA/PA requests underlying Counts 7, 8, and 9; and Counts 11, 14, and 15, parts (c) and (d), the IRS withheld some documents in full and some in part pursuant to 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(a). Withholding of information related to tax return and return information of another taxpayer or taxpayers is authorized under 5 U.S.C. § 552(b)(3), in conjunction with I.R.C. § 6103(a), and 5 U.S.C. § 552(b)(7)(C). Plaintiff contends that the information withheld relates to tax information of her husband, and that the IRS is not justified in withholding such information from her. Even if the information withheld relates to plaintiff's husband, the record does not show that plaintiff's husband requested that the information be released to plaintiff. The IRS should not be left to guess whether a person would object to release of information that concerns private information requested by a third party.

The IRS also withheld information identifying third parties and witnesses contacted during an IRS investigation, as well as information that these parties gave to the IRS, under 5 U.S.C. § 552(b)(7)(C). The IRS has balanced the public interest in disclosure of such information against the invasion of personal privacy, and has determined as a categorical matter that such information is exempt from public disclosure because there are strong privacy interests in the personal information withheld and there is little or no countervailing public interest in such information; that determination is reasonable. *See Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *Safecard Serv's Inc.*, 926 F.2d 1197 (D.C. Cir. 1991). Plaintiff has not shown that this information was improperly withheld.

There is no evidence that the IRS improperly withheld documents plaintiff had requested. The IRS' motion for summary judgment should be granted and the case should be dismissed.

3. Claims that the IRS maintains a system of records designed to fabricate, falsify and fraudulently represent returns and return information. Dkt. 61, ¶ 32. In the Third Amended Complaint, plaintiff "demands this court order the return of all properties taken from Plaintiff as a direct result of the adverse effect of Defendants [sic] inaccurate records and such properties shall include bank accounts, savings accounts and payments under contract, plus a reasonable interest the total to be made upon final judgment in the above captioned case." Third Amended Complaint, ¶ 260.

It appears that the plaintiff was involved in some action involving the IRS, and that as a result of a decision in that action, plaintiff lost certain financial assets. Plaintiff appears to claim that the records of the IRS were falsified and inaccurate. Plaintiff could have raised that issue in the underlying IRS action against her. This claim goes beyond the disclosure provisions of the FOIA and PA, and appears to be an at-

tempt to use the FOIA and PA to attack a judgment entered against plaintiff in a separate proceeding. Plaintiff may not use the FOIA and Privacy Act to make such an attack. The claims that the IRS maintains a system of records designed to fabricate, falsify and fraudulently represent returns and return information are not properly before the court in this action, and these claims should be dismissed on this motion for summary judgment.

4. **[2]** Monetary damages under FOIA and PA. The FOIA does not provide a remedy of money damages. *See Lake Mohave Boat Owners Assoc. v. National Park Serv.*, 78 F.3d 1360, 1363 n.1 (9th Cir. 1996); *Gale v. U.S. Department of Justice*, 628 F.2d 224, 226 n. 4 (D.C. Cir. 1980). Damages are not recoverable in any suit brought under the Privacy Act, 5 U.S.C. § 552a(g)(1)(B), involving access to records, where the remedy is injunctive relief. *See* 5 U.S.C. § 552a(g)(3)(A); *Thurston v. United States*, 810 F.2d 438, 447 (4th Cir. 1987); *Cell Assoc., Inc. v. National Inst's of Health*, 579 F.2d 155, 1161–62 (9th Cir. 1978). Plaintiff is not entitled to recover monetary damages for the alleged violations of her rights under the FOIA/PA. Even if plaintiff were to prevail in this case, which she has not, she is not entitled to monetary damages. The IRS' motion for summary judgment should be granted as to this issue.

5. **[3]** Costs. In a FOIA action, ''[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.'' 5 U.S.C. § 552(a)(4)(E). The Privacy Act also provides for an award of reasonable attorney's fees and costs incurred ''in any case under this paragraph in which the complainant has substantially prevailed.'' 5 U.S.C. § 552a(g)(3)(B). In her response, plaintiff contends that she is not requesting attorney's fees in connection with this action, but requests that the court order that the IRS reimburse her for the costs incurred in prosecuting this action.

In order to establish that she substantially prevailed under 5 U.S.C. § 552(a)(4)(E), a plaintiff must prove (1) that the prosecution of the action could reasonably be regarded as necessary to obtain the information; and (2) that the action had a substantive causative effect on the delivery of the information. *Long. v. IRS*, 932 F.2d 1309, 1313 [67 AFTR 2d 91-990] (9th Cir. 1991). The criteria for awarding attorney's fees and litigation costs in Privacy Act actions are the same as the criteria for awarding such fees and costs as in a FOIA case. *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1088 (5th Cir. 1981), *cert. denied*, 455 U.S. 950 (1982).

Plaintiff did not exhaust her claims relating to Count 1 (October 19, 2000), Count 2 (July 28, 2000), Count 5 (July 7, 2001), Count 12 (June 24, 1998), and Count 13 (June 25, 1998) by filing an administrative appeal. She should not have filed this civil case with regard to those claims until she had pursued the administrative process, and an award of costs is not warranted with regard to those claims. With regard to Count 1 (October 19, 2000), Count 3 (July 6, 2001), Count 4 (July 5, 2001), Count 5 (July 7, 2001), Count 6 (June 22, 2001, Count 7 (June 27, 2001), Count 8 (June 30, 2001), Count 9 (July 4, 2001), Count 10 (July 13, 2001), Count 11 (July 14, 2001), Count 12 (June 24, 1998), Count 13 (June 25, 1998), Count 14 (July 15, 2001), and Count 15 (July 18, 2001), a review of the record shows that the IRS had responded to some of these requests before plaintiff filed this civil action. Some of the responses of the IRS were sent after plaintiff had filed this action. The record shows, however, that the IRS searched for the requested records and was in the process of identifying, locating, and providing the documents at issue when plaintiff filed this civil action. Plaintiff's requests were complicated because some were duplicative and some requested information that was not in a form retrievable by the IRS. Plaintiff has not shown that the prosecution of this action was necessary to obtain the information requested. Moreover, the benefit to the public is minimal, considering that plaintiff requested access to documents and

records pertaining to herself; and the IRS has shown that its actions had a reasonable basis in law. *See Church of Scientology v. U.S. Postal Service*, 700 F.2d 486, 492 (9th Cir. 1983). Plaintiff is not entitled to an award of costs for prosecuting this action. The IRS' motion for summary judgment should be granted as to this issue.

6. Proper party defendant. Plaintiff named ''Commissioner of Internal Revenue'' as the defendant in this action. The district court has jurisdiction over the agency that allegedly violated the FOIA and PA. 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552a(g)(1). Individual agency employees are not proper party defendants in FOIA actions. *See Thompson v. Walbran*, 990 F.2d 403, 405 (8th Cir. 1993); *Petrus v. Bowen*, 833 F.2d 581, 582 (5thCir. 1987). The Internal Revenue Service is the proper party defendant in this action. Plaintiff's arguments in her response to the motion for summary judgment, to the effect that the IRS does not have the capacity to sue or be sued, are frivolous. Because any amendment of the complaint to name the proper party defendant would be futile, the court should not permit plaintiff to file an amended complaint naming the proper party defendant.

7. Motion for continuance under Fed.R.Civ.P. 56(f). Plaintiff has requested that the court delay consideration of this motion for summary judgment for sixty days, pursuant to Fed.R.Civ.P. 56(f) so that she may conduct the discovery necessary to respond to this motion for summary judgment. Plaintiff contends that the IRS did not identify their ''expert witnesses'' until it was too late for her to engage in discovery during the discovery period.

Fed.R.Civ.P. 56(f) provides as follows:

> When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In order to continue a summary judgment motion under Fed.R.Civ.P. 56(f), a party so requesting must show that he or she diligently pursued previous discovery opportunities, and must also show how allowing additional discovery would preclude summary judgment. *Qualls v. Blue Cross of California, Inc.*, 22 F.3d 839, 844 (9th Cir. 1994). Plaintiff has not made a sufficient showing under Fed.R.Civ.P. 56(f) to continue this case or to conduct additional discovery. The discovery period set by the court has concluded. The witnesses plaintiff has identified as ''experts'' are fact witnesses; plaintiff had the opportunity to conduct discovery related to these witnesses during the discovery period. Moreover, plaintiff has made no showing that additional discovery would preclude summary judgment in this case. Plaintiff's Rule 56(f) Motion to Postpone Consideration of Defendant's Motion for Summary Judgment (Dkt. 61) should be denied.

Therefore, it is hereby

ORDERED that the Internal Revenue Service's Motion for Summary Judgment (Dkt. 54) is GRANTED. Plaintiff's Rule 56(f) Motion to Postpone Consideration of Defendant's Motion for Summary Judgment (Dkt. 61) is DENIED. The case is DISMISSED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 1st day of November, 2002.

ROBERT J. BRYAN

United States District Judge

¶2002-5688

In Re: William D. WOODS, Debtor. William D. WOODS, PLAINTIFF v. INTERNAL REVENUE SERVICE, and INDIANA DEPARTMENT OF REVENUE, DEFENDANTS. U.S. Bankruptcy Court, Southern Dist. of Indiana, (Bktcy Ct IN) Case No. 01-01694-JKC-7; Adv. Pro.

No. 01-212, Oct. 28, 2002. Judgment entereed in accord with (2002, Bktcy Ct IN) 90 AFTR 2d 2002-6498, 2002-2 USTC ¶50675. Years 1988, 1989, 1990, 1991, 1992, 1993. Decision for Taxpayer.

1. Tax claims in bankruptcy—dischargeability—untimely filed returns—what constitutes returns. Final judgment was entered in Chap. 7 debtor's favor against IRS, consistent with prior summary judgment decision. *Reference:* United States Tax Reporter ¶68,726.52(27).

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF INDIANA INDIANAPOLIS DIVISION,

FINAL JUDGMENT

James K. Coachys, Judge

[1] The Court, following a status conference on October 28, 2002, finds that all of the issues pending in the above Adversary Proceeding as between Plaintiff/Debtor William D. Woods and the Internal Revenue Service have been concluded. Therefore, the Court now enters final judgment in favor of the Plaintiff and against the Internal Revenue Service consistent with its August 30, 2002 Order Denying United States' Motion for Summary Judgment and Granting Partial Summary Judgment in Favor of Debtor.

IT IS SO ORDERED.

Dated: OCT 28, 2002

James K. Coachys, Judge

United States Bankruptcy Court

¶2002-5689

William L. COMER, PLAINTIFF v. INTERNAL REVENUE SERVICE and Department of Justice, DEFENDANTS. U.S. District Court, Eastern Dist. of Michigan, (DC MI) Case No. 97-CV-76329-DT, Oct. 30, 2002. Earlier proceedings at (2002, DC MI) 89 AFTR 2d 2002-2352; (2001, DC MI) 88 AFTR 2d 2001-6409; (2000, DC MI) 86 AFTR 2d 2000-6681, 2001-1 USTC ¶50206, denying reconsideration of (2000, DC MI) 86 AFTR 2d 2000-6262, 2001-1 USTC ¶50204; and (2000, DC MI) 84 AFTR 2d 99-6767, 99-2 USTC ¶50927. Decision for Taxpayer in part and for Govt. in part.

1. FOIA—litigation costs—attorney's fees. Pro se taxpayer was awarded costs of litigating FOIA action against IRS and Justice Dept.: taxpayer was "eligible" under FOIA to recover costs where he substantially prevailed in action that was reasonably necessary to obtain, and resulted in substantial release of documents that were non-public records available only from govt.; and taxpayer was "entitled" to recovery where action was in public, not any commercial interest, and forced govt. to release information that it had been unreasonably withholding for 4 years. But, taxpayer's recovery was limited to exclude paralegal costs, which, although not precluded by 28 USC §1920, were awardable only as component of attorney's fees, to which taxpayer as pro se litigant wasn't entitled. *Reference:* United States Tax Reporter ¶76,556.502(72); 76,556.502(70).

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION,

ORDER GRANTING IN PART, DENYING IN PART, PLAINTIFF'S MOTION FOR LITIGATION COSTS

ROBERT H. CLELAND UNITED STATES DISTRICT JUDGE

Pending before the court is Plaintiff William L. Comer's "Motion for an Award of All Litigation Costs," filed on March 22, 2002. The matter is fully briefed, and the court finds that oral argument is unnecessary. *See* E.D. Mich. LR 7.1(e) (2). For the reasons stated below, the court will grant in part, deny in part, Plaintiff's motion.

This litigation, which commenced on December 30, 1997, stems from Plaintiff's requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff filed a *pro se* complaint consisting of thirty-five counts covering more than forty separate FOIA requests to various Internal Revenue offices and the Department of Justice. On March 8, 2002, the court is-

sued an order granting Defendants' motion to dismiss the sole remaining count of Plaintiff's complaint for lack of subject matter jurisdiction and accordingly dismissed the complaint. Thereafter, Plaintiff brought the instant motion, seeking litigation costs incurred from his FOIA claims.

II. DISCUSSION

A. Recovery Of Litigation Costs under FOIA

[1] Recovery of litigation costs under the FOIA fee-shifting provision is subject to a two-step inquiry. *GMRI, Inc. v. E.E.O.C.*, 149 F.3d 449, 451 (6th Cir. 1998). Application of FOIA § 552(a)(4)(E) requires judicial determination of both the Plaintiff's eligibility for and entitlement to an award of fees and costs. *Tax Analysts v. United States Department of Justice*, 965 F.2d 1092, 1093 (D.C. Cir. 1992).

A complainant may be eligible to recover attorney fees and litigation costs reasonably incurred in any case where the complainant has "substantially prevailed" pursuant to FOIA § 552(a)(4)(E). A plaintiff need not win a lawsuit or receive a court order compelling the government to produce the requested documents to recover fees and costs. *Dixie Fuel Co. v. Callahan*, 136 F. Supp. 2d 659 (E.D. Ky. 2001). A plaintiff will have "substantially prevailed" if he presents convincing evidence showing he is "eligible" for an award by: (1) proving that filing of the FOIA action was reasonably necessary to obtain the information sought; and (2) proving that the action had a substantial causative effect on an ultimate receipt of that information. *Id.* at 662, (*citing GFRI*, 149 F.3d at 451–52).

Although Defendants mooted Plaintiff's FOIA claim for production by turning over certain documents, the merits of the claim remain relevant to determining whether Plaintiff substantially prevailed. Plaintiff acted reasonably in filing his FOIA claim since the documents were not available as public records and were only obtainable through Defendants. Plaintiff's FOIA claim also had a causative effect on Plaintiff's ultimate acquisition of the requested documents. Plaintiff's prosecution of the lawsuit resulted in the release of a substantial number of documents by Defendants. The court therefore finds that Plaintiff is "eligible" to recover litigation costs.

The court must next determine whether, in equity, Plaintiff is "entitled" to an award of fees and costs. Three factors guide this analysis: "(1) the benefit to the public deriving from the case; (2) the commercial benefit to the complainant and the nature of its interest in the records; and (3) whether the agency's withholding had a reasonable basis in law." *Dixie Fuel*, 136 F. Supp. 2d at 664 (*quoting Detroit Free Press*, 73 F.3d 93, 97 (6th Cir. 1996)).

Under the first factor, the court finds that this case provided a distinct benefit to the public.

> The public a unique interest in the enforcement and vindication of the FOIA. Each time an agency disregards its obligation to diligently answer and provide information in response to FOIA requests, the public is harmed. In the same sense, the public interest is served when, as in the case at bar, a court refuses to condone the agency's behavior by ignoring its unreasonable conduct.

Dixie Fuel, 136 F. Supp. 2d at 664. Defendants' protracted release of a large number of documents to Plaintiff constitutes unreasonable conduct. Awarding Plaintiff litigation costs in this case serves the public interest as an enforcement and vindication of the FOIA.

Under the second factor, the court finds that Plaintiff's FOIA action was not motivated by commercial benefit. Defendants mistakenly rely on *Aviation Data Service v. Federal Aviation Administration*, 687 F.2d 1319 (10th Cir. 1982), alleging that Plaintiff was motivated by another lawsuit and thus maintained a private interest in its FOIA action. Plaintiff's alleged "private interest" in other ligation differs substantially from the "commercial benefit" analysis offered in *Aviation Data*: the Defendants there were "engaged in the business of collecting and selling to clients" information gathered through its FOIA actions,

id. at 1320; here, there is no evidence that Plaintiff planned to sell any information gathered through its FOIA action, nor was Plaintiff specifically engaged in such a business. Thus, this factor also favors Plaintiff.

Finally, the court finds that Defendants' withholding of information to Plaintiff had no reasonable basis in law. Defendants offer no legal basis for not complying with the FOIA request. The court recognizes that Plaintiff's requests were numerous, but a delay of four years in this case was unreasonable. Accordingly, the court finds that this factor weighs in favor of an award of costs.

Upon equitable consideration of all the above factors, the court concludes that Plaintiff is entitled to receive litigation costs under the FOIA.

B. Amount of Litigation Costs

Under FOIA, Federal district courts "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." FOIA § 552(a)(4)(E). Plaintiff seeks $7,819.92 in litigation costs. Defendants ask the court to reduce this amount by $4,707.45, arguing that the "other litigation costs" recoverable under FOIA are limited to those costs specifically enumerated in Local Rule 54.1, which lists taxable costs in the Bill of Costs Handbook for the Eastern District of Michigan, in accordance with 28 U.S.C. § 1920.[1] For the reasons set forth below, the court holds that 28 U.S.C. § 1920 does not limit litigation costs recoverable under FOIA. The court agrees with Defendants, however, that Plaintiff's request for paralegal fees should be denied. Plaintiff is therefore entitled to recover all of its litigation costs, but is not entitled to recover its requested paralegal fees.

The first issue the court must consider in determining the amount of Plaintiff's litigation costs is whether § 1920 expressly limits these costs. The court rejects the "contention that costs under FOIA [are] limited by § 1920." *Blazy v. Tenet*, 194 F.3d 90, 95 (D.C. Cir 1999); *see also Kuzma v. Internal Revenue Service*, 821 F.2d 930 [60 AFTR 2d 87-5166] (2nd Cir. 1987). "The statutory language and the purposes of the relevant sections, as well as the legislative history and decisions of various other courts, lead us to conclude that an award of costs pursuant to § 552 is not limited to those authorized by § 1920." *Blazy*, 194 F.3d at 95. To hold otherwise would effectively "excise the words 'other litigation costs' from the statute by rendering them meaningless." *Id.*

Public policy also guides the court's analysis that recoverable litigation costs under FOIA are not limited by those costs expressly defined by § 1920. "The policies underlying § 1920 are antithetical to the remedial purpose of § 552." *Kuzma*, 821 F.2d at 933. "Section 1920 is premised on the 'American rule' that parties to a litigation should bear their own costs," *id.* at 933, whereas recovery of litigation costs under FOIA was meant as a specific exception to this general American rule "to alleviate the financial burdens suffered by citizens seeking information from the government . . . in furtherance of a national policy of disclosure of government information." *Id.*

In *Kuzman*, Plaintiff recovered costs beyond the scope of § 1920 such as "photocopying, postage, covers, exhibits, typing, transportation and parking fees." 821 F.2d at 933. The court reasoned that these items "clearly represent the reasonable costs of litigation and are recoverable." *Id.* in the present matter, Defendants challenge Plaintiff's costs of $136.19 for printing, $285.96 for postage, and $194.80 for photocopies. The court holds that all these items are recoverable because they represent Plaintiff's reasonable costs of litigation.

[1] Taxable costs under 28 U.S.C. § 1920 include only: "(1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." 28 U.S.C. § 1920.

The only other cost Defendants contest in this case is Plaintiff's $4,090.50 request for paralegal fees. The court finds that these fees are not recoverable. The Sixth Circuit has held that paralegal expenses are more appropriately classified as "attorney's fees" rather than "litigation costs." The authority "to award a reasonable attorney's fee includes the authority to award those reasonable out-of-pocket expenses incurred by the attorney, which are normally charged to a fee-paying client in the course of providing legal services" such as "paralegal expenses." *Sigley v. Kuhn*, 2000 WL 145187, 205 F.3d 1341 (6th Cir. 2000); *see also Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624, 639 (6th Cir. 1979).

In the instant case, Plaintiff, a pro se litigant, did not request attorney's fees, presumably in recognition of the Sixth Circuit's well-established rule that "a *pro se* litigant who is not an attorney may not recover attorney fees pursuant to the FOIA." *Wolfel v. U.S.*, 711 F.2d 66, 68 (6th Cir. 1983); *see also Falcone v. IRS*, 714 F.2d 646 [52 AFTR 2d 83-5705] (6th Cir. 1983) ("The same rule applies to *pro se* FOIA plaintiffs who also happen to be attorneys"). Thus, the court denies Plain-tiff's request for paralegal fees, which are recoverable only as a component of attor-ney's fees in a FOIA action.

Denying Plaintiff's request for paralegal fees also accords with the policies and purposes of FOIA. Plaintiff argues for paralegal fees because they are generally less expensive than those of an experienced attorney. The Sixth Circuit disagrees:

> Persons contemplating legal action *should be encouraged to consult with attorneys.*Litigation may not be necessary. Frustrations and misunderstandings or failures of understanding by the intended complainant may be quickly soothed and resolved by counsel. We do not believe it naive to expect that the result of the intervention of counsel will be compliance with the law by the agency involved, a furnishing of the information sought, and an avoidance of unnecessary litigation.

Wolfel v. United States, 711 F.2d 66, 68 (6th Cir. 1983) (emphasis added); *see also Falcone v. I.R.S.*, 714 F.2d 646, 647 [52 AFTR 2d 83-5705] (6th Cir. 1983) (denying an attorney-fee award to a pro se attorney in FOIA action because such an attorney lacks the "detached and objective perspective" necessary to fulfill the aims of the Act).

"A person has a right to proceed *pro se*, just as one has a right to retain counsel." *Wolfel*, 711 F.2d at 68. In the present matter, Plaintiff chose not to retain counsel. Because paralegal fees are awardable only as a component of attorney's fees in a FOIA action, the court denies Plaintiff's request for paralegal fees in this case.

Plaintiff is thus entitled to recover $3,729.42. This amount represents Plaintiff's total requested litigation costs of $7,819.92, minus Plaintiff's $4,090.50 request for paralegal fees.

III. CONCLUSION

For the reasons stated above, IT IS ORDERED that Plaintiff's motion for litigation costs [Dkt. # 64] is GRANTED IN PART, DENIED IN PART. IT IS FURTHER ORDERED that litigation costs in the amount of $3,729.42 are AWARDED to Plaintiff and against Defendants.

ROBERT H. CLELAND

UNITED STATES DISTRICT JUDGE

Dated: October 30, 2002

¶2002-5690

Kent E. HOVIND and Eric HOVIND, PETITIONERS v. Scott M. SCHNEIDER, Special Agent, Internal Revenue Service, COMMISSIONER, INTERNAL REVENUE SERVICE, RESPONDENTS. U.S. District Court, Northern Dist. of Florida, (DC FL) Case No.: 3:02cv297/RV/MCR, Oct. 31, 2002. Years 1997, 1998, 1999, 2000, 2001. Decision for Govt.

1. Actions against IRS and IRS employees—Anti-Injunction Act. Taxpayers' action against IRS and IRS agents to enjoin agents from trespassing on their property or pursuing collection was dis-

missed: no exception to AIA's bar against collection-related injunctive relief applied. *Reference:* United States Tax Reporter ¶74,215.05(5). IRC §7421.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION,

ORDER

ROGER VINSON Chief United States District Judge

Ther petitioners have filed a complaint to enjoin the Internal Revenue Service (''IRS'') and its agents from ''contacting, harassing, and trespassing upon the premises of petitioners.'' The respondents have moved to dismiss the complaint. (Doc. 7) The petitioners have not filed a responsive memorandum.[1] The following facts are taken from the petitioner's complaint, and are accepted as true for purposes of ruling on the motion to dismiss.

I. BACKGROUND

Respondent Scott M. Schneider, a Special Agent with the IRS, is conducting an investigation into the federal income tax liabilities of Kent E. Hovind. On July 11, 2002, Schneider came onto the property located at 29 Cummings Road, Pensacola, Florida, with four summons for petitioner Eric Hovind, CSE Transportation, Creation Science Evangelism (a.k.a. CSE Enterprises), and Faith Baptist Fellowship.[2] These summons noted that a criminal investigation regarding tax periods 1997, 1998, 1999, 2000, and 2001 was underway against Kent E. Hovind, and provided that each of the recipients of a summons was to appear before respondent Scott Schneider, or any other designated agent, on July 2002, to give testimony and provide copies of certain financial records.

Posted on the grounds of 29 Cummings Road was a sign which reads:

POSTED-NOTICE

This Property is Private Property

NO TRESPASSING

SPECIAL NOTICE TO LOCAL, STATE AND FEDERAL GOVERNMENT AGENTS,

EMPLOYEES, AND INSPECTORS

PERMISSION TO ENTER THESE PREMISES IS HEREBY SPECIFICALLY DENIED

WITHOUT PRIOR WRITTEN CONSENT.

Despite the notice, Schneider entered the premises without procuring prior written consent and served the summons. The petitioners contend that Schneider entered the property, notwithstanding the posted notice, ''with reckless disregard towards [their] constitutional rights.''

According to the petition, the petitioner have ''realistic concerns and fears stemming from previous Gestapo actions of the Internal Revenue Service against [Kent E. Hovind].'' These concerns stem from a ''raid'' that the IRS allegedly performed on Kent E. Hovind's home. The petitioners also allege that ''Internal Revenue Service agents are permitted to carry and use automatic firearms in the course of their investigative tactics, which includes terrorizing citizens of this country.'' The petitioners now seek to enjoin the IRS and its agents from ''contacting, harassing, and trespassing upon the premises of petitioners.''

II. DISCUSSION

A. Motion to Dismiss Standard

A motion to dismiss for failure to state a claim cannot be granted unless the complaint alleges no set of facts which, if proved, would entitle the plaintiff to relief. See, e.g., Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L. Ed. 2d 90, 96 (1974); Blackston v. State of Alabama, 30 F.3d 117, 120 (11th Cir. 1994). On a motion to dismiss, the facts stated in the complaint and all reasonable inferences

[1] Failure to file a responsive memorandum may be sufficient cause to grant the motion to dismiss. N.D. Fla. Loc. R. 7.1(C)(1).

[2] The relationship of these parties to one another and to Kent E. Hovind is not explained in the complaint. However, according to the declaration of Respondent Schneider, Kent E. Hovind has advertised products and services for sale through CSE Enterprises, and Kent E. Hovind is listed on public documents as the ''elder'' of Faith Baptist Fellowship. According to Schneider, Kent E. Hovind used Faith Baptist Fellowship to transfer property to his son, Eric Hovind. Furthermore, according to Schneider, Kent E. Hovind resides at 29 Cummings Road, Pensacola, Florida, where the unincorporated ''businesses'' of CSE Enterprises and Faith Baptist Fellowship are located.

therefrom are taken as true. Stephens v. Department of Health and Human Servs., 901 F.2d 1571, 1573 (11th Cir. 1990).

B. Analysis

[1] The Tax Anti-Injunction Act [26 U.S.C. §7421(a)] provides that "no suit for the purpose of restraining the assessment of collection of any tax shall be maintained in any court by any person." It prohibits federal courts from issuing injunctions to enjoin the assessment or collection of taxes where the statutory scheme provides an alternative remedy. Woods v. IRS, 3 F.3d 403, 404 [72 AFTR 2d 93-6395] (11th Cir. 1993). Its purpose is to permit the government to assess and collect taxes allegedly due without judicial intervention, while allowing challenges to the disputed sums to be determined in a subsequent action for a refund. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 8 [9 AFTR 2d 1594], 82 S. Ct. 1125 [9 AFTR 2d 1594], 8 L. Ed. 2d 292, 296 (1962). The Anti-Injunction Act will apply unless a recognized exception is applicable.

The Anti-Injunction Act does provide for statutory exceptions. However, the petitioners have not asserted that any of these statutorily-created exceptions apply, and none of them appear to be applicable.[3] In addition to the statutory exceptions, federal courts may enjoin the collection of taxes if it can be shown that either: (1) under no circumstances could the government ultimately prevail on its tax claim; or (2) equity jurisdiction otherwise exists. Mathes v. United States, 901 F.2d 1031, 1033 [66 AFTR 2d 90-5035] (11th Cir. 1990). However, the general rule is that, except in very rare and compelling circumstances, federal courts will not entertain actions to enjoin the collection of taxes. Id.

The IRS is pursuing a criminal investigation regarding Kent E. Hovind's federal income tax liabilities. The actions the petitioners seek to enjoin would impair the IRS's attempt to assess and collect those taxes. Therefore, the Anti-Injunction Act is applicable in this instance, and the petitioners have the burden of demonstrating that an exception should be applied. Bowers v. United States, 423 F.2d 1207, 1208 [26 AFTR 2d 70-5106] (5th Cir. 1970). The petitioners have not done so. After review of the complaint, it is clear to me that this case does not present one of those "rare and compelling circumstances" necessitating an exception. The Anti-Injunction Act bars this Court from exercising jurisdiction over this matter. As a result, the complaint must be dismissed.

III. CONCLUSION

For the forgoing reasons, the respondents motion to dismiss the complaint (doc. 7) is GRANTED on the basis of lack of jurisdiction. The complaint is DISMISSED, WITH PREJUDICE.

DONE AND ORDERED this 31 day of October, 2002.

ROGER VINSON

Chief United States District Judge

¶2002-5691

Eric L. GADSDEN, PLAINTIFF v. COMMISSIONER of Internal Revenue, DEFENDANT. U.S. District Court, Central Dist. of California, (DC CA) CV 01-10347 LGB (JTLx), July 18, 2002. Decision for Govt.

1. District court procedure—motion to dismiss—local rules. District court dismissed pro se taxpayer's amended complaint: taxpayer's failure to answer govt.'s current dismissal motion before filing appeal of earlier decision was considered consent to motion under local rules; and, taxpayer had been warned that, pro se status notwithstanding, his failure to comply with local rules could result in dismissal.

[3] These exceptions pertain to: (1) a petition for review by the Tax Court for relief from joint and several liability on joint returns [26 U.S.C. § 6015(e)]; (2) the assessment and collection of deficiencies prior to the issuance of a notice of deficiency [§§ 6212(a) and (c) and 6213]; (3) a premature action for assessing a deficiency attributed to a partnership [§§6225(b), 6246(b)]; (4) suspension of a levy action if a hearing is requested under Section 6330(a)(3)(B) [§6330(e)(1)]; (5) suspension of a levy action during the pendency of proceedings for a refund of divisible tax [§6331(i)]; (6) the collection of "responsible person" penalties where a bond has been filed [§ 6672(c)]; (7) the collection of a tax return preparer penalty [§ 6694(c)]; (8) the enforcement of a levy on property where such enforcement would injure the interest of a lienholder other than the person against whom the tax has been assessed [§§ 7426(a) and (b)(1)]; (9) the review of the reasonableness of a jeopardy assessment [§ 7429(b)]; and (10) proceedings for determination of employment status [§ 7436].

Reference: United States Tax Reporter ¶74,336.504(65).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA,

ORDER GRANTING MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE

LOURDES G. BAIRD United States District Judge

[1] Plaintiff Eric Gadsden filed a complaint on November 30, 2001 alleging a number of claims against the Commissioner of Internal Revenue (''the Commissioner''). The Commissioner brought a motion to dismiss on February 15, 2002. The motion was granted on April 15, 2002. In granting the motion, several of plaintiff's claims were dismissed with prejudice, while one based on 26 U.S.C. § 6103 was dismissed with leave to amend.

On May 3, 2002, Gadsden filed the current Amended Complaint stating that ''the subject matter of this action is predicated on 26 U.S.C. Section 6103 and 26 U.S.C. Section 7431.'' Amended Compl. at 1. The Commissioner then filed the present motion on June 13, 2002 requesting dismissal for lack of jurisdiction and failure to state a claim. The next day, Gadsden filed a notice of appeal ''from the final judgment entered in this action on the Sixteenth day of April 2002.'' Notice of Appeal. Gadsden has not filed an opposition.

Before addressing the merits of the Commissioner's motion, the Court must address a jurisdictional concern. Under normal circumstances, the filing of a notice of appeal divests a district court of jurisdiction. See Estate of Conners v. O'Connor, 6 F.3d 656, 658 (9th Cir. 1993). Here, however, Gadsden has appealed a non-appealable order because the April 15, 2002 order is not final - as a matter of fact, Gadsden's Amended Complaint is still actively before the Court. See id. (no transfer of jurisdiction where notice of appeal is from an unappealable order); WMX Technologies v. Miller, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc (dismissal with leave to amend not final appealable order).

Papers not timely filed by a party including any memoranda or other papers required to be filed under this rule will not be considered and may be deemed by the Court consent to the granting or denial of the motion, as the case may be. Local Rule 7-12. As Gadsden has already appealed in this action, the Court construes his failure to file an opposition as consent to the granting of the motion. Moreover, in a March 21, 2002 minute order postponing consideration of the first motion to dismiss in recognition of Gadsden's pro se status, the Court warned Gadsden that failure to comply with the applicable rules of court might result in dismissal. Good cause appearing, the Court GRANTS the Commissioner's motion to dismiss. This action is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

Dated: July 18, 2002

LOURDES G. BAIRD

United States District Judge

¶2002-5692

Javaid HUSSAIN, ETC; ET AL., PLAINTIFFS, Steven J. RANDO and Glenn A. WOODS, APPELLANTS v. BOSTON OLD COLONY INSURANCE COMPANY, ET AL., DEFENDANTS, UNITED STATES OF AMERICA, DEFENDANT-APPELLEE, HIBERNIA NATIONAL BANK, APPELLEE. U.S. Court of Appeals, Fifth Circuit, (CA5) Docket No. 01-31322, Oct. 31, 2002. District Court, (2001, DC LA) 88 AFTR 2d 2001-6157, 170 F Supp 2d 663, 2001-2 USTC ¶50674 [88 AFTR 2d 2001-6157], judgment entered (2001, DC LA) 88 AFTR 2d 2001-6935, affirmed in part, and reversed and remanded in part. Decision against Taxpayer in part.

1. Review of district court decision—jurisdiction—interpleader actions—removal from state court—quiet title; lien priority. District court properly asserted jurisdiction over fire insurer's post-judgment motion to determine distribution of

lien proceeds of taxpayer's state court judgment against it: insurer's request fell under 28 USC §2410's broad jurisdictional purview for interpleader actions. Although insurer had disclaimed any interest in proceeds and govt. wasn't party to initial state court suit, broad statute clearly covered action that was intended to avoid multiple litigation and resolve lien priority as between govt. and private parties. Also, facts that case caption didn't identify action as interpleader and that funds weren't deposited in court registry didn't themselves negate suit's character as interpleader; bringing govt. in via show cause order rather than as named party in original complaint wasn't dispositive; and suit's post-judgment posture didn't otherwise preclude it from being brought. *Reference:* United States Tax Reporter ¶74,336.507(10); 74,336.508(60); 63,215.04(147). IRC §6321.

2. Lien property—priority; distribution of funds—fire insurance policy proceeds—interpleader actions—professional fees. Taxpayer's attorney's challenges to district court 's determination of relative priorities of his IRC §6323(b)(8) lien interest as against mortga-gee's priority loss-payee claim and govt.'s junior tax claim to taxpayer's judgment against fire insurer were largely rejected: mortgagee's indisputable right to recover as loss-payee and fact that taxpayer's attor-ney wasn't only attorney on case refuted his argument to recover fees ahead of mortgagee on basis of gross vs. net pro-ceeds; and his attempt to apply post-judg-ment, renegotiated, higher contingency fee rate than that contained in original agree-ment was rejected where allowing such would violate IRC §6323(b)(8)'s ''judg-ment'' language and underlying purpose. But, court's taxing of portion of non-ap-pearing, non-testifying CPA's fees as costs was improper under Louisiana law. *Reference:* United States Tax Reporter ¶63,215.02(190); 63,235.16(40); 63,215.04(20); 74,336.511(80). IRC §6321; 6323.

Appeal from the United States District Court For the Eastern District of Louisiana

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,

Before WIENER, EMILIO M. GARZA,* and PARKER, Circuit Judges.

WIENER, Circuit Judge:

This case arrives at our doorstep after a procedural odyssey through both the state and federal court systems. It began as a suit in a Louisiana state court by an insured and his secured lender to recover policy proceeds from the insurance company, and has ended with a protracted multi-party dispute among the insured (''Hussain''), his attorneys (collectively ''Rando''), the lender/mortgagee (''Hibernia''), the defendant insurance company (Boston Old Colony or ''BOC'') and the defendant-appellee United States of America (the ''government'') over the proper distribution of an insurance proceeds fund that is insufficient to satisfy all claims in full. Central to this appeal is Rando's challenge to federal subject matter jurisdiction, as well as the rulings of the district court on the priority and amounts of distribution of the insurance fund among the several claimants. We affirm the district court in all respects except for its assessment of costs for Hussain's expert fees.

I. Facts and Proceedings

This case was sparked by a 1991 fire that destroyed the inventory of Sheik's Oriental Rugs, Inc., owned by Hussain. He was insured up to $500,000 by BOC. Hibernia was named on the BOC insurance policy (the ''Policy'') as a loss payee, under a 1989 loan of $177,699.02 to Hussain who had secured his promissory note by a chattel mortgage on his inventory (the ''covered property''). Although the Policy appears to contain two different provisions governing the relationship between Hussain and Hibernia, a close reading suggests that only one — the ''Loss Payable'' -- provision applies: The other, by its terms, envisions Hibernia as the putative buyer of the

* Judge Garza concurs in judgment only.

covered property, which it does not appear ever to have been. The Policy's "Loss Payable" provision reads as follows:

> A. Loss Payable
>
> For covered property in which both you and a Loss Payee . . . have an insurable interest, we will:
>
> . . .
>
> 2. Pay any claim for loss or damage jointly to you and the Loss Payee, as interests may appear.

In signing the Hibernia loan documents, Hussain warranted that he alone owned the mortgaged property, "free and clear from any adverse claim, mortgage, lien, security interest, privilege, or encumbrance."

After the fire, Hussain defaulted on the Hibernia promissory note and litigation commenced. In 1992, as holder of the secured note, Hibernia sued Hussain, and in 1994 obtained a state court default judgment against him which recognized Hibernia's continuing security interest in the covered property. Also in 1992, Hibernia, as loss payee under the Policy, filed a separate state court action against Hussain and BOC to recover a portion of the policy proceeds.

In 1993, Hussain sued BOC on the Policy in state court. This suit was consolidated with Hibernia's suit as loss payee. In 1995, Hussain retained Rando as new counsel, and in doing so, executed a contingency-fee agreement that assigned one-third of any recovery to his new attorneys. Rando asserted before the district court that he has since spent $368,449.72 in prosecuting this case.[1]

BOC denied liability under the Policy's arson exclusion. The state court rejected that defense in a directed verdict, ruling that BOC owed Hussain and Hibernia $500,000 in policy proceeds, plus interest, costs, and fees. BOC appealed to the higher Louisiana courts; but once the Louisiana Supreme Court denied certiorari on November 13, 2000, the judgment as to BOC's liability became final.

On December 8, 2000, the Internal Revenue Service of the Department of the Treasury ("IRS") notified BOC of federal tax liens against Hussain's property. On the same day, Hussain executed a new fee agreement giving Rando a 39% interest "in and to any gross recovery I/we may have in this matter." Rather than institute concursus (interpleader) proceedings, BOC — still in the context of the consolidated suits against it, and despite the finality of the judgment in that case — filed a motion to have the court determine the amounts and priority of distribution of funds. As part of that motion, BOC also secured and served on the IRS an order to show cause why it should not be excluded from any distribution. This prompted the IRS first to file a notice of its tax lien in the records of Orleans Parish on January 9, 2001, and then, on January 17, 2001 to remove the case to the Eastern District of Louisiana.[2]

After briefing, the district court ruled that (1) Hibernia takes first priority, as loss payee; (2) second in line, Rando takes as attorneys' fees pursuant to the state court litigation, one-third of the amount remaining after Hibernia's claim is fully paid; and (3) third in line, the government takes the remainder of the policy proceeds, ahead of all other creditors of Hussain.[3] Also, on motion by Hussain, the court taxed costs of $5,000, which was one-fifth of the amount that Hussain had sought, in payment for his expert witness, John Theriot, CPA.[4]

On appeal Rando has raised several issues, in essence contending that he should be paid an additional $196,377.48, an

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1 Hussain v. Boston Old Colony Ins. Co., 170 F. Supp 2d. 663, 667 (E.D. La. 2001).

2 See 28 U.S.C. § 1444 (2000). In this case the point at which the IRS filed its lien does not affect the priority of claims adjudicated here. The law provides that a federal tax lien arises upon assessment of the tax, and thus does not impose any filing requirement. See United States v. McDermott, 507 U.S. 447, 448 [71 AFTR 2d 93-1154] (1993). Nonetheless, provisions of the Internal Revenue Code provide that both the holders of security interests, such as Hibernia, and attorneys who obtain judgments or settlements for their clients, such as Rando, have priority over the federal tax lien. See 26 U.S.C. §§ 6323(a), (b) (8) (2000). While holders of security interests may only have priority if such interests arise before notice of the federal tax lien is filed, Hibernia became loss payee in 1990 and the fire triggering its rights occurred in 1991, well before the federal government filed notice of any tax lien.

3 Hussain, 170 F. Supp 2d. at 671–73.

4 Id. at 675.

amount determined by applying his claimed contingent fee percentage (39%) to the entire amount payable from the Policy and awarded by the court.

II. Analysis

A. Standard of Review

This court reviews de novo a district court's determination of its subject-matter jurisdiction.[5] On the merits, statutory construction is reviewed de novo,[6] with factual findings reviewed for clear error.[7] An award of attorney's fees is reviewed for abuse of discretion.[8]

B. Subject-Matter Jurisdiction

[1] Section 2410(a) waives the sovereign immunity of the federal government, enabling private parties to hale the government into court to determine the priority of outstanding liens on real or personal property.[9] As a trade off for the waiver of sovereign immunity, section 1444 permits the government to remove to federal district court any such case initiated in state court.[10] In light of this conditional relationship between §§ 2410(a) and 1444, we have held that § 1444 "confers a substantive right to remove, independent of any other jurisdictional limitations."[11]

Thus, to find subject matter jurisdiction in this case we had to resolve initially whether § 2410(a) applies in this case. For us to conclude that jurisdiction was proper at the time of judgment, not only must we justify the presence of the United States in the dispute, but we must also demonstrate how § 2410(a) (5), which covers actions in interpleader or in the nature of interpleader, applies to the parties' actions in this dispute. Once the applicability of § 2410(a) is established, federal subject matter jurisdiction is present on the basis of § 1444.

1. General Construction of § 2410(a)

The law is well settled that the government is not subject to suit unless it has waived its sovereign immunity.[12] As noted, § 2410 was specifically passed to waive the sovereign immunity of the United States so that private parties could get the government into court when necessary to quiet title or resolve priority of liens or mortgages.[13] Such waiver, however, must be narrowly construed to comport precisely with congressional intent.[14] Thus, "no suit may be maintained against the United States unless the suit is brought in exact compliance with the terms of a statute under which the sovereign has consented to be sued."[15]

In conformity with this strict construction, we have found at least three instances in which waiver of sovereign immunity does not exist under § 2410(a). There is no waiver (1) when a taxpayer seeks to challenge the validity of any underlying tax assessment,[16] (2) when the government is claiming a title interest in property rather

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5 Your Insurance Needs Agency Inc. v. United States, 274 F.3d 1001, 1003 [88 AFTR 2d 2001-7108] (5th Cir. 2001) ("[W]e exercise plenary, de novo review of a district court's assumption of subject matter jurisdiction.").

6 Kemp v. G.D. Searl & Co., 103 F.3d 405, 407 (5th Cir. 1997) ("Questions of statutory interpretation are questions of law and thus reviewed de novo").

7 Jason D.W. v. Houston Indep. Sch. Dist., 158 F.3d 205, 208 (5th Cir. 1998).

8 Id.

9 28 U.S.C. § 2410(a) (2000). Section 2410(a) provides, (a) Under conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter -

(1) to quiet title to,

(2) to foreclose a mortgage or other lien upon,

(3) to partition,

(4) to condemn, or

(5) of interpleader or in the nature of interpleader with respect to, real or personal property on which the United States has or claims a mortgage or other lien. Id.

10 28 U.S.C. § 1444. Section 1444 provides, "[a]ny action brought under section 2410 of this title against the United States in any State court may be removed by the United States to the district court of the United States for the district and division in which the action is pending." Id.

11 City of Miami Beach v. Smith, 551 F.2d 1370, 1374 n.5 (5th Cir. 1977).

12 See United States v. Testan, 424 U.S. 392, 399 (1976).

13 See Estate of Johnson v. United States, 836 F.2d 940, 943 [61 AFTR 2d 88-579] (5th Cir. 1988); 28 U.S.C. § 2410(a).

14 See Estate of Johnson, 836 F.2d at 943.

15 Koehler v. United States, 153 F.3d 263, 265–66 [82 AFTR 2d 98-6270] (5th Cir. 1998).

16 Montgomery v. United States, 933 F.2d 348, 349 [68 AFTR 2d 91-5120] (5th Cir. 1991).

than a lien interest,[17] or (3) when the government no longer has a mortgage on, or other security right in, the property in dispute.[18]

Even so, such strict compliance with the statute does not imply that literal interpretation of § 2410's every word is required. Standing together, the cases noted above simply reiterate that § 2410(a) applies only when the issue concerns the priority of an existing government mortgage or other security interest. On this issue, the determination of sovereign immunity is strict. In contrast, we and other courts have taken a more inclusive approach to the types of underlying relief, such as quiet title and interpleader suits, to which § 2410(a) expressly applies. Specifically, when the priority of a presently existing lien interest of the government is in dispute, and the question is whether § 2410(a) applies to the type of relief sought, the statute has been read much more expansively.

In explaining the application of § 2410(a), we have found that "jurisdiction does not depend on the specific relief sought, [e.g.] foreclosure. Rather it rests on the existence of the traditional controversy in which a private party asserts an ownership which is superior to the claimed lien of the United States Government."[19] Informing this approach is our recognition of Congress's conviction "that a means be available to determine such disputes lest the absence of judicial recourse depress the marketability of property subject to federal tax liens."[20] Other courts have found the applicability of § 2410(a) to underlying actions equally capacious.[21]

In the instant case, the government maintains an outstanding tax lien on Hussain's property. Thus, § 2410(a) appears applicable. Although the applicability of § 2410(a)(5) to the suit as a whole remains to be discussed, our prior holdings and our understanding of congressional intent predispose us to accept the government's presence in this case despite its unique mode of entrance.

2. Breadth of Interpleader Actions under § 2410(a)(5)

Given the expansive approach to determining the kinds of relief for which § 2410(a) is available, we next consider whether § 2410(a)(5) covers the state court motion practice instituted by BOC after the judgment against it and in favor of Hussain and Hibernia had become final and no longer appealable. Even though establishing the applicability of this statute in terms of the government's interest and its waiver of sovereign immunity has been accomplished, we are nevertheless required to decide whether the post-judgment proceedings in this case come within the scope of § 2410(a)(5). Specifically, we must determine (1) whether BOC's Motion to Determine Amount and Distribution of Funds constitutes an action in interpleader within the contemplation of § 2410(a)(5), and (2) whether the government's presence as respondent under a show cause order satisfies the statutory requirement that the government be "named a party in any civil action or suit."[22]

a. Whether There Is an Action in Interpleader

Section 2410(a)(5) expressly covers both interpleader actions and actions in the nature of interpleader. A traditional interpleader suit is an equitable action available to a plaintiff-stakeholder who is, or may be, exposed to multiple liability or multiple litigation, usually when two or more claims are brought that are mutually incon-

17 Cummings v. United States, 648 F.2d 289, 292 (5th Cir. 1981).

18 See Koehler, 153 F.3d at 266–67.

19 United States v. Morrison, 247 F.2d 285, 290 [52 AFTR 78] (5th Cir. 1957).

20 Estate of Johnson, 836 F.2d at 945.

21 See Progressive Consumer Fed. Credit Union v. United States, 79 F.3d 1228, 1231–32 [77 AFTR 2d 96-1419] (1st Cir. 1996) (hailing the substance over the form of relief sought because Congress "was concerned not with the niceties of common law pleading, but with practical problems facing owners whose property was encumbered by government liens"); City of New York v. Evigo Corp., 121 F. Supp. 748, 750 [46 AFTR 168] (S.D.N.Y. 1954) (ignoring the technical procedures used by the City of New York and finding jurisdiction under §§ 2410(a) and 1444 because the "purpose and effect of the action" concerned "priority for the satisfaction of the respective tax claims out of the property seized"). See also United States v. Coson, 286 F.2d 453, 457 [7 AFTR 2d 589] (9th Cir. 1961) (interpreting the words "quiet title" broadly in conformity with the text and the history of the statute).

22 28 U.S.C. § 2410(a).

sistent.[23] The purpose of interpleader is to enable the plaintiff-stakeholder to avoid "the burden of unnecessary litigation or the risk of loss by the establishment of multiple liability when only a single obligation is owing."[24] Thus, traditionally the claims of the defendant claimants must be mutually exclusive and adverse to one another such that one claimant's gain in the stake would be another claimant's loss.[25] In contrast to the subsequently evolved bill in the nature of interpleader, the stakeholder in a strict bill of interpleader maintains no claim or interest in the stake.[26]

An "action in the nature of interpleader" is a term of art that refers to those actions in which an interpleading plaintiff asserts an interest in the subject matter of the dispute.[27] In all other respects, actions in the nature of interpleader are identical to traditional interpleader suits. It is § 2410(a)(5)'s reference to suits in the nature of interpleader that the district court appears to have relied on in finding jurisdiction.[28] The district court was incorrect in this reading, however, because BOC had already disclaimed all interest in the insurance proceeds when it filed its motion to determine distribution of funds. Thus, BOC did not have the requisite claim or interest in the fund that is required for the plaintiffs' action to constitute one in the nature of interpleader.

Even though we have not previously determined the precise scope of an interpleader action under § 2410(a)(5), two primary factors convince us that this provision applies to the facts of this case. First, as noted above, we have taken an ex-pansive approach to determining the types of relief to which § 2410(a) applies. Sec-ond, the equitable purpose of interpleader to protect stakeholders from multiple liabil-ity and multiple litigation has led us to construe its requirements liberally.[29] In addition to the more traditional interpleader requirement that two or more claimants have competing, mutually exclusive claims to the stake, we have recognized that a plaintiff-stakeholder may employ inter-pleader when its liability is limited and the combined claims are in excess of such lim-ited liability, even though not mutually ex-clusive.[30] Further, the Supreme Court has counseled that when removal has occurred and jurisdictional requirements otherwise have been met, any problems with party labels are immaterial because the parties could have been "realigned" by the court.[31]

In like manner, other courts at both the federal and state levels have interpreted broadly which actions constitute an interpleader. One older district court case in the Second Circuit addressed a factual situation similar to the instant case. In United States v. Webster Record Corp., a chemical company was a state court judgment creditor of Webster Record Corporation (Webster), which in turn was a depositor in (and thus a creditor of) Bankers Trust Company (Bankers).[32] To collect its state judgment against Webster, the chemical company initiated supplemental proceedings in state court against Bankers to acquire the deposit that Bankers was holding for Webster.[33] During these supplemental proceedings, the IRS served a notice of levy on Bankers, demanding the deposit to

23 See Gen. Elec. Credit Corp. v. Grubbs, 447 F.2d 286, 288 (5th Cir. 1971), rev'd on other grounds, 405 U.S. 699, 705–06 (1972).

24 Texas v. Florida, 306 U.S. 398, 412 (1939).

25 See id. at 405–06; Grubbs, 447 F.2d at 288. In Grubbs, we found that the plaintiff failed to assert a "viable" interpleader because he had never shown that he would be multiply liable on the same fund. Rather, we noted that the record suggested that he was individually liable to each of his judgment holders. See Grubbs, 447 F.2d at 289–90. The Supreme Court ultimately reversed because even though removal may have been defective (because the interpleader was not viable), the district court would have had jurisdiction of the action had it been brought there originally. See Grubbs, 405 U.S. at 702, 705–06.

26 See Texas, 306 U.S. at 406.

27 See id., at 406–07.

28 See Hussain v. Boston Old Colony Ins. Co., 170 F. Supp 2d. 663, 669 (E.D.La. 2001) (finding that BOC's motion was in the nature of interpleader because it was "intended to rank priority to the real or personal property to which the United States (and others) has a claim, which brings it squarely within the scope and purpose of § 2410").

29 See In re Bohart, 743 F.2d 313, 324–25 (5th Cir. 1984).

30 See General Electric Credit Corp. v. Grubbs, 447 F.2d 286, 289 (5th Cir. 1971).

31 Mackay 229 U.S. at 176.

32 192 F. Supp. 104 [7 AFTR 2d 1134] (S.D.N.Y. 1961).

33 See id. at 104–05.

satisfy a tax lien against Webster.[34] Instead of appearing in the supplemental proceedings to determine lien priority over this deposit, the government sued directly in federal district court to foreclose on the lien.[35]

The district court recognized that any order directed at Bankers to turn over the Webster deposit to the chemical company would not bind the government, and thus would lead to further litigation.[36] Without using the label "interpleader," the court also recognized that there was a substantial dispute as to priority of the claimants' entitlement to the deposited funds. As such, the appropriate action would be to join the government as defendant in a state court suit to determine lien priorities; yet, recognized the court, such an action undoubtedly would provoke the government to remove the action to federal court under the authority of § 2410(a). Thus, concluded the court, "it would be an idle gesture to permit [the chemical company] to proceed in the State Court, since its action would eventually be removed to this Court."[37]

In sum, the equitable purpose of interpleader to protect the stakeholder from multiple litigation and liability (expressed in Webster as the desirability of avoiding unnecessary litigation later) and the purpose of § 2410 of resolving outstanding government liens, outweighed any defects in the procedural history. Louisiana courts have also recognized that a concursus proceeding (Louisiana's version of interpleader) "should be construed liberally and given a broad application."[38] In short, the broad approach toward determination of the types of relief available under § 2410(a) generally, in combination with the equitable nature of interpleader to protect a stakeholder from multiple liability and vexatious litigation, indicates that § 2410(a)(5) encompasses BOC's actions.

It is true here that the motion practice of the parties did not use the same labels as actions taken to initiate an interpleader proceeding.[39] Regardless of the misleading case caption, however, the substantive posture of the parties mirrored the substance of an action in interpleader. By the time of judgment in federal court, the parties had taken several procedural steps that produced a situation in which BOC had brought Hussain, Hibernia, Rando, and the government together to contest the priority of liens and distribution of payments from the insurance fund possessed by BOC.

Although BOC did not refer to "interpleader" or "concursus," and did not deposit the fund in the registry of the court, it possessed an insurance proceeds fund of $500,000 in which it claimed no interest and to which there were several claimants. BOC had been found liable to Hussain and Hibernia under the Policy; the IRS had served notice of a tax levy on BOC for the money; and Hussain's attorney, Rando, had asserted a right to recover his contingent fee from the proceeds. In addition, those four claimants sought satisfaction from the insurance proceeds and, in the aggregate, their claims (1) exceeded the total amount available in the fund, and (2) were adverse

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34 See id. at 105.

35 Id.

36 Id.

37 Id.

38 Damson Oil Corp. v. Sarver, 346 So. 2d 1304, 1307 (La. Ct. App. 3d Cir. 1977); Asian Int'l, Ltd. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 435 So. 2d 1064, 1066–67 (La. Ct. App. 1st Cir. 1983) (recognizing that statutes governing concursus "are to be construed liberally," and thus holding that alternative procedural devices may be used to invoke a concursus proceeding if its substantive requirements are met). But see Hampton v. Greenfield, 602 So. 2d 327, 329 (La. Ct. App. 4th Cir. 1992), rev'd on other grounds, 618 So. 2d 859 (La. 1993) (finding that a concursus proceeding may not be used to relitigate the issue of liability). Under Louisiana law, "[a] concursus proceeding is one in which two or more persons having competing or conflicting claims to money, property or mortgages or privileges on property are impleaded and required to assert their respective claims contradictorily against all other parties to the proceeding." La. Code Civ. Proc. Ann. art. 4651 (West 2002).

39 Although the Supreme Court has indicated that defensive interpleader under Rule 22 must be framed as either a cross-claim or counter-claim, its emphasis on the form of pleadings was meant to reiterate that rule interpleader is only proper when there is "some nexus with a party already in the case." Grubbs, 405 U.S. at 705 n.2. Thus, as in other areas of pleading, we construe the pleading liberally according to its substance rather than its form or label. See Indus. Dev. Bd. v. Fuqua Indus., Inc., 523 F.2d 1226, 1235 (5th Cir. 1975) (relying on the liberal pleading standard of the federal rules to construe a complaint to include request for relief on a theory of subrogation, even though the complaint was not clear); 5 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, § 1286, n.10 (2d Ed. 1990); 7 Wright & Miller, Federal Practice & Procedure, §1715.

to each other.[40] Consequently, BOC had a genuine fear of multiple and vexatious litigation.

To avoid that, BOC filed its Motion to Determine Amount and Distribution of Funds with the Louisiana trial court, and asked that court to order the IRS to show cause as to its interest in the insurance proceeds fund. Similarly, in the federal district court, BOC's Motion to Determine Amount and Distribution of Funds was an attempt to bring in all who claimed an interest in the stake so that BOC would not be liable for an amount greater than the limits of the insurance policy or have to defend multiple suits. Thus, in conformity with the expansive approach taken toward this form of the equitable relief, the actions of BOC were sufficient in fact to constitute interpleader against the government under the requirements of § 2410(a) (5).

b. Whether the Presence of the United States Pursuant to § 2410(a) is Satisfied by the Order to Show Cause

The second interpretation issue presented is whether the government's presence in this suit by virtue of the state court's order to show cause satisfies § 2410(a)'s requirement that the United States be "named a party in any civil action or suit."[41] We are aware of no case law, either in this circuit or elsewhere, interpreting this particular phrase from § 2410(a). Furthermore, the statutory construction of other language in § 2410 that we have undertaken points in different directions. As described above, we have narrowly construed the language waiving sovereign immunity, but we have broadly interpreted the types of relief to which this statute applies. As the requirement that the government be "named a party in any civil action" relates more to the form of relief sought in the underlying state court proceedings than to the waiver of sovereign immunity, we interpret "any civil action or suit" broadly to include the instant orders to show cause because their purpose is to determine the priority of claims to money or property.

The cases narrowly interpreting the waiver of sovereign immunity are less applicable here because the nature of the government's interest, which triggers (or prevents) the waiver of immunity, is not at stake. Rather, at issue here is simply the procedure by which the government was brought into an action to determine the ranking of its lien.

Additionally, applying § 2410 to these orders to show cause comports with the statute's purpose. On two occasions, Congress has broadened the original section 2410(a), each time allowing waiver of sovereign immunity in additional types of cases, so as to enhance the ability of private parties to resolve issues of ranking or priority when government liens are involved. The 1942 amendment, which extended the statute's ambit to include quiet title actions, "was in response to the recognized need for a way to force disputes over government tax liens to resolution, rather than leaving the United States in complete control of the timing."[42] Similarly, in 1966, Congress wanted to expand the waiver of sovereign immunity to cover more types of litigation so that private parties could bring the government into those additional kinds of cases.[43] We discern a pattern over time in Congress's broadening of the applicability of § 2410(a) to include more and more instances in which it was "desirable for the Government to be a party in order to assert its interest."[44] Congress has clearly wanted the government to be amenable to suit in an increasing variety of actions. In keeping with this trend toward inclusiveness, we conclude that the government's presence in a suit, by virtue of an order to show cause as to the ranking of its lien in a specific fund, comes within the statute's coverage; inclu-

40 As noted, it is well settled that claims to the stake need not be mutually exclusive. See 4 Moore's Federal Practice § 22.03[1][d] (Matthew Bender 3d ed.). We and other courts have also found that adversity of claims is satisfied when additional claims to a fund are derivative of one particular claimant's right to the fund. See Bricks Unlimited, Inc. v. Agee, 672 F.2d 1255, 1257–58 (5th Cir. 1982). See generally 4 Moore's Federal Practice § 22.03[1][d], n.13.

41 28 U.S.C. § 2410(a).

42 United States v. Perry, 473 F.2d 643, 645 [31 AFTR 2d 73-567] (5th Cir. 1973).

43 See Sen. Rep. No. 89-1708, at 1966 U.S.C.C.A.N. 3722, 3754– 55.

44 Id. at 3755.

sion facilitates the statutory purpose of resolving the priorities of those liens on property in which the government has a security interest.

In combination, a more expansive approach to determining the kinds of relief covered by § 2410(a) and the intent of Congress to address the "practical problems facing owners whose property was encumbered by government liens" instead of the "niceties of common law pleading,"[45] dictates § 2410(a)'s inclusion of an order to show cause that brings the government into court to answer a stakeholder's call to determine lien priorities.

In sum, the district had federal subject matter jurisdiction because this case met the requirements of § 2410(a) as well as those of § 1444. Section 2410(a) only waives sovereign immunity and does not create a basis for federal subject matter jurisdiction. But, once it is deemed applicable in a state court action, such as the one here, it makes available to the government § 1444, which we have held creates a substantive right of removal to federal court, regardless of other jurisdictional limitations.[46]

C. Effect of a Final State Court Judgment

There is one remaining complication that we must resolve before addressing to the merits of this appeal. Unlike any of the cases discussed above, BOC's interpleader-like actions were not initiated until after the state court judgment (in a case that the government was not involved in, as a party or otherwise) that required BOC to pay the insurance proceeds to Hussain and Hibernia "as their interests appear in the policy" had become final and no longer subject to appeal. The Supreme Court has interpreted the Full Faith and Credit Act to require that federal courts grant the same preclusive effect to a state court judgment as the state court would have given to it.[47] Therefore, whether the Louisiana court judgment is considered final, in that sense, is a matter of state law.

The Louisiana Code of Civil Procedure provides that "[n]o claimant may be impleaded in a concursus proceeding whose claim has been prosecuted to judgment."[48] The purpose of this rule is to protect the claimant, "who has prosecuted his claim to judgment, and otherwise would be forced to relitigate the matter, not only with the obligor, but with all other adverse claimants."[49] In conformity with this language, the Louisiana Supreme Court has held that when claims have been "established," they may not be impleaded in a later interpleader suit.[50] Although the statutory language was adopted after the period during which the court tackled these cases, its decisions give contextual meaning to the provision. Review of the cases, however, demonstrates that the requirements to preclude subsequent interpleader by an "established" claim are neither completely clear nor met in this instance.

In Victor v. Lewis, Louisiana's highest court stated that the law is well-settled that a "claimant who has been put to the test of a trial by a surety, and has established his claim, may not be impleaded later by the surety in an interpleader suit, and compelled to prove his claim again with other adverse claimants."[51] In Victor, a plaintiff had successfully sued a real estate broker and an insurance company, as the bro-

45 Progressive Consumer Fed. Credit Union, 79 F.3d at 1231–32.

46 City of Miami Beach, 551 F.2d 1374 n.5. Even if § 1444 did not create independent federal subject matter jurisdiction, or this case had been brought directly in federal court, this interpleader-like action would appear to meet the requirements for federal jurisdiction under § 1332. See 28 U.S.C. § 1332(a)(1). Section 1332 jurisdiction under Rule 22 (rule interpleader) requires: (1) complete diversity of citizenship, which is met when the stakeholder is diverse from all the claimants, even if citizenship of the claimants is not diverse; and (2) an amount-in-controversy that exceeds $75,000 exclusive of interest and costs. See 4 Moore's Federal Practice § 22.04[2][a]. In this case, complete diversity was present: BOC is a Massachusetts corporation, and Hussain, Hibernia, and Rando are Louisiana citizens. As the government is not a citizen of any state, it is not considered in the complete diversity calculus. See 4 Moore's Federal Practice § 22.08[1], n.9. As for the second prong of the test for diversity jurisdiction, amount-in-controversy, the principal amount at stake of the insurance fund is $500,000, well in excess of the $75,000 threshold. Thus, subject matter jurisdiction on the basis of diversity would have been met.

47 See Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984); A.L.T. Corp. v. Small Bus. Admin., 801 F.2d 1451, 1455 (5th Cir. 1986).

48 La. Code Civ. Proc. Ann. art. 4652 (West 2002).

49 La. Code Civ. Proc. Ann. art. 4652, cmt. b.

50 See Am. Sur. Co. of N.Y. v. Ryan, 170 So. 34, 40 (La. 1936); Am. Sur. Co. of N.Y. v. Brim, 144 So. 727, 730 (La. 1932).

51 Victor v Lewis, 161 So. 597, 598 (La. 1935) (emphasis added).

ker's surety, for damages.[52] The state court of appeal affirmed the surety's liability, but reversed and remanded for a determination of quantum because the surety was entitled to offset its liability by the value to the plaintiff of the use of some land. The appellate court denied a rehearing requested by the surety, and the Louisiana Supreme Court denied certiorari. On remand in district court, the surety instituted a concursus (interpleader) action and deposited the full amount of the bond with the court. Rejecting this attempt at interpleader, the state supreme court found that the plaintiff's claim had been "finally and definitely established" because three courts had reviewed the issue;[53] the remaining issue relating to the value of the land during the time occupied by plaintiff was not enough to alter the conclusion that the judgment was final.[54]

The same court rejected a plaintiff's attempt at interpleader under an almost identical set of facts in American Surety Co. of New York v. Brim.[55] The court reasoned that a party who is aware of its ability to initiate concursus but chooses not to bring such an action cannot do so after losing the original suit. The court concluded that allowing interpleader under those conditions would increase the amount of litigation, thus working against the purpose of interpleader, and would force a successful claimant to "accept a pro rata part of a fund ... and thereby largely cause her to lose the benefits of her judgment."[56]

In American Surety Co. of New York v. Ryan, yet another factually similar case, the Louisiana Supreme Court rejected American Surety's attempt to recoup awards it had paid to individual claimants after it had instituted a concursus action.[57] Apparently relying on the doctrine of novation, the court characterized those plaintiffs as judgment creditors of American Surety, no longer being claimants to a fund.[58] The factors on which the court relied were (1) the claims had been reduced to judgment before American Surety made any deposit into the registry of the court, (2) the judgments were executory against any property or fund owned by American Surety, and (3) American Surety had paid the judgments from other funds and without reference to the court-deposited fund.[59]

In contrast to those conclusions, it was also in Ryan that the court finally allowed interpleader against one claimant whose claim the court determined was not "established."[60] This claimant, Howland & Co ("Howland"), had won a judgment against a different company, Home Accident Insurance Company, by suing its ancillary receiver in a process that was more summary than adversarial.[61] Howland then successfully sued American Surety, as surety of Home Accident Insurance Company, for payment on the unpaid judgment.[62] That judgment, however, was apparently never signed, and American Surety filed a motion for rehearing and an order for Howland to show cause why the rehearing should not be granted.[63] The proceedings stopped there because American Surety filed its interpleader action at about the same time.[64]

In rejecting Howland's assertion that its claim was established, the court found that Howland's prior judgment was based on insufficient proof; that it was never signed; and that the motion for rehearing was

52 See id.
53 Id.
54 Id.
55 144 So. 727 (La. 1932).
56 Id. at 730.
57 170 So. 34 (La. 1936).
58 Id. at 39.
59 Id.
60 Id. at 40.
61 The original suit was brought against the ancillary receiver of Home Accident Insurance Company. The litigation, according to the court, only consisted of a set of interrogatories that the receiver answered, in which he essentially admitted to liability if Howland's proffered exhibits were correct. It was on this basis that the court found in favor of Howland, who then used the judgment to obtain a judgment against American Surety. See id.
62 Id. at 37–38.
63 Id.
64 Id.

never adjudicated.[65] The court also based its conclusion on the fact that the prior judgment was executory only against American Surety for no more than the amount of the bond it held, thereby restricting recovery to the available proceeds from an insurance bond.[66] The court surmised that these factors prevented Howland's claim from being "established," thereby freeing the stakeholding plaintiff to bring Howland into a subsequent concursus proceeding.[67]

These Louisiana cases suggest that any plaintiff who has prosecuted his case through the appellate levels and achieved a judgment for which there is no further avenue of litigation cannot later be brought into a suit in interpleader. And, at first glance, the facts of our case suggest that Hussain and Hibernia had indeed established their claims through a final, executory judgment, thus blocking their being interpled subsequently by BOC: Hussain and Hibernia had prevailed at the trial and appellate court levels, and BOC's writ application had been denied by the Louisiana Supreme Court, before the government ever asserted its tax lien and, necessarily, before BOC could have responded by filing its show cause motion. Thus, as described in Victor, "th[e] matter was passed upon by three courts in definitive judgments."[68]

Closer scrutiny reveals, however, that this case is distinguishable from prior decisions. The positions of the parties in this case are factually different from past examples of "established" claims such that this case does not come within the scope of article 4652 of the Louisiana Code of Civil Procedure prohibiting concursus (interpleader) against claimants who have already prosecuted their claims to judgment.[69]

Like Howland, the unestablished claimant in Ryan, Hussain and Hibernia's aggregate recovery is limited to the policy proceeds, and thus is not a general judgment against BOC itself. The initial state court judgment held BOC liable to Hussain and Hibernia for 500,000, "the policy limits under Business Owner's Xtra Policy . . . as their interests appear in the Policy." In fact, the trial court specifically rejected all other claims brought against BOC, including those for penalties for arbitrary failure to pay claims under the policy. Thus, as in Ryan, the trial court specifically restricted the judgment to the amount of the policy (plus interest and costs), and prohibited any recovery against the insurance company in excess of that amount.

Furthermore, this case is unlike Brim, because it is not clear that BOC had "knowledge of all the facts" such that it could have chosen to proceed in concursus originally.[70] During the liability stage of this litigation, only Hussain and Hibernia had made claims to the insurance proceeds. Although a situation in which two parties sue for the same funds is often ripe for concursus, such is not the case when the combined claims fail to exceed the fund and are not mutually exclusive. As Hibernia's claim was derivative of Hussain's and as the cases were consolidated relatively early in the litigation, there was apparently no fear of multiple liability or multiple litigation to prompt BOC to file a concursus proceeding. In fact, notice of the IRS lien on Hussain's property and its threatened legal action did not appear until December 2000, which was subsequent to the Louisiana Supreme Court's denial of certiorari.

It is also evident that further proceedings in this instance likely would not increase litigation. Regardless of whether the government remains a party, the merits of this case indicate that Rando and Hibernia would continue to dispute the priority of their claims in the fund: A court would still have to sort out which contingency fee percentage Rando was entitled to receive,

65 See id. at 40.
66 See id. at 40–41.
67 Id.
68 161 So. at 598.
69 La. Code Civ. Proc. Ann. art. 4652.
70 Brim, 144 So. at 730.

and whether the demand for expert fees was proper. Thus, even if a concursus or interpleader were not allowed in this case, additional litigation would still arise.

Neither would Hussain lose the benefits of his judgment if interpleader were allowed. State court litigation ensured that BOC was liable to Hussain and Hibernia for the full policy proceeds plus interest and costs. Further litigation would not alter the judgment against BOC. If future litigation should force Hussain to accept a reduced recovery, it will be because the government partially satisfies its tax lien against Hussain through the interpleader proceeding; but the government would have obtained this result regardless. Without interpleader, Hussain would have taken the remaining policy proceeds, and would have been forced to pay these proceeds in separate litigation with the government to satisfy tax arrearages. Allowing interpleader simply skips this unnecessary step, and enables the government to collect without engaging in duplicative litigation.

Finally, this case is unlike Victor v. Lewis because of the remaining substantive legal issues requiring resolution. The Victor court found that factual determination of the value of land occupancy did not upset the ''established'' character of the plaintiff's claim. Here, in contrast, the parties will continue to advance substantive legal disputes after the finding of liability. Such issues do not call into question the final judgment against BOC, but they are significant enough, in our view, to allow litigation to continue through interpleader.

In conclusion, even though Hussain and Hibernia's judgment against BOC is a final, unalterable state court judgment, it is not ''established'' in the sense of Louisiana jurisprudence and does not preclude a subsequent interpleader-like action under these unique facts. The state court judgment was specifically limited to the insurance policy proceeds and it was not practical, or expected, for BOC to attempt an interpleader-like action until it became aware of the government's lien. Further-more, none of the dangers that accompany subsequent interpleader are present. The remaining issues concern substantive ques-tions of priority, and would have arisen even in the absence of this interpleader-like action. If Hussain's award is reduced, it will be because of Hussain's own tax li-abilities and not because of an independent claim to the fund. Allowing this action may actually bring a benefit to Hussain, because it preempts separate litigation be-tween him and the government and, as a result, saves him attorney fees in such an action. Thus, because these proceedings do not threaten relitigation or the reconsidera-tion of BOC's liability, but instead provide a potential benefit to Hussain, we see no reason why an interpleader-like action should not have proceeded in this particu-lar case.

D. Amount of Attorney Fees

[2] Having resolved jurisdictional and final judgment ambiguities, the first merits issue is whether Rando was entitled to have attorneys' fees calculated on Hussain's net recovery under the insurance policy, as the district court held, or on his gross recovery, as Rando argues. An alternative way of viewing the question is: Does Hibernia, as a named loss-payee mortgagee, prime the secured claim of Rando, the insured's attorney, in the distribution of insurance proceeds from BOC?

The district court gave priority to Hibernia over Rando, reasoning that ''the loss payee-mortgagee (Hibernia) is entitled to the proceeds of the policy to the extent of the mortgage debt, with any surplus then payable to the insured-mortgagor (Hussain).''[71] Rando argues on appeal that (1) Hibernia is a loss payee under a simple or open loss-payable clause, not a standard or union clause; (2) under an open loss-payable clause, the loss payee recovers only if the insured recovers; ergo (3) Hibernia's right to recover is contingent on, and derivative of, Hussain's right to recover. In Rando's view, this is the reason that the state court awarded judgment in the insurance suit for Hussain and Hibernia ''jointly'' — as the Policy's Loss Payable

[71] Hussain, 170 F. Supp 2d. at 670 (citing J.B. Durbin v. Allstate Ins. Co., 267 So. 2d 779, 781 (La. Ct. App. 2d Cir. 1972))

provision required. Hence, Rando concludes, the contingency-fee rate should apply to Hussain's gross recovery from BOC, not to his recovery net of BOC's payment to Hibernia.

Hibernia counters that (1) Louisiana law clearly ranks the loss-payee ahead of the insured; (2) there is no basis for applying Rando's contingency fee to Hibernia's recovery; and (3) Rando's distinction between types of loss payees is irrelevant in this case. Hibernia also emphasizes that it has independently prosecuted this suit, having been the first to sue, thereby interrupting prescription and commencing the accrual of judicial interest.

Rando's argument that he has priority over Hibernia has little support in either statutory or case law. The relevant state statute, La. Rev. Stat. § 9:5001(A), states:

> A special privilege is hereby granted to attorneys at law for the amount of their professional fees on all judgments obtained by them, and on the property recovered thereby, either as plaintiff or defendant, to take rank as a first privilege thereon superior to all other privileges and security interests under Chapter 9 of the Louisiana Commercial Laws.[72]

Even from the statute alone, one might conclude that "judgment obtained by them," in a consolidated case, refers to the judgment an attorney obtains for his client, and not any amount obtained by another party. This view is reflected both by our decisions and those of the Louisiana courts.

On several occasions, we have recognized that "when a mortgagee is designated as the loss payee, the insured in effect appoints him to receive payment under the policy."[73]

> It is well established as the law of Louisiana that where insurance is taken out by the mortgagor for the benefit of mortgagee, or is made payable to the mortgagee as his interest may appear, the mortgagee is entitled to the proceeds of the policy to the extent of his mortgage debt, holding the surplus, if any, after the extinguishment of his debt for the benefit of the mortgagor. Adams v. Allan, La. App., 19 So.2d 578 (1st Cir. 1944).[74]

We have gone so far as to apply this principle to create an equitable lien in favor of the mortgagee, entitling it to recover insurance proceeds, even when the insurance policy did not name the mortgagee as a loss payee.[75]

Rando cites Lazlo v. State Farm Fire & Casualty Co.,[76] for the proposition that he should recover on the gross amount BOC paid out, not merely the net amount. But, as Hibernia and the government assert, Lazlo is distinguishable. In that case, fire consumed a house that was insured and mortgaged; and, as here, the mortgagee was a named loss payee in the insurance policy.[77] Unlike this case, however, the insurance company in Lazlo purchased the mortgage from the mortgagee.[78] Litigation over the arson issue resulted in cancellation of the mortgage. We held that the mortgage became property "recovered" for the homeowner through the arson litigation; the value of the mortgage, under La. Rev. Stat. § 9:5001, was thus to be included in the attorneys' fees privilege.[79]

At first glance, it does appear difficult to distinguish Lazlo meaningfully from this case: Both plaintiffs had loss-payee provi-

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72 La. Rev. Stat. Ann. § 9:5001(A) (West 2002).

73 Walter v. Marine Office of Am., 537 F.2d 89, 98 (5th Cir. 1976) (citing Diaz v. Cherokee Ins. Co., 275 So. 2d 922, 925 (La. Ct. App. 1973)). Walter turned on whether there should be an exception to this general rule when the mortgagor makes repairs after an accident damaging the mortgaged property, and this Court held in the negative. Id. at 97–99.

74 Id. at 99.

75 Am. Gen'l Fire & Cas. Co. v. Reese, 853 F.2d 370, 373–74 (5th Cir. 1988) ("Of course, the general law in Louisiana is that where an insurance policy is taken out by a mortgagor for the benefit of a mortgagee, the mortgagee is entitled to the proceeds of the policy to the extent of the mortgage debt due at the time of loss.").

76 796 F.2d 807 (5th Cir. 1986).

77 Id. at 808.

78 Id.; id. at 811 ("It is crucial in this connection that State Farm did not 'pay off' the mortgage; it bought the mortgage. Consequently, if there had been a judgment in State Farm's favor [on the arson issue], Lazlo could have been sued under the mortgage . . . .").

79 Id. at 812 ("It is clear for fee privilege purposes that such cancellation at least comprises 'property recovered' by counsel for Lazlo.") (emphasis in original).

sions in their mortgages directing the insurance company to pay the mortgagee in the event of losses to the mortgaged property. The most significant difference is that the insurance company bought the mortgage from the mortgagee in Lazlo and cancelled it after litigation.[80] This difference, however, in no way increased the insured's recovery beyond the surplus after satisfaction of the mortgage; neither does it reflect any greater professional effort on the part of Lazlo's attorney. Irrespective of whether the mortgage was bought and cancelled, the loss-payee provision made certain that the professional efforts of Lazlo's lawyer would never have produced a recovery of more than the surplus policy funds. If the mortgage had not been cancelled, then the insurance company likely would have paid itself the funds due under the loss-payee provision, thereby paying off Lazlo's mortgage. Thus, if Lazlo's reduced recovery was a foregone conclusion because of the loss-payee provision, it is hard to see why Rando should be deprived of the fees on the total policy when the loss payee provisions similarly reduced Hussain's recovery.

Nonetheless, Lazlo remains distinguishable. Assigning the mortgage to the insurer may seem like a procedural technicality as far as the insured's ultimate recovery is concerned, but it did have the practical effect of covering the mortgagee's interest in the mortgage. Unlike the mortgagee in Lazlo, the mortgagee in this case, Hibernia, did not convey or assign the mortgage to BOC. Instead, it pursued litigation on its own to protect the amount it was entitled to receive as loss-payee. Although Rando is correct that to recover Hibernia needed Hussain, that statement is only correct insofar as Hussain's action may have been a technical prerequisite to recovery from BOC.

The law is clear that even under an open or simple loss payable provision, such as the one in operation here, the mortgagee has a direct claim to the insurance proceeds up to the amount necessary to cover the outstanding balance on the obligation secured by that mortgage.[81] The only drawback with this type of provision, as opposed to a standard or union clause, is that the mortgagee cannot recover if the insured is somehow at fault for the loss. Thus, if Hussain's presence in the suit was necessary at all, it was merely to allow a defense against arson allegations. As Hibernia notes, it initiated litigation itself a year before Hussain sued; and Hibernia obtained a judgment against Hussain which liquidated the amount due to it under the loss-payable provision.

This difference from Lazlo is material. Unlike Lazlo, the mortgagee's financial interest was not satisfied through an assignment. Instead, the mortgagee litigated to ensure its receipt of the amount outstanding on the note. Thus, Rando cannot alone claim credit for recovering the amount that was due directly to Hibernia as a result of the loss payee provision; neither was he the only lawyer — or even the first one — presumably working to refute the arson allegation. In light of the well-established character of Hibernia's right to the money, and the work of its counsel in the litigation, Rando is not entitled to an award of fees on that portion of the recovery. Finally, despite any remaining similarities between Lazlo and this case, the weight of authority both in our precedent and under Louisiana's indicates that a mortgagee's rights under a loss-payee provision vest automatically when a loss-causing incident occurs.[82] As a result, any amount ultimately recovered by Hussain was certain to be, from the outset, net of the outstand-

[80] Another difference, as noted by the district court, is that the fee agreements themselves differed because Lazlo's payment plan assigned to his attorney "(40%) per centum $60,000 plus interest and costs any and all sums collected or rights and/or interest obtained," Lazlo, 796 F.2d 810 n.3, while Hussain's fee agreements with Rando spoke in terms of "any recovery" and "gross recovery". Hussain, 170 F. Supp 2d. at 671–72. It is not apparent that this difference should have any legal ramifications, however.

[81] See Ingersoll-Rand Fin. Corp. v. Employers Ins. of Wausau, 771 F.2d 910, 913 & n.3 (5th Cir. 1985) (noting the difference between standard and simple clauses by explaining that "[t]he latter simply provides that the proceeds of the policy shall first be paid to the mortgagee as his interest appears, but it does not provide a separate undertaking that the mortgagee's interest shall not be impaired by any act or neglect of the insured-mortgagor."); Whitney Nat'l Bank of New Orleans v. State Farm Fire & Cas. Co., 518 F. Supp. 359, 361–62 & n.2 (E.D.La. 1981) (quoting insurance treatise language to explain the difference).

[82] See Walter, 537 F.2d at 99 (recognizing that the mortgagee's rights vested at the time of the accident) (citing Wray-Dickinson Co. v. Commercial Credit Co., 192 So. 2d 769 (La. Ct. App. 1939); Pearson v. Rapstine, 203 F.2d 313, 315 (5th Cir. 1953); Durbin, 267 So. 2d at 781.

ing balance on his mortgage to Hibernia.[83]

Simply stated, then, Rando's contentions that (1) he has priority over Hibernia, and (2) his fee should be calculated on the gross amount paid out by BOC rather than the net amount recovered by Hussain, are wrong. Thus, we affirm the district court's allowance of the net amount only.

E. Appropriate Contingency Fee Percentage

Rando also contends that the district court erred in applying as his contractual contingency fee percentage the 33 1/3% figure from his 1995 fee agreement with Hussain rather than the 39% figure from their 2000 fee agreement. The district court concluded that Rando's super-priority for attorney's fees under 26 U.S.C. § 6323(b)(8) only applied to his success in having BOC held liable for the insurance proceeds, not his post-judgment effort to collect the monies.[84] Thus, reasoned the court, Rando only deserved fees under this provision for the work done pursuant to the 1995 agreement, which specified a contingency fee of 33 1/3%. On appeal, Rando chiefly argues that under Louisiana law, "the highest reasonable contingency fee controls."

No party disputes that Rando's effort to achieve a judgment against BOC for the insurance fund entitles him to a super-priority ranking for his fees over the federal tax lien. Rather, the issue is whether Rando can substitute a higher contingency fee percentage after the adjudication of BOC's liability but before any of the funds are actually distributed. Stated differently, we must determine whether § 6323(b)(8)'s super-priority ranking attaches when BOC's is found liable, or when the proper distributions from the insurance fund are actually determined. To answer this question, we must first determine the scope of the term "judgment" as used in the relevant statute. Section 6321 of the Internal Revenue Code establishes "a lien in favor of the United States upon all property and rights to property, whether real or personal" against a delinquent taxpayer.[85] This lien attaches at the time of assessment and to all property owned or subsequently acquired by the taxpayer.[86] Section 6323(b)(8) creates an exception to this federal tax lien priority. In part, it provides that a previously filed federal tax lien shall not be valid, "[w]ith respect to a judgment or other amount in settlement of a claim or of a cause of action, as against an attorney who, under local law, holds a lien upon or a contract enforceable [sic] against such judgment or amount, to the extent of his reasonable compensation for obtaining such judgment or procuring such settlement."[87] The announced purpose of this provision is to provide an incentive to attorneys to enhance the value of a taxpayer's property, which would ultimately increase the government's revenue collection.[88]

We have already determined that, because of continuing disputes about the proper distributions from the insurance fund, the adjudication of BOC's liability constituted a final state court judgment, but did not preclude a subsequent interpleader-like action. This portion of the case asks, as a question of law, whether the "judgment" of which § 6323(b) (8) speaks requires actual distribution of the fund or merely a determination of liability. As such, the issue requires our de novo review.

We have not had the opportunity to interpret § 6323(b)(8) in the context of the specific issue we review today. Other courts have concluded that "obtaining such

83 Rando's reliance on Lerner Stores Corp. v. Elec. Maid Bake Shops is similarly misplaced: There we held that a mortgagee was not entitled to priority for the mortgagee's own attorneys' fees, and the case did not adjudge the relative priorities of a loss payee-mortgagee and the insured-mortgagor. 24 F.2d 780, 781 (5th Cir. 1928).

84 Hussain, 170 F. Supp 2d. at 672.

85 26 U.S.C. § 6321 (2000).

86 See Tex. Commerce Bank-Fort Worth, N.A. v. United States, 896 F.2d 152, 161 [65 AFTR 2d 90-848] (5th Cir. 1990); Centex-Landis Constr. Co. v. United States, No. CIV.A.99-1968, 2000 WL 1039475, at *2 [86 AFTR 2d 2000-5128] (E.D.La. May 9, 2000).

87 26 U.S.C. § 6323(b)(8) (2000).

88 See Reed & Steven v. HIP Health Plan of Fla., Inc., 81 F. Supp 2d. 1335, 1338 [84 AFTR 2d 99-6369] (S.D.Fla. 1999); S. Rep. No. 89-1708, at 1966 U.S.C.C.A.N. 3722, 3727 ("An attorney's fee in such a case can be thought of as similar in concept to the repairman's charge in that it can be expected to enhance the value of the taxpayer's property.").

judgment''[89] means that an attorney must have created a fund which increases the taxpayer's taxable property.[90] Thus, it is fairly well-settled that the word ''judgment'' as used in § 6323(b)(8), must be read in light of the statute's purpose; that is, the creation of a fund that increases the taxpayer's property for the ultimate benefit of the IRS.

What is required to create such a fund is much less clear. Although to our knowledge no court has addressed the precise fact pattern that is now before us, other courts have confronted this general question in slightly different contexts. For instance, some courts have taken ''a more expansive view of what constitutes the creation of such a fund.''[91] These fora have found that both recovery of seized funds from the government[92] and efforts to obtain confirmation of an arbitration award[93] constitute fund creation within the intendment of § 6323(b)(8). Another court has concluded that ''judgment'' in the statute ''refers both to the judicial act and that which in whole or in part satisfies the 'judgment','' suggesting that fees charged for efforts to collect a judgment deserve super-priority treatment as well.[94]

In contrast, appearing more restrictive, several courts have held that such other activities fail to create a fund and thus fail to constitute a judgment under the statute. One court has found, for example, that the filing of a suit against a party who responds by interpleading the plaintiff and depositing an amount into the court registry is not enough to constitute creating a fund and thereby a ''judgment'' from which attorney fees are warranted.[95] Similarly, courts have concluded that interlocutory decisions, even if creating new funds, do not come within the statutory meaning of ''judgment.''[96]

These cases provide little clear guidance for us because they neither establish a uniform interpretation nor address the particular circumstances of this case. We face a situation here in which the issue of BOC's liability has been exhausted in state courts and accepted as final in federal court. The final resolution of this case, however, is still open because some of the parties continue to compete for priority and quantum of the limited insurance proceeds. Even though the judgment here may not be final in terms of all distribution issues, however, it is final in that, in the end, BOC cannot avoid or reduce its obligation to pay out all the insurance fund proceeds and interest.

If we were to conclude that creation of a fund, and thus the term ''judgment,'' requires actual distribution, § 6323(b)(8) would give super-priority to all the fees charged, from the very beginning through the very last distribution from the fund. The renegotiation of the contingency fee, as a result, would appear to apply to whatever is the final distribution. The problem with this interpretation is that the outcome it dictates undermines the purpose of § 6323(b)(8), i.e., increasing the value of the taxpayer's property to better satisfy outstanding tax liens. Once BOC is found liable, the fund is created; any subsequent effort cannot increase the amount of the insurance proceeds or the government's recovery. Indeed, because there is a limited fund available for distribution, the outcome advocated by Rando would increase his fees but decrease Hussain's potential recovery. Reducing Hussain's potential re-

89 26 U.S.C. § 6323(b)(8).

90 See Reed & Steven, 81 F. Supp 2d. at 1338; United States v. McGaughey, No. 93-CV-196-WDS, 93-30173, 90-3475-WDS, 1999 WL 282780, at *3 [83 AFTR 2d 99-2023] (S.D. Ill. March 24, 1999). See also Rosenman & Colin v. Richard, 850 F.2d 57, 61 (2d Cir. 1988) (interpreting a similar New York statute to limit the attorney's lien to the fund created or property obtained in a judgment won on behalf of her client).

91 Warner v. United States, No. J-C-94-210, 1995 WL 693188, at *4 (E.D. Ark. Sept. 19, 1995) (citing Markham v. Fay, NO. 91-10821-Z, 1993 WL 160604, at *7 (D. Mass. May 5, 1993) and Chicago Title Ins. Co. v. Kern, 81-2 U.S.T.C. (CCH) ¶ 9696 [48 AFTR 2d 81-5939] (D.D.C. 1981)).

92 See United States v. N.Y. State Dep't of Taxation and Fin., 138 F. Supp 2d. 392, 398–399 (W.D.N.Y. 2001).

93 See Blimpie Int'l, Inc. v. Peacox Ventures, L.L.C., No. C-00-1510 VRW, 2001 WL 1155076, at *3 (N.D. Cal. Sept. 19, 2001).

94 McGinley v. United States, 942 F. Supp. 1239, 1244 [79 AFTR 2d 97-1162] n.3 (D. Neb. 1996).

95 See Centex-Landis Constr. Co., 2000 WL 1039475, at *2.

96 See McGaughey, 1999 WL 282780, at *3–4 (stating that even if an interim compensation order created new funds and was procured by the attorney, such interim orders are ''not the type of 'judgment' to which the statute refers''); McGinley, 942 F. Supp. at 1245 (finding that an interlocutory decision does not constitute a ''judgment'' because it ''lacks the fundamental character of finality that distinguishes the common understanding of the word 'judgment' from other court orders'').

covery to add to Rando's take would, in turn, reduce the property available to satisfy the tax lien. Such a result is diametrically opposed to that intended by Congress in enacting § 6323(b)(8).

In contrast, applying § 6323(b)(8) only to Rando's effort in securing BOC's liability comports with the purpose of the statute. The point at which BOC is held liable is the point at which a fund is created in the taxpayer's favor. Any litigation subsequent to this point, albeit necessary to bring the case to its final conclusion, does nothing to increase the value of the taxpayer's property. Indeed, as indicated above, negotiation of a higher contingency fee would actually reduce Hussain's theoretical recovery and thereby diminish the value of the property available to satisfy the federal tax lien.

Furthermore, this conclusion is not likely to lessen the incentive of attorneys in cases of this nature as it does not preclude super-priority treatment of attorney fees. For his effort in finding BOC liable, Rando will still receive fees equaling 33-1/3% of Hussain's recovery. Thus, lawyers in future cases will still have an incentive to represent delinquent taxpayers.

We conclude that only the fees earned in litigating BOC's liability deserve super-priority under § 6323(b)(8), and these fees are assessed pursuant to the original 33 1/3% contingent fee agreement. As this is the approach taken by the district court, we affirm its ruling on the issue.

F. Award of Expert

The final substantive issue concerns whether the district court erred in reducing the expert fee of John Theriot, CPA, from $24,509.50 -- the amount he billed, which the court described as ''obscene'' -- to $5,000, and awarding that reduced amount.[97] On appeal Rando simply argues that the attorney's privilege to fees under La. Rev. Stat. 9:5001 extends to all court costs and litigation expenses advanced by the attorney for the client's benefit. The government, on the other hand, contends that Rando was entitled to no expert fee for Theriot because he never testified; and in the alternative, that the district court's assessment was reasonable.

The district court accepted Rando's contention that Theriot would have been called had the case gone to trial instead of being concluded by directed verdict, and therefore reasoned that some fee was appropriate.[98] The court justified the reduced fee by applying Louisiana's balancing test for allocating experts' fees, which weighs such factors as (1) the amount of time the expert spends in preparing for trial; (2) the amount of time he spends in court; (3) his expertise; (4) the amount he charges; (5) the amount involved in the award; and (6) the degree to which the opinion of his experts aid the court.[99]

Our review of the district court's opinion is conducted under the very deferential abuse of discretion standard. Even under this standard, however, we must conclude that, in this instance, the district court abused its discretion by granting any fee whatsoever.[100]

It is well settled under Louisiana law that, because costs can be awarded pursuant to statute only, and because Louisiana has no statute that provides costs for the fees of experts who do not testify, any taxation for such fees as costs is an error of law and thus an abuse of discretion.[101] This is consistent with Louisiana's rule that, if a deposition is not used as evidence at trial, the costs in procuring it cannot be taxed as costs.[102]

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97 Hussain, 170 F. Supp. 2d at 675.

98 See id.

99 Viator v. Liverpool & London S.S. Prot. and Indem. Ass'n, 97-262, (La. App. 3 Cir. 10/8/97), 701 So. 2d 487, 497.

100 See United States v. Logan, 861 F.2d 859, 866 n.5 (5th Cir. 1988) (''abuse of discretion is a phrase which sounds worse than it really is; it is simply a legal term of art which carries no pejorative connotations'') (citation and internal quotation marks omitted).

101 See State Dep't of Highways v. Salemi, 193 So. 2d 252, 254 (La. 1966) (''Since they were not called to testify in court, we are of the view that the amount of the fee paid these experts cannot properly be considered an item of the costs awarded in the compromise judgment.''); Moran v. Harris, 93-2227, *3 (La. App. 1 Cir. 11/10/94), 645 So. 2d 1248, 1249-50; Allstate Ins. Co. v. Aetna Cas. and Sur. Co., 93-0588 (La. App. 1 Cir. 3/11/94), 634 So. 2d 49, 50 (holding that award of fee for expert in case that was involuntarily dismissed before trial was an abuse of discretion); Haas v. Ledoux's Estate, 427 So. 2d 12 (La. Ct. App. 3d Cir. 1983) (upholding denial of fees).

102 See Moran, 645 So. 2d at 1249–50.

The district court acknowledged the rule that fees of experts who do not testify cannot be taxed as costs, but concluded that because Rando intended to call Theriot and was only prevented from doing so by the court's rendering of a directed verdict, some such costs should be awarded. Louisiana precedent indicates, however, that the reason an expert does not or is unable to testify is irrelevant. Courts have held in particular that such costs should be denied even when an expert's inability to testify arises involuntarily.[103]

Regardless of the court's role in preventing Theriot's testifying, the fact remains that he never testified in person and never had a report or other testimony, such as deposition or affidavit testimony, entered into evidence. Louisiana law dictates unequivocally that, under these circumstances, none of Theriot's charges can be taxed as costs.

III. Conclusion

For the reasons stated herein, we affirm the district court's holdings as to (1) subject matter jurisdiction, and (2) the priority and amount of BOC's distributions from the insurance proceeds fund to Hibernia, Rando, and the United States, including the court's ruling on the appropriate contingency fee percentage used in calculating Rando's recovery and the principal sum to which that percentage should be applied. We reverse, however, the district court's taxation of any part of Theriot's expert fee as costs. We therefore vacate the court's original judgment and remand with instructions for the district court to enter a new judgment with updated and corrected distribution amounts, and with no award of expert witness fee.

AFFIRMED in part; REVERSED in part; and REMANDED with instructions.

¶2002-5693

ANDALEX RESOURCES, INC., ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) Docket Nos. 99-268T; 00-241T; 00-245T; 00-634T; 98-414T; 00-457T; 00-249T; 00-244T; 99-299T; 00-243T; 97-68T; 97-310T; 97-311T; 97-317T; 97-521T; 97-522T; 98-557T; 98-200T; 01-252T; 00-218T; 00-216T; 00-248T; 00-762T; 00-247T; 99-301T; 01-423T; 00-236T; 99-298T; 00-250T; 01-422T; 00-242T; 00-246T; 00-467T; 01-252T; 00-148T; 02-200T, Nov. 19, 2002. Decision for Govt.

1. Refund actions—coal excise taxes—constitutionality—pre-judgment interest—sovereign immunity—Export Clause—summary judgment. Coal producers weren't entitled to prejudgment interest under 28 USC §2411 on judgment that awarded them recovery of unconstitutional excise taxes under Export Clause's stand-alone monetary relief provision: §2411's limited sovereign immunity waiver expressly applied only to *refund* actions, so didn't apply to overpayments recovered under Constitution and outside tax refund system. Also, Export Clause, language of which was prohibitive only and contained no affirmative restorative compensation provision, carried no interest mandate; and money mandate didn't in itself necessarily imply interest mandate. *Reference:* United States Tax Reporter ¶66,115.01(3); 74,336.510(40); 74,225.01(75). USTR Excise Taxes ¶41,215.01(30) IRC §4121; 6611; 7422.

Steven H. Becker and Paul A. Horowitz, Coudert Brothers LLP, New York, NY, for plaintiffs Andalex Resources, Inc., et al.; Robert M. Rolfe, Hunton & Williams, Richmond, VA, for plaintiffs Buffalo Mining Company et al.; William L. Anderson, Crowell & Moring, Washington, DC, for plaintiffs Cyprus Amax Coal Company; William R. Rakes, Gentry, Locke, Roanoke, VA, for plaintiffs Concept Mining, Inc., et al.; David J. Levine, McDermott, Will & Emery, Washington, DC, for plaintiffs Pen Coal Corp.; John Y. Merrell,

[103] See id. at 1249 (explaining that the expert was unable to testify because of an injury); Parish of Jefferson v. Harimaw, Inc., 297 So. 2d 694, 698 (La. Ct. App. 4th Cir. 1974) (holding that "the defendant cannot recover the fees paid experts in preparation for expropriation litigation who give no testimony via depositions nor who are 'used on the trial' when suit is properly dismissed by the plaintiff without prejudice").

Jr., and John Y. Merrell, Merrell & Merrell, McLean, VA, for plaintiffs Black Rock Coal, Inc., et al.; Mary Lou Smith, Howe, Anderson & Steyer, Washington, DC, for plaintiffs Chisholm Coal Company; Eric Roger Thiessen, Penn, Stuart & Eskridge, Abington, VA, for plaintiff Rapoca Energy Company; and Dennis Jeffrey Whittlesey, Jackson & Kelly, Washington, DC for plaintiff Bluestone Coal Corp., et al.
Robert Charles Stoddart, and Robert N. Dorosin, United States Department of Justice, Tax Division, Washington, D.C., for defendant with whom were Eileen J. O'Connor, Assistant Attorney General; and Mildred L. Seidman, Chief, Court of Federal Claims Section.

U.S. Court of Federal Claims,

OPINION

HODGES, Judge.

The opinion that follows was issued on July 23, 2002, then withheld because the Federal Circuit's opinion in United States Shoe Corporation, was distributed the same day. See United States Shoe Corp. v. United States, 296 F.3d 1378 [90 AFTR 2d 2002-5376] (Fed. Cir. 2002). We issued an Order on July 25 advising the parties of the opinion granting defendant's motion for summary judgment, and asked how they wished to proceed in light of the U.S. Shoe decision.[1]

We held a hearing on August 29 to discuss the effect of the Federal Circuit's opinion on this case, and the parties briefed the issue further in September. We have considered the parties' arguments, and submit the opinion herewith as it was drafted.

INTRODUCTION

Plaintiff coal producers paid federal taxes on their shipments of coal pursuant to 26 U.S.C. § 4121. Some of the shipments included exports. A federal district court held that the coal tax was unconstitutional when applied to exports. Ranger Fuel Corp. v. United States, 33 F. Supp. 2d 466 [83 AFTR 2d 99-375] (E.D. Va. 1998). The Government did not appeal this holding. The Internal Revenue Service issued a notice of acquiescence to the Ranger Fuel ruling in May 2000. See Notice 2000-28, 2000-21 I.R.B. 1116 (May 22, 2000). Plaintiffs subsequently brought claims for refunds in this court under the Tucker Act and filed motions for summary judgment on the issue of interest on those claims. See Cyprus Amax Coal Co. v. United States, 205 F.3d 1369 [85 AFTR 2d 2000-1151] (Fed. Cir. 2000), cert. denied, 532 U.S. 1065 (2001).

The Government filed a cross-motion for partial summary judgment on the interest issue. We grant defendant's cross-motion for partial summary judgment.

BACKGROUND

___The Federal Circuit reversed this court's holding that the Court of Federal Claims lacked jurisdiction to entertain plaintiffs' constitutionally-based tax claims because they had not observed administrative tax refund requirements. See Cyprus Amax, 205 F.3d at 1371. The Circuit explained that plaintiffs met the jurisdictional requirements of this court because "the Export Clause is self-executing." Id. at 1374. Therefore, "a party can recover for payment of taxes under the Export Clause independent of the tax refund statute." Id.

The appeals court explained that plaintiffs "had two alternate avenues through which to obtain relief - a tax refund action or a cause of action based on the Export Clause - and either one is sufficient to invoke the Court of Federal Claims' jurisdiction under the Tucker Act." Id. at 1375. The Export Clause provides plaintiffs with an alternate means to recover their tax overpayments under the Tucker Act. The Circuit's Cyprus Amax decision permits plaintiffs to use the Tucker Act's six-year statute of limitations without complying with the administrative tax refund requirements. Id. at 1372. Plaintiffs "can poten-

[1] "While the export clause provides plaintiffs with an alternate and independent avenue for tax overpayment recovery, the provision is not interest-mandating. Because the export clause does not contain a constitutional waiver of sovereign immunity, plaintiffs cannot recover interest under that provision. On that basis, we would grant defendant's cross-motion for summary judgment." Andalex Resources, Inc., et al. v. United States, No. 99-268T (Fed. Cl. July 25, 2002).

tially recover an additional three years of taxes under the Tucker Act than under a tax refund claim." Id. at 1372–73. Now plaintiffs seek awards of interest added to any judgments of tax overpayment that this court may allow.

DISCUSSION

[1] ___Plaintiffs employ the alternate avenue of relief supplied by the Export Clause of the Constitution and by the ruling of the Federal Circuit in Cyprus Amax. By choosing this avenue, they can recover six years of tax overpayments instead of the three years that would have been permitted according to the administrative process of the tax code. Their claims for interest are predicated both upon the statutory provisions of 28 U.S.C. § 2411 and upon the Export Clause of the Constitution.

28 U.S.C. § 2411 Claims

___"[T]he United States upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest." United States v. Rogers, 255 U.S. 163, 169 (1921) (citations omitted). According to plaintiffs, Congress provided the necessary waiver of sovereign immunity for us to award them interest, in 28 U.S.C. § 2411. Section 2411 of Title 28, United States Code, provides in pertinent part:

> In any judgment of any court rendered (. . . against the United States . . .) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the overpayment rate established under section 6621 of the Internal Revenue Code of 1986 upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.

28 U.S.C. § 2411. Plaintiffs assert that this court must award interest on their claims because they will receive: 1) a judgment rendered against the United States; 2) for an overpayment; 3) in respect of an internal revenue tax.

The Government contends that plaintiffs' choice to pursue their claims under the Export Clause of the Constitution precludes their claims for pre-judgment interest under § 2411. Congress enacted § 2411 to aid in judicial enforcement of tax refunds; it is essentially a tax refund statute. Plaintiffs have chosen to pursue their claims independently of the tax refund system, so they may not use the § 2411 waiver of sovereign immunity for interest payments.

28 U.S.C. § 2411 Waiver of Immunity

___The Tucker Act gives this court jurisdiction to hear tax refund actions. "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon . . . any Act of Congress . . ." 28 U.S.C. § 1491. The Tucker Act includes a six-year statute of limitations. See 28 U.S.C. § 2501. The Tucker Act is a jurisdictional statute and its statute of limitations is general.[2] As a result, tax refund claims brought in the Court of Federal Claims under the Tucker Act generally retain the shorter limitations provided by the Internal Revenue Code, 26 U.S.C. § 6511 (2002).[3] The IRC limitations apply in situations like plaintiffs' where a statute is declared unconstitutional after the parties have paid taxes:

> The statute of limitation on the right to a refund or to recover any amount assessed and collected as a tax cannot be made to depend upon the question of whether there was any legal authority for the assessment and collection. [Otherwise] the statute of limitation would be practically of no force or effect. The

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[2] The Court of Claims explained this in West Publ'g Co. Employees' Preferred Stock Ass'n v. United States, 198 Ct. Cl. 668, 674 n.6 [30 AFTR 2d 72-5007](1972) (quoting United States v. A.S. Kreider Co., 313 U.S. 443 [25 AFTR 1264], 447 (1941)):

> [T]here has been no question but that the general six-year statute was intended only as an outside limit on the period within which all suits against the United States might be begun, and that "Congress left it open to provide less liberally for particular actions which, because of special considerations, required different treatment.]

[3] 26 U.S.C. § 6511(a) provides in pertinent part:

> Period of limitation on filing claim. Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid . . . .

> statute of limitation is jurisdictional in this court, and when ... the time within which a person may bring a suit against the United States has expired, or that plaintiff has not complied with the requirements necessary to give him a right to maintain a suit, this court is without jurisdiction to entertain it.

West Publ'g Co. Employees' Preferred Stock Ass'n v. United States, 198 Ct. Cl. 668, 674 [30 AFTR 2d 72-5007] (1972) (quoting Wisconsin National Life Ins. Co. v. United States, 70 Ct. Cl. 433, 438 [8 AFTR 11136] (1930)).

___ Tax refund claims brought under Tucker Act jurisdiction are further restricted by administrative requirements. "[A]n administrative claim must be filed before a suit seeking a refund may be brought in any court." Williams v. United States, 11 Cl. Ct. 189, 191 [58 AFTR 2d 86-6134] (1986), aff'd 818 F.2d 877 (Fed. Cir. 1987) (citing 26 U.S.C. § 7422(a)) (emphasis added). As a result, "[f]ailure to plead and demonstrate that a timely administrative claim has been filed ... wrests jurisdiction from this court." Id. at 191–92.

Plaintiffs must file timely refund claims with the IRS, followed by complaints submitted to this court demonstrating their adherence to administrative requirements, to receive judgments under the Tucker Act. If the court renders judgment in their favor, and the refund is based upon a tax overpayment, 28 U.S.C. § 2411 provides interest on the judgment. Plaintiffs would avoid the shorter statute of limitations, and the administrative requirements of the tax refund statutes by using the Export Clause for jurisdiction, while returning to the tax statutes to obtain interest pursuant to § 2411.

28 U.S.C. § 2411 Interest

Plaintiffs are not seeking tax refunds, yet they claim that 28 U.S.C. § 2411 authorizes awards of interest on their claims. They contend that § 2411 provides interest on any judgment for restitution of tax overpayments, regardless of whether the claimant adhered to administrative tax refund requirements.

Plaintiffs chose to pursue their claims for damage under the Export Clause rather than as tax refunds pursuant to the Tax Code. "Because their claims are not for tax or penalty refunds, their claims do not fall within the jurisdiction of the Court of Federal Claims pursuant to 28 U.S.C. §[] ... 1491, the statute[] that give[s] the Court of Federal Claims jurisdiction over claims for tax refunds." Brown v. United States, 105 F.3d 621, 623 [79 AFTR 2d 97-599] (1997).[4] As the Federal Circuit explained, plaintiffs have removed themselves from the tax refund system and this court's jurisdiction over tax refund claims. Id. Plaintiffs' claims here fall within the jurisdiction of this court only because the Export Clause provides them with an independent cause of action for a monetary remedy. Cyprus Amax, 205 F.3d at 1374.

Title 28 U.S.C. § 2411 permits claimants to receive pre-judgment interest in tax refund cases. It provides an express waiver of sovereign immunity for such claims against the Government. See Library of Congress v. Shaw, 478 U.S. 310, 318 n.6 (1986). Claimants must be within the tax refund system to receive interest pursuant to § 2411, however. The Court of Claims so ruled in Economy Plumbing & Heating Co. v. United States, 470 F.2d 585 [31 AFTR 2d 73-993] (1972). The court explained:

> We do not think that the provisions of 28 U.S.C. § 2411[] and Section 6611 of the Internal Revenue Code providing for interest ... upon "any overpayment in respect of any internal-revenue tax" ... has any application to this case. We interpret those statutes as applying only to taxpayers who have overpaid their taxes, have filed a timely claim for refund, and are within the administrative system providing for the recovery of overpaid taxes and are entitled to its benefits.

[4] In Brown, the Federal Circuit declared that plaintiff taxpayers' claims for monetary damages based upon fraudulent takings and Fourth Amendment violations lacked subject matter jurisdiction in the Court of Federal Claims under the Tucker Act's tax refund jurisdiction. See Brown v. United States, 105 F.3d 621 [79 AFTR 2d 97-599] (1997).

Id. at 591–92 (emphasis added).[5] Plaintiffs in this case are taxpayers who overpaid their taxes and they filed claims for refunds. However, they brought this action under the Export Clause, and are not entitled to the benefits of the tax refund system.

Tax refund statutes apply to tax refund actions. Plaintiffs may not use § 2411 to recover interest on any judgment that this court may render regarding plaintiffs' principal claims. We may award interest only if the Export Clause mandates interest.

Export Clause Claims

___Plaintiffs claim that constitutional provisions carrying a requirement for monetary awards inherently provide for interest awards. In effect, any money-mandating Constitutional provision implies a similar Constitutional mandate for interest. We agree with the Government that this court may award pre-judgment interest on plaintiffs' Constitutionally-based claims only if the Export Clause mandates such an award.

Plaintiffs argue that money-mandating constitutional provisions implicitly are interest- mandating provisions. See Library of Congress v. Shaw, 478 U.S. 310, 317 (1986). They contend that this argument that the Constitution requires payment of interest is supported by court rulings under the Fifth Amendment Takings Clause and the Judicial Compensation Clause of Article III.

Fifth Amendment Takings Clause

"[T]he United States is not liable to interest except where it assumes the liability by contract or by the express words of a statute, or must pay it as part of the just compensation required by the Constitution." Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 47 (1928) (citing Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 304, 306 (1923)). The Court later noted that "[t]he allowance of interest in eminent domain cases is only an apparent exception [to the 'no-interest' rule], which has its origin in the Constitution." Smyth v. United States, 302 U.S. 329, 353 (1937) (citing Shoshone Tribe of Indians v. United States, 299 U.S. 476, 497 (1937)). "The requirement that 'just compensation' shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is part of such compensation." Seaboard Air Line Ry. Co. v. United States, 261 U.S. 299, 306 (1923).

Plaintiffs argue that the Fifth Amendment's requirement that interest be paid arises not from the Constitution's mandate for payment of "just compensation," but from the constitutional roots of the Fifth Amendment itself. They offer Hatter v. United States, 38 Fed. Cl. 166 [80 AFTR 2d 97-5646] (1997), which involves Article III of the Constitution, as support for this argument. See Hatter v. United States, 38 Fed. Cl. 166 [80 AFTR 2d 97-5646] (1997).

Article III Judicial Compensation Clause

The Federal Circuit ruled that Article III of the Constitution is money-mandating, as it relates to judicial compensation. Hatter v. United States, 953 F.2d 626, 628 [69 AFTR 2d 92-1418] (Fed. Cir. 1992). Article III "mandates the payment of money in the event of . . ." its violation. Id at 628. The court reasoned that the provision declares "in mandatory and unconditional terms, that judges' salaries 'shall not be diminished during their Continuance in Office.'" Id. The compulsory language of the Article and its implied mandate for repayment "presupposes damages as the remedy for a governmental act violating the [provision]." Id.

The Court of Federal Claims ruled that Article III is interest-mandating. See Hatter v. United States, 38 Fed. Cl. 166 [80 AFTR 2d 97-5646] (1997).[6] The court derived this affirmative requirement from the language of Article III "specifically re-

[5] In Economy Plumbing, the Court of Claims considered whether plaintiffs, who originally brought suit under a contract claim, could use 28 U.S.C. § 2411(a) to recover interest. See Economy Plumbing, 470 F.2d 585 [31 AFTR 2d 73-993] (1972).

[6] The Federal Circuit considered issues arising from the Hatter litigation five times, but that court has not ruled on whether interest is available under the Judicial Compensation Clause. We do not agree with plaintiffs' suggestion that the Federal Circuit accepted the Court of Federal Claims' award of interest in Hatter v. United States, 38 Fed. Cl. 166 [80 AFTR 2d 97-5646] (1997); the decision was not appealed.

quir[ing] that judicial compensation be paid 'at stated Times.''' Id. at 183 (citations omitted). The cardinal objective of the provision ''is to maintain the independence of the federal judiciary.'' Id. The court reasoned that a failure to award interest for violations of the Judicial Compensation Clause would threaten this independence because ''Congress would then be free to delay indefinitely payment of the principal amount of protected compensation leaving the judges with no remedy for the delay.'' Id.

Plaintiffs maintain that the trial court's view of Article III as an interest-mandating provision follows logically from the Federal Circuit's holding that Article III ''mandates the payment of money in the event of a prohibited compensation diminution.'' Hatter, 953 F.2d at 628. Plaintiffs contend that the necessary implication of the Hatter decisions is that any Constitutional provision providing a cause of action for money damages provides also a cause of action for pre-judgment interest. This argument does not resolve the issue of defendant's sovereign immunity to interest liability.

Plaintiffs point out that the Export Clause and Article III employ wholly prohibitive language, and both are money-mandating. Because the Compensation Clause is interest-mandating, the Export Clause must be as well, they contend.

The Export Clause and Article III employ similar prohibitive language. The Federal Circuit stated that, ''[b]oth clauses speak in absolute and unconditional terms, and both protect pecuniary interests.'' Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1375 [85 AFTR 2d 2000-1151] (Fed. Cir. 2000), cert. denied, 532 U.S. 1065 (2001). The Export Clause, like the Judicial Compensation Clause, is money-mandating. Cyprus Amax, 205 F.3d at 1373.[7] Both arise under the Constitution. Such similarities do not compel this court to hold that the Export Clause is also interest-mandating, however.

Prohibition Does Not Equate To Interest-Mandating

The Export Clause and Article III use prohibitive language, but an affirmative requirement of restorative compensation is present only in the Compensation Clause. The Court of Federal Claims grounded its award of pre-judgment interest for violations of Article III upon this affirmative requirement. See Hatter v. Untied States, 38 Fed. Cl. 166 [80 AFTR 2d 97-5646] (1997). The court reasoned that the affirmative requirement derives from the language of Article III requiring payment of judicial compensation at specific times and that the compensation paid may not be diminished. Id. at 182–83. ''There is a sounder basis for interest on delayed compensation protected under Article III than on just compensation guaranteed by the Fifth Amendment.'' Id. The court predicated this resolution upon Article III's requirement of payment ''at stated Times'' and upon the Clause's purpose of preserving the autonomy of the federal judiciary. Id. The Export Clause lacks such an affirmative requirement or implied right to pre-judgment interest.

The Export Clause contains a proscription against certain government actions. The Supreme Court stated that the ''text of the Export Clause ... expressly prohibits Congress from laying any tax or duty on exports.'' United States v. Int'l. Bus. Machs Corp., 517 U.S. 843, 852 [77 AFTR 2d 96-2412] (1996). The language of the Export Clause establishes the provision as a bare prohibition against taxation. It lacks the affirmative requirement for an award of pre-judgment interest discerned in the judicial Compensation Clause. The Court of International Trade arrived at the same conclusion. See Swisher Intern., Inc. v. United States, 178 F. Supp. 2d 1354 (Ct. Int'l. Trade 2001).[8]

[7] The Federal Circuit determined that, ''given a fair textual interpretation, the language of the Export Clause leads to the ineluctable conclusion that the clause provides a cause of action with a monetary remedy.'' Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 [85 AFTR 2d 2000-1151] (Fed. Cir. 2000), cert. denied, 532 U.S. 1065 (2001).

[8] Plaintiffs in Swisher appealed the Court of International Trade's holding soon after the court released its slip opinion. One of the issues currently on appeal before the Federal Circuit is the denial of plaintiffs' claim for an award of pre-judgment interest under the Export Clause.

> The Export Clause merely contains a prohibition against government action . . . [I]t is not an absolute and affirmative requirement to restore Plaintiffs to their prior position. It is this affirmative requirement that fully waives sovereign immunity under the [Takings] Clause of the Fifth Amendment and perhaps under Article III.

Swisher, 178 F. Supp. 2d at 1362.

"The framers of the constitution employed words in their natural sense; and, where they are plain and clear, resort to collateral aids to interpretation is unnecessary, and cannot be indulged in to narrow or enlarge the text . . . ." McPherson v. Blacker, 146 U.S. 1, 27 (1892). The Export Clause is unambiguous. The prohibition against governmental action does not imply a requirement for an award of interest.

The Export Clause lacks any form of directive that parallels Article III's requirement for compensation payment "at stated Times." The Court of Federal Claims expressed the importance of this timing requirement in its holding that Article III provides pre-judgment interest. See Hatter v. United States, 38 Fed. Cl. 166 [80 AFTR 2d 97-5646] (1997).

The court reasoned that the underlying purpose of the Judicial Compensation Clause "is to maintain the independence of the federal judiciary" by providing a remedy for its violation. Hatter 38 Fed. Cl. at 183. The purpose of the Export Clause is "the requirement . . . that exports should be free from any governmental burden." See, e.g., United States v. Hvoslef, 237 U.S. 1, 15 [3 AFTR 2913] (1915) (quoting Fairbank v. United States, 181 U.S. 282, 290 (1901).[9]

The Export Clause does not require a self-contained and all-encompassing remedy to further its purpose. The Internal Revenue Code provides full compensatory remedies for violations of the Export Clause. Claimants may take advantage of these remedies so long as they follow the administrative requirements discussed previously in the § 2411 analysis. The holding in Cyprus Amax provides plaintiffs with an alternate and independent avenue of relief under the Export Clause to recover their tax overpayments. Cyprus Amax, 205 F.3d at 1375. A finding that the Export Clause is interest-mandating would not further the underlying purpose of the provision. Such a holding would neither prevent the imposition of tax burdens upon exports, nor provide claimants with a unique remedy for violations of the clause. The Hatter rationale for finding that Article III is interest-mandating does not apply to the Export Clause. See Hatter v. United States, 38 Fed. Cl. 166 [80 AFTR 2d 97-5646] (1997).

Money-Mandate Does Not Mean Interest-Mandate

Plaintiffs next rely upon statements made by the Federal Circuit that the Export Clause is money-mandating. Cyprus Amax, 205 F.3d at 1373. They argue that money-mandating constitutional provisions require money damages, which include compensation. Compensation is the basis for interest awards under the Constitution. As the Export Clause arises under the Constitution, it requires an award of pre-judgment interest.

The Cyprus Amax court did not suggest that the Export Clause is interest-mandating. See Cyprus Amax, 205 F.3d 1369 [85 AFTR 2d 2000-1151] (Fed. Cir. 2000). The court did not address the issue of interest at all. The only issue considered by the Federal Circuit in Cyprus Amax for the purposes of this analysis was the Exports Clause's ability to provide "an independent cause of action for [a] monetary remed[y]." Id. at 137. The Circuit concluded that "the Export Clause's restriction on taxing power requires Congress to refund money obtained in contravention of the clause." Id. at 1373.

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[9] Plaintiffs suggest that an award of interest would further the purpose of the Export Clause because "exports should not be made a source of revenue to the national government." Fairbank v. United States, 181 U.S. 282, 292–93 (1901). However, the Fairbank court stated that this is only part of the Export Clause's purpose. Id. It is not equivalent to the primary, underlying purpose of Article III that was given so much weight by the Hatter court. See Hatter v. United States, 38 Fed. Cl. 166 [80 AFTR 2d 97-5646] (1997).

A money-mandating provision is not necessarily an interest-mandating provision. The Supreme Court has observed that "[t]he allowance of interest on damages is not an absolute right." Boston Sand & Gravel, 278 U.S. at 41, 49 (quoting The Scotland, 118 U.S. 507, 518 (1886)).

The Takings Clause and the Compensation Clause do not confer rights to interest based only upon their money-mandating nature. The unique language found in both Constitutional provisions requires the Government to restore claimants to the relative positions that they would have occupied but for the violations.

> [T]he reasoning on which interest is added to value as a part of "just compensation" ... is not applicable to this situation. That reasoning is that when a court determines just compensation, it first fixes bare value at the time of the taking and adds a sum to compensate for deferred payment of bare value so as to make the property owner whole as required by the Fifth Amendment.

Albrecht v. United States, 329 U.S. 599, 603 (1947) (emphasis added). "It is the meaning embodied in the term 'just compensation' which creates the requirement that the government provide a 'full and exact equivalent' in the form of interest." Olson v. United States, 292 U.S. 246, 254–55 (1934)). The Constitution requires waiver of sovereign immunity for the recovery of interest against the Government. "In the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress." United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 658–59 (1947) (emphasis added). The Export Clause lacks such a constitutional requirement.

CONCLUSION

Plaintiffs brought their claims in this court under the Export Clause of the Constitution. They do not assert a tax refund suit under the Tucker Act. Title 28 U.S.C. § 2411 provides a statutory waiver of sovereign immunity to interest liability only for claims brought within the tax refund system. Plaintiffs do not seek a tax refund, so they cannot recover interest under § 2411. While the Export Clause provides plaintiffs with an alternate and independent avenue for recovery, an overpayment of tax in this case, it is not interest-mandating. It does not contain a Constitutional waiver of sovereign immunity, and plaintiffs cannot recover interest under its terms.

Plaintiffs' Cross-Motion for Summary Judgment is DENIED. Defendant's Cross-Motion is GRANTED.

Robert H. Hodges, Jr.

Judge

¶2002-5694

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Nelson Lee JENNINGS, DEFENDANT-APPELLANT. U.S. Court of Appeals, Fourth Circuit, (CA4) Docket No. 00-4331, Nov. 14, 2002. District Court affirmed per curiam. Decision for Govt.

1. Tax crimes—aiding and assisting in preparation of false returns—motion for new trial—evidence. Tax preparer's IRC §7206(2) conviction and sentence for willfully aiding and assisting in preparation and presentation of fraudulent returns were affirmed: district court properly denied preparer new trial where, even if govt. presented perjured testimony from preparer's clients/taxpayers, jury still could have found that returns claiming itemized deductions exceeding 60% of adjusted gross income were facially false, and could have reasonably inferred preparer's willfulness from his repeated failures to obtain supportive documentation of such incredible deductions. Also, taxpayers' perjury only went to their credibility, not preparer's guilt; and preparer's argument that he was denied due process by not having opportunity to impeach them was refuted by undisputed proof that he had received their returns and affidavits in ample time before trial to prepare.

Reference: United States Tax Reporter ¶72,065.01(10). IRC §7206.

ARGUED: William P. Robinson, Jr., Robinson, Neeley & Anderson, Norfolk, Virginia, for Appellant. Stephen Westley Haynie, Assistant United States Attorney, Norfolk, Virginia, for Appellee.
ON BRIEF: Helen F. Fahey, United States Attorney, Norfolk, Virginia, for Appellee.

United States Court of Appeals, Fourth Circuit,

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Henry C. Morgan Jr., District Judge. (CR-99-165).

Before LUTTIG, MOTZ, and GREGORY, Circuit Judges.

OPINION

PER CURIAM.

Affirmed by unpublished PER CURIAM opinion.

Nelson Jennings, a tax preparer, was convicted of 12 counts of willfully aiding or assisting in the preparation and presentation of false and fraudulent returns in violation of 26 U.S.C. § 7206(2). For the reasons that follow, we affirm.

I.

A computer program developed by the Internal Revenue Service (''IRS'') uncovered an unusual pattern in a number of the tax returns prepared by Jennings. J.A. 34-35. The IRS reviewed approximately 90 returns, discovering that the itemized deductions on the returns were disproportionately high in relation to the adjusted gross income of the taxpayers. J.A. 36-37.

The IRS thereafter designated 23 returns for full investigation, including interviews with the taxpayers whose returns were selected. During the interviews, the taxpayers signed affidavits stating that they were not eligible for many of the deductions listed on the returns, that they did not review the returns carefully or provide Jennings with documentation to support the claimed deductions, and that they relied on Jennings' expertise in preparing the returns. Thus, contrary to the signed statement in their tax returns,[1] the taxpayers essentially denied any knowledge of the fraudulent deductions, explaining that they were interested only in the amount of the refund.

The government subsequently indicted Jennings on 23 counts of willfully aiding and assisting in the preparation and presentation of false and fraudulent returns in violation of 26 U.S.C. § 7206(2).[2] At trial, the government called the taxpayer witnesses, who, ''[f]or the most part [ ],'' testified consistently with their signed affidavits. S.J.A. 175. In addition to the taxpayer testimony, the district court also admitted the fraudulent returns into evidence. J.A. 29-30.

The jury returned a guilty verdict on 12 of the 23 counts of the indictment. J.A. 1034-35. The district court subsequently denied Jennings' motion to set aside the jury verdict and for a new trial, S.J.A. 173-78, and sentenced him to 27 months imprisonment, J.A. 1158-59. This appeal followed.

II.

[1] Jennings argues that the district court erred in refusing to grant him a new trial because the government's knowing use of perjured tax-payer testimony violated his right to due process, thereby depriving him of a fair trial. We disagree.

In denying Jennings' motion for a new trial, the district court held that ''the taxpayer witnesses committed perjury either (1) when they signed their returns stating that they had examined the figures on the returns and that those figures were correct;

[1] In the tax returns, the taxpayers signed the following statement: ''Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete.'' S.J.A. 148.

[2] Section 7206(2) provides as follows: Any person who ... willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document ... shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

or (2) when they signed the affidavits and testified in Court that they did not examine the deductions contained in the return." S.J.A. 176. Nevertheless, the district court concluded that even "the presentation of [such] inherently incredible . . . testimony" did not prejudice Jennings "by depriving him of a fair trial." S.J.A. 177. We express no view regarding whether the government knowingly used perjured testimony against Jennings *at the trial* because, even if we assume that it did, there is no "reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. White,* 238 F.3d 537, 540–41 (4th Cir.2001) (quoting *Kyles v. Whitley,* 514 U.S. 419, 433 n. 7 (1995)).

First, the weight of the evidence in this case, even aside from the taxpayers' testimony, pointed heavily toward Jennings' guilt. As the district court observed in reaching this conclusion, "a simple comparison of the amounts the taxpayers claimed to have paid in medical expenses and charitable contributions with the amount of income earned by the taxpayers reveals the grossly disproportionate amount of itemized deductions claimed on the returns." S.J.A. 177. Indeed, the jury could have readily found that the returns were "fraudulent" or "false" on their face since the total itemized deductions as a percentage of adjusted gross income on the 23 returns ranged from a low of 45% to a high of 99%, with 22 of the 23 returns containing total itemized deductions that were greater than 60% of adjusted gross income. S.J.A. 172. *See United States v. Conlin,* 551 F.2d 534, 536 [39 AFTR 2d 77-1112] (2d Cir.1977) (holding that the jury's finding that a tax preparer acted willfully was supported "by both the frequency and similarity of" the overstated deductions in the returns that he prepared). Furthermore, as the district court noted, the jury could have inferred guilt, especially as to willfulness, from Jennings' repeated pattern of failing to obtain "sufficient documentation despite the obvious disproportion between the deductions and available income" on the returns. S.J.A. 177.

Second, even assuming *arguendo* that the government knowingly submitted perjured testimony, Jennings conceded at oral argument that he "ha[d] failed to demonstrate that [the taxpayers] lied about any material fact." *Knox v. Johnson,* 224 F.3d 470, 478 (5th Cir.2000). Section 7206(2) expressly provides that a person may be convicted "whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document." Thus, even if the taxpayers' testimony at trial denying any knowledge of the claimed deductions was perjurious, such testimony was not material since "the innocence or guilty knowledge of a taxpayer is irrelevant to [a section 7206 prosecution]." *United States v. Jackson,* 452 F.2d 144, 147 [28 AFTR 2d 71-5843] (7th Cir.1971) (emphasis added); *see also United States v. Rowlee,* 899 F.2d 1275, 1279 [65 AFTR 2d 90-973] (2d Cir.1990) ("In fact, the guilt or innocence of the taxpayer for whom the return was filed is irrelevant to the question of the adviser's guilt."). As a result, any perjured testimony in this case was relevant only to the credibility of the taxpayer witnesses, not to establishing a section 7206(2) violation by Jennings.

Finally, to the extent Jennings contends that his due process rights were violated by not being afforded an opportunity to impeach the credibility of the taxpayer witnesses, we disagree, for it is *undisputed* that the government turned over to Jennings both the tax returns and the affidavits almost two months prior to trial. Indeed, having been made aware of the discrepancies in the various taxpayer statements, defense counsel actually highlighted some of the inconsistencies during his examination of the taxpayer witnesses at trial.

Accordingly, we hold that the district court did not abuse its discretion in denying Jennings' motion to set aside the verdict and for a new trial because even if the government knowingly presented perjured testimony, there is no "reasonable likeli-

hood that the false testimony could have affected the judgment of the jury.''[3]

CONCLUSION

For the reasons stated herein, the judgment of the district court is affirmed.

AFFIRMED.

¶2002-5695

In Re: Bryan Christian McMILLAN, Debtor. In Re: Sally Dawn KNAPP, Debtor. U.S. Bankruptcy Court, Western Dist. of Washington, (Bktcy Ct WA) Docket No. 01-50591, Oct. 22, 2002. Year 2001. Decision against Govt.

1. Tax claims in bankruptcy—confirmed plan—income deduction orders—payment of refunds. Chap. 13 trustee's 11 USC §1325(c) motion to order IRS to pay debtors' refunds directly to trustee was granted over IRS's objection: refunds that taxpayers *voluntarily* committed to funding Chap. 13 plans were income for §1325(c) purposes; and fact that 1 plan hadn't yet been confirmed was irrelevant. Also, Assignment of Claims Act didn't bar §1325(c) relief; and administrative burden on IRS in sending refunds to trustee was outweighed by importance of income deduction orders to plans' success. *Reference:* United States Tax Reporter ¶68,726.52(30).

United States Bankruptcy Court, W.D. Washington,

MEMORANDUM DECISION

SNYDER, Bankruptcy J.

The above matters came before the Court on Notice and Motions for Orders Requiring IRS to Send Debtor's Tax Refunds to Trustee (Motions) filed by the Chapter 13 Trustee (Trustee) in two unrelated cases. The Trustee's Motions were opposed by the Internal Revenue Service (IRS). A hearing was held in both cases on September 5, 2002. The issues presented in the matters are similar; accordingly, resolution is addressed in a single decision. Taking into consideration the pleadings and arguments presented, the Court's findings of fact and conclusions of law are as follows:

FINDINGS OF FACT

1. Bryan Christian McMillan

Bryan Christian McMillan (McMillan) filed a voluntary petition for Chapter 7 relief in Bankruptcy Court for the Western District of Washington on November 2, 2001. The case was converted to Chapter 13 on March 11, 2002. McMillan filed a proposed Chapter 13 Plan on March 12, 2002. The Trustee initially objected to the proposed Chapter 13 Plan on the basis that it did not constitute McMillan's best efforts under 11 U.S.C. § 1325(a)(3) and (b)(1)(B). The Trustee argued that McMillan consciously withheld too great an amount for his federal income tax. Specifically, by this ''over withholding'' he generated a $16,000 tax refund for 2001, that should have been paid into his Chapter 13 Plan. McMillan filed a first amended Chapter 13 Plan (Plan) on May 23, 2002, providing for payment of all of his 2001 tax refund into the Plan, less $4,000. Paragraph 10 of the Plan was amended to add the following provision: ''Debtor agrees to have future IRS refunds paid directly to Trustee, with amount to be paid into plan to be determined upon receipt.'' McMillan subsequently received a tax refund of $17,322 for 2001, and paid $13,322 into the Plan, retaining $4,000. On June 4, 2002, the Trustee filed a Notice and Motion for Order Requiring IRS to Send Debtor's Tax Refunds to Trustee. A confirmation hearing was held on June 27, 2002, and the Plan was confirmed by order of July 2, 2002.

The IRS is not listed in McMillan's schedules, nor has it filed a proof of claim, as McMillan has no prepetition tax liability. The IRS therefore did not receive a copy of McMillan's proposed Plan or notice of the confirmation hearing. However,

[3] In a related claim, Jennings also argues that the district court erred when it failed to instruct the jury that it was entitled to completely disregard the taxpayer testimony because the taxpayer witnesses committed perjury either in their returns or in their affidavits. J.A. 1009. Even assuming *arguendo* that the taxpayer testimony was, in fact, perjurious, the district court did not abuse its discretion in refusing Jennings' proffered instruction because the court appropriately administered a ''broad range of instructions on credibility.'' *United States v. Gray*, 137 F.3d 765, 773–74 (4th Cir.1998).

prior to the confirmation hearing on June 27, 2002, the IRS was served with a Notice and Motion for Order Requiring IRS to Send Debtor's Tax Refunds to Trustee. In this motion, the Trustee set forth the proposed language for Paragraph 10 of the Plan. The IRS subsequently filed an objection to the Trustee's Motion requiring it to send McMillan's tax refund to the Trustee.

2. Sally Dawn Knapp

Sally Dawn Knapp (Knapp) filed a voluntary petition for Chapter 13 relief in Bankruptcy Court for the Western District of Washington on March 28, 2002, and a proposed Chapter 13 Plan on that same date. Knapp filed a first amended Chapter 13 Plan (Plan) on April 29, 2002. This Plan has not yet been confirmed. Knapp's proposed Plan indicates that she commits all tax refunds to fund the Plan. On or about June 10, 2002, the IRS filed an amended proof of claim stating an un-secured priority claim of $461.68 for un-paid federal income tax for the year 2001. On June 12, 2002, the Trustee filed a No-tice and Motion for Order Requiring IRS to send Debtor's Tax Refunds to Trustee. The IRS filed an objection on August 30, 2002.

CONCLUSIONS OF LAW

[1] These cases raise the issue of whether, pursuant to 11 U.S.C. § 1325(c), a bankruptcy court can order the IRS to send a debtor's tax refunds directly to a Chapter 13 trustee when the debtor's plan voluntarily commits such refunds to funding the plan.

11 U.S.C. § 1325(c) provides that, after confirmation of a plan, ''the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.'' The term ''entity'' includes a governmental unit, and the term ''governmental unit'' includes the United States. 11 U.S.C. §§ 101(15) and (27).

In instant cases, the Debtors voluntarily agreed to commit all or a portion of their tax refunds to their respective Chapter 13 Plans and the Trustee seeks an order requiring the IRS to remit tax refunds directly to it for distribution. The IRS asserts three principal arguments in response to the Trustee's motions: (1) the Trustee has failed to show that such refunds are ''projected disposable net income''; (2) the Assignment of Claims Act prohibits the IRS from remitting the refunds to the Trustee; and (3) requiring the IRS to remit the refunds to the Trustee would impose an unfair administrative burden on the IRS.

1. Does the Debtors' tax refunds constitute ''income'' under 11 U.S.C. § 1325(c)?

The IRS first argues, relying on In re Anderson, 21 F.3d 355 (9th Cir.1994), that the Court cannot require refunds to be committed to a debtor's plan without a showing that such refunds are ''projected disposable income,'' in accordance with 11 U.S.C. § 1325(b)(1)(B). This section provides that if a party objects to confirmation, the plan may only be approved if ''as of the effective date of the plan,'' the plan provides for payment of ''all of the debtor's projected disposable income .... '' 11 U.S.C. § 1325(b)(1)(B).

In Anderson, the trustee objected to confirmation of the debtors' plan and refused to allow confirmation unless the debtors agreed to sign a certification providing that the debtors would pay all actual disposable income during the life of the plan. The Ninth Circuit reviewed the plain language of 11 U.S.C. § 1325(b)(1) and determined that confirmation of a Chapter 13 plan is only dependent on projected, not actual, disposable income being committed. Anderson, 21 F.3d at 358 (rejecting the trustee's attempt to impose a different, more burdensome requirement on the debtors' plan as a prerequisite to confirmation). Cases subsequent to Anderson, rely on this language to hold that Chapter 13 debtors cannot be required, as a prerequisite to confirmation, to agree to pay over refunds for the life of a plan without a showing that such refunds are projected disposable income. In re Heath, 182 B.R. 557, 559–60 (9th Cir. BAP1995); In re Kuehn, 177 B.R. 671, 673 (Bankr.D.Ariz.1995). Accordingly, Anderson is controlling in cases where a party objects to confirmation on the basis that the debtor refuses to commit

actual, as opposed to projected, future income to the plan. Anderson, however, is not determinative of the issue before this Court, since in each of these cases, the Debtors voluntarily agreed to commit all or a portion of their tax refunds to their perspective Plans.

In the instant cases, neither the Debtors nor the Trustee object to including the actual income tax refunds as Plan payments. Accordingly, the issue of actual, as opposed to projected, disposable income is not present. In In re Profit, 283 B.R. 567, 574 [90 AFTR 2d 2002-6600] (9th Cir. BAP2002), the Bankruptcy Appellate Panel (BAP) specifically determined that Anderson does not apply to a case where a debtor's confirmed plan provides for turnover of tax refunds as part of his or her plan payments. The BAP, citing In re Cochran, 141 B.R. 270, 272 (M.D.Ga.1992) with approval, determined that such a plan treats the refunds as disposable income. Profit, 283 B.R.574. This holding is also in accord with In re Freeman, 86 F.3d 478, 481 [78 AFTR 2d 96-5131] (6th Cir.1996), in which the Sixth Circuit held that a tax refund constitutes projected disposable income if the debtor specifically commits the tax refunds to the plan, and makes no argument that it is not disposable income. Accordingly, tax refunds voluntarily committed by a debtor to his or her respective Chapter 13 plan is held to constitute projected disposable income.

At the September 5, 2002 hearing, the IRS argued that because Knapp's Plan has not yet been confirmed, Knapp's circumstances are similar to that of the debtors in Anderson. This Court concludes, however, that it is irrelevant that Knapp's Plan has not yet been confirmed. As stated previously, Knapp voluntarily agreed to commit all tax refunds to her plan. Anderson is therefore not applicable. Despite the language of 11 U.S.C. § 1325(c) authorizing the Court to issue a wage deduction order "[a]fter confirmation," there is also no reason in this case to wait until that event occurs. The IRS did not object to confirmation. There are no other objections to confirmation pending, and nothing to suggest that confirmation will not occur. It is an accepted practice in this district and others to issue such orders prior to confirmation. See In re Torres, 191 B.R. 735, 737 (Bankr.N.D.Ill.1996); 5 Norton Bankruptcy Law and Practice 2d § 122:11, 122–112 (1997). The issue before the Court is not one of confirmation, or whether the tax returns constitute actual or disposable in-come. The issue presented is the enforce-ment of wage orders issued pursuant to 11 U.S.C. § 1325(c) against the IRS.

Although it is not necessary in the instant cases to determine whether refunds are projected disposable income under an Anderson analysis, it has been argued in other cases that refunds are not even "income" for purposes of 11 U.S.C. § 1325(c). See Cochran, 141 B.R. at 271–72. The IRS did not specifically raise this argument. However, since these are important issues for this Court, and because the parties have indicated that the Trustee intends to file similar motions in the future, the Court finds it provident to address that issue in this decision to provide further guidance.

The term "income" is not defined in the bankruptcy code. However, as the Ninth Circuit in Anderson pointed out, it is clear that projected disposable income and actual disposable income are not identical. See Anderson, 21 F.3d at 357–58. In the instant cases, the Debtors' Plans provide for payment of tax refunds into the Plans. The tax refunds are therefore plan payments. Profit, 283 B.R. 574. In addition, as noted by the court in Cochran, a tax refund, by its definition, is a "repayment of overpaid taxes on income, i.e. money that should have been classified originally as net income rather than paid as taxes." Cochran, 141 B.R at 272. Although there may be a split of authority as to whether tax refunds are necessarily projected disposable income, this Court is not aware of any decision holding that tax refunds are not income for purposes of 11 U.S.C. § 1325(c). This Court concludes that tax refunds qualify as income for purposes of 11 U.S.C. § 1325(c).

2. Does the Assignment of Claims Act bar the Court from ordering the IRS to send the Debtors' tax refunds directly to the Trustee?

Although this issue was not raised in its pleadings, at the September 5, 2002 hearing, the IRS indicated that the Assignment of Claims Act (31 U.S.C. § 3727) bars the Court from ordering the IRS to send the Debtors' tax refunds directly to the Trustee.

The Assignment of Claims Act prohibits the assignment of income tax refunds prior to submission of the tax return and allowance of the refund by the IRS. 31 U.S.C. § 3727(b). In Cochran, the IRS argued that this statute bars the bankruptcy court from ordering the IRS to send a refund directly to the trustee until the claim is allowed. Cochran, 142 B.R. at 272. Based on a review of case law involving the same issue under the Social Security Act, the court in Cochran determined that 11 U.S.C. § 1325(c) impliedly modified the more general Assignment of Claims Act to allow the assignment of tax refunds to the trustee. Cochran, 142 B.R. at 273 (citing United States v. Devall, 704 F.2d 1513, 1514–15 (11th Cir.1983)). The Cochran court also relied on the fact that Congress has taken no action to restrict the application of 11 U.S.C. § 1325(c) to tax refunds as it did in modifying 42 U.S.C. § 407 of the Social Security Act to prevent bankruptcy income deduction orders from applying to social security benefits. Cochran, 141 B.R. at 273; see 42 U.S.C. § 407(b) (amended in 1983 to add a new section (b) to specifically provide that no other provision of law enacted before, on or after this section may be construed to modify this section unless it does so by express reference to the section). The Cochran court further noted that the Assignment of Claims Act was passed well prior to the enactment of 11 U.S.C. § 1325(c), indicating that Congress was necessarily aware of the Assignment of Claims Act's existence when it approved the broad grant of authority to the bankruptcy court under 11 U.S.C. § 1325(c). Cochran, 141 B.R. at 273. The statutory analysis by the Cochran court is in accord with Ninth Circuit precedent, and this Court adopts its decision and analysis in this decision. See also Parker N. Am. Corp. v. Resolution Trust Corp. (In re Parker N. Am. Corp.), 24 F.3d 1145, 1151 (9th Cir.1994) (general statutory language is typically superseded by specific provisions in the more recently-enacted statute).

Although Cochran is the only case this Court is aware of on the specific issue of the interplay between 11 U.S.C. § 1325(c) and the Assignment of Claims Act, the decision is supported by prior decisions holding that the Assignment of Claims Act does not apply where tax refunds were transferred to the trustee by operation of law or in accordance with a plan of arrangement. See, e.g., In re Kepp Elec. & Mfg. Co., 98 F.Supp. 51, 60–61 [40 AFTR 926] (D.Minn.1951) (tax refunds transferred to receiver under confirmed Chapter XI plan of arrangement not within purview of Assignment of Claims Act because transfer constituted an "act of law").

For the reasons stated above, this Court concludes that it is not barred in the instant cases from ordering the IRS to remit tax refunds directly to the Trustee by the Assignment of Claims Act.

3. Does the burden on the IRS prevent the Court from ordering the IRS to send the Debtors' tax refunds directly to the Trustee?

The IRS also argues that as a matter of fairness, the IRS should not have to bear the administrative burden of remitting such refunds directly to the Trustee. In support of its position, the IRS submitted a declaration from Karen I. Camp, Territory Manager for the Insolvency Groups in Territory 12. In her declaration, Ms. Camp states that it will require the IRS to expend a significant amount of resources, above what is normally necessary, to remit tax refunds directly to a trustee. This Court has no reason to doubt Ms. Camp's credibility. The critical question then is where the burden should fall.

The IRS argues that the burden should remain with the debtor. If a debtor chooses, or is required, to commit his or tax refunds to funding a plan, the burden is on the debtor to ensure that they are remitted to the trustee. If the debtor fails in his or her obligations, remedies exist under the bankruptcy code to deny his or her discharge or dismiss the case.

The IRS's argument is persuasive. In the instant cases, there has been no showing that the Debtors will not voluntarily remit their refunds to the Trustee. The fact that they agreed to do so in their Plans, clearly indicates that this is their intention. Thus, it may appear unfair to require the IRS to perhaps unnecessarily assume these additional costs. Nonetheless, this burden must also be weighed against the purpose of 11 U.S.C. § 1325(c).

It is likely a burden on any entity to comply with an order issued pursuant to 11 U.S.C. § 1325(c). This section was added to the bankruptcy code because it was recognized that income deduction orders are a critical element for a successful Chapter 13 plan. See 5 Norton Bankruptcy Law and Practice 2d § 122:11, 122–109 (1997). Despite the best intentions of the debtor at the time of confirmation, it is the past experience of this Court that plans without income deduction orders too often prove unsuccessful.

Based on the recognized importance of income deduction orders to the success of Chapter 13 plans and the fact that such orders are authorized by the bankruptcy code and not prohibited by any other laws, this Court concludes that the Trustee's Motions should be granted in these cases. It must be noted that the principals set forth in this decision only apply to Chapter 13 cases where the debtor's plan specifically commits tax refunds to the plan. If no such provision exists, Anderson will apply, and the Court will be required to examine whether the refunds constitute projected disposable income on a case-by-case basis.

These matters are continued to October 31, 2002, at 1:00 p.m., for presentation of orders incorporating this Memorandum Decision pursuant to Fed. R. Bankr.P. 7052.

¶2002-5696

Joan HARRIMAN, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Eastern Dist. of New York, (DC NY) No. 96 CV 3670 JS MLO, Aug. 2, 2002. District Court, (2002, DC NY) 90 AFTR 2d 2002-5647, 2002-2 USTC ¶50644, vacated and amended. Years 1973, 1976, 1980, 1987, 1990, 1992, 1993, 1994. Decision for Taxpayer in part and for Govt. in part.

1. District court procedure—motion to vacate default judgment. District court vacated default judgment against IRS in pro se taxpayer's action for refund, damages and injunctive relief: F.R.Civ.P. 60 didn't apply where judgment was never entered; and govt.'s failure to respond for 3 years in which 3 separate attorneys handled case may have been negligent, but wasn't willful. Also, IRS's limitations period and sovereign immunity defenses were meritorious; and vacatur wouldn't prejudice taxpayer. *Reference:* United States Tax Reporter ¶74,025.01(95). IRC §7402.

2. Refund actions—jurisdiction—full payment—limitations periods. Govt. was granted in part jurisdictional dismissal of pro se taxpayer's amended refund complaint: although taxpayer sufficiently alleged sovereign immunity waiver, she failed to meet full payment prerequisite to suit for certain years; and was time-barred with respect to those withheld taxes and earned income credit (EIC) that were deemed paid outside IRC §6511's applicable 3-year lookback period. But, taxpayer's amendments to complaint cured any IRC §6532 limitations periods defects as to remaining years; and she sufficiently stated claim for 1 year's EIC so as to defeat govt.'s alternate F.R.Civ.P. 12(b)(6) motion. *Reference:* United States Tax Reporter ¶74,336.501(10); 74,225.01(5); 65,115.07(20); 65,325.01(5); 65,025.02(3). IRC §6502; 6511; 6532; 7422.

3. Actions against U.S.—damages—Federal Tort Claims Act—Anti-Injunction Act. Pro se taxpayer's collection-re-

lated injunctive and damages claims against govt. were dismissed: AIA barred injunctive relief; IRC §7433 provided no basis for taxpayer's pain and suffering damages claim; and tort damage claims were dismissed for her failure to exhaust administrative remedies under FTCA. *Reference:* United States Tax Reporter ¶74,215.05(5); 74,335.01(7); 76,557.53(12); 74,336.504(44). IRC §7421; 7433.

Joan Harriman, East Hampton, NY, pro se.
Bartholomew Cirenza, Trial Attorney, U.S. Department of Justice, Washington, DC, for Defendants.

United States District Court, E.D. New York.

SEYBERT, District Judge.

This Court's Memorandum and Order, dated July 22, 2002, is hereby vacated in its entirety and amended as follows. Pending before the Court is Joan Harriman's (''Plaintiff''), motion pursuant to Fed.R.Civ.P. 15(c) to name the United States as Defendant instead of the Internal Revenue Service (''Defendant'' or the ''Government''), the Defendant's motion for an order pursuant to Fed.R.Civ.P. 55(c) to set aside the entry of default against the United States and Defendant's motion for an order pursuant to Fed.R.Civ.P. 12(b)(1) and/or 12(b)(6) dismissing Plaintiff's complaint.

BACKGROUND

Plaintiff commenced suit on July 24, 1996 by filing a complaint with this Court. As a basis for federal jurisdiction, Plaintiff asserted 28 U.S.C. 1346(a)(1), 28 U.S.C. 1331, 28 U.S.C. 1396 and 28 U.S.C. 1402(a)(1) and Sections 6502(a), 6331(d) and 6501(a) of the Internal Revenue Code. Plaintiff's complaint seeks to claim a refund for taxes levied for tax years 1973, 1976, 1980, 1987, 1990, 1992, 1993, and 1994, totaling $6,097.56, plus interest and damages in the amount of $100,000 for pain and suffering. Plaintiff also seeks a permanent injunction to prevent the Internal Revenue Service from applying any future tax overpayments to her tax lien. Plaintiff filed an amended complaint on August 7, 1996 ro remedy a possible statute of limitations issue. Defendant subsequently requested an extension to answer from the Plaintiff and was denied. On February 25, 1999, Plaintiff made a request to have a default judgment entered against the government. The Clerk of the Court certified the default on February 25, 1999. Defendant subsequently requested that the Court schedule a pre-motion conference to discuss the government's motion to vacate the default. Plaintiff failed to appear at the initial conference and again failed to appear at a later scheduled conference. As a result, Defendant has moved to vacate the default judgment entered against it.

LEGAL STANDARD

The Court will first address Defendant's motion to vacate the default pursuant to Fed.R.Civ.P. 55(c). Rule 55(c) permits this Court, in its discretion, ''[f]or good cause shown ... [to] set aside an entry of default....'' Fed.R.Civ.P. 55(c). The Government argues that this Court does not have jurisdiction over this action because the United States did not consent to suit in the manner in which Plaintiff has sued and has accordingly not waived its immunity. Defendant argues that this Court's lack of jurisdiction is good cause, as required by Rule 55(c), to set aside the default.

The Court never entered judgment of default so Fed.R.Civ.P. 60(b) does not apply to this action. This Court is bound to consider the following factors in determining whether an order vacating the entry of default is appropriate: ''(1) whether the default was willful; (2) whether setting aside the default would prejudice the adversary; and (3) whether a meritorious defense is presented.'' Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir.1993). Moreover, this Court must take into consideration the fact that the Second Circuit has expressed a ''preference for resolving disputes on the merits,'' and, therefore, all inferences should be resolved in favor of the defaulting party. Id. at 95, 96; see also Shah v.

N.Y. State Dep't of Civil Serv., 168 F.3d 610, 615 (2d Cir.1999).

ANALYSIS

Viewing all inferences in favor of Defendant, the defaulting party, for the reasons set forth below, the Court hereby vacates the entry of default.

1. Willfulness of the Default

[1] Defendant argues that three separate attorneys handled this case on behalf of the tax division, but fails to supply a reason for the government's failure to respond. Plaintiff argues that the fact that Defendant has done nothing for three years is per se willful. She further argues that pursuant to Fed.R.Civ.P. 60, Defendant's motion to vacate the default is barred by the one year statute of limitations set forth therein. However, as noted above, judgment of default was never entered in this case and accordingly, Rule 60 does not apply. Finally, Plaintiff states that Defendant's default was willful because Defendant has not "presented a meritorious defense to the court by providing any reasonable excuse for their negligence." Plaintiff's Cross-Motion to Uphold and Enforce Default Judgment Against Defendant, Pg. 1.

"Willfulness in the context of a default [is] conduct that is more than merely negligent or careless." S.E.C. v. McNulty, 137 F.3d 732, 738 (2d Cir.1998). Neither party has adequately provided an explanation of the default to show that it was willful. It seems that Plaintiff has admitted in her opposition to defendant's motion to vacate the default that the Defendant was negligent in its conduct. The Court finds the Government's handling of this case extremely poor to say the least, however, there is no evidence of willful conduct on the government's part with respect to the default.

2. Meritorious Defense

A meritorious defense need only consist of evidence, which if proven at trial, would constitute a complete defense. Williams v. Helbig, 01 CV 4448(ILG), 2002 WL 1358675, 4 (E.D.N.Y. June 19, 2002) (citing McNulty, 137 F.3d at 740) (quoting Enron Oil Corp., 10 F.3d at 98). Defendant argues that the statute of limitations and the doctrine of sovereign immunity bars Plaintiff's claims. Defendant asserts that the United States has not consented to be sued in the manner contemplated by the Plaintiff herein. If Defendant succeeds in its argument that sovereign immunity or the statute of limitations defenses apply, it would win the case. Plaintiff asserts that Defendant has waived its claim of lack of jurisdiction and its claim to sovereign immunity.

The Court finds that if Defendant adequately proves either of its defenses it will have two separate complete defenses. Accordingly, Defendant does have a meritorious defense to this action.

3. Prejudice to Plaintiff

Defendant asserts that, pursuant to Fed.R.Civ.P. 55(e) "[n]o judgment by default shall be entered against the United States ... unless the claimant establishes a claim or right to relief by evidence satisfactory to the Court." The Court finds that Plaintiff will not be prejudiced by a finding that the default in this action should be vacated, as there is a preference that cases be decided on the merits. Moreover, this case has remained stagnant for years without either party taking action.

For the reasons set forth above, the entry of default in this action is hereby VACATED.

DEFENDANT'S MOTIONS TO DISMISS

Defendant has moved to dismiss the present action for the following reasons: (1) the United States has not consented to suit in the manner contemplated by the Plaintiff; (2) the Court lacks jurisdiction with respect to the 1987 income tax year due to the statute of limitations; (3) the Court lacks jurisdiction over Plaintiff's suit for refund with respect to years 1973, 1976, 1980, 1987, 1992, 1993 and 1994 because Plaintiff did not wait the requisite six month period pursuant to 26 U.S.C. § 6532 prior to commencing suit; (4) the Court lacks jurisdiction over Plaintiff's complaint as it relates to the 1980, 1990 and 1993

tax years because she has not fully paid the disputed assessed liabilities; (5) Plaintiff's demand for injunctive relief is barred by the Anti Injunction Act; (6) Plaintiff has failed to state a cause of action upon which relief may be granted as to years 1987 and 1992 because she paid no tax for either of those years; (7) Plaintiff's suit as it relates to the year 1980 is statutorily barred pursuant to § 6512 because she previously filed a petition with the United States Tax Court for that year; (8) Plaintiff is barred from proceeding on her demand for pain and suffering pursuant to § 7433 because she did not allege and cannot establish that she exhausted her administrative remedies; and (9) to the extent Plaintiff seeks tort damages, other than under § 7433, she is likewise barred under the Federal Tort Claims Act because she did not first file an administrative claim for such damages.

It is unclear, after a thorough review of Defendant's moving papers, pursuant to which Federal Rule of Civil Procedure Defendant makes each of its motions. The difference is significant because the Court may only consider the complaint and documents attached thereto or incorporated by reference when deciding a motion to dismiss pursuant to Rule 12(b)(6). However, when deciding a motion brought pursuant to Rule 12(b)(1), the Court can consider facts outside the pleadings. See Ghartey v. St. John's Queens Hosp., 869 F.2d 160, 162 (2d Cir.1989). It seems that Defendant deems his statute of limitations arguments jurisdictional and, accordingly, has moved to dismiss pursuant to 12(b)(1) and that only number six above was brought pursuant to 12(b)(6). The Court recognizes and shall adhere to the Rule that a plaintiff proceeding pro se is entitled to have her complaint "held to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972) (per curiam).

Generally, "[w]here the dates in a complaint show that an action is barred by a statute of limitations," it is appropriate for a defendant to move to dismiss pursuant to Fed.R.Civ.P. 12(b)(6). See Ghartey, 869 F.2d at 162; Mr. & Mrs. D. v. Southington Bd. of Educ., 119 F.Supp.2d 105, 107 (D.Conn.2000); see also Joslin v. Grossman, 107 F.Supp.2d 150, 153 (D.Conn.2000).

The Court will address each of Defendant's points in turn and state pursuant to which Rule such motion is being decided.

LEGAL STANDARD

1. Rule 12(b)(6) Standard

A district court should grant a motion to dismiss under Fed.R.Civ.P. 12(b)(6) for failure to state a claim only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249–50, 109 S.Ct. 2893, 2906, 106 L.Ed.2d 195 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984)); Annis v. County of Westchester, 36 F.3d 251, 253 (2d Cir.1994).

In applying this standard, a district court must "read the facts alleged in the complaint in the light most favorable" to the plaintiff and accept the factual allegations as true. H.J. Inc., 492 U.S. at 249, 109 S.Ct. at 2906; Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982); Christ Gatzonis Elec. Contractor, Inc. v. New York City Sch. Constr. Auth., 23 F.3d 636, 639 (2d Cir.1994); see also Leatherman v. Tarrant County Narcotics Intelligence and Coordinator Unit, 507 U.S. 163, 165, 113 S.Ct. 1160, 1163, 122 L.Ed.2d 517 (1993) (citing Fed.R.Civ.P. 8(a)(2) to demonstrate liberal system of "notice pleading" employed by the Federal Rules of Civil Procedure).

The Court's duty "is merely to assess the legal feasibility of the [amended] complaint, not to assay the weight of the evidence which might be offered in support thereof." Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir.1980). Accord Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir.1985). The appropriate inquiry, there-

fore, is not "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer, 416 U.S. at 236, 94 S.Ct. at 1686; Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123–24 (2d Cir.1991) (noting that plaintiff is not compelled to prove his or her case at the pleading stage).

Additionally, a claimant is not required to set out in detail the facts upon which he or she bases a claim. Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). A claimant need only give a statement of his or her claim that will give defendant "fair notice of what the ... claim is and the grounds upon which it rests." Id. Therefore, where a complaint is filed that charges each element necessary to recover, dismissal of the case for failure to set out evidential facts can seldom be warranted. United States v. Employing Plasterers' Ass'n of Chicago, 347 U.S. 186, 189, 74 S.Ct. 452, 454, 99 L.Ed. 618 (1954). Individual allegations, however, that are so baldly conclusory that they fail to give notice of the basic events and circumstances of which the plaintiff complains are meaningless as a practical matter and, as a matter of law, insufficient to state a claim. See Barr v. Abrams, 810 F.2d 358, 363 (2d Cir.1987). Additionally, on a motion to dismiss, a complaint shall be deemed "to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference ... and documents that the plaintiff[ ] either possessed or knew about and upon which [they] relied in bringing the suit...." Rothman v. Gregor, 220 F.3d 81, 88–89 (2d Cir.2000) (citations omitted).

2. Rule 12(b)(1) Standard

A defendant may move to dismiss pursuant to Rule 12(b)(1) in two separate ways. He can either attack the complaint on its face, arguing that the Plaintiff has failed to allege facts supporting subject matter jurisdiction or he can argue that factually, jurisdiction is lacking. See Tasini v. New York Times Co., Inc., 184 F.Supp.2d 350, 353 (S.D.N.Y.2002) (citing Sniado v. Bank Austria AG, 00 CV 9123, 2001 WL 812236, at 1 (S.D.N.Y. Jul. 18, 2001); see also Greater New York Hosp. Assoc. v. United States, 98 CV 2741, 1999 WL 1021561, at 4 (S.D.N.Y. Nov. 9, 1999).

The material that is reviewable by a court differs depending upon the type of attack being made. On a motion to dismiss brought pursuant to Fed.R.Civ.P. 12(b)(1) based on a facial defect in the complaint, the court should review the complaint, deeming all averments as true, for sufficiency. However, if Defendant has made a factual challenge to the Plaintiff's allegations in the complaint to the effect that jurisdiction is lacking, "the Court may consider affidavits and other material beyond the pleadings to resolve the jurisdictional question." Araujo v. John Hancock Life Ins. Co., 206 F.Supp.2d 377 (E.D.N.Y.2002) (citing Robinson v. Gov't of Malaysia, 269 F.3d 133, 141 n. 6 (2d Cir.2001)). Further, truth of the allegations in the complaint is not presumed "rather, the burden is on the plaintiff to satisfy the Court, as fact-finder, of the jurisdictional facts." Tasini, 184 F.Supp. at 353–54 (quoting Guadagno v. Wallack Ader Levithan Assoc., 932 F.Supp. 94, 95 (S.D.N.Y.1996), aff'd, 125 F.3d 844, 1997 WL 609007 (2d Cir.1997) (citations omitted)). It is within the above framework that the Court will review the Defendant's motions to dismiss.

ANALYSIS

[2] 1. Defendant's argument that the United States has not consented to suit in the manner contemplated by the Plaintiff

Although unclear from Defendant's moving papers, the Court discerns Defendant's argument with respect to sovereign immunity to be that Plaintiff has not cited the proper authority for her basis of jurisdiction in federal court or that she has failed to meet all of the requirements to commence suit. Plaintiff cites various Internal Revenue Code sections as authority for jurisdiction as well as 28 U.S.C. § 1331 as a basis for federal question jurisdiction. Initially, subject matter jurisdiction over the commencement of this action is validly found in 28 U.S.C. § 1346, which

provides: (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of: (1) Any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws . . . . ''Thus, sovereign immunity is waived for suits for the refund of taxes erroneously or illegally assessed or collected.'' Triangle Corp. v. United States, 592 F.Supp. 1316, 1317 [54 AFTR 2d 84-6394] (D.Conn.1984) (internal quotation marks omitted). Accordingly, Plaintiff has sufficiently alleged jurisdiction to withstand an initial facial challenge to the Complaint. The Court recognizes that there are other factors that impact jurisdiction, which are discussed below.

2. Defendant argues that the Court lacks jurisdiction with respect to the 1987 income tax year due to the statute of limitations

While statute of limitations defenses have often, in this circuit, been reviewed pursuant to Fed.R.Civ.P. 12(b)(6) as an element of a claim, statutes of limitation are jurisdictional in tax cases. See United States v. Dalm, 494 U.S. 596, 608 [65 AFTR 2d 90-1210], 110 S.Ct. 1361, 1368 [65 AFTR 2d 90-1210], 108 L.Ed.2d 548 [65 AFTR 2d 90-1210] (1990). The Dalm Court cited an earlier Supreme Court decision clarifying the United States' immunity to suit without its consent and noted that any statute of limitations imposed by Congress is a specific condition on consent. See id. at 608 (citing United States v. Testan, 424 U.S. 392, 399, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976)). The Court concluded its analysis by noting that ''the power to consent to such suits is reserved to Congress'' and that going beyond such consent is an imposition on sovereign immunity. Id. at 610. Sovereign immunity is a jurisdictional bar to suit and if a statute of limitation has not been complied with, Congress has not given consent to suit, accordingly, absent compliance with such statute of limitations, this Court lacks jurisdiction. Because the statute of limitations is jurisdictional in this situation, rather than an element necessary to sustain suit, a defense of statute of limitations will be reviewed pursuant to Fed.R.Civ.P. 12(b)(1). See Maiman v. Internal Revenue Serv., 96 CV 5566(SJ), 1998 WL 161003, 1 [81 AFTR 2d 98-1456](E.D.N.Y. March 27, 1998), aff'd, Maiman v. C.I.R., 182 F.3d 900 [83 AFTR 2d 99-2873] (2d Cir.1999) (reviewing a statute of limitations claim in a tax refund suit under Rule 12(b)(1)). As noted fully above, when making a determination on a 12(b)(1) motion, factually attacking Plaintiff's allegations, the Court can employ the use of extrinsic documents and need not confine itself to the Complaint.

Defendant argues that Plaintiff's claim for a refund based upon the 1987 tax year was not timely filed. Plaintiff asserts, in her Amended Complaint, that the action was brought in a timely fashion with respect to her filing of taxes for the 1987 tax year. Plaintiff's tax return was due to be filed on April 15, 1988, however, she was granted a four month extension of filing until August 15, 1988 and actually filed her 1987 tax return on April 13, 1994, more than six years late.

Defendant asserts that the relevant statute of limitations provisions are §§ 6511(a) and 6511(b)(2)(A). Section 6511 provides, in pertinent part, that: Limitations on credit or refund

> (a) Period of limitation on filing claim. Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid . . . .
>
> (B)(2)(A) Limit where claim filed within 3-year period.--If the claim was filed by the taxpayer during the 3-year period

prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to three years plus the period of any extension of time for filing the return.

I.R.C. § 6511.

Read in conjunction, a taxpayer can recover a refund if that overpayment was paid during the last 3 years plus any extensions granted (the ''look-back period''). Plaintiff's claim for a refund was her tax return, which was filed on April 13, 1994 and this action was commenced on July 24, 1996, within the three year period prescribed by statute, accordingly, her claim was timely filed. See Treasury Regulation § 301.6402-3(a)(5).

Plaintiff encounters difficulty with the second portion of the statute, which pro-vides that any refund is limited to taxes paid during the look-back period. Plain-tiff's look-back period is three years plus four months before April 13, 1994, or December 13, 1990. Accordingly, to be entitled to a refund, the taxes sought to be refunded had to be paid during that look-back period. Plaintiff seeks a refund for withholding credits and earned income credits totaling $288 and $117, respectively. The Internal Revenue Code § 6513(b)(1) provides that ''[a]ny tax actually deducted and withheld at the source during any calendar year ... [shall] be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31.'' I.R.C. § 6513. Accordingly, Plaintiff's withholding credit of $288 was deemed paid on April 15, 1988, which is not within the look-back period as set forth above. Similarly, Plaintiff's earned income credit was deemed paid on the same date and is therefore not recoverable. See McLeod v. United States, 229 Ct. Cl. 810 [49 AFTR 2d 82-610] (1982). Defendant's motion to dismiss with respect to Plaintiff's claim for a refund based upon her 1987 tax return is GRANTED.

3. Defendant's argument that the Court lacks jurisdiction over Plaintiff's suit for refund with respect to years 1973, 1976, 1980, 1987, 1992, 1993 and 1994 because she did not wait the requisite six month period pursuant to 26 U.S.C. § 6532.

Defendant argues that Plaintiff's claims for tax years 1973, 1976, 1980, 1987, 1992, 1993 and 1994 should be dismissed because this Court lacks jurisdiction because the Plaintiff failed to follow the procedure set forth in Internal Revenue Code Section 6532. Section 6532 provides, in pertinent part, that ''[n]o suit or proceeding under Section 7422(a) for the recovery of any internal revenue tax, penalty or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section .... ''I.R.C. § 6532. In other words, a claimant must give the Internal Revenue Service at least six months to process a claim prior to commencing suit in federal court. Plaintiff filed her claims for a refund for tax years 1973, 1976, 1980, 1987, 1992, 1993, and 1994 on January 30, 1996 and commenced this action on July 24, 1996, which was one week too early. Am. Compl. p 17. Congressional limitations on suit are jurisdictional and this Court would not normally have subject matter jurisdiction to hear this case because such rules have not been followed. See Dubay v. Scott, 98 CV 0029(DJS), 1998 WL 1035429, 4 [82 AFTR 2d 98-6770] (D.Conn. Sept. 30, 1998) (finding that the court lacked subject matter jurisdiction because Plaintiff failed to wait six months to file the claim as required by Section 6532). However, in light of the fact that Plaintiff amended her complaint on August 7, 1996, after the expiration of the six month waiting period and for the express purpose of complying with the statute of limitations, Defendant's argument is mooted. Plaintiff's amended complaint cures any prior jurisdictional defect with respect to the six month waiting period. Defendants are not prejudiced by the amended complaint and dismissal followed by refiling would waste court resources. Defendant's motion to dismiss is DENIED.

4. Defendant's argument that the Court lacks jurisdiction over Plaintiff's complaint as it relates to the 1980, 1990 and 1993 tax years because she has not fully paid the disputed assessed liabilities.

The Supreme Court held in Flora v. United States, "that [Section] 1346(a)(1), correctly construed, requires full payment of the assessment before an income tax refund suit can be maintained in a Federal District Court." 362 U.S. 145, 177 [5 AFTR 2d 1046], 80 S.Ct. 630, 647 [5 AFTR 2d 1046], 4 L.Ed.2d 623 [5 AFTR 2d 1046] (1960); United States v. Forma, 42 F.3d 759, 763 [75 AFTR 2d 95-315] (2d Cir.1994). As noted in depth above, Congressional limits on consent to suit are jurisdictional and, accordingly, this Court will review Defendant's motion to dismiss pursuant to Rule 12(b)(1). Plaintiff has outstanding balances on each of her accounts for tax years, 1980, 1990, and 1993. See Gov't Ex. A. Accordingly, this Court does not have jurisdiction to hear Plaintiff's claims with respect to tax years, 1980, 1990 and 1993 and, therefore, Defendant's motion to dismiss Plaintiff's complaint with respect to those years is GRANTED.

[3] 5. Defendant's argument that Plaintiff's demand for injunctive relief is barred by the Anti Injunction Act

Plaintiff seeks to have an injunction issued, barring the "IRS from taking any further refunds from her income tax returns and from illegally charging her any late fees." Am. Compl. Defendant argues that Plaintiff's claim for injunctive relief should be denied because courts are generally barred from restraining the collection of any tax. Plaintiff does not oppose Defendant's argument. The rule set forth in 26 U.S.C. § 7421(a) states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." This section applies to the case at bar to restrict an injunction on the assessment or collection on any taxes. Accordingly, Defendant's motion to have Plaintiff's claim for an injunction dismissed is GRANTED.

6. Defendant argues that Plaintiff has failed to state a cause of action upon which relief may be granted as to years 1987 and 1992 because she paid no tax for either of those years.

Defendant argues, pursuant to Rule 12(b)(6), that Plaintiff has failed to state a claim for which relief can be granted in that she did not pay any taxes for either 1987 or 1992. Defendant's argument is based upon the theory that you cannot seek a refund if you have not previously overpaid. The Court will only address Plaintiff's claim for 1992, as her claim for 1987 was previously dismissed. Plaintiff, in 1992 was due to received an earned income credit of $805 according to the certificate of assessments and payments. She had no taxable income but her earned income credit was transferred to pay her delinquent account dating back at least to her 1987 return. The Supreme Court has held that a taxpayer "can receive the amount by which his entitlement to an earned-income credit exceeds his tax liability only because §6401(b) of the Code defines that amount as an 'overpayment,' and § 6402 provides a mechanism for disbursing overpayments, namely, the income tax refund process. The refundability of the earned-income credit is thus inseparable from its classification as an overpayment of tax." Sorenson v. Secretary of Treasury of the United States, 475 U.S. 851, 860 [57 AFTR 2d 86-1189], 106 S.Ct. 1600, 1606 [57 AFTR 2d 86-1189], 89 L.Ed.2d 855 [57 AFTR 2d 86-1189] (1986). In light of the fact that Defendant's motion is pursuant to 12(b)(6) and the Court is bound to look at all pleadings in favor of Plaintiff, and because Plaintiff is pro se and should be awarded every opportunity to properly plead her case, this Court holds that Plaintiff has sufficiently stated a claim upon which relief can be granted with respect to her tax claim for 1992. Defendant's motion to dismiss is DENIED.

7. Defendant argues that Plaintiff's suit as it relates to the year 1980 is statutorily barred pursuant to § 6512 because she pre-

viously filed a petition with the United States Tax Court for that year.

The Court need not address Defendant's res judicata argument because it previously dismissed Plaintiff's claim pursuant to her tax return for 1980, however, the Court notes that because Plaintiff commenced suit in the United States Tax Court, she is barred from suit for a claim emanating from that tax return in this Court. See I.R.C. 6512(a) (''if the taxpayer files a petition with the Tax Court within the time prescribed in section 6213(a) ... no suit by a taxpayer for the recovery of any part of the tax shall be instituted in any court ....'')

8. Defendant's argument that Plaintiff is barred from proceeding on her demand for pain and suffering pursuant to § 7433 because she did not allege that she exhausted her administrative remedies and to the extent Plaintiff seeks tort damages, other than under § 7433, she is likewise barred under the Federal Tort Claims Act because she did not first file an administrative claim for such damages.

The Court notes that there is no provision in Section 7433 for pain and suffering. See Shreiber v. Mastrogiovanni, 98 CV 2515(JEI), 1999 WL 99093, 4 [85 AFTR 2d 2000-1958] (D.N.J. March 1, 1999) (noting that § 7433 ''does not provide a remedy for pain and suffering'' but rather ''limits recovery to actual economic damages and costs of the action.'' Accordingly, Plaintiff's claim for pain and suffering is dismissed and Defendant's motion is GRANTED.

Finally, with respect to any other tort damages, other than pursuant to Section 7433, Defendant argues that the Court lacks jurisdiction over that portion of Plaintiff's complaint, sounding in tort, because Plaintiff did not allege that she has satisfied the provisions of the Federal Tort Claims Act. To the extent such claims are brought pursuant to the Federal Tort Claims Act, they are DENIED because the Act does not apply to tax claims. See 28 U.S.C. § 2680 (''The provisions of this chapter and 1346(b) of this title shall not apply to ... [a]ny claim arising in respect to the assessment or collection of any tax ....'')

RULE 15(c) MOTION

Finally, Plaintiff's motion to change the named defendant from the Internal Revenue Service to the United States is GRANTED.

CONCLUSION

For the reasons set forth above,

Defendant's motion to vacate the entry of default is GRANTED;

Defendant's motion to dismiss Plaintiff's complaint based upon sovereign immunity is DENIED;

Defendant's motion to dismiss based upon the argument that the Court lacks jurisdiction with respect to the 1987 income tax year due to the statute of limitations is GRANTED;

Defendant's motion to dismiss based upon the argument that the Court lacks jurisdiction over Plaintiff's suit for refund with respect to years 1973, 1976, 1980, 1987, 1992, 1993 and 1994 because Plaintiff did not wait the requisite six month period pursuant to 26 U.S.C. § 6532 prior to commencing suit is DENIED;

Defendant's motion to dismiss based upon the argument that the Court lacks jurisdiction over Plaintiff's complaint as it relates to the 1980, 1990 and 1993 tax years because she has not fully paid the disputed assessed liabilities is GRANTED;

Defendant's motion to dismiss based upon the argument that Plaintiff's demand for injunctive relief is barred by the Anti Injunction Act is GRANTED;

Defendant's motion to dismiss based upon the argument that Plaintiff has failed to state a cause of action upon which relief may be granted as to years 1987 and 1992 because she paid no tax for either of those years is DENIED;

Defendant's motion to dismiss based upon the argument that Plaintiff's suit as it relates to the year 1980 is statutorily barred pursuant to § 6512 because she previously filed a petition with the United States Tax Court for that year is moot be-

cause Plaintiff's claim for the 1980 tax year was previously dismissed;

Defendant's motion to dismiss based upon the argument that Plaintiff is barred from proceeding on her demand for pain and suffering pursuant to § 7433 is GRANTED;

Defendant's motion to dismiss based upon the argument that to the extent Plaintiff seeks tort damages, other than under § 7433, she is likewise barred under the Federal Tort Claims Act is GRANTED; and

Plaintiff's motion to change the name of the Defendant from the Internal Revenue Service to the United States is GRANTED.

All other motions are DENIED.

Defendant is direct to file an answer within 30 days of the date hereof.

SO ORDERED.

¶2002-5697

UNITED STATES OF AMERICA, PETITIONER v. Denny DAVILA, RESPONDENT. U.S. District Court, Northern Dist. of Texas, (DC TX) Docket No. 3-02-CV-1896-D, Nov. 14, 2002. Years 1996, 1997, 1998, 2000. Decision for Govt.

1. Summons enforcement—legitimate purpose—proof. Magistrate judge's recommendation to enforce IRS summons against taxpayer who failed to file returns for 4 years was adopted: IRS showed that summoned information wasn't already in its possession and was relevant to legitimate investigation of taxpayer, and that proper administrative procedures were followed; and taxpayer failed to show govt.'s bad faith or abuse of process. *Reference:* United States Tax Reporter ¶76,025.04(25). IRC §7602.

United States District Court, N.D. Texas, Dallas Division,

ORDER

FITZWATER, J.

After making an independent review of the pleadings, files and records in this case, and the Findings and Recommendation of the United States Magistrate Judge, I am of the opinion that the Findings and Recommendation of the Magistrate Judge are correct and they are hereby adopted as the Findings of the Court.

FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

KAPLAN, Magistrate J.

Petitioner United States of America has filed a petition to enforce two Internal Revenue Service summonses served on Respondent Denny Davila. For the reasons stated herein, the petition should be granted.

I.

On June 27, 2001, the IRS served two summonses on respondent as part of an investigation into his income tax liability for the years 1996, 1997, 1998, and 2000. Respondent was directed to appear before Revenue Officer Sundra McWoods and produce certain books, records, papers, and data on July 24, 2001 at 1:00 p.m. Respondent failed to appear as required. The government filed this action to enforce the summonses on September 4, 2002.

A show cause hearing was scheduled for October 17, 2002 at 9:30 a.m. Respondent was personally served with a copy of the show cause order on September 20, 2002, but failed to appear at the hearing. Assistant United States Attorney Shane Read appeared for the government and announced ready to proceed. After considering the evidence and the written submissions of the parties, the court determines that the summonses should be enforced.

II.

[1] A federal district court may enforce an IRS summons if the respondent fails to appear and produce records that are relevant to a legitimate tax inquiry. 28 U.S.C. § 7604; United States v. Wyatt, 637 F.2d 293, 299–300 [47 AFTR 2d 81-789] (5th Cir.1981). The government must prove that: (1) the investigation is being conducted for a legitimate purpose; (2) the summons is relevant to that purpose; (3) the information sought is not already in the

possession of the IRS; and (4) all proper administrative procedures have been followed. United States v. Powell, 379 U.S. 48, 57–58 [14 AFTR 2d 5942], 85 S.Ct. 248, 254–55 [14 AFTR 2d 5942], 13 L.Ed.2d 112 [14 AFTR 2d 5942] (1964); Barquero v. United States, 18 F.3d 1311, 1316 [73 AFTR 2d 94-1769] (5th Cir.1994). The burden then shifts to the taxpayer to challenge the summons on any "appropriate ground." Powell, 85 S.Ct. at 255; Barquero, 18 F.3d at 1316–17. These grounds are limited to cases involving harassment, abuse of process, and other acts of bad faith. See United States v. Stuart, 489 U.S. 353, 360 [63 AFTR 2d 89-681], 109 S.Ct. 1183, 1188 [63 AFTR 2d 89-681], 103 L.Ed.2d 388 [63 AFTR 2d 89-681] (1989).

Revenue Officer Sundra McWoods testified at the hearing. She said that respondent has not filed any tax returns for the years 1996, 1997, 1998, and 2000. According to Woods, the financial information requested in the summonses is necessary to determine the amount of respondent's tax liability for those years. Woods further testified that the IRS has followed all applicable statutes and administrative procedures and that there is no Justice Department referral in effect with respect to this matter.

The court finds that the IRS summonses are valid and should be enforced. The government has established that the investigation is being conducted for a legitimate purpose, the summonses are relevant to that purpose, the information sought is not already in the possession of the IRS, and the proper administrative procedures have been followed. Respondent has failed to demonstrate bad faith or an abuse of process on the part of the government.

RECOMMENDATION

For these reasons, the petition to enforce the IRS summonses should be granted. Respondent Denny Davila should be ordered to testify and produce all books, records, papers, and other documents specified in the summonses attached as Exhibit "A" and "B" to the government's petition filed on September 4, 2002. Respondent should be ordered to appear with these materials before Revenue Officer Sundra McWoods, or any other officer of the Internal Revenue Service, at 1100 Commerce Street, Room 9A23, Dallas, Texas 75242, on November 7, 2002 at 10:00 a.m.

A copy of this recommendation shall be sent by certified mail, return receipt requested, and by regular mail to Denny Davila, 835 Balkan Drive, Lancaster, Texas 75134.

¶2002-5698

IN RE: John P. RYAN, JR., DEBTOR. UNITED STATES OF AMERICA, PLAINTIFF v. John P. RYAN, Jr., DEFENDANT. U.S. Bankruptcy Court, Western Dist. of Missouri, (Bktcy Ct MO) Docket Nos. 00-44649-JWV, 01-04143-JWV, Nov. 19, 2002. Years 1988, 1989, 1991, 1993, 1994. Decision for Govt.

1. Tax claims in bankruptcy—dischargeability—willful tax evasion—pre- and post- petition interest. Chap. 7 debtor/attorney's unpaid tax debts and accrued interest were nondischargeable under 11 USC §523(a)(1)(C) where he willfully attempted. Self-employed taxpayer practiced law for 35 years but never paid estimated taxes, and paid almost no taxes for 14 years; failed to timely file returns; made no voluntary tax payments even after IRS initiated collection; despite high risk investments, had substantial income that he used to support his family in style and comfort that they desired, including purchase of condo in Colorado; diverted funds via transfers from corp. to joint checking account; claimed he stopped receiving salary from his professional corp. to avoid IRS levy yet somehow still paid family expenses; didn't prove that corp.'s purchase of tractor for him and wife was loan; and essentially consented through his corp.'s attorneys in prior action against corp. to 50% penalty for failure to honor levy on his wages, which was practically concession of willfulness. Also, based on 8th Cir. precedent, post-petition interest was non-dischargeable as integral part of

underlying liability. *Reference:* United States Tax Reporter ¶68,726.52(27).

United States Bankruptcy Court, W.D. Missouri, Western Division,

MEMORANDUM OPINION AND ORDER

VENTERS, Bankruptcy J.

This adversary proceeding comes before the Court on the United States of America's ("IRS") Complaint to Determine the Dischargeability of Debts under 11 U.S.C. § 523(a)(1)(C). The Court held a trial on this matter at the Federal Courthouse in Kansas City, Missouri, on October 24, 2002. At that time, the Court announced that it would take this matter under advisement. The Court has reviewed the pleadings, relevant case law, the stipulated facts, and the evidence adduced at trial and is now ready to rule. For the reasons set out below, the Court finds that the Debtor engaged in a pattern of conduct in which he willfully and deliberately attempted to evade or defeat his lawful tax obligations for the tax years of 1988, 1989, 1991, 1993, and 1994. Therefore, the Court finds that the unpaid income tax and accrued interest for those years is nondischargeable pursuant to 11 U.S.C. § 523(a)(1)(C).[1]

FACTUAL BACKGROUND

The parties have agreed to a stipulation of the facts in this case and to the authenticity of the exhibits admitted into evidence. In addition, there was substantial evidence adduced at trial.

A. Joint Stipulation of Facts

1. This is an adversary proceeding brought by the United States of America pursuant to Sections 523(a)(1)(C) and 727(b) of the Bankruptcy Code (11 U.S.C.), and Rule 4007 of the Rules of Practice and Procedure in Bankruptcy against the defendant, John P. Ryan, Jr., to obtain a determination of the dischargeability of the federal income taxes assessed against him for the 1988, 1989, 1991, 1993 and 1994 taxable years in the above-captioned Chapter 7 case.

2. The defendant, John P. Ryan, Jr., who resides at 3000 East 195th Street, Belton, Missouri, within the jurisdiction of this Court, filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code with the United States Bankruptcy Court for the Western District of Missouri on December 7, 2000.

3. A discharge under Section 727 of the Bankruptcy Code was entered in the above-captioned Chapter 7 bankruptcy case on August 13, 2001.

4. The Internal Revenue Service filed a Proof of Claim for Internal Revenue Taxes filed in the above-captioned Chapter 7 bankruptcy case with respect to the federal income taxes and statutory additions to tax assessed against debtor, John P. Ryan, Jr., for the taxable periods and in the amounts set forth below:

Taxable Year Ending	Date of Assessment	Tax Due	Penalty to Petition Date	Interest to Petition Date
12/31/88	08/21/92	$ 0.00	$ 5,446.93	$ 56,822.68
12/31/89	10/19/92	$57,101.00	$28,230.08	$113,947.44
12/31/91	10/17/94	$ 4,868.30	$ 8,532.34	$ 16,557.49

Taxable Year Ending	Date of Assessment	Tax Due	Penalty to Petition Date	Interest to Petition Date
12/31/93	06/24/96	$ 9,923.00	$ 5,025.42	$ 9,926.58
12/31/94	09/23/96	$40,991.00	$21,426.25	$ 33,090.52

[1] This Memorandum Opinion and Order constitutes the Court's findings of fact and conclusions of law pursuant to Rule 7052, Federal Rules of Bankruptcy Procedure. This is a core proceeding arising under 28 U.S.C. § 157(b)(2)(I). This Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 157(a) and 1334.

5. The pre-petition penalties assessed against the debtor, John P. Ryan, Jr., relate to events which took place more than three years prior to the filing of the petition for relief in the above-captioned Chapter 7 case, and are accordingly dischargeable under Section 727 of the Bankruptcy Code.

6. The unpaid balances of the federal income taxes assessed against Ryan for the taxable years at issue in this adversary proceeding are as follows:

Tax Year	Unpaid Income Tax	Accrued Interest (to 10/24/02)
1988	$ 0.00	$ 50,569.04
1989	$57,101.00	$141,331.73
1991	$ 4,868.30	$ 20,712.61
1993	$ 9,923.00	$ 13,440.49
1994	$40,991.00	$ 46,582.19

7. In this adversary proceeding, the United States contends the debtor's 1988, 1989, 1991, 1993 and 1994 federal income taxes are excepted from discharge under Section 523(a)(1)(C) of the Bankruptcy Code (11 U.S.C.) because of his alleged willful attempts to evade or defeat those taxes.

8. The actual dates on which John P. Ryan, Jr. filed his 1988, 1989, 1991, 1993 and 1994 federal income tax returns (Forms 1040) were as follows:

Tax Year	Date of Tax Return Filing
1988	July 12, 1990
1989	July 30, 1992
1991	August 22, 1994
1993	February 8, 1996
1994	June 18, 1996

9. The federal income taxes described in paragraph 6, above, were assessed solely against the debtor because he filed separate federal income tax returns with the IRS for those taxable years.

10. John P. Ryan, Jr., P.C., was incorporated under the Professional Corporations Act of Missouri on March 1, 1993. See Plaintiff's Exhibit 9.

11. John P. Ryan, Jr. ("Ryan") was the incorporator of John P. Ryan, Jr., P.C. See Plaintiff's Exhibit 10.

12. John P. Ryan, Jr., P.C. was incorporated as a Professional Corporation (as set forth in Article Eight of its Articles of Incorporation) for reasons which included "[t]he operation of a law office." See Plaintiff's Exhibit 9.

13. The 1993--1998 Annual Registration Reports filed by or on behalf of John P. Ryan, Jr., P.C. with the Missouri Secretary of State show that the debtor served continuously as its president from the time of its incorporation in 1993 until its dissolution. See Plaintiff's Exhibits 11–17.

14. The 1993--1998 Annual Registration Reports filed by or on behalf of John P. Ryan, Jr., P.C. with the Missouri Secretary of State reflect that Linda C. Ryan (Ryan's wife) was its corporate secretary at all times pertinent to this adversary proceeding, and that Ryan and his wife were the only stockholders in the Corporation. See Plaintiff's Exhibits 11–17.

15. On March 4, 1996, at approximately 3:30 p.m., Revenue Officer Osborn served an IRS Notice of Levy on Wages, Salary, and Other Income (Form 668-W) on John P. Ryan, Jr., P.C. to administratively seize any wages, salary and other income due Ryan from his Corporation in satisfaction of his 1988, 1989 and 1991 federal income tax liabilities. See Plaintiff's Exhibit 6.

16. Osborn served the Notice of Levy on John P. Ryan, Jr., P.C. by handing it to Jennifer R. Reagan, an attorney and associate office manager for the Corporation.

17. Ryan owed $232,645.34 in unpaid federal income taxes and statutory additions to tax for the 1988, 1989 and 1991

tax years at the time the IRS notice of levy was served on March 4, 1996. See Plaintiff's Exhibit 6.

18. On March 19, 1996, Revenue Officer Osborn served a Final Demand (Form 668-C) on the Corporation. See Plaintiff's Exhibit 7.

19. The Internal Revenue Service received no payments from John P. Ryan, Jr., P.C. pursuant to the Notice of Levy and Final Demand described above.

20. Revenue Officer Osborn received a letter dated March 30, 1996, in response to the Notice of Levy served on John P. Ryan, Jr., P.C., which stated that:

In Response to the levy served on this corporation, a copy of which is attached, please be advised this corporation does not have any property due John P. Ryan at this time.

See Plaintiff's Exhibit 8.

21. The March 30, 1996 letter was signed by Ryan on behalf of John P. Ryan, Jr., P.C. See Plaintiff's Exhibit 8.

22. Subsequent to March 4, 1996, Revenue Officer Osborn recommended that a civil suit be brought against the Corporation pursuant to Section 6332(d) of the Internal Revenue Code.

23. The United States sued John P. Ryan, Jr., P.C. under Section 6332(d) of the Internal Revenue Code for its alleged refusal to honor the March 4, 1996 levy. The complaint in that action was subsequently amended to add Ryan as a defendant and reduce to judgment Ryan's 1988, 1989 and 1991 federal income tax liabilities. See Plaintiff's Exhibit 62.

24. On October 12, 1999, judgment was entered in favor of the United States and against Ryan and his corporation, John P. Ryan, Jr., P.C., in the civil action entitled United States v. John P. Ryan, Jr. and John P. Ryan, Jr., P.C., a Missouri Corporation, Case No. 97-1424-CV-W-5 (USDC W.D. Missouri). See Plaintiff's Exhibit 63.

25. In the October 12, 1999 judgment, the United States received judgment for the unpaid balance of the tax assessments made against Ryan for his unpaid 1988, 1989 and 1991 federal income tax liabilities.

26. Judgment was also entered against John P. Ryan, Jr., P.C., and in favor of the United States, for: (1) $100,000, plus interest according to law from March 4, 1996 (the date of the IRS levy on the Corporation), under Section 6332(d)(1) of the Internal Revenue Code for the Corporation's wrongful refusal to honor the IRS levy; and (2) $50,000, under Section 6332(d)(2) of the Internal Revenue Code, because the Corporation's refusal to honor the March 4, 1996 levy was without "reasonable cause."

27. After Ryan failed to pay the judgment entered against him, the United States sought an installment payment order under the Federal Debt Collection Procedures Act, 28 U.S.C. § 3001, et seq. The District Court scheduled a hearing on the Government's request for an installment payment order for December 7, 2000. See Plaintiff's Exhibits 65 and 66.

B. Additional Findings of Fact

In addition to the stipulated facts, the Court makes the following factual findings from the evidence adduced at trial:

Ryan began practicing law in 1967 after returning from a tour of duty in Vietnam. For most of his nearly 35 years in practice, he has been self-employed. Ryan admitted that he knew he had a duty to pay federal income tax but was unaware that he was required to make quarterly estimated tax payments. Accordingly, he has never submitted any quarterly payments of estimated taxes. When he would apply for an extension to file his income tax returns, he was legally required to pay 90% of his estimated income tax; however, although he made some payments in this manner, the payments never amounted to the required 90% of the tax owed. (Def.'s Ex. 6)

Revenue Officer Melvin Osborn ("Osborn") attempted to identify assets belonging to Ryan that might be seized to satisfy the federal income tax liabilities. As part of his investigation, Osborn found that most of Ryan's major assets were titled jointly and held in tenancy by the entireties

with his wife, Linda C. Ryan (referred to herein as "Chris Ryan"). The Ryans own a 115-acre farm, rental properties--including the building where Ryan has his law office--and a storage company, all held in tenancy by the entireties.

Osborn's investigation of bank records for the corporate checking account of John P. Ryan, Jr., P.C. revealed that $1,139,117.01 was deposited from March 5, 1996, through June 30, 1998. (Pl.Exs.28–30) From his examination of the bank records, Osborn determined that funds were being transferred from the corporate checking account of John P. Ryan, Jr., P.C. to the joint checking accounts of Ryan and his wife at the same bank (accounts No. 400383732 and No. 400760927). The total amount of the funds transferred from the checking account of the corporation to Account No. 400760927 after the service of the Notice of Levy on March 4, 1996, through June 30, 1998, was $43,500.00, and the total amount transferred to Account No. 400383732 in that same period was $34,200.00. (Pl.Exs.28–33) The bank records also disclosed that several checks were written to Ryan and/or his wife in the same time period for a total of $67,879.91. (Pl.Ex. 42–48) Ryan admitted that some of these checks were for personal expenditures. Two transactions are particularly noteworthy. For one, Ryan's professional corporation paid for a John Deere Tractor for $19,000.00 on July 12, 1996, that was intended for Ryan's personal use. Ryan explained that this was a personal loan from the corporation so that he and his wife would have the funds necessary to purchase the tractor while they were awaiting financing. He also testified that as soon as the financing was available he deposited the proceeds into the corporate checking account to repay the loan. (Pl.Ex. 41) The bank records did reflect a subsequent deposit of more than $19,000.00. (Pl.Ex. 28) The second transaction of note occurred on July 30, 1996, when the corporation received a wire transfer of funds in the amount of $44,988.00. (Pl.Ex. 28). On that same date, the corporation issued a check for $44,988.00 to Ryan personally. (Pl.Ex. 43) Ryan testified that the $44,988.00 received by the corporation represented proceeds from a loan Ryan and his wife had obtained from a bank in Colorado. Ryan explained that the bank in Colorado had made a mistake and the funds should have never been placed in the corporate account. This loan was secured by a condominium the Ryans owned in Gunnison, Colorado. Ryan testified that he paid approximately $53,000.00 for the property but was unsure of when it was purchased. Ryan's oldest son, Jack, used the condominium while he attended college in Colorado. Ryan testified that the condominium was later sold for approximately $60,000.00 in 1997 or 1998.

In addition to providing housing for his oldest son while he attended college in Colorado, Ryan testified that he and his wife had provided money for college expenses to each of their three children. Ryan stated that for the years 2000 and 2001 he paid approximately $30,000.00 each year for his youngest son to attend Notre Dame University. At the same time he provided tuition of approximately $1,300.00--$1,500.00 per semester for his daughter to attend a local state university. Ryan testified that he paid these personal expenses for his children even though he knew of his tax liability because he loved his family and wanted to offer them the best opportunities.

As set out in the stipulated facts, Ryan incorporated his law practice in 1993. Ryan was the principal lawyer in the firm; he testified that at times he had two associates who worked with him. The corporation reported income of $227,669.00 for the last seven months of 1993 (it was incorporated in June). In 1994, it reported gross income of $448,703.00, and in 1995 it reported gross income of $537,659.00. (Pl.Exs.34–36) After the IRS levy was served on March 4, 1996, Ryan stopped receiving a salary from the corporation. Ryan testified that he needed to support his family so he discontinued paying himself a salary so that the IRS would not be able to collect on its levy. For the first few months of 1996, before the levy was

served, Ryan received $10,000.00 in compensation from the corporation. (Pl.Exs.18–19) Ryan explained that while his corporation was still operating, and after the IRS levy was served, he accepted new clients personally, not on behalf of the corporation. It is his testimony that he had clients separate from the corporation and received fees from those clients that were not deposited into the corporate checking account. Ryan testified that as president of the corporation he alone was responsible for the decisions made for the corporation.

On October 23, 2002, just one day before the trial of this matter, Ryan hand-delivered to the IRS's Kansas City Service Center his tax returns for 1998, 1999, 2000, and 2001. For 1998, Ryan filed a joint return with his wife, and they claimed entitlement to a refund of $213.00. However, Ryan testified that he filed separate returns for himself for 1999, 2000, and 2001, and that he owes taxes on those returns of $23,251.00 for 1999, $33,168.00 for 2000, and $45,717.00 for 2001, a total of more than $100,000.00. Ryan expressed shock at the amount of unpaid taxes for those years, but testified that he would pay them.

Additional facts necessary for a resolution of the issues will be set out in the Discussion section below.

DISCUSSION

[1] The Bankruptcy Code allows most debtors to ''reorder their affairs, make peace with their creditors, and enjoy a 'new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.''' Grogan v. Garner, 498 U.S. 279, 286–87 [70 AFTR 2d 92-5639], 111 S.Ct. 654 [70 AFTR 2d 92-5639], 112 L.Ed.2d 755 (1991)(quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 78 L.Ed. 1230 (1934)). However, there are limitations to this principle; certain conduct or acts of the debtor can lead to the forfeiture of this opportunity. See, e.g., 11 U.S.C. § 523(a) and § 727(a). One such limitation is § 523(a)(1)(C), which Congress specifically enacted to make sure that the Bankruptcy Code did not become a inappropriate vehicle for tax evasion. In re Spirito, 198 B.R. 624, 629 [77 AFTR 2d 96-2262] (Bankr.M.D.Fla.1996).

Section 523(a)(1)(C) provides:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt -
>
> (1) for a tax or a customs duty -
>
> * * *
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax;

11 U.S.C. § 523(a)(1)(C).

Although the Eighth Circuit Court of Appeals has not addressed the issue of what constitutes ''willfully attempted in any manner to evade or defeat such tax'' for purposes of § 523(a)(1)(C), the Bankruptcy Appellate Panel for the Eighth Circuit has addressed this issue. In In re May, 251 B.R. 714, 718 [86 AFTR 2d 2000-5595] (B.A.P. 8th Cir.2000), the court held that ''[i]f a debtor is aware of the duty to pay his taxes, has the wherewithal to pay the taxes and takes steps to avoid paying them, there is a willful attempt to evade or defeat the tax.'' See also United States v. Carnes (In re Carnes), 244 B.R. 435 [85 AFTR 2d 2000-1807] (Bankr.W.D.Mo.2000). Intent to evade taxes is generally proven by circumstantial evidence and reasonable inferences drawn from the existence of certain fact patterns called badges of fraud. ''In the income tax area, badges of fraud include significant understatements of income made repeatedly; failure to file tax returns; repeatedly filing returns late; implausible or inconsistent behavior by the taxpayer; and failure to cooperate with federal tax authorities.'' Berzon v. United States, 145 B.R. 247, 250 (Bankr.N.D.Ill.1992).

To prevail under § 523(a)(1)(C), the IRS does not have to show that the debtor had an evil motive or bad purpose in not paying his taxes. Wright v. IRS (In re Wright), 191 B.R. 291, 292 (S.D.N.Y.1995). Instead, the government is required to prove that the debtor's attempts

to avoid tax liability were "voluntary, conscious, and intentional." In re Toti, 24 F.3d 806, 809 [73 AFTR 2d 94-2022] (6th Cir.), cert. denied, 513 U.S. 987, 115 S.Ct. 482, 130 L.Ed.2d 395 (1994). Evasion may be established by acts of omission as well as acts of commission. Matter of Bruner, 55 F.3d 195, 200 [76 AFTR 2d 95-5024] (5th Cir.1995); Toti, 24 F.3d at 809. The burden of establishing that the tax debts are excepted from discharge falls on the government. Grogan v. Garner, 498 U.S. 279, 291 [70 AFTR 2d 92-5639], 111 S.Ct. 654, 661 [70 AFTR 2d 92-5639], 112 L.Ed.2d 755 [70 AFTR 2d 92-5639] (1991). Therefore, the IRS must prove by a preponderance of the evidence that Ryan either filed a fraudulent tax return or that the Debtor willfully attempted to evade or defeat his tax liabilities. Id.

Applying these rules to the facts of this case, it is clear to the Court that Ryan engaged in a pattern of conduct designed to willfully evade or defeat the taxes he owed for 1988, 1989, 1991, 1993, and 1994.[2]

1. Failure to pay estimated taxes

Ryan began practicing law in 1967 after returning from a tour of duty in Vietnam. For most of his nearly 35 years in practice, Ryan has been self-employed, and therefore has been required by provisions of the Internal Revenue Code[3] to pay his own taxes, rather than relying on others to withhold and transmit those taxes to the IRS for him. Despite this legal requirement, Ryan has never paid any estimated taxes--not for the five tax years in question, and not for the following years and continuing right up to the present day. In the face of levies by the IRS and other collection efforts, Ryan has refused to change his pattern of ignoring the tax laws. As a result, he continues to incur unpaid tax liabilities in the tens of thousands of dollars. This blatant disregard for the requirements of the tax law can only be deemed deliberate and intentional.

Remarkably, this failure has continued up to the trial of this matter. Ryan filed his tax returns for 1998, 1999, 2000, and 2001 the day before the trial in this Adversary Proceeding was to begin, by personally hand-delivering them to the IRS Service Center in Kansas City.[4] Once again, Ryan did not pay estimated taxes on a quarterly basis. As a result, he now owes taxes of $23,251.00 for 1999, $33,168.00 for 2000, and $45,717.00 for 2001, before the imposition of penalties and interest.

In his testimony and in counsel's argument, Ryan seemed to suggest that his failure to pay his taxes on a timely basis should be excused or overlooked because he has seldom worked in a corporate setting where his taxes would be withheld by the employer. This argument turns things upside down. Since Ryan has worked virtually all of his adult life in a self-employed situation, he should be well acquainted with the provisions of the tax law requiring quarterly estimated tax payments. He cannot blame his own failure to withhold sufficient funds from his income to make his quarterly tax payments on the fact that someone else failed to withhold the taxes for him. By deciding to be self-employed, Ryan has chosen to be personally responsible for the payment of his taxes, a responsibility that he has totally failed to shoulder.

2. Failure to timely file tax returns

The IRS argues that one factor that tends to prove Ryan's intention to evade his income tax obligation is his repeated failure to timely file tax returns. While direct proof is seldom available as to a debtor's intent, reasonable inferences can be drawn from certain patterns of conduct, including repeatedly filing late returns. In re Binkley, 176 B.R. 260, 265 [74 AFTR 2d 94-6670] (Bankr.M.D.Fla.1994).

For the five years at issue, Ryan never once filed his federal income tax return on time. In fact, for all five years, his tax returns were filed more than one year late; in

[2] It has not been alleged that Ryan filed a fraudulent tax return.

[3] Individual taxpayers are required to pay quarterly installments of estimated taxes pursuant to 26 U.S.C. § 6654.

[4] Apparently, Ryan did this in an attempt to impress the Court; his counsel argued that, despite all his past transgressions, Ryan was now current in the filing of all of his returns. The Court is not impressed by such a transparent and self-serving act.

two years, they were filed more than two years late.[5] In attempting to explain away his late filings, Ryan testified that he was "just dilatory" and that he was "distracted by other things," referring to his law practice. While this testimony may be honest, it is just not credible as an excuse for his persistently late filings. Clearly, Ryan chose to put other things ahead of his statutory obligation to report and pay his taxes. As just noted hereinabove, Ryan's pattern of filing his tax returns years after they are due has continued to the present day. His failure to timely file his tax returns evidences his intent to evade or defeat his lawful tax obligations.

3. Failure to make voluntary tax payments

After the IRS initiated its collection efforts, Ryan did not make any voluntary payments on his taxes and did not attempt to work out a voluntary payment agreement, even though he had, by that time, become somewhat familiar with Osborn and perhaps others in the IRS's collection division. Without even making an inquiry, Ryan decided that it would be pointless to offer voluntary payments in view of the large amount of taxes owed.[6]

In fact, it appears from the testimony and documentary evidence that the only times Ryan has voluntarily paid anything on his tax obligations have been when he received a salary from his professional corporation, when the IRS collected minimal amounts from its levies, and when Ryan filed for extensions of the tax-filing deadlines. In each of those instances, the tax payments were effectively compelled. Therefore, Ryan has not voluntarily made any tax payments since at least 1989.

4. Failure to pay taxes when he had an apparent ability to do so.

According to Ryan's testimony, he lost substantial amounts of money in high-risk investments in 1988 and 1989, and this made it impossible for him to pay his taxes. However, it is notable that Ryan had total income of $101,847.00 in 1988 and $227,507.00 in 1989, incomes that were very substantial and would have allowed him to pay his taxes and still support his family in comfort.[7] Nevertheless, in 1989, Ryan paid absolutely no taxes, and ended that year with a $60,963.00 tax delinquency. (Debtor's Ex. 6)[8] Ryan admitted that these high-risk investments were made with the earnings from his law practice. Clearly, then, Ryan made a conscious decision to risk his substantial earnings in speculative investments rather than making the tax payments he was required to make.

It is noteworthy that Ryan never testified at any time that he did not have sufficient money with which to pay his taxes. Rather, he testified that he did not have enough money to pay his delinquent taxes and support his family (apparently in the style and comfort he, or they, desired), and therefore he chose to use his money to support his family. This testimony is simply not credible. Between 1988 and 1994, a period that covers the years at issue here, Ryan had annual income, according to his own Exhibit 6, that ranged between $27,219.00 and $227,507.00. In two of those years, his income exceeded $200,000.00; in three other years, his income exceeded $100,000.00; and only once did his income fall below $50,000.00. Despite this income--which exceeded $850,000.00 over a period of seven years--Ryan failed to pay $141,299.00 in federal income taxes.[9] It is all too obvious that Ryan did, indeed, have substantial income with which to pay

[5] It is worth noting that Ryan filed separate returns except in those years such as 1996 and 1998 when there was no tax liability. When Ryan was questioned about his filing status he indicated that he followed the advice of his tax preparer. However, Michael J. Messina, Ryan's tax preparer, testified that he usually followed his client's direction in deciding filing status. Messina stated that it was not his practice to make comparisons for his clients so that they would be able to tell which filing status might yield a more favorable tax return. Messina conceded that, generally speaking, most married taxpayers fare better when choosing a "married filing jointly" status. In the case of the Ryans, Messina contended that it would not be fair to Chris Ryan to subject her to a tax liability for which she was not responsible.

[6] Considering Ryan's record of paying his taxes--or, more accurately, not paying his taxes--any promises of voluntary payments would have to be taken with the proverbial grain of salt.

[7] Ryan did not file his tax return for 1988 until July 12, 1990. He did not file his 1989 tax return until July 30, 1992.

[8] Ryan's 1988 taxes were eventually paid in full, though there is still an interest delinquency of more than $56,000.00. It is not clear when the 1988 taxes were finally paid.

[9] No issue has been raised about Ryan's Missouri income taxes. Presumably, those taxes were not paid, either.

his taxes, and it is even more obvious that he made the deliberate choice to spend his money in other ways than paying his taxes.

Furthermore, during the period of time Ryan was not paying his taxes, Ryan and his wife purchased a condominium in Colorado for approximately $53,000.00. Ryan offered no testimony on the source of funds used to purchase this property, although he indicated that the majority of the purchase price was financed and that he and his wife used their joint funds to pay the balance. The condominium was purchased for their oldest son's use while he attended college in Colorado. The property was sold in 1997 or 1998 for approximately $60,000.00.

5. Transfers from corporate checking account to joint checking accounts.

At some point, not made clear by the testimony, Ryan and his wife entered into an agreement with their bank, Midwest Bank, for the automatic transfer of funds from the account of the professional corporation to cover overdrafts incurred by Chris Ryan on her personal account. The Ryans had two personal bank accounts, with the Debtor carrying the checkbook for one and Chris Ryan carrying the checkbook for the other. However, both of them could write checks on both accounts. Apparently, Chris Ryan had a habit of overdrawing her account. To remedy this situation, the Ryans agreed with Midwest Bank that, whenever Chris Ryan wrote an insufficient funds check, the bank would automatically transfer funds from John Ryan's professional corporation's checking account to the personal checking account to cover the overdraft. John Ryan testified that these transfers were not considered as income by him, and accordingly the transfers were not included on the Ryans' tax returns. There was no testimony that those transfers were ever repaid to the corporation. Ryan testified that there was nothing sinister about these transfers because that was the way the Ryans had covered Chris Ryan's overdrafts for several years, beginning before the IRS undertook its collection efforts. Though the amounts of these transfers were not great, they nonetheless demonstrate Ryan's cavalier attitude toward his tax reporting and payment obligations. The transfers amounted to a diversion of funds that could otherwise have been applied to the Debtor's tax obligations.

One thing Ryan does not seem to understand is that, before his earnings become the joint property of him and his wife, the earnings are first his personal income and earnings and as such are subject to the liens of the Government.

6. Levy against professional corporation and stoppage of salary.

Most damaging to Ryan is what oc-curred in 1996 with his professional corpo-ration. In approximately June 1993, Ryan set up a professional corporation, John P. Ryan, Jr., P.C. According to Ryan, he set up the corporation on the advice of his accountant and tax lawyer, Michael J. Messina, to accomplish three goals: To provide for the withholding of income taxes because of Ryan's past problems in timely paying his taxes; to establish a retirement plan since Ryan did not have such a plan; and to provide other benefits (such as insurance) that could be taken as tax deductible items through the corporation. Messina testified that his purpose in suggesting the professional corporation was to provide "financial discipline" for Ryan and to help prevent him from falling behind in the payment of his taxes, as Ryan obviously had a habit of doing. Ryan was the president of the corporation, which operated the law practice that Ryan had previously operated as a sole proprietorship.

When efforts to obtain voluntary payments on the delinquent taxes were unsuccessful, the IRS issued a Notice of Levy on the professional corporation on March 4, 1996, in an attempt to intercept Ryan's earnings from his law practice. (Pl.Ex. 6) When a prompt response to that levy was not received, the IRS on March 19, 1996, served a final demand on the corporation for payment of the amount then delinquent, $232,645.34. (Pl.Ex. 7) Ryan apparently did two things in response to the levy and the final demand. First, on March 30, 1996, Ryan wrote a letter to Osborn at the IRS stating that "this corporation does not

have any property due John P. Ryan at this time." (Pl.Ex. 8) Second and more importantly, Ryan simply stopped paying himself a salary, in obvious defiance of the levy.[10] Ryan admitted that he stopped taking a salary from the corporation to prevent the IRS levy from attaching his earnings.

What is not clear is what Ryan did to obtain money for his family's living expenses, after supposedly stopping his salary. Prior to the issuance of the levy, Ryan had withdrawn $10,000.00 from the corporation in the first two months of 1996. Ryan testified that, after stopping his salary, he began to handle his own legal business as a private practice, although the corporation continued to operate as well.[11] According to Schedule C of Ryan's 1996 tax return (Pl.Ex. 40), he had only $7,680.00 in gross income from his legal practice for the rest of 1996, and his total income for the year was allegedly just $16,716.00. (Def.Ex. 6) This was in stark contrast to $69,680.00 in salary paid to Ryan by the corporation for the last seven months of 1993, $133,219.00 in 1994, and $93,700.00 in 1995. (Pl.Exs.34–36) The picture is muddied further by the fact that the professional corporation--of which Ryan was the president and at least 50 per cent shareholder[12] –stopped filing federal tax returns after 1995, although Ryan testified that the corporation continued in existence until the end of 1999.[13]

At trial, Ryan testified that there was a period of time when he had to borrow money from friends in order to support his family. However, he offered no corroborating testimony or evidence to support that contention, and the Court simply finds it unworthy of belief. The logical conclusion to be drawn from the pattern of conduct engaged in by Ryan is that, in complete defiance of the IRS's attempts to levy on his income, Ryan continued to extract money from the professional corporation to support the lifestyle to which he and his family had become accustomed, and he simply evaded the IRS levy by refusing to honor it.

From the time the levy was served on the corporation in March until the end of 1996, the corporation deposited $461,657.52 in its bank account. Ryan apparently would have the Court believe that he received none of that, a proposition that simply defies belief. In the absence of accounting records--which would be within the exclusive control of Ryan--we can only surmise what became of that $461,657.52. A safe inference is that Ryan himself received a substantial amount of that income and spent it for his family and personal living expenses. It is simply not credible that Ryan received only $16,716.00 in total income for 1996 from his law practice when the corporation of which he was the president and the law firm of which he was the principal had income of at least $461,657.52 in the last seven months of the year.

This testimony is even more incredible when one considers the income reported by Ryan in prior years. In 1993, Ryan reported profit from his law practice in the five months before he formed his professional corporation of $85,762.00 and he reported W-2 income from the professional corporation that year of $69,680.00, a total from his law practice that year of $155,442.00. (Pl.Ex. 37) In 1994, Ryan reported income from his legal practice on Schedule C of $99,541.00, plus an additional $133,319.00 in W-2 income from

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[10] An IRS levy continues in effect until it is terminated by the IRS. The Notice of Levy received by Ryan's office--it was served on an associate attorney in Ryan's office who also had the title of assistant office manager--stated:

"Items levied on to pay this are: (1) all wages and salary for personal services of this taxpayer that you now possess or for which you [the professional corporation] become obligated, from the date you receive this notice of levy until a release of levy is issued . . ."

[11] Ryan testified that he has had up to two associate lawyers working in his firm at one time or another. There was no testimony as to how many associates he had in 1996.

[12] Ryan pretended ignorance as to whether he owned 50 percent or 100 percent of the stock of the professional corporation, or whether he and his wife owned part or all of the stock jointly. Under Missouri law, a non-professional cannot own stock in a professional corporation, MO. REV. STAT. § 356.111, so we are left to guess as to Ryan's ownership interest in the professional corporation. Furthermore, it would be a violation of the Rules of Professional Conduct for Chris Ryan to own any interest in the professional corporation because she is not a lawyer. See MO. SUP. CT. R. 4-5.4(d).

[13] Between March 1996 and June 1998, deposits totaling $1,139,117.01 were made to the corporation bank account, according to banking records obtained by the IRS. (Pl.Ex. 31) Ryan contended that these deposits included at least $63,988.00 in proceeds from loans that Ryan and his wife had obtained personally, but which were incorrectly deposited in the corporation's bank account. Even if we accept Ryan's contention in that regard, the corporation nevertheless deposited $1,075,129.01 in its account for this period.

the professional corporation, a total of $232,860.00. (Pl.Ex. 38) In 1995, he reported W-2 income from the professional corporation of $107,673.00. (Pl.Ex. 39) The logical conclusion to be drawn from all of this is that Ryan extracted what he needed--or wanted--from the professional corporation in 1996, in total and complete defiance of the IRS's levy on his earnings.

7. Purchase of tractor by corporation

Another example of Ryan's evasion, according to the IRS, was the purchase of a John Deere tractor. On July 12, 1996, Ryan purchased a tractor and mower from an implement dealer for $19,000.00; the names on the purchase invoice were John P. Ryan and Linda C. Ryan (Ryan testified that he personally wrote Linda Ryan's name on the invoice). (Pl.Ex. 41) The implement dealer was paid with a $19,000.00 check drawn on Ryan's professional corporation. (Pl.Ex. 42) Ryan testified that he used the corporate bank account because he was unable to secure a loan before the transaction closed. He explained that he did receive a bank loan, although it was two or three days after he had written the check. The bank statements admitted in evidence seem to support Ryan in this matter inasmuch as there was a deposit of $21,296.51 made on July 16, 1996, the same day the $19,000.00 check cleared the corporation's checking account. (Pl.Ex. 28) Ryan insisted that he and his wife--not the professional corporation--repaid the bank loan, though they offered no further proof of that.

8. Purchase of the Colorado condominium

Another somewhat suspicious transaction involving the corporation bank account occurred in July 1996, as well. On July 30, 1996, the corporation received a wire transfer of funds in the amount of $44,988.00. (Pl.Ex. 28) On that same date, the corporation issued a check for $44,988.00 to Ryan personally. (Pl.Ex. 43) Ryan testified that the $44,988.00 received by the corporation represented proceeds from a loan Ryan and his wife had obtained from a bank in Colorado. The loan was supposedly secured by a condominium the couple owned in Gunnison, Colorado, and which had been occupied by their oldest son while he attended college. Ryan testified that the condominium was later sold for approximately $60,000.00 in 1997 or 1998; no part of the proceeds was applied to Ryan's delinquent taxes, inasmuch as the property was owned jointly by Ryan and his wife. Once again, Ryan offered no other evidence to support his version of these transactions.

Even assuming, for the sake of argument, that Ryan's testimony is correct, these transactions again demonstrate the cavalier attitude that Ryan has taken toward the proper handling and accounting of his financial affairs. From the evidence, it is clear that Ryan has repeatedly mixed his personal accounts and finances with those of his professional corporation and that he has used the professional corporation for his own purposes and for his own advantage in improper ways. One purpose for engaging in such activities, it can be inferred, would be to confound and confuse the IRS and make collection of Ryan's delinquent taxes more difficult. The Court has no trouble in making this inference.

9. The Government's Civil Action

Frustrated by its efforts to collect the taxes Ryan owed, the Government sued Ryan and his professional corporation in U.S. District Court in 1998. United States v. John P. Ryan, Jr. and John P. Ryan, Jr., P.C., a Missouri Corporation, Case No. 97-1424-CV-W-5 (USDC W.D. Missouri). (Pl.Ex. 62) On October 12, 1999, by consent, a judgment was entered in favor of the United States and against Ryan and his corporation. (Pl.Ex. 63) In that action, the Government obtained a judgment of $100,000.00 against the professional corporation pursuant to 26 U.S.C. § 6332(d)(1) for the corporation's wrongful refusal to honor the March 4, 1996, Notice of Levy, plus a 50 percent penalty of $50,000.00 pursuant to 26 U.S.C. § 6332(d)(2). The judgment also liquidated Ryan's personal tax obligations for 1988, 1989, and 1991 in the amount of $134,030.67. Ryan testified that he made one or perhaps two payments

of $1,000.00 each on this judgment. When Ryan continued to refuse to pay the judgment, the Government filed a Motion in September 2000 seeking a District Court order compelling Ryan to make payments of $5,000.00 a month on the judgment, inasmuch as his personal earnings as an attorney were not subject to garnishment. (Pl.Ex. 64) A hearing was scheduled on that motion for December 7, 2000. (Pl.Ex. 65) However, before that hearing could be held, Ryan filed these bankruptcy proceedings on December 7, 2000.

There are two remarkable things about this civil action and the judgment obtained by the Government. First, the professional corporation which Ryan owned (in whole or part) and which he headed acknowledged in the Consent to Judgment (Pl.Ex. 63) that it had wrongfully refused to honor the IRS's March 4, 1996, levy on Ryan's earnings. Moreover, the corporation consented to a 50 percent penalty ($50,000.00) for its refusal to honor the levy. Ryan acknowledges that he was the president of the corporation and was the principal lawyer in the law firm. In short, Ryan called the shots. Apparently, he--in consultation with his attorneys--was the one who consented on behalf of the corporation to the judgment entered in the District Court. Despite these concessions, Ryan would nevertheless have this Court believe that he did nothing to evade payment of his tax obligations. Ryan's actions have spoken much louder than his words.

Second, Ryan's failure to make any significant payments on the consent judgment is further evidence of his willful evasion of the taxes he owed. In over one year, Ryan paid--at most--$2,000.00 on the judgment. At the same time, he was also failing to pay his current taxes. At trial, Ryan casually dismissed his failure to make payments on the judgment by saying that "everyone" knew he would not be able to make the payments he had agreed to make. Coming from an attorney, this casual indifference to and disregard for a lawful judgment of a United States Court is particularly repugnant.[14]

10. Holding property as tenants by the entireties

The Plaintiff makes much of the fact that Ryan and his wife held all of their property as tenants by the entireties, thereby placing virtually all of Ryan's assets (other than his earnings) beyond the reach of the IRS's collection efforts.[15] The Court is not persuaded by this argument. It is customary for husbands and wives in Missouri to take title or ownership of both real and personal property as tenants by the entireties; to do otherwise is exceptional and might well be cause for inquiry. Moreover, the Court accepts Ryan's testimony that he and his wife--who have been married for approximately 30 years--have always acquired their properties as tenants by the entireties, going back several years before Ryan began to encounter problems paying his taxes. Finally, with the exception of the John Deere tractor and the Colorado condominium, the Plaintiff has failed to show that Ryan acquired any substantial real or tangible personal property after 1988 that would have been subject to levy by the IRS but for the tenants by the entireties ownership. Certainly, the Plaintiff has not demonstrated that Ryan transferred any real or personal property after 1988 from his individual name to himself and his wife as tenants by the entireties in an effort to hinder the Government's collection efforts, with the exception, of course, of his personal income and earnings as discussed hereinabove.

11. Post-Petition Interest

The IRS requested that the Court find the accrued interest on the tax liability is also nondischargeable. The IRS offers as authority for this request Hanna v. U.S. (In re Hanna), 872 F.2d 829 (8th Cir.1989).

14 As a fellow member of the Bar, the Court is especially offended by Ryan's behavior and attitude.

15 That situation may be changing, in light of the United States Supreme Court's recent decision in United States v. Craft, 535 U.S. 274 [89 AFTR 2d 2002-2005], 122 S.Ct. 1414, 152 L.Ed.2d 437 (2002). In Craft, the Supreme Court held that the individual taxpayer's fail-ure to pay federal income taxes resulted in the attachment of a federal tax lien on the entireties property. The Court relied upon the statutory language of 26 U.S.C. § 6321 to hold that Congress intended to reach any and all of a taxpayer's interest in his property to satisfy the collection of taxes. Id., 122 S.Ct. at 1422–23. Although the Court acknowledged that each spouse has a property interest in the entireties estate, it further explained that "each tenant possesses individual rights in the estate sufficient to constitute 'property' or 'rights to property' for the purpose of the lien . . . ." Id., 122 S.Ct. at 1419. The IRS apparently has not yet tested the Craft ruling, at least in Missouri.

The Eighth Circuit in Hanna held that post-petition interest is nondischargeable if it arises out of a nondischargeable tax liability. Like the facts in the instant case, Hanna involved a Chapter 7 proceeding where the Debtor owed the nondischargeable tax liabilities. This Court is bound to follow this precedent. Therefore, the Court finds that the interest which accrued post-petition is nondischargeable as it is an integral part of the underlying tax liability.

CONCLUSION AND ORDER

In this Court's view, this is a clear-cut case of an individual who has made a conscious and willful decision not to pay his taxes or, in the words of the statute, to willfully evade or defeat his taxes. Though he has made some payments on his taxes over the years, he has--for almost 14 years--failed to pay the taxes that he admits are legally and lawfully owing and has engaged in a pattern of conduct to avoid paying the full amount of taxes owed. He has diverted his separate income into high-risk, unsuccessful investments, rather than paying his taxes as they came due. He has elected to spend money on a condominium in Colorado for the use of his college-age son and to acquire a relatively expensive farm tractor rather than pay his taxes. He has chosen to pay $30,000.00 a year in tuition, room and board, and other expenses so that his youngest son could attend a prestigious private university, rather than paying his taxes. Despite being self-employed as an attorney for most of his adult life, Ryan has persisted in not paying his taxes on a quarterly, estimated tax basis as required by law, and he has continued to ignore those legal requirements right up to the date of trial, resulting in tens of thousands of dollars more in delinquent taxes post-petition. He has voluntarily transferred money from his professional corporation to personal bank accounts to cover overdrafts of his wife, without recognizing such transfers as taxable income. When confronted with the IRS's collection efforts, Ryan never attempted to work out any kind of voluntary agreement for payment of his delinquent taxes, while at the same time he continued his pattern of not paying his current taxes. When sued by the Government in District Court, Ryan consented to a judgment on behalf of himself and his professional corporation, but then made only one or perhaps two payments on that judgment and filed bankruptcy the day before a scheduled hearing on a motion to compel him to make the payments he had promised to make. Finally, and perhaps most importantly, when the IRS levied on his income from his professional corporation, Ryan caused the corporation to stop issuing pay checks to him, despite the fact that the professional corporation continued to deposit thousands of dollars in the corporate account each month.

For all of these reasons, the Court has no difficulty in concluding that Ryan has engaged in a pattern of conduct aimed at willfully and deliberately attempting to evade or defeat his lawful tax obligations, as provided in 11 U.S.C. § 523(a)(1)(C), and that he should not be discharged from those obligations.

Therefore, it is

ORDERED that the United States of America be and is hereby granted the relief sought in its Complaint, and the Debtor, John P. Ryan, Jr., be and is hereby denied discharge of the federal income taxes owed for the years 1988, 1989, 1991, 1993, and 1994, plus pre-petition and post-petition interest accrued thereon, pursuant to 11 U.S.C. § 523(a)(1)(C). The costs of this action are taxed against the Debtor.

¶2002-5699

CAPITAL VIDEO CORPORATION; Kenneth Guarino, PETITIONERS-APPELLANTS, v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, First Circuit, (CA1) Docket No. 02-1564, Nov. 27, 2002. Tax Court, (2002) TC Memo 2002-40, RIA TC Memo ¶2002-040 (Swift, *J.*), affirmed. Year 1996. Decision for Govt.

1. Business deductions—legal fees—corp. payments for shareholder's legal defense—ordinary and necessary ex-

penses—constructive dividends—accuracy- related negligence penalties—reasonable cause—controlling authority. Tax Court properly held that taxpayer/corp. couldn't deduct legal fees it paid for taxpayer/sole shareholder's defense of his criminal conspiracy indictments as ordinary and necessary business expenses: taxpayers didn't show how shareholder's conspiracy to avoid local crime boss's income taxes related to, or that his criminal defense protected, taxpayer's business, so burden of proof never shifted to IRS. Taxpayers' claim that Court erred by not making "common sense inference" that conspiracy was necessary part of tribute payment scheme was rejected where there was fatal lack of evidence connecting the tribute payments, tax conspiracy and taxpayer's corp. Also, Court properly found that fees payment was constructive dividend to shareholder and that shareholder couldn't deduct fees as miscellaneous itemized business expenses under IRC §162(a). *Reference:* United States Tax Reporter ¶1625.106(5); 3165.01(82); 66,625.01(10). IRC §162; 301; 316; 6662.

Brian C. Newberry, with whom James P. Redding and Hinckley, Allen & Snyder, LLP were on brief, for Appellants.
Judith A. Hagley, Attorney, Tax Division, with whom Eileen J. O'Connor, Assistant Attorney General, and Gilbert S. Rothenberg, Attorney, Tax Division, were on brief, for Appellee.

United States Court of Appeals For the First Circuit,

APPEAL FROM THE UNITED STATES TAX COURT [Hon. Stephen J. Swift, U.S. Tax Court Judge]

Before Lynch, Circuit Judge, Cyr, Senior Circuit Judge, and Lipez, Circuit Judge.

LYNCH, Circuit Judge.

This case raises the issue of the deductibility of legal fees paid for a defense against criminal charges as ordinary and necessary business expenses under Internal Revenue Code § 162(a) (2000). The petitioners, a corporation and the sole shareholder of that corporation, were sent tax deficiency notices by the Internal Revenue Service (IRS) on April 24, 2000, in the sum of $116,950.00 for the corporation and $312,874.00 for the individual, plus penalties under I.R.C. § 6662. Both of the deficiency notices stemmed from legal fees relating to the defense of a federal criminal indictment against Kenneth Guarino. The legal fees were paid and then deducted by the corporation, Capital Video Corporation, and were not counted as income by Guarino, the corporation's sole shareholder. Petitioners argue that the criminal conduct was so related to the operation of the corporation that the legal fees were a deductible corporate expense and properly not included in Guarino's gross income. The tax court disagreed, finding that the criminal charges were not sufficiently related to the operation of the corporation. We affirm the ruling of the tax court.

I.

These facts are derived from the joint stipulated facts and from the exhibits, which were stipulated to be authentic.[1] The parties rested on only these facts and exhibits before the tax court.

In 1979, Kenneth Guarino created and incorporated Capital Video Corporation, located in Cranston, Rhode Island; Guarino was the sole shareholder. Capital Video was a distributor of pornographic videotapes. Guarino was associated with Natale Richichi, a capo in the Gambino family of La Cosa Nostra, who dealt directly with the bosses of both the Gambino and Patriarca families and had influence with other factions of La Cosa Nostra. Guarino was concerned that members of other organized crime families would extort money from, or take over, his multimillion dollar business. He also worried that organized crime would interfere with his other business ventures, including a show at the Dunes Hotel and Casino in Las Vegas,

[1] Some facts are taken from Guarino's plea agreement. Because only the authenticity of the plea agreement has been stipulated to, the parties dispute whether the facts detailed in the plea agreement are binding on the parties. This debate is inapposite, because the only facts we derive from the plea agreement are used against the petitioners, who urged that the plea agreement facts be binding.

called "Night Dreams," and a precious metals business in the New England area.

Guarino in 1979 began to pay "tribute" to Richichi to fend off extortion attempts and to assist Guarino with other business matters where Richichi's influence as a capo might benefit Guarino. This included protection for the Night Dreams production and the precious metals business in New England, and for influence with various union officials. The payments averaged between eight and ten thousand dollars twice per month. The total amount of the payments is in dispute, but between July 1985 and September 1995, Guarino paid Richichi at least $1,728,000 in cash.

A substantial portion of Richichi's income came from Guarino's payments, and Richichi was not otherwise lawfully employed. Richichi worried that the IRS would become aware of and attempt to tax his substantial income and assets. As a result, Richichi and Guarino made arrangements to conceal the tribute payments from the IRS. The payments were always made in cash. While some of the funds were paid by Capital Video, these payments were kept off of its accounting books. Some payments were hidden by skimming funds from the profits of Capital Video's video booth and peep show machines; Capital Video generated false Forms 1099 so that it appeared that the skimmed profits were instead flowing to Guarino and a nominee owner.[2] Other funds from Capital Video were reported as loans and dividends to nominee owners; Capital Video's bookkeeper, Guarino's former mother-in-law, would write these loan and dividend checks and cash them herself. Guarino also provided Richichi with a Capital Video credit card, had Capital Video lease Mercedes-Benz automobiles for him and for his daughter, and paid for health insurance coverage for Richichi and his wife under Capital Video's employee plan.

Apart from helping to hide the tribute payments from the IRS, Guarino also helped Richichi hide other assets. For instance, Guarino advised Richichi on the details of how to hide his ownership of property in the Dominican Republic by using a corporation and nominee owners. He also offered to help conceal Richichi's interest in property more directly, though there were no allegations that Guarino actually served in anything more than an advisory capacity with regard to Richichi's other assets.

In October 1992, Guarino and Richichi, along with another defendant, were indicted by a federal grand jury on one count of conspiring to bribe an official of the stagehands union in connection with Guarino's Las Vegas show. In August 1994, Guarino and Richichi were indicted with three others in a superseding indictment. Count One alleged a conspiracy to "defraud the United States by impeding, impairing, obstructing, and defeating the lawful government functions of the [IRS] in the ascertainment, computation, assessment, and collection of federal income taxes owed by" Richichi. Count Two reiterated the allegation of conspiracy to bribe a union official. Finally, in August 1995 Guarino and Richichi were again indicted under a second superseding indictment for both of these counts, and they were also each separately indicted for several counts of interstate transportation of obscene material through the use of a common carrier, 18 U.S.C. § 1462, and aiding and abetting that crime under 18 U.S.C. § 2.[3]

In January 1997, Guarino, as part of a plea agreement, pled guilty only to the charge of conspiracy to evade taxes. He was sentenced to sixteen months in prison, eleven of which were served in a halfway house, and fined $250,000.

Capital Video was a subchapter C corporation whose fiscal year began on March 1. On March 1, 1996, Capital Video elected to be treated instead as a sub-chapter S corporation. This change in sta-tus meant, among other things, that its fis-cal year needed to match the calendar year. As a result, Capital Video's first fiscal

[2] A "nominee owner" is someone who owns an asset merely on paper, in order to disguise the true owner of property.

[3] The obscenity charges did not stem from the operations of Capital Video, which was an on-site video store, but instead involved separate mail-order pornographic video businesses.

year as a subchapter S corporation was a short one, lasting from March 1 to December 31, 1996.

During the calendar years 1995 and 1996, Capital Video, out of its corporate funds, paid for all of the legal defense fees for Guarino stemming from all of these criminal indictments. Capital Video paid $250,034 in fees during calendar year 1995 and $517,038 in fees during calendar year 1996, for a total of $767,072. Of that amount, Capital Video spent $343,971 between March 1, 1995 and February 29, 1996, when it was a C corporation. For the C corporation fiscal year ending February 29, 1996, Capital Video deducted as ordinary and necessary business expenses the $343,971 it had paid in legal fees for Guarino. Capital Video spent the remaining $423,101 between March 1 and December 1, 1996; it deducted this amount for its subchapter S corporation short fiscal year. Guarino failed to report the payment of these legal fees as income.

The IRS sent notices of deficiency to both Capital Video and Guarino. For Capital Video, the IRS disallowed the full $343,971 in legal fees that had been deducted as an ordinary and necessary business expense for the C corporation fiscal year ending February 29, 1996.[4] For Guarino, the IRS assessed a tax deficiency for his 1996 taxes. The IRS treated the entire $343,971 paid by Capital Video when it was a subchapter C corporation as a constructive dividend to Guarino. The IRS later conceded that $250,034 of those fees, though deducted in the corporate fiscal year ending February 1996, were actually paid in 1995; they therefore could not be counted as personal income for Guarino for 1996. The remainder of the deducted amount, $93,936, was spent in January and February of 1996, part of the 1996 tax year for Guarino's personal tax purposes. For the legal fees paid by Capital Video once it elected S corporation status, the IRS increased Guarino's 1996 taxable ordinary income by $423,101.

Capital Video and Guarino sued in the U.S. Tax Court, arguing that the conspiracy to evade payment of taxes was directly related to the tribute payments, which were themselves made to protect and promote Capital Video's business. Therefore, they argued, the legal fees were properly deductible by Capital Video as ordinary and necessary business expenses and should not be included in Guarino's taxable income. The tax court ruled for the IRS, finding that the petitioners had not established that the conspiracy charge was sufficiently related to the protection and promotion of Capital Video, though it refused to apply I.R.C. § 6662 penalties. Capital Video Corp. v. Comm'r, Nos. 4094-00, 4096-00, 2002 Tax Ct. Memo LEXIS 42, 9–10, 15 (Feb. 11, 2002). This appeal timely followed.

II.

We review decisions of the tax court "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." I.R.C. § 7482(a)(1); see State Police Ass'n v. Comm'r, 125 F.3d 1, 5 [80 AFTR 2d 97-6074] (1st Cir. 1997). The tax court's legal interpretations are reviewed de novo. Alexander v. IRS, 72 F.3d 938, 941 [77 AFTR 2d 96-301] (1st Cir. 1995). We will overturn its factual findings only if they are clearly erroneous. Filios v. Comm'r, 224 F.3d 16, 21 [86 AFTR 2d 2000-5639] (1st Cir. 2000). The clear error standard of review extends to factual findings "based on inferences from stipulated facts." Medchem, Inc. v. Comm'r, 295 F.3d 118, 122 [90 AFTR 2d 2002-5163] (1st Cir. 2002). A trial court's finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Comm'r v. Duberstein, 363 U.S. 278, 291 [5 AFTR 2d 1626] (1960) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)).

III.

[4] Subchapter S corporations do not pay income tax; they instead pass through all of their income to their shareholders every year. See I.R.C. §§ 1363(a), 1366(a). Thus, the validity of the deduction did not affect Capital Video's taxes once it elected S corporation status, but instead affected how much tax Guarino paid on the corporate disbursements.

A. Deduction by Capital Video

1. The Legal Standard

The burden of proof is generally on the taxpayer to demonstrate that the IRS's nondeductibility determination is in error. U.S. Tax Ct. R. 142(a); United States v. Janis, 428 U.S. 433, 440 [38 AFTR 2d 76-5378] (1976). Once ''a taxpayer introduces credible evidence with respect to any factual issue,'' the burden shifts to the IRS on that issue. I.R.C. § 7491(a)(1).

Section 162(a) of the Internal Revenue Code permits the deduction of ''all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.'' Id. § 162(a). To qualify as a § 162(a) deduction, an expense must ''(1) be 'paid or incurred during the taxable year,' (2) be for 'carrying on any trade or business,' (3) be an 'expense,' (4) be a 'necessary' expense, and (5) be an 'ordinary' expense.'' Comm'r v. Lincoln Sav. & Loan Ass'n, 403 U.S. 345, 352 [27 AFTR 2d 71-1542] (1971). The phrase ''ordinary and necessary'' has a specialized definition in tax law. The term ''necessary'' imposes ''only the minimal requirement that the expense be 'appropriate and helpful' for 'the development of the [taxpayer's] business.' Comm'r v. Tellier, 383 U.S. 687, 689 [17 AFTR 2d 633] (1966) (quoting Welch v. Helvering, 290 U.S. 111, 113 [12 AFTR 1456] (1933)). Moreover, an expense need not be recurring in order to be considered ordinary under § 162(a):

> Ordinary in this context does not mean that the payments must be habitual or normal in the sense that the same taxpayer will have to make them often. A lawsuit affecting the safety of a business may happen once in a lifetime. The counsel fees may be so heavy that repetition is unlikely. None the less, the expense is an ordinary one because we know from experience that payments for such a purpose, whether the amount is large or small, are the common and accepted means of defense against attack.

Welch, 290 U.S. at 114. To be deductible as ordinary and necessary, an expense must be ''directly connected with'' or have ''proximately resulted from'' business activity. Kornhauser v. United States, 276 U.S. 145, 153 [6 AFTR 7358] (1928). Whether an expenditure is ordinary and necessary is usually a question of fact. Comm'r v. Heininger, 320 U.S. 467, 475 [31 AFTR 783] (1943).

Legal fees paid to defend the business interests of a taxpayer may normally be deducted under § 162(a). Tellier, 383 U.S. at 690. Public policy does not prohibit the deduction of legal fees relating to criminal activity so long as the legal fees are an ordinary and necessary expense of a trade or business. Id. at 694–95; Heininger, 320 U.S. at 474. However, the payment of another taxpayer's expenses generally is not deductible as a business expense. Welch, 290 U.S. at 114. This principle extends to legal fees, which a taxpayer usually cannot deduct as a business expense if the fees are for legal services provided to another. J. Gordon Turnbull, Inc. v. Comm'r, 41 T.C. 358, 378 (1963), aff'd, 373 F.2d 87 [19 AFTR 2d 606] (5th Cir. 1967).

This general rule, like many such rules, has a limited exception. If the taxpayer pays the expenses of another in order to promote the paying taxpayer's business interests, the payment may sometimes be deductible as an ordinary and necessary business expense. See Gould v. Comm'r, 64 T.C. 132, 134–35 (1975). The relevant test is that of Lohrke v. Commissioner, 48 T.C. 679 (1967), which the parties agree applies. The test is twofold: First, the tax court must ''ascertain the purpose or motive which cause[d] the taxpayer to pay the obligations of the other person.'' Id. at 688. To meet this prong, the expense must have been made primarily to benefit the taxpayer's business; any benefit conferred on the party whose expenses are being paid must be only incidental. AMW Invs., Inc. v. Comm'r, No. 3901-94, 1996 Tax Ct. Memo LEXIS 255, at 13–14 [1996 RIA TC Memo ¶96,235] (May 22, 1996). Second, the tax court ''must then judge whether it is an ordinary and necessary expense of the [taxpayer's] trade or business; that is, is it an appropriate expenditure for

the furtherance or promotion of that trade or business? If so, the expense is deductible by the individual paying it.'' Lohrke, 48 T.C. at 688.

The second prong of this test, as applied to legal expenses, reflects the focus on the origin of the subject of litigation, and not on the consequences to the taxpayer. United States v. Gilmore, 372 U.S. 39, 48 [11 AFTR 2d 758] (1963) (''[T]he characterization, as 'business' or 'personal,' of the litigation costs of resisting a claim depends on whether or not the claim arises in connection with the taxpayer's profit-seeking activities. It does not depend on the consequences that might result . . . .'') (emphasis in original). A corporation may not pay the legal expenses of an indispensable employee merely on the rationale that the employee may otherwise lose his case and be imprisoned, with disastrous results to the corporation. Jack's Maint. Contractors, Inc. v. Comm'r, 703 F.2d 154, 156–57 [51 AFTR 2d 83-1130] (5th Cir. 1983) (per curiam).

Were the contrary rule adopted, businesses could deduct all manner of personal expenses paid on behalf of indispensable employees as long as the expenses were necessary to keep them employed; such a rule ''would be far too broad.'' Id. at 157; see also Cummins Diesel Sales, Inc. v. United States, 207 F. Supp. 746, 748–49 [10 AFTR 2d 5098] (D. Or. 1962), aff'd, 321 F.2d 503 [12 AFTR 2d 5296] (9th Cir. 1963) (denying a corporate deduction for the wages of a nurse whose care was necessary to the principal officer and shareholder of the corporation). In order to prevent this small exception from throwing open the floodgates of corporate deduction, the second prong of the Lohrke test requires that the expense arise in connection with the business activities of the taxpayer paying the expense. See Lohrke, 48 T.C. at 688; see also Gilmore, 372 U.S. at 48; Kornhauser, 276 U.S. at 153.

2. Factual Analysis

[1] The taxpayers concede that the tax court articulated the correct principles of law, but argue that these principles were incorrectly applied to the facts. The tax court found that there was insufficient evidence under the ''ordinary and necessary'' second prong of the Lohrke test. It found no evidence ''that indicates that Richichi would not have provided the protection to Capital Video if Guarino had not participated in the conspiracy relating to Richichi's taxes and if Capital Video had not paid Guarino's legal fees.'' Capital Video, 2002 Tax Ct. Memo LEXIS 42, at 10. Therefore, the petitioners had ''not established that Guarino's participation in the conspiracy . . . and Capital Video's payment of the legal fees in dispute had a sufficient business relationship with the protection or promotion of Capital Video's business.'' Id.

For Capital Video to deduct the legal fees paid for Guarino's criminal defense, it is not enough to argue that its business would be in danger if Guarino were convicted of the crimes of which he was accused.[5] It is not enough for Capital Video to argue that its decision to pay for Guarino's legal fees was made primarily for business reasons. When, as here, the corporation pays the legal expenses of a sole shareholder, it may be difficult to disentangle the motive of the business from that of the shareholder. Instead, Capital Video must also prove that the origin of the expense, here Guarino's criminal conspiracy activity, arose in connection with, or proximately resulted from, Capital Video's business activities. Gilmore, 372 U.S. at 48.

There is no clear error in the tax court's factual finding that the petitioners failed to establish that the expense was an ordinary and necessary one. Simply put, the petitioners presented no evidence that the criminal charge, the conspiracy to avoid paying Richichi's taxes (even ignoring the other charges), was sufficiently related to Capital Video. No one testified, for example, that the protection Richichi offered would not be provided had Guarino not helped to hide the tribute payments, or that such tax conspiracies are an integral part of tribute payments to organized crime net-

[5] In fact, the sales and resulting profits of Capital Video actually increased while Guarino was incarcerated.

works. There was nothing in the record that required the tax court to make a finding that the conspiracy was related to the promotion of Capital Video's business. The burden of proof is on the taxpayer; had the petitioners introduced credible evidence on this point, the burden would have been shifted to the IRS, I.R.C. § 7491(a), but no such evidence was introduced.

The petitioners maintain that even though there was no direct evidence requiring a contrary conclusion, it was clear error for the tax court to refuse to make a "common-sense inference" that the tax conspiracy was a necessary part of the tribute payment scheme. They argue that the underlying payment of protection was an ordinary and necessary expense of Capital Video and that a crime necessarily carries with it a cover-up, and so the cover-up must also be an ordinary and necessary expense. There were more than adequate grounds to refuse to make such an inference.

We hold[6] there was a fatal lack of evidence regarding the relationship between the tribute payments, the tax conspiracy, and Capital Video. While Capital Video may have benefitted from Richichi's protection, there was no evidence presented as to what services Richichi provided Capital Video. It is impossible to ascertain from the record whether Capital Video was a primary or even a significant beneficiary of the services, if any, exchanged for the tribute payments. Furthermore, no evidence was introduced that the effectiveness of the tribute payments depended on the resulting tax conspiracy. In light of these gaps in the evidence, the taxpayers did not show that the tribute payments were ordinary and necessary expenses of Capital Video. Even if the tax court did make an inference linking the tribute payments to the conspiracy charge, as the petitioners request, that inference itself would not result in a finding that the legal fees were deductible, because the tribute payments themselves are not clearly linked to the business of Capital Video. We cannot say the tax court committed clear error in rejecting the hypothesis that the tribute payments, as to Capital Video, necessitated the cover up which resulted in one of the criminal charges in the absence of evidence of this relationship.

In sum, the tax court did not commit clear error by refusing to find that the payment of legal fees was an ordinary and necessary business expense by Capital Video. The deductions do not meet the second prong of the Lohrke test. Accordingly, we need not reach the question of the motive for the payments under Lohrke's first prong.

B. Income to Guarino

Once the tax court determined that the $423,101 in legal fees paid by Capital Video after it became a subchapter S corporation were not deductible, "such adjustment mechanically results in additional income to Guarino in that same amount as a result of the corresponding increase in Guarino's share of the income of Capital Video, as an S corporation." Capital Video, 2002 Tax Ct. Memo LEXIS 42, at 12. Subchapter S corporations do not retain profits or losses but instead pass them to their shareholders every year. See I.R.C. § 1366(a). Once it is determined that the legal fees were not deductible business expenses, Capital Video's S corporation taxable income is increased by $423,101. Guarino, as the sole shareholder, must pay taxes on that amount as personal income. This result depends not on whether that money was spent for his benefit; instead, it flows directly from the pass-through nature of S corporation status.

The tax court also concluded that the $93,936 in legal fees paid during calendar year 1996 while Capital Video was a subchapter C corporation should be construed as a constructive dividend to Guarino, and that he thus owed tax on that amount as well. Capital Video, 2002 Tax Ct. Memo LEXIS 42, at 11–12; see Hadley v. Comm'r, 36 F.2d 543, 545 [8 AFTR 9877]

[6] As background, we note that the indictments accused Guarino of four means of engaging in criminal misconduct, only one of which referenced or involved Capital Video in any way. The other three involved other pornography distribution enterprises and Guarino's Las Vegas show. The legal fees were paid to lawyers who were defending Guarino against all of these charges. The mere fact that Guarino pled guilty to only the conspiracy charge of the second superseding indictment, which described conduct linked to Capital Video as well as other conduct, does not transform the legal fees paid to resolve all of these criminal indictments into expenses deductible by Capital Video.

(D.C. Cir. 1929); Hood v. Comm'r, 115 T.C. 172, 180 (2000); Magnon v. Comm'r, 73 T.C. 980, 993–94 (1980). Guarino has not challenged this holding on appeal; he disputes the finding of a constructive dividend solely by arguing that the legal expenses were deductible by Capital Video. Because we find otherwise, that portion spent by Capital Video as a subchapter C corporation constitutes a constructive dividend and is therefore taxable to Guarino as ordinary income. I.R.C. § 61(a)(7).

C. Miscellaneous Itemized Deductions

Finally, Guarino argues that he should be able to deduct the legal expenses as miscellaneous itemized business expense deductions under I.R.C. § 162(a). He claims that if the legal fees paid by Capital Video are to be taxable to him, then those legal fees should be considered to have been paid by him directly; moreover, he argues, once the legal fees are treated as his expense, he should be able to deduct them as a business expense. The tax court held that Guarino had not shown that the legal expenses were sufficiently related to a trade or business. Capital Video, 2002 Tax Ct. Memo LEXIS 42, at 13. There was no clear error in this holding.

Section 162(a) permits deductions by individuals as well as by corporations for "ordinary and necessary expenses paid or incurred ... in carrying on any trade or business." I.R.C. § 162(a). Individuals may deduct legal expenses under § 162(a) if they are sufficiently related to the taxpayer's business. Tellier, 383 U.S. at 689. The appropriate test is whether the "origin and character of the claim with respect to which an expense was incurred" is business or personal. Gilmore, 372 U.S. at 49.

To meet the ordinary and necessary § 162(a) standard for deductibility from his personal taxes, Guarino need not show that the criminal activity originated with Capital Video; the relationships with his other business ventures, including the precious metals business and the Las Vegas show which were also protected and aided by Richichi, are also relevant. Ultimately, however, Guarino did not show that the legal defense fees were ordinary and necessary business expenses, even considering the entirety of his business enterprises. The failings are similar to those set forth in the analysis of Capital Video's deduction. Guarino did not show a link between the protection of the businesses and the tax conspiracy in which he engaged; there was no evidence that the latter was an integral part of securing the former. Moreover, the indictment alleged, and the plea agreement acknowledged, conduct beyond merely hiding the tribute payments from the government. There was no clear error in the finding that the legal fees are not deductible by Guarino under § 162(a).

The judgment of the tax court against both Capital Video and Guarino is affirmed.

¶2002-5700

UNITED STATES OF AMERICA, PLAINTIFF v. Michael SPANO, SR., ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of Illinois, (DC IL) Docket No. 01 CR 348, Nov. 18, 2002. Decision against Taxpayer.

1. Tax crimes—tax conspiracy—post-trial motions for acquittal or new trial—prosecutor's misrepresentation. Taxpayer convicted of tax conspiracy involving income derived from insurance fraud and evidence of her signing co. checks was denied post-trial motion for acquittal or new trial. Despite prosecutor's misrepresentation in final argument that check copies couldn't be examined by handwriting expert, new trial wasn't warranted where defense counsel immediately objected and court sustained with explanation that no evidence was presented that "you can't use a copy for an exemplar." Also, jury was instructed to disregard unsupported closing arguments; and circumstantial and other evidence sufficed to show she signed checks. *Reference:* United States Tax Reporter ¶73,446.520(35).

2. Tax crimes—tax conspiracy—motion for severance and mistrial—prejudice. Taxpayer convicted of tax conspiracy along with other defendants involving income derived from insurance

fraud and evidence of taxpayer signing co. checks was properly denied pre-trial motion for severance and for mistrial after acquittal on all counts except tax conspiracy (count 17): taxpayer wasn't prejudiced by being tried on other counts where court sustained objection regarding prosecutor's generalization about *all* defendants and other counts, and clearly instructed jury that taxpayer was only involved in count 17. Taxpayer didn't tender additional jury instruction or claim that instruction was confusing. And since count 17 related to other counts, proof of defendants' receipt of income and fraud would have been presented even if taxpayer had been tried alone. *Reference:* United States Tax Reporter ¶73,446.517(30).

United States District Court, N.D. Illinois, Eastern Division,

MEMORANDUM OPINION

GRADY, J.

The court has under advisement the post-trial motion of the defendant Bonnie LaGiglio and has considered the additional briefs it requested from the parties concerning the prosecutor's argument and the court's denial of a severance.

The Prosecutor's Argument

[1] Bonnie LaGiglio was convicted on Count 17, a tax conspiracy charge. Part of the evidence offered by the government to show defendant's participation in the conspiracy consisted of binders containing copies of Plaza Partners checks purporting to have been signed by her. Many of these checks were cashed at currency exchanges under circumstances consistent with an attempt to conceal income from the IRS. The question of whether Bonnie LaGiglio signed any of these checks was an important one.

The government called a handwriting examiner to identify Bonnie LaGiglio's signature on several documents, but the witness did not attempt to identify the signatures on the copies of the Plaza Partners checks contained in the binders. In his final argument to the jury, LaGiglio's attorney emphasized this failure of the prosecution to authenticate her signature on the checks by expert testimony. During rebuttal argument, Assistant United States Attorney Schneider referred to one of the binders of Plaza checks and stated:

> And you won't find original signatures in this book, and you can't get a handwriting expert to render an opinion . . .

Defense counsel interrupted:

> I'm going to object. There is no testimony like that. They didn't ask that expert the question . . . he can't argue that to the jury.

The court agreed with defense counsel, stating:

> I think that is true. There is no evidence that you can't use a copy for an exemplar, one way or the other, one way or the other. (Tr. 11.) Mr. Schneider then continued with his argument, and no further comment was made concerning the fact that the contents of the binders were copies rather than originals.

LaGiglio argues that the remark by the prosecutor was unfairly prejudicial, because it went outside the record to provide an explanation for the government's failure to offer expert testimony about the signatures. Although the statement was interrupted by the defendant's objection, we have no doubt that the jury would have understood the prosecutor to mean that a handwriting expert will not render an opinion based on copies. As we stated in ruling on the defendant's objection, there had been no such evidence, "one way or the other." What the prosecutor was about to say is not easy to discern because the objection cut him off in mid-sentence. Obviously, he was not attempting to argue that copies could not be used for comparison purposes. The government was, after all, inviting the jury to make its own comparison between the authenticated handwriting of Bonnie LaGiglio and the checks in the binders. Immediately following the court's ruling on the defense objection, the prosecutor stated "you look at the signatures on these unknown and you compare them to these in this book and it's not a difficult

task, as Mr. Anderson [the other prosecutor, who had made the initial closing argument] said." LaGiglio argues in her post-trial motion that there was no "evidence offered, expert or otherwise, that an expert opinion could not be obtained from reviewing copies as opposed to originals. Indeed, had such testimony been offered, counsel would have vigorously crossed-examined it and refuted it." (Defendant Bonnie LaGiglio's Motion for Judgment of Acquittal, or in the Alternative for a New Trial at 3.)

The dispute between the parties, then, is not about whether it was possible to make valid handwriting comparisons by looking at copies. The government urged the jury to do it, and the defendant not only acknowledges but strenuously argues that there was nothing inappropriate about using copies.

At the time the objection was made, however, the situation was not as clear as it is now. Defense counsel was obviously under the impression that the prosecutor was about to say that copies are not a suitable basis for handwriting comparison. In ruling on the defense objection, the court understood the prosecutor's interrupted statement in the same way ("there is no evidence that you can't use a copy for an exemplar ..."). In retrospect, it appears that the prosecutor may have been about to distinguish between what a jury can properly do and what a professional handwriting expert is willing to use as a basis for expert testimony. "[Y]ou won't find original signatures in this book, and you can't get a handwriting expert to render an opinion...." In other words, although a fact finder can use copies, an expert will not render an opinion based on copies. If this is what the prosecutor was intending to say, there would have been no inconsistency between his objectionable statement and his invitation to the jury to use the copies in their own comparison.

But LaGiglio's point is the same, re-gardless of the nuances of what the prosecutor was attempting to say:

The prosecutor's explanation was offered with the clear intention of giving the jury a facially plausible reason for the government's failure to offer evidence regarding the checks. (LaGiglio Motion at 5.) And, whatever the prosecutor was in-tending to say about copies, it was clearly not based on the evidence and was there-fore improper. The question is whether the remark of the prosecutor was so prejudicial to the defendant, under all of the circumstances, that a new trial is required.

A number of factors lead us to the conclusion that the improper comment by the prosecutor is not a basis for a new trial.

First, the court immediately sustained the objection. Instead of simply saying "sustained," we explained to the jury that we thought defense counsel was correct, that there had been no evidence presented, one way or the other, "that you can't use a copy for an exemplar." That ended the matter, and the prosecutor made no further comment about the expert and copies.

In the instructions given at the end of the case, the jury was told that "closing arguments and other statements of counsel should be disregarded to the extent they are not supported by the evidence." (Court's Instruction No. 2.) The defendant tendered no additional instruction relating to this particular remark of the prosecutor, apparently thinking, as we did, that this general instruction was sufficient. Jurors are presumed to follow the court's instructions, see United States v. Andreas, 216 F.3d 645, 673 (7th Cir.2000) (presuming that jury followed curative instruction given after prosecutor's improper statement in closing argument), and we see no reason to suppose they did not do so here. There was no evidence to support the prosecutor's statement, and, if the jury followed the instruction, they disregarded the statement.

LaGiglio argues that notwithstanding these considerations the remark of the prosecutor did irreparable damage. "Nor did it matter if the Court should strike the comment, since the seed was planted." Id. at 5. But LaGiglio offers no persuasive reasoning for this kind of pessimism. She argues that "the prosecutor's statement stood as fact, undenied and unrebutted."

But this ignores the court's immediate instruction that there had been no evidence to support the statement. There was nothing to rebut. LaGiglio emphasizes that "The misstatement was made in rebuttal so that counsel could not respond." (LaGiglio Reply at 7.) The argument seems to be that, because the prosecutor had made a statement not based on the evidence, to which an objection had been sustained, the defendant was disadvantaged by her inability to develop the point that the argument had not been based on the evidence. Fortunately, this is not how trials are conducted, or there would be no end to them. When an objection is sustained, that ends the matter. This would have been true had the improper remark been made in the prosecution's opening argument and the objection been sustained at that time. It would not have been appropriate for defendant to rehash the matter during her final argument.

Defendant discounts the value of the curative instruction, arguing that because government counsel ignored his responsibility to confine his argument to the evidence there is no reason to think the jury would comply with its responsibility to obey the court's instructions. (Reply at 6–7.) This non sequitur falls of its own weight: if it were a valid argument, the only remedy for improper remarks of counsel would be a mistrial.

Defendant argues that the prejudice resulting from the improper remark of the prosecutor was magnified by the fact that, aside from the remark, there was no evidence that she signed the checks. Thus, the jury would have given weight to the prosecutor's attempted explanation of why the expert did not testify about the copies. This argument is difficult to understand, because we do not see how it follows from the prosecutor's remark that Bonnie LaGiglio signed the checks. That an expert will not testify from copies--assuming that to be true--has no tendency to prove that the copies bore the genuine signature of LaGiglio.

More than that, LaGiglio is seriously mistaken in her belief that there was no evidence of her having signed any of the Plaza Partners checks. There was evidence of various kinds.

Circumstantial evidence included the facts indicating Bonnie LaGiglio's association with Plaza Partners and the various individuals and entities connected with it. She had access to the Plaza checkbook, which was kept at her home. She was authorized to write checks on the account. While none of these circumstances, singly or in combination, shows that Bonnie LaGiglio signed any of the checks, or cashed any of them at currency exchanges, they at least show that she could have been a signer. She is not a candidate picked out of the air.

There may have been direct evidence on the point, but our recollection of the particular testimony is indistinct, and we will therefore not consider it in deciding this motion.[1]

The principal evidence that the jury could have relied on to find that Bonnie LaGiglio signed her name to the Plaza checks is something LaGiglio's motion ignores altogether: a comparison between her known signatures and the questioned signatures on the checks. Extensive use was made of an overhead projector throughout the trial. The known exemplars of Bonnie LaGiglio's signature were projected on the screen while the handwriting expert was explaining the distinctive features of the signature. The jurors were taking notes during this testimony, as they did throughout the trial, and they would have been able to recall the testimony in detail during their deliberations. The binders of Plaza checks were, of course, sent to the jury room. The jury deliberated for 11 full days and certainly had ample opportunity to compare the signature on each and every check with the known exemplars had they desired to do so. That kind of comparison by the fact finder is permitted by Federal Evidence Rule 606(b) and is recognized as

[1] We vaguely recall Frank Taylor testifying that Bonnie LaGiglio and Lori Weber Taylor, Frank's wife, cashed Plaza Partners checks at currency exchanges and dispensed the cash to him and to John LaGiglio. If Bonnie LaGiglio did cash checks purporting to have been signed by her, it seems unlikely that someone else would have signed her name. However, we may be mistaken in our recollection of the evidence.

a legitimate method for the jury to use in reaching a conclusion about handwriting:

Papia complains that nobody specifically testified that the note was her writing. But the court admitted other documents containing Papia's handwriting into evidence, and the jury could compare the note at the bottom of the letter to the writing in those documents. See Fed.R.Evid. 901(b)(3). United States v. Papia, 910 F.2d 1357, 1366 (7th Cir.1990).

We followed the testimony of the handwriting expert and looked at known exemplars and the various checks displayed on the overhead screen. Bonnie LaGiglio has a very distinctive signature, and we will note for what it may be worth that the signatures on the Plaza checks appeared to us to be indistinguishable from LaGiglio's known signatures. This was a general impression, not an attempt at an analysis. We note our observation only to point out why we would not be surprised if the jury had found that many of the checks cashed at the currency exchanges had indeed been signed by Bonnie LaGiglio.

There is testimony that LaGiglio relies on to suggest that her husband signed her name to these checks. Frank Taylor testified that he saw John LaGiglio sign Bonnie's name to two documents, and the government's handwriting expert testified that John LaGiglio had signed Bonnie's name to a deed. From this evidence the jury could have concluded that John signed Bonnie's name to all of the Plaza Partners checks as well. This was certainly the conclusion Bonnie's counsel was suggesting the jury should draw. Through speaking objections, he repeatedly called the jury's attention to the failure of the government to call witnesses to testify that they had seen Bonnie sign particular documents, including the checks. It was a frequent refrain throughout the trial, and it was emphasized again during final argument.

The one person who sat through this three month trial with the most intimate knowledge as to whether Bonnie signed the checks, was, of course, Bonnie herself. She did not testify, as was her privilege, and no inference can be drawn from her failure to testify.[2] But there was nothing that prevented the defendant from calling some other witness, perhaps a handwriting expert, to testify that the signatures on the Plaza checks were not hers.[3] Her election not to do this seems to us to have been highlighted by the repeated comments of her counsel about the prosecution's failure to call witnesses to say the signatures were hers. It amounted almost to taunting. Had the prosecutor responded--as he did not--that LaGiglio could have called a witness to testify that the checks did not bear her signature, there would have been nothing inappropriate about the comment. See United States v. Alanis, 265 F.3d 576, 586 (7th Cir.2001); United States v. Harris, 271 F.3d 690, 700 (7th Cir.2001); United States v. Sblendorio, 830 F.2d 1382, 1391 (7th Cir.1987). While the prosecution in this case did make an improper comment that was not based on the evidence, it refrained from making a comment that would have been both appropriate and damaging to the defendant on the handwriting issue. On balance, the defendant came out far ahead.

The government presented evidence, including expert testimony, from which the jury could reasonably have concluded that Bonnie LaGiglio wrote the signature on most, if not all of the Plaza Partners checks that were cashed at currency exchanges. The inference that defendant participated in the tax conspiracy would be supported by proof that she signed any of these checks; that someone else, such as her husband, might have signed her name to a few of them, or even many of them, would cast little doubt on her complicity, if in fact she signed a substantial number of them. The government's proof would

[2] In this discussion of prosecutorial misconduct, it is perhaps appropriate to note that, throughout this three month trial, involving a mass of uncontradicted evidence and eight defendants who did not testify, there was not a single comment by the prosecutors that could possibly have been interpreted as a comment on any defendant's silence. While this is how it should be, it is sometimes more easily said than done.

[3] It would also have been appropriate to call a lay witness. See Fed.R.Evid. 701, 901(b)(2); United States v. Tipton, 964 F.2d 650, 655 (7th Cir.1992) (lay witness who was familiar with handwriting of a co-worker was permitted to testify about it).

have been stronger had its expert compared the signatures on the checks to the known handwriting of the defendant and found it to be the same, but it was strong enough without that, especially in light of the defendant's failure to offer any evidence on the subject. The prosecution's improper argument as to why it did not produce expert testimony concerning the checks would not have affected the jury's analysis even if the jury had not been told to disregard it. But the instruction was given, and the presumption is that the jury followed it. The improper argument was harmless beyond a reasonable doubt and provides no basis for a new trial.

Denial of the Severance Motion

[2] At the conclusion of the government's case, the court entered a judgment of acquittal for the defendant Bonnie LaGiglio on all counts except Count 17. She argues now that the prejudice from being tried on the other counts was so great as to make it impossible for her to receive a fair trial on Count 17 and that the court erred in denying her pretrial motion for a separate trial as well as in denying her motion for a mistrial after her acquittal on all counts but the tax conspiracy.

It is true that the insurance fraud against the Town of Cicero involved largely different facts than those which proved the Count 17 tax conspiracy. The evidence was sufficient to show Bonnie LaGiglio's involvement in the tax conspiracy but insufficient to show her involvement in the insurance fraud or the other substantive offenses related to that fraud. It was for this reason that the court granted the judgment of acquittal at the close of the government's case.

LaGiglio argues that because she was charged under all counts of the indictment until her acquittal, the jury necessarily considered all of the evidence in the case in ultimately determining her guilt on Count 17:

Generically, this evidence related to doctors threatening to withhold cancer treatments because the defendants were not paying health claims, to surreptitious Sunday meetings, to evening sessions fashioning phony invoices in the name of a partnership of which she was, at the least, a nominal partner, to secret meetings in parking lots with envelopes passing and to bribes and kickbacks. As far as the jury was concerned, this evidence could be considered by them in determining her guilt on the tax count. (LaGiglio's Motion at 18 (emphasis added).) Defendant does not explain how the jury could rationally find her guilty of the tax conspiracy because other defendants defrauded the Town, submitted phony invoices, and met secretly in parking lots. There is no rational relationship, which is why the court acquitted LaGiglio on these other counts. The jury was clearly instructed at the beginning of the opening arguments that LaGiglio was only involved in Count 17. As the prosecutor began the opening argument, he misspoke and was corrected by the court:

Anderson: Over the past 10 weeks, we have heard over 50 witnesses, we have seen literally hundreds of documents, and we have learned thousands of details. But out of all of these witnesses and out of all of these documents and all of these details, there really arises just one central issue, and that issue is this: Did the defendants use Specialty Bank Consultants, SRC, as their cookie jar from which they could steal and defraud the Town of Cicero?

Mr. Nash: Judge, I am going to object at this point regarding Bonnie LaGiglio.

The Court: Well, that's really not a correct statement, Mr. Andersson, because as to Bonnie LaGiglio, the issue is entirely different than that, in the sense that Bonnie LaGiglio is named only in a count of the indictment, ladies and gentlemen, that charges a tax conspiracy, a conspiracy to avoid taxes, and she is not charged in the portions of the indictment that involve the alleged fraud against the Town of Cicero. (Government's Consolidated Response, Ex. D at 6.) Instructions that the court gave the jury at the end of the arguments made clear that LaGiglio was charged only in Count 17 and that the jury was to give separate consideration to each defendant. (Court's Instruction No. 24.) LaGiglio did

not tender any additional instruction, nor does she argue now that the instructions given were in any way confusing as to what charge the jury was to consider against her.

LaGiglio argues that coconspirator statements contained in the government's Santiago[4] proffer were considered against her even though they had nothing to do with Count 17. But LaGiglio does not point to a single coconspirator statement implicating her that would have been excluded as hearsay but for Federal Evidence Rule 801(d)(2)(E). Santiago, therefore, had nothing to do with this defendant, even on the tax conspiracy, let alone as to the other counts in which she was originally charged.

Count 17 is, of course, related to the other counts in that the defendants are charged in Count 17 with conspiring to evade taxes on income they derived from, among other sources, the insurance fraud against the Town. Proof of the defendants' receipt of that income would have been necessary and proper even if Count 17 had been severed from the rest of the indictment and Count 17 had been tried separately. And even if Bonnie LaGiglio had been completely severed and tried alone on Count 17, proof of the conspiracy, and the overt acts charged would have required presentation of much of the same fraud evidence that LaGiglio claims was heard by her jury only because her motion for a severance had been denied.

The government points out that, as it turned out, LaGiglio gained an important advantage from being tried with the other defendants. (Government's Consolidated Response at 20.) She had made a number of false statements, including false exculpatory statements, to a federal agent that were relevant to Count 17. The statements were redacted to remove references to the other defendants,[5] and all defendants, including LaGiglio, apparently believed that the hearsay problem had been solved. However, the court was of the view that the statements were still hearsay as to the other defendants even if references to them were deleted, and therefore the court, acting sua sponte, refused to admit LaGiglio's statements. The sole basis for this was to protect the other defendants, not to protect LaGiglio, and, had LaGiglio been tried alone, the statements would have been admitted. They would have added considerably to the weight of the evidence against her on Count 17.

We conclude that Bonnie LaGiglio did not suffer any unfair prejudice from the denial of her motion for a severance and that her motion for a mistrial was properly denied.

Conclusion

Bonnie LaGiglio's post-trial motion for a judgment of acquittal or, in the alterative, for a new trial, will be denied.

¶2002-5701

UNITED STATES OF AMERICA, PLAINTIFF v. Willard M. ARNOLD, Dorothy N. ARNOLD, Robert B. Arnold, DBA Marketing, Inc., as successor in interest to Carnegie Multi International Corporation, DBA Marketing, Inc., as successor in interest to Carnegie Mortgage Securities, Inc., DBA Marketing, Inc., as successor in interest to Murtaugh Corporation, DBA Marketing, Inc., as successor in interest to Thoroughbred Sales, Inc., Nahama Limited Company, The Arnold Group, Inc., Multi-Housing of Florida, Inc., R.B. and Associates, Inc., The Chestertown Bank of Maryland, Barnett Bank of Marion County, N.A., Colonial Bank, as successor to First Family Federal Savings & Loan Association; and Regency Savings Bank, FSB, successor by assignment to Barnett Bank of Marion County, N.A., DEFENDANTS. U.S. District Court, Middle Dist. of Florida, (DC FL) CIVIL ACTION NO. 5:99-CV-161-0C-21, Nov. 5, 2002. Earlier proceedings at (2002, DC FL) 90 AFTR 2d 2002-6342; (2002, DC FL) 90 AFTR 2d 2002-6344; (2002, DC FL) 90 AFTR 2d 2002-6260; (2002, DC

[4] United States v. Santiago, 582 F.2d 1128, 1134 (7th Cir.1978).
[5] Bruton v. United States, 391 U.S. 123 (1968).

FL) 90 AFTR 2d 2002-5228; (2002, DC FL) 89 AFTR 2d 2002-2823; (2002, DC FL) 89 AFTR 2d 2002-2500; (2001, DC FL) 89 AFTR 2d 2002-1167, 2002-1 USTC ¶50300, amending (2001, DC FL) 88 AFTR 2d 2001-5867, 2001-2 USTC ¶50605; and (2001, DC FL) 88 AFTR 2d 2001-5284, 2001-2 USTC ¶50553. Decision for Govt.

1. Collection actions—sale of receivership estate property—"alternative amount" withholding rule. Receiver's motion to confirm sale of receivership estate property was granted, and receiver was authorized to proceed with private sale free and clear of any federal tax liens. Also, under Reg. §1.1445-2(d)(3)'s "alternative amount" withholding rule, taxpayer wouldn't realize any proceeds from sale, so neither receiver nor purchaser were required to make any withholdings from proceeds. And, balance of proceeds after payment of fees and costs was to be paid over to govt. *Reference:* United States Tax Reporter ¶74,035.03(100); 14,455.01(10). IRC §1445; 7403.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION,

ORDER ON MOTION FOR CONFIRMATION OF SALE OF PROPERTY OF THE RECEIVERSHIP ESTATE (Hilltop Manor Apartments and Pine Shade Condominium)

RALPH W. NIMMONS, JR. United States District Judge

[1] THIS cause came on for consideration on the Receiver's Motion for Confirmation of Sale of Property of the Receivership Estate (Hilltop Manor Apartments and Pine Shade Condominium) (Dkt. 335), and the Court having reviewed said Motion and the Certificate of Receiver Supporting Confirmation of Private Sale attached thereto and finding that the proposed private sale complies with 28 U.S.C. §2001 and the Order On Motion for Leave to Proceed with Private Sales of Defendants' Real Property Assets Pursuant to 28 U.S.C. §2001 (Dkt. 103) and Order Establishing Private Sale Procedures (Dkt. 269), it is hereby ordered as follows:

1. The Motion for Confirmation of Sale of Property of the Receivership Estate (Hilltop Manor Apartments and Pine Shade Condominium) (Dkt. 335) is granted.

2. The Receiver is authorized to proceed with the sale of the property described as Hilltop Manor Apartments and Pine Shade Condominium, and more fully described on Exhibit A attached hereto to Douglas Keeler and Robin Keeler, on the terms and conditions set forth in the proposed Agreement of Sale and Purchase.

3. The private sale to Douglas Keeler and Robin Keeler is hereby confirmed.

4. The property shall be sold free and clear of any federal tax liens held by the United States of America.

5. The Court finds that under the special "alternative amount" withholding rule in I.R.S. Reg.§1.1445-2(d)(3), the owner of the Subject Property, Defendant, DBA Marketing, Inc., will not realize any proceeds from the sale of the Subject Properties and therefore neither the Receiver nor Douglas Keeler and Robin Keeler is required to withhold any of the sale proceeds for the purpose of paying federal taxes on the sales.

6. The Receiver is authorized to satisfy any liens or encumbrances that are to be paid as a condition of the sale, to pay all closing costs associated with the sale, including the Receiver's attorneys fees and costs and to pay the Receiver's commission pursuant to the provisions of the Order on Motion of Receiver for Approval of Receiver's Compensation Arrangements and for authority to Pay the Receiver's Compensation and the Expenses of the Receivership on a Monthly Basis (Dkt. 54). The Receiver shall disburse the balance of the sale proceeds to Plaintiff, United States of America.

DONE AND ORDERED at Jacksonville, Florida this 5th day of November, 2002.

RALPH W. NIMMONS, JR.

United States District Judge

¶2002-5702

Patrick S. ELLIOTT; Donna J. ELLIOTT, PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. Larry ELLIOTT; Julie F. ELLIOTT, PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Fifth Circuit, (CA5) Docket Nos. 02-60077, 02-60078, Nov. 7, 2002. Tax Court, (2001) TC Memo 2001-164, RIA TC Memo ¶2001-164, 82 CCH TCM 13 (opinion by Gerber, *J.*), affirmed per curiam. Years 1992, 1993, 1994, 1995. Decision for Govt.

1. Assessment and deficiency procedures—validity of deficiency notice; adequacy of description. Tax Court properly upheld deficiency notices as valid: notices weren't so inadequate as to deprive Court of jurisdiction and sufficiently informed taxpayers that their claimed business expense deductions were disallowed. But, 5th Cir. reproached IRS, which "clearly could have done considerably better." *Reference:* United States Tax Reporter ¶62,125.02(10); 75,225.01(15). IRC §6212; 7522.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,

Appeals from the Decision of the United States Tax Court (19425-98 & 19433-98),

Before KING, Chief Judge, and JOLLY and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

CHARLES R. FULBRUGE III - CLERK

[1] The notices of deficiency were not so inadequate as to deprive the Tax Court of jurisdiction, and they were sufficient to inform the Elliotts that their claimed business expense deductions had not been allowed. That said, the Internal Revenue Service clearly could have done considerably better and thereby saved all involved, including the Tax Court and this court, from this wasteful exercise.

AFFIRMED.

¶2002-5703

Coburn T. NORFLEET, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Eastern Dist. of North Carolina, (DC NC) Docket No. 5:02-CV-515-BR, Nov. 6, 2002. Decision for Govt.

1. Third-party summonses—petition to quash—jurisdiction. Pro se taxpayer's petition to quash 3d-party IRS summonses was dismissed for lack of jurisdiction: summoned entities were located outside district where petition was filed. *Reference:* United States Tax Reporter ¶76,095.01(75). IRC §7609.

Jonathan D. Carroll U. S. Department of Justice P. O. Box 227 Washington, DC 20044
Coburn T. Norfleet 879 South Marye Dr. Graham, NC 27253

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NORTH CAROLINA WESTERN DIVISION,

JUDGMENT

Decision by Court.

IT IS ORDERED, ADJUDGED AND DECREED that the defendant's motion to dismiss is GRANTED and the petition is DISMISSED WITHOUT PREJUDICE. (BRITT, J)

This Judgment Filed and Entered on November 6, 2002, and Copies To:

Jonathan D. Carroll

U. S. Department of Justice

P. O. Box 227

Washington, DC 20044

Coburn T. Norfleet

879 South Marye Dr.

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

Graham, NC 27253

November 6, 2002

DAVID W. DANIEL, CLERK

(By) Deputy Clerk

ORDER

W. EARL BRITT Senior United States District Judge

[1] This matter is before the court on the government's motion to dismiss the petition brought pursuant to 26 U.S.C. § 7609(b)(2). Despite having been sent a Roseboro notice, petitioner, who is proceeding pro se, did not respond to the motion. The court agrees with the government that this court lacks jurisdiction to determine the validity of the administrative summonses at issue. All of the entities summoned are located outside of this judicial district. (See Pet., Exs. A-E; Supp. Pet.) Accordingly, this court lacks subject matter jurisdiction. See 26 U.S.C. § 7609(h)(1) (''The United States district court for the district within which the person to be summoned resides or is found shall have jurisdiction to hear and determine any proceeding brought under (b)(2), (f), or (g).''). The motion to dismiss is ALLOWED, and the petition is DISMISSED WITHOUT PREJUDICE.

This 30 October 2002.

W. EARL BRITT

Senior United States District Judge

¶2002-5704

ESTATE OF Algerine Allen SMITH, deceased, James Allen Smith, Executor, PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Fifth Circuit, (CA5) Docket No. 02-60075, Nov. 7, 2002. Tax Court, (2001) TC Memo 2001-303, RIA TC Memo ¶2001-303, 82 CCH TCM 909, on remand from (1999, CA5) 84 AFTR 2d 99-7393, 198 F3d 515, 2000-1 USTC ¶50147, vacating, reversing and remanding (1997) 108 TC 412, supplemented (1998) 110 TC 12, affirmed per curiam. Date of death 11-16-90. Decision for Govt.

1. Deductions for claims against estate—settlement payments—repayment of previously reported income—claim of right—valuation—Rule 155 computations. Tax Court's remand determination of date of death value of oil co.'s claim against decedent was affirmed: Court's limitation on deduction amount accorded with 5th Cir.'s mandate; admission of govt.'s expert's testimony was proper; and placing burden of proof on taxpayer was appropriate. *Reference:* USTR Estate & Gift Taxes ¶20,535.07(22); 20,315.27(25); 20,315.27(50).United States Tax Reporter ¶13,415.01(47); 74,536.1556(45). IRC §1341; 2031; 2053.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,

Appeal from a Decision of the United States Tax Court

Before JONES, SMITH, and SILER,* Circuit Judges.

PER CURIAM:*

[1] After carefully considering the appellant's position in light of the briefs, pertinent portions of the record, and oral arguments, we affirm the judgment of the Tax Court.

At the time of her death, Algerine Allen Smith (decedent) was one of multiple defendants in a lawsuit brought by Exxon Corporation to recoup excessive royalty payments. The decedent's estate claimed a deduction on its federal estate tax return under 26 U.S.C. § 2053(a)(3) in the amount of $2,482,719, the entire amount sought by Exxon from the decedent. In 1997, the Tax Court held that the deduction for Exxon's claim was limited to $681,840, the amount eventually paid in settlement of the claim. Estate of Smith v. Comm'r, 108 T.C. 412, 425 (1997). On appeal, a panel of this Court concluded

* Circuit Judge of the 6th Circuit, sitting by designation.

* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

that the estate was not entitled to deduct the full amount claimed by Exxon, Estate of Smith v. Comm'r, 198 F.3d 515, 521 [84 AFTR 2d 99-7393] (5th Cir. 1999) (Smith I), and remanded the case to the Tax Court with instructions to appraise the value of Exxon's claim based on information known or available as of the date of the decedent's death. Id. at 517–18. On remand, the Commissioner presented the testimony of an expert witness that the value of Exxon's claim at the time of the decedent's death was not more than $681,840. The Estate did not present any evidence of the value of Exxon's claim but, instead, simply argued that it was entitled to deduct the full amount demanded by Exxon. The Tax Court limited the amount of the estate's deduction to $681,840.

The appellants challenge the Tax Court's limitation of the estate's deduction, the admission of the expert witness's testimony, and the denial of its motion to place the burden of proof on the Commissioner. We cannot square the appellants' claim for a deduction in the amount of $2,482,719 with this Court's holding in Smith I. The Tax Court complied with the mandate of this Court in valuing Exxon's claim and did not abuse its discretion in admitting the testimony of the Commissioner's expert witness. The expert witness's testimony satisfies the requirements of Federal Rule of Evidence 702 and is precisely the type of evidence that this Court instructed the Tax Court to consider. We also conclude that the Tax Court did not err by placing the burden of proof on the estate regarding the claimed deduction. Sealy Power, Ltd. v. Comm'r, 46 F.3d 382, 387 [75 AFTR 2d 95-1213] (5th Cir. 1995).

For the foregoing reasons, the judgment of the Tax Court is affirmed.

AFFIRMED.

¶2002-5705

LONG-TERM CAPITAL HOLDINGS, ET AL., PETITIONERS v. UNITED STATES OF AMERICA, RESPONDENT. U.S. District Court, Dist. of Connecticut (DC CT) Docket No. 3:01 CV 1290 (JBA), Oct. 30, 2002. Year 1997. Decision for Govt. in part.

1. District court procedure—discovery—privileged documents—attorney-client privilege; work prod-uct—waiver—partnership items. Mag-istrate judge granted in part and denied in part govt.'s motion to compel partnership to produce privileged legal opinion (Opin-ion) that it had secured at time of audit: taxpayer actually waived attorney-client privilege when it disclosed to accountant "gist" of Opinion, which discussed propriety of loss deductions underlying audit and on which taxpayer based its good faith reliance defense; and taxpayer otherwise impliedly waived privilege when it or its in-house counsel voluntarily made specific disclosure to nonlawyer accountant of another, earlier legal opinion discussing same underlying transaction and deductions as that discussed in instant Opinion. But, Opinion was subject to in-camera review before disclosure to determine to what extent it, as document prepared in advance of litigation potentially stemming from audit, was still protected by work-product doctrine. *Reference:* United States Tax Reporter ¶74,025.01(5); 62,215. IRC §6221; 7402.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT,

Joan Glazer Margolis

All cases[1]

RULING ON RESPONDENT'S MOTION TO COMPEL

On July 9, 2001, Long-Term Capital Holdings, L.P., Long-Term Capital Portfolio, L.P. and Long-Term Capital Management, L.P. ["LTCM"][collectively "Petitioners"], as the tax matters partners of Long-Term Capital Partners, L.P., filed a Petition for Readjustment pursuant to 26 U.S.C. § 6226(a)(2) (Dkt. #1). Respondent

[1] On November 20, 2001, United States District Judge Janet Bond Arterton issued an Order of Consolidation, consolidating 3:01 CV 1291, 3:01 CV 1292, and 3:01 CV 1714 with this lead case 3:01cv1290. (Dkt. #28.) On May 8, 2002, 3:01 CV 1713 and 3:01 CV 1711 were also consolidated with this case for all purposes. (Dkt. #64.)

United States of America [''Respondent''] filed its Answer and Affirmative Defenses on September 14, 2001. (Dkt. #13).

On July 12, 2002, Respondent filed its Motion to Compel, with brief and affidavit in support. (Dkts. ##73–75)[2] On August 2, 2002, Petitioners filed their brief in opposition. (Dkt#79)[3] Two weeks later, Respondent filed its reply brief. (Dkt. #83)[4] On August 19, 2002, United States District Judge Janet Bond Arterton referred all discovery, including this motion, to this Magistrate Judge. (Dkt. #84).

Respondent's Motion to Compel (Dkt. #73) is granted in part to the extent set forth below.

I. FACTUAL BACKGROUND[5]

The Petition followed a decision by the Internal Revenue Service [''IRS''] to adjust Petitioners' R basis in certain stock transactions and to disallow certain deductions taken on its 1997 tax return. The 1997 deductions were taken after Petitioners sold a sum of preferred stock following certain partnership transactions involving Petitioners and Onslow Trading & Commercial LLC] ''Onslow''].

In 1996, Onslow contributed or sold investments to Petitioners in blocks of preferred stock in exchange for a partnership interest in Petitioners' business. (Dkt. #74, at 5; Dkt. #79, at 3). Shortly after the partnership was formed, Onslow sold its partnership interest back to Petitioners, and Petitioners in turn sold the preferred stock for the aggregate sum of $1,078,400. (Id.; Dkt. #1, ¶ 18). It is this sale that gives rise to the loss claimed by Petitioners at issue in this case. Prior to the sale, Petitioners engaged Shearman and Sterling [''S&S''] to determine Onslow's tax basis in the stock. (Dkt. #79, at 3).[6] Around the time of the sale, Petitioners received legal advice from King and Spalding [''K&S''], later memorialized in a formal legal opinion, relating to Petitioners' partnership tax issues, though the parties dispute the actual content of this opinion as this opinion is at issue in this litigation. (Dkt. #79, at 4; Dkt. #83, at 4). After the sale, Petitioners claim they relied on the S&S opinions to determine that Petitioners had a sales loss of $106,058,228, which Petitioners reported on their 1997 tax return. (Dkt. #79, at 3). Petitioners' 1997 tax returns were the subject of an audit by the IRS and during the IRS's administrative proceedings, Petitioners produced several legal opinions pro-vided by S&S explaining Onslow's basis in the stock. (Dkt. #74, at 6; Dkt. #79, at 3–4). Petitioners withheld the legal opin-ions issued by K&S, labeled in Petitioners' privilege log as relating to ''preferred stock transactions,'' on grounds that such opinions were protected by the attorney-client privilege and work product doctrine. (Dkt. #79, at 4; Dkt. #74, at 6).

II. DISCUSSION

[1] Respondent seeks an order compelling Petitioners to turn over the K&S opinion which Petitioners claim is protected by attorney-client privilege and the work product doctrine. Respondent asserts that Petitioners waived their attorney-client privilege with respect to the K&S Opinion by asserting a defense of good faith reliance on that opinion. (Dkt. #74, at 7). Additionally, Respondent asserts that since Petitioners have placed both the K&S opinion and S&S opinion in issue, Petitioners should not be allowed to selectively disclose those communications which.support its claims and withhold other communications relating to the same issue. (Id. at 8).

Petitioners respond that the prior disclosure of the S&S opinion did not waive attorney-client privilege with respect to the K&S opinion because the S&S opinion was not privileged (Dkt. #79, at 1, 5–6),

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[2] The following three exhibits were attached to the brief (Dkt. #74): copy of Petitioners' Response to Respondent's First Request for Production of Documents, dated January 16, 2002 (Exh. A); copy of Petitioners' R Privilege Log, dated January 16, 2002 (Exh. B); and excerpts from the deposition of Brett Yacker, taken on May 28, 2002 (Exh. C).

[3] The following four exhibits were attached: copies of decisions (Exhs. A & D); copy of correspondence between counsel, dated May 29, 2002 (Exh. B); and additional excerpts from the Yacker deposition (Exh. C).

[4] An additional two exhibits were attached: copy of a letter, dated August 1, 1996, from Shearman & Sterling to Petitioners (Exh. D); and copy of a letter, dated October 13, 2000, from McKee Nelson, Ernest & Young, LLP to the IRS (Exh. E).

[5] In light of the complex factual and procedural history, the Court only references those matters relevant to the pending motion.

[6] According to Petitioners, S&S issued opinions on August 1, 1996 and November 1, 1996. (Id.).

and even if the S&S opinions were privileged, their disclosure thereof did not constitute an implied waiver as to the K&S opinion because the opinions address different issues, and disclosure of the S&S opinion has no effect on the privilege of the K&S opinion. (Id. at 1, 6–11).

Respondent further argues that Petitioners waived the attorney-client privilege with respect to the K&S opinion by disclosing the substance of that opinion to its tax accountant. (Dkt. #74, at 9–11). Petitioners counter by arguing that disclosure to the accountant was an extrajudicial disclosure and therefore did not constitute a subject matter waiver, and in any event was so minimal as to not constitute a waiver under any circumstances. (Dkt. #79, at 1–2, 11–18).

Petitioners further argue that because the opinion was prepared in anticipation of litigation, it is protected under the work product doctrine, and as opinion work product, the K&S opinion should be afforded an even higher level of protection. (Id. at 18–19, 21–23). Respondent counters that Petitioners have set forth no evidence that the K&S opinion was prepared in anticipation of litigation and the work product doctrine does not protect documents that are prepared in the ordinary course of business. (Dkt. #83, at 7–9). Petitioners argue that despite the disclosure to the accountant, the work product protection was not waived. (Dkt. #79, at 19–21). To this argument, Respondent replies that Petitioners waived the work product protection by raising "advice-of-counsel" as an issue. (Dkt. #83, at 9). Lastly, Petitioners argue that Respondent has not made a highly persuasive showing that the document is needed. (Dkt. #79, at 22). Respondent counters that principles of equity and fairness dictate that it be provided with the K&S opinion. (Dkt. #83, at 5).

A. ACTUAL WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

Pursuant to the Federal Rules of Civil Procedure, the scope of discovery extends to "any matter, not privileged, which is relevant to the subject matter in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Fed. R. Civ. P. 26(b)(1). The burden of establishing the "existence of an attorney-client privilege, in all of its elements, rests with the party asserting it. The administration of the privilege in the courts requires recognition that sound legal advice or advocacy depends upon the lawyer's being fully informed by the client." In re Grand Jury Proceedings v. Doe, 219 F.3d 175, 182 (2d Cir. 2000) (citations & internal quotations omitted), on remand, 2001 WL 237377 (S.D.N.Y. March 2, 2001).[7] However, "since the privilege stands in derogation of the public's right to every man's evidence, . . . it ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." 219 F.3d at 182 (citations & internal quotations omitted).

"[T]he *extrajudicial* disclosure of a portion of an attorney-client conversation . . . cannot in itself waive the privilege as to the rest of the conversation." U.S.v. Jacobs, 117 F.3d 82, 89–90 (2d Cir. 1997) (citation omitted(emphasis in original));[8] see also In re von Bulow, 828 F.2d 94, 102 (2d Cir. 1987).[9] Thus, the rule that "testimony as to part of a privileged communication, in fairness, requires production of the remainder" does not apply when the privilege-holder or his attorney makes extrajudicial disclosures that are not subse-

[7] On remand the court applied the following factors: (1) the corporate-agent dichotomy; (2) the context of the disclosure; (3) the nature of the disclosure; and (4) the prejudice to the government. In re Grand Jury Proceedings, 2001 WL 237377, at 4–12. The District Court found that although the first three factors in that case tended towards supporting a finding of waiver, the factors were outweighed by the fact that the prejudice to the government could be remedied in a manner that would not cause an undue burden. Id. at 12.

[8] Jacobs' attorney originally had written two opinion letters characterizing the legality of Jacobs' scheme as "dubious." Id. at 89. Jacobs, however, altered the letters, by omitting a "not" from one of the attorney's statements, so that the letters appeared to approve of his actions. Id. at 89, 90. The Second Circuit found that an inaccurate statement of a privileged communication waives the privilege with respect to that communication. Id. at 90.

[9] After Claus von Bulow's release from prison, his attorney published a book, with von Bulow's permission, which detailed several confidential conversations the two had during von Bulow's prosecution for the attempted murder of his wife. Id. at 96. In an action for civil assault brought against him by his wife's children, the plaintiffs argued that the disclosures in the book were evidence of a waiver of the attorney-client privilege. Id. The von Bulow court found that the attorney-client privilege was waived as to the conversations disclosed in the book, but not to any other, unrelated conversations. Id. at 100–04.

quently placed at issue during litigation. In re von Bulow, 828 F.2d at 102. However, as the court in von Bulow has recognized, the attorney-client privilege may be waived with respect to any "matters *actually disclosed*" even though the disclosures are extrajudicial. Id. (emphasis in original); Jacobs, 117 F.3d at 90. Furthermore, because it is vital to a claim of privilege that the communications between attorney and client are made in confidence and maintained in confidence, any voluntary disclosure of an attorney-client communication to a third party for purposes inconsistent with maintaining confidentiality waives the attorney-client privilege as to that disclosure. See Bowne v. AmBase Corp., 150 F.R.D. 465, 478–79 (S.D.N.Y. 1993); see also Westinghouse Electric Corp. v. Republic of the Philippines, 951 F.2d 1414, 1427 (3d Cir. 1991) ("[U]nder traditional wavier doctrine a voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else.")

In the Jacobs decision, the Second Circuit found that a waiver of the attorney-client privilege extends to documentary evidence when the gist or substance of the documents have been disclosed. 117 F.3d at 90. In this case, although there is no suggestion of impropriety on the part of the Petitioners as there was in the Jacobs case, Petitioners did disclose the gist or substance of the opinion at issue while withholding the actual document as protected by the attorney-client privilege. Petitioners disclosed to its tax accountant that it had secured a legal opinion that determined that it was "more likely than not" that Petitioners could take the deduction based on Onslow's tax basis.[10] Petitioners would have secured this legal opinion, in part, to identify whether it could take the deduction and the gist of the opinion would be the conclusion reached by the preparer. Petitioners' disclosure of the "more likely than not" language to its accountant is a disclosure of the gist of the opinion, and therefore weighs in favor of a finding that the attorney-client privilege was waived.

Petitioners seek to avoid this conclusion by urging reliance on 26 U.S.C. § 7525(a)(1), which provides in pertinent part:

> With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

Petitioners' argument, however, fails for two reasons. First, the meeting between Petitioners' in-house tax counsel and the Price Waterhouse accountant in charge of Petitioners' matter was held in 1997.[11] (Dkt. #79, at 11 n.9). The statute upon which Petitioners rely was enacted prospectively on July 22, 1998, thus the communications between the accountant and the Petitioners do not fall within the accountant-client privilege. 26 U.S.C. § 7525; see also U.S. v. Frederick, [83 AFTR 2d 99-1870] 182 F.3d 496, 502 (statute is applicable only to communications made on or after July 22, 1998, the date the statute was enacted), reh.denied, 84 A.F.T.R.2d (RIA) 5760 [84 AFTR 2d 99-5760] (7th Cir. 1999), cert. denied, 528 U.S. 1154 (2000). Second, Petitioners argue that the statute reflects Congress' acknowledgment of "the confidential nature of communications between tax accountants and their clients," and the alleged disclosure was made in a meeting between Petitioners' tax advisors, each of whom could be expected to maintain confidentiality. (Dkt. #79, at 20).

The new statute protects communications between a taxpayer and a federally authorized tax practitioner "to the extent

[10] Petitioners' accountant testified in his deposition that "[w]hen Larry [Noe] [Petitioners' in-house counsel] went through the transaction ... telling us that they had a legal opinion from Sherman & Sterling ... that gave us great comfort. And then on the transaction itself, if it would create a loss, that they have a legal opinion from King & Spalding that's more likely than not that the loss can be taken, satisfied our fiduciary duty to make sure that the position could be reported." (Dkt. #74, Exh. C, at 67–68).

[11] Petitioners' privilege log indicates that the K&S opinion was dated January 27, 1999. (Dkt. #74, Exh. B, at 1). However, according to Petitioners, Brett Yacker testified in his deposition that the disclosure regarding the opinion occurred in a meeting held in 1997. (Dkt. #79, at 11 n.9).

the communication would be considered a privileged communication if it were between a taxpayer and an attorney.'' 26 U.S.C. § 7525(a)(1). Thus, despite Petitioners' reliance on Congressional intent, the judiciary has held that ''[t]here is no common law accountant's or tax preparer's privilege.'' Frederick, 182 F.3d at 500 (citations omitted). Rather, ''[t]he information that a person furnishes the preparer of his tax return is furnished for the purpose of enabling the preparation of the return, not the preparation of a brief or opinion letter. Such information therefore is not privileged.'' Id.

The statute does not protect work product so any reliance on such an argument by Petitioners must fail. Frederick, 182 F.3d at 502. Furthermore, even if it were applicable to this case, which it is not, because it is applicable only to communications made on or after July 22, 1998, nothing in the new statute suggests that nonlawyer practitioners, such as the Price Waterhouse partner involved in this case, are entitled to the privilege when they are doing other than lawyers' work. Id. Accordingly, the fact that Petitioners disclosed the gist of the K&S opinion to its tax accountant waives heavily in favor of a finding of a waiver of the attorney-client privilege.

B. IMPLIED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

An ''implied waiver [of the attorney-client privilege] may be found where the privilege holder asserts a claim that *in fairness* requires examination of protected communications.'' In re Grand Jury Proceedings, 219 F.3d at 182 (citation omitted) (emphasis in original). For example, ''a party who voluntarily asserts an advice-of-counsel defense is deemed to have waived its privilege with respect to the advice received.'' In re Grand Jury Proceedings, 2001 WL 237377, at 3 (citing In re Grand Jury Proceedings, 219 F.3d at 182–83). Fairness is decided on a case-by-case basis and ''depends primarily on the specific context in which the privilege is asserted.'' 219 F.3d at 183. Because this case involves a disclosure of the substance of a communication upon which Petitioners rely,[12] fairness dictates that this court examines the factors surrounding the disclosure in order to determine the existence and scope of a waiver of the attorney-client privilege. In addition to the effect of the disclosure, many of the factors which the Second Circuit and the Southern District of New York have applied to cases involving implied waiver issues in the corporate context are relevant to the issues in this case. Thus, like the Second Circuit and District Court in In re Grand Jury Proceedings, this Court will examine the nature of the disclosure, the context of the disclosure and the prejudice to the government to determine whether a finding of an implied waiver exists and if so, to determine the scope of the waiver.

1. EFFECT OF THE DISCLOSURE OF THE SHEARMAN & STERLING OPINIONS

As stated above, Petitioners argue that the S&S opinion was not protected by the attorney-client privilege, and even if it were, its disclosure could not waive any claim to the privilege with respect to the K&S opinion. (Dkt. #79, at 5–11). In order to invoke the attorney-client privilege, ''a party must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or providing legal advice.'' United States v. Constr. Products Research, 73 F.3d 464, 473 (2d Cir.) (citing Fisher v. United States, 425 U.S. 391, 403 [37 AFTR 2d 76-1244] (1976),) cert. denied, 519 U.S. 927 (1996). In this case, the S&S opinion was provided by the law firm of Shearman & Sterling to Petitioners at Petitioners' request. (Dkt. #83, Exh. D). The S&S opinion was intended to be, and was in fact, kept substan-

[12] Petitioners do not rebut Respondent's argument that because they have asserted an ''advice-of-counsel defense,'' the privilege, with respect to the advice received, has been waived. (Dkt. #79, at 5–6).

tially confidential (Dkt. #83, Exh. E),[13] and the language in the S&S opinion confirms that the opinion details legal advice. (Dkt. #83, Exh. D at 1, 7) (''You have requested our opinion with respect to the basis of certain preferred stock received by Onslow . . . .'' ''The opinions set forth above are based upon current U.S. Federal income tax law and administrative practice as in effect on the date hereof. In rendering such opinions, we have considered all pertinent facts and circumstances . . . .''). Additionally, in Petitioners' letter response to an initial discovery request by the IRS, dated October 13, 2000, Petitioners admit that the S&S opinion is a legal opinion that was withheld due to attorney-client privilege. (Dkt. #83, Exh. E).

Thus, having admitted that the S&S opinion was protected by the attorney-client privilege, Petitioners' only remaining argument is that the disclosure of the S&S opinion had no bearing on the K&S opinion because the S&S opinion and the K&S opinion concern separate issues and the waiver of one does not affect a waiver of the other. (Dkt. #79, at 9–11). Petitioners assert that the S&S opinion concerns Onslow's underlying lease transactions and the impact of those transactions on the tax basis of the stock that Onslow contributed to LTCM. (Id. at 9). In contrast, the K&S opinion, according to Petitioners, provides advice on certain partnership tax issues. (Id.). This Court agrees with Respondent that Petitioners' distinction, to the extent that one exists, is insubstantial because a determination of the validity of a tax deduction necessarily involves the review of the applicable basis in the asset (as outlined in the S&S opinion) and whether the holder may assume that established basis for purposes of its own tax deductions (information presumably outlined in the K&S opinion). Consequently, the fact that both opinions address the same overarching issue, and the fact that Petitioners chose to produce one privileged communication relating to that issue while withholding a second opinion articulating legal advice upon which Petitioners rely, weighs in favor of a finding that the attorney-client privilege was waived by Petitioners.

2. CONTEXT OF THE DISCLOSURE

In addition to the abovementioned factor, the inquiry into whether a party ''purposefully chose not to assert the privilege when it was appropriate to do so is relevant to the waiver analysis.'' In re Grand Jury Proceedings, 219 F.3d at 187. A voluntary disclosure of an attorney-client communication ''expressly waives the privilege'' and the ''waiver covers any information directly related to that which was actually disclosed.'' United States v. Workman, 138 F.3d 1261, 1263 (8th Cir. 1998) (citations omitted). Thus, when a party makes the strategic decision to disclose some privileged information, an implied waiver may be found by the courts. See In re Grand Jury Proceedings, 219 F.3d at 184.

In this case, Petitioners made a deliberate decision to disclose privileged materials in a forum where disclosure was voluntary and was calculated to their benefit. Petitioners had originally refused disclosure of the S&S opinion, however, Petitioners then voluntarily produced the S&S opinion during the IRS's Administrative Proceedings. (Dkt. #79, at 3–4, 6). Petitioners offer no evidence that they were compelled to produce the S&S opinion other than to assert that given the circumstances, including the fact that the S&S opinion was not privileged, it would have been ''likely'' that had Petitioners not voluntarily turned the opinion over, the IRS would have used ''its summons powers to compel . . . disclosure.'' (Id. at 6). As discussed above, the S&S opinion was privileged and Petitioners voluntarily disclosed it as the IRS

[13] Petitioners have disclosed that ''[n]o current employee of the partnership received or reviewed a copy of either of the opinions in question, nor is any current employee knowledgeable of who did. To the best of the taxpayer's knowledge and belief, Larry Noe [in-house counsel], and perhaps Myron Scholes, would have received copies of the opinions.'' (Dkt. #83, Exh. E, ¶ 6.d). Additionally, Petitioners assert that ''several of the partners of [LTCM] and Smita Conjeevaram, a partnership employee who worked with Mr. Noe, may have been informed of the existence of the legal opinions relating to the transactions, but not of the substance contained therein.'' (Id. ¶ 6.e). Sean Galvin, a former manager with Price Waterhouse, and Will Taggart, a partner with Coopers & Lybrand were ''provided information necessary for preparation of the partnership returns'' but were not given the opinions and were not informed of the substance of the opinions. (Id.). The fact that only such a select group of individuals knew of the opinion, let alone had seen it, is evidence of Petitioners' intention to keep its contents confidential.

never issued a summons or otherwise compelled its production. A party "cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party." In re Grand Jury Proceedings, 219 F.3d at 182 (citations omitted). In this case, Petitioners' voluntary production of the S&S opinion and subsequent withholding of the K&S opinion is an attempt to use the privileged communications as both "a shield and a sword." Id. Consequently, the Court finds that the voluntary nature of the disclosure weighs in favor of a finding of waiver.

3. LEGAL EXPERIENCE OF THE ONE DISCLOSING

Fairness considerations may dictate a different result when a party who is "uncounseled and has no legal training" discloses information otherwise protected by the attorney-client privilege. Id. at 186. At all times during this case, Petitioners were counseled in their decisions by their in-house tax counsel, among other legal professionals. In fact, the disclosure of the substance of the K&S opinion was made by Petitioners' in-house counsel.[14] The legal experience of the one disclosing and the legal expertise available to Petitioners favors a finding of waiver.

4. NATURE OF THE DISCLOSURE

Occasions where a witness refers generally to the fact that he has consulted with counsel are distinguishable from those occasions where a witness testifies about specific legal advice, with the latter situation weighing in favor of a finding of waiver. In re Grand Jury Proceedings, 2001 WL 237377, at 8. A party "may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes." U.S. v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir.) (citing Von Bulow, 828 F.2d at 101–02), cert. denied, 502 U.S. 813 (1991). Thus, the privilege may be waived when a party asserts a claim that in fairness requires examination of protected communications. See Bilzerian, 926 F.2d at 1292 (the waiver principle is applicable to a defendant's testimony that he thought his actions were legal since his testimony would have put in issue his knowledge of the law and the basis for his understanding of what the law required); compare In re Grand Jury Proceedings, 219 F.3d at 187 (fairness and consistency do not require an inference of waiver when a witness testified that "everything that I have heard from counsel . . . supports the fact that we are not legally responsible.").

Petitioners' statement to its tax accountant included more than just a general reference to the fact that Petitioners had sought legal advice from K&S. Petitioners' disclosure referred directly to the advice received. Petitioners' accountant, Brett Yacker, testified at his deposition that he was told by Larry Noe, Petitioners' in-house counsel, that Petitioners had a legal opinion from King & Spalding upon which they would rely, which opinion stated that it is "more likely than not" that the loss can be taken. (Dkt. #74, Exh. C, at 67–68).[15] The specificity of this disclosure weighs in favor of a finding of waiver.

C. WORK PRODUCT DOCTRINE PROTECTION

"The work-product doctrine, codified for the federal courts in Fed. R. Civ. P. 26(b)(3), is intended to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation,' free from unnecessary intrusion by his adversaries." U.S. v. Adlman, 134 F.3d 1194, 1196 [81 AFTR 2d 98-820] (2d Cir. 1998) (quoting Hickman v. Taylor, 329 U.S. 495, 510–11 (1947)). Yet despite the breadth of this doctrine, the work product protection does

[14] In-house counsel may waive the attorney-client privilege on behalf of a corporation. See generally Bausch & Lomb Inc. v. Alcon Lab. Inc. 173 F.R.D. 367 (W.D.N.Y. 1996) (statements made by in-house counsel for Alcon constitute disclosure of at least part of a privileged communication between Alcon and its litigation counsel, and thus operates to effect a waiver of Alcon's attorney-client privilege).

[15] "When Larry [Noe] went through the transaction . . . telling us that they had a legal opinion from Sherman & Sterling . . . that gave us great comfort. And then on the transaction itself, if it would create a loss, that they have a legal opinion from King & Spalding *that's more likely than not that the loss can be taken*, satisfied our fiduciary duty to make sure that the position could be reported." (emphasis added). (Dkt. #74, Exh. C, at 67–68).

not apply to "documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation" even if such documents would also be useful in the event of litigation. Adlman, 134 F.3d at 1202; see also In re Grand Jury Proceedings, 2001 WL at 1167497, at 14 (S.D.N.Y. Oct. 3, 2001) (citations omitted). Although a finding that a document is prepared because of the prospect of litigation warrants application of Rule 26(b)(3), the application of the work product privilege and the protections it provides does not necessarily follow. Aldman, 134 F.3d at 1202–03. Rather, such a finding means that a document is "*eligible*" for work product privilege. Id. (emphasis in original). Thus, prior to deciding whether the work product privilege has been waived, the Court must determine whether the document is eligible for such protection and must assess whether the party seeking discovery has made an adequate showing of substantial need for the document and an inability to obtain its contents elsewhere without undue hardship. See id.

The facts in Adlman are remarkably similar to those here. In Adlman, a corporation contemplated a merger which was expected to produce an enormous loss and tax refund, which Adlman, its corporate counsel and vice president, expected would be challenged by the IRS and would result in litigation. Id. at 1195. Adlman requested that an accountant and attorney at Arthur Andersen & Co. evaluate the tax implications of this proposed restructuring. Arthur Andersen thereafter prepared a fifty-eight page memorandum, analyzing the IRS' likely challenges to the reorganization and the resulting tax refund claim, proposing possible legal theories or strategies for the corporation to adopt in response, and predicting the likely outcome of litigation. Id.

The Second Circuit held that the memorandum did not lose protection "'Lmerely because it is created in order to assist with a business decision.'R" Id. at 1202. Furthermore, the "fact that the materials serve other functions apart from litigation does not mean that they should not be protected by work-product immunity if they reveal directly or indirectly the mental impressions or opinions of the attorney who prepared them." Id. (citation omitted). In fact, a memorandum that qualifies for the work product privilege "may be prepared in expectation of litigation with the primary purpose of helping the company decide whether to undertake the contemplated transaction" because whether to undertake a transaction and, if so, how to proceed with the transaction may be influenced by the company's evaluation of the likelihood of success in the litigation. Id. at 1199. In this case, it is likely that Petitioners would have solicited the S&S and K&S opinions in the ordinary course of business so that they could establish Onslow's basis, determine whether they could assume it as their own, and then determine whether they could deduct it from their 1997 tax return. However, as in Adlman, it is equally likely that Petitioners would have solicited the S&S and K&S opinions to assist in analyzing the IRS' likely challenges, proposing possible legal theories or strategies for the corporation to adopt in response, and predicting the likely outcome of litigation.

Respondent, in response to Petitioners' argument that they solicited the K&S opinion because of the prospect of litigation arising from the IRS audit of their 1997 return, contends that an IRS audit does not necessarily lead to litigation, thus any solicitation of these opinions was not done solely in anticipation of litigation. See United States v. Baggott, [52 AFTR 2d 83-5248] 463 U.S. 476 (1983). Respondent's argument, however, is unpersuasive because the Supreme Court expressly limited its decision in Baggot to interpreting Federal Rule of Criminal Procedure 6(e)(3)(C)(i). See Baggot, 463 U.S. at 479 n. 3. Thus, while the K&S opinion may have been prepared in part to assist in a business decision, it is nevertheless eligible for work product protection because it is a document that was prepared with an eye toward litigation. However, a finding

of eligibility for work product protection is not the end of the analysis.[16]

Moreover, Rule 26(b)(3) further pro-vides that ''the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.'' As the Second Circuit observed in Adlman, ''documents that tend to reveal the attorney's mental process--described by commentators as opinion work product[]--receive special protection not accorded to factual material.'' 134 F.3d at 1197 (citations & internal quotations omitted).

Under Rule 26(b)(3), a. party may obtain discovery of factual work product ''only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.'' In Adlman, the Second Circuit declined to decide whether ''opinion work product is ever discoverable upon a showing of necessity and unavailability by other means,'' but indicated that ''[t]he Rule is clear that, at a minimum, such material is to be protected unless a highly persuasive showing is made.'' Id. at 1204 (citations omitted). See also Resolution Trust Corp. v. Massachusetts Mut. Life Ins. Co., 200 F.R.D. 183, 190–91 (W.D.N.Y. 2001) (''The standard for production [of opinion work product] is 'more stringent' because material reflecting thought processes or strategy of an attorney deserves the highest protection.'') (citation omitted). Absent an argument of waiver of the work product doctrine, Respondent does not justify its desire to access the K&S opinion work product.

D. PREJUDICE TO THE OPPOSING PARTY: SCOPE OF PRIVILEGE

The Second Circuit held in In re Grand Jury Proceedings that ''[t]he fairness concerns that guide the waiver analysis [for attorney-client privilege] are equally compelling in th[e] context [of work product doctrine].'' 219 F.3d at 191. Upon remand, the parties agreed that ''where a party has waived the work-product protection by affirmatively disclosing otherwise privileged material to an adversary, the waiver makes inquiry into whether there is 'substantial need' for the work-product irrelevant.'' 2001 WL 237377, at 12 & 13 n.8. The district court emphasized that a party may not ''advance the work-product doctrine to sustain a unilateral testimonial use of work-product,'' id. at 12 (citation omitted), but also cautioned that since opinion work product is granted greater protection that fact work product, ''even if a party waived the attorney work-product, protection over pure opinion work-product may remain intact.'' Id. (citation omitted); See also Resolution Trust, 200 F.R.D. at 191–96 (''at issue'', fairness, and/or disclosure to a third party may all operate as waiver of work product).

Under these circumstances, it is apparent that the best course of action is for the Court to conduct an *in camera* review of the K&S opinion letter. See, e.g., Adlman, 134 F.3d at 1204 (''In camera review of the Memorandum shows that it does not reflect the motives of Sequa's executives, but rather the legal analysis of its accountants.''); Resolution Trust, 200 F.R.D. at 190.

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16 Given the significance of the issues at stake here, Petitioner's privilege log is somewhat sketchy. ''[T]he decisions of the Second Circuit ... explicitly place upon the party invoking the privilege or work-product immunity the burden of proving the facts on which the claim is based.'' Bowne, 150 F.R.D. at 473. The courts ''generally look to a showing based on affidavits or equivalent statements that address'' the documents for which the privilege is claimed. Id. (citations omitted). Additionally, the court may utilize an adequately detailed privilege log in conjunction with evidentiary submissions to fill in any factual gaps.' Id. at 474. Reliance on privilege logs requires that the log identify each document, the parties to the communication, the relationship among the parties in the log and the litigating parties, the maintenance of confidence and sufficient detail 'to permit a judgment as to whether the document is at least potentially protected from disclosure.' Id. An affidavit or deposition testimony supplements the contents of the log, providing reasons for any disclosures or documents not normally within the privilege relationship. See id. However, a party's claim may still be rejected if the party fails to 'provide sufficient detail to demonstrate fulfillment of all of the legal requirements for application of the privilege.' Id. (citations omitted):

As in Bowne, Petitioners support their work product privilege claim with a relatively skeletal description offered in the privilege log. (Dkt.#74, Exh. B). With respect to the K&S opinion letter, the privilege log simply reveals the parties to the document, the date, that the document concerns ''Preferred Stock Transactions,'' and that the document is an ''Opinion.'' (Id.). Petitioners' bare assertion within the privilege log that the K&S opinion is an ''Opinion'' and it is protected by the ''Attorney/Client Privilege'' ''Attorney Work Product'' is a ''mere conclusory or ipse dixit assertion[].'' Bowne, 150 F.R.D. at 474 (citations omitted).

Petitioner, however, has supplied adequate details in its brief for the Court to determine that the work product doctrine applies here.

III. CONCLUSION

In conclusion, for the reasons stated above, Respondent's Motion to Compel production of the King & Spalding opinion (Dkt. #73) is granted to the extent that the Court finds that Petitioners waived the attorney-client privilege. However, because the Court finds that the work product doctrine nonetheless applies, the Court orders Petitioners to submit a complete copy of the K&S opinion for an *in camera* review on or before November 15, 2002.

This is not a Recommended Ruling but a Ruling on discovery, the standard of review of which is specified in 28 U.S.C. § 636; Fed. R. Civ. P. 6(a), 6(e) & 72; and Rule 2 of the Local Rules for United States Magistrate Judges. As such, it is an order of the Court unless reversed or modified by the District Judge upon timely made objection.

See 28 U.S.C. § 636(b) (written objections to ruling must be filed within ten days after service of same); Fed. R. Civ. P. 6(a), 6(e) & 72; Rule 2 of the Local Rules for United States Magistrate Judges, United States District Court for the District of Connecticut; Small v. secretary, H&HS, 892 F.2d 15, 16 (2d Cir. 1989) (failure to file timely objection to Magistrate Judge's recommended ruling may preclude further appeal to Second Circuit).[17]

Dated at New Haven, Connecticut, this 30th day of October, 2002.

Joan Glazer Margolis

United States Magistrate Judge

¶2002-5706

UNITED STATES OF AMERICA, PLAINTIFF v. Billy Joe TORRENCE, Norma Ruth Jones TORRENCE, Steven Kelly Torrence, and Caroline Torrence Morris Rodden, DEFENDANTS. U.S. District Court, Eastern Dist. of Texas, (DC TX) CIVIL NO. 6:02CV204, Nov. 5, 2002. Judgment entered in accord with (2002, DC TX) 90 AFTR 2d 2002-6097 and (2002, DC TX) 90 AFTR 2d 2002-7081. Years 1994, 1995, 1996, 1997, 1998, 1999, 2000. Decision for Govt.

1. Collection actions—foreclosure—funds held by third party—default judgment. Judgment was entered against taxpayer's sister and son in accord with prior default orders for portion of taxpayer's tax debts in amounts stated, plus interest. Also, remainder of taxpayer's tax debts was established pursuant to settlement; and U.S was allowed to continue to pursue collection of those debts from sister and son. *Reference:* United States Tax Reporter ¶74,035.03(135). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION,

FINAL JUDGMENT

Plaintiff United States of America filed an unopposed motion for entry of final judgment in this case. Default orders were previously entered by this Court against Defendants Steven Kelly Torrence and Caroline Torrence Morris Redden. On September 18, 2002, this Court entered an Agreed Order Resolving United States' Claims Against Defendant Billy Joe Torrence and Norma Ruth Jones Torrence, pursuant to a mediated settlement agreement between these parties. No opposition having been filed, and for good cause shown, the Court granted the United States' motion for entry of final judgment, and entered this final judgment, the form of which has been agreed to by all counsel of record in this case. Therefore,

[1] IT IS ORDERED, ADJUDGED AND DECREED that Defendant Steven Kelly Torrence is indebted to the United States of America in the amount of $600,000.00, plus interest according to law, and any payments made on this debt by Steven Kelly Torrence or on his behalf shall be applied to the unpaid federal income (1040) taxes of Billy Joe Torrence for tax years 1994, 1995, 1996, 1997, 1998, 1999, and 2000.

[17] If any counsel believes a settlement conference before this Magistrate Judge would be productive, he or she should contact Chambers accordingly.

IT IS ORDERED, ADJUDGED AND DECREED that Defendant Caroline Torrence Morris Rodden is indebted to the United States of America in the amount of $350,000.00, plus interest according to law, and any payments made on this debt by Caroline Torrence Morris Rodden or on her behalf shall be applied to the unpaid federal income (1040) taxes of Billy Joe Torrence for tax years 1994, 1995, 1996, 1997, 1998, 1999, and 2000.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the United States and Defendants Billy Joe Torrence and Norma Ruth Jones Torrence are bound to the terms of the mediated settlement agreement set forth in the Agreed Order Resolving United States' Claims Against Defendant Billy Joe Torrence and Norma Ruth Jones Torrence entered September 18, 2002, including, but not limited to, the following provisions:

IT IS ORDERED that Mr. Torrence is indebted to the United States of America in the amount of $855,340.01, plus interest thereon from June 1, 2002 until paid, for his federal income (1040) tax liabilities for tax years 1994, 1995, 1996, 1997, 1998, 1999, and 2000, to be paid on the terms set forth herein [in the September 18, 2002 Agreed Order referred to above]; and

IT IS FURTHER ORDERED that the United States will be allowed to continue to pursue its claims against Defendants Steven Kelly Torrence and Caroline Torrence Morris Rodden to collect Mr. Torrence's 1994–2000 federal income tax debts.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs of court and attorneys' fees are taxed against the respective party incurring same, and that this judgment may be signed in counterparts and by facsimile by the parties hereto.

SIGNED this 5th day of November, 2002.

UNITED STATES DISTRICT JUDGE

¶2002-5707

IN RE: THE AMERICAN ELK INC., Debtor. IN RE: CHAMA LAND & CATTLE CO., Debtor. IN RE: THE AMERICAN ELK CONSERVATORY HOLDINGS, INC., Debtor. IN RE: THE LODGE AT CHAMA, INC., Debtor. U.S. Bankruptcy Court, Northern Dist. of Texas, (Bktcy Ct TX) Case No. 93-38330-HCA-11, Oct. 30, 2002. On remand from *O'Cheskey, Walter v. U.S.*, (2001, DC TX) 89 AFTR 2d 2002-639. Decision against Taxpayer in part.

1. Tax claims in bankruptcy—determination of tax liability—deductions—damage payments vs. corp. distributions—proof—collateral estoppel; res judicata—business deductions—reasonable and necessary expenses—settlement payments—bankruptcy estate consolidation—tax consolidation—qualified settlement funds— qualification. On remand, bankruptcy court reaffirmed in large part that trustee improperly characterized distribution to corp. debtors' shareholder's brother as deductible damages rather than return of equity: facts that distribution funds derived solely from 1 corp. in which brother held shares, rather than from other corps. in which he held no stake, that he had obtained no damages adjudication against those corps., and that he didn't otherwise prove any actual damages allocation, mitigated against trustee's characterization; and mere fact that damages suit had been filed wasn't dispositive. Also, trustee's reliance on 11 USC §1129(b)'s absolute priority rule for per se damages characterization was misplaced since rule didn't apply to consensual plan involving no impaired unsecured creditor class; and case law involving non-bankruptcy liquidations was inapplicable. But, in deference to district court mandate that at least some portion of distribution was for damages, court allowed approximately 7% to be characterized as such. *Reference:* United States Tax Reporter ¶68,726.52(50); 74,337.503(75); 74,337.504(5); 68,726.52(3); 1625.012(15); 68,726.527(15); 68,726.52(5); 79,007.10(5); 468B5.03(1).

IRC §162; 468B.

UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF TEXAS DALLAS DIVISION,

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON REMAND

Harold C. Abramson United States Bankruptcy Judge Northern District of Texas

Came before the Court on remand, Walter O'Cheskey's (the ''Trustee'') ''First Amended Motion to Determine Tax Liability'', filed on September 30, 1998. The Court had previously ruled that the Trustee's distributions to Gary Vaughn (''Gary'') were returns of stock equity and not for damage claims against the above captioned debtors (the ''Chama Estates''), but on appeal, the District Court ruled in its Memorandum Opinion and Order (the ''Opinion''), entered on December 21, 2001, that this Court ''erred in not allocating some of the distributions to Gary as payment for damages.'' (Mem. Op., p. 16). The District Court then remanded the case to this Court ''for calculation of the amount of the payments to Gary that were for damages claims and for determination of the Trustee's tax liability.'' (Mem. Op., p. 34).

It is the Trustee's belief that $2,905,338 of the distributions to Gary were on account of damages sustained against the Chama Estates. But while the District Court found that ''at least some of the payments by the Trustee to Gary must have constituted payment for damages'', (Mem. Op., p. 16), this does not lower the Trustee's burden of proving that payments made to Gary were on account of damages, nor does it shift the burden of proof to the Internal Revenue Service (the ''IRS'') to prove that the payments were not made on account of damages.[1] As such, the Trustee must still show the Court that the $2,905,338 paid to Gary was on account of damages and not as a return of equity.

The legal arguments made by the Trustee in support of his position that the payments were made on account of damages and not a return of equity are not dispositive of the issue before the Court.[2] First, the Trustee argues that the absolute priority rule of the Bankruptcy Code, 11 U.S.C. § 1129(b)(2)(B), prohibits payment of Gary's equity interests before his claims as a creditor, and as such, the $2,905,338 must be on account of Gary's damages. However, the absolute priority rule is not applicable in this case. Because the Plan was consensual and no unsecured creditor class was impaired, the Plan is governed by 11 U.S.C. § 1129(a) and not by § 1129(b), and thus the absolute priority rule has no relevance. Second, the Trustee argues that distributions made to a creditor are required to first be applied to satisfy claims with any remaining amount applied to equity. While the line of cases and the Revenue Ruling that the Trustee cites to do reflect this point, they pertain to non-bankruptcy corporate liquidations.[3] In a Chapter 11 Bankruptcy setting, distribu-

[1] *See INDOPCO, Inc. v. Commissioner*, 503 U.S. 79, 84 [69 AFTR 2d 92-694] (1992) (quoting *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593 [30 AFTR 1310] (1943)) (''[A]n income tax deduction is a matter of legislative grace and;h3the burden of clearly showing the right to the claimed deduction is on the taxpayer'').

[2] It should also be noted that the Trustee and Gary are represented by the same attorney, thus it appears the proposed allocation of the $2,905,338 as damages is entirely tax motivated. Buttressing this point is the fact that Gary did not report any of the Trustee's distributions as being from damages, but reported $200,000 as repayment of a note receivable and $594,872 as a liquidating distribution.

[3] *See Braddock Land Co., Inc. v. Commissioner*, 75 T.C. 324, 333 (1980) (''[A]mounts paid to a shareholder-creditor upon liquidation must first be applied to satisfy any outstanding indebtedness, and only the remainder of the assets distributed constitutes a distribution in liquidation in exchange for his stock.''); *Crown v. Commissioner*, 58 T.C. 825, 834–35 (1972), *aff'd per curiam*, 487 F.2d 1404 (7th Cir. 1973) (''If the amounts distributed are not in excess of the debt obligations, the courts have found that no liquidating distribution has occurred even though the distribution was made as the corporation was liquidating.''); *Bratton v. Commissioner*, 31 T.C. 891 (1959), *aff'd*, 283 F.2d 257 [6 AFTR 2d 5760] (6th Cir. 1960), *cert. denied*, 366 U.S. 911 (1961) (''To the extent of;h3indebtedness to each of them, the value of those assets represented ordinary income. Anything in excess thereof represented payment for their stock''); *Houston Natural Gas Corp. v. Commissioner*, 9 T.C. 570, 574 (1947), *aff'd*, 173 F.2d 461 [37 AFTR 1137] (5th Cir. 1949) (''[A] subsidiary's transfer of all assets to a creditor parent is first applicable to a discharge of its indebtedness to the parent,'' and ''[i]t is the excess of the assets' value above indebtedness that constitutes a liquidating distribution''); Rev-Ruling 76-175, 1976-1 C.B. 92 (''Amounts received by a shareholder-creditor upon the liquidation of a corporation are applied first to satisfy the indebtedness, and any remaining amount constitutes a distribution in liquidation in exchange for the stock.'').

tions must be made according to a confirmed plan and the confirmation order.[4]

[1] As pointed out by the Court, the Plan at issue was a consensual plan, with Gary choosing to participate in Class Six as a Settling Principal. As a Settling Principal, ''all Claims and Equity Interests of any kind, direct or indirect, asserted;h3against or in the Chama Estates shall be fully satisfied and discharged'' according to the treatment set forth in Article Five. (Plan, Art. 6). Pursuant to the treatment elected in Article Five, Gary ''receive[d] one-third (1/3) of all the Net Proceeds, plus 45 percent (45%) . . . of the remaining one-third (1/3) of the Net Proceeds'' if available.[5] (Plan, Art. 5(b)(i)). Though Gary was paid under the Plan for his ''Claims and Equity Interests,'' he was paid through the aforementioned Article Five division of Net Proceeds, which is what the Court must look to for determining whether Gary was paid on account of damages or as a return of equity. The Net Proceeds are defined as the remaining ''undistributed funds and assets of the Chama Estates.'' (Plan, Def. (33)). Thus, the Net Proceeds that Gary was paid from were the undistributed portions of the $25.5 million realized from the sale of the 32,000 acre game ranch in Northern New Mexico, plus various improvements including a hunting lodge, wildlife, and two Class A game parks licensed by the State of New Mexico (the ''Ranch''), to the Jicarilla Apache Indian Tribe, as it was this sale that provided the basis for the Plan, and consequent division of the Net Proceeds of the Chama Estates.

It is important to note at this point that this Court equitably voided the series of contrived transactions (the ''1990 Transactions'') undertaken by Malcolm Kelso (''Kelso'') to transfer the value of the Ranch away from Chama Land & Cattle Co. (''Chama L&C'').[6] By voiding the 1990 Transactions, the Court put the estate back to the form that it was in prior to the 1990 Transactions, where Chama L&C was the only existing entity of the collective four Chama Estates, with its sole asset being the Ranch.[7] Thus, in effect, the value of the shares owned by Gary was represented by the value of his percentage of the Ranch.[8] Had the Ranch been sold prior to the 1990 Transactions, Gary would have received an equity distribution based upon the value received. When the Court equitably voided the 1990 Transactions, it disregarded the corporate fictions created by Kelso, effectively treating the four Chama Estates as the one estate, Chama L&C, that existed prior to the 1990 Transactions, which returned the entire value of the Ranch to Chama L&C. Thus, despite Gary receiving monies from all four Chama Estates, when the Trustee distributed the division of Net Proceeds to Gary, it was in effect a return of equity in Chama L&C from the sale of the Ranch, and not a payment on account of damages asserted against the Chama Estates.[9]

Also weighing against finding that the Trustee's distributions were on account of damages is the fact that there was neither an adjudication of Gary's damages against the Chama Estates, nor was there any testimony from Gary as to the amount of dam-

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4 *See e.g. In re Dial Business Forms Inc.*, 283 B.R. 537, 542 (B.A.P. 8th Cir. 2002) (''[A] confirmed plan controls, even if a different result would occur under state law.''); *In re Astroglass Boat Co., Inc.*, 32 B.R. 538, 542 (Bankr.M.D.Tenn. 1983) (The plan and order of confirmation fixes the rights of the parties).

5 The additional 45% was only available to Gary if the remaining 1/3 of the Net Proceeds was not allocated to Kelso/LEI pursuant to the Kelso Estimation Order. (Plan, Art. 5(b)(i)).

6 For a discussion of the 1990 Transactions, *see In re Legal Econometrics*, 191 B.R. 331 (Bankr.N.D.Tex. 1995) (Abramson, B.J.); *see also In re Legal Econometrics*, 169 B.R. 876 (Bankr.N.D.Tex. 1994) (Abramson, B.J.)

7 *See* Hearing Transcript, July 28, 1995 [filed in 93-36940-HCA-11] (''[Kelso's] acquisition of the voting trusts and the warrants, the contrived leases, conveyances from Chama[L&C] to Lodge, et cetera, were all based upon the fraud of a fiduciary attempting to put himself in complete control over a long period of time. In equity those transactions, based upon that type of misrepresentation and misdealing, would be voidable. I have previously spoken and made findings with regard to rejecting all of those. I find that they are void in equity. They're not to be enforced.'').

8 Gary and Grady Vaughn (''Grady'') were the sole shareholders of Chama L&C, with Gary owning 31.2% of the common stock.

9 It appears from the District Court's Opinion that it seized on the fact that because Grady only owned stock in Chama L&C but had alleged damages claims against the other three Chama Estates, and since he received distributions from all four Chama Estates, that the distributions made to Gary must not have all been a return of equity. (Mem. Op., p. 15). However, this view disregards the equitable voiding of the 1990 Transactions, which put the Chama Estates back to the position they were prior to the 1990 Transactions, where only Chama L&C existed. If there were damages, the damages would have been caused by Kelso in his use of the voting trusts and the warrants, the contrived leases, and the creation of the Chama Estates to convey the Ranch away from Chama L&C, but would not have been caused by the Chama Estates themselves.

ages caused by the Chama Estates at either the 1995 confirmation hearings or the 1999 tax determination trial. What evidence from Gary that the Court does have is that he sued fourteen defendants, including the Chama Estates, and filed identical proofs of claim in the bankruptcy cases of the Chama Estates, Grady, Kelso, and Legal Econometrics, Inc. However, not only were the proofs of claim filed for undetermined amounts, but also the ninth amended complaint filed by Gary against the fourteen defendants, and which was attached to the proofs of claim, did not contain any allocation of damages between the Chama Estates. Merely because Gary alleged damages against the Chama Estates, and was subsequently paid out of those same Chama Estates, does not make those distributions on account of damages.[10] But while the alleged damages are just that, allegations, there is no denying that Gary received a distribution based on a division of the Net Proceeds, which was funded in toto by the sale of the Ranch. And as this Court stated previously, after equitably voiding the 1990 Transactions, the value of the Ranch was returned to Chama L&C, in which Gary did have an equity interest. Thus, while the Trustee's argument for damages is fraught with conjecture, it is certain that Gary did receive an equity distribution from the proceeds of the Ranch.

[2] Therefore, because this Court rejects the Trustee's legal arguments characterizing the $2,905,338 as a return of damages instead of a return of equity, and in light of the equitable voiding of the 1990 Transactions, thus putting the value of the Ranch back into Chama L&C, the sole source of the divided Net Proceeds, and the lack of evidence as to the alleged damages, the Trustee has not met his burden of proof. Thus, it is this Court's belief, as it held prior, that the distributions made to Gary were on account of a return of equity in Chama L&C, and not as a payment of damages against the Chama Estates. However, in the alternative, and out of respect for the District Court's Opinion that found that some of the distributions were for damages, the Court finds that of the $2,905,338, the sum of $198,718.17[11] was in payment of damages and thus deductible as an ordinary and necessary business expense.[12]

IT IS ORDERED that, in response to the District Court's Opinion finding that "at least some of the payments by the Trustee to Gary must have constituted payment for damages," the Trustee's "First Amended Motion to Determine Tax Liability" is GRANTED in part; therefore, of the $2,905,338 distribution from the Trustee to Gary Vaughn sought to be determined as payment for damages, only $198,718.17 is on account of damages and thus deductible as an ordinary and necessary business expense, with the remaining $2,706,619.83 allocated to a return of equity.

Signed this OCT 30 2002 day of October, 2002.

Harold C. Abramson

United States Bankruptcy Judge

Northern District of Texas

¶2002-5708

Darrell D. BILLHEIMER, PLAINTIFF v. Michael LOUDERBACK, aka IRS, DEFENDANT. U.S. District Court, Southern Dist. of Ohio, (DC OH) Case No. C-3-00-574, Nov. 1, 2002. District Court,

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[10] The Court recognizes that a final judgment is not necessary for showing that a business expense is deductible, *see Old Town Corp., v. Commissioner*, 37 T.C. 845, 858–59 (1962), but in light of *INDOPCO's* requirement that "the burden of clearly showing the right to the claimed deduction is on the taxpayer," 503 U.S. at 84, the Court wants to make it clear that the Trustee nor Gary has produced any evidence of what the actual damages against the Chama Estates are, only that there must be damages because the District Court says there are.

[11] This amount was calculated by taking the $1,054,459.71 in Attorneys Fees withheld by Vial, Hamilton and multiplying that number by 18.8%. The 18.8% was calculated by taking the total of the $200,000 Notes Receivable and $594,872.68 Chama Liquidating Distributions and dividing that amount by the $4,217,838.84 Amount Available for Debt Repayment and Distribution to Gary W. Vaughn Entities. (IRS Ex. 46). The $198,718.17 amount was put forth by the IRS at this Court's October 16, 2002 hearing to determine the amount of the payments to Gary that were for damages claims and for determination of the Trustee's tax liability. The Court acknowledges that the IRS did not concede that $198,718.17 was the amount of the distribution that should be listed as damages, but only put forth this amount in response to questioning by the Court as an alternative finding. Additionally, this amount is in line with the IRS' Post-Trial Brief, which stated that "the [C]ourt would be generous in re-allocating to Gary's damage claims not more than one-half of the $594,872 in liquidating distributions from Chama that he reported on his 1995 income tax return." (Post Tr. Br., p. 7).

[12] The District Court found in its Opinion that the Trustee "has established that proper payments to Gary to settle any damage claims against the Chama Estates may be deductible as ordinary and necessary expenses." (Mem. Op., p. 23).

(2002, DC OH) 90 AFTR 2d 2002-6553, adopted. Earlier proceedings at (2001, DC OH) 88 AFTR 2d 2001- 6447, denying reconsideration and adopting (2001, DC OH) 87 AFTR 2d 2001-1585; and (2001, DC OH) 87 AFTR 2d 2001-994, 2001-1 USTC ¶50299. Decision against Taxpayer.

1. Actions against IRS agents—proper parties—sovereign immunity—remand—reconsideration—motion for relief from judgment. Magistrate judge's report and recommendations was adopted, based on judge's reasoning. *Reference:* United States Tax Reporter ¶74,336.505(15); 74,336.506(25); 74,336.508(60).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION,

DECISION AND ENTRY ADOPTING REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (DOC. #27); PLAINTIFF'S OBJECTIONS TO SAID JUDICIAL FILING (DOC. #8) OVERRULED; PLAINTIFF'S MOTION TO VACATE A VOID JUDGMENT (DOC. #26) OVERRULED; CAPTIONED CAUSE REMAINS TERMINATED

CHIEF JUDGE WALTER HERBERT RICE

[1] Based upon the reasoning set forth by the United States Magistrate Judge in his Report and Recommendations, filed September 10, 2002, as well as upon a thorough *de novo* review of this Court's file, this Court adopts the aforesaid Report and Recommendations (Doc. #27) in their entirety. The Petitioner's Objections to said judicial filing (Doc. #28) are overruled. The Plaintiff's Petition to Vacate a Void Judgment (Doc. #26) is overruled.

The captioned cause remains terminated upon the docket records of this Court.

November 1, 2002

WALTER HERBERT RICE, CHIEF JUDGE

UNITED STATES DISTRICT COURT

¶2002-5709

Runar Dean JOHNSON, PLAINTIFF v. COMMISSIONER OF INTERNAL REVENUE, DEFENDANT. U.S. District Court, Western Dist. of Washington, (DC WA) Case No. C01-5490RJB, Nov. 1, 2002. Years 1992, 1993, 1994, 1995. Decision for Govt.

1. FOIA—reasonable search—failure to exhaust administrative remedies—proper parties. Taxpayer's repeat FOIA action against IRS Commissioner was dismissed on summary judgment: record clearly showed that IRS conducted reasonable searches and released all responsive documents to certain requests; that some requests were repetitive and had been previously replied to or were for publicly available information; that no documents responsive to other requests existed; and that taxpayer hadn't exhausted his administrative remedies by filing administrative appeal with respect to certain request before filing suit. Also, although IRS, not Commissioner individually, was proper party to suit, allowing taxpayer to amend complaint would be futile; his request for continuance was denied; and IRS was granted protective order that it didn't need to respond to certain interrogatories. *Reference:* United States Tax Reporter ¶76,556.502(75); 76,556.502(80).

2. FOIA—Privacy Act—damages—costs. Taxpayer's request for damages relating to unsuccessful FOIA and PA claims against IRS Commissioner were denied: neither FOIA nor PA provided for money damages; and taxpayer's claim that IRS maintained false and fraudulent records was really impermissible attempt to attack judgment in earlier IRS action against him and outside FOIA jurisdiction. Also, taxpayer wasn't entitled to costs of action since action wasn't necessary to obtain requested information that had already been released, didn't exist or was publicly available. *Reference:* United States Tax Reporter ¶76,556.502(70); 76,556.504; 76,556.502(72).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA,

ORDER GRANTING INTERNAL REVENUE SERVICE'S MOTION FOR SUMMARY JUDGMENT AND GRANTING INTERNAL REVENUE SERVICE'S MOTION FOR A PROTECTIVE ORDER

ROBERT J. BRYAN United States District Judge

This matter comes before the court on the Internal Revenue Service's Motion for Summary Judgment (Dkt. 40), on the Internal Revenue Service's Motion for a Protective Order (Dkt. 43), and on Plaintiff's Rule 56(f) Motion to Postpone Consideration of Defendant's Motion for Summary Judgment (Dkt. 49). The court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

FACTUAL BACKGROUND

During 2001, Mr. Johnson filed several Freedom of Information Act (FOIA) and Privacy Act (PA) requests with the Internal Revenue Service (IRS), requesting a variety of documents and records.

1. On May 31, 2001, Mr. Johnson requested a Document filed under DLN 29217-146-03104-0. The Ogden Campus Disclosure office received the request on July 21, 2001, Kenneth Wilder, a Disclosure Specialist at the Ogden Campus Disclosure Office, located a one page document responsive to the request after determining that the document had been filed under a different locator number, and then sent a copy of the document to Mr. Johnson on January 2, 2002. The IRS did not withhold any information from the document.

2. On June 7, 2001, Mr. Johnson requested a Document filed under DLN 91277-048-00000-8. The Ogden Campus Disclosure Office determined that the documents requested did not exist, and notified Mr. Johnson of the same on August 2, 2001. Mr. Johnson appealed the determination by the Ogden Campus Disclosure Office to the IRS Appeals Office in Riverside, California. The Appeals Office determined that the documents correspond-ing to Mr. Johnson's request had been destroyed and that there were no copies available; the Appeals Office affirmed the decision of the Ogden Campus Disclosure Office.

3. On June 8, 2001, Mr. Johnson requested a Document filed under DLN 29247-449-70035-8. The Ogden Campus Disclosure Office received the request on July 30, 2001. The Ogden Campus Disclosure Office determined that the documents identified in this request had been provided to Mr. Johnson by the Seattle Disclosure Office on June 25, 1998. Because the examination file was located at the IRS' Seattle offices and the FOIA request sent to the Seattle office predated the one received by the Ogden Campus Disclosure Office, it was the duty of the Seattle Disclosure Office to process any such requests for documents, including the document corresponding to this request. On October 12, 2001, the Ogden Campus Disclosure Office informed Mr. Johnson that the Seattle Disclosure Office was responsible for this request.

4. On June 9, 2001, Mr. Johnson requested a Document filed under DLN 91277-029-775008. The Ogden Campus Disclosure Office determined that the documents requested did not exist, and notified Mr. Johnson of the same on August 2, 2001. Mr. Johnson appealed the determination by the Ogden Campus Disclosure Office to the IRS Appeals Office in Riverside. California. The Appeals Office determined that the documents correspond-ing to Mr. Johnson's request had been destroyed and that no copies were available; the Appeals Office affirmed the decision of the Ogden Campus Disclosure Office.

5. On June 10, 2001, Mr. Johnson requested a Document filed under DLN 91277-290-00000-7. The Ogden Campus Disclosure Office determined that the documents requested did not exist, and notified Mr. Johnson of the same on August 2, 2001. Mr. Johnson appealed the determination by the Ogden Campus Disclosure Office to the IRS Appeals Office in Riverside, California. The Appeals Office

determined that the documents corresponding to Mr. Johnson's request had been destroyed and that no copies were available; the Appeals Office affirmed the decision of the Ogden Campus Disclosure Office.

6. On June 12, 2001, Mr. Johnson requested a Document filed under DLN 91277-273-00000-5. The Ogden Campus Disclosure Office determined that the documents requested did not exist, and notified Mr. Johnson of the same on August 2, 2001. Mr. Johnson appealed the determination by the Ogden Campus Disclosure Office to the IRS Appeals Office in Riverside, California. The Appeals Office determined that the documents correspond-ing to Mr. Johnson's request had been destroyed and that no copies were available; the Appeals Office affirmed the decision of the Ogden Campus Disclosure Office.

7. On June 14, 2001, Mr. Johnson requested a Document filed under DLN 91249-240-20000-5. The Ogden Campus Disclosure Office received this request on July 30, 2001. Mr. Wilder determined that this document had been destroyed pursuant to IRS published records retention schedules. On August 24, 2001, the Ogden Campus Disclosure Office notified Mr. Johnson that the document had been destroyed in accordance with the IRS' published records retention schedules.

8. On June 15, 2001, Mr. Johnson requested a Document filed under DLN 91277-240-20000-5. The Ogden Campus Disclosure Office determined that the documents requested did not exist, and notified Mr. Johnson of the same on August 2, 2001. Mr. Johnson appealed the determination by the Ogden Campus Disclosure Office to the IRS Appeals Office in Riverside, California. The Appeals Office determined that the documents correspond-ing to Mr. Johnson's request had been destroyed and that no copies were available; the Appeals Office affirmed the decision of the Ogden Campus Disclosure Office.

9. On June 22, 2001, Mr. Johnson requested Form 23C records of assessment for the years 1993–95. The Ogden Campus Disclosure Office received this request on July 30, 2001. On August 29, 2001, the Ogden Campus Disclosure Office notified Mr. Johnson that it needed additional time to process the request. At Mr. Wilder's request, the IRS Accounting Office in Ogden located thirty-one pages of responsive documents. On September 27, 2001, the Ogden Campus Disclosure Office sent the thirty-one pages of responsive documents to Mr. Johnson. The IRS did not withhold any information from the documents.

10. On July 5, 2001, Mr. Johnson requested tax module documents for the years 1992–95. The Ogden Campus Disclosure Office received this request on July 30, 2001. The responsive documents contained TXMODA transcripts, which included all of the information in Mr. Johnson's tax modules for the years 1992 through 1995. These documents were provided to Mr. Johnson by the Ogden Campus Disclosure Office on September 5, 2001. The IRS did not withhold any information from the documents.

11. On July 6, 2001, Mr. Johnson requested AMDISA documents for the years 1995–97. The Ogden Campus Disclosure Office received this request on July 30, 2001. Mr. Wilder determined that the IRS was not in possession of any documents responsive to this request, and informed Mr. Johnson of this on August 30, 2001.

12. On July 13, 2001, Mr. Johnson requested the following documents for 1993: (1) Records identifying the Assessment Officer; (2) Form 9984 Examining Officers Activity Record; (3) Form 5600 Statutory Notice Worksheet; (4) Form 4340 Certificate of Assessments and Payments; (5) Form 813 which is used to create a Non-Master File; and (6) Form 23C Summary Record of Assessment. The Ogden Campus Disclosure Office received this request on August 10, 2001. Mr. Wilder contacted the IRS Accounting Office in Ogden, which is responsible for maintaining records on the assessments ordered by the IRS' Ogden Campus. Mr. Wilder also reviewed the taxpayer account information to determine if any of the requested documents were in the IRS' possession. Mr. Wilder verified that the IRS had already provided such documents to Mr. Johnson in response to

his June 22, 2001 FOIA/PA request. On September 10, 2001, the Ogden Campus Disclosure Office sent two pages of documents to Mr. Johnson that were responsive to his requests for records identifying the assessment officer and for Form 9984 Examining Officers Activity Record. The Ogden Campus Disclosure Office notified Mr. Johnson that the IRS did not possess any documents responsive to his requests for Form 4340 Certificate of Assessments and Payments and Form 813. The IRS also notified Mr. Johnson that it would not provide any additional documents responsive to his request because he had submitted other FOIA requests with the IRS requesting the same documents; and that the items published in the Internal Revenue Manual were available to the public through the IRS' FOIA reading room and on the website.

On August 30, 2001, Mr. Johnson filed this civil action, contending that the IRS failed to comply with the FOIA and PA by failing to respond to his requests; failing to produce documents he requested; and failing to maintain accurate, timely, relevant and complete records, which are ''based upon false, fraudulent and inaccurate records which such act caused a determination which is adverse to'' him. *See* Dkt. 25, ¶ 27. Mr. Johnson requests that the court order that the IRS immediately disclose the documents requested; that if the documents requested do not exist, the IRS certify as such under penalty of perjury; that Mr. Johnson be reimbursed for litigations costs; and that the court award damages. Dkt. 25, at 32–33.

The IRS has now filed a motion for summary judgment and a motion for a protective order.

MOTION FOR SUMMARY JUDGMENT
(Dkt. 40)

Motion. The IRS filed a motion for summary judgment, contending that (1) Mr. Johnson fails to state a claim upon which relief may be granted because the IRS is not improperly withholding any documents responsive to his FOIA requests; (2) the federal court lacks subject matter jurisdiction over claims related to Mr. Johnson's June 14, 2001 request because he did not exhaust his administrative remedies; (3) Mr. Johnson is not entitled to monetary damages under the FOIA or the PA; (4) Mr. Johnson is not entitled to attorney's fees or costs; and (5) the Commissioner of Internal Revenue is not a proper party defendant.

In response to the motion for summary judgment, Mr. Johnson responded to the merits of the IRS' summary judgment motion, and also requested that the court delay consideration of this motion for summary judgment until thirty days after an additional period of discovery is completed, pursuant to Fed.R.Civ.P. 56(f), so that he may conduct the discovery necessary to respond to this motion for summary judgment.

Summary Judgment Standard. Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that them is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R.Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply ''some metaphysical doubt.''). *See also*Fed. R.Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical*

Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial -- e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and ''missing facts'' will not be ''presumed.'' *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888–89 (1990).

Discussion.

[1] A. *Improper withholding of requests.* In order to prevail on a motion for summary judgment in a FOIA action, an agency must show that a reasonable search for responsive records was conducted. *See Patterson v. IRS*, 56 F.3d 832, 841 [75 AFTR 2d 95-2707] (7th Cir. 1995); *Oglesby v. United States Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). In a FOIA action, the court may enjoin an agency where the agency has (1) improperly (2) withheld (3) agency records. *See*5 U.S.C. § 552(a)(4)(B); *Kissinger v. Reporter's Comm. For Freedom of the Press*, 445 U.S. 136, 150 (1980). Each of these three criteria must be met before a district court may formulate remedies and force an agency to comply with a FOIA request. *See United States Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 142 [63 AFTR 2d 89-1492] (1989). A court may also enjoin an agency where the agency has refused to comply with an individual request for agency documents pursuant to the Privacy Act. *See* 5 U.S.C. § 552a(g)(1). If upon the initiation of a lawsuit, it is determined that all documents found responsive to the underlying suit have been released in full to the requester, the litigation should be dismissed on the grounds of mootness because there is no justiciable controversy. *See Tijerina v. Walters*, 821 F.2d 789, 799 (D.C. Cir. 1987); *Carter v. V.A.*, 780 F.2d 1479, 1481 (9th Cir. 1986); *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982).

Mr. Johnson contends that the IRS failed to respond to his requests and failed to produce the documents he had requested. The record shows that the IRS provided Mr. Johnson with documents responsive to his requests. *See* Factual Background above related to May 31, 2001; June 22, 2001; July 5, 2001; and July 13, 2001 requests. In some instances, there were no documents to disclose because the requested documents did not exit or had been destroyed pursuant to the IRS' records retention policy, *See* discussion above related to June 7, 2001; June 9, 2001, June 10, 2001; June 12, 2001; June 14, 2001; June 15, 2001; July 6, 2001; and July 13, 2001 requests. Regarding the June 8, 2001 request, Mr. Johnson had already requested and received these documents, and he was notified that the Seattle Disclosure Office was responsible for this request; Mr. Johnson has not shown that he sent a request to the Seattle Disclosure Office and/or that the request was denied. Further, with regard to the July 13, 2001 request, the IRS notified Mr. Johnson that it would not provide any additional documents responsive to his request because he had submitted other FOIA requests with the IRS requesting the same documents. This was a reasonable response to a request for documents that the IRS had previously provided to Mr. Johnson. Finally, with regard to the July 13, 2001 request, the IRS notified Mr. Johnson that the items published in the Internal Revenue Manual were available to the public through the IRS' FOIA reading room and on the website; this was a reasonable response to Mr. Johnson's request for reformation that is widely available to the public. The IRS has shown that it conducted a reasonable search for records responsive to Mr. Johnson's requests. There is no evidence that

any of the documents were improperly withheld. The IRS' motion for summary judgment should be granted and the case should be dismissed.

B. *Failure to exhaust administrative remedies with regard to June 14, 2001 request.* The IRS contends that Mr. Johnson failed to exhaust his administrative remedy by filing an administrative appeal with regard to his June 14, 2001 request, and that the claim regarding this request should therefore be dismissed. As discussed above, the record shows that the IRS conducted a reasonable search for records regarding this request, and the IRS concluded that the records requested did not exist. The IRS' motion for summary judgment as to this claim should be granted. However, the court will address the issue regarding the June 14, 2001 on an alternative basis.

In a FOIA action, a plaintiff must exhaust administrative remedies prior to seeking judicial review. *See American Fed'n of Gov't Employees v. Department of Commerce*, 907 F.2d 203, 209 (D.C. Cir. 1990); *Spannnaus v. Department of Justice*, 824 F.2d 52, 58 (D.C. Cir. 1987); *United States v. Steele*, 799 F.2d 461, 466 (9th Cir. 1986); *United States v. United States District Court*, 717 F.2d 478, 480 (9th Cir. 1983). Therefore, when an agency has responded to a requester under the FOIA within the statutory time period of twenty working days, 5 U.S.C. § 552(a)(6)(A)(i), the requester must file an administrative appeal before seeking relief from the courts. *See Taylor v. Appleton*, 30 F.3d 1365, 1369 [74 AFTR 2d 94-6303] (11th Cir. 1994); *McDonnell v. United States*, 4 F.3d 1227, 1240 (3d Cir. 1993); *Ogelsby v. U.S. Department of Army*, 920 F.2d 57, 61 (D.D. Cir. 1990). Where a FOIA plaintiff attempts to obtain judicial review without first exhausting administrative remedies, the lawsuit is subject to dismissal for lack of subject matter jurisdiction. *See Hymen v. Merit Sys. Protection Bd.*, 799 F.2d 1421, 1423 (9th Cir. 1986) (*overruled on other grounds by Capital Tracing, Inc. v. United States*, 63 F.3d 859 [76 AFTR 2d 95-5993] (9th Cir. 1995) and *Williams-Scaife v. Department of Defense Dependent Schools*, 925 F.2d 346 (9th Cir. 1991)).

Regarding Mr. Johnson's FOIA/PA request of June 14, 2001, which was received by the IRS on July 30, 2001, the IRS responded to the request on August 24, 2001, within twenty working days of receipt of the request. Mr. Johnson was required to file an administrative appeal before filing a civil action in federal court regarding this issue, and he has not shown that he has done so. The IRS' motion for summary judgment should be granted as to this issue.

C. *Monetary damages under FOIA and PA.* The FOIA does not provide a remedy of money damages. *See Lake Mohave Boat Owners Assoc. v. National Park Serv.*, 78 F.3d 1360, 1363 n. 1 (9th Cir. 1996); *Gale v. U.S. Department of Justice*, 628 F.2d 224, 226 n. 4 (D.C. Cir. 1980). Damages are not recoverable in any suit brought under the Privacy Act, 5 U.S.C. § 552a(g)(1)(B), involving access to records, where the remedy is injunctive relief. *See*5 U.S.C. § 552a(g)(3)(A); *Thurston v. United States*, 810 F.2d 438, 447 (4th Cir. 1987); *Cell Assoc., Inc. v. National Inst's of Health*, 579 F.2d 155. 1161–62 (9th Cir. 1978). Mr. Johnson is not entitled to recover monetary damages for the alleged violations of his rights under FOIA/PA. Even if Mr. Johnson were to prevail in this case, which he has not, he is not entitled to monetary damages. The IRS' motion for summary judgment should be granted as to this issue.

[2] D. *Costs.* In a FOIA action, "[t]he court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." 5 U.S.C. § 552(a)(4)(E). The Privacy Act also provides for an award of reasonable attorney's fees and costs incurred "in any case under this paragraph in which the complainant has substantially prevailed." 5 U.S.C. § 552a(g)(3)(B). Mr. Johnson has not requested attorney's fees in connection with this action. At issue is whether Mr.

Johnson should be awarded costs for litigating this case.

In order to establish that he substantially prevailed under 5 U.S.C. § 552(a)(4)(E), a plaintiff must prove (1) that the prosecution of the action could reasonably be regarded as necessary to obtain the information; and (2) that the action had a substantive causative effect on the delivery of the information. *Long. v. IRS*, 932 F. 2d 1309, 1313 [67 AFTR 2d 91-990] (9th Cir. 1991). The criteria for awarding attor-ney's fees and litigation costs in Privacy Act actions are the same as the criteria for awarding such fees and costs as in a FOIA case. *Barrett v. Bureau of Customs*, 651 F.2d 1087, 1088 (5th Cir. 1981), *cert. de-nied*, 455 U.S. 950 (1982).

The IRS responded to Mr. Johnson's FOIA/PA requests of May 31, 2001, June 8, 2001, June 22, 2001, July 5, 2001, and July 13, 2001 after this civil suit was filed. A review of the record shows that the IRS searched for the requested records and was in the process of identifying, locating, and providing the documents at issue when Mr. Johnson flied this civil action. Mr. Johnson has not shown that the prosecution of this action was necessary to obtain the information requested. Mr. Johnson is not entitled to an award of costs for prosecuting this action. The IRS' motion for summary judgment should be granted as to this issue.

E. *Proper party defendant.* Mr. Johnson named "Commissioner of Internal Revenue" as the defendant in this action. The district court has jurisdiction over the agency that allegedly violated the FOIA and PA. 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552a(g)(1). Individual agency employees are not proper party defendants in FOIA actions. *See Thompson v. Walbran*, 990 F.2d 403, 405 (8th Cir. 1993); *Petrus v. Bowen*, 833 F.2d 581, 582 (5th Cir. 1987). The Internal Revenue Service is the proper party defendant in this action. However, because any amendment of the complaint to name the proper party defendant would be futile, the court should not permit Mr. Johnson to file an amended complaint naming the proper party defendant.

F. *Claims that the IRS failed to maintain accurate, timely, relevant and complete records.* In the Second Amended Complaint, plaintiff claims that the IRS failed "to maintain accurate, timely, relevant and complete records, relating to Plaintiff and account number 574-10-7987 and such inaccurate, untimely, irrelevant and incomplete records are based upon false, fraudulent and inaccurate records which such act caused a determination which is adverse to Plaintiff and brings rise to Plaintiffs [sic] cause of action pursuant to Title 5 U.S.C. § 552a(g)(1)(B), (C), and (D)." *See* Dkt. 25, ¶ 27. Plaintiff requests restitution as part of his damages. *Id.* at ¶ 201.

It appears that Mr. Johnson was involved in some action involving the IRS, and that as a result of a decision in that action, plaintiff lost certain assets. Mr. Johnson appears to claim that the records of the IRS were falsified and inaccurate. Mr. Johnson could have raised that issue in the underlying IRS action against him. This claim goes beyond the disclosure provisions of the FOIA and PA, and appears to be an attempt to use the FOIA and PA to attack a judgment entered against Mr. Johnson in a separate proceeding. Mr. Johnson may not use the FOIA and Privacy Act to make such an attack. The claims that IRS failed to maintain accurate, timely, relevant and complete records relating to Mr. Johnson, and that such inaccurate, untimely, irrelevant and incomplete records were based upon false, fraudulent and inaccurate records are not properly before the court in this action, and these claims should be dismissed on this motion for summary judgment.

IRS' MOTION FOR PROTECTIVE ORDER (Dkt. 43)

The IRS has filed a motion for protective order, requesting that the court order that the IRS need not respond to Mr. Johnson's interrogatories of Kenneth Wilder, or in the alternative, that the court suspend the date upon which the IRS must respond pending a decision on the IRS' motion for summary judgment.

Mr. Johnson has propounded interrogatories to Mr. Wilder. Dkt. 43, Exh. A. Pur-

suant to the court's scheduling order, the deadline for completing discovery was August 18, 2002. These interrogatories were served on Mr. Wilder after the date for completion of discovery. Moreover, a review of the interrogatories shows that answers to the questions propounded are not necessary in order for Mr. Johnson to respond to the IRS' motion for summary judgment.

The Internal Revenue Service's Motion for a Protective Order should be granted, and the court should order that the IRS need not respond to the interrogatories propounded to Mr. Wilder.

REQUEST FOR CONTINUANCE UNDER FED.R.CIV.P. 56(f) (Dkt. 49)

Mr. Johnson has requested that the court delay consideration of this motion for summary judgment pursuant to Fed. R.Civ. P. 56(f). He requests that the court grant him an additional period of time in which to conduct discovery, and that the IRS' motion for summary judgment be continued until thirty days after discovery is concluded. Mr. Johnson contends that the IRS did not identify their ''expert witnesses'' until it was too late for him to engage in discovery during the discovery period.

Fed. R.Civ.P. 56(f) provides as follows:

> When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In order to continue a summary judgment motion under Fed. R.Civ. P. 56(f), a party so requesting must show that he or she diligently pursued previous discovery opportunities, and must also show how allowing additional discovery would preclude summary judgment. *Qualls v. Blue Cross of California, Inc.*, 22 F.3d 839, 844 (9th Cir. 1994). Mr. Johnson has not made a sufficient showing under Fed. R.Civ.P. 56(f) to continue this case or to conduct additional discovery. The discovery period set by the court has concluded. The witnesses Mr. Johnson has identified as ''experts'' are fact witnesses; Mr. Johnson had the opportunity to conduct discovery related to these witnesses during the discovery period. Moreover, Mr. Johnson has made no showing that additional discovery would preclude summary judgment in this case. Mr. Johnson's request for a continuance should be denied.

Therefore, it is hereby

ORDERED that the Internal Revenue Service's Motion for Summary Judgment (Dkt. 40) is GRANTED. The case is DISMISSED. The Internal Revenue Service's Motion for a Protective Order (Dkt. 43) is GRANTED, and the IRS need not respond to the Interrogatories propounded to Mr. Wilder. Plaintiff's Rule 56(f) Motion to Postpone Consideration of Defendant's Motion for Summary Judgment (Dkt. 49) is DENIED.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 1st day of November, 2002.

ROBERT J. BRYAN

United States District Judge

¶2002-5710

Jose A. PEREZ, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Fifth Circuit, (CA5) Docket No. 02-50377, Nov. 27, 2002. District Court, (2001, DC TX) 89 AFTR 2d 2002-1884, 2002-1 USTC ¶50259, affirmed per curiam. Earlier proceedings at (2002, DC TX) 89 AFTR 2d 2002-2127; (2001, DC TX) 88 AFTR 2d 2001-6550, 2001-2 USTC ¶50735; and (2001, DC TX) 88 AFTR 2d 2001-5556, 2001-1 USTC ¶50454. Years 1984, 1985, 1986, 1987. Decision for Govt.

1. Review of District Court decision—quiet title—jurisdiction. District court

properly asserted jurisdiction over pro se taxpayer's quiet title complaint: action involving property against which IRS had placed lien clearly fell within 28 USC §2410's purview; and taxpayer's failure to strictly adhere to statute's pleading requirements wasn't in itself fatal. *Reference:* United States Tax Reporter ¶74,336.507(3).

2. Actions against U.S.—quiet title—validity of assessments—validity of lien—limitations periods—counterclaims; actions to reduce assessments to judgment—summary judgment. District court properly granted govt. summary judgment on taxpayer's quiet title action and its collection counterclaim: Forms 4340 and 4549 presumptively proved assessments' validity and that taxpayer was given proper notice thereof; taxpayer's meritless challenges thereto were rejected; and IRS wasn't required to issue deficiency notice before placing lien on taxpayer's property since it was merely attempting to collect self-reported liability that taxpayer had waived his right to contest when signing Form 4549. *Reference:* United States Tax Reporter ¶74,035.01(25); 62,015.01(17); 62,015.01(30); 63,015.03(12); 62,125.01; 65,025.03(3). IRC §6201; 6212; 6301; 6303; 6330; 6502; 7403.

Jose Perez, Houston, TX, pro se.
Carol A. Barthel, Jonathan S. Cohen, U.S. Dept. of Justice, Tax Div., Washington, DC, for Defendant-Appellee.

United States Court of Appeals, Fifth Circuit,

Appeal from the United States District Court for the Western District of Texas.

Before DAVIS, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

Summary Calendar.

Taxpayer brought quiet-title action against government to remove federal tax lien placed on his property. The United States District Court for the Western District of Texas, Garnett Thomas Eisele, J., granted summary judgment for government, and appeal was taken. The Court of Appeals held that: (1) court had subject matter jurisdiction; (2) government adequately proved tax liabilities; and (2) taxpayer was not entitled to additional notices prior to placement of tax lien.

Affirmed.

Pro se plaintiff-appellant Jose A. Perez appeals from the district court's order granting summary judgment to the United States of America ("government") in Perez's quiet-title action against the government to remove a federal tax lien placed on his property by the Internal Revenue Service ("IRS"). In concluding that Perez's arguments on appeal are without merit, we affirm the judgment of the district court.

I.

FACTS AND PROCEEDINGS

In April 1988, Perez filed four federal income tax returns with the IRS, covering tax years 1984, 1985, 1986, and 1987. In these returns, Perez identified the following tax liabilities:

1984:	$5,867
1985:	$7,780
1986:	$5,526
1987:	$1,312

He did not, however, pay anything toward the amounts listed on his tax returns. In June 1988, the IRS assessed Perez's taxes for the years 1984 through 1987.

Following an audit in July 1988, Perez agreed to tax deficiencies in the amounts of $1,452 and $1,442, plus penalties, for tax years 1983 and 1984, respectively. Later in that month, Perez executed IRS Form 4549, consenting to the immediate assessment and collection of the deficiencies for 1983 and 1984, as well as to the immediate collection of his 1985 tax liability of $7,780. In April 1989, the IRS also identified deficiencies of $1,367 for tax year 1986, which consisted entirely of assessed penalties and interest on Perez's $5,526 unpaid tax liability for that year. The IRS assessed all of these deficiencies

in September 1989. In March 1990, Perez executed IRS Form CP-2000, consenting to the immediate assessment and collection of a $303 deficiency for his 1987 tax year. The IRS assessed this deficiency in June of that year.

In April 1989, the IRS placed a federal tax lien on Perez's property. In March 1997, the IRS notified Perez's employer that it intended to levy Perez's wages for his outstanding tax liabilities. In March 2000, the IRS sent Perez a final notice of intent to levy. Perez subsequently requested a collection due process hearing before the IRS's Office of Appeals. In early September of that year, the Office of Appeals rejected his request.

The following month, Perez filed suit against Charles Rossotti, the Commissioner of Internal Revenue. In his complaint, Perez alleged (1) procedural irregularities by the IRS in executing the tax lien against his property, and (2) violation of his administrative due process rights resulting from the IRS's rejection of his administrative appeal concerning the levy on his income from his (now former) employer. In April 2001, the district court dismissed Perez's administrative appeal for lack of jurisdiction, and ordered Perez to amend his complaint to comply with the pleading requirements under 28 U.S.C. § 2410(b) for his federal tax lien claims.

In May 2001, Perez filed an amended complaint seeking to quiet title to his property encumbered by the federal tax lien. In his amended complaint, Perez alleged a litany of procedural irregularities committed by the IRS in placing the tax lien on his property in 1989, *viz.*, (1) the IRS did not properly assess his taxes for the years 1984, 1985, 1986, and 1987; (2) even if the IRS properly assessed the taxes, it did not properly notify him of this assessment; (3) the IRS failed to issue notices of deficiency prior to placing the lien on his property; and (4) the IRS is now barred by the statute of limitations from the collection of these taxes. Perez also alleged that the IRS failed to notify him properly of the levy on his wages. The government filed a counterclaim in May 2001, seeking to reduce Perez's tax liabilities to judgment.

Both parties then moved for summary judgment. Relying on records proffered by the government in support of its motion--in particular, IRS Forms 4340, showing Perez's relevant tax liabilities and the notices issued by the IRS, the IRS RACS Report-006 (Summary Record of Assessments), and the aforementioned IRS Form 4549--the district court granted summary judgment to the government and denied summary judgment to Perez. Perez timely filed a notice of appeal in April 2002.

II.

ANALYSIS

[1] Three issues are presented in this appeal: (1) Perez's challenge to the district court's decision that the IRS Forms 4340 and 4549 are proper evidence of his assessed taxes and the IRS's notifications thereof; (2) his challenge to the district court's ruling that the IRS did not need to issue deficiency notices because Perez's tax arrears were not a "deficiency," as defined by the relevant statutes;[1] and (3) the government's argument that Perez's complaint should be dismissed outright for lack of jurisdiction under § 2410(b). Although we disagree with the government and conclude that the federal courts have jurisdiction over Perez's complaint, we hold that the district court's order granting summary judgment to the government was proper.

A. Standard of Review

We review a grant of summary judgment de novo, applying the same standard as the district court.[2] A motion for summary judgment is properly granted only if there is no genuine issue as to any material fact.[3] An issue is material if its resolution could affect the outcome of the ac-

[1] Perez does not challenge on appeal the district court's grant of summary judgment to the government on the issues of (1) the IRS's actions being time-barred by the statute of limitations and (2) the validity of the IRS's levy on his wages. Therefore, Perez has waived these two issues. *Ruiz v. United States*, 160 F.3d 273, 275 (5th Cir.1998) (noting that "issues not briefed on appeal are waived").

[2] *Morris v. Covan Worldwide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir.1998).

[3] Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

tion.[4] In deciding whether a fact issue has been created, we must view the facts and the inferences to be drawn therefrom in the light most favorable to the nonmoving party.[5]

The standard for summary judgment mirrors that for judgment as a matter of law.[6] Thus, the court must review all of the evidence in the record, but make no credibility determinations or weigh any evidence.[7] In reviewing all the evidence, the court must disregard all evidence favorable to the moving party that the jury is not required to believe, and should give credence to the evidence favoring the nonmoving party as well as that evidence supporting the moving party that is uncontradicted and unimpeached.[8] The nonmoving party, however, cannot satisfy his summary judgment burden with conclu-sional allegations, unsubstantiated asser-tions, or only a scintilla of evidence.[9]

B. Federal Jurisdiction Under § 2410

We must first address the government's argument concerning jurisdiction because this is a threshold issue that must be resolved before any federal court reaches the merits of the case before it. The law is well established that the government or any of its instrumentalities may not be sued by a citizen without the government's express consent.[10] In this case, Perez has brought suit under § 2410, which is clearly a waiver of sovereign immunity. This statute provides, in part, that the government may be named as a party in any civil suit to quiet title to property on which the government has a mortgage or lien.[11] As the IRS has placed a lien on Perez's real property, there appears to be federal jurisdiction to hear Perez's complaint.

The government maintains, however, that Perez has failed to meet the requirements of § 2410(b), which states that a complaint to quiet title "shall set forth with particularity . . . the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed."[12] Strictly speaking, Perez failed to specify any of this information in his amended complaint. Thus, the government urges, we must dismiss Perez's complaint for failure to state a claim under § 2410.

In considering this complaint, filed as it is by a *pro se* plaintiff, we decline the government's invitation to adopt a strict application of § 2410. To do so would be inequitable; we would, in effect, be punishing Perez for lacking the linguistic and analytical skills of a trained lawyer in deciphering the requirements of the United States Code. It is precisely to avoid such a result that courts have adopted the rule that a *pro se* plaintiff's pleadings are liberally construed.[13] In this case, the information required of Perez is obvious from the relatively sparse record, including from the documents and forms submitted by the government in its motion for summary judgment; the court is not unduly required to scour a voluminous record to determine the essentials of the statute. Accordingly, we construe Perez's *pro se* complaint liberally and hold that he has met the jurisdictional requirement for bringing a quiet-title action against the government under § 2410.

C. The Evidentiary Status of IRS Forms 4340 and 4549

[2] On appeal, Perez contends that it is settled precedent that the IRS forms sub-

4 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

5 *See Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir.1999).

6 *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. 2548.

7 *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

8 *Id.* at 151, 120 S.Ct. 2097.

9 *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir.1994) (en banc).

10 *Rodriguez v. Tex. Comm'n on the Arts*, 199 F.3d 279, 280 (5th Cir.2000).

11 28 U.S.C. § 2410(a).

12 § 2410(b).

13 *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (holding that allegations in a *pro se* complaint are to be held "to less stringent standards than formal pleadings drafted by lawyers"). *See also SEC v. AMX, Int'l, Inc.*, 7 F.3d 71, 75 (5th Cir.1993) (recognizing the established rule that this court "must construe [a *pro se* plaintiff's] allegations and briefs more permissively").

mitted by the government--the computer-generated IRS Form 4340 (Certificates of Assessments and Payments) and the duly-executed IRS Form 4549 (Income Tax Examination Changes)--are not valid evidence of either the IRS's assessed taxes or the IRS's notice to the taxpayer of these taxes. This assertion is spurious.

We held over a decade ago that, under the Federal Rules of Evidence, IRS Form 4340 constitutes valid evidence of a taxpayer's assessed liabilities and the IRS's notice thereof.[14] There is also substantial precedent that IRS Forms 4340 and 4549 are appropriate sources evidencing the IRS's assessment and notice of tax arrears.[15]

As the district court explained in this case, the IRS Forms submitted by the government show that the IRS properly assessed Perez's taxes and provided sufficient notice to Perez of his federal tax liabilities. For example, the IRS Forms 4340 reflect that the IRS assessed the taxes Perez reported on his tax returns for the years 1984 through 1987, and issued delinquency notices to Perez of these tax liabilities in 1988, 1991, and 1995. Further, Perez executed an IRS Form 4549 for tax years 1983 through 1985, which provides expressly that he "consent[s] to the immediate assessment and collection of any increase in tax and penalties, ... plus any interest as provided by law." In sum, the IRS Forms 4340 and 4549, as well as IRS Form CP-2000, evidence the IRS's proper assessment and notice of all of Perez's tax liabilities, including deficiencies.

Against this solid evidence, Perez offered the district court only unsubstantiated, self-serving allegations that he did not receive notice of his assessed federal tax liabilities. And, his legal argument that IRS Forms 4340 and 4549 are not valid evidence of assessment and notice is totally specious. At a minimum, Perez was on notice of his assessed tax liabilities and deficiencies for the years 1983 through 1985, as evidenced by his signature on Form 4549.[16] The district court properly granted summary judgment to the government on the issues of whether Perez's taxes were properly assessed and whether Perez was properly notified of these assessments.

D. Deficiency Notices

Perez contends further that, regardless of whether his taxes were properly assessed, the lien on his property is procedurally defective, because, he alleges, the IRS failed to send him 30, 60, and 90-day deficiency notices.[17] In granting summary judgment to the government, the district court determined that Perez's tax liabilities were not "deficiencies," as defined by the applicable statutes and case law; consequently, he was not entitled to these procedural safeguards. On appeal, the government reiterates the statutory analysis by the district court on this issue.

As a general rule, the IRS may not assess or collect a taxpayer's deficiency unless it sends the requisite notices of deficiency.[18] As defined by Internal Revenue Code ("IRC"), a "deficiency" is "the amount by which the tax imposed ... exceeds ... the amount shown as the tax by

14 *McCarty v. United States*, 929 F.2d 1085, 1089 [68 AFTR 2d 91-5193] (5th Cir.1991) (holding that Form 4340 showing "notice of assessment and demand for payment" is admissible under the Federal Rules of Evidence).

15 *See, e.g., In re Orr*, 180 F.3d 656, 658 [84 AFTR 2d 99-5390] (5th Cir.1999) (discussing contents of Form 4549). *See also Hughes v. United States*, 953 F.2d 531, 535–36 [69 AFTR 2d 92-472] (9th Cir.1992) (discussing valid evidentiary status of Form 4340 "as proof that assessments had been made"); *United States v. Chila*, 871 F.2d 1015, 1017–18 [63 AFTR 2d 89-1278] (11th Cir.1989) (noting that Form 23-C, precursor to Form 4340, is presumptive proof of a valid assessment); *Steele v. Regan*, 755 F.2d 1091, 1092–93 [55 AFTR 2d 85-928] (4th Cir.1985) (discussing plaintiff's signature of Form 4549); *In re Barry*, 48 B.R. 600, 603 [56 AFTR 2d 85-5169] (Bankr.M.D.Tenn.1985) (discussing contents of Form 4549); *Kraft v. Comm'r of Internal Revenue*, 1997 WL 643365 (U.S.Tax Ct.1997) (discussing contents of Form 4549).

16 Perez further argues that Form 4549 requires the explicit approval of the IRS's District Director in order for it to be effective. He derives this argument from the last line of Form 4549, which states that the taxpayer understands "that this report is subject to acceptance by the District Director." In this case, the Form 4549 was signed only by the IRS examiner. We reject Perez's contention that an IRS examiner is not a duly authorized agent of the district director capable of accepting a Form 4549. *In re Barry*, 48 B.R. at 603 ("A revenue agent is a delegate of the district director authorized to accept waivers. His signature is sufficient 'acceptance' of this [IRS Form 4549] waiver."). *Cf. Holbrook v. United States*, 284 F.2d 747 [6 AFTR 2d 6003] (9th Cir.1960) (holding that it is not necessary for the IRS Commissioner to personally consent to a taxpayer waiver in order for it to be effective).

17 *See* 26 U.S.C. §§ 6212–6213.

18 *McCarty*, 929 F.2d at 1089.

the taxpayer on his return . . . .''[19] ''In other words, an 'income tax deficiency' exists when a taxpayer has failed to make an adequate return of income.''[20] Clearly, the IRC predicates the validity of an assessment and collection of an asserted deficiency on the proper notification of the taxpayer of his *total*tax liability. In other words, the IRS must provide notices of the amount that it claims the taxpayer owes, *over and above the amount reported by the taxpayer on his income tax return.*[21] This is a cut-and-dry notice requirement--the stuff of basic procedural due process.

The district court in this case correctly interpreted and applied the requirements of the IRC to Perez's claims. It determined that

> there is no ''deficiency,'' in the tax code sense, where a taxpayer reports on his return that he owes an amount, but simply fails to remit such amount to the IRS. In this circumstance, because there is no ''deficiency,'' the IRS is not required to issue a notice of deficiency before placing a lien on the taxpayer's property, because, presumably, the taxpayer is already on notice as to the amount in taxes he owes to the government.[22]

Stated differently, here the IRS is not seeking to assess and collect any amount that is *greater* than what Perez had already listed on the four federal income tax returns that he filed in 1988 or consented to on IRS Form 4549.[23] Perez was onnotice of his overdue tax liabilities as early as 1988, when he (1) late-filed his returns, listing the taxes he owed to the government for the years 1983 through 1987, but (2) failed to pay anything toward these amounts. In fact, the IRS was authorized in 1988, without providing any notice, to assess and to collect the unpaid taxes that Perez is now claiming more than ten years later as requiring deficiency notices.[24] The IRC is sometimes criticized for being obscure in its requirements of taxpayers, but in this instance it is clear beyond peradventure that Perez's long-overdue tax arrears are not ''deficiencies.'' He has no claim to the procedural protections mandated for that type of tax liability.

III.

CONCLUSION

The IRS properly assessed Perez's tax liabilities for the years 1983 through 1987, and, in so doing, followed the requisite procedures for validly placing a lien on Perez's property. The district court's order granting summary judgment to the government is, in all respects,

AFFIRMED.

¶2002-5711

UNITED STATES OF AMERICA, PLAINTIFF v. Robert C. WELTI, individually and D/B/A Bopat Enterprises, DEFENDANTS. U.S. District Court, Southern Dist. of Ohio, (DC OH) CASE NO. C-1-02-243, Nov. 8, 2002. Years 1999, 2000, 2001. Decision for Govt.

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19 26 U.S.C. § 6211(a). *See Laing v. United States*, 423 U.S. 161, 173–74 [37 AFTR 2d 76-530], 96 S.Ct. 473 [37 AFTR 2d 76-530], 46 L.Ed.2d 416 (1976) (''In essence, a deficiency as defined in the Code is the amount of tax imposed less any amount that may have been reported by the taxpayer on his return. § 6211(a).'').

20 *Miles v. United States*, 1999 WL 500999, at 1 [83 AFTR 2d 99-2941] (N.D.Tex.1999) (citing *Moore v. Cleveland Ry. Co.*, 108 F.2d 656, 659 [24 AFTR 74] (6th Cir.1940)).

21 *Murray v. Comm'r of Internal Revenue*, 24 F.3d 901, 903 [73 AFTR 2d 94-2046] (7th Cir.1994) (discussing deficiency notice requirements for assessed tax deficiencies as contrasted against the collection of assessed taxes based on a taxpayer's return); *Meyer v. Comm'r of Internal Revenue*, 97 T.C. 555, 560, 1991 WL 238309 (U.S.Tax Ct.1991) (interpreting § 6213(a) as requiring ''mailing of notice of deficiency'' prior to ''assessing or collecting a deficiency'').

22 *Perez v. United States*, 2001 WL 1836185, at 8 [89 AFTR 2d 2002-1884] (W.D.Tex.2001). *Accord Koch v. Alexander*, 561 F.2d 1115, 1118 [40 AFTR 2d 77-5545] (4th Cir.1977) (holding that plaintiff-taxpayers are ''not entitled to a notice of deficiency'' because they owe the government only the amount listed on their tax return); *Miles*, 1999 WL 500999 at 2 (rejecting plaintiff-taxpayer's argument that he was owed deficiency notices because the ''tax being imposed and collected is the tax reported by Plaintiff'' in his tax returns).

23 It is long-settled precedent in this circuit that a taxpayer may waive the notice requirements of the IRC in consenting to a deficiency assessment. *Thomas v. Merchantile Nat'l Bank*, 204 F.2d 943, 944 [43 AFTR 1002] (5th Cir.1953) (interpreting a waiver executed by a taxpayer under § 871, the precursor to § 6213, as having ''waived the ninety-day notice and other procedural requirements'' of the statute). A duly executed IRS Form 4549 is a proper waiver of the deficiency notice requirements. *In re Barry*, 48 B.R. at 603 (discussing IRS Form 4549 as constituting ''a proper waiver of [deficiency] notice as provided in I.R.C. § 6213(d)''); *Aguirre v. Comm'r of Internal Revenue*, 117 T.C. 324, 2001 WL 1659293 (U.S.Tax Ct.2001) (granting summary judgment to the IRS on the ground that petitioners signed IRS Form 4549, waiving their right to contest their tax liabilities, and thus precluding the need to sendthem a deficiency notice).

24 26 U.S.C. § 6201(a)(1) (providing for the IRS's immediate assessment and collection of taxes listed on a taxpayer's income tax return).

1. Return preparer penalties—injunctions. Magistrate judge recommended that pro se CPA be preliminarily enjoined from preparing false returns based on frivolous IRC §861 argument, using sham charitable and offshore trust schemes to generate understatements, and other abusive conduct: govt. was likely to succeed on merits, which where supported by case law, testimony of IRS agents as to abusive nature of returns, and CPA's pattern of non-cooperation and obstructing IRS investigations. Also, injunctive relief was equitable considering cost of CPA's scheme to IRS, public's protection and relatively minor effect on CPA, who was still allowed to engage in non-abusive practice. *Reference:* United States Tax Reporter ¶74,075; 74,085.01(50). IRC §7407; 7408.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION,

REPORT AND RECOMMENDATION

(DLOTT, J.)

(HOGAN, M.J.)

Before the Court is Plaintiff's Motion for a Preliminary Injunction (Doc. 11) and Plaintiff's Reply (Doc. 18). Defendant, who is proceeding on a pro se basis, although he is a C.P.A. and an experienced accountant, filed no Memorandum in Opposition. An evidentiary hearing on Plaintiff's Motion was conducted on October 19, 2002 and succeeding days. The Government is seeking to prevent Defendant, who conducts his profession in Ripley, Ohio, from the preparation of federal income tax returns that understate taxpayer liability by the use of trusts and from representing clients before the Internal Revenue Service. In addition, the Government seeks and Order requiring Defendant to produce a list of all persons for whom he provided such services. Based upon the evidence, both in the form of witness testimony and exhibits, the Plaintiff's Motion is well-taken and should be granted.

PRELIMINARY INJUNCTION STANDARD

Although the Government argues that because injunctive relief is authorized by statute, 26 U.S.C., Sections 7402, 7407 and 7408, traditional equitable considerations need not be considered, we believe that the safer path is to consider the following factors: (1) substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not granted, (3) whether the threat of injury to the Government outweighs the harm that injunctive relief would cause Defendant, and (4) the effect that injunctive relief would have on the public's interest. *Marchinski v. Howard*, 2002 FED App. 0367P (6th Cir. 2002).

Under 26 U.S.C., Section 7402, the Court may issue injunctive relief to enforce the internal revenue laws.

Under 26 U.S.C., Section 7407, a preliminary injunction may be granted if the Government demonstrates that (1) Defendant engaged in conduct subject to penalty under 26 U.S.C., Section 6694 or engaged in any other fraudulent and deceptive act that substantially interferes with the proper administration of the internal revenue laws and (2) injunctive relief is appropriate to prevent a recurrence of such conduct. Title 26 U.S.C. Section 6694 imposes a penalty on a preparer of income tax returns who either knows or reasonably should know that a claim contained an understatement of tax liability due to a frivolous position for which there was no realistic possibility of being sustained.

The Government argues that, in addition, 26 U.S.C., Section 7408 provides a basis for granting injunctive relief. Section 7408 authorizes injunctive relief if the Government demonstrates that Defendant engaged in conduct subject to penalty under 26 U.S.C., Section 6701, which, in turn, imposes penalties upon any person who aids, assists or advises with respect to the preparation of tax returns when Defendant knows or has reason to believe that such advice will be used in connection with any material matter to understate the tax liability of another. The Government argues that

the culpable mental state or lack thereof is illustrated by: (1) one's reliance upon knowledgeable professionals, (2) one's level of education and sophistication and (3) one's familiarity with tax matters. See *Estate Preservation Services*, 202 F.3d at 1103 [85 AFTR 2d 2000-603].

PRELIMINARY MATTERS

Defendant failed to file any responsive pleading directed to the merits of the Government's Motion. Rather, Defendant challenged the authority of Michael R. Paul, Esq., an attorney not licensed to practice law in Ohio, to prosecute this case. We find 28 U.S.C., Sections 515(a) and 517 to be amply authority for Mr. Paul, a Government lawyer assigned to the Tax Division of the United States Department of Justice, to prosecute the case.

Defendant also challenged the authority of the magistrate judge to hear the case in the absence of consent by the parties. The magistrate judge's authority to hear, consider and report his recommendation to an Article III judge is described at 28 U.S.C., Sections 636(b)(1)(B) and (b)(3) as well as Local Rule 72.1. The Order of reference is listed as Document 3 in the record. Contrary to Defendant's assertion to the contrary, the magistrate judge is "empowered to deal with all pretrial procedures, whether dispositive or not, and render a report and recommendation to the Court on any matters classified as dispositive by statute." (See Doc. 3)

The Government asserts that the Court could render its Report and Recommendation without an evidentiary hearing and that it should do so in this case since Defendant failed to file a Memorandum in Opposition. See *United States v. Rosile*, 202 WL 1760861 [90 AFTR 2d 2002-5094] (M.D. Fla. 2002). Because Defendant is pro se and since the remedy sought by the Government is so drastic, this Court chose to proceed cautiously and afford the Defendant the opportunity to confront the witnesses and evidence against him. Defendant offered no factual evidence and the evidence he did offer was in the form of written arguments challenging the I.R.S. to impose any tax on an individual's domestic income and its authority to investigate whether tax returns comply with the law. Considering the fact that Defendant is both a licensed professional and a certified public accountant with a wealth of experience, this Court finds both these arguments to be both alarming and specious. The theory underlying Defendant's position in this case is that one can lawfully create a trust, maintain complete control over all the trust's assets, and pay no income tax. Since the major premise is absurd, what follows is equally absurd whether it be in the form of a business trust, equipment or service trust, family residence trust, charitable trust or final trust.

MUHICH V. COMMISSIONER OF INTERNAL REVENUE

Plaintiff urges us to follow the law as stated by the Seventh Circuit in *Frank Muhich v. Commissioner of Internal Revenue*, 238 F.3d 860 [87 AFTR 2d 2001-667] (7th Cir. 2001). The similarity of the Muhich situation will become apparent as we summarize the facts. Muhich was the President of an Illinois company called Midwest Portraits Corporation. Muhich met with an financial planner named Myers, who was a representative of Heritage Assurance Group, a promoter of abusive trust schemes. After meeting Bartoli, a Heritage attorney and subsequently being referred to an accountant named Savino, Muhich paid Heritage $12,000 for an abusive trust packet and thereafter created the Muhich Asset Management Trust. The trust scheme adopted by Muhich was described in the opinion as follows:

> "An individual transfers his or her assets and right to receive income to a newly created family trust in exchange for a certificate of beneficial interest (CBI). A CBI gives the individual the right to receive any distributions that the trustee, who is the same as the transferring individual, decides to make. The family trust pays and deducts all of the trustee's personal expenses and distributes any excess corpus to a charitable trust created under the scheme. The individual creates other trusts to circulate funds among and between."

The Muhichs created the Muhich Asset Management trust and transferred all of their property to it, in return for which they received a CBI representing 90 units. The Muhich Asset Management Trust then set up the Muhich Charitable Trust and received 100 units of ownership in the Muhich Charitable Trust. The Muhich Asset Management Trust then created the Muhich Business Trust and received 100 units of ownership. The Muhich Business Trust then created the Muhich Equity Trust and the Muhich Vehicle Trust and funded the corpus of each trust with $10 in exchange for a CBI from each trust representing 100 units of ownership. The Muhichs were the sole trustees and beneficiaries of all 5 trusts and as the opinion stated "had exclusive control over the trust property, had the right to direct any and all distributions from the trusts, controlled the bank accounts and their ability to deal with and benefit from all trust property was as free and unrestricted as before the trusts were established."

The issue before the Circuit was whether, as the Tax Court previously found, the trusts were "shams." In referring to the nondeductibility of personal expenses, the Circuit cited Chirelstein's Federal Income Taxation (2d Ed., 1979) for the principle that "Personal consumption expenses must obviously be treated as nondeductible on the whole; if they were allowed, the individual tax base could be reduced to zero through expenditures on personal living items and the notion of a tax on economic gain would have to be abandoned." The Circuit referred to a "sham" transaction as having no eco-nomic effect other than to create tax losses and cited *Gregory v. Helvering*, 293 U.S. 465 [14 AFTR 1191] (1935) for the princi-ple that "the Commissioner is not required to recognize for tax purposes those transac-tions which lack economic substance." Despite the fact that the Seventh Circuit's view is not controlling here, its holding is not unique and certainly reflects the pre-vailing law in this Circuit and in the coun-try.

EVIDENCE AND EXHIBITS

David C. Morgeson, an I.R.S. agent for 19 years, testified that abusive trust arrangements were the subjects of I.R.S. Notice 9724, entitled Certain Trust Arrangements, published in April, 1997 (Exhibit 4). The Notice emphasized the following legal principles upon which the abovementioned trusts would be evaluated:

(1) The substance rather than the form of the transaction is controlling for tax purposes. If the relationship of the trust property to the grantor did not differ in any material respect after the creation of the trust, then the income and assets would be taxed to the grantor and the trust mechanism ignored.

(2) If the owner of property transferred to a trust retains an economic interest in or control over the property, all expenses and income of the trust are taxable to the owner.

(3) A lawfully created trust is taxed on its income, reduced by amounts distributed to beneficiaries. The trust must obtain a taxpayer identification number and file annual returns reporting its income. The trust must report distributions to beneficiaries on Form K-1 and the beneficiary must report the distributed income on the beneficiary's tax return.

(5) Nondeductible personal expenses cannot be transformed into deductible expenses by the use of trusts and the costs of creating those trusts are not deductible.

(6) A genuine charity, not the owner or the owner's family members, must benefit in order to claim a valid charitable deduction.

(7) A U.S. citizen that fails to report a transfer of property to a foreign trust or the receipt of a distribution from a foreign trust is subject to a tax penalty equal to 35% of the gross value of the transaction.

(8) Civil and/or criminal penalties may apply.

In addition, the Notice encouraged taxpayers who have participated in abusive trust arrangements to voluntarily file amended returns and supplied a phone

number for those who had questions regarding the Notice or the information contained therein. Mr. Morgeson testified that Notice 9724 was published on the I.R.S. web site, in the Federal Register, and was available to the general public.

Mr. Morgeson testified that his investigation of Defendant began approximately 2 years ago and involved the review of 103 tax returns from taxpayers in 20 states. He classified 71 out of 103 returns as ''abusive'' and distributed all 71 to be audited. Mr. Morgeson personally reviewed 35 of these returns. A number of these returns were closed due to criminal prosecution or successfully resolved by deficiency assessments and voluntary payments by taxpayers. The average understatement of tax liabilities for returns prepared by Defendant and reviewed by Mr. Morgeson was estimated to be $92,172 per return. Mr. Morgeson said that Defendant's filing of abusive returns began in 1999 and continued through 2001. The investigation showed that Defendant obtains clients from Heritage Companies in Illinois and HG Asset Management in Ohio. Both are classified as ''abusive trust promoters.'' At present, I.R.S. has audited 26 returns at an average of 550 hours per taxpayer. I.R.S. has collected $170,000 from three of the audited taxpayers whose ''trusts'' were admitted to be shams and expects to recover a total of $645,000 from cooperating taxpayers.

Morgeson sent Defendant a letter in November, 2001 and informed him that he was under investigation for possible violations of 26 U.S.C., Section 6701 and requested copies of the trust instruments and a list of Defendant's clients. Defendant was required to attend a meeting in January, 2002, but Defendant both refused to attend the meeting and refused to submit the requested documentation. Defendant's response, also in January, 2001, called to Mr. Morgeson's attention that ''Title 26 and Title 27 of the United States Code are not positive law and of limited application to the residents of the fifty states'' and challenged Morgeson's ''standing'' to either investigate or prosecute him. In addition, Defendant threatened to make Morgeson a party (we don't believe he meant a plaintiff) to a class-action law suit.

Lastly, Morgeson noted the similarity in the returns he reviewed. The vehicle of the ''business trust'' was used to significantly reduce or eliminate self-employment income and tax on Form 1040 by taking large deductions for management or commission fees on Schedule C. The management or commission fees are then paid to another trust under the control of the taxpayer. The vehicle of the ''final trust'' used a domestic trust to claim an income distribution deduction on Form 1040. The income distribution to an offshore trust offsets the domestic trust's income. The offshore trust then distributes its income to a second offshore trust under the control of the taxpayer and located in Belize. The ''charitable trust'' uses a charitable deduction to a second charitable trust or foundation controlled by the taxpayer. Lastly, a ''family residence trust'' is used to put the taxpayer's business in trust and than claim deductions for nondeductible personal expenses charged to the trust.

As evidence of his claim that Defendant has embarked upon a pattern and practice of obstructing I.R.S. investigations and audits, the Government calls our attention to Exhibits E, F, G, H and I. Exhibit E is a transcript of a meeting between I.R.S. Agents Walsh and Kochert with Defendant in January, 2002 in which the agents were attempting to obtain information from Defendant about the Wellbrooks Asset Management Trust. Instead of providing the books and records as requested, Defendant used the time to put into the record 38 exhibits, none of which aided the agents in conducting an audit. Exhibit F is a copy of a letter Defendant wrote to client Ruth Rutledge and explaining that she need not report her payment to Defendant for income tax services under authority of 26 U.S.C., Section 861. Exhibits G and H are hearsay newspaper accounts of the Government's struggles with Defendant and are given no weight. Exhibit I is a five-page ''challenge'' to Mr. Morgeson's authority, which is authored by Defendant and given

considerable weight by this Court. These exhibits display either a superficial understanding of the law or an irrational belief about what the law requires. Either is particularly troubling when one considers that Defendant is in the business of rendering professional advice about the tax law to consumers seeking his advice and following it. From the oral argument submitted at the conclusion of his case, it would appear that Defendant has adopted the beliefs of one Larkin Rose as set forth in a videotape called ''Theft by Deception,'' rather than any accepted authority on the interpretation of the tax laws. We are not sure why a C.P.A., in the twilight of his professional career, would embark upon such a path.

The Government next presented the testimony of Jeanette Maggiacomo, I.R.S. Agent with 27 years of experience. Ms. Maggiacomo's mission was to testify relative to the three audits that she performed on tax returns prepared by Defendant. The first audit was of the 1998 and 1999 returns of Charles and Leanna Oliver, both of whom were employed. Defendant prepared a 1998 trust return for Strategic Financial Business Trust that reduced its taxable income to zero by distributing $79,492 for ''management services'' to the Strategic Financial Management Asset Management Trust. Defendant then prepared a trust return for the Strategic Financial Management Trust that distributed $689,929 in taxable income to the Chico International Trust in Belmopan, Belize. Charles Oliver was listed as the trustee for the Chico International Trust and the two interim trusts used the Oliver's home address. Neither the taxpayers or Defendant provided any proof that any payments were made to the off-shore trust. The 1999 trust returns prepared by Defendant used the identical modus operandi, the effect of which was to distribute $425,096 in taxable income to the Chico International Trust in Belize. Again, Charles Oliver retained control over the funds as he was listed as the trustee of the off-shore trust. Because neither the 1998 nor 1999 trust scheme divested the Olivers of either control over their businesses or the income stream that resulted, all trust income was attributable to the Olivers. (See Exhibit 8)

Ms. Maggiacomo made two attempts to convince the Olivers that their trust schemes were of the sham variety. The first was to provide them with a copy of I.R.S. Notice 9724. The second was to provide them with copies of I.R.S. Form 4549A, which provided a proper assessment of income taxes for 1998 and 1999. The Olivers turned to Defendant as the one who prepared their returns and Defendant provided no information to I.R.S., which would enable the agency to recompute the tax liability. Instead, Defendant challenged the authority of I.R.S. to question the Olivers' tax returns. Subsequently, the Olivers have retained an attorney and have represented that they intend to amend their returns and pay the appropriate taxes. Ms. Maggiacomo's unchallenged Declaration indicates that the Olivers' representation included penalties and interest. The Court, however, thinks it likely that the Olivers' Lawyer has negotiation in mind, especially on the subject of penalties and interest. In any event, Ms. Maggiacomo spent approximately 142 hours in investigative work, all of which is attributable to the preparation of these returns.

Melody Walsh, I.R.S. Agent for 23 years, testified about the audits she performed in reference to returns prepared by Defendant for Charles and Dr. Julianne Swayne in 1999 and 2000. Instead of an off-shore trust used in the Oliver's situation, Defendant used the vehicle of the charitable trust. The Swaynes' Form 1040 contained Schedule C, upon which was a deduction for management or commission fees paid to the Century Asset Trust. The Swaynes also put their income derived from business into the Century Asset Trust and then claimed deductions for personal expenses such as real estate taxes paid, depreciation, mortgage interest, health insurance and repair and maintenance of their personal residence. The remaining taxable income was reduced to zero by ''charitable'' contributions made by the Century Asset Trust to a charitable trust, the latter of which was controlled by the Swaynes.

The analysis of the substance of the transactions showed that the Swaynes never surrendered control over their businesses (Dr. Swayne is a dentist; Mr. Swayne owns rental properties) or the income stream that flowed from those businesses. (See Exhibit 8)

When the Swaynes were sent a copy of I.R.S. Notice 9724, they promised to and did file amended returns and paid approximately $35,000 in back taxes owed. Due to the Swaynes' immediate cooperation, Ms. Walsh spent approximately 50 hours investigating the abusive trust schemes employed in their case.

Although the testimony focused upon the above-mentioned returns, Plaintiff's exhibits demonstrated similar abusive trust schemes for taxpayers Michael E. Diesel of St. Marys, Kansas (Exhibit 5), Trent and Tamara Schuler of Springfield, Ohio (Exhibit 6), Steven and Joan Welbourn of Brentwood, Tennessee (Exhibit 7) and Ruth Rutledge of Holiday, Texas (Exhibit 8).

[1] We must conclude from the above-stated factual basis that the Government has a substantial likelihood of success on the merits in this case.

EQUITABLE CONSIDERATIONS

What remains to be decided is the effect on Plaintiff if injunctive relief is denied, the effect upon Defendant if it is granted, and the effect on the public interest in either event. It is apparent from the testimony and argument that Defendant does not acknowledge the authority to tax domestic income, nor does he recognize the authority of the I.R.S. to either question the factual basis for which representations are made upon tax returns or to obtain any degree of cooperation from the taxpayer or tax preparer. The impact of this belief upon the Government is obvious. There will be intense interest in all trust returns prepared by Defendant and a lot of time expended by I.R.S. employees in investigating and auditing these returns. In addition, there will be wasted time attempting to obtain taxpayer cooperation, all of which has been demonstrated by past behavior. For those returns that slip between the cracks, there will be a loss of funds in the Government's coffers.

The effect upon the public favors the injunctive relief sought by the Government. Persons who seek the advice of professions are entitled to expressions of opinion that are both defendable, logical and practical. Pursuing sham trust schemes costs the taxpayer unnecessary penalties and interest and subjects the taxpayer to possible criminal penalties.

It is doubtful that the effect upon Defendant would be to put him out of the business. In considering a form of injunctive relief that would be less onerous, the Court recalls the fundamental belief of Mr. Welti that domestic income is nontaxable. Such a belief would, of necessity, impact the preparation of tax returns in general. However, the Government has not sought the cancellation of Defendant's professional license, nor any prohibition upon other forms of work that accountants typically perform. The Government has not sought a prohibition against the filing of any tax return, but only those returns that intentionally understate income. Mr. Welti, who is in the twilight of his career, would be free to perform other accounting functions. On balance, we find that all the above equita-ble concerns favor the relief sought by the Government and that a preliminary injunction should issue.

IT IS THEREFORE RECOMMENDED THAT: preliminary injunctive relief shall issue preventing Robert C. Welti, individually, and Bopat Enterprises from:

(1) Preparing federal tax returns or other documents to be filed with I.R.S. that understate taxpayers' liabilities using the Section 861 Argument or other frivolous positions;

(2) Engaging in activity subject to penalty under I.R.C., Section 6700, including organizing a plan or arrangement and making a statement regarding the excludibility of income that he knows or has reason to know is false or fraudulent as to any material matter;

(3) Engaging in activity subject to penalty under I.R.C., Section 6701, including preparing and/or assisting in the preparation of a document related to a matter material to the internal revenue laws that includes a position that he knows will result in the understatement of tax liability;

(4) Failing to retain and produce to the Internal Revenue Service upon request, a list of all clients for whom he performed return preparation services that involve the creation of trusts;

(5) Engaging in any other activity subject to penalty under I.R.C., Sections 6694, 6695, 6700 or 6701; and

(6) Engaging in other similar conduct that substantially interferes with the proper administration and enforcement of the internal revenue laws.

November 8, 2003

Timothy S. Hogan

United States Magistrate Judge

¶2002-5712

Juan PLUMEY and Margarita Tellado PLUMEY, PLAINTIFFS v. HACIENDA DE PUERTO RICO, DEFENDANT. U.S. District Court, Eastern Dist. of Virginia, (DC VA) Civil Action Number 3:02CV291, Nov. 6, 2002. Year 1999. Decision for Govt.

1. Refund actions—failure to exhaust administrative remedies—Tax Injunction Act. Taxpayers' action for Puerto Rican tax refund was dismissed for lack of jurisdiction: taxpayers didn't exhaust their administrative remedies directly with Treasury Dept. of Puerto Rico. Also, TIA barred injunctive, declaratory and refund relief for Puerto Rico tax cases brought in federal court. *Reference:* United States Tax Reporter ¶74,225.01(20); 74,336.504(20). IRC §7422.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Richmond Division,

FINAL ORDER

For the reasons stated in the accompanying Memorandum Opinion, the Court GRANTS the motions to dismiss filed by the United States and the Hacienda de Puerto Rico. This matter is DISMISSED for LACK OF SUBJECT MATTER JURISDICTION.

It is so ORDERED.

Plaintiffs are advised that they have the right to appeal the decision of the Court. Should they wish to do so, written notice of appeal must be filed with the Clerk of the Court within sixty (60) days of the date of entry hereof. Failure to file a timely notice of appeal may result in the loss of the right to appeal.

Let the Clerk send a copy of this Final Order and the Memorandum Opinion to all counsel of record and the plaintiffs who are pro se.

DATE NOV 6 2002

/s/

SENIOR UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

[1] This matter is before the Court on the motions to dismiss filed by the United States and the Hacienda de Puerto Rico. The complaint was filed in this matter on May 7, 2002 and was served on the United States Attorney for the Eastern District of Virginia, which filed a motion to dismiss on September 6, 2002. The Department of Treasury of the Commonwealth of Puerto Rico, known as the Departamento de Hacienda de Puerto Rico, filed a motion to dismiss on October 30, 2002. The plaintiffs have not responded to either motion.

Plaintiffs are seeking to recover approximately $700.00 that was paid to the Hacienda de Puerto Rico for the year 1999. Federal district courts have jurisdiction over suits filed against the United States "for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected." Webb v. United States, 66 F.3d 691, 693 [76 AFTR 2d 95-6696] (4th Cir. 1995). However, the

district court's jurisdiction is derived from 28 U.S.C. § 1346(a) and 26 U.S.C. § 7422(a), and there is no jurisdiction until a plaintiff has exhausted his remedy with the agency directly. Further, the Tax Injunction Act bars suits in federal court for injunctive, declaratory or refund relief in state tax cases. 28 U.S.C. § 1341. These restrictions also apply to Puerto Rico tax cases. See Trailer Marine Transport Corp. v. Rivera Vazquez, 977 F.2d 1, 5 (1st Cir. 1992); 48 U.S.C. § 872 ("No suit for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico shall be maintained in the United States District Court for the District of Puerto Rico."); Parker v. Agosto-Alicea, 878 F.2d 557, 559 (1st Cir. 1989). Based on the Parker opinion, it appears that the plaintiffs must seek relief directly from the Departamento de Hacienda de Puerto Rico in Puerto Rico and ultimately in the courts of the Commonwealth of Puerto Rico.

For these reasons, the motions to dismiss for lack of subject matter jurisdiction will be granted and this matter will be dismissed.

An appropriate Order shall issue.

DATE NOV 6 2002

/s/

SENIOR UNITED STATES DISTRICT JUDGE

¶2002-5713

Stuart BECKER, DEBTOR-APPELLANT v. INTERNAL REVENUE SERVICE, APPELLEE. U.S. District Court, Southern Dist. of New York, (DC NY) 02 Civ. 5044 (LAK) (92 B 43957), Nov. 27, 2002. Bankruptcy Court affirmed. Years 1987, 1990. Decision for Govt.

1. Bad debt deductions—debt vs. equity—proof—bankruptcy. Bankruptcy court properly determined that taxpayer's unrepaid advances to his accounting corp. were equity rather than deductible debt: taxpayer's argument that court shouldn't have relied on IRC §385(b) factors in making its equity vs. debt determination absent any promulgation of regs was meritless. Also, taxpayer's challenge to govt.'s expert's testimony was rejected. *Reference:* United States Tax Reporter ¶1665.133(5); 3855.01(5); 68,726.52(50). IRC §166; 385.

2. Assessments—abatements—reinstatements—equity—detrimental reliance—bankruptcy. Bankruptcy court properly upheld IRS's belated reinstatement, after limitations period had expired, of erroneously abated employment tax assessment: taxpayer didn't prove he reasonably relied to his detriment on abatement as incentive to enter subsequent 3d party settlements where he didn't actually enter such settlements until after IRS had filed its proof of claim in bankruptcy and taxpayer had clearly received notice of reinstatements; and taxpayer's other, untimely raised grounds for reliance weren't considered. *Reference:* United States Tax Reporter ¶64,045.01(10); 74,338.513(40); 68,726.52(3). IRC §6404.

Stuart A. Smith *Attorney for Debtor-Appellant*
Nicole Gueron Assistant United States Attorney JAMES B. COMEY UNITED STATES ATTORNEY *Attorneys for Appellee*

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK,

MEMORANDUM OPINION

LEWIS A. KAPLAN, *District Judge.*

Debtor appeals from a decision of the Bankruptcy Court overruling, after trial, his objection to federal income and employment tax claims interposed by the Internal Revenue Service.[1] The appeal presents essentially two issues: whether the court below erred in holding that (1) debtor was not entitled to a business bad debt deduction on his personal income tax return for

[1] The Bankruptcy Court rendered a memorandum decision dated March 18, 2002. Debtor filed a notice of appeal on March 25, 2002. The order overruling the debtor's objection was entered on April 9, 2002. The notice of appeal therefore was premature, and no notice of appeal from the order itself ever was filed. The notice of appeal nevertheless is sufficient to invoke the Court's jurisdiction. *See, e.g., Bucurescu v. 190A Realty Corp.*, 282 B.R. 124, 129 (S.D.N.Y. 2002).

1990 in respect of advances he had made to and payments he had made on guarantees of obligations of his professional corporation because he had failed to establish the existence of a debtor-creditor relationship between himself and the corporate entity, and (2) the IRS was entitled to reinstate an employment tax assessment against the debtor, after the statute of limitations had run, where the assessment initially had been abated in error.

The Bad Debt Deduction

[1] The Bankruptcy Court rejected the claimed bad debt deduction on the grounds that the debtor failed to establish that (a) there was a debtor-creditor relationship between him and his corporation, and (b) the corporation had a valid and enforceable obligation to pay a fixed or determinable sum of money. In doing so, it relied, among other things, on the five factors articulated in 26 U.S.C. § 385(b), as well as others set forth in cases including *Gilbert v. Commissioner*,[2] as pertinent to the determination of whether corporate obligations are debt or equity.[3] In finding that the advances to the corporation were equity rather than debt, the judge below rejected the debtor's contention that he had a reasonable expectation of repayment and found, *inter alia*, that the debtor established no definitive dates or demands for repayment, demanded no interest, and produced no notes or other evidence of indebtedness and that the corporation furnished no security, had a high debt-equity ratio, and lacked the ability to obtain similar advances from other lenders.[4] In concluding that the payments on account of guarantees were not debt, he found that the corporation issued no writings to document indebtedness to the debtor, that repayment depended upon the success of the business, that third party lenders refused to loan to the corporation absent the personal guarantee because of its poor financial condition, that the corporation's initial capitalization was very thin, and that the corporation provided no security.[5]

As debtor concedes,[6] the characterization of corporate obligations as debt or equity is primarily a question of fact.[7] While debtor argues that the evidence should have been weighed differently,[8] he does not contend that any of the Bankruptcy Judge's findings were clearly erroneous. Rather, he argues that the court below erroneously relied upon the opinion of the government's expert[9] and on Section 385(b) of the Internal Revenue Code, 26 U.S.C. 385(b). Neither contention is meritorious.

The first contention is based on the fact that the expert witness, Mr. Rapp, testified that the advances were capital contributions because they were intended to preserve the client base of the corporation which, under Standard Canons of the Accounting Profession, had no proprietary rights in its client base.[10] But this is a distortion and oversimplification of Rapp's testimony, which broadly supported the IRS's position and the findings below for a host of reasons.

The contention regarding Section 385(b) is similarly misguided, distorting both what the court below actually did and the significance of the statute. To be sure, the debtor is correct in arguing that Section 385 of the Code authorized the adoption of regulations to determine whether an interest in a corporation is debt or equity, that Section 385(b) listed five factors which "may" be included in such regulations,[11] and that

2 262 F.2d 512, 514 [3 AFTR 2d 456] (2d Cir.), *cert. denied*, 359 U.S. 1002 (1959).

3 Mem. Dec. 7–8, 11.

4 *Id.* 7–10.

5 *Id.*10–11.

6 Debtor's Mem. 21–22.

7 *Gilbert*, 248 F.2d at 400; *Cohen v. Commissioner*, 148 F.2d 336 [33 AFTR 939] (2d Cir. 1945); Rev. Proc. 99-3, § 4.02(1), 1999-1 IRB 103; 1 BORIS I. BITTKER & JAMES S. EUSTACE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS § 4.02[6] (7th ed. 2002). *But cf. Gilbert*, 248 F.2d [52 AFTR 634] at 408 (Waterman, J., concurring) (mixed question of law and fact).

8 For example, he argues that the significance of the thin capitalization of the corporation is less in a service corporation like this accounting firm than in a business dependent upon hard assets. (*Id.* at 22 n.19, 26) At oral argument, he argued more extensively that some of the factors relied upon below involved actions which, in a close corporation setting, are essentially formalistic.

9 Debtor's Mem. 24.

10 Debtor's Mem. 24.

11 26 U.S.C. § 385(b).

no regulations ever have been adopted.[12] But that is not to say that the factors that Congress in Section 385(b) suggested for consideration, among others, in any regulations are irrelevant to the debt-equity determination simply because no regulations ever were adopted. Indeed, the case law makes crystal clear that the question of whether an interest is debt or equity depends upon its true nature, which must be determined in light of a host of pertinent factors including but not limited to factors that happen also to be listed in Section 385(b).[13] Thus, the fact that Section 385 regulations never were promulgated does not even begin to transform the debtor's sow's ear into a silk purse. For the court below did precisely what it ought to have done - it made findings as to the subsidiary facts pertinent to the classification of the advances and guarantee payments as debt or equity, weighed them all together, and made an ultimate finding that they constituted equity.[14] That the debtor or, for that matter, another judge might have come to a different conclusion based on the same subsidiary facts is neither here nor there. There was no error of fact or law.

The Employment Tax Issue

[2] The debtor concedes that the reinstatement of the employment tax assessment after the expiration of the statute of limitations was effective against the debtor, notwithstanding the running of the statute of limitations, unless the debtor was prejudiced.[15] The court below found, as a factual matter, that he was not.[16] Although the debtor has steered clear of challenging that finding as clearly erroneous, he does contend that he relied to his detriment on the abatement of the assessment and, in consequence, that the employment tax claim should have been dismissed.

In June 1988, the IRS assessed debtor for over $182,000 for employment taxes payable by his corporation for 1987 and a limited prior period. In late 1989, the Service mistakenly abated substantially the entire liability. It reinstated the assessment in 1991. Although there is a dispute, un-resolved by the court below, as to when the debtor learned of the reinstatement, the debtor was aware of the reinstatement no later than November 20, 1992, when the IRS filed its proof of claim in the bankruptcy court.

The debtor's brief in this Court asserts that he was prejudiced by the belated reinstatement because he acted in reliance on the lack of the claimed liability in four respects: he allegedly (1) agreed to make monthly payments totaling about $300,000 to a group of creditors of his former firm pursuant to a November 1988 settlement agreement, this in full satisfaction of obligations of $3 to $4 million; (2) entered into a residential lease for his family at a rental in excess of what he would have undertaken had he known of the assessment; (3) made payments for educational expenses of his children that he was obliged to make pursuant to a settlement agreement with his ex-wife; and (4) agreed to a settlement of litigation with Laventhol & Horvath.[17]

Certain of these contentions are afterthoughts that will not be considered here. In the joint pretrial order below, debtor asserted that he relied to his detriment on the abatement of the assessment only in the respects mentioned in clauses (1) and (4) of the preceding paragraph.[18] There was no mention of the residential lease or the family educational expenses as products of detrimental reliance on the erroneous abatement. While there was very limited

12 The history is set out in 1 BITTKER & EUSTACE, *supra*, ¶ 4.02[8]. *See also* Margaret A. Gibson, *The Intractable Debt/Equity Problem: A New Structure for Analyzing Shareholder Advances*, 81 NW. U. L. REV. 452, 452–54 (1987).

13 See, e.g., Gilbert, 248 F.2d [52 AFTR 634] at 402, 406–07. Indeed, three of the five Section 385(b) factors - the debt-equity ratio, the existence of a written unconditional promise to pay on a fixed date or on demand a sum certain plus a fixed rate of interest, and the relationship between holdings of stock and holdings of the interest in question - are mentioned specifically in *Gilbert*. *Id.* at 402, 406–07. *See also Nassau Lens Co. v. Comm'r*, 308 F.2d 39, 46–47 [10 AFTR 2d 5581] (2d Cir. 1962). A fourth - the existence or absence of subordination to or preference over indebtedness - was mentioned as pertinent in *Nassau Lens*. *Id.* at 47. The fifth Section 385(b) factor, convertibility of the interest into equity, is of obvious relevance.

14 *See generally* Gibson, *supra*, 81 NW. U. L. REV.at 462–65 (describing and criticizing governing judicial approach).

15 Debtor's Mem. 30–31.

16 Mem. Dec. 13.

17 Def. Mem. 14–15.

18 Joint pretrial order, at 8–10.

mention of these points in the debtor's self-serving trial testimony, there is no indication in the record that the judge below regarded these contentions as properly before him notwithstanding their absence from the pretrial order. Accordingly, this Court will not consider them.[19]

Having pruned away the underbrush, the Court turns to the merits of the debtor's remaining claims of detrimental reliance. At the outset, it must be noted that the court below, although it found no prejudice, made no specific findings as to the two remaining claimed incidents.

The first of these claims is patently bogus. The debtor did enter into a settlement agreement with a group of banks in November 1988.[20] But that was not the claimed detrimental reliance. When asked what he did in reliance on the abatement of the assessment, the debtor testified, in relevant part, that he entered into a stipulation of settlement of adversary proceedings brought against him by a group of banks, a stipulation that required him to make quite substantial payments to the banks.[21] On cross-examination, however, the debtor admitted that he settled the adversary proceedings *after* the IRS filing its proof of claim in the bankruptcy.[22] Thus, at the time the debtor entered into the settlement and agreed to make the payments upon which he now relies, he knew that the assessment had been reinstated and that the IRS claimed that he owed the employment taxes at issue. Thus, the trial court's finding that there was no prejudice is not rendered clearly erroneous by the debtor's agreement to this settlement, as it certainly was entitled to find, as a matter of fact, that any reliance on the erroneous abatement in settling this matter after receipt of the November 1992 notice of claim was unreasonable. Indeed, this Court would hold that any such reliance would have been unreasonable as a matter of law.

The claim with respect to the Laventhol & Horvath settlement is equally deficient. While debtor's contentions in the joint pretrial order referred to that settlement, they did not in terms claim that the debtor had entered into that arrangement in reliance on the abatement of the assessment.[23] When the debtor was asked what he did in reliance on the abatement and prior to his learning that the abatement was erroneous, he did not mention it.[24] As debtor's counsel conceded at oral argument, the only evidence of record shows that the Laventhol settlement was approved by the Court below in January 1994, some fourteen months after the filing of the IRS's proof of claim. This alone probably would suffice to defeat any claim of detrimental reliance, even if the settlement had been agreed to prior to the filing of the proof of claim, because the debtor could have sought relief from the stipulation of settlement from the bankruptcy court if the filing of the proof of claim had materially changed his circumstances. But there is no need to rely on this point. The burden of proving detrimental reliance was on the debtor, as his position was analogous to a claim of equitable estoppel.[25] And since he came forward with no evidence that he obligated himself to the Laventhol settlement before the proof of claim was filed, there is no basis for concluding that the finding made below of no prejudice was clearly erroneous.[26] In any case, this Court would hold, as a matter of law, that debtor offered insufficient proof to warrant a conclusion that he reasonably relied to

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19 The debtor's post-trial proposed findings of fact and conclusions of law did raise these matters. PF ¶ 82. But there was no motion to amend the pretrial order or the pleadings to conform to the proof. The court below made no findings on these points, one way or the other, so there is no basis for concluding that it allowed an amendment informally and *sub silentio*.

The pretrial order "controls the subsequent course of the action." FED. R. CIV. P. 16(e). Absent leave of the trial court, the parties are held to the issues there set forth. *See, e.g.*, 6A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1527, at 269–79 (1990). It manifestly would be inappropriate for this Court to entertain the possibility of reversing the court below based on a factual contention that was not made in the pretrial order where leave to expand the contentions at trial neither was sought nor granted.

20 GX OO.

21 Tr., Sept. 13, 1999, at 58–62. (The stipulation of settlement was GX G.)

22 Id. at 68–70.

23 Joint pretrial order at 10.

24 Tr., Sept. 13, 1999, at 52–53

25 *See, e.g., City of New York v. Shalala*, 34 F.3d 1161, 1168 (2d Cir. 1994).

26 Indeed, the debtor's counsel stated at oral argument that he understood (from matters outside the record) that the Laventhol settlement was agreed to in January 1994, which was long after the November 1992 proof of claim.

his detriment on the erroneous abatement in entering into the Laventhol settlement.

Conclusion

The Court has considered all of the debtor's contentions, regardless of whether they are mentioned specifically here. They are without merit. The order which the debtor is deemed to have appealed from is affirmed.

SO ORDERED.

Dated: November 27, 2002

Lewis A. Kaplan

United States District Judge

¶2002-5714

Alfred ABDO, JR., d/b/a American Tax Planning Company, PLAINTIFF-COUNTERCLAIM DEFENDANT v. UNITED STATES INTERNAL REVENUE SERVICE, DEFENDANT-COUNTERCLAIM PLAINTIFF. U.S. District Court, Middle Dist. of North Carolina, (DC NC) CIVIL NO. 1:01CV00098, Nov. 8, 2002. Earlier proceedings at (2001, DC NC) 88 AFTR 2d 2001-5591, 179 F Supp 2d 495; and (2001, DC NC) 88 AFTR 2d 2001-5240, 176 F Supp 2d 495, 2001-2 USTC ¶50591 [88 AFTR 2d 2001-5240]. Decision for Govt.

1. Return preparer penalties—injunctions. Return preparer was permanently enjoined under IRC §7402, IRC §7407 and IRC §7408 from preparing returns asserting erroneous wage/income exclusion for withheld Social Security taxes, guaranteeing refund, misrepresenting himself as CPA, intimidating clients from cooperating with IRS and other related conduct: preparer should have known IRC §3121-based exclusion argument and his other protester type positions were legally frivolous in violation of IRC §6694; his failure to provide IRS requested client lists violated IRC §6695; his programs clearly fell within IRC §6700's proscription against abusive tax shelter organization or promotion; and his conduct was otherwise punishable under IRC §6701. Also, equities favored permanent injunction where preparer subjected his clients to civil and criminal liability, cost govt. great expense, blatantly disregarded law and failed to show serious recognition of his culpability. *Reference:* United States Tax Reporter ¶74,075; 74,085.01(50); 74,025.01(11). IRC § 3121; 6694; 6695; 6700; 6701; 7402; 7407; 7408.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA,

MEMORANDUM OPINION

BULLOCK, District Judge

Plaintiff and Counterclaim Defendant Alfred Abdo, Jr. (''Abdo''), a tax return preparer, filed this action pro se on January 24, 2001, seeking declaratory and injunctive relief on behalf of his clients in order to obtain refunds allegedly owed them from the Internal Revenue Service (''IRS''). The IRS filed a motion to dismiss on March 29, 2001, and an answer and counterclaim on May 15, 2001, seeking to permanently enjoin Abdo under Internal Revenue Code (''I.R.C.'') Sections 7402, 7407, and 7408 from acting as an income tax return preparer and from other related activities. After entering a preliminary injunction against Abdo on May 25, 2001, this court dismissed Abdo's complaint with prejudice on August 27, 2001. The IRS now moves for summary judgment on its counterclaim.

FACTS

Abdo is a tax return preparer and adviser doing business as American Tax Planning Company (''ATP'') in Winston-Salem, North Carolina. Abdo started ATP in 1980 with services including auditing previously filed tax returns and filing amendments if necessary, tax advice, and related tax services.

Abdo has a post-graduate education and is licensed in real estate, securities, and life insurance. Before coming up with his tax programs, Abdo was licensed by the National Association of Securities Dealers (''NASD'') as a securities representative and salesman. Abdo was suspended and

fined $25,000.00 in 1992 by the NASD for violating suitability requirements and guaranteeing repurchase of clients' interests if they were unsatisfied. To date Abdo has not paid the fine and remains suspended.

In an effort to attract more clients, Abdo began to advertise a new program based on "voluntary compliance" in 1997. In short, this program was grounded on Abdo's belief that only those deriving income from an alcohol-, tobacco-, or firearms-related activity ("ATF") were subject to federal income tax. Abdo has backed his belief in this assertion with his own actions: since he has not earned any income from ATF activities, Abdo has not paid federal income tax nor filed a federal income tax return since at least 1990. Abdo also attempted to support his "voluntary compliance" argument by citing Eisner v. Macomber, 252 U.S. 189 [3 AFTR 3020] (1920), a 1920 United States Supreme Court case. Abdo claims that this case stands for the proposition that, since labor is exchanged for wages, taxpayers' wages are not a gain and therefore are not taxable. Abdo has prepared tax returns using this argument for four couples and has convinced at least two other married couples to stop paying their taxes altogether.

In exchange for a monthly fee, Abdo would prepare W-4 forms for each client based on his "voluntary compliance" argument. He further promised to reimburse clients for any IRS-related expenses having to do with their returns, up to $10,000.00. Clients were then instructed to choose a voluntary amount to give to the Government, and not surprisingly this amount would be zero. It was based on this information that Abdo would then submit the W-4 forms to the client's employer with up to fifteen exemptions listed. When the employers accepted these forms, Abdo's clients would no longer have taxes withheld and would stop paying taxes.

Abdo had hopes of attracting numerous tax clients to this program through client referrals. Through this program Abdo hoped to attract the "masses" and let them "keep 100% of their earnings." (United States Mot. Summ. J., Ex. C, Jackson Dep. Ex. 16.) When the "voluntary compliance" program failed to catch on, Abdo created a new program: the "Tax Return Audit Challenge Program."

Abdo based this program on I.R.C. Sec. 3121 and offered a version of a money-back guarantee. Under this program Abdo guaranteed $200.00 to any taxpayer whose income tax return is audited by ATP and no refund is identified. Abdo would charge an initial fee and fifty per cent (50%) of any refund received from the IRS or any state. For each amended return prepared by Abdo, the relevant section of the I.R.C. or court decision was cited. Generally, Abdo based the returns under this program on his Section 3121 argument (discussed at greater length infra) that Social Security wages withheld are not taxable income.

Although Abdo primarily asserted the Section 3121 argument under this program, he also continued to assert his "voluntary compliance" position. New clients were asked to sign a number of forms initially, including a power of attorney, non-disclosure, and "Voluntary Compliance Declaration." Abdo even promoted a new referral based system for select clients in which clients would receive fees for all direct and indirect (secondary) referrals.

Abdo filed more than 168 amended federal income tax returns based on this Section 3121 argument.[1] Initially, some clients enrolled in the "Tax Return Audit Challenge" did receive tax refunds after submissions to the IRS.[2] This was short-lived, however, as the IRS soon began denying returns submitted by ATP and Abdo which cited I.R.C. Sec. 3121 exclusions. The IRS then began sending frivolous-filing letters to Abdo's clients. These letters stated that the taxpayer had filed a frivolous return and would be assessed a penalty of $500.00 unless the return was immediately withdrawn.

[1] These returns were filed by or on behalf of seventy different taxpayers. The total amount claimed on these 168 returns is $242,296.00. (Evid. Mat. Support United States Mot. T.R.O., Ex. D, Gunnell Decl. ¶ 4.)

[2] The IRS issued refunds in eleven (11) of those amended returns.

In the face of these letters and warnings from the IRS, Abdo continued to assert his program and his arguments. After the IRS notified Abdo's clients they would avoid penalties by withdrawing their returns, Abdo sent his clients e-mail messages describing these warnings and offers from the IRS as lies and "intimidation tech-niques." (United States Mot. Summ. J., Ex. D, Rose Dep. Ex. 16.) He also warned his clients that if they withdrew their re-turns they would be in breach of contract with ATP. Abdo even scolded one client who had stopped paying taxes based on Abdo's advice for being concerned with his non-payment and non-filing activities.

After the IRS began investigating Abdo, it sent him a letter asking Abdo to produce a list of his clients, which he is required by law to keep and produce on request. He failed to comply. When Abdo met with the investigators in January 2001, he was asked once again to provide the list for in-spection by the IRS and once again he re-fused. Although Abdo cites computer problems as the reason for the non-compli-ance, he has not produced any evidence to support this claim.

Instead of complying with the request, Abdo initiated this lawsuit against the IRS seeking refunds on behalf of his clients. The Government counterclaimed. On May 25, 2001, this court entered a preliminary injunction on behalf of the IRS enjoining Abdo. The injunction prohibited Abdo from (1) preparing or filing individual tax returns that contained a deduction, exemp-tion, or exclusion from wages or gross in-come any Social Security taxes withheld or paid; (2)guaranteeing the payment of any tax refund or the allowance of any tax credit; (3) falsely claiming or representing himself as a certified public accountant; (4) threatening to sue or otherwise intimidating his clients if they cooperated with the United States; and (5) disseminating mater-ials or making statements that have the tendency to make the public believe any of Abdo's tax-related arguments based on voluntary compliance, ATF, or Section 3121. Furthermore, the court ordered Abdo to produce his client list for immediate in-spection by the IRS. On August 27, 2001, this court dismissed Abdo's suit against the IRS with prejudice.

Although Abdo complied with the order to produce the client list, he continued to assert his Section 3121 argument. In Octo-ber 2001, Abdo sent a hearing-request let-ter on behalf of a client to the IRS--four months after agreeing to the preliminary injunction--in which he asserted his Sec-tion 3121 argument. Furthermore, in his deposition, Abdo remained steadfast in his belief that his Section 3121 argument is valid and legal and that he disagreed with this court's position. Although he has con-ceded that others who have used similar arguments are in jail for failing to pay their taxes or file returns, Abdo testified that he presumed the judges misunderstood the law or that the defendants did not raise the right arguments.

The Government brought this motion for summary judgment on its counterclaims to enjoin Abdo under I.R.C. Secs. 7402(a), 7407 and 7408. The Government is seek-ing a permanent injunction against Abdo under these sections barring him from pre-paring tax returns or other tax documents, advising clients on tax matters, and pro-moting abusive tax schemes.

DISCUSSION

Summary judgment must be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the bur-den of persuasion on the relevant issues. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party may survive a motion for summary judgment by producing "evidence from which a [fact finder] might return a verdict in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). When the mo-tion is supported by affidavits, the non-moving party must set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(e); see also Cray Communications, Inc. v. Novatel Computer Sys., Inc., 33 F.3d 390, 393–94 (4th Cir. 1994) (moving party on summary judgment motion can simply argue the ab-

sence of evidence by which the non-movant can prove her case). In considering the evidence, all reasonable inferences are to be drawn in favor of the non-moving party. Anderson, 477 U.S. at 255. However, ''[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the [fact finder] could reasonably find for the plaintiff.'' Id. at 252.

I. Violations of Sections 7407 and 7408

The United States avers in its counterclaim that Abdo violated I.R.C. Secs. 7407 and 7408. Both sections authorize a court to issue an injunction if the defendant is found to have violated certain sections of the I.R.C. or engaged in certain behavior and the injunction is appropriate to prevent further conduct. I.R.C. Sec. 7407(a) authorizes the United States to seek to enjoin a tax-return preparer from further engaging in conduct described in Section 7407(b). Section 7407(b) in turn authorizes injunctions against tax return preparers who, among other things, (1) engage in any conduct subject to penalty under Section 6694 or Section 6695; (2) misrepresent their eligibility to practice before the I.R.S.; (3) guarantee the payment of any tax refund; or (4) engage in any other fraudulent or deceptive conduct that substantially interferes with the proper administration of the Internal Revenue laws. I.R.C. § 7407(b).

The United States also avers that Abdo violated I.R.C. Sec. 7408, which provides that the United States may commence an action in a district court to enjoin any person from engaging in conduct subject to penalty under Sections 6700 or 6701 of the I.R.C. I.R.C. Sec. 7408(a). The court may grant such relief if it finds ''(1) that the person has engaged in any conduct subject to penalty under section 6700 . . . or section 6701 . . . , and (2) that injunctive relief is appropriate to prevent recurrence of such conduct.'' I.R.C. Sec. 7408(b).

A. Section 6694(a); Frivolous Positions by Tax Return Preparer

[1] I.R.C. Sec. 6694(a) subjects a tax return preparer to penalty for knowingly asserting frivolous positions that do not have a realistic possibility for being sustained on the merits. Under this statute, the United States has to prove that (1) there was an unrealistic position taken in respect to any return or claim for refund; (2) defendant knew or reasonably should have known about this position; and (3) such position was frivolous. As is shown below, Abdo has asserted numerous positions on behalf of his tax preparation clients which he knew or reasonably should have known were unrealistic and frivolous.

First, Abdo has taken numerous unrealistic positions in respect to his clients' tax returns and claims of refund. Abdo filed over 168 amended federal income tax returns asserting an argument that I.R.C. Sec. 3121 exempts from the definition of ''wages'' (and therefore from ''gross income'' for federal income tax purposes) all Social Security taxes that are withheld from wages. First, I.R.C. Sec. 275(a)(1)(A) plainly prohibits the deduction of withheld Social Security tax from gross wages,[3] and courts have consistently upheld this statute. See, e.g., Zwiener v. Commissioner, 743 F.2d 273, 276 [54 AFTR 2d 84-6079] (5th Cir. 1984) (finding 'no merit' in argument that Social Security and FICA taxes were exempt under Section 3121's definition of 'wages'); Sickler v. Commissioner, 1994 WL 510454 (Tax Ct. Sept. 19, 1994), 68 T.C.M. (CCH) 727 [1994 RIA TC Memo ¶94,462] (1994). In fact, this court has had occasion to deal with this argument once before. In Sickler v. United States, the defendant alleged both that the income tax is unconstitutional because it was a direct tax and that he was not required to pay taxes on Social Security wages. 1992 WL 208172 at 1, 70 A.F.T.R.2d 92-5377 [70 AFTR 2d 92-5377] (RIA) (M.D.N.C. July 1, 1992),

3 ''(a) General rule. - No deduction shall be allowed for the following taxes:

(1) Federal income taxes, including-

(A) the tax imposed by section 3101 (relating to the tax on employees under the Federal Insurance Contributions Act FICA]).'

I.R.C. Sec. 275. Similarly, I.R.C. Sec. 3502 provides '[t]he taxes imposed by section 3103 of chapter 21 . . . shall not be allowed as a deduction to the taxpayer in computing taxable income under subtitle A.' I.R.C. Sec. 3502.

aff'd, 989 F.2d 494 (4th Cir. 1993). This court found that both arguments were without merit, 'legally unsound' and 'patently absurd' and granted the Government's motion for summary judgment. Id. Second, Abdo's position is fundamentally flawed because the definition of 'wages' in Section 3121 upon which Abdo relies for his support applies only to liability for employment tax, not for federal income tax. Moreover, the statute that defines 'gross income' for purposes of calculating federal taxable income, I.R.C. Sec. 61(a), does not even use the term 'wages,' and instead uses the term 'compensation for services.'[4]

Abdo has also asserted arguments based on Eisner v. Macomber on behalf of his clients. Abdo's argument is not new nor is it correct. This argument is based on the Supreme Court's holding in Eisner that the term ''income'' was defined as '''the gain derived from capital, from labor, or from both combined''' and did not include ''gain accruing to capital.'' Eisner v. Macomber, 252 U.S. 189, 207 [3 AFTR 3020] (1920) (citations omitted). Since labor is exchanged for wages, the argument goes, taxpayers' wages are not ''gain'' and, therefore, are not taxable. On multiple occasions, Abdo cited this argument and reduced taxpayers' income to zero. Not only does he misstate the holding of this case,[5] but taxpayers who have tried to defend themselves with this argument have been convicted of tax evasion.[6]

Abdo has also continuously asserted to his clients and potential clients that paying federal income tax is voluntary. Through his website, radio appearances, and e-mails, Abdo assured people that compliance with the federal income tax system was voluntary. Not surprisingly this position led to clients choosing to give zero per cent as a ''voluntary contribution'' to the Government. This ''voluntary compliance'' argument is similar to the Eisner v. Macomber argument and equally absurd.

Second, Abdo knew or reasonably should have known the unrealistic nature of these positions. Abdo is a well-educated man and holds himself out as an expert in tax matters. Furthermore, he has over twenty-eight years of experience. With this education and experience, Abdo was or certainly should have been aware of the volume of cases in the United States rejecting his positions. Just because Abdo does not personally agree with these decisions, including the earlier decision of this court, does not give him the right to violate the law by asserting unrealistic and frivolous positions on behalf of unknowledgeable clients. As this court has stated previously, ''[t]axpayers are not entitled to create deductions of amounts reflecting their contribution to Government spending with which they do not agree.'' Sickler, 992 WL 208172, at 1; see also Dalton v. United States, 800 F.2d 1316, 1319–20 [58 AFTR 2d 86-5775] (4th Cir. 1986).

Lastly, Abdo's positions are frivolous. '''[T]he test for frivolousness is an objective one, under which we must evaluate [Abdo's] position in terms of its legal underpinnings.''' Sickler, 1992 WL 208172, at 1 (quoting McKee v. United States, 781 F.2d 1043, 1047 [57 AFTR 2d 86-646] (4th Cir. 1986)). Abdo claims that the United States has mischaracterized his legal arguments and that his real arguments are not frivolous. The court disagrees. Abdo has intentionally used unrealistic positions based on inaccurate and outdated legal interpretations in order to claim tax refunds from the United States Govern-

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4 '(a) General definition.-Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items: (1) Compensation for services . . . .' I.R.C. Sec. 61 (emphasis added).

5 In United States v. Connor, the defendant asserted the same argument about Eisner v. Macomber as Abdo. 898 F.2d 942, 943 [66 AFTR 2d 90-5713] (3d Cir. 1990). In response, the Third Circuit corrected this misinterpretation of precedent in holding in favor of the United States:

> Connor purports to find authority for his argument in Eisner v. Macomber, . . . a case patently inapposite because it held merely that a stock dividend made to shareholders in their proportionate interests against profits accumulated by the corporation was not income. As the Supreme Court later explained in Commissioner v. Glenshaw Glass Co., . . . the Eisner Court held that the distribution of a corporate stock dividend changed only the form of the taxpayer's capital investment and that because the taxpayer received nothing out of the company's assets for his separate use and benefit, the distribution was not a taxable event. Glenshaw reiterated that Congress intended to use the full measure of its taxing power in creating the income tax.

Id. (citations omitted).

6 See Bachner v. Commissioner, 81 F.3d 1274 [77 AFTR 2d 96-1883] (3d Cir. 1996); Connor, 898 F.2d at 942 [66 AFTR 2d 90-5713].

ment. Because Abdo's arguments are without legal support, they are frivolous.

B. Section 6695: Failure to Supply Client List

I.R.C. Sec. 6695 penalizes a tax return preparer for failing to comply with I.R.C. Sec. 6107(b). I.R.C. Sec. 6107(b) requires tax return preparers to maintain a client list for the preceding three years and to allow the Government to inspect the list upon request. The IRS asked Abdo twice to produce his client list but to no avail. Although Abdo contends that he could not produce the list due to computer problems, he offers no support for this other than his self-serving statement in his affidavit. In fact, Abdo did not provide the requested client list until this court ordered him to do so five months after the initial request.

C. Misrepresentation of Eligibility to Practice

I.R.C. Sec. 7407(b)(1)(B) authorizes injunctions against tax return preparers who misrepresent their eligibility to practice before the IRS. The United States offers evidence that Abdo, although not a certified public accountant (''CPA''), signed a power of attorney form and submitted it to the IRS identifying himself as a North Carolina CPA with registration number ''17752.'' This registration number belongs to Clara Jean Pinkney, a CPA who has worked with Abdo.

Abdo does not deny that he signed his name to a power of attorney form. He asserts, however, that it was simply a mistake and not done with intent to deceive. Abdo also states that the CPA designation was not required for representation before the IRS. As a result, Abdo concludes that the explanation of the ''oversight'' was ''reasonable'' and further states that the United States has failed to show a pattern of this behavior. (Countercl. Def.'s Mem. Opp'n United States Mot. Summ. J. at 13.)

Although the United States has a plausible argument, especially in light of Abdo's other conduct, at this stage of the proceedings all reasonable inferences must be in favor of the non-movant. Therefore, the court will not base any injunctive relief on the ground that Abdo misrepresented his eligibility to practice before the IRS.

D. Guarantee of Tax Refund

I.R.C. Sec. 7407(b)(1)(C) authorizes injunctions against tax return preparers who guarantee the payment of any tax refund. Under Abdo's ''Tax Return Audit Challenge Program,'' if a refund could not be identified ''the client gets $200.00 for her troubles.'' (Countercl. Def.'s Mem. Opp'n United States Mot. Summ. J. at 8.) Although Abdo claims that ''the only guarantee was a guarantee of $200.00 . . . not a tax refund,'' the court finds otherwise. (Id.) Abdo is not simply guaranteeing $200.00. By making a statement like the one found in Abdo's program, Abdo is communicating to perspective clients that he guarantees results. As no reasonable person would expect a tax return preparer to voluntarily part with their money for free, the obvious implication drawn from Abdo's statement is that he is guaranteeing a tax refund.

E. Section 6700: Abusive Tax Shelters

Section 6700 imposes a penalty on any person who organizes any shelter, plan, or arrangement and makes or furnishes or causes another person to make or furnish a statement regarding the excludability of income that the person knows or has reason to know is false or fraudulent as to any material matter. To establish that Abdo engaged in conduct subject to penalty under Section 6700, the United States must prove: (1) that Abdo has organized or sold (or assisted in the organization of) an entity, plan, or arrangement; (2) that he made or furnished statements concerning tax benefits to be derived from the entity, plan, or arrangement; (3) that he knew or had reason to know the statements were false or fraudulent; and (4) that the false or fraudulent statements pertained to a material matter. See United States v. Campbell, 897 F.2d 1317, 1320 [65 AFTR 2d 90-1003] (5th Cir. 1990); United States v. Kaun, 827 F.2d 1144, 1149 [60 AFTR 2d 87-5623] (7th Cir. 1987) (''Under Section 6700, the government must prove that the defendant was involved in an 'abusive tax

shelter': that is, any entity whose principal purpose is the avoidance or evasion of federal income tax.'').

Abdo argues that his ''Tax Return Audit Challenge program'' is not a plan, arrangement, or entity. Instead, Abdo asserts that customers are simply asked to ''send in their tax returns for an evaluation which will net them $200.00 from Abdo if he could not identify a refund owed them.'' (Countercl. Def.'s Mem. Opp'n United States Mot. Summ. J. at 8.) Additionally, Abdo claims that this program was not a promotion or arrangement but was a ''marketing concept designed to attract clients.'' (Id.)

Abdo's argument, however, ''ignores the plain (and sweeping) language of the statute, which applies to '(ii) any investment plan or arrangement, or (iii) any other plan or arrangement.''' United States v. Savoie, 594 F. Supp. 678, 680 [55 AFTR 2d 85-1228] (D. La. 1984). Furthermore, the Senate Finance Committee's Report concerning the statute confirms that Congress designed Section 6700 as a ''penalty provision specifically directed towards promoters of abusive tax shelters and other abusive tax avoidance schemes.'' S. Rep. No. 97-494, 97th Cong., 2d Sess. 266, reprinted in 1982 U.S.C.C.A.N. 781, 1014 (emphasis added).

Abdo ''organized'' at least two tax-avoidance plans or arrangements within the meaning of Section 6700. Through these plans, Abdo made numerous ''false'' or ''fraudulent'' statements concerning tax benefits. Abdo first organized and promoted a ''voluntary compliance'' plan on his website and on the radio to attract clients. Under this system, Abdo promoted the concept that only certain narrowly defined types of wages were taxable.[7] If a client did not earn wages under any of these three ATF categories (which most, if not all, would not), then the client would be told that his wages could be deducted. Then the client would determine his share of voluntary compliance. Generally, this would be zero. Based on this decision, Abdo would then prepare W-4 forms with up to fifteen exemptions listed and the client would then sign and file them with their employer. Once the employers accepted the forms, the employees would no longer have any taxes withheld and would stop paying taxes. Furthermore, Abdo was entitled to a contingency fee of fifty per cent of any tax refund amount received by the client. Abdo prepared tax returns based on this concept (that wages and other income are not taxable and citing Eisner) for at least four couples.

After this initial program, Abdo created and organized a new program called American Tax Planning Company ''Tax Return Audit Challenge Program.'' This plan was based upon Abdo's Section 3121 argument that the term ''wages'' is misdefined by the IRS and actually excludes certain items, such as Social Security withholding. Under this program, Abdo would look at a person's prior tax returns and determine if there were any ''errors'' which would lead to a tax refund. If he did not find any errors, Abdo guaranteed them payment of $200.00 (and possibly up to $500.00). If errors were found that would lead to a refund,[8] however, Abdo would re-file or amend the return and would be entitled to a fifty per cent contingency fee of any refund. Abdo also promised incentive payments in which initial clients would receive fees for all direct and indirect (secondary) referrals. At least two of Abdo's clients were recruited for this pro-gram.

Not only were Abdo's statements false and fraudulent, but Abdo knew that they were. Abdo alleges he possesses education,

[7] Abdo's argument was that unless you were involved in an ''excise taxable revenue event or activity'' such as alcohol-, tobacco-, or firearm-related activities, you were not subject to income tax. (Countercl. Def.'s Mem. Opp'n United States Mot. Summ. J., Ex. C, at 43 l. 14 through 51 l. 19.) When asked during his deposition about a former client's tax return and whether his income was a ''revenue'' or ''basically a taxable activity,'' Abdo's response was,

> I don't believe so. I don't believe he's manufacturing tobacco; I don't believe he's distilling alcohol; I don't believe he's manufacturing firearms. I don't believe that what he does for his employer--and if memory serves me correct, he indicated he was a computer programmer, something of that sort. That activity, computer programming, is not the activity that I've come to understand, under Subtitle D or Subtitle E of the Internal Revenue Code, as being the excise tax revenue activity.

(Id. at 44, 11. 8–20.)

[8] This, of course, would be the expected result based on Abdo's untenable position under Section 3121.

experience, and knowledge, and that he is an expert in tax matters. Furthermore, Abdo is familiar with the I.R.C., its accompanying regulations, and the federal case law construing them. Accordingly, the court presumes that he is also aware that his ''voluntary compliance,'' ATF and Section 3121 arguments are without any legal support. In fact, Abdo has already testified that he was ''not aware'' of any other tax return preparer or tax professional in the United States who interpreted Section 3121 the way he does. (United States Mot. Summ. J., Ex. A, Abdo Dep. at 213, 11. 9–14.) Furthermore, Abdo is presumably aware that these arguments are simply variations of the same tired tax protester ''wages are not income'' argument that has long been deemed frivolous. Indeed, this argument has been rejected as many times as it has been asserted. See, e.g., United States v. Connor, 898 F.2d 942, 944 [66 AFTR 2d 90-5713] (3d Cir. 1990) (''We take this opportunity to reiterate that wages are income within the meaning of the Sixteenth Amendment .... We will view arguments to the contrary as frivolous, which may subject the party asserting them to appropriate sanctions,''); Connor v. Commissioner, 770 F.2d 17, 20 [56 AFTR 2d 85-5647] (2d Cir. 1985) (''Wages are income. The argument that they are not has been rejected so frequently that the very raising of it justifies the imposition of sanctions.'' (citation omitted)); Peth v. Breitzmann, 611 F. Supp. 50, 53 [55 AFTR 2d 85-1280] (E.D. Wis. 1985) (''No court has ever accepted [the 'wages are not income'] argument for the purpose of determining taxable income. Indeed, it has always been rejected. For once and for all, wages are taxable income.'' (citations omitted)).

Lastly, the above-described false statements found in Abdo's programs concern ''material matter.'' A matter is considered material ''if it would have a substantial impact on the decision-making process of a reasonably prudent investor.'' S. Rep. No. 97-494, 97th Cong. 2d Sess. at 267 (1982 U.S.C.C.A.N. 781, 1015). The false representations contained in Abdo's programs are ''material'' because ''[t]he taxpayers who have been or are now being audited by the IRS or are involved in litigation because they relied upon [Abdo's] representations should certainly have been informed about their complete lack of merit.'' United States v. White, 769 F.2d 511, 515 [56 AFTR 2d 85-6430] (8th Cir. 1985). In other words, those clients who participated in Abdo's program and filed W-4 forms with their employers which falsely claimed that they were exempt from the requirements to withhold federal income taxes should certainly have been told that the arguments and ideas behind the program were baseless and were bound to cause them to be subjected to penalties.

F. Section 6701: Understatement of Tax Liability

I.R.C. Sec. 6701(a) imposes a penalty on any person who (1) ''aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document,'' (2) ''knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws,'' and (3) ''knows that such portion (if so used) would result in an understatement of the liability for tax of another person.'' I.R.C. Sec. 6701. There is no dispute that Abdo is responsible for filling out and filing tax returns on behalf of over 200 clients. In many of these cases Abdo asserted positions that are legally unfounded and frivolous. Abdo is an educated man and a self-proclaimed tax expert who has been in the practice of tax advising, consulting, and preparation since 1980. With this education and expertise, however, comes responsibility. The law attributes to Abdo ''a basic knowledge of the law such that [he] should reasonably be aware that [his] personal belief that paying taxes is a voluntary activity does not represent the current state of the law.'' United States v. Raymond, 228 F.3d 804, 812 [86 AFTR 2d 2000-6196] (7th Cir. 2000). The same may be said about Abdo's Section 3121 argument. When Abdo asserted these positions in his clients' tax returns, he knew or had reason to

believe that these positions were contrary to the law.

The Eighth Circuit dealt with a similar issue in v. United States, 924 F.2d 785 [67 AFTR 2d 91-494] (8th Cir. 1991). In that case the court enjoined Mattingly, a tax return preparer, under Section 7601, noting that the IRS warned him in numerous communications about his frivolous arguments. Id. at 792. Like Mattingly, Abdo was warned numerous times about his frivolous filings. Not only did the IRS reject Abdo's arguments and tax returns, but it sent numerous letters to Abdo's clients warning them that they could be subject to frivolous filing penalties. In fact, Abdo even told one client that he expected the IRS to reject his Section 3121 argument. As a result, Abdo violated I.R.C. Sec. 6701.

II. Appropriateness of Injunctive Relief

Because Abdo has engaged in the prohibited conduct specified in I.R.C. Sec. 7407 and 7408, the court must now determine whether injunctive relief is appropriate to prevent the recurrence of such conduct. An injunction may issue without resort to the traditional equitable prerequisites[9] if a statute expressly authorizes the injunction. See Time Warner Entm't/Advanced--NewHouse P'ship v. Worldwide Elecs., L.C., 50 F. Supp. 2d 1288, 1302 (S.D. Fla. 1999); see also Burlington N.R.R. Co. v. Department of Revenue, 934 F.2d 1064, 1074–75 (9th Cir. 1991); Duke v. Uniroyal, Inc., 777 F. Supp. 428, 432–33 (E.D.N.C. 1991). Because both Section 7407 and 7408 authorize injunctions, injunctive relief under these sections does not have to be established by resort to traditional equitable factors. Instead, courts rely on the factors identified in each individual section. See United States v. Ernst & Whinney, 735 F.2d 1296, 1303 [54 AFTR 2d 84-5472] (llth Cir. 1984) (discussing injunction requirements under Section 7407); White, 769 F.2d at 515 (holding that Section 7408 sets forth the standards for injunctive relief).

A. Weighing of Factors

To determine whether an injunction is appropriate under these sections, courts "assess the totality of the circumstances surrounding Abdo and his violation, including such factors as": (1) "the gravity of harm caused by the offense;" (2) "the extent of the defendant's participation and his degree of scienter;" (3) "the isolated or recurrent nature of the infraction and the likelihood that the defendant's customary business activities might again involve him in such transactions;" (4) "the defendant's recognition of his own culpability;" and (5) "the sincerity of his assurances against future violations." Kaun, 827 F.2d at 1149–50.

1. The gravity of harm

Abdo's activities have harmed his clients substantially, both financially and psychologically. Numerous tax returns will have to be audited and some of Abdo's clients have already been assessed civil penalties under I.R.C. Sec. 6702 ("frivolous-return penalty"). A few of Abdo's clients are even facing possible criminal liability. But the damage is not only to clients'R pocketbooks. At least one client stated that Abdo's representation had made her life "miserable." (Delores Turner Dep. at 25, 11. 8–11.) All of this could have been avoided if Abdo had only prepared the returns honestly and accurately.

Abdo has harmed not only his clients but the Government and general public as well. As one court has stated in a similar tax-avoidance case under Sec. 7407, "Defendant[] repeatedly engaged in conduct prohibited by statute, all to the detriment of the United States government and the taxpaying public. The large number of returns the defendant[] prepared over several years which understate [his] clients' tax liabilities demonstrates the gravity of the harm [he] caused." United States v. Bailey, 789 F. Supp. 788, 816 [69 AFTR 2d 92-1237] (N.D. Tex. 1992). Abdo has filed over 200 tax returns alleging his Section 3121 position, his "voluntary compliance"

[9] I.e., balancing of harms, likelihood of success on the merits, and public interest. See llA Charles Alan Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice and Procedure Civ. 2d § 2949 (2d ed. 1995). However, application of these factors in the present case would clearly support injunctive relief, as the court found in entering its preliminary injunction on May 25, 2001.

position, or his Eisner v. Macomber position. It is estimated that Abdo's conduct has created at least $243,000.00 in understated tax. The IRS has already spent valuable time on Abdo and his clients' frivolous tax returns. Because the IRS's computer system does not currently track amended return preparers, the IRS has had to manually detect many of Abdo's frivolous returns. This has required the IRS to appoint a person to deal strictly with returns submitted by Abdo. (Evid. Material Supp. U.S. Mot. T.R.O., Ex. D, Gonnell Decl., ¶ 4.)

2. Extent of Abdo's participation and degree of scienter

There is little doubt as to Abdo's participation here. Abdo created and produced these programs based on his own erroneous interpretations of the law. Abdo is a knowledgeable and educated man who has much experience in the area of tax preparation. He used this knowledge and experience to fabricate, recreate, and splice together frivolous and unrealistic arguments based on outdated holdings of cases and tax law. Moreover, Abdo deliberately and repeatedly engaged in this conduct in order to profit from his tax auditing programs. Despite Abdo's protestations that no evidence has been produced proving his knowledge that these activities were frivolous, unrealistic, and abusive tax shelters, his motives are easily discernible. ''By building a reputation for drastically reducing tax liability or securing refunds when other tax preparers or even certified public accountants could not, [Abdo hoped to build] a large and prosperous tax-preparer business.'' Bailey, 789 F. Supp. at 817. Abdo hoped to build ''Winston-Salem's next Piedmont Airlines'' on the back of his frivolous and unrealistic tax-avoidance schemes. (United States Mot. Summ. J., Ex. A, Abdo Dep. at 11, 11, 3–4.) Although these programs were clearly designed to make Abdo money, they were also tax-avoidance schemes that Abdo knew were erroneous and illegal.

3. Isolated or recurrent nature of infraction and likelihood of future ones

Abdo's activities were not isolated, but were part of a money-making program designed to gain clients through a referral plan. Abdo prepared over 200 tax returns based on his frivolous positions. Abdo has shown no evidence of altering his unlawful behavior. Despite the imposition of a preliminary injunction by this court, Abdo has continued to assert his frivolous and un-realistic positions. In October 2001, five months after the injunction was issued, Abdo prepared and sent a hearing request letter on behalf of a client to the IRS in which he asserted his Section 3121 position. In his deposition, Abdo remained adamant that his tax positions are legally sound and valid. Furthermore, Abdo, a tax preparer, has yet to file any personal income tax return since at least the 1990 tax year. Abdo's recurrent violations and steadfast beliefs will likely cause substantial harm to the United States Government and the taxpaying public in the future without judicial relief.

4. Abdo's recognition of culpability

As stated above, Abdo continues to steadfastly deny any culpability or wrongdoing. He has stoutly defended his positions (except for his Eisner v. Macomber position which Abdo has ''abandoned . . . after further research.'' (Countercl. Def.'s Mem. Opp'n United States Mot. Summ. J. at 11.)) and refuses to accept any positions to the contrary. As a tax preparer and adviser, Abdo's blatant disregard for the law and adamant defense of frivolous positions in the face of overwhelming evidence clearly interfere with the proper administration of the Internal Revenue laws.

5. Sincerity of assurances against future violations

Because Abdo has yet to acknowledge any violation, any assurance that he would not engage in future violations would be difficult to believe. As Abdo has shown on at least one occasion,[10] he has little re-

[10] Abdo was sanctioned for unethical and inappropriate behavior by the NASD in 1992. AS a result, he was suspended and required to pay $25,000.00. Abdo never paid the fine and remains suspended.

spect for legal process and is unwilling to take responsibility for his actions.

Viewing the totality of Abdo's conduct and violations under these five factors, it is apparent that nothing short of a full injunction will stop his unlawful behavior.

B. Type of Injunction

The court must make another decision, however; namely, whether to simply enjoin Abdo from further engaging in such conduct or to enjoin him from acting as an income tax preparer permanently. Under I.R.C. Sec. 7407(b) (2), if a court finds that the income tax return preparer continually or repeatedly engaged in the conduct prohibited by these sections, and that an injunction prohibiting such conduct would not be sufficient to prevent such person's interference with the proper administration of the law, then it may impose a lifetime ban. Furthermore, I.R.C. Sec. 7402 pro-vides additional authority for permanently enjoining Abdo. It authorizes injunctions "as may be necessary or appropriate for the enforcement of the internal revenue laws." I.R.C. Sec. 7402(a).

In United States v. Bailey, the defendants prepared fraudulent income tax returns using a deceptive and indiscernible tax scheme. 789 F. Supp. at 788 [69 AFTR 2d 92-1237]. After reviewing the totality of the evidence and finding that the defendants engaged in conduct subject to civil and criminal penalties, the court issued a lifetime return preparation ban. Id. In United States v. Nordbrock, the court issued a lifetime return preparation ban because the defendant refused to turn over requested tax returns and client lists to the IRS for over three years. 38 F.3d 440, 447 [74 AFTR 2d 94-6624] (9th Cir. 1994).

Like the defendants in the aforementioned cases, Abdo's conduct is deserving of more than a simple injunction on prohibited conduct. He has continually asserted frivolous and unrealistic positions on numerous tax returns prepared on behalf of clients. He refused to turn over a client list to the IRS for months until ordered by this court to do so. He guaranteed tax refunds to his potential clients through his "Tax Return Audit Challenge Program." He created and administered an abusive tax shelter which resulted in the understatement of hundreds of thousands of dollars on behalf of clients. He has intentionally refused to file his own income tax return or pay taxes for at least twelve years based on his ATF argument. He has caused substantial financial harm to his clients, the United States, and the taxpaying public. Finally, he shows no signs of remorse or culpability and refuses to acknowledge any wrongdoing. As a result, the court will broadly apply both Sections 7407 and 7402(a).

III. First Amendment Concerns

Lastly, Abdo claims that a permanent injunction in this case would violate his First Amendment right to free speech. Although the First Amendment does protect many forms of expression, including the right to disagree with the law, it does not protect speech which is directed toward producing imminent lawless action or which proposes illegal activity or transactions. See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982); Brandenburg v. Ohio, 395 U.S. 444 (1969). Although Abdo is free to advocate change or talk about reforming the current tax law, he is not free to break the law or to instruct others to do so.

Furthermore, the speech at issue is mostly of a commercial nature. Under each of his tax plans, Abdo charged monthly and contingency fees in exchange for his service of providing false and fraudulent tax advice, tax returns, or W-4 forms. Although commercial speech is protected by the First Amendment, false or misleading commercial speech is not. See Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748 (1976); see also In re R.M.J., 455 U.S. 191 (1982) (holding that advertising may be totally prohibited when the content or method suggests that it is inherently misleading). As the Supreme Court has held, "[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake .... The First Amendment ... does not prohibit the State from ensuring that the stream of commercial information flow[s] cleanly as

well as freely.'' Virginia Pharmacy Bd., 425 U.S. at 771–72.

Finally, many other courts have ordered permanent injunctions against tax return preparers for violations similar to those of Abdo despite any First Amendment concerns. See, e.g., Kaun, 827 F.2d at 1144 [60 AFTR 2d 87-5623]; Campbell, 897 F.2d at 1317 [65 AFTR 2d 90-1003]; Nordbrock, 38 F.3d at 440 [74 AFTR 2d 94-6624]; Savoie, 594 F. Supp. at 678 [55 AFTR 2d 85-1228]; United States v. Shugarman, 596 F. Supp. 186 [54 AFTR 2d 84-6327] (E.D. Va. 1984). Accordingly, the court finds no violation of Abdo's First Amendment rights in permanently en-joining him from acting as a tax preparer.

CONCLUSION

The court will grant the Internal Revenue Service's motion for summary judgment. The court will also issue an injunction permanently barring Abdo from acting as an income tax preparer and from other related activities.

An order, judgment, and permanent injunction in accordance with this memorandum opinion shall be entered contemporaneously herewith.

November 8, 2002

/s/

United States District Judge

ORDER, JUDGMENT, and PERMANENT INJUNCTION

BULLOCK, District Judge

For the reasons stated in a memorandum opinion filed contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that the motion of the United States Internal Revenue Service for summary judgment on its counterclaim against Counterclaim Defendant Alfred Abdo, Jr., d/b/a American Tax Planning Company [Doc. #14] is GRANTED;

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to Internal Revenue Code Sections 7402, 7407, and 7408, Alfred Abdo, Jr., and American Tax Planning Company, and their agents, representatives, employees, successors, and all other persons or entities in active concert or participation with Abdo, American Tax Planning Company, or either of them are PERMANENTLY ENJOINED from:

1. Preparing, assisting in the preparation of, or filing federal income tax returns on behalf of any other person or entity;

2. Giving any tax advice to any other person or entity for pay;

3. Falsely claiming or representing that Alfred Abdo, Jr., is a certified public accountant;

4. Threatening to sue or otherwise intimidating any individuals if they cooperate with the United States, revoke positions taken on amended tax returns, or admit liability or pay any frivolous return penalties assessed against them as a consequence of filing tax returns asserting Abdo's I.R.C. Section 3121(a) position, or taxes are voluntary position;

5. Disseminating materials or making statements, written, oral, or electronic that have the tendency to make the public believe that

a. Paying income taxes is voluntary;

b. Income taxes do not go to pay for government services;

c. Individuals can withdraw from voluntarily paying federal income taxes;

d. Wages are not subject to federal income taxes;

e. There is no ''gain'' from exchanges of wages for labor and therefore that wages are not ''income;''

f. I.R.C. Section 3121 excepts from the definition of ''wages'' all withheld social-security taxes;

g. The law and the Fourth Amendment to the United States Constitution prohibit the IRS from requiring taxpayers to provide information;

6. Selling, organizing, or promoting any abusive tax scheme in violation of I.R.C. Section 6700;

7. Engaging in any other activity subject to penalty under I.R.C. Sections 6694, 6695, 6700, and 6701; and

8. Engaging in any of the activities listed in Paragraphs 1 through 7 above through the use of any other individual or entity;

IT IS FURTHER ORDERED that, within thirty (30) days of the entry of this Order and Judgment and Permanent Injunction, Alfred Abdo, Jr., mail a copy of this Order and Judgment and Permanent Injunction to every person for whom he has prepared a tax-related document; and

IT IS FURTHER ORDERED that within forty-five (45) days of the entry of this Order Alfred Abdo, Jr., provide evidence of his compliance with the foregoing paragraph by filing a declaration with this court setting out a complete list of names and addresses of individuals or entities to whom he has mailed a copy of this Order and Injunction. Failure to abide by this order may be punished by criminal contempt under 18 U.S.C. § 401.

November 8, 2002

/s/

United States District Judge

¶2002-5715

In Re: ABATEMENT ENVIRONMENTAL RESOURCES, INC., Debtor. Scott D. FIELD, TRUSTEE-PLAINTIFF v. THE UNITED STATES OF AMERICA on behalf of Internal Revenue Service, DEFENDANT. U.S. Bankruptcy Court, Dist. of Maryland, (Bktcy Ct MD) Case No. 99-22370-7; Adversary Proceeding No. 01-1088, Nov. 5, 2002. Years 1996, 1997. Decision for Taxpayer in part and for Govt. in part.

1. Tax claims in bankruptcy—avoidable transfers—limitations periods—sovereign immunity—initial transferees—dominion and control—summary judgment. Trustee was granted summary judgment on its complaint to recover as avoidable transfers payments Chap. 7 debtor-co. made to IRS for shareholder's personal tax obligations: although trustee was concededly time-barred from suing under 11 USC §548(a)(1), he was still entitled to relief under §544(b)(1), §550 and Maryland law. IRS, not shareholder, was §550(a)(1) ''initial transferee'' where shareholder, although having control of debtor, never had dominion or control of funds that were transferred directly from debtor to IRS; and Maryland fraudulent transfer law requirements were met absent any rebuttal evidence from govt. to prove debtor's post-transfer solvency or that adequate consideration was given. Also, govt.'s sovereign immunity defense was foreclosed by §106(a)(1)'s plain language. *Reference:* United States Tax Reporter ¶68,726.53(10).

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND Greenbelt Division,

DECISION AND ORDER

Ross W. Krumm U. S. Bankruptcy Judge

At Greenbelt in said District this 5th day of November, 2002:

The matter before the court arises as a result of a motion for summary judgment filed by the United States of America on behalf of Internal Revenue Service (herein IRS). Scott D. Field, Trustee (herein the Trustee) of Abatement Environmental Resources, Inc. (herein Debtor) filed pleadings in opposition to the motion for summary judgment. The issues raised by the IRS in its motion for summary judgment have been fully briefed by the parties.

Facts:

For purposes of ruling on the motion for summary judgment, the following facts are not in dispute:

1. Joseph E. Downey (herein Downey) was an officer and stockholder of the Debtor at all times relevant to the actions by the Debtor in issuing checks made payable to the Internal Revenue Service for application to Downey's individual income tax liability.

2. Three checks were issued by the Debtor made payable to the Internal Revenue Service and each contained in the memo portion of the check individual income tax information of Downey necessary

for IRS to apply the checks to his individual liability. The checks, which the IRS attached to its motion for summary judgment are as follows:

(a) Check No. 3244 dated April 15, 1997, in the amount of $82,000.00 signed by Downey containing the memo that it is for the 1996 estimated tax and showing Downey's social security number and the notation ''form 4868''. The check was submitted in conjunction with form 4868, and Downey's request for extension of time to file his individual 1996 income tax return.

(b) Check No. 3534 dated January 10, 1998, in the amount of $65,000.00 signed by Downey and containing the memo ''1997 1040ES, social security number 041-44-5935 (Downey's social security number). This check was submitted in conjunction with Downey's request for extension of time to file his individual 1997 income tax return;

(c) Check number 2414 dated April 16, 1998, in the amount of $65,000.00 and showing on the memo line ''for 1997 form 4868; social security number 041-44-5935.'' This check was submitted in conjunction with Downey's request for extension of time to file his individual 1997 income tax return. The signature on this corporate check does not appear to be Downey's.

3. The three checks constitute transfers by the Debtor which the Trustee seeks to recover from the IRS utilizing 11 U.S.C. § 544(b)(1)[1] and section 15-204 and section 15-205 of Maryland State law.

4. On November 17, 1997, Downey filed his 1996 federal income tax return, form 1040, reported a tax liability of $208,543.00, claimed withholding taxes of $137,995.00, leaving him with a surplus of $11,452.00 from the $82,000.00 check. IRS concedes that $7,700.00 of that surplus was transferred to another government agency for child support payments and the balance of $3,753.00 was credited toward Downey's 1997 tax liability.

5. On February 15, 1999, Downey filed his 1997 form 1040, reporting a tax liability of $164,171.00, claiming withholding credits in the amount of $81,737.00, leaving a surplus of $51,318.00 which was transferred to his 1998 income tax account.

6. On November 29, 1999, Downey filed his 1998 form 1040, claimed withholding credits in the amount of $84,976.00 and reported no tax liability. As a result, on November 29, 1999, the IRS refunded to Downey a surplus of $166,294.00.[2]

The Trustee seeks to recover the total amount of all three checks, $212,000.00, together with interest and costs.

Summary Judgment Standard:

Under Federal Rule of Civil Procedure 56(c),[3] summary judgment is to be granted ''if the pleadings, depositions, answers to interrogatorics, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'' In this case, because the IRS does not bear the burden of persuasion at trial but is the moving party on the summary judgment motion, it must show the court that there is an absence of evidence to support the non-moving party's (the Trustee's) case. Celotex Corp. V. Catrett, 477 U.S. 317, 324 (1986). In assessing the motion, this court views the evidence in a light most favorable to the non-moving party. Cox v. County of Prince William, 249 F.3d 295, 299 (4th Cir. 2001).

Positions of the Parties:

[1] The IRS in its motion for summary judgment asserts three positions which it believes entitle it, as a matter of law, to summary judgment.

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[1] 11 U.S.C. § 544(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

[2] Thus, IRS kept $45,706.00 of the $212,000.00 sent to it.

[3] Federal rule 56(c) is applicable to this proceeding pursuant to Federal Rules of Bankruptcy Procedure 7056(c).

1. Statute of Limitations. 11 U.S.C. § 548(a)(1) is not available to the Trustee as a statutory basis for recovery because it has a one year look back, or statute of limitations. The last transfer by the Debtor was made in April of 1998, and the Debtor's bankruptcy filing occurred in October of 1999, approximately eighteen months after the last transfer. The Trustee concedes the position of the IRS on this issue.

2. Sovereign Immunity. Sovereign immunity prohibits the Trustee from bringing this action under 11 U.S.C. § 544(b)(1) and § 15-204 and 15-205 of Maryland state law (dealing with recovery of fraudulent transfers). The IRS states that the Trustee needs to establish that a creditor in a state law action could sue for recovery of the tax refunds in state court. It argues that sovereign immunity would prohibit there being a creditor who could utilize the state courts for such a recovery under Maryland state law and that the Trustee's rights in a bankruptcy proceeding can rise no higher than an existing creditor of the Debtor.

The Trustee's responds that 11 U.S.C. § 106(a)(1) abrogated sovereign immunity of the IRS and that 11 U.S.C. § 106(a)(3) enables the bankruptcy court to enter an order authorizing the recovery of the transfers under 11 U.S.C. § 550.[4]

The court has considered the authorities cited by the IRS and the Trustee on this issue and finds that the Trustee's position prevails because the plain language of 11 U.S.C. § 106(a) abrogates the assertion by IRS of sovereign immunity in the case at bar.

3. No Section 550(a) Liability.

The IRS asserts that it is not an ''initial transferee'' under 11 U.S.C. § 550(a)(1) and that it has a defense, as a matter of law under 11 U.S.C. § 550(b) which prohibits the Trustee's recovery under 11 U.S.C. § 550(a)(2) as an immediate transferee of the initial transferee.[5]

The IRS argues that Downey as the corporate officer who caused the Debtor to issue the checks is, in fact, the initial transferee of funds from the Debtor, thereby eliminating IRS as an initial transferee of the transfer or the entity for whose benefit such transfer was made under section 550(a)(1). It relies on the undisputed fact that Downey caused Debtor to issue the three checks. It then argues that Downey exercised dominion and control over the Debtor's assets sufficient to confer initial transferee status on him, thereby eliminating IRS under 11 U.S.C. § 550(a)(1).

The position of the IRS hinges upon the argument that Downey was the first to exercise dominion and control over the corporate funds when he improperly converted corporate funds to his personal use. The IRS cites Bonded Fin. Servs. Inc. v. European American Bank, 838 F.2d 890, 894 (7th Cir. 1988), in support of its position. The holding in Bonded Financial is cited in many cases involving issues of transfer similar to the one in the case at bar as the landmark decision for determining initial transferee status. While this court considered all of the authorities cited by both the IRS and the Trustee, it is persuaded by the majority decision in Rupp v. Markgraf, 95 F.3d 936 (10th Cir. 1996), that the IRS is the initial transferee in the case at bar and the court adopts those cases and the reasoning used by the majority in Rupp. In reaching its decision, the Rupp court analyzed Bonded Financial as it pertains to the question of ''dominion and control'' and when it is applied. The court stated:

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[4] 11 U.S.C. § 106(a) Notwithstanding an assertion of sovereign immunity, sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to the following: (1) Sections ... 544 ... 550 ... of this title.

(3) The court may issue against a governmental unit an order, process, or judgment under such sections or the Federal Rules of Bankruptcy Procedure, including an order or judgment awarding a money recovery, but not including an award of punitive damages. Such order or judgment for costs of fees under this title of the Federal Rules of Bankruptcy Procedure against any governmental unit shall be consistent with the provisions and limitations of section 2412(d)(2)(A) of title 28.

[5] 11 U.S.C. § 550(a)(1). Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from—(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(b)(1). The trustee may not recover under section (a)(2) of this section from—(1) a transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith, and without knowledge of the voidability of the transfer avoided.

It is clear that the Bonded court's discussion of dominion and control refers to dominion and control over the funds after the disputed transfer, not dominion and control over the *transferor* for the transfer.

Id. at 940.

Applying Rupp's interpretation of when to look at dominion and control to the undisputed facts of this case, it is clear that the funds in issue went from the Debtor to the IRS and that after the checks were issued and sent (herein "the disputed transfer") Downey had no dominion and control over the funds. Thus, the IRS, on motion for summary judgment cannot bear its burden of showing an absence of evi-dence to support the Trustee's case and the court need go no further in order to deny the motion.

Conclusion:

For the reasons stated above, the motion by the IRS for summary judgment is denied. Accordingly, it is

ORDERED:

That the motion for summary judgment of the IRS be, and it hereby is DENIED except insofar as it pertains to 11 U.S.C. § 548(a)(1) as a statutory basis for recovery and partial summary judgment is granted the IRS with respect thereto.

Copies of this decision and order are directed to be mailed to Gregory S. Hrebiniak, Esquire, Tax Division, U. S. Department of Justice, P. O. Box 227, Ben Franklin Station, Washington, D.C., 20044, counsel to the United States; and to James M. Hoffman, Esquire, 11921 Rockville Pike, Third Floor, Rockville, Maryland, 20852-2743, counsel to Scott D. Field, Chapter 7 Trustee.

Ross W. Krumm

U. S. Bankruptcy Judge

SUMMARY JUDGMENT DECISION AND ORDER

Ross W. Krumm U. S. Bankruptcy Judge

At Greenbelt in said District this 5th day of November, 2002:

Scott D. Field, Chapter 7 trustee in the above-captioned proceeding (herein the Trustee), filed a motion for summary judgment against the United States of America (herein the Government). The complaint against the Government seeks to recover transfers made by Abatement Environmental Resources, Inc. (herein the Debtor) to pay the personal tax obligations of the Debtor's owner and one of its chief executive officers, Joseph Downey. The statutory basis for recovery is 11 U.S.C. § 544(b)(1) and Md. Comm. Code §§ 15204 and 15-205.

The facts pertaining to the motion for summary judgment are summarized in the Trustee's memorandum in support of summary judgment. There is no response from the Government. Further, the court analyzed the facts in a companion decision and order in this case wherein the Government was the moving party for summary judgment. Repetition of the facts in this decision and order is unnecessary.

However, because the Trustee is the moving party in his motion for summary judgment, he must satisfy both the initial burden of production on the motion for summary judgment by showing that there is no genuine dispute as to any material fact and he must satisfy the ultimate burden of persuasion on his claim by showing that he would be entitled to a directed verdict at trial. *See*, Celotex Corp. v. Catrett, 477 U.S. 317, 331–32 (1986). Once the Trustee makes a properly supported motion, the burden shifts to the Government to demonstrate the existence of a genuine dispute.

The Trustee seeks avoidance of three transfers of cash from the Debtor to the Government under 11 U.S.C. § 544(b)(1) and relies on Maryland Commercial Code, §§ 15-204 and 15-205 as the "applicable" law to render the transfers voidable. Under section 15-204, one of the elements of proof is insolvency. The Trustee points to Maryland case law as authority for the proposition that the Government bears the burden to prove solvency after the transfer. *See*, In Re Colondrea, 17 B.R. 568, 579 (Bankr. Md. 1982).

The Trustee also points to the fact that the Government's response to his discovery demonstrates that it has no proof as to whether the Debtor was or would be insolvent after the transfers. Since discovery was closed on August 31, 2001, the proof offered by the Government at a trial could rise no higher than its responses to discovery. Thus, because the Government cannot show solvency at trial there is no genuine dispute as to this material fact and one of the elements of proof required to find for the Trustee is met.

Since the corporate debtor paid individual tax liability of Downey,[1] there can be no fair consideration for the transfer that flowed from the Government to the Debtor. Also, the Government's responses to the Trustee's discovery support a finding in favor of the Trustee on this element of proof. The court finds that the Trustee meets the burdens imposed on him as a movant for summary judgment and this shifts the burden to the Government to demonstrate the existence of a material dispute. With no response to the motion, the Government fails.[2]

The court's ruling in favor of the Trustee with respect to Md. Comm. Code § 15-204 obviates the necessity of addressing the Trustee's motion pertaining to Md. Comm. Code § 15-205.

Accordingly, it is

ORDERED:

That the Trustee's motion for summary judgment with respect to Md. Comm. Code § 15-204 is GRANTED and JUDGMENT is entered for the Trustee in the amount of $212,000.00, together with interest at the federal judgment rate from the date of this order until paid and such costs as are allowed by statute.

Copies of this decision and order are directed to be mailed to Gregory S. Hrebiniak, Esquire, Tax Division, U. S. Department of Justice, P. O. Box 227, Ben Franklin Station, Washington, D.C., 20044, counsel to the United States; and to James M. Hoffman, Esquire, 11921 Rockville Pike, Third Floor, Rockville, Maryland, 20852-2743, counsel to Scott D. Field, Chapter 7 Trustee.

Ross W. Krumm

U. S. Bankruptcy Judge

JUDGMENT

DUNCAN W. KEIR United States Bankruptcy Judge for the District of Maryland

In accordance with that Summary Judgment Decision and Order entered contemporaneously herewith, it is by the United States Bankruptcy Court for the District of Maryland,

ORDERED, that judgment is granted against Defendant, The United States of America on behalf of Internal Revenue Service, and in favor of Plaintiff, Scott D. Field, Chapter 7 Trustee for Abatement Environmental Resources, Inc., in the amount of $212,000.00, plus interest at the federal judgment rate from November 5, 2002, and costs.

DATED: 11/5/02

DUNCAN W. KEIR

United States Bankruptcy Judge for the District of Maryland

¶2002-5716

Christopher Joseph BUSH; Robin Leigh Pickering, PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. United States Court of Appeals, Fourth Circuit, (CA4) No. 02-1949, Nov. 27, 2002. Tax Court, (2002) TC Memo 2002-33 , TC Memo ¶2002-033, 83 CCH TCM 1176 [TC Memo 2002-33] (opinion by Dean, *J.*), affirmed per curiam. Year 1996. Decision for Govt.

1. Activities not-for-profit—talent agency—proof—personal vs. business expenses—medical expenses—deficiency notices—petition date identified as legal holiday. Deficiency determination against

[1] The court's companion decision and order in the motion for summary judgment sets forth the facts which are not disputed. *See*, pp. 2–4 of Decision and Order dated November 5, 2002.

[2] The court has taken into account the positions and arguments put forth by the Government in its motion for summary judgment and finds no basis in them to rule that there is a material dispute.

pro se taxpayers was affirmed, based on Tax Court's reasoning. *Reference:* United States Tax Reporter ¶1835.01(2); 1625.012(5); 2625.07(15); 2135.02(5); 2625.04(40); 62,125.02(10); 75,035.01. IRC §162; 183; 213; 262; 6212; 6213; 7503.

Christopher Joseph Bush, Robin Leigh Pickering, Appellants Pro Se. Eileen J. O'Connor, Assistant Attorney General, Teresa Ellen McLaughlin, Laurie Allyn Snyder, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; B. John Williams, Jr., INTERNAL REVENUE SERVICE, Washington, D.C., for Appellee.

United States Court of Appeals, Fourth Circuit,

Appeal from the United States Tax Court. (Tax Ct. No. 00-7401)

Before NIEMEYER, WILLIAMS, and TRAXLER, Circuit Judges.

PER CURIAM:

[1] Christopher Joseph Bush and Robin Leigh Pickering appeal from the tax court's order determining a deficiency with respect to their 1996 federal income tax liability. We have reviewed the record and the tax court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the tax court. *See Bush v. Commissioner*, No. 00-7401 (U.S. Tax Ct. May 14, 2002). We deny Appellants' motion for formal briefs and dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

¶2002-5717

SIERRA PACIFIC RESOURCES AND SUBSIDIARIES, successor to Nevada Power Company and Subsidiaries, PLAINTIFF v. UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 01-482T, Nov. 21, 2002. Year 1988. Decision for Govt.

1. Refund suits—jurisdiction—limitations periods—untimely claims—variance doctrine—amendments; relation back. Power co.'s refund suit based on untimely "claim letter" for deficiency interest was dismissed for lack of jurisdiction: claim letter, based on challenge to IRS's interest calculation methodology, impermissibly varied from original, timely claims that taxpayer asserted in Forms 1120X and 870-AD and which were based on different legal theories of accounting method change and income adjustments. Also, fact that Forms *generally* contained implicit interest claim wasn't sufficient to put IRS on notice of taxpayer's specific, late-raised calculation theory; and argument that IRS waived Reg. §301.6404-2(b)(1)'s specificity and evidentiary requirements, which taxpayer also failed to meet, was rejected. Similarly, taxpayer's attempt to relate letter back to original claim as amendment was rejected since letter's miscalculation theory wasn't germane to original claim and letter was filed late, after original claims were resolved and limitations period had expired. *Reference:* United States Tax Reporter ¶74,225.05(20); 64,025.18(10); 65,115.04(2); 64,025.11(70); 64,025.19(5). IRC §6402; 6511; 6611; 7422.

Joseph M. Persinger, Milbank, Tweed, Hadley & McCloy LLP, New York, NY, for the plaintiff.
Rozella A. Oliver, Tax Division, Mildred L. Seidman, Chief, Court of Federal Claims Section, Eileen J. O'Connor, Assistant Attorney General, United States Department of Justice, Washington, D.C., for the defendant.

United States Court of Federal Claims,

OPINION

HORN, J.

Tax Refund Claim; Statute of Limitations, 26 U.S.C. § 6511(a); Requirement to File an Administrative Claim Prior to Bringing Suit, 26 U.S.C. § 7422(a); Specificity of Administrative Refund Claims, 26 C.F.R. § 301.6402-2(b)(1); Variance Between Administrative Claim and Claim

Before the Court; Amendments to Refund Claims.

Sierra Pacific Resources and Subsidiaries (Sierra Pacific), a Nevada Corporation, became the successor in interest to the Nevada Power Company and Subsidiaries (Nevada Power) following a merger on July 28, 1999. Sierra Pacific has brought this action against the United States to recover deficiency interest plaintiff claims was overassessed as a result of an alleged erroneous methodology utilized by the Internal Revenue Service (IRS) for the calculation of deficiency interest on Nevada Power's 1988 net federal tax liabilities. Sierra Pacific alleges the IRS erroneously began assessing deficiency interest on March 15, 1989, when the correct start date for the assessment of deficiency interest should have been March 15, 1990, the due date of the 1989 taxes. The United States asserts that this court lacks subject matter jurisdiction because of a failure by Sierra Pacific to file a proper administrative claim for the refund of the allegedly erroneously calculated deficiency interest with the IRS within the period prescribed by the applicable statute of limitations. Plaintiff responds by contending that: (1) Nevada Power's 1991 1120X and 1992 870-AD forms set forth a sufficient basis for the present proceeding; (2) a waiver by the IRS of its own regulations should allow this suit to proceed; and (3) a Claim Letter filed in 1998 was a proper amendment to Nevada Power's 1991 1120X and 1992 870-AD forms, and, therefore, the 1998 Claim Letter should serve as a duly filed administrative claim on which the present suit may proceed. For the reasons discussed below, the court finds that plaintiff failed to file a timely and sufficient administrative claim on which to base the present suit and, therefore, the court should grant the government's motion to dismiss the complaint for lack of subject matter jurisdiction.

FINDINGS OF FACT

Nevada Power filed a federal corporate income tax return on September 19, 1989, for its 1988 tax year. Nevada Power's tax return calculated an $11,472,703.00 assessment of tax for its 1988 tax year. Prior to this assessment, according to the Certificate of Assessments, Payments, and Other Specified Matters, Nevada Power had made four estimated tax payments totaling $11,995,000.00. In addition, on March 15, 1988, an overpaid credit from the prior tax period in the amount of $1,426,334.00 was credited to Nevada Power's 1988 tax account, along with a $65,867.00 credit for federal tax on fuels. As a consequence of the estimated tax payments and credits, Nevada Power's tax account balance was $13,491,201.00. After payment of the $11,472,703.00 1988 tax assessment, Nevada Power's 1988 tax account retained a balance of $2,018,498.00. Nevada Power elected to transfer the remaining 1988 tax account funds to its next tax period to serve as a credit against its 1989 federal income tax liabilities.

A subsequent audit of Nevada Power's 1988 tax year (the 1991 Audit) was conducted by the IRS. IRS Form 4549, entitled "Income Tax Examination Changes," which reflected the income tax examination changes from the audit, was acknowledged by the signature of the Vice-President, Treasurer, and Chief Financial Officer of Nevada Power, on June 25, 1991, following the words:

Consent to Assessment and Collection--I do not wish to exercise my appeal rights with the Internal Revenue Service or to contest in the United States Tax Court the findings in this report. Therefore, I give my consent to the immediate assessment and collection of any increase in tax and penalties, and accept any decrease in tax and penalties shown above, plus any interest as provided by law. It is understood that this report is subject to acceptance by the District Director.

The resultant assessment determined by the IRS, and consented to by Nevada Power, was $964,885.00 in deficiency tax and $278,217.00 in deficiency interest for Nevada Power's 1988 tax year. The Form 4549, signed by the Chief Financial Officer of Nevada Power, indicates that the assessment of the deficiency tax and interest was due to, among other items, changes

in the taxable income from "Heat Pump Rebates," "Genwal Stock Purchase," and "Legal Expenses--Genwal Stock." The deficiency tax and deficiency interest assessments, totaling $1,243,102.00, were posted to Nevada Power's tax account on April 6, 1992, but were discharged by Nevada Power with an advanced payment of $1,243,102.00 made on June 25, 1991.

On September 30, 1991, Nevada Power filed an amended 1988 income tax return by submitting Form 1120X, entitled "Amended U.S. Corporation Income Tax Return," to the IRS. Instructions for Form 1120X indicate that the "IRS will figure any interest due and will either include it in the refund or bill the corporation for the interest." The Form 1120X submitted by Nevada Power did not make a specific claim for a refund of interest, and Sierra Pacific acknowledges that no such specific claim was made on this form. In Part II of Form 1120X, the taxpayer is instructed to provide the basis for the amendments to the original tax return and is instructed to "[e]nter the line number from page 1 for the items you are changing, and give the reason for each change. Show any computation in detail." Nevada Power provided two reasons for its changes:

> "Lines 1, 2 + 3 change in method of accounting for customer deposits (Rev.Proc.91-31) See Attachment # 2" and "Line 4 change in tax due to change in income See Schedule J."

On December 9, 1992, Nevada Power and the IRS executed Form 870-AD, entitled "Offer of Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment," for the 1988 tax year. Form 870-AD states that the parties "consent to the assessment and collection of the following deficiencies with interest as provided by law. The undersigned offers also to accept the following overassessments as correct." The form indicates that Nevada Power had been overassessed $40,088.00 in taxes for the 1988 tax year. This amount was abated in Nevada Power's 1988 tax account on February 1, 1993, as was $11,557.37, the corresponding amount of previously assessed deficiency interest applicable to the overassessed taxes of $40,088.00, as calculated by the IRS. On February 1, 1993, the IRS simultaneously credited "interest due taxpayer," in the amounts of $3,250.81 and $2,961.89, and issued a refund of $29,373.48. The only other activity in the 1988 tax account was a subsequent credit of interest and an issuance of a refund on May 10, 1993, in the amounts of $4,164.41 and $32,649.00, respectively. The net result of these transactions was a zero-balance on May 10, 1993. For more than five years following the refund on May 10, 1993, no activity in the 1988 tax account is noted on the Certificate of Assessments, Payments, and Other Specified Matters.

On August 7, 1998, Nevada Power submitted a letter (the 1998 Claim Letter) to the IRS, petitioning for an adjustment to its 1988 tax year account. In the 1998 Claim Letter, Nevada Power asserted for the first time that the deficiency interest posted to its 1988 tax account on April 6, 1992 (the $278,217.00 in deficiency interest assessed as a result of the 1991 Audit), and the abatement posted to the 1988 tax account on February 1, 1993 (the $11,557.37 abatement of deficiency interest associated with the 870-AD form), were erroneously calculated due to the use of an incorrect starting date for the assessment of deficiency interest. Nevada Power contended that the starting date for the assessment of deficiency interest was erroneous because the $2,018,498.00 balance in its 1988 tax account that it elected to credit to its 1989 tax account was not needed to meet the 1989 estimated tax payment, and "pursuant to (1) the decisions in the cases May Department Stores [May Department Stores v. United States, 36 Fed. Cl. 680 [78 AFTR 2d 96-7034] (1996)] and Sequa [Sequa v. United States, 1996 WL 194323 [80 AFTR 2d 97-7824] (S.D.N.Y. April 22, 1996)] and (2) the benefit rule of Rev. Rul. 88-98, interest should have started on March 15, 1990, the due date of the 89/12 tax return."

The IRS disallowed Nevada Power's claim in a letter dated August 19, 1998, stating "[w]e cannot allow a claim for

credit or refund if you file the claim more than 3 years after you file the return, or 2 years after you pay the tax, whichever is later.''

Plaintiff requested reconsideration of the IRS's disallowance regarding its 1998 Claim Letter in correspondence November 2, 1999. Plaintiff claimed that the 1120X and 870-AD forms were timely filed claims for deficiency interest, the 1998 Claim Letter properly amended these claims, and that, therefore, Nevada Power was entitled to a refund of the deficiency interest that was allegedly improperly assessed. There is no indication in the record of any response to this letter. The IRS and Nevada Power subsequently executed Form 907, entitled ''Agreement to Extend the Time to Bring Suit,'' which indicated that Nevada Power could file suit on or before August 19, 2001, regarding the IRS's disallowance of Nevada Power's claim for $208,315.00 on August 19, 1998.

On August 17, 2001, Sierra Pacific filed a complaint with the United States Court of Federal Claims initiating the present suit against the United States. Sierra Pacific seeks to recover $242,309.26, together with interest.

DISCUSSION

[1] Subject matter jurisdiction may be challenged at any time by the parties, by the court sua sponte, even on appeal. Fanning, Phillips, Molnar v. West, 160 F.3d 717, 720 (Fed.Cir.1998) (quoting Booth v. United States, 990 F.2d 617, 620 (Fed.Cir.), reh'g denied (1993)); United States v. Newport News Shipbuilding & Dry Dock Co., 933 F.2d 996, 998 n. 1 (Fed.Cir.1991). Once jurisdiction is challenged by the court or the opposing party, the plaintiff bears the burden of establishing jurisdiction. See McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936); Alder Terrace, Inc. v. United States, 161 F.3d 1372, 1377 (Fed.Cir.1998); Trauma Serv. Group v. United States, 104 F.3d 1321, 1324 (Fed.Cir.1997); Rocovich v. United States, 933 F.2d 991, 993 [67 AFTR 2d 91-1210] (Fed.Cir.1991); Bowen v. United States, 49 Fed. Cl. 673, 675 (2001) (noting that the plaintiff bears the burden of proof on a motion to dismiss for lack of jurisdiction), aff'd 292 F.3d 1383 (Fed.Cir.2002); Schweiger Constr. Co. v. United States, 49 Fed. Cl. 188, 205 (2001); Catellus Dev. Corp. v. United States, 31 Fed. Cl. 399, 404 (1994). A plaintiff must establish jurisdiction by a preponderance of the evidence. Reynolds v. Army & Air Force Exch, Serv., 846 F.2d 746, 748 (Fed.Cir.1988); Martinez v. United States, 48 Fed. Cl. 851, 857 (2001), aff'd in part, 281 F.3d 1376 (Fed.Cir.2002); Bowen v.. United States, 49 Fed. Cl. at 675; Vanalco, Inc. v. United States, 48 Fed. Cl. 68, 73 (2000); Alaska v. United States, 32 Fed. Cl. 689, 695 (1995), appeal dismissed, 86 F.3d 1178 (Fed.Cir.1996) (table). When construing the pleadings pursuant to a motion to dismiss, the court should grant the motion only if ''it appears beyond doubt that [plaintiff] can prove no set of facts in support of [its] claim which would entitle [it] to relief.'' Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 654 (1999) (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)); Consolidated Edison Co. v. O'Leary, 117 F.3d 538, 542 (Fed.Cir.1997), cert. denied sub nom. Consolidated Edison Co. v. Pena, 522 U.S. 1108 (1998); see also New Valley Corp. v. United States, 119 F.3d 1576, 1579 (Fed.Cir.), reh'g denied, en banc suggestion declined, (1997); Highland Falls-Fort Montgomery Cent. School Dist. v. United States, 48 F.3d 1166, 1169 (Fed.Cir.), cert. denied, 516 U.S. 820 (1995); Hamlet v. United States, 873 F.2d 1414, 1416 (Fed.Cir.1989); W.R. Cooper Gen, Contractor, Inc. v. United States, 843 F.2d 1362, 1364 (Fed.Cir.1988) (''When the facts alleged in the complaint reveal 'any possible basis on which the non-movant might prevail, the motion must be denied.'''); RCS Enters., Inc. v. United States, 46 Fed. Cl. 509, 513 (2000).

Pursuant to Rule 8(a)(1) of the Rules of the Court of Federal Claims (RCFC) and Rule 8(a)(1) of the Federal Rules of Civil Procedure, a plaintiff need only state in the complaint ''a short and plain statement of the grounds upon which the court's jurisdiction depends.'' RCFC 8(a)(1). However,

"[d]etermination of jurisdiction starts with the complaint, which must be well-pleaded in that it must state the necessary elements of the plaintiff's claim, independent of any defense that may be interposed." Holley v. United States, 124 F.3d 1462, 1465 (Fed.Cir.), reh'g denied (1997) (citing Franchise Tax Bd. v. Constr, Laborers Vacation Trust, 463 U.S. 1 (1983)). "[C]onclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss." Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir.1981), aff'd, 460 U.S. 325 (1983); see also Bradley v. Chiron Corp., 136 F.3d 1317, 1322 (Fed.Cir.1998) ("Conclusory allegations of law and unwarranted inferences of fact do not suffice to support a claim.").

When deciding on a motion to dismiss based on lack of subject matter jurisdiction, this court must assume that all undisputed facts alleged in the complaint are true and must draw all reasonable infer-ences in the non-movant's favor. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Conley v. Gibson, 355 U.S. at 45–46; Boyle v. United States, 200 F.3d 1369, 1372 (Fed.Cir.2000); Perez v. United States, 156 F.3d 1366, 1370 (Fed.Cir.1998); Highland Falls-Fort Mont-gomery Cent. School Dist. v. United States, 48 F.3d at 1667 (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed.Cir.1991)); Henke v. United States, 60 F.3d 795, 797 (Fed.Cir.1995); Hamlet v. United States, 873 F.2d at 1416; Ho v. United States, 49 Fed. Cl. 96, 100 (2001), aff'd, 30 Fed. Appx. 964 (Fed.Cir.2002); Alaska v. United States, 32 Fed. Cl. at 695. If a defendant or the court challenges jurisdiction or plaintiff's claim for relief, however, the plaintiff cannot rely merely on allegations in the complaint, but must instead bring forth relevant, competent proof to establish jurisdiction. McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. at 189; see also Land v. Dollar, 330 U.S. 731, 735 n. 4 (1947); Reynolds v. Army & Air Force Exch. Serv., 846 F.2d at 747; Catellus Dev. Corp. v. United States, 31 Fed. Cl. at 404–05. When con-sidering a motion to dismiss for lack of subject matter jurisdiction, the court may examine relevant evidence in order to re-solve any factual disputes. See Mover v. United States, 190 F.3d 1314, 1318 (Fed.Cir.1999); Reynolds v. Army & Air Force Exch. Serv., 846 F.2d at 747; see also Cedars-Sinai Med. Ctr. v. Watkins, 11 F.3d 1573, 1584 (Fed.Cir.1993), cert. de-nied sub nom., Cedars-Sinai Med. Ctr. v. O'Leary, 512 U.S. 1235 (1994) ("In estab-lishing predicate jurisdictional facts, a court is not restricted to the face of the pleadings, but may review evidence extrin-sic to the pleadings, including affidavits and deposition testimony."); Vanalco v. United States, 48 Fed. Cl. at 73 ("If the truth of the alleged jurisdictional facts is challenged in a motion to dismiss, the court may consider relevant evidence to re-solve the factual dispute.").

In order for this court to have jurisdiction over a plaintiff's complaint, the Tucker Act requires that the plaintiff identify an independent substantive right enforceable against the United States for money damages. 28 U.S.C. § 1491 (1994). The Tucker Act states:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1).

As interpreted by the United States Supreme Court, this Act waives sovereign immunity to allow jurisdiction over claims (1) founded on an express or implied contract with the United States; (2) for a refund from a prior payment made to the government; or (3) based on federal constitutional, or statutory, or regulatory law mandating compensation by the federal government for damages sustained. See United States v. Testan, 424 U.S. 392, 400 (1976), reh'g denied, 425 U.S. 957 (1976) (citing Eastport Steamship Corp. v. United States, 178 Ct. Cl. 599, 605–06, 372 F.2d 1002, 1009 (1967)); see also Palmer v.

United States, 168 F.3d 1310, 1314 (Fed.Cir.1999); Stinson, Lyons & Bustamante, P.A. v. United States, 33 Fed. Cl. 474, 478 (1995), aff'd, 79 F.3d 136 (Fed.Cir.1996). A waiver of traditional sovereign immunity cannot be implied but must be "unequivocally expressed." INS v. St. Cyr, 533 U.S. 289, 299 n. 10 (2001); United States v. Nordic Village, Inc., 503 U.S. 30, 33 [69 AFTR 2d 92-687] (1992); Ins. Co. of the West v. United States, 243 F.3d 1367, 1372 (Fed.Cir.), reh'g and reh'g en banc denied (2001); Saraco v. United States, 61 F.3d 863, 864 (Fed.Cir.1995) (quoting United States v. King, 395 U.S. 1, 4 [23 AFTR 2d 69-1358] (1969)), cert. denied, 517 U.S. 1166 (1996).

The Tucker Act, however, merely confers jurisdiction on the United States Court of Federal Claims, "'it does not create any substantive right enforceable against the United States for money damages.'" United States v. Mitchell, 445 U.S. 535, 538 (quoting United States v. Testan, 424 U.S. at 398–99), reh'g denied, 446 U.S. 992 (1980); White Mountain Apache Tribe v. United States, 249 F.3d 1364, 1372 (Fed.Cir.), reh'g and reh'g en banc denied (2001), cert. granted, No. 01-1067, 2002 WL 104944 (U.S. Apr. 22, 2002); Cyprus Amax Coal Co. v. United States, 205 F.3d 1369, 1373 [85 AFTR 2d 2000-1151] (Fed.Cir.2000); cert. denied, 121 S.Ct. 2214 (2001); New York Life Ins. Co. v. United States, 118 F.3d 1553, 1555–56 [80 AFTR 2d 97-5117] (Fed.Cir.1997), cert. denied, 523 U.S. 1094 (1998); United States v. Connolly, 716 F.2d 882, 885 (Fed.Cir.1983) (en banc), cert. denied, 465 U.S. 1065 (1984). Individual claimants, therefore, must look beyond the jurisdictional statute for a waiver of sovereign immunity. United States v. Mitchell, 445 U.S. at 538. In order for a claim to be successful, the plaintiff "must also demonstrate that the source of law relied upon 'can fairly be interpreted as mandating compensation by the federal government for the damages sustained.'" White Mountain Apache Tribe v. United States, 249 F.3d at 1372 (quoting United States v. Mitchell, 463 U.S. 207, 216–17 (1983)); United States v. Testan, 424 U.S. at 400; Tippett v. United States, 185 F.3d 1250, 1254 (Fed.Cir.1999) ("[T]he plaintiff must assert a claim under a separate money-mandating constitutional provision, statute, or regulation, the violation of which supports a claim for damages against the United States.") (quoting James v. Caldera, 159 F.3d 573, 580 (Fed.Cir.1998), reh'g denied (1999)); Doe v. United States, 100 F.3d 1576, 1579 (Fed.Cir.1996), reh'g denied, en banc suggestion declined (1997); Eastport Steamship Corp. v. United States, 178 Ct. Cl. at 607, 372 F.2d at 1009.

Prior to maintaining a suit to recover improperly assessed taxes or interest, a taxpayer must satisfy the statutory prerequisite of filing an administrative claim with the IRS. See 26 U.S.C. § 7422(a). The administrative claim must comport with both "the provisions of law ... and the regulations of the [IRS]." Id. For a claim to be properly before the court, it must be filed in compliance with the statute of limitations codified at 26 U.S.C. § 6511(a). United States v. Dalm, 494 U.S. 596, 602 [65 AFTR 2d 90-1210] (1990). In relevant part, Section 6511(a) requires that any [c]laim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later.

26 U.S.C. 6511(a).

Failure to comply with § 6511(a) results in the absence of jurisdiction for the court to resolve the claim on the merits, and the suit must be dismissed pursuant to Rule 12(b)(1) of the United States Court of Federal Claims for want of subject matter jurisdiction. United States v. Dalm, 494 U.S. at 602.

Treasury Regulation § 301.6402-2 similarly restricts the allowance of refunds to claims that have been filed prior to the expiration of the statute of limitations. 26 C.F.R. § 301.6402-2. In addition, s 301.6402-2 requires that claims for refund "must set forth in detail each ground upon

which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof.'' 26 C.F.R. § 301.6402-2(b)(1).

As the United States Court of Claims stated in Alexander Proudfoot Company v. United States, the requirement for filing an adequate refund claim:

> is designed both to prevent surprise and to give adequate notice to the Service of the nature of the claim and the specific facts upon which it is predicated, thereby permitting an administrative investigation and determination. In addition, the Commissioner is provided with an opportunity to correct any errors, and if disagreement remains, to limit the scope of any ensuing litigation to those issues which have been examined and which he is willing to defend.

197 Ct. Cl. 219, 227 [29 AFTR 2d 72-543], 454 F.2d 1379, 1383 [29 AFTR 2d 72-543] (1972) (citation omitted) (quoting Union Pac. R.R. v. United States, 182 Ct. Cl. 103, 109 [21 AFTR 2d 478], 389 F.2d 437, 442 [21 AFTR 2d 478] (1968)).

In Lockheed Martin Corporation v. United States, the United States Court of Appeals for the Federal Circuit noted that 26 U.S.C. § 7422(a) and 26 C.F.R. § 301.6402-2(b)(1) have long been recognized to prevent a taxpayer from substantially varying the legal or the factual basis of an administrative claim when before a court. Lockheed Martin Corp. v. United States, 210 F.3d 1366, 1371 [85 AFTR 2d 2000-1495] (Fed.Cir.2000) (''Courts have long interpreted § 7422(a) and Treasury Reg. § 301.6402-2(b)(1) as stating a 'substantial variance' rule which bars a taxpayer from presenting claims in a tax refund suit that 'substantially vary' the legal theories and factual bases set forth in the tax refund claim presented to the IRS.''). This principle, referred to as the ''substantial variance rule,'' ensures that the IRS has ''notice as to the nature of the claim and the specific facts upon which it is predicated,'' ensures that the IRS has ''an opportunity to correct errors,'' and ''limits any subsequent litigation to those grounds that the IRS had an opportunity to consider and is willing to defend.'' Lockheed Martin Corp. v. United States, 210 F.3d at 1371 (Fed.Cir.2000).

Sierra Pacific contends that the 1120X form filed on September 30, 1991, and the 870-AD form filed on December 9, 1992, by Nevada Power for its 1988 tax year, were sufficient to notify the IRS of Sierra Pacific's current claim and invoke this court's jurisdiction. Nevada Power submitted the 1120X form as an amendment to its 1988 tax return. It specifically requested the IRS to adjust its tax liabilities for the 1988 tax year, due to a ''change in method of accounting for customer deposits'' and a ''change in tax due to change in income.'' The 1120X form also reflected changes stemming from an audit made several months prior that modified tax liabilities as a result of, among other items, changes in the taxable income from ''Heat Pump Rebates,'' ''Genwal Stock Purchase,'' and ''Legal Expenses--Genwal Stock.'' These were the specific items Nevada Power addressed in the 1120X form for consideration by the IRS. On the 1120X form, Nevada Power did not address Sierra Pacific's current allegation that the IRS was utilizing an erroneous methodology for the calculation of deficiency interest, namely, the use of an incorrect starting date for the assessment of deficiency interest. Nevada Power made no mention of any legal theory remotely similar to what Sierra Pacific now claims before this court. In fact, there is no suggestion on the 1120X form that Nevada Power was alleging any error whatsoever on the part of the IRS. The IRS Commissioner is ''entitled to take [the claim] at face value and to examine only the points to which it directed his attention.'' United States v. Garbutt Oil Co., 302 U.S. 528, 533 [19 AFTR 1248] (1938). Sierra Pacific's present claim that the IRS utilized an erroneous method of calculating deficiency interest, therefore, substantially varies, from the 1120X submitted in 1991.

This finding of substantial variance is consistent with a similar issue recently considered by the United States Court of Federal Claims in Mobil Corporation v.

United States, 52 Fed. Cl. 327 [89 AFTR 2d 2002-2105] (2002). In Mobil, the court considered whether the filing of a Form 1120X provided adequate notice for the recovery of interest that was allegedly improperly assessed as a result of a computational error. Id. at 333. Although the taxpayer in Mobil may have been entitled to the deficiency interest directly associ-ated with the amount of the refund itself, the court determined that the portion sought as a result of an ''alleged miscalcu-lation is based on a separate legal theory that plaintiff was obligated to disclose in its claim.'' Id. Similar to the plaintiff in Mobil, Sierra Pacific did not disclose the separate legal theory that the IRS was utilizing a potentially erroneous methodol-ogy in the calculation of deficiency inter-est.

The same conclusion must be drawn in regard to the 870-AD form. The 870-AD form was an agreement between Nevada Power and the IRS acknowledging that Nevada Power had been overassessed $40,088.00 in taxes. Accompanying the 870-AD form was Form 4549, entitled ''Income Tax Examination Changes,'' which shows that the $40,088.00 was the difference between the ''Total Tax per Return,'' the $12,437,588.00 in tax that was indicated on Nevada Power's original 1988 tax return, and the ''Total Corrected Tax Liability,'' $12,397,500.00. The ''Corrected Tax Liability'' is shown on the Form 4549 to be a result of adjustments to income. The 870-AD form did not address a claim for deficiency interest assessed for Nevada Power's 1988 tax year beyond that which may be directly associated with the $40,088.00, and did not address a claim that the IRS was employing an erroneous methodology for the calculation of deficiency interest, specifically, an erroneous starting date. Therefore, the claim Nevada Power asserted in the 870-AD substantially varies from Sierra Pacific's current claims.

In Burlington Northern Inc. v. United States, the United States Court of Claims noted that ''[a]ny ground for refund not expressly or impliedly contained in the application for refund cannot be considered by a court in which a suit for refund is subsequently initiated.'' Burlington N. Inc. v. United States, 231 Ct. Cl. 222, 225 [50 AFTR 2d 82-5275], 684 F.2d 866, 868 [50 AFTR 2d 82-5275] (1982). Neither the Form 1120X, filed in 1991, nor the Form 870-AD, filed in 1992, mentions any legal or factual theory remotely similar to what Sierra Pacific now claims, that an erroneous start date was utilized for the assessment of deficiency interest. Indeed, no suggestion, neither ''expressly'' nor ''impliedly,'' was made on the 870-AD that any error whatsoever was made on the part of the IRS. Id. Because the claim that the IRS was utilizing an erroneous method for the calculation of deficiency interest was ''not expressly or impliedly contained in'' Form 1120X or Form 870-AD, which Sierra Pacific categorizes in its opposition to the United States' motion to dismiss as the claims for refund filed in 1991 and 1992, and which Sierra Pacific alleges ''set forth the basis for the instant proceeding,'' neither may serve as a basis for the present suit. See Lockheed Martin Corp. v. United States, 210 F.3d at 1371.

Although the United States alleges in its brief submitted to this court that ''[w]here deficiency interest is to be refunded only because the underlying tax deficiency to which it relates is to be refunded, then no specific claim for refund of the interest is necessary,'' that does not resolve the issues presented by this case. It has been stated that ''deficiency interest has been so closely braided to principal that it has been deemed an integral part of the tax.'' Alexander Proudfoot Co. v. United States, 197 Ct. Cl. at 226; 454 F.2d at 1382. Implicit in Forms 1120X and 870-AD, therefore, is a request for deficiency interest. Deluxe Check Printers, Inc. v. United States, 15 Cl.Ct. 175, 182 [62 AFTR 2d 88-5146] (1988), aff'd in part and rev'd in part on other grounds sub nom. Deluxe Corp. v. United States, 885 F.2d 848 [64 AFTR 2d 89-5327] (Fed.Cir.1989). That particular request for deficiency interest was granted by the IRS's subsequent credit of $11,557.37 in deficiency interest that the IRS associated with the $40,088.00 deficiency tax refund. Although it is true that

implicit in Form 1120X and Form 870-AD is a request for directly related deficiency interest, it is only that interest ''tied entirely to the lawfulness of the principal tax,'' not the lawfulness of the method for calculating deficiency interest. John B. Lambert & Assocs. v. United States, 212 Ct. Cl. 71, 87 [38 AFTR 2d 76-6207] (1976) (a case in which the interest claim was not tied to the lawfulness of the principal tax, but an independent claim for prenotice interest, which, therefore, was ''clearly not presented.'') Sierra Pacific's present claim that the IRS erroneously calculated deficiency interest by utilizing an incorrect starting date for the assessment was not ''tied entirely to the lawfulness of the principal tax,'' and goes beyond the deficiency interest that may have been implicitly claimed in the Form 1120X and Form 870-AD. See id. As the court stated in Mobile Corp.,

> Defendant acknowledges that plaintiff asked for interest on the taxes that it overpaid in its original claim, and generally cases hold that interest is a component of the refund. Now, however, the plaintiff contests the method that IRS used to calculate the amount of interest that plaintiff owed. Even if IRS mistakenly did not calculate interest using normal administrative procedures, contesting the method of calculation was a new claim. Plaintiff was required to bring that error to the Commissioner's attention.
>
> Mobile Corp. v. United States, 52 Fed. Cl. at 329 (emphasis in original). Both the 1120X and 870-AD forms were specific in nature, seeking IRS action on theories wholly unrelated to Sierra Pacific's present claim for deficiency interest. Neither of the forms makes any mention of an improper start date used by the IRS in its calculation of deficiency interest. The forms cannot, therefore, be fairly viewed as ''set[ting] forth in detail each ground upon which'' Sierra Pacific now claims a refund, nor can they be fairly viewed, as required, as ''sufficient to apprise the Commissioner of the exact basis thereof.'' See 26 C.F.R. § 301.6402-2(b)(1).
>
> The IRS regulations also require that ''the taxpayer submit with its tax refund claim the supporting evidence necessary to prove its claim.'' Lockheed Martin Corp. v. United States, 210 F.3d at 1371; see also 26 C.F.R. § 301.6402-2. Neither the Form 1120X nor the Form 870-AD submitted to the IRS by Nevada Power pro-vides the evidence necessary to support and prove that the IRS utilized an errone-ous date to calculate deficiency interest. Id. No reference was made by Nevada Power in either Form to facts, revenue rulings, the IRS's manual, or case law to support the notion that some error had been made by the IRS in its method of calculating the deficiency interest at issue.
>
> Upon consideration of the facts and circumstances surrounding the 1120X and 870-AD forms submitted by Nevada Power, it is evident that Form 1120X and Form 870-AD could not provide the IRS: (1) ''notice as to the nature of the claim and the specific facts upon which it is predicated;'' (2) ''an opportunity to correct errors'' presently asserted by Sierra Pacific; (3) nor would they ''limit[] any subsequent litigation to those grounds that the IRS had an opportunity to consider and is willing to defend.'' Lockheed Martin Corp., 210 F.3d at 1371. The 1120X and the 870-AD claims filed by Nevada Power in 1991 and 1992 ''substantially vary'' from the present claim before the court, fail to ''expressly or impliedly'' contain a claim that the IRS utilized an erroneous date for the calculation of deficiency interest, and do not set forth ''the supporting evidence necessary to prove its claim'' that an erroneous method of calculation was used. Therefore, the 1120X and 870-AD forms submitted by Nevada Power for its 1988 tax year cannot serve as a basis for the present refund claim in this court.
>
> Sierra Pacific makes an alternative claim that if the 1120X and 870-AD forms are in themselves insufficient to provide a basis for the present suit, the IRS may have waived its own ''Regulation.'' This assertion appears in only one sentence of Sierra Pacific's brief. Sierra Pacific has not specified the basis of this assertion nor has it

indicated which regulation has been allegedly waived. The ''Regulation'' presumably refers to 26 C.F.R. § 301.6402-2(b)(1), which provides that a taxpayer must ''set forth in detail each ground upon which a credit or refund is claimed and facts sufficient to apprise the Commissioner of the exact basis thereof.'' 26 C.F.R. § 301.6402-2(b)(1).

The Supreme Court, in United States v. Andrews, addressed the waiver of IRS regulations governing specificity of claims. United States v. Andrews, 302 U.S. 517, 525 [19 AFTR 1243] (1938). In Andrews, the Supreme Court indicated that where a specific claim, not a general claim, was filed with the IRS, which ''pointed unerringly to the items the Commissioner must consider,'' no waiver of the regulation requiring specificity is implicated. Id.

The 1120X and 870-AD forms submitted by Nevada Power were both specific in their purpose and pointed clearly to the items the IRS was asked to consider by Nevada Power. The 1120X form, submitted by Nevada Power to amend its 1988 tax return, stated the grounds for its amendments as a ''change in [the] method of accounting for customer deposits'' and a ''change in tax due to change in income.'' The 870-AD form was an agreement indicating that Nevada Power was overassessed $40,088.00, which, as indicated in the associated Form 4549, was due to adjustments by Nevada Power to its taxable income, for items such as, ''Legal--Amended Articles,'' ''Legal--Diversification Study,'' and ''Amended Returns--Customer Deposits.'' Neither of the forms suggests that the IRS was asked to reconsider the date used to calculate the deficiency tax. Rather, both forms clearly indicate the specific items Nevada Power presented for consideration by the IRS. The forms did not raise the attention of the IRS to the claims now before the court, which were asserted for the first time in the 1998 Claim Letter sent to the IRS. The IRS Commissioner did not waive the requirement to provide the specific grounds and factual details in support of Nevada Power's refund claim, which ''pointed unerringly to the items the Commissioner must consider,'' for ''[t]here was no need for him to do so.'' Id.

No argument has been made that the 1998 Claim Letter would be independently sufficient to maintain the present suit. A new claim brought in 1998, being more than three years after the filing of the 1988 tax return on September 19, 1989, and more than two years after the most recent payment of the 1988 taxes on June 25, 1991, would clearly be untimely under the statute of limitations found at 26 U.S.C. § 6511(a). Rather, Sierra Pacific contends that the 1998 Claim Letter was an amendment or clarification to its earlier claims embodied in the 1120X and 870-AD forms.

In United States v. Andrews, the Supreme Court clarified the requirements imposed upon a filing so that it might be considered an amendment to a prior administrative claim and stated the following:

> Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained, is permissible. On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim.

United States v. Andrews, 302 U.S. at 524. Similarly, in Consolidated Coppermines Corporation v. United States, the United States Court of Claims stated,

> [w]here the amendment is inconsistent with the former claim, or has injected new and unrelated matter, we have not allowed it, but where it is germane to the original claim and sets up matter discovered in the course of the investiga-

tion of the original one, we have allowed it.

Consol. Coppermines Corp. v. United States, 155 Ct. Cl. 731, 736 [8 AFTR 2d 5871], 296 F.2d 743 [8 AFTR 2d 5871] (1961).

Sierra Pacific contends that the 1998 Claim Letter is a proper amendment to the 1120X and 870-AD forms, filed in 1991 and 1992, respectively. Nevada Power's 1998 Claim Letter, filed after the expiration of the applicable statute of limitations, should not be characterized as a proper amendment to either the 1120X or the 870-AD forms. The 1998 Claim Letter raises a new and independent claim asserting grounds for a refund that had until then never been made known to the IRS, namely, that the IRS had utilized an erroneous method for the calculation of deficiency interest. The 1120X and 870-AD forms filed by Nevada Power were based on specific changes, including changes in the taxable income identified in the 1120X form and the 4549 form that accompanied the 870-AD, such as: "Heat Pump Rebates," "Genwal Stock Purchase," and "Legal Expenses--Genwal Stock," a "change in method of accounting for customer deposits," and a "change in tax due to change in income." Although implicit in these tax claims is a claim for deficiency interest associated with the changes in tax, Nevada Power made no assertion that the IRS was utilizing an erroneous date for the calculation of deficiency interest. As has already been discussed, nothing on either the 1120X or the 870-AD forms, nor within any of the other documents presented to the court, demonstrates that the IRS was given notice of such a date miscalculation claim at any time prior to the submission of the 1998 Claim Letter to the IRS.

The 1998 Claim Letter did not clarify any grounds for a refund claim already present in either the 1120X or 870-AD forms, nor did it "make[] more definite the matters already within [the] knowledge [of the IRS]." United States v. Andrews, 302 U.S. at 524. For the first time in the 1998 Claim Letter, Nevada Power called for the IRS to reevaluate the method by which the IRS had assessed deficiency interest for Nevada Power's 1988 tax year. This was an "action requiring examination of other matters not germane" to the items presented by Nevada Power in the 1120X and 870-AD forms. Id. As the Supreme Court indicated in United States v. Andrews, it is an untenable position that "a claim limited to a specified item might be amended out of time to seek a refund on account of other and unrelated items." Id. at 527.

Sierra Pacific cites to the Claims Court's decision in Deluxe Check Printers, Inc. v. United States and the Eleventh Circuit decision in Mutual Assurance, Inc. v. United States to attempt to support the proposition that it is entitled to the deficiency interest presently sought. Deluxe Check Printers, Inc. v. United States, 15 Cl.Ct. 175 [62 AFTR 2d 88-5146] (1988), rev'd in part on other grounds sub. nom Deluxe Corp. v. United States, 885 F.2d 848 [64 AFTR 2d 89-5327] (Fed.Cir.1989); Mut. Assurance, Inc. v. United States, 56 F.3d 1353 [76 AFTR 2d 95-5132] (11th. Cir.1995). Sierra Pacific's reliance upon Deluxe Check and Mutual Assurance is unconvincing. In Deluxe Check, the court characterized the issue as "whether, in light of the totality of the facts and circumstances surrounding the refund claim(s) ... the IRS had actual or constructive notice of the nature of plaintiff's claim for the interest erroneously assessed." Id. at 180. The court indicated that each case is dependent on the specific facts presented. Id. This court agrees with the fact specific nature of variance tax cases. In the case before this court, however, no assertion has been made by Sierra Pacific that the IRS had actual notice of the alleged error in the method of calculation of interest. As discussed above, nothing in the Form 870-AD or the Form 1120X gave notice to the IRS of Sierra Pacific's current allegation that the IRS was employing an incorrect starting date for the calculation of deficiency interest. These facts distinguish the present case from both Deluxe Check and Mutual Assurance. See United States v. Garbutt Oil Co., 302 U.S. at 533 ("The claim be-

ing thus specific, the Commissioner was entitled to take it at face value and to examine only the points to which it directed his attention.''). Nevada Power's claim for deficiency interest in its 1998 Claim Letter was for deficiency interest based on a different legal theory, and went beyond the claim for interest associated with the underlying tax sought in the 1120X and 870-AD Forms. The specific assertion that these forms provided notice to the IRS of an erroneous starting date for the calculation of deficiency interest cannot reasonably be drawn from the documents Nevada Power submitted to the IRS.

The characterization of the 1998 Claim Letter as an amendment to the Form 1120X or Form 870-AD should also be rejected because the Form 1120X and Form 870-AD claims were no longer pending and the statute of limitations had expired at the time the 1998 Claim Letter was submitted. An amendment to a refund claim submitted after the expiration of the applicable statute of limitations may only be made if the original claim is still pending. See Allstate Ins. v. United States, 213 Ct. Cl. 96, 104 [39 AFTR 2d 77-1096], 550 F.2d 629, 633 [39 AFTR 2d 77-1096] (1977) (''It is a rule of long standing that once a refund claim has been disallowed, it is not subject to amendment.''); see also Union Pac. R.R. Co. v. United States, 182 Ct. Cl. 103, 116–17 [21 AFTR 2d 478], 389 F.2d 437, 447 [21 AFTR 2d 478] (1968) (''The disposition of a taxpayer's refund claim by allowance of the amount requested in full, however, precludes an amendment asserting an additional amount after the expiration of the statutory period for refund.''). Absent such a principle, a taxpayer would be permitted to amend any refund claim in perpetuity. See Mut. Life Ins, Co. of N.Y. v. United States, 72 Ct. Cl. 204 [9 AFTR 1377], 49 F.2d 662, 664, cert. denied, 284 U.S. 628 (1931) (''A claim that has been rejected may not be amended after the statute of limitation has expired. Sugar Land Railway Co. v. United States, 48 F.(2d) 973 [71 Ct. Cl. 628 [9 AFTR 1216]], decided April 6, 1931, by this court. To hold that a claim for refund made on a specific ground may, after it has been considered and rejected, be amended or enlarged so as to include an entirely different ground ... would be to permit an indefinite postponement of the limitation for bringing suit and would nullify the provisions of the statute as to the time within which claims may be filed and the time within which suit may be brought.''); Mobil Corp. v. United States, 52 Fed. Cl. at 336.

Sierra Pacific argues that its 1998 Claim Letter should be understood as an amendment of the 1991 1120X and 1992 870-AD forms. From an examination of the activity relating to the Nevada Power's 1988 tax account, it is clear that neither the Form 1120X nor the Form 870-AD claims were pending at the time Nevada Power submitted its 1998 Claim Letter. In fact, the record indicates that both of these claims had been resolved by the IRS more than five years prior to the 1998 Claim Letter.

The Certificate of Assessments, Payments, and Other Specified Matters for Nevada Power's 1988 tax account indicates that on February 2, 1993, the IRS abated the $40,088.00 in overassessed taxes, as indicated on the 870-AD form, and $11,557.37 in interest, the corresponding amount of interest associated with the $40,088, on Nevada Power's 1988 tax account. The IRS simultaneously credited ''interest due taxpayer,'' and issued a refund of $29,373.48. The only subsequent activity in the 1988 account was a credit of interest and an issuance of refunds on May 10, 1993, in the amounts of $4,164.41 and $32,649.00, respectively. The result of these transactions was a zero-balance in the 1988 tax account on May 10, 1993. For more than five years after the issuance of the final refund, no activity is shown in the 1988 tax account. It is evident that the IRS had long completed its evaluation of both the Form 1120X and Form 870-AD, as shown through the issuance of a refund that created a zero-balance in the 1988 tax account in 1993, followed by five years of inactivity. Once the IRS concluded its evaluation of the Form 1120X and Form 870-AD, and the statute of limitations had

expired, the forms were no longer subject to amendment.

CONCLUSION

Nevada Power's failure to file a proper administrative claim within the statutorily mandated time period precludes this court from exercising jurisdiction over plaintiff's claim. Because Sierra Pacific has failed to prove that this court has jurisdiction, the motion of the United States to dismiss the complaint is GRANTED.

IT IS SO ORDERED.

¶2002-5718

UNITED STATES OF AMERICA, PLAINTIFF v. Gilbert GOO, Individually and as Sole Trustee of the Brandar Management Trust; Creative Signs & Graphics, Ltd., a Hawaii Corporation, DEFENDANTS. U.S. District Court, Dist. of Hawaii, (DC HI) CIVIL NO. 00-540 DAE LEK, Nov. 18, 2002. Earlier proceedings at (2002, DC HI) 90 AFTR 2d 2002-5079; (2002, DC HI) 89 AFTR 2d 2002-3034; (2002, DC HI) 89 AFTR 2d 2002-2646; (2001, DC HI) 88 AFTR 2d 2001-6413; (2001, DC HI) 88 AFTR 2d 2001-5784; and (2001, DC HI) 88 AFTR 2d 2001-5466. Years 1989, 1990, 1991, 1992, 1993. Decision for Taxpayer in part and for Govt. in part.

1. Actions to enforce liens—foreclosure and judicial sale—distribution of proceeds—surcharge—Federal Debt Collection Procedure Act. Taxpayer was granted in part return of surplus foreclosure sale and rent proceeds that govt. collected on lien property, less 10% given to U.S. as FDCPA sanctioned surcharge: govt.'s alleged failure to file accurate expense accounting didn't preclude it from asserting surcharge; and surcharge was clearly authorized with respect to amount of judgment relating to taxpayer's tax liability. But, govt. had no right to recover surcharge on amount collected for back rent. *Reference:* United States Tax Reporter ¶74,035.03(110). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII,

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT GILBERT GOO'S MOTION FOR THE RETURN OF SURPLUS PROCEEDS; ORDER GRANTING IN PART AND DENYING IN PART UNITED STATES' MOTION OF COLLECTION OF SURCHARGE

DAVID ALAN EZRA CHIEF UNITED STATES DISTRICT JUDGE

The court heard Defendant Gilbert Goo's and the United States' motions on November 18, 2002. Gilbert Goo, Pro Se, appeared on the briefs or at the hearing; Department of Justice Attorney Jeremy Hendon, appeared on the briefs or at the hearing on behalf of the United States. After reviewing the motions and the supporting and opposing memoranda, the court GRANTS IN PART AND DENIES IN PART Defendant's Motion for the Return of Surplus Proceeds to Gilbert Y.K. Goo, Individually and as Sole Trustee of the Brandar Management Trust, Respondents; and GRANTS IN PART AND DENIES IN PART the United States' Motion for Collection of Surcharge Pursuant to 28 U.S.C. § 3011.

BACKGROUND

On or about August 2, 2000, the United States filed the instant action seeking to: (I) reduce to judgment the outstanding federal income tax liabilities assessed against taxpayer Gilbert Goo (''Defendant''); and (ii) foreclose its tax liens against two parcels of real property, including the property at issue in the present action.

On July 3, 2001, the Court entered an order granting the United States' motion for summary judgment. Judgment was entered against Goo on July 16, 2001 in the amount of $585,089.95, plus interest as provided by law.

On February 21, 2002, the subject properties were sold, and Defendant's unpaid tax liabilities for the years 1989 through 1993, inclusive, were satisfied in full. The United States sold the two parcels

of property for a total of $695,000.00 Additionally, the United States received rent checks totaling $21,840.00 for one of the properties. Thus, the United States collected a total of $716,840.00 for the sale and rent of the property. After property taxes were paid on the subject properties, the United States received a net sum of $715,975.81.

On August 23, 2002, the United States deposited two checks totaling $113,166.45 in excess sales proceeds with the Clerk of the Court. This amount reflects the net sum collected by the United States, minus the tax amount owed by Defendant and IRS sales expenses of $6,799.33.

On October 3, 2002, Defendant filed a Motion for the Return of Surplus Proceeds to Gilbert Y.K. Goo, Individually and as Sole Trustee of the Brandar Management Trust, Respondents (''Motion''). The United States opposed the motion on October 29, 2002 (''Opposition''). Additionally, on November 5, 2002, the United States filed a Motion for Collection of Surcharge Pursuant to 28 U.S.C. § 3011 (''Motion for Collection of Surcharge''). On November 12, 2002, Defendant filed a Reply to his Motion and Objection to the Government's Motion for Collection of Surcharge (''Reply'').

DISCUSSION

[1] Defendant requests the return of the $113,166.45 in surplus proceeds. ''The United States does not object to the Court partially granting Goo's motion, and returning $54,659.49 to him. That amount is the difference between the funds deposited with the registry of the Court and the amount the United States seeks pursuant to Section 3011.'' Opposition at 3. Thus, the court will first consider the United States' Motion for Collection of Surcharge in order to determine the actual amount due to Defendant at this time.

I. THE UNITED STATES MAY RECOVER A SURCHARGE PURSUANT TO FDCPA

The Federal Debt Collection Procedures Act (''FDCPA'') authorizes the United States to recover ''10 percent of the amount of the debt in connection with the recovery of the debt, to cover the cost of processing and handling the litigation and enforcement under this chapter of the claim for such debt.'' 28 U.S.C. § 3011(a) (2002). However, this surcharge does not apply if ''(1) the United States receives an attorney's fee in connection with the enforcement of the claim; or (2) the law pursuant to which the action on the claim is based provides any other amount to cover such costs.'' 28 U.S.C. § 3011(b) (2002).

''A judgment in a civil action shall create a lien on all real property of a judgment debtor on filing a certified copy of the abstract of the judgment in the manner in which a notice of tax lien would be filed under'' the Internal Revenue Code. 28 U.S.C. § 3201(a) (2002). Chapter 28 includes ''an amount that is owing to the United States on account of a[n] ... assessment, ... [or] tax ...'' within its definition of ''debt'' for purposes of 28 U.S.C. § 3011(a). See 28 U.S.C. § 3002(3)(B) (2002).

The instant action involved the reduction of assessments to judgment and the foreclosure of tax liens against Defendant. The amount of judgment, $585,089.95, reflected Defendant's unpaid federal income tax liability. The United States filed a certified copy of the judgment pursuant to the Internal Revenue Code and obtained a judgment lien. Accordingly, the FDCPA authorizes the United States to recover $58,509.00, which represents ''10 percent of the amount of the debt in connection with the recovery of the debt ....'' 28 U.S.C. § 3011(a) (2002).

Defendant, however, argues that the court should deny the Government's Motion for Collection of Surcharge because the Internal Revenue Service did not ''file an accurate accounting of all receipts and expenses,'' and the Internal Revenue Service already deducted approximately $7000.00 for expenses incurred in the sale of Defendant's property. See Reply at 2–4. The Internal Revenue Service's recovery of costs and expenses, which covered items such as airfare, hotel, and parking, however, does ''cover the cost of processing

and handling the litigation and enforcement under this chapter of the claim for such debt.'' 28 U.S.C. § 3011(a). Defendant fails to provide any authority that precludes the United States from asserting a surcharge under the FDCPA, which is akin to an attorneys' fee statute for the United States' in a debt recovery action. See United States v. Sackett, 114 F.3d 1050, 1051 (10th Cir. 1997).

At the hearing, Defendant argued that the Government should not be permitted to assert a surcharge of $2,184 for its collection of $21,840.00 back rent from his tenant. The court agrees, and reduces the amount due to the United States by that amount.

Thus, the court GRANTS IN PART AND DENIES IN PART the United State's Motion for Collection of Surcharge and orders payment of $56,325.00 be made from the surplus proceeds that were deposited with the Clerk of the Court on August 23, 2002.

II. DEFENDANT IS ENTITLED TO $56,841.45

In regards to Defendant's Motion, the court finds that Defendant is entitled to the $113,166.45 deposited with the registry, which represents the surplus of proceeds generated from the sale of his properties minus Defendant's unpaid tax liabilities. However, the court finds that this amount must be reduced by $56,325.00, pursuant to the FDCPA, as described above. Thus, the court GRANTS IN PART AND DENIES IN PART Defendant's Motion and orders the return of $56,841.45 to Defendant.

CONCLUSION

For the reasons stated above, the court GRANTS IN PART AND DENIES IN PART Defendant's Motion for the Return of Surplus Proceeds to Gilbert Y.K. Goo, Individually and as Sole Trustee of the Brandar Management Trust, Respondents, and orders the Clerk of the Court to return $56,841.45 to Defendant upon maturation of the certificate of deposit. Additionally, the court GRANTS IN PART AND DENIES IN PART the United State's Motion for Collection of Surcharge Pursuant to 28 U.S.C. § 3011, and orders the Clerk of the Court to pay $56,325.00 to the United States from the Defendant's surplus proceeds.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, NOV 18 2002.

DAVID ALAN EZRA

CHIEF UNITED STATES DISTRICT JUDGE

United States of America vs. Gilbert Goo, et al., Civil no. 00-00540 DAE/LEK; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT GILBERT GOO'S MOTION FOR THE RETURN OF SURPLUS PROCEEDS; ORDER GRANTING IN PART AND DENYING IN PART UNITED STATES' MOTION FOR COLLECTION OF SURCHARGE

¶2002-5719

William GIFFORD, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-02-0467-RLH (LRL), Oct. 23, 2002. Year 1999. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalty—summary judgment. Tax protester's petition to invalidate IRS's administrative determination to proceed with collection of IRC §6702 penalty for year he filed ''zero'' return was dismissed: penalty assessment was clearly valid where Form W-2 refuted taxpayer's return position; taxpayer's protester-type challenge to tax was frivolous; and Appeals Officer's reliance on Form 4340 satisfied IRC §6330's verification requirement. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(10). IRC §6330; 6702.

UNITED STATES DISTRICT COURT DISTRICT OF NEVADA,

JUDGEMENT IN A CIVIL CASE

__Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed. Judgment is entered in favor of defendants United States of America and against plaintiff William Gifford.

October 23, 2002

Date

LANCE S. WILSON

Clerk

/s/

By Deputy Clerk,

ORDER

ROGER L. HUNT United States District Judge

(Motion to Dismiss-2)

Before the Court is Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (#2), filed August 1, 2002. The Court has also considered Plaintiff's Opposition (#7), filed September 3, 2002, and Plaintiff's Complaint (#1), filed April 2, 2002.

BACKGROUND

Plaintiff asks this court to grant two request: 1) To ''declare invalid'' a collection due process determination made by the IRS against him and 2) To order reim-bursement by Defendant of Plaintiff's costs associated with bringing this action.

Following a pattern of behavior the Court has yet to understand, Plaintiff filed Form 1040, U.S. Individual Income Tax Return, for the 1999 tax year. Although the IRS's return data sheet showed income received by the Plaintiff, the Return contained zeroes on all lines reflecting income earned or taxes due and had attached a statement outlining reasons for his belief that he had no income to report and did not, therefore, owe federal income tax.

Pursuant to Section 6702, the IRS assessed a $500 civil penalty on Plaintiff for filing the return. Section 6702 assesses a $500 civil penalty if an individual ''files what purports to be a return'' but which contains ''information that on its face indicates that the self-assessment is substantially incorrect'' and is due to ''a position which is frivolous.''

The IRS posted a Notice of Federal Tax Lien for unpaid civil penalties pursuant to Internal Revenue Code §§ 6321, 6322, and 6323 and informed Plaintiff of the lien. Plaintiff then requested from Defendant a collection due process hearing regarding the frivolous return penalties and collection alternatives which was held on February 5, 2002, a transcript of which is attached to Plaintiff's Complaint (#1).

Finally, on March 14, 2002, the IRS sent Plaintiff a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (Notice of Determination) informing Plaintiff that the proposed levy to collect the frivolous return penalty would not be restricted. Attached to the Notice of Determination was Attachment 3194 explaining that the decision was based on the determination that the IRS fully complied with all applicable laws, regulations, and administrative procedures. The Notice of Determination also informed Plaintiff that any dispute of the determination could be made within 30 days in the appropriate United States District Court. Plaintiff timely filed with this Court and Defendant now moves to dismiss.

DISCUSSION

I. Dismissal for Failure to State a Claim

[1] Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for ''failure . . . to state a claim upon which relief can be granted.'' ''[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.''

Conley v. Gibson, 355 U.S. 41, 45–46 (1957); *see also Yamaguchi v. U.S. Dep't of the Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). All factual allegations set forth in the complaint ''are taken as true and construed in the light most favorable to [p]plaintiffs.'' *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) (citing *In re Wells Fargo Sec. Litig.*, 12 F.3d 922, 925 (9th Cir. 1993), *cert denied*, 513 U.S. 917, 115 S.Ct. 295, 130 L.Ed.2d 209 (1994)). Dismissal is appropriate ''only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'' *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

II. Analysis

Plaintiff first asks that the collection due process determination made against him by the IRS be declared invalid. Since the Tax Court does not have jurisdiction to consider frivolous return penalties, *See Van Es v. Commissioner*, 115 T.C. 324 (2000), the matter is appropriately before this court. 26 U.S.C. § 6320(c), 6330(d)(1)(B).

26 U.S.C § 6702 assigns liability in the amount of five hundred dollars ($500) to a person filing a frivolous tax return. The Secretary of the Treasury or his delegate, such as the IRS,[1] assesses this penalty in the same manner as a tax, and any reference to a ''tax'' in Title 26 also includes this penalty. 26 U.S.C. § 6671. Section 6201 of the Code authorizes the Secretary to make any necessary tax assessments. In the case of a frivolous return penalty, the deficiency procedures of Title 26, Chapter 63, subchapter B, do not apply. U.S.C. § 6703(b). The failure to pay the penalty results in a lien on the person's property. 26 U.S.C. § 6321. To ensure the validity of the lien, the Secretary files the lien with, in this case, the Clark County Recorder, 26 U.S.C. § 6323(f)(1)(A), and sends a notice of filing of the lien to the person, 26 U.S.C. § 6320(a). The Secretary must also inform the person of his right to a hearing at the same time. 26 U.S.C. § 6320(a)(3)(B). For the purposes of this Order, the procedures of the collection due process hearing, 26 U.S.C. § 6330(c), apply to the lien hearing, 26 U.S.C. § 6320(c). If the person requests a hearing, the hearing officer must ''obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.'' 26 U.S.C. § 6330(c)(1). At the hearing, the person may also raise any relevant issue, including spousal defenses, the appropriateness of the collection action, and any collection alternatives. 26 U.S.C. § 6330(c)(2)(A). The person ''may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.'' 26 U.S.C. § 6330(c)(2)(B).

The ''underlying tax liability'' in this case is the frivolous return penalty. *See* 26 U.S.C. § 6671; *see also* 26 C.F.R. 301.6321-1. Plaintiff properly challenged the validity of the frivolous return penalties at the collection due process hearing because the statutory deficiency procedures do not apply to frivolous return penalties, 26 U.S.C. § 6703(b), and thus Plaintiff had no prior opportunity to dispute the penalties. The validity of the income taxes the Plaintiff owes for 1999 is not at issue in this action. On the other hand, the tax return that Plaintiff filed is relevant because they determine whether assessment of the frivolous return penalty was proper.

Section 6330(d) is silent on the standard that the Court should use the review the determination of the collection hearing. However, the legislative history indicates that if the validity of the underlying tax liability was properly at issue, then review is *de novo*. H. Conf. Rep. 105-599 (1998); *see also Dogwood Forest Rest Home, Inc. v. United States*, 181 F. Supp. 2d 554, 559 [89 AFTR 2d 2002-728] (M.D.N.C. 2001);

[1] 1 The Court will use the collective term ''Secretary'' to refer to the Secretary of the Treasury and any delegates. See 26 U.S.C. § 7701(a)(11)(B). The Secretary of the Treasury may delegate much of his authority and responsibilities to others by prescribing rules and regulations, among other methods. 26 U.S.C. § 7805(a); *see also* 26 C.F.R. §§ 301.7701-9, 301.7701-10.

MRCA Info. Servs. v. United States, 145 F. Supp. 2d 194, 198–99 [89 AFTR 2d 2002-694] (D. Conn. 2000); *Sego v. Commissioner*, 114 T.C. 604, 610 (2000). The Court will use that standard of review.

There is no doubt as to the validity of the penalty. Plaintiff submitted Form 1040 for 1999 with zeros in the income section, but the IRS's information return data showed income considerably more than zero. He also attached an explanation of how no provisions of the Internal Revenue code make him liable for the income tax, how his wages are not income, and other matters. Wages are income, 26 U.S.C. § 61, upon which Plaintiff owes a tax, 26 U.S.C. § 1, and courts—including this one—have found arguments to the contrary to be tired and frivolous long before Plaintiff filed the tax returns at issue. *See, e.g., Sisemore v. United States*, 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir. 1986); *Coleman v. Commissioner*, 791 F.2d 68, 70 [57 AFTR 2d 86-1420] (7th Cir. 1986); *Sullivan v. United States*, 788 F.2d 813, 815 [57 AFTR 2d 86-1226] (1st Cir. 1986); *Olson v. United States*, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir. 1985); *In re Hopkins*, 192 B.R. 760, 762–63 [76 AFTR 2d 95-7748] (D. Nev. 1995); and other cases too numerous to cite. On its face, Plaintiff's tax returns were substantially incorrect and frivolous, thus making Plaintiff liable for the frivolous return penalty. 26 U.S.C. § 6702. The assessments of the frivolous return penalties are valid.

No genuine issue of material fact exists over the verification of all legal and administrative requirements. The hearing officer apparently properly relied on Form 4340 for such verification.[2] *See Huff v. United States*, 10 F.3d 1440, 1446–47 [72 AFTR 2d 93-6682] (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994); *Hughes v. United States*, 953 F.2d 531, 538–40 [69 AFTR 2d 92-472] (9th Cir. 1992); *see also Davis v. Commissioner*, 115 T.C. 35, 41 (2000). The Form 4340 evidently show, and is not disputed by Plaintiff, that the frivolous return penalty had been assessed, that notices had been mailed to Plaintiff, and the Plaintiff had requested a hearing. Because, as noted above, the tax return is clearly frivolous, the hearing officer did not err in his verification that the requirements of any applicable law and administrative procedures had been met. Therefore, the collection due process determination is valid.

Without declaring defendant's collection due process determination invalid, the Court has no reason to reach Plaintiff's request for costs.

. . . .

. . . .

. . . .

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (#2) is GRANTED.

Dated: October 21, 2002.

ROGER L. HUNT

United States District Judge

¶2002-5720

William W. BRIDGE, III, PLAINTIFF v. Frank R. BRANCATELLI, ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of Ohio, (DC OH) CASE NO. 1:02 CV 1809, Nov. 20, 2002. Decision for Govt.

1. Actions against IRS—sovereign immunity—jurisdiction. Pro se taxpayer's claims against IRS in action against his attorney and others for malpractice and related torts were dismissed: vague complaint that merely identified IRS as judgment creditor but alleged no facts on which to base claims against it showed no sovereign immunity waiver for suit. Also, remaining claims against attorney and others were remanded to state court.

[2] *See* Plaintiff's Complaint, Exhibit C at 3. However, the Court urges Counsel for the Government to, in the future, include Form 4340 as evidence of its position.

Reference: United States Tax Reporter ¶74,336.506(25).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO,

MEMORANDUM OF OPINION AND ORDER

JUDGE PATRICIA A. GAUGHAN

This action was removed from the Lake County Court of Common Pleas on September 16, 2002 by the defendant Internal Revenue Service. Accompanying the Notice of Removal was the government's Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and (6). For the reasons set forth below, the Motion is granted, the claims asserted against the Internal Revenue Service are dismissed without prejudice, and this matter is remanded to the appropriate state court.

I. Background

Plaintiff pro se William W. Bridge, III alleges that he retained attorney Frank R. Brancatelli to represent him in several legal matters. It appears from the complaint that he obtained a referral to Mr. Brancatelli through the Lake County Bar Association. In February, 2002, Mr. Brancatelli allegedly admitted to the plaintiff that he was the subject of a federal grand jury inquiry. Plaintiff claims that after this revelation, Mr. Brancatelli began to neglect the legal matters entrusted to him, resulting in the dismissals of several pending cases for want of prosecution. He contends the attorney refused to provide an accounting for the time he spent on plaintiff's legal matters, inform him of the status of his cases, provide copies of communications and pleadings he filed on plaintiff's behalf, or return any of plaintiff's legal files.

In addition, plaintiff claims Mr. Brancatelli advised plaintiff to enter his business, Nations Construction, LLC ("Nations Construction") into construction contracts with Ry-Marc Plastics, Inc. ("Ry-Marc") and Travis Products, Inc. ("Travis"). Ry-Marc and Travis assigned insurance proceeds due to them from the Ohio Casualty Group of Insurance Companies ("OCG") to Nations Construction. These proceeds were allegedly intended to cover a portion of the funds due to Nations Construction under the contract. Plaintiff states Mr. Brancatelli convinced him to permit the monies due to Nations Construction under these contracts to be paid into Mr. Brancatelli's IOLTA trust account. Mr. Brancatelli would then disburse the payments to Nations Construction. He contends he discovered that Mr. Brancatelli also represented Ry-Marc and Travis in legal matters and often permitted Ry-Marc and Travis to deposit money in his attorney IOLTA account to avoid attachment by their creditors. One of these creditors was allegedly the Internal Revenue Service.[1] Plaintiff claims that at some point, Mr. Brancatelli, Ry-Marc and Travis stopped making payments to him and misappropriated funds due to him from the IOLTA account. He further alleges that Ry-Marc and Travis caused the insurance proceeds from OCG which were assigned to him to be diverted to other sources. Plaintiff does not state the amount of money he believes to still be due to Nations Construction under the contracts.

Plaintiff filed an action against Mr. Brancatelli in the Lake County Court of Common Pleas. The date of that filing is not discernable from the documents pro-vided to this court. On July 29, 2002, plaintiff filed an amended complaint in that action. The amended complaint, which was attached to the Notice of Removal, names attorney Brancatelli, the Lake County Bar Association, Ry-Marc, Travis, Ry-Marc and Travis President Joseph Soltesiz, Sr., OCG, and the Internal Revenue Service as defendants. It contains five claims for relief.[2] Count I of the amended complaint contains a claim for legal malpractice against Mr. Brancatelli. Count II contains a claim for legal malpractice against the Lake County Bar Association. Count III

[1] Exhibit D of the amended complaint suggests that the IRS has filed a tax lien in the amount of $71,220.80 against property owned by Ry-Marc. In addition to the amount owed to the IRS, the exhibit suggests that Ry-Marc owes $71,005.28 to judgment creditors, and $ 17,831.00 to State and local government bodies for unpaid property taxes.

[2] The amended complaint sets forth six Counts. The first five Counts contain claims against various defendants. Count VI sets forth a request for specific relief. It does not contain a separate legal claim.

asserts a claim for replevin against Mr. Brancatelli. Count IV asserts claims of theft, conversion, and tortious interference with contract against Brancatelli, Ry-Marc, Travis, Soltesiz, and OCG. Count V sets forth claims for breach of fiduciary duty against Brancatelli, Ry-Marc, Travis, Soltesiz, and OCG. Plaintiff seeks injunctive relief, and monetary damages.

On September 16, 2002, the United States filed a Notice of Removal and a Motion to Dismiss pursuant to Fed R.Civ.P. 12(b)(1) and (6). In the Motion, the United States asserts that plaintiff has not affirmatively demonstrated that the United States has waived its sovereign immunity. It further asserts that the plaintiff has failed to state a claim upon which relief may be granted. The government seeks dismissal from this action and remand of the remaining issues to state court.

II. Analysis

[1] To survive a motion to dismiss, the plaintiff's complaint must contain "either direct or indirect allegations respecting all material elements to sustain recovery under some viable legal theory." Bd. of Trustees of Painesville Township v. City of Painesville, Ohio, 200 F.3d 396, 398 (6th Cir. 1999). The court must construe the complaint in a light most favorable to the plaintiff, accept as true all of plaintiff's well-plead factual allegations, and determine whether plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Id.; See Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); Rossborough Mfg.Co. v. Trimble, 301 F.3d 482, 489 (6th Cir. 2002). While pro se pleadings are liberally construed, Boag v. MacDougall, 454 U.S. 364, 365 (1982) (per curiam); Haines v. Kerner, 404 U.S. 519, 520 (1972), the plaintiff bears the burden of proving subject matter jurisdiction when it is challenged. Rogers v. Stratton Indus., Inc., 798 F.2d 913, 915 (1986).

In the present case, the plaintiff has stated no apparent cause of action against the Internal Revenue Service. Plaintiff indicates that the "United States Government, Internal Revenue Service . . . is named herein as a necessary party only under [Ohio Civil] Rule 19 because the IRS is a judgment creditor of plaintiff William W. Bridge, III, Nations Construction, LLC, and Defendants Brancatelli, Soltesiz, Ry-Marc and Travis." (Am. Compl. at 4.) The relief he seeks from the government is unclear.

The United States, as a sovereign, cannot be sued without its prior consent, and the terms of its consent define the court's subject matter jurisdiction. McGinness v. U.S., 90 F.3d 143, 145 [78 AFTR 2d 96-5621] (6th Cir. 1996). A waiver of sovereign immunity must be strictly construed, unequivocally expressed, and cannot be implied. U.S. v. King, 395 U.S. 1, 4 [23 AFTR 2d 69-1358] (1969); Soriano v. U.S., 270, 276 (1957). Although there are a number of potential claims that plaintiff may be seeking to assert against the Internal Revenue Service based upon the facts stated in the amended complaint, none is reasonably discernable from the face of the pleading. District courts are not required to conjure up questions never squarely presented to them. Id. at 1278. To do so would "require . . . [the courts] to explore exhaustively all potential claims of a pro se plaintiff, . . . [and] would . . . transform the district court from its legitimate advisory role to the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party." Id. at 1278. Even liberally construing the pleading, there is not a sufficient indication that the United States waived its sovereign immunity. Consequently, plaintiff failed to demonstrate that this court would have subject matter jurisdiction over the United States. The claims against this defendant are therefore dismissed without prejudice pursuant to Fed R. Civ P. 12(b)(1).[3]

III. Conclusion

For the preceding reasons, the United State's Motion to Dismiss is granted. The claims against the United States and/or the Internal Revenue Service are dismissed

[3] A dismissal for lack of subject matter jurisdiction does not operate as a dismissal on the merits. Rogers v. Stratton Industries, Inc., 798 F.2d 913, 917 (6th Cir. 1986).

without prejudice pursuant to Fed R. Civ. P. 12(b)(1). As this court lacks jurisdiction over the other claims against the remaining defendants, this matter is remanded to the Lake County, Ohio Court of Common Pleas.

IT IS SO ORDERED

PATRICIA A. GAUGHAN

UNITED STATES DISTRICT JUDGE

¶2002-5721

MICROSOFT CORPORATION, APPELLANT v. COMMISSIONER of Internal Revenue, APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-71584, Dec. 3, 2002. Tax Court, (2000) 115 TC 228 (opinion by Jacobs, *J.*), reversed and remanded. Years 1987, 1988, 1989, 1990, 1991. Decision for Taxpayer.

1. Foreign sales corps.—foreign trading gross receipts—qualification as export property—copyrighted computer software masters. Tax Court improperly determined that software co.'s copyrighted computer software master copies licensed for reproduction abroad weren't deductible export property under pre-'97 IRC §927(a)(2)(B): software masters were clearly covered by statute's parenthetical exception for copyrights for ''films, tapes, records or *similar reproductions*.'' Based on statute's plain language, its explicit exclusion of *intangible* but not tangible intellectual property, and case law, parenthetical was interpreted as generally covering type of media to which copyrighted material was affixed, not just specific content; so, since software masters were tangible material stored on same or similar type of media as that used by motion picture and sound recording industries, they were considered ''similar reproductions'' to those clearly excepted materials. Also, parenthetical's expansive interpretation was further supported by copyright law, fact that Congress had explicitly rejected more limiting language and legislative purpose. *Reference:* United States Tax Reporter ¶9275.01(10); 9935.01(15). IRC §924; 993. Former IRC §927.

2. Foreign sales corps.—export property—copyrighted computer software masters—validity of Temp. Reg. §1.927(a)-1T(f)(3). Tax Court improperly upheld as valid Temp. Reg. §1.927(a)-1T(f)(3): reg's explicit exclusion of copyrighted computer software from deductible export property conflicted with pre-'97 IRC §927(a)(2)(B)'s plain language and its ''similar reproductions'' exception, which clearly encompassed copyrighted software licensed for reproduction abroad. *Reference:* United States Tax Reporter ¶9275.01(15). Former IRC §927.

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

On Appeal from a Decision of the United States Tax Court,

Before: David R. Thompson and Johnnie B. Rawlinson, Circuit Judges, and William W Schwarzer,* Senior District Judge.

Opinion by Judge Thompson

OPINION

THOMPSON, Circuit Judge:

FOR PUBLICATION

Tax Court No. 16878-96

Microsoft Corporation appeals the tax court's deficiency judgment in favor of the Commissioner of Internal Revenue (the ''Commissioner''). In 1990 and 1991, Microsoft claimed ''export property'' deductions for certain commissions it paid to Microsoft Foreign Sales Corporation. These commissions were for royalty income subsidiaries earned from the international distribution of master copies of Microsoft computer software. The Commissioner disallowed the deductions because it concluded that master copies of computer software were not deductible

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

"export property" under now repealed I.R.C. § 927(a)(2)(B). During the applicable period, that section provided, in relevant part:

> The term "export property" shall not include ... patents, inventions, models, designs, formulas, or processes whether or not patented, copyrights (other than films, tapes, records, or similar reproductions, for commercial or home use), good will, trademarks, trade brands, franchises, or other like property ....

§ 927(a)(2)(B).[1] Because we interpret this section's phrase "copyrights (other than films, tapes, records, or similar reproductions, for commercial or home use)" to include computer software masters, we reverse the tax court's judgment.

I

Statutory Background

In 1970, in response to a troubled economy, Congress twice tried but failed to enact legislation that would have exempted export property from tax liability in certain circumstances. Both bills stated that intangible intellectual property would not be deductible export property, but exempted certain copyrightable materials. One bill provided that "copyrights (other than mo-tion picture films or films or tapes used for radio or television broadcasting)" were not export property. H.R. 18392, 91st Cong. sec. 2, § 991 (1970). The other provided that "copyrights (other than films, tapes, or records for the commercial showing of motion pictures or used for radio or television broadcasting or to provide background music)," were not export property. H.R. 18970, 91st Cong. sec. 402, § 991 (1970). Neither bill was enacted.

The next year, Congress successfully passed the Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497, with stated goals which included putting the lagging economy on a high growth path, increasing the number of jobs, reducing the high unemployment rate, increasing exports, and improving the balance of payments (hereinafter "the DISC legislation"). S. Rep. No. 92-437, at 1 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1918. The Senate Report explained that:

> To provide tax incentives for U.S. firms to increase their exports, [Congress] has provided tax deferral for one-half of export-related profits, so long as they are retained in a new type of U.S. corporation known as a Domestic International Sales Corporation or a "DISC." The requirements for qualification as a DISC in general are that substantially all of the corporation's gross receipts and assets must be export related.

Id. at 12, *reprinted in* 1971 U.S.C.C.A.N. at 1928. By this legislation, Congress sought "to provide substantial stimulus to exports and at the same time to avoid granting undue tax advantages to the DISC's [sic]." *Id.* at 13, *reprinted in* 1971 U.S.C.C.A.N. at 1928.

In 1984, responding to pressure from signatories to the General Agreement on Tariffs and Trade, Congress supplemented the DISC regime with Foreign Sales Corporations ("FSCs") in the Tax Reform Act of 1984, Pub. L. No. 98-369, § 801(a), 98 Stat. 494, 991 (1984) (hereinafter "the FSC legislation"). *Polychrome Int'l Corp. v. Krigger*, 5 F.3d 1522, 1526 [72 AFTR 2d 93-6319] (3d Cir. 1993) (citing Joint Committee on Taxation, *General Explanation of the Revenue Provisions of the Deficit Reduction Act of 1984*, 98th Cong. 2d Sess., at 1041–42 (CCH 1985)). Under the new legislation, FSCs promoted the same goals as DISCs, but a FSC could permanently exclude, rather than defer, a portion of its profits from qualifying export sales. *See* H.R. Conf. Rep. No. 98-861, at 968–77 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1445, 1656–65. The language that determined qualifying export property remained the same in both the 1971 and 1984 versions of the law. In each, export property must have been:

[1] Unless otherwise specified, all references are to the Internal Revenue Code (Title 26 of the United States Code) as in effect in 1990 and 1991. In 2000, Congress repealed §§ 921 through 927. *See* FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Pub. L. No. 106-519, § 2, 114 Stat. 2423.

(A) manufactured, produced, grown, or extracted in the United States by a person other than a DISC [FSC],

(B) held primarily for the sale, lease, or rental, in the ordinary course of trade or business, by, or to, a DISC [FSC], for direct use, consumption, or disposition outside the United States, and

(C) not more than 50 percent of the fair market value of which is attributable to articles imported into the United States.

§§ 993(c)(1), 927(a)(1). Both statutes excluded from export property "patents, inventions, models, designs, formulas, or processes[,] whether or not patented, copyrights (other than films, tapes, records, or similar reproductions, for commercial or home use), good will, trademarks, trade brands, franchises, or other like property." §§ 993(c)(2)(B), 927(a)(2)(B) (The only difference between the clauses is that a comma after the word "processes" was omitted from the § 927 version.).

Although some uncertainty was expressed regarding whether and to what extent this exception applied to copyrighted computer software programs, (*see, e.g.*, Tech. Adv. Mem. 85-49-003 (Aug. 16, 1985)), the parenthetical exception remained unchanged until 1997, when Congress amended § 927(a)(2)(B) to specify that computer software was within the parenthetical exception: "[t]he term 'export property' shall not include ... copyrights (other than films, records, or similar reproductions, and other than computer software (whether or not patented), for commercial or home use) ...." *See* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1171, 111 Stat. 788, 987. In making this change, Congress recognized that then-current Treasury Regulations excluded from treatment as "export property" computer software accompanied by the right to reproduce, but directed that "[n]o inference [was] intended regarding the qualification as export property of computer software licensed for reproduction abroad under present law." H.R. Conf. Rep. No. 105-220, at 636 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1129, 1448.

II

Factual Background

Organized as a partnership in 1975, Appellant incorporated as Microsoft Corporation ("Microsoft") in 1980. Microsoft's 1990 and 1991 Forms 10-K described its business as the "development, production, marketing, and support of a wide range of software for business and professional use, including operating systems, languages and application programs, as well as books, hardware and CD-ROM products for the microcomputer marketplace."

Microsoft distributed its products internationally through two principal lines: foreign computer makers (known as original equipment manufacturers or "OEMs") and Microsoft's foreign subsidiaries (known as controlled foreign corporations or "CFCs"). OEMs and CFCs purchased from Microsoft computer software master copies ("software masters"), which contained the object code for computer programs and related data files for Microsoft products including operating systems (such as MS-DOS and Windows) and applications (such as Word and Excel). Such purchases included a license which gave the OEMs and CFCs the right make copies for distribution to others. The software licensees could store the digital information from the masters on network computers at their facilities and modify, reproduce, and distribute the licensed software, paying a royalty for each copy of the copyrighted work distributed in the market or for each computer system the OEMs sold.

Microsoft's Product Release Services group ("PRS") produced the master copies of the software and related documentation for distribution to the OEMs and CFCs. During the years at issue, PRS provided masters on .25 inch magnetic tape and on 5.25 inch and 3.5 inch magnetic diskettes ("diskettes"). During this period, Microsoft also exported individually packaged retail software, but deductions for these items are not at issue in this appeal because the Commissioner determined that these individually packaged standardized software products came within the defini-

tion of "export property." *See Microsoft, Inc. v. Comm' of Internal Revenue*, 115 T.C. 228, 248–50 (2000); Temp. Treas. Reg. § 1.927(a)-1T(f)(3).

Microsoft organized Microsoft FSC Corporation ("MS-FSC") as a Virgin Islands corporation in 1984, and qualified it as a FSC to take advantage of the favorable tax provisions available under the FSC legislation. Microsoft and MS-FSC treated the royalties that Microsoft earned from the software master licenses to the OEMs and CFCs as foreign trading gross receipts ("FTGRs") for the purpose of determining foreign trade income under § 924. Microsoft then paid MS-FSC a commission based upon these gross receipts, using the applicable administrative pricing rules of § 925.

The Commissioner disallowed Microsoft's deductions for commission amounts attributable to software masters because the Commissioner determined that the software masters, which included the right to reproduce, did not qualify as "export property," but instead constituted disqualified copyright property under § 927(a)(2)(B). In response, Microsoft filed suit in the tax court. It contended that the Commissioner incorrectly disallowed its FSC commission deductions attributable to the export of software copies. The amounts of these claimed deductions were $16,426,046 in 1990 and $15,340,797 in 1991.[2] The case came on for trial in 1999.

III

Tax Court Trial

In the tax court, the parties stipulated that Microsoft's software development in the United States satisfied the domestic production requirement of § 927(a)(1). At trial, Microsoft argued that the parenthetical phrase "other than film, tapes, records, or similar reproductions, for commercial or home use" in § 927(a)(2)(B) ("the Similar Reproductions Parenthetical") covered the *media* to which copyrighted material is affixed. In Microsoft's view, once a software program was affixed to "films, tapes, records, or similar reproductions," it became export property under § 927(a)(2)(B). Microsoft's evidence showed that, in 1990 and 1991, software, sound recordings, and motion pictures were distributed on a variety of media including magnetic tapes and diskettes and CDs (software), records, magnetic tapes, and CDs (sound recordings), and film, magnetic tapes, and laser video disks (motion pictures). Additionally, export procedures for each involved the use of master copies on some form of magnetic tape. Microsoft's evidence also showed that it used licensing techniques similar to those used by the motion picture and music industries, which allowed for product reproduction and adaptation to fit particular markets and required use of associated trademarks.

The Commissioner argued that the parenthetical reference to "films, tapes, records, or similar reproductions" covered the particular *content* typically placed on the specifically listed media, and therefore included only sound recordings and motion pictures. The Commissioner argued that because software is fundamentally different from motion picture and sound recordings, it could not constitute a "similar reproduction" falling within the parenthetical, and could not be export property under § 927(a). The Commissioner presented evidence of differences between sound recordings and motion pictures as compared to software, and emphasized that computer software actually enables the computer to do a variety of useful functions while sound recordings and motion pictures are more analogous to data that can lead to different outputs, but cannot add to a machine's basic functionality.

The tax court ruled in favor of the Commissioner. In an opinion filed September 15, 2000 and a decision filed July 2, 2001, the court held that:

> [w]ithin the purview of the parenthetical, (1) "films, tapes, and records" are content specific, and (2) "similar reproductions" refers to "films, tapes, and records" on media that might be invented in the future. In sum, we hold

[2] References are to tax years ending June 30, 1990 and June 30, 1991, respectively.

that copyrights in computer software do not constitute section 927(a) ''export property''.

Microsoft Corp., 115 T.C. at 248. The tax court found that computer software is ''fundamentally different'' from film, tapes, and records in that it ''causes a computer to perform countless functions.'' *Id.* The court also relied on Temporary Treasury Regulation § 1.927(a)-1T(f)(3), holding that this regulation conformed with the court's interpretation of the statute. *Id.* at 249. The reference in the regulation to ''master recording tapes,'' the court held, was meant to benefit the sound recording industry only. *Id.* at 249–50. Finally, the court rejected Microsoft's argument that the regulation was invalid. *Id.* at 253. Microsoft filed a timely appeal to this court.

IV

Analysis

[1] The primary issue is whether computer software masters, sold for adaptation, reproduction, and distribution abroad, come within the phrase ''copyrights (other than films, tapes, records, or similar reproductions, for commercial or home use),'' and thus qualify as ''export property'' under Internal Revenue Code § 927(a)(2)(B). The tax court held that ''similar reproductions'' in this section refers only to reproductions of motion pictures and sound recordings. Microsoft argues that ''similar reproductions'' includes computer software because the entire parenthetical refers to the media to which copyrighted works are affixed. We review this issue of statutory construction, and the tax court's construction of the tax code, de novo. *Leslie v. Comm' of Internal Revenue*, 146 F.3d 643, 648 [81 AFTR 2d 98-2153] (9th Cir. 1998).

We begin our statutory interpretation by looking at the plain meaning of § 927(a)(2)(B). ''Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'' *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). When the text of a statute contains undefined terms, we construe those terms to have their ordinary meanings. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476 (1994). Where the plain language of the statute is susceptible of more than one interpretation, ''we are left with the task of determining the more plausible interpretation of the language Congress [chose].'' *United States v. Hohri*, 482 U.S. 64, 70 (1987).

The statute at issue reads:

> The term ''export property'' shall not include . . . patents, inventions, models, designs, formulas, or processes whether or not patented, copyrights (other than films, tapes, records, or similar reproductions, for commercial or home use), good will, trademarks, trade brands, franchises, or other like property . . . .

§ 927(a)(2)(B). We must interpret the statute's parenthetical phrase ''(other than films, tapes, records, or similar reproductions, for commercial or home use).'' If computer software masters constitute ''similar reproductions'' to ''films, tapes, [and] records'' then computer software masters are to be considered export property under § 927(a).

Dictionary definitions contemporary to the original enactment of § 927(a)(2)(B) clarify the meaning of the words used in the parenthetical. The relevant Webster's New World Dictionary published in 1972 (''Webster's'') defines ''tape'' as ''a narrow strip or band of steel, paper, etc.'' or a shortened form of ''magnetic tape.'' *Webster's New World Dictionary of the American Language* 1454 (David B. Guralnik, ed., 2d College ed. 1972). Webster's defines ''film'' as either ''a motion picture'' or ''a sheet or roll of a flexible cellulose material covered with a substance sensitive to light and used in taking photographs or making motion pictures.'' *Id.* at 522. ''Record'' is defined as ''something on which sound or visual images have been recorded; esp. a thin, flat grooved disc for playing on a phonograph.'' *Id.* at 1187. Thus, at the time Congress adopted the language, the terms ''film'' and ''record,'' as well as ''tape,'' could properly refer to

the media capable of holding content or the content itself.

''Words that can have more than one meaning are given content, however, by their surroundings . . . .'' *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 466 (2001) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) and *Jones v. United States*, 527 U.S. 373, 389 (1999)). In deciding which of the relevant definitions to apply, we look to the words nearby. *Limited, Inc. v. Comm' of Internal Revenue*, 286 F.3d 324, 334 [89 AFTR 2d 2002-1924] (6th Cir. 2002). Given this guidance, it makes sense for each specific term in the Similar Reproductions Parenthetical to refer to media, rather than content.

Though ''record'' and ''film'' each could potentially have been used as a synonym for specific content (''film'' for ''motion picture'' and ''record'' for ''sound recording''), such a construction would render ''tape,'' which had a definition that more clearly referenced a medium and not the type of content stored, wholly out of place. Moreover, if ''films, tapes, [and] records'' each referred to content in 1971, ''tapes'' would have been mere surplusage as it is capable of storing both audio content, like records, and audiovisual content, like films. We are reluctant to treat statutory terms as mere surplusage. *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citing *Babbitt v. Sweet Home Chapter, Communities for a Great Or.*, 515 U.S. 687, 698 (1995)). Thus, ''tapes'' as well as ''films'' and ''records'' must be considered in giving meaning to ''similar reproductions.''[3]

Both Microsoft and producers of master copies from the motion picture and sound recording industries store and distribute their products on similar and sometimes identical media, including magnetic media (such as tapes and diskettes) and optical media including compact discs (''CDs'') and digital video discs (''DVDs''). Because the computer software industry and the entertainment industry use the same or similar media on which to store and distribute their content, the reproductions of their copyrighted works *are*similar. Thus, the plain meaning of the Similar Reproductions Parenthetical is that computer software masters are similar reproductions to motion picture and sound masters, which the Commissioner concedes are included in the parenthetical.

We have also considered whether there is any ambiguity in the plain meaning of the Similar Reproductions Parenthetical. In doing so, we have examined that parenthetical in relation to the specific list of items excluded from ''export property'' under § 927(a)(2)(B). *See John v. United States*, 247 F.3d 1032, 1041 (9th Cir. 2001); *Smith v. United States*, 508 U.S. 223, 233 (1993) (''Just as a single word cannot be read in isolation, nor can a single provision of a statute.''). The doctrine of *noscitur a sociis* counsels that words should be understood by the company they keep. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). Applying these doctrines, the excluded items in § 927(a)(2)(B), ''patents, inventions, models, designs, formulas, or processes whether or not patented, copyrights [except for some copyrights], good will, trademarks, trade brands, franchises, or other like property,'' should be understood to have something in common that the excepted copyrights do not. When read as a whole, the most appropriate interpretation is that Congress sought to prevent intangible intellectual property from obtaining the benefits of categorization as ''export property'' while permitting certain intellectual property that had been reduced to tangible film, tape, record or similar form to enjoy that benefit.

Because ''films, tapes, records or similar reproductions'' when manufactured in the United States are tangible property upon export, they are distinguishable from the various sorts of intangible property excluded from the ''export property'' definition. This construction corresponds to the

[3] The 1972 edition of Webster's New World Dictionary of the American Language (David B. Guralnik, ed., 2d College ed.) indicated that ''similar reproductions'' referred to ''cop[ies]'' or ''duplicat[es]'' that are ''nearly but not exactly the same'' as those enumerated. *Id.* at 1207, 1327.

Commissioner's treatment of individually packaged software.

Our decision in *United States v. Lacy* is also instructive. 119 F.3d 742 (9th Cir. 1997), *cert. denied*, 523 U.S. 1101 (1998). In *Lacy*, we construed 18 U.S.C. § 2252(a)(4)(B) (1996 version), which made it a crime to possess "3 [sic] or more books, magazines, periodicals, films, video tapes, or *other matter* which contain any visual depiction . . . if the producing of such depiction involves the use of a minor engaging in sexually explicit conduct . . . . " (emphasis added). Although the word "matter" could have been construed to refer to the computer graphics files (known as "GIFs") themselves or to the computer disks and hard drive that contained the GIFs, we construed "matter" to refer to "the physical medium that contains the visual depiction—in this case, the hard drive of Lacy's computer and the disks found in his apartment." *Lacy*, 119 F.3d at 748. We explained that

> This interpretation is supported by two principles of statutory interpretation, *noscitur a sociis* and *ejusdem generis*. "The first means that a word is understood by the associated words, the second, that a general term following more specific terms means that the things embraced in the general term are of the same kind as those denoted by the specific terms." *United States v. Baird*, 85 F.3d 450, 453 (9th Cir. 1996) (citing 2A Norman J. Singer, *Sutherland-Statutory Construction*§§ 47.16, 47.17 (5th ed. 1992)). Although canons of construction do not mandate how a phrase is to be read, they "describe[] what we usually mean by a particular manner of expression." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992). Here, the word "matter" appears at the end of the list "books, magazines, periodicals, films, [and] videotapes," all of which are physical media capable of containing images. *See Baird*, 85 F.3d at 453 (looking to a list's "theme" to determine the meaning of a general term).

Id.

Here, as in *Lacy*, a general phrase follows a list of more specific terms: the general phrase "similar reproductions" follows the more specific terms "films, tapes, [and] records." Thus, "films, tapes, [and] records" must inform our understanding of "similar reproductions," and "similar reproductions" must mean things "of the same kind" as those denoted by "films, tapes, [and] records." *Id.*To read the statute as containing specific references to content followed by a general reference to media is contrary to the application of the canons of construction on which we relied in *Lacy*. Because the phrase "similar reproductions" refers to unspecified media, the more specific "films, tapes, and records" must also refer to media. Microsoft's computer software master tapes are thus included in the statute's specific listing of "films, tapes, [and] records," and its CD-ROMs, DVD-ROMs and diskettes are included within the meaning of "similar reproductions."

When the plain language of a statute is clear, we need look no further to divine its meaning. *United States v. Lewis*, 67 F.3d 225, 228 (9th Cir. 1995) (citing *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) and *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 [63 AFTR 2d 89-652] (1989)). Nevertheless, the history of the DISC legislation supports the plain meaning set out above.

"[W]e may not add terms or provisions where [C]ongress has omitted them, and this restraint is even more compelling when [C]ongress has specifically removed a term from a statute . . . . " *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993) (citations omitted). In the present case, Congress considered unambiguously content-based language in earlier drafts and opted instead for the present language. Specifically, Congress considered a parenthetical that would have limited qualifying copyrights to "motion picture films or films or tapes used for television broadcasting," H.R. 18392, 91st Cong. sec. 2, § 991 (1970), and a parenthetical that would have limited qualifying copyrights to "films, tapes, or records for

the commercial showing of motion pictures or used for radio or television broadcasting or to provide background music.'' H.R. 18970, 91st Cong. sec. 402, § 991 (1970). It chose neither. In other words, Congress considered language that explicitly restricted the media of films, tapes, and records to motion pictures, television, radio, or background music, but ultimately chose language that left the nature of the copyrighted material more broadly defined. *See* § 927(a)(2)(B). It would be unreasonable to conclude that, having rejected more limiting language in favor of more expansive language, Congress intended to retain the limited meaning. *See Russello v. United States*, 464 U.S. 16, 23–24 (1983) (citing *Arizona v. California*, 373 U.S. 546, 580–81 (1963)). Thus, this legislative history supports our conclusion that software masters on ''films, tapes, records, or similar reproductions'' are within the Similar Reproductions Parenthetical.

Other legislative history also supports this conclusion. In 1979, Congress adopted all of the recommendations of the Final Report of the National Commission on New Technological Uses of Copyrighted Works. That report recognized a fundamental similarity between intellectual property rights in computer programs and other copyrighted works. *See* National Commission on New Technological Uses of Copyrighted Works, *Final Report*, 1, 9–15, 20–23 (1979) (hereinafter ''CONTU Report''). In the CONTU Report, the Commission concluded that:

> [Computer p]rograms should no more be considered machine parts than videotapes should be considered parts of projectors or phonorecords parts of sound reproduction equipment . . . . In all three instances, the medium in which the copyrighted material is stored is moved past a sensing device at a set speed, causing electric current to flow, and ultimately resulting in the movement of machine parts to print words, display pictures, or create sounds.

CONTU Report at 21. Given this fundamental similarity, when one groups together ''films, tapes, [and] records'' in order to determine whether a CD or a magnetic diskette, for example, is a similar reproduction, the essential determination depends upon what fundamental features films, tapes, and records share so that one can determine whether other items constitute ''similar reproductions.''

The evidence at trial established that computer software, sound recording and motion picture media share many similarities. The media used for computer software can be read only with the aid of a machine, just as sound recordings and motion pictures can only be read with the aid of a machine. Magnetic media containing computer software is erasable and re-writable, just as are magnetic audio and video tapes. Computer software tapes are mastered in a manner identical to sound recording media. A single master can generate multiple perfect copies of motion pictures, sound recordings, or computer software at minimal expense. Optical media, whether for computer software or reproduction of sound or audiovisual recordings, is encoded on injection molded plastic disks upon which digital information is stored as a series of ''1''s and ''0''s, read by a focused laser scanning the surface. The similarities in media are fundamental to the way in which these types of copyrighted works are reproduced and distributed, making computer software reproductions similar to ''films, tapes, [and] records.'' These similarities in media to which the copyrighted material is affixed, not the content of that material, inform our decision as to the meaning of the Similar Reproductions Parenthetical.

Congress was aware of the distinction between content and media when, in 1971, the same year the DISC legislation was enacted, it amended the Copyright Code. In enacting that amendment, Congress stated:

> ''Sound recordings'' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. ''Reproductions of sound recordings'' are material objects in which sounds other than those accompanying a motion picture are fixed *by any method now known or later devel-*

oped, and from which sounds can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device, and include the ''parts of instruments serving to reproduce mechanically the musical work'', ''mechanical reproductions'', and *''interchangeable parts, such as discs or tapes for use in mechanical music-producing machines''* . . . .

Pub. L. No. 92-140, sec. 1(e), 85 Stat. 391 (1971), *reprinted in* 1971 U.S.C.C.A.N. 417, 418 (current version at 17 U.S.C. § 101 (2002)) (emphasis added). Under the Copyright Code as amended in 1976 (after the DISC legislation, but before the FSC legislation), ''audiovisual works'' are ''works that consist of a series of related images . . . together with accompanying sounds, if any, *regardless of the nature of the material objects, such as films or tapes*, in which the works are embodied.'' 17 U.S.C. § 101 (1976 & 2002) (emphasis added). ''Motion pictures'' are defined as one specific type of audiovisual work. *Id.* Sound recordings are ''works that result from the fixation of a series of musical, spoken, or other sounds . . . *regardless of the nature of the material objects, such as disks, tapes, or other phonorecords*, in which they are embodied.'' *Id.* (emphasis added)

As a matter of copyright law, therefore, references to ''films, tapes, and records'' refer to the media on which content is embodied, not the content itself. Reading copyright law and § 927(a)(2)(B) consistently, ''similar reproductions'' refers to copies or likenesses that are similar (share some common characteristic) to ''films, tapes, and records.'' Magnetic tapes and diskettes and optical DVDs and CDs, all of which can embody software code, therefore, are similar to films, tapes, and records, because all are media on which machine-readable copyrighted material can be stored.

The Commissioner contends that our interpretation conflicts with the purpose of the statute, arguing that to include computer software masters within the § 927(a)(2)(B) exception would virtually eviscerate the copyright exclusion because all material could be embodied in some machine readable master, which could then be shipped abroad for adaptation, reproduction, and distribution. Such an interpretation, the Commissioner asserts, would send overseas the domestic jobs Congress sought to promote by enacting the DISC legislation. We disagree.

Currently, the Commissioner treats sound and audiovisual masters as qualifying export property under § 927(a)(2)(B). The copyright owners sell and lease these masters overseas with licenses that allow them to be adapted, reproduced, packaged, and sold for consumption in ways that meet local technological, language, and censorship requirements. Congress specifically included the exception embodied in § 927(a)(2)(B) although an obvious result would be a decrease in the domestic jobs otherwise potentially gained as a result of the DISC/FSC legislation.

Evidence at trial established, however, that the vast majority of jobs created by Microsoft's export activities are domestic. These activities include a three-step software creative process that requires between 12 and 32 months of domestic development for each software product. Because the heart of the creative process in developing software, motion pictures, and sound recordings is domestic, the majority of the jobs created are domestic. Accordingly, including the computer software industry within the exception advances the legislative purpose. It would be aberrant for Congress to offer this tax advantage to the entertainment industry to the exclusion of all other industries when Congress' plain language indicates a broader, yet parallel treatment.[4]

V

The Conflicting Regulation

[2] The parties offer various arguments with regard to whether Temporary Treasury Regulation § 1.927(a)-1T(f)(3)

[4] Our decision should not be read to interpret the statute to refer to every possible copyright, but only the software masters in controversy before us. We do not decide, for example, that the Similar Reproductions Parenthetical covers literary copyrights.

conflicts with § 927(a)(2)(B), and if it does, whether the regulation is invalid. The regulation reads:

> *Intangible property.* Export property does not include any patent, invention, model, design, formula, or process, whether or not patented, or any copyright (other than films, tapes, records, or similar reproductions, for commercial or home use), goodwill, trademark, tradebrand, franchise, or other like property. Although a copyright such as a copyright on a book or computer software does not constitute export property, a copyrighted article (such as a book or standardized, mass marketed computer software) if not accompanied by the right to reproduce for external use is export property if the requirements of this section are otherwise satisfied. Computer software referred to in the preceding sentence may be on any medium, including, but not limited to, magnetic tape, punched cards, disks, semiconductor chips and circuit boards. A license of a master recording tape for reproduction outside the United States is not disqualified under this paragraph from being export property.

26 C.F.R. §1.927(a)-1T(f)(3). Because we conclude that the statute clearly expresses Congress's intent, we do not defer to the conflicting regulation. *See Dole v. United Steelworkers*, 494 U.S. 26, 42–43 (1989); *Bd. of Governors of Federal Reserve System v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986) (''The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.''). Moreover, because Temporary Treasury Regulation § 1.927(a)-1T(f)(3) conflicts with the plain meaning of Internal Revenue Code § 927(a)(2)(B), the regulation is invalid. *United States v. Cartwright*, 411 U.S. 546, 557 [31 AFTR 2d 73-1461] (1973) (affirming invalidation of a Treasury regulation because it was an unreasonable interpretation even though it was not ''technically inconsistent'' with the lan-guage of the statute); *United States v. Vo-gel Fertilizer Co.*, 455 U.S. 16, 26 [49 AFTR 2d 82-491] (1982) (affirming invali-dation of a Treasury regulation because the statutory language and legislative history made clear that the regulation was not a reasonable interpretation of the accompa-nying statute despite the fact that the statu-tory language could support the regula-tion).

VI

Conclusion

Computer software licensed for adaptation, reproduction, and distribution abroad is ''export property'' within the meaning of Internal Revenue Code § 927(a)(2)(B). This is the plain meaning of the statute.[5] Temporary Treasury Regulation §1.927(a)-1T(f)(3), which conflicts with the statue, is invalid. Accordingly, the judgment of the tax court is reversed, and the case is remanded for further proceedings consistent with this opinion.[6]

Judgment of the tax court REVERSED; case REMANDED for further proceedings.

¶2002-5722

Lawrence F. MOORE, PLAINTIFF v. UNITED STATES, ET AL., DEFENDANT. U.S. District Court, Northern Dist. of Ohio, (DC OH) CASE NO. 1:02 CV 1334, Nov. 4, 2002. Years 1997, 1998, 1999. Decision for Govt.

1. Refund actions—failure to state claim for relief—res judicata. Taxpayer's refund action with respect to 2 years for which he claimed he had ''zero'' gross income was dismissed for failure to state claim: tax protestor rhetoric that wages weren't income was frivolous. Also, govt. was granted summary judgment that res judicata barred claims for years that were subject of prior suit that was dis-

[5] Having determined the statute's plain meaning, which is supported by legislative history including congressional adoption of the recommendations of the CONTU Report, we need not address whether the tax court erred in finding that computer software is fundamentally different from sound recordings and motion pictures.

[6] In view of our reversal of the tax court's judgment, there may be other issues which now require resolution in that court. One such issue appears to be whether the royalties paid were solely for the exploitation of copyright rights, as Microsoft maintains, or for patents, trademark, and trade secrets, in addition to copyright rights, as the Commissioner contends.

missed on final judgment. *Reference:* United States Tax Reporter ¶74,225.01(3); 74,337.503(75). IRC §7422.

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION,

Memorandum of Opinion and Order

JUDGE PATRICIA A. GAUGHAN

This matter is before the Court upon defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment (Doc. 5). For the following reasons, the Motion is GRANTED.

Facts

Plaintiff, Lawrence F. Moore, filed Moore, filed this Complaint against defendant, United States Government, Department of Treasury, Internal Revenue Service (collectively hereafter, defendant), in the Cuyahoga County Common Pleas Court. The matter was thereafter removed to this Court inasmuch as the United States or one of its agencies had been sued. 28 U.S.C. § 1442.

Plaintiff's Complaint alleges that it is a civil action to recover an overpayment of income taxes for the years 1997 to 1999. Plaintiff contends that he previously filed a verified claim for a refund in the amount of $11,462.00. Plaintiff alleges that defendant has unlawfully detained the money interfering with his Constitutional right to the possessory interest of his property. Plaintiff attaches Amended U.S. Individual Income Tax Returns for the years 1998 and 1999. (Compl. and Addendum A).

This matter is now before the Court upon defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment.

Discussion

[1] Defendant moves to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) with respect to the claims for income tax refunds for the taxable years 1998 and 1999. Alternatively, defendant seeks summary judgment with respect to the claims for taxable years 1997 and 1998.

(1) Failure to State a Claim

Defendant asserts that the Complaint fails to state a claim with regard to the claims for income tax refunds for the taxable years 1998 and 1999.

Standard of Review

When considering a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the allegations of the complaint mut be taken as true and construed liberally in favor of plaintiff. *Lawrence v. Chancery Court of Tenn.*, 188 F.3d 687 (6th Cir. 1999). The complaint is only to be dismissed if the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957), *Hammond v. Baldwin*, 866 F.2d 172 (6th Cir. 1989). However, the complaint must set forth "more than the bare assertion of legal conclusions. *In Re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993); *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988).

While a court may generally not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion, material which is properly submitted as part of the complaint may be considered. *Hal Roach Studios v. Richard Feiner and Co.*, 896 F.2d 1542 (9th Cir. 1990), *Charal v. Royal Appliance Mfg. Co.*, No. 94-3284, 1995 WL 490131 (6th Cir. August 15, 1995) (materials integral to the complaint were considered on a Rule 12 (b)(6) motion without converting the motion into one for summary judgment). Additionally, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss." *Branch v. Tunnell*, 14 F.3d 449 (9th Cir. 1994).

Analysis

Plaintiff submits his amended tax returns for the years 1998 and 1999. Plaintiff's 1998 amended return states that his ad-

justed gross income is zero. Plaintiff provides the explanation, ''I incur nor have incurred no tax liability.'' Plaintiff's amended return further states that he is owed a refund of $4,776.00. Plaintiff's 1999 amended return states that his adjusted gross income is zero. Plaintiff again states, ''I incur nor have incurred no tax liability.'' Plaintiff's amended return further states that he is owed a refund of $2,071.00. (Compl. Addendum A).

This Court agrees with defendant that plaintiff is essentially arguing that wages are not income and that the United States is interfering with his Constitutional and property rights. These arguments have been rejected by the Sixth Circuit and other courts. *Himes v. United States*, No. 85-5632, 1986 WL 17539 (6th Cir. August 14, 1986)(and cases cited therein).

Therefore, plaintiff fails to state a claim with regard to his Complaint relevant to the taxable years 1998 and 1999.

(2) Summary Judgment

Defendant argues that plaintiff's claims for taxable years 1997 and 1998 are barred by the doctrine of res judicata.

Standard of Review

Summary Judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (citing Fed. R. Civ. P. 56(c)); *see also LaPointe v. UAW, Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). The burden of showing the absence of any such genuine issues of material facts rests with the moving party:

> [A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ''the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits,'' if any, which it believes demonstrates the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323 (citing Fed. R. Civ. P. 56(c)). A fact is ''material only if its resolution will affect the outcome of the lawsuit.'' *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party. Federal Rule of Civil Procedure 56(e) provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of [his] pleadings, but [his response], by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

The court must afford all reasonable inferences and construe the evidence in the light most favorable to the nonmoving party. *Cox v. Kentucky Dep't. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995) (citation omitted); *see also United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 562 (6th Cir. 1985). However, the nonmoving party may not simply rely on its pleading, but must ''produce evidence that results in a conflict of material fact to be solved by a jury.'' *Cox*, 53 F.3d at 150.

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of his case. *Tolton v. American Biodyne, Inc.*, 48 F.3d 937, 941 (6th cir. 1995) (citing *Celotex*, 477 U.S. at 322). Accordingly, ''the mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.'' *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995) (quoting *Anderson*, 477 U.S. at 52 (1986)). Moreover, if the evidence is ''merely colorable'' and not ''significantly probative,'' the court may decide the legal issue and grant summary judgment. *Anderson*, 477 U.S. at 249–50 (citation omitted).

Analysis

Plaintiff previously filed an action seeking federal income tax refunds for the taxable years 1992 through 1998. *Moore v.*

United States Government, No. 1:00 CV 1260 (N.D. Ohio, July 27, 2000) United States District Judge Solomon Oliver issued an Order dismissing plaintiff's complaint in its entirety finding, *inter alia*, no merit to plaintiff's claim that wages are not income and, therefore, non-taxable. (Doc. 5 Ex. A).

The Ohio courts have set forth the elements of the doctrine of res judicata:

> In order for res judicata to bar a second suit, the following elements must be present: (a) an existing final judgment; (b) rendered on the merits without fraud or collusion; (c) by a court of competent jurisdiction; (d) is conclusive of all rights, questions, and facts in issue; (e) as to the parties and their privies; and (f) in all other actions in the same or any other judicial tribunal or concurrent jurisdiction.

Corradi v. Bear Creek Investments, No. 72915, 1998 WL 241927, 4 (Ohio App. 8 Dist. 1998), (citing *Ohio Dept., of Human Serv. v. Kozar*, 99 Ohio App.3d 713, 716, 651 N.E.2d 1039 (1995)). Clearly, all of the elements have been met as there has been a final judgment on the merits between these same parties by a court of competent jurisdiction. Plaintiff argues that no final judgment was made in Case No. 1:00 CV 1260 because the case was dismissed. This Court disagrees given that Judge Oliver determined that plaintiff's complaint failed to state a claim and dismissed the action, issuing a final Order.

Conclusion

For the foregoing reasons, defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment is granted.

IT IS SO ORDERED.

PATRICIA A. GAUGHAN

United States District Judge

Judgment Entry

JUDGE PATRICIA A. GAUGHAN

This Court, having issued its Memorandum of Opinion and Order granting defendant's Motion to Dismiss or in the Alternative Motion for Summary Judgment (Doc. 5), hereby enters judgment for defendant.

IT IS SO ORDERED.

PATRICIA A. GAUGHAN

United States District Judge

¶2002-5723

Antonio L. GOMEZ; Brenda L. GOMEZ, PLAINTIFFS v. UNITED STATES OF AMERICA, ET AL., DEFENDANTS. U.S. District Court, Dist. of Arizona, (DC AZ) No. CV 02-202-TUC-RCC, Nov. 25, 2002. Year 2000. Decision for Govt.

1. Refund actions—failure to state claim for relief—proper parties. Pro se taxpayers' refund action against U.S., IRS and IRS employee was dismissed for failure to state claim: only U.S., not IRS, was proper governmental defendant to tax refund suit; IRS employee wasn't subject to suit individually absent any allegation he acted outside scope of his authority; and taxpayers asserted only previously rejected and frivolous arguments that they weren't engaged in international commerce and that wages weren't income. Also, taxpayers were timely served with govt.'s dismissal motion. *Reference:* United States Tax Reporter ¶74,225.01(3). IRC §7422.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA,

ORDER

Raner C. Collins United States District Judge

Pending before the Court is Defendants' August 20, 2002 Motion to Dismiss and Plaintiff's September 20, 2002 Motion for Summary Judgment. After consideration of the parties' arguments, the Court will grant Defendants' motion to dismiss and deny Plaintiffs' motion for summary judgment.

Factual and Procedural Background

Plaintiffs filed their complaint with this Court on April 22, 2002 against the United States, Internal Revenue Service (''IRS''),

and Dennis Paj, an IRS employee. Plaintiffs claim they are entitled to a refund of $11,440.00 of income tax for the year 2000. Plaintiffs filed a return for the tax year 2000 on which they claimed no income. Plaintiffs also attached W-2 forms to their 2000 tax return which indicate that Plaintiffs earned approximately $132,000.00. After being granted two time extensions. Defendants filed a motion to dismiss on August 20, 2002. Plaintiffs filed a motion for summary judgment on September 20, 2002.

Motion to Dismiss Standard

A motion to dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) should not be granted unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 102 (1957); *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994). Thus, the Court must view the complaint in the light most favorable to the nonmoving party, with every doubt resolved in its behalf, and with that party's allegations taken as true. *See Abramson v. Brownstein*, 897 F.2d 389, 391 (9th Cir. 1990). The court need not accept, however, legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged. *See Clegg*, at 754–55. "Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990)(citing *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 533–34 (9th Cir. 1984)).

In addition, when considering the pleadings filed by a *pro se* civil rights litigant, "the court must construe the pleadings liberally and must afford plaintiff the benefit of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972). "A *pro se* litigant must be given leave to amend his or her complaint unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.'" *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (quoting *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980)). Finally, before it may dismiss a *pro se* complaint for failure to state a claim, the Court is required to 'give the plaintiff a statement of the complaint's deficiencies.' *Karim-Panahi*, 839 F.2d at 623–24. 'Without the benefit of a statement of deficiencies, the *pro se* litigant will likely repeat previous errors.' *Noll*, 809 F.2d at 1448.

Parties' Claims

Defendants claim that Plaintiffs failed to make a single factual allegation in support of their claim for a refund but rather relied on two meritless legal theories. The first is that their income is not taxable because they were not involved in international commerce and the second is that the IRS cannot collect federal income taxes from Plaintiffs because there has been no proper delegation of authority from the Secretary of the Treasury to the Internal Revenue Service. Defendants argue that these theories have been repeatedly rejected by the Courts. Further, Defendants argue that IRS employee Dennis Paj is not an appropriately named defendant because Paj did not act outside the scope of his official authority as an IRS employee and the complaint contains no allegations against Paj; it merely seeks a refund of federal income taxes. Further, Defendants contend the IRS is not a proper party to lawsuits. *Citing Freck v. Internal Revenue Service*, 37 F.3d 986, 989 [74 AFTR 2d 94-6544], n.1 (3rd. Cir. 1994).

Plaintiffs respond in both their filed response and motion for summary judgment that Defendants' motion to dismiss was untimely and that default should be entered against Defendants. Plaintiffs also claim that wages are not income as defined by the tax code (Pl. 8/26/02 Resp., ¶s11–13, 18), and that IRS employee Dennis Paj acted outside of his authority in handling and rejecting Plaintiffs' tax documents. (Pl. Mot. for Summ. J., ¶35). Plaintiffs further state that they are not claiming that they are not liable for taxes because of their lack of involvement in international com-

merce (they apparently cite this section to show Paj was acting outside of this authority) and that they are not alleging the Secretary of the Treasury failed to delegate tax collection authority to the IRS and its employees. (Pl. Mot. for Summ. J., ¶ 30, 35.)

Discussion

Timeliness

[1] On August 12, 2002, the Court filed an order which granted Defendants up to and including August 19, 2002 to *serve* its answer or other response in this matter. Defendants *filed* their motion to dismiss with the Court on August 20, 2002. However, Defendants certified that the Motion to Dismiss was served on Plaintiffs via United States mail on August 19, 2002. Rule 5 of the Federal Rules of Civil Procedure provides: service is made by ''mailing a copy to the last known address of the person served. Service by mail is complete in mailing.'' As Defendants mailed their motion to dismiss on August 19, 2002, in compliance with the Court's deadline for service of a response to Plaintiffs' complaint, Defendants' motion is not untimely.

Proper Parties

''The Department of Treasury and Internal Revenue Service are not entities subject to suit.'' *Krouse v. U.S. Government Treasury Dept. I.R.S.*, 380 F.Supp. 219, 221 [35 AFTR 2d 75-999] (D.C. Cal. 1974); *Blackmar v. Guerre*, 342 U.S. 512 (1952). Additionally, a federal officer can be held liable for damages only if his actions were committed outside the scope of his statutory authority. *Dugan v. Rank*, 372, U.S. 609 (1962); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 [56 AFTR 2d 85-5567] (9th Cir. 1985). Because Plaintiffs have offered no facts alleging that Defendant Paj acted outside of the scope of his authority as an IRS employee, dismissal as to Paj is appropriate. Similarly, the United States, rather than the IRS, is the appropriately named party in tax suits for recovery of damages. Consequently, Defendants motion to dismiss will be granted with respect to Defendants IRS and Paj.

Plaintiff's Complaints

Plaintiffs claim that they are entitled to a refund of approximately $11,440.00 because they filed a tax return and because Defendant Paj allegedly did not have the authority to determine Plaintiff's claim was frivolous. Plaintiffs allege no facts in support of these claims, nor is it clear by what legal theory Plaintiffs believe they are entitled to a refund. From Plaintiffs' complaint it appears Plaintiffs believe they are not liable for taxes because they were not engaged in international commerce; Plaintiffs then state in their response this is not their allegation. Plaintiffs also seem to assert they are entitled to a refund of taxes because wages are not income for the purposes of federal income tax collection.

The Supreme Court has ''repeatedly held that in defining 'gross income' . . . Congress intended to 'tax all gains except those specifically exempted.' *Comm'r of Internal Revenue v. LoBlue*, 351 U.S. 243, 246 [49 AFTR 832] (1956); *see Comm'r of Internal Revenue v. Minzer*, 279 F.2d 338 [5 AFTR 2d 1572] (5th Cir. 1960). The courts have chosen to use the meaning given the term 'income' by its everyday use in common speech. *Helvering v. Edison Bros. Stores*, 133 F.2d 575, 579 [30 AFTR 940] (8th Cir. 1943). The meaning of income in its everyday sense is 'a gain or recurrent benefit usually measured in money that derives from capital or labor; also: the amount of such gain recovered by an individual in a given period of time;' income is nothing more nor less than realized gain. *Id.* Plaintiffs' W-2 forms for the 2000 tax year clearly indicate that Plaintiffs experienced financial gain as the result of their labor despite the fact that they indicated no income on their tax return form. Consequently, Plaintiffs are not entitled to relief under the theory that their wages are not income for purposes of the federal income tax laws.

Because Plaintiffs have alleged no set of facts which would entitle them to the relief they seek, namely a refund of $11,440.00 in federal taxes for the 2000 tax year, the Court will grant Defendants' motion to dis-

miss and deny Plaintiffs' motion for summary judgment.

Accordingly,

IT IS ORDERED that Defendants' August 20, 2002 Motion to Dismiss [Doc. 12] is GRANTED; the case is DISMISSED WITHOUT PREJUDICE and the Clerk is directed to enter judgment and close the case.

IT IS FURTHER ORDERED that Plaintiffs' September 20, 2002 Motion for Summary Judgment [Doc. 16] is DENIED.

DATED this 23nd day of October, 2002.

Raner C. Collins

United States District Judge

¶2002-5724

Darren S. STANLEY, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) CV-S-02-0220-RLH (PAL), Oct. 24, 2002. Years 1997, 1998, 1999. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalty—summary judgment. Tax protester's petition to invalidate IRS's administrative determination to proceed with collection of IRC §6702 penalty for year he filed ''zero'' return was dismissed: penalty assessment was clearly valid where Form W-2 refuted taxpayer's return position; taxpayer's protester-type challenge to tax was frivolous; and Appeals Officer's reliance on Form 4340 satisfied IRC §6330's verification requirement. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(10). IRC §6330; 6702.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA,

JUDGMENT IN A CIVIL CASE

__ Jury Verdict. This action came before the jury for a trial by the Court. The issues have been tried and the jury has rendered it's verdict.

X Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that this action is dismissed. Judgment is entered in favor of defendants United States of America and against plaintiff Darren S. Stanley.

October 24, 2002

Date

LANCE S. WILSON

Clerk

/s/

Deputy Clerk,

ORDER

ROGER L. HUNT United States District Judge

(Motion to Dismiss or in the Alternative for Summary Judgment-#7)

Before the Court is Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (#7), filed August 13, 2002. The Court has also considered Plaintiff's Opposition (#9), filed August 30, 2002, and Plaintiff's Complaint (#1), filed February 15, 2002.

BACKGROUND

Plaintiff asks this court to grant two requests: 1) To ''declare invalid'' a collection due process determination made by the IRS against him; 2) To order reim-bursement by Defendant of Plaintiff's costs associated with bringing this action; and 3) To award punitive damages.

Following a pattern of behavior the Court has yet to understand, Plaintiff filed Form 1040, U.S. Individual Income Tax Return, for the 1997, 1998, and 1999 tax years. Although his W-2 forms showed receipt of income, Plaintiff's Return contained zeroes on all lines reflecting income earned or taxes due and had attached statements outlining reasons for his belief that he had no income to report and did not, therefore, owe federal income tax.

Pursuant to Section 6702, the IRS assessed civil penalties on Plaintiff for filing the returns. Section 6702 assesses a $500

civil penalty if an individual "files what purports to be a return" but which contains "information that on its face indicates that the self-assessment is substantially incorrect" and is due to "a position which is frivolous."

The IRS posted a Notice of Federal Tax Lien for unpaid civil penalties pursuant to Internal Revenue Code §§ 6321, 6322, and 6323 and informed Plaintiff of the lien. Plaintiff then requested from Defendant a collection due process hearing regarding the frivolous return penalties and collection alternatives which was held on January 4, 2002, a transcript of which is attached to Plaintiff's Complaint (#1).

Finally, on January 17, 2002, the IRS sent Plaintiff a Notice of Determination Concerning Collection Actions(s) Under Section 6320 and/or 6330 (Notice of Determination) informing Plaintiff that the proposed levy to collect the frivolous return penalty would not be restricted. Attached to the Notice of Determination was Attachment 3194 explaining that the decision was based on the determination that the IRS fully complied with all applicable laws, regulations, and administrative procedures. The Notice of Determination also informed Plaintiff that any dispute of the determination could be made within 30 days in the appropriate United States District Court. Plaintiff timely filed with this Court and Defendant now moves to dismiss.

DISCUSSION

I. Dismissal for Failure to State a Claim

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for "failure ... to state a claim upon which relief can be granted." "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see also Yamaguchi v. U.S. Dep't of the Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to [p]laintiffs." *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996) (citing *In re Wells Fargo Sec. Litig.*, 12 F.3d 922, 925 (9th Cir. 1993), *cert denied*, 513 U.S. 917, 115 S.Ct. 295, 130 L.Ed.2d 209 (1994)). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

II. Analysis

[1] Plaintiff first asks that the collection due process determination made against him by the IRS be declared invalid. Since the Tax Court does not have jurisdiction to consider frivolous return penalties, *See Vans Es v. Commissioner*, 115 T.C. 324 (2000), the matter is appropriately before this court. 26 U.S.C. § 6320(c), 6330(d)(1)(B).

26 U.S.C. § 6702 assigns liability in the amount of five hundred dollars ($500) to a person filing a frivolous tax return. The Secretary of the Treasury or his delegate, such as the IRS,[1] assesses this penalty in the same manner as a tax, and any reference to a "tax" in Title 26 also includes this penalty. 26 U.S.C. § 6671. Section 6201 of the Code authorizes the Secretary to make any necessary tax assessments. In the case of a frivolous return penalty, the deficiency procedures of Title 26, Chapter 63, subchapter B, do not apply. 26 U.S.C. § 6703(b). The failure to pay the penalty results in a lien on the person's property. 26 U.S.C. § 6321. To ensure the validity of the lien, the Secretary files the lien with, in this case, the Clark County Recorder, 26 U.S.C. § 6323(f)(1)(A), and sends a notice of filing of the lien to the person, 26 U.S.C. § 6320(a). The secretary must also inform the person of his right to a hearing at the same time. 26 U.S.C. §

[1] The Court will use the collective term "Secretary" to refer to the Secretary of the Treasury and any delegates. *See* 26 U.S.C. § 7701(a)(11)(B). The Secretary of the Treasury may delegate much of his authority and responsibilities to others by prescribing rules and regulations, among other methods. 26 U.S.C. § 7805(a); *see also* 26 C.F.R. §§ 301.7701-9, 301.7701-10.

6320(a)(3)(B). For the purposes of this Order, the procedures of the collection due process hearing, 26 U.S.C. § 6330(c), apply to the lien hearing, 26 U.S.C. § 6320(c). If the person requests a hearing, the hearing officer must "obtain verification from the Secretary that the requirement of any applicable law or administrative procedure have been met." 26 U.S.C. § 6330(c)(1). At the hearing, the person may also raise any relevant issue, including spousal defenses, the appropriateness of the collection action, and any collection alternatives. 26 U.S.C. § 6330(c)(2)(A). The person "may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." 26 U.S.C. § 6330(c)(2)(B).

The "underlying tax liability" in this case is the frivolous return penalty. *See* 26 U.S.C. § 6671; *see also* 26 C.F.R. 301.6321-1. Plaintiff properly challenged the validity of the frivolous return penalties at the collection due process hearing because the statutory deficiency procedures do not apply to frivolous return penalties, 26 U.S.C. § 6703(b), and thus Plaintiff had no prior opportunity to dispute the penalties. The validity of the income taxes that Plaintiff owes for 1999 is not at issue in this action. On the other hand, the tax return that Plaintiff filed is relevant because they determine whether assessment of the frivolous return penalty was proper.

Section 6330(d) is silent on the standard that the Court should use to review the determination of the collection hearing. However, the legislative history indicates that if the validity of the underlying tax liability was properly at issue, then review is *de novo*. H. Conf. Rep. 105-599 (1998); *see also Dogwood Forest Rest Home, Inc. v. United States*, 181 F. Supp. 2d 554, 559 (M.D.N.C. 2001); *MRCA Info. Servs. v. United States*, 145 F. Supp. 2d 194, 198–99 (D. Conn. 2000); *Sego v. Commissioner*, 114 T.C. 604, 610 (2000). The Court will use that standard of review.

There is no doubt as to the validity of the penalty. Plaintiff submitted Form 1040 for years 1997, 1998, and 1999 with zeros in the income section, but the submitted W-2s showed income considerably more than zero. He also attached an explanation of how no provisions of the Internal Revenue code make him liable for the income tax, how his wages are not income, and other matters. Wages are income, 26 U.S.C. § 61, upon which Plaintiff owes a tax, 26 U.S.C. § 1, and courts—including this one—have found arguments to the contrary to be tired and frivolous long before Plaintiff filed the tax returns at issue. *See, e.g., Sisemore v. United States*, 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir. 1986); *Coleman v. Commissioner*, 791 F.2d 68, 70 [57 AFTR 2d 86-1420] (7th Cir. 1986); *Sullivan v. United States*, 788 F.2d 813, 815 [57 AFTR 2d 86-1226] (1st Cir. 1986); *Olson v. United States*, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042](9th Cir. 1985); *In re Hopkins*, 192 B.R. 760 [76 AFTR 2d 95-7748], 762–63 (D. Nev. 1995); and other cases too numerous to cite. On its face, Plaintiff's tax returns were substantially incorrect and frivolous, thus making Plaintiff liable for the frivolous return penalty. 26 U.S.C. § 6702. The assessments of the frivolous return penalties are valid.

No genuine issue of material fact exists over the verification of all legal and administrative requirements. The hearing officer apparently properly relied on Form 4340 for such verification.[2] *See Huff v. United States*, 10 F.3d 1440, 1446–47 [72 AFTR 2d 93-6682] (9th Cir. 1993), *cert. denied*, 512 U.S. 1219 (1994); *Hughes v. United States*, 953 F.2d 531, 538–40 [69 AFTR 2d 92-472] (9th Cir. 1992); *see also Davis v. Commissioner*, 115 T.C. 35, 41 (2000). The Forms 4340 evidently show, and is not disputed by Plaintiff, that the frivolous return penalty had been assessed, that notices had been mailed to Plaintiff, and that Plaintiff had requested a hearing.

[2] *See* Plaintiff's Complaint, Exhibit C at 9. However, the Court urges Counsel for the Government to, in the future, include Form 4340 as evidence of its position.

Because, as noted above, the tax return is clearly frivolous, the hearing officer did not err in his verification that the requirements of any applicable law and administrative procedures had been met. Therefore, the collection due process determination is valid.

Without declaring defendant's collection due process determination invalid, the Court has no reason to reach Plaintiff's requests for costs or damages.

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CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (#7) is GRANTED.

Dated: October 22, 2002.

ROGER L. HUNT

United States District Judge

¶2002-5725

Dan R. WISE, PLAINTIFF v. Kelly J. HARVEY, DEFENDANT v. William S. MONTGOMERY, Ann B. MONTGOMERY, UNITED STATES INTERNAL REVENUE SERVICE, and Samuel Spritzer Furs, Inc., DEFENDANTS on Interpleader. U.S. District Court, Southern Dist. of Texas, (DC TX) CIVIL ACTION NO. H-02-1242, Nov. 20, 2002. Earlier proceedings at (2002, DC TX) 90 AFTR 2d 2002-5381; and (2002, DC TX) 89 AFTR 2d 2002-2809. Decision for Govt.

1. Interpleader—motion to extend time. IRS's unopposed motion to extend time to respond to interpleader action was granted. *Reference:* United States Tax Reporter ¶63,215.04(147). IRC §6321.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION,

ORDER

JOHN D. RAINEY UNITED STATES DISTRICT JUDGE

[1] Pending before the Court is Defendant on Interpleader United States of America Internal Revenue Service's (''the IRS'') Motion to Extend Time to Respond (Dkt. #2). The IRS's motion was filed on April 1, 2002. Under Local Rule 7.3, ''Opposed motions will be submitted to the judge twenty days from filing without notice from the clerk and without appearance by counsel.''[1] Thus, the opposing parties had until April 24, 2002 to respond to the pending motion. As of the date of this order no response has been received by the Court. Local Rule 7.4 provides that, ''Failure to respond will be taken as a representation of no opposition.'' Thus, the IRS's motion will be treated as unopposed.

For the foregoing reasons, the IRS's Motion to Extend Time to Respond is GRANTED. The answer filed by the IRS on July 23, 2002 is deemed timely filed.

It is so ORDERED.

Signed this 20th day of November, 2002.

JOHN D. RAINEY

UNITED STATES DISTRICT JUDGE

¶2002-5726

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Ljupco RISTOVSKI, DEFENDANT-APPELLANT. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-1747, Dec. 4, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—subscribing false corp. returns; submitting false documents to IRS—motion for new trial. District court properly denied as untimely taxpayer's F.R.Crim.P. Rule 33 motion for new trial of IRC §7206(1) and IRC §7207 convictions: court's retroactive application of amended Rule's filing deadline

[1] Federal Rule of Civil Procedure 6(c) gives a party who is served with a motion by mail or fax an additional three days to respond.

to pre-amendment crimes, rather than using original Rule under which taxpayer's motion would have been timely, wasn't ex post facto clause violation since amendments effected only procedural changes that merely diminished without extinguishing taxpayer's time to file motion and didn't otherwise alter any substantive right. *Reference:* United States Tax Reporter ¶72,065.01(5); 73,446.520(10). IRC §7206; 7207.

ARGUED: Harold Z. Gurewitz, GUREWITZ & RABEN, Detroit, Michigan, for Appellant.
Ross I. MacKenzie, ASSISTANT UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee. ON BRIEF: Harold Z. Gurewitz, GUREWITZ & RABEN, Detroit, Michigan, for Appellant. Ross I. MacKenzie, ASSISTANT UNITED STATES ATTORNEY, Detroit, Michigan, for Appellee.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT,

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

Before: BOGGS and COLE, Circuit Judges; BELL, Chief District Judge.*

OPINION

BELL, District Judge.

RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 96-80463--Bernard A. Friedman, District Judge.

Defendant-Appellant Ljupco Ristovski appeals the district court order denying his motion for new trial filed under Fed. R. Crim. P. 33.

Ristovski was convicted by a jury on October 15, 1997, of two counts of subscribing false corporate tax returns in violation of 26 U.S.C. § 7206(1) and eight counts of submitting false documents to the Internal Revenue Service in violation of 26 U.S.C. § 7207. Ristovski was sentenced on June 16, 1998, to 18 months imprisonment. His conviction and sentence were affirmed on April 18, 2000. United States v. Ristovski, Nos. 98-1749 & 98-1868 [85 AFTR 2d 2000-1393] (6th Cir. Apr. 18, 2000). His petition for writ of certiorari was denied on December 4, 2000, and the mandate was issued by the Court of Appeals on December 10, 2000.

On March 19, 2001, Ristovski filed a motion for new trial on the basis of newly discovered evidence. The district court, in an oral opinion, denied the motion for lack of jurisdiction because it was untimely. The district court noted that even if it did have jurisdiction, it would deny the motion on the merits because the evidence could have been discovered earlier and was cumulative. The written order denying Ristovski's motion for new trial was entered on June 4, 2001.

Motions for new trial are governed by Rule 33 of the Federal Rules of Criminal Procedure. Prior to December 1, 1998, Rule 33 required that motions for new trial based on newly discovered evidence be brought within two years after final judgment.[1] Ristovski's motion for new trial, which was filed on March 19, 2001, would have been timely under the Rule 33 in effect at the time the offense was committed because it was filed within two years after final judgment. Amendments to Rule 33 were promulgated on April 24, 1998, and went into effect on December 1, 1998. Rule 33 as amended requires that motions for new trial based on newly discovered evidence be brought within three years af-

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* The Honorable Robert Holmes Bell, Chief United States District Judge for the Western District of Michigan, sitting by designation.

[1] Prior to the December 1, 1998 amendments, Rule 33 read as follows:

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Fed. R. Crim. P. 33 (1997).

ter the verdict or finding of guilty.[2] The purpose of the amendments to Rule 33 was to bring uniformity in the manner in which the time period for new trial motions based on newly discovered evidence was calculated.[3] Ristovski's motion for new trial is untimely under the amended Rule 33 because it was filed approximately five months after the three-year period measured from the date of his verdict.

[1] Ristovski's first argument on appeal is that the district court's conclusion that his motion for new trial was untimely under Rule 33 as amended in 1998 violates the Ex Post Facto Clause of the United States Constitution.[4] The timeliness of Appellant's motion for new trial is a threshold question because if a motion for new trial is untimely, the court lacks jurisdiction to consider it on the merits. United States v. Koehler, 24 F.3d 867, 869 (6th Cir. 1994) (citing United States v. Smith, 331 U.S. 469, 475–76 (1947)). See also United States v. Moreno, 181 F.3d 206, 212 (2d Cir. 1999) (court lacks jurisdiction to consider untimely motion for new trial) (citing cases). Whether the district court's application of amended Rule 33 was a violation of the Ex Post Facto Clause is a legal question we review de novo. See United States v. Futrell, 209 F.3d 1286, 1289 (6th Cir. 2000) (''A defendant's claim that his or her sentence was imposed in violation of the ex post facto clause presents a question of law, and we review questions of law de novo'' (quoting United States v. Logal, 106 F.3d 1547, 1550–51 (11th Cir. 1997))).

The Ex Post Facto Clause forbids Congress to enact any law ''which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'' Weaver v. Graham, 450 U.S. 24, 28 (1981) (footnote omitted) (quoting Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325–26 (1867)). ''[T]wo critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it.'' Weaver, 450 U.S. at 29 (footnote omitted). See also Kellogg v. Shoemaker, 46 F.3d 503, 509 (6th Cir. 1995).

With respect to the first element, retrospective application, ''[t]he critical question is whether the law changes the legal consequences of acts completed before its effective date.'' Weaver, 450 U.S. at 31. ''The focus in determining whether a new law violates the ex post facto clause is the time the offense was committed.'' Kellogg, 46 F.3d at 509 (citing Weaver, 450 U.S. at 31). In this case the offenses were committed in 1990, 1991, and 1997. Rule 33 was amended in December 1998. The district court's application of the time limitation in amended Rule 33 was retrospective because it changed the criminal review procedure for offenses occurring before the date of its enactment.

Retrospective application alone, however, is not enough to make out an ex post facto violation. The Ex Post Facto Clause does not guarantee that a criminal defendant's case will be governed in all respects by the law in force when the crime was committed. Dobbert v. Florida, 432 U.S. 282, 293 (1977). ''[T]he constitutional pro-

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[2] Rule 33, after the 1998 amendments, provides:

On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may - on defendant's motion for new trial - vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Fed. R. Crim. P. 33.

[3] The Advisory Committee explained that using the date of the ''final judgment'' as the triggering event caused disparity in the amount of time available for a defendant to file a motion for new trial in the event of an appeal because some courts measured the two-year period from the date of the appellate court's judgment and other courts from the date of its mandate:

It is the intent of the Committee to remove that element of inconsistency by using the trial court's verdict or finding of guilty as the triggering event. The change also furthers internal consistency within the rule itself; the time for filing a motion for new trial on any other ground currently runs from that same event.

Fed. R. Crim. P. 33 Advisory Committee Notes, 1998 Amendments. The time period for filing motions for new trial was expanded from two years to three years ''to compensate for what would have otherwise resulted in less time than that currently contemplated in the rule for filing such motions.'' Id.

[4] Article I of the United States Constitution provides that neither Congress nor any State shall pass any ''ex post facto Law.'' U.S. Const., art. I, § 9, cl. 3; art. I, § 10, cl. 1.

vision was intended to secure substantial personal rights against arbitrary and oppressive legislation, see Malloy v. South Carolina, 237 U.S. 180, 183 (1915), and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance.'' Dobbert, 432 U.S. at 293 (quoting Beazell v. Ohio, 269 U.S. 167, 171 (1925)). Thus, no ex post facto violation occurs if a change does not alter ''substantial personal rights,'' but merely changes ''modes of procedure which do not affect matters of substance.'' Miller v. Florida, 482 U.S. 423, 430 (1987) (quoting Dobbert, 432 U.S. at 293). ''Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto.'' Dobbert, 432 U.S. at 293. See also Landgraf v. USI Film Prods., 511 U.S. 244, 275 n.28 (1994) (''While we have strictly construed the Ex Post Facto Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case.''). On the other hand, a change in the law that alters a substantial right can be ex post facto ''even if the statute takes a seemingly procedural form.'' Weaver, 450 U.S. at 29 n.12 (citing Thompson v. Utah, 170 U.S. 343, 354–55 (1898); Kring v. Missouri, 107 U.S. 221, 232 (1882)).

The Supreme Court has recognized that the distinction between substance and procedure might sometimes prove elusive. Miller, 482 U.S. at 433. The general rule that has emerged from the case law, however, is that a change is procedural, and does not affect a substantial right if the change does ''not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.'' Weaver, 450 U.S. at 31 n.12 (quoting Hopt v. Utah, 110 U.S. 574, 590 (1884)). Thus, in Weaver the Court found that Florida's revised good-time provision violated the Ex Post Facto Clause because it constricted an inmate's opportunity to earn early release, and thereby made ''more onerous the punishment for crimes committed before its enactment.'' 450 U.S. at 35–36. In Miller the Court held that because a change in the sentencing guidelines after the offense was committed increased the number of primary offense points assigned to sexual offenses by 20%, the change could not be deemed procedural because it ''directly and adversely'' affected the sentence the petitioner would receive. Miller, 482 U.S. at 433–35. In Dobbert, on the other hand, the Court rejected the petitioner's argument that changes in the Florida death penalty statute posed an ex post facto violation: ''[T]he change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.'' Id. at 293-94.[5] The Dobbert Court compared the case before it to Hopt v. Utah, 110 U.S. 574 (1884), in which the Court considered a change in the rules of evidence between the date of the offense and the date of the trial: ''Even though this change in the law obviously had a detrimental impact upon the defendant, the Court found that the law was not ex post facto because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict.'' Dobbert, 432 U.S. at 293 (citing Hopt, 110 U.S. at 589).

We analyze Appellant's claim that the retroactive application of amended Rule 33 violated the Ex Post Facto Clause with these principles in mind.

The question of whether the retroactive application of Rule 33 is substantive or procedural has not been widely addressed in the case law. The Ninth Circuit, in an unpublished decision, held that the 1998 amendments to Rule 33 resulted in a procedural change, not an increase in punishment, and that its application to a defen-

[5] Under the former procedure the imposition of the death penalty was presumed unless the jury made a recommendation for mercy. Under the new procedure there was a separate sentencing hearing where the defendant could present mitigating evidence. The jury would render an advisory verdict based upon its perception of aggravating and mitigating factors in the case, after which the Court would make the final sentencing determination. Dobbert, 432 U.S. at 294–95.

dant who was convicted in 1994 did not constitute an ex post facto violation. United States v. Tavizon, Nos. 97-50512, 99-50076, 99-50315, 99-50756, 722, 2001 WL 38416, at 4 (9th Cir. Jan. 16, 2001).[6]

We are aware of only one case that has held the application of amended Rule 33 to constitute an ex post facto violation. In United States v. West, 103 F. Supp. 2d 1301 (N.D. Ala. 2000), the district court found that the change made in Rule 33 while the defendant's appeal was pending was a "substantive change" because it constituted "a very material alteration in the procedural rights of persons who claim to be entitled to a new trial because of newly discovered evidence." Id. at 1303. The court accordingly held that the retroactive application of the amended rule while a defendant's appeal was pending violated the ex post facto provision. Id.

It is significant that in West the defendant was sentenced in November 1995. Accordingly, if amended Rule 33 were applied to his case, his three-year period for filing a motion for new trial on the basis of newly discovered evidence would have expired before the amendments to Rule 33 even went into effect. The district court was appropriately concerned about the fairness of applying amended Rule 33 when to do so would eliminate the defendant's opportunity to file a motion for new trial. However, the court in West did not have to make its decision on constitutional ex post facto grounds. At the time the amendments to Rule 33 were promulgated, the Supreme Court specified that the amendments would apply to all pending criminal cases "insofar as just and practicable." Supreme Court Order 98-17, April 24, 1998. The West court could have avoided the constitutional issue by following United States v. Jean, 1999 WL 301652 (N.D. Ill. Apr. 29, 1999), and holding that it would not be "just and practicable" to apply the amended Rule 33 to cases where the three years expired before the effective date of the amended rule.

Unlike the defendants in West and Jean, Ristovski's ability to file a motion for new trial on the basis of newly discovered evidence was not eliminated by the application of amended Rule 33. There was no denial of his substantive right to file a motion for new trial. The only effect of the amendment was to decrease the time frame in which he could file his motion. Ristovski was convicted on October 15, 1997. After Rule 33 was amended on December 1, 1998, Ristovski still had until October 15, 2000, more than nineteen months, to file a motion for new trial on the basis of newly discovered evidence. Because he had ample time to bring his motion for new trial, application of Rule 33 to him was just and practicable. Application of the time limitation under amended Rule 33 merely changed the mode of procedure. It did not assign "more disadvantageous criminal or penal consequences to an act than did the law in place when the act occurred," Weaver, 450 U.S. at 31 n.13, nor did it affect matters of substance or alter substantial personal rights of the defendant. See Miller, 482 U.S. at 430. Like the Court in Dobbert, we find that the following language from Hopt summarizes our conclusion that the change was procedural and not a violation of the Ex Post Facto Clause:

> The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute.

Dobbert, 432 U.S. at 294 (quoting Hopt, 110 U.S. at 589–90). Accordingly, we affirm the district court's application of Rule 33 as amended and its determination that Ristovski's motion for new trial was untimely.

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[6] This court, in an unpublished opinion, applied amended Rule 33 to bar a 1999 motion for new trial on a 1994 conviction that had become final in 1996. United States v. Blue, No. 99-4131, 2000 WL 1800499 (6th Cir. Nov. 30, 2000). Because the motion would have been untimely under either the old or the amended Rule 33, it was unnecessary in Blue to consider the ex post facto implications of applying Rule 33 as amended. At least two other courts have similarly applied amended Rule 33 to cases where the verdicts were rendered before the effective date of the amendment, without discussion. See United States v. Robinson, No. 00-10038, 2001 WL 180559 (9th Cir. Feb. 22, 2001); United States v. Camacho, No. S12 94 CR. 313, 1999 WL 1084229 (S.D. N.Y. Dec. 1, 1999).

Because we affirm the district court's determination that the motion for new trial was untimely, we need not address Ristovski's alternative arguments that the district court abused its discretion when it entered its alternative finding that Ristovski was not entitled to relief on the merits of his motion for new trial.

In summary, we AFFIRM the district court's denial of Defendant-Appellant Ristovski's motion for new trial.

¶2002-5727

W. Cameron PARSONS, PLAINTIFF v. UNITED STATES OF AMERICA DEPARTMENT OF TREASURY, Internal Revenue Service, State of Alabama, Department of Revenue; Teresa Turner; and Linda Hartsfield, DEFENDANTS. U.S. District Court, Northern Dist. of Alabama, (DC AL) Civil Action Number 01-C-2513-W, Nov. 15, 2002. Decision for Govt.

1. Lien property—interpleader actions—attorney's fees and costs—sovereign immunity. Govt.'s motion to dismiss attorney's action for determination of competing claims to interpleaded proceeds of sale of deceased taxpayer's lien property was granted: IRS rather than U.S. had been improperly named as party; and attorney wasn't entitled to recover his fees from proceeds that were substantially less than govt.'s tax lien amounts. Also, overall judicial economy was best served by dismissal where requisite meeting between parties hadn't occurred; state tax authority had already been dismissed; and other defendants had either defaulted or hadn't been properly served. *Reference:* United States Tax Reporter ¶74,336.506(25); 63,215.04(145). IRC §6321.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION,

MEMORANDUM OPINION

Chief United States District Judge U.W. Clemon

[1] This case was brought as an interpleader action in the Circuit Court of Tuscaloosa, County, Alabama. It arises out of a foreclosure sale conducted by the Plaintiff, an attorney, on property formerly owned by the late Carl Wayne Turner. The proceeds of the foreclosure sale exceeded the amount of the indebtedness owned by Turner to the Plaintiff's client. The Plaintiff has duly deposited the excess funds ($44,543.30) with the Clerk of the Circuit Court.

The United States timely removed the case to this Court.

The First Defense asserted in the answer is that "[t]he United States of America, Department of Treasury, Internal Revenue Service should be dismissed as a party to this action because it lacks capacity to sue and be sued . . . ." The United States has not moved to be substituted as the proper Defendant.

The Second Defense is that Plaintiff is not entitled to recover his attorney's fees and costs to the extent that they are in derogation of federal tax liens. That defense appears to be viable. *Cable Atlanta, Inc. v. Project, Inc.*, 749 F.2d 626, 627 [55 AFTR 2d 85-552] (11th Cir. 1984). The Court judicially notes that the Internal Revenue Service has filed tax liens against Carl Wayne Turner which substantially exceed the amount of the interpleaded funds.

There has not been a meeting of the parties, as required by F.R. Civ.P. 26(f).

Defendant Alabama State Department of Revenue's Motion to Dismiss has been granted.

Default judgment has been entered against Defendant Teresa Turner.

Plaintiff has not effected service on the other Defendant, Linda Hartsfield.

The interpleaded funds remain in the Circuit Court of Tuscaloosa County. Plaintiff is not required to effect the transfer of the funds to this Court, particularly since he is not entitled to a reasonable attorney's fee for his services.

Under all of the circumstances, judicial efficiency and the interests of justice

would best be served by dismissing the case, without prejudice.

Done this 15th day of November, 2002

Chief United States District Judge

U.W. Clemon

¶2002-5728

Don LINDNER and Janet V. LINDNER, PLAINTIFFS v. COMMISSIONER of Internal Revenue, DEFENDANT. U.S. District Court, Eastern Dist. of Missouri, (DC MO) No. 4:02-CV-1054 CEJ, Nov. 13, 2002. Years 1990, 1992. Decision for Govt.

1. Collection due process—review of administrative determination—jurisdiction. Taxpayers' district court petition for review of IRS's administrative determination to proceed with collection was dismissed for lack of jurisdiction: Tax Court had exclusive jurisdiction to review proposed levy that related to taxpayers' income tax liabilities; and, to extent taxpayers were challenging earlier, summary dismissal of their Tax Court petition for subject year, they should have filed appeal with Court of Appeals. *Reference:* United States Tax Reporter ¶63,305.01(10). IRC §6330.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION,

MEMORANDUM AND ORDER

CAROL E. JACKSON UNITED STATES DISTRICT JUDGE

This matter is before the Court on defendant's motion to dismiss. See Fed.R.Civ.P. 12(b)(1) and 12(b)(6). Plaintiffs filed a response to defendant's motion, and the issues have been fully briefed.

Plaintiffs, Don and Janet Lindner, bring this action against defendant, the Commissioner of Internal Revenue (the ''IRS''), disputing their income tax liabilities for the years 1990 and 1992. The IRS asks this Court to dismiss plaintiffs' complaint arguing that the action is barred by the doctrine of res judicata.

I. Background

On July 24, 1996 the IRS mailed notices of deficiency to plaintiffs with respect to their 1990 and 1992 income tax liabilities. The IRS contended that plaintiffs owed $208,723.00 for the 1990 tax year and $2,348.00 for the 1992 tax year. In response to the notice of deficiency issued for 1990, plaintiffs filed a petition con-testing the deficiency with the Tax Court on April 29, 1997. That case was dis-missed by the Tax Court on July 11, 1997 for lack of jurisdiction due to the untimely filing of the petition.[1] Plaintiffs did not contest the notice of deficiency for the 1992 tax year.

On April 6, 1998 plaintiffs were granted audit reconsideration for the 1990 tax year. After reviewing additional documents submitted by plaintiffs, the IRS allowed an additional net operating loss adjustment in the amount of $95,002.00 resulting in a tax decrease of $26,600.00 for the tax year 1990.

On May 3, 1999 the IRS sent plaintiffs a Notice of Intent to Levy. In that notice, the IRS noted that the levy would be in the amounts of $396,568.58 for the 1990 tax year and $4,502.36 for the 1992 tax year. On May 11, 1999, in response to a Notice of Federal Tax Lien, plaintiffs each filed a separate Form 12153 requesting a collection of due process hearing.[2] A telephone conference with plaintiff Don Lindner was scheduled for December 9, 1999, and a telephone conference with plaintiff Janet Lindner was scheduled for December 16, 1999. In the letters setting the conference dates, the IRS stated, ''Collection Due Process does not apply to a challenge of the existence or amount of the underlying tax

[1] Section 6213(a) of the Internal Revenue Code provides that the petition must be filed with the Tax Court within 90 days of the notice of deficiency being mailed, or 150 days if the notice is addressed to a person outside the United States. 26 U.S.C. § 6213(a). Plaintiffs filed their petition 269 days after the mailing of the notice of deficiency. Thus, the Tax Court dismissed plaintiffs' petition for lack of jurisdiction.

[2] Section 6330 of the Internal Revenue Code provides for notice and opportunity for hearing before levy. 26 U.S.C. § 6330. Such a hearing is held by the IRS Office of Appeals. 26 U.S.C. § 6330(b)(1).

liability, if you received a notice of deficiency.''[3]

On December 9, 1999 plaintiff Don Lindner had a telephone conference with Settlement/Appeals Officer Helen Latta. Mr. Lindner was given the opportunity to raise collection alternatives but stated that he did not wish to do so because it was his belief that he did not owe the 1990 assessed tax. He did not raise any issues pertaining to the 1992 tax year. In addition, Mr. Lindner offered no spousal defense arguments on behalf of his wife, Janet Lindner. Mrs. Lindner did not participate in the hearing and did not respond to the conference scheduled for her on December 16, 1999.

On February 3, 2000 the IRS issued a Notice of Determination Concerning Collection Action(s) Under Sections 6320 and/or 6330 to plaintiffs. The notice approved the lien action and denied relief to plaintiffs. Within the notice was a summary of the determination of the December 9th due process hearing. It stated,

> The Collection Due Process Appeal does not afford the Appeals Office jurisdiction over the assessment of the tax because you previously received the right to due process with the statutory notice of deficiency. Collection is charged with the duty to efficiently collect tax assessed and the Appeals Office is unable to consider less intrusive collection actions without a proposal from you.

On February 8, 2000 plaintiffs filed a petition in the Tax Court asking the Court for judicial review of the administrative hearing. On May 25, 2000 plaintiffs filed an amended petition. But for the introductory paragraphs, the amended petition is identical to the complaint filed in this action.

In the Tax Court, the IRS moved for summary judgment against plaintiffs arguing that the validity of plaintiffs' underlying tax liabilities was not properly at issue in the Tax Court because § 6330 of the Internal Revenue Code only provides for a review of the underlying tax liability when the taxpayer did not receive any statutory notice of deficiency or did not otherwise have an opportunity to dispute such tax liability. Thus, the IRS argued that because plaintiffs had received notice of their deficiency, and because plaintiffs would have had the opportunity to dispute the liability if they had filed a timely petition with the Tax Court, review of the taxpayer's liability at this stage was precluded. On June 12, 2002 the Tax Court agreed with the IRS's assertions and granted it summary judgment. The Tax Court further ordered that the IRS ''may proceed with the collection action as determined in the notice of determination concerning collection action for petitioners' taxable years 1990 and 1992.'' Plaintiffs filed the present action in this Court on July 11, 2002.

II. Legal Standards

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is to test the legal sufficiency of the complaint. A complaint is not to be dismissed for failure to state a claim for which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim entitling him to relief. Conley v. Gibson, 355 U.S. 41, 45–46 (1957). The factual allegations of a complaint are assumed true and construed in favor of the plaintiff. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). The issue is not whether plaintiff will ultimately prevail, but whether the plaintiff is entitled to present evidence in support of his claim. Id. Thus,

> [i]f as a matter of law ''it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations,'' ... a claim must be dismissed, without regard to whether it is based on an outlandish legal theory or on a close but ultimately unavailing one.

Neitzke v. Williams, 490 U.S. 319, 327 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

[3] Section 6330 provides that a petitioner may raise at the due process hearing challenges to the existence or amount of the underlying tax liability *only if* the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability. 26 U.S.C. 6330(c)(2)(B).

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a party to move for a dismissal based on a court's lack of subject matter jurisdiction to hear the case. Dismissal under Rule 12(b)(1) is appropriate if the issue before the court is whether the plaintiff has failed to satisfy a threshold jurisdictional requirement. See Trimble v. Asarco, Inc., 232 F.3d 946, 955 n.9 (8th Cir. 2000). In order to properly dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the complaint must be successfully challenged on its face or on the factual truthfulness of its averments. See Titus v. Sullivan, 4 F.3d 590, 593 (8th Cir. 1993). In a facial attack, the court restricts itself to the face of the pleadings, and all of the factual allegations concerning jurisdiction are presumed to be true. Id. However, in a factual challenge, the court considers matters outside of the pleadings, and no presumptive truthfulness attaches to the plaintiff's allegations. See Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir. 1990). Furthermore, the existence of disputed material facts does not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Id. at 729. ''Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction--its very power to hear the case--there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.'' Id. Moreover, the plaintiff has the burden of proof that jurisdiction does in fact exist. Id.

III. Discussion

[1] Defendants asks this Court to dismiss plaintiff's case under the doctrine of res judicata because the issues raised in this case are identical to the issues raised in the Tax Court. The Court need not decide whether the doctrine of res judicata applies in this case because this Court lacks jurisdiction on other grounds.

Plaintiffs assert that jurisdiction in this case is based on 26 U.S.C. § 6330. Section § 6330 provides, in part, that ''no levy may be made on any property or right to property of any person unless the Secretary has notified such person in writing of their right to a hearing under this section before such levy is made.'' The record clearly shows that plaintiffs received a hearing before the IRS Office of Appeals. However, the statute provides for judicial review of the Appeals Office's determination. Section 6330(d)(1) states:

> (1) Judicial review of determination.--The person may, within 30 days of a determination under this section, appeal such determination--
>
> (A) to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter); or
>
> (B) if the Tax Court does not have jurisdiction of the underlying tax liability, to a district court of the United States.

Thus, the Tax Court has the power to hear appeals from determinations pursuant to 26 U.S.C. § 6330(d)(1)(A). The record is clear that the Tax Court reviewed the Appeals Office's determination when plaintiffs filed a petition in that court on February 8, 2000. Nevertheless, plaintiffs maintain that the district court has jurisdiction because ''the Tax Court's opinion was summary, no real judicial guidance was given.'' Only if the Tax Court does not have jurisdiction over the ''underlying tax liability'' does a United States District Court have jurisdiction. 26 U.S.C. § 6330(d)(1)(B).

The Tax Court is an Article I court and has jurisdiction to rule on deficiencies assessed by the government on taxpayers. 26 U.S.C. § 6213; see also Crawford v. Commissioner of Internal Revenue, 266 F.3d 1120, 1122 [88 AFTR 2d 2001-5962] (9th Cir. 2001); Freytag v. Commissioner of Internal Revenue, 501 U.S. 868, 891 [68 AFTR 2d 91-5025] (1991) (''The Tax Court's function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are Courts of Law. Furthermore, the Tax Court exercises its judicial power in much the same way as the federal district courts exercise theirs.''). The Tax Court also has jurisdiction over lien or levy actions in relation to income tax liabilities. 26 U.S.C. § 6330; see also True v. Commissioner of the Internal Revenue, 108 F.Supp.2d 1361,

1364 [87 AFTR 2d 2001-2617] (M.D. Fla. 2000) (holding that the district court lacked subject matter jurisdiction over a § 6330 case involving income taxes as opposed to an employment tax); Treas. Reg. § 601.102(b)(1) (identifying income taxes as being within the jurisdiction of the Tax Court). The plaintiff's claims involve a dispute over a proposed levy by the IRS in response to an alleged income tax liability. Thus, jurisdiction was vested in the Tax Court, not in the district court.

Plaintiffs argue that they are ''merely pursuing their legal avenues of appeal'' by filing a complaint in this Court. However, if it is review of the Tax Court's decision that plaintiffs are seeking, then they have come to the wrong court. Section 7482 of the Internal Revenue Code provides for review of a decision of the Tax Court by a United States Court of Appeals. 26 U.S.C. § 7482(a).

Based on reasons discussed above, this Court must dismiss plaintiffs' complaint for lack of subject matter jurisdiction.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion to dismiss [#5] is granted.

CAROL E. JACKSON

UNITED STATES DISTRICT JUDGE

Dated this 13th day of November, 2002.

¶2002-5729

HORTON HOMES, INC., PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Middle Dist. of Georgia, (DC GA) CASE NO. 5:01-cv-130-2 (WDO), Nov. 12, 2002. Years 1989, 1990, 1991, 1992, 1993, 1994, 1995. Decision for Govt.

1. Excise taxes—refund—''first retail sale''—specialized heavy vehicles not intended for retail sale. Taxpayer's refund claim for excise taxes paid on purchase of incomplete, transportation vehicles/''toters'' designed to transport manufactured homes was rejected: vehicles that were originally purchased as incomplete chassis cabs and modified to tow, not carry, manufactured homes were considered taxable tractors, not trucks. Significantly, vehicles were equipped with air brakes, towing package, and A-frame ball hitch with hydraulic lift; and 75% of home's weight load was carried on home's chassis, not toter's chassis. Also, ''first retail sale'' occurred when chassis cabs were converted into functional toters. *Reference:* USTR Excise Taxes ¶40,515.01(25); 40,525.01(10). IRC §4051; 4052.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION,

JUDGMENT

Civil Order File Volume 85, Page 8799

Pursuant to the Findings of Fact and Law of this Court filed November 12, 2002, and for the reasons stated therein, JUDGMENT is hereby entered in favor of defendant United States of America. Defendant is awarded its costs of this action.

This 12th day of November, 2002.

GREGORY J. LEONARD, CLERK

Denise Partee, Deputy Clerk

FINDINGS OF FACT AND LAW

WILBUR D. OWENS, JR. UNITED STATES DISTRICT COURT

After hearing the trial of this case and carefully considering the memoranda submitted by both parties, the Court enters the following findings of fact and conclusions of law.

Plaintiff filed this action the United States of America, through the Secretary of the Treasury and the Internal Revenue Service, assessed excise taxes on Horton Homes' purchase of certain vehicles known as ''toters.'' Toters are vehicles used to transport manufactured homes from the plant where they are built to the retail dealer of the manufactured homes. The vehicles in question were originally purchased from LJL Truck Center in Macon, Georgia. When purchased from LJL, the vehicles were incomplete chassis cabs specially ordered with a 128-inch wheel base. At that time, the vehicles were not capable

of towing manufactured homes or any other cargo. LJL and Plaintiff Horton Homes arranged to have the vehicles transported to Kingsley-Fisher industries where certain modifications were made. Kingsley-Fisher initially transported the vehicles to another manufacturer, Double Eagle, where sleeper cabs were installed. After the sleeper cabs were installed, the vehicles were transported back to Kingsley-Fisher where the vehicles were converted into what is known as a ''toter.'' Kingsley-Fisher installed a heavy duty vertical power hitch, coil spring boxes, a 200-gallon fuel tank, ''Wide Load'' sign, a mirror and light bar, a spare tire rack, fenders, a lighting receptacle and a manual control box mounted on the dash or the window frame of the cab that could activate the lights and electromagnetic brakes on the manufactured home. When the vehicles left Kingsley-Fisher, they had become ''toters'' capable of towing or pulling a manufactured home. Kingsley-Fisher then delivered each toter to Horton Homes.

The Internal Revenue Service (hereinafter referred to as the ''IRS'') assessed excise taxes on toters purchased by Horton Homes during the periods of 1989–1995. The IRS contends the tax is due based upon §§ 4051 and 4052 of the Internal Revenue Code. The IRS contends those sections impose a 12% percent excise tax on ''tractors'' and that the toters in this case fall within the statutory and regulatory definitions of ''tractor.'' The IRS contends the toters are tractors because (1) they are primarily designed to tow or pull the manufactured homes, (2) the toters contain brakes that are attached to the manufactured home and are activated from inside the toter's cab, (3) the manufactured home is similar to the statutory example of a ''trailer'' or ''semitrailer'' because the wheels are attached to the chassis of the manufactured home so that it may be pulled by the toter and (4) a majority of the weight of the manufactured home is not carried on the same chassis as the toter but is carried on its own chassis.

Plaintiff Horton Homes seeks a refund of the excise taxes that have been paid and a judgment finding that the toters are not tractors or subject to future excise taxes. Plaintiff contends the toters do not fall within the statutory and regulatory definitions of tractor but are ''trucks.'' Plaintiff contends the manufactured homes are not similar to the trailers and semi-trailers discussed in the statutes and regulations. Plaintiff contends the brakes attached to the manufactured homes have no real function because the manufactured home is stopped mainly by the toter's brakes and the manufactured home's brakes are for back-up, emergency purposes only.

Title 26, section 4051 of the United States Code provides:

(a) There is hereby imposed on the first retail sale of the following articles (including in each case parts or accessories sold on or in connection therewith or with the sale thereof) a tax of 12 percent of the amount for which the article is so sold:

(A) Automobile truck chassis;
(B) Automobile truck bodies;
(C) Truck trailer and semitrailer chassis;
(D) Truck trailer and semitrailer bodies; or
(E) Tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer.

. . .

(b) Under regulations prescribed by the Secretary . . . If (A) the owner . . . or operator of any vehicle which contains an article taxable under subsection (a) installs (or causes to be installed) any part or accessory on such vehicle, and (B) such installation is not later than the date 6 months after the date such vehicle (as it contains such article) was first placed in service,

then there is hereby imposed on such installation a tax equal to 12 percent of the price of such part of accessory and its installation.

(2) Exceptions. Paragraph (1) shall not apply if (A) the part or accessory in-

stalled is a replacement part of accessory, or (B) the aggregate price of the parts and accessories (and their installation) described in paragraph (1) with respect to any vehicle does not exceed $1,000 (or such other amount or amounts as the Secretary may be regulations prescribe).

(3) Installers secondarily liable for tax. The owners of the trade or business installing the parts or accessories shall be secondarily liable for the tax imposed by paragraph (1).

''The term 'first retail sale' means the first sale, for a purpose other than for resale or leasing in a long-term lease, after production, manufacture, or importation.'' 26 U.S.C. § 4052(a)(1). ''If any person uses an article taxable under section 4051 before the first retail sale of such article, then such person shall be liable for tax under section 4051 in the same manner as if such article were sold at retail by him.'' Id. at (a)(3)(A).

Often it is necessary to refer to applicable regulations when determining whether a particular set of facts is covered by a statute. A court's role in determining the validity of regulations is limited, since ''Congress has delegated to the Secretary of the Treasury, not to [the courts] the task of administering the tax laws of the Nation.'' Commissioner v. Portland Cement Co. of Utah, 450 U.S. 156, 169 [47 AFTR 2d 81-855] (1981). The ''role of the judiciary in cases of this sort begins and ends with assuring that the [Treasury] regulations fall within [the Secretary's] authority tom implement the congressional mandate in some reasonable manner.'' United States v. Correll, 389 U.S. 299, 307 [20 AFTR 2d 5845] (1967).

For Horton Homes' toters to be subject to the excise tax they must be ''tractors'' and not ''trucks.'' Under the applicable regulations, a ''tractor'' is defined as a ''highway vehicle primarily designed to tow a vehicle, such as a trailer or semitrailer, but does not carry cargo on the same chassis as the engine. A vehicle equipped with air brakes and/or towing package will be *presumed* to be primarily designed as a tractor.'' Treas. Reg. § 145.4051-1(e)(1) (emphasis added). ''An incomplete chassis cab shall be treated as a tractor if it is equipped with one or more of the following . . . a device for supplying pressure from the chassis can to the brake system (air or hydraulic) of the towed vehicle; a mechanism for protecting the chassis cab brake system from the effects of a loss of pressure in the brake system of the towed vehicle; a control linking the brake system of the chassis to the brake system of the towed vehicle; a control in the cab for operating the towed vehicle's brakes independently of the chassis cab's brakes; or any other equipment designed to make it suitable for use as a tractor.'' Id. ''The term 'truck' refers to a highway vehicle that is primarily designed to transport its load on the same chassis as the engine even if it is also equipped to tow a vehicle, such as a trailer or semitrailer.'' Id. at (e)(2).

[1] Horton Homes' toters fall squarely within the meaning of ''tractor'' as described in the statutes and regulations. The toters are highway vehicles primarily designed to tow manufactured homes that are attached to the toter's A-frame ball hitch with a hydraulic lift hitch. The toters are equipped with air brakes and a towing package. The toters have a control in the cab for operating the manufactured home's brakes independently of the cab's brakes. The toters are not trucks because, as Plaintiff's expert Dr. Bansall testified, at least 75% of the weight load of the manufactured home is carried on the manufactured home's chassis and *not* the chassis of the toter. The toters are vehicles designed to *tow* rather than *carry* manufactured homes. Horton Homes is therefore liable for the excise taxes assessed.

Horton Homes is liable for the excise tax, as opposed to LJL or any other manufacturer, because the ''first retail sale'' occurred upon completion of the conversion of the incomplete chassis cabs into toters. Until the incomplete chassis cabs were converted into toters, they had no functional use. The chassis cabs were specially ordered from LJL with a shortened, 128-

inch wheel base so they could be converted into toters to tow the manufactured homes. Finding that Horton Homes' toters are not subject to the excise tax would be to elevate form over substance, a practice that is strongly discouraged in the tax arena. See Redwing Carriers, Inc. v. Tomlinson, 399 F.2d 652 [22 AFTR 2d 5448] (5th Cir. 1968). Plaintiff is therefore liable for the excise tax as assessed by the IRS for the periods between 1989 and 1995. Further, Plaintiff is not entitled to a refund of the amounts already paid. Let judgment be entered in favor of Defendant United States of America.

SO ORDERED this 12th day of November, 2002.

WILBUR D. OWENS, JR.

UNITED STATES DISTRICT COURT

¶2002-5730

Angel Ruiz RIVERA, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Dist. of Puerto Rico, (DC PR) Civil No. 99-1012 (JAG), Nov. 13, 2002. Earlier proceeding at (2002, DC PR) 90 AFTR 2d 2002-6536. Year 1995. Decision for Govt.

1. Bill of costs—recoverable fees. IRS's unopposed bill of costs for deposition and interpreters' fees was granted. *Reference:* United States Tax Reporter ¶74,336.511(27).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO,

ORDER

JAY A. GARCIA-GREGORY United States District Judge

[1] On October 4, 2002, the IRS filed a bill of costs, pursuant to Fed.R.Civ.P 54 and 28 U.S.C. § 1920, seeking $2,163.75 from plaintiff (Docket No. 87). The costs are for the taking of three depositions ($1,858.75) and for the compensation of interpreters ($305.00). The IRS's bill of costs stands unopposed. Finding no compelling reason to modify the bill of costs, the Court grants the IRS the amount of $2,163.75 as costs in this case. IT IS SO ORDERED.

In San Juan, Puerto Rico, this 13th day of November 2002.

JAY A. GARCIA-GREGORY

United States District Judge

¶2002-5731

Linda L. JOKINEN, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Eleventh Circuit, (CA11) No. 02-10493, Nov. 14, 2002. Tax Court affirmed per curiam. Year 1996. Decision against Taxpayer.

1. Gain or loss—computation—foreclosure sales—failure to timely file returns penalties. Tax Court properly upheld IRS's deficiency determination and imposition of IRC §6651(a)(1) penalty against pro se taxpayer: taxpayer's argument that portion of foreclosure sale proceeds given directly to county treasure to pay property's outstanding real estate taxes wasn't realized by her and shouldn't have been included in gain calculation was properly rejected since proceeds' use and taxpayers' failure to receive them personally were of no tax consequence; and Court had no jurisdiction to consider her underlying real estate tax liability. Also, taxpayer's stipulation to late filing and failure to offer any excuse therefor supported penalty's imposition; and claim raised for 1st time on appeal that she was afraid to file return because govt. sold property to known drug dealer wasn't considered. *Reference:* United States Tax Reporter ¶10,015.13(70); 66,515.14(5). IRC §1001; 6651.

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT,

Appeal from the United States Tax Court

Before EDMONDSON, Chief Judge, BLACK and MARCUS, Circuit Judges.

PER CURIAM:

U.S. Tax Court No. 13012-00

[1] Petitioner-Appellant Linda L. Jokinen, a pro se taxpayer, appeals an order of the tax court that upheld a income tax deficiency determination of the Commissioner of the Internal Revenue Service (''IRS'') for tax year 1996 and imposed a penalty for failure to file timely a 1996 tax return. No reversible error has been shown; we affirm.

Jokinen challenged in the tax court the attribution of taxable income to her in 1996 from a foreclosure sale of real property. The property was sold for $35,000; the gain on the sale of the property was $21,500; Jokinen received approximately $11,200 of the foreclosure sale proceeds; and approximately $12,350 was given directly to the county treasurer to pay outstanding real estate taxes on the foreclosed property. Jokinen claimed that proceeds of the foreclosure sale that were used to satisfy delinquent real estate taxes should not be included in the calculation of her gain on the sale because these proceeds were not ''realized'' by her and because she claimed to have owed no delinquent real estate taxes. Jokinen offered no explanation for her failure to file timely a 1996 return.

The tax court rejected Jokinen's claimed errors. The tax court noted that application of the foreclosure sale proceeds to satisfy liens against the property did not alter the taxable nature of the gain; that the taxpayer did not receive personally these proceeds was of no tax consequence.[1] About Jokinen's claim that she owed no taxes, the tax court observed that it had no jurisdiction to resolve Jokinen's claim about real estate taxes owed; Jokinen's remedy, if any, was to seek a refund of real estate taxes in the appropriate forum. Because Jokinen stipulated that her 1996 return was late, and because she offered no explanation or other evidence to counter the imposition of a late-filing penalty under I.R.C. § 6651(a)(1)[2] , the tax court sustained the late-filing penalty imposed.

Jokinen states that she is appealing the tax court decision, but Jokinen offers no intelligible argument to show error in the tax court's rejection of her challenge to the IRS's deficiency determination. Jokinen has abandoned this claim. See Rowe v. Schreiber, 139 F.3d 1381, 1382 n.1 (11th Cir. 1998) (issues not argued on appeal are deemed abandoned). It is only by a very liberal construction of Jokinen's brief that we can distill an argument challenging imposition of the late-filing penalty. See Haines v. Kerner, 92 S.Ct. 594, 595–96 (1972) (pro se filings held to less stringent standards).

Jokinen argues that the government sold her property at the foreclosure sale to a known drug dealer and she was afraid to file timely her 1996 return. But Jokinen's claimed fear, raised for the first time on appeal, will not be considered. See Narey v. Dean, 32 F.3d 1521, 1526–27 (11th Cir. 1994) (arguments not raised in the district court that are raised for the first time on appeal will not be addressed except in very limited circumstances). Because Jokinen proffered no evidence before the tax court bearing on the imposition of the penalty, admitted that she failed to file her 1996 return on time, offered no explanation for this failure when expressly questioned by the tax court, and no miscarriage of justice has been shown, the circumstances support no consideration of this issue on appeal.

AFFIRMED.

¶2002-5732

Beverly M. PARKER, PETITIONER v. UNITED STATES OF AMERICA and Internal Revenue Service, RESPONDENTS. U.S. District Court, Eastern Dist. of North Carolina, (DC NC) NO. 4:02-CV-145-H(4), Nov. 13, 2002. Years 1997, 1999, 2000, 2001. Decision against Taxpayer.

[1] The tax court also considered whether Jokinen's gain could be offset by her user of her share of the proceeds to purchase a mobile home, but because the mobile home purchase prices was less than the adjusted sale price of the foreclosed property, the mobile home failed to qualify as ''replacement property.'' See I.R.C. § 1034.

[2] I.R.C. § 6651(a)(1) makes a taxpayer liable for a penalty for failure to file a tax return on the prescribed date unless it is shown that the failure was due to reasonable cause and not due to willful neglect.

1. Third-party summons enforcement—petition to quash—notice—legitimate purpose. Taxpayer's petition to quash (petition) IRS's 3d-party summons served on bank was dismissed: service of summons by certified mail was proper under IRC §7603(b)(1) where recipient was both bank and 3d-party record-keeper; summons notice was also properly sent to taxpayer's last known address in satisfaction of IRC §7609(a)(2); and IRC §7609(b)(2)'s requirements for *petition* service didn't apply to summons' service. Also, govt. established prima facie enforcement case where summoned bank documents not already in IRS's possession were relevant to legitimate investigation of taxpayer's tax liabilities, all administrative steps had been followed and there was no Justice Dept. referral. *Reference:* United States Tax Reporter ¶76,095.01(10). IRC §7603; 7609.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA EASTERN DIVISION,

ORDER

LOUISE W. FLANAGAN United States Magistrate Judge

This matter presents itself upon a petition to quash an Internal Revenue Service (''IRS'') third party summons, filed September 30, 2002, wherein petitioner alleges that the administrative summons she seeks to quash fails to comply with the requirements of 26 U.S.C. §§ 7603, 7609(a)(2), and 7609(b)(2), and with the standards of United States v. Powell, 379 U.S. 48 [14 AFTR 2d 5942] (1964). Respondents have filed a response to the petition, denying these allegations. The matter now is ripe for ruling.

[1] Respondents contend that the summons complied with 26 U.S.C. § 7603, which allows service of a third party record-keeper summons by certified or registered mail. See 26 U.S.C.§ 7603(b)(2)(A); 26 U.S.C. § 7603(b)(1). Respondents also state that they have complied with the requirements of 26 U.S.C. § 7609(a)(2), in that petitioner was provided with timely notice of the summons, sent by certified mail to her last known address. Respondents further assert that 26 U.S.C. § 7609(b)(2) concerns the requirements for serving a petition to quash summons, and does not impose any requirements on the IRS with respect to the contents, format, or service of its administrative summonses. Finally, respondents note that Powell requires only that the government make an initial showing that the summons is issued for a legitimate purpose, that the inquiry is relevant to the purpose, that the information sought is not already within its possession, and that the administrative steps required by the IRS Code have been followed. See Powell, 379 U.S. at 57–58. Respondents claims that they have met this burden.

26 U.S.C. § 7603 sets forth the procedure for service of an IRS summons. The statute provides: ''A summons ... for the production of books, papers, records, or other data by a third-party recordkeeper may also be served by certified or registered mail to the last known address of such recordkeeper.'' 26 U.S.C. § 7603(b)(1). The statute defines ''third-party recordkeeper'' as ''any mutual savings bank, cooperative bank, domestic building and loan association, or other savings institution chartered and supervised as a savings and loan or similar association under Federal or State law, any bank (as defined in section 581), orany credit union (within the meaning of section 501(c)(14)(A)).'' 26 U.S.C. § 7603(b)(2)(A). Section 581 defines ''bank'' as ''a bank or trust company incorporated and doing business under the laws of the United States (including laws relating to the District of Columbia) or of any State, a substantial part of the business of which consists of receiving deposits and making loans and discounts, or of exercising fiduciary powers similar to those permitted to national banks under authority of the Comptroller of the Currency, and which is subject by law to supervision and examination by State and Federal authority having supervision over banking institutions.'' 26 U.S.C. § 581.

The East Carolina Bank, recipient of the summons at issue here, is a ''bank'' under 26 U.S.C. § 581 and a ''third-party recordkeeper'' under 26 U.S.C. § 7603(b)(2)(A). Therefore, the court finds respondents arguments to be correct, that service of the summons by certified mail was proper under 26 U.S.C. § 7603(b)(1).

26 U.S.C. § 7609 sets forth the special procedure for third-party summonses. Section 7609(a)(2) states that ''notice shall be sufficient if, on or before such third day, such notice is served in the manner pro-vided in section 7603 (relating to service of summons) upon the person entitled to notice, or is mailed by certified or regis-tered mail to the last known address of such person, or, in the absence of a last known address, is left with the person summoned.'' 26 U.S.C. § 7609(a)(2). Here, petitioner was provided with timely notice of the summons, sent by certified mail to her last known address. Therefore, notice to petitioner of the summons also was suf-ficient under 26 U.S.C. § 7609(a)(2).

26 U.S.C. § 7609(b)(2) concerns the right to initiate a proceeding to quash summons and sets forth the requirements for serving a petition. This section imposes requirements only on the petitioner in an action, and does not impose any requirements on the IRS with respect to the contents, format, or service of its adminis-trative summonses. Therefore, the sum-mons itself could not violate this section.

Finally, United States v. Powell sets forth the standards the government must meet to obtain enforcement of an IRS summons. See Powell, 379 U.S. at 57–58. In that case, the Supreme Court held:

> [T]he Commissioner need not meet any standard of probable cause to obtain enforcement of his summons ... He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed--in particular, that the ''Secretary or his delegate,'' after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect.

Id. In addition, no summons can be issued '''if a Justice Department referral is in effect' with respect to a person about whom information is sought by means of the summons.'' United States v. Stuart, 489 U.S. 353, 362 [63 AFTR 2d 89-681] (1989) (quoting 26 U.S.C. § 7602(c)). In this matter, the purpose of the investigation is a legitimate one: to determine petitioner's tax liabilities for the years 1997, 1999, 2000, and 2001. The bank records sought may be relevant to this purpose, and are not already within the IRS' possession. As discussed above, the administrative steps required by the IRS Code have been followed. No Justice Department referral is in effect with respect to petitioner. Therefore, the government has complied with the standards set forth in Powell and Stuart.

For the reasons set forth above, the petition to quash is hereby DENIED. The East Carolina Bank is ORDERED to produce those records which are the subject of the summons within 14 days of the date of this order, at a time certain to be fixed by Agent Kenneth Smith, or any authorized officer of the IRS. In the court's discretion, the government is DENIED its costs in this action,

So ORDERED, this the 13th day of November, 2002.

LOUISE W. FLANAGAN

United States Magistrate Judge

¶2002-5733

In the Matter of GARY N. BERARDI, Debtor. Gary N. BERARDI, PLAINTIFF/APPELLANT v. UNITED STATES, ET AL., DEFENDANT/APPELLEE. U.S. District Court, Eastern Dist. of Pennsylvania, (DC PA) CIVIL ACTION NO. 02-1641, Oct. 16, 2002. Bankruptcy Court, (2002, Bktcy Ct PA) 89 AFTR 2d 2002-1363, 276 BR 388, 2002-1 USTC ¶50320, affirmed. Year 1995. Decision for Govt.

1. Bankruptcy court procedure—burden of proof—examinations beginning after 7-22-98. Bankruptcy court properly rejected Chap. 13 debtor's attempt to shift burden of proving assessment to IRS under IRC §7491: statute didn't apply where audit commenced before 7-22-98; and taxpayer didn't offer anything other than his own self-serving testimony to rebut assessment's presumptive correctness. Also, even if IRC §7491 did apply, taxpayer didn't offer any income or expense records to meet statute's substantiation and record-keeping prerequisites. *Reference:* United States Tax Reporter ¶68,726.52(50); 74,915.01(5). IRC §7491.

2. Tax claims in bankruptcy—objection to proof of claim—unreported income; deductions—proof—failure to timely file returns and accuracy-related negligence penalties—interest. Bankruptcy court properly upheld assessment against Chap. 13 debtor-gambler-businessperson for year he didn't report income and overstated business deductions: taxpayer didn't offer any proof to support contention that unreported bank deposits and funds he used to buy gambling chips were really nontaxable loans from casinos; and, even if he ultimately lost those funds in his gambling escapades, he wasn't entitled to any corresponding loss deduction since he hadn't reported funds as income in 1st place or itemized his deductions. Also, taxpayer's flawed rebuttal to IRS's auditor's calculations of his allowable business expenses didn't prove he was entitled to deductions above amounts IRS allowed. *Reference:* United States Tax Reporter ¶68,726.51(10); 615.047(5); 1625.019(5); 66,515.14(5); 66,625.01(20); 66,015.01(100). IRC §61; 63; 162; 6651; 6601; 6621; 6662.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,

MEMORANDUM and ORDER

YOHN, J.

Appellant, Gary N. Berardi, appeals from a final order of the bankruptcy court. That court denied his request for a declaratory judgment that appellee, the Internal Revenue Service (''IRS''), incorrectly assessed his tax liability for the 1995 tax year, and overruled his objections to appellee's proof of claim. Appellant argues that the bankruptcy court abused its discretion by placing the burden on him, rather than appellee, to prove that appellee's tax assessment was incorrect. Furthermore, he argues that the bankruptcy court's findings of fact regarding appellee's assessment of his income and business deductions were clearly erroneous. This court concludes that the bankruptcy court applied the correct legal standard by placing the burden of proof on appellant, and that the record of the prior proceedings clearly substantiates the bankruptcy court's findings that appellant 1) failed to report several thousand dollars of income as evidenced by excess funds in his bank account and monies which he used to purchase chips at various casinos, 2) failed to deduct or demonstrate that he was entitled to deduct his alleged wagering loses, and 3) received deductions for all of those business expenses which he could substantiate. For these reasons, the decision of the bankruptcy court will be affirmed.

BACKGROUND

In 1999, appellant, Gary N. Berardi, the sole owner and operator of ''Custom Lawn and Tree Services,'' filed for Chapter 13 bankruptcy. Consequently, this case comes to this court on appeal from the bankruptcy court. It, however, revolves exclusively around the 1995 tax return and gambling habits of Berardi. Hence, the facts giving rise to this dispute focus primarily on Berardi's relationships with the IRS and several Atlantic City casinos.

During Father's Day weekend of 1995, Berardi and his wife went to Atlantic City to gamble. According to the record and the bankruptcy court's findings of fact, Berardi purchased $34,900 worth of gambling chips during his stay. Berardi testified that he and his wife only brought $500 to Atlantic City and that the money used to purchase these chips was ''derived from a conglomeration of markers drawn, and

winnings earned, whereas all of the chips were converted into cash and then the cash ... again bought more gaming chips.'' *In re Berardi*, 276 B.R. 388, 391 [89 AFTR 2d 2002-1363] (Bankr. E.D.Pa. 2002). The bankruptcy court, however, found that the casinos' records did not support this testimony; rather, the records indicated that Berardi never ''cashed out''[1] an amount great enough to generate a Currency Transaction Report (CRT). The law requires casinos to fill out these reports and return them to the IRS when any one individual cashes in or out $10,000 or more during a 24-hour period. Additionally, the bankruptcy court found that Berardi's maximum line of credit at each of these casinos was $3,000. In short, it appears from the bankruptcy court's findings that Berardi brought with him several tens of thousands of dollars of income to purchase chips during his brief stay in Atlantic City, that he presented no documentary evidence to the contrary and that the bankruptcy court did not find his testimony credible.

In 1998, the IRS audited Berardi and determined that his income for the 1995 tax year was $208,061, which was $49,299 more than he reported on his 1995 federal income tax return. The additional income was the sum of three figures: 1) $14,399, which appeared as deposits in Berardi's bank account, but which he never included in his gross income; 2) $23,400 which he used to purchase gambling chips at the Claridge Casino on June 17, 1995; and 3) $11,500 which he used to purchase gambling chips at the Trump Taj Mahal Casino on June 22, 1995. Furthermore, the IRS found that Berardi had overestimated his business expenses during that year. Specifically, Berardi had reported $137,770 in expenses, but the IRS found that he had failed to substantiate some of these expenses, and hence his allowable expenses were only $113,769. Finally, although Berardi filed and received an extension on his tax filing during this year, he still managed to miss the later deadline.[2] As result of these inaccuracies and his failure to submit his return in timely fashion, the IRS determined that Berardi underpaid his 1995 income taxes in the amount of $24,079 and assessed the following penalties against him: 1) $1,024 for failing to file his taxes in a timely manner; 2) $4,816 for inaccurately reporting his income and expenses; and 3) $5,878 in interest.[3] On August 11, 1998, the IRS sent Berardi a Notice of Deficiency, informing him of these facts.

After receiving the Notice of Deficiency, Berardi filed a petition in Tax Court challenging the IRS's assessment. That proceeding was stayed as a result of Berardi's filing for Chapter 13 bankruptcy on September 8, 1998. It is the bankruptcy court's order of February 22, 2002, finding in favor of the IRS, that Berardi now appeals to this court.

STANDARD OF REVIEW

Pursuant to the Federal Rules of Bankruptcy Procedure, a district court, sitting as an appellate tribunal, ''may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings.'' Fed. R. Bankr. P. 8013. In so doing, this court must apply a clearly erroneous standard to review the bankruptcy court's factual findings and a de novo standard to review its conclusions of law. *In re Brown*, 951 F.2d 564, 567 (3d Cir. 1991); *see also* Fed. R. Bankr. P. 8013 (''Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.''). A finding of fact is clearly erroneous if a reviewing court has a ''definite and firm conviction that a mistake has been committed.'' *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). A factual determination of the bankruptcy court will be ac-

[1] In order to gamble in Atlantic City casinos, an individual must play with gambling chips, which he receives in exchange for cash (or its equivalent). This process is referred to as ''cashing in.'' When he has finished gambling, whatever chips he has remaining he returns to the casino in exchange for their value in dollars. This process is unsurprisingly referred to as ''cashing out.''

[2] The IRS extended the deadline to October 15, 1996 and Berardi filed his tax return on November 4, 1996.

[3] While the court includes these facts in an effort to be comprehensive, appellant does not appear to challenge these penalties in his appeal. For this reason and because the court affirms the bankruptcy court's holding that Berardi did in fact under report his income and overstate his business expenses, this court need not address or examine the legitimacy of these penalties.

cepted unless that determination is either "completely devoid of minimum evidentiary support" or "bears no rational relationship to the supportive evidentiary data." *Hoots v. Pennsylvania*, 703 F.2d 722, 725 (3d. Cir. 1983).

DISCUSSION

I.

[1] Appellant first questions whether the bankruptcy court erred in requiring him to bear the burden of proving that appellee's assessment of his tax liability was erroneous. Appellant cites 26 U.S.C. § 7491 in support of his argument that the court should have placed the burden of proof on appellee. Since this is a question of law, this court reviews this issue de novo.[4]

Section 7491 states that "[i]f, in any court proceeding, a taxpayer introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitled A or B, the Secretary shall have the burden of proof with respect to such issue." 26 U.S.C. § 7491(a)(1)(Supp. 2002). However, this section only "appl[ies] to court proceedings arising in connection with examinations commencing after the date of the enactment of this Act [July 22, 1998]." 26 U.S.C. § 7491 (Supp. 2002) (citing Pub.L. 105-206 § 3001(c)); *see also Hudson v. United States*, 1999 WL 820453, 3 n.1 [84 AFTR 2d 99-6713] (E.D.Pa. Sept. 29, 1999) (stating that this section was not relevant to assessments made prior to July 22, 1998); *Toberman v. CIR*, 294 F.3d 985, 989 n.3 [89 AFTR 2d 2002-3043] (8th Cir. 2002) (same).

In this case, the record reveals that appellee conducted and completed its audit of appellant's 1995 taxes prior to July 22, 1998. Although the IRS Notice of Deficiency was mailed to appellant on August 11, 1998, every date that appears on appellee's documents evaluating appellant's case are dated no later than May 20, 1998. (Doc. 8, Gov. Ex. B, p. 1). This leads the court to conclude that appellee commenced the audit prior to the enactment of Section 7491, and hence that section simply does not apply to appellant's case.

In those cases where Section 7941 does not apply, our Court of Appeals has held that the burden of proving that an IRS assessment was erroneous lies squarely on the taxpayer challenging it. *See Francisco v. United States*, 267 F.3d 303, 319 [88 AFTR 2d 2001-6513] (3d Cir. 2001) (citing *Sullivan v. United States*, 618 F.2d 1001, 1008 [45 AFTR 2d 80-1211] (3d Cir. 1980) for the proposition that "the taxpayer bears the burden of proving, by a preponderance of the evidence, that the IRS's assessment is erroneous"). Earlier, the Third Circuit held that "[t]he burden of proving that an assessment is arbitrary and excessive rests on the taxpayer, [but] if the taxpayer cannot prove that the assessment was arbitrary, [he] retains the burden of overcoming the presumption in favor of the government that the assessment was not erroneous." *Reslyn Corp. v. United States*, 851 F.2d 660, 663 [63 AFTR 2d 89-757] (3d Cir. 1998). Only if the taxpayer sustains those burdens does "the ultimate burden of proving that the assessment is indeed correct ... placed on the government." *Id.*

Plaintiff in this case has failed to produce anything other than his own testimony, which the bankruptcy court did not credit, to prove that defendant's assessment was arbitrary, excessive, or erroneous. In short, plaintiff's testimony failed to defeat the presumption in favor of the government let alone prove by a preponderance that defendant had erred. *See infra* Discussion, Part II (explaining the lack of credible evidence).

Moreover, even if Section 7941 does apply, appellant cannot reap its benefits. The

[4] *See Bacon v. Commissioner*, 2001 U.S.App.LEXIS 21882, 6 [88 AFTR 2d 2001-6396] (3d Cir. Sept. 25, 2001) (unpublished) ("Our review of the burden of proof with regard to establishing amounts of unreported income - a question of law - is de novo."); *Xenakis v. U.S. Dept. of Treasury*, 281 B.R. 585, 590 [89 AFTR 2d 2002-1744] (W.D. Pa. 2002) ("The allocation of the burden of proof with regard to establishing amounts of unreported income is a question of law subject to *de novo* review.")

United States Tax Court[5] has held that in order for the section's burden-shifting to occur "the taxpayer must comply with substantiation and record-breaking requirements of the Internal Revenue Code. Under [that code], the taxpayer is required to maintain records that are sufficient to enable the Commissioner to determine the correct tax liability." *Lutz v. Commissioner*, 2002 WL 506881, 4 (U.S. Tax Ct. April 4, 2002). Like the plaintiffs in *Lutz v. Commissioner*, appellant has failed to provide the court with any record 1) proving that his unreported income was merely loans from casinos, or 2) substantiating that he incurred business expenses that appellee disallowed. *Seeinfra* Discussion, Part II (detailing how the record substantiates these findings).

In sum, the bankruptcy court in no way abuse its discretion by correctly requiring appellant to demonstrate that appellee's assessment was erroneous.

II.

[2] The second question which appellant presents for review is whether the bankruptcy court erred in determining that appellant had under reported his personal income for the 1995 tax year. This is an issue of fact, and consequently, the court must review it for clear error.[6]

The bankruptcy court concurred with appellee's assessment that appellant had under reported his income to the tune of $49,299. This figure is the total of the following sums: 1) an unreported $14,399 that appeared in appellant's checking account during the 1995 tax year; and 2) an unreported $11,500 and $23,400 that appellant used to purchase gambling chips at the Taj Mahal and Claridge casinos, respectively.

The record completely supports the bankruptcy court's findings. With regard to the $14,399, appellant's bank records and the calculations of appellee's auditor support the fact that these monies to indeed appear in is account during the tax year in question. *See* Doc. 12 at 56 (relaying the auditor's explanations of her calculations); Doc. 8, Gov't Ex. B at 14 (detailing those calculations); Doc. 8, Gov't Ex. C (providing copies of the auditor's handwritten calculations and appellant's bank statements). While appellant argues that these monies were loans from casinos, there is nothing in the record to substantiate this allegation and the bankruptcy judge did not credit Berardi's testimony. There is no record of such a loan from any of the three casinos at which appellant had a line of credit nor is there a promissory note of any kind. In fact, the record actually proves inapposite: according to both appellant's testimony and casino records, appellant's credit limit at each of the casinos was only $3,000 at a maximum. *See*Doc. 12 at 13 (transcribing appellant's testimony to the same effect); Doc. 7 (providing central credit gaming reports that detail appellant's line of credit at the Taj Mahal, Trump Plaza, and Claridge).

Regarding the $23,400 and $11,500 which appellant used to purchase chips at the two casinos, the record and the testimony of appellee's expert witness support the conclusion that these funds were unreported income. First, the second reflects that appellant paid for gaming chips out of his own pocket. *See* Doc. 12 at 94 (relaying that casino currency reports indicated that appellant paid for $11,500 and $23,400 worth gambling chips with "large bills"); Doc. 8, Ex. E (same). Appellant testified that these sums were the product of money brought from home, casino loans, and wagering winnings. Doc. 12 at 44. However, as noted previously, the record evidences that appellant's credit limit at the casinos was set at a maximum of

[5] Because neither the Supreme Court nor our Court of Appeals has addressed how this section should be applied, this court looks to the Tax Court for guidance. While the decisions of the Tax Court are not binding on this court, the Supreme Court has noted that "[i]n deciding law questions courts may properly attach weight to the decisions of points of law by an administrative body having special competence to deal with the subject matter." *Dobson v. Commissioner*, 320 U.S. 489, 502 [31 AFTR 773] (1943). The Tax Court is one such body. *ABKCO Industries, Inc. v. Commissioner*, 482 F.2d 150, 155 [32 AFTR 2d 73-5292] (3d Cir. 1973). Moreover, our Court of Appeals has commented that "the Tax Court's resolutions of questions of law are persuasive and ... it is desirable for the reviewing court to have the benefit of the Tax Court's expertise in these matters." *Id.*

[6] *See Norgaard v. Commissioner*, 939 F.2d 874, 878 [68 AFTR 2d 91-5302] (9th Cir. 1991) (declaring in a case similar to appellant's that questions regarding the amount of one's taxable income are "question[s] of fact to be determined from the facts of each case, established by the taxpayer's evidence, and the credibility of the taxpayer and supporting witnesses").

$3,000. Doc. 12 at 13; Doc. 7. Thus, only $9,000 of the $34,900 could have been in casino loans. There is, however, no evidence in the record to substantiate even this claim.[7] Moreover, if he brought the money from home or had wagering winnings in that amount, it is unreported income.

Finally, appellant claims that even if this money was technically income, it is not taxable because he lost all of it during his gambling escapades. However, in order for this argument to have any impact on his ultimate tax liability, as a matter of law, he must have claimed the money as part of his gross income and then deducted the loss, both of which he failed to do.[8] As the report of appellee's auditor reveals, appellant never claimed this money as income. Doc. 12 at 56; Doc. 8, Gov't Ex. B at 14; Doc. 8 Gov't Ex. C. And, he filed a standardized deduction in 1995, which, by virtue of being substantially less than $34,900 means he did not deduct these alleged losses.

Because the record supports the bankruptcy court's findings of fact, the court simply did not err.

III.

The third and final issue appellant raises on appeal is whether the bankruptcy court incorrectly determined that appellee allowed all of appellant's legitimate business expenses. The bankruptcy court found that appellee 1) did allow $20,992 for the cost of appellant's goods, 2) did allow $14,664 in depreciation costs, and 3) properly disallowed $24,001 in claimed business expenses because appellant was unable to document them. Once again, this is an issue of fact, which this court reviews for clear error.[9]

The record manifestly supports the bankruptcy court's holding on this issue. Appellee's auditor testified that she evaluated appellant's deductions by comparing his vendor ledger, which presumably was his personal record of the costs and income of his business, with those expenses he listed on his tax return. Doc. 12 at 62. In short, she identified which of these expenses were business-related and documented, and then deducted them from his taxable gross income. She then allowed $20,992 for the cost of his goods, $14,664 for depreciations costs, and a host of other expenses, which brought appellant's allowable expenses to a total of $113,769. Doc. 12 at 62–63; Doc. 8, Gov't Ex. B at 15. At the end of this process, she concluded that the $24,001 in expenses was unverified and hence was disallowed. In order then to successfully challenge the auditor's assessment, appellant would need to 1) identify the specific expenses that the auditor did not allow and 2) provide the court with some documentation for these expenses.[10] Appellant has failed to do either. While appellant provided the court with his own version of the auditor's calculations, it was mathematically flawed and failed to actually substantiate any of his alleged additional expenses.[11]

Once again, the bankruptcy court's findings of fact were not clearly erroneous because they are substantiated by the record.

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7 Although appellant argues that appellee's auditor determined these monies were income solely based on her ignorance of casinos and the procedures through which they lend money to their customers, that fact, even if true, is totally irrelevant to the validity of the bankruptcy court's holding. The bottom line is that the record reveals that these monies were not casino loans.

8 While the court gleans from appellant's brief that he is only challenging the bankruptcy court's finding of fact and not its conclusions of law, it is worth noting that the bankruptcy court also correctly characterized the law on this issue. As a matter of law, the money which appellant used to purchase gambling chips is income regardless of whether appellant won it while gambling or whether he initially brought it to Atlantic City. The IRS does consider gambling winnings to be taxable income. *See* 26 U.S.C. § 61 ("[G]ross income means all income from whatever source derived . . . ."); *see also McClanahan v. U.S.*, 292 F.2d 630, 631 [8 AFTR 2d 5077] (5th Cir. 1961) *cert. denied* 368 U.S. 913 (holding that "gambling winnings of the type here involved are includable in gross income"). While the Internal Revenue Code does allow individuals to deduct their wagering losses up to the amount that they have won, in order to do so, a taxpayer must first claim his wagering winning as gross income. *McClanahan*, 292 F.2d at 631; *see also* 26 U.S.C. § 165(d) ("Losses from wagering transactions shall be allowed to the extent of the gains from such transactions.").

9 *See Norgaard*, 939 F.2d at 878 (holding that these are factual issues).

10 Again, while appellant has only challenged the bankruptcy court's findings of fact on this issue, this court notes that the bankruptcy court correctly placed on appellant the burden of proving that these deductions were substantiated. *See Norgaard*, 939 F.2d at 878 (citing 26 C.F.R. § 1.6001-1 for the proposition that "the taxpayer also has the duty to maintain records sufficient to establish the amount of deductions").

11 Appellant provided the court with a typed chart that was intended to illuminate mathematical flaws in the auditor's assessment. The chart, however, did nothing other than illuminate the frivolousness of appellant's appeal. Not only did appellant incorrectly transcribe numbers, but he also added the figures at times when the auditor had clearly subtracted them. *Compare*Appellant Br. at 4 (providing appellant's chart) *with* Doc. 8, Gov't Ex. C at 70 (providing the auditor's written calculations).

CONCLUSION

In sum, the bankruptcy court correctly required appellant to bear the burden of proving that appellee's assessment was erroneous. Because appellant 1) did not submit any evidence to demonstrate that the funds in his bank account and those used to purchase gambling chips were not taxable income (other than his own testimony which the bankruptcy judge did not credit), 2) did not deduct the alleged gambling losses from his reported gambling winnings for his 1995 taxes, and 3) did not substantiate $24,001 worth of declared business expenses, he has failed to meet his burden of proving that appellee incorrectly assessed his taxes. For these reasons, the court will affirm the decision of the bankruptcy court. An appropriate order follows.

ORDER

William H. Yohn, Jr., J.

And now on this 16 day of October, 2002, upon consideration of Gary N. Berardi's Appeal and Brief; and the United States' opposition; it is hereby ORDERED that the bankruptcy court's order dated February 22, 2002 is AFFIRMED.

William H. Yohn, Jr., J.

¶2002-5734

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Crystal FOSTER; Robert FOSTER, DEFENDANTS-APPELLANTS and Rebecca Carpenter; Pamela Miffin; 1ST Advantage Federal Credit Union; Wachovia Bank, N.A.; Mercedes-Benz Credit Corporation, DEFENDANTS. U.S. Court of Appeals, Fourth Circuit, (CA4) No. 02-1086, Dec. 3, 2002. District Court, (2002, DC VA) 89 AFTR 2d 2002-1063, 2002-1 USTC ¶50263, affirmed per curiam. Year 2000. Decision against Taxpayer.

1. Recovery of erroneous refunds—proof of error—collection. District court properly upheld IRS's complaint to recover erroneous refund that taxpayer obtained using false/non-existent regulated investment co.: IRC §7405 clearly authorized govt. to pursue collection through timely-filed erroneous refund action without 1st issuing deficiency notice. Also, taxpayer's argument that evidence wasn't sufficient to prove she received and cashed refund check was meritless in face of govt.'s uncontroverted case and her attorney's admission that she did in fact receive and cash check. *Reference:* United States Tax Reporter ¶74,055.01(5); 74,035.03(80). IRC §7403; 7405.

ARGUED: David Lassiter, Jr., JEFFERSON & LASSITER, Richmond, Virginia, for Appellants. Gretchen M. Wolfinger, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Eileen J. O'Connor, Assistant Attorney General, Gilbert S. Rothenberg, Paul J. McNulty, United States Attorney, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT,

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (CA-01-783-3)

Before WILKINSON, Chief Judge, and LUTTIG and MOTZ, Circuit Judges.

OPINION

PER CURIAM:

Affirmed by unpublished per curiam opinion.

UNPUBLISHED

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

The Internal Revenue Service (''IRS'') issued Crystal Foster a sizeable refund in the year 2001. Shortly thereafter, the IRS concluded that the refund was erroneous and brought suit in federal district court to recover the refunded amount. The district court held that the refund was in error and ordered Crystal Foster, and others who it found had received portions of the refund from Crystal, to return the funds. Crystal,

and her father Robert, appealed. Finding no error in the rulings of the district court, we affirm.

I.

The testimony and evidence at the preliminary injunction hearing and at the bench trial established the following. Around July of 2001, Crystal Foster filed her income tax return for tax year 2000. Crystal's tax return reflected total income of $3429. On her return, Crystal also claimed that a $500,000 tax payment had been made on her behalf as described on her Form 2439. Her Form 2439 showed $500,000 in undistributed long-term capital gains from a registered investment company (RIC) or real estate investment company trust (REIT), although the RIC/REIT was not identified on the form. J.A. 140. Crystal's return stated that the $500,000 should be refunded to her.

The IRS sent a letter to Crystal requesting the name of the RIC/REIT. The letter was returned to the IRS with a notation on the bottom identifying the RIC as "US Department of Treasury, Black Capital Investments." J.A. 137. Subsequently, on October 29, 2001, the IRS issued a United States Treasury check to Crystal in the amount of the requested refund of $500,000, plus $7534.95 in interest. Crystal received the check and proceeded to disburse portions of it to several others, including $100,000 to her father Robert Foster.

Upon further investigation, the IRS realized that "Black Capital Investments" did not exist under the auspices of the United States Treasury, or otherwise. Neither had any RIC or REIT withheld $500,000 and paid that amount to the IRS on behalf of Crystal. Realizing its mistake, on November 20, 2001, the United States filed a complaint in federal district court seeking recovery of the funds from both Crystal and Robert, among others. The United States obtained a preliminary injunction to prevent the Fosters from dissipating the proceeds of the refund. The Fosters filed a motion to dismiss for lack of jurisdiction, which the district court denied. The district court also denied the Fosters' motion for recusal. After a bench trial, the district court entered judgment in favor of the United States and ordered that the funds be returned. The Fosters appealed.

II.

[1] On appeal, the Fosters argue that the district court erred in denying their motion to dismiss. Though the Fosters never specified the federal rule on which they were relying, their motion to dismiss was apparently one for lack of subject matter jurisdiction. We review *de novo* the denial of a motion to dismiss under Rule 12(b)(1). *See Pur-year v. County of Roanoke*, 214 F.3d 514, 517 (4th Cir. 2000).

The Fosters moved to dismiss on the ground that the United States failed to send them a notice of deficiency before commencing suit. This failure allegedly deprived the Fosters of the opportunity to challenge the assessment in Tax Court. The United States argues that it had a choice of mechanisms by which to recover the erroneous refund; it could either bring suit in district court pursuant to 26 U.S.C. § 7405, as it did here, or it could issue a notice of deficiency and pursue administrative collection procedures.

The Fosters' argument is wholly without merit. Section 7405 states, in relevant part:

(a) Refunds after limitation period.—Any portion of a tax imposed by this title, refund of which is erroneously made, within the meaning of section 6514, may be recovered by civil action brought in the name of the United States.

(b) Refunds otherwise erroneous.—Any portion of a tax imposed by this title which has been erroneously refunded (if such refund would not be considered as erroneous under section 6514) may be recovered by civil action brought in the name of the United States.

26 U.S.C. § 7405. On its face, the statute clearly allows for the collection of an erroneous refund in district court. The only restriction on the ability of the United States to bring such a suit is the statute of limitations provided by section 7405(d), which is generally two years. *See*26 U.S.C. §

6532(b). In *Singleton v. United States*, 128 F.3d 833 [80 AFTR 2d 97-7360] (4th Cir. 1997), we noted that the government can elect to collect in district court an erroneous refund through section 7405, provided it does so within the specified limitations period, or it can issue a notice of deficiency and pursue administrative collection procedures. *Id.* at 837; *see also O'Bryant v. United States*, 49 F.3d 340, 342–43 [75 AFTR 2d 95-1484] (7th Cir. 1995) ("There are two ways in which the IRS can recover an erroneous payment to a taxpayer. It can either file suit under § 7405, the erroneous refund suit provision, or pursue the post-assessment collection procedures ... (§ 6303 notice and demand, followed by judicial and/or administrative action)." (footnote omitted)); *Rushlight Automatic Sprinkler Co. v. United States*, 294 F.2d 572, 573–74 [8 AFTR 2d 5128] (9th Cir. 1961) (examining the predecessor statute to section 7405 and concluding that the government was entitled to maintain an action under that statute for recovery of an erroneous refund without first following the deficiency notice procedures). In this case, the United States opted to proceed under section 7405, and thus no notice of deficiency was required. Because the United States commenced suit well within the two year limitations period, the district court had subject matter jurisdiction over the case.

III.

The Fosters also challenge the sufficiency of the evidence at trial. In order for the United States to prevail in its section 7405 action against Crystal Foster, it had to establish: 1) that a refund of a sum certain was made, 2) that the recovery action was timely, and 3) that Crystal Foster was not entitled to the refund. *See, e.g., United States v. Commercial Nat'l Bank of Peoria*, 874 F.2d 1165, 1169 [63 AFTR 2d 89-1428] (7th Cir. 1989). In addition, the United States was obliged to show that Robert was a transferee of Crystal in the amount of $100,000. This court may only set aside the district court's factual findings if they are clearly erroneous. Fed. R. Civ. P. 52(a).

The Fosters do not challenge the district court's findings that the refund suit was timely, that the refund was erroneous, and that Robert Foster was a transferee of the alleged amount. They contend only that there was insufficient admissible evidence on which the court could find that Crystal received and cashed the refund check.

The Fosters' argument is once again without merit. The United States showed that the IRS issued an erroneous refund to Crystal Foster. *See, e.g.*, J.A. 117–18 ("Q: And is there anything in those exhibits that shows that a refund was sent? A: Yes. In exhibit 2 there is an indication on 10 A 2001 that a hold was reversed and refund issued on 10/29/02 in the amount of $507,534.95. Q: Should that refund have been issued? A: No."). The United States adduced circumstantial evidence that Crystal Foster received and cashed the refund check. *See* J.A. 120 ("Q: But do you know if Mrs. Foster actually physically received a refund check from you? A: Refund was issued in her name, and it was cashed."). In addition, Crystal Foster's attorney, Mr. Lassiter, admitted that she had received the money. At the preliminary injunction hearing, Mr. Lassiter said that "she received the check for $500,000." J.A. 30; *see also* J.A. 29 (Lassiter: "They got the check and simply didn't leave it in the bank to sit ...."). The United States' case was essentially uncontroverted, as the Fosters chose not to put on any probative evidence or witnesses at the preliminary injunction hearing or at the bench trial. Given the evidence presented, it cannot be said that the district court's factual conclusions were clearly erroneous.*

The judgment of the district court is affirmed.

AFFIRMED

* The Fosters also appeal the district court's denial of their motion for recusal. The Fosters do not assert any extrajudicial source of bias, and the remarks of the district court fall well short of displaying a "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). We accordingly affirm the district court's denial of their motion.

¶2002-5735

In Re: C & C EXCAVATING, INC., Debtor. HALSTEAD CONTRACTORS, INC., PLAINTIFF v. C & C EXCAVATING, INC., ET AL., DEFENDANTS. U.S. Bankruptcy Court, Northern Dist. of Alabama, (Bktcy Ct AL) Bk. No. 00-43424-JSS; Adversary No. 01-40210-JSS, Nov. 14, 2002. Earlier proceeding at (2002, Bktcy Ct AL) 90 AFTR 2d 2002-5637. Decision for Govt. in part.

1. Tax claims in bankruptcy—lien priority—interpleaded funds. Bankruptcy court issued amended order for distribution to govt. and bank of interpleaded funds from various sources, according to their respective priorities. Also, govt. and bank were entitled to interest on their respective portions of funds, but bank's interest recovery was reduced by 10% for fee established by Executive Committee of Judicial Council of U.S. pursuant to 28 USC §1930. *Reference:* United States Tax Reporter ¶63,215.04(147); 68,726.52(3). IRC §6321.

United States Bankruptcy Court Northern District of Alabama, Eastern Division,

AMENDED ORDER

James S. Sledge United States Bankruptcy Judge

Chapter 7

[1] This adversary proceeding came before the Court for trial October 8, 2002. Upon consideration of the evidence submitted at trial, the Court determines that the tax liens of the United States are entitled to priority over the liens and claims of other party-defendants with respect to the funds interplead by APAC-Alabama, Inc. (''APAC'') and with respect to $39,216.63 of the funds interplead by Harris-Robinson, Inc. (''Harris-Robinson''). Further, the Court determines that the liens of Colonial Bank, Inc. (''Colonial'') are entitled to priority over the liens and claims of other party-defendants with respect to $34,777.01 of the funds interplead by Harris-Robinson.

IT IS HEREBY ORDERED that the Clerk of Court shall forthwith distribute the sum of $48,245.21 to the United States.

IT IS FURTHER ORDERED that the Clerk of Court shall forthwith distribute the sum of $34,777.01 to Colonial.

IT IS FURTHER ORDERED that the Clerk of Court will deduct ten percent of the interest earned on the investment of $34,777.01 of the funds interplead by Harris-Robinson from the monies to be distributed to Colonial for the fee established by the Executive Committee of the Judicial Council of the United States, pursuant to 28 U.S.C. § 1930.

IT IS FURTHER ORDERED that the remainder of the interest earned on the investment of the funds deposited by APAC and the funds deposited by Harris-Robinson less the fee above shall be paid 42% to Colonial Bank and 58% to the United States.

So ORDERED this 14th day of November, 2002.

James S. Sledge

United States Bankruptcy Judge

¶2002-5736

FLEET NATIONAL BANK v. Ronald F. KAPLAN, ET AL. U.S. District Court, Dist. of Massachusetts, (DC MA) CIVIL ACTION NO. 02-11175-RWZ, Oct. 11, 2002. Decision for Taxpayer.

1. Actions against IRS—joinder—sovereign immunity. Massachusetts Dept. of Revenue (DOR)'s motion to dismiss bank's interpleader action against it, IRS and other parties was granted in part and denied in part: although DOR itself was entitled to dismissal on sovereign immunity grounds, its contention that entire suit should also be dismissed for failure to join indispensable party was rejected where doing so would leave bank without adequate remedy. And, any prejudice to DOR from action's continuance would be averted by court's giving it notice of further proceedings and opportunity to file amicus briefs.

Reference: United States Tax Reporter ¶74,336.504(61); 74,336.506(25).

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS,

MEMORANDUM OF DECISION AND ORDER

ZOBEL, D.J.

[1] Plaintiff Fleet National Bank (''Fleet'') brought this action in interpleader to determine the interests of defendants in a surplus of $204,409.89 left over from a foreclosure sale of real property owned by Ronald F. Kaplan. Among the defendants in this case are the Internal Revenue Service (''IRS'') and the Massachusetts Department of Revenue (''Commonwealth''), which recorded tax liens against Kaplan. When Fleet brought its lawsuit in state court, the IRS removed the case to this Court, as is the federal government's right under 28 U.S.C. §§ 1444 and 2410. As a result, the Commonwealth has filed a motion to dismiss, arguing that the Eleventh Amendment immunizes it from suit in federal court and that its sovereign immunity mandates dismissal of the entire action under Fed. R. Civ. P. 19(b) for failure to join an indispensable party. The motion is allowed only to the extent that the Commonwealth is dismissed as a party from this lawsuit.

This case does not present a situation in which the Commonwealth's sovereign immunity has been abrogated with ''unequivocal statutory language'' or waived so dismissal of the Commonwealth is appropriate. College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999); Seminole Tribe v. Florida, 517 U.S. 44, 66 (1996). Nevertheless, there is no need to dismiss the entire action for failure to join an indispensable party. This Court can lessen or avoid any prejudice to the Commonwealth by giving it notice of further proceedings and an opportunity to file briefs as *amicus.* First Massachusetts Bank v. Daoust, 214 F. Supp. 2d 79, 83–84 (D. Mass. 2002). Moreover, Fleet will not have an adequate remedy if the action is dismissed for nonjoinder. See Fed. R. Civ. P. 19(b).

Accordingly, the motion to dismiss is ALLOWED only to the extent that the Commonwealth is dismissed as a party from this case. The motion is otherwise DENIED.

October 11, 2002.

DATE

RYA W. ZOBEL

UNITED STATES DISTRICT JUDGE

¶2002-5737

In Re: Ragip Sinan MUNGAN a/k/a R.S. Mungan a/k/a Sinan Mungan a/k/a R. Sinan Mungan, Debtor. Mary Catheryn JEDLICKA a/k/a Mary C. Jedlicka a/k/a Cathy Jedlicka, Debtor; Kenneth Hunley and wife, Peggy Hunley, PLAINTIFFS v. Ragip Sinan MUNGAN, a/k/a R.S. Mungan, a/k/a Sinan Mungan, a/k/a R. Sinan Mungan, Mortgage Masters, Inc., Mortgage Masters Financial Services Corporation, G. Wayne Walls, Trustee, First Tennessee Bank National Association, Mary Cathryn Jedlicka, a/k/a Mary C. Jedlicka, a/k/a Cathy Jedlicka, William T. Hendon, Trustee, Robert Long and wife, Melissa Long, Fidelity National Insurance Company of New York, State of Tennessee, by and through both Department of Labor and Workforce Development and through The Department of Revenue, The United States of America, by and through The Internal Revenue Service, IMC Mortgage Company, Joe M. Kirsch, Trustee, Tennessee Water Service, Inc., New Century Mortgage Corporation, Firstar Bank Milwaukee N.A., as trustee under Salomon Brother Mortgage Securities VII Mortgage Pass-Through Certificates Series 1999-NCS, Michael Hunley and wife, Robin Hunley, Steven J. Lusk, Trustee, DEFENDANTS, U.S. Bankruptcy Court, Eastern Dist. of Tennessee, (Bktcy Ct TN) Case No. 01-31472; Case No. 01-31712; Adv. Proc. No. 01-3169, Nov. 18, 2002. Years 1989,

1992, 1993, 1994, 1995, 1996, 1997. Decision for Govt.

1. Tax claims in bankruptcy—lien property—fraudulent conveyances—prepetition liens—offers in compromise. IRS was granted summary judgment that it had priority tax lien interest in real property that debtor allegedly obtained by fraud from original owners-3d party taxpayers: taxpayers' claim that tax liens against them were extinguished by virtue of their prior partial payment towards 1 *non-lien* year's liability was rejected where partial payment wasn't made pursuant to any valid, written compromise of their entire liability; IRS had issued no lien release certificate; and lien refiling deadlines were still open. So, those liens remained enforceable and attached to properties, regardless of who was current owner. And, to extent debtor was valid owner, property was also subject to separate lien against him. *Reference:* United States Tax Reporter ¶68,726.53(2); 63,215.04(9); 71,225.03(5). IRC §6321; 6325; 7122.

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IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

MEMORANDUM ON UNITED STATES' MOTION FOR SUMMARY JUDGMENT

RICHARD STAIR, JR. UNITED STATES BANKRUPTCY JUDGE

On October 19, 2001, the Plaintiffs, Kenneth and Peggy Hunley, filed the Complaint initiating this adversary proceeding in which they seek equitable relief from this court setting aside certain recorded deeds transferring the Plaintiffs' real property, which the Plaintiffs claim were fraudulently obtained by the Debtor, Ragip Sinan Mungan d/b/a Mortgage Masters, Inc. The United States of America, "by and through the Internal Revenue Service" (IRS) is named as a defendant due to federal tax liens levied against the real property on account of taxes assessed against the Plaintiffs and Defendant Mortgage Masters, Inc. (Mortgage Masters).

Before the court is a Motion for Summary Judgment (Motion) filed by the IRS on October 4, 2002, asserting that regardless of which entity actually owns the real property at issue, the Plaintiffs or Mortgage Masters, the IRS has liens encumbering the real property based on recorded federal tax liens. The Plaintiffs filed a "Plaintiffs' Response to United States' Motion for Summary Judgement" on October 15, 2002, stating that their tax liability has been satisfied pursuant to payment and settlement with the IRS. Neither Mortgage Masters, the Longs, nor any other defendant filed a response to the Motion. Accordingly, no defendant opposes the Motion.[1]

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (K), and (O). (West 1993).

I.

The facts, as pertinent to the Motion, are set forth in the Plaintiffs' Complaint and the Motion. Prior to December 1997, the Plaintiffs owned two parcels of real property, one located at 4220 Van Dyke Drive, Knoxville, Tennessee, and the other located at 610 Jade Road, Knoxville, Ten-

[1] Pursuant to E.D. Tenn. LBR 7007-1, a party opposing a motion for summary judgment "shall respond within twenty days after the date of the filing of the motion . . . . A failure to respond shall be construed by the court to mean that the respondent does not oppose the relief requested by the motion"

nessee (collectively, the Real Property). For reasons in dispute and still to be litigated, the Plaintiffs transferred the Van Dyke property to Defendants Michael and Robin Hunley and transferred the Jade Road property to Defendants Robert and Melissa Long sometime after August 1, 1999. The Van Dyke property was subsequently transferred to Mortgage Masters. By this adversary proceeding, the Plaintiffs are seeking to set aside these conveyances as fraudulent.

The IRS filed four federal tax liens against the Plaintiffs: (1) on August 15, 1994, in the aggregate amount of $12,920,98; (2) on September 29, 1994, in the amount of $1,617.00; (3) on February 10, 1998, in the aggregate amount of $2,285.64; and (4) on March 23, 2001, in the amount of $1,083.34 (the Federal Tax Liens).[2] The IRS claims that these tax liens are secured by the Real Property, regardless of whether it is owned by the Plaintiffs, the Longs, or Mortgage Masters. The IRS argues that if the Plaintiffs still own the Real Property, the 1994 tax liens attached to it prior to any alleged fraudulent conveyances or other encumbrances. Additionally, if the court later determines that the Real Property is owned by Mortgage Masters and/or the Longs, the IRS again claims to be a secured creditor by virtue of its tax liens.[3]

II

Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Rule 56(c) is made applicable to this adversary proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure.

The IRS, as the moving party, bears the initial burden of proving both that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Owens Corning v. Nat'l Union Fire Ins. Co.*, 257 F.3d 484, 491 (6th Cir. 2001). The burden then shifts to the nonmoving party, in this case, the Plaintiffs, to produce specific facts showing that there is, in fact, a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986) (citing Fed. R. Civ. P. 56(e)). In doing so, the nonmoving party must cite specific evidence and may not merely rely upon allegations contained in the pleadings. *Harris v. Gen. Motors Corp.*, 201 F.3d 800, 802 (6th Cir. 2000). The facts, and all resulting inferences, must be viewed in the light most favorable to the nonmovant. *Matsushita*, 106 S. Ct. at 1356. The court must then decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2512 (1986).

III

In support of its Motion for Summary Judgment, the IRS attached copies of the Federal Tax Liens recorded against both the Plaintiffs and Mortgage Masters. The Federal Tax Liens concerning the Plaintiffs are itemized as follows:

(1) Lien filed August 15, 1994, which includes taxes in the amount of $12,920.98 for the periods ending December 31, 1989, and December 31, 1992. These taxes were assessed on May 28, 1990, and October 4, 1993, respectively.

(2) Lien filed September 29, 1994, which includes taxes in the amount of $1,617.00 for the period ending December 31, 1993, which were assessed on September 5, 1994.

(3) Lien filed February 10, 1998, which includes taxes in the amount of $2,285.64

[2] Additionally, the IRS filed the following three Federal Tax Liens against Mortgage Masters; (1) February 23, 2001, in the aggregate amount of $65,897.03; (2) April 10, 2001, in the amount of $1,650.00; and (3) October 29, 2001, in the amount of $7,363.61. Because Mortgage Masters and Robert and Melissa Long do not oppose the Motion, summary judgment will be granted the IRS as to them. *See supra* n. 1.

[3] Summary judgment is being granted on this claim, so if Mortgage Masters and the Longs are deemed to own the Real Property, the Real Property is subject to the IRS liens.

for the periods ending December 31, 1994, December 31, 1995, and December 31, 1996. These taxes were assessed on October 2, 1995, September 9, 1996, and September 29, 1997, respectively.

(4) Lien filed March 23, 2001, which includes taxes in the amount of $1,083.34 for the period ending December 31, 1997, and assessed on November 16, 1998.

In response, the Plaintiffs rely upon the Affidavit of the Plaintiff, Kenneth Hunley, together with a payment receipt showing payment to the IRS in the amount of $359.84 on October 9, 2001, and a second copy of the payment receipt with a handwritten "Paid in full. D. Sester ID 62-11031" and marked "Received October 10, 2001 Internal Revenue Service, W&I Area 3, Territory 4, Knoxville, Tennessee." In his Affidavit, the Plaintiff states that Ms. Sester, an employee of the IRS in Knoxville, Tennessee, told him that payment of the $359.84 would clear the Plaintiffs' debt with the IRS because "the rest of the debt was in a 'non-collectable [sic] status.'" The Plaintiff also avers that Ms. Sester told the Plaintiffs that "the uncollectible [sic] debt liens would be gone or expire by the end of 2003." The Plaintiffs therefore contend that their debt to the IRS has been "fully satisfied and paid in full."

IV

[1] Federal Tax Liens are governed by the Internal Revenue Code (I.R.C.), located at title 26 of the United States Code. The statutes pertinent to this action are, as follows:

§ 6321. Lien for taxes.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

I.R.C. § 6321 (West 2002).

§ 6322. Period of lien.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.

I.R.C. § 6322 (West 2002).

§ 6325. Release of lien or discharge of property.

(a) Release of lien.—Subject to such regulations as the Secretary may prescribe, the Secretary shall issue a certificate of release of any lien imposed with respect to any internal revenue tax not later than 30 days after the day on which—

(1) Liability satisfied or unenforceable.—The Secretary finds that the liability for the amount assessed, together with all interest in respect thereof, has been fully satisfied or has become legally unenforceable; . . .

. . . .

(f) Effect of certificate.—

(1) Conclusiveness.— . . . [I]f a certificate is issued pursuant to this section by the Secretary and is filed in the same office as the notice of lien to which it relates (if such notice of lien has been filed) such certificate shall have the following effect:

(A) in the case of a certificate of release, such certificate shall be conclusive that the lien referred to in such certificate is extinguished;

(B) in the case of a certificate of discharge, such certificate shall be conclusive that the property covered by such certificate is discharged from the lien[.]

I.R.C. § 6325(a)(1) (West 2002).

§ 7122. Compromises.

(a) Authorization.—The Secretary may compromise any civil or criminal case arising under the internal revenue

laws prior to reference to the Department of Justice for prosecution or defense; . . .

(b) Record.—Whenever a compromise is made by the Secretary in any case, there shall be placed on file in the office of the Secretary the opinion of the General Counsel for the Department of the Treasury or his delegate, with his reasons therefor, with a statement of—

(1) The amount of tax assessed,

(2) The amount of interest, additional amount, addition to the tax, or assessable penalty, imposed by law on the person against whom the tax is assessed, and

(3) The amount actually paid in accordance with the terms of the compromise.

Notwithstanding the foregoing provisions of this subsection, no such opinion shall be required with respect to the compromise of any civil case in which the unpaid amount of tax assessed (including any interest, additional amount, addition to the tax, or assessable penalty) is less than $50,000. However, such compromise shall be subject to continuing quality review by the Secretary.

I.R.C. § 7122 (West 2002).

In summary, a valid tax lien, once recorded, remains as long as the underlying tax liability is enforceable. I.R.C. § 6322; *United States v. Hodes*, 355 F.2d 746, 748 [17 AFTR 2d 343] (2d Cir. 1966). There are only three methods for releasing an IRS tax lien: "1) the tax lien becomes unenforceable by operation of time, (2) the debt which is the basis of the lien is paid in full or (3) an Offer in Compromise is accepted by the IRS which would settle the debt and any tax lien associated with the debt would be no longer enforceable and have to be released." *United States v. Alfano*, 34 F. Supp. 2d 827, 840 [84 AFTR 2d 99-6336] (E.D.N.Y. 1999) (quoting *In re Robert Turner Optical, Inc.*, Bankr. No. 93-01004, 1994 WL 779352, at 4 [74 AFTR 2d 94-6447] (Bankr. N.D. Ala. Sept. 8, 1994)). To be unenforceable under I.R.C. § 6322, "all of the [IRS's] remedies . . . must be extinguished." *Id.* at 839 (quoting *Dillard v. United States (In re Dillard)*, 118 B.R. 89, 93 (Bankr. N.D. Ill. 1990)).

V

In the present case, there is no question that the Federal Tax Liens have not become unenforceable by operation of time. As noted on the Federal Tax Liens, with the exception of the 1989 assessments, the re-file deadlines have not yet expired. As such, the Liens would still be enforceable.[4] Additionally, there is no question that the Plaintiffs have not paid in full the total amounts assessed and covered by the Federal Tax Liens.

The first issue is whether the Plaintiffs' $359.84 payment to the IRS constituted a compromise for the entire amount of tax liability owed by the Plaintiffs, such that it would release the Federal Tax Liens on the Real Property.

"An offer to compromise a tax liability must be made in writing, must be signed by the taxpayer under penalty of perjury, and must contain all of the information prescribed or requested by the Secretary." 26 C.F.R. § 301.7122-1(d)(1). The offer must also be accepted by an IRS delegate authorized to accept such compromises. *See Foulds v. Comm'r*, 56 T.C.M. (CCH) 1112 [¶89,029 PH Memo TC] (1989). "An offer to compromise has not been accepted until the IRS issues a written notification of acceptance to the taxpayer or the taxpayer's representative." 26 C.F.R. § 301.7122-1(e)(1). These regulations are strictly construed and compliance therewith is mandatory. *Delohery v. Internal Revenue Serv.*, 843 F. Supp. 666, 669 [73 AFTR 2d 94-1335] (D. Colo. 1994) (citing *Boulez v. Comm'r*, 810 F.2d 209, 215 [59 AFTR 2d 87-608] (D.C. Cir. 1987)). These

[4] The Federal Tax Lien notices each provide that:

With respect to each assessment below, unless notice of lien is refiled by the date in column (e), this notice shall constitute the certificate of release of lien as defined in IRC 6325(a).

The deadline for re-filing the Federal Tax Lien as to the 1989 assessment was June 27, 2000. It appears that the 1989 assessment was not re-filed, and if so, the tax liability therefor, in the amount of $11,079.25, was in fact released.

regulations provide the only means by which a compromise with the IRS may be effectuated. *Id.* (citing *Klein v. Comm'r*, 899 F.2d 1149, 1152 [65 AFTR 2d 90-1039] (11th Cir. 1990); *Laurins v. Comm'r*, 889 F.2d 910, 912 [65 AFTR 2d 90-364] (9th Cir. 1989); *Brooks v. United States*, 833 F.2d 1136, 1145 [60 AFTR 2d 87-6063] (4th Cir. 1987)).

An informal ''agreement'' does not constitute a compromise under the I.R.C. and does not bind the government. *See Botany Worsted Mills v. United States*, 49 S. Ct. 129, 132 [7 AFTR 8847] (1929). Therefore, ''even if subordinate revenue officials at a conference informally [agree] to accept the taxpayer's payment of a lien in full satisfaction of [his] tax liability, that agreement would not bind [the IRS].'' *Foulds*, 56 T.C.M. 1112 [¶89,029 PH Memo TC] (citing *Parks v. Comm'r*, 33 T.C. 298, 301 (1959)).

The Plaintiffs have the burden of proving that their payment of $359.84 was a compromise of their entire tax liability of $17,906.96. *Id.* (citing *Welch v. Helvering*, 290 U.S. 111 [12 AFTR 1456] (1933)). The Plaintiffs must likewise prove that D. Sester, as the government official who allegedly formed a compromise with them, had the actual authority to bind the IRS to such agreement. *See Brubaker v. United States*, 342 F.2d 655, 662 [15 AFTR 2d 440] (7thCir. 1965); *Buesing v. United States*, 42 Fed. Cl. 679, 688 [83 AFTR 2d 99-543] (Fed. Cl. 1999) (citing, among others, *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990)).

The documents provided by the Plaintiffs do not convince the court that the Plaintiffs and the IRS entered into a compromise whereby the Plaintiffs were released from their total $17,906.96 tax liability by the payment of $359.84. First, there was no offer to compromise in writing, as required by 26 C.F.R. 301.7122-1(d)(1), nor was there a written acceptance by the IRS of an offer of compromise, as required by 26 C.F.R. § 301.7122-1(e)(1). The receipt of payment evidencing the handwritten ''Paid in full. D. Sester ID 62-11031'' and marked ''Received October 10, 2001 Internal Revenue Service, W&I Area 3, Territory 4, Knoxville, Tennessee'' does not satisfy this requirement.

Moreover, after reviewing these documents, it is obvious to the court that the $359.84 payment made by the Plaintiffs was in satisfaction of their past due 1999 taxes, for which the IRS has not recorded or asserted a lien. The taxes covered by the Federal Tax Liens are for the years 1989, 1992, 1993, 1994, 1995, 1996, and 1997.

Second, the IRS did not file a certificate of release pertaining to the Federal Tax Liens with the Knox County Register of Deeds, as it is required to do in the event of a party's satisfaction. *See* I.R.C. § 6325. A certificate of release of the lien must be filed, otherwise, the tax lien is not released. *United States v. Waite, Inc.*, 480 F. Supp. 1235, 1239–40 [45 AFTR 2d 80-479] (W.D. Pa. 1979). Clearly, the IRS did not intend for the Plaintiffs' $359.84 payment to satisfy the entire $17,906.96 balance owed by the Plaintiffs and secured by the Federal Tax Liens.[5]

VI

The next issue before the court is whether the Federal Tax Liens which attached to the Real Property prior to any alleged conveyances or transfers would still attach regardless of the current owner of the Real Property.

Federal tax liens attach to the property and property rights of the delinquent taxpayer. *Pronto Enters., Inc. v. United States*, 188 B.R. 590, 592 [76 AFTR 2d 95-6474] (W.D. Mo. 1995). This includes real and personal property owned at the time of assessment and after-acquired. *United States v. Gen. Motors Corp.*, 929 F.2d 249, 251 [67 AFTR 2d 91-725] (6th Cir. 1991). Once a federal tax lien has attached, the delinquent taxpayer ''cannot avoid or defeat liability by disclaiming or renouncing interest in the property or transferring or

[5] As noted earlier, however, if the IRS did not re-file its Federal Tax Lien for the 1989 assessment prior to June 27, 2000, the Notice of Tax Lien recorded on August 15, 1994, will, in fact, serve as the Certificate of Release of Lien as to $11,079.25 in tax liability, thus leaving the Plaintiffs' total tax liability as $6,827.71.

conveying the interest.'' *United States v. Jepsen*, 131 F. Supp. 2d 1076, 1085 [87 AFTR 2d 2001-2200] (W.D. Ark. 2000) (citing *United States v. Rodgers*, 103 S. Ct. 2132, 2141 n. 16 [52 AFTR 2d 83-5042] (1983)). Likewise, once the lien has attached, any subsequent purchaser of the property takes subject to the IRS lien. *See United States v. Bess*, 78 S. Ct. 1054, 1058 [1 AFTR 2d 1904] (1958) (''The transfer of property subsequent to the attachment of the lien does not affect the lien ....''); *United States v. Donahue*, 905 F.2d 1325, 1331 [66 AFTR 2d 90-5202] (9th Cir. 1990) (''[A] lien continues to attach to a taxpayer's property regardless of any subsequent transfer of the property.'').

It does not matter whether the Real Property is presently owned by the Plaintiffs, by the Longs, or by Mortgage Masters. In either event, the IRS maintains a security interest in the Real Property pursuant to its Federal Tax Liens filed prior to any sort of transfer. Accordingly, if the Plaintiffs still own the Real Property, it is encumbered by the Federal Tax Liens filed in their names. However, if Mortgage Masters is the owner of the Van Dyke property, that property is encumbered not only by the Federal Tax Liens in Mortgage Masters' name, but also by the Federal Tax Liens filed in the Plaintiffs' names prior to the first date of transfer, *i.e.*, all Federal Tax Liens filed prior to August 1, 1999. Likewise, the Jade Road property allegedly transferred to the Longs is encumbered with the Federal Tax Liens in the Plaintiffs' names prior to and at the time of the transfer.

VII

Taking all facts and inferences in the light most favorable to the Plaintiffs, the court finds that there is no genuine issue of material fact. There was no compromise of the total tax liability evidenced by the Federal Tax Liens. Additionally, pursuant to the Internal Revenue Code, the Federal Tax Liens attaching the Real Property remain until either released or satisfied. As such, the IRS is entitled to summary judgment as a matter of law.

An order consistent with this Memorandum will be entered.

FILED: November 18, 2002

BY THE COURT

RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

ORDER

Pursuant to the Memorandum on United States' Motion for Summary Judgment filed this date, the court directs the following:

1. The United States' Motion for Summary Judgment filed October 4, 2002, by the Defendant United States of America, on behalf of its agency, the Internal Revenue Service, is GRANTED.

2. The Federal Tax Liens filed against the Plaintiffs by the Internal Revenue Service on August 15, 1994, September 29, 1994, February 10, 1998, and March 23, 2001, unless otherwise released by the Internal Revenue Service, continue to encumber the real property known as 4220 Van Dyke Drive, Knoxville, Tennessee, and 610 Jade Road, Knoxville, Tennessee, and the interest of the Defendant United States in these properties is superior to all subsequently filed interests in the properties.

3. The Federal Tax Liens filed against the Defendant Mortgage Masters, Inc., by the Internal Revenue Service on February 23, 2001, and October 29, 2001, continue to encumber the real property known as 4220 Van Dyke Drive, Knoxville, Tennessee, and the interest of the United States in this property is superior to all subsequently filed interests in this property.

SO ORDERED.

ENTER: November 18, 2002

BY THE COURT

RICHARD STAIR, JR.

UNITED STATES BANKRUPTCY JUDGE

¶2002-5738

UNITED STATES OF AMERICA, PLAINTIFF v. Ross CLINGER, ET AL., DEFENDANTS. U.S. District Court, Dist. of Colorado, (DC CO) Civil Action No. 95-WY-2058-WD (BNB), Sept. 13, 2002. Earlier proceeding at (2001, DC CO) 88 AFTR 2d 2001-5513. Decision for Govt.

1. Collection actions—foreclosure—confirmation of sale. Magistrate judge recommended granting govt.'s motion to confirm marshal's sale of lien property: sale had proceeded properly in accord with 28 USC §2001's requirements and prior sale order's terms; and price paid, although almost 6 times lower than property's alleged value, wasn't so low as to shock conscience or require new sale where price obtained was still within range of 2 earlier, unconsummated offers and above minimum price set by sale order. Also, taxpayer's real estate associate/*non-appraiser*'s valuation of allegedly comparable properties wasn't considered; and taxpayer showed no additional circumstances reflecting unfairness. *Reference:* United States Tax Reporter ¶74,035.03(100). IRC §7403.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO,

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Magistrate Judge Boyd N. Boland

This matter is before me on the United States' Motion to Confirm Sale (the "Motion"), filed May 29, 2002. I held a hearing on the Motion on July 24, 2002, and ordered supplemental briefing. The United States and Mr. Clinger each submitted additional briefs, which I have reviewed. I now respectfully RECOMMEND that the Motion be GRANTED and that the sale of the real property to Kalima Masse be CONFIRMED.

[1] The first issue is whether confirmation of the present sale is necessary at all. The provisions of 28 U.S.C. § 2001 govern foreclosures of taxpayers' property. United States v. Stonehill, 83 F.3d 1156, 1160 [77 AFTR 2d 96-2212] (9th Cir. 1996). The relevant portions of that statute provide:

(a) Any realty or interest therein sold under any order or decree of any court of the United States shall be sold as a whole or in separate parcels at public sale at the courthouse of the county, parish, or city in which the greater part of the property is located, or upon the premises or some parcel thereof located therein, as the court directs. Such sale shall be upon such terms and conditions as the court directs.

* * *

(b) After a hearing, of which notice to all interested parties shall be given by publication or otherwise as the court directs, the court may order the sale of such realty or interest or any part thereof at private sale for cash or other consideration and upon such terms and conditions as the court approves, if it finds that the best interests of the estate will be conserved thereby. Before confirmation of any privale sale, the court shall appoint three disinterested persons to appraise such property or difference groups of three appraisers each to appraise property of different classes or situated in different localities. No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published in such newspaper or newspapers of general circulation as the court directs at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale.

28 U.S.C. § 2001 (emphasis added).

In the circumstance of a private sale, the statute makes clear that the sale must be confirmed. There is no similar requirement in the instance of a public sale, however. The only condition imposed by the statute on a public sale is that it "shall be upon

such terms and conditions as the court directs.''

In this case, on February 13, 2002, the district judge entered an Amended Order of Foreclosure and Decree of Sale (the ''Order of Sale''). That order establishes a number of terms and conditions, two of which are relevant here. First, the Order of Sale sets a minimum sale price, as follows:

> A minimum bid of $110,000.00 is set for the real property. If the minimum bid is not met or exceeded, the United States Marshal or her representative may, without permission of this Court, and under the terms and conditions in this Order of Sale, hold a new public sale with a reduction of the minimum bid.

Order of Sale, at ¶4(f).

In addition, the Order of Sale provides for confirmation of the sale, even though the sale is to be public and not private:

> The sale of real property shall be subject to confirmation by this Court. On the confirmation of the sale, the United States Marshal shall execute and deliver a quit claim deed conveying the real property to the purchaser. On confirmation of the sale, the real property shall be discharged and free form all interests in, liens against, or claims to, the realty that are held or asserted by plaintiff or any of the defendants in this action.

Id., at ¶4(i).

There is no dispute that the conditions of the statute have been satisfied. The property was sold at public sale, conducted at the courthouse of El Paso County, Colorado, which is the county in which the property is located. Motion, Exh. A at ¶1. Nor is there any dispute that the conditions imposed by the court in the Order of Sale were complied with. Id. at ¶s1–3. The price bid at the public sale was $113,000.00.

Mr. Clinger, the sole objector to confirmation of the sale, opposes confirmation on the following ground:

> The Court should deny confirmation of sale and set sale aside sale [sic], for the following reasons: inadequacy, [sic] of price secured at public judicial sale. Property and buildings valued at $698,000 were sold for $113,000. Property is valued at greater that six times the sale price.

Defendants Clinger's Response to USA's Motion to Confirm sale, date April 8th of 2002 (the ''Opposition''), at p.1.

The Tenth Circuit Court of Appeals, on several occasions, has held the inadequacy of price alone is not sufficient grounds to refuse confirmation or to set aside a sale. For example, in Smith v. Juhan, 311 F.2d 670, 672 (10th Cir. 1962), the circuit court stated:

> In this jurisdiction, it is well settled that a judicial sale regularly made with notice and in the manner prescribed by law will not be denied confirmation or be set aside for mere inadequacy in price unless the price is so grossly inadequate as to shock the conscience of the court and is coupled with slight additional circumstances indicating unfairness such as chilled bidding.

Accord Breeding Motor Freight Lines, Inc. v. Reconstruction Finance Corp., 172 F.2d 416, 424 (10th Cir. 1949).

No credible evidence has been presented of an inadequate price being paid for this property, and certainly no evidence that shocks my conscience.

The sale at issue here was the Marshal's third attempt to sell the property. Motion, at p.1 n.1. At the first public sale, on March 2, 1999, a William Simpson bid $150,000 for the property. United States' Supplemental Memorandum In Support of Motion to Confirm Sale (the ''US Supp''), at p.4. Mr. Simpson did not tender the full purchase price within the time required, however, and the sale was not consummated. Id. A second sale occurred on March 9, 2001, at which the Town of Monument, Colorado, was the high bidder at $190,000.00. Id. at p.5. Again, the purchaser failed to tender the full purchase price within the time required. Id. Each of these purchase prices, although higher than the $113,000.00 bid here, are within the

same general range and support its reasonableness.

Moreover, I note that in the Order of Sale, the district judge set a minimum bid of $110,000.00. The United States argues that the minimum bid defines what was a reasonable price for this property. The minimum bid apparently was suggested by the United States, US Supp at pp.3–4, "after consulting with a Revenue Officer with approximately 25 years of experience, who had consulted with at least one local real estate office concerning the value of the property." Id. at p.7. The Revenue Officer estimated the value of the property at $150,000.00. Id. In addition to that, the El Paso County Assessor determined the value of the property in 1999 to be $157,406.00. Id. All of these facts further support the reasonableness of the price obtained here.

Mr. Clinger relies on various materials in urging that the price is unconscionable. The first are materials purporting to show the value of a neighboring parcel of real property at $550,000.00. Opposition, at Exhs. C–D. No analysis of comparability is provided by any reliable source, however, and this evidence is completely unpersuasive.

Mr. Clinger also points to a "Market Analysis" dated July 18, 2002, in which Craig Cuddy, who identifies himself as a real estate associate but not an appraiser, purports to value the property by comparison to three other properties. Supplemental to Defendant Clinger's Response to USA's Motion to Confirm Sale ("Clinger's First Supp."), at Exh.E. Because Mr. Cuddy is not an appraiser, I place no reliance whatsoever on his valuation.

Nor has Mr. Clinger made any claim or showing of an additional circumstance indicating unfairness, such as chilled bidding. See Smith, 311 F.2d at 672 (requiring a showing of inadequate price "coupled with slight additional circum-stances indicating unfairness" to deny con-firmation of or to set aside a judicial sale).

Based upon these facts, I find that the price obtained at the public sale of the property is not grossly inadequate and does not shock my conscience. In addition, I find that there has been no showing of any additional circumstances indicating unfairness in the sale process. I find, further, that all of the conditions of sale imposed by law and by the Order of Sale have been satisfied. Accordingly,

I respectfully RECOMMEND that the Motion be GRANTED and that the sale to Kalima Masse be CONFIRMED.

I FURTHER RECOMMEND that the Order Confirming Sale and Directing Disbursement of Proceeds, attached as an appendix to the US Supp, be entered as an order of the court.

FURTHER, IT IS ORDERED that pursuant of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), the parties have 10 days after service of this recommendation to serve and file specific, written objections. A party's failure to serve and file specific, written objections waives *de novo* review of the recommendation by the district judge, Fed. R. Civ. P. 72(b); Thomas v. Arn, 474 U.S. 140, 147–48 (1985), and also waives appellate review of both factual and legal questions. Makin v. Colorado Dept. of Corrections, 183 F.3d 1205, 1210 (10th Cir. 1999); Talley v. Hesse, 91 F.3d 1411, 1412–13 (10th Cir. 1996). A party's objections to this recommendation must be both timely and specific to preserve an issue for *de novo* review by the district court or for appellate review. United States v. One Parcel of Real Property, 73 F.3d 1057, 1060 (10th Cir. 1996).

Dated September 13, 2002.

BY THE COURT:

/s/

United States Magistrate Judge

¶2002-5739

In Re: Dennis HARKER, Debtor. Dennis HARKER, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Bankruptcy Appellate Panel, Eighth Circuit, (BAP8) Docket No. 02-6024SI, Dec. 5, 2002 Bank-

ruptcy Court, (2002, Bktcy Ct IA) 89 AFTR 2d 2002-2410, 2002-1 USTC ¶50440, affirmed. Earlier proceeding at (2001, Bktcy Ct IA) 87 AFTR 2d 2001-1005. Years 1985, 1986, 1987. Decision for Govt.

1. Tax claims in bankruptcy—determination of tax liability—dischargeability—automatic stay—application of payments—collateral estoppel—interest. Bankruptcy court's remand determination of Chap. 7 debtor/tax evader's outstanding nondischargeable tax and interest debts was affirmed: taxpayer was collaterally estopped from challenging IRS's alleged failure to apply additional voluntary payments he purportedly made to liabilities that had been considered in earlier Tax Court decision; and had no right to contest IRS's application of levy proceeds to dischargeable vs. nondischargeable debt since proceeds represented involuntary payments. Also, taxpayer's interest liability under IRC §6601 wasn't affected by Tax Court's failure to reference it; bankruptcy court's reopening of record to take IRS officer's testimony on interest accruals was appropriate; interest calculations were properly made in accord with IRC §6621; and other arguments that raised collateral issues outside scope of remand order weren't considered. *Reference:* United States Tax Reporter ¶68,726.52(27); 68,726.52(50); 68,726.52(90); 66,015.02(39); 74,337.504(5). IRC §6601; 6621.

United States Bankruptcy Appellate Panel FOR THE EIGHTH CIRCUIT,

Appeal from the United States Bankruptcy Court for the Southern District of Iowa

Before KOGER, Chief Judge, DREHER, and FEDERMAN, Bankruptcy Judges.

FEDERMAN, Bankruptcy Judge.

Plaintiff-Appellant Dennis Harker appeals from a decision of the bankruptcy court on an order of remand to determine the amount of his tax liability.[1] We affirm.

BACKGROUND

In 1989, the Internal Revenue Service (the IRS) brought criminal charges against Harker and his then-wife, Mary Harker, for tax evasion. As a result of those charges, Harker pled guilty to income tax evasion for the tax year 1987, and Mary Harker pled guilty to income tax evasion for 1985. Thereafter, Harker and Mary Harker paid more than $245,000.00 for the 1987 taxes and interest. On October 11, 1991, the United States Attorney filed a satisfaction of judgment with the clerk of the United States District Court for the Southern District of Iowa, which indicated Harker had made full restitution for the 1987 taxes.

Due to their fraud and substantial underpayment, however, the IRS determined that the Harkers were liable for income tax deficiencies and statutory additions to tax for 1985 through 1987, and so notified them. After receiving that notice, Harker filed a petition with the United States Tax Court (the Tax Court). On December 1, 1994, the Tax Court found that Harker had committed fraud, substantially understated his income, and actively evaded federal income tax in years 1985 through 1987. The Tax Court then found deficiencies of income tax due as follows: $17,080.00 for 1985, $135,662.00 for 1986, and $0 for 1987. Harker unsuccessfully appealed the decision of the Tax Court to the Court of Appeals for the Eighth Circuit, but he raised only procedural issues and did not challenge the merits of the Tax Court's ruling as to the amount of taxes owed for the years in question.

Two weeks after the Tax Court decision, on May 16, 1995, Harker filed a Chapter 13 petition with the United States Bankruptcy Court for the Southern District of Iowa. On June 14, 1996, the bankruptcy court dismissed the petition as a bad faith filing, and found that Harker filed it "as a litigation tactic to avoid posting an appeal bond that would have been required to postpone assessment by the IRS" pending

[1] The Honorable Russell J. Hill, United States Bankruptcy Judge for the Southern District of Iowa.

appeal of the Tax Court decision. Characterizing Harker's tax deficiencies as "potentially nondischargeable in a Chapter 7" proceeding, the court concluded that "using Chapter 13 in such a manner is inconsistent with the spirit of the Bankruptcy Code and with the fundamental goal to reorganize debts." The Order permitted Harker to convert his case to a Chapter 7 proceeding before the dismissal became final 20 days later, and further provided that the automatic stay would remain in effect until the conclusion of the 20-day grace period. Harker failed to convert his case. As a result, the automatic stay terminated on July 5, 1996.

Thereafter, on July 12, 1996, the IRS recorded tax liens in the amount of $1,073,298.20 with the Polk County, Missouri Recorder and the Boone County, Missouri Recorder. Harker then moved the bankruptcy court for the following: (1) to reimpose the automatic stay; (2) for a stay pending appeal of the order of dismissal; (3) for an order compelling the IRS to cease and desist from further collection activity; (4) for an order requiring the IRS to remove tax liens; and (5) for a holding that the tax liens were void *ab initio*. On August 20, 1996, the bankruptcy court denied this motion, finding that the automatic stay terminated 20 days after the June 14, 1996 dismissal order, therefore, the IRS did not violate the automatic stay when it filed its liens and its notice of intent to levy on July 12, 1996. Further, the bankruptcy court refused to grant Harker a stay pending his appeal, holding that the tax claim "has been pending since May 1, 1995 and [Harker] has not shown a reasonable likelihood of success on the merits of his appeal sufficient to warrant an entry of a stay."

On August 26, 1996, the district court partially granted Harker's motion for stay pending appeal, and ordered the United States to "not take final action affecting title on property prior to this court's final ruling on the merits." On September 6, 1996, the district court denied Harker's appeal.

On June 12, 1997, in order to collect on Harker's 1985–1987 tax liabilities, the IRS levied on a 145.84-acre farm he owned in Boone County, Iowa and a dwelling he owned in West Des Moines, Iowa, and scheduled public auctions for September 9 and 10, 1997. On September 8, 1997, the day before the auction, Harker filed this Chapter 7 bankruptcy petition; on September 23, 1997, he commenced this adversary proceeding seeking to discharge his tax debt for 1985–1987. On November 4, 1997, the Chapter 7 trustee filed reports of abandonment and no assets.

The United States moved for relief from the automatic stay to sell the seized real estate. Following the hearing on the motion, the court entered an order terminating the stay to permit the United States to sell both properties after finding that the federal tax liens that encumbered the properties exceeded their value. In offering the Boone County real estate for sale at public auction, the United States described it as a "136-acre farm." Both properties were sold in August 1998, and the United States realized a total of $285,000.00 from the sales, which it applied to Harker's fraud penalties. On October 27, 1998, Harker received a Chapter 7 discharge.

On April 27, 1998, the bankruptcy court entered summary judgment in Harker's favor, finding that the United States had failed to prove that his 1985 and 1986 tax obligations were excepted from discharge under 11 U.S.C. § 523(a)(1)(C). The Court further found that the penalties and interest on penalties for 1985 through 1987 were also dischargeable because they arose from events occurring more than three years before his petition. The court agreed with the United States that due to Harker's criminal conviction for tax evasion, any liability for taxes for 1987 would be nondischargeable, but found no taxes due for that year.

The United States appealed to the district court, which affirmed that the penalties and interest on penalties were dischargeable, but reversed the bankruptcy court's decision that tax and interest on tax for 1985 and 1986 were also dischargeable. Because the Tax Court had found that Harker committed fraud and substantially

understated income for 1985 through 1987, the district court held that he was collaterally estopped from arguing that the tax and interest were not excepted from discharge under 11 U.S.C. § 523(a)(1)(C). The district court remanded the case to the bankruptcy court for a ''determination of Harker's nondischargeable taxes and interest'' for 1985 through 1987.

On June 12, 2000, the bankruptcy court held the remand hearing, and on April 30, 2001, it reopened the record to take the testimony of IRS Revenue Officer Howard L. Hoy. The United States submitted the Tax Court decision in *Harker v. Commissioner*, the IRS's certified tax assessments, and Hoy's calculations of the outstanding debt, less all credits, and the dischargeable penalties and interest on penalties. Harker argued that he had no tax liability because the United States did not prove he owed anything, and it did not properly credit his payments. He attacked the sale of his real estate and asked for an equitable discharge of his tax debt.

The bankruptcy court determined, however, that the United States had presented *prima facie* evidence of Harker's tax liability through the certified tax assessments, and Harker failed to disprove this evidence. With regard to additional payments Harker claimed to have made, the court found that any payments made, and their application, prior to May 1, 1995, were considered by the Tax Court and included in its calculation. Addressing Harker's arguments about the sale of this seized real estate, the bankruptcy court found that because it had lifted the stay to permit the United States to proceed *in rem* with the sale and the trustee did not object, the sale was not conducted under the court's supervision and had no effect on the property of the estate. Noting that Harker's other arguments were ''without merit,'' the court denied his request for an equitable discharge from all remaining tax liability because ''he is not a sympathetic debtor, and equity does not balance in his favor for the request relief.''

On April 15, 2002, the bankruptcy court entered its order finding Harker's tax liabilities, as of April 30, 2001, to be as follows:

(1) $76,819.54 for the year 1985. ''Said amount is comprised of $17,462.58 tax deficiency, collection costs, and lien fees, and $59,356.96 of accrued interest.''

(2) $532,761.96 for the year 1986. ''Said amount is comprised of $135,622.00 of tax deficiency, and $397,139.96 of accrued interest.''

(3 $0.00 for the year 1987. ''Debtor has paid the required taxes and interest and no balance is outstanding.''

On April 26, 2002, Harker filed a timely appeal from the Bankruptcy Court's Order.

STANDARD OF REVIEW

A bankruptcy appellate panel shall not set aside findings of fact unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.[2] We review the legal conclusions of the bankruptcy court *de novo*.

DISCUSSION

[1] Harker, in essence, raised six issues at the bankruptcy court hearing on remand. The bankruptcy court considered the arguments and summarily dismissed three of them. Harker raises those same six issues on appeal. He argues that the IRS did not properly apply voluntary payments he made prior to May 1, 1995, that the IRS inaccurately calculated the interest due on the 1985 and 1986 tax deficiencies, and that the IRS improperly applied the involuntary payments derived from the sale of his homestead and farm to dischargeable debt. He then argues that the IRS violated the automatic stay when it filed its tax liens, that the transfer of the sales proceeds from the farm and homestead was preferential and should be avoided, and that the IRS acted inequitably by applying involuntary payments to dischargeable penalties and by improperly accounting for other

[2] Gourley v. Usery (In re Usery), 123 F.3d 1089, 1093 (8th Cir. 1997); O'Neal v. Southwest Mo. Bank (In re Broadview Lumber Co., Inc.), 118 F.3d 1246, 1250 (8th Cir. 1997) (citing First Nat'l Bank of Olathe, Kansas v. Pontow (In re Pontow), 111 F.3d 604, 609 (8th Cir.1997)); Fed. R. Bankr. P. 8013.

payments. The first three arguments are within the scope of the order of remand, as they directly influence the calculation of taxes and interest due. We find, however, that we have no jurisdiction to address the remaining arguments. The district court remanded solely for a determination of Harker's tax liability, including the interest that has accrued on those taxes, and the proper credit to be given for payments received by the IRS. The bankruptcy court's scope of review was limited by the order of remand.[3] Our review of the bankruptcy court's determination, based upon that order of remand, is limited as well. We, therefore, find that Harker's claims that the IRS violated the automatic stay when it filed its tax liens, that the transfer of the sales proceeds from the farm and homestead was preferential, and that the IRS acted inequitably raise collateral issues outside the scope of the order of remand and cannot be considered here.

We will address the remaining arguments in turn.

1. Application of Payments Prior to May 1, 1995

The bankruptcy court found that the amount of tax due for 1985 and 1986 had previously been determined by the Tax Court, and that in making that determination, the Tax Court necessarily considered payments that had been made prior to the date of its decision. We agree. The bankruptcy court properly declined to revise the Tax Court's calculation. As the district court held, Harker is collaterally estopped from relitigating the Tax Court's decision. Further, because the Tax Court decided Harker's tax liability before he filed his case, the bankruptcy court lacked jurisdiction to revisit his May 1, 1995 tax liability. Section 505 (a)(2) of the Bankruptcy Code (the Code) precludes a bankruptcy court from determining tax "if such amount . . . was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement" of the bankruptcy case.[4] We, therefore, find no error in the bankruptcy court's determination that it was estopped from considering the application of any payments made prior to May 1, 1995.

2. Application of Proceeds to Dischargeable Penalties

The IRS applied all of the sales proceeds to the penalties due and owing as a result of the 1987 tax deficiency, which are a dischargeable debt. For obvious reasons, Harker would prefer that the IRS had applied the proceeds against the obligations that are nondischargeable.

The funds that the IRS obtained, however, from the seizure and sale of the farm and homestead represented an involuntary payment of a tax liability. As such, the government was free to apply the levied proceeds to the fraud penalties. A taxpayer may direct the application of a voluntary tax payment to the government, but the government directs the allocation of an involuntary payment.[5] The properly-filed federal income tax liens secured the government's claim for penalties, regardless of Harker's subsequent discharge in bankruptcy. The discharge extinguished only his personal liability for the penalties, and interest on the penalties.[6] In *Isom v. United States*,[7] after the debtors obtained a discharge of their tax liability in their Chapter 7 bankruptcy case, they argued that based on this discharge the IRS should

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[3] *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089, 1094 (8th Cir. 1988) *Citing Adamian v. Lombardi*, 608 F.2d 1224, 1228 (9thCir. 1979). *See also Thornton v. Carter*, 109 F.2d 316, 320 (8th Cir. 1940) (holding that once a mandate issues from the reviewing court to the court below, a second appeal brings up nothing for review but the proceedings subsequent to the mandate).

[4] 11 U.S.C. § 505 (a)(2). *See Allison v. United States*, (In re Allison), 232 B.R. 195, 202 [83 AFTR 2d 99-1009] (Bankr. D. Mont. 1998) *judgment vacated on other grounds*, 238 F.3d 427 (9th Cir. Mont. 2000) (Table) (citing *Hammers v. Internal Revenue Service, (In re Hammers)*, 988 F.2d 32 [71 AFTR 2d 93-1703] (5th Cir. 1993)) (stating that "[c]learly, this Court had no jurisdiction to try the determination of the 1988 tax year assessment since that deficiency has been fully adjudicated pre-petition by the Tax Court").

[5] *See Jehan-Das, Inc. v. United States (In re Jehan-Das, Inc.)*, 925 F.2d 237, 238 [67 AFTR 2d 91-542] (8th Cir. 1991), *cert. denied*, 502 U.S. 810, 112 S. Ct. 55, 116 L. Ed. 2d 32 (1991) (holding that, if a payment is voluntary, the taxpayer can decide which of his tax liabilities to pay; otherwise the IRS directs the application of the payment); *Muntwyler v. United States*, 703 F.2d 1030, 1032 [51 AFTR 2d 83-997] (7th Cir. 1983) (accepting the IRS policy to allocate involuntary payments as it sees fit as a "sensible tax policy").

[6] *See* 11 U.S.C. § 524(a)(1) (providing that a discharge "voids any judgment . . . to the extent that such judgment is a determination of the personal liability of the debtor") (emphasis added); *See Johnson v. Home State Bank*, 501 U.S. 78, 82–83, 111 S. Ct. 2150, 2153, 115 L. Ed. 2d 66 (1991) (finding that a Chapter 7 "discharge extinguishes only 'the personal liability of the debtor.'") (emphasis in the original) (citations omitted).

[7] 901 F.2d 744 [67 AFTR 2d 91-314] (9th Cir. 1990).

release the tax lien.[8] In rejecting this argument, the court held that "liability for the amount assessed remains legally enforceable even where the underlying tax debt is discharged in the bankruptcy proceeding."[9] The court found that, while the discharge precluded the IRS from collecting the debt as a personal liability of the debtors, "their property remains liable for a debt secured by ... a valid tax lien."[10] Therefore, despite the fact that Harker obtained a discharge of his personal liability for fraud penalties, the involuntary lien included the fraud penalties. The government was, thus, free to sell the property to which the lien attached, and to apply the proceeds from that sale to reduce any dischargeable obligations secured by the lien.

3. Calculation of Interest on Tax Deficiency

The final issue relates to interest charged on the tax liability as determined by the Tax Court. The Tax Court found that Harker's tax deficiency was $17,080.00 for 1985, $135,622.00 for 1986, and zero for 1987. The bankruptcy court and the district court accepted this calculation. We, therefore, begin with a finding that that is the amount of the tax deficiency. Both the bankruptcy court and the district court found that the tax deficiency and the interest thereon are nondischargeable, and that any penalties or additions to tax, and the interest thereon, are dischargeable. This leaves for our consideration the arguments Harker makes as to the bankruptcy court's calculation of interest on the three years of tax deficiency in question.

Harker first argues that no interest should be allowed, because the Tax Court decision did not provide for interest. The district court, however, remanded to the bankruptcy court for a calculation of interest due. In so doing, the district court implicitly rejected this argument.

In any event, section 6601 of the Internal Revenue Code (the IRC) provides for interest on tax deficiencies from the due date until the date of payment, and also establishes the basis for calculating the interest due:

> (a) General Rule. If any amount of tax imposed by this title (whether required to be shown on a return, or to be paid by stamp or by some other method) is not paid on or before the last date prescribed for payment, interest on such amount at the underpayment rate established under section 6621 shall be paid for the period from such last date to the date paid.[11]

In this case, the last date prescribed for payment for the 1985 tax deficiency was April 15, 1986, and the last date prescribed for payment for the 1986 taxes was April 15, 1987. Moreover, section 6601 of the IRC authorizes the IRS to collect interest upon unpaid assessed interest.[12] For all these reasons, the bankruptcy court properly rejected Harker's argument that no interest is due.

Harker then argues that the bankruptcy court should not have reopened the hearing to allow Mr. Hoy to testify as to the amount of interest due. It is within the discretion of the bankruptcy court to determine the manner of presentation of evidence, and there was no abuse of that discretion in reopening the record.[13]

Harker next claims that the IRS incorrectly calculated the interest due on the tax deficiency. Section 6621 of the IRC determines the statutory rate of interest for the underpayment of tax:

(a) General Rule.

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8 *Id.* at 745.

9 *Id.*

10 *Id.*

11 26 U.S.C. § 6601(a) (2002).

12 *Cohn v. United* States, 872 F.2d 533 [63 AFTR 2d 89-1171] (2nd Cir. 1989) (holding that the statute is clear on its face and in no manner suggests that the IRS is prohibited from imposing compound interest on taxes accruing after December 31, 1982); United *States v. Glasser*, 287 F.2d 433, 434 [7 AFTR 2d 784] (7th Cir. 1961) (recognizing that, while the law does not favor compound interest, such a consideration does not prevail in the face of a statute so authorizing).

13 *See California Airmotive Corp. v. Bass*, 354 F.2d 453, 455 (9th Cir. 1965) (stating that in a judicial hearing, reasonable discretion must be vested in the officer who guides the course of the proceedings); *In re Grimm*, 168 B.R. 102, 106 (Bankr. E.D. Va. 1994) (holding that a decision to reopen the record is within the sound discretion of the trial court).

. . .

(2) Underpayment rate.—The underpayment rate established under this section shall be the sum of—

(A) the Federal short-term rate determined under section (b), plus
(B) 3 percentage points.

(b) Federal short-term rate.—For purposes of this section—

(1) General Rule.—The Secretary shall determine the Federal short-term rate for the first month in each calendar quarter.
(2) Period during which rate applies.--

(A) In general.—Except as provided in subparagraph (B), the Federal short-term rate determined under paragraph (1) for any month shall apply during the first calendar quarter beginning after such month.

. . .

(3) Federal short-term rate.—The Federal short term rate for any month shall be the Federal short-term rate determined by the Secretary in accordance with section 1274(d). Any such rate shall be rounded to the nearest full percent (or, if a multiple of ½ of 1 percent, such rate shall be increased to the next highest full percent).[14]

A table of interest rates as calculated, pursuant to section 6621 of the IRC, is found in the Internal Revenue Bulletin.[15] According to the table, quarterly interest rates from April 15, 1986 until April 30, 2001, (the period during which the IRS calculated the interest due on the tax deficiencies in this case) varied from a high of 12 percent to a low of 6 percent.[16] The bankruptcy court adopted the testimony and calculations of Mr. Hoy. The bankruptcy court found the accrued interest due on the 1985 tax deficiency of $17,462.58, including collection costs and lien fees, to be $59,356.96 as of April 30, 2001.[17] It found the accrued interest due on the 1986 tax deficiency of $135,622.00 to be $397,099.96 as of April 30, 2001.[18] According to Mr. Hoy's testimony, he calculated the tax deficiency as of the due date. In the case of the 1985 tax deficiency, that due date was April 15, 1986. In the case of the 1986 tax deficiency, that due date was April 15, 1987. He then calculated the accrued interest on both tax deficiencies as of August 22, 1995, the date the IRS calculated interest relative to the Tax Court decision. He then calculated the accrued interest on the 1985 taxes from August 22, 1995, until April 30, 2001, and the accrued interest on the 1986 taxes from September 9, 1996, until April 30, 2001. Those calculations are as follows.

	1985	1986
Tax Deficiency	$17,080.00	$135,622.00
Collection costs	358.58	
Lien fees	24.00	
Interest thru 8/22/95	29,850.06	232,253.72
Interest on tax	10,824.87 (8/22/95-4/30/01)	65,515.59 (9/9/96-4/30/01)
Interest on interest	18,682.03 (8/22/95-4/30/01)	99,330.65 (9/9/96-4/30/01)
Total liability	$76,819.54[19]	$532,721.96[20]

We cannot find that the bankruptcy courts factual findings as to the amount of interest assessed for 1985 and 1986 are clearly erroneous. Mr. Hoy testified that he ex-

14 26 U.S.C. § 6621(a)(2)and (b) and (3) (2002).

15 *See* Rev. Rul. 2002-59, 2002-38 I.R.B 557–562, 2002 WL 2001131 (Sept. 23, 2002).

16 *Id.*

17 *Harker v. United States (In re Harker)*, 2002 WL 1058108 6 (Bankr. S.D. Iowa, April 15, 2002).

18 *Id.*

19 Appellant's Ex. D indicates that the total balance due is $76,876.94. The difference between that sum and the sum above is $57.40. The IRS assigned a collection cost in that exact sum to the 1985 tax deficiency. It appears the IRS neglected to include that collection cost in the final calculation.

20 Appellant's Ex. E.

cluded interest on penalties and penalties from his calculation. He calculated the tax deficiency, the accrued interest, and the interest on that interest, pursuant to statute. He testified that he used the statutory rates of interest. If Harker believed there was error in the statutory calculations, he had an opportunity to so demonstrate at the hearing by calling his own expert witness. He failed to do so.

We find that the bankruptcy court was limited to a determination of the tax liability, pursuant to an order of remand from the district court, and as to that determination we find no error in the bankruptcy court's calculations. We, therefore, affirm the decision of the bankruptcy court.

A true copy.

Attest:

CLERK, U.S. BANKRUPTCY APPELLATE PANEL, EIGHTH CIRCUIT

¶2002-5740

ESTATE OF Robert A. JACK, by Margo J. Blair, Executrix, PLAINTIFF v. UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) Docket No. 01-410T, Nov. 27, 2002. Date of death 8-27-96. Decision for Govt.

1. Gross estate—foreign citizens—resident vs. non-resident—domicile—intent to stay in U.S. indefinitely. Govt. was granted summary judgment that, for estate tax purposes, decedent-Canadian veterinary doctor in U.S. on extended TN Temporary Professional, nonimmigrant visa was legally capable of forming intent to be domiciled in U.S.: although visa terms explicitly required decedent to retain Canadian domicile and provided him only temporary U.S. stay, govt. raised specter that he still *could* have been in violation of his visa without immigration authorities' knowledge and intending to stay in U.S. indefinitely. But, whether decedent did in fact hold such intent wasn't decided. *Reference:* USTR Estate & Gift Taxes ¶21,015.01(5). IRC §2031; 2101.

F. MICHAEL KOVACH, Bellevue, Washington, for the plaintiff.
ELIZABETH D. SEWARD, Tax Division; MILDRED L. SEIDMAN, Chief, Court of Federal Claims Section; EILEEN J. O'CONNOR, Assistant Attorney General, Department of Justice, Washington, D.C., for the defendant.

In the United States Court of Federal Claims,

OPINION

HORN, J.

Motion for Partial Summary Judgment; Estate Tax Liability of Decedent Holding a TN Temporary Professional Visa; Domicile.

The parties have filed cross-motions for partial summary judgment to determine whether a Canadian citizen employed in the United States on the date of his death, who was admitted to the United States under TC and TN nonimmigrant, temporary professional classifications,[1] was legally capable of forming an intent to be domiciled in the United. States for federal estate tax purposes. The government argues that the holder of a TN Temporary Professional visa is legally capable of forming the intent to be domiciled in the United States for federal estate tax purposes. The plaintiff claims in her cross-motion for partial summary judgment that the intent to establish domicile by the holder of a TN Temporary Professional visa would be in direct violation of the terms of the visa, so that such an intent would be precluded. According to the plaintiff, "Dr. Jack's nonimmigrant visa establishes Dr. Jack's intent to depart, provides for his deportation should he fail to

[1] In Toll v. Moreno, 458 U.S. 1 (1982), the United States Supreme Court recognized two general classes of aliens, immigrant and nonimmigrant, with various sub-categories. See Toll v. Moreno, 458 U.S. at 13–14; 8 U.S.C. § 1101(a)(15) (2000). For example, symbols such as "TN" (North American Free Trade Agreement (NAFTA) professional); "TD" (spouse or child of NAFTA professional); "A-1" (ambassador or public minister); "C-2" (alien in transit to United Nations headquarters); and "G-4" (international organization officer, employee, or immediate family) designate different types of nonimmigrant visa status, and are inserted in the space provided in the visa stamp. 22 C.F.R. § 41.12 (2002). The "TC" visa status was established for the temporary entry of certain types of Canadian professionals under the United States-Canada Free Trade Agreement, Pub. L. No. 100-449, 102 Stat. 1851 (1988). The TC status no longer exists, replaced by TN Temporary Professional status. See 8 C.F.R. § 214.6(l) (2002).

depart and, accordingly, precludes his forming an intent to remain indefinitely.'' At the parties' request, the question of whether Dr. Jack actually developed an intent to be domiciled in the United States is to be deferred until the legal question presented in the cross-motions for partial summary judgment is resolved.

FINDINGS OF FACT

Dr. Robert A. Jack was born in Winnipeg, Canada on March 7, 1947, and died in Davis, California on August 27, 1996.[2] Until October, 1992, Dr. Jack resided and was domiciled in Canada, where he practiced veterinary medicine. In October, 1992, Dr. Jack was offered a two-year employment contract with the University of California in Davis, California, as Equine Medical Director in its School of Veterinary Medicine, for the period of January, 1993 through December, 1994. On November 2, 1992, Dr. Jack applied for admission to the United States as a TC class nonimmigrant and obtained TC Temporary Professional status, allowing him to be admitted to, and remain in, the United States for a period of one year. In December, 1992, Dr. Jack moved to Davis, California, under his TC Temporary Professional visa, and in January, 1993, commenced his duties as Equine Medical Director of the School of Veterinary Medicine.

According to the plaintiff, while living in California, Dr. Jack maintained bank accounts in Canada, continued affiliations with Canadian professional associations, remained a licensed Canadian veterinarian, maintained his Canadian driver's license and voter registration, and also maintained a Canadian mailing address.

On or about December 13, 1993, Dr. Jack obtained an extension of his TC Temporary Professional visa through December 31, 1994. On or about December 2, 1994, Dr. Jack obtained TN Temporary Professional classification available under the newly-enacted NAFTA, enabling him to continue his employment in the United States. In January, 1995, Dr. Jack extended his contract with the University of California at Davis as Equine Medical Director in the School of Veterinary Medicine for two years, through December, 1996. Due to the January, 1995 contract extension, on or about May 25, 1996, Dr. Jack obtained an extension on his TN Temporary Professional visa through November 17, 1996. Approximately three months later, on August 27, 1996, Dr. Jack died in Davis, California, at the age of forty-nine.

Following his death, Dr. Jack's estate paid an estate tax of $15,415.00, as a nonresident not a citizen of the United States, based on the value of his gross estate in the United States, excluding assets outside the United States at the time of his death. The estate tax return was audited, and on May 24, 2000, a Notice of Deficiency was issued by the Internal Revenue Service (IRS) assessing an estate tax deficiency of $80,443.00. The deficiency was premised on a determination by the IRS that Dr. Jack was domiciled in the United States on the date of his death. The IRS wrote: ''As it has been determined that the decedent was domiciled in the United States at the date of death, the reported value of the taxable estate is increased by the entire value of the gross estate outside the U.S. pursuant to Section 2031 of the Internal Revenue Code.''

Therefore, according to the IRS, Dr. Jack's assets outside the United States at the time of his death were subject to the estate tax of the United States. The parties agree that Dr. Jack's Canadian assets are part of his gross estate for tax purposes only if he were domiciled in the United States at the time of his death and that such domicile requires that Dr. Jack intended to remain in the United States indefinitely at the time of his death.

On December 6, 2000, the IRS assessed plaintiff in the amount of $80,443.00 in additional estate taxes, plus $23,662.04 in interest. Additional interest of $377.96 and $1,044.49 was subsequently assessed. The

[2] The preliminary joint stipulation of facts filed by the parties includes the following proviso: ''This preliminary stipulation addresses the jurisdictional facts and facts material to Dr. Jack's status in the United States as a nonimmigrant temporary professional class TC and TN alien. Even if the Court were to decide that Dr. Jack could not form an intent to be domiciled in the United States as a matter of law, substantiation issues remain to be resolved.''

Executrix of Dr. Jack's estate paid the alleged estate tax deficiency and statutory interest on July 6, 2000, and the additional assessed interest on February 27, 2001 and April 26, 2001. Subsequently, on August 6, 2000, the Executrix of Dr. Jack's estate filed an amended United States Estate Tax Return, Form 706-NA, which claimed a refund of estate taxes of $85,497.00.

The parties have filed cross-motions for partial summary judgment regarding whether an individual holding a TN Temporary Professional visa can legally form the intent to be domiciled in the United States, thus subjecting the individual's foreign property to the federal estate tax of the United States.

DISCUSSION

[1] The parties have filed cross-motions for partial summary judgment pursuant to Rule 56 of the Rules of the United States Court of Federal Claims (RCFC). RCFC 56 is patterned on Rule 56 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) and is similar both in language and effect. Both rules provide that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RCFC 56(c); Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986); Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970); Telemac Cellular Corp. v. Topp Telecom, Inc., 247 F.3d 1316, 1323 (Fed. Cir.), reh'g denied and reh'g en banc denied (2001); Monon Corp. v. Stoughton Trailers, Inc., 239 F.3d 1253, 1257 (Fed. Cir. 2001); Avenal v. United States, 100 F.3d 933, 936 (Fed. Cir. 1996), reh'g denied (1997); Creppel v. United States, 41 F.3d 627, 630–31 (Fed. Cir. 1994). A fact is material if it will make a difference in the result of a case under the governing law. Irrelevant or unnecessary factual disputes do not preclude the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. at 247–48; see also Monon Corp. v. Stoughton Trailers, Inc., 239 F.3d at 1257; Curtis v. United States, 144 Ct. Cl. 194, 199, 168 F. Supp. 213, 216 (1958), cert. denied, 361 U.S. 843 (1959), reh'g denied, 361 U.S. 941 (1960).

When reaching a summary judgment determination, the judge's function is not to weigh the evidence and determine the truth of the case presented, but to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. at 249; see, e.g., Ford Motor Co. v. United States, 157 F.3d 849, 854 (Fed. Cir. 1998) (the nature of a summary judgment proceeding is such that the trial judge does not make findings of fact); Johnson v. United States, 49 Fed. Cl. 648, 651 (2001); Becho, Inc. v. United States, 47 Fed. Cl. 595, 599 (2000). The judge must determine whether the evidence presents a disagreement sufficient to require submission to fact finding, or whether the issues presented are so one-sided that one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. at 250–52; Jay v. Sec'y of Dep't of Health and Human Servs., 998 F.2d 979, 982 (Fed. Cir.), reh'g denied and en banc suggestion declined (1993). When the record could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial, and the motion must be granted. See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Hall v. Aqua Queen Mfg., Inc., 93 F.3d 1548, 1553 n.3 (Fed. Cir. 1996). In such a case, there is no need for the parties to undertake the time and expense of a trial, and the moving party should prevail without further proceedings. Summary judgment:

> saves the expense and time of a full trial when it is unnecessary. When the material facts are adequately developed in the motion papers, a full trial is useless. "Useless" in this context means that more evidence than is already available in connection with the motion for summary judgment could not reasonably be expected to change the result.

Dehne v. United States, 23 Cl. Ct. 606, 614–15 (1991) (citing Pure Gold, Inc. v.

Syntex, Inc., 739 F.2d 624, 626 (Fed. Cir. 1984)), vacated on other grounds, 970 F.2d 890 (Fed. Cir. 1992); United States Steel Corp. v. Vasco Metals Corp., 394 F.2d 1009, 1011 (C.C.P.A. 1968).

Summary judgment, however, will not be granted if "the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. at 248; Eli Lilly & Co. v. Barr Labs., Inc., 251 F.3d 955, 971 (Fed. Cir. 2001), cert. denied, 122 S. Ct. 913 (2002); Gen. Elec. Co. v. Nintendo Co., 179 F.3d 1350, 1353 (Fed. Cir. 1999). In other words, if the nonmoving party produces sufficient evidence to raise a question as to the outcome of the case, then the motion for summary judgment should be denied. Any doubt over factual issues must be resolved in favor of the party opposing summary judgment, to whom the benefit of all presumptions and inferences runs. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. at 587–88; Monon Corp. v. Stoughton Trailers, Inc., 239 F.3d at 1257; Wanlass v. Fedders Corp., 145 F.3d 1461, 1463 (Fed. Cir.), reh'g denied and en banc suggestion declined (1998).

The initial burden on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact may be discharged if the moving party can demonstrate that there is an absence of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); see also Trilogy Communications, Inc. v. Times Fiber Communications, Inc., 109 F.3d 739, 741 (Fed. Cir.) (quoting Conroy v. Reebok Int'l, Ltd., 14 F.3d 1570, 1575 (Fed. Cir. 1994), reh'g denied and en banc suggestion declined (1995)), reh'g denied and en banc suggestion declined (1997); Lockwood v. Am. Airlines, Inc., 107 F.3d 1565, 1569 (Fed. Cir. 1997). If the moving party makes such a showing, the burden shifts to the nonmoving party to demonstrate that a genuine dispute regarding a material fact exists by presenting evidence which establishes the existence of an element essential to its case upon which it bears the burden of proof. See Celotex Corp. v. Catrett, 477 U.S. at 322; Am. Airlines v. United States, 204 F.3d 1103, 1108 [85 AFTR 2d 2000-1005] (Fed. Cir. 2000); see also Schoell v. Regal Marine Indus., Inc., 247 F.3d 1202, 1207 (Fed. Cir. 2001).

Pursuant to RCFC 56, a motion for summary judgment may succeed whether or not accompanied by affidavits and/or other documentary evidence in addition to the pleadings already on file. Celotex Corp. v. Catrett, 477 U.S. at 324. Generally, however, in order to prevail by demonstrating that a genuine issue for trial exists, the nonmoving party must go beyond the pleadings by use of evidence such as affidavits, depositions, answers to interrogatories and admissions. Id.

Even if both parties argue in favor of summary judgment and allege an absence of genuine issues of material fact, however, the court is not relieved of its responsibility to determine the appropriateness of summary disposition in a particular case. Prineville Sawmill Co. v. United States, 859 F.2d 905, 911 (Fed. Cir. 1988) (citing Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1391 (Fed. Cir. 1987)); Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 1037 n.5 (9th Cir. 2000), cert. denied, 532 U.S. 942 (2001). "[S]imply because both parties moved for summary judgment, it does not follow that summary judgment should be granted one or the other." LewRon Television, Inc. v. D.H. Overmyer Leasing Co., 401 F.2d 689, 692 (4th Cir. 1968), cert. denied, 393 U.S. 1083 (1969); see also B.F. Goodrich Co. v. U.S. Filter Corp., 245 F.3d 587, 593 (6th Cir. 2001); Massey v. Del Labs., Inc., 118 F.3d 1568, 1573 (Fed. Cir. 1997). Cross-motions are no more than a claim by each party that it alone is entitled to summary judgment. The making of such inherently contradictory claims, however, does not establish that if one is rejected the other necessarily is justified. B.F. Goodrich Co. v. U.S. Filter Corp., 245 F.3d at 593; Atl. Richfield Co. v. Farm Credit Bank of Wichita, 226 F.3d 1138, 1148 (10th Cir. 2000); Allstate Ins. Co. v. Occidental

Int'l., Inc., 140 F.3d 1, 2 (1st Cir. 1998); Reading & Bates Corp. v. United States, 40 Fed. Cl. 737, 748 [81 AFTR 2d 98-1126] (1998). The court must evaluate each party's motion on its own merits, taking care to draw all reasonable inferences against the party whose motion is under consideration. DeMarini Sports, Inc. v. Worth, Inc., 239 F.3d 1314, 1322 (Fed. Cir. 2001); Gart v. Logitech, Inc., 254 F.3d 1334, 1338–39 (Fed. Cir. 2001), cert. denied, 122 S. Ct. 921 (2002). After reviewing the parties' submissions, the court finds that there are no material facts in dispute.

The parties have stipulated that Dr. Jack held a TN Temporary Professional visa at the time of his death. Defendant claims that Dr. Jack developed the subjective intent to stay in the United States despite the fact that such an intent would have been in direct violation of his visa, and that, therefore, the IRS should be allowed to tax Dr. Jack's property holdings outside of the United States. See 26 U.S.C. §§ 2001(a), 2031(a), 2103 (1994). While the plaintiff's cross-motion for partial summary judgment raises the question of the legal capacity of Dr. Jack to establish domicile under his visa, defendant argues it should not be prevented from demonstrating that Dr. Jack either failed to reveal his true intent to stay in the United States indefinitely to the immigration officer who granted him his renewed TN Temporary Professional visa in 1996, or that he had developed the intent to stay in the United States in the intervening months between the renewal of his 1996 TN Temporary Professional visa and the time of his death.

Plaintiff argues that the basic terms of the doctor's TN Temporary Professional visa required him to retain his Canadian domicile and, therefore, prevented his ability to develop the requisite intent to stay in the United States, since the TN Temporary Professional visa specifically prevents such domiciliary intent. Although the plaintiff argues that the TN visa raises the presumption that Dr. Jack's domicile has not changed from Canada, plaintiff does not address the issue of whether Dr. Jack could have been in the United States in violation of his visa.

Dr. Jack entered the United States in 1992 as a Canadian citizen with TC Temporary Professional status. After the implementation of the NAFTA, Dr. Jack's nonimmigrant status was converted from TC Temporary Professional to the TN Temporary Professional classification. 8 C.F.R. § 214.6(l). As implemented by Congress, the law provides that the United States, Canada and Mexico shall grant temporary entry to certain classes of business people seeking to "engage in business activities at a professional level . . . ." NAFTA Implementation Act, Pub. L. No.103-182, 107 Stat. 2057, Subtitle D, § 341(b)(2) (codified at 8 U.S.C. § 1184(e)(2) (2000)). Dr. Jack, as a veterinarian, qualified for a TN Temporary Professional pursuant to the NAFTA. 8 C.F.R. § 214.6(c). The NAFTA Implementation Act states:

> An alien who is a citizen of Canada or Mexico . . . who seeks to enter the United States under and pursuant to the provisions of Section D of Annex 1603 of the NAFTA . . . to engage in business activities at a professional level as provided for in such Annex, may be admitted for such purpose under regulations of the Attorney General . . . . For purposes of this Act, including the issuance of entry documents . . . such alien shall be treated as if seeking classification, or classifiable, as a nonimmigrant . . . .

8 U.S.C. § 1184(e)(2).

Regulations promulgated by the Attorney General pursuant to the NAFTA Implementation Act state:

> Temporary entry, as defined in the NAFTA, means entry without the intent to establish permanent residence.[3] The alien must satisfy the inspecting immigration officer that the proposed stay is temporary. A temporary period has a reasonable, finite end that does not equate to permanent residence. In order to establish that the alien's entry will be

[3] The section following the first sentence in this definition was added to the C.F.R. in the 1999 edition.

> temporary, the alien must demonstrate to the satisfaction of the inspecting immigration officer that his or her work assignment in the United States will end at a predictable time and that he or she will depart upon completion of the assignment.

8 C.F.R. § 214.6(b). A Canadian citizen who qualifies for admission may be admitted for up to one year under the classification symbol TN. 8 C.F.R. § 214.6(f)(1). This status may be extended for additional one-year periods, and there is no limit on the number of extensions a Canadian citizen may obtain to remain in the United States on TN Temporary Professional visa status. See 8 C.F.R. § 214.6(h)(2)(i). As noted, however, the individual must not intend to remain in the United States permanently. See 8 C.F.R. § 214.6(b).

Dr. Jack's domiciliary intent is significant because section 2001(a) of the Internal Revenue Code of 1986 (IRC) states that "[a] tax is hereby imposed on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States." 26 U.S.C. § 2001(a). IRS tax regulation 26 C.F.R. § 20.0-1(b)(1) (1994) defines "resident" as follows:

> A "resident" decedent is a decedent who, at the time of his death, had his domicile in the United States .... A person acquires a domicile in a place by living there, for even a brief period of time, with no definite present intention of later removing therefrom. Residence without the requisite intention to remain indefinitely will not suffice to constitute domicile ....

26 C.F.R. § 20.0-1(b)(1).

If a decedent satisfies the definition of resident as provided in 26 C.F.R. § 20.0 - 1(b)(1), "[t]he value of the gross estate [for estate tax purposes] of the decedent shall be ... the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated." 26 U.S.C. § 2031(a). If a decedent does not satisfy the IRC's residency requirements, the decedent's estate is subject to the estate tax imposed on estates of "non-residents not a citizen." 26 U.S.C. § 2101 (1994). If deemed a "non-resident not a citizen" by the IRS, "the value of the gross estate ... shall be that part of his gross estate ... which at the time of his death is situated in the United States." 26 U.S.C. 2103.

The definition of "resident," as pro-vided by 26 C.F.R. § 20.0-1(b)(1), requires the resolution of whether the decedent was domiciled in the United States at the time of his death. See Estate of Jan Willem Neinhuys v. Comm'r, 17 T.C. 1149, 1159 (1952) (holding that "the amount of the estate tax on the estate of the decedent is dependent, in part, upon whether or not the decedent was domiciled in the United States at the date of his death."); Estate of Anthony H.G. Fokker v. Comm'r, 10 T.C. 1225, 1245 (1948) ("If the estate is liable for tax, it is because Fokker died a resident of the United States. A resident of the United States, under the applicable regulations, is one who, at the time of his death, had his domicile in the United States.").

"'Domicile' is ... a concept widely used [and uncontroverted] in both federal and state courts for jurisdiction and conflict-of-laws purposes .... For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 48 (1989) (quoting Texas v. Florida, 306 U.S. 398, 424 (1939)).

The United States Supreme Court addressed the issue of establishing domicile in Mitchell v. United States, 88 U.S. 350 (1874), stating: "Domicile has been thus defined: 'A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time.'" Mitchell v. United States, 88 U.S. at 352 (citations omitted). The Supreme Court further clarified the establishment of legal domicile, stating:

> A domicile once acquired is presumed to continue until it is shown to have been changed. Where a change of domicile is alleged the burden of proving it rests upon the person making the allegation. To constitute the new domicile two

> things are indispensable: First, residence in the new locality; and, second, the intention to remain there .... Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains.

Mitchell v. United States, 88 U.S. at 353 (citation omitted, emphasis in original). In Vlandis v. Kline, the Supreme Court cited an opinion of the Attorney General of Connecticut for a reasonable standard for determining domicile:

> In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning. This general statement, however, is difficult of application. Each individual case must be decided on its own particular facts. In reviewing a claim, relevant criteria include year-round residence, voter registration, place of filing tax returns, property ownership, driver's license, car registration, marital status, vacation employment, etc.

Vlandis v. Kline, 412 U.S. 441, 454 (1973) (quoting Opinion of the Attorney General of the State of Connecticut Regarding Non-Resident Tuition, Sept. 6, 1972 (unreported)); District of Columbia v. Murphy, 314 U.S. 441, 454 (1941) (holding that one can reside in one place, but be domiciled in another); Texas v. Florida, 306 U.S. 398, 425, 59 S. Ct. 563, 576 (1939) (Domicile is established by "the actual fact as to the place of residence and decedent's real attitude and intention with respect to it as disclosed by his entire course of conduct."); Gilbert v. David, 235 U.S. 561, 569 (1915) ("[C]hange of domicile is said to arise where there is a change of abode and 'the absence of any present intention to not reside permanently or indefinitely in the new abode,'" as opposed to entertaining a "floating intention" to return at some time in the future); Byers v. United States, 136 Ct. Cl. 250, 251 [49 AFTR 1614], 141 F. Supp. 927, 928 [49 AFTR 1614] (1956) ("Domicile is a compound of fact and law ... requir[ing] conjunction of physical presence and [the intention to remain] in the new location to bring about domiciliary change," and citing to the definition established by Mitchell v. United States, 88 U.S. at 353); see also Perry v. Pogemiller, 16 F.3d 138, 140 (7th Cir. 1993) (holding that domicile is ordinarily understood to mean physical presence and the intent to remain somewhere indefinitely); Anwo v. INS, 607 F.2d 435, 437 (D.C. Cir. 1979) ("[I]t is generally accepted that domicile is not established unless an individual intends to reside permanently or indefinitely in the new location.").

Defendant cites the United States Supreme Court's holdings in Elkins v. Moreno, 435 U.S. 647 (1978) and Toll v. Moreno, 458 U.S. 1 (1982), to suggest that aliens who are in the United States under a valid nonimmigrant visa can develop the subjective intent to remain in the United States indefinitely and, therefore, can legally establish domicile.[4] The Court in Elkins v. Moreno found that a certain class of temporary nonimmigrant aliens could establish domicile, but in doing so the Court looked closely at the intent of Congress when Congress established the particular visa classification. See Elkins v. Moreno, 435 U.S. at 664–665. The Court determined that under the law, "were a G-4 alien to develop a subjective intent to stay indefinitely in the United States he would be able to do so without violating [the law or the regulations] or the terms of his visa ... [and he/she] would not necessarily be subject to deportation ... [or] have to leave and re-enter the country in order to become an immigrant." Id. at 666–667. The Court found that Congress did not specifically limit the ability of G-4 visa holders to establish legal domicile. Id. at 664.

[4] The visas at issue in Elkins v. Moreno and Toll v. Moreno were "G-4" visas. See Elkins v. Moreno, 435 U.S. at 651; Toll v. Moreno, 458 U.S. at 3. A G-4 designation is given to an officer or employee of an international organization or their immediate family. 22 C.F.R. § 41.12.

The defendant also cites the United States Supreme Court holding in Toll v. Moreno, as further proof that nonimmigrant visa holders can establish domicile. The Supreme Court in Toll v. Moreno stated that the visa status of a G-4 visa holder allowed for the establishment of domicile. 458 U.S. at 17. The Court further noted, however, that "[f]or many ... nonimmigrant categories, Congress has precluded the covered alien from establishing domicile in the United States." Id. at 14.

Elkins v. Moreno and Toll v. Moreno involved G-4 visas, not TN Temporary Professional visas. See Elkins v. Moreno, 435 U.S. at 652; Toll v. Moreno, 458 U.S. at 3. G-4 visa holders are admitted for an indefinite period, have acquired special privileges, and are not required to file yearly visa renewal applications for continuation of their visa. See Elkins v. Moreno, 435 U.S. at 666; Toll v. Moreno, 458 U.S. at 14,17. Moreover, according to the Supreme Court, those admitted under a G-4 classification are permitted to establish domicile. Id. Neither Elkins v. Moreno nor Toll v. Moreno establish that any nonimmigrant visa holder, regardless of the type of visa classification held, can or cannot establish domicile, or address whether an individual with a visa which does not permit domicile might violate the terms of his/her visa and form domiciliary intent.

The Ninth Circuit in Carlson v. Reed, 249 F.3d 876, 877 (9th Cir. 2001) addressed the issue of whether a TN/TD Temporary Professional visa holder can form the intent to establish domicile in the United States and also discussed Elkins v. Moreno and Toll v. Moreno. The issue before the Ninth Circuit was whether a person holding a TD visa[5] can "possess the legal capacity to 'establish domicile in the United States' under federal immigration law." Id. at 878. In deciding that the holder of such a visa did not have the capacity to establish domicile, the court looked at the congressional intent when Congress established the visa program under the NAFTA. Id. at 880. The Ninth Circuit determined that "admission into the United States for TN/TD nonimmigrant aliens is expressly conditioned on an intent not to establish permanent residence here. It is evident that Congress has 'precluded [TN/TD visa holders] from establishing domicile in the United States' under Elkins and Toll." Id.[6]

The Supreme Court in Elkins v. Moreno and Toll v. Moreno, and the Ninth Circuit in Carlson v. Reed, looked at congressional intent when the respective visa programs were established. The Supreme Court also has indicated that "Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden." Boutilier v. INS, 387 U.S. 118, 123 (1967). "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over" the admission of aliens. Oceanic Navigation Co. v. Stanaham, 214 U.S. 320, 339 (1909).

Congress, when establishing the TN Temporary Professional visa program, clearly stated its intention that aliens seeking admission under the NAFTA as professionals should be classified as nonimmigrants. 8 U.S.C. § 1184(e)(2). Regulations promulgated pursuant to the NAFTA, while allowing Canadian citizens the opportunity to renew their TN visas, although requiring such renewal applications annually, also require the applicant to have the intent to remain in the country only temporarily. See 8 C.F.R. § 214.6(b).

Congress has established requirements for admission to the country under various immigration laws. "Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted ... is deportable." 8 U.S.C. § 1227(a)(1)(C)(i) (2000). The government retains the right to

[5] See 22 C.F.R. § 41.12. The "TD" visa symbol signifies "spouse or child of NAFTA Professional (TN)." TD and TN were often used interchangeably in Carlson v. Reed, 249 F.3d 876 (9th Cir. 2001).

[6] Other courts have addressed the issue of whether certain classes of visa holders can legally establish domicile based on the terms of the visa. See, e.g., Anwo v. INS, 607 F.2d at 437,438 (D.C. Cir. 1979) (holding that because petitioner held a student visa, petitioner could not establish a lawful domicile since by holding a student visa, petitioner was asserting that he intended to reside in the United States temporarily).

review the status of an alien to determine if the alien is in compliance with the terms of his visa. To prevent the defendant from attempting to prove that an individual alien is not in compliance with those laws would be equivalent to preventing the government from proving an individual had violated the terms of his or her visa. Indeed, courts have validated deportation of aliens for violating the terms of their visa. See, e.g., Reid v. INS, 420 U.S. 619, 624 (1975) (holding that an alien who makes false statements about being a United States citizen at the time of his entry to the United States may be deported as one who ''entered the United States without inspection.''); United States v. Tittjung, 235 F.3d 330, 342 (7th Cir. 2000), cert. denied, 533 U.S. 931 (2001) (upholding a district court's decision that an individual can be deported because his position as a Nazi concentration camp guard invalidated his previously issued visa); Mortazavi v. INS, 719 F.2d 86, 87–88 (4th Cir. 1983) (holding that the failure of a nonimmigrant student to attend school due to his suspension by the school constitutes grounds for deportation); Wettasinghe v. INS, 702 F.2d 641, 642 (6th Cir.1983) (holding that an alien was properly found deportable by the federal government when he entered the country on a nonimmigrant student visa and proceeded to start a business in direct violation of the terms of the visa).

The defendant asserts that it should be permitted to attempt to show that Dr. Jack was in the United States in violation of his TN Temporary Professional visa at the time of his death. ''While Dr. Jack had to satisfy the immigration authorities that he did not intend to reside permanently in the United States in order to obtain the annual TC and TN classifications,'' the defendant states that it should not be prevented from ''demonstrating that his intent changed, or was other than what he represented to the INS officers who stamped his passport.'' Plaintiff alleges that there is a presumption that Dr. Jack's domicile remained in Canada and that the defendant should be precluded from arguing that Dr. Jack had the intent to establish domicile in the United States because such an intent was specifically precluded by the visa held by Dr. Jack.

Although in order to hold a TN Temporary Professional visa Dr. Jack should not have had the legal intent to establish domicile, the defendant has rebutted the plaintiff's allegation of a presumption that at the time of his death Dr. Jack intended to remain domiciled in Canada by virtue of holding a TN visa. In the Notice of Deficiency (which was followed by an IRS assessment based on the Notice of Deficiency) the IRS determined that ''the decedent was domiciled in the United States on the date of death.'' ''It is well established in the tax law that an assess-ment is entitled to a legal presumption of correctness - a presumption that can help the Government prove its case against a taxpayer in court.'' United States v. Fior D'Italia, Inc., 122 S. Ct. 2117, 2122 [89 AFTR 2d 2002-2883] (2002) (citations omitted). The presumption in favor of the defendant, based on the assessment, pre-sumably made following proper inquiry by the government officials, outweighs the vague alleged presumption for which the plaintiff has cited no support. The govern-ment should be allowed an opportunity to prove, consistent with the notice of defi-ciency and the assessment, that Dr. Jack had developed the intent to domicile in the United States, even though in violation of the terms of his visa at the time of his death.

Whether Dr. Jack intended to make the United States his domicile is ''mainly a question of fact turning on [decedent's] intent to remain indefinitely in [the United States] or a lack of intent to make his home elsewhere.'' Carrasco-Favela v. INS, 563 F.2d 1220, 1222 (5th Cir. 1977) (citing Mas v. Perry, 489 F.2d 1396 (5th Cir.), cert. denied, 419 U.S. 842 (1974)). The United States Supreme Court, in Texas v. Florida, held:

> While one's statements may supply evidence of the intention requisite to establish domicile at a given place of residence, they cannot supply the fact of residence there; and they are of slight weight when they conflict with the fact.

This is the more so where, as here, decedent's declarations are shown to have been inspired by the desire to establish a nominal residence for tax purposes, different from his actual residence in fact.

Texas v. Florida, 306 U.S. 398, 425 (1939) (citations omitted).

As stated by the United States Court of Appeals for the Third Circuit, ''If [the decedent] complied with the terms of his temporary worker visa, then he could not have had the intent necessary to establish a domicile in this country. On the other hand, if he did plan to make the United States his domicile, then he violated the conditions of his visa and his intent was not lawful.'' Graham v. INS, 998 F.2d 194, 196 (3rd Cir. 1993). The IRS has previously determined that an illegal alien can establish domicile in the United States, allowing the agency to tax all assets in the alien's estate, both inside and outside the United States, upon the alien's death. Rev. Rul. 80-209, 1980-2 C.B. 248 (1980).

The decedent may have developed the intent to be domiciled in the United States although that would have put him in violation of the terms of his visa. The defendant has raised enough of an issue regarding Dr. Jack's domiciliary status at the time of his death and should be allowed an opportunity to establish that Dr. Jack had formed the intent to be domiciled in the United States at the time of his death for the purposes of assessing estate taxes. Although never to be assumed, there are those individuals who violate the terms of their visas. The defendant should be allowed to offer proof regarding Dr. Jack's intent.

CONCLUSION

The plaintiff's motion for partial summary judgment is DENIED. The defendant's motion for partial summary judgment is GRANTED.

IT IS SO ORDERED.

MARIAN BLANK HORN

Judge

¶2002-5741

UNITED STATES OF AMERICA, PLAINTIFF v. Eddie Lee MIMS and Erma Jentinico MIMS, DEFENDANTS. U.S. District Court, Southern Dist. of Georgia (DC GA) CASE NO.: 6:02-CV-00105, Nov. 14, 2002. Decision for Govt.

1. Return preparer penalties—injunctions. Return preparers were permanently enjoined from preparing or assisting preparation of returns that claimed fabricated tax credits for slavery reparations or other comparably frivolous items, from promoting any other abusive tax shelter schemes, and from engaging in further conduct subject to penalty under IRC §6701, IRC §6694, IRC §6695 and that interfered with tax law administration. Also, preparers were required to turn over to IRS names of all clients or other persons for whom they prepared returns or had any contact with regarding their fabricated credit and other abusive schemes; and to notify such persons of falsity and potentially punishable nature of such claims. *Reference:* United States Tax Reporter ¶74,075; 74,025.01(11). IRC §6694; 6695; 6701; 7402; 7407; 7408.

United States District Court, Southern District of Georgia, Statesboro Division,

PERMANENT INJUNCTION

EDENFIELD, DISTRICT JUDGE

This cause comes before the Court on the parties' joint motion for entry of permanent injunction. The Court, having reviewed the motion, finds that the motion should be granted.

IT IS THEREFORE ORDERED THAT:

A. **[1]** Pursuant to IRC § 7407, Defendants and their representatives, agents, servants, employees, attorneys, and any persons in active concert or participation with them, are prohibited from preparing federal-income-tax returns, amended returns, and other related documents and forms for others.

B. Pursuant to IRC § 7402, 7407, and 7408, Defendants and their representatives, agents, servants, employees, attorneys, and any persons in active concert or participation with them, are prohibited from directly or indirectly;

i. Further engaging in any conduct subject to penalty under IRC § 6701, i.e., preparing or assisting others in the preparation of any tax forms or other documents to be used in connection with any material matter arising under the internal revenue laws and which they know will (if so used) result in the understatement of income tax liability;

ii. Further engaging in any conduct subject to penalty under IRC § 6694, i.e., preparing any part of a return or claim for refund that includes unrealistic position;

iii. Further engaging in any conduct subject to penalty under IRC § 6695, i.e, failing to turn over a complete and accurate list of clients to the IRS upon request or a copy of all tax returns they prepared;

iv. Further acting as income-tax preparers; and

v. Further engaging in any conduct that interferes with the administration and enforcement of internal revenue laws.

C. Defendants and their representatives, agents, servants, employees, attorneys, and any persons in active concert or participation with them, are prohibited from preparing or assisting in preparing any return, amended return, or other document to be filed with the IRS claiming a credit or refund for ''second-class'' citizenship, reparations for slavery, or separate-but-equal laws, or any other fabricated tax credit or refund.

D. Pursuant to IRC §§ 7402, 7407, 7408, Defendants are orderedd to contact:

(1) all persons to whom they gave, sold, or distributed any materials espousing or related to the ''second-class'' citizenship, reparations for slavery, segregation, or separate-but-equal laws, or any other comparable tax credit

(2) all persons to whom Defendants prepared or assisted in preparing any federal income tax returns or tax-related documents; and

(3) all persons who contacted Defendants regarding a tax credit for ''second-class''citizenship, reparations for slavery, segregation, or separate-but-equal laws, or any other fabricated tax credit (in correspondence, by personal or telephone conversations, or through electronic means) and inform those persons that the Internal Revenue Code does not provide for a tax credit for ''second-class''citizenship, reparations for slavery, segregation, or separate-but-equal laws or any other fabricated tax credit; the falsity of the tax returns prepared on those persons' behalf; the possibility of the imposition of frivolous-return penalties against them; the possibility that the United States may seek to recover any erroneous payment they may have received; and the fact that a permanent injunction has been entered against Defendants.

E. Pursuant to IRC §§ 7402, 7407, 7408, Defendants are ordered to turn over to the United States all records in their possession or to which they have access, that identify (1) the persons or entities to whom gave or sold, directly or indirectly, any materials related to the ''second-class'' citizenship tax credit argument or similar argument, (2) the persons or entities for whom Defendants and their associates prepared or assisted in preparing any tax return or other tax-related document, and (3) the persons or entities who purchased or used any other tax shelter, plan, or arrangement that Defendants have promoted or otherwise been associated with.

SO ORDERED, this 14 day of Nov., 2002.

B. AVANT EDENFIELD

UNITED STATES DISTRICT JUDGE

¶2002-5742

UNITED STATES OF AMERICA, PLAINTIFF v. Melvyn W. TAYLOR,

Evelyn TAYLOR, Aurora Loan Services, and Elbar Investments, Inc., DEFENDANTS. U.S. District Court, Southern Dist. of Texas, (DC TX) CIVIL NO. H-01-2395, Nov. 14, 2002. Years 1990, 1991, 1992, 1994, 1995, 1996, 1997, 1998. Decision for Govt. in part.

1. Collection actions—reducing assessments to judgment—foreclosure—lien priority—property held by third party—judicial sales. Govt. was awarded final judgment against taxpayers in amount stated for unpaid taxes, interest and penalties. Also, govt.'s foreclosure complaint was upheld in part: govt.'s lien interest in all taxpayer's property clearly extended to land subsequently purchased by 3d party via IRC §7425(a) judicial sale/judicial proceeding; and tax liens were superior to all competing interests except loan co.'s admittedly priority claim up until date judicial proceeding commenced; but, tax liens filed after date judicial proceeding commenced were discharged by operation of IRC §7425(a). So, govt.'s right to proceeds of any tax sale of property, after accounting for loan co.'s priority interest, extended only to lien filings extant before judicial proceeding's commencement, with remainder going to 3d-party purchaser. *Reference:* United States Tax Reporter ¶74,035.01(30); 74,035.03(100); 74,255.01(3). IRC §6321; 7403; 7425.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION,

This case for tax indebtedness and foreclosure of federal tax liens was tried to the Court on November 7, 2002. Based on the evidence presented and the applicable law, the Court enters the following Findings of Fact and Conclusions of Law.[1]

FINDINGS OF FACT

1. Melvyn and Evelyn Taylor (the Taylors) owned the property (''Property'') described as:

Lot Thirty-Two (32), in Block Five (5), of Oaks of Devonshire, Section One (1), according to the map or plat thereof recorded in Volume 311, Page 58, of the Map Records of Harris County, Texas and being commonly known as 20215 Woodsboro Court, Spring, Texas 77388.

2. The Taylors owed federal income taxes, including penalties and interest, for the tax years 1990, 1991, and 1992, of $47,399.80 (as of Dec. 4, 2000).

3. A federal tax lien was filed on July 28, 1994, in Harris County, Texas for the Taylors' 1990, 1991 and 1992 liabilities.

4. It is undisputed that the federal tax lien filed on July 28, 1994, is superior to any interest in the Property of any party other than that of Aurora Loan Services, Inc.

5. The Taylors owed federal income taxes, including penalties and interest, for the tax years 1994, 1995, and 1996, of $24,069.93 (as of Dec. 4, 2000).

6. On November 16, 1998, a suit was filed in Cause No. 98-55154 in the 281st Judicial District Court of Harris County, Texas, (the ''state court suit'') seeking judicial foreclosure of a lien which secured then outstanding delinquent maintenance fees on the property owed by the Taylors to Oaks of Devonshire Homeowners Association for unpaid homeowner's association fees.

7. A federal tax lien was filed on November 20, 1998, in Harris County, Texas for the Taylors' 1994–1996 liability.

8. On March 12, 1999, a Default Judgment (the ''judgment'') was signed in the state court suit ordering foreclosure of the lien that secured the maintenance fees that were delinquent at the time of the filing of the judicial foreclosure suit on November 16, 1998.

9. On July 6, 1999, Elbar acquired title to the Property by purchase at a Constable's Sale held pursuant to the authority of the judgment in the Texas judicial foreclosure suit. The total amount of homeowner

[1] Any finding of fact that is more appropriately characterized as a conclusion of law shall be so construed and any conclusion of law more appropriately characterized as a finding of fact shall be so construed.

fees, attorneys fees and costs related to the foreclosure was $2,704.33.

10. No notice of this sale was provided to the Internal Revenue Service.

11. The Taylors owed federal income taxes, including penalties and interest, for the tax year 1997, of $13,117.00 (as of Dec. 4, 2000).

12. A federal tax lien was filed on September 13, 1999, in Harris County, Texas for the Taylors' 1997 liability.

13. The Taylors owed income taxes, including penalties and interest, for the tax year of 1998, of $11,216.24 (as of Dec. 4, 2000).

14. A federal tax lien was filed on June 5, 2000, in Harris County, Texas for the Taylors' 1998 liability.

15. The Notice of Federal Tax Lien recorded on July 28, 1994, under County Clerk's File No. P980011 of the Real Property Records of Harris County, Texas, is superior to any interest held in the Property by Elbar.

16. It is undisputed that both the Notice of Federal Tax Lien recorded on September 13, 1999, under Clerk's File Number T961162 of the Real Property Records of Harris County, Texas, and the Notice of Federal Tax Lien recorded on June 5, 2000, under Clerk's File Number U425880 of the Real Property Records of Harris County, Texas, are inferior to any interest held in the Property by Elbar.

CONCLUSIONS OF LAW

17. The United States acquired a lien on all property and rights to property, whether real or personal, of the Taylors after their failure or neglect to pay federal income taxes. *See* 26 U.S.C. § 6321. The federal tax liens also include all additions to tax, including interest, penalties and costs. *See id.; Zink v. United States*, No. H-79-535, 1981 WL 1951, at 3 (S.D. Tex. June 5, 1981).

18. The United States' federal tax liens were filed in the Harris County, Texas real property records. *See* 26 U.S.C. § 6323(f)(1)(A)(i).

19. The March 12, 1999, state court judgment and the July 6, 1999, sale of the Property followed a plenary judicial proceeding in which pleadings were filed, parties notified by service of process and evidentiary proof was made of the indebtedness that was the subject of the state court suit. *See* 25 C.F.R. § 301.7425 -1(a) (Judicial proceedings subject to sec-tion 7425(a) are ''plenary in nature and proceed of formal pleadings''); *compare with*26 C.F.R. § 301.7425-2 (describing non-judicial proceedings).

20. **[1]** Accordingly, the judgment of foreclosure obtained on March 12, 1998, was a ''judicial proceeding'' within the meaning of 26 U.S.C. § 7425(a). *See United States v. Capobianco*, 836 F.2d 808, 817 [61 AFTR 2d 88-370] (3d Cir. 1998) (judgment obtained in a plenary proceeding for mortgage foreclosure is a ''judicial sale'' within the meaning of section 7425); *A.H. & R.S. Coal Corp. v. United States*, 461 F. Supp. 752, 754–55 [42 AFTR 2d 78-5928] (W.D. Pa. 1978) (explaining that, under section 7425, a judicial sale is typically based on an order or judgment made pursuant to a judicial decree); *cf. Myers v. United States*, 647 F.2d 591, 597 [48 AFTR 2d 81-5223] (5th Cir. 1981) (non-plenary executory proceedings are not ''judicial proceedings'' within the meaning of section 7425(a)).[2]

21. The judgment rendered on March 12, 1999, is subject to the lien of the United States filed on July 28, 1994, because that lien was filed before the state court suit was instituted. *See* 26 U.S.C. § 7425(a)(1).

22. The judgment rendered on March 12, 1999, is *not* subject to any lien filed by the Internal Revenue Service *after* November 16, 1998, the date on which the state

[2] The argument of the United States that the state court proceeding at issue here did not result in a ''judicial sale'' within the meaning of 26 U.S.C. § 7425(a) because this sale followed a ''default'' judgment is rejected. The primary purpose of the notice provisions of section 7425 is to protect the interests of the United States in instances where, for example, a summary state law procedure does not require notice to potentially affected parties before disposition of the property. *See* Federal Tax Lien Act of 1966, Pub. L. 8-9719, 1966 U.S.C.C.A.N. 3722, 3748 (Discharge of Liens Held by United States (Sec. 109 of the Bill and Sec. 7425 of the Code)). The purpose underlying section 7425 is not to protect the United States against extinction of its rights where, as here, the United States has not filed a notice of tax lien *before* judicial proceedings were commenced.

court action was filed. *See* 26 U.S.C. § 7425(a)(2); *see also* C.F.R. § 301.7425-1(c)(3)(i) (''Where the United States is not joined as a party in the court proceeding and . . . a notice of lien has not been filed . . . at the time the action or suit is commenced . . . a judgment or judicial sale pursuant to such a judgment shall have the same effect with respect to the discharge or divestment of the lien of the United States as may be provided with respect to these matters by the local law of the place where the property is situated.''); *id. at* (3)(ii) (examples of judicial sales discharging federal tax liens filed after commencement of suit); *Capobianco*, 836 F.2d at 817.

23. The Taylors are indebted to the United States for the amounts set forth above plus interest and any statutory additions accruing since December 4, 2000. *See, e.g.*, 26 U.S.C. § 6321 (providing for interest, additional amount, addition to tax, assessable penalties and costs); 26 U.S.C. § 6621 (rate of interest); and 28 U.S.C. § 6621 (assessments of surcharges).

24. The United States is entitled to a judgment for the total amount owed by the Taylors plus interest and all statutory additions. *See, e.g.*, 26 U.S.C. §§ 6321, 6621; and 28 U.S.C. § 6621.

FINAL JUDGMENT

VANESSA D. GILMORE UNITED STATES DISTRICT JUDGE

For the reasons stated in the Court's Findings of Fact and Conclusions of Law signed on the 14th day of November 2002,

IT IS HEREBY ORDERED that the United States is awarded a judgment against Melvyn W. Taylor and Evelyn Taylor for the total amount owed by the Taylors which, calculated as of December 4, 2000, was $ 95,802.97, plus any additional interest and all statutory additions.

IT IS FURTHER ORDERED that the United States is entitled to foreclose on the subject Property, either administratively or judicially. The proceeds of any sale should first be applied to the security interest of Aurora, then to the United States for the Taylors' tax liabilities on the years 1990–1992, then to Elbar.

THIS IS A FINAL JUDGMENT.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED this the 14th day of November, 2002, at Houston, Texas.

VANESSA D. GILMORE

UNITED STATES DISTRICT JUDGE

¶2002-5743

Robert J. DAVY, PLAINTIFF v. SIX RECORDS OF LIEN and IRS/Executive in Charge, DEFENDANT. U.S. District Court, Northern Dist. of Florida, (DC FL) CASE NO. 1:02cv109 MMP, Oct. 24, 2002. Decision for Govt.

1. Actions against IRS employees—lien discharge—jurisdiction—removal and remand—sovereign immunity. Action taxpayer filed under Florida construction lien law for discharge of federal tax lien was dismissed: construction lien law clearly didn't apply to federal tax liens. Also, case's removal from state to federal court was proper under 28 USC §1442. *Reference:* United States Tax Reporter ¶74,336.508(60); 74,336.506(25).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION,

ORDER

Maurice M. Paul, Senior District Judge

[1] This matter is before the Court on the motion to dismiss filed by the defendant (doc. 4) on September 9, 2002. The plaintiff did not file a response to the motion to dismiss within the time period specified by Local Rule 7.1(C)(1). However, the plaintiff sent a letter to the United States which contained his responses to the motion to dismiss and arguments amounting to a motion to remand this case to state court. The defendant submitted a copy of the letter to the Court as an attachment to doc. 8, and the Court has reviewed the re-

sponse. For the reasons given below, the implicit motion to remand is denied, and the defendant's motion to dismiss is granted.

The plaintiff filed a suit in state court seeking to have the state court discharge several federal tax liens under the auspices of Fla. Stat. 713.21(4). The defendant removed the case to federal court, noting that the United States, or one of its agencies, the Internal Revenue Service, was the defendant. Such an action is removable under 28 U.S.C. § 1442(a)(1). The defendant then moved to dismiss, arguing that 713.21(4) applied only to construction liens and also arguing that the United States has not waived its sovereign immunity for a suit such as this one.

The Court agrees with the government that the Complaint clearly does not state a claim and therefore declines to answer the sovereign immunity question. The Florida statutory provision that plaintiff relies on, Fla. Stat. 713.21, states as follows:

> 713.21 Discharge of Lien
>
> A lien properly perfected under this chapter may be discharged by any of the following methods:
>
> (4) By an order of the circuit court of the county where the property is located, as provided in this subsection. Upon filing a complaint therefore by any interested party the clerk shall issue a summons to the lienor to show cause within 20 days why his lien should not be enforced by action or vacated and canceled of record. Upon failure of the lienor to show cause why his lien should not be enforced or his failure to commence such action before the return date of the summons the court shall forthwith order cancellation of the lien.

The first sentence of 713.21 points out that it applies only to a "lien properly perfected under this chapter." Chapter 713 is entitled "Construction Liens" and section 713.02 sets out the "Types of Lienors and Exemptions" covered by the chapter. The individuals who are entitled to perfect a lien under Chapter 713 are those who "render professional services," such as an "architect, landscape architect, interior designer, engineer, or surveyor and mapper," Fla. Stat. 713.03; a person who "performs services or furnishes material to real property for the purpose of making it suitable as the site for the construction of an improvement or improvements," Fla. Stat. 713.04; or "a materialman or laborer . . . or a contractor who complies with the provisions of this part," Fla. Stat. 713.05–06. Nowhere in Chapter 713 is a tax lien mentioned as one "perfected under this chapter."

In short, with regard to tax liens, Fla. Stat. 713.21 does not provide the method of relief the plaintiff seeks. Therefore, the Court agrees with the United States that the plaintiff's complaint fails to state a claim upon which relief can be granted.

Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. The plaintiff's motion for remand, contained within the letter attached to doc. 8, is DENIED. This case was properly removed to this Court.

2. The defendant's motion to dismiss (doc. 4) is GRANTED.

3. The Clerk shall enter judgment in favor of the defendant and is directed to close this case.

DONE AND ORDERED this 23rd day of October, 2002.

Maurice M. Paul, Senior District Judge

JUDGMENT

This action came to trial or hearing before the Court with the Honorable Maurice M. Paul presiding. The issues have been tried or heard and a decision has been rendered.

Judgment is entered in favor of the Defendants, SIX RECORDS OF LIEN and IRS/EXECUTIVE IN CHARGE, and against the Plaintiff, ROBERT J. DAVY, pursuant to Court's order granting defendants' Motion to Dismiss. This case is closed. Cost are allowed as provided by law.

October 24, 2002

DATE

WILLIAM McCOOL, CLERK OF COURT

Deputy Clerk: Louise Trautman

¶2002-5744

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Donald Ray NANCE, DEFENDANT-APPELLANT. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 01-1143, Nov. 6, 2002. District Court affirmed. Years 1993, 1994. Decision against Taxpayer.

1. Tax crimes—tax evasion—sentencing—departures; enhancements. Taxpayer/CFO's 70-month sentence and order to make restitution for tax evasion and bank fraud were affirmed: denial of 2-level acceptance of responsibility reduction was proper where taxpayer's failure to fully disclose his financial information, in order to conceal assets, showed unwillingness to fully accept ramifications of his actions; his interference with govt.'s ability to prosecute and punish his crimes, even after he entered guilty plea, indicated that he hadn't truly accepted responsibility; and his prior obstructive acts, which already resulted in obstruction of justice sentence enhancement, further supported reduction's denial. Also, 2-level abuse of trust enhancement was warranted where taxpayer used his CFO position to embezzle co.'s payroll taxes; and imposing separate enhancements for failure to report criminal activity income and for embezzlement wasn't impermissible double counting since conduct underlying each enhancement was distinct. *Reference:* United States Tax Reporter ¶73,446.516(55).

United States Court of Appeals, Sixth Circuit,

On Appeal from the United States District Court for the Eastern District of Michigan.

Before KENNEDY, NORRIS and BATCHELDER, Circuit Judges.

KENNEDY, Circuit Judge.

This case was not selected for publication in the Federal Reporter.

NOT RECOMMENDED FOR FULL--TEXT PUBLICATION

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

Defendant Donald Ray Nance appeals the sentence imposed under the United States Sentencing Guidelines after his conviction on tax evasion and bank fraud charges. Finding no error in the imposition of the challenged enhancement, we affirm.

I.

Nance was the chief financial officer of ServiceMax Tire and Auto Centers of Michigan. In 1993 and 1994, he prepared two sets of employment tax returns--one stating the correct amount of tax due. which he sent to corporate headquarters, and the other stating a lower amount due, which he sent to the Internal Revenue Service. Nance stole the excess paid by his employer, forged the company bookkeeper's name, destroyed company documents, and did not report the embezzled amount on his personal income tax. Nance also defrauded Bank One by falsely claiming that he was president of his company in order to obtain a line of credit from the bank, and making false statements on a home equity loan application.

Nance pled guilty and was sentenced to 70 months incarceration plus five years of supervised release, as well as substantial monetary restitution. The initial presentence investigation report recommended that Nance receive an enhancement for obstruction of justice and a reduction for acceptance of responsibility. After the presentence report was prepared, however, probation officers discovered that Nance had provided false financial information in an attempt to conceal his assets. On that basis, the court rejected the accept-

ance of responsibility reduction. The sentencing judge also applied an abuse of trust enhancement on the grounds that Nance had abused the trust placed in him by his employer by taking advantage of his position as chief financial officer to embezzle money. Nance appeals both of these sentencing decisions.

II.

A. The Denial of an Acceptance of Responsibility Reduction

[1] The Sentencing Guidelines allow a two-level reduction in total offense level "if the defendant clearly demonstrates acceptance of responsibility for his offense." United States Sentencing Guidelines § 3E1.1(a). The district court's determination that a defendant is not entitled to an acceptance of responsibility adjustment is reviewed for clear error. *United States v. Christoph,* 904 F.2d 1036, 1040 (6th Cir.1990), *cert. denied,* 498 U.S. 1041 (1991). "The determination of the sentencing judge is entitled to great deference on review and should not be disturbed unless it is without foundation." *United States v. Wilson,*878 F.2d 921, 923 (6th Cir.1989).

Nance contends that the district court denied the adjustment as a substitute punishment for obstruction of justice, rather than engaging in a genuine inquiry as to his acceptance of responsibility. The district court did note that because Nance had already received an obstruction of justice enhancement, that avenue for addressing Nance's continuing deceptive behavior was not available to the court. However, the district court did not stop there; it linked Nance's deception to his lack of recognition and affirmative acceptance of responsibility. Although Nance fully admitted the truth of the charges against him, the district court found that his failure to expose his assets so that the court might impose the appropriate penalty for his offense demonstrated an unwillingness to face the full ramifications of his actions.[1] *See United States v. Cross,* 900 F.2d 66, 70 (6th Cir.1990) (affirming the denial of an acceptance of responsibility reduction in part because the defendant "refused to provide financial information so that the court could assess a fine proportional to his ability to pay."). *See also United States v. Loeb,* 45 F.3d 719 (2d Cir.1995), *cert. denied,* 514 U.S. 1135 (1995) (denying acceptance of responsibility adjustment where defendant fled to avoid sentencing). The fact that Nance interfered with the judicial system's ability to prosecute and punish his crimes even after he entered a guilty plea indicates that Nance had not accepted responsibility for his criminal conduct. *See, e.g., United States v. Honken,* 184 F.3d 961, 970 (8th Cir.1999) (noting that "virtually every defendant who receives an acceptance of responsibility adjustment commits no obstruction of justice between the guilty plea and the sentencing hearing, for post-plea obstructive conduct would almost certainly be disqualifying."), *cert. denied,* 528 U.S. 1056 (1999). His prior obstructive acts, which resulted in the original enhancement for obstruction of justice, also support the district court's decision, for it is only the "extraordinary case" in which both an obstruction of justice enhancement and an acceptance of responsibility reduction apply. U.S.S.G. § 3E1.1(a), cmt. n. 4. The district court's decision not to award the reduction is not clearly erroneous.

B. The Application of an Abuse of Trust Enhancement

A defendant's offense level will be enhanced by two levels if he abuses a position of public or private trust "in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. "For this adjustment to apply, the position of public or private trust must have contributed in some significant way to facilitating the commission or concealment of the offense." U.S.S.G. § 3B1.3, cmt. n. 1. The determination that a defendant occupied a position of trust is a question of law that this court reviews *de novo.*

[1] The court noted that "after [Nance] did these--committed these criminal acts for which he finally admitted his guilt, but then to go on with this pattern in an attempt or what seems to be an attempt to avoid either the imposition of severe restitution obligations or--or a considerable fine by muddying the waters regarding his financial affairs and with these very convoluted transactions, a very clever pattern." (Sentencing Tr. at 3–74, J.A. 181).

United States v. Young, 266 F.3d 468 (6th Cir.2001).

The Introductory Commentary to Section 3, Part B of the Sentencing Guidelines provide that the abuse of trust enhancement should be based not only on the "elements and acts cited in the count of conviction," but also all relevant conduct within the scope of § 1B1.3(a). This includes "all acts and omissions . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense," "all acts and omissions . . . that were part of the same course of conduct or common scheme or plan as the offense of conviction," as well as "all harm that resulted from [those] acts and omissions." U.S.S.G. §§ 1B1.3(a)(1)–(3). Nance admits he embezzled money from and lied to his employer, with respect to whom he did occupy a position of trust. These acts were conduct relevant to his tax evasion conviction. *See United States v. Young*, 266 F.3d 468 (6th Cir.2001) (embezzlement of employer's funds is relevant conduct to money laundering charge and therefore abuse of trust enhancement applies); *United States v. Cianci*, 154 F.3d 106 [82 AFTR 2d 98-5829] (3d Cir.1998) (uncharged embezzlement is relevant conduct to tax evasion charge and therefore abuse of trust enhancement applies).

Nance counters that the abuse of trust enhancement is double counting because he already received an enhancement under U.S.S.G. § 2T1.1(b)(1) for failing to report income received from criminal activity.[2] Nance apparently believes that since the failure to report the embezzled money was already the basis for his § 2T1.1(b)(1) enhancement, the act of embezzling that money cannot also be the basis for his abuse of trust enhancement. This theory fails, since the conduct underlying each of those enhancements is clearly distinct--failure to report the proceeds from a criminal act on the one hand, and the criminal act itself on the other hand. *See United States v. Farrow*, 198 F.3d 179. 193 (6th Cir.2000) (noting the "well-established rule" that "impermissible 'double counting' occurs when precisely the same aspect of a defendant's conduct factors into his sentence in two separate ways."). The district court properly applied the abuse of trust enhancement.

For the forgoing reasons, we AFFIRM the sentence imposed by the district court.

¶2002-5745

C. Robert SUESS, ET AL., PLAINTIFFS v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) Case No. 90-981 C, Dec. 3, 2002. Decision against Taxpayer in part.

1. Actions against U.S.—covered asset losses—damages—motion to reconsider—receivership tax liability. FDIC and bank were denied reconsideration of decision on amount of damage award against govt. for "lost equity value" of failed S&L Assoc. Also, govt.'s reconsideration request was held in abeyance pending determination of receivership's tax liability since such determination could potentially eclipse claimant shareholders' recovery rights and result in situation where, because none of money that govt. owed on damages award would actually leave govt., no actual case or controversy would remain. *Reference:* United States Tax Reporter ¶5935.01(60); 68,727.52(20). IRC §593.

Don S. Willner, Willner U'Ren & Hooten, LLP, Portland, Oregon, for plaintiffs.
Bruce C. Taylor, Federal Deposit Insurance Corporation, Washington, D.C. for the FDIC as plaintiff in its capacity as Manager of the FSLIC Resolution Fund-RTC and as receiver for and successor in interest to Benjamin Franklin Federal Savings & Loan Association.
Jonathan S. Lawlor, with whom were *Jeanne E. Davidson*, Deputy Director, and *David M. Cohen*, Director, Commercial

[2] Section 2T1.1(b) provides: "If the defendant failed to report or to correctly identify the source of income exceeding $10.000 in any year from criminal activity, increase by 2 levels."

Litigation Branch, Civil Division, Department of Justice, Washington, D.C. for defendant.

In the United States Court of Federal Claims,

ORDER

SMITH, Senior Judge.

Winstar-related case;

Motions for Reconsideration.

[1] After a trial on damages, this matter was decided on April 1, 2002, and published at 52 Fed. Cl. 221 (2002). On June 6, 2002, judgment was entered for plaintiffs in the amount of $34,672,500, representing the "lost equity value" of Benjamin Franklin Federal Savings & Loan Association. Defendant filed a Motion for Reconsideration on June 20, 2002, and plaintiffs and plaintiff-FDIC responded on July 24, 2002. On July 31, 2002, defendant filed its reply. Plaintiffs also filed a Motion for Reconsideration on July 10, 2002, and defendant and plaintiff-FDIC responded on July 24, 2002. On July 31, 2002, plaintiffs filed their reply. The Court held oral argument on the Motions for Reconsideration on November 21, 2002. After reviewing the briefs and hearing oral argument, the Court hereby DENIES plaintiffs' Motion for Reconsideration, and WITHHOLDS decision on defendant's Motion for Reconsideration until the issue of the receivership's tax liability is resolved.

On April 22, 2002, the IRS filed an Amended Proof of Claim with the FDIC in connection with the receivership proceeding of the Benjamin Franklin Federal Savings & Loan Association. The Amended Proof of Claim reflected a total an indebtedness of $1,077,768,461 for income tax liabilities of the receivership. On July 17, 2002, the IRS sued the FDIC in the U.S. District Court for the District of Columbia to determine the validity, amount, and status under 12 C.F.R. § 360.3 of the receivership's tax liability. *See United States v. FDIC*, No. CV-02-01427 (D.D.C. July 17, 2002). The plaintiffs filed a Motion to Intervene and to transfer the suit to the United States District Court for the District of Oregon on September 16, 2002. As of the date of this Order, that motion is still pending.

Oral argument revealed that the determination of the validity, amount, and status of the receivership's income tax liability would significantly assist the Court in resolving the defendant's Motion for Reconsideration. For instance, *if* the tax claim overwhelms both the existing receivership surplus (valued at $88 million as of December 31, 2001) and the $34.7 million damage award, then under the receivership distribution system no monies would flow to the shareholder plaintiffs. Therefore, following the Federal Circuit's reasoning in *Landmark Land Co., Inc. v. United States*, 256 F.3d 1365, 1380 (Fed. Cir. 2001), where "none of the money paid by the government in satisfaction of such a judgment would leave the government" the remaining claims in this matter would "not give rise to an actual case or controversy." For these reasons, and in an effort to conserve judicial resources at this Court and at the Federal Circuit, the Court withholds ruling on defendant's Motion for Reconsideration until the tax claim is resolved.

As discussed at the conclusion of oral argument, the Court also ORDERS the parties to file a Joint Status Report, no later than March 28, 2003, informing the Court as to the status of the tax claim litigation.

It is so ORDERED.

LOREN A. SMITH,

Senior Judge

¶2002-5746

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Darryl J. PETERSON, DEFENDANT-APPELLANT. U.S. Court of Appeals, Tenth Circuit, (CA10) No. 02-3076, Dec. 9, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—tax evasion—U.S. Sentencing Guidelines—double counting. Taxpayer's sentence for tax evasion and mail fraud was affirmed: district court didn't err in using victim's testimony to determine taxpayer's base offense level ab-

sent any relevant rebuttal evidence; and court's refusal to group offenses under U.S.S.G. §3D1.2(c) was proper according to case precedent, statutory notes and fact that tax and mail fraud weren't ''closely related'' offenses involving same victims, behaviors, or harms. *Reference:* United States Tax Reporter ¶73,446.516(55).

David J. Phillips, Federal Public Defender and Marilyn M. Trubey, Assistant Federal Public Defender, Topeka, Kansas, for Defendant-Appellant.
Eric F. Melgren, United States Attorney and Nancy Landis Caplinger, Assistant U.S. Attorney, Topeka, Kansas, for Plaintiff-Appellee.

UNITED STATES COURT OF APPEALS TENTH CIRCUIT,

Appeal from the United States District Court for the District of Kansas

Before SEYMOUR, HENRY and BRISCOE, Circuit Judges.

SEYMOUR, Circuit Judge.

(D.C. No. 01-CR-40053-01-SAC)

PUBLISH

On the Briefs:

Darryl J. Peterson was convicted of mail fraud and tax evasion and sentenced to thirty months on each count, to run concurrently. He now challenges the district court's sentencing decision on two grounds. He contends the court erred in determining the amount of loss and in refusing to group the two counts of conviction. For the reasons set forth below, we affirm.

I

During a three year period of contract employment with two companies, Midwest Staff Leasing, L.L.C., and Midwest Construction Staff Leasing, L.L.C., Mr. Peterson embezzled funds and used the mail to cover up his embezzlement. In addition, he failed to report the embezzled funds on his income tax returns. In fact, he failed to file any individual income tax returns or pay any individual income taxes for a period of three years roughly coinciding with the embezzlement. In that same period, no employment taxes were withheld from his salary. Although Mr. Peterson did file a tax return for the last calendar year in which he embezzled funds, he did not include the embezzled amounts as income.

Mr. Peterson was charged with one count of mail fraud in violation of 18 U.S.C. 1341, and one count of tax evasion in violation of 26 U.S.C. 7201. He pled guilty on both counts. At the sentencing stage, the district court calculated Mr. Peterson's base offense level from its determination of the amount of loss sustained. The court considered arguments on the possibility of a multiple count adjustment, but declined to group the counts. Mr. Peterson challenges both the amount of loss and the refusal to group the counts.

II

[1] For the purpose of determining a base offense level, the district court was required to calculate the total amount of loss resulting from Mr. Peterson's illegal activities. We review factual determinations such as this for clear error. United States v. Schild, 269 F.3d 1198, 1200 (10th Cir. 2001).

The district court explicitly referred to the evidence it considered on the amount of loss, including the victim's spreadsheets itemizing each check written during the relevant period and noting whether each check was authorized or not. The court also considered the victim's affidavit as to the amount of loss. Although Mr. Peterson asserts the amount was actually much lower than the figures put forward by the victim, he has not pointed to any evidence supporting the figure he advocates, nor any evidence disputing the reliability of the victim's calculations. He simply contends instead that the district court erred in making its determination based on what he asserts were ''self-serving statements of the victim,'' not amounting to a preponderance of the evidence. Aplt. Br. at 7.

Based on the evidence before it, the district court determined by a preponderance of the evidence that the total amount of loss as a result of Mr. Peterson's embez-

zlement was $529,006.99. We are not persuaded the court clearly erred in reaching this result.

III

Having determined the base offense level, the district court considered Mr. Peterson's arguments in favor of grouping the tax evasion and mail fraud counts for a multiple count adjustment pursuant to U.S.S.G. 3D1.2(c). That guideline pro-vides:

> All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:
>
> . . .
>
> (c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

Mr. Peterson contended the two counts of conviction should be grouped under 3D1.2(c) because the guideline for tax evasion in U.S.S.G. 2T1.1(b) includes a two level increase for the failure to report income exceeding $10,000 in any year from criminal activity. Two levels were thus added to Mr. Peterson's base offense level for income generated by the mail fraud pursuant to 2T1.(b). Nevertheless, the district court was not persuaded that grouping was appropriate.

We review de novo the district court's interpretation and application of the sentencing guidelines. United States v. Chavez-Valenzuela, 170 F.3d 1038, 1039 (10th Cir. 1999). The circuits are divided over whether to group mail fraud and tax evasion under 3D1.2(c). We have not directly addressed the question in the context of that guideline, but have done so under 3D1.2(d). See United States v. Lindsay, 184 F.3d 1138, 1142–43 [84 AFTR 2d 99-5102] (10th Cir. 1999) (holding mail fraud and tax evasion do not involve substantially same harm so should not be grouped).[1]

Mr. Peterson points to a Fifth Circuit decision holding that the two crimes should be grouped under 3D1.2(c) where, as here, the offense level for tax evasion is enhanced two points for unreported income from mail fraud. United States v. Haltom, 113 F.3d 43 [79 AFTR 2d 97-2779] (5th Cir. 1997). On the other hand, the Third, Fourth, and Sixth Circuits have held that tax evasion should not be grouped with mail or wire fraud or with money laundering. Weinberger v. United States, 268 F.3d 346, 354–55 [88 AFTR 2d 2001-7226] (6th Cir. 2001) (rejecting grouping of tax evasion and mail fraud counts); United States v. Morris, No. 00-4043, 2000 WL 1260162 [86 AFTR 2d 2000-5986] (4th Cir. Sept. 6, 2000), cert. denied, 531 U.S. 1203 (2001) (no error in refusing to group money laundering and tax evasion counts); United States v. Vitale, 159 F.3d 810, 813–15 [82 AFTR 2d 98-7098] (3d Cir. 1998) (declining to group wire fraud and tax evasion). The Third Circuit dismissed the Haltom rationale as unpersuasive, and expressly declined to follow an advisory issued by the Sentencing Commission's Training Staff stating that tax evasion should always be grouped with mail or wire fraud. Vitale, 159 F.3d at 815 (affirming reasoning in United States v. Astorri, 923 F.2d 1052 (3d Cir. 1991), and declining to follow Questions Most Frequently Asked About the Sentencing Guidelines, Vol. V, March 1, 1992). The Training Staff advisory is not binding and does not represent the Commission's official position on the matter. Id. at 815. The Third Circuit reasoned that tax evasion and wire fraud represent different criminal conduct and grouping them in this type of case "would have the anomalous result that an enhancement designed to increase a sentence has the effect of reducing it." Id. at 814.

When we addressed grouping counts of mail fraud and tax evasion under U.S.S.G. 3D1.2(d), we held that the two offenses in-

[1] U.S.S.G. 3D1.2(d) provides that counts involve substantially the same harm "[when] the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior."

volve different harms and should not be grouped. Lindsay, 184 F.3d at 1142–43. In declining to group these two crimes, we pointed out that the victims of the offenses are distinct because society is harmed by tax evasion, whereas an individual is harmed by mail fraud. Moreover, we said the offenses involve distinct behavior, and the measures of harm attributable to each offense are distinct. Id. at 1143. Relying on Lindsay, the district court here similarly emphasized the differences between tax evasion and mail fraud:

> To put it succinctly, the mail fraud and tax evasion convictions are based on different elements, affected different victims, and involved different criminal conduct. To commit these crimes, the defendant had to make separate decisions to violate different laws. These differences, as well as the different harms, demonstrate the convictions are not ''closely related'' for purposes of 3D1.2.
>
> Moreover, the court believes the specific offense characteristic for failure to report criminally-derived income is not sufficiently based here on conduct embodied in the mail fraud count as to warrant grouping. Section 2T1.1(b)(1) speaks to the defendant failing to report or identify the source of income coming from criminal activity. The conduct embodied in the mail fraud conviction was the defendant obtaining by mail the checks written by Ms. Arnold for employment taxes and using those monies to conceal what he had embezzled from the companies. The defendant also used the mail to have the company's bank statements sent directly to him in order to keep others from learning about his embezzlement. In other words, the specific offense characteristic for the tax evasion count relates to the defendant's subsequent decision and conduct regarding the tax treatment of those monies he embezzled from the companies, and this conduct is not embodied within the defendant's use of the mail to conceal the embezzlement from the victims. The court finds this is not a situation of double counting.

Rec., vol. II, Ruling on Objections to the Presentence Report at 9–10 (citation omitted).

We agree with the district court's reasoning and we note as well that the enhancement in 2T1.1(b)(1), the tax evasion guideline, serves a different purpose than the enhancement in 2F1.1(b)(1)(k), the mail fraud guideline, which is yet another reason there was no impermissible double counting in this case. See United States v. Flinn, 18 F.3d 826, 830 (10th Cir. 1994) (no double counting where enhancement provisions serve different purposes). The purpose for the increase under 2F1.1(b)(1)(k) is to account for the seriousness of the crime in terms of the amount of money involved. The purpose for the increase under 2T1.1(b)(1) is to account for the fact that

> [c]riminally derived income is generally difficult to establish, so that the tax loss in such cases will tend to be substantially understated. An enhancement for offenders who violate the tax laws as part of a pattern of criminal activity from which they derive a substantial portion of their income also serves to implement the mandate of 28 U.S.C. 994(i)(2).

U.S.S.G. 2T1.1 Background.

Application Note 5 to 3D1(c) elaborates on the applicability of the subsection, emphasizing that it applies only where the two counts are ''closely related.'' U.S.S.G. 3D1.2(c), comment. (n.5). We are convinced that tax evasion and mail fraud are not closely related because the victims of tax evasion and mail fraud are not the same, the offenses involve distinct behaviors, the purposes of the enhancements are different, and the harms attributable to each crime are dissimilar. Accordingly, the district court correctly declined to group the tax evasion and mail fraud counts in this case.

We AFFIRM.

¶2002-5747

Susan ZIMMERMAN, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. Donald ZIMMERMAN, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Tenth Circuit, (CA10) No. 02-9004; No. 02-9005, Dec. 9, 2002. Tax Court affirmed, and appeal dismissed. De-cision for Govt.

1. Appeals to Courts of Appeal—jurisdiction—untimely appeal notice—timely mailing as timely filing—illegible postmark—proof. Taxpayer-husband's appeal of Tax Court deficiency and reconsideration decisions against him was dismissed for lack of jurisdiction: hus-band's appeal notice wasn't timely filed; and IRC §7502's deemed filing rule didn't apply absent any legible proof of allegedly timely, original postmark. Also, Court's dismissal for failure to state claim of wife's separate petition and denial of her meritless reconsideration motion were affirmed, based on Court's reasoning. *Reference:* United States Tax Reporter ¶74,825.09(10); 75,025.01(17); 74,536.12351(15). IRC §7482; 7502.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,

Before SEYMOUR, EBEL, and O'BRIEN, Circuit Judges.

ORDER AND JUDGMENT*

David M. Ebel Circuit Judge

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

We have consolidated these appeals for purposes of disposition. In No. 02-9004, Susan Zimmerman petitions for review of decisions of the Tax Court granting the respondent's motion to dismiss her petition and denying her motion for reconsidera-tion/motion for new trial. Similarly, in No. 02-9005, Donald Zimmerman petitions for review of the Tax Court's decisions dismissing his petition and denying his motion for reconsideration/motion for new trial. We dismiss Donald Zimmerman's petition for review for lack of jurisdiction. We affirm the Tax Court's decisions concerning Susan Zimmerman's petition.

1. Timeliness of Donald Zimmerman's petition for review

[1] At the outset, we must address whether we have jurisdiction over Donald Zimmerman's petition for review. Under Fed. R. App. P. 13(a)(1), a petitioner must file his petition for review within ninety days of the entry of the Tax Court's decision. If the petitioner makes a timely motion to vacate or revise the Tax Court's decision, however, the time to file a notice of appeal runs from the entry of the order disposing of that motion. Id. 13(a)(2).

The Tax Court entered a final order in Donald Zimmerman's case on October 5, 2001. He filed a timely motion for reconsideration on December 4, 2001.(1) The Tax Court denied his motion on December 7, 2001. Mr. Zimmerman's former counsel mailed a notice of appeal to the Tax Court 125 days later, on April 11, 2002.

This April 11, 2002 notice of appeal was untimely. Mr. Zimmerman's former counsel, however, also sent a letter to the Tax Court stating that she had mailed an original notice of appeal to the Tax Court on February 26, 2002, eighty-one days after the motion for reconsideration was denied. Her letter claimed that the original notice of appeal "evidently was destroyed in the mail" and that "[w]e received in our office a mangled representation of we

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

(1) The Tax Court construed the motion to reconsider as a motion to vacate. The motion was postmarked October 29, 2001 and hence was timely. The Tax Court assigned the delay between the postmark and filing dates to the closure of a Washington, D.C., postal service facility due to presence of anthrax bacterium.

think the appeal.'' [sic] R. doc. 14, letter of April 11, 2002. Counsel's letter contained a photocopy of the original notice of appeal, but no registered or certified mail receipt and no evidence of the original envelope, its postmark date or its ''mangled'' contents.

A notice of appeal is deemed delivered on the date of mailing, as established by a United States postmark. 26 U.S.C. 7502(a), (b); 26 C.F.R. 301.7502-1(b)(iii). Use of registered mail or certified mail provides prima facie evidence that the notice of appeal was delivered; the date of registration or the date of the U.S. postmark on the certified mail receipt is treated as the postmark date. 26 U.S.C. 7502(C)(1); 26 C.F.R. 301.7502-1(c)(2). Mr. Zimmerman has presented no evidence that the original notice of appeal was postmarked within the prescribed time period. We have only counsel's unsworn letter and a purported copy of the original notice of appeal to evidence the first attempt at filing a notice of appeal. These items are insufficient as a matter of law to establish timely delivery and filing. Therefore, we dismiss Mr. Zimmerman's petition for review as untimely.

2. Susan Zimmerman's petition

The Tax Court dismissed Susan Zimmerman's petition for failure to state a claim upon which relief could be granted. It further denied her motion to reconsider/motion for new trial (which it termed a motion to vacate), because the motion did nothing but repeat arguments raised previously. We review the dismissal of Ms. Zimmerman's Tax Court petition for failure to state a claim de novo. Fox v. Comm'r, 969 F.2d 951, 952 [70 AFTR 2d 92-5323] (10th Cir. 1992). The Tax Court's denial of her motion to vacate is reviewed for an abuse of discretion. Drobny v. Comm'r, 113 F.3d 670, 676 [79 AFTR 2d 97-2395] (7th Cir. 1997).

Having reviewed the briefs, the record and the applicable law in light of the above-referenced standards, we AFFIRM the challenged Tax Court decisions in No. 02-9004, for substantially the same reasons stated in the Tax Court's orders of October 5, 2001 and December 7, 2001. We DISMISS No. 02-9005, for lack of appellate jurisdiction. All pending motions are DENIED.

Entered for the Court

David M. Ebel

Circuit Judge

¶2002-5748

Everett Dale THOMAS, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 02-71394; IRS No. 5189-01, Dec. 4, 2002. Tax Court affirmed. Years 1993, 1994, 1995, 1996, 1997, 1998. Decision against Taxpayer.

1. Review of Tax Court decision—proof of income—penalties—frivolous claims sanctions—frivolous appeals sanctions. Tax Court properly upheld deficiencies, penalties and $5,000 IRC §6673 sanction against pro se taxpayer: taxpayer's stipulation to receiving wages and interest income asserted by IRS supported deficiency determination; and IRC §6673 sanction was appropriate where suit was frivolous and brought primarily for delay. Also, $2,000 frivolous appeal sanction was imposed. *Reference:* United States Tax Reporter ¶74,536.09151(95); 66,735.01(5); 74,336.511(30). IRC §6673; 7482.

United States Court of Appeals, Ninth Circuit,

Appeal from a Decision of the United States Tax Court.

Before GOODWIN, TROTT, and GRABER, Circuit Judges.

MEMORANDUM*

[1] Everett Dale Thomas appeals pro se the tax court's judgment upholding the Commissioner of Internal Revenue's determinations of income tax deficiencies and additions to tax for Thomas' tax years

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

1993 to 1998 and the tax court's imposition of a $5,000 penalty. We affirm.

The tax court correctly upheld the Commissioner's deficiency determinations, where Thomas stipulated that he received the wages and interest income asserted by the Commissioner. See generally 26 U.S.C. §§ 1, 61; Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 16–17 [3 AFTR 2926] (1916); Maisano v. United States, 908 F.2d 408, 409 [66 AFTR 2d 90-5327] (9th Cir.1990); Roat v. Commissioner, 847 F.2d 1379, 1381 [61 AFTR 2d 88-1254] (9th Cir.1988).

The tax court did not clearly err in sustaining the additions to tax. Allen v. Commissioner, 925 F.2d 348, 353 [67 AFTR 2d 91-543] (9th Cir.1991). Nor did the tax court did abuse its discretion in imposing a $5,000 penalty under 26 U.S.C. § 6673(a) on the ground that Thomas' positions were frivolous and that he maintained the proceedings primarily for delay. Wolf v. Commissioner, 4 F.3d 709, 716 [72 AFTR 2d 93-5740] (9th Cir.1993).

We GRANT in part the Commissioner's request, pursuant to 28 U.S.C. § 1912 and Fed. R.App. P. 38, for sanctions on account of Thomas' maintaining this frivolous appeal. Sanctions are imposed in the amount of two thousand dollars ($2,000).

AFFIRMED.

¶2002-5749

Hexin E. McPHEE, PLAINTIFF v. INTERNAL REVENUE SERVICE, ET AL., DEFENDANTS. U.S. District Court, Northern Dist. of Texas, (DC TX) No. Civ.A.3:00-CV-2028-D, Nov. 25, 2002. Earlier proceedings at (2002, DC TX) 90 AFTR 2d 2002-6368, denying reconsideration of (2002, DC TX) 90 AFTR 2d 2002-5350. Decision for Govt.

1. Actions by third parties—wrongful levy—community property—value of lien. IRS was entitled to retain entire amount of payment husband made from home sale proceeds for release of lien that had been imposed for ex-wife's taxes: taxpayer didn't show that his payment exceeded lien's value. Ex-wife's post-divorce bankruptcy didn't void or otherwise affect lien where lien wasn't provided for by her bankruptcy plan; and IRS's presumptively correct homestead interest present value calculations showed lien amount exceeded taxpayer's lien release payment, even after accounting for his mortgage payments. Also, taxpayer's attempt to reduce lien by portion of additional payments he made towards personal loan on another residence was rejected. *Reference:* United States Tax Reporter ¶74,265.01(25); 63,215.02(160). IRC §6321; 7426.

United States District Court, N.D. Texas, Dallas Division,

MEMORANDUM OPINION

FITZWATER, J.

This is an action by plaintiff Hexin E. McPhee (''McPhee'') under 26 U.S.C. § 7426 to recover proceeds in the amount of $45,864.24 that he maintains the Internal Revenue Service (''IRS'') wrongfully obtained from the sale of his residence at 321 Crooked Tree Court, Coppell, Texas (''Residence'') to satisfy a tax lien that secured the recovery of unpaid income taxes owed by his former wife, Debra McPhee (''Debra''). Following a bench trial at which all evidence on all issues was to be introduced,* the court issued two opinions in this case, see McPhee v. IRS, 2002 WL 1477433 (N.D.Tex. July 5, 2002) (Fitzwater, J.) (''McPhee I''), and McPhee v. IRS, 2002 WL 31045978 (N.D.Tex. Sept. 10, 2002) (Fitzwater, J.) (opinion denying reconsideration) (''McPhee II''), in which it held that McPhee had failed to prove by clear and convincing evidence that the Residence was his separate property. E.g., McPhee I, 2002 WL 1477433, at 1. In McPhee I the court directed the parties to stipulate to the extent of the IRS' lien rights in the Residence, or (absent agreement) to brief the remaining issues concerning the extent of the IRS' rights.

* McPhee concedes this. See P. Br. in Support Valuation of Lien at 3 (''The court has previously heard all relevant testimony regarding this matter.'').

The parties have been unable to reach agreement and have submitted briefing on this issue.

I

The court assumes familiarity with its prior rulings in McPhee I and McPhee II and will only recount the facts pertinent to the present decision. While McPhee and Debra were married, but separated, Debra failed to pay income taxes to the IRS. The couple reconciled in Texas, and McPhee became aware that Debra owed these taxes. Two weeks before the couple divorced in Texas, the IRS filed a lien on the Residence as a result of Debra's arrearage. The divorce decree awarded McPhee the Residence, subject to any debts that the property might have, but the decree also made Debra responsible for her share of income taxes that accrued during her separation from McPhee.

After the divorce became final, Debra filed for chapter 13 bankruptcy protection. She did not list any real property in Texas on her schedules. The IRS filed a proof of claim that stated that it was owed $55,918.39 unsecured, $0.00 secured, and $5,894.73 priority unsecured. Later, McPhee paid the IRS $45,864.24 to obtain a release of its lien so that he could sell the Residence. The IRS maintains that Debra owed $49,958.64 in unpaid taxes, and that its lien in the Residence extended to that amount, minus $2,524.05 credited to McPhee for principal paid on the mortgage loan after the couple's divorce, resulting in an indebtedness of $47,434.59.

II

[1] The question now before the court is whether the IRS' lien interest extends to the full amount (or more) than McPhee paid to obtain release of the lien. If the amount of the lien is equal to or greater than what McPhee paid, he is entitled to no relief in this suit.

The parties quarrel over several theories, and McPhee argues extensively that Debra's chapter 13 bankruptcy extinguished the IRS' lien against the Residence, giving the lien a value of $0.00. If McPhee is incorrect about the effect of Debra's bankruptcy, however, the court need only decide if he has proved by a preponderance of the evidence that his payment of $45,864.24 to the IRS exceeded what Debra owed and what was secured by the lien. The court holds that Debra's bankruptcy did not extinguish the lien and that McPhee has failed to prove that his $45,864.24 payment exceeded the IRS' lien in the Residence.

Generally, statutory liens pass through the bankruptcy process unaffected. See In re Simmons, 765 F.2d 547, 556–57 (5th Cir.1985) (addressing statutory liens that are valid under state law); accord In re Deutchman, 192 F.3d 457, 460 [84 AFTR 2d 99-6314] (4th Cir.1999) (''[a] bankruptcy discharge extinguishes only in personam claims against the debtor(s), but generally has no effect on an in rem claim against the debtor's property.'' (quoting Cen Pen Corp. v. Hanson, 58 F.3d 89, 92 (4th Cir.1995))). It is well settled that, when a debtor's plan does not address a creditor's secured lien, ''the lien simply passes through the bankruptcy and remains enforceable in rem after the discharge is granted and the case closed.'' In re Kuebler, 156 B.R. 1012, 1017 [72 AFTR 2d 93-6055] (Bankr.E.D.Ark.1993); see In re Junes, 99 B.R. 978, 981 [64 AFTR 2d 89-5256] (Bankr.9th Cir.1989). Debra did not own an interest in the Residence at the time she filed for bankruptcy and therefore did not list this property in her schedules. Her interest had been divested via the divorce decree. The IRS therefore correctly asserted in her bankruptcy that it did not have a secured interest in Debra's bankruptcy estate. As in Kuebler, Debra's chapter 13 plan provided no treatment for the IRS' secured claim, and the IRS retained its tax lien on the Residence. See Kuebler, 156 B.R. at 1017. Therefore, the lien against the Residence remains.

The issue therefore becomes what is the extent of the lien. McPhee paid the sum of $45,864.24 to the IRS to obtain release of the lien. He contends primarily that the lien had a value of $0.00 after Debra's bankruptcy. He also maintains that, even if he is incorrect and the lien is not voided

due to Debra's bankruptcy, the value of the lien was established at her bankruptcy. McPhee argues that he has not been given credit for reducing the mortgage from the date of the couple's divorce to the date the Residence was sold, an amount of $4,668.14. He also posits that he is entitled to $99,000 in appreciation and mortgage reduction. McPhee further argues on various grounds that Debra's bankruptcy reduced her indebtedness to the IRS in the sum of $5,894.73, which Debra has already paid

The IRS responds that McPhee and Debra had homestead interests in the Residence at the time the lien arose and that such an interest is valued according to the tables promulgated under 26 U.S.C. § 7520. These tables are used to determine the present value of future interests in property. According to the IRS, based on McPhee's and Debra's respective dates of birth, McPhee's homestead interest that was compensable on the sale of the Residence was 45.93% of the net sales proceeds of $92,396.22. Debra's 54.07% interest equaled $49,958.64. Even if McPhee paid $4,668.13 to reduce the first mortgage, these payments benefited both McPhee's and Debra's interests, and he should receive credit for 54.07% of these payments ($2,524.05). Because McPhee paid only $45,864.24 to the IRS, and it is owed $47,434.59 even after credits are given to him, he is not entitled to any recovery in this lawsuit. The IRS contends that McPhee is not entitled to credit for payments made on the Compass Bank loan because inter alia that the loan related to his California residence, was not secured by the Residence, and did not have a superior position over the IRS' tax lien. It contends that although $14,049.00 of loans proceeds were applied at closing toward the Residence, he is not entitled to a credit against the IRS lien because these payments are akin to community property wages.

Apart from arguments that are now immaterial in view of the court's rulings concerning the effect of Debra's bankruptcy, McPhee maintains in reply that the record evidence is insufficient to make the homestead interest present value calculations due the absence of evidence about McPhee's and Debra's ages at certain relevant times, and that no assumptions can be made about McPhee's and Debra's relative homestead interests except that they had equal interests. This deficiency in proof does not, however, support a finding against the IRS' position, because McPhee has the burden of proof in this case. Therefore, the absence of necessary evidence dictates judgment against McPhee's position, not in his favor.

McPhee also argues that Debra should receive no benefit for payments he made after their divorce to reduce the amount of the first mortgage. The IRS' calculations, however, have reduced Debra's interest in the Residence by $2,524.05 (57.04% of the sum of $4,668.13 by which he reduced the first mortgage) to reflect the proper credit for these payments. Even after this reduction, McPhee's payment was not equal to or greater than the IRS' lien interest.

Concerning the Compass Bank loan, McPhee maintains he was obligated to pay off the loan with monies that were not community property, that the loan had to be repaid, and that any transfer or sale of the Residence was subject to the repayment. These arguments do not adequately counter the IRS' position that the Compass Bank loan related to his California residence, was not secured by the Residence, and did not have a superior position over the IRS' tax lien. The fact that McPhee was required to pay off a personal loan from the proceeds of the Residence does not mean that the payment benefited Debra's homestead interest or reduced the value of the IRS' lien. McPhee has not shown by a preponderance of the evidence that he is entitled to any credits greater than those that the IRS has accorded him under its calculations.

Accordingly, because McPhee's interpretation of the effect of Debra's bankruptcy is legally incorrect and he has failed to carry his burden of proof concerning the extent of Debra's interest in the Residence, he has not proved that he is entitled to re-

lief in this case. A judgment in favor of defendants is filed contemporaneously with the filing of this opinion.

¶2002-5750

Flynn C. JOHNSON, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of Nevada, (DC NV) No. CVS020009RLHPAL, Sept. 16, 2002. Years 1997, 1998, 1999. Decision for Govt.

1. Collection due process—review of administrative determination—frivolous return penalties. Tax protester's petition to invalidate IRS's administrative determination to proceed with collection of IRC §6702 penalties for years he filed "zero" returns was dismissed: penalty assessments were clearly valid where returns asserting no income or tax on reported wages were substantially incorrect and facially frivolous; and Appeals Officer's reliance on Forms 4340 satisfied IRC §6330's verification requirement. *Reference:* United States Tax Reporter ¶63,305.01(5); 67,025.01(10). IRC §6330; 6702.

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United States District Court, D. Nevada,

ORDER

HUNT, J.

(Motion to Dismiss or in the Alternative for Summary Judgment-8)

Before the Court is Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (# 8), filed July 2, 2002. The Court has also considered Plaintiff's Opposition (# 10), filed July 15, 2002, and Plaintiff's Complaint (# 1), filed January 3, 2002.

BACKGROUND

Plaintiff asks this court to grant three requests: 1) To "declare invalid" a collection due process determination made by the IRS against him; 2) To order reim-bursement by Defendant of Plaintiff's costs associated with bringing this action; and 3) To award punitive damages based on Defendant's conduct.

Following a pattern of behavior the Court has yet to understand, Plaintiff filed Form 1040, U.S. Individual Income Tax Return, for the 1997, 1998, and 1999 tax years. Although the included Forms W-2 showed income received by the Plaintiff, both Returns contained zeroes on all lines reflecting income earned or taxes due and had attached statements outlining reasons for their belief that they had no income to report and did not, therefore, owe federal income tax.

Pursuant to Section 6702, the IRS assessed three $500 civil penalties on Plaintiff for filing the stated returns. Section 6702 assesses a $500 civil penalty if an individual "files what purports to be a return" but which contains "information that on its face indicates that the self-assessment is substantially incorrect" and is due to "a position which is frivolous."

The IRS posted a Notice of Federal Tax Lien for unpaid civil penalties pursuant to Internal Revenue Code §§ 6321, 6322, and 6323 and informed Plaintiff of the lien by certified mail on August 4, 2001. Plaintiff then requested from Defendant a collection due process hearing regarding the frivolous return penalties and collection alternatives which was held on November 7, 2001, a transcript of which is attached to Plaintiff's Complaint (# 1).

Finally, on December 6, 2001, the IRS sent Plaintiff a Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330 (Notice of Determination) informing Plaintiff that the proposed levy to collect the frivolous return penalty would not be restricted. Attached to the Notice of Determination was Attachment 3194 explaining that the decision was based on the determination that

the IRS fully complied with all applicable laws, regulations, and administrative procedures. The Notice of Determination also informed Plaintiff that any dispute of the determination could be made within 30 days in the appropriate United States District Court. Plaintiff timely filed with this Court and Defendant now moves for dismissal or in the alternative summary judgment.

DISCUSSION

I. Dismissal for Failure to State a Claim

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a court may dismiss a complaint for "failure ... to state a claim upon which relief can be granted." "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45–46 (1957); see also Yamaguchi v. U.S. Dep't of the Air Force, 109 F.3d 1475, 1481 (9th Cir.1997). All factual allegations set forth in the complaint "are taken as true and construed in the light most favorable to [p]laintiffs." Epstein v.. Washington Energy Co., 83 F.3d 1136, 1140 (9th Cir.1996) (citing In re Wells Fargo Sec. Litig., 12 F.3d 922, 925 (9th Cir.1993), cert denied, 513 U.S. 917, 115 S.Ct. 295, 130 L.Ed.2d 209 (1994)). Dismissal is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); see also McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir.1988).

II. Summary Judgment Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only "where the record before the court on the motion reveals the absence of any material issue of fact and [where] the moving party is entitled to judgment as a matter of law." Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 883 (9th Cir.1982) (quoting Portland Retail Druggists Ass'n v. Kaiser Found. Health Plan, 662 F.2d 641, 645 (9th Cir.1981)), cert. denied, 460 U.S. 1085 (1983). "A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the parties' differing version of the truth." Sec. & Exch. Comm'n v. Seaboard Corp., 677 F.2d 1289, 1293 (9th Cir.1982) (citation omitted).

The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view all facts and draw all inferences in the light most favorable to the responding party. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). See also Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 883 (9th Cir.1982), cert. denied, 460 U.S. 1085 (1983). Once this burden has been met, "[t]he opposing party must then present specific facts demonstrating that there is a factual dispute about a material issue." Zoslaw, 693 F.2d at 883 (citation and internal quotes omitted).

III. Analysis

[1] Plaintiff first asks that the collection due process determination made against him by the IRS be declared invalid. Since the Tax Court does not have jurisdiction to consider frivolous return penalties, See Van Es v. Commissioner, 115 T.C. 324 (2000), the matter is appropriately before this court. 26 U.S.C. § 6320(c), 6330(d)(1)(B).

26 U.S.C. § 6702 assigns liability in the amount of five hundred dollars ($500) to a person filing a frivolous tax return. The Secretary of the Treasury or his delegate, such as the IRS,[1] assesses this penalty in the same manner as a tax, and any reference to a "tax" in Title 26 also includes this penalty. 26 U.S.C. § 6671. Section 6201 of the Code authorizes the Secretary to make any necessary tax assessments. In the case of a frivolous return penalty, the deficiency procedures of Title 26, Chapter 63, subchapter B, do not apply. 26 U.S.C.

[1] The Court will use the collective term "Secretary" to refer to the Secretary of the Treasury and any delegates. See 26 U.S.C. § 7701(a)(11)(B). The Secretary of the Treasury may delegate much of his authority and responsibilities to others by prescribing rules and regulations, among other methods. 26 U.S.C. § 7805(a); see also 26 C.F.R. §§ 301.7701–9, 301.7701–10.

§ 6703(b). The failure to pay the penalty results in a lien on the person's property. 26 U.S.C. § 6321. To ensure the validity of the lien, the Secretary files the lien with, in this case, the Clark County Recorder, 26 U.S.C. § 6323(f)(1)(A), and sends a notice of filing of the lien to the person, 26 U.S.C. § 6320(a). The Secretary must also inform the person of his right to a hearing at the same time. 26 U.S.C. § 6320(a)(3)(B). For the purposes of this Order, the procedures of the collection due process hearing, 26 U.S.C. § 6330(c), apply to the lien hearing, 26 U.S.C. § 6320(c). If the person requests a hearing, the hearing officer must ''obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.'' 26 U.S.C. § 6330(c)(1). At the hearing, the person may also raise any relevant issue, including spousal defenses, the appropriateness of the collection action, and any collection alternatives. 26 U.S.C. § 6330(c)(2)(A). The person ''may also raise at the hearing challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability.'' 26 U.S.C. § 6330(c)(2)(B).

The ''underlying tax liability'' in this case is the frivolous return penalty. See 26 U.S.C. 6671; see also 26 C.F.R. 301.6321-1. Plaintiff properly challenged the validity of the frivolous return penalties at the collection due process hearing because the statutory deficiency procedures do not apply to frivolous return penalties, 26 U.S.C. >§ 6703(b), and thus Plaintiff had no prior opportunity to dispute the penalties. The validity of the income taxes that Plaintiff owes for 1997, 1998, and 1999 is not at issue in this action. On the other hand, the tax returns that Plaintiff filed are relevant because they determine whether assessment of the frivolous return penalty was proper.

Section 6330(d) is silent on the standard that the Court should use to review the determination of the collection hearing. However, the legislative history indicates that if the validity of the underlying tax liability was properly at issue, then review is de novo. H. Conf. Rep. 105-599 (1998); see also Dogwood Forest Rest Home, Inc. v. United States, 181 F.Supp.2d 554, 559 [89 AFTR 2d 2002-728] (M.D.N.C.2001); MRCA Info. Servs. v. United States, 145 F.Supp.2d 194, 198–99 [89 AFTR 2d 2002-694] (D.Conn.2000); Sego v. Commissioner, 114 T.C. 604, 610 (2000). The Court will use that standard of review.

There is no doubt as to the validity of the penalty. Plaintiff submitted Form 1040 for 1997, 1998, and 1999 with zeros in the income section and Forms W-2 showing income considerably more than zero. Motion (# 8), Exhibits 1, 2, and 3. He also attached an explanation of how no provisions of the Internal Revenue code make him liable for the income tax, how his wages are not income, and other matters. Wages are income, 26 U.S.C. § 61, upon which Plaintiff owes a tax, 26 U.S.C. § 1, and courts-including this one-have found arguments to the contrary to be tired and frivolous long before Plaintiff filed the tax returns at issue. See, e.g., Sisemore v. United States, 797 F.2d 268, 270 [58 AFTR 2d 86-5485] (6th Cir.1986); Coleman v. Commissioner, 791 F.2d 68, 70 [57 AFTR 2d 86-1420] (7th Cir.1986); Sullivan v. United States, 788 F.2d 813, 815 [57 AFTR 2d 86-1226] (1st Cir.1986); Olson v. United States, 760 F.2d 1003, 1005 [56 AFTR 2d 85-5042] (9th Cir.1985); In re Hopkins, 192 B.R. 760, 762–63 [76 AFTR 2d 95-7748] (D.Nev.1995); and other cases too numerous to cite. On its face, Plaintiff's tax returns were substantially incorrect and frivolous, thus making Plaintiff liable for the frivolous return penalty. 26 U.S.C. § 6702. The assessments of the frivolous return penalties are valid.

No genuine issue of material fact exists over the verification of all legal and administrative requirements. The hearing officer properly relied on Forms 4340, Defendant's Motion (# 8) Exhibit 3, for such verification. See Huff v. United States, 10 F.3d 1440, 1446–47 [72 AFTR 2d 93-6682] (9th Cir.1993), cert. denied, 512

U.S. 1219 (1994); Hughes v. United States, 953 F.2d 531, 538–40 [69 AFTR 2d 92-472] (9th Cir.1992); see also Davis v. Commissioner, 115 T.C. 35, 41 (2000). The Forms 4340 show that the frivolous return penalty had been assessed, that notices had been mailed to Plaintiff, and that Plaintiff had requested a hearing. Because, as noted above, the tax returns are clearly frivolous, the hearing officer did not err in his verification that the requirements of any applicable law and administrative procedures had been met. Therefore, the collection due process determination is valid.

Without declaring defendant's collection due process determination invalid, the Court has no reason to reach Plaintiff's requests for costs or damages.

CONCLUSION

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendant's Motion for Dismissal or in the Alternative Summary Judgment (# 8) is GRANTED.

¶2002-5751

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Leonard Shyrl BROWN, DEFENDANT-APPELLANT. U.S. Court of Appeals, Tenth Circuit, (CA10) Nos. 02-4019 and 02-4095, Dec. 9, 2002. District Court affirmed Decision for Govt.

1. Tax crimes—conspiracy to defraud U.S.—motion to withdraw guilty plea. Taxpayer's convictions for conspiracy to defraud U.S. and mail fraud were affirmed: taxpayer was properly denied motion to withdraw guilty plea where plea was knowingly and voluntarily made and supported by guilt admission; jurisdictional argument was meritless; and taxpayer's request for release pending appeal was properly denied where he raised no sub-stantial question likely to result in reversal, order for new trial, reduced sentence or zero prison time. *Reference:* United States Tax Reporter ¶73,446.505(10); 73,446.517(30).

UNITED STATES COURT OF APPEALS TENTH CIRCUIT,

Before SEYMOUR, HENRY, and BRISCOE, Circuit Judges.

ORDER AND JUDGMENT[1]

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal.

See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[1] In case No. 02-4019, defendant Leonard Shyrl Brown appeals his conviction of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and mail fraud, in violation of 18 U.S.C. 1341. In case No. 02-4095, he appeals the district court's denial of his motion for release pending appeal. We exercise jurisdiction pursuant to 28 U.S.C. 1291 and affirm.

On November 15, 2000, Brown, his son, and his daughter-in-law were indicted for violations of the Internal Revenue Code. Brown pled guilty to two charges -- conspiracy to defraud the United States and mail fraud. The district court denied several motions filed by Brown, including his motion to withdraw his plea. In accordance with his plea agreement, he was sentenced on January 22, 2002, to a thirty-month term of imprisonment. Brown's court-appointed attorney has filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and a motion to withdraw. Brown has also filed a pro se appellate brief in each case.

Brown filed his motion to withdraw his plea based on his assertion that he did not understand that by entering a guilty plea he was giving up his right to a jury trial. We review the district court's denial of a mo-

[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

tion to withdraw a guilty plea for an abuse of discretion. United States v. Siedlik, 231 F.3d 744, 748 (10th Cir. 2000) (''[U]nless it is shown that the trial court acted unjustly or unfairly, there is no abuse of discretion. It is within the sound discretion of the trial court to determine what circumstances justify granting such a motion.''). The district court found that Brown's plea was knowingly and voluntarily made and that it was supported by Brown's admission of guilt.

We have reviewed the entire record on appeal, as well as Brown's appellate filings, and conclude that the district court did not abuse its discretion in denying his motion to withdraw his guilty plea. Additionally, we find no merit to Brown's remaining arguments on appeal. His contention that the district court lacked jurisdiction is frivolous. See 18 U.S.C. 3231 (vesting federal district courts with jurisdiction over ''all offenses against the laws of the United States''); United States v. Collins, 920 F.2d 619, 629 [67 AFTR 2d 91-1037] (10th Cir. 1990) (stating ef-forts to argue that federal jurisdiction does not encompass prosecutions for federal tax evasion have been rejected as ''frivo-lous''). Further, Brown's assertions regard-ing inclusion of a charge based upon 18 U.S.C. 287 in the indictment are irrelevant because the 287 charge was dismissed in exchange for his guilty plea. With regard to the district court's denial of Brown's re-quest for release pending appeal, the court did not err. Brown did not ''raise[] a sub-stantial question of law or fact likely to re-sult in -- (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not in-clude a term of imprisonment, or (iv) a re-duced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.'' 18 U.S.C. 3143(b)(1)(B).

AFFIRMED. Counsel's motion to withdraw is GRANTED. All pending motions are DENIED.

Entered for the Court

Mary Beck Briscoe

Circuit Judge

¶2002-5752

Charles FORDJOUR, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, D. Arizona, (DC AZ) No. CV981977PHXROSJRI, Aug. 29, 2002. Earlier proceedings at (2002, DC AZ) 90 AFTR 2d 2002-5631; and (2002, DC AZ) 89 AFTR 2d 2002-2812. Years 1994, 1995, 1999. Decision for Govt.

1. Refund actions—motion to dismiss—jurisdiction—effect of filing Tax Court petition—failure to state claim—constitutional claims. Pro se taxpayer's amended refund complaint for 2 years was dismissed: taxpayer's conclusory allegations that he didn't owe reassessed taxes or interest for 1 year didn't establish or even allege he fully paid tax for that year before filing suit; and pending Tax Court case for other year deprived district court of jurisdiction for that year. Also, taxpayer's mere identification of 42 USC §1983 and *Bivens* as basis for suit without any supporting factual allegations failed to state claim thereunder. *Reference:* United States Tax Reporter ¶74,225.01(5); 74,225.04(5); 65,125.01(5); 74,336.504(40). IRC §6512; 7422.

2. Earned income credit—qualification for credit—married taxpayers—failure to file joint return. Pro se taxpayer's complaint to recover EIC was denied on summary judgment based on taxpayer's unrefuted marital status and failure to file joint return for subject year. *Reference:* United States Tax Reporter ¶325.02(10). IRC §32.

United States District Court, D. Arizona,

ORDER

SILVER, J.

Pending before the Court are the following four motions filed by Defendant United States of America: (1) a Motion to Dismiss Counts 1 and 2 for lack of subject matter jurisdiction (Doc. # 42-1); (2) a Motion to Determine that the Complaint Makes No Other Claims for Which Relief Can Be Granted (Doc. # 42-3); (3) a Motion for Summary Judgment on Count 3 (Doc. # 49); and (4) an Amended Motion for Sum-

mary Judgment on Count 3 (Doc. # 60). For the reasons set forth below, the Court will: (1) grant Defendant's Motion to Dismiss Counts 1 and 2; (2) grant Defendant's Motion to Determine that the Complaint Makes No Other Claims for Which Relief Can Be Granted; (3) grant Defendant's Amended Motion for Summary Judgment on Count 3; and (4) deny as moot Defendant's Motion for Summary Judgment on Count 3.

Background and Procedural History

I. PLAINTIFF'S COMPLAINT

On October 30, 1998, Plaintiff Charles Fordjour, a prisoner confined in the Arizona State Prison Complex in Douglas, Arizona, filed a pro se Complaint (Doc. # 1) against the Internal Revenue Service ("IRS") Commissioner for income tax refunds pursuant to 28 U.S.C. § 1346(a). The Court screened the Complaint pursuant to 28 U.S.C. § 1915A and dismissed it for lack of jurisdiction in a December 27, 1999 Order (Doc. # 15). The Court dismissed the Complaint in part because Plaintiff improperly named the IRS Commissioner as a defendant (12/27/99 Order at 4). In addition, the Court found that "even if the United States were substituted as the proper defendant, the Court [was] without subject matter jurisdiction because Plaintiff [had] not satisfied the jurisdictional prerequisites by exhausting his administrative remedies after having paid his tax assessments in full." (Id.)

In a July 18, 2000 Order (Doc. # 23), the Court granted Plaintiff's Motion to Vacate Judgment to Permit Plaintiff to Amend Complaint (Doc. # 17). The Court gave Plaintiff thirty days to file an amended complaint against the United States for income tax refunds pursuant to 28 U.S.C. § 1346(a). (7/18/00 Order at 3). The Court instructed Plaintiff as follows: "The amended complaint ... must seek only refund of taxes paid and must allege, if Plaintiff can do so in good faith, that Plaintiff has exhausted his administrative remedies after having paid his tax assessments in full." (Id.) (emphasis in original). Pursuant to the Court's Order, Plaintiff filed a First Amended Complaint on August 18, 2000 (Doc. # 25). The Amended Complaint names the United States as the sole Defendant and seeks tax refunds pursuant to 28 U.S.C. § 1346(a) for the years 1994 (Count 1), 1995 (Count 2), and 1999 (Count 3).

II. DEFENDANT'S MOTIONS TO DISMISS

On January 18, 2002, Defendant filed the pending Motion to Dismiss Counts 1 and 2 and the Motion to Determine that the Complaint Makes No Other Claims for Which Relief Can Be Granted. Defendant also filed a supporting Memorandum (Doc. # 43), a Statement of Undisputed Material Facts (Doc. # 45), and the Declaration of Norma J. Schrock (Doc. # 44), counsel for Defendant. Plaintiff filed an Opposition (Doc. # 48) on February 21, 2002, and Defendant filed a Reply (Doc. # 53) on March 5, 2002.

Pursuant to a July 15, 2002 Order (Doc. # 71), Plaintiff filed a second Opposition (Doc. # 74) and a Statement of Facts (Doc. # 73) on July 29, 2002, and Defendant filed a second Reply (Doc. # 75) on August 9, 2002.

III. DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

On February 26, 2002, Defendant filed the pending Motion for Summary Judgment on Count Three. Defendant also filed a Statement of Undisputed Material Facts (Doc. # 50) and a supporting Memorandum (Doc. # 51). On April 5, 2002, Plaintiff filed an Opposition (Doc. # 58) and a Statement of Facts (Doc. # 59).

Instead of filing a reply, Defendant filed the pending Amended Motion for Summary Judgment on Count 3 on April 9, 2002. Defendant also filed: (1) an Amended Memorandum (Doc. # 61); (2) an Amended Statement of Undisputed Material Facts (Doc. # 62); and (3) the Declaration of Attorney J. Robert Cuatto (Doc. # 63). On May 17, 2002, Plaintiff filed a document (Doc. # 69) stating that his April

5, 2002 Opposition is sufficient to rebut Defendant's Amended Motion.[1]

Discussion

I. DEFENDANT'S MOTION TO DISMISS COUNTS 1 AND 2 FOR LACK OF SUBJECT MATTER JURISDICTION

A. Legal Standard

"The party asserting jurisdiction has the burden of proving all jurisdictional facts." Indus. Tectonics, Inc. v. Aero Alloy, 912 F.2d 1090, 1092 (9th Cir.1990) (citing McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189 (1936)); see Kokkonen v. Guardian Life Ins. Co. of Am., 114 S.Ct. 1673, 1675 (1994); Fenton v. Freedman, 748 F.2d 1358, 1359, n. 1 (9th Cir.1994); see also William W. Schwarzer et al., Federal Civil Procedure Before Trial ("Federal Civil Procedure") § 9:77, at 9–17 (2002). In effect, the court presumes lack of jurisdiction until the plaintiff proves otherwise. See Kokkonen, 114 S.Ct. at 1675; Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir.1989). The defense of lack of subject matter jurisdiction may be raised at any time by the parties or the court. See Fed.R.Civ.P. 12(h)(3). A Rule 12(b)(1) motion to dismiss "for lack of subject matter jurisdiction may either attack the allegations of the complaint or may be made as a 'speaking motion' attacking the existence of subject matter jurisdiction in fact." Thornhill Publ'g Co. v. Gen. Tel. & Elecs., 594 F.2d 730, 733 (9th Cir.1979); see Federal Civil Procedure § 9:78, at 9–18.

In resolving the former motion, a "facial attack" under Rule 12(b)(1), the district court must accept the allegations of the complaint as true. See Federal Civil Procedure § 9:84, at 9–20 (citing Valdez v. United States, 837 F.Supp. 1065, 1067 (E.D.Cal.1993), aff'd, (9th Cir.1995)). Unlike a Rule 12(b)(6) motion, however, the court will not reasonably infer allegations sufficient to support federal subject matter jurisdiction because a plaintiff must affirmatively allege such jurisdiction. Id. § 9:84a, at 9–20.

In resolving a "speaking motion" or "factual attack" under Rule 12(b)(1), the court is not limited to the allegations in the pleadings if the "jurisdictional issue is separable from the merits of [the] case." Roberts v. Corrothers, 812 F.2d 1173, 1177 (9th Cir.1987); see Greene v. United States, - F.Supp.2d -, No. CIV-S-01-08777GGH, 2000 WL 1307309, at 4 (E.D.Cal. May 16, 2002) (citing Trentacosta v. Frontier Pac. Aircraft Indus., 813 F.2d 1553, 1558 (9th Cir.1987)). Instead, "[t]he court may view evidence outside the record, and no presumptive truthfulness is due to the complaint's allegations that bear on the subject matter [jurisdiction] of the court." Greene, 2000 WL 1307309, at 4 (citing Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir.1983)); see Roberts, 812 F.2d at 1177; Valdez, 837 F.Supp. at 1067; see also Federal Civil Procedure § 9:86, at 9–21. Indeed, "the district court is[] 'free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary.'" Id. (quoting Augustine, 704 F.2d at 1077); see Federal Civil Procedure § 9:85, at 9–20.

However, the court must hold an evidentiary hearing before resolving issues of credibility or genuinely disputed material facts. See Federal Civil Procedure § 9:85.1, at 9–21.[2] If the court resolves a Rule 12(b)(1) motion on declarations alone without an evidentiary hearing, it must accept the plaintiff's factual allegations in the complaint as true. See id. (citing McLachlan v. Bell, 261 F.3d 908, 909 (9th Cir.2001)); Greene, 2000 WL 1307309, at 4 ("[I]n the absence of a full-fledged evidentiary hearing, disputes in the facts pertinent to subject matter [jurisdiction] are viewed in the light most favorable to the opposing party.") (citing Dreier v. United States, 106 F.3d 844, 847 (9th Cir.1997)). Similarly, without an evidentiary hearing, genuinely "disputed facts related to subject matter jurisdiction should be treated in the

[1] The document Plaintiff filed is titled "Plaintiff's Opposition in Lieu of Filing a New Amended Response Is Sufficient to Rebut Any and All Defendants' [sic] Motion for Summary Judgment on Count 3."

[2] The court has the discretion to order an evidentiary hearing before trial or postpone the motion until trial. See id.

same way as one would adjudicate a summary judgment motion.'' Greene, 2000 WL 1307309, at 4 (citing Dreier, 106 F.3d at 847).

B. The Parties' Papers

In its Motion to Dismiss Counts 1 and 2, Defendant argues that the Court lacks subject matter jurisdiction over Count 1, Plaintiff's 1994 refund claim, because Plaintiff was reassessed $7,742.62 in unpaid federal income tax and interest for 1994 and has not satisfied the jurisdictional prerequisite of paying that reassessment in full. (Mot. at 3–5) (citing Def.'s Statement of Undisputed Material Facts (''SOF'') p p 13–14; 28 U.S.C. § 1346(a)(1); United States v. Dalm, 494 U.S. 596, 608–10 [65 AFTR 2d 90-1210] (1990); Flora v. United States, 362 U.S. 145, 150–51 [5 AFTR 2d 1046] (1960)). Defendant further states that the Court lacks subject matter jurisdiction over Count 2, Plaintiff's 1995 refund claim, because the matter is currently pending in Tax Court. (Mot. at 3, 9) (citing Def.'s SOF p p 18–19; 26 U.S.C. § 6512(a); Flora, 362 U.S. at 166; United States v. Wolf, 238 F.2d 447, 451 [50 AFTR 713] (9th Cir.1956); Russell v. United States, 592 F.2d 1069, 1071 [43 AFTR 2d 79-927] (9th Cir.), cert. denied, 444 U.S. 946 (1979)).

In his original Opposition, Plaintiff did not allege or offer any evidence to show that (1) he has paid in full the tax reassessment for 1994, or (2) the matter of his 1995 refund claim is not currently pending in Tax Court. Instead, Plaintiff simply ''declare[d] that he does not owe any [t]axes and any allege[d] absurd interest [was] falsely assessed and alleged by [D]efendant[.]'' (Opp'n at 5). Plaintiff also repeatedly ''cautioned'' the Court regarding the appropriate legal standards and set forth the legal standard for Rule 12(b)(6) motions to dismiss for failure to state a claim. (Id. at 3–4). Finally, Plaintiff noted that if the Court considers matters outside the pleadings in ruling on a Rule 12(b)(6) motion, it must treat the motion as a Rule 56 motion for summary judgment and give all parties reasonable opportunity to present evidence in support of or in opposition to such motion. (Id. at 3).

Here, however, Defendant filed a Rule 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction. ''Because [Defendant's] [M]otion to [D]ismiss is a factual attack, this Court may determine the facts for itself, considering the allegations of the complaint and extrinsic evidence.'' Valdez, 837 F.Supp. at 1067 (citations omitted). In addition, the ''Court may weigh disputed evidence and determine the facts to evaluate for itself the merits of jurisdictional claims.'' Id. ''Moreover, no presumptive truthfulness attaches to [P]laintiff's allegations or any inferences drawn therefrom'' if the Court holds an evidentiary hearing. Id. Finally, the Court need not formally convert Defendant's Motion to Dismiss into a Rule 56 motion for summary judgment merely because Defendant presented supporting evidence and the Court will consider such evidence in ruling on Defendant's Motion to Dismiss. See Greene, 2000 WL 1307309, at 4 (''The government has noticed this motion both pursuant to [Rule] 12(b)(1) (subject matter jurisdiction), and in the alternative, summary judgment. [T]he most appropriate procedural vehicle to drive the court's decision is Rule 12(b)(1)[.]'').

In a July 15, 2002 Order, the Court gave Plaintiff the opportunity to present evidence in opposition to Defendant's Motion to Dismiss Counts 1 and 2 for lack of jurisdiction. (7/15/02 Order at 8). The Court advised Plaintiff as follows:

Plaintiff is advised that conclusory factual and legal allegations, such as those contained in his present Opposition that he owes no taxes for 1994 and 1995, will not be sufficient to meet his burden of establishing this Court's jurisdiction. Instead, Plaintiff must present specific documentary evidence in opposition to Defendant's evidence. Specifically, Plaintiff must present documentary evidence that (1) he has exhausted all of his administrative remedies after having paid his 1994 tax assessment in full, and (2) the matter of Plaintiff's 1995 refund claim is not currently pending in Tax Court.

(Id. at 6) (emphasis in original). Pursuant to the Court's Order, Plaintiff timely filed a second Opposition and a Statement of Facts on July 29, 2002, and Defendant filed a second Reply on August 9, 2002.

C. Count 1 (Plaintiff's 1994 Refund Claim)

1. Substantive law

[1] Pursuant to 28 U.S.C. § 1346, "[t]he district courts shall have original jurisdiction . . . of[][a]ny civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected . . . ." 28 U.S.C. § 1346(a)(1). In enacting section 1346, Congress waived the United States' sovereign immunity from suits seeking a federal tax refund, but only if plaintiffs satisfy certain prerequisites to filing suit. See United States v. Dalm 494 U.S. 596, 608–10 [65 AFTR 2d 90-1210] (1990). One of these jurisdictional prerequisites is that the challenged tax assessment must be paid in full. See 28 U.S.C. § 1346(a)(1); Flora v. United States 362 U.S. 145, 150–51 [5 AFTR 2d 1046] (1960) (holding that section 1346(a)(1) "requires full payment of the assessment before an income tax refund suit can be maintained in a Federal District Court"); see also PCCE, Inc. v. United States 159 F.3d 425, 428–29 [82 AFTR 2d 98-6914] (9th Cir.1998) (holding that United States did not waive its sovereign immunity against challenge to tax assessment and that district court lacked jurisdiction over plaintiff's refund claim because assessment was not paid in full:

> "[N]othing in the record suggests that the [tax] assessment has been 'fully satisfied.' The root of this requirement is the long-standing 'pay first and litigate later' principle explained in Flora [.]"); Korobkin v. United States, 988 F.2d 975, 976 [71 AFTR 2d 93-1245] (9th Cir.1993) (citing Flora and affirming dismissal of suit challenging tax penalty assessments because "the district court lacks jurisdiction over the refund suit unless the taxpayer pays the entire penalty first"); Thomas v. United States, 755 F.2d 728, 729 [55 AFTR 2d 85-1094] (9th Cir.1985) (citing Flora and stating: "[T]here is no jurisdiction in the district courts over suits for the refund of penalty amounts paid until the taxpayer has paid the full amount of the contested penalty assessment[.]"); Boynton v. United States 566 F.2d 50, 53 n. 5 [40 AFTR 2d 77-5994] (9th Cir.1977) (citing Flora and stating: "The Supreme Court exhaustively examined congressional intent in this area, as well as general tax policy, in determining that full payment of the assessed taxes was a jurisdictional prerequisite to a refund suit in District Court.").

2. Analysis

Plaintiff does not dispute that on December 27, 1999, the IRS reassessed a tax and interest deficiency against him in the amount of $7,742.72 for the 1994 tax year. (Def.'s SOF p 14; see Pl.'s SOF). As Defendant correctly points out in its second Reply, Plaintiff simply ignores the question of whether he has paid the reassessment in full despite the Court's admonition in the July 15, 2002 Order that "Plaintiff must present documentary evidence that . . . he has . . . paid his 1994 tax assessment in full [.]" (Reply at 2; 7/15/02 Order at 6) (emphasis in original). Indeed, Plaintiff does not even address the December 27, 1999 reassessment in his second Opposition and fails to offer any evidence in his Statement of Facts to show that he has paid the reassessment in full.[3]

Instead, Plaintiff simply argues the merits of his 1994 refund claim and that a prior tax assessment was improper. For example, Plaintiff contends that he filed an amended 1994 tax return showing that he "was entitled to $10,013.00 in income tax refunds" and that "said refunds have never been paid by Defendant [.]" (Opp'n at 2). Plaintiff further contends that Defendant "deliberately with malicious intent deprive[d] Plaintiff of his right to claim his biological dependents and as such declined all [of] Plaintiff's exemptions for his de-

[3] Similarly, Plaintiff does not allege in the First Amended Complaint that he has paid the reassessment in full.

pendents therefore creating a false and illegal tax assessment[.]'' (Id.)

As the Court advised Plaintiff in the July 15, 2002 Order, however, such ''conclusory factual and legal allegations ... [are] not ... sufficient to meet [Plaintiff's] burden of establishing this Court's jurisdiction.'' (7/15/02 Order at 6) (emphasis in original); see e.g., Indus. Tectonics, 912 F.2d at 1092 (''The party asserting jurisdiction has the burden of proving all jurisdictional facts.''). Because Plaintiff has neither alleged nor offered any evidence to show that he has paid in full the December 27, 1999 reassessment of his 1994 tax and interest deficiency, the Court lacks subject matter jurisdiction over Plaintiffs 1994 refund claim. See 28 U.S.C. § 1346(a)(1); Flora 362 U.S. at 150–51; Thomas 755 F.2d at 729 (''Since Thomas has not paid the full [assessed] penalty amount, there is no jurisdiction under the Flora test.''). Accordingly, the Court will grant Defendant's Motion to Dismiss with respect to Count 1. See Flora, 362 U.S. at 150–51; PCCE, 159 F.3d at 428–29; Korobkin, 988 F.2d at 976.

D. Count 2 (Plaintiff's 1995 Refund Claim)

1. Substantive law

[2] Pursuant to the Internal Revenue Code, if a taxpayer receives a deficiency notice and properly files a petition with the Tax Court, ''no suit by the taxpayer of the recovery of any part of the tax shall be instituted in any court[.]'' 26 U.S.C. § 6512(a). Similarly, if a taxpayer files a petition with the Tax Court after filing suit in district court on the same refund claim, ''the district court ... shall lose jurisdiction of [the] taxpayer's suit to whatever extent jurisdiction is acquired by the Tax Court of the subject matter of [the] taxpayer's suit for refund.'' 26 U.S.C. § 7422(e). Thus, a district court is deprived of subject matter jurisdiction by a properly filed Tax Court petition involving the same refund claim whether the petition is filed before or after the district court suit is filed. See United States v. Wolf 238 F.2d 447, 451 [50 AFTR 713] (9th Cir.1956) (holding that district court lacked jurisdiction over tax suit based on previously filed Tax Court petition); Russell v. United States 592 F.2d 1069, 1071 [43 AFTR 2d 79-927] (9th Cir.), cert. denied, 444 U.S. 946 (1979) (holding that under section 7422(e), the district court ''lost jurisdiction when the taxpayer filed her petition with the Tax Court''). In sum, under the Internal Revenue Code '''a claimant is given the option of pursuing his suit in the District Court or in the Tax Court, but he cannot litigate in both.''' Russell, 592 F.2d at 1071 (quoting Flora, 362 U.S. at 166); see Conforte v. United States, 979 F.2d 1375, 1379 [71 AFTR 2d 93-339] (9th Cir.1992).

2. Analysis

In his second Opposition, Plaintiff argues that the Court ''has 'original jurisdiction' to decide ... Plaintiff's claims since the United States Tax Court declined to accept jurisdiction by dismissing Plaintiff's case on October 21, 1998.'' (Opp'n at 3) (citing Pl.'s SOF p 9). Significantly, however, Plaintiff does not dispute that he filed a petition with the Tax Court in February 2000 challenging the deficiency notice he received for the 1995 tax year. (See Def's SOF p 18; Opp'n at 3–4; Pl.'s SOF). Nor does Plaintiff dispute that the Tax Court case involving his 1995 refund claim is still pending. (See Def.'s SOF p 19; Opp'n at 3–4; Pl.'s SOF).

Instead, Plaintiff argues the merits of his case by contending that Defendant ''refuse[s] to allow Plaintiff to claim his dependents exemptions and thereby falsely with deceptive practices ... assess[ed] an illegal and unconstitutional tax assessment.'' (Opp'n at 3). Plaintiff notes that he ''specifically objects, opposes, disputes and challenges the illegal and unconstitutional allege[d] tax assessment ... which is false and deceptive.'' (Id. at 4). Finally, Plaintiff claims that Defendant ''still has not paid Plaintiff his refunds due to him and his family to date.'' (Id. at 3–4) (emphasis in original).

As the Court advised Plaintiff in the July 15, 2002 Order, however, such ''conclusory factual and legal allegations ... [are] not ... sufficient to meet [Plaintiff's] burden of establishing this Court's

jurisdiction.'' (7/15/02 Order at 6) (emphasis in original); see, e.g., Indus. Tectonics, 912 F.2d at 1092. Because Plaintiff has neither alleged nor offered any evidence to show that he did not file a currently pending petition with the Tax Court regarding his 1995 refund claim, the Court lacks subject matter jurisdiction over the claim. See 26 U.S.C. §§ 6512(a), 7422(e); Flora 362 U.S. at 166; Russell 592 F.2d at 1071 (''[T]he District Court lost jurisdiction when the taxpayer filed her petition with the Tax Court[.]''). Accordingly, the Court will grant Defendant's Motion to Dismiss with respect to Count 2. See id.

II. DEFENDANT'S MOTION TO DETERMINE THAT THE COMPLAINT STATES NO OTHER CLAIMS FOR WHICH RELIEF CAN BE GRANTED

As part of its Motion to Dismiss Counts 1 and 2, Defendant has moved the Court to determine that Counts 1 and 2 state no claims for relief other than tax refund claims under 28 U.S.C. § 1346(a). Defendant moves the Court to make such a determination because in addition to citing section 1346(a) as a basis for the Court's jurisdiction, Plaintiff references 42 U.S.C. § 1983 and Bivens v. Six Unknown Federal Narcotic Agents, 403 U.S. 388 (1971). (First Am. Compl. at 1, p 1).[4] For the reasons set forth below, the Court finds that Counts 1 and 2 state no other claims for which relief can be granted.

A. Legal Standard

A court may not dismiss a complaint for failure to state a claim ''unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would entitle him to relief.'' Barnett v. Centoni, 31 F.3d 813, 813 (9th Cir.1994) (citing Buckley v. Los Angeles, 957 F.2d 652, 654 (9th Cir.1992)); see Conley v. Gibson, 355 U.S. 41, 47 (1957); Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir.1995); W. Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir.1981). Pro se complaints, ''however inartfully pleaded[,] are held to less stringent standards than formal pleadings drafted by lawyers[.]'' Hughes v. Rowe, 449 U.S. 5, 9 (1980) (quotation marks omitted); see Ortez v. Wash. County, 88 F.3d 804, 807 (9th Cir.1996).

When analyzing a complaint for failure to state a claim, ''[a]ll allegations of material fact are taken as true and construed in the light most favorable to the non-moving party.'' Smith v. Jackson, 84 F.3d 1213, 1217 (9th Cir.1996); see Miree v. DeKalb County, 433 U.S. 25, 27 n. 2 (1977). In addition, the district court must assume that all general allegations ''embrace whatever specific facts might be necessary to support them.'' Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir.1994), cert. denied, 515 U.S. 1173 (1995) (citations omitted). The district court need not assume, however, that the plaintiff can prove facts different from those alleged in the complaint. See Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519, 526 (1983). Similarly, legal conclusions couched as factual allegations are not given a presumption of truthfulness and ''conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss.'' Pareto v. F.D.I.C., 139 F.3d 696, 699 (9th Cir.1998); see Jones v. Cmty. Redev. Agency, 733 F.2d 646, 649–50 (9th Cir.1984); W. Mining Council, 643 F.2d at 624.

''Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'' Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir.1988); see Federal Civil Procedure § 9:187, at 9–46. Alternatively, dismissal may be appropriate when the plaintiff has included sufficient allegations disclosing some absolute defense or bar to recovery. See Weisbuch v. County of L.A., 119 F.3d 778, 783, n. 1 (9th Cir.1997) (''If the pleadings establish facts compelling a decision one way, that is as good as if depositions and other . . . evidence on summary judgment establishes

[4] Plaintiff's First Amended Complaint is a form complaint used by pro se prisoners. Plaintiff simply checked the boxes indicating that section 1983 (box a.) and Bivens (box b.) were bases for the Court's jurisdiction. (Id.) Plaintiff, however, typed in 28 U.S.C. § 1346(a) next to the jurisdictional box entitled ''other'' (box c.). (Id.)

the identical facts.''); see also Federal Civil Procedure § 9:193, at 9–47.

B. Analysis

Plaintiff states the following in Counts 1 and 2 with respect to the constitutional or other federal right that has allegedly been violated by Defendant: ''Denial of Plaintiff's right to his income tax refunds in violation [] of 28 U.S.C. § 1346(a)[.]'' (First Am. Compl. at 4–5, p 1). Plaintiff indicates that Counts 1 and 2 involve only ''income tax refunds.'' (Id. p 2).

Regarding the facts supporting Count 1, Plaintiff alleges the following:

> ''Defendant ... assessed an illegal and unlawful tax assessment ... for all taxes allegedly owed by Plaintiff for taxable year 1994 ... and erred in denying Plaintiff the right to claim his legal biological dependants [sic] .... To this date Defendant ... continue[s] to deny and refund Plaintiff's remaining income tax refunds.'' (Id. at 4, p 3). Regarding his injury, Plaintiff alleges that ''[p]ursuant to 28 U.S.C. § 1346(a), Plaintiff is legally entitled to his income tax refunds to support and provide basic necessities of life for his family.'' (Id. p 4).

Regarding the facts supporting Count 2, Plaintiff alleges the following: ''Defendant ... continue[s] to deny Plaintiff and his dependents their right to their income tax refunds[] since 1995 to present .... Defendant ['s] ... grievous errors in 1994 has [sic] affected all [of] Plaintiff's income tax refunds for 1995 and currently 1999 and all future taxes.'' (Id. at 4, p 3). Regarding his alleged injury, Plaintiff states: ''Plaintiff and his dependents have suffered continuous injuries and harm and extreme hardship from the illegal and unconstitutional denial of their rightful income tax refunds.'' (Id. p 4).

Significantly, Plaintiff relies on only 28 U.S.C. § 1346(a) as the legal basis of his tax refund claims in Counts 1 and 2 and does not refer to 42 U.S.C. § 1983 or Bivens in either Count. (Id. at 4–5).[5] Indeed, the only place section 1983 and Bivens are referenced in the First Amended Complaint is on the first page where Plaintiff checked boxes indicating that the Court has jurisdiction pursuant to section 1983 and Bivens. (Id. at 1, p 1). Merely checking these boxes, however, is not sufficient to state a claim for which relief can be granted. See Associated Gen. Contractors of Cal., 459 U.S. at 526 (stating that district court need not assume that plaintiff can prove facts different from those alleged in complaint); Balistreri, 901 F.2d at 699 (''Dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.''). Reading Plaintiff's allegations liberally and taking them as true, the Court finds that Plaintiff does not state a valid section 1983 or Bivens claim in either Count 1 or 2. Accordingly, the Court will grant Defendant's Motion to Determine that the Complaint Makes No Other Claims for Which Relief Can Be Granted.

III. DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT ON COUNT 3

A. Legal Standard

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, ''show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'' Fed.R.Civ.P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986); Jesinger v. Nev. Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir.1994). Substantive law determines which facts are material, and ''[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see Jesinger, 24 F.3d at 1130. In addition, the dispute must be genuine, that is, ''the evi-

[5] Plaintiff's reliance solely on section 1346(a) in the First Amended Complaint complies with the Court's July 18, 2000 Order that granted Plaintiff's Motion to Vacate Judgment to Permit Plaintiff to Amend Complaint. The Court stated the following in that Order: ''Plaintiff will be given thirty days ... to file an amended complaint for income tax refunds pursuant to 28 U.S.C. § 1346(a).'' (7/18/00 Order at 3) (emphasis added). Thus, to the extent Plaintiff stated claims for relief under section 1983 and Bivens in the First Amended Complaint, he would be in violation of the July 18, 2000 Order and the Court would strike the claims.

dence is such that a reasonable jury could return a verdict for the nonmoving party.'' Anderson, 477 U.S. at 248.

A principal purpose of summary judgment is ''to isolate and dispose of factually unsupported claims.'' Celotex, 477 U.S. at 323–24. Summary judgment is appropriate against a party who ''fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'' Id. at 322; see Citadel Holding Corp. v. Roven, 26 F.3d 960, 964 (9th Cir.1994). The moving party need not disprove matters on which the opponent has the burden of proof at trial. Celotex, 477 U.S. at 323.

Furthermore, the party opposing summary judgment ''may not rest upon the mere allegations or denials of [the party's] pleadings, but ... must set forth specific facts showing that there is a genuine issue for trial.'' Fed.R.Civ.P. 56(e); see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986); Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1049 (9th Cir.1995); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir.1989); see also Rule 1.10(l)(1), Rules of Practice of the United States District Court for the District of Arizona (''Any party opposing a motion for summary judgment must ... set[] forth the specific facts, which the opposing party asserts, including those facts which establish a genuine issue of material fact precluding summary judgment in favor of the moving party.''). There is no issue for trial unless there is sufficient evidence favoring the non-moving party; if the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson, 477 U.S. at 249–50. However, because ''[c]redibility determinations, the weighing of evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, ... [t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor'' at the summary judgment stage. Id. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158–59 (1970)); see Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir.1995).

B. Defendant's Motion for Summary Judgment on Count 3

In its Motion for Summary Judgment on Count 3, Plaintiff's 1999 refund claim, Defendant argues that Plaintiff is not entitled to the $2,410.00 ''Earned Income Credit'' (''EIC'') he seeks because he was a prisoner in 1999 and earnings of prisoners do not qualify as ''earned income'' for the purpose of determining EIC eligibility. (Mot. at 3–4) (citing 26 U.S.C. § 32(c)(2)(B)(iv); Wilson v. Commissioner 81 T.C. Memo 1745 ¶2001-139 (2001)). In his Opposition and Statement of Facts, however, Plaintiff offered evidence to show that his former employer, Motorola, payed [sic] him $6000.00 in 1999 as part of a settlement of his unpaid wages claim against Motorola. (Pl.'s SOF pp 3–5). Instead of filing a reply, Defendant filed the pending Amended Motion for Summary Judgment on Count 3.

C. Defendant's Amended Motion for Summary Judgment on Count 3

In its Amended Motion, Defendant argues that even if the income reported on Plaintiff's 1999 tax return was not earned while he was a prisoner, he is still ineligible for an EIC. (Mot. at 4). Defendant argues that Plaintiff is still ineligible because he was married in 1999, but did not file a joint return as required to be eligible for an EIC. (Id.; SOF p 4) (citing 26 U.S.C. § 32(d)).

1. Substantive law

The eligibility requirements for the EIC are set forth in the Internal Revenue Code, 26 U.S.C. § 32. Regarding the eligibility of a married individual, section 32(d) pro-vides: ''In the case of an individual who is married [,] ... this section shall apply only if a joint return is filed[.]'' 26 U.S.C. §32(d); see Chapell v. Commissioner T.C. Memo 2001-146 [TC Memo 2001-146], No. 2875- 99, 2001 WL 699009 (Tax Ct. June 20, 2001) (''A taxpayer who is married must file a joint return with his or her spouse for the taxable year in order for section 32 to apply.'') (citing 26 U.S.C. §

32(d)); Becker v. Commissioner T.C. Memo 1995-177 [1995 RIA TC Memo ¶95,177], No. 6297-94, 1995 WL 225572 (Tax Ct. Apr. 17, 1995) (''A married individual . . . may not claim the EIC unless a joint return is filed.'') (citing 26 U.S.C. § 32(d)).

2. Analysis

In its Amended Motion and Statement of Facts, Defendant presents evidence that Plaintiff (1) was legally married during 1999, and (2) did not file a joint return with his spouse for the 1999 tax year. (Am. Mot. at 4; Am. SOF p 4). Defendant thus concludes that Plaintiff is not eligible for an EIC regardless of the source of his 1999 income. (Am. Mot. at 4).

In the document Plaintiff filed in response to Defendant's Amended Motion, he does not address the issue of whether he was married during 1999. Instead, Plaintiff states (at 1) that his April 5, 2002 Opposition to Defendant's original Motion for Summary Judgment on Count 3 ''is sufficient to rebut [D]efendants [sic] Amended [M]otion[.]'' Plaintiff, however, fails to address his 1999 marital status in his April 5, 2002 Opposition. Thus, Plaintiff has failed to ''set forth specific facts showing that there is a genuine issue for trial'' regarding his 1999 marital status. Fed.R.Civ.P. 56(e); see e.g., Matsushita Elec. Indus., 475 U.S. at 86–87.

Based on the undisputed evidence, ''[Plaintiff] was married in [1999], but he and [his spouse] did not file a joint return. Thus, [Plaintiff] is not entitled to an [EIC] for [1999].'' Chappell 2001 WL 699009; see Becker 1995 WL 225572 (''Petitioner was married and did not file a joint return with her husband. Consequently, petitioner is not entitled to claim an [EIC].'') (citing 26 U.S.C. § 32(d)). Accordingly, the Court will grant Defendant's Amended Motion for Summary Judgment on Count 3. See Fed.R.Civ.P. 56(c); see Celotex, 477 U.S. at 322–23; Jesinger, 24 F.3d at 1130.

IT IS THEREFORE ORDERED that Defendant United States of America's Motion to Dismiss Counts 1 and 2 (Doc. # 42-1) is GRANTED.

IT IS FURTHER ORDERED that Defendant United States of America's Motion to Determine that the Complaint Makes No Other Claims for Which Relief Can Be Granted (Doc. # 42-3) is GRANTED.

IT IS FURTHER ORDERED that Defendant United States of America's Amended Motion for Summary Judgment on Count 3 (Doc. # 60) is GRANTED.

IT IS FURTHER ORDERED that Defendant United States of America's Motion for Summary Judgment on Count 3 (Doc. # 49) is DENIED as moot.

¶2002-5753

ANDERSON COLUMBIA CO., INC., successor by merger of Columbia Paving, Inc., PLAINTIFF v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 96-405 T, Nov. 27, 2002. Year 1988. Decision for Govt.

1. Interest—date interest begins to run—deficiency arising from change in accounting method—tax due date. Govt.'s right to collect deficiency interest as of subject year's return's due date was upheld on summary judgment: taxpayer's contention that, because deficiency arose from IRC §481 retroactive accounting method change for which it was required to obtain IRS's consent, no deficiency and thus no interest arose until consent agreement was effective, was rejected. Under clearly established law, IRC §481 adjustment had no effect for IRC §6601 purposes on due date for tax and return to which adjustment related. *Reference:* United States Tax Reporter ¶66,015.02(39). IRC §481; 6601.

Kenneth G. Anderson, Jacksonville, Florida, for plaintiff.
Jennifer Dover Spriggs, Washington, D.C., with whom was Assistant Attorney General Eileen J. O'Connor, for defendant.

U.S. Court of Federal Claims,

OPINION

MEROW, Judge.

Tax; Change in accounting method; Interest on underpayment

This tax case concerns plaintiff's claim for a refund of interest paid. This matter is before the Court on cross-motions for summary judgment. As a result of plaintiff's change in its method of accounting, plaintiff was required to adjust its taxable income upward on a past return and interest was assessed on the difference in tax owed. Plaintiff contends that interest is inappropriate because the consent of the Commissioner of Internal Revenue was required before it could change its method of accounting. Therefore, plaintiff argues, the resulting increase in tax liability did not arise until the consent became effective. Defendant maintains that interest was properly assessed under the applicable statutes and regulations. For the reasons stated below, plaintiff's motion for summary judgment is denied and defendant's cross-motion for summary judgment is granted.

BACKGROUND

The following facts are undisputed. On Sept. 23, 1987, plaintiff Anderson Columbia Co., Inc.[1/] filed with the Internal Revenue Service (''IRS'') a Form 3115 Application for Change in Accounting Method. Plaintiff wished to change its accounting method from the ''completed contract method'' to the ''percentage completion method'' beginning with the tax year ending March 31, 1988. The IRS subsequently requested additional information, and plaintiff filed an amended Form 3115 application on November 13, 1989.

In a Consent Agreement executed by the IRS on January 16, 1990, and by plaintiff on March 14, 1990, the IRS granted plaintiff's request for an accounting method change effective for the tax year ending March 31, 1988. Under Internal Revenue Code (''I.R.C.'') § 481(a), a taxpayer that changes its method of accounting is required to adjust its taxable income, if necessary, to avoid double deductions or exclusions of items of income as a result of the change. Pursuant to the Consent Agreement, plaintiff was to take one-third of the required § 481 adjustment into account when computing taxable income for each year of the adjustment period, beginning with the year of change.

The Consent Agreement provided, *inter alia*, that:

> Permission is hereby granted ... the taxpayer ... to change its accounting method ... provided ... (2) that for any taxable year prior to the year of change there will be no issue pending before the Internal Revenue Service or any Federal Court concerning the accounting method that is the subject of this ruling.

At the time of plaintiff's application for a change in method of accounting, the IRS was investigating plaintiff's accounting methods. Under this audit investigation, the IRS proposed § 481 adjustments to increase plaintiff's taxable income for several previous tax years. After a lengthy examination and appeals process, the investigation was closed June 10, 1992, with no adjustments made.

On January 21, 1992, plaintiff filed a Form 1120X Amended U.S. Corporate Income Tax Return for the tax year ending March 31, 1988. This form showed a balance due of $485,972, pursuant to the change in method of accounting under the Consent Agreement. Plaintiff paid this tax. On March 10, 1992, the IRS assessed interest on the additional tax due for the tax year ending March 31, 1988, in the amount of $140, 314.41, as well as a delinquency penalty. Plaintiff sought to have both the interest and penalty amounts abated. The IRS agreed to abate the penalty amount, but refused to abate the interest. Plaintiff then paid the interest.

On May 23, 1994, Plaintiff filed a Form 843 Claim for a Refund with the IRS seeking return of the interest paid. This claim

[1/] Plaintiff Anderson Columbia Co., Inc. is the successor by merger of Columbia Paving, Inc. In 1988, Columbia Paving was consolidated with Anderson Contracting Company, Inc. to form Anderson Columbia Paving Inc., which was immediately thereafter merged into Anderson Columbia Co., Inc. Anderson Columbia Co., Inc. is the surviving corporation. For convenience, these corporations shall collectively be referred to as ''plaintiff'' or ''Anderson.''

was disallowed on July 11, 1994. Plaintiff then filed this action on July 9, 1996. In Count I of its complaint, plaintiff seeks a refund of the interest paid, plus interest, costs and attorneys' fees. In its Reply Brief dated May 24, 2001, plaintiff advised that it had withdrawn Count II of its complaint, which sought review of the Commissioner of Internal Revenue's (''Commissioner'') decision not to abate interest. Both parties have moved for summary judgment on Count I.

DISCUSSION

A. Summary Judgment Standards

Summary judgment is appropriate when there are no genuine disputes over material facts and the moving party is entitled to prevail as a matter of law. RCFC 56(c); *See Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). In cases in which both parties move for summary judgment, each party bears the burden of demonstrating the absence of disputes of material facts in its own case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A genuine dispute concerning a material fact exists when the evidence presented would permit a reasonable jury to find in favor of the non-movant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Thus, in order to prevail upon a motion for summary judgment, a party must demonstrate that no facts exist which would change the outcome of the litigation under the substantive law governing the suit. *See id.* at 248.

B. Merits

[1] As a general rule, once it is established that taxes due for a given year have not been paid by the last date prescribed for payment, interest related to such taxes must be paid as a matter of law. *See* I.R.C. § 6601. Interest is ''not a penalty but is intended only to compensate the Government for delay in the payment of a tax.'' *Avon Prods., Inc. v. United States*, 588 F.2d 342, 343 [42 AFTR 2d 78-6266] (2d Cir. 1978). Unless a statutory exception applies, neither the IRS nor the courts have discretion to excuse a taxpayer from payment of interest. *See Johnson v. United States*, 602 F.2d 734, 738 [44 AFTR 2d 79-5607] (6th Cir. 1979). The last date prescribed for payment of tax is generally the due date for the tax return on which the tax is reported, without regard to any extension of time for filing the return. *See* I.R.C. § 6601(b); *May Dep't Stores Co. v. United States*, 36 Fed. Cl. 680, 683 [78 AFTR 2d 96-7034] (1996). Under the statutes and regulations governing corporate income tax returns, plaintiff's return for the fiscal year ending March 31, 1988 was due on June 15, 1988. *See*I.R.C. § 6072(b).

Plaintiff contends that it did not become liable for the increased tax resulting from the change in its method of accounting until either January 21, 1992, when its amended tax return was filed, or June 10, 1992, when the audit examination closed. Plaintiff's argument is essentially this: 1) Under I.R.C. § 446(e), plaintiff was required to secure the consent of the Commissioner before it could change its method of accounting; 2) Under the Consent Agreement executed by the parties, consent was granted only if ''there will be no issue pending before the Internal Revenue Service or any Federal Court concerning the accounting method that is the subject of this ruling;'' 3) The audit examination of plaintiff's accounting meth-ods did not close until June 10, 1992; 4) Therefore, the Consent Agreement was not effective and plaintiff did not actually change its method of accounting, thereby assuming increased tax liability, until June 10, 1992.[2/] Defendant does not dispute any of the three premises of plaintiff's ar-gument set forth above, but maintains that interest was properly asserted nevertheless. Although plaintiff's argument has some logical appeal, it is ultimately unpersuasive because it misconstrues the purpose of assessing interest on unpaid tax.

''Congress intended the United States to have the use of the money lawfully due when it becomes due.'' *Manning v. Seely*

[2/] It is unclear why plaintiff argues that the date it became liable for the increased tax is either January 21, 1992, when it filed its Form 1120X, or June 10, 1992, when the audit examination was closed. Plaintiff offers no support for why the date of filing of an amended tax return would affect the date that tax liability arose, and seems to tailor all of its arguments to the June 10, 1992 date.

[sic Seeley] *Tube & Box Co. of New Jersey*, 338 U.S. 561, 566 [38 AFTR 1202] (1950). If tax is not properly paid, interest is assessed to compensate for the Government's loss of use of the money, irrespective of the rea-son for the late payment. *See Suffness v. United States*, 974 F.2d 608, 610 [70 AFTR 2d 92-5865] (5th Cir. 1993). Even assuming that the Consent Agreement did not become effective until June 10, 1992 when the audit investigation closed, plain-tiff would still be liable for interest from the due date of its return under the princi-ples above. I.R.C. § 481 required a retroac-tive adjustment to plaintiff's fiscal year 1988, 1989 and 1990 tax returns. The re-sult of this adjustment was that plaintiff owed additional tax for 1988, and was owed a refund for 1989 and 1990. How-ever, the adjustment of the returns under I.R.C. § 481 did not affect the due date of the tax under I.R.C. § 6601. Plaintiff's fis-cal year 1988 tax return remained due on June 15, 1988, and interest is owed on any underpayment from that date because the government is entitled to use of the money on that date. Similarly, plaintiff is entitled to interest on the overpayments in fiscal years 1989 and 1990, and this interest was refunded to plaintiff.

This approach is supported by both the statutory scheme and the relevant case law. In *Gen. Dynamics Corp. v. United States*, 562 F.2d 1201 [40 AFTR 2d 77-5161] (Ct. Cl. 1977), the court held that the taxpayer's 1961 change in the way it treated foreign taxes paid related back to its 1958 and 1959 tax returns. As such, it held that the plaintiff's tax liability for those years was calculated from the time fixed for filing those returns and that therefore the plaintiff owed interest to the government from those dates to compensate for the government's loss of use of the money. "To read § 6601 et al. differently would do violence to the plain meaning of those sections." *Id.* at 1207. Similarly, here plaintiff's change in method of accounting relates back to 1988. Its 1988 return must be adjusted to reflect this change, and therefore plaintiff must pay interest on any underpayment of tax. Accordingly, defendant is entitled to summary judgment.

CONCLUSION

For the foregoing reasons, it is ORDERED:

(1) Plaintiff's motion for Summary Judgment is DENIED;

(2) Defendant's Motion for Summary Judgment is GRANTED and the Clerk is directed to enter final judgment for the Defendant with no costs to be assessed.

James F. Merow

Senior Judge

¶2002-5754

UNITED STATES OF AMERICA, APPELLEE v. Edwin C. ALLEN, II, DEFENDANT-APPELLANT. U.S. Court of Appeals, First Circuit, (CA1) No. 01-2643, Dec. 10, 2002. District Court affirmed. Decision for Govt.

1. Tax crimes—fraudulent returns and statements—conditions of probation. 1st Circuit upheld special conditions of supervised release against taxpayer who pled guilty to tax evasion for making false claim on financial statement: imposing limits on taxpayer's ability to obtain credit and requiring that he give probation officer access to financial information fell within Federal Sentencing Commission's specific recommendations for defendants like taxpayer who were paying fines in installments; alcohol prohibitions were supported by taxpayer's alcohol abuse history and reasonably related to offense; and mandatory mental counseling condition didn't result in impermissible delegation of authority to probation officer where officer was merely required to oversee administrative details. *Reference:* United States Tax Reporter ¶72,065.01(52). IRC §7206.

David Abraham Silverman, for appellant.
F. Mark Terison, Senior Litigation Counsel, with whom Paula D. Silsby, United States Attorney, was on brief, for appellee.

United States Court of Appeals For the First Circuit,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

Before Torruella, Circuit Judge, Stahl, Senior Circuit Judge, and Howard, Circuit Judge.

[Hon. D. Brock Hornby, U.S. District Judge]

TORRUELLA, Circuit Judge. Defendant-appellant, Edwin C. Allen, appeals the special conditions of his supervised release. Because we do not find that the district court erred in imposing the conditions, we affirm.

I. Background

On April 27, 2001, Allen pled guilty to a single count of tax evasion for making a false claim on a financial statement. Based upon a claim of diminished mental capacity, Allen sought a downward departure from the sentencing range listed in the United States Sentencing Guidelines (U.S.S.G.). (1) The district court refused his request and on November 5, 2001 sentenced him to eight months imprisonment followed by three years of supervised release.

Allen makes two arguments attacking the special conditions imposed. First, he argues that three conditions are overbroad and involve a greater deprivation of liberty than is reasonably necessary for the purposes of his supervised release. Second, he contends that the special condition requiring that he attend mental health treatment improperly delegates judicial authority to the probation officer.

II. Standard of Review

Ordinarily, we would review the imposition of special conditions of supervised release for abuse of discretion. United States v. Peppe, 80 F.3d 19, 22 (1st Cir. 1996). However, because Allen had an opportunity to object to the special conditions and failed to do so, we review for plain error only. Id. "The plain error hurdle is high. Under the standard, we may set aside the challenged portion of the instant sentence if, and only if, the appellant succeeds in showing an obvious and clear error under current law that affected his substantial rights." United States v. Brown, 235 F.3d 2, 4 (1st Cir. 2000) (citations and internal quotation marks omitted). However, "[e]ven then, we may decline to correct an error that does not seriously affect the fairness, integrity or public reputation of judicial proceedings." Id.

III. Overbreadth Challenges

[1] U.S.S.G. § 5D1.3 governs the conditions of supervised release. The court may impose additional conditions where they are reasonably related to the offense and the history of the defendant, as long as they do not deprive the defendant of a greater amount "of liberty than is reasonably necessary" to deter criminal conduct and to protect the public from the defendant. U.S.S.G. § 5D1.3(b) (2000). (2) The Federal Sentencing Commission ("the Commission") provides a list of "special conditions" that it recommends in specified circumstances. U.S.S.G. § 5D1.3(d). We now consider the special conditions that Allen challenges.

A. Financial Information and Credit Limitations

Allen argues that the provisions requiring that he "provide the probation officer with access to any requested financial information" and limiting his ability to obtain credit are overbroad in violation of section 5D1.3(b). (3) Far from committing error, the district court imposed special conditions that the Commission specifically recommends for defendants, such as Allen, who are paying fines in installments. U.S.S.G. § 5D1.3(d)(2)–(3). Consequently, Allen has not established that the district court imposed these conditions in clear error.

B. Alcohol Prohibitions

Allen next challenges the special condition prohibiting his possession of alcohol and his presence at establishments primarily serving alcohol. The condition pro-vides:

Defendant shall not at any time be in possession, joint, sole, actual or constructive, of any alcoholic beverage. He shall

not associate with individuals consuming alcoholic beverages, shall not frequent business establishments whose primary product to the consumer is alcoholic beverages, and shall not use any medication containing alcohol without permission from the probation officer or a prescription from a licensed physician.

Allen argues that the condition is overbroad and that there is not an adequate relationship between the nature and circumstances of his offense and the special condition imposed.

Allen has not shown that the alcohol condition is so broadly drawn or divorced from the nature and circumstances of his offense that it constitutes clear error. The record contains ample evidence of Allen's history of alcohol abuse, including a conviction for driving while under the influence of alcohol. In addition, defense counsel argued that Allen's mental illness contributed to the commission of his crime, and that Allen's abuse of alcohol exacerbated the symptoms of the mental illness. Based on the record, the district court did not commit obvious error in con-cluding that Allen's history of alcohol abuse required a stiff prohibition, (4) see United States v. Thurlow, 44 F.3d 46, 47 (1st Cir. 1995) (upholding a special condi-tion prohibiting the use and possession of alcohol where the record showed a history of alcohol abuse), and that there was ''an adequate relationship between the nature and circumstances of the offense, the demonstrated propensities of the offender and the special condition attached to the offender's release,'' Brown, 235 F.3d at 7. Far from erring, the district court created an alcohol prohibition reasonably related to Allen's history of alcohol abuse and to permissible goals of supervised release, in-cluding Allen's rehabilitation and protec-tion of the public.

IV. Delegation Argument

Finally, Allen claims that Judge Hornby impermissibly delegated judicial authority to the probation officer when he ordered, as a special condition of supervised release, that ''[d]efendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.'' According to Allen, this condition is an unlawful delegation because it empowers the probation officer to decide whether and for how long Allen must participate in mental health treatment.

While ''[c]ases or controversies committed to Art. III courts cannot be delegated to nonjudicial officers for resolution[,] [t]hat general principle does not ... prohibit courts from using nonjudicial officers to support judicial functions, as long as that judicial officer retains and exercises ultimate responsibility.'' United States v. Johnson, 48 F.3d 806, 809 (4th Cir. 1995); see also United States v. Raddatz, 477 U.S. 667, 683 (1980) (holding that ''so long as the ultimate decision is made by the district court,'' delegation to a magistrate judge does not violate Article III); cf. United States v. Merric, 166 F.3d 406, 409 (1st Cir. 1999) (vacating a sentence in which the judge delegated final authority over defendant's fine payment schedule to the probation officer). Allen relies on cases outside this Circuit for his claim that this special condition amounted to an unlawful delegation. See United States v. Peterson, 248 F.3d 79 (2d Cir. 2001); United States v. Kent, 209 F.3d 1073 (8th Cir. 2000). Unlike Allen, we do not read these opinions as announcing -- nor do we adopt -- a general rule that counseling clauses such as the one before us are prohibited. However, these cases do provide persuasive guidance for the proposition that special conditions of probation should be evaluated in light of the facts of the case as reflected by the entire record. In Kent, the Eighth Circuit vacated the district court's imposition of a special condition requiring the defendant to attend psychological counseling because it appeared that the ''probation officer, as opposed to the court, would retain and exercise ultimate responsibility over the situation.'' Kent, 209 F.3d at 1079. Crucially, the court made this determination after examining the entire record and finding both that the trial judge had stated outright that the parole officer would be the one to determine whether defendant had to attend

counseling and that the record did not demonstrate that the defendant had mental health problems. Id. at 1075, 1078–79. Citing to Kent, the Second Circuit pro-vided a concise rule for delegations of psychiatric counseling:

If [the defendant] is required to participate in a mental health intervention only if directed to do so by his probation officer, then this special condition constitutes an impermissible delegation of judicial authority to the probation officer. On the other hand, if the District Court was intending nothing more than to delegate to the probation officer details with respect to the selection and schedule of the program, such delegation was proper.

Peterson, 248 F.3d at 85 (citations omitted).

When we examine the record, it becomes evident that Judge Hornby was merely directing the probation officer to perform ministerial support services and was not giving the officer the power to determine whether Allen had to attend psychiatric counseling. The record contains many references to Allen's mental illness. For example, defense counsel submitted an affidavit from Allen's doctor, Ronald S. Ebert, who "found that there was a history suggestive of a mental illness as well as alcohol abuse" and opined that Allen was "suffering from a major depressive disorder characterized by mood disorder, depression, disorganized and confused thinking, anxiety and irritability." Defense counsel stated Dr. Stephanie Brody diagnosed Allen with "affective mental illness." Defense counsel argued that Allen's mental illness contributed to the commission of Allen's crime and asked the court to impose mental health treatment as a condition of probation, if the court agreed to a reduction in his sentence. The extensive evidence of Allen's mental illness indicates that the court was imposing mandatory counseling and delegating the administrative details to the probation officer, actions constituting a permissible delegation. See Peterson, 248 F.3d at 85.

V. Conclusion

For the reasons stated above, we affirm.

1. Applying the 2000 Sentencing Guidelines, Judge Hornby found that Allen fell in the Zone C range of eight to fourteen months imprisonment.

2. U.S.S.G. § 5D1.3(b) states in its entirety:

(b) The court may impose other conditions of supervised release to the extent that such conditions (1) are reasonably related to (A) the nature and circumstances of the offense and the history and characteristics of the defendant; (B) the need for the sentence imposed to afford adequate deterrence to criminal conduct; (C) the need to protect the public from further crimes of the defendant; and (D) the need to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and (2) involve no greater deprivation of liberty than is reasonably necessary for the purposes set forth above and are consistent with any pertinent policy statements issued by the Sentencing Commission.

3. It is notable that the credit condition does not prevent Allen from obtaining credit; it merely requires that he gain approval from his probation officer before applying for credit.

4. Allen can petition for a change in the condition if it is applied unreasonably. See 18 U.S.C. § 3583(e).

¶2002-5755

UNITED STATES OF AMERICA, PLAINTIFF v. Willie Henry HAUGABOOK DEFENDANT. U.S. District Court, Middle Dist. of Georgia, (DC FL) Civil No. 5:02-CV-0367-4 (CAR), Dec. 9, 2002. Decision for Govt.

1. Actions against tax return preparers—permanent injunction—reparations claims. Return preparer who filed returns claiming tax credit or refund for reparations for slavery, segregation, separate-but-equal laws, and treatment as "second-class" citizen, and anyone acting

with him, were permanently enjoined under IRC §7407 from preparing returns or related documents, and under IRC §7407, IRC §7402, and IRC §7408 from engaging in conduct subject to IRC §6694, IRC §6695, and IRC §6701 penalties, from acting as return preparer, and from hindering tax law administration. Also preparer was ordered to notify all clients and advertise in local paper that IRC doesn't provide for such credits. *Reference:* United States Tax Reporter ¶74,075. IRC §7407.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION,

Permanent Injunction

C. ASHLEY ROYAL UNITED STATES DISTRICT JUDGE

This cause comes before the Court on the parties' joint motion for entry of permanent injunction. The Court, having reviewed the motion, finds that the motion should be granted.

IT IS THEREFORE ORDERED THAT:

A. **[1]** Pursuant to IRC § 7407, Defendant and anyone acting in concert with him are prohibited from preparing federal-income-tax returns, amended returns, and other related documents and forms for others.

B. Pursuant to IRC §§ 7402, 7407, and 7408, Defendant and anyone acting in concert with him are prohibiting from directly or indirectly;

i. Engaging in any conduct subject to penalty under IRC § 6694, *i.e.*, preparing any part of a return or claim for refund that includes an unrealistic position;

ii. Engaging in any conduct subject to penalty under IRC § 6695, *i.e.*, failing to turn a complete and accurate list of clients, with taxpayer identification numbers, to the IRS on request or a copy of all tax returns he prepared;

iii. Engaging in any conduct subject to penalty under IRC § 6701, *i.e.*, preparing or assisting others in the preparation of any tax forms or other documents to be used in connection with any material matter arising under the internal revenue laws and which he know will (if so used) result in the understatement of income tax liability;

iv. Acting as an income-tax-return preparer; and

v. Engaging in any conduct that interferes with the administration and enforcement of the internal revenue laws.

C. Defendant and anyone acting in concert with him are prohibited from preparing or assisting in preparing any return, amended return, or other document to be filed with the IRS claiming a tax credit or refund for reparations for slavery, segregation, separate-but-equal laws, treatment as a ''second-class'' citizen, or any other comparable grounds, as well as any other fabricated tax credit or refund.

D. Pursuant to IRC §§ 7402, 7407, and 7408, Defendant is ordered to contact the people described below for whom Defendant has phone numbers and/or addresses. Defendant must contact:

(1) all persons to whom Defendant gave, sold, or distributed any materials espousing or related to a tax credit or refund for reparations for slavery, segregation, separate-but-equal laws, treatment as a ''second-class'' citizen, or any other comparable grounds, as well as any other fabricated tax credit or refund;

(1) all persons for whom Defendant prepared or assisted in preparing any federal income tax returns or tax-related documents; and

(2) all persons who contacted Defendant regarding a tax credit or refund for reparations for slavery, segregation, separate-but-equal laws, treatment as a ''second-class'' citizen, or any other comparable grounds, as well as any other fabricated tax credit or refund (in correspondence, by personal or telephone conversations, or through electronic means)

and inform those persons that the Internal Revenue Code does not provide for a tax credit or refund for reparations for slavery,

segregation, separate-but-equal laws, treatment as a ''second-class'' citizen, or any other comparable grounds; the falsity of the tax returns prepared on those persons' behalf; the possibility of the imposition of frivolous-return penalties against them; the possibility that the United States may seek to recover any erroneous payment they may have received; and the fact that a permanent injunction has been entered against Defendant.

E. Defendant must place the advertisement attached hereto in the local Macon newspaper, *The Macon Telegraph.* The ad is to run for one day, be placed as a retail advertisement and not a classified advertisement, and be at least 3 column inches.

F. Defendant shall certify to the Court within 21 days that he has complied with paragraphs D and E.

G. The Court shall retain jurisdiction over this case to compel compliance with this injunction.

H. The Government may engage in discovery, pursuant to the Rules 26 through 37 of the Federal Rules of Civil Procedure, after the entry of the injunction to monitor compliance with the injunction.

SO ORDERED, this the 9th day of December, 2002.

C. ASHLEY ROYAL

UNITED STATES DISTRICT JUDGE

ADVERTISEMENT

A Message From Willie Henry Haugabook of Montezuma, Georgia

This message is to all persons for whom I have prepared tax returns with reparations claims; all persons to whom I may have given materials about a purported tax credit for slavery reparations or for segregation, separate-but-equal laws, or treatment as a ''second-class'' citizen; and all persons with whom I may have discussed such purported tax credits.

On ___, the United States District Court for the Middle District of Georgia entered an injunction against me prohibiting me from preparing federal income tax returns.

There is no tax credit for slavery reparations or for segregation, separate-but-equal laws, or treatment as a ''second-class'' citizen. If you file federal income tax returns claiming such false tax credits you may have a penalty imposed against you for filing a frivolous return. Any refund you may receive because of such a false tax credit is erroneous and the United States may seek to recover that money.

¶2002-5756

Peter G. SAM v. UNITED STATES OF AMERICA. U.S. District Court, Dist. of Maryland, (DC MD) Civil No. DKC-01-105, Nov. 27, 2002. Earlier proceeding at (2002, DC MD) 90 AFTR 2d 2002-6437, 2002-2 USTC ¶50673. Years 1992, 1993. Decision for Taxpayer.

1. Employment taxes—refunds—employees vs. independent contractors—proof. Magistrate judge granted trucking business sole proprietor partial employment tax refund for truck drivers working under contract: taxpayer's highly specific testimony and corroborating written contracts overcame presumptive correctness of IRS's assessments and showed drivers were independent contractors, not employees. Notably, taxpayer exercised little control over drivers' hours or other work details, had no permanent relationship and didn't intend to create any kind of employment relationship with drivers, left profit opportunity up to drivers, and held only minimally significant discharge right under mutually terminable contracts; and fact that drivers' work was part of taxpayer's regular business wasn't in itself dispositive. *Reference:* United States Tax Reporter ¶74,225.05(5); 34,015.38(12); 34,015.45(5). IRC §3401; 7422.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND,

ORDER

JILLYN K. SCHULZE United States Magistrate Judge

(Magistrate Judge Jillyn K. Schulze)

For the reasons stated in the foregoing Memorandum Opinion, it is this 27 day of Nov, 2002, by the United States District Court for the District of Maryland, ORDERED that:

1. Judgment BE, and the same hereby IS ENTERED in favor of Plaintiff, in the amount of $7,369.26, plus costs and interest.

3. The clerk is directed to transmit copies of the Memorandum Opinion and this Order to counsel for the parties and CLOSE this case.

JILLYN K. SCHULZE

United States Magistrate Judge

MEMORANDUM OPINION

[1] Plaintiff Peter G. Sam brought this action seeking a refund of taxes, penalties, and interest paid following an Internal Revenue Service audit of his trucking business for tax years 1992 and 1993. The case was referred to me for all proceedings by consent of the parties. Upon the United States' motion for summary judgment, Mr. Sam's claim was reduced by amounts which were either barred by limitations or not presented in his administrative claim for refund. A bench trial was then held at which exhibits and testimony were received. For the reasons set forth below, judgment will now be entered in favor of Mr. Sam.

Mr. Sam operated a trucking business as a sole proprietor, contracting with common carriers for delivery of goods. Following an employment tax examination of his business for years 1992 and 1993, the IRS determined that the truck drivers were employees rather than independent contractors as maintained by Mr. Sam. Assessments for employment taxes, interest and penalties were made, and paid by Mr. Sam.

Mr. Sam testified that pursuant to contracts with carriers, he would provide a truck and driver to haul the carriers' loads. The carrier and the driver would agree on the price, and the carrier paid Mr. Sam the agreed amount, minus 1) any advances the carrier may have made to the driver, and 2) any amounts the carrier may have paid for fuel or truck maintenance during the trip.

Mr. Sam introduced a copy of the standard contract he executed with all of his drivers. The driver agrees to operated Mr. Sam's equipment for a percentage of gross revenue less road expenses, with fuel cost and normal maintenance not considered road expenses. The contract provides that neither party intends to create an employment relationship and that Mr. Sam will not pay tax, social insurance benefits, or workers compensation and unemployment insurance. The driver agrees to indemnify Mr. Sam from liability from operation. Either party may terminate the contract at any time. Upon termination, the driver must return the truck to a location designated by Mr. Sam.

Mr. Sam also testified regarding his relationship with the drivers. Mr. Sam provided the truck, which he owned and for which he paid routine maintenance, licensing, and upkeep. While under contract, the driver kept possession of the truck and used it to haul the carriers' loads. After negotiating the hauling price with the carrier, the driver was entitled to 25% of the revenue from each delivery. The driver had the discretion to decline a load if he or she deemed the potential for profit insufficient. Mr. Sam did not tell the drivers what hours or days to work or what routes to follow, and the driver his or her food and lodging costs (or slept in the truck). Fuel, tolls, and on-the-road maintenance costs were deducted from the revenue before the drivers' percentage was computed.[1]

The parties do not dispute the amounts of the assessments or that Mr. Sam has paid all assessed amounts.[2] The only issue presented is whether Mr. Sam's drivers were employees, rendering the assessments proper, or whether they were independent

[1] With regard to fuel costs, Mr. Sam's testimony was inconsistent with the written contract, and I make no finding on that question. The testimony and the contract were otherwise consistent.

[2] At trial, Mr. Sam sought to revisit the summary judgment ruling concerning the amount of his claim that is barred by limitations or failure to seek administrative relief. However, his request was untimely and was in any event not supported by any new evidence or law, and is thus denied. *See* Federal Rules of Civil Procedure 56 and 60.

contractors, which would entitle Mr. Sam to a refund of the $7,369.26 which remains in the case.

The United States relies on the established presumption that in a tax refund suit, the Commissioner's deficiency determinations are correct, and the taxpayer bears the burden of proving that the Commissioner's findings were erroneous. *Helvering v. Taylor*, 293 U.S. 507, 514–15 [14 AFTR 1194] (1935); *Mays v. United States*, 763 F.2d 1295, 1297 [56 AFTR 2d 85-5335] (11th Cir. 1985). Combining the presumption with the rule that a taxpayer's claim ''must be substantiated by something other than ... uncorroborated oral testimony, ... or self-serving statements,'' *id.*, the United States concludes that Mr. Sam did not meet his burden of proof because his oral testimony was uncorroborated and/or his statements were self-serving.

Mr. Sam's oral testimony was corroborated by the written contract, the provisions of which are materially consistent with Mr. Sam's testimony regarding both the intent of the parties and the details of the relationship between Mr. Sam and the drivers. Nor can his evidence be viewed as merely self-serving. The preclusion on reliance on ''self-serving statements'' is directed at conclusory statements or after the fact documents prepared solely to justify or validate some prior action. *See, e.g., Mays*, 763 F.2d at 1297 (computer printout, prepared after the IRS audit had been completed and unsupported by any contemporaneous documentation, deemed insufficient); *see also Trucks, Inc. v. United States*, 234 F.3d 1340, 1342 [86 AFTR 2d 2000-7180] (11th Cir. 2000) (evi-dence of company president's state of mind on the question of the reasonableness of her decisions was not a mere self-serv-ing statement); *Novotny v. United States*, 184 F.Supp.2d 1071, 1083 [88 AFTR 2d 2001-6204] (D. Col. 2001) (statements pre-pared ten years later in response to a re-quest from the government were ''uncorroborated and self-serving''). Mr. Sam's testimony was not conclusory, but rather was highly specific, and the contract was contemporaneous with the pertinent events.

The United States points out that Mr. Sam did not offer a copy of his contract with the carriers or testimony from his drivers. However, he is not required to offer all possible evidence, but rather must present evidence that is legally sufficient to overcome the presumption in the United States' favor. The United States also appears to be contending that the fact that the contract sought to prevent the creation of an employment relationship renders it ''self-serving.'' This argument would bear weight if the contract had been prepared for purposes of this litigation or the audit, but it was not. The contract is not ''self-serving'' for the present purpose of determining whether it achieved its intended effect.

In sum, Mr. Sam's testimony is corroborated by the driver's contract, and the contract provides contemporaneous documentation of his relationship with the drivers. This evidence is legally sufficient to overcome the presumption that the Commissioner's determination is correct.[3]

The United States did not offer any evidence to rebut or contradict Mr. Sam's evidence. Based on this, as well as, Mr. Sam's demeanor as a witness, I find that Mr. Sam's evidence was credible. Accordingly, I find the facts regarding Mr. Sam's relationship with the drivers to be in accordance with his testimony and the written contract.

Application of the law to these facts requires an assessment of the factors relevant to determining whether an employment relationship exists. These include (1) the degree of control exercised by the principal over the details of the work; (2) which party owns the facilities used in the work; (3) the worker's opportunity for profit or loss; (4) whether the principal has the right to discharge the individual; (5) whether the work is part of the principal's regular business; (6) the permanency of the relationship; and (7) the relationship the parties

[3] Plaintiff's exhibit two, documents concerning a 1984 audit, has not been considered as I find it has no relevance to the issues presented in this case.

believe they are creating. *Eren v. Commissioner of Internal Revenue*, 180 F.3d 594, 596 [83 AFTR 2d 99-2799] (4th Cir. 1999); *Weber v. Commissioner of the I.R.S.*, 60 F.3d 1194, 1110 [76 AFTR 2d 95-5782] (4th Cir. 1995). The ''right-to-control'' is the most important factor. *Id.*

The evidence establishes that Mr. Sam exercised little control over his drivers. He did not dictate when they worked, did not decide whether they would take a particular load, and did not decide the route they would take when making a delivery. He permitted them to keep possession of the trucks at all times, working and non-working, during their contracts. He did not retain the right to control the manner or means by which the drivers performed their delivery obligations. This factor weighs heavily in favor of a determination that the drivers were independent contractors.

The second factor, which party invested in the work facilities, does not weigh in either party's favor here. Mr. Sam did not provide a workplace. Although Mr. Sam owned and provided routine maintenance for the trucks, the drivers had possession at all times. The drivers also had an interest in the maintenance of the trucks because they were responsible for handling on-the-road repairs and were required to pay a portion of the costs of those repairs. In addition, the drivers indemnified Mr. Sam from liability for their actions.

The drivers clearly had the opportunity to control their profit. They could both negotiate the price and refuse a load if they felt that their profit potential was too low. They had the ability to determine whether or not they would work at any particular time. They could also affect their profit by their selection of routes and travel times.

Mr. Sam, of course, retained the right of discharge since the contracts provided that either party could terminate at any time. However, the right of discharge does not, in this case, serve its customary function of providing an employer with oversight as to the manner or means of job performance, and it thus weighs only slightly in the United States' favor.

The fifth factor, whether the work is part of the principal's regular business, weighs in the United States' favor, since providing transportation was Mr. Sam's sole business. The sixth and seventh factors, however, weigh in Mr. Sam's favor, since his relationships with the drivers were not permanent and neither he nor the drivers believed they were creating an employment relationship or intended to do so.

In sum, four of the seven factors, including the most important factor, indicate that Mr. Sam's drivers were independent contractors. Of the three remaining factors, one indicates that the drivers were employees, one weighs slightly in that direction, and one is neutral. The preponderance of the evidence establishes that Mr. Sam's drivers were independent contractors.

For the reasons stated, judgment will be entered in favor of Mr. Sam in the amount of $7,369.26, plus costs and interest.

Date: 11/27/02

JILLYN K. SCHULZE

United States Magistrate Judge

¶2002-5757

Nickolas Antonious MELLS, PLAINTIFF v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Dist. of Columbia, (DC Dist Col) Civ. Action No. 99-2030 (TPJ), Nov. 21, 2002. Earlier proceeding at (2001, DC Dist Col) 87 AFTR 2d 2001-1067. Decision for Govt.

1. FOIA—jurisdiction—failure to exhaust administrative remedies—constructive exhaustion. District court had jurisdiction over pro se prisoner's complaint for FOIA search fee waiver: taxpayer constructively exhausted his administrative remedies where IRS did or at least should have treated his letter explicitly conveying his appeal intent as appeal of his fee waiver denial, and didn't timely respond to such letter within statutory 20-day period. Also, IRS's subsequent letter to taxpayer that was twice returned as undelivered was disregarded. *Reference:* United States Tax Reporter ¶76,556.502(75).

2. FOIA—search fees—waiver—public vs. private interest. IRS's denial of pro se prisoner's request for FOIA search fee waiver was upheld: taxpayer's contentions that requested records' disclosures would benefit him personally and tangentially contribute to public's understanding of govt.'s "collusive" operations showed no real or significant public benefit from disclosure or that he had any intent to publicly disseminate disclosed information. *Reference:* United States Tax Reporter ¶76,556.502(65).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA,

MEMORANDUM OPINION

Thomas Penfield Jackson U.S. District Judge

In this action filed under the Freedom of Information Act, plaintiff challenges defendant's denial of his request for a fee waiver. See Order filed June 22, 2001, and Memorandum Opinion (Mem. Op. I) filed January 23, 2001, for case background and procedural history. Pending before the Court are the parties' respective motions for summary judgment. Defendant asserts, inter alia, that the Court lacks subject matter jurisdiction. Upon consideration of the parties' submissions and the entire record, the Court finds that it has subject matter jurisdiction over the claim, but further finds that plaintiff has not shown his entitlement to a fee waiver. Accordingly, the Court will grant defendant's motion and will deny plaintiff's motion.

I. FACTUAL BACKGROUND

Defendant originally assessed plaintiff a copying charge of $628.35 to obtain records responsive to his FOIA request. See Mem. Op. 1 at 2. By letter dated February 5, 2001, following the dismissal of this case without prejudice, plaintiff requested that the agency waive the fees, asserting a public interest. Specifically, plaintiff stated that "the information is likely to contribute significantly to public understanding of the wrongful and collusive operation of the government ... Mells was targeted, having all of my civil rights violated by corrupt confidential informants who were bribed with tax-payers dollar. Waiver of fees should be granted based upon the fact that the information in which I seek is exculpatory." Government's Exhibit B, Declaration of Valerie Barta ("Barta Decl."), Exhibit A. Defendant denied the fee waiver request by letter dated March 6, 2001, which informed plaintiff of a slight modification of the assessment to $627.90, explained the agency's decision, and offered an alternative approach for plaintiff to reduce his costs. Barta Decl., Exhibit B.

By letter dated March 5, 2001, and received by defendant on March 8, 2001 (Barta Decl. ¶ 4), plaintiff stated his intent to appeal what he had deemed to be a denial of his fee waiver request on the mistaken belief that defendant had not met the statutory deadline discussed more fully below. Id., Exhibits C, D. Defendant informed plaintiff in a letter dated March 12, 2001, that, among other things, its March 6 response was timely because its response deadline was March 8, 2001. Defendant also enclosed a notice of plaintiff's appeal rights, which it had "inadvertent[ly]" omitted from the March 6 determination letter. Id., Exhibit E.

By letter dated March 8, 2001, plaintiff requested that defendant provide the 100 free pages allowed under the FOIA, which he then specified as "all grand jury subpoenas and ... trial subpoenas. Id, Exhibit D. Defendant treated that request as an amendment to plaintiff's original FOIA request and, by letter dated April 4, 2001, provided plaintiff with 153 pages at no charge. Id., Exhibit F. In that same letter, defendant informed plaintiff that he would be charged 'for copying fees for access to the remaining documents' and informed plaintiff of his right to appeal its response to the amended request. Defendant's release of records is not before the Court.[1]

On June 18, 2001, plaintiff reinitiated this action by filing what the Court con-

[1] Plaintiff complained to the agency about the released records, see Barta Decl., Exhibits G, H, but has not sought to amend or supplement the complaint to add a claim stemming from defendant's release of records.

strued as a motion for relief from judgment under Fed. R. Civ. P 60(b). The Court granted the motion and reopened the case by Order of June 22, 2001.

II. DISCUSSION

1 Subject Matter Jurisdiction

[1] Defendant asserts, over plaintiff's objection, that the Court lacks subject matter jurisdiction because plaintiff did not exhaust his administrative remedies by appealing the agency's denial of his fee waiver request. The record shows that defendant treated (or ''should'' have treated) plaintiff's letter of March 5, 2001, as an appeal of the fee waiver denial, notwithstanding that the initial agency determination is dated March 6, 2001. See Government's Exhibit 3, Declaration of Tammy Wilson (''Wilson Decl''), Exhibit A, pp. 1, 2 8. By letter dated June 7, 2001, defendant attempted to contact plaintiff to confirm his intentions to appeal the fee waiver denial because of its ''uncertain[ty]'' about plaintiff's desire to do so in light of ''additional correspondence with the Disclosure office'' since the March 5 letter and the fact that ''the processing of your FOIA fee waiver was incomplete at the time you submitted your appeal to the DOJ.'' Government's Exhibit 3, Declaration of Tammy Wilson (''Wilson Decl''), Exhibit C. In the June 7 letter, defendant informed plaintiff that it would ''presume'' that he was satisfied with the decision below if it did not hear from him within thirty days and would then close the administrative appeal file. Id. It appears that plaintiff, a *pro se* prisoner, never received the letter, which, on two mailing attempts, was returned each time to defendant as undelivered. Wilson Decl. ¶s 4, 5. The Court therefore assumes that the administrative appeal file is closed.

The FOIA statute requires an agency to ''make a determination with respect to any appeal within twenty [business] days after the receipt of such appeal,'' unless it extends the time limit upon a showing of ''unusual circumstances.'' 5 U.S.C. § 552(a)(6)(A)(ii)-(B)(i). A FOIA requester may ''bring suit in federal district court [] if he has not yet received a determination from the agency'' within the time permitted by statute. Oglesby v. U.S. Dep't of Army, 920 F.2d 57, 71 (D.C. Cir. 1990). ''By virtue of a special provision virtually unique to FOIA, exhaustion is complete - for purposes of allowing recourse to the courts - on the expiration of specified deadlines.'' Spannaus v. U.S. Department of Justice, 824 F.2d 52, 58 (D.C. Cir. 1987). A FOIA requester is ''deemed to have exhausted his administrative remedies ... if the agency fails to comply with the applicable time limit provisions of this paragraph.'' 5 U.S.C. § 552(a)(6)(C)(i). ''[J]udicial review [is available] after the administrative appeal has taken place: 'if on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person ... of the provision for judicial review of that determination.''' Oglesby v. U.S. Dep't of Army, 920 F.2d at 64 (quoting 5 U.S.C. § 552(a)(6)(A)(ii)).

Defendant neither provided plaintiff with a final agency determination before the reinitiation of this case nor extended the statutory time limit to do so, and the agency's June 7 letter of inquiry does not appear to be significantly probative of the exhaustion question In Oglesby, supra, the Court determined that the Department of State's ''letter ... merely inform[ing] [the requester] that he could call the agency for further information ... did not qualify as notice to appellant of his right to appeal the negative, its response was insufficient under the FOIA to trigger the exhaustion requirement and appellant was free to file suit under [the constructive exhaustion provision]'' Oglesby v. U.S. Dep't of Army, 920 F.2d at 67. Similarly, the Court finds that defendant's letter inquiring about plaintiff's intent to appeal, particularly in light of the March 5 letter in which he stated that he was appealing the fee waiver denial, is insufficient to trigger the actual

exhaustion requirement.[2] The Court therefore concludes that plaintiff constructively exhausted his administrative remedies and will now turn to the merits of the fee waiver claim.

2. Denial of Fee Waiver Request

A fee waiver or reduction is warranted if the FOIA requester shows that ''disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.'' 5 U.S.C. § 552(a)(4)(A)(iii). The IRS's FOIA regulations set forth six factor for determining if the statutory standard for a fee waiver is satisfied. See 26 C.F.R. § 601.702(f)(2)(ii).[3] Upon consideration of those factors, defendant determined that plaintiff had not satisfied any of the public interest standards and that the records responsive to his FOIA request were ''identified as mostly personal in nature. Therefore these documents would contain no public interest.'' Wilson Decl., Exhibit A, p.8

The Court reviews the denial of a fee waiver de novo based on the record that was before the agency at the time of its determination. 5 U.S.C. § 552(a)(4)(A)(vii). Plaintiff justified his request for a fee waiver by asserting that disclosure of the information would yield exculpatory evidence pertaining to his criminal conviction, which then would ''likely [] contribute significantly to public understanding of the wrongful and collu-sive operation of the government.'' Barta Decl., Exhibit A. The Court agrees with defendant's assessment of the request inso-far as plaintiff's reasons are overwhelm-ingly personal in nature and do not in any way show a significant public benefit flow-ing from disclosure of the records. More-over, plaintiff does not state any intention of disseminating the information to the public. That ''alone is a sufficient basis for denying the fee waiver request'' Larson v. Central Intelligence Agency, 843 F.2d 1481, 1483 (D.C. Cir. 1988). The Court af-firms the agency's denial of plaintiff's fee waiver request. A separate Order dis-missing this action accompanies this Memorandum Opinion.

Date: 11/21/02

Thomas Penfield Jackson

U.S. District Judge

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is ORDERED that the defendant's motion for summary judgment [# 35] is GRANTED; it is FURTHER ORDERED that plaintiff's motion for summary judgment [# 37] is DENIED; and it is

FURTHER ORDERED that this case is DISMISSED. This is a final appealable Order.

Date: 11/21/02

Thomas Penfield Jackson

U.S. District Judge

---

2 Moreover, defendant notified plaintiff by letter dated April 2, 2001, that his ''correspondence of February 5 (the fee waiver request) and March 5, 2001 (notice of appeal)'' was forwarded to the Richmond Appeals Office, where ''appeals from denials of fee waivers by the Internal Revenue Service are coordinated [and] where it will be assigned to an appeals officer for response.'' Wilson Decl., Exhibit A, p.2. Plaintiff could have reasonably relied on that letter as acknowledgment of his appeal, thereby triggering the agency's obligation to provide a substantive response within twenty days.

3 The regulations state in relevant part:

[O]fficials shall consider several factors, including, but not limited to, those set forth below, in determining requests for waiver or reduction of fees--

(A) Whether the subject of the releasable records concerns the agency's operations or activities;

(B) Whether the releasable records are likely to contribute to an understanding of the agency's operations or activities,

(C) Whether the releasable records are likely to contribute to the general public's understanding of the agency's operations or activities (e.g, how will the requester convey the information to the general public).

(D) The significance of the contribution to the general public's understanding of the agency's operations or activities (e.g., is the information contained in the releasable records already available to the general public);

(E) The existence and magnitude of the requester's commercial interest, as that term is used in paragraph (f)(3)(i)(A) of this section, being furthered by the releasable records; and

(F) Whether the magnitude of the requester's commercial interest is sufficiently large in comparison to the general public's interest.

(iii) Requesters asking for reduction or waiver of fees must state the reasons why they believe disclosure meets the standards set forth in paragraph (f)(2)(ii) of this section.

26 C.F.R. § 601.702(f)(2)(ii).

¶2002-5758

UNITED STATES OF AMERICA, PLAINTIFF v. Jerry C. FIKE and Commonwealth of Pennsylvania, DEFENDANTS. U.S. District Court, Western Dist. of Pennsylvania, (DC PA) Civil No. 01-302J, Nov. 22, 2002. Years 1985, 1986, 1987, 1988, 1992, 1993, 1994. Decision for Govt.

1. District court jurisdiction—motions—default judgment—tax liens. Govt.'s motions to allow IRS to sell taxpayer's real property and for default judgment were granted. So, judgment was entered in govt.'s favor for unpaid income tax balance, penalties and interest; govt.'s liens against taxpayer's property were valid and foreclosed; and property was ordered sold. *Reference:* United States Tax Reporter ¶74,025.01(3); 74,025.01(95). IRC §7402.

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Michael C. Colville Assistant United States Attorney Western District of Pennsylvania 633 U.S. Post Office & Courthouse Pittsburgh, PA 15219
Jerry C. Fike 171 Gashouse Road Addison, PA 15411
Deborah C. Phillips Assistant Counsel Commonwealth of Pennsylvania Department of Labor and Industry 914 Penn Avenue 6th Floor Pittsburgh, PA 15222

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA,

ORDER GRANTING MOTION TO ALLOW THE INTERNAL REVENUE SERVICE TO SELL PROPERTY

[1] Having considered the United States' Motion to Allow the Internal Revenue Service to Sell Property any opposition and reply thereto, and the entire record of this proceeding, it is by the Court

ORDERED that the motion is GRANTED; and it is further

ORDERED that Internal Revenue Service be permitted to sell defendant Jerry C. Fike's real property located at 171 Gashouse Road, Addison, Somerset County, Pennsylvania, as described in the Decree of Sale; and it is further

ORDERED that the Clerk shall dis-tribute copies of this Order to the persons listed below.

SO ORDERED this 22nd day of Nov, 2002.

/s/

UNITED STATES DISTRICT JUDGE

COPIES TO:

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ORDER FOR ENTRY OF DEFAULT JUDGMENT

Having considered the United States' motion for default judgment, together with the memorandum of law in support thereof, and having further considered defendants' opposition, if any, the Court concludes that the motion should be granted.

Accordingly, it is this 22nd day of Nov, 2002, ORDERED AND ADJUDGED as follows:

1. The United States' motion for default judgment is granted.

2. A judgment shall be entered in favor of the United States and against Defendant Jerry C. Fike for the unpaid balance of the federal income taxes for the years ending December 31, 1985, December 31, 1986, December 31, 1987, December 31, 1988, December 31, 1992, December 31, 1993, and December 31, 1994., and penalties and interest thereon, for a total of $169,459.50, plus interest according to 28 U.S.C. § 1961(c) from September 30, 2002 until paid.

3. The liens of the United States are valid and existing liens against all property and rights to property owned by the defendant Jerry C. Fike, including particularly, the property located at 171 Gashouse Road, Addison, Somerset County, Pennsylvania.

4. The federal tax liens upon the real property owned by Jerry C. Fike are foreclosed. Accordingly, the property located at 171 Gashouse Road, Addison, Somerset County, Pennsylvania shall be turned over to the Internal Revenue Service and sold, and that the proceeds from said sale be distributed as follows: (i) all administrative costs for the sale be paid from the sale price; and (ii) the balance of the sale proceeds be paid first to the Commonwealth of Pennsylvania to satisfy its unemployment tax lien, (iii) to the United States to satisfy the federal income tax indebtedness of Jerry C. Fike, and (iv) then to Jerry C. Fike.

5. The Clerk shall distribute conformed copies of this order to the parties listed below.

6. The Clerk shall enter judgment accordingly.

Dated this 22nd day of Nov, 2002.

/s/

UNITED STATES DISTRICT JUDGE

COPIES TO:

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¶2002-5759

John Parks TROWBRIDGE, PLAINTIFF-APPELLANT v. THE DEPARTMENT OF THE TREASURY; Internal Revenue Service; Paul Cordova, District Director; Michael Reno, Revenue Agent; Sharon Warren, Agent Manager; Internal Revenue Service District Office; United States of America, DEFENDANTS-APPELLEES. U.S. Court of Appeals, Fifth Circuit, (CA5) No. 02-20216, Nov. 21, 2002. District Court, (2001, DC TX) 89 AFTR 2d 2002-466, 2002-1 USTC ¶50172, affirmed. Years 1991, 1992, 1993, 1994, 1995, 1996. Decision for Govt.

1. Actions against IRS—mandamus—right to administrative appeal and review conference—jurisdiction—failure to state claim for relief. District court properly dismissed tax protester's mandamus complaint to compel IRS and District Director to grant him administrative ap-

peal: Reg. §601.106(b)'s appeals directive didn't give taxpayer right to, and imposed no duty on IRS to provide him, administrative appeal that involved only general protester-type challenges to tax laws' applicability. Also, to extent requesting mandamus relief from appeals court, relief was jurisdictionally barred. *Reference:* United States Tax Reporter ¶74,217.501(5).

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,

On Appeal from the United States District Court for the Southern District of Texas, Houston Division (H-01-CV-369)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and BENAVIDES, Circuit Judges. REYNALDO G. GARZA, Circuit Judge:[1]

SUMMARY CALENDAR

In this appeal we review the dismissal of appellant John Parks Trowbridge's motion for writ of mandamus, which had been filed pursuant to 28 U.S.C. § 1361. For the following reasons, we affirm the district court's judgment and deny mandamus.

I.

[1] Revenue Agent Michael Reno conducted a tax return audit of John Parks Trowbridge for the tax years of 1991 through 1996. As requested by the IRS, Trowbridge submitted Form 1040 returns for those years; however, he did so under protest, alleging that the taxing statutes do not apply to him and that he should not have been directed to submit tax returns for the years in question. Both before and after submitting the 1040 returns, Trowbridge filed several requests with the IRS, demanding a determination letter be issued that specifically identified the taxing statutes and implementing regulations that required him to file income tax returns. Such a determination letter was never issued.[2]

Agent Reno ultimately concluded that Trowbridge had not satisfied his tax obligations, and, accordingly, IRS District Director Paul Cordova issued a report of the proposed deficiencies (''30-day letter''). In addition to setting out the proposed additional tax liabilities, the 30-day letter notified Trowbridge of his right to an administrative appeal in the event that he disagreed with the IRS's findings.

After receiving the 30-day letter, Trowbridge submitted a written protest requesting an administrative appeal. However, rather than challenge the tax liability determination, Trowbridge's protest alleged issues that the IRS regarded as frivolous—such as his claim that he was not subject to tax rates under the Internal Revenue Code, and his claim that the IRS's alleged failure to provide reference to a valid taxing statute rendered the entire IRS report null and void. The IRS requested corrections to the written protest, and Trowbridge subsequently resubmitted his protest letter, again requesting an administrative hearing, but still failing to challenge any specific item of tax proposed by the IRS. Without responding to this second request for an Appeals Office review, the IRS sent Trowbridge a notice of deficiency.

Trowbridge, proceeding pro se, then filed this mandamus action in the district court, seeking an order compelling the IRS to grant him an Appeals Office conference. Trowbridge's complaint alleges that he is entitled to such a conference, which he describes as ''a regulatory duty and due process right,'' under Sections 7521(b)(1)(A) and 7522(b)(3) of the Internal Revenue Code, 26 U.S.C. and 26 C.F.R. Sections 601.103(b) and (c), 601.105(c)(1)(i), and 601.106(b).

The Government moved to dismiss the suit for lack of jurisdiction, or, alternatively, for failure to state a claim on which relief could be granted. The Government asserted that Trowbridge had not met the jurisdictional prerequisites for obtaining

[1] Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[2] To compel the issuance of the requested determination letter, Trowbridge filed a separate suit seeking mandamus; the district court denied mandamus, and this Court affirmed. *See Trowbridge v. IRS*, No. 01-21109 [90 AFTR 2d 2002-6419] (5th Cir. August 23, 2002)(unpublished).

mandamus relief because he had not shown that he had a clear right to the relief sought, that the IRS had a clear duty to perform the act in question, and that he did not have other adequate remedies. Trowbridge opposed the motion, arguing that this was an administrative law case, not a tax case. He additionally asserted that the failure of the IRS to grant an Appeals conference amounted to a violation of due process and equal protection.

The district court granted the motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). The court held that the complaint did not establish Trowbridge's entitlement to relief under the mandamus statute because Trowbridge had not shown that he "was entitled as a matter of right to an administrative appeal," nor had he shown that the IRS had a "*legal* duty to grant him an appeal." The district court determined that Trowbridge's citations were to "procedural rules and publications ... which do not have the force of law" and which do not impose mandatory legal duties or create duties to the public. Trowbridge filed timely notice of appeal.

II.

Mandamus relief is reserved for extraordinary circumstances. *See In re Stone*, 118 F.3d 1032, 1034 (5th Cir. 1997)(citing *Kerr v. United States Dist. Ct.*, 426 U.S. 394, 403, 96 S.Ct. 2119, 2123 (1976)). To obtain a mandamus order, the petitioner must establish "(1) a clear right to the relief, (2) a clear duty by the respondent to do the act requested, and (3) the lack of any other adequate remedy. *In re Stone*, 118 F.3d at 1034 (citations omitted). Mandamus is granted in only the clearest and most compelling cases. *See In re Willy*, 831 F.2d 545, 549 (5th Cir. 1987). If the party seeking mandamus fails to demonstrate the existence of any of the necessary elements, mandamus is not available. *See Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980). Furthermore, the issuance of the writ of mandamus lies within the discretion of the court to which it is directed. *See United States v. Denson*, 603 F.2d 1143, 1146 (5th Cir. 1979)(en banc). This Court reviews an order disposing of a case on the pleadings de novo. *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 246 (5th Cir. 1997)(failure to state a claim); *Ingalls Shipbuilding, Inc. v. Asbestos Health Claimants*, 17 F.3d 130, 132 (5th Cir. 1994)(subject matter jurisdiction).

On appeal, Trowbridge challenges the district court's determination that he had no clear right to an administrative appeal, as well as its determination that the IRS did not have a clear duty to allow him to proceed on appeal. The Government asserts that the district court lacked jurisdiction under Section 1361 because Trowbridge had no clear right to an appeals conference and because the IRS had no clear duty to provide for such an appeal.

The Code of Federal Regulations pro-vides that, after a 30-day letter has been issued, "the taxpayer has the right ... of administrative appeal to the Appeals organization" if the taxpayer so requests and if a written protest—if required—is filed. 26 C.F.R. § 601.106(b). The regulation adds, however, that "the appeals procedures do not extend to cases involving solely the failure or refusal to comply with the tax laws because of moral, religious, political, constitutional, conscientious, or similar grounds." *Id.* Publication 5, which explains the appeal rights and which was mailed to Trowbridge with the 30-day letter, adds that "Appeals cannot consider your reasons for not agreeing if they don't come within the scope of the tax laws (for example, if you disagree solely on moral, religious, political, constitutional, conscientious or similar grounds)."

As the immediately preceding paragraph makes clear, the applicability of Section 601.106(b) depends on the nature of the claims raised. Therefore, Trowbridge has not shown that he has a "clear right" to an administrative hearing, nor has he shown that the IRS had a "clear duty" to allow such a hearing.

Our review of the record shows that, in his requests for a hearing, Trowbridge's primary complaint was that the IRS allegedly failed to show which taxing statute applied to him, despite his repeated re-

quests that they do so. After his initial protest, the IRS advised Trowbridge that "[a]ny arguments that the Internal Revenue Code does not apply to you for any reasons will result in the issuance of a statutory notice of deficiency and the loss of administrative appeal rights." As earlier noted, Trowbridge responded, yet, in doing so, still failed to identify any specific items in the 30-day letter with which he disagreed. As a result, the IRS apparently interpreted Trowbridge's correspondence as a challenge to the applicability of the Internal Revenue Code to him generally. A protest of this nature does not meet the IRS's criteria for granting an Appeals conference. Therefore the district court did not err in granting the motion to dismiss. *See Stone*, 118 F.3d at 1034 (petitioner must demonstrate all elements necessary for mandamus, including a clear right to the relief and a clear duty by the respondent to do the act requested).

To the extent the Trowbridge seeks mandamus relief from this Court, his request must fail because we lack the authority to issue a writ of mandamus ordering that he be granted an Appeals conference. The district court has original jurisdiction over any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. *See* 28 U.S.C. § 1361; *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980)(courts of appeals may issue writs of mandamus only when necessary or appropriate to aid their jurisdiction).

III.

For the foregoing reasons the judgment of the district court is AFFIRMED and mandamus is DENIED.

¶2002-5760

Fabian VAKSMAN, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Fifth Circuit, (CA5) No. 02-60062, Nov. 21, 2002. Tax Court, (2001) TC Memo 2001-165, RIA TC Memo ¶2001-165, 82 CCH TCM 19 (opinion by Armen, *J.*), affirmed. Year 1997. Decision for Govt.

1. Business deductions—auto and cellular phone expenses—listed property—substantiation—attorney's fees. Tax Court properly denied Russian translator auto depreciation and cell phone expense deductions: taxpayer's uncorroborated testimony didn't establish either car's or phone's business use or otherwise meet IRC §274(d)'s strict substantiation requirements. Also, taxpayer's meritless challenges to IRS's methods and 1st Amendment claim regarding his transmission of poem to IRS Group Manager and ensuing investigation were rejected. *Reference:* United States Tax Reporter ¶2745.14(75); 1625.019(5). IRC §162; 274.

2. Business deductions—education expenses—ordinary and necessary—proximate relationship to business. Tax Court properly denied Russian translator's "continuing education" expense deduction for cost of his U.S. history doctoral studies: taxpayer didn't substantiate his costs; or, even if he had, costs didn't qualify as IRC §162 ordinary and necessary business expenses absent any proof of direct nexus between taxpayer's translating and university affiliation. Also, marginal relationship between taxpayer's business and access he gained from university association to computers and university resources wasn't sufficient nexus for IRC §162 purposes. *Reference:* United States Tax Reporter ¶1625.186(160); 1625.012(5). IRC §162.

3. Home office deductions—regular and exclusive usage. Tax Court properly denied Russian translator home office deduction above amount IRS allowed: taxpayer's claimed 80% business use of apartment was belied by his own admission that he only worked 7 days during year at issue. Also, taxpayer mistakenly included his bed and bathrooms in business use estimate since, even if used sometime for business, those rooms clearly couldn't have been used exclusively for business. *Reference:* United States Tax Reporter ¶280A5.01(5). IRC §280A.

4. Attorney's fees and costs—pro se taxpayers—prevailing party. Russian

translator wasn't entitled to attorney's fees of Tax Court action he litigated pro se: as pro se litigant, taxpayer couldn't have incurred any attorney's fees. Also, taxpayer didn't qualify as prevailing party where he didn't substantially prevail either with respect to amount in controversy or on most significant issues. *Reference:* United States Tax Reporter ¶74,305.01(3); 74,305.01(40). IRC §7430.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,

Appeal from the United States Tax Court (4741-00)

Before DAVIS, WIENER and EMILIO M. GARZA, Circuit Judges.

WIENER, Circuit Judge* :

Petitioner-Appellant Fabian Vaksman appeals the decision of the United States Tax Court determining a deficiency in his federal income tax for 1997 in the amount of $2,108. For essentially the same reasons as are set forth in the Tax Court's ruling, we affirm.[1]

[1] Vaksman appeals the Tax Court's determinations regarding the deductions he claimed for (1) depreciation of his automobile; (2) cellular telephone expenses; (3) educational expenses; and (4) business use of his home. He also challenges specified IRS policies and procedures and alleges several constitutional violations. We briefly address each of Vaksman's claim.

1. Automobile Depreciation

Vaksman asserts that he drove his automobile 15,000 miles in 1997, of which 79.10 percent, or 11,865 miles were for business. On this basis, he computed a $1,325 depreciation deduction. He did not, however, submit any records to substantiate the business use of his vehicle, or to distinguish business-use from personal use.

Passenger automobiles are "listed property" subject to the strict substantiation requirements of § 274(d) of the Internal Revenue Code ("I.R.C."). Under I.R.C. § 274(d), "[n]o deduction or credit shall be allowed ... with respect to any listed property ... unless the taxpayer substantiates by adequate records or sufficient evidence corroborating the taxpayer's own statement" (1) the amount of the expenses; (2) the time and place of the use of the property; and (3) the "business purpose of the expenses."[2] As Vaksman has pro-vided none of the required documentation, but relies solely on his own uncorroborated estimate, the Tax Court properly disallowed the deduction.

2. Cellular Telephone Expenses

Vaksman claimed a deduction of $715 for cellular telephone expenses. Cellular telephone are also "listed property" subject to the substantiation requirements of I.R.C. § 274. As with his automobile, Vaksman failed to submit any documentation to establish the business use of his cellular telephone, the amount he paid for the service, or even the identity of the telephone company. The Tax Court properly disallowed the deduction.

3. Educational Expenses

[2] Vaksman claimed a deduction of $1,550 for "continuing education." On appeal, he argues that his tuition payments to the University of Houston for "dissertation hours" in the history department were "used as a business expense" and were necessary to generate business as a Russian translator.

As a threshold matter, we again note that Vaksman has failed to submit documentation in support of the claimed deduction. Even if the deduction were adequately documented, however, Vaksman's tuition payments to the university would not be deductible as business expenses under these circumstances. The I.R.C. authorizes deductions for business expenses

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[1] We review the Tax Court's factual findings for clear error and examine conclusions of law de novo. Dunn v. Comm'r of Internal Revenue, 301 F.3d 339, 348 [90 AFTR 2d 2002-5527] (5th Cir, 2002).

[2] 26 U.S.C. § 274(d)(4).

that are "ordinary and necessary."[3] An expense is "ordinary and necessary" if it is "appropriate, helpful, and of a common or frequent occurrence in the type of business carried on by the taxpayer."[4] The expense "must be directly related to the taxpayer's business."[5]

Vaksman has failed to establish that his pursuit of a doctoral degree in history "relates to" his translating business. Although Vaksman contends that a university affiliation was necessary to generate translation business, he produced no evidence; and the record on appeal reflects no evidence to support this contention. Neither we, the Tax Court, nor the Commissioner has questioned the fact that Vaksman is engaged in the business of Russian translating; nevertheless, he has failed to prove a "nexus" between this business and the study of United States history. Although association with a local university, and access to computers and other university resources, may marginally benefit any businessman, we agree with the Tax Court's conclusion that "[t]he 'ordinary and necessary' requirement ... is not so elastic a concept as to countenance a marginal relationship between an expense and a taxpayer's trade or business."[6]

4. Business Use of Home

[3] Vaksman claimed a home office deduction of $5,280 based on his estimate that, in 1997, he used 80 percent of the 900 available square feet in his apartment (720 square feet) for his translating business. The Commissioner reduced the deduction to $1,588, allocating 25 percent of Vaksman's $6,350 rent to business use.

As a general rule, "the use of a dwelling unit which is used by the taxpayer during the taxable year as a residence" is not deductible.[7] This rule does not apply, however, to the portion of a residence "which is exclusively used on a regular basis ... as the principal place of business for any trade or business of the taxpayer."[8]

Vaksman failed to demonstrate that he used 80 percent of his residence exclusively and on a regular basis for his translating business. As the Tax Court explained, Vaksman's claim in this regard is belied by his own admission that he worked only seven days in 1997. Moreover, Vaksman's inclusion of his bathroom and bedroom in his estimate of "business use" is misplaced; although he may have used these areas on occasion for a business purpose, any business use of these areas was not exclusive. We conclude that the Tax Court properly disallowed the $5,280 deduction in favor of a more reasonable—and, we might add, generous—$1,588 home office deduction.

5. Remaining Claims

[4] Vaksman's remaining arguments are entirely without merit. He dedicates the bulk of his argument on appeal to perceived unfairness in the Internal Revenue Service ("IRS") procedures leading to his notice of deficiency. In particular, Vaksman objects to the ability of an IRS supervisor to "overrule" or modify the conclusions of an auditor and repeatedly alleges "bad faith" on the part of the IRS for failing to comply with his discovery requests. Vaksman also asserts sweeping First Amendment and constitutional issues and seeks an award of costs and attorney fees.

Courts do not "look behind the notice of deficiency to determine or examine the evidence used, or the propriety of the Commissioner's motives in making the deficiency determinations."[9] The law is well-settled that the government's determination of deficiency is presumed to be correct; this "presumption of correctness generally prohibits a court from looking behind the Commissioner's determination even though it may be based on hearsay or

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3 26 U.S.C. § 162(a)

4 Tulia Feedlot, Inc. v. United States, 513 F.2d 800, 804 [36 AFTR 2d 75-5078] (5th Cir. 1975).

5 Hymel v. Comm'r of Internal Revenue, 794 F.2d 939, 940 [58 AFTR 2d 86-5291] (5th Cir. 1986).

6 82 T.C.M. (CCH) 19 [TC Memo 2001-165], R. 17, at 11.

7 26 U.S.C. § 280A(a).

8 Id. § 280A(c)(A).

9 Pasternak v. Comm'r of Internal Revenue, 990 F.2d 893, 898 [71 AFTR 2d 93-1469] (6th Cir. 1993).

other evidence inadmissible at trial.''[10] For this reason, we, like the Tax Court, will not revisit or second-guess the methods of the IRS.

Vaksman's First Amendment claim is grounded in his complaint that the IRS sent an agent to his home to investigate his transmission of a poem to an IRS Group Manager. Assuming, without concluding, that the Tax Court had jurisdiction to consider this claim and that we have appellate jurisdiction to review it, we hold that Vaksman's First Amendment claim is wholly without merit and not worthy of further discussion.

Finally, Vaksman's claim for costs and attorney fees is equally without merit and borders on frivolousness. As a pro se litigant, he is not entitled to attorney fees because, quite simply, he did not actually ''pay'' or ''incur'' attorney fees.[11] In addition, Vaksman was not the 'prevailing party' as defined in I.R.C. § 7430(c)(4). Vaksman neither 'substantially prevailed with respect to the amount in controversy'[12] —the deficiency was reduced only from $2,217 in the original notice, to $2,108 in the Tax Court's decision—nor 'substantially prevailed with respect to the most significant issues.'[13]

We recognize that Vaksman has serious misgivings about the manner in which federal income taxes are collected in the United States. It is obvious, and unfortunate, that he feels that he has been unfairly and illegally ''targeted'' by the IRS. Nevertheless, our careful review of the record, the parties' briefs, and the applicable law convinces us that, as a matter of law, all Vaksman's claims in the Tax Court, and his contentions on appeal, are baseless. Finally, we caution Vaksman against further prosecution of these claims, lest he incur sanctions for protracting litigation that is legally frivolous.

Conclusion

For essentially the same reasons set forth by the Tax Court, its disposition of this action is, in all respects, AFFIRMED.

¶2002-5761

L. Thorne McCARTY and Mary Lynne ROBERTSON, PLAINTIFFS v. THE UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Dist. of New Jersey, (DC NJ) Civ. No. 01-4942 (GEB), Nov. 13, 2002. Year 1997. Decision for Taxpayers in part and for Govt. in part.

1. Actions against U.S.—damages—wrongful collection—refunds—failure to state claim for relief. Pro se taxpayers' complaint for damages from IRS's refusal to grant them refund was dismissed for failure to state claim: IRC §7433's limited sovereign immunity waiver for suits seeking damages from IRS's *collection* activities didn't extend to refund decisions since refund decisions involved tax *determination*, not any collection. But, taxpayers were given leave to amend complaint. *Reference:* United States Tax Reporter ¶74,335.01(7). IRC §7433.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY,

MEMORANDUM OPINION

BROWN, District Judge

NOT FOR PUBLICATION

This matter comes before the Court upon defendant's motion to dismiss Count III of plaintiffs' complaint for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6), and upon plaintiffs' motion to amend the complaint. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331. For the reasons discussed below, defendant's motion to dismiss Court III of plaintiffs' complaint is granted

10 Portillo v. Comm'r of Internal Revenue, 932 F.2d 1128, 1133 [67 AFTR 2d 91-1149] (5th Cir. 1991)

11 Corrigan v. United States, 27 F.3d 436, 438 [74 AFTR 2d 94-5115] (9th Cir. 1994) (''A pro se litigant does not pay or incur attorney fees. Thus, attorney fees are not available to pro se litigants under I.R.C. § 7430).

12 26 U.S.C. §7430(c)(4)(i)(I).

13 Id. § 7430(c)(4)(i)(II).

and plaintiffs' motion to amend the complaint is granted.

I. BACKGROUND

Plaintiffs brought the instant action seeking under Court I and II: an income tax refund from the taxable year of 1997, pursuant to 26 U.S.C. § 7422 (''§ 7422''), Count III: damages under 26 U.S.C. § 7433 (''§ 7433''), and Count IV: a violation of the Fifth and Fourteenth Amendments. Plaintiffs' Complaint (''Pls' Compl.'') ¶4. The allegations in plaintiffs' complaint can be summarized as follows. In June 1997, plaintiffs were married in the Republic of Fiji. *Id.* ¶ 7. Because of their June 1997 marriage, plaintiffs filed their 1997 tax return as ''Married Filing Joint Return'' incurring a tax liability of $38,822.00. *Id.* ¶ 8. In 1999, plaintiffs determined that their marriage was not legal, and subsequently, that their tax return from 1997 was incorrect. *Id.* ¶ 9. Plaintiffs believe that the correct income tax filing in 1997 should have stated that plaintiff McCarty was ''Single'' incurring a tax liability of $25,226.00, and plaintiff Robertson was ''Head of Household'' resulting in a tax liability of $8,961.00. *Id.* On August 24, 1999, plaintiffs filed an amended return for the taxable year of 1997 claiming a refund of $4,635.00 *Id.* ¶ 10. The Internal Revenue Service (''IRS'') refused to pay plaintiffs' refund. *Id.* ¶ 11. Pursuant to § 7422, plaintiffs contend that they are entitled to a refund. *Id.* ¶ 4. Plaintiffs assert in ¶s 20–69 of the complaint, that the IRS violated § 7433 by not providing ''a valid legal explanation'' for the IRS' denial of plaintiffs' claimed refund for the taxable year of 1997. Pursuant to this claim, plaintiffs maintain that the IRS: (1) systematically misrepresented the facts of plaintiffs' case; (2) systematically distorted the content of the IRS regulations; and (3) systematically refused to respond to plaintiffs' questions regarding denial of plaintiffs' claim. *Id.* ¶ 21. Finally, plaintiffs assert that if defendant attempts to argue that plaintiffs were legally married in 1997, then it is a violation of the Fifth and Fourteenth Amendments because the tax consequences that plaintiffs suffered were solely due to the fact that they were married. *Id.* 78. Defendant moves to dismiss Count III of plaintiffs' complaint. Plaintiffs also move to amend the complaint.

II. DISCUSSION

A. Standard Under Fed. R. Civ. P. 12(B)(6)

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. *See Oran v. Stafford*, 226 F.3d 275, 279 (3d Cir. 2000); *Langford v. City of Atlantic City*, 235 F.3d 845, 850 (3d Cir. 2000); *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986). The Court may not dismiss a complaint unless plaintiff can prove no set of facts that would entitle her to relief. *See Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3d Cir. 1985), *cert. denied*, 474 U.S. 935 (1985). ''The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'' *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

Under Rule 12(b)(6), the Court must ''accept the allegations in the complaint as true, and draw all reasonable factual inferences in favor of the plaintiff. [The motion can be granted] only if no relief could be granted under any set of facts that could be proved.'' *Turbe v. Government of the Virgin Islands*, 938 F.2d 427, 428 (3d Cir. 1991) (citing *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1394–95 (3d Cir. 1991)); *see also Langford*, 235 F.3d at 850; *Dykes v. Southeastern Pennsylvania Transp. Auth.*, 68 F.3d 1564, 1565, n. 1 (3d Cir. 1995), *cert. denied*, 517 U.S. 1142 (1996); *Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250, 1255 (3d Cir. 1994); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir.1994). A complaint may be dismissed for failure to state a claim where it appears beyond any doubt that no relief could be granted under any set of facts

which could be proved consistent with the allegations. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

A complaint should not be dismissed unless it appears beyond doubt that ''the facts alleged in the complaint, even if true, fail to support the claim.'' *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988). Legal conclusions made in the guise of factual allegations, however, are given no presumption of truthfulness. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (''[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss'').

B. Defendant's Motion to Dismiss

[1] Defendant argues that § 7433 only applies to the IRS' collection activity, and because plaintiffs' complaint involves a refund, then § 7433 does not apply. Defendant's Brief (''Def's Br.'') at 2. In addition, defendant argues that plaintiffs have not plead any violation of the Internal Revenue Code (''IRC'') or its implementing regulations that would sustain a claim for damages under § 7433. *Id.*at 3. Finally, defendant argues that discovery is not required for plaintiffs to file a complaint that states a claim for relief. Defendant's Reply (''Def's Rep.'') at 5.

Plaintiffs argue that § 7433 is only inapplicable to cases involving the ''determination or assessment process'' of Federal tax. Plaintiffs' Brief (''Pls' Br.'') at 6. Plaintiffs maintain that the refund process for Federal tax is a part of the collection procedure and therefore, § 7433 is applicable. *Id.* at 7. In addition, plaintiffs contend that they have identified several statutes and regulations that the IRS disregarded in violation of § 7433. *Id.* Finally, plaintiffs assert that defendant has not complied in good faith with discovery, which has affected plaintiffs' ability to strengthen their claim under § 7433. *Id.* at 16.

1. 26 U.S.C. § 7433

26 U.S.C. § 7433(a) provides,

> If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employer of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in Section 7432, such civil action shall be the exclusive remedy for recovering damages resulting from such actions.

§ 7433 is a waiver that allows a taxpayer to sue the United States. ''The [United States] Supreme Court has ruled that in a case involving the government's sovereign immunity the statute in question must be strictly observed in favor of the sovereign and may not be enlarged beyond the waiver its language expressly requires.'' *Miller v. United States*, 66 F.3d 220, 222 [76 AFTR 2d 95-6584] (9th Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996) (citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33–35 [69 AFTR 2d 92-687] (1992)).

Under § 7433, plaintiffs must prove: (1) that the IRS was engaged in the collection of Federal tax; and (2) that an officer or employer of the Internal Revenue Service recklessly or intentionally disregarded any provision of the IRC, or any regulation promulgated under the IRC. Initially then, if the IRS was not engaged in the collection of Federal taxes, plaintiffs' claim must fail.

Gonsalves v. Internal Revenue Service, 975 F.2d 13, 16 [70 AFTR 2d 92-5702] (1st Cir. 1992), involved similar issues as the instant situation. In *Gonsalves*, plaintiff contended that the ''government violated the tax laws by refusing to give him a refund because he was exempt from paying taxes during the years in question.'' *Gonsalves*, 975 F.2d at 16. The *Gonsalves* court held that plaintiff's asserted violation ''runs afoul'' of § 7433, because § 7433 only applies to *collection* activity. *Id.* (emphasis added). The court explained that plaintiff's refund claim dealt with the determination of tax liability, and determination actions are not covered under § 7433. *Id.* ''Taxpayers who wish to challenge the

IRS' calculation of their tax liability must file either a petition for redetermination in the Tax court, 26 U.S.C. §§ 6213, 6214, or a refund action in the district court. 26 U.S.C. § 7422." *Id.* "Section 7433 was not intended to supplement or supersede, or to allow taxpayers to circumvent, these procedures." *Id.*Thus, the court concluded that because plaintiff did not allege any collection activity on the part of the IRS § 7433 does not apply. *Id.*

In addition, the Fifth and Eighth Circuits are in accord wit the *Gonsalves* ruling that unless the IRS is engaged in a collection action, a taxpayer cannot maintain a claim under § 7433. The Fifth Circuit explained that "§ 7433 'is limited to reckless or intentional disregard in connection with the *collection* of taxes. An action under this provision may not be based on alleged reckless or intentional disregard in connection with the *determination* of tax.'" *Shaw v. United States*, 20 F.3d 182, 184 [73 AFTR 2d 94-1998] (5th Cir. 1994) (quoting H.R.CONF.REP. NO. 100-1104, 100th Cong., 2d Sess. 229 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4515, 5289 (emphasis added)). "Therefore, based upon the plain language of the statute, which is clearly supported by the statute's legislative history, a taxpayer cannot seek damages under § 7433 for an improper assessment of taxes." *Shaw*, 20 F.3d at 184. The Eighth Circuit stated, "Because [plaintiff] Miller, is challenging only the determination of the tax, the claim is not actionable under § 7433 of the Internal Revenue Code." *Miller*, 66 F.3d at 223.

In addition, various district courts have held that unless a plaintiff pleads a collection activity on behalf of the IRS, then § 7433 does not apply. "[S]ection 7433(a) only applies to the reckless or intentional disregard of the tax laws in the *collection* of taxes, not the improper assessment of taxes." *Culpepper-Smith v. United States*, No. CIV.A.96-CV-5855, 1998 WL 544964 at 9 [82 AFTR 2d 98-6212] (Aug. 24, 1998 E.D.Pa.). "Section 7433(a) was not intended to confer a cause of action where taxes have been improperly assessed . . . . " *Hart v. United States*, No. CIV.A.96-5639, [81 AFTR 2d 98-1964] 1997 WL 732466 at 1 (Nov. 21, 1997 E.D.Pa.) (citing *Ivory v. United States*, No. C-3-94-353, 1995 WL 724522 at 4 [76 AFTR 2d 95-6951] (Sept. 21, 1995 S.D. Ohio)). "Because no collection activities were instigated by the Internal Revenue Service, the Court finds that the plaintiffs do not state a claim for relief under section 7433." *Springer v. Collector of Internal Revenue*, No. 94-C-350-BU, 1995 WL 43433 3 [75 AFTR 2d 95-1695] (Feb 22, 1995 N.D. Okla.) (citing *V-1 Oil v. United States*, 813 F.Supp. 730, 731 [70 AFTR 2d 92-5837] (D. Idaho 1992) (stating that section 7433 is limited to wrongful conduct during collection activities)). "§ 7433 gives a taxpayer the right to recover for damages incurred because of wrongful *collection* actions. The courts have distinguished wrongful assessment actions and have not allowed recovery under § 7433 in cases involving only a wrongful assessment." *Kachougian v. United States*, No. C.A.96-508T, 1998 WL 233750 2 [81 AFTR 2d 98-976] (Feb 9, 1998 D.R.I).

Plaintiffs argue that the line of cases noted above explain that § 7433 is only inapplicable to wrongful actions by IRS employees during the process of determining and assessing Federal tax, and plaintiffs assert that their claim, however, does not involve the same issues. Pl's Br. at 6. Plaintiffs contend that the complaint alleges that IRS employees disregarded the IRC and its implementing regulations in failing to provide a proper explanation to plaintiffs regarding the rejection of their refund claim for taxes voluntarily paid. *Id.* at 7. Plaintiffs maintain that the refund process is one part of what they assert is a two-part mechanism in collecting Federal tax:

> (i) taxpayers compute and pay what they think they owe, and if they later conclude that they overpaid, they file a claim or lawsuit for a refund, (ii) the IRS computes what it thinks taxpayers owe, and if it concludes that a particular tax payer has underpaid, it files or threatens to file a lien or levy.

Id. at 6. Therefore, plaintiffs assert that § 7433 is applicable to the instant situation. *Id.* at 7.

The Court finds that the gravamen of plaintiffs' complaint is that the IRS refused to grant plaintiffs a refund for taxes paid for the taxable year of 1997 because the IRS found that no refund was appropriate. The IRS' denial of a request for a refund was due to the IRS' determination that the taxes paid from 1997 were calculated correctly. Therefore, the IRS' refusal to grant plaintiffs' refund involved the determination of taxes and not collection of taxes. Any proceeding explanations provided by IRS employees regarding the rejection of plaintiffs' refund claim, resulted from the determination of plaintiffs' tax liability. Because plaintiffs have failed to allege that the IRS was engaged in any collection activity regarding their 1997 refund claim, § 7433 does not apply. Thus, this Court adopts the reasoning in *Gonsalves* and holds that under Count III, plaintiffs do not state a claim upon which relief can be granted.[1]

C. Plaintiffs' Amended Complaint

On October 25, 2002, plaintiffs moved to amend their complaint. The Federal Rules of Civil Procedure provide that a party may amend his pleading once before a responsive pleading is served, or thereafter upon leave of court or on consent from his adversary. Fed. R. Civ. P. 15(a). The rules states that "leave should be freely given when justice so provides." *Id.* The decision whether to grant leave to amend rests with the sound discretion of the trial judge and will be overturned on appeal only upon a finding of abuse of discretion. *See Oran v. Stafford*, 226 F.3d 275, 291 (3d Cir. 2000) (citation omitted); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 654 (3d Cir. 1998) (citing *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984)).

Defendant does not oppose plaintiffs' motion to amend the complaint. Therefore, plaintiffs' motion to amend the complaint is granted. However, the amendment does not affect the Court's decision on the motion to dismiss Count III of plaintiffs' complaint. Plaintiffs did not add any new counts to the complaint. Plaintiffs' new allegations contained in ¶s 1–4 of the amended complaint, regarding Count III of the complaint, pertain to the second prong of the § 7433 inquiry. Because the Court dismissed Count III based on the first prong § 7433, and determined that it was not necessary to address the second prong, plaintiffs' amendment as to Count III has no bearing on the outcome of the motion to dismiss.

III. CONCLUSION

For the reasons discussed above, defendant's motion to dismiss Count III of plaintiffs' complaint is granted, and plaintiffs' motion to amend the complaint is granted. An appropriate form of order is filed herewith.

GARRETT E. BROWN, JR., U.S.D.J.

ORDER

This matter comes before the Court upon defendant's motion to dismiss Count III of plaintiffs' complaint for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6); and upon plaintiffs' motion to amend their complaint; and the Court having considered the parties' submissions; and for the reasons stated in the Memorandum Opinion accompanying this Order;

IT IS this 13th day of NOVEMBER, 2002;

ORDERED that defendant's motion to dismiss Count III of plaintiffs' complaint is GRANTED; and it is further

ORDERED that plaintiffs' motion to amend their complaint is GRANTED.

GARRETT E. BROWN, JR., U.S.D.J.

¶2002-5762

Barry E. WILT; Barabara A. WILT, PLAINTIFFS-APPELLANTS v. INTERNAL REVENUE SERVICE; United

[1] Because this Court has ruled that plaintiffs have not alleged any collection on the part of the IRS, there is no need to further address the inquiry under § 7433 or to address plaintiffs' discovery argument.

States of America, DEFENDANTS-APPELLEES. U.S. Court of Appeals, Fourth Circuit, (CA4) No. 02-1550, Dec. 11, 2002. District Court affirmed per curiam. Decision against Taxpayers.

1. Refund actions—abatement; damages—jurisdiction—partnership-level determinations. District court properly dismissed taxpayer's refund suit for lack of jurisdiction: no reversible error existed where court lacked jurisdiction under IRC §7422 to reconsider partnership-level determinations from which penalties and interest arose, under IRC §6404(e) to abate interest on deficiency, and under IRC §7433 to award damages. *Reference:* United States Tax Reporter ¶74,225.01(50); 64,045.01(3); 74,335.01(7). IRC §6404; 7422; 7433.

Barry E. Wilt, Barbara A. Wilt, Appellants Pro Se. Richard Farber, Anthony Thomas Sheehan, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT,

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Graham C. Mullen, Chief District Judge. (CV-00-441-3-MN)

Before WILKINS, TRAXLER, and GREGORY, Circuit Judges.

PER CURIAM:

UNPUBLISHED

Affirmed by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

[1] Barry E. Wilt and Barbara A. Wilt appeal the district court's order dismissing their tax refund suit for lack of jurisdiction. We have reviewed the record and find no reversible error. Under 26 U.S.C. § 7422 (2000), the district court lacked jurisdiction to reconsider the partnership-level determinations upon which the penalties and interest at issue were based. The district court also lacked jurisdiction to abate interest on the underlying deficiency, see 26 U.S.C. §§ 6404(e), (2000), or to award damages, see 26 U.S.C. § 7433 (2000). Accordingly, we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

¶2002-5763

UNITED STATES OF AMERICA, PLAINTIFF v. THE NORTHERN TRUST COMPANY, as Trustee for the Pepsico, Inc. Master Trust and Paul R. Stout, DEFENDANTS. U.S. District Court, Northern Dist. of Illinois, (DC IL) No. 01 C 6597, Nov. 26, 2002. Years 1973, 1975, 1976, 1977, 1978, 1979, 1980. Decision for Govt.

1. Collection actions—foreclosure—pension payments—standing—summary judgment. Govt.'s motion for summary judgment to foreclose liens against taxpayer's monthly pension payments was granted: govt. clearly had standing under IRC §6321 and IRC §7403 to bring foreclosure action; employer's declaration established both employer's and pension plan's existence and taxpayer's unqualified right to receive pension payments; and letter from IRS employee who personally reviewed taxpayer's records established assessment's validity and presumptive correctness, which taxpayer failed to rebut *Reference:* United States Tax Reporter ¶74,035.03(3). IRC §6321; 7403.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION,

MEMORANDUM OPINION AND ORDER

David H. Coar United States District Judge

HONORABLE DAVID H. COAR

Plaintiff, the United States of America (''Plaintiff'') brings this complaint in this Court to foreclose the federal tax lien that attached to the rights of Defendant Paul R. Stout (''Stout'') to receive monthly payments from the PespiCo, Inc. Master Trust under the Quaker Oats Retirement Plan. Before this Court is Plaintiff's motion for summary judgment. For the following reasons, the Plaintiff's motion for summary judgment is GRANTED.

I. Summary Judgment Standard

Summary judgment is proper ''if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'' Fed. R. Civ. P. 56(c); Michael v. St. Joseph County, et. al, 259 F.3d 842, 845 (7th Cir. 2001). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, a reasonable jury could return a verdict for the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 931 (7th Cir. 1995).

Because the purpose of summary judgment is to isolate and dispose of factually unsupported claims, the non-movant must respond to the motion with evidence setting forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(e); Michael, 259 F.3d at 845; Albiero v. City of Kankakee, 246 F.3d 927, 932 (7th Cir. 2001). To successfully oppose the motion for summary judgment, the non-movant must do more that raise a ''metaphysical doubt'' as to the material facts, see Wolf v. Northwest Ind. Symphony Soc'y, 250 F.3d 1136, 1141 (7th Cir. 2001) (citation and quotation omitted), and instead must present definite, competent evidence to rebut the motion, see Albiero, 246 F.3d at 932. A scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; ''there must be evidence on which the jury could reasonably find for the [non-movant].'' Anderson, 477 U.S. at 250.

II. Factual Background

The following facts are taken from the parties' Local Rule 56.1 Statement of Uncontested Facts. Stout is an Illinois resident who resides in Ashton, Illinois. Defendant The PepsiCo., Inc. Master Trust is a valid trust under Illinois and federal law. Its Trustee is the Northern Trust Company, a corporation with its principal place of business in Chicago, Illinois. Stout has the right to be paid by the PepsiCo., Inc. Master Trust the sum of $711.38 every month for the rest of his life pursuant to the retirement plan of The Quaker Oats Company. Stout began working for The Quaker Oats Company in 1944 and his employment ceased on May 5, 1978.

On July 31, 1986, a delegate of the Secretary of the Treasury made an assessment against Stout for unpaid federal income tax, penalties, and interest for the years 1973 and 1975 through and including 1980, in the following amounts:

Notice of the assessment and demand for its payment were duly sent to Stout on or about the date it was made. Despite notice and demand, Stout has not fully paid his assessed liability. He owes the United States $466,204.44 plus accrued interest and statutory additions as allowed by law from and after May 29, 2002.

In 1996, the United States filed suit against Stout in this court, requesting a money judgment for the unpaid balance of the assessment. That action was assigned case No. 96 C 4683. On January 25, 2000, judgment was entered in favor of the United States and against Stout for the unpaid balance of the assessment.

III. Discussion

[1] In support of its motion for summary judgment, the United States submitted evidence of the unpaid tax assessment against Stout in the form of Declaration of IRS employee Rodney Joseph. Further, as evidence of Stout's rights to receive pension payments, the United States submitted a Declaration of a Quaker Oats employee, Linnea Kopp, which states that Stout will

receive $711.38 every month for the rest of his life pursuant to the retirement plan of The Quaker Oats Company. Stout objects to summary judgment on several grounds. First, he argues that the United States lacks standing to bring this claim against him. Second, he argues that there has been no discovery in this case and that, as a result, there are "numerous genuine issues of material facts." Finally, he argues that the IRS cannot prove the validity of the tax assessment against him and he submits a letter from the IRS as evidence that a tax liability against him does not exist. This Court addresses each of Stout's arguments in turn.

The United States is a proper party

The United States has standing to bring this claim. Under 26 U.S.C. § 6321, which provides that the amount of a delinquent taxpayer's liability shall be a lien in the favor of the United States upon all property and rights to property belonging to the taxpayer, the United States has a legally protected interest. Further, 26 U.S.C. § 7403 specifically states:

> In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

Thus, Stout's argument that the United States has not standing to bring this suit against him is without merit.

Discovery

Stout argues that summary judgment is improper because there has been no discovery. A district court has wide discretion with respect to discovery, Brown-Bey v. United States, 720 F.2d 467, 470 (7th Cir. 1983), and Stout offers no explanation as to why discovery is necessary in this case. Facts that he disputes, such as the existence of PepsiCo., Inc. and The Northern Trust Company, do not create a genuine issue that defeat summary judgment, especially considering that the Declaration of Linnea Kopp is more than sufficient to establish not only the existence of these entities but also Stout's right to receive payments pursuant to his retirement plan. Thus, discovery on these issues would not be useful.

Further, while Stout argues that not tax liability against him exists, his "proof" is a letter from the IRS in response to a Freedom of Information/Privacy Act request that states no such thing. Stout takes issue with the IRS employee, Rodney Joseph, arguing that Joseph has no personal knowledge of the tax assessment made against Stout in 1986. As an IRS employee who reviewed IRS records concerning Stout, however, Joseph has demonstrated the requisite personal knowledge to establish the existence and validity of the tax assessment. Federal tax assessments, once demonstrated, are presumptively correct and the burden is on the taxpayer to show by a preponderance of the evidence that the determination is incorrect. U.S. v. Kim, 111 F.3d 1351 [79 AFTR 2d 97-2238] (7th Cir. 1997). Stout has not met his burden, nor can he show how discovery would enable him to question the validity of the tax assessment. Therefor, this Court finds that there is no genuine issue of fact regarding the validity of the tax assessment or the existence of Stout's right to receive retirement benefits pursuant to his Quaker Retirement Plan; summary judgment is granted in favor of the United States.

IV. Conclusion

For the foregoing reasons, this Court GRANTS the United States' motion for summary judgment in the amount of $466,204.44 plus accrued interest and statutory additions as allowed by law from and after May 29, 2002. As such, a federal tax lien has attached to Stout's right to receive pension payments, in the amount of $711.38 every month, from the Northern Trust Company, trustee to the PepsiCo., Inc. Master Trust which holds the funds

used to make payments according to Stout's Quaker Oats Retirement Plan. This case is closed.

Enter:

David H. Coar

United States District Judge

Dated: November 26, 2002

¶2002-5764

PEOPLE OF NEW JERSEY, ex rel.: Robert Kent EVANS and Daphne Dee EVANS, PLAINTIFFS v. INTERNAL REVENUE SERVICE, Charles O. ROSSOTTI, Commissioner, DEFENDANTS. U.S. District Court, Dist. of New Jersey, (DC NJ) CIVIL ACTION NO. 02-2475, Nov. 25, 2002. Decision for Govt.

1. District court jurisdiction—jeopardy assessments—dismissal. Taxpayers' complaint was dismissed without prejudice for lack of jurisdiction under F.R.Civ.P. 12(b)(1) where IRS had never imposed IRC §7429(b) jeopardy assessment against them. *Reference:* United States Tax Reporter ¶74,336.504(61).

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,

ORDER

HON. STEPHEN M. ORLOFSKY

This matter having come before the Court on the Motion of the United States to Dismiss, Christopher J. Christie, Esq., United States Attorney, Susan Steele, Esq., Assistant United States Attorney, and Isaac D. Paxman, Esq., Trial Attorney, Tax Division, United States Department of Justice, appearing for Defendants; Robert Kent Evans and Daphne Dee Evans, appearing pro se; and,

The Court having considered the moving papers of Defendants, and Plaintiffs having failed to oppose the Motion to Dismiss; and

[1] It appearing further that the Internal Revenue Service has never imposed a jeopardy assessment pursuant to 26 U.S.C. § 7429(b) and therefore, that this Court lacks subject matter jurisdiction over Plaintiffs' claims;

Accordingly, IT IS on this 25th day of November, 2002, hereby ORDERED that the Motion to Dismiss Plaintiffs' Complaint for Lack of Subject Jurisdiction pursuant to F.R. Civ. P. 12(b)(1) is GRANTED without prejudice to Plaintiffs' right to refile a Complaint if a jeopardy assessment is imposed.

STEPHEN M. ORLOFSKY

UNITED STATES DISTRICT JUDGE

¶2002-5765

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Leonard CHAVIN and Martin Litwin, DEFENDANTS-APPELLANTS. U.S. Court of Appeals, Seventh Circuit, (CA7) Nos. 01-2302 and 01-3414, Dec. 13, 2002. District Court affirmed. Years 1992, 1993, 1994. Decision for Govt.

1. Tax crimes—conspiracy to defraud IRS; false statements; assisting preparation of fraudulent returns—jury instructions—evidence. Taxpayer's and his attorney's conspiracy, IRC §7206(1) and IRC §7206(2) convictions for scheme to defraud IRS of substantial underreported gain through use of manufactured transactions and false, offsetting bad debt loss were affirmed: proposed good-faith-reliance jury instruction was properly denied where reliance defense was already adequately covered by willfulness instruction; instruction regarding significance of taxpayer's return signing wasn't misleading; and evidentiary challenges to testimonies of expert and other witness were meritless. Also, attorney's tax expertise and active role in creating false debt supported finding that he assisted in preparing subsequent years' returns claiming false carryover losses. *Reference:* United States Tax Reporter ¶72,065.01(5); 72,065.01(10); 73,446.514(25). IRC §7206.

2. Tax crimes—U.S. Sentencing Guidelines—grouping—tax loss computations. Taxpayer's and his attorney's sentences for

conspiring to defraud IRS, making false statements and assisting in false return preparation were affirmed: taxpayer's argument for "automatic" grouping of his tax and related bankruptcy fraud offenses was properly rejected where offenses fell under different Guidelines and weren't of same general type; and attorney's double-counting argument for grouping of his tax and perjury offenses was properly rejected where tax sentence and sophisticated means enhancement thereto weren't based on and would have been same without perjury count. Also, taxpayer's allegedly legitimate, unclaimed deductions were properly ignored in tax loss computations since U.S.S.G. §2T1.1(c)(1) targeted only intended or attempted loss, as reported on filed return, and not actual loss; and jury's finding on total debt/loss amount precluded taxpayer from attempting at sentencing to relitigate legitimacy of portion of that debt. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §7206.

In the United States Court of Appeals For the Seventh Circuit,

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 99 CR 282-Rebecca R. Pallmeyer, Judge.

Before Easterbrook, Kanne, and Evans, *Circuit Judges.*

Kanne, Circuit Judge.

On July 22, 1998, this court affirmed the district court's decision to deny Leonard Chavin a discharge in bankruptcy. *In re Chavin*, 150 F.3d 726, 729 (7th Cir. 1998). In our opinion, we noted an appearance of deliberate fraud in Chavin's bankruptcy filings. Accordingly, we referred the case to the Department of Justice for further investigation. *Id.* Eventually, a grand jury returned a fifteen-count superseding indictment charging Chavin and his attorney, Martin Litwin, with tax and bankruptcy fraud. Following a lengthy trial, a jury found them guilty on eleven of the fifteen counts, and the district court sentenced Chavin to 37 months in prison and Litwin to 33 months in prison. On appeal, they raise multiple issues, including various claims related to the district court's application of the federal sentencing guidelines. We reject all of Chavin's and Litwin's arguments and affirm the district court's disposition.

I. History

A. Tax Fraud

Leonard Chavin, a businessman and investor, owned a block of commercial real estate on South Halsted in Chicago ("the Halsted property"). He also controlled a corporation known as SCV Corporation ("SCV"), which held as its only asset a clothing store that did business under the name of Howard's Style Shop ("HSS").[1] The business struggled, and over a period of years Chavin personally lent SCV in excess of $900,000. In 1992, Chavin sold part of the Halsted property for $975,000, generating a substantial capital gain and greatly increasing his tax burden.[2] Chavin and his attorney, Litwin, devised a plan to offset the Halsted-property gain with the SCV-debt loss.

They discovered that the tax code allows an individual to take a deduction for worthless, unrecoverable debts, known as a "bad debt loss." 26 U.S.C. § 166(d) (2002). The only problem was that they had to somehow make the SCV debt worthless to Chavin. They did so by manufacturing a sham sale of SCV's only asset, the HSS clothing store, to Litwin's cousin, Michael Glickman. Glickman paid nothing out of his own pocket for HSS. He was told that the sale was nothing more than a "paper transaction"—meaning he would have no connection with the clothing store except that on paper he would be listed as the owner. Following the "sale," Chavin continued to control HSS and nothing

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[1] Chavin's daughter, Shari Chavin Vass, was actually listed as the owner of SCV in the Illinois Department of Revenue filings, but the record clearly shows that Chavin ran and controlled the company and his daughter had virtually no connection to it.

[2] Chavin, with the help of Litwin, structured the sale of the Halsted property to make it appear that the purchase price was only $675,000, rather than $975,000; thus, in calculating his capital gain on his 1992 tax return Chavin used $675,000 as the sale price. At trial, the jury found that Chavin had underreported the sale price by $300,000 and thus that he had underreported his capital gain by that same amount. This finding is not challenged on appeal.

about the business changed. And because SCV no longer had any assets of record, Chavin could claim that the debt SCV owed him was entirely worthless and thereby claim it as a bad debt loss. On his 1992 tax return, Chavin reported a capital gain from the sale of the Halsted property of $328,000. Against this, Chavin deducted $900,000 as a bad debt loss based on the SCV debt. In 1992, Chavin could only take the loss to the extent that it offset the capital gain from the Halsted-property sale plus $3000—in total $331,000; thus, he carried over the remaining portions of the loss on his returns for subsequent years.

After being alerted to possible fraud in Chavin's financial dealings, the government investigated and a federal grand jury returned a fifteen-count superseding indictment. The first six counts of the indictment related to the tax dealings just described. Count 1 charged Chavin and Litwin with conspiring to defraud the Internal Revenue Service ("IRS") through the creation of a fraudulent $900,000 bad debt loss in violation of 18 U.S.C. § 371. Count 2 charged Chavin with violating 26 U.S.C. § 7206(1) by making false statements on his 1992 tax return, in that he understated the sale price of the Halsted property and in that he claimed a $900,000 bad debt loss to which he knew he was not entitled. Counts 3 and 5 charged Chavin with making false statements on his 1993 and 1994 tax returns, respectively, in that he reported a false carryover loss from his 1992 return in violation of 26 U.S.C. § 7206(1). Similarly, Counts 4 and 6 charged Litwin with violating 26 U.S.C. § 7206(2) for aiding and assisting Chavin in the preparation and presentation of his 1993 and 1994 fraudulent tax returns. Following a trial, the jury convicted Chavin and Litwin on all of these tax counts.

B. Bankruptcy Fraud

The remaining charges in the superseding indictment, Counts 7 through 15, related to a bankruptcy fraud that developed when Chavin's creditors forced him into bankruptcy proceeding, Chavin was required to file schedules disclosing all of his assets, income, and expenses. On the schedules he filed, he failed to disclose certain assets and income, including the interest he had in HSS. Also, as part of the bankruptcy proceeding, Glickman was deposed about his purported ownership of HSS. Litwin counseled Glickman on his responses so as to make it appear that Glickman owned HSS and that Chavin had no interest in the company.

The relevant portion of Count 7 charged Litwin with violating 18 U.S.C. § 1623 for aiding Glickman to commit perjury in the bankruptcy proceedings.[3] Litwin was found guilty on this count. Counts 8 through 13 charged Chavin with concealing various assets from the bankruptcy trustee and his creditors in violation of 18 U.S.C. § 152(1). Of these counts, the jury convicted Chavin on Counts 10 and 11, which both related to life insurance polices. Chavin was convicted on Count 14, which charged him with failing to disclose assets on his bankruptcy filings in violation of 18 U.S.C. § 152(3). Finally, the jury convicted Chavin on Count 15, which charged him with converting an asset in bankruptcy in violation of 18 U.S.C. § 152(7).

C. The Sentencing and Appeal

Following a sentencing hearing, the district court determined that the appropriate sentencing level under the U.S. Sentencing Guidelines was 19 for both defendants, which corresponds to a sentencing range between 30 and 37 months. The district court sentenced Chavin to 37 months imprisonment and fined him $10,000 and sentenced Litwin to 33 months imprisonment and fined him $50,000.

II. Analysis

A. Trial Issues

1. Theory-of-Defense Jury Instruction

[1] Chavin and Litwin argued as part of their defense to the tax-fraud charges that they relied in good faith on the advice of Chavin's accountant Kessler and there-

[3] Count 7 also charged Glickman with committing perjury during the bankruptcy proceedings, but Glickman pled guilty to the charge prior to trial.

fore did not ''willfully'' perpetrate the tax fraud. Defendants tendered a theory-of-defense jury instruction that covered this point. The district court, however, refused to give the instruction to the jury, stating that the theory of defense was sufficiently covered by other instructions; specifically, by the pattern instruction on good faith and a further instruction that made clear that defendants must have acted ''willfully'' within the precise definition of that term.

We review a district court's refusal to give a theory-of-defense instruction *de novo. United States v. Meyer*, 157 F.3d 1067, 1074 (7th Cir. 1998). To be entitled to a theory of defense instruction, a defendant must satisfy a four-part test by showing (1) that the proposed instruction is a correct statement of law; (2) that the evidence in the case supports the theory of defense; (3) that the theory of defense is not already part of the charge; and (4) that failure to include the proposed instruction would deny the defendant a fair trial. *Id.*

Here, defendants have, at the very least, failed to satisfy the third element. We have recognized in prior tax-evasion cases that a '''good faith reliance' defense is essentially a claim that the [defendant] did not act 'willfully.''' *United States v. Brimberry*, 961 F.2d 1286, 1291 [69 AFTR 2d 92-1153] (7th Cir. 1992). Consequently, when, as here, instructions are given that require the jury to find that a defendant acted ''willfully'' and those instructions define ''willfulness'' and ''good faith'' as mutually exclusive, then a further ''good faith reliance'' theory-of-defense instruction would be unnecessarily redundant. *Id.*; *United States v. Kelley*, 864 F.2d 569, 573 [63 AFTR 2d 89-616] (7th Cir. 1989). Therefore, we find that the instructions given by the district court adequately covered the defendants' theory of defense.

2. Jury Instruction on Chavin's Signing of His Tax Return

Chavin further argues on appeal that the instruction the district court gave about the effect of his signature on his 1992 tax return could likely have led the jury to believe that his signature alone overrode his ''reliance on a tax professional'' defense. Chavin offered an alternative instruction based on language from *United States v. White*, 879 F.2d 1509, 1511 (7th Cir. 1989). Ultimately, the district court rejected this instruction and instead used an instruction based on other language from the *White* opinion—language that was later cited with approval in *United States v. Ellis*, 50 F.3d 419, 425 (7th Cir. 1995). Both instructions. were accurate statements of the law and did not substantially differ from one another. In this situation, we review a district court's decision on the precise wording of the instruction for abuse of discretion. *Riemer v. Ill. Dep't of Transp.*, 148 F.3d 800, 804 (7th Cir. 1998). The instruction given plainly stated that the determination of whether Chavin acted knowingly should be based on the ''totality of the circumstances, including *but not limited to* the bare fact of the defendant's signature on various documents.'' (Tr. 2787) (emphasis added). We find that it was not an abuse of discretion for the district court to conclude that this language would not mislead the jury into thinking that Chavin's signature alone defeated his ''reliance on a tax professional'' defense.

3. Restriction of Direct Examination of Defense Expert Sharps

At trial, Chavin sought to have defense expert Jason Sharps testify during direct examination that Chavin's accountant, Kessler, had made various ''mistakes'' on Chavin's tax return. The district court permitted inquiry into the ways that Sharps would have prepared the return differently; however, the court did not allow Sharps to testify that where he and Kessler differed, Kessler had made a ''mistake.'' We review a district court's evidentiary rulings for abuse of discretion. *United States v. Smith*, 230 F.3d 300, 307 (7th Cir. 2000). Chavin argues that the testimony that Kessler had made mistakes was relevant to the issue of whether Chavin relied on his accountant to prepare correct income tax returns and to the calculation of tax loss. We do not perceive how this evidence could be relevant to either of these issues, and Chavin provides no explanation as to why it is relevant. Therefore, we find that the district

court did not abuse its discretion in refusing to allow this evidence.

4. Litwin's Motion to Serve as Co-Counsel

Before trial, defendant Litwin, an attorney specializing in tax, real estate, and bankruptcy law, filed a motion to serve as co-counsel in his defense. The district court denied the motion, and Litwin raises the issue again on appeal.

There is no question that a defendant has a constitutional right to conduct his own defense. But seeking to serve as co-counsel in a "hybrid representation" is a separate question. *United States v. Oakey*, 853 F.2d 551, 553 [62 AFTR 2d 88-5379] (7th Cir. 1988). We recognize, along with all other circuits that have considered the question, that there is no Sixth Amendment right to hybrid representation; rather, whether a defendant may act as co-counsel along with his own attorney, is a matter within the discretion of the district court. *United States v. Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989) ("The decision to grant or deny 'hybrid representation' lies solely within the discretion of the trial court."); *United States v. Norris*, 780 F.2d 1207, 1211 (5th Cir. 1986) ("[A] defendant does not have the right to a hybrid representation, in which he conducts a portion of the trial and counsel conducts the balance."); *United States v. Halbert*, 640 F.2d 1000, 1009 (9th Cir. 1981) ('A criminal defendant does not have an absolute right to both self-representation and the assistance of counsel."); *see also United States v. Singleton*, 107 F.3d 1091, 1101 n.7 (4th Cir. 1997) ("The cases reiterating the principle that courts are not required to allow defendants to split the responsibilities of the representation with an attorney are myriad.").

This court has held that hybrid representation is "disfavored." *United States v. Kosmel*, 272 F.3d 501, 506 (7th Cir. 2001); *Cain v. Peters*, 972 F.2d 748, 750 (7th Cir. 1992); *United States v. Oakey*, 853 F.2d 551, 553 [62 AFTR 2d 88-5379] (7th Cir. 1988). The primary reason we have expressed concern about hybrid representation is because "it allows a defendant to address the jury, in his capacity as counsel, without being cross-examined, in his capacity as a defendant." *Oakey*, 853 F.2d at 553. Litwin contends that his assurances, given before trial, that he would testify if permitted to serve as co-counsel neutralized the potential problems with hybrid representation. This sort of pre-trial promise, however, does not fully allay the concerns. If, after the trial began, he were to go back on his promise and decide not to testify, there would be no effective way for the trial court then to compel him to take the stand. Consequently, his promise is without effect. Further, the fact that Litwin is an attorney with experience in the matters involved in this case does not in any way ease concerns that he could make unsworn statements to the jury without being subject to cross-examination. Therefore, we find that the district court properly refused to allow Litwin to serve as co-counsel in his defense.

5. Sufficiency of Evidence: Glickman's Testimony

Litwin challenges two aspects of the verdict against him on grounds of insufficient evidence; the first is whether the testimony of his cousin was sufficient to convict him. We will reverse based on insufficiency of evidence only if, viewing the evidence in the light most favorable to the government, the record contains no evidence from which the jury could find guilt beyond a reasonable doubt. *United States v. Combs*, 222 F.3d 353, 362 (7th Cir. 2000).

Litwin argued in a motion for a judgment of acquittal that the testimony of his cousin, Michael Glickman, was inherently incredible. The district court denied the motion and we affirm. As we have stated in previous cases, "it is not the role of the appellate court to question the jury's credibility determinations." *United States v. Stott*, 245 F.3d 890, 898 (7th Cir. 2001); *see also United States v. Durham*, 211 F.3d 437, 445 (7th Cir. 2000); *United States v. Alcantar*, 83 F.3d 185, 189 (7th Cir. 1996). Therefore, we will reverse a jury verdict only if the testimony was incredible as a matter of law. *Stott*, 245 F.3d at 898. Litwin points primarily to evidence

that Glickman had previously lied to or cheated various people, including his own family members. We do not find that this evidence, or any of the other evidence that Litwin has put before us, meets his substantial burden of showing that Glickman's testimony was incredible as a matter of law.

6. Sufficiency of Evidence: Conviction on Counts 4 and 6

Counts 4 and 6 of the indictment charged Litwin with assisting Chavin in the presentation of fraudulent tax returns for 1993 and 1994—the years in which Chavin carried over the fraudulent bad debt loss. Litwin contends that the guilty verdict on these counts must be reversed because he did not aid Chavin in the preparation of these returns, nor, he claims, was it foreseeable to him that Chavin would make false statements on these returns. We disagree. Litwin knew that Chavin would have a large bad-debt loss in 1992 because he had helped Chavin create the loss. And based on Litwin's experience in tax matters, it was reasonable for the jury to conclude that he would have known that the entire loss could not have been deducted in 1992—that some of it would have to be carried over to subsequent years. Therefore, we find that there was sufficient evidence to support his conviction on Counts 4 and 6.

B. Sentencing Issues

[2] Chavin and Litwin also challenge various aspects of their sentences. We review a sentencing court's factual determinations for clear error and interpretations of the guidelines *de novo*. *United States v. Owolabi*, 69 F.3d 156, 162 (7th Cir. 1995).

1. Grouping as to Chavin

Chavin challenges the district court's refusal to group the tax and bankruptcy counts together as closely related under § 3D1.2(d) of the sentencing guidelines. Had the district court grouped these counts, Chavin would have received a lower sentence. Guideline § 3D1.2 provides:

> All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:
>
> . . .
>
> (d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.
>
> Offenses covered by the following guidelines are to be grouped under this subsection:
>
> [Several guideline provisions then are listed, including § 2F1.1 and § 2T1.1, the offenses for which Chavin was convicted.]

U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 3D1.2 (2000).

Chavin first contends that since he was convicted of offenses listed in the "to be grouped" category the district court had no choice but to group the offenses because listed offenses must be grouped automatically. Because such a conclusion flies in the face of the overriding purpose of § 3D1.2, we disagree, and as we note below, we are not alone in this determination. *See, e.g., United States v. Williams*, 154 F.3d 655, 657 [82 AFTR 2d 98-6177] (6th Cir. 1998) ("The bulk of the courts to have considered the proper construction of subsection (d) have concluded that there is no automatic grouping of counts simply because those counts are on the 'are to be grouped' list.").

In *United States v. Wilson*, we noted that the primary goal of § 3D1.2 "is to combine offenses involving closely related counts." 98 F.3d 281, 282 (7th Cir. 1996) (quotations omitted). In cases, like this one, where two different offense guidelines are at issue, automatic grouping would often lead to the grouping of entirely unrelated counts. *See United States v. Harper*, 972 F.2d 321, 322 (11th Cir. 1992) ("In some circumstances, automatic grouping detracts from the main purpose of section 3D1.2: to combine offenses involving

closely related counts.''). In light of the purpose of § 3D1.2, we seriously doubt that its drafters would have desired such an outcome. In fact, the commentary to § 3D1.2 makes it clear that they did not: ''[c]ounts involving offenses to which *different offense guidelines apply* are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection.'' U.S.S.G. § 3D1.2 cmt. n.6 (emphasis added). Consequently, at least in cases where different offense guidelines apply—as is the case here, where the offenses are under § 2F1.1 and § 2T1.1—grouping is not automatic; rather the sentencing court is required to make an additional inquiry into whether the offenses are ''of the same general type.''

In support of his argument for automatic grouping, Chavin points to cases in the Second and Ninth Circuits that hold that grouping is required when offenses are listed on subsection (d)'s ''to be grouped'' list. We see an important distinction, however, between those cases and the case before us. In both of those cases, the defendants sought to have charges grouped that were covered by the same offense guideline. *United States v. Gelzer*, 50 F.3d 1133, 1144–45 (2d Cir. 1995) (counts that the court held were required to be grouped were possession of a firearm with an obliterated serial number and possession of a firearm by a felon, both offenses to which § 2K2.1 applied); *United States v. Buenrostro-Torres*, 24 F.3d 1173, 1176 (9th Cir. 1994) (''If the offenses at issue are covered by one of the listed guidelines we do not analyze the facts of the particular case. Here, the offenses ... are covered by § 2F1.1.'') (emphasis added). Consequently, the courts in those cases did not need to consider the commentary language about situations where the offenses at issue are covered by different offense guidelines.[4]

In fact, when the Second Circuit was faced with the issue of whether to group counts that were covered by different guidelines—§ 2F1.1 (fraud) and § 2S1.1 (money laundering), both of which were on the ''to be grouped'' list—they did not find that automatic grouping was appropriate, stating instead that the two counts ''should only be grouped if the counts are also of the same general type.'' *United States v. Napoli*, 179 F.3d 1, 10 (2d Cir. 1999). Ultimately, the court found that the two offenses involved there should not be grouped. *Id.* at 10–11. Therefore, the Second Circuit clearly does not view that grouping is always automatic simply because the offenses are listed. The Second Circuit is not alone in this finding. At least four other circuits have reached the same conclusion. *See Williams*, 154 F.3d at 657 (noting that the courts that have considered the proper construction of subsection (d) have held that there is no automatic grouping); *United States v. Walker*, 112 F.3d 163, 166–67 (4th Cir. 1997) (stating that when considering whether to group mail fraud (§ 2F1.1) and money laundering (§ 2S1.1) ''[s]ubsection (d) expressly permits the grouping of offenses under the fraud and money laundering guidelines, but any grouped offenses must be 'closely related'''); *United States v. Seligsohn*, 981 F.2d 1418, 1425 (3d Cir. 1992) (''[A]lthough all of the counts are listed in subsection (d) as appropriate for grouping, that inclusion does not mean that the counts must be grouped. Counts must be of the 'same general type' before grouping is appropriate.'') (citations omitted); United States v. Harper, 972 F.2d 321, 322 (11th Cir. 1992) (''[G]rouping is not automatic, even if all offenses in question are encompassed within this ['to be grouped'] category.''). We join these circuits in finding that grouping under subsection (d) is not automatic simply because the offenses at issue are listed on the ''to be grouped'' list.

Although we reject *automatic* grouping, the counts in Chavin's case could still be grouped if the offenses are ''of the same general type and otherwise meet the criteria for grouping under ... subsection

[4] We should note that we do not today adopt in this circuit the interpretations put forth in the Second and Ninth Circuits that grouping is automatic when the counts involved are covered by the same offense guideline. We simply note that Chavin's case is distinguishable from those decisions on that basis.

[(d)].'' U.S.S.G. § 3D1.2 cmt. n.6. Chavin's offenses, however, are not ''of the same general type.'' We agree with the district court's reasoning as to why the tax and bankruptcy counts are not of the same general type:

> [T]he victims are different, and the time frame and context do not completely overlap. Mr. Chavin's effort to cheat his creditors simply does not involve ''substantially the same harm'' as does his effort to cheat the government.

(R.173.)

Defendants argue at some length that the district court erred because it based its finding that the offenses were not of the same type partially on the fact that the victim of the bankruptcy fraud was different from the victim of the tax evasion. According to Chavin, while identity of victims is required for application of subsections (a) and (b) of § 3D1.2, it is irrelevant to subsections (c) and (d). While we agree that identity of victims is not *required* for grouping under subsection (c) or (d), the notion that identity of victims is irrelevant is in conflict with precedent in this circuit and with the guideline commentary. In *United States v. Wilson*, in considering whether to group two counts under subsection (d), we stated ''[w]hether the offenses involve different victims is, as the background commentary notes, 'a primary consideration' in the grouping decision.'' 98 F.3d at 283 (citing U.S.S.G. § 3D1.2 cmt. background). In fact, our decision to group the two offenses involved in *Wilson* was based largely on the fact that the victim was essentially the same. *Id.* at 283 (rejecting an argument that mail fraud and money laundering involve different victims in favor of a more intuitive argument that the victims are in reality the same). Consequently, the district court properly considered the fact that the victim of the tax fraud was the United States government and the victims of the bankruptcy fraud were Chavin's creditors as a factor in determining whether these offenses were of the same general type.

Even aside from there being different victims involved, there are other considerations that lead us to the conclusion that Chavin's crimes are not of the same general type. The tax and bankruptcy frauds were not ''part of a single continuous course of criminal activity.'' *United States v. Petrillo*, 237 F.3d 119, 125 [87 AFTR 2d 2001-323] (2d Cir. 2000). Indeed, the two offenses are quite separate. The core of Chavin's tax fraud was committed in 1992 when he made the sham sale to Glickman and filed his fraudulent tax return for that year.[5] The core of the bankruptcy fraud did not occur until December 1994. Further, the bankruptcy was not even initiated by Chavin, but rather by his creditors, so the idea that it was part of his criminal plan seems implausible. Also, as the government notes in its brief, the harms involved in these offenses were quite different: ''the financial loss to bankruptcy creditors is not 'of the same general type' as the harm implicated by a tax offense, which is a crime against the polity and which has indirect effects on all taxpayers and on the government's ability to protect and serve the public at large.'' (Gov. Brief at 37.) Finally, as the district court correctly noted at the sentencing hearing, the only real connection between the bankruptcy fraud and tax fraud appears to be the testimony offered by Glickman in the bankruptcy proceedings. Even construing ''of the same general type'' broadly, as the application notes suggest we should, we do not find that this minimal connection between the offenses requires grouping in this case. U.S.S.G. § 3D1.2 cmt. n.6.

2. Grouping as to Litwin

Litwin argues that the district court erred by not grouping the aiding and abetting perjury count with the tax evasion charges against him. We agree with the district court and reject Litwin's claim. Litwin bases his argument on § 3D1.2(c), which provides that counts involve substantially the same harm ''[w]hen one of the counts embodies conduct that is treated as a spe-

[5] We recognize that Chavin was convicted of tax fraud for his later tax returns as well but clearly these were only spin-offs of the original fraud that occurred in 1992.

cific offense characteristic in, or other adjustment to, the guidelines applicable to another of the counts.'' U.S.S.G. § 3D1.2(c). Litwin's sentence on the tax offense was enhanced two levels for sophisticated concealment. Litwin argues that the perjury charge was used as part of the basis for the sophisticated-concealment enhancement of the tax sentence; thus, the perjury count should have been grouped with the tax offense under subsection (c) because it was used as ''an adjustment to'' the tax sentence.

We begin by noting that the commentary specifically states that subsection (c) was intended to apply only to counts that are ''closely related.'' *Id.* § 3D1.2 cmt. n.5. While we recognize that Glickman's perjury did to some extent aid in the perpetuation of the tax conspiracy: the ostensible purpose of the perjury was to keep Chavin's assets hidden from his creditors. Consequently, we doubt that these counts are closely related.[6]

However, the reason we reject Litwin's argument for grouping is that his situation simply does not fit within the primary purpose of subsection (c), which is to ''prevent 'double counting' of offense behavior.'' *Id.* § 3D1.2 cmt. n.5. Refusal to group the perjury offense and the tax conspiracy offense did not result in double counting here because, as was brought out at oral argument, Litwin would have received the same enhancement for sophisticated concealment even if the perjury charge was not considered at all. In other words, other evidence besides the perjury offense provided ample support for the sophisticated-concealment enhancement. Indeed, the district court appears to have concluded that the perjury actually did not provide any support to the sophisticated-concealment enhancement because the purpose of the perjury was not to cover up the tax crimes.[7] Consequently, it cannot be said that the perjury charge was double counted because it was not counted at all under the sophisticated-concealment enhancement.

3. Tax-Loss Calculation: Unclaimed Deductions

Chavin and Litwin argue that they were improperly sentenced because the tax-loss figure upon which the district court based its sentence was inflated for two reasons: First, they contend that the district court should have reduced the tax-loss figure by the amount of legitimate but unclaimed deductions on Chavin's tax return. Second, they maintain that part of the bad debt loss Chavin took was legitimate and should not have been considered in determining tax loss.

We start with the unclaimed-deductions issue. Chavin and Litwin were sentenced on the tax counts under § 2T1.1 of the guidelines. Assessing the proper sentence under § 2T1.1 requires a determination of the ''tax loss'' resulting from the offense. Section 2T1.1(c)(1) provides the definition of tax loss applicable to this case: ''If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (*i.e.*, the loss that would have resulted had the offense been successfully completed).'' U.S.S.G. § 2T1.1(c)(1). Also, notes (A) and (C) under this subsection provide a further explanation of how to calculate tax loss in certain circumstances:

> (A) If the offense involved filing a tax return in which gross income was underreported, the tax loss shall be treated as equal to 28% of the unreported gross income . . . unless a more accurate determination of the tax loss can be made.
>
> . . .
>
> (C) If the offense involved improperly claiming a deduction to provide a basis for tax evasion in the future, the tax loss shall be treated as equal to 28% of the

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6 As did Chavin, Litwin asserts that the fact that there are different victims is irrelevant to the grouping determination under subsection (c). We reject Litwin's argument just as we did Chavin's. Identity of victims is not a determinative factor under section (c), but it is a ''primary consideration.'' U.S.S.G. § 3D1.2, cmt. n.7.

7 At the sentencing hearing the district court stated: ''[w]hat we are talking about here, as I understand it, is in one context lying to the United States, in another context lying in effect to the bankruptcy court and Mr. Chavin's creditors. I think that means there are different victims. I think it means that the criminal objective is a different one. *I don't think it's fair to say the conduct is treated as a specific offense characteristic if we say they concealed it in one context. In another they lied about it in bankruptcy.*''(Tr. 45–46) (emphasis added).

> amount of the improperly claimed deduction . . . unless a more accurate determination of the tax loss can be made.

U.S.S.G. § 2T1.1(c)(1)(A) & (C). Chavin and Litwin assert that if the district court had considered all of the legitimate deductions that Chavin mistakenly failed to claim on his 1992 return then the tax-loss figure would have been reduced from $199,000 to $57,352, which would have corresponded to a lower sentencing level.

The issue of whether to allow consideration of legitimate but unclaimed deductions in the determination of tax loss hinges on the definition of "tax loss." On the one hand, Chavin and Litwin argue, in essence, that "tax loss" refers to the *actual* amount of loss suffered by the government as a result of the tax scheme. If we accept this interpretation, then unclaimed deductions should be considered because the government did not actually lose as much money as the scheme intended since the unclaimed deductions serve to offset the amount that the defendants attempted to evade. On the other hand, the government contends that "tax loss" refers to the amount of loss that the defendant *attempted* or *intended* to create through his tax offense. If we accept this interpretation, then unclaimed deductions should not be taken into account because they have no relevance to the amount of loss that the scheme attempted to produce.

It is apparent from the definition of "tax loss" provided in the guidelines that the government has the correct position. The guidelines state that "tax loss is the total amount of loss that was the object of the offense." *Id.* § 2T1.1(c)(1). We take the phrase "the object of the offense" to mean that the *attempted*or *intended* loss, rather than the *actual* loss to the government, is the proper basis of the tax-loss figure. Here, the object of Chavin's offense was the amount by which he underreported and fraudulently stated his tax liability on his return; reference to other unrelated mistakes on the return such as unclaimed deductions tells us nothing about the amount of loss to the government that his scheme intended to create.

Chavin and Litwin argue that we should accept their interpretation because it is less subjective than the government's interpretation. They contend that trying to determine the loss that the defendant *intended* to create is simply too speculative. While in principle it is true that trying to assess intentions is often a subjective endeavor, we strongly disagree that the government's view leads to more subjective results. Here, the defendants' intention is embodied in the tax return that was filed with the IRS. We need to look no further than that return to find the tax-loss figure under the government's view. In fact, it is the defendants' position that would insert subjectivity into the calculation because it would require us to recreate a "perfect" tax return, taking into account all the legitimate unclaimed deductions, which would undoubtedly engender a great deal of dispute between the parties over which deductions were legitimate and which were not.

Defendants further argue that the 1993 changes in the commentary to the tax-fraud sections of the guidelines mandate courts to consider unclaimed deductions. Before 1993, § 2T1.1(a) defined "tax loss" as the greater of (1) the total amount of tax that the taxpayer evaded or attempted to evade; and (2) 28% of the amount by which the greater of gross income and taxable income was understated.[8] U.S.S.G. §§ 2T1.1(a) & 2T1.3(a)(2) (1992). The commentary to this section provided that the "alternative standard [the 28% rate] may be easier to determine, and should make irrelevant the issue of whether the taxpayer was entitled to offsetting adjustments that he failed to claim." *Id.* § 2T1.1 cmt. n.4. When the Guidelines were amended in 1993, this note was deleted. Defendants contend that this deletion means that now courts must consider offsetting adjustments.

[8] The actual language of pre-1993 § 2T1.1(a) states: "the 'tax loss' is the greater of: (A) the total amount of tax that the taxpayer evaded or attempted to evade; and (B) the 'tax loss' defined in § 2T1.3." U.S.S.G. § 2T1.1(a) (1992). Section 2T1.3(a)(2) provided that "the 'tax loss' is 28 percent of the amount by which the greater of gross income and taxable income was understated." *Id.* § 2T1.3(a)(2).

Defendants, however, do not acknowledge that the entire definition of tax loss was changed by the 1993 amendments. The government offers an equally plausible reason as to why the commentary about offsetting adjustments was deleted, that takes account of the new ''tax loss'' definition. The government contends that the language was deleted because the new tax-loss definition specifically excludes consideration of unclaimed deductions on its face by defining tax loss as the ''object of the offense.'' Consequently, the explanatory note was no longer required. We agree with the government that the current definition of tax loss appears to exclude consideration of unclaimed deductions, and we refuse to ignore this definition based on the fact that certain language was deleted from the commentary notes in 1993.

Finally, defendants base their argument in favor of the consideration of unclaimed deductions on the language in § 2T1.1(c)(1)(A) and (C), which states ''the tax loss shall be treated as equal to 28% of the amount of the unreported gross income . . . *unless a more accurate determination of the tax loss can be made.*'' U.S.S.G. § 2T1.1(c)(1)(A) & (C) (2000) (emphasis added). Chavin and Litwin contend that this provision plainly requires the sentencing court to recalculate the defendant's tax return considering the unclaimed deductions if such consideration would result in a ''more accurate determination'' of tax loss. Defendants point out that in dicta the Second Circuit in *United States v. Martinez-Rios* stated that the phrase ''a more accurate determination'' allows a defendant to have legitimate but unclaimed deductions considered. 143 F.3d 662, 671 [81 AFTR 2d 98-2083] (2d Cir. 1998).[9] We note that the Tenth Circuit has questioned the Second Circuit's interpretation, stating ''[w]e do not interpret this provision as giving taxpayers a second opportunity to claim deductions after having been convicted of tax fraud.'' *United States v. Spencer*, 178 F.3d 1365, 1368 [83 AFTR 2d 99-2709] (10th Cir. 1999). The Tenth Circuit further explained that the phrase ''a more accurate determination'' simply allows the defendant or the government to argue for a *rate* that is ''more accurate'' than the 28% presumptive rate. *Id.* at 1368. It is our view that the Tenth Circuit interpreted the guideline correctly.[10]

Given the definition of tax loss discussed above, we simply cannot read the phrase ''a more accurate determination'' to allow for consideration of unclaimed deductions. Considering unclaimed deductions is outside the purview of what we are trying to accomplish in tax-loss calculations, which as the Tenth Circuit stated, is to ''merely assess[] the tax loss resulting from the manner in which the defendant chose to complete his income tax returns.'' *Id.* at 1368. It is simply not the role of this court to consider other hypothetical ways that the defendant could have completed his return. *United States v. Wu*, 81 F.3d 72, 75 [77 AFTR 2d 96-1786] (7th Cir. 1996).[11]

4. Tax-Loss Calculation: the $339,000 Loan Payment

Finally, Chavin and Litwin argue that $339,000 of the claimed $900,000 bad debt loss was in fact a legitimate deduction, and should not have been included in the tax-loss figure upon which their sentence was based. In 1992, Chavin made a $339,000 payment to Cole Taylor Bank as a guarantor of a loan the bank had made to SCV. This payment, as reflected in SCV's financial statements, created a $339,000 debt on the part of the company to Chavin, adding to SCV's already substantial indebtedness to him. This $339,000 debt was part of the $900,000 bad debt loss that Chavin claimed on his 1992 tax return. The defendants argued at trial that the $339,000 debt was legitimately deducted. The jury

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9 The Second Circuit recently affirmed this position in United States v. Gordon, 291 F.3d 181, 187 [89 AFTR 2d 2002-2757] (2d Cir. 2002).

10 The government notes in its brief how its expert, Ellis, correctly argued for a ''more accurate determination'' of the rate:

> Ellis determined that the total amount of unreported income was $674,625. He could have multiplied this figure by the 28% presumptive rate . . . and been done with it. However, he made ''a more accurate determination,'' because some of that unreported income was ordinary income and some was capital gain, and the two are taxed at different rates depending on the income of the taxpayer.

(Gov. Br. at 29).

11 We recognize that Wu was decided under the pre-1993 guidelines, but the principle expressed there is still applicable.

returned a general verdict finding defendants guilty on all tax counts. At sentencing, the defendants argued that while the jury convicted them of having created a fraudulent bad debt loss, the jury did not specify the amount of the loss that was illegitimate. Thus, they maintained that it was still an open question as to whether Chavin was entitled to the $339,000 deduction. The district court rejected the argument, finding that the jury had determined that Chavin improperly took a bad debt loss of $900,000 and was not entitled to any portion of it. Consequently, the district court sentenced defendants based on a $900,000 tax loss figure, noting that to make a finding that the tax-loss figure was lower than $900,000 would contradict the jury's verdict.

On appeal, Chavin again argues that the jury did not decide the issue of whether the $339,000 deduction was legitimate, and that because the verdict did not necessarily resolve the issue, the district court erred by not making its own finding on the issue. We agree with the district court's conclusion that the jury had already preclusively decided the issue and that the sentencing court could not sentence defendants based on an amount different from what the jury decided. Defendants were convicted on all the tax offenses charged—Counts 1 through 6. All of these counts reference $900,000 as the bad-debt-loss figure, and make no mention of or distinction between the various elements that comprised the total debt. Defendants' attempt to cut the total debt into pieces and argue about the individual parts at sentencing was, as the district court found, unavailing.

In any event, the record reveals that Chavin was not entitled to the deduction for which he argued. Chavin argues that the $339,000 was deductible because SCV was insolvent prior to and independent of the sham sale to Glickman and because he had personally guaranteed the loan he had paid on SCV's behalf. These factors alone, however, do not trigger the ability to take a deduction. Section 166(d) of the tax code, the section under which Chavin attempted to take the deduction on his 1992 return, permits individuals to take deductions for nonbusiness debts only when those debts become ''worthless.'' 26 U.S.C. § 166(d)(1)(B) (2000). As this court has noted, ''[t]he criterion of worthlessness is interpreted strictly: the deduction is unavailable if even a modest fraction of the debt can be recovered.'' *Buchanan v. United States*, 87 F.3d 197, 198 [78 AFTR 2d 96-5001] (7th Cir. 1996). At the end of 1992, SCV, though insolvent, still had assets worth $839,000-against liabilities of $1,240,000. Given this amount of assets, it was reasonable for the jury to have found that Chavin had at least a ''reasonable prospect of recovering'' a ''nontrivial'' amount of the money SCV owed him. *Id.* at 200.

As the government points out, the real triggering event that made the debt worthless and thereby ''entitled'' Chavin to the bad-debt-loss deduction was the sham sale to Glickman, which drained SCV of all its assets and ensured its inability to repay him. Indeed, as even the defense's tax expert noted at trial, Chavin's tax return itself showed that the sale to Glickman, and nothing else, was the triggering event. Because the event that triggered the availability of the deduction was fraudulent, the deduction itself was illegitimate. Therefore, Chavin was not entitled to any portion of the $900,000 bad debt loss, not even the $339,000 portion related to the loan payment.

III. Conclusion

For the foregoing reasons, we AFFIRM the sentences imposed by the district court on Litwin and Chavin.

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Clerk of the United States Court of Appeals for the Seventh Circuit

¶2002-5766

Nicholas E. EUSTACE, ET AL., PETITIONERS-APPELLANTS v. COMMISSIONER of Internal Revenue, RESPON-

DENT-APPELLEE. U.S. Court of Appeals, Seventh Circuit, (CA7) No. 01-4222, Dec. 13, 2002. Tax Court, (2001) TC Memo 2001-66, RIA TC Memo ¶2001-066, 81 CCH TCM 1370 (opinion by Foley, *J.*), affirmed. Years 1990, 1991, 1992. Decision for Govt.

1. Research credits—discovery; process of experimentation—computer software development—proof. Tax Court properly denied S corp./software developer's research credit for developmental changes made to its business management software: corp.'s mere ''tinkering'' and non-innovative fine-tuning of its existing software codes didn't rise to level of *scientific* experimentation necessary to satisfy IRC §41(d)(1) where fundamental nature of subject task wasn't changed and computer science principles weren't advanced; and taxpayers' reliance on draft regs for lesser, broader experimentation standard that could be satisfied by simple trial and error product testing was misplaced. Also, release of any final regs wouldn't aid their position where regs wouldn't apply retroactively; and fact that precedential case law involved interpretation of IRC §41(d)(4)(E)'s independent requirements as well as IRC §41(d)(1) definitions was irrelevant. *Reference:* United States Tax Reporter ¶415.01(20). IRC §41.

In the United States Court of Appeals For the Seventh Circuit,

Appeal from the United States District Court Tax Court Nos. 21088-96 et al.—Maurice B. Foley, Judge.

Before Bauer, Easterbrook, and Manion, *Circuit Judges.*

Easterbrook, Circuit Judge.

[1] Applied Systems, a Subchapter S corporation, develops and sells software that independent insurance agencies use to manage their businesses. During the early 1990s Applied Systems improved its software package, and its investors (the taxpayers in this case) want to take a tax credit under 26 U.S.C. §41 based on the amount by which Applied Systems increased its R&D expenses during these years. Taxpayers who have sought a credit under §41 for commercial software development have been uniformly unsuccessful. See, e.g., *Tax & Accounting Software Corp. v. United States*, 301 F.3d 1254 [90 AFTR 2d 2002-6107] (10th Cir. 2002); *Wicor, Inc. v. United States*, 263 F.3d 659 [88 AFTR 2d 2001-5474] (7th Cir. 2001); *United Stationers, Inc. v. United States*, 163 F.3d 440 [82 AFTR 2d 98-7488] (7th Cir. 1998); *Norwest Corp. v. CIR*, 110 T.C. 454 (1998). The only exception—on which the taxpayers in this case principally rely—is the district court's decision in *Tax & Accounting*, 111 F. Supp. 2d 1153 [86 AFTR 2d 2000-5752] (N.D. Okla. 2000), which the tenth circuit reversed after they filed their brief. Applied Systems' claim is no better than the others.

The evidence at trial in the Tax Court shows that Applied Systems engaged in normal software development. During the early 1990s it enhanced its software package so that it could handle additional ratings computations, so that it could handle transactions between insurers and agencies, so that multiple people could work on the same customer file simultaneously without corrupting or overwriting each others' changes, and so that more functions could be handled in a given amount of random access memory. It discarded a word processing module licensed from another vendor, replacing it with a simple text editor with reduced memory demands but good form-letter-generation features. These are not the only changes, but they show the character of the work. None of it was pioneering; all of it entailed variations on themes long used by other developers. The Commissioner conceded that this work met many of the requirements in §41 but contested several others, of which only two require attention: that the research be ''undertaken for the purpose of discovering information which is technological in nature'' (§41(d)(1) (B)(i)), and that the activities ''constitute elements of a process of experimentation'' (§41(d)(1)(C)). The Tax Court concluded that Applied Systems flunked both tests—the former because it did not produce an ''innovation in underly-

ing principle'' and the latter because the research in question was not designed to dispel uncertainty about the technological possibility of developing software of this kind. T.C. Memo 2001-66 [TC Memo 2001-66] (2001).

Taxpayers concede that if §41 means what the Tax Court thought, then they lose. Applied Systems has not tried to show that its software embodies any leap in information technology or that there was any doubt about the technological ability to produce software of this kind. But it contends that §41 does not set so high a standard and that industrious development of software through a process of trial and error meets the statutory standard. The difficulty with this position is that the Tax Court did not get its legal views out of thin air. This court announced them in *United Stationers*, and *Wicor*declined an opportunity to revisit the subject. *United Stationers* held that software development satisfies the statutory technological-information requirement only if ''the research is intended to expand or refine existing principles of computer science'' and the resulting information is ''of broad effect'' (163 F.3d at 444). As for experimentation, we held that the taxpayer must formulate and test hypotheses in order to dissipate uncertainty about the possibility of success, a standard that fine-tuning (or debugging) of computer programs does not satisfy. *Id.* at 445–46.

Although the word ''experiment'' has many shadings in common speech, we held that as used in §41 it has the *scientific* sense of forming and testing hypotheses rather than the lay (or even engineering) sense of trial and error. Galileo engaged in experiments about acceleration when he rolled balls down an inclined plane. An auto manufacturer trying different nozzles from those on hand to find the one that applies the smoothest coat of paint is not engaged in ''experimentation'' under this view, nor is a software developer trying different methods to implement a feature accompanied by maximum execution speed and minimum demand on system resources such as RAM. Tinkering differs from experimentation in the vocabulary of research-and §41 is about research, and thus about use of the scientific method. Authors and movie makers playing with sentences and scenes to find what most impresses the public are not doing scientific research using ''experimentation''. Just so with software. Developers are authors too; that they write lines of code readable by machines rather than lines of words readable by people does not fundamentally change the nature of the task and make one form of writing ''experimentation'' when the other is not. Experimentation is a subset of all steps taken to resolve uncertainty; otherwise searching for a place to park a car would be a ''process of experimentation''.

The tenth circuit has disagreed with our understanding of §41. It held in *Tax & Accounting Software*that the technological-information requirement can be satisfied by new knowledge that is less a step forward than *United Stationers* required—but that ''information must be separate from the product that is actually developed.'' 301 F.3d at 1262. With respect to experimentation, the tenth circuit was not receptive to the idea that only hypothesis formulation and testing fits, but it still held that the taxpayer must establish that testing was designed to overcome uncertainty about whether the desired end result was technologically feasible. *Id.* at 1264–68. Applied Systems cannot meet these definitions any more than those in *United Stationers.*

In the long run, neither our view nor the tenth circuit's has staying power. Both *United Stationers* and *Tax & Accounting Software* analyzed §41 without the benefit of the regulations that are supposed to illuminate the path to decision. Section 41's predecessor was enacted in 1981, and §41 has been on the books in its current form since 1986, but the Internal Revenue Service has yet to promulgate the regulations that are important to this statutory design. (Section 41 refers ten times to regulations that the Secretary of the Treasury is to develop and issue.) The most recent draft was published almost a year ago, 66 Fed. Reg. 66,362 (Dec. 26, 2001), and has not been made final. Applied Systems asks us

to discard the approach of *United Stationers* and use the one found in the draft regulations. That would not be sound, for two reasons: first, proposed regulations have no legal effect; second, the draft says that when final the regulations will apply only to taxable years ending on or after December 21, 2001. So Applied Systems gets no solace from this source even if the regulatory approach would favor its position (which we doubt, given that the regulations essentially track *United Stationers'* definition of ''experimentation'' as use of the scientific method).

One other line of argument requires only brief mention. Applied Systems thinks that we should disregard *Wicor* and *United Stationers* on the ground that the credit sought by those taxpayers was covered by §41(d)(4)(E), which disqualifies the costs of internal-use software except to the extent allowed by (nonexistent) regulations. In both *Wicor* and *United Stationers* the taxpayer contracted with a consulting firm to develop software that the taxpayer would use in its own business, while Applied Systems developed software for sale to customers. Yet §41(d)(4)(E) has nothing to do with the definitions in §41(d)(1), and Wicor stopped there. *United Stationers* held that the taxpayer lost under both §41(d)(1) and §41(d)(4)(E). That an opinion contains multiple grounds of decision does not justify disregarding any of them; it would be no more sound to throw out *United Stationers'* interpretation of §41(d)(1) than to disregard its interpretation of §41(d)(4)(E) (which was that contracting-out the development of software for in-house use fits within the §41(d)(4)(E) disqualification). Sections 41(d)(1) and (d)(4) are independent rules, which deserve, and have received, independent constructions.

Whether we apply the definitions articulated in *United Stationers* or the competing interpretation from *Tax & Accounting Software*, simple industrious software development does not qualify for the §41 tax credit. Accordingly, the judgment of the Tax Court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

¶2002-5767

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Jeffrey D'AMBROSIA and Duane Pede, DEFENDANTS-APPELLANTS. U.S. Court of Appeals, Seventh Circuit, (CA7) Nos. 02-1635 & 02-1636, Dec. 16, 2002. District Court affirmed. Years 1997, 1998, 1999. Decision for Govt.

1. Tax crimes—sentencing—conspiracy; false statements. Taxpayers' sentences for conspiring to defraud IRS, making false statements and other related crimes were affirmed: imposing 4-level organizer-leader enhancement to tax conspiracy sentences partly on basis of taxpayers' wagering offenses was proper, regardless of whether their tax conspiracy and wagering offenses should have been grouped. For sentencing purposes, wagering offenses were ''related conduct'' to tax conspiracy where income from illegal offshore wagering scheme that taxpayers both organized and led was what they conspired to hide from IRS through offshore tax shelters, which shelters were integral part of wagering operation; and fact that their attorney was organizer of shelters and concealment part of scheme didn't affect taxpayers' status as such with respect to overall scheme. *Reference:* United States Tax Reporter ¶73,446.516(55). IRC §7206.

In the United States Court of Appeals For the Seventh Circuit,

Appeals from the United States District Court for the Western District of Wisconsin.

Before Posner, Ripple, and Manion, *Circuit Judges.*

Manion, *Circuit Judge.*

No. 01 CR 121—Barbara B. Crabb, *Chief Judge.*

Duane Pede and Jeffrey D'Ambrosia pleaded guilty to using wire communication facilities to transmit wagering information in interstate and foreign commerce in violation of 18 U.S.C. §§ 2, 1084 (''Wire Wagering Act''), and to making false and fraudulent statements on income tax returns in violation of 26 U.S.C. § 7206(1). Pursuant to the terms of their plea agreements, the defendants also stipulated that from 1997 to 1999 they conspired to defraud the Internal Revenue Service by using the profits of an illegal offshore sports bookmaking operation to pay vendors and bettors, and by placing profits from that operation and personal income in offshore bank accounts under nominee names. The district court sentenced each defendant to 60 months' imprisonment. The defendants appeal their sentences, and we affirm.

I.

This case involves an elaborate scheme by Duane Pede and Jeffrey D'Ambrosia to operate an illegal sports bookmaking operation and to conceal income and assets from the Internal Revenue Service. In July 1995, Pede and D'Ambrosia merged their respective sports betting handicapping companies—The Scoreboard, Inc. (Pede) and NSN, Inc. (D'Ambrosia)—to form Sports Spectrum, L.L.C. (''Sports Spectrum'').[1] Sports Spectrum provided its customers with: (1) up-to-the-minute betting lines for sporting events over the telephone for a fee; (2) up-to-the-minute scores on sporting events over the telephone for a fee; (3) ''guaranteed'' winning picks on sporting events over the telephone through handicapping services; (4) sports betting and online casino gambling through one of two sports books; and (5) internet access.

In August 1996, Pede and D'Ambrosia expanded Sports Spectrum's business interests by founding Gold Medal Sports Book (''Gold Medal''),[2] an offshore internet-based sports bookmaking operation incorporated and located on the island of Curacao in the Netherlands Antilles. Pede and D'Ambrosia placed profits from Gold Medal's operations in offshore bank accounts in the Bahamas under nominee names, some of which they used to pay Sports Spectrum (for printing services, database support, statistical analysis, and consulting and technical support services),[3] The Scoreboard (for consulting and technical support services), other vendors, and winning bettors.[4] The defendants also directed the distribution of Gold Medal profits to offshore banks as part of a deferred compensation program concocted by David Tedder, an attorney in Orlando, Florida, who marketed estate planning and asset protection devices to his clients.[5] The defendants hired Tedder prior to the commencement of Gold Medal's business operations, and, following his advice, enrolled in a foreign deferred compensation program that he developed and maintained. Under this program, the defendants resigned from Sports Spectrum and entered into employment agreements with Surety Services Limited (''Surety Services''), a corporation located in Dublin, Ireland, which then loaned the defendants out to an independent United States employee leasing company known as Personal Leasing Services Company, Inc. (''PLSC''). PLSC, in turn, contracted with Sports Spectrum for the defendants' services. Sports Spec-

[1] Sports Spectrum had offices in Las Vegas, Nevada, where D'Ambrosia resided, and in Nelsonville, Wisconsin, where Pede resided.

[2] Gold Medal entered a plea of guilty to RICO charges on December 3, 2001, agreeing to forfeit $3,528,617 and discontinue its business operations.

[3] Pede and D'Ambrosia also owned a printing company and bulk mailing business called Signature Press, which handled all of the printing jobs for the various Sports Spectrum entities, including the printing of scoring schedules for The Scoreboard; tout letters for the handicapping services of Jeff Allen Sports, Dan Pastorini Sports, Mike Wynn Sports, and Razor Sharp Sports; and marketing brochures for the sports book companies utilized by Sports Spectrum (i.e., Gold Medal and Seven Palms Casino). Gold Medal mailed letters and brochures to United States residents advertising its sports booking services, and solicited those individuals to place wagers over the telephone lines from the United States to Gold Medal in Curacao via a toll-free betting line.

[4] Gold Medal handled telephone and internet sports bets in excess of $33 million in 1996; $167 million in 1997; $119 million in 1998; $78 million in 1999, and $5.7 million in the first quarter of 2000. During the three and a half years it conducted business, Gold Medal took in approximately $402.7 million in wagers. A portion of the profits were distributed to investors as dividends or ''return on capital,'' while a significant portion of the corporation's net profits were placed in deferred compensation accounts for the defendants and other senior staff in the manner described *infra.*

[5] Unbeknownst to the defendants, Tedder had been disbarred from the practice of law at the time they retained his services.

trum paid PLSC for these services, PLSC transferred the defendants' wages, i.e., "lease payments," to Surety Services, and Surety Services funneled the lease payments to offshore bank accounts in nominee names. According to Tedder, this process rendered the defendants' earnings "tax-free," and made the money available for use by them at any time by way of loans. D'Ambrosia joined Tedder's de-ferred compensation program in June 1997, placing a sizable portion of his personal savings into the plan from the outset. After entering into the program, D'Ambrosia's untaxed earnings and profits from Gold Medal were placed into an offshore account labeled Corpus Harem #XIII at Barclays Bank in Nassau, Bahamas. From 1997 to 1999, D'Ambrosia's untaxed earnings were approximately $3,638,234. Pede joined Tedder's program in December 1997, and his untaxed earnings and profits from Gold Medal were thereafter placed in an offshore account labeled Corpus Harem #VIII at Surety Bank and Trust in Nassau, Bahamas. From 1997 to 1999, Pede had untaxed earnings of $1,467,352 diverted to this offshore bank account.

In 1999, Pede and D'Ambrosia filed fraudulent income tax returns for tax year 1998. Schedule B, Part III, Line 7(a) of the 1998 1040 form required the defendants, under penalty of perjury, to answer the following question: "At any time during 1998, did you have any interest in or signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account?" Each defendant falsely answered "no" to this question on their respective tax returns, notwithstanding the fact that they both had financial interest in and signature authority over numerous foreign bank accounts.[6]

On November 16, 2001, a three-count information was filed against Pede and D'Ambrosia. Count One charged the defendants with using wire communication facilities to transmit wagering information in interstate and foreign commerce in violation of 18 U.S.C. §§ 2, 1084. Count Two charged defendant Pede with filing a false income tax return for tax year 1998 in violation of 26 U.S.C. § 7206(1). Count three charged defendant D'Ambrosia with filing a false income tax return for tax year 1998 in violation of 26 U.S.C. § 7206(1).[7]

On December 3, 2001, the defendants waived indictment and pleaded guilty to the three-count information. In written plea agreements, the defendants also stipulated that from 1997 to 1999 they conspired with one another and others to defraud the IRS by using Gold Medal's profits to pay Sports Spectrum, vendors, and bettors, and by placing some of the company's profits in offshore bank accounts under nominee names. The defendants stipulated that the tax loss resulting from this tax conspiracy amounted to $1,429,565. The district court accepted the defendants' guilty pleas, and in doing so held: (1) that the tax offenses and stipulated conduct (i.e., "tax conspiracy offenses") could be grouped together under U.S.S.G § 3D1.2(b) and (d);[8] and (2) that the tax conspiracy offenses could then be grouped with the wagering offense under U.S.S.G. § 3D1.2(c) "because [the wagering offense] embodies conduct (criminal activity producing the source of income not correctly reported) that is treated

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6 The defendants had signature authority over at least four foreign bank accounts: a Gold Medal account at ORCO Bank in Curacao; and accounts at Surety Bank in Nassau, Bahamas in the names of Gold Medal, Research Technology, and Global Access. They also had "actual authority" of the deferred compensation accounts noted *supra*.

7 The government's investigation also determined that Pede and D'Ambrosia had engaged in money laundering and mail fraud. The defendants were not, however, charged with either of these offenses.

8 Section 3D1.2—"Groups of Closely Related Counts"—provides that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group." Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

The defendants do not challenge the propriety of the district court's decision to group the tax offenses with the stipulated conduct.

as a specific offense characteristic in guideline 2T1.1,[9] which is applicable to the stipulated conduct that constitutes a separate count for the purpose of sentencing.' In calculating the defendants' sentences under the guidelines, the district court concluded that a four-level increase in the offense level was appropriate for their role in the grouped offense because it determined that Pede and D'Ambrosia 'were the leaders and organizers of criminal activity that involved more than five participants or was otherwise extensive.' The district court then used the offense level for the tax conspiracy (24), pursuant to U.S.S.G. § 3D1.3(a),[10] as the offense level for the grouped offenses, resulting in a sentencing guideline range of imprisonment of 51 to 63 months. The district court then sentenced each defendant to 60 months' imprisonment followed by one year of supervised release, and a fine of $100,000. The defendants appeal their sentences, challenging the district court's decision to group the wagering offense with the tax conspiracy offenses and to apply a four-level increase to their offense levels for being leaders or organizers of the tax conspiracy under U.S.S.G. § 3B1.1(a).

II.

[1] We review the district court's application of the United States Sentencing Guidelines *de novo*, but defer to the court's findings of fact unless they are clearly erroneous. *See, e.g., United States v. Febus*, 218 F.3d 784, 795–96 (7th Cir. 2000).

The issue before us is whether the district court erred in applying a four-level enhancement to each of the defendants' sentences for being leaders or organizers of a tax conspiracy under U.S.S.G § 3B1.1. The defendants make two arguments on appeal. First, they contend that the district court should have applied the adjustment for role in offense, under § 3B1.1, prior to grouping as required by U.S.S.G. § 1B1.1(d).[11] Second, the defendants maintain that the district court erred in grouping the wagering offense with the tax conspiracy offenses, and that but for this error they would not have received four-level "organizer or leader" enhancements for the tax conspiracy offenses. Without the four-level sentencing enhancement, the defendants would have been subject to a lower sentencing range, and therefore, presumably, would have received less prison time.

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[9] Section 2T1.1, 'Tax Evasion; Willful Failure to File Return, Supply Information, or Pay Tax; Fraudulent or False Returns, Statements, or Other Documents,' provides:

(a) Base Offense Level:

(1) Level from § 2T4.1 (Tax Table) corresponding to the tax loss; or
(2) 6, if there is no tax loss.

(b) Specific Offense Characteristics

(1) If the defendant failed to report or to correctly identify the source of income exceeding $10,000 in any year from criminal activity, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(2) If the offense involved sophisticated means, increase by 2 levels. If the resulting offense level is less than level 12, increase to level 12.

(c) Special Instructions

For the purposes of this guideline—
(1) If the offense involved tax evasion or a fraudulent or false return, statement, or other document, the tax loss is the total amount of loss that was the object of the offense (i.e., the loss that would have resulted had the offense been successfully completed).

[10] Section 3D1.3(a), 'Offense Level Applicable to Each Group of Closely Related Counts,' provides that '[i]n the case of counts grouped together pursuant to § 3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group.'

[11] Section 1B1.1(d) provides that "[i]f there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly." *Id.* Section 1B1.1(a)-(c) provide the following "application instructions":

(a) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See § 1B1.2.

(b) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

Because we conclude that the defendants are subject to the four-level "organizer-leader" enhancement regardless of whether the wagering offense and tax conspiracy offenses are analyzed separately or grouped together under § 3D1.2, we need not address whether the district court's grouping of these offenses was proper. *See, e.g., Williams v. United States*, 503 U.S. 193, 203 (1992) (holding that a remand is not necessary for a district court's misapplication of the sentencing guidelines if we conclude, on the record as a whole, that the error was harmless because it did not affect the district court's selection of the sentence imposed); *United States v. Saunders*, 129 F.3d 925, 932 (7th Cir. 1997) (same).

Our analysis in this case begins with the defendants' stipulations in their respective plea agreements that they conspired with David Tedder to defraud the IRS. Their stipulations are identical and provide as follows:

> Pursuant to USSG § 1B1.2(c),[12] the defendant stipulates that the government could prove that from 1997 to 1999, the defendant conspired with David Tedder [and co-defendant] to defraud the Internal Revenue Service by hiding income and assets. The defendant further stipulates that the government could prove that the tax loss associated with the conspiracy was $1,429,565, and was reasonably foreseeable to the defendant.

In analyzing whether the defendants played an "aggravating role" in the tax conspiracy, we turn to § 3B1.1, which "provides adjustments to the offense level based upon the role the defendant played in committing the offense." § 3B1.1, introductory commentary. Section 3B1.1(a) directs that "[i]f the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels."

The defendants readily concede that they were leaders and/or organizers of an offshore sports book, Gold Medal, and that a four-level enhancement for their role in the wagering offense, under § 3B1.1(a), was therefore appropriate. The defendants take issue, however, with the district court's determination that they were also organizers and/or leaders of the tax conspiracy. They contend that their participation in the tax conspiracy was limited to their role as clients of David Tedder. In support of their argument, the defendants direct us to the fourth application note of § 3B1.1, which provides that:

> In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

§ 3B1.1, commentary n.4.

Pede and D'Ambrosia contend that while they were participants in the tax conspiracy (i.e., providing the necessary funding and making investment suggestions), they did not control the total number of participants or the manner in which the monies were diverted as part of the de-ferred compensation scheme. The defend-ants also assert that they neither partici-pated in the recruitment of accomplices nor "claimed right to a larger share of the fruits of the crime." In short, they claim that Tedder was the mastermind of the tax conspiracy because he: (1) developed and implemented the tax deferment scheme; (2) directed and employed associates and assistants who helped him manage their in-

[12] Section 1B1.2(c) directs that "[a] plea agreement ... containing a stipulation that specifically establishes the commission of additional offense(s) shall be treated as if the defendant had been convicted of additional count(s) charging those offense(s)."

vestments; (3) established the necessary banking relationships; (4) controlled the defendants' investments; (5) managed the offshore bank accounts; and (6) claimed the largest share of the fruits of the tax conspiracy by misappropriating the defendants' money. As such, the defendants maintain that the district court erred in applying a four-level "organizer or leader" enhancement to their tax conspiracy offenses per § 3B1.1(a).

The defendants' argument, however, fails to recognize that the determination of whether a defendant is an "organizer or leader" under § 3B1.1 "is to be made on the basis of all conduct within the scope of § 1B1.3 (Relevant Conduct), i.e., all conduct included under § 1B1.3(a)(1)-(4), *and not solely on the basis of the elements and acts cited in the count of the conviction.*" § 3B1.1, introductory commentary (emphasis added). Thus, in evaluating the extent of the defendants' role in the tax conspiracy under § 3B1.1, we look not only to their participation in the tax conspiracy but to any other conduct relevant to that conspiracy. *See, e.g., United States v. Bjorkman*, 270 F.3d 482, 496 (7th Cir. 2001); United States v. Baker, 227 F.3d 955, 966 (7th Cir. 2000); United States v. Montague, 29 F.3d 317, 323–24 (7th Cir. 1994). Relevant conduct includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," § 1B1.3(a)(1)(A), and "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity," § 1B1.3(a)(1)(B), that "occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." § 1B1.3(a)(1)(A)-(B).

Here, there is no question that the defendants' operation of a multi-jurisdictional offshore sports bookmaking empire is clearly relevant in assessing their role in the tax conspiracy. Pede and D'Ambrosia were the leaders of their respective businesses, Sports Spectrum and Gold Medal. They consulted with one another frequently and together made decisions affecting these businesses, including decisions on investing money in the scheme established and managed by Tedder.[13] Specifically, the defendants conspired to evade taxes by placing the profits of Gold Medal in offshore bank accounts in nominee names and by using these nontaxed profits to fund Gold Medal's ongoing operations—i.e., paying vendors and winning bettors. In doing so, they directed staff within their own organizations to transfer money to accounts controlled by Tedder and assigned accountant Randy Moreau the task of monitoring the deferred compensation accounts for them. Furthermore, as the district court noted, "[t]he tax shelters ... were an integral part of the corporate structure [of the defendants' gambling operation] .... Not only did the tax shelters increase the profits obtained from the operation of the illegal betting scheme, they helped hide the existence of the corporations from federal regulators because the [defendants] did not report the income from the corporations."

That Pede and D'Ambrosia were neither organizers nor leaders of Tedder's deferred compensation program is of no consequence. The tax conspiracy offenses address the extent to which each defendant used Tedder's program to conceal from the IRS the income and assets they derived from Gold Medal's operations. We, therefore, agree with the district court that "it is not determinative whether [the defendants] exercised a leadership role over David Tedder and his colleagues. [They] exercised a leadership role over the entire scheme, a part of which was to hide assets and income through an illegal tax shelter." *See, e.g., United States v. Nicolaou*, 180 F.3d 565, 574 [83 AFTR 2d 99-2821] (4th Cir. 1999) (holding that defendant's leadership role in illegal gambling was relevant conduct supporting four-level leadership sentencing enhancement "because [the conduct] occurred during 'the commission of, and in preparation for' the money laundering ... [and] [w]ithout the illegal

[13] Tedder controlled his part of the organization by directing his staff to run component businesses that were "shell corporations" as part of the deferred compensation program.

gambling, there would have been no ill-gotten gains to launder.''). *See also Febus*, 218 F.3d at 796 (holding that defendant's interim leadership of long-running illegal lottery was relevant conduct to gambling and conspiracy offenses, thus supporting four-level ''organizer or leader'' enhancement); *United States v. Damico*, 99 F.3d 1431, 1437 (7th Cir. 1996) (rejecting defendant's argument that his racketeering conduct was not relevant to his extortion-related conduct, for purposes of § 3B1.1(a)—i.e., that the extortion-related conduct involved only one person other than himself—because ''section 3B1.1's use of the phrase 'criminal activity' is 'broad enough to include the entire racketeering conspiracy rather than the particular predicate act alone.'''') (citation omitted).[14]

The defendants' final argument is that their roles as leaders and organizers of the wagering offense should have no bearing on whether they were organizers and/or leaders of the tax conspiracy because ''[t]he purpose of U.S.S.G. § 3B1.1 is [to] permit the district court to assess the relative culpability of one defendant to another participant . . . .'' We rejected this same argument, however, in *United States v. Bjorkman*, 270 F.3d 482 (7th Cir. 2001),[15] noting:

> [The defendant] correctly notes that the purpose of § 3B1.1 is to assign punishment to defendants based upon their relative degree of responsibility for the ''offense.'' However, this proposition aids [the defendant's] argument only if the term ''offense'' is construed narrowly as denoting only the offense of conviction, not including relevant conduct. Since we have rejected this construction of ''offense,'' we must also reject [the defendant's] derivative argument from § 3B1.1's purpose.

Id. at 497.

Therefore, whether the defendants' wagering and tax conspiracy offenses are evaluated separately or grouped together, the result remains the same: the tax conspiracy offenses incorporate the defendants' relevant conduct in operating a multi-jurisdictional offshore sports book betting empire, thus subjecting them to a four-level ''organizer or leader'' enhancement under § 3B1.1(a). *See, e.g., Nicolaou*, 180 F.3d 565, 574 [83 AFTR 2d 99-2821] (4th Cir. 1999) (holding ''that even if grouping of money laundering and gambling were improper, or if a role adjustment were only to be applied prior to grouping, the four-level enhancement to the money-laundering sentence on the basis of a leadership role in the gambling offenses would be appropriate under the Guidelines [pursuant to § 1B1.3(a)(1)-(2)]'').

III.

For the reasons noted herein, we conclude that the district court's decision to apply a four-level ''organizer or leader'' enhancement to the defendants' tax conspiracy offenses, pursuant to § 3B1.1, was proper. The judgment of the district court is, therefore, Affirmed.

Posner, *Circuit Judge*, dissenting.

The district court imposed the organizer enhancement on these two defendants after grouping the tax and gambling offenses. My colleagues now affirm on a different ground, that the gambling offense was relevant conduct.

I disagree but I wish they had at least said that the grouping was improper, as it plainly was, rather than ducking the issue. The government's defense of the district court's ruling was irresponsible. Not only was it a palpable error for the district court to group the two offenses, but since grouping usually results in a more lenient sentence (and would have done so here had the judge not improperly enhanced the sentences) the government is arguing against its long-term interests. Once again a local office of the Justice Department,

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14 That the defendants consider Tedder to be the ''bigger fish'' in the tax conspiracy, even if true, has no bearing on whether they organized or exercised a leadership role in the tax conspiracy. *See* § 3B1.1, cmt. 4 (''There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy.''). *Cf. Bjorkman*, 270 F.3d at 497 n.1.

15 The dissent suggests that our reliance on *Bjorkman* is somehow misplaced because that case involved a grouping of multiple counts under § 3D1.2(d), an issue we do not address here. The fact that § 3B1.1 and § 3D1.2 *both* refer to § 1B1.3(a), however, makes this a distinction without a difference. As such, we see no reason why the *Bjorkman* Court's analysis is any less persuasive outside of the grouping context.

indifferent as it seems to the implications of its position for the Department as a whole, has embraced a position rejected by the Department in its other cases. See *Adler v. Espy*, 35 F.3d 263, 264 (7th Cir. 1994); *Ortega v. United States*, 270 F.3d 540, 548–49 (8th Cir. 2001); *United States v. Bartlett*, 856 F.2d 1071, 1080 n. 13 (8th Cir. 1988); cf. *Woodhill Corp. v. Federal Emergency Management Agency*, 168 F.3d 1025, 1027–28 (7th Cir. 1999); *United States v. White*, 882 F.2d 250, 252 (7th Cir. 1989).

Grouping—the purpose and usual effect of which are to limit the defendant's sentence to the punishment for the most serious of the grouped offenses, U.S.S.G. ch. 3, pt. D, Introductory Commentary; *United States v. Runyan*, 290 F.3d 223, 251 (5th Cir. 2002); *United States v. Kalust*, 249 F.3d 106, 110 (2d Cir. 2001); *United States v. Reetz*, 18 F.3d 595, 598 and n. 3 (8th Cir. 1994); *United States v. Patterson*, 947 F.2d 635, 636–37 (2d Cir. 1991)—is done when a defendant is convicted of multiple counts so closely related that they essentially merge into a single offense; or, in the words of the guideline, when they inflict "substantially the same harm." U.S.S.G. § 3D1.2. When, as in this case, the victims are different (the victims of the gambling offense are the community as a whole, as in other "victimless" crimes, and perhaps the gamblers themselves, if a paternalistic view is taken, while the victims of the tax offenses are the members of the taxpaying public), grouping is improper, as several cases hold with regard to the closely related question whether to group fraud and tax evasion. *Weinberger v. United States*, 268 F.3d 346, 354–55 [88 AFTR 2d 2001-7226] (6th Cir. 2001); *United States v. Astorri*, 923 F.2d 1052, 1056–57 (3d Cir. 1991); *United States v. Vitale*, 159 F.3d 810, 813–15 [82 AFTR 2d 98-7098] (3d Cir. 1998); *United States v. Lindsay*, 184 F.3d 1138, 1142–43 [84 AFTR 2d 99-5102] (10th Cir. 1999).

I acknowledge the existence of contrary precedents, illustrated by *United States v. Gordon*, 291 F.3d 181, 189–90 [89 AFTR 2d 2002-2757] (2d Cir. 2002), and *United States v. Haltom*, 113 F.3d 43, 46 [79 AFTR 2d 97-2779] (5th Cir. 1997), that allow the grouping of fraud and tax evasion, but their reasoning is not persuasive, especially if carried over to a case like this. It is common for illegal gambling enterprises to pay income taxes in order to avoid compounding their offenses, especially since, as this case illustrates, the tax offense will often be more serious than what in the case of gambling is little more than a "morals" offense. Gambling is extremely widespread in the United States and broadly approved; the moral distinction between the gambling that is legal and the gambling that is illegal is faint to the point of invisibility.

In *all* the cases I have cited or could cite on both sides of the question, except *Gordon*, where the government grudgingly acknowledged the existence of binding circuit precedent that required grouping, the government was arguing against grouping, which is to say against the position it is arguing for in this case. See also Brief for the United States in *Glover v. United States* (531 U.S. 198 (2001)), No. 99-8576, pp. 39–44.

I said that the *usual* effect, not the invariable effect, of grouping is to lighten the defendant's sentence. In *United States v. Bjorkman*, 270 F.3d 482, 495–97 (7th Cir. 2001) (per curiam), we held, pursuant to U.S.S.G. § 1B1.3(a)(2), that when offenses constituting parts of the "same course of conduct or common scheme or plan" are grouped under section 3D1.2(d) of the guidelines (which is done "when the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature . . ."), a managerial role in one of the grouped offenses can be automatically attached to the offense of conviction. For by definition offenses grouped on such a basis in such circumstances are not merely different characterizations of the same basic criminal activity but different building blocks of an overarching offense. A typical example would be where the de-

fendant's offense level is determined by what may have been the relatively minor amount of drugs that he handled but it was part of a larger course of conduct in which he played a managerial role.

Bjorkman was such a case; this is not; the difference is made clear by *United States v. Ritsema*, 31 F.3d 559, 565–66 (7th Cir. 1994), which held that "section 1B1.3(a)(2) cannot be read to make Ritsema's obstruction of justice conduct relevant to his silencer offense [possession of an unregistered silencer] because by its terms, it applies only to offenses which would be grouped as multiple counts under section 3D1.2(d)." Substitute gambling for obstruction of justice and tax evasion for possessing an unregistered silencer and you have this case. In any event, my colleagues decline to decide whether grouping was proper in this case, making unintelligible their reliance on *Bjorkman*, a case that presupposed grouping—and under the inapplicable § 3D1.2(d), to boot. Pretending that the defendants had been convicted only of the tax offense, my colleagues adopt the government's alternative argument that since that offense was related to the gambling offense and the sentencing guidelines provide that in deciding whether a defendant is an organizer the sentencing court should consider "relevant conduct," U.S.S.G. ch. 3, pt. B, Introductory Commentary; *United States v. Billingsley*, 115 F.3d 458, 465 (7th Cir. 1997); *United States v. Febus*, 218 F.3d 784, 796 (7th Cir. 2000), the defendants should be deemed organizers of the tax offense. This is a fiction. Their role in the tax offense was merely to accept the illegal advice of their tax lawyer. He concocted, organized, and implemented the offense. They are guilty too of course but are no more organizers of the offense than a thief who sells stolen property to a fence is an organizer of the fencing operation.

Is it a fiction commanded or countenanced by the sentencing guidelines? It is not. So far as bears on this case (since it is *not* a grouping case, or treated as one by the majority), relevant conduct is criminal activity "that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." U.S.S.G. § 1B1.3(a)(1). The offense of conviction was tax evasion, and the gambling activity that generated the income on which the defendants failed to pay taxes was not "in preparation for that offense." We have made clear that "factually related to" is not synonymous with "in preparation for." *United States v. Tai*, 994 F.2d 1204, 1213 (7th Cir. 1993). Nor is this a case like *United States v. Lewis*, 79 F.3d 688, 691–92 (7th Cir. 1996), where the relevant conduct was money laundering undertaken to shield the offense of conviction, which was the sale of cocaine, from detection. The government has it backwards: the tax evasion was an attempt to avoid discovery of the gambling offense, not vice versa. And while the gambling offense and the tax offense overlapped in time, for an offense to "occur . . . during the commission of the offense of conviction" implies more than a temporal overlap, as we held in *United States v. Ritsema*, *supra*, 31 F.3d at 566–67; see also *United States v. Taylor*, 272 F.3d 980, 982–84 (7th Cir. 2001); compare *United States v. Ellison*, 113 F.3d 77, 83 (7th Cir. 1997). Otherwise, if the defendants had beaten their wives during the period in which they were beating taxes, the wife-beating offense would be deemed relevant conduct. The purpose of "during the commission" is, we explained in *Ritsema*, "to free the [sentencing] court from the strict confines of the indictment so that it may hold the defendant accountable for the full range of harms that stemmed from his offense conduct." 31 F.3d at 567. The harm from the defendants' tax evasion was not augmented by the fact that the income on which they evaded taxes was generated by gambling. The harm would have been the same had it been generated by lawful business dealings.

The guidelines' directive to consider relevant conduct in determining a defendant's status as an organizer pertains to situations in which the relevant conduct enables the court to identify the defendant as an organizer of the offense of which he was con-

victed. Suppose that that offense is a single sale of drugs to an undercover agent by the defendant at the door of a crack house and the relevant conduct is defendant's ownership and management of the crack house. Then it would be apparent that his role in relation to the sale had been that of an organizer rather than merely that of a sales clerk. See *United States v. Noble*, 246 F.3d 946, 954 (7th Cir. 2001); *United States v. McClinton*, 135 F.3d 1178, 1191 (7th Cir. 1998); see also *United States v. Lillard*, 929 F.2d 500, 503 (9th Cir. 1991); cf. my earlier discussion of grouping under U.S.S.G. § 3D1.2(d). But the relevant conduct here, which is to say the gambling enterprise, does not demonstrate that the defendants played an organizing role in relation to the tax offense. All it demon-strates is the motive and source of funds for their dealings with the crooked tax law-yer.

A true Copy:

Teste:

Clerk of the United States Court of

Appeals for the Seventh Circuit

¶2002-5768

UNITED STATES OF AMERICA v. Jean Noel PINEAU, Ann PINEAU, ET AL. U.S. District Court, Eastern Dist. of Louisiana, (DC LA) No. CR.A.01-239, Dec. 10, 2002. Decision for Taxpayers in part and for Govt. in part.

1. Tax crimes—tax evasion; conspiracy to obstruct IRS—indictments—severance. Taxpayer's motion to sever his tax evasion and tax conspiracy charges from 39-count mail fraud and money laundering indictment was denied: joinder was proper under F.R.Crim.P. 8 where tax and non-tax counts were all part of common scheme to defraud investors through fraudulent sale of "guaranteed" promissory notes and impede IRS from collecting taxes on laundered proceeds of those sales; and taxpayer participated along with co-defendants in same series of acts underlying scheme. Also, taxpayer showed no prejudice from trying charges together or that doing so would impede jury's ability to make reliable judgment on each of his offenses. But, joinder of wife, who wasn't alleged to have participated in same series of acts or transactions and who was charged only with personal tax evasion, wasn't permissible under Rule 8; or, even if it were, separate trial was still warranted based on serious risk that joint trial would prevent jury from making reliable judgment as to her. *Reference:* United States Tax Reporter ¶73,446.509(5). IRC §7201.

United States District Court, E.D. Louisiana,

ORDER AND REASONS

ENGELHARDT, J.

Before the Court is the Joint Motion and Incorporated Memorandum of Defendants Ann Pineau and Jean Noel Pineau for a Severance. For the reasons that follow, the motion is GRANTED IN PART, in that it is granted as to Ann Pineau, and DENIED IN PART, in that it is denied in all other respects.

I. BACKGROUND

In a second superseding indictment (the "indictment"), the government has charged five defendants (Jean Noel Pineau, Craig Brown, Richard Rienstra, Joseph Aguda, and Cedric Vaumoron) with taking part in a scheme to defraud investors by selling promissory notes "guaranteed" by New England International Surety, Inc. ("New England") and OMNE RE S.A., a subsidiary of New England. Count 1 of the indictment charges all five of these defendants with conspiracy to commit mail fraud for the purpose of executing this scheme. Counts 2 through 34 charge four defendants (Brown, Rienstra, Aguda, and Jean Pineau) with actual mail fraud. Count 35 charges these same four with conspiracy to launder funds received from the sale of the notes. Count 36 charges Jean Pineau and Craig Brown with conspiracy to impede the Internal Revenue Service in the collection of corporate and personal income taxes. Counts 37 and 38 charges Jean Pineau and his wife, Ann Pineau, with personal income tax evasion. Count 39

charges Craig Brown with personal income tax evasion.

II. LAW AND ANALYSIS

Ann and Jean Pineau have filed a joint motion seeking to have the tax evasion charges against them (Counts 37 and 38) and the tax conspiracy charge against Jean Pineau and Craig Brown (Count 36) tried separately from the rest of the case. Under Rule 8(b) of the Federal Rules of Criminal Procedure, the government may charge two or more defendants in the same indictment only ''if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses.'' Fed.R.Crim.P. 8(b).[1] Even where joinder is technically proper, Rule 14 gives the Court discretion to order separate trials if the joinder appears to prejudice a defendant. See Fed.R.Crim.P. 14(a) (''If the joinder of offenses or defendants in an indictment ... appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other re-lief that justice requires.''). ''[W]hen defendants properly have been joined under Rule 8(b),'' however, a court ''should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'' Zafiro v. United States, 506 U.S. 534, 539 (1993).

A. Jean Pineau:

[1] The Court finds that charges against Jean Pineau properly have been joined and that his joinder with the other conspiracy defendants is likewise proper. These defendants (J.Pineau, Brown, Rienstra, Aguda, and Vaumoron) are alleged to have participated in the same series of acts related to the sale of promissory notes ''guaranteed'' by New England and Omne RE. Indeed, Jean Pineau is charged in each count of the indictment, except for Count 39, which charges Craig Brown with evasion of personal income tax. Each of these charges is alleged to be part of a common scheme: mail fraud and conspiracy to commit mail fraud in selling the notes (Counts 1 through 34); conspiracy to launder the funds received from the sale of the notes (Count 35); and conspiracy to impede the collection of taxes, including those due on proceeds from the sale of the notes (Count 36). The Court finds that the tax conspiracy count has a sufficient nexus with the fraud and money laundering conspiracies. This count includes allegations of (1) failing to provide Forms 1099 or W-2 to brokers who earned commissions on the sale of the notes; (2) filing false documents on behalf of New England and OMNE S.R.L. Inc., claiming exemption from United States tax laws; (3) instructing clients that the payments they received were not taxable income and that OMNE would not send any documentation to the tax authorities regarding such payments; (4) creating a fictitious Form W-2 for Jean Pineau; and (5) personal income tax evasion by Jean Pineau and Craig Brown.

Although the personal income tax evasion charges (Counts 37 through 39) are less obviously connected to the fraud and money laundering conspiracy charges, Jean Pineau's and Craig Brown's alleged acts in this regard are alleged to be part of the tax conspiracy, which is connected to the other counts in several ways. Thus, the Court does not find the joinder of the charges against Jean Pineau to be improper in any respect. See Fed.R.Crim.P. 8(a) and (b).

Nor does the Court find any basis for a discretionary severance as to Jean Pineau under Rule 14. Mr. Pineau has pointed to no prejudice that he likely will suffer as a result of having the tax charges tried together with the other counts of the indictment, other than to state generally that the evidence on both the tax and the fraud charges will be ''highly technical.'' See Motion at p. 5. He has made no showing that joinder of the tax charges will in any way impede the jury's ability to make a reliable judgment as to his guilt or innocence

[1] A single indictment may charge a defendant with two or more offenses provided that ''the offenses charged ... are of the same or similar character, or are based on the same transaction, or are connected with or constitute parts of a common scheme or plan.'' Fed.R.Crim.P. 8(a).

on each separate offense. Accordingly, the motion is denied as to Jean Noel Pineau.

B. Ann Pineau:

Unlike her husband, who is charged in nearly every count of the indictment, Ann Pineau is not alleged to have participated in any of the acts or transactions set forth in Counts 1 through 36. This is not a case of an alleged minor player who risks being tainted by the evidence against his co- conspirators - Ann Pineau is not alleged to have played even a minor role in any conspiracy or scheme. She is charged strictly with personal income tax evasion and nothing more. Because Ann Pineau is not "alleged to have participated in the same act or transaction, or in the same series of acts or transactions" as the other defendants (with the exception of her husband on the income tax charge), her joinder exceeds the limits of Rule 8(b).[2]

Moreover, even if her joinder were permissible under Rule 8, the Court nevertheless would order a separate trial for Ann Pineau, for she has demonstrated a serious risk that a joint trial would prevent the jury from making a reliable judgment about her guilt or innocence. See Zafiro, 506 U.S. at 539; see also United States v. Edmond, 935 F.2d 1511, 1517 (7th Cir.1991) ("[N]ot granting [Mrs. Edmond's] severance motion ... tested the ability of jurors not to tar [Mrs. Edmond] with the broad brush applied to her husband and his codefendants .... [J]ustice would have been better served by trying [Mrs. Edmond] on the tax counts (either alone or with her husband) in a separate proceeding."). The government argues that "[b]ecause Ann Pineau financially benefitted from the fruits of the underlying fraudulent crimes, she cannot claim, and has not shown, prejudice from being charged with those who committed those crimes." Opp. Memo. at p. 8. The government has made Ms. Pineau's case for her. The trial on the conspiracy charges is expected to last two to three weeks, with many elderly victims as witnesses. There is a serious risk that Ann Pineau would be tarred with the evidence against her husband and the other defendants even though she is not alleged to have participated any of the alleged fraud or conspiracies.

III. CONCLUSION

Accordingly, for the foregoing reasons, IT IS ORDERED that the Joint Motion and Incorporated Memorandum of Defendants Ann Pineau and Jean Noel Pineau for a Severance is GRANTED IN PART, in that it is granted as to Ann Pineau, and DENIED IN PART, in that it is denied in all other respects.

¶2002-5769

Paul HYNARD, PLAINTIFF v. INTERNAL REVENUE SERVICE and United States of America, DEFENDANTS. U.S. District Court, Southern Dist. New York, (DC NY) No. 01CIV.9840(LSMCM), Oct. 9, 2002. Years 1988, 1989. Decision for Govt.

1. Bad debt deductions—nonbusiness bad debt—bona fide debt; worthlessness—refunds. Taxpayer's bad debt deduction-based refund complaint was denied on summary judgment: alleged debt, stemming from step-brother's unfulfilled promise to compensate taxpayer out of future inheritance for shooting him, wasn't bona fide for IRC §166 purposes since it arose from no debtor-creditor relationship and, being based on future contingency, wasn't for fixed or determinable sum. Also, even if valid, debt didn't become worthless until step-brother came into inheritance and reneged on his promise to pay taxpayer, which occurred well after years at issue. *Reference:* United States Tax Reporter ¶1665.140(10); 1665.260(5); 74,225.05(40). IRC §166; 7422.

2. Deficiency notice—proper mailing—last known address—levy notice. Deficiency notice mailed to address listed on taxpayer's most recently filed amended returns was upheld: IRS's reliance on that

[2] The Court makes no decision today as to whether Jean Pineau should be joined in the trial of Ann Pineau on the tax evasion charges. Neither side addressed in its briefing its preferences in the event the Court granted the motion as to one movant only. The Court notes that joinder of these two defendants on Counts 37 and 38 would be proper under Rule 8(b), provided these counts were severed from the other counts in the indictment.

address as taxpayer's last known address was proper absent any notice from taxpayer of intervening address change. Similarly, taxpayer's address challenge to subsequent levy notice was rejected where taxpayer failed to inform IRS that he was incarcerated at that time or notify IRS of his prison address. *Reference:* United States Tax Reporter ¶62,125.03(14); 63,315.01(15). IRC §6211; 6212; 6331.

3. Wrongful levy actions—who can bring suit. Taxpayer's wrongful levy challenge to IRS's levy of his bank account was jurisdictionally barred: IRC §7426's limited sovereign immunity waiver extended only to suits by persons *other than taxpayers* against whom underlying taxes were assessed. *Reference:* United States Tax Reporter ¶74,265.01(15). IRC §7426.

Megan L. Brackney (MLB-6870), Assistant United States Attorney, New York. Paul O. Hynard, Yonkers, Pro se Plaintiff.

United States District Court, S.D. New York,

MEMORANDUM DECISION AND ORDER GRANTING GOVERNMENT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

MCMAHON, J.

In this action, pro se plaintiff Paul Hynard (''the plaintiff'') seeks a credit or refund for an alleged overpayment of federal income taxes in the amount of $10,211.51 for the 1988 and 1989 tax years. Plaintiff has attempted to deduct an alleged loss resulting from his failure to collect on a promised payment from a relative as a bad debt pursuant to 26 U.S.C. § 166. Summary judgment in defendants' favor is warranted on this issue because plaintiff has not offered evidence tending to show that the alleged debt is a bona fide debt which became worthless during the tax years in question. Rather, the undisputed facts make two things clear: there was no bona fide debt, and the alleged loss did not arise in the tax years at issue.

Plaintiff also challenges the IRS's March 26, 1993 assessment of a deficiency for the 1988 and 1989 tax years on the ground that the IRS did not send the Notice of Deficiency to his current address. Defendant is entitled to summary judgment on this issue as well, because there is no dispute that the IRS sent plaintiff the Notice of Deficiency to plaintiff's last-known address and that plaintiff did indeed receive the Notice of Deficiency.

Finally, plaintiff challenges the IRS's levy of his personal checking account, again claiming that the IRS failed to send him notice to his current address. Plaintiff admits, however, that he did not submit notice of a change of address to the IRS and that he received actual notice of the levy from his bank prior to its execution. Thus, summary judgment should be granted in defendants' favor on this issue as well.

Statement of Facts

On April 17, 1989, plaintiff filed a federal income tax return for the tax year ending on December 31, 1988. See Declaration of Arnold B. Rifkin (''Rifkin Decl.'') p 5, Exhibit (''Ex.'') A; Declaration of Megan L. Brackney (''Brackney Decl.'') Exhibit A (Transcript of the May 22, 2002 deposition of Paul Hynard), at 7–9. On February 16, 1991 and December 14, 1991, plaintiff submitted amended individual income tax returns (Form 1040X) for the 1988 tax year. Rifkin Decl. Ex. B, C; Brackney Decl. Ex. A at 11–14. On March 26, 1990, plaintiff filed a federal income tax return for the tax year ending on December 31, 1989. Rifkin Decl. Ex. J; Brackney Decl. Ex. A at 31. On November 1, 1990 and on December 24, 1991, plaintiff filed amended individual tax returns for 1989. Rifkin Decl. Ex. K and L; Brackney Decl. Ex. A at 34–35.

Plaintiff's December 14, 1991 amended tax return for 1988 and plaintiff's December 24, 1991 amended tax return for 1989 list 10 Cherry Lane, Medford, New York, 11763-4084 as plaintiff's address. Rifkin Decl. Ex. J and L. On March 26, 1993, the IRS sent to plaintiff at 10 Cherry Lane, Medford, New York, 11763-4084 a Notice

of Deficiency for the 1988 and 1989 tax years. Rifkin Decl. Ex. P. Plaintiff admits to having received the Notice of Deficiency in February 1994. Brackney Decl. Ex. B (Complaint) at p 5(n).

On September 1, 1994, plaintiff filed additional amended tax returns for the 1988 and 1989 tax years. Rifkin Ex. D and M; Brackney Decl. Ex. A at 18–19, 21–24. With the September 1, 1994 amended tax returns, plaintiff submitted a Schedule D form for Capital Gains and Losses in which he claimed a $3,000 bad debt deduction for each year. Id. In his September 1, 1994 amended returns, plaintiff claimed that he was entitled to a $3000 bad debt deduction for 1988 and 1989 because his step-brother, Vicha Hynard, did not repay a $45,000 debt. Rifkin Decl. Ex. D, M. Plaintiff claims that Vicha Hynard shot plaintiff and then agreed to pay him $45,000 for having shot him. Brackney Decl. Ex. A at 25–29. On April 26, 1987, Vicha Hynard signed a document entitled ''Assignment of Benefits'' in which he agreed to assign the first $45,000 of the ''third division I receive in connection with the Estate of my stepfather, Edward O. Hynard, to my stepbrother, Paul Hynard, as and for the recovery of a debt to Paul, which I hereby acknowledge.'' Rifkin Decl. Ex. E; Brackney Decl. Ex. A at 27–28.

On June 12, 1992, Edward O. Hynard died. Rifkin Decl. Ex. I; Brackney Decl. Ex. A at 28. Plaintiff testified that he learned that he would not receive any money from the estate of Edward O. Hynard sometime in 1994. Brackney Decl. Ex. A at 30. Plaintiff further claims that Edward O. Hynard's estate was probated in 1998–1999. Id. Plaintiff claims that he did not receive any distribution from Edward O. Hynard's estate and Vicha Hynard never paid him $45,000. Id. at 28–30.

In August of 1998, the IRS sent a notice of levy to Astoria Federal Savings & Loan and to plaintiff at P.O. Box 1102, Middle Island, New York, 11763. Rifkin Decl. Ex. N. The Notice of Levy notified plaintiff that a total of $9,504.48 representing due and owing tax liability for 1988 and 1989 would be levied from his bank account. Id. On August 27, 1998, plaintiff's bank, Astoria Federal Savings and Loan Association, sent plaintiff a copy of the Notice of Levy. Rifkin Decl. Ex. N and O; Brackney Decl. Ex. A at 43–44. In August of 1998, plaintiff was incarcerated at the Groveland Correctional Facility, but plaintiff failed to notify the IRS that he was at a different address. Brackney Decl. Ex. A at 45, 48–49.

On October 2, 1998, the IRS levied plaintiff's personal checking account at Astoria Federal Savings and Loan in the amount of $1,729.06 for unpaid taxes, interest, and penalties for the 1988 tax year and $7,7175.42 for unpaid taxes, interest, and penalties for the 1989 tax year. Rifkin Decl. at pp 15, 33.

Prior to filing this suit on November 7, 2001, plaintiff had paid his full tax liability for the 1988 and 1989 tax years. Rifkin Decl. pp 19, 37 (as of October 22, 2001, plaintiff's accounts for 1988 and 1989 had a zero balance).

STANDARD FOR SUMMARY JUDGMENT

A party is entitled to summary judgment when there is no ''genuine issue of material fact'' and the undisputed facts warrant judgment for the moving party as a matter of law. Fed.R.Civ.P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). In addressing a motion for summary judgment, ''the court must view the evidence in the light most favorable to the party against whom summary judgment is sought and must draw all reasonable inferences in [its] favor.'' Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Whether any disputed issue of fact exists is for the Court to determine. Balderman v. United States Veterans Admin., 870 F.2d 57, 60 (2d Cir.1989). The moving party has the initial burden of demonstrating the absence of a disputed issue of material fact. Celotex v. Catrett, 477 U.S. 317, 323 (1986). Once such a showing has been made, the non-moving party must present ''specific facts showing that there is a genuine issue for trial.'' Fed.R.Civ.P. 56(e). The party opposing

summary judgment "may not rely on conclusory allegations or unsubstantiated speculation." Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir.1998). Moreover, not every disputed factual issue is material in light of the substantive law that governs the case. "Only disputes over facts that might affect the outcome of the suit under the gov-erning law will properly preclude summary judgment." Anderson, 477 U.S. at 248.

Applying this standard, plaintiff's motion for summary judgment must be denied and defendants' cross-motion granted.

PLAINTIFF IS NOT ENTITLED TO A BAD DEBT DEDUCTION

[1] Plaintiff appears to claim that he is entitled to a bad debt deduction of $3,000 for the 1988 tax year and $3,000 for the 1989 tax year.[1] Brackney Decl. Ex. A at pp 5(a)–(g), 5(k), 6(a)–(d), Ex. B at 23–24, 36–38, 50–52; Rifkin Decl. Ex. D, M. However, the undisputed facts show that plaintiff has failed to establish the elements of either a business or a nonbusiness bad debt under 26 U.S.C. § 166. Therefore, defendants are entitled to summary judgment on this issue and plaintiff's motion for summary judgment should be denied.

A. Plaintiff Bears the Burden of Proof that He Is Entitled to a Deduction

The burden of proof with respect to a claimed tax deduction rests upon the taxpayer. Wisely v. United States, 893 F.2d 660, 666 [65 AFTR 2d 90-1183] (4th Cir.1990) ("deductions are a matter of legislative grace, and the taxpayer seeking the benefit of a deduction must show that every condition which Congress has seen fit to impose is fully satisfied"). Likewise, the burden of proof with respect to a bad debt deduction is on the taxpayer. Davis v. C.I.R. 866 F.2d 852, 859 [63 AFTR 2d 89-699] (6th Cir.1989) (citing Welch v. Helvering, 290 U.S. 111, 115 [12 AFTR 1456] (1933)). To meet this burden, a taxpayer must, as a matter of law, make an affirmative showing supported by specific evidence that he is entitled to the challenged deductions. LaBow v. Comm'r of Internal Revenue, 763 F.2d 125, 131–32 [56 AFTR 2d 85-5111] (2d Cir.1985) (taxpayer "must always make an affirmative showing, based on 'specific evidence' and not just the 'taxpayer's unsupported statement,' that he is entitled to a deduction") (quoting Hintz v. Commissioner, 712 F.2d 281, 286 [52 AFTR 2d 83-5554] (7th Cir.1983)).

B. Plaintiff Is Not Entitled to a Bad Debt Deduction

Debts owed to a taxpayer which become worthless during the taxable year are deductible from gross income pursuant to Section 166 of the Internal Revenue Code. 26 U.S.C. § 166. A business bad debt is fully deductible from ordinary income, however, a nonbusiness bad debt of a non-corporate taxpayer is treated as a short-term capital loss. Marrin v. C.I.R., 147 F.3d 147, 150 [81 AFTR 2d 98-2374] (2d Cir.1998); 26 U.S.C. p 166(d)(1). Section 1211(b) restricts the deduction for capital losses of a non-corporate taxpayer to the $3,000. Marrin, 147 F.3d at 150; 26 U.S.C. § 1211(b).

Plaintiff does not state whether he is entitled to a bad business or a bad nonbusiness debt deduction. I conclude that the so-called debt was a nonbusiness debt. Plaintiff did not attempt to deduct the $45,000 debt in full; rather, he claimed a $3,000 deduction for both the 1988 and 1989 tax

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[1] The Court has jurisdiction over plaintiff's tax refund claims for 1988 and 1989. First, plaintiff has paid his entire tax liability for the 1988 and 1989 tax years. See Rifkin Decl. pp 19, 37; 26 U.S.C. § 1346(a)(1); Falik v. United States, 343 U.S. 38 [sic, 343 F.2d 38], 43 [15 AFTR 2d 566] (2d Cir.1965) (taxpayer must "pay first and litigate later") (internal citation omitted). Second, plaintiff filed a timely administrative claim. A claim for a bad debt deduction under 26 U.S.C. § 166 must be filed within seven years of the date the tax return was required to have been filed. 26 U.S.C. § 166(d)(1)(A). Plaintiff claimed a bad debt deduction on his September 1, 1994 amended tax returns for 1988 and 1989, within the seven year period. Third, plaintiff timely filed suit in the district court. The Internal Revenue Code provides:

(a) Suits by taxpayers for refund.--

(1) General rule.--No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

26 U.S.C. § 6532(a)(1). Here, plaintiff's suit was filed on November 7, 2001, well after the expiration of six months from the September 1, 1994 filing date of the amended returns. It does not appear that the IRS ever sent plaintiff a notice of disallowance of the September 1, 1994 amended tax returns for 1988 and 1989, and, thus, the two-year statute of limitations is not implicated.

years, which is more consistent with a nonbusiness bad debt deduction. Moreover, the document that allegedly gives rise to the debt has nothing to do with any trade or business. The April 26, 1987, ''Assignment of Benefits,'' which plaintiff identifies as the written agreement memorial-izing this debt, states:

> I, Vicha Hynard, hereby agree to assign the first FORTY-FIVE THOUSAND and 00/100 DOLLARS ($45,000.00) of the third division I receive in connection with the Estate of my stepfather, Edward O. Hynard, to my stepbrother, PAUL HYNARD, as and for the recovery of a debt to Paul, which I hereby acknowl-edge.

Rifkin Decl. Ex. E. Plaintiff claims that his step-brother signed the above-described document after shooting him. Brackney Decl. Ex. A at 25–27.

Assuming that the debt is a nonbusiness debt--defined as a debt other than one created or acquired in connection with a trade or business of the taxpayer. 26 U.S.C. § 166(d)(1)(B)--plaintiff is not entitled to a bad debt deduction. Section 166(d) of the Internal Revenue Code provides that a taxpayer may deduct a nonbusiness bad debt if he or she can establish two elements: (1) the existence of a bona fide debt; and (2) that the bona fide debt became completely worthless during the taxable year in question. 26 U.S.C. § 166(d). In this case, plaintiff has not satisfied either element.

As an initial matter, the alleged $45,000 debt is not a bona fide debt. The Treasury Regulations define a ''bona fide debt'' as ''a debt which arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money.'' 26 C.F.R. § 1.166-1(c). A ''debtor-creditor'' relationship contemplates that the taxpayer has made a loan. See Peoplefeeders, Inc. and Subsidiaries v. C.I.R., 1999 WL 49780 (U.S. Tax Ct.), 77 T.C.M.. [1999 RIA TC Memo ¶99,036] (CCH) 1349 (Feb. 4, 1999). The inquiry is whether the parties actually intended and regarded the transaction as a loan. Estate of Van Anda v. Commissioner, 12 T.C. 1158, 1163 (1949), aff'd per curiam, 192 F.2d 391 [41 AFTR 355] (2d Cir.1951). Here, plaintiff admits that the alleged debt was not a loan. Brackney Decl. Ex. A at 25. Rather, it appears that the step-brother promised to pay plaintiff some money to recompense him for the injury plaintiff suffered at his hands. Thus, plaintiff and his step-brother do not have a ''debtor-creditor'' relationship.

Also, the alleged debt is not bona fide because it is not an obligation to pay a ''fixed or determinable sum of money.'' Plaintiff claims that there was a written agreement between himself and Vicha Hynard stating that Vicha Hynard would pay him $45,000 out of the proceeds of their father's estate. Plaintiff's father, Edward O. Hynard, died on June 12, 1992, see Rifkin Decl. Ex. I, after this assignment was executed. Vicha Hynard had no interest in the estate of his father until his father died in 1992. Until his father died, neither the amount of property in the estate nor the beneficiaries of the estate could not be determined. Thus, at the time this document was executed, Vicha Hynard had no right to any distribution from Edward Hynard's estate at all, much less to a distribution in the amount of $45,000. When Vicha Hynard signed the April 27, 1987 ''Assignment of Benefits,'' the amount of money plaintiff would receive, if any, was not fixed and could not be determined.

Even if plaintiff could establish that there was a bona fide debt, he is not entitled to a bad debt deduction for 1988 or 1989 because the debt did not become worthless in 1988 or 1989. See 26 U.S.C. § 166(a)(1) (taxpayer may deduct ''any debt which becomes worthless within the taxable year''). The alleged assignment was created on April 26, 1987. Rifkin Decl. Ex. E. The obligation to repay was contingent on the death of Edward O. Hynard and the amount of any distribution from his estate, since the promise to pay was limited to estate proceeds. See id. Edward O. Hynard did not die until 1992, see Rifkin Decl. Ex. I, and the estate was probated in 1992–93. Brackney Dec. Ex. A at 30. Plaintiff alleges that he learned that he

would not receive the $45,000 from his father's will in 1994. Id. None of these events relates to either the 1988 or 1989 tax years. Consequently, there is no basis for a bad debt deduction for those tax years.

THE NOTICE OF DEFICIENCY WAS ADEQUATE

[2] Plaintiff claims that IRS did not provide him proper notice of the deficiency assessed against him on March 23, 1996 for the 1988 and 1989 tax years. See Brackney Ex. B at pp 5(m)–(n). This claim is without merit.

In order to collect a deficiency in income tax, the IRS must send the taxpayer notice of deficiency at his or her "last known address." 26 U.S.C. § 6212(b)(1); Follum v. Commissioner of Internal Revenue, 128 F.3d 118, 119 [80 AFTR 2d 97-7779] (2d Cir.1997). The taxpayer's "last known address is the address where the Commissioner reasonably believed the taxpayer wished to be reached." Id. (quoting Tadros v. Commissioner, 763 F.2d 89 [56 AFTR 2d 85-5119], 91 (2d Cir.1985)). As a matter of law, the address shown on the taxpayer's most recently filed return is the last known address unless the taxpayer has sent the IRS a notice of change of address. Follum, 128 F.2d at 119. The reasonableness of the Commissioner's belief as to what the taxpayer's last known address is to be assessed as of the time of the IRS mailing. Id. Although the Commissioner must "exercise reasonable diligence to ascertain the taxpayer's correct address if prior to mailing the deficiency notice she has become aware that the last known address may be incorrect, ... [it] is the responsibility of the taxpayer to provide clear and concise notification to the IRS of any change of address." Id. at 119–20.

Plaintiff listed his address as 10 Cherry Lane, Medford, New York on his December 14, 1991 and December 24, 1991 amended tax returns for 1988 and 1989. See Rifkin Ex. B.L. On March 26, 1993, the IRS mailed the Notice of Deficiency to plaintiff at 10 Cherry Lane, Medford, New York. Brackney Decl. Ex. B at p 5(m); Rifkin Decl. Ex. P. Plaintiff does not allege that he notified the IRS that he had a new address prior to March 26, 1993, see Brackney Decl. Ex. B at p 5(n), and there is no evidence that he did so.

In any event, as long as the notice was in fact provided to the taxpayer, the deficiency could be assessed. Sicari v. Commissioner of Internal Revenue, 136 F.3d 925, 929 [81 AFTR 2d 98-954] (2d Cir.1998) ("Even if the notice was inadequately addressed, the requirement of effective notice would be satisfied if the Service could prove, by a preponderance of the evidence, that the envelope containing the notice was in fact delivered to the [plaintiff's] residence"); Bonty v. Commissioner of Internal Revenue, 74 T.C.M. (CCH) 322, 323 [1997 RIA TC Memo ¶97,372], 1997 WL 461910 (1997) ("[A] taxpayer's actual receipt of a notice of deficiency, without prejudicial delay, obviates the need to decide whether the notice was mailed to the last known address").

Plaintiff admits that he received the notice of deficiency in February 1994. See Brackney Decl. Ex. B at p 5(n). The only prejudice plaintiff claims he suffered as a result of the alleged delay in receiving the notice of deficiency is that a prior lawsuit that he filed in the United States District Court for the Eastern District of New York was dismissed as a result of his failure to file within 90 days of the notice of deficiency. See id. This is an inaccurate characterization of what happened in the 1994 lawsuit; the court dismissed plaintiff's compliant for lack of jurisdiction because plaintiff had not paid the deficiency prior to filing suit, not because he failed to file within 90 days of the notice. See Hynard v. Internal Revenue Service, 881 F.Supp. 92, 94 [75 AFTR 2d 95-344] (E.D.N.Y.1994). Indeed, there is no requirement that the plaintiff file suit in United States District Court within 90 days of the challenged determination. The 90 day requirement applies to filing a petition for redetermination in United State Tax Court. See 26 U.S.C. § 6503. As explained in note 1 supra. a suit in federal district court brought under 26 U.S.C. § 7422 may be filed any time after six months after the

claim was filed or within two years after the IRS has notified the taxpayer that the claim is disallowed. 26 U.S.C. § 6532(a)(1).

THE IRS LEVY WAS PROPER

[3] Finally, plaintiff challenges the IRS' levy of his personal checking account for taxes he owed for the 1988 and 1989 tax years. Plaintiff contends that the levy was improper because the IRS did not send notice of its intent to levy to his last known address. See Brackney Decl. Ex. B at 5(g), (h). Although plaintiff does not identify any authority that gives him a private right of action on this basis, sections 7426 and 7433 of the I.R.C. provide causes of action to taxpayers alleging an invalid or improper collection of a federal tax. However, the Government is entitled to judgment in its favor as a matter of law under either of these provisions.

A. Section 7433 of the I.R.C.

Plaintiff fails to state a claim for an improper collection pursuant to section 7433 of the I.R.C., which provides, in relevant part:

> If, in connection with any collection of Federal tax with respect to a taxpayer, any officer of employee of the Internal Revenue Service recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

26 U.S.C. § 7433(a). An action to enforce liability under section 7433 ''[m]ay be brought only within two years after the date the right of action accrues.'' 26 U.S.C. § 7443(d)(3). A cause of action accrues ''when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.'' 26 C.F.R. § 301.7433-1(g)(2). The two-year statute of limitations of section 7443 is not subject to equitable tolling, even where the taxpayer seeks to exhaust administrative remedies. See United States v. Marsh, 89 F.Supp.2d 1171, 1176–77 [85 AFTR 2d 2000-1474] (D. Hawaii 2000).

Plaintiff claims that the IRS failed to properly provide him notice of its intent to levy his checking account at his last known address. Complaint pp 5(g). Plaintiff attaches to the Complaint the IRS' notice of levy. Plaintiff admits that he received a copy of the notice of levy from his bank in August of 1998. Exhibit Q at 43–44. Accordingly, plaintiff not only had a ''reasonable opportunity to discover'' the facts supporting a possible cause of action for an improper levy, but he also had actual notice of the IRS levy in August of 1998. Plaintiff failed to file his action within two years after admittedly learning about the levy. Thus, his challenge to the levy is untimely and must be dismissed.

Moreover, section 7433 of the I.R.C. provides a remedy for improper collection of federal taxes only where an employee of the IRS recklessly or intentionally disregards a statute or regulation. It cannot be used to challenge improper assessment of taxes. Miller v. United States, 66 F.3d 220, 222 [76 AFTR 2d 95-6584] (9th Cir.1995); Shaw v. United States, 20 F.3d 182, 184 [73 AFTR 2d 94-1998] (5th Cir.1994). To the extent plaintiff is challenging the levy, the complaint must be dismissed unless it alleges facts sufficient to demonstrate that IRS employees recklessly or intentionally disregarded some provision or regulation of the Internal Revenue Code. See 26 U.S.C. § 4733(a). Although the IRS is required to provide notice to the taxpayer at his or her ''last known address'' before levy, see 26 U.S.C. § 6331(d)(2)(C), the IRS did not recklessly or intentionally disregard the notice requirements of section 6331(d) of the I.R.C. To the contrary, the IRS acted properly.

As explained above in the context of a notice of deficiency, the taxpayer's ''last known address is the address where the Commissioner reasonably believed the taxpayer wished to be reached.'' Follum v. Commissioner of Internal Revenue, 128 F.3d 118, 119 [80 AFTR 2d 97-7779] (2d Cir.1997) (quoting Tadros v. Commissioner, 763 F.2d 89, 91 [56 AFTR 2d 85-

5119] (2d Cir.1985)). It is the taxpayer's responsibility to provide "clear and concise notification to the IRS of any change of address." Follum, 128 F.3d at 119.

In August of 1998, the IRS sent the notice of levy to plaintiff at P.O. Box 1102, Middle Island, NY, the address plaintiff provided in his September 1, 1994 amended tax returns for 1988 and 1989. Rifkin Decl. Ex. D, M. From September 1996 through August of 1998, plaintiff was incarcerated at the Groveland Correctional Center. Brackney Decl. Ex. A at 45. Plaintiff admits, however, that he did not notify the IRS that he had a new mailing address, namely Groveland Correctional Center:

> Q. What I am asking is did you ever send a change of address or any kind of notice to the IRS that your new address was Groveland Correctional Facility?
>
> A. No, I am not going to do.
>
> Q. So you are saying that you never notified them of the address change?
>
> A. I don't need to when they put off since 1995 and they do anything, so since I was incarcerated, I got to wait until when they come out, what are you doing to do any good. They ignore me already in §94 and §95, my amendment plus a claim and the claim they made already before is the Statute of Limitations in three-year and seven-year for a bad debt. So I made before all those times and they ignore me all that. I wait until I come out because I had no documents to show all of this.
>
> Q. You are saying that you never notified the IRS of your new address when you were in prison?
>
> A. What is the question?
>
> Q. You are saying that you never notified the IRS of your new address?
>
> A. No, I don't. This is not important.

Brackney Decl. Ex. A at 48–49. Thus, there is no dispute that plaintiff failed to provide the IRS with his current address. Moreover, there is no evidence that the IRS was aware that plaintiff was incarcerated and no longer at the address plaintiff provided in his September 1, 1994 amended tax returns. The Government is entitled to judgment in its favor on this issue.

B. Section 7426 of the I.R.C.

Plaintiff's claim could be construed as one for wrongful levy pursuant to section 7426 of the I.R.C., but plaintiff fails to establish a waiver of sovereign immunity necessary for subject matter jurisdiction over such a claim. Section 7426 waives sovereign immunity to permit persons other than taxpayers to bring actions against the United States for wrongful levy. In authorizing this cause of action, the statute only waives sovereign immunity for persons "other than the person against whom is assessed the tax out of which such levy arose." 26 U.S.C. § 7426(a)(1). Like all matters relating to sovereign immunity, this statute is strictly construed. It is well-settled that the "United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)); see also Robinson v. Overseas Military Sales Corp., 21 F.3d 502, 510 (2d Cir.1994). The plaintiff asserting subject matter jurisdiction, moreover, has the burden of proving by a preponderance of the evidence that it exists. See Malik v. Meissner, 82 F.3d 560, 562 (2d Cir.1996).

Here, there is no subject matter jurisdiction under 26 U.S.C. § 7426(a)(1) because plaintiff is not a third-party. For example, in Akers v. United States, 539 F.Supp. 831 [49 AFTR 2d 82-1088] (D.Conn.1982), aff'd, 718 F.2d 1084 (2d Cir.1983), the court held that it lacked jurisdiction with respect to the plaintiff's wife claim against the United States pursuant to § 7426(a)(1) because the tax was assessed to both the plaintiff and his wife. Here, the levy related to taxes assessed and collected di-

rectly against Plaintiff. Accordingly, the Court lacks jurisdiction under § 7426.[2]

CONCLUSION

For the reasons stated above, defendants are entitled to judgment as a matter of law in their favor.

¶2002-5770

In Re: Blanca E. SCOLA, Debtor. U.S. Bankruptcy Court, Southern Dist. of Texas, (Bktcy Ct TX) No. 01-50553-L2-13, June 29, 2002. Years 2000, 2001. Decision for Govt.

1. Tax claims in bankruptcy—objection to proof of claim—failure to file returns—dismissal of petition. Chap. 13 debtor's objection to IRS's proof of claim for years she didn't file returns was dismissed: taxpayer offered nothing other than unsupported objection to rebut prima facie correctness of IRS's claim. Also, taxpayer was warned that her further failure to comply with court orders to file returns and other documents could result in case's dismissal since her delays were unreasonable and prejudiced creditors . *Reference:* United States Tax Reporter ¶68,726.51(10); 68,726.52(40).

United States Bankruptcy Court, S.D. Texas, Laredo Division,

MEMORANDUM OPINION AND ORDER DISMISSING OBJECTION TO CLAIM (doc # 20), AND GIVING DEBTOR NOTICE THAT CASE MAY BE DISMISSED WITH PREJUDICE

STEEN, Bankruptcy J.

This bankruptcy case was filed December 31, 2001, under chapter 13 of the Bankruptcy Code. The Initial Order (docket # 4) was issued January 4, 2002. The Initial Order requires, among other things, that the Debtor file her schedules, statement of financial affairs and chapter 13 plan timely (as required by the statute and Federal Rules of Bankruptcy Procedure). The Initial Order also requires the Debtor to file delinquent federal income tax returns within 60 days after the case was filed and to file timely all tax returns due post-petition.

The Debtor's schedules, statement of financial affairs and chapter 13 plan were not filed timely, but they were filed (tardy) on February 12, 2002. Apparently unaware that these documents had been filed, on February 15, 2002, the chapter 13 trustee filed a motion to dismiss the case. At the hearing on his motion to dismiss, the Trustee withdrew the motion.

The United States, Internal Revenue Service (IRS) filed a proof of claim for estimated taxes due for federal income taxes for 2000 and 2001. On April 26, 2002, the Debtor filed an objection to the proof of claim. The objection does not disclose that the Debtor had not filed income tax returns and the objection did not assert what the correct amount of taxes would be, if any. The objection merely stated that the amount showed in the proof of claim was not owed. At the chapter 13 plan confirmation hearing on May 10, 2002, the plan could not be confirmed because the IRS claim had not been resolved.

A hearing on the Debtor's objection to the IRS proof of claim was conducted on June 26, 2002. The United States stated that it had filed the proof of claim because it had evidence that the Debtor was a wage earner during 2000 and 2001 (presumably W2 withholding forms) but the Debtor had not filed tax returns. The Debtor and counsel admitted that tax returns had not been filed, even as of the date of the hearing, which was approximately 6 months after the date that the bankruptcy case had been filed and the Initial Order issued. In essence, the Debtor and counsel argued that the Debtor had been too preoccupied with financial and other problems between April

[2] Any claim under section 7426 also would be time-barred. Section 7426 also mandates that to waive sovereign immunity, the plaintiff must bring the cause of action within nine months of the date of the levy. 26 U.S.C. § 7426(a). See also Williams v. United States, 947 F.2d 37, 39 [68 AFTR 2d 91-5760] (2d Cir.1991) (''[T]he statute of limitations may operate in suits against the United States not only as an affirmative defense ... but also may deprive a court of subject matter jurisdiction over an action that is not timely filed.''). The levy at issue here occurred on October 2, 1998, See Rifkin Decl. Ex. G. Plaintiff filed this suit on November 14, 2001. Thus, even assuming, arguendo, that plaintiff had been a third-party entitled to bring an action under § 7426(a), the nine-month statute of limitations for a wrongful levy action would have expired on June 29, 1999, over two years before plaintiff filed this suit.

15, 2001, and June 26, 2002, to file her tax returns.

OBJECTION TO CLAIM IS DISMISSED

[1] A proof of claim is prima facie evidence of the validity and amount of the claim, Federal Rules of Bankruptcy Procedure 3001(f). Therefore, ''[t]he objecting party has the initial burden of contro-verting a proof of claim ...'' Collier on Bankruptcy, 15th Ed. p 3007.01[1]. In this case, it is doubtful that the objection satisfies the requirements of the Federal Rules of Bankruptcy Procedure, and it is certainly clear that the Debtor has not met its burden.

Federal Rules of Bankruptcy Procedure 9011 requires certain due diligence with respect to papers filed with the Court:

By presenting to the court ... a ... paper, an attorney ... is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... the allegations and other factual contentions have evidentiary support ... [Emphasis supplied.]

The allegation that the Debtor does not owe the taxes asserted in the proof of claim, when the Debtor has not even filed a return, is based on doubtful due diligence by the attorney. The Court might be inclined to pursue this issue further, except that the Court suspects that if it looked beneath the surface, the IRS contentions with respect to the ''estimated'' tax due might be similarly unsupported. The Court will not, in this instance, pursue the rule 9011 issues.

However, it is clear that on the day of the hearing of this objection to claim, Debtor had absolutely no evidence to rebut the prima facie status of the IRS proof of claim. Therefore, the objection is denied and dismissed.

NOTICE OF POSSIBLE DISMISSAL WITH PREJUDICE

As noted above, the Debtor has delayed this case dramatically by failing to file schedules and statements of financial affairs when due, by failing to ask for reasonable extensions, and by failing to file tax returns timely so that priority claims (if any) can be determined and the case confirmed. These delays violate both the Federal Rules of Bankruptcy Procedure and the Initial Order issued by this Court.

Payments to creditors in the chapter 13 case are delayed pending confirmation of a plan. The continued hearing on confirmation of the Debtor's chapter 13 plan is scheduled for July 10, and it is clear that the Debtor still has not filed tax returns so that priority claims can be established. July 10 will be the fourth hearing in this case that has accomplished nothing because the Debtor has not fulfilled her duties:

1. March 13, 2002, hearing on trustee's motion to dismiss for failure to file schedules, statement of financial affairs, and chapter 13 plan timely. Motion withdrawn because documents filed, although tardy.
2. May 10, 2002, hearing on confirmation hearing and motion to dismiss. Hearings continued on representation that Debtor had filed objection to IRS proof of claim that must be resolved prior to plan confirmation.
3. June 26, 2002, hearing on objection to IRS proof of claim. Objection denied for reasons stated above.
4. July 10.

Bankruptcy Code § 1307 provides that on request of a party in interest the Court may convert a chapter 13 case or dismiss the case for cause, including ''unreasonable delay by the debtor that is prejudicial to creditors.'' On April 9, 2002, the chapter 13 trustee filed a motion to dismiss for unreasonable delay. That motion was first heard on May 10 and was continued to July 10.

Bankruptcy Code § 109(g)(1) provides that an individual may not be a debtor in a subsequent bankruptcy case within 180 days if the previous case was dismissed for willful failure of the debtor to abide by orders of the court. The Debtor is hereby given notice that if the Court dismisses on July 10, the dismissal may be with prejudice it appears that the failure to com-

ply with the Initial Order was willful. If the Debtor wishes to contest dismissal with prejudice, the Debtor should be prepared with that evidence at the hearing on July 10.

The Court notes that this warning has been provided to the Debtor in: (i) the Initial Order, (ii) orally, in person to Debtor and counsel, at the hearing on June 26, and (iii) in this order.

¶2002-5771

UNITED STATES OF AMERICA v. Edwin and Rebecca NICHOLSON. U.S. District Court, Eastern Dist. Louisiana, (DC LA) No. Civ.A. 01-1214, Dec. 11, 2002. Years 1986, 1987, 1993, 1994. Decision for Govt.

1. Limitations periods on collection—suspensions. Limitations periods didn't bar collection action that govt. filed more than 10 years after taxpayers' 1st assessment: accounting for suspensions for years taxpayers were in bankruptcy and while their offers in compromise were under investigation, IRC §6502's 10-year period remained open as of date action was filed. Also, action was filed well within 10 years from subsequent assessments. *Reference:* United States Tax Reporter ¶65,025.03(55). IRC §6502.

2. Collection actions—reducing assessments to judgment—summary judgment. Taxpayers' assessments were reduced to judgement on summary judgment: neither taxpayers' accountant/tax consultant's conclusory statement that he believed assessments were erroneous nor taxpayers' unsupported estoppel claim rebutted assessments' presumptive correctness. *Reference:* United States Tax Reporter ¶74,035.01(25). IRC §7403.

United States District Court, E.D. Louisiana,

MCNAMARA, J.

Before the court is the renewed "Motion for Summary Judgment" filed by Plaintiff, the United States of America.[1] Defendants, Edwin Nicholson and Rebecca Nicholson, filed a memorandum in opposition. The motion is before the court on briefs, without oral argument.

Having reviewed the memoranda and attachments of the parties, the record and the applicable law, the court finds that there is no genuine issue of material fact and, as a matter of law, the Government is entitled to have Defendants' assessed tax liabilities reduced to Judgment. The United States assessed federal income tax liability against the Defendants for the years 1993 and 1994, and federal employment tax liability for the first and third quarters of 1986 and the first, third and fourth quarters of 1987. Prior to the commencement of this lawsuit, Defendants made several payments on these tax liabilities which were credited to the Defendants' accounts. (See certified original Certificates of Assessments and Payments, attached as Exhibits A & B to Plaintiff's original Motion for Summary Judgment).

In opposition to the Government's motion, the Defendants assert several arguments: that the statute of limitations has expired; that payments made to the IRS were not properly applied; and that various employees of the IRS told Defendants if they made certain payments, their tax liability would be paid. As discussed below, none of these arguments have merit.

(1) The Statute of Limitations has not expired.

[1] Pursuant to § 6502 of the Internal Revenue Code of 1986, the United States may collect a tax (1) within 10 years after the assessment or (2) if there is an installment agreement between the taxpayer and Secretary, prior to the date which is 90 days after the expiration of any period for

[1] On December 17, 2001, the Government initially filed its Motion for Summary Judgment. Defendants filed a memorandum in opposition, which the court treated as a Rule 56(f) request for discovery. On March 6, 2002, the court denied the Government's motion as premature, but without prejudice to be reasserted when discovery was complete. On August 27, 2002, the Government filed its renewed Motion for Summary Judgment, which was set for hearing on October 16, 2002. Defendants filed an opposition on October 8, 2002 and a Motion for Leave to File a Counter-Claim on October 10, 2002. On November 22, 2002, the Government filed a Motion to Supplement the Record, which was set for hearing on December 11, 2002. Defendants did not file a memorandum in opposition to the Government's Motion to Supplement, and the court granted that motion in a Minute Entry simultaneously entered with this Minute Entry.

collection agreed upon in writing by the Secretary and taxpayer. IRC § 6502(a).

Further, the statute of limitations is suspended during the time period an offer of compromise is under investigation plus one year. See IRC § 6502(a)(2) & IRS Forms 656 (attached as Exhibits A & B to the Government's Motion to Supplement Record, Doc. No. 33);[2] see also United States v. Ressler, 576 F.2d 650, 652 [42 AFTR 2d 78-5388] (5th Cir.1978). Finally, the collection statute is suspended during the time a taxpayer has a petition for bankruptcy pending in a United States Bankruptcy Court plus an additional 6 months. IRC § 6503(h).

Here, Defendants were initially assessed employment tax liability for the first quarter of 1986 on January 26, 1987. (See certified original Certificates of Assessment and Payment, attached as Exhibit B to the Government's original Motion for Summary Judgment). Defendants filed a petition for bankruptcy with the United States Bankruptcy Court for the Eastern District of Louisiana on June 28, 1988, and that bankruptcy case (No. 88-12707) was closed on February 28, 1989.

Further, Defendants filed an offer of compromise regarding their employment taxes on April 26, 1988, and that offer was withdrawn on August 1, 1988. (See certified original Certificates of Assessment and Payment, attached as Exhibit B to the Government's original Motion for Summary Judgment).[3] Defendants also filed another offer in compromise on February 21, 1992, and that offer was rejected on January 8, 1993. (Id.).[4]

Since the collection statute was suspended when the Defendants were in bankruptcy (plus 6 months) and when each of their offers in compromise was under investigation (plus one year), the statute of limitations for collecting Defendants' business/employment taxes was tolled approximately 4 years, 3 1/2 months. Thus, the statute of limitations for Defendants' employment tax liability had not expired when this suit was filed on April 20, 2001. Defendants' federal income tax liability for the tax years 1993 and 1994 were assessed on May 19, 1997. (See certified original Certificates of Assessment and Payment, attached as Exhibit A to the Government's original Motion for Summary Judgment). Thus, the 10-year statute of limitations had not expired with respect to those taxes.

(2) Defendants have failed to submit competent evidence to defeat the Government's motion for summary judgment.

The only evidence submitted with Defendants' opposition memorandum is the Affidavit of Ernest D. Kelly, who attests that he is an accountant and tax consultant, and that he is familiar with the facts and circumstances of this case. In Paragraph 14 of his Affidavit, Mr. Kelly states that he "believes that the current tax liability being claimed by the IRS is erroneous on several counts.[5] However, Mr. Kelly's beliefs are not facts constituting competent evidence to defeat the Government's motion. Further, other statements made by Mr. Kelly are either not based on personal knowledge, are conclusory assertions made without supporting evidence, or constitute

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[2] IRS Standard Forms 656 (attached as Exhibits A & B to the Government's Motion to Supplement the Record) contain the following language:

6. The taxpayer-proponents waive the benefit of any statute of limitations applicable to the assessment and collection of the liability sought to be compromised and agree to the suspension of the running of the statutory period of limitations on assessment and collection for the period during which this offer is pending, or the period during which any installment remains unpaid, and for 1 year thereafter. For these purposes, the offer shall be deemed pending from the date of acceptance of the waiver of the statutory period of limitations by an authorized Internal Revenue Service official, until the date on which the offer is formally accepted, rejected, or withdrawn in writing.

"The purpose of giving a waiver, in connection with an offer of compromise, is to enable the Government to consider the offer without suffering prejudice because of the running of the statute of limitations against the collection of the tax while the offer is being considered." United States v. Ressler, 576 F.2d 650, 652 [42 AFTR 2d 78-5388] (5th Cir.1978).

[3] The Government was unable to submit the actual offer of compromise submitted by Defendants on April 26, 1988 (and withdrawn on February 21, 1992), because the IRS destroys such documents six years after the offers are rejected or withdrawn. However, the Government supplemented the record with IRS Standard Form 656 which was in effect on April 26, 1988. (See Government's Motion to Supplement with attached Exhibit A & Schneidau Declaration).

[4] Again, the Government was unable to submit the actual offer of compromise submitted by Defendants on February 21, 1992 (and rejected on January 8, 1993), because the IRS destroys such documents six years after the offers are rejected or withdrawn. However, the Government supplemented the record with IRS Standard Form 656 which was in effect on February 21, 1992. (See Government's Motion to Supplement with attached Exhibit B & Schneidau Declaration).

[5] The Government states in its reply memorandum that the Affidavit of Mr. Kelly is not signed. However, the Affidavit that is filed into the record is signed. (See Kelly Affidavit, Doc. No. 27, Exhibit 10).

mistaken legal conclusions (e.g. re: statute of limitations).[6]

Finally, Defendants argue that IRS employees informed them that their tax liability would be paid if Defendants made certain payments, and that the IRS should now be estopped from collecting taxes made on these statements. However, Defendants offer no competent evidence to support such an argument.

Conclusion

The Government has provided the court with certified originals of Certificates of Assessment and Payment which presumptively establish Defendants' tax liability. Yoon v. Commissioner of Internal Revenue, 135 F.3d 1007, 1012 [81 AFTR 2d 98-938] (5th Cir.1998); Portillo v. Commissioner of Internal Revenue, 932 F.2d 1128, 1132 [67 AFTR 2d 91-1149] (5th Cir.1991).

To rebut this presumption, Defendants bear the burden of proving by a preponderance of the evidence that the assessments were arbitrary or erroneous. Yoon, 135 F.2d at 1012; Bar L. Ranch, Inc. v. Phinney, 426 F.2d 995, 998–99 [25 AFTR 2d 70-1234] (5th Cir.1970). Defendants have failed to do so.

Thus, the Government is entitled to have the following unpaid, assessed tax liabilities (plus statutory additions) against Defendants reduced to Judgment:

(1) the federal income tax liability owed by and assessed against Defendants, Edwin and Rebecca Nicholson, for the 1993 and 1994 tax years (in the respective amounts of $4,443.10 and $2,333.52, plus statutory additions, including interest calculated since the respective dates of assessment); and

(2) the federal employment tax liability owed by and assessed against Defendants for the first and third quarters of 1986 (in the respective amounts of $5.73 and $2,053.40, plus statutory additions, including interest calculated since the respective dates of assessment) and for the first, third and fourth quarters of 1987 (in the respective amounts of $5,483.61, $3,684.29 and $3,669.03, plus statutory additions, including interest calculated since the respective dates of assessment).

Accordingly;

IT IS ORDERED that the Government's unopposed ''Motion for Summary Judgment'' be and is hereby GRANTED, and Judgment will be so entered.

¶2002-5772

Robert C. TORRE, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. United States Court of Appeals, Ninth Circuit, (CA9) Nos. 02-70133, Dec. 11, 2002. Tax Court, (2001) TC Memo 2001-218, RIA TC Memo ¶2001-218, 82 CCH TCM 429 (opinion by Wolfe, *J.*), affirmed. Year 1997. Decision against Taxpayer.

1. Capital gains and losses—mutual fund distributions—reporting requirements—losses—casualty; theft—declining value of home—proof. Tax Court correctly determined that pro se taxpayer failed to properly report mutual fund income. *Reference:* United States Tax Reporter ¶615.238(40); 8525.20(5); 12,225.35(25); 1655.3010(10); 1655.360(30). IRC §61; 165; 852; 1222.

United States Court of Appeals, Ninth Circuit,

Appeal from a Decision of the United States Tax Court.

Before GOODWIN, TROTT, and GRABER, Circuit Judges.

MEMORANDUM*

Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

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[6] The court has also compared the Affidavit of Mr. Kelly with the Affidavit of Defendant, Edwin Nicholson, which was submitted with Defendant Nicholson's opposition to the Government's initial motion for summary judgment. (See Nicholson Affidavit, attached to Opposition Memorandum, Doc. No. 16). The striking similarity between these two affidavits is suspect, or at least curious.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[1] Taxpayer Robert C. Torre appeals pro se the Tax Court's determination that Torre failed to properly report $5,603 of income from a mutual account fund for the 1997 tax year. We have jurisdiction to review the final order of the Tax Court under 26 U.S .C. § 7482. We review the Tax Court's legal conclusions de novo, and its factual findings for clear error. Estate of Rapp v. Comm'r, 140 F.3d 1211, 1215 [81 AFTR 2d 98-1151] (9th Cir.1998). We affirm.

The Tax Court correctly determined that Torre failed to properly report $5,603 of income from a mutual account fund for the 1997 tax year. See Comm'r v. Schleier, 515 U.S. 323, 327–28 [75 AFTR 2d 95-2675] (1995) (noting the broad definition of ''gross income'' under 26 U.S.C. s 61(a)).

Torre was not entitled to a jury trial. See Dawn v. Comm'r, 675 F.2d 1077, 1079 [50 AFTR 2d 82-5005] (9th Cir.1982) (stating that taxpayers are not entitled to jury trial in tax court).

Torre's remaining contentions are rejected as unpersuasive.

AFFIRMED.

¶2002-5773

Theodore O'TOOLE, PLAINTIFF-APPELLANT v. INTERNAL REVENUE SERVICE, DEFENDANT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 02-55597, Dec. 11, 2002. District Court, (2002, DC CA) 89 AFTR 2d 2002-2059, 2002-1 USTC ¶50387, affirmed. Decision for Govt.

1. Limitations periods on refunds—untimely claims—full payment; failure to file return—FOIA. District court properly granted govt. summary judgment on taxpayer's amended refund complaint: taxpayer didn't timely file administrative claim within IRC §6511(a)'s 2-year period; and, whether IRS's late response to his FOIA claim caused his late refund claim filing was irrelevant since equitable tolling didn't apply in IRC §6511 context. Also, taxpayer's FOIA request for monetary damages, which weren't authorized by statute, failed to state valid claim. *Reference:* United States Tax Reporter ¶65,115.04(70); 65,115.04(37); 76,556.502(75). IRC §6511.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the Central District of California, Alicemarie H. Stotler, District Judge, Presiding.

Before GOODWIN, TROTT, and GRABER, Circuit Judges.

MEMORANDUM*

[1] Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

Theodore O'Toole appeals pro se the district court's judgment for the Internal Revenue Service (''IRS'') in his action seeking a tax refund. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, Cement Masons Health & Welfare Trust Fund for No. Calif. v. Stone, 197 F.3d 1003, 1005 (9th Cir.1999), cert. denied, 122 S.Ct. 902 (2002), and we affirm.

The district court properly concluded that because O'Toole did not file his administrative claim for a tax refund within two years of paying the tax, the administrative claim was untimely under 26 U.S.C. § 6511(a) and 26 C.F.R. § 301.6511(a)-1(a)(2). The district court therefore lacked subject matter jurisdiction over O'Toole's tax refund action. See Imperial Plan, Inc. v. United States, 95 F.3d 25, 26 [78 AFTR 2d 96-6331] (9th Cir.1996) (affirming dismissal for lack of subject matter jurisdiction where taxpayer failed to file a timely administrative tax refund claim under section 6511).

O'Toole contends that the two-year limitations period should be equitably tolled because of the IRS's late response to his

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Freedom of Information Act (''FOIA'') request. However, section 6511 is not subject to equitable tolling. See United States v. Brockamp, 519 U.S. 347, 354 [79 AFTR 2d 97-986] (1997).

O'Toole failed to state a valid FOIA claim because he requested only monetary damages in this action, and the statute does not authorize such relief. See 5 U.S.C. § 552(a)(4)(B).

O'Toole's remaining contentions are not persuasive.

AFFIRMED.

¶2002-5774

Larry LAND, sued as Larry D. Land, PETITIONER v. INTERNAL REVENUE SERVICE and Blaine Holiday, RESPONDENT. U.S. District Court, Dist. of Minnesota, (DC MN) Civil No. 01-2280 (DWF/SRN), Dec. 3, 2002. District Court adopted. Year 1995. Decision for Govt. in part.

1. Actions against IRS—refunds—compensatory and punitive damages—jurisdiction—sovereign immunity. Magistrate judge's recommendation to grant IRS summary judgment on or dismissal of taxpayer's suit for refund and damages was adopted: district court was divested of jurisdiction over any refund claim for year that taxpayer filed Tax Court petition; further lacked jurisdiction over what was essentially appeal of other claims that taxpayer had already presented to Tax Court; and had no jurisdiction under 28 USC §2675 to consider compensatory damage claim that taxpayer failed to 1st pursue with IRS. Also, govt. was immune from any punitive damages claim under §2664. *Reference:* United States Tax Reporter ¶74,225.04(5); 65,125.01(5); 74,336.506(25). IRC §6512; 7422.

Larry Land, *Pro Se*, 1946 Edgerton, St. Paul, MN 55117, Plaintiff.
Mary E. Bielefeld, Esq., P.O. Box 7238, United States Department of Justice, Tax Division, Ben Franklin Station, Washington, DC 20044, counsel for Defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA,

ORDER AND MEMORANDUM

DONOVAN W. FRANK Judge of United States District Court

This matter is before the Court upon Plaintiff's objections and Defendant's objections to Magistrate Judge Susan Richard Nelson's Report and Recommendation dated October 30, 2002, recommending that Defendant's Motion to Dismiss or, Alternatively, for Summary Judgment be granted; that Plaintiff's Motion for Entry of Judgment by Default be denied; that Plaintiff's Motion to Dismiss be denied in part and denied as moot in part; and that Plaintiff's Motion to Dismiss Pursuant to Rule 56 be denied in part and denied as moot in part.

The Court has conducted a *de novo* of the record. 28 U.S.C. § 636(b)(1); Local Rule 72.1(c).

Based upon the Court's review of the record, the Court's review of the arguments and submissions of both parties, and the Court being otherwise duly advised in the premises, the Court, for the reasons set forth below, adopts the Report and Recommendation of Magistrate Judge Nelson.

Accordingly, IT IS HEREBY ORDERED that:

1. Defendants' Motion to Dismiss or, Alternatively, for Summary Judgment (Doc. Nos. 12-1 and 12-2) is GRANTED.
2. Plaintiff's Motion for Entry of Judgment by Default (Doc. No. 7) is DENIED;
3. Plaintiff's Motion to Dismiss (Doc. No. 20) is DENIED IN PART and DENIED AS MOOT IN PART; and
4. Plaintiff's Motion to Dismiss Under Rule 56 and for Relief (Doc. No. 27) is DENIED IN PART and DENIED AS MOOT IN PART.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 3, 2002

DONOVAN W. FRANK

Judge of United States District Court

MEMORANDUM

[1] The factual background for this matter is adequately set forth in the Report and Recommendation and is incorporated by reference for the purposes of the parties' objections.

The Court has dismissed the Plaintiff's case pursuant to Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure. The Court has done so after a *de novo*review of the record. However, the Court has reviewed the record and the totality of the circumstances in adopting the Report and Recommendation of Magistrate Judge Nelson filed on October 30, 2002. Therefore, the Court does not need to reach the issue of the specific objections that the Defendants have placed before the Court to the Report and Recommendation of Magistrate Judge Nelson in order to resolve the dispositive motion. The record as a whole supports dismissal of the Plaintiff's claims pursuant to Rule 12. The Court need not make any findings of fact or adopt specifically any portion or portions of the factual background set forth in the Report and Recommendation of Magistrate Judge Nelson.

The Court lacks subject matter jurisdiction over all of Plaintiff's claims. Pursuant to 26 U.S.C. §§ 6512 and 7422, the district court lost subject matter jurisdiction over any claims concerning Plaintiff's taxes from the year 1995 when the Plaintiff chose to pursue his claim concerning those taxes in Tax Court. Moreover, because the Lands chose to pursue their case with the ''small tax case'' designation, the Tax Court's final decision is not subject to review by the Eighth Circuit. *See* 26 U.S.C. § 7463.

After reviewing the record before the Court, the Court finds and concludes that, with the exception of Plaintiff's arguments regarding serving the complaint, all of Plaintiff's claims were presented to the Tax Court either during the proceeding, or afterwards, through the Plaintiff's numerous motions for reconsideration and to vacate that decision. Thus, any consideration of the merits of Plaintiff's claims would be tantamount to reviewing the Tax Court's decision. Because this Court lacks subject matter jurisdiction over such review, the Court cannot consider Plaintiff's request for an order allowing him to file amended tax forms for the year 1995, and that he and the IRS file a motion for reconsideration and withdrawal of the Tax Court's decision.

Furthermore, the Court lacks subject matter jurisdiction over Plaintiff's claim for compensation for nonpecuniary losses. The Court understands this to be a claim for compensatory damages, as Magistrate Judge Nelson did in her Report and Recommendation to the Court. Pursuant to 28 U.S.C. § 2675, such a claim against the United States must first be presented to the appropriate federal agency, in this case the IRS. The Plaintiff did not pursue this claim with the IRS. Because the Plaintiff did not pursue his claim with the IRS, the Court has no jurisdiction under this statute to hear Plaintiff's claim. The Court also finds and concludes that the Court lacks subject matter jurisdiction over Plaintiff's claim for punitive damages because, as stated in 28 U.S.C. § 2664, the United States is immune from punitive damages.

The Court lacks subject matter jurisdiction over Plaintiff's basic claims. Therefore, there exists no basis for considering Plaintiff's request for costs incurred in bringing the present motion, or pain and suffering that Plaintiff allegedly endured as a result of litigating the Tax Court proceeding.

Based upon the Court's review of the entire record in this matter, the Court has dismissed all claims of the Plaintiff pursuant to Rules 12(b)(1) and 12(h)(3) of the Federal Rules of Civil Procedure.

¶2002-5775

In Re: Jeffrey Lee GREENSPAN, Debtor. U.S. Bankruptcy Court, Dist. of Maryland, (Bktcy Ct MD) Case No. 01-24731-DK, Nov. 27, 2002. Years 1988, 1990. Decision for Taxpayer in part and for Govt. in part.

1. Tax claims in bankruptcy—proof of claim—limitations periods on assessment and collection. IRS wasn't time-barred from asserting proof of claim against Chap. 13 debtor-disbarred attorney: IRS clearly was under no time restriction pursuant to IRC §6501(c)(3) to assess taxes for year taxpayer never filed return, timely made supplemental assessment for other year within 3 years of that year's return filing, and timely instituted collection within 10 years of assessments. Taxpayer's focus on discharge limitations periods was misplaced. *Reference:* United States Tax Reporter ¶65,015.14(5); 65,025.03(5); 68,726.51(3). IRC §6501; 6502.

2. Tax claims in bankruptcy—objection to proof of claim—burden of proof. Chap. 13 debtor-disbarred attorney's objection to IRS's proof of claim for year he never filed return was upheld: taxpayer effectively rebutted presumptive correctness of IRS's claim, which IRS based only on computer-generated transcript and Form 1099 from unnamed source, with credible testimony that disbarment precluded him from working or earning any income during subject year; and IRS came forward with no additional evidence to factually support its assessment. But, IRS's claim for subsequent year was allowed, based on IRS's specific documentation of subject assessment and taxpayer's failure to rebut with any concrete proof of assessment's inaccuracy. *Reference:* United States Tax Reporter ¶68,726.51(10); 68,726.52(50).

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MARYLAND at Greenbelt,

MEMORANDUM OF DECISION

DUNCAN W. KEIR United States Bankruptcy Court for the District of Maryland

Chapter 13

Debtor Jeffrey Lee Greenspan has objected to the proof of claim filed by the Internal Revenue Service (IRS) for unpaid income taxes for the years 1988 and 1990. The court held a hearing on this issue on July 15, 2002 and permitted the parties to submit post-hearing points of authority. After considering the evidence presented at the hearing and receiving the IRS's post-hearing submission, the court determines that the IRS's claim is allowed in part and disallowed in part.

I. Background

Debtor filed a voluntary bankruptcy petition on December 10, 2001 under Chapter 13 of the Bankruptcy Code. On March 4, 2002, the IRS filed a proof of claim in the amount of $29,969.78 for unpaid income taxes for the years 1988 and 1990. The debtor filed an objection to the IRS's proof of claim, disputing the claim in its entirety and asserting that even if such taxes were owed, the length of time that has elapsed would make such taxes dischargeable under Chapter 13. Debtor, who is unrepresented in this action, appears to confuse the concepts of dischargeable debts and allowed claims. An allowed claim is eligible for distribution in the Chapter 13 case, without regard to whether the remaining debt (if any) will be discharged under 11 U.S.C. § 1328 at the time the debtor completes the performance of the plan.

On May 15, 2002, the IRS filed a response to debtor's objection stating that debtor failed to serve the United States Government in accordance with Bankruptcy Rule 7004 and that even though the taxes were assessed more than six years ago, this fact does not make them dischargeable. In its initial response, the IRS carried forward the debtor's confusion of the issues.[1]

At the July 15, 2002 hearing, counsel for the United States waived service and proceeded on the issue of the allowability of its claim. The IRS offered into evidence a certified transcript indicating that the IRS received a Form 1099 from an employer of

[1] Taxes that constitute non-dischargeable debts in Chapter 7 cases, pursuant to 11 U.S.C. § 523(a)(1) and 11 U.S.C. § 727(b), are dischargeable in Chapter 13. 11 U.S.C. § 1328(a). However, the same taxes constitute priority claims (11 U.S.C. § 507(a)(8)) and must be paid in full by the plan, unless the claim holder consents to lesser treatment. 11 U.S.C. § 1322(a)(2). As the Chapter 13 discharge that would discharge such tax is not granted until completion of the performance of the plan (11 U.S.C. § 1328(a)), the priority tax debt is satisfied by payment or compromise before discharge. The "hardship discharge" that may be granted without completion of plan performance does not discharge the priority tax debt. 11 U.S.C. § 1322(b).

the debtor for income paid to the debtor in 1988.[2] Since the IRS did not receive a return from debtor for the 1988 tax year, it generated a substitute return on September 16, 1994 using the information from the submitted Form 1099. The IRS calculated the amount of tax owed and the amount of penalties due for the lack of filing a return and also assessed a negligence penalty. On September 11, 1995, the IRS assessed the interest owed on the assessment. Debtor disputes the assessment and testified that he earned no income in 1988. Consequently, he did not file a return.

At the hearing, the IRS also submitted a certified transcript of supplemental tax assessments made in connection with debtor's 1990 income. The IRS maintains that debtor paid his initial tax assessment in full; however, he never paid the subsequent assessments. On his initial 1990 return, which was filed on May 23, 1991,[3] debtor claimed head of household status. Debtor claimed this status per the recommendation of his tax preparer since he financially supported his mother in 1990. On June 17, 1991, a tax assessment was made, the debtor's withholding and excess FICA were applied to this assessment, and debtor was issued a refund. Debtor testified that at some point in 1991, he received a letter from the IRS challenging his claiming head of household status. Debtor responded by sending the IRS information supporting a head of household status. Debtor then moved back to Maryland and the Post Office in California stopped forwarding his mail after six months. Debtor testified that he never received the second letter issued by the IRS indicating that they had adjusted his tax liability and added an accuracy penalty because the information he submitted was not enough to support a head of household status. These supplemental assessments are reflected in the IRS's proof of claim.

II. Analysis

There are two issues presented in this case: 1) whether the assessment and collection actions taken by the IRS with regard to the 1988 and 1990 income taxes are within the applicable statute of limitations; and 2) whether the respective assessments are correct.

A. Statute of Limitations

[1] The statute of limitations applicable to the government's tax claim is controlled by applicable nonbankruptcy law. 11 U.S.C. § 502(b)(1) provides that a claim shall be disallowed to the extent that the claim is unenforceable under applicable law. Here, the applicable nonbankruptcy laws are sections 6501 and 6502 of the Internal Revenue Code, which govern the time limitations placed on assessment and collection actions by the IRS. Section 6501(a) of the I.R.C. establishes that "the amount of any tax imposed under this title shall be assessed within three years after the return was filed." With limited exceptions, the taxing authority is barred from bringing an assessment proceeding in court if an assessment is not made within three years of the filing of a tax return. 26 U.S.C. § 6501. Once a tax is assessed, collection actions are governed by I.R.C. § 6502, which provides a ten-year period in which a properly-assessed tax may be collected, either by levy or by a proceeding in court. The ten-year period begins on the date the tax is assessed. 26 U.S.C. § 6501.

1. 1988 Taxes

Debtor argues in his Objection to the IRS's proof of claim that the assessment and collection efforts made by the IRS with regard to debtor's alleged tax debt for 1988 are time barred. In its post-hearing points of authority, the IRS contends that its 1988 tax assessment against debtor was timely filed in accordance with I.R.C. § 6501(c)(3), which provides an exception to

[2] Due to the amount of time that has elapsed since the taxable year at issue, the IRS is unable to determine the identity of the employer that submitted the Form 1099.

[3] There was some dispute at the hearing as to whether debtor filed his 1990 return on time. The IRS records reflect that debtor was granted an extension to file; however, debtor believes that the taxes were filed on time. The certified transcript submitted by the IRS shows that an extension was granted on April 15, 1991 and that the return was filed on May 23, 1991. There is no indication on the certified transcript that a late filing penalty was assessed for the 1990 taxes. Nonetheless, counsel for the government stated that a late filing penalty had been assessed for the 1990 return and that perhaps such a penalty was rolled into the miscellaneous penalty shown on the transcript. It appears that counsel was mistaken as to the late filing penalty since the miscellaneous penalty assessed against debtor for his 1990 taxes was an accuracy penalty.

the general three-year period in which tax assessments must be made. I.R.C. § 6501(c)(3) permits a tax to be assessed at any time in cases where no return has been filed, as in the present case. The IRS further maintains that its collection efforts are within the applicable statute of limitations since I.R.C. § 6502(a) provides that the IRS may pursue collection of an assessment within ten years of the assessment date. Debtor maintains that the IRS did not take any assessment actions within six years prior to the date he filed his Chapter 13 petition. As a result, such tax debt is not allowed in a Chapter 13 case, or in the alternative, such debt would be dischargeable. Debtor cites no authority to support his assertions.

The court agrees with the IRS that the 1988 tax assessments are not barred by the applicable statute of limitations. The Internal Revenue Code clearly states that in cases where no return has been filed, the IRS may assess a tax at any time. Here, it is undisputed that debtor never filed an income tax return for the taxable year 1988. As a result, the IRS generated a substitute return on September 16, 1994 using the information from the submitted Form 1099. On September 11, 1995, the IRS assessed the interest owed on the assessment. Since debtor's bankruptcy petition was filed within ten years of the substitute return generated by the IRS, the ten-year statute of limitations for collection actions by the IRS has not yet expired.

2. 1990 Taxes

The IRS maintains that its assessment and collection efforts with regard to the 1990 supplemental tax assessments are also within the applicable statute of limitations. Debtor filed his initial tax return for the 1990 tax year on May 23, 1991. Based on debtor's submitted return, an assessment was made by the IRS and a refund was issued. Nearly two years later, the IRS made additional assessments with respect to debtor's income earned in 1990. According to the evidence submitted by the IRS, these supplemental assessments were made on May 27, 1993 and were within the three-year period required by § 6501(a) of the Internal Revenue Code. As the ten-year statute of limitations governing the IRS's collection efforts had not expired at the time of debtor's bankruptcy filing, the 1990 tax assessments and the current collection action are timely. The court agrees with this analysis.

Debtor's argument regarding the 1990 assessments is similar to his argument regarding the 1988 assessment. Debtor states that the 1990 assessments were made more than six years prior to the date of filing of his Chapter 13 petition, therefore, the assessments are dischargeable. Debtor's argument focuses on the dischargeability of the IRS's claim rather than the allowability of the claim, which is not relevant to this issue at hand. Moreover, debtor cites no authority to support his argument.

B. Accuracy of Assessments

While the IRS's assessment and collection efforts were within the applicable statute of limitations, this alone is not determinative of the allowability of the IRS's claim. The court must look at the burden of proof placed on both parties before a determination of allowability can be made.

Bankruptcy Rule 3001(f) states that a "proof of claim executed and filed in accordance with these rules shall constitute prima facie evidence of the validity and amount of the claim." To overcome the prima facie validity, the objecting party must demonstrate, by evidence, a defense to one or more elements of the cause of action asserted in the claim, which defense, if uncontravened, would be sufficient to defeat the legal basis for the claim asserted. In Re Gates, 214 B.R. 467, 472 (Bankr.D.Md.1997).

When the objection is to a tax claim, the burden of proof remains where the substantive tax law puts it. See Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 26 (2000). Accordingly, the first issue in a tax deficiency proceeding is the arbitrariness of the Commissioner's determination, upon which the taxpayer bears the burden of persuasion by a preponderance of the evidence. See Cebollero v. Commissioner, 967 F.2d 986, 990 [70 AFTR 2d 92-5082]

(4th Cir. 1992). If the taxpayer meets this burden and proves that the determination is arbitrary, then the presumption that the tax deficiency is correct vanishes. See id. The analysis then turns to a determination of the correctness of the deficiency. See id. The Fourth Circuit explained the general burden allocation scheme as follows:

> In this Circuit, the Commissioner always has the burden of persuasion as to the amount and existence of any deficiency. Before the Commissioner is required to carry that burden, however, the taxpayer first must dispense with the so-called presumption of correctness by carrying his own burden and persuading the court by a preponderance of the evidence that the assessment is arbitrary and excessive.

Cebollero v. Commissioner, 967 F.2d at 991. Once the taxpayer meets this burden, the Government, not the taxpayer, must prove how much the taxpayer actually owes. See Higginbotham v. United States, 556 F.2d. 1173, 1175 [40 AFTR 2d 77-6312] (4th Cir. 1977); see also Lesser v. United States, 368 F.2d 306, 310 [18 AFTR 2d 5963] (2d. Cir. 1968). This burden allocation scheme is justified by the presumption of administrative regularity, the need to encourage taxpayers to keep records, and the governmental interest in facilitating the collection of taxes. Higginbotham v. United States, 556 F.2d at 1175. In this case, debtor bears the burden of proving by a preponderance of the evidence that the 1988 and 1990 tax assessments made by the IRS are arbitrary and excessive. If debtor presents evidence sufficient to meet this burden, the IRS must then prove that its assessments are correct.

1. 1988 Taxes

Debtor disputes that he was required to file a tax return for 1988. In support of his assertion, debtor testified at the hearing that he earned no income in 1988. For this reason, he did not file an income tax return for that year. Through his testimony, debtor explained that he was suspended and subsequently disbarred from the practice of law in early 1988. As a result, he had no job from which income could be earned. Furthermore, debtor testified that he had no knowledge of the Form 1099 that formed the basis of the IRS's substitute return since he did not have an employer in 1988.

The IRS, on the other hand, submitted into evidence a certified transcript that debtor earned $20,000 in 1988. At the hearing, counsel for the Government stated that this income was reported on a Form 1099 that was submitted to the IRS by an undeterminable employer. Based on this Form 1099, the IRS generated a substitute tax return and assessed taxes, penalties, and interest against the debtor. The core of the IRS's argument is that debtor's evidence is insufficient to dispense with the burden of correctness in favor of its tax assessment.

In light of the conflicting evidence, the court must determine whether the debtor's testimony is sufficient to place the burden on the IRS to prove that its 1988 tax assessment is correct. Under the circumstances of this case, debtor faced the difficult challenge of proving a negative. Nonetheless, debtor testified at the hearing that he earned no income in 1988 due to the events that occurred early that year which resulted in a revocation of debtor's license to practice law in the State of Ma-ryland. The court finds the debtor's testi-mony to be credible and sufficient to over-come the presumption of correctness in favor of the assessment. This finding places the burden on the IRS to prove by a preponderance of the evidence that its 1988 tax assessment is accurate. Despite this burden, the IRS did not submit any additional evidence or information to sub-stantiate its 1988 tax assessment. No evi-dence was submitted as to the specific em-ployer from which the debtor allegedly earned income in 1988. The sole evidence relied upon by the IRS is a computer-gen-erated summary (transcript) calculating a tax on an income figure and a reference to a Form 1099. No Form 1099 was entered into evidence, and no identification of the purported source of the 1099 was intro-duced. The transcript is only a computer reference to data, the origin and accuracy

of which is not identified. It is in effect, a type of hearsay. The transcript asserts that a 1099 filed by an unknown employer (declarant) stated that the debtor earned income in 1988. While the transcript was allowed into evidence as a governmental record, the complete absence of identifying information means that the record is scant support for the accuracy of the assessment. The court finds that such evidence is insufficient to prove the existence and accuracy of the tax deficiency; therefore, the portion of the IRS's claim that relates to taxes due for the year 1988 is disallowed.

2. 1990 Taxes

Regarding the 1990 supplemental tax assessments, debtor's primary argument is that he never received notice that his 1990 taxes remained in dispute. While the IRS transcript shows that debtor was issued a refund in 1990, debtor testified at the hearing that he received a follow- up assessment letter from the IRS challenging his head of household status. In response, debtor stated that he submitted further documentation to the IRS supporting such a status. Debtor testified that he never received the second follow-up letter from the IRS, presumably because he had moved back to Maryland and the post office in California stopped forwarding his mail. Debtor testified that he thought the matter had been resolved in his favor.

The evidence offered by the IRS to support its 1990 tax assessments is more substantial than the evidence offered for the 1988 tax. Specifically, the 1990 transcript provides more detail and counsel for the Government stated at the hearing that she was able to locate an examination file in Fresno, California for debtor for this tax year. Government counsel agreed with debtor's testimony regarding these taxes. She further stated that the IRS notified debtor of a deficiency concerning his head of household status and also with some self-employment income that he had claimed.

The court finds that debtor did not provide sufficient evidence to overcome the presumption in favor of the 1990 tax assessments. Debtor provided no evidence that the supplemental assessments were inaccurate or wrongly assessed. While debtor may disagree with the IRS's rejection of his head of household status, he offered no proof that the assessments were inaccurate, rather, his testimony focused on his lack of notice that the taxes remained in dispute. As such, the IRS's 1990 tax claim is an allowed claim with nonpriority, general unsecured status.

III. Conclusion

For these stated reasons, the proof of claim filed by the Internal Revenue Service for unpaid income taxes for the years 1988 and 1990 will be allowed in part and disallowed in part. Specifically, the portion of the IRS's claim for unpaid income taxes from 1988 will be disallowed while the taxes, penalties and interest assessed for the tax year 1990 will be allowed claims with nonpriority, general unsecured status. An order in conformity with this Memorandum shall be entered.

11/25/02

Date

DUNCAN W. KEIR

United States Bankruptcy Court for the District of Maryland

ORDER ALLOWING CLAIM, IN PART

DUNCAN W. KEIR United States Bankruptcy Judge for the District of Maryland

For the reasons stated in the Memorandum of Decision entered contemporaneously herewith, the debtor's objection to the proof of claim filed by the Internal Revenue Service is sustained in part and denied in part. The claim of the United States (Internal Revenue Service) for unpaid income taxes, interest, and penalties thereupon, for the tax year 1988 is disallowed. The claim for tax year 1990, is allowed as a nonpriority, general unsecured claim. The Internal Revenue Service is instructed to file an amended proof of claim reflecting the amount of its allowed claim as set forth in this Order.

Accordingly, it is by the United States Bankruptcy Court for the District of Maryland,

ORDERED, that the debtor's objection to the proof of claim filed by the Internal Revenue Service is sustained in part and is denied in part; and it is further

ORDERED, that the Internal Revenue Service shall file an amended proof of claim in compliance with this Order.

DATED: 11/27/02

DUNCAN W. KEIR

United States Bankruptcy Judge for the District of Maryland

¶2002-5776

In Re: Larry D. EADES, DEBTOR. U.S. Bankruptcy Court, Northern Dist. of California, (Bktcy Ct CA) Docket No. 02-10859, Aug. 23, 2002. Decision against Taxpayer.

1. Tax claims in bankruptcy—plan confirmation. Chap. 13 debtor's ex-wife's objection to his plan confirmation was sustained: plan's provision for payment of only priority tax debt but not other priority debts, including spousal support and attorney's fees awarded wife under marital dissolution proceeding, violated 11 USC §1322(a)(2). *Reference:* United States Tax Reporter ¶68,726.52(44).

Richard V. Day, Law Offices of Richard V. Day, Napa, CA, for Linda Eades.
Ellyn M. Lazar, Law Offices of Ellyn M. Lazar, Santa Rosa, CA, for Larry D. Eades.

United States Bankruptcy Court, N.D. California

Memorandum on Objection to Confirmation

ALAN JAROSLOVSKY, Bankruptcy Judge.

DO NOT PUBLISH

This case disposition has no value as precedent and is not intended for publication. Any publication, either in print or electronically, is contrary to the intent and wishes of the court.

[1] Debtor Larry Eades has proposed a plan which provides for payments of $250 per month for 47 months. This plan would pay only the priority tax debt of about $9,000.00, with no dividend to other creditors. His former spouse, Linda Eades, objects. Since it appears that the plan does not provide for the payment of all priority debt in full, as required by § 1322(a)(2) of the Bankruptcy Code, it cannot be confirmed. In addition to the priority tax debt, the debtor had $6,583.19 in spousal support debt owing on the date he filed his Chapter 13 petition. This consisted of $1,000.00 in spousal support and $5,583.19 in Linda's attorneys' fees. Contrary to the debtor's position, these amounts are entitled to priority under § 507(a)(7) of the Code. The debtor argues that the attorneys' fees are not entitled to priority because "the orders which provided for such payments ... also included property settlement issues." However, this is not a correct interpretation of the law. If attorneys' fees were awarded in a marital dissolution proceeding in which support was an issue, and the award was made on the basis of need, then the attorneys' fees are considered to be support. In re Gionis, 170 B.R. 675, 681–82 (9th Cir.BAP 1994). They are not pro-rated between support and non-support issues. Jones v. Tyson, 518 F.2d 678, 680–81 (9th Cir.1975). While neither attorneys' fee order specifically mentioned need, the state court did find that the debtor has the ability to earn $80,000.00 per year and Linda has the ability to earn only $12,000.00 per year. Based on this imbalance of earnings capacity, it is clear that the fee awards were made on the basis of need and are accordingly entitled to priority status. See Gionis, 170 B.R. at 683. Since the plan does not meet the requirement of § 1322(a)(2), confirmation will be denied. Counsel for Linda shall submit an appropriate form of order.

¶2002-5777

Frank HEATLEY, and Betty HEATLEY, PLAINTIFFS v. INTERNAL REVENUE SERVICE, DEFENDANT. U.S. District Court, Middle Dist. of Florida, (DC FL) Case No. 6:01-cv-1044-Orl-22DAB, Nov. 25, 2002. Reconsideration of (2002, DC FL) 90 AFTR 2d 2002-6840, denied. Year 2000. Decision against Govt.

1. Capital gains—rate of tax—calculations—refunds. Magistrate judge recommended denying govt. reconsideration of decision that it hadn't summarily proved its position on taxpayers' capital gains-based refund complaint: although taxpayers' argument for application of lowest 10% capital gains tax rate was legally incorrect, IRS, with its ever-changing positions and failure to specifically explain its calculations, still hadn't proved as matter of law what amount of refund taxpayers were owed; and was precluded by its earlier stipulation from refuting taxpayers' right to at least some refund. *Reference:* United States Tax Reporter ¶12,235.07(130); 74,225.05(40). IRC §1223; 7422.

United States District Court Middle District of Florida Orlando Division,

Amended Report And Recommendation

DAVID A. BAKER UNITED STATES MAGISTRATE JUDGE

To the United States District Court

This cause came on for consideration without oral argument on the following motions filed herein:

MOTION: MOTION FOR SUMMARY JUDGMENT (UNITED STATES) (Doc. No. 19)

FILED: July 30, 2002

THEREON it is RECOMMENDED that the motion be DENIED.

MOTION: MOTION FOR SUMMARY JUDGMENT(PLAINTIFFS) (Doc. No. 24)

THEREON it is RECOMMENDED that the motion be GRANTED in part and DENIED in part.

Background

This matter is before the Court pursuant to a request by the District Court (Doc. No. 39). On September 19, 2002, the undersigned entered a Report and Recommendation on the instant motions, concluding that there was no genuine issue of material fact that Plaintiffs were due a re-fund (as counsel for the United States had stipulated to same in his papers), but that there was insufficient evidence of record to support a finding as to the amount of the refund (Doc. No. 29). The United States objected to the Report, and supplemented the record with an affidavit of Grady Boles, IRS Senior Reviewer (Doc. No. 30). Plaintiffs filed their Reply to the Report on October 7, 2002 (Doc. No. 31). Upon review, the District Judge construed the Government's objection as a request for reconsideration of the supplemented record, and referred the motions anew to the undersigned for reconsideration and issuance of an amended report and recommendation (Doc. No. 39).

The Court has reviewed the record, the arguments of the parties, and the applicable law. It is the conclusion of this Court that the Government is bound by its stipulation that the Plaintiffs are due a refund, and that genuine issues of material fact still exist as to the amount of that refund.

Facts

As set forth in the prior Report, the parties agree on most of the relevant facts. Plaintiffs, Mr. and Mrs. Heatley, appearing *pro se*, filed this lawsuit with respect to their 2000 federal income tax return. Plaintiff Frank Heatley purchased 200 shares of common stock in the Walt Disney Corporation on July 9, 1979, for $7,047.81 (Deposition of Heatley, at 11–13).[1] Through dividend reinvestment and several stock splits, Mr. Heatley's 200 shares grew to 11,088 shares. (*Id.* at 12). Including dividend reinvestment, Mr. Heatley paid $10,764.37 total for the shares. (*Id.*, Ex-

[1] As only one deposition was filed in this matter, the Court refers to the deposition of Mr. Heatley as "Deposition."

hibit #2, p. 3). On August 3, 2000, Mr. Heatley sold all of these shares for a total of $442,827.00, realizing a net gain of $432,062.32. (*Id.* at 23, 25).

According to the government, during calendar year 2000, Plaintiffs made four estimated tax payments of $800.00 to the Internal Revenue Service (''the IRS''), an additional payment of $43,204.26 on August 24, 2000, and another payment of $43,204.26 on September 28, 2000. *Certified Literal Transcript of Assessments and Payments*, Doc. No. 21. As explained by Mr. Heatley:

> When I sold the stock in August 2000 I did not know what percentage was to be paid to the IRS as I did not know my taxable income on my 1040 form for the year 2000. Naturally, it was in August. I thought I would remain in the fifteen percent bracket, so I made out a check to the IRS of $43,204.26 on August 22, 2000, which was approximately 10 percent. After reviewing my records I concluded that I may fall into the twenty percent bracket long term, so I made another check out of forty three thousand two hundred four twenty six on September 22, 2000. I sent this to the IRS thinking it would be a fair estimate, fair figure. I did enclose a letter with the second check to the IRS stating that I did not know my status at that time of capital gains, and it would be—and when I do they will be informed.

(Deposition of Heatley, at 31, quoting the Complaint.)

In February 2001, Mr. Heatley completed a Form 1040, listing taxable income of $37,512. (Deposition, Exhibit 4). Mr. Heatley calculated a tax of $5,629.00 and an amount owed of $209, which payment was included with the return. The Heatleys did not complete or return a schedule with respect to the Capital Gain. The IRS assessed the reported tax liability of $5,629 on April 30, 2001, and wrote the Heatleys that they were due a refund of $86,408.52. (Deposition, Exhibit 5). As stated by Mr. Heatley in his Complaint, ''This was an obvious error as I did owe them at least $43,204.26 for my Capital Gains.'' Nonetheless, on April 30, 2001, the IRS took the position that the correct tax liability was $5,629 and the Heatleys were due a refund of $86,408.52.

The IRS requested that Plaintiffs complete and return an Amended U.S. Individual Income Tax return, Form 1040X, claim for refund. (Deposition, Exhibit 2). Mr. Heatley completed Parts I and II of Schedule D of the Form, reporting a long-term gain of $432,062.63, but did not complete Parts III and IV.

Mr. Heatley turned 80 years old on October 2, 2002. (*Id.* at 7). He prepared and filed Plaintiffs' 2000 tax return without the assistance of an accountant or other tax professional (*Id.* at 40–41).

According to the government's brief,[2] the IRS:

> corrected the return for what was considered a mathematical error and computed the plaintiff's liability anew. The IRS included the capital gain of $432,062 as income and thus calculated the plaintiffs' adjusted gross income to be $484,224.63. The IRS reduced the plaintiffs' exemptions to $0, applying the phase-out provisions of 26 U.S.C. § 151(d)(3)(C). The IRS computed the plaintiffs' federal income tax liability to be $92,808.26. (Brief, at 3).

The IRS determined that the Plaintiffs owed an additional $792.18 (including $21.70 interest), which the Plaintiffs paid on September 4, 2001, along with their claim for refund. (Doc. No. 21). Thus, on August 27, 2001, the IRS took the position that the correct tax liability was $92,808.26 and the Heatleys owed an additional $792.18 (including interest).

Plaintiffs assert that due to the amount of non-capital gains income they reported in tax year 2000, they are in the 15% tax bracket and thus, the capital gain should have been taxed at a 10% rate, and not at the 20% rate applied by the IRS. Plaintiffs claim a refund of $43,206.26. While origi-

[2] Although the Brief cites to ''Ex. C'' for these assertions, the Court was unable to locate an ''Ex. C'' to either the brief or the Deposition. As such, these assertions are without record support, save for the ultimate conclusion of tax owed found in the Literal Transcript.

nally denying that Plaintiffs were due any refund, in its motion for summary judgment the government asserts, without citation to the record, that "the IRS incorrectly calculated ... the plaintiffs' liability for tax year 2000", asserted that Plaintiffs "correct tax liability for tax year 2000 is $92,806.66" and acknowledges that Plaintiffs[3] are due a refund of $1.00, plus applicable interest. (Brief at 8). Thus, on July 30, 2002, the United States took the position that the correct tax liability was $92,806.66 and Plaintiffs were due a refund of $1.00, plus interest.

In the Objection to the Report and Recommendation, the United States incorporates the Declaration of Gradey Boles (Doc. No. 30, Exhibit 1). Mr. Boles, senior reviewer employed by the IRS, prepared a Capital Gains computation with respect to income tax year 2000 for Plaintiffs. In his Declaration, Mr. Boles, under penalty of perjury, declares that "the total tax for Frank R. and Betty C. Heatley for the year 2000" is "$92,807.66". *Id.* The Capital Gains Computation attached to that Declaration, however, states that the total tax due is "92,807.63" (emphasis added). Thus, on September 30, 2002, the IRS took the position that the correct tax liability was $92,807.66 *and* $92,807.63.

In the Joint Final Pretrial Statement (Doc. No. 37), filed on October 30, 2002, the IRS takes the position that "the plaintiffs are not due any refund for tax year 2000."

In summary, the United States, while claiming that there is no genuine issue of material fact as to the amount of the Heatley's tax liability for 2000, has asserted:

DATE	TAX LIABILITY	REFUND
April 30, 2001	$ 5,629.00	$86,408.52
August 27, 2001	$92,808.26	none: $729.18 owed
July 30, 2002	$92,806.66	$1.00 plus interest
September 30, 2002	$92,807.66	none
September 30, 2002	$92,807.63	none

Summary Judgment Standard

A party is entitled to judgment as a matter of law when the party can show that there is no genuine issue as to any material fact. Fed. R. Civ. Pro. 56(c). The substantive law applicable to the case determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party bears the burden of proving that no genuine issue of material fact exists. *Id.* at 323. In determining whether the moving party has satisfied its burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. A party faced with summary judgment is obligated to come forward with extrinsic evidence which is "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" in order to avoid the entry of a summary judgment. *Hilburn v. Murata Electronics North America, Inc.* 181 F.3d 1220, 1225 (11th Cir. 1999) (internal citation omitted).

Analysis

[1] As set forth in this Court's prior analysis, the basic issue in this case is the correct interpretation of the provisions of the Internal Revenue Code dealing with the taxation of long-term capital gains for tax year 2000. This provision, charitably called "highly technical" by the government in its brief, reads:

[3] Unaccountably, the government, in making this concession, refers to the Plaintiffs as "Debtor." (Doc. No. 19 at 8).

h) Maximum capital gains rate.—

(1) In general.—If a taxpayer has a net capital gain for any taxable year, the tax imposed by this section for such taxable year shall not exceed the sum of—

(A) a tax computed at the rates and in the same manner as if this subsection had not been enacted on the greater of—

(i) taxable income reduced by the net capital gain; or
(ii) the lesser of—

(I) the amount of taxable income taxed at a rate below 28 percent; or
(II) taxable income reduced by the adjusted net capital gain;

(B) 10 percent of so much of the adjusted net capital gain (or, if less, taxable income) as does not exceed the excess (if any) of—

(i) the amount of taxable income which would (without regard to this paragraph) be taxed at a rate below 28 percent, over
(ii) the taxable income reduced by the adjusted net capital gain;

(C) 20 percent of the adjusted net capital gain (or, if less, taxable income) in excess of the amount on which a tax is determined under subparagraph (B);
(D) 25 percent of the excess (if any) of—

(i) the unrecaptured section 1250 gain (or, if less, the net capital gain), over
(ii) the excess (if any) of—

(I) the sum of the amount on which tax is determined under subparagraph (A) plus the net capital gain, over
(II) taxable income; and

(E) 28 percent of the amount of taxable income in excess of the sum of the amounts on which tax is determined under the preceding subparagraphs of this paragraph.

26 USCA § 1(h).

In somewhat plainer English, with certain exceptions not applicable here, under the Taxpayer Relief Act of 1997, any net long-term capital gain which would otherwise be taxed at 15 percent is taxed at 10 percent. Individuals in higher tax brackets pay tax at a maximum rate of 20 percent on net capital gains. *See Corpus Juris Secundum*: Internal Revenue § 115 (2002 edition). There is no question that *but for* the sale of the Disney stock, Plaintiffs would remain within the 15% tax bracket. *See* Internal Revenue Code § 1(a). There is also no question that if the monies received from the sale of the stock are credited as income to the Plaintiffs, Plaintiffs move into the 39.6% marginal tax bracket.

Plaintiffs argue that the gains should be taxed at 10%, as Plaintiffs are otherwise in the 15% tax bracket. The government contends that most of the gains should be taxed at the maximum rate of 20%, as Plaintiffs are in the higher tax bracket. Contrary to Plaintiffs' arguments, having total non-capital gain income within the 15% bracket does not allow a taxpayer to take advantage of the 10% capital gain rate for an unlimited amount of capital gains.[4]

Section 61(a) of the Code states that gross income includes "all income from whatever source derived" (unless otherwise provided), and section 61(a)(3) expressly provides that gross income includes gains derived from dealings in property. Thus, as argued by the government, one must first include the gain as income, in order to carry out the calculations applicable to the capital gains portion of total income. Though the Court agrees with this aspect of the government's argument, the

[4] Having a larger gross income also reduces or eliminates the availability of other tax advantages, such as deductions, exemptions and eligibility for various tax deferral accounts. This feature of the progressive tax system has grown considerably in complexity in recent years, well beyond applying higher marginal rates to higher income individuals. The potential unfairness created by recognizing all of a truly long term capital gain in a single year is a topic that tax theorists have debated for years. Ameliorating this effect is one justification for creating lower capital gains tax rates.

computation of Plaintiffs' actual tax liability and payment credits is not adequately supported on this record so as to allow entry of summary judgment.

Commentators have noted that the calculation of capital gains liability involves a complex series of netting and layering. *See, e.g.*, West Federal Taxation—Individual Income Taxes, Chapter 16, Doc. 5 (2001 edition) (available online at 2001 WL 423759). According to the commentators, after computing tax on ordinary taxable income using the regular tax rates, a taxpayer is to compute tax on the capital gain by calculating the portion of the 10%/20% capital gain that is taxed at 10% (available only if ordinary taxable income plus 25% and 28% capital gain layers do not put taxpayer above the 15% bracket; 10% rate is no longer available once income including the portion of the gain taxed at 10% puts taxpayer out of the 15% bracket) plus the 20% long term capital gain (remaining portion of 10%/20% capital gain.) *Id.* Translated, this means that Plaintiffs' tax liability is computed by computing the tax on their ordinary taxable income *plus* the portion of their capital gain that is taxes at 10% *up until*that amount exceeds the 15% tax bracket, plus the remaining amount of the capital gain taxed at 20%. Thus, the applicable rate is not necessarily 10% or 20%, but will be a combination of the two. Because the 10% rate for capital gains lasts only to the point where the taxpayer continues to be in the 15% tax bracket, to the extent Plaintiffs contend that the entire capital gain of $432,062 should be taxed at 10%, this contention cannot stand.

Although it is plain that Plaintiffs are not entitled to a 10% capital tax rate on the full amount of the capital gain, the government has not met its burden of proof with respect to the correct amount to be refunded to Plaintiffs. Although the IRS argues that the material facts are not disputed and computation of the correct tax is a question of law for the Court, this argument is misguided. In a refund suit, it is the function of the Court on summary judgment to review the IRS' assessment of tax liability, *not* to calculate the liability for the IRS in the first instance. Here, the IRS has taken numerous inconsistent positions as to Plaintiffs' correct tax liability, both before and after the assessment. Further, there is no evidence in the record of *how* the IRS arrived at the tax liability they ultimately imposed and plenty of record evidence that the IRS itself cannot consistently apply the "undisputed facts" to the law and arrive at a correct assessment.[5] Moreover, the government admits in its papers that the IRS miscalculated the tax liability of Plaintiffs and that Plaintiffs are owed a refund.[6] Thus, while the Court concludes that there is no genuine issue of material fact that Plaintiffs are due a refund (due to the government's apparent stipulation as to this issue), there is *still* no evidence sufficient to support a finding of the amount of that refund. Under the law, on this record, even as supplemented by the United States, summary judgment in the government's favor is not appropriate.

In so finding, the Court is cognizant of the extended proceedings already undertaken with respect to resolving this matter. The Court suggests the following course of action, should the District Court approve this Report. As admitted by the United States, and as is abundantly clear from this record, the tax code provision on Capital Gains is highly technical. As such, the Court should consider referring this matter to a Special Master, with expertise in tax matters, as is contemplated by Rule 53(b), Fed. R. Civ. P.[7] Alternatively, the matter could go to a short trial, where Plaintiffs will ultimately bear the burden of showing entitlement to a specific refund and where presumably expert testimony will be offered to assist the Court.

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[5] This is a problem not unique to the IRS. In a recent article in the Wall Street Journal, a writer took a tax situation to five different tax prepares and received five different "widely varying" results. Patrick Barta, *The Cranky Consumer: Testing the Way to Happy Returns*, The Wall Street Journal, April 9, 2002, at D3, also available on Westlaw at 2002 WL-WSJ 3391152.

[6] The United States never directly addresses this issue in its later pleadings, but seems to be reneging on this stipulation by stating in the Pretrial Statement that no refund is due. This inconsistency alone is sufficient to deny summary judgment for the Government.

[7] As this is a non-jury matter involving "matters of account and of difficult computation of damages," referral to an accountant or other Special Master with significant tax expertise is appropriate under the Rule. The Master could meet with the parties, determine if any additional information regarding Plaintiffs' finances is needed, and perform the analysis necessary to calculate their taxes and payments.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Recommended in Orlando, Florida this 25th day of November, 2002.

DAVID A. BAKER

UNITED STATES MAGISTRATE JUDGE

¶2002-5778

NICOLE ROSE CORP., formerly known as Quintron Corporation, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Second Circuit, (CA2) No. 02-4110, Dec. 13, 2002. Tax Court, (2001) 117 TC 328 (opinion by Swift, *J.*), af-firmed. Years 1992, 1993, 1994. Decision for Govt.

1. Sham transactions—business purpose; economic substance—business deductions. Tax Court properly denied aircraft equipment corp. $22 million in business expense deductions relating to complex circular transfers between com-monly controlled corps. of interests in mul-tilayered computer leases and related trusts: transactions lacked economic sub-stance. Taxpayer held no significant inter-est trusts or computer equipment; offered no valuation evidence; and whether it earned pretax profit on part of transactions was irrelevant to question of underlying leaseback's substance. *Reference:* United States Tax Reporter ¶79,007.07(10); 79,007.01(20); 1625.012(5). IRC §162.

2. Accuracy-related negligence penalties—reasonable cause. Accuracy-related negligence penalties were properly upheld against aircraft equipment corp. that engaged in complex circular sham transactions: participation of qualified advisors couldn't shelter taxpayer from penalties for blatantly obvious tax avoidance scheme. *Reference:* United States Tax Reporter ¶66,625.01(10). IRC §6662.

Robert F. Denvir, Winston & Strawn (James M. Lynch, Peter W. Poulos, David L. Theyssen, on the brief), Chicago, IL, for Appellant.

Thomas J. Sawyer, Tax Division, Department of Justice (Eileen J. O'Connor, Assistant Attorney General, Teresa E. McLaughlin, on the brief), Washington, DC, for Appellee.

United States Court of Appeals, Second Circuit,

Appeal from the United States Tax Court (Stephen J. Swift, Judge).

SUMMARY ORDER

PRESENT: Hon. JOHN M. WALKER, Jr., Chief Judge, Hon. JAMES L. OAKES, and Hon. RICHARD J. CARDAMONE, Circuit Judges.

This case was not selected for publication in the Federal Reporter.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Second Circuit Rules § 0.23. (FIND CTA2 § 0.23.)

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of December, two thousand and two.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be and it hereby is AFFIRMED.

Petitioner-appellant Nicole Rose Corp.[1] (Rose) appeals from the December 28, 2001 decision of the Tax Court finding deficiencies of $1,171,365, $684,700, and $4,559,237 for 1992, 1993, and 1994, respectively and imposing penalties totaling $1,283,060, pursuant to 26 U.S.C. § 6662(a). On appeal, Rose argues that the tax court erred because it disregarded the real economic effects of the transfer of lease interests and the pretax profit earned by Rose through the disputed transactions. We affirm.[2]

The dispute between the Commissioner of Internal Revenue (Commissioner) and Rose concerns approximately $22 million in claimed business expense deductions. Rose maintains that the business expenses arose from the transfer of Rose's interest in certain leases of European computer equipment. The leases originated when Brussels Airport purchased computer equipment from ABN, a commercial Dutch Bank, and then leased the equipment back to ABN for a term extending from 1990 until December 31, 1997. The Brussels Airport financed this purchase with a loan from Pierson, Heldring & Pierson, N.V. (Pierson), a subsidiary of ABN. Rather than pay Brussels Airport under the leaseback, ABN paid Pierson directly. In 1991, ABN assigned its interest under the lease to Atrium Finis (Atrium), a British firm; Atrium then subleased the equipment back to ABN for three years with the option to extend the leaseback for an additional four years. ABN prepaid to Atrium approximately $25 million, 90 percent of the amount due over the six-year term of the original Brussels Airport lease. This $25 million was placed in a trust fund to secure Pierson's right to repayment on its loan to Brussels Airport. Pierson, not Atrium, was both beneficiary and trustee of the trust fund and had no recourse against Atrium for payments on the loan to Brussels Airport. Atrium was required to make additional payments of approximately $1.6 million to cover the remaining ten percent due on the Brussels lease.

In September of 1993, Rose's director, Douglas Wolf, assisted in the renegotiation of some of the terms of the payments due under the Atrium-ABN leaseback. In particular, the additional $1.6 million owed by Atrium to Pierson was reduced to $400,000 and ABN agreed to continue subleasing from Atrium the equipment for the four-year renewal period of the sublease. The parties restructured ABN's lease payments during the renewal period in a residual value certificate (RVC) under which ABN would pay Atrium on November 30, 1996 and November 30, 1998, 200 percent of the equipment's fair market value in excess of $5 million on the first date and in excess of $2 million on the second date. The tax court found that no credible effort was made to establish whether the base amounts were reasonable and whether the RVC had any foreseeable value.

On September 30, 1993, Atrium transferred to Rose its rights and obligations relating to the underlying Brussels leaseback, the Atrium sublease, the trust fund, and the RVC. Rose immediately transferred the first three of these interests to Wildervank, a Dutch bank, along with $400,000 in cash and ten shares of stock in Cove Enterprises, Inc., an unrelated corporation. Rose retained its interest in the RVC but never tried to determine the value of the leased equipment.

Rose claimed a loss of approximately $22 million on the transaction with Wildervank. This loss was based on the transfer of the $400,000 in cash, a $2,118,644 capital loss from the transfer of

[1] We refer to Petitioner Nicole Rose Corp. by its current name throughout, including in connection with transactions that were conducted under its prior names, QTN Acquisitions and Quintron.

[2] Our decision on this appeal originally appeared in an unpublished summary order, issued on December 13, 2002. The government subsequently moved to have the decision published. Because we are persuaded that this decision may have some precedential value, we grant the motion and publish our disposition.

the Cove stock, and an ordinary business expense of $21,840,660 from the transfer of Brussels Lease and the Trust Fund.

Rose applied the claimed $22 million business deduction to income generated through Rose's purchase of Quintron Corp., a Virginia corporation, and the sale of substantially all of Quintron's assets. In September 1993, Rose had purchased all the shares of Quintron, merged into Quintron, and immediately sold Quintron's assets to Loral Aerospace Corp., generating $11 million in income. Rose then used the claimed $22 million deduction from the lease transfer to offset this $11 million in income, resulting in no tax, and also carried back the remaining loss to Quintron's 1992 and 1993 tax years, thereby offsetting Quintron's income from those years and generating tax refunds of $1,172,448 and $684,705, respectively.

The tax court determined that Rose entered into the lease sale transaction with Atrium solely for the purpose of tax avoidance and that the transaction lacked economic substance, and, therefore, was without effect for Federal income tax purposes. A transaction is a sham "if it is fictitious or if it has no business purpose or economic effect other than the creation of tax deductions." DeMartino v. Commissioner, 862 F.2d 400, 406 [63 AFTR 2d 89-327] (2d Cir.1988); see also Gilman v. Commissioner, 933 F.2d 143, 147 [67 AFTR 2d 91-1016] (2d Cir.1991).

[1] Rose contends that the tax court erred because the lease transfer to Wildervank resulted in a change in Rose's assets and legal obligations and therefore had real economic effects. In particular, Rose argues that the transaction terminated its obligations under the lease and entitled it to the possibility of a future payment under the RVC. The tax court found, however, that, based on the testimony of the Commissioner's expert, Rose "had no legitimate interest of value in the Trust Fund and no legitimate obligations associated therewith." Whether a transaction lacks economic substance is a question of fact that we review under the clearly erroneous standard. See Lee v. Commissioner, 155 F.3d 584, 586 [82 AFTR 2d 98-6110] (2d Cir.1998).

We cannot say that the tax court's finding that the transaction lacked economic substance was clearly erroneous. Because the trust fund was controlled by and was for the benefit of Pierson, Rose did not have a significant interest in the contents of the fund. Nor did Rose have a significant interest in the computer equipment sublease, which it had immediately leased back to ABN for the duration of the sublease. Finally, testimony before the tax court showed that the parties lacked information on the value of the computer equipment and made no attempt to value the equipment on the RVC payment dates.

Rose's second argument on appeal is that there was economic substance because Rose earned a pre-tax profit on the transaction "which included the Quintron stock purchase and asset sale and the transfer of the lease interests and cash to Wildervank." This argument is meritless. The relevant inquiry is whether the transaction that generated the claimed deductions--the lease transfer--had economic substance. Income generated through the Quintron purchase and asset sale is irrelevant to this inquiry. We therefore affirm the tax court's decision rejecting the claimed $22 million tax deductions.

[2] Finally, Rose argues that the tax court erred in imposing accuracy-related penalties under 26 U.S.C. §6662 because Rose had reasonably relied on qualified advisors concerning an issue of first impression. The tax court rejected this argument below finding that the scheme was so clear and obvious that the participation of professionals could not shelter Rose from the penalties. We review the tax court's finding for clear error. Goldman v. Commissioner, 39 F.3d 402, 406 [74 AFTR 2d 94-6923] (2d Cir.1994). We agree that Rose's scheme was sufficiently blatant that the participation of experts cannot convert its actions into a "reasonable attempt to comply with the provisions" of the tax code. 26 U.S.C. 6662(c). We therefore affirm the imposition of penalties.

For the reasons set forth above, the judgment of the tax court is hereby AFFIRMED.

¶2002-5779

Elihu FIER, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Second Circuit, (CA2) No. 02-6093, Dec. 16, 2002. District Court, (2002, DC NY) 89 AFTR 2d 2002-1649, 2002-1 USTC ¶50355, affirmed. Years 1981, 1982. Decision against Taxpayer.

1. Limitations periods on refunds and credits—payments vs. deposits—proof. District court's jurisdictional dismissal of pro se taxpayer's refund complaint was affirmed, based on court's findings regarding limitations period's expiration and payment vs. deposit character of taxpayer's remittance to IRS. *Reference:* United States Tax Reporter ¶65,115.04(70); 64,015.02(5); 65,115.07(20); 74,225.01(20); 74,336.504(33). IRC §6401; 6511; 7422.

Elihu Fier, Boca Raton, FL, for Appellant, pro se.
Rebecca Martin, Assistant United States Attorney for the Southern District of New York, New York, NY, for Appellee.

United States Court of Appeals, Second Circuit,

Appeal from the United States District Court for the Southern District of New York (John G. Koeltl, Judge).,

SUMMARY ORDER

PRESENT: Honorable FRED I. PARKER, Honorable CHESTER J. STRAUB, and Honorable BARRINGTON D. PARKER, Jr., Circuit Judges.

This case was not selected for publication in the Federal Reporter.

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Second Circuit Rules § 0.23. (FIND CTA2 § 0.23.)

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 16th day of December, Two Thousand and Two.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the decision of said district court be and it hereby is AFFIRMED.

[1] Plaintiff-appellant Elihu Fier, acting pro se, appeals from the March 21, 2002 order of the United States District Court for the Southern District of New York (John G. Koeltl, Judge), granting defendant-appellee the United States of America's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction. On appeal, Fier challenged the district court's ability to find facts in the context of a 12(b)(1) motion and asserted that contrary to the district court's finding, his disbursement to the Internal Revenue Service, which matched his tax liability to the penny, was a deposit, rather than a payment of that liability. He further asserted that the statute of limitations had not yet run prior to his filing his action.

When considering a motion pursuant to Federal Rule of Civil Procedure 12(b)(1), district courts may make findings of fact.

See Rent Stabilization Ass'n v. Dinkins, 5 F.3d 591, 594 (2d Cir.1993). We review district court decisions "to dismiss an action for want of subject matter jurisdiction on a Rule 12(b)(1) motion for clear error with respect to factual findings and de novo with respect to legal conclusions." Virtual Countries, Inc. v. Republic of S. Afr., 300 F.3d 230, 235 (2d Cir.2002). We find no error here, clear or otherwise.

The judgment of the district court is AFFIRMED for substantially the same reasons stated by the district court; further, the government's motion to strike part of the joint appendix is denied as moot.

¶2002-5780

Riad Elsoh HAMAD, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Fifth Circuit, (CA5) No. 02-60390, Nov. 26, 2002. Tax Court affirmed. Decision against Taxpayer.

1. Review of Tax Court decision—abandonment of appeal. Tax Court decision against taxpayer was affirmed: taxpayer abandoned his appellate challenge to Court's entry of decision after he'd filed amended return where he didn't cite authority for his position. *Reference:* United States Tax Reporter ¶74,825.04(35). IRC §7482.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT,

Appeal from the Decision of the United States Tax Court (7748-01)

Before JONES, STEWART, and DENNIS, Circuit Judges.

EDITH H. JONES, Circuit Judge:*

[1] The appellant challenges the validity of the U.S. Tax Court's decision entered after the appellant filed an amended tax return. Because the appellant does not cite any authority in support of his position, this Court considers the challenge abandoned for being inadequately briefed. L&A Contracting Co. v. S. Concrete Servs., Inc., 17 F.3d 106, 113 (5th Cir. 1994); F.R.A.P. 28(a)(9)(A).

AFFIRMED

¶2002-5781

Robert STOKEY and Robert Stokey II, PLAINTIFFS v. CHINA SEA RESTAURANT, INC., ET AL., DEFENDANTS. U.S. District Court, Southern Dist. of Florida, (DC FL) CASE NO. 01-10089-CIV-KING, Nov. 14, 2002. Years 1999, 2002. Decision for Govt.

1. Action for wrongful levy—tax liens—priority of competing claims—security interests. Govt. was granted summary judgment on 3d parties' wrongful levy claim: federal tax lien for taxpayer's employment tax debts was superior to 3d parties' security interest in taxpayer's levied liquor license where tax liens were properly filed under Florida law and perfected before license had been transferred to 3d parties. *Reference:* United States Tax Reporter ¶63,215.04(135); 74,265.01(7). IRC §6321; 7426.

Deborah M. Morris Trial Attorney, Tax Division US Department of Justice PO Box 14198, Ben Franklin Station Washington, DC 20044
Nicholas W. Mulick, Esq. Hershoff, Lupino, & Mulick, LLP 90130 Old Highway Tavernier, FL 33070

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION,

ORDER GRANTING THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT

JAMES LAWRENCE KING U.S. DISTRICT JUDGE SOUTHERN DISTRICT OF FLORIDA

THIS CAUSE comes before the Court upon the United States' Motion for Summary Judgment filed on September 12,

* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

2002. Plaintiffs have not filed a Response, and the time to do so has passed.

I. BACKGROUND

On August 28, 1997, Steven R. Moshy (''Moshy'') and Debra S. Burrows (''Burrows'') executed a Balloon Promissory Note, Lease Agreement, Memorandum of Lease, Security Agreement or Chattel Mortgage, a Pledge Agreement, and an Indemnity Agreement in favor of the Plaintiffs related to the sale of China Sea Restaurant, Inc. (''China Sea''). These documents pledged collateral, including Alcoholic Beverage License 54-00098 5COP (''the license''), issued by the Flor-ida Department of Business and Profes-sional Regulation, Division of Alcoholic Beverages and Tobacco (''DABT''). On September 26, 1997, the Stokeys recorded their interest in the license with the DABT.

Beginning in 1999, China Sea failed to pay its Federal employment taxes. On October 26, 2000, a Notice of Federal Tax Lien (''NFTL'') was filed with the Florida Secretary of State for the 1999 liabilities in the amount of $47,742.22. NFTLs covering the 2002 liabilities were filed on March 9, 2001, and March 30, 2001, in the amounts of $30,106.36 and $26,386.97 respectively.

On February 16, 2001, the Stokeys reacquired ownership of the collateral, in lieu of foreclosure, from Moshy, Burrows, and China Sea, which granted the Stokeys title to the personal property of China Sea, including the interest in the license. On March 22, 2001, the IRS issued a levy for China Sea's 1999 liabilities. A Notice of Levy was served upon the Stokeys on that date. On March 26, 2001, the IRS seized the license. On September 18, 2001, the IRS released the levy, and issued another levy on that same date for approximately $122,000.00, which included China Sea's 1999 and 2000 liabilities. On September 19, 2001, the IRS re-seized the license.

II. STANDARD OF REVIEW

Summary judgment is appropriate only where it is shown that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If the record as a whole could not lead a rational fact-finder to find for the non-moving party, there is no genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). On a motion for summary judgment, the court must view the evidence and resolve all inferences in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). There is no requirement that the trial judge make findings of fact. Id., at 251.

The moving party bears the burden of pointing to that part of the record which shows the absence of a genuine issue of material fact. If the movant meets its burden, the burden then shifts to the non-moving party to establish that a genuine dispute of material fact exists. See Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 918 (11th Cir. 1993). To meet this burden, the non-moving party must go beyond the pleadings and ''come forward with significant, probative evidence demonstrating the existence of a triable issue of fact.'' Chanel, Inc. v. Italian Activewear of Florida, Inc., 931 F.2d 1472, 1477 (11th Cir. 1991). If the evidence relied on is such that a reasonable jury could return a verdict in favor of the non-moving party, then the court should refuse to grant summary judgment. Hairston, 9 F.3d at 919. However, a mere scintilla of evidence in support of the non-moving party's position is insufficient to defeat a motion for summary judgment. Anderson, 477 U.S. at 252. If the evidence is merely colorable or is not significantly probative, summary judgment is proper. See id. at 249–50.

III. ANALYSIS

[1] In a wrongful levy suit, the initial burden is upon the plaintiff to show that he holds title or some other ownership interest in the property at issue. Morris v. United States, 813 F.2d 343, 345 [59 AFTR 2d 87-919] (11th Cir. 1987). The burden then shifts to the United States to establish a nexus between the taxpayer and the property by substantial evidence. Id. However, the plaintiff retains the final obligation of

persuading the Court that the levy should be overturned. Id.

Pursuant to 26 U.S.C. § 6321, if a person fails to pay their tax liabilities after demand, a lien arises in favor of the United States on all property and rights to property of that person. The lien imposed by § 6321 arises on the date of assessment. 26 U.S.C. § 6322. This statutory lien is not valid against certain parties, as provided in § 6323(a), until notice of the tax lien has been filed pursuant to § 6323(f).[1]

Plaintiffs argue that the United States was required to file its notice of federal tax lien with the DABT pursuant to Fla. Stat. § 561.65. However, § 561.65 is not applicable. Instead, § 703.901 governs the filing of the notice of federal tax lien, and it stipulates, in pertinent part, that:

> (c) Notices of federal liens upon personal property, whether tangible or intangible, for obligations payable to the United States, and certificates and notices affecting the liens, shall be filed as follows:
>
> 1. If the person against whose interest the lien applies is a corporation or a partnership whose principle executive offices is in this state ... in the office of the Secretary of State.

Therefore, because the United States filed three Notices of Federal Tax Lien on October 26, 2000, March 9, 2001, and March 30, 2001, with the Secretary of State, the federal tax liens were perfected on those dates. The filing with the Secretary of State on October 26, 2000, preceded any transfer of ownership of the liquor license to the Stokeys, and the liquor license was clearly encumbered by the first NFTL at the time of the transfer. The transfer of property subsequent to the attachment of a federal tax lien does not affect the lien, which remains on the property in the hands of the transferee. United States v. Bess, 357 U.S. 51, 57 [1 AFTR 2d 1904] (1958). Therefore, the United States' interest in the liquor license is superior to the interest of the Stokeys.

IV. CONCLUSION

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that the United States' Motion for Summary Judgment be, and the same is hereby, GRANTED.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 14th day of November, 2002.

JAMES LAWRENCE KING

U.S. DISTRICT JUDGE

SOUTHERN DISTRICT OF FLORIDA

ORDER OF FINAL JUDGMENT

Pursuant to Fed.R.Civ.P. 58 and the Court's Order Granting the United States' Motion for Summary Judgment, it is

ORDERED and ADJUDGED that judgment is entered in favor of the United States and against Plaintiffs Robert Stokey and Robert Stokey II. The case, namely the entire Complaint, is dismissed with prejudice. This case is CLOSED. The Court retains jurisdiction of the above-styled action to determine fees, costs, and expenses incurred by the United States in defending this action. It is further

ORDERED and ADJUDGED that any pending motions are DENIED as moot.

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States Courthouse, Miami, Florida, this 14th day of November, 2002.

JAMES LAWRENCE KING

U.S. DISTRICT JUDGE

SOUTHERN DISTRICT OF FLORIDA

[1] Section 6323(f) provides that the notice shall be filed "[i]n the case of personal property, whether tangible or intangible, in one office within the State ... as designated by the laws of such State, in which the property subject to the lien is situated ...." 26 U.S.C. § 6323(f)(1)(A)(ii).

¶2002-5782

In Re: Jeffrey Randall BREEDEN, Debtor. U.S. Bankruptcy Court, Western Dist. of Virginia, (Bktcy Ct VA) CASE NO. 00-02186-WA4-7, Nov. 25, 2002. Decision for Govt.

1. Tax claims in bankruptcy—objection to proof of claim—dismissal. Chap. 11 debtor's objection to IRS's proof of claim was dismissed for failure to appear at scheduled hearing. *Reference:* United States Tax Reporter ¶68,726.51(10).

IN THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF VIRGINIA LYNCHBURG DIVISION,

ORDER DISMISSING DEBTOR'S OBJECTION TO PROOF OF CLAIM OF INTERNAL REVENUE SERVICE

CHAPTER 11

[1] Before the Court is the debtor's Objection to the claim of the Internal Revenue Service. Since neither debtor nor any representative of debtor appeared at the scheduled hearing on the objection, it is hereby

ORDERED that the debtor's Objection to the claim of the Internal Revenue Service is DISMISSED.

Date: NOV 25 2002

UNITED STATES BANKRUPTCY JUDGE

¶2002-5783

UNITED STATES OF AMERICA, PLAINTIFF v. Beckham S. PRATHER, JR., ET AL., DEFENDANTS. U.S. District Court, Southern Dist. of Ohio, (DC OH) Case No. C-1-00-982, Nov. 19, 2002. District Court, (2002, DC OH) 90 AFTR 2d 2002-7221, adopted. Years 1988, 1989, 1990, 1991, 1992, 1993. Decision for Govt.

1. Collection actions—reducing assessments to judgment—foreclosure—property held by third parties—nominees; alter ego—summary judgment. Magistrate judge's recommendation granting govt. summary judgment reducing liens for unpaid taxes to judgment was adopted: taxpayer didn't raise specific objection to magistrate judge's report and recommendation, so failed to identify issue that court should give de novo consideration. *Reference:* United States Tax Reporter ¶74,035.01(25); 74,035.03(80); 63,215.02(115). IRC §6321; 7403.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION,

JUDGMENT IN A CIVIL CASE

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE [DOC. 40] IS ADOPTED IN TOTO.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [DOC. 26] IS GRANTED.

THE LIENS FOR UNPAID TAXES FOR THE YEARS 1988 TO 1993 FILED WITH THE COUNTY RECORDERS IN BROWN AND CLERMONT COUNTIES, OHIO, AND MADE A PART OF THE RECORD IN THIS ACTION ARE REDUCED TO JUDGMENT AND THIS CASE IS CLOSED PURSUANT TO ORDER OF THE COURT [DOC. 45].

NOVEMBER 19, 2002

Date

KENNETH J. MURPHY

Clerk

/s/

(By) Deputy Clerk

Order Adopting Report and Recommendation

Sandra S. Beckwith United States District Judge

[1] This matter is before the Court on Defendant Prather's ''objection'' to the Report and Recommendation entered on October 17, 2002, by United States Magistrate Judge Timothy S. Hogan. In the Report and Recommendation, the Magistrate Judge set forth his recommendation that Plaintiff's motion for summary judgment be GRANTED. While Defendant Prather has filed a document styled ''Objection'' in response to the Report and Recommendation, he has not raised a specific objection to any part of the Report and Recommendation. Accordingly, he has failed to identify any issue to which the Court must give de novo consideration. See F. R. Civ. P. 72(b).

In any event, the Court concurs with the Magistrate Judge's Report and Recommendation, and hereby ADOPTS it in toto. Plaintiff's motion for summary judgment (Doc. 26) is hereby GRANTED. The liens for unpaid taxes for the years 1988 to 1993 filed with the County Recorders in Brown and Clermont Counties, Ohio, and made a part of the record in this action are reduced to judgment.[1]

IT IS SO ORDERED.

Sandra S. Beckwith

United States District Judge

¶2002-5784

EMERALD INTERNATIONAL CORPORATION, PLAINTIFF v. THE UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 01-258T, Dec. 13, 2002. Years 1995, 1996, 1997, 1998. Decision for Govt.

1. Coal excise taxes—constitutionality; exports—refunds—standing. Domestic coal broker/purchaser's complaint for recovery of coal excise taxes included in cost of coal it purchased for export was denied: purchaser lacked standing under Export Clause and Tucker Act since its tax injury wasn't caused by govt.'s tax imposition on 3d-party producers but merely by producers' independent decision to pass that tax burden on to purchaser. Also, IRC §6416 foreclosed ''inevitable pass-on'' argument; and Anti-Assignment doctrine didn't apply. Similarly, unconstitutional takings and illegal exaction claims weren't available absent any proof producers were acting as govt.'s agents or directed by it to collect tax from purchaser; implied contract claim was rejected; and equitable relief wasn't available. *Reference:* USTR Excise Taxes ¶41,215.01(25); 41,215.01(30); 42,215.04(47); 64,165.01(20). IRC §4121; 4221; 6416.

Lev K. Martyniuk, Crescent Springs, Kentucky, for the plaintiff.
Robert C. Stoddart, U.S. Department of Justice, Washington, D.C., with whom was *Mildred L. Seidman*, U.S. Department of Justice, for the defendant.

U.S. Court of Federal Claims,

OPINION

ALLEGRA, Judge:

Summary Judgment; Suit by coal purchaser seeking monetary relief on account of the alleged unconstitutional application of the Black Lung Excise Tax; Suit under *Cyprus Amax*seeking damages under Export Clause of the Constitution; Lack of standing; Takings claim; *Commonwealth Edison*; *Casa de Cambio*; Illegal exaction; Implied contract.

Plaintiff is a domestic coal broker that purchased millions of tons of coals during the years in suit. The price it paid for that coal included the cost of the coal excise tax imposed on coal producers under 26 U.S.C. § 4121(a), often reflected as a separate line item on its bill. Much of this coal was to be resold to foreign purchasers at or near the time of these purchases. Plaintiff brings this suit to recover the amounts it paid on account of the excise tax, asserting

[1] The United States' motion to correct two clerical errors in the September 26, 2002, Order of Magistrate Judge Hogan (Doc. 39) is GRANTED, and that Order is deemed amended as requested.

that the imposition thereof on its coal violated the Export Clause of the Constitution, art. I, § 9, cl. 5. The case is before the court on defendant's motion for summary judgment, in which defendant asserts, *inter alia*, that plaintiff lacks standing to sue. For the reasons that follow, the court GRANTS this motion.

I. Facts

Emerald International Corporation (Emerald or plaintiff), an Ohio corporation, is a seller and exporter of coal. From January 1, 1995, through March 31, 1998, Emerald purchased coal from vendors within the United States and then exported it to customers in Europe, South America, Asia, and Africa. According to plaintiff, ninety-five percent of this coal had a foreign customer identified at the time of its purchase: either there was a foreign buyer already contracted to buy the coal, Emerald was in contract negotiations with one or more foreign purchasers for the sale, or Emerald had identified potential purchasers among the coal companies with whom it had prior dealings. Plaintiff further alleges that, in many instances, the coal exported by it was shipped directly from barge to vessel without passing through an export staging area, and in the remaining instances, the purchased coal was shipped to a deep-water export terminal as part of an industry practice necessary for physically loading it onto an ocean vessel.[1]

Plaintiff seeks to recover an amount corresponding to excise taxes it allegedly paid on the exported coal under the Black Lung Excise Tax, 26 U.S.C. § 4121 (the Coal Tax). Emerald did not itself produce any of the subject coal and never paid any Coal Tax thereon directly to the United States. Nonetheless, it alleges that it bore the economic burden of the tax when the domestic producers from which it purchased the coal included the Coal Tax in the sale price, often as a separate line item, and then remitted the amounts collected from Emerald to the IRS. For its part, Emerald asserts that it did not regularly pass this tax on to its consumers.

To declare and remit the Coal Tax, an excise tax return must be prepared and filed quarterly with respect to sales made during that period. Emerald did not file any such returns for any of the relevant periods. However, it filed two claims for refund with the IRS, seeking the return of Coal Taxes allegedly paid: The first claim was filed on or about January 31, 2001, for the fourth quarter of 1997 and in the amount of $334,849.10; this claim was denied by the IRS on or about April 9, 2001. The second was filed on or about April 30, 2001, for the first quarter of 1998, in the amount of $300,970.45; it was denied on or about July 12, 2001. Emerald apparently did not file refund claims for any of the other taxes at issue here.

On April 30, 2001, Emerald filed a complaint with this court in which it avers that: (i) the Coal Tax imposed on the transactions in question violated the Export Clause; (ii) the imposition of the tax effectuated a taking under the Takings Clause of the Fifth Amendment; and (iii) the government's retention of the taxes violates an implied contract to return funds collected unconstitutionally. Emerald requests the return of the tax payments collected on account of its export sales made between January 1, 1995, and March 31, 1998, together with interest. Additionally, plaintiff seeks recovery of its costs, expenses, and attorney's fees, as well as a declaration that the Coal Tax is unconstitutional as applied to Emerald's export sales.

On February 1, 2002, defendant filed a motion for summary judgment. Following briefing, oral argument on this motion was held August 22, 2002.

II. Discussion

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. RCFC 56; *Hunt*

[1] While the parties generally agree upon the facts in this case, they disagree as to the process by which the coal was exported and entered the stream of export. For example, defendant insists that Emerald purchased the coal on its own account then sold it, pointing to a joint status report in which Emerald stated that it purchased coal for its own account, negotiated written agreements for the exportation of the coal, and accepted the financial risks of not being able to sell the coal. For the reasons discussed below, these factual issues prove immaterial to this court's decision.

v. Cromartie, 526 U.S. 541, 549 (1999); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The court must determine whether the evidence presents a disagreement sufficient to require submission to fact-finding, or whether the issues presented are so one-sided that one party must prevail as a matter of law. *Anderson*, 477 U.S. at 250–52.

Plaintiff asserts four theories for recovery here: a damages claim based upon the money-mandating language of the Export Clause; a takings claim arising under the Fifth Amendment; an illegal exaction claim; and, finally, a claim based upon an implied contract. The court will review *seriatim* the viability of each of these potential paths to recovery.

A. Suit for Damages under the Tucker Act

[1] Plaintiff first asserts that it is entitled to damages stemming from its payment of an excise tax whose imposition was unconstitutional under the Export Clause of the Constitution, art. I, § 9, cl. 5. In so arguing, plaintiff invokes *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 [85 AFTR 2d 2000-1151] (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001), in which the Federal Circuit held that this court had jurisdiction under the Tucker Act, 28 U.S.C. § 1491 over such a suit.[2] For its part, defendant agrees that the Coal Tax is unconstitutional when imposed on exported coal,[3] but disagrees that the coal at issue was in the stream of export at the time the tax was imposed, so as to render the Coal Tax, as imposed here, unconstitutional. More fundamentally, defendant asserts that plaintiff lacks standing to raise its damages claim and that, at all events, its assertions fail to state a claim under RCFC 12(b)(6).

Though its mere mention strikes trepidation in the stoutest judicial heart, "standing" is a threshold issue in every case, involving whether the court has the power to entertain the suit. "Fundamentally," the Federal Circuit has stated, "the question of standing involves the determination of whether a particular litigant is entitled to invoke the jurisdiction of a federal court to decide the merits of a dispute or of particular issues." *McKinney v. U.S. Dept. of Treasury*, 799 F.2d 1544, 1549 (Fed. Cir. 1986); *see also Warth v. Seldin*, 422 U.S. 490, 498 (1975). This inquiry focuses not on the merits of the issue raised, but on the "qualifications and status of the party seeking to bring [its] complaint before a federal court." *McKinney*, 799 F.2d at 1549; *see also Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 [38 AFTR 2d 76-5027] (1976). It reflects both constitutional or statutory limitations on federal court jurisdiction, as well as prudential reservations on its exercise. *Warth*, 422 U.S. at 498.[4] The United States Court of Federal Claims, though an Article I court, 28 U.S.C. § 171, applies the same standing requirements enforced by other Federal courts. *See Glass v. United States*, 258 F.3d 1349, 1355–56 (Fed. Cir. 2001); *Landmark Land Co. v. United States*, 256 F.3d 1365, 1380 (Fed. Cir. 2001); *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1290 (Fed. Cir. 1999); *CW Government Travel, Inc. v. United States*, 46 Fed. Cl. 554, 557–58 (2000); *American Maritime Transport, Inc.*

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[2] To invoke jurisdiction under the Tucker Act, a party must point to a complementary substantive right found in another source of federal law, such as the Constitution, federal statutes, or executive regulations. *See Mitchell v. United States*, 463 U.S. 206, 216 (1983). That substantive right must be fairly interpreted as mandating compensation by the Federal Government for the damages sustained. *Id.* at 216–17. Defendant contends that *Cyprus Amax*, *supra*, did not find that the Export Clause is such a "money-mandating" provision that would support the filing of a suit for damages under the Tucker Act, 28 U.S.C. § 1491. This court recently rejected an identical claim in *Usibelli Coal Mine v. United States*, 2002 WL 31505903 [90 AFTR 2d 2002-7305] (Fed. Cl. Nov. 8, 2002). There, after extensively reviewing the opinion in *Cyprus Amax*, this court found that the Federal Circuit "viewed the Export Clause as a money-mandating provision that authorized the award of money damages, thereby allowing a claimant to file an action based directly on that clause." *Id.* at 6.

[3] *See* I.R.S. Notice 2000-28, 2000-21 I.R.B. 1116 (May 22, 2000) (citing *United States v. Int'l Bus. Machines, Corp.*, 517 U.S. 843 [77 AFTR 2d 96-2412] (1996) and *Ranger Fuel Corp. v. United States*, 33 F. Supp. 2d 466 [83 AFTR 2d 99-375] (E.D. Va. 1998)).

[4] The court must first determine that the litigant satisfies the core standing requirements to assure itself that it has the judicial power to address the litigant's claims. *Simon*, 426 U.S. at 39. Then, it must determine whether any prudential limitations restrain the court from exercising that power. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475–76 (1982); *Gladstone Realtors, et al. v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

v. United States, 18 Cl. Ct. 283, 290–91 (1989).[5]

The basic calculus of constitutional standing requires an injury in fact caused by the defendant and redressable by the court. Thus, a party bringing a constitutional challenge must demonstrate that it "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone*, 441 U.S. at 99, that the injury "fairly can be traced to the challenged action" and is "likely to be redressed by a favorable decision." *Simon*, 426 U.S. at 38, 41; *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998); *Allen v. Wright*, 468 U.S. 737, 751 [54 AFTR 2d 84-5361] (1984); *First Hartford*, 194 F.3d at 1290; *McKinney*, 799 F.2d at 1550. "This triad of injury in fact, causation, and redressability," the Supreme Court recently illuminated, "comprises the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel*, 523 U.S. 103–04. Plaintiff bears the burden of meeting these requirements, which in the context of a summary judgment motion, requires it to "set forth" by affidavit or other evidence "specific facts" in support of standing, rather than "mere allegations." RCFC 56(e); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990).

Applying this tripartite test, the decisive factor here appears to be causation - whether any economic injury experienced by plaintiff was "fairly traced" to the imposition of the Coal Tax. In describing this causation requirement, the Supreme Court has often differentiated between direct and indirect harms, with obstacles to standing arising "when a person is harmed indirectly by government action that directly involves someone else." Michael Asimow, Arthur Earl Bonfield, & Ronald M. Levin, State and Federal Administrative Law 648 (2d ed. 1998). Thus, for example, in *Lujan*, the Court opined:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction and perhaps on the response of others as well.'

504 U.S. at 561–62 (emphasis in original). The Court further observed that 'when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish.' *Id.* at 562 (quoting *Allen*, 468 U.S. at 758); *see also* Cass R. Sunstein, 'What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III,' 91 Mich. L. Rev. 163, 200 (1992).

As will be discussed further below, the instant case involves indirect harm. Nonetheless, in *Lujan* and elsewhere, the Supreme Court has recognized that the injury to a plaintiff may be the consequence of

[5] Although well established in the case law, it might seem odd, at first blush, that a constitutional doctrine ingrained in Article III of the Constitution would be applied to an Article I court. Several reasons, however, militate in favor of such an application. First, the Supreme Court has indicated that Article I courts, like their Article III counterparts, exercise the judicial power of the United States. *See, e.g., Freytag v. Commissioner*, 501 U.S. 868, 889 [68 AFTR 2d 91-5025] (1991). Second, the statute empowering this court to enter final judgments specifically refers to "case or controversy," 28 U.S.C. § 2519, thereby appearing to invoke the Article III requirements. *See CW Government Travel*, 46 Fed. Cl. at 557–58. Finally, Congress has specified that judgments of this court are reviewable by the Court of Appeals for the Federal Circuit and, ultimately, the Supreme Court, both Article III tribunals that would be unable to perform such review absent a justiciable case or controversy. *See American Maritime Transport*, 18 Cl. Ct. at 291; *Welsh v. United States*, 2 Cl. Ct. 417, 420–21 [52 AFTR 2d 83-5113] (1983). At all events, if not constitutionally mandated, application of the standing doctrine would still be appropriate on prudential grounds, unless jurisdiction granted by Congress required otherwise. *See, e.g., Zevalkink v. Brown*, 102 F.3d 1236, 1243 (Fed. Cir. 1996).

government action affecting the acts or decisions of a third party which, in turn, cause injury to the plaintiff. Many of the Court's authorities on this point were construed in *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920 (Fed. Cir. 1991), which involved economic injuries similar to those alleged here. In that case, individual farmers, animal husbandry groups and animal protection organizations filed suit challenging a rule promulgated by the Commissioner of the Patent and Trademark Office stating that nonnaturally occurring, man-made living microorganisms, including animals, are patentable subject matter. The farmers and animal husbandry groups alleged, *inter alia*, that the new rule would increase their cost of operations by forcing them to pay royalties to purchase patented, genetically altered animals, thereby decreasing their profits. The district court dismissed the case for failure to state a claim, 710 F. Supp. 728 (N.D. Cal. 1989), thereby obliging the Federal Circuit, on appeal, to assume that the injuries asserted in the complaint were true, which assumption, in turn, satisfied the injury-in-fact requirement of the standing doctrine.

Focusing on causation, however, the court held that the identified economic injuries could not be attributed to the Commissioner's allegedly unlawful issuance of patents. In so concluding, the Federal Circuit considered a number of the Supreme Court decisions previously cited herein, among them *Allen, supra*, *Simon, supra*, and *Warth, supra*. Of these, the court identified *Simon* as best-exemplifying the Court's approach to such cases, observing that in that case, the Supreme Court -

> found plaintiffs without standing because the injury depended upon independent actions of third parties, not before the court, which were speculative, that is, not controlled by the government action. Under such circumstances, the injury is not ''fairly traceable'' to the government's action. As stated in *Simon*, 426 U.S. at 41–42, ... ''[A] federal court act[s] only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.''

932 F.2d at 932–33.[6] As to the plaintiffs' claim that the Commissioner's actions would necessarily increase their costs, the court found that the ''farmers cannot be forced to purchase improved animals and pay the premium (*i.e.*, 'royalty') which the farmers say is likely to be asked.'' 932 F.2d at 934. Moreover, the court found ''at best speculative'' the notion that the costs of their operations would necessarily increase by reason of the payment of any royalties, finding instead that the farmer's costs would be impacted by market factors unrelated to defendant's conduct. *Id.* It concluded that, ''following the Supreme Court's reasoning in *Simon*, we conclude that the alleged economic injuries of individual farmers and farm organizations are not 'fairly traceable' to the allegedly erroneous interpretation of the statute by the Commissioner.'' 932 F.2d at 936.[7]

Now one might argue that *Animal Legal Defense Fund* differs from the case *sub judice* in that the economic injury there was prospective. But, in fact, the Federal Circuit, in reviewing the trial court's dismissal order, assumed that the injuries al-

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[6] In *Simon*, the Court held that indigents who had been denied care by hospitals could not challenge new IRS criteria for affording tax exempt status to such organizations without their providing nonemergency care to indigents, stating that ''it is purely speculative whether the denials of service specified in the complaint fairly can be traced to [the IRS] or instead resulted from decisions made by the hospitals without regard to the tax implications.'' 426 U.S. at 42–43.

[7] The Federal Circuit's decision derived support from several other cases discussed by the court. For example, *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973), involved a Texas statute that provided for up to two years of incarceration for any father who refused to pay child support. When a mother challenged the failure of the district attorney to enforce the statute against the father of her child, the Court found that there was no causal relationship between the prosecutor's refusal to act and the injury, finding it only ''speculative'' that the prospect of the prosecution would lead to the desired outcome. 410 U.S. at 618. In *Allen, supra*, the court held that parents of black children had no standing to seek review of the adequacy of the Internal Revenue Service's enforcement of prohibitions on providing tax subsidies to segregated private schools. The Court rejected the claim that the policy encouraged segregated schools stating:

> It is entirely speculative ... whether withdrawal of a tax exemption from any particular school would lead the school to change its policies ... [and whether] any given parent ... would decide to transfer the child to public school as a result of any changes in educational or financial policy made by the private school once it was threatened with loss of tax-exempt status.

468 U.S. at 758. Finally, in *Warth, supra*, the Court found that individuals with low or moderate income could not challenge an ordinance that had the apparent effect of excluding low or moderately priced housing from a locale, finding that the individuals had not established that apart from the ordinance they would have been able to locate affordable housing. 422 U.S. at 515–16.

leged would occur. It found that the farmers lacked standing, then, not because they would not be injured-in-fact, but because any such injuries would not be fairly traceable to the United States, due to the intervention of third parties. The rationale underlying this holding was buttressed by later Supreme Court decisions, among them, *Lujan*, in which the Court stated that to demonstrate causation under the constitutional standing doctrine, there must be a "causal connection between the injury and the conduct complained of," and correspondingly, the injuries must not be "'the result of the independent action of some third party not before the court.'" *Lujan*, 504 U.S. at 560–61 (quoting *Simon*, 426 U.S. at 41–42).[8] Further *post hoc* support for the Federal Circuit's decision may be found in *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997), which states that standing may exist where the plaintiff's injury produced by some third party action is the result of the "determinative or coercive effect" of a government action directed at the third party.[9]

For its part, plaintiff has failed to establish the requisite causal connection between its alleged harm and the imposition of the Coal Tax. By its terms, that manufacturer's excise tax was imposed not upon plaintiff, but upon the producers of the coal.[10] Thus, unlike excise taxes imposed on such things as airline tickets, the coal producers here did not act as a collecting agent for the United States.[11] Further, there was no statutory or regulatory obligation for the producers to pass the tax along to plaintiff,[12] nor, certainly, any requirement that plaintiff agree to transactions specifically including the tax. Indeed, nothing prevented the coal producers from paying the tax, absorbing the impact thereof and themselves pursuing a refund suit - indeed, numerous cases pending in this court present this exact scenario. Accordingly, every indication is that any economic harm experienced here by plaintiff was not the direct result of the Coal Tax, but rather derived from actions independently taken by the third-party producers.

Similar observations were recently made by this court in resolving an analogous standing issue in *Ammex, Inc. v. United States*, 52 Fed. Cl. 303 [89 AFTR 2d 2002-1961] (2002), *reconsideration denied*, 52 Fed. Cl. 555 [89 AFTR 2d 2002-2566] (2002). There, this court held that the purchaser of gasoline and diesel for resale at a duty free facility did not have standing to lay claim to the tax imposed on such fuel allegedly in violation of the Export Clause. In so holding, this court stated that "[w]here the defendant by direct act has not laid any tax or duty upon the plaintiff, and no such act is fairly traceable to the defendant (since the incidence of the tax was upon the supplier(s)), plaintiff cannot establish an injury in fact caused by the defendant." *Id.* at 311. On reconsideration, the court reaffirmed its standing ruling, again focusing on the fact that the tax in question was imposed on the gasoline and diesel sellers, with the economic burden of

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8 *See also Friends of the Earth, Inc. v Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000) ("The traceability prong means it must be likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the court."); *American Coalition for Competitive Trade v. Clinton*, 128 F.3d 761, 764 (D.C. Cir. 1997) ("there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.").

9 *See also Tennessee Valley Authority v. U.S. E.P.A.*, 278 F.3d 1184, 1207 (11th Cir. 2002); *Telephone and Data Systems Inc. v. F.C.C.*, 19 F.3d 42, 47 (D.C. Cir. 1994) ("we need not attempt any broad explication of the justiciability of indirect injury, for one narrow proposition at least is clear: injurious private conduct is fairly traceable to the administrative action contested in the suit if that action authorized the conduct or established its legality").

10 *See generally Amax Coal Co. v. United States*, 959 F. Supp. 990, 991–93 [79 AFTR 2d 97-822] (S.D. In. 1996) (describing history and purpose of tax). This conclusion also finds support in the Treasury's regulations. *See* 26 C.F.R. § 48.4121-1(a)(1)-(2); *see also Joann Coal Co. v. United States*, 883 F.2d 5 [64 AFTR 2d 89-5963] (4th Cir. 1989). Further indication that the tax is imposed on the producer may be found in 26 U.S.C. § 4218, which provides that "[i]f any person manufactures, produces or imports an article ... and uses it ..., then he shall be liable for tax under this chapter in the same manner as if such article were sold by him." *See Mulga Coal Co., Inc. v. United States*, 825 F.2d 1547 [61 AFTR 2d 88-1401] (11th Cir. 1987).

11 In the case of the airline ticket tax, 26 U.S.C. § 4291 specifically imposes the collection responsibility on the persons receiving payment for travel services. *See Brennan v. Southwest Airlines Co.*, 134 F.3d 1405 [81 AFTR 2d 98-566] (9th Cir. 1998). No similar provision exists here.

12 Indeed, as observed by the Court of Claims in another excise tax case, "'[t]he phrase "passed the tax on" is inaccurate, as obviously the tax is laid and remains on the manufacturer and on him alone .... The purchaser does not pay the tax. He pays or may pay the seller more for the goods because of the seller's obligation, but that is all.'" *Dow Jones & Co. v. United States*, 128 F. Supp. 748, 749 [47 AFTR 155] (Ct. Cl. 1955) (quoting *Lash's Products Co. v. United States*, 278 U.S. 175, 176 [7 AFTR 8838] (1929)); *see also Gurley v. Rhoden*, 421 U.S. 200, 204–05 (1975).

the tax being shifted to plaintiff only by the independent actions of those sellers. On this count, the court observed that "[t]he excise tax was levied against plaintiff's suppliers, absent any contemplation in the taxing statute itself that said tax should be passed on to the plaintiff. On the contrary, plaintiff contracted with its suppliers to pay to them costs approximating the economic equivalence of taxes . . ." *Ammex*, 52 Fed. Cl. at 559; *see also Dow Jones & Co. v. United States*, 128 F. Supp. at 750.

Plaintiff, however, argues that it was economically inevitable that the coal producers would pass along the tax to it, either as a separate line item or, at least, in determining the selling price of the coal. While this contention is superficially appealing, it is belied, in the first instance, by plaintiff's own assertion that *it* did not pass the tax along to its consumers - an observations that gives a whole new meaning to the old adage, "Do as I say, not as I do." Plaintiff's position also is irreconcilable with the substantial body of case law construing 26 U.S.C. § 6416. In relevant part, that provision prohibits a refund of excise taxes unless the individual who paid the tax establishes that it "has not included the tax in the price of the article with respect to which it was imposed and has not collected the amount of the tax from the person who purchased such article."[13] 26 U.S.C. §6416(a)(1)(A).[14] Applying this statute, this court and the Court of Claims have on numerous occasions been required to determine whether a particular excise tax was absorbed by the manufacturer or passed on to its customers. Notably, for our purposes, these cases do not assume that the excise taxes will be passed along, but instead employ a multi-factored analysis that takes into account, for example, the correlation between price changes and the application of the tax, whether the tax is separately invoiced, the existence of negotiated contracts including the excise taxes and the taxpayer's profitability. *See Worthington Pump & Machinery Corp. v. United States*, 122 F. Supp. 843, 847 [46 AFTR 324] (Ct. Cl. 1954); *Tenneco, Inc. v. United States*, 17 Cl. Ct. 345, 347 [64 AFTR 2d 89-5955] (1989), *aff'd*, 899 F.2d 1227 (Fed. Cir. 1990). These and other cases, moreover, make clear that the nature of this inquiry may differ markedly depending on whether and to what extent the price for a given item is cost-based or market-driven. *See, e.g., Tenneco*, 17 Cl. Ct. at 347; *Holmes Limestone Co. v. United States*, 946 F.Supp. 1310, 1314 [78 AFTR 2d 96-7466] (N.D. Ohio 1996).

For our purposes, the significance of these cases lies not in how they determine that a tax has been shifted, but simply in exhibiting that such a shifting is not preordained. That all or significant portion of a given excise tax may be absorbed by the seller/producer thus destroys any notion that the passing along of such a liability is the "determinative or coercive effect" of the imposition of such a tax. Rather, the determination whether such a tax will be passed on involves the independent judgment of a third party - the seller/producer - made by reference to a whole range of facts.[15] For standing purposes, the mere existence of such discretion, no matter how it is exercised in a particular situation, breaks the requisite chain of causation between the imposition of the tax and any

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[13] If the individual who paid the tax passed it along, it still may be able to sue for a refund if, for example, it can show that it repaid the amount of the tax to the ultimate purchaser of the article. 26 U.S.C. & 6416(a)(1)(B).

[14] This section was enacted to prevent a manufacturer or dealer from being unjustly enriched by recovering an overpayment of tax that was passed on to a purchaser. *See Travel Industries of Kansas, Inc. v. United States*, 425 F.2d 1297, 1298 – 99 [25 AFTR 2d 70-1674] (10th Cir. 1970) (summarizing the legislative history of this provision).

[15] For further indication of the complexity of setting prices and the factors that enter into whether a given seller will pass along a particular cost to a purchaser, *see, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720, 726 (1977) (discussing this concept in the context of a Sherman Act antitrust action); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (same). In another antitrust case, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Supreme Court discussed this issue thusly -

> A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued.

Id. at 492 – 93.

economic harm in the form of higher costs suffered by the purchaser thereof. *See Mideast Sys. and China Civil Constr. Saipan Joint Venture, Inc. v. Hodel*, 792 F.2d 1172, 1178 (D.C. Cir. 1986) (''the presence of an independent variable between either the harm and the relief or the harm and the conduct makes causation sufficiently tenuous that standing should be denied''). Accordingly, standing in this case neither rises nor falls on whether the seller of the coal included a specific provision passing along the tax to a given purchaser. What is the sockdolager here - and fatal to plaintiff's pursuit of standing - is that the sellers of its coal had a choice whether to pass along or absorb the tax.

Were this a case involving private parties, perhaps a contract provision passing along a tax would be covered by the ''doctrine that the assignee of [a] claim has standing to assert the injury in fact suffered by the assignor.'' *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 773 (2000). But in a case involving the government, such an approach is foreclosed by the Anti-Assignment Act, 31 U.S.C. 3727, which, in terms the Supreme Court has described as ''broad'' and ''all-inclusive,'' *United States v. Shannon*, 342 U.S. 288, 292–93 (1952), prohibits the ''transfer or assignment of any part of a claim against the United States Government or of an interest in the claim.'' This Act precludes even unintentional assignments - even one, for example, that might be occasioned by shifting to a purchaser the financial burden of a tax imposed by the United States. *See generally, National Bank of Commerce v. Downie*, 218 U.S. 345, 350 (1910); *Spofford v. Kirk*, 97 U.S. 484, 488–89 (1878). Applying the Act to the latter situation, in fact, fulfills at least two fundamental purposes underlying the statute: first, to ''prevent possible multiple payment of claims ... and to enable the Government to deal only with the original claimant,'' *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 366, 373 (1949);[16] and second, to preserve the defendant's defenses against the transferor that may be inapplicable to the transferee, *Shannon*, 342 U.S. at 291–92; *Westfed Holdings, Inc. v. United States*, 52 Fed. Cl. 135, 142–43 (2002); *MDS Associates, Ltd. v. United States*, 31 Fed. Cl. 389, 393 (1994), *aff'd*, 135 F.3d 778 (Fed. Cir. 1998).[17] By comparison, adopting plaintiff's theory would potentially require this court to consider the overlapping claims not only of the seller/manufacturer and its immediate purchaser, but also those of any subsequent purchasers *ad infinitum*, any one of which might plausibly argue that it bore at least a portion of the damages caused by the unconstitutional imposition of the coal tax. *See generally, Savannah Sugar Refining Corp. v. Commissioner*, 121 F.2d 426, 427 [27 AFTR 697] (5th Cir. 1941) (discussing the problems with proceeding in this fashion); *Alexander Smith & Sons Carpet Co. v. Commissioner*, 117 F.2d 974 [26 AFTR 483] (2d Cir. 1941) (same).

The short of it is that the causal relationship between the imposition of the Coal Tax and plaintiff's alleged economic injury here is too remote. As such, plaintiff has failed to establish its standing to seek the damages it claims under the Export Clause.

B. Takings Claim

Plaintiff next contends that in imposing the Coal Tax on its transactions, the United States affected a taking of its prop-

[16] *See also Shannon*, 342 U.S. at 293 (''One of Congress' basic purposes in passing the Act was 'that the government might not be harassed by multiplying the number of persons with whom it had to deal.''').

[17] Indeed, the Anti-Assignment Act is one of the underlying rationales for the so-called Severin doctrine. Under that doctrine, subcontractors under government contracts ordinarily do not have standing to sue the government. *See Severin v. United States*, 99 Ct. Cl. 435, 442 (1943), *cert. denied*, 322 U.S. 733 (1944). In so concluding, the Court of Claims reasoned that the subcontractor may not sue in its own right even though the contract between it and the prime contractor allocates a particular cost to the subcontractor because such a contract, under the Anti-Assignment Act, cannot have the effect of shifting the claim regarding the cost to the subcontractor. *See Severin*, 99 Ct. Cl. at 442; *see also George Hyman Constr. Co. v. United States*, 30 Fed. Cl. 170, 173 (1993), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994). Here too, the contract between the seller and the purchaser cannot have the effect of shifting the seller's claim to the purchaser. It should be noted that under the *Severin* doctrine, if the prime contractor is liable to the subcontractor for damages sustained by the subcontractor, that prime contractor may bring an action against the government to recoup what essentially are the subcontractor's damages. *See Severin*, 99 Ct. Cl. at 443; *see also W.G. Yates & Sons Constr. Co., Inc v. Caldera*, 192 F.3d 987, 991 (1999); *E.R. Mitchell Constr. Co. v. Danzig*, 175 F.3d 1369, 1370 (Fed. Cir. 1999). By analogy to the contract scenario, one might surmise that the seller/manufacturer which pays the excise tax might be able to sue for damages under the Tucker Act, even though it has passed the tax along, provided it can show that it is somehow obliged to reimburse its purchaser if it recovers. *See 123 East Fifty-Fourth St., Inc. v. United States*, 157 F.2d 68, 70 [35 AFTR 78] (2d Cir. 1946). Whether this theory actually bears out, however, is an issue for another day.

erty in violation of the Fifth Amendment. This claim, however, plainly is foreclosed by *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339 (Fed. Cir. 2001) (en banc), *cert. denied*, 122 S.Ct. 2293 (2002). There, the Federal Circuit, construing the Supreme Court's opinions in *Eastern Enterprises, Inc. v. Apfel*, 524 U.S. 498 (1998), held that the imposition of an excise tax results neither in a *per se* or regulatory taking, as there can be no taking of money under the Fifth Amendment. The court reasoned that the imposition of the tax did not involve an interest in physical or intellectual property, but rather an ordinary liability to pay money, concluding that the "imposition of an obligation to pay money does not constitute an unconstitutional taking of property." *Commonwealth Edison*, 271 F.3d at 1339–40; *see also United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); *U.S. Shoe Corp. v. United States*, 296 F.3d 1378, 1383 [90 AFTR 2d 2002-5376] (Fed. Cir. 2002) (imposition of Harbor Maintenance Tax not a taking); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 811 (1990) ("Requiring money to be spent is not a taking of property."). In this court's view, the holding and rationale of this *en banc* opinion fit this case like a glove and yield a similar result.

Even were that not true, the takings claim alleged here would squash headlong into *Casa de Cambio Comdiv S.A., De. C.V. v. United States*, 291 F.3d 1356 (Fed. Cir. 2002), *aff'g*, 48 Fed. Cl. 137 (2000). There, the Federal Circuit reiterated the long-standing rule that a "compensable taking does not occur unless the government's actions on the intermediate third party have a 'direct and substantial' impact on the plaintiff asserting the takings claim." *Id.* at 1361 (quoting *Nat'l Bd. of YMCA v. United States*, 395 U.S. 85, 93 (1969)).[18] It held that the depositor of stolen Treasury check (Casa) could not maintain a taking claim when the Federal Reserve Bank, upon discovering that the Treasury check it had paid had been stolen, recouped the proceeds of the check from the presenting bank (Norwest), which, in turn, debited the depositor's account. Surveying numerous cases, the Federal Circuit found that "[b]ecause the government did not direct Norwest to take action against Casa, and because Norwest did not act as the alter ego or agent of the government, Casa has not stated a claim for relief under the Takings Clause." *Id.* at 1363. In this court's view, a similar holding is compelled here - the government neither directed the seller/manufacturers to collect the Coal Tax from Emerald nor did the seller/manufacturer act as the government's agent in allegedly passing along the tax. As such, plaintiff's takings claim is not well-founded.

C. Illegal Exaction[19]

Plaintiff next asserts that the United States has illegally exacted money from it in violation of the Export Clause. Under the Tucker Act, illegal exaction jurisdiction lies where a plaintiff "has paid money over to the Government, directly or in effect," and "seeks return of all or part of that sum arguing" that it "was improperly paid, exacted, or taken from [it] in contravention of the Constitution, a statute, or a regulation." *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007–1008 (Ct. Cl. 1967).[20] Such is not the case here.

As described in greater detail above, the portion of the coal price allegedly paid by plaintiff in respect of the Coal Tax was neither paid directly to defendant, nor paid

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[18] *See also Shewfelt v. United States*, 104 F.3d 1333, 1337 (Fed. Cir. 1997); *Erosion Victims of Lake Superior Regulation v. United States*, 833 F.2d 297, 301 (Fed. Cir. 1987); *Langenegger v. United States*, 756 F.2d 1565, 1572 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 824 (1985).

[19] Various arguments in defendant's briefs are directed at explaining why plaintiff cannot maintain a tax refund suit before this court. In its briefs and at oral argument, plaintiff made clear that it is not pursuing such a suit. At one point, however, plaintiff suggests that because it might have been able to file a refund suit, this court has jurisdiction to consider its other claims. But, plaintiff's ability to file a refund suit appears to be based upon a specific statute, 26 U.S.C. § 6416(c), which authorizes an "exporter" or "shipper" to file a refund claim if it meets certain conditions, among them that the "person who paid such taxes waives his claim to such amount." Even if this provision were applicable here, its existence does not suggest that plaintiff may maintain other forms of action. Indeed, this provision reaffirms Congress' understanding that it is the seller/producer, rather than the purchaser, who is subject to the excise tax.

[20] *See also New York Life Ins. Co. v. United States*, 118 F.3d 1553, 1556 [80 AFTR 2d 97-5117] (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 1559 (1998); *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572–73 (Fed. Cir. 1996). *See also*Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3657 at p. 487 (3d ed. 1998).

to a third party at the direction of the defendant, nor even extracted by the coal producers from plaintiff at the direction of the defendant. In such circumstances, the Federal Circuit has held that an illegal exaction claim does not lie. Thus, in *Casa de Cambio, supra*, the court refused to impute to the government the actions of the presenting bank in collecting funds from its depositor in response to the Federal Reserve's action against the presenting bank. The court rejected the notion that the illegal exaction doctrine could be stretched to encompass a situation in which the presenting bank neither acted at the government's behest nor pursuant to a statute or a regulation, but rather in its own self-interest. In this regard, it reasoned that the same standard applicable to takings actions was applicable to illegal exaction claims, stating that the relevant precedents "only echo the standard in the Takings Clause context that a plaintiff has a claim for an illegal exaction only where the government has direct and substantial impact on the plaintiff asserting the claim." 291 F.3d at 1364. Applying this standard, the court concluded "this test is identical to the Takings test, and again that no such direct action by the United States is alleged here." *Id.* The court thus rejected any notion that an illegal exaction claim could be based simply upon the foreseeable reaction of some third party in imposing on its customer a charge that had been exacted by the United States.[21]

Accordingly, plaintiff's illegal exaction claim suffers the same fate as its takings claim - and for the same reasons. Here, as in *Casa de Cambio*, plaintiff's "loss" was not occasioned by the direct and substantial action of the United States, but rather "derived from the enforcement of alleged rights under a contract [*i.e.*, the coal purchase agreements] to which the government was not a party." 48 Fed. Cl. at 144–45. As such, there was no illegal exaction here.[22]

D. Suit Based on Implied Contract In Law

Finally, plaintiff seeks to recover under an implied contract. In this regard, it is axiomatic that Tucker Act jurisdiction "extends only to contracts either express or implied in fact, and not to claims on contracts implied in law." *Hercules, Inc. v. United States*, 516 U.S. 417, 423 (1996); *see also Sanders v. United States*, 252 F.3d 1329, 1334 (Fed. Cir. 2001). In the instant case, Emerald entered into no express contract with the United States. Likewise, it appears that no contract implied in fact arose here. "A contract implied in fact exists only where the circumstances illustrate that the equivalent of mutual assent is present." *Collins v. United States*, 532 F.2d 1344, 1351 [37 AFTR 2d 76-1191] (Ct. Cl. 1976); *see also Hercules*, 516 U.S. at 423–24; *Porter v. United States*, 496 F.2d 583, 590–91 (Ct. Cl. 1974), *cert. denied*, 420 U.S. 1004 (1975). Conversely, a contract implied in law is one in which a duty to make restitution is implied, regardless of the lack of mutual assent, for reasons of justice and equity. *See Hercules*, 516 U.S. at 424; *see also Baltimore & Ohio R. Co. v United States*, 261 U.S. 592, 597 (1923). There is absolutely no indication of mutual assent in this case. Rather, plaintiff's case is based solely on the notion that it is inequitable for it to have borne the impact of the Coal Tax and yet be unable to recover the same from the United States. Since it can neither be shown that an express con-

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[21] In discussing this same point, this court's opinion in *Casa de Cambio* stated -

> Essentially, plaintiff's claim is that the Treasury set into motion a sequence of events that ultimately resulted in its loss. But, neither Treasury nor the Federal Reserve ordered Norwest to debit plaintiff's account, as might be the case in a tax levy. Rather, Norwest made an independent decision to exercise what it believed were its rights under its deposit contract with Casa. To hold this enough to impose illegal exaction liability on the government would be to open a whole range of new justiciable claims essentially focusing on whether the government proximately caused some third party's injury, thereby adopting a new form of liability primarily based on foreseeability. One can conceive of a garden variety of situations where, for example, the government imposes a cost on an entity, that entity shifts the cost to a third party and the third party might argue the government's action in dealing with the intermediary was unconstitutional or violative of a statute or regulation. While the "injury" to a third party in these circumstances may well be reasonably foreseeable or even occur with the government's full knowledge, that, in this court's view, is no more adequate to impose illegal exaction liability than it is, under the decided case law, to impose liability under the Takings Clause.

Casa de Cambio, 48 Fed. Cl. at 145.

[22] In arguing to the contrary, plaintiff relies on this court's decision in *Fireman v. United States*, 44 Fed. Cl. 528 (1999). However, that opinion seems inconsistent with the approach taken by the Federal Circuit in *Casa de Cambio*, and arguably was overruled by the latter decision. *See Casa de Cambio*, 291 F.3d at 1364 n.1 (noting the *Fireman* decision). At all events, *Fireman* is distinguishable for the reasons stated in this court's opinion in *Casa de Cambio*, 48 Fed. Cl. at 147–48.

tract or one implied in fact existed and since this court's jurisdiction over implied contracts is limited to contracts implied-in-fact, plaintiff's claim on this count must fail.[23]

III. Conclusion

This court need go no further. Each of the counts in plaintiff's complaint wilts in the hot glare of precedent and all for essentially the same reason -- a lack of causation. That this same legal finding should have conclusive impact in two arenas -- that of constitutional standing and the Tucker Act -- should come as no surprise, for both laws and their associated jurisprudence, in their own way, focus on whether there was an adequate nexus between an action taken by the United States and the harm alleged by a given plaintiff. Here, there was not. Rather, plaintiff has suffered, at best, what the common law termed a *damnum absque injuria* - a harm without legal injury - and must look elsewhere for a remedy. As such, and for the foregoing reasons, this court GRANTS defendant's motion for summary judgment.

Francis M. Allegra

Judge

¶2002-5785

Curt A. and Susan C. BENNETT, PLAINTIFF v. UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 77-005T, Dec. 2, 2002. Decision for Taxpayers in part and for Govt.

1. Court of Federal Claims—refund suits—dismissal—cost to govt.—failure to prosecute. Hockey player's and wife's refund suit was dismissed with prejudice under either Court of Federal Claims Rule 41(a)(2)'s voluntary dismissal provision or 41(b)'s failure to prosecute provision: taxpayers' failure to appear and fact they requested dismissal only on eve of rescheduled trial showed they had no interest in timely prosecuting suit; and prejudicial, as opposed to non-prejudicial, dismissal was appropriate based on drawn-out nature of proceedings and cost to govt. *Reference:* United States Tax Reporter ¶74,225.05(45); 74,225.05(35); 74,336.510(35). IRC §7422.

In the United States Court of Federal Claims,

ORDER

MARIAN BLANK HORN Judge

The above-captioned case is one of two hundred and thirty-one (231) related "hockey player tax refund" cases filed in this court.[1] The complaint in Case No. 77-005T was filed on January 3, 1977. The case is before the court on plaintiffs' motion to dismiss and on consideration by the court of dismissal, with prejudice, for failure to prosecute pursuant to Rule 41(b) of the Rules of the United States Court of Federal Claims (RCFC).

FINDINGS OF FACT

On February 25, 1991, the court sent an order to all of the remaining plaintiffs in the related hockey player tax refund cases, including the plaintiffs in the above captioned case, which requested that they inform the court as to whether they wished to proceed with their respective cases. The court required the plaintiffs to comply with the following:

> If the plaintiff wishes to continue as a plaintiff in this action, he/she must complete and sign the attached Notice A, indicating a desire to continue in the lawsuit and designating that Charles L Abrahams is to continue as counsel on the case, indicate another choice of counsel, or indicate that the plaintiff

[23] Plaintiff suggests that this court may hear equitable claims when they are incidental to this court's exercise of jurisdiction under the Tucker Act. There are at least two problems with this suggestion. First, plaintiff cites no statutory support for this claim and, indeed, there is none, as the limited forms of equitable relief afforded to this court are unavailable here. *See, e.g.*, 28 U.S.C. §§ 1491(a)(2), 1491(b)(1). Second, the only case cited by plaintiff in support of this jurisdiction, *Carney v. United States*, 462 F.2d 1142, 1145 (Ct. Cl. 1972), specifically forecloses the granting of any "specific equitable relief," which is precisely what plaintiff seeks here. *See Guardsman Elevator Co. v. United States*,50 Fed. Cl. 577, 584 (2001).

[1] For a more complete explanation of the extensive procedural history and for numerous examples of legal issues common to the hockey player tax refund cases, see this court's opinion in Frederick E. and Linda L. Speck v. United States, 28 Fed. Cl. 254 [71 AFTR 2d 93-1403] (1993) (denying tax refund claims), appeal dismissed, 1994 WL 745411 (Fed. Cir. 1994).

wishes to proceed pro se, acting on his or her own behalf, representing him or herself. Such Notice A must be filed with the Court on or before June 28, 1991.

In the alternative, should plaintiff decide not to pursue the claims in this action further, he/she must complete and sign the attached Notice B and file it with the Court no later than June 28, 1991.

In the case of a married couple who have jointly filed their lawsuit in these cases, each party must individually complete Notice A or B.

(Emphasis in original).

Plaintiffs both filed Notice A intentions to continue prosecuting their claims on June 10, 1991, and again on June 28, 1991, also indicating on both occasions that plaintiffs wished to be represented by attorney Charles L. Abrahams. In a November 6, 1992 order, the court scheduled trial in the above captioned case for November 16, 1992, however, plaintiffs did not appear for the trial. On May 12, 1993, the court scheduled a pretrial conference for the above captioned case and for all remaining hockey player tax refund cases, to be held on July 7–9, 1993, to review the status of the cases. As a result of the delays occasioned by plaintiffs in the hockey player tax refund cases filed in this court, the court's May 12, 1993 order reminded all of the remaining parties of RCFC 41(b), which authorizes the court to dismiss a case for failure to prosecute. (See Speck v. United States, 28 Fed. Cl. at 263–69, 310–12, for a general description of the delays encountered in the prosecution of the hockey player tax refund cases.) Susan Bennett did not make an appearance at the pretrial conference held on July 7, 1993. Curt Bennett appeared by telephone at the July 7, 1993 pretrial conference, indicated that he wished to continue to prosecute his case, but also asked about the procedure for dismissing his case and in this regard was referred to his attorney. On September 22, 1993, the court again scheduled the above captioned case for trial, to commence on December 6, 1993. Shortly before trial, on November 23, 1993, plaintiffs' counsel filed a document titled "Motion to Dismiss," with a separate "Declaration of Charles L. Abrahams," both of which stated that plaintiffs wanted to dismiss their case.

DISCUSSION

[1] RCFC 41(b) allows for the dismissal of a case for failure to prosecute. RCFC 41(b) states as follows: Rule 41. Dismissal of Actions

(b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, the court may dismiss on its own motion or defendant may move for dismissal of an action or any claim. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for failure to join a party under RCFC 19, operates as an adjudication upon the merits.

Because public policy strongly favors the prompt disposition of cases by trial courts, and in order to expedite judicial proceedings while preventing undue delays in the disposition of pending cases, federal trial courts have been given broad discretion to dismiss a plaintiff's action with prejudice. Link v. Wabash R.R. Co., 370 U.S. 626, 629–30, reh'g denied, 371 U.S. 873 (1962); see also Syntex Ophthalmics, Inc. v. Novicky, 795 F.2d 983, 986 (Fed. Cir. 1986) (affirming dismissal of defendant's counterclaims for failure to appear at trial); Mulbah v. Detroit Bd. of Educ., 261 F.3d 586, 590–91 (6th Cir. 2001); Ortiz-Anglada v. Ortiz-Perez, 183 F.3d 65, 66–67 (1st Cir. 1999). Several courts have indicated that, although subject to rebuttal, prejudice to the defendant resulting from unreasonable delay or a failure to prosecute may be presumed. Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 753 (9th Cir. 2002); LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d 206, 210 (2d Cir. 2001); Southwest Marine Inc. v. Danzig, 217 F.3d 1128, 1138 (9th Cir. 2000), cert. denied, 532 U.S. 1007 (2001); Lyell Theatre Corp.

v. Loews Corp., 682 F.2d 37, 42 (2d Cir. 1982); Citizens Utils. Co. v. American Tel. & Tel. Co., 595 F.2d 1171, 1174 (9th Cir.), cert. denied, 444 U.S. 931 (1979).

Furthermore, a court may dismiss a case for failure to prosecute on its own initiative. In addition to the explicit authority set forth in the RCFC 41(b), ''[t]he authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'' Link v. Wabash R.R. Co., 370 U.S. at 630–31 (footnote omitted); see also Lyell Theatre Corp., 682 F.2d at 42–43; Colbert v. United States, 30 Fed. Cl. 95, 97 (1993). The United States Court of Appeals for the Federal Circuit has explicitly adopted the standards articulated in Link. See, e.g., Claude E. Atkins Enters., Inc. v. United States, 899 F.2d 1180, 1184–85 (Fed. Cir. 1990); Kadin Corp. v. United States, 782 F.2d 175, 176–77 (Fed. Cir.), cert. denied, 476 U.S. 1171 (1986). The court in Kadin stated that, ''[i]f [Claims Court] judges are to discharge their heavy responsibilities effectively, their power to dismiss, in situations such as the one before us, must be more than theoretical.'' Kadin Corp. v. United States, 782 F.2d at 177 (quoting Automated Datatron, Inc. v. Woodcock, 659 F.2d 1168, 1170 (D.C. Cir. 1981)). The United States Court of Appeals for the Federal Circuit also stated that this court's exercise of discretion to dismiss a case for failure to prosecute will not be disturbed on appeal ''unless upon a weighing of relevant factors we are left with 'a ''definite and firm conviction'' that the court below committed a clear error of judgment.''' Adkins v. United States, 816 F.2d 1580, 1582 (Fed. Cir. 1987) (quoting Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 917 (Fed. Cir. 1984)).

As noted by the United States Court of Appeals for the Federal Circuit, ''dismissal is a harsh sanction . . . .'' Kadin Corp. v. United States, 782 F.2d at 176; accord Martens v. Thomann, 273 F.3d 159, 179 (2d Cir. 2001); LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d at 209. In Kadin, however, plaintiff's and counsel's ''entire course of conduct reflected a callous disregard for the rules and regulations of the court and fell far short of the obligations an attorney owes to a court before which he is conducting litigation.'' Kadin Corp. v. United States, 782 F.2d at 177. When a plaintiff files a lawsuit in this court, the court must presume that the party, and the counsel who represents the party, intend to prosecute that case to a final resolution. Repeated disregard of court orders forces the court to abandon that presumption, and warrants dismissal of the complaint, with prejudice, pursuant to RCFC 41(b).

In the alternative, voluntary dismissal of a complaint by a plaintiff is provided for in RCFC 41(a). RCFC 41(a)(1)(i) permits a plaintiff to dismiss a complaint without prejudice when a notice of dismissal is filed before the service of the defendant's answer. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 394 (1990). Because the defendant in the instant case has filed an answer, the plaintiffs may dismiss this action only by stipulation as outlined in Rule 41(a)(1)(ii), or by order of the court, ''upon such terms and conditions as the court deems proper,'' under RCFC 41(a)(2). Plaintiffs' November 23, 1993 motion to dismiss is not stipulated to by the government, and does not address whether the dismissal requested is with or without prejudice.

RCFC 41(a) states: Rule 41. Dismissal of Actions

(a) Voluntary Dismissal; Effect Thereof. (1) By Plaintiff; by Stipulation. Subject to the provisions of RCFC 23, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court(i) by filing a notice of dismissal at any time before service of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice,

except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by the United States prior to the service upon it of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Rule 41(a)(2) vests wide discretion in trial courts to allow for voluntary dismissal "upon order of the court and upon such terms and conditions as the court deems proper." RCFC 41(a)(2); see also Deuterium Corp. v. United States, 21 Cl. Ct. 132, 134 (1990). Moreover, pursuant to RCFC 41(a)(2), the dismissal of the above-captioned case is within the sound discretion of this court and may be overturned only upon a showing of an abuse of discretion. See Templeton v. Nedlloyd Lines, 901 F.2d 1273, 1274–75 (5th Cir. 1990); see also Herring v. City of Whitehall, 804 F.2d 464, 466 (8th Cir. 1986).

RCFC 41(a)(2) states that, "[u]nless otherwise specified in the order, a dismissal under this paragraph is without prejudice." However, "[a] court can respect this norm and still exercise considerable discretion by offering reasonable grounds when dismissing an action with prejudice." Deuterium Corp. v. United States, 21 Cl. Ct. at 134 (citing Link v. Wabash R.R. Co., 370 U.S. at 629–33; Durham v. Florida East Coast Ry. Co., 385 F.2d 366, 367–68 (5th Cir. 1967)).

This court concurs with the rationale outlined in Deuterium, which states:

> No precise formula governs dismissals with prejudice. The decision largely hinges on the equities of the case, with due regard for the interests of both parties. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849 (1947); LeCompte v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976). The grounds for dismissing with prejudice, however, fall generally into three broad categories: the burden on defendant of dismissal without prejudice, the progress of the litigation, and the diligence and good faith of the plaintiff.

Deuterium Corp. v. United States, 21 Cl. Ct. at 134. A federal court may dismiss an action with prejudice if it finds that "[t]he government has devoted considerable time and effort to preparing the case and formulating its interrogatories, and it may cause the government expense and inconvenience if the case now were put in possible limbo." Alumni Ass'n of Univ. of North Carolina, Inc. v. United States, 223 Ct. Cl. 765, 767 [46 AFTR 2d 80-5008], 650 F.2d 287 (1980); see also Deuterium Corp. v. United States, 21 Cl. Ct. at 134–35.

In the instant case, plaintiffs' initial insistence to proceed with their case caused the government, and the court, to expend enormous amounts of time, effort and expense in response. Plaintiffs failed to appear for one trial date, and indicated their desire to dismiss their claims only as a subsequent trial date drew near. Plaintiffs have evinced no interest in the timely prosecution of their claims since indicating their contrary interest to dismiss the claims. Allowing the plaintiffs to withdraw from the case, without prejudice, after the considerable time, effort and expense expended by defendant, is a burden that this court will not impose. As pointed out by the court in Deuterium, "[d]ismissal with prejudice is appropriate where there have been extensive proceedings with a trial clearly in sight." Deuterium Corp. v. United States, 21 Cl. Ct. at 135 (citing Ferguson v. Eakle, 492 F.2d 26 (3rd Cir. 1974); Rollison v. Washington Nat'l Insur. Co., 176 F.2d 364 (4th Cir. 1949)). This court agrees with the following statement

in Deuterium, which is equally appropriate in the present case:

> Under these circumstances, defendant should not be exposed to the uncertainty of future litigation and to the costs of beginning anew. If this court granted plaintiff's motion, plaintiff would have wiped the slate clean. After ... years of litigation and losses on several motions, this clean slate would unduly strengthen plaintiff's position at defendant's expense, if plaintiff later elected to refile. Thus, this court dismisses the remaining counts of plaintiff's amended petition with prejudice.

Deuterium Corp. v. United States, 21 Cl. Ct. at 136 (footnote omitted); see also Schweiger Constr. Co. v. United States, 49 Fed. Cl. 188, 208–09 (2001).

CONCLUSION

For the foregoing reasons, plaintiffs' motion to dismiss is GRANTED, with prejudice, pursuant to RCFC 41(a)(2). The Clerk's Office is directed to DISMISS, with prejudice, the complaint in Case No. 77-005T. On independent grounds pursuant to RCFC 41(b), dismissal, with prejudice, of the complaint in Case No. 77-005T is directed, for failure to prosecute.

IT IS SO ORDERED.

MARIAN BLANK HORN

Judge

¶2002-5786

ONTARIO POWER GENERATION, INC., PLAINTIFF v. THE UNITED STATES, DEFENDANT v. MINGO LOGAN COAL CO., ET AL., THIRD PARTY-DEFENDANTS. U.S. Court of Federal Claims, (Ct Fed Cl) No. 00-761T, Dec. 13, 2002. Decision for Govt.

1. Coal excise taxes—constitutionality; exports—refunds—standing. Canadian power co.'s complaint for recovery of coal excise taxes included in cost of coal it purchased from U.S. suppliers was denied: purchaser lacked standing under Export Clause and Tucker Act since its tax injury wasn't caused by govt.'s tax imposition on 3d-party producers but merely by producers' independent decision to pass that tax burden on to purchaser; and as foreign purchaser, its interests weren't in "zone of interests" protected by Export Clause, which was explicitly fashioned in domestic terms and didn't protect international free trade in general. Also, purchaser's claim was effectively impermissible assertion of 3d parties', not its own rights. *Reference:* USTR Excise Taxes ¶41,215.01(25); 41,215.01(30); 42,215.04(47); 64,165.01(20). IRC §4121; 4221; 6416.

Richard J. Gagnon and Stephen J. Marzen, Sherman & Sterling, Washington, D.C., for the plaintiff.
Robert C. Stoddart, U.S. Department of Justice, Washington, D.C., with whom was Mildred L. Seidman, U.S. Department of Justice, for the defendant.
Anthony S. Gasaway, Bryan Cave, LLP, St. Louis, Missouri, for third-party defendants Mingo Logan Coal Co., Ashland Coal, Inc. and Arch Coal Sales, Inc.

U.S. Court of Federal Claims,

OPINION

ALLEGRA, Judge:

Motion to dismiss complaint; Suit by Canadian coal purchaser seeking monetary relief on account of the alleged unconstitutional application of the Black Lung Excise Tax and coal reclamation fee; Illegal exaction; Export Clause of the Constitution; Lack of constitutional standing; Lack of prudential standing.

Plaintiff is a state-owned Canadian power generating corporation that purchased millions of tons of U.S. coal in the six years leading up to the filing of this action. The price that plaintiff paid for that coal included the cost of the coal excise taxes imposed under 26 U.S.C. § 4121(a) and reclamation fees imposed under 30 U.S.C. § 1232. Plaintiff brings this action to recover these amounts as an illegal exaction in violation of the Export Clause of the Constitution. Defendant and the third-party defendants have moved to dismiss the complaint arguing, *inter alia*, that plaintiff lacks standing to assert this claim. Fol-

lowing oral argument and after careful consideration of the parties' filings, this court hereby GRANTS this motion to dismiss.

I. Facts[1]

Ontario Power Generation (''OPG'' or plaintiff) is a corporation owned by, and organized under the laws of, the province of Ontario, Canada. OPG was the ultimate purchaser and user of coal purchased from various U.S. suppliers during the years in question. Plaintiff claims that these suppliers collected from it, by including in the price of the coal, the Black Lung Excise Tax required by 26 U.S.C. § 4121 (the Coal Tax), as well the reclamation fee required by 30 U.S.C. § 1232. OPG alleges that it, in effect, paid the Coal Tax and reclamation fee, averring further that this tax and fee, insofar as they applied to their transactions, violated the Export Clause of the Constitution, Article I, § 9, cl. 5.

Plaintiff filed its original complaint in this case on December 15, 2000. On July 31, 2001, it amended that complaint, seeking recovery of both the Coal Tax and reclamation fees, alleging that both ''have been illegally exacted from plaintiff in contravention of the Export Clause.''

On October 18, 2001, the United States filed a motion for judgment on the pleadings and for dismissal. Defendant's motion challenges both plaintiff's standing to bring an action to recover with respect to the Coal Tax and the jurisdiction of this court to hear plaintiff's claim regarding the reclamation fees. On March 5, 2002, Mingo Logan Coal Co., Ashland Coal, Inc., and Arch Coal Sales, Inc., collectively filed a motion for judgment on the pleadings and for dismissal of OPG's complaint (the third parties' motion).[2] Alliance Coal LLC and Seascape Coal Sales, Inc. were later granted permission to join the third parties' motion. Oral arguments on the two motions — those of the United States and the third parties — were conducted on September 12, 2002.

II. Discussion

[1] Today, this court filed an opinion and order in *Emerald International Corp. v. United States*, Slip Op. No. 01-258T [90 AFTR 2d 2002-7710] (Dec. 13, 2002), granting the defendant's motion for summary judgment and dismissing the complaint therein. In that case, this court held that a domestic coal broker, who purchased coal for purposes of resale to various international customers, lacked constitutional standing to assert a damage claim under the Export Clause. This court further held Emerald could not pursue a recovery under the Tucker Act on several other theories: (i) as a takings claim based upon the Fifth Amendment; (ii) an illegal exaction claim; and (iii) a claim based upon an implied contract.

In the court's view, *Emerald* disposes of all of the claims raised by Ontario in the case *sub judice*. While defendant does not, for purposes of this motion, challenge plaintiff's constitutional standing to bring Export Clause claims, the third-party defendants do so and the court finds that challenge well-taken. This court concludes that the same standing deficiencies identified in *Emerald* are also patent here, principally, that plaintiff cannot show that any economic injury it suffered was fairly traceable to imposition of the Coal Tax or the reclamation fee on the producers participating in its transactions.[3] In the language of the Supreme Court, any such injury is not the result of the ''determinative

[1] In reviewing the sufficiency of the complaint pursuant to a motion to dismiss, this court must presume that the factual allegations included in the complaint are true. *Miree v. DeKalb County, Ga.*, 433 U.S. 25, 27 n.2 (1977); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988).

[2] By order dated June 8, 2001, this court directed the Clerk to give notice of this matter to all ''persons'' listed in an Appendix A attached to said order. The full style of this matter includes all 49 entities listed in this Appendix, but only six of these parties actually filed pleadings of some sort in this action. Four — Mingo Logan Coal Co., Ashland Coal, Inc., Arch Coal Sales, Inc. and Alliance Coal LLC — filed answers to plaintiff's complaint and have been listed as third-party defendants. Two — Seascape Coal Sales, Inc. and Riverton Coal Sales, Inc. — filed third-party complaints and have been listed as third-party plaintiffs. But, the answers and complaints filed by these third parties all essentially assert that they, and not plaintiff, are entitled to the taxes at issue. Some of these third parties have also filed separate lawsuits in this court, seeking to recover the same taxes at issue here. For ease of reference, the court will collectively refer to all these parties as ''third-party defendants.''

[3] Similarly to the Coal Tax, the liability for paying the reclamation fee falls on the operators of the coal mines. Thus, 30 U.S.C. § 1232, states that ''[a]ll operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior . . .'' For purposes of the reclamation fee, an ''operator'' is ''any person . . . engaged in coal mining who removes . . . more than 250 tons of coal by mining within 12 consecutive calendar months in any one location.'' 30 U.S.C. § 1292(13).

or coercive'' effect of the imposition of the Coal Tax and the reclamation fee, but rather '''the result of the independent action of some third party not before the court,''' *to wit*, the decision of the coal producers to ''pass on'' the burden of these exactions to their customers. *Bennett v. Spear*, 520 U.S. 154, 168–69 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). *See Emerald*, Slip Op. at 5–12.

Breaking new ground, the court also finds that OPG, as a foreign consumer of coal, fails to meet prudential standing requirements. According to the Supreme Court, the prudential standing question is ''whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.'' *Warth v. Seldin*, 422 U.S. 490, 500 (1975). In more familiar terms, the issue is ''whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'' *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 152–53 (1970). While this test, at least in some contexts, is ''not meant to be especially demanding,'' *Clark v. Securities Indus. Ass'n*, 479 U.S. 388, 399 (1987),[4] the Supreme Court has, nonetheless, made clear that standing should be denied, on prudential grounds, where plaintiffs are ''merely incidental beneficiaries'' of the statutory or constitutional provision at issue. *National Credit Union Admin. v. First Nat'l Bank and Trust Co.*, 522 U.S. 479, 494 n.7 (1998); *see also Clark*, 479 U.S. at 399; *McKinney v. U.S. Department of the Treasury*, 799 F.2d 1544, 1551–52 (Fed. Cir. 1986). Finally, none of the parties disputes that these prudential standing requirements may be applied in this court in cases brought under the Tucker Act, a conclusion that seemingly flows from the numerous cases that have applied Article III constitutional standing principles to this court. *See Emerald*, Slip Op. at 4 & n.5.

For our purposes, the question then is whether plaintiff's interests are arguably within the ''zone of interests'' to be protected by the Export Clause. That clause provides that ''[n]o Tax or Duty shall be laid on Articles exported from any State.'' U.S. Const. Art. I, § 9, cl. 5. Plaintiff claims that its interests are within the relevant zone because the Clause was adopted to ''protect international free trade.'' Defendant, joined by the intervening defendants, disagrees and retorts that ''[t]he U.S. Constitution ... is not a draft version of GATT: the Framers did not intend to benefit foreign purchasers.''

The court concludes that plaintiff's interests plainly do not fall within the zone of interests protected by the Export Clause. While the language of that clause is inconclusive on this count, its context within the Constitution is telling. The Export Clause falls within section 9 of Article I of the Constitution, which section, with its eight clauses, generally was designed to limit the powers granted to Congress and thereby strike an appropriate balance of power between the States and the Federal Government. That the Export Clause was not intended broadly to promote free trade is apparent from Article I, § 10, cl. 2 of the Constitution, which allows the States, with congressional approval, ''to lay any Imposts or Duties on Imports or Exports.'' Thus, the Constitution ''left to the states a greater power over exports than congress had, for by the ninth section of the first article, they were prohibited from taxing exports, without any qualification, even by the consent of the states; whereas, with the consent of congress, any state can impose such a tax by law, subject to the conditions prescribed.'' *Mayor, Alderman and Commonalty of New York v. Miln*, 36 U.S. 102, 11 Pet. 102 (1837) (Baldwin, J., con-

[4] In *Clark*, the Supreme Court suggested that the ''zone of interests'' test is most forgiving in the context of the '''generous review provisions''' of the Administrative Procedures Act, 479 U.S. at 400 n.16 (quoting *Data Processing*, 397 U.S. at 156). The Court, nonetheless, indicated that the ''zone of interests'' inquiry remains relevant outside the APA context, albeit in a narrower fashion and with the possibility that other factors may be relevant in considering prudential standing. 479 U.S. at 400 n.16. For the reasons that follow, this court does not believe that any of these nuances in the ''zone of interests'' test are determinative here.

curring).[5] Moreover, nothing in the Constitution prohibits Congress from taxing *imports*, a concept that prominent commentators view as even more antithetical to free trade. *See, e.g.*, 1 Bruce E. Club, United States Foreign Trade Law lxii (1991). Contrary to plaintiff's importunings, then, the Constitution neither entirely proscribes the taxation of exports nor generally forbids the Federal taxation of imports at all, leading this court to reject plaintiff's claim that the buckler of the Export Clause was to be wielded by foreign purchasers to protect free trade. *See Florida Sugar Martketing and Terminal Ass'n v. United States*, 220 F.3d 1331, 1335–37 [86 AFTR 2d 2000-5467] (Fed. Cir. 2000).[6]

Plaintiff, however, cites that portion of *United States v. Hvoslef*, 237 U.S. 1, 15 [3 AFTR 2913] (1915), in which the Supreme Court stated that "the purpose of the [Export Clause] is that exportation, all exportation, shall be free from national burden." Viewed in context, however, this quote merely refuted the contention that "there should be enforcement [of the Export Clause] only so far as necessary to prevent . . . discrimination" between or among the States. 237 U.S. at 15. Indeed, while the court is mindful of the need to avoid converting the prudential standing analysis into a full blown consideration of the merits, it remains that countless decisions have described the purpose of the Export Clause only in domestic terms, as preventing Congress from giving an advantage to the ports and commerce of one state, by prohibiting Congress from taxing exports at all.[7] For example, *Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369 [85 AFTR 2d 2000-1151] (Fed. Cir. 2000), the case upon which plaintiff principally relies, states that "the Framers intended the Export Clause to allay the fears of certain States that they would bear a greater tax burden due to differing levels of exportation." *Id.* at 1373–74. Conversely, in no case cited by plaintiff or otherwise found has this clause been successfully invoked by a foreign entity seeking to overturn a tax or a duty.[8] While foreign purchasers undoubtedly stand to benefit incidentally from this constitutional protection, that does not mean that they are among the direct beneficiaries thereof — and the latter is controlling for purposes of determining whether a given individual is within the requisite "zone of interests." *See Warth*, 422 U.S. at 510 (explaining the "incidental congruity of interest" is insufficient to confer standing); *Tax Analysts and Advocates v. Blumental*, 566 F.2d 130, 143 [40 AFTR 2d 77-5232]

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[5] Justice Henry Baldwin actually published his concurring opinion in a supplementary volume entitled, *A General View of the Origin and Nature of the Constitution and Government of the United States . . . Together with the Opinions in the Cases decided at January Term, 1837, Arising on the Restraints on the Powers of the States* (1837). According to two commentators, this "anomaly [arose] in part from [Court reporter] Peter's poor relations with Justice Baldwin" and the justice's inability to finish his opinions in time for publication. Morris L. Cohen & Sharon H. O'Connor, A Guide to the Early Reports of the Supreme Court 70 (1995).

[6] It appears from the convention debates, that opponents of the Export Clause, among them, James Madison, were fearful that adoption of the clause ultimately would inhibit free trade, by preventing the United States from negotiating favorable treaties. *See* 2 *The Records of the Federal Convention of 1787 361* (Max Farrand ed. 1966) (quoting James Madison on Aug. 21); *see also Florida Sugar*, 220 F.3d at 1335–36; Note, Constitutionality of Export Controls, 76 Yale L.J. 200, 202 (1966) (In adopting the clause, "the Convention was aware that it was depriving the new government of a tool for both domestic and foreign commercial policy."). Indeed, a review of Madison's notes of the debates on the Export Clause, which occurred primarily on August 16 and 21, 1787, reveals not the slightest concern about foreign consumers or free trade among either proponents or opponents of the provision. *See* 2 *The Records of the Federal Convention of 1787* 304–310 (Max Farrand ed. 1966). Typical of the views expressed by the proponents were those of Mr. Elseworth, who is reported by Madison to have stated that — "There are solid reasons agst. Congs. taxing exports. 1. it will discourage industry, as taxes on imports discourage luxury. 2. The produce of different States is such as to prevent uniformity in such taxes. There are indeed but a few articles that could be taxed at all; as [tobacco] rice & indigo, and a tax on these alone would be partial & unjust. 3. The taxing of exports would engender incurable jealousies." *Id.*at 360; *see also* 1 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1013–15 (5th ed., 1905) (summarizing the debates).

[7] *See United States vs. United States Shoe Corp.*, 523 U.S. 360, 368 [81 AFTR 2d 98-1256] (1998) ("[T]he Framers sought to alleviate . . . concerns [that Northern States would tax exports to the disadvantage of Southern States] by completely denying to Congress the power to tax exports at all." (quoting *United States vs. Int'l Bus. Machines Corp.*, 517 U.S. 843 [77 AFTR 2d 96-2412], 861 (1996) (alternations in original))); *Int'l Bus. Machines*, 517 U.S. at 848 ("We know historically that [the Export Clause] was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress . . . ." (quoting *Fairbank v. United States*, 181 U.S. 283, 290 (1901))); *Florida Sugar*, 220 F.3d at 1338 (clause designed to "protect against the federal government discriminatorily taxing the interstate commerce of a particular state or region"); *Carnival Cruise Lines, Inc. v. United States*, 200 F.3d 1361, 1364 [85 AFTR 2d 2000-305] (Fed. Cir.), *cert. denied*, 530 U.S. 1274 (2000) (same).

[8] Several cases, in fact, suggest a general hesitancy by courts to afford foreign entities and individuals standing to sue absent some indication from Congress that it intended a law with a domestic scope to be enforced by foreigners. See, e.g., *Sacilor, Acieries et Laminoirs de Lorraine v. United States*, 815 F.2d 1488, 1491 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 924 (1987) (holding European manufacturer of steel pipe lacked prudential standing to challenge denial of its request to allow further importation of pipe, finding that "it does not appear that Congress intended to rely on foreign manufacturers to challenge administrative application of American import laws"); *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1209–11 (5th Cir. 1991) (finding that Canadian workers, affected by the loss of sales due to the EPA's ban of asbestos under the Toxic Substance Control Act, did not have standing to challenge the action because of the Act's "national emphasis").

(D.C. Cir. 1977) (a mere "congruence between the purpose of the statute . . . and the interests asserted by [a plaintiff] is not sufficient to invoke the federal judicial power").

Based on the foregoing, this court concludes that plaintiff is not arguably within the zone of interests protected by the Export Clause and thus lacks prudential standing to bring any claims predicated upon that clause. This conclusion draws further support from cases which indicate that another consideration in assessing prudential standing is that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. Here, plaintiff is essentially asserting the rights of the coal producers, upon whom the exactions in questions were actually imposed. Of course, it is well-accepted that the Congress, may if it wishes, expressly override prudential considerations of standing and authorize the filing of a law suit. *See Bennett*, 520 U.S. at 162–63. But, this court sees no evidence of this here. *Per contra.* The case law suggests that plaintiff's illegal exaction claim fails to state a claim under the Tucker Act. *See Casa de Cambio Comdiv S.A., De. C.V. v. United States*, 291 F.3d 1356 (Fed. Cir. 2002), *aff'g*, 48 Fed. Cl. 137 (2000). This, indeed, was the conclusion of this court on analogous facts in Emerald, Slip Op. at 13–14.[9]

III. Conclusion

For these reasons, this court GRANTS defendant's motion to dismiss plaintiff's complaint for lack of standing. The Clerk is hereby ordered to dismiss plaintiff's complaint. On or before January 10, 2003, defendant and the third-party defendants shall file a joint status report with the court indicating how, if at all, they intend to proceed with respect to the third-party actions associated with this case.

—

Francis M. Allegra

Judge

¶2002-5787

Norman G. FERGUSON, PLAINTIFF v. UNITED STATES, DEFENDANT. Norman G. and Dianne L. FERGUSON, PLAINTIFFS v. UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 77-088T; No. 89-527T, Dec. 2, 2002. Decision for Taxpayers in part and for Govt.

1. Court of Federal Claims—refund suits—dismissal—cost to govt.—failure to prosecute. Hockey player's and wife's refund suit was dismissed with prejudice under either Court of Federal Claims Rule 41(a)(2)'s voluntary dismissal provision or 41(b)'s failure to prosecute provision: taxpayers' failure to appear and fact they requested dismissal only on eve of rescheduled trial showed they had no interest in timely prosecuting suit; and prejudicial, as opposed to non-prejudicial, dismissal was appropriate based on drawn-out nature of proceedings and cost to govt. *Reference:* United States Tax Reporter ¶74,225.05(45); 74,225.05(35); 74,336.510(35). IRC §7422.

ORDER

MARIAN BLANK HORN Judge

The above-captioned cases are two of the two hundred and thirty-one (231) related "hockey player tax refund" cases filed in this court.[1] The complaint in Case No. 77-088T was filed on February 9, 1977 and the complaint in Case No. 89-

[9] In *Ashkir v. United States*, 46 Fed. Cl. 438 (2000), this court held that a nonresident alien lacked standing to invoke the Takings Clause of the Fifth Amendment with respect to real property located in Somalia. The court found that neither the plaintiff nor his property possessed the requisite substantial connection with the United States that would allow for his invocation of the Takings Clause. 46 Fed. Cl. at 444–45. Although this court intimated that a similar analysis might apply to other provisions of the Constitution, *id.* at 443, based on the foregoing, this court need not decide whether the analysis in *Ashkir* actually extends to the Export Clause. Based on its resolution of the standing issue, this court also need not reach the issue whether it or the district courts has exclusive jurisdiction to consider plaintiff's challenge to the imposition of the reclamation fees. But *see Amerikohl Mining, Inc. v. United States*, 899 F.2d 1210 (Fed. Cir. 1990); *Consolidation Coal Co. v. United States*, 54 Fed. Cl. 14 [90 AFTR 2d 2002-7028] (2002).

[1] For a more complete explanation of the extensive procedural history and for numerous examples of legal issues common to the hockey player tax refund cases, see this court's opinion in Frederick E. and Linda L. Speck v. United States, 28 Fed. Cl. 254 [71 AFTR 2d 93-1403] (1993) (denying tax refund claims), appeal dismissed, 1994 WL 745411 (Fed. Cir. 1994).

527T was filed on September 26, 1989. The cases are before the court on plaintiff Norman G. Ferguson's motion to dismiss and on consideration by the court of dismissal, with prejudice, for failure to prosecute pursuant to Rule 41(b) of the Rules of the United States Court of Federal Claims (RCFC).

FINDINGS OF FACT

On February 25, 1991, the court sent an order to all of the remaining plaintiffs in the related hockey player tax refund cases, including the plaintiffs, Norman Ferguson and Dianne Ferguson, which requested that they inform the court as to whether they wished to proceed with their respective cases. The court required the plaintiffs to comply with the following:

> If the plaintiff wishes to continue as a plaintiff in this action, he/she must complete and sign the attached Notice A, indicating a desire to continue in the lawsuit and designating that Charles L. Abrahams is to continue as counsel on the case, indicate another choice of counsel, or indicate that the plaintiff wishes to proceed pro se, acting on his or her own behalf, representing him or herself. Such Notice A must be filed with the Court on or before June 28, 1991.
>
> In the alternative, should plaintiff decide not to pursue the claims in this action further, he/she must complete and sign the attached Notice B and file it with the Court no later than June 28, 1991.
>
> In the case of a married couple who have jointly filed their lawsuit in these cases, each party must individually complete Notice A or B.

(Emphasis in original.)

Plaintiffs Norman Ferguson and Dianne Ferguson each filed with the court "Notice A" documents, dated May 21, 1991, indicating that they wished to prosecute Case No. 89-527T in this court, and that they wished to be represented by attorney Charles L. Abrahams. Case No. 77-088T was not addressed in either Norman Ferguson's or Dianne Ferguson's Notice A documents. On May 12, 1993, the court scheduled a pretrial conference for the above captioned cases and for all remaining hockey player tax refund cases, to be held on July 7–9, 1993, to review the status of the cases. As a result of the delays occasioned by plaintiffs in the hockey player tax refund cases filed in this court, the court's May 12, 1993 order reminded all of the remaining parties of RCFC 41(b), which authorizes the court to dismiss a case for failure to prosecute. (See Speck v. United States, 28 Fed. Cl. at 263–69, 310–12, for a general description of the delays encountered in the prosecution of the hockey player tax refund cases.) On July 7, 1993, the court held a pretrial conference in the above captioned cases. Plaintiff Norman Ferguson, appearing by telephone, indicated that he wished to proceed with his cases. Plaintiff Dianne Ferguson did not appear for the pretrial conference.

On September 22, 1993, the court scheduled the above captioned cases for trial, to commence on December 6, 1993. Shortly before trial, on November 23, 1993, plaintiffs' counsel filed a document titled "Motion to Dismiss," with a separate "Declaration of Charles L. Abrahams," both of which stated that Norman Ferguson wanted to dismiss his cases.[2] Plaintiffs were informed in a conference on November 29, 1993, and in a confirming order of the court dated November 30, 1993, that counsel of record and all named plaintiffs must appear in person at a hearing scheduled to commence December 6, 1993. On December 6, 1993, neither plaintiff Norman Ferguson nor plaintiff Dianne Ferguson made an appearance as directed.

DISCUSSION

[1] RCFC 41(b) allows for the dismissal of a case for failure to prosecute. RCFC 41(b) states as follows: Rule 41. Dismissal of Actions

(b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to

[2] In an August 21, 1998 filing, plaintiffs' counsel stated that both Norman Ferguson and Dianne Ferguson wanted to dismiss their claims.

prosecute or to comply with these rules or any order of court, the court may dismiss on its own motion or defendant may move for dismissal of an action or any claim. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for failure to join a party under RCFC 19, operates as an adjudication upon the merits.

Because public policy strongly favors the prompt disposition of cases by trial courts, and in order to expedite judicial proceedings while preventing undue delays in the disposition of pending cases, federal trial courts have been given broad discretion to dismiss a plaintiff's action with prejudice. Link v. Wabash R.R. Co., 370 U.S. 626, 629–30, reh'g denied, 371 U.S. 873 (1962); see also Syntex Ophthalmics, Inc. v. Novicky, 795 F.2d 983, 986 (Fed. Cir. 1986) (affirming dismissal of defendant's counterclaims for failure to appear at trial); Mulbah v. Detroit Bd. of Educ., 261 F.3d 586, 590–91 (6th Cir. 2001); Ortiz-Anglada v. Ortiz-Perez, 183 F.3d 65, 66–67 (1st Cir. 1999). Several courts have indicated that, although subject to rebuttal, prejudice to the defendant resulting from unreasonable delay or a failure to prosecute may be presumed. Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 753 (9th Cir. 2002); LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d 206, 210 (2d Cir. 2001); Southwest Marine Inc. v. Danzig, 217 F.3d 1128, 1138, (9th Cir. 2000), cert. denied, 532 U.S. 1007 (2001); Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 42 (2d Cir. 1982); Citizens Utils. Co. v. American Tel. & Tel. Co., 595 F.2d 1171, 1174 (9th Cir.), cert. denied, 444 U.S. 931 (1979).

Furthermore, a court may dismiss a case for failure to prosecute on its own initiative. In addition to the explicit authority set forth in the RCFC 41(b), ''[t]he authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'' Link v. Wabash R.R. Co., 370 U.S. at 630–31 (footnote omitted); see also Lyell Theatre Corp., 682 F.2d at 42–43; Colbert v. United States, 30 Fed. Cl. 95, 97 (1993). The United States Court of Appeals for the Federal Circuit has explicitly adopted the standards articulated in Link. See, e.g., Claude E. Atkins Enters., Inc. v. United States, 899 F.2d 1180, 1184–85 (Fed. Cir. 1990); Kadin Corp. v. United States, 782 F.2d 175, 176–77 (Fed. Cir.), cert. denied, 476 U.S. 1171 (1986). The court in Kadin stated that, ''[i]f [Claims Court] judges are to discharge their heavy responsibility effectively, their power to dismiss, in situations such as the one before us, must be more than theoretical.'' Kadin Corp. v. United States, 782 F.2d at 177 (quoting Automated Datatron, Inc. v. Woodcock, 659 F.2d 1168, 1170 (D.C. Cir. 1981)). The United States Court of Appeals for the Federal Circuit also stated that this court's exercise of discretion to dismiss a case for failure to prosecute will not be disturbed on appeal ''unless upon a weighing of relevant factors we are left with 'a ''definite and firm conviction'' that the court below committed a clear error of judgment.''' Adkins v. United States, 816 F.2d 1580, 1582 (Fed. Cir. 1987) (quoting Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 917 (Fed. Cir. 1984)).

As noted by the United States Court of Appeals for the Federal Circuit, ''dismissal is a harsh sanction ....'' Kadin Corp. v. United States, 782 F.2d at 176; accord Martens v. Thomann, 273 F.3d 159, 179 (2d Cir. 2001); LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d at 209. In Kadin, however, plaintiff's and counsel's ''entire course of conduct reflected a callous disregard for the rules and regulations of the court and fell far short of the obligations an attorney owes to a court before which he is conducting litigation.'' Kadin Corp. v. United States, 782 F.2d at 177. When a plaintiff files a lawsuit in this court, the court must presume that the party, and the counsel who represents the party, intend to prosecute that case to a final resolution. Repeated disregard of court orders forces

the court to abandon that presumption, and warrants dismissal of the complaint, with prejudice, pursuant to RCFC 41(b).

In the alternative, voluntary dismissal of a complaint by a plaintiff is provided for in RCFC 41(a). RCFC 41(a)(1)(i) permits a plaintiff to dismiss a complaint without prejudice when a notice of dismissal is filed before the service of the defendant's answer. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 394 (1990). Because the defendant in the instant case has filed an answer, the plaintiffs may dismiss this action only by stipulation as outlined in Rule 41(a)(1)(ii), or by order the court, "upon such terms and conditions as the court deems proper," under RCFC 41(a)(2). Norman Ferguson's November 23, 1993 motion to dismiss does not reflect a stipulation by the government, and does not address whether the dismissal requested is with or without prejudice.

RCFC 41(a) states: Rule 41. Dismissal of Actions

(a) Voluntary Dismissal; Effect Thereof. (1) By Plaintiff; by Stipulation. Subject to the provisions of RCFC 23, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by the United States prior to the service upon it of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Rule 41(a)(2) vests wide discretion in trial courts to allow for voluntary dismissal "upon order of the court and upon such terms and conditions as the court deems proper." RCFC 41(a)(2); see also Deuterium Corp. v. United States, 21 Cl. Ct. 132, 134 (1990). Moreover, pursuant to RCFC 41(a)(2), the dismissal of the above-captioned case is within the sound discretion of this court and may be overturned only upon a showing of an abuse of discretion. See Templeton v. Nedlloyd Lines, 901 F.2d 1273, 1274–75 (5th Cir. 1990); see also Herring v. City of Whitehall, 804 F.2d 464, 466 (8th Cir. 1986).

RCFC 41(a)(2) states that, "[u]nless otherwise specified in the order, a dismissal under this paragraph is without prejudice." However, "[a] court can respect this norm and still exercise considerable discretion by offering reasonable grounds when dismissing an action with prejudice." Deuterium Corp. v. United States, 21 Cl. at 134 (citing Link v. Wabash R.R. Co., 370 U.S. at 629–33; Durham v. Florida East Coast Ry. Co., 385 F.2d 366, 367–68 (5th Cir. 1967)).

This court concurs with the rationale outlined in Deuterium, which states:

No precise formula governs dismissals with prejudice. The decision largely hinges on the equities of the case, with due regard for the interests of both parties. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849 (1947); LeCompte v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976). The grounds for dismissing with prejudice, however, fall generally into three broad categories: the burden on defendant of dismissal without prejudice, the progress of the litigation, and the diligence and good faith of the plaintiff.

Deuterium Corp. v. United States, 21 Cl. Ct. at 134. A federal court may dismiss an action with prejudice if it finds that "[t]he government has devoted considerable time and effort to preparing the case and formulating its interrogatories, and it may cause the government expense and inconvenience if the case now were put in possible limbo." Alumni Ass'n of Univ. of North Carolina, Inc. v. United States, 223 Ct. Cl. 765, 767 [46 AFTR 2d 80-5008], 650 F.2d 287 (1980); see also Deuterium Corp. v. United States, 21 Cl. Ct. at 134–35.

In the instant case, plaintiffs' initial insistence to proceed with their cases caused the government, and the court, to expend enormous amounts of time, effort and expense in response. Norman Ferguson indicated the desire to dismiss his claims only as the trial date drew near, and both plaintiffs ignored the court's direction to appear for a hearing. Plaintiffs have evinced no interest in the timely prosecution of their claims since indicating their contrary interest to dismiss the claims. Allowing the plaintiffs to withdraw from the case, without prejudice, after the considerable time, effort and expense expended by defendant, is a burden that this court will not impose. As pointed out by the court in Deuterium, "[d]ismissal with prejudice is appropriate where there have been extensive proceedings with a trial clearly in sight." Deuterium Corp. v. United States, 21 Cl. Ct. at 135 (citing Ferguson v. Eakle, 492 F.2d 26 (3rd Cir. 1974); Rollison v. Washington Nat'l Insur. Cor., 176 F.2d 364 (4th Cir. 1949)). This court agrees with the following statement in Deuterium, which is equally appropriate in the present case:

> Under these circumstances, defendant should not be exposed to the uncertainty of future litigation and to the costs of beginning anew. If this court granted plaintiff's motion, plaintiff would have wiped the slate clean. After ... years of litigation and losses on several motions, this clean slate would unduly strengthen plaintiff's position at defendant's expense, if plaintiff later elected to refile. Thus, this court dismisses the remaining counts of plaintiff's amended petition with prejudice.

Deuterium Corp. v. United States, 21 Cl. Ct. at 136 (footnote omitted); see also Schweiger Constr. Co. v. United States, 49 Fed. Cl. 188, 208–09 (2001).

CONCLUSION

For the foregoing reasons, Norman Ferguson's motion to dismiss Case Nos. 77-088T and 89-527T is GRANTED, with prejudice, pursuant to RCFC 41(a)(2). The Clerk's Office is directed to DISMISS, with prejudice, the complaints in Case Nos. 77-088T and 89-527T as to Norman Ferguson. The Clerk's Office also is directed to DISMISS, with prejudice, Case No. 89-527T as to Dianne Ferguson, pursuant to RCFC 41(b), for failure to prosecute. On independent grounds, Case Nos. 77-088T and 89-527T also are dismissed as to Norman Ferguson pursuant to RCFC 41(b), for failure to prosecute.

IT IS SO ORDERED.

MARIAN BLANK HORN

Judge

¶2002-5788

Barrie M. MEISSNER, PLAINTIFF v. UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) Nos. 77-303T, 89-627T, Dec. 2, 2002. Decision for Taxpayer in part and for Govt.

1. Court of Federal Claims—refund suits—dismissal—cost to govt. Hockey player's refund suit was dismissed with prejudice under Court of Federal Claims Rule 41(a)(2)'s voluntary dismissal provision: prejudicial dismissal was warranted in light of extensive delays and cost to govt. caused by taxpayer's initial insistence on maintaining case, failure to appear at scheduled conferences, and last-minute dismissal request. *Reference:* United States Tax Reporter ¶74,225.05(45); 74,336.510(60). IRC §7422.

In the United States Court of Federal Claims,

ORDER

MARIAN BLANK HORN Judge

The above-numbered cases are two of the two hundred and thirty-one (231) related ''hockey player tax refund'' cases filed in this court.[1] The complaint in Case No. 77-303T was filed on June 1, 1977 and the complaint in Case No. 89-627T was filed on November 16, 1989. The cases are before the court on plaintiff's motion to dismiss, with prejudice. Plaintiff's motion will be reviewed pursuant to Rule 41(a)(2) of the Rules of the United States Court of Federal Claims (RCFC).

FINDINGS OF FACT

On February 25, 1991, the court sent an order to all of the remaining plaintiffs in the related hockey player tax refund cases, including the plaintiff in the above numbered cases, which requested that the plaintiff's inform the court as to whether they wished to proceed with their respective cases. The court required the plaintiffs to comply with the following:

> If the plaintiff wishes to continue as a plaintiff in this action, he/she must complete and sign the attached Notice A, indicating a desire to continue in the lawsuit and designating that Charles L. Abrahams is to continue as counsel on the case, indicate another choice of counsel, or indicate that the plaintiff wishes to proceed pro se, acting on his or her own behalf, representing him or herself. Such Notice A must be filed with the Court on or before June 28, 1991.
>
> In the alternative, should plaintiff decide not to pursue the claims in this action further, he/she must complete and sign the attached Notice B and file it with the Court no later than June 28, 1991.
>
> In the case of a married couple who have jointly filed their lawsuit in these cases, each party must individually complete Notice A or B.

(Emphasis in original.)

On May 31, 1991, plaintiff filed a Notice A intention to continue prosecuting his claims, also indicating he wished to be represented by attorney Charles L. Abrahams. On May 12, 1993, the court scheduled a pretrial conference for the above captioned cases and for all remaining hockey player tax refund cases, to be held on July 7–9, 1993, to review the status of the cases. As a result of the delays occasioned by plaintiffs in the hockey player tax refund cases filed in this court, the court's May 12, 1993 order reminded all of the remaining parties of RCFC 41(b), which authorizes the court to dismiss a case for failure to prosecute. (See Speck v. United States, 28 Fed. Cl. at 263–69, 310–12, for a general description of the delays encountered in the prosecution of the hockey player tax refund cases.) Barrie Meissner appeared by telephone at the July 7, 1993 pretrial conference, indicated that he believed he wanted to continue the prosecution of his cases, but also indicated that he wanted to speak with his attorney about the matter after the conference concluded. On November 22, 1993, both plaintiff and plaintiff's counsel filed notices with the court indicating that plaintiff wanted to continue to prosecute his cases. However, on February 18, 1994, plaintiff filed a motion to dismiss his cases, with prejudice. In a February 25, 1994 order, the court scheduled a conference with plaintiff for March 10, 1994, and arranged for plaintiff to appear by telephone. Plaintiff did not make himself available for the March 10, 1994 conference. The court rescheduled the conference for April 13, 1994, again arranging for plaintiff to appear by telephone, but, once again, plaintiff did not make himself available for the conference.

DISCUSSION

[1] Voluntary dismissal of a complaint by a plaintiff is provided for in RCFC 41(a). RCFC 41(a)(1)(i) permits a plaintiff to dismiss a complaint without

[1] For a more complete explanation of the extensive procedural history and for numerous examples of legal issues common to the hockey player tax refund cases, see this court's opinion in Frederick E. and Linda L. Speck v. United States, 28 Fed. Cl. 254 [71 AFTR 2d 93-1403] (1993) (denying tax refund claims), appeal dismissed, 1994 WL 745411 (Fed. Cir. 1994).

prejudice when a notice of dismissal is filed before the service of the defendant's answer. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 394 (1990). Because the defendant in the instant case has filed an answer, plaintiff may dismiss this action only through a stipulation of dismissal signed by all parties, as outlined in Rule 41(a)(1)(ii), or may request dismissal by the court, "upon such terms and conditions as the court deems proper," pursuant to RCFC 41(a)(2). Plaintiff's February 18, 1994 motion to dismiss does not reflect a stipulation of dismissal signed by all parties, but, instead, requests the court's approval of a dismissal, with prejudice.

RCFC 41(a) states: Rule 41. Dismissal of Actions

(a) Voluntary Dismissal; Effect Thereof. (1) By Plaintiff; by Stipulation. Subject to the provisions of RCFC 23, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by the United States prior to the service upon it of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

As noted above, Rule 41(a)(2) vests wide discretion in trial courts to allow for voluntary dismissal, "upon order of the court and upon such terms and conditions as the court deems proper." See Deuterium Corp. v. United States, 21 Cl. Ct. 132, 134 (1990). Moreover, pursuant to RCFC 41(a)(2), the dismissal of the above-captioned case is within the sound discretion of this court and may be overturned only upon a showing of an abuse of discretion. See Templeton v. Nedlloyd Lines, 901 F.2d 1273, 1274–75 (5th Cir. 1990); see also Herring v. City of Whitehall, 804 F.2d 464, 466 (8th Cir. 1986).

RCFC 41(a)(2) states that, "[u]nless otherwise specified in the order, a dismissal under this paragraph is without prejudice." However, "[a] court can respect this norm and still exercise considerable discretion by offering reasonable grounds when dismissing an action with prejudice." Deuterium Corp. v. United States, 21 Cl. Ct. at 134 (citing Link v. Wabash R.R. C., 370 U.S. at 629–33; Durham v. Florida East Coast Ry. Co., 385 F.2d 366, 367–68 (5th Cir. 1967)).

This court concurs with the rationale outlined in Deuterium, which states:

> No precise formula governs dismissals with prejudice. The decision largely hinges on the equities of the case, with due regard for the interests of both parties. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849 (1947); LeCompte v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976). The grounds for dismissing with prejudice, however, fall generally into three broad categories: the burden on defendant of dismissal without prejudice, the progress of the litigation, and the diligence and good faith of the plaintiff.

Deuterium Corp. v. United States, 21 Cl. Ct. at 134. A federal court may dismiss an action with prejudice if it finds that "[t]he government has devoted considerable time and effort to preparing the case and formulating its interrogatories, and it may cause

the government expense and inconvenience if the case now were put in possible limbo.'' Alumni Ass'n of Univ. of North Carolina, Inc. v. United States, 223 Ct. Cl. 765, 767 [46 AFTR 2d 80-5008], 650 F.2d 287 (1980); see also Deuterium Corp. v. United States, 21 Cl. Ct. at 134–35.

In the instant case, plaintiff's initial insistence to proceed with his cases caused the government, and the court, to expend enormous amounts of time, effort and expense in response. Plaintiff also failed to appear for conferences in which it was arranged for plaintiff to appear by telephone for his convenience. Approving plaintiff's motion to dismiss, with prejudice, is appropriate, after the considerable time, effort and expense expended by defendant. As pointed out by the court in Deuterium, ''[d]ismissal with prejudice is appropriate where there have been extensive proceedings with a trial clearly in sight.'' Deuterium Corp. v. United States, 21 Cl. Ct. at 135 (citing Ferguson v. Eakle, 492 F.2d 26 (3rd Cir. 1974); Rollison v. Washington Nat'l Insur. Co., 176 F.2d 364 (4th Cir. 1949)). This court agrees with the following statement in Deuterium, which is equally appropriate in the present case:

> Under these circumstances, defendant should not be exposed to the uncertainty of future litigation and to the costs of beginning anew. If this court granted plaintiff's motion, plaintiff would have wiped the slate clean. After . . . years of litigation and losses on several motions, this clean slate would unduly strengthen plaintiff's position at defendant's expense, if plaintiff later elected to refile. Thus, this court dismisses the remaining counts of plaintiff's amended petition with prejudice.

Deuterium Corp. v. United States, 21 Cl. Ct. at 136 (footnote omitted); see also Schweiger Constr. Co. v. United States, 49 Fed. Cl. 188, 208–09 (2001).

CONCLUSION

As requested by plaintiff's motion to dismiss, with prejudice, pursuant to RCFC 41(a)(2), plaintiff's motion is GRANTED, and the Clerk's Office is directed to DISMISS, with prejudice, the complaints in Case Nos. 77-303T and 89-626T.

IT IS SO ORDERED.

MARIAN BLANK HORN

Judge

¶2002-5789

Donald A. TANNAHILL, PLAINTIFF v. UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 77-147T, Dec. 2, 2002. Decision for Taxpayer in part and for Govt.

1. Court of Federal Claims—refund suits—dismissal—failure to prosecute. Hockey player's refund suit was dismissed with prejudice under either Court of Federal Claims Rule 41(a)(2)'s voluntary dismissal provision or 41(b)'s failure to prosecute provision: taxpayer's and attorney's failure to appear at scheduled hearings and conferences and fact dismissal was requested only on eve of rescheduled trial showed taxpayer had no interest in timely prosecuting suit; and prejudicial, as opposed to non-prejudicial, dismissal was appropriate based on drawn-out nature of proceedings and cost to govt. *Reference:* United States Tax Reporter ¶74,225.05(45); 74,225.05(35); 74,336.510(35). IRC §7422.

In the United States Court of Federal Claims,

ORDER

MARIAN BLANK HORN Judge

The above-captioned case is one of the two hundred and thirty-one (231) related ''hockey player tax refund'' cases filed in this court.[1] The complaint in Case No. 77-147T was filed on March 15, 1977. The case is before the court on plaintiff's request for the court to dismiss his claims,

[1] For a more complete explanation of the extensive procedural history and for numerous examples of legal issues common to the hockey player tax refund cases, see this court's opinion in Frederick E. and Linda L. Speck v. United States, 28 Fed. Cl. 254 [71 AFTR 2d 93-1403] (1993)(denying tax refund claims), appeal dismissed, 1994 WL 745411 (Fed. Cir. 1994).

with prejudice,[2] and on consideration by the court of dismissal, with prejudice, for failure to prosecute pursuant to Rule 41(b) of the Rules of the United States Court of Federal Claims (RCFC).

FINDINGS OF FACT

On February 25, 1991, the court sent an order to all of the remaining plaintiffs in the related hockey player tax refund cases, including the plaintiff in the above numbered case, which requested that the plaintiffs inform the court as to whether they wished to proceed with their respective cases. The court required the plaintiffs to comply with the following:

> If the plaintiff wishes to continue as a plaintiff in this action, he/she must complete and sign the attached Notice A, indicating a desire to continue in the lawsuit and designating that Charles L. Abrahams is to continue as counsel on the case, indicate another choice of counsel, or indicate that the plaintiff wishes to proceed pro se, acting on his or her own behalf, representing him or herself. Such Notice A must be filed with the Court on or before June 28, 1991.
>
> In the alternative, should plaintiff decide not to pursue the claims in this action further, he/she must complete and sign the attached Notice B and file it with the Court no later than June 28, 1991.
>
> In the case of a married couple who have jointly filed their lawsuit in these cases, each party must individually complete Notice A or B.

(Emphasis in original.)

On June 12, 1991, plaintiff filed a Notice B with the court, requesting dismissal of all of his pending claims, with prejudice. After further consultation with his attorney, however, on June 26, 1991, plaintiff filed a Notice A, indicating an intention to continue prosecution of his claims, and also indicating he wished to be represented by attorney Charles L. Abrahams. Plaintiff indicated on this Notice A form that his filing of the earlier Notice B was in error.

On August 12, 1991, plaintiff filed a motion to disqualify defendant's counsel, and the Department of Justice, from further participation in the hockey players tax refund cases. The court held a fact finding hearing on the plaintiff's motion to disqualify defendant's counsel on September 23–25, 1991, in San Diego, California, which was continued on October 15–18, 1991, in Washington, D.C. The court heard the testimony of certain witnesses in San Diego in order to accommodate those witnesses for whom it was particularly difficult to appear outside of California.[3] The attorney for the plaintiff, Charles L. Abrahams, appeared at the San Diego portion of the hearing and, in fact, testified in support of his motion. However, plaintiff's counsel failed to appear at the Washington, D.C. continuation of the hearing, despite the fact that the court had set the dates for the second portion of the fact-finding hearing at a status conference on September 11, 1991, almost six weeks prior to the commencement date of the hearing in Washington, D.C.

The court first received notice of Mr. Abraham's deliberate refusal to attend the hearing in Washington, D.C. when it received a facsimile transmission from Mr. Abrahams on October 11, 1991, stating that although he understood that this court had denied his request for yet another continuance, he had decided that he would be unable to attend the hearings scheduled to begin four days later. Nonetheless, the hearing was convened as scheduled, on October 15, 1991, and Mr. Abrahams failed to appear. On October 16, 1991, the second day of the hearing in Washington, D.C., the court received another facsimile transmission from Mr. Abrahams, sent from his La Mesa, California office, and bearing his signature, confirming to the

[2] Plaintiff's June 16, 1992 filing is titled, "Declaration of Donald A. Tannahill," and provides, in part, that: "I am dismissing these cases with prejudice and give up any right I have to collect refunds involved in my action."

[3] The statute which creates the United States Court of Federal Claims includes a provision stating that: "The times and places of the sessions of the Court of Federal Claims shall be prescribed with a view to securing reasonable opportunity to citizens to appear before the Court of Federal Claims with as little inconvenience and expense to citizens as is practicable." 28 U.S.C. § 173 (2000).

court that he had decided not to attend the hearing and, in fact, would not attend.

Noting for the record the unusual nature of the proceedings which were about to occur, the court decided to continue with the Washington, D.C. portion of the fact-finding hearing, even without the presence of Mr. Abrahams. This decision was made, in part, because it was clear to the court that Mr. Abrahams had deliberately failed to appear at the continuation of the hearing. Furthermore, the court felt that his actions were part of a pattern of delay designed to force the court to reschedule the five hockey player trials set to commence on December 2, 1991. Plaintiff's counsel had previously made requests to delay those trials, all of which the defendant had vigorously opposed. Moreover, numerous witnesses had made complicated and expensive arrangements to appear at the proceedings in Washington, D.C., which had been scheduled almost six weeks ear-lier, on September 11, 1991, and the court and the defendant had spent many hours preparing for the continuation portion of the hearing. The court, therefore, felt com-pelled to continue the hearing, as previ-ously scheduled, and to allow the wit-nesses who were scheduled to appear in Washington, D.C. to testify. In addition, the court felt that a motion to disqualify defendant's counsel from further participa-tion in the hockey player tax refund cases should be addressed as quickly as possi-ble.[4]

The court scheduled trial in the above captioned case to begin on June 22, 1992, in Pasadena, California. On June 16, 1992, shortly before trial was to commence, plaintiff filed a request with the court to dismiss his claims, with prejudice.

DISCUSSION

[1] RCFC 41(b) allows for the dismissal of a case for failure to prosecute. RCFC 41(b) states as follows: Rule 41. Dismissal of Actions

(b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, the court may dismiss on its own motion or defendant may move for dismissal of an action or any claim. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for failure to join a party under RCFC 19, operates as an adjudication upon the merits.

Because public policy strongly favors the prompt disposition of cases by trial courts, and in order to expedite judicial proceedings while preventing undue delays in the disposition of pending cases, federal trial courts have been given broad discretion to dismiss a plaintiff's action with prejudice. Link v. Wabash R.R. Co., 370 U.S. 626, 629–30, reh'g denied, 371 U.S. 873 (1962); see also Syntex Ophthalmics, Inc. v. Novicky, 795 F.2d 983, 986 (Fed. Cir. 1986)(affirming dismissal of defendant's counterclaims for failure to appear at trial); Mulbah v. Detroit Bd. of Educ., 261 F.3d 586, 590–91 (6th Cir. 2001); Ortiz-Anglada v. Ortiz-Perez, 183 F.3d 65, 66–67 (1st Cir. 1999). Several courts have indicated that, although subject to rebuttal, prejudice to the defendant resulting from unreasonable delay or a failure to prosecute may be presumed. Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 753 (9th Cir. 2002); LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d 206, 210 (2d Cir. 2001); Southwest Marine Inc. v. Danzig, 217 F.3d 1128, 1138 (9th Cir. 2000), cert. denied, 532 U.S. 1007 (2001); Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 42 (2d Cir. 1982); Citizens Utils. Co. v. American Tel. & Tel. Co., 595 F.2d 1171, 1174 (9th Cir.), cert. denied, 444 U.S. 931 (1979).

Furthermore, a court may dismiss a case for failure to prosecute on its own initiative. In addition to the explicit authority set forth in the RCFC 41(b), "[t]he authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not

[4] In Tannahill v. United States, 25 Cl. Ct. 149, 173 (1992), the court denied plaintiff's motion for disqualification of counsel from further participation in the hockey players tax refund cases, and in Tannahill v. United States, 27 Cl. Ct. 724, 751–52 (1992), the court denied plaintiff's motion for disqualification of the Department of Justice from the same cases.

by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'' Link v. Wabash R.R. Co., 370 U.S. at 630–31 (footnote omitted); see also Lyell Theatre Corp., 682 F.2d at 42–43; Colbert v. United States, 30 Fed. Cl. 95, 97 (1993). The United States Court of Appeals for the Federal Circuit has explicitly adopted the standards articulated in Link. See, e.g., Claude E. Atkins Enters., Inc. v. United States, 899 F.2d 1180, 1184–85 (Fed. Cir. 1990); Kadin Corp. v. United States, 782 F.2d 175, 176–77 (Fed. Cir.), cert. denied, 476 U.S. 1171 (1986). The court in Kadin stated that, ''[i]f [Claims Court] judges are to discharge their heavy responsibilities effectively, their power to dismiss, in situations such as the one before us, must be more than theoretical.'' Kadin Corp. v. United States, 782 F.2d at 177 (quoting Automated Datatron, Inc. v. Woodcock, 659 F.2d 1168, 1170 (D.C. Cir. 1981)). The United States Court of Appeals for the Federal Circuit also stated that this court's exercise of discretion to dismiss a case for failure to prosecute will not be disturbed on appeal ''unless upon a weighing of relevant factors we are left with 'a ''definite and firm conviction'' that the court below committed a clear error of judgment.''' Adkins v. United States, 816 F.2d 1580, 1582 (Fed. Cir. 1987) (quoting Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 917 (Fed. Cir. 1984)).

As noted by the United States Court of Appeals for the Federal Circuit, ''dismissal is a harsh sanction . . . .'' Kadin Corp. v. United States, 782 F.2d at 176; accord Martens v. Thomann, 273 F.3d 159, 179 (2d Cir.2001); LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d at 209. In Kadin, however, plaintiff's and counsel's ''entire course of conduct reflected a callous disregard for the rules and regulations of the court and fell far short of the obligations an attorney owes to a court before which he is conducting litigation.'' Kadin Corp. v. United States, 782 F.2d at 177. When a plaintiff files a lawsuit in this court, the court must presume that the party, and the counsel who represents the party, intend to prosecute that case to a final resolution. Repeated disregard of court orders forces the court to abandon that presumption, and warrants dismissal of the complaint, with prejudice, pursuant to RCFC 41(b).

In the alternative, voluntary dismissal of a complaint by a plaintiff is provided for in RCFC 41(a). RCFC 41(a)(1)(i) permits a plaintiff to dismiss a complaint without prejudice when a notice of dismissal is filed before the service of the defendant's answer. See Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 394 (1990). Because the defendant in the instant case has filed an answer, the plaintiffs may dismiss this action only by stipulation of all the parties as outlined in Rule 41(a)(1)(ii), or by order of the court, ''upon such terms and conditions as the court deems proper,'' pursuant to RCFC 41(a)(2). Plaintiff's June 16, 1992, request that the court dismiss his claims does not reflect a stipulation by the government, but does indicate that the dismissal requested is with prejudice,.

RCFC 41(a) states: Rule 41. Dismissal of Actions

(a) Voluntary Dismissal; Effect Thereof. (1) By Plaintiff; by Stipulation. Subject to the provisions of RCFC 23, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court(i) by filing a notice of dismissal at any time before service of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems

proper. If a counterclaim has been pleaded by the United States prior to the service upon it of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Rule 41(a)(2) vests wide discretion in trial courts to allow for voluntary dismissal "upon order of the court and upon such terms and conditions as the court deems proper." RCFC 41(a)(2); see also Deuterium Corp. v. United States, 21 Cl. Ct. 132, 134 (1990). Moreover, pursuant to RCFC 41(a)(2), the dismissal of the above-captioned case is within the sound discretion of this court and may be overturned only upon a showing of an abuse of discretion. See Templeton v. Nedlloyd Lines, 901 F.2d 1273, 1274–75 (5th Cir. 1990); see also Herring v. City of Whitehall, 804 F.2d 464, 466 (8th Cir. 1986).

RCFC 41(a)(2) states that, "[u]nless otherwise specified in the order, a dismissal under this paragraph is without prejudice." However, "[a] court can respect this norm and still exercise considerable discretion by offering reasonable grounds when dismissing an action with prejudice." Deuterium Corp. v. United States, 21 Cl. Ct. at 134 (citing Link v. Wabash R.R. Co., 370 U.S. at 629–33; Durham v. Florida East Coast Ry. Co., 385 F.2d 366, 367–68 (5th Cir. 1967)).

This court concurs with the rationale outlined in Deuterium, which states:

> No precise formula governs dismissals with prejudice. The decision largely hinges on the equities of the case, with due regard for the interests of both parties. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849 (1947); LeCompte v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976). The grounds for dismissing with prejudice, however, fall generally into three broad categories: the burden on defendant of dismissal without prejudice, the progress of the litigation, and the diligence and good faith of the plaintiff.

Deuterium Corp. v. United States, 21 Cl. Ct. at 134. A federal court may dismiss an action with prejudice if it finds that "[t]he government has devoted considerable time and effort to preparing the case and formulating its interrogatories, and it may cause the government expense and inconvenience if the case now were put in possible limbo." Alumni Ass'n of Univ. of North Carolina, Inc. v. United States, 223 Ct. Cl. 765, 767 [46 AFTR 2d 80-5008], 650 F.2d 287 (1980); see also Deuterium Corp. v. United States, 21 Cl. Ct. at 134–35.

In the instant case, plaintiff's initial insistence to proceed with his case caused the government, and the court, to expend enormous amounts of time, effort and expense in response. Plaintiff's counsel filed a motion to disqualify defendant's counsel, then failed to appear for a hearing on the matter. Plaintiff dismissed his claims, with prejudice, only as a subsequent trial date drew near. Approving plaintiff's request to dismiss his claims, with prejudice, is appropriate, after the considerable time, effort and expense expended by defendant. As pointed out by the court in Deuterium, "[d]ismissal with prejudice is appropriate where there have been extensive proceedings with a trial clearly in sight." Deuterium Corp. v. United States, 21 Cl. Ct. at 135 (citing Ferguson v. Eakle, 492 F.2d 26 (3rd Cir. 1974); Rollison v. Washington Nat'l Insur. Co., 176 F.2d 364 (4th Cir. 1949)). This court agrees with the following statement in Deuterium, which is equally appropriate in the present case:

> Under these circumstances, defendant should not be exposed to the uncertainty of future litigation and to the costs of beginning anew. If this court granted plaintiff's motion, plaintiff would have wiped the slate clean. After ... years of litigation and losses on several motions, this clean slate would unduly strengthen plaintiff's position at defendant's expense, if plaintiff later elected to refile. Thus, this court dismisses the remaining counts of plaintiff's amended petition with prejudice.

Deuterium Corp. v. United States, 21 Cl. Ct. at 136 (footnote omitted); see also Schwweiger Constr. Co. v. United States, 49 Fed. Cl. 188, 208–09 (2001).

CONCLUSION

For the foregoing reasons, plaintiff's request for the court to dismiss his claims, with prejudice, is GRANTED, pursuant to RCFC 41(a)(2). The Clerk's Office is directed to DISMISS, with prejudice, the complaint in Case No. 77-147T. On independent grounds pursuant to RCFC 41(b), dismissal, with prejudice, of the complaint in Case No. 77-147T is directed, for failure to prosecute.

IT IS SO ORDERED.

MARIAN BLANK HORN

Judge

¶2002-5790

Gilles VILLEMURE, PLAINTIFF v. UNITED STATES, DEFENDANT. U.S. Court of Federal Claims, (Ct Fed Cl) No. 77-045T, Dec. 2, 2002. Decision for Taxpayer in part and for Govt.

1. Court of Federal Claims—refund suits—dismissal—failure to prosecute. Hockey player's refund suit was dismissed with prejudice under either Court of Federal Claims Rule 41(a)(2)'s voluntary dismissal provision or 41(b)'s failure to prosecute provision: taxpayer's failure to appear and fact he requested dismissal only on eve of rescheduled trial showed he had no interest in timely prosecuting suit; and prejudicial, as opposed to non-prejudicial, dismissal was appropriate based on drawn-out nature of proceedings and cost to govt. *Reference:* United States Tax Reporter ¶74,225.05(45); 74,225.05(35); 74,336.510(35). IRC §7422.

In the United States Court of Federal Claims,

ORDER

MARIAN BLANK HORN Judge

The above-captioned case is one of two hundred and thirty-one (231) related "hockey player tax refund" cases filed in this court.[1] The complaint in Case No. 77-045T was filed on January 21, 1977. The case is before the court on plaintiff's motion to dismiss and on consideration by the court of dismissal, with prejudice, for failure to prosecute pursuant to Rule 41(b) of the Rules of the United States Court of Federal Claims (RCFC).

FINDINGS OF FACT

On February 25, 1991, the court sent an order to all of the remaining plaintiffs in the related hockey player tax refund cases, including the plaintiff in the above captioned case, which requested that the plaintiffs inform the court as to whether they wished to proceed with their respective cases. The court required the plaintiffs to comply with the following:

> If the plaintiff wishes to continue as a plaintiff in this action, he/she must complete and sign the attached Notice A, indicating a desire to continue in the lawsuit and designating that Charles L. Abrahams is to continue as counsel on the case, indicate another choice of counsel, or indicate that the plaintiff wishes to proceed pro se, acting on his or her own behalf, representing him or herself. Such Notice A must be filed with the Court on or before June 28, 1991.
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> In the alternative, should plaintiff decide not to pursue the claims in this action further, he/she must complete and sign the attached Notice B and file it with the Court no later than June 28, 1991.
>
> In the case of a married couple who have jointly filed their lawsuit in these cases, each party must individually complete Notice A or B.

(Emphasis in original.)

[1] For a more complete explanation of the extensive procedural history and for numerous examples of legal issues common to the hockey player tax refund cases, see this court's opinion in Frederick E. and Linda L. Speck v. United States, 28 Fed. Cl. 254 [71 AFTR 2d 93-1403] (1993) (denying tax refund claims), appeal dismissed, 1994 WL 745411 (Fed. Cir. 1994).

On October 1, 1991, plaintiff filed a Notice A, reflecting an intention to continue prosecuting his claims, and also indicating that plaintiff wished to be represented by attorney Charles L. Abrahams. The court scheduled that in the above captioned case for November 16, 1992, however, plaintiff did not appear for the trial. On May 12, 1993, the court scheduled a pretrial conference for the above captioned case and for all remaining hockey player tax refund cases, to be held on July 7–9, 1993, to review the status of the cases. As a result of the delays occasioned by plaintiffs in the hockey player tax refund cases filed in this court, the court's May 12, 1993 order reminded all of the remaining parties of RCFC 41(b), which authorizes the court to dismiss a case for failure to prosecute. (See Speck v. United States, 28 Fed. Cl. at 263–69, 310–12, for a general description of the delays encountered in the prosecution of the hockey player tax refund cases.) Gilles Villemure appeared by telephone at the July 9, 1993 pretrial conference, indicating that he did not know if he should request dismissal of his case or if he should continue to prosecute his case, and in this regard was referred to his attorney by the court. In an order dated September 22, 1993 and a confirmatory order dated November 30, 1993, the court again scheduled the above captioned case for trial, to commence on December 6, 1993. Shortly before trial, on November 23, 1993, plaintiff's counsel filed a document titled "Motion to Dismiss," with a separate "Declaration of Charles L. Abrahams," both of which stated that plaintiff wanted to dismiss his case.

DISCUSSION

[1] RCFC 41(b) allows for the dismissal of a case for failure to prosecute. RCFC 41(b) states as follows: Rule 41. Dismissal of Actions

> (b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, the court may dismiss on its own motion or defendant may move for dismissal of an action or any claim. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision of this rule and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for failure to join a party under RCFC 19, operates as an adjudication upon the merits.

Because public policy strongly favors the prompt disposition of cases by trial courts, and in order to expedite judicial proceedings while preventing undue delays in the disposition pf pending cases, federal trial courts have been given broad discretion to dismiss a plaintiff's action with prejudice. Link v. Wabash R.R. Co., 370 U.S. 626, 629–30, reh'g denied, 371 U.S. 873 (1962); see also Syntex Ophthalmics, Inc. v. Novicky, 795 F.2d 983, 986 (Fed. Cir. 1986) (affirming dismissal of defendant's counterclaims for failure to appear at trial); Mulbah v. Detroit Bd. of Educ., 261 F.3d 586, 590–91 (6th Cir. 2001); Ortiz-Anglada v. Ortiz-Perez, 183 F.3d 65, 66–67 (1st Cir. 1999). Several courts have indicated that, although subject to rebuttal, prejudice to the defendant resulting from unreasonable delay or a failure to prosecute may be presumed. Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 753 (9th Cir. 2002); LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d 206, 210 (2d Cir. 2001); Southwest Marine Inc. v. Danzig, 217 F.3d 1128, 1138 (9th Cir. 2000), cert. denied, 532 U.S. 1007 (2001); Lyell Theatre Corp. v. Loews Corp., 682 F.2d 37, 42 (2d Cir. 1982); Citizens Utils. Co. v. American Tel. & Tel. Co., 595 F.2d 1171, 1174 (9th Cir.), cert. denied, 444 U.S. 931 (1979).

Furthermore, a court may dismiss a case for failure to prosecute on its own initiative. In addition to the explicit authority set forth in the RCFC 41(b), "[t]he authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." Link v. Wabash R.R. Co., 370 U.S. at 630–31 (footnote omitted); see also Lyell Theatre Corp., 682 F.2d at 42–43; Colbert v.

United States, 30 Fed. Cl. 95, 97 (1993). The United States Court of Appeals for the Federal Circuit has explicitly adopted the standards articulated in Link. See, e.g., Claude E. Atkins Enters., Inc. v. United States, 899 F.2d 1180, 1184–85 (Fed. Cir. 1990); Kadin Corp. v. United States, 782 F.2d 175, 176–77 (Fed. Cir.), cert. denied, 476 U.S. 1171 (1986). The court in Kadin stated that, ''[i]f [Claims Court] judges are to discharge their heavy responsibilities effectively, their power to dismiss, in situations such as the one before us, must be more than theoretical.'' Kadin Corp. v. United States, 782 F.2d at 177 (quoting Automated Datatron, Inc. v. Woodcock, 659 F.2d 1168, 1170 (D.C. Cir. 1981)). The United States Court of Appeals for the Federal Circuit also stated that this court's exercise of discretion to dismiss a case for failure to prosecute will not be disturbed on appeal ''unless upon a weighing of relevant factors we are left with 'a ''definite and firm conviction'' that the court below committed a clear error of judgment.''' Adkins v. United States, 816 F.2d 1580, 1582 (Fed. Cir. 1987) (quoting Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 917 (Fed. Cir. 1984)).

As noted by the United States Court of Appeals for the Federal Circuit, ''dismissal is a harsh sanction . . . .'' Kadin Corp. v. United States, 782 F.2d at 176; accord Martens v. Thomann, 273 F.3d 159, 179 (2d Cir. 2001); LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d at 209. In Kadin, however, plaintiff's and counsel's ''entire course of conduct reflected a callous disregard for the rules and regulations of the court and fell far short of the obligations an attorney owes to a court before which he is conducting litigation.'' Kadin Corp. v. United States, 782 F.2d at 177. When a plaintiff files a lawsuit in this court, the court must presume that the party, and the counsel who represents the party, intend to prosecute that case to a final resolution. Repeated disregard of court orders forces the court to abandon that presumption, and warrants dismissal of the complaint, with prejudice, pursuant to RCFC 41(b).

In the alternative, voluntary dismissal of a complaint by a plaintiff is provided for in RCFC 41(a). RCFC 41(a)(1)(i) permits a plaintiff to dismiss a complaint without prejudice when a notice of dismissal is filed before the service of the defendant's answer. See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 394 (1990). Because the defendant in the instant case has filed an answer, the plaintiffs may dismiss this action only by stipulation of all the parties as outlined in Rule 41(a)(1)(ii), or by order of the court, ''upon such terms and conditions as the court deems proper,'' pursuant to RCFC 41(a)(2). Plaintiff's November 23, 1993 motion to dismiss does not reflect a stipulation by the government, and does not address whether the dismissal requested is with or without prejudice.

RCFC 41(a) states: Rule 41. Dismissal of Actions

(a) Voluntary Dismissal; Effect Thereof. (1) By Plaintiff; by Stipulation. Subject to the provisions of RCFC 23, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States an action based on or including the same claim.

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by the United States prior to the service upon it of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection

unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

Rule 41(a)(2) vests wide discretion in trial courts to allow for voluntary dismissal "upon order of the court and upon such terms and conditions as the court deems proper." RCFC 41(a)(2); see also Deuterium Corp. v. United States, 21 Cl. Ct. 132, 134 (1990). Moreover, pursuant to RCFC 41(a)(2), the dismissal of the above-captioned case is within the sound discretion of this court and may be overturned only upon a showing of an abuse of discretion. See Templeton v. Nedlloyd Lines, 901 F.2d 1273, 1274–75 (5th Cir. 1990); see also Herring v. City of Whitehall, 804 F.2d 464, 466 (8th Cir. 1986).

RCFC 41(a)(2) states that "[u]nless otherwise specified in the order, a dismissal under this paragraph is without prejudice." However, "[a] court can respect this norm and still exercise considerable discretion by offering reasonable grounds when dis-missing an action with prejudice." Deute-rium Corp. v. United States, 21 Cl. Ct. at 134 (citing Link v. Wabash R.R. Co., 370 U.S. at 629–33; Durham v. Florida East Coast Ry. Co., 385 F.2d 366, 367–68 (5th Cir. 1967)).

This court concurs with the rationale outlined in Deuterium, which states:

> No precise formula governs dismissals with prejudice. The decision largely hinges on the equities of the case, with due regard for the interests of both parties. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 67 S. Ct. 752, 91 L.Ed. 849 (1947); LeCompte v. Mr. Chip, Inc., 528 F.2d 601 (5th Cir. 1976). The grounds for dismissing with prejudice, however, fall generally into three broad categories: the burden on defendant of dismissal without prejudice, the progress of the litigation, and the diligence and good faith of the plaintiff.

Deuterium Corp. v. United States, 21 Cl. Ct. at 134. A federal court may dismiss an action with prejudice if it finds that "[t]he government has devoted considerable time and effort to preparing the case and formulating its interrogatories, and it may cause the government expense and inconvenience if the case now were put in possible limbo." Alumni Ass'n of Univ. of North Carolina, Inc. v. United States, 223 Ct. Cl. 765, 767 [46 AFTR 2d 80-5008], 650 F.2d 287 (1980); see also Deuterium Corp. v. United Sates, 21 Cl. Ct. at 134–35.

In the instant case, plaintiff's initial insistence to proceed with his case caused the government, and the court, to expend enormous amounts of time, effort and expense in response. Plaintiff failed to appear for one trial date, and dismissed his claims only as a subsequent trial date drew near. Plaintiff has evinced no interest in the timely prosecution of his claims since indicating his contrary interest to dismiss the claims. Allowing the plaintiff to withdraw from the case, without prejudice, after the considerable time, effort and expense expended by defendant, is a burden that his court will not impose. As pointed out by the court in Deuterium, "[d]ismissal with prejudice is appropriate where there have been extensive proceedings with a trial clearly in sight." Deuterium Corp. v. United States, 21 Cl. Ct at 135 (citing Ferguson v. Eakle, 492 F.2d 26 (3rd Cir. 1974); Rollison v. Washington Nat'l Insur. Co., 176 F.2d 364 (4th Cir. 1949)). This court agrees with the following statement in Deuterium, which is equally appropriate in the present case:

> Under these circumstances, defendant should not be exposed to the uncertainty of future litigation and to the costs of beginning anew. If this court granted plaintiff's motion, plaintiff would have wiped the slate clean.
>
> After ... years of litigation and losses on several motions, this clean slate would unduly strengthen plaintiff's position at defendant's expense, if plaintiff later elected to refile. Thus, this court dismisses the remaining counts of plaintiff's amended petition with prejudice.

Deuterium Corp. v. United States, 21 Cl. Ct. at 136 (footnote omitted); see also

Schweiger Constr. Co. v. United States, 49 Fed. Cl. 188, 208–09 (2001).

CONCLUSION

For the foregoing reasons, plaintiff's motion to dismiss is GRANTED, with prejudice, pursuant to RCFC 41(a)(2). The Clerk's Office is directed to DISMISS, with prejudice, the complaint in Case No. 77-045T. On independent grounds pursuant to RCFC 41(b), dismissal, with prejudice, of the complaint in Case no 77-045T is directed, for failure to prosecute.

IT IS SO ORDERED.

MARIAN BLANK HORN

Judge

¶2002-5791

YEAGLE DRYWALL COMPANY, INC., APPELLANT in No. 02-1132 v. COMMISSIONER of Internal Revenue Veterinary Surgical Consultants, P.C., APPELLANT in No. 02-1214 v. COMMISSIONER of Internal Revenue. U.S. Court of Appeals, Third Circuit, (CA3) Case Nos: 02-1132; 02-1214, Dec. 18, 2002. Tax Courts, (2001) TC Memo 2001-284, RIA TC Memo ¶2001-284, 82 CCH TCM 814, and (2001) 117 TC 141 (opinions by Jacobs *J.*), affirmed. Years 1994, 1995, 1996, 1997. Decision for Govt.

1. Employment taxes—employees—S corp. shareholders—S corp. distributions—safe harbor relief. Tax Court properly determined that drywall and veterinary S corps.' respective presidents/owners were employees, and that corp. distributions to them were really wages subject to employment taxes: facts that owners performed almost all corp. tasks and brought in most if not all revenues showed that distributions were payments for their substantial services. Also, taxpayers weren't entitled to safe harbor relief under '78 Revenue Act §530 where their reliance on non-controlling case law wasn't reasonable, and they didn't otherwise allege any reasonable basis for their positions. And, due process argument raised for 1st time on appeal wasn't considered. *Reference:* United States Tax Reporter ¶31,115.01; 33,015.01(20); 34,015.09(95); 35,095.01(10); 13,665. IRC §3111; 3121; 3301; 3401; 3509; 1366.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,

On Appeal from the United States Tax Court (Nos. 00-3908 and 99-2500) Tax Judge: The Honorable Julian I. Jacobs

Before: ROTH, SMITH and CUDAHY,* Circuit Judges

OPINION

D. BROOKS SMITH, Circuit Judge:

NOT PRECEDENTIAL

This consolidated appeal challenges determinations by the United States Tax Court that an officer and shareholder of each of the corporate taxpayers was an employee and that the taxpayer was therefore liable for taxes under the Federal Insurance Contributions Act (''FICA''), 26 U.S.C. §§3101–3128, and the Federal Unemployment Tax Act (''FUTA''), 26 U.S.C. §§ 3301–3311. For the reasons set forth below, we will affirm.

I.

The taxpayers, Veterinary Surgical Consultants, P.C. (''VSC'') and Yeagle Drywall Company, Inc. (''YDC''), both received from the Internal Revenue Service (''IRS'') a ''Notice of Determination Concerning Worker Classification Under Section 7436.'' VSC's notice, dated November 17, 1998, advised that the IRS had determined that Kenneth Sadanaga, D.V.M., was to be classified as an employee for purposes of federal employment taxes for all quarters in 1994, 1995 and 1996 and that the taxpayer was not ''entitled to relief from this classification pursuant to section 530 of the Revenue Act of 1978.'' VSC filed a timely petition for redetermination with the United States Tax Court and the parties stipulated to the facts. The stipulation established that the taxpayer was a

* Honorable Richard Cudahy, Circuit Judge for the United States Court of Appeals for the Seventh Circuit, sitting by designation.

subchapter ''S'' corporation which provided consulting and surgical services to veterinarians. The corporation was solely owned by Dr. Sadanaga, who was also its president and its only officer since incorporation. He alone performed the veterinary services rendered by VSC. In addition to his professional services, Dr. Sadanaga managed the business, performing all of the administrative tasks.

VSC did not make regular payments to Dr. Sadanaga for his services. Instead the money from VSC's bank account was withdrawn by Dr. Sadanaga as the need arose. The payments were not listed by VSC on its federal Form 1120S return as compensation to its officers or as wages. Instead, VSC computed its ordinary income and Dr. Sadanaga indicated this amount as non-passive income on the Schedule K-1 of his Form 1040 Return. The non-passive income on his returns for 1994, 1995, and 1996, respectively, was $83,995.50, $173,030.39, and $161,483.35.

The IRS issued its Notice of Determination Concerning Worker Classification to YDC in February 2000, advising that John Yeagle was classified as an employee for calendar years 1995, 1996, and 1997. Yeagle owned 99% of the business, with the remaining 1% in his wife's name. Yeagle was president of his business since its incorporation and performed the following services: soliciting business; ordering supplies; executing agreements; managing finances; and hiring and firing independent contractors.

Yeagle, like Sadanaga, did not receive payments from his company on a regular basis. Rather, Yeagle ''would take money from [YDC's] bank account as Mr. Yeagle's needs arose and/or would pay personal expenses from such account as he desired.'' Like VSC, Yeagle Drywall did not pay employment taxes for the services rendered by its owner, John Yeagle. Instead, it filed a Form 1120S reflecting the income earned by the corporation and Yeagle indicated that amount as non-passive income on the Schedule K-1 of his Form 1040 Return. The non-passive income reported for 1995, 1996, and 1997, respectively, was $26,711.08, $32,973.39, and $34,508.90.

Based on these stipulated facts, the Tax Court determined, in separate decisions, that the IRS had not erred in classifying Dr. Sadanaga and John Yeagle as employees under the FICA and the FUTA. It found that the payments received by Dr. Sadanaga and Yeagle were remuneration for the substantial services performed on behalf of the corporate taxpayer and that VSC and YDC were liable for the unpaid FICA and FUTA taxes. The Tax Court also concluded that neither taxpayer could obtain relief from the taxes due under the safe harbor established by section 530 of the Revenue Act of 1978.

II.

We have ''exclusive jurisdiction'' under 26 U.S.C. §7482(a)(1) ''to review the decisions of the Tax Court ... in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury[.]'' 26 U.S.C. § 7482(a)(1). ''Thus, we have plenary review over the Tax Court's findings of law, including its construction and application of the Internal Revenue Code.'' PNC Bancorp, Inc. v. Commissioner of Internal Revenue, 212 F.3d 822, 827 [85 AFTR 2d 2000-1854] (3d Cir. 2000).

III.

[1] FICA and FUTA impose taxes on employers based on the wages paid to individuals in their employ. 26 U.S.C. §§ 3111, 3301. ''Wages'' is defined broadly by both Acts, with certain exceptions not applicable here, as ''all remuneration for employment[.]'' 26 U.S.C. §§ 3121(a), 3306(b). Employment is defined as ''any service of whatever nature, performed ... by an employee for the person employing him[.]'' 26 U.S.C. §§ 3121(b), 3306(c). FICA also defines ''employee,'' in pertinent part, as:

(1) any officer of a corporation; or.5

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee[.]

26 U.S.C. § 3121(d). Treasury regulation § 31.3121(d)-1(b) restates the general rule that an officer of a corporation is an employee of the corporation and specifies that there is an exception for an ''officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration[.]'' 26 C.F.R. § 31.3121(d)-1(b).

Consistent with this law, the Tax Court focused on whether the distributions of income made by VSC and YDC were remuneration for the services performed by Dr. Sadanaga and John Yeagle. The court found that each of these individuals performed substantial services for the corporate taxpayers and that the distributions of income received were, in fact, remuneration for the services rendered. Accordingly, it held that the taxpayers were liable for federal employment taxes under the FICA and the FUTA.

We agree. Under the FICA, an officer of a corporation is an employee unless he performs only minor services. 26 U.S.C. §3121(d)(1); 26 C.F.R. § 31.3121(d) -1(b). Dr. Sadanaga's services were anything but minor inasmuch as he was the only source of revenue for VSC and performed all of the administrative tasks. Likewise, John Yeagle managed and directed all of the activities undertaken by YDC. Because these services were substantial, the Tax Court did not err in concluding that the distributions of income paid by the corporate taxpayers were remuneration for services rendered, thereby constituting wages under both the FICA and the FUTA.

The Ninth Circuit's decision in Spicer Accounting, Inc. v. United States, 918 F.2d 90 [66 AFTR 2d 90-5806] (9th Cir. 1990), is instructive. There, the court determined that the dividends paid by an S corporation to a shareholder, who was also an officer and the only certified public accountant performing services for the business, were wages. It relied upon: (1) treasury regulations which provide that the ''form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment,'' id. (citing 26 C.F.R. §§ 31.3121(a)-1(b), 31.3306(b)-1(b)); (2) the definition of employee in § 3121(d)(1); and (3) the exception contained in the treasury regulation for officers performing minor services, 26 C.F.R. § 31.3121(d)-1(b). Because Mr. Spicer was the only individual providing accounting services to the corporation and these services were substantial, the court concluded that the dividends were remuneration and subject to federal employment taxes. 918 F.2d at 92–93; see also Joseph Radtke, S.C. v. United States, 895 F.2d 1196 [65 AFTR 2d 90-1155] (7th Cir. 1990).

The taxpayers argue, however, that the Tax Court erred because it failed to consider whether, under the stipulated facts, Dr. Sadanaga and John Yeagle were employees ''under the usual common law rules applicable in determining the employer-employee relationship,'' as provided by § 3121(d)(2). They rely upon Texas Carbonate Co. v. Phinney, 307 F.2d 289 (5th Cir. 1962), which conducted an employer-employee analysis, consistent with § 3121(d)(2), despite the fact that the purported employee was an officer of the corporate taxpayer.

Reliance upon Texas Carbonate is misplaced for two reasons. First, it is neither binding nor authoritative in light of its failure to apply the plain language of § 3121(d) which defines employee by using the conjunction ''or'' between subparagraphs (1) and (2). This conjunction signifies an intent that an individual may qualify as an employee under either set of circumstances. Here, Dr. Sadanaga and John Yeagle satisfy the criteria set forth in § 3121(d)(1) and the applicable treasury regulation § 31.3121(d)-1(b), thereby obviating any reason to analyze whether they are employees under the usual common law rules under subparagraph (2).[1]

Second, despite the Texas Carbonate court's failure to recognize the applicabil-

[1] It is important to point out that by rejecting the taxpayers' argument, we are avoiding an interpretation of § 3121(d) which would render subparagraph (1) superfluous. See Rosenberg v. XM Ventures, 274 F.3d 137, 141 (3d Cir. 2001).

ity of § 3121(d)(1), its analysis considered whether the services of the officer, in the absence of any control by the corporation, were substantial. It pointed out that the officer was a stockholder, a director, and a manager of the company, in charge of its sales, and the development of its markets. These services, in the court's view, were substantial and justified the determination that: (1) the officer was an employee; and (2) the corporation was liable for federal employment taxes. 307 F.2d at 292–93.

IV.

Under Section 530 of the Revenue Act of 1978, there is a safe harbor for taxpayers who owe FICA and FUTA taxes as a result of wrongfully failing to classify certain individuals as employees. See P.L. 95-600, as amended by P.L. 96-167, P.L. 96-541, P.L. 97-248, P.L. 99-514 and P.L. 104-188 (hereinafter cited as ''Section 530''). This uncodified section relieves a taxpayer of certain federal employment tax liabilities arising from a failure to treat an individual as an employee if the taxpayer had a ''reasonable basis for not treating such individual as an employee.'' Section 530 (a)(1); 303 West 42nd St. Enter., Inc. v. I.R.S., 181 F.3d 272, 274 [83 AFTR 2d 99-2892] (2d Cir. 1999). Section 530 (a)(2) specifies that a taxpayer shall be treated as having a reasonable basis for not treating an individual as an employee if it reasonably relied on:

(A) judicial precedent, published rulings, technical advise with respect to the taxpayer, or a letter ruling to the taxpayer;

(B) a past Internal Revenue Service audit of the taxpayer[;] or

(C) long-standing recognized practice of a significant segment of the industry in which such individual was engaged.

Section 530 (a)(2).

Here, the taxpayers assert that the Tax Court improperly determined that they were not entitled to relief under this safe harbor provision. They contend that there was a reasonable basis for not treating Dr. Sadanaga and John Yeagle as employees, citing the judicial precedent in Texas Carbonate, 307 F.2d at 289.

As we explained above, Texas Carbonate is not authoritative and it does not support the taxpayers' argument that Dr. Sadanaga and John Yeagle were not employees. Thus, any reliance upon Texas Carbonate by either VSC or YDC was unreasonable, particularly in light of the subsequent decisions in Radtke, 895 F.2d at 1197–98, and Spicer Accounting, 918 F.2d at 94–95. Indeed, Spicer Accounting rejected the taxpayer's argument that it had a reasonable basis for not treating its officer as an employee under Section 530 and should not be held liable. The court reasoned that Mr. Spicer was ''for all practical purposes, the central worker for the taxpayer'' and it declared that a ''corporation's sole full-time worker must be treated as an employee.'' 918 F.2d at 95.

Finally, the taxpayers argue that their due process rights were violated because the IRS failed to give written notice of the provisions of Section 530 at earlier audits. This argument was not raised before the Tax Court and we will not consider it for the first time on appeal. Harris v. City of Philadelphia, 35 F.3d 840, 845 (3d Cir. 1994).

V.

Accordingly, because Dr. Sadanaga and John Yeagle were properly classified by the IRS as employees of VSC and YDC, respectively, and there was no reasonable basis for not treating them as employees, we will affirm the decision of the Tax Court.

To the Clerk of Court:

Please file the foregoing Opinion.

/s/ D. Brooks Smith

Circuit Judge

¶2002-5792

UNITED STATES OF AMERICA, PLAINTIFF v. David T. BOSSET, DEFENDANT. U.S. District Court, Middle Dist. of Florida, (DC FL) Case No. 8:01-cv-2154-T-17TBM, Nov. 19, 2002. Earlier

proceeding at (2002, DC FL) 89 AFTR 2d 2002-2407. Years 1998, 1999, 2000, 2001. Decision for Govt.

1. District Court jurisdiction—discovery—civil contempt—default judgment. Magistrate judge recommended alternative order that either pro se taxpayer who was unwilling to participate in discovery in violation of court orders be held in willful contempt and incarcerated; or, given that taxpayer clearly violated rules of discovery under F.R.Civ.P. 37(b)(2)(B) and (C), his defenses be stricken and default judgment be entered against him. *Reference:* United States Tax Reporter ¶74,025.01(25); 74,025.01(95). IRC §7402.

UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION,

REPORT AND RECOMMENDATION

THOMAS B. McCOUN III UNITED STATES MAGISTRATE JUDGE

THIS MATTER is before the court on the Government's Motion for Contempt and Motion for Order to Show Cause (Doc. 66), the court's Order to Show Cause (Doc. 71), and the Defendant's Answer to the Court's Order to Show Cause (Doc. 73). A hearing on the matter of contempt was conducted on November 18, 2002.

A review of the history of this litigation reveals the pro se Defendant's unwillingness to participate in discovery. On June 10, 2002, the Government filed a motion to compel (Doc. 21) seeking an Order compelling the Defendant to respond to document requests and interrogatories served on February 26, 2002. Mr. Bosset failed to file a response in opposition. Thus, the court entered an Order (Doc. 24) deeming the motion unopposed, granting the motion to compel, and directing Mr. Bosset to respond to the requests for production and interrogatories within twenty days from the date of the Order.[1] Mr. Bosset objected to the Order and sought *de novo* review by the district judge. As grounds, Mr. Bosset explained that he had not consented to the exercise of magistrate jurisdiction and advised the court of his contemporaneously filed motion to have the case redesignated as a Track 2 case. See (Docs. 25, 26). By Order of July 22, 2002, the district judge granted the motion to redesignate the case as a Track 2 case, explained the authority of the magistrate judge to rule on discovery matters and non-dispositive motions, and advised Mr. Bosset that if he required additional time to respond to the discovery request, he could direct such request to the magistrate judge. See (Doc. 34). Additionally, the court overruled Mr. Bosset's objections and expressly noted that "the redesignation of this case does not excuse Defendant from complying with the Order granting the Motion to Compel." Id. at 3.

Thereafter, Mr. Bosset filed Respondent's Emergency Demand to Immediately Stay Discovery in the Civil Case While Criminal Indictment or Investigation is Pending and Demand Asserting Fifth Amendment Protections and Notice of Violation of This Court of Equal Protection of the Laws (Doc. 35). A hearing on the motion was conducted on August 22, 2002. See (Doc. 48). The court entered an Order (Doc. 47) denying Mr. Bosset's emergency demand to stay discovery because there was no evidence of an ongoing criminal investigation against Mr. Bosset. At the hearing and in the Order, the court granted Mr. Bosset an additional twenty days to respond to all outstanding discovery requests and warned Mr. Bosset that a failure to do so may result in sanctions against him. Id.

On September 11, 2002, each of the parties filed a unilateral Case Management Report. See (Docs. 56, 57). Although the reports reflect that the parties met on Au-

[1] This case was originally designated as a Track One case under Middle District of Florida Rule 3.05. Nevertheless, the parties met telephonically on January 10, 2002, and agreed to procedures for the exchange of documents. See (Doc. 22). Although the parties are exempt from the disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure in Track One cases, based upon their agreement, the Government made its Rule 26 disclosures. The Defendant made no disclosures, thus prompting the Government's initiation of formal discovery in February 2002.

gust 22, 2002, and agreed to a unified discovery and case management schedule, as reflected in the Government's unilateral report, the parties were unable to agree upon certain language added by the Defendant. See (Doc. 56). The Case Management and Scheduling Order was entered September 23, 2002. See (Doc. 61). By this Order, the parties are required to meet the agreed upon terms of the Case Management Reports.

On September 30, 2002, the Government filed the instant Motion for Contempt and Motion for Order to Show Cause (Doc. 66). In its memorandum in support of its motion (Doc. 67), the Government complains that Mr. Bosset has still not responded to the Government's discovery requests despite this court's prior Orders. The court entered an Order to Show Cause (Doc. 71) directing Mr. Bosset to show cause why he should not be sanctioned or held in contempt of court for his failure to comply with this court's discovery Orders. Mr. Bosset filed Defendant's Answer to the Court's Order to Show Cause (Doc. 73) asserting that "all 'outstanding discovery requests' have been responded to" and, for the first time, contending that the Government's discovery requests failed to conform with Middle District of Florida Rule 3.03 because the Government failed to attach a computer disk to its discovery requests.[2] At the November 18, 2002, hearing, Mr. Bosset reasserted his position that there is no outstanding discovery to which he is obliged to respond because the government's written discovery requests were not accompanied by a computer disk. Mr. Bosset offers no other excuse for his failure to comply with the discovery or this court's orders.

[1] Upon consideration, I find that Mr. Bosset has willfully failed to comply with long-outstanding discovery requests and at least two prior Orders of this court directing him to respond. His claim that he has complied with discovery or that there are no outstanding requests is specious at best and is clearly calculated to obstruct these proceedings by delay. Contrary to Mr. Bosset's argument, the record reveals that he has made no effort at all to respond to the discovery or the court's Orders. In these circumstances, I find that a severe sanction is not only warranted but necessary.

Rule 37(d) of the Federal Rules of Civil Procedure provides in pertinent part:

> If a party ... fails ... (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on the motion may make such orders in regard to the failure as are just and may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Fed. R. Civ. P. 37(d). Rule 37(b)(2) provides:

> If a party ... fails to obey an order to provide or permit discovery, ... the court in which the action is pending may make such order in regard to the failure as are just, and among other the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party; ...

[2] The pertinent provisions of this rule urge counsel to maximize their use of computer technology and, as an example, suggest that interrogatories be served with a copy of the questions on disk in addition to the require printed copy.

Fed. R. Civ. P. 37(b)(2). This rule grants the court broad authority to impose sanctions upon a party for failure to obey a court order to provide or permit discovery. Gratton v. Great Am. Communications, 178 F.3d 1373, 1374 (11th Cir. 1999); BankAtlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045, 1048 (11th Cir. 1994). However, the court is only authorized to imposed such sanctions "as are just" against a party that violates an order compelling discovery. Chudasama v. Mazda Motor Corp., 123 F.3d 1353, 1966 (11th Cir. 1997).

Additionally, courts have the power to enforce compliance with their lawful orders through civil contempt. See Citronelle-Mobile Gathering, Inc. v. Watkins, 943 F.2d 1297, 1301 (11th Cir. 1991) (citing Shillitani v. United States, 384 U.S. 364, 370 (1966)). Once the party moving for a contempt order makes a prima facie showing that a party subject to a court order has violated the court's orders, the burden shifts to that party to produce evidence explaining his noncompliance. Citronelle-Mobile, 943 F.2d at 1301 (citing United States v. Rylander, 460 U.S. 752, 755 [51 AFTR 2d 83-1068] (1983)). That party must demonstrate an inability to comply with the court's order by showing that he has made "in good faith all reasonable efforts to comply." Id. (citing United States v. Ryan, 402 U.S. 530, 534 [27 AFTR 2d 71-1504] (1971)). Due process requires that the court inform the alleged contemnor of the contemptuous conduct and provide a hearing to allow the contemnor to explain why the court should not make a contempt finding. Id. at 1305 (citing Mercer v. Mitchell, 908 F.2d 763, 767 (11th Cir. 1990)). Contempt sanctions should be designed to ensure compliance with the court's orders, but the sanctions should not be any greater than necessary to ensure such compliance or be so excessive as to be punitive in nature. Id. (citations omitted). In cases where an act constituting a civil contempt is committed before a magistrate judge, 28 U.S.C. § 636 provides that

> the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served, upon any person whose behavior is brought into question under this paragraph, an order requiring such person to appear before a district judge upon a day certain to show cause why that person should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

28 U.S.C. § 636(e)(6)(A)(iii).

I make the following alternative recommended dispositions:

1) The circumstances of this case reveal that Mr. Bosset is in willful contempt of the Orders of this court. Absent Mr. Bosset purging such contempt, a period of incarceration should be imposed. Thus, in accordance with the provisions of 29 U.S.C. § 636, I hereby certify the foregoing facts to the district judge as true and correct and recommend that she conduct further proceedings consistent with this statute; OR

2) The circumstances reveal a clear violation of the rules of discovery. In accordance with Rule 37(b)(2)(B) and (C), the court should deny Mr. Bosset an opportunity to support his defenses, order that the Mr. Bosset's Answer and defenses (Doc. 5) be stricken, and enter a default judgment against him.

Respectfully submitted this

19th day of November 2002.

THOMAS B. McCOUN III

UNITED STATES MAGISTRATE JUDGE

NOTICE TO PARTIES

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal and a *de novo* determination by a district judge. See 28 U.S.C. §

636(b)(1); Fed. R. Civ. P. 72; see also Fed. R. Civ. P. 6; M.D. Fla. R. 4.20.

Copies furnished to:

The Honorable Elizabeth A. Kovachevich, United States District Judge

Counsel of Record

Pro se Defendant

¶2002-5793

UNITED STATES OF AMERICA, PETITIONER v. Kerwin J. MILLER, Trustee of the Kerwin J. Miller Asset Management Trust, a/k/a Kerwin James Miller Asset Management Company; Kerwin J. Miller; and Mona Miller, RESPONDENT. U.S. District Court, Dist. of South Dakota, (DC SD) CIV 02-4191, Nov. 25, 2002. Decision for Govt.

1. Summons enforcement—procedure. Pursuant to prior IRS summons enforcement order, district court set date for trustee and other summoned persons or entities to produce summoned documents; and clarified that trustee was required to provide testimony but only with respect to trust documents' identity and authenticity. *Reference:* United States Tax Reporter ¶76,025.04(25). IRC §7602.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION,

ORDER

Lawrence L. Piersol Chief Judge

[1] On October 8, 2002, a hearing was held before the Court to determine whether the Respondent should be required to comply with and obey summonses served on them by the Internal Revenue Service (''IRS''). At the hearing the Court enforced the summonses and ordered the parties to confer in an attempt to agree on a mutually convenient date for the Respondents to produce the documents. The Memorandum Opinion and Order issued on October 11, 2002 set forth the oral rulings the Court made during the hearing.

The parties are unable to agree on a date for the Respondents to produce the documents and provide testimony to the IRS. On October 22 the United States filed a motion for an Order setting a date. (Doc. 20.) On November 4, 2002, the Respondents filed an opposition to the motion. (Doc. 24.)[1] Because the parties cannot agree, the Court will set a date. In a letter dated October 18, 2002 from Kerwin Miller to attorney Donald Dowie, Respondents offered December 5, 2002 as a date to meet with the IRS agent. (Doc. 29, Exhibit 3.) Accordingly, the Court will set December 5 as the date for the Respondents to produce the documents to the IRS and to provide the testimony necessary to authenticate the Trust documents.

Also pending before the Court is the United States' Motion to Amend or for Clarification of Order dated October 11, 2002. (Doc. 21.) The government asks that the Order reflect that Kerwin Miller, in his capacity as trustee, is required to provide testimony in order to authenticate documents that are produced on behalf of the Trust in response to the summons. Respondents oppose this motion. (Doc. 26.) Kerwin Miller will be required to provide testimony only to identify and authenticate the documents he is required to produce as the trustee for the Trust. See Braswell v. United States, 487 U.S. 99 [62 AFTR 2d 88-5724] (1988); United States v. Harrison, 653 F.2d 359 [48 AFTR 2d 81-5704] (8th Cir. 1981). Accordingly,

IT IS ORDERED:

(1) that the United States' Motion for Entry of Order Setting Date for Respondents to Produce Documents and for Kerwin Miller to Provide Testimony in his Capacity as Trustee Authenticating Documents is granted (Doc. 19.);

(2) that the United States' Motion to Amend or For Clarification of Order Dated October 11, 2002 is granted to the extent that Kerwin Miller will be required to pro-

[1] Respondents also filed an opposition to the October 11, 2002 Memorandum Opinion and Order (Doc. 27) and an opposition to the United States' proposed Order (Doc. 25).

vide testimony only to identify and authenticate the documents he is required to produce as the trustee for the Trust (Doc. 21); and

(3) that Respondents' shall produce documents to IRS Revenue Agent Griff Anderson, and Kerwin Miller as trustee shall give testimony authenticating documents produced by the Trust, pursuant to the summonses issued to Kerwin J. Miller, Mona Miller, and the Trust, respectively, on July 25, 2001, and the summons issued to the Trust on August 16, 2001 at

Internal Revenue Service

2500 W.49th St., Room 104

Sioux Falls, SD 57105-6556

at 9:30 on Thursday, December 5, 2002.

Dated this 25th day of November, 2002.

BY THE COURT:

Lawrence L. Piersol

Chief Judge

¶2002-5794

UNITED STATES OF AMERICA v. James E. FELTON, JR. APPELLANT. U.S. Court of Appeals, Third Circuit, (CA3) Docket No. 02-1100, Dec. 18, 2002. District Court affirmed. Decision against Taxpayer.

1. Tax crimes—conspiracy to obstruct IRS functions—U.S. Sentencing Guidelines. Taxpayer's conviction and sentence for conspiracy to obstruct IRS functions were affirmed, and his counsel's motion to withdraw was granted: no non-frivolous appeal issues existed where taxpayer's waiver of appeal rights was knowing and voluntary; sentence imposed was consistent with U.S.S.G.; and district court's discretionary decision on extent of downward departure for taxpayer's extraordinary physical impairment wasn't reviewable. *Reference:* United States Tax Reporter ¶72,015.03(20); 73,446.516(55). IRC §7201.

United States Court of Appeals, Third Circuit,

On Appeal from the United States District Court for the District of New Jersey. (D.C.Crim. Action No. 98-cr-00476). District Judge: Honorable Stephen M. Orlofsky.

Before FUENTES and STAPLETON, Circuit Judges, and O'KELLEY,*

OPINION

STAPLETON, Circuit Judge.

[1] Appellant, James E. Felton, Jr., pled guilty to having conspired to interfere with the Internal Revenue Service's performance of its official duties. He did so pursuant to a plea agreement in which he voluntarily agreed to waive his right to appeal and/or collaterally attack his conviction. He was granted a two-level downward departure based on an extraordinary physical impairment and was sentenced to a term of eighteen months, a sentence at the bottom of the Guidelines range.

Our review of the record, like that of appellant's counsel, fails to disclose any non-frivolous issues for appeal. Thus, in accordance with Anders v. California, 306 U.S. 738 (1967), we will affirm the judgment of the District Court and will grant the motion of appellant's counsel to withdraw.

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. Appellant's pleas were knowing and voluntary, and the requirements of Fed. R. Crim P. 11 were satisfied. The sentence imposed was consistent with the Guidelines, and we have no jurisdiction to review the extent of the departure.

The judgment of the District Court will be affirmed.

¶2002-5795

Joseph TORNICHIO, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Ohio, (DC OH) CASE NO. 5:02-

* Honorable William C. O'Kelley, United States District Judge for the District of Northern Georgia, sitting by designation. District Judge.

CV-351, Dec. 11, 2002. Earlier proceeding at (2002, DC OH) 89 AFTR 2d 2002-1506, 2002-1 USTC ¶50411. Years 1996, 1997, 1998. Decision for Govt.

1. Collection due process—review of administrative determination—prior opportunity to contest deficiencies—frivolous returns penalties. Pro se taxpayer's petition to set aside IRS's administrative determination to proceed with collection of frivolous returns penalties for years he filed ''zero'' returns was dismissed: although Appeals Officer improperly refused to consider taxpayer's rightful challenge to his underlying tax liability, his meritless arguments about IRS's collection authority, satisfaction of IRC §6330(c)(1)'s verification requirement, and legal basis for penalties stated no claim for relief. Also, penalties were clearly warranted where taxpayer offered only frivolous protester-type arguments to support zero-income/tax position that was belied by his Forms W-2; and his conditional offer to pay wasn't valid collection alternative under IRC §6330. *Reference:* United States Tax Reporter ¶63,305.01(15); 63,305.01(5); 67,025.01(10). IRC §6330; 6702.

2. Actions against U.S.—damages—wrongful collection—Federal Tort Claims Act—failure to exhaust administrative remedies. Pro se taxpayer's complaint for damages from IRS's levy notice was dismissed for lack of jurisdiction: complaint wasn't actionable under IRC §7433 where taxpayer hadn't exhausted his administrative remedies thereunder or alleged any actual *collection* activity by govt. Similarly, taxpayer's compensatory damages claim under FTCA was jurisdictionally barred for failure to exhaust administrative remedies, and by virtue of FTCA's express exception of tax-related claims; and discovery request was denied as futile. *Reference:* United States Tax Reporter ¶74,335.01(7); 76,557.53(12). IRC §7433.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION,

ORDER AND OPINION, [Resolving Doc. 13]

Judge James S. Gwin

On October 29, 2002, Defendant the United States of America (''the United States'') moved the Court to dismiss *pro se* Plaintiff Tornichio's complaint against it and affirm the Internal Revenue Service's (''IRS'') determination that Tornichio is liable for filing frivolous income tax returns. In his complaint, Tornichio asks the Court to invalidate the IRS's determination because he believes the IRS collection due process (''CDP'') hearing was invalid. He also seeks compensatory and punitive damages against the United States.

The United States alleges that Tornichio fails to state a claim upon which the Court can grant relief. The United States further claims that the Court must dismiss Tornichio's compensatory and punitive damage claims for lack of subject matter jurisdiction. Tornichio opposes the motion.

For the reasons that follow, the Court grants the United State's motion to dismiss and affirm. Accordingly, the Court dismisses Tornichio's complaint against the United States and affirms the determination of the IRS Appeals Office that Tornichio is liable for filing frivolous income tax returns.

I. Background

Tornichio filed tax returns for tax years 1996, 1997, and 1998 in which he reported his income as ''-0-.'' In support of his claim that he had zero income and tax liability, Tornichio alleged that the IRS lacks authority to collect income taxes. After receiving information documents showing that Tornichio earned $51,700.00 in 1996, $78,952.00 in 1997 and $45,244.00 in 1998, the IRS assessed Tornichio a $500 ''frivolous return'' penalty on each return. After Tornichio refused to voluntarily pay the penalties, the IRS sent several notices of intent to levy on each return assessment. Tornichio still did not pay the penalties.

On October 17, 2000, the IRS sent Tornichio, by certified mail, a final notice of intent to levy. On November 3, 2000, Tornichio requested a CDP hearing pursu-

ant to Internal Revenue Code (''I.R.C.'') § 6330. He asked that the appeals officer furnish the following information at the hearing:

i. verification from the Secretary that the requirements of any applicable law or administrative procedure have been met;

ii. delegation orders from the Secretary delegating authority to those persons who imposed the ''frivolous penalty;''

iii. a listing of Treasury Department regulations that allow IRS employees to impose ''frivolous penalties;'' and

iv. documented proof that the Secretary authorized the collection action and that the Attorney General or his delegate directed that collection action commence.

Tornichio also advised the appeals officer that he intended to challenge the '''existence of the underlying liability' of the tax that generated the 'frivolous penalty''' because he never received a Deficiency Notice regarding the underlying tax liability.

IRS Settlement Officer Dolin responded to Tornichio in a letter dated November 28, 2001. Dolin advised Tornichio that the CDP conference would be informal, ''facts, arguments, and legal authority to support your position'' may be presented, but ''[i]t is the Service's position that in cases where a taxpayer's request for a collection due process hearing only states moral, religious, political, constitutional, conscientious or similar grounds to support his/her position, Appeals will not consider those grounds in the Due Process/ Equivalent hearing pursuant to IRC Section 6320/6330.''(emphasis in original). Dolin noted further that courts had previously addressed Tornichio's concerns about the legal authority of the IRS.

Tornichio responded in a letter dated December 4, 2001, saying again that he wanted the IRS officer to bring all of the items listed in his September 28, 2001, letter to the hearing. Concerned that he did not receive a reply from the IRS, Tornichio sent a certified letter dated December 18, 2001, requesting several documents, including IRS Document #330 for tax years 1996, 1997, &1998.

On January 15, 2002, the IRS Appeals Office held the CDP hearing. The hearing did not result in any settlement or resolution of the matter. Accordingly, on February 1, 2002, the IRS sent a ''Notice of Determination Concerning Collection Action(s) Under Section 6320 and/or 6330'', via certified mail, to Tornichio.

The determination letter stated as follows:

> It has been determined that no relief is to be granted and that the proposed levy action is sustained. The Internal Revenue Service has complied with code and procedural requirements in collecting the tax.

The letter further stated that Tornichio could appeal the IRS determination by filing a complaint with the Court within thirty days.

On February 26, 2002, Tornichio timely filed this action. In his complaint, Tornichio seeks to set aside the IRS determination of liability. In asking that his liability be set aside, Tornichio says that the IRS unlawfully issued the determination. Specifically, Tornichio complains that the appeals officer failed to provide any of the information he requested in his September 28, 2001, letter. Additionally, he claims the IRS officer refused to accept his ''collection alternative''of paying the penalty immediately ''if the appeals officer would merely cite and produce the statute . . . where an income tax 'liability' was established by law.'' Tornichio also makes claims for compensatory and punitive damages against the United States.

On March 18, 2002, the Court dismissed the action without prejudice because the Tax Court appeared to have sole jurisdiction. On September 17, 2002, the Court vacated its March 18, 2002 opinion and order and reopened the case.

On October 29, 2002, the United States moved the Court to dismiss the complaint against it and affirm the IRS Appeals Office's determination. The United States also moved the Court to dismiss

Tornichio's damage claims against the United States for lack of subject matter jurisdiction. Tornichio opposes the motion.

II. Standard & Analysis

A. Standard

The United States alleges that the Court should dismiss the complaint against it and affirm the determination of the IRS officer for two reasons. First, the United States says that the Court should dismiss the claim that the CDP hearing was invalid because it fails to state a claim upon which the Court can grant relief. Second, it asserts that the Court lacks subject matter jurisdiction over Tornichio's damage claims against the United States.

[1] The Court now presents the standards for the two dismissal grounds, and then discusses each ground in later sections.

1. Failure to State a Claim

The Court uses the Fed. R. Civ. P. 12(b)(6) standard to judge the legal sufficiency of a claim. Under this rule, the Court presumes that all well pleaded allegations are true, resolves all doubts and inferences in favor of the pleader, and views the pleading in the light most favorable to the non-moving party. *Cent. States, Southeast & Southwest Areas Pension Fund v. Mahoning Nat'l Bank*, 112 F.3d 253 (6th Cir. 1997). *See also In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997) (holding that when ruling on a motion to dismiss for failure to state a claim, the court deems as admitted all factual allegations made by plaintiff, and the court must construe all ambiguous allegations in plaintiff's favor.) Courts will dismiss a claim under this rule only if it appears beyond doubt that the pleader can prove no set of facts in support of the claim that would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41 (1957); *Advocacy Org. For Patients & Providers v. Auto Club Ins. Ass'n*, 176 F.3d 315 (6th Cir. 1999). Finally, the district court must read a *pro se* plaintiff's allegations liberally and apply a less stringent standard to the pleadings of a *pro se* plaintiff than to a complaint drafted by counsel. *Haines v. Kerner*, 404 U.S. 519, 520–21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

2. Subject Matter Jurisdiction

When a party challenges subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1), the plaintiff has the burden of proving that the Court has jurisdiction over the cause of action. *Madison-Hughes v. Shalala*, 80 F.3d 1121, 1130 (6th Cir. 1996); *Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 915 (6th Cir. 1986). The Court, however, construes the allegations of the complaint favorably to the pleader. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In ruling on such a motion, the district court may resolve factual issues when necessary to resolve its jurisdiction. *Madison-Hughes*, 80 F.3d at 1130; *Rogers*, 798 F.2d at 918. Further, when considering a motion to dismiss for lack of subject matter jurisdiction, this Court may look beyond jurisdictional allegations in the complaint and the Court may consider whatever evidence the parties submit. *Fairport Intern. Exploration, Inc. v. Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1081 (6th Cir. 1997). Finally, the district court must read a *pro se* plaintiff's allegations liberally and apply a less stringent standard to the pleadings of a *pro se* plaintiff than to a complaint drafted by counsel. *Haines*, 404 U.S. at 520–21.

B. Analysis

The United States says that the Court should dismiss Tornichio's claim that the CDP hearing was invalid because the IRS officer did not abuse his discretion. Therefore, the United States asks the Court to affirm the determination of the appeals officer. It also moves the Court to dismiss the damage claims against it because the United States has not waived its sovereign immunity. Accordingly, the United States argues that the Court lacks subject matter jurisdiction.

The Court now discusses each of these issues.

1. CDP Hearing and IRS Determination

a. Appropriate Standard of Review

As an initial matter, the Court determines the appropriate standard of review for Tornichio's claim that the Court should set aside the IRS's notice of determination. The United States asserts that the Court should apply an abuse of discretion standard.

Although section 6330(d) provides for judicial review of the IRS's administrative determinations, it is silent as to the standard of review a district court should apply when a taxpayer appeals a Notice of Determination by the IRS Appeals Office. 26 U.S.C. § 6330(d). The legislative history, however, shows that the court should conduct a *de novo* review "where the validity of the tax liability was properly at issue at the administrative hearing." H. R. Conf. Rep. No. 105-599, at 266 (1998). *See also Rennie v. Internal Revenue Serv.*, 216 F. Supp.2d 1078, 1080 [90 AFTR 2d 2002-5329] (E.D. Cal. 2002); *Geller v. U.S.*, 2001 WL 1346669 [88 AFTR 2d 2001-6494] (S.D. Ohio Sept. 26, 2001).

But, where the validity of the underlying tax liability is not properly part of the appeal, the taxpayer may challenge the determination for abuse of discretion. H.R. Conf. Rep. No. 105-599, at 266 (1998); *Rennie*, 216 F. Supp.2d at 1080; *Goza v. Comm'r of Internal Revenue*, 114 T.C. 176, 181–182 (2000) (concluding that a court must review the IRS officer's determinations using an abuse of discretion standard when the validity of the tax liability itself is not at issue); *MRCA Info. Servs. v. United States*, 145 F.Supp.2d 194, 199 [89 AFTR 2d 2002-694] (D. Conn. 2000).

The United States alleges that Tornichio did not challenge the underlying tax liability at the CDP hearing. Therefore, it argues that the abuse of discretion standard applies.

The record, however, refutes these claims. First, Tornichio notified the IRS when he requested the CDP hearing that he was challenging the underlying tax liability. Then, he also disputed the underlying liability at the CDP hearing. The IRS officer refused to hear the challenge because he said that Tornichio had received the statutory notice of deficiency. The United States, however, admits that Tornichio did not receive the statutory notice of deficiency. Under § 6330(c)(2), one may only raise challenges to the underlying tax liability if he did not receive "any statutory notice of deficiency." Accordingly, the validity of the tax liability is properly part of the appeal and the appropriate standard of review is *de novo*.

b. Application of De Novo Standard

Having determined that the appropriate standard of review is *de novo*, the Court now applies it to Tornichio's claim that the CDP hearing violated the law. He bases this claim on four grounds. First, he says that the appeals officer did not "produce and present to Plaintiff the 'verification from the Secretary' as required by Section 6330(c)." As part of this argument, he further claims that the IRS did not "'prior to issuance of the determination' at issue, send Plaintiff the 'verification from the IRS office collecting the tax that the requirements of any applicable laws have been met,' as 'required' by Treasury Regulation 301.6330-1(e)."

Next, he alleges that the IRS officer did not produce or identify the four documents he says it was required to produce: 1) "any document signed by any Defendant employee that would have supported the imposition of the 'frivolous penalty' at issue"; 2) "any Delegation of Authority from the Secretary that authorized any Defendant employee to impose the 'frivolous penalty' at issue"; 3) a "Treasury Department regulation that authorized Defendant employees to impose the 'frivolous penalty' at issue or required Plaintiff to pay such a 'frivolous penalty'"; and 4) "any statute that established the 'existence ... of the underlying liability' of the tax for which the 'frivolous penalty' had been imposed."

As a third ground, Tornichio asserts that the hearing was unlawful because the appeals officer refused to accept his proposed collection alternative that "he would immediately pay the 'frivolous penalty' if the

appeals officer would merely cite and produce the statute that established the 'underlying liability' for the tax.'' He further says that although the IRS officer had the I.R.C. in front of him, he refused to point out where the law establishes an income tax ''liability.''

Finally, Tornichio argues that the hearing was invalid because the IRS did not produce the ''documented proof that the Secretary authorized the instant collection action and that the Attorney General or his delegate 'directed' that this collection action be commenced.''

For the reasons discussed below, these allegations fail to state a claim upon which the Court can grant relief. The Court now examines each argument in turn.

Verification From the Secretary and the IRS Office

Tornichio argues that the CDP hearing was unlawful because the IRS officer did not present the verification from the Secretary as he says was required by § 6330(c). He further alleges that the officer unlawfully failed to send Tornichio verification from the IRS office.

The Court disagrees. Section 6330(c)(1) only requires that the IRS officer ''obtain verification from the Secretary that the requirements of any applicable law or administrative procedure have been met.'' Section 301.6330-1(e) requires the officer to ''obtain verification from the IRS office collecting the tax that the requirements of any applicable law or administrative procedure have been met.'' Nothing in either the statute or the regulation requires that the officer send or provide the verification to the taxpayer. *Rennie*, 216 F. Supp.2d at 1080; *Nestor v. Comm'r*, 2002 WL 236682 [2002 RIA TC Memo ¶2002-251] (U.S. Tax Ct.2002).

Failure to Produce Documents

Tornichio also contends the CDP hearing was invalid because the IRS officer did not produce or identify the following four documents: 1) ''any document signed by any Defendant employee that would have supported the imposition of the 'frivolous penalty' at issue''; 2) ''any Delegation of Authority from the Secretary that authorized any Defendant employee to impose the 'frivolous penalty' at issue''; 3) a ''Treasury Department regulation that authorized Defendant employees to impose the 'frivolous penalty' at issue or required Plaintiff to pay such a 'frivolous penalty'''; and 4) ''any statute that established the 'existence ... of the underlying liability' of the tax for which the 'frivolous penalty' had been imposed.''

Again the Court disagrees. The law does not require the IRS to produce any of these documents or information before imposing a levy or in connection with a CDP hearing. First, courts have rejected argument that the IRS must produce evidence of delegated authority, stating:

> Relevant statutes and regulations demonstrate ... that the Secretary does have the power to collect taxes, and that such power can be delegated to local IRS agents.26 U.S.C. § 6301 provides that ''[t]he Secretary shall collect the taxes imposed by the internal revenue laws.'' The actual task of collecting taxes, however, has been delegated to local IRS directors. ''The taxes imposed by the internal revenue laws shall be collected by district directors of internal revenue.'' 26 C.F.R. § 301.6301-1. District directors in turn are authorized to redelegate the levy power to lower level officials such as collection officers. *See* IRS Delegation Order 191. The delegation of authority down the chain of command, from the Secretary, to the Commissioner of Internal Revenue, to local IRS employees constitutes a valid delegation by the Secretary to the Commissioner, and a redelegation by the Commissioner to the delegated officers and employees. *See* 36 C.F.R. § 301.7701-9.

Rennie, 216 F. Supp.2d at 1082 (quoting *Hughes v. United States*, 953 F.2d 531, 536 [69 AFTR 2d 92-472] (9th Cir. 1992).

Further, the I.R.C. does not require that the IRS publish the internal delegations of administrative authority to enforce the Internal Revenue laws. *Hughes*, 953 F.2d at 539; *Rennie*,216 F. Supp.2d at 1082; *Lonsdale v. United States*, 919 F.2d 1440, 1446

[67 AFTR 2d 91-1049] (10th Cir. 1990). Additionally, as to Tornichio's claim that the IRS officer did not produce any document supporting the imposition of the frivolous penalty, 26 U.S.C. § 6702 provides for a $500 civil penalty for a frivolous income tax return if:

(1) any individual files what purports to be a return of the tax imposed by subtitle A but which--

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or
(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to--

(A) a position which is frivolous, or
(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws.

Here, the record shows that Tornichio filed income tax returns for tax years 1996, 1997, and 1998 that reported his income as "zero." Along with reporting his income as "zero," he made tax protester arguments. Tornichio's return is unquestionably a "purported return" within the meaning of Section 6702. *See Fuller v. United States,* 786 F.2d 1437, 1438–1439 [57 AFTR 2d 86-1224] (9th Cir.1986); *see also Hudson v. United States,* 766 F.2d 1288 [56 AFTR 2d 85-5582] (9th Cir.1985). Further, the positions raised in his returns are frivolous within the meaning of Section 6702. For example, his assertions that the I.R.C. does not define "income" and that people can only derive income from corporate activity lack merit. 26 U.S.C. § 61(a) defines gross income as "all income from whatever source derived . . . ."

Courts have also consistently found identical arguments to the ones here to be frivolous.[1] *See, e.g., Tornichio v. United States,* 1998 WL 381304 [81 AFTR 2d 98-1377] (N.D. Ohio 1998), *aff'd,*1999 WL 191340, 173 F.3d 856 [83 AFTR 2d 99-1516] (6th Cir.1999); *Gavigan v. United States,* 2000 WL 33187163 [87 AFTR 2d 2001-808] (D. Conn. 2000); *Townsend v. United States,* 2000 WL 1616081 [86 AFTR 2d 2000-6611] (W.D. Mich. 2000); *Perl v. United States,* 1999 WL 1022186 [84 AFTR 2d 99-6751] (D. Mass. 1999); *Dose v. United States,* 1986 WL 147 [58 AFTR 2d 86-6291] (N.D. Iowa 1986); *In re Bertelt,* 184 B.R. 603 (Bkrtcy. M.D. Fla.1995); *Ghalardi Tax Educ. Found. v. Comm'r,* 1998 WL 906755 [1998 RIA Memo ¶98,460] (U.S. Tax Ct.1998); *Zyglis v. Comm'r,* 1993 WL 289265 [1993 RIA TC Memo ¶93,341] (U.S. Tax Ct.1993).

Finally, the allegation that the appeals officer erred because he "did not identify or produce a Treasury Department regulation that authorized Defendant employees to impose the 'frivolous penalty' at issue or required Plaintiff to pay such a 'frivolous penalty'" is also without merit. *See Hudson,* 766 F.2d at 1291; *Gass v. United States,* 2000 WL 1204575 [87 AFTR 2d 2001-1592] (D. Colo.2000).

Refusal to Accept Proposed Collection Alternative

Tornichio also asserts that the hearing violated the law because the IRS officer refused to accept his proposed collection alternative that "he would immediately pay the 'frivolous penalty' if the appeals officer would merely cite and produce the statute that established the 'underlying liability' for the tax."

This allegation does not state a claim. The purpose of sections 6330(c)(2)(A) and 6330(c)(3)(C) is to allow the taxpayer to propose a method of payment that resolves the underlying tax liability by means other than a tax lien by a levy. Tornichio's allegations do not propose an "alternative" to collection by levy. Instead they propose a condition to payment of the underlying liability.

[1] The Court notes that Tornichio was a plaintiff in one of the cases, *Tornichio v. United States,* 1998 WL 381304 (N.D. Ohio 1998).

No Proof that Attorney General Directed the Collection Action

Finally, Tornichio says that the hearing was invalid because the IRS did not produce the "documented proof that the Secretary authorized the instant collection action and that the Attorney General or his delegate 'directed' that this collection action be commenced."

This argument fails. The I.R.C. does not require publication of internal delegations of administrative authority to enforce the Internal Revenue laws. *Hughes*, 953 F.2d at 531 [69 AFTR 2d 92-472]; *Londsdale*, 919 F.2d at 1446.

2. Subject Matter Jurisdiction Over Damage Claims

Besides contending that Tornichio's allegations about the IRS's notice of determination fail to state a claim upon which the Court can grant relief, the United States also argues that the Court lacks subject matter jurisdiction over Tornichio's damage claims. Specifically, it asserts that the United States has not waived its sovereign immunity.

a. § 7433 Damage Claim

[1] Although Tornichio cites no legal authority for his damage claim, section 7433 of the I.R.C. provides for taxpayer suits seeking damages against the United States where, "in connection with any collection of federal tax with respect to a taxpayer, any officer or employee of the IRS recklessly or intentionally disregards any provision of this title, or any regulation promulgated under this title . . ."26 U.S.C. § 7433. The scope of 7433 is limited to unauthorized collection actions and does not extend to determinations of liability. H.R. Conf. Rep. No. 1104 at 229, 1988-3 C.B. at 719.

However, section 7433 only provides limited waiver of sovereign immunity. Specifically, the United States has not waived its sovereign immunity unless the taxpayer exhausts available administrative remedies; the failure to exhaust available administrative remedies is a jurisdictional bar to suits under § 7433. *Venen v. United States*, 38 F.3d 100, 103 [74 AFTR 2d 94-6680] (3d Cir.1994); *Conforte v. United States*, 979 F.2d 1375, 1377 [71 AFTR 2d 93-339] (9th Cir.1992).

Here, Tornichio makes no showing that he exhausted his administrative remedies regarding the alleged collection damages. Therefore, this failure to exhaust remedies jurisdictionally bars his suit. Further, his complaint does not allege any collection activity. A notice of intent to levy is not a collection action. Instead, it is a predicate to collection action. Therefore, the Court lacks subject matter jurisdiction over Tornichio's § 7433 damage claim.

b. Compensatory Damage Claim

Tornichio also seeks compensatory damages from the United States. Federal courts have jurisdiction pursuant to 28 U.S.C. § 1346(b) over "civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945." 28 U.S.C. § 1346(b). Further, to bring a tort action against the government, the plaintiff must first establish that the government has waived sovereign immunity. *See Lundstrum v. Lyng*, 954 F.2d 1142, 1145 (6th Cir. 1991) (*per curiam*) (citations omitted). The Federal Torts Claims Act ("FTCA") is the exclusive waiver of sovereign immunity for tort actions against the United States, its agencies, and its employees acting within the scope of their employment. *See* 28 U.S.C. § 2679. *See also Arbour v. Jenkins*, 903 F.2d 416, 419 (6th Cir. 1990).

But the government has waived its sovereign immunity to suits under the Act only insofar as the plaintiff has exhausted his administrative remedies. 28 U.S.C. § 2675(a); *Lundstrum*, 954 F.2d at 1145 ("A prerequisite to suit under the [Act] . . . is the exhaustion by the plaintiff of administrative remedies."). Section 2675(a) pro-vides that an "action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a).

The filing of an administrative claim is jurisdictional and is an absolute, non-waivable prerequisite to maintaining a civil action against the United States for damages arising from the alleged wrongful acts of a federal employee. *McNeil v. United States*, 508 U.S. 106 (1993); *Conn v. United States*, 867 F.2d 916 (6th Cir. 1989).

Tornichio has not filed administrative tort claims against the United States. Therefore, he does not satisfy the jurisdictional prerequisite of the FTCA. Accordingly, the Court has no jurisdiction over Tornichio's compensatory damage claims against the United States. Therefore, the Court grants the United States' motion to dismiss the damage claims against it.

Assuming *arguendo* that Tornichio had exhausted his administrative remedies, the Court still lacks jurisdiction over his compensatory damage claims because the FTCA expressly excepts tax claims. Specifically, § 2680(c) states: "The provisions of this chapter shall not apply to ... (c) Any claim arising in respect of the assessment or collection of any tax." 28 U.S.C. § 2680(c).

In sum, Tornichio failed to exhaust administrative remedies for both his § 7433 and compensatory damage claims against the United States. Accordingly, the United States has not waived its sovereign immunity and the Court lacks subject matter jurisdiction over the damage claims against the United States.

3. No Opportunity for Discovery

As a final argument against the United States' motion to dismiss, Tornichio says that the Court should deny the motion because he has not received an opportunity for discovery. Tornichio has requested admissions, interrogatories, and production of documents from the United States. He sets forth no adequate explanation, however, of how additional discovery can rebut the record or case law before the Court. Further, the Court concludes that Tornichio's complaint about the invalidity of the IRS determination fails to state a claim upon which the Court can grant relief. It also finds that the Court lacks subject matter jurisdiction over the damage claims. Therefore, as a matter of law, Tornichio cannot make out a claim, irrespective of any discovery he achieves.

III. Conclusion

For the reasons discussed above, the Court grants the United States' motion to dismiss the complaint against it and affirm the determination of the IRS Appeals Office. Accordingly, the Court dismisses Plaintiff Tornichio's complaint against the United States and affirms the IRS's determination that Tornichio is liable for filing frivolous tax returns.

IT IS SO ORDERED.

Dated: December 11, 2002

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE

JUDGMENT

The Court has filed its Memorandum Opinion and Order in the above-captioned matter. For the reasons discussed in its opinion, the Court dismisses Tornichio's complaint against the United States and affirms the IRS determination that Tornichio is liable for filing frivolous income tax returns. Accordingly, this action is terminated under Rule 58 of the Federal Rules of Civil Procedure.

Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a) and *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001), that, for the reasons stated in the Court's opinion, an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

Dated: December 11, 2002

JAMES S. GWIN

UNITED STATES DISTRICT JUDGE

¶2002-5796

BASQUE STATION, INC., PLAINTIFF-APPELLEE v. UNITED STATES OF AMERICA, DEFENDANT-APPEL-

LANT. U.S. Court of Appeals, Ninth Circuit, (CA9) Docket No. 01-35774, Dec. 17, 2002. District Court, (2001, DC ID) 88 AFTR 2d 2001-5160, on remand from (2000, CA9) 85 AFTR 2d 2000-1014, 213 F3d 641, reversed. Earlier proceedings at (2001, DC ID) 88 AFTR 2d 2001-5904; (1997, DC ID) 79 AFTR 2d 97-2390; and (1995, DC ID) 76 AFTR 2d 95-8031 [75 AFTR 2d 95-2689], adopting (1995, DC ID) 75 AFTR 2d 95-2689. Years 1988, 1989, 1990, 1991, 1992. Decision against Taxpayer.

1. Diesel fuel excise taxes—refunds—summary judgment. District court's remand decision that wholesale diesel fuel distributor's pooled fuel transactions with 3d party didn't amount to taxable sale for excise tax purposes was reversed: taxpayer's contractual relation with supplier and legal obligation to pay for entire fuel shipment that it then passed portion of onto 3d party, plus 3d party's lack of any legal relationship with supplier, showed that only taxpayer was legal owner of entire shipment and that it's further transfer of portion thereof to 3d party constituted "transfer of property" for consideration; and facts that taxpayer and 3d party didn't intend buy/sell relationship, that taxpayer never picked up fuel itself, and that it retained no profit on transfers to 3d party were irrelevant. Also, producer-to-producer exception didn't apply where 3d party, by virtue of its failure to obtain Certificate of Registration number from IRS, never qualified as producer under IRC §4101 in 1st place. *Reference:* USTR Excise Taxes ¶40,925.01(5); 40,415.01(3). IRC §4041; 4091; 4092; 4093; 4101.

United States Court of Appeals, Ninth Circuit,

Appeal from the United States District Court for the District of Idaho, Edward J. Lodge, District Judge, Presiding.

Before RYMER, HAWKINS and MCKEOWN, Circuit Judges.

MEMORANDUM*

I. Taxable Sale

The district court erred in determining that a taxable sale did not occur between Basque Station, Inc. ("Basque") and Transport Petroleum ("Transport"). Former I.R.C. Section 4091(a) imposed an excise tax on the "sale" of diesel fuel "by a producer." 26 U.S.C. § 4091(a)(1990).[1] "Sale" is defined in the regulations as:

> An agreement whereby the seller transfers the property (that is the title or substantial incidents of ownership) in goods to the buyer for a consideration called the price, which may consist of money, services, or things.

26 C.F.R. § 48.0-2(a)(5).

A. Transfer of Property

[1] The district court found that Basque did not transfer property to Transport within the meaning of the regulations, believing there was no evidence that Basque "had, at any time, possession, control or ownership of the diesel fuel which was delivered to Transport." It is, however, undisputed that Basque was in a contractual relationship with Texaco and was legally obligated to pay for the entire shipment, whereas Transport was not in any contractual relationship with Texaco and Texaco had no recourse against Transport for payment. When orders were placed with Texaco using Basque's identification numbers, Basque became the owner of the entire shipment and could then do what it wished with the fuel.

That Transport's trucks would actually pick up the fuel from Texaco does not alter the Transport-Basque relationship. Basque did not have its own trucks and had always used a third party to pick up fuel. Transport did not become the purchaser because it took delivery of the fuel. Delivery did not give it legal rights to the fuel any more than it gave the previous carriers legal title to the fuel.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[1] The provisions regarding taxation of diesel fuel are now codified at 26 U.S.C. § 4081 et. seq. This disposition, however, will refer to the provisions in effect during the relevant tax years.

Although Basque and Transport may not have intended to be in a buyer/seller relationship, their intent does not change the legal substance of the transaction. Texaco was not a party to their ''co-purchase'' agreement and was in a legal relationship only with Basque. Likewise, that Texaco was aware of and even encouraged the relationship between Basque and Transport does not alter the parties' legal obligations. Basque, legally entitled to the entire shipment, then transferred rights to a portion of that fuel to Transport. This satisfies the ''transfer of property'' aspect of the definition of ''sale'' in 26 C.F.R. § 48.0-2(a)(5).

B. Consideration

The district court also found there was no evidence Basque received any consideration from Transport, noting that there was no evidence Basque retained any of the money it received from Transport, but instead passed all the money on to Texaco. The district court appears to have conflated ''consideration'' with ''profit.'' It does not matter that Basque did not sell fuel to Transport at a premium--Basque was not giving the fuel away, and received compensation for the portion of fuel Transport retained. The price Basque charged Transport was simply equal to the price Texaco charged Basque.

II. Producer-to-Producer Exception

Because there was a taxable sale, we now address the question initially raised in the 1999 appeal to this court regarding the applicability of the producer-to-producer exemption from the excise tax. See 26 U.S.C. §§ 4092(c) & 4093(b)(1990). In order to qualify as a ''producer,'' one must register with the Secretary of the Treasury before incurring any tax liability. 26 U.S.C. § 4101(a). The district court concluded that Transport had satisfied these requirements by merely filing an application under Section 4101, even though Transport never received a Certificate of Registration number from the IRS.

We disagree that Section 4101 can be satisfied by merely submitting the requisite form to the IRS. Although there were no formal regulations governing Section 4101 during the applicable time period, the IRS did issue Notice 88-30, 1988-1 C.B. 497, which clarified that in order to be exempt from the tax, the purchaser had to notify the seller of its Certificate of Registry number and that number had to appear on the invoice for each tax free sale.[2] Although nonbinding, the Notice indicated it could be relied upon to the same extent as revenue rulings, which guide this court in interpreting relevant statutes. Lucky Stores, Inc. & Subsidiaries v. C.I.R., 153 F.3d 964, 966 n. 4 [82 AFTR 2d 98-5815] (9th Cir.1998). This interpretation of the registration requirement is also consistent with the regulations that existed at the time with respect to the similar statutory regime for taxation of gasoline sales. 26 C.F.R. § 48.4082-1 (''wholesale distributor will be considered a producer of gasoline only ... after the date in which the distributor is issued a Certificate of Registry (Form 637) as a producer of gasoline.'').

The district court erred in its initial holding that Transport had qualified as a ''producer'' under Section 4101 by merely submitting a registration form to the IRS. Because Transport never received a Certificate of Registration number, it is not a ''producer'' under Section 4092(b)(1)(A), and any sale between Basque and Transport is not exempt from the excise tax under Section 4093(b).

REVERSED.

¶2002-5797

Jerome SPADE, PLAINTIFF v. STAR BANK, ET AL., DEFENDANTS. U.S. District Court, Eastern Dist. of Penn-sylvania, (DC PA) CIVIL ACTION NO. 01-3349, Dec. 19, 2002. Earlier proceed-ing at (2002, DC PA) 90 AFTR 2d 2002-7147. Year 1993. Decision against Tax-payer.

1. 100% penalty for failure to pay over trust fund taxes—liability—contribution—responsible person; willfulness.

[2] The final regulations further clarified this requirement by stating a ''person is registered under section 4101 only if the district director has issued a registration letter to the person and that registration letter has not been revoked or suspended.'' 26 C.F.R. § 48.4101-1(a)(2).

Taxpayer/CFO's claims for contribution to his IRC §6672 liability from Chair of corp.'s Board of Directors and from outside representative of another co. that held shares in subject corp. were denied on summary judgment: taxpayer didn't prove defendants were responsible for paying over corp.'s trust fund taxes. Notably, exhibits taxpayer offered merely showed that outside representative was involved in corp.'s liquidation and that Chair was involved in negotiating outside management agreement, but not that either of them were involved in corp.'s daily operations or finances. Also, taxpayer didn't offer any proof of or even address defendants' willfulness. *Reference:* United States Tax Reporter ¶66,725.05(20); 66,725.05(10). IRC §6672.

United States District Court, E.D. Pennsylvania,

Before this Court are two Motions for Summary Judgment filed by Defendants Phillip Rice (''Rice'') and Ralph D. Ketchum (''Ketchum'').

MEMORANDUM

Robert F. Kelly, Sr. J.

Plaintiff, Jerome Spade (''Spade''), brought this action pursuant to 26 U.S.C. § 6672(d), seeking contribution from the Defendants for payment of a tax penalty assessed against him.[1] For the following reasons, the Motions are granted.

I. FACTUAL BACKGROUND[2]

Spade was employed as an accountant temp for Robert Half International, Inc. (''RHI''), a temporary employment agency. In April 1993, RHI placed Spade at Heintz Corporation (''Heintz''). While Spade was acting as Heintz's Chief Financial Officer (''CFO''), Heintz failed to make its payroll tax payments. At the end of July 1993, RHI terminated Spade's employment because of Heintz's failure to pay RHI for its services. At this time, Spade was hired as a full-time employee for Heintz. On or about August 4, 1993, Heintz filed for Chapter 11 bankruptcy. Spade's employment as Heintz's CFO ceased in September 1995.

By letter dated September 28, 1996, the Internal Revenue Service (''IRS'') informed Spade that he was being assessed for the 1993 unpaid payroll taxes by Heintz. The IRS was legally allowed to seek payment from Spade in accordance with 26 U.S.C. § 6672(a). Section 6672(a) provides that individuals who were required to collect, account for, and pay taxes for a business may be personally liable for a penalty if the business fails to pay the owed taxes. 26 U.S.C. § 6672(a). According to the IRS, the amount of Heintz's unpaid taxes was $ 25,999.86, however, due to accrued penalties and interest, the assessment against Spade amounted to $ 123,826.01.[3] Spade contested his responsibility for the assessment against him. Following litigation, Spade and the IRS reached a settlement on March 16, 2000. The general terms of the settlement required Spade to pay $12,500 according to a payment plan concluding with a final payment to be paid in August 2000. Under the terms of the plan, Spade would be severely penalized for any missed payments. In August 2000, Spade successfully paid off the $12,500 without any penalties. In connection with the IRS litigation and settlement, Spade states that he has paid an additional $10,500 in attorney's fees.

On or about March 16, 2001, Spade filed suit in the Philadelphia Municipal Court for $10,000 against Star Bank, N.A. (''Star Bank''), Donald C. Molton, Jr. (''Molton''), Rice and Ketchum. Spade dismissed the action. On July 2, 2001,

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[1] Spade's lawsuit also included state law claims for breach of employer's duty of care, negligence, misrepresentation and breach of contract. (See Compl.). All of Spade's state law claims were dismissed by the Court on November 6, 2002. (See Dkt. No. 51 (Memorandum Opinion and Order)). Even though the Court's November 6, 2002 Order employed the language ''Spade's state law claims are DISMISSED,'' Rice, Ketchum and Spade inexplicably address the state law claims as if they have not been previously dismissed. (Id.). For clarification, the Court notes that Spade's only remaining claim is his claim seeking contribution pursuant to 26 U.S.C. § 6672(d). All other claims, meaning all of Spade's state law claims, are dismissed. As a result, the Court is only addressing Defendants' Motions for Summary Judgment regarding Plaintiff's Section 6672(d) claim for contribution.

[2] The Court adopts the Factual Background set forth in its prior Memorandum in this case. (See Dkt. No. 51).

[3] The final IRS assessment of $ 25,999.86 related to Heintz's unpaid payroll taxes for the last week of June 30, 1993 and the first week of July 1993.

Spade filed the instant action against the aforementioned adding the following as defendants: RHI, Heintz, James Doyle, Empire Management Group, Inc. (''Empire Management''), Clifford Crowley (''Crowley'') and Grisanti, Galef & Goldress, Inc. (''GGG Inc.'').[4] An arbitration hearing on this case was held on June 5, 2002. On June 6, 2002, an arbitration award was entered.

Spade requested a trial de novo on July 1, 2002. On this same date, Spade filed a Motion for Summary Judgment Against RHI. RHI's response to Spade's motion included a Cross-Motion for Summary Judgment. Spade's Motion for Summary Judgment Against RHI was denied on September 11, 2002. The Court granted RHI's Cross-Motion for Summary Judg-ment and the Motions for Summary Judg-ment filed by Molton and Crowley on No-vember 6, 2002. Currently, the Court is addressing the Motions for Summary Judg-ment filed by Rice and Ketchum.[5]

II. LEGAL STANDARD

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper ''if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'' Fed.R.Civ.P. 56(c). Essentially, the inquiry is ''whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.'' Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–252 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249.

A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present ''specific facts showing that there is a genuine issue for trial.'' Fed.R.Civ.P. 56(e). Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir.1989)(citing Celotex, 477 U.S. at 325 (1986)). Further, the non-moving party has the burden of producing evidence to establish prima facie each element of its claim. Celotex, 477 U.S. at 322–23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir.1987).

III. DISCUSSION

A. 26 U.S.C. § 6672[6]

[1] By law, employers must regularly withhold federal income and Social Security taxes from their employees' wages. Luce v. Luce, 119 F.Supp.2d 779, 783 (S.D.Ohio 2000)(citing 26 U.S.C. §§ 3101-02, [86 AFTR 2d 2000-6977] 3402). The taxes withheld from each employee's wages constitute a special fund held in trust under the Internal Revenue Code (''IRC'') for the exclusive use of the United States. See 26 U.S.C. § 7501. On a quarterly basis, these taxes are collected from employers. Luce, 119 F.Supp.2d at 783. ''The withholding taxes are not a mere debt, but 'are part of the wages of

[4] On February 8, 2002, the Court issued an Order dismissing Heintz, Empire Management and GGG Inc. due to Spade's lack of prosecution for failure to make service of complaint. (Dkt. No. 29 (Court Order)).

[5] The Court is addressing Rice and Ketchum's Motions for Summary Judgment at this time, not in conjunction with the earlier filed Motions for Summary Judgment, because Rice and Ketchum's Motions were belatedly filed after the Court's disposition of the previous Motions. The Plaintiff has not objected to the unpunctual filing of these Motions, therefore, the Court will address each Motion.

[6] 26 U.S.C. § 6672, the ''Trust Fund Recovery Penalty'' provision, is a collection device designed to ensure that unpaid trust fund taxes are paid, if not by the defaulting corporate employer, then by those persons responsible for the default. Smith v. United States, 894 F.2d 1549, 1553 [71A AFTR 2d 93-3456] (11th Cir.1990).

the employee, held by the employer in trust for the government.''' Id. (quoting Gephart v. United States, 818 F.2d 469, 472 [59 AFTR 2d 87-1099] (6th Cir.1987); 26 U.S.C. § 7501(a)). If these taxes are not paid at the end of each quarter, the government does not have any recourse against individual taxpaying employees. Id. However, ''if these taxes are not paid at the end of each quarter, federal law imposes a 100 % penalty tax on any person who willfully fails to collect, truthfully account for, and pay over these taxes.'' Id. (citing 26 U.S.C. § 6672) (footnote omitted).

According to 26 U.S.C. §6672(a), ''[t]he IRS is authorized to assess and collect a trust fund recovery penalty from any officer or employee of any corporation who is responsible for collecting, accounting for, and paying over any tax imposed by the Internal Revenue Code and who willfully fails to do so.'' United States v. Bisbee, 245 F.3d 1001, 1005 [87 AFTR 2d 2001-1611] (8th Cir.2001)(citing 26 U.S.C. §Section 6672(a) of the IRC provides:

Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax, or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over.

26 U.S.C. § 6672(a). Thus, Section 6672(a) allows a 100 percent assessment of a penalty against any person responsible for the payment of payroll taxes who willfully fails to pay such taxes. Id. After payment of the penalty, the statute allows the ''responsible person'' to seek contribution from any other responsible party who would be liable for the unpaid tax. See 26 U.S.C. § 6672(d). Specifically, Section 6672(d) provides, in part:

If more than 1 person is liable for the penalty under subsection (a) with respect to any tax, each person who paid such penalty shall be entitled to recover from other persons who are liable for such penalty an amount equal to the excess of the amount paid by such person over such person's proportionate share of the penalty.

26 U.S.C. § 6672(d). Thus, if more than one person is liable for the penalty for unpaid withholding taxes, Section 6672(d) provides a federal right to contribution or indemnification. Id.

1. Contribution Pursuant to 26 U.S.C. §6672

Under Section 6672, ''[p]ersonal liability ... properly is imposed upon the person or persons who were: '(1) responsible for collecting, accounting for, and remitting payroll taxes, and (2) who willfully failed to do so.''' In re Sheppard, 253 B.R. 397, 403 [85 AFTR 2d 2000-1825] (Bkrtcy.D.S.C.2000)(quoting Plett v. United States, 185 F.3d 216, 218 [84 AFTR 2d 99-5403] (4th Cir.1999); 26 U.S.C. § 6672)) (citations omitted); see also Quattrone Accountants, Inc. v. I.R.S., 895 F.2d 921, 927 [65 AFTR 2d 90-580] (3d Cir.1989). Thus, in order to set forth a claim for contribution against others, a person must show that the others are (1) a ''responsible person,'' and (2) they ''willfully failed to collect or truthfully account for and pay over'' the payroll taxes. Quattrone, 895 F.2d at 927 (citation omitted).

a. ''Responsible Person'' Under 26 U.S.C § 6672

For purposes of Section 6672(a), a ''responsible person'' is defined as an individual ''who is 'required to collect, truthfully account for or pay over any tax due to the United States.''' Greenberg v. United States, 46 F.3d 239, 242–43 [74 AFTR 2d 94-7343] (3d Cir.1994)(quoting United States v. Carrigan, 31 F.3d 130, 133 [74 AFTR 2d 94-5425] (3d Cir.1994)). '''Responsibility is a matter of status, duty, or authority, not knowledge.' While a responsible person must have significant control over the corporation's finances, exclusive control is not necessary.'' Id. at 243 (quoting Brounstein v. United States, 979 F.2d 952, 954 [71 AFTR 2d 93-1714] (3d Cir.1992)) (quotation marks and citation omitted). It is not required that the responsible person be a corporate officer. Quat-

trone, 895 F.2d at 927 (citation omitted). ''A person is responsible if the person has significant, though not necessarily exclusive, control over the employer's finances.'' Id. (citation omitted). ''A person has significant control if he has the final or significant word over which bills or creditors get paid.'' Id. (citation omitted). It is important to note that ''[t]here can be more than one responsible person for a given employer.'' Id. at 926 (citation omitted). ''That another person also may be liable under Section 6672 does not affect the liability of the person presently subject to suit.'' Id. (citation omitted). When determining whether an individual is a responsible person, courts also consider the following factors:

(1) contents of the corporate bylaws, (2) ability to sign checks on the company's bank account, (3) signature on the employer's federal quarterly and other tax returns, (4) payment of other creditors in lieu of the United States, (5) identity of officers, directors, and principal stockholders in the firm, (6) identity of individuals in charge of hiring and discharging employees, and (7) identity of individuals in charge of the firm's financial affairs. Brounstein, 979 F.2d at 954–55 (citation omitted).

b. ''Willfulness'' Under 26 U.S.C § 6672

In order for liability to attach under Section 6672, once it is proven that an individual is a ''responsible person,'' there next must be a showing that the ''responsible person'' ''willfully'' failed to collect, account for or pay over the withheld taxes. 26 U.S.C. § 6672(a). ''[U]nder section 6672(a), willfulness is 'a voluntary, conscious and intentional decision to prefer other creditors over the Government.' A responsible person acts willfully when he pays other creditors in preference to the IRS knowing that taxes are due, or with reckless disregard for whether taxes have been paid.'' Greenberg, 46 F.3d at 244 (quoting Brounstein, 979 F.2d at 955–56) (citations omitted). ''In order for the failure to turn over withholding taxes to be willful, a responsible person need only know that the taxes are due or act in reckless disregard of this fact when he fails to remit to IRS.'' Id. ''Reckless disregard includes failure to investigate or correct mismanagement after being notified that withholding taxes have not been paid.'' Id. (citations omitted). ''The taxpayer need not act with an evil motive or bad purpose for his action or inaction to be willful.'' Id. (citing Hochstein v. United States, 900 F.2d 543, 548 [65 AFTR 2d 90-937] (2d Cir.1990)). A willful failure to pay taxes includes ''[a]ny payment to other creditors, including the payment of net wages to the corporation's employees, with knowledge that the employment taxes are due and owing to the Government.'' Id. (citation omitted).

B. Analysis of 26 U.S.C § 6672 Regarding Rice and Ketchum

1. Rice

Rice argues that Plaintiff's Section 6672(d) claim against him should be dismissed because he was not a ''responsible person'' that ''willfully failed'' to collect and/or pay taxes pursuant to 26 U.S.C. 6672. (Rice's Mem. Law Supp. Mot. Summ. J. at 2). Rice contends that Spade cannot show that he was a ''responsible person'' in accordance with Section 6672 because ''there is no evidence that Rice was a controlling party over Heintz Corporation, with the decision - making authority to decide how corporate funds were spent, or that he had actual power to make such payments.'' (Id. at 5). Rice also argues that he did not ''willfully fail'' to remit Heintz's taxes and there ''has been no evidence presented that Rice had any direct or indirect authority or knowledge with respect to paying taxes on behalf of Heintz corporation.'' (Id. at 6). Regarding the issue of whether Rice was a ''responsible person,'' Plaintiff counters Rice's argument with the assertion that Rice was a ''responsible person'' because he ''was one of the persons involved in the day to day operations of Heintz, Inc.'' (Spade's Mem. Law Answer Rice's Mot. Summ. J. at 2). Spade relies upon the exhibits attached to his Memorandum of Law in Answer to Phillip Rice's Motion for Summary Judgment, labeled P-1 through P-4, as evi-

dence of Rice's involvement in the management of Heintz's day to day operations. (Id.). As for the issue of whether Rice ''willfully failed'' to remit Heintz's withholding taxes, Spade is silent. For the following reasons, the Court concludes that Spade cannot seek contribution from Rice pursuant to Section 6672(d) because he has not shown that Rice is a ''responsible person'' who ''willfully failed to collect or truthfully account for and pay over'' Heintz's payroll taxes. 26 U.S.C. §§ 6672(a) and (d).

a. ''Responsible Person''

Rice argues that he was not a ''responsible person'' under Section 6672 for making payroll taxes on behalf of Heintz. Rice states that he was not an officer, employee or shareholder of Heintz, but ''was the representative of a company which owns shares in Heintz, and as such, made infrequent visits to Philadelphia for the purposes of monitoring the progress of Heintz.'' (Rice's Pre-Trial Mem. at 2). Rice states that Spade cannot prove that he was a ''responsible person'' because ''not one document was produced by [Spade] in discovery that identifies one action Rice took on behalf of Heintz Corporation, much less, that he controlled the day-to-day operations of it and was responsible for directing the flow of monies to taxing authorities.'' (Rice's Mem. Law Supp. Mot. Summ. J. at 6).

Spade counters Rice's argument with the assertion that Rice was, in fact, a ''responsible person'' under Section 6672. (Spade's Mem. Law Ans. Rice's Mot. Summ. J. at 3–12). In support of his argument, Spade's relies upon four exhibits to allegedly show that Rice had primary responsibility for the management of Heintz. (Id. at 8). Examination of the exhibits does not reveal that Rice had primary responsibility for Heintz's management. Instead, the exhibits reveal that Rice was involved in the liquidation of Heintz and negotiating a management agreement and eventual purchase and sale agreement with Empire Management. (Id., Exs. P-1, P-2, P-3 and P-4). As a result, the exhibits fail to establish the necessary showing that Rice was a person who was ''required to collect, truthfully account for or pay over any tax due to the United States'' on behalf of Heintz. Greenberg, 46 F.3d at 242–43.

Based on the aforementioned, the Court concludes that Spade has failed to show that Rice is a ''responsible person'' who ''wilfully failed'' to remit Heintz's payroll taxes. Regarding the ''responsible person'' prong of the Section 6672(a) analysis, Spade does not provide any evidence that Rice was a ''responsible person'' as defined by Section 6672(a). Thus, Spade fails to proffer any evidence to show or create any genuine issue of material fact that Rice was ''required to collect, truthfully account for or pay over any tax due to the United States'' on behalf of Heintz. Greenberg, 46 F.3d at 242–43. As a result of the aforementioned, the Court concludes that Spade has failed to prove that Rice was a ''responsible person'' under Section 6672(a). Consequently, Spade is unable to seek contribution from Rice pursuant to Section 6672(d).

b. ''Willfulness''

Although, the Court's conclusion that Spade has failed to show that Rice was a ''responsible person'' ends its Section 6672 inquiry, the Court takes this opportunity to note that Spade has not presented any evidence whatsoever showing that Rice ''willfully failed'' to remit Heintz's payroll taxes. Although Rice argues that he did not ''willfully fail'' to collect or pay over any payroll taxes, Spade does not address Rice's argument. (Rice's Mem. Law Supp. Mot. Summ. J. at 6; Spade's Mem. Law Ans. Rice's Mot. Summ. J.). Spade totally ignores the ''willfulness'' requirement under Section 6672 and, consequently, completely fails to offer any evidence that Rice ''willfully failed'' to remit the delinquent taxes through reckless disregard or by making ''a voluntary, conscious and intentional decision to prefer other creditors over the Government.'' Greenberg, 46 F.3d at 244. As a result, the Court concludes that Spade has failed to make any showing whatsoever regarding the ''willfulness'' element of liability under Section 6672. Since Spade has not offered

any evidence showing that Rice was a ''responsible person'' who ''willfully failed'' to pay Heintz's taxes, Rice is entitled to summary judgment regarding Spade's Section 6672(d) claim for contribution.

2. Ketchum[7]

Ketchum argues that he is entitled to summary judgment because ''[t]he evidence establishes that [he] is not a 'responsible person' that willfully failed to collect and/or pay taxes pursuant to 26 U.S.C. § 6672.'' (Ketchum's Mem. Law Supp. Mot. Summ. J. at 5). Ketchum states that he was Chairman of the Board of Directors of Heintz, not the former president of Heintz as alleged by Spade. (Id. at 3–4). As Chairman of the Board of Directors, Ketchum argues that he had limited authority. (Id.). As a result of this limited authority, Ketchum contends that he was not a ''responsible person'' under Section 6672 because he ''was not involved in the daily operations or decision making of Heintz.'' (Id.). Ketchum also argues that he did not ''wilfully fail'' to remit Heintz's payroll taxes. (Id. at 9). In fact, Ketchum argues that he ''was not aware of the non-payment of taxes until many months after Heintz filed for bankruptcy.'' (Id. at 4). Spade counters Ketchum's argument with the contention that he was a ''responsible person'' because he ''was one of the persons involved in the day to day operations of Heintz, Inc.'' (Spade Ans. Ketchum's Mot. Summ. J. at 3). Spade relies upon his affidavit and the exhibits attached to his Memorandum of Law in Answer to Ralph D. Ketchum's Motion for Summary Judgment, labeled Exhibits A, B, C and D, as evidence of Ketchum's involvement in the management of Heintz's day to day operations. (Id.). As for the issue of whether Ketchum ''willfully failed'' to remit Heintz's withholding taxes, Spade is silent. For the following reasons, the Court concludes that Spade cannot seek contribution from Ketchum pursuant to Section 6672(d) because he has not shown that Ketchum is a ''responsible person'' who ''willfully failed to collect or truthfully account for and pay over'' Heintz's payroll taxes. 26 U.S.C. §§ 6672(a) and (d).

a. ''Responsible Person''

Ketchum claims that he was not a ''responsible person'' under Section 6672. (Ketchum's Mem. Law Supp. Mot. Summ. J. at 6–8). In support of his contention, Ketchum includes an affidavit declaring, among other things, that he ''had no involvement or decision-making authority concerning Mr. Spade being brought in as Chief Financial Officer,'' he ''was not involved in the daily operations or decision making of Heintz,'' he ''had no control over the finances of Heintz,'' he ''had no authority to transfer funds of Heintz,'' he ''had no check funding authority or ability to authorize payments or non-payments on behalf of Heintz,'' he ''was never responsible for collection of or payment of taxes,'' and he ''did not personally hire or fire Mr. Spade.'' (Id., Ex. A (Ketchum's Aff.)). Spade counters Ketchum's averments with his own affidavit and three exhibits. (Spade Ans. Ketchum's Mot. Summ. J., Exs. A, B, C and D). Spade's affidavit avers that ''Mr. Ketchum would fax to [him] specific requests for wire transfer payments,'' ''Mr. Ketchum was listed as a signatory'' on a debtor-in-possession operating bank account with ''the authority to request wire transfer payments,'' and Mr. Ketchum helped to hire Spade and terminated Spade's employment with Heintz. (Id., Ex. A (Spade's Aff.)). As for Spade's exhibits B, C and D, they reveal that Ketchum was involved in negotiating a management agreement with Empire Management, but do not address Ketchum's role in Heintz's daily management or his role regarding accounting for or paying over Heintz's payroll taxes to the IRS. (Id., Exs. B, C and D).

As a result of the affidavits, and their conflicting averments, this Court is unable to conclude whether Ketchum was, in fact, involved in the day to day operations of Heintz. The Court is unable to conclude whether Ketchum was involved in Heintz's

[7] Ketchum's motion is a Motion for Summary Judgment, and Alternatively, Motion In Limine. (Dkt. No. 56). Since the Court is granting Ketchum's Motion for Summary Judgment, it will deny his Alternative Motion In Limine as moot. However, the Court notes that it has addressed the issues raised in Ketchum's Alternative Motion In Limine at the December 9, 2002 conference.

daily operations, however, it is of no consequence since the relevant inquiry is whether Ketchum was an individual ''required to collect, truthfully account for or pay over any tax due to the United States'' on behalf of Heintz. Greenberg, 46 F.3d at 242–43. Instead of showing Ketchum's role pertaining to the accounting for or payment of Heintz's taxes, Spade only focuses on arguing that Ketchum was involved in Heintz's daily operations. Spade fails to offer any evidence that Ketchum had any duty or authority regarding collecting, truthfully accounting for or paying over any of Heintz's taxes to the IRS. As a result, the Court concludes that Spade's failure to provide any evidence to show that Ketchum was an individual who was required to collect, truthfully account for or pay over Heintz's taxes necessarily results in a finding that Spade has failed to prove that Ketchum was a ''responsible person'' under Section 6672(a). Since Section 6672 requires a showing of ''responsibility,'' Spade is unable to seek contribution from Ketchum pursuant to Section 6672(d).

b. ''Willfulness''

Even though the Court's conclusion that Spade has failed to show that Ketchum was a ''responsible person'' ends its Section 6672 inquiry, the Court takes this opportunity to note that Spade has not presented any evidence whatsoever showing that Ketchum ''willfully failed'' to remit Heintz's payroll taxes. Ketchum contends that he did not become aware of the failure of Heintz to pay taxes until well after it filed for bankruptcy. (Ketchum's Mem. Law Supp. Mot. Summ. J. at 9). In furtherance of his argument, Ketchum states that ''there has been no evidence presented that [he] had any direct authority or knowledge with respect to paying taxes on behalf of Heintz'' and ''[t]here is also no indication that [he] was placed on knowledge that the taxes were due and he somehow ignored such notice.'' (Id.). Although Ketchum argues that he never ''willfully failed'' to pay over any payroll taxes, Spade totally ignores Ketchum's argument. Consequently, Spade fails to offer any evidence that Ketchum ''willfully failed'' to remit the delinquent taxes through reckless disregard or by making ''a voluntary, conscious and intentional decision to prefer other creditors over the Government.'' Greenberg, 46 F.3d at 244. As a result, the Court concludes that Spade has failed to show that Ketchum was a ''responsible person'' who ''willfully failed'' to pay Heintz's taxes. Therefore, Ketchum is entitled to summary judgment regarding Spade's Section 6672(d) claim for contribution.

IV. CONCLUSION

Spade fails to make the required showing that Rice and Ketchum were responsible for collecting, accounting for, and remitting Heintz's payroll taxes, and that they willfully failed to do so. See 26 U.S.C. §§ 6672(a) and (d). As a result, Spade is unable to establish his claims for contribution against Rice and Ketchum pursuant to Section 6672(d). Thus, the Motions for Summary Judgment filed by Rice and Ketchum are granted.

An appropriate Order follows.

ORDER

AND NOW, this 19 th day of December, 2002, upon consideration of the Motions for Summary Judgment filed by Defendants Phillip Rice (Dkt. No. 52) and Ralph Ketchum (Dkt. No. 56-1), and the Responses thereto, it is hereby ORDERED that:

1. the Motions for Summary Judgment are GRANTED.
2. Ralph Ketchum's Alternative Motion In Limine (Dkt. No. 56-2) is DENIED as moot.
3. Defendants Phillip Rice and Ralph Ketchum are DISMISSED from this action.

BY THE COURT:

Robert F. Kelly, Sr. J.

¶2002-5798

Darlene R. ESPOSITO, a/k/a Amnesty National, APPELLANT v. INTERNAL

REVENUE SERVICE, APPELLEE. U.S. Court of Appeals, Dist. of Columbia Circuit, (CA Dist Col) Docket No. 02-5295, Dec. 13, 2002. District Court, (2002, DC Dist Col) 90 AFTR 2d 2002-5157, 208 F Supp 2d 44, 2002-2 USTC ¶50539 [90 AFTR 2d 2002-5157], affirmed per curiam. Years 1996, 1997, 1998. Decision against Taxpayer.

1. District court jurisdiction—review of Tax Court decision—motions for declaratory and injunctive relief. District court's determination that it lacked jurisdiction to review decisions of Tax Court was summarily affirmed per curiam, and taxpayer's motion for discovery was denied. *Reference:* United States Tax Reporter ¶74,825.02(5); 74,025.01(18). IRC §7402; 7482.

United States Court of Appeals, District of Columbia Circuit,

BEFORE: GINSBURG, Chief Judge, and TATEL and GARLAND, Circuit Judges.

ORDER

PER CURIAM.

[1] Upon consideration of the motion for discovery and the opposition thereto; and the motion for summary affirmance and the opposition thereto, it is

ORDERED that the motion for discovery be denied. It is

FURTHER ORDERED that the motion for summary affirmance be granted. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C.Cir.1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C.Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980). The district court correctly determined that it lacked jurisdiction to review decisions of the United States Tax Court. See 26 U.S.C. § 7482(a)(1).

Pursuant to D.C.Cir. Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R.App. P. 41(b); D.C.Cir. Rule 41.

¶2002-5799

UNITED STATES OF AMERICA, PLAINTIFF v. DIVERSIFIED GROUP, INC., DEFENDANT. U.S. District Court, Southern Dist. of New York, (DC NY) Docket No. M-18-304, Nov. 25, 2002. Later proceeding at (2002, DC NY) 90 AFTR 2d 2002-7775. Decision for Govt. in part.

1. Summons enforcement—procedure—attorney-client privilege. Govt.'s petition to enforce 5 IRS summonses against holding co./alleged tax shelter promoter was granted in part: govt. made out prima facie enforcement case with IRS agent's declaration that summoned documents weren't already in IRS's possession, that documents were potentially relevant to legitimate investigation into co.'s potential violation of tax shelter laws and that all applicable laws were met; and taxpayer's attempt to contest enforcement on basis of underlying merits was inappropriate. Also, ordering taxpayer to make good faith search for records resolved any ambiguity as to its possession thereof; and IRS didn't waive its enforcement rights merely by temporarily adjourning taxpayer's testimony. But, taxpayer wasn't required to turn over those documents identified in its "adequately detailed" privilege log. *Reference:* United States Tax Reporter ¶76,025.04(25); 76,025.07(15). IRC §7602.

JAMES B. COMEY United States Attorney for the Southern District of New York BY: NEIL BINDER DAVID JONES Assistant United States Attorneys
MCDERMOTT WILL & EMERY Attorneys for Defendant Diversified BY: ELLIOT SILVERMAN
FULLBRIGHT & JAWORSKI Attorneys for Defendant Diversified BY: JASPER TAYLOR III

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK,

Before: HON. PETER K. LEISURE, District Judge

New York, N.Y.

9:55 a.m.

THE COURT: The United States brings this petition to enforce five IRS summonses, pursuant to 26 U.S.C. Sections 7402(b) and 7604(a). On October 21, 2002, Hon. Loretta A. Preska, United States District Judge of this Court, signed an order to show cause why respondent The Diversified Group, Inc. (''DGI'') should not be compelled to testify and produce the book, records and other paper demanded in the Internal Revenue Service (''IRS'') summonses served upon DGI on May 3, 2002.

I. Background.

A. statutory and regulatory background.

Like much tax law, the underlying statutes and regulations in this matter are complicated. The papers submitted at oral argument by the parties have assisted the Court in the consideration of the complex statutes and regulations. But a cursory review of the relevant statutes and regulations will assist to put this consideration in the proper context.

Pursuant to 26 U.S.C. Section 6111, certain tax shelters must be registered with the IRS. 26 U.S.C. Section 6111(a)(1). Section 6112 requires the organizers and sellers of these tax shelters to maintain a list of all investors in each shelter and to make that list available to the IRS upon request. 26 U.S.C. Section 6112(a). Tax shelter organizers who fail to comply with these registration, record keeping and production requirements may be liable for penalties. See 26 U.S.C. 6707(a); *id*, paragraph 6708.

Section 6111 defines the types of tax shelters that must comply with the registration, record keeping and production requirements. Additionally, 26 C.F.R. Section 301.6111-2T authorizes the IRS to publish notices regarding specific financial arrangements it considers to be subject to the requirements of Section 6111 and Section 6112. 26 C.F.R. Section 301.6111-2T(b)(2). Such arrangements are then known as ''listed transaction.'' *Id.* Once an arrangement becomes a listed transaction, it, and all transactions that are substantially similar, is *per se* subject to the Section 6111 and Section 6112 requirement. *Id.*

B. Factual background.

DGI is a holding company. Among other things, it provides ''consulting services to individuals and businesses regarding various business and investment strategies, some of which are structured so as to take advantages of various tax benefits provided in the Internal Revenue Code,'' Dec. of James Haber, sworn to on November 4, 2002 (''Haber Dec.'')

The IRS is currently investigating whether DGI has violated the tax laws regarding the registration and maintenance of records concerning tax shelters. Declaration of Revenue Agent Juan Marulanda, sworn to on October 18, 2002 (''Marulanda Dec.'') paragraph 4. Juan Marulanda is the revenue agent assigned to the investigation. *Id.* In 2000, the IRS received information from a taxpayer's federal income tax return ''identifying [DGI] as the promoter of a tax avoidance scheme'' that the IRS believes is a tax shelter under Section 6111. *Id.* paragraph 5. DGI has not registered the alleged tax shelter with the IRS. *Id.* paragraph 6.

According to Marulanda, the IRS has received twelve disclosure statements from taxpayers identifying DGI ''as the promoter or manager of tax avoidance transactions'' similar to a listed transaction. *Id.* paragraph 7. DGI has not registered these transactions and has refused to produce any investor lists.

On March 25, 2002, the IRS sent DGI five information document request. DGI responded, through its counsel, with several okays to the request and did not produce any documents. *Id.* paragraph 16. Because the IRS believed that DGI's objections had no merit, they served five summonses (''summonses'') on DGI which sought documents and testimony relating to transactions that either potentially could be subject to the registration, record keeping

and production requirements of Section 6111 and Section 6112 or are somewhat similar to transaction regulated by though statutes. *Id*; see also summonses, dated May 3, 2002, attached as Exhibits C-G to Marulanda Dec. The summonses also seek investor lists for the transactions. DGI's counsel again responded with objections and no document have been produced. Marulanda Dec. paragraph 19.

While DGI objected to the production of documents, it did agree to provide oral testimony. *See Letter* to Juan Marulanda from Elliot Silverman, Esq., dated May 15, 2002, attached as Exhibit H to Marulanda Dec. By agreement of the IRS and counsel for DGI, the testimony was scheduled for July 23, 2002. See letter to Elliot Silverman, Esq., from Juan Marulanda, dated June 5, 2002, attached as Exhibit 18 to Haber Dec. However, on July 17, 2002, Marulanda sent a letter to DGI's attorney indicating that the scheduled testimony would not proceed on July 23, 2002. Marulanda wrote that DGI had failed to provide the requested documents, the testimony would be ''premature.'' *See letter* to Elliot Silverman, Esq., from Juan Marulanda, dated July 17, 2002, attached as Exhibit 19 to Haber Dec.

According to Marulanda, the IRS is not in possession of any of the information requested in the summonses, they have fully complied with the applicable provisions of the Internal Revenue Code and there has been no referral to the Department of Justice for criminal prosecution. Marulanda Dec. paragraphs 20, 22, 23.

II. Discussion.

[1] The IRS is authorized to issue summonses to ''examine'' any books, papers, records, or other data' and take testimony in investigations. 26 U.S.C. Section 7602. This provision is 'critical to the investigation and enforcement functions of the IRS.' *State v. Arthur Young, Inc.*, 465 U.S. 805, 814 [53 AFTR 2d 84-866] (1984). The Supreme Court has noted that Congress provided the IRS with 'expansive information-gathering authority,' *id* at 16; *See Also Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 323 [55 AFTR 2d 85-491] (1985) (stating that the Supreme Court has never held 'that the IRS must conduct it investigations in the least intrusive manner'), and that restrictions on the IRS' summons power should be avoided 'absent unambiguous directions from Congress.' *United States v. Bisceglia*, 420 U.S. 141, 150s [35 AFTR 2d 75-702] (1975)., *See also PAA Mgmt., Ltd. v. United States*, 962 F.2d 212, 226 [69 AFTR 2d 92-1166] (2d Cir. 1992) ('the summons power of the IRS under the Code is quite broad, and court are constrained to exercise caution before circumscribing the summons authority.'). In *Bisceglia*, the Court noted the alternative to the vast summons power vested in the IRS 'could well involve far less agreeable invasions of house, business and records,' *Id* at 146.

In order to make out a *prima facie* case for enforcement of a summons under Section 7602, the government must show that (1) a legitimate purpose exists for the investigate, (2) the summons may be relevant to that purpose, (3) the information sought is not already in the possession of the government, and (4) the procedural and administrative step required by the Internal Revenue Code for serving a summons have been followed. *United States v. Powell*, 379 U.S. 48, 57–58 [14 AFTR 2d 5942] (1964). Once the government satisfied these requirements, the burden then shifts to the taxpayer challenging the summons to object on any appropriate ground. *See PAA Mgmt.*, 962 F.2d at 215. The Second Circuit has held that the Government's burden of proof in showing its compliance with the *Powell* standards is ''minimal.'' *United States v. White*, 853, F.2d 107, 111 [62 AFTR 2d 88-5972] (2d Cir. 1988). This minimal standard may be established by an affidavit of an IRS agent involved in the investigate. *See id.*

Additionally, it is important to note that ''summons enforcement proceedings are intended to be summary in nature, so that an investigation can advance to an ultimate determination as to whether tax liability exists.'' *United States v. White*, 853, F.2d 107, 111 (2d Cir. 1988). The issue in such summary proceedings ''is not whether the IRS has established, or is even likely to es-

tablish guilt or liability on the taxpayer's part; rather, the issue is whether the IRS had a valid tax determination or collection purpose in issuing its summons.'' *Id* (emphasis in original).

In this proceeding, the IRS has established each of the four *Powell* factors. The purpose of the IRS in this investigation is to determine whether DGI has complied with federal tax law regarding tax shelters. It is certainly legitimate for the IRS to investigate such conduct.

With regard to the relevancy prong, both Section 7602 and *Powell* indicate that it is only necessary that the information sought ''may be relevant to the purpose of the investigation. 26 U.S.C. Section 7602; *Powell*, 379 U.S. at 57., *see also In re McVane*, 44 F.3d 1127, 1137 (stating that in an enforcement proceeding, courts should defer to the administrative agency's determination of relevancy unless it is clearly erroneous). The Supreme Court has noted that 'the [IRS] can hardly be expected to know whether such data will in fact be relevant until it is procured and scrutinized.' *Arthur Young*, 465 U.S. at 814. Furthermore, the relevancy requirement has 'been interpreted liberally in favor of the IRS.' *PAA Mgmt.*, 962 F.2d at 216., *United States v. Arthur Young, Inc.*, 677 F.2d 211, 216 [49 AFTR 2d 82-1107] (2d Cir. 1982), affirmed in part and reversed in part on other grounds, 465 U.S. 805 [53 AFTR 2d 84-866] (1984) ('the judges in this circuit have therefore construed the summons power liberally, and allowed it to extend to widely-sweeping document requests..' *United States v. Noall*, 587 F.2d 123, 125 [42 AFTR 2d 78-6241] (2d Cir. 1978) (Friendly, J.) (stating that only requiring potential relevance is advised 'since the [IRS] cannot be certain that the documents are relevant or material until [it] sees them'). In this enforcement action, the requested information certainly may be relevant to the IRS's in-vestigation. It 'might throw light' on whether DGI is in fact promoting tax shel-ters that are subject to the requirements of Section 6111 and Section 6112. *See United States v. Davey*, 543 F.2d 996, 1000 [38 AFTR 2d 76-5889] (2d Cir. 1976)., *See Also United States v. Merrill Lynch, Inc.*, No. M-18-304, 1993 WL 22117, at 4 (S S.D.N.Y. 1993) (stating that contacting respondent's clients is an appropriate way to determine if tax laws have been followed).

The last two prongs are satisfied by Marulanda's declaration that the requested document are not in the possession of the IRS, and that the IRS has complied fully with the applicable provisions of the Internal Revenue Code. *See White*, 853 F.2d at 111 (stating that the *Powell* standards may be satisfied with a declaration from an IRS agent). DGI has not seriously contested that these two prongs have been satisfied. Because the Court finds that the *Powell*test has been satisfied, the burden is now on DGI to show why the summonses should not be enforced. Respondent has not met this ''heavy burden.'' *See United States v. LaSalle National Bank*, 437 U.S. 298, 316 [42 AFTR 2d 78-5198] (1978).

Several of DGI's bases for opposition revolve around its contention that it never participated in the types of tax shelters regulated by Section 6111 and Section 6112. Fundamentally, DGI's argument is that it does not have to produce document potentially showing a violation of the statutes because it dit not violate the statute. This argument is to no avail in a summons enforcement proceeding. *See Merrill Lynch, Inc.*, 1993, wl 22117, at 4 (stating that the IRS does not have to accept respondent's claim that it complied with the law at face value). If the IRS later brings an action against DGI based on Section 6111 or Section 6112, DGI certainly will be able to contest the merits of the case at that time. *See White*, 853 F.2d at 116 (''the function of the district court . . . in an enforcement proceeding is not to test the final merits of [underlying tax issue], but to assess within the limits of Powell whether the IRS issued its summons for a legitimate tax determination purpose.''). Here, the government wisely has not responded to DGI's invitation to litigate the merits at this stage of the proceedings. Similarly, the Court will decline the invitation to adjudicate the

merits in this summary proceeding. *See id* at 111.

DGI argues that according to *United States v. Barth*, [62 AFTR 2d 88-5972]745 F.2d 184 [54 AFTR 2d 84-6049] (2d Cir. 1987), the Court must first determine if the requested documents are in DGI's possession before it can issue an order compelling enforcement. *Barth* holds that the enforcement of an IRS sum-mons is a finding that the summonsed party has possession of the documents. *Id* at 187. This principle was reaffirmed in *United States v. Sancetta*, 788 F.2d 67, 72 [57 AFTR 2d 86-1158] (2d Cir. 1986). However, in *Sancetta*, the Second Circuit found no problem with the district court ordering a good faith search of the sum-monsed party's records to determine if the documents are in its possession. *Id* at 73. This procedure makes sense given the in-tended summary nature of enforcement proceedings. Therefore, the Court directs such a search of DGI's records and if in fact it finds documents responsive to the summonses, it must produce them.

DGI is correct that courts will not enforce a summons that contains vague or ambiguous terms. *See i.e. McVane*, 44 F.3d at 1139. However, its protestation that phrases in the summonses such ''any subsidiary or affiliate'' are impermissibly vague is disingenuous to say the least and the Court will not entertain such arguments. *See i.e.In re Investigation of World Arrangement, etc.*, 13 F.R.D. 280 (DDC 1952). Nor will the Court entertain DGI's contention that the summonses require DGI to make legal judgments.

DGI also raises concerns regarding its attorney-client privilege. The attorney-client privilege protect (a) communication between a client and its attorney (b) ''that was intended and in fact was kept confidential,'' and (c) was ''made for the purpose of obtaining or providing legal advice.'' *United States v. Constr. Prods. Research*, 73 F.3d 464, 473 (2d Cir. 1996) (McLaughlin, J.) Certainly DGI cannot be compelled to produce documents that are validly protected by this important privilege. However, it is equally certain that DGI bears the burden of establishing each element of the attorney-client privilege before it can shield allegedly privileged documents from production. *U.S. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 119 F.3d 210, 214 (2d Cir. 1997).

DGI has now, for the firs time, submitted a privilege log as part of it opposition to this petition. *See*Privilege Log attached as Exhibit 20 to Haber Dec. In order to be '''adequately detailed''' privilege logs should.

> ''Identify each document and the individuals who were party to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. Other required information, such as the relationship between . . . individuals not normally within the privileged relationship, is then typically supplied by affidavit or deposition testimony. Even under this approach, however, if the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected.''

See Constr. Prods. Research, 73 F.3d at 473 (quoting *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D., 465, 474 (S.D.N.Y. 1993); *see also In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992). DGI's privilege log, along with the declaration of James Haber, the president of DGI, meets this standard and therefore the five document listed in the log do not need to be produced. However, during DGI's oral testimony, the IRS may make further inquiries to uncover facts that may later assist it in challenging the privilege claims.

Finally, I find no merit's in DGI's contention that petitioner waived its right to seek enforcement of the summonses with respect to taking oral testimony. The IRS simply adjourned the testimony because of DGI's failure to produce the summonsed document. *United States v. Malnik*, 489 F.2d 682 [33 AFTR 2d 74-692] (5th Cir. 1974), is simply not applicable in the instant proceeding.

Conclusion.

For the foregoing reasons, the petition to enforce the summonses is granted. DGI must search its records and produce all requested document that are in its possession and that are not protected by the attorney-client privilege within 30 days of this order. Within 30 days of such production, DGI must provide oral testimony in accordance with the summonses.

This order is in the transcript that will be prepared and it will be signed by the Court as so ordered when made available. I'll date the order when I receive the transcript and the 30 days starts to run from the date of my signature.

Is there any question?

MR. SILVERMAN: Your Honor, will the Court entertain a motion to stay enforcement of the order pending an appeal to the Second Circuit?

THE COURT: Yes. There's no reason to put you on an expedited schedule and also force the Second Circuit to hear the application and then decide whether to grant the stay. So I will do that if you'll prepare the order. Talk to government counsel, however, It may be submitted with their consent.

MR. BINDER: Your Honor, what we'd ask is that we have a day to consult with counsel for Diversified see if we can't work out an arrangement to consent to it, if it can be done on a -- if they could agree to meet certain time frames. There has been a lot of delay. We do think a lot of the objections are without merit. We don't want to put any burden by having an expedited appeal to the Circuit. If we could have a day to see if we can resolve this without objection, we would ask the Court to grant it.

THE COURT: That makes sense to me but let me say that if you can't agree on that schedule, come back to me and I'll fix the schedule and it may be tighter than either side wants so it may well be that you'll want to work that out. Thank you.

MR. SILVERMAN: Thank you, your Honor.

MR. TAYLOR: Thank you, your Honor.

(Proceedings adjourned)

¶2002-5800

UNITED STATES OF AMERICA, PETITIONER v. THE DIVERSIFIED GROUP, INC. AND SUBSIDIARIES, RESPONDENTS. U.S. District Court, Southern Dist. of New York, (DC NY) Docket No. M 18-304 PKL, Dec. 13, 2002. Earlier proceeding at (2002, DC NY) 90 AFTR 2d 2002-7770. Decision for Govt.

1. Summons enforcement—stay of enforcement. Corp. was denied stay of IRS summons enforcement pending appeal: based on prior enforcement order, taxpayer had little likelihood of succeeding on merits; and, even if it did ultimately succeed, it still wouldn't be irreparably harmed by being forced to produce summoned documents. Also, any incidental harm to its clients was irrelevant; and stay would injure both IRS and public by dragging out already protracted proceedings and by potential loss of records. But, based on large number of documents requested and taxpayer's intent to seek appeal, it was allowed additional time to respond. *Reference:* United States Tax Reporter ¶76,025.04(26). IRC §7602.

United States District Court, S.D. New York,

MEMORANDUM ORDER

LEISURE, J.

On November 25, 2002, this Court issued a Bench Opinion enforcing five IRS summonses directed to respondent The Diversified Group, Inc. (''DGI''). Respondent now moves this Court pursuant to Rule 62 of the Federal Rules of Civil Procedure to stay the Order pending an appeal to the Second Circuit. The government opposes the request.

Four considerations guide a court in determining whether to issue a stay under Rule 62. They are (1) the movant's likelihood of success on the merits; (2) irrepara-

ble injury if the stay is not granted; (3) whether the granting of the stay will cause substantial injury to the opposing party; and (4) the public interest. Hilton v. Braunskill, 481 U.S. 770, 776 (1987); Mohammed v. Reno, 309 F.3d 95, 100 (2d Cir.2002). Whether to grant a stay is in the discretion of the district court. Fed. R. Civ. Pro. 62(c).

A. Likelihood of Success

[1] The Second Circuit has held that likelihood of success is particularly important when a Court determines whether to stay enforcement of an IRS summons, stating that such a stay should not be granted unless ''there is a substantial possibility of success.'' In re Turner, 309 F.2d 69, 72 [10 AFTR 2d 5783] (2d Cir.1962) (Friendly, J.). As one court has stated,

The requirement of demonstrating some merit to the appeal is especially important when considering a motion to stay the enforcement of a third party IRS summons in light of the summary nature of the proceedings, the strong public interest in expediting the resolution of the underlying tax investigation, and the strong likelihood of abuse of the appeal process in order to stall the progress of the tax investigation.

United States v. Ferndale Co-Op Credit Union, Nos. 82-70599-70600, 1982 WL 1679, at 2 [50 AFTR 2d 82-5430] (E.D. Mich. June 21, 1982).

In the instant matter, DGI does not have a substantial possibility of success. The Court has already considered DGI's defenses to the enforcement of the summonses and found them to be without merit. In addition, DGI has not made sufficient arguments indicating that the November 25, 2002 Order is likely to be reversed by the Second Circuit.

B. Irreparable Injury

DGI contends that without a stay, it will suffer irreparable injury in that its right to an appeal will be vitiated ''as a practical matter,'' and its client's privacy will be lost. Respondent's Memorandum of Law in Support of Motion for Stay Pending Appeal (''Resp.'s Memo'') at 4. Neither of these considerations are irreparable harm.

In Church of Scientology v. United States, 506 U.S. 9 [70 AFTR 2d 92-6055] (1992), the government successfully enforced an IRS summons in the lower court. The respondent thereafter answered the summons but also appealed the order. The Supreme Court held that the appeal was not moot. As such, DGI would still have a right to appeal the November 25, 2002 Order, even if it is forced to comply with the summonses.

Respondent argues that even though its appeal would not be moot, it would still suffer irreparable injury because ''the Court of Appeals, even if it reverses, will 'not be able to return the parties to the status quo ante.''' Resp.'s Memo at 4 (quoting Church of Scientology, 506 U.S. at 12). However, DGI misses the full import of Church of Scientology, which stated that ''a court can fashion some form of meaningful relief'' when it reverses the enforcement of an already-complied-with summons. Church of Scientology, 506 U.S. at 12–13. Several courts have held that the production of documents in response to an IRS summons is not sufficient irreparable injury to qualify for a stay of enforcement. See, e.g., United States v. Sweet, No. 80-5046, 1980 WL 4702, at 1 (5th Cir. Jan. 31, 1980) (stating that ''the alleged injury is not irreparable for nothing contained herein, of course, constitutes a ruling concerning the admissibility or inadmissibility in evidence of any documents that may be produced pursuant to the summons or of any evidence that might be discovered as a result of their production''); Simmons v. United States, No. CV-F-94-5500, 1995 WL 149353, at 3–4 [75 AFTR 2d 95-1601] (E.D.Cal. Mar. 6, 1995), aff'd, 86 F.3d 1163 [77 AFTR 2d 96-2366] (9th Cir.1996); United States v. Barth, 591 F.Supp. 91, 101 [54 AFTR 2d 84-5100] (D.Conn.), aff'd in part and rev'd in part, 745 F.2d 184 [54 AFTR 2d 84-6049] (2d Cir.1984); United States v. Blackburn, 538 F.Supp. 1385, 1387 [50 AFTR 2d 82-5070] (M.D.Fl.1982). Therefore, DGI's claimed irreparable harm from being forced to produce the documents is without merit.

DGI's second claim of irreparable harm, that its clients' privacy will be invaded, is also without merit.[1] The Supreme Court has previously rejected this argument, stating that when the IRS is legitimately investigating a particular taxpayer, "any incidental effect on the privacy rights of unnamed taxpayers is justified by the IRS's interest in enforcing the tax laws." Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 321 [55 AFTR 2d 85-491] (1985); see also SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 743 (1984) ("It is es-tablished that, when a person communi-cates information to a third party even on the understanding that the communication is confidential, he cannot not object if the third party conveys that information or records thereof to law enforcement authori-ties."). As such, DGI can make no recog-nizable showing of irreparable harm.

C. Injury to the IRS and the Public Interest

There is substantial overlap between the injury to the IRS and the harm to the public interest if the Court grants a stay and therefore these last two considerations will be discussed together.

"The public has interests in the correct ascertainment of tax liabilities and the speedy resolution of controversies . . ." United States v. Sweet, No. 79-940, 1980 WL 1507, at 3 [45 AFTR 2d 80-742] (M.D.Fl. Jan. 28, 1980); see also Bob Jones Univ. v. Simon, 416 U.S. 725, 736 [33 AFTR 2d 74-1279] (1974) (describing the government's "need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference"). The summonses at issue were served over seven months ago. If the Court were to grant an open-ended stay at this point would further protract what is suppose to be a summary proceeding. See United States v. White, 853 F.2d 107, 111 [62 AFTR 2d 88-5972] (2d Cir.1988). A stay would also subject the petitioner to the risk of "loss of records or the dimming of memories." United States v. Clark, No 79-190-G, 1980 WL 1502, at 1 [45 AFTR 2d 80-874] (M.D.N.C. Feb. 6, 1980). As such, the Court finds that there is potential harm to the interests of both petitioner and the public if a stay is issued.

Respondent has requested that if the Court denies the stay motion, compliance with the summonses be extended until thirty days after the Court rules on the motion. The government has not responded to this request but has stated that it will consent to a seven-day stay to permit DGI to request both a stay and an expedited appeal from the Second Circuit.[2] The Court thinks these requests can be combined into one sensible outcome.

While reasonable in scope, the IRS has summonsed numerous documents. DGI must be given time to find and produce these documents. Furthermore, this Court should do nothing to forestall DGI's right to request a stay from the Court of Appeals. Therefore, DGI has forty days from the date of this Order to comply with the summonses. Such time should be sufficient for DGI to both marshal the requested documents and request relief from the Second Circuit.

CONCLUSION

The Court hereby DENIES DGI's motion for a stay of the November 25, 2002 Order. DGI has forty days from today to comply with the summonses.

SO ORDERED.

¶2002-5801

James TRIPLETT, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Sixth Circuit, (CA6) Docket No. 02-1542, Dec. 17, 2002. Tax Court, (2001) TC Memo 2001-320, RIA TC Memo ¶2001-320, 82 CCH TCM

[1] Even if there was merit to this argument, it is not clear that DGI has standing to assert it. See Runkle v. United States, 962 F.Supp. 1112, 1114 [79 AFTR 2d 97-842] (N.D.Ind.1997).

[2] It is not unusual in this District for a Court to grant a short stay so that a party can request a stay from the Second Circuit. See In re Grand Jury Subpoenas, No. M 11-189, 2002 WL 31040322, at 7 (S.D.N.Y. Sept. 12, 2002); United States v. Adlman, No. M 18-304, 1994 WL 191869, at 3 [74 AFTR 2d 94-5551] (S.D.N.Y. May 16, 1994), aff'd in part and vacated in part, 68 F.3d 1495 [76 AFTR 2d 95-7188] (2d Cir.1995).

1005 (opinion by Dawson, *J.*), affirmed. Year 1993. Decision against Taxpayer.

1. Business deductions—substantiation—net operating losses (NOLs)—income exclusions—gain on sale of personal residence—nonrecognition—accuracy-related negligence penalties—reasonable cause. Tax Court properly disallowed taxpayer's claimed business deductions for failure to substantiate and NOL carryforward where no NOL was sustained, and upheld IRC §6662 accuracy-related negligence penalties: Court's factual findings were supported by evidence and weren't clearly erroneous, and its conclusions of law were correct. *Reference:* United States Tax Reporter ¶1625.019(5); 1725.02(15); 1218.51(10); 10,345.01(15); 66,625.01(20). IRC §121; 162; 172; 1034; 6662 .

United States Court of Appeals, Sixth Circuit,

Before KENNEDY and GILMAN, Circuit Judges; and SARGUS, District Judge.*

ORDER

[1] James Triplett, a pro se Ohio taxpayer, appeals a tax court decision in favor of the Commissioner of Internal Revenue, finding deficiencies in Triplett's income tax due for the taxable year 1993. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R.App. P. 34(a).

The Commissioner of Internal Revenue issued a notice of deficiency for tax year 1993 in the amount of $8,922 and a penalty, under I.R.C. § 6662, in the amount of $1,784, after the Commissioner: 1) disallowed all of the deductions claimed on the Schedule C because Triplett failed to establish "that any amount was paid for the designated purpose or that the expenditure, if paid. constitutes an ordinary and necessary business expense," *see* I.R.C. § 162(a); 2) disallowed the "carry forward loss" credit because "there is no provision in the Internal Revenue Code for such a credit" and because Triplett "did not sustain a net operating loss ... in any taxable year prior to 1993," *see* I.R.C. § 172(b); and 3) determined that the entire understatement of tax required to be shown on Triplett's 1993 return was due to negligence, *see* I.R.C. § 6662. Triplett filed a timely petition for a redetermination of those deficiencies in the tax court, and the government filed its answer. The parties entered into a stipulation of facts, and the case was assigned to a Special Trial Judge who conducted a trial. Subsequently, the Special Trial Judge entered findings of fact and an opinion which generally affirmed the Commissioner's determination of a deficiency. The tax court agreed with the Special Trial Judge's resolution of the matter and entered its decision upholding the Commissioner's determination. The court summarily denied Triplett's motion for reconsideration. This timely appeal followed.

The Commissioner's determination of a tax deficiency is presumptively correct, and the taxpayer has the burden of proving that the determination is erroneous or arbitrary. *See Welch v. Helvering*, 290 U.S. 111, 115 [12 AFTR 1456] (1933); *Kearns v. Comm'r*, 979 F.2d 1176, 1178 [70 AFTR 2d 92-6129] (6th Cir.1992). This court will not disturb the tax court's findings of fact unless clearly erroneous. *See Estate of Quirk v. Comm'r*, 928 F.2d 751, 759 [67 AFTR 2d 91-782] (6th Cir.1991). The tax court's application of the law is reviewed de novo. *See Kearns*, 979 F.2d at 1178.

Upon consideration of the briefs and record in this appeal, we are of the opinion that the findings of fact of the tax court are supported by substantial evidence and are not clearly erroneous and that its conclusions of law are correct.

Accordingly, the decision of the tax court is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

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* The Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

¶2002-5802

Julie A. GRAEF, fka Julie A. Bates, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT and COUNTERCLAIM PLAINTIFF v. Scott BATES, COUNTERCLAIM DEFENDANT. U.S. District Court, Northern Dist. of Ohio, (DC OH) CASE NO. 5:02CV178, Dec. 17, 2002. Decision for Govt.

1. Collection actions—employment tax claims. Stipulated judgment was entered for govt. on its employment tax claims against taxpayers, pursuant to which schedule of payments was set out and govt. agreed not to pursue collection absent taxpayers' default. *Reference:* United States Tax Reporter ¶74,035.01(35). IRC §7403.

THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO EASTERN DIVISION,

Judge James Gwin U.S. District Court

SETTLEMENT AGREEMENT

JUDGE GWIN

MAGISTRATE JUDGE GALLAS

The United States and Julie Graef have reached a settlement of the United States'claims against Ms. Graef. The terms of the settlement are as follows:

1. **[1]** This agreement settles the United States' employment tax claims against Julie Graef with respect to the wages of the employees of SJB Enterprises, Inc. for the quarters set forth in this case.

2. As part of the settlement of the United States' tax claims in this case, the parties agree to the filing of the stipulated judgment, a copy of which accompanies this settlement agreement.

3. Initially, Ms. Graef will pay the United States a sum of $2,000 which will be received by counsel for the United States at his Washington, D.C. office by December 16, 2002. The foregoing payment and all future payments will be made by check and made out to the United States Treasury.

4. In addition to the foregoing payment of $2,000, Ms. Graef will pay the sum of $250 every six months for eight years or sixteen (16) payments for a total of $4,000. The first of the foregoing payments will be paid on June 16, 2003 and then every six months thereafter. Payments should be sent to the Internal Revenue Service, Technical Support, 550 Main Street, Room 3411, Cincinnati, Ohio 45202.

5. In addition to the foregoing fixed payments, Ms. Graef will pay certain amounts depending on the level of her annual income and the phrase ''annual income'' is defined in the future income agreement that is being executed concurrently herewith. In summary, the future income agreement provides for the following amounts to be paid as follows:

a. 0% under $20,000 of annual income,
b. 10% of annual income between $20,000 and $30,000.
c. 15% of annual income between $30,000 and $40,000.
d. 20% of annual income between $40,000 and $50,000.
e. 25% of annual income between $50,000 and $60,000.
f. 30% of annual income between $70,000 and $80,000.

The maximum amount that Ms. Graef is obligated to pay under the future income agreement is the unpaid amount of the stipulated judgment.

6. Upon Ms. Graef's faithful compliance with this agreement or upon the payment of the judgment, the tax liabilities and judgment will be considered paid in full and will be marked satisfied.

7. Any amounts paid by Scott Bates will be applied against the judgment against Ms. Graef.

8. The United States will be allowed to keep any amounts already paid or collected from Ms. Graef. In addition, as long as Ms. Graef is in compliance with this agreement, any future overpayments will be refunded with respect to the liabilities covered by this agreement.

9. In the event that any of the foregoing payments are not timely received as pro-vided herein, a late penalty of $100 will be imposed upon the default amount and such amount will also accrue interest at the then current IRS statutory rate from the date that is 60 days of the date of agreement until paid. In addition, in the event that the default amount plus penalty and interest is not received within 10 days after written notification of the failure to pay the foregoing amount, the United States will be free to commence collection efforts on its judgment. Written notification of the foregoing payment default will be sent to Ms. Graef's legal counsel or in the event that Ms. Graef is no longer represented by counsel, then such notification will be sent to Ms. Graef's last known address.

10. As long as Ms. Graef is in compliance with the terms of this agreement including the time for any cure period for any payment default as provided herein, the United States will not seek to collect on its judgment.

11. This settlement agreement is the final resolution of all claims and defenses set forth in this case between the United States and Julie Graef.

Date of Agreement: December _13__, 2002.

United States of America

STIPULATED JUDGMENT

The United States and Julie Graef, by and through their counsel, pursuant to the terms of their settlement agreement, have consented to the entry of this judgment. The parties' settlement agreement is being filed concurrently with this judgment. Accordingly, it is ordered that:

JUDGMENT IS HEREBY ENTERED in favor of the United States of America against defendant Julie Graef, in the sum of $46,751 including accrued interest and additions as provided by law through December 6, 2002, with interest to accrue thereon from December 6, 2002, until paid in full with respect to the respect to the wages of the employees of SJB Enterprises, Inc. for the quarters set forth in this case.

Date: December ____, 2002.

Judge James Gwin

STIPULATED JUDGMENT

The United States and Scott Bates, by and through their counsel, pursuant to the terms of their settlement agreement, have consented to the entry of this judgment. The parties' settlement agreement is being filed concurrently with this judgment. Accordingly, it is ordered that:

JUDGMENT IS HEREBY ENTERED in favor of the United States of America against defendant Scott Bates, in the sum of $46,665 including accrued interest and additions as provided by law through December 6, 2002, with interest to accrue thereon from December 6, 2002, until paid in full with respect to the respect to the wages of the employees of SJB Enterprises, Inc. for the quarters set forth in this case.

Date: December 17, 2002.

/s/ James S. Gwin

Judge James Gwin

U.S. District Court

¶2002-5803

UNITED STATES OF AMERICA, APPELLEE v. Arnold Edward BENSON, DEFENDANT-APPELLANT. U.S. Court of Appeals, Second Circuit, (CA2) No. 02-1501, Dec. 20, 2002. District Court affirmed. Decision against Taxpayer.

1. Tax crimes—making false returns—sentencing—enhancements. Taxpayer's sentence for making and filing false employer's quarterly tax return was affirmed: court's adoption of pre-sentencing report's finding that taxpayer directed one or more of his employees to prepare fraudulent returns was sufficient basis to support 2-level sentence enhancement under U.S.S.G. §3B1.1(c). And enhancement was proper where taxpayer failed to demonstrate that it was clearly erroneous for court to conclude that more likely than not successful prose-

cution of his 3 subordinates would occur. *Reference:* United States Tax Reporter ¶72,065.01(50); 73,446.516(55). IRC §7206.

For Appellant: JAMES F. GREENWALD, Assistant Federal Public Defender, for Alexander Bunin, Federal Public Defender (Melissa A. Tuohey, Assistant Federal Public Defender, on the brief), Syracuse, New York.
For Appellee: ELIZABETH S. RIKER, Assistant United States Attorney, for Glenn T. Suddaby, United States Attorney, Northern District of New York (Andrew T. Baxter, Tina E. Sciocchetti, Assistant Unites States Attorneys, on the brief), Albany, New York.

United States Court of Appeals, Second Circuit,

PRESENT: HON. GUIDO CALABRESI, HON. ROSEMARY S. POOLER, HON. BARRINGTON D. PARKER, JR., Circuit Judges,

Appeal from the United States District Court for the Northern District of New York (Munson, J.).

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is hereby AFFIRMED.

[1] Defendant-Appellant Arnold Benson pleaded guilty in the district court to one count of willfully making and filing a false U.S. Employer's Quarterly Tax Return in violation of 26 U.S.C. § 7206(1). Benson appeals from the district court's imposition of a two-level sentence enhancement under U.S.S.G. § 3B1.1(c), an enhancement based on a finding that Benson directed one or more of his employees to engage in criminal conduct by preparing fraudulent returns.

Although the district court did not itself state that Benson had supervised subordinates who had, at Benson's direction, committed crimes, the court did adopt this finding of the pre-sentencing report as well as the report's conclusion that the enhancement should be imposed. The court did so both orally at sentencing and in its written judgment.

Appellate review is made easier when a district court makes explicit factual findings in support of enhancements or departures. Still, while specific findings that support a § 3B1.1 enhancement are required, we have held that adoption of the findings contained in a PSR suffices. See, e.g., United States v. Escotto, 121 F.3d 81, 85 (2d Cir.1997). Accordingly, we reject Benson's argument that we must vacate and remand his sentence for additional findings by the district court.

Benson also argues that the three subordinates are not criminally liable. A district court's factual findings as to the defendant's role in the offense must be based on the preponderance of the evidence and are reviewed only for clear error. See id. In particular, since § 3B1.1(c) mandates a two- level enhancement for the supervision of even one other individual in a criminal enterprise, Benson must demonstrate that the findings as to each of the three subordinates are clearly erroneous. While Benson makes a plausible argument that the government might have difficulty successfully prosecuting the three subordinates, he has not shown that, as to each of the three employees, it is clearly erroneous to conclude that a successful prosecution would, more probably than not, lie. The sentencing enhancement must, therefore, be affirmed.

We have considered all of Appellant's arguments and find them meritless. We therefore AFFIRM the sentence imposed by the district court.

For the Court,

ROSEANN B. MacKECHNIE

Clerk of Court

¶2002-5804

Orville MACKLIN, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Eastern Dist. of Wisconsin, (DC WI) No. 01-CV-548, Dec. 11, 2002. Earlier proceeding at

(2002, DC WI) 90 AFTR 2d 2002-6547. Decision for Govt.

1. Actions against U.S.—quiet title; damages for failure to release lien; attorney's fees; Federal Tort Claims Act—sovereign immunity. 3d party's amended complaint to quiet title to property against which IRS had filed nominee liens and for damages was dismissed: complaint didn't sufficiently identify contested liens or taxpayers against whom such liens were filed; leave to amend would be futile in face of 3d party's prior failures to correct his pleading defects; and, based on his 3d party status, IRC §7432 damages suit wasn't available. Also, 28 USC §2412(b) attorney's fees claim failed since 3d party clearly wasn't prevailing party; and FTCA barred claim for tort damages from slander of title. *Reference:* United States Tax Reporter ¶74,336.507(60); 74,325.01; 74,336.511(80); 76,557.53(12). IRC §7432.

Robert L. Elliott, Milwaukee, for Plaintiffs.
Steven M. Biskupic, United States Department of Justice, Office of the U.S. Attorney, Milwaukee, Mary E. Bielefeld, United States Department of Justice, Tax Division, Ben Franklin Station, Washington, DC, for Defendants.

United States District Court, E.D. Wisconsin,

JUDGMENT IN A CIVIL CASE

RANDA, Chief J.

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came on for consideration and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendant's motion for judgment on the pleadings is GRANTED. This case is hereby DISMISSED in its entirety.

DECISION AND ORDER

Orville Macklin owns three contiguous parcels of property in Franklin, Wisconsin, Milwaukee County: 9824 W. St. Martins Road, 9745 W. Loomis Road and 9821 W. Loomis Road. On December 15, 2000, the defendant, through the Internal Revenue Service (IRS), filed and recorded three nominee liens against each parcel. According to the liens, Macklin was holding each parcel for the benefit of Gerald Macklin, Randy Greil, and Jan-9821, Inc. T/A "Illusions" (the "Taxpayers"). Macklin's complaint alleges four claims for relief: A quiet title action under 28 U.S.C. § 2410, economic damages under 26 U.S.C. § 7432, attorneys fees and costs under Wis. Stat. § 814.025 and 28 U.S.C. § 2412(b), and damages for "slander of title" under Wis. Stat. § 706.13.[1]

The government has moved to dismiss and, alternatively, for judgment on the pleadings.[2] The government's motion is granted and this matter is dismissed in its entirety.

I. Quiet Title Under § 2410

[1] § 2410(a)(1) provides: "... the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter ... to quiet title to ... real or personal property on which the United States has or claims a mortgage or other lien." This provision is not jurisdictional but merely waives the government's sovereign immunity. However, for the waiver to be effective, plaintiffs must strictly comply with § 2410(b), which provides:

> The complaint or pleading shall set forth with particularity the nature of the

[1] As the Court observed in its September 4, 2002 Decision and Order, jurisdiction over this matter is grounded in 28 U.S.C. § 1340. See Macklin v. United States, 300 F.3d 814, 820 [90 AFTR 2d 2002-6052] (7th Cir.2002) (§ 1340 is "a statute conferring original jurisdiction on the district courts in any action arising under the internal revenue laws of the United States," and "Federal law, specifically provisions of the federal Internal Revenue Code and its accompanying regulations, dictates the form and content of a federal tax lien").

[2] As the pleadings have been closed, this motion is properly considered one for judgment on the pleadings. See Fed.R.Civ.P. 12(c). However, the standard of review is substantively identical to a motion to dismiss for failure to state a claim. See MOORE'S FED. PRACTICE 3D, § 12.38 ("... any distinction between them is merely semantic because the same standard applies to motions made under either subsection"). Accordingly, the Court cannot look outside the pleadings and must accept as true the allegations in Macklin's complaint.

interest or lien of the United States. In actions or suits involving liens arising under the internal revenue laws, the complaint or pleading shall include the name and address of the taxpayer whose liability created the lien and, if a notice of the tax lien was filed, the identity of the internal revenue office which filed the notice, and the date and place such notice of lien was filed.

These requirements are strictly enforced; the United States, as sovereign, consents to be sued only when the conditions set forth in § 2410(b) are met: "A noncomplying complaint does not invoke the statutory waiver of sovereign immunity and, consequently, cannot state a claim upon which relief could be granted." Dahn v. United States, 127 F.3d 1249, 1251 [80 AFTR 2d 97-7631] (10th Cir.1997). The government, in its motion to dismiss, argues that Macklin's complaint is deficient in several respects, and indeed it is. First, the Complaint[3] states that the names and addresses of the taxpayer whose liability created the nominee liens with regard to Randy Griel and Jan-9821 Inc. are "unknown and unobtainable by the Plaintiff." pp 11–12. The Complaint also fails to state whether a notice of tax lien was filed regarding one taxpayer and fails to state when the notices of tax lien were filed.

In response to the motion to dismiss, Macklin suggests that the names and addresses are not listed because he simply does not know them. Given that the waiver of sovereign immunity is to be strictly construed, the Court is not convinced that this excuses noncompliance with § 2410(b). It is Macklin's affirmative duty to discover these names and addresses. Furthermore, Macklin's arguments demonstrate that he knows (or could know) the addresses but he does not want to reveal them. See Brief in Opposition, pp. 2–3 ("The Affidavits of Randy Greil and Janice Greil were obtained, at their request, through their attorney, Attorney Michael P. Stupar, and the friend of Randy Greil, Gerald Macklin rather than through personal contact because of their concern that personal contact would lead to further harassment of such witnesses by the Defendant ') (emphasis added). Once again, this does not excuse noncompliance with the provisions of § 2410(b).

The Court considered granting Macklin leave to file an amended complaint to correct its deficiencies. See Cipriano v. Tocco, 757 F.Supp. 1484, 1495 [71A AFTR 2d 93-3781] (E.D.Mich.1991) (when plaintiff fails to satisfy pleading requirements of § 2410(b), "the appropriate remedy is to grant the plaintiffs leave to amend the complaint"). However, Macklin has had plenty of time to satisfy § 2410(b). Furthermore, it appears obvious that Macklin will not correct these deficiencies, even if given the opportunity, because Macklin did not move for leave to amend his complaint in response to the government's motion to dismiss. See Macklin, 300 F.3d at 821 n. 7 (" ... the Government noted this deficiency in its motion to dismiss; yet, Mr. Macklin has never taken any action to amend the deficiencies in his pleadings. We note that this deficiency, standing alone, would support the dismissal of his action against the United States") (emphasis added) (citing Dahn, 127 F.3d at 1251).[4]

Accordingly, Macklin's quiet title action under § 2410 is dismissed, and Macklin shall not be granted leave to file an amended complaint.

II. Damages Under § 7432

§ 7432(a) provides: "In general.--If any officer or employee of the Internal Revenue Service knowingly, or by reason of negligence, fails to release a lien under section 6325 on property of the taxpayer, such taxpayer may bring a civil action for damages against the United States in a district court of the United States" (emphasis added). By filing a "nominee lien" against Orville Macklin's property, the IRS seeks to recover tax debts from the Taxpayers under the theory that they have "engaged in a sort of legal fiction, for tax purposes,

[3] The Court here refers to Macklin's December 20, 2001 Amended Complaint.

[4] Furthermore, Macklin does not even attempt to explain the other deficiencies in his complaint (i.e., when the tax lien notices were filed).

by placing legal title to property in the hands of another [Orville Macklin] while, in actuality, retaining all or some of the benefits of being the true owners.'' Richards v. United States, 231 B.R. 571, 578 [83 AFTR 2d 99-1138] (E.D.Pa.1999). Accordingly, Macklin is not the ''taxpayer'' for purposes of § 7432; he is a ''nominee'' of the taxpayers. As such, Macklin's only remedy is for ''wrongful levy'' under 26 U.S.C. § 7426, which provides ''the exclusive remedy for an innocent party whose property is confiscated by the IRS to satisfy another person's tax liability.'' Texas Commerce Bank-Forth Worth, N.A. v. United States, 896 F.2d 152, 156 [65 AFTR 2d 90-848] (5th Cir.1990); see also Ridgeley A. Scott, Suing the IRS and its Employees for Damages: David and Goliath, 20 S. Ill. U.L.J. 507, 539 (1996) (under § 7432, the ''only person who can sue is the taxpayer. The statute does not apply to the claim of a person whose property is subjected to a lien for the tax of another person ' (emphasis added).

In sum, Macklin cannot maintain an action for damages under § 7432, and his claim must be dismissed.

III. Claim for Attorneys Fees, Wis. Stat. § 814.025 and 28 U.S.C. § 2412(b)

IV. Slander of Title Under Wis. Stat. § 706.13

Monetary relief may not be awarded against the United States unless it has waived its sovereign immunity. See Department of Army v. Blue Fox, Inc., 525 U.S. 255, 261, 119 S.Ct. 687, 142 L.Ed.2d 718 (1999). Macklin argues that § 2412(b) waives the government's sovereign immunity with regard to attorneys fees and costs: ''a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States . . . '' But § 2412(e) excepts proceedings under the Internal Revenue Code, 26 U.S.C. § 7430. In any event, Macklin obviously does not qualify as a ''prevailing party'' under § 2412(b). Furthermore, Wis. Stats. §§ 814.025 and 706.13 by their terms do not waive the government's immunity from suit. Indeed, the slander of title claim is properly considered a tort claim, and the ''Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq., requires the exhaustion of administrative remedies prior to suing the federal government in tort.'' Frey v. EPA, 270 F.3d 1129, 1136 (7th Cir.2001).[5]

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

1. The United States' motion for judgment on the pleadings is GRANTED; and
2. This case is DISMISSED in its entirety.

SO ORDERED,

¶2002-5805

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE v. Roger REBBE, DEFENDANT-APPELLANT. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 02-50073, Dec. 24, 2002. District Court affirmed. Years 1993, 1994. Decision for Govt.

1. Tax crimes—conspiracy; aiding false return preparation—evidence. Accountant's conviction for conspiracy and aiding preparation of false corp. returns omitting payroll information was affirmed: govt.'s introduction of accountant's plea negotiation statements for rebuttal purposes was proper where accountant had signed knowing waiver of prohibition against introduction of plea negotiation statements; and statements were admitted only for limited purpose of refuting contradictory testimony he had submitted on defense about his knowledge of returns' falsity and his advice to CFO on fraudulent bank account scheme and hiding payroll. Also, accountant didn't show that Congress affirmatively intended to bar such waivers or how waiver would undermine plea-bargaining

[5] It appears, however, that such a claim would be excepted from the provisions of the FTCA. See 28 U.S.C. § 2680(c). Such a conclusion only reinforces the fact that the government has not waived its sovereign immunity.

system; and contention that waiver deprived him of right to present defense at trial was meritless. *Reference:* United States Tax Reporter ¶72,065.01(10). IRC §7206.

Dennis Fischer, Santa Monica, California, for the defendant-appellant.
Susan De Witt, Assistant United States Attorney, Los Angeles, California, for the plaintiff-appellee.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Appeal from the United States District Court for the Central District of California Margaret M. Morrow, District Judge, Presiding

Before: Dorothy W. Nelson, Thomas G. Nelson, Circuit Judges, and William W Schwarzer,* District Judge.

Opinion by Judge D.W. Nelson

OPINION

D.W. NELSON, Circuit Judge:

FOR PUBLICATION

Defendant-Appellant Roger Rebbe appeals his conviction for one count of conspiracy to commit offenses against the United States and eleven counts of aiding and assisting in the preparation of false tax returns, on the ground that the district court erred in admitting proffer statements he made to the Government during a plea negotiation. Rebbe's proffer statements were used by the Government to rebut evidence and arguments he presented at trial that were inconsistent with his proffer statements. We affirm.

BACKGROUND

Rebbe, an accountant, assisted the Sherman Oaks Tree Service (''SOTS'') and George Buskett, its chief executive officer, in evading workers' compensation insurance payments and federal payroll taxes. Rebbe was responsible for preparing all of SOTS' annual tax returns between 1994 and 1998. Rebbe advised Buskett to open two bank accounts, the ''Green Account'' and the ''Blue Account.'' SOTS' income was deposited into the Blue Account. A portion of SOTS's income, however, was regularly withdrawn from the Blue Account and transferred to the Green Account. SOTS' annual tax returns only reported the payroll figures from the Green Account to the Internal Revenue Service (the ''IRS'').

In 1996, Buskett was audited by the IRS. The IRS requested that Buskett produce all of the Green Account's deposit slips. Buskett and Rebbe subsequently manufactured false deposit slips to give the appearance that the funds in the Green Account came from different sources. In reality, all of the deposits in the Green Account were from the same source—the Blue Account. In April 1999, Rebbe and his attorney met with the Government to explore the possibility of a plea. Prior to making a proffer, both Rebbe and his attorney signed the Government's standard form proffer agreement (the ''Waiver'').

The Waiver stated that although Rebbe's proffer statements were inadmissible as part of the Government's case-in-chief,

> the government may use ... statements made by you or your client at the meeting and all evidence obtained directly or indirectly from those statements for the purposes of cross-examination should your client testify, or to rebut any evidence, argument or representations offered by or on behalf of your client in connection with the trial ....

In his proffer, Rebbe admitted that he advised Buskett to open the Blue Account and that he was aware that the tax returns he prepared for SOTS did not reflect the company's true payroll.

Rebbe met with the Government a second time on May 5, 1999. Both Rebbe and his attorney again signed the Waiver before answering questions from the Government. In his second proffer, Rebbe admitted that he manufactured false duplicate deposit slips for the Green Account; advised Buskett to open the Blue Account;

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* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

and knowingly filed false corporate tax returns for SOTS in 1993 and 1994.

On November 2, 2000, Rebbe was indicted. The plea negotiations with the Government failed and Rebbe was notified of the Government's intent to introduce his proffer statements at trial pursuant to the terms of the Waiver. Rebbe responded with a motion to exclude or limit the Government's use of his proffer statements.

The district court denied Rebbe's motion, concluding that Rebbe's proffer statements were admissible to rebut any evidence or arguments he made at trial that were inconsistent with his proffer statements. The district court explained that if the Government wished to admit Rebbe's proffer statements, it should advise the court of its intent to do so immediately prior to resting its case-in-chief. The district court would then inquire as to whether Rebbe wished to present a defense. If Rebbe answered in the affirmative, the district court explained that it would defer ruling on the admissibility of the proffer statements until after the close of the defense's case. If, however, Rebbe elected to present no defense, Rebbe's proffer statements were admissible at the end of the Government's case-in-chief, so long as Rebbe had presented evidence or made arguments and/or representations at trial that were inconsistent with his proffer statements.

After the Government rested, Rebbe asked for an advisory ruling from the district court as to whether the admissibility of Rebbe's proffer statements had been triggered. The district court declined to issue such a ruling. Rebbe subsequently informed the district court that he intended to present a defense. In his defense, Rebbe did not choose to testify but called four witnesses in support of his case.

At the close of Rebbe's case, the Government moved to introduce Rebbe's proffer statements in rebuttal. The Government argued that Rebbe presented contradictory evidence and arguments in his opening statement, his questioning of Government witnesses, and his examination of defense witnesses. The district court granted the Government's request and permitted the Government to admit Rebbe's proffer statements as to the following matters—that "he knew the payroll tax returns did not show true payroll; that he advised Mr. Buskett not to bring him records of the [Green Account] ... that he advised Mr. Buskett where to deposit large checks" and that he assisted in the production of false deposit slips.

On May 23, 2001, Rebbe was convicted on all counts. The district court sentenced Rebbe to one year and one day of imprisonment, three years of supervised release, and an $1800 special assessment.

STANDARD OF REVIEW

Whether a defendant may waive the prohibition against the introduction of plea negotiation statements is a question of law and statutory interpretation, and therefore, is reviewed de novo. *See Anderson v. United States*, 966 F.2d 487, 489 [70 AFTR 2d 92-5010] (9th Cir. 1992).

The Government, however, takes issue with the appropriate standard of review because it contends that Rebbe never raised the issue of the Waiver's enforceability at the district court. It is the Government's position that this Court should review the district court's ruling for plain error. We disagree.

There are ample facts in the record to demonstrate that Rebbe raised this issue before the district court. In Rebbe's motion to exclude, he argued that the Waiver was vague and that the proffer statements could not be admitted in the Government's case-in-chief. Furthermore, the district court expressly noted that it was rejecting Rebbe's arguments as to the "enforceability" of the Waiver. The district court was clearly on notice that Rebbe was objecting to the Waiver's enforceability under the Federal Rules.

Accordingly, we reject the Government's argument and review this issue de novo.

DISCUSSION

[1] Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure

11(e)(6) are substantively identical in that they prohibit the admission of statements made by a criminal defendant during a plea discussion. *United States v. Mezzanatto*, 513 U.S. 196, 200 (1998). Rule 410 states in pertinent part that:

> [E]vidence of the following is not, in any civil or criminal proceeding, admissible against the defendant ... who ... was a participant in the plea discussions: ... (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure ...; or (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty.

Fed. R. Evid. 410.

Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6), however, are subject to waiver for purposes of impeachment, so long as the waiver was knowing, voluntary and intelligent. *Mezzanatto*, 513 U.S. at 200. In *Mezzanatto*, the Supreme Court held that the Federal Rules are waiveable for purposes of impeaching a defendant who chooses to testify at trial. 513 U.S. at 200–203. The Federal Rules are presumptively waiveable, absent some affirmative indication of Congress's intent to preclude such a waiver. *Id.* at 201. "[T]he plea-statement Rules were enacted against a background presumption that legal rights generally, and evidentiary provisions specifically, are subject to waiver by voluntary agreement of the parties." *Id.* at 203.

In the present case, Rebbe argues that the district court erred when it allowed for the possibility of admitting his proffer statements during the Government's case-in-chief. Rebbe contends that his proffer statements were admissible only to impeach him should he testify at trial and that the Government cannot introduce a criminal defendant's proffer statements in its case-in-chief.

Here, however, the Government did not present Rebbe's proffer statements in its case-in-chief. The Government moved to admit Rebbe's proffer statements in rebuttal, after Rebbe finished presenting his defense. Although we recognize that in *Mezzanatto*, Justice Ginsburg's concurring opinion, joined by Justice O'Connor and Justice Breyer, expressed serious doubt and concern as to whether such waivers are enforceable in cases where the Government seeks to admit a defendant's proffer statements in its case-in-chief, those facts are not presently before us. *Id.* at 211 ("a waiver to use such statements in the case-in-chief would more severely undermine a defendant's incentive to negotiate."). In the case at bar, Rebbe elected to present a defense at trial. The Government did not move for admission of Rebbe's proffer statements until *after* Rebbe rested. Therefore, the district court did not rule on the admissibility of the proffer statements until after the close of Rebbe's defense. The concerns raised in Justice Ginsburg's concurring opinion, as a result, are not implicated. Because the Government did not use Rebbe's proffer statements in its case-in-chief, we decline to address the larger issue of whether this or any other waiver, permitting the Government to use a defendant's proffer statements in its case-in-chief, is enforceable under the Federal Rules.[1] Instead, we confine our analysis strictly to the facts of this particular case. The only issue presently before us is whether the district court erred in admitting Rebbe's proffer statements in rebuttal.

The Waiver in this case is broadly worded. It permits the Government to use Rebbe's proffer statements "to rebut any evidence, argument or representations" offered by Rebbe or on his behalf in connection with the trial. Both Rebbe and his attorney signed the Waiver. At the proffer session, Rebbe was represented and advised by counsel. Hence, the admissibility of the proffer statements was triggered if Rebbe or his attorney presented any evi-

[1] The *Mezzanatto* Court left open the question of whether waivers that permit the Government to admit a defendant's proffer in its case-in-chief are enforceable. Had the Government introduced Rebbe's proffer in its case-in-chief or, alternatively, had Rebbe elected to present no defense at trial and forced the Government to move for admission of the proffer as the last item in its case-in-chief, the serious concerns raised in Justice Ginsburg's concurring opinion in *Mezzanatto* would be clearly triggered. This, however, is not the case before us and we need not explore this question to resolve the issues raised by Rebbe in this appeal.

dence or made any arguments and/or representations at trial that were inconsistent with his proffer statements. *See United States v. Krilich*, 159 F.3d 1020, 1025 (7th Cir. 1998) (''Introduction of the statements thus was proper if either his testimony or evidence that he presented through the testimony of others contradicted the proffer.'') (citations omitted).

At trial, Rebbe presented a defense and vigorously cross-examined Government witnesses. Specifically, Rebbe elicited testimony from witnesses implying that Buskett possessed the financial expertise and sophistication to design and execute SOTS' fraudulent bank account scheme independently. Witnesses also testified that only records from the Green Account were ever delivered to Rebbe, implying that Rebbe possessed no knowledge about the Blue Account. Lastly, Rebbe presented evidence that he played no role in manufacturing duplicate deposit slips submitted to the IRS.

Therefore, in light of the fact that Rebbe presented a defense that was inconsistent with his proffer statements and the Government did not seek to admit Rebbe's proffer statements in its case-in-chief, we cannot discern any error on the part of the district court in admitting Rebbe's proffer statements in rebuttal. As noted by the Supreme Court, the Federal Rules of Evidence and Criminal Procedure are presumptively waiveable. *Mezzanatto*, 513 U.S. at 204. The burden is on Rebbe to overcome this presumption by identifying some affirmative basis for concluding that the Federal Rules cannot be waived for purposes of rebuttal. *Id.* In weighing whether this presumption has been overcome, public policy considerations and their impact should be duly considered. *Id.* at 204–210. In the present case, Rebbe failed to make such a showing.

Having carefully examined the record in this appeal, we find that the facts in this case are analogous to those in *Mezzanatto*. In *Mezzanatto*, the Government sought to admit the defendant's proffer statements, after he testified at trial in a manner that was inconsistent with his proffer statements. *Id.* at 199. Although Rebbe did not testify at trial, four witnesses testified in his defense, and Rebbe's attorney presented evidence and made representations at trial that were inconsistent with his proffer statements.

Enforcing this Waiver for purposes of rebuttal will assist in promoting the truth-seeking function of trials. As noted by the Supreme Court, ''The admission of plea statements for impeachment purposes *enhances* the truth-seeking function of trials and will result in more accurate verdicts.'' *Id.* at 204. Similarly, the use of proffers in rebuttal encourages criminal defendants to present defenses at trial that are not fraudulent. If Rebbe, for instance, were to present evidence or arguments at trial that were inconsistent with his proffer statements, the Waiver expressly permitted the Government to introduce the proffer statements in rebuttal. Such waivers may help ensure that criminal defendants make proffers to the Government that are straightforward and honest. *See Krilich*, 159 F.3d at 1024 (''By authorizing the prosecutor to use his statements if he should contradict himself, [the defendant] made his representations more credible . . . .'').

Rebbe argues that Waivers such as this one, however, will substantially reduce a criminal defendant's incentive to enter into plea discussions. According to Rebbe, the ''zone of unrestrained candor'' in plea negotiations that Congress intended to create through the Federal Rules would be undermined through such waivers. Although the Supreme Court in *Mezzanatto* recognized that some defendants may be deterred from entering into plea discussions if such waivers are enforceable, *id.* at 207 (''[T]he availability of waiver may discourage some defendants from negotiating.''), the Court ultimately rejected this basis for prohibiting such waivers as being ''unfounded.'' *Id.* at 209. Similarly, in the present case, Rebbe failed to demonstrate that Congress affirmatively intended to bar waivers such as this one or, alternatively, why our present system of plea-bargaining would be undermined if this Waiver were deemed enforceable for purposes of rebuttal.

Rebbe's argument is entirely too speculative and without sufficient justification to support his appeal.

Rebbe's contention that this Waiver deprives him of his right to present a defense at trial is also without merit. Rebbe agreed to the Waiver voluntarily and with the advice of counsel. In spite of the Waiver, Rebbe was still free to make any arguments or ask any questions he wished to at trial. The only limitation on Rebbe's right to present a defense was that if he presented evidence or arguments that were inconsistent with his proffer statements, the Government could introduce his proffer statements in rebuttal.

Rebbe had available to him a range of possible arguments and defenses at trial that could have been used without triggering the proffer's admission.[2] For instance, Rebbe was free to challenge the sufficiency of the Government's evidence; call into question the credibility of Government witnesses; question Government witnesses about their knowledge and qualifications; challenge inconsistencies in the Government's evidence; and ask Government witnesses about their motives for testifying against Rebbe. *See Krilich*, 159 F.3d at 1025 (''Impeachment of a witness need not be 'contrary to' or 'inconsistent with' a defendant's admission of guilt in a bargaining proffer.'').

CONCLUSION

For the foregoing reasons, we find that the district court's decision to admit Rebbe's proffer statements in rebuttal was not erroneous, and we AFFIRM the judgment of the district court.

¶2002-5806

Charles Robert SCHETZER, APPELLANT v. COMM. of Internal Revenue, APPELLEE. U.S. Court of Appeals, Eighth Circuit, (CA8) No. 02-2286, Dec. 23, 2002. Tax Court affirmed per curiam. Year 1996. Decision for Govt.

1. Passive activity losses—rental real estate offset—constitutionality. Tax Court properly rejected taxpayer's constitutional challenge to IRC §469(i) as indiscriminately favoring persons who rent real estate over persons who rent cars: statutory classification was presumptively valid absent lack of rational relation to legitimate purpose or proof of interference with fundamental rights. Also, remaining arguments were disregarded as frivolous or untimely raised. *Reference:* United States Tax Reporter ¶4695.30(35). IRC §469.

United States Court of Appeals FOR THE EIGHTH CIRCUIT,

Appeal from the United States Tax Court.

Before LOKEN, BYE, and RILEY, Circuit Judges.

PER CURIAM.

[UNPUBLISHED]

[1] Charles Schetzer (Schetzer) appeals the tax court's[1] decision affirming the Internal Revenue Service's assessment of federal income tax deficiencies against him for the 1996 taxable year, and upholding 26 U.S.C. § 469(i) (allowing $25,000 offset against income for rental real estate activities) against Schetzer's equal protection challenge.

In support of his equal protection challenge, Schetzer argues, as he did below, that section 469(i) improperly favors those who rent real estate over persons, such as himself, who rent cars. We conclude Schetzer's equal protection challenge is unavailing. See Regan v. Taxation With Representation, 461 U.S. 540, 547–48 [51 AFTR 2d 83-1294] (1983) (statutory classifications are valid if they bear rational relation to legitimate governmental purpose, unless statute interferes with fundamental

[2] Assistant United States Attorney Susan DeWitt claimed that there was very little that a defendant in Rebbe's position could do at trial and informed the district court, ''I can't think of anything, as I sit here today, that would not, in my mind, trigger the Government's right to rebut.'' This is incorrect. Had Rebbe's position been as hopeless as that suggested by the Government, Rebbe's claim that his right to present a defense at trial was violated would have more merit.

[1] The Honorable James S. Halpern, United States Tax Court.

right or employs suspect classification; burden is particularly high to overcome presumption of constitutionality of tax statute). Schetzer's remaining arguments are either raised for the first time on appeal, are frivolous, or are not material to the issue of his tax liabilities.

Accordingly, we affirm. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

¶2002-5807

Donald Charles FLEMING and Joyce Lana FLEMING, PLAINTIFFS v. UNITED STATES, DEFENDANT. U.S. District Court, Middle Dist. of Florida, (DC FL) No. 3:01170CIVJ21TEM, Feb. 15, 2002. Earlier proceeding at (2002, DC FL) 90 AFTR 2d 2002-5287. Decision for Govt.

1. Actions against U.S.—Declaratory Judgment Act—sanctions. Tax protesters' action to void contractual relations with govt. and declare themselves nontaxpayers was dismissed with prejudice: DJA barred declaratory relief with respect to taxes; or, even if not barred by DJA, sovereign immunity waiver to action was otherwise lacking; and granting leave to amend would be futile. Also, taxpayers were ordered to show cause why they shouldn't be sanctioned under F.R.Civ.P. 11. *Reference:* United States Tax Reporter ¶74,217.502(90); 74,336.506(25); 74,336.511(35).

Donald Charles Fleming, Jacksonville, FL, plaintiff, pro se.

Joyce Lana Fleming, Jacksonville, FL, plaintiff, pro se.

Bruce T. Russell, U.S. Dept. of Justice, Tax Division, Ben Franklin Station, Washington, DC, USA, for USA, defendant.

United States District Court, M.D. Florida,

ORDER

NIMMONS, J.

This cause comes before the Court on Defendant's Motion to Dismiss (Dkt.6) to which Plaintiffs have not filed a formal response.[1]

I. Motion to Dismiss Standard

It is well established that "a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of facts which could be proved in support of his claim." Cook & Nichol, Inc. v. Plimsoll Club, 451 F.2d 505, 506 (5th Cir.1971); accord Conley v. Gibson, 355 U.S. 41, 47–48 (1957). In evaluating the sufficiency of a complaint for purposes of a motion to dismiss, the factual allegations of the complaint must be accepted as true, Hishon v. King & Spalding, 467 U.S. 69 (1984), and viewed in a light most favorable to the plaintiff. Scheuer v. Rhodes, 416 U.S. 232 (1974). Of course, the Court is not required to accept as true allegations which state conclusions of law. Solis-Ramirez v. United States, 758 F.2d 1426, 1429 (11th Cir.1985).[2]

II. Factual and Procedural Background

Plaintiffs are two of multiple individuals currently being criminally prosecuted in

[1] Defendant's Motion to Dismiss was filed April 20, 2001. Pursuant to Rule 3.01(b), Local Rule, Middle District of Florida, Plaintiffs' response thereto was due to be filed ten days after Plaintiffs were served with said motion. Subsequently, on October 31, 2001, and again on January 7, 2002, Defendant has filed its Notices (Dkts. 7 & 8) to the Court, informing the Court of this pending dispositive motion. The first Notice (Dkt.7) also tendered supplemental authority in support of Defendant's motion. After the filing of Defendant's second Notice (Dkt.8), the Plaintiffs filed a Response (Dkt.9) thereto, wherein Plaintiffs (i) argue the inapplicability of the supplemental authority referenced in Defendant's first Notice; (ii) ask the Court to take judicial notice of a ruling made by the Judge of this Court presiding over Plaintiffs' criminal trial; and (iii) grant additional declaratory relief, to wit: (a) declaring correct the above referenced ruling of the Judge presiding over the criminal case; (b) declaring incorrect Defendant's legal authority relied on in support of its Motion to Dismiss; (c) declaring unconstitutional the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq; (d) declaring Plaintiffs are not liable to pay the federal revenue tax which is the basis for the criminal case. The Court will consider Plaintiffs' Response (Dkt.9)--however untimely--as a response to Defendant's Motion. The Court will not construe Plaintiffs' Response as a motion to amend their complaint, not because of the improper fashion in which it has been presented to the Court, but rather because the seemingly additional declaratory relief requested therein is, in fact, the same basic relief as that requested in Plaintiffs' Complaint or is merely argument in opposition to Defendant's Motion to Dismiss.

[2] Accord Grindstaff v. Green, 133 F.3d 416, 421 (6th Cir.1998); Panaras v. Liquid Carbonic Ind. Corp., 74 F.3d 786, 792 (7th Cir.1996); 5A Wright & Miller, Federal Practice & Procedure, § 1357 at 315–18 (1990).

this Court for conspiracy to defraud the United States, tax evasion, witness tampering, and other charges. See United States v. Donald C. Fleming, Joyce L. Fleming, etc., Case No. 3: 00cr262-20-J-HTS. This case is the third in the trilogy of civil suits that these two Plaintiffs have commenced at various times during investigation into their activities, their indictments, and/or their ongoing prosecution. See Donald C. Fleming and Joyce L. Fleming v. USA, Case No. 3:96cv279-J-21-HTS; Donald C. Fleming and Joyce L. Fleming v. A. William Mackie, etc., Case No. 3:98cv459-J-21-HTS. Both of those prior suits are currently administratively stayed.

In the present case, the Plaintiffs seek a judgment declaring void certain contracts entered into between Plaintiffs and the United States government. In their Complaint, Plaintiffs assert three counts: Count I, entitled "Void Contract"; Count II, entitled "Slavery and Involuntary Servitude in Application of the Collective Entity Rule"; and Count III, entitled "Fraud in the Application of the Collective Entity Rule."

The contracts which Plaintiffs seek to avoid are those allegedly entered into and/or created when Plaintiffs applied for their Social Security cards/numbers and/or when Plaintiffs filed various tax returns over the years. The asserted grounds for the unenforceability of these contracts are as follows: that they are void because they were entered into when the Plaintiffs were minors (Count I); that they are void because they create a condition of involuntary servitude in violation of the Thirteenth Amendment to the U.S. Constitution; and that they are fraudulent because of "[t]he withholding of definitions [of particular terms]" from the Plaintiffs and because the contracts violate the Supreme Court's Collective Entity Rule.[3] More simply stated, as Plaintiffs themselves have put it, they have been studying the voluntary nature of the Social Security, Federal Income Tax and Internal Revenue Code and they have reached the conclusion that they no longer choose to voluntarily participate in any government programs.

(Dkt. 1 at p 7). In the portion of their Complaint entitled "Remedy," Plaintiffs demand that this court enters a declaratory judgment in his and her favor and against the Federal Government declaring each and every contract between the Plaintiffs and the Federal Government is voided.

(Id. at unnumbered p. 4).

Defendant's Motion to Dismiss seeks to dismiss the Plaintiffs' Complaint based on (i) insufficient service and service of process; (ii) sovereign immunity of the U.S. government; (iii) failure to state a claim because the Declaratory Judgment Act expressly excludes this type of Federal tax case; and (iv) the Anti-Injunction Act prohibits the injunctive relief that Defendant infers Plaintiffs' Complaint to seek.

IV. Discussion

[1] It is clear, as Defendants have argued, that the Declaratory Judgment Act, 28 U.S.C. § 2201–2202, expressly excludes matters "with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code."[4] See 28 U.S.C. § 2201. Further, even assuming that Plaintiffs' claims are properly brought as a federal question under 28 U.S.C. § 1331, or otherwise, Plaintiffs have not shown that the United States has waived its sovereign immunity in this regard, a necessary prerequisite to this Court's exercise of subject matter jurisdiction over any suit against the United States. See United States v. Dalm, 494 U.S. 596, 608 [65 AFTR 2d 90-1210] (1990).

Therefore, on the basis of the arguments presented by the Defendant in its Motion (Dkt.6), including, inter alia, the case of Fogel v. United States, Case No. 00-CV-2293-J (LSP), 2001 WL 306496 at 1–2 [87 AFTR 2d 2001-1233] (S.D.Cal. Feb. 6,

[3] The "collective entity rule" provides that a personal privilege against self-incrimination cannot provide a basis for refusing to produce corporate or partnership records. See, e.g., In Re Grand Jury Subpoena c/d 91 R0052-011, 142 F.R.D. 122, 124 (M.D.N.C.1992)(citing, inter alia, United States v. Braswell, 487 U.S. 99 [62 AFTR 2d 88-5724] (1988)). It is not clear what application this rule has to the instant civil suit.

[4] That section relates to declaratory judgments of 501(c)(3) charitable corporations and other entities not applicable to the instant case. See 26 U.S.C. § 7428.

2001), and the authority cited therein, it appears to a certainty that the Plaintiffs would not be entitled to recover under any state of facts which could be proved in support of their claims. Accordingly, Defendant's Motion to Dismiss is due to be granted. See Cook, 451 F.2d at 506; accord Conley, 355 U.S. at 47–48.[5]

V. Leave to Amend

Having dismissed all of Plaintiffs' claims in their Complaint, there remains the issue of whether to allow Plaintiffs leave to amend those claims--that is, whether the dismissal should be with or without prejudice. Circuit precedent requires that "[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir.1991). The Eleventh Circuit has stated only two exceptions to this rule: (i) where the plaintiff has indicated that he does not wish to amend his complaint; and (ii) where a more carefully drafted complaint could not state a claim under the Conley standard. Id.

In this case, Plaintiffs have not stated whether they wish leave to amend. The Court will presume that Plaintiffs impliedly seek such leave. However, as to the second exception stated in Pitt, the Court concludes that Plaintiffs would not be able to amend the dismissed claims so as to state any claim against Defendant. The dismissal of the above set-forth claims of the Complaint, therefore, will be with prejudice.

Upon consideration of the foregoing, it is hereby ORDERED:

1. Defendant's Motion To Dismiss (Dkt.6) is GRANTED. Plaintiffs' Complaint (Dkt.1) is dismissed with prejudice.

2. The Clerk is DIRECTED to enter judgment in favor of Defendant.

3. Pursuant to Rule 11(c)(1)(B), Federal Rules of Civil Procedure, the Court, sua sponte, hereby directs Plaintiffs Donald Charles Fleming and Joyce Lana Fleming to show cause: (1) why they have not violated Rule 11(b) by presenting frivolous, harassing, and vexatious claims, through the assertion of claims clearly outside this Court's jurisdiction, seeking relief clearly barred by the Declaratory Judgment Act, and/or presenting claims clearly barred by sovereign immunity; and (2) why appropriate sanctions against them under Rule 11(c)(2) should not be imposed therefor. Such cause, if any, shall be shown by the said Plaintiffs in writing filed herein on or before March 5, 2002. Defendant United States may file a response thereto on or before March 19, 2002. The Court retains jurisdiction of this case for the purposes of disposing of this Rule 11 proceeding.

¶2002-5808

In Re: Mark V. BASHER, Debtor. Mark V. BASHER, PLAINTIFF v. UNITED STATES OF AMERICA, DEPARTMENT OF THE TREASURY, Internal Revenue Service, DEFENDANT. U.S. Bankruptcy Court, Eastern Dist. of Pennsylvania, (Bktcy Ct PA) Nos. 02-12328DWS, 02-0346, Dec. 3, 2002. Years 1989, 1990, 1991, 1992, 1993. Decision for Taxpayer in part and for Govt. in part.

1. Tax claims in bankruptcy—secured claims—prepetition liens—valuation—property held as tenants by entireties—proof. Debtor's complaint to reduce secured portion of IRS's secured claim was held in abeyance pending submission of valuation evidence: although 50% of equity in rental property, against which IRS admittedly held 1st lien and which taxpayer owned as tenant in common with father, was clearly available to secure IRS's claim, and although tax liens further attached to taxpayer's interest in residential property that he owned as tenant by entireties with wife, what value that residential property interest held wasn't determinable from record. Notably, IRS's improperly, untimely raised fraudulent conveyance theory for ignoring wife's interest altogether

[5] Because the Court has determined this case is due to be dismissed based on the issues of the sovereign immunity and the unavailability of the requested relief under the Declaratory Judgment Act, the Court need not consider Defendant's other arguments regarding service of process and the Anti-Injunction Act.

wasn't considered; and it offered no proof to support alternative argument that entireties interest was simply 50% of residence's value. But, taxpayer also failed to prove his contention that, just because residence couldn't be sold at *private* sale without spouse's consent, and because her interest wasn't likely to otherwise be severed by death or divorce, his interest held no value. *Reference:* United States Tax Reporter ¶68,726.53(2); 68,726.52(50); 63,215.02(150). IRC §6321.

Michael Kaliner, Fairless Hills, PA, for Plaintiff.
Jennifer L. Best, U.S. Department of Justice, Washington, DC, for Defendnat.
Edward Sparkman, Philadelphia, PA, for Chapter 13 Trustee.
Dave P. Adams, Philadelphia, PA, for United States Trustee.

United States Bankruptcy Court, E.D. Pennsylvania,

MEMORANDUM OPINION

SIGMUND, Bankruptcy J.

Before the Court is the Complaint of the debtor Mark V. Basher (''Debtor'') to determine secured status of the claim of the Internal Revenue Service (''IRS'') pursuant to 11 U.S.C. § 506(a). Debtor seeks to reduce the secured portion of the IRS' secured claim from $285,371.71 to $21,107[1] based on the values he attributes to the properties to which the IRS' lien attaches. Trial was held on September 25, 2002 after which the IRS was given the opportunity to supplement its trial memorandum and the Debtor to respond if he deemed it necessary. The memoranda have now been filed.

BACKGROUND

The parties agree that the IRS' lien attaches to the Debtor's personal property which has a value of $1,107 and to two pieces of real property in which the Debtor has an ownership interest. The real property is located at 239 Wilde Avenue, Drexel Hill, Pennsylvania (the ''Rental Property'') and at 70 Forrest Drive, Holland, Pennsylvania (the ''Residence''). They further agree that on the petition date, the fair market values of the Rental Property and Residence were $90,000 and $250,000 respectively, and that there are no mortgages or liens on the Rental Property superior to the IRS' tax lien. Stipulation of Facts p 1–3. (Doc. No. 15).[2] The parties also agree that the IRS asserts a secured claim in the amount of $285,371.71 for unpaid income taxes for the years 1989 through 1993.

Based on the evidence elicited at the trial, I make the following additional findings:

The Rental Property. This property is owned by the Debtor and Walter Sr. as tenants in common by reason of a deed dated December 3, 1992 transferring title from Debtor and his former wife Helen Basher (nee Green) (''Helen''). Exhibit G-10. Its chain of title reflects a series of interfamilial transfers commencing in March 1983 when Mark and Helen Basher conveyed it to Walter Sr., Exhibit G-7, and he then conveyed it on the same date to himself and Debtor, Exhibit G-8, and they then conveyed it back to Debtor and Helen on August 6, 1986, Exhibit G-9 where it remained until the conveyance of the present ownership to Debtor and Walter Sr. There is one other ''transfer'' of the Rental Property of interest and that is memorialized in a deed from Debtor and Helen as Helen Green to Debtor and Helen as Helen Basher dated January 22, 1981. Exhibit G-6. All of these transfers were for a nominal consideration ($1) except the transfer from Walter Sr. and Jr. to Debtor and Helen for $67,000. Id. Walter Sr., a licensed realtor who advises the family regularly on real estate issues and assisted the Debtor with certain of his real estate transactions, could

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[1] The Debtor subsequently amended the amount to which he seeks to reduce the IRS' secured claim from $21,107 to $46,107. See infra n. 4.

[2] Notwithstanding this acknowledgment, the Debtor originally argued that Walter Basher Sr. (''Walter Sr.'') had an interest in the Rental Property superior to the IRS. Walter Sr., the Debtor's father and tenant in common with the Debtor on the Rental Property, had satisfied the first mortgage of Alliance Bank (formerly Greater Delaware Valley Savings and Loan Association) (''Bank'') and was subrogated to that position. While Walter Sr. may have rights of subrogation that give him a claim against the Debtor, it is clear that he did not step into the shoes of the Bank on its mortgage which was, as the Debtor concedes, satisfied.

not explain the dual transfers on March 30, 1983 nor why the property was transferred from time to time as it was.[3]

The Residence. This property was purchased in 1993 by the Debtor as a single man (presumably between his marriages to Helen and to his present wife Marcella Basher (nee O'Brien)) from Joseph and Linda Frangipane. A mortgage dated May 21, 1993 was granted to Debtor by Bank and recorded on May 28, 1993. Exhibit G-4. The Residence was then conveyed by Debtor to himself and Marcella O'Brien on June 2, 1994, several months before their marriage for $1. Exhibit G-2. That deed was not recorded. A second deed was executed on November 18, 1994 conveying the Residence from Debtor to himself and Marcella who by then was Marcella Basher. Exhibit G-3. Marcella is presently 45 years old. There is no pending or threatened marital dissolution proceeding.

DISCUSSION

A. Rental Property

[1] Having easily concluded that the Rental Property is subject to the IRS' first lien, it follows that 50% of the equity in the Rental Property which Debtor owns with Walter Jr. is available to secure the IRS' claim. Given the stipulated value of the Rental Property of $90,000 and the absence of any liens prior to those of the IRS, $45,000 of value attaches to the IRS' lien.[4]

B. Residence

The remaining legal dispute centers around the Debtor's interest in the Residence which he values at zero. He contends that by reason of its ownership as a tenancy by entireties, it has no market value. In support of that position, he elicited the expert opinion of Walter Sr. that he would be unable to find a buyer for Debtor's interest in the Residence encumbered as it is by Marcella's survivorship interest. The IRS, on the other hand, demands that the Court ignore the recorded ownership of the Residence on the grounds that a fraud was committed against the IRS and hold the entire equity available to secure its claim. For the reasons that follow, I find the Debtor's position as to the ownership of the Residence to be the correct one.

The IRS contends that the Debtor's transfer of the Residence to Marcella for $1 evidences fraudulent intent given the existence of lien claims against him and concludes therefrom that the property should be deemed to be owned solely by Debtor for the purposes of determining the IRS' secured claim. I respectfully disagree. Rather, I agree with the Debtor that the IRS cannot avoid a transfer of the Residence in this proceeding.

On September 18, 2002, the parties filed their Revised Joint Pretrial Statement pursuant to this Court's Pretrial Order entered May 21, 2002.[5] In the Statement, they identified the sole legal issue presented in this adversary proceeding as "the value of the United States' secured claim pursuant to 11 U.S.C. § 506(a)" where the Internal Revenue Code, 26 U.S.C. § 6321, provides that "a federal tax lien attaches to all 'property and rights to property, whether real or personal' belonging to a person liable for federal taxes." Doc. No. 16. No

[3] He suggested that the transfer by Mark and Helen to him may have been because they were buying their own residence but that explanation makes little sense since the same day, Walter Sr. transferred the property to himself and Debtor. He also thought Walter Jr. was getting married and wanted to take his money out of the Rental Property to buy his own house. This does not explain why Walter Sr. also transferred his interest at that time. Significantly, it is not clear why the Debtor felt it necessary to present any of the evidence regarding the various transfers of the Rental Property since they are irrelevant for the purpose of fixing value on the Rental Property.

[4] The Debtor's original request for a reduction of the secured portion of the IRS' secured claim from $285,371.71 to $21,107 was based on his contention that the IRS' lien on the Rental Property was subordinate to the claim of Walter Sr. Based on my rejection of this argument and his subsequent acknowledgment that the IRS has the first lien on the Rental Property, the Debtor amended his request to assert that the IRS' secured claim should be limited to $46,107 which is the sum of the value of his personal property ($1,107) and the value of his 50% equity interest ($45,000) in the Rental Property.

[5] The Statement superceded the Joint Pretrial Statement filed on September 4, 2002 which was required to be revised after a hearing held on September 12, 2002. The legal issue was identified the same in the original statement and there was no request to amend to add a new issue or claim. Fed.R.Civ.P. 16(e) as applicable to adversary proceedings by Fed.R.Bankr.P. 7016 governs the requirement for pretrial orders and amendments thereto. Local B.R. 7016-1 incorporating District Court Civil Rule 16.1(d)(2)(a) governs the conduct of this adversary proceeding. The Pretrial Order issued on May 21, 2002 in furtherance of these rules provides that the proposed pretrial statement shall note all issues, agreed and disputed. Once accepted by the Court, the pretrial statement has the effect of a pretrial order and shall govern the conduct of the trial. It may be amended only in exceptional circumstances and to prevent manifest injustice. These carefully crafted procedures are intended to prevent surprise and the concomitant prejudice which arises when new theories and issues are raised after the case is fully pretried. In this case, IRS did not seek to amend its Statement.

reference was made to any fraudulent transfer nor had the issue been pled by the IRS in its Answer. The Debtor argued that an alleged fraudulent transfer was not properly before me in this adversary proceeding. When I agreed, the IRS contended that the fraudulent transfer was not in the bankruptcy sense (i.e., 11 U.S.C. §§ 548) but rather based on other law.[6] It also then made an oral motion to amend its answer to the Complaint to assert fraudulent transfer as a defense and now contends that it has raised fraudulent conveyance as an affirmative defense to Debtor's objection to its secured claim. United States' Post Trial Brief at 11. It provides no authority for its use of state fraudulent conveyance law as an "affirmative defense."

I do not intend to dwell at any great length on this unsupported and flawed theory. In the first instance, the claim is not properly before me. It has never been plead and was not disclosed in the joint pretrial statement. There was no basis for the Debtor to conclude that the IRS was presenting a fraudulent conveyance claim until it stated as much in its closing argument. While a motion to amend the answer to conform to the evidence may be granted when the issues are tried by implied consent, Fed.R.Civ.P. 15(b) (incorporated in bankruptcy by Fed.R.Bankr.P. 7015), the motion made here will be denied because no consent can be implied.

Moreover, the right of the IRS to bring such an action has not been proven.[7] Section 544 of the Bankruptcy Code pro-vides that the trustee shall have the rights and powers and may avoid any transfer that is voidable by a creditor under, inter alia, state fraudulent conveyance law. Such avoided transfers may be recovered for the benefit of the estate under § 550 and are property of the estate under § 541. Upon filing of bankruptcy, this avoiding powers is exclusively held by the trustee and may not be exercised by a creditor, such as the IRS, on its own behalf.[8] Even if the IRS had standing to pursue this action on its own behalf, it has not done so appropriately. A fraudulent conveyance action is initiated by adversary proceeding, i.e., the filing of a complaint. Fed.R.Bankr.P. 7001(1). A voiding action is not an affirmative defense to an action to determine the value of a secured claim. Moreover, as its goal is to avoid a property interest, the party who received the ultimate transfer sought to be avoided (Marcella) who is not a party to this action, would have to be joined.

Accordingly, I not only deny the oral motion to amend the answer to conform to the evidence but would have denied a motion to amend the answer had it been requested in a more timely manner. The decision of whether to allow an amendment after the pleadings are closed lies solely within the discretion of the trial court. United States v. Continental Ill. Nat'l Bank and Trust Co., 889 F.2d 1248, 1254 (2d Cir.1989) (citing Fed.R.Civ.P. 1). Where, as here, the amendment would be futile, I would exercise my discretion disallow it. Foman v. Davis, 371 U.S. 178, 83 S.Ct.

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[6] It was this contention that motivated me to accept a post-trial brief from the IRS. I now see that it is fraudulent conveyance law, albeit state law, that the IRS relies upon. The IRS contends that Pennsylvania's Uniform Fraudulent Conveyance Act, 39 Pa.C.S.A. § 357.5 (repealed), effective for transfers made prior to February 1, 1994 supports a ruling that the 1994 transfers (i.e., from Debtor to himself and Marcella O'Brien and subsequently from Debtor to himself and Marcella Basher) were fraudulent. United States' Trial Brief at 6 n. 5. While I disagree with the IRS as to the applicable state fraudulent conveyance statute (The first transfer relating to the Residence (as opposed to the Rental Property) occurred on June 2, 1994 and therefore the law that governs is the Uniform Fraudulent Conveyance Act, 12 Pa.C.S.A. § 1501 et seq.), the differences in the two laws is not dispositive of my ruling in this matter.

[7] Aside from the question of standing, the automatic stay and most significantly the statute of limitations governing these 1994 transactions (4 years under Pennsylvania Fraudulent Conveyance Act, 12 Pa.C.S.A. § 5109) appear to present insurmountable barriers aside from the procedural posture of the action.

[8] This conclusion does not implicate the recent decision of the Third Circuit Court of Appeals in Official Committee of Creditors of. Cybernetics Corporation, on Behalf of Cybernetics Corporation, Debtor in Possession v. Chinery et al., 304 F.3d 316 (2002), vacated 2002 WL 31554591 (3d Cir. Nov. 18, 2002), which involved a derivative suit brought by the creditors' committee on behalf of the debtor-in-possession.

227 (1962).[9] I turn next to the value of the IRS's lien on the Debtor's joint tenancy interest in the Residence.

In United States v. Craft, 535 U.S. 274 [89 AFTR 2d 2002-2005], 122 S.Ct. 1414 (2002), the United States Supreme Court held that each tenant by the entirety possessed individual rights in the estate sufficient to constitute ''property'' or ''rights to property'' to which a federal tax lien could attach under § 6321 of the Internal Revenue Code. 26 U.S.C. § 6321. The Court noted that whether the interests of the husband in the property as a tenant by the entirety constituted ''property and rights to property'' for the purposes of the federal tax lien statute was ultimately a question of federal law, although the answer to this federal question largely depended on state law. Under Michigan law at issue in Craft, the Court found that the respondent had the following rights in the entireties property: the right to use the property, the right to exclude third parties from it, the right to a share of income produced from it, the right of survivorship, the right to become a tenant in common with equal shares upon divorce, the right to sell the property with the respondent's consent and to receive half the proceeds from such a sale, the right to place an encumbrance on the property with the respondent's consent, and the right to block respondent from selling or encumbering the property unilaterally.

Id. at 1422. Based on Craft, the Debtor has conceded that the IRS liens attach to the Debtor's tenancy by entirety interest in the Residence. Neither the Debtor nor the IRS have addressed the components of that interest under Pennsylvania law. Both, however, recognize that Craft does not elucidate how to value that interest given its component parts under state law.[10] Indeed Craft is understandably silent as to any of the implications of its holding that federal tax liens attach to entireties property, including the IRS' enforcement remedies.

Debtor presented the sole evidence of value at trial. Walter Sr., a realtor, testified he never saw nor had he recommended that anyone purchase a survivorship interest in real property held as tenants by the entireties.[11] In support of this view, Debtor produced an actuarial report showing that a woman of 45 years, Marcella's present age, has a life expectancy of 37-½ years. Exhibit P-2. Given her relative youth, Debtor argues, a person who acquired Debtor's interest would be unlikely to enjoy full control of the property, if ever, for many years and therefore would hardly purchase the interest. Moreover, according to Debtor, the tenancy will not otherwise be terminated because, as he testified, his marriage is intact and Marcella does not agree to sell the Residence. Because of these limitations on the use and

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[9] While not before me, I find the evidence of a fraudulent conveyance unpersuasive. As Walter Sr. testified, it is common when a person marries to convey his solely owned real property to himself and his spouse. Upon marriage a marital estate is formed and the family residence is logically the foundation of that estate. The conveyance assures that if the transferor spouse (in this case, Debtor) should die, the newly co-titled spouse (Marcella) will be entitled to remain in the house with any children of the marriage and take whatever action is deemed appropriate with respect to this most significant asset. In this sense, the conveyance is not a commercial transaction for which the spouse would be expected to pay significant value. The $1 consideration recited is the nominal amount that historically signifies that a contract was formed. Moreover, the IRS liens attached as early as 1989, Exhibit G-11, yet Debtor purchased the Residence as a single man in 1993. I find no evidence that his conveyance of that Property to himself and Marcella in anticipation of their imminent marriage was a fraud on the IRS. Nor do I find anything malevolent about the Debtor's second conveyance to Debtor and Marcella after the marriage had occurred and she changed her name to Basher. Debtor, perhaps relying on the ''expertise'' of his father, apparently believed that he had to correct the deed to reflect the new surname of his wife. Indeed the same step was taken with the Rental Property which was conveyed to his prior wife in her maiden name and then again to her in her married name. Exhibit G-7. Finally, the fact that Marcella was granted an ownership interest without a concomitant obligation to assume the mortgage does not evidence fraud against the IRS. Presumably the Bank did not require her joinder on the mortgage and absent that demand, it would be surprising indeed for Marcella to voluntarily assume the obligation.

[10] Indeed the Supreme Court expressly refused to decide whether the right to survivorship alone would qualify as ''property'' or ''rights to property'' under § 6321. This statement was made in response to the respondent's argument that the right of survivorship was a mere expectancy which under the Court's decision in Drye v. United States, 528 U.S. 49, 60 n. 7 [84 AFTR 2d 99-7160], 120 S.Ct. 474 [84 AFTR 2d 99-7160] (1999), would not be considered property for the purposes of a federal tax lien until it ripens into a present estate. Recognizing its statement in Drye that ''[w]e do not mean to suggest that an expectancy that has pecuniary value ... would fall within § 6321 prior to the time it ripens into a present estate,'' it nonetheless noted that it did not decide the question nor would it be necessary to do so in Craft where a ''number of the sticks in respondent's husband's bundle were presently existing.'' Id. Thus, the Court not only failed to provide any guidance on how the property rights would be valued but expressly refused to decide whether the survivorship interest in and of itself was a present interest.

[11] The IRS originally objected to the admission of Walter Sr. as an expert. The objection was sustained on the grounds of surprise since he had not been identified as an expert in the Pretrial Statement. However, Debtor's counsel proceeded to ask him questions that drew upon his expertise to which the IRS did not object, and then the IRS' counsel asked him questions as an expert as well. When Debtor's counsel objected to the expert questions, IRS's counsel properly noted that Debtor's counsel had opened the door and that cross examination as an expert was fair game. I agreed.

enjoyment that a purchaser would derive from ownership of the Debtor's interest in the Residence, Debtor argues that no value should be attributed to it.

The IRS states that the Debtor's conclusion that there is no value in tenancy by entireties property to which the federal tax lien can attach renders the Supreme Court's decision in Craft meaningless. The IRS does not develop this point further and the Debtor does not address it in his reply brief.[12] Moreover, the IRS contends that the Debtor's proofs are inadequate because he did not provide expert testimony as to the marketability of the Debtor's interest. On the latter point, I respectfully disagree. Debtor presented Walter Sr. and as noted above, both parties examined him as an expert. While one might challenge the weight of his evidence, the IRS failed to present evidence contrary to his viewpoint. Moreover, rather than discussing the validity of Walter Sr.'s view regarding the value of a tenancy by the entireties interest, the IRS merely concludes that the correct measure of value of such an interest is 50%. Fifty percent of the assessed value of the asset would be the correct measure of value for a joint or tenancy in common where each tenant owns a separate fractional share of concurrent ownership and may unilaterally realize the value of its interest. 122 U.S. at 1421. The IRS fails to advance its rationale for applying the same formula to a tenancy by the entireties, the characteristics of which are distinct from a tenancy in common. Unlike the tenant in common,, the tenant by entireties requires the consent of the spouse to alienate his or her share through sale or gift or place encumbrances thereon. Id. at 1421–22. Whether a tenancy by the entireties should be treated the same as a joint or tenancy in common for valuation purposes was not addressed.

I also disagree with the IRS' conclusion that failing to place a 50% value on the interest renders Craft meaningless. As noted above, Craft simply makes clear that the IRS' liens attach to entireties property. The IRS could have no present enforcement rights to that property and still have valuable rights as now recognized by the Supreme Court. For example, if the nondebtor spouse should die or the entireties estate be severed by divorce, the IRS's attached liens would be enforceable against subsequent encumbrances on the formerly entireties property.

Concluding then that the IRS's valuation formula has not been supported, I also question the merit of Debtor's conclusion that absent the ability of the Debtor to sell the Residence without his spouse's consent and given the unlikelihood that the entireties estate will be severed by death or divorce in the near future, no value should be attributed to his interest. This thesis assumes that the only measure of value of such interest is what the Debtor could realize in a private sale. There may be other legal avenues for realizing value from this asset.

Given the importance of the dispositive valuation issue, I am reluctant to render a judgment without the parties' weighing in on these questions. While I offered the IRS and Debtor an opportunity to file post--trial briefs, neither addressed the one most significant issue presented by the Complaint, i.e., the value of property held as tenants by the entireties to which the IRS' liens attach. Accordingly, I will leave that issue open to afford another opportunity to the parties to elaborate on their respective positions on this difficult and significant issue.[13]

An Order consistent with this Memorandum Opinion shall issue.

ORDER

AND NOW, this 3rd day of December 2002, upon trial of the Complaint of the debtor Mark V. Basher (''Debtor'') to Determine Secured Status and the answer thereto of Defendant Internal Revenue Ser-

[12] Indeed the Debtor's reply brief is one paragraph and like the IRS' brief, provides no assistance to the Court on the most significant and difficult issue in this case, i.e., the valuation of the Debtor's interest in the Residence.

[13] This is not an invitation to reopen the record but rather to have the parties opine on how I reach a valuation number on the record before me. In so doing, counsel should address who has the burden of proof in a § 506(a) valuation contest and how the burden applies based on the record in this case.

vice (''IRS'') and after trial of this matter and for the reasons set forth in the accompanying Memorandum Opinion;

And the Court finding that (1) the value of Debtor's interest in the property to which the IRS' liens attach, other than the real property at 70 Forrest Drive, Holland, Pennsylvania (the ''Residence'') is $46,107;

And the parties having failed to adequately brief their respective legal positions on the value of the Debtor's interest in the Residence which he owns as tenants in entireties with his wife Marcella Basher;

It is hereby ORDERED that by December 20, 2002 the IRS will file a memorandum of points and authorities supporting its position that the Debtor's interest should be valued at 50% of the Residence's market value or otherwise and by January 10, 2003 the Debtor shall file a responsive memorandum addressing the IRS's position and its own position that the Debtor's interest should be valued at 0% of the Residence's market value. Both parties shall also address who has the burden of proof in this matter and whether the burden has been satisfied based on the record which was made. 2002 WL 31856712 (Bankr.E.D.Pa.)

¶2002-5809

James E. BROWN, PETITIONER-APPELLANT v. COMMISSIONER of Internal Revenue, RESPONDENT-APPELLEE. U.S. Court of Appeals, Sixth Circuit, (CA6) No. 02-1630, Dec. 19, 2002. Tax Court affirmed. Year 1995. Decision for Govt.

1. Collection due process—review of administrative determination—prior opportunity to contest deficiencies—collateral estoppel—deficiency procedures—venue for appeals. Tax Court properly dismissed taxpayer's IRC §6330 petition contesting IRS's administrative determination to proceed with erroneous refund collection: taxpayer was estopped by prior case from relitigating Tax Court's jurisdiction and IRS's right to pursue refund's collection through deficiency procedures; and taxpayer wasn't entitled to challenge his underlying liability for which he had received proper notice and had prior opportunity to contest. Also, taxpayer's appellate venue argument was meritless. *Reference:* United States Tax Reporter ¶74,337.504(5); 63,305.01(10); 63,305.01(15); 74,425.01(5). IRC §6330; 7442.

United States Court of Appeals, Sixth Circuit,

Before KENNEDY and GILMAN, Circuit Judges; and SARGUS, District Judge.*

ORDER

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION*

[1] James E. Brown appeals pro se from a decision of the tax court that dismissed a ''Petition for Lien or Levy Action,'' which he had filed under 26 U.S.C. § 6330(d)(1)(A). His appeal has been referred to a panel of this court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon review, we unanimously agree that oral argument is not needed in this case. Fed. R.App. P. 34(a).

The Internal Revenue Service (''IRS'') notified Brown of a deficiency in 1995, alleging that he had not reported an award of back pay as taxable income. Brown filed a petition in the tax court contesting his tax liability under 26 U.S.C. § 6213(a). The tax court held, inter alia, that the back pay was taxable, that the deficiency notice was timely, and that issuing a refund did not bar the IRS from asserting a deficiency. Brown v. Commissioner, 74 T.C.M. (CCH) 1449, 1451-54 [1997 RIA TC Memo ¶97,567] (1997), aff'd, No. 98-1444, 1999 WL 283903 [83 AFTR 2d 99-2268] (6th Cir. Apr. 27, 1999) (unpublished), cert. denied, 528 U.S. 967 (1999).

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* The Honorable Edmund A. Sargus, Jr., United States District Judge for the Southern District of Ohio, sitting by designation.

* Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

In September 2000, the IRS issued to Brown a Final Notice of Intent to Levy and Notice of Right to a Hearing. Brown petitioned the district court for a due process proceeding regarding the collection. The district court properly dismissed the petition, as the tax court had jurisdiction over his claims. See 26 U.S.C. § 6330(d)(1). Brown did not file a timely appeal from that judgment, and it is not directly at issue here.

Instead, Brown filed a petition in the tax court under § 6330, challenging the manner in which his tax deficiency had been determined and assessed. The tax court dismissed the case on November 5, 2001, ruling that these claims were not cognizable under § 6330(c)(2)(B). Brown appealed that judgment to the United States Court of Appeals for the District of Columbia Circuit, and the appeal was transferred to our court because he is a legal resident of Tennessee.

We review the tax court's legal conclusions de novo, while examining its factual findings for clear error. See Zack v. Commissioner, 291 F.3d 407, 412 [89 AFTR 2d 2002-2578] (6th Cir.2002).

Brown argues that the tax court lacked jurisdiction over his current petition because his case involves the validity of a levy to collect an erroneous refund, under 26 U.S.C. § 6330(d)(1)(B). This argument is precluded by the tax court's decision in his prior case, which held that "the Commissioner may proceed through the deficiency route where there has been an erroneous refund as in this case." Brown, 74 T.C.M. (CCH) at 1451 (collecting cases). Thus, Brown is estopped from relitigating that issue here. See Montana v.. United States, 440 U.S. 147, 152–53 (1979).

Brown also argues that this court is not the proper venue for his appeal because he was a resident of Germany in 1995, when a petition for a redetermination of his tax liability was filed. As proof of his German residency he relies on a prior Court of Claims decision regarding his employment expenses for 1971 where that court found he was living in Germany at the time of his employment by the United States Army. However, that decision indicates that he was a legal resident of Tennessee, even though his actual residence was in Germany. Brown v. United States, 741 F.2d 1374, 1376 (Fed.Cir.1984). Thus, Brown's argument fails because venue for appellate review of the tax court's decision depends on his legal residence. See Estate of Israel v. Commissioner of IRS, 159 F.3d 593, 595 [82 AFTR 2d 98-6937] (D.C.Cir.1998).

Brown's remaining arguments all challenge the statutory propriety or constitutionality of the Commissioner's determination of a tax deficiency. However, Brown was notified of this deficiency and he had an ample opportunity to contest it in the prior action that he had filed under § 6213(a). Thus, the tax court properly determined that these types of claims were not cognizable in the due process collection action that he filed under § 6330. See 26 U.S.C. § 6330(c).

Accordingly, for these reasons and those stated in its opinion, the tax court's decision is affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

¶2002-5810

Paul E. FARRELL; Frances G. FARRELL, PLAINTIFFS-APPELLANTS v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE. U.S. Court of Appeals, Ninth Circuit, (CA9) No. 01-15435, Dec. 24, 2002. District Court, (2001, DC HI) 87 AFTR 2d 2001-1159, 2001-1 USTC ¶50279, affirmed. Years 1994, 1995, 1996. Decision for Govt.

1. Foreign income—exclusions—U.S. possession vs. foreign country—"specified possessions." District court properly determined that taxpayers' post-'86 Johnston Island (JI) income wasn't excludable from gross income as either IRC §911 foreign-earned income or as IRC §931 specified possession income: as U.S. insular possession, JI clearly wasn't foreign country for IRC §911 purposes; IRC §931's explicit, limited definition of specified possessions indisputably didn't include JI; and taxpayers' attempt to apply pre-'86,

void Reg. §1.931-1's definition was rejected. Also, certain specified possessions' failures to effect agreement required by TRA '86 for implementing IRC §931's limited definition/exclusion as to them was irrelevant to taxpayer's JI claim. *Reference:* United States Tax Reporter ¶9115.04(140); 9315.01(5). IRC §911; 931.

Kenneth W. McWade, Kailua, Hawaii, for the plaintiffs-appellants.
Kenneth W. Rosenberg, United States Department of Justice, Tax Division, Washington, D.C., for the defendant-appellee.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Appeal from the United States District Court for the District of Hawaii Susan Oki Mollway, District Judge, Presiding

Before: Pamela Ann Rymer, Sidney R. Thomas and Barry G. Silverman, Circuit Judges.

Opinion by Judge Silverman

OPINION

SILVERMAN, Circuit Judge:

FOR PUBLICATION

We hold today that income earned by a taxpayer on Johnston Island, a U.S. insular possession, is not excludable from gross income as ''foreign earned income'' under § 911 of the Internal Revenue Code. Neither is it income derived from a source within a ''specified possession'' as defined by § 931 of the Code. We therefore affirm the district court.

I. FACTS

Between 1994 and 1996, appellant Paul Farrell was employed by Raytheon Corporation. During those years, Farrell lived and worked on Johnston Island, a 591-acre island located approximately 700 miles west-southwest of Hawaii. It is the principal island of the Johnston Atoll, a U.S. military installation and bird refuge. *See* U.S. General Accounting Office, Report to the Chairman, Committee on Resources, House of Representatives, *U.S. Insular Areas - Application of the U.S. Constitution*, GAO/OGC 98-5 (app. II) at 50–52 (Nov. 1997).

On Farrell's federal income tax returns for 1994, 1995 and 1996, Farrell (filing jointly with his wife) treated $70,000 of his earnings each year as excludable from gross income as ''foreign earned income'' under § 911 of the Internal Revenue Code. The exclusions were disallowed by the IRS. Farrell then filed amended returns seeking refunds for the years in question, claiming that his Johnston Island earnings were excludable under either § 911 (''foreign earned income'') or § 931 (income from a ''specified possession''). The refunds were denied, and Farrell filed suit in district court.

The district court granted the government's motion for summary judgment, ruling that a § 911 exclusion for ''foreign earned income'' did not apply because Johnston Island, being a U.S. possession, is not a foreign country. The court also held that Farrell's Johnston Island income did not qualify for exclusion under § 931 as income from a ''specified possession'' because § 931 defines ''specified possession'' to mean Guam, American Samoa and the Northern Mariana Islands—Johnston Island is not on the list. Finally, the court rejected Farrell's argument that his Johnston Island income was excludable under Treas. Reg. § 1.931-1, which continues to list Johnston Island as a possession of the United States for purposes of § 931. The court ruled that the regulation, although still on the books, implemented a prior version of § 931. In 1986, the present version of § 931 was enacted, rendering the pre-existing regulation flatly inconsistent with the now-extant statutory language and, therefore, inoperative. The Farrells appeal.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. A grant of summary judgment is reviewed de novo. *Oliver v. Keller*, 289 F.3d 623, 626 (9th Cir. 2002).

III. ANALYSIS

We agree with the district court that the Farrells' Johnston Island income is not excludable under either § 911 or § 931.

A. Section 911

In pertinent part, 26 U.S.C. § 911 states:

> **[1]** § 911. Citizens or residents of the United States living abroad
>
> (a) Exclusion from gross income.—At the election of a qualified individual (made separately with respect to paragraphs (1) and (2)), there shall be excluded from the gross income of such individual, and exempt from taxation under this subtitle, for any taxable year—
>
> (1) the foreign earned income of such individual, and
> (2) the housing cost amount of such individual.
>
> (b) Foreign Earned Income.—
> (1) Definition.—For purposes of this section—
> A) In general.—The term ''foreign earned income'' with respect to any individual means the amount received by such individual from sources within a foreign country or countries ....
>
> (d) Definitions and special rules.—For purposes of this section—
>
> (1) Qualified individual.—The term ''qualified individual'' means an individual whose tax home is in a foreign country ....

Pursuant to this section, an individual whose tax home is a foreign country may elect to exclude the amount received from sources within a foreign country. During the relevant time period, this excludable amount was limited to $70,000. Treasury Regulation § 1.911-2(h) provides that, ''[t]he term 'foreign country' when used in a geographical sense includes any territory under the sovereignty of a government other than that of the United States.''

Johnston Island is not a foreign country. It is a United States insular possession.

Johnston Atoll is located about 700 miles west-southwest of Honolulu. It consists today of two natural islands, Sand and Johnston, and two manmade islets, North and East (also known as Akau and Hikina), enclosed by an egg-shaped reef approximately twenty-one miles in circumference ....

Although first discovered in 1796, the atoll was not formally claimed for the United States until March 1858 by the captain of the schooner Palestine. The schooner had been chartered by two Americans, William Parker and R. F. Ryan, specifically to find Johnston and Sand Islands and, if guano were discovered, to claim them under the Guano Islands Act [Act of Aug. 18, 1856, ch. 164, 11 Stat. 119, current version at 48 U.S.C. §§ 1411–1419 (1994)[1]]. The atoll was located, the presence of guano was confirmed, a flag was raised, and signs were erected stating that the entire area was claimed for the United States and for the owners and charterers of the schooner.

The American claim was at first disputed. In June 1858, Samuel Allen, sailing on the Kalama under the Hawaiian flag and representing the Kingdom of Hawaii, tore down the U.S. flag and signs on Johnston Atoll and raised the Hawaiian flag. On July 27, 1858, the atoll was declared part of the domain of King Kamehameha IV. However, several months later, King Kamehameha revoked the lease on guano he had granted to Allen when he learned that the atoll had been claimed previously by the United States.

A large amount of guano was removed from the atoll during the next 50 years, but by 1920, Johnston and Sand

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[1] 48 U.S.C. § 1411 states:

Guano districts; claim by United States - Whenever any citizen of the United States discovers a deposit of guano on any island, rock, or key, not within the lawful jurisdiction of any other government, and not occupied by the citizens of any other government, and takes peaceable possession thereof, and occupies the same, such island, rock, or key may, at the discretion of the President, be considered as appertaining to the United States.

Islands had been abandoned. As a result of a biological survey conducted by the U.S. Department of Agriculture and the Bernice Paushi Bishop Museum of Honolulu in 1923, President Calvin Coolidge designated Johnston and Sand Islands a bird refuge. In 1934, President Franklin Roosevelt placed Johnston, Sand, and Wake Islands and Kingman Reef under the control of the Secretary of the Navy. Johnston and Sand Islands remained under the additional jurisdiction of the Department of Agriculture for purposes of serving as a bird refuge.

With the advent of World War II, the airspace above and the waters within the three-mile marine boundaries of Johnston and Sand Islands were designated a naval defensive area by President Roosevelt. During the course of the war, Sand and Johnston Islands were developed as a military air base and also served as a submarine refueling base. The atoll was heavily used during the war and, as use of the atoll increased, so too did the land area; the military dredged coral from the lagoon to increase the length of the runways.

In 1948, the Secretary of the Navy transferred operational control of the atoll to the Air Force. Over the next 10 years, the atoll was used by the Coast Guard as well as the Air Force and continued coral fill construction expanded the atoll by 25 acres. In 1958, two high-altitude nuclear tests were launched from the atoll. Nuclear testing resumed in 1962 with an agreement granting control of the atoll to the Atomic Energy Commission for the Pacific Atomic Tests.

Between 1963 and 1964, the actual acreage of Johnston and Sand islands was increased from 198 acres to 591 acres; additionally, two manmade islands were created-North (Akau) and East (Hikina) - adding another 24 and 17 acres respectively. At that time, the decision was made to refer to the area collectively as Johnston Atoll.

Between 1964 and 1973, the Air Force was an active presence on the atoll. In 1973, the Air Force agreed with the Defense Nuclear Agency that the latter would assume operational control of the atoll.

> Johnston Atoll remains under the operational control of the Defense Nuclear Agency. It is a storage and disposal site for chemical munitions and a standby test site for atmospheric nuclear weapons testing. It remains a bird refuge, with the Fish and Wildlife Service of the Department of the Interior having taken over the duties previously assigned to the Department of Agriculture.

U.S. General Accounting Office, Report to the Chairman, Committee on Resources, House of Representatives, *U.S. Insular Areas - Application of the U.S. Constitution*,GAO/OGC 98-5 (app. II) at 51–52 (Nov. 1997) (citations and footnotes omitted).

Having no local government or native population, Johnston Island is an unorganized unincorporated insular possession. *U.S. Insular Areas - Application of the U.S. Constitution*, *supra* at 10, 40; 6 New Encyclopaedia Britannica 598 (15th ed. 2002). In addition, Johnston Atoll is not part of Guam, American Samoa, or the Northern Mariana Islands, and is specifically excluded from the islands making up the State of Hawaii. *See* 48 U.S.C. §§ 1421, 1661–1662, 1801 (1994); *U.S. Insular Areas - Application of the U.S. Constitution*, *supra* at 43–44; Act Admitting Hawaii to Statehood, Pub. L. No. 8-3, § 2, 73 Stat. 4 (1959), current version at 48 U.S.C. ch. 3, sec. 2 (1994).

Since Johnston Island is a U.S. possession, not a foreign country, income earned there cannot be excluded under § 911. *See Specking v. Commissioner*, 117 T.C. 95 (2001), 2001 U.S. Tax Ct. Lexis 40, at 35 (''Inasmuch as Johnston Island does not fall within the definition of a foreign country, the compensation petitioners earned on Johnston Island does not come within the definition of 'foreign earned income' . . . . '')

B. Section 931

Farrell also argues that he can exclude his Johnston Island income under § 931 as

income from a specified possession. In pertinent part, 26 U.S.C. § 931 states:

> § 931. Income from sources within Guam, American Samoa, or the Northern Mariana Islands
>
> (a) General Rule.—In the case of an individual who is a bona fide resident of a specified possession during the entire taxable year, gross income shall not include—
>
> (1) income derived from sources within any specified possession, and
> (2) income effectively connected with the conduct of a trade or business by such individual within any specified possession . . . .
>
> (c) Specified Possession.—For purposes of this section, the term ''specified possession'' means Guam, American Samoa, and the Northern Mariana Islands.

(Emphasis added.)

By its explicit terms, § 931 applies only to income derived from sources within Guam, American Samoa and the Northern Mariana Islands. Acknowledging this, Farrell relies on Tres. Reg. § 1.931-1, which states in pertinent part:

> Treas. Reg. § 1.931-1 Citizens of the United States and domestic corporations deriving income from sources within a certain possession of the United States.
>
> (a) Definitions.
>
> (1) As used in section 931 and this section, the term ''possession of the United States'' includes American Samoa, Guam, *Johnston Island*, Midway Islands, the Panama Canal Zone, Puerto Rico and Wake Island. However, the term does not include (i) the Virgin Islands and (ii), when used with respect to citizens of the United States, the term does not include Puerto Rico or, in the case of taxable years beginning after December 31, 1972, Guam.

(Emphasis added.)

This regulation was promulgated prior to the enactment of the Tax Reform Act of 1986. Prior to the 1986 legislation, § 931 permitted, on certain conditions, the exclusion of income derived from sources within a possession of the United States, except for sources within Puerto Rico, the Virgin Islands, or Guam. In other words, income derived from Johnston Island *could* be excluded. However, the Tax Reform Act of 1986 changed all of that, limiting the § 931 exclusion only to income derived from sources within Guam, American Samoa and the Northern Mariana Islands. In other words, income from Johnston Island could no longer be excluded. Nevertheless, Treas. Reg. § 1.931-1 remains on the books.

This regulation, if still valid, would support the view taken by Farrell. The problem, however, is that the regulation is flatly contradicted by the present version of § 931, and, therefore, cannot stand. *See Specking v. Commissioner*, 117 T.C. 95 (2001), 2001 U.S. Tax Ct. Lexis 40, at 30 (''The regulatory language on which petitioners rely defines the term 'possession' for purposes of old section 931. As we have concluded above, that provision no longer applies to petitioners. Consequently, the regulatory provision also has no application to them and is obsolete as to petitioners.'')

It is well-settled that when a regulation conflicts with a subsequently enacted statute, the statute controls and voids the regulation. *See Microsoft Corp. v. C.I.R.*, ___ F.3d ___ [90 AFTR 2d 2002-7521] (9th Cir. 2002), No. 01-71584, 2002 WL 31687644, at 10–11; *see Cramer v. C.I.R.*, 64 F.3d 1406, 1412 [76 AFTR 2d 95-6482] (9th Cir. 1995) (''[W]e will uphold a Treasury regulation if it 'implement[s] the congressional mandate in some reasonable manner,' and is not 'plainly inconsistent' with the Code.'') (citations omitted); *see also Scofield v. Lewis*, 251 F.2d 128, 132 [1 AFTR 2d 702] (5th Cir. 1958) (''A Regulation, valid when promulgated, becomes invalid upon the enactment of a statute in conflict with the Regulation.'')

Finally, Farrell argues that the definition of ''specified possession'' in the current version of § 931 has not come into play because, he contends, Guam and the

Northern Mariana Islands have not entered into implementing agreements with the United States. It is true that Congress made the excludability of income derived from Guam, American Samoa, and the Northern Mariana Islands contingent upon the signing of agreements between the United States and the specified possessions. *See* Pub. L. No. 99-514, § 1277, 100 Stat. 2600-02, as amended by Pub. L. No. 100-647, Title I, § 1012(z), Nov. 10, 1988, 102 Stat. 3531.[2] That contingency, however, only affects the taxability of income derived in Guam, American Samoa, and the Northern Mariana Islands. It does affect income derived from sources within other U.S. possessions. *See Specking v. Commissioner*, 117 T.C. 95 (2001), 2001 U.S. Tax Ct. Lexis 40, at 30 (''[N]othing in the legislative history supports petitioners' argument that Congress intended to keep old section 931 in force as to the other possessions should one or more of the specified possessions not implement a tax agreement with the United States.'')

AFFIRMED

¶2002-5811

TRIGON INSURANCE COMPANY (Formerly Blue Cross and Blue Shield of Virginia), PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Eastern Dist. of Virginia, (DC VA) No. CIV. 3:00CV365, Dec. 17, 2002. Earlier proceedings at (2002, DC VA) 90 AFTR 2d 2002-5891, 215 F Supp 2d 687, 2002-2 USTC ¶50580 [90 AFTR 2d 2002-5891]; and (2001, DC VA) 88 AFTR 2d 2001-6883. Years 1989, 1990, 1991, 1992, 1993, 1994, 1995. Decision against Taxpayer.

1. Losses—terminated contracts—former Blue Cross/Blue Shield (BC/BS) orgs.—transitional rules—Fresh Start Basis Rule—applicability—closed and completed transactions—valuation—discounted cash flow (DCF) method; cost approach. Former BC/BS org.'s motions to alter or amend, or for new trial, of decision denying its refund claim for post-'86 terminated contract loss deductions were denied: taxpayer offered no factual or legal basis for altering decision that, although taxpayer had proved *potential* deductibility of its terminated contract losses, it had not proved contracts' value. It was clearly taxpayer's burden in refund action to prove not only that it had right to refund, but also exactly what amount that refund should be; and ''relaxed'' burden/exception applicable to taxpayers subject of arbitrary *deficiency* determination didn't apply since this was refund action, in which taxpayer was asserting right to recover specific sum from govt., not just trying to disprove IRS's determination. Also, *Cohan* rule allowing judicial estimate of inadequately substantiated deductions didn't apply or otherwise relieve taxpayer of its burden where such rule didn't turn only on finding of deduction eligibility, but also required some reliable basis on which court could make estimate, which basis was lacking in instant case that required complex underlying data to apply sophisticated economic models. *Reference:* United States Tax Reporter ¶10,125.64(5); 1655.0921(40); 1655.0601(80); 10,125.64(3). IRC §165; 1012.

Gilbert E. Schill, Jr., Esquire, McGuireWoods LLP, Richmond, James D. Bridgeman, Esquire, David J. Curtin, Esquire, Michael J. Desmond, Esquire, McKee Nelson, Washington, D.C., for Plaintiff.

M. Hannah Lauck, Esquire, Assistant United States Attorney, United States Attorney's Office, Richmond, Charles P. Hurley, Esquire, Trial Attorney, Tax Division, U.S. Department of Justice, Washington, D.C., for Defendant.

United States District Court, E.D. Virginia, Richmond Division,

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[2] The statute states:

(b) Special Rule for Guam, American Samoa, and the Northern Mariana Islands.—The amendments made by this subtitle shall apply with respect to Guam, American Samoa, or the Northern Mariana Islands (and to residents thereof and corporations created or organized therein) only if (and so long as) an implementing agreement under section 1271 [of Pub. L. 99-514, set out as a note under this section] is in effect between the United States and such possession.

MEMORANDUM OPINION

PAYNE, District J.

In this action, Plaintiff, Trigon Insurance Company (''Trigon''), seeks a refund of federal income taxes, plus interest, that it allegedly overpaid in the years 1989 through 1995. As explained fully in the Memorandum Opinion issued on August 9, 2002 (the ''August 9 Opinion''),[1] Trigon and the United States disagreed over the meaning and effect of certain provisions of the Tax Reform Act of 1986 (the ''1986 Act'').[2] Trigon asserted that certain contracts it had entered into with individual subscribers and health care providers before 1987 were valuable assets, and that, whenever one of these contracts was terminated, Trigon incurred a loss which could have been, but which was not, deducted on its tax returns in the years 1987 through 1995. Trigon failed to include those losses in its annual returns in each of those years, but it subsequently filed amended returns in which it claimed a sizeable refund for the 1989 through 1995[3] tax years. The United States opposed this refund on several grounds.

For reasons explained fully in the August 9 Opinion, the Court, accepting Trigon's general legal theory, held that contract terminations of the type at issue were eligible losses that, upon proper proof, could qualify for a deduction of the kind claimed by Trigon. However, the August 9 Opinion also held that, as a matter of fact, Trigon had failed to satisfy its burden to prove the value of these terminated contracts, and, therefore, had failed to establish entitlement to the deduction and the refund sought. As a result, judgment was entered in favor of the United States.

Trigon now has moved the Court to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e), or in the alternative, to order, pursuant to Fed.R.Civ.P. 59(a), a new trial limited to the issue of determining the amount of the refund. For the reasons that follow, Trigon's principal and alternate motions are denied.

STATEMENT OF FACTS

The August 9 Opinion explains in detail the circumstances giving rise to this dispute, and in the interests of brevity and completeness, that opinion is incorporated here by reference. However, a brief review of the background of this action and the Court's findings relevant to the present motion is necessary.

The company now known as Trigon Insurance Co. is the corporate descendant of two Blue Cross and Blue Shield organizations--Blue Cross/Blue Shield of Virginia (the ''Richmond Plan'') and Blue Cross/Blue Shield of Southwestern Virginia (the ''Roanoke Plan''). Those plans merged in March 1986.

Following the merger, Trigon immediately faced a changed tax landscape because, before 1987, the plans were exempt from federal income taxation, and the 1986 Act eliminated the exemption and subjected the former Blue Cross/Blue Shield organizations to taxation beginning with their first taxable years after December 31, 1986. To facilitate the transition into the new tax regime, Congress enacted a number of transitional rules, including § 1012(c)(3)(A)(ii) of the 1986 Act (the ''Fresh Start Basis Rule'') which provides that:

> for purposes of determining gain or loss, the adjusted basis of any asset held on the 1st day of such taxable year shall be treated as equal to its fair market value as of such day.

Applying this rule, Trigon's basis in each asset owned on January 1, 1987 (the first day of Trigon's next tax year) was equal to the asset's fair market value on that date. Trigon subsequently determined that among these assets were contracts with its subscribers (Trigon's customers), and contracts with its providers (the doctors and hospitals who agreed to provide service to Trigon customers).

After January 1, 1987, as one might expect, Trigon subscribers and providers ter-

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[1] Trigon Insurance Co. v. United States, 215 F.Supp.2d 687 (E.D.Va.2002).

[2] Pub.L. No. 99-514, 100 Stat.2085 (1986), now codified as 26 U.S.C. § 833.

[3] Trigon could not use the losses on 1987 or 1988 returns, but the losses could be carried forward.

minated some of these contracts. Trigon did not claim these terminations as losses on its tax returns. Trigon, however, eventually determined that it was entitled to claim the terminated contracts as losses, and, on November 16, 1996, Trigon filed amended income tax returns for the years 1987 through 1995 claiming loss deductions for the value of contracts terminated. The IRS denied these deductions, and after an aborted settlement agreement, Trigon filed this action.

In its Complaint, Trigon asserted that the deductions, if accepted, would have resulted in a total refund amount of $61,649,000.[4] Three categories of losses formed the basis for the claimed loss deduction:

(1) The termination, between January 1, 1987 and December 31, 1995, of 15,998 of the 22,509 group health insurance subscription contracts owned on January 1, 1987, the estimated fair market value of such contracts on January 1, 1987 being $175,147,656;

(2) The termination, between January 1, 1987 and December 31, 1995, of 3,381 of the 9,436 provider contracts with physicians owned on January 1, 1987, the estimated fair market value of such contracts on January 1, 1987 being $207,896; and

(3) The termination, between January 1, 1987 and December 31, 1995, of its contract with Smyth County Community Hospital, the estimated fair market value of that contract on January 1, 1987 being $36,507.

In essence, Trigon's legal theory was that, on January 1, 1987, Trigon owned intangible assets in the form of health insurance subscriber and provider contracts; each of these contracts had a determinable fair market value on January 1, 1987; some of these contracts were lost by virtue of terminations during the 1987 through 1995 tax years; and the tax deductions for the losses arising from the terminated contracts translate into federal income tax refunds for the 1989 through 1995 tax years.

The United States raised five arguments in opposition to Trigon's theory:

(1) that the stepped-up basis provided by the Fresh Start Basis Rule was not available for tax deductions based on the alleged termination of the contracts at issue;

(2) that Trigon did not establish that the "cancellation, abandonment or termination" of Trigon's contracts constituted a tax deductible loss under the Internal Revenue Code;

(3) that, because there is no market for the individual contracts, no fair market value can be ascertained for the individual contracts;

(4) that each contract is not an individual asset and cannot be valued separately; and

(5) that Trigon did not meet its burden to prove, by a preponderance of the evidence, a reliable value for the contracts that form the basis of the loss deduction here at issue.

For the reasons explained fully in the August 9 Opinion, the four legal arguments advanced by the United States were rejected. Nevertheless, having accepted that, in theory, a taxpayer in Trigon's shoes could claim losses from the termination of subscriber and provider contracts, the August 9 Opinion held that Trigon had failed to meet its burden to establish the amount of the claimed deduction because it had failed to prove a reliable value for the contracts, the termination of which was the predicate for the claimed refund. Therefore, judgment was entered in favor of the United States.

In assessing the current motions, it is appropriate to remember how this issue was framed at trial. In an effort to meet its burden, Trigon chiefly relied on the testimony of Michael C. Wierwille, an expert in the valuation of businesses and their assets, to establish the fair market value of the subscriber and provider contracts on

[4] Shortly before trial, this figure was reduced to $35,188,255, and, at trial, Trigon's tax expert estimated the refund to be $33,181,966. See 215 F.Supp.2d at 694.

January 1, 1987.[5] The United States presented no affirmative valuation evidence of its own, opting instead to attack the credibility of Wierwille's method in general, and the application of that method under the facts of this case.[6]

DISCUSSION

[1] Rule 59(e) grants aggrieved parties the opportunity to file a motion to alter or amend an adverse judgment, but does not specify the circumstances under which a such a motion is to be granted. The Fourth Circuit recognizes three grounds for amending a judgment: "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir.1993).

Rule 59(a) allows for aggrieved parties to file a motion for a new trial as to all or some of the issues in the action, but, like Rule 59(e), does not specify the grounds upon which such a motion is to be granted. The Fourth Circuit has held that a trial court should grant a Rule 59(a) motion where the court "is of the opinion that [1] the verdict is against the clear weight of the evidence, or [2] is based upon evidence which is false, or [3] will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." Atlas Food Sys. & Services, Inc. v. Crane Nat'l Vendors, Inc., 99 F.3d 587, 594 (4th Cir.1996).

Trigon bases both its principal and alternate motions on the ground that the Court, having found that Trigon theoretically was entitled to claim losses from the termination of its subscriber and provider contracts, made an error of law in failing to estimate the amount of the refund, notwithstanding that Trigon's valuation evidence was found neither credible nor sufficient. Trigon asserts that it met its burden of proving that it was entitled to some deduction, but merely failed to quantify the amount of the deduction. In such circumstances, Trigon argues, the Court has a responsibility to estimate the amount of the claimed deduction; and the failure to do so in this case, Trigon says, constitutes clear error resulting in a manifest injustice within the meaning of Fourth Circuit's jurisprudence as outlined in Hutchinson (as to Rule 59(e)) and Atlas Food (as to Rule 59(a)).

For the reasons that follow, there is neither error nor injustice in refusing to estimate the amount of the refund that Trigon claimed it was owed, but failed to prove at trial. As explained below, there is no basis for amending the judgment or granting a new trial.

A. The Nature Of The Taxpayer's Burden In Cases Such As This One

Although courts employ slightly varied formulations in describing the taxpayer's burden of proof in a refund case such as this, certain aspects of the burden are clear. First, in all actions challenging the United States' assessment of taxes, the assessment of the Commissioner is presumed to be correct. See Compton v. United States, 334 F.2d 212, 216 [14 AFTR 2d 5217] (4th Cir.1964); Estate of Andrews v. United States, 850 F.Supp. 1279, 1289 [73 AFTR 2d 94-2395] (E.D.Va.1994). Consequently, in a refund suit, the taxpayer bears the burden of proving either "that no tax at all is owed or that the amount of tax owed is in a lesser amount than that determined by the IRS." Estate of Andrews, 850 F.Supp. at 1289. However, "[i]t is not enough for him to demonstrate that the assessment of the tax for which refund is sought was erroneous in some respects." See United States v. Janis, 428 U.S. 433, 440 [38 AFTR 2d 76-5378] (1976). Rather, "[t]he plaintiff, to prevail, must establish the exact amount which she is entitled to recover." Compton, 334 F.2d at 216. Stated differently, "the ultimate question in a suit for refund is not whether the Government was wrong, but whether the plaintiff can establish that taxes were in fact overpaid.

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[5] A tax accounting expert established the quantum of the deduction based on Wierwille's valuation testimony.

[6] Trigon called another expert to rebut some of the evidence given by the experts presented by the United States and to support some of Wierwille's testimony.

The plaintiff, to prevail, must establish the exact amount which she is entitled to recover.'' Id. (emphasis supplied).[7]

The extent of the plaintiff's burden stems from the fact that a refund action is the descendent of the common law action in indebitatus assumpsit. See Stone v. White, 301 U.S. 532, 534 [19 AFTR 503] (1937). As the Fourth Circuit explained in Compton:

An action for refund of taxes paid is in the nature of an action of assumpsit for money had and received and the plaintiff's right to recover must be measured by equitable standards. Here, taxpayer's entire liability is at issue and if, under any state of facts, the Government is entitled to the money claimed, she cannot prevail. Consequently, it is not enough merely to show that the assessment was invalid or that the Commissioner erred; the plaintiff must go further and produce evidence from which another and proper determination can be made. 334 F.2d at 216 (citing Taylor v. Commissioner, 70 F.2d 619, 620 [13 AFTR 1042] (2d Cir.1934) aff'd sub. nom. Helvering v. Taylor, 293 U.S. 507 [14 AFTR 1194] (1935). In Taylor, Judge Hand explained the extent of the taxpayer's burden in a refund action as follows:

> If the burden of proof goes so far as to demand not only that the taxpayer show that the deficiency assessed against him is wrong, but what is the proper deficiency, or that there should be none at all, the decision was right, even though we know that the tax is too high. In an action to recover taxes unlawfully collected the burden does go so far ... But the reason for this is obvious; a plaintiff, seeking an affirmative judgment measured in dollars, must prove how much is due. His claim is for money paid and he must show that every dollar he recovers is unjustly withheld. So it is not enough merely to prove that the tax as a whole was unlawful; some of the dollars he paid may nevertheless have been due.

70 F.2d at 620–21. In Compton, the Fourth Circuit confirmed that, in a refund action, the taxpayer does not satisfy his burden by showing merely that some refund is owed without proving the amount owed. See 334 F.2d at 216.

Nonetheless, Trigon argues that the burden is more relaxed. According to Trigon, the taxpayer has the burden of proving the overpayment of taxes, and, when the claim turns on a determination of value, the taxpayer need not prove that its proffered valuation is correct, but only that the correct refund amount is something higher than that advocated by the United States. In support of this contention, Trigon relies on two broad lines of authority: (1) cases generally following the rule of Helvering v. Taylor, 293 U.S. 507, 515–16 [14 AFTR 1194] (1935) concerning the shifting burdens in deficiency cases; and (2) those cases following the rule of Cohan v. Comm'r, 39 F.2d 540, 544 [8 AFTR 10552] (2d Cir.1930) concerning the relaxation of substantiation requirements for taxpayers claiming deductions. For the reasons that follow, neither line of authority applies to refund cases such as this one.

B. The Helvering v. Taylor Exception Does Not Apply To Refund Cases

In Helvering v. Taylor, the Supreme Court crafted a limited exception to the burden taxpayers bear in appeals of deficiency rulings. As with refund actions, the general rule in deficiency cases is that the taxpayer must show not only that the assessment was erroneous, but also the amount to which he is entitled. See 293 U.S. at 515. However, when the taxpayer succeeds in showing that the government's determination was ''arbitrary and excessive,'' the taxpayer need not establish the correct amount the IRS should have charged in order to satisfy his burden. See id. at 515; see also Cebollero v. Comm'r, 967 F.2d 986, 990 [70 AFTR 2d 92-5082] (4th Cir.1992) (explaining the Helvering rule).

In the opinion of the Court of Appeals in Taylor, which the Supreme Court af-

[7] The ''exact amount'' text is not to be taken literally, but instead is subject to the general proviso that claims for refunds, like those for damages, must be supported by evidence proving the claim amount with reasonable specificity.

firmed, Judge Hand explained the rationale for the relaxation of the taxpayer's burden in deficiency actions once the taxpayer proves that the government's determination was arbitrary and excessive:[8]

> [The reasoning supporting the more stringent burden in refund cases] does not apply when the proceeding is to review an assessment. Although that does indeed partake of the nature of a judgment, and the taxpayer has the burden of proving that it was wrong, after he has done so, he need not, at least under ordinary principles of procedure, prove that he owed not [sic] tax, or what was the tax that he did owe . . . . Any other result would invert the ordinary rules of procedure by imposing a burden of establishing a negative upon the obligor; indeed of disproving the existence of all possible obligations.

70 F.2d at 621. Stated somewhat differently, the taxpayer challenging the assessment of a deficiency should not be required to prove a negative, i.e., that no tax is owed, or if any is owed, that no other obligations exist, whereas the taxpayer seeking a refund of taxes paid reasonably can be expected to prove affirmatively the exact amount overpaid and why. See generally, Leo P. Martinez, Tax Collection and Populist Rhetoric, Shifting the Burden of Proof in Tax Cases, 39 Hastings L.J. 239 (1987) (explaining the derivation of the burden rules in different types of tax cases).

Trigon asserts that some expansive language in several decisions following Helvering v. Taylor extends the applicability of the exception beyond those deficiency cases where the taxpayer shows that the government's assessment was "arbitrary and excessive."[9] With but one exception, each of these decisions involved the same narrow factual situation that the Supreme Court faced in Taylor--i.e., the appeal of a deficiency action brought by the government. Trigon cites only one decision in which the Helvering v. Taylor exception has been applied in a refund action--United States v. Hover, 268 F.2d 657, 665 [4 AFTR 2d 6121] (9th Cir.1959)--and the Fourth Circuit has expressly recognized that Hover is an outlier not in accord with accepted precedent. See Compton, 334 F.2d at 216 n. 10. Because this is an action for a refund, rather than a deficiency action, Compton controls and the Helvering v. Taylor exception does not apply.

C. The Cohan Rule Does Not Apply Where There Is Insufficient Evidence To Support Estimation

Under Cohan and its progeny, a taxpayer claiming a deduction may overcome the presumptive correctness of the denial of the deduction by the IRS, even where the taxpayer has failed to show the exact amount of the deduction, so long as the evidence shows that the taxpayer is entitled to the deduction, and there is sufficient evidence in the record from which the Court may estimate the exact amount. In Cohan, the legendary entertainer George M. Cohan claimed certain business entertainment expenses as deductions, but had failed to keep records of these expenses, and therefore, could not establish the exact amount of the deduction. Even though Cohan had established that he did have some such expenses, and, therefore, was entitled to some deduction, the Commissioner disallowed the entire deduction, and the Board

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[8] In affirming the judgment of the Court of Appeals, the Supreme Court did not explain the rationale supporting the burden rules as completely as did Judge Hand, but nonetheless adopted Judge Hand's conclusions over the differing rules in other circuits.

[9] See Wilson Coal Land Co. v. Comm'r, 87 F.2d 185, 189 [18 AFTR 748] (4th Cir.1937) ("The presumption that the Commissioner's determination was correct was no longer conclusive when the taxpayer offered evidence tending to show that it rested upon a false foundation; and the Board was obliged to consider this evidence, even though the taxpayer failed to prove the correct amount of tax or to show that none was assessable."); Clinton Cotton Mills v. Comm'r, 78 F.2d 292, 295 [16 AFTR 380] (4th Cir.1935) ("Even if the Board were not disposed to accept the testimony of the witnesses as to the 1913 valuation in its entirety, it should certainly have determined that value in the light of this testimony and the other evidence in the case."); B.F. Sturtevant Co. v. Comm'r, 75 F.2d 316, 323–24 [15 AFTR 174] (1st Cir.1935) ("When the Board [of Tax Appeals] held that, because the petitioner did not prove what was the fair market value of the [assets] . . . to its satisfaction and the satisfaction of its accountant, the figure allowed by the Commissioner must stand, we think it erred as a matter of law."); Guggenheim v. Helvering, 117 F.2d 469, 474 [26 AFTR 428] (2d Cir.1941) ("And of all possible appraisals that alone was sure to be wrong which the Board chose; a doctrine so enamored of accuracy that it must abdicate is the most irrational of all. The law is not so helpless; situations again and again present themselves where, after all shifts are exhausted, rather than permit certain injustice, a tribunal will make the best reckoning that the facts admit though fully conscious of its infirmities."); Comm'r v. Thompson, 222 F.2d 893, 895 [47 AFTR 958] (3d Cir.1955) ("It is the function of the trier of fact to weigh all the elements properly considered in the valuation and to translate them into dollars and cents. If there is speculation in this, it is a product of the nature of the problem, but not a reason for abdicating the judicial function, which, in the administration of justice, is frequently called upon to appraise intangibles.")

of Tax Appeals affirmed. The Second Circuit reversed, holding that, when the Tax Board acknowledged the legitimacy of a claimed deduction, the deduction could not be disallowed entirely merely because the taxpayer cannot prove an exact figure. Judge Learned Hand explained:

Absolute certainty in such matters is usually impossible and is not necessary; the Board should make as close an approximation as it can, bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making. But to allow nothing at all appears to us inconsistent with saying that something was spent. True, we do not know how many trips Cohan made, nor how large his entertainments were; yet there was obviously some basis for computation, if necessary by drawing upon the Board's personal estimates of the minimum of such expenses. The amount may be trivial and unsatisfactory, but there was basis for some allowance, and it was wrong to refuse any, even though it were the traveling expenses of a single trip. It is not fatal that the result will inevitably be speculative; many important decisions must be such. We think that the Board was in error as to this and must reconsider the evidence.

39 F.2d at 543–44.

Courts continue to rely on the Cohan rule, albeit with some caution, to estimate the amount of a claimed deduction in cases where the taxpayer is unable to produce evidence substantiating the exact amount of a claimed deduction. See e.g., Dunn v. Comm'r, 301 F.3d 339, 358 [90 AFTR 2d 2002-5527] (5th Cir.2002); Ellis Banking Corp. v. Comm'r, 688 F.2d 1376, 1383 [50 AFTR 2d 82-5909] (11th Cir.1982); Levine v. Comm'r, 324 F.2d 298, 302–03 [12 AFTR 2d 5842] (3d Cir.1963); Bryant v. Comm'r, 76 F.2d 103, 105 [15 AFTR 395] (2d Cir.1935). Nevertheless, courts also have been reluctant to accept invitations to follow Cohan where a taxpayer fails to provide evidence that would permit an informed estimate of the amount of a deduction. See e.g., Reinke v. Comm'r, 46 F.3d 760, 764 [75 AFTR 2d 95-736] (8th Cir.1995); Rodman v. Comm'r, 542 F.2d 845, 853–84 [38 AFTR 2d 76-5840] (2d Cir.1976); Coloman v. Comm'r, 540 F.2d 427, 431–32 [38 AFTR 2d 76-5523] (9th Cir.1976).

For example, in Coloman, the Ninth Circuit explained the danger of liberal application of the Cohan rule. In that case, the taxpayer claimed a loss based on the depreciation of stock received in exchange for a partnership interest. The taxpayer, however, could not establish the basis of the stock with any credible evidence, so the Tax Court denied the deduction. On appeal, the taxpayer urged the Ninth Circuit to reverse the Tax Court for failing to apply the Cohan rule, but the Court declined: ''In the instant case, to allow the Cohan doctrine to be invoked by the taxpayers would be in essence to condone the use of that doctrine as a substitute for burden of proof.'' 540 F.2d at 431–32.

For similar reasons, courts have declined to apply Cohan in cases where there is no doubt that the taxpayer incurred some deductible expense, but the taxpayer failed to present evidence sufficient to allow the court to make an accurate finding on the amount of the deduction. In Williams v. United States, 245 F.2d 559, 560 [51 AFTR 594] (5th Cir.1957), a corporation brought a refund suit claiming a deduction for expenses that its president had incurred in entertaining potential customers. The corporation's Board of Directors had given its president an allowance for such expenditures, and, in its refund suit, the corporation simply claimed the amount of that allowance as the amount of the deduction. Although the District Court held that the corporation ''doubtless did have certain entertainment and other expenses in 1950,'' it declined to estimate the amount of the deduction under Cohan. The Fifth Circuit affirmed, and explained that, although Cohan grants district courts the latitude to estimate in some circumstances, it ''certainly does not require that such latitude be exercised.'' Id. Unless a district court has before it evidence sufficient to form a reasonable estimate, the Fifth Circuit explained, estimation under the Cohan rule ''would be unguided largesse.'' Id.; see

also Norgaard v. Commissioner, 939 F.2d 874, 879 [68 AFTR 2d 91-5302] (9th Cir.1991); Vanicek v. Commissioner, 85 T.C. 731, 742–43 (1985). Following this reasoning, triers of fact consistently have declined to follow Cohan where the evidence is insufficient to form the basis of a reasonable estimate. See Maguire v. Comm'r, 1996 WL 123146, 71 T.C.M. (CCH) 2535 [1996 RIA TC Memo ¶96,145], T.C.M. (RIA) 96,145 (U.S. Tax Ct.); Williams v. Commissioner, 1994 WL 50462, 67 T.C.M. (CCH) 2185 [1994 RIA TC Memo ¶94,063], T.C.M. (RIA) 94,063 (U.S. Tax Ct.) (''We stress that in order for this Court to apply the rationale of Cohan v. Comm'r ... to any particular disallowed expenditure, there must be sufficient evidence to permit us to make an estimation ... Self-serving, vague, and undocumented testimony is insufficient.''); Hyde v. Comm'r, 1992 WL 174208, 64 T.C.M. (CCH) 265 [1992 RIA TC Memo ¶92,419], T.C.M. (RIA) 92,419 (U.S. Tax Ct.); Beam v. Comm'r, 1990 WL 83346, 59 T.C.M. (CCH) 915 [¶90,304 PH Memo TC], T.C.M. (P-H) 90,304 (U.S. Tax Ct.).

In this action, Trigon's argument that it was error not to apply Cohan and its progeny fails for similar reasons. First, although the August 9 Opinion generally accepted Trigon's legal theory, at no point did the opinion conclude that the subscriber and provider contracts actually had value on January 1, 1987. Trigon erroneously relies on the following language in asserting that the August 9 Opinion held that the contracts in question had value on January 1, 1987:

> Trigon correctly argues that the cancellation or termination of a subscriber or provider contract is evidence of a closed and completed transaction and is an identifiable event within the meaning of Section 1.165-1(d)(1) of the regulations. Moreover, the cancellation or termination of a contract results in the sudden termination of its usefulness in Trigon's business and, therefore, satis-fies the requirements for deductibility described in Section 1.165-2(a) of the Regulations.

215 F.Supp.2d at 703. Contrary to Trigon's argument, it does not necessarily follow, from the fact that the termination of a subscriber or provider contract is an identifiable event satisfying the requirements for deductibility, that Trigon's subscriber and provider contracts actually had value on January 1, 1987, or that the termination of such contracts between 1989 and 1995 actually resulted in a loss to Trigon.

Although some contracts likely had some value, the evidence in the record suggests that many of the contracts might well have been liabilities rather than assets. For example, the record shows that many contracts were unprofitable because of the effects of the competition between the Richmond and Roanoke plans and because of the sea change that was afoot in the health care industry at the valuation date.

Trigon further relies on the testimony of the United States' expert witness, Dr. Foster, in attempting to show that the subscriber contracts had value.[10] See Foster Tr. (11/16/02) 1242:13-21 (showing that application of the income method of valuation with different inputs resulted in an aggregate market value estimate of $130 million). Reliance on this testimony is likewise misplaced because Dr. Foster tes-tified about the validity of the method that Trigon's expert used in valuing the contracts, not about the actual value of the contracts. The $130 million figure that Dr. Foster mentioned in testimony was not a valuation, but was offered to show the sensitivity of Wierwille's model to the inputs used to apply it. That Dr. Foster came up with a figure less than half as much as the figure advanced by Wierwille was simply one part of a large body of evidence indicating the unreliability of Wierwille's method. Accordingly, the $130 million figure does not prove that the contracts had some value as of January 1, 1987.

But, assuming that the contracts had some value as of January 1, 1987, the evidence simply was insufficient to permit

[10] Trigon makes no effort to show that the provider contracts actually had value.

any reasonably accurate quantification of that value. That is made clear by the August 9 Opinion. Even though the opinion held that the income approach was a suitable method for valuing assets such as the subscriber contracts in question here, the record shows that the income approach is highly dependent on the reliability of each of its three constituent elements, or "inputs," as has become the vernacular of this case. Those elements are: (1) projection of asset life; (2) projection of the income or cash flow to be received from the asset over its life; and (3) discounting the future income or cash flow back to its net present value on the valuation date. See 215 F.Supp.2d at 714–18. And, each of those three elements requires its own inputs, the reliability of which is critical to the reliability of the ultimate output--the valuation opinion. Id. at 726–39.

One consequence of these facts is that there is no reliable evidentiary predicate to use to fix the amount of a loss deduction for those contracts. As the August 9 Opinion makes clear, the inputs used by Trigon's expert were unreliable on each of the three elements, and several sub-elements, that comprise the income approach to valuation used to value the subscriber contracts. See id.

Likewise, there were fundamental defects respecting Wierwille's inputs to the cost approach that was used to value the provider contracts. See i.d. at 739–41. Consequently, like his valuation of the subscriber contracts, the valuation of the provider contracts was not reliable. In the absence of valuations based on reliable and accurate inputs, the Court simply lacks the evidence necessary to make a reasonable estimate of value.

In fact, on this record, the making of an estimation would be an exercise in sheer speculation. Unlike in Cohan, where the Tax Board was presumed to have personal knowledge of how to estimate expenses, the Court lacks the ability to manipulate the complex underlying data or to apply the complex underlying economic and mathematic models that are essential to valuation under either the income approach or the cost approach.

The sophisticated valuation techniques here can only be employed reliably by an expert in the field. That exercise is beyond the reach, and outside the province, of a district judge. Trigon has cited, and the Court has found, no decision applying the rule of Cohan to complex valuation cases such as this one. And, where, as here, the basic evidentiary predicate for valuation has been found wanting in so many ways, to do so would offend fundamental precepts respecting the nature and importance of the burden of proof.

CONCLUSION

For the foregoing reasons, there is no basis either for amending the judgment under Rule 59(e) or ordering a new trial limited to the issue of the appropriate measure of damages under Rule 59(a). Therefore, Trigon's motion is denied.

The Court is directed to send a copy of this Memorandum Opinion to all counsel of record.

It is so ORDERED.

¶2002-5812

In Re: SCOTT CABLE COMMUNICATIONS, INC., Debtor. U.S. Bankruptcy Court, Dist. of Connecticut, (Bktcy Ct CT) Case No. 98-51923, Dec. 23, 2002. Earlier proceedings at (2002, Bktcy Ct CT) 90 AFTR 2d 2002-5701; (2002, Bktcy Ct DE) 89 AFTR 2d 2002-1645; (2001, Bktcy Ct CT) 87 AFTR 2d 2001-2611, 263 BR 6, on remand from (2001, DC CT) 87 AFTR 2d 2001-1547, reversing and remanding (1999, Bktcy Ct CT) 83 AFTR 2d 99-2495, 232 BR 558, 99-1 USTC ¶50513; and (1998, Bktcy Ct CT) 83 AFTR 2d 99-1028, 227 BR 596, 99-1 USTC ¶50288. Decision for Taxpayer.

1. Bankruptcy court procedure—application for interim fees and expenses—IRS objection. Chap. 11 debtor-in-possession/intervenor's applications for interim fees and expenses of its attorneys were granted over IRS's objection: IRS merely advanced same meritless standing

and other arguments that were previously rejected in prior proceeding authorizing cash carve out from escrow fund to pay administrative expenses. *Reference:* United States Tax Reporter ¶68,726.52(3); 68,726.52(30).

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UNITED STATES BANKRUPTCY COURT DISTRICT OF CONNECTICUT,

ORDER ON DEBTOR'S APPLICATIONS FOR INTERIM COMPENSATION

Alan H. W. Shiff, Chief Bankruptcy Judge:

Chapter 11

Because this case is complicated by its relationship to a prior bankruptcy case in the district of Delaware, a brief historical note is warranted in the analysis of the debtor's instant application for interim compensation.

Scott Cable Communications, Inc., commenced a chapter 11 case in Delaware on February 14, 1996. On December 6, 1996, the Delaware Bankruptcy Court confirmed a plan, which, *inter alia*, treated certain holders of equity as holders of secured claims (''Jr. PIK'' noteholders).

[1] On October 1, 1998, Scott (hereafter the ''debtor'') commenced a second chapter 11 case in this court and filed a so-called ''pre-packaged'' liquidating plan, pursuant to which it sought authorization to sell assets, conditioned on the entry of a confirmation order. *United States v. State Street Bank and Trust Co., et al., (In re Scott Cable Communications Inc.)*, 232 B.R. 558, 562–563 [83 AFTR 2d 99-2495] (Bankr. D. Conn. 1999). On November 16, 1998, the Internal Revenue Service objected to confirmation for the reason that the plan constituted a tax avoidance scheme. The objection was sustained on December 11, 1998. *In re Scott Cable Communications, Inc.*, 227 B.R. 596, 604 [83 AFTR 2d 99-1028] (Bankr. D. Conn. 1998).[1]

On November 19, 1998, the IRS filed adversary proceeding 98-5104, for a determination that the Jr. PIK noteholders are holders of an equity interest or that their claims be equitably subordinated. On December 17, 1998, the defendant, State Street Bank, the indentured trustee for the Jr. PIK noteholders, filed a motion for summary judgment. The motion was granted on April 26, 1999, for the reason that the issue of secured status of the Jr. PIK noteholders was precluded by the *res judicata* effect of the Delaware Bankruptcy Court's confirmation order. *Id.*, 232 B.R. at 565 (Bankr D. Conn. 1999).

On March 9, 2001, the District Court reversed, holding that although ''the IRS received both the Delaware Plan and Delaware Disclosure Statement,'' and had filed notices of appearance in the Delaware bankruptcy proceeding, ''it did not receive adequate notice ... that its pecuniary interests would be implicated.'' *In re Scott Cable Communications*, 259 B.R. at 536, 538, 540 and 545 [87 AFTR 2d 2001-1547] (D. Conn. 2001). The adversary proceeding was remanded for further proceed-

[1] On December 23, 1998, the debtor moved for permission to sell its assets free and clear of all interests with the interests to attach to the proceeds of the sale which were to be deposited into an interest bearing escrow account. *See* 11 U.S.C. § 363(f). The debtor's motion was granted on January 14, 1999, and the sale closed on February 12, 1999. As of April 26, 1999, approximately $30,291,296 remained in the escrow account, which is the sole remaining asset in this case. The Jr. PIK noteholders assert a security interest in the fund, and the IRS and others assert administrative claims in this case. *See In re Scott Cable Communications Inc., supra*, 232 B.R. at 563. See also docket items 27 and 116.

ings to give the IRS an opportunity to object to the consequences of the Delaware plan provisions that treated the Jr. PIK noteholders as holders of secured claims.

Delaware Proceeding.

On June 7, 2001, this court transferred AP 98-5104 to the Delaware Bankruptcy Court along with any administrative expense applications arising out of that proceeding after determining that that court is in the best position to construe its confirmation order in the context of the IRS' challenge. *See In re Scott Cable Communications, supra,* 263 B.R. 6 [87 AFTR 2d 2001-2611], *motion for leave to appeal denied,* Case no. 3:99-CV-918, (D. Conn. August 30, 2001) (AWT).

On March 4, 2002, Delaware bankruptcy judge Walsh overruled an objection by the IRS to the debtor's motion to intervene. *See United States v. State Street Bank (In re Scott Cable Communications),* ___ B.R. ___, 2002 WL 417013 (Bankr. D. Del).

> The United States argues that Debtor is not entitled to intervene as a "party in interest" because it has no meaningful financial or other interest to protect in the adversary proceeding. I disagree.
>
> Although Debtor may not have a significant financial interest in the outcome of the adversary proceeding, it does have an interest and fiduciary duty, as debtor-in-possession, to ensure that the Estate's assets are distributed in accordance with the proper legal and equitable priorities of the parties in interest. It also has an interest in the adversary proceeding because the outcome of the proceeding has the potential to disrupt Debtor's current capital structure as established by the confirmation order entered in connection with Debtor's prior reorganization case.

Id., 2002 WL 417013 at 3.

Proceeding in this court.

On April 4, 2002, the debtor filed a motion, to which the IRS objected, for a cash collateral carve out, so that, *inter alia,* it could pay any administrative expenses that were allowed by the Delaware Bankruptcy Court.[2] *See May 1, 2002 hearing record* at 3:19. On July 18, 2002, the court overruled the IRS' objection, observing that Judge Walsh's March 4, 2002 order, which was not appealed, established the law of this case. The July 18 order also authorized a $829,400 carve out from the escrow fund to pay administrative expenses, subject to any further orders from this or the Delaware court. *See In re Scott Cable Communications,* 2002 WL 1988166 1, n.4 (Bankr D. Conn. 2002), *appeal pending,* Case no. 02-CV-1725 (D. Conn.) (AWT).[3]

On October 22, 2002, the debtor filed an application for $141,708.50 and $33,926.47 for the interim fees and expenses, respectively, of Akin, Gump. By separate application, the debtor sought $21,304.50 and $2,350.77 for the interim fees and expenses, respectively, of Zeisler & Zeisler. The IRS objected for essentially same unpersuasive reasons it raised in opposition to the debtor's motion for the cash collateral carve out, i.e., that the debtor lacks standing to defend the Delaware adversary proceeding, has an actual conflict of interest, and is administratively insolvent. *See May 1, 2002 hearing record* at 2:44, 2:50, 3:42, 3:52, and *December 3, 2002 hearing record* at 11:02, 11:04, 11:12, 11:40, 11:46. On December 3, 2002, the Akin, Gump application was bifurcated, so that, consistent with the order transferring the adversary proceeding, *see supra,* slip op. at 3, the Delaware Bankruptcy Court would assess the fees and expenses incurred there, and this court would review only those matters as to which jurisdiction was retained.

Accordingly, IT IS ORDERED that subject to adjustment and disgorgement, Akin, Gump is allowed interim fees of $139,433.50 and expenses of $4,625.01, and Zeisler & Zeisler is allowed interim fees of $21,304.50 and expenses of $2,350.77. *See* 11 U.S.C. § 331; and

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[2] The adversary proceeding is numbered 01-4605 in the Delaware Bankruptcy Court.

[3] Since there is no stay pending the appeal of the cash collateral order, this court retains jurisdiction to implement its terms. *See In re Prudential Lines, Inc.,* 170 B.R. 222, 243 (S.D.N.Y.1994) ("[W]hile an appeal of an order or judgment is pending, the court retains jurisdiction to implement or enforce the order or judgment").

IT IS FURTHER ORDERED, that the effective date of this order shall be 30 days from this date without prejudice to any party to timely seek an extension for cause.

Dated at Bridgeport, Connecticut this 23rd of December, 2002.

Alan H.W. Shiff

Chief United States Bankruptcy Judge

¶2002-5813

Milton W. LAWSON, PLAINTIFF v. THE UNITED STATES OF AMERICA, DEFENDANT. U.S. District Court, Northern Dist. of Alabama, (DC AL) CIVIL ACTION NO. CV-02-S-O159-S, Dec. 23, 2002. Decision for Govt.

1. Recovery of erroneous refunds—offer and compromise. Pursuant to consent decree, taxpayer was ordered to return refund, including interest, plus additional $500 to Dept. of Treasury, and govt. was ordered to honor original offer and compromise. *Reference:* United States Tax Reporter ¶74,055.01(20); 71,225.01(5). IRC §7122; 7405.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION,

CONSENT DECREE

The Court having been advised that the parties have agreed to settle this matter, and the Court having been advised of the terms of said settlement, it is hereby ORDERED, ADJUDGED, and DECREED, as follows:

1. **[1]** The Plaintiff shall return to the United States the refund he received which the United States contended at one point voided the original offer and compromise between the parties. The Plaintiff shall also pay interest on that refund since the date that it should have been paid to the IRS. The Plaintiff shall also pay an additional $500 to the Department of Treasury. In total, these sums amount to a one time payment of $5,835.30, which the Plaintiff shall immediately make payable to the Department of Treasury. Said funds may be in the form of cash, personal check, cashiers check or any other negotiable funds accepted by the Department of Treasury. Said funds will be mailed, via certified mail, to Candice Turner, attorney for the United States of America. Said funds will be deemed delivered to the United States as of the date they were mailed.

2. The United States will return to, and honor, the original offer and compromise, attached hereto as Exhibit A. It is hereby ORDERED, ADJUDGED, and DECREED that all the terms of said offer and compromise have been complied with by all parties to same, and that, by its terms said offer and compromise is complete. The plaintiff has no further liability on either the offer and compromise or the underlying taxes compromised by same.

DONE and ORDERED this 23rd day of December, 2002.

/s/

UNITED STATES DISTRICT JUDGE

¶2002-5814

GILBERTON POWER COMPANY, by Ri-Corp. Development, Inc., a General Partner; Birch Power Corporation, tax matters partner v. UNITED STATES OF AMERICA, APPELLANT. U.S. Court of Appeals, Third Circuit, (CA3) No. 02-1783, Dec. 23, 2002. District Court, (2002, DC PA) 89 AFTR 2d 2002-1009, 2002-1 USTC ¶50265, affirmed per curiam. Year 1987. Decision for Govt.

1. Energy tax credits—biomass property; alternative energy source; alternative substance—anthracite mining debris. District court properly determined that power co. wasn't entitled to energy tax credit for investments in power plant fueled by coal mining debris (culm): culm, being partly comprised of anthracite, didn't qualify as "alternate substance" for IRC §46 and IRC §48 purposes, thus precluding plant's qualification as alternative substance-fueled "biomass property."

Reference: United States Tax Reporter ¶485.12(10). IRC §46; 48. Former IRC §38.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENN-SYLVANIA

Before: NYGAARD, ALITO and RENDELL, Circuit Judges.

OPINION OF THE COURT

PER CURIAM:

NOT-PRECEDENTIAL

District Court Judge: James F. McClure, Jr.

Because we write for the benefit of the parties, the background of the appeal is not set out.

[1] Birch Power Corporation, as tax matters partner for Gilberton Power Company (''Gilberton''), filed claims against the United States pursuant to 26 U.S.C. § 6226(a)(2), alleging that the Internal Revenue Service (''the IRS'') had improperly denied an energy tax credit for investments it made in 1987 in a power plant fueled by debris from coal mining known as ''culm.'' Following motions for summary judgment filed by both parties, the District Court held that Gilberton was disqualified from claiming the energy tax credits because culm is not an ''alternate substance,'' as defined in the relevant sections of the Internal Revenue Code. Gilberton contests this order.

Our review of a grant of summary judgment is de novo. Goosby v. Johnson & Johnson Medical, Inc., 228 F.3d 313, 318 (3d Cir. 2000). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Saldana v. Kmart Corp., 260 F.3d 228, 231–32 (3d Cir. 2001). We view all facts and draw all reasonable inferences in favor of the non-moving party. Id. at 232. However, the party opposing summary judgment may not rely on the allegations in their pleadings; instead, through ''more than a scintilla'' of evidence, they must present ''specific facts showing there is a genuine issue for trial.'' Id.

''As with all questions of statutory interpretation, we begin with the language of the statute itself.'' In re United Healthcare Systems, Inc., 200 F.3d 170, 176 (3d Cir. 1999). ''Where statutory language is plain, we must enforce that language according to its terms.'' Caterpillar, Inc. v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., 107 F.3d 1052, 1058 (3d Cir. 1997). Moreover, ''[w]here the statutory language is plain and unambiguous, further inquiry is not required, except in the extraordinary case where a literal reading of the language produces an absurd result.'' Idahoan Fresh v. Advantage Produce, Inc., 157 F.3d 197, 202 (3d Cir. 1998).

We reject Gilberton's argument that the District Court erred when it ruled in favor of IRS. Sections 46(a) and (b) of the I.R.C. provide tax credits for investment in power generation facilities that qualify as ''biomass properties,'' as defined in Section 48(l)(15). A biomass property includes ''a boiler for which the primary fuel will be an alternate substance.'' I.R.C. § 48(l)(3)(A)(i) (1987). An alternate substance is defined as ''any substance other than ... oil and natural gas, and ... any product of oil and natural gas,'' but ''does not include any inorganic substance and does not include coal (including lignite) or any product of such coal.'' Id. §§ 48(l)(3)(B), (15)(B)(ii). The culm that Gilberton uses to fuel its power generation facility is a mixture of anthracite, a form of coal, and inorganic materials. Accordingly, under the plain language of Section 48(l), culm is not an alternate substance. Gilberton's invocation of the policy consideration that drove the enactment of Section 48 of the I.R.C. is unavailing. ''Where statutory language is plain, we must enforce that language according to its terms.'' Caterpillar, Inc., 107 F.3d at 1058. The plain language of Section 48(l) of the

I.R.C. excludes Gilberton from claiming an energy tax credit under Section 46.

We have considered all of Appellant's arguments and see no basis for reversal. The judgment of the District Court is, therefore, affirmed.

¶2002-5815

Sterling G. PARKER, PETITIONER v. UNITED STATES OF AMERICA and Internal Revenue Service, DEFENDANT. U.S. District Court, Northern Dist. of Alabama, (DC AL) CV-02-BE-2540-S, Nov. 25, 2002. Years 1997, 1999, 2000, 2001. Decision for Govt.

1. Third-party summons enforcement—petition to quash—legitimate purpose—notice. Taxpayer's motion to quash 3d-party summons issued on bank was dismissed for failure to state claim: IRS agent issued summons as result of legitimate investigation into taxpayer's liabilities, both taxpayer and bank received proper notice, taxpayer only offered meritless defenses, and summons satisfied requirements of IRC §7609(a)(2), IRC §7609(b)(2) and IRC §7603. *Reference:* United States Tax Reporter ¶76,095.01(10). IRC §7603; 7609.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION,

ORDER

KARON O. BOWDRE UNITED STATES DISTRICT JUDGE

[1] This case is before the court on Respondents' Motion to Dismiss Petition to Quash Internal Revenue Service Third-Party Summons. The Internal Revenue Service (''IRS'') is conducting an investigation to determine the federal income tax liability of the petitioner for the taxable years 1997, 1999, 2000, and 2001. Petitioner filed income tax returns for the taxable years 1997 and 1999 reporting no income and no tax liability. The IRS began investigating petitioner because information returns filed by a third-party payer indicate that petitioner does have taxable income for 1997 and 1999. In addition, petitioner has not filed tax returns for the taxable years 2000 and 2001.

Revenue Agent Alan Turner contacted petitioner by letter requesting that petitioner meet with Turner to discuss petitioner's federal income tax liability. Petitioner wrote Agent Turner a letter stating that: ''I have no intention of meeting with you, nor do I intend to consent 'to disclose all information necessary for the preparation' of a tax return. Further, I have no intention of requesting your assistance for the purposes of preparing or filing any return.'' On June 14, 2002, Agent Turner issued a summons to New South Federal Savings Bank to obtain records relevant to determining petitioner's income tax liability. Petitioner filed a Petitioner to Quash Internal Revenue Service Third Party Summons in response to Agent Turner's summons. On August 9, 2002, Agent Turner withdrew the IRS summons issued to New South Federal Savings Bank because the summons was not properly served. On August 26, 2002, Magistrate Judge Armstrong granted the IRS's Motion to Dismiss Petitioner's Motion to Quash and dismissed petitioner's case without prejudice. *See Parker v. United States of America*, CV-02-RRA-1655-S.

Petitioner's case was subsequently reassigned to Agent Kenneth L. Smith. Agent Smith issued a summons to New South Federal Savings Bank on September 11, 2002, to obtain records relevant to determining petitioner's income tax liability for 1997, 1999, 2000, and 2001. Again, petitioner responded to the summons by filing a Petition to Quash Internal Revenue Service Third Party Summons. After some confusion regarding whether petitioner's Petition to Quash was an exact duplicate of the petition that was dismissed by Judge Armstrong, the Clerk for the Northern District of Alabama filed petitioner's case on October 15, 2002.

Respondents filed the Motion to Dismiss that is before this court on November 22, 2002. Respondents argue that petitioner's

petition should be dismissed pursuant to Rules 12(b)(1), 12(b)(5), and 12(b)(6) of the Federal Rules of Civil Procedure for the following reasons: (1) petitioner failed to file the petition to quash within twenty days after notice of the summons; (2) the petition to quash was not properly served; (3) the legal requirements of 26 U.S.C. §§ 7609(a)(2), 7609(b)(2), and 7603 have been met.

Because there was some confusion with the Clerk of this court regarding petitioner's filing, this court does not address respondents' arguments under Rules 12(b)(1) and 12(b)(5) that petitioner's filing was untimely and that the petitioner did not properly serve respondents. Therefore, the court only addresses respondents' argument under Rule 12(b)(6) that the legal requirements for issuing a summons by an IRS agent have been met and thus the Petition to Quash fails to state a claim upon which relief can be granted.

After considering the arguments submitted by petitioner and respondents, the court hereby GRANTS Respondents' Motion to Dismiss Petition to Quash Internal Revenue Service Third-Party Summons. The court finds that Agent Smith's summons was issued as a result of a legitimate investigation of petitioner's tax liability and that petitioner and New South Federal Savings Bank received the required notice. Although petitioner submitted numerous defenses in his Petition to Quash, the court finds each of these defenses without merit. The summons at issue in this lawsuit meets the legal requirements of 26 U.S.C. §§7609(a)(2), 7609(b)(2), and 7603. Therefore, the court GRANTS Respondents' Motion to Dismiss and dismisses this action WITH PREJUDICE. Costs taxed as paid.

DONE and ORDERED this 25th day of November, 2002.

KARON O. BOWDRE

UNITED STATES DISTRICT JUDGE